

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

-vs-

Civil Action No. 10-cv-457(GLS/RFT)

MCGINN, SMITH & CO., INC., *et al.*,

Defendants.

NOTICE OF MOTION

PLEASE TAKE NOTICE, that upon the annexed Affidavit of Charles C. Swanekamp, Esq. and the Memorandum of Law and upon all prior pleadings and proceedings heretofore had herein, a Motion will be made as follows:

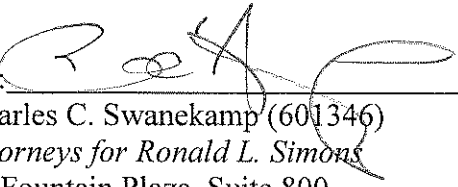
DATE, PLACE AND TIME OF MOTION: The date and time of the motion will be determined by the Court, with the location to be at the James T. Foley U.S. Courthouse, 445 Broadway, Albany, New York 12207 before the Hon. David R. Homer, Magistrate Judge.

TYPE OF MOTION: Ronald L. Simons, a non-party to this action, seeks to quash a subpoena to appear and testify pursuant to Fed. R. Civ. Pro. 45(c)(3)(A).

DATED: November 5, 2010

Respectfully submitted,

JAECKLE FLEISCHMANN & MUGEL, LLP

By: 
Charles C. Swanekamp (601346)
Attorneys for Ronald L. Simons
12 Fountain Plaza, Suite 800
Buffalo, New York 14202
Telephone: 716.856.0600
Fax: 716-856-0432

E-Mail: cswanekamp@jaeckle.com
and

Brian Devane, Esq. (501138)
LAW OFFICE OF BRIAN DEVANE
Of Counsel
600 Broadway
Albany, New York 12207-2235
Telephone: 518.475.9845
Fax: 518.475.9846
E-Mail: bdevane@devanelaw.com

TO: Lara S. Mehraban, Esq.
Securities and Exchange Commission
3 World Financial Center, Room 400
New York, New York 10281
Telephone: 212.336.0591
E-mail: MehrabanL@sec.gov

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

-vs-

Civil Action No. 10-cv-457(GLS/RFT)

MCGINN, SMITH & CO., INC., *et al.*,

Defendants.

AFFIDAVIT OF CHARLES C. SWANEKAMP
IN SUPPORT OF MOTION TO QUASH
PURSUANT TO FED. R. CIV. PRO. 45(c)(3)(A)

STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

CHARLES C. SWANEKAMP, being duly sworn, deposes:

1. I am a partner in the law firm of Jaeckle Fleischmann & Mugel, LLP, attorneys for Piaker & Lyons, CPA (hereinafter "Piaker") and Ronald L. Simons (hereinafter "Simons") as President and Principle of Piaker. I am licensed to practice in the State of New York and am duly admitted to practice in the United States District Court for the Northern District of New York. I make this affidavit based upon personal knowledge.

2. On or about April 23, 2010, Piaker was served with a Subpoena to Testify Before the Grand Jury ("Grand Jury Subpoena") issued upon the application of Elizabeth C. Coombe, Assistant United States Attorney (hereinafter "AUSA Coombe"), a copy of which is annexed hereto as **Exhibit "A"**.

3. Pursuant to the terms of the Grand Jury Subpoena, the custodian of records for Piaker was to appear before the Grand Jury for the Northern District of New York on May 6, 2010. The custodian was also required to produce certain documents related to accounting which Piaker performed for the named defendants in this action.

4. After several months of discussions, Piaker produced over twenty thousand responsive documents to the Grand Jury Subpoena.

5. Several discussions were also had with AUSA Coombe regarding her meeting with Ronald L. Simons, the President of Piaker in connection with the documents produced. Specifically, Mr. Simons, as a Principle at Piaker, was primarily responsible for all work performed by Piaker for the Defendants.

6. After some negotiations, it was agreed that Mr. Simons, accompanied by myself and Brian Devane, Esq., would meet with the AUSA Coombe in Albany on September 2, 2010 and that Mr. Simons would have use immunity for that meeting.

7. On September 2, 2010, Mr. Simons was presented for an interview with AUSA Coombe. AUSA Coombe had also invited a special criminal investigator with the Internal Revenue Service to the meeting. After some initial questioning, it became apparent that AUSA Coombe wanted to question Mr. Simons on activity beyond that which was the initial premise for the Grand Jury Subpoena. As a result, I terminated the meeting.

8. On or about September 17, 2010, Piaker was issued a Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (hereinafter "First SEC Subpoena"), a copy of which is annexed hereto as **Exhibit "B"**,

by Lara S. Mehraban, Esq. of the Securities and Exchange Commission ("SEC") in connection with this action.

9. After several discussion with Ms. Mehraban, our office produced several thousand documents, all of which had also been previously produced to the United States Attorneys' Office.

10. By letter dated October 20, 2010, AUSA Coombe informed Mr. Devane, that Mr. Simons was now a target of a grand jury investigation." A copy of the October 20, 2010 letter is annexed hereto as **Exhibit "C"**.

11. On October 20, 2010, Ms. Mehraban, on behalf of the SEC, issued to Mr. Simons, a Subpoena to Appear and Testify at a Hearing or Trial in a Civil Action (hereinafter "Second SEC Subpoena"), a copy of which is annexed hereto as **Exhibit "D"**.

12. As evidenced by the documents produced in this action, Mr. Simons, on behalf of Piaker, prepared and filed corporate tax returns for Defendant McGinn Smith & Co., Inc. as well as for Messrs. McGinn and Smith personally.

13. Based upon discussions with AUSA Coombe, it is these very tax returns which form the basis of the United States Attorney's Office target letter. Furthermore, it is these same returns which the Plaintiff SEC seeks to question Mr. Simons about at the hearing currently scheduled before this Court on November 16, 2010.

14. I have advised Ms. Mehraban that Mr. Simons is now deemed a target of a grand jury investigation and in correspondence dated October 29, 2010 (**Exhibit "E"**) requested that the subpoena be withdrawn based on the fact that since he was identified as a target of the investigation, he would be asserting his Fifth Amendment right against self incrimination and

decline to answer the questions posed. Ms. Mehraban has insisted, unfortunately, that Mr. Simons appear at the November hearing.

15. My telephone conference with Ms. Mehraban was November 1, 2010 and constitutes compliance with Local Rule 7.1(d)(1) which requires a good faith effort on resolving a discovery dispute.

16. Based upon the actions taken by AUSA Coombe, Mr. Simons has no option but to assert his 5th Amendment right at the hearing as any testimony in connection with this action will prejudice his interests with respect to the United States Attorneys' Office investigation, specifically since both the SEC and AUSA Coombe predicate their questioning on Mr. Simon's preparation of the same tax returns.

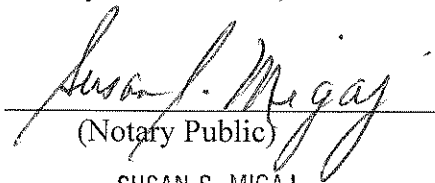
17. The relief herein sought has not been previously requested.

18. It is respectfully requested that this Court quash the subpoena in all respects, and for such other and further relief as this Court deems proper.



Charles C. Swanekamp (601346)
12 Fountain Plaza, Suite 800
Buffalo, New York 14202
Telephone: 716.856.0600
Fax: 716-856-0432
E-Mail: cswanekamp@jaeckle.com

Sworn to before me this
5th day of November, 2010.


(Notary Public)

SUSAN S. MIGAJ
Notary Public, State of New York
Qualified in Erie County
Commission Expires September 30, 20 14

EXHIBIT A

AO110 (Rev. 12/89) Subpoena to Testify Before Grand Jury

UNITED STATES DISTRICT COURT

NORTHERN

DISTRICT OF

NEW YORK

TO: Custodian of Records
Plaker & Lyons
Certified Public Accountants

SUBPOENA TO TESTIFY
BEFORE GRAND JURY

SUBPOENA FOR:

☒ PERSON ☒ DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

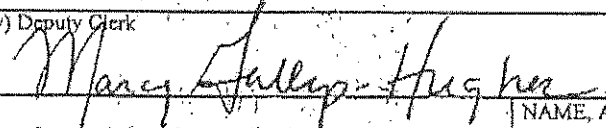
PLACE UNITED STATES GRAND JURY NORTHERN DISTRICT OF NEW YORK JAMES T. FOLEY U.S. COURTHOUSE 445 BROADWAY ALBANY, NEW YORK	COURTROOM Grand Jury Rm, 4th Floor <hr/> DATE AND TIME Thursday, May 6, 2010 @ 10:00 a.m.
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YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

Please See Attached

☐ Please see additional information on reverse.

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK LAWRENCE K. BAERMAN (By) Deputy Clerk 	DATE April 23, 2010
This subpoena is issued on application of the United States of America	NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY Elizabeth C. Coombe, Assistant U.S. Attorney James T. Foley U.S. Courthouse 445 Broadway, Room 218 Albany, New York 12207

* If not applicable, enter "none".

AO110 (Rev. 12/89) Subpoena to Testify Before Grand Jury

RETURN OF SERVICE ⁽¹⁾		
RECEIVED BY SERVER	DATE	PLACE
SERVED	DATE	PLACE
SERVED ON (PRINT NAME)		
SERVED BY (PRINT NAME)		TITLE
STATEMENT OF SERVICE FEES		
TRAVEL	SERVICES	TOTAL
DECLARATION OF SERVER ⁽²⁾		
<p>I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.</p>		
Executed on _____		SIGNATURE OF SERVER
DATE		
		ADDRESS OF SERVER
<div style="border: 1px solid black; height: 150px; margin-top: 10px;"></div>		
ADDITIONAL INFORMATION		

- (1) As to who may serve a subpoena and the manner of its service see Rule 17(d), Federal Rules of Criminal Procedure, or Rule 45(c), Federal Rules of Civil Procedure.
- (2) Fees and mileage need not be tendered to the witness upon service of a subpoena issued on behalf of the United States or an officer or agency thereof (Rule 45(c), Federal Rules of Civil Procedure; Rule 17(d), Federal Rules of Criminal Procedure) or on behalf of certain indigent parties and criminal defendants who are unable to pay such costs (28 USC 1825, Rule 17(b) Federal Rules of Criminal Procedure).

**ATTACHMENT TO GRAND JURY SUBPOENA
TO PIAKER & LYONS CERTIFIED PUBLIC ACCOUNTANTS**

1. DOCUMENTS TO BE PRODUCED: For the period August 1, 2003 through the present, any and all documents within your possession and control related to Timothy M. McGinn, David R. Smith, Thomas E. Livingston, and/or any of the following entities:

- alseT IP LLC
- Cruise Charter Ventures LLC
- Cruise Charter Venture Trust 08
- First Advisory Income Notes, LLC (FAIN)
- First Excelsior Income Notes, LLC (FEIN)
- First Independent Income Notes, LLC (FIIN)
- Firstline Senior and Junior Trusts 07
- Fortress Trust 08
- Integrated Excellence Senior and Junior Trusts 08
- M&S Partners
- McGinn, Smith & Co. Inc.
- McGinn, Smith Advisors, LLC
- McGinn, Smith Asset Management Corporation
- McGinn, Smith Capital Holding Corporation
- McGinn, Smith Capital Management LLC
- McGinn, Smith Group LLC
- McGinn, Smith Holding, LLC
- McGinn, Smith Licensing Company LLC
- McGinn, Smith Transaction Funding (MSTF)
- Mr. Cranberry, LLC
- NEI Capital LLC
- Pine Street Capital Partners
- TDM Cable Funding LLC
- TDM Cable Trust 06
- TDM Cable Trust 08
- TDM Luxury Cruise Trust 07
- TDM Verifier Trust 07
- TDM Verifier Trust 07R
- TDM Verifier Trust 08
- TDM Verifier Trust 08R
- TDM Verifier Trust 09
- TDM Verifier Trust 11
- TDMM Benchmark Trust 09
- TDMM Cable Funding LLC
- TDMM Cable Junior and Senior Trusts 09
- Third Albany Income Notes, LLC (TAIN)
- Verifier Capital LLC

including, but not limited to any and all books, records, bank statements, canceled checks, deposit tickets, work-papers, financial statements, correspondence and other pertinent documents furnished by or on behalf of the above named individuals and entities for the preparation of state and federal income tax returns and for any other entity in which either or both of them have a financial interest, including but not limited to:

- (a) Any and all records used in or resulting from the preparation of federal and state income tax returns consisting of but not limited to work-papers, notes, papers, memoranda and correspondence used or prepared by you relative to the preparation of the aforementioned returns.
- (b) Copies of federal and state income and payroll tax returns, state sales tax returns and amended tax returns.
- (c) All records, books of account and other documents or papers related to financial transactions of the principals.
- (d) All client billing records relative to this client to include records disclosing the dates and types of service rendered; client account cards; billing invoices; records reflecting the dates, amounts, purpose, and method of all payments (cash or check); and all correspondence with this client.

RECORD FORMAT: In addition to hard copies, records are requested in the form of magnetic media. Data may be provided in 3 ½ inch diskettes or compact disks (CDs). ASCII fixed length files are preferred, however, ASCII delimited format is acceptable. A record layout for the data is also requested.

2. **DEFINITIONS:** Unless explicitly stated otherwise, the following words or phrases used herein shall be construed as follows:

- a. "Document" or "records" refers to all written or graphic matter, however produced or reproduced, or to any other tangible permanent record, and, without limitation, including, among other things, digital data stored on hard drives, thumb drives, floppy discs, cd's or any other format, meta data, all video and audio recordings, electronic mail, letters, correspondence, records, memoranda, minutes, notes, summaries, telephone records, books, schedules, reports, studies, appraisals, analyses, lists, interviews, books of account, telegrams, notes and minutes of meetings, interoffice communications, results of investigations, working papers, computer data, papers similar to any of the foregoing and other writings of every kind of description (whether or not actually used, and including drafts of all documents), and including not only originals of such documents but all photostatic or microfilmed copies in whatever form, and all sound records or electronic data compilations in whatever form.
- b. "Financial Records" includes, but is not limited to, bank account statements, deposit slips, deposit items, checks, brokerage statements, wires, and money transfers.
- c. A document "relating or incident to" a given subject matter means any document or communication that constitutes, contains, embodies, comprises, reflects, identifies, describes, analyzes, or is in any way pertinent to that subject, including, without limitation, documents concerning the presentation of other documents.
- d. A document within your "possession and control" includes not only those in your direct possession, but also those documents in the possession of another person which you have the right to claim or possess.
- e. "Document(s)" also includes all items which are subject to a claim of privilege. If any such documents are responsive to the subpoena, each page of the "privileged" document will be numbered consecutively, and placed in a sealed envelope to be held by the custodian until directed otherwise by the Court. The custodian will then provide the Grand Jury with a log which includes the following information with respect to each document withheld: the page numbers assigned, the date, its author, primary and secondary addresses, the type of document (e.g., letter, memo, report), the client, the attorney, a general description of the subject matter of the document, and which privilege which is claimed.

EXHIBIT B



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
3 WORLD FINANCIAL CENTER
ROOM 400
NEW YORK, NEW YORK 10281-1022

WRITER'S DIRECT DIAL LINE
LARA SHALOV MEHRABAN
(212) 336-0591
MehrabanL@sec.gov

September 17, 2010

By Email and First Class Mail

Ronald L. Simons, CPA
President
Piaker & Lyons, Certified Public Accountants
92 Hawley Street
P.O. Box 1330
Binghamton, NY 13902-1330
(607) 729-9373
rsimons@pnlcpa.com

Re: *SEC v. McGinn Smith & Co., et al.*,
No. 10 Civ. 457 (NDNY)

Dear Mr. Simons:

Enclosed is a subpoena issued to Piaker & Lyons, Certified Public Accountants, in the above-referenced action. The subpoena requires that you produce documents to the SEC at the address listed above by October 1, 2010, at 2 p.m.

Thank you for your prompt attention to this matter. Please feel free to contact me with any questions. If you are unable to reach me, please contact Linda Arnold at (212) 336-0022 or Michael Paley at (212) 336-0145.

Sincerely,

A handwritten signature in black ink, appearing to be "Lara Shalov Mehraban", is written over the word "Sincerely,".

Lara Shalov Mehraban

UNITED STATES DISTRICT COURT

for the

Northern District of New York

Securities and Exchange Commission

Plaintiff

v.

McGinn, Smith, & Co., Inc., et al.

Defendant

Civil Action No. 10-CV-457 (GLS/RFT)

(If the action is pending in another district, state where:)

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Piaker & Lyons, Certified Public Accountants

Attn: Ronald L. Simons, President, 92 Hawley Street, P.O. Box 1330, Binghamton, NY 13902-1330

☒ **Production:** YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material: See Attachment.

Place: Securities and Exchange Commission, 3 World
Financial Center, Suite 400, New York, NY 10281
Attn: Lara Shalov Mehraban

Date and Time:

10/01/2010 2:00 pm

☐ **Inspection of Premises:** YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:

Date and Time:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 09/17/2010

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) Securities and Exchange Commission, who issues or requests this subpoena, are:

Lara Shalov Mehraban, Securities and Exchange Commission, 3 World Financial Center, New York NY 10281

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)**(c) Protecting a Person Subject to a Subpoena.**

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

SUBPOENA ATTACHMENT

Piaker & Lyons, CPA

September 17, 2010

INSTRUCTIONS

1. This Subpoena requires the production of each responsive document in its entirety, including all non-identical copies, drafts, and identical copies containing different handwritten notions, without abbreviation, expurgation, or redaction.
2. Claims of privilege with respect to any document, or portion of any document, shall be made as required by Rule 45(d)(2) of the Federal Rules of Civil Procedure.
3. If any document sought by this Subpoena once was, but no longer is, within your possession, control or custody, please identify each such document and its present or last known custodian, and state: (a) the reason why the document is not being produced; and (b) the date of the loss, destruction, discarding, theft or other disposal of the document.
4. Unless otherwise indicated, this Subpoena seeks documents from January 1, 2003 onward.
5. This Subpoena is ongoing in nature, and you should continue to produce responsive documents as they are found or created on an ongoing basis.

DEFINITIONS

1. "And" as well as "or" shall be construed in either the disjunctive or conjunctive form as necessary to bring within the scope of the request any information which may otherwise be construed to be outside its scope.
2. "Communication" means any transmittal of information (in the form of facts, ideas, inquiries, or otherwise), and includes without limitation e-mail, instant messages, faxes, text messages, notes of meetings, phone logs, and letters.

3. "Concerning" means relating to, referring to, describing, evidencing, or constituting.

4. "Document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a), including without limitation audio files, voicemail messages, electronic spreadsheets and drafts of electronic spreadsheets or other computerized data, including email messages (deleted or otherwise, and whether located at your offices or at your employees' residences or property, or on central or official databases, your servers and backup servers, local databases, internet-based e-mail servers, individual employees' hard drives, discs or personal digital assistants), notes, memoranda, work papers, paper files, desk files, draft workpapers). A draft or non-identical copy is a separate document within the meaning of this term.

5. "FAIN" shall mean First Advisory Income Notes, LLC, as well as any subsidiaries, predecessors, successors or affiliated entities, and any present and former directors, officers, employees, agents, attorneys, consultants, representatives and independent contractors of the foregoing entities.

6. "FEIN" shall mean First Excelsior Income Notes, LLC, as well as any subsidiaries, predecessors, successors or affiliated entities, and any present and former directors, officers, employees, agents, attorneys, consultants, representatives and independent contractors of the foregoing entities.

7. "FIIN" shall mean First Independent Income Notes, LLC, as well as any subsidiaries, predecessors, successors or affiliated entities, and any present and former directors, officers, employees, agents, attorneys, consultants, representatives and independent contractors of the foregoing entities.

8. "L. Smith" shall mean Lynn A. Smith and any person or entity acting on her behalf.

9. "McGinn" shall mean Timothy M. McGinn and any person or entity acting on his behalf.

10. "McGinn Smith Entities" or "McGinn Smith Entity" shall mean all of or any of the entities known as McGinn, Smith & Co., Inc., McGinn, Smith Advisors, LLC, and McGinn, Smith Capital Holdings Corp., as well as any entity or trust in which any of them, Smith, and/or McGinn have or had a controlling interest, any subsidiaries, predecessors, successors or affiliated entities, and any present and former directors, officers, employees, agents, trustees, attorneys, consultants, representatives and independent contractors of the foregoing entities, including, but not limited to, the entities identified in Exhibit A to the Preliminary Injunction Order, dated July 22, 2010 (attached hereto as Exhibit A).

11. "Smith" shall mean David L. Smith and any person or entity acting on his behalf.

12. "TAIN" shall mean Third Albany Income Notes, LLC, as well as any subsidiaries, predecessors, successors or affiliated entities, and any present and former directors, officers, employees, agents, attorneys, consultants, representatives and independent contractors of the foregoing entities.

13. "Trust" or "Trusts" shall mean Firstline Jr. and Sr. Trusts 07 offerings, TDM Cable Trust 06, TDM Luxury Cruise Trust 07, TDM Verifier Trust 07, TDM Verifier Trust 08, Cruise Charter Venture Trust 08, Fortress Trust 08, Integrated Excellence Jr. and Sr. Trusts 08, TDM Cable Trust 08, TDM Verifier Trust 09, TDMM Benchmark Trust 09, TDMM Cable Jr. and Sr. Trust 09, TDM Verifier Trust 07R, TDM Verifier Trust 08R, or any other offering for which any McGinn Smith Entity acted as placement agent.

14. "You" or "your" shall refer to Piaker & Lyons, Certified Public Accountants, as well as any subsidiaries, predecessors, successors or affiliated entities, and any present and former directors, officers, employees, agents, attorneys, consultants, representatives and independent contractors of the foregoing entities.

DOCUMENTS SUBPOENAED

1. All documents concerning FAIN, FEIN, FIIN, TAIN, the Trusts and the MS Entities, including but not limited to:

- (a) draft and final retention or engagement letters, or other documents that define the nature, scope and terms of work performed by you;
- (b) internal and external correspondence (including but not limited to documents concerning communications with McGinn and Smith and any current or former employees of FAIN, FEIN, FIIN, TAIN, any Trust or any MS Entity);
- (c) invoices and receipts of payment (including copies of checks);
- (d) desk files;
- (e) all draft and final work papers (including all indexes describing work papers and any referencing system or abbreviations used);
- (f) all documents provided to you by McGinn, Smith, FAIN, FEIN, FIIN, TAIN, any Trust or any MS Entity;
- (g) all draft and final federal, state and local tax returns; and
- (h) all documents concerning the preparation and issuance of financial statements.

2. All documents concerning McGinn, L. Smith, or Smith, including but not limited to:

- (a) draft and final retention or engagement letters, or other documents that define the nature, scope and terms of work performed by you;
- (b) internal and external correspondence (including but not limited to documents concerning communications with McGinn, L. Smith or Smith);
- (c) invoices and receipts of payment (including copies of checks);
- (d) desk files;
- (e) all draft and final work papers (including all indexes describing work papers and any referencing system or abbreviations used);
- (f) all documents provided to you by McGinn, L. Smith or Smith;
- (g) all draft and final federal, state and local tax returns; and
- (h) all documents concerning the preparation and issuance of financial statements.

3. Documents sufficient to identify all current and former employees of Piaker & Lyons who performed the services described in Requests Nos. 1 and 2, above.

4. All documents concerning your document retention, destruction, storage or archiving policies, procedures and practices.

Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

10 Civ. 457 (GLS) (DRH)

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

Defendants, and

LYNN A. SMITH,

Relief Defendant.

PRELIMINARY INJUNCTION ORDER

The Securities and Exchange Commission ("Commission") having filed a Complaint on April 20, 2010; and the Commission that same day having filed an Order to Show Cause seeking emergency relief; and the Court having entered an Order dated April 20, 2010 granting a temporary restraining order; asset freeze and other relief against defendants McGinn, Smith & Co., Inc. ("MS & Co."); McGinn, Smith Advisors LLC ("MS Advisors"); McGinn, Smith Capital Holdings Corp. ("MS Capital"); First Advisory Income Notes, LLC ("FAIN"); First Excelsior Income Notes, LLC ("FEIN"); First Independent Income Notes, LLC ("FIIN"); Third Albany Income Notes, LLC ("TAIN"); Timothy M. McGinn ("McGinn"); David L. Smith ("Smith") (collectively, the "Defendants") and Lynn A. Smith ("Relief Defendant"); and

appointing a temporary Receiver over MS & Co., MS Advisors, MS Capital, FAIN, FEIN, FIIN and TAIN, and all other entities McGinn or Smith control or have an ownership interest in, including but not limited to the entities listed on Exhibit A (collectively, the "MS Entities").

Defendants and the Relief Defendant each having (1) entered a general appearance; (2) consented to the Court's jurisdiction over Defendants and Relief Defendant and the subject matter of this action; (3) consented to entry of this Preliminary Injunction Order (the "Order"), without admitting or denying the allegations of the Complaint, and reserving all rights to answer or otherwise respond to the Complaint; (4) waived findings of fact and conclusions of law for the purposes of this Order only; (5) waived any right to appeal from this Order; and (6) reserved their rights to apply to this Court at any time for a modification of this Order.

The Court has considered: (1) the Complaint filed by the Commission on April 20, 2010; (2) the Declaration of Israel Maya, executed on April 19, 2010; (3) the Declaration of Roseann Daniello, executed on April 19, 2010; (4) the Declaration of Lara Shalov Mehraban, executed on April 19, 2010; (5) the Appendix of Exhibits in Support of Emergency Application; and (6) the Memorandum of Law in support of the Commission's application, dated April 20, 2010.

Based on the foregoing, the Court finds that a proper showing, as required by Section 20(b) of the Securities Act of 1933 ("Securities Act"), Section 21(d) of the Securities Exchange Act of 1934 ("Exchange Act"), Section 209(d) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 42(d) of the Investment Company Act of 1940 ("Company Act") has been made for the relief granted herein.

NOW, THEREFORE,

I.

IT IS HEREBY ORDERED that the Commission's Motion for a Preliminary Injunction is GRANTED.

II.

IT IS HEREBY ORDERED that, pending a final disposition of this action, MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith, and each of their agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service or otherwise, are preliminarily restrained and enjoined from violating, directly or indirectly, Sections 5(a) and 5(c) of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. §§ 77e(a) and 77e(c).

III.

IT IS FURTHER ORDERED that, pending a final disposition of this action, MS & Co., MS Advisors, MS Capital, McGinn and Smith, and each of their agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service or otherwise, are preliminarily restrained and enjoined from violating, directly or indirectly, Section 17(a) of 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 Exchange Act Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

IV.

IT IS FURTHER ORDERED that, pending a final disposition of this action, MS & Co., MS Advisors, McGinn and Smith, and each of their agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service or otherwise, are preliminarily restrained and enjoined

from violating, directly or indirectly, 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) and (2), and Rule 206(4)-8 thereunder, 17 C.F.R. §275.206(4)-8.

V.

IT IS FURTHER ORDERED that, pending a final disposition of this action, MS & Co., each of its agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service or otherwise, are preliminarily restrained and enjoined from violating, directly or indirectly, Section 15(c)(1)(A) of the Exchange Act, 15 U.S.C. § 78(o)(1), and Smith and McGinn, and each of their agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service or otherwise, are preliminarily restrained and enjoined from, directly or indirectly, aiding and abetting a violation of Section 15(c)(1)(A) of the Exchange Act, 15 U.S.C. § 78(o)(1).

VI.

IT IS FURTHER ORDERED that, pending a final disposition of this action, FAIN, FEIN, FIIN and TAIN, and each of their agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service or otherwise, are preliminarily restrained and enjoined from violating, directly or indirectly, Section 7(a) of the Company Act, 15 U.S.C. § 80a-7.

VII.

IT IS FURTHER ORDERED that, pending a final disposition of this action, the Defendants and the Relief Defendant, and each of their financial and brokerage institutions,

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

VIII.

IT IS FURTHER ORDERED that, pending final disposition of this action, William J. Brown, Esq., who was appointed Temporary Receiver by the Court's order dated April 20, 2010, shall serve as Receiver over the MS Entities, pending the final disposition of this action to (i) preserve the *status quo*, (ii) ascertain the extent of commingling of funds among the MS Entities; (iii) ascertain the true financial condition of the MS Entities and the disposition of investor funds; (iv) prevent further dissipation of the property and assets of the MS Entities and all

entities they control or have an ownership interest in; (v) prevent the encumbrance or disposal of property or assets of the MS Entities and the investors; (vi) preserve the books, records and documents of the MS Entities; (vii) be available to respond to investor inquiries; and (viii) determine whether the MS Entities should undertake bankruptcy filings.

To effectuate the foregoing, the Receiver is empowered to:

- (a) Take and retain immediate possession and control of all of the assets, including but not limited to all books, records and documents, of the MS Entities, and assume all the rights and powers of these assets with respect thereto including the powers set forth in the applicable management agreements, by-laws, LLC agreements or any other controlling agreements;
- (b) Have exclusive control of, and be made the sole authorized signatory for, all accounts at any bank, brokerage firm or financial institution that has possession or control of any assets or funds of the MS Entities;
- (c) Pay from available funds of any MS Entity the necessary expenses required to preserve the assets and property of the MS Entities, including the books, records, and documents of the MS Entities and all entities they control or have an ownership interest in, notwithstanding the asset freeze imposed by paragraph VII, above. This subparagraph does not, and is not intended to, effectuate or permit a substantive consolidation of the estates except for the payment of expenses as expressly set forth in this subparagraph;
- (d) Succeed to all rights to manage all properties owned or controlled, directly or indirectly, by the MS Entities, pursuant to applicable management agreements, by-laws, LLC agreements, or other controlling agreements relating to each entity;

- (e) Take steps to locate assets that may have been conveyed to third parties or otherwise concealed;
- (f) Take steps to ascertain the disposition and use of funds obtained by the Defendants resulting from the sale of securities issued by MS Entities;
- (g) Engage and employ persons, including accountants, attorneys and experts, to assist in the carrying out of the Receiver's duties and responsibilities hereunder;
- (h) Establish a cash management system by closing, transferring, consolidating and opening bank accounts and securities accounts, so long as records are kept of the sources and uses of all funds;
- (i) Invest all cash of the MS Entities in U.S. government securities or U.S. government guaranteed securities having remaining maturities of up to two years and in money market accounts maintained by financial institutions having net worths of no less than \$50 billion;
- (j) Discharge his duties as Receiver by making and authorizing in the ordinary course payments and disbursements from the funds and assets under his control, incurring expenses, and entering into agreements, including loan agreements and credit facilities, all as reasonably necessary or advisable under the circumstances;
- (k) Investigate, prosecute, defend, intervene in, and otherwise participate in, compromise and adjust actions in any state, federal, administrative, or foreign tribunal of any kind, or any potential actions or claims, as the Receiver believes in his sole discretion advisable or proper to collect, conserve, or otherwise recover the assets of the MS Entities, or entities they own or control;
- (l) Notwithstanding the terms of this Order, borrow monies and encumber assets of

the MS Entities, or the entities they own or control, to the extent such actions are deemed necessary by the Receiver based on his own experience and input from his advisors to be most beneficial to preserving enterprise value for one or more of the MS Entities and those entitled to proceeds; provided that encumbrances in excess of \$100,000 shall first require at least four (4) business days' written notice (unless shortened by court order) to the Commission, McGinn and Smith (such notice to be given to McGinn and Smith via ECF, facsimile, e-mail, and/or hand delivery to their respective counsel of record), and such other MS Entity investors having filed notices of appearance in the above-captioned case; provided further that the Receiver may apply for an order under seal or a hearing *in camera*, as circumstances require;

- (m) Use, lease, sell, and convert into money all assets of the MS Entities, either in public or private sales or other transactions on terms the Receiver reasonably believes based on his own experience and input from his advisors to be most beneficial to the MS Entities and those entitled to the proceeds; provided, however, all leases and sales of property appraised for or having a cost basis of \$100,000 or more shall only be consummated with prior court approval on at least four (4) business days' written notice (unless shortened by court order) to the Commission, McGinn and Smith (such notice to be given to McGinn and Smith via ECF, facsimile, e-mail, and/or hand delivery to their respective counsel of record), and creditors or MS Entity investors who have filed notices of appearance in the appearance in the above-captioned case; provided further that the Receiver may apply for an order under seal or *in camera*, as circumstances

require;

- (n) Take all necessary steps to gain control of the Defendants' interests in assets in foreign jurisdictions, including but not limited to taking steps necessary to repatriate foreign assets; and
- (n) Take such further action as the Court shall deem equitable, just, and appropriate under the circumstances upon proper application of the Receiver.

IX.

IT IS FURTHER ORDERED that the Receiver and all persons who may be engaged or employed by the Receiver to assist him in carrying out his duties and obligations hereunder, or any of their partners, officers, directors, members, employees, or agents, shall be immune from liability for all actions or omissions within the scope of the Receiver's authority. This provision shall apply to claims based on conduct during the term of any agreement entered into between the Receiver and any other person who may be engaged or employed by the Receiver hereunder, even if such claims are filed after the termination of any such agreement.

X.

IT IS FURTHER ORDERED that if in accordance with this order the Receiver determines that any of the MS Entities, should undertake a bankruptcy filing, the Receiver be, and hereby is, authorized to commence cases under title 11 of the United States Code for such entities in this district, and in such cases the Receiver shall prosecute the bankruptcy petitions in accordance with title 11 subject to the same parameters and objectives as a chapter 11 trustee and shall remain in possession, custody, and control of the title 11 estates subject to the rights of any party in interest to challenge such possession, custody, and control under 11 U.S.C. § 543 or to request a determination by this Court as to whether the Receiver should be deemed a debtor in

possession or trustee, at a hearing, on due notice to all parties in interest, before the undersigned. Before taking action under this paragraph, however, at least two (2) business days' written notice (unless shortened by court order) stating that the Receiver is contemplating action under title 11 must be provided to the Commission, McGinn and Smith (such notice to be given to the McGinn and Smith via ECF, facsimile, e-mail, and/or hand delivery to their respective counsel of record), and such other MS Entity investors who request such notice; provided further that the Receiver may apply for an order under seal or a hearing *in camera* as circumstances require.

XI.

IT IS FURTHER ORDERED that to facilitate efficient coordination in one district of all bankruptcies of MS Entities and the entities they own or control, the Northern District of New York shall be the Receiver's principal place of business for making decisions in respect of operating and disposing of each of the MS Entities and entities they own or control, and their respective assets.

XII.

IT IS FURTHER ORDERED that in lieu of providing retainers to the Receiver and his advisors, all payments made pursuant to the foregoing procedures prior to the initiation of any voluntary or involuntary petition for relief under the United States Bankruptcy Code, or foreign insolvency proceeding, shall be deemed payments made according to ordinary business terms and incurred in the ordinary course of business or financial affairs of the transferees and the MS Entities and not subject to avoidance as a preferential payment.

XIII.

IT IS FURTHER ORDERED that no person or entity, including any creditor or claimant against any of the Defendants or the Relief Defendant, or any person acting on behalf of

such creditor or claimant, shall take any action without further order of the Court to interfere with the taking control, possession or management of the assets, including but not limited to the filing of any lawsuits, liens or encumbrances or bankruptcy cases to impact the property and assets subject to this order.

XIV.

IT IS FURTHER ORDERED that the Defendants and the MS Entities are jointly and severally liable for the the reasonable costs, fees and expenses of the Receiver incurred in connection with the performance of his duties as described herein, including but not limited to, the reasonable costs, fees and expenses of all person who may be engaged or employed by the Receiver to assist him in carrying out his duties and obligations. All applications for costs, fees and expenses of the Receiver and those employed by him shall be made by application to the Court setting forth in reasonable detail the nature of such costs, fees and expenses, with notice to all parties and an opportunity to be heard.

XV.

IT IS FURTHER ORDERED that, pending final disposition of this action, the Defendants, the Relief Defendant, and any person or entity acting at their direction or on their behalf, or any other person, including but not limited to any investor, who receives actual notice of this Order by personal service or otherwise, are (1) restrained and enjoined from destroying, altering, concealing or otherwise interfering with the access of Commission and the Receiver to any and all documents, books and records, that are in the possession, custody or control of the Defendants, the Relief Defendant, and each of their officers, agents, employees, servants, accountants, financial or brokerage institutions, attorneys-in-fact, subsidiaries, affiliates, predecessors, successors and related entities, including but not limited to, the MS Entities, that

refer, reflect or relate to the allegations in the Complaint, including, without limitation, documents, books, and records referring, reflecting or relating to the Defendants' and the Relief Defendant's finances or business operations; and (2) ordered to provide all reasonable cooperation to the Receiver in carrying out his duties set forth herein.

XVI.

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

Dated: July 22, 2010
Albany, New York


UNITED STATES MAGISTRATE JUDGE

Exhibit A

List of Known Entities Controlled By McGinn and/or Smith

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

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

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
Mercantile Bank	██████1998	107th Assoc. LLC Trust 07	
Mercantile Bank	██████1987	107th Associates LLC	
M&T Bank	██████6850	107th Associates LLC	
M&T Bank	██████8478	74 State Street Capital LP	Operating
M&T Bank	██████062	74 State Street Capital LP	
M&T Bank	██████6288	Acquisition Trust 03	Operating Account
Whitney National Bank	██████9335	Benchmark Communication LLC	
M&T Bank	██████0805	Capital Center Credit Corp	Operating
M&T Bank	██████2250	Capital Center Credit Corp	Careclub Depository, 99 Pine St
JPMorganChase	██████587	Capital Center Credit Corp	Special Account Michael Levy
NFS/Fidelity	██████178	Capital Center Credit Corp	Attn: David Rees
			C/O MCGINN SMITH & CO INC
			ATTN DAVID P REES
JPMorganChase	██████4817	Capital Center Credit Corp c/o McGinn Smith & Co	
Monterey Bank	██████354	Charter Cruise Ventures	dba YOLO Cruises
M&T Bank	██████133	CMS Financial	
M&T Bank	██████6985	CMS Financial Services Corp.	
M&T Bank	██████064	CMS Financial Services Corp.	
Monterey Bank	██████346	Cruise Charter Ventures	dba YOLO Cruises
Mercantile Bank	██████8972	Cruise Charter Ventures LLC	
Mercantile Bank	██████1307	Cruise Charter Ventures LLC	
Mercantile Bank	██████2808	Cruise Charter Ventures Trust 08	
M&T Bank	██████3528	First Advisory Income Notes	Operating
M&T Bank	██████489	First Advisory Income Notes	Escrow
M&T Bank	██████9147	First Excelsior Income Notes LLC	Alarm Accum Account
M&T Bank	██████9139	First Excelsior Income Notes LLC	Operating
Charter One Bank	██████863-B	First Excelsior Income Notes LLC	Escrow
JPMorganChase	██████6928	First Excelsior Income Notes LLC	
NFS/Fidelity	██████9280	First Excelsior Income Notes LLC	
M&T Bank	██████5013	First Independent Income Notes	Operating
M&T Bank	██████9279	First Independent Income Notes	Monitoring Contract Accum

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
Charter One Bank	██████003-6	First Independent Income Notes	Timothy McGinn
JPMorganChase	██████893	First Independent Income Notes	
JPMorganChase	██████087	First Independent Income Notes	
NFS/Fidelity	██████934	First Independent Income Notes	
Mercantile Bank	██████1921	FirstLine Senior Trust 07 DTD 5/19/07	McGinn Smith Capital Holdings Corp. TTEE
M&T Bank	██████5028	FirstLine Sr Trust 07	
M&T Bank	██████5366	FirstLine Sr Trust 07 Series B	
Mercantile Bank	██████0733	FirstLine Sr Trust 07 Series B	McGinn Smith & Co Inc Trustee
M&T Bank	██████5010	FirstLine Trust 07	
Mercantile Bank	██████1910	FirstLine Trust 07 DTD 5/19/07	McGinn Smith Capital Holdings Corp. TTEE
Mercantile Bank	██████0722	FirstLine Trust 07 Series B	McGinn Smith & Co Inc Trustee, UAD 10/16/07
M&T Bank	██████5358	FirstLine Trust 07 Series B	
M&T Bank	██████6413	Fortress Trust 08	c/o McGinn Smith Capital Holdings Corp.
Mercantile Bank	██████9187	Fortress Trust 08 UTD 9/10/08	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	██████6165	Integrated Excellence Jr Trust	
Mercantile Bank	██████8994	Integrated Excellence Jr Trust 08 DTD 5/28/08	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	██████6173	Integrated Excellence Sr Trust	
Mercantile Bank	██████3983	Integrated Excellence Sr Trust 08 DTD 5/27/08	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	██████6858	JP Investors LLC	
M&T Bank	██████8783	James J. Carroll Charitable Fund	
M&T Bank	██████6815	JGC Trust 09	Operating c/o McGinn Smith
Mercantile Bank	██████1674	Luxury Cruise Center Inc	
Mercantile Bank	██████0446	Luxury Cruise Center Inc	
Mercantile Bank	██████0435	Luxury Cruise Charter Inc. Payables	
Mercantile Bank	██████1945	Luxury Cruise Receivables LLC	
Mercantile Bank	██████1967	Luxury Cruise Receivables LLC	
M&T Bank	██████3996	M&S Partners	
JPMorganChase	██████443	McGinn Smith & Co	
JPMorganChase	██████670	McGinn Smith & Co	

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
NFS/Fidelity	██████0167	MCGINN SMITH & CO DELIGIANNIS MASTER ACCOUNT	
NFS/Fidelity	██████035	MCGINN SMITH & CO AVERAGE PRICE ACCOUNT	
JPMorgan Chase	██████800	McGinn Smith & Co Capital A/C	
JPMorgan Chase	██████302	McGinn Smith & Co Corporate Bond A/C Attn: David Rees	
JPMorgan Chase	██████906	McGinn Smith & Co Deposit Account Attn: David Rees	
JPMorgan Chase	██████805	McGinn Smith & Co Error Account Attn: David Rees	
JPMorgan Chase	██████801	McGinn Smith & Co Firm Trading A/C Attn: David Rees	
JPMorgan Chase	██████803	McGinn Smith & Co Govt Bond A/C Attn: David Rees	
NFS/Fidelity	██████007	MCGINN SMITH & CO INC	
NFS/Fidelity	██████051	MCGINN SMITH & CO INC ALBANY BTAM S DIFFERENCE	
NFS/Fidelity	██████043	MCGINN SMITH & CO INC ALBANY BTAM MASTER ACCOUNT	
NFS/Fidelity	██████007	MCGINN SMITH & CO INC DAVID L SMITH	
NFS/Fidelity	██████175	MCGINN SMITH & CO INC DELIGIANNIS S DIFFERENCE	
NFS/Fidelity	██████086	MCGINN SMITH & CO INC NYC BTAM UNALLOCATED	
NFS/Fidelity	██████728	MCGINN SMITH & CO INC REVENUE ACCOUNT	
NFS/Fidelity	██████060	MCGINN SMITH & CO INC ALBANY BTAM UNALLOCATED	
NFS/Fidelity	██████205	MCGINN SMITH & CO INC BOYLAN S DIFFERENCE	

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
NFS/Fidelity	██████191	MCGINN SMITH & CO INC BOYLAN MASTER ACCOUNT	
NFS/Fidelity	██████183	MCGINN SMITH & CO INC DELIGIANNIS UNALLOCATED	
NFS/Fidelity	██████116	MCGINN SMITH & CO INC ERROR ACCOUNT	
NFS/Fidelity	██████230	MCGINN SMITH & CO INC RABINOVICH S DIFFERENCE	
NFS/Fidelity	██████221	MCGINN SMITH & CO INC RABINOVICH MASTER ACCOUNT	
NFS/Fidelity	██████248	MCGINN SMITH & CO INC RABINOVICH UNALLOCATED	
NFS/Fidelity	██████140	MCGINN SMITH & CO INC SANCHIRICO S DIFFERENCE	
NFS/Fidelity	██████132	MCGINN SMITH & CO INC SANCHIRICO MASTER ACCOUNTS	
NFS/Fidelity	██████159	MCGINN SMITH & CO INC SANCHIRICO UNALLOCATED	
NFS/Fidelity	██████108	MCGINN SMITH & CO INC SYNDICATE ACCOUNT	
JPMorganChase	██████304	McGinn Smith & Co Municipal Bond Account Attr: David Rees	
JPMorganChase	██████815	McGinn Smith & Co Reserve A/C Residual Bal	
NFS/Fidelity	██████019	MCGINN SMITH & CO RISKLESS PRINCIPAL	
JPMorganChase	██████607	McGinn Smith & Co Syndicate A/C	
M&T Bank	██████1081	McGinn Smith & Company	Dividend

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
M&T Bank	████████4734	McGinn Smith & Company	
M&T Bank	████████3569	McGinn Smith Advisors LLC	
M&T Bank	████████5044	McGinn Smith Alarm Trading LLC	
M&T Bank	████████4351	McGinn Smith Capital Holdings	MSCH Paying Agent for Vidsoft Inc.
M&T Bank	████████3551	McGinn Smith Capital Holdings	Payment Agent for Vigilant Privacy Corp.
M&T Bank	████████8803	McGinn Smith Capital Holdings	
JPMorganChase	████████573	McGinn Smith Capital Holdings	
NFS/Fidelity	████████734	MCGINN SMITH CAPITAL HOLDINGS	
M&T Bank	████████5783	McGinn Smith Capital Holdings Corp	Hannan Reserve Account
Mercantile Bank	████████1635	McGinn Smith Funding LLC	
Monterey Bank	████████338	McGinn Smith Funding LLC	
M&T Bank	████████8925	McGinn Smith Holdings LLC	
NFS/Fidelity	████████944	MCGINN SMITH INCENTIVE PL CUST IRA OF TIMOTHY MCGINN	
JPMorganChase	████████246	McGinn Smith Incentive Savings Plan	
Mercantile Bank	████████9022	McGinn Smith Independent Services Corp	
M&T Bank	████████5975	McGinn Smith Independent Services Corp	
M&T Bank	████████5051	McGinn Smith Licensing Company LLC	
Mercantile Bank	████████3083	McGinn Smith Transaction Funding Corp	
M&T Bank	████████6207	McGinn Smith Transaction Funding Corp	
Mercantile Bank	████████8857	McGinn Smith Transaction Funding Corp	2nd Offering Account
M&T Bank	████████5036	McGinn Smith Acceptance Corp	

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
JP Morgan Chase	██████████0294	McGinn, Tim (Union Bank of California Cust Adams, Keegan Retirement Svgs Plan, FBO Tim McGinn A/C # ██████████5003)	
NFS/Fidelity	██████████745	McGinn, Timothy M.	
M&T Bank	██████████2675	McGinn, Timothy M.	
M&T Bank	██████████9504	McGinn, Timothy M.	
Mercantile Bank	██████████6288	McGinn, Timothy M.	
JP Morgan Chase	██████████9655	McGinn, Timothy M.	
Bank of America	****5452	McGinn, Timothy and Nancy	
Mercantile Bank	██████████2171	MR Cranberry LLC	c/o Timothy McGinn
NFS/Fidelity	██████████272	MR Cranberry LLC	
M&T Bank	██████████5421	MSFC Security Holdings LLC	
Mercantile Bank	██████████9220	NBI Capital LLC	
M&T Bank	██████████6835	Pacific Trust 02	Operating
Mercantile Bank	██████████9687	Prime Vision Communication Mgmt Keys Cove LLC	c/o McGinn Smith & Co
Bank of Florida	██████████976	Prime Vision Communications LLC	
Mercantile Bank	██████████9698	Prime Vision Communications of Cutler Cay LLC	c/o McGinn Smith & Co
Mercantile Bank	██████████9518	Prime Vision Funding of Cutler Cove LLC	c/o McGinn Smith & Co
Mercantile Bank	██████████9529	Prime Vision Funding of Key Cove LLC	c/o McGinn Smith & Co
M&T Bank	██████████6767	RTC Trust 02	Accum
M&T Bank	██████████6775	RTC Trust 02	Operating
M&T Bank	██████████3635	SAI Trust 00	
Charter One Bank	██████████523-3	SAI Trust 00	
M&T Bank	██████████8966	SAI Trust 03	Jr
M&T Bank	██████████4620	SAI Trust 03	Sr
M&T Bank	██████████7729	Security Participation Trust I	
M&T Bank	██████████9410	Security Participation Trust II	Accum
M&T Bank	██████████9288	Security Participation Trust II	Operating
M&T Bank	██████████8123	Security Participation Trust III	Operating
M&T Bank	██████████8115	Security Participation Trust III	Accum
M&T Bank	██████████5460	Security Participation Trust IV	
Charter One Bank	██████████023-6	Security Participation Trust Oper	
M&T Bank	██████████4492	Seton Hall Associates	McGinn & Smith
NFS/Fidelity	██████████208	Smith, David L.	
M&T Bank	██████████965	Smith, David L.	
NFS/Fidelity	xxx-xx6777	Smith, David L.	
NFS/Fidelity	xxx-xx4353	Smith, David and Lynn	

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
NFS/Fidelity	916	Smith, Lynn A.	
NFS/Fidelity	912	Smith, Lynn A.	
Bank of America		Smith, Lynn A.	
JPMorganChase		Smith, Lynn A.	
Mercantile Bank	9507	TDM Cable Funding LLC	c/o McGinn Smith & Co.
Mercantile Bank	9573	TDM Cable Funding LLC / TDM Cable Trust 06	c/o McGinn Smith & Co.
M&T Bank	4765	TDM Cable Funding LLC TDM Verifier Trust 07 Operating	TDM Verifier Trust 07 Operating
M&T Bank	4500	TDM Cable Funding LLC Trust 06 Account	Trust 06 Account
M&T Bank	6234	TDM Luxury Cruise Trust 07	
Mercantile Bank	2086	TDM Luxury Cruise Trust 07 DTD 7/16/07	McGinn Smith Capital Holdings Corp - TTEE
Mercantile Bank	437	TDM Verifier Trust 07	Escrow
Mercantile Bank	4216	TDM Verifier Trust 07R	
M&T Bank	5738	TDM Verifier Trust 08	
Mercantile Bank	1030	TDM Verifier Trust 08 DTD 12/11/07	McGinn Smith Capital Holdings Corp - TTEE
Mercantile Bank	9132	TDM Verifier Trust 08R DTD 12/11/07	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	6736	TDM Verifier Trust 09	
Mercantile Bank	4007	TDM Verifier Trust 09 DTD 12/15/08	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	7064	TDM Verifier Trust 11	
M&T Bank	409	TDM Verifier Trust 11	
M&T Bank	7056	TDMM Benchmark Trust 09	
Mercantile Bank	9077	TDMM Cable Funding LLC	
Mercantile Bank	4139	TDMM Cable Jr Tr 09 DTD 1/16/09	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	6728	TDMM Cable Jr Trust 09	
Mercantile Bank	4150	TDMM Cable Sr Tr 09 DTD 1/16/09	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	6710	TDMM Cable Sr Trust 09	
M&T Bank	462	Third Albany Income Notes	Escrow
NFS/Fidelity	384	Third Albany Income Notes	
M&T Bank	9550	Third Albany Income Notes	Operating
M&T Bank	3593	Third Albany Income Notes	Alarm Account
JPMorganChase	988	Third Albany Income Notes	

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
NPS/Fidelity	██████████671	Urbelis Thomas TREE David L Smith & Lynn A Smith, Irrev Tr U/A 8/4/04	
Mercantile Bank	██████████0222	White Glove Cruises LLC	
Mercantile Bank	██████████8201	White Glove Cruises LLC	
Mercantile Bank	██████████0231	White Glove Cruises LLC	
Mercantile Bank	██████████2759	White Glove Cruises LLC	

EXHIBIT C



U.S. Department of Justice

*United States Attorney
Northern District of New York*

445 Broadway
Room 218
Albany, NY 12207

518-431-0247
FAX: 518-431-0249

October 20, 2010

BY ELECTRONIC MAIL

Brian Devane, Esquire
Law Office of Brian Devane
600 Broadway
Albany, NY 12207-2235

Re: Ronald Simons

Dear Mr. Devane:

I am writing to tell you that, based on the information currently available, your client, Ronald Simons, is a target of the grand jury investigation.

Very truly yours,

RICHARD S. HARTUNIAN
United States Attorney

By: /s/ Elizabeth C. Coombe
Elizabeth C. Coombe
Assistant U.S. Attorney

EXHIBIT D



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
3 WORLD FINANCIAL CENTER
ROOM 400
NEW YORK, NEW YORK 10281-1022

WRITER'S DIRECT DIAL LINE
LARA SHALOV MEHRABAN
(212) 336-0591
MehrabanL@sec.gov

October 20, 2010

By Email and UPS Overnight Delivery

Charles C. Swanekamp
Jaeckle Fleischmann & Mugel, LLP
12 Fountain Plaza, Suite 800
Buffalo, NY 14202-2292

Re: SEC v. McGinn Smith & Co., et al.,
No. 10 Civ. 457 (NDNY)

Dear Mr. Swanekamp:

As David mentioned in his email to you yesterday, enclosed is a subpoena issued to Ronald Simons. I understand that you represent Piaker & Lyons, LLP in connection with the SEC's subpoena issued on September 17, 2010. Please let me know whether you also will represent Mr. Simons and whether you agree to accept service of this subpoena.

The subpoena requires Mr. Simons to appear for testimony at a hearing in the above-referenced action scheduled by Magistrate Judge David Homer on November 16, 2010 at 9:15 a.m. Judge Homer's order scheduling the hearing and the other court papers filed in this action are available electronically on Pacer as well as on the Receiver's website at www.mcginnsmithreceiver.com. Judge Homer's order scheduling the hearing, dated October 7, 2010, is Docket Entry #150.

Please feel free to contact me or David with any questions. I can be reached at (212) 336-0591 and David can be reached at (212) 336-0174.

Sincerely,

A handwritten signature in black ink, appearing to be "L. Mehraban", written over a horizontal line.

Lara Shalov Mehraban

Encl.

AO 88 (Rev. 06/09) Subpoena to Appear and Testify at a Hearing or Trial in a Civil Action

UNITED STATES DISTRICT COURT

for the
Northern District of New York

Securities and Exchange Commission

Plaintiff

v.

McGinn Smith & Co., Inc., et al.

Defendant

Civil Action No. 10-cv-457 (GLS/DRH)

SUBPOENA TO APPEAR AND TESTIFY
AT A HEARING OR TRIAL IN A CIVIL ACTION

To: Ronald L. Simons

c/o Charles Swanekamp, Jaeckle, Fleishmann & Mugal LLP, 12 Fountain Plaza, Ste 800, Buffalo, NY 14202-2292

YOU ARE COMMANDED to appear in the United States district court at the time, date, and place set forth below to testify at a hearing or trial in this civil action. When you arrive, you must remain at the court until the judge or a court officer allows you to leave. If you are an organization that is *not* a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place: James T. Foley, United States Courthouse
445 Broadway
Albany, NY 12207

Courtroom No.: 3

Date and Time: 11/16/2010 9:15 am

You must also bring with you the following documents, electronically stored information, or objects (*blank if not applicable*):

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Fed. R. Civ. P. 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 10/20/2010

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (*name of party*)

Plaintiff

, who issues or requests this subpoena, are:

Lara S. Mehraban, Securities and Exchange Commission,
3 World Financial Center, Room 400, New York, NY 10281 (212) 336-0591

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)**(c) Protecting a Person Subject to a Subpoena.**

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

EXHIBIT E



Charles C. Swanekamp
Partner
Direct: 716.843.3925
cswanekamp@jaeckle.com

12 Fountain Plaza | Suite 800
Buffalo, NY 14202-2292
Tel: 716.856.0600
Fax: 716.856.0432

October 29, 2010

Via E-Mail mehrabanl@sec.gov
and First Class Mail

Ms. Lara Shalov Mehraban
U.S. Securities and Exchange Commission
New York Regional Office
3 World Financial Center, Room 400
New York, NY 10281-1022

Re: SEC v. McGinn Smith & Co., et al.
No. 10 Civ. 457 (NDNY)

Dear Ms. Mehraban:

May this correspondence confirm my acceptance of the Subpoena directed to my client, Ronald Simons, with respect to a hearing to be conducted on November 16, 2010 at 9:15 a.m. in the matter of *Securities and Exchange Commission v. McGinn Smith & Co.* (No. 10-cv-457). My acceptance of service in this matter on behalf of Mr. Simons does not necessarily constitute an acceptance of service of any future subpoenas or other documents on my client.

You have indicated that the testimony sought from my client will relate to the David Smith Private Annuity Trust and tax returns prepared for David and Lynn Smith, among other things.

May this correspondence constitute a formal request that you withdraw your Subpoena directed to Mr. Simons. As you are no doubt aware, Mr. Simons has been designated a "target" by the United States Attorney for the Northern District of New York in regard to a Grand Jury proceeding that is presently in process in regard to the *McGinn Smith & Co.* matter. As such, it is my client's intention to assert the Fifth Amendment right against self-incrimination and to accordingly, respectfully decline to answer any questions posed to him with respect to the *McGinn Smith & Co.* engagement. Inasmuch as my client will not be providing any testimony, and in the interests of judicial economy, we respectfully submit that the Subpoena should be withdrawn.

Ms. Lara Shalov Mehraban
US Securities and Exchange Commission
New York Regional Office
October 29, 2010

Page 2

We would appreciate advisement by November 3, 2010 of your intentions with respect to the withdrawal of the Subpoena. Unless we hear from you affirmatively that the Subpoena will be withdrawn, we will have little recourse other than moving to quash it in all respects.

Very truly yours,



CHARLES C. SWANEKAMP

CCS:sm/1021618

cc: Brian DeVane, Esq.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

-vs-

Civil Action No. 10-cv-457(GLS/RFT)

MCGINN, SMITH & CO., INC., *et al.*,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO QUASH PURSUANT TO FED. R. CIV. P. 45(c)(3)(A)(iii)

This memorandum of law is submitted on behalf of Ronald L. Simons, a non-party to this action, in support of his motion to quash a subpoena ad testificandum issued by plaintiff Securities and Exchange Commission ("SEC"). The relevant facts are contained in the accompanying affidavit of Charles C. Swanekamp, Esq., and will not be repeated herein.

ARGUMENT

Pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 45(c)(3)(A)(iii), "the issuing court must quash or modify a subpoena that...requires disclosure of privileged or other protected matter, if no exception or waiver applies...." (Emphasis added). In this case, Mr. Simons asserts that testifying before this Court in this action implicates his Fifth Amendment right against self-incrimination.

Specifically, Mr. Simons is the President and a principle of the accounting firm of Piaker & Lyons, LLP ("Piaker"). For several years, Piaker completed and filed federal tax returns for defendant McGinn, Smith & Co., Inc., as well as some of its related entities and Messrs. McGinn

and Smith personally. As a result of his preparation of these tax returns, Mr. Simons is now a target of an investigation by the United States Attorneys' Office ("USAO"). It is these same tax returns upon which the SEC seeks to question Mr. Simons.

As detailed in the accompanying affidavit, the documents which the SEC obtained from Piaker as a result of an earlier subpoena, are a subset of documents produced to the United States Attorneys' Office pursuant to a Grand Jury Subpoena. Piaker has not produced any documents to the SEC which were not previously produced to the USAO. Consequently, at the upcoming hearing, any document upon which Mr. Simons is questioned about has an impact on the USAO's investigation. As a result, Mr. Simons must assert his Fifth Amendment right against self-incrimination to any question posed by the SEC at the upcoming hearing.

It is well established that the Fifth Amendment "can be asserted in any proceeding, civil or criminal,...against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 444-445, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972)(footnotes omitted). Here, Mr. Simons is a target of criminal investigation by the USAO. His assertion of his Fifth Amendment rights is not based upon the specter of a possibility that his statements might be used against him.

While the SEC may argue that Mr. Simons should be compelled to appear at the upcoming hearing because the SEC may ask questions which Mr. Simons could answer, such a compulsion also jeopardizes Mr. Simons right to preserve his Fifth Amendment privileges. As stated in *United States v. O'Henry Film Works, Inc*, 598 F.2d 313, 317 (2d Cir. 1979)(citations omitted), "[a] witness who fails to invoke the Fifth Amendment against questions as to which he could have claimed it is deemed to have waived his privilege respecting all questions on the

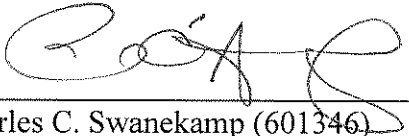
same subject matter." In this case, the SEC is seeking to call Mr. Simons not to ask him general questions relating to tax preparation; rather they seek to question him on specific tax returns—the same tax returns in the possession of the USAO. Indeed, even a seemingly innocuous question about why an entry was placed on a certain schedule, if answered, will waive Mr. Simons' right to invoke his Fifth Amendment privilege under the *O'Henry Film Works, Inc.* analysis. Consequently, Mr. Simons will not be able to answer any questions at the upcoming hearing, rendering his appearance futile.

As a result, the subpoena ad testificandum should be quashed and no additional subpoenas issued for Mr. Simons' testimony until the USAO investigation is complete.

DATED: November 5, 2010

Respectfully submitted,

JAECKLE FLEISCHMANN & MUGEL, LLP

By: 

Charles C. Swanekamp (601346)
Attorneys for Ronald L. Simons
12 Fountain Plaza, Suite 800
Buffalo, New York 14202
Telephone: 716.856.0600
Fax: 716-856-0432
E-Mail: cswanekamp@jaeckle.com

and

Brian Devane, Esq. (501138)
LAW OFFICE OF BRIAN DEVANE
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TO: Lara S. Mehraban, Esq.
Securities and Exchange Commission
3 World Financial Center, Room 400
New York, New York 10281
Telephone: 212.336.0591
E-mail: MehrabanL@sec.gov

1024407