

**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.

**REPLY MEMORANDUM TO PLAINTIFF'S OPPOSITION OF
DAVID L. SMITH'S MOTION TO MODIFY THE ASSET FREEZE TO PERMIT
THE RELEASE OF FUNDS TO PAY CRIMINAL TRIAL TRANSCRIPT COSTS**

In Reply to the SEC's Opposition to David L. Smith's Motion to Modify the Asset Freeze to Permit the Release of Funds to Pay Criminal Trial Transcript Costs, dated November 22, 2013, David L. Smith asserts the following:

ARGUMENT

I. THE SEC HAS FAILED TO MEET ITS BURDEN UNDER *MONSANTO* IN MAKING A PROBABLE CAUSE SHOWING THAT THE REQUESTED \$3,600.00 IS TRACEABLE TO ANY ALLEGED FRAUD.

The SEC has failed to meet its burden in showing that the amount of \$3,600.00 sought from Lynn Smith's Stock Account is traceable to any alleged fraud and does not dispute that in September 2002 it was worth over \$3 million, before any of the allegations of fraud within the SEC's Complaint arose. Dkt. 620-2, ¶ 12. The SEC even acknowledges that the Stock Account has been in existence for decades and that throughout its existence it had considerable funds, well in excess of the \$3,600.00 being sought. While the SEC challenges that the Stock Account was funded with a \$60,000.00 inheritance, it provides no evidence to the contrary, only the assertion that approximately forty years ago, the value of the Stock Account dipped to approximately \$10,000.00. Even if this had bearing on the instant motion, this amount is still in excess of the \$3,600.00 being sought.

The SEC's speculation that the \$60,000.00 inheritance was diminished by Mrs. Smith's personal uses of the Stock Account ignores the exponential growth of the account throughout the decades. Moreover, the SEC fails to advance any evidence that would show that the monies currently in the Stock Account are not related to Mrs. Smith's original inheritance. The SEC's speculations without more, are insufficient to satisfy its burden of making a probable cause showing that the \$60,000.00 inheritance is traceable to any alleged fraud. *See U.S. v. Monsanto*, 924 F.2d 11186 (2d Cir. 1991) (*Monsanto IV*), *cert denied*, 112 S.Ct. 382 (1992); *S.E.C. v. Coates*, 1994 WL 455558 at *3 (S.D.N.Y. Aug. 23, 1994), Dkt. No. 440-1.

II. THE \$3,600.00 REQUESTED CAN BE REASONABLY SEVERED FROM THE ASSET FREEZE.

The SEC has failed to show why the \$3,600.00 cannot be reasonably severed from the Stock Account and thus has failed to meet its burden under *Monsanto*. The amount sought should be released because it (1) cannot be found that original inheritance amount from 1968 is traceable to proceeds of any alleged unlawful activity and (2) the amount can be reasonably severed as it is not so commingled in any alleged unlawful proceeds. See Dkt. 478, p. 11. Furthermore, the SEC misrepresents this Court's prior decision which addressed the issue of whether the Stock Account in its entirety should be severed from the asset freeze. See Dkt. 86. David Smith's instant motion is seeking to reasonably sever a small portion of monies from the Stock Account from the \$60,000.00 inheritance, which has not been previously requested.

III. THE SHOWING OF NECESSITY HAS PREVIOUSLY BEEN FOUND BY THIS COURT.

This Court has previously found Mr. Smith has met his burden of demonstrating a need for relief and stated "Smith currently has no source of income . . . [n]o other means of paying those costs and [attorneys'] fees appears nor has any been suggested by the SEC." Dkt. 478, p. 7. The need for a release of funds for criminal appeal costs is even greater now that Mr. Smith is incarcerated. The SEC has provided no assertions of other funds from where the Smith's would be able to obtain funds from other than putting their Saratoga residence up for sale, which would take months and it would be unlikely that any funds from the sale would come into Mr. Smith's hands due to the outstanding judgments against him. Additionally, Mr. Smith would be unable to apply to the Second Circuit to proceed *in forma pauperis* as he would be required to state his family's millions of dollars in frozen assets in the application, which unquestionable would result

in a denial of his application. Therefore, there is a distinct need for the release of the funds requested.

CONCLUSION

For the foregoing reasons, and the reasons stated in Mr. Smith's October 29, 2013 initial papers, Mr. Smith respectfully requests that his Motion to Modify the Asset Freeze to Permit the Release of Funds for Trial Transcript Costs be granted.

Dated: November 27, 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