UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	
v.	:	**10 Civ. 457 (GLS)**
McGINN, SMITH & CO., INC., et al.,	:	
Defendants.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO MOVANTS' MOTION TO MODIFY THE ASSET FREEZE TO PROVIDE LIVING EXPENSES, RELEASE CERTAIN ACCOUNTS IN THE NAMES OF GEOFFREY AND LAUREN SMITH, AND TO PROVIDE COUNSEL FEES

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Plaintiff Securities and Exchange Commission respectfully submits this memorandum of law in opposition to the motion of Lynn Smith ("L. Smith"), Geoffrey Smith ("G. Smith"), Lauren Smith, and the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (the "Trust") (collectively, the "Movants") to modify the asset freeze to provide for Lynn Smith's living expenses, release certain accounts in the names of Geoffrey and Lauren Smith, and to pay counsel fees.

PRELIMINARY STATEMENT

L. Smith's motion to receive funds that have been frozen for the benefit of the victims of the McGinn Smith fraud presents her as an innocent and passive bystander. In fact, however, much of L. Smith's predicament is a result of her own decision to misrepresent her assets at the start of this case. Those lies–which have been meticulously described by this Court and by the Second Circuit, and which she continues to refuse to take responsibility for–undercut L. Smith's strenuous efforts to depict herself as a victim.

L. Smith's motion fails to even mention the hundreds of victims of the McGinn Smith fraud. Focusing only on her own plight, L. Smith argues that the scant dollars in the Receivership–which are indisputably woefully insufficient to make victims whole–should instead be given to her, in the amount of $4,144 per month "for an extended period of time," Br. at 2, and $100,000 in attorney fees. As prior decisions of this Court have held, however, a party seeking to unfreeze assets must show that doing so "would be 'in the best interests of the defrauded investors.'" Dkt. 478 at 27; Dkt. 592 at 15 (quoting *SEC v. Grossman*, 887 F. Supp. 649, 661 (S.D.N.Y. 1995), *aff'd*, 101 F.3d 109 (2d Cir. 1996)).

L. Smith fails to provide an adequate basis for elevating her considerations above those of the victims. The Movants' brief, moreover, misrepresents basic procedural and

evidentiary facts. Most importantly, L. Smith continues to argue that the stock account is hers alone and that the Trust is a legitimate trust. Both arguments have been discredited by this Court and the Second Circuit. L. Smith nevertheless claims that "[t]he SEC has not set forth any proof on the merits," Br. at 3, ignoring the three-day evidentiary hearing in June 2010 establishing that David Smith for many years used the stock account as a financing tool for the broker-dealer, and the evidentiary hearing and voluminous submissions during the second half of 2010 proving the lies of Lynn Smith and those around her regarding the Smiths' control of the Trust

The Court's rulings demonstrate "a substantial likelihood of success" on the merits as to the Trust, and a "likelihood of success" on the merits as to the stock account. Dkt. 86 at 25-36; Dkt. 194 at 22. In contrast, neither L. Smith nor the Trust have ever been able to identify any persuasive evidence to support their theories. Although L. Smith now claims that she is "ready for a trial on the merits," and that the last three years "have crawled by," Br. at 4, neither the Smiths nor the Trust have ever shown any urgency to resolve this case, as demonstrated by their frivolous appeals of four separate orders to the Second Circuit,[1] and their efforts to stay the SEC case pending the outcome of the criminal trial. Dkt. No. 470 (Order stating that "David Smith . . . the Trust, and the individual Smith defendants join in the motion of the United States for a stay and [the SEC] takes no position"). At no time during this18-month period did L. Smith, G. Smith, Lauren Smith, or the Trust ever seek to modify the stay to allow the claims against them to proceed.

It appears that L. Smith's strategy is to free up assets from the Receivership to support her and to fund a legal strategy that will allow them to continue litigating on every front for the foreseeable future. *See* Br. at 2 (predicting SEC case ongoing "over the next 12 to 18

[1] *See Smith v. SEC*, 2011 WL 7437561 (2d Cir. 2011); *Smith v. SEC*, 653 F.3d 121 (2d Cir. 2011); *SEC v. Smith et al.*, 710 F.3d 87 (2d Cir. 2013).

months"). Given the weakness of the Movants' legal arguments, it is not surprising that they would want to delay a resolution on the merits regarding the stock and Trust accounts.

With the criminal conviction of David Smith, it is a near certainty that a judgment based on collateral estoppel will be entered against him in the SEC case. "[I]t is well-settled that a criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case" *United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978) (citing cases). Collateral estoppel applies even if the causes of action are not identical so long as a defendant's convictions establish the requisite elements of the violations. *See, e.g., SEC v. Shehyn*, No. 04 CV 2003, 2010 U.S. Dist. LEXIS 84882, at *9 (S.D.N.Y. Aug. 9, 2010) (defendant's admissions by guilty plea to mail and wire fraud charges establish requisite elements of securities fraud charges); *SEC v. Roor*, No. 99 CV 3372, 2004 U.S. Dist. LEXIS 17416, at * 24 (S.D.N.Y. Aug. 30,2004) ("[I]t matters not what the precise charges in the indictment and civil complaint are, so long as they are predicated on the same factual allegations"); *SEC v. Dimensional Ent. Corp.*, 493 F. Supp. 1270 (S.D.N.Y. 1980) (factual allegations underlying wire fraud convictions sufficient to establish violation of securities law provisions).

Courts in this Circuit routinely find that, where a criminal action precedes the resolution of the SEC's enforcement action, a defendant is collaterally estopped from relitigating the issues in the SEC action. *See SEC v. Namer*, 183 Fed. Appx. 120, 121,2006 U.S. App. LEXIS 13772, at **2 (2d Cir. June 1, 2006) (district court properly granted partial summary judgment after determining that defendant was collaterally estopped from relitigating liability issues determined in parallel criminal case); *SEC v. Dimensional Ent. Corp.*, 493 F. Supp. 1270 (S.D.N.Y. 1980); *SEC v. Everest Mgmt. Corp.*, 466 F. Supp. 167 (S.D.N.Y. 1979).

David Smith's failure to concede that his criminal conviction collaterally estops him from contesting liability in the SEC case unnecessarily delays a resolution as to the stock account and the Trust account. In any event, once a judgment is entered against him, the assets in the stock account and the Trust account would be subject to disgorgement as assets of David Smith. In short, the stock account and the Trust account are both likely to be found to be assets of David Smith's and subject to seizure in satisfaction of the SEC's anticipated judgment against David Smith.

I. LYNN SMITH'S MOTION FOR LIVING EXPENSES SHOULD BE DENIED

As this Court recently found, "the true financial picture of the Smiths and their possible availability of resources remain unclear." Dkt. 592, at 17. And although L. Smith's motion promises "a complete accounting," Br. at 2, in fact, her motion offers almost no new evidence regarding her current financial situation other than simply referring back to the discredited accountings that were submitted in April 2010. Br. at 2 (citing to Dkt. Nos. 14 and 19). This motion fails to establish that providing L. Smith funds that have been frozen for the benefit of investors would benefit those investors.

L. Smith argues that her hardship is "obvious" (Br. at 2), but apart from her recent notification of receipt of food stamp benefits, she fails to offer sufficient evidence of her resources or of how she has spent the funds that she has received. For example, L. Smith has failed to submit any bank records showing balances in checking or saving accounts, and how that money has actually been spent. It does appear that L. Smith has a checking account, since her affidavit states that for the past six months "monthly debits from my checking account have averaged $7,265" (¶ 16). Nevertheless, L. Smith fails to provide any account statements from

her checking account, and she does not explain the source of funds into her checking account that allowed her to make "monthly debits" of $7,265.

In addition, L. Smith fails to fully explain what happened to the $600,000 that she received in July 2010 from the sale of the Sacandaga Lake house. Although $325,000 was paid to "various law firms," the remaining $275,000 has not been accounted for with any specificity. L. Smith's brief merely states that the $275,000 was "diminished over the course of several months" to pay unnamed people, and her affidavit also fails to explain how this $275,000 was spent and whether any of it remains. It also is far from clear that L. Smith has managed her resources prudently since the freeze has been in place. For example, her affidavit refers to the elimination of "$31,500 of wedding expenses for my daughter" (¶13), but fails to explain why these expenses were $31,500 when the Court had previously understood that these expenses were $3,338.40 (*see* Dkt. No. 592, citing Apr. 4, 2012 Court opinion).

Finally, L. Smith fails to disclose a significant asset that has been available to her since 2010: her home in Saratoga Springs, NY. As the Smiths' stated in a brief they filed on July 30, 2012, "the equity in the [Saratoga Springs] home remains significant and without the concerns of a volatile market." Dkt. 508-2 at 7. While the Smiths successfully opposed the motion by the SEC and Citizens Bank to allow the Receiver to sell this home, L. Smith should not be permitted to receive frozen funds when she has chosen not to free up the significant equity in her home.

In any event, L. Smith's monthly expenses are excessive and are not supported by any documentation. For example, L. Smith does not explain why she needs $448 dollars in gas per month; and she does not include any documentation to support her claimed expenses for any

of her other expenses. For these reasons alone, L. Smith's motion to use frozen funds for her own benefit should be denied.

II. THE FREEZE OVER GEOFFREY AND LAUREN SMITH'S ACCOUNTS SHOULD REMAIN

G. and Lauren Smith do not dispute that, in July 2010, just before the misrepresentations regarding the Trust were revealed, they received, $296,000 and $83,500, respectively. Had the truth about the Trust been known, they never would have received those funds. As a consequence, they were named as relief defendants in the Second Amended Complaint, and the SEC seeks an order requiring them to disgorge these amounts, plus prejudgment interest. See Second Amended Complaint, ¶¶ 150,151; 162-174; 206-211. In addition, several accounts in their names were frozen, but the amounts in these accounts are far below the amount they received in July 2010. Br. at 11.

G. and Lauren Smith now claim, for the first time, that the amount sought in disgorgement from them should be reduced because they disposed of certain of these funds: they both transferred $75,000 to Lynn Smith and Geoff Smith "invested [$200,000] into Capacity One Management." Br. at 10. However, they fail to cite any authority for the proposition that a judgment against them for monies they received in allegedly fraudulent transfers should be reduced simply because they spent or otherwise passed on some portion of those funds. Moreover, they fail to provide any evidence whatsoever as to their current financial condition that would warrant a modification of the asset freeze as to them. Finally, although the Court has imposed an Order requiring L. Smith to repay the $600,000.00 she received when the Trust's assets were wrongfully unfrozen (which includes the $150,000.00 Lauren and Geoffrey transferred to her), there is no certainty that L. Smith will ever comply with that Order. It is entirely appropriate therefore to seek to recover these funds from the original recipients.

Accordingly, Geoffrey and Lauren Smith have failed to sustain their burden of demonstrating why the balance of equities weighs in favor of releasing funds to them that will be needed to repay defrauded investors.

III. THE MOVANTS' MOTION TO USE FROZEN FUNDS TO PAY PAST AND FUTURE COUNSEL FEES SHOULD BE DENIED

A party seeking to unfreeze assets must show that doing so would be "in the interests of the defrauded investors." *SEC v. Grossman*, 887 F. Supp. 649,661 (S.D.N.Y. 1995), *aff'd*, 173 F.3d 846 (2d Cir. 1999); *see also SEC v. Forte*, 598 F. Supp. 2d 689, 692 (E.D. Pa. 2009) ("Several courts have held that before they will unfreeze assets, the defendant must 'establish that the modification is in the interest of the defrauded investors.'") (quoting *Grossman*, 887 F. Supp. at 661). A court must weigh "the disadvantages and possible deleterious effect of a freeze . . . against the considerations indicating the need for such relief." *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972).

Courts regularly have denied or limited the payment of attorneys' fees from frozen assets. *E.g., SEC v. Private Equity Mgmt. Group, Inc.*, No. CV 09-2901, 2009 WL 2058247, at *2 (C.D. Cal. July 9, 2009) (denying request to amend asset freeze to allow payment of attorneys' fees); *SEC v. Sekhri*, No. 98 CIV. 2320, 2000 WL 1036295, at * 2 (S.D.N.Y. July 26, 2000) (denying motion to release funds from asset freeze for attorneys' fees).[2]

[2] The cases cited by Movants where an asset freeze was modified to pay attorneys' fees are clearly distinguishable and are not controlling. *See, e.g., United States v. Noriega*, 746 F. Supp. 1541, 1545-46 (S.D. Fla. 1990) (involved attorney fees for criminal, not civil, case); *SEC v. Dowdell*, 175 F.Supp. 2d 850, 854 (W.D. Va. 2001) (allowed attorney fees only for initial preliminary injunction phase of case before likelihood of success on merits assessed by court); *SEC v. Gonzalez de Castilla*, 170 F. Supp.2d 427, 430 (S.D.N.Y. 2001) (awarded fees but only where, unlike here, the court was concerned that the "inference upon which the freeze was granted may not be supported by the necessary quantum of proof"); *CFTC v. Noble Metals Int'l*, 67 F.3d 766, 774-776 (9th Cir. 1995) (denied attorney fees where frozen assets fell far short of amount needed to compensate victims); *SEC v. International Loan Network, Inc.*, 770 F. Supp.

The Movants concede that, under Second Circuit law, in order to modify an asset freeze to provide for counsel fees, "the defendant must establish that the funds he seeks are untainted and that there are sufficient funds to satisfy any disgorgement remedy that might be ordered in the event a violation is established at trial." Br. at 12 (citations omitted). It is irrefutable, however, that the Movants' frozen assets, together with the assets held by the Receiver, are woefully insufficient to satisfy the amount likely to be owed to investors. As a result, the Movants cannot meet their burden.

The Movants claim this is their "second request to modify the asset freeze to provide living expenses and counsel fees." Br. at 10 This statement is incorrect and misleading This Court has not only denied one prior motion of L. Smith to modify the asset freeze to pay living expenses and counsel fees (Dkt. No. 211); but it has also denied a motion by the Trust to modify the asset freeze to pay legal fees (Dkt. 478) and it has also denied a motion by a non-party law firm, Iseman, Cunningham, Riester & Hyde LLP ("Iseman Cunningham") to modify the asset freeze to pay its legal fees (Dkt. 277). The Court's reasons for denying these repeated motions to modify the asset freeze to pay legal fees are even more compelling today.

On December 2, 2010, the Court summarily denied L. Smith's cross-motion to lift the asset freeze to pay attorney's fees and living expenses. Dkt. 211. The Court noted that L. Smith had already received at least $440,000.00 from the sale of the Great Sacandaga Lake Property (in fact, she received $600,000) and stated that these funds should allow payment of all reasonable legal and living expenses of Lynn Smith for the foreseeable future. Significantly, the

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678, 680 (D.D.C. 1991)(awarded fees where, unlike here, the SEC presented no evidence of improper diversion or secretion of assets by defendants); *SEC v. Quinn*, 997 F.2d 287, 289 (7th Cir. 1993)(only "small amounts" of unspecified quantity released but other requests for attorney fees denied).

Court made clear that: "Expenditure of these funds for excessive and unreasonable legal and living expenses does not and will not provide a basis to lift the asset freeze." Id. at 5.

On February 11, 2011, the Court denied a motion by the non-party law firm Iseman Cunningham for an order unfreezing Trust assets to pay certain attorney's fees owed to them in connection with their representation of the Trust. Dkt. 277. Iseman Cunningham was retained to represent the Trust at the evidentiary hearing held on November 16, 2010, in connection with the SEC's motion for reconsideration of that portion of the Court's prior order denying its request to freeze the Trust. After stating that the issue presented was "whether a balancing of the interests of investors in preserving assets for possible later restitution is outweighed by the interests of the Trust and Iseman Cunningham in paying Iseman Cunningham's fees and costs," Dkt. No. 277 at 4, (citing *S.E.C. v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972)), the Court concluded that the balance "weighs decidedly" (*Id.)* in favor of denying the motion for three reasons. First, noting that the total amount of investor funds obtained through the defendants' fraud dwarfs the value of the assets frozen for the benefit of investors, the Court concluded that: "The investors, on whose behalf the assets were frozen, thus possess a heightened interest in having those assets maintained without further diminution pending the outcome of this action. This interest far outweighs that of either the Trust or Iseman Cunningham in payment of the charged fees and costs before this action is fully resolved." *Id.*, at 4-5.

Second, the Court noted that the Trust was subjected to the asset freeze after a determination that David Smith possessed a beneficial interest in the Trust and that, "[i]n these circumstances, the Trust must be viewed as an asset of David Smith." The Court then concluded that absent an accounting from David Smith making clear that he had no other assets to pay the

fees, the Trust and Iseman Cunningham could not meet their burden of demonstrating a need to lift the freeze to pay the fees. *Id.* at 5. Third, the Trust was already represented by counsel when Iseman Cunningham was retained and the need to retain them "was necessitated by the conduct of David Smith, L. Smith, the then-Trustee, and the then-counsel in concealing a document whose discovery gave rise to the SEC's motion for reconsideration. "To permit a further depletion of assets available to repay investors would reward that misconduct at the substantial expense of investors." *Id.* at 5-6.

On April 4, 2012, the Court, *inter alia,* denied the Trust's motion to release sufficient assets of the Trust to pay certain current and future expenses, including $117,462.93 in accrued attorneys' fees owed to the Featherstonhaugh firm. MDO 4/4/12, Dkt. 478. The Court cited four reasons why "the balance of interests here weigh decidedly in favor of denying the Trust's motion for payment of its attorney's fees and costs," *Id.* at 24.: (1) the total amount of investor funds obtained through the defendants' alleged fraud far exceeds the assets frozen for the benefit of investors; (2) the Trust's assets were frozen after a determination that David Smith possessed a beneficial interest in the Trust; that freeze should not be lifted absent a showing that David Smith had no other assets to pay the Trust's legal fees and there was evidence of other sources of income (such as part-time rental of the Sarasota Springs residence) and evidence of payments of non-essential expenses (including $3,338.40 in payments for their daughter's engagement party) that diminished the argued need for access to frozen Trust assets; (3) the amount of attorney's fees and costs incurred by the Trust would have to be substantially reduced before any assets were released such that they could likely be paid from any remaining available Smith assets; and (4) payment of the Trust's legal fees and expenses at the end of the case remains possible if the Trust prevails. *Id.* at 24-27.

Significantly, the Court stated that, "a substantial portion of the fees and costs are directly related to the Trust's own misconduct, and that of those acting on behalf of the Trust, in concealing the existence of the Annuity Agreement. Dkt. 478 at 25. It also noted that generally fees and costs incurred would be reduced by amounts charged for litigation efforts that were unsuccessful, citing *Barfield v. New York City Health & Hosps. Corp.*,537 F.3d 132, 151-52 (2d Cir. 2008). It noted that: "Here, the Trust was unsuccessful on the SEC's motion for reconsideration, its own motion for reconsideration of MDO II, and its appeal of those decisions." It also noted that it would not automatically accept the rate charged by counsel and that any further consideration would require of review of more detailed billing records that reflected the actual worked performed (which here would ensure that frozen assets were not being used to pay the costs of prior unsuccessful litigation efforts). *Id.* at 25-26.

Finally, in an analogous ruling, this Court recently denied David and L. Smith's motion to unfreeze the stock account to pay certain taxes due to the Internal Revenue Service. Dkt. 592 (MDO dated Sept. 11, 2013). The Court noted that this Court and the Court of Appeals have both held that the stock account is a joint asset of David Smith's and that this is now the law of the case. *Id.* at 14-15. The Court held that "for multiple reasons, the balance of interests weighs decidedly in favor of denying defendants' motion…" Those reasons closely tracked the reasons this Court has previously used in denying motions to unfreeze the Trust's assets, including that the total claims against the McGinn Smith Estate amount to at least $100 million "with cash on hand value of $14 million, with just under $3.4 million coming from frozen assets of the relief defendants;" the ability to satisfy tax obligations from other sources not considered part of the asset freeze, including a possible foreclosure sale of the Smiths' primary residence;

and the possibility that the tax obligation could be satisfied at the conclusion of this action if Lynn Smith prevails.

The Court's reasoning in denying the prior motions to modify the asset freeze to pay legal fees incurred by the Trust and L. Smith has even more force under the current facts of the case. First, David Smith has now been found guilty of numerous counts of securities fraud arising from the same conduct charged in the Amended Complaint in this case. Thus, his liability for a disgorgement order reflecting the at least $100 million in investor losses is even more certain than when Judge Homer issued the above three orders. Second, it is undisputed that a surplus will not exist from the frozen assets to satisfy this liability given that the Receiver only has in hand only approximately $14 million, with just under $3.4 million coming from the relief defendants.

Third, the Movants argue that FWC has incurred substantial expenses while defending this action for the past three years and that it is extremely unfair to continue to force it to bear the costs associated with this complex matter. However, Movants fail to acknowledge that a substantial portion of those fees have been incurred pursuing one losing motion and appeal after another. Although the proffered legal bills do not reflect the actual services rendered, there can be no doubt that a sizable amount of the services rendered by FWC has arisen as a result of Lynn Smith's and the Trust's meritless opposition to and appeals from the SEC's motion to freeze the stock account and Trust assets, and L. Smith and the Trust's various initial oppositions to and appeals from the order directing the Receiver to sell the Vero Beach house and the order imposing sanctions. L. Smith and the Trust lost every one of these motions and appeals. To permit a further depletion of assets available to repay investors to pay legal fees incurred by L. Smith and the Trust in furtherance of their outrageous fraud on this court, and

their frivolous pursuit of one losing motion and appeal after another, would be " to reward that misconduct at the substantial expense of investors." Dkt. 277 at 5-6.

In addition, "[e]xpenditure of these funds for excessive and unreasonable legal and living expenses does not and will not provide a basis to lift the asset freeze." Dkt. No. 211 at 5. L. Smith has already paid $125,000.0 to FWC to pursue baseless motions and appeals, paid $50,000.00 to David Smith's lawyers, and allegedly paid $150,000.00 to Gusrae Kaplan "for past representation related to this investigation" (L. Smith Aff. at ¶ 15).

However, although Lynn Smith claims she has made now made a full disclosure of her finances, there are serious unanswered questions regarding this alleged payment to Gusrae, Kaplan. The attached legal bills (L. Smith Aff., Exhibit F) are woefully incomplete. The first bill reflects only services rendered for a "FINRA Disciplinary" matter and "Reviewed FINRA order," not the instant case, and the second bill reflects only $1,470 owed for unspecified services rendered. Also, a payment of $95,000.00 on July 20, 2010 reflected on a Lynn Smith bank statement (Exhibit F at p. 8) contains no printed payee information and the attached Gusrae Kaplan legal bills do not reflect any such amount being owed to them or paid to them. They certainly do not reflect payment for work in connection with this case, as opposed to prior FINRA matters or other unrelated matters..

Thus, L. Smith has still not made clear how she spent this $150,000.00 or why her voluntary choice to ostensibly pay $150,000.00 to a law firm that had minimal involvement in this case and no ongoing involvement should entitle her to seek more money from the frozen assets now. Accordingly, L. Smith's choice to spend $150,000.00 to pay Gusrae Kaplan appears to be "excessive and unreasonable legal fees" that should not provide a basis to lift the asset freeze.

Furthermore, FWC agreed to represent the Trust in February 2011, at a time when it well knew that the Trust's assets were frozen and that the Court had just days earlier denied Iseman Cunningham's motion for payment of legal fees from the Trust's assets. It was well aware that any payment for services rendered on behalf of the Trust would have to come from some other source or be deferred until the end of the case.

In addition, the resolution of this action should not take 12 to 18 months. If David Smith were to concede that he is collaterally estopped from contesting liability in the civil case based on his criminal convictions on multiple counts of securities fraud in the related criminal case, the parties could quickly proceed to a non-jury hearing as to the amount of a judgment against David Smith and whether the stock account and Trust Account are assets of David Smith subject to disgorgement. This could be done in a matter of months and, if those assets are found to be subject to a disgorgement order against David Smith, no subsequent jury trial will be necessary. Moreover, even assuming, *arguendo,* a jury trial occurs as to the Trust assets, that trial should be brief and could occur shortly after this Court's decision as to which of David Smith's assets are subject to immediate satisfaction of his disgorgement order without the need for a trial. Movants should not be given an open-ended $100,000 advance to pursue even more unwarranted and frivolous litigation at the potential expense of defrauded investors.

Finally, if L. Smith or the Trust prevail at the end of the case, there will be more than enough money to pay the attorneys' fees in their entirety. On the other hand, if the SEC prevails, then monies paid out of the frozen assets now for Movants' attorney fees cannot be clawed back and will be lost to the defrauded investors. Thus, the irreparable harm that will result to investors if monies that are due to them are irretrievably lost through payments of the Trust's and Lynn Smith's attorney's fees outweighs any prejudice that may result from a delay of

those payments to the attorneys until the end of the case, assuming the Movants prevail. This is particularly so where this Court and the Court of Appeals have repeatedly found that the SEC has a high likelihood of success, and that likelihood has increased greatly following David Smith's conviction in the related criminal case.

CONCLUSION

For the foregoing reasons, the Movants' motion should be denied in its entirety.

Dated: New York, NY
November 12, 2013

Respectfully submitted,

Securities and Exchange Commission

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