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.	:	

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
MOTION TO COMPEL COMPLIANCE WITH NONPARTY SUBPOENAS

SECURITIES AND EXCHANGE COMMISSION
3 World Financial Center
New York, NY 10281
(212) 336-0174

September 9, 2011

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Plaintiff Securities and Exchange Commission respectfully submits this reply memorandum of law in further support of its motion to compel compliance with document and testimony subpoenas served on April 7 and June 21, 2011, on nonparties Martin S. Finn and his law firm, Lavelle & Finn LLC.

ARGUMENT

In what amounts to an untimely motion for reconsideration of a ruling made in June 2010, Lynn Smith's brief narrowly focuses on the letter dated January 28, 2009, from attorney Martin Finn to the Smiths.[1] L. Smith argues that the Court erred in admitting the Finn letter into evidence fifteen months ago; therefore, the motion to compel based on the crime-fraud exception should be denied. Smith Br. at 4-5.

For the following reasons, L. Smith's arguments are without merit.

First, the Finn letter that L. Smith focuses on constitutes only one piece of the considerable evidence and judicial findings supporting probable cause. *See* Dkt. 338-1 at 3-6 (summarizing evidence and findings in support of probable cause). The SEC has submitted more than enough evidence, even independent of the Finn letter, to support a finding of probable cause to believe a fraud has been committed and that the communications were in furtherance of the fraud. The Finn letter constitutes evidence that the Smiths sought legal advice on how to move assets from joint ownership into Lynn's name, but this fact is not disputed and in any event has been established independently.

Second, L. Smith's argues that "but for the privileged communication in the form of the Letter, the SEC would have no basis whatsoever to believe that there was a [attorney-client] communication in the first place." L. Smith Br. at 6. This assertion is not correct because there

[1] David Smith submitted no opposition papers to the SEC's motion.

is admissible evidence regarding this meeting apart from Finn's letter. In an e-mail dated January 14, 2009, D. Smith stated that he was "meeting with my estate attorney tomorrow afternoon and Lynn and I have to shift money around between us." Dkt. 46-1 Ex. 5. The meeting referenced in this e-mail appears to be the same meeting referred to on Finn's 1/28/09 letter to the Smiths. And the identity of the Smiths' estate planning attorney and the general subject matter of the meeting are not privileged. Indeed, the privilege generally only covers actual communications between client and attorney, not the identity of the participants in a meeting, the purpose of a meeting, or whether any action was taken after a meeting.[2] The 77-item privilege logs, which L. Smith and D. Smith have provided to the Court and to the SEC, provide additional evidence of the communications between the Smiths and Finn as far back as May 2006.

Third, under Local Rule 7.1(g), L. Smith had fourteen days to file a motion for reconsideration of the Court's June 8, 2010 ruling admitting the Finn letter into evidence, but failed to do so. Her request that the Court now "reconsider this point of law," L. Smith Br. at 5, therefore, is untimely. In addition, L. Smith argues that the Court has the discretion to revisit earlier rulings, and cites several cases generally holding that "[o]rdinarily, findings of fact and conclusions of law made in a preliminary injunction proceeding do not preclude reexamination of the merits at a subsequent trial." *ILGO v. Guiliani*, 143 F.3d 638, 644 (2d Cir. 1998). However, the proposition that "findings of fact and conclusions of law" made after a preliminary

[2] L. Smith accuses the SEC of "seeking to vitiate the most sanctified privilege known to American jurisprudence." L. Smith Br. at 3. However, "[c]ontrary to modern yet ill-informed perceptions, the attorney-client privilege is often '[n]arrowly defined, riddled with exceptions, and subject to continuing criticism.' Grand as the privilege stands in our legal lexicon, it is nonetheless narrowly defined by both scholars and the courts. The attorney-client privilege does not give broad, unfettered latitude to every communication with a lawyer, but is to be narrowly construed to meet this narrowest of missions." *SEC v. Ryan*, 747 F. Supp.2d 355, 366-67 (N.D.N.Y. 2010) (citations omitted).

injunction hearing do not preclude reexamination of the merits of a case at trial does not support L. Smith's argument that a ruling on a privilege waiver can be revisited 1 ½ years later, particularly where no new facts or legal arguments are advanced to challenge the validity of the initial ruling.

Fourth, even if the Court had excluded the Finn letter from the preliminary injunction hearing, it still can be properly considered by the Court on this motion. If the Finn letter were still protected by the privilege, it nevertheless would have been included on a privilege log and reviewed by the Court during *in camera* review.

Fifth, L. Smith argues that most of the evidence presented in support of the crime-fraud motion "only relate[s] to David [Smith]." L. Smith Br. at 7. There is sufficient evidence, however, of L. Smith's conduct to support a probable cause determination, including her status as a defendant in a securities fraud case in 2003 that required a $200,000 settlement payment; her involvement in the creation of the David and Lynn Smith Trust and the Annuity Agreement in 2004; her conduct in failing to disclose that Agreement in this case; her knowledge that McGinn Smith had been named in a number of customer arbitrations in 2009 and concern that "we could lose our assets"; and her involvement in the transfer of numerous assets to her sole ownership. Dkt. 338-8, at 30; 338-1 at 306.

Sixth, L. Smith tries to confuse the timeline of events by arguing that the Smiths' consultation with Finn occurred before the Smiths knew of the FINRA investigation. L. Smith Br. at 10. The evidence, however, shows the opposite: the meeting with Finn took place one week after FINRA sent a letter to the Smiths' home asking D. Smith to appear for an on-the-record interview. Dkt. 338-8 at 35-36.

Finally, L. Smith seeks to downplay the significance of the 2003 complaint naming L.

Smith as a defendant, which led to a $200,000 payment to the plaintiff, by arguing that the allegations were baseless. Whether or not the allegations in the complaint were without merit, however, L. Smith does not dispute that she was a defendant in that case, that the case arose from her husband's securities business, and that $200,000 was paid to settle it. That evidence, along with the other evidence set forth in the SEC's motion (Dkt. 338-1 at 3-6), supports a finding that the transfers of assets from 2004 onward were made with intent to hinder, delay or defraud present or future creditors.

CONCLUSION

Plaintiff respectfully requests that the Court grant its motion to compel compliance with the Finn Subpoenas.

Dated: New York, NY
September 9, 2011

Respectfully submitted,

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