

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

GEOFFREY R. SMITH, 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
THE MOTIONS TO RELEASE CERTAIN ASSETS FROM THE ASSET FREEZE
BY DEFENDANTS TIMOTHY M. MCGINN AND DAVID L. SMITH**

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Plaintiff Securities and Exchange Commission (the “SEC”) submits this Memorandum of Law in opposition to the motions by defendants Timothy M. McGinn (“McGinn”) and David L. Smith (“Smith”) to release assets from the asset freeze to pay for their attorneys’ fees and costs.

PRELIMINARY STATEMENT

The motions by defendants Smith and McGinn for relief from the asset freeze so that they can advance fees to their counsel in a parallel criminal proceeding should be denied. In this action, the SEC has alleged a massive securities fraud. Investor losses approximate \$130 million. The Court froze the defendants’ assets to protect defrauded investors in the event of a final judgment in favor of the SEC. The court already has found that the “record to date demonstrates that the total amount of investors’ funds obtained through fraud by defendants dwarfs the value of the assets frozen by the SEC for the benefit of such investors.” (Dkt. No. 277 (MDO, dated Feb. 2, 2011, denying motion by Iseman Cunningham for fees), at 4-5).

The defendants’ motions should also be denied because they do not show that, without access to the frozen funds, they would be unable to retain counsel of their choice. In addition, the frozen funds that the defendants seek to have released from the asset freeze are tainted by the fraud. Finally, the SEC and the Court cannot make a determination now whether the defendants’ requests for fees and costs are reasonable. If the Court concludes that additional evidence is necessary to determine whether a particular asset is tainted by the fraud, the SEC requests that the Court hold an evidentiary hearing before releasing any funds from the asset freeze.

STATEMENT OF FACTS

Procedural History

On April 20, 2010, the SEC commenced this action alleging that defendants McGinn and Smith, and entities they controlled, engaged in a wide-ranging securities fraud. On the same day, the Court entered a temporary restraining order freezing the defendants' assets and appointing a receiver over the corporate assets. (Dkt. No. 5.) Investor losses approximate \$130 million. *See* Declaration of Kerri L. Palen, dated Feb. 24, 2012 ("Palen Decl.") at ¶ 3. The amount owed to investors is substantially higher than the funds that have been frozen or are in the receivership. *See* Dkt. No. 425 (Second Report of Receiver, filed November 16, 2011, noting that receivership bank accounts had an aggregate balance of \$8,197,217.11 as of November 4, 2011.)

On July 7, 2010, after a three-day evidentiary hearing, the Court granted the SEC's motion for a preliminary injunction continuing the asset freeze over the assets of defendants Smith and McGinn, finding that the SEC had demonstrated a substantial likelihood of success on the merits of its claims against the defendants. (Dkt. No. 86, at 30-31.) The Court also continued the asset freeze over a stock account in the name of David Smith's wife, Lynn Smith (the "Stock Account"). In its decision, the Court found that the Stock Account had received ill-gotten gains to which Lynn Smith (as a relief defendant) had no right. (*Id.* at 31-33.) The Court further stated that because the fraudulent payments were "commingled with potentially legitimate funds, separating the legitimately held funds in the Stock Account and the checking account from the fraudulently obtained funds would be nearly impossible." (*Id.* at 32.) The Court also found in the alternative that the freeze over the Stock Account should be continued under a theory of joint ownership because "David Smith enjoyed unfettered control over the [Stock Account]." (*Id.* at 9, 34-36.) In the July 7 decision, the Court denied the SEC's motion

for a preliminary injunction as to a trust created by David and Lynn Smith (the “Trust”). The Court later refroze the Trust’s assets on the SEC’s motion for reconsideration. (Dkt. No. 194.) The Second Circuit affirmed the Court’s decision. *Smith v. SEC*, 432 Fed. App’x 10 (2d Cir. Aug. 8, 2011).

There has been extensive motion practice in this action, including three appeals to the Second Circuit Court of Appeals. Discovery was completed on December 16, 2011. During discovery, the SEC took the depositions of 23 witnesses, including Smith and McGinn, who both appeared for their depositions and testified. On January 26, 2012, Smith and McGinn were charged in a 30-count Indictment with conspiracy, mail fraud, wire fraud, securities fraud, and filing false tax returns.

Alleged Grounds for Relief from the Asset Freeze

Defendants Smith and McGinn now for the first time seek relief from the asset freeze. They both claim, with no supporting documentation apart from their own statements, that without relief from the asset freeze in this action they will be unable to pay their attorneys’ fees in the criminal action. They each seek release of personal assets that they claim are not tainted by the fraud. Neither Smith nor McGinn seek release of any receivership assets.

Smith. Smith declares that he currently has “no source of income or unrestrained assets.” (Dkt. No. 440-2 at ¶ 5.) He seeks a release from the asset freeze of \$300,000 to pay his attorneys. (Dkt. No. 440-1 at 3.) In his accompanying memorandum of law, Smith states that he seeks to release \$300,000 from the “Smith family assets” and that “[a]mong the assets Mr. Smith is asking this Court to consider releasing are Lynn Smith’s stock account [the Stock Account] or liquid cash assets used by the receiver.” (*Id.*) Smith defines the “Smith family assets” in paragraph 7 of his declaration to include the Stock Account, the Trust’s assets, his and Lynn

Smith's retirement accounts, the Vero Beach property, the Saratoga Springs residence, a life insurance policy for Lynn Smith and a life insurance trust, for which Lynn Smith is the beneficiary. Smith also includes a letter dated February 9, 2012, signed by his wife's attorney, stating that she approves the use of \$300,000 of her funds related to the Stock Account's investment in Pine Street Capital for Smith's defense. (Dkt. No. 440-2, Ex. A.)

McGinn. McGinn declares that his only sources of income are the income from his self-employment as a sales representative for a company identified as Total Merchant Services, his social security benefits, and his wife's unemployment benefits which total \$5,051 per month. He claims that his living expenses are \$4,500, which leaves only \$551 per month to pay attorneys' fees and costs. (Dkt. No. 439-2, at ¶¶ 5-9.) He seeks the release of 10 specific assets, including real and personal property, a bank account and a retirement account, that he estimates have a total likely value of \$128,330. (*Id.* at Schedule A.) McGinn has not submitted any documentation apart from his declaration to support his assertions.

ARGUMENT

The purpose of an asset freeze is to facilitate enforcement of any disgorgement remedy ordered upon a finding that defendants violated the securities laws. *See, e.g., SEC v. Infinity Group Co.*, 212 F.3d 180, 197 (3d Cir. 2000) ("A freeze of assets is designed to preserve the status quo by preventing the dissipation and diversion of assets.") (citation omitted). The court has broad authority in civil enforcement actions brought by the SEC to fashion appropriate relief and take actions necessary to protect defrauded investors. *See SEC v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1103 (2d Cir. 1972). The court must balance the interests of investors in preserving the assets for possible later restitution with the interests of the parties seeking release from the freeze. *See* Dkt. No. 277, at 3-4 (denying request by Iseman Cunningham for payment from frozen Trust assets); *Manor*

Nursing Centers, 458 F.2d at 1106 (“the disadvantages and possible deleterious effect of a freeze must be weighed against the considerations indicating the need for such relief”).

Courts that have considered requests for relief from asset freezes imposed in SEC actions in order to pay attorney fees in parallel criminal cases have paid particular attention to a defendant’s Fifth and Sixth Amendment rights. These courts, however, have made clear that a defendant has no right to use funds tainted by the fraud to pay legal bills. *See, e.g., SEC v. Cherif*, 933 F.2d 403, 417 (7th Cir. 1991) (“A criminal defendant has ‘no Sixth Amendment right to spend another person’s money for services rendered by an attorney.’”) (*quoting Caplin & Drysdale, Chartered v. US*, 491 U.S. 617, 626 (1989)); *SEC v. FTC Capital Markets, Inc.*, No. 09 Civ. 4755, 2010 WL 2652405, at * 9 (S.D.N.Y. June 30, 2010); *SEC v. Credit Bancorp, Ltd.*, No. 99 Civ. 11395, 2010 WL 768944, at *3 (S.D.N.Y. Mar. 8, 2010); *SEC v. Lauer*, No. 03-80612-Civ., 2009 WL 812719, at * 1 (S.D. Fla. Mar. 26, 2009); *SEC v. Cobalt Multifamily Investors, I LLC*, No. 06 Civ. 2360, 2007 WL 1040309, at *3 (S.D.N.Y. Apr. 2, 2007); *SEC v. Coates*, No. 94 Civ. 5361, 1994 WL 455558, at *3 (S.D.N.Y. Aug. 23, 1994).

To obtain relief, a defendant must initially show that without access to the frozen funds, his Sixth Amendment rights would be violated because he would be unable to obtain the counsel of his choice. Dkt. No. 440-1 at 2; Dkt. No. 439-1, at 3 (*citing SEC v. Sekhri*, No. 98 Civ. 2320, 2000 WL 1036295, at *1-2 (S.D.N.Y. July 26, 2000) (denying request to release fees to pay counsel); *FTC Capital Markets*, 2010 WL 2652405, at *7; and *Coates*, 1994 WL 455558, at *3)). Upon such a showing, the court then considers whether there is probable cause that the funds sought to be released are tainted by the fraud. *See, e.g., Credit Bancorp*, 2010 WL 768944, at *4; *Coates*, 1994 WL 455558, at * 3. Finally, even where a Sixth Amendment right to use frozen funds has been established, the court may limit the release if the amount requested is

unreasonable or excessive. *See, e.g., S.E.C. v. Petters*, No. 09-1750, 2009 WL 3379954, at *3 (D. Minn. Oct. 20, 2009) (refusing to allow the full amount of fees and expenses requested because the amounts were excessive); *FTC Capital Markets*, 2010 WL 2652405, at *9.

Smith's and McGinn's motions fail at every step: they do not make a showing of need; the funds requested to be released from the asset freeze are tainted; and McGinn and Smith have presented no evidence as to the reasonableness of the fees and costs they request. Their motions for access to the frozen funds should be denied.

I. Neither Smith Nor McGinn Have Shown That The Release of Funds Is Necessary to Pay Their Legal Fees

Smith. Smith declares that he “currently has no sources of income or unrestrained assets.” Dkt. No. 440-2 (Smith Decl., at ¶ 5). But Smith fails to mention the \$600,000 that his wife received in July 2010 on the sale of the property on Sacandaga Lake. *See, e.g.,* Dkt. 303 (Lynn Smith Memorandum of Law in Opposition to Motion for Sanctions, at 16 (noting sale to of Sacandaga Lake property to Trust for \$600,000)). He also fails to mention that he and his wife recently received \$14,000 for the rent of their property in Saratoga Springs. *See* Declaration of David Stoelting, dated Feb. 24, 2012 (“Stoelting Decl.”), at ¶ 2, and Ex. A. Further, Smith provides no evidence of any attempt to seek employment at any time during the almost two years that the asset freeze has been in place.

Moreover, despite the freeze and despite their failure to obtain employment, the Smiths have continued to maintain their Saratoga Springs household for nearly two years. In addition, they have been able to pay certain of their bills and to make expenditures. For example, in the summer of 2011, they spent over \$3,300 on an engagement dinner at the Saratoga National Golf Club. Stoelting Decl. at ¶ 3. Given their failure to disclose their sources of income, Smith's blanket declaration of inability to pay legal fees is insufficient. *See, e.g., Cobalt Multifamily*

Investors, 2007 WL 1040309, at *3 (requiring a “competent showing of need”). *Cf. Petters*, 2009 WL 3379954, at * 2 (finding showing of need where defendant was incarcerated and relief-defendant wife presented evidence that she had been seeking employment without success and rental income she received on property was insufficient).

McGinn. McGinn’s assertions in his declaration regarding his sources of income and expenses are not supported by any documentation. Moreover, some facts appear to contradict the statements in his declaration. For example, he declares that he lives in Florida and that one of the expenses he is seeking to pay from frozen funds is travel from his home in Florida to New York to attend court. McGinn Decl. ¶¶ 1, 8. At her deposition on November 28, 2011, however, McGinn’s wife, Nancy, testified that she and McGinn are renting a townhouse in Waterford, New York, and that they are both living there. Stoelting Decl. Ex B (Deposition of Nancy McGinn (“N. McGinn Dep.”), at 62, 79-80). In addition, McGinn declares that Nancy receives \$375 per month in unemployment benefits. McGinn Decl. ¶ 7. Nancy testified at her deposition, however, that she was employed for at least part of the year as an innkeeper. Stoelting Decl. Ex. B (N. McGinn Dep., at 14, 60-61). In addition, McGinn’s credibility is in question because he already has been found in contempt of court in this action. Dkt. No. 207 (MDO, dated Dec. 1, 2010, finding McGinn in contempt). Because McGinn has not provided documentation to support the sources of his income and his expenses, there is evidence that appears to contradict some of his declarations, and his credibility is in question, he has not adequately established a need for frozen funds.

As such, the court should deny Smith’s and McGinn’s requests for relief from the asset freeze.

II. The Assets Smith and McGinn Seek To Have Released Are Tainted by the Fraud

Smith. All of the assets listed as “Smith family assets” in Smith’s declaration are tainted by the fraud:

The Stock Account¹

The Court has heard extensive evidence regarding the Stock Account. After a three-day hearing with numerous witnesses and exhibits, the Court made the following relevant findings regarding the Stock Account: (1) Smith used the Stock Account to make numerous short-term loans to MS & Co. related entities, all of which were repaid from MS & Co. related accounts (MDO I, at 10); (2) the Stock Account received funds that were derived from fraudulently obtained investments (*Id.* at 31); and (3) the ill-gotten gains were commingled with potentially legitimate funds such that separating the funds would be nearly impossible (*Id.*). Based on the evidence already presented and the findings the Court has made, the Court should conclude that there is sufficient evidence that the Stock Account is tainted by the fraud. *See Lauer*, 2009 WL 812719, at *4.

In *Lauer*, for example, the defendant requested a release of funds that he claimed to have acquired before the fraud began. 2009 WL 812719, at *1-2. The district court concluded that the requested funds were tainted by the fraud and that it was “‘unnecessary to attempt to segregate in some manner the tainted funds from the commingled account . . . The presence of some tainted funds . . . is sufficient to taint [all].’” *Id.* at *4 (*quoting US v. Garcia*, 37 F.3d 1359, 1365 (9th Cir. 1994) (ellipses in original)). The court continued that “[b]ecause money is

¹ Smith’s motion contains a letter from counsel for Lynn Smith consenting to the use of up to \$300,000 of her funds from the cash held by the Receiver that relates to the Stock Account’s investment in Pine Street Capital. The funds used to purchase the Pine Street investment were from the Stock Account and, as discussed in this section, the entire Stock Account is tainted by the fraud.

fungible, the government must prove only that the tainted proceeds were commingled with other funds,” and that “[w]hen money is commingled, the ‘illicitly-acquired funds and the legitimately-acquired funds . . . cannot be distinguished from each other. . . .’” *Id.* at *5 (quoting *US v. Ward*, 197 F.3d 1076, 1083 (11th Cir. 1999) and *US v. Moore*, 27 F.3d 969, 976-77 (4th Cir. 1994)).

Like the account in question in *Lauer*, the Court here has concluded that the Stock Account received tainted funds and that such funds were commingled with potentially-legitimate funds. Accordingly, the Stock Account is tainted by the fraud and funds should not be released from the Stock Account to pay Smith’s attorneys’ fees and costs.

The Real Property

Smith lists three pieces of real property in his list of “Smith family assets:” the Sacandaga Lake property (now owned by the Trust), the Vero Beach property and the Saratoga Springs property. Even though these properties were purchased prior to the time period of the fraud, there is evidence that the mortgage payments, taxes and other upkeep for the properties was paid for with proceeds of the fraud. For example, the mortgage payments for both the Vero Beach property (\$6,188 per month) and Saratoga Springs property (\$4,667 per month) were generally paid each month from a Smith account that received many fraudulently obtained funds. Palen Decl. at ¶¶ 4-5. Similarly, payments for taxes due on these properties and on the Sacandaga Lake property were also paid from this account. *Id.* Funds from this Smith account also were used to pay a total of over \$18,000 in 2007 for a deck that presumably relates to one of these properties. *Id.*

In *Lauer*, the district court found that a condominium purchased prior to the fraud was tainted because tainted funds were used to maintain ownership, use and benefit of the property. *Lauer*, 2009 WL 812719, at * 3 (“[W]hen tainted funds are used to pay costs associated with

maintaining ownership of the property, the property itself and its proceeds are tainted by the fraud.”). Similarly, here, tainted funds were used to maintain ownership, use and benefit of the properties and therefore, the asset freeze should not be lifted so as to allow payments from any sale of these properties to pay Smith’s attorneys’ fees and costs. (The SEC would support the sale of these properties where the equity, if any, from a sale would be held by the Receiver.)

The Trust

The Trust assets are also tainted by fraud. The Second Amended Complaint alleges that in August 2004, when the Charter One stock worth more than \$4 million was transferred to the Trust, the Smiths had intent to hinder, defraud or delay present or future creditors. *See* Second Am. Compl. ¶¶ 144-175, 206-211 (Dkt. No. 334) (fraudulent conveyance claim).

Among other evidence of their fraudulent intent at the time of the transfer, the Smiths created the Trust about one year after the launch of the first fraudulent offering, and they knew or should have known that these offerings would be unable to meet their obligations to investors. In addition, David and Lynn Smith were named as defendants in a securities fraud lawsuit filed in 2003 and settled in 2004 with a payment of \$200,000 to the plaintiff. Smith’s handwritten notes from several years before the transfer demonstrate his knowledge that his fraudulent securities practices had caused him to be “overwhelmed by the thought of financial losses.” Dkt. No. 103-1, at 7-10. The actions of the Smiths and their agents in concealing the Annuity Agreement in this action further demonstrates that the Trust was created as a vehicle to hinder, defraud or delay creditors. Accordingly, the asset freeze should not be lifted to allow payments of Smith’s counsel in the parallel criminal proceeding from the Trust’s assets.²

² Moreover, unlike Lynn Smith, the Trustee for the Trust, Geoffrey Smith, does not purport grant authority to use Trust assets to pay for Smith’s legal fees in the criminal proceeding. The

Smith's 401(k) and IRA accounts

Smith's 401(k) was funded by payments to Smith from MS & Co., and from MS & Co. directly through its matching program.³ Many of these payments were made during the period of the fraud. For example, Smith's W-2s for the years 2004 to 2010 show a total of \$115,000 being deposited into his 401(k) account. Palen Decl. Ex. 1. Other records show \$14,000 in contributions from MS & Co. during that time. *Id.* These funds were commingled with untainted funds and the account appreciated over time. It would be difficult to untangle the untainted and tainted funds and, therefore, the court should find the entire 401(k) account tainted by the fraud. *See Lauer*, 2009 WL 812719, at * 4-5.

Similarly, Smith's IRA account is tainted by the fraud. As of January 1, 2004, which is the earliest statement currently in the SEC's possession for Smith's IRA account, the account only held \$4,419. Palen Decl. Ex.2. During the period from 2004 to 2010, Smith contributed \$18,000 to the account, and the account appreciated. *Id.* These contributions came from the Stock Account and the 2007 contribution came from Smith's M&T Bank account shortly after a large transfer to him from TDM Cable Funding, LLC. *Id.* Like the 401(k) account, it would be difficult to untangle the untainted and tainted funds and, therefore, the court should find the entire account tainted by the fraud.⁴

absence of a letter, or any mention in the Trust's motion and accompanying papers, suggests that the Trustee opposes use of the Trust funds to pay for Smith's legal fees.

³ The Court already has denied Smith's motion for a release of the 401(k) assets, finding that the money in that account "will be important in either facilitating repayment [to investors] or determining whether [Smith] has an ability to pay the amount ordered disgorged." Dkt. No. 221, at 5.

⁴ Smith also includes the cash value of two life insurance policies in his list of the "Smith Family Assets." Smith submits no information to support any claim that these assets are untainted by the fraud. At this time, there is not sufficient information to determine whether

McGinn. McGinn seeks to release from the asset freeze ten specific items, which are listed in Schedule A to his declaration. Dkt. No. 439-2 (Schedule A). For the assets listed in numbers 1 through 6, there is insufficient information to determine whether they are tainted by the fraud. McGinn offers no evidence to support his assertions, and his credibility is in question. The SEC requests an evidentiary hearing with respect to these items, and any other items for which the Court determines there is insufficient evidence to find that they are tainted by the fraud (as discussed in Section IV, below). McGinn's retirement account (number 10 on Schedule A) appears to have been funded prior to 2003 and, therefore, does not appear to be tainted by the fraud.

Boca Raton Property and Furniture (Numbers 7 and 8 on Schedule A)

Like Smith's real property discussed above, the mortgage and upkeep of McGinn's Boca Raton property was paid for with proceeds of the fraud. For example, McGinn's mortgage for the Boca Raton property (\$3,539 per month), maintenance and taxes were generally paid from two McGinn accounts that received the proceeds of the fraud. Palen Decl. ¶¶ 6-7. McGinn also wrote a check from one of these accounts for over \$20,000 to "Furniture Land South" shortly after the Boca Raton property was purchased. In general, these accounts appear to have paid all of McGinn's living expenses (that were not otherwise being paid directly by a McGinn Smith entity), including credit card payments, during the period of the fraud. *Id.*

these policies are tainted by the fraud and the SEC, therefore, requests an evidentiary hearing with respect to these items.

In addition, Smith includes Lynn Smith's IRA account in his description of the "Smith family assets." To the extent that Smith is seeking to use funds from this account to pay his attorney fees, the account should not be released from the freeze because the account is tainted by the fraud. The money Lynn Smith used to fund the account came primarily from the Stock Account during the period of the fraud, and the 2007 transfer came from Smith's M&T Bank account shortly after a transfer to that account from TDM Cable Funding, LLC. Palen Decl. Ex. 3.

Moreover, the Boca Raton property likely has no equity. *See* Dkt. No. 221 (denying release of funds for upkeep of this property). The SEC would support a sale of the Boca Raton property.

M&T Bank Account (Number 9 on Schedule A)

The funds in this account are tainted by the fraud. On April 8, 2010 (less than two weeks before the SEC filed this action), this account received \$50,000 from MS Funding, LLC and \$7,618 from MS & Co. for a total of \$57,617. Of that total, approximately \$9,400 remained at the time the asset freeze was imposed on April 20, 2010. Palen Decl. Ex. 4.

III. There Has Been No Showing that the Requested Fees and Costs are Reasonable

Smith and McGinn each ask for funds to be released for to pay for fees and costs not yet incurred. The simple, generalized statements made by counsel for McGinn and Smith about the complexity of the case are insufficient to show the reasonableness of the requested fees. To determine the reasonableness of fees, a court looks to a reasonable rate for an attorney in the district multiplied by the hours reasonably expended. *See* Dkt. No. 342, at 41-46 (reviewing the SEC's request for fees and determining a reasonable fee). The SEC and the Court cannot make such a determination without any record of the fees incurred. Thus, to the extent that the Court finds a release of funds appropriate, the SEC requests that it and the Court have an opportunity to review the fees and costs incurred to ensure that only those fees and costs deemed reasonable are allowed. *See, e.g., Petters*, 2009 WL 3379954, at *3 (denying request for full amount of fees and expenses requested because amounts requested were excessive); *FTC Capital Markets*, 2010 WL 2652405, at *9 (denying release of full amount of fees requested where attorney performed minimal work); *see also Sekhri*, 2000 WL 1036295, at *2 (denying request for additional fees

because amounts already paid from unfrozen funds “did not appear to [the] Court to require augmentation”).

**IV. The Court Should Order An Evidentiary Hearing
If The Court Determines That There Is Insufficient
Evidence That Particular Assets Are Tainted By the Fraud**

As discussed above, there is sufficient evidence that most of the assets Smith and McGinn seek to have released from the asset freeze are tainted by the fraud. There are a few assets for which there is currently insufficient evidence to determine whether they are tainted by the fraud (including the cash value of Smith’s life insurance policies and the items listed as numbers 1 to 6 on McGinn’s Schedule A). For these assets, and any others for which the Court determines that there is insufficient evidence of taint, the SEC requests an evidentiary hearing. *See, e.g., Lauer*, 2009 WL 812719, at *1 (finding assets tainted by fraud after briefing and evidentiary hearing); *Coates*, 1994 WL 455558, at *3 (ordering evidentiary hearing).

If an evidentiary hearing is ordered, the SEC requests limited discovery regarding the assets that will be the subject of the hearing.

CONCLUSION

For the reasons set forth above, the Court should deny the requests by defendants McGinn and Smith to release certain assets from the asset freeze to pay attorneys' fees and costs.

Dated: New York, New York
February 24, 2012

Respectfully submitted,

s/ Lara Shalov Mehraban
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Of Counsel:

David Stoelting
Kevin McGrath
Joshua Newville

DECLARATION OF DAVID STOELTING

I, David Stoelting, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a Senior Trial Counsel in the Enforcement Division of the New York Regional Office of the Securities and Exchange Commission. I have been employed with the Commission since February 2004. I make this declaration in support of the SEC's opposition to the motions to amend the asset freeze to permit payment of attorney fees and costs by David L. Smith and Timothy M. McGinn.
2. During discovery, the SEC sent a subpoena to one of the banks at which Lynn Smith has an account. In reviewing the documents produced by the bank pursuant to that subpoena, I noticed a check made payable to Lynn Smith in the amount of \$14,000. On October 27, 2011, I telephoned the woman on whose account the check was drawn and who signed the check. She told me that she had rented the Smiths' residence in Saratoga Springs, New York from late July through Labor Day of 2011, at a cost of \$14,000. She rented the home through a broker and never met the Smiths. Her check is attached at Exhibit A.
3. The SEC learned during discovery that in the summer of 2011 the Smiths gave an engagement party at the Saratoga National Golf Club. On October 27, 2011, I spoke with an employee of the Saratoga National Golf Club. She confirmed that the Smiths held an engagement dinner at the club. She told me that the dinner cost \$3,338.40, and was paid for by a credit card in Lynn Smith's name.
4. Attached as Exhibit B are true and correct excerpts of the deposition of Nancy McGinn on November 28, 2011.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: New York, New York
February 24, 2012

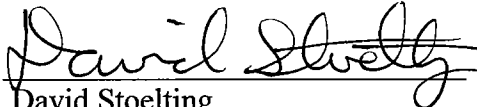

David Stoelting

Exhibit A



Account Number:

Date:

September 08, 2011

Page:

1 of 1

The Image shown below represents an official copy of the original document as processed by FNB of Scotia.

Redacted	4202
Redacted	55-537/212 BRANCH 13
Rockaway, NJ 07866	0-20-2011 Date
Pay to the Order of <u>LYNN SMITH</u>	\$ 14,000.00
<u>FOURTEEN THOUSAND AND 00/100</u>	Dollars
Lakeland bank Wharton Office Wharton, NJ 07885 www.lakelandbank.com	Redacted
For <u>BALON RENTAL + SECURITY DEPOSIT</u>	MP
Redacted	Redacted

Redacted 06/28/2011 4202 \$14000.00

<p style="text-align: right;"><i>Lynn Smith</i></p>	
<p style="text-align: right;">Redacted</p>	

Redacted 06/28/2011 4202 \$14000.00

Notice of Confidentiality: This copy contains information from FNB of Scotia which is confidential or privileged. The information is intended for the use of the account owner(s) or their representative. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is prohibited.



Account Number: [Redacted] 2705
 Date: September 08, 2011
 Page: 1 of 1

The Image shown below represents an official copy of the original document as processed by FNB of Scotia.

DEPOSIT TICKET

LYNN A. SMITH
 [Redacted]
 SARATOGA SPRINGS, NY 12866

CASH ▶
 60-1071/213

14000.00

DATE 06/28/11
 DEPOSITS MAY NOT BE AVAILABLE FOR IMMEDIATE WITHDRAWAL

TOTAL FROM OTHER SIDE ▶
 SUB TOTAL ▶
 LESS CASH RECEIVED ▶

\$ 14000.00

SIGN HERE FOR CASH RECEIVED (IF REQUIRED) *

1st National Bank of Scotia

[Redacted] 2705

[Redacted] 2705 06/28/2011 \$14000.00

CHECKS LIST SINGLY	TOTAL	DOLLARS	CENTS	CURRENCY COUNT - FOR FINANCIAL INSTITUTION USE ONLY
	x	100		
	x	50		
	x	20		
	x	10		
	x	5		
	x	2		
	x	1		

*****14,000.00

DDA DEPOSIT
 List Acct: [Redacted] 2705
 Transaction 0031 by ALJ07
 Received 6/28/2011 at 12:39pm

[Redacted] 2705 06/28/2011 \$14000.00

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Exhibit B

1
 2 UNITED STATES DISTRICT COURT
 3 NORTHERN DISTRICT OF NEW YORK
 4 * * * * *
 5 SECURITIES AND EXCHANGE COMMISSION,
 6 Plaintiff,
 7 -vs- 10 Civ. 457 (GLS/DRH)
 8 MCGINN, SMITH & CO., INC.,
 MCGINN, SMITH ADVISORS, LLC,
 9 MCGINN, SMITH CAPITAL HOLDINGS CORP.,
 FIRST ADVISORY INCOME NOTES, LLC,
 10 FIRST EXCELSIOR INCOME NOTES, LLC,
 FIRST INDEPENDENT INCOME NOTES, LLC,
 11 THIRD ALBANY INCOME NOTES, LLC,
 TIMOTHY M. MCGINN, DAVID L. SMITH,
 12 LYNN A. SMITH, GEOFFREY R. SMITH,
 Individually and as Trustee of the David L.
 13 and Lynn A. Smith Irrevocable Trust U/A 8/04/04,
 LAUREN T. SMITH, and NANCY MCGINN,
 14 Defendants,
 15 LYNN A. SMITH, and
 16 NANCY MCGINN,
 17 Relief Defendants, and
 18 GEOFFREY R. SMITH, Trustee of the
 David L. And Lynn A. Smith Irrevocable
 19 Trust U/A 8/04/04,
 20 Intervenor.
 21 * * * * *
 22
 23
 24
 25

1 N. McGinn
 2
 3 EXAMINATION BEFORE TRIAL of NANCY MCGINN,
 4 held at Phillips Lytle, LLC, Albany, New York,
 5 on November 28, 2011 before NORA B. LAMICA,
 6 Court Reporter and Notary Public in and for
 7 the State of New York.
 8
 9 APPEARANCES:
 10 Attorneys for Plaintiff:
 11 SECURITIES AND EXCHANGE COMMISSION
 Attorneys at Law
 12 3 World Financial Center, Room 400
 New York, New York 10281
 13 BY: JOSHUA M. NEWVILLE, ESQ.
 BY: DAVID STOELTING, ESQ.
 14
 15
 16
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 20
 21
 22
 23
 24
 25

1 N. McGinn
 2
 3 INDEX
 4 EXAMINATION
 5 Page
 6 NANCY MCGINN
 7 Examination by MR. NEWVILLE 6
 8
 9 EXHIBITS
 10 No. Description Page
 11 398 Plaintiff's first request for 9
 production of documents to
 defendant Nancy McGinn
 12 Letter dated 10/21/2011 23
 13 399 addressed to Honorable
 Judge D. Homer from
 14 Eleanor and Russell Lastrup
 15
 400 E-mail dated October 13, 2009 33
 16 from Timothy McGinn to Nancy McGinn
 17 401 Series of e-mails between 35
 Tim McGinn and Bonnie Sindel
 18
 402 Three-page document containing 39
 19 quick claim deed
 20 403 Document prepared by SEC 44
 summarizing transfers from
 21 accounts in the name of
 Mr. McGinn to Nancy McGinn
 22
 404 E-mail chain between Nancy McGinn 46
 23 and Timothy McGinn
 24
 25

1 N. McGinn
 2
 3 405 Copies of canceled checks from 48
 Timothy McGinn to Nancy McGinn
 4 and Nancy Lastrup
 5
 406 Document prepared by SEC titled 50
 6 Nancy McGinn cash deposits into
 account number 0230257505
 7
 407 Records from the First National 53
 8 Bank of Scotia for the period
 3/31/2006 through 4/27/2006
 9
 408 Deposit tickets for Ms. McGinn's 56
 10 account at First National Bank of
 Scotia for the period 6/2/2008
 11 through 6/19/2008
 12
 13
 14
 15
 16
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 22
 23
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 25

1 N. McGinn
 2 anything, no.
 3 Q. When did you stop working?
 4 A. I stopped in -- dates are what really kills me
 5 -- 2004, maybe it was 2003. I still had the SEFCU.
 6 That's when I was working I had the SEFCU accounts.
 7 Q. Where were you employed?
 8 A. The New York State Legislature.
 9 Q. What did you do?
 10 A. I was the majority leader's, one of his
 11 secretaries.
 12 Q. And who was the majority leader?
 13 A. Joseph Bruno.
 14 Q. How long did you work for Mr. Bruno?
 15 A. About six years. I started in 1999 so --
 16 maybe it was '98. I'd really have to look in my records.
 17 I just don't -- I didn't really think much about it
 18 time-wise.
 19 Q. That's fine. We're just trying to get your
 20 best recollection. So your employment for Mr. Bruno
 21 ended around the 2004 time period; is that correct?
 22 A. Yes.
 23 Q. Have you had any employment since then?
 24 A. Just recently. Last year I started working,
 25 last September.

1 N. McGinn
 2 Q. Where do you currently work?
 3 A. It's called The Mansion Inn and it's a bed and
 4 breakfast.
 5 Q. Where is it located?
 6 A. Rock City Falls.
 7 Q. What do you do there?
 8 A. I'm an innkeeper. We do events, we do
 9 weddings, things like that. It's my niece through
 10 marriage, it's her family's place. I'm currently not
 11 working there now. They're closed during the winter so
 12 just summertimes.
 13 Q. And who owns the bed and breakfast?
 14 A. My nephew's wife's family.
 15 Q. Could you identify their names just for the
 16 record?
 17 A. The last name is Wojidka. It's
 18 Jeffrey Wojidka, the father.
 19 COURT REPORTER: Could you spell that?
 20 THE WITNESS: I could try. It's
 21 W-O-J-I-D-K-A.
 22 Q. What is your educational background?
 23 A. Just high school.
 24 Q. And where were you employed prior to the time
 25 you worked for Mr. Bruno in the State Legislature?

1 N. McGinn
 2 A. I worked at a place -- it was called
 3 Capotia (phonetic). It was a debt-reducing company. I
 4 was only there for a short time. Prior to that I was
 5 raising children so I would waitress and things like
 6 that.
 7 Q. You understand that one of the reasons we're
 8 here today is because of events that happened involving
 9 your husband, Tim McGinn. Do you understand that?
 10 A. Yes, I do.
 11 Q. Are you currently married to Mr. McGinn?
 12 A. Yes.
 13 Q. Roughly when did you get married to
 14 Mr. McGinn?
 15 A. July 19, 2006.
 16 Q. And do you currently reside with Mr. McGinn?
 17 A. Yes, I do.
 18 Q. How long have you lived together?
 19 A. It was eight years in October when we bought
 20 the house.
 21 Q. And roughly when did you buy the house?
 22 A. I think it was October of -- it was eight
 23 years ago, '04 or '03. I forget when the house was
 24 purchased.
 25 Q. You're referring to the house in Niskayuna?

1 N. McGinn
 2 A. Yes, I am.
 3 Q. Did you have any involvement in the business
 4 affairs of McGinn Smith?
 5 A. No, I did not.
 6 Q. Were you ever employed by McGinn Smith?
 7 A. No, I was not.
 8 Q. Were you ever on the payroll for any purposes
 9 such as health insurance or anything like that?
 10 A. No.
 11 Q. Did you ever have any role with any company
 12 that was affiliated with McGinn Smith?
 13 A. No.
 14 Q. Did you ever have any role with any company
 15 that was affiliated with your husband, Mr. McGinn?
 16 A. No.
 17 Q. During the period of your marriage, did
 18 Mr. McGinn keep you up-to-date on business affairs of
 19 McGinn Smith at all?
 20 A. No. I never got involved in any of that at
 21 all.
 22 Q. Did he ever tell you anything about how the
 23 business was going or what kinds of things that they were
 24 working on?
 25 A. No.

1 N. McGinn
 2 accurate to you?
 3 A. Yes.
 4 Q. Do you recall a cash deposit in the amount of
 5 \$720 on or about June 2, 2008?
 6 A. Not really, no.
 7 Q. Do you have any understanding sitting here
 8 today as to where the money came from for that deposit or
 9 what it was used for?
 10 A. Well it could be some landscaping I had done.
 11 It could be something that may have happened to the
 12 house. These people, they don't take credit cards so you
 13 always have to have cash to give them. It could be, once
 14 again, numerous things. I just don't recall exactly what
 15 these are for at all.
 16 Q. These records that we're looking at now, they
 17 don't reflect withdrawals that you made in cash. These
 18 are deposits that you made of cash into your account.
 19 A. Right.
 20 Q. So if you needed to pay a landscaper or
 21 somebody for work done around the house, you wouldn't
 22 need to deposit cash into your account, you would
 23 withdraw cash?
 24 A. But I would write a check off of that, put the
 25 cash in and write a check off of that and then I'd have a

1 N. McGinn
 2 record.
 3 Q. But I don't understand why you would have \$720
 4 in cash lying around that you needed to use to pay --
 5 A. In '08 I was not working so it was probably
 6 payments I had to make. And Tim would probably cash his
 7 check and then give me the cash so I could put it in my
 8 account. That's how that worked. That's what we used to
 9 do.
 10 Q. He would cash his check and take out currency?
 11 A. Yes, if I needed it for specific cash
 12 payments, whether it be a cash payment, whether it be a
 13 car payment that was in my name. Just many things it
 14 could be.
 15 Q. Go back and take a look at Exhibit 406. The
 16 grand total of cash that we've seen that you've deposited
 17 into your account is around \$53,000 from January '06 to
 18 May of 2010. Do you see that?
 19 A. Mm-hmm. Yes.
 20 Q. And is it your testimony that those deposits
 21 could be some combination of cash that was provided to
 22 you by either Mr. McGinn or cash that came to you from
 23 your children or various other sources?
 24 A. Yes. I would say it could be from any of
 25 those.

1 N. McGinn
 2 Q. And do you have any way sitting here today of
 3 identifying which cash deposits came from which source?
 4 A. I really wouldn't know. I couldn't do that.
 5 I just -- I couldn't recall what each of them would be
 6 from.
 7 MR. NEWVILLE: Let's take five minutes.
 8 (Whereupon, a brief recess was taken.)
 9 MR. NEWVILLE: We're back on the record.
 10 Q. Just a few clarification points. How old are
 11 your kids?
 12 A. 26, 24 and 20.
 13 Q. Did they reside with you and Mr. McGinn during
 14 the entire period of time up until recently?
 15 A. Yes.
 16 Q. They lived in the Niskayuna house, correct?
 17 A. Correct.
 18 Q. During that period of time did you and
 19 Mr. McGinn pay your children's expenses for various
 20 things? Let me withdraw that. From the 2003 to 2010
 21 time period did you pay your children's expenses when
 22 they needed it?
 23 A. Well depending on what expenses were. If they
 24 were old enough to work, they kind-of paid for their own
 25 clothing and things like that. But yes, as an obligation

1 N. McGinn
 2 as a parent I did buy clothes when need be, I fed them.
 3 I did the normal things. But they also had a father that
 4 would do whatever had to be done as well. They lived
 5 with me but their father also paid their expenses.
 6 Q. How much time -- let me backup. There's a
 7 house in Florida that you and Mr. McGinn own, correct?
 8 A. That's correct.
 9 Q. Roughly when did you purchase that house?
 10 A. Three years ago so 2008 -- 2007 or 2008.
 11 Q. And that house in Florida was put into both of
 12 your names, correct?
 13 A. Correct.
 14 Q. Joint tenancy to your understanding?
 15 A. We're both on the deed.
 16 Q. Okay. What discussions did you have when you
 17 purchased that house about putting the Florida house in
 18 both of your names?
 19 A. That I wanted to be on it as well. We were
 20 married at this point. Typically that's what you do when
 21 you're married, you buy a home together. We wanted it to
 22 be our retirement home so-to-speak.
 23 Q. How much time do you spend at the Florida
 24 home?
 25 A. I do not spend too much time. I'm working

1 N. McGinn
 2 now. It's tough to get down. Not too much time.
 3 Q. What about during the 2007 to 2009 time
 4 period?
 5 A. I would just go down on occasion because I
 6 still had kids in school, so I wouldn't leave them for
 7 that much time.
 8 Q. How much time did you husband spend in Florida
 9 during the 2007 to 2009 time period?
 10 A. Not much more than I did. You know. It's
 11 hard to -- he would go down maybe for a few days longer
 12 than I would but really it was never a long length of
 13 time. At that point we weren't able to.
 14 Q. Currently have you been spending any time over
 15 the past say year in the Florida house?
 16 A. I was there in April last.
 17 Q. How much time did you spend there?
 18 A. About a week.
 19 Q. Are you and Mr. McGinn paying the maintenance
 20 and keeping up the Florida house?
 21 A. We pay what we can.
 22 Q. Do you have plans to sell the Florida house?
 23 A. Not as of right now.
 24 Q. The mortgage is not current on that house?
 25 A. No, it is not.

1 N. McGinn
 2 Q. You mentioned you currently reside at an
 3 address in Waterford; is that correct?
 4 A. That's correct.
 5 Q. And I think when we spoke last week you said
 6 you were in the process of moving, right?
 7 A. Yes, we moved.
 8 Q. And you reside there with your husband,
 9 Mr. McGinn, correct?
 10 A. That's correct, and my daughter. My daughter
 11 as well.
 12 Q. Your youngest daughter?
 13 A. Yes.
 14 Q. Where is your husband employed?
 15 A. He is working for a company. It's named
 16 AmeriBank. I don't know a lot about it or how -- he
 17 works for them but it's -- what they do is they set-up
 18 appointments for him and he goes out.
 19 Q. Do you know who he meets with as part of these
 20 appointments?
 21 A. It's all selling. He meets with anyone who
 22 uses a credit card machine.
 23 Q. How long has he been working with AmeriBank?
 24 A. For about four or five months maybe. I forget
 25 exactly when he started this.

1 N. McGinn
 2 Q. How did he come to work with the people at
 3 AmeriBank?
 4 A. He found it online I believe.
 5 Q. What kind of services does AmeriBank offer
 6 that he works for?
 7 A. It's credit card swiping machines.
 8 Q. Credit card processing?
 9 A. Processing, yes.
 10 Q. He's working in some sort of sales role to
 11 your knowledge?
 12 A. Yeah. I would say that would be the best
 13 description.
 14 Q. Do you know anything else about other
 15 employment that he's had since the SEC case was filed?
 16 A. He has not had any other employment.
 17 Q. Let's take a quick look back at the large
 18 stack of bank account documents that we --
 19 A. 407?
 20 Q. We've got 407, we've got 408. Those are
 21 copies of the cash deposits. And then Exhibit 406, which
 22 is a summary prepared of various cash deposits that the
 23 SEC has identified. My question is whether any of the
 24 deposits in cash were related at all to any loans that
 25 you had between you and Mr. McGinn?

1 N. McGinn
 2 A. What kind of loan?
 3 Q. I'm just wondering whether there were any
 4 loans that were made between you and Mr. McGinn?
 5 A. Between he and I?
 6 Q. Yes.
 7 A. No.
 8 Q. Was there ever any transfer made between the
 9 two of you where there was an agreement to pay back the
 10 amount after a certain period of time?
 11 A. The only one he and I had an agreement was
 12 when my daughter went to a private school for one year
 13 and that was all.
 14 Q. When was that?
 15 A. That was sixth grade so it was probably '04.
 16 I don't know the exact date.
 17 Q. What were the circumstances surrounding that?
 18 I take it he paid for the private school and you agreed
 19 that you would pay him back at some point?
 20 A. That's correct. I wanted to get her out of
 21 the public school district so I put her in a private
 22 school. That didn't go very well. So that was the one
 23 thing that, you know, I was more than willing to pay him
 24 back for that.
 25 Q. Roughly how much was the amount?

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1 N. McGinn
2 about Mr. Bruno in the papers did you discuss his role at
3 McGinn Smith at all with your husband?
4 A. I didn't really discuss it. I probably said,
5 "What's going on?" I had no idea it was even happening
6 to the Senator because I wasn't there at the time when
7 all this took place. You know. All I know is that I
8 think he was a salesperson or something at McGinn Smith.
9 I didn't know specifics. And I don't even think at that
10 point -- I don't think he was even working at
11 McGinn Smith at that point so I didn't really think much
12 about it.
13 Q. Do you recall at some point your husband
14 testified in the proceedings involving Mr. Bruno?
15 A. Yes, I do remember that.
16 Q. Did you discuss with him his testimony at all
17 before he went in?
18 A. I really didn't because I don't even think
19 that's something he should be discussing with me and
20 vice-versa. I would never want to put myself in a
21 situation -- you know, if I knew something or didn't know
22 something, I'd rather not know what he has to testify
23 about so I just never even asked questions.
24 Q. Well before you came in to testify here today
25 did you speak at all with your husband about your

Page 78

1 N. McGinn
2 testimony?
3 A. No, I didn't. I just -- I think it's best not
4 to. You know. I'd come in and I'd just do what I have
5 to do. And -- but no, we didn't discuss it ahead of
6 time.
7 Q. Did he tell you, "Listen, you're going to
8 testify. You might be asked about the topics X, Y or Z"?
9 A. Being I was in a deposition before I kind-of
10 knew what a deposition was about. So he knew I knew that
11 one other time so I knew basically what was going to
12 happen. I didn't know what questions would be asked.
13 Q. Did you speak with Stew Jones at all before
14 coming in here today?
15 A. No, I did not.
16 Q. Have you ever spoken to Mr. Jones?
17 A. No, I have not.
18 Q. Mr. Jones represents your husband --
19 A. Correct.
20 Q. -- in various matters involving McGinn Smith,
21 correct?
22 A. Yeah. Whatever -- he represents him for
23 whatever. I'm not sure.
24 MR. NEWVILLE: Let's take a quick break
25 and I think we can finish right up.

Page 79

1 N. McGinn
2 (Whereupon, a brief recess was taken.)
3 MR. NEWVILLE: Back on the record.
4 Q. Just a couple more followup questions. What
5 is your current address? It's in Waterford, correct?
6 A. Yes.
7 Q. And what is the address?
8 A. 7 Crows Nest Court.
9 Q. Crows Nest Court. That's a townhouse I think
10 you mentioned?
11 A. Yes.
12 Q. Who are you renting that from?
13 A. A gentleman, Ted Lombardi.
14 Q. Is that address considered in Clifton as well?
15 A. It's near Clifton Park. They're just right
16 next door to one another.
17 Q. Is Clifton a different area from Clifton Park?
18 A. Clifton Park.
19 Q. It's the same thing?
20 A. Yeah, it's the same thing. It's not Clifton,
21 it's Clifton Park.
22 Q. And Waterford is right next to Clifton Park,
23 correct?
24 A. That's correct.
25 Q. Have you signed any -- is that lease in your

Page 80

1 N. McGinn
2 name?
3 A. Yes, it is.
4 Q. Who is making the lease payments?
5 A. We both are. We're both working.
6 Q. And Mr. McGinn is residing there full-time?
7 A. Yes.
8 Q. Have you signed any other leases for other
9 real estate in the last year?
10 A. I haven't. I mean I had to do this one
11 because, I don't know, if they did a credit check he
12 wouldn't be able to live anywhere so it had to be in my
13 name.
14 Q. Do you have any plans to move out anytime
15 soon?
16 A. We signed a six-month lease to start and we'll
17 go from there. I can do it month to month after that.
18 Q. Does Mr. McGinn have any plans to move out
19 anytime soon?
20 A. I don't believe so.
21 MR. NEWVILLE: I think we're concluded
22 for today. Thank you so much for your time.
23 (Whereupon, the Examination concluded.)
24
25

DECLARATION OF KERRI L. PALEN

I, Kerri L. Palen, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a staff accountant in the New York Regional Office of the Securities and Exchange Commission, where I have worked since 2010. Prior to joining the Commission, I worked for over 16 years at Deloitte and at Alvarez & Marsel as an auditor and financial fraud investigator. I am a Certified Public Accountant and a Certified Fraud Examiner. I submit this declaration in support of the SEC's opposition to the motions to amend the asset freeze to permit payment of attorneys' fees and costs by David L. Smith ("Smith") and Timothy M. McGinn ("McGinn").

2. This declaration is based on my review of a database maintained for McGinn, Smith & Co., Inc. ("MS & Co."), bank records for Smith and McGinn, bank records for a number of entities owned or controlled by McGinn and/or Smith, and other records listed below.

3. From September 2003 through April 2010, MS & Co. and various issuers owned or controlled by McGinn and/or Smith raised over \$143 million dollars through two types of unregistered debt offerings: the Four Funds offerings (2003-2006) and the Trust offerings (2006-2010). According to MS & Co.'s database, as of April 2010, investors in these offerings were owed approximately \$130 million.

4. An account at M&T Bank ending in 9965 in the name of Smith received proceeds of the fraud, including payments from Cruise Charter Ventures, (\$50,000), Integrated Excellence (\$35,000), McGinn Smith Transaction Funding, LLC (\$376,438), MS Funding, LLC (\$626,000), NEI Capital, LLC (\$360,000), TDM Cable Funding LLC (\$694,000) and TDMM Cable Funding (\$74,000), for a total of \$2,215,438.

5. The Smith M&T Bank account made monthly mortgage payments for the Vero Beach property of \$6,188 per month and the Saratoga Springs property of \$4,667 per month. This account also made payments for taxes for these properties and the Sacandaga Camp property. In 2007, the account also paid a total of \$18,000 to various contractors for a deck.

6. Accounts at M&T Bank ending in 9504 and 2675 in the name of McGinn received proceeds of the fraud, including payments from Cruise Charter Ventures, (\$190,036), Integrated Excellence (\$50,000), McGinn Smith Transaction Funding, LLC (\$230,000), MS Funding, LLC (\$747,051), NEI Capital, LLC (\$210,000), TDM Cable Funding LLC (\$834,541), TDMM Cable Funding (\$82,500) and TDMM Cable Junior Trust 09 (\$30,000), for a total of \$2,374,128.

7. The McGinn M&T Bank accounts made the monthly mortgage payments for the Boca Raton property of \$3,539 per month. McGinn also wrote a check from this account to "Furniture Land South" of \$21,379.57 on July 11, 2007, which is shortly after he purchased the Boca Raton property. These accounts appear to have paid McGinn's living expenses during the period of the fraud, including the property taxes related to the Boca Raton property, credit card payments, landscaping fees, country club dues, utilities, and clothing.

8. I prepared the attached exhibits summarizing certain records that I have reviewed. The sources for the information are listed in each exhibit.

Exhibit No.	Description
1	David Smith's 401(k) for the years 2004-2010
2	David Smith's IRA for the years 2004-2010
3	Lynn Smith's IRA for the years 2004-2010
4	Timothy McGinn's M&T Bank account

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
February 24, 2012



Kerri L. Palen
Kerri L. Palen

Exhibit 1

David Smith 401(k)

Year	Employee Contribution	MS&Co Matching Contributions
2004	\$ 8,000	\$ 3,500
2005	18,000	-
2006	20,000	3,500
2007	20,500	3,500
2008	20,500	3,500
2009	22,000	-
2010	6,000	-
Total	\$ 115,000	\$ 14,000

Total funds deposited to David Smith's 401(k) since 2004: \$ 129,000

Sources: David Smith's W-2 Statements, Piaker and Lyons tax workpapers and John Hancock annual statements.

Exhibit 2

David Smith Individual Retirement Account (IRA)

Balance in David Smith's IRA account on 1/01/2004
(excluding unpriced IASG securities) \$ 4,419

<u>Date of Contribution</u>	<u>Source of Contribution</u>	<u>Amount</u>
4/20/2004	Stock Account	\$ 3,500
4/13/2006	David Smith account, funded by the Stock Account	4,500
4/9/2007	David Smith account, funded by TDM Cable Funding, LLC	5,000
4/15/2008	Stock Account	<u>5,000</u>
Total IRA Contributions made for the period 2004 through 2008		<u>\$ 18,000</u>

Sources: Bank account and IRA account statements.

Exhibit 3

Lynn Smith Individual Retirement Account (IRA)

Date of Contribution	Source of Contribution	Amount
2005		\$ 4,500
4/9/2006	David Smith account, funded by the Stock Account	4,500
4/9/2007	David Smith account, funded by TDM Cable Funding, LLC	5,000
4/15/2008	Stock Account	<u>5,000</u>
Total IRA Contributions made for the period 2004 through 2008		<u>\$ 19,000</u>

Sources: Bank account and IRA account statements.

Exhibit 4

Description of Last Two Deposits Into Timothy McGinn's Bank Account

Balance in Timothy McGinn's bank account on 4/23/2010 \$ **9,372**

Last Deposits Made into Account:

<u>Date</u>	<u>Description of Transactions</u>	<u>Amount</u>
4/8/2010	Deposit from MS&Co	\$ 7,618
4/9/2010	Deposit from MS Funding, LLC	\$ 50,000

Source: Bank account statements, copies of deposited items and cancelled checks.