

**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/CFH)

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.

NOTICE OF MOTION

PLEASE TAKE NOTICE, that upon the accompanying Memorandum of Law in Support of David L. Smith's Motion to Modify the Asset Freeze to Permit the Release of Funds to Pay Criminal Trial Transcript Costs, Declarations of David L. Smith and William J. Dreyer and accompanying exhibits submitted in support thereof, defendant David L. Smith will move this

Court before the Honorable Christian F. Hummel at the United States Courthouse, 445 Broadway, Albany, New York, at a date and time to be determined by the Court, for an order granting the release of the Smith family frozen assets for Mr. Smith's payment of transcript costs in his parallel criminal appeal.

Dated: October 29, 2013
Albany, New York

DREYER BOYAJIAN LLP

/s/ William J. Dreyer

WILLIAM J. DREYER, ESQ.

Bar Roll No.: 101539

LAUREN S. OWENS, ESQ.

Bar Roll No.: 517391

Attorneys for Defendant David L. Smith

75 Columbia Street

Albany, New York 12210

Telephone: (518) 463-7784

Facsimile: (518) 463-4039

**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/CFH)

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.

DECLARATION OF WILLIAM J. DREYER

WILLIAM J. DREYER hereby declares under the 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 Mr. Smith's criminal appeal, *United States v. McGinn*, 13-3202.

2. I submit this Declaration and the attached exhibit in support of David L. Smith's Motion to Modify the Asset Freeze to Permit the Release of Funds to Pay Criminal Trial Transcript Costs.

3. My office was provided an invoice from the court reporter in Mr. Smith's criminal trial (United States v. McGinn and Smith, 1:12-cr-028 (DNH)), that requires a \$12,000 deposit for the transcript costs of the four week trial and sentencing proceeding, and estimates the full payment due to be \$14,000. The invoice is attached as **Exhibit "A"**.

4. My office has advanced a total of \$2,000 towards the deposit amount, however the court reporter will not release the transcripts until full deposit is made.

5. My office has previously made five Applications for Attorneys' Fees and Costs pursuant to this Court's prior releases from the asset freeze.

6. Due to the lengthiness and complexity of Mr. Smith's criminal trial, the funds previously released have been exhausted and there are no available funds to remit for the transcript costs.

7. Without the transcripts, Mr. Smith will be unable to make a meaningful appeal of his convictions and sentence.

8. Accordingly, it is respectfully requested that the Court grant the relief sought in this Motion.

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

Executed on: October 29, 2013

/s/ William J. Dreyer
WILLIAM J. DREYER

**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/CFH)

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.

DECLARATION OF DAVID L. SMITH

DAVID L. SMITH hereby declares under the penalty of perjury:

1. I am a defendant in the above-captioned action and am also the appellant in a criminal appeal that is presently pending before the Second Circuit Court of Appeals: *United States v. McGinn*, 13-3202.

2. I make this Declaration in support of my Motion to Modify the Asset Freeze to Permit the Release of Funds to Pay Criminal Trial Transcript Costs.

3. The trial transcripts are necessary for my counsel to meaningfully appeal my criminal conviction and sentence.

4. I have been advised that the estimated cost for obtaining the trial transcripts is \$14,000.

5. I am currently incarcerated and have no source of income or unrestrained assets to pay the transcript costs.

6. Due to my incarceration I no longer receive nor am eligible for social security payments.

7. All of my assets and those of my wife, Lynn Smith, are frozen pursuant to orders by Judge David R. Homer in this civil action. This includes a stock account held in my wife's name.

8. Prior to SEC intervention and the appointment of the receiver in this case, I acted as my wife's broker and as such am familiar with the transactions involving her stock account.

9. As her broker, I had limited discretion over investment decisions concerning public companies, but exercised no discretion over investments in private placements or access to the stock account without my wife's discretion.

10. As stated in my Declaration dated March 2, 2012 (Dkt. No. 456-1), my wife, Lynn Smith, received an inheritance of \$60,000 after the death of her father, with which a stock account in her name was funded in 1968.

11. Throughout the decades, my wife's stock account grew exponentially, including a result of millions of dollars in productivity gains for the account during the economic boom in the 1990s.

12. In September 2002 the stock account was worth over \$3 million, before any of the allegations of fraud within the SEC's Complaint arose.

13. Although the stock account is now under the receiver's control, it is estimated that the stock account is currently valued in excess of \$1.5 million.

14. Additionally, for the past three years during which the asset freeze has been in effect, my wife and I have rented our Saratoga Springs residence out for the Saratoga Track season to assist in paying for our living expenses.

15. For the 2013 track season, \$16,200 was received for the rental. Due to our present circumstances and my current inability to provide any source of income to my family, my wife must retain this amount for necessary living expenses for the year and therefore she is unable to pay for the transcript costs out of this amount.

16. Our Saratoga Springs residence is also subject to the asset freeze of this Court. Due to the financial condition of the Smith family, no mortgage payments have been made on the residence since May 2011 and in 2012 foreclosure proceedings were instituted by Citizen's Bank. See Dkt. No. 552.

17. As a result of this Court's Memorandum and Decision dated August 24, 2012, denying a release of the residence from the asset freeze, foreclosure proceedings remain stagnant. See Dkt. No. 552.

18. Accordingly, I have moved this Court to authorize the release of \$14,000 of my family's frozen assets for the payment of necessary and reasonable costs related to my criminal appeal.

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

Executed on: October 16, 2013



DAVID L. SMITH

**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/CFH)

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.

**MEMORANDUM OF LAW IN SUPPORT OF DAVID L. SMITH'S
MOTION TO MODIFY THE ASSET FREEZE TO PERMIT THE
RELEASE OF FUNDS TO PAY CRIMINAL TRIAL TRANSCRIPT COSTS**

PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted in support of David L. Smith's Motion to Modify the Asset Freeze to Permit the Release of Funds to Pay Criminal Trial Transcript Costs. On September 3, 2013, this Court granted Mr. Smith leave to move to release frozen assets so that he may remit for the expense for his entire criminal trial transcript which is necessary for the appeal of his conviction and sentencing. Mr. Smith further makes this motion pursuant to the Fifth Amendment of the United States Constitution.

FACTUAL BACKGROUND

This Court's Preliminary Injunction Order issued on July 7, 2010 froze all of Mr. Smith's assets, the assets of his wife, Lynn Smith, and the assets of the defendant Trust. Dkt. No. 86. Through Mr. Smith's former counsel, he consented to the Preliminary Injunction Order but did not admit or deny the allegations of the Complaint and reserved his right to apply to this Court at any time for a modification of the Order. Dkt. No. 440-3, ¶ 3. On two separate occasions, this Court permitted the release of certain assets of Mr. Smith for the payment of attorneys' fees and expenses related to Mr. Smith's then-pending criminal trial. *See* Dkt. Nos. 478, 501. As this Court is aware through Dreyer Boyajian LLP's in camera review of the five Applications for Attorneys' Fees and Costs that have been submitted, the amounts previously released have been exhausted and there remains no available funds from the released assets to pay for Mr. Smith's appeal. *See* Dkt. Nos. 539, 550, 555, 557, 562.

After a four week criminal trial in Utica, Mr. Smith was ultimately convicted of fifteen of the twenty-eight counts of the indictment and on August 7, 2013, was sentenced to a period of ten years imprisonment and was remanded that same day. *See United States v. McGinn and Smith*, 1:12-cr-028 (DNH), Dkt. Nos. 104, 232. A notice of appeal was filed on August 16,

2013, appealing both the conviction and sentence. *See United States v. McGinn and Smith*, 1:12-cr-028 (DNH), Dkt. No. 238. Upon a request of the entire trial transcript and transcript of the sentencing was submitted, the court reporter advised that the transcript request consists of 3,449 pages and requires a deposit of \$12,000, with a total cost estimated to be \$14,000¹. See Dreyer Decl. ¶ 3, Ex. "A". Once the deposit is received in full, the court reporter will complete the transcript request within thirty days. Mr. Smith's counsel has already advanced \$2,000 towards the deposit and upon information and belief, there has been no other payments submitted towards the deposit. Dreyer Decl. ¶ 4.

With Mr. Smith incarcerated and the asset freeze still in place on all Smith family assets, there exists no funds from which the Smith family can pay the trial transcript costs with. Smith Decl. ¶¶ 5-7. Mrs. Smith must retain the \$16,200 she receives as rental income during the Saratoga track season, her pension, and social security income for her living expenses for the entire year, which she currently struggles to meet. Smith Decl. ¶¶ 14-15. The Smith's residence is currently subject to the asset freeze and foreclosure proceedings were instituted by Citizen's Bank in 2012, however remain stagnant. Smith Decl. ¶¶ 16-17. The Smith family has exhausted loans from friends and extended family and Mrs. Smith is currently in a dire financial situation. *See Lynn A. Smith's Motion Seeking to Modify the Asset Freeze to Provide Living Expenses*, dated October 18, 2013.

Mrs. Smith's stock account has been included in the asset freeze and has been the subject of significant litigation in this case. While her stock account has grown exponentially since the initial funding, including a growth of millions of dollars in productivity gains during the economic boom of the 1990s, the stock account was initially funded with \$60,000 Mrs. Smith

¹ It has been suggested that the SEC split the transcript costs with Mr. Smith, which if permitted, would require a release of \$7,000 of Smith family assets.

received as inheritance after her father's death in 1968, decades before any of the alleged fraud. Smith Decl. ¶¶ 10-13. This is indisputable.

Mr. Smith was previously found to have demonstrated a need for the release of assets to pay legal costs and fees (“[n]o other means of paying those costs and fees appears nor has any been suggested by the SEC.”) Dkt. No. 478, p. 7. Furthermore, his current financial situation is significantly worse than at the time this Court found that he had a necessity for the release of frozen assets. It is plain that there are no available funds for which Mr. Smith may pay for the transcript costs.

ARGUMENT

MR. SMITH'S RIGHT TO A CRIMINAL APPEAL WILL BE UNDULY BURDENED UNLESS FUNDS ARE RELEASED FROM THE ASSET FREEZE TO PAY TRANSCRIPT COSTS.

A criminal defendant's right to appeal is grounded in statutes and rules. *See Furman v. United States*, 720 F.2d 263, 264 (2d Cir. 1983), *see* 18 U.S.C. §§ 3732, 3742; F.R.A.P. 4(b). A defendant has an absolute right to appeal if convicted by a judge or jury at trial. *Atilus v. United States*, 406 F.2d 694, 697 (5th Cir. 1969). Furthermore, the “United States Supreme Court has held that criminal appeals must comply with the demands of the Due Process and Equal Protection Clauses of the U.S. Constitution.” *Carter v. Kelly*, 2013 WL 3340486 at *3 (E.D.N.Y. Jun. 28, 2013). *See Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *see also Smith v. Robbins*, 528 U.S. 259, 276-77 (2000) (criminal appellant must have the minimum safeguards necessary to make their appeal “adequate and effective.”).

While the current motion is seeking a release of assets for costs necessarily incurred related to Mr. Smith's pending criminal appeal and not for attorneys' fees², it is submitted that the analysis provided in *United States v. Monsanto* should apply as to costs associated with a criminal proceeding. 924 F.2d 1186, 1203 (2d Cir. 1991). Thus, where a defendant in a civil enforcement action seeks to lift a civil asset freeze to pay for costs in a parallel criminal proceeding, a court should determine: (1) whether the criminal defendant has made a needs-based showing that the requested frozen funds are necessary to pay for his legal defense [costs]; (2) the extent, if any, the government has demonstrated that the frozen funds are traceable to fraud; and (3) the value of the requested amount of frozen assets to be released is reasonable. See *S.E.C. v. Sekhri*, 2000 WL 1036295 (S.D.N.Y. Jul. 26, 2000); *S.E.C. v. FTC Capital Markets, Inc.*, 2010 WL 2652405 (S.D.N.Y. Jun. 30, 2010), see also Dkt. No. 478, p. 5.

A. Mr. Smith Has No Other Unfrozen Assets From Which to Pay His Trial Transcript Costs.

Mr. Smith's inability to pay the estimated \$14,000 fee for his trial transcript is obvious. He has no current source of income and due to his incarceration, no longer receives social security payments. Smith Decl. ¶¶ 5-6. All of his family's assets are frozen. Smith Decl. ¶ 7. The \$16,200 received by the Smith family from the 2013 rental of their Saratoga Springs residence must be used for Mrs. Smith's living expenses until she is able to rent the house out again next July, should she still be possession of the house. Smith Decl. ¶ 14-15. Therefore, this Court should follow its prior determination whereby it determined that "Smith as well has met his burden of demonstrating a need for the relief sought here." Dkt. No. 478, p. 7.

² Mr. Smith does not waive his right to make future motions for a release of assets for attorneys' fees related to the criminal appeal and/or his civil case.

B. The Inheritance that Funded Lynn Smith's Stock Account in 1968 is Not Tainted and Easily Severable.

Although currently under the receiver's control, it is estimated that Lynn Smith's stock account is valued in excess of \$1.5 million. Smith Decl. ¶ 13. While Mr. Smith maintains that the Stock Account is not tainted and that he acted only as her broker with only limited discretion to investment decisions concerning public companies (not the private placements that are the subject of the civil complaint), *at a minimum*, the \$60,000 amount that the Stock Account was created with has absolutely no relation to the SEC's allegations that begin in 2003, *thirty-five years* after the Stock Account was originally funded. Smith Decl. ¶¶ 8-10. Any argument by the SEC that the \$60,000 is commingled in unlawful proceeds should be rejected as the \$60,000 should appropriately be deemed untainted and reasonably severable from the current value of the stock account.

C. The \$14,000 Transcript Cost is Reasonable and Appropriate.

The estimated \$14,000 transcript cost encompasses the four weeks of trial proceedings and the sentencing proceeding. Dreyer Decl. ¶ 3, **Ex. "A"**. The court reporter estimates that the transcript will consist of 3,449 pages. In light of the lengthiness of the transcript, the \$14,000 fee is entirely reasonable and consistent with the customary and usual transcript fees in this District.

Therefore, Mr. Smith has demonstrated a need for a release of the asset freeze, that at least \$100,000 of the Stock Account is untainted or easily severable, and that the transcript costs are reasonable.

CONCLUSION

Based on the foregoing and the accompanying declarations of David L. Smith and William J. Dreyer, Mr. Smith respectfully requests that his Motion to the Asset Freeze to Permit the Release of Funds for Trial Transcript Costs be granted.

Dated: October 29, 2013
Albany, New York

DREYER BOYAJIAN LLP

/s/ William J. Dreyer

WILLIAM J. DREYER, ESQ.

Bar Roll No.: 101539

LAUREN S. OWENS, ESQ.

Bar Roll No.: 517391

Attorneys for Defendant David L. Smith

75 Columbia Street

Albany, New York 12210

Telephone: (518) 463-7784

Facsimile: (518) 463-4039