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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	
Plaintiff,	
v.	**10 Civ. 457 (GLS/DRH)**
McGINN, SMITH & CO., INC., McGINN, SMITH ADVISORS, LLC, McGINN, SMITH CAPITAL HOLDINGS CORP., FIRST ADVISORY INCOME NOTES, LLC, FIRST EXCELSIOR INCOME NOTES, LLC, FIRST INDEPENDENT INCOME NOTES, LLC, THIRD ALBANY INCOME NOTES, LLC, TIMOTHY M. MCGINN, DAVID L. SMITH, LYNN A. SMITH, DAVID M. WOJESKI, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, GEOFFREY R. SMITH, LAUREN T. SMITH, and NANCY MCGINN,	
Defendants,	
LYNN A. SMITH, and NANCY MCGINN,	
Relief Defendants, and	
DAVID M. WOJESKI, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04,	
Intervenor.	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO MCGINN AND SMITH'S MOTION TO COMPEL THE RETURN OF DOCUMENTS

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Plaintiff Securities and Exchange Commission respectfully submits this memorandum of law in opposition to defendants Timothy McGinn and David Smith's motion to compel the SEC to: "(i) cease and desist using documents and information in its possession, custody and control which were obtained by the government's execution of a search warrant against defendants and (ii) return such documents and information to the Department of Justice." Defendants' Motion at 1-2.

PRELIMINARY STATEMENT

Defendants argue that the SEC should cease any review of and return to the Department of Justice ("DOJ") all documents that DOJ seized pursuant to the execution of search warrants, at least until the legality of the search warrants and their execution are decided. Defendants' Br. at 1. Defendants base their argument on the Second Circuit's recent opinion in *Securities and Exchange Commission v. Rajaratnam,* 622 F.3d 159, 2010 WL 3768060 (2d Cir. Sept. 29, 2010). However, *Rajaratnam* is clearly distinguishable and is not "controlling precedent" as defendants argue. Defendants' Br. at 1.

First, *Rajaratnam* dealt with the SEC's right, pursuant to Fed. R. Civ. P. Rule 26 (Rule 26), to compel defendants to produce conversations intercepted by the government pursuant to Title III of the Omnibus Crime Control and Safe Street Act of 1968 ("Title III"). It did not concern search warrant evidence. The Second Circuit held, in part, that the defendants should not be compelled to produce those conversations until the court in a parallel criminal case decided a pending motion to suppress the wiretaps, and the court in the civil case then weighed the defendants' privacy interests in the intercepted conversations against the SEC's need for the intercepted conversations in the civil case.

Although defendants argue that there is no difference between the privacy protections accorded Title III material and the protections for search warrant evidence, Def. Br. at 4-5, in fact the Supreme Court and Congress have clearly imposed far greater restrictions on DOJ's and other government agencies' right to access, use and disclose Title III materials than search warrant evidence. Title III expressly precluded DOJ from sharing the contents of the wiretaps with the SEC in the particular circumstances of the *Rajaratnam* case, which is why the SEC requested the intercepted conversations directly from the defendants pursuant to Rule 26. When Congress wants to limit DOJ's ability to disclose evidence to other government agencies, it explicitly does so. *See, e.g.*, Title III, Section 2517; *see also* Fed. R. Crim. P. Rule 6(e) (limiting DOJ's ability to disclose grand jury material, including to other government agencies). By contrast, the statute governing search warrants, Federal Rule of Criminal Procedure Rule 41 (Rule 41) contains no limitations whatsoever on DOJ's right to share search warrant evidence with other governmental agencies. Indeed, defendants fail to cite even one case in the long jurisprudence of the Fourth Amendment in which DOJ's right to share search warrant materials with other government agencies has ever been questioned.

Second, *Rajaratnam* is also distinguishable because it dealt with a discovery request pursuant to Rule 26, which controls the scope of and limits on discovery between party opponents. Rule 26 has no relevance to DOJ's ability to voluntarily share information with another government agency. Nor is there any other provision in either the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure that limits DOJ's ability to share search warrant evidence with another government agency.

Third, defendants' claim of prejudice because DOJ is allegedly disclosing only inculpatory documents to the SEC is unsupported and meritless, given that the defendants have the right to obtain direct access to all seized documents pursuant to Federal Rule Criminal Procedure Rule 41(g) and have chosen not to do so. Moreover, the SEC has made available to defendants all of the documents it has received from DOJ.

Finally, although the court need not reach this issue, McGinn and Smith have no privacy interests in any business records seized from McGinn Smith and Co., given that that entity was a registered broker-dealer and a regulated investment advisor whose books and records are subject to on demand inspection by the SEC. They also have no privacy expectations or standing as to any documents seized from each other's residence or any documents seized from other unspecified locations and/or safe deposit boxes not under their control.

ARGUMENT

THERE IS NO CONSTITUTIONAL, STATUTORY OR CASE LAW SUPPORT FOR DEFENDANTS' NOVEL ATTEMPT TO RESTRICT DOJ'S ABILITY TO SHARE SEARCH WARRANT EVIDENCE WITH THE SEC

A. Title III Evidence Enjoys Greater Privacy Protections Than Materials Obtained Through Search Warrants

Defendants move for an order requiring the SEC to cease and desist from reviewing, and to return, materials it has received from the United States Attorney's Office for the Northern District of New York (USAO) that were seized pursuant to the execution of search warrants at the offices of McGinn Smith & Co., Inc. (McGinn Smith), various residences of McGinn and Smith, and other unspecified "locations connected to McGinn Smith" and "bank safe deposit boxes." Defendants Br. at 1. Defendants do not dispute the fact that all such materials received by the SEC have been made available by the SEC to the defendants. Defendants' Br. at 3. In fact, in response to defendants' discovery request dated September 17, 2010, the SEC produced

approximately four terabytes of documents on discs to the defendants without cost to them, as well as hard copies of all other documents that the SEC has received from the USAO.

Defendants first incorrectly argue that "there is no difference between the privacy rights implicated in a search and seizure under the Fourth Amendment and those implicated under Title III relating to electronic surveillance." Defendants Br. at 4-5. They then argue that any protections accorded electronic interceptions should automatically apply equally to search warrants. *Id.* Specifically, they contend that because *Rajaratnam* held that defendants could not be compelled to disclose Title III evidence requested pursuant to Rule 26 until at least after a pending motion to suppress the wiretaps in a parallel criminal case was decided, DOJ should be prohibited from voluntarily sharing search warrant evidence with the SEC in this case until the legality of the search warrants are decided. Defendants' Br. at 5-9. Defendants' arguments are baseless.

Defendants' reliance upon *Berger v. New York,* 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347 (1968) for their argument that Fourth Amendment protections apply "equally" to wiretaps and searches of "houses, papers, and effects" is misplaced. Def. Br. at 4. In *Berger*, the Court held that a New York eavesdrop statute that permitted a bug or wiretap to be installed for up to 60 days based only on a showing of "reasonable grounds to believe that evidence of crime might be obtained" was too broad in its sweep and, among other defects, lacked the required particularity as to what crime had been committed, the place to be searched and the persons or things to be seized. *Id.* at 56.

Significantly, the Court further held that more than the ordinary standard of probable cause used to support "conventional warrants' was required. The Court stated that "a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, *with its*

inherent dangers, than that required when conventional procedures of search and seizure are utilized." *Id.* at 60. *(Emphasis added).* The Court noted, for example, that unlike ordinary search warrants, wiretaps are conducted without notice to the multiple individuals affected, can be ongoing for months, and can indiscriminately capture conversations of a wide range of innocent individuals. *Id.* at 59. "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices." *Id.* at 63. A wiretap places an "invisible policeman … in the bedroom, in the business conference, in the social hour". *Id.* at 64-65 (1967) (Douglas, J. concurring). Indeed, in his concurring opinion, Justice Stewart emphasized the need for heightened requirements for electronic interceptions due to their more intrusive nature.

> The need for particularity and evidence of reliability in the showing required when judicial authorization is sought for the kind of electronic eavesdropping involved in this case is especially great. The standard of reasonableness embodied in the Fourth Amendment demands that the showing of justification match the degree of intrusion. By its very nature electronic eavesdropping for a 60-day period, even of a specified office, involves a broad invasion of a constitutionally protected area. Only the most precise and rigorous standard of probable cause should justify such an intrusion.

Id. at 69.

Thus, B*erger* provides no support for defendants claim that all protections afforded electronic interceptions apply equally to search warrants.

Similarly, in *Katz,* the Court simply held that the interception of conversations through a listening device attached to a telephone in a public phone booth was a search and seizure within the meaning of the Fourth Amendment, 354 U.S. at 353, and that the interception without prior judicial authorization violated the Fourth Amendment, *id. at 358-359.* Thus, neither *Berger* nor *Katz* addressed whether the Fourth Amendment requires that all protections afforded electronic interceptions apply "equally" to search warrants.

In 1968, following *Berger* and *Katz*, Congress enacted Title III. Title III contains limitations and restrictions far beyond those imposed on ordinary search warrants. For example, unlike ordinary search warrants, Congress limited the use of electronic surveillance to certain major types of offenses and specific categories of crimes. *See* 18 U.S.C. §2516. Title III also imposed important preconditions to obtaining authorization to intercept conversations that are not applied to ordinary search warrants, including the requirements that only district court judges may issue Title III warrants, requiring a particularized showing of both probable cause and necessity, including an exhaustion of alternative investigative means, and requiring interceptions to remain under the control and supervision of the authorizing court. 18 U.S.C. § 2518(1) and (2).

Congress also imposed strict limitations on the use and disclosure of wiretap materials that are not imposed on disclosure of search warrant materials. For example, Congress authorized felony criminal sanctions for anyone who intentionally uses or discloses the contents of any wiretapped conversations that such person knows or has reason to know was obtained in violation of Title III. 18 U.S.C. § 2511(1)(c) & (d). It also prohibited the disclosure of wiretap materials obtained during a criminal investigation with the intent to obstruct justice. 18 U.S.C. § 2511(1)(e).

Congress also broadly proscribed the use of wiretap information, and any evidence derived therefrom, as evidence "in any trial, hearing, or other proceeding in or before any court . . . or other authority of the United States . . . if the disclosure of that information would be in violation of this chapter." *Id.* § 2515.

Unlike search warrants, Title III also requires that the contents of wiretaps be immediately sealed upon the conclusion of the wiretapping, *id.* §2518(8), and that notice be

provided prior to the use of the wiretaps in any court proceeding, *id.* §2518(9). Violation of Title III's sealing requirements may lead to suppression of the intercepted conversations. *See, e.g., United States v. Gigante*, 538 F.2d 502 (2d Cir. 1976); *United States v. Amanuel*, 418 F. Supp. 2d 244 (W.D.N.Y. 2005).

Title III also imposes a distinct statutory rule of exclusion that applies to both criminal and civil proceedings, *id.,* §§ 2515, 2518(10), and that supplements the judicially fashioned exclusionary rule arising from the Fourth Amendment, *see United States v. Giordano,* 416 U.S. 505, 524 (1974).

Again, unlike search warrants, Title III sets forth distinct rules limiting the use and disclosure of the contents of intercepted communications. Section 2517(1) provides that any law enforcement officer who has legally obtained knowledge of the contents of intercepted communications may disclose such contents to another law enforcement officer only to the extent such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure. Section 2517(2) provides that any law enforcement officer who has legally obtained knowledge of the contents of intercepted communications may use such contents only to the extent such use is appropriate to the proper performance of his official duties. Section 2517(3) provides for the disclosure of such contents while giving testimony under oath at certain proceedings, conditioned upon the presence of the seal required for all wiretap intercepts (Section 2518(8)(a)). Section 2517(5) provides that the contents of intercepted communications relating to offenses other than those specified in the order of authorization may be disclosed at such proceedings only with the authorization or approval of a judge based on a finding that the contents were intercepted in accordance with the provisions of Title III.

No such restrictions apply to the use of evidence obtained pursuant to search warrants, even though Congress could easily have included such protections when it first enacted or subsequently amended Fed. R. Crim. P. Rule 41, which deals with search warrants.

Indeed, the Second Circuit long ago made clear that, through Title III, Congress intended to accord electronic communications protections beyond those privacy interests protected by the Fourth Amendment alone.

> It should be clear by now that the problem of electronic surveillance strikes deep emotional chords in a people whose concern for the protection of privacy – particularly the privacy of words and thoughts - is historic. In Title III [ ] Congress responded to this by balancing the needs of law enforcement against the important public and individual concern for privacy. It authorized electronic surveillance only under the most rigorous, carefully drawn standards.

United States v. Huss, 482 F.2d 38, 52 (2d Cir. 1973).

Unlike search warrant material, there is a "strong presumption against disclosure of the fruits of wiretaps applications." *New York Times*, 577 F.3d at 406. These protections, unlike those applicable to search warrants, even extend to those wiretaps that are legally obtained. *See, e.g. United States v. Cianfrandi,* 573 F.2d 835, 856 (3rd Cir. 1978)("Congress intended to regulate strictly disclosures of intercepted communications, limiting the public revelation of even interceptions obtained in accordance with the Act to certain narrowly defined circumstances.").

The *Rajaratnam* Court itself noted: "[W]e conclude that those [privacy] concerns and the evident desire of Congress to limit disclosures of the fruits even of lawful wiretapping, must be carefully weighed before discovery is ordered." *Rajaratnam,* 622 F.3d at 185. Moreover, the Second Circuit's holding that the SEC's right to access to the wiretaps should have been weighed

against the "relevant privacy interests at stake" was based on its prior holding in *In re Application of Newsday, Inc.,* 895 F.2d 74 (2d Cir. 1990), another Title III case. *Id.* at 177-178.[1]

Title III's protections not only extend beyond the protections accorded search warrant materials, they also encompass interests beyond those protected by the Fourth Amendment. For example, they encompass interests protected by the First Amendment. Its terms are designed to "foster[] private speech," *Bartnicki v. Vopper*, 532 U.S. 514, 545 (2001) which sits at the core of the First Amendment. *See, e.g., Zweibon v. Mitchell,* 516 F.2d 594, 633 (D.C. Cir. 1975)(en banc)(Title III's strict protections "protect the privacy interests of those whose conversations the government seeks to overhear, but also . . . protect free and robust exercise of the First Amendment rights of free speech and association by those who might otherwise be chilled by the fear of unsupervised and unlimited executive power to institute electronic surveillance."). Title III's "special safeguards against the unique problems" posed by wiretapping include enhancing the rights of grand jury witnesses to refuse to testify. *See United States v. Calandra*, 414 U.S. 338, 355 n.11 (1974)(discussing *Gelbard).*

Finally, "[T]he privacy interests of [those] innocent third parties . . . that may be harmed by disclosure of Title III material should . . . weigh[] heavily with the trial judge, since all the parties who may be harmed by disclosure are typically not before the court." *In re New York Times*, 828 F.2d at 116.

Thus, defendants' central argument that "there is no difference between the privacy rights implicated in a search and seizure under the Fourth Amendment and those implicated under Title III" is belied by numerous Supreme Court and Circuit Court statements to the contrary and by the provisions of Title III itself, all of which recognize the need for greater protections for

[1] In *Newsday,* the Court upheld the partial disclosure to a newspaper of information obtained from a wiretap that was contained is a sealed search warrant application.

electronic interceptions, due to the broader intrusions on privacy, than those arising from search warrants. Indeed, although Congress has specifically chosen to restrict DOJ's ability to share Title III evidence with other government agencies, and specifically chosen to restrict DOJ's ability to share grand jury materials with other government agencies (*see* Fed. R. Crim. P. Rule 6(e), it has never chosen to limit DOJ's ability to share search warrant evidence with other government agencies.

Thus, Defendants' argument (Def. Br. at 5-80 that *Rajaratnam's* holding regarding Title III interceptions should apply equally to search warrant evidence fails because, as discussed above, search warrant materials do not enjoy the same elevated constitutional or statutory protections applicable to Title III materials. Furthermore, given that *Rajaratnam* dealt only with Title III interceptions, and not search warrants, it provides no new support for defendants' argument.[2]

B. The *Rajaratnam* Court's Holding Regarding Production Of Title III Evidence Pursuant To Fed. R. Civ. P. Rule 26 Has No Relevance To The USAO'S Ability To Share Search Warrant Evidence With The SEC

Defendants' also rely upon *Rajaratnam* to support their argument that the SEC is only entitled to obtain relevant evidence from the USAO. This reliance is also misplaced. *Rajaratnam* involved a discovery request by the SEC pursuant to Fed. R. Civ. P. Rule 26 seeking intercepted conversations in the possession of the defendants. Rule 26 does not apply to voluntary exchanges of information and evidence between the USAO and the SEC. Accordingly, *Rajaratnam's* holding that the defendants are only obligated to produce relevant intercepted conversations in response to the SEC's Rule 26 discovery request has no relevance to this case, where the USAO has voluntarily shared evidence with the SEC.

[2] On November 24, 2010, the district court judge in the criminal case denied the defendants' motion to suppress the wiretaps.

Rajaratnam arose from a discovery request by the SEC pursuant to Rule 26 that Rajaratnam and his co-defendant Danielle Chiesi disclose copies of wiretapped conversations provided to them by the USAO in a parallel criminal proceeding. The civil and criminal cases involved similar allegations of insider trading. Defendants appealed the district court's order compelling them to disclose all such wiretapped conversations in their possession. The Second Circuit rejected the defendants' argument that Title III prohibits the disclosure of wiretapped conversations by defendants in a civil enforcement proceeding to a civil enforcement agency where the defendants have received those conversations lawfully pursuant to Title III. *Rajaratnam* at 164. However, it further held that the district court clearly exceeded its discretion in ordering the disclosure of "thousands of conversations involving hundreds of parties" prior to any ruling on the legality of the wiretaps and without limiting the disclosure to relevant conversations. *Id.* According to the Defendants, the wiretapped conversations spanned sixteen months, included 18,510 communications involving 550 separate individuals which were intercepted from ten separate telephones. *Id.* at 165.

In placing conditions on the SEC's access to the intercepted conversations, the Court emphasized the "strong privacy interests at stake in connection with the fruits of electronic surveillance." *Id.* at 184. It stated:

> The privacy interests in the instant case merit particular attention given that the disclosure order implicated thousands of conversations of hundreds of innocent parties, and the district court ordered disclosure prior to any ruling on the legality of the interceptions and without limiting the disclosure to relevant conversations.

Id.

The Court also noted that Title III contains specific statutory provisions limiting the proper dissemination and use of lawfully authorized electronic surveillance and not only

prohibits but makes it a crime to intentionally disclose the fruits of illegal wiretaps. *Id.* at 185. *See also* 18 U.S.C. §§2511(1)(c), 2515 and 2518(10)(a).

Thus, the Second Circuit's holding in *Rajaratnam* was not grounded solely in the Fourth Amendment's protection of privacy interests. Rather, it was based upon the heightened constitutional and statutory protections accorded Title III interceptions, given the potentially more intrusive and widespread privacy invasions that arise when the government is permitted to eavesdrop on the private conversations of numerous individuals, including many potentially innocent third parties, in real time and over an extended period of time. Accordingly, *Rajaratnam* provides no support for defendants' argument that the USAO may not share search warrant materials with the SEC until the legality of the warrant has been decided.

Similarly, defendants' reliance upon *Rajaratnam* for their claim that the USAO can only share documents relevant to this action with the SEC (Def. Br. at 6; 8-9) is also misplaced. As noted above, *Rajaratnam* involved a discovery request by the SEC to the defendants pursuant to Fed. R. Civ. P., Rule 26. *Rajaratnam* at 180-184. Rule 26(b)(1) specifically limits such discovery to any non-privileged matter that is relevant to any party's claim or defense and, for good cause shown, any matter relevant to the subject matter involved in the action. Rule 26(b)(2)(C) allows the court to limit even such discovery if, among other reasons, it is unreasonably cumulative or duplicative, can be obtained from some other source that is more convenient, less burdensome or less expensive. Fed. R. Civ. P. Rule 26 is not applicable to this case and there are no other statutory or other limitations placed on the USAO's rights to voluntarily share information in its possession with the SEC.

Defendants fail to cite to even one statute or case, aside from their unfounded reliance upon *Rajaratnam,* to support their novel argument that the USAO is prohibited from sharing

evidence of illegal activity seized from search warrants with other government enforcement agencies until the legality of the warrant is determined. That failure is not surprising. Nothing in Fed. R. Crim. P. Rule 41, which deals with search warrants, prohibits the disclosure of search warrant evidence to the SEC. Similarly, Title 18, U.S.C. §§ 3101-3118, entitled "Chapter 205, Searches and Seizures" contain no prohibition or restriction on the disclosure of search warrant evidence to the SEC.

Moreover, such a limitation would lead to absurd results contrary to public policy. Such a limitation would mean that the USAO could not disclose to the SEC evidence of ongoing, or prior frauds on investors unrelated to the charges in the pending complaint until after a criminal case was brought and after sufficient time had elapsed for the defendants to challenge the warrant. It would also lead to the absurd conclusion that the USAO could not share any search warrant evidence regarding ongoing or prior frauds on investors with the SEC if the SEC did not already have a pending complaint as to which the evidence was relevant. Thus, unless and until the USAO charged individuals criminally, and the defendants chose to move to suppress the search warrant, and the court ruled on the motion, the perpetrators of that fraud could continue their fraud on investors without that evidence being shared with the SEC for the protection of investors. There is no constitutional, statutory or case law basis for any such restrictions on the USAO's ability to share evidence with the SEC and such a restriction would not only unduly hamper legitimate law enforcement efforts but defy common sense.[3]

[3] Also, as a practical matter, most if not all of the documents currently in the possession of DOJ would have been subject to discovery from the defendants pursuant to Rule 26 if the search warrants had not been executed. Defendants should not be able to use the fact that these documents were seized pursuant to a search warrant as a shield, denying the SEC access to documents it would otherwise have been able to obtain through normal discovery.

C. Defendants' Other Claims of Prejudice Are Meritless

Defendants' contention that the "USAO also selectively has been providing arguably inculpatory documents to the SEC" (Def. Br. at 7), is unsupported by any fact. Indeed, given that the defendants admit that they have not yet accessed the four terabytes of documents the SEC has produced to them, Russo Decl. at ¶¶ 5, 7, it is unclear how they can make such an unsupported claim in good faith.

Defendants further contend, again without any factual support, that the USAO has "hand-picked" certain documents that arguably help the SEC's case, while withholding other relevant and potentially exculpatory documents, Def. Br. at 9. Defendants' claims of prejudice are not only unfounded but unwarranted, as they retain the right to obtain copies, or even to seek the return, of all seized documents, either through a motion under Fed. R. Crim. P. Rule 41(g) or by subpoena. Yet, they have chosen not to pursue either remedy. Indeed, defendants seem more interested in depriving the SEC access to documents than they are in obtaining access to the documents for themselves.

D. Defendants Have No Reasonable Expectation of Privacy As to McGinn Smith Documents

Finally, although the court need not address this issue, the defendants have no reasonable expectation of privacy as to the documents seized from McGinn Smith. As a regulated entity, McGinn Smith was required to maintain its books and records for inspection on demand by the SEC. *See* Sections 17(a) and (b) of the Securities Exchange Act of 1934 and rules thereunder; Section 204 of the Investment Advisor Act of 1940, 15 U.S.C. § 80b-4, and Rule 204-2 promulgated thereunder. Inspection of such records does not violate any reasonable expectation of privacy. *See United States v. Szur*, No. S5 97 CR 108, 1998 WL 132942 (S.D.N.Y. Mar. 20, 1998). In *Szur*, the defendant moved to suppress records obtained in

searches by the SEC and NASD as having been seized in violation of his Fourth Amendment rights. The court disagreed:

> The securities industry is subject to pervasive regulation, and, in fact, requires brokers selling securities to make and keep extensive records which must be produced to the SEC upon demand. . . . Thus, to the extent a regulatory agency requires the production of documents to which it would otherwise be entitled under a regulatory and statutory scheme which furthers a substantial regulatory interest, the production of the documents does not violate a defendant's Fourth Amendment right since the "inspection [does] not intrude upon any reasonable expectation of privacy" that a defendant might have.

Id. at *14, citing *United States v. Blocker,* 104 F.3d 720, 726 (5th Cir. 1997).

Numerous other courts have ruled that a person does not have a reasonable expectation of privacy in documents, files, or records that are compiled under, and may be inspected pursuant to, government statutes or regulations. *See, e.g., United States v. Chuang*, 897 F.2d 646, 650 (2d Cir. 1990) ("In view of the pervasive nature of federal regulation of the banking industry, [Defendant], as an officer of the bank, knew that bank documents . . . were subject to periodic examination . . . . The existence of a regulatory scheme necessarily reduces a bank officer's expectation of privacy in his corporate office."); *United States v. Blocker*, 104 F.3d at 728 (in the context of an audit of insurance records, the defendant did not have "any reasonable expectation of privacy" in the records where the investigator "was authorized by statute and by [the defendant] to search [the company's] records"); *McLaughlin v. A.B. Chance Co.*, 842 F.2d 724, 726 (4th Cir. 1988) ("The issue presented is whether . . . an OSHA compliance officer . . . may examine and copy OSHA forms . . . when OSHA regulations require the maintaining of such forms and the production thereof for inspection and copying by a representative of the Secretary of Labor for the purpose of carrying out the provisions of the Act. We hold that [the employer company] had no reasonable expectation of privacy in [the] OSHA forms . . . and the information contained therein"); *United States v. Sorcher*, No. 05-CR-0799, 2007 WL 1160099,

at *8 (E.D.N.Y. Apr. 18, 2007) ("where an entity governed by a regulatory scheme [federal and state education regulations] maintains documents required by that scheme, its owners or operators would have no reasonable expectation of privacy that would protect those documents from seizure by the regulators").

Accordingly, the defendants can have no reasonable expectation of privacy as to the business records of McGinn Smith that were required to be maintained and to which the SEC has the right to inspection independent of any need for a search warrant or subpoena.

They also have no privacy expectations or standing as to any documents seized from each other's residence or any documents seized from other unspecified locations and/or safe deposit boxes not under their control.

CONCLUSION

For all the foregoing reasons, the Court should deny defendants' Motion to Compel in its entirety.

Dated: New York, NY
November 29, 2010

Respectfully submitted,

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