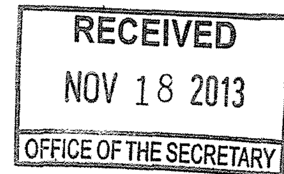

SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15514

In the Matter of

DONALD J. ANTHONY, JR.,
FRANK H. CHIAPPONE,
RICHARD D. FELDMANN,
WILLIAM P. GAMELLO,
ANDREW G. GUZZETTI,
WILLIAM F. LEX,
THOMAS E. LIVINGSTON,
BRIAN T. MAYER,
PHILIP S. RABINOVICH, and
RYAN C. ROGERS,

Respondents.

ANSWER OF RYAN C. ROGERS

Ryan C. Rogers ("Mr. Rogers") for his answer to the allegations contained in the Order Instituting Administrative and Cease-and-Desist Proceedings dated September 23, 2013 (the "OIP"), responds as follows:

I.

PRELIMINARY STATEMENT

Mr. Rogers denies having violated any provision of the securities laws, including Sections 5(a) and (c) of the Securities Act of 1933 ("Securities Act"), Section 17(a) of the Securities Act, or Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder.

This matter arises from the secret theft and diversion of investors' funds by Timothy McGinn ("Mr. McGinn") and David Smith ("Mr. Smith"), who ran an Albany-based

broker-dealer and investment bank, McGinn Smith & Co., Inc. ("McGinn Smith"), which ceased operations in 2010. Mr. McGinn and Mr. Smith were convicted of their crimes on February 6, 2013. Mr. Rogers testified before the grand jury and was prepared to testify at trial on behalf of the government against them but was not called as a trial witness.[1]

Mr. Rogers did not participate in, or know about Mr. McGinn's and Mr. Smith's secret theft and diversion of investors' funds. Nor does the Division allege otherwise.

Product Suitability

Mr. Rogers was fully familiar with (1) the security alarm, "triple play" and travel agency receivable contract financings, among other public and private debt and equity investments, that underpinned McGinn Smith's origination of McGinn Smith Securities (as defined), (2) the trust configuration of the notes and contract certificates that were offered, and (3) the performance of the Securities. He reviewed the type of investments to be included in the so-called "Four Funds" – private equity-like investments – before offering them to clients for whom they would be suitable and after informing them of the risks inherent in the investments.

He also knew the separate due diligence previously undertaken by McGinn Smith's investment banking department regarding the McGinn Smith Securities. He reviewed the private placement memoranda for each of the McGinn Smith Securities. He believed in the securities that he offered at the times he offered them. He did all that is or could be reasonably expected of a registered representative, if not more.

---

1 Mr. Rogers also fully cooperated with the Division in connection with the SEC Action (as defined) by providing deposition testimony and documents as a non-party witness. The Division did not inform Mr. Rogers that he was the subject of any investigation until November 2012 – 17 months after providing this cooperation. Mr. Rogers was stunned to learn that the Division was contemplating these charges, which the Division had not previously mentioned.

In no manner could his due diligence of the McGinn Smith Securities be remotely characterized as insufficient, let alone with the intent necessary to rise to a level of fraud. The McGinn Smith Securities were cash flowing investments that performed until, unbeknownst to Mr. Rogers, Mr. McGinn and Mr. Smith secretly stole and diverted money from them, and the economy fell into a steep recession.

For example, the court-appointed Receiver that took over McGinn Smith wrote to an investor in March 2012 that, since 2010, "[t]he Alarm Traders alarm contracts have produced a significant return for investors during the Receivership,"[2] and reported to the Court that these cash flowing assets "help[ed] fund the cost of operating the estates" and enabled the estates to accumulate "net revenue … for investors [of] $2,862,831."[3] The alarm contract assets alone were sold for $2,250,000.[4] There was nothing wrong with the investments, except for Mr. McGinn's and Mr. Smith's secret theft and diversion of money for which they have been criminally convicted and the recession that negatively impacted some of them. Mr. Rogers's family members invested more than $200,000 in McGinn Smith Securities including those at issue in the OIP. Mr. Rogers, his friends, family and other clients were victims of Mr. McGinn's and Mr. Smith's secret theft and diversion.

---

2 *See* Letter from William J. Brown, as Receiver to L. Levy dated March 5, 2012, attached as Exhibit 2.

3 *See* Motion of William J. Brown, as Receiver, for an Order Approving (I) Sale and Bidding Procedures With Respect to the Sale of Certain Alarm System Monitoring Accounts and Related Assets Owned by Certain Receivership Entities Including the Assignment of Certain Agreements Related Thereto, (II) Time, Date, Place and Manner of Notice for Each of the Auction and Sale Hearing, and (III) the Sale of the Receiver's Interests Free and Clear of Liens, Claims, Encumbrances, and Other Interests (March 1, 2012) at ¶ 9, Dkt. No. 453 in *SEC v. McGinn, Smith & Co., Inc. et al.*, No. 10 Civ. 457 (N.D.N.Y.) (the "SEC Action").

4 *See* Notice of Filing Asset Purchase Agreement filed March 3, 2012 at ¶ 3(a), Dkt. No. 476, in the SEC Action.

Accredited Investors

At no time did Mr. Rogers know, or have reason to know, that more than 35 *un*accredited investors (a) allegedly had subscribed to any McGinn Smith private placement offering ("McGinn Smith Securities"),[5] (b) were accepted by McGinn Smith in its Albany headquarters, or that (c) the proceeds of McGinn Smith Securities were commingled and used to support other McGinn Smith Securities in making their scheduled payment to investors. Mr. Rogers had no authority to accept subscriptions, had no knowledge of the number of *un*accredited investors that McGinn Smith had accepted on each deal, and had no knowledge of any commingling or misuse of investment funds.

Mr. Rogers had no reason to think that subscriptions by his *accredited* investors would have any bearing on the private offering exemption or Regulation D safe harbor. Nor was there any reason why, in the ordinary course of business, Mr. Rogers would have had reason to know (or should have known) that McGinn Smith's secret commingling or misuse of investment funds somehow could lead to an alleged aggregation of unaccredited investors from multiple transactions in supposed violation of Section 5.

Request for a More Definite Statement

Mr. Rogers needs a more definite statement to adequately respond to the OIP and prepare his defenses because certain allegations span seven years and others refer only to the ten "Respondents" as a group.

---

[5] In fact, the Division states at paragraph 32 that no Trust Offering had more than 35 unaccredited investors.

As described in his separate motion for more definite statement dated November 7, 2013, Mr. Rogers needs a more definite statement regarding the allegations in seven paragraphs of the OIP (¶¶ 27, 32, 35, 36, 37, 45 and 47), as follows:

> OIP ¶ 37 With respect to the alleged unspecified material misrepresentations and material omissions in paragraph 37, the Division should identify (a) the date (month/year) of the alleged material misrepresentation or material omission, (b) the investor to whom Mr. Rogers allegedly made such a misrepresentation or omission, (c) whether it was a material misrepresentation or a material omission, or both, and (d) the security as to which such material misrepresentation or material omission was made, and provide the information in the form of the chart below or otherwise.

Name of Investor	*Date of Mat. Misrep. / Mat. Omission*	*Misrep. / Omission / Both*	*Name of Security*	*Name of Broker*
1.				
2.				
3.				
4.				
Etc.				

> OIP ¶ 45 With respect to the allegations in paragraph 45, the Division should identify each investor for whom Mr. Rogers sought/obtained redemptions, the name of the security, and when such redemptions were sought/obtained (month/year), and provide the information in the form of the chart below or otherwise.

Name of Investor	*Name of Security*	*Date of Redemption Sought / Obtained*	*Name of Broker*
1.			

2.			
3.			
4.			
Etc.			

OIP ¶ 27 With respect to the allegations in paragraph 27 that "Respondents sold the Four Funds to unaccredited investors," the Division should identify the name of the unaccredited investor, the name of the security (i.e., which of the Four Funds offerings), and the date offered by Mr. Rogers (month/year), and provide the information in the form of the chart below or otherwise.

Name of Unaccredited Investor	*Name of Security*	*Date Offered*	*Name of Broker*
1.			
2.			
3.			
4.			
Etc.			

OIP ¶ 32 With respect to the allegations in paragraph 32 concerning "MSF Conduit", the Division should identify the 69 unaccredited investors, the name of each security they purchased, the date offered (month/year), and whether Mr. Rogers offered the security to any of the 69 unaccredited investors, and provide the information in the form of the chart below or otherwise.

69 Unaccredited Investors

Name of Unaccredited Investor	*Name of Security*	*Date Offered*	*Name of Broker*

1.			
2.			
3.			
4.			
Etc.			

OIP ¶ 32 With respect to the allegations in paragraph 32 concerning "TDM Conduit", the Division should identify the 59 unaccredited investors, the name of each security they purchased, the date offered (month/year), and whether Mr. Rogers offered the specific security to any of the 59 unaccredited investors, and provide the information in the form of the chart below or otherwise.

59 Unaccredited Investors

Name of Unaccredited Investor	*Name of Security*	*Date Offered*	*Name of Broker*
1 .			
2 .			
3 .			
4 .			
Etc.			

OIP ¶ 35, 36, 47 With respect to the allegations in paragraphs 35, 36 and 47, the Division should identify each red flag *not previously identified* in paragraphs 40 (Smith's alleged refusal to provide specific information about investments by Four Funds), 43 (alleged "replacement policy" by 2006), and 48 (January 8, 2008 meeting), when each such red flag was disclosed to, otherwise was known to, or should have been known by (month/year) Mr. Rogers, and provide the information in the form of the chart below or otherwise.

Description of Red Flag	*Date Disclosed To, Known By, Or Should Have Known By*	*Name of Broker*
1.		
2.		
3.		
4.		
Etc.		

Statute of Limitations, 28 U.S.C. § 2462

28 U.S.C. § 2462 bars this proceeding. It provides that

> …an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced *within five years* from the date when the claim first accrued …. (emphasis added)

The Division's allegations in the OIP occurred more than five years ago (that is, before September 23, 2008). In February 2013, the Supreme Court held in *SEC v. Gabelli* that the five-year statute of limitations in 28 U.S.C. § 2462 begins to run when the alleged fraud occurs, and not when the fraud is discovered. 568 U.S. ___, 133 S. Ct. 1216, 1219-20 (2013) (no discovery rule applicable to the commission); *see also SEC v. Bartek*, 484 F. App'x 949, 954 (5th Cir. 2012) (punitive injunctions and associational bars sought by the Commission were subject to § 2462); *Johnson v. SEC*, 87 F.3d 484, 492 (D.C. Cir. 1996) (finding that § 2462 applies to administrative proceedings); *SEC v. Pentagon Capital Mgmt. PLC*, 725 F.3d 279, 287 (2d Cir. 2013) (applying § 2462 to exclude any transactions occurring earlier than five years before commencement of action). The statute bars this proceeding "for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise," 28 U.S.C. § 2462, because, according

to the allegations of the OIP, the alleged fraud and alleged violations of Section 5 all occurred more than five years before this proceeding commenced.

II.

ANSWER

A. *RESPONDENTS*

1. ***Donald J. Anthony, Jr.****, 60 years old, is a resident of Loudonville, NY. He was registered with McGinn, Smith & Co., Inc. ("MS & Co.") from November 1997 to December 2009, and McGinn, Smith Advisors, LLC ("MS Advisors") from February 2006 to December 2009.*

2. ***Frank H. Chiappone****, 57 years old, is a resident of Clifton Park, NY. He was registered with MS & Co. from February 1989 to December 2009.*

3. ***Richard D. Feldmann****, 74 years old, is a resident of Delmar, NY. He was registered with MS & Co. from July 1987 to December 2009.*

4. ***William P. Gamello****, 49 years old, is a resident of Rexford, NY. He was registered with MS & Co. from April 2005 to December 2009.*

5. ***Andrew G. Guzzetti****, 66 years old, is a resident of Saratoga Springs, NY. He was registered with MS & Co. from September 2004 to December 2009.*

6. ***William F. Lex****, 67 years old, is a resident of Phoenixville, PA. He was registered with MS & Co. from January 1983 to December 2009.*

7. ***Thomas E. Livingston****, 55 years old, is a resident of Slingerlands, NY. He was registered with MS & Co. from October 1988 to December 2009, and became a 20% shareholder of MS Holdings in 2004.*

Response:

Mr. Rogers does not have, and is unable to obtain, sufficient information to admit or deny the allegations in paragraphs 1, 2, 3, 4, 5, 6, and 7 of the OIP.

8. ***Brian T. Mayer****, 40 years old, is a resident of Princeton, NJ. Mayer was registered with MS & Co. from July 2001 to December 2009, and MS Advisors from February 2006 to April 2009.*

9. ***Philip S. Rabinovich****, 39 years old, is a resident of Roslyn, NY. He was registered with MS & Co. from July 2001 to December 2009, and with MS Advisors from August 2006 to December 2009.*

10. ***Ryan C. Rogers****, 40 years old, is a resident of East Northport, NY. He was registered with MS & Co. from July 2001 to December 2009, and with MS Advisors from February 2006 to April 2009.*

Response:

Mr. Rogers admits the allegations in paragraphs 8, 9 and 10 of the OIP, except states that, prior to July 2001, Messrs. Rabinovich, Mayer and Rogers had been registered representatives with Mercer Partners in New York City. They had an established client base at Mercer Partners, including family and friends, who invested in a wide range of securities. In 2001, McGinn Smith acquired Mercer Partners which suffered financial difficulties when the internet and technology stock bubble burst. They, along with other representatives of Mercer Partners, became the New York City branch office of Albany-headquartered McGinn Smith. During the time they were registered with McGinn Smith, they continued to offer a wide array of securities that were suitable for their clients and consistent with their investment objectives. Mr. Rogers offered McGinn Smith Securities to his clients as a registered representative – not as an investment adviser – and had no discretion over his clients' accounts with respect to the McGinn Smith Securities.

In October 2009, Mr. Rogers left McGinn Smith and formed RMR Wealth Management ("RMR") along with Messrs. Rabinovich and Mayer. RMR is a registered investment adviser with its office in New York City. A description of RMR's methods of analysis for its clients and statement concerning investment strategies and risks, taken from its Part 2A brochure of Form ADV, is attached as Exhibit 1. RMR's investment advisory business has not and does not involve the offer to its clients of private placement investments, such as the Four Funds or the Trust Offerings.

B. *RELEVANT ENTITIES[6] AND INDIVIDUALS*

11. ***MS & Co.****, a New York corporation founded in 1980 by David Smith and Timothy McGinn, had its principal place of business at 99 Pine Street, Albany, NY, and maintained branch offices at Clifton Park, NY, New York, NY, and King of Prussia, PA. MS & Co. was registered with the Commission as a broker-dealer beginning in 1980 and as an investment adviser in April 2009. It was owned by Smith (50%), McGinn (50%; 30% after 2004), and Thomas Livingston (20% after 2004). From 2003 to 2009, MS & Co. had about 55 employees, including about 35 registered representatives. On December 24, 2009, MS & Co. filed a partial BD-W. On March 9, 2010, MS & Co. also withdrew its investment adviser registration. FINRA terminated MS & Co.'s FINRA membership on August 4, 2010.*

12. ***MS Advisors*** *was a New York corporation formed in 2003 with its principal place of business at 99 Pine Street, Albany, New York. MS Advisors was owned by Smith (50%), McGinn (30%) and Livingston (20%). MS Advisors was registered as an investment adviser with the Commission from January 3, 2006 to April 24, 2009, and was the investment adviser to the Four Funds (defined below) until April 2009, when it was replaced by MS & Co.*

13. ***McGinn, Smith Holdings, LLC ("MS Holdings")*** *was owned by Smith (50%), McGinn (30%) and Livingston (20%).*

14. ***McGinn, Smith Capital Holdings Corp. ("MS Capital")*** *was a New York corporation formed in 1989 with its principal place of business at 99 Pine Street, Albany, New York. MS Capital was owned by MS Holdings (52%), McGinn (24%) and Smith (24%). MS Capital was the indenture trustee, the servicing agent and the collateral agent for the Four Funds, and the trustee for all the Trusts created between 2006 and 2009. Smith was president and McGinn was chairman of the board.*

---

[6] *On April 20, 2010, the United States District Court for the Northern District of New York granted the SEC's motion for a temporary restraining order and appointed a Receiver over numerous entities controlled or owned by Timothy McGinn and David Smith. See SEC v. McGinn Smith & Co., Inc., et al., 10-CV-457 (N.D.N.Y.) (GLS/CFH) (Dkt. Nos. 4, 5, 96). All the McGinn Smith entities-including MS & Co., MS Advisors, MS Capital, MS Holdings, FIIN, FEIN, FAIN and TAIN-remain under the Receiver's control.*

Response: Mr. Rogers admits on information and belief the first sentence of this footnote. Mr. Rogers denies the second sentence of the footnote and states on information and belief that some of the McGinn Smith receivership entities have been liquidated in sales to third parties with the assets underlying those ongoing, operating businesses.

Response:

Mr. Rogers admits on information and belief the allegations in paragraphs 11, 12, 13 and 14 of the OIP, except states that (a) Mr. Rogers left McGinn Smith in October 2009 to form RMR with Messrs. Rabinovich and Mayer, and (b) on information and belief, McGinn Smith at times had approximately 45 registered representatives. Mr. Rogers never had any equity or ownership interest in any of the aforementioned McGinn Smith entities, all of which were operated out of the Albany headquarters.

*15. The **Four Funds** were New York limited liability companies, whose sole managing member was MS Advisors. MS & Co. served as the placement agent for the Four Funds offerings, and MS Capital acted as the Trustee. The Four Funds shared offices with MS & Co. and the other McGinn Smith entities at 99 Pine Street, Albany, NY. The Four Funds offerings are listed below, along with the promised rate of return, the maximum amount of the offering, and the date of the PPM:*

(a) *First Independent Income Notes, LLC ("FIIN"), 5%/7.5%/10.25% ($20 million) (9/15/03);*

(b) *First Excelsior Income Notes LLC ("FEIN"), 5%/7.5%/10.25% ($20 million) (1/16/04);*

(c) *Third Albany Income Notes, LLC ("TAIN"), 5.75%/7.75%/10.25% ($30 million) (11/1/04); and*

(d) *First Advisory Income Notes, LLC ("FAIN"), 6%/7.75%/10.25% ($20 million) (10/1/05).*

Response:

Mr. Rogers admits the first three sentences of paragraph 15 of the OIP. This information comes directly from page one of the confidential private placement memoranda ("PPM") that Mr. Rogers read and distributed to investors for whom the investment offerings were suitable and after apprising them of the investment risks. Mr. Rogers denies the fourth

sentence of paragraph 15 and states that he never promised any rate of return to any investor, and that there was no rate of return promised in the PPM. The notes were offered in three tranches and accrued interest at the rates stated in each of the PPMs, subject to all of the risk factors and other disclosures made in each of the PPMs concerning the risks associated with the investment.

*16. The **Trust Offerings** were offerings by special purpose entities, purportedly to invest in contracts for burglar alarm service, "triple play" (broadband, cable and telephone) service or luxury cruises. MS & Co. acted as a placement agent and MS Capital acted as Trustee for the Trust Offerings. The Trust Offerings are listed below, along with the promised rate of return, the maximum amount of the offering, and the date of the PPM:*

(a) *TDM Cable Trust 06, 7.75%/9.25% ($3,550,000) (11/13/06)*

(b) *TDM Verifier Trust 07, 8.25%/9% ($3,475,000) (2/23/07)*

(c) *Firstline Senior Trust 07, 9.25% ($1,850,000) (5/19/07)*

(d) *Firstline Trust 07, 11% ($1,867,000) (5/19/07)*

(e) *Firstline Senior Trust 07 Series B, 9.5% ($1,435,000) (10/19/07)*

(f) *TDM Luxury Cruise Trust 07, 10% ($3,630,000 (7/16/07)*

(g) *Firstline Trust 07 Series B, 11% ($2,115,000) (10/19/07)*

(h) *TDM Verifier Trust 08, 8.50%/10% ($3,850,000) (12/17/07)*

(i) *Cruise Charter Ventures Trust 08, 13% ($3,250,000) (2/14/08)*

(j) *Integrated Excellence Sr. Trust 08, 9% ($900,000) (5/30/08)*

(k) *Integrated Excellence Jr. Trust 08, 10% ($580,000) (5/30/08)*

(l) *Fortress Trust 08, 13% ($3,060,000) (9/24/08)*

(m) *TDM Cable Trust 06, 10% ($1,380,000) (11/17/08)*

(n) *TDM Verifier Trust 09, 10% ($1,300,000) (12/15/08)*

(o) *TDMM Cable Jr Trust 09, 11% ($1,325,000) (1/19/09)*

(p) *TDMM Cable Sr. Trust 09, 9% ($1,550,000) (1/19/09)*

(q) *TDM Verifier Trust 07R, 9% ($2,100,000) (2/2/09)*

(r) *TDM Verifier Trust 08R, 9% ($2,005,000) (7/6/09)*

(s) *TDMM Benchmark Trust 09, 8%, 9%, 10%, 11%, 12% ($3,000,000) (8/20/09)*

(t) *TDM Verifier Trust 11, 9% ($1,550,000) (9/3/09)*

(u) *Cruise Charter Ventures, LLC, 12% ($400,000) (9/25/09)*

Response:

Mr. Rogers denies the first sentence of paragraph 16 of the OIP. The Trust Offerings did not "purport" to invest in contracts for burglar alarm service, "triple play" (broadband, cable and telephone) service or luxury cruises. The Trust Offerings actually made those investments. For example, the Receiver appointed to manage the assets has periodically reported on the sales of assets for the benefit of the estate, as follows:

> **ASSETS FOR SALE Alarm Contracts - SOLD; Triple Play Contracts - SOLD; Travel Agency SOLD.** (Updated as of March 12, 21, 26 and 28, April 5, May 7, June 8, and September 25, 2012): The sales have closed, and the purchase price deposited into the Receiver's accounts for each of the alarm contract, triple play, and travel agency sales.

Investor Notice available at http://mcginnsmithreceiver.com/) (last visited November 15, 2013) (emphasis in original). Most recently, the Receiver has reported that assets held by one of the entities, Verifier, were sold for $4 million by auction and approved by Magistrate Judge Christian F. Hummel in the Northern District of New York on October 2, 2013:

> **September 20, 2013**: VERIFIER CAPITAL HOLDINGS LLC REDEMPTION MOTION AND NOTICE OF AUCTION - A motion has been filed which will result in a $4 million payment to the estate for the benefit of investors. McGinn Smith entities made investments described in the Motion (Docket No. 590) in Verifier. Verifier has agreed to repurchase the securities subject to higher and better offers and court approval. An auction is scheduled for September 30, 2013 at 9:00 a.m., as described in the Notice (Docket No. 597). The approval hearing

> is on October 2, 2013 at 9:00 a.m. Any party interested in making a competing offer and bidding should contact the Receiver.
>
> **Update: October 4, 2013**: The Motion was approved. A closing for the payment of the $4 million is expected by mid-October.

Investor Notice available at http://mcginnsmithreceiver.com/) (last visited November 15, 2013) (emphasis in original).

In public filings, the Receiver has explained that it also continues to manage assets that have not yet been sold in addition to successfully completing purchase and sale negotiations over other assets. Those assets are substantial. *See* Fifth Interim Application of Phillips Lytle LLP and the Receiver for Allowance of Compensation and Reimbursement of Expenses (the "Fifth Interim Application"), at 3 (Dkt. No. 595) (September 13, 2013) (reporting $14.8 million in funds on hand including $11.3 million "from operations of Receiver businesses" and estimating that "it appears likely that additional collections will be in the range of $9 to $10 million, although they remain subject to negotiations and contingencies.").

The Receiver's time entries reflect several successful sales and negotiations over other assets:

> Category C relates to the significant time spent in the disposition during the Application Period primarily with respect to Alarm Traders, White Glove Cruises, the Florida triple play assets, and Seton Hall all of which have resulted in successful dispositions resulting in more than $3,743,218 in proceeds for the estate. Additional time was spent attempting to dispose of the Receiver's interest in another triple play business and in Verifier.

Id. (Category C of Fifth Interim Application) at 5-6. Separately, the Receiver and his law firm, Phillips Lytle LLP, have reported on their management of the ongoing operation of the various businesses underpinning the broker-dealer, investment banking and alarm contract servicing functions that existed at McGinn Smith, along with the various assets underpinning each of the

private placement offerings that were left behind as a result of the seizure of McGinn Smith's operations. Those entries include, for example:

> processing and approval of payments to vendors and other third parties for services rendered to Receiver operating companies prior to sale of each of those companies...dealing with business issues for White Glove Cruises, LLC and Benchmark Communications regarding financial performance...dealing with Benchmark operational issues...dealings with the various banks at which operating entities of the Receivership estates maintain accounts, [and] the review of checks and invoices for payment on a weekly basis for those various operating businesses...

Id. (Category F of Fifth Interim Application) at 11.

The PPMs for each of the Trust Offerings fully disclosed and described the business purpose of each investment and the underlying businesses and assets intended to secure each such investment.

Mr. Rogers admits the second sentence of paragraph 16 of the OIP and states that the information about the Trustee and Placement Agent of each of the Trust Offerings appears in each of the PPMs.

Mr. Rogers denies the third sentence of paragraph 16, and states that he never promised any rate of return to any investor, and that there was no rate of return promised in any PPM. The terms under which the contract certificates were offered by each of the Trust Offerings varied, and the contract certificates accrued interest at the rates stated in each of the Trust Offering PPMs, subject to all of the risk factors and other disclosures made in each of those PPMs concerning the risks associated with each investment.

*17. **McGinn Smith Transaction Funding** ("**MSTF**") was a New York corporation formed in 2008. Like the Four Funds and Trust offerings, the $10 million MSTF offering on April 22, 2008 was underwritten by MS & Co.*

Response:

Mr. Rogers admits the allegations in paragraph 17 of the OIP, except states that the Four Funds, Trust Offerings and MSTF offering were not all "underwritten" by MS & Co. [McGinn Smith]. McGinn Smith typically acted as a placement agent or sales agent for those transactions, and the capacity in which it acted was disclosed in each PPM.

*18. **Timothy M. McGinn**, 64 years old, was the chairman, secretary and co-owner of MS & Co. From July 2003 through May 2006, McGinn served as CEO of Integrated Alarm Services Group, Inc. ("IASG"), which went public in July 2003. In September 2011, FINRA permanently barred McGinn from associating with any FINRA member. On February 6, 2013, following a four-week trial, a jury in the Northern District of New York found McGinn guilty of multiple counts of mail and wire fraud, securities fraud, and filing false tax returns. United States v. Timothy M. McGinn & David L. Smith, 12-CR-28 (DNH) (N.D.N.Y.). On August 7, 2013, McGinn was sentenced to 15 years in prison and ordered to pay restitution of $5,992,800.*

Response:

Mr. Rogers admits on information and belief the allegations in paragraph 18 of the OIP.

*19. **David L. Smith**, 67 years old, was the president and chief executive officer of MS & Co. and the manager of the Four Funds. Until 2007, Smith was also the chief compliance officer of MS & Co. In September 2011, FINRA permanently barred Smith from associating with any FINRA member. On February 6, 2013, following a four-week trial, a jury in the Northern District of New York found Smith guilty of multiple counts of mail and wire fraud, securities fraud, and filing false tax returns. United States v. Timothy M. McGinn & David L. Smith, 12-CR-28 (DNH) (N.D.N.Y.). On August 7, 2013, Smith was sentenced to 10 years in prison and ordered to pay restitution of $5,989,736.*

Response:

Mr. Rogers admits on information and belief the allegations in paragraph 19 of the OIP.

C. *OVERVIEW*

20. Respondents Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers were among the top-selling brokers at MS & Co. They sold millions of dollars of MS & Co. private placements in spite of numerous red flags, including a policy–which was clearly inconsistent with the terms of the offerings–that required them to "replace"

customers seeking to redeem notes with new customers before the redemption would be honored. Guzzetti, a supervisor at MS & Co., failed to take any action despite knowledge of red flags. Based on their conduct, Respondents committed the following violations:

(a) *Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers willfully violated Sections 5(a) and (c) of the Securities Act by offering and selling notes for which no registration statements were in effect;*

(b) *Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, by knowingly or recklessly, or negligently, failing to perform reasonable due diligence to form a reasonable basis for their recommendations to customers, and made misrepresentations and omissions in recommending the Four Funds and Trust Offerings; and*

(c) *Guzzetti failed reasonably to supervise the other Respondents, pursuant to Section 15(b)(6), incorporating by reference Section 15(b)(4)(E) of the Exchange Act.*

Response:

Mr. Rogers denies the allegations in paragraph 20 of the OIP to the extent they refer to him, and he denies knowledge or information sufficient to form a belief as to the truth of the allegations regarding the other listed Respondents.

D. *THE MS & CO. OFFERINGS*

21. David Smith and Timothy McGinn created and controlled the Four Funds and Trust Offerings. The offerings raised more than $125 million from more than 750 investors. Investor losses exceed $80 million.

Response:

Mr. Rogers does not have, and is unable to obtain, sufficient information to admit or deny the allegations in paragraph 21 of the OIP, except that Mr. Rogers denies that both David

Smith and Timothy McGinn created and controlled the Four Funds and Trust Offerings. Mr. Rogers states on information and belief that Mr. Smith created and controlled the Four Funds and that Mr. McGinn created and controlled the Trust Offerings.

22. The Four Funds offerings – FIIN (Sept. 2003), FEIN (Jan. 2004), TAIN (Nov. 2004) and FAIN (Oct. 2005) – raised at least $85 million. Smith controlled the issuers, prepared the private placement memoranda ("PPMs"), set the terms of the offerings, controlled the investor money, and made all the investment decisions. Four Funds investors were promised quarterly interest payments and a return of principal upon maturity. Each offering had three tranches: the five-year "secured junior" notes paid 10.25%; the three or five year "secured senior subordinated" paid 7.5% or 7.75%; and the one-year "secured senior" notes paid 5%, 5.75% or 6%.

Response:

Mr. Rogers does not have, and is unable to obtain, sufficient information to admit or deny the allegations in the first sentence of paragraph 22 of the OIP. Mr. Rogers admits on information and belief the allegations in the second sentence of paragraph 22. Mr. Rogers denies the third sentence of paragraph 22, and states that he never promised any rate of return to any investor, and that there was no rate of return promised in any PPM. Mr. Rogers denies the fourth sentence of paragraph 22, and states that the offering memoranda set forth the specific rates of interest that were contemplated for each tranche of notes, in each offering.

23. Although the Four Funds PPMs labeled each tranche as "secured," there were no secured assets subject to forfeiture in the event that a particular Fund failed.

Response:

Mr. Rogers denies the allegations in paragraph 23 of the OIP. The allegation that there were no secured assets subject to forfeiture is false. For example, UCC financing statements were filed securing assets within the portfolios, and other investments were secured by personal guarantees or by security agreements within the underlying investments.

24. According to the PPMs, MS & Co., as the placement agent, was to receive a commission of 2% of the offering proceeds. In addition, according to the PPMs, the brokers were

entitled to (and did receive) "incentive commissions . . . [paid] to our managing member's salesmen at the rate of 2% of the aggregate principal amount of the notes per year over the term of the notes."

Response:

With respect to the allegations of paragraph 24 of the OIP, Mr. Rogers respectfully refers to the PPMs which fully disclosed the commissions intended to be paid to the placement agent and salesmen at the time of the offering and during the term of the notes, except that Mr. Rogers (i) denies that percentage of commissions were paid to him during the entire term of the notes, and (ii) denies commissions were paid.

25. Smith had no experience in making investment decisions and managing investments for entities like the Four Funds, and Smith had broad flexibility in making investment decisions. As the PPMs for the offerings stated, each of the Four Funds was:

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

Response:

Mr. Rogers denies on information and belief the allegations in the first sentence of paragraph 25 of the OIP, except states on information and belief that Mr. Smith had flexibility in making investment decisions. Mr. Rogers respectfully refers to the PPMs for each of the Four Funds for the statements therein.

26. The PPMs stated that the notes would be offered only to accredited investors, as defined in Rule 501(a) of Regulation D. To this end, the PPMs required that each investor "represent in writing that it qualifies as an 'accredited investor' . . . and must demonstrate the basis for such qualification." The subscription agreements similarly reiterated that the notes were offered to accredited investors only.

Response:

With respect to the allegations of paragraph 26 of the OIP, Mr. Rogers respectfully refers to each of the PPMs and each of the subscription agreements for the statements therein.

27. Despite these representations, each of the Four Funds offerings had more than 35 unaccredited investors. The Respondents sold the Four Funds to unaccredited investors.

Response:

Mr. Rogers denies on information and belief the allegations of paragraph 27 of the OIP that each of the Four Funds offerings had more than 35 unaccredited investors, and denies on information and belief that he sold the Four Funds to unaccredited investors. Mr. Rogers further states that he denies knowledge or information sufficient to form a belief as to other "Respondents."

28. In September 2003, just weeks after the launch of the FIIN offering, Smith began diverting millions of dollars to pay investors in pre-2003 MS & Co. offerings.[7] *Overall, Smith used at least $12.8 million of the Four Funds offering proceeds to pay investors in pre-2003 MS & Co. offerings.*

Response:

Mr. Rogers does not have, and is unable to obtain, sufficient information to admit or deny the allegations in paragraph 28 of the OIP.

29. Smith invested a majority of the Four Funds' proceeds in entities that were affiliated with MS & Co., even though the PPM did not disclose this, and in risky and highly

---

[7] *From 1990 through early 2003, Smith and McGinn orchestrated, through MS & Co. and related entities, dozens of note offerings secured by residential alarm contracts.*

Response: Mr. Rogers does not have, and is unable to obtain, sufficient information to admit or deny the allegations in this footnote, except states that when he joined McGinn Smith in July 2001 he understood that McGinn Smith had a long history of performance of successful private placement offerings secured by residential alarm contracts, among other business pursuits.

speculative venture capital investments. For example, Smith invested $8.8 million in alseT Management, a start-up partially-owned and controlled by Livingston and Smith himself, which never earned any revenue. The Four Funds' investments did not generate sufficient returns required to meet the issuers' obligations to investors.

Response:

Mr. Rogers denies the allegations of a portion of the first sentence in paragraph 29 of the OIP that the risk of each of the Four Funds was not fully disclosed in the PPMs, and states that he does not have, and is unable to obtain, sufficient information to admit or deny that a majority of the Four Funds' proceeds were invested in entities affiliated with MS & Co. [McGinn Smith] or in "risky and highly speculative venture capital investments," except states that Mr. Rogers knew the type of investments that Mr. Smith would make and was informed of examples of those investments. Mr. Rogers denies knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of paragraph 29 of the OIP. Mr. Rogers denies on information and belief the allegations of the third sentence of paragraph 29 of the OIP.

30. In 2006, McGinn returned to MS & Co. on a full-time basis after nearly three years as CEO of IASG. McGinn created the twenty-one Trust Offerings, plus MSTF, that raised over $41 million. The Trust Offerings ostensibly were created to fund entities engaged in specific areas, such as burglar alarm service, triple play service, or luxury cruises. These entities, however, were not funded directly by the issuer; instead, in most cases, the offering proceeds were first transferred to various conduit entities, primarily McGinn Smith Funding LLC (the "MSF Conduit") or TDM Cable Funding LLC (the "TDM Conduit").

Response:

Mr. Rogers denies knowledge or information sufficient to form a belief as to how much was raised as alleged in the first sentence of paragraph 30 of the OIP, and admits on information and belief that Mr. McGinn returned in 2006. Mr. Rogers admits on information and belief the allegation in the second sentence of paragraph 30 that Mr. McGinn created the Trust Offerings and MSTF, but denies on information and belief the allegations in the second sentence

that the Trust Offerings "ostensibly" were created to fund the specific entities. Mr. Rogers denies knowledge or information sufficient to form a belief as to the truth of the allegations of the third sentence concerning a "TDM Conduit" or "MSF Conduit," except respectfully refers to each of the Trust Offering PPMs for the statements therein.

31. The proceeds of the Trust Offerings were commingled and then used as needed by MS & Co., including infusing cash into the faltering Four Funds. The conduits and their corresponding Trust Offerings are listed below:

TDM Conduit

- *TDM Cable Trust 06, 7.75%/9.25% (11/13/2006)*
- *TDM Verifier Trust 07, 8.25%/9.00% (2/23/2007)*
- *TDM Luxury Cruise, 10% (7/16/2007)*
- *TDM Cable Trust 06, 10% (11/17/2008)*
- *TDMM Cable Senior Trust 09, 9% (1/19/2009)*
- *TDMM Cable Jr. Trust 09, 11% (1/19/2009)*
- *TDM Verifier Trust 07R, 9% (2/2/2009)*
- *TDM Verifier Trust 08R (7/6/2009)*

MSF Conduit

- *Firstline Senior Trust 07, 9.25%/11% (5/19/2007)*
- *Firstline Trust 07 Series B, 9.5%/11% (10/19/2007)*
- *TDM Verifier Trust 08, 8.5%/10% (12/17/2007)*
- *TDM Verifier Trust 09, 10% (12/15/2008)*

Response:

Mr. Rogers does not have, and is unable to obtain, sufficient information to admit or deny the allegations in paragraph 31 of the OIP.

32. The Trust PPMs stated that they would "generally be offered only to accredited investors," but also provided for 35 or fewer unaccredited investors, supposedly under Rule 506. None of the Trust Offerings exceeded 35 unaccredited investors. When integrated according to their Conduit entity, however, Rule 506's limitation on unaccredited investors was breached: at least 69 investors in the Trusts tied to the TDM Conduit were unaccredited, and at least 59 investors in the Trusts linked to the MSF Conduit were unaccredited.

Response:

Mr. Rogers admits the first sentence of paragraph 32 of the OIP, except states that the Trust PPMs did not "supposedly" provide for 35 or fewer unaccredited investors. That is what Regulation D actually provides.

Mr. Rogers denies knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of paragraph 32 of the OIP. Mr. Rogers denies the allegations of the third sentence of paragraph 32 of the OIP.

33. The Trust Offerings continued the egregious misuse of investor funds. Smith and McGinn, for example, took for personal use millions of dollars in offering proceeds from the TDM Cable 06, TDMM Cable, Integrated Excellence, MSTF and Fortress offerings, used investor funds to pay earlier noteholders, and used the Trust Offering proceeds to satisfy liquidity needs for other MS & Co. entities.

Response:

Mr. Rogers denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 33 of the OIP and states on information and belief based on subsequent events that Mr. McGinn and Mr. Smith secretly stole and diverted investor funds. Mr. Rogers states that he did not know of Mr. McGinn's and Mr. Smith's secret theft and diversion of investor funds. Mr. Rogers states that he did not know, had no reason to know, and did not believe at the time that any investor funds were being stolen or diverted from any of the Trust Offerings.

E. *THE RESPONDENTS' ILLEGAL CONDUCT*

34. The Respondents, as associated persons of a broker-dealer, had an obligation to conduct a reasonable investigation of the issuers in order to form a reasonable basis for any recommendation to customers regarding the MS & Co. offerings. By making a recommendation, the Respondents implicitly represented to their customers that they had an adequate basis for the recommendation. A broker has a duty to investigate the truth of the representations he makes to customers, because, by virtue of his title, customers are entitled to presume that the representations made were the result of reasonable investigation.

Response:

Mr. Rogers states that the allegations of paragraph 34 of the OIP are purported statements of law as to which no pleading is required and to the extent any such pleading is required, he denies the allegations. Mr. Rogers further states that he conducted appropriate due diligence and informed his accredited investor clients of the risks of any investment they might choose to make in any offering. Mr. Rogers denies knowledge or information sufficient to form a belief as to the truth of the allegations regarding other "Respondents."

35. The Respondents blindly relied upon Smith and McGinn, even in the face of red flags. The Respondents, as licensed securities professionals, knew or should have known that securities issued by smaller companies of recent origin require more thorough investigation. They should not simply parrot the marketing information furnished by Smith and McGinn, particularly in the face of red flags. In addition, where Respondents lacked essential information about an issuer or its securities when making a recommendation, they failed to disclose this fact as well as the risks that arose from their lack of information.

Response:

Mr. Rogers denies the allegations of paragraph 35 of the OIP to the extent they apply to him, and he denies knowledge or information sufficient to form a belief as to the truth of the allegations regarding other "Respondents."

36. The Respondents' due diligence, which at best consisted of reading the PPMs, was wholly inadequate, despite their knowledge that the issuers were completely controlled by Smith and McGinn. There were numerous red flags, moreover, that should have alerted the Respondents to the need for a thorough investigation. Instead, the Respondents blindly sold whatever private placement Smith and McGinn told them to sell.

Response:

Mr. Rogers denies the allegations of paragraph 36 of the OIP to the extent they apply to him, and he denies knowledge or information sufficient to form a belief as to the truth of the allegations regarding other "Respondents."

37. The Respondents also made material misrepresentations and omissions when recommending the Four Funds and Trust Offerings to their customers.

Response:

Mr. Rogers denies the allegations of paragraph 37 of the OIP to the extent they apply to him, and he denies knowledge or information sufficient to form a belief as to the truth of the allegations regarding other "Respondents."

The Respondents Knew of Red Flags
<u>Surrounding the Four Funds Offerings.</u>

38. Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers performed inadequate due diligence prior to recommending the Four Funds to their customers. The PPMs for the Four Funds, which they read or were reckless in not reading, made disclosures that should have caused the Respondents, as associated persons of a broker-dealer, to conduct a searching inquiry prior to recommending the products to their customers. This heightened duty arose from the following factors:

(a) *The PPMs made clear that Smith owned and controlled each of the issuers—which were new, single-purpose entities with no operating history— as well as the placement agent (MS & Co.) and the trustee. Smith also had total control over the disposition of investor funds, with absolutely no oversight or control. As a result, the Respondents should have made specific inquiries as to how customer money would be invested before recommending the Four Funds to their customers.*

(b) *The Respondents knew or should have known that Smith had never before managed offerings of the size and scope of the Four Funds. The debt offerings that MS & Co. had done before 2003 were small-scale note offerings tied to the income streams from home alarm contracts, far different from the broad and non-specific investment mandate of Four Funds offerings.*[8] *Given Smith's lack of experience in this area, and the Respondents' knowledge*

8 *The Respondents, when recommending the Four Funds and Trust Offerings, held out the pre-2003 alarm note offerings as indicative of Smith and McGinn's integrity and skill. These earlier offerings, however, were also mismanaged. In a handwritten letter from Smith to McGinn in 2000, Smith characterized the pre-2003 offerings as a "Ponzi Scheme" because the offering proceeds "for the most part are used to fulfill the investment promise to*

of this lack of experience, they should have made specific inquiries as to how Smith planned to invest the offering proceeds. This is particularly true given fact that the issuers' ability to make the relatively high interest payments, and to return the investors' principal, depended on the nature of the investments;

(c) *The PPMs stated that the Four Funds could acquire investments "from our managing member [MS Advisors] or any affiliate," could "purchase securities from issuers in offerings for which [MS & Co.] is acting as underwriter or placement agent," and that "[a]ffiliates of the placement agent may purchase a portion of the notes offered hereby." As a result, the Respondents should have inquired whether Smith—who controlled without oversight the issuers, the placement agent and the disposition of investor funds—did engage in any transactions with affiliates. If they had, they would have discovered that nearly half of the offering proceeds had been invested in affiliates; and*

(d) *Despite the complete prohibition on sales to unaccredited investors in the Four Funds PPMs, the Respondents knew that sales were being made to unaccredited investors. The Respondents, therefore, knew that the PPMs' prohibition on sales to unaccredited investors was disregarded, which should have caused them to make inquiries.*

---

earlier investors . . . the new investments have no chance of being repaid in full." These offerings were eventually paid off not from the income stream generated by the investments, but rather through the IASG IPO in July 2003, as well as over $12 million from the Four Funds offerings.

Response: Mr. Rogers denies the allegations in the first sentence of this footnote to the extent they apply to him, and he denies knowledge or information sufficient to form a belief as to the truth of the allegations regarding other "Respondents." Mr. Rogers does not have, and is unable to obtain, sufficient information to admit or deny the allegations in the remainder of this footnote.

Response:

Mr. Rogers denies the allegations of paragraph 38 of the OIP to the extent they refer to him, and he denies knowledge or information sufficient to form a belief as to the truth of the allegations regarding other "Respondents."

39. These factors should have prompted the Respondents to conduct a searching inquiry into the offerings. Instead, they essentially turned a blind eye and sold the Four Funds offerings with no specific knowledge of how investor funds were being used.

Response:

Mr. Rogers denies the allegations of paragraph 39 of the OIP to the extent they apply to him, and he denies knowledge or information sufficient to form a belief as to the truth of the allegations regarding other "Respondents."

Smith's Refusal to Disclose to the Brokers How He Had Invested Four Funds Offering Proceeds Was a Red Flag.

40. From the commencement of the FIIN offering in September 2003 until January 2008, Smith provided his brokers with no specific information about how he had invested the offering proceeds. Any questions by the brokers were deflected with the claim that Smith had made loans to local Albany businesses with Four Funds proceeds, and those businesses desired anonymity. Indeed, Smith steadfastly refused to give the brokers any meaningful information about how he had invested the Four Funds offering proceeds. This refusal should have prompted the brokers to further question the propriety of the Four Funds.

Response:

Mr. Rogers denies the allegations of paragraph 40 of the OIP.

41. The information blackout that Smith imposed was contrary to the PPMs, which stated that an "annual statement of the operations consisting of a balance sheet and income statement" would be provided to investors upon request. These reports, however, were never made available and it appears that no brokers requested this information before January 2008, when Smith disclosed that the Four Funds would be restructured.

Response:

Mr. Rogers denies the allegations of paragraph 41 of the OIP.

42. MS & Co.'s compliance manual, moreover, stated that "it will make a reasonable investigation . . . [and] Paperwork recording the due diligence will be kept in the legal files." The Respondents also never asked to see the due diligence files, notwithstanding the red flags regarding the Four Funds.

Response:

Mr. Rogers denies the allegations of paragraph 42 to the extent that they apply to him, and he denies knowledge or information sufficient to form a belief as to the truth of the allegations to the extent they refer to other "Respondents." Mr. Rogers respectfully refers to the compliance manual of McGinn Smith (excerpted here as Exhibit 3) for the statements therein.

The Respondents Continued to Recommend MS & Co. Offerings Despite Knowledge of the Redemption Policy – Another Major Red Flag.

43. By 2006, the Funds began having significant difficulty in meeting the redemption requests. Smith therefore instituted a policy that required brokers to "replace" customers seeking to redeem Four Funds notes, including maturing notes, with new customers (the "Redemption Policy"). The PPMs, however, did not state that a customer's right to redemption depended on finding a "replacement."

Response:

Mr. Rogers denies knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 43 of the OIP, except states that the Funds were continuing to pay principal and interest to investors. Mr. Rogers denies the allegations of the second sentence of paragraph 43. Mr. Rogers refers to each of the PPMs for the statements therein and further states that the PPMs warned that liquidity was a risk factor of the investment. Each of the PPMs expressly disclosed the absence of a public market for the securities and lack of liquidity of the notes, as follows:

> There is no existing or public market for the notes. We cannot provide you with any assurance as to:
>
> - the liquidity of any market that may develop for the notes;
> - your ability to sell or pledge your notes; or
> - the prices at which you will be able to sell your notes.

Four Funds PPMs ("Absence of Public Market").

44. The Redemption Policy was another red flag that put the Respondents on notice that the Four Funds were being handled much differently from what the PPMs provided. None of the Respondents, however, undertook any investigation of the offerings; they also failed to disclose this material information to their customers; and they continued to recommend MS & Co. private placements to their customers for several more years.

Response:

Mr. Rogers denies the allegations of paragraph 44 of the OIP to the extent they apply to him, and he denies knowledge or information sufficient to form a belief as to the truth of the allegations to the extent they refer to other "Respondents."

45. The Respondents learned of the policy at different times beginning in late 2006. They were shocked by the policy and knew that it was contrary to the PPMs. The Respondents, however, did not disclose the Redemption Policy to customers, even those who sought to reinvest, or "roll over," Four Funds notes at maturity. Collectively, the Respondents raised millions of dollars in MS & Co. private placements after learning of the policy. They stood to profit if a customer elected to roll over, and would receive their annual commission for the life of the note. The Respondents sought redemptions for current customers even knowing that the redemption would be paid not with investment returns, as the PPMs represented, but rather with new investor funds.

Response:

Mr. Rogers denies the allegations of paragraph 45 of the OIP to the extent they apply to him, and he denies knowledge or information sufficient to form a belief as to the truth of the allegations to the extent they refer to other "Respondents."

The Respondents Continued to Sell the Trust Offerings Despite Learning in January 2008 that the Four Funds Had Been Mismanaged.

46. On January 8, 2008, Smith and McGinn held an all-day meeting to inform the brokers, including the Respondents, that the Four Funds were in default, that payments to investors would be curtailed, and that the offerings would be restructured. Smith revealed that the Four Funds investment portfolios consisted of loans to small, local businesses, some of which had already filed for bankruptcy; risky venture capital investments; investments with sub-prime exposure; and other nonperforming investments. By contrast, the Four Funds each had made

only one investment in a publicly-traded security: Exchange Boulevard.com, a risky venture capital company that was quoted on OTC Link, formerly known as the Pink Sheets.

Response:

Mr. Rogers denies the allegations of paragraph 46 of the OIP, except states that there was a meeting on January 8, 2008 during which Mr. Smith explained that certain of the investments made within the Four Funds were underperforming and, accordingly, that interest payments to investors in the junior tranches of the Four Funds would be curtailed.

47. None of the Respondents, despite the alarming disclosures in this meeting, requested any kind of probing investigation into what happened to the Four Funds or the ongoing Trust Offerings. After the January 2008 meeting, there were thirteen offerings by MSTF and the Trusts, which raised at least $20 million. As a result of the accumulation of red flags since the launch of the Four Funds in September 2003, the Respondents should have conducted a searching inquiry regarding any MS & Co. private placement. Instead, they recommended the Trust Offerings to their customers based on insufficient due diligence.

Response:

Mr. Rogers denies the allegations of paragraph 47 of the OIP including the characterizations of the meeting, except Mr. Rogers denies knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence. Mr. Rogers denies knowledge or information sufficient to form a belief as to the truth of the allegations to the extent that they refer to other "Respondents."

48. During the three years of the Trust and MSTF Offerings, investor funds were being used in ways contrary to the uses described in the PPMs; for example, Smith and McGinn took at least $4 million in offering proceeds for themselves and another MS & Co. officer. Offering proceeds also were used to pay investors in earlier offerings and MS & Co.'s payroll.

Response:

Mr. Rogers denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 48 of the OIP.

49. In the Trust Offerings, the amount actually invested pursuant to a particular PPM was far less than that PPM disclosed.

Response:

Mr. Rogers denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 49 of the OIP.

50. The Trust PPMs, moreover, like the Four Funds PPMs, raised red flags that should have been readily apparent to the brokers. For example, the August 2009 TDMM Benchmark Trust 09 ("Benchmark") PPM should have raised a red flag. Benchmark promised a high rate of return, which ranged from 8% to 12%, during a time when the prime rate was only 3.25%. The Respondents should have been skeptical of Benchmark's ability to meet the promised interest payments especially when considering that the PPM disclosed that only $1,950,000 (approximately 65%) of the total $3 million raised would actually be invested, with the remainder siphoned off in fees. The Respondents who recommended the Benchmark offering did so despite the exorbitant fees, and without questioning how MS & Co. planned to make 8 – 12% interest payments and redeem the principal upon maturity while taking over one-third of the money raised in fees.

Response:

Mr. Rogers denies the allegations of paragraph 50 of the OIP to the extent that they apply to him, and he denies knowledge or information sufficient to form a belief as to the truth of the allegations to the extent they apply to other "Respondents."

51. The second Firstline Trust offering of October 19, 2007 raised $3.2 million from investors (an earlier Firstline offering in May 2007 had raised $3.7 million). In this offering, a McGinn Smith affiliate loaned the offering proceeds to Firstline Securities, Inc., a Utah corporation that sold residential alarm contracts. At the time of the October 2007 offering, McGinn had been informed of the threat of crippling litigation by one of Firstline's creditors, and McGinn was personally involved in trying to resolve the dispute. Litigation resulted and, on January 25, 2008, Firstline filed a voluntary petition for Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the District of Utah. If the Respondents had conducted due diligence in response to red flags, they would have discovered the legal issues, which should have caused them to stop selling the Firstline offering. Instead, they were unaware of the bankruptcy filing until McGinn finally disclosed it in September 2009. Lex, Feldmann, Chiappone, Rabinovich and Mayer sold Firstline trust certificates after the bankruptcy filing.

Response:

Mr. Rogers denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 51 of the OIP, and further states that he had no knowledge of any bankruptcy regarding Firstline when he offered Firstline notes to his accredited investor

clients for whom they were suitable and after disclosing the risks known to him. Mr. Rogers states that Mr. McGinn revealed the bankruptcy filing in September 2009. Mr. Rogers denies knowledge or information sufficient to form a belief as to the truth of the allegations regarding certificates other Respondents may have offered to their clients.

F. *SALES AND COMMISSIONS*

52. Anthony sold approximately $2.2 million of the Four Funds, and approximately $630,000 of the Trust Offerings. He earned approximately $104,000 in commissions.

53. Chiappone sold approximately $12 million of the Four Funds offerings and approximately $3.4 million of the Trust Offerings. He earned approximately $513,000 in commissions.

54. Feldmann sold approximately $5.4 million of the Four Funds offerings and approximately $595,000 of the Trust Offerings. Feldmann earned approximately $299,000 in commissions.

55. Gamello sold approximately $1.3 million of the Four Funds offerings and approximately $1.6 million of the Trusts. He earned approximately $74,500 in commissions.

56. Lex sold approximately $38.5 million of the Four Funds offerings and approximately $6.6 million of the Trust Offerings. He earned approximately $1,523,000 in commissions.

57. Livingston sold approximately $3.5 million of the Four Funds offerings and approximately $380,000 of the Trust Offerings. His total commissions were approximately $143,000.

Response:

Mr. Rogers does not have, and is unable to obtain, sufficient information to admit or deny the allegations in paragraphs 52, 53, 54, 55, 56 and 57 of the OIP.

58. Mayer sold approximately $1.7 million of the Four Funds offerings and approximately $1.9 million of the Trust Offerings. He earned approximately $81,000 in commissions, plus an additional 2% of the gross commissions generated by the New York City office.

Response:

Mr. Rogers denies on information and belief the allegations in paragraph 58 of the OIP.

59. Rabinovich sold approximately $20.3 million of the Four Funds offerings and approximately $6.8 of the Trust Offerings. He earned approximately $578,000 in commissions.

Response:

Mr. Rogers denies on information and belief the allegations in paragraph 59 of the OIP.

60. Rogers sold approximately $2 million of Four Funds and approximately $5.2 million of the Trust Offerings. He earned approximately $240,000 in commissions.

Response:

Mr. Rogers denies the allegations in paragraph 60 of the OIP.

G. *GUZZETTI FAILED REASONABLY TO SUPERVISE*

61. Guzzetti was the managing director of the MS & Co. Private Client Group from 2004 until late 2009. During this period, Guzzetti supervised MS & Co. registered representatives with regard to the Four Funds and Trust Offerings.

Response:

Mr. Rogers denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 61, except states on information and belief that Mr. Guzzetti was a Series 24 registered representative.

62. Guzzetti, who also earned about $6,000 in commissions, had direct supervisory responsibilities of the Respondents. He carried out numerous managerial duties, including recruiting and hiring MS & Co. employees; assigning and reassigning customers to brokers; evaluating employee performances and awarding commissions; addressing customer grievances; answering employee questions regarding the firm; and issuing instruction and guidance regarding specific financial products and transactions, administrative issues, and broader firm policy.

Response:

Mr. Rogers denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 62, except states on information and belief that Mr. Guzzetti was a Series 24 registered representative.

63. Guzzetti also sent regular e-mails summarizing MS & Co. products available for sale to customers. In a February 2006 email, for example, Guzzetti stated that "there are many investors sitting in money market accounts (fear of higher interest rates) who are losing return (cost of waiting). Our FAIN'S offer a way of locking in higher returns with $ sitting in money markets waiting for the 'top' in interest rates."

Response:

Mr. Rogers admits on information and belief the allegation in paragraph 63 of the OIP that Mr. Guzzetti regularly sent emails about available products and respectfully refers to the referenced February 2006 email for the statements therein.

64. Guzzetti learned of the Redemption Policy by December 2006, when he received an email from Smith stating that Rabinovich "needs to replace the $100,000 before doing the trade. I am running on fumes with all of these redemptions and cannot afford any[]more." In November 2007, Guzzetti received an email from Smith stating that "I do not have the liquidity. Any redemptions have to have replacement sales beforehand. . . . My preference is for there to be no redemptions." Guzzetti instructed the brokers to adhere to the Redemption Policy.

Response:

Mr. Rogers denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 64, except he denies that he was instructed by Mr. Guzzetti to adhere to the alleged Redemption Policy.

65. Guzzetti had a duty to investigate red flags that suggest misconduct may be occurring and to take action when made aware of suspicious conduct. Had Guzzetti responded reasonably to the red flags, he would have prevented or detected the underlying violations committed by Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers.

Response:

Mr. Rogers denies the allegations of paragraph 65 of the OIP to the extent it alleges that he committed any violation, and he denies knowledge or information sufficient to form a belief as to the truth of the allegations to the extent they refer to others.

H. ***VIOLATIONS***

66. As a result of the conduct described above, Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers willfully violated Sections 5(a) and (c) of the Securities Act.

67. As a result of the conduct described above, Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers willfully violated Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

68. As a result of the conduct described above, Guzzetti failed reasonably to supervise Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers, pursuant to Section 15(b)(6), incorporating by reference Section 15(b)(4)(E) of the Exchange Act, with a view toward preventing and detecting their violations of Sections 5(a) and (c) and 17 of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Response:

Mr. Rogers denies having violated any provision of the securities laws, including Sections 5(a) and (c) of the Securities Act, Section 17(a) of the Securities Act, or Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and accordingly denies the allegations of paragraphs 66, 67 and 68 of the OIP. Mr. Rogers further states that no responsive pleading is required to the extent the allegations refer to others and to the extent any pleading is required, he denies knowledge or information sufficient to form a belief as to the truth of the allegations to the extent they refer to others.

III.

DEFENSES

First Defense

(Statute of Limitations)

69. The violations alleged in the OIP against Mr. Rogers are barred by the five-year statute of limitations contained in 28 U.S.C. § 2462. "Any civil fine, penalty or forfeiture, pecuniary or otherwise" sought against Mr. Rogers is barred to the extent that it purports to be based on any act or omission prior to September 23, 2008, (i.e., more than five years prior to the date the OIP was filed). The OIP does not allege any act or omission by Mr. Rogers after September 23, 2008.

Second Defense

(Failure to State a Claim Under Securities Act Sections 5(a) and 5(c))

70. Mr. Rogers did not violate Section 5(a) or 5(c) of the Securities Act (the "Section 5 Claim") for at least the following reasons:

71. First, as noted in his separate motion for more definite statement, the Division has not alleged the essential elements of a Section 5 claim, and has not even alleged on which McGinn Smith Securities it is basing its Section 5 Claim against Mr. Rogers. The OIP does not identify (i) any of the alleged unaccredited investors in any of the McGinn Smith Securities, (ii) the particular Securities in which they invested, (iii) the dates on which they invested, or (iv) which broker allegedly offered to these investors. Mr. Rogers is unable to prepare more particular defenses in light of these omissions and reserves the right to amend or supplement his answer and defenses upon receipt of a more definite statement from the Division.

72. Second, on information and belief, the exemptions stated in the PPMs, including Section 4(2) of the Securities Act, and the corresponding safe harbor provided by Rule 506 of Regulation D, were satisfied.

73. Third, the Division has not asserted a cognizable Section 5 Claim against Mr. Rogers. Based on his knowledge of the history and prior course of similar offerings by McGinn Smith, Mr. Rogers knew that the offerings of the McGinn Smith Securities were normal brokers' transactions and not part of an unlawful distribution in violation of Section 5(a) and 5(c) of the Securities Act. Nor were there any red flags at the time of each offering of McGinn Smith Securities that suggested each offering had not qualified or would not qualify for its stated exemption from registration.

74. Mr. Rogers took all reasonable steps to avoid participation in any distribution violative of the registration provisions of Section 5(a) and 5(c) of the Securities Act. For example, Mr. Rogers:

(a) read the offering documents which specified the applicable exemptions (for example, Section 4(2) of the Securities Act and Rule 506 of Regulation D thereunder);

(b) spoke with representatives of McGinn Smith's law department, compliance department and investment banking department regarding the exemption from registration under which the McGinn Smith Securities were being offered;

(c) knew, for example, that investments were to be accepted by McGinn Smith only after completion of an investor questionnaire and/or subscription documents, and that investor funds were to be held in escrow, for example, with CharterOne Bank, FSB, until the offering closed;

(d) knew that employees at the Albany headquarters were tasked with tracking investor subscriptions;

(e) knew that McGinn Smith had retained outside counsel (Gersten Savage) to prepare certain of the private placement memoranda and advise on the applicability of the exemption; and

(f) knew that FINRA and the SEC had examined the New York branch office of McGinn Smith and that no issue had been raised by FINRA or the SEC regarding the exempt status from registration of the McGinn Smith Securities.

75. At no time did Mr. Rogers know, or have reason to know, that (a) more than 35 *un*accredited investors had subscribed to any McGinn Smith Securities offering and were accepted by McGinn Smith in its Albany headquarters (if in fact that occurred), or (b) the proceeds of the McGinn Smith Securities were commingled and used to support other McGinn Smith Securities in making their scheduled payments to investors or otherwise and thus could be allegedly integrated to establish a violation of Section 5(a) or 5(c). Mr. Rogers had no authority to accept subscriptions, had no knowledge of the number of *un*accredited investors that McGinn Smith had accepted on each offering of McGinn Smith Securities, and had no knowledge of any commingling or misuse of investment funds by Mr. McGinn or Mr. Smith.

76. Mr. Rogers was never advised by Mr. McGinn, Mr. Smith or anyone else that more than 35 *un*accredited investors were permitted to purchase any of the McGinn Smith Securities, or that there was commingling or misuse of investor funds from the offerings of the McGinn Smith Securities. Accordingly, Mr. Rogers had more than a reasonable basis to believe, and he did believe, that there were no more than 35 purchasers of securities from the issuer in any offering at issue in this proceeding.[9]

---

[9] No SEC or FINRA rule, regulation, notice, release or case of which we are aware provides that a registered representative who has no authority to accept a subscription and no knowledge of the number of unaccredited investors that were accepted by the broker-dealer entity, as in Mr. Rogers's case – who reasonably believed at the time that there were no more than 35 unacccredited purchasers of securities in any offering at issue in these proceedings – has liability under Section 5(a) or 5(c). The same is true where, as alleged here, an integration allegedly occurred because the broker dealer entity (McGinn Smith) or its principals (Mr. McGinn and Mr. Smith) commingled or misused investor funds from a number of private placements.

77. Fourth, Mr. Rogers did not act negligently. At the time of each offering of McGinn Smith Securities, Mr. Rogers did not believe, and had no reason to believe, (1) that the offering had failed to qualify for an applicable exemption, or (2) that the offering was sold in a way, or that the funds of several McGinn Smith Securities were commingled in a way, that would destroy the exemption from registration. Mr. Rogers had a reasonable basis to believe that the stated exemptions had been satisfied by McGinn Smith.

78. Fifth, Mr. Rogers neither caused nor was a substantial factor in causing any private placement offering to lose its exemption. For example, the Division has not alleged in the OIP that any unaccredited investor client of Mr. Rogers subscribed to any of the Four Fund offerings. The Division has admitted that none of the Trust Offerings had more than 35 unaccredited investors. *See* OIP ¶ 32.

79. Sixth, Rule 501(e)(1) provides that, for purposes of calculating the number of purchasers under Rule 506(b), "[t]he following purchasers shall be excluded: (i) [a]ny relative, spouse or relative of the spouse of a purchaser who has the same principal residence as the purchaser; (ii) [a]ny trust or estate in which a purchaser and any of the persons related to him [as defined]...collectively have more than 50 percent of the beneficial interest (excluding contingent interests); (iii) [a]ny corporation or other organization of which a purchaser and any of the persons related to him [as defined]...collectively are beneficial owners of more than 50 percent of the equity securities (excluding directors' qualifying shares) or equity interests; and (iv) [a]ny accredited investor." On information and belief, the Division's allegations in the OIP did not apply this Rule with respect to the correct calculation of the number of purchasers of the Four Funds, or any one Trust Offering or combination of Trust Offerings.

80. Seventh, the Division has not alleged any supposed "red flag" that would have materially undermined Mr. Rogers's reasonable belief at the time that each offering was in compliance with the applicable exemption and Regulation D safe harbor.

81. Eighth, each of the offerings of McGinn Smith Securities was suitable for Mr. Rogers's clients who subscribed to them and his clients so represented in their investor questionnaires and/or subscription documents.

82. Ninth, to the extent the Division's allegations rely on a theory of integration under Rule 502(a) of Regulation D, the OIP fails to state a claim due to the long gap in time between the various separate transactions referred to in the OIP. Under Rule 502, "[o]ffers and sales that are made more than six months before the start of a Regulation D offering or are made more than six months after completion of a Regulation D offering will not be considered part of that Regulation D offering, so long as during those six month periods there are no offers or sales of securities by or for the issuer that are of the same or a similar class as those offered or sold under Regulation D . . ." Because offerings of McGinn Smith Securities were more than six months apart and satisfied the conditions of Rule 502, they cannot be integrated as the Division alleges.

83. Tenth, the offerings of the McGinn Smith Securities also cannot be integrated as alleged by the Division because the factors to be considered under Rule 502 of Regulation D before integrating offers are not satisfied. There was no single plan of financing. There were different securities and classes of securities. The offerings were made at different times, for different consideration and for different purposes. Among other things, several of the offerings the Division has identified, as acknowledged in the OIP, "were created to fund entities

engaged in specific areas, such as burglar alarm service, triple play service, or luxury cruises" (OIP ¶ 30) among other operating businesses and assets.

84. Eleventh, Mr. Rogers's offers of McGinn Smith Securities complied with all applicable terms, conditions and requirements of Regulation D. The SEC has not alleged otherwise. And under Rule 508 of Regulation D, any purported failure to comply with the Section 4(2) private offering exemption or with Rule 506 of Regulation D is not actionable because (i) it did not pertain to a term, condition, or requirement directly intended to protect the particular individuals or entities to whom Mr. Rogers presented McGinn Smith Securities, where suitable and after informing them of the investment risks, (ii) it was insignificant with respect to the offering as a whole, because of Mr. Rogers's reasonable belief that his offers were made in compliance with all applicable securities laws and regulations, and (iii) Mr. Rogers made a good faith and reasonable attempt to comply with all applicable terms, conditions and requirements of Rule 506 with respect to McGinn Smith Securities offerings.

85. For at least these reasons, Mr. Rogers did not violate Section 5(a) or 5(c) of the Securities Act.

Third Defense

(Failure to State a Claim Under Exchange Act Section 10(b) / Rule 10b-5, or Securities Act Section 17(a))

86. Mr. Rogers did not violate Section 10(b) or Rule 10b-5 of the Exchange Act, or Section 17(a) of the Securities Act (the "Fraud Claim"), for at least the following reasons:

87. First, as noted in his separate motion for more definite statement, the Division has not provided sufficient information with respect to the Fraud Claim, upon which Mr. Rogers could prepare defenses or alleged the essential elements of a fraud claim under section 17(a) of the Securities Act or Section 10(b) of the Exchange Act or Rule 10b-5

thereunder. The Division has not alleged (i) the date (month/year) of any alleged material misrepresentation or material omission, (ii) the investor to whom such a misrepresentation or omission was made, (iii) whether it was a material misrepresentation or a material omission, or both, (iv) the security as to which such material misrepresentation or material omission was made, and (v) which broker allegedly made such material misrepresentation or material omission to the investor about the specific security. Mr. Rogers is unable to prepare more particular defenses in light of these omissions and reserves the right to amend or supplement his answer and defenses upon receipt of a more definite statement from the Division.

88. Second, Mr. Rogers did not engage in any knowing or recklessly deceptive conduct that could form the basis of a Section 10(b) violation, or in any knowing or reckless or negligent conduct that could form the basis of a Section 17(a) violation. Mr. Rogers had no intent to manipulate, deceive or defraud any client. Mr. Rogers's conduct was not highly unreasonable or an extreme departure from the standards of ordinary care. He was not aware of any danger, and there was no obvious danger, at the time of each offering of McGinn Smith Securities.

89. Third, Mr. Rogers did not make any knowing or reckless or negligent material misrepresentations or material omissions to any subscribing investor in connection with any McGinn Smith Securities. The OIP does not identify any material misrepresentation or material omission to any subscribing investor about any McGinn Smith Security.

90. Fourth, Mr. Rogers disclosed the risks of investment to clients to whom he offered McGinn Smith Securities, either himself or through the offering documents he distributed at the time.

91. Fifth, to the extent that the Division's allegations refer to statements contained in one of the PPMs offering McGinn Smith Securities, Mr. Rogers was not the maker of any material misstatement or material omission in respect of any such statements and such statements could not form the basis of Section 10(b) or Section 17(a) liability with respect to Mr. Rogers. Mr. Rogers did not have authority over any statement in any of the PPMs for the McGinn Smith Securities. The SEC has acknowledged that Mr. Smith prepared the Four Funds private placement memoranda (OIP ¶ 22) and that Mr. McGinn created the Trust Offerings and MSTF (OIP ¶ 30). Mr. Rogers did not prepare or participate in the preparation of any of the PPMs. Accordingly, the Division has not sufficiently alleged facts with respect to Mr. Rogers that would support a duty on his part to investigate or verify the veracity of representations made by others in the Four Funds and Trust Offering PPMs.

92. Sixth, Mr. Rogers had no discretionary control over any of his clients' accounts or their investment decisions with respect to the McGinn Smith Securities. Accordingly, Mr. Rogers had no duty to monitor such accounts or to give advice to such customers with respect to those positions on an ongoing basis. Mr. Rogers's duties as to those transactions did not encompass, among other things, the offer of unsolicited information or advice.

93. Seventh, to the extent that the Division's allegations refer to predictions, opinions or other projections expressed by Mr. Rogers about McGinn Smith Securities, such statements are not representations of material facts and are not a proper basis for the Fraud Claim. Regardless of how particular statements or omissions might be characterized, Mr. Rogers believed in the securities that he offered at the times he offered them. His statements were not

negligent or reckless or deliberately false. The Division has not alleged that Mr. Rogers did not believe any statement he made at the time he made it.

94. Eighth, Mr. Rogers did not cause any loss to any investor in any McGinn Smith Securities. The causes of any losses were the result of either (a) the secret theft and diversion of funds by Mr. McGinn and Mr. Smith, (b) the severe liquidity constraints starting in the summer of 2007, followed by the severe recession in 2008 and into 2009, (c) general market conditions, or (d) a combination of these factors.

95. Ninth, there was no material misstatement or material omission by Mr. Rogers to any subscribing investor about any McGinn Smith Securities that was a substantial contributing factor in that investor's decision to subscribe to any McGinn Smith Securities.

96. Tenth, there was no material misstatement or material omission by Mr. Rogers to any subscribing investor about any McGinn Smith Securities that was a substantial contributing factor in the decline in value of any McGinn Smith Securities.

97. Eleventh, Mr. Rogers did not (i) employ any device, scheme, or artifice to defraud, or (ii) make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (iii) engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon any purchaser of securities.

98. For at least these reasons, Mr. Rogers did not violate Section 10(b) or Rule 10b-5 of the Exchange Act, or Section 17(a) of the Securities Act.

Fourth Defense

(Reasonable Investigation)

99. Mr. Rogers made a reasonable investigation before offering any McGinn Smith Securities to any client. In April 2010, approximately six months following Mr. Rogers's departure from McGinn Smith to form his own registered investment adviser, FINRA published guidance regarding the "reasonable investigation" to be performed before offering private placements to customers. Mr. Rogers satisfied FINRA's then-published guidance to the extent (if at all) that such guidance even applies (a) to an individual registered representative, or (b) at the times alleged in the OIP. FINRA, Regulatory Notice 10-22, REGULATION D OFFERINGS: OBLIGATION OF BROKER-DEALER TO CONDUCT REASONABLE INVESTIGATIONS IN REGULATION D OFFERINGS (Apr. 2010) at 3-4.

100. Mr. Rogers was fully familiar with (1) the security alarm receivable contract financing that underpinned McGinn Smith's origination of McGinn Smith Securities, (2) the trust configuration of the notes that were offered, and (3) the performance of the McGinn Smith Securities. He knew about McGinn Smith's history and the firm's established investment banking department, including its long involvement in both private and public institutional offerings. He knew the investment mandate, and reviewed the type of investments to be included in the so-called "Four Funds" – private equity like investments – before offering them to clients for whom they would be suitable.

101. Mr. Rogers also knew the separate due diligence previously undertaken by McGinn Smith's investment banking department regarding the McGinn Smith Securities. He reviewed the private placement memoranda filed with the SEC for each of the McGinn Smith Securities, which he presented only to investors for whom they were suitable and only after

informing them of the risks. He did all that is or could be reasonably expected of a registered representative, if not more. In no manner could his due diligence of the McGinn Smith Securities be remotely characterized as insufficient, let alone with the intent necessary to rise to a level of fraud.

102. Mr. Rogers also knew from Mr. McGinn's and Mr. Smith's explanations that due diligence had been undertaken in accordance with McGinn Smith's due diligence procedures which provide:

> When McGinn, Smith acts as underwriter in connection with limited partnership and/or private placement offerings, it will make a reasonable investigation of the project to include inspection of completed projects, conversations with in-house counsel where applicable, a complete examination of financial documents and any other documents deemed necessary to deal fairly with the investing public. Paperwork recording the due diligence will be kept in the legal files.

Ex. 3 (McGinn Smith Compliance Manual) at 39.

103. Given McGinn Smith's track record of similar offerings for some 20 years, its legal, compliance and research infrastructure, and the offering documents, Mr. Rogers had more than a reasonable basis to believe such due diligence was performed by McGinn Smith in addition to his own due diligence.

104. The reasonable investigation Mr. Rogers performed is an additional defense to (i) the Section 5 Claim because Mr. Rogers at all times reasonably believed that the exemptions provided by the Securities Act and Regulation D thereunder were available in connection with the offer of any McGinn Smith Securities; and (ii) the Fraud Claim because Mr. Rogers at all times had a reasonable basis upon which to offer any McGinn Smith Securities.

Fifth Defense

(Inconvenient Forum)

105. The Division has commenced this proceeding in an inconvenient forum. It should have been brought against Mr. Rogers in federal district court in the Southern District of New York ("SDNY") where he works. The Division commenced the underlying action against Mr. McGinn, Mr. Smith and McGinn Smith in the Northern District of New York where they worked. Because this inconvenient forum deprives Mr. Rogers of important procedural rights and adversely affects his ability to present his case, the proceeding should be dismissed and refiled in the SDNY. If the relief sought in this defense is not granted, then the hearing scheduled to be held in Washington D.C., an inconvenient forum for Mr. Rogers and his witnesses, should (a) be broken down into separate trials, by Respondent or McGinn Smith office, or (b) start with any evidence that the Division believes is applicable to all Respondents, followed by any specific evidence against each Respondent *seriatim*.

106. The Administrative Procedures Act and the Commission's Rules of Practice authorize an Administrative Law Judge to rule on and dispose of this administrative proceeding on the grounds that it has been brought in an inconvenient forum, which is in the nature of a motion for procedural relief. *See* 5 U.S.C. 556(c)(9); SEC Rules of Practice, Rule 111(h) (hearing officer may "consider[] and rul[e] upon all procedural and other motions.").

107. *Forum non conveniens* "is and has long been a doctrine of general application" under federal common law. *American Dredging Co. v. Miller*, 510 U.S. 443, 450 (U.S. 1994). The well-settled principles governing whether an action has been brought in an inconvenient forum are as follows:

> Under the federal doctrine of *forum non conveniens*, "when an alternative forum has jurisdiction to hear [a] case, and when trial in the chosen forum

> would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,' or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems,' the court may, in the exercise of its sound discretion, dismiss the case," even if jurisdiction and proper venue are established.

Id. at 447-48 (citations omitted) (emphasis added).

108. In determining that a proceeding has been brought in an inconvenient forum, courts weigh the relative benefits of the forum chosen by the plaintiff and the alternative forum in which the proceeding might have been brought, considering either (i) the private interests of the litigants or (ii) the public interests of the courts and the community. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 91 L. Ed. 1055, 67 S. Ct. 839 (1947). *American Dredging Co.* quotes the *Gulf Oil* factors that might be considered at common law:

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility [sic] of a judgment if one is obtained. . . .
>
> Factors of public interest also have [a] place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id. at 508-09 (emphasis added); *see also* 5 U.S.C. 554(b) ("In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.").

109. Here, the Division's choice to commence an administrative proceeding, instead of a federal court action, and to name ten unrelated Respondents, is inequitable, inappropriate under the circumstances, and disproportionately burdensome for Mr. Rogers. The burdens imposed by the Division's choice of forum are out of all proportion to the Division's convenience.

110. The Division's reliance on voluminous material developed over the past three years from the SEC Action is unfair to Mr. Rogers, as he is deprived of the protections of the Federal Rules of Civil Procedure (including motions to dismiss and fact and expert discovery) that were afforded to Mr. Smith and Mr. McGinn in the SEC Action.

111. Because of the inconvenience, undue time and expense and practical difficulties of an administrative trial in Washington D.C., Mr. Rogers will not have a meaningful opportunity to be heard. The private and public interest factors support this conclusion.

112. First, Mr. Rogers has compelling private interests in having the proceeding in the SDNY. None of his witnesses are located in Washington, D.C., while the evidence material and necessary for his defense is in the New York City area. The lodging, travel and opportunity costs (missing work) of obtaining the attendance of willing New York-area witnesses, including former employees of McGinn Smith and Mr. Rogers's New York City area clients, is significantly increased by having the hearings out of state. The costs of procuring those witnesses, and the logistics of transporting the evidence, and preparing for and

participating in a lengthy proceeding out of state likewise will be unduly burdensome and potentially insurmountable.

113. Likewise, although the Commission enjoys nationwide subpoena power, the practical difficulties of enforcing that power over potential witnesses who might decline to cooperate and reside far away from the hearing location likely will impinge on Mr. Rogers's procedural and substantive rights.

114. Second, the public interest factors on balance also weigh in favor of the SDNY. The Division elected to sue Mr. McGinn and Mr. Smith in the United States District Court for the Northern District of New York in April 2010. The allegations in the OIP overlap and are based on voluminous material from the SEC Action.

115. Accordingly, summary disposition on the grounds of *forum non conveniens* is appropriate to preserve Mr. Rogers's procedural and substantive rights, in light of both the private and public interests involved.

Sixth Defense

(Selective Enforcement)

116. The Division's decision to institute proceedings against Mr. Rogers in this matter, as opposed to the other approximately 35 or 45 registered representatives of McGinn Smith or the other employees of McGinn Smith's alarm trading business, investment banking or accounting departments, is arbitrary and capricious under the circumstances and a case of improper selective enforcement.

117. Many other registered representatives offered McGinn Smith Securities during the relevant time period who are not Respondents in this proceeding. There is no basis for the selection of Mr. Rogers, as opposed to the other 35 to 45 registered representatives of

McGinn Smith who worked in one of its four offices during the relevant period of time. For example, under the Division's theory of Section 5 liability, each and every registered representative whose client subscribed to McGinn Smith Securities – whether accredited or *un*accredited – automatically would have violated Section 5 regardless of whether the registered representative followed McGinn Smith's procedures for private placements, had a reasonable belief at the time that the offering was in compliance with the applicable exemption and Regulation D safe harbor, or otherwise had any responsibility or knowledge of the total subscriptions accepted by McGinn Smith.

118. Accordingly, the proceeding against Mr. Rogers is arbitrary and capricious under the circumstances and should not go forward.

Seventh Defense

(Laches and Estoppel)

119. The Division's claims are also barred by the equitable doctrines of laches and/or estoppel.

120. First, the Division's claims are unreasonably and inequitably stale and under the circumstances it would be unfair and inappropriate for the Division to seek relief in any form (legal or equitable) upon claims that purport to require Mr. Rogers to reconstruct the circumstances surrounding particular private placement offerings that are now up to ten years old.

121. Second, the Division's claims are also subject to the doctrine of equitable or collateral estoppel, in that the Division already elected to sue Mr. McGinn and Mr. Smith in 2010, which action has been ongoing for the past three years. Representations made or positions taken in those or other related proceedings may collaterally or equitably estop the Division from

taking new or contradictory positions in these proceedings. Mr. Rogers reserves the right to amend or supplement this defense subject to the receipt of a more definite statement from the Division.

Eighth Defense

(5 U.S.C. § 556)

122. Finally, Mr. Rogers asserts two defenses based on Section 556 of the Administrative Procedures Act:

123. First, "[a] sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556. With respect to Mr. Rogers, the Division's allegations in the OIP are not supported by or in accordance with reliable, probative, or substantial evidence.

124. Second, under Section 556, "[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." *Id.* The Division's choice (a) to commence this administrative proceeding, rather than a federal court action as it did against Mr. McGinn, Mr. Smith and McGinn Smith, (b) to name ten unrelated Respondents, increasing the cost and complexity of the administrative proceeding, and (c) to inundate Mr. Rogers with more than ten million computer files and 120 boxes of records of McGinn Smith and others that cannot be meaningfully analyzed (because the Division has not culled or identified relevant documents), will impermissibly impair Mr. Rogers's rights to a full and true disclosure of the facts, especially given the accelerated timetable of this administrative proceeding (as compared with a federal court action).

WHEREFORE, Mr. Rogers requests a finding that the Division's position has no reasonable basis in law or fact and is not substantially justified, and that no remedial action or civil fine, penalty, or forfeiture, pecuniary or otherwise, is appropriate pursuant to Sections 15(b), 21B or 21C of the Securities Exchange Act of 1934, Section 203 of the Investment Advisers Act of 1940, Section 9 of the Investment Company Act of 1940, or Section 8A of the Securities Act of 1933, and that the proceeding against him be dismissed, and for such other and further relief as is just and proper.

Dated: New York, New York
November 15, 2013

Respectfully submitted,

SEWARD & KISSEL LLP

By: M. William Munno

M. William Munno
Brian P. Maloney
Michael Weitman
One Battery Park Plaza
New York, New York 10004
Tel.: (212) 574-1200
Fax: (212) 480-8421
munno@sewkis.com
maloney@sewkis.com
weitman@sewkis.com

Attorneys for Respondent Ryan C. Rogers

SK 27029 0001 1428510