

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

10 Civ. 457 (GLS/CFH)

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, DAVID L. SMITH,
LYNN A. SMITH, DAVID M. WOJESKI, 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,

Defendants,

LYNN A. SMITH, and
NANCY MCGINN,

Relief Defendants, and

DAVID M. WOJESKI, Trustee of the
David L. and Lynn A. Smith Irrevocable
Trust U/A 8/04/04,

Intervenor.

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO
DEFENDANT/RELIEF DEFENDANT LYNN A. SMITH'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

David Stoelting,
Kevin P. McGrath
SECURITIES AND EXCHANGE COMMISSION
200 Vesey Street
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August 11, 2014

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Plaintiff Securities and Exchange Commission respectfully submits this memorandum of law in opposition to the motion for summary judgment filed by defendant/relief defendant Lynn A. Smith.

PRELIMINARY STATEMENT

Lynn Smith's argument that she has a legitimate claim to the \$2.2 million held in the Stock Account ignores the vast amount of evidence proving that her husband, defendant David Smith, exercised complete control and domination over this account, and that the Stock Account received millions of dollars in ill-gotten gains. The Stock Account, in fact, functioned for nearly twenty years as an indispensable financing arm of McGinn, Smith & Co., Inc. ("MS & Co.") and as an instrumentality of the fraud from 2003 through 2010. Lynn Smith's primary role was to sign the blank letters of authorization that her husband, defendant David Smith, provided to her. David Smith kept the signed letters in his office and used them in his sole discretion as MS & Co.'s financing needs dictated.

The arguments Lynn Smith makes in support of her summary judgment motion are nothing new: they are the same arguments that she made during the three-day preliminary injunction hearing in June 2010. At that time, Judge Homer rejected Lynn Smith's testimony that she alone controlled the Stock Account as "incredible," and held that "the record established that [defendant] David Smith treated the Stock Account as his own" and that "Lynn Smith has likely received ill-gotten gains throughout the multiple deposits into her stock account after 2003 when the fraudulent scheme [commenced]." *SEC v. McGinn, Smith & Co., Inc.*, 752 F.Supp.2d 194, 215-216 (N.D.N.Y. 2010), *aff'd*, 432 Fed.Appx. 10 (2d Cir. 2011). *See also SEC v. McGinn, Smith & Co., Inc.*, 2011 WL 1770472, at *3-4 (N.D.N.Y. May 9, 2011) (denying L. Smith's motion to dismiss).

Additional evidence that was not available during the June 2010 hearing – including definitive proof that the Stock Account was created in 1991, and not 1969, as Lynn Smith claims – further strengthens the conclusion that the Stock Account should be considered an asset of David Smith’s. Given the evidence of David Smith’s control of the Stock Account, no finder of fact could find in favor of Lynn Smith. Her motion for summary judgment should be denied, and the Stock Account should be used to satisfy the anticipated judgment against David Smith.

STATEMENT OF UNDISPUTED FACTS

The evidence regarding the Stock Account is set forth in the *Plaintiff’s Statement of Material Facts in Support of Motion for Summary Judgment* (“SEC SMF”), ¶¶ 331-470 (Dkt. 711 at 58-80).

David Smith Funded and Had Full Trading Authority Over the Stock Account

The Stock Account was opened in 1991 and funded with assets from a joint David and Lynn Smith brokerage account. Prior financial statements of the Smiths reported only jointly held stock and cash. Other than Lynn Smith’s testimony, no evidence exists of a brokerage account solely in Lynn Smith’s name prior to 1991. *See, e.g.*, SEC SMF, ¶¶ 333-356.

David Smith had full trading authorization over, and the unfettered right to withdraw money from, the Stock Account. SEC SMF ¶ 357. Investment decisions were made by David Smith. SEC SMF ¶ 358. Lynn Smith did not know whether any money from the Stock Account was used to invest in any McGinn Smith entities, and she left those decisions to David Smith. SEC SMF ¶¶ 359, 360, 463-470. She had no input into the transactions in the account and allowed David Smith free rein to treat the Stock Account as his own.

David Smith and his family jointly benefitted from the Stock Account. The Smiths financed the purchase of their prior primary residence in Clifton Park from the Stock Account.

SEC SMF ¶ 362. In the mid-1980s, the Stock Account was used to purchase a ski condominium in Vermont for approximately \$125,000. SEC SMF ¶ 363. Money from the Stock Account was used to purchase a residence in Vero Beach, Florida in the name of David and Lynn Smith in 2001. SEC SMF ¶¶ 364-365. In 2003, the Stock Account was used to purchase Smiths' residence in Saratoga Springs, N.Y. in both their names. SEC SMF ¶ 370. The Smiths financed their two children's college educations from the Stock Account. SMF ¶ 367.

The Stock Account was also frequently used to fund common expenses and fund assets that benefitted both David and Lynn Smith. SMF ¶¶ 373-374. The Stock Account contributed approximately \$142,500 to IRAs for David, Lynn, Geoffrey and Lauren Smith over the years. SEC SMF ¶ 368. David Smith repeatedly used funds transferred from the Stock Account to his checking account to pay large common expenses of him and Lynn Smith, such as mortgage payments on their primary residence in Saratoga Springs and their home in Vero Beach, Florida, golf club dues, federal and state taxes, payments to their children Geoffrey and Lauren Smith, car payments and insurance. SEC SMF ¶¶ 373-374; App. Ex. 1 (Palen Ex 26).

David Smith personally benefitted from the Stock Account. Between August 28, 1999 and April 5, 2010, approximately \$4.7 million was transferred from the Stock Account to David Smith's checking account, and only \$390,000 was transferred from David Smith's checking account back to the Stock Account. SEC App. Ex. 1 (Palen Exhibit 24). And from November 21, 1992 through August 27, 1999, at least \$2,585,000 was transferred from the Stock Account to David Smith's checking account, with no known transfers back to the Stock Account. *Id.* at 2.

McGinn also benefitted from the Stock Account, receiving \$970,000 in 2004. Lynn Smith testified that she never discussed this transfer with McGinn. SEC App. Ex. 271 at 73-74.

Although he signed a demand note, McGinn only repaid \$185,000, and there is no evidence Lynn Smith ever demanded repayment.

David Smith Contributed Substantial Assets to the Stock Account

Contrary to Lynn Smith's claim that she alone funded the Stock Account, David Smith made transfers into the Stock Account, including a \$38,430 deposit, funds from a trust totaling \$326,304, and a \$410,000 note. *See SEC v. McGinn Smith*, 752 F. Supp. 2d at 216.

The valuable Charter One bank stock that was transferred to the Smith Trust in 2004 was acquired when David Smith purchased 40,688 shares of ALBANK stock for approximately \$406,325 dollars, using portions of \$352,000 withdrawn from the Stock Account and portions of \$150,000 that he borrowed from McGinn Smith. SEC SMF ¶¶ 376-380. Moreover, David Smith purchased all 40,688 shares of ALBANK stock in his name, not Lynn Smith's, and the ALBANK stock was not deposited into the Stock Account until September 18, 1992, more than five months after David Smith purchased it in his name. SEC SMF ¶ 381; App. Ex. 239.

In October 2002, all 105,000 shares of the Charter One stock was journaled out of the Stock Account and into an account in the name of KC Acquisition Corp., a McGinn Smith entity. SEC SMF ¶ 394. The transfer was made to facilitate the initial public offering of a public company Smith and McGinn formed, Integrated Alarm Services Group, Inc. (IASG). SEC App. Ex.225 (IASG PPM describing loan from Stock Account). The bank stock remained out of the Stock Account until July 29, 2003, after the IASG initial public offering, when the shares were journaled back into the Stock Account. SEC SMF ¶¶ 394-398. See also SEC SMF ¶¶ 75-80 (describing how \$35 million IASG IPO proceeds redeemed investors in pre-2003 MS & Co. offerings).

The Stock Account Funded MS & Co. and was an Instrument of the Fraud

From October 2003 until the end of 2009, Smith and McGinn raised over \$124 million in the Four Funds, Trust and MSTF offerings, and they fraudulently misused and misappropriated these funds. SEC SMF ¶¶ 67-330. The fraud began with the FIIN offering in October 2003, when David Smith diverted \$2 million in FIIN offering proceeds to redeem investors in pre-2003 MS & Co. offerings. SEC SMF ¶¶ 81-97. Investor losses exceed \$75 million. SEC App. Ex. 3, ¶ 7.

During the period of the fraud, \$5,783,807.23 was transferred into the Stock Account from Smith, McGinn, MS & Co. and related entities. Declaration of Kerri Palen dated August 7, 2014 (“Palen 8.7.14 Decl.”), ¶ 3. Ex. A.

Smith controlled the Stock Account through letters of authorization (“LOAs”). David McQuade, the operations manager at MS & Co., testified that “I would provide Mr. Smith with [blank] letters of authorization, which he would bring to Lynn Smith, she would sign them, and then he returned them to me.” SEC App. Ex. 271 at 175 (Dkt. 745-9 at 174). David Smith would typically give McQuade “[a]round a dozen” signed letters of authorization at a time. *Id.* at 277. When the supply of letters of authorization got low, McQuade would provide blank forms to David Smith, who would obtain Lynn Smith’s signature on the letters and then return them to McQuade, who kept the signed letters in his drawer. *Id.* at 177. SEC SMF ¶¶ 436-437. *See also* SEC App. Ex. 270 (letters of authorization).

Over 137 LOAs were processed by MS & Co. employees. SEC SMF ¶ 438. Lynn Smith signed the majority of LOAs, but David Smith also directed MS & Co. employees to “cut and paste” her signature on LOAs when necessary. SEC SMF ¶¶ 433-434. McGinn and other MS & Co. employees frequently countersigned the LOAs. SEC SMF ¶¶ 439-441. Many of the transfers provided short-term infusions of capital to facilitate deals. SEC SMF ¶¶ 440-442.

Lynn Smith never signed promissory notes with regard to the transfers; indeed, she never even saw any notes evidencing any indebtedness to her, even though she supposedly was the lender. SEC App. Ex. 272 at 129-130. There was no negotiation over the terms of the loan, and Lynn Smith did not know how the interest rate was calculated. *Id.* at 330-333. She did not know the interest rates of the loans or the terms of the loans. *Id.* at 410-411.

Between 1999 and 2010, there were withdrawals of approximately \$17.2 million from the Stock Account going to David Smith's various business entities and approximately \$13.7 million in known transfers back from those entities to the Stock Account. SMF ¶¶ 400-401. Bank records for the period prior to 1999, for which the records are incomplete, also show millions of dollars being transferred from the Stock Account to David Smith's businesses and back. SMF ¶¶ 415-416.

The Court's Findings Following the Preliminary Injunction Hearing

The Court found, after the three-day preliminary injunction hearing, and based on a voluminous documentary record, that David Smith was the "joint owner" of the Stock Account. *SEC v. McGinn Smith*, 752 F. Supp. 2d at 215 (Dkt. No. 86). The Court found that "Smith had access and control over the account for decades, he had both a personal and professional interest in the Stock Account and benefitted from its funds in both his home-life and career, and he commingled funds between the Stock Account and his business and personal accounts." *Id.* at 216. The Court further found that "David Smith utilized the Stock Account as a personal line of credit for his business interests to further his personal and professional endeavors." *Id.* The Court froze the Stock Account as an asset of David Smith's to be secured to satisfy any judgment against him. *Id.* at 216-217.

The Court alternatively found that the Stock Account should be frozen because it contained ill-gotten proceeds of David Smith's fraudulent conduct, stating "Lynn Smith has likely received ill-gotten gains throughout the multiple deposits into her stock account after 2003 when the fraudulent scheme involving the Four Funds alleged by the SEC commenced. Since 2003, Lynn Smith has been refunded over \$1 million from MS & CO and its related individuals and entities in loan repayments. These payments derive from fraudulently obtained investments." *Id.* at 214. In fact, the evidence now shows that the Stock Account received over \$5.7 million in ill-gotten gains during the period of the fraud. Palen 8.7.14 Decl., ¶ 3. Ex. A.

The Court rejected Lynn Smith's claim that she was a bona fide creditor, finding that "Lynn Smith was unaware how many loans she has made, to whom the loans were made, what they were for, or what the interest rates and payment schedules were. . . . Such conduct belies any claim of a legitimate creditor-debtor relationship." 752 F.Supp.2d at 215. The Court concluded that "[s]uch uninformed, casual, and informal transactions in the amounts at issue here corroborate the conclusion that there was no consideration and no contractual relationship that would entitle Lynn Smith to repayment as an arm's length, disinterested creditor." *Id.*

Indeed, the Court found Lynn Smith's testimony regarding her alleged pre-approval of all transfers and her reasons for the Smiths' transferring title of assets to her name alone to be "incredible," explaining:

[T]he timing of these transfers of title to Lynn Smith as the threat of investors recovering from David Smith mounted, the unfailingly self-serving content of Lynn Smith's testimony, the improbability of that testimony in material respects, the absence of credible corroborating evidence, inconsistencies in her testimony, and the Court's observations of Lynn Smith as she testified, the Court finds incredible her testimony regarding the reasons for these transactions as well as verbal communications with David Smith. Her testimony on these subjects is rejected.

Id. at 203, n.13.¹

On appeal, the Second Circuit affirmed the Court’s findings in all respects. *Smith v. SEC*, 432 Fed. Appx. 10 (2d Cir. 2011); SEC SMF ¶ 42.

ARGUMENT

I. Lynn Smith’s Motion for Summary Judgment Should Be Denied

Summary judgment is appropriate if the moving party demonstrates “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). No trier of fact, however, could conclude that Lynn Smith has a legitimate claim to the Stock Account.

Lynn Smith’s argument that she has a legitimate claim to the Stock Account rests on her assertion that “[t]he SEC has made no effort to allege what source of funds constitute ill-gotten gains, the dates the funds were allegedly transferred, or the accounts from which they were transferred.” L. Smith Br. at 9. In fact, the SEC has submitted detailed evidence showing every transfer into and out of the Stock Account from its inception in 1991 to April 2010. App. Ex. 1 at 70-96 (Ex. 25). Far from “a speculative statement without any specific evidence,” as Lynn Smith argues, the SEC has submitted overwhelming evidence that the Stock Account functioned first and foremost as an asset of David Smith’s to enrich himself (and McGinn), to enhance MS & Co.’s business interests and, secondarily, to fund joint family expenses. SEC SMF ¶¶ 330-470.

¹ Lynn Smith’s credibility was further diminished by her intentional misconduct in failing to disclose the Annuity Agreement, which resulted in sanctions against her. *See SEC v. McGinn Smith*, 798 F.Supp.2d 412, 425 (N.D.N.Y. 2011) (“Lynn Smith’s testimony and contentions here have been consistently self-serving, contradicted by other evidence, and unworthy of belief”). On appeal, the Second Circuit noted that the record surrounding Lynn Smith’s concealment of the Annuity Agreement “carries a circumstantial stench” and that the “finding that Lynn Smith acted in bad faith in not revealing her interest in the Trust is amply supported by the record.” *SEC v. Smith*, 710 F.3d 87, 97-98 (2d Cir. 2013).

Relying on evidence that was already been found deficient at the preliminary injunction hearing, Lynn Smith relies on the affidavit of John D'Aleo, who offers conclusory and unsubstantiated opinion. D'Aleo even mischaracterizes his own submission, falsely claiming that he "has prepared a summary and compilation of the deposits and withdrawals of the assets in Lynn Smith's individual brokerage account since 1999." Dkt. 696-7, ¶ 3. D'Aleo, however, has not prepared any such summary. Instead, his affidavit includes only the partial list of transactions that was prepared prior to the preliminary injunction hearing on May 12, 2010. Dkt. 696-7 at 93-98 (Ex. B). (The SEC has submitted a detailed listing of every transaction in the Stock Account from 1991 through 2010. App. Ex. 1, Ex. 25.)

D'Aleo's opinion is based solely on several deposits and withdrawals into the Stock Account, and he concludes that "Lynn Smith has a legitimate claim to deposits she received from McGinn Smith entities." Dkt. 696-7 at 6. D'Aleo's affidavit, however, completely ignores the vast amount of evidence that completely undermines his conclusion, including the fact that Lynn Smith signed blank LOAs and provided them to David Smith; the lack of any loan agreements or other evidence of arm's length transactions; Lynn Smith's own ignorance of the transactions in the Stock Account; and the sheer scope of the transfers between the Stock Account and MS & Co. entities. D'Aleo's opinion – which is the same uninformed and unpersuasive opinion he offered during the preliminary injunction hearing – is so divorced from the factual record in this case that it should be rejected as completely unreliable.

Over \$5.7 in ill-gotten gains were received into the Stock Account during the years of the fraud. Palen 8.7.14 Decl. ¶ 3, Ex. A. There is no evidence that Lynn Smith provided any consideration for these funds, and "she has no legitimate claim of ownership" over the funds

currently frozen in the Stock Account. 752 F.Supp.2d at 215. The evidence offered by the SEC proves that Lynn Smith controlled almost nothing about the Stock Account; instead, David Smith exercised total control. SEC SMF ¶¶ 331-462. At a minimum, this evidence is sufficient to require denial of Lynn Smith's summary judgment.

II. **The Stock Account is an Asset of David Smith's**

The evidence shows that David Smith exercised "unfettered control over the [stock] account . . . David Smith directed transfers from the account at his sole option by the blank letters of authorization which Lynn Smith signed. . . . it is clear that David Smith had complete access to and control over the account and that such access and control were maintained for decades." 752 F.Supp.2d at 216. As a result, and regardless of Lynn Smith's status as a relief defendant, the Stock Account should be considered an asset of David Smith's and used to satisfy the anticipated judgment against him, for the benefit of the victims of his fraud. 752 F. Supp.2d at 216-217 (citing *SEC v. Heden*, 51 F.Supp.2d 296, 300 (S.D.N.Y. 1999). See also *SEC v. Teo*, 2009 WL 1684467, *10 (D.N.J. June 12, 2009) (defendant who retained trading authority over trust retained beneficial ownership over the trust assets despite disclaiming beneficial ownership in Schedule 13D filing); *In re Worldcom, Inc.*, 34 B.R. 430, 439 (Bankr. S.D.N.Y. 2006) ("A 'beneficial owner' may generally be defined as 'one recognized in equity as the owner of something because use and title belong to that person, even though legal title may belong to someone else').

CONCLUSION

For the foregoing reasons, plaintiff SEC respectfully requests that the Court deny Lynn Smith's motion for summary judgment.

Dated: New York, NY

August 11, 2014

Respectfully submitted,

s/ David Stoelting

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Intervenor.

**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S RESPONSE TO
DEFENDANT/RELIEF DEFENDANT LYNN A. SMITH'S STATEMENT OF
MATERIAL FACTS**

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Kevin P. McGrath
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August 11, 2014

Plaintiff Securities and Exchange Commission respectfully submits these Responses to the Statement of Material Facts submitted by Defendant/Relief Defendant Lynn A. Smith on July 8, 2014 (Dkt. 701).

Lynn Smith SMF 1:

The individual stock account in the name of Lynn A. Smith, held at RMR Wealth Management, account number **Redacted**, was initially created in 1969 with a \$60,000 initial investment that came from an inheritance from her father's estate. Dkt. Nos. 86 at 7, 23 at 4, 69-1 at 4.

Response:

Deny. Apart from Lynn Smith's unsupported and discredited testimony, no evidence exists of any brokerage account solely in Lynn Smith's name before November 1991. SEC SMF ¶ 356.¹ The only brokerage account in Lynn Smith's name – the "Stock Account," as it is referred to in the Court's opinions, which is currently at RMR Wealth Management – was opened by David Smith in November 1991. SEC SMF ¶¶ 338, 341. Prior to November 1991, the Smiths maintained a joint brokerage account in both their names. The account in Lynn Smith's name was funded in November 1991 with cash and securities from the joint account. SEC SMF ¶¶ 339.

Lynn Smith's Statement of Material Facts does not identify any documents to support her assertion that a brokerage account in her name "was initially created in 1969 with a \$60,000 initial investment that came from an inheritance from her father's estate." L. Smith SMF ¶ 1. She cites only to this Court's opinion dated July 7, 2010, Dkt. 86 at 7, and to two Affidavits she filed prior to the June 2010 preliminary injunction hearing. Dkt. 23 at 4, 69-1 at 4. At that time, more than four years ago, Lynn Smith's testimony was the only evidence before the Court regarding the origin and history of the Stock Account. Since then, Lynn Smith has been

¹ References to "SEC SMF" are to *Plaintiff's Statement of Material Facts in Support of Motion for Summary Judgment* filed July 8, 2014 (Dkt. 711).

sanctioned for providing false testimony and has been found by this Court and the Second Circuit to have little credibility.

Since the preliminary injunction hearing, the SEC has discovered contemporaneous documents from 1991 – the Customer Agreement (App. Ex. 343²), the Report of New Account (App. Ex. 263, 264), and the wire transfer authorization (App. Ex. 184) – which prove that Lynn Smith’s statements regarding the origin and history of the Stock Account are false.

Lynn Smith SMF 2:

Lynn Smith's individual brokerage account has remained at all times, in her individual name. Dkt. Nos. 86, 23 at 4, 69-1 at 4.

Response:

Deny. *See supra* Response to Lynn Smith SMF 1.

Lynn Smith SMF 3:

The Plaintiffs’ theory of allegedly fraudulent activity began in 2003. *See*, Dkt. No. 334 at 2 (quoting “from at least 2003 through April 2010, McGinn and Smith used MS & Co., a registered broker-dealer and investment adviser, MS Advisors, an investment adviser, and MS Capital, as well as dozens of affiliated entities they own or control (collectively, “the McGinn Smith Entities”), to raise over \$136 million in more than 20 unregistered debt offerings. The debt offerings, including the Four Funds and numerous trust entities (the “Trusts”), have been sold to more than 900 investors”).

Response:

Admit. For the evidence supporting the allegations of fraud, *see* SEC SMF ¶¶ 1-330.

Lynn Smith SMF 4:

In November of 2002, Lynn Smith's stock account was valued at \$3,617,797.00. On March 31, 2010 Lynn Smith's stock account was valued at \$2,118,511.06. *See*, Lynn Smith brokerage statement from November 2002, and March 2010.

²References to “App. Ex.” are to the exhibits to the SEC’s Statement of Material Facts (Dkt. 711-1).

Response:

Admit that the Stock Account had the stated values but deny that the Stock Account was Lynn Smith's alone, *see supra* Response to Lynn Smith SMF 1.

Lynn Smith SMF 5:

Lynn Smith has been married to David Smith since 1968. Dkt. No. 23.

Response:

Admit.

Lynn Smith SMF 6:

David Smith has been the broker of record of Lynn Smith's individual stock account since the mid-1970's until he surrendered his securities licenses due to the related criminal investigation. Dkt. Nos. 86 at 34, Dkt. No. 23.

Response:

Deny. *See supra* Response to Lynn Smith SMF 1. In addition, David Smith did not "surrender[] his securities licenses due to the related criminal investigation." Rather, FINRA barred Smith from association with any FINRA firm in 2011, after Smith failed to appear at a hearing on fraud charges filed by FINRA against him. In addition, in April 2014, following the conviction against him in the criminal case, the Commission entered an order, on consent, permanently barring Smith from association with any broker, dealer and investment adviser. SEC SMF ¶¶ 64, 61.

Lynn Smith SMF 7:

David Smith, as the broker of record for Lynn Smith's individual stock account, had discretionary authority over the account at all times. Dkt. Nos. 87-89. See also, Preliminary Injunction Hearing Transcript at page 327 quoting:

LYNN SMITH- DIRECT- STOELTING

- Q: And did Mr. Smith have authority to buy or sell securities in this stock account without getting your approval first?
A: Without getting my approval?
Q: Yes.

- A: Did he have a discretionary - as he - when he was a stock broker?
I pretty much always gave approval.
- Q: Okay. But my question was whether he could have the authority
to buy or sell securities on his own without asking you first.
- A: He could.
- Q: So I think you referred to that as discretionary authority?
- A: I believe a lot of investors have that with their brokers. And he
was my husband.
- Q: I'm just trying to establish that he did have discretionary authority.
- A: Yes. Yes.
- Q: And could Mr. - did Mr. Smith have the authority to take-to
make cash- to take cash out of the account without your
approval?
- A: No.

Response:

Admit. *See also supra* Response to Lynn Smith SMF 1.

Lynn Smith SMF 8:

On June 5, 2009 Lynn Smith made a \$366,000 bridge loan to TDMM Cable Funding. Dkt. No. 23, ¶27 (quoting “two payments, one for \$160,800 and one for \$175,00 were made to my account from TDMM Cable in repayment of a loan in the amount of \$366,000 which I made to TDMM cable from my stock account on 6/5/04.” [*sic*]).

Response:

Admit that the transaction occurred but deny that the loan was made at the direction of Lynn Smith, deny that she was a bona fide creditor and deny that she was the sole owner of the Stock Account, *see supra* Response to Lynn Smith SMF 1.

Lynn Smith SMF 9:

The bridge loan was repaid to Lynn Smith in two installments; one for \$160,800 and one for \$175,000 from TDMM Cable in repayment of a loan in the amount of \$366,000 which was made to TDMM Cable from Lynn Smith's stock account on June 5, 2004. Id.

Response:

Admit that the transaction occurred but deny that Lynn Smith was a bona fide creditor and deny that she was the sole owner of the Stock Account, *see supra* Response to Lynn Smith SMF 1.

Lynn Smith SMF 10:

A June 5, 2009 promissory note in the amount of \$366,000 reflects a loan Lynn Smith made to TDMM Cable Funding. See, June 5, 2009 Promissory Note payable to Lynn A. Smith signed by Timothy McGinn.

Response:

Deny. The Promissory Note is not signed. *See* Affidavit of John D'Aleo sworn to July 2, 2014, Ex. D (Dkt. 696-7 at 106-108). Admit that a total of \$366,000 was transferred out of the Stock Account on June 5 and 9, 2009, and that these funds appear to have been used to purchase assets in connection with the TDMM Cable Funding offering. App. Ex 1 at 85.

Lynn Smith SMF 11:

The TDMM Cable Jr. Trust 09 Preferred Placement Memorandum states:

TDM will use the proceeds of the loan together with funds provided by TDMM Cable Sr. Trust 09 to purchase the operating assets and customer accounts of Broadband Solutions LLC and HipNET LLC and to pay certain pre-closing expenses estimated to be approximately \$400,000.

Dkt. Nos. 4-19 at 8-9.

Response:

Admit.

Lynn Smith SMF 12:

Lynn Smith's brokerage account statement from April 2006 indicates a check received for \$4,500 on April 13, 2006. See John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 431, lines 10-17 (quoting "A: Okay. Item two is a check received on April 13, 2006. I'm looking now at the statement, the first document which is funds received into Lynn Smith's accounts. That shows a check received on that date for 4500...").

Response:

Admit that the transaction occurred but deny that Lynn Smith was the sole owner of the Stock Account, *see supra* Response to Lynn Smith SMF 1.

Lynn Smith SMF 13:

Lynn Smith's brokerage account statement from October 4, 2006 also indicates a similar deposit for \$85,000. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt.no.87-

89, p.431, lines 18-24 (quoting "...[t]he next item is an item on October 4th, 2006, in the amount of \$85,000. That we were able to find because you provided me with the copy of a check from Tim McGinn that indicated that it was a partial repayment of a loan that had been made...").

Response:

Admit that the transaction occurred but deny that Lynn Smith was the sole owner of the Stock Account, *see supra* Response to Lynn Smith SMF 1.

Lynn Smith SMF 14:

On October 15, 2004 Tim McGinn signed a promissory note valued at \$970,000 which was addressed to Lynn A. Smith. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 432, lines 17-21 (quoting "A: Yes. That is a promissory note dated October 15th, 2004, for the \$970,000 that Mr. McGinn borrowed from Lynn Smith...").

Response:

Admit.

Lynn Smith SMF 15:

The October 2004 statement to Lynn Smith's brokerage account indicates a deposit equal to the amount of \$970,000. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 432, lines 21-24 (quoting "Q: Did you cross check the date of the check and the amount against the Lynn Smith account statement? A: Yes, I did.).

Response:

Deny. The October 2004 account statement does not show a deposit of \$970,000, or any similar transaction. *See* D'Aleo Aff. Ex. C (Dkt. 696-7 at 100-108. There were no deposits of any amount into the Stock Account during the second half of 2004. SEC App. Ex. 1 81 (Dkt. 712).

Lynn Smith SMF 16:

On May 14, 2007 a deposit of \$100,000 was made into Lynn Smith's brokerage account. See, John D'Aleo Preliminary Injunction hearing at Dkt. Nos. 87-89 at 433, lines 9-13 (quoting "...I believe that it probably was attached in the second page of Exhibit 15G. Shows the check, made payable to the amount of a hundred thousand dollars, and the memo says loan.").

Response:

Admit that the transaction occurred but deny that Lynn Smith was the sole owner of the Stock Account, *see supra* Response to Lynn Smith SMF 1.

Lynn Smith SMF 17:

The May 14, 2007 deposit into Lynn Smith's brokerage account was the partial repayment of a promissory note signed by Tim McGinn and the memo section states "loan". Id.

Response:

Admit that the transaction occurred but deny that Lynn Smith was the sole owner of the Stock Account and deny that she was a bona fide creditor, *see supra* Response to Lynn Smith SMF 1.

Lynn Smith SMF 18:

On November 29, 2007 Lynn Smith made a \$375,000 bridge loan from her brokerage account to McGinn Smith Funding. John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 433, lines 21-25 (quoting "...This relates to repayment of a bridge loan in the amount of 375,000 that was made by Miss Smith on November 29th, 2007, to McGinn Smith Funding").

Response:

Admit that the transaction occurred but deny that the transaction was done at the direction of Lynn Smith, deny that she was the sole owner of the Stock Account and deny that she was a bona fide creditor, *see supra* Response to Lynn Smith SMF 1.

Lynn Smith SMF 19:

On December 21, 2007 Lynn Smith received a deposit from a wire transfer in the amount of \$380,000 into her brokerage account. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 433, line 10- 434, line 18 (quoting "...Next item is item seven. It's dated 12/20/2007. Also says transaction. Check received in the amount of \$300,000. Okay...").

Response:

Admit that the transaction occurred but deny that the transaction was done at the direction of Lynn Smith, deny that she was the sole owner of the Stock Account and deny that she was a bona fide creditor, *see supra* Response to Lynn Smith SMF 1.

Lynn Smith SMF 20:

This transaction was complicated by the fact that the repayment of the bridge loan originally went to David Smith's account at M&T Bank on December 12, 2007 in error. After David Smith discovered the error, he transferred \$380,000 to Lynn Smith's account on December 21, 2007. Id.

Response:

Admit that the transaction occurred but deny that Lynn Smith was the sole owner of the Stock Account and deny that she was a bona fide creditor, *see supra* Response to Lynn Smith SMF 1.

Lynn Smith SMF 21:

On February 4, 2009 Lynn Smith's brokerage account received a deposit of \$38,430.46. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 435, lines 18-20 (quoting "[i]t was funds that, no question, belonged to David Smith. He simply deposited this \$38,000 into his wife's account").

Response:

Admit that the Stock Account received a transfer of \$38,430.49 on February 4, 2009, but these funds were transferred from an account in the name of Capital Center Credit Corp. ("C4"), which was controlled by David Smith, and this transfer was intended to shield assets from investors and creditors. *See* SEC SMF 427-430.

Lynn Smith SMF 22:

On February 20, 2009 a deposit from David Smith in the amount of \$326,304.11 was made into Lynn Smith's brokerage account. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 436, lines 19-21 (quoting "[t]he next item is what we refer to as item 11. It's a deposit on February 20th, 2009. It is from David Smith in the amount of \$326,304.11").

Response:

Admit that the transaction occurred but deny that Lynn Smith was the sole owner of the Stock Account, *see supra* Response to Lynn Smith SMF 1.

Lynn Smith SMF 23:

As it relates to the deposit into Lynn Smith's brokerage account on March 18, 2010 in the amount of \$100,000, it was made as a repayment of a loan made to TDMM Benchmark on March 16, 2010. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89, at 438, lines 24-26 (quoting "A. Yes. We have item 13, which was a deposit on March 18, 2010, in the amount of \$100,000.").

Response:

Deny. Although \$100,000 was transferred from the Stock Account to TDMM Cable Funding on March 16, 2010, and returned on March 18, 2010, there is no loan agreement or other documentation showing that this was a loan.

Dated: New York, NY
August 11, 2014

Respectfully submitted,

s/ David Stoelting

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

10 Civ. 457 (GLS/CFH)

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, DAVID L. SMITH,
LYNN A. SMITH, DAVID M. WOJESKI, 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,

Defendants,

LYNN A. SMITH, and
NANCY MCGINN,

Relief Defendants, and

DAVID M. WOJESKI, Trustee of the
David L. and Lynn A. Smith Irrevocable
Trust U/A 8/04/04,

Intervenor.

DECLARATION OF KERRI L. PALEN IN SUPPORT OF PLAINTIFF'S
OPPOSITION TO DEFENDANT/RELIEF DEFENDANT LYNN A. SMITH'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

DECLARATION OF KERRI L. PALEN

I, Kerri L. Palen, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a Staff Accountant in the Enforcement Division of the New York Regional Office of the Securities and Exchange Commission.
2. On July 8, 2014, I submitted a Declaration in support of the SEC's motions for summary judgment that, in Exhibit 25, identified funds transferred into and out of a brokerage account in Lynn Smith's name, referred to as the "Stock Account." *See* Dkt. 712 at 71-86.
3. Exhibit A attached hereto – which was adapted from the information in Exhibit 25 to my July 8 Declaration – lists a total of \$5,783,807.23 in transfers of cash and stock received into the Stock Account from David Smith, Timothy McGinn and McGinn Smith & Co., Inc. and affiliated entities from October 2013 through April 2010.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
August 7, 2014


Kerri L. Palen

Cash and Stock Transfers to
Stock Account from Related Entities, Smith and McGinn since 10/14/03

Exhibit A

Date	Payor	Shares	Cash	Comments
10/14/2003	Capital Center Credit Corp.		\$ 1,777,222.22	From proceeds of Maracay Homes Sale - (from C4 to FIIN)
10/30/2003	First Independent Income Notes		15,556.00	Interest on Loan on 10/1/03
10/30/2003	First Independent Income Notes		500,000.00	Repayment of Loan on 10/1/03
10/30/2003	First Independent Income Notes		500,000.00	Repayment of Loan on 10/1/03
10/30/2003	First Independent Income Notes		500,000.00	Repayment of Loan on 10/1/03
10/30/2003	First Independent Income Notes		500,000.00	Repayment of Loan on 10/1/03
1/15/2004	Coventry Carelink Holding Corp.		117,415.34	
1/12/2006	Smith, David (Checking)		10,000.00	
3/3/2006	McGinn Smith & Company		20,000.00	
4/13/2006	McGinn Smith & Company		4,500.00	Cash Contribution prior year IRA
10/4/2006	McGinn, Timothy		85,000.00	
4/9/2007	McGinn Smith & Company		5,000.00	Cash Contribution prior year IRA
5/14/2007	McGinn, Timothy		100,000.00	
12/20/2007	Smith, David (Checking)		380,000.00	Funded using money from McGinn Smith Funding. According to Lynn Smith, this relates to repayment of bridge loan in the amount of \$375,000 made 11/29/07 to McGinn Smith Funding LLC.
11/6/2008	Smith, David & Lynn		560.10	
2/4/2009	Capital Center Credit Corp.		38,430.46	
2/20/2009	Smith, David (Brokerage)		326,304.11	Correspondence says to journal all assets from David Smith MSA- 2208 account to Lynn's 0916 account. Note that these funds were transferred to MSA- 2208 earlier in February from the David Smith QTIP Trust account. The majority of the funds that funded the QTIP Trust were proceeds of the fraud that flowed through David Smith's M&T account ending 89965.
3/18/2009	Smith, David (Brokerage)	468,019 shares of Pine Street Investment		Journal Pine Street Investment from MSA- 2208 to Stock Account. (Source was David Smith Qtip Trust). Unconfirmed Estimated Market Value at 3/31/09 was \$468,019
6/10/2009	TDMM Cable Funding		160,800.00	TDMM Cable Jr Investor Funds - repayment of 6/5/09 bridge financing
7/30/2009	TDMM Cable Jr. Trust 09		175,000.00	TDMM Cable Jr Investor Funds - repayment of 6/5/09 bridge financing
3/18/2010	TDMM Cable Funding		100,000.00	Funds were transferred from the Stock account on 3/16/10 and returned on 3/18/10
Cash Transferred from Related Entities, Smith and McGinn			\$ 5,315,788.23	
Market Value of Stock Transferred from Smith (on date of transfer)			468,019.00	
Total Transferred from Related Entities, Smith and McGinn			\$ 5,783,807.23	