

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

10 Civ. 457 (GLS/DRH)

**McGINN, SMITH & CO., INC.,
McGINN, SMITH ADVISORS, LLC,
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC,
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. MCGINN, 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,

**LYNN A. SMITH, and
NANCY MCGINN,**

Relief Defendants, and

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

Intervenor.

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the Court's Text Order dated May 19, 2011 granting Plaintiff leave to file a motion regarding the crime-fraud exception to the attorney-client privilege; the Memorandum of Law in support of Plaintiff's Motion to Compel Compliance with Subpoenas dated July 6, 2011; the Declaration of David Stoelting dated July 6, 2011, and the accompanying exhibits; and upon all prior proceedings and filings herein, Plaintiff Securities and

Exchange Commission will move, on August 18, 2011, at 9:30 a.m., or at any other date convenient to the Court, before the Honorable David R. Homer, United States Magistrate Judge, United States District Court, Northern District of New York, 445 Broadway, Albany, NY, for an order compelling nonparty Martin Finn, Esq. and the law firm of Lavelle & Finn LLP to comply with the Subpoenas served on them on April 7, 2011 and June 21, 2011; and

PLEASE TAKE FURTHER NOTICE that pursuant to Local Rule 7.1(b)(2), opposition papers must be filed and served not less than seventeen days prior to the return date.

Dated: New York, NY
July 6, 2011

Respectfully submitted,

s/David Stoelting
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Attorney for Plaintiff
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Of Counsel:

Kevin McGrath
Haimavathi V. Marlier
Joshua Newville

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

SECURITIES AND EXCHANGE COMMISSION,

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TIMOTHY M. MCGINN, DAVID L. SMITH,
LYNN A. SMITH, DAVID M. WOJESKI, Trustee of
the David L. and Lynn A. Smith Irrevocable
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LAUREN T. SMITH, and NANCY MCGINN,**

Defendants,

**LYNN A. SMITH, and
NANCY MCGINN,**

Relief Defendants, and

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

Intervenor.

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
MOTION TO COMPEL COMPLIANCE WITH NONPARTY SUBPOENAS**

**SECURITIES AND EXCHANGE COMMISSION
3 World Financial Center
New York, NY 10281
(212) 336-0174**

July 6, 2011

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Plaintiff Securities and Exchange Commission respectfully submits this memorandum of law in support of its motion to compel compliance with document and testimony subpoenas served on April 7 and June 21, 2011, on nonparties Martin S. Finn and his law firm, Lavelle & Finn LLC (collectively the "Finn Subpoenas"). *See* Declaration of David Stoelting dated July 6, 2011 ("Decl."), Exs. 1, 2, 3.

PRELIMINARY STATEMENT

Martin Finn is an estate planning lawyer that David and Lynn Smith consulted in order to receive advice about transferring assets out of David Smith's name the period of the securities fraud that began in 2003. The Smiths consulted with Finn about most of their assets, including the David L. and Lynn A. Smith Irrevocable Trust U/A 9/4/04 ("Trust"), which the Smiths created in 2004 to shield \$4.5 million of their wealth from creditors. Decl. Ex 5 at 39, 77-78; Ex. 6 at 20.

In January 2009, the Smiths again met with Finn to receive advice about protecting valuable assets from creditors. Decl. Ex. 7. At the time, the Smiths knew that David Smith would likely become liable to investors as a result of his ongoing violations of the federal securities laws. Their consultations with Finn, an attorney whose expertise is asset protection, were in furtherance of their scheme to fraudulently move assets out of the reach of creditors. The Finn Subpoenas seek documents concerning this scheme, and the Smiths have instructed Finn and his law firm to assert the attorney-client privilege "with respect to the entirety of the file and representation which are the subject of the subpoenas." Decl. Ex. 4.

The motion to compel should be granted for either of the following reasons:

First, the crime-fraud exception removes the attorney-client privilege from communications between Finn and his law firm and the Smiths. Evidence shows that from the

beginning of David Smith's securities fraud scheme in 2003, the Smiths had an intent to defraud present and future creditors. All communications with Finn after that time should be produced. The Court previously found that the SEC demonstrated a likelihood of success of proving that certain joint assets were transferred to Lynn's name "solely for the fraudulent purpose of shielding David Smith's assets from seizure." *SEC v. McGinn, Smith & Co., Inc., et al.*, 752 F. Supp. 2d 194, 217 (N.D.N.Y. 2010) (Dkt. 86) (freezing transferred assets). Accordingly, the documents and testimony that the SEC seeks from Finn and his law firm relate to the Smiths' efforts to further their ongoing fraudulent conduct. The attorney-client privilege does not protect these communications from disclosure.

Second, David Smith waived any applicable privilege or protection. In June 2009, David Smith produced to the Financial Industry Regulatory Authority ("FINRA") a letter from Finn detailing the Smiths' "asset protection" goals. Decl. Ex. 7. Smith never asked FINRA to return the letter. Decl. Ex. 9 ¶ 5; Ex. 6 at 3-8. On June 8, 2010, during the preliminary injunction hearing, the Court found that David Smith waived any privileges protecting the letter. Decl. Ex. 6 at 8. Lynn Smith then testified in open court during the June 2010 preliminary injunction hearing about the letter, her communications with Finn, and the advice received from Finn. Decl. Ex. 6 at 12-35. As a result, any privilege adhering to communications regarding their asset protection actions has been waived.

STATEMENT OF FACTS

The Subpoenas to Martin Finn and Lavalley & Finn, LLP

Finn is an attorney specializing in estate planning and asset protection. He is a partner at the law firm of Lavalley and Finn, LLP in Latham, NY. On April 7, 2011, the SEC issued a Rule 45 subpoena to Finn requesting all communications between Finn and David and Lynn Smith,

including all documents concerning his advice to the Smiths regarding estate planning, asset protection and transfers of money or other assets.¹ Decl. Ex. 1. On June 21, 2011, the SEC served Finn with a deposition subpoena and Lavalley & Finn, LLP with a document subpoena. Decl. Exs. 2, 3. David Smith and Lynn Smith have instructed Finn and his firm not to comply with the subpoenas on the basis of the attorney-client privilege. Decl. Ex. 4 at 4-5.

The Smiths' Intent to Defraud Creditors

David and Lynn Smith's intent to defraud present and/or future creditors existed at least by the time of the first fraudulent offering in September 2003, and is evidenced by the following:

- The FIIN and FEIN offerings in September 2003 and January 2004 raised a total of \$40 million and by August 2004 (when the Smiths created the Trust and transferred \$4.5 million to it), the liabilities of FIIN and FEIN far exceeded the Smiths' assets. Dkt. 87 at 62-63 (Testimony of Israel Maya); Decl. Ex. 8 (PI Hearing Ex. 32).
- David Smith, Lynn Smith, Timothy McGinn, MS & Co. and other entities controlled by Smith and McGinn were named as defendants in a securities fraud suit, *Meyers v. Integrated Alarm Services Group, Inc., et al.* 03 CV 9748 (S.D.N.Y. 2003). Dkt. 103-2 ¶ 41 (complaint in *Meyer v. McGinn Smith, et al.*) The complaint asserted 23 causes of action and sought \$3 million in damages for each claim. The case was settled in 2004 by the payment of \$200,000 to the plaintiff. Dkt. 103-2 ¶¶ 41-43, Ex. 6.

¹ In September 2010, the SEC provided the defendants with a copy of the database of electronic files seized on April 20, 2010 pursuant to search warrants. Since then, no defendant has informed the SEC of privileged documents in the database. In the course of its review of the database, however, the SEC has identified eight documents that are potentially subject to any privilege between Finn and the Smiths. The SEC has segregated these documents and restricted access to them, until the privilege issues are resolved.

- Smith acknowledged that his fraudulent investment schemes could lead to financial ruin. In an undated, handwritten “personal confession,” Smith wrote that “I am overwhelmed by the thought of the financial losses[.]” Dkt. 103-2 ¶ 51, Ex. 14.
- In 2003 and early 2004, the SEC’s Broker-Dealer Inspection Program (“BDIP”) conducted an examination of MS & Co. In a letter to Smith from the BDIP dated February 26, 2004, Smith was advised of several “deficiencies and/or violations of law.” Dkt. 103-2 ¶ 52, Ex. 15.
- The creation of the Trust in August 2004, funded with \$4.5 million, and the “Private Annuity Agreement,” were designed to shelter assets from the Smiths’ present and future creditors, and the Smiths went to great lengths to prevent the disclosure of the Annuity Agreement, in order to hide their interests in the Trust. *SEC v. Wojeski*, 752 F. Supp.2d 220, 231 n.17 (N.D.N.Y. 2010 (Dkt. 194)).
- In an e-mail dated January 14, 2009 to McGinn, David Smith stated, in reference to Finn, that he was “meeting with my estate attorney tomorrow afternoon and Lynn and I have to shift money around between us[.]” Dkt. 46-1 Ex. 5.
- David Smith, who invoked his Fifth Amendment privileges in this proceeding (*SEC v. McGinn Smith*, 752 F.Supp.2d 194, 208-209 (N.D.N.Y. 2010)), lied under oath about his assets. As this Court noted, “David Smith testified [before FINRA] that he and his wife had maintained separate finances for twenty years[.]” *SEC v. McGinn Smith*, 752 F.Supp.2d 194, 211 (N.D.N.Y. 2010) (Dkt. 86).

January 1999 Letter from Finn to the Smiths

A letter dated January 28, 2009, from Finn to the Smiths refers to the Smiths’ “asset protection objectives” and summarized “the proposed transfer of assets we recently discussed.”

Decl. Ex. 7. L. Smith testified that she recognized the letter and recalled receiving it. Dkt. 88 at 81. The assets referenced in this letter as potential transfers to Lynn are a David L. Smith Lifetime QTIP Trust; a \$410,000 note receivable; and David Smith's interests in Capital Center Credit Corp. and Mr. Cranberry LLC (an affiliated MS & Co. entity). Decl. Ex. 7.

The letter from Finn also refers to "three asset ownership worksheets" that were apparently attached to the original letter but that have not yet been produced. These worksheets show "your assets as they are currently owned," "the first set of transfers to be made immediately," and a third worksheet showing ownership of assets six months after "the initial transfers." Decl. Ex. 7. Finn also warned the Smiths that if they are sued by creditors "these transfers will be scrutinized to determine if they were fraudulently conveyed." Accordingly, Finn further warned the Smiths that "to avoid these transfers from being characterized as fraudulent conveyances," they "must not have actual intent to delay or defraud creditors." Decl. Ex. 7. The letter concluded with Finn inviting the Smiths to "contact me with any questions or if you need assistance with the transfers." Decl. Ex. 7.

Lynn Smith's Testimony Concerning Consultations With Finn

L. Smith stated that "[w]e went [to Finn] to protect our assets. That's why I went to an estate lawyer." Decl. Ex. 6 at 20. She testified that the meeting with Finn also included discussions regarding the Trust: "I know we went to a meeting with our estate planner . . . I spent the afternoon there and we tried to do the best we could with setting up this irrevocable trust for our kids." Stoelting Decl. Ex. 5 at 77-78. L. Smith also testified that one purpose of the January 2009 meeting was to "talk[] about an irrevocable trust for our children." Dkt. 88 at 82.

Lynn Smith also testified that a transfer of \$326,000 from a David Smith account to her stock account was pursuant to advice received from Finn: "Marty Finn . . . instructed Dave to

put this amount [\$326,000] in my account rather than his, and then we were going to put that into the fund, the trust fund.” Decl. Ex. 5 at 65. She also stated that “I’m just going along with what our estate planning lawyer told us to do[.]” Decl. Ex. 5 at 65.

The Smiths consulted with Finn about the Vero Beach house. Although it appears that Finn initially advised the Smiths to keep the house in joint ownership, the Smiths rejected this advice. L. Smith testified that “I had been wanting to put the [Vero Beach] house in my name, but there was an estate planning lawyer [Martin Finn] who said we should keep it jointly. And that was about four years ago. And then I insisted that it be put in my name because I paid for it.” Decl. Ex. 6 at 13-14.

The Court’s Findings Regarding the Smiths’ Intent to Fraudulently Convey Assets

In its July 7, 2010 memorandum-decision and order, the Court found that by early 2009, with “the commencement of FINRA proceedings . . . [.]David Smith faced the distinct possibility that his assets could be seized to pay judgment awarded to investors.” *SEC v. McGinn, Smith & Co.*, 752 F. Supp. 2d at 217. The Vero Beach house and the checking account “were treated no differently after the 2009 transfers and were at all time used jointly by the Smiths for their mutual benefit.” *Id.* As a result, “the SEC has demonstrated a likelihood of success in proving that these assets were jointly owned by David Smith and that the 2009 transfers into Lynn Smith’s name alone were solely for the fraudulent purpose of shielding David Smith’s assets from seizure.” *Id.*

The Court’s November 22, 2010 memorandum-decision and order stated that the Smiths purpose in creating the Trust “was to protect the assets of the Trust to insure their existence when the Annuity Agreement payments were to commence and not simply to protect those assets for the use of [their] children.” *SEC v. Wojeski*, 752 F.Supp.2d at 232.

ARGUMENT

The subpoenaed documents and communications are directly relevant, among other things, to the Eighth Claim for Relief in the Second Amended Complaint, which alleges that David Smith and Lynn Smith transferred assets with the “actual intent to hinder, delay or defraud either present or future creditors.” *See* Dkt. 334, 2d Am. Compl. ¶¶ 206-11. The Court should compel compliance with the Finn Subpoenas, which seek documents and testimony concerning the Smiths’ plans to conceal assets, either pursuant to the crime-fraud exception to the attorney-client privilege or because any privilege has been waived.

I. The Crime-Fraud Exception Removes the Attorney-Client Privilege From Communications between Finn and the Smiths

In the Second Circuit, “[t]he crime-fraud exception removes the privilege from those attorney-client communications that are related[d] to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct. It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime.” *See U.S. v. Jacobs*, 117 F.3d 82, 87 89 (2d Cir. 97) (compelling production of communications with attorney where attorney’s services were sought to perpetuate ongoing fraudulent scheme). “There is no question that the crime-fraud exception embraces securities fraud and common-law fraud.” *SEC v. Hermann*, 00 CV 5575, 2004 WL 964104, *6 (S.D.N.Y. May 5, 2004) (granting motion to compel documents and testimony).

The SEC must show “that there is a factual basis for a showing of probable cause to believe that a fraud or crime has been committed and that the communications were in furtherance of the fraud or crime. *Jacobs*, 117 F.3d at 87. Probable cause requires only “a reasonable basis for believing that the objective was fraudulent.” *In re Grand Jury Subpoena*

Duces Tecum, 731 F.2d 1032, 1039 (2d Cir. 1984); *see also SEC v. Hermann*, 2004 WL 964104, *8 (probable cause “requires only a reasonable basis of suspicion”).

The SEC has met its burden of establishing a *prima facie* case that David and Lynn Smith: (1) intended to fraudulently and illegally conceal assets from present or future creditors, and (2) communicated with Finn in furtherance of the fraud. Under these circumstances, the attorney-client privilege is inapplicable.

First, this Court has found that “the SEC has demonstrated a substantial likelihood of success on its claims against McGinn, David Smith, and the other named defendants.” *SEC v. McGinn, Smith & Co.*, 752 F.Supp.2d. at 214. The Court has also already found that the 2009 transfers of assets by David and Lynn Smith into Lynn Smith’s name alone “were solely for the fraudulent purpose of shielding David Smith’s assets from seizure.” *Id.* at 217.

With respect to the Trust, the SEC has already demonstrated that the Smiths fraudulently failed to disclose their interest in that Trust, “exacerbated by their statements and testimony that the Trust was created solely to benefit the Smiths’ children without disclosing the additional fact that the Trust was also created to pay a substantial annuity in the future to David and Lynn Smith.” *SEC v. McGinn, Smith & Co.*, 752 F.Supp.2d. at 231 n.17. The Court has also found that David Smith controlled the Trust in order to preserve the Smiths’ interest in annuity payments:

David Smith possessed an equitable and beneficial interest in the Trust through the Annuity Agreement and that his conduct in controlling the investments of Trust assets by the Trustee, paying the Trust’s taxes, and, with his wife, paying the living expenses of his adult child was to protect the assets of the Trust to insure their existence when the Annuity Agreement payments were to commence and not simply to protect those assets for the use of his children.

Id. at 232 . Given the nature of the Trust and the evidence showing David Smith’s intent to conceal assets from the beginning of the fraud in 2003 (*see* pages 3-4 above) the SEC has more

than demonstrated that there is probable cause to believe the Smiths created the Trust during 2004 to fraudulently conceal the Smiths' ownership interest in the annuity and to protect that annuity from creditors.

As to the second part of the *Jacobs* test, the SEC has provided more than a reasonable basis for concluding that the communications between the Smiths and Finn were in furtherance of the fraud. The controlling question is whether the communications at issue were "intended in some way to facilitate or to conceal" the commission of a fraud. *Jacobs*, 117 F. 3d at 88. Finn's expertise was essential for the Smiths to shield their assets from present and future creditors. As Lynn Smith testified, "[w]e went to [Finn] to protect our assets. That's why I went to an estate lawyer. . . . I certainly could not plan an estate." Decl. Ex. 6 at 20, 24.

The SEC need not establish that Finn knew of the Smiths' fraudulent intent or that Finn himself intended to further the Smiths' fraud. It need only establish probable cause that the advice was used by the Smiths in furtherance of their fraud. *See, e.g., S.E.C. v. Herman*, 2004 WL 964104, at *2 ("[t]he pertinent intent is that of the client, not the attorney").

David and Lynn Smith were concerned with the threat of substantial litigation exposure when they retained Finn to advise them regarding estate planning and asset protection objectives. The Smiths utilized Finn to provide assistance and advice on the Irrevocable Trust and the QTIP Trust, and there is probable cause to believe these trusts were part of the scheme to conceal assets. The Smiths met with Finn again in January 2009 in furtherance of David Smith's efforts "to shift money around between" him and Lynn Smith. Dkt. 46-1 Ex. 5 (e-mail from David Smith to Timothy McGinn). Finn proposed asset transfers from David Smith to Lynn Smith to assist their "asset protection objectives" and warned the Smiths that these transfers could be regarded as fraudulent conveyances. Decl. Ex. 7. The communications between Finn and the

Smiths were therefore in furtherance of the Smiths' efforts to transfer assets for fraudulent purposes.

The crime-fraud exception should apply to all post-2003 documents and communications with Finn regarding the Trust, the QTIP Trust, the Smith's estate planning and asset protection objectives, proposed and actual transfers of assets of the Smiths and the law of fraudulent conveyances. The motion to compel compliance with the Finn Subpoenas should be granted.

II. Any Privilege Over Communications Between Finn and the Smiths Has Been Waived

On June 9, 2010, the Court ruled during the preliminary injunction hearing that the Smiths waived the protections of the attorney-client privilege by producing the letter from Finn to FINRA. The Court ruled that "[t]he letter was produced [to FINRA], it was part of the record of the FINRA proceedings. No objection was ever raised until the deposition of Mrs. Smith within the last week . . . The privilege has been waived by Mr. Smith, and it has been produced to FINRA, used in their proceedings. It's return was never demanded on the attorney/client privilege and, therefore, the waiver holds." Decl. Ex. 6 at 8; Ex. 9 (FINRA Declaration re production of Finn letter).

"[D]isclosure in the context of litigation – whether by trial or deposition testimony or by production of documents – will result in an implied waiver broader than the original disclosure itself." *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 485 S.D.N.Y. 1993). The Court correctly ruled that the any attorney-client protections over the letter have been waived. On that basis, L. Smith testified at the hearing regarding the letter and her communications with Finn. Decl. Ex. 6 at 13-35. The privilege over the subject matter of the protection of assets by the Smiths has been waived.

Under the circumstances of this case, a broad subject matter waiver should be found. Concerns of fairness also dictate a broad subject matter waiver because defendants have suggested that the some of the conveyances at issue were done on advice of counsel. Lynn Smith testified in her deposition \$326,000 was transferred from David Smith's QTIP account to her account because "Marty Finn instructed Dave to put this amount in my account rather than his . . . I'm just going along with what our estate planning attorney told us to do." Decl. Ex. 5 at 65. Consistent with Second Circuit law, the Smiths should not be able to argue that they moved assets from David's name to Lynn's name based on Finn's advice, and at the same time prevent the disclosure of the basis for the advice. "[T]he privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications." See *U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) ("the attorney client privilege cannot at once be used as a shield and a sword"). All of the communications with Finn after 2003 should be discoverable.

CONCLUSION

Plaintiff respectfully requests that the Court grant its motion to compel compliance with the Finn Subpoenas.

Dated: New York, NY
July 7, 2011

Respectfully submitted,

s/David Stoelting
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E-mail: stoeltingd@sec.gov

Of Counsel:

Kevin McGrath
Haimavathi V. Marlier
Joshua Newville

DECLARATION OF DAVID STOELTING

I, David Stoelting, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am an attorney in the Enforcement Division of the New York Regional Office of the Securities and Exchange Commission. I have been employed with the Commission since February 2004. I make this declaration for purpose of submitting to the Court certain documents in connection with plaintiff's motion to compel.

2. Attached hereto are true and correct copies of the following:

DATE	DOCUMENT	EXHIBIT
4/7/11	Subpoena <i>Duces Tecum</i> to Martin Finn	1
6/21/11	Deposition Subpoena to Martin Finn	2
6/21/11	Subpoena <i>Duces Tecum</i> to Lavalle & Finn, LLP	3
7/5/11	Letter from William J. Keniry to David Stoelting	4
5/27/11	Lynn Smith deposition transcript (excerpts)	5
6/9-10/11	Preliminary Injunction hearing transcript (excerpts)	6
1/28/09	Letter from Martin Finn to David and Lynn Smith	7
	Cash, Investor Liability and Equity (Ex 32 in PI Hrg.)	8
6/8/10	Declaration of Christopher Rattiner	9

I declare under penalty of perjury that the foregoing is true and correct.

Executed: New York, New York
July 6, 2011

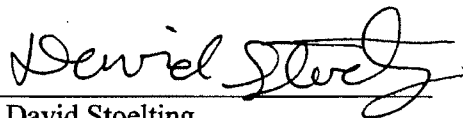

David Stoelting

EXHIBIT 1



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

WRITER'S DIRECT LINE
JOSHUA M. NEWVILLE
(212) 336-0578
Newvillej@sec.gov

April 7, 2011

By First Class Mail and Email (marty@lavelleandfinn.com)

Martin S. Finn
Lavelle & Finn, LLP
29 British American Boulevard
Latham, NY 12110

Re: SEC v. McGinn, Smith, & Co., Inc. et al., No. 10-CV-457

Dear Mr. Finn:

Enclosed please find a subpoena issued to you in the above-referenced action. The subpoena requires you to produce certain documents.

If you have any questions, please call me at (212) 336-0578 or email me at newvillej@sec.gov.

Very truly yours,

A handwritten signature in dark ink, appearing to read "J. Newville", written over the typed name.

Joshua M. Newville
Senior Counsel

Enclosures: Subpoena and Attachment

AO 88B (Rev. 06/09) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises 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)

(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: Martin S. Finn
Lavelle & Finn, LLP, 29 British American Boulevard, Latham, NY 12110

☒ **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: Joshua M. Newville

Date and Time:

05/05/2011 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: 04/07/2011

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:

Joshua M. Newville, Securities and Exchange Commission, 3 World Financial Center, New York NY 10281

AO 88B (Rev. 06/09) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (Page 2)

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

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

☒ I served the subpoena by delivering a copy to the named person as follows: By email and first class mail
to Martin S. Finn, Lavelle & Finn, LLP
_____ on *(date)* 04/07/2011 ; or

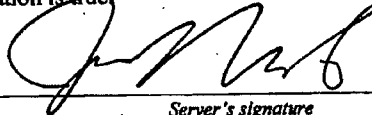
☐ I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: 4/7/2011



Server's signature

Joshua M. Newville

Printed name and title

Senior Counsel
SEC, NYRO

3 World Financial Center
New York, NY 10281

Server's address

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).

SUBPOENA ATTACHMENT

Martin S. Finn

April 7, 2011

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 notations, without abbreviation, expurgation, or redaction.
2. Claims of privilege with respect to any document, or portions of any documents, 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. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the document request all responses and production of documents that might otherwise be construed to be outside of its scope.
2. "All" shall mean each and every.
3. "Any" shall be construed as "any and all."

4. "Communication" means any transmittal of information (in the form of facts, ideas, inquiries, or otherwise).

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

6. "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 office or residence or property, or on central or official databases, your servers and backup servers, local databases, internet-based e-mail servers, 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.

7. "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.

8. "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.

9. "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.

10. "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.

11. "Immediate Family" shall mean parents, former spouse(s) or current spouse, siblings, children (including step-children and foster children), and grandchildren.

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

13. "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, D. Smith, and/or T. 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, FAIN, FEIN, FIIN, TAIN, and other entities identified in Exhibit A to the Order to Show Cause, Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief, dated April 20, 2010, as modified by the Court's Order of June 9, 2010 (attached hereto as Exhibit A).

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

15. "Lynn Smith" shall mean Lynn A. Smith and any person or entity acting on her behalf.
16. "You" or "Your" shall refer to Martin S. Finn and any person or entity acting on your behalf.

DOCUMENTS SUBPOENAED

1. All documents concerning D. Smith or Lynn Smith, including without limitation:
 - a. all documents concerning estate planning, asset protection, and transfers of money or other assets;
 - b. all documents concerning assets of D. Smith or Lynn Smith;
 - c. all documents concerning asset conveyances, transfers, gifts, sales or bequests by D. Smith or Lynn Smith;
 - d. all documents concerning any trust for the benefit of D. Smith or Lynn Smith, including without limitation the David L. Smith Lifetime QTIP Trust;
 - e. all documents concerning any trust established by D. Smith or Lynn Smith, including without limitation the David L. & Lynn A. Smith Irrevocable Trust U/A, dated August 4, 2004;
 - f. all documents concerning the \$410,000 note receivable owned by D. Smith or Lynn Smith;
 - g. all documents concerning D. Smith or Lynn Smith interests in Capital Center Credit Corp or Mr. Cranberry, LLC;
 - h. all documents concerning the D. Smith and Lynn Smith principal residence;
 - i. all documents concerning the D. Smith and Lynn Smith Vero Beach property.

2. All documents concerning any communications (including without limitation e-mail, instant messages, faxes, text messages, notes of meetings, phone logs, and letters) concerning T. McGinn, D. Smith, or Lynn Smith.

3. All documents concerning any McGinn Smith Entity.

4. All documents concerning all contracts, agreements, retention letters, engagement letters or arrangements between you and T. McGinn, D. Smith, Lynn Smith, or any McGinn Smith Entity.

5. All documents concerning *Securities and Exchange Commission v. McGinn, Smith & Co., Inc. et al.*, Civil Action No. 10-CV-457 pending in the District Court for the Northern District of New York.

Exhibit A

List of Known Entities Controlled By McGinn and/or Smith

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

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

EXHIBIT 2

AO 88A (Rev. 06/09) Subpoena to Testify at a Deposition 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)

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

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Martin S. Finn

☒ **Testimony:** YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. 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: Albany, NY (location to be determined)

Date and Time:

07/27/2011 9:30 am

The deposition will be recorded by this method: Court reporter and videographer

- ☐ **Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

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: 08/21/2011

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

United States Securities and Exchange Commission, who issues or requests this subpoena, are:
David Stoelting stoeltingd@sec.gov
3 World Financial Center, Suite 400 (212) 336-0174
New York, NY 10281

AO 88A (Rev. 06/09) Subpoena to Testify at a Deposition in a Civil Action (Page 2)

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

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

☒ I served the subpoena by delivering a copy to the named individual as follows: by e-mail and first class mail
to William J. Keniry, Esq.

_____ on *(date)* 06/21/2011 ; or

☐ I returned the subpoena unexecuted because: _____
_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00 .

I declare under penalty of perjury that this information is true.

Date: 06/21/2011

Server's signature

David Stoetting, Senior Trial Counsel

Printed name and title

3 World Financial Center
Room 400
New York, NY 10281

Server's address

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 3

AO 88B (Rev. 06/09) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of New York

Securities and Exchange Commission)	
<i>Plaintiff</i>)	
v.)	Civil Action No. 10-CV-457 (GLS/DRH)
McGinn, Smith, & Co., Inc., et al.)	
<i>Defendant</i>)	(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: Lavelle & Finn, LLP, 29 British American Boulevard, Latham, NY 12110

☒ **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: David Stoelting	Date and Time: 07/21/2011 5:00 am
---	--------------------------------------

☐ **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: 06/21/2011

CLERK OF COURT

OR


Attorney's signature

Signature of Clerk or Deputy Clerk

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:

David Stoelting, Securities and Exchange Commission, 3 World Financial Center, New York NY 10281, 212.336.0174.
stoeltingd@sec.gov

AO 88B (Rev. 06/09) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (Page 2)

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

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for (name of individual and title, if any) _____
was received by me on (date) _____.

☒ I served the subpoena by delivering a copy to the named person as follows: By email and first class mail
to William J. Keniry, Esq.
_____ on (date) 06/21/2011 ; or

☐ I returned the subpoena unexecuted because: _____
_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: 06/21/2011

Server's signature

David Stoelting
Printed name and title

Senior Trial Counsel
SEC, NYRO
3 World Financial Center
New York, NY 10281

Server's address

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.**

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

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(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

Lavalle & Finn, LLP

June 21, 2011

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 notations, without abbreviation, expurgation, or redaction.
2. Claims of privilege with respect to any document, or portions of any documents, 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. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the document request all responses and production of documents that might otherwise be construed to be outside of its scope.
2. "All" shall mean each and every.
3. "Any" shall be construed as "any and all."

4. "Communication" means any transmittal of information (in the form of facts, ideas, inquiries, or otherwise).

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

6. "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 office or residence or property, or on central or official databases, your servers and backup servers, local databases, internet-based e-mail servers, 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.

7. "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.

8. "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.

9. "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.

10. "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.

11. "Immediate Family" shall mean parents, former spouse(s) or current spouse, siblings, children (including step-children and foster children), and grandchildren.

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

13. "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, D. Smith, and/or T. 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, FAIN, FEIN, FIIN, TAIN, and other entities identified in Exhibit A to the Order to Show Cause, Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief, dated April 20, 2010, as modified by the Court's Order of June 9, 2010 (attached hereto as Exhibit A).

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

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

16. "You" or "Your" shall refer to Martin S. Finn and any person or entity acting on your behalf.

DOCUMENTS SUBPOENAED

1. All documents concerning D. Smith or Lynn Smith, including without limitation:
 - a. all documents concerning estate planning, asset protection, and transfers of money or other assets;
 - b. all documents concerning assets of D. Smith or Lynn Smith;
 - c. all documents concerning asset conveyances, transfers, gifts, sales or bequests by D. Smith or Lynn Smith;
 - d. all documents concerning any trust for the benefit of D. Smith or Lynn Smith, including without limitation the David L. Smith Lifetime QTIP Trust;
 - e. all documents concerning any trust established by D. Smith or Lynn Smith, including without limitation the David L. & Lynn A. Smith Irrevocable Trust U/A, dated August 4, 2004;
 - f. all documents concerning the \$410,000 note receivable owned by D. Smith or Lynn Smith;
 - g. all documents concerning D. Smith or Lynn Smith interests in Capital Center Credit Corp or Mr. Cranberry, LLC;
 - h. all documents concerning the D. Smith and Lynn Smith principal residence;
 - i. all documents concerning the D. Smith and Lynn Smith Vero Beach property.

2. All documents concerning any communications (including without limitation e-mail, instant messages, faxes, text messages, notes of meetings, phone logs, and letters) concerning T. McGinn, D. Smith, or Lynn Smith.

3. All documents concerning any McGinn Smith Entity.

4. All documents concerning all contracts, agreements, retention letters, engagement letters or arrangements between you and T. McGinn, D. Smith, Lynn Smith, or any McGinn Smith Entity.

5. All documents concerning *Securities and Exchange Commission v. McGinn, Smith & Co., Inc. et al.*, Civil Action No. 10-CV-457 pending in the District Court for the Northern District of New York.

EXHIBIT 4

TABNER, RYAN AND KENIRY, LLP

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ALBANY, NEW YORK 12211

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TRACY L. BULLETT
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PATRICIA A. MORRISSEY

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WILLIAM H. KENIRY
Retired Justice of the Supreme
Court of the State of New York
of Counsel

LEGAL ASSISTANTS
LORI L. LUGG
APRIL L. SCHMICK

*ALSO ADMITTED IN THE STATE OF MASSACHUSETTS

**ALSO ADMITTED IN THE STATE OF FLORIDA

***ALSO ADMITTED IN THE STATES OF CONNECTICUT & CALIFORNIA

July 5, 2011

VIA EMAIL AND REGULAR MAIL

David Stoelting, Senior Trial Counsel
United States Security and Exchange Commission
New York Regional Office
3 World Financial Center
New York, New York 10281-1022

Re: SEC v. McGinn Smith, et al
Civil Action No.: 10-CV-457
Our File No.: 72274

Dear Mr. Stoelting:

This letter will confirm that our law firm represents Lavelle & Finn, LLP, and Martin S. Finn, Esq., in connection with the subpoenas that you served on them (dated June 21, 2011). As we indicated previously to Joshua Newville, Esq., of the SEC, the subpoenaed materials and information are in the possession of a law firm and consist of material that is privileged and confidential or otherwise subject to certain protections from disclosure (See attached letters).

As you know, because the attorney-client privilege has been asserted with respect to the entirety of the file and representation which are the subject of the subpoenas, we are required to object, and therefore object to the subpoenas in toto, and request that you withdraw them.

If there is any question or concern, please contact me immediately and directly. Thank you very much.

With best wishes.

TABNER, RYAN and KENIRY, LLP

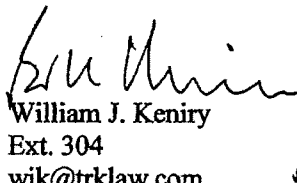
David Stoelting, Esq.

July 5, 2011

Page 2

Very truly yours,

TABNER, RYAN and KENIRY, LLP


William J. Keniry
Ext. 304
wjk@trklaw.com

WJK/bmq
Attachments

TABNER, RYAN AND KENIRY, LLP

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**ALSO ADMITTED IN THE STATE OF FLORIDA

***ALSO ADMITTED IN THE STATES OF CONNECTICUT & CALIFORNIA

April 29, 2011

Joshua M. Newville, Esq., Senior Counsel
United States Security and Exchange Commission
New York Regional Office
3 World Financial Center, Suite 400
New York, New York 10281-1022

Re: SCC v. McGinn Smith, et al
Civil Action No.: 10-CV-457
Our File No.: 72274

Dear Mr. Newville:

This will confirm our telephone conversation of April 28, 2011, wherein we agreed that the subpoena issued by your office seeks privileged and confidential information.

Mr. Dreyer's client has asserted the attorney-client privilege with respect to the entirety of the file which is the subject of the subpoena.

As a result of the foregoing, we have agreed that compliance with the subpoena by our clients shall be held in abeyance pending a determination by the Court.

We agreed that you will keep me advised with respect to how you intend to proceed, whether by an agreement between and among all of the attorneys and parties involved or otherwise, by obtaining direction from Magistrate Homer.

If there is any question or concern, please contact me immediately and directly.

With best wishes.

Very truly yours,

TABNER, RYAN and KENIRY, LLP


William J. Keniry
Ext. 304

wjk@trklaw.com

WJK/mrl

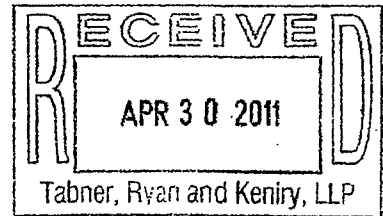
G:\Clients\Lavelle and Finn - 3899\006 - 72274\Newville ltr 4.29.11.wpd



**FEATHERSTONHAUGH,
WILEY & CLYNE, LLP**
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SCOTT J. ELY
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PHONE: (518) 436-0786
FAX: (518) 427-0452

April 29, 2011

David Stoelting
Securities and Exchange Commission
3 World Financial Center, Room 400
New York, New York 10281

Re: Securities Exchange Commission v. McGinn, Smith & Co., Inc., et al.
Case No: 1:10-CV-457 (GLS/DRH)

Dear Mr. Stoelting:

Please be advised that we are in receipt of a subpoena that was purportedly served on Martin S. Finn on or about April 7, 2011. Response to said subpoena is returnable on May 5, 2011.

We understand that Lavelle and Finn was engaged by David and Lynn Smith to provide legal advice and to prepare legal documents in connection with their estate planning. We are sending this letter on behalf of our client, Lynn Smith, to assert her attorney/client privilege as to the subpoenaed documents being sought by the SEC and to any anticipated testimony by Mr. Finn or other members or employees of Lavelle and Finn.

Please feel free to contact me should you wish to discuss this matter further.

Very truly yours,

Featherstonhaugh, Wiley & Clyne, LLP

A handwritten signature in black ink, appearing to be "SJE", written over the printed name "Scott J. Ely".

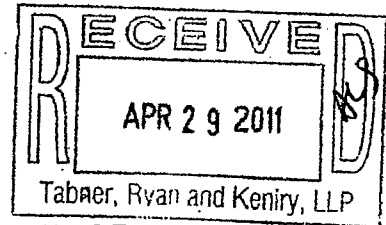
Scott J. Ely

SJE/cr

cdc: William J. Keniry, Esq.
William J. Dreyer, Esq.



DREYER BOYAJIAN LLP
ATTORNEYS AT LAW



William J. Dreyer
wjdreyer@dreyerboyajian.com
(518) 463-7784 Ext. 239

April 28, 2011

Via First Class Mail

David Stoelting
Securities and Exchange Commission
New York Regional Office
3 World Financial Center, Suite 400
New York, NY 10281-1022

Re: SEC v. McGinn Smith & Co., Inc., et al
10-CV-457 (GLS/DRH)

Dear Mr. Stoelting:

We have been informed that the SEC has issued a subpoena upon Attorney Finn of the law firm of Lavelle and Finn. William J. Keniry of the firm Tabner, Ryan & Keniry, LLP, represents Mr. Finn.

Mr. Smith, a client of that firm, asserts his lawyer-client privilege with respect to the file subpoenaed and to any anticipated testimony by Mr. Finn or other members or employees of Lavelle and Finn. It is our understanding that you will receive a similar letter from Mr. Ely or Mr. Featherstonaugh on behalf of Mrs. Smith.

Very truly yours,

DREYER BOYAJIAN LLP

By:

William J. Dreyer

WJD/lab

cc: William J. Keniry, Esq. ✓
James D. Featherstonaugh, Esq.

Enclosures

J:\WJD\Smidav-11084 (SES) \mtr\Correspondence\Sent\Ltr to Stoelting 4-27-2011.doc

TABNER, RYAN AND KENIRY, LLP

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*ALSO ADMITTED IN THE STATE OF MASSACHUSETTS

**ALSO ADMITTED IN THE STATE OF FLORIDA

***ALSO ADMITTED IN THE STATES OF CONNECTICUT & CALIFORNIA

April 27, 2011

VIA EMAIL AND REGULAR MAIL

Joshua M. Newville, Esq., Senior Counsel
United States Security and Exchange Commission
New York Regional Office
3 World Financial Center, Suite 400
New York, New York 10281-1022

Re: SCC v. McGinn Smith, et al
Civil Action No.: 10-CV-457
Our File No.: 72274

Dear Mr. Newville:

In connection with the voicemail message which I left for you on April 27, 2011, this will confirm that our law firm represents Lavelle & Finn, LLP, and Martin S. Finn, Esq. As indicated in my voicemail to you, I am in possession of a copy of your letter dated April 7, 2011, addressed to Martin S. Finn, Esq., together with the enclosure, consisting of a subpoena. Your letter and subpoena state that Mr. Finn and his firm are required to produce certain documents.

It is manifest that you have subpoenaed materials and information in the possession of a law firm and further, material which is privileged or otherwise subject to certain protections from disclosure.

In light of the foregoing, please immediately respond to me and address this issue. If you have certain legal authority upon which you intend to rely in asserting that the materials should be disclosed, please deliver that to me forthwith.

TABNER, RYAN and KENIRY, LLP

Joshua M. Newville

April 27, 2011

Page 2

I would like to ascertain from you whether or not you have addressed this obvious circumstance of privilege with the attorneys for the parties, as their clients' rights may be implicated by the subpoena which you issued on April 7, 2011.

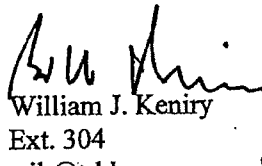
I look forward to receiving your prompt and complete response. I also request that your response confirm that the response time is adjourned to permit proper consideration of the issue of privilege and other protections from disclosure.

Thank you very much.

With best wishes.

Very truly yours,

TABNER, RYAN and KENIRY, LLP


William J. Keniry
Ext. 304
wjk@trklaw.com

WJKals

EXHIBIT 5

Page 1	Page 3
<p>***ROUGH ASCII & UNCERTIFIED TRANSCRIPT*** UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK</p> <p>-----X SECURITIES AND EXCHANGE COMMISSION, Plaintiff, Index No. 10Civ 457 -against- (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 McGINN and DAVID L. SMITH;</p> <p>Defendants. -----X</p> <p>EXAMINATION BEFORE TRIAL of LYNN SMITH, RELIEF DEFENDANT, taken by the Plaintiff, pursuant to Court Order, held at the office of Phillips Lytle, 30 South Pearl Street, Albany, New York, on May 27, 2010, at 11:36 a.m., taken before George Malinowski, a Notary Public of the State of New York.</p>	<p>1 2 3 STIPULATIONS 4 IT IS HEREBY STIPULATED AND AGREED by 5 and between the attorneys for the respective 6 parties herein, that filing, sealing and 7 certification be and the same are hereby 8 waived. 9 IT IS FURTHER STIPULATED AND AGREED 10 that all objections, except as to the form of 11 the question shall be reserved to the time of 12 the trial. 13 IT IS FURTHER STIPULATED AND AGREED 14 that the within deposition may be signed and 15 sworn to before any officer authorized to 16 administer an oath, with the same force and 17 effect as if signed and sworn to before the 18 Court and that a copy of this examination 19 shall be furnished without charge to the 20 attorney representing the witness testifying 21 herein. 22 23 24 25</p>
Page 2	Page 4
<p>1 2 APPEARANCES: 3 4 ***ROUGH ASCII & UNCERTIFIED TRANSCRIPT*** 5 UNITED STATES SECURITIES EXCHANGE & 6 COMMISSION 7 Attorneys for Plaintiff 8 3 World Financial Center 9 New York, New York 10281 10 BY: DAVID STOELTING, ESQ. 11 LARA S. MEHRABAN, ESQ. 12 13 FEATHERSTONHAUGH WILEY & CLYNE, LLP 14 Attorneys for Witness 15 99 Pine Street 16 Albany, New York 12207 17 BY: JAMES D. FEATHERSTONHAUGH, ESQ. 18 19 GREENBERG TRAUER, LLP 20 Attorneys for Timothy McGinn and David L. 21 Smith 22 54 State Street 23 Albany, New York 12207 24 BY: MICHAEL KOENIG, ESQ. 25 EMILY P. FEYRER, ESQ.</p>	<p>1 2 LYNN SMITH, 3 having been first duly sworn by a 4 Notary Public, was examined and testified 5 as follows: 6 EXAMINATION BY 7 MR. STOELTING: 8 Q Would you please state your name for the 9 record. 10 A Lynn Smith 11 Q Where do you reside? 12 A [REDACTED], Saratoga Springs, 13 New York 12866. 14 MR. STOELTING: Would counsel in 15 the room please identify themselves. 16 MR. FEATHERSTONHAUGH: Jim 17 Featherstonhaugh from Featherstonhaugh, 18 Wiley & Clyne, counsel for the relief 19 defendant Lynn Anne Smith. 20 MR. KOENIG: Michael Koenig and 21 Emily Feyrer from Greenberg & Traurig. 22 We represent the individual defendants, 23 Tim McGinn and David Smith. 24 I'm here today specifically -- I'd 25 like to put this on the record after the</p>

Page 37	Page 39
<p>1 L. Smith 2 or separately or together that isn't 3 referenced here? 4 We have the [REDACTED] house, 5 we have the [REDACTED] house, Vero Beach, 6 the lake house and the ski condo; is there any 7 other? 8 A I sold a two-family house in Amsterdam 9 that my parents lived in which I kept for 35 10 years allowing my brother-in-law and 11 sister-in-law to live in, one flat fee, in the 12 house with kind of a deal where they would 13 maintain the property at a lower rent. 14 Q When was the house sold? 15 A That was sold in 2006, maybe. 16 Q Is there any other real estate 17 transactions other than the ones we mentioned? 18 A No. 19 Q Okay. And in paragraph 23 it mentions 20 the trust and there is a reference to Tom 21 Urbelis, can you just tell me how Mr. Urbelis 22 came to, is he the trustee or -- 23 A He was the trustee, he is not -- 24 Q Can you just tell me how you know him? 25 A Yes, he's been one of my husband's and</p>	<p>1 L. Smith 2 trust had in assets? 3 MR. FEATHERSTONHAUGH Object to 4 the form. Answer if you can. 5 A It had the stock, the \$6 million worth 6 of All Bank stock. 7 Q What is your understanding, do you 8 understand there is a written document that 9 governs the administration of the trust, have 10 you ever seen anything called a declaration of 11 trust? 12 A Well, we had an estate planner, a 13 lawyer, and Marty Finn, and I'm sure I 14 probably have seen it, but I won't say that I 15 can recall exactly that I've seen it. 16 Q Okay. Let me just ask you, what is your 17 understanding of the purpose of the trust? 18 A The trust, the purpose of the trust was 19 our children are 27 and 30 years old. 20 Presently, we started this about four years 21 ago, this particular trust and I wanted them 22 to be able to have an opportunity to if they 23 wanted to start a business, own a home, I 24 wanted them to have the rewards, reap the 25 rewards of my husband's business and so we</p>
Page 38	Page 40
<p>1 L. Smith 2 my best friend since about 7th grade. 3 Q What is Mr. Urbelis's profession? 4 A He's a lawyer. 5 Q Do you know what kind of legal practice 6 he has? 7 A No. 8 Q Where does he live? 9 A Andover, Massachusetts. 10 Q How long has he lived there? 11 A 30 years. 12 Q You say in paragraph 23 that the trust 13 has been managed since its inception by Thomas 14 Urbelis; does he manage it on his own? 15 A Yes. 16 Q What does he do to manage it? 17 A He pays the -- well, he signs some 18 things so we can pay the taxes on the trust, 19 and I don't think there is anything else he 20 does. 21 Q And what are the assets of the trust? 22 A The All Bank stock. 23 MR. FEATHERSTONHAUGH Currently, 24 is that the question? 25 Q Well, or since its creation what has the</p>	<p>1 L. Smith 2 both agreed on putting that in the trust. 3 Q I thought the trust started with your 4 money? 5 A It did. 6 Q How is that reaping the rewards of your 7 husband's business? 8 A Well, I guess his knowledge on buying 9 the All Bank is what gave us the 6 million. 10 When I say reaping the rewards of his 11 business, that's what I'm referring to, not 12 McGinn Smith & Company, I'm talking about his 13 knowledge as to being a broker. 14 Q Was it also that because his business 15 was earning money, you could have that stock 16 account sitting there and, you know, not being 17 used because you're living off the money your 18 husband earned from his business? 19 MR. FEATHERSTONHAUGH Object as 20 to form. You can go ahead and answer. 21 A Yes. 22 Q So, the trust was created, you would 23 agree, for your children not for you and your 24 husband? 25 A Exactly.</p>

Page 61	Page 63
<p>1 L. Smith</p> <p>2 A It says here since 1982, and that's what</p> <p>3 I remember.</p> <p>4 Q Number 7, cash contribution, \$5,000 and</p> <p>5 you don't remember the source?</p> <p>6 A No. Or back to the IRA thing, my</p> <p>7 husband has had a business for 29 years that</p> <p>8 he did earn a salary and maybe it was a gift</p> <p>9 to my IRA, I don't know.</p> <p>10 Q 9 is another repayment --</p> <p>11 MR. FEATHERSTONHAUGH: That's</p> <p>12 paragraph F now.</p> <p>13 MR. STOELTING: Paragraph F.</p> <p>14 Q -- is another repayment from Mr. McGinn?</p> <p>15 A Yes.</p> <p>16 Q So, that \$185,000, is that all that he's</p> <p>17 repaid you?</p> <p>18 A Yes.</p> <p>19 Q And G, transaction number 10, \$380,000,</p> <p>20 a bridge loan to MS Funding in November of</p> <p>21 2007, do you remember the circumstances of</p> <p>22 that bridge loan?</p> <p>23 A Where are you again?</p> <p>24 Q I'm sorry, it's paragraph G on page 11.</p> <p>25 A I forgot the question.</p>	<p>1 L. Smith</p> <p>2 late '90s and held in the Capital Center</p> <p>3 Credit Corp account; what was that account?</p> <p>4 A That was an old account, I think that</p> <p>5 may have had something to do with the</p> <p>6 integrated alarm company that they were</p> <p>7 working on.</p> <p>8 Q Your recollection is that that money of</p> <p>9 \$38,000 was a gift to you?</p> <p>10 A Yes.</p> <p>11 Q And B, it's a transfer of \$20,000 and</p> <p>12 then it's a loan, it's a reference to a</p> <p>13 loan; so you're saying that that \$20,000 is the</p> <p>14 repayment of a loan?</p> <p>15 A Yes.</p> <p>16 Q In March 2006, do you recall which</p> <p>17 entity you made the loan to?</p> <p>18 A No.</p> <p>19 Q That would have been another loan out of</p> <p>20 your stock account?</p> <p>21 A Yes.</p> <p>22 Q And then transactions 3 and 4 are</p> <p>23 payments from Pine Street Capital Partnership.</p> <p>24 A Yes.</p> <p>25 Q Why did you invest in Pine Street</p>
Page 62	Page 64
<p>1 L. Smith</p> <p>2 Q Do you see paragraph G, refers to</p> <p>3 transaction 10, which is \$380,000, and it says</p> <p>4 it's the repayment of a bridge loan made by me</p> <p>5 to MS Funding.</p> <p>6 A Yes.</p> <p>7 Q What were the circumstances of that</p> <p>8 bridge loan?</p> <p>9 A I don't know.</p> <p>10 Q Do you remember why you made a bridge</p> <p>11 loan to MS Funding?</p> <p>12 A No.</p> <p>13 Q What was your understanding of what MS</p> <p>14 Funding was at the time?</p> <p>15 A MS Funding, I don't know.</p> <p>16 Q Okay, and then the rest, you said you</p> <p>17 don't remember, so let's turn to Exhibit C</p> <p>18 which we've marked as Plaintiff's 7. Exhibit</p> <p>19 C is eight transactions.</p> <p>20 MR. FEATHERSTONHAUGH: Shouldn't</p> <p>21 we call it Exhibit 7, again for the</p> <p>22 record?</p> <p>23 Q Exhibit 7 is eight transactions, and</p> <p>24 let's see if we can quickly go through them.</p> <p>25 Transfer of funds earned by David Smith in the</p>	<p>1 L. Smith</p> <p>2 Capital?</p> <p>3 A There were two very bright guys that</p> <p>4 were starting up a fund, and the way I</p> <p>5 understood it, the fund would lend money to</p> <p>6 small private businesses and then you would</p> <p>7 get back a little share of stock sometimes as</p> <p>8 well as some interest on your loan. And Dave</p> <p>9 trusted these guys, Tim Wells and Mike Lasche,</p> <p>10 and likewise they thought very highly of him.</p> <p>11 And that was the business venture which we</p> <p>12 talked about and he decided to do.</p> <p>13 Q Your understanding of how the Pine</p> <p>14 Street fund would work, did that come from</p> <p>15 discussions with Wells and Lasche?</p> <p>16 A No.</p> <p>17 Q It was based on discussions with your</p> <p>18 husband?</p> <p>19 MR. KOENIG: I'm going to put</p> <p>20 espousal privilege on that to the extent</p> <p>21 if she can answer the question without</p> <p>22 having to violate any spousal</p> <p>23 privileges.</p> <p>24 Q Going back to paragraph D, which is</p> <p>25 transaction number 5. Referring to</p>

<p style="text-align: right;">Page 65</p> <p>1 L. Smith</p> <p>2 transaction 5, a transfer to your account of</p> <p>3 \$326,000 and it says it represents the return</p> <p>4 to my account of funds used to fund a QTIP</p> <p>5 trust established as estate planning work.</p> <p>6 What do you recall about why there was a</p> <p>7 return of funds to your account of about</p> <p>8 \$326,000?</p> <p>9 A Well, we had been to an estate planning</p> <p>10 lawyer, I think I mentioned to him before</p> <p>11 Marty Finn, and I think what happened was he</p> <p>12 had instructed Dave to put this amount in my</p> <p>13 account rather than his, and then we were</p> <p>14 going to put that into the fund, the trust</p> <p>15 fund.</p> <p>16 Q So the \$326,000 was previously in an</p> <p>17 account, Mr. Smith, it was under your</p> <p>18 husband's control?</p> <p>19 A Yes.</p> <p>20 Q Why was the QTIP trust established?</p> <p>21 A I don't know, I don't even know. I'm</p> <p>22 having a hard time dealing of what a QTIP is,</p> <p>23 honestly. I've been trying to figure that one</p> <p>24 out for four years, but I'm just going along</p> <p>25 with what our estate planning lawyer told us</p>	<p style="text-align: right;">Page 67</p> <p>1 L. Smith</p> <p>2 Q That understanding was based on</p> <p>3 conversations with your husband?</p> <p>4 A Yes.</p> <p>5 MR. KOENIG: I'm going to invoke a</p> <p>6 privilege in the extent you said you're</p> <p>7 asking for conversations with her</p> <p>8 husband. He's not, again, just so it's</p> <p>9 clear, and we took a break and we're now</p> <p>10 back on, Mr. Smith is not waiving</p> <p>11 spousal privilege.</p> <p>12 Q On line 7, do you see where it says,</p> <p>13 TDMM Cable funding?</p> <p>14 MR. FEATHERSTONHAUGH: Could you</p> <p>15 just tell me what you're looking at</p> <p>16 you're looking at Exhibit 7 now and line</p> <p>17 7.</p> <p>18 THE WITNESS: Yes.</p> <p>19 MR. STOELTING: Yes.</p> <p>20 Q Your description of transaction 7 in</p> <p>21 your declaration says that the loan was to</p> <p>22 TDMM Benchmark, but the exhibit says that the</p> <p>23 payment came from TDMM Cable funding, do you</p> <p>24 know why you made -- why you say in the</p> <p>25 declaration that the loan was to TDMM</p>
<p style="text-align: right;">Page 66</p> <p>1 L. Smith</p> <p>2 to do, and Dave did it and it shows up here.</p> <p>3 Q Do you have an understanding of why the</p> <p>4 estate planning lawyer directed \$326,000 be</p> <p>5 moved from your husband's account to your</p> <p>6 account?</p> <p>7 A No.</p> <p>8 Q Paragraph E refers to 6 and 8 --</p> <p>9 MR. STOELTING: Off the record.</p> <p>10 (Whereupon, an off the record</p> <p>11 discussion was held.)</p> <p>12 MR. STOELTING: Back on the</p> <p>13 record.</p> <p>14 Q Mrs. Smith, going back to paragraph F</p> <p>15 that refers to transaction number 7 in what we</p> <p>16 marked as Exhibit 7, it says, repayment of a</p> <p>17 loan I made to TDMM Benchmark on March 16th,</p> <p>18 2010 of \$100,000; do you recall what the</p> <p>19 amount of the loan was?</p> <p>20 A It would be \$100,000.</p> <p>21 Q Do you recall why you made that loan?</p> <p>22 A Yes. I was making the loans, those</p> <p>23 three loans to TDMM of -- again, with the</p> <p>24 understanding that I would be getting the</p> <p>25 money back very shortly, which I got back.</p>	<p style="text-align: right;">Page 68</p> <p>1 L. Smith</p> <p>2 Benchmark but the loan came from TDMM Cable</p> <p>3 funding?</p> <p>4 A No.</p> <p>5 Q Do you remember any other times you</p> <p>6 loaned money to Benchmark?</p> <p>7 A No.</p> <p>8 Q Did you ever talk to the people that</p> <p>9 actually run Benchmark?</p> <p>10 A No.</p> <p>11 Q Did you talk to anyone about that loan</p> <p>12 other than your husband?</p> <p>13 A No.</p> <p>14 (Plaintiff's Exhibit 8, one-page</p> <p>15 document marked for identification, as</p> <p>16 of this date.)</p> <p>17 Q And then I'll just take that from you,</p> <p>18 thank you. This is what we've marked as</p> <p>19 Exhibit 8. Exhibit 8 is a one-page document</p> <p>20 that was originally Exhibit D to Mr. Smith's</p> <p>21 declaration.</p> <p>22 Do you see the payments into your</p> <p>23 account that began on July 15th, 2009?</p> <p>24 A Yes.</p> <p>25 Q And those were your husband's payroll</p>

Page 69	Page 71
<p>1 L. Smith</p> <p>2 accounts - I'm sorry, payroll payments?</p> <p>3 A Yes.</p> <p>4 Q Why were those payments being made into</p> <p>5 your account beginning on July 15th, 2009?</p> <p>6 A Because I paid the household bills with</p> <p>7 it.</p> <p>8 Q But didn't you pay the household bills</p> <p>9 before July 15th, 2009?</p> <p>10 A Yes.</p> <p>11 Q Where were your husband's payroll</p> <p>12 payments being made to before July 15th, 2009?</p> <p>13 A We had a joint checking account.</p> <p>14 Q Do you have an understanding of why his</p> <p>15 paychecks in July, 2009 were being shifted</p> <p>16 from the joint account to the account in your</p> <p>17 name?</p> <p>18 A Yes.</p> <p>19 Q What is that understanding?</p> <p>20 A I closed the joint account and opened an</p> <p>21 account of my own.</p> <p>22 Q Why did you do that?</p> <p>23 A He had his own checking account, he</p> <p>24 never used the one we're speaking of and I</p> <p>25 wanted my own checking account.</p>	<p>1 L. Smith</p> <p>2 THE WITNESS:I can answer the</p> <p>3 question.</p> <p>4 A He had his checking account with which</p> <p>5 he paid some of the bigger bills out of. I</p> <p>6 had my checking account. I paid the household</p> <p>7 bills out of that. He never or very, very</p> <p>8 seldom used that account. I wanted my own</p> <p>9 checking account. Many couples today have</p> <p>10 their own separate checking accounts, and my</p> <p>11 job was to pay the household bills. He, his</p> <p>12 job was to go to work at 7:30 in the morning</p> <p>13 and come home at 8:30 at night, and that's the</p> <p>14 way it went. So I paid those bills and they</p> <p>15 were in my checking account.</p> <p>16 Q Weren't you generally in 2009 moving</p> <p>17 assets out of his name and joint ownership</p> <p>18 into your name exclusively?</p> <p>19 MR. KOENIG:Can you repeat that?</p> <p>20 Q In 2009 weren't you and your husband</p> <p>21 moving assets out of his name and joint</p> <p>22 ownership into your name?</p> <p>23 MR. KOENIG:Object to form.</p> <p>24 MR. FEATHERSTONHAUGH:He'll join</p> <p>25 in that objection. Go ahead and answer.</p>
Page 70	Page 72
<p>1 L. Smith</p> <p>2 Q But couldn't you have done all of that</p> <p>3 without having him have his payroll being made</p> <p>4 into the account that you control?</p> <p>5 MR. FEATHERSTONHAUGH:Objection</p> <p>6 as to form. Additionally, I'm not going</p> <p>7 to stop you, Mr. Stoelting; but I think</p> <p>8 this is repetitive of an entire line of</p> <p>9 questioning you did before.</p> <p>10 MR. STOELTING:I say that's a</p> <p>11 fair statement.</p> <p>12 MR. FEATHERSTONHAUGH:Could I</p> <p>13 just ask one question because I seem to</p> <p>14 have lost an exhibit, what is Exhibit 4?</p> <p>15 MS. FEYRER:It's the affidavit.</p> <p>16 MR. FEATHERSTONHAUGH:Thank you.</p> <p>17 Q Do you have an understanding of why your</p> <p>18 husband didn't decide to direct his paychecks</p> <p>19 to his own checking account?</p> <p>20 A Yes.</p> <p>21 MR. KOENIG:Mr. Smith is not</p> <p>22 waiving spousal privilege, if you can</p> <p>23 answer the question without violating</p> <p>24 any communications you and your husband</p> <p>25 had, go ahead.</p>	<p>1 L. Smith</p> <p>2 A In 2009, I believe I answered this</p> <p>3 before, I had demanded that he put the house</p> <p>4 in Florida in my name because I had paid - my</p> <p>5 funds were what paid for that house. I also</p> <p>6 asked to have my own separate checking account</p> <p>7 in 2009 which is what I did.</p> <p>8 The answer is that - I think that was</p> <p>9 the question. I don't know, I'm not sure what</p> <p>10 you said, actually. I think it was that.</p> <p>11 Q That's fine. Was there anything</p> <p>12 specifically that prompted you to want the</p> <p>13 Vero Beach house in your name and the checking</p> <p>14 account in your name?</p> <p>15 A Was there anything specific?</p> <p>16 Q Yes.</p> <p>17 A No.</p> <p>18 MR. STOELTING:Off the record.</p> <p>19 (Whereupon, an off the record</p> <p>20 discussion was held.)</p> <p>21 (Plaintiff's Exhibit 9, a</p> <p>22 three-page document consisting of an</p> <p>23 e-mail with a letter attached marked for</p> <p>24 identification, as of this date.)</p> <p>25 MR. STOELTING:Back on the</p>

Page 73	Page 75
<p>1 L. Smith</p> <p>2 record. We've marked as Exhibit 9, a</p> <p>3 three-page document that's an e-mail</p> <p>4 with a letter attached.</p> <p>5 MR. FEATHERSTONHAUGH: Could you</p> <p>6 just hold on until I get to finish</p> <p>7 reading it too, please.</p> <p>8 MR. KOENIG: Off the record.</p> <p>9 (Whereupon, an off the record</p> <p>10 discussion was held.)</p> <p>11 MR. STOELTING: Back on the</p> <p>12 record.</p> <p>13 Q. Mrs. Smith, have you had a chance to</p> <p>14 take a look at the letter dated January 28th,</p> <p>15 2009?</p> <p>16 A. Yes.</p> <p>17 Q. Is this a letter from Martin Finn?</p> <p>18 A. Yes.</p> <p>19 Q. Was that the estate planning person you</p> <p>20 were referring to earlier?</p> <p>21 A. Yes.</p> <p>22 Q. Have you ever seen this letter before?</p> <p>23 A. I don't recall.</p> <p>24 Q. Does reading the letter refresh your</p> <p>25 recollection about generally trying to</p>	<p>1 L. Smith</p> <p>2 specifics of this letter which --</p> <p>3 MR. KOENIG: I raise the same</p> <p>4 objections. I take your representation</p> <p>5 in good faith that this was something</p> <p>6 that was presented to you by FINRA, I</p> <p>7 believe you made a representation to us,</p> <p>8 which I take on good faith, your</p> <p>9 representation is that FINRA has advised</p> <p>10 you that some other counsel to Mr. Smith</p> <p>11 has approved the release of this letter</p> <p>12 into the FINRA record and that's how you</p> <p>13 came into it.</p> <p>14 So, with that representation,</p> <p>15 taking it into good faith, I have no way</p> <p>16 to verify that, not that you're not</p> <p>17 making something up in good faith, but I</p> <p>18 don't know what occurred prior. So to</p> <p>19 that extent I still view it as a</p> <p>20 privileged communication and even if if</p> <p>21 Mr. Smith waived it, even if Mr. Smith</p> <p>22 approved it, that's still going to be</p> <p>23 attorney/client privilege.</p> <p>24 MR. STOELTING: I just won't ask</p> <p>25 anymore questions about the letter.</p>
Page 74	Page 76
<p>1 L. Smith</p> <p>2 transfer assets from David to you last year?</p> <p>3 A. From David to me or to the trust?</p> <p>4 Q. Let's just say transfer assets out of</p> <p>5 David's name.</p> <p>6 MR. FEATHERSTONHAUGH: I'm going</p> <p>7 to object to any questions about the</p> <p>8 letter itself. I have no understanding</p> <p>9 of where this came from, but it is</p> <p>10 currently a privileged communication</p> <p>11 between counsel and Mr. and Mrs. Smith.</p> <p>12 I understand, well if I</p> <p>13 understand, I understand the commission</p> <p>14 is saying that they believe the</p> <p>15 privilege was waived because the matter</p> <p>16 was voluntarily produced by Mr. Smith's</p> <p>17 lawyer.</p> <p>18 MR. STOELTING: That's right.</p> <p>19 MR. FEATHERSTONHAUGH: In a FINRA</p> <p>20 proceeding and, perhaps, if you could</p> <p>21 give me something that would</p> <p>22 substantiate that a waiver was made,</p> <p>23 you're certainly free to ask her about</p> <p>24 these transactions and stuff, but my</p> <p>25 objection is directed solely to the</p>	<p>1 L. Smith</p> <p>2 (Plaintiff's Exhibit 10, e-mail</p> <p>3 marked for identification, as of this</p> <p>4 date.)</p> <p>5 Q. Now, this is on the same general topic,</p> <p>6 but I'm trying to kind of refresh your</p> <p>7 recollection about the topic about moving</p> <p>8 money around between you and your husband,</p> <p>9 specifically out of the moving assets, money,</p> <p>10 property, so that it's not any longer in David</p> <p>11 Smith's name.</p> <p>12 Do you recall that general trend in, you</p> <p>13 know, early '09?</p> <p>14 MR. KOENIG: Objection to form.</p> <p>15 A. If you're referring to -- I opened a</p> <p>16 checking account, yes, I did, of my own. I</p> <p>17 didn't -- we didn't move any money around in</p> <p>18 that, that account was exactly the same, it</p> <p>19 was the household account to pay bills, his</p> <p>20 paycheck went into it. I already mentioned</p> <p>21 that I had wanted the house in my name in</p> <p>22 Florida. I think I said that three times.</p> <p>23 It's the only thing I think you're referring</p> <p>24 to, I can't think of anything else.</p> <p>25 Q. Exhibit 10 is an e-mail and you're not</p>

<p style="text-align: right;">Page 77</p> <p>1 L. Smith</p> <p>2 on the e-mail, but I'm just showing it to you</p> <p>3 in the thought that it might refresh your</p> <p>4 recollection. So if you could just read it.</p> <p>5 A Yes.</p> <p>6 Q First of all, have you ever seen this</p> <p>7 e-mail before today?</p> <p>8 A I don't read other people's e-mails, no.</p> <p>9 Q Looking at paragraph 2, where it says</p> <p>10 this has to be accurate, my value for Mr.</p> <p>11 Cranberry, this has to be accurate as I am</p> <p>12 meeting with my estate attorney tomorrow</p> <p>13 afternoon, and Lynn and I have to shift money</p> <p>14 around between us, and our respective net</p> <p>15 worths are critical in determining that</p> <p>16 number.</p> <p>17 Does that refresh your recollection</p> <p>18 about the topic of moving money around and</p> <p>19 assets?</p> <p>20 MR. KOENIG: Objection to form of</p> <p>21 the question.</p> <p>22 A I have not seen this e-mail before, but</p> <p>23 I know we went to a meeting with our estate</p> <p>24 planner — and I'm not a lawyer, I went — I</p> <p>25 spent the afternoon there and we tried to do</p>	<p style="text-align: right;">Page 79</p> <p>1 L. Smith</p> <p>2 a difference in your mind?</p> <p>3 A Yeah, there is a difference between</p> <p>4 loaning and investing. And I don't know if I</p> <p>5 invested in any of them. I left that up to my</p> <p>6 broker.</p> <p>7 Q Your husband?</p> <p>8 A Yes.</p> <p>9 Q We've talked about the irrevocable</p> <p>10 trust. Was that something you thought of as</p> <p>11 an asset under your control?</p> <p>12 MR. FEATHERSTONHAUGH: I'll object</p> <p>13 to the form of the question, but go</p> <p>14 ahead and answer it.</p> <p>15 A Specifically, under my control?</p> <p>16 Q Yes.</p> <p>17 A No.</p> <p>18 Q Or your joining with your husband?</p> <p>19 A No.</p> <p>20 Q Why not?</p> <p>21 A I thought that the trustee and my two</p> <p>22 children would have control of the trust fund.</p> <p>23 (Plaintiff's Exhibit 11, a</p> <p>24 three-page financial statement dated</p> <p>25 August of 2008 marked for</p>
<p style="text-align: right;">Page 78</p> <p>1 L. Smith</p> <p>2 the best we could with setting up this</p> <p>3 irrevocable trust for our kids.</p> <p>4 Q You just referred to the revocable trust</p> <p>5 or irrevocable trust?</p> <p>6 A Irrevocable trust.</p> <p>7 Q When was that set up?</p> <p>8 A Three or four years ago.</p> <p>9 Q So, this meeting, the meetings in 2009</p> <p>10 with Mr. Finn, do they relate to the</p> <p>11 irrevocable trusts that already existed?</p> <p>12 A I believe so.</p> <p>13 Q Have you ever heard of Mr. Cranberry?</p> <p>14 A Of course.</p> <p>15 Q What is Mr. Cranberry?</p> <p>16 A He's a racehorse that's also a name that</p> <p>17 was given to a partnership that my husband was</p> <p>18 in.</p> <p>19 Q Did you ever loan any money or make any</p> <p>20 investments in Mr. Cranberry?</p> <p>21 A I don't know.</p> <p>22 Q By the way, you talked about your</p> <p>23 loaning money to various entities, cable,</p> <p>24 Benchmark, did you ever make investments in</p> <p>25 those as opposed to loaning money or is there</p>	<p style="text-align: right;">Page 80</p> <p>1 L. Smith</p> <p>2 identification, as of this date.)</p> <p>3 Q Exhibit 11 is three pages, financial</p> <p>4 statement dated August of 2008.</p> <p>5 Can you tell me what Exhibit 11 is?</p> <p>6 MR. FEATHERSTONHAUGH: If you</p> <p>7 know.</p> <p>8 A I don't know. It's a financial</p> <p>9 statement.</p> <p>10 Q Have you ever seen it before today?</p> <p>11 A No.</p> <p>12 Q Do you see where it says, cash and</p> <p>13 securities?</p> <p>14 MR. FEATHERSTONHAUGH: On page 1.</p> <p>15 A Yes.</p> <p>16 Q That says 7.1 million?</p> <p>17 A Yes.</p> <p>18 Q Do you have an understanding of whether</p> <p>19 or not that includes the value of the trust?</p> <p>20 MR. FEATHERSTONHAUGH: I think</p> <p>21 he's asking you if you have an</p> <p>22 understanding independent of that</p> <p>23 document. Is that correct, Mr.</p> <p>24 Stodting?</p> <p>25 Q Correct, did you have an understanding</p>

EXHIBIT 6

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF NEW YORK

3 -----
4 SECURITIES AND EXCHANGE COMMISSION

5 Plaintiff,

6 -versus-

10-CV-457

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

18 -----
19 TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING

20 held in and for the United States District Court,
21 Northern District of New York, James T. Foley United
22 States Courthouse, 445 Broadway, Albany, New York,
23 on WEDNESDAY, JULY 9, 2010, the HON. DAVID R. HOMER,
24 United States District Court Magistrate Judge, Presiding.
25

26 **APPEARANCES:**

27 **FOR THE PLAINTIFF:**

28 SECURITIES AND EXCHANGE COMMISSION

29 BY: DAVID P. STOELTING, ESQ.

30 KEVIN P. McGRATH, ESQ.

31 LARA MEHRABAN, ESQ.

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

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

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

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

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

25 THE COURT: This is a declaration by Miss

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3

1 Smith?

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

5 THE COURT: All right.

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

12 THE COURT: Who's the letter to?

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

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

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

21 THE COURT: Okay.

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

24 THE COURT: That's 124?

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

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1 is Exhibit 118 in the binders.

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

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

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

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

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

3 MR. STOELTING: She was not.

4 THE COURT: All right. Mr. Featherstonhaugh?

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

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

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

18 MR. FEATHERSTONHAUGH: Mr. and Mrs.

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

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

23 THE COURT: Why didn't he?

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

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

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

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

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

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

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

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

3 THE COURT: All right.

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

11 THE COURT: All right. Thank you.

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

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

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

5 THE COURT: All right. Thank you.

6 MR. KOENIG: Thank you.

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

23 Anything else, Mr. Stoelting?

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

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

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

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

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

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

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

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

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

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1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF NEW YORK
3 -----
4 SECURITIES AND EXCHANGE COMMISSION

4 Plaintiff,
5 -versus- 10-CV-457

6 MCGINN, SMITH & CO., INC.,
7 MCGINN, SMITH ADVISORS, LLC,
8 MCGINN, SMITH CAPITAL HOLDINGS CORP.,
9 FIRST ADVISORY INCOME NOTES, LLC,
10 FIRST EXCELSIOR INCOME NOTES, LLC,
11 FIRST INDEPENDENT INCOME NOTES, LLC,
12 THIRD ALBANY INCOME NOTES, LLC,
13 TIMOTHY M. MCGINN and DAVID L. SMITH,
14 Defendants,
15 and LYNN A. SMITH,
16 Relief Defendant.
17 -----

18 TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING (cont'd)
19 held in and for the United States District Court,
20 Northern District of New York, James T. Foley United
21 States Courthouse, 445 Broadway, Albany, New York,
22 on THURSDAY, JULY 10, 2010, the HON. DAVID R. HOMER,
23 United States District Court Magistrate Judge, Presiding.

24 **APPEARANCES:**

25 **FOR THE PLAINTIFF:**

SECURITIES AND EXCHANGE COMMISSION

BY: DAVID P. STOELTING, ESQ.

KEVIN P. McGRATH, ESQ.

LARA MEHRABAN, ESQ.

**BONNIE J. BUCKLEY, RPR, CRR
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1 APPEARANCES (continued):

2
3 FOR THE RELIEF DEFENDANT LYNN A. SMITH:

4 FEATHERSTONHAUGH & WILEY LAW FIRM

5 BY: JAMES D. FEATHERSTONHAUGH, ESQ.

6
7 FOR THE TRUSTEE DAVID M. WOJESKI:

8 THE DUNN LAW FIRM

9 BY: JILL A. DUNN, ESQ.

10
11 FOR THE DEFENDANTS TIMOTHY MCGINN AND DAVID SMITH:

12 GREENBERG, TRAURIG LAW FIRM

13 BY: MICHAEL L. KOENIG, ESQ.

14
15 ALSO PRESENT:

16 LYNN A. SMITH, Relief Defendant

17 DAVID M. WOJESKI, TRUSTEE

18 RYAN SMITH

19

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BONNIE J. BUCKLEY, RPR, CRR
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LYNN SMITH - DIRECT - STOELTING

1 Q. How much money has Mr. McGinn paid back?

2 A. He's paid back two separate checks, one for a
3 hundred thousand dollars and one for 85,000.

4 Q. Do you have an understanding of why Mr. McGinn has
5 not paid back the balance?

6 A. Yes.

7 Q. What is that?

8 A. He's having a cash flow problem at the moment.

9 Q. And do you know why in the -- since the loans were
10 made in 2004, he has not paid back a greater amount on the
11 loans other than the 185,000?

12 A. No.

13 Q. Has he been having cash flow problems since you
14 extended him the loan in 2004?

15 A. I don't know that.

16 Q. And why did Mr. McGinn need this money?

17 A. For two purposes. One, he was buying some stock
18 in the alarm company that he was the president of. And the
19 other was for a down payment on a home in Niskayuna.

20 Q. Do you recall the name of the alarm company?

21 A. Integrated Alarm Systems.

22 Q. Was it Integrated Alarm Services Group Inc.?

23 A. Yes. Sorry.

24 Q. And what is your primary residence?

25 A. Two Rolling Brook Drive, Saratoga Springs, New

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12

LYNN SMITH - DIRECT - STOELTING

1 York.

2 Q. And is that house held jointly with your husband?

3 A. Yes, it is.

4 Q. When did you purchase that house?

5 A. About eight years ago.

6 Q. And it's been held jointly with your husband since
7 you purchased it eight years ago?

8 A. Yes.

9 Q. And do you also own a home in Vero Beach?

10 A. Yes.

11 Q. When was that home purchased?

12 A. That was purchased about nine years ago.

13 Q. And when you purchased the Vero Beach home, it was
14 held jointly with you and your husband, correct?

15 A. Yes, it was.

16 Q. And in whose name is that Vero Beach house now?

17 A. It is in my name.

18 Q. Only?

19 A. Yes.

20 Q. And when did -- when was it transferred from joint
21 ownership to your ownership only?

22 A. It was transferred a year ago.

23 Q. And why did that transfer occur?

24 A. Because I paid for the home with my funds, and I
25 had been wanting to put the house in my name, but there was

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13

LYNN SMITH - DIRECT - STOELTING

14

1 an estate planning lawyer who said we should keep it
2 jointly. And that was about four years ago. And then I
3 insisted that it be put in my name because I paid for it.

4 Q. And you paid for that house out of your stock
5 account?

6 A. Yes.

7 Q. And that house was -- the Vero Beach house, was it
8 used by all members of your family?

9 A. Yes.

10 Q. The estate planning attorney you referred to, is
11 that Martin Finn?

12 A. Yes.

13 Q. And you said that Mr. Finn advised you that from
14 an estate planning perspective it would be preferable to
15 leave the house as a joint asset?

16 A. Yes, he did.

17 Q. And you did not follow that advice, correct?

18 A. Correct.

19 Q. And you also own a house in Broadalbin, New York?

20 A. Yes. It's a small camp on Sacandaga Lake.

21 Q. How long have you had that house?

22 A. I've had that house for about 40 years.

23 Q. In whose name is that house?

24 A. Lynn A. Smith.

25 Q. Now, up until about a year ago, which bank account

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LYNN SMITH - DIRECT - STOELTING

1 did you use for basic household bills?

2 A. Oh, our checking account.

3 Q. At Bank of America?

4 A. Yes.

5 Q. And that was a joint account with you and your
6 husband?

7 A. Yes.

8 Q. And up until about a year ago that joint account
9 at Bank of America was the account that David Smith
10 deposited his paychecks?

11 A. Yes. He had direct deposit from work.

12 Q. And then about a year ago, you opened up an
13 account at BOA in your name only, correct?

14 A. Yes.

15 Q. And at that point, David's paycheck, which had
16 previously been deposited into the joint account, then began
17 to be deposited into your account; correct?

18 A. Correct.

19 Q. And do you recall why that change occurred?

20 A. His check -- his paycheck was deposited into that
21 account because I paid the household bills from that
22 account. And I had decided that I wanted a checking account
23 of my own. Many couples have that. I hadn't. And I wanted
24 to have some independence. My daughter's unemployed, and I
25 didn't want -- he never used the account anyway, and I

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1 really didn't want someone looking over my shoulder as to
2 where I was sending someone a check.

3 Q. Doesn't David Smith have a separate checking
4 account in his own name?

5 A. Yes, he does.

6 Q. Why didn't he choose to have his paychecks
7 deposited in his own checking account?

8 A. He used the -- his checking account for items that
9 maybe I could not afford to write checks out of mine. We
10 had two mortgages, car payments, insurance, and so on. And
11 that's what he used his account for, the big things. And I
12 used mine for household daily, lawn service, groceries, that
13 kind of thing.

14 Q. And at the time that you opened -- that you closed
15 the joint checking account and opened up your own account
16 and switched David's paychecks to your own account, wasn't
17 that about the same time that you switched the Vero Beach
18 house from joint ownership to your ownership?

19 A. No. I think the Vero Beach house was quite a bit
20 before that. Or a few months before that.

21 Q. A few months before?

22 A. Yeah. I remember it was the summer that I changed
23 the checking account, I believe, last summer.

24 Q. And the switch in Vero Beach happened?

25 A. I believe it was April.

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1 Q. Of 2009? Last year?

2 A. Yes.

3 Q. Do you recall consulting with Martin Finn on the
4 topic of transferring assets to you?

5 A. I don't understand your question.

6 Q. You recall Martin Finn was the estate planning
7 attorney?

8 A. Yes, I do.

9 Q. All right. And he was engaged by you and your
10 husband to give you --

11 A. Exactly.

12 Q. Can I finish my question please?

13 A. Sorry.

14 Q. He was engaged by you and your husband to provide
15 you with estate planning advice?

16 A. Yes.

17 Q. And didn't you have a meeting with him in
18 January 2009 on the subject of the best way to transfer
19 assets to your name?

20 MR. FEATHERSTONHAUGH: Your Honor, I just
21 want to make sure I understand your Honor's ruling from
22 yesterday. Obviously, I object to any questions, as I
23 mentioned yesterday, based on the attorney/client privilege
24 that are going to explore Mrs. Smith's conversation with her
25 estate planning counsel. I thought your Honor said those

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1 would be preserved. And I can raise them at the end. Or do
2 I need to --

3 THE COURT: No, you're making an objection
4 now, I take it?

5 MR. FEATHERSTONHAUGH: Yes.

6 THE COURT: SEC counsel is entitled to find
7 out if there was a conversation.

8 MR. FEATHERSTONHAUGH: Yeah.

9 THE COURT: And the topic, but not the
10 content of the conversation.

11 MR. FEATHERSTONHAUGH: Okay. Thank you.

12 THE COURT: As to this question, the
13 objection is overruled.

14 A. Yes, we had a meeting in 2009.

15 Q. And the topic of the meeting was transferring
16 assets to your name, correct?

17 MR. FEATHERSTONHAUGH: Objection.

18 THE COURT: Overruled.

19 A. I don't recall that that meeting was about that --

20 Q. What --

21 A. -- transferring assets. It was -- I -- it was
22 just an estate planning meeting with our lawyer, our estate
23 lawyer. It was lengthy, and honestly, I can't remember what
24 actually took place.

25 Q. Do you recall the meeting at all?

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1 A. Yes. I know we had a meeting in 2009.

2 Q. And do you recall among the topics being discussed
3 of how to move jointly held assets or David Smith's assets
4 into your name?

5 A. I don't believe that that meeting was solely about
6 moving assets around. It may have been discussed. He's an
7 estate planner. That's all I remember about the meeting.

8 Q. Could you turn to Exhibit 118 in the binder,
9 please?

10 THE COURT: Just to be sure, could you help
11 her out again?

12 Q. Exhibit 118 is three pages. Mrs. Smith, if you
13 could just skip over the first page, which is an e-mail.
14 And the second page is a letter dated January 28, 2009, a
15 two-page letter from Martin Finn to Mr. and Mrs. David L.
16 Smith.

17 A. Yes.

18 Q. You have the letter open in front of you?

19 A. Yes.

20 Q. Do you recognize this letter?

21 A. Yes.

22 Q. Did you receive it around January 28, 2009?

23 A. Yes.

24 Q. The letter says Dear David and Lynn.

25 MR. FEATHERSTONHAUGH: Objection, your Honor.

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1 THE COURT: What's your objection?

2 MR. FEATHERSTONHAUGH: My objection is that
3 this is a letter, a private letter from counsel to the
4 witness.

5 THE COURT: Is this the same objection as
6 yesterday?

7 MR. FEATHERSTONHAUGH: Yes.

8 THE COURT: All right. Same ruling.
9 Overruled.

10 BY MR. STOELTING:

11 Q. The first sentence says: This letter summarizes
12 the proposed transfer of assets we recently discussed which
13 will further your estate planning and asset protection
14 objectives.

15 A. Yes.

16 Q. What were your asset protection objectives at that
17 time?

18 A. I don't know if I understand the question. I --
19 we went for estate planning, for talking about an
20 irrevocable trust for our children and so on. We went to
21 protect our assets. That's why I went to an estate lawyer.

22 Q. At this time, were you aware that a security
23 regulator called FINRA was conducting an examination of
24 McGinn, Smith & Co. Inc.?

25 A. I was aware that there was a routine FINRA audit

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1 going on, which, if I recall, had gone on every year. I
2 didn't understand that it was an investigation. I just
3 heard that it was an audit.

4 Q. And did the audit or the investigation, was that
5 the reason that you were seeking asset protection?

6 A. No.

7 Q. Do you recall in January 2009, shortly before this
8 meeting, that David Smith received a letter from FINRA
9 ordering him to appear for sworn on-the-record testimony?

10 A. No.

11 Q. Would you please look at the next -- following
12 document, Plaintiff's 119? Plaintiff's 119 is a letter from
13 FINRA, dated January 21, 2009, from a senior examiner at
14 FINRA to David Smith at 2 Rolling Brook Drive, Saratoga
15 Springs. That's your home, correct?

16 A. Yes.

17 Q. And the letter says: Dear Mr. Smith: In
18 connection with the above --

19 MR. FEATHERSTONHAUGH: Objection, your Honor.

20 THE COURT: To what?

21 MR. FEATHERSTONHAUGH: He's reading a
22 document which, as your Honor has pointed out, speaks for
23 itself. He hasn't even identified the fact that the witness
24 has ever seen it.

25 THE COURT: I'll give him up to the three

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1 paragraphs that you had Mr. Welles read.

2 MR. FEATHERSTONHAUGH: All right.

3 THE COURT: Your objection is overruled.

4 BY MR. STOELTING:

5 Q. This letter was apparently sent to your home,
6 Mrs. Smith, by, it says, first class and certified mail. Do
7 you remember receiving this letter around January 21, 2009?

8 A. Sir, I do not. First of all, it's addressed to
9 Mr. Smith. Apparently, he didn't share this with me.

10 Q. So let me just continue essentially trying to
11 refresh your recollection. I'll just read the first
12 sentence.

13 In connection with the above referenced
14 examination, you are hereby requested under FINRA Rule 8210
15 to appear for an on-the-record interview.

16 THE COURT: Mr. Stoelting. Her memory is not
17 exhausted. She said she didn't receive it.

18 MR. STOELTING: I'm trying to refresh her
19 recollection as to the information in the letter about the
20 fact that her husband was called for this on the record --

21 THE COURT: Her recollection is not
22 exhausted. She said she didn't receive it and she wasn't
23 told.

24 BY MR. STOELTING:

25 Q. Were you aware that your husband gave

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1 on-the-record testimony to FINRA on multiple occasions in
2 2009 and 2010?

3 A. Yes.

4 Q. And when was the first time you remember being
5 aware of that?

6 A. I can't remember.

7 Q. And before 2009, do you remember your husband ever
8 providing on-the-record testimony to FINRA?

9 A. No.

10 Q. Looking back at Plaintiff's 118, which is the
11 letter from Mr. Finn, the second paragraph refers to
12 something called the David L. Smith lifetime QTIP trust. Do
13 you see that?

14 A. I do.

15 Q. Did you have an understanding at the time of what
16 that trust was?

17 A. I do not understand a QTIP trust to this day. I'm
18 sorry.

19 Q. I'm not -- I'm just asking generally whether you
20 had an understanding that your husband had an asset that was
21 referred to as a QTIP trust.

22 A. Yes.

23 Q. And the letter from Mr. Finn says, it says that
24 because the David L. Smith lifetime trust was funded with
25 assets which belong to David, those assets must be

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1 distributed out of the trust and back to David.

2 And then the last sentence of that paragraph says:

3 Once the assets are back in David's name, David will make a
4 gift of those assets to Lynn. Lynn will hold these assets
5 for approximately six months and will then transfer the
6 assets to the QTIP trust.

7 Do you recall the assets of the trust being
8 transferred to you?

9 A. No.

10 Q. The next paragraph says: In addition to the above
11 transfer, we also recommend that David transfer the \$410,000
12 note receivable and his interest in Capital Center Credit
13 Corp. and Mr. Cranberry LLC to Lynn. Do you remember those
14 transfers occurring?

15 A. I'm reading what you're saying, but I don't
16 remember the transfers occurring.

17 Q. Did you have an understanding at that time why
18 Mr. Finn was recommending that you move this note and
19 Mr. Cranberry from David to Lynn?

20 A. No. The reason we went to Marty Finn is because
21 he's an estate planning lawyer. I certainly could not plan
22 an estate.

23 Q. Okay. Well, did you disagree with any of his
24 recommendations?

25 A. No. Of course not.

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1 Q. So you would have done your best to follow his
2 advice?

3 A. Yes.

4 Q. ^ ^ The last paragraph says: It is important to
5 note that should either of you file for bankruptcy or be
6 sued by a creditor subsequent to these transfers, these
7 transfers will be scrutinized to determine if they were
8 fraudulently conveyed. In order to avoid these transfers
9 from being characterized as fraudulent conveyances, you
10 must: One, not have actual intent to delay or defraud
11 creditors. Not make transfers which leave you with
12 insufficient assets to satisfy your debts. Not engage in or
13 become engaged in a business for which your assets remain
14 after the transfer constitute an unreasonably small capital.
15 And, four, not intend to or reasonably believe that you will
16 incur debts after the transfers for which your remaining
17 assets are insufficient to repay.

18 Do you recall any conversations with David Smith
19 on the topic of whether the transfers recommended in this
20 letter might be considered fraudulent according to the
21 criteria set out by Mr. Finn?

22 A. No.

23 Q. Do you recall any conversations with anyone on the
24 topic of whether the transfers recommended in the letter
25 might be considered fraudulent?

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1 A. No.

2 Q. Do you recall any conversations with anyone on the
3 topic of whether the transfer of the Vero Beach house to
4 your name and the shifts in the checking account might be
5 considered fraudulent?

6 A. No.

7 Q. Now, in the second page of the letter from
8 Mr. Finn, there's a reference to the Vero Beach house that
9 that paragraph that begins: We also discussed ... and it
10 says, it's three lines down: It is more beneficial for you
11 to own those properties jointly as tenants by the entirety.
12 And he's referring to the Vero Beach property. Did I read
13 that correctly?

14 A. Yes.

15 Q. Okay. Why did you reject Mr. Finn's advice that
16 it was more beneficial from an estate planning perspective
17 to keep it jointly held?

18 A. I think I mentioned before, I funded the house and
19 I wanted the house in my name, and that's what we finally
20 did.

21 Q. Well, you said earlier that you respected
22 Mr. Finn's advice, correct?

23 A. There's two pages of his advice here. That
24 particular part of his advice I did not agree with.

25 Q. Was it because you wanted to keep the Vero Beach

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1 house from any creditors of David Smith?

2 A. No.

3 Q. Now, as to the timing of this meeting with
4 Mr. Finn, is it your testimony that your husband never told
5 you -- or withdrawn.

6 Did David Smith tell you about his FINRA
7 testimony, the fact that he would be examined on the record
8 by FINRA before the testimony occurred?

9 A. Yes.

10 Q. And how far in advance did you hear about the fact
11 that FINRA had called him in to testify?

12 A. Not too far in advance.

13 Q. And were you, were you concerned about that?

14 A. Oh, of course.

15 Q. And that had never happened before in his 25 year
16 career in the securities industry, right?

17 A. Twenty-nine year career. And it was the same kind
18 of audit every single year. And for the four years before
19 this past year, everything was fine.

20 Q. Except that he had never been called in before to
21 give on the record testimony, correct?

22 A. Correct.

23 Q. And the fact that that was happening for the first
24 time in his 29 year career, did that give you concern?

25 A. Yes.

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1 Q. And did you do anything because of that concern?

2 A. No.

3 Q. Did the movement of these assets that we talked
4 about, the bank account and the Vero Beach house, have
5 anything to do with your knowledge about his on-the-record
6 testimony?

7 A. No.

8 Q. And were you aware that there were a number of
9 arbitrations filed against McGinn, Smith & Co. Inc., FINRA
10 arbitrations throughout 2009?

11 A. Yes.

12 Q. And when did you first become aware of that?

13 A. I do not recall.

14 Q. But you did become aware of that some time last
15 year?

16 A. Oh, yes.

17 Q. And did that concern you?

18 A. Yes.

19 Q. Why did it concern you?

20 A. Why did it concern me that he was being
21 investigated by FINRA?

22 Q. Yes.

23 A. He's a good businessman. They had a great
24 business. And I wasn't happy to have my husband be
25 investigated.

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1 Q. And why did the FINRA arbitrations brought by
2 customers of McGinn, Smith concern you?

3 A. Why did they concern me? Can you rephrase that?

4 Q. Sure. I'll withdraw the question.

5 Did you understand that the FINRA arbitrations
6 that were filed in 2009 by customers of McGinn, Smith
7 against your husband and his company sought money damages?

8 A. Yes. I believe there were many other firms
9 besides McGinn, Smith that had arbitrations against them.
10 As we all know, the economic crisis that we've been going
11 through, giant firms on Wall Street have gone under. Of
12 course, I was concerned.

13 Q. And were you aware that there had been
14 arbitrations filed in late 2008 as well against McGinn,
15 Smith?

16 A. No.

17 Q. It was 2009 that you became aware?

18 A. I, I -- yes.

19 Q. And were you concerned that if those arbitrations
20 were successful, that you could lose your joint assets or
21 David Smith's assets?

22 A. I would be concerned that we could lose our
23 assets, yes.

24 Q. Do you recall submitting an affidavit in this
25 proceeding a few weeks ago?

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1 A. Yes.

2 Q. And paragraph 11, I can show it to you if you
3 would like, but it was referred to as something called
4 Capital Center Credit Stock.

5 A. Yes.

6 Q. And was that another asset of David that was
7 transferred to you?

8 A. Yes.

9 Q. And do you recall why that was done?

10 A. When that was done? Was that the question, when?

11 Q. Yes.

12 A. Could I have a little help?

13 Q. Yes.

14 A. A lot of numbers here.

15 Q. Let me hand up a copy of your affidavit. It's, I
16 believe, on page 11. It's referring to an attach -- I'm
17 sorry.

18 A. Page 11, yes.

19 THE COURT: Does this have an Exhibit Number?

20 MR. STOELTING: Your Honor, it hasn't been
21 marked as an exhibit, but it's already in the record, it was
22 filed by Mr. Featherstonhaugh, it's document 23 on --

23 THE COURT: This is the assets and
24 liabilities statement of Mrs. Smith?

25 MR. STOELTING: No, your Honor. It's called

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1 Affidavit of Relief Defendant Lynn A. Smith. It was filed
2 on May 21st of this year, document 23.

3 THE COURT: All right. That's sufficient.

4 BY MR. STOELTING:

5 Q. All right. Is this your affidavit?

6 A. Yes.

7 Q. Okay. And that's your signature somewhere in the
8 back?

9 A. Yes. Yes.

10 Q. Okay. If you would turn please to page 11,
11 paragraph 33(a).

12 A. Yes.

13 Q. Okay. Does that refresh your recollection about
14 the transfer of funds held in a Capital Center Credit
15 Corp. account to you in 2009?

16 A. Yes.

17 Q. Okay. And it refers to an exhibit and transaction
18 one, and I think if we look at that, it's Exhibit C,
19 transaction one.

20 A. Yes.

21 Q. Okay. And the amount of that transfer was
22 \$38,430?

23 A. Yes.

24 Q. Okay. And that transfer was made in 2009?

25 A. Yes.

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1 Q. Okay. And according to your affidavit, Mr. Smith
2 had held those funds since the late '90s?

3 A. Yes.

4 Q. And why in 2009 did he transfer them to your stock
5 account?

6 A. I believe he had some legal advice on that. And
7 the actual check, I believe, on that was for like...

8 Oh, no, not that one. That was just a -- just
9 something that was old, they were closing down I think.

10 Q. Who was closing down?

11 A. We were.

12 Q. You and your husband?

13 A. I was. We had -- Capital Center Credit Corp,
14 that's the alarm company, yes, we invested in that.

15 Q. But my question is about the timing of it. Why --
16 if it had been held by Mr. Smith in the late '90s, why in
17 2009 was it transferred to your stock account?

18 A. We decided to cash it in.

19 Q. Do you remember any particular reason?

20 A. No.

21 Q. Was it just a coincidence that it happened at the
22 time that you were transferring the checking account and the
23 Vero Beach house to your name?

24 A. Yes.

25 Q. You recall we mentioned the QTIP trust earlier and

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1 it was referred to in Mr. Finn's letter?

2 A. Yes.

3 Q. And you didn't recall whether the QTIP funds had
4 been transferred to you or not? If you would turn to the
5 next page, page 12.

6 A. Mm-hmm.

7 Q. Do you see the paragraph that says D?

8 A. Yes, D.

9 Q. Does that refresh your recollection that the QTIP
10 \$326,304 of the QTIP funds were transferred to you?

11 A. You're on D. Yes. Yes.

12 Q. So that transaction did occur, correct?

13 A. Yes.

14 Q. And that occurred, if we -- it's referring to a
15 row on Exhibit C. It's referenced as item 5. And that
16 indicates that the transfer occurred on February 20th,
17 2009, correct?

18 A. Exhibit C, item ... I see it.

19 Q. Okay.

20 A. Okay. Item 5.

21 Q. Is that the same transaction that's referenced in
22 paragraph D on page 12?

23 A. Yes.

24 Q. And that's a transfer from David Smith to you, to
25 your NFS account of \$326,000?

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1 A. Yes.

2 Q. And you recall when we were looking at the letter
3 from Mr. Finn and he was describing the transfer of the QTIP
4 funds, that his letter said or advised that you should hold
5 the QTIP funds for six months and then transfer them back to
6 David Smith? Do you recall that, or would you like to look
7 at the letter again?

8 A. I don't recall it. I can look at the letter again
9 but ... and which paragraph are you looking at?

10 Q. It's Exhibit 118, the second paragraph of the
11 letter, referring to the QTIP. It says: Once the assets
12 are back in David's name, David will make a gift of those
13 assets to Lynn. Lynn will hold these assets for
14 approximately six months and will then transfer the assets
15 back to the QTIP trust.

16 A. What is the question? Yes.

17 Q. Did you ever transfer the \$326,000 back?

18 A. I thought I did. I believe so.

19 Q. Do you know when that happened?

20 A. No.

21 Q. Is it possible it did not happen?

22 A. It's possible.

23 Q. Do you know one way or another?

24 A. No.

25 Q. Do you know Nancy McGinn, the wife of Tim McGinn?

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1 A. Yes.

2 Q. Have you ever discussed with Nancy McGinn the
3 topic of moving assets from joint ownership or held by a
4 husband to the wife's name?

5 A. No.

6 Q. Were you aware that Tim and Nancy lived in a house
7 at 26 Port Huron Drive in Niskayuna?

8 A. Yes.

9 Q. Were you aware that in October 2009, the house in
10 Niskayuna that had been solely in Tim McGinn's name was
11 transferred to Nancy McGinn's name for one dollar
12 consideration?

13 A. No.

14 Q. All right. Mrs. Smith, if you could refer back to
15 Exhibit 75, which was the statement of net assets we were
16 looking at a moment ago.

17 A. Yes.

18 Q. Now, this was something, obviously, that was
19 prepared pursuant to a Court order that you knew would be
20 given to the SEC, correct?

21 A. Correct.

22 Q. And the statement of net assets does not include
23 anywhere the David and Lynn Smith irrevocable trust,
24 correct?

25 A. Correct.

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EXHIBIT 7

Mehraban, Lara

From: Tiffani Filien [tiffani@lavelleandfinn.com]
Sent: Monday, June 22, 2009 2:12 PM
To: smithd@mcglinnsmith.com
Subject: Letter
Attachments: Asset Transfer Letter 1_28_09.pdf

Good afternoon Mr. Smith. Attached for your reference is a letter addressed to you and your wife, dated January 28, 2009, summarizing a proposed transfer of assets.

Thank you and please let me know if you have any questions or if you have trouble opening the attachment.

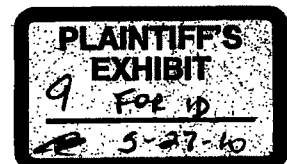
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5/11/2010



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* also admitted to NJ
* also admitted to FL

January 28, 2009

VIA PERSONAL DELIVERY

Mr. and Mrs. David L. Smith
2 Rolling Brook Drive
Saratoga Springs, New York 12866

Re: Estate Planning

Dear David and Lynn:

This letter summarizes the proposed transfer of assets we recently discussed which will further your estate planning and asset protection objectives. Enclosed are three asset ownership worksheets which illustrate the changes in ownership discussed below. The first worksheet shows your assets as they are currently owned. The second worksheet shows the first set of transfers to be made immediately. The third worksheet shows the ownership of assets six (6) months after the initial transfers.

Because the David L. Smith Lifetime QTIP Trust (the "QTIP Trust") was funded with assets which belonged to David, those assets must be distributed out of the trust and back to David. This transfer may be done pursuant to Article III, Section A., Paragraph 3. of the QTIP Trust. Once the assets are back in David's name, David will make a gift of those assets to Lynn. Lynn will hold these assets for approximately six (6) months and will then transfer the assets to the QTIP Trust.

In addition to the above transfer, we also recommend that David transfer the \$410,000 note receivable and his interests in Capital Center Credit Corp. and Mr. Cranberry, LLC to Lynn. Again, after approximately six (6) months Lynn will transfer these assets to the QTIP Trust. It should be noted that Lynn will need to file a gift tax return for any transfers she makes to the QTIP Trust. No gift tax will be payable, however, because there is a marital deduction available for gifts made between spouses. We have contacted Ron Simons, CPA and informed him that any transfers made to the QTIP Trust in 2008 do not require a gift tax return.

It is important to note that should either of you file for bankruptcy or be sued by a creditor subsequent to the transfers, these transfers will be scrutinized to determine if they were fraudulently conveyed. In order to avoid these transfers from being characterized as

**Lavelle
& Finn**
LIMITED LIABILITY PARTNERSHIP
Attorneys At Law

Mr. and Mrs. David L. Smith
January 28, 2009
Page 2

fraudulent conveyances you must: I) not have actual intent to delay or defraud creditors; ii) not make transfers which leave you with insufficient assets to satisfy your debts; iii) not engage in or become engaged in a business for which your assets remaining after the transfer constitute an unreasonably small capital; and iv) not intend to or reasonably believe that you will incur debts after the transfers for which your remaining assets are insufficient to repay.

We also discussed the possibility of transferring ownership of your principal residence and the Verq Beach property to Lynn's name alone. At this time, it is more beneficial for you to own those properties jointly as tenants by the entirety. When titled as tenants by the entirety these assets are non-probate property and will pass by law to the surviving spouse upon the first spouse's death. In addition, each spouse is treated as owning an undivided 100% interest in the property which means that the consent of both spouses is required in order to sell or mortgage the property. Tenants by the entirety also offers protection against the creditors of one spouse. Although a creditor of one spouse can obtain a lien on that spouse's interest in the property, the lien will only survive if the debtor spouse is the surviving spouse and becomes the sole owner of the property. Finally, courts do not have the authority to order the sale of property owned as tenants by the entirety and, therefore, if one spouse files for bankruptcy the court cannot order the sale or transfer of the property.

Once you have had a chance to review this information please do not hesitate to contact me with any questions or if you need assistance with the transfers. Thank you.

Very truly yours,

LAVELLE & FINN, LLP

By: 

Martin S. Finn, JD, CPA, LL.M.

Enclosures
MSF/ale

EXHIBIT 8

**Cash, Investor Liability and Equity
from Inception to 09/30/2009
All Four Notes Consolidated.**

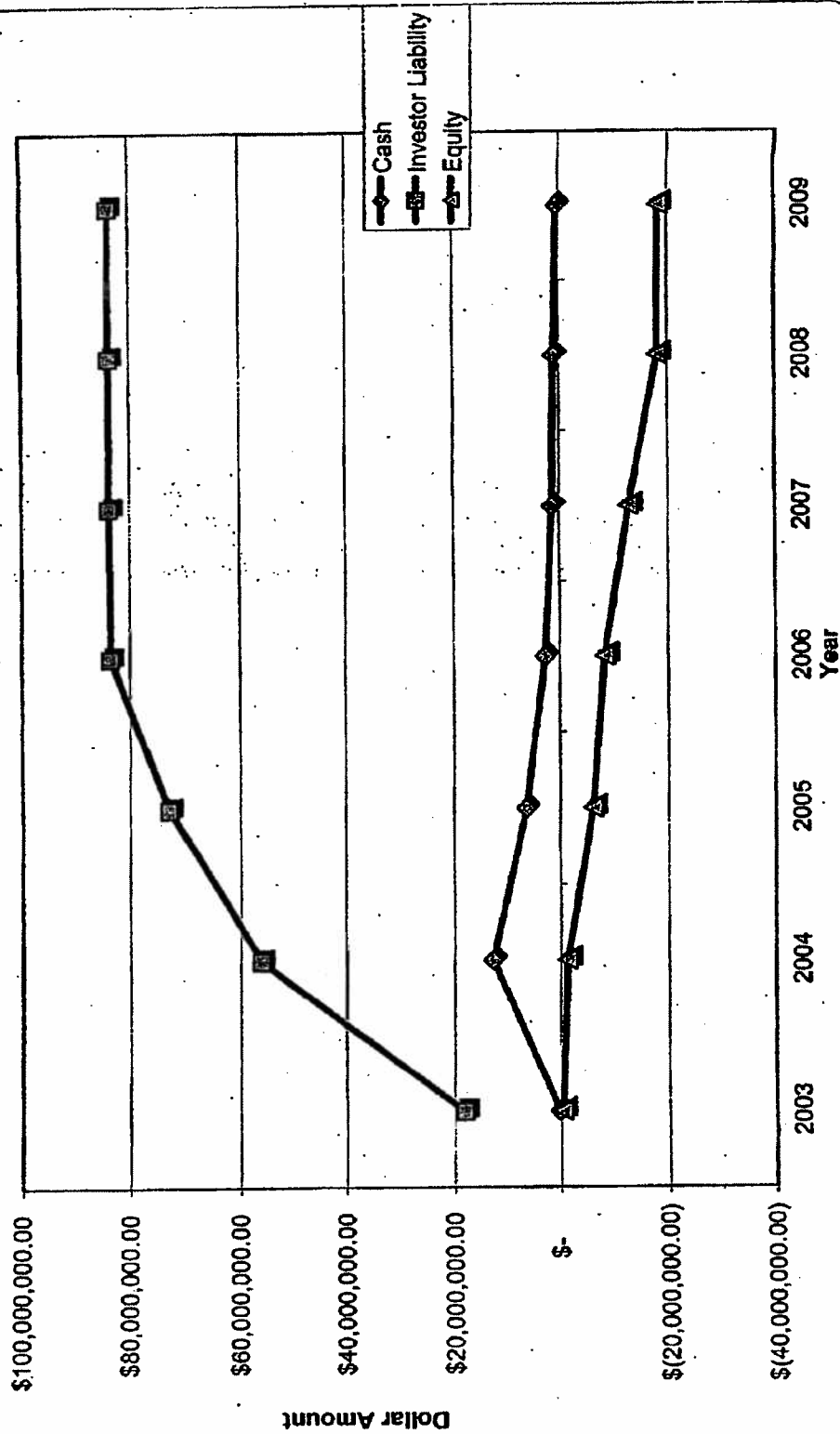


EXHIBIT 9

06/08/2010 14:08 FAX

FINRA

001/002

DECLARATION OF CHRISTOPHER RATTNER

I, Christopher Rattner, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a Principal Examiner with the Financial Industry Regulatory Authority (FINRA), District 9, Woodbridge, New Jersey.
2. I was a member of the FINRA investigative team that conducted an investigation of McGinn, Smith & Co., Inc. ("MS"), David Smith and Timothy McGinn. This investigation led to the filing of a Complaint on April 5, 2010, by FINRA, *Department of Enforcement v. McGinn, Smith & Co., Inc., David L. Smith and Timothy M. McGinn*, Disciplinary Proceeding No. 20090179845 (FINRA).
3. During the investigation, FINRA requested numerous documents from MS. It is my understanding that those documents were produced to FINRA by MS as they were maintained in the ordinary course of business. Attached hereto are various correspondence from counsel to MS relating to the productions by MS to FINRA.
4. As the production letters from MS make clear, counsel to MS advised it during the production process, conducted a privilege review of the documents prior to production and removed documents that counsel determined to be privileged.
5. I have reviewed a three-page document marked as Plaintiff's Exhibit 9, which contains a cover e-mail and attaches a letter dated January 28, 2009 ("PX 9"). MS produced this letter to FINRA on June 22, 2009. Since then, counsel to MS has not contacted FINRA to assert any privilege over PX 9 or request its return.
6. The documents and files that FINRA received from MS were subsequently requested by the Securities and Exchange Commission and provided to them by FINRA.

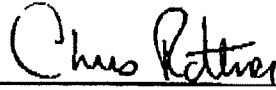
06/08/2010 14:08 FAX

FINRA

002/002

I declare under penalty of perjury that the foregoing is true and correct.

Executed: June 8, 2010
Woodbridge, New Jersey

A handwritten signature in cursive script, appearing to read "Chris Rattiner", is written over a horizontal line.

Christopher Rattiner



Financial Industry Regulatory Authority

Via Facsimile and First Class Mail

May 13, 2009

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

Re: FINRA Routine Examination #20080117152 of McGinn, Smith & Co., Inc

Dear Mr. Franceski:

In connection with the above examination, please have available copies of the following information for on-site staff review on Monday, June 1, 2009:

- (1) All firm emails in native format placed onto a CD in a searchable format, related to the offerings of Coventry CareLink Bridge Loan Notes ("Coventry") and CMS Financial Services Corporation ("CMS") for the period of January 1, 2006 through the present;
- (2) All sales and training materials, including but not limited to PowerPoint presentations, related to Coventry and CMS;
- (3) Any due diligence related to Coventry and CMS;
- (4) Subscription agreements and investor questionnaires related to Coventry and CMS;
- (5) The Letter of Intent provided by MS Financial Services Corp. to Coventry CareLink as referenced on page "x" of the Coventry Private Placement Memorandum;
- (6) Any communication(s) with investors regarding the most recent extension of Coventry;
- (7) Any documentation related to the status of the Connecticut Tax Program, referenced in the CMS Private Placement Memorandum;
- (8) All note agreements for any note issued by 107th Associates LLC;
- (9) For First Independent Income Notes, LLC; First Excelsior Income Notes, LLC; Third Albany Income Notes, LLC; First Advisory Income Notes, LLC; Coventry; CMS; and any private offering involving Coventry CareLink or Coventry Resources; please provide the following information:

a. Private Placement Memoranda;

b. Lists of investors including dates and amounts of investment;

Investor protection, Market integrity.

New Jersey District Office
Suite 710
581 Main Street
Woodbridge, NJ
07095
T 732 596 1000
F 732 596 1001
www.finra.org

FINRA 000000000000

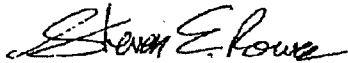
Mr. David Franceski, Jr.
Stradley Ronon Stevens & Young, LLP
May 13, 2009
Page 2 of 2

- c. Subscriptions agreements and investor questionnaires;
 - d. Escrow account statements;
 - e. Extension and/or conversion notifications;
 - f. A detailed statement as to how proceeds have been applied, including dates, amounts of investment, payees, and all supporting documentation;
 - g. A detailed list of monies paid/returned to investors to date, including dates, amounts, recipients and description of payment [i.e. interest, principal];
 - h. All balance sheets and income statements prepared from the offering date through the present; and
 - i. Correspondence or emails with actual or prospective investors;
- (10) For the entities listed in (9) above, 107th Associates LLC, and Mr. Cranbury, please provide a list of all financial accounts, including the name of the financial/banking institution, account number, all authorized signatories, and the date established;
- (11) For the accounts identified in response to (10) above, please provide account statements covering the period of December 2006 through April 2009;
- (12) A statement and supporting documentation detailing any compensation received by McGinn, Smith & Co., Inc. and all of its affiliated entities in connection with the following offerings: Coventry, CMS, and all offerings referenced in (9) above; and
- (13) All customer arbitrations, civil actions, complaints, and settlements related to the offerings referenced in (9) above.

If any of the information requested is being omitted because it was provided previously, please indicate.

This request is being made pursuant to FINRA Rule 8210 which requires a member firm and persons associated (or formerly associated) with a member firm to provide information with respect to any matter involved in an investigation, complaint or proceeding. If you have any questions, please contact the undersigned at (732) 596-2075 or Michael Paulsen, Examination Manager at (732) 596-2073.

Sincerely,



Steven E. Rowen
Senior Examiner

Cc: McGinn, Smith & Co., Inc.
Mr. David L. Smith, President
99 Pine St.
Albany, NY 12207



FACSIMILE

TO <u>David C. Franfort, Esq.</u>	FROM <u>Michael J. Newman</u>
COMPANY _____	FAX <u>732-598-3595</u>
FAX _____	TEL <u>732-598-2030</u>
TEL _____	
DATE <u>6/3/09</u>	
NUMBER OF PAGES INCLUDING COVER _____	

This facsimile is strictly confidential and is intended solely for the person or organization to whom it is addressed.

As discussed.

Mike

Investor protection. Market integrity.

581 Main Street t 732 596 2000
Suite 710 f 732 596 2001
Woodbridge, NJ www.finra.org

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Jaggs, Gary C.

From: Rowen, Steven
Sent: Tuesday, June 16, 2009 2:47 PM
To: Paulsen, Michael; Newman, Michael; Jaggs, Gary C.; Pearlman, Randy
Subject: FW: McGinn Smith Documents
Attachments: Rowen Steve letter 6-16-09.pdf



Rowen Steve
letter 6-16-09.pdf.

Steven E. Rowen
Senior Examiner
FINRA
New Jersey District Office
(732) 596-2075
steven.rowen@finra.org

-----Original Message-----

From: Goldstein, Georgia [mailto:goldsteing@mcginnsmith.com]
Sent: Tuesday, June 16, 2009 2:40 PM
To: Rowen, Steven
Subject:

Mr. Rowen,
Please see attached letter from David Smith.

Sincerely,

Georgia B. Goldstein, Sales Assistant
McGinn, Smith & Co., Inc.
99 Pine Street, 5th Floor
Albany, NY 12207
518-449-5131
fax: 518-449-4894
goldsteing@mcginnsmith.com

*McGinnSmith
& Company, Inc.*

Investment Bankers • Investment Brokers

June 16, 2009

99 Pine Street
Albany, NY 12207
518-449-5131
Fax 518-449-4894
www.mcginnsmith.com

Mr. Steven Rowen, Senior Examiner
Financial Industry Regulatory Authority
New Jersey District Office
581 Main Street, Suite 710
Woodbridge, N.J. 07095

Dear Steve,

Pursuant to the FINRA Routine Examination of McGinn, Smith & Company, Inc., #20080117152, I am enclosing a schedule for delivery for the electronic document requests of May 13, 2009 and June 3, 2009 and a document Directory to facilitate access to the requested material. The physical documents remain on site at 99 Pine Street, available for your inspection. After you receive the electronic files, please notify me if we can re-file the physical documents.

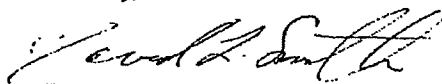
We have previously sent via electronic file all emails not protected by client attorney privilege for CMS, CCHC, Coventry, FIIN, FEIN, FAIN and TAIN. We have also sent electronically all investor lists for the aforementioned and in addition the list for TDM Cable Trust '06.

We are presently scanning and producing all requested documentation in electronic format to be sent to Ikon Office Solutions of Rochester, NY to be Bates numbered and available on disk form. This format was by way of agreement between Mike Paulsen and myself at a meeting on June 2, 2009 held in my office. Ikon Office Solutions, Inc. has opened a secure web site for the transmittal of the documents and we sent them Disk #1 today, June 16, 2009. They have assured us that they can provide us with a two day turn around, including overnight delivery of the disk. Assuming that the material is returned to us in good form, we will overnight Disk #1 to you on Thursday, June 18th. Once assured that the quality and integrity of the material is intact, we will begin to forward the remaining files for Bates numbering and disk production. Our anticipated schedule for the remaining documentation is as follows:

Disk #	Date sent to Ikon	Date sent to FINRA
2,7	June 19, 2009	June 23, 2009
3,4	June 22, 2009	June 24, 2009
5,6	June 23, 2009	June 25, 2009

If you have any questions regarding the transmittal of the document request, please do not hesitate to call me at 518-449-5131.

Sincerely,



David L. Smith
President

FINRA0000000005

Jaggs, Gary C.

From: Rowen, Steven
Sent: Tuesday, June 16, 2009 5:00 PM
To: Paulsen, Michael; Newman, Michael; Jaggs, Gary C.; Pearlman, Randy
Subject: FW: Document schedule

From: Smith, David [mailto:smithd@mcginnsmith.com]
Sent: Tuesday, June 16, 2009 4:55 PM
To: Rowen, Steven
Cc: Debevec, Christine
Subject: Document schedule

Steve,

My email to you this afternoon was not quite correct. I had understood from my attorney that the second production of emails had been sent to Mike Newman last Friday. Upon receiving a copy of my email to you, my attorney notified me that the production of emails relating to FIIN, FEIN, FAIN, TAIN and Coventry Resources for the broader period were taking additional time to process due to the extreme volume. She anticipates that they will be out by the end of the week. My apologies for the error.

Regards,
Dave Smith

6/16/2009

6/16/2009

**STRADLEY
RONON**
ATTORNEYS AT LAW

Stradley Ronon Stevens & Young, LLP
2600 One Commerce Square
Philadelphia, PA 19103-7098
Telephone 215.564.8000
Fax 215.564.8120
www.stradley.com

Christine M. Debevec
CDebevec@stradley.com
215.564.8156

June 10, 2009

Via Federal Express

Michael Newman, Esquire
Senior Regional Counsel
Financial Industry Regulatory Authority
New Jersey District Office
581 Main Street, Suite 710
Woodbridge, NJ 07095

RECEIVED

JUN 11 2009

**FINRA
DISTRICT 9 NEW JERSEY**

**Re: FINRA Routine Examination #20080117152 of McGinn, Smith & Co., Inc.
FOIA Confidential Treatment Requested**

Dear Michael:

This letter will serve to supplement the response of McGinn, Smith & Co., Inc. ("MSC") to paragraph (1) of the May 13, 2009 letter of Steven E. Rowen, Senior Examiner. Enclosed herewith is a disk containing firm emails in native and searchable format related to Coventry Carelink and CMS Financial Services Corporation for the time period of January 1, 2006 through May 13, 2009. The search terms that we used to identify responsive emails are: "CMS Financial" or "Coventry Carelink."

After performing the keyword search above to identify the responsive documents, we applied certain electronic filters and performed text searches in an effort to identify and to remove privileged communications. However, as David Franceski indicated to you in previous discussions, in order to turn this production around more quickly we did not take the time to perform an extensive privilege review on each email communication being produced. Thus, to the extent that certain privileged communications were not identified in our electronic privilege searches, this production is being provided to FINRA with FINRA's agreement that MSC does not waive any attorney-client, attorney work product or related privileges applicable to the emails actually produced.

As we discussed last week, we anticipate producing emails in response to paragraph 9(i) of the May 13, 2009 letter later this week.

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L # 951639 v.1

FINRA 000000000011

Michael Newman, Esquire
June 10, 2009
Page 2

On behalf of MSC, we request confidential treatment of the information here submitted. This letter has been marked "FOIA Confidential Treatment Requested," and the information accompanying it carries the same request.

Should you have any questions about the enclosed documents, please call me.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Christine Debevec", followed by the initials "JBC" in a smaller, more formal script.

Christine M. Debevec

CMD/lm
Enclosure

cc: David L. Smith (w/ encl.)
David C. Franceski, Jr., Esq. (w/ encl.)

L # 951689 v.1

FINRA00000001

*McGinnSmith
& Company, Inc.*

RECEIVED
JUN 19 2009
FINRA
DISTRICT 9 NEW JERSEY

Investment Bankers • Investment Brokers

99 Pine Street
Albany, NY 12207
518-449-5131
Fax 518-449-4894
www.mcginnsmith.com

June 18, 2009

Mr. Steven Rowen, Senior Examiner
Financial Industry Regulatory Authority
New Jersey District Office
581 Main Street, Suite 710
Woodbridge, New Jersey 07095

Dear Steve,

As a follow up to my letter and email of June 16, 2009 regarding the Routine Examination #20080117152 I am enclosing Disk #1 that contains the documents requested and as outlined in the Document Directory provided in my follow up email of June 17, 2009. The total number of pages in Disk #1 were in excess of 10,000.

We continue to believe that we will be able to adhere to the schedule outlined in the June 16, 2009 letter. Thus, we will be mailing you the disks containing the remaining requested documents next week.

Sincerely,



David L. Smith
President

DLS/gbg
Enclosures

CC: Christine Debevec

END *****



Stradley Ronon Stevens & Young, LLP
2600 One Commerce Square
Philadelphia, PA 19103-7098
Telephone 215.564.8000
Fax 215.564.8120
www.stradley.com

FOIA CONFIDENTIAL TREATMENT REQUESTED

Christine M. Debevec
CDebevec@stradley.com
215.564.8156

June 22, 2009

Via Federal Express

Michael Newman, Esquire
Senior Regional Counsel
Financial Industry Regulatory Authority
New Jersey District Office
581 Main Street, Suite 710
Woodbridge, NJ 07095

RECEIVED

JUN 23 2009

FINRA
DISTRICT 9 NEW JERSEY

**Re: FINRA Routine Examination #20080117152 of McGinn, Smith & Co., Inc.
FOIA Confidential Treatment Requested**

Dear Michael:

This letter will serve to supplement the response of McGinn, Smith & Co., Inc. ("MSC") to paragraph 9(i) of the May 13, 2009 letter of Steven E. Rowen, Senior Examiner. Enclosed herewith is a disk containing firm emails in native and searchable format related to First Independent Income Notes, First Excelsior Income Notes, Third Albany Income Notes, First Advisory Income Notes, and Coventry Resources for the time period July 1, 2002 through May 13, 2009. Also enclosed are firm emails related to Coventry Carelink and CMS Financial Services Corporation for the time period of July 1, 2002 through December 31, 2005. The search terms that we used to identify responsive emails are: "First Independent Income Notes;" "FIIN;" "First Excelsior Income Notes;" "FEIN;" "Third Albany Income Notes;" "TAIN;" "First Advisory Income Notes;" "FAIN;" "Coventry Resources;" "CMS Financial;" and "Coventry Carelink." As we discussed, MSC has agreed to produce all non-privileged emails responsive to this keyword search, even though the search is broader than that requested in paragraph 9(i) – which limited the request to emails with actual or prospective investors.

After performing the keyword search above to identify the responsive documents, we applied certain electronic filters and performed text searches in an effort to identify and to remove privileged communications. However, as we have previously indicated to you, in order to turn this production around more quickly we did not take the time to perform an extensive privilege review on each email communication being produced. Thus, to the extent that certain privileged communications were not identified in our electronic privilege searches, this production is being provided to FINRA with FINRA's agreement that MSC does not waive any

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L # 957950 v.1

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Michael Newman, Esquire
June 22, 2009
Page 2

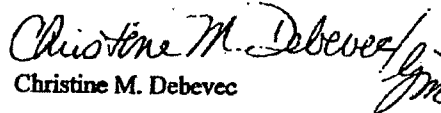
FOIA CONFIDENTIAL TREATMENT REQUESTED

attorney-client, attorney work product or related privileges applicable to the emails actually produced.

On behalf of MSC, we request confidential treatment of the information here submitted. This letter has been marked "FOIA Confidential Treatment Requested," and the information accompanying it carries the same request.

Should you have any questions about the enclosed documents, please call me.

Sincerely yours,


Christine M. Debevec

CMD/lm
Enclosure

cc: David L. Smith (w/ encl.)
David C. Franceski, Jr., Esq. (w/ encl.)

*McGinnSmith
& Company, Inc.*

JUN 29 2009
FINRA
DISTRICT 9 NEW JERSEY

Investment Bankers • Investment Brokers

99 Pine Street
Albany, NY 12207
518-449-5131
Fax 518-449-4894
www.mcginnsmith.com

June 24, 2009

Mr. Steven Rowen, Senior Examiner
Financial Industry Regulatory Authority
New Jersey District Office
581 Main Street, Suite 710
Woodbridge, New Jersey 07095

Dear Steve,

As a follow up to my letter and email of June 16, 2009 regarding the Routine Examination #20080117152 I am enclosing Disks #3 and #4 that contain the documents requested and as outlined in the Document Directory provided in my follow up email of June 17, 2009. The total number of pages in Disks #3 and #4 were approximately 1,000.

Disks #5 and #6 are in the process of being scanned and numbered and will be mailed to you early next week.

Sincerely,



David L. Smith
President

DLS/gbg
Enclosures

CC: Christine Debevec

*McGinn Smith
& Company, Inc.*

Investment Bankers • Investment Brokers

99 Pine Street
Albany, NY 12207
518-449-5131
Fax 518-449-4894
www.mcginnsmith.com

July 1, 2009

Mr. Steven Rowen, Senior Examiner
Financial Industry Regulatory Authority
New Jersey District Office
581 Main Street, Suite 710
Woodbridge, New Jersey 07095

RECEIVED

JUL 06 2009


FINRA
DISTRICT 9 NEW JERSEY

Dear Steve,

As a follow up to my letter and email of June 16, 2009 regarding the Routine Examination #20080117152 I am enclosing Disks #5 and #6 that contain the documents requested and as outlined in the Document Directory provided in my follow up email of June 17, 2009. The total number of pages in Disks #5 and #6 were approximately 1,000.

This completes forwarding all of the information you have requested to date on disk form, with sequential numbering via the Bates system.

Sincerely,



David L. Smith
President

DLS/gbg
Enclosures

CC: Christine Debevec