

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

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, AND 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,

**Case No.: 1:10-CV-457
(GLS/DRH)**

Defendants,

LYNN A. SMITH and NANCY McGINN,

Relief Defendants, and

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

Intervenor.

**MEMORANDUM OF LAW IN OPPOSITION TO SEC'S MOTION TO
MODIFY THE ASSET FREEZE TO COMPEL THE SALE OF THE
VERO BEACH PROPERTY AND TO APPOINT THE RECEIVER
TO OVERSEE THE SALE DATED DECEMBER 15, 2010**

Featherstonhaugh, Wiley & Clyne, LLP
Attorneys for Relief Defendant/Defendant
Lynn A. Smith
Albany, New York 12207
Tel. No.: (518) 436-0786

Relief Defendant/Defendant respectfully submits this Memorandum of Law in Opposition to the Securities and Exchange Commission's (the "SEC") Motion to (i) Modify the Asset Freeze to Compel the Sale of Property held in the name of defendant and relief defendant Lynn A. Smith located in Vero Beach Florida (the "Property"); and (ii) to appoint the Receiver to oversee the sale of the Property.

PRELIMINARY STATEMENT

As the Court is well aware, the posture of this case at this point in time is that there exists a freeze of certain assets of Lynn Smith, including the Vero Beach home that is based on an *allegation* that she is an appropriate relief defendant or in the alternative her husband David Smith is a joint owner. Since the freeze order, the record confirms that Lynn Smith has considered selling this property in order to avoid the mounting expenses and the risk of foreclosure on a valuable asset. As well she should, Mrs. Smith still considers this home to be *her* asset and she continues to demonstrate her willingness to maintain her equity interest in that property as this litigation proceeds.

The SEC, on the other hand believes that it is entitled to this asset as if an order of disgorgement had already been rendered. They are taking the position that because Lynn Smith is having second thoughts about selling the property that she now is violating the freeze order by allowing the value to "dissipate" and thereby providing this Court jurisdiction to order the property to be sold involuntarily. Yet at the same time, the SEC has opposed each and every effort on the part of Lynn Smith to free up some of her own money to maintain the asset, thereby placing Mrs. Smith in a proverbial "Catch-22".

Not only does the SEC want the Court to order an involuntary sale, it wants to control every facet of the sale, by appointing the Receiver to effectuate the sale, including

the listing of the home, approving contract terms and price and delineating what constitutes “closing costs”, which according to the proposed order would not even include Home Owner assessments which continue to accrue as liens on the property. Again, the SEC has not secured any right to move on this property other than to freeze Lynn Smith from further encumbering the asset. It had no right to liquidate it when the freeze was first imposed despite its awareness of the existing encumbrances nor does it have that right now simply because Lynn Smith is having second thoughts about selling and certainly about selling it pursuant to the terms and structure currently contemplated by the SEC.

Not only do the facts not warrant the relief being sought by the SEC, the suggested action is offensive to the basic concept of fairness underlying all American Jurisprudence. The suggestion that this Court would order the involuntary sale of a citizen’s property without due process of the law, particularly when that citizen, by the government’s own admission, has no culpability is outrageous. With this application, the SEC has gone beyond being a federal agency charged with regulating the securities industry and has attempted to morph into an enforcement arm of the federal government that seeks to effectuate its purpose without regard to the constitutional rights of its targets.

Accordingly, your Honor should reject this motion with costs.

POINT I

**LYNN SMITH HAS DONE NOTHING TO
DISSIPATE THE VALUE IN THE VERO BEACH
PROPERTY.**

Under the Preliminary Injunction Order, the Smiths must “hold and retain within their control, and otherwise prevent, any...encumbrance...dissipation...or other disposal of any assets...including money, real or personal property[.]” The Vero Beach residence was an asset subject to this original Order and it was known by the SEC then that the property was encumbered by an existing mortgage. At that time, the SEC did not seek to extend the Order to include the involuntary sale of this asset despite its knowledge that it could eventually be subject to foreclosure if the monthly mortgage payments were not timely paid. The likelihood of a foreclosure action was essentially imminent when the SEC sought and obtained an expansive freeze order which encompassed every liquid asset Mrs. Smith could use to maintain the value of that property. Ironically, it is the SEC who was and continues to be responsible for the dissipation of this asset.

It was Mrs. Smith who first presented the idea of selling the property to protect its value and the prospect of foreclosure. She did so to preserve her asset rather than concede it to the government for future disgorgement although it was understood that the proceeds of any sale would remain frozen pursuant to the Court’s Order pending the outcome of the litigation. When negotiations failed to yield an acceptable means in which to effectuate the sale due to the SEC’s uncompromising position to control every aspect of the transaction and appoint the Receiver for such purposes, Lynn Smith has had second thoughts about selling the property. Contrary to the SEC’s position, her decision not to sell the property has had no effect of further dissipating an asset that the SEC

essentially guaranteed would dissipate as a result of how it structured and defended its current asset freeze against Lynn Smith.

In fact, Lynn Smith has allocated what resources have been available to her to at least prevent the property from falling into disrepair and its equity from further deteriorating. She has maintained the insurance, the landscaping, the pool, utilities and pest control. These are the items that enable a house to maintain its fair market value. While it is true that she received \$600,000 in proceeds from the sale of her camp house, it has been impossible for her to maintain the Vero Beach mortgage and other related expenses because of more pressing needs that include essential living expenses as well as the exorbitant cost of mounting a legal defense for both herself and her husband. This however, in no way diminishes her desire to maintain the value of her Property, including staying current on the mortgage. The SEC argues that the only option that will preserve the equity of the Property for the benefit of investors is to enter the proposed order. However, the government has another option which is to relax the freeze so that further dissipation and ultimate foreclosure does not occur.

POINT II

**THE SEC FAILS TO CITE TO A SINGLE
AUTHORITY SUPPORTING ITS REQUEST FOR AN
INVOLUNTARY SALE OF AN ASSET BEFORE A
FINAL JUDGEMENT IS ENTERED.**

The SEC claims that the Court has “inherent authority to order the sale of the Property to preserve the *status quo*” and cites to several cases that stand for the proposition that a court has authority to impose an asset freeze to prevent dissipation and diversion of assets. It is undisputed that a Court has the inherent power to impose an asset freeze which is exactly what has been done in this case. However, the SEC’s current application to the Court is not to impose an asset freeze but rather to compel an involuntary sale of an asset. The cases cited by the SEC do not support any such proposition. Apart from these authorities, the SEC relies on Section 21(d)(5) of the Securities Exchange Act of 1934, which permits the SEC to petition a federal court for any equitable relief that may be appropriate or necessary for the benefit of investors.

Pursuant to the Court’s preliminary injunction order, this asset along with other assets owned by Lynn Smith have been subject to a freeze during the pendency of this case. There has been no finding by a jury or a Court that Lynn Smith is a proper relief defendant nor has there been a finding that David Smith is a joint owner of the Vero Beach Property. While the SEC may not concur, we believe that a jury will find that David Smith is not liable for the securities fraud violations that have been alleged against him, will find that Lynn Smith is not a proper relief defendant and is appropriately the sole owner of the Vero Beach house. Even if it were eventually determined that the ownership of the Vero Beach house is either joint or a tenancy by the entirety, the SEC has yet to suggest or identify any circumstances under which they could reasonably

expect to accede to Lynn Smith's interest in the property. Indeed, the wildest, completely unsubstantiated figure the SEC has put forward in any of its pleadings that could be subject to disgorgement against Lynn Smith as a relief defendant is \$1.8 Million which is less than the amount which has been totally frozen in her stock account.

Based on the foregoing, it is no wonder why the SEC could not point to a single authority to support its current application. Accordingly the Court should dismiss this motion with costs.

POINT III

**FLORIDA'S HOMESTEAD EXEMPTION IS A
VIABLE DEFENSE TO ANY JUDGMENT THAT
THE SEC OBTAINS TO DISGORGE FROZEN
ASSETS.**

Contrary to the position of the SEC, should Lynn Smith become a permanent resident of Florida and successfully apply for the protections under that State's homestead exemption, it is submitted that the Vero Beach Property would not be subject to any final order of disgorgement. Should she elect to move, this is a viable defense that she is entitled to.

The SEC cites to SEC v. AMX, Int'l, Inc., et al., 872 F. Supp. 1541, 1544 (N.D. Tex. 1994) for the proposition that a defendant who is subject to a disgorgement order is not entitled to rely on the state law homestead exemption. However, this case is easily distinguishable from the present matter. Initially we need to review an earlier appeal to the 5th Circuit in that same case. In SEC v. AMX, Int'l, Inc., 7 F.3d 71 (5th Cir. 1993), a defendant subject to a disgorgement order plead an inability to pay with his home being his only worthy asset. The issue before the Court was whether the SEC's disgorgement order was exempt from collection under the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. sec. 3001 *et seq.* (the "FDCPA"). The FDCPA permits an individual debtor to exempt from collection by federal officials any property that is exempt under the state law of the debtor's domicile. Id. In AMX, Int'l, Inc. the defendant who was subject to the disgorgement order resided in Texas which exempted from debt collection the defendant's homestead. The 5th Circuit held that an order of disgorgement order does not constitute a debt under the FDCPA and therefore does not preclude a court from considering the homestead in determining whether the defendant had met his burden of

establishing financial inability. On remand the district court concluded that the defendant disgorge his homestead in partial satisfaction of the disgorgement order.

In this case, the homestead exemption arises directly from the State of Florida's Constitution. Article X, Section 4 provides:

- (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon...the following property owned by a natural person:
 - (1) A homestead...limited to the residence of the owner or the owner's family.

Pursuant to this provision, homestead property is protected with a shield against third party creditors which would include any judgment rendered against Lynn Smith or any subsequent order of disgorgement. Unlike the *AMX, Int'l, Inc.* case whether an order of disgorgement is a debt or not is irrelevant since the Florida homestead exemption applies to all judgments and decrees.

Accordingly, Lynn Smith has a constitutional right to protect her property under Florida law should she elect to become a permanent resident. She should not therefore be deprived of that right in exchange for an expedient and illegal forfeiture of this real property asset.

CONCLUSION

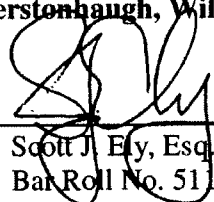
Wherefore, for all of the foregoing reasons, the Lynn Smith respectfully requests that the Court deny the SEC's motion in its entirety.

Dated: January 7, 2011

Respectfully submitted,

Featherstonhaugh, Wiley & Clyne, LLP

By: _____


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LYNN A. SMITH, DAVID M. WOJESKI, Trustee
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U/A 8/04/04, GEOFFREY R. SMITH, LAUREN
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**Case No.: 1:10-CV-457
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DAVID M. WOJESKI, Trustee of the David L.
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Intervenor.

AFFIDAVIT OF DEFENDANT AND RELIEF DEFENDANT LYNN A. SMITH

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

1. I respectfully submit this affidavit in opposition to the motion by Plaintiff, Securities and Exchange Commission (the "SEC") seeking an Order to Modify the Asset Freeze to Compel the Sale of the Vero Beach Property and to Appoint the Receiver to Oversee the Sale dated December 15, 2010.

2. I am the sole owner of property located at 906 Orchid Point Way, Vero Beach, Florida. ("Vero Beach Property" or "Property").

3. My husband and I purchased the Vero Beach Property on July 2, 2001 and initially held title as husband and wife.

4. We purchased the Property for approximately \$1.4 million with a down payment of approximately \$400,000 and the remainder was financed through a 30-year mortgage. At some point, the original mortgage was refinanced at a lower rate. We made regular, consistent monthly mortgage payments up to and until the SEC successfully froze my husband's assets as well as my own. I believe that under our current mortgage, we have twenty-one years left before paying off this debt in full. Our current monthly mortgage payment is \$6,188 per month.

5. The down payment was primarily financed by me through my stock account.

6. Since our purchase of the Vero Beach Property, we have used it continuously as our vacation home during the winter months. While we have never lived there on a full time basis, we maintained and treated the Property like our primary home. We have never rented the Property or otherwise allowed it to be encumbered except for the primary mortgage and various liens referenced to in this affidavit.

7. In September, 2009, at my insistence, the Property was transferred to my name alone and I remain the sole owner of the Property.

8. Despite the current asset freeze, I have attempted to maintain the value of the Property by keeping up with the home's general maintenance including its

landscaping (\$475/month), pest control (\$100/month), pool cleaning (\$86/month), utilities (\$530/month), and insurance (\$796/month).

9. In addition to these general maintenance costs, there are other expenses associated with the Property including taxes 1,875/month and monthly dues of \$1,375 and various additional annual assessments totaling \$1,060. I am currently in arrears for dues and mandatory homeowner assessments. From my understanding of the Association rules, these arrears attach in the form of a lien on the Property which is subordinate to my primary mortgage.

10. Because of the asset freeze, I have been unable to keep up with the mortgage payments and believe those payments to be in arrears by approximately 5 months.

11. At this point in time, I have not decided to sell the Vero Beach Property due in part because I am considering moving there and making it my permanent residence. If I do decide to move, I would consider seeking a homestead exemption pursuant to Florida law.

12. Because of my uncertainty about selling the Property, the SEC apparently believes it has the right to force the sale of my Vero Beach Property. The SEC is demanding that the receiver who has been appointed to manage and marshal the assets of McGinn Smith & Co. and various other related entities and who has no jurisdiction over my personal assets be delegated by this Court to control the sale, including the price, the choice of realtor and the terms of the sale. I object to this overly zealous and premature attempt to liquefy an asset of mine under complete government control before I or my husband has been afforded the opportunity to defend ourselves against the myriad of

unsubstantiated allegations of the SEC and before a jury has reached a decision on the merits of this case. The SEC is acting as if its case against me and my husband is a “fait accompli” and that it has some type of right to exercise disgorgement even before there has been a finding of liability let alone an assessment of an appropriate disgorgement figure from a relief defendant or whether my Vero Beach Property is even appropriate for such relief.

13. I do not take responsibility for the fact that the Property is in jeopardy of being foreclosed. The fact that the Property is in danger of foreclosure is solely the result of the SEC’s unyielding position, with the Court’s acceptance of that position, in refusing to free up any assets from my stock account that would enable me to maintain the status quo of this asset. Both my husband and I have demonstrated our commitment to preserve as best we can the value of this home as required under the Court’s preliminary injunction order. If I had any ability to maintain this asset so as to avoid the prospect of foreclosure or the filing of additional liens on the Property, I most certainly would as both my husband and I have done in the past. The only reason why it is in jeopardy of foreclosure is because of the SEC’s unwillingness to free up any money to help preserve this asset.

14. I received a total of \$600,000 from the sale of my camp on Great Sacandaga Lake to the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04. Unfortunately, due to mounting legal bills associated with the defense of both myself and my husband in this civil suit, the bulk of the proceeds from that sale went to pay for legal expenses. I used the remainder of these proceeds to fund our primary living expenses over the past few months. As a result, I am left with very little to pay off the amounts

that are owed on the Vero Beach Property and certainly not enough to pay the continuing accrual of these costs. I do not apologize for using this money to defend my rights or for my husband's defense. I believe that we have a right to defend ourselves in a court of law and how I decided to allocate the proceeds of the sale of my camp is irrelevant to the actions that the SEC is now proposing to take against my Vero Beach home. Surely I have not suddenly awakened in a Kafkaesque country where I have been deprived of the basic right to defend myself against my accusers before action is taken against me.

15. As stated previously, I am uncertain at this time whether I want to sell the Vero Beach Property. However, if I did decide to sell, I reject the notion that the receiver should control that process. I do not believe that the receiver can adequately represent my interests since he has consistently demonstrated his support of the SEC. As the "client" to any transaction involving the sale of this Property that I still retain in my name, I have the right to choose the agents that I believe will pursue the transaction in my best interests. After all, until a jury determines that my husband has done something wrong and that he has profited from it and moreover that those profits have come to me without consideration, the Property still remains my asset.

16. In addition, I do not feel that the receiver is familiar with the particular details of this Property nor has any connections with realtors who can properly market its sale which is supported by his own declaration. I on the other hand have lived in this community for nine years and know that Orchid Island Realty specifically markets the development where the Property is located and, in fact, has offices that are on the premises. I believe that this realtor will maximize the true market value of the Property if

I ever decide to sell. If the house were to be listed, I would seek an initial selling price of \$1.9 million with the hopes of an actual sales price of \$1.7 million.

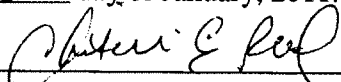
17. I agree as I have when negotiating the terms of any sale of this asset that any net proceeds from the sale of this Property, if it were to ever occur based on my terms, would remain as a frozen asset pending the outcome of the civil litigation against my husband, and me.

18. I have no intention of conceding my rights in the Vero Beach Property to the SEC unless and until a jury determines that my husband is libel for the illegal conduct alleged and the Property is deemed an asset subject to disgorgement. Nor do I intend to concede or surrender any rights that I may have under the Florida homestead exemption should I decide to move to Florida permanently and make the Vero Beach Property my primary residence. If I do decide to sell, I have no intention of conceding my rights to effectuate such sale to a third party.

WHEREFORE, I respectfully ask this Court to deny the SEC's motion for an Order to Modify the Asset Freeze to Allow the Sale of the Vero Beach Property and to Appoint the Receiver to Oversee the Sale.


LYNN A. SMITH

Sworn to before me this
10th day of January, 2011.


Notary Public – State of New York



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SECURITIES AND EXCHANGE COMMISSION

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Intervenor.

DECLARATION OF JAMES D. FEATHERSTONHAUGH

I, JAMES D. FEATHERSTONHAUGH, pursuant to 28 USC §1746, declare under penalty of perjury, the following facts:

1. I am an attorney duly admitted to practice before this Court and represent Lynn A. Smith, a Relief Defendant and Defendant in the instant proceeding. I make this declaration in opposition to Plaintiff's motion seeking an Order to Modify the Asset Freeze to Direct the Sale of the Vero Beach Property and to Appoint the Receiver to

Oversee the Sale dated December 15, 2010. I make this declaration based on my personal knowledge, court records, and on occasion, where noted, on information and belief.

2. Lynn Smith holds title to the Vero Beach Property which has been the subject of a freeze order since the Plaintiff's Temporary Restraining Order was first granted at the initiation of this litigation.

3. Because of the freeze order which also includes Lynn Smith's stock account, Mrs. Smith has been unable to stay current on certain expenses related to the home including a monthly mortgage payment of \$6,188.00.

4. Lynn Smith has considered placing the property on the market for sale. Due to the pending freeze order, I began to negotiate the terms of a possible sale through a modification of the freeze order with the SEC, on behalf of my client.

5. Apparently the SEC believes there is some probative value in disclosing the substance of these negotiations in seeking the involuntary sale of this asset, apparently concluding that neither Rule 408 of the Federal Rules of Evidence nor professionalism apply to them. However, since this door has been opened, I did attempt to negotiate a mutually acceptable agreement between my client and the SEC, specifically with plaintiff's counsel, Kevin McGrath, concerning the sale of this asset. Before an agreement could be reached, plaintiff's counsel David Stoelting interjected with a proposed order that sought to appoint the receiver as the individual the SEC wanted to effectuate the sale. While I did not have any immediate objection to Mr. Brown taking on this role as I expressed in the string of e-mails that were attached to the SEC's motion, my client has expressed to me her strong objection to this arrangement. I

reiterated these objections to the Court and the SEC during the pre-motion conference on December 9, 2010. Consequently, Mrs. Smith is reconsidering her intentions to sell her Vero Beach home, which as the owner of this property continues to be her absolute right.

6. Now, unbelievably, the SEC seeks to force a sale before a trial has been held, a judgment has been rendered, an order of disgorgement has been directed against the Vero Beach property or Lynn Smith's status as a relief defendant has even been determined. In my 40 years of practicing law, I have never been witness to such an outrageous and unabashed governmental attempt to persuade a court to forego a citizen's most basic fundamental right of due process.

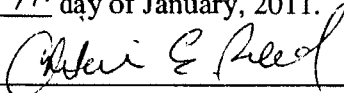
7. The SEC is the party primarily responsible for the potential diminishment of value of the Vero Beach property due entirely to its unwillingness to free up monies from the current asset freeze that would enable Mrs. Smith to preserve the equity that remains in this asset. It should not now be permitted to use its own shortsighted actions to support an involuntary sale of this asset before my client has her day in court.

8. Not only does the SEC seek the Court's permission to liquefy this asset in violation of Mrs. Smith's rights, it also suggests that they have the right to trample on Mrs. Smith's rights derived under the Florida Constitution which provides a homestead exemption for those who take up permanent residence in that State. If she should elect to move into the Vero Beach house and make that her permanent residence, she could become eligible for this exemption and, in such event, it appears clear to me that not even an order of disgorgement could touch this asset.

WHEREFORE, the Court should dismiss without further consideration the SEC's attempt to force the sale of the Vero Beach property in violation of Mrs. Smith's constitutional rights along with costs and attorney's fees associated with this application.


JAMES D. FEATHERSTONHAUGH

Sworn to before me this
7th day of January, 2011.


Notary Public – State of New York

