

**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 RELIEF DEFENDANT/DEFENDANT
LYNN A. SMITH'S RESPONSE TO THE PLAINTIFFS' MOTION PURSUANT
TO FEDERAL RULE OF CIVIL PROCEDURE 56 FOR SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

Relief Defendant/Defendant Lynn A. Smith submits this Memorandum of Law in response to the Securities and Exchange Commission's (the "SEC" or "Plaintiffs") Motion for Summary Judgment against Timothy M. McGinn, David L. Smith, Lynn A. Smith, Geoffrey R. Smith and Nancy McGinn pursuant to Federal Rule of Civil Procedure 56 and Northern District Local Rule 7.1(a)(3).

Relief Defendant/Defendant Lynn A. Smith ("Lynn Smith") strongly opposes the Plaintiffs' Motion for Summary Judgment. There are numerous genuine issues of material facts concerning ownership and control over the stock account held in Lynn A. Smith's individual name (the "Stock Account").¹ The SEC, as the Plaintiff and moving party, has the burden of proof to set forth conclusive evidence that establishes no material issues of genuine fact exists as to ownership and control of the Stock Account. Lynn Smith respectfully submits that the Plaintiffs have not fulfilled this burden, and therefore, the SEC is not entitled to apply Lynn Smith's Stock Account against a possible judgment against David Smith.

The Plaintiffs do not dispute that the Stock Account has been held in Lynn Smith's individual name for at least twenty three years.² The Plaintiffs do however, submit voluminous and extremely circumstantial evidence to support an unsubstantiated theory that David Smith owned and controlled the Stock Account. This has been a highly disputed issue of fact throughout this entire litigation which should only be determined by a jury trial on the merits.

¹ The Account is currently held in the name of Lynn A. Smith at RMR Securities, Account No. 405-04091 and is valued at approximately \$2,243,485.

² Plaintiffs' Statement of Material Facts in Support of Motion for Summary Judgment sets forth allegations in ¶331-¶356 which put Lynn Smith's counsel on notice for the first time, after four years of litigation, that the Stock Account may have been created in 1991, and not in 1969 as previously submitted by Counsel based on information and belief.

What is also undisputed is that Lynn Smith has not broken any securities laws. By the SEC's own admission, Lynn Smith had little knowledge of the complex business dealings of McGinn Smith and Co. and relied heavily upon her husband's financial knowledge. She is perhaps the greatest victim of the McGinn Smith & Co. wrongdoing. At her husband's urging she loaned Timothy McGinn \$1,000,000 to purchase a home, of which only \$85,000 has been repaid. She will likely never see the remaining balance. She has been denied access to nearly all of her assets for over four years and been forced to apply for public assistance in the form of food stamps. Additionally, her husband of over forty years, has begun serving a lengthy prison sentence due to his recent criminal conviction. In other words, Lynn Smith's life has been destroyed.

Since the Stock Account was maintained in Lynn Smith's name, she was free to utilize the assets in any manner she saw appropriate. Lynn Smith often allowed the Stock Account to benefit her family members. Simply because Dave Smith benefited from the Stock Account as Lynn Smith's husband does not equate to the fact that David Smith owned it. The benefits he received were conferred by the goodwill of Lynn Smith.

SUMMARY OF ARGUMENT

In this Memorandum Relief Defendant/Defendant Lynn A. Smith argues that the SEC's Motion for Summary Judgment should be denied because there are disputed issues of fact as to ownership and control of the Stock Account. After considering the evidence in light most favorable to the Relief Defendant/Defendant, Lynn A. Smith, the SEC can only prevail in this motion for summary judgment against the assets of Lynn Smith in one of two possibilities.

The first is if the SEC is able to somehow demonstrate that the money transferred into the Stock Account was received without consideration. The second requires the SEC to prove that David Smith is the lawful joint-owner of the assets in the Stock Account. Under this theory, the

Court should recognize that previous preliminary rulings are not binding as to ownership of the Stock Account.

Assuming, *arguendo*, that the SEC could somehow prevail as to joint ownership, in order to have the Stock Account completely applied to a judgment only against David Smith, the SEC must further submit additional evidence showing that David Smith completely controlled all aspects of the account itself. This is an extremely difficult burden to fulfill on a summary judgment standard and the SEC falls well short of their requirement. Lynn Smith strongly opposes the SEC's attacks on her credibility in the Plaintiffs' Motion for Summary Judgment. Witness credibility is to be evaluated and determined by a jury. It has absolutely no bearing on a motion for summary judgment.

David Smith's personal and professional relationship with Lynn Smith began nearly fifty years ago. During that time, David Smith served in two separate and distinct roles. One was as a faithful husband and father to Lynn Smith and their children. In his other role, David Smith served as Lynn Smith's stock broker of record who maintained full discretionary authority over the securities held in her individual Stock Account. The evidence before the Court establishes that David Smith's authority over the account was confined to authorization to act on behalf of Lynn Smith who was a "customer" of McGinn Smith & Co. The SEC's attempt to cloud the issue as to the ownership and control over the Stock Account simply because David Smith was married to Lynn Smith does not circumvent the requirement that a jury is to decide disputed issues of fact.

Additionally, the SEC has not submitted evidence in admissible form to the Court in support of their Motion. For example, the Commission did not disclose any expert witnesses to be utilized at trial pursuant to Magistrate Hummel's January 22, 2014 scheduling Order. Dkt.672. However, the SEC has submitted evidence in the form of a "review and analysis" from a Certified

Public Account and Certified Fraud Examiner. *See*, Plaintiffs' SMF App.Ex.1. This evidence is not admissible and should not be considered by the Court in determining the merits of this motion.

STANDARD FOR SUMMARY JUDGMENT

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment should be rendered "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party bears the burden of proving that there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments". *Weyant v. Okst*, 101 F.3d 845, 854 (2d Cir. 1996).

As such, the Court must resolve any ambiguity in favor of the nonmoving party. *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 122 (2d Cir. 2004). Once a moving party has met its burden, the nonmoving party will defeat summary judgment only if it identifies "evidence in the record from any source from which a reasonable inference in [its] favor may be drawn". *Binder & Binder PC v. Barnhart*, 481 F.3d 141, 148 (2d Cir. 2007) (internal quotation marks omitted); *see also, Anderson*, 477 U.S. at 252 ("[T]here must be evidence on which the jury could reasonably find for the [nonmoving party].").

ARGUMENT

POINT I

OWNERSHIP AND CONTROL OF THE STOCK ACCOUNT ARE GENUINE ISSUES OF MATERIAL FACT THAT SHOULD BE ADJUDICATED BY A JURY TRIAL NOT ON SUMMARY JUDGMENT.

A. The Preliminary Injunction Decision And Order Is Not Conclusive Evidence That David Smith Is A Joint Owner Of The Stock Account.

Preliminary rulings as to the likely outcome on the merits for preliminary injunction orders do not establish law of the case. Sierra Club v. U.S. Army Corps of Engrs., 771 F.2d 409, 413 (8th Cir. Mo. 1985) (finding of fact and conclusions of law made by a court in granting or denying a preliminary injunction are not binding at the trial on the merits). Even the Supreme Court of the United States of America has recognized this principal and held that “[a] party ... is not required to prove his case in full at a preliminary-injunction hearing...and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding...on the merits.” University of Texas v. Camenisch, 451 U.S. 390, 395 (1981).

Similarly, the United States Court of Appeals, Second Circuit has held that “the decision of both the trial and appellate court on whether to grant or deny a temporary injunction does not preclude the parties in any way from litigating the merits of the case”. DiLaura v. Power Autho., 982 F.2d 73, 77 (quoting 11 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure §2962, at 630–31 (1973)). New York State decisional law also recognizes this proposition and has held that the “[grant] or denial of a motion for a preliminary injunction does not constitute the law of the case or an adjudication on the merits...therefore, the issues must be tried as if no application for a preliminary injunction had been made.” Ratner v. Fountains Clove Road

Apartments, Inc., 118 A.D.2d 843, 843 (2d Dept.1986); Fortunoff v. Triad Land Associates, 906 F. Supp. 107, 113 (E.D.N.Y. 1995).

In the instant matter before the Court, the SEC states on page 22 of their Memorandum of Law that:

The Court has already found, after the three day preliminary injunction hearing... that David Smith was the “joint owner” of the Stock Account. SEC v. McGinn Smith, 752 F.Supp 2d 194, 215 (N.D.N.Y. 2010); MDO dated July 7, 2010.

Based on this erroneous statement, the SEC further suggests that:

Accordingly, David Smith jointly owned and controlled the Stock Account and the Receiver should be directed to apply the Stock Account’s assets for the benefit of the investors.

Plaintiffs’ Memorandum of Law at p.23.

The SEC’s suggestions ignore the fundamental principal that no litigant is required to prove their case on the merits at a hearing concerning a provisional remedy. More notably, Honorable Gary L. Sharpe, Chief Judge of the Northern District of New York, has recognized this basic concept. Judge Sharpe held in his May 6, 2011 Decision and Order that:

Judge Homer’s findings were not boundless; to the contrary, they were based on proof extracted from a condensed discovery, governed by the “substantial showing of likelihood of success” standard, and confined to evaluating the assets’ susceptibility to freezing. Thus, in light of these limitations, and because the pending motions implicate the adequacy of the SEC’s pleadings regarding distinct issues, reliance on the law of the case doctrine here would seem to offend the well-settled principle that the doctrine be “only addressed to its good sense.” Higgins v. Cal. Prune & Apricot Grower, Inc., 3 F.2d 896, 898 (2d. Cir. 1924) (citations omitted); see also City of Anaheim v. Duncan, 658 F.2d 1326, 1328 n.2 (9th Cir. 1981) (“[A] decision on a preliminary injunction does not constitute the law of the case” (citation omitted)); Berrigan v. Sigler, 499 F.2d 514, 518 (D.C. Cir. 1974) (“The decision of a ...court whether to grant or deny a preliminary injunction does not constitute the law of the case for the purposes of further proceedings” (citations omitted)); Garten v. Hochman, No. 08 Civ. 9425, 2010 WL

2465479, at *3 n.1 (S.D.N.Y. June 16, 2010) (“[T]he law of the case doctrine is not typically applied in connection with preliminary determinations, such as a ruling on a motion for a preliminary injunction.” (citation omitted)); see, e.g., Davidson v. Bartholome, 460 F. Supp. 2d 436, 443 (S.D.N.Y. 2006) (finding the law of the case doctrine inapplicable where the court ruled on a summary judgment motion “before any meaningful discovery,” and was later presented with a summary judgment motion after discovery had been completed.

Dkt. No. 321 at 20-22.

The longstanding decisional law combined with Judge Sharpe’s Decision and Order provide a conclusive determination that reliance on preliminary rulings to establish ownership of the Stock Account is severely misguided. The previous Preliminary Injunction Order was decided on a “substantial likelihood of success” standard limited on a truncated hearing addressing the extent to which an asset freeze could be implemented.

At trial a jury could, and we believe likely will, determine that the stock account is an individual asset owned by Lynn Smith. It is completely baseless for the SEC to think these issues have already been decided, when they are clear issues of fact that can only be left to a jury to decide.

B. Ownership Of The Stock Account Is An Issue Of Fact For A Jury To Determine.

Although for purposes of the preliminary injunction, this Court has disregarded the argument that Lynn Smith was the sole owner of the stock account, a jury may well decide differently at trial. Whether Lynn Smith owned the stock account individually or jointly requires examining numerous factors. As noted by Magistrate Homer’s July 7, 2010 Decision and Order:

In determining joint ownership, the... court considered a defendant's control over the asset, the length of time the asset had been held, whether the defendant had an interest in and benefitted from the asset, whether the defendant had transferred assets from his name into the asset, whether he or

she contributed to acquire the asset initially, and whether the defendant ever withdrew any funds from the asset. *Id.* at 301.

In order to determine ownership of the Stock Account, the Court must consider each of these factors. Each of these factors is refuted by Lynn Smith, raises a separate issue of fact and is discussed below.

1. **The Stock Account Has Always Been Held In The Name Of Lynn A. Smith Individually**

The SEC admits that “the Stock Account, [is] in the name of L.Smith, Account No.405-04091.” Plaintiffs’ Statement of Material Facts (“SMF”) at ¶338. This statement alone may create an issue of fact as to ownership because it is evidence that the stock account is an individual asset of Lynn Smith.

The SEC also erroneously suggests that the Stock Account “was opened on November 21, 1991 with Bear Stearns as the clearing broker”. Plaintiffs’ SMF ¶338. However, other evidence in the record establishes that the account was created between 1969 and 1971. For example, Lynn Smith stated in an affidavit that:

13. My father’s will created a trust that allowed a portion of the estate to pass to me immediately and a portion to pass to me five years later. My father’s estate included my parent’s home in Amsterdam, my father’s life insurance, his stock account and the property on Great Sacandaga Lake. Having lost both my parents very young, I have always respected the fact that my father, who did not expect to die at the age of 50, provided for my future. The property and stock account my father left me in 1969 was my rightful inheritance, and it is galling that the Commission wants to take that from me.

14. When we moved to Rochester, I used a broker in Rochester to manage my stock account, which remained with Hayden, Stone & Co. At that time, the account had approximately \$60,000 in it.

Dkt.23 at ¶13,¶14.

This presents a classic issue of fact for a jury to determine. To support her statements, Lynn Smith explains the facts and circumstances surrounding the Plaintiffs' SMF Exhibits 221, 222, 263 and 264. *See*, Plaintiffs' SMF ¶¶333-¶338. These exhibits represent "Report of New Account dated November 11, 1991" (Exhibit 263, 264), and "Full Trading Authorization" (Exhibit 221, 222).

Prior to 1991, McGinn Smith & Co. utilized the clearing broker Securities Settlement Corporation to ensure that current securities regulations were followed and that the funds involved in each transaction were properly handled. However, sometime in 1992 Securities Settlement Corporation ceased doing business and none of their records are currently available. *See*, SEC News Digest, Issue 92-130, Administrative Proceedings Brought Against Securities Settlement Corporation, at p.2 stating:

SSC was subsequently sold to Jesup & Lamont Securities Co., Inc., which merged with Josephthal & Co. to become Jesup Josephthal & Co. In late 1991 Jesup Josephthal & Co. changed its name to JJC Securities, Co.

Due to Securities Settlement Corp. no longer operating as a clearing broker, McGinn Smith & Co. were forced to change to the services of a new clearing broker. Shortly thereafter, McGinn Smith & Co. began to utilize Bear Stearns as its new clearing broker. As a result of the change of clearing brokers, Bear Stearns required their own new account information for all of the McGinn Smith accounts it would be handling. Bear Stearns required the new account information to ensure that transfers and trades were properly executed to allow the corporation and the investor to be credited accordingly.

Thus, Bear Stearns required Lynn Smith to sign and execute the "Report of New Account dated November 11, 1991" (Exhibit 263, 264), and "Full Trading Authorization" (Exhibits 221,222) even though Lynn Smith had a pre-existing account. These exact documents were

required for all McGinn Smith & Co. accounts that Bear Stearns conducted clearing broker services for. This explanation establishes that the SEC's evidence does not prove that the account was created in 1991. Instead, the SEC's evidence proves nothing more than the fact that the Stock Account first utilized Bear Stearns as a clearing agent in 1991. The SEC's reliance of exhibits 221 and 222 to prove the account was initially created in 1991 is clearly erroneous.

The SEC also wrongfully suggests that the account was created in 1991 because:

[T]he Smiths reported only jointly held stock and cash [in the financial statements from 1984-1992] and there is no documented evidence of any account solely in Lynn Smith's name. See, e.g., SMF at ¶¶333-356.

As what has become the repeated practice of the Commission, there is no actual evidence to support this statement by the Plaintiffs. Although Lynn Smith has lost accessible access to the records taken from her home and from her husband's business, she has provided her counsel with some evidence that suggests there is documented account information in Lynn Smith's name alone prior to 1991. See, Exhibit 1 to Relief Defendant/Defendant Lynn A. Smith's Response to the Plaintiffs' Statement of Material Facts. Exhibit 1 reflects various stock certificates and correspondence that demonstrated Lynn Smith maintained a brokerage account in her individual name prior to 1991.

Moreover, the Smith's financial statements from the years 1984 - 1992 do not conclusively demonstrate that the legal title of the assets listed was held jointly as the SEC suggests. The Smith's financial statements certainly do not prove that Lynn Smith's stock account was "opened in 1991 and funded with assets from a joint David and Lynn Smith brokerage account" as alleged on page 20 of the SEC's brief. Finally, with the exception of Plaintiffs SMF Exhibit 185, there is no way to authenticate the accuracy of the financial statements. Lynn Smith has no recollection

of assisting in the preparation of the financial statements. Besides Plaintiffs SMF Exhibit 185, there is no signatures to verify the information contained in the financial statements.

As such, the various financial statements from the Smith family between 1984 and 1992 (App.Ex. 180 – 189) offer nothing more than a reflection of the total value of assets that were owned either by Lynn Smith or David Smith. There is no indication in the Smith financial statements that can even call for the remote speculation as to whether the assets were owned either individually or jointly. The Plaintiffs alleged in their SMF that:

352. The first joint financial statement prepared after the creation of the Stock Account is the joint financial statement dated May 1, 1992. App. Ex.189.

353. The May 1, 1992 financial statement reports that the Smiths jointly owned cash and marketable securities totaling \$530,000. App. Ex. 189.

Lynn Smith denies that the May 1, 1992 financial statements are accurate or a true representation of legal title of her assets. *See*, Plaintiffs' SMF ¶352-¶353. Lynn Smith did not create the financial statements and does not believe that they are accurate. However, Lynn Smith does recognize the accuracy of Plaintiffs' SMF Ex.262 which represents a statement from her Stock Account dated 60 days prior to the May 1, 1992 alleged financial statement.

The Stock Account statement from March 3, 1992 "...reports a balance of \$446,469 in cash and securities as of March 3, 1992". *See*, Plaintiffs' SMF ¶351, App.Ex.262. This conclusively establishes that \$446,469 was undoubtedly held in Lynn Smith's name in March of 1992. However, the May 1, 1992 financial statement (Ex.189) reports the Smith's owned \$530,000 in cash and marketable securities. Thus, the financial statement dated May 1, 1992 cannot be accurate because \$530,000 of the alleged "joint assets" is clearly composed of \$446,469 that belonged exclusively to Lynn Smith. The SEC's position that the financial statements also prove "[t]he Stock Account was Funded from a Joint Stock Account" also cannot be true if the Stock

Account statement from March of 1992 verifies Lynn Smith individually held individual title to \$446,469 sixty days prior to the financial statement being created by David Smith.

Under the SEC theory, the \$446,469 held in Lynn Smith's individual name would have been transferred into joint ownership with David Smith sometime after March 3 and before May 1, 1992. Then, the \$446,469 would have been transferred back into Lynn Smith's name after May 1, 1992. In a more realistic theory, David Smith created the financial statements not to prove ownership of his assets, but instead to be used as a tool for compiling a list of assets that were owned by David OR Lynn Smith. The financial statements were never created to be a completely accurate characterization of legal title, but only an accounting as to what assets the Smith's owned in total or in combination.

Regardless of the year the stock account was created or how it was funded, it has been held in Lynn Smith's name alone for at least twenty three years, and more likely, much longer than that. Nothing set forth by the Commission in the Plaintiffs' SMF from ¶331 - ¶335 sets forth any conclusive evidence that David Smith owned and controlled the Stock Account and certainly does not eliminate all issues of material facts.

2. David Smith Did Not Exercise Control Over The Stock Account

The SEC also admits that David Smith had full discretionary authority over the Stock Account. Plaintiffs' SMF ¶357, citing App.Ex.221, App.Ex.222. A fair reading of the Full Trading Authorization exhibits makes clear that Lynn Smith is a mere "customer" of McGinn Smith & Co. and further reveals:

The Agent [David L. Smith] is authorized to act for the undersigned [Lynn Smith] and in the undersigned behalf, in the same manner and with the same

force and effect as the undersigned with respect to such purchases, sales or transactions in the account(s).

Because David Smith was an “agent” for his “customer” Lynn Smith, David Smith did not “control” the Stock Account. David Smith’s management of the account was limited to his discretion in his capacity of the broker of record in which he supposedly acted in the customer’s best interest at all times. Every customer who gave David Smith discretion over their accounts signed the same documents as Lynn Smith.

David Smith’s discretion also did not allow him to withdrawal money from the accounts he managed. This was true for two reasons. First, McGinn Smith & Co. internal procedures did not fashion brokers with the ability to withdraw from any account under their management whatsoever. All withdrawals and loans to other private businesses at McGinn Smith & Co. could only proceed with a letter of authorization signed by the customer after they were fully aware of the opportunity presented to them. Second, the Bear Stearns full authorization agreements also prohibit the withdrawal of money without a separate letter of authorization. The Bear Stearns agreements are limited to cash withdrawals made to an account in the owner’s name only. Any other cash withdrawal to a third party would require a separate letter of authorization. Lynn Smith’s Stock Account transaction were treated no different. Each transaction was accompanied by a separate letter of authorization signed by Lynn Smith with her full consent.

Furthermore, David Smith had discretionary authority over approximately fifteen other stock accounts in his capacity as a stock broker at McGinn Smith & Co. Surely the SEC does not allege that he was also a joint owner over all the other discretionary accounts he managed as well. His role as Lynn Smith’s husband should not cloud the legal ramifications of full trading authorization.

3. **Whether David Smith Benefited From Lynn Smith's Stock Account Is Irrelevant**

Lynn Smith has always maintained during the course of this litigation that the proceeds in her stock account was “her money” and she was free to do whatever she wanted with it. If Lynn Smith wanted to use the money in her stock account as a gift to her family members, a charitable organization, or for any other purpose, she would be free to do so. This belief is illustrated by the December 20, 2001 gift of 200 shares of Charter One Stock to Empire State College from Lynn Smith. *See*, Plaintiffs’ SMF at App.Ex.1-76. In light of that transfer, the Plaintiffs’ do not allege that Empire State College owns or controls the Stock Account simply because they received a benefit from it. Any of these hypothetical situations do not lead to a conclusion that the Stock Account was controlled by the person receiving the gift or benefit. The same rationale should be applied to Lynn Smith’s Stock Account and the benefit David Smith received. How and when Lynn Smith chooses to spend her money has absolutely no bearing as to who the money belongs to or as to whether David Smith controlled the Stock Account.

For example, the SEC alleges in ¶567 that Lynn Smith fraudulently “...transferred title of their Vero Beach residence, which had been held in both their names since its purchase in 2001 to L.Smith’s name alone.” However, the SEC admits that Lynn Smith “funded the purchase of the house” in the very next paragraph. Since Lynn Smith funded the purchase of the house, she had every right to maintain ownership of the Vero Beach residence in her name alone. This single factor does not provide any evidence as to whether David Smith owned or controlled the Stock Account.

The SEC also argues that “The Stock Account Was the Central Funding Mechanism for David Smith’s Businesses and His Fraudulent Schemes”. SEC brief at page 23. This statement seems to ignore that McGinn Smith & Co. raised over \$124 million of investor funds. It is

inaccurate and misleading for the SEC to submit that Lynn Smith's Stock Account "was the central mechanism" when the entire business was dependent on private investors contributing money to be invested in various opportunities. Moreover, there were numerous other investors that provided bridge loan capital. Those investors included Burt Fischer and the Mr. Cranbery entity.

4. Whether David Smith Contributed Assets To Lynn Smith's Stock Account

The Plaintiffs' allege in the SMF that David Smith made contributions to Lynn Smith's Stock Account. *See*, Plaintiffs SMF 375-388, 420,421, 427-430. These allegations focus on three separate areas: (a) the ALBANK stock; (b) the David L. Smith Lifetime Q-Tip Trust (the "QTIP Trust"); and (c) the David L. Smith IRA account.

a. The ALBANK Stock

As it relates to the Affidavit Lynn Smith provided on May 21, 2010, the information provided was accurate based on Lynn Smith's best recollection and personal beliefs of a specific stock purchase that occurred approximately eighteen years prior. In that Affidavit Lynn Smith described to the best of her ability that:

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... I held this stock in my brokerage account for many years and, because of subsequent mergers and acquisitions involving Albany Savings Bank, Citizens Bank and Charter One Financial, and the resulting stock splits and increases in value, my holdings in this banking institution increased to 100,735 shares of Charter One stock by 1999...[the shares were] valued at \$24.75 per share in August 1999.

The SEC has suggested that this statement was "false" because "David Smith also contributed money to purchase the initial ALBANK stock". To be candid, after four years of litigation, this is the first time that counsel for Lynn Smith has been put on notice that David Smith contributed \$50,000 to the initial purchase of the ALBANK stock. The SEC has admitted that Lynn Smith

relied on her husband's "business acumen" when it came to investing. *See*, Plaintiffs' SMF at ¶¶469-¶470. Lynn Smith has also stated that she left many of the investment decisions up to her broker of record, David Smith just like many other McGinn Smith & Co. "customers". Therefore, it is not only completely reasonable that Lynn Smith did not specifically recall that David Smith contributed to the ALBANK initial stock purchase, but also a highly likely scenario.

Even assuming, *arguendo*, that this fact may be accurate, the ALBANK stock was deposited into Lynn Smith's Stock Account on September 18, 1992. It is also undisputed that Lynn Smith funded the vast majority of the transaction. As a result, the \$50,000 contribution to the ALBANK stock from David Smith was simply a gift to Lynn Smith. Lynn Smith validly accepted the gift from David Smith after the initial stock purchase was deposited into her individual account. *See*, Plaintiffs' SMF at ¶381; citing App. Ex. 234. Accordingly, a husband to wife gift should not be construed as a contribution of assets.

b. The David L. Smith QTIP Trust

The SEC also alleges that:

the Stock Account received fraudulent proceeds ... through its receipt of funds, totaling \$610,095.54 from David Smith's QTIP Trust.

See, Plaintiffs' SMF at ¶426.

First, Lynn Smith brings to the Court's attention that none of these allegation are set forth in the Second Amended Complaint. The only allegation set forth in the Second Amended Complaint concerning the QTIP Trust is:

Smith also deposited significant personal assets into the Stock Account, including...the proceeds of a trust amounting to \$326,304....

Dkt.334 at ¶118.

It is not disputed that the QTIP Trust was funded through David Smith's personal assets. However, the transfer of proceeds of the QTIP Trust to Lynn Smith's Stock Account was executed strictly for estate planning purposes. *See*, Plaintiffs' SMF App.Ex.301 (the "Estate Planning letter"). Pursuant to the Estate Planning letter, David and Lynn Smith were advised:

Because the David L. Smith Lifetime QTIP Trust (the "QTIP Trust") was funded with assets which belonged to David, those assets must be distributed out of the trust and back to David. This transfer may be done pursuant to Article III, section A., Paragraph 3. Of the QTIP Trust. Once the assets are back in David's name, David will make a gift of those assets to Lynn. Lynn will hold these assets for approximately six (6) months and will then transfer the assets to the QTIP Trust.

After receiving this letter, David Smith followed the instructions in the Estate Planning Letter and transferred the proceeds from the QTIP Trust to Lynn Smith's brokerage account. Unfortunately, Lynn never received the opportunity to transfer the proceeds back into the QTIP Trust. As a result, the QTIP Trust proceeds remain inside Lynn Smith's Stock Account today. The Estate Planning letter provides evidence that the money was transferred to Lynn Smith pursuant to estate planning purposes, as a valid gift. The transfer was never intended to avoid creditors, but rather to accomplish valid estate planning objectives.

Additionally, the SEC alleges that the QTIP Trust was fraudulently funded with assets David Smith received from the Firstline Trust offering. *See*, Plaintiffs' SMF ¶¶422-¶426. However, the SEC has failed to recognize that David Smith was acquitted on all but the one count related to the Firstline offering. *See*, Plaintiffs' SMF App.Ex.6, 23. David Smith was convicted of Count 10 which directly resulted from a letter that was sent to investors from Timothy McGinn advising that Firstline filed for bankruptcy. David Smith was found guilty in Count 10 as it related to misleading investors, and not fraudulently obtaining assets from the offering.

c. The David L. Smith IRA Account

In response to the allegations set forth in paragraph 427 of Plaintiffs SMF, Lynn Smith retained a Certified Public Accountant, John D'Aleo who has been disclosed as an expert by the defense. In preparing his conclusions, Mr. D'Aleo testified at the Preliminary Injunction hearing that he:

[E]xamined various bank records, checks, and promissory notes in connection with the [Stock] [A]ccount. In other words, I have traced the flow of funds going in and coming out of Lynn Smith's brokerage account from 1999 through 2010. This information was made available during my testimony as Lynn Smith Exhibits 14 and 15...

Dkt.696-7 at ¶3.

Mr. D'Aleo came to the conclusion:

As it relates to the \$38,430.46 transfer on February 4, 2009 into Lynn Smith's brokerage account, there was no question that the funds belonged to David Smith. He simply deposited the \$38,430.46 into his wife's account.

Id.

Consequently, counsel for Lynn Smith recognizes that David Smith may have improperly deposited \$38,430.46 into his wife's Stock Account. The \$38,430.46 represents the maximum dollar figure that the SEC could be able to obtain from Lynn Smith's Stock Account. The remaining money in the Stock Account unquestionably is an asset of Lynn Smith and should not be applied against David Smith's potential judgment.

POINT II

THE COURT SHOULD NOT CONSIDER EVIDENCE SUBMITTED BY THE SEC THAT QUESTIONS THE CREDIBILITY OF LYNN SMITH AND WAS NOT REVEALED IN A FORMAL EXPERT REPORT AS REQUIRED BY THE SCHEDULING ORDER.

A. Credibility Is Not An Issue To Be Decided by Summary Judgment.

It is a well-established rule that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150 (2000); Dillon v. Morano, 497 F.3d 247, 254 (2d Cir. 2007) ("Resolutions of credibility conflicts and choices between conflicting versions of the facts are matters for the jury, not for the court on summary judgment."). On a motion for summary judgment, district courts simply "may not make credibility determinations ..." SR Int'l Bus. Ins. Co. v. World Trade Ctr. Proprs., LLC, 467 F.3d 107, 118 (2d Cir. 2006) ("Even in borderline cases, where the nonmovant has provided only a modicum of evidence to suggest that credibility is an issue, a court should err on the side of sending credibility determinations to the jury"); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("[T]he trial courts should act . . . with caution in granting summary judgment . . . where there is reason to believe that the better course would be to proceed to a full trial."). Otherwise, the court is weighing the evidence, which it decidedly cannot do on a motion for summary judgment. Desia v. GE Life & Annuity Assur. Co., 2008 U.S. Dist. LEXIS 86407, 21-22 (D. Conn. Oct. 24, 2008).

In this case, the SEC has repeated in their SMF that Lynn Smith has made false statements. Plaintiffs' SMF at ¶335, ¶383, ¶384. Regardless as to the truth of Lynn Smith's statements, the SEC's attempts to discredit Lynn Smith's testimony, character and credibility are not appropriate

in a motion for summary judgment. As such, Lynn Smith respectfully requests the Court to not consider any evidence which is submitted for the purpose of raising issues of Lynn Smith's credibility. The record before the Court contains sworn testimony from Lynn Smith that creates an issue of fact and the SEC's attempt to discredit her testimony is meaningless.

B. The Declaration of Kerri L. Palen Is Not Admissible.

The Commission's Motion for Summary Judgment relies heavily upon a Declaration of Kerri L. Palen (the "Palen Declaration"), a Certified Public Accountant and Certified Fraud Examiner, who has provided an "analysis" of multiple accounts and various Smith financial statements. *See*, Plaintiffs' SMF, Exhibit 1. Lynn Smith respectfully submits that the Court should not accept and or rely on the Palen declaration because she is an expert who has not been disclosed pursuant to Court Order which causes great prejudice to Lynn Smith.

Had the declaration been disclosed pursuant to Magistrate Hummel's scheduling Order dated January 22, 2014, the defense would have had an opportunity to review her findings and analysis and formulate a proper response. The defense has been blindsided by the allegations in the Palen declaration and has not had a full and fair opportunity to respond to its contents. In the event that the Court should accept the Palen Declaration, which it should not, a preliminary review of her declaration reveals numerous inaccuracies which should persuade the Court to not consider its contents or conclusions.

The first example of the Palen Declaration's improper analysis begins at Exhibit 25. According to Exhibit 25, on November 29, 2007 Lynn Smith loaned \$375,000 to McGinn Smith Funding as a bridge loan. On December 20, 2007 Lynn Smith is repaid \$380,000. Palen Exhibit 26 illustrates that David Smith received \$376,000 from McGinn Smith Funding, which was then repaid properly to Lynn Smith.

Since the SEC has never alleged that the \$376,000 was fraudulent proceeds, it becomes obviously apparent that David Smith did not contribute \$380,000 to the Stock Account as the Palen Declaration suggests. David Smith simply deposited the \$380,000 into the Stock Account that came from McGinn Smith Funding. The \$380,000 did not belong to David Smith.

Because of this fact and analysis, Palen erroneously concludes that from 1992-1999 withdrawals from the Stock Account exceeded cash deposits by a staggering \$ (-) 4,965,241.00. The Palen Declaration also concludes that from 1999-2010 withdrawals from the stock account exceed cash deposits by an astounding \$ (-) 5,918,116.00. By applying elementary mathematics, the Palen Declaration analysis would leave a negative balance of \$ (-) 10,883,357.00 in the Stock Account. Going one step further, in order for the account to have a balance in April of 2010 of roughly \$2.5 million, the account would have needed a beginning balance of \$13.3 million if it was created in 1991, as suggested by the SEC. The Court should realize that the Palen Declaration is a complete fabrication and falsehood because the SEC itself claims that the "first available statement for the Stock Account, dated March 3, 1992 reports a balance of \$446,469 in cash and securities as of March 3, 1992."

Additionally, the majority of the disbursements from the Stock Account covered in the Palen Declaration were the purchases of real estate in Vero Beach, Florida and Saratoga Springs, New York, and also for tax purposes which were handled by David Smith, the Palen Declaration lists "not known" to the majority of them. The Palen declaration simply ignores the fact that each transaction has been previously and specifically explained by Lynn Smith.

The Palen Declaration also addresses a \$3,150,000 loan to IASG in exchange for a 2 year promissory note on January 14, 2003. There are two obvious problems associated with the Palen Declaration analysis of this declaration. The First is that the Palen Declaration shows the loan

amount to be \$3,000,000, not \$3,150,000. The second, and more important problem, is that the Palen Declaration shows this as a cash withdrawal of the account. However, there is obvious consideration in the form of a two year promissory note that was given in exchange for the cash. Therefore, it is erroneous for the Palen Declaration to show this as a simple "\$3,000,000 cash withdrawal" when it was a perfectly legitimate investment made by Lynn Smith based on her stock broker's suggestion.

By ignoring all of these facts, the Palen Declaration is still somehow able to draw definitive conclusions while ignoring the "unknown" data. This method of analysis is highly questionable and should be discredited by the Court.

POINT III

EVEN IF A COLLATERAL ESTOPPEL THEORY IS SUCCESSFULLY ASSERTED, SUMMARY JUDGMENT SHOULD BE LIMITED TO THE CRIMINAL JUDGMENT RESTITUTION AMOUNT.

Even assuming, *arguendo*, that collateral estoppel can be used to gain a judgment against David Smith, the Criminal Judgment Order makes clear that David Smith's restitution amount is equal to \$5,989,736. *See*, Plaintiffs' SMF, Ex. 10. The restitution number is further reduced by the criminal presentencing investigation report that determines that \$241,014 of the total restitution amount is composed of tax losses. Therefore, the Court should cap any potential judgment against David Smith at a maximum of \$5,748,722. Moreover, the extreme downturn in the stock market in 2008 greatly contributed to investor losses.

Another problematic area of concern for the SEC is that the Judgment in a Criminal Case against David L. Smith states on page 6, paragraph G that:

G. Special Instructions regarding the payment of criminal monetary penalties:

The Court orders that any cash value of the assets collected thus far by the Receiver, William J. Brown, appointed by the Court in this case may be deducted from the total restitution amount...

Dkt.696-5.

Here, the Receiver has collected \$15,847,495 not including the Stock Account and Smith Trust. *See*, Declaration of William J. Brown dated June 30, 2014. In light of the special instructions regarding the payment of criminal monetary penalties, the Court should determine that any possible judgment against David Smith is fully satisfied by the \$15,847,495 already collected by the Receiver. As a result, it is not necessary to apply any of the assets in Lynn Smith's Stock Account against a judgment against David Smith.

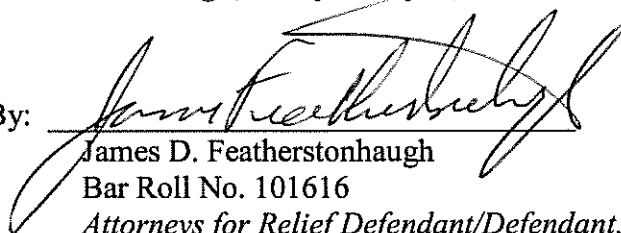
CONCLUSION

For the foregoing reasons the Court should determine that a genuine issue of material fact exists as to whether Lynn Smith individually owned and controlled the Stock Account. Accordingly, the Court should deny summary judgment as it relates to the Stock Account and allow the case to proceed to trial.

Dated: August 11, 2014

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