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A Model  
“Account Control Agreement”  
under Revised Article 9 of the  
Uniform Commercial Code

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## Model Account Control Agreement

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### *Introduction*

In many secured transactions, the debtor may wish to use a securities account as collateral while retaining the right to buy and sell securities in the account. Since 1994, Article 9 of the Uniform Commercial Code has provided specific mechanisms for perfecting security interests in securities accounts. One of these mechanisms is the *account control agreement*.

An account control agreement ordinarily does not *grant* a security interest in a securities account; that is the job of the security agreement between the debtor and the creditor. Rather, an account control agreement is a three-party agreement between the debtor, the creditor and the debtor's securities intermediary that *perfects* the security interest created by the security agreement.

There are other ways under Article 9 for a secured creditor to perfect a securities interest in a securities account. It could perfect by filing a financing statement indicating the securities account as collateral, or it could have the property in the debtor's securities account transferred to its own securities account. But a security interest perfected by an account control agreement will be prior to a security interest perfected by filing, and could prove less complicated than having the secured creditor open its own securities account.

Under the pre-1994 version of Articles 8 and 9, brokerage firms entered into tri-party "pledged account" agreements that perfected the creditor's interest by mov-

ing securities to a special pledge account for which the brokerage customer had trading privileges. The statutory mechanisms introduced in 1994 enabled debtors, secured creditors and brokerage houses to place these practices on a firmer footing.

The model agreement that follows uses the Article 8 and 9 provisions to perfect a debtor's security interest in a securities account, but it also borrows from pre-1994 pledged account agreements, particularly as to indemnity and exculpation. The model is presented twice – first by itself and then with commentary tracing the provisions back to their origins in Articles 8 and 9 or in existing pledged account agreement practice. The commentary assumes familiarity with the approach and terminology of Articles 8 and 9.

The model is directed at legal concerns – it is designed to perfect a security interest in a brokerage account in the most direct way possible. The term "model" is not meant to preclude modifications that address business concerns.

We have tried to keep the model simple. Since account control agreements will be used for retail customers, this seemed appropriate, although the provisions should also work for institutional investors. We were also concerned that the model agreement not confuse non-lawyers, such as brokerage house operations personnel, not familiar with UCC terminology. The model is not, however, a "plain English" document – we felt free

to use legal terminology such as “indemnify,” “joint and several” and “security interest.”

An earlier version of this article appeared in the November 1997 issue of *The Business Lawyer*. In 2001, we revised the article to take account of the 1998 revisions to Articles 8 and 9 (*revised Article 9*). This latest version has been slightly revised to take account of some additional

practical and theoretical concerns that have arisen under revised Article 9.

Except as otherwise noted, section references in the commentary are to the Uniform Commercial Code as amended by revised Article 9.

*Howard Darmstadter*  
*Sandra M. Rocks*  
*Steven O. Weise*

## ACCOUNT CONTROL AGREEMENT

[date]

### PARTIES

- **First National Bank** (*Creditor*)
- **Amy Borrower** (*Customer*)
- **Street Wise & Co.** (*Broker*)

### BACKGROUND

Customer has granted Creditor a security interest in a securities account maintained by Broker for Customer. The parties are entering into this agreement to perfect Creditor's security interest in that account.

### AGREEMENT

#### 1 The Account

Broker represents and warrants to Creditor that:

- Broker maintains securities account number 1234-5678 for Customer (together with any securities account maintained by Broker described in section 10, "Successor Accounts" below, the *Account*).
- Exhibit A is a statement produced by Broker in the ordinary course of its business regarding the property credited to the Account at the statement's date. Broker does not know of any inaccuracy in the statement.
- Broker does not know of any claim to or interest in the Account, except for claims and interests of the parties referred to in this agreement [, *except* that property noted as [...] or [...] on Exhibit A is not property in the Account].

All property credited to the Account, and all other rights of Customer against Broker arising out of the Account, including any free credit balances, will be treated as *financial assets* under Article 8 of the [jurisdiction] Uniform Commercial Code.

#### 2 Control by Creditor

Broker will comply with all notifications it receives directing it to transfer or redeem any financial assets in the Account (each an *entitlement order*) originated by Creditor without further consent by Customer.

#### 3 Customer's rights in Account

Except as otherwise provided in this section 3, Broker will comply with entitlement orders originated by Customer without further consent by Creditor.

If Creditor notifies Broker that Creditor will exercise exclusive control over the Account (a *notice of exclusive control*), Broker will cease:

- complying with entitlement orders or other directions concerning the Account originated by Customer, and
- distributing to Customer interest and dividends on financial assets in the Account.

Until Broker receives a notice of exclusive control, Broker may distribute to Customer all interest and regular cash dividends on financial assets in the Account.

Broker will not comply with any entitlement order originated by Customer that would require Broker to make a free delivery of any financial assets in the Account to Customer or any other person.

#### 4 Priority of Creditor's security interest

Broker subordinates in favor of Creditor any security interest, lien or right of setoff Broker may have, now or in the future, against the Account or financial assets in the Account, *except* that Broker will retain its prior lien on financial assets in the Account to secure payment for financial assets purchased for the Account and normal commissions and fees for the Account.

#### 5 No third party control

Broker represents and warrants that no third party has a right to give an entitlement order regarding financial assets in the Account.

Broker will not agree with any third party that Broker will comply with entitlement orders originated by the third party.

#### 6 Statements, confirmations and notices of adverse claims

Broker will send copies of all statements and confirmations for the Account simultaneously to Customer and Creditor.

Broker will use reasonable efforts promptly to notify Creditor and Customer if any other person claims that it has a property interest in a financial asset in

the Account and that it is a violation of that person's rights for anyone else to hold, transfer or deal with the financial asset.

## **7 Broker's responsibility**

Except for permitting a withdrawal, delivery or payment in violation of section 3, Broker will not be liable to Creditor for complying with entitlement orders from Customer that are received by Broker before Broker receives and has a reasonable opportunity to act on a notice of exclusive control.

Broker will not be liable to Customer for complying with a notice of exclusive control or with entitlement orders originated by Creditor, even if Customer notifies Broker that Creditor is not legally entitled to issue the entitlement order or notice of exclusive control, unless:

- Broker takes the action after it is served with an injunction, restraining order or other legal process enjoining it from doing so, issued by a court of competent jurisdiction, and had a reasonable opportunity to act on the injunction, restraining order or other legal process, or
- Broker acts in collusion with Creditor in violating Customer's rights.

This agreement does not create any obligation of Broker except for those expressly set forth in this agreement. In particular, Broker need not investigate whether Creditor is entitled under Creditor's agreements with Customer to give an entitlement order or a notice of exclusive control. Broker may rely on notices and communications it believes given by the appropriate party.

## **8 Indemnity**

Creditor and Customer will indemnify Broker, its officers, directors, employees and agents against claims, liabilities and expenses arising out of this agreement (including reasonable attorneys' fees and disbursements), except to the extent the claims, liabilities or expenses are caused by Broker's gross negligence or willful misconduct. Creditor's and Customer's liability under this section is joint and several.

## **9 Termination; survival**

Creditor may terminate this agreement by notice to Broker and Customer. Broker may terminate this agreement on 30 days' notice to Creditor and Customer.

If Creditor notifies Broker that Creditor's security interest in the Account has terminated, this agreement will immediately terminate.

Sections 7, "Broker's responsibility," and 8, "indemnity," will survive termination of this agreement.

## **10 Successor Accounts**

The Account will include the securities account described in section 1, any substitute or replacement securities account, and any securities account maintained by Broker into which property from the Account is transferred, unless the Creditor expressly agrees in writing prior to the transfer that the account into which such property is transferred will not be subject to this agreement.

## **11 Governing law**

This agreement will be governed by the laws of the State of [jurisdiction].

## **12 Entire agreement; amendments**

This agreement is the entire agreement, and supersedes any prior agreements and contemporaneous oral agreements, of the parties concerning its subject matter.

No amendment of, or waiver of a right under, this agreement will be binding unless it is in writing and signed by the party to be charged.

## **13 Severability**

To the extent a provision of this agreement is unenforceable, this agreement will be construed as if the unenforceable provision were omitted.

## **14 Successors and assigns**

A successor to or assignee of Creditor's rights and obligations under the security agreement between Creditor and Customer will succeed to Creditor's rights and obligations under this agreement.

## **15 Notices**

A notice or other communication to a party under this agreement will be in writing (except that enti-

tlement orders may be given orally), will be sent to the party's address set forth below or to such other address as the party may notify the other parties and will be effective on receipt.

SIGNATURES

ADDRESSES

CUSTOMER

\_\_\_\_\_  
Amy Borrower

CREDITOR

First National Bank

By \_\_\_\_\_

BROKER

Street Wise & Co.

By \_\_\_\_\_

ACCOUNT CONTROL AGREEMENT

[date]

## PARTIES

- **First National Bank** (*Creditor*)
- **Amy Borrower** (*Customer*)
- **Street Wise & Co.** (*Broker*)

## BACKGROUND

Customer has granted Creditor a security interest in a securities account maintained by Broker for Customer. The parties are entering into this agreement to perfect Creditor's security interest in that account.

"Account control agreement," while descriptive, is not a term used in Articles 8 ad 9.

An account control agreement is voluntary. Broker is not required to enter into the agreement even if Customer so directs, and cannot enter into such an agreement without Customer's consent. §8-106(g). For Creditor to have "control," Broker must be a party to the agreement. §8-106, official comment 5. (The importance of "control" is explained below.)

An account control agreement will not ordinarily include a security agreement. Creditor and Customer will enter into a separate agreement granting the security interest. Broker will usually not want to be involved in that part of the transaction.

## AGREEMENT

**1 The Account**

Broker represents and warrants to Creditor that:

- Broker maintains securities account number 1234-5678 for Customer (together with any securities account maintained by Broker described in section 10, “Successor Accounts” below, the *Account*).
  
- Exhibit A is a statement produced by Broker in the ordinary course of its business regarding the property credited to the Account at the statement’s date. Broker does not know of any inaccuracy in the statement.

This identifies the securities account and establishes that Customer has rights in it.

A “securities account” is “an account to which a financial asset is or may be credited in accordance with an agreement under which the person maintaining the account [here, Broker] undertakes to treat the person for whom the account is maintained [Customer] as entitled to exercise the rights that comprise the financial asset.” §8-501(a). “Account” is obviously not used in the definition of securities account (or in the model agreement) in its Article 9 sense of a right to payment of certain monetary obligations. §9-102(a)(2).

Broker does not represent or warrant the accuracy of the account statement, only that it was produced in the ordinary course of business and that Broker does not know that the statement is inaccurate. Broker “knows” of an inaccuracy if it has actual knowledge of the inaccuracy. §1-201(25). Knowledge by Broker is effective for transactions subject to the account control agreement when it is brought to the attention of the individual(s) conducting the transaction. §1-201(27).

## Model Account Control Agreement

## Commentary

- Broker does not know of any claim to or interest in the Account, except for claims and interests of the parties referred to in this agreement [, *except* that property noted as [...] or [...] on Exhibit A is not property in the Account].

Broker's representation and warranty will provide Creditor with some comfort that Customer has a "clean" title to the financial assets in the Account. For example, it will provide comfort that the Account is not a joint account. (Sections 4, "priority of creditor's security interest," and 5, "no third party control," will give Creditor comfort as to the priority of its security interest.)

Financial assets registered in Customer's name, payable to her order or specially endorsed to her (and that have not been endorsed to Broker or in blank) are not part of the Account. §8-501(d). Therefore, Creditor can not perfect its security interest in such assets by using an account control agreement. To avoid listing any such assets, Broker may want to set up a separate "clean" account that does not contain such assets. Alternatively, Broker may include the bracketed language identifying those assets that may be listed in the account statement but are not part of the Account. (Some brokers mark these assets as "certificated" or "in safekeeping.")

## Model Account Control Agreement

## Commentary

All property credited to the Account, and all other rights of Customer against Broker arising out of the Account, including any free credit balances, will be treated as *financial assets* under Article 8 of the [jurisdiction] Uniform Commercial Code.

This paragraph assures that Creditor will have a perfected security interest in all property in the Account, even if the property is not a security. “Financial assets” include (i) securities, (ii) obligations of or interests in a person or property or an enterprise that is of a type traded on financial markets or recognized as a medium for investment, and (iii) property held by Broker in the Account if Broker agrees that the property is to be treated as a financial asset under Article 8. § 8-102(a)(9).

Once the property in the Account is a “financial asset,” Customer will have a “security entitlement” with respect to it (§ 8-102(a)(17)). Customer’s security entitlement with respect to a financial asset will be “investment property” under revised Article 9, and Creditor will be able to perfect a security interest in such investment property by an account control agreement, as described in the commentary to section 2 below.

A commodity contract can not be a “financial asset.” § 8-103(f). Accordingly, Customer can not have a security entitlement with respect to a commodity contract. Commodity contracts and commodity accounts are investment property (§ 9-102) in which a security interest can be perfected by control conferred by an appropriate agreement between a commodity intermediary, its customer and a secured creditor (§ 9-106(b)(2)). However, the model agreement presented here would have to be reworked before it would be adequate to perfect such a security interest.

## 2 Control by Creditor

Broker will comply with all notifications it receives directing it to transfer or redeem any financial assets in the Account (each an *entitlement order*) originated by Creditor without further consent by Customer.

This provision perfects Creditor's security interest in both the Account and the financial assets in the Account.

A securities account, such as the Account, and the security entitlements carried in the Account, are all "investment property." §9-102(a)(49). Creditor may therefore perfect its security interest in the Account and the securities entitlements by "control." §9-314(a). A security interest perfected by control has priority over a security interest not perfected by control, such as a security interest perfected by filing. §9-328(1).

Creditor will have control over the security entitlements carried in the Account if Broker agrees to comply with entitlement orders originated by Creditor without further consent by Customer. §§9-106(a), 8-106(d)(2). (An "entitlement order" is a notice to Broker directing it to transfer or redeem a financial asset to which Customer has a security entitlement. §8-102(a)(8).) An agreement that provides that Broker will, without Customer's consent, honor instructions from Creditor concerning the Account will give Creditor control over the security entitlements carried in the Account. §9-106, official comment 4.

If Creditor obtains control over all security entitlements carried in the Account, Creditor will also have control over the Account (§ 9-106(c)), and therefore will have perfected its security interest in the Account (§ 9-314(a)).

Under the account control agreement, Creditor's right to give an entitlement order is not conditioned on Customer's default under any agreement between Customer and Creditor. If Creditor's right to give an entitlement order was conditioned on Customer's default, it would still be "control." § 8-106, official comment 7. It is not likely, however, that Broker will want to be put in the position of having to decide whether the condition has been satisfied – that is, whether Creditor has become entitled to give an entitlement order.

### **3 Customer's rights in Account**

Except as otherwise provided in this section 3, Broker will comply with entitlement orders originated by Customer without further consent by Creditor.

In the absence of other agreement, Broker has a duty to comply with Customer's entitlement orders. § 8-507(a). The importance of this sentence lies, therefore, in its introductory proviso. Customer's right to give entitlement orders does not preclude Creditor from having control over the Account. § 8-106(f).

Creditor might want to limit the kinds of investment that Customer can make. Such a provision would, however, require a degree of monitoring that Broker may be unable or unwilling to provide.

## Model Account Control Agreement

## Commentary

If Creditor notifies Broker that Creditor will exercise exclusive control over the Account (a *notice of exclusive control*), Broker will cease:

- complying with entitlement orders or other directions concerning the Account originated by Customer, and
- distributing to Customer interest and dividends on financial assets in the Account.

Until Broker receives a notice of exclusive control, Broker may distribute to Customer all interest and regular cash dividends on financial assets in the Account.

Broker will not comply with any entitlement order originated by Customer that would require Broker to make a free delivery of any financial assets in the Account to Customer or any other person.

Broker's duty to obey Customer's entitlement orders can be modified by agreement. § 8-507, comment 3. If Creditor can not cut off Customer's right to give entitlement orders, Customer could try to countermand Creditor's entitlement orders.

The security agreement should state the circumstances under which Creditor can deliver a notice of exclusive control. If the Account is not to be used for trading by Customer, Creditor may provide in the security agreement that a notice of exclusive control will be given at inception.

"Notice of exclusive control" is not a term used in revised Article 9.

Customer's right to receive dividends and other distributions does not defeat Creditor's control. § 8-106, official comment 4, example 7.

Creditor will have control without this provision. However, allowing Customer to withdraw property or make free deliveries from the Account would undermine the value of Creditor's security interest. If Creditor wants to allow Customer to make a specific withdrawal or free delivery, Creditor can give the appropriate entitlement order. A more complicated alternative would be for the account control agreement to allow Customer to give the entitlement order if Creditor gives Broker a certificate permitting the withdrawal or delivery.

**4 Priority of Creditor's security interest**

Broker subordinates in favor of Creditor any security interest, lien or right of setoff Broker may have, now or in the future, against the Account or financial assets in the Account, *except* that Broker will retain its prior lien on financial assets in the Account to secure payment for financial assets purchased for the Account and normal commissions and fees for the Account.

**5 No third party control**

Broker represents and warrants that no third party has a right to give an entitlement order regarding financial assets in the Account.

This section and the following section 5 give Creditor priority over any other security interests in the Account that are perfected by control.

Without this subordination, Broker would have priority over Creditor. §9-328(3). A consequence of Broker's subordination is that the Account must be a cash account, not a margin account. Broker's junior security interest may be useful to Broker if Customer has a debit in a separate margin account with Broker.

If a third party could give such an order without Customer's further consent, the third party would have "control." §8-106(d)(2). If it also had a security interest in property in the Account, that security interest would be prior to Creditor's. §9-328(2)(B)(ii). Even if the third party did not have a security interest, it could transfer property out of the Account, which could destroy perfection of Creditor's security interest.

## Model Account Control Agreement

## Commentary

Broker will not agree with any third party that Broker will comply with entitlement orders originated by the third party.

Broker has represented (preceding sentence) that no third party has the right to give entitlement orders. If Broker and Customer subsequently enter into an account control agreement with a third party, Creditor's security interest will be prior to the third party's security interest. §9-328(2)(B)(ii). Nonetheless, Creditor will still want to prevent any third party acquiring the right to transfer property out of the Account.

### **6 Statements, confirmations and notices of adverse claims**

Broker will send copies of all statements and confirmations for the Account simultaneously to Customer and Creditor.

This will assist Creditor in monitoring the Account.

Broker will use reasonable efforts promptly to notify Creditor and Customer if any other person claims that it has a property interest in a financial asset in the Account and that it is a violation of that person's rights for anyone else to hold, transfer or deal with the financial asset.

The claims referred to in this sentence are "adverse claims." § 8-102(a)(1).

## 7 Broker's responsibility

Except for permitting a withdrawal, delivery or payment in violation of section 3, Broker will not be liable to Creditor for complying with entitlement orders from Customer that are received by Broker before Broker receives and has a reasonable opportunity to act on a notice of exclusive control.

Broker will not be liable to Customer for complying with a notice of exclusive control or with entitlement orders originated by Creditor, even if Customer notifies Broker that Creditor is not legally entitled to issue the entitlement order or notice of exclusive control, unless:

- Broker takes the action after it is served with an injunction, restraining order or other legal process enjoining it from doing so, issued by a court of competent jurisdiction, and had a reasonable opportunity to act on the injunction, restraining order or other legal process, or
- Broker acts in collusion with Creditor in violating Customer's rights.

This paragraph treats Creditor's delivery of a notice of exclusive control like an adverse claimant's obtaining of an injunction or other legal process. Under revised Article 9, if Broker transfers a financial asset pursuant to an effective entitlement order, Broker is not liable to an adverse claimant unless Broker "took the action after being served with an injunction, restraining order or other legal process enjoining it from doing so ... and had a reasonable opportunity to act on the injunction, restraining order or legal process." §8-115(1).

If Customer gives such notice, it is an adverse claimant. §8-102(a)(1). The sentence states the rule of section 8-115, as preserved by section 9-331(b).

This agreement does not create any obligation of Broker except for those expressly set forth in this agreement. In particular, Broker need not investigate whether Creditor is entitled under Creditor's agreements with Customer to give an entitlement order or a notice of exclusive control. Broker may rely on notices and communications it believes given by the appropriate party.

### **8 Indemnity**

Creditor and Customer will indemnify Broker, its officers, directors, employees and agents against claims, liabilities and expenses arising out of this agreement (including reasonable attorneys' fees and disbursements), except to the extent the claims, liabilities or expenses are caused by Broker's gross negligence or willful misconduct.

Creditor's and Customer's liability under this section is joint and several.

Broker is not likely to charge a fee for entering into an account control agreement but may do so as an accommodation to Customer. Broker will therefore not want to take additional material risks, and will want to be indemnified against claims.

Joint and several liability of Customer and Creditor on the indemnity is common, though not universal, in pledged account agreements governed by pre-1994 Article 9.

**9 Termination; survival**

Creditor may terminate this agreement by notice to Broker and Customer. Broker may terminate this agreement on 30 days' notice to Creditor and Customer.

If Creditor notifies Broker that Creditor's security interest in the Account has terminated, this agreement will immediately terminate.

Sections 7, "Broker's responsibility," and 8, "indemnity," will survive termination of this agreement.

Broker should have the right to terminate the account control agreement or the Account. However, simply permitting Broker to terminate the control arrangement would pose too great a risk to Creditor unless Creditor has enough time to move the collateral to another account subject to Creditor's perfected security interest. The steps Creditor can take in this situation should be set out in the security agreement.

## 10 Successor Accounts

The Account will include the securities account described in section 1, any substitute or replacement securities account, and any securities account maintained by Broker into which property from the Account is transferred, unless the Creditor expressly agrees in writing prior to the transfer that the account into which such property is transferred will not be subject to this agreement.

## 11 Governing law

This agreement will be governed by the laws of the State of [jurisdiction].

A brokerage accounts may be renumbered for operational reasons. For example, part of the account number may designate the branch at which the account is maintained, so that if the account is moved to a different branch, or if the branch number is changed, the account number will automatically change.

An account may also be changed from an account in a single name to a joint account, or vice-versa, or a trust account may be transferred to the trust's beneficiary. This section makes all these renumbered or transferee accounts subject to the control agreement.

There may, of course, be a question as to whether the control agreement will be effective to bind, for example, a trust beneficiary when only the trustee signed the control agreement. These issues may be handled in the security agreement or other agreements. This section merely provides that the transfer, in itself, will not render the control agreement ineffective.

Perfection and priority of Creditor's security interest will be governed by the local law of Broker's "jurisdiction." §9-305(a)(3). The local law of Broker's jurisdiction also governs issues concerning the indirect holding system that are

dealt with in Article 8. §8-110(b); official comment 3.

If an agreement between Broker and Customer specifies a particular jurisdiction as Broker's jurisdiction, that is Broker's jurisdiction for purposes of revised Article 9. §§9-305(a)(3), 8-110(e)(1). Such a specification would most likely appear in the agreement between Broker and Customer that governs the Account. If so, it would prevail over the governing law specification in the model account control agreement. If, however, there is no agreement between Customer and Broker governing the Account (as frequently happens for cash accounts), or if the agreement does not specify Broker's jurisdiction, then the governing law specification in the model agreement will be effective to specify Broker's jurisdiction. §8-110(e)(2).

The jurisdiction specified in the agreement need not bear a "reasonable relation" to the transaction. §8-110, official comment 3.

Revised Article 9 has been adopted in every state, as have the 1994 revisions to Article 8.

## **12 Entire agreement; amendments**

This agreement is the entire agreement, and supersedes any prior agreements and contemporaneous oral agreements, of the parties concerning its subject matter.

No amendment of, or waiver of a right under, this agreement will be binding unless it is in writing and signed by the party to be charged.

### **13 Severability**

To the extent a provision of this agreement is unenforceable, this agreement will be construed as if the unenforceable provision were omitted.

Creditor will probably prefer to lose any particular provision rather than have the entire agreement voided and perfection of its security interest lost.

### **14 Successors and assigns**

A successor to or assignee of Creditor's rights and obligations under the security agreement between Creditor and Customer will succeed to Creditor's rights and obligations under this agreement.

Without this sentence, an assignee of Creditor's security interest would have to obtain Customer's and Broker's agreement to a new account control agreement if it wished to retain perfection by control.

### **15 Notices**

A notice or other communication to a party under this agreement will be in writing (except that entitlement orders may be given orally), will be sent to the party's address set forth below or to such other address as the party may notify the other parties and will be effective on receipt.

Model Account Control Agreement

Commentary

SIGNATURES

ADDRESSES

CUSTOMER

\_\_\_\_\_  
Amy Borrower

CREDITOR

First National Bank

By \_\_\_\_\_

BROKER

Street Wise & Co.

By \_\_\_\_\_

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