



*E. Stewart Jones, Jr.
Meghan Rielly Keenholtz
James C. Knox*

*Of Counsel
W. Farley Jones*

*28 Second Street
Troy, New York 12180
Telephone (518) 274-5820
Toll Free (866) ESJONES
Fax (518) 274-5875
www.esjlaw.com*

FAX SHEET

DATE: December 14, 2011

TO: David Stoetting, Esq.

FAX NO.: 212-336-1324

FROM: E. Stewart Jones, Jr.

RE: SEC v. McGinn, Smith & Co., Inc., et al

NO. OF PAGES: 4 INCLUDING COVER SHEET)

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Message:



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December 14, 2011

VIA FACSIMILE! (212-336-1324)
Securities and Exchange Commission
3 World Financial Center
Room 4300
New York, New York 10281

Attn: David Stoelting, Esq.

Re: SEC v. McGinn, Smith & Co., Inc., et al
Our File No. CR-878

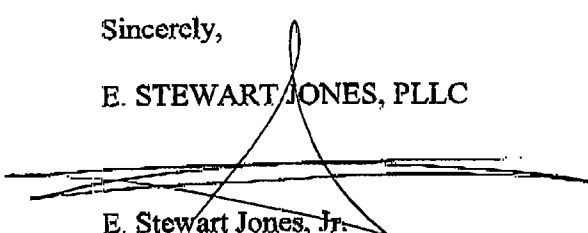
Dear Mr. Stoelting:

I am enclosing Timothy McGinn's Responses to the First Set of Requests for Admissions.

A signed copy will be furnished upon Mr. McGinn's return to the area.

Sincerely,

E. STEWART JONES, PLLC



E. Stewart Jones, Jr.

ESJ,JR./ml
Enclosure.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

10 Civ. 457 (GLS/DRH)

McGINN, SMITH & CO., INC., et al,

Defendants.

DEFENDANT TIMOTHY MCGINN'S RESPONSES TO
PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSIONS

1. Admits with qualification. See David Smith's response.
2. Admits that Tim McGinn was the Chairman and Secretary of MS & Co., was the Treasurer of MS Advisors, but MS Advisors was owned by MS Holdings, which in turn was owned by Mr. Smith, Mr. McGinn and Mr. Livingston.
3. Admits that Mr. McGinn owned 30% of MS & Co. and 30% of MS Advisors through MS Holdings, which owned 100% of MS Advisors.
4. & 5. Refer to response of Mr. Smith.
6. Denies. See David Smith's response.
7. Admits.
8. Admits.
9. Denies. MS Advisors remained the investment advisor.
10. Admits.
11. Admits.
12. Admits.
13. Admits.
14. Denies. PPMs authorized transactions with affiliates.
15. Denies. See "14" above.
16. Denies. PPMs authorized mergers and therefore allowed transfers.
17. Denies. See "14", "15" and "16" above.
18. Denies the word "increasingly", but otherwise admits.

19. Admits, although precise dollar figure is unknown, and the \$10,000,000.00 referenced, if accurate, included accrued interest.

20. Admits.

21. Denies

22. Denies.

23. Denies as to a portion of 2008, but otherwise admits with qualification. See David Smith's response.

24. Admits

25. Refer to the response on behalf of David Smith.

26. Denies that the country clubs were "exclusive", denies with respect to the Pine Tree Golf Club and cannot confirm the monetary amount referenced, but otherwise admits.

27. - 45. Refer to response on behalf of David Smith.

46. Admits that cash transfers were made, but denies the characterization of "without consideration" as it is unclear and uncertain as to what that term means in this context.

47. - 57. Refer to response on behalf of David Smith.

58. Admits that there was a lawsuit filed, but lacked present knowledge or information sufficient to form a belief as to whether the lawsuit was characterized as a "securities fraud" suit, admits that it arose from a June, 2003 public offering, but states that that offering is what created the value, admits, upon information and belief, that the lawsuit identity as described is correct.

59. Admits.

DATED: December 12, 2011

Timothy McGinn

DATED: December 12, 2011

E. Stewart Jones, Jr., Esq.
E. STEWART JONES, PLLC
Attorney for Timothy McGinn
28 Second Street
Troy, New York 12180
(518) 274-5820



<p style="text-align: center;">5</p> <p>1 T. Urbelis</p> <p>2 MS. MEHRABAN:</p> <p>3 Q Would you please state your name for the</p> <p>4 record.</p> <p>5 A Thomas Urbelis.</p> <p>6 Q Would you please state your current home</p> <p>7 address.</p> <p>8 A REDACTED Andover, Massachusetts</p> <p>9 01810.</p> <p>10 Q Can you tell me your educational</p> <p>11 background after high school, please.</p> <p>12 A I graduated from Union College in 1967.</p> <p>13 I graduated from the University of Rochester,</p> <p>14 Graduate School of Management in 1969. I</p> <p>15 graduated from Boston College Law School in</p> <p>16 1978, and I've attended professional education</p> <p>17 courses since then.</p> <p>18 Q Can you walk me through your</p> <p>19 professional experience after you graduated</p> <p>20 from law school?</p> <p>21 A You mean?</p> <p>22 Q As a lawyer.</p> <p>23 A In practices?</p> <p>24 Q Yes.</p> <p>25 A I started, after I graduated from law</p>	<p style="text-align: center;">7</p> <p>1 T. Urbelis</p> <p>2 serve as special counsel on occasion to</p> <p>3 municipalities with regard to civil rights</p> <p>4 defense, where the municipality or its</p> <p>5 employees or officers are sued for civil</p> <p>6 rights violations; so I'll participate in the</p> <p>7 defense of those. That's how my practice has</p> <p>8 evolved as to what I pretty much do now.</p> <p>9 (Plaintiff's Exhibit 16, subpoena</p> <p>10 to serve on deposition marked for</p> <p>11 identification as of today's date.)</p> <p>12 Q This is the subpoena I sent you on</p> <p>13 Friday. Your appearance today is pursuant to</p> <p>14 the subpoena.</p> <p>15 A Yes, it is.</p> <p>16 Q When did you first meet David Smith?</p> <p>17 A Approximately '56, '57. Well, 50 years</p> <p>18 ago.</p> <p>19 Q How?</p> <p>20 A We grew up in the same town and went to</p> <p>21 the same schools.</p> <p>22 MR. FEATHERSTONHAUGH: May I</p> <p>23 interject about Exhibit 16?</p> <p>24 MS. MEHRABAN: Sure.</p> <p>25 MR. FEATHERSTONHAUGH: Exhibit 16</p>
<p style="text-align: center;">6</p> <p>1 T. Urbelis</p> <p>2 school, I started with a firm in Boston called</p> <p>3 Withington, Cross, Park & Groden, I worked</p> <p>4 there as an associate, and I became partner in</p> <p>5 1983. In 1990, four of the partners including</p> <p>6 myself spun off and started our own firm in</p> <p>7 Boston. Over the years, one or two would drop</p> <p>8 out, and I'm not exactly sure which years they</p> <p>9 were, but currently I'm partner with Urbelis &</p> <p>10 Fieldsteel.</p> <p>11 Q What type of law do you practice?</p> <p>12 A I primarily practice in the area of</p> <p>13 municipal law, I represent cities and towns.</p> <p>14 I'm town counsel, that's C-O-U-N-S-E-L that's</p> <p>15 counsel in the form of Government, for towns.</p> <p>16 I perform special legal services for other</p> <p>17 towns. I do quite a bit of land court</p> <p>18 litigation resulting from that because of</p> <p>19 decisions that one of the regulatory boards</p> <p>20 might make, like, I don't know what you call</p> <p>21 it here, but the planning board or zoning</p> <p>22 board of appeals or conservation commission of</p> <p>23 the Board of Health. So I'll represent the</p> <p>24 communities in those mostly land court and</p> <p>25 administrative-type of litigations. I also</p>	<p style="text-align: center;">8</p> <p>1 T. Urbelis</p> <p>2 I think asks for, in addition for the</p> <p>3 witness' appearance, for various</p> <p>4 documents, and I wonder if any documents</p> <p>5 were produced in response to the</p> <p>6 subpoena, and if they have been if we</p> <p>7 might have copies of them?</p> <p>8 MS. MEHRABAN: Sure. My</p> <p>9 understanding is that the only documents</p> <p>10 that were produced to me were produced</p> <p>11 to Ms. Dunn.</p> <p>12 A Let me clarify that. There is one</p> <p>13 letter that Ms. Dunn had asked me for, it's</p> <p>14 the letter that Dave sent me that we talked</p> <p>15 about, which I sent over the weekend. So</p> <p>16 that's one that you don't have.</p> <p>17 MS. MEHRABAN: So I can get you</p> <p>18 copies of all those documents, but most</p> <p>19 of them are exhibits.</p> <p>20 A But what I sent is exactly what I sent</p> <p>21 to Ms. Dunn.</p> <p>22 MR. FEATHERSTONHAUGH: Okay.</p> <p>23 A Can I clarify that's not total, I mean I</p> <p>24 haven't --</p> <p>25 Q You haven't completed your search for</p>



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<p style="text-align: center;">9</p> <p>1 T. Urbelis</p> <p>2 documents?</p> <p>3 A As I explained to you, you know, I got</p> <p>4 the subpoena at 2 o'clock, Friday. And my</p> <p>5 office was closing early, and, you know, I</p> <p>6 offered to send her the documents to have</p> <p>7 copies of the documents that I had sent to Ms.</p> <p>8 Dunn, and I was leaving right then for the</p> <p>9 holiday weekend, Memorial Day weekend, out of</p> <p>10 state and I haven't done anything since. I</p> <p>11 got a phone call or we got a phone call Sunday</p> <p>12 night.</p> <p>13 Q Do you want to go off the record?</p> <p>14 A My daughter was --</p> <p>15 MS. MEHRABAN: Let's go off the</p> <p>16 record.</p> <p>17 (Whereupon, an off the record</p> <p>18 discussion was held.)</p> <p>19 MS. MEHRABAN: Back on the record.</p> <p>20 Q I believe you just explained to me how</p> <p>21 you knew David Smith.</p> <p>22 A Yes, we been friends more than 50 years,</p> <p>23 we met in junior high.</p> <p>24 Q Would the answer be the same with</p> <p>25 respect to Lynn Smith?</p>	<p style="text-align: center;">11</p> <p>1 T. Urbelis</p> <p>2 approvals.</p> <p>3 Q And were you involved in that</p> <p>4 representation?</p> <p>5 A No. There was another time in the early</p> <p>6 '80s, '84, '85, '86, around there, where there</p> <p>7 was some litigation that McGinn, Smith was</p> <p>8 involved in with regard to I believe a real</p> <p>9 estate developer and the case was in</p> <p>10 Massachusetts and I represented the company</p> <p>11 and the case was settled, but ever since then,</p> <p>12 since that, I've -- no, I haven't represented</p> <p>13 them as an attorney. I never represented any</p> <p>14 of them.</p> <p>15 Q As a trustee for this trust, what did</p> <p>16 you do?</p> <p>17 A Well, I -- let me tell you what I took</p> <p>18 as my duties as I saw them. My very first</p> <p>19 duty obviously was to make sure the kids were</p> <p>20 okay.</p> <p>21 Jeff and Lauren, I've known them since</p> <p>22 they were born. And I think that's -- I don't</p> <p>23 know if I'm speculating -- that might be one</p> <p>24 of the reasons besides knowing me, they might</p> <p>25 have wanted someone who knew the kids and what</p>
<p style="text-align: center;">10</p> <p>1 T. Urbelis</p> <p>2 A Same.</p> <p>3 Q How did you become trustee with the</p> <p>4 David L. and Lynn A. Smith Trust?</p> <p>5 A I don't know if it was Dave calling me</p> <p>6 or Lynn -- probably Dave, I don't remember --</p> <p>7 and asked me to be the trustee for the</p> <p>8 children's trust.</p> <p>9 Q Prior to that time, had you been a</p> <p>10 trustee for any trust for David Smith or Lynn</p> <p>11 Smith?</p> <p>12 A I am a trustee of a life insurance trust</p> <p>13 on Dave's life; that's it.</p> <p>14 Q How long have you been a trustee for</p> <p>15 that trust?</p> <p>16 A Maybe 20 years.</p> <p>17 Q Have you ever represented David Smith or</p> <p>18 Lynn Smith in your capacity as an attorney?</p> <p>19 A I never represented Lynn. In 1980 when</p> <p>20 Dave and Tim McGinn were starting their firm,</p> <p>21 they asked me if I knew any lawyers in Boston,</p> <p>22 and one of the partners in the firm that was</p> <p>23 associated with us did that kind of work; so</p> <p>24 he worked with them in setting up their</p> <p>25 company and getting the appropriate regulatory</p>	<p style="text-align: center;">12</p> <p>1 T. Urbelis</p> <p>2 their personalities were and needs and things</p> <p>3 like that; so I've known Jeff and Lauren ever</p> <p>4 since they were born. So, my first duty as I</p> <p>5 saw it was if they needed money or some kind</p> <p>6 of assistance was to provide it.</p> <p>7 Another consideration for me was I</p> <p>8 wanted to make sure in a situation like this</p> <p>9 that the taxes got paid, so I wanted an</p> <p>10 assurance that I was not going to be</p> <p>11 responsible for preparing tax returns, and I</p> <p>12 make no bones about it, I have an accountant</p> <p>13 that does mine and I don't understand it. So</p> <p>14 I have an accountant that does that, and I</p> <p>15 wanted the same professional expertise to deal</p> <p>16 with the tax returns. I wanted to make sure I</p> <p>17 had an assurance that they were going to get</p> <p>18 done on a timely basis and they were going to</p> <p>19 get paid.</p> <p>20 With regard to the investments and the</p> <p>21 trust, I did not see my duties as making the</p> <p>22 trust double, triple, quadruple over time. I</p> <p>23 wanted the money to be fairly secure for, if</p> <p>24 and when the kids needed it. And I looked to</p> <p>25 Dave to provide advice to me with regard to</p>



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<p style="text-align: center;">13</p> <p>1 T. Urbelis</p> <p>2 the prudent investment or appropriate</p> <p>3 investments to make in the trust.</p> <p>4 Q Were you compensated in your position as</p> <p>5 trustee?</p> <p>6 A No.</p> <p>7 Q Do you have any background in investing?</p> <p>8 A Not really, no, I don't have time to.</p> <p>9 Q Did you make any investment decisions as</p> <p>10 trustee of the trust that were not based on</p> <p>11 recommendations from David Smith?</p> <p>12 A I don't think so. There really weren't</p> <p>13 that many. I mean, over the six or seven</p> <p>14 years, six years, there really -- I think if</p> <p>15 you look at other investments, there really</p> <p>16 weren't that many transactions. I mean, there</p> <p>17 were a couple big ones, but I mean it wasn't</p> <p>18 like there were six or seven, continually six</p> <p>19 or seven transactions. I mean, there were</p> <p>20 some, it was mostly talking to Dave.</p> <p>21 I felt a couple of things. One, this</p> <p>22 trust in my mind was kind of unique because</p> <p>23 the person who was one of the donors was in</p> <p>24 the business of investments, so it's not like</p> <p>25 the person who was the donor was a dentist or</p>	<p style="text-align: center;">15</p> <p>1 T. Urbelis</p> <p>2 Q You said that your first goal in being</p> <p>3 the trustee was to make sure the children were</p> <p>4 okay.</p> <p>5 A Right.</p> <p>6 Q How did you do that?</p> <p>7 A Well, I knew what the kids were up to.</p> <p>8 I mean, my wife and I are very good friends</p> <p>9 with Dave and Lynn. And again, we have kids</p> <p>10 that are fairly close to the same ages of Jeff</p> <p>11 and Lauren, and my wife and Lynn raised a</p> <p>12 couple of teenagers at the same time. So we</p> <p>13 had a lot of conversations about what the kids</p> <p>14 are up to and which kid is doing what, and</p> <p>15 just that I knew about what they were doing</p> <p>16 and whether they needed money.</p> <p>17 So, I mean, obviously if I knew one of</p> <p>18 them was in a tough spot, I would have stepped</p> <p>19 in, but that was never brought to my attention</p> <p>20 or I never became aware of it.</p> <p>21 Q Did you have conversations with Jeff</p> <p>22 Smith?</p> <p>23 A Yeah, I've talked to Jeff.</p> <p>24 Q How often?</p> <p>25 A Probably, well, probably more often.</p>
<p style="text-align: center;">14</p> <p>1 T. Urbelis</p> <p>2 a musician or athlete, and I had to go pay</p> <p>3 somebody to get advice. The person, it was,</p> <p>4 if you will, an in-house expert right there.</p> <p>5 Secondly, it was somebody who I had</p> <p>6 invested money with. So, obviously if it was</p> <p>7 good enough for me to consult with Dave to get</p> <p>8 his advice for my personal investments, it was</p> <p>9 good enough to ask him about his trust.</p> <p>10 And another thought in my mind has</p> <p>11 always been is this is his children's money</p> <p>12 and who else will you give advice to, but</p> <p>13 someone who is dealing with your children's</p> <p>14 money? So I felt very comfortable with regard</p> <p>15 to the investment side of what I was doing to</p> <p>16 consult with Dave, and Mr. Simons was the</p> <p>17 certified public accountant who was doing the</p> <p>18 taxes.</p> <p>19 Q And where was Mr. Simons employed?</p> <p>20 A He has an accounting firm in Syracuse.</p> <p>21 Q Is it Piaker & Lyons?</p> <p>22 A Yes.</p> <p>23 Q Were any distributions ever made by the</p> <p>24 trust to the beneficiaries of the trust?</p> <p>25 A I don't think so.</p>	<p style="text-align: center;">16</p> <p>1 T. Urbelis</p> <p>2 You mean about the trust?</p> <p>3 Q Yes.</p> <p>4 A I recall -- I think -- I'm just trying</p> <p>5 to recall -- as I was driving up here and I</p> <p>6 think about when the trust was created, I</p> <p>7 joked with both of them.</p> <p>8 I said, you guys better be nice to me</p> <p>9 because you may want me at some point. We</p> <p>10 joked about it, and I really haven't had any</p> <p>11 substantive conversations with Lauren about</p> <p>12 it.</p> <p>13 Jeff, I had a recent conversation with</p> <p>14 Jeff, he called me. I think it was April 15th</p> <p>15 this year and said that, you know, it was tax</p> <p>16 time. So every year around April 15th, I'd</p> <p>17 transfer money, make sure that taxes got paid.</p> <p>18 And he was also, for a period of time, the</p> <p>19 account representative on the trust, he was</p> <p>20 not just the beneficiary, he was the actual</p> <p>21 representative.</p> <p>22 Q And your understanding is that the money</p> <p>23 that was transferred was to pay taxes on the</p> <p>24 trust?</p> <p>25 A Pay taxes, yes, that was my</p>



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<p style="text-align: center;">17</p> <p>1 T. Urbelis</p> <p>2 understanding.</p> <p>3 Q Did Jeff send you or anyone send you any</p> <p>4 documents of what the tax liabilities were on</p> <p>5 the trust?</p> <p>6 A Well, I received a document from a</p> <p>7 gentleman, I think, Brian Maher in New York</p> <p>8 who -- I'm not exactly sure who he is. He's</p> <p>9 with the clearinghouse, RMR.</p> <p>10 Jeff had called me and said, all right,</p> <p>11 we'll fax up the document to sign to transfer</p> <p>12 the money, and Jeff, they tried a couple of</p> <p>13 times and it didn't come through the fax</p> <p>14 machines.</p> <p>15 So I called Mr. Maher, and he e-mailed</p> <p>16 me the form that they prepared for me to sign</p> <p>17 to transfer the funds.</p> <p>18 Q Did you ever see any documents prior to</p> <p>19 authorizing the transfer showing how much the</p> <p>20 taxes were for the trust?</p> <p>21 A For this year?</p> <p>22 Q For any given year.</p> <p>23 A Well, I can tell you I didn't this year,</p> <p>24 I haven't reviewed all the documents, I don't</p> <p>25 know.</p>	<p style="text-align: center;">19</p> <p>1 T. Urbelis</p> <p>2 referenced, it seems to make sense that it's</p> <p>3 dated the same date.</p> <p>4 Q I represent to you that this is a</p> <p>5 document that you sent me.</p> <p>6 A Again, I'm assuming that's what it was.</p> <p>7 It looks like there is a delivery slip here.</p> <p>8 Yeah, this is a letter that Dave Smith sent to</p> <p>9 me.</p> <p>10 Q And it's attaching the declaration of</p> <p>11 trust?</p> <p>12 A Right. Is this the one that I signed?</p> <p>13 Well, that's what I mean, so I don't think he</p> <p>14 sent me this one with my signature, so, I mean</p> <p>15 I may have just stapled it together to keep</p> <p>16 the signed one with the letter. It doesn't</p> <p>17 make sense that he sent me one, but maybe he</p> <p>18 did.</p> <p>19 No, actually, I think the handwriting</p> <p>20 where it says August 4th, looks like my</p> <p>21 handwriting on the first paragraph, so I'm not</p> <p>22 exactly sure what the sequence was, but as I</p> <p>23 say, this is a signed one. I think I also</p> <p>24 sent you a blank one or one that wasn't signed</p> <p>25 by me, if I recall, so that may be what was</p>
<p style="text-align: center;">18</p> <p>1 T. Urbelis</p> <p>2 Q The trust only made a few distributions</p> <p>3 over the years; is that correct?</p> <p>4 MS. DUNN: Objection to the form</p> <p>5 of the question.</p> <p>6 A The trust, yeah, well, it depends on</p> <p>7 what you mean by the distributions. Money</p> <p>8 going out of the trust?</p> <p>9 Q That's what I mean.</p> <p>10 A Correct, that was for taxes.</p> <p>11 Q Do you recall distributions other than</p> <p>12 for taxes?</p> <p>13 A No.</p> <p>14 Q I'm going to show you some documents.</p> <p>15 (Plaintiff's Exhibit 17, letter</p> <p>16 marked for identification of today's</p> <p>17 date.)</p> <p>18 Q I'm handing you Plaintiff's 17. If you</p> <p>19 can take a look at it and let me know what it</p> <p>20 is?</p> <p>21 A Yes, Exhibit 17 is a letter that I</p> <p>22 received from Dave Smith. I assume that this</p> <p>23 is the attachment that's attached, although, I</p> <p>24 don't have any independent memory. I just</p> <p>25 assume that this is the trust that was</p>	<p style="text-align: center;">20</p> <p>1 T. Urbelis</p> <p>2 included in the letter.</p> <p>3 MR. FEATHERSTONHAUGH: Could I</p> <p>4 impose on you just for the clarity of</p> <p>5 the record to actually describe the</p> <p>6 document.</p> <p>7 MS. MEHRABAN: Sure. Plaintiff's</p> <p>8 Exhibit 17 is an 11-page document dated</p> <p>9 August 4th, 2004. The first page is a</p> <p>10 letter from David Smith to Thomas</p> <p>11 Urbelis. The second page through the</p> <p>12 tenth page is the signed declaration of</p> <p>13 trust and the last page is an Airborne</p> <p>14 Express receipt.</p> <p>15 MR. FEATHERSTONHAUGH: Thank you.</p> <p>16 Q I'm going to direct your attention to</p> <p>17 the letter, the first paragraph of the letter,</p> <p>18 the fifth sentence.</p> <p>19 A Yeah.</p> <p>20 Q It says:</p> <p>21 "You and I will be able to consult</p> <p>22 on investments, but I am not eligible to</p> <p>23 exercise any direct control over the</p> <p>24 trust or its investments."</p> <p>25 What's your understanding as to what</p>



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<p style="text-align: center;">21</p> <p>1 T. Urbelis</p> <p>2 that means?</p> <p>3 A That I could consult with Dave on</p> <p>4 investments, but obviously I'm the only one</p> <p>5 that can sign a transfer or acquisition or</p> <p>6 disposition of any of the investments. He</p> <p>7 couldn't do it on his own.</p> <p>8 I mean I'm on the board of trustees of a</p> <p>9 charitable organization, where our accountant</p> <p>10 or our investment advisor buys and sells stock</p> <p>11 and every year gives us a report.</p> <p>12 My experience with that led me to</p> <p>13 conclude in my mind that that wasn't going to</p> <p>14 happen here, based on that sentence, that our</p> <p>15 investment advisor for this charitable</p> <p>16 organization, which I sit on the board, has</p> <p>17 given authority to the investment advisor</p> <p>18 during the year to sell IBM, buy GE, to do</p> <p>19 whatever you think is best, and then tell us</p> <p>20 at the end of the year, give us a report as to</p> <p>21 what you have done.</p> <p>22 Q In other words, is it fair to say that</p> <p>23 you --</p> <p>24 MS. DUNN: Objection to the form</p> <p>25 of the question.</p>	<p style="text-align: center;">23</p> <p>1 T. Urbelis</p> <p>2 time a fee for your services?</p> <p>3 A Yes, I did.</p> <p>4 Q What was that discussion?</p> <p>5 A Dave said, you know, we want to pay you.</p> <p>6 We want to see you get fairly compensated</p> <p>7 based upon what other trustees handling this</p> <p>8 kind of a trust get compensated. So let me</p> <p>9 know what you think is fair.</p> <p>10 I said, I'm not going to bother, I'm not</p> <p>11 going to take anything.</p> <p>12 Q Why did you say that?</p> <p>13 A Because they're my friends.</p> <p>14 Q The next paragraph refers to someone</p> <p>15 named Bruce Hoover of Sullivan & Olertheros</p> <p>16 (phonetic) in Buffalo, did you ever speak to</p> <p>17 Bruce Hoover?</p> <p>18 A No, not that I recall.</p> <p>19 Q The final sentence says:</p> <p>20 "The trust was drawn at the</p> <p>21 direction of Daniel Blake of Buffalo."</p> <p>22 Did you ever speak to Daniel Blake?</p> <p>23 A I don't think so.</p> <p>24 Q If you turn the page, please, this is</p> <p>25 the actual declaration of trust; is it not?</p>
<p style="text-align: center;">22</p> <p>1 T. Urbelis</p> <p>2 MR. FEATHERSTONHAUGH: Objection</p> <p>3 to the form of the question.</p> <p>4 MS. MEHRABAN: I'll rephrase the</p> <p>5 question.</p> <p>6 Q In other words, David Smith did not have</p> <p>7 discretionary authority over the account?</p> <p>8 A I didn't think so.</p> <p>9 Q The next sentence, "We will discuss some</p> <p>10 options to accomplish that at a later date,"</p> <p>11 what does the "that" refer to?</p> <p>12 MS. DUNN: Objection to the form</p> <p>13 of the question.</p> <p>14 A To consult on investments.</p> <p>15 Q What options did you discuss with David</p> <p>16 Smith about how to accomplish investments?</p> <p>17 A I don't recall. I don't recall any</p> <p>18 discussion.</p> <p>19 Q What other options would there have</p> <p>20 been?</p> <p>21 A I don't know.</p> <p>22 Q The last sentence says, "We will discuss</p> <p>23 a fee for your services at that time, also."</p> <p>24 A Right.</p> <p>25 Q Did you discuss with David Smith at any</p>	<p style="text-align: center;">24</p> <p>1 T. Urbelis</p> <p>2 A Yes, it looks like it is; if it's got my</p> <p>3 signature on it, that's the one. Yeah, this</p> <p>4 is it.</p> <p>5 Q I don't have any other questions on</p> <p>6 that.</p> <p>7 (Plaintiff's 18, a three-page</p> <p>8 document marked for identification of</p> <p>9 today's date.)</p> <p>10 Q This is a three-page document, the first</p> <p>11 two pages are a letter from Patty Sicluna to</p> <p>12 you, Mr. Urbelis, and the third page appears</p> <p>13 to be -- I'm not exactly sure.</p> <p>14 A The third page doesn't belong there. I</p> <p>15 some how I misplaced that. I just copied</p> <p>16 everything that was in it; so you got</p> <p>17 something that means nothing to you, it has no</p> <p>18 effect on anything.</p> <p>19 Q So, we'll just talk about the first two</p> <p>20 pages then of Exhibit 18. If you can take a</p> <p>21 look at it and let me know what it is.</p> <p>22 MR. FEATHERSTONHAUGH: Might I ask</p> <p>23 for the clarity of the record, if all</p> <p>24 counsel agreed, that it would be better</p> <p>25 just to remove the third page, so that</p>



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<p style="text-align: center;">25</p> <p>1 T. Urbelis</p> <p>2 Exhibit 18 is a two-page document?</p> <p>3 MS. MEHRABAN: I think it's fine,</p> <p>4 let's leave it.</p> <p>5 Q What are the first two pages of Exhibit</p> <p>6 18?</p> <p>7 A It's a letter from Ms. Sicluna. It</p> <p>8 looks like -- well, the first paragraph</p> <p>9 relates to the David and Lynn Smith Trust.</p> <p>10 The other paragraphs relate to investments</p> <p>11 that I or my wife had made, and I'd rather not</p> <p>12 get into that.</p> <p>13 The first paragraph relates to the fact</p> <p>14 that Dave had recommended that the trust</p> <p>15 invest in Pine Street Capital Partners LP, and</p> <p>16 Patty was sending me the documents to sign.</p> <p>17 Q What did you and David discuss about the</p> <p>18 investment of Pine Street Capital?</p> <p>19 A I don't remember the details. I just</p> <p>20 don't remember exactly what we talked about.</p> <p>21 Q Did you discuss the investment of Pine</p> <p>22 Street Capital with the beneficiaries of the</p> <p>23 trust at all?</p> <p>24 A No.</p> <p>25 Q Before agreeing to invest in Pine Street</p>	<p style="text-align: center;">27</p> <p>1 T. Urbelis</p> <p>2 if I can have a second to look at it,</p> <p>3 too?</p> <p>4 MS. MEHRABAN: Sure.</p> <p>5 Q What is this document?</p> <p>6 A This was something, again, that Patty</p> <p>7 Sicluna had sent to me to effectuate the</p> <p>8 investment that's shown.</p> <p>9 Q How did the trust come to be invested in</p> <p>10 Deerfield Tri Arc Capital Corp.?</p> <p>11 A Dave and I talked about it.</p> <p>12 Q What did you discuss?</p> <p>13 A I don't recall the exact discussion, but</p> <p>14 I -- he explained to me what it was and I</p> <p>15 mean, I really don't remember the details of</p> <p>16 it.</p> <p>17 Q Did you discuss the investment in</p> <p>18 Deerfield Tri Arc with the beneficiaries of</p> <p>19 the trust?</p> <p>20 A No.</p> <p>21 Q I don't have any other questions about</p> <p>22 that.</p> <p>23 (Plaintiff's Exhibit 20, a</p> <p>24 one-page document marked for</p> <p>25 identification of today's date.)</p>
<p style="text-align: center;">26</p> <p>1 T. Urbelis</p> <p>2 Capital, did you determine that investing in</p> <p>3 Pine Street Capital would meet the goals of</p> <p>4 the trustee of the trust?</p> <p>5 A Yeah, I did do that because it was also</p> <p>6 something that I was considering investing in,</p> <p>7 personally.</p> <p>8 Q How did you do that?</p> <p>9 MS. DUNN: Objection to the form</p> <p>10 of the question.</p> <p>11 MR. FEATHERSTONHAUGH: Objection</p> <p>12 to the form of the question.</p> <p>13 A I talked to Dave.</p> <p>14 Q Can I just ask who William Camisa is?</p> <p>15 A That's my nephew.</p> <p>16 Q I don't have any other questions about</p> <p>17 this document.</p> <p>18 (Plaintiff's Exhibit 19, an</p> <p>19 eight-page document marked for</p> <p>20 identification of today's date.)</p> <p>21 Q Exhibit 19 is an eight-page document.</p> <p>22 The first page is a fax and the second page is</p> <p>23 a subscription agreement for Deerfield Tri Arc</p> <p>24 Capital Corp.</p> <p>25 MR. FEATHERSTONHAUGH: Can I ask</p>	<p style="text-align: center;">28</p> <p>1 T. Urbelis</p> <p>2 Q Exhibit 20 is a one-page legal size</p> <p>3 document.</p> <p>4 MR. FEATHERSTONHAUGH: The title</p> <p>5 of mine is cut off, is it cut off on</p> <p>6 every document?</p> <p>7 MS. MEHRABAN: It's cut off on all</p> <p>8 of them.</p> <p>9 A The one I sent you I think is also cut</p> <p>10 off.</p> <p>11 Q Can you tell us what this document is?</p> <p>12 A This looks like -- I think this was a</p> <p>13 Bear Stearns. Bear Stearns was going to be</p> <p>14 doing the clearing for the investments, and</p> <p>15 this was something I had to sign as the</p> <p>16 trustee to have Bear Stearns do it.</p> <p>17 Q Who filled out the document?</p> <p>18 A I didn't, I don't know who did.</p> <p>19 Q You did not check the box "Real Estate"?</p> <p>20 A No.</p> <p>21 Q Or "Private Placements"?</p> <p>22 A No, I just -- it doesn't look like any</p> <p>23 of my handwriting, it does look like my</p> <p>24 signature, though.</p> <p>25 Q Okay. I don't have any other questions</p>



<p style="text-align: center;">29</p> <p>1 T. Urbelis</p> <p>2 of this document.</p> <p>3 (Plaintiff's Exhibits 21 and 22, a</p> <p>4 one-page document marked for</p> <p>5 identification as of today's date.)</p> <p>6 Q They're both one-page documents. You</p> <p>7 can take a look at them, I think they go</p> <p>8 together.</p> <p>9 A Yeah, I think they do, too. They</p> <p>10 probably do, I don't see any date.</p> <p>11 Q No, there is no date.</p> <p>12 A Well, the March 1st up here, the letter</p> <p>13 on Exhibit 21, and then it looks like I signed</p> <p>14 Exhibit 22 on March 25th, but I can't tell</p> <p>15 what year. But in any event, Exhibits 21 and</p> <p>16 22, they relate to the trust's acquisition of</p> <p>17 Pine Street Capital Partners LP Investment.</p> <p>18 Q Was there more than one investment in</p> <p>19 Pine Street Capital Partners or is this all</p> <p>20 the same investment?</p> <p>21 A There may have been two --</p> <p>22 MS. DUNN: Objection to the form.</p> <p>23 A There may have been two. I think there</p> <p>24 were two.</p> <p>25 (Plaintiff's Exhibit 23, a</p>	<p style="text-align: center;">31</p> <p>1 T. Urbelis</p> <p>2 think people were rushing to get the taxes</p> <p>3 paid and this is the way it was done; I think</p> <p>4 it's the way it went.</p> <p>5 Where did the check come from? The</p> <p>6 check came from Dave who then sent it to my</p> <p>7 law firm, which I wanted it to have absolutely</p> <p>8 nothing to do with the trust, which is why I</p> <p>9 said I don't want to do this anymore where it</p> <p>10 goes on the old interest of trust accounts,</p> <p>11 which is like an escrow account. So that's</p> <p>12 the way it was done this year, but it wasn't</p> <p>13 done like that after, where it goes into my</p> <p>14 ULTA account, and then I incur a check out of</p> <p>15 my ULTA account to make sure the taxes got</p> <p>16 paid.</p> <p>17 So I said, I don't want to do that</p> <p>18 anymore, I want to keep my law firm out of it,</p> <p>19 they're not my clients.</p> <p>20 Q What about the last page?</p> <p>21 A The handwritten -- I don't know. Oh,</p> <p>22 I'm sorry, it's on Dave's letterhead. It</p> <p>23 looks like Dave's handwriting.</p> <p>24 Q Do you know what it is?</p> <p>25 A Well, it's got my law firm there, it's</p>
<p style="text-align: center;">30</p> <p>1 T. Urbelis</p> <p>2 four-page document marked for</p> <p>3 identification of today's date.)</p> <p>4 Q Plaintiff's Exhibit 23 is a four-page</p> <p>5 compilation of documents that I believe you</p> <p>6 produced stapled.</p> <p>7 A Okay, that doesn't mean they're all</p> <p>8 together, that may have been for my</p> <p>9 bookkeeping convenience.</p> <p>10 Q Why don't you walk through them and tell</p> <p>11 me what they are.</p> <p>12 MS. DUNN: For the record, I'm</p> <p>13 curious about it, they weren't stapled</p> <p>14 when I received them.</p> <p>15 A This is a letter to me from David Quade</p> <p>16 of McGinn Smith discussing the payment for the</p> <p>17 2004 taxes.</p> <p>18 In the beginning, this kind of -- this</p> <p>19 was the first year we kind of stumbled through</p> <p>20 the method to do this. So this is the way it</p> <p>21 was done, this was the way it was done which I</p> <p>22 don't think you'll see anything like that in</p> <p>23 the other ones.</p> <p>24 The money was just transferred out of</p> <p>25 the account after that, but after this, I</p>	<p style="text-align: center;">32</p> <p>1 T. Urbelis</p> <p>2 got my phone number, overnight, it looks like</p> <p>3 it says 1800 federal filing, state -- I don't</p> <p>4 know, it must be the calculation for that year</p> <p>5 or the numbers that were needed to pay the</p> <p>6 taxes that year.</p> <p>7 Q But you don't know whether it's part of</p> <p>8 the same document?</p> <p>9 A No, I don't know.</p> <p>10 (Plaintiff's Exhibits 24 and 25,</p> <p>11 documents marked for identification of</p> <p>12 today's date.)</p> <p>13 A Yeah, 24 and 25, I think we talked about</p> <p>14 this in one of the exhibits, I'm not sure</p> <p>15 which one, but about the Deerfield Capital.</p> <p>16 This is just further documents that need to be</p> <p>17 executed with regard to the acquisitions of</p> <p>18 this investment.</p> <p>19 25 is -- it's my signature on 25, so it</p> <p>20 looks like that may be something that -- well,</p> <p>21 I don't know. It looks like -- I don't know,</p> <p>22 but it does look like my signature.</p> <p>23 Q You don't know what Exhibit 25 relates</p> <p>24 to?</p> <p>25 A I think it relates to this investment,</p>



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<p style="text-align: center;">33</p> <p>1 T. Urbelis</p> <p>2 if I look -- well, it doesn't say that, so I'd</p> <p>3 just be guessing.</p> <p>4 Q Did you discuss these documents with</p> <p>5 David Smith before you signed them?</p> <p>6 A I can't say I discussed each page of</p> <p>7 every document, but we did discuss the</p> <p>8 investment.</p> <p>9 Q What does this document relate to with</p> <p>10 respect to the investment?</p> <p>11 MS. DUNN: I'm going to object to</p> <p>12 the form of the question. He said he</p> <p>13 doesn't recognize Exhibit 25 other than</p> <p>14 his signature.</p> <p>15 MS. MEHRABAN: I'm sorry, I was</p> <p>16 referring to Exhibit 24.</p> <p>17 A Well, Exhibit 24 represents the</p> <p>18 documents -- it relates to documents with the</p> <p>19 Deerfield Tri Arc Capital Corp. acquisition.</p> <p>20 Q Just to take you back to Exhibit 19, the</p> <p>21 investment for Deerfield Tri Arc was made in</p> <p>22 December '04?</p> <p>23 A I don't know the dates.</p> <p>24 MS. DUNN: Was that a question?</p> <p>25 MS. MEHRABAN: Yes.</p>	<p style="text-align: center;">35</p> <p>1 T. Urbelis</p> <p>2 it was May or something. And then I got this</p> <p>3 and I just didn't understand what all the</p> <p>4 documents represented, why there were further</p> <p>5 documents.</p> <p>6 Q Did Dave call you in response to your</p> <p>7 fax?</p> <p>8 A I don't have a specific recollection,</p> <p>9 but he must have because he always did when I</p> <p>10 asked him to talk about one of the</p> <p>11 investments, especially this one, it seemed to</p> <p>12 me, from my standpoint, a little confusing as</p> <p>13 to what was going on.</p> <p>14 Q You don't recall anything about your</p> <p>15 discussion?</p> <p>16 A No, it was five years ago. I don't know.</p> <p>17 (Plaintiff's Exhibit 27, a</p> <p>18 three-page compilation of faxes from</p> <p>19 David Smith to Thomas Urbelis marked for</p> <p>20 identification of today's date.)</p> <p>21 Q This is a three-page compilation, it's a</p> <p>22 fax from David to you and then the fax</p> <p>23 transmittal confirmation and then a signed</p> <p>24 authorization.</p> <p>25 A Did the second page come from me? I</p>
<p style="text-align: center;">34</p> <p>1 T. Urbelis</p> <p>2 A Exhibit 19, it says we received it in</p> <p>3 December of '04. As to follow-up documents,</p> <p>4 they both look like 50,000 shares.</p> <p>5 MR. FEATHERSTONHAUGH: So when you</p> <p>6 say both, can you just tell me which</p> <p>7 exhibits?</p> <p>8 THE WITNESS: I'm talking about</p> <p>9 Exhibits 19 and 24.</p> <p>10 A So I don't know the exact time frame on</p> <p>11 these, but I'm not just guessing. It looks</p> <p>12 like they both talk about 50,000 shares.</p> <p>13 Well, it discusses the acquisition, I don't</p> <p>14 recall the sequence of these, I'm sorry.</p> <p>15 (Plaintiff's Exhibit 26, fax to</p> <p>16 David Smith from Thomas Urbelis marked</p> <p>17 for identification of today's date.)</p> <p>18 Q Exhibit 26 is a fax to David Smith from</p> <p>19 you, a 26-page fax, and it's dated June 7th,</p> <p>20 2005.</p> <p>21 A This was, I did say that Dave called me</p> <p>22 on this. I think I was confused with all</p> <p>23 these documents because I had signed something</p> <p>24 in December, and then I had signed something</p> <p>25 and I don't know if it was the last exhibit,</p>	<p style="text-align: center;">36</p> <p>1 T. Urbelis</p> <p>2 don't think any of these three pages came from</p> <p>3 me. Oh, I don't recognize it. I don't</p> <p>4 recognize the second page here.</p> <p>5 Q Do you recognize the first page and the</p> <p>6 third page?</p> <p>7 A I --</p> <p>8 Q Let me give you another document that</p> <p>9 might clarify your recollection.</p> <p>10 MR. FEATHERSTONHAUGH: Could we</p> <p>11 let him finish his answer?</p> <p>12 A I don't really know on Exhibit 27 here.</p> <p>13 Q Let me give you another document that</p> <p>14 might refresh your recollection.</p> <p>15 (Plaintiff's Exhibit 28, document</p> <p>16 marked for identification of today's</p> <p>17 date.)</p> <p>18 A Yeah, Exhibit 28 is my signature. To</p> <p>19 compare it, it looks the same as Exhibit 27.</p> <p>20 Q Did you discuss with David Smith the</p> <p>21 wire of \$92,105 prior to you signing the</p> <p>22 authorization?</p> <p>23 A I don't remember. I mean it was here,</p> <p>24 as I said when I first started the deposition,</p> <p>25 every April I would send money for taxes.</p>



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<p style="text-align: center;">37</p> <p>1 T. Urbelis</p> <p>2 Somebody would let me know.</p> <p>3 Q Is it your understanding that the</p> <p>4 \$92,105 was the tax liability for the trust</p> <p>5 for 2005?</p> <p>6 A It looks like it, yeah.</p> <p>7 Q Did you discuss this wire transfer with</p> <p>8 the beneficiaries of the trust before?</p> <p>9 A No.</p> <p>10 (Plaintiff's Exhibit 29, a</p> <p>11 three-page compilation of documents</p> <p>12 marked for identification of today's</p> <p>13 date.)</p> <p>14 Q Exhibit 29 is a three-page compilation</p> <p>15 of documents. If you could take a look at it</p> <p>16 and tell me what it is, please.</p> <p>17 A I don't know if I've seen the third</p> <p>18 page. Did I send this to you, I don't recall</p> <p>19 it?</p> <p>20 Q I'm not 100 percent sure actually, if</p> <p>21 not, then I found it in the e-mails.</p> <p>22 A Okay, I don't recall the third page.</p> <p>23 Q What about the first and second pages?</p> <p>24 A Well, the second page has my firm's name</p> <p>25 up on top, so I assume I received it.</p>	<p style="text-align: center;">39</p> <p>1 T. Urbelis</p> <p>2 Q Exhibit 30 is a two-page document, a fax</p> <p>3 cover and an authorization.</p> <p>4 A Right. It looks like my signature and</p> <p>5 again this is tax season. So I'm assuming</p> <p>6 that's what this one is, the outline of the</p> <p>7 particular memory, but I'm assuming that's</p> <p>8 what that one is.</p> <p>9 Q Did you have a discussion with David</p> <p>10 Smith prior to signing this authorization?</p> <p>11 A I don't remember.</p> <p>12 Q Is it your understanding --</p> <p>13 A Did it come with something?</p> <p>14 Q If you flip over the page it's a</p> <p>15 two-sided.</p> <p>16 A Oh, sorry. I don't remember seeing the</p> <p>17 back side of this.</p> <p>18 MS. DUNN: For the record,</p> <p>19 counsel, can you identify who -- did you</p> <p>20 receive this document in a back-to-back</p> <p>21 format?</p> <p>22 MS. MEHRABAN: I did.</p> <p>23 MR. FEATHERSTONHAUGH: Could I</p> <p>24 ask, for the purposes of the record, Mr.</p> <p>25 Urbelis, when you say you're referring</p>
<p style="text-align: center;">38</p> <p>1 T. Urbelis</p> <p>2 Q You assume you received or sent it?</p> <p>3 A Oh, it's from me to George. Oh, I'm</p> <p>4 sorry. Yeah, I guess I sent the second page.</p> <p>5 Q And what about the first page?</p> <p>6 A It looks like the first page is what I</p> <p>7 sent.</p> <p>8 Q What is the first page?</p> <p>9 A Again, that was with the transactions</p> <p>10 with the Deerfield Capital Corp., a conversion</p> <p>11 to common shares.</p> <p>12 Q Did you discuss this with David Smith</p> <p>13 prior to signing it?</p> <p>14 A This stuff was confusing to me, so I</p> <p>15 needed an explanation.</p> <p>16 Q Who did you discuss it with?</p> <p>17 A I don't think I ever discussed anything</p> <p>18 with anybody other than Dave.</p> <p>19 Q Do you recall your discussion with Dave</p> <p>20 regarding this letter?</p> <p>21 A No, not specifically.</p> <p>22 (Plaintiff's Exhibit 30, a</p> <p>23 two-page document consisting of a fax</p> <p>24 cover and authorization marked for</p> <p>25 identification of today's date.)</p>	<p style="text-align: center;">40</p> <p>1 T. Urbelis</p> <p>2 to seeing the back side, could you tell</p> <p>3 me which side you're calling the back</p> <p>4 side?</p> <p>5 THE WITNESS: The front side is</p> <p>6 the one with the plaintiff's exhibit on</p> <p>7 it.</p> <p>8 MR. FEATHERSTONHAUGH: Well I</p> <p>9 don't have that, so --</p> <p>10 THE WITNESS: The one with my</p> <p>11 signature on the bottom, April 11th,</p> <p>12 2008 where it looks like I signed it,</p> <p>13 April 14th, 2008. That's what I</p> <p>14 consider the front side. I don't</p> <p>15 believe I've seen the back side.</p> <p>16 MS. MEHRABAN: And I do believe I</p> <p>17 got it as a double-sided document, but I</p> <p>18 don't, off the top of my head I don't</p> <p>19 know the source. I'm not sure if it was</p> <p>20 in the -- I'm not sure I do, that's</p> <p>21 correct.</p> <p>22 MS. DUNN: So we moved on from the</p> <p>23 documents Mr. Urbelis produced in</p> <p>24 response to the subpoena?</p> <p>25 MR. FEATHERSTONHAUGH: We have a</p>



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<p style="text-align: center;">41</p> <p>1 T. Urbelis</p> <p>2 couple.</p> <p>3 MS. MEHRABAN: I have them in</p> <p>4 chronological order, so it's mixed.</p> <p>5 Q The \$110,636, is it your understanding</p> <p>6 that that represents the trust tax liability</p> <p>7 for 2007?</p> <p>8 A I -- again, I don't know if how the</p> <p>9 accounting, I don't know if it was for prior</p> <p>10 taxes, estimated taxes, but my understanding</p> <p>11 is it was for taxes, I mean --</p> <p>12 Q And taxes related to the trust?</p> <p>13 A Taxes related to the trust.</p> <p>14 Q Okay, that's it for that document,</p> <p>15 thank you.</p> <p>16 (Plaintiff's Exhibit 31, a</p> <p>17 two-page document marked for</p> <p>18 identification for today's date.)</p> <p>19 Q Exhibit 31 is a two-page document titled</p> <p>20 "Indemnity Agreement" and the second page is</p> <p>21 an e-mail from you.</p> <p>22 A The two documents are totally unrelated,</p> <p>23 so I don't know how they're stapled together.</p> <p>24 MS. DUNN: These documents were</p> <p>25 not stapled together when I received</p>	<p style="text-align: center;">43</p> <p>1 T. Urbelis</p> <p>2 else they won't do it, and it had an indemnity</p> <p>3 clause in there that I had to sign which I</p> <p>4 felt very uncomfortable with.</p> <p>5 And so I called Dave, and I said I</p> <p>6 really -- I'm really uncomfortable with</p> <p>7 signing this because even though I'm signing</p> <p>8 as trustee, it still says that NFS could at</p> <p>9 some point invoke that in some future</p> <p>10 circumstance that I can't even predict. I</p> <p>11 said that I felt very uncomfortable with it.</p> <p>12 And Dave said, well, why don't you draft</p> <p>13 something up that Lynn and I could sign that</p> <p>14 would make you feel comfortable with having</p> <p>15 you do NFS for the trust; so I did, I drafted</p> <p>16 this.</p> <p>17 Q By "this" you mean the first page of</p> <p>18 Exhibit 31?</p> <p>19 A Yes.</p> <p>20 Q Okay, I have no other questions on this</p> <p>21 document.</p> <p>22 (Plaintiff's Exhibit 32, a</p> <p>23 five-page form marked for identification</p> <p>24 of today's date.)</p> <p>25 Q Exhibit 32 is a form that's a five-page</p>
<p style="text-align: center;">42</p> <p>1 T. Urbelis</p> <p>2 them from Mr. Urbelis, so I'm not sure</p> <p>3 how they got attached. I don't believe</p> <p>4 they were even together. You know,</p> <p>5 they're two years apart.</p> <p>6 MS. MEHRABAN: I believe that I</p> <p>7 had copied documents in the manner in</p> <p>8 which I received them, but it's possible</p> <p>9 there was a mistake.</p> <p>10 Q So let's talk about the first page.</p> <p>11 A Sure. The first page is called an</p> <p>12 indemnity agreement.</p> <p>13 Q What is this?</p> <p>14 A It's an indemnity agreement signed by</p> <p>15 Dave and Lynn Smith in November 10th, 2008.</p> <p>16 Q Why was this signed on this date?</p> <p>17 A Because at that time or right around</p> <p>18 that time, the trust was -- I think that's</p> <p>19 when they were transferring the National</p> <p>20 Financial Services as a clearing agent and I</p> <p>21 had to sign a document that I felt very</p> <p>22 uncomfortable with.</p> <p>23 There was an NFS standard form that I</p> <p>24 assume they make for all of their people for</p> <p>25 whom they provide clearing services sign or</p>	<p style="text-align: center;">44</p> <p>1 T. Urbelis</p> <p>2 document. If you could tell me what this</p> <p>3 relates to? I guess first, if you could tell</p> <p>4 me if this is your signature on the last page?</p> <p>5 A Yeah, it looks like it.</p> <p>6 MR. FEATHERSTONHAUGH: Maybe I</p> <p>7 have the wrong thing. I have -- my</p> <p>8 Exhibit 32 is two separate forms, with a</p> <p>9 total of five pages but they appear to</p> <p>10 be different.</p> <p>11 MS. MEHRABAN: I think you're</p> <p>12 right, there are two forms; the first</p> <p>13 one is two pages and the second one is</p> <p>14 three pages.</p> <p>15 Q Is that your signature on the first page</p> <p>16 of Exhibit 32 on the bottom?</p> <p>17 A It looks like it is, although, did I</p> <p>18 produce this to you? I don't think I did. I</p> <p>19 just don't recognize it, I don't think I have</p> <p>20 this in my file.</p> <p>21 Q But is that your signature?</p> <p>22 A Yes.</p> <p>23 Q But do you know what this transfer of</p> <p>24 assets form relates to?</p> <p>25 A I don't know, it looks like it's -- I</p>



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<p style="text-align: center;">45</p> <p>1 T. Urbelis</p> <p>2 don't know, I'd have to study it, I don't want</p> <p>3 to give you a misleading answer.</p> <p>4 MR. FEATHERSTONHAUGH: May I</p> <p>5 inquire as to where did this document</p> <p>6 come from? The one I have is not quite</p> <p>7 legible, but the larger portions are</p> <p>8 legible.</p> <p>9 MS. MEHRABAN: It's from the</p> <p>10 e-mails that McGinn Smith & Company</p> <p>11 produced to FINRA.</p> <p>12 MS. DUNN: So is that an</p> <p>13 attachment to an e-mail? It doesn't</p> <p>14 appear to be an e-mail.</p> <p>15 MR. STOELTING: We received</p> <p>16 production from FINRA that has been</p> <p>17 available to everyone from the</p> <p>18 beginning.</p> <p>19 MS. DUNN: I'm just intervening</p> <p>20 from last week, so I don't have any of</p> <p>21 the production that you're referring to.</p> <p>22 He's testified he doesn't recognize the</p> <p>23 document, so.</p> <p>24 MS. MEHRABAN: And that his</p> <p>25 signature is on it.</p>	<p style="text-align: center;">47</p> <p>1 T. Urbelis</p> <p>2 ask so I understand you, are you</p> <p>3 representing that these two documents</p> <p>4 are related somehow?</p> <p>5 MR. STOELTING: Just let her ask</p> <p>6 the question, please.</p> <p>7 MR. FEATHERSTONHAUGH: Excuse me,</p> <p>8 counsel, I doubt your colleague will</p> <p>9 need your advice, but I'm simply</p> <p>10 inquiring as to whether you're</p> <p>11 representing that.</p> <p>12 MS. MEHRABAN: I believe that</p> <p>13 they're related, but I'm asking the</p> <p>14 witness to explain; if he can't explain,</p> <p>15 he can't explain.</p> <p>16 A I can't explain.</p> <p>17 Q Do you recognize the National Financial</p> <p>18 Services Alternative Investments Addendum and</p> <p>19 Custody Agreement?</p> <p>20 A No.</p> <p>21 (Plaintiff's Exhibit 33, a</p> <p>22 two-page document marked for</p> <p>23 identification of today's date.)</p> <p>24 Q This is a two-page document and I can</p> <p>25 represent to you that this I printed off our</p>
<p style="text-align: center;">46</p> <p>1 T. Urbelis</p> <p>2 MS. DUNN: He recognizes his</p> <p>3 signature, but I don't know about you</p> <p>4 getting too far into the document.</p> <p>5 MS. MEHRABAN: You can interrupt</p> <p>6 me, if I go too far.</p> <p>7 Q It's on page three of the document,</p> <p>8 National Financial Services Alternative</p> <p>9 Investments Addendum and Custody Agreement.</p> <p>10 You testified earlier that it is your</p> <p>11 signature on the third page, Mr. Urbelis.</p> <p>12 A It looks like it, yes.</p> <p>13 MS. DUNN: My page 3 doesn't have</p> <p>14 a signature.</p> <p>15 MR. FEATHERSTONHAUGH: Neither</p> <p>16 does mine.</p> <p>17 MS. MEHRABAN: It's the last page</p> <p>18 of Exhibit 32.</p> <p>19 MS. DUNN: It is my third page.</p> <p>20 MS. MEHRABAN: It is the third</p> <p>21 page of the National --</p> <p>22 MR. FEATHERSTONHAUGH: Could I ask</p> <p>23 a question, counsel --</p> <p>24 MS. MEHRABAN: Let me finish.</p> <p>25 MR. FEATHERSTONHAUGH: I need to</p>	<p style="text-align: center;">48</p> <p>1 T. Urbelis</p> <p>2 e-mail system, which was the e-mail that</p> <p>3 McGinn Smith & Co. produced to us, but you</p> <p>4 produced it to me in a different format, it's</p> <p>5 the exact same e-mail.</p> <p>6 A This one, Exhibit 33? I doesn't think</p> <p>7 so.</p> <p>8 Q It's in a different format, it's just</p> <p>9 that the type was different.</p> <p>10 MS. MEHRABAN: Let's go off the</p> <p>11 record for a second.</p> <p>12 (Whereupon, an off the record</p> <p>13 discussion was held.)</p> <p>14 MS. MEHRABAN: Back on the record.</p> <p>15 Q Look at the document and if you could</p> <p>16 let me know if you've seen it before?</p> <p>17 A This first one, this first page, Exhibit</p> <p>18 33?</p> <p>19 Q Yes.</p> <p>20 A I don't recall seeing this, no.</p> <p>21 Q What about the second page?</p> <p>22 A I don't know.</p> <p>23 Q Do you remember signing something</p> <p>24 allowing for the payment of taxes in April,</p> <p>25 2009?</p>



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<p style="text-align: center;">49</p> <p>1 T. Urbelis</p> <p>2 A I don't recall, but I certainly I must</p> <p>3 had, April comes tax time, I just don't</p> <p>4 recognize this document.</p> <p>5 (Plaintiff's Exhibit 34, a</p> <p>6 three-page document, marked for</p> <p>7 identification of today's date.)</p> <p>8 Q Exhibit 34 is a three-page document.</p> <p>9 The first page is a letter and the second two</p> <p>10 pages are related to shipping.</p> <p>11 Do you recognize this document?</p> <p>12 A Yes.</p> <p>13 Q What is it?</p> <p>14 A It's a copy of a letter that I sent to</p> <p>15 Dave and Lynn.</p> <p>16 Q It's a resignation letter; is it not?</p> <p>17 A Yes.</p> <p>18 Q And it's dated April 22nd, 2010.</p> <p>19 A Yes.</p> <p>20 Q Why did you resign on April 22nd, 2010?</p> <p>21 A I resigned because of this lawsuit. I</p> <p>22 was made aware that there was a lawsuit and I</p> <p>23 read the Albany Times Union articles and</p> <p>24 according to that, 80 or 90 million dollars</p> <p>25 that McGinn Smith had allegedly received from</p>	<p style="text-align: center;">51</p> <p>1 T. Urbelis</p> <p>2 actual conflict of interest, but certainly an</p> <p>3 appearance of a conflict of interest, and I</p> <p>4 really didn't want to continue that.</p> <p>5 Q And if I understand, is it correct that</p> <p>6 that was because you were a personal investor</p> <p>7 as well?</p> <p>8 A I and my family, yes. So when all of</p> <p>9 those things added up, I couldn't -- I could</p> <p>10 not in good faith continue my duties. I'm</p> <p>11 sure I certainly wouldn't do anything to hurt</p> <p>12 the kids, but I didn't want to have any kind</p> <p>13 of appearance of impropriety.</p> <p>14 Q Did you speak to the beneficiaries of</p> <p>15 the trust before resigning?</p> <p>16 A No.</p> <p>17 Q And the resignation shall take effect on</p> <p>18 May 27th, 2010, is that because of the terms</p> <p>19 of the declaration of trust?</p> <p>20 A Yeah, according to the trust I had to give</p> <p>21 30 days notice.</p> <p>22 Q I have no other questions about that.</p> <p>23 Let's take a five-minute break.</p> <p>24 (Whereupon, a five minute recess</p> <p>25 took place.)</p>
<p style="text-align: center;">50</p> <p>1 T. Urbelis</p> <p>2 investors, that there was only \$500,000 left</p> <p>3 and since I and my family and the trust were</p> <p>4 investors, \$500,000 from 90 million, I think</p> <p>5 that was the number that was in the paper,</p> <p>6 something in that range, it was very</p> <p>7 disconcerting.</p> <p>8 I was told by a friend that Dave could</p> <p>9 not speak with any of the investors and Dave</p> <p>10 or Lynn could not speak with any of the</p> <p>11 investors. And at that time, there was a</p> <p>12 great deal of turmoil for me.</p> <p>13 I came to the conclusion that because I</p> <p>14 and my family were investors, that I could not</p> <p>15 really fulfill my fiduciary duty with regard</p> <p>16 to the trust and the kids, where the trust was</p> <p>17 an investor and I also was an investor.</p> <p>18 So it just in my mind I couldn't talk to</p> <p>19 anybody, I couldn't talk to Dave or Lynn about</p> <p>20 it, to my understanding. There was no way</p> <p>21 that I could continue in a fiduciary capacity,</p> <p>22 so I resigned.</p> <p>23 I just thought I was clearly, in my</p> <p>24 mind, because of the lawsuit and the</p> <p>25 allegations that were in there, and if not, an</p>	<p style="text-align: center;">52</p> <p>1 T. Urbelis</p> <p>2 Q I'm going to ask you to look at again</p> <p>3 Plaintiff's Exhibit 28.</p> <p>4 A Okay.</p> <p>5 Q This is a wire authorization, correct?</p> <p>6 A Yes.</p> <p>7 Q And it's your signature on the bottom; I</p> <p>8 believe you testified to that earlier.</p> <p>9 A Yes.</p> <p>10 Q And this wire went to David Smith; is</p> <p>11 that correct?</p> <p>12 A Yeah, I think what happened, and I</p> <p>13 didn't get into the details of these things</p> <p>14 with the accountant, but I think I just</p> <p>15 assumed the money went kind of, like we talked</p> <p>16 about 2004, 2005, it came out of the -- out of</p> <p>17 their account and he had or Mr. Simons, who</p> <p>18 was making sure that the taxes get paid and</p> <p>19 filed, I just assumed that there was a way,</p> <p>20 you know, that either he brought the check to</p> <p>21 Mr. Simons or Mr. Simons got the check or Dave</p> <p>22 wrote the check to the IRS. I didn't care as</p> <p>23 long as I wasn't getting notices from the IRS</p> <p>24 that the State of New York -- that the taxes</p> <p>25 weren't getting paid.</p>



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<p style="text-align: center;">53</p> <p>1 T. Urbelis</p> <p>2 I did get something in 2009 that they</p> <p>3 lost one of the returns or something. So that</p> <p>4 as to how the mechanics of how the taxes were</p> <p>5 getting paid, I left that up to Mr. Simons.</p> <p>6 Q Do you know what David Smith did with</p> <p>7 these funds?</p> <p>8 A Do I know what he did with them, no.</p> <p>9 Q Did you ever discuss with the</p> <p>10 beneficiaries of the trust any payments from</p> <p>11 the trust?</p> <p>12 A Well, yeah, I talked to Jeff this past</p> <p>13 month.</p> <p>14 Q What did you talk to him about?</p> <p>15 A He called me, he said -- I think I</p> <p>16 testified about that.</p> <p>17 MR. FEATHERSTONHAUGH: I think he</p> <p>18 already testified to this, but.</p> <p>19 Q Refresh my recollection.</p> <p>20 A Jeff called me, and I signed the thing</p> <p>21 for Mr. Maher. That was Jeff's initiation.</p> <p>22 Q Was that the only time you talked to</p> <p>23 Jeff Smith regarding the payments from the</p> <p>24 trust?</p> <p>25 A I think so.</p>	<p style="text-align: center;">55</p> <p>1 T. Urbelis</p> <p>2 Q Unfortunately, we have one page. This</p> <p>3 is one page of an account statement, and I'm</p> <p>4 going to ask you about the transaction on June</p> <p>5 30th, 2006.</p> <p>6 A 2006? Is this the trust account?</p> <p>7 Q Yes.</p> <p>8 MR. FEATHERSTONHAUGH: Could I</p> <p>9 ask, maybe it's here and -- does this</p> <p>10 say whose account statement is it part</p> <p>11 of, an account statement?</p> <p>12 MS. MEHRABAN: It's page 6, the</p> <p>13 account number is listed at the top and</p> <p>14 that's the trust account. I don't have</p> <p>15 the complete account statement, so I'll</p> <p>16 just show you page 6.</p> <p>17 Q I'm going to direct you to the transfer</p> <p>18 of a check for \$83,830 on June 30th of 2006;</p> <p>19 do you recall what that was for?</p> <p>20 A No, I don't, I'm sorry.</p> <p>21 (Plaintiff's Exhibit 37, a letter</p> <p>22 marked for identification of today's</p> <p>23 date.)</p> <p>24 Q What is this document?</p> <p>25 MR. FEATHERSTONHAUGH: I haven't</p>
<p style="text-align: center;">54</p> <p>1 T. Urbelis</p> <p>2 Q In the past year, did David Smith ask</p> <p>3 you to loan any funds from the trust to McGinn</p> <p>4 Smith & Company?</p> <p>5 A To McGinn Smith, not that I recall.</p> <p>6 Q What about to any other entity related</p> <p>7 to McGinn Smith?</p> <p>8 A I don't recall that, no.</p> <p>9 (Plaintiff's Exhibit 35, an e-mail</p> <p>10 marked for identification of today's</p> <p>11 date.)</p> <p>12 A Yes, this is the e-mail that he received</p> <p>13 from Mr. Maher this year.</p> <p>14 Q This is what you were just describing to</p> <p>15 us?</p> <p>16 A Yes.</p> <p>17 Q So, the letter of authorization relates</p> <p>18 to the payment of taxes?</p> <p>19 A Yes.</p> <p>20 Q At least that was your understanding?</p> <p>21 A That was my understanding.</p> <p>22 Q Thank you.</p> <p>23 (Plaintiff's Exhibit 36, one page</p> <p>24 of an account statement, marked for</p> <p>25 identification of today's date.)</p>	<p style="text-align: center;">56</p> <p>1 T. Urbelis</p> <p>2 had a chance, this is the first time</p> <p>3 I've seen it, may I have a couple</p> <p>4 minutes to read it, please.</p> <p>5 MS. MEHRABAN: Sure. Off the</p> <p>6 record.</p> <p>7 (Whereupon, a discussion off the</p> <p>8 record was held.)</p> <p>9 MS. MEHRABAN: Back on the record.</p> <p>10 Q Mr. Urbelis, what is this document?</p> <p>11 A It's a letter dated May 2, 2010 which I</p> <p>12 received from Dave Smith.</p> <p>13 Q Can you read the first sentence?</p> <p>14 A "I understand from a comment that you</p> <p>15 made to Jim Featherstonhaugh that you have</p> <p>16 lost a great deal of money through McGinn</p> <p>17 Smith."</p> <p>18 Q What comment did you make to Jim?</p> <p>19 A I told him that I lost a great deal of</p> <p>20 money through my accounts at McGinn Smith.</p> <p>21 Q How did you speak to him?</p> <p>22 A Mr. Featherstonhaugh, he called me.</p> <p>23 Q Did you respond to this letter?</p> <p>24 A Yes, I did, I think you have it.</p> <p>25 (Plaintiff's Exhibit 38, a letter</p>



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<p style="text-align: center;">57</p> <p>1 T. Urbelis</p> <p>2 from Thomas Urbelis to David Smith,</p> <p>3 marked for identification of today's</p> <p>4 date.)</p> <p>5 Q What is Exhibit 38?</p> <p>6 A It's a letter I wrote to Dave Smith.</p> <p>7 Q Who is Timmy?</p> <p>8 A Tim Cioche, yeah, a mutual friend.</p> <p>9 Q Did you meet with Dave Smith as a result</p> <p>10 of this letter?</p> <p>11 A No.</p> <p>12 Q Did you speak to him after writing this</p> <p>13 letter?</p> <p>14 A Yes.</p> <p>15 Q When?</p> <p>16 A It was the -- whatever date this is, I</p> <p>17 think this is the middle of the week, I talked</p> <p>18 with Dave that Saturday, briefly, and I talked</p> <p>19 to him again I believe it was -- he called and</p> <p>20 I couldn't -- I know something was going on at</p> <p>21 the house. I couldn't talk to him and then he</p> <p>22 called me, I believe it was either that next</p> <p>23 Monday or Tuesday.</p> <p>24 Q Tell me about that conversation.</p> <p>25 A He called me and like I said in my</p>	<p style="text-align: center;">59</p> <p>1 T. Urbelis</p> <p>2 substantiation regarding to the actuality of</p> <p>3 what was going on with Pine Street Capital</p> <p>4 Limited Partners, something like that.</p> <p>5 He said that, you know, my investments</p> <p>6 were still good, substantially good, he didn't</p> <p>7 know exactly the exact numbers and asked me if</p> <p>8 I had obviously seen the newspapers about the</p> <p>9 lawsuit, and I expressed concern to him, hoped</p> <p>10 he and Lynn were okay.</p> <p>11 He said that he didn't do anything</p> <p>12 wrong, that he's not liable for any of the</p> <p>13 allegations that were caused. He said, you</p> <p>14 know, once all the information comes out, you</p> <p>15 know, it's unfortunate that it's gotten to</p> <p>16 this, but he said once the information comes</p> <p>17 out, he said it will show that he is not</p> <p>18 liable, that he did nothing wrong, that's what</p> <p>19 he said.</p> <p>20 He said Lynn and he were having trouble</p> <p>21 paying their bills because of the freeze on</p> <p>22 the accounts, so that was making it difficult</p> <p>23 for them. That's about all I can remember at</p> <p>24 this point.</p> <p>25 Q Do you remember any other discussions</p>
<p style="text-align: center;">58</p> <p>1 T. Urbelis</p> <p>2 letter, I thought that they couldn't -- Dave</p> <p>3 couldn't talk to us but that's obviously some</p> <p>4 kind of a miscommunication, and I wanted to</p> <p>5 let him know I resigned as trustee.</p> <p>6 Well, let me back up. The very first</p> <p>7 thing I said when I called was, how's Lynn.</p> <p>8 He told me she wasn't doing well. I talked</p> <p>9 about that with him and expressed to her, my</p> <p>10 wife, and my concern about Lynn. So we talked</p> <p>11 about that for a bit, and I told him I wanted</p> <p>12 to explain why I didn't have the opportunity,</p> <p>13 I didn't think I could talk to them, so I</p> <p>14 wanted to explain to him the reason. I did</p> <p>15 it, it was obviously I thought based upon what</p> <p>16 I saw in the papers that I had a potential if</p> <p>17 not actual conflict of interest and also I was</p> <p>18 trying to carry out my duties as trustee;</p> <p>19 that's the same thing I told you a little</p> <p>20 while ago.</p> <p>21 And then we talked about that and then</p> <p>22 he talked further about what he had told me in</p> <p>23 the letter about our investments and explained</p> <p>24 those to me, and told me to give Tim Wells a</p> <p>25 call if I had further questions or wanted more</p>	<p style="text-align: center;">60</p> <p>1 T. Urbelis</p> <p>2 regarding the trust?</p> <p>3 A No, I would just -- it was why I</p> <p>4 resigned, nothing subsequent about the trust,</p> <p>5 it was just why I resigned.</p> <p>6 Q Okay. I have nothing further on this</p> <p>7 document.</p> <p>8 (Plaintiff's Exhibit 39, document</p> <p>9 for the appointment of new trustee to</p> <p>10 the trust, marked for identification of</p> <p>11 today's date.)</p> <p>12 Q Have you seen this document before?</p> <p>13 A Yes, I have.</p> <p>14 Q What is it?</p> <p>15 A It's the appointment of a new trustee</p> <p>16 for the trust, to my understanding.</p> <p>17 Q Do you know David Wojesky?</p> <p>18 A No.</p> <p>19 Q Did you have any involvement in who was</p> <p>20 appointed as the trustee for the trust?</p> <p>21 A No. I don't think -- I know I may have</p> <p>22 met him, but I don't recall.</p> <p>23 Q Do you remember a transfer of \$95,000</p> <p>24 from the trust to Lynn Smith in April of this</p> <p>25 year?</p>



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<p style="text-align: center;">61</p> <p>1 T. Urbelis</p> <p>2 A Yeah, that's the one that Jeff called me</p> <p>3 about and Mr. Maher sent me the form, I think.</p> <p>4 Q What was your understanding of what that</p> <p>5 was for?</p> <p>6 MR. FEATHERSTONHAUGH: I believe</p> <p>7 he testified to that three times now.</p> <p>8 MS. MEHRABAN: I believe the</p> <p>9 answer wasn't quite clear.</p> <p>10</p> <p>11 (Continued on the next page to</p> <p>12 accommodate jurat.)</p> <p>13</p> <p>14</p> <p>15</p> <p>16</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 style="text-align: center;">63</p> <p>1</p> <p>2 I N D E X</p> <p>3 WITNESS EXAMINATION BY PAGE</p> <p>4 THOMAS URBELIS MS. MEHRABAN 4</p> <p>5 EXHIBITS</p> <p>6 PLAINTIFF'S DESCRIPTION PAGE</p> <p>7 16 Subpoena 7</p> <p>8 17 Letter 18</p> <p>9 18 Three-page document 24</p> <p>10 19 Eight-page document 26</p> <p>11 20 One-page document 27</p> <p>12 21 One-page document 29</p> <p>13 22 One-page document 29</p> <p>14 23 Four-page document 29</p> <p>15 24 Documents 32</p> <p>16 25 Documents 32</p> <p>17 26 Fax 34</p> <p>18 27 Three-page compilation 35</p> <p>19 Of faxes</p> <p>20 28 Document 36</p> <p>21 29 Three-page compilation 37</p> <p>22 Of Documents</p> <p>23 30 Two-page document 38</p> <p>24 31 Two-page document 41</p> <p>25 32 Five-page document 43</p> <p>33 Two-page document 47</p>
<p style="text-align: center;">62</p> <p>1 T. Urbelis</p> <p>2 A Taxes for the trust.</p> <p>3 Q For the trust?</p> <p>4 A Yes.</p> <p>5 MS. MEHRABAN: I don't have any</p> <p>6 other questions. Thank you very much.</p> <p>7 MR. FEATHERSTONHAUGH: I have no</p> <p>8 questions for Mr. Urbelis on behalf of</p> <p>9 the relief defendant.</p> <p>10 MS. DUNN: I have no questions.</p> <p>11 THE WITNESS: Thank you very much.</p> <p>12 -oOo-</p> <p>13 (Whereupon, the deposition of THOMAS</p> <p>14 URBELIS was concluded at 2:08 p.m.)</p> <p>15</p> <p>16 _____</p> <p>17 THOMAS URBELIS</p> <p>18 Subscribed and sworn to</p> <p>19 Before me, this ____ day</p> <p>20 of _____, 2010.</p> <p>21</p> <p>22 _____</p> <p>23 NOTARY PUBLIC</p> <p>24</p> <p>25</p>	<p style="text-align: center;">64</p> <p>1</p> <p>2</p> <p>3 I N D E X</p> <p>4 Of</p> <p>5 EXHIBITS</p> <p>6 (Continued)</p> <p>7 PLAINTIFF'S DESCRIPTION PAGE</p> <p>8</p> <p>9 34 Three-page document 49</p> <p>10 35 E-Mail 54</p> <p>11 36 Account statement 54</p> <p>12 37 Letter 55</p> <p>13 38 Letter 56</p> <p>14 39 Document appointment of 60</p> <p>15 new trustee to the trust</p> <p>16</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>



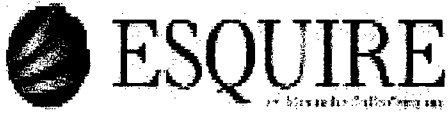
<p style="text-align: center;">65</p> <p>1 DEPOSITION ERRATA SHEET</p> <p>2</p> <p>3</p> <p>4 Our Assignment No. 310714</p> <p>5 Case Caption: SEC vs. MCGINN, SMITH & CO.,</p> <p>6</p> <p>7</p> <p>8 DECLARATION UNDER PENALTY OF PERJURY</p> <p>9 I declare under penalty of perjury</p> <p>10 that I have read the entire transcript of</p> <p>11 my Deposition taken in the captioned matter</p> <p>12 or the same has been read to me, and</p> <p>13 the same is true and accurate, save and</p> <p>14 except for changes and/or corrections, if</p> <p>15 any, as indicated by me on the DEPOSITION</p> <p>16 ERRATA SHEET hereof, with the understanding</p> <p>17 that I offer these changes as if still under</p> <p>18 oath.</p> <p>19 Signed on the _____ day of</p> <p>20 _____, 20____.</p> <p>21</p> <p>22 _____</p> <p>23 THOMAS URBELIS</p> <p>24</p> <p>25</p>	<p style="text-align: center;">67</p> <p>1 DEPOSITION ERRATA SHEET</p> <p>2 Page No. _____ Line No. _____ Change to: _____</p> <p>3 _____</p> <p>4 Reason for change: _____</p> <p>5 Page No. _____ Line No. _____ Change to: _____</p> <p>6 _____</p> <p>7 Reason for change: _____</p> <p>8 Page No. _____ Line No. _____ Change to: _____</p> <p>9 _____</p> <p>10 Reason for change: _____</p> <p>11 Page No. _____ Line No. _____ Change to: _____</p> <p>12 _____</p> <p>13 Reason for change: _____</p> <p>14 Page No. _____ Line No. _____ Change to: _____</p> <p>15 _____</p> <p>16 Reason for change: _____</p> <p>17 Page No. _____ Line No. _____ Change to: _____</p> <p>18 _____</p> <p>19 Reason for change: _____</p> <p>20 Page No. _____ Line No. _____ Change to: _____</p> <p>21 _____</p> <p>22 Reason for change: _____</p> <p>23 _____</p> <p>24 SIGNATURE: _____ DATE: _____</p> <p>25 THOMAS URBELIS</p>
<p style="text-align: center;">66</p> <p>1 DEPOSITION ERRATA SHEET</p> <p>2 Page No. _____ Line No. _____ Change to: _____</p> <p>3 _____</p> <p>4 Reason for change: _____</p> <p>5 Page No. _____ Line No. _____ Change to: _____</p> <p>6 _____</p> <p>7 Reason for change: _____</p> <p>8 Page No. _____ Line No. _____ Change to: _____</p> <p>9 _____</p> <p>10 Reason for change: _____</p> <p>11 Page No. _____ Line No. _____ Change to: _____</p> <p>12 _____</p> <p>13 Reason for change: _____</p> <p>14 Page No. _____ Line No. _____ Change to: _____</p> <p>15 _____</p> <p>16 Reason for change: _____</p> <p>17 Page No. _____ Line No. _____ Change to: _____</p> <p>18 _____</p> <p>19 Reason for change: _____</p> <p>20 Page No. _____ Line No. _____ Change to: _____</p> <p>21 _____</p> <p>22 Reason for change: _____</p> <p>23 _____</p> <p>24 SIGNATURE: _____ DATE: _____</p> <p>25 THOMAS URBELIS</p>	<p style="text-align: center;">68</p> <p>1</p> <p>2 CERTIFICATE</p> <p>3 I, GEORGE MALINOWSKI, a shorthand reporter</p> <p>4 and Notary Public within and for The State of</p> <p>5 New York, do hereby certify:</p> <p>6 That the witness whose testimony is</p> <p>7 hereinbefore set forth was duly sworn by me,</p> <p>8 and the foregoing transcript is a true record</p> <p>9 of the testimony given by such witness(es).</p> <p>10 I further certify that I am not related to</p> <p>11 any of the parties to this action by blood or</p> <p>12 marriage, and that I am in no way interested</p> <p>13 in the outcome of this matter.</p> <p>14</p> <p>15 _____</p> <p>16 GEORGE MALINOWSKI</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>



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www.esquiresolutions.com



1 Penn Plaza
47th Floor
New York, NY 10019
212-687-8010

July 2, 2010

SEC -NERO

Att: David Stoelting, Esq.
Suite 400
Three World Financial Center
New York, New York 10281-1022

Re: Witness: Thomas Urbelis
Case Caption: SEC vs. McGinn, Smith & Co.
Depo Date: June 1, 2010
Job No.: 310714/File No.: 16703

Dear Sir:

Enclosed please find the Errata Sheet executed by the witness T. Urbelis, for the above mentioned case.

If you have any questions or concerns please contact our office.

Sincerely,

Venetta Brown
Client Services
Esquire – An Alexander Gallo Company

DEPOSITION ERRATA SHEET

Our Assignment No. 310714

Case Caption: SEC vs. MCGINN, SMITH & CO.,

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that I have read the entire transcript of my Deposition taken in the captioned matter or the same has been read to me, and the same is true and accurate, save and except for changes and/or corrections, if any, as indicated by me on the DEPOSITION ERRATA SHEET hereof, with the understanding that I offer these changes as if still under oath.

Signed on the 29th day of

JUNE, 2010.

Thomas Urbelis

THOMAS URBELIS



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One Penn Plaza
New York, NY 10119
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DEPOSITION ERRATA SHEET

Page No. 4 Line No. 23-24 Change to: Delete "I am the attorney for the witness Thomas Urbelis."

Reason for change: Ms. Dunn did not say those words and she is not my attorney.

Page No. 6 Line No. 22 Change to: Change "of" to "or"

Reason for change: _____

Page No. 9 Line No. 6 Change to: Change "her" to "you"

Reason for change: _____

Page No. 10 Line No. 22 Change to: Add "I" between "that" and "was"

Reason for change: _____

Page No. 10 Line No. 23 Change to: Delete "us"

Reason for change: _____

Page No. 11 Line No. 21 Change to: Change "Jeff" to "Geoff"

Reason for change: _____

Page No. 12 Line No. 3 Change to: Change "Jeff" to "Geoff"

Reason for change: _____

SIGNATURE: Thomas Urbelis DATE: JUNE 29, 2010

THOMAS URBELIS



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DEPOSITION ERRATA SHEET

Page No. 13 Line No. 8 Change to: Delete "I don't
have time to"

Reason for change: _____

Page No. 14 Line No. 5 Change to: Change "who" to
"whom"

Reason for change: _____

Page No. 14 Line No. 9 Change to: Change "his" to
"this"

Reason for change: _____

Page No. 14 Line No. 11 Change to: Change the first
"is" to "that"

Reason for change: _____

Page No. 15 Line No. 10 Change to: Change "Jeff" to
"Geoff"

Reason for change: _____

Page No. 15 Line No. 21 Change to: Change "Jeff" to
"Geoff"

Reason for change: _____

Page No. 15 Line No. 23 Change to: Change "Jeff" to
"Geoff"

Reason for change: _____

SIGNATURE: Thomas Urbelis DATE: JUNE 29, 2010

THOMAS URBELIS



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DEPOSITION ERRATA SHEET

Page No. 16 Line No. 13 & 14 Change to: Change "Jeff" to
"Geoff"

Reason for change: _____

Page No. 17 Line No. 10 & 12 Change to: Change "Jeff" to
"Geoff"

Reason for change: _____

Page No. 24 Line No. 15 Change to: Delete the first "I"

Reason for change: _____

Page No. 30 Line No. 15 Change to: Change "Quade" to
"McQuade"

Reason for change: _____

Page No. 31 Line No. 7 Change to: Delete "it"

Reason for change: _____

Page No. 31 Line No. 10 Change to: Delete "on the old
interest of trust accounts" and substitute "into an interest account"

Reason for change: _____

Page No. 31 Line No. 14 & 15 Change to: Change "ULTA" to
"IOLTA"

Reason for change: _____

SIGNATURE: Thomas Urbelis DATE: JUNE 29, 2010

THOMAS URBELIS



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DEPOSITION ERRATA SHEET

Page No. 32 Line No. 16 Change to: Change "need" to
"needed"

Reason for change: _____

Page No. 34 Line No. 21 Change to: Change "called" to
"call"

Reason for change: _____

Page No. 38 Line No. 3 Change to: Change "George" to
"Georgia"

Reason for change: _____

Page No. 42 Line No. 15 Change to: Change "in" to "on"

Reason for change: _____

Page No. 42 Line No. 24 Change to: Delete the first
"for"

Reason for change: _____

Page No. 48 Line No. 6 Change to: Change "doesn't" to
"don't"

Reason for change: _____

Page No. 49 Line No. 2 Change to: Delete the third "I"

Reason for change: _____

SIGNATURE: Thomas Urbelis DATE: JUNE 29, 2010

THOMAS URBELIS



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New York, NY 10119
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DEPOSITION ERRATA SHEET

Page No. 52 Line No. 24 Change to: Change the first
"that" to "and"

Reason for change: _____

Page No. 53 Line No. 12, 20, 21 & 23 Change to: Change "Jeff" to
"Geoff"

Reason for change: _____

Page No. 54 Line No. 12 Change to: Change "he" to "I"

Reason for change: _____

Page No. 57 Line No. 8 Change to: Change "Cioche" to
"Kolojay"

Reason for change: _____

Page No. 58 Line No. 5 Change to: After "know" insert
"why"

Reason for change: _____

Page No. 58 Line No. 7 Change to: Change the second
"I" to "he"

Reason for change: _____

Page No. 58 Line No. 9 Change to: Change "her" to "him"

Reason for change: _____

SIGNATURE: Thomas Urbelis DATE: JUNE 29, 2010

THOMAS URBELIS



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DEPOSITION ERRATA SHEET

Page No. 58 Line No. 10 Change to: Change "wife" to
"wife's"

Reason for change: _____

Page No. 59 Line No. 2 Change to: Delete "to"

Reason for change: _____

Page No. 59 Line No. 7 Change to: Delete "exactly"

Reason for change: _____

Page No. 59 Line No. 13 Change to: "caused" is incorrect

Reason for change: _____

Page No. 61 Line No. 2 Change to: Change "Jeff" to
"Geoff"

Reason for change: _____

Page No. _____ Line No. _____ Change to: _____

Reason for change: _____

Page No. _____ Line No. _____ Change to: _____

Reason for change: _____

SIGNATURE: Thomas Urbelis DATE: JUNE 19, 2010

THOMAS URBELIS



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Facsimile: 212.557.5972

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One Penn Plaza
New York, NY 10119
www.esquiresolutions.com

File

MAILED 0-30
11-26-91

November 21, 1991

McGinn, Smith & Co., Inc.
One Capital Center
99 Pine Street
Albany, NY 12207

Dear Sirs:

Please accept this letter as authorization to journal _____
all cash and securities _____ from my account REDACTED 5-1-1 to
account, REDACTED 1-1-1.

Thank you for your prompt attention to this matter.

Sincerely,

David L. Smith
David L. Smith

Lynn A. Smith
Lynn A. Smith

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

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

LYNN A. SMITH, and
NANCY MCGINN

Relief Defendant, and

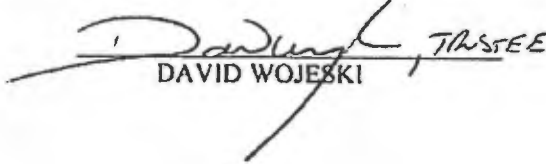
DAVID M. WOJESKI, Trustee of the
David L. and Lynn A. Smith Irrevocable
Trust U/A 8/04/04,

Intervenor.

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

VERIFIED ACCOUNTING

I, David Wojeski, hereby verify, under penalties of perjury, that the attached document sets forth all distributions, payments or transfers from the David L. and Lynn A. Smith Irrevocable Trust since July 7, 2010.


DAVID WOJESKI

Sworn to before me this 16th
day of August, 2010.


Notary Public

JILL A. DUNN
Notary Public, State of New York
No. 02DU5024316
Qualified in Albany County
Commission Expires ~~March 7, 2011~~
April 10, 2014

All transactions since July 7, 2010

Account name	Date	Transaction type	Name	Amount
Kinderhook checking	7/23/2010	wire in	internal transfer	50,000.00
	7/26/2010	check	Wojeski & Company CPA's	(5,775.50)
	7/26/2010	check	Wojeski & Company CPA's	(8,098.50)
	7/31/2010	check	The Dunn Law Firm	(5,355.00)
Kinderhook Savings	7/22/2010	deposit	transfer	2,000,000.00
	7/23/2010	wire out	internal transfer	(50,000.00)
	7/23/2010	wire out	Lynn Smith	(449,878.00)
	7/31/2010	withdrawal	bank & wire fees	(25.00)
	7/31/2010	deposit	interest income	522.85
RMR Cash account	7/9/2010	wire out	The Dunn Law Firm	(95,741.40)
	7/12/2010	wire out	Geoffrey Smith	(96,500.00)
	7/12/2010	wire out	Lauren Smith	(83,500.00)
	7/16/2010	wire out	Geoffrey Smith	(200,000.00)
	7/22/2010	wire out	Kinderhook Bank	(2,000,000.00)

Description

transfer from Kinderhook savings
reimbursement for title company charges paid by Wojeski & Company
trustee fees
legal fees

transfer from RMR to get interest on idle cash
transfer to Kinderhook checking
closing proceeds on property purchase
July fees
July interest

legal fees
\$75,000 down payment on property, \$15,160 credit card debt, \$3,055 for health insurance, \$3,285 living expenses
\$75,000 down payment on property, \$1,800 new apt lease deposit, \$6,200 credit card debt
Investment in Capacity One Management, LLC - (RMR would not wire directly to the LLC)
to move money to interest bearing account

HUD-1

U.S. Department of Housing
and Urban Development

OMB No. 2502-0265

A. Settlement Statement

Type of Loan

- ☐ 1. FHA ☐ 2. FmHA ☐ 3. Conv. Unins.
☐ 4. V.A. ☐ 5. Conv. Ins.

6. File Number
5388-203717. Loan Number
4100763

ID:

8. Mortg. Ins. Casa Num.

C. NOTE: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

D. NAME OF BORROWER: David L. Smith and Lynn A. Smith, husband and wife
 Address of Borrower: REDACTED Clifton Park, New York 12085

E. NAME OF SELLER: Jones & Jones, Incorporated, a Florida corporation
 Address of Seller: REDACTED Vero Beach, Florida 32960

TIN: 65-0025644

F. NAME OF LENDER: PoinTE Bank
 Address of Lender: 21845 Powerline Road, Boca Raton, Florida 33433

G. PROPERTY LOCATION: REDACTED Vero Beach, Florida 32963

H. SETTLEMENT AGENT: O'HAIRE, QUINN, CANDLER & CASALINO, CHTD.
 Place of Settlement: 3111 Cardinal Drive, Vero Beach, Florida 32963

TIN: 65-0549320

Phone:

I. SETTLEMENT DATE: 6/22/01

DISBURSEMENT DATE: 6/22/01

J. Summary of borrower's transaction		K. Summary of seller's transaction	
100. Gross amount due from borrower:		400. Gross amount due to seller:	
101. Contract sales price	1,389,000.00	401. Contract sales price	1,389,000.00
102. Personal property		402. Personal property	
103. Settlement charges to borrower (Line 1400)	12,152.22	403.	
104.		404.	
105.		405.	
Payments for items paid by seller in advance:		Adjustments for items paid by seller in advance:	
City/town taxes		406. City/town taxes	
County taxes		407. County taxes	
108. Assessments		408. Assessments	
109. Annual Maint.Fee=\$2425 from 06/22/01 to 12/31/01	1,282.25	409. Annual Maint.Fee=\$2425 from 06/22/01 to 12/31/01	1,282.25
110. LPGas-340 gal@1.55	527.00	410. LPGas-340 gal@1.55	527.00
111.		411.	
112.		412.	
120. Gross amount due from borrower:	1,402,961.47	420. Gross amount due to seller:	1,390,809.25
200. Amounts paid or in behalf of borrower:		500. Reductions in amount due to seller:	
201. Deposit or earnest money	130,000.00	501. Excess deposit (see instructions)	
202. Principal amount of new loan(s)	1,000,000.00	502. Settlement charges to seller (line 1400)	71,340.50
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204. Principal amount of second mortgage		504. Payoff of first mortgage loan	266,604.52
205.		505. Payoff of second mortgage loan	
206.		506. Deposits held by seller	
207. Principal amt of mortgage held by seller		507. Principal amt of mortgage held by seller	
208.		508.	
209.		509.	
Adjustments for items unpaid by seller:		Adjustments for items unpaid by seller:	
210. City/town taxes		510. City/town taxes	
211. County taxes from 01/01/01 to 06/22/01	2,156.12	511. County taxes from 01/01/01 to 06/22/01	2,156.12
212. Assessments		512. Assessments	
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
		518.	
		519.	
220. Total paid by/for borrower:	1,132,156.12	520. Total reductions in amount due seller:	340,101.14
300. Cash at settlement from/to borrower:		600. Cash at settlement to/from seller:	
301. Gross amount due from borrower (line 120)	1,402,961.47	601. Gross amount due to seller (line 420)	1,390,809.25
302. Less amount paid by/for the borrower (line 220)	(1,132,156.12)	602. Less total reductions in amount due seller (line 520)	(340,101.14)
303. Cash (<input checked="" type="checkbox"/> From <input type="checkbox"/> To) Borrower:	270,805.35	603. Cash (<input checked="" type="checkbox"/> To <input type="checkbox"/> From) Seller:	1,050,708.11

Substitute Form 1099 Seller Statement: The information contained in blocks E, G, H, and I and on line 401 is important tax information and is being furnished to the IRS. If you are required to file a return, a negligence penalty or other sanction will be imposed on you if this item is required to be reported and the IRS determines that it has not been reported.

Seller Instructions: If this real estate was your principal residence, file Form 2119, Sale or Exchange of Principal Residence, for any gain, with your tax return; for other transactions, complete the applicable parts of Form 4797, Form 8262 and/or Schedule D (Form 1040).

Borrower's Initial(s):

Seller's Initial(s):

L. Settlement charges				Borrower POC	Seller POC	Paid from Borrower's Funds at Settlement	Paid from Seller's Funds at Settlement
700. Total Sales/Brokers Com. based on price	\$1,389,000.00 @	4.0000 % =	55,560.00				
55,560.00	4.0000 % to	Orchid Island Realty, Inc.					
r/u3. Commission paid at settlement							
704.	to						55,560.00
800. Items payable in connection with loan.							
				Borrower POC	Seller POC		
801. Loan origination fee	% to						
802. Loan discount	% to						
803. Appraisal fee [Total Amount \$600]	to	Boitalico R/E Appraisers, Inc.	275.00			325.00	
804. Credit report [Total Amount \$23.50]	to	Pointe Bank	60.00			-36.50	
805. Courier Fees	to	Pointe Bank				50.00	
806. Flood Certification Fee	to	Fidelity National Tax Service				18.50	
807. Processing Fee	to	Pointe Bank				250.00	
808. Tax Service Fee	to	Fidelity National Tax Service				110.00	
809. Underwriting Fee	to	Pointe Bank				200.00	
810. Document Preparation	to	D.P.S.				50.00	
811.	to						
900. Items required by lender to be paid in advance:							
901. Interest from	08/22/01 to 07/01/01	@ 212.3300 /day				1,910.97	
902. Mortgage insurance premium for	months to						
903. Hazard insurance premium for	years to						
904. Flood insurance premium for	years to						
905.	years to						
1000. Reserves deposited with lender:							
				Borrower POC	Seller POC		
1001. Hazard insurance	months @		per month				
1002. Mortgage insurance	months @		per month				
1003. City property taxes	months @		per month				
1004. County property taxes	months @		per month				
1005. Annual assessments	months @		per month				
1006. Flood insurance	months @		per month				
1009. Aggregate accounting adjustment							
1100. Title charges:							
				Borrower POC	Seller POC		
1101. Settlement or closing fee	to	O'HAIRE, QUINN, CANDLER & CASALINO, CHTD.				250.00	150.00
1102. Abstract or title search	to	O'HAIRE, QUINN, CANDLER & CASALINO, CHTD.					35.00
1103. Title examination	to	O'HAIRE, QUINN, CANDLER & CASALINO, CHTD.				50.00	50.00
1104. Title insurance binder	to						
1105. Document preparation	to	O'HAIRE, QUINN, CANDLER & CASALINO, CHTD.				50.00	
1106. Notary fees	to						
1107. Attorney's Fees	to	O'HAIRE, QUINN, CANDLER & CASALINO, CHTD.					350.00
(includes above item numbers:)							
1108. Title Insurance	to	Attorneys' Title Insurance Fund, Inc.				25.00	5,472.50
(includes above item numbers:)							
1109. Lender's coverage (Premium):	\$1,000,000.00 (\$25.00)						
1110. Owner's coverage (Premium):	\$1,389,000.00 (\$5,472.50-w/re-issue credit)						
1111. Endorse: ALTA 5.1-25.00;ALTA 8.1-25.00;FF9-649.75						599.75	
1112.	to						
1113.	to						
1200. Government recording and transfer charges:							
1201. Recording fees	Deed	\$10.50	Mortgage(s)	\$114.00	Releases	124.50	
1202. City/county tax/stamps	Deed		Mortgage(s)	\$2,000.00		2,000.00	
1203. State tax/stamps	Deed	\$9,723.00	Mortgage(s)	\$3,500.00		3,500.00	9,723.00
1204.	to						
1205.	to						
1300. Additional settlement charges:							
				Borrower POC	Seller POC		
1301. Survey	to	David M. Jones Land Surveyor				250.00	
1302. Pest Inspection	to						
Capital Contribution	to	Orchid Island Golf & Beach Community Associat				2,425.00	
1305.	to						
1306.	to						
1307.	to						
1308.	to						
1309.							
1400. Total settlement charges:							
(Enter on lines 103, Section J and 502, Section K)						12,152.22	71,340.50

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

David L. Smith	Borrower	By: Jones & Jones, Incorporated	Seller
		Darwyn A. Jones, President	
Lynn A. Smith	Borrower		Seller

The HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused, or will cause, the funds to be disbursed in accordance with this statement.

O'HAIRE, QUINN, CANDLER & CASALINO, CHTD.

By: _____ Date _____
As Its Authorized Representative

WARNING: It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine and imprisonment. For details see: Title 18 U.S. Code Section 1001 and Section 1010.

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Exhibit C

**DAVID & LYNN SMITH IRREVOCABLE
TRUST WITHDRAWALS 2004-2010**

<u>Date</u>	<u>Amount</u>	<u>Explanation</u>
12/27/2004	\$100,000	Purchase 5 year 9% Notes due 12/31/09 of Pine Street Capital Partners, LLP
4/11/2005	\$300,000	Same as above
4/18/2005	\$2,300	Payment to DLS to reimburse for 2004 trust taxes paid from personal account.
4/18/2006	\$92,105	Wired to DLS to reimburse \$87,595 for payment of 2005 trust taxes (\$71,595) and 2006 trust estimated tax (\$16,000) paid from personal account. Difference of \$4,510 currently unexplained.
6/30/2006	\$83,830	Pine Street Capital Partners, LLP - capital call
12/20/2006	\$129,678	Same as above
4/15/2008	\$110,636	Wire transfer for payment of 2007 US+NYS trust taxes and 2008 trust estimates.
4/13/2009	\$32,987	2008 US final trust tax payment
4/13/2009	\$8,570	2008 NYS final trust tax payment (Return shows \$8,573 due)
4/15/2010	\$95,000	Reimbursement to L. Smith for: Trust 2009 extension payment (US) \$16,000 (NYS) \$4,000 Personal 2009 tax extensions (US) \$66,500 (NYS) \$8,500

Updated: June 4, 2010

SMITH IRREVOCABLE TRUST

DEPOSITS 2004-2010

DEPOSITS:

<u>Date</u>	<u>Amount</u>	<u>Explanation</u>
9/1/2004	\$ 4,450,000.00	100,000 shs. Charter One Financial
6/30/2005	\$ 8,250.00	Interest- Pine Street Capital Partners, LLP ("PSCP")
10/4/2005	\$ 9,000.00	Interest-PSCP
12/30/2005	\$ 9,000.00	Interest-PSCP
	<u>\$ 26,250.00</u>	
8/21/2006	\$ 9,000.00	Interest-PSCP
6/30/2006	\$ 9,000.00	Interest-PSCP
9/30/2006	\$ 9,000.00	Interest-PSCP
12/29/2006	\$ 9,000.00	Interest-PSCP
	<u>\$ 36,000.00</u>	
3/30/2007	\$ 9,000.00	Interest-PSCP
6/29/2007	\$ 8,163.26	Interest-PSCP
9/25/2007	\$ 18,594.26	Return of Capital-PSCP
10/1/2007	\$ 7,326.52	Interest-PSCP
12/31/2007	\$ 7,326.52	Interest-PSCP
	<u>\$ 50,410.56</u>	
3/31/2008	\$ 7,326.52	Interest-PSCP
3/31/2008	\$ 25,793.27	Interest-PSCP
3/31/2008	\$ 55,782.82	Return of Capital-PSCP
6/30/2008	\$ 6,071.40	Interest-PSCP
9/30/2008	\$ 6,071.40	Interest-PSCP
12/31/2008	\$ 5,429.90	Interest-PSCP
	<u>\$ 106,475.31</u>	
1/16/2009	\$ 27,891.00	Return of Capital-PSCP
1/16/2009	\$ 74,377.00	Return of Capital-PSCP
	<u>\$ 102,268.00</u>	
4/16/2010	\$ 9,297.13	Return of Capital-PSCP
OTHER CONTRIBUTIONS TO TRUST:		
5/6/2009		Contribution of Pine Street Capital, LLP
	\$ 109,929.00	Promissory 9% Note Dated 12/31/09
10/9/2009	\$ (9,297.00)	Return of Principal- 9% Note
	\$ 100,632.00	
7/2/2009		Contribution of Pine Street Capital, LLP
	\$ 399,451.00	Partnership Units to Trust
	<u>\$ 500,083.00</u>	

SMITH IRREVOCABLE TRUST
TAX PAYMENTS 2004-2010

	2004 US	2004 NVS	2005 US	2005 NVS	2006 US	2006 NVS	2007 US	2007 NVS	2008 US	2008 NVS	2009 US	2009 NVS	Totals
Extension Payment													
4/15/2005													\$ (2,300)
4/15/2008													\$ (80,636)
4/15/2010													\$ (20,000)
Estimated Payments													
4/15/2006						\$ (16,000)							\$ (16,000)
12/30/2006						\$ (65,000)							\$ (85,000)
4/15/2007							\$ (20,000)						\$ (20,092)
4/14/2008							\$ (15,019)						\$ (30,000)
Overpayment Applied													
			\$ (1,000)	\$ (341)			\$ (18,834)	\$ (227)					\$
Final Tax (+/- penalty)	\$ 800	\$ 159	\$ 56,268	\$ 16,668	\$ 62,166	\$ 19,773	\$ 96,435	\$ 23,354	\$ 56,987	\$ 14,573			\$
Overpayment Tax Due	\$ (1,000)	\$ (341)			\$ (18,834)	\$ (227)	\$	\$	\$ 32,987	\$ 8,573			\$ (71,595)
4/15/2006			\$ 55,268	\$ 16,327									\$ (41,560)
4/15/2009													\$ (367,183)

Summary of Tax Payments				Summary of Tax Payment Related Distributions			
4/15/2005		\$	2,300 (1)	4/18/2005	\$	2,300 (1)	Check payable to DLS
4/15/2006	\$ 16,000			4/18/2006	\$	92,105 (2)	Wire to DLS
4/15/2006	\$ 71,595	\$ 87,595 (2)					
12/30/2006		\$ 85,000 (3)					
4/15/2007		\$ 20,092 (3)		4/15/2008	\$	110,636 (4)	Wire to DLS
4/15/2008	\$ 30,000			4/13/2009	\$ 32,987		Payable to US Treasury
4/15/2008	\$ 80,636	\$ 110,636 (4)		4/13/2009	\$ 8,573	\$ 41,560 (5)	Payable to NVS Income Tax
4/15/2009	\$ 32,987			4/15/2010	\$	20,000 (6)	Wire to L. A. Smith
4/15/2009	\$ 8,573	\$ 41,560 (5)					
4/15/2010	\$ 16,000						
4/15/2010	\$ 4,000	\$ 20,000					
		\$ 367,183				\$ 266,601	

- Notes:
- [1] [4] [5] Total payments agree to distributions
- [2] Reimbursement to DLS included difference of \$4,510 which is believed to relate to \$4,600 4/16/06 NVS estimate for trust paid from DLS account not claimed on return as filed.
- [3] Payments made out of DLS funds. No record found of reimbursement from trust to to DLS
- [6] Payment included in total of \$95,000 wired to account of Lynn A. Smith on 4/15/10.

Updated: June 8, 2010 at 1:00PM

<p style="text-align: right;">233</p> <p>UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK</p> <p>SECURITIES AND EXCHANGE COMMISSION, Plaintiff, -vs- CVA #: 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, DAVID L. SMITH, LYNN A. SMITH, GEOFFREY R. SMITH, Individually and as Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, LAUREN T. SMITH, and NANCY McGINN,</p> <p>Defendants.</p> <p>LYNN A. SMITH, and NANCY McGINN,</p> <p>Relief Defendants, and</p> <p>GEOFFREY R. SMITH, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04m</p> <p>Intervenor</p> <p>Deposition of DAVID L. SMITH, held at the offices of Phillips Lytle, LLP., Albany, New York, on December 14, 2011, before DEBORAH R. SALESKI, Court Reporter and Notary Public in and for the State of New York.</p>	<p style="text-align: right;">235</p> <p>1 2 3 EXHIBITS 4 No. Description Marked 5 530 Numerous Pages of Handwritten and 6 Typed Written Pages 236 7 8 531 E-Mail String 253 9 10 532 Three Pages of Handwritten Notes 11 Entitled TAIN 259 12 533 Fund Advances to MSTF 262 13 534 Two-Page Typewritten Document 14 Which Somebody's Written At the 15 Top in Handwriting F-I-I-N 262 16 535 Single Page of Handwritten Notes 262 17 536 Two-Page Typewritten Document With 18 Handwriting F-E-I-N 262 19 20 537 Set of Handwritten Notes Entitled 21 "F-E-I-N" 262 22 539 Series of Handwritten Notes Entitled 23 "F-I-I-N" 262 24 25 540 One-Page Cover E-Mail from Thomas Livingston 302 541 Promissory Note Dated January 23rd, 2004 313 542 letter from the Securities and Exchange Commission dated February 26, 2004 Elizabeth Coombs On January 14th 336 543 Letter Dated August 4, 2004 Addressed To Thomas Urbelis 338 544 David L. Smith, Lynn A. Smith Financial Statement August 2005 363 545 David L. Smith, Lynn A. Smith Financial Statement December 31, 2007 366</p>
<p style="text-align: right;">234</p> <p>1 2 APPEARANCES: 3 For the Plaintiff: 4 KEVIN McGRATH, ESQ. 5 Senior Counsel 6 Division of Enforcement 7 United States Securities and Exchange Commission 8 3 World Financial Center, Suite 400 9 New York, New York 10281-1022 10 (212) 336-0578 11 12 For the Defendant David L. Smith: 13 DREYER BOYAJIAN, LLP 14 Attorneys at Law 15 75 Columbia Street 16 Albany, New York 12210 17 BY: WILLIAM DREYER, ESQ. 18 (518) 463-7784 19 20 Also Present: 21 David Stoelting, Securities and Exchange Commission 22 Lara Shalov Mehraban, Securities and Exchange Commission 23 William J. Brown, Esq. 24 Scott Ely, Esq. 25</p>	<p style="text-align: right;">236</p> <p>1 D. Smith 2 DAVID L. SMITH, having been recalled as 3 a witness, being previously duly sworn by the notary 4 public present, testified further as follows: 5 6 EXAMINATION BY MR. McGRATH: 7 Q. Good morning, Mr. Smith. 8 A. Good morning. 9 Q. Just for the record you're represented by 10 Mr. Dreyer again here this morning? 11 A. I am. 12 Q. I'll just remind you again you're under oath. 13 All right. I'm going to mark, I think the 14 next exhibit is 530. It's a lengthy document and for now 15 I'd just ask you to mark this. It's a lengthy document. 16 For now I'm just going to direct your attention to one 17 page and we'll be coming back to it in a few minutes and 18 then later on we'll spend more time with it. So feel 19 free to look at the whole document before you answer my 20 questions, but my first question is going to be very 21 limited. 22 A. Okay. 23 (Whereupon, Exhibit 530 was marked for 24 identification, on this date.) 25 BY MR. McGRATH:</p>



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<p>325</p> <p>1 D. Smith</p> <p>2 of different entries here, that's the one I'm going to</p> <p>3 focus your attention on for purposes of my question. Do</p> <p>4 you recognize this Document 445?</p> <p>5 A. No, but I have some handwriting on it, so...</p> <p>6 Q. That was my going to be my next question. Is</p> <p>7 that your handwriting?</p> <p>8 A. That is my handwriting.</p> <p>9 Q. And the date is 7/20/92 and you've got a</p> <p>10 notation it looks like 5,000 and underneath it 35,000?</p> <p>11 A. Right.</p> <p>12 Q. Do you have any recollection as you sit here</p> <p>13 today what you intended by those notations?</p> <p>14 A. I do not.</p> <p>15 Q. All right. Do you agree that the reference to</p> <p>16 David L. Smith is to you?</p> <p>17 A. Correct.</p> <p>18 Q. And does this indicate -- well, strike that.</p> <p>19 What is your understanding of the entry on the</p> <p>20 line associated with the loan date, 3/23/92, for</p> <p>21 principal and the next column and what is your</p> <p>22 understanding of the entry for 100,000 in the far</p> <p>23 right-hand column underpayment/advance?</p> <p>24 A. It would appear that I was loaned \$100,000. I</p> <p>25 don't know why it would have, you know, principal of 150</p>	<p>327</p> <p>1 D. Smith</p> <p>2 A. I do.</p> <p>3 Q. Okay. What was this transaction for?</p> <p>4 A. There was an opportunity to subscribe to</p> <p>5 Albany Savings Bank that was going public. The maximum</p> <p>6 subscription one could subscribe to I think was a half a</p> <p>7 million dollars. I attempted to subscribe to that,</p> <p>8 ultimately was cut back and I got whatever I got which I</p> <p>9 think was \$400,000.</p> <p>10 Q. And you see that the date of this \$500,000</p> <p>11 receipt from you is March 23, 1992, that's the same date</p> <p>12 reflected in Exhibit 445, that you appear to have been</p> <p>13 loaned or withdrew \$150,000 from McGinn, Smith & Co.,</p> <p>14 correct?</p> <p>15 A. That's correct.</p> <p>16 Q. And there's a debit as reflected in</p> <p>17 Exhibit 444 on 3/16/92 from your wife's, Lynn Smith's</p> <p>18 Bear Stearns account of 300 looks like 54,000 dollars</p> <p>19 several days earlier on 3/16/92.</p> <p>20 A. Mm-mm.</p> <p>21 Q. Does that refresh your recollection that you</p> <p>22 contributed part of the \$500,000 that was used to</p> <p>23 purchase the Albark stock in 1992?</p> <p>24 A. Well, I'll comment on that, but I don't think</p> <p>25 that's how you or at least I didn't take it as how you</p>
<p>326</p> <p>1 D. Smith</p> <p>2 and advanced only 100 unless there was some sort of</p> <p>3 credit agreement that the firm gave me, you know, I don't</p> <p>4 know. It's sort of an unusual way we would have done</p> <p>5 business.</p> <p>6 But it looks like I was advanced \$100,000. I don't</p> <p>7 know if -- well, let me see, I'm trying to think how</p> <p>8 those things -- no, I'm misreading that. I apologize. I</p> <p>9 think that's what that is, is clearly there was a loan of</p> <p>10 \$150,000 and then there was a payment of 100 leaving a</p> <p>11 balance of 50 and then there was a payment of 8, leaving</p> <p>12 a balance of 42, dat, dat, dat, dat, dat. So that's how</p> <p>13 I would interpret that, there must have been a loan of</p> <p>14 150,000 and a subsequent payment, which looks like it was</p> <p>15 on 4/6. The loan was on 3/23 and roughly 13 days later</p> <p>16 or 14 days later \$100,000 was paid.</p> <p>17 Q. I'm going to show you now Exhibit 446. It is</p> <p>18 a one-page document. It's a receipt in the amount of</p> <p>19 \$500,000 dated March 23rd, 1992 received from David L.</p> <p>20 Smith \$500,000. And it says for and someone's written in</p> <p>21 stock purchase. There's a stamp Albany Savings Bank --</p> <p>22 A. Mm-mm.</p> <p>23 Q. -- March 23, 1992 and under the heading Albany</p> <p>24 Savings Bank there's a signature of Vickey Lobo. Do you</p> <p>25 recall this transaction?</p>	<p>328</p> <p>1 D. Smith</p> <p>2 phrased the question. I thought you said did I</p> <p>3 contribute anything initially after the 40,000 shares and</p> <p>4 the answer was no.</p> <p>5 Q. I think my first question was: Did you make</p> <p>6 any initial contribution and then did you make any</p> <p>7 subsequent contribution. So let's go back to the first</p> <p>8 question, did you contribute some monies or other assets</p> <p>9 to the original purchase of the 40,688 Albark Financial</p> <p>10 Corporation shares?</p> <p>11 A. It would appear that I contributed \$50,000,</p> <p>12 yes.</p> <p>13 Q. 50 or 150?</p> <p>14 A. Well, only 50 because they only accepted</p> <p>15 \$400,000, they sent back 100. In fact, I think they sent</p> <p>16 back 104 or something like that.</p> <p>17 Q. Well, you contributed approximately 150,000 to</p> <p>18 the 500,000 initial transfer and then subsequently only a</p> <p>19 portion of that money was allocated to the --</p> <p>20 A. It wasn't an allocation, that's all the</p> <p>21 subscription was for.</p> <p>22 Q. I'm using the word allocation, a portion of</p> <p>23 that \$500,000 was used to purchase the 40,688 shares of</p> <p>24 Albark stock?</p> <p>25 A. That's correct.</p>



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<p>1 D. Smith 345</p> <p>2 say anything to Mr. Urbelis that would have led him to</p> <p>3 treat this agreement, the private annuity contract as a</p> <p>4 non-binding agreement not to be honored by him?</p> <p>5 A. No, not that I can imagine. No.</p> <p>6 Q. And between the time that this document was</p> <p>7 entered into on or about August 4th, 2004 and the time</p> <p>8 that he resigned at trustee did you ever say or do</p> <p>9 anything that would have reasonably led him to believe</p> <p>10 that he shouldn't honor this agreement?</p> <p>11 A. No.</p> <p>12 Q. Okay. Do you have any recollection as to</p> <p>13 why -- let me ask you this: Did you ever see a copy of</p> <p>14 this agreement that contained Mr. Urbelis' signature,</p> <p>15 referring to 457?</p> <p>16 A. That continued it or didn't?</p> <p>17 Q. That contained his signature.</p> <p>18 A. No, I don't think I have. I don't think I</p> <p>19 have. I think that my understanding is that he -- for</p> <p>20 whatever reason, he never signed it and didn't send it</p> <p>21 back.</p> <p>22 Q. You don't have any recollection as to why that</p> <p>23 was?</p> <p>24 A. No, my recollection is I sent him a letter,</p> <p>25 sent him the agreement, probably asked him to sign and</p>	<p>1 D. Smith 347</p> <p>2 acumen and experience. She had virtually none. The</p> <p>3 experience had been reasonably good for all the years</p> <p>4 we've been married and she quite frankly -- and this is</p> <p>5 not to denigrate her skill sets or her intellectual</p> <p>6 capacity whatsoever, she just didn't have a lot of</p> <p>7 interest in those things. She knew that we were</p> <p>8 reasonably well off, that our future ability to enjoy a</p> <p>9 post-retirement was fairly well in place and just did not</p> <p>10 bother herself with details. And like a lot of wives</p> <p>11 post making that signature, as I said, if I went back to</p> <p>12 her and some period of time and asked her what I just</p> <p>13 told you and gave her a test, she would probably fail it.</p> <p>14 Q. Well, she certainly had sufficient</p> <p>15 intelligence to understand what she was signing, correct?</p> <p>16 A. Oh, I think that's correct, sure.</p> <p>17 Q. She certainly understood that she and you</p> <p>18 would be entitled to 489,000 plus a year beginning in</p> <p>19 2015 at the time she signed this document, correct?</p> <p>20 A. Yeah, but I think the thought probably left</p> <p>21 her 15 minutes later.</p> <p>22 Q. Again, that's your interpretation of what</p> <p>23 happened in your wife's mind.</p> <p>24 A. Yes. Fairly accurate one when you're married</p> <p>25 for 44 years, you know.</p>
<p>1 D. Smith 346</p> <p>2 send me back a copy. That evidently never happened and I</p> <p>3 probably just sort of lost track of things until this</p> <p>4 whole inquiry came up, was not aware that he had not</p> <p>5 signed it.</p> <p>6 Q. Now, your wife obviously is a signatory to the</p> <p>7 private annuity contract. What discussions do you recall</p> <p>8 having with your wife regarding the terms of the contract</p> <p>9 and specifically the fact that you both would be entitled</p> <p>10 to a payment beginning in the year 2015?</p> <p>11 MR. DREYER: Can you be more accurate as</p> <p>12 to the time period you're talking?</p> <p>13 MR. McGRATH: Thank you.</p> <p>14 Q. At the time that you and your wife entered</p> <p>15 into this private annuity agreement, let's start with</p> <p>16 that.</p> <p>17 A. My recollection is I would have given her the</p> <p>18 basic background, reasons, benefits, talked about the</p> <p>19 annuity payment and, you know, 15 minutes later if given</p> <p>20 a quiz, she would have failed, but that notwithstanding</p> <p>21 that I had that discussion.</p> <p>22 Q. Why do you say that?</p> <p>23 A. Because the nature of the beast is my wife is,</p> <p>24 you know, totally dependent on -- well, let me rephrase</p> <p>25 that. She had a great deal of confidence in my business</p>	<p>1 D. Smith 348</p> <p>2 Q. Now, this stock that was transferred had a</p> <p>3 value of approximately \$4,400,000 or so?</p> <p>4 A. That's correct.</p> <p>5 Q. Is that consistent with your memory?</p> <p>6 A. Yes.</p> <p>7 Q. That's a sizeable amount of money, isn't it?</p> <p>8 A. Yes.</p> <p>9 Q. What percentage of you and your wife's liquid</p> <p>10 net worth did that represent at the time you transferred</p> <p>11 this money or sold -- I'm sorry, that the stock was</p> <p>12 conveyed to the trust pursuant to the private annuity</p> <p>13 agreement?</p> <p>14 A. I had a net worth -- we had a net worth,</p> <p>15 excuse me, in 2004 of probably approximately \$15 million.</p> <p>16 Q. And what was your liquid net worth at that</p> <p>17 time, if you can estimate it?</p> <p>18 A. Well, it was probably another 7 million in</p> <p>19 securities, cash and securities. The rest would be in</p> <p>20 real estate. I think I had valued my business interest</p> <p>21 at around a million dollars, so that's probably pretty</p> <p>22 much how we got there.</p> <p>23 Q. All right. Now, I think I understand you to</p> <p>24 say that your wife really didn't focus that much on the</p> <p>25 business end of your finances.</p>



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<p>1 D. Smith</p> <p>2 A. That's an accurate statement, yes.</p> <p>3 Q. She had previously lent some sizeable amount</p> <p>4 of monies to corporate entities that you've been involved</p> <p>5 in or affiliated with prior to August 2004, correct?</p> <p>6 A. That's correct.</p> <p>7 Q. And, in fact, she had a practice of executing</p> <p>8 Letters of Authorization that allowed you to make certain</p> <p>9 transfers in and out of her account in furtherance of the</p> <p>10 business activities in McGinn, Smith & Co., correct?</p> <p>11 A. No, those Letters of Authorization, Kevin,</p> <p>12 were primarily for purposes of taking monies in and out</p> <p>13 of the account for more personal items not business</p> <p>14 items. You know, if we had to transfer money for a car</p> <p>15 or vacation into the checking account or something like</p> <p>16 that, more as a convenience factor. I didn't want her</p> <p>17 running down from Saratoga to sign things.</p> <p>18 The business interests were always discussed with</p> <p>19 her, authorization was given. She had some -- certainly</p> <p>20 some understanding of what was being done and what the</p> <p>21 benefits were, but, I guess, your phrase, the stack of</p> <p>22 LOAs was more designed as a convenience for smaller</p> <p>23 transfers.</p> <p>24 Q. Were any of them used by you to make transfers</p> <p>25 for the benefit of McGinn, Smith & Co. or any of</p>	<p>349</p> <p>1 D. Smith</p> <p>2 from Mr. Simons?</p> <p>3 A. At the time after getting myself familiar with</p> <p>4 the private annuity concept and doing some research on my</p> <p>5 own, both through the internet and printing out some</p> <p>6 literature, my recollection is I even contacted there's a</p> <p>7 such a thing as the private annuity, I don't want to call</p> <p>8 it foundation, but a group of professionals that promote</p> <p>9 the thing. I think I even had some literature sent from</p> <p>10 them. This second piece here, I may have actually</p> <p>11 forwarded this to Ron, I don't know. But, again, the</p> <p>12 circumstances were that I touched base with Ron to give</p> <p>13 him the basics of what I was contemplating and I think</p> <p>14 what we have here is that Ron did some work on his own</p> <p>15 and made some notes and evidently sent them back to me.</p> <p>16 Q. Okay. Now, Mr. Urbelis has given testimony in</p> <p>17 this proceeding and he's testified in substance that he</p> <p>18 did not view it as part of his obligation as the trustee</p> <p>19 of the Irrevocable Trust to make sure that there was</p> <p>20 sufficient funds in the trust to honor the obligation</p> <p>21 reflected in the private annuity agreement to pay you and</p> <p>22 your wife \$489,932 a year beginning in September</p> <p>23 2015. That's his testimony. As you sit here today do</p> <p>24 you have any understanding as to why he would testify</p> <p>25 that way?</p>
<p>350</p> <p>1 D. Smith</p> <p>2 affiliated entities?</p> <p>3 A. I don't think so. I mean, I couldn't swear to</p> <p>4 that. I mean, the fact is those transfers, we had the</p> <p>5 discussion, and whether I used one from a pile or brought</p> <p>6 a new one home, I can't say with certainty. I think it</p> <p>7 was probably the latter, but there's no way for me to</p> <p>8 know with certainty.</p> <p>9 Q. Okay. Let me show me you what's been marked</p> <p>10 as Exhibit 458 and just ask you to take a look at this</p> <p>11 and see if you recognize this document. First page is</p> <p>12 Piaker & Lyons, it's addressed to David Smith, it looks</p> <p>13 like it's from Ron Simons on or about August 10th, 2004.</p> <p>14 Do you remember receiving this document or seeing this</p> <p>15 document before?</p> <p>16 A. I don't. I remember the circumstances in</p> <p>17 which it was probably sent, but I don't recall with</p> <p>18 certainty seeing this specific document.</p> <p>19 Q. Okay.</p> <p>20 A. I'm not sure it matters.</p> <p>21 Q. Actually there's a cover page and there's a</p> <p>22 document attached to it, correct?</p> <p>23 A. Right.</p> <p>24 Q. What do you recall just briefly about the</p> <p>25 circumstances that led to you receiving this document</p>	<p>352</p> <p>1 D. Smith</p> <p>2 MR. DREYER: Objection to form. Answer</p> <p>3 if you can.</p> <p>4 A. No, I mean, he's agreed to be the trustee, the</p> <p>5 trustee has contractually agreed to make those payments.</p> <p>6 Why, Tom is a lawyer, I mean, a layperson I think might</p> <p>7 have some question, but certainly he should understand</p> <p>8 the responsibilities as a trustee, so I don't know why he</p> <p>9 would have responded as such.</p> <p>10 Q. And, again, there's nothing that you recall</p> <p>11 saying or doing that would have led him to believe that</p> <p>12 he didn't have an obligation as the trustee to make sure</p> <p>13 money was available for these private annuity payments to</p> <p>14 you and your wife?</p> <p>15 A. Well, you know, I think the way you're</p> <p>16 phrasing it, make sure there's money available, I mean,</p> <p>17 clearly the trustee had a responsibility to see that the</p> <p>18 account grew to the point where it could meet its</p> <p>19 obligation and that necessitated about a four-and-a-half</p> <p>20 percent return, not exactly a terrific bogie, at least at</p> <p>21 the time it didn't seem that way. Circumstances may have</p> <p>22 changed. But no, I don't know why he would have so</p> <p>23 testified. I really don't. I've had no discussions with</p> <p>24 him. I can't imagine anyway.</p> <p>25 Q. To your knowledge did your wife ever have</p>



ESQUIRE

Toll Free: 800.944.9454
Facsimile: 212.557.5972

Suite 4715
One Penn Plaza
New York, NY 10119
www.esquiresolutions.com

**TDMM Funding
Sources & Uses**

TDMM Funding LLC is Formed in 2009

Purpose: to fund the acquisition of Broadband and Hipnet
to fund the acquisition of Benchmark Communications

Involved Parties

TDMM Funding			
June	a) Lynn Smith Invests	366,000.00	
	a) Shutts & Bowen Broadband Investment		(316,000.00)
	a) Shutts & Bowen Legal Expense		(50,000.00)
July	b) Funds \$234,000 through TDMM Funding	234,000	
	b) Lynn Smith		(160,800)
	b) M. Rogers		(25,000)
	b) Dave Smith		(24,000)
	b) Tim McGinn		(24,000)
	c) MS Funding Loan as Stated in PPM	60,000	
	The TDMM Benchmark PPM States a \$50,000 loan from MSTF		
August	c) Shutts & Bowen Legal Expense		(50,000)
	d) TDMM Benchmark Funds \$536,000	536,000	
	d) TDMM Benchmark Funds \$481,000	481,000	
	d) Tim McGinn		-8500
	d) McGinn Smith & Company		-275000
	d) TDM Verifer Trust 07r		-74000
	d) David Smith		-50000
	d) Tim McGinn		-50000
	d) TDM Cable Trust 06		-33000

Lynn Smith

- a) Invests \$366,000
- b) Is Repaid \$160,800 from the TDMM Cable JR Trust 09

NOTE: Investment goes directly to Shutts & Bowen, it does not pass through TDMM Funding LLC

Shutts & Bowen

- a) Is Paid \$316,000 to Purchase Broadband/& other uses (see statement)
- a) Is Paid \$50k Legal Expenses
- c) Is Paid \$50k Legal Expenses

TDMM Cable Jr Trust 09	
Source	b) Funds \$234,000 through TDMM Funding

MS Funding

- c) Funds TDMM Funding \$60k

TDMM Benchmark Trust

- d) TDMM Benchmark Funds TDMM Funding \$536,000
- d) TDMM Benchmark Funds TDMM Funding \$481,000

Matthew Rogers

- b) MR/TDMM Cable Jr 25,000.00

Dave Smith

- b) DS/TDMM Cable JR 24,000.00
- d) DS/TDMM Benchmark 50,000.00

Tim McGinn

- b) TM/TDMM Cable Jr 24,000.00
- d) TM/MS Funding 8,500.00
- d) TM/Benchmark 50,000.00

REDACTED 7572 C 1
 MCGINN, SMITH & CO., INC.
 ONE CAPITAL CENTER
 99 PINE STREET, 5th FLOOR
 ALBANY, NY 12207

Account Number: REDACTED 0892

*McGinnSmith
& Company, Inc.*

GEOFFREY R SMITH TTEE
 DAVID L SMITH LIFETIME QTIP TR
 LYNN A SMITH GTR

REDACTED

YOUR FINANCIAL CONSULTANT IS
 DAVID L SMITH
 RR#: 700

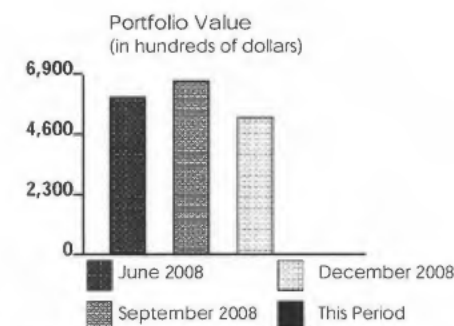
FOR QUESTIONS OR UP-TO-DATE ACCOUNT INFORMATION:
 Local 518 449 5131
 National 800 724 3330

Statement Date: 02/01/09 to 02/28/09

SNAPSHOT

TOTAL PORTFOLIO
\$21.77

PORTFOLIO VALUE	This Period	Prior Period
Cash and Cash Equivalents	\$21.77	\$325,074.11
Accrued Interest	\$0.00	\$1,310.43
Securities	\$0.00	\$158,290.00
Other Securities	\$0.00	\$125,421.00
TOTAL PORTFOLIO VALUE	\$21.77	\$610,095.54



A portfolio value less than \$100.00 may not be displayed.

ACCOUNT ACTIVITY	This Period	Year-To-Date
Net Trading	\$0.00	(\$14,638.92)
Net Core Fund Activity	\$325,052.34	\$209,280.25
Net Additions and Withdrawals	(\$325,074.11)	(\$240,880.11)
Net Income and Expenses	\$21.77	\$11,761.64
Net Miscellaneous Activity	\$0.00	\$0.00

LEGEND

() Numbers in parenthesis
 are debits or subtractions
 NFS - National Financial
 Services LLC

Account Number: REDACTED 0892
Account Name: SMITH
Statement Date: 02/01/2009 to 02/28/2009

*McGinnSmith
& Company, Inc.*

SUMMARY

ALERT: Taxable income is determined based on information available to NFS at the time the statement was prepared, and is subject to change. Final information on taxation of interest and dividends is available on Form 1099-Div, which is mailed in January of the subsequent year.

PORTFOLIO VALUE		This Period	Prior Period
Cash and Cash Equivalents			
Money Markets		\$21.77	\$325,074.11
Accrued Interest		\$0.00	\$1,310.43
Securities			
Equities			
Equity		\$0.00	\$47,800.00
Options			
Equity		\$0.00	(\$3,950.00)
Fixed Income			
Corporate Bonds		\$0.00	\$114,440.00
Total Securities		\$0.00	\$158,290.00
Other Securities		\$0.00	\$125,421.00
TOTAL PORTFOLIO VALUE		\$21.77	\$610,095.54
ACCOUNT ACTIVITY		This Period	Year-To-Date
BEGINNING BALANCE		\$0.00	
Trading			
Securities Purchased		\$0.00	(\$44,486.90)
Securities Sold		\$0.00	\$1,842.98
Redemptions		\$0.00	\$28,005.00
NET TRADING		\$0.00	(\$14,638.92)
Core Fund Activity			
Core Funds Purchased		(\$21.77)	(\$160,300.76)
Core Funds Sold		\$325,074.11	\$369,581.01
NET CORE FUND ACTIVITY		\$325,052.34	\$209,280.25
Additions and Withdrawals			
Deposits		\$0.00	\$84,194.00
Other Additions and Withdrawals		(\$325,074.11)	(\$325,074.11)
NET ADDITIONS AND WITHDRAWALS		(\$325,074.11)	(\$240,880.11)
Income and Expenses			
Taxable Income			
Taxable Dividends		\$21.77	\$218.86
Taxable Interest		\$0.00	\$1,250.00
NET TAXABLE INCOME		\$21.77	\$1,468.86
Non-Taxable Income			
Return of Capital		\$0.00	\$10,312.78
NET NON-TAXABLE INCOME		\$0.00	\$10,312.78



Account Number: REDACTED 0892
Account Name: SMITH

Statement Date: 02/01/2009 to 02/28/2009

McGinnSmith & Company, Inc.

TOTAL INCOME	\$21.77	\$11,781.64
Account Fees	\$0.00	(\$20.00)
TOTAL EXPENSES	\$0.00	(\$20.00)
NET INCOME AND EXPENSES	\$21.77	\$11,761.64
NET MISCELLANEOUS ACTIVITY	\$0.00	\$0.00
ENDING BALANCE	\$0.00	

DETAIL

PORTFOLIO VALUE

NFS-provided estimated cost basis (including cost basis and short sale proceeds information provided to NFS by customers), realized gain and loss, and holding period information may not reflect all adjustments necessary for tax reporting purposes. Taxpayers should verify such information against their own records when calculating reportable gain or loss resulting from a sale, redemption, or exchange. NFS does not report such information to the IRS or other taxing authorities and is not responsible for the accuracy of such information taxpayers may be required to report to federal, state, and other taxing authorities. NFS makes no warranties with respect to, and specifically disclaims any liability arising out of a customer's use of, or any tax position taken in reliance upon, such information. Unless otherwise specified, NFS determines cost basis at the time of sale based on the average cost-single category (ACSC) method for open-end mutual funds and based on the first-in, first-out (FIFO) method for all other securities.

Amortization, accretion and similar adjustments to cost basis have been provided for many fixed income securities (and some bond-like equities), however, they are not provided for certain types, such as short-term instruments, Unit Investment Trusts, foreign fixed income securities, or those that are subject to early prepayment of principal (pay downs). Where current year premium or acquisition premium amortization is provided, the prior years' cumulative amortization is reflected in the adjusted cost basis, but we cannot provide a breakdown or the total of such prior amortization amounts.

LIMITATION ON COST BASIS INFORMATION: NFS's cost basis information system has a cumulative lifetime limit on how much activity it can track for each individual security position in an account. For this purpose, each buy, sell, dividend, wash sale disallowed loss, stock split, stock merger, etc, is an event. For some customers, this limit can be reached with approximately 1500 events. Upon reaching the limit, the system no longer displays or tracks cost basis information for the affected position, and such information will usually show as not available or unknown. Once the limit is reached, all cost basis information for the affected position will need to be tracked and updated by you, the investor.

CASH AND CASH EQUIVALENTS 100.00%

Description	Symbol/Cusip Account Type	Quantity	Price on 02/28/09	Current Market Value	Prior Market Value	Estimated Annual Income
Money Markets						
PRIME FUND - CAPITAL RESERVES CLASS	FPRXX CASH	21.77	\$1.00	\$21.77	\$325,074.11	
7 DAY AVG NET YIELD .36%						
Total Cash and Cash Equivalents				\$21.77		

ACCRUED INTEREST 0.00%

Total Accrued Interest				\$0.00	\$1,310.43	
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Account Number: REDACTED 0892
Account Name: SMITH
Statement Date: 02/01/2009 to 02/28/2009

McGinnSmith & Company, Inc.

EQUITIES 0.00%

Total Equities	\$0.00
----------------	--------

OPTIONS 0.00%

Total Options	\$0.00
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FIXED INCOME 0.00%

For an explanation of fixed income pricing, please see the last page. Redemption schedule(s), bond rating(s), and other information are provided where available. If information does not appear regarding a particular investment, it is not available. The ratings on this statement are provided by Standard & Poor's and/or Moody's to rate the quality based on the respective rating agency's assessment.

Accrued Interest - Represents interest accumulated since the last coupon date on certain fixed income securities which may not yet have been paid by the issuer or received by NFS. There is no guarantee that the accrued interest will be paid by the issuer.

Total Fixed Income	\$0.00
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Total Securities	\$0.00
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OTHER SECURITIES 0.00%

Total Other Securities	\$0.00
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TOTAL PORTFOLIO VALUE	\$21.77
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ACCOUNT ACTIVITY

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CORE FUND ACTIVITY



Account Number: REDACTED0892
 Account Name: SMITH
 Statement Date: 02/01/2009 to 02/28/2009

McGinnSmith & Company, Inc.

Core Funds Purchased

Settlement Date	Account Type	Transaction	Description	Quantity	Amount
02/27/09	CASH	YOU BOUGHT	PRIME FUND - CAPITAL RESERVES CLASS @ 1	21.77	(\$21.77)

Net Core Funds Purchased (\$21.77)

Core Funds Sold

Settlement Date	Account Type	Transaction	Description	Quantity	Amount
02/04/09	CASH	YOU SOLD	PRIME FUND - CAPITAL RESERVES CLASS @ 1	(325,074.11)	\$325,074.11

Net Core Funds Sold \$325,074.11

NET CORE FUND ACTIVITY \$325,052.34

ADDITIONS AND WITHDRAWALS

Other Additions and Withdrawals

Date	Account Type	Transaction	Description	Quantity	Amount	Total Cost Basis	Realized Gain (Loss)
02/04/09	CASH	TRANSFERRED TO	JPMORGAN CHASE & CO GLOBAL MTN 15.000000% 05/07/2009 REVRX EXCH LKD GENERAL ELECTRIC COMPANY VS REDACTED ₂₀₈₋₁	(100,000)	\$0.00		
02/04/09	CASH	TRANSFERRED TO	PINE STREET CAPITAL PARTNERS LP BASED ON MGMT'S UNCONFIRMED ESTIMATE OF NET ASSETS VS REDACTED ₂₀₈₋₁	(125,421)	\$0.00		
02/04/09	CASH	TRANSFERRED FROM	CALL (TBT) PROSHARES MAR 45 (100 SHS) VS REDACTED ₂₀₈₋₁	5	\$0.00		
02/04/09	CASH	TRANSFERRED TO	PROSHARES ULTRASHORT LEHMAN BROS 20 YR PROSHARES VS REDACTED ₂₀₈₋₁	(1,000)	\$0.00		
02/04/09	CASH	TRANSFERRED FROM	CALL (TBT) PROSHARES FEB 46 (100 SHS) REDACTED ₂₀₈₋₁	5	\$0.00		
02/04/09	CASH	TRANSFERRED TO	REDACTED ₂₀₈₋₁		(\$325,074.11)		

Net Other Additions and Withdrawals (\$325,074.11)

Account Number: REDACTED0892
Account Name: SMITH
Statement Date: 02/01/2009 to 02/28/2009

McGinnSmith & Company, Inc.

NET ADDITIONS AND WITHDRAWALS

(\$325,074.11)

INCOME AND EXPENSES

Taxable Income

Date	Account Type	Transaction	Description	Quantity	Amount
Taxable Dividends					
02/27/09	CASH	DIVIDEND RECEIVED	PRIME FUND - CAPITAL RESERVES CLASS DIVIDEND RECEIVED		\$21.77

Net Taxable Income

\$21.77

Total Income

\$21.77

NET INCOME AND EXPENSES

\$21.77

MISCELLANEOUS ACCOUNT ACTIVITY

Date	Account Type	Transaction	Description	Quantity	Amount
02/06/09	RESSTK	ADJUSTMENT	PINE STREET CAPITAL PARTNERS L P PROM NT 9.000% 12/31/2009 BASED ON MGMT'S UNCONFIRMED EST OF NET ASSETS REF REDACTED5880	(41,390)	\$0.00

NET MISCELLANEOUS ACCOUNT ACTIVITY

\$0.00

FOOTNOTES AND COST BASIS INFORMATION

NFS-provided estimated cost basis (including cost basis and short sale proceeds information provided to NFS by customers), realized gain and loss, and holding period information may not reflect all adjustments necessary for tax reporting purposes. Taxpayers should verify such information against their own records when calculating reportable gain or loss resulting from a sale, redemption, or exchange. NFS does not report such information to the IRS or other taxing authorities and is not responsible for the accuracy of such information taxpayers may be required to report to federal, state, and other taxing authorities. NFS makes no warranties with respect to, and specifically disclaims any liability arising out of a customer's use of, or any tax position taken in reliance upon, such information. Unless otherwise specified, NFS determines cost basis at the time of sale based on the average cost-single category (ACSC) method for open-end mutual funds and based on the first-in, first-out (FIFO) method for all other securities. Customers should consult their tax advisors for further information.

For investments in partnerships, NFS does not make any adjustments to cost basis information as the calculation of basis in such investments requires supplemental information from the partnership on its income and distributions during the period you held your investment. Partnerships usually provide this additional information on a Form K-1 Issued by April 15th of the following year.



Account Number: REDACTED 0892

Account Name: SMITH

Statement Date: 02/01/2009 to 02/28/2009

McGinnSmith
& Company, Inc.

MISCELLANEOUS FOOTNOTES

Callable Securities Lottery - When street name or bearer securities held for you are subject to a partial call or partial redemption by the issuer, NFS may or may not receive an allocation of called/redeemed securities by the issuer, transfer agent and/or depository. If NFS is allocated a portion of the called/redeemed securities, NFS utilizes an impartial lottery allocation system, in accordance with applicable rules, that randomly selects the securities within customer accounts that will be called/redeemed. NFS' allocations are not made on a pro rata basis and it is possible for you to receive a full or partial allocation, or no allocation. You have the right to withdraw uncalled fully paid securities at any time prior to the cutoff date and time established by the issuer, transfer agent and/or depository with respect to the partial call, and also to withdraw excess margin securities provided your account is not subject to restriction under Regulation T or such withdrawal will not cause an undermargined condition.

GLOSSARY Short Account Balances - If you have sold securities under the short sale rule, we have, in accordance with regulations, segregated the proceeds from such transactions in your Short Account. Any market increases or decreases from the original sale price will be marked to the market and will be transferred to your Margin Account on a weekly basis. **Market Value** - The Total Market Value has been calculated out to 9 decimal places, however, the individual unit price is displayed in 5 decimal places. The Total Market Value represents prices obtained from various sources, may be impacted by the frequency in which such prices are reported and such prices are not guaranteed. Prices received from pricing vendors are generally based on current market quotes, but when such quotes are not available the pricing vendors use a variety of techniques to estimate value. These estimates, particularly for **fixed income securities**, may be based on certain minimum principal amounts (e.g. \$1 million) and may not reflect all of the factors that affect the value of the security, including liquidity risk. The prices provided are not firm bids or offers. Certain securities may reflect "N/A" or "unavailable" where the price for such security is generally not available from

CUSTOMER SERVICE: Please review your statement and report any discrepancies immediately. Inquiries or concerns regarding your brokerage account or the activity therein should be directed to your broker/dealer at the telephone number and address reflected on the front of this statement and National Financial Services LLC ("NFS") who carries your brokerage account and acts as your custodian for funds and securities deposited with NFS directly by you, through your broker/dealer, or as a result of transactions NFS processes for your account. NFS may be contacted by calling (800) 801-9942. Any oral communications regarding inaccuracies or discrepancies should be reconfirmed in writing to protect your rights, including those under the Securities Investor Protection Act ("SIPA"). When contacting either NFS or your broker/dealer, remember to include your entire brokerage account number to ensure a prompt reply. Please notify the service center or your broker/dealer promptly in writing of any change of address.

ADDITIONAL INFORMATION Customer free credit balances are not segregated and may be used in NFS business, subject to the limitations of 17CFR Section 240.15c3-2 under the Securities and Exchange Act of 1934. You have the right to receive from NFS in the course of normal business operations, subject to open commitments in any of your brokerage accounts, any free credit balances to which you are entitled or any fully paid securities to which you are entitled and any securities purchased on margin upon full payment of any indebtedness to NFS. Interest on free credit balances awaiting reinvestment may be paid out at rates that may vary with current short-term money market rates and/or your brokerage account balances, set at the discretion of your broker/dealer and/or NFS.

Credit Adjustment Program. Accountholders receiving payments in lieu of qualified dividends may not be eligible to receive credit adjustments intended to help cover additional associated federal tax burdens. NFS reserves the right to deny the adjustment to any accountholder and to amend or terminate the credit adjustment program.

Options Customers. Each transaction confirmation previously delivered to you contains full information about commissions and other charges. If you require further information, please contact your broker/dealer.

Assignments of American and European-style options are allocated among customer short positions pursuant to a random allocation procedure, a description of which is available upon request. Short positions in American-style options are liable for assignment at any time. The writer of a European-style option is subject to exercise assignment only during the exercise period. You should advise your broker/dealer promptly of any material change in your investment objectives or financial situation. **Splits, Dividends, and Interest.** Expected stock split, next dividend payable, and next interest payable information has been provided by third parties and may be subject to change. Information for certain securities may be missing if not received from third parties in time for printing. NFS is not responsible for inaccurate, incomplete, or missing information. Please consult your broker/dealer for more information about expected stock split, next dividend payable, and next interest payable for certain securities.

Equity Dividend Reinvestment Customers. Shares credited to your brokerage account resulted from transactions effected as agent by either: 1) Your broker/dealer for your investment account, or 2) through the Depository Trust Company (DTC) dividend reinvestment program. For broker/dealer effected transactions, the time of the transactions, the exchange upon which these transactions occurred and the name of the person from whom the security was purchased will be furnished upon written request. NFS may have acted as market maker in effecting trades in 'over-the-counter' securities.

Retirement Contributions/Distributions. A summary of retirement contributions/distributions is displayed for you in the activity summary section of your statement. **Income Reporting.** NFS reports earnings from investments in Traditional IRAs, Rollover IRAs, SEP-IRAs and, Keoghs as tax-deferred income. Earnings from Roth IRAs are reported as tax-free income, since distributions may be tax-free after meeting the 5 year aging requirement and certain other conditions. **A financial statement** of NFS is available for your personal inspection at its office or a copy of it will be mailed to you upon your written request.

Statement Mailing. NFS will deliver statements by mail or, if applicable, notify you by e-mail of your statement's availability, if you had transactions that affected your cash balances or security positions held in your account(s) during the last monthly reporting period. At a minimum, all brokerage customers will receive quarterly statements (at least four times per calendar year) as long as their accounts contain a cash or securities balance.

Loads and Fees. In addition to sales loads and 12b-1 fees described in the prospectus, NFS or your

a pricing source. The Market Value of a security, including those priced at par value, may differ from its purchase price and may not closely reflect the value at which the security may be sold or purchased based on various market factors. Investment decisions should be made only after consulting your broker/dealer.

Estimated Yield and Estimated Annual Income - When available, the coupon rate of some fixed income securities is divided by the current market value of the fixed income security to create the Estimated Yield figure and/or the current interest rate or most recently declared dividends for certain securities are annualized to create the Estimated Annual Income figure. These figures are estimates only, based on mathematical calculations of available data, and have been obtained from information providers believed to be reliable, but no assurance can be made as to accuracy. Since the interest and dividend rates are subject to change at any time, and may be affected by current and future economic, political and business conditions, they should not be relied on for making investment, trading decisions, or tax decisions.

broker/dealer receives other compensation in connection with the purchase and/or the on-going maintenance of positions in certain mutual fund shares and other investment products in your brokerage account. This additional compensation may be paid by the mutual fund or other investment product, its investment advisor or one of its affiliates. Additional information about the source(s) and amount(s) of compensation as well as other remuneration received by NFS or your broker/dealer will be furnished to you upon written request. At time of purchase, fund shares may be assigned a transaction fee or no transaction fee status. At time of sale, applicable fees will be based on that status.

Margin. If you have applied for margin privileges and been approved, you may borrow money from NFS in exchange for pledging the assets in your account as collateral for any outstanding margin loan. The amount you may borrow is based on the value of securities in your margin account, which is identified on your statement. If you have a margin account, this is a combined statement of your margin account and special memorandum account other than your non-purpose margin accounts maintained for you under Section 220.5 of Regulation T issued by the Board of Governors of the Federal Reserve Board. The permanent record of the separate account, as required by Regulation T, is available for your inspection upon request.

NYSE and FINRA. All transactions are subject to the constitution, rules, regulations, customs, usages, rulings and interpretations of the exchange market and its clearing house, if any, where the transactions are executed, and of the New York Stock Exchange (NYSE) and of the Financial Industry Regulatory Authority ("FINRA"). The FINRA requires that we notify you in writing of the availability of an investor brochure that includes information describing FINRA Regulation's BrokerCheck Program ("Program"). To obtain a brochure or more information about the Program or FINRA Regulation, contact the FINRA Regulation BrokerCheck Program Hotline at (800) 289-9999 or access the FINRA's web site at www.finra.org.

New York Stock Exchange Rule 382 requires that your broker/dealer and NFS allocate between them certain functions regarding the administration of your brokerage account. The following is a summary of the allocation services performed by your broker/dealer and NFS. A more complete description is available upon request. **Your broker/dealer is responsible for:** (1) obtaining and verifying brokerage account information and documentation, (2) opening, approving and monitoring your brokerage account, (3) transmitting timely and accurate instructions to NFS with respect to your brokerage account, (4) determining the suitability of investment recommendations and advice, (5) operating, and supervising your brokerage account and its own activities in compliance with applicable laws and regulations including compliance with margin rules pertaining to your margin account, if applicable, and (6) maintaining required books and records for the services that it performs.

NFS shall, at the direction of your broker/dealer: (1) execute, clear and settle transactions processed through NFS by your broker/dealer, (2) prepare and send transaction confirmations and periodic statements of your brokerage account (unless your broker/dealer has undertaken to do so). Certain securities pricing and descriptive information may be provided by your broker/dealer or obtained from third parties deemed to be reliable, however, this information has not been verified by NFS, (3) act as custodian for funds and securities received by NFS on your behalf, (4) follow the instructions of your broker/dealer with respect to transactions and the receipt and delivery of funds and securities for your brokerage account, and (5) extend margin credit for purchasing or carrying securities on margin. Your broker/dealer is responsible for ensuring that your brokerage account is in compliance with federal, industry and NFS margin rules, and for advising you of margin requirements. NFS shall maintain the required books and records for the services it performs.

Securities in accounts carried by National Financial Services LLC ("NFS"), a Fidelity Investments company, are protected in accordance with the Securities Investor Protection Corporation ("SIPC") up to \$500,000 (including cash claims limited to \$100,000). For details, please see www.sipc.org. NFS has arranged for additional insurance protection for cash and securities to supplement its SIPC coverage. This additional protection covers total account net equity in excess of the \$500,000/\$100,000 coverage provided by SIPC. Neither coverage protects against a decline in the market value of securities. Bank Deposit Sweep Program funds are SIPC protected until swept to a Program Bank at which time the funds may be eligible for FDIC insurance. Assets Held Away, commodities, unregistered investment contracts, futures accounts and other investments may not be covered. Mutual funds and/or other securities are not backed or guaranteed by any bank, nor are they insured by the FDIC and involve investment risk including possible loss of principal.

End of Statement

081120



REDACTED 9509 H 2
MCGINN, SMITH & CO., INC.
ONE CAPITAL CENTER
99 PINE STREET, 5th FLOOR
ALBANY, NY 12207

Account Number: REDACTED 208

McGinnSmith
& Company, Inc.

DAVID L SMITH
REDACTED

YOUR FINANCIAL CONSULTANT IS
DAVID L SMITH
RR#: 700

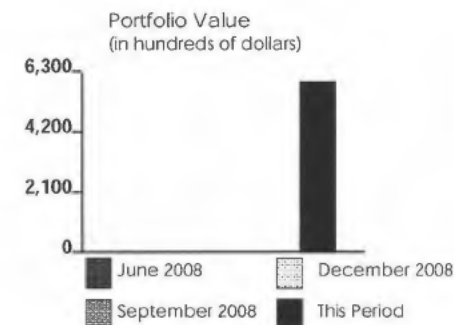
FOR QUESTIONS OR UP-TO-DATE ACCOUNT INFORMATION:
Local 518 449 5131
National 800 724 3330

Statement Date: 02/01/09 to 02/28/09

SNAPSHOT

TOTAL PORTFOLIO
\$601,630.41

PORTFOLIO VALUE	This Period	Prior Period
Cash and Cash Equivalents	(\$20.00)	\$0.00
Accrued Interest	\$1,942.41	\$0.00
Securities	\$131,689.00	\$0.00
Other Securities	\$468,019.00	\$0.00
TOTAL PORTFOLIO VALUE	\$601,630.41	\$0.00



A portfolio value less than \$100.00 may not be displayed.

ACCOUNT ACTIVITY	This Period	Year-To-Date
Net Additions and Withdrawals	(\$1,230.00)	(\$1,230.00)
Net Income and Expenses	\$1,210.00	\$1,210.00
Net Miscellaneous Activity	\$0.00	\$0.00

LEGEND

() Numbers in parenthesis
are debits or subtractions
NFS = National Financial
Services LLC

Account Number: REDACTED,208
 Account Name: SMITH
 Statement Date: 02/01/2009 to 02/28/2009

McGinnSmith & Company, Inc.

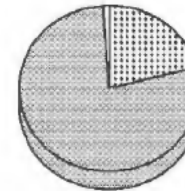
SUMMARY

ALERT: Taxable income is determined based on information available to NFS at the time the statement was prepared, and is subject to change. Final information on taxation of interest and dividends is available on Form 1099-Div, which is mailed in January of the subsequent year.

PORTFOLIO VALUE		This Period	Prior Period
Cash and Cash Equivalents			
Cash		(\$20.00)	\$0.00
Accrued Interest		\$1,942.41	\$0.00
Securities			
Fixed Income			
Corporate Bonds		\$131,689.00	\$0.00
Total Securities		\$131,689.00	\$0.00
Other Securities		\$468,019.00	\$0.00
TOTAL PORTFOLIO VALUE		\$601,630.41	\$0.00
ACCOUNT ACTIVITY		This Period	Year-To-Date
BEGINNING BALANCE		\$0.00	
Additions and Withdrawals			
Other Additions and Withdrawals		(\$1,230.00)	(\$1,230.00)
NET ADDITIONS AND WITHDRAWALS		(\$1,230.00)	(\$1,230.00)
Income and Expenses			
Taxable Income			
Taxable Interest		\$1,250.00	\$1,250.00
NET TAXABLE INCOME		\$1,250.00	\$1,250.00
TOTAL INCOME		\$1,250.00	\$1,250.00
Account Fees		(\$40.00)	(\$40.00)
TOTAL EXPENSES		(\$40.00)	(\$40.00)
NET INCOME AND EXPENSES		\$1,210.00	\$1,210.00
NET MISCELLANEOUS ACTIVITY		\$0.00	\$0.00
ENDING BALANCE		(\$20.00)	

DETAIL

PORTFOLIO ALLOCATION



	Fixed Income	21.89%
	Other Securities	77.79%
	Accrued Interest	0.32%

Allocations for equities, fixed income, and other categories may include mutual funds and may be net of short positions. NFS has made assumptions concerning how certain mutual funds are allocated. Closed-end mutual funds listed on an exchange may be included in the equity allocation. The chart may not reflect your actual portfolio allocation. Consult your broker/dealer prior to making investment decisions.



Account Number: REDACTED 2208
 Account Name: SMITH
 Statement Date: 02/01/2009 to 02/28/2009

McGinnSmith & Company, Inc.

PORTFOLIO VALUE

NFS-provided estimated cost basis (including cost basis and short sale proceeds information provided to NFS by customers), realized gain and loss, and holding period information may not reflect all adjustments necessary for tax reporting purposes. Taxpayers should verify such information against their own records when calculating reportable gain or loss resulting from a sale, redemption, or exchange. NFS does not report such information to the IRS or other taxing authorities and is not responsible for the accuracy of such information taxpayers may be required to report to federal, state, and other taxing authorities. NFS makes no warranties with respect to, and specifically disclaims any liability arising out of a customer's use of, or any tax position taken in reliance upon, such information. Unless otherwise specified, NFS determines cost basis at the time of sale based on the average cost-single category (ACSC) method for open-end mutual funds and based on the first-in, first-out (FIFO) method for all other securities.

Amortization, accretion and similar adjustments to cost basis have been provided for many fixed income securities (and some bond-like equities), however, they are not provided for certain types, such as short-term instruments, Unit Investment Trusts, foreign fixed income securities, or those that are subject to early prepayment of principal (pay downs). Where current year premium or acquisition premium amortization is provided, the prior years' cumulative amortization is reflected in the adjusted cost basis, but we cannot provide a breakdown or the total of such prior amortization amounts.

LIMITATION ON COST BASIS INFORMATION: NFS's cost basis information system has a cumulative lifetime limit on how much activity it can track for each individual security position in an account. For this purpose, each buy, sell, dividend, wash sale disallowed loss, stock split, stock merger, etc, is an event. For some customers, this limit can be reached with approximately 1500 events. Upon reaching the limit, the system no longer displays or tracks cost basis information for the affected position, and such information will usually show as not available or unknown. Once the limit is reached, all cost basis information for the affected position will need to be tracked and updated by you, the investor.

CASH AND CASH EQUIVALENTS 0.00%

Description	Symbol/Cusip Account Type	Quantity	Price on 02/28/09	Current Market Value	Prior Market Value	Estimated Annual Income
Cash						
NET CASH POSITION				(\$20.00)	unavailable	
Total Cash and Cash Equivalents				(\$20.00)		

ACCRUED INTEREST 0.32%

Description	Symbol/Cusip Account Type	Quantity	Price on 02/28/09	Current Market Value	Prior Market Value	Estimated Annual Income
Accrued Interest						
Fixed Income				\$1,942.41	unavailable	
Total Accrued Interest				\$1,942.41	\$0.00	

Account Number: REDACTED 02208
 Account Name: SMITH
 Statement Date: 02/01/2009 to 02/28/2009

McGinnSmith & Company, Inc.

FIXED INCOME 21.89%

For an explanation of fixed income pricing, please see the last page. Redemption schedule(s), bond rating(s), and other information are provided where available. If information does not appear regarding a particular investment, it is not available. The ratings on this statement are provided by Standard & Poor's and/or Moody's to rate the quality based on the respective rating agency's assessment.

Accrued Interest - Represents interest accumulated since the last coupon date on certain fixed income securities which may not yet have been paid by the issuer or received by NFS. There is no guarantee that the accrued interest will be paid by the issuer.

Description	Symbol/Cusip Account Type	Quantity	Estimated Price on 02/28/09	Estimated Current Market Value	Estimated Prior Market Value	Estimated Annual Income	Total Cost Basis	Unrealized Gain (Loss)
Corporate Bonds								
PINE STREET CAPITAL PARTNERS L P PROM NT 9.000% 12/31/2009 BASED ON MGMT'S UNCONFIRMED EST OF NET ASSETS CPN PMT QUARTERLY ON MAR 31, JUN 31, SEP 31, DEC 31 Next Interest Payable: 03/31/09 Accrued Interest \$1942.41	REDACTED ABT2 RESSTK	131,689	\$100.00 AI	\$131,689.00	unavailable	\$11,852.01		
Total Fixed Income		131,689		\$131,689.00		\$11,852.01		

Total Securities \$131,689.00 \$11,852.01

OTHER SECURITIES 77.79%

Description	Symbol/Cusip Account Type	Quantity	Price on 02/28/09	Current Market Value	Prior Market Value	Estimated Annual Income
PINE STREET CAPITAL PARTNERS LP BASED ON MGMT'S UNCONFIRMED ESTIMATE OF NET ASSETS	REDACTED 9109 CASH	125,421	\$1.00 AI	\$125,421.00	unavailable	
PINE STREET CAPITAL PARTNERS LP BASED ON MGMT'S UNCONFIRMED ESTIMATE OF NET ASSETS * In transfer	REDACTED 9109 CASH	342,598 *	\$1.00 AI	\$342,598.00	unavailable	
Total Other Securities				\$468,019.00		

TOTAL PORTFOLIO VALUE \$601,630.41 \$11,852.01



Account Number: REDACTED 2208
 Account Name: SMITH
 Statement Date: 02/01/2009 to 02/28/2009

McGinnSmith
 & Company, Inc.

ACCOUNT ACTIVITY

NFS-provided estimated cost basis (including cost basis and short sale proceeds information provided to NFS by customers), realized gain and loss, and holding period information may not reflect all adjustments necessary for tax reporting purposes. Taxpayers should verify such information against their own records when calculating reportable gain or loss resulting from a sale, redemption, or exchange. NFS does not report such information to the IRS or other taxing authorities and is not responsible for the accuracy of such information taxpayers may be required to report to federal, state, and other taxing authorities. NFS makes no warranties with respect to, and specifically disclaims any liability arising out of a customer's use of, or any tax position taken in reliance upon, such information. Unless otherwise specified, NFS determines cost basis at the time of sale based on the average cost-single category (ACSC) method for open-end mutual funds and based on the first-in, first-out (FIFO) method for all other securities.

Amortization, accretion and similar adjustments to cost basis have been provided for many fixed income securities (and some bond-like equities), however, they are not provided for certain types, such as short-term instruments, Unit Investment Trusts, foreign fixed income securities, or those that are subject to early prepayment of principal (pay downs). Where current year premium or acquisition premium amortization is provided, the prior years' cumulative amortization is reflected in the adjusted cost basis, but we cannot provide a breakdown or the total of such prior amortization amounts.

LIMITATION ON COST BASIS INFORMATION: NFS's cost basis information system has a cumulative lifetime limit on how much activity it can track for each individual security position in an account. For this purpose, each buy, sell, dividend, wash sale disallowed loss, stock split, stock merger, etc. is an event. For some customers, this limit can be reached with approximately 1500 events. Upon reaching the limit, the system no longer displays or tracks cost basis information for the affected position, and such information will usually show as not available or unknown. Once the limit is reached, all cost basis information for the affected position will need to be tracked and updated by you, the investor.

ADDITIONS AND WITHDRAWALS

Other Additions and Withdrawals

Date	Account Type	Transaction	Description	Quantity	Amount	Total Cost Basis	Realized Gain (Loss)
02/04/09	CASH	TRANSFERRED FROM	JPMORGAN CHASE & CO GLOBAL MTN 15.000000% 05/07/2009 REVRS EXCH LKD GENERAL ELECTRIC COMPANY VS REDACTED 892-1	100,000	\$0.00	\$0.00	\$0.00
02/04/09	CASH	TRANSFERRED FROM	PINE STREET CAPITAL PARTNERS LP BASED ON MGMT'S UNCONFIRMED ESTIMATE OF NET ASSETS VS REDACTED 892-1	125,421	\$0.00		
02/04/09	CASH	TRANSFERRED TO	CALL (TBT) PROSHARES MAR 45 (100 SHS) VS REDACTED 892-1	(5)	\$0.00		
02/04/09	CASH	TRANSFERRED FROM	PROSHARES ULTRASHORT LEHMAN BROS 20 YR PROSHARES VS REDACTED 892-1	1,000	\$0.00	\$0.00	\$0.00
02/04/09	CASH	TRANSFERRED TO	CALL (TBT) PROSHARES FEB 46 (100 SHS) VS REDACTED 892-1	(5)	\$0.00		
02/04/09	CASH	TRANSFERRED FROM	VS REDACTED 892-1		\$325,074.11		
02/20/09	CASH	TRANSFERRED TO	JPMORGAN CHASE & CO GLOBAL MTN 15.000000% 05/07/2009 REVRS EXCH LKD GENERAL ELECTRIC COMPANY VS REDACTED 916-1	(100,000)	\$0.00		

Account Number: REDACTED 2208
Account Name: SMITH
Statement Date: 02/01/2009 to 02/28/2009

McGinnSmith & Company, Inc.

Other Additions and Withdrawals

Date	Account Type	Transaction	Description	Quantity	Amount	Total Cost Basis	Realized Gain (Loss)
02/20/09	CASH	TRANSFERRED FROM	CALL (TBT) PROSHARES MAR 45 (100 SHS) VS REDACTED 916-1	5	\$0.00		
02/20/09	CASH	TRANSFERRED TO	PROSHARES ULTRASHORT LEHMAN BROS 20 YR PROSHARES VS REDACTED 916-1	(1,000)	\$0.00		
02/20/09	CASH	TRANSFERRED FROM	CALL (TBT) PROSHARES FEB 46 (100 SHS) VS REDACTED 916-1	5	\$0.00		
02/20/09	CASH	TRANSFERRED TO	REDACTED 916-1		(\$326,304.11)		
Net Other Additions and Withdrawals					(\$1,230.00)		

NET ADDITIONS AND WITHDRAWALS

(\$1,230.00)

INCOME AND EXPENSES

Taxable Income

Date	Account Type	Transaction	Description	Quantity	Amount
Taxable Interest					
02/09/09	CASH	INTEREST	JPMORGAN CHASE & CO GLOBAL MTN 15.000000% 05/07/2009 REVRS EXCH LKD GENERAL ELECTRIC COMPANY		\$1,250.00

Net Taxable Income

\$1,250.00

Total Income

\$1,250.00

Account Fees

Date	Account Type	Transaction	Description	Quantity	Amount
02/11/09	CASH	FEE PAID	ALT INV RECEIVE REDACTED ABT2 02/11/09		(\$20.00)
02/23/09	CASH	FEE PAID	ALT INV RECEIVE REDACTED 9109 02/23/09		(\$20.00)

Net Account Fees

(\$40.00)

Total Expenses

(\$40.00)



Account Number: REDACTED 2208

Account Name: SMITH

Statement Date: 02/01/2009 to 02/28/2009

McGinnSmith & Company, Inc.

NET INCOME AND EXPENSES

\$1,210.00

MISCELLANEOUS ACCOUNT ACTIVITY

Date	Account Type	Transaction	Description	Quantity	Amount	Total Cost Basis	Realized Gain (Loss)
02/06/09	RESSTK	ADJUSTMENT	PINE STREET CAPITAL PARTNERS L P PROM NT 9.000% 12/31/2009 BASED ON MGMT'S UNCONFIRMED EST OF NET ASSETS REF REDACTED5880	41,390	\$0.00		
02/11/09	RESSTK	RECEIVED FROM YOU	PINE STREET CAPITAL PARTNERS L P PROM NT 9.000% 12/31/2009 BASED ON MGMT'S UNCONFIRMED EST OF NET ASSETS REF REDACTED0490	90,299	\$0.00		
02/23/09	CASH	RECEIVED FROM YOU	PINE STREET CAPITAL PARTNERS LP BASED ON MGMT'S UNCONFIRMED ESTIMATE OF NET ASSETS NON-ACAT RECEIVE	342,598	\$0.00		

NET MISCELLANEOUS ACCOUNT ACTIVITY

\$0.00

FOOTNOTES AND COST BASIS INFORMATION

NFS-provided estimated cost basis (including cost basis and short sale proceeds information provided to NFS by customers), realized gain and loss, and holding period information may not reflect all adjustments necessary for tax reporting purposes. Taxpayers should verify such information against their own records when calculating reportable gain or loss resulting from a sale, redemption, or exchange. NFS does not report such information to the IRS or other taxing authorities and is not responsible for the accuracy of such information taxpayers may be required to report to federal, state, and other taxing authorities. NFS makes no warranties with respect to, and specifically disclaims any liability arising out of a customer's use of, or any tax position taken in reliance upon, such information. Unless otherwise specified, NFS determines cost basis at the time of sale based on the average cost-single category (ACSC) method for open-end mutual funds and based on the first-in, first-out (FIFO) method for all other securities. Customers should consult their tax advisors for further information.

For investments in partnerships, NFS does not make any adjustments to cost basis information as the calculation of basis in such investments requires supplemental information from the partnership on its income and distributions during the period you held your investment. Partnerships usually provide this additional information on a Form K-1 issued by April 15th of the following year.

MISCELLANEOUS FOOTNOTES

Callable Securities Lottery - When street name or bearer securities held for you are subject to a partial call or partial redemption by the issuer, NFS may or may not receive an allocation of called/redeemed securities by the issuer, transfer agent and/or depository. If NFS is allocated a portion of the called/redeemed securities, NFS utilizes an impartial lottery allocation system, in accordance with applicable rules, that randomly selects the securities within customer accounts that will be called/redeemed. NFS' allocations are not made on a pro rata basis and it is possible for you to receive a full or partial allocation, or no allocation. You have the right to withdraw uncalled fully paid securities at any time prior to the cutoff date and time established by the issuer, transfer agent and/or depository with respect to the partial call, and also to withdraw excess margin securities provided your account is not subject to restriction under Regulation T or such withdrawal will not cause an undermargined condition.

Account Number: REDACTED 2208
Account Name: SMITH

Statement Date: 02/01/2009 to 02/28/2009

McGinnSmith & Company, Inc.

AI - Investments such as direct participation program securities (e.g., partnerships, limited liability companies, and real estate trusts which are not listed on any exchange), commodity pools, private equity, private debt and hedge funds are generally illiquid investments and their current values will be different from the purchase price. Unless otherwise indicated, the values shown on this statement for such investments have been provided by the management, administrator or sponsor of each program, or a third-party vendor without independent verification by National Financial Services LLC (NFS) or your broker/dealer and represent their estimate of the value of the investor's participation in the program, as of a date no greater than 12 months from the date of this statement. Therefore the estimated values shown herein may not necessarily reflect actual market values or be realized upon liquidation. If an estimated value is not provided, accurate valuation information is not available.



GLOSSARY Short Account Balances - If you have sold securities under the short sale rule, we have, in accordance with regulations, segregated the proceeds from such transactions in your Short Account. Any market increases or decreases from the original sale price will be marked to the market and will be transferred to your Margin Account on a weekly basis. **Market Value** - The Total Market Value has been calculated out to 9 decimal places, however, the individual unit price is displayed in 5 decimal places. The Total Market Value represents prices obtained from various sources, may be impacted by the frequency in which such prices are reported and such prices are not guaranteed. Prices received from pricing vendors are generally based on current market quotes, but when such quotes are not available the pricing vendors use a variety of techniques to estimate value. These estimates, particularly for **fixed income securities**, may be based on certain minimum principal amounts (e.g. \$1 million) and may not reflect all of the factors that affect the value of the security, including liquidity risk. The prices provided are not firm bids or offers. Certain securities may reflect "N/A" or "unavailable" where the price for such security is generally not available from

CUSTOMER SERVICE: Please review your statement and report any discrepancies immediately. Inquiries or concerns regarding your brokerage account or the activity therein should be directed to your broker/dealer at the telephone number and address reflected on the front of this statement and National Financial Services LLC ("NFS") who carries your brokerage account and acts as your custodian for funds and securities deposited with NFS directly by you, through your broker/dealer, or as a result of transactions NFS processes for your account. NFS may be contacted by calling (800) 801-9942. Any oral communications regarding inaccuracies or discrepancies should be reconfirmed in writing to protect your rights, including those under the Securities Investor Protection Act ("SIPA"). When contacting either NFS or your broker/dealer, remember to include your entire brokerage account number to ensure a prompt reply. Please notify the service center or your broker/dealer promptly in writing of any change of address.

ADDITIONAL INFORMATION Customer free credit balances are not segregated and may be used in NFS business, subject to the limitations of 17CFR Section 240.15c3-2 under the Securities and Exchange Act of 1934. You have the right to receive from NFS in the course of normal business operations, subject to open commitments in any of your brokerage accounts, any free credit balances to which you are entitled or any fully paid securities to which you are entitled and any securities purchased on margin upon full payment of any indebtedness to NFS. Interest on free credit balances awaiting reinvestment may be paid out at rates that may vary with current short-term money market rates and/or your brokerage account balances, set at the discretion of your broker/dealer and/or NFS.

Credit Adjustment Program. Accountholders receiving payments in lieu of qualified dividends may not be eligible to receive credit adjustments intended to help cover additional associated federal tax burdens. NFS reserves the right to deny the adjustment to any accountholder and to amend or terminate the credit adjustment program.

Options Customers. Each transaction confirmation previously delivered to you contains full information about commissions and other charges. If you require further information, please contact your broker/dealer.

Assignments of American and European-style options are allocated among customer short positions pursuant to a random allocation procedure, a description of which is available upon request. Short positions in American-style options are liable for assignment at any time. The writer of a European-style option is subject to exercise assignment only during the exercise period. You should advise your broker/dealer promptly of any material change in your investment objectives or financial situation. **Splits, Dividends, and Interest.** Expected stock split, next dividend payable, and next interest payable information has been provided by third parties and may be subject to change. Information for certain securities may be missing if not received from third parties in time for printing. NFS is not responsible for inaccurate, incomplete, or missing information. Please consult your broker/dealer for more information about expected stock split, next dividend payable, and next interest payable for certain securities.

Equity Dividend Reinvestment Customers. Shares credited to your brokerage account resulted from transactions effected as agent by either: 1) Your broker/dealer for your investment account, or 2) through the Depository Trust Company (DTC) dividend reinvestment program. For broker/dealer effected transactions, the time of the transactions, the exchange upon which these transactions occurred and the name of the person from whom the security was purchased will be furnished upon written request. NFS may have acted as market maker in effecting trades in 'over-the-counter' securities.

Retirement Contributions/Distributions. A summary of retirement contributions/distributions is displayed for you in the activity summary section of your statement. **Income Reporting.** NFS reports earnings from investments in Traditional IRAs, Rollover IRAs, SEP-IRAs and, Keoghs as tax-deferred income. Earnings from Roth IRAs are reported as tax-free income, since distributions may be tax-free after meeting the 5 year aging requirement and certain other conditions. **A financial statement** of NFS is available for your personal inspection at its office or a copy of it will be mailed to you upon your written request.

Statement Mailing. NFS will deliver statements by mail or, if applicable, notify you by e-mail of your statement's availability, if you had transactions that affected your cash balances or security positions held in your account(s) during the last monthly reporting period. At a minimum, all brokerage customers will receive quarterly statements (at least four times per calendar year) as long as their accounts contain a cash or securities balance.

Loads and Fees. In addition to sales loads and 12b-1 fees described in the prospectus, NFS or your

a pricing source. The Market Value of a security, including those priced at par value, may differ from its purchase price and may not closely reflect the value at which the security may be sold or purchased based on various market factors. Investment decisions should be made only after consulting your broker/dealer.

Estimated Yield and Estimated Annual Income - When available, the coupon rate of some fixed income securities is divided by the current market value of the fixed income security to create the Estimated Yield figure and/or the current interest rate or most recently declared dividends for certain securities are annualized to create the Estimated Annual Income figure. These figures are estimates only, based on mathematical calculations of available data, and have been obtained from information providers believed to be reliable, but no assurance can be made as to accuracy. Since the interest and dividend rates are subject to change at any time, and may be affected by current and future economic, political and business conditions, they should not be relied on for making investment, trading decisions, or tax decisions.

broker/dealer receives other compensation in connection with the purchase and/or the on-going maintenance of positions in certain mutual fund shares and other investment products in your brokerage account. This additional compensation may be paid by the mutual fund or other investment product, its investment advisor or one of its affiliates. Additional information about the source(s) and amount(s) of compensation as well as other remuneration received by NFS or your broker/dealer will be furnished to you upon written request. At time of purchase, fund shares may be assigned a transaction fee or no transaction fee status. At time of sale, applicable fees will be based on that status.

Margin. If you have applied for margin privileges and been approved, you may borrow money from NFS in exchange for pledging the assets in your account as collateral for any outstanding margin loan. The amount you may borrow is based on the value of securities in your margin account, which is identified on your statement. If you have a margin account, this is a combined statement of your margin account and special memorandum account other than your non-purpose margin accounts maintained for you under Section 220.5 of Regulation T issued by the Board of Governors of the Federal Reserve Board. The permanent record of the separate account, as required by Regulation T, is available for your inspection upon request.

NYSE and FINRA. All transactions are subject to the constitution, rules, regulations, customs, usages, rulings and interpretations of the exchange market and its clearing house, if any, where the transactions are executed, and of the New York Stock Exchange (NYSE) and of the Financial Industry Regulatory Authority ("FINRA"). The FINRA requires that we notify you in writing of the availability of an investor brochure that includes information describing FINRA Regulation's BrokerCheck Program ("Program"). To obtain a brochure or more information about the Program or FINRA Regulation, contact the FINRA Regulation BrokerCheck Program Hotline at (800) 289-9999 or access the FINRA's web site at www.finra.org.

New York Stock Exchange Rule 382 requires that your broker/dealer and NFS allocate between them certain functions regarding the administration of your brokerage account. The following is a summary of the allocation services performed by your broker/dealer and NFS. A more complete description is available upon request. **Your broker/dealer is responsible for:** (1) obtaining and verifying brokerage account information and documentation, (2) opening, approving and monitoring your brokerage account, (3) transmitting timely and accurate instructions to NFS with respect to your brokerage account, (4) determining the suitability of investment recommendations and advice, (5) operating, and supervising your brokerage account and its own activities in compliance with applicable laws and regulations including compliance with margin rules pertaining to your margin account, if applicable, and (6) maintaining required books and records for the services that it performs.

NFS shall, at the direction of your broker/dealer: (1) execute, clear and settle transactions processed through NFS by your broker/dealer, (2) prepare and send transaction confirmations and periodic statements of your brokerage account (unless your broker/dealer has undertaken to do so). Certain securities pricing and descriptive information may be provided by your broker/dealer or obtained from third parties deemed to be reliable, however, this information has not been verified by NFS, (3) act as custodian for funds and securities received by NFS on your behalf, (4) follow the instructions of your broker/dealer with respect to transactions and the receipt and delivery of funds and securities for your brokerage account, and (5) extend margin credit for purchasing or carrying securities on margin. Your broker/dealer is responsible for ensuring that your brokerage account is in compliance with federal, industry and NFS margin rules, and for advising you of margin requirements. NFS shall maintain the required books and records for the services it performs.

Securities in accounts carried by National Financial Services LLC ("NFS"), a Fidelity Investments company, are protected in accordance with the Securities Investor Protection Corporation ("SIPC") up to \$500,000 (including cash claims limited to \$100,000). For details, please see www.sipc.org. NFS has arranged for additional insurance protection for cash and securities to supplement its SIPC coverage. This additional protection covers total account net equity in excess of the \$500,000/\$100,000 coverage provided by SIPC. Neither coverage protects against a decline in the market value of securities. Bank Deposit Sweep Program funds are SIPC protected until swept to a Program Bank at which time the funds may be eligible for FDIC insurance. Assets Held Away, commodities, unregistered investment contracts, futures accounts and other investments may not be covered. Mutual funds and/or other securities are not backed or guaranteed by any bank, nor are they insured by the FDIC and involve investment risk including possible loss of principal.

End of Statement

081120

REDACTED 9509

NFS002402



NFS002403

REDACTED

9562 H 2

MCGINN, SMITH & CO., INC.
ONE CAPITAL CENTER
99 PINE STREET, 5th FLOOR
ALBANY, NY 12207

Account Number: REDACTED 208

*McGinn Smith
& Company, Inc.*

DAVID L SMITH
REDACTED
SARATOGA SPRINGS NY 12866

YOUR FINANCIAL CONSULTANT IS
DAVID L SMITH
RR#: 700

FOR QUESTIONS OR UP-TO-DATE ACCOUNT INFORMATION:
Local 518 449 5131
National 800 724 3330

Statement Date: 03/01/09 to 03/31/09

SNAPSHOT

TOTAL PORTFOLIO
(\$20.00)

PORTFOLIO VALUE	This Period	Prior Period
Cash and Cash Equivalents	(\$20.00)	(\$20.00)
Accrued Interest	\$0.00	\$1,942.41
Securities	\$0.00	\$131,689.00
Other Securities	\$0.00	\$468,019.00
TOTAL PORTFOLIO VALUE	(\$20.00)	\$601,630.41

ACCOUNT ACTIVITY	This Period	Year-To-Date
Net Additions and Withdrawals	\$0.00	(\$1,230.00)
Net Income and Expenses	\$0.00	\$1,210.00
Net Miscellaneous Activity	\$0.00	\$0.00

LEGEND

() Numbers in parenthesis
are debits or subtractions
NFS = National Financial
Services LLC

REDACTED
Account Number: 208
Account Name: SMITH

Statement Date: 03/01/2009 to 03/31/2009

McGinn Smith
& Company, Inc.

PORTFOLIO VALUE

NFS-provided estimated cost basis (including cost basis and short sale proceeds information provided to NFS by customers), realized gain and loss, and holding period information may not reflect all adjustments necessary for tax reporting purposes. Taxpayers should verify such information against their own records when calculating reportable gain or loss resulting from a sale, redemption, or exchange. NFS does not report such information to the IRS or other taxing authorities and is not responsible for the accuracy of such information taxpayers may be required to report to federal, state, and other taxing authorities. NFS makes no warranties with respect to, and specifically disclaims any liability arising out of a customer's use of, or any tax position taken in reliance upon, such information. Unless otherwise specified, NFS determines cost basis at the time of sale based on the average cost-single category (ACSC) method for open-end mutual funds and based on the first-in, first-out (FIFO) method for all other securities.

Amortization, accretion and similar adjustments to cost basis have been provided for many fixed income securities (and some bond-like equities), however, they are not provided for certain types, such as short-term instruments, Unit Investment Trusts, foreign fixed income securities, or those that are subject to early prepayment of principal (pay downs). Where current year premium or acquisition premium amortization is provided, the prior years' cumulative amortization is reflected in the adjusted cost basis, but we cannot provide a breakdown or the total of such prior amortization amounts.

LIMITATION ON COST BASIS INFORMATION: NFS's cost basis information system has a cumulative lifetime limit on how much activity it can track for each individual security position in an account. For this purpose, each buy, sell, dividend, wash sale disallowed loss, stock split, stock merger, etc. is an event. For some customers, this limit can be reached with approximately 1500 events. Upon reaching the limit, the system no longer displays or tracks cost basis information for the affected position, and such information will usually show as not available or unknown. Once the limit is reached, all cost basis information for the affected position will need to be tracked and updated by you, the investor.

CASH AND CASH EQUIVALENTS 0.00%

Description	Symbol/Cusip	Quantity	Price on 03/31/09	Current Market Value	Prior Market Value	Estimated Annual Income
Cash						
NET CASH POSITION				(\$20.00)	(\$20.00)	

Total Cash and Cash Equivalents

(\$20.00)

ACCRUED INTEREST 0.00%

Total Accrued Interest

\$0.00

\$1,942.41

FIXED INCOME 0.00%

For an explanation of fixed income pricing, please see the last page. Redemption schedule(s), bond rating(s), and other information are provided where available. If information does not appear regarding a particular investment, it is not available. The ratings on this statement are provided by Standard & Poor's and/or Moody's to rate the quality based on the respective rating agency's assessment.

Accrued Interest - Represents interest accumulated since the last coupon date on certain fixed income securities which may not yet have been paid by the issuer or received by NFS. There is no guarantee that the accrued interest will be paid by the issuer.

Total Fixed Income

\$0.00

Total Securities

\$0.00

OTHER SECURITIES 0.00%

Total Other Securities

\$0.00

REDACTED
Account Number: 2208
Account Name: Smith

Statement Date: 03/01/2009 to 03/31/2009

McGinn Smith
& Company, Inc.

TOTAL PORTFOLIO VALUE

(\$20.00)

ACCOUNT ACTIVITY

NFS-provided estimated cost basis (including cost basis and short sale proceeds information provided to NFS by customers), realized gain and loss, and holding period information may not reflect all adjustments necessary for tax reporting purposes. Taxpayers should verify such information against their own records when calculating reportable gain or loss resulting from a sale, redemption, or exchange. NFS does not report such information to the IRS or other taxing authorities and is not responsible for the accuracy of such information taxpayers may be required to report to federal, state, and other taxing authorities. NFS makes no warranties with respect to, and specifically disclaims any liability arising out of a customer's use of, or any tax position taken in reliance upon, such information. Unless otherwise specified, NFS determines cost basis at the time of sale based on the average cost-single category (ACSC) method for open-end mutual funds and based on the first-in, first-out (FIFO) method for all other securities.

Amortization, accretion and similar adjustments to cost basis have been provided for many fixed income securities (and some bond-like equities), however, they are not provided for certain types, such as short-term instruments, Unit Investment Trusts, foreign fixed income securities, or those that are subject to early prepayment of principal (pay downs). Where current year premium or acquisition premium amortization is provided, the prior years' cumulative amortization is reflected in the adjusted cost basis, but we cannot provide a breakdown of the total of such prior amortization amounts.

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ADDITIONS AND WITHDRAWALS
Other Additions and Withdrawals

Date	Account Type	Transaction	Description	Quantity	Amount	Total Cost Basis	Realized Gain (Loss)
03/20/09	CASH	TRANSFERRED TO	PINE STREET CAPITAL PARTNERS LP BASED ON MGMT'S UNCONFIRMED ESTIMATE OF NET ASSETS VS REDACTE 316-1	(466.019)	\$0.00		

Net Other Additions and Withdrawals

\$0.00

NET ADDITIONS AND WITHDRAWALS

\$0.00



Account Number: REDACTED 208
Account Name: SMITH
Statement Date: 03/01/2009 to 03/31/2009

McGinn Smith
& Company, Inc.

MISCELLANEOUS ACCOUNT ACTIVITY

Date	Account Type	Transaction	Description	Quantity	Amount	Total Cost Basis	Realized Gain (Loss)
03/19/09	RESSTK	ADJUSTMENT	PINE STREET CAPITAL PARTNERS L.P. PROM NT 9.000% 12/31/2009 BASED ON MGMT'S UNCONFIRMED EST OF NET ASSETS REF REDACTED 5880	(41,390)	\$0.00		
03/19/09	RESSTK	ADJUSTMENT	PINE STREET CAPITAL PARTNERS L.P. PROM NT 9.000% 12/31/2009 BASED ON MGMT'S UNCONFIRMED EST OF NET ASSETS REF REDACTED 30490	(90,299)	\$0.00		
03/19/09	RESSTK	DELIVERED TO YOU	PINE STREET CAPITAL PARTNERS L.P. PROM NT 9.000% 12/31/2009 BASED ON MGMT'S UNCONFIRMED EST OF NET ASSETS REF REDACTED 5880	(41,390)	\$0.00		
03/19/09	RESSTK	DELIVERED TO YOU	PINE STREET CAPITAL PARTNERS L.P. PROM NT 9.000% 12/31/2009 BASED ON MGMT'S UNCONFIRMED EST OF NET ASSETS REF REDACTED 5880	(90,299)	\$0.00		
03/19/09	RESSTK	RECEIVED FROM YOU	PINE STREET CAPITAL PARTNERS L.P. PROM NT 9.000% 12/31/2009 BASED ON MGMT'S UNCONFIRMED EST OF NET ASSETS REF REDACTED 30490	41,390	\$0.00		
03/19/09	RESSTK	RECEIVED FROM YOU	PINE STREET CAPITAL PARTNERS L.P. PROM NT 9.000% 12/31/2009 BASED ON MGMT'S UNCONFIRMED EST OF NET ASSETS REF REDACTED 5880	90,299	\$0.00		
03/25/09	RESSTK	ADJUSTMENT	PINE STREET CAPITAL PARTNERS L.P. PROM NT 9.000% 12/31/2009 BASED ON MGMT'S UNCONFIRMED EST OF NET ASSETS REF REDACTED 0169	131,689	\$0.00		
03/26/09	RESSTK	ADJUSTMENT	PINE STREET CAPITAL PARTNERS L.P. PROM NT 9.000% 12/31/2009 BASED ON MGMT'S UNCONFIRMED EST OF NET ASSETS TFER TO REDAC 0916 TFER FRM REDAC 2208	(131,689)	\$0.00		

NET MISCELLANEOUS ACCOUNT ACTIVITY

\$0.00

REDACTED

9562

Account carried with National Financial Services LLC, Member NYSE, SIPC

NFS002408

REDACTED

208

Account Number:
Account Name: SMITH

Statement Date: 03/01/2009 to 03/31/2009

*McGinn Smith
& Company, Inc.*

MESSAGES

National Financial Services LLC, NFS, is required by the Securities Exchange Act of 1934 to provide certain financial information from its Statement of Financial Condition At December 31, 2008. NFS had net capital of \$2,671,091,968, which was 26.54 percent of aggregate debit items and exceeds its minimum requirement by \$2,469,785,231. To acquire the Statement of Financial Condition, log on to www.mybrokerageinfo.com. If you wish to obtain a copy of this document at no cost please call 1-800-439-5627.

FOOTNOTES AND COST BASIS INFORMATION

NFS-provided estimated cost basis (including cost basis and short sale proceeds information provided to NFS by customers), realized gain and loss, and holding period information may not reflect all adjustments necessary for tax reporting purposes. Taxpayers should verify such information against their own records when calculating reportable gain or loss resulting from a sale, redemption, or exchange. NFS does not report such information to the IRS or other taxing authorities and is not responsible for the accuracy of such information taxpayers may be required to report to federal, state, and other taxing authorities. NFS makes no warranties with respect to, and specifically disclaims any liability arising out of, or any tax position taken in reliance upon, such information. Unless otherwise specified, NFS determines cost basis at the time of sale based on the average cost-single category (ACSC) method for open-end mutual funds and based on the first-in, first-out (FIFO) method for all other securities. Customers should consult their tax advisors for further information.

For investments in partnerships, NFS does not make any adjustments to cost basis information as the calculation of basis in such investments requires supplemental information from the partnership on its income and distributions during the period you held your investment. Partnerships usually provide this additional information on a Form K-1 issued by April 15th of the following year.

MISCELLANEOUS FOOTNOTES

Callable Securities Lottery - When street name or bearer securities held for you are subject to a partial call or partial redemption by the issuer, NFS may or may not receive an allocation of called/redeemed securities by the issuer, transfer agent and/or depository. If NFS is allocated a portion of the called/redeemed securities, NFS utilizes an impartial lottery allocation system, in accordance with applicable rules, that randomly selects the securities within customer accounts that will be called/redeemed. NFS' allocations are not made on a pro rata basis and it is possible for you to receive a full or partial allocation, or no allocation. You have the right to withdraw uncalled fully paid securities at any time prior to the cutoff date and time established by the issuer, transfer agent and/or depository with respect to the partial call, and also to withdraw excess margin securities provided your account is not subject to restriction under Regulation T or such withdrawal will not cause an undermargined condition.



GLOSSARY Short Account Balances. - If you have sold securities under the short sale rule, we have, in accordance with regulations, segregated the proceeds from such transactions in your Short Account. Any market increases or decreases from the original sale price will be marked to the market and will be transferred to your Margin Account on a weekly basis. **Market Value** - The Total Market Value has been calculated out to 9 decimal places, however, the individual unit price is displayed in 5 decimal places. The Total Market Value represents prices obtained from various sources, may be impacted by the frequency in which such prices are reported and such prices are not guaranteed. Prices received from pricing vendors are generally based on current market quotes, but when such quotes are not available the pricing vendors use a variety of techniques to estimate value. These estimates, particularly for **fixed income securities**, may be based on certain minimum principal amounts (e.g. \$1 million) and may not reflect all of the factors that affect the value of the security, including liquidity risk. The prices provided are not firm bids or offers. Certain securities may reflect "N/A" or "unavailable" where the price for such security is generally not available from a pricing source. The Market Value of a security, including those priced at par value, may differ from its **CUSTOMER SERVICE:** Please review your statement and report any discrepancies immediately. Inquiries or concerns regarding your brokerage account, or the activity therein should be directed to your broker/dealer at the telephone number and address reflected on the front of this statement and National Financial Services LLC ("NFS") who carries your brokerage account and acts as your custodian for funds and securities deposited with NFS directly by you, through your broker/dealer, or as a result of transactions NFS processes for your account. NFS may be contacted by calling (800) 801-9942. Any oral communications regarding inaccuracies or discrepancies should be reconfirmed in writing to protect your rights, including those under the Securities Investor Protection Act ("SIPA"). When contacting either NFS or your broker/dealer, remember to include your entire brokerage account number to ensure a prompt reply. Please notify the service center or your broker/dealer promptly in writing of any change of address.

ADDITIONAL INFORMATION Customer free credit balances are not segregated and may be used in NFS business, subject to the limitations of 17CFR Section 240.15c3-2 under the Securities and Exchange Act of 1934. You have the right to receive from NFS in the course of normal business operations, subject to open commitments in any of your brokerage accounts, any free credit balances to which you are entitled or any fully paid securities to which you are entitled and any securities purchased on margin upon full payment of any indebtedness to NFS. Interest on free credit balances awaiting reinvestment may be paid out at rates that may vary with current short-term money market rates and/or your brokerage account balances, set at the discretion of your broker/dealer and/or NFS.

Credit Adjustment Program. Accountholders receiving payments in lieu of qualified dividends may not be eligible to receive credit adjustments intended to help cover additional associated federal tax burdens. NFS reserves the right to deny the adjustment to any accountholder and to amend or terminate the credit adjustment program.

Options Customers. Each transaction confirmation previously delivered to you contains full information about commissions and other charges. If you require further information, please contact your broker/dealer.

Assignments of American and European-style options are allocated among customer short positions pursuant to a random allocation procedure, a description of which is available upon request. Short positions in American-style options are liable for assignment at any time. The writer of a European-style option is subject to exercise assignment only during the exercise period. You should advise your broker/dealer promptly of any material change in your investment objectives or financial situation. **Splits, Dividends, and Interest.** Expected stock split, next dividend payable, and next interest payable information has been provided by third parties and may be subject to change. Information for certain securities may be missing if not received from third parties in time for printing. NFS is not responsible for inaccurate, incomplete, or missing information. Please consult your broker/dealer for more information about expected stock split, next dividend payable, and next interest payable for certain securities.

Equity Dividend Reinvestment Customers. Shares credited to your brokerage account, resulted from transactions effected as agent by either: 1) Your broker/dealer for your investment account, or 2) through the Depository Trust Company (DTC) dividend reinvestment program. For broker/dealer effected transactions, the time of the transactions, the exchange upon which these transactions occurred and the name of the person from whom the security was purchased will be furnished upon written request. NFS may have acted as market maker in effecting trades in "over-the-counter" securities.

Retirement Contributions/Distributions. A summary of retirement contributions/distributions is displayed for you in the activity summary section of your statement. **Income Reporting.** NFS reports earnings from investments in Traditional IRAs, Rollover IRAs, SEP-IRAs and Keoghs as tax-deferred income. Earnings from Roth IRAs are reported as tax-free income, since distributions may be tax-free after meeting the 5 year aging requirement and certain other conditions. A **Financial Statement** of NFS is available for your personal inspection at its office or a copy of it will be mailed to you upon your written request.

Statement Mailing. NFS will deliver statements by mail or, if applicable, notify you by e-mail of your statement's availability. If you had transactions that affected your cash balances or security positions held in your account(s) during the last monthly reporting period. At a minimum, all brokerage customers will receive quarterly statements (at least four times per calendar year) as long as their accounts contain a cash or securities balance.

Loads and Fees. In addition to sales loads and 12b-1 fees described in the prospectus, NFS or your

purchase price and may not closely reflect the value at which the security may be sold or purchased based on various market factors. Investment decisions should be made only after consulting your broker/dealer. **Estimated Yield ("EY") and Estimated Annual Income ("EAI")** - When available, the coupon rate of some fixed income securities is divided by the current market value of the fixed income security to create the EY figure and/or the current interest rate or most recently declared dividends for certain securities are annualized to create the EAI figure. EAI and EY are estimates, and the income and yield might by lower or higher. Additionally, estimates may include return of principal or capital gains which would render them overstated. EY reflects only the income generated by an investment, not changes in prices which fluctuate. These figures are based on mathematical calculations of available data, and have been obtained from information providers believed to be reliable, but no assurance can be made as to accuracy. Since the interest and dividend rates are subject to change at any time, and may be affected by current and future economic, political and business conditions, they should not be relied on for making investment, trading decisions, or tax decisions.

broker/dealer receives other compensation in connection with the purchase and/or the on-going maintenance of positions in certain mutual fund shares and other investment products in your brokerage account. This additional compensation may be paid by the mutual fund or other investment product, its investment advisor or one of its affiliates. Additional information about the source(s) and amount(s) of compensation as well as other remuneration received by NFS or your broker/dealer will be furnished to you upon written request. At time of purchase, fund shares may be assigned a transaction fee or no transaction fee status. At time of sale, applicable fees will be based on that status.

Margin. If you have applied for margin privileges and been approved, you may borrow money from NFS in exchange for pledging the assets in your account as collateral for any outstanding margin loan. The amount you may borrow is based on the value of securities in your margin account, which is identified on your statement. If you have a margin account, this is a combined statement of your margin account and special memorandum account other than your non-purpose margin accounts maintained for you under Section 220.5 of Regulation T issued by the Board of Governors of the Federal Reserve Board. The permanent record of the separate account, as required by Regulation T, is available for your inspection upon request.

NVSE and FINRA. All transactions are subject to the constitution, rules, regulations, customs, usages, rulings and interpretations of the exchange market and its clearing house, if any, where the transactions are executed, and of the New York Stock Exchange (NYSE) and of the Financial Industry Regulatory Authority ("FINRA"). The FINRA requires that we notify you in writing of the availability of an investor brochure that includes information describing FINRA Regulation's BrokerCheck Program ("Program"). To obtain a brochure or more information about the Program or FINRA Regulation, contact the FINRA Regulation BrokerCheck Program Hotline at (800) 289-9999 or access the FINRA's web site at www.finra.org.

New York Stock Exchange Rule 382 requires that your broker/dealer and NFS allocate between them certain functions regarding the administration of your brokerage account. The following is a summary of the allocation services performed by your broker/dealer and NFS. A more complete description is available upon request. **Your broker/dealer is responsible for:** (1) obtaining and verifying brokerage account information and documentation, (2) opening, approving and monitoring your brokerage account, (3) transmitting timely and accurate instructions to NFS with respect to your brokerage account, (4) determining the suitability of investment recommendations and advice, (5) operating, and supervising your brokerage account and its own activities in compliance with applicable laws and regulations including compliance with margin rules pertaining to your margin account, if applicable, and (6) maintaining required books and records for the services that it performs.

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Securities in accounts carried by National Financial Services LLC ("NFS") are protected in accordance with the Securities Investor Protection Corporation ("SIPC") up to \$500,000 (including up to \$100,000 for cash awaiting reinvestment). NFS also has arranged for coverage above these limits. Neither coverage protects against a decline in the market value of securities, nor does either coverage extend to certain securities that are considered ineligible for coverage. For more details on SIPC, or to request a SIPC brochure, visit www.sipc.org or call 1-202-371-8300. Bank Deposit Sweep Program funds are SIPC protected until swept to a Program Bank at which time the funds may be eligible for FDIC insurance. Assets Held Away, commodities, unregistered investment contracts, futures accounts and other investments may not be covered. Mutual funds and/or other securities are not backed or guaranteed by any bank, nor are they insured by the FDIC and involve investment risk including possible loss of principal.

End of Statement

090321


MERCANTILE BANK
 7600769077 31

TDMM CABLE FUNDING LLC
 99 PINE STREET
 ALBANY NY 12207

June 10, 2009 - June 30, 2009 Account Number
 REDACTED Page 1 of 2
 No enclosures

FREE BUSINESS CHECKING Summary REDACTED 9077

Previous Balance	+ Deposits Credits	- Checks Debits	- Service Charges	+ Interest Credits	New Balance
0.00	234,000.00	233,892.00	0.00	0.00	108.00

20 Days in Statement Period

Deposits

Date	Description	Amount
06-10	CUSTOMER DEPOSIT	234,000.00
Total Deposits		\$234,000.00

Described Debits

Date	Description	Amount
06-10	WIRE TRANSFER FEE	23.00
06-10	WIRE TRANSFER FEE	23.00
06-10	WIRE TRANSFER FEE	23.00
06-10	WIRE TRANSFER FEE	23.00
06-10	OUTGOING WIRE TRANSFER National Financial Services	160,800.00
06-10	OUTGOING WIRE TRANSFER Matthew Rogers	25,000.00

REDACTED

MERCANTILE BANK

TDMM CABLE JR TR 09 DTD 01/16/09
MCGINN SMITH CAPITAL HOLDINGS CORP-TTEE
99 PINE STREET
ALBANY NY 12207

June 30, 2009 - July 31, 2009

Account Number
REDACTED 4139

Page 1 of 2
1 enclosures

FREE BUSINESS CHECKING

Summary

REDACTED 4139

Previous Balance	+ Deposits Credits	- Checks Debits	- Service Charges	+ Interest Credits	New Balance
90,945.00	175,000.00	265,732.00	0.00	0.00	213.00

31 Days in Statement Period

Deposits

Date	Description	Amount
07-22	INCOMING WIRE TRANSFER RANDALL R SPOHN	75,000.00
07-24	INCOMING WIRE TRANSFER KATINA P SARRIS	25,000.00
07-29	CUSTOMER DEPOSIT	75,000.00
Total Deposits		\$175,000.00

Described Debits

Date	Description	Amount
07-02	DEBIT MEMO	78,500.00
07-02	WIRE TRANSFER FEE	23.00
07-02	OUTGOING WIRE TRANSFER TDMM Cable Sr Trust 09	12,146.00

891005

MERC 000233

TDMM CABLE JR TR 09 DTD 01/16/09
MCGINN SMITH CAPITAL HOLDINGS CORP-TTEE

Account Number REDACTED
D 4139

Page 2 of 2

Described Debits (continued)

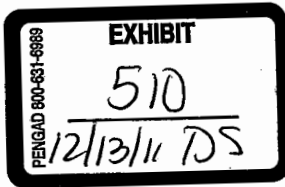
<i>Date</i>	<i>Description</i>	<i>Amount</i>
07-22	WIRE TRANSFER FEE	20.00
07-24	WIRE TRANSFER FEE	20.00
07-30	WIRE TRANSFER FEE	23.00
07-30	OUTGOING WIRE TRANSFER National Financial Services	175,000.00
<i>Total Described Debits</i>		<i>\$265,732.00</i>

Daily Balance Summary

<i>Date</i>	<i>Balance</i>	<i>Date</i>	<i>Balance</i>
06-30 Beginning Balance	90,945.00	07-24	100,236.00
07-02	276.00	07-29	175,236.00
07-22	75,256.00	07-30 Ending Balance	213.00

891006

MERC 000234

**PROMISSORY NOTE**

\$350,000.00

October 3, 2006

FOR VALUE RECEIVED, MATTHEW ROGERS, promises to pay to the order of TDM CABLE FUNDING, LLC or its designee, (the "Payee"), the principal sum of THREE HUNDRED FIFTY THOUSAND AND 00/100 (\$350,000.00) DOLLARS, together with interest on the unpaid principal balance at a per annum rate equal to three (3%) percent, commencing on the date funds are advanced by the Payee to the Maker under the terms of this Note.

1. **Maturity.** Principal and interest are due on October 2, 2012.
2. **Payments.** All payments of principal and interest in respect of this Note shall be made by check payable to Payee at 99 Pine Street, Albany, New York 12207, or at such other place as Payee may designate in writing.
3. **Events of Default.** (a) The following events (herein called "Events of Default") shall constitute events of default under this Note:

(i) Maker shall fail to pay the principal or interest on this Note as provided for herein;

(ii) (A) Maker shall commence any proceeding or other action relating to it in bankruptcy or seek reorganization, arrangement, readjustment of its debts, receivership, dissolution, liquidation, winding-up, composition or any other relief under any bankruptcy law, or under any other insolvency, reorganization, liquidation, dissolution, arrangement, composition, readjustment of debt or any other similar act or law, of any jurisdiction, domestic or foreign, now or hereafter existing; or (B) Maker shall admit the material allegations of any petition or pleading in connection with any such proceeding; or (C) Maker shall apply for, or consent or acquiesce to, the appointment of a receiver, conservator, trustee or similar officer for it or for all or a substantial part of its property; or (D) Maker shall make a general assignment for the benefit of creditors; or

(iii) (A) The commencement of any proceedings or the taking of any other action against Maker in bankruptcy or seeking reorganization, arrangement, readjustment of its debts, liquidation, dissolution, arrangement, composition, or any other relief under any bankruptcy law or any other similar act or law of any jurisdiction, domestic or foreign, now or hereafter existing and the continuance of any of such events for forty-five (45) days undismissed, unbonded or undischarged; or (B) the appointment of a receiver, conservator, trustee or similar officer for the Maker for any of its property and the continuance of any of such events for forty-five (45) days undismissed, unbonded or undischarged; or

(C) the issuance of a warrant of attachment, execution or similar process against any of the property of the Maker and the continuance of such event for forty-five (45) days undismissed, unbonded and undischarged;

In any such event, and in addition to Payee's rights under this Note, Payee at its option and without written notice to Maker, may declare the entire principal amount of this Note then outstanding together with accrued unpaid interest thereon immediately due and payable, and the same shall forthwith become immediately due and payable without presentment, demand, protest, or other notice of any kind, all of which are expressly waived.

4. **Waiver of Demand/Presentment.** The undersigned waives demand, presentment for payment, notice of nonpayment, protest, notice of dishonor and protest, notice of intention to accelerate, notice of acceleration, and all other notices, filing of suit and diligence in collecting this Note and agrees to any substitution, exchange or release of any security or the release of any party liable hereon and further agrees that it will not be necessary for any holder hereof, in order to enforce payment of this Note by it, to first institute suit or exhaust its remedies against any other party, and consents to any extension or postponement of time of payment of this Note or any other indulgence with respect hereto, without notice thereof.

5. **Default Fees and Compensation.** In the event that the Maker fails to comply with the terms and provisions of this Note, including but not limited to the failure to make payment of the any amounts due and owing under this Note, or the occurrence of an Event of Default set forth above, Payee shall be entitled to additional compensation on top of any outstanding principal and interest due on the Note equal to a Five (5%) percent fee on the outstanding balance due and owing by the Maker to the Payee under the terms of the Note.

Any such fee(s) provided for in this paragraph shall be added to the principal amount due under this Note and shall be paid in accordance with the terms and provisions contained herein.

6. **Collection Costs; Attorney's Fees.** In the event this Note is turned over to an attorney for collection, or Payee otherwise seeks advice of an attorney in connection with the exercise or enforcement of its rights hereunder, Maker agrees to pay all reasonable costs of collection, including reasonable attorney's fees and expenses and all out-of-pocket expenses incurred by the Maker in connection with such collection efforts, which amounts may, at Maker's option, be added to the principal hereof.

7. **Obligation to Pay Principal and Interest; Covenants.** No provision of this Note shall alter or impair the obligation of Maker, which is absolute and unconditional, to pay the principal, interest, and any other consideration due and owing on this Note at the place, at the respective times, at the rates, and in the currency herein prescribed.

8. **Voluntary Prepayment.** This Note may be prepaid with no pre-payment penalty to Maker. Interest shall accrue to and include the date on which prepayment is made.

9. **Maker's Representation.**

(a) **Authority.** Maker has all requisite corporate power and authority to enter into this Note. The execution and delivery of this Note has been duly authorized by all necessary corporate action on the part of Maker. This Note has been duly executed and delivered by Maker and constitutes the valid and binding obligation of Maker enforceable against Maker in accordance with its terms.

10. **Miscellaneous.**

10.1. **Benefit.** This Note shall be binding upon and inure to the benefit of the parties hereto and their legal representatives, successors and assigns.

10.2 **Governing Law.** This Note and any dispute, disagreement, or issue of construction or interpretation arising hereunder whether relating to its execution, its validity, the obligations provided therein or performance shall be governed and interpreted according to the law of the State of New York without regard to conflicts of law principles, and Maker agrees that service of process upon it mailed by certified mail to its address shall be deemed in every respect effective service of process upon it in any such suit, action or proceeding.

10.3 **Jurisdiction and Venue.** Maker (i) agrees that any legal suit, action or proceeding arising out of or relating to this Note shall be instituted exclusively in any state or federal court in Albany County in the State of New York, (ii) waives any objection to the venue of any such suit, action or proceeding and the right to assert that such forum is not a convenient forum, and (iii) irrevocably consents to the jurisdiction of the New York State Supreme Court or the United States District Court in Albany County of the State of New York in any such suit, action or proceeding.

10.4 **WAIVER OF JURY TRIAL.** TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, MAKER AND PAYEE HEREBY IRREVOCABLY AND EXPRESSLY WAIVE ALL RIGHT TO A TRIAL BY JURY IN ANY ACTION, PROCEEDING, COUNTERCLAIM (WHETHER BASED UPON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THIS NOTE, OR OTHER DOCUMENTS ENTERED IN CONNECTION HERewith OR THE TRANSACTIONS CONTEMPLATED HEREBY.

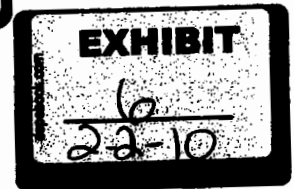
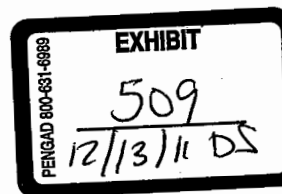
10.5 **Section Headings.** Section headings herein have been inserted for reference only and shall not be deemed to limit or otherwise affect, in any matter, or be deemed to interpret in whole or in part any of the terms or provisions of this Note.

10.6 Survival of Representations, Warranties and Agreements. The representations, warranties and agreements contained herein shall survive the delivery of this Note.

10.7 Severability. In case any one or more of the provisions contained in this Note shall be deemed invalid, illegal, or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

IN WITNESS WHEREOF, this Note has been executed and delivered on the date specified above by the duly authorized representative of the Maker.


Matthew Rogers

**PROMISSORY NOTE**

\$350,000.00

October 2, 2006

FOR VALUE RECEIVED, DAVID L. SMITH, promises to pay to the order of TDM CABLE FUNDING, LLC or its designee, (the "Payee"), the principal sum of THREE HUNDRED FIFTY THOUSAND AND 00/100 (\$350,000.00) DOLLARS, together with interest on the unpaid principal balance at a per annum rate equal to three (3%) percent, commencing on the date funds are advanced by the Payee to the Maker under the terms of this Note.

1. **Maturity.** Principal and interest are due on October 1, 2012.
2. **Payments.** All payments of principal and interest in respect of this Note shall be made by check payable to Payee at 99 Pine Street, Albany, New York 12207, or at such other place as Payee may designate in writing.
3. **Events of Default.** (a) The following events (herein called "Events of Default") shall constitute events of default under this Note:

(i) Maker shall fail to pay the principal or interest on this Note as provided for herein;

(ii) (A) Maker shall commence any proceeding or other action relating to it in bankruptcy or seek reorganization, arrangement, readjustment of its debts, receivership, dissolution, liquidation, winding-up, composition or any other relief under any bankruptcy law, or under any other insolvency, reorganization, liquidation, dissolution, arrangement, composition, readjustment of debt or any other similar act or law, of any jurisdiction, domestic or foreign, now or hereafter existing; or (B) Maker shall admit the material allegations of any petition or pleading in connection with any such proceeding; or (C) Maker shall apply for, or consent or acquiesce to, the appointment of a receiver, conservator, trustee or similar officer for it or for all or a substantial part of its property; or (D) Maker shall make a general assignment for the benefit of creditors; or

(iii) (A) The commencement of any proceedings or the taking of any other action against Maker in bankruptcy or seeking reorganization, arrangement, readjustment of its debts, liquidation, dissolution, arrangement, composition, or any other relief under any bankruptcy law or any other similar act or law of any jurisdiction, domestic or foreign, now or hereafter existing and the continuance of any of such events for forty-five (45) days undismissed, unbonded or undischarged; or (B) the appointment of a receiver, conservator, trustee or similar officer for the Maker for any of its property and the continuance of any of such events for forty-five (45) days undismissed, unbonded or undischarged; or

(C) the issuance of a warrant of attachment, execution or similar process against any of the property of the Maker and the continuance of such event for forty-five (45) days undismissed, unbonded and undischarged;

In any such event, and in addition to Payee's rights under this Note, Payee at its option and without written notice to Maker, may declare the entire principal amount of this Note then outstanding together with accrued unpaid interest thereon immediately due and payable, and the same shall forthwith become immediately due and payable without presentment, demand, protest, or other notice of any kind, all of which are expressly waived.

4. **Waiver of Demand/Presentment.** The undersigned waives demand, presentment for payment, notice of nonpayment, protest, notice of dishonor and protest, notice of intention to accelerate, notice of acceleration, and all other notices, filing of suit and diligence in collecting this Note and agrees to any substitution, exchange or release of any security or the release of any party liable hereon and further agrees that it will not be necessary for any holder hereof, in order to enforce payment of this Note by it, to first institute suit or exhaust its remedies against any other party, and consents to any extension or postponement of time of payment of this Note or any other indulgence with respect hereto, without notice thereof.

5. **Default Fees and Compensation.** In the event that the Maker fails to comply with the terms and provisions of this Note, including but not limited to the failure to make payment of the any amounts due and owing under this Note, or the occurrence of an Event of Default set forth above, Payee shall be entitled to additional compensation on top of any outstanding principal and interest due on the Note equal to a Five (5%) percent fee on the outstanding balance due and owing by the Maker to the Payee under the terms of the Note.

Any such fee(s) provided for in this paragraph shall be added to the principal amount due under this Note and shall be paid in accordance with the terms and provisions contained herein.

6. **Collection Costs; Attorney's Fees.** In the event this Note is turned over to an attorney for collection, or Payee otherwise seeks advice of an attorney in connection with the exercise or enforcement of its rights hereunder, Maker agrees to pay all reasonable costs of collection, including reasonable attorney's fees and expenses and all out-of-pocket expenses incurred by the Maker in connection with such collection efforts, which amounts may, at Maker's option, be added to the principal hereof.

7. **Obligation to Pay Principal and Interest; Covenants.** No provision of this Note shall alter or impair the obligation of Maker, which is absolute and unconditional, to pay the principal, interest, and any other consideration due and owing on this Note at the place, at the respective times, at the rates, and in the currency herein prescribed.

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9. **Maker's Representation.**

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10. **Miscellaneous.**

10.1. **Benefit.** This Note shall be binding upon and inure to the benefit of the parties hereto and their legal representatives, successors and assigns.

10.2 **Governing Law.** This Note and any dispute, disagreement, or issue of construction or interpretation arising hereunder whether relating to its execution, its validity, the obligations provided therein or performance shall be governed and interpreted according to the law of the State of New York without regard to conflicts of law principles, and Maker agrees that service of process upon it mailed by certified mail to its address shall be deemed in every respect effective service of process upon it in any such suit, action or proceeding.

10.3 **Jurisdiction and Venue.** Maker (i) agrees that any legal suit, action or proceeding arising out of or relating to this Note shall be instituted exclusively in any state or federal court in Albany County in the State of New York, (ii) waives any objection to the venue of any such suit, action or proceeding and the right to assert that such forum is not a convenient forum, and (iii) irrevocably consents to the jurisdiction of the New York State Supreme Court or the United States District Court in Albany County of the State of New York in any such suit, action or proceeding.

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10.5 **Section Headings.** Section headings herein have been inserted for reference only and shall not be deemed to limit or otherwise affect, in any matter, or be deemed to interpret in whole or in part any of the terms or provisions of this Note.

10.6 **Survival of Representations, Warranties and Agreements.** The representations, warranties and agreements contained herein shall survive the delivery of this Note.

10.7 **Severability.** In case any one or more of the provisions contained in this Note shall be deemed invalid, illegal, or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

IN WITNESS WHEREOF, this Note has been executed and delivered on the date specified above by the duly authorized representative of the Maker.


David L. Smith

10 Civ. 457 (GLS/DRH)

**SECOND AMENDED
COMPLAINT**

JURY TRIAL DEMANDED

Plaintiff Securities and Exchange Commission (the “Commission”) for its second amended complaint against McGinn, Smith & Co., Inc. (“MS & Co.”), McGinn, Smith Advisors, LLC (“MS Advisors”), McGinn, Smith Capital Holdings Corp. (“MS Capital”), First Advisory Income Notes, LLC (“FAIN”), First Excelsior Income Notes, LLC (“FEIN”), First Independent Income Notes, LLC (“FIIN”), Third Albany Income Notes, LLC (“TAIN”) (FIIN, FEIN, FAIN and TAIN are referred to collectively herein as the “Four Funds”), Timothy M. McGinn (“McGinn”), David L. Smith (“Smith”), Lynn A. Smith (“L. Smith”), Geoffrey R. Smith (“G. Smith”), Individually and as Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (the “Smith Trust”), Lauren T. Smith (“L.T. Smith”), and Nancy McGinn (“N. McGinn”), Defendants, and L. Smith and N. McGinn, Relief Defendants, alleges as follows:

SUMMARY OF ALLEGATIONS

1. This action arises from a fraud orchestrated by defendants McGinn, Smith and entities they control. From at least 2003 through April 2010, McGinn and Smith used MS & Co., a registered broker-dealer and investment adviser, MS Advisors, an investment adviser, and MS Capital, as well as dozens of affiliated entities they own or control (collectively, “the McGinn Smith Entities”), to raise over \$136 million in more than 20 unregistered debt offerings. The debt offerings, including the Four Funds and numerous trust entities (the “Trusts”), have been sold to more than 900 investors. The offering fraud already has caused significant investor losses, and this emergency action is intended to stop the fraud and preserve the status quo for the benefit of the victims.

2. McGinn, Smith, MS & Co., MS Advisors and MS Capital deceived investors in the Four Funds. They told investors that their money would be invested and that the McGinn Smith Entities’ profits would depend on the spread between the cost of the investment and the

rate of return. Instead, the Defendants secretly funneled investor money to entities they owned or controlled, even though this was not permitted by offering materials. Defendants concealed from investors the truth about the Four Funds, including the fact that investor money was being routed to in-house entities controlled by Smith and McGinn and to other non-public and illiquid investments, and that these actions were having a disastrous impact on the investors.

3. In addition to the Four Funds, Smith and McGinn directed a series of smaller-scale offerings, primarily through various Trusts. The Trusts also were used as vehicles to funnel investor funds to various companies controlled by Smith and McGinn, contrary to the terms of the Private Placement Memoranda (PPMs). Investor money raised in offerings for the Trusts was routinely diverted to other McGinn Smith Entities as liquidity needs of the enterprise dictated. The Defendants also used offering proceeds to make unauthorized investments in and unsecured loans to speculative, financially troubled McGinn Smith Entities, to make MS & Co.'s payroll, to pay commission and transaction fees to McGinn Smith Entities, to make interest payments to investors in other entities, to support McGinn's and Smith's lifestyles, and to procure strippers for a "sexually themed" cruise.

4. During the period of the fraud, Smith and McGinn transferred substantial assets, including houses, cash and stock, with an intent to shield those assets from creditors.

5. The fraud has had a devastating impact on the investors. In 2009, Smith and McGinn received e-mails telling them the investors were wondering "if they've bought into a Ponzi Scheme," and a MS&Co. broker reported to McGinn and Smith that there are "many people who refer to our deals as a Ponzi Scheme."

6. As of September 2009, it appears that investors in the Four Funds were owed at least \$84 million, that the Four Funds had less than \$500,000 in cash on hand, and that their

remaining assets were worth only a small fraction of the amount owed to investors. Similarly, the Trusts have a negative equity of approximately \$18 million, and have never had the ability to pay the interest rates promoted to investors and also pay back principal. Nonetheless, McGinn and Smith continued to raise money from investors, using similar misrepresentations. During the first few months of 2010, contrary to representations to investors, McGinn and Smith continued to drain what little cash remained through payment of “fees” to themselves.

PROCEDURAL HISTORY

7. On April 20, 2010, in order to halt the ongoing fraud, maintain the status quo and preserve assets for injured investors, the Commission filed a Complaint and Order to Show Cause seeking emergency relief. At 2:00 p.m. on April 20, 2010, the Court granted the Commission’s application for emergency relief and entered an Order freezing assets of the defendants and the relief defendant, L. Smith, including a brokerage account in the name of the Smith Trust; appointing a Receiver over the McGinn Smith Entities; and requiring the defendants and the relief defendant to produce verified accountings. The Order to Show Cause also provided for expedited discovery and scheduled a hearing on the Commission’s motion for a preliminary injunction.

8. On May 28, 2010, the Smith Trust filed a motion to intervene for the limited purpose of asking the Court to lift the temporary restraining order and asset freeze as it related to the Smith Trust’s brokerage account. On June 1, 2010, the Smith Trust’s motion to intervene was granted.

9. Smith and McGinn consented to the preliminary injunction freezing their assets, and the Receiver consented as to the remaining defendants. The Smith Trust and L. Smith, however, opposed entry of the preliminary injunction.

10. On June 9, 10 and 11, 2010, following six weeks of discovery focusing on the Smith Trust and the Smiths' assets, the Court conducted a hearing on the Commission's motion for a preliminary injunction, and the motions of L. Smith and the Smith Trust to lift the asset freeze over their assets. During the hearing, the Court heard testimony from, among others, L. Smith, G. Smith, and David Wojeski, who had been named as Trustee when the original Trustee, Thomas Urbelis, resigned shortly after the Complaint was filed. Urbelis also testified at the hearing by way of deposition. L. Smith, G. Smith, Wojeski and Urbelis testified at the June 2010 hearing that the Smith Trust was nothing more than a simple family trust created by David and Lynn Smith for the sole purpose of benefitting their two children.

11. On July 7, 2010, the Court issued a memorandum-decision and order ("MDO I") that granted in part the Commission's motion for a preliminary injunction, and denied L. Smith's motion. As to the Smith Trust, the Court found that the Commission had not demonstrated that David Smith controlled the Trust or was the beneficial owner of the Trust; therefore, MDO I vacated the asset freeze as to the Trust.

12. On July 22, 2010, the Court entered the Preliminary Injunction Order.

13. On August 3, 2010, the Commission filed an Amended Complaint, motion for reconsideration of MDO I, and an application for emergency relief requesting that the Court, among other relief, again freeze the assets of the Smith Trust, based upon a previously undisclosed "Private Annuity Agreement" between David and Lynn Smith and the Smith Trust that gave the Smiths an interest in the assets of the Smith Trust.

14. On November 22, 2010, the Court issued a memorandum-decision and order ("MDO II") granting the Commission's motion for reconsideration of MDO I, and further finding that the Commission demonstrated a substantial likelihood of success of proving that

David and Lynn Smith created the Smith Trust and Annuity Agreement to avoid gift and capital gains taxes; and that David Smith maintained control of the Smith Trust to insure that the annuity payments back to the Smiths would be made. MDO II also found evidence of fraud, misrepresentation, and misconduct by those associated with the Trust in failing to disclose the Annuity Agreement. Accordingly, the Commission's motion for a preliminary injunction as to the Smith Trust was granted.

15. On December 1, 2010, following the submission of an emergency motion by the Commission, the Court issued a memorandum-decision and order finding that in September and October 2010, McGinn engaged in a fraudulent securities offering through an entity named Security Alarm Credit, LLC, and that this offering included misrepresentations and omissions of material facts. The Court enjoined the offering; enjoined McGinn from proceeding with any offering without prior Court approval; and found McGinn in contempt of the Preliminary Injunction Order.

VIOLATIONS

By virtue of the conduct alleged herein:

16. MS & Co., MS Advisors, MS Capital, McGinn and Smith, directly or indirectly, singly or in concert, have engaged and, unless restrained and enjoined will continue to engage in acts, practices, schemes and courses of business that constitute violations of Section 17(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. § 77q(a)] and Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder[17 C.F.R. § 240.10b-5];

17. MS & Co., MS Advisors, McGinn and Smith directly or indirectly, singly or in concert, have engaged and, unless restrained and enjoined, will continue to engage in acts,

practices, schemes and courses of business that constitute violations of Sections 206(1), 206(2) and 206(4) of the Investment Advisers Act of 1940 (the “Advisers Act”) [15 U.S.C. §§ 80b-6(1)(2) and (6)] and Rule 206(4)-8 thereunder [17 C.F.R. §275.206(4)-8];

18. FAIN, FEIN, FIIN and TAIN have violated and, unless restrained and enjoined, will continue to violate Section 7(a) of the Investment Company Act of 1940 (“Company Act”) [15 U.S.C. § 80a-7];

19. MS & Co., MS Capital, FAIN, FEIN, FIIN, and TAIN, McGinn and Smith directly or indirectly, singly or in concert, have violated and, unless restrained and enjoined, will continue to violate Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. § 77e];

20. MS & Co. violated and, unless restrained and enjoined, will continue to violate Section 15(c) (1) of the Exchange Act [15 U.S.C. § 78(o)(1)] and Rule 10b-3 [17 C.F.R. § 240.10b-3], and McGinn and Smith have aided and abetted such violation;

21. The fraudulent conveyance defendants – Smith, L. Smith, G. Smith, L.T. Smith, the Smith Trust, McGinn and N. McGinn – conveyed certain property with actual intent to hinder, delay or defraud either present or future creditors, or received such property, in violation of N.Y. Debtor & Creditor Law (“NYDCL”) Section 276.

22. L. Smith and N. McGinn, as relief defendants, have received and retained ill-gotten gains from defendants’ fraud.

JURISDICTION AND VENUE

23. The Commission brings this action pursuant to the authority conferred upon it by Section 20(b) of the Securities Act [15 U.S.C. § 77t(b)], Section 21(d)(1) of the Exchange Act [15 U.S.C. § 78u(d)(1)], Section 209(d) of the Advisers Act, [15 U.S.C. §80b-9(d)] and Section

42(d) of the Company Act [15 U.S.C. §80a-41(d)]. The fraudulent conveyance claim is brought under Section 276 of the NYDCL.

24. The Commission seeks final judgments: (i) restraining and permanently enjoining McGinn, Smith, MS & Co., MS Advisors, MS Capital, and the Four Funds from engaging in the acts, practices and courses of business respectively alleged against them herein; (ii) ordering McGinn, Smith, MS & Co., MS Advisors, MS Capital, the Four Funds, L. Smith and N. McGinn to disgorge any ill-gotten gains and to pay prejudgment interest thereon, jointly and severally; (iii) prohibiting McGinn from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. §78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. §78o(d)]; and (iv) imposing civil money penalties on certain defendants pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)], Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)], Section 209(e) of the Advisers Act [15 U.S.C. § 80b-9(e)], and Section 42(e) of the Company Act [15 U.S.C. § 80a-41(e)].

25. As to the fraudulent conveyance claim, the Commission seeks to have the fraudulent conveyances voided pursuant to Sections 276 and 278 of the NYDCL and to recover the property fraudulently conveyed or its equivalent value (and for attorneys' fees pursuant to Section 276-a of the NYDCL).

26. This Court has jurisdiction over this action pursuant to Sections 20(b) and 22(a) of the Securities Act [15 U.S.C. §§ 77t(b) and 77v(a)], Sections 21(e) and 27 of the Exchange Act [15 U.S.C. §§ 78u(e) and 78aa], Sections 42 and 44 of the Company Act [15 U.S.C. §§ 80a-41 and 80a-43] and Sections 209 and 214 of the Advisers Act [15 U.S.C. §§ 80b-9 and 80b-14].

This Court has jurisdiction over the fraudulent conveyance claim pursuant to 28 U.S.C. § 1345 and the Court's ancillary and/or supplemental jurisdiction.

27. Venue lies in the Northern District of New York, pursuant to Section 22 (a) of the Securities Act [15 U.S.C. § 77v(a)], Section 27 of the Exchange Act [15 U.S.C. § 78aa], Section 44 of the Company Act [15 U.S.C. § 80a-43] and Section 214 of the Advisers Act [15 U.S.C. § 80b-14]. The Defendants directly or indirectly, singly or in concert, have made use of the means and instrumentalities of interstate commerce, or of the mails, in connection with the transactions, acts, practices, and courses of business alleged herein. Certain of these transactions, acts, practices, and courses of business occurred in the Northern District of New York. For example, the main offices of MS & Co., MS Advisors, MS Capital, the Four Funds, and the various Trusts were located in Albany, New York and McGinn and Smith transacted business at those offices.

DEFENDANTS AND RELIEF DEFENDANTS

28. **Timothy M. McGinn,** ^{REDACTED}, is a resident of Schenectady, New York. He is the chairman, secretary, and co-owner of MS & Co. as well as treasurer and indirect co-owner of MS Advisors. From 2003 to 2006, McGinn served as Chief Executive Officer of Integrated Alarm Services Group, Inc. ("IASG"), a publicly traded company. He left IASG and returned to MS & Co. in the fall of 2006.

29. **David L. Smith,** ^{REDACTED}, is a resident of Saratoga Springs, New York. He is the president of MS & Co. and the managing member of MS Advisors. Until 2007, Smith also was the chief compliance officer of MS & Co. Smith owns about 50% of MS & Co. and about 50% of MS Advisors.

30. **McGinn, Smith & Co., Inc. ("MS & Co."),** a registered broker-dealer and New York corporation founded in 1981 by Smith and McGinn, has its principal place of business at

99 Pine Street, Albany, NY. It is currently owned by Smith (50%), McGinn (30%), another partner (“Partner 3”) (about 15%) and a fourth partner (“Partner 4”) (about 5%). In April 2009, MS & Co. registered with the Commission as an investment adviser, and replaced MS Advisors as the adviser to the Funds. Throughout 2009, MS & Co. had about 53 employees, including about 35 registered representatives, and branch offices in Clifton Park, Manhattan and Boca Raton. On December 24, 2009, MS & Co. filed a partial BD-W in connection with winding down much of its broker-dealer business. On March 9, 2010, it also withdrew its investment adviser registration.

31. **McGinn Smith Advisors, LLC (“MS Advisors”)** is a New York corporation with its principal place of business at 99 Pine Street, Albany, New York. MS Advisors is a wholly-owned subsidiary of McGinn, Smith Holdings LLC, which is owned 50% by Smith, 30% by McGinn and 20% by MS Partners. MS Advisors was registered as an investment advisor with the Commission from January 3, 2006 to April 24, 2009. It was the investment adviser to all of the Funds until April 2009, when it was replaced by MS & Co.

32. **McGinn, Smith Capital Holdings Corp. (“MS Capital”)** is a New York corporation with its principal place of business at 99 Pine Street, Albany, New York. It is owned by MS Holdings LLC (52%), McGinn (24%) and Smith (24%). It is the indenture trustee for the Funds and the trustee for all the Trusts created between 2006 and 2009. Smith is president and McGinn is chairman of the board.

33. **First Independent Income Notes LLC (“FIIN”); First Equity Income Notes LLC (“FEIN”); First Albany Income Notes LLC (“FAIN”) and Third Albany Income Notes LLC (“TAIN”)** are New York corporations and unregistered investment companies with

their principal places of business at 99 Pine Street, Albany, New York. They are wholly-owned by MS Advisors.

34. **Geoffrey R. Smith,** ^{REDACTED}, a resident of New York, New York, is the son of Smith and L. Smith, and a beneficiary of the Smith Trust. G. Smith is also the Trustee of the Smith Trust. G. Smith became Trustee when he was substituted for the prior trustee, David M. Wojeski, on February 14, 2011. Wojeski was named as Trustee when the original Trustee, Thomas Urbelis, resigned on April 22, 2010.

35. **Lauren T. Smith,** ^{REDACTED}, a resident of Aspen, Colorado, is the daughter of Smith and L. Smith, and a beneficiary of the Smith Trust.

36. **Lynn A. Smith,** ^{REDACTED}, is the wife of Smith and a resident of Saratoga Springs, New York.

37. **Nancy McGinn,** ^{REDACTED}, is the wife of McGinn and a resident of Schenectady, New York.

FACTS

38. McGinn and Smith founded MS & Co. in 1980 and the firm registered as a broker-dealer in 1981. McGinn sold 40% of his interest in MS & Co. to Partner 3 in 2003 when he became the chief executive officer of IASG, but he returned to MS & Co. in 2006. Since then, he and Smith have actively controlled virtually every aspect of the McGinn Smith Entities' operations.

The Four Funds

39. Between September 2003 and October 2005, MS Advisors formed FAIN, FEIN, FIIN and TAIN. MS Advisors held 100% of the membership interest in each Fund and was their sole managing member. MS Advisors also served as investment adviser to the Four Funds.

Smith was responsible for the majority of the investment decisions for the Funds. Among other functions, McGinn served as signatory on behalf of various McGinn Smith Entities that received loans from the Funds.

40. MS & Co. acted as the placement agent for debt offerings by the Four Funds, raising a total of approximately \$90 million. MS Capital served as Trustee and Servicing Agent for each of the Four Funds. The Funds each had between 150 and 300 investors.

41. Each Fund invested more than 40% of its assets in securities. MS & Co. was required to, but did not, register each of the Funds as investment companies.

42. The terms of the offerings by the Four Funds, as disclosed in their “Confidential Private Placement Memoranda (“PPMs”), are summarized below:

OFFERING	DATE OF PPM	AGGREGATE PRINCIPAL AMOUNT	TYPES OF NOTES SOLD
FIIN	Sept. 15, 2003	\$20 million	5% Secured Senior Notes due 2004 7.5% Secured Senior Subordinated Notes due 2008 10.25% Secured Junior Notes due 2008
FEIN	Jan. 16, 2004	\$20 million	5% Secured Senior Notes due 2005 7.5% Secured Senior Subordinated Notes due 2007 10.25% Secured Junior Notes due 2009
TAIN	Nov. 1, 2004	\$30 million	5.75% Secured Senior Notes due 2005 7.75% Secured Senior Subordinated Notes due 2007 10.25% Secured Junior Notes due 2009
FAIN	Oct. 1, 2005	\$20 million	6% Secured Senior Notes due 2005 7.75% Secured Senior Subordinated Notes due 2007 10.25% Secured Junior Notes due 2010

43. Each note holder was entitled to quarterly interest payments. The Secured Senior Subordinated and Secured Junior Note holders' rights to payments were subordinated to the rights of the Senior Secured Note holders.

44. The PPMs contained essentially identical disclosures, terms and conditions. They were prepared at Smith's direction and were reviewed by him for accuracy prior to commencement of each offering. Each PPM disclosed that the issuer was:

formed to identify and acquire various public and/or private investments, which may include, without limitation, debt securities, collateralized debt obligations, bonds, equity securities, trust preferreds, collateralized stock, convertible stock, bridge loans, leases, mortgages, equipment leases, securitized cash flow instruments, and any other investments that may add value to our portfolio. . . .

45. Although the PPMs include broad disclosures about the risks of investing in the Four Funds, the disclosures regarding potential affiliated transactions, aside from payment of fees and commissions to affiliates, was limited to the following language:

[The Fund] may acquire Investments from our managing member or an affiliate of our managing member that has purchased the Investments. If the Investment is purchased from our managing member or any affiliate, we will not pay above the price paid by our managing member or such affiliate for the Investment, other than to reimburse our managing member or such affiliate for its costs and any discounts that it may have received by virtue of a special arrangement or relationship. In other words, if we purchase an Investment from our managing member or any of its affiliates, we will pay the same price for the Investment that we would have paid if we had purchased the Investment directly. We may also purchase securities from issuers in offerings for which McGinn, Smith & Co., is acting as underwriter or placement agent and for which McGinn, Smith & Co. will receive a commission.

46. The PPMs did not disclose that the Four Funds would make any loans to, transfers, or investments in, affiliated entities.

47. The Four Funds increasingly made unauthorized loans and transfers to and investments in affiliated McGinn Smith Entities. By September 2009, approximately one-half of all of the Four Funds' assets had been loaned to or invested in affiliated, often cash poor and

financially desperate McGinn Smith Entities. The PPMs suggested that the Four Funds were created to identify and invest in a wide spectrum of public and private investments that would “add value to our portfolio.” In fact, the Four Funds served the more limited purpose of loaning or investing the majority of their funds in financially troubled McGinn Smith Entities. Only about \$3.6 million of the approximately \$106 million raised by the Four Funds was invested in liquid, publicly traded companies.

48. The PPMs did not disclose that most of the McGinn Smith Entities were illiquid, had little or no revenues, or were in poor financial condition when they received the proceeds from the Four Fund offerings. The investments appear to have been preceded by little due diligence (none of which was done by persons independent of MS & Co.). The investments were generally dictated by liquidity needs of the McGinn Smith Entities.

49. For example, between 2005 and 2007, MS Advisors caused three of the Four Funds to loan nearly \$8 million to alseT IP, a start-up entity partly owned and managed by Partner 3. At least \$700,000 of those loans was immediately transferred to Partner 3 as salary. AlseT never made a penny, and never repaid any of the loans. By December 2007, an internal MS & Co. email shows that the chief financial officer placed the value of the Four Funds’ loans to alseT at zero. Nonetheless, MS Advisors caused two of the Four Funds to “loan” alseT an additional \$250,000 in February 2008, so that alseT could make additional payments to certain individuals.

50. By no later than 2006, McGinn, Smith, MS & Co., MS Advisors, MS Capital and the Four Funds knew or recklessly disregarded that the Four Funds could not redeem investor notes when they became due. For example, on December 21, 2006, an MS & Co. employee sent an email to Smith telling him that a TAIN investor wanted to redeem \$100,000 in TAIN notes

due December 15, 2006 and purchase \$100,000 in one of the Trusts (TDM 9.25%). Smith replied that the broker “needs to replace the \$100,000 before doing the trade.” He continued: “I am running on fumes with all of these redemptions and cannot afford any more.”

51. By the end of 2007, each of the Four Funds had already paid out millions more than the Four Funds had received in income from investments. As of September 30, 2009, since inception the Four Funds had revenues of only \$12.9 million and spent a total of \$37 million, for a combined total loss from operations of \$24 million.

52. By the end of 2007, the Four Funds’ assets were worth a fraction of the amount owed to investors. According to an analysis in December 2007 by MS & Co.’s then-chief financial officer, the combined “book value” of the Four Funds was then only \$69,384,870 compared to total notes payable of \$86,046,000. Moreover, the CFO calculated that the “net realizable” amount in the Four Funds combined as only \$37,160,299, nearly \$48.9 million less than the amount owed to investors. Nonetheless, the Four Funds continued to raise money from investors without disclosing these facts.

Additional Misrepresentations and Omissions

53. On January 13, 2005, Smith wrote to a prospective investor that the purpose of TAIN “is to make investments, primarily in the form of secured loans, to private and public entities for purposes that include acquisition, equipment purchases, receivable financing and general corporate growth.” At the time Smith wrote this letter, TAIN had made three investments. Only one of those three investments was secured, a loan for only \$830,000 out of a total of \$13.1 million in outstanding investments.

54. Smith steered another investor away from investing in blue chip stocks like General Electric as too risky, and told him that the Four Funds’ private placements were safer investments.

55. On July 6, 2004, an MS & Co. broker told a prospective investor that:

The [FEIN] Notes represent a basket of asset backed securities with substantial cash flow, a history of performance and limited liquidity in the marketplace. The portfolio includes securities from both the public and private sector. Asset classes consist of bonds, notes, preferred stock, leases, mortgages, limited partnerships, and securitized cash flow instruments. Our most active market of ideas comes from small private placements (\$25 - \$50 million) offered by investment banks primarily to institutional investors. We take comfort in these ideas due to the fact that these offerings are usually proceeded [sic] with substantial due diligence, scrutinized by product and industry professionals, and underwritten by top-tier investment banking firms with an ongoing capability to assist with additional capital if necessary. . . . I feel this investment is a great way for you to earn an attractive yield while minimizing risk.

56. In fact, the “basket” of securities in which FEIN invested consisted mostly of promissory notes from MS & Co. affiliates that did not have “substantial cash flow” or “a history of performance.” There is no evidence that any of the investments in FEIN resulted from “small private placements . . . offered by investment banks primarily to institutional investors.” There is no evidence of any “due diligence,” “scrutin[y] by product and industry professionals,” or underwriting by “top-tier investment banking firms” for any of the investments made by the Four Funds at any time.

57. In addition, MS & Co. did not provide other investors with the relevant PPMs prior to their investments.

58. In order to maintain sufficient monies in the Four Funds to continue to make interest payments, MS & Co. encouraged investors to rollover their notes when they became due. As a result, McGinn, Smith, and MS & Co., and other entities were able to use what was, in effect, principal, to continue to make periodic interest payments.

Four Funds Restructuring

59. By as early as 2007, McGinn and 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.

60. In January 2008, Smith sent a letter to certain investors in the Four Funds stating that the Four Funds had run into difficulty, which he falsely and misleadingly blamed as "primarily on liquidity" caused by the subprime crisis. In April 2008, Smith sent a second letter informing Four Fund investors that the problems cited in the January letter have "become more acute" and that, because two investments had eliminated their dividends or ceased distributions, the Four Funds were "forced" to eliminate the interest payments to Secured Junior Notes holders for the quarter. The letter also noted that MS Advisors had been advised by counsel that "distributions at this time quite probably reflect a return of capital and not interest, and therefore distributions at this time might be considered an invasion of principal due to the Senior and Senior Subordinated Note holders. This is a result of not knowing how and where to price our investments in these very illiquid markets."

61. In October 2008, Smith sent a letter to all Four Funds' note holders that falsely and misleadingly blamed the financial condition of the Four Funds on, among other things, the "current condition of the financial credit markets" and "financial crisis." It further stated that "the lack of liquidity in the credit markets . . . is the major issue that impacts your investment in the [Funds]."

62. These statements by Smith were false or misleading. The letters did not mention that affiliates of MS & Co., many of which were insolvent, owed the Four Funds tens of millions of dollars. These letters also omitted the material information that the value of the Four Funds'

assets was only 50 % or less of the amount owed investors, and falsely suggested that note holders had a reasonable prospect of eventually receiving their principal, pursuant to the restructuring plans.

63. The purported restructuring plan extended the maturity dates of the notes, some until 2023, and unilaterally reduced interest payments for all the note tranches. Since the 2008 restructuring, MS Advisors has made only reduced interest payments to the Secured Senior Note holders.

64. Smith also misrepresented that MS & Co. and the McGinn Smith Entities would be making their own “sacrifices” and would “forfeit” all annual fees and commissions as part of the note restructuring to “improve liquidity.” In fact, MS & Co. received approximately \$700,000 in fees in 2009 and \$275,000 in fees in 2010, after this letter was sent.

65. Notwithstanding the insolvency of the Four Funds, MS & Co. continued to sell and rollover investors’ notes in these Four Funds, including junior notes. Internal MS & Co. documents show new and rollover investments, including investments by customers of Smith, of at least \$736,500 in 2008 and \$130,500 in 2009. The firm apparently used these new investments in part to permit certain preferred investors to cash out.

66. Despite the dire condition of the Four Funds, Smith and McGinn and MS Advisors continued to divert the remaining moneys in the Four Funds to other financially troubled McGinn Smith Entities, such as Cruise Charter Ventures LLC (“CCV”) and TDM Luxury Cruise Trust 07 (“TDM Luxury”).

67. The PPMs also stated that the notes were being offered only to “accredited investors.” By MS & Co.’s own records, however, the Four Funds each had many unaccredited investors. According to MS & Co.’s records, as of March 20, 2006, FAIN had 30 unaccredited

investors; FEIN had 46 unaccredited investors; FIIN had 31 unaccredited investors; and TAIN had 75 unaccredited investors.

THE TRUST OFFERINGS

68. Between 2006 and 2009, MS & Co. acted as placement agent for: four Firstline Jr. and Sr. Trusts 07 offerings (“Firstline Trusts”), TDM Cable Trust 06 (“TDM Cable 06”), TDM Luxury Cruise Trust 07 (“TDM Cruise”), TDM Verifier Trust 07 (“Verifier 07”), TDM Verifier Trust 08 (“Verifier 08”); Cruise Charter Venture Trust 08 (“CCV Trust”), Fortress Trust 08 (“Fortress Trust”), Integrated Excellence Jr. and Sr. Trusts 08, TDM Cable Trust 08; TDM Verifier Trust 09; TDMM Benchmark Trust 09 (“Benchmark 09”), TDMM Cable Jr. and Sr. Trusts 09 (“TDMM Cable 09”), TDM Verifier Trust 07R; and TDM Verifier Trust 08R and other offerings, including affiliate McGinn Smith Transaction Funding Corp. (“MSTF”).

69. The Trusts issued one or more tranches of notes and promoted interest rates ranging from 7.75 % to 13% *per annum*. Maturity dates varied from approximately 15 months to five years from the date of the offering.

70. Many of the Trusts were created to loan the offering proceeds, minus placement agent fees, to another McGinn Smith Entity (“the Conduit Entity”), which would then use those funds, minus substantial additional fees, to purchase specific contracts or receivables from a third entity, such as contracts for burglar alarm services or “triple play” (broadband, cable and telephone) services, or luxury cruise charters. The Trusts were generally left with only a promissory note and a “security” interest in the assets to be purchased by the Conduit Entity.

71. The Declaration of Trust typically defined “Permitted Investments” to mean a “promissory note” evidencing a loan from the Trust to the particular Conduit Entity. In addition, to the extent not employed for the loan from the Trust to the Conduit Entity, the Declaration permitted

temporary investments limited to (1) certificates of deposit; (2) regularly traded short term AAA rated debt obligations; or (3) U.S. Treasury obligations.

The PPMs Misled Investors as to the True Purpose of the Trusts

72. The true purpose of the Trusts was to structure a series of transactions that would allow various McGinn Smith Entities to siphon off millions of dollars in transaction fees and commissions and to serve the interest of McGinn Smith Entities, not the Trust investors. MS & Co. extracted enormous fees from these Trust deals, which were not clearly disclosed in the PPMs. The Trusts typically paid placement agent fees to MS & Co. of 5% to 9.5%. When the Trusts transferred funds to the Conduit Entity, that entity paid large fees to MS & Co. that were variously characterized as, among other things, “trust administration fees,” “acquisition costs,” “investment banking fees,” “legal fees,” and “due diligence fees.” Those fees were sometimes as much as 20% or more of the gross proceeds of the offering.

73. Although many of these fees were disclosed in the Trust PPMs, the PPMs failed to disclose that certain of these fees, commissions or transaction costs overstated the true market value of the services performed, were unnecessary or were paid for services not performed or not performed with the customary degree of professional care and due diligence.

74. The PPMs also failed to disclose that, contrary to the terms of the Trust PPMs, large portions of the proceeds would be diverted to financially struggling McGinn Smith Entities, commingled with the offering proceeds of other Trusts, used to pay interest and principal to investors in other Trusts and to keep the financially failing McGinn Smith fraud scheme afloat.

75. While the Trust PPMs often disclosed that there “was a high degree of risk” associated with the investment, the PPMs failed to disclose that it was virtually certain that the Trusts would not be able to meet their obligations to pay the promised interest payments or to

repay principal, given the large percentage of proceeds siphoned off in commissions and transaction fees by McGinn Smith Entities before any investments were made, combined with unauthorized loans to affiliated entities.

76. McGinn and Smith have fraudulently maintained the illusion of success by funding interest payments with principal raised in other Trust offerings, at the expense of these investors. The following examples demonstrate how the Trusts have been used to benefit the McGinn Smith Entities, at the expense of Trust investors.

Benchmark 09 Trust PPM Misrepresented How Proceeds Would Be Used

77. On about July 27, 2009, MS & Co. launched an offering for the Benchmark 09 Trust. The PPM states that approximately \$1,950,000 of the \$3 million raised would be loaned to TDMM Cable Funding, which would use the loan proceeds to purchase the operating assets and “triple play” contracts of Benchmark LLC. TDMM Cable Funding would then purportedly use the earnings from this investment in Benchmark LLC to repay principal and interest due on the loan from the Benchmark 09 Trust.

78. According to the PPM, MS & Co.’s fees and expenses would total \$1,050,000, or 34% of the offering proceeds.

79. Contrary to the representations in the PPM, the net proceeds of the offering were used for many unauthorized purposes. For example, notwithstanding the PPM’s representation that money loaned by the Trust to TDMM Cable Funding would be used to acquire the assets of Benchmark LLC, McGinn directed that some of the money in the TDMM Cable Funding account be diverted to affiliated entities, including TDM Cable 06 and TDM Verifier 07 and TDMM Cable Sr Trust. Those funds were presumably used to pay “interest” to the various Trusts investors.

80. The Benchmark 09 Trust promised investors 10.5% interest on the notes, with a maturity date of five years. Given that defendants took 34% of the proceeds to themselves in fees and diverted additional monies to affiliated entities in unauthorized transfers, their representation that investors would be repaid out of the investment in Benchmark LLC was false, and McGinn, Smith, MS & Co. and MS Capital knew, or recklessly disregarded, that this representation was false. Nevertheless, McGinn continued to personally raise money for this offering as recently as December 10, 2009.

The TDMM Cable Trust 09

81. On January 19, 2009, MS & Co. launched an offering of \$1,550,000 of 9.00% three-year notes in TDMM Cable Senior Trust 09 (“Senior 09 Tranche”) and an offering of \$1,325,000 of 11% 54-month notes in TDMM Cable Junior Trust 09 (“Junior 09 Tranche,” collectively “TDMM Cable 09”). The Senior and Junior offerings sold out.

82. The PPM stated that after MS & Co. took a placement agent fee of 5% of the amount raised for Senior 09 Tranche and 8% of the amount raised for Junior 09 Tranche, the balance, about \$2.7 million, would be loaned to TDM Cable Funding, which would use the proceeds to acquire all the operating assets and customer contracts of Broadband Solutions LLC and HipNET LLC (both of which purportedly provided “triple play” service to communities in Florida). The PPMs also state that TDM Cable Funding would pay MS & Co. an additional \$400,000 for “acquisition negotiations, legal and due diligence activities”-- making MS & Co.’s total fee \$583,500 or 20.3% of the gross proceeds of the offering.

83. Not satisfied with the disclosed fees, MS & Co. used a total of at least 54% of the funds raised to: (i) make payments to McGinn, McGinn’s son, Smith, relief defendant L. Smith, MS Partner 4 and an Albany politician; (ii) to cover MS & Co.’s payroll between January and

April 2009; and (iii) to pay investors in other Trust entities. The following is a summary of McGinn's misuse use of TDMM Cable 09 investor funds:

84. During January 2009, MS & Co. raised the first \$554,000 from investors for the Senior 09 Tranche. On January 30, 2009, McGinn transferred \$475,000 from the Trust to TDM Cable Funding, and transferred \$413,000 from the TDM Cable Funding to MS & Co., where it was immediately used to cover the firm's payroll.

85. In February 2009, McGinn again transferred large sums of money from the TDMM Cable Senior Trust account to TDM Cable Funding and then to MS & Co to make MS & Co.'s mid-February and end of February payroll. The following months, McGinn again transferred substantial amounts from the TDMM Cable 09 Trust accounts to MS & Co. to cover the March 31 and April 30 payrolls.

86. McGinn also transferred a total of at least \$99,000 to McGinn's personal account; more than \$21,000 to McGinn's son (apparently a lawyer who worked for MS & Co.); more than \$105,000 to a MS & Co. affiliate called Mr. Cranberry; \$18,750 to an Albany politician's law firm; at least \$70,000 to MSTF; \$26,500 to Verifier 07; \$10,000 to Firstline Trust; \$25,000 to a senior MS & Co. officer \$24,000 to Smith; and more than \$335,000 to Smith's wife, relief defendant L. Smith.

87. The transfers described above total \$1,646,040 -- nearly three times the fees to which MS & Co. Entities were entitled pursuant to the PPMs, and more than half of the gross offering proceeds.

The Verifier 08 Trust

88. In December 2007, MS & Co. launched an offering for the TDM Verifier 08 Trust. Verifier 08 offered up to \$3.85 million in 18-month notes and 36-month notes, with returns of 8.5% and 10%, respectively. The offering sold out.

89. The PPM represented that the net proceeds of the Trust, \$3,484,500, (after subtraction of MS and Co. 9.5% fee of \$365,750) were to be “advanced” by the Trust to McGinn Smith Funding LLC (“MS Funding”) for the purpose of purchasing \$3,000,000 face value of “guaranteed payment units” issued by Verifier Capital LLC, a company that “provides capital to security alarm dealers by purchasing some or all of their security alarm monitoring accounts.” A senior managing director of MS & Co. was the Chairman and 12.5% owner of Verifier Capital LLC.

90. The Trust has had to borrow money from other McGinn Smith Entities to make its scheduled interest payments.

91. Verifier 08 investors were deceived about the success of the Verifier 08 Trust with the first quarterly “interest” payment, which was actually a return of investor capital.

92. Thereafter, in order to make quarterly interest payments to Verifier 08 investors, the Verifier 08 Trust repeatedly borrowed funds from other McGinn Smith Entities. Furthermore, despite having income insufficient to make interest payments to investors, the Trust made numerous unauthorized loans to other McGinn Smith Entities.

The CCV Trust

93. McGinn, MS Capital and MS & Co. also deceived investors into unwittingly investing in a sexually-oriented charter cruise venture created by McGinn. In February 2008, MS & Co. launched a \$3,250,000 note offering for an entity 50% owned by an MS & Co.

affiliate called CCV. The PPM stated that CCV “is engaged in the business of procuring whole ship charters and selling the berths to various affinity groups.” The PPM stated that the net proceeds of the offering would be used to charter a ship and to “underwrite the marketing, sales and administrative expenses associated with selling [the] berths for the cruise.”

94. The PPM did not disclose that CCV operated under the name YOLO (You Only Live Once) Cruises, that the affinity group was sexually oriented, that strippers and go-go dancers would be procured to entertain passengers, that investor money would be used to buy insurance for these individuals and that YOLO was run by a woman with whom McGinn was romantically involved.

95. The PPM failed to disclose that instead of marketing charters to an unlimited variety of “affinity groups” as represented, the charters would only be marketed to a narrow niche of potential customers interested in cruises “involving sexually themed activities among and between consenting adults” (as belatedly disclosed in a PPM for a later offering) and that the charters would involve legally and morally questionable activities that investors might not want to be associated with.

96. McGinn was the managing member of CCV. He was involved in its day-to-day operations and was keenly interested in the activities aboard the cruise. McGinn “borrowed” from other Trusts and Funds to fund CCV.

97. Even though CCV lost \$1.5 million during its first 17 months of operation, McGinn and Smith nonetheless enriched themselves. CCV transferred at least \$50,000 to Smith, \$75,000 to McGinn, and paid at least \$245,000 to MS & Co. in “advisory fees.” CCV also paid McGinn’s son (an attorney and MS & Co. employee) \$7,240 for “consulting.” Between July 2008 and November 2009, CCV also transferred to McGinn more than \$156,000, purportedly to

pay credit card charges related to meals, travel and other expenses; and in June 2009, CCV transferred more than \$32,000 to White Glove Cruises, a Florida company managed by McGinn.

98. The CCV Trust also promised investors a 13% rate of interest on their notes, even though the Trust was to earn its investment return by loaning the money to CCV, which was obligated to pay back interest to the CCV Trust of only 10%.

The CCV Trust (2nd PPM)

99. In 2009, MS & Co. conducted a second CCV offering of \$400,000 raised from just three investors. The PPM falsely and misleadingly stated that CCV's loss for the period February 1, 2008 through June 2009 was \$870,000. In fact, MS & Co.'s internal books and records show a loss of nearly \$1.5 million during that period.

The Firstline Trusts

100. Firstline Trusts raised a total of \$7 million in 2007. According to the Firstline Trust 07 Junior PPM, dated October 19, 2007, the Firstline Trusts were created to acquire a tranche of financing secured by contracts owned or originated by Firstline Security, Inc., a security alarm company. In January 2008, Firstline Security filed for bankruptcy. Nonetheless, MS & Co. continued to sell notes in this offering without disclosing the bankruptcy filing to investors.

101. A December 7, 2009 email to McGinn reveals that Firstline loaned another McGinn Smith affiliated entity, known as Mr. Cranberry, more than \$2.27 million. Mr. Cranberry does not appear to be involved in the security alarm business.

MS & Co. Did Not Disclose that the Proceeds Would Be Commingled

102. A common feature of most of the Trust offerings was that the proceeds -- rather than being directly invested -- were "loaned" to an intermediate entity, most often TDM Cable

Funding (*see, e.g.* Verifier 07 (for the purchase of alarm contract receivables); TDM Luxury (luxury cabin cruise receivables); and TDM Cable 06 and TDMM Cable 09 Junior and Senior (triple play receivables)). However, instead of using the proceeds for the stated purpose, Smith and McGinn diverted the proceeds as needed to meet the cash needs of other McGinn Smith Entities.

103. As alleged above, on several occasions, McGinn transferred funds raised in the TDMM Cable 09 offerings to TDM Cable Funding, and then transferred those funds to MS & Co. for payroll.

**McGinn and Smith Have Taken Large Personal
“Loans” from Various McGinn Smith Entities**

104. McGinn, Smith and another senior MS & Co. employee frequently received substantial “loans” from the McGinn Smith Entities. Between October 2006 and October 2009, TDM Cable Funding “loaned” McGinn \$830,341, Smith \$694,000, and the senior MS & Co. employee \$563,000, for a total of nearly \$2.1 million. None of these loans has been repaid, and it does not appear that any interest has ever been paid.

105. McGinn and Smith each took a \$200,000 loan from the Firstline Trust. Firstline Securities filed for bankruptcy a few months after the four Firstline offerings raised about \$7 million. Although Firstline Trust investors are owed \$5.9 million, McGinn and Smith have not repaid the loans.

106. McGinn also authorized the following additional personal loans, none of which were evidenced by loan documentation: (i) from NEI, a McGinn Smith Entity, to Smith totaling \$360,000, to the senior MS & Co. employee totaling \$285,000 and to McGinn totaling \$340,000; and (ii) from TDMM Cable Funding to Smith totaling \$74,000, to the senior MS & Co. employee totaling \$25,000 and to McGinn totaling \$82,500.

McGinn and Smith Submitted Backdated Documents to FINRA

107. While under investigation by FINRA, McGinn, Smith and MS & Co. submitted numerous backdated promissory notes after FINRA requested loan documentation during its exam.

The Misuse of Funds and Deception Became More Desperate

108. The audited financial statements for MS & Co. for 2008 state that the firm had a loss of more than \$1.8 million, and includes a “going concern” clause. Virtually every day in 2009, McGinn obtained from his accounting staff a summary of the cash available in the bank accounts controlled by MS & Co., and a report of the immediate “funding needs.” The documentary evidence reveals a constant movement of money among dozens of MS & Co. affiliates and scores of bank accounts, designed to use any cash available to satisfy the most pressing funding needs – primarily the firm’s payroll, and payments to the personal accounts of McGinn and Smith, along with interest payments and redemption requests by investors threatening to complain to authorities.

109. Internal MS & Co. emails in 2009, including many by McGinn and Smith, reveal a constant need to raise millions of dollars, a growing desperation to make payroll, meet interest payments and assuage investors complaining of a Ponzi scheme, in order to keep their house of cards from collapsing. For example, on February 24, 2009, Smith emailed McGinn regarding an upcoming payroll. He stated: “We have been living on the edge for some time and Tim’s deals have kept us alive by fronting our profit. However, the \$200,000 + that we are losing every month is just too difficult to keep pace with.” On February 25, 2009, another MS & Co. Partner 3 emailed Smith: “In our many conversations over the last year, I came to understand the depths to which the firm has sunk relative to its revenue.” The liquidity problems were so severe that one

outside broker was forced to invest \$10,000 of his own money so one of his elderly customers could be redeemed.

110. Notwithstanding these financial woes, McGinn and Smith continued to solicit investors for the Four Funds and the Trusts throughout 2009 and into 2010, using the original Fund and Trust PPMs. In Smith's testimony provided to FINRA on February 12, 2010, Smith stated that MS & Co. continues to raise funds from new investors.

MS & Co. Has Paid for Luxuries for Smith and McGinn

111. From at least January 2004, MS & Co. made monthly payments on two cars for Smith (a Lexus and a Mercedes) totaling more than \$89,000, including payments of about \$17,000 in each of 2007 and 2008. MS & Co. made monthly payments on McGinn's behalf to exclusive country clubs, including the Schuyler Meadows Club, the Fort Orange Club and the Pine Tree Golf Club. In 2007 and 2008 alone, those payments totaled more than \$22,000.

Transfers to L. Smith and N. McGinn Without Consideration

112. L. Smith received more than \$1.8 million from Smith and the McGinn Smith Entities during the period of the fraud. For example, L. Smith received \$375,000 in December 2007; \$325,000 in June and July 2009; \$100,000 in March 2010; and \$185,000 in October 2006 and May 2007. L. Smith received many other payments from McGinn Smith Entities.

113. L. Smith provided no consideration for these transfers.

114. L. Smith maintained a brokerage account at MS & Co. which in 2010 was transferred to NFS/RMR Capital Management (the "Stock Account"). Smith exercised beneficial ownership and unfettered control over the Stock Account for at least fifteen years. L. Smith allowed Smith, McGinn and the McGinn Smith Entities to draw upon the Stock Account for business and personal needs without restrictions, and the Stock Account served as a de facto

financing arm for Smith and McGinn and the McGinn Smith Entities during the period of the fraud. L. Smith allowed Smith to use the Stock Account as a personal line of credit to further his personal and professional interests. Internal e-mails during the period of the fraud show McGinn Smith employees freely transferring money into and out of the Stock Account, which contained ill-gotten gains.

115. 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. 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. 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. The Charter One stock also continued to appreciate during this time. During the period from August 1999 to September 2002, the Smiths 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. By the end of September 2002, the Stock Account had 105,000 shares of Charter One stock worth over \$3 million.

116. Smith and L. Smith used the Charter One stock to further their business interests. 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, a McGinn Smith Entity.

117. 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. Smith, as the treasurer of KC Acquisition Corp., signed the letter authorizing the transfer of shares back to L. Smith.

118. Smith also deposited significant personal assets into the Stock Account, including cash of \$38,430, the proceeds of a trust amounting to \$326,304, and a note receivable totaling \$410,000.

119. In an e-mail dated January 14, 2009 from Smith to McGinn, Smith stated that “Lynn and I have to shift money around between us.”

120. In 2009, when an investigation by the Financial Industry Regulatory Authority (FINRA) into MS & Co. commenced, and as Smith and McGinn learned that they and their firm were named as Respondents in a number of FINRA arbitrations filed by investors, Smith and L. Smith began moving assets that had been jointly held into solely L. Smith’s name.

121. In mid-2009, L. Smith opened up a checking account in her name for the first time and began depositing assets into this account which had previously been deposited into a joint account, including Smith’s paychecks. These transfers were without consideration.

122. At the same time, a house in Vero Beach, Florida was transferred to L. Smith after being previously held in joint ownership. This transfer was without consideration.

123. From 2003 through March 2010, McGinn made numerous cash transfers from McGinn’s account to an account in the name of N. McGinn. These transfers were without consideration.

Fraudulent Transfer to the Smith Trust

124. Smith and L. Smith created the Smith Trust pursuant to a Declaration of Trust dated August 4, 2004. Smith and L. Smith are the grantors of the Smith Trust. The named beneficiaries are their children, LT. Smith and G. Smith, who are REDACTED old, respectively.

125. The Smith Trust had no assets when it was created. On August 31, 2004, Smith and L. Smith entered into the Annuity Agreement with the Smith Trust. Under the agreement, Smith and L. Smith agreed to sell 100,000 shares of Charter One stock to the Smith Trust in exchange for annuity payments from the Smith Trust of \$489,932 per year from September 26, 2015 until the last to die of Smith and L. Smith. The agreement states that the payment amount of \$489,932 is derived from an annuity interest rate of 4.6% per annum. Both Smith and L. Smith signed the agreement with the Smith Trust.

126. A separate one-page document entitled "Private Annuity" dated September 7, 2004 set forth a joint life expectancy for Smith and L. Smith of 31 years. The Smiths therefore have a joint life expectancy of 20 years from the date the payment obligations are scheduled to begin in September 2015. The annual payment of \$489,932, if paid out over the 20-year joint life expectancy, would therefore entitle Smith and/or L. Smith to receive payments of approximately \$10 million from the Smith Trust.

127. 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. Smith and L. Smith knew, therefore, that their Charter One stock would be converted to cash as a result of the buy-out. The deal was completed on August 31, 2004.

128. On September 1, 2004, 100,000 shares of Charter One stock was transferred from the Stock Account to the Smith Trust account. At the time of this transfer, the fair market value of the Charter One stock was approximately \$4.45 million.

129. On the same day that the 100,000 shares were transferred from the Stock Account to the Smith Trust account on September 1, 2004, the cash merger occurred, resulting in the Smith Trust account being credited with \$4,450,000 in cash.

130. G. Smith and L.T. Smith, the named beneficiaries, never received a distribution from the Smith Trust from its creation until April 15, 2010, when G. Smith requested a distribution of \$95,000, which he testified was to give to his parents to pay their personal taxes. The funds were transferred directly from the Smith Trust to L. Smith's checking account.

131. When they transferred the Charter One stock to the Smith Trust account, Smith and L. Smith had the intent to hinder, delay or defraud present or future creditors. Their intent is shown by the following evidence:

132. First, at the time of the transfer, the FIIN and FEIN fraudulent offerings were well underway. The FIIN offering dated September 15, 2003 and the FEIN offering dated January 16, 2004 each raised \$20 million from investors, for a total of \$40 million. The private placement memoranda for both offerings did not permit investments in affiliates but Smith from the beginning invested with affiliates. Accordingly, as of December 31, 2003, 11% of the investments were with affiliates, and this grew to 32% by December 31, 2004. Smith therefore knew that he would likely become liable to the defrauded investors and/or to the Commission as a result of his ongoing violations of the federal securities laws.

133. In addition, at the time of the transfer to the Smith Trust, the liabilities of FIIN and FEIN far exceeded their assets; as a result, Smith knew that he would be unable to meet the payment obligations of these Funds to investors.

134. Second, at the time of the transfer, Smith was aware of the consequences of committing fraud and that his actions would result in significant financial loss. In a lengthy, undated, handwritten "personal confession" to McGinn, Smith wrote that:

The business has become addicted to the cash flow from the trust business, and without that we will have a difficult time surviving. . . . The default of the trusts will drastically reduce revenues, cause us to lose brokers and at least their confidence in us, bring on crushing litigation and devastating

publicity and I am convinced prosecution by regulators or worse. . . . I am overwhelmed by the thought of the financial losses, the humiliation, the perceived betrayal of trust. . . . I, unlike you, feel that we are vulnerable to criminal prosecution. . . .

[W]e are now in possession of indisputable empirical evidence that the new investments have no chance of ever being repaid in full. . . . For us not to allow for these deficits by setting up adequate reserves is, in my judgment, bordering on fraud, certainly, by not disclosing in the prospectus our poor history of collections, we are not providing the prospective investors an accurate picture of his risk. We both know why we don't make that disclosure – because such disclosure would cause our salesman to cease selling and investors to cease buying. Thus, we are misleading both our own employees and customers. . . . This is wrong. I strongly believe that in civil or criminal litigation we would lose badly on this point. . . .

[B]oth you and I are violating the high standards of integrity and ethics that have been the historical standard for us. That bothers me very very much. But what terrifies me is the possibility of being indicted for such conduct, and worse, the prospect of conviction. I cannot emphasize enough how strongly I feel about this point.

135. Third, in December 2003, Smith, L. Smith, McGinn, MS & Co. and other entities controlled by Smith and 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.). A focus of the factual allegations in this complaint was two \$3 million loans by L. Smith to certain entities to facilitate a public offering of a company affiliated with Smith and McGinn. The Stock Account was used to make these loans. The complaint asserted 23 causes of action and sought \$3 million in damages for each claim. Upon information and belief, the case was settled in the spring of 2004 by the payment of \$200,000 to the plaintiff.

136. Fourth, as early as May 4, 2004, when the impending buy-out of Charter One was announced, Smith and L. Smith knew that the value of their stock holdings would increase substantially and would become cash as of the closing of the merger, which would result in

approximately \$4.5 million in cash in the Stock Account. The Smiths waited until the day of the buy-out before selling the stock to the Trust account pursuant to the Annuity Agreement. On that day, through a merger, the 100,000 shares of stock was converted into approximately \$4.5 million in cash. The creation of the Smith Trust and the transfer of the stock through the Annuity Agreement therefore served to shelter this large sum of cash.

137. Fifth, in 2003 and early 2004 the Broker-Dealer Inspection Program (“BDIP”) of the SEC conducted an examination of MS & Co. In a letter to Smith from the BDIP dated February 26, 2004, Smith was put on notice of various “deficiencies and/or violations of law.”

138. Finally, Smith and L. Smith concealed the existence of the Annuity Agreement when questions arose in 2010 in this matter regarding their assets, the Smith Trust, and the circumstances surrounding the transfer of the Charter One stock to the Smith Trust.

Additional Fraudulent Transfers

139. Smith and McGinn made other fraudulent transfers with an intent to hinder, delay or defraud creditors, as follows:

140. Pursuant to a deed dated October 19, 2009, McGinn transferred title to a house, located at **REDACTED** Niskayuna, New York, to N. McGinn, for consideration of “less than \$100.00.”

141. In 2009, Smith and L. Smith transferred title to a house in Vero Beach, Florida, which had been jointly held, to L. Smith.

142. In 2009, Smith and L. Smith caused a joint checking account at Bank of America to be transferred to L. Smith.

143. In July 2010, funds that had been fraudulently conveyed to the Smith Trust were transferred to G. Smith and L.T. Smith and others.

Fraudulent Transfers from the Smith Trust to G. Smith, L.T. Smith and L. Smith

144. On April 20, 2010, Plaintiff moved for a preliminary injunction which, *inter alia*, sought to freeze the assets of the Smith Trust.

145. To persuade the Court to unfreeze \$3.5 million in assets held by the Smith Trust, the then-trustee (David Wojeski), prior trustee (Thomas Urbelis), counsel for the Smith Trust (Jill Dunn), L. Smith and G. Smith misrepresented the nature and purpose of the Smith Trust and concealed the existence of the Annuity Agreement.

146. Wojeski, Urbelis, L. Smith, Dunn and G. Smith characterized the Smith Trust as a trust created solely to benefit G. Smith and L.T. Smith without disclosing that the Trust was created to pay a substantial annuity in the future to Smith and L. Smith. In fact, the Smith Trust was created as a vehicle to protect and preserve the assets of the Smiths from present and future creditors.

147. Following a hearing, on July 7, 2010, prior to the disclosure of the Annuity Agreement, the Court in MDO I vacated the asset freeze as to the Smith Trust.

148. Approximately \$944,848 was disbursed from the Smith Trust bank account from July 7, 2010 through August 3, 2010, when the Smith Trust was re-frozen. Those disbursements include the following:

149. L. Smith directly received \$449,878 directly from the Smith Trust in exchange for title to property on Great Sacandaga Lake (the "Lake Property") that had been held in L. Smith's name, and indirectly received \$150,000 through Geoffrey and Lauren Smith (down payment for Lake Property).

150. G. Smith received \$296,500, including \$75,000 that he gave to L. Smith as a down payment on the purchase by the Smith Trust of the Lake Property, and \$200,000, a

purported “investment” by the Smith Trust in a company G. Smith created, Capacity One Management LLC.

151. L.T. Smith received \$83,500, including \$75,000 that she gave to L. Smith as a down payment on the purchase of the Lake Property.

152. Jill Dunn, counsel for the Smith Trust, received \$101,096.

153. Wojeski, the trustee of the Smith Trust from May 2010 through January 2011, received \$13,874, including \$5,775.50 reimbursement for fees paid to title company and \$8,098.50 for trustee fees.

154. On August 3, 2010, the Court again froze the Smith Trust assets after Plaintiff filed a motion upon discovery of the Annuity Agreement which had been concealed by individuals affiliated with the Smith Trust.

155. Between July 7 to August 3, 2010, when it transferred approximately \$944,848 to G. Smith, L.T. Smith, L. Smith and others, the Smith Trust had the intent to hinder, delay or defraud present or future creditors. The Trust, through its Trustees, the beneficiaries, and others knew that the order in MDO I vacating the freeze as to the Smith Trust was obtained through fraud and misrepresentation. Their intent is shown by the following evidence:

156. First, the individuals affiliated with the Smith Trust, including the Trustees, the beneficiaries and L. Smith, knew but concealed the existence of the smoking-gun Annuity Agreement and concealed the fact that the Smith Trust was obligated to pay a substantial annuity to Smith and L. Smith.

157. Second, the prior trustee, Thomas Urbelis, was a party to the Annuity Agreement, had a copy of that agreement in his possession, knew that the Smith Trust was required to pay millions of dollars to the Smiths beginning in 2015, and knew that the Charter

One stock was sold to the Smith Trust in exchange for the annuity, not donated. Yet he failed to disclose any of these facts during his deposition in response to questions requiring disclosure and failed to produce the Annuity Agreement in response to a document request.

158. Third, Jill Dunn, counsel for the Smith Trust, knew that the Smith Trust was a “private annuity trust” and knew that there was a separate agreement creating the private annuity. Yet she filed a memorandum of law and declarations from Wojeski and L. Smith that she knew or recklessly disregarded were false, elicited testimony that was tailored to conceal the truth by implying that the “transfer” of stock was a gift, not a sale, and falsely stated to the Court that L. Smith had relinquished any and all interest whatsoever in the assets of the Smith Trust.

159. Finally, Wojeski, trustee at the time of the 2010 transfers, had a fiduciary duty to identify any obligation of the Trust, such as the Annuity Agreement. Wojeski, moreover, was required to conduct due diligence because he gave sworn oral and written testimony to the Court as the Trustee and legal representative of the Smith Trust. Wojeski nevertheless knew or recklessly disregarded that the Charter One stock was not donated but sold to the Trust in exchange for annuity payments and knew or recklessly disregarded that the Trust was contractually obligated to pay most or all of its assets back to Smith and L. Smith. Wojeski also testified that Smith and L. Smith had no interest in the Smith Trust, described the transfer of stock as a gift rather than as a purchase and sale, and failed to disclose that the Smith Trust was contractually obligated to pay its assets back to Smith and L. Smith.

160. Between July 7 to August 3, 2010, when L. Smith received \$449,878.00 directly from the Smith Trust and \$150,000 indirectly through her children, L. Smith had the intent to hinder, delay or defraud present or future creditors because she knew that the Court’s July 7,

2010 order unfreezing the Trust Assets was obtained through fraud and misrepresentation. Her intent is shown by the following evidence:

161. L. Smith was the donor of the Smith Trust and a party to the Annuity Agreement and thus knew that she and Smith had a right to receive millions in annuity payments from the Smith Trust. Yet L. Smith failed to disclose the Annuity Agreement in response to a document demand, submitted a false statement of assets and two false affidavits in May 2010 disclaiming her interest in the Smith Trust, and testified falsely during her deposition and in the preliminary injunction hearing.

162. Between July 7 and August 3, 2010, when G. Smith and L.T. Smith received over \$350,000.00 from the Smith Trust, they had the intent to hinder, delay or defraud present or future creditors because they knew that MDO I, which vacated the freeze as to the Trust, was obtained through fraud and misrepresentation. Their intent is shown by the following evidence which constitute “badges of fraud” with regard to the fraudulent conveyance claim:

163. First, G. Smith and L.T. Smith were told of the existence of the Smith Trust shortly after it was created in 2004; therefore, they knew or should have known that the true intent of the Trust was to pay a substantial annuity in the future to Smith and L. Smith pursuant to the Annuity Agreement.

164. Second, on or about Thanksgiving 2004, Smith discussed the Smith Trust with G. Smith and provided him with the trust agreement.

165. Third, on or shortly after Thanksgiving 2004, G. Smith had informed L.T. Smith that they were the named beneficiaries of the Smith Trust containing approximately \$4,000,000.00 set up by their parents.

166. Fourth, the conduct of G. Smith and L.T. Smith from 2004 through 2010 demonstrates their knowledge that the Trust was created not for their benefit but rather to hide the assets of their parents, David and Lynn Smith. For example, G. Smith and L.T. Smith never requested or received any distribution from the Smith Trust from its creation in 2004 through April 14, 2010, even though G. Smith had been working to start his own company since at least October 2009 and L.T. Smith was unemployed for a year during the 2008-2010 time period.

167. Fifth, from 2004 to 2010, G. Smith and L.T. Smith periodically received financial support directly from Smith and L. Smith rather than taking any distributions from the Smith Trust. Smith and L. Smith also paid the Smith Trust's taxes directly from their accounts rather than allowing the Smith Trust to pay its own tax liabilities. Upon information and belief, Smith and L. Smith undertook these actions to preserve the Trust assets and their interest in annuity payments.

168. Sixth, G. Smith and L.T. Smith knew or should have known that Smith made the investment decisions for the Smith Trust and received all of the trust account statements.

169. Seventh, the only distribution of Smith Trust assets to its stated beneficiaries before July 7, 2010 occurred on April 15, 2010, when G. Smith requested a distribution of \$95,000, which he gave to Smith and L. Smith to pay their personal taxes. The funds were transferred directly from the Smith Trust to L. Smith's checking account.

170. Eighth, the close family relationship between Smith, L. Smith, G. Smith and L.T. Smith, and Urbelis, who was a close family friend, is another of the badges of fraud.

171. Ninth, G. Smith and L.T. Smith knew that Smith faced substantial liability to creditors as a result of this action brought by the SEC, various FINRA arbitrations, and other

complaints by investors, and that the Court had frozen assets held by Smith or jointly held by Smith and L. Smith.

172. Tenth, G. Smith and L.T. Smith knew that the Smith Trust had been subject to the asset freeze in this matter and that substantial effort was undertaken in order to release the assets of the Smith Trust from the asset freeze.

173. Eleventh, with knowledge of falsity or reckless disregard of the truth, G. Smith testified at the preliminary injunction hearing that from 2004 onward he believed that the trust assets were owned by him and L.T. Smith equally, while failing to mention his parents' interest in annuity payments from the Smith Trust.

174. Twelfth, when the Smith Trust assets were released from the asset freeze, almost \$600,000 of the total amount distributed was provided to L. Smith, purportedly in exchange for the Lake Property. This transaction provided cash to L. Smith in exchange for the only other significant asset owned by Smith or L. Smith that was not subject to the asset freeze. L. Smith appears to have paid \$115,000 from these funds to her counsel.

175. Finally, upon information and belief, no independent appraisal or valuation of the Lake Property was completed before it was sold to the Smith Trust, and Smith, L. Smith, G. Smith and L.T. Smith have continued to share possession, benefit and use of the Lake Property.

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. Paragraphs 1 through 175 are realleged and incorporated by reference as if set forth fully herein.

177. The Fund and Trust certificates and notes are securities within the meaning of Section 2(1) of the Securities Act [15 U.S.C. § 77b(1) and Section 3(a)(10) of the Exchange Act [15 U.S.C. § 78c(a)(10)].

178. From at least 2005 through the present, MS & Co., MS Advisors, MS Capital, McGinn, and Smith, directly or indirectly, singly or in concert, by use of the means or instruments of transportation or communication in, or the means or instrumentalities of, interstate commerce or by the use of the mails, in connection with the offer or sale of securities, knowingly or recklessly: a) employed, are employing or are about to employ devices, schemes and artifices to defraud; b) have obtained, are obtaining or are about to obtain money and property by means of untrue statements of material fact or omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or c) have engaged, are engaging or are about to engage in transactions, practices or courses of business which have operated, operate or will operate as a fraud and deceit upon investors.

179. By reason of the foregoing, MS & Co., MS Advisors, MS Capital, McGinn, and Smith, directly or indirectly, singly or in concert, have violated, are violating , and unless restrained and enjoined will again Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)].

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. Paragraphs 1 through 175 are realleged and incorporated by reference as if set forth fully herein.

181. From at least 2005 through the present, the MS & Co., MS Advisors, MS Capital, McGinn, and Smith, directly or indirectly, singly or in concert, by use of the means or

instruments of transportation or communication in, or the means or instrumentalities of, interstate commerce or by the use of the mails, in connection with the offer or sale of securities, knowingly or recklessly: a) employed, are employing or are about to employ devices, schemes and artifices to defraud; b) have obtained, are obtaining or are about to obtain money and property by means of untrue statements of material fact or omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and/or c) have engaged, are engaging or are about to engage in transactions, practices or courses of business which have operated, operate or will operate as a fraud and deceit upon investors.

182. By reason of the activities herein described, the MS & Co., MS Advisors, MS Capital, McGinn, and Smith, singly or in concert, directly or indirectly, have violated, are violating, and unless restrained and enjoined will again violate Section 10(b) of the Exchange Act [15 U.S.C. §§78j(b)] and Rule 10b-5 [17 C.F.R. §240.10b-5] promulgated thereunder.

THIRD CLAIM FOR RELIEF
Violations, and Aiding and Abetting Violations, of
Section 15(c)(1) Of The Exchange Act, 15 U.S.C. §78o(c)(1), and
Rule 10b-3, 17 C.F.R. §240.10b-3
(Against MS & Co. and aiding and abetting by McGinn and Smith)
(Violations of Antifraud Provisions by Brokers)

183. Paragraphs 1 through 175 are realleged and incorporated by reference as if set forth fully herein.

184. MS & Co. engaged and is engaging in the business of effecting transactions in securities for the accounts of others, and therefore was and is a broker within the meaning of Section 3(a)(4) of the Exchange Act, 15 U.S.C. §78c(a)(4).

185. MS & Co., while a broker, directly or indirectly, by use of the mails or the means or instrumentalities of interstate commerce, has effected and is effecting transactions in, and has

induced and attempted to induce and are attempting to induce the purchase or sale of, securities by means of manipulative, deceptive, or other fraudulent devices or contrivances, including: (a) acts, practices, and courses of business that operated or would have operated as a fraud or deceit upon any person, including persons to whom MS & Co. offered and/or sold securities; and (b) making untrue statements of material fact and omissions to state a material fact necessary, in order to make the statements made, in light of the circumstances under which they were made, not misleading with knowledge or reasonable grounds to believe that such statements are untrue or misleading.

186. As part of and in furtherance of this violative conduct, MS & Co. offered and/or sold securities by making the material misrepresentations and omissions set forth herein.

187. MS & Co. knew, was reckless in not knowing, or had reasonable grounds to believe that said representations or omissions were false or misleading.

188. By reason of the foregoing, MS & Co. has violated, is violating, and unless restrained and enjoined, will again violate Section 15(c)(1) of the Exchange Act, 15 U.S.C. §78o(c)(1), and Rule 10b-3, 17 C.F.R. §240.10b-3.

189. To the extent McGinn and Smith were associated with MS & Co., and not acting brokers unassociated with a registered broker-dealer, McGinn and Smith each aided and abetted, and, unless restrained and enjoined, will again aid and abet, MS & Co's violations of Section 15(c)(1) of the Exchange Act, 15 U.S.C. §78o(c)(1), and Rule 10b-3, 17 C.F.R. §240.10b-3.

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. Paragraphs 1 through 175 are realleged and incorporated and incorporated by reference as if set forth fully herein.

191. From at least 2005 through the present, MS & Co. and MS Advisors, by use of the means or instrumentalities of interstate commerce or of the mails, and while engaged in the business of advising others for compensation as to the advisability of investing in, purchasing, or selling securities: (a) employed devices, schemes, and artifices to defraud; and (b) engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon clients or prospective clients.

192. By reason of the foregoing, MS & Co. and MS Advisors, singly or in concert, directly or indirectly, violated Sections 206(1), 206(2) and 206(4) of the Advisers Act [15 U.S.C. §§ 80b-6(1) and (2)] and Rule 206(4)-8 thereunder [17 C.F.R. §275.206(4)-8].

193. McGinn and Smith, knowingly or recklessly provided substantial assistance to MS & Co. and MS Advisors and thereby directly or indirectly, singly or in concert, by use of the means or instrumentalities of interstate commerce, or of the mails, aided and abetted MS & Co. and MS Advisors' violations of Sections 206(1), 206(2) and 206(4)-2 of the Advisers Act [15 U.S.C. §§ 80b-6(1) and (2)] and Rule 206(4)-2 thereunder [17 C.F.R. §275.206(4)-8].

FIFTH CLAIM FOR RELIEF
Violations of Section 7(a) of the Investment Company Act
(FAIN, FEIN, FIIN and TAIN)

194. Paragraphs 1 through 175 are realleged and incorporated and incorporated by reference as if set forth fully herein.

195. FAIN, FEIN, FIIN and TAIN issued securities, in the form of notes, in what amounted to a public offering, and held themselves out as funds formed to identify and acquire various public and/or private investments, which may include, without limitation, debt securities, collateralized debt obligations, bonds, equity securities, trust preferreds, collateralized stock, convertible stock, and any other investments that may add value to our portfolio.

196. Accordingly, FAIN, FEIN, FIIN and TAIN were investment companies under Section 3(a)(1) of the Company Act [15 U.S.C. § 80a-3(a)(1)], and were required to register as investment companies with the Commission under Section 7(a) of the Company Act [15 U.S.C. § 80a-7(a)]. FAIN, FEIN, FIIN and TAIN were never so registered and, while acting as investment companies, FAIN, FEIN, FIIN and TAIN offered, purchased and sold, redeemed or retired securities by the use of the mails and the means and instrumentalities of interstate commerce and engaged in business in interstate commerce.

197. By reason of the foregoing, FAIN, FEIN, FIIN and TAIN violated Section 7(a) of the Company Act [15 U.S.C. § 80a-7(a)].

SIXTH CLAIM FOR RELIEF

**Violations of Section 5(a) and 5(c) of the Securities Act
(MS & Co., MS Capital, the Four Funds, McGinn and Smith)**

198. Paragraphs 1 through 175 are realleged and incorporated and incorporated by reference as if set forth fully herein.

199. The notes and certificates that MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith offered and sold as alleged herein constitute “securities” as defined in the Securities Act and the Exchange Act.

200. The FAIN, FEIN, FIIN and TAIN offerings were not limited to 35 or fewer non-accredited purchasers, and MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith could not reasonably have believed that the offering was so limited. Further, not all of the non-accredited purchasers satisfied the sophistication requirement of Rule 506(b)(2)(ii) of Regulation D [17 C.F.R. § 230.506(b)(2)(ii)], and MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith could not reasonably have believed that all such purchasers met the requirement at the time they invested.

201. MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith Investments singly or in concert, directly or indirectly, have made use of the means or instruments of transportation or communication in interstate commerce, or of the mails, to offer and sell securities through the use or medium of a prospectus or otherwise, or have carried or caused to be carried through the mails or in interstate commerce, by any means or instruments of transportation, securities for the purpose of sale or for delivery after sale, when no registration statement has been filed or was in effect as to such securities and when no exemption from registration was available.

202. By reason of the foregoing MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith singly or in concert, directly or indirectly, have violated, are violating, and unless enjoined will again violate Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. §§ 77e(a) and 77e(c)].

SEVENTH CLAIM FOR RELIEF
(Relief Defendants)

203. Paragraphs 1 through 175 are realleged and incorporated and incorporated by reference as if set forth fully herein.

204. Relief Defendants L. Smith and N. McGinn were recipients, without consideration, of proceeds of the fraudulent and illegal sales of securities alleged above. The Relief Defendants profited from such receipt or from the fraudulent and illegal sales of securities alleged above by obtaining illegal proceeds under circumstances in which it is not just, equitable, or conscionable for them to retain the illegal proceeds. Consequently, L. Smith and N. McGinn have each been named as a Relief Defendant for the amount of proceeds by which each has been unjustly enriched as a result of the fraudulent scheme or illegal sales transactions.

205. By reason of the foregoing, L. Smith and N. McGinn should disgorge their ill-gotten gains, plus prejudgment interest.

EIGHTH CLAIM FOR RELIEF
Violations of Section 276 of New York Debtor and Creditor Law
(David Smith, Lynn Smith, Tim McGinn, Nancy McGinn,
the Smith Trust, Geoffrey Smith, and Lauren Smith)

206. Paragraphs 1 through 175 are realleged and incorporated and incorporated by reference as if set forth fully herein.

207. McGinn, Smith and L. Smith made transfers with the actual intent to hinder, delay or defraud either present or future creditors, including the following:

- (a) 100,000 shares of Charter One stock from the Stock Account to the Smith Trust in 2004;
- (b) the Niskayuna house from McGinn to N. McGinn in 2009; and
- (c) the Vero Beach house from joint ownership to L. Smith in 2009.

208. The Smith Trust, N. McGinn and L. Smith received fraudulently conveyed assets.

209. G. Smith and L.T. Smith received funds after July 7, 2010 that had been fraudulently conveyed to the Smith Trust.

210. The Smith Trust made transfers with the actual intent to hinder, delay or defraud either present or future creditors, including the following:

- (a) \$150,000 to L. Smith indirectly through G. Smith and L.T. Smith for the Lake Property;
- (b) \$449,878.00 to L. Smith in exchange for the Lake Property;

(c) \$296,500 to G. Smith, including \$75,000 that he gave to L. Smith as a down payment for the Lake Property and \$200,000 for a company he created;

(d) \$83,500 to L.T. Smith, including \$75,000 that she gave to L. Smith as a down payment for the Lake Property.

211. Consequently, all fraudulent conveyances should be voided and set aside, and the property, or its equivalent value, recovered under Section 278 of New York Debtor and Creditor Law.

PRAYER FOR RELIEF

WHEREFORE, the Court having entered the Order to Show Cause, Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief on April 20, 2010 (Dkt. 5); the Preliminary Injunction Order on July 22, 2010 (Dkt. 96); the Order to Show Cause on August 3, 2010 (Dkt. 104); and subsequent Orders concerning preliminary relief on November 22, 2010 (Dkt. 194), December 1, 2010 (Dkt. 207); December 22, 2010 (Dkt. 233) and February 1, 2011 (Dkt. 263);

WHEREFORE, the Commission respectfully requests that the Court grant the following additional relief:

I.

A Final Judgment finding that McGinn, Smith, MS & Co., MS Advisors, MS Capital, and the Four Funds each violated the securities laws and rules promulgated thereunder as alleged against them herein;

II.

A Final Judgment permanently restraining and enjoining McGinn, Smith, MS & Co., MS Advisors, MS Capital, and the Four Funds and their agents, servants, employees and attorneys and all persons in active concert or participation with them who receive actual notice of the injunction by personal service or otherwise, and each of them, from committing future violations of each of the securities laws and rules promulgated thereunder, or alternatively, from aiding and abetting such future violations, as respectively alleged against them herein.

III.

An Order directing the return of all assets transferred from the Smith Trust after July 7, 2010.

IV.

A Final Judgment directing McGinn, Smith, MS & Co., MS Advisors, MS Capital, the Four Funds, L. Smith, and N. McGinn to disgorge their ill-gotten gains, plus prejudgment interest.

V.

A Final Judgment directing McGinn, Smith, MS & Co., MS Advisors, MS Capital, and the Four Funds to pay civil money penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)].

VI.

A Final Judgment permanently prohibiting McGinn from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act

[15 U.S.C. §78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. §78o(d)];

VII.

A Final Judgment directing McGinn, Smith, N. McGinn, L. Smith, the Smith Trust, G. Smith and L.T. Smith to return all assets fraudulently conveyed, or their equivalent value, and to pay attorneys' fees pursuant to NYDCL §§ 276, 276-a and 278.

VIII.

Granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
June 8, 2011

s/ David Stoelting
Attorney Bar Number: 516163
Attorney for Plaintiff
Securities and Exchange Commission
3 World Financial Center, Room 400
New York, NY 10281
Telephone: (212) 336-0174
Fax: (212) 336-1324
E-mail: stoeltingd@sec.gov

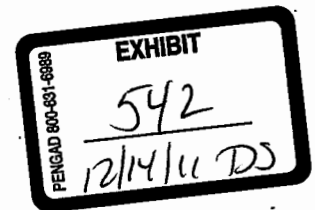
Of Counsel:
Andrew Calamari
Michael Paley
Kevin McGrath
Lara Mehraban
Haimavathi V. Marlier
Joshua Newville



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NORTHEAST REGIONAL OFFICE
233 BROADWAY
NEW YORK, N.Y. 10279

IN REPLYING PLEASE QUOTE
NERO-BDIP-SCV
(646) 428-1932

February 26, 2004



Mr. David Smith
President
McGinn, Smith & Co., Inc.
99 Pine Street, 5th Floor
Albany, New York 12207

Dear Mr. Smith:

A broker-dealer examination of the McGinn Smith & Co., Inc. ("MS & Co.") main office located in Albany, New York and the MS & Co. Manhattan branch office conducted by the Northeast Regional Office of the United States Securities & Exchange Commission revealed the following violations of the rules and regulations promulgated under the Securities Exchange Act of 1934 ("Exchange Act") and by the National Association of Securities Dealers, Inc. ("NASD"). With respect to the main office examination:

Section 15(a) of the Exchange Act was violated in that MS & Co. controlled and operated Capital Center Credit Corporation ("C4") as an unregistered broker-dealer. The staff's review of C4's business activities disclosed that C4 received customer funds, purchased investments from customers, warehoused certain investments, engaged in loan transactions, and issued short-term commercial paper. Therefore, C4 should be registered as a broker-dealer by virtue of its business activities, or, its books and records should be encompassed in MS & Co.'s financial statements, which may require the firm to increase its net capital requirement to \$250,000.

Rule 17a-4(b)(4) and NASD Conduct Rule 3110 was violated in that MS & Co. failed to preserve for a period of three years, and/or preserve in an accessible place for two years, electronic communications relating to the business of the firm. Due to certain deficient processes with the firm's computerized systems, not all required electronic communications were preserved.

Rule 17a-3(a)(1) was violated in that MS & Co. failed to make and keep current blotters containing an itemized daily record of all purchases and sales of securities.

NASD Conduct Rule 3010 was violated in that MS & Co. failed to establish, maintain, and enforce a supervisory system to ensure compliance with NASD rules relating to retention of electronic communications. Moreover, MS & Co. failed to establish and/or enforce adequate

policies and procedures for maintaining written complaints, arbitrations, and settlements. More specifically, the firm failed to establish and maintain separate complaint files for Joyce Magnavito and Robert H. Hill, who are clients of MS & Co.

With respect to the branch office examination:

Section 5 of the Securities Act of 1933 was violated in that MS & Co. accepted certain customer funds for the purchase of the Integrated Alarm Services Group, Inc. ("IASG") initial public offering ("IPO") prior to the effective date of the offering.

Rule 17a-4(b)(4) and NASD Conduct Rule 2210 were violated in that MS & Co.'s Manhattan branch office failed to review and preserve all incoming and outgoing correspondence.

NASD Conduct Rule 3010 was violated in that MS & Co. failed to enforce its written supervisory procedures with respect to maintaining and reviewing all correspondence and detecting and preventing selling away by its RRs. Specifically, Benardo Misseri, Gregory Gatto and Teekachand Tiwari violated NASD Conduct Rule 3040 by engaging in various private placement securities transactions they were offering to the firm's customers without the approval and knowledge of MS & Co. management.

We are bringing the deficiencies and/or violations of law described above to your attention for immediate corrective action, without regard to any other action(s) that may result from the examination. You should not assume that the Registrant's activities not discussed in this letter are in full compliance with the federal securities laws and other applicable rules and regulations. The above findings are based on the staff's examination and are not findings or conclusions of the Commission.

Notwithstanding whether the Commission takes any action with respect to the above violations, please promptly advise the staff in writing as to the specific procedures which you have put into effect to guard against any further infractions of the above cited Rules. The staff requires that you submit your written response within 30 days of the date of this letter. In addition, please submit a copy of your response to Fred McDonald, District Director, NASD District 11 Office in Boston, Massachusetts.

Sincerely,



Steven C. Vitulano
Branch Chief
Broker-Dealer Inspection Program

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

McGINN, SMITH & CO., INC., et al.,

10 Civ. 457 (GLS/DRH)

Defendants.

DAVID SMITH'S RESPONSES TO
PLAINTIFF'S FIRST SET OF INTERROGATORIES

1. Identify each person with knowledge or information relevant to the subject matter of the Action.

RESPONSE: Defendant smith objects to this question on the grounds that the question is overreaching and broad and calls for an answer that is voluminous in scope, and constitutes an attempt to limit defendant smith's testimony at trial. Notwithstanding the objection, defendant Smith states as follows:

- a. Employees of McGinn, Smith & Co.

- 1) Timothy McGinn;
- 2) Thomas Livingston;
- 3) Andrew Guzzetti;
- 4) Joseph Carr;
- 5) Brian Shea;
- 6) Brian Cooper;
- 7) Patricia Sicluna;
- 8) David Rees; and
- 9) Matthew Rogers

- b. Jay Kaplowitz – managing partner of Gersten, Savage LLC
- c. Lynn Smith
- d. Geoffrey Smith
- e. Thomas Urbelis
- f. Timothy Wells
- g. Daniel Blake

2. Identify all documents relevant to the Action, including the custodian, location and general description of such documents.

RESPONSE: Defendant Smith objects to this question on the grounds that the question is overly broad, calls for an answer that is voluminous in scope, and constitutes an attempt to limit defendant Smith's testimony at trial. Notwithstanding the objection, defendant Smith states as follows: The SEC has in its possession all relevant documents that they have received either through subpoena, cooperation with FINRA, or in cooperation with the U.S. Attorney's Office of the Northern District of New York, located in Albany.

3. Identify the \$600 million of retail transactions referred to on page 2 of the 1/14/11 letter.

RESPONSE: The \$600 million of identified transactions include the following:

- a. McGinn Smith brokerage offerings: \$200 million;
- b. IASG IPO: \$225 million;
- c. IASG high-yield bond offering: \$125 million;
- d. Response USA, a publicly traded alarm company; \$25 million;
- e. King Central acquisitions: \$25 million; and
- f. Capital Center Credit Corporation: \$5 to \$10 million.

4. Identify the "non-compete clause" referred to on page 3 of the 1/14/11 letter.

RESPONSE: The non-compete clause can be found in the offering prospectus for the public offering of IASG, July 23, 2003.

5. Identify the "business plan" referred to in the first full paragraph on page 3 of the 1/14/11 letter.

RESPONSE: The business plan referred to was the determination by the officers of McGinn Smith that with the capital raising transactions for the home security alarm business no longer available after July 23, 2003, McGinn Smith would seek to develop more fee-based revenue sources for the firm as opposed to transactional business.

6. Identify the "29 boxes of due diligence files" referred to in footnote 2 of the 1/14/11 letter, including the contents and present location of these boxes.

RESPONSE: The 29 boxes of due diligence contained financial and other due diligence material for most of the loans and investments made by the specialty finance companies known as FIIN, FEIN, TAIN and FAIN. These boxes were in the possession of James Hacker, Esq., an attorney who represented McGinn Smith in several arbitrations. Upon information and belief, Mr. Hacker delivered the boxes to the U.S. Attorney (NDNY) pursuant to a subpoena in the spring of 2010.

7. Identify the bases for the statement on page 5 of the 1/14/11 letter that “MS & Co.s’s legal counsel, Gersten Savage, LLP,...found [the private placement memorandum for the LLC’s] to be accurate and legally sufficient.”

RESPONSE: Defendant Smith drew a conclusion that since Gersten Savage drafted and prepared the PPMs and the LLCs, the law firm found them to be legally sufficient and accurate.

8. Identify the “legal advice” relied upon referred to on page 5 of the 1/14/11 letter.

RESPONSE: The legal advice was provided by our securities law firm, Gersten Savage, who drafted and prepared the PPMs used in the offerings of the four LLCs

9. Identify the bases for the statement on page 6 of the 1/14/11 letter that “at most, 27.6% investments [were] in affiliates.

RESPONSE: The statement “at most 27.6% of investments were in affiliates”, was specifically phrased to include not only affiliates, but also any entities that had some related party relationship to McGinn Smith or its principals. Thus, investments in PSC P, LLC, alsoT, SAI International, and 107th Associates, which are not affiliates in the sense that they are not companies that control, are controlled by, or are under common control with either company, or in the case of 107 Associates which was simply a pass through entity to a non-affiliate, but did have a related party relationship, were included. If these entities were

excluded, the percentage of investments would drop to approximately 12.5%. The 27.6%*, which includes the aforementioned entities, was derived from the following schedule:

FIIN:

107 th Associates	\$ 150,000	
alseT	\$2,268,607	
McGinn, Smith Transaction Funding	\$ 175,000	
Cruise Charter Ventures	\$ 8,000	
Luxury Cruise	\$ 77,000	
TDMM Cable	\$ 74,000	
TDMV	\$ 20,000	
McGinn, Smith Partners (MSP)	\$ 300,000	
McGinn, Smith Capital Holdings (MSCH)	\$ 150,000	
MS Preferred Stock	\$ 340,800	
TDM Cable	\$2,878,179	
FEIN	\$ 117,770	Total: \$6,559,356

FEIN:

107 th Associates	\$ 500,000
Capital Center Credit Corp. (C4)	\$ 500,000
FIIN	\$ 750,000
MS Transaction funding (MSTF)	\$ 150,000
TDMM	\$ 44,000
White Glove	\$ 30,000
C4	\$ 208,091
IAS	\$ 100,000

MSCH	\$ 100,000	
JVA	\$ 95,000	
CSDS	\$ 80,000	
MSP	\$ 725,000	
MGS Acceptance	\$ 100,000	
MS Preferred Stock	\$ 422,800	
Pacific Trust	\$ 329,000	
RTC	\$ 294,596	
TDM	\$ 25,000	
PSCP	\$ 800,000	Total: \$5,254,487

TAIN:

107 th Associates	\$1,200,000
alseT	\$2,585,000
Cruise Charter Venues (CCV)	\$ 20,000
MSCH	\$ 100,000
MSTF	\$ 225,000
TDM	\$ 150,000
FIIN	\$ 75,000
FEIN	\$ 450,000
MCG	\$ 150,000
MS Preferred	\$ 610,733
MS Holdings	\$ 202,000
MS prf.	\$ 180,000
Pacific	\$ 40,000

PSCP	\$1,429,081	
PSCP	\$ 965,231	Total: \$8,382,045

FAIN:

107 th Associates	\$ 300,000	
alseT	\$4,000,000	
FIIN	\$ 180,000	
MSP	\$ 12,635	
MSH	\$ 200,000	
MS prf	\$ 100,000	
MS Licensing	\$ 75,000	
MSCH	\$ 50,300	
PSP	\$ 823,172	
PSCP	\$ 556,975	
RTC	\$ 459,200	
SAI Int.	\$1,010,000	
TDM	\$1,406,415	
Verifier	\$ 771,415	Total: \$9,945,339

Summary:

FIIN	\$6,559,356	
FEIN	\$5,254,487	
FAIN	\$9,945,399	
TAIN	\$8,382,045	Total: \$30,141,337*

$30,141,337 / 106,480,572$ (total investments) = 28.3%

The original calculation used a total of “affiliate” investments of \$29,391,337, resulting in the arrived at percentage of 27.6% ($29,391,337 / 106,480,572$). In reviewing the

figures, Smith realized that he had missed a \$750,000 loan between FEIN and FIIN, which results in the revised 28.3%.

10. Identify the bases for the statement on page 6 of the 1/14/11 letter that “[a]pproximately 22.5% of the total investments made by the Funds were underwritten by top-tier investment banks including UBS, Duetche [sic] bank, and Merrill Lynch.”

RESPONSE: The following investments made by the LLCs were underwritten by major investment banks:

FIIN:

CMET	\$1,800,000	
DeKania Income	\$2,000,000	
Marcay Homes	\$5,000,000	
Sandler Income	\$3,000,000	
Cochise ATM	\$1,700,000	Total: \$13,500,000

FEIN:

Deerfield Capital	\$2,000,000	
GSC Capital	\$ 500,000	
Cherokee ATM	\$1,500,000	Total: \$4,000,000

TAIN:

Deerfield Capital	\$5,000,000	
GSC Capital	\$1,500,000	Total: \$6,500,000

Total: $\$24,000,000 / 106,480,572 = 22.54\%$

In addition, there were investments in Lehman offerings of \$90,000 for each of FEIN and TAIN, and \$80,200 in offerings of Morgan Stanley by TAIN. Also, \$1,950,000 characterized as “other” on the balance sheet of FIIN, which to the best of defendant’s recollection were syndicated offerings of major investment banks in public utility preferred stocks. If the aforementioned are added to the total, the amount would be \$26,235,000 or 24.64%.

11. Identify the bases for the statement on page 6 of the 1/14/11 letter that “[t]he Funds invested approximately \$10.3 million in public securities.”

RESPONSE: The LLCs investments of approximately \$10.3 million in public companies is represented as follows:

Exchange Blvd. common stock:

FAIN: \$1,160,000

FIIN: \$ 560,000

TAIN: \$ 480,000 Total: \$2,200,000

Exchange Blvd. loans:

FAIN: \$ 150,000

TAIN: \$ 500,000 Total: \$ 650,000

Exchange Blvd. Royalties:

FAIN: \$ 50,000

FIIN: \$ 115,000 Total: \$ 165,000

Lehman offerings:

FEIN: \$ 90,000

TAIN: \$ 90,000 Total: \$ 180,000

Morgan, Stanley offerings:

TAIN: \$ 80,200

Deerfield Capital:

TAIN: \$5,000,000

FEIN: \$2,000,000 Total: \$7,000,000

\$10,275,200

In addition, to the best of defendant’s recollection, there was \$1,975,000 invested through FIIN in public utility preferred stocks that are carried on the balance sheet as “other.”

These investments were not included due to Smith's inability to review and verify the Bear Stearns account statements for FIIN.

12. Identify the bases for the statement on page 6 of the 1/14/11 letter that "[t]he LLC's...could thus be characterized as a blind pool."

RESPONSE: Defendant states that a blind pool is an investment entity that doesn't specify what investment opportunities the managing partner plans to undertake. While the four specialty finance companies stated a broad array of investment objectives and the forms of investment, specific loans and investments were essentially unknown at the time of the capital raise. Thus, investors were relying on the managing partner to select loans and investments after the capital raise. Also, the LLCs were no different than other finance companies that raise capital to later deploy as future loan and investment opportunities are presented. Because investors are making their investment on the strength of the manager, as opposed to a specific loan or investment, the LLCs could be characterized as a "blind pool".

13. Identify the bases for the statement on page 6 of the 1/14/11 letter that "[t]he LLC's were not required to register under the Investment Company Act of 1940."

RESPONSE: The bases for the statement that the LLCs were not required to register under the Investment Company Act of 1940 was the legal advice that the LLCs' security counsel, Gersten Savage, rendered at the time of formation. Further, the rest of the paragraph on page 6 and continued on page 7 is self-explanatory. Finally, the SEC is in possession of the opinion letter offered by Gersten Savage dated July 1, 2008 that supports this position.

14. Identify the bases for the statement on page 6 of the 1/14/11 letter that "MS & Co. relied on the advice of its securities counsel, Gersten, Savage LLP."

RESPONSE: to the best of defendant's recollection, in the late spring of 2003, McGinn Smith engaged Gersten Savage to represent it and affiliate entities, to advise on the

formation and securities offering to be named a specialty finance company that would engage in providing financing, principally in the form of loans, to private businesses. The first such offering was in September 2003 and sought to raise capital for a newly formed LLC known as First independent Income Notes, LLC. McGinn Smith and Company and other affiliates continued to seek the advice of Gersten Savage for questions concerning security law, subsequent formation of other LLCs in similar businesses, and for advice concerning litigation for some of the LLC's portfolio companies.

15. Identify the bases for the statement on page 7 of the 1/14/11 letter that "MS & Co. attempted to benefit the LLC's and their investors by making loans to available affiliates which were collateralized by the fees owed, rather than taking its fees directly."

RESPONSE: In many instances where affiliates of McGinn Smith were seeking capital, the LLCs through contractual agreement owed McGinn Smith and its affiliates, MS Advisors and McGinn Smith Capital Holdings, fees for service. Since the LLCs were benefited by having their capital invested as opposed to residing in cash to await future investment opportunity or to lose any investment return as result of paying their contractual liability to McGinn Smith, in some instances it was determined to be in the best interest of the LLC's to lend the money to the affiliates, using current and future fees as collateral, and deferring payment of the fees until the obligation was satisfied.

16. Identify the bases for the statement on page 7 of the 1/14/11 letter that "David and Lynn Smith's contribution of capital on three occasions during....2008-2009....speaks to the fact that the fees had already been allocated for other purposes.

RESPONSE: During the financial downturn and recession of 2008-2009 McGinn Smith found itself in the need of capital for both working capital purposes and regulatory purposes. At the same time, the LLCs owed a substantial amount of fees to McGinn Smith and its

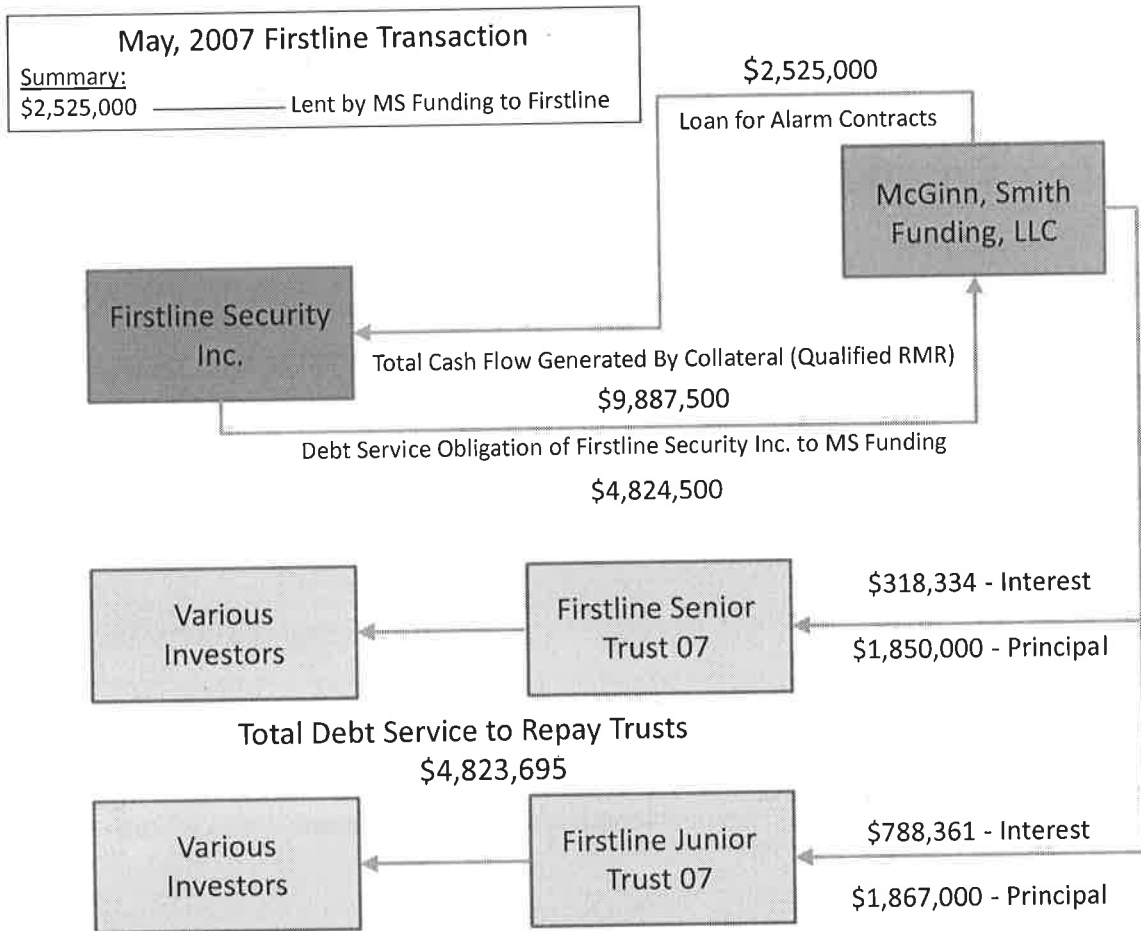
affiliates, including \$2,591,516 at year-end 2007 and \$3,111,283 at year-end 2008. A draft of an analysis of the fees earned and paid analysis was sent to FINRA, upon its request, on January 5, 2010 by Brian Shea, to the best of defendant's knowledge. McGinn Smith had represented in a letter to investors that from January 2008 it would no longer be taking future fees except for legal liabilities related to the LLCs until the LLCs had regained their ability to be current on their liabilities. The four LLCs in the aggregate owed McGinn Smith and its affiliates in excess of \$2.5 million dollars at the end of 2007, which was available. However because those fees were previously pledged as collateral McGinn Smith did not seek payment of all or part of those fees, although payment would have in turn eliminated any capital problems the firm was undergoing at the time. Therefore, David and Lynn Smith contributed their own capital resources, to the best of defendant's recollection, on three different occasions. Defendant's best recollection is that his wife and he lent to MS Holding \$150,000 in July of 2007 that was to be repaid as soon as possible, but no later than one year from the loan date. Financial circumstances at McGinn Smith prevented that schedule from being fulfilled, with \$50,000 being paid through October 2008 and the balance of \$100,000 remaining outstanding. Also, sometime during that period, defendant recalls his wife purchased \$75,000 of McGinn Smith preferred stock to inject working capital into the firm. Finally, to the best of defendant's recollection, in late April or early May of 2009 the Smiths lent an additional \$100,000 to MS Holdings. As stated in the letter of 1/14/11, is that if the millions of dollars owed to the firm and its affiliates were not already pledged there would have been no need for the capital contributions of Mr. and Mrs. Smith.

17. Identify the bases for the statement on page 10 of the 1/14/11 letter that "[i]n every transaction, the Trust purchased all of the assets outlined in the prospectus and those assets provided the cash flow necessary to return the investor's money plus interest as contracted."

RESPONSE: The financial models that demonstrated the cash flow available to repay investor loans plus interest were reviewed by defendant at the time of the offerings, and were prepared by Mr. McGinn. Defendant states that the assets were purchased because there is a record of the cash flow from those assets being received by the proper entity. The SEC is in possession of the financial records showing receipt of the cash flow derived from the assets purchased as outlined in the PPMs.

18. Identify the bases for the statement on page 10 of the 1/14/11 letter that “[r]eturns from the contracts generally were 22-24%.”

RESPONSE: The returns generated in the McGinn Smith alarm financing model for alarm dealers were generally in the 22-24% area. Mr. McGinn, who had developed the model, has provided as an example the May 2007 Firstline Transaction. The following tables demonstrate the return. The first table shows the flow of funds between all of the parties, including the \$2,525,000 debt obligation of Firstline Security, Inc. (the borrower) to MS Funding (the lender). The second table shows the amortization of the \$2,525,000 over 60 months, for total payments of \$4,824,500, which results in the IRR of 24.64%.



Global Flow of Funds for Firstline May, 2007 Transaction

Month	Payment Date		Pledged RMR	Monthly Debt Service
1	June	2007	\$ -	\$ (2,525,000.00)
2	July	2007	\$ 50,000.00	\$ -
3	August	2007	\$ 87,500.00	\$ -
4	September	2007	\$ 125,000.00	\$ -
5	October	2007	\$ 175,000.00	\$ 70,000.00
6	November	2007	\$ 175,000.00	\$ 70,000.00
7	December	2007	\$ 175,000.00	\$ 60,000.00
8	January	2008	\$ 175,000.00	\$ 52,000.00
9	February	2008	\$ 175,000.00	\$ 45,000.00
10	March	2008	\$ 175,000.00	\$ 43,750.00
11	April	2008	\$ 175,000.00	\$ 43,750.00
12	May	2008	\$ 175,000.00	\$ 42,500.00
13	June	2008	\$ 175,000.00	\$ 42,500.00
14	July	2008	\$ 175,000.00	\$ 43,750.00
15	August	2008	\$ 175,000.00	\$ 55,000.00
16	September	2008	\$ 175,000.00	\$ 68,750.00
17	October	2008	\$ 175,000.00	\$ 87,500.00
18	November	2008	\$ 175,000.00	\$ 86,250.00
19	December	2008	\$ 175,000.00	\$ 85,000.00
20	January	2009	\$ 175,000.00	\$ 83,750.00
21	February	2009	\$ 175,000.00	\$ 82,500.00
22	March	2009	\$ 175,000.00	\$ 81,250.00
23	April	2009	\$ 175,000.00	\$ 80,000.00
24	May	2009	\$ 175,000.00	\$ 78,750.00
25	June	2009	\$ 175,000.00	\$ 77,500.00
26	July	2009	\$ 175,000.00	\$ 76,250.00
27	August	2009	\$ 175,000.00	\$ 87,500.00
28	September	2009	\$ 175,000.00	\$ 100,000.00
29	October	2009	\$ 175,000.00	\$ 106,250.00
30	November	2009	\$ 175,000.00	\$ 103,750.00
31	December	2009	\$ 175,000.00	\$ 102,500.00
32	January	2010	\$ 175,000.00	\$ 101,250.00
33	February	2010	\$ 175,000.00	\$ 100,000.00
34	March	2010	\$ 175,000.00	\$ 98,750.00
35	April	2010	\$ 175,000.00	\$ 97,500.00
36	May	2010	\$ 175,000.00	\$ 97,500.00
37	June	2010	\$ 175,000.00	\$ 96,250.00
38	July	2010	\$ 175,000.00	\$ 93,750.00
39	August	2010	\$ 175,000.00	\$ 93,750.00
40	September	2010	\$ 175,000.00	\$ 93,750.00
41	October	2010	\$ 175,000.00	\$ 93,750.00
42	November	2010	\$ 175,000.00	\$ 115,000.00
43	December	2010	\$ 175,000.00	\$ 113,750.00
44	January	2011	\$ 175,000.00	\$ 111,250.00
45	February	2011	\$ 175,000.00	\$ 110,000.00
46	March	2011	\$ 175,000.00	\$ 108,750.00
47	April	2011	\$ 175,000.00	\$ 106,250.00
48	May	2011	\$ 175,000.00	\$ 105,000.00
49	June	2011	\$ 175,000.00	\$ 103,750.00
50	July	2011	\$ 175,000.00	\$ 101,250.00
51	August	2011	\$ 175,000.00	\$ 100,000.00
52	September	2011	\$ 175,000.00	\$ 98,750.00
53	October	2011	\$ 175,000.00	\$ 97,500.00
54	November	2011	\$ 175,000.00	\$ 96,250.00
55	December	2011	\$ 175,000.00	\$ 95,000.00
56	January	2012	\$ 175,000.00	\$ 93,750.00
57	February	2012	\$ 175,000.00	\$ 91,250.00
58	March	2012	\$ 175,000.00	\$ 90,000.00
59	April	2012	\$ 175,000.00	\$ 88,750.00
60	May	2012	\$ 175,000.00	\$ 76,250.00

Total Debt Service: \$ **4,824,500.00**

IRR: **24.64%**

19. Identify the lenders, borrowers, and amounts loaned in connection with the statement on page 11 of the 1/14/11 letter that "all of the affiliate loans were paid off with fees".

RESPONSE: The analysis that follows has been completed without the ability to access the full and complete financial records of the LLCs or the entities that were the borrowers. Defendant has used his best recollection and the balance sheets for 2008 and 2009 that are in draft form, and were completed in April of 2010, awaiting review by the accountants, Piaker & Lyons.

The statement that "all of the affiliate loans were paid off with fees" referred not to the totality of the original amounts of all the affiliate loans, but rather to the balances of those loans. A large number of the loans had been paid off through the cash flow or the cash available of the entity that had borrowed the money. Examples include the FIIN loan to TDM Cable Funding of \$2,878,179, the FAIN loan to TDM Cable Funding of \$1,406,415, and the FAIN loan to Verifier of \$771,415. These were bridge loans that were repaid without the use of the collateralized fees. Other loans had received cash payments not related to the fees over the course of the loan. The following tables list the loans that were either considered an affiliate or that MS Advisors considered to have a related party issue and therefore received a pledge of the McGinn Smith fees as collateral. The only loans of the aforementioned list that were not paid as of the end of 2009 were the RTC loan to FEIN with the balance of \$66,195, the FIIN loan to Cruise Charter Ventures, with a balance of \$8000, for total balances outstanding of \$74,195. Two other items from the affiliate list remained open, a \$75,000 equity investment in MS Licensing by FAIN and the intraparty loan between LLCs of \$323,850 that was owed to FEIN by FIIN. Loans between the LLCs offered no benefit to McGinn Smith or its principals, the asset and liability of each netting out, and thus fees were not pledged as collateral.

FIIN Balance Sheet as of 12/31/09 (draft)

Original loan	Entity	Balance
\$8000	Cruise Charter Ventures	\$8000
\$175,000	MSTF	0
\$77,000	Luxury Cruise	0
\$74,000	TDMM	0
\$20,000	TDMM	0
\$117,770	FEIN	0
\$300,000	MSP	0
\$150,000	MSCH	0
\$340,000	MS preferred	0
\$2,878,179	TDM Cable Funding	0
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\$4,140,749		\$8000

FEIN Balance Sheet as of 12/31/2009 (draft)

\$500,000	Capital Center Credit Corp (C 4)	0
\$750,000	FIIN	\$323,850
\$150,000	MSTF	0
\$45,000	TDM Cable Funding	0
\$30,000	White Glove	0
\$208091	C 4	0
\$100,000	IAS 5yr	0
\$100,000	MSCH	0
\$95,000	JVA	0

\$80,000	CSDS	0
\$725,000	MSP	0
\$100,000	MGS Acceptance	0
\$422,800	MS preferred	0
\$32,900	Pacific	0
\$294,596	RTC	\$66,195
\$25,000	TDM	0
<hr/>		
\$3,954,487		\$390,045

TAIN Balance Sheet 12/31/2009 (draft)

\$20,000	Cruise Charter Ventures	0
\$100,000	MSCH	0
\$225,000	MSTF	0
\$150,000	TDM	0
\$75,000	FIIN	0
\$450,000	FEIN	0
\$150,000	MGS Acceptance	0
\$610,733	MS preferred	0
\$202,000	MS Holdings	0
\$180,000	MS preferred	0
\$40,000	Pacific	0
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\$2,202,733		0

FAIN Balance Sheet 12/31/2009 (draft)

\$12,635	MSP	0
\$200,000	MSCH	0
\$100,000	MS preferred	0
\$75,000	MS Licensing (equity investment)	\$75,000
\$50,300	MSCH	0
\$459,200	RTC	0
\$1,010,000	SAI	0
\$1,406,415	TDM	0
\$771,415	Verifier	0
\$180,000	FIIN	0
<hr/>		
\$4,264,965		\$75,000

Thus, at the end of 2009, \$12,915,164 of loans to affiliates or related parties had been repaid either through cash sources or by the allocation of McGinn Smith fees with the exception of \$74,195. To the best of defendant's recollection, those two remaining loans were paid in 2010, although defendant currently does not have access to financial records to verify that belief. Included are two draft exhibits that were provided to FINRA in January 2010 that demonstrate both the fee earnings from 2004 to 2010 and the allocation of fees to repay affiliate loans through that time. It is defendant's recollection that additional fees were allocated after January 2010 and are reflected on the 2009 balance sheets for the LLCs. Exhibit 1 shows loan principal of \$5,340,250 and accrued interest of \$276,690 being paid to

various related party loans. Exhibit 2 shows the fees earned and paid from 2004 to 2010. Starting in 2008, McGinn Smith did not receive any cash fees to their businesses with the exception, to the best of defendant's recollection is that of approximately \$600-\$700,000 in either late 2009 or early 2010 for legal fees that had accrued relating to the litigation involving the LLCs. Additionally, there remained a balance of \$325,644 of fees owing of which a potential of \$310,000 was a brokers commission liability. Thus, if one adds the \$2,591,516 of accrued fees at the end of 2007, the \$2,764,905 of fees earned in 2008, the \$1,319,245 of fees earned in 2009, and the \$490,004 of fees earned in 2010, the total fees available is \$7,165,670. If one deducts from that amount the related party loans plus accrued interest shown on Exhibit 1 of \$5,616,940, the approximate \$650,000 in legal fees taken, the \$74,195 believed paid in 2010 and the balance of accrued fees due of \$325,644, there remains an additional \$498,891 that was most likely allocated to the related party loans between the time of the Exhibit 1 schedule provided to FINRA in January 2010 and April 2010 when the balance sheets for the four LLCs were completed, for a total allocation of \$6,115,831.

20. Identify the bases for the statement on page 1 of the 2/4/11 letter that "[a]ll of these fees were standard and customary in the securities industry."

RESPONSE: The bases for that statement is the 38 years defendant spent in the securities industry, having devoted a great deal of that time selling private placements issued by other security firms and structuring private placements for sale by McGinn Smith and Company. Since the entire letter of 2/04/11 deals with the fees and discusses each of the fees in depth, we would simply be redundant to cover those areas already covered in the letter. Suffice it to say, the fees are competitive within the industry.

21. Identify the bases for the statement on page 3 of the 2/4/11 letter that the PPMs "were


drafted and approved upon the advice of counsel.”

RESPONSE: The bases for the statement that the PPMs "were drafted and approved upon the advice of counsel" refers to the PPMs of the four LLCs in question, FIIN, FEIN, TAIN, and FAIN. Securities counsel for McGinn Smith met with officers of McGinn Smith, including David Smith, in the spring and summer of 2003 to discuss the business concept, the capital formation, and the applicable regulatory considerations for the LLCs'. Security counsel, Gersten Savage, was engaged by McGinn Smith to advise us on the offerings and draft a memorandum. Gersten Savage in fact provided those services and was compensated for them.

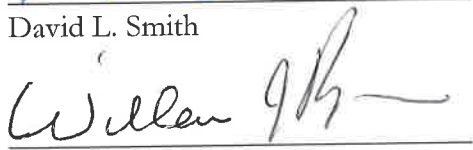
22. Identify the bases for the statement on page 5 of the 2/4/11 letter that the fees were “well within the accepted and customary fees for private placement investment banking transactions.”

RESPONSE: See RESPONSE to 20, above. The total fees of the transactions in question, which totaled 11.86% of the capital raised, is on the low end of the cost of similar transactions in defendant’s experience. Selling commissions for retail private placement transactions for sourcing, financing, and structuring the transaction, are similarly priced in defendant’s experience.

Dated: December 7, 2011


David L. Smith

Dated: December 7, 2011


William J. Dreyer, Esq.
DREYER BOYAJIAN LLP
Attorneys for Defendant Smith
75 Columbia Street
Albany, New York 12210
(518) 463-7784 [phone]

Ex h. b. 1 /

The LLC's
(FEIN, FIIN, TAIN & FAIN)
Schedule of Related Party Loans
Pledged with Fees Earned

DRAFT

Outstanding Related Loans

	Loan Principal	Accrued Interest	
Capital Center Credit Corp	\$653,404	\$133,519	Settled YE 2008
Centrury Same Day Surgery	\$112,904	\$55,137	Settled YE 2008
JV Associates	\$95,000	\$2,850	Settled YE 2009
M&S Partners	\$604,050	\$67,989	Settled YE 2008
McGinn Smith Preferred Stock	\$857,800	\$0	Settled YE 2009
McGinn Smith Holdings	\$81,373	\$1,520	Settled YE 2009
McGinn Smith Capital Holdings	\$333,132	\$5,458	Settled YE 2009
McGinn Smith Transaction Funding	\$550,000	\$0	Settled YE 2009
Pacific	\$152,526	\$3,926	Settled YE 2008
RTC	\$612,055	\$0	Settled YE 2009
SAI	\$863,393	\$0	Settled YE 2009
Seton Hall	\$8,613	\$258	Settled YE 2008
TDM Cable Funding	\$40,000	\$850	Settled YE 2009
TDM Luxury Cruise	\$77,000	\$578	Settled YE 2009
TDM Verifier 07	\$150,000	\$3,563	Settled YE 2009
TDMM Funding	\$45,000	\$225	Settled YE 2009
TDMM Sr Trust	\$74,000	\$555	Settled YE 2009
White Glove	\$30,000	\$263	Settled YE 2009
	\$5,340,250	\$276,690	

The LLC's
(FEIN, FIIN, TAIN & FAIN)
Fees Earned & Paid Analysis

DRAFT

Tranche	Total Raised								
Jr	40,218,000								
Sr Sub	22,406,000								
Sr	22,450,000								
Total	85,074,000								
ACCRUALS (all as of 12/31)									
Fees Earned	2004	2005	2006	2007	2008	2009	2010		
U/w .02	865,510	1,367,860	1,701,480	1,701,480	1,701,480	835,970	333,620		
MGMT .01	512,683	725,633	850,740	850,740	850,740	386,620	125,108		
Admin 0.0025	128,171	181,408	212,685	212,685	212,685	96,655	31,277		
	1,506,363	2,274,901	2,764,905	2,764,905	2,764,905	1,319,245	490,004		
Fees Paid	PAID								Through 2/25
U/w .02	885,020	1,135,290	1,575,627	1,270,403	1,224,889	1,300,310	485,000		
MGMT .01	349,974	688,675	630,639	183,929	1,020,250	2,190,530	240,000		
Admin 0.0025	-	-	-	-	-	351,776	27,272		
	1,234,994	1,823,965	2,206,266	1,454,332	2,245,139	3,842,617	752,272		
Cummulative Net									
Fees Payable	271,369	722,305	1,280,943	2,591,516	3,111,283	587,911	325,644		
					Brokers Commission Liability				
						Accrual Balance	(310,000)		
							15,644		

Exh. b. 1 2