

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

McGINN, SMITH & CO., INC.,
McGINN, SMITH ADVISORS, LLC,
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC,
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. MCGINN, AND DAVID L. SMITH,
LYNN A. SMITH, GEOFFREY R. SMITH, Trustee
of the David L. and Lynn A. Smith Irrevocable Trust
U/A 8/04/04, GEOFFREY R. SMITH, LAUREN
T. SMITH, and NANCY MCGINN,

Case No.: 1:10-CV-457

(GLS/DRH)

Defendants,

LYNN A. SMITH and NANCY MCGINN,

Relief Defendants, and

GEOFFREY R. SMITH, Trustee of the David L.
and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenor.

**REPLY TO PLAINTIFF'S OPPOSITION
OF DEFENDANT DAVID L. SMITH'S MOTION TO MODIFY
THE JULY 22, 2010 PRELIMINARY INJUNCTION ORDER**

David L. Smith hereby submits the Supplemental Declarations of David L. Smith and
William J. Dreyer in reply to the SEC's Opposition to the Motions to Release Certain Assets


from the Asset Freeze by Defendants Timothy M. McGinn and David L. Smith, dated February 24, 2012.

For the reasons stated in Mr. Smith's opening submissions, it is respectfully requested that this Court grant his Motion to Modify the July 22, 2010 Preliminary Injunction Order to release attorneys' fees and costs in his parallel criminal action or require the SEC to demonstrate that there is probable cause to believe Mr. Smith committed the crimes charged and that all assets currently subject to the asset freeze orders are traceable to the alleged fraudulent conduct.

Dated: March 2, 2012
Albany, New York

Respectfully submitted,

DREYER BOYAJIAN LLP



WILLIAM J. DREYER, ESQ.

Bar Roll No.: 101539

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Relief Defendants, and

GEOFFREY R. SMITH, Trustee of the David L.
and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenor.

**SUPPLEMENTAL DECLARATION OF DAVID L. SMITH
IN FURTHER SUPPORT OF HIS MOTION FOR ATTORNEYS' FEES & COSTS**

DAVID L. SMITH hereby declares under penalty of perjury:

1. I am a defendant in the above-captioned action and I am also a defendant in a criminal case before Judge David N. Hurd: *United States of America v. Timothy M. McGinn and David L. Smith*, 1:12-cr-028 (DNH).

2. I make this Declaration in further support of my Motion to Modify the July 22, 2010 Preliminary Injunction Order for the release of Smith family funds to pay my attorneys' fees and costs associated with the defense in the parallel criminal proceeding against me.

3. As previously stated in my February 10, 2012 Declaration, I currently have no source of income or unrestrained assets. All of my assets and those of my wife, Lynn Smith, and the assets of the defendant Trust are frozen pursuant to orders by Judge David R. Homer in this civil action.

4. In July 2010, the Court permitted the sale of our Sacandaga Lake property for which my wife and I received approximately \$600,000 in sale proceeds. The majority of these proceeds were used to pay the legal fees for both myself and my wife in this action. A portion of the money was also used to pay for the expenses that had accrued since the April 2010 restraining order and the remaining amount has been used to pay for my family's living expenses in the twenty months since the sale of the Sacandaga property; the proceeds of which have since been depleted.

5. Additionally, my wife and I have been unable to make our monthly mortgage payments on our Saratoga Springs residence since May 2011 and the property is currently in foreclosure. Therefore, a sale of this property would be impractical and it would take months before there could be any proper asset disposition from such proceeds.

6. I am specifically asking this Court to consider the release of Lynn Smith's stock account or liquid cash assets used by the receiver as potential asset sources from which to pay my attorneys' fees and costs in the continued representation in my criminal case.

7. Lynn Smith's stock account was initially funded with \$100,000 she received in inheritance after her father's death in 1968. This amount grew exponentially during the

economic boom of the 1990s, resulting in millions of dollars in productivity gains for the account.

8. The stock account has always been in Lynn Smith's name alone, although I acted as the account's broker and as such I am fully familiar with the transactions surrounding the account.

9. Around March 1992, a portion of the assets from the account were used to purchase 40,688 shares of Albany Financial Corporation shares. These shares were purchased at \$10.00 per share at the initial public offering of Albany Financial Corporation. See **Ex. A**, Excerpts from the Deposition of David L. Smith, ps. 324-331.

10. On March 23, 1992, I contributed \$52,880 towards the Albany Financial Corporation stock purchase with a \$150,000 loan from McGinn, Smith & Co., Inc. See **Ex. A**, ps. 324-326.

11. On April 6, 1992, \$100,000 of the loan was repaid to McGinn, Smith & Co. and the remaining \$50,000 was repaid in three installments between May 8, 1992 and June 30, 1992. See **Ex. A**, p. 326.

12. By September 2002, the Albany Financial Corporation stock purchase, now Charter One Financial Inc., had 105,000 shares and was worth over \$3 million. See Dkt. No. 334, Second Amended Complaint dated June 8, 2011, ¶ 115.

13. The value of Lynn Smith's assets predate 2003, the year the SEC asserts the alleged fraud in this proceeding began. See Dkt. No. 334, ¶ 1. Additionally, Lynn Smith's assets further predate the October 2006 date that the Government in the parallel criminal action alleges the same or similar fraudulent scheme began. See Dkt. No. 440-3, Ex. B, ¶ 48.

14. The amount of Smith family assets currently frozen exceeds the amounts alleged in both civil and criminal proceedings against me.

15. The SEC is in possession of all documents related to my family's finances and the SEC's own staff accountant has calculated that I received \$2,215,438 in alleged fraudulent proceeds. See Dkt. No. 448-2, Declaration of Kerry L. Palen, ¶ 4. Correspondingly, the criminal Indictment alleges that I received approximately \$1,567,000 in fraudulent proceeds. See Dkt. No. 440-3, Ex. B, ¶ 48.

16. As previously provided in my February 10, 2012 Declaration, Lynn Smith's assets amount to \$2,890,730, which exceeds both of the alleged amounts I received. See Dkt. No. 440-2, Decl. of David L. Smith, ¶ 7.

17. Although it is vigorously maintained that these assets are untainted, the SEC is in possession of documentation that reflects there are Smith family funds available to satisfy any potential judgment against me.

18. As referenced above, I have no available assets with which to pay my attorneys and unless a portion of family assets are released, I will be unable to retain counsel of my choice in my criminal case.

19. It is important for me that Dreyer Boyajian LLP remain my defense counsel in my criminal action; however, my attorneys have informed me that without payment, they will be unable to continue to represent me.

Pursuant to 18 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct.

Executed on: March 2, 2012


DAVID L. SMITH

EXHIBIT

A

David L. Smith

December 14, 2011

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D. Smith

and Social Security number next to that. Let me just ask you, first, Mr. Smith, did you and your wife, Lynn Smith, live at 8 Beech Ridge Road in Clifton Park in 1992?

A. Yes.

Q. And if you look further down you'll see that there is a transaction reflecting Albank Financial Corp. shares in the amount of 40,688, is that the way you read that series of transactions there in the middle of the page?

A. Yes.

Q. I'm now going to show you a document marked 444, which is a one-page document entitled "Receipt" and it states "We have this day debited your account and the date of 3/16/92." The account number reads 40504091-2-9 and then it says \$354,000 and if you could go back to Exhibit 443 and just confirm my reading that the same account Number 40504091 is reflected in 443 and 444.

A. Yes.

Q. I'm now going to show you Exhibit 445. It's a document McGinn, Smith & Co., Inc.; loan interest officer, David L. Smith. And it -- with a loan date of 3/23/92. Payment date of 4/6/92. Principal amount of \$150,000 and in the right-hand column it says payment/advance \$100,000. That's the first of a number



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David L. Smith

December 14, 2011

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D. Smith

of different entries here, that's the one I'm going to focus your attention on for purposes of my question. Do you recognize this Document 445?

A. No, but I have some handwriting on it, so...

Q. That was my going to be my next question. Is that your handwriting?

A. That is my handwriting.

Q. And the date is 7/20/92 and you've got a notation it looks like 5,000 and underneath it 35,000?

A. Right.

Q. Do you have any recollection as you sit here today what you intended by those notations?

A. I do not.

Q. All right. Do you agree that the reference to David L. Smith is to you?

A. Correct.

Q. And does this indicate -- well, strike that. What is your understanding of the entry on the line associated with the loan date, 3/23/92, for principal and the next column and what is your understanding of the entry for 100,000 in the far right-hand column underpayment/advance?

A. It would appear that I was loaned \$100,000. I don't know why it would have, you know, principal of 150



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D. Smith

and advanced only 100 unless there was some sort of credit agreement that the firm gave me, you know, I don't know. It's sort of an unusual way we would have done business.

But it looks like I was advanced \$100,000. I don't know if -- well, let me see, I'm trying to think how those things -- no, I'm misreading that. I apologize. I think that's what that is, is clearly there was a loan of \$150,000 and then there was a payment of 100 leaving a balance of 50 and then there was a payment of 8, leaving a balance of 42, dat, dat, dat, dat, dat. So that's how I would interpret that, there must have been a loan of 150,000 and a subsequent payment, which looks like it was on 4/6. The loan was on 3/23 and roughly 13 days later or 14 days later \$100,000 was paid.

Q. I'm going to show you now Exhibit 446. It is a one-page document. It's a receipt in the amount of \$500,000 dated March 23rd, 1992 received from David L. Smith \$500,000. And it says for and someone's written in stock purchase. There's a stamp Albany Savings Bank --

A. Mm-mm.

Q. -- March 23, 1992 and under the heading Albany Savings Bank there's a signature of Vickey Lobo. Do you recall this transaction?



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D. Smith

A. I do.

Q. Okay. What was this transaction for?

A. There was an opportunity to subscribe to Albany Savings Bank that was going public. The maximum subscription one could subscribe to I think was a half a million dollars. I attempted to subscribe to that, ultimately was cut back and I got whatever I got which I think was \$400,000.

Q. And you see that the date of this \$500,000 receipt from you is March 23, 1992, that's the same date reflected in Exhibit 445, that you appear to have been loaned or withdrew \$150,000 from McGinn, Smith & Co., correct?

A. That's correct.

Q. And there's a debit as reflected in Exhibit 444 on 3/16/92 from your wife's, Lynn Smith's Bear Stearns account of 300 looks like 54,000 dollars several days earlier on 3/16/92.

A. Mm-mm.

Q. Does that refresh your recollection that you contributed part of the \$500,000 that was used to purchase the Albank stock in 1992?

A. Well, I'll comment on that, but I don't think that's how you or at least I didn't take it as how you



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D. Smith

phrased the question. I thought you said did I contribute anything initially after the 40,000 shares and the answer was no.

Q. I think my first question was: Did you make any initial contribution and then did you make any subsequent contribution. So let's go back to the first question, did you contribute some monies or other assets to the original purchase of the 40,688 Albank Financial Corporation shares?

A. It would appear that I contributed \$50,000, yes.

Q. 50 or 150?

A. Well, only 50 because they only accepted \$400,000, they sent back 100. In fact, I think they sent back 104 or something like that.

Q. Well, you contributed approximately 150,000 to the 500,000 initial transfer and then subsequently only a portion of that money was allocated to the --

A. It wasn't an allocation, that's all the subscription was for.

Q. I'm using the word allocation, a portion of that \$500,000 was used to purchase the 40,688 shares of Albank stock?

A. That's correct.



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D. Smith

Q. I'm going to show you Exhibit 449, which is an affidavit that your wife executed in connection with this lawsuit on or about May 21st, 2010. And I would direct your attention, take whatever time you need to read it. Let me ask you first, did you see a version of this document before your wife signed it and submitted it to the court?

A. I don't believe so, no.

Q. Did you discuss it with her?

A. No.

Q. Did you know that she was going to be submitting an affidavit to the court in connection with this lawsuit describing the circumstances under which she came to be in possession of the Charter Bank stock that was ultimately transferred to the David and Lynn Smith Irrevocable Trust?

A. I don't know. I've really been told to keep totally out of it and it wouldn't surprise me if an affidavit was submitted, but I wasn't specifically reviewing it or involved in it, no.

Q. But my question is more narrow at this point. Did you have any discussions with your wife about the information that was included in this affidavit?

A. No.



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D. Smith

Q. You see in paragraph 3 she states "In approximately April 1992 using assets in my stock account, I purchased 40,000 shares of Albank stock at \$10 per share at the initial public offering when the bank was converted to Albany Savings Bank." And then jumping over to paragraph 5 she states "On August 4, 2004 my husband and I created the David L. and Lynn A. Smith Irrevocable Trust by signing a Declaration of Trust with the trustee. Although my husband and I were both designated as donors of the trust, I provided the initial and, to date, only asset transferred to the trust." Isn't it a fact based on the document that we've just walked through that, in fact, you contributed part of the monies that led to the growth of the asset that was contributed to the trust?

A. That is true. My wife would have no understanding of that nor would I have until I saw the documents and took place 20 years ago, so...

Q. All right.

A. If you expect one to remember that is a bit -- asking a lot.

Q. Okay. Just to completed the record I'm going show you 447, which is a one-page document dated March 27th, 1992 from Albany Savings Bank to you David L.



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D. Smith

Smith acknowledging receipt on 3/23/92 of your order for 50,000 shares at the price of \$10 per share. And then it goes on to say that you're going to make some allocation along the lines you mentioned.

And then let me show you 448, it's a letter dated April 1, 1992 from Albany Savings Bank addressed to you stating that we appreciate your interest in the stock offering of Albank Financial Corporation. Further down it says "Therefore your subscription is for 40,688 shares" and there's a check back to you for --

A. 93,674.85.

Q. Right, attached to this. Do you remember receiving this letter?

A. Now I do, sure.

Q. And this is, in fact, how the 40,688 shares of Albank came to be acquired, correct, through this allocation?

A. That's correct.

Q. All right. Now, at the time that you decided to create the irrevocable trust, did you talk to your wife about it?

A. Yes.

Q. And who other than your wife did you talk to about setting up the trust before it was formed?



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Intervenor.

**SUPPLEMENTAL DECLARATION OF WILLIAM J. DREYER
IN FURTHER SUPPORT OF DAVID L. SMITH'S
MOTION FOR ATTORNEYS' FEES & COSTS**

WILLIAM J. DREYER hereby declares under penalty of perjury:

1. I am an attorney duly admitted to practice in this Court. I am a partner in the law firm of Dreyer Boyajian LLP, counsel to David L. Smith in the above-captioned case and in the

parallel criminal action, *United States of America v. Timothy M. McGinn and David L. Smith*, 1:12-cr-028 (DNH).

2. As stated in David L. Smith's February 10, 2012 Motion to Modify the July 22, 2010 Preliminary Injunction Order, Mr. Smith is seeking \$300,000 to be released for attorneys' fees and costs associated with the defense in the criminal action against him.

3. Of the \$300,000 requested, \$250,000 is requested to satisfy the legal fees associated with representing Mr. Smith against the complex tax, wire, mail, and securities fraud charges against him and the remaining \$50,000 will be allocated for costs such as necessary expert witnesses, daily transcripts, copying fees, courtroom technology, and living costs during the Utica trial.

4. The \$250,000 amount for legal fees is based upon the \$350 average hourly rate for partners and \$275 average hourly rate for associates in the Albany-area and the immense amount of time and preparation necessary for Mr. Smith's legal defense. Declarant is aware that many attorneys in the upstate area charge fees greater than \$350 per hour, with some charging \$500 per hour. In major metropolitan areas such as New York and Washington, D.C., rates are in the range of \$750 to \$1200 per hour for partners. Declarant's hourly rate is higher than \$350, however this amount has been used to estimate a fixed fee which the SEC, in light of their experience in other cases, should realize is reasonable. Their challenge to the amount of this fixed fee calls into question the objectivity of the SEC in matters relating to the rights of the criminal defendants to have a fair trial and select counsel of their choice.

5. Notwithstanding the SEC's unwillingness to acknowledge its experience in other cases, we advise the Court herein that to represent David Smith on an hourly basis would cost over \$1,000,000. A trial of four weeks with out-of-court preparation sessions, would consume

about 60 hours a week for partners and one or two associates, alone costing over \$200,000. Additionally, pretrial motions, discovery, and trial preparation over a period of eight months before trial would amount to over \$800,000 in attorneys' fees. As Mr. Smith has revealed in financial statements, his previous civil attorneys over the course of three months charged over \$300,000 in legal fees for intensive preliminary matters well before discovery even began. Thus, the \$300,000 requested to be released in this action is intended to be a proposal that the Court, SEC, and Government would find reasonable and acceptable under the circumstances.

6. For these reasons, \$300,000 is a reasonable estimate in light of the intricate nature of the charges alleged in the Indictment, the probability that the trial will surpass the estimated four week length, the expectation that several motions will be made during the course of the litigation, and the vast amount of discovery that will need to be reviewed, among other things.

7. Therefore, the estimated legal fees associated with the defense of this case far exceed the \$250,000 requested to be released from this Court's freeze order.

8. Due to the large amount of time, careful attention, and expenses Mr. Smith's criminal defense requires, Dreyer Boyajian LLP will be unable to continue to represent him, unless the requested amount for attorneys' fees and costs is released.

9. Although it is fully within the Court's discretion, because the SEC is in possession of all of Mr. Smith's financial information, it is averred that an evidentiary hearing would be unnecessary in the instant motion.

10. It is respectfully requested that the Court grant the relief sought in David L. Smith's Motion to Modify the July 22, 2010 Preliminary Injunction Order.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: March 2, 2012



WILLIAM J. DREYER