UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

No. 10-CV-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; and DAVID L. SMITH; LYNN A. SMITH; NANCY McGINN; GEOFFREY R. SMITH; LAUREN T. SMITH; FINRA AND THE FINRA EMPLOYEES; and GEOFFREY R. SMITH, Trustee of David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04.

Defendants.

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DAVID R. HOMER
U.S. MAGISTRATE JUDGE

MEMORANDUM-DECISION AND ORDER

Presently pending is the motion of plaintiff Securities and Exchange Commission ("SEC") for an order compelling non-parties Martin S. Finn ("Finn") and the law firm of Lavelle & Finn, LLP ("Lavelle & Finn") to comply with two subpoenas served on Finn and one served on Lavelle & Finn on April 7 and June 21, 2011 (collectively "the subpoenas") seeking production of the records of defendants David L. Smith and Lynn A. Smith. Dkt. No. 338. The Smiths have objected to the subpoenas on the ground that the records and information sought are protected from disclosure by their attorney-client privileges and the work product doctrine. Dkt. Nos. 373, 411, 412, 415, 416. The SEC contends that even if such protections apply, the records and information sought are excepted from their coverage by the crime-fraud exception and the waiver doctrine. Dkt. Nos. 338-1, 375. The Lavelle & Finn documents at issue have been submitted for ex parte, in camera review. Upon completion of that review and for the reasons stated below, the SEC's motion is granted in part and denied in part.

I. Background

A. The SEC's Claims

For a more complete description of the background of this action, see Mem.-Decision & Order filed May 9, 2011. Dkt. No. 321 (district court's decision denying motions to dismiss of certain defendants); Mem.-Decision & Order filed Nov. 22, 2010 (Dkt. No. 194) ("MDO II") at 2-4, 8-23; and Mem.-Decision & Order filed July 7, 2010 (Dkt. No. 86) ("MDO I") at 3-12, 31-41. As relevant to the pending motion, defendants Timothy M. McGinn ("McGinn") and David L. Smith formed McGinn, Smith & Co., Inc. ("MS & Co.") in 1981 with a principal place of business in Albany, New York. MDO I at 3. Through its own employees and through related entities, MS & Co. offered financial services to clients, including investment advice, stock brokerage services, and investments in securities which it sold. Id. Lynn Smith is married to David Smith. Id. In 2004, David and Lynn Smith created the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 ("Trust") for the benefit of the Smiths' two adult children. Id. at 3, 11-12. The SEC was created, inter alia, to regulate the purchases and sales of securities and acts to enforce compliance with laws and regulations governing such transactions. See 15 U.S.C. § 78a et seq.

On April 20, 2010, the SEC commenced this action by filing a complaint alleging that McGinn, David Smith, and their company defrauded investors of over $80 million through violations of § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a); § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); Rule 10b-5 under the 1934 act, 17 C.F.R. § 240.10b-5; and related provisions. Compl. (Dkt. No. 1) at ¶¶ 7-12. To preserve defendants' assets for the benefit of investors in the event it prevails here, the SEC

simultaneously sought and was granted a temporary restraining order ("TRO") (1) appointing a receiver to take possession of defendants' assets and of MS & Co. and its related entities, (2) freezing defendants' assets pending the outcome of this action, (3) freezing the assets of Lynn Smith, (4) ordering verified accountings, and (5) granting related relief. Dkt. Nos. 4, 5.

B. The Subpoenas and the Lavelle & Finn Documents

During pretrial proceedings, the SEC has contended, and produced evidence, that David and Lynn Smith at various times took steps to shield their assets from the reach of the SEC, other regulators, disgruntled investors, and other creditors. For example, in 2004, the Smiths created a trust of $4 million which purported to be irrevocable and for the sole benefit of their two children but which included a private agreement for the Trust to pay annual annuities of almost $500,000 to the Smiths beginning eleven years later. See, e.g., MDO II at 8-13. In 2008-09, as regulators and investors began examining more closely the activities of David Smith and his various business ventures, the Smiths transferred in to Lynn Smith's name alone certain property they had previously owned in both their names and Lynn Smith opened a checking account solely in her name for the first time in over forty years of marriage. See, e.g., MDO I at 7-12.

In this connection, the SEC served the subpoenas on Finn and Lavelle & Finn for testimony and documents related to the Smiths' financial and estate planning. Dkt. Nos. 338–3 - 5. The Smiths separately asserted the attorney-client privilege and other protections and Finn and Lavelle & Finn declined to comply with the subpoenas on the grounds asserted by the Smiths. Dkt. No. 338-6. Together, the subpoenas required the

production of all documents maintained by Lavelle & Finn concerning their representation of the Smiths. Dkt. No. 338-3 - 5. The Smiths separately served privilege logs on the SEC identifying the documents withheld from production and the bases for withholding them. See L. Smith Letter-Br. dated Aug. 31, 2011 (Dkt. No. 415) (filed under seal); D. Smith Letter-Br. dated Aug. 31, 2011 (Dkt. No. 416) (filed under seal); D. Smith Supp. Letter-Br. dated Oct. 26, 2011 (Dkt. No. 411) (filed under seal); L. Smith Supp. Letter-Br. dated Oct. 26, 2011 (Dkt. No. 412) (filed under seal).[1] The present motion followed.

II. Discussion

The Smiths assert that the documents sought by the SEC are protected from disclosure in major part by the attorney-client privilege and the work product doctrine. The SEC contends that to the extent that any documents are protected by the attorney-client privilege, they are excepted from its protection by the crime-fraud exception and by waiver. Further, it contends that the work product doctrine is inapplicable here.

A. Legal Standard

1. Attorney-Client Privilege and Crime-Fraud Exception

The Federal Rules of Civil Procedure allow for broad discovery demands so long as

[1]An initial privilege log was prepared and served by the Smiths based on the documents disclosed to them by Lavelle & Finn. See L. Smith Letter-Br. dated Aug. 31, 2011; D. Smith Letter-Br. dated Aug. 31, 2011. Thereafter, Lavelle & Finn located and disclosed additional documents to the Smiths and the Smiths then served supplemental letter-briefs and a supplemental privilege log listing five additional documents. See D. Smith Supp. Letter-Br. dated Oct. 26, 2011; L. Smith Supp. Letter-Br. dated Oct. 26, 2011. Reference herein to the Smith's privilege log will be to the supplemental privilege log attached to their October 26, 2011 letter-briefs.

the information requested is relevant and not privileged or otherwise limited by a court order. Fed. R. Civ. P. 26(b)(1). "The attorney-client privilege is the oldest of the privileges for confidential communications . . . [designed] to encourage full and frank communication between attorneys and their clients . . . ." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). Communications are deemed confidential if:

> (1) ... legal advice of any kind is sought, (2) from a professional legal advisor in his or her capacity as such, (3) the communication relates to that purpose, (4) made in confidence, (5) by the client, and (6) are at his or her insistence permanently protected, (7) from disclosure by the client or the legal advisor, (8) except if the protection is waived.

Trudeau v. New York State Consumer Protection Bd., 237 F.R.D. 325, 335-36 (N.D.N.Y. 2006) (citations omitted); see also In re Richard Roe, Inc., 68 F.3d 38, 39-40 (2d Cir. 1995) ("Roe I") (quoting United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961)). "The burden of establishing the . . . privilege, in all its elements, always rests upon the person asserting it." Lugosch v. Congel, 219 F.R.D. 220, 236 (N.D.N.Y. 2003). Thus, the burden of demonstrating the applicability of the privilege here rests with defendants.

"The crime-fraud exception removes the privilege from those attorney-client communications that are relate[d] to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct." United States v. Jacobs, 117 F.3d 82, 87 (2d Cir. 1997) (internal quotation marks and citations omitted); Chevron Corp. v. Salazar, 275 F.R.D. 437, 451 (S.D.N.Y. 2011). This exception serves "to assure that the 'seal of secrecy' between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." United States v. Zolin, 491 U.S. 554, 563 (1989) (internal quotation marks and citations omitted). The party invoking the exception bears the burden of demonstrating (1) facts establishing probable cause to

believe that a fraud or crime has been committed and (2) "the communications in question were in furtherance thereof." Jacobs, 117 F.3d at 87.[2]

The showing of probable cause must suffice to convince "'a prudent person' as constituting 'a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof.'" In re John Doe, 13 F.3d 633, 637 (2d Cir. 1994) (quoting In re Grand Jury, 731 F.2d 1032, 1039 (2d Cir. 1984)). This minimal standard is satisfied by demonstrating that it is more likely than not that a crime or fraud was committed. See Illinois v. Gates, 462 U.S. 213, 235 (1983); Locke v. United States, 7 Cranch 339, 348 (1813) (Marshall, C.J.) ("[T]he term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation.... It imports a seizure made under circumstance which warrant suspicion."); A.I.A. Holdings, S.A. v. Lehman Bros., Inc., No. 97 Civ. 4978(LMM)HBP, 1999 WL 61442, at *5 (S.D.N.Y. Feb. 3, 1999). If this requirement is satisfied, the court may then opt to conduct an ex parte, in camera inspection of the communications in question. Zolin, 491 U.S. at 572; Jacobs, 117 F.3d at 87.

The court must then determine whether the communications in question were "in furtherance of" the crime or fraud." Roe I, 68 F.3d at 40. By comparison to the more relaxed probable cause standard of the first prong, the "in furtherance of" standard is more stringent and focuses on the intent of the client. See Jacobs, 117 F.3d at 88 (describing the standard as "narrow and precise"). The moving party's burden is generally made more

[2]The crime-fraud exception is equally applicable to the work product doctrine. See Roe I, 68 F.3d at 40 n.2; A.I.A. Holdings, S.A. v. Lehman Bros., Inc., No. 97 Civ. 4978(LMM)HBP, 1999 WL 61442, at *4 (S.D.N.Y. Feb. 3, 1999).

difficult by the fact that, as here, that party must meet the requirement without access to the communications in question and in reliance on the court's ex parte, in camera review. See, e.g., In re Richard Roe, Inc. II, 168 F.3d 69, 70-71 (2d Cir. 1999) ("Roe II"). It is not sufficient to meet this requirement that a communication may appear to constitute relevant evidence to establish the commission of a crime or fraud. Id. Rather, the communication or attorney work product itself must have been in furtherance of the crime or fraud. Id. Moreover, to satisfy the "in furtherance of" requirement, there must be probable cause to believe that the communication in question was intended at the time of its making to facilitate or conceal the crime or fraud. Id. (citations omitted). Thus, communications with an attorney before actions were taken would likely lead to the conclusion that such communications were not in furtherance of a crime or fraud, but communications after may compel a different conclusion. See Roe II, 168 F.3d at 71-72 (taking steps to defend a law suit not in furtherance of a crime or fraud unless moving party shows that defense was baseless or conducted in a manner to further the crime or fraud); Jacobs, 117 F.3d at 88-89; Roe I, 68 F.3d at 40-41 (gathering cases).

2. Work Product Doctrine

The work product doctrine is codified in Fed. R. Civ. P. 26(b)(3) , which states in pertinent part as follows:

> (A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

> (i) they are otherwise discoverable under Rule 26(b)(1); and
>
> (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
>
> (B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

Rather than a privilege, the doctrine creates a form of qualified immunity from discovery for documents within its scope. Chiasson v. Zapata Gulf Marine Corp., 988 F.2d 513, 514 n. 2 (5th Cir. 1993); Diamond State Ins. Co. v. Rebel Oil Co., Inc., 157 F.R.D. 691, 699 (D. Nev.1994). Its application is governed by federal rather than state law. In re Combustion, Inc., 161 F.R.D. 51, 52 (W.D. La.1995). Its limited protection serves to prevent exploitation of the efforts of another party in preparing for litigation, see Diamond State Ins. Co. v. Rebel Oil Co., Inc., 157 F.R.D. at 698-999, and to permit a party to prepare for trial without fear that its thought processes will be disclosed to another party. See Redvanly v. NYNEX Corp., 152 F.R.D. 460, 463-64 (S.D.N.Y.1993).

A party asserting the protection of the doctrine bears the initial burden of showing that the documents in question fall within the scope of the doctrine. Ward v. CSX Transp., Inc., 161 F.R.D. 38, 40 (E.D.N.C. 1995). Material falls within the scope of the doctrine if it satisfies three criteria. First, the material must be a document or tangible thing. Second, it must have been prepared in anticipation of litigation. Third, it must have been prepared by or for a party or its representative. Bartley v. Isuzu Motors Ltd., 158 F.R.D. 165, 167 (D. Colo. 1994).

B. Lavelle & Finn Documents

The privilege log served by Lavelle & Finn lists eighty-three separately numbered documents, including attachments. Dkt. Nos. 411, 412. No document was contained in Privilege Log Document Number 39. Dkt. Nos. 411, 412. Neither David nor Lynn Smith contends that nine of those documents remain protected from disclosure by any privilege[3] and those documents have already been released to the SEC. There are five documents for which Lynn Smith asserts a claim of privilege but for which David Smith does not.[4] All claims of privilege rest on the attorney-client privilege except that both David and Lynn Smith also assert the work product doctrine as to Document 15 and Lynn Smith, but not David Smith, asserts that doctrine as to Document 3. Dkt. Nos. 411, 412.

David and Lynn Smith have satisfied their burden of demonstrating that the Lavelle & Finn documents fall within the scope of the attorney-client privilege, the work product doctrine, or both unless otherwise noted below. Thus, the burden shifts to the SEC to demonstrate that those documents are excluded from those protections by either the crime-fraud exception or the waiver doctrine.

1.Crime-Fraud Exception

a. Probable Cause

The eighth cause of action in the SEC's second amended complaint alleges that David Smith, Lynn Smith, and others transferred assets with the intent to defraud creditors.

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[3]Privilege Log Document Numbers 5, 14, 38, 43, 53, 59, 59.1, 61, and 77. Dkt. Nos. 411, 412.

[4]Privilege Log Document Numbers 51, 60, 64, 65, 76. Dkt. Nos. 411, 412.

Second Am. Compl. (Dkt. No. 334) at ¶¶ 206-11. The SEC contends[5] that probable cause to believe that David and Lynn Smith committed this alleged fraud is demonstrated by the following facts:[6]

• Two offerings in September 2003 and January 2004 raised a total of $40 million and by August 2004 when the Smiths created the Trust, the liabilities of the two offerings exceeded the Smiths' assets. Dkt. 87 at 62-63 (Testimony SEC accountant.

• David Smith, Lynn Smith, and others were named as defendants in a securities fraud suit, Meyers v. Integrated Alarm Services Group, Inc., et at. No. 03 CV 9748 (S.D.N.Y. 2003). Dkt. 103-2 -41 (complaint in Meyer v. McGinn Smith, et at). The complaint asserted twenty-three causes of action and sought $3 million in damages for each claim. The case was settled in 2004 by the payment of $200,000 to the plaintiff. Dkt. No. 103-2, ¶¶ 41-43, Ex. 6.

• David Smith acknowledged that his fraudulent investment schemes could lead to financial ruin. In an undated, handwritten "personal confession," Smith wrote, inter alia, that "I am overwhelmed by the thought of the financial losses[.]" Dkt. 103-2, ¶ 51, Ex. 14.

• In 2003 and early 2004, the SEC's Broker-Dealer Inspection Program ("BDIP") conducted an examination of MS & Co. In a letter to David Smith from the BDIP dated February 26, 2004, Smith was advised of several "deficiencies and/or violations of law." Dkt. 103-2, ¶ 52, Ex. 15.

• The creation of the Trust in August 2004, funded with $4.5 million, and the "Private

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[5]See SEC Mem. of Law (Dkt. No. 338-1) at 3-6.

[6]Lynn Smith, but not David Smith, challenges the SEC's assertion that these facts constitute probable cause. See Dkt. Nos. 373 at 8; 416 at 2.

Annuity Agreement" were designed to shelter assets from the Smiths' present and future creditors, and the Smiths went to great lengths to prevent the disclosure of the Annuity Agreement, in order to hide their interests in the Trust. MDO II at 20 n.l7.

• In an e-mail dated January 14, 2009 to McGinn, David Smith stated, in reference to Finn, 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.

• David Smith lied under oath about his assets. As this Court noted, "David Smith testified [before FINRA] that he and his wife had maintained separate finances for twenty years[.]" MDO I at 24-26.

• A letter dated January 28, 2009, from Finn to the Smiths refers to the Smiths' "asset protection objectives" and summarized "the proposed transfer of assets we recently discussed." Dkt. No. 338-9. Lynn Smith testified that she recognized the letter and recalled receiving it. Dkt. No. 88 at 81. The assets referenced in this letter as potential transfers to Lynn Smith are a David L. Smith Lifetime QTIP Trust; a $410,000 note receivable; and David Smith's interests in Capital Center Credit Corp. and Mr. Cranberry LLC, an affiliated MS & Co. entity. Id. The letter from Finn also refers to "three asset ownership worksheets" that were apparently attached to the original letter but that have not yet been produced. These worksheets show "your assets as they are currently owned," "the first set of transfers to be made immediately," and a third worksheet showing ownership of assets six months after "the initial transfers." Id. Finn also warned the Smiths that if they are sued by creditors "these transfers will be scrutinized to determine if they were fraudulently conveyed" and that "to avoid these transfers from being characterized as fraudulent conveyances," they "must not have actual intent to delay or defraud creditors." Id. The letter concluded with Finn

inviting the Smiths to "contact me with any questions or if you need assistance with the transfers." Id.

• Lynn Smith stated that "[w]e went [to Finn] to protect our assets. That's why I went to an estate lawyer." Dkt. No. 338-8 at 20. She testified that the meeting with Finn also included discussions regarding the Trust: "I know we went to a meeting with our estate planner ... I spent the afternoon there and we tried to do the best we could with setting up this irrevocable trust for our kids." Dkt. No. 338-7 at 77-78. Lynn Smith also testified that one purpose of the January 2009 meeting was to "talk[] about an irrevocable trust for our children." Dkt. No. 88 at 82. Lynn Smith also testified that a transfer of $326,000 from a David Smith account to her stock account was pursuant to advice received from Finn: "Marty Finn ... instructed Dave to put this amount [$326,000] in my account rather than his, and then we were going to put that into the fund, the trust fund." Dkt. No. 338-7 at 65. She also stated that "I'm just going along with what our estate planning lawyer told us to do[.]" Id.

• The Smiths consulted with Finn about the Vero Beach house. Although it appears that Finn initially advised the Smiths to keep the house in joint ownership, the Smiths rejected this advice. Lynn Smith testified that "I had been wanting to put the [Vero Beach] house in my name, but there was an estate planning lawyer [Martin Finn] who said we should keep it jointly. And that was about four years ago. And then I insisted that it be put in my name because I paid for it." Dkt. No. 88 at 13-14.

• In a prior decision in this case, the Court found that by early 2009, "David Smith faced the distinct possibility that his assets could be seized to pay judgment awarded to investors." MDO I at 36-37. The Vero Beach house and the checking account "were treated no differently after the 2009 transfers and were at all time used jointly by the Smiths for their

mutual benefit." Id. As a result, "the SEC has demonstrated a likelihood of success in proving that these assets were jointly owned by David Smith and that the 2009 transfers into Lynn Smith's name alone were solely for the fraudulent purpose of shielding David Smith's assets from seizure." Id. The Court later found that the Smiths purpose in creating the Trust "was to protect the assets of the Trust to insure their existence when the Annuity Agreement payments were to commence and not simply to protect those assets for the use of [their] children." MDO II at 21.

These facts suffice to demonstrate that (1) as to the Trust and the private annuity agreement and (2) after 2007 and continuing at least to April 20, 2010, David and Lynn Smith embarked on a plan to shield their assets from creditors, their efforts to do so increased as disgruntled investors and regulatory agencies focused more intently on the activities of David Smith and his associates, and included the transfer of assets held jointly by David and Lynn Smith into their children's names or into Lynn Smith's name alone.[7] Such facts satisfy the minimal standard of probable cause to believe that David and Lynn Smith engaged in various fraudulent conveyances with respect to the Trust and the private annuity agreement and after 2007 to carry out this plan. The SEC has, therefore, met the first requirement of the crime-fraud exception.

b. In Furtherance of Crime or Fraud

As to the documents for which either David or Lynn Smith asserts a claim of privilege, a review of those documents indicates that many are relevant to the SEC's claim

[7]See also pages 24-25 & n.10 infra.

that the Smiths fraudulently conveyed assets to shield them from creditors. Such documents may demonstrate that the Smiths took steps during the period in question to transfer title and control of their assets to individuals and entities other than David Smith to achieve this purpose as well as other more legitimate purposes such as tax avoidance, estate planning, and the like. In the circumstances presented here, the mere fact that the Smiths consulted with an attorney such as Finn specializing in those areas may be probative of the Smiths' efforts to transfer and convey assets. However, as discussed supra, relevance alone is insufficient to satisfy the second prong of the crime-fraud exception. That prong requires a greater showing that the communications in question reflect that they were made in furtherance of the Smiths' asserted fraud. As to those communications:

- **Documents 1-3**. These are two e-mail messages within Lavelle & Finn concerning the defense of this action and several telefax transmissions, all dated in August 2010, almost four months after this action was commenced. Nothing in the content of any of these documents indicates that they were intended to further any crime or fraud. Accordingly, the SEC's motion as to these documents is denied.[8]

- **Document 4**. This is one-page of handwritten notes regarding certain assets of the Smiths created after January 2007 but otherwise undated. Nothing in the document indicates an intent to further a crime or fraud. The SEC's motion as to this document is

[8]Lynn Smith also contends that this item is protected by the work product doctrine. Portions of the item appear to include the mental impressions of Lavelle & Finn and those portions would also be protected under that doctrine. However, because the item is protected completely by the attorney-client privilege and is not subject to the crime-fraud exception, the scope of the work product protection as to this item need not be determined.

denied.

- **Document 6**. This is a one-page receipt dated April 26, 2010 from Lynn Smith's counsel confirming receipt from Lavelle & Finn of the documents listed therein. The date, sender, and receiver compel the conclusion that this document was not created in furtherance of a crime or fraud. The SEC's motion as to this document is denied.

- **Documents 7, 11 & 16**. This is a transmittal e-mail from Lavelle & Finn to David Smith dated June 22, 2009 attaching a letter dated January 28, 2009 from Finn to David and Lynn Smith concerning their recent discussions. See subsection (B)(2) infra.

- **Document 8**. This is a one-page memorandum to the files from Finn dated March 15, 2010 concerning a telephone conversation with David Smith on that date. It appears that Smith sought legal advice regarding the Trust. It appears from the memorandum, however, that in seeking the advice, David Smith failed to disclose to Finn the existence of the Annuity Agreement and that its existence was a material fact in obtaining the legal advice he sought. See, e.g., MDO II at 20-23. Thus, probable cause exists to believe that advice sought here by David Smith and given by Finn were in furtherance of a fraudulent conveyance as described above in subsection (B)(1). The SEC's motion as to this document is granted.

- **Document 9**. This is one page of handwritten notes dated March 15, 2010 by an unidentified author referring to the Smiths. The document contains what appears to be references to certain transactions involving assets of the Smiths. See MDO I at 10, 36-37 ("[T]he SEC has demonstrated a likelihood of success in proving that these assets were jointly owned by David Smith and that the 2009 transfers into Lynn Smith's name alone

were solely for the fraudulent purpose of shielding David Smith's assets from seizure."). It is probable, therefore, that the references in these notes to such a transfer reflects communications in furtherance of a fraudulent conveyance. Accordingly, the SEC's motion as to this document is granted.

- **Document 10**. This is a one-page memorandum to the file from Finn dated June 22, 2009 concerning a conversation with David Smith on the same date. Given the date of the memorandum and the fact that it concerns transferring title to assets then held in David Smith's name to Lynn Smith alone, there is probable cause to believe that the communication was in furtherance of the allegedly fraudulent conveyances. See, e.g., MDO I at 36-37; MDO II at 20 n.17. Accordingly, the SEC's motion as to this document is granted.

- **Document 12**. This is a legal newsletter dated June 18, 2009 containing no indicia that it was intended to further any crime or fraud. The SEC's motion as to this document is denied.

- **Documents 13, 17, & 19**. These are a list of the Smiths' assets dated January 2009 and two separate one-page copies with handwritten notations whose authorships are unknown. Viewed together, these documents refer to the transfer of title to certain of the Smiths' assets. Given the dates and subject matter, it thus appears probable that these communications were in furtherance of the alleged fraudulent conveyances. The SEC's motion as to these documents is granted.

- **Documents 15, 23, 24, & 34**. These are printouts of statutes from a computerized legal research database and legal articles from various publications, they do not appear to

be in furtherance of any crime or fraud,[9] they fall within the scope of attorney work product, and the SEC's motion as to these documents is denied.

- **Documents 18 & 21**. These are two versions of a memorandum to the files from Finn dated January 9, 2009 concerning advice to the Smiths on transferring title to their assets. From the date and subject matter of this communication, it appears probable that it was intended to further the alleged fraudulent conveyances. Accordingly, the SEC's motion as to these documents is granted.

- **Document 20**. This is an undated single page of handwritten notes regarding legal research on the conveyance of assets. Given the subject matter, it appears probable that the communication was intended to further the alleged fraudulent conveyances. Accordingly, the SEC's motion as to this document is granted.

- **Document 22**. This is an unsigned copy of David Smith's 2007 federal tax return. It contains no indication of any matter in furtherance of any scheme or fraud. The SEC's motion as to this document is denied.

- **Documents 25 & 27**. These are a two-page letter from David Smith to Finn dated January 7, 2009 and its three-page attachment. The letter refers to the conveyances of title to certain jointly held assets of the Smiths. Given the date and subject matter of the letter, it appears probable that the communication was in furtherance of the allegedly fraudulent conveyances. Accordingly, the SEC's motion as to these documents is granted.

- **Document 26**. This is a one-page summary of deposits to one of the Smiths' accounts between May 2007 and October 2008. Nothing in the communication appears

[9]One document contains limited handwritten notations by an unknown author, but those notations make no reference to any matter directly involving the Smiths.

related to any crime or fraud. Accordingly, the SEC's motion as to this document is denied.

- **Documents 28, 30, & 31**. These are three one-page Asset Ownership Worksheets for the Smiths, one dated December 2008 and two dated November 2006. Unlike the January 2009 worksheet for the Smiths, these communications contain nothing related to any alleged crime or fraud. Compare Documents 13, 17, 19, & 28. Accordingly, the SEC's motion as to these documents is denied.

- **Document 29**. This is an undated one-page e-mail from Finn to David Smith. It refers to the transfer of assets between the Smiths and, therefore, it is probable that this communication was made in furtherance of the allegedly fraudulent conveyances. The SEC's motion as to this document is granted.

- **Document 32**. This is a one-page memorandum to the files from Finn dated November 19, 2008 concerning a conversation with David Smith. The subject matter makes no reference to any asset transfers and contains no other indication that the communication was in furtherance of any crime or fraud. The SEC's motion as to this document is denied.

- **Documents 33 & 82**. These are two one-page virtually identical Lavelle & Finn interoffice memoranda dated December 4, 2008 and August 24, 2011 to Finn concerning various laws. They do not contain any indication that the communications were made in furtherance of any crime or fraud. The SEC's motion as to these documents is denied.

- **Document 35**. This is two pages of handwritten notes dated November 19, 2008 by unknown authors concerning various matters. The documents contain no information which would suggest that the communications were made in furtherance of any crime or

fraud. The SEC's motion as to this document is denied.

- **Document 36**. These are e-mails to and from David Smith and a Lavelle & Finn employee dated November 27, 2006. They contain no indication that the communications were made in furtherance of any fraud. The SEC's motion as to this document is denied.

- **Document 37**. This is one page of handwritten notes by an unknown author dated November 22, 2006. It contains no indication that it was made in furtherance of a crime or fraud. The SEC's motion as to this document is denied.

- **Document 40**. This is a one-page message to David Smith from Finn dated February 21, 2007 containing no indication that the communication was in furtherance of any crime or fraud. The SEC's motion as to this document is denied.

- **Documents 41**. This contains the same message as Document 40 plus a one-page letter to the Smiths from Finn dated February 7, 2007. Neither contains any indication that the communications were in furtherance of any crime or fraud. The SEC's motion as to this document is denied.

- **Documents 42 & 47**. These are a two-page memorandum from Finn to David and Lynn Smith dated February 6, 2007 and a memorandum to the files from Finn dated December 11, 2006. They contain no indication that they were made in furtherance of any crime or fraud. The SEC's motion as to these documents is denied.

- **Documents 44 & 46**. These are a total of four pages of handwritten notes dated in January and February, 2007 by unknown authors. Nothing in the notes indicates that they were made in furtherance of any crime or fraud. The SEC's motion as to these documents is denied.

- **Document 45**. This is an e-mail from a Lavelle & Finn paralegal to David Smith dated January 18, 2007 and contains no indication that it was made in furtherance of any crime or fraud. The SEC's motion as to this document is denied.

- **Document 48**. This is an interoffice memorandum dated November 27, 2006 and contains no indication that it was made in furtherance of any crime or fraud. The SEC's motion as to this document is denied.

- **Document 49**. This is an e-mail from Finn to David Smith dated November 27, 2006 and contains no indication that it was made in furtherance of any crime or fraud. The SEC's motion as to this document is denied.

- **Document 50**. This is a three-page letter from Finn to David and Lynn Smith dated November 16, 2006 and contains no indication that it was made in furtherance of any crime or fraud. The SEC's motion as to this document is denied.

- **Document 51**. This is a one-page financial statement for David and Lynn Smith dated October 2006. There are no contents or omissions indicating that it was made in furtherance of a crime or fraud. The SEC's motion as to the document is denied.

- **Document 52**. This is a one-page letter from David Smith to Finn dated November 8, 2006 with two pages of enclosures. This communication contains no indication that it was made in furtherance of any crime or fraud. The SEC's motion as to this document is denied.

- **Document 53.1**. This is one page of handwritten notes undated and by an unknown author. It contains no indication that it was made in furtherance of any crime or fraud. The SEC's motion as to this document is denied.

- **Document 54**. This is a two-page Lavelle & Finn form entitled "Schedule of Agents" for David and Lynn Smith which is undated. It contains no indication that it was made in furtherance of any crime or fraud. The SEC's motion as to this document is denied.

- **Document 55**. This is a one-page letter from David Smith to Finn dated October 5, 2006 and contains no indication that it was made in furtherance of any crime or fraud. The SEC's motion as to this document is denied.

- **Document 56**. This is a three-page letter from Finn to David and Lynn Smith dated May 24, 2006 regarding the terms of the Smiths retention of Lavelle & Finn and countersigned by David and Lynn Smith on October 3, 2006. It contains no indication that it was made in furtherance of any crime or fraud. The SEC's motion as to this document is denied.

- **Document 57**. This is a one-page memorandum to the files from Finn dated May 23, 2006 concerning a meeting with David Smith of the same date. The first paragraph refers to a private annuity agreement. Given this reference and the date of the communication, it is probable that this communication was in furtherance of allegedly fraudulent conveyances. The remainder of the document contains no indication that those paragraphs were made in furtherance of any crime or fraud. Accordingly, the SEC's motion as to this document is granted but Lavelle & Finn may redact the final three paragraphs of the document before production to the SEC.

- **Document 58**. This is two pages of handwritten notes by an unknown author dated May 23, 2006. The communication does not appear to contain any indication that it was

made in furtherance of any crime or fraud. The SEC's motion as to this document is denied.

- **Documents 60-76**. These are a QTIP Trust, wills, powers of attorney, living wills, health care proxies, and a life insurance trust variously in the names of David and Lynn Smith. All are dated in 1997 and 2007. They contain no indication that they were made in furtherance of any crime or fraud. The SEC's motion as to these documents is denied.

- **Document 78**. This is a one-page blank checklist for estate planning documents. It contains no indication that it was made in furtherance of any crime or fraud. The SEC's motion as to this document is denied.

- **Documents 79 & 80**. These are executive summaries of the Smiths' wills, are seven pages each, and are undated. They contain no indication that they were made in furtherance of any crime or fraud. The SEC's motion as to these documents is denied.

- **Document 81**. This is a draft of a QTIP trust for Lynn Smith dated January 2007. It contains no indication that it was made in furtherance of any crime or fraud. The SEC's motion as to this document is denied.

- **Document 83**. These are the billing records from Lavelle & Finn for David and Lynn Smith from 2006 through August 2010. It appears probable that given the dates and contents, the entries for the following dates were made in furtherance of allegedly fraudulent conveyances: 1/9/09, 1/12/09, 1/13/09, 1/14/09, 1/15/09, 1/26/09, 1/28/09, and 3/15/10. The SEC's motion as to all entries for those dates is granted and, therefore, Lavelle & Finn shall disclose this document to the SEC and may redact from that disclosure all entries except those for the dates listed herein.

2. Waiver

Documents 7, 11, and 16 are different copies of a letter from Finn to David and Lynn Smith dated January 28, 2009. Beginning in 2008, MS & Co. came under investigation by the Financial Industry Regulatory Authority (FINRA).[10] See MDO I at 5-6. During that investigation, MS & Co. and David Smith disclosed the January 28, 2009 letter to FINRA authorities without claiming the protection of any privilege. Dkt. No. 87 at 16-17. When the SEC offered this letter in evidence during the evidentiary hearing on June 9, 2010 on its motion for a preliminary injunction, Lynn Smith, but not David Smith, objected to its use by the SEC on the ground that its use against her was protected by her attorney-client privilege. Id. at 17-19, 21. Lynn Smith's objection to the admission on the ground of privilege was overruled, the letter was admitted in evidence, and Lynn Smith was questioned bout the letter during her testimony . Id. at 22; Dkt. No. 88 at 79-83. The decision on the SEC's motion for a preliminary injunction was filed on July 7, 2010. MDO I. The SEC now contends that David and Lynn Smith waived any privilege as to the letter when David Smith disclosed it during the FINRA proceedings in 2009. SEC Mem. of Law (Dkt. No. 338-1) at 10-11. David Smith concedes the waiver of his privilege. Dkt. No. 416

[10]FINRA was created by statute in 2007 as the only officially registered national securities association. Nat'l Ass'n of Sec. Dealers, Inc. v. S.E.C., 431 F.3d 803, 804 (D.C. Cir. 2005). "By virtue of its statutory authority, [FINRA] wears two institutional hats: it serves as a professional association, promoting the interests of [its] members ... and it serves as a quasi-governmental agency, with express statutory authority to adjudicate actions against members who are accused of illegal securities practices and to sanction members found to have violated the Exchange Act or [SEC] regulations issued pursuant thereto." Id. (citing 15 U.S.C. § 78o-3(b)(7)). In its self-regulatory role, FINRA requires members to arbitrate disputes with clients, an arbitration may result in an award of damages to a client against a member, and FINRA may investigate the conduct of a member and impose sanctions. See Karsner v. Lothian, 532 F.3d 876, 880 (D.C. Cir. 2008).

at 4. Lynn Smith does not, renews the objection she made during the preliminary injunction hearing, and contends that the Court should reverse the ruling it made at that hearing. L. Smith Mem. of Law (Dkt. No. 373) at 2-5.

As to Lynn Smith's contention, she filed an appeal of MDO I and that decision was affirmed. See Smith v. S.E.C., 432 Fed.Appx. 10 (2d Cir. Aug. 8, 2011). On that appeal, Lynn Smith failed to raise as an issue that the Court erred in finding that there had been a waiver of the privilege as to the letter and admitting it in evidence against Lynn Smith. See L. Smith Opening Brief, 2011 WL 199425 (2d Cir. filed Jan. 13, 2011); L. Smith Reply Brief, 2011 WL 2678128 (2d Cir. filed June 29, 2011). The law of the case doctrine holds "that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Pepper v. United States, 131 S. Ct. 1229, 1250 (2011) (quoting Arizona v. California, 460 U.S. 605, 618 (1983)). The doctrine informs the exercise of a court's discretion but does not bar reversing a prior holding where a court is convinced that its prior holding was clearly erroneous. Id. at 1250-51. Here, the ruling during the preliminary injunction hearing was not clearly erroneous and, moreover, Lynn Smith failed to challenge that ruling on her appeal. Accordingly, under the rule of the case doctrine, the Court adheres to its prior ruling that the Smiths' claims of privilege as to the January 28, 2009 letter have been waived and the SEC's motion as to Documents 7, 11, and 16 is granted.

The SEC further contends that the Smiths' waiver of privilege as to the January 28, 2009 letter operates as an implied waiver of their privilege as to all communications between them and Lavelle & Finn. SEC Mem. of Law at 10-11. The Second Circuit has held that "a waiver may be implied in circumstances where it is called for in the interests of

fairness. [F]airness considerations arise when the party attempts to use the privilege both as a shield and a sword." In re Sims, 534 F.3d 117, 132 (2d Cir. 2008) (internal quotation marks and citations omitted).

> The key to a finding of implied waiver . . . is some showing by the party arguing for a waiver that the opposing party relies on the privileged communication as a claim or defense or as an element of a claim or defense. The assertion of an "advice-of-counsel" defense has been properly described as a "quintessential example" of an implied waiver of the privilege.

In re County of Erie, 546 F.3d 222, 228 (2d Cir. 2008); see also In re Bilzerian, 926 F.2d 1285, 1292-94 (2d Cir. 1991).

The SEC has failed to meet its burden of demonstrating that the Smiths have raised advice-of-counsel as a defense to any fraudulent conveyance claim. For example, during the preliminary injunction hearing, Lynn Smith testified that certain assets jointly held with David Smith were transferred into her name alone in 2009 contrary to the advice of Finn, not because of it. See Dkt. No. 88 at 76-83. The SEC has offered no sufficient evidence to demonstrate that at any point in the litigation of this action, either David or Lynn Smith claimed to convey any asset in reliance on Finn's advice and, therefore, no sufficient basis exists to find that David or Lynn Smith made any implied, at issue, or subject matter waiver of all communications between themselves and Lavelle & Finn. Accordingly, the SEC's contention that the Smiths have waived their attorney-client privileges for all communications between the Smiths and Lavelle & Finn must be rejected.

III. Conclusion

For the reasons stated above, it is hereby

ORDERED that the SEC's motion to compel Lavelle & Finn and Martin Finn to comply with the subpoenas served upon them is:

1. **GRANTED** as to Documents 7-11, 13, 16, 17, 18-21, 25, 27, 29, 57 (with redactions), and 83 (with redactions), and Lavelle & Finn shall produce copies of such documents to the SEC on or before **November 30, 2011** unless otherwise ordered;

2. **DENIED** as to all other documents at issue;

3. **GRANTED** as to the deposition subpoena ad testificandum to Finn with the scope of his testimony limited consistent with this opinion and the documents ordered disclosed; and

4. Counsel for Lavelle & Finn shall contact the chambers of the undersigned to arrange for return to Lavelle & Finn of the documents submitted for ex parte, in camera review, and counsel for Lavelle & Finn shall maintain such documents pending completion of the litigation of this action or an order of any court of competent jurisdiction.

DATED: November 15, 2011

David R. Homer
U.S. Magistrate Judge