UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

10 Civ.457 (GLS/CFH)

DAVID L. SMITH,

Defendant

LYNN A. SMITH, ET AL

Relief Defendant,

David Stoelting
Attorney for Plaintiff
Room 400
3 World Financial Center
New York, N.Y. 10281

Lynn A. Smith
2 Rolling Brook Dr.
Saratoga Springs, N. Y. 12866
Acting Pro Se

Phillips Lytle LLP
William J. Brown, Esq.
Receiver
3400 HSBC Center
Buffalo, N. Y. 14203

GARY L. SHARPE

U.S. MAGISTRATE JUDGE

MOTION TO MODIFY ASSET FREEZE

TO ALLOW THE RELEASE OF CERTAIN PROPERTY

WHEREAS, on April 20, 2010, the Commission filed a complaint and an Order to Show Cause seeking emergency relief and, on that same date, the Court granted the Commission's request for

a temporary restraining order that, among other things, froze the assets of the defendants and the relief defendant (Docket No. 5) (the "Freeze Order") and, on July 22, 2010, the Court entered the Preliminary Injunction Order that, among other things, continued the freeze Order over the defendants and relief defendant (Docket No. 96) and appointed William J. Brown as Receiver ("Receiver"); and

WHEREAS, on June 26, 2015, the Court entered its Final Judgment as to defendant David L. Smith (Docket No. 835), and its Final Judgment as to relief defendant Lynn A. Smith (Docket No. 837) (Collectively the "Judgments"); and

WHEREAS, some of that property subject to the Freeze includes the retirement account of Lynn A. Smith, specifically her Individual Retirement Account (IRA); and

WHEREAS, in a Summary Order filed September 4, 2019 in the United States District Court, Northern District of New York, as so ordered by Gary L. Sharpe, U.S. District Judge, the motion filed by David Smith, acting pro se and on behalf of Lynn Smith, to unfreeze her IRA, (Dkt. No. 1034, filed 2/19/19) was denied; and

WHEREAS, the Court ordered the denial "with leave to renew; the proper party - that is, Lynn Smith - may bring a motion regarding her "IRA"; and

WHEREAS, Lynn Smith, age 73, has met the requirement of age 70 1/2 to initiate her Required Minimum Distribution (RMD), and believes that she must begin to receive those distributions as required by law; and

WHEREAS, Lynn Smith plans to ask the court through this motion to unfreeze her IRA assets so that she may begin to take those distributions as required and manage those assets for her benefit; and

WHEREAS, Lynn Smith will argue those assets are exempt from the disgorgement order, first because they are exempt assets under the N.Y.S. "Homestead Act", Civil Practice Laws and Review (CPLR) 5205, and second, while acknowledging the SEC plans to argue that under SEC disgorgement orders some courts have disregarded state exemptions, and MAY so order, Lynn Smith will argue that the orders of disgorgement are specific remedies for securities law violations, and Lynn Smith has not been charged with any such securities law violations, and therefore her IRA is not subject to a disgorgement order; and

WHEREAS, as in Judge Sharpe's disgorgement order he stated "that the only reason advanced by the SEC to hold Lynn Smith liable was the SEC's contention that Lynn and David Smith were joint owners of Lynn Smith's stock account and therefore David Smith's liability extended to assets held in Lynn Smith's name; however, in regards to Lynn Smith's IRA there is no conceivable way to make the joint account argument; and

WHEREAS, the SEC has now included in their argument to justify the taking of Lynn Smith's IRA her liability for the fraudulent transfer of assets; retirement assets under ERISSA are exempt from civil actions such as the liability arising from the fraudulent transfer of assets and can only be penetrated under the order of disgorgement, and as previously stated disgorgement only applies to securities law violations which Lynn Smith has never been accused or convicted of [1]; and

WHEREAS, the Final Judgment as to Defendant David Smith (Dkt. 835, filed 6/25/15) specifically decreed in Section VIII various assets either in the name of Lynn Smith (brokerage

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[1] In Judge Sharpe's order he rejects this argument because it was raised for the first time in a reply, and the SEC and Receiver have not had an opportunity to respond. However, he notes that this issue is unclear, and believes the court would benefit from a full briefing on this issue, if and when it is properly raised, thus offering Lynn Smith "leave to renew".

account RMR-040916) or jointly held (the David L. and Lynn A. Smith Irrevocable Trust, including account number RMR-069671), and transfers to Lynn Smith of the title to the Vero Beach property and a joint checking account at the Bank of America (BOA) were the assets ordered, adjudged, and decreed of Lynn Smith to be applied to David Smith's payment obligations under the Final Judgment, and this order does not include the IRA account of Lynn Smith and therefore it should not be available to the SEC; and

WHEREAS, the Final Judgment as to Lynn Smith (DKT.837, filed 6/25/15) ordered, adjudged, and decreed a list of transfers under Section I, subject to offsets in Section II, to be transferred to the Receiver, and included the proceeds of the sale of the Sacandaga property and the assets mentioned in the Judgment Order for David Smith, including the Vero Beach property, assets of the Smith Trust, and the BOA account; and this order does not include the IRA account of Lynn Smith and therefore the account should not be available to the SEC; and

WHEREAS, for the reasons and arguments stated below, petitioner Lynn A. Smith, acting pro se, respectfully requests the Court to unfreeze her IRA retirement assets upon consideration of this motion.

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BACKGROUND

In April of 2010, the Commission (SEC) filed a complaint against defendants David Smith and Timothy McGinn, along with various entities owned and controlled by McGinn and Smith, alleging multiple violations of the federal securities laws. Upon the filing of the complaint, the SEC moved for and was granted a freeze on all of the assets of the defendants and relief defendants pending adjudication of the complaint. Subsequently, the complaint was stayed pending the action to be taken by the U.S. Attorney's Office (USAO), United States District Court, Northern District of New York. Ultimately, the USAO handed down an indictment of McGinn and Smith and in a 4 1/2 week trial over the period January to February 2013 held in the Court of Judge David N. Hurd in Utica, NY., the defendants were found guilty of multiple securities law violations and were sentenced on August 7, 2013. Smith received a ten-year sentence.

With the criminal conviction of Smith, the SEC moved for Summary judgment of the assets of Smith, his wife, and a trust established for his children for the benefit of the alleged defrauded investors. In a decision ordered by Judge Gary L. Sharpe on March 30, 2015 the Summary Judgment was granted and the assets of Defendants David Smith and Lynn Smith and the trust established for their children were to be disgorged for the benefit of investors and to be overseen by the appointed Receiver, William J. Brown. Judge Sharpe's order was affirmed

on April 18, 2016 by the U.S. Court of Appeals for the Second Circuit. Receiver Brown has retained control of the various Smith assets since April 2010.

On February 19, 2019, David Smith, acting pro se, filed a motion "to modify the asset freeze to allow the release of certain property", (Dkt. No. 1039). Specifically, the motion sought to unfreeze his interest in the McGinn Smith Incentive Savings plan, his individual IRA, and the IRA of relief defendant Lynn A. Smith, his wife. The motion was denied on September 4, 2019. However, without expressing an opinion as to the arguments regarding Lynn Smith's disgorgement, Judge Sharpe noted that both the SEC's and the Receiver's response left the issue unclear and expressed the opinion that "the court would benefit from a full briefing on this issue, if and when it is properly raised". Judge Sharpe also opined that the rejection of Lynn Smith's IRA and the arguments regarding disgorgement was because this argument was first raised in a reply, and the SEC and Receiver had not had an opportunity to respond. He also rejected arguments because Lynn Smith in a letter filed stating that she wished for David Smith's filings to be accepted on her behalf and wished the arguments presented to be accepted as pro se for herself. The Court noted that David Smith, as a non-attorney, could not represent Lynn Smith, and thus to the extent that Lynn Smith brings the same motion on her behalf, the motion must be rejected. However, Judge Sharpe noted that Lynn Smith is free to move for relief regarding her IRA on

her own behalf. Accordingly, this motion on behalf of Lynn Smith, acting pro se, is being made pursuant to Judge Sharpe's instructions.

SUMMARY OF ARGUMENTS

1. Petitioner Lynn Smith believes it is time to release her IRA from the Freeze Order so that she might comply with the IRS regulation of Required Minimum Distribution (RMD) as she is past the required age and is in need of the retirement assets to provide her the means of support.

Petitioner believes that the SEC and the Receiver have held the asset based on the disgorgement order issued in the Court's Final Judgment issued June 25, 2015 (Dkt. No. 837) and this order and judgment is in error because the disgorgement is a remedy available to the courts for the benefit of investors for a violation of securities laws. In the case of Lynn Smith, she has never been accused or found guilty of the violation of securities laws, and therefore the disgorgement order is invalid.

The SEC has argued that in the enforcement of disgorgement judgments, courts may use their discretion to disregard state law exemptions, which exemption Smith's IRA would normally benefit from. The petitioner has no disagreement with that assertion as there is ample case law to support it. However, petitioner believes that disgorgement enforcement is the only manner in which ERISSA

accounts may be penetrated. All other judgment enforcements are money judgments that the ERISSA trust is protected from. Thus, if Lynn Smith is not guilty of security law violations and disgorgement cannot be applied, her IRA account should be unfrozen.

2. Petitioner will argue that even in the unlikely event that Lynn Smith's IRA account is available for a disgorgement order, she will argue that the SEC has not and cannot meet the requirements of disgorgement. The court has relied on the theory of equitable relief to establish a justification for its disgorgement order. However, the Supreme Court has clearly interpreted "equitable relief" that for an order to turn over money or property to qualify as true equitable relief, it must be an order to return money or property identified as belonging in good conscience to the plaintiff that COULD CLEARLY BE TRACED TO PARTICULAR FUNDS OR PROPERTY IN THE DEFENDANT'S POSSESSION. There are no assets identified with the plaintiff's ownership that could ever be traced to Lynn Smith's retirement account. Thus, any disgorgement order of the IRA would be in contravention to existing law.

3. The attachment of Lynn Smith's assets, including her IRA, resulted from the SEC successfully making the argument that Lynn's brokerage account, RMR 040916, was in fact a joint account of David Smith primarily because David Smith had limited discretion over the account. There was never any specific argument

advanced regarding Lynn Smith's IRA, but instead seems to have been simply swept up in the effort to seize all of the assets of the Smiths for application to the disgorgement order.

In Judge Sharpe's decision and order of 3/30/15 relating to the disgorgement of Lynn Smith's assets, Judge Sharpe's opinion stated, "Here, the SEC relies ENTIRELY on the joint or equitable ownership theory". There were never any tests or representations that the IRA account of Lynn Smith demonstrated joint ownership. The fact is there is no plausible theory to support joint ownership between David Smith and Lynn Smith's IRA; therefore, the asset should be released immediately.

4. Attempts by the SEC to include liabilities as a result of certain alleged fraudulent conveyances do not meet the disgorgement test of securities law violations, and are therefore simple money judgments which cannot be satisfied with an exempt account such as Lynn Smith's ERISSA IRA.

Arguments

I

LYNN SMITH'S IRA HAS BEEN FROZEN SUBJECT TO A DISGORGEMENT ORDER. SEC DISGORGEMENT ORDERS MAY AT THE DISCRETION OF THE COURT BE MADE AVAILABLE FOR THE BENEFIT OF INVESTORS AS A RESULT OF THE DEFENDANT'S VIOLATION OF SECURITIES LAWS. SINCE LYNN SMITH HAS

NEVER BEEN ACCUSED OR FOUND GUILTY OF THE VIOLATION OF SECURITIES LAWS THE DISGORGEMENT ORDER AS IT RELATES TO HER IRA IS INVALID

Lynn Smith's IRA was frozen subject to the Final Judgment of 6/20/15 issued by Judge Sharpe and pursuant to the SEC request for Order of Disgorgement. In the case of Lynn Smith's IRA an order of disgorgement would not be valid because disgorgement only applies as a remedy for restitution for investors deemed to have been defrauded as a result of securities violations. These disgorgement orders are at the discretion of the court and may be made available for the benefit of investors to atone for ill-gotten gains that the defendants benefited from. Lynn Smith has never been accused or found guilty of securities violations or benefitted from ill-gotten gains. Thus, without securities law violations to support disgorgement, the judgment is simply a money judgment which is not available for ERISSA under the N.Y.S. exemption codified through the "Homestead Act".

Judge Sharpe himself has reinforced this legal concept when in his decision of 3/30/15 relating to the disgorgement of Lynn Smith's assets he states in justifying his order, "Generally, federal courts have jurisdiction over and may order equitable relief against a relief defendant in a securities enforcement action if she: (1) has received ill-gotten gains; and (2) does not have a legitimate claims to these funds" (SEC v. Cavanaugh, 155 f. 3d 729, 136 2nd Cir 1998). Lynn Smith's IRA

or Lynn Smith has never received any ill-gotten gains and the SEC never even attempted to trace any such gains. Not only did the SEC fail to identify and trace such ill-gotten gains to the IRA, but Lynn Smith has never been accused of any securities law violations which is necessary to invoke disgorgement against a defendant. As to not having a legitimate claim to these funds there is nothing in the record to support that supposition. Lynn's IRA was long standing, received legitimate contributions each year from her earnings, there were never any distributions, and were reported each year on her tax filings. She fully intended to use those assets for her retirement.

The concept of disgorgement has a long history of federal courts having an equitable power to order monetary relief identified as "disgorgement", and was finally codified in the passage of the Sarbanes-Oxley legislation in 2002 which used the phrase "equitable relief" to describe its powers. This phrase is one that has been carefully and clearly interpreted by the Supreme Court in multiple cases, most notably "Great-West Life and Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002). The petitioner sees no purpose in accounting for the multiple cases involved with the question of disgorgement. The court is well familiar with the law. However, since Lynn Smith's argument is that disgorgement only applies to securities law violations, of which she is not guilty of, she feels it important to quote two cases in support of her argument:

1. "Disgorgement serves to remedy securities law violations by depriving violators of the fruits of their alleged conduct" (SEC v. Fishbach Corp. 133 F. 3d 170, 175- 2nd Cir 1997), and

2. Disgorgement is an equitable remedy imposed to force a defendant to give up the amount by which he was unjustly enriched" (FTC v. Bronson Partners 654 F 3d, 359, 372, 2nd Cir 2011).

Thus, the theory of disgorgement is to remove the ill-gotten gains realized by the wrongdoers. That was the limitation.

The central argument here is that no one, including the SEC, has ever accused Lynn Smith of securities violations or being unjustly enriched through ill-gotten gains. Thus, disgorgement cannot apply to Lynn Smith. The sole reason Lynn Smith's assets were attached is because the SEC advanced the argument that Lynn Smith's accounts - her brokerage account - were an extension of David Smith and acted as a joint account. That argument has never been alleged or proven as it relates to Lynn Smith's IRA. That issue will be dealt with in detail later in the motion.

Finally, Petitioner believes that the state exemption under the "Homestead Act" remains unchallenged. Under New York State law, specifically Civil Practice Laws and Review (CPLR) 5205, retirement ERISSA account assets are protected

from civil judgment. The SEC and Court have previously argued that under a SEC disgorgement order, the court at its discretion may disregard state exemptions. Lynn Smith is well aware that limited history supports that theory. However, that theory is limited to disgorgement orders, not simple civil money judgments. Since disgorgement requires a violation of securities laws and Lynn Smith has not violated such laws, disgorgement does not apply and there is no other means for the court to disregard the state exemption.

Under CPLR 5205 it is stated "all trusts, custodial accounts, annuities, insurance contracts, monies, assets, or interests established as part of, and all payments from, either any trust or plan, which is qualified as an IRA either under Section 400 or 400A of the U.S. Internal Revenue Code of 1986.... shall be considered a trust which has been proceeded from a person other than a judgment debtor... is exempt from application to the satisfaction of a money judgment". Lynn Smith's IRA qualifies as a trust under ERISSA, and without the legitimacy of a disgorgement order, the liability that the SEC seeks to impose is simply a money judgment that is exempt under the law.

II

LYNN SMITH WILL ARGUE THAT EVEN IF DISGORGEMENT IS CONSIDERED APPLICABLE TO HER IRA, THE SUPREME COURT IN ITS DECISION FOR KOKESH V. SEC, 137 S. CT. 1635 (2017) HAS BROUGHT CLARITY TO THE ISSUE OF DISGORGEMENT AND HOW IT IS APPLIED, AND IN DOING SO THE COURT'S DECISION HELD THAT SEC DISGORGEMENT OPERATES AS A PENALTY UNDER 2462; AND AS REGARDS TO LYNN SMITH'S IRA THE SEC HAS NEVER MET, NOR CAN THEY MEET, THE REQUIREMENTS OF 2462. THEREFORE, THE RETIREMENT ASSETS SHOULD BE RELEASED TO LYNN SMITH.

Because it is defendant Lynn Smith's belief that the SEC plans to advance the argument that some courts have disregarded state law exemptions in SEC enforcement actions seeking disgorgement, Lynn Smith intends to further explore the issue of disgorgement, and in particular the unanimous ruling of the Supreme Court in Kokesh v. SEC.

The unanimous ruling of the Supreme Court in Kokesh v. SEC, 137 S. Ct. 1635 (2017) is important for the court to consider. In previous responses the SEC has totally misrepresented the significance of "Kokesh'. They have opined that this was a "narrow holding confined to the statute of limitations". That opinion is without merit. While the Kokesh case did in fact center around a statute of limitations and did not impair a court's ability to impose disgorgement, what the ruling did without reservation was to demonstrate that SEC disgorgement constitutes a penalty within the meaning of 2462. Therefore, when applying

disgorgement, the SEC and courts must follow all of the statutory and constitutional and civil penalties that apply. When the restrictions are applied to the Lynn Smith IRA, the SEC is not entitled to disgorgement regardless of their ability to argue that federal courts may supersede state exemptions.

Having established disgorgement as a penalty subject to 2462, the SEC is subject to the following penalty amounts:

1) Penalty for each violation shall not exceed the greater of $100,000 for a natural person,

2) the gross amount of the pecuniary gain to such defendant as a result of the violation, and

3) additional monetary relief in the form of "equitable relief" under Sarbanes-Oxley and the "Fair Funds provision".

In the case of (1) above, Lynn Smith has already paid disgorgement far in excess of $100,000. In (2) the SEC failed to demonstrate pecuniary gains as required by them bearing the burden of proof, and in (3) the SEC is left under equitable relief to specifically identify and trace those assets as a result of the wrongdoing, which they have not done, nor can they do. The defendant Lynn Smith never had possession of such property or money. In particular, the assets of

her IRA never possessed such property or money, and the SEC would have no ability to trace those particular funds or property to the defendant's IRA account.

The point here is that the restitution was so ordered for losses assumed by investors, not for ill-gotten gains by the defendants. Now in its request for disgorgement from Lynn Smith's IRA the SEC is attempting to circumvent the law which states disgorgement must be specifically identified and traced assets to the wrongdoing. When the SEC is now forced to comply with 2462 in regards to Lynn Smith's IRA, those assets are no longer available.

III

THE SOLE REASON THAT THE SEC HAS LAID CLAIM TO THE ASSETS OF LYNN SMITH BY THEIR OWN STATEMENT IS THAT HER ACCOUNT IS IN FACT A JOINT ACCOUNT WITH DAVID SMITH AND THEREFORE AVAILABLE TO SATISFY DAVID SMITH'S JUDGMENT OBLIGATIONS. LYNN SMITH WILL ARGUE AND DEMONSTRATE THAT THERE IS NO CONCEIVABLE ARGUMENT TO SUPPORT THE ASSERTION THAT LYNN SMITH'S IRA IS A JOINT ACCOUNT WITH DAVID SMITH.

The sole argument that the SEC advanced and the court relied on in its disgorgement order of Lynn Smith's assets was that those assets were in reality jointly owned by David Smith. As regards to Lynn Smith's IRA there is no evidence whatsoever to support that position.

In Judge Sharpe's Decision and Order of 3/30/15 relating to the disgorgement of Lynn Smith's assets, Judge Sharpe states that the court is "considering the SEC's request for disgorgement of profits..." (the SEC has never attempted to identify and trace such profits, and in particular as it relates to Lynn Smith's IRA).

The Order also addresses the disputes surrounding certain assets that remain frozen. The relevant assets include the following: (1) assets held in Lynn Smith's name including (a) a checking account with Bank of America, (b) a stock account maintained at RMR Wealth Management, and (c) proceeds from the sale of a vacation home in Vero beach, Florida. In the Final Judgment as to defendant David Smith (Dkt. 835, filed 6/25/15) the same aforementioned assets were cited and ordered to be applied to David Smith's payment obligations. The Order did not include Lynn Smith's IRA.

In the Final Judgment as to Lynn Smith (Dkt. 837, filed 6/25/15) it was ordered that a list of transfers under Section I, subject to offsets in Section III, the proceeds of the sale of the Sacandaga Lake property, and the assets mentioned in the Judgment Order for David Smith, including the Vero Beach property, the assets of the Smith trust, and the Bank of America account. Again, there was no mention of Lynn Smith's IRA in the Final Judgment Order for Lynn Smith.

Continuing in his Decision and Order of 3/30/15, Judge Sharpe after citing SEC v. Cavanaugh for the court's ability to order equitable relief for ill-gotten gains, went on to state "that alternatively, if an asset belonging to a relief defendant is in reality, also an asset of the defendant", then application of the two-part Cavanaugh test is appropriate. This was the theory that the SEC advanced and the court accepted regarding Lynn Smith's stock account. The Order went on to state that in determining whether a defendant and relief defendant jointly own an asset, "the central inquiry concerns the element of control (implicating) the concept of equitable ownership...". The Order spent considerable time in describing the control David Smith had over Lynn Smith's stock account. No effort was ever made to demonstrate similar control over Lynn Smith's IRA.

The Order further stated, "In addition to the element of control, other factors determine joint ownership:

(1) the length of time the asset was held;

(2) Whether the defendant had an interest and benefited from the asset;

(3) Whether the defendant had transferred assets from his name into the asset;

(4) Whether defendant contributed to acquire the asset initially; and

(5) Whether the defendant ever withdrew any funds from the asset

The SEC has never attempted to apply any of these tests to Lynn Smith's IRA, and if they had they would have failed. Lynn Smith's IRA was of long standing, was solely in her interest, there had never been any transfers, she had contributed initially and all subsequent contributions were from her own salary, and she has never withdrawn any funds.

Judge Sharpe's opinion goes on to state, "Here, the SEC relies entirely on the joint or equitable ownership theory". Thus, the SEC is not alleging any ill-gotten gains, and because there is no plausible theory to support joint ownership with Lynn Smith's IRA, including the very tests outlined by Judge Sharpe, the asset should be released to her immediately.

IV

THE SEC ARGUES THAT AS A RESULT OF THE FINAL JUDGMENT FINDING LYNN SMITH LIABLE FOR A NUMBER OF FRAUDULENT TRANSFERS SHE MADE WITH DAVID SMITH AND THAT ORDERED HER TO DISGORGE THE FUNDS THAT WERE TRANSFERRED. THE DEFENDANT WILL ARGUE THAT THE IRA UNDER ERISSA IS NOT SUBJECT TO LIABILITY FOR THE ALLEGED FRAUDULENT TRANSFERS FOR REASONS STATED BELOW AND THE SEC DISGORGEMENT OF AN IRA IS ONLY AVAILABLE FOR SECURITIES LAW VIOLATIONS, OF WHICH LYNN SMITH HAS NEVER BEEN ACCUSED OR FOUND GUILTY OF.

In a response by the SEC filed 4/12/19 (Dkt 1049) to David Smith's Motion of 2/19/19 to "Modify the Asset Freeze" the SEC attempted to make the argument that "the Final Judgment as to L. Smith found her liable as a defendant for a number of fraudulent transfers she made with D. Smith and ordered her to disgorge the funds that were transferred." However, all of those transfers are in fact "money judgments" that are prohibited from being satisfied by an ERISSA qualified retirement account such as Lynn Smith's IRA. As previously argued, only SEC disgorgement enforcement orders can be ordered by the courts at their discretion to disregard state exemptions afforded retirement accounts. Disgorgement is only eligible when an alleged securities violation can be proven. No such securities violations for Lynn Smith have ever been alleged or proven. Fraudulent transfers are not a securities violation and any resulting judgment is a "money judgment" that cannot be enforced on an ERISSA IRA. Therefore, the alleged fraudulent transfers cannot be disgorged from Lynn Smith's IRA.

CONCLUSION

For the foregoing reasons the Court should decide that the SEC's intentions to include the IRA retirement account of Lynn Smith for disgorgement purposes does not meet the very tests and limitations required.

The "Homestead" exemption should be reconsidered for Lynn Smith's IRA because disgorgement cannot be used to disregard a state exemption unless it meets the test intended - that is a remedy for securities law violations. Since Lynn Smith has never been accused or found guilty of securities law violations it would be unjust to apply disgorgement as a means of usurping the state exemption.

The Disgorgement Order issued by Judge Sharpe stated that the only reason advanced by the SEC to hold Lynn Smith liable was that Lynn and David Smith were joint owners of the assets. In Judge Sharpe's order he cited several reasons for agreeing with the contention of the SEC regarding Lynn Smith's stock account, but the IRA never received similar scrutiny. If it had, the scrutiny would have concluded that the IRA does not meet any of the tests necessary, including the ones Judge Sharpe listed in his order, to deem the assets of the defendant and relief defendant jointly owned.

Even if disgorgement is attempted to be applied to Lynn Smith's IRA it does not meet the restrictions of a "penalty under 2462" where identification and tracing of ill-gotten gains to the defendant's possession are now required as a result of the unanimous Supreme Court Decision in Kokesh v. SEC of June 2017.

Any attempts to hold the IRA liable for the alleged fraudulent transfers fails because these violations are not securities violations and therefore only qualify as "money judgments" which an IRA is exempt from as a qualified ERISSA Trust.

Finally, in the Final Judgments of both David and Lynn Smith (Dkts. 835 and 837 respectively) and in the Decision and Order for Disgorgement issued on 3/30/15, the IRA of Lynn Smith was never listed as an asset to be disgorged.

Lynn Smith, acting pro se, believes that when the Court duly considers the aforementioned, they will correctly decide in favor of the Petitioner and release her IRA retirement account so that she may begin to meet the IRS Required Minimum Distribution and have access to her retirement funds to meet ordinary living expenses.

I trust that the Court will give a fair and careful consideration of the arguments made in this motion.

Respectfully submitted,

Lynn A. Smith

Lynn Smith, pro se

October 1, 2019

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	
v.	:	**10 Civ.457 (GLS/CFH)**
LYNN A. SMITH, ET AL	:	
Relief Defendant,	:	

GARY L. SHARPE

U.S. MAGISTRATE JUDGE

AFFIDAVIT OF RELIEF DEFENDANT LYNN A. SMITH, ACTING PRO SE

LYNN A. SMITH, being duly sworn, deposes and says:

1. On October 1, 2019, I copied Priority Mail remitted the "Motion To Modify the Asset Freeze to Allow the Release of Certain Property" filed with this Court on October 1, 2019 on behalf of relief defendant Lynn A. Smith to the following:

Mr. William J. Brown, as Receiver
Phillips Lytle, LLP
One Canalside
125 main St.
Buffalo, N.Y. 14203

and

Mr. David Stoelting

Attorney for Plaintiff
Room 400
3 World Financial Center
New York, NY 10281

2. On October 1, 2019, I had emailed the "Motion to Modify the Asset Freeze to Allow the Release of Certain Property" filed with this Court on October 1, 2019, to the following:

Mr. William Dreyer, Counsel of Record
Dreyer Boyajian, LLP
75 Columbia Street
Albany, NY 12210
WDreyer@dbls.com
And
Mr. James Hacker
Jones Hacker Murphy, LLP
28 Second Street
Troy, NY 12180
jhacker@joneshacker.com

Respectfully,

Lynn A. Smith

Lynn A. Smith

NEW YORK STATE NOTARY ACKNOWLEDGMENT

THE STATE OF NEW YORK
COUNTY OF Saratoga

On the 27th day of September in the year 2019 before me, the undersigned, personally appeared Lynn A Smith personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Notary Public Signature

Print Paul G Kavanaugh

Title or Office Notary Public

My commission expires: 10/20/2022

Paul G Kavanaugh
Notary Public State of New York
No. 01KA6313446
Qualified in Warren County
My Commission Exp. 10/20/2022

(SEAL)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. **10 Civ.457 (GLS/CFH)**

LYNN A. SMITH, ET AL

Relief Defendant,

GARY L. SHARPE

U.S. MAGISTRATE JUDGE

October 1, 2019

Dear Judge Sharpe,

I respectfully request that the Court grant me permission to represent myself, pro se, in the enclosed matter of the "MOTION TO MODIFY THE ASSET FREEZE TO ALLOW THE RELEASE OF CERTAIN PROPERTY".

I am not financially capable of retaining counsel and I remain in substantial debt to previous counsel that has appeared in this court on my behalf. I believe that I am sufficiently versed in both the facts and the governing law that addresses the Motion.

Respectfully submitted,

Lynn A. Smith

Lynn A. Smith

2 Rolling Brook Dr.

Saratoga Springs, N.Y. 12866

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FROM:
Lynn A. Smith
2 Rolling Brook Dr.
Saratoga Springs, NY
12866

TO:
Hon. Gary Sharpe
United State. District Judge
United State District Court
Northern District of New York
United States Court House
445 Broadway
Albany, N. Y. 12207

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