UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

No. 10-CV-457 (GLS/CFH)

McGINN, SMITH & CO., INC., et al.,

Defendants.

APPEARANCES:

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CHRISTIAN F. HUMMEL
U.S. MAGISTRATE JUDGE

MEMORANDUM-DECISION AND ORDER

Presently pending before the Court are the motions of (1) Lynn Smith to modify the asset freeze to provide living expenses and counsel fees (Dkt. Nos. 610, 636, 638, 639); (2) Geoffrey and Lauren Smith to modify the asset freeze to provide release of certain accounts in the names of Geoffrey and Lauren Smith and counsel fees (Dkt. Nos. 610, 636, 638, 639); and (3) David L. Smith to modify the asset freeze to permit the release of funds to pay criminal trial transcript costs (Dkt. No. 620, 643, 650). Plaintiff Securities and Exchange Commission ("SEC") opposes the motions. Dkt. Nos. 630, 648. For the reasons which follow, all of the motions are denied.

I. Background

For a more complete description of the background of this action, see S.E.C. v. McGinn, Smith & Co., 2011 WL 1770472 (N.D.N.Y. May 9, 2011) (district court's decision denying motions to dismiss of certain defendants); S.E.C. v. Wojeski, 752 F. Supp. 2d 220 (N.D.N.Y. 2010) (reconsidering prior asset freeze order and subsequently modifying said order to include the Trust) aff'd 432 Fed. App'x 10 (2d Cir. 2011); S.E.C. v. McGinn, No. 10-CV-457 (GLS/DRH), 2012 WL 1142516 (N.D.N.Y. Apr. 4, 2012) (hereinafter Smith I) (granting in part and denying in part previous motions of defendants McGinn and Smith, and denying in its entirety the Trust's motion, for orders releasing assets from the preliminary injunction).

A. Modification of Asset Freeze for Release of Funds for Living Expenses and Counsel Fees for Lynn Smith

Lynn Smith moves this Court seeking a modification of the asset freeze to release a

sum of money of approximately $4,000 per month for living expenses throughout the duration of the legal proceedings and another $100,000 for counsel fees which are past due and continuing to accumulate. Dkt. No. 610.

Prior to her husband's conviction in February of 2013, the Smith's received income of approximately $875,000 through (1) the sale of Sacandaga Camp to the David L. And Lynn A. Smith Irrevocable Trust U/A 8/04/04 ("the Trust") of $600,000; (2) unemployment benefits provided to David Smith for a total of $40,000; (3) a consulting contract with New York State Building Projects, Inc. for $9,350; (4) renting their primary residence in Saratoga Springs during the summer months totalling proceeds of $21,000 in 2011; $16,200 in 2012; and $16,200 in 2013; (4) social security payments of $113,050; and (5) loans from family and friends of $57,900. L. Smith Aff. (Dkt. No. 610-1) ¶¶ 3, 18-21. Lynn Smith reports that she has decreased her monthly expenses from approximately $21,000/month in 2010, to $13,000/month in 2011, to $7,150/month in 2012, to $6,900/month in 2013. Id. ¶ 10. Lynn Smith's monthly expenses have recently been further decreased to approximately $5,150/month by eliminating obligations including (1) $35,000 in wedding expenses for her daughter; (2) life insurance and health insurance premiums forfeited and discontinued; (3) expenses associated with a vacation home which was subject to a Court-ordered sale; (4) $15,000 in Trust expenses; (5) legal expenses in connection with the criminal representation of David L. Smith; and (6) income tax obligations. Id. ¶ 13. Lynn Smith's currently reported monthly obligations are: (1) groceries for $500; (2) utilities for $1017; (3) gas and auto repairs for $748; (4) insurance premiums of $574; (5) an automobile loan of $270; (6) credit card minimum payments of $1,300; (7) clothing needs of $50; (8) medical expenses of $350; (9) home maintenance of $250; and cash expenditures of $100. Id. ¶ 17.

Lynn Smith affirms that she currently owes approximately $17,000 in credit card debt and has an outstanding $900,000 sanction order from this Court and legal fees of approximately $441,500. L. Smith Aff. ¶¶ 8, 9, 30. Moreover, neither the mortgage nor taxes on their Saratoga Springs home have been paid since June of 2011 (L. Smith Aff. ¶ 22; D. Smith Decl. ¶ 16) and according to David L. Smith, as of 2012 foreclosure proceedings were instituted by Citizen's Bank (D. Smith Dec. ¶ 16). Such proceedings remain stagnant. D. Smith Decl. ¶ 17.

With respect to the $600,000 which Lynn Smith received from the sale of the Sacandaga Lake Property to the Trust, she contends that her counsel Featherstonhaugh, Wiley & Clyne, LLP ("FWP") received payments totaling $125,000[1]. L. Smith Aff. ¶ 15; see also Dkt. No. 610-5 (treasurer's check to FWP for $100,000). Further, $50,000 was paid to Dreyer Boyajian, LLP in connection with the criminal representation of David L. Smith. L. Smith Aff. ¶ 15; see also Dkt. No. 610-6 (treasurer's check to Dreyer Boyajian for $50,000). Finally, $150,000 was paid to Gusrae, Kaplan, Bruno & Nusbaum, PLLC ("GKBN") "for past representation related to this litigation." L. Smith Aff. ¶ 15; but see Dkt. No. 610-7 at 1-5 (billing records from GKBN related to a FINRA disciplinary hearing showing, as of June 30, 2010, a payment of $5,000 and balance of $14,390); Id. at 8 (bank statement showing a check written from $95,000 on July 20, 2010 with a handwritten note that such payments were for "Marty + Marty, NYC lawyers" without any corresponding billing statements from the firm); Id. at 6-7 (billing records from GKBN related to "Professional

[1] Billing records were attached from FWP showing outstanding balances in connection with the representation of both Lynn Smith and the Trust. Dkt. No. 610-10. Included in these records is the transaction date, the rate of the attorney working on the issue, the hours billed, and the total amount of work billed. Id. However, the records do not specify what the particular transactions related to, specifically which issues were being researched, written upon, or argued.

Services" showing, as of September 27, 2010, a payment of $50,000 and balance of $68,420). With respect to the remaining $275,000 in proceeds, Lynn Smith explains that

> on July 27, 2010 a treasurer's check was drawn in the amount of $275,000 so that the Smiths could retain control of these funds going forward. As time progressed, the treasurer's check would be drawn upon and small deposits would be made into the [Smith bank] account to meet necessary expenses. On August 3, 2011 the Smiths deposited the last remaining proceeds from the $275,000 treasurer's check which amounted to $40,000. . . The bank statements [since then] reveal that the account has maintained a balance of less than $20.00 since September of 2011 and that all of the proceeds from the sale of the camp are gone.

L. Smith Reply Mem. of Law (Dkt. No. 636) at 7-8; see also Dkt. Nos. 636-2 - 636-3 (providing copies of bank statements July of 2010 through the end of August 2013).

Based upon the figures listed below, Lynn Smith has a present monthly income of $915. But see L. Smith Aff. ¶ 7 (claiming her monthly income is $965 based on her social security benefits and retirement payments). She receives $727 in social security benefits, $138 from the New York State Teacher's Retirement System, and $50 from the Supplemental Nutrition Assistance Program. Id. ¶¶ 5, 7; Dkt. Nos. 610-2-610-4.

B. Modification of Asset Freeze to Release Accounts in the Names of Geoffrey and Lauren Smith

> After the July 7, 2010 Order, the Trustee of the . . . Trust disbursed $449,878 directly to Lynn Smith in connection with the purchase of the lakefront property. The Trustee also disbursed $296,000 to Geoffrey Smith, and $83,500 to Lauren Smith . . . Lauren Smith received $83,500, of which, $75,000 went directly to Lynn Smith to help finance the lakefront property transaction. Thus, Lauren Smith personally received a distribution of $8,500. Although Lauren Smith received only $8,500, over $86,000 of her assets have been frozen . . . Geoffrey Smith received $296,000. Seventy-five thousand dollars was transferred to his mother, and $200,000 was invested into Capacity One Management. Therefore, Geoffrey Smith actually received

> $21,500 in distributions. However, the SEC has frozen approximately $64,000 of his personal assets.

Trust Mem. of Law (Dkt. No. 610-12) at 10-11; see also id. at 11 (chart indicating the various accounts of Lauren and Geoffrey Smith which were frozen, and the corresponding balances). Counsel seeks the asset freeze to be modified to only include $8,500 for Lauren and $21,500 for Geoffrey, allowing the remainder of the money identified in their various accounts to be unfrozen for their personal use. Id. at 11.

Further, these defendants join in the prior motion of Lynn Smith to release $100,000 to pay FWC for legal fees, which total more than $146,000 for the Trust and over $441,000 for Lynn Smith. Trust Mem. of Law at 14. Additionally, on October 23, 2013, FWC was replaced as counsel by Linnan & Fallon, LLP. Linnan Decl. (Dkt. No. 638-1 at 1-3) ¶ 3. In an affidavit submitted by the Trust's present counsel, reported legal fees due to Linnan & Fallon since the filing of the present motion are in excess of $23,000. Id. ¶ 4; see also Dkt. No. 638-1 at 5-7.

C. Modification of Asset Freeze for Release of Funds For Criminal Transcript Costs

After a four week criminal trial, David L. Smith was convicted of fifteen counts from a twenty-eight count indictment and, on August 7, 2013, was sentenced and immediately remanded to a period of ten years imprisonment. United States v. McGinn & Smith, No. 12-CR-28 (DNH), Dkt. Nos. 104, 232; Dkt. No. 636-1 (Judgement from the criminal case outlining that David Smith was to be sentenced for 120 months and owed restitution to the named victims in the amount of $5,748,722.00). Accordingly, as of August 7, 2013, David L. Smith no longer had a viable source of income or was eligible to receive any further social security benefits. D. Smith Decl. (Dkt. No. 620-2) ¶¶ 5-6. On August 16, 2013 a

notice of appeal was filed with the Second Circuit appealing both the conviction and sentence. United States v. McGinn & Smith, No. 12-CR-28 (DNH), Dkt. No. 238. David L. Smith continues to be represented by the firm Dreyer Boyajian, LLP. Dreyer Decl. (Dkt. No. 620-1) ¶ 1.

In connection with his representation, counsel for David Smith contacted the court reporter from the criminal trial seeking the trial transcript. Dreyer Decl. ¶ 3. The invoice for the transcript for the trial and sentencing costs $14,000, with a $12,000 deposit required. Id. Dreyer Boyajian has advanced a total of $2,000 towards that deposit amount. Id. ¶ 4. Dreyer Boyajian has also made five separate applications to this Court, ex parte and in camera, pursuant to the Court's prior order for release of attorneys fees and costs. Id. ¶ 5. "Due to the lengthiness and complexity of [the] . . . criminal trial, the funds previously released have been exhausted and there are no available funds to remit for the transcript costs." Id. ¶ 6.

On or about October 29, 2013, David L. Smith made a motion to release $14,000 from the asset freeze to cover the cost of the transcripts from the criminal trial and sentencing. See e.g., Dkt. No. 620; D. Smith. Decl. ¶ 18. However, on November 21, 2013, counsel for David L. Smith sent a letter to the Court seeking to modify the previous application for release of frozen assets. Dkt. No. 643. "[T]he SEC . . . agreed to provide the $14,000 payment for the criminal trial transcript costs, as the SEC will require the transcripts for their future motion practice[; however,] the court reporter still requires a separate payment of $3,600 . . . for transcript copying fees." Id. Therefore, even though the need for release of the $14,000 was rendered moot, David L. Smith continued to request a modification of the asset freeze of $3,600 to obtain a copy of the criminal trial transcripts. Id. This figure includes the $2,000 deposit previously advanced by Dreyer Boyajian, LLP. Id.

II. Modification of the Asset Freeze

As previously discussed by this court, "[t]he preliminary injunction freezing the defendants' assets was entered to insure the availability of those assets to compensate the alleged victims of defendants' conduct in the event the SEC prevails in this action." Smith I, 2012 WL 1142516, at *2 (N.D.N.Y. Apr. 4, 2012); see also S.E.C. v. Unifund SAL, 910 F.2d 1028, 1041 (2d Cir. 1990) (explaining that an asset freeze is "ancillary relief to facilitate enforcement of any disgorgement remedy that might be ordered in the event a violation is established at trial."); S.E.C. 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."). What defendants are asking the Court to again consider is, despite the stated purpose of the asset freeze, whether defendants have demonstrated that release of the assets to pay their tax liabilities, interests, and fees would be "in the best interests of the defrauded investors." S.E.C. v. Grossman, 887 F. Supp. 469, 661 (S.D.N.Y. 1995) aff'd 101 F.3d 109 (2d Cir. 1996).

District courts have a well established "authority to freeze personal assets temporarily and the corollary authority to release frozen personal assets, or lower the amount frozen." S.E.C. v. Duclaud Gonzalez de Castilla, 170 F. Supp. 2d 427, 429 (S.D.N.Y. 2001) (citations omitted). In considering whether to modify an asset freeze, "the disadvantages and possible deleterious effect of a freeze must be weighed against the considerations indicating the need for such relief." S.E.C. v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1106 (2d Cir. 1972).

A. Lynn Smith's Living Expenses

For multiple reasons, the balance of interests here weighs decidedly in favor of denying defendant's motion for a modification of the asset freeze to release thousands of dollars per month for living expenses. First, the total amount of investor funds obtained through defendants' alleged fraud far exceeds the value of assets frozen by the SEC for the benefit of those investors in the event the SEC prevails in this action. Compare Am. Compl. ¶¶ 1, 6 (alleging losses to over 900 investors of approximately $84 million) with e.g., Dkt. No. 580 ¶¶ 8-9 (explaining total claims asserted against the McGinn Smith Estate of approximately $125 million with objections of approximately $24 million leaving an excess of $100 million in investor claims with a cash on hand value of $14 million, with just under $3.4 million coming from frozen assets of the relief defendants). There still remains no likelihood that a surplus will exist from the frozen assets in the event the SEC prevails in this action. 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 the action.

Second, the Smiths maintain that the stock account, from which they have requested the asset modification, is under the sole control of Lynn Smith. As discussed by this Court multiple times, such contentions are disingenuous as the asset is owned by both David and Lynn Smith. See S.E.C. v McGinn, Smith & Co., Inc., 752 F. Supp. 2d 194, 216 (N.D.N.Y. 2010) (holding that "David Smith had complete access to and control over the [stock] account and that such access and control were maintained for decades."); Smith v. S.E.C., 432 Fed. Appx. 10 (2d Cir. 2011) ("David Smith utilized the Stock Account as a personal line of credit . . . [and] treated . . . [it] as his own . . . mak[ing] bridge loans to keep his business going . . . [and] occasionally deposit[ing] his assets into the stock account."). The

injunction was upheld on the Trust's appeal. Smith v. S.E.C., 432 Fed. Appx. 10 (2d Cir. 2011). Regardless of arguments over whether or not this represents the law of the case, the Court cannot ignore its previous findings, upheld on appeal, that indicate that at a minimum, the SEC has shown a substantial likelihood of success that this asset belonged to David L. Smith. Thus, as it has before, David Smith is viewed as possessing a beneficial interest in the Trust and it is seen as a joint asset.

The asset freeze over the account, therefore, should not be lifted absent a showing that Lynn Smith is unable to satisfy her living expenses from other, unfrozen sources. Lynn Smith does have an undisputed income of slightly more than $900 per month. This is not insubstantial, however, Lynn Smith has gone to great lengths to detail her financial woes and outline the drastically different economic status she now possesses. This would seem to weight in favor of Lynn Smith's motion to release at least some portion of money each month for her continued support.

However, the evidence indicates that for the last three years the Smiths have received income from renting their property during the summer months, that Lynn Smith chose not to remit any of the $600,000 from the Sacandaga Lake sale and instead use it to continue to finance her affluent lifestyle, and that she paid approximately $35,000 towards her daughter's wedding. Given that the Court previously determined that the rental income from the Smith's Saratoga home and approximately $3,300 spent on an engagement party "indicate[d] . . . [the presence of] other income and assets not presently subject to the asset freeze from which . . . costs c[ould] be paid and [instead the Smiths] . . . continue[d] to incur non-essential expenses the payment of which could have been made for [various costs and fees rendering] . . . the declared need for release of the funds . . . diminished," any other finding, especially given the extended duration of the case and criminal conviction of David

L. Smith, would be inconceivable. Smith I, 2012 WL 1142516, at *11. Accordingly, the declared need for the release of funds is again diminished by the access to other funds and expenditure of available fund on non-essential costs.

Third, payment of these outstanding obligations and subsequent liabilities at the conclusion of this action remains possible if Lynn Smith prevails. If she prevails, the assets presently frozen attributable to the relief defendants are approximately $3.4 million, which far exceeds Lynn Smith's present credit card debt and sanctions.

Balancing these factors, the SEC, on behalf of investors, possesses a strong interest in maintaining the assets of the stock account, presently frozen, without diminution given the large sum of money which may potentially be owed by Smith. On the other hand, the Smith's assets outside the freeze, from which non-essential expenses were paid, weighs against any requests to release money. Therefore, the interests of the defrauded investors in preserving the frozen assets substantially outweighs the interests of Lynn Smith in releasing assets to pay for living expenses. For these reasons, Lynn Smith's motion is denied.

B. Release of Lauren and Geoffrey Smith's Personal Accounts

Lauren and Geoffrey Smith were provided with $380,500 in disbursements when the Trust was deemed outside of the asset freeze. Shortly thereafter, the annuity agreement which has been the subject of much litigation and the lynch pin for the Court's decision to both include the Trust in the asset freeze and deem David Smith as having a beneficial interest in the Trust, was discovered. See S.E.C. v. Wojeski, 752 F. Supp. 2d 220 (N.D.N.Y. 2010) (reconsidering prior motion exempting the Trust from the asset freeze on account of the newly discovered Annuity Agreement and ultimately granting the SEC's

motion to include the Trust in the preliminary injuction) aff'd Smith v. S.E.C., 432 Fed. Appx 10 (2d Cir. 2011). Had the existence of the annuity agreement been revealed during the limited discovery prior to the hearing, or in testimony during the hearing, as it should have been, the Trust would have never been carved out of the asset freeze and Lauren and Geoffrey Smith would have never received any disbursements. This is a procedural point which counsel for both Lynn Smith and the Trust seem to either forget or feel the need to relitigate.

There has never been a dispute that the operating documents initiating the creation of the Trust were fraudulent, incomplete, or in any way defective. The Trust documents undoubtedly gave various powers to the Trustee to buy, sell, and invest in the best interests of the Trust, as well as to hire representation when appropriate. However, as has been discussed by this Court numerous times, and upheld on appeal, "control and management over all assets of the Trust have been removed to the Receiver," and as a part of the asset freeze, any subsequent motion regarding the removal of Trust assets is not an "invo[cation] of authority of the Trust to pay . . . fees . . . costs [or other distributions] but the discretion of the Court to permit such payment from frozen assets." Smith I, 2012 WL 1142516, at *8, *10.

As previously discussed, when determining whether to lift the asset freeze, there is a balancing test to determine what is in the best interests of the investors. S.E.C. v. Grossman, 887 F. Supp. 469 at 661. As was previously stated, the money in the Trust never should have been unfrozen, thus Lauren and Geoffrey never should have received any distributions. Moreover, in an attempt to make the Trust whole, the Court issued a sanction order against Lynn Smith which she failed to pay, instead admittedly using it to pay counsel fees and keeping the balance in the form of a treasurer's check from which she

continued to draw upon for the last number of years to continue to finance her life. Any diminution of the Trust was due to the misrepresentations of David and Lynn Smith.

Given the large disparity in what is owed to investors compared with what is included in the asset freeze, the best interest of the investors compels preservation of the Trust monies. Moreover, the Smith children have failed to cite any authority for the proposition that the asset freeze should be lifted because they spent or otherwise passed on a portion of the distribution made to them. Further, in the event that the Trust is not deemed a beneficial asset of David L. Smith, the monies will be returned to the Smith children, as well as control of the Trust.

Accordingly, for these reasons the motion of the Smith children is denied.

C. Counsel Fees and Litigation Costs

As previously discussed in Smith I, 2012 WL 1142516, there is a difference in determining whether funds should be released for payment of attorneys fees and costs in a criminal versus a civil case. "The Supreme Court has held that while a criminal defendant has the Sixth Amendment right to retain the counsel of his or her choice, the defendant may not use funds obtained from criminal activity to do so." United States v. Monsanto, 491 U.S. 603 (1989). As relevant to the current inquiry, in S.E.C. v. Coates, No. 94-CV-5361 (KMV), 1994 WL 455558 (S.D.N.Y. Aug. 23, 1994), the defendant in a civil enforcement action brought by the SEC was also named in a parallel criminal action and sought the release of funds to retain an attorney. The court held that the Monsanto factors applied equally to a SEC enforcement action and

> [t]hus, where a defendant in a civil enforcement action seeks to lift an asset freeze to retain counsel in a parallel criminal action, a court must determine whether (1) the defendant has demonstrated

> a need for that relief; (2) if so, the defendant has demonstrated that the assets for which release is sought are [not] traceable to criminal activity; and (3) the defendant has shown that the value of the assets sought to be released is reasonable.

Smith I, 2012 WL 1142516, at *2-*3.

Conversely, "the standard for unfreezing assets to pay legal fees incurred while defending a civil action is different than that utilized for a criminal action." Smith I, 2012 WL 1142516, at *10 (citing cases and explaining that civil actions do not implicate a defendant's Fifth or Sixth Amendment rights). Accordingly, when those constitutional rights are not within the purview of the court, the appropriate standard within which to determine whether modification of an asset freeze is indicated is again "whether a balancing of the interests of investors in preserving assets for possible later restitution is outweighed by the interests of the Trust in paying [counsel] . . . fees and costs." Id. (citing S.E.C. v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1106 (2d Cir. 1972)).

i. FWC and Linnan & Fallon

FWC seeks release of $100,000 to defray costs that are associated with both Lynn Smith and the Trust. Linnan & Fallon also appears to join in this motion, indicating that the Trust now has legal bills in excess of $23,000 since its appearance in the case. The discussion surrounding the payment of either firm is based upon whether the modification of the asset freeze outweighs the interest of the investors. For numerous reasons, it does not.

First, as has been mentioned time and again, the total amount of investor funds obtained through the defendants' alleged fraud far exceeds the value of the assets frozen by the SEC for the benefit of the investors. Thus, the investors possess a heightened interest in the conservation of these frozen assets. This interest far outweighs that of either

Lynn Smith or the Trust in paying the charged fees and costs before the action is fully resolved.

This is especially true because, in the event the assets are not deemed to be an asset of David L. Smith, Lynn Smith and the Trust will be entitled to receive the balance of those frozen funds. This amounts to millions of dollars, an amount far in excess of the current or projected legal fees and costs. Accordingly, if the frozen assets are returned to these parties, they are able to fulfill any overdue obligations at that time with additional money to spare. However, if that money is released from the asset freeze yet the Trust is ultimately deemed to be an asset of David Smith, which would have otherwise been used to compensate the defrauded investors, that money will be gone and the investors will have lost a substantial benefit.

Second, for the reasons discussed above, it appears that at least Lynn Smith had additional assets that were outside of the asset freeze at her disposal. Instead of choosing to use those monies for payment of her mounting and outstanding fees, she instead decided to expend them on other non-essential costs. Accordingly, the declared release for the need for such funds is diminished.

Third, the amount of attorneys fees would most likely be substantially diminished, so the figures provided by FWC, and probably Linnan & Fallon, would have to be reexamined. As previously discussed, "assets would be released from the freeze only to pay reasonable fees and costs, not simply all fees and costs [and] . . . such fees and costs incurred are reduced by amounts charged for litigation efforts which were unsuccessful." Smith I, 2012 WL 1142516, at *12 (citations omitted). There is no information in the billing records which were provided regarding the content of the work completed. With respect to FWC, any work that was done in connection with various motions for reconsideration and subsequent

appeals would be discounted as those further litigation attempts were unsuccessful. Moreover, with respect to both firms, the hourly rates charged by counsel would have to be examined to determine whether the rates and time expended comply with the standard in this circuit. Moreover, any amount deemed reasonable pursuant to the standard in this circuit would have to be further reduced to include a credit for the monies already paid to FWC by Lynn Smith.

While not necessarily a major contributing factor, but of note, FWC and Linnan & Fallon both entered this litigation on behalf of the Trust after a prior law firm's request for counsel fees was denied for substantially similar reasons. Dkt. No. 277. Accordingly, this reasoning should not be foreign to either counsel.

Balancing these factors, the SEC, on behalf of the investors, possesses a strong interest in maintaining the assets of the Trust without diminution given the large amount which may potentially be owed by Smith. This interest is further strengthened by the recent criminal conviction and restitution order entered against David Smith. On the other hand, Lynn Smith has outside, unfrozen assets which were not used to subsidize her legal expenses and the total amount charged by FWC and Linnan & Fallon appears beyond what would be allowed. Thus, the interests of the defrauded investors substantially outweighs the interest in releasing assets to pay either FWC or Linnan & Fallon.

ii. Criminal Transcript Costs

Conversely, the request of David Smith for modification of the asset freeze to permit monies to secure his criminal transcripts speaks to his Fifth and Sixth Amendment rights and the former standard of consideration. However, David Smith fails to proffer facts sufficient to satisfy the three-prong test.

First, there is a serious question as to whether or not David Smith has demonstrated a need for the release of funds for his transcript. While initially the amount of the funds required for the transcript was great, it has now been reduced to copying costs as the SEC has agreed to pay the bulk of the balance, leaving David Smith responsible for $3,600. Moreover, Dreyer Boyajian has supplied a $2,000 advance, leaving a balance of only $1,600. While the Court understands that the law firm would appreciate seeing their advance returned, such is the cost of doing business in the criminal sector.

David Smith has reported that he received money from the rental of his house, a year-long consulting contract, social security, and unemployment. Moreover, it appears that the Smiths spent $35,000 on their daughter's wedding. All of these sources of income were outside of the asset freeze and during the course of the criminal trial. Accordingly, finding $1,600 to pay the balance of the trial transcript copying costs seems reasonable as it appears David Smith had sufficient assets outside the asset freeze available to him for some time.

Second, it appears that David Smith is seeking release of funds from Lynn Smith's stock account. However, the Court has already found that the stock account is tainted. Specifically, this "asset ha[s] previously been the subject of extensive litigation . . . and the evidence . . . demonstrates that [the stock account is] . . . tainted either as the proceeds of unlawful activity or as so commingled in unlawful proceeds that any untainted portions cannot be reasonably severed." Smith I, 2012 WL 1142516, at *5. Accordingly, to the extent that these assets are attempting to be accessed, any such motions are still denied for the reasons previously stated by the Court. Id.

Accordingly, as David Smith has failed to establish either of the first two prongs, the third will not be discussed. For the reasons stated above, the motion of David Smith is

denied.

III. Conclusion

For the reasons stated above, it is hereby

ORDERED that:

1. Lynn Smith's motion for release of funds from the preliminary injunction to pay for living expenses and counsel fees (Dkt. No. 610) is **DENIED** in all respects;
2. Lauren and Geoffrey Smith's motion for release of assets from the preliminary injunction to unfreeze personal accounts and pay counsel fees (Dkt. No. 610) is **DENIED** in all respects;
3. David Smith's motion for release of funds from the preliminary injunction to pay for criminal transcript copying costs (Dkt. No. 620) is **DENIED** in all respects.

SO ORDERED.

Dated: January 8, 2014
Albany, NY

Christian F. Hummel
U.S. Magistrate Judge