UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Plaintiff Securities and Exchange Commission respectfully submits this reply memorandum of law in response to the submissions of David Smith; Lynn Smith; and the David and Lynn Smith Irrevocable Trust U/A 08/08/04, Geoffrey Smith and Lauren Smith opposing plaintiff's motion for summary judgment, and David Smith's cross-motion on damages.[1]

PRELIMINARY STATEMENT

Despite the vehement tone of their opposition papers, David Smith, Lynn Smith and the Smith Trust present little evidence that would support a jury verdict in their favor. And at this point in time – following a three-day evidentiary hearing in June 2010, several years of discovery, sweeping sanctions for concealing relevant material, three (unsuccessful) appeals to the Second Circuit, and a lengthy trial in the parallel criminal case – they have certainly had a sufficient opportunity to develop favorable evidence. Indeed, their responses to the SEC's Statement of Material Facts ("SEC SMF") shows that there are no genuine issues of fact remaining. *See* Exhibits A, B, C, and D (summary charts showing facts in SEC SMF that are admitted and deemed admitted). As a result, summary judgment should be entered on all claims.

First, David Smith attempts the impossible by arguing that he should not be found liable in the civil case when a jury previously found him guilty beyond a reasonable doubt in the criminal case. In addition, Smith's argument that he should not be subject to a substantial disgorgement order, when the victims of his massive fraud have lost nearly $100 million, should be rejected.

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[1]Timothy McGinn and Nancy McGinn have not submitted any opposition to the SEC's summary judgment motion. As a result, summary judgment should be entered against them on the relevant claims in the SAC, and the requested relief imposed. *See Pedroso v. Syracuse Cmty. Health Ctr.*, 2014 WL 3956570, *6 (N.D.N.Y. Aug. 13, 2014) ("in this District, where a non-movant has willfully failed to respond to a movant's properly filed and facially meritorious memorandum of law (submitted in support of its motion for summary judgment), the non-movant is deemed to have 'consented' to the legal arguments contained in that memorandum of law")

Second, Lynn Smith's argument that she alone controlled the Stock Account that was in her name is contradicted by overwhelming evidence that David Smith controlled every aspect of the Stock Account for his personal and professional benefit. As a result, the Stock Account should be treated as an asset of David Smith's and used to satisfy the requested judgment against him.

Finally, the Smith Trust simply cannot escape the significance of the Annuity Agreement, which Lynn Smith and the Trust recognized by trying so hard to conceal it from discovery in 2010. The overwhelming weight of the evidence shows that the Smith Trust was a sham and nothing more than an instrument to conceal assets for the benefit of David and Lynn Smith. As a result, its assets should be applied to satisfy David Smith's requested judgment.

ARGUMENT

I. THE EVIDENCE WARRANTS SUMMARY JUDGMENT AGAINST DAVID SMITH

The SEC's summary judgment motion offers overwhelming evidence of David Smith's violations of the federal securities laws. In response, Smith must come forward with specific facts showing a genuine issue of material fact for trial. A dispute of fact is "genuine" if "the [record] evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1096). A dispute of fact is "material" if it "might affect the outcome of the suit under the governing law." *Id.*

Smith's submission fails to raise any disputes of material fact, and it is inconceivable that a jury could render a verdict in his favor. As a result, the SEC's summary judgment motion should be granted on the first four claims in the Second Amended Complaint ("SAC") against David Smith.

A. Smith Does Not Dispute the Vast Majority of the SEC's SMF

The SEC's SMF contains extensive and detailed evidence of Smith's fraudulent conduct in connection with the Four Funds, Trust and MSTF offerings, in addition to his convictions in the parallel criminal action. In particular, the SEC SMF details, through an extensive analysis of dozens of bank accounts, the undisclosed payments to redeem investors in prior offerings (¶¶ 75-97); the unauthorized investments in affiliates (¶¶ 98-119); the undisclosed policy linking redemptions to new investor funds (¶¶ 124-136); the misuse of Trust Offering proceeds (¶¶ 145-150); and the constant net capital violations (¶¶ 152-158). Further evidence of Smith's fraudulent conduct came from the criminal trial (¶¶ 159-330).

Smith admits 170 of the SEC's material facts addressing the fraud. *See* Ex. A. With regard to another 113 of the SEC's SMF, Smith fails to adhere to Local Rule 7.1(a) (3), which provides that "[e]ach denial shall set forth a specific citation to the record where the factual issue arises. . . . The Court shall deem admitted any properly supported facts set forth in the Statement of Material Facts that the opposing party does not specifically controvert." NDNY Local Civil Rule 7.1(a)(3). "[T]his court has often enforced Local Rule 7.1(a)(3) by deeming facts set forth in a moving party's statement to be admitted . . . where the nonmoving party has willfully failed to properly respond to that statement[.]" *Pedroso v. Syracuse Cmty. Health Ctr*, 2014 WL 3956570, at *6 (N.D.N.Y. Aug. 13, 2014). *See also* Fed. R. Civ. P. 56(e)(2) ("If a party fails to . . . .properly support an assertion of facts or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion"); Advisory Committee Notes (this rule "reflects the 'deemed admitted' provisions in many local rules").

Smith merely lists boilerplate objections such as "improperly states a legal conclusion,"

"contains legal argument, opinion, and conclusory statements," "contains improper characterization," "irrelevant and immaterial," or "vague, overbroad and otherwise irrelevant." These *pro forma* objections – without citation to any record evidence – should be deemed admissions. Moreover, Smith's failure to cite to evidence is especially striking because Smith has had access to the vast record in both the civil and criminal cases. His failure to identify a single piece of evidence as a basis for his denials for 113 facts should be taken as a concession that no such evidence exists.

Failure to adhere to Local Rule 7.1(a)(3) is a basis to grant summary judgment, and the Second Circuit has affirmed summary judgment orders when there has been a "failure to comply with the local rules governing summary judgment submission in the Northern District of New York. Specifically, . . . Local Rule 7.1(a)(3)." *New York State Teamsters Conf. Pension and Ret. Fund v. Express Service, Inc*., 426 F.3d 640, 648 (2d Cir. 2005). *See also Alzawahra v. Albany Medical Center*, et al., 546 Fed.Appx. 53, 54 (2d Cir. 2013) ("we have previously affirmed district court orders granting summary judgment where the opposing party failed to adhere to the requirement of [Local Rule 7.1(a)(3)].)" In *New York Teamsters*, the non-moving party – like Smith – filed "mostly conclusory denials of [movants'] factual assertions and failed to include any record citations." *See* 426 F.3d at 648. As a result, "[t]he district court, applying Rule 7.1(a)(3) strictly, reasonably deemed [movants'] statement of facts to be admitted[.]"). Similarly, Smith's denials without citations to any evidence should be deemed admissions. When these are combined with the SEC's SMF that Smith admits, it is apparent that no issues of material fact exist.

B. Collateral Estoppel on the First through Fourth Claims is Warranted

Smith's argument that his convictions for conspiracy, mail fraud, wire fraud and securities fraud have no collateral estoppel effect should be rejected. His primary argument – that "there are numerous differences" between the Superseding Indictment ("Indictment") and the SAC – is plainly false. Smith Br. at 4. As demonstrated in the SEC's opening brief, the Indictment and the SAC concern the same defendants, the same offerings and the same violations. SEC Br. at 4-5. All of the conduct alleged in the Indictment is also contained in the SAC, with the exception of the tax fraud conduct. In any event, "[t]here is no case law that supports the proposition that a criminal indictment must match a civil complaint exactly in terms of parties and claims for there to be preclusive effect." *SEC v. Blackwell*, 477 F. Supp.2d 891, 900 (S.D.Ohio 2007).

The primary difference between the SAC and the Indictment is the time frames. Both the Indictment and the SAC cover conduct from September 2006 through 2009, but the SAC also includes conduct from September 2003 onward, when the first of the Four Funds offerings was launched. App. Ex. 6 (Indictment); App. Ex. 297 (SAC). As a result, the SAC contains more detail on the Four Funds offerings, which took place in September 2003 (FIIN), January and November 2004 (FEIN, TAIN), and October 2005 (FAIN), and raised more than $85 million. SEC SMF ¶¶ 9-11; App. Ex. 1 at 39 (Palen Ex. 3). The criminal case, however, also implicates the Four Funds, SEC SMF ¶¶ 159-173, and the SEC case implicates all of the Trust and MSTF offerings. SEC SMF ¶¶ 145-150. Smith's argument, therefore, that the civil and criminal cases covered different transactions is incorrect.

David Smith also argues that his acquittals are sufficient to raise a material fact. Smith Br. at 4-5. This is a red herring, however, because acquittals do not result in collateral estoppel.

Rather, it is his multiple securities fraud convictions, in addition to the conspiracy and mail and wire fraud, that are more than enough to justify collateral estoppel. "Convictions for mail fraud, wire fraud, securities fraud, and conspiracy to commit securities fraud suffice to establish claims for securities fraud based on the same facts in a related civil action." *SEC v. Bravata*, __ F. Supp.2d __, 2014 WL 897348, at *16 (E.D. Mich. 2014) (numerous citations omitted).

Smith's convictions on six counts of securities fraud by themselves are sufficient to grant summary judgment on the first four claims in the SAC. The jury instructions on the securities fraud counts track the elements of the antifraud provisions of the federal securities laws (§ 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5), and the jury found beyond a reasonable doubt that Smith was guilty on all six securities fraud counts. App. Ex. 58 at 42-50; App. Ex. 23 at 8-10.

Finally, Smith argues that the collateral estoppel effect of his conspiracy conviction is "ambiguous," and "must be resolved in favor of Mr. Smith," because the conviction could have been based on his intent to defraud either investors or FINRA. Smith Br. at 5. There is no ambiguity, however, in the conspiracy conviction: it supports collateral estoppel on the SAC's securities fraud charges regardless of whether the jury found his intent was to defraud investors or FINRA. As part of an overall scheme to defraud, the SAC alleges Smith's intent to defraud both FINRA and investors. App. Ex. 297 ¶¶ 107, 120 (FINRA); 39-106 (investors).

C. The Restitution Imposed in the Criminal Action is Irrelevant to the Appropriate Amount of Disgorgement in this Action

Smith argues that, if collateral estoppel applies, then "equity" mandates that his disgorgement be limited to the restitution ordered in the criminal action. Smith Br. at 6-9. Smith is wrong. Restitution and disgorgement are distinct concepts. No court has ever held that, under principles of collateral estoppel, restitution in a criminal case is binding on the same defendant in

a parallel SEC case.

As Smith points out, restitution in criminal cases is imposed pursuant to the Mandatory Victims Restitution Act ("MVRA"), which provides that "the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court[.]" 18 U.S.C. § 3663A. The MVRA, however, applies only in criminal cases; it does not apply in SEC cases. And contrary to the specific procedural requirements of the MVRA, courts in SEC actions have broad equitable powers to fashion appropriate remedies when they find violations of the federal securities laws. SEC Br. at 14-16. In this case, where investor losses exceeds $80 million, a disgorgement order that is tied to the total amount raised minus the amount returned – the standard measure of disgorgement in offering fraud cases – is appropriate. *See* SEC Br. at 16-17.

The lack of transparency to the restitution number also shows that restitution is not an appropriate measure of disgorgement. Judge Hurd found that the US Attorney's Office did not prove a $30.2 million loss amount at trial, App. Ex. 26 at 5, but he did not identify any reasons. Instead, he stated without explanation that he would adopt the $6.3 million "loss amount" in the Probation Office's report, which remains nonpublic and under seal.[2] It is not at all clear how the Probation Office determined this loss amount; how the restitution amounts in the criminal judgments relate to the Probation Office's loss amount; which offerings the restitution order is intended to cover; and which victims are intended to receive payments.

In this case, the SEC has submitted uncontroverted evidence that total investor losses from the Four Funds, Trust and MSTF offerings are approximately $100 million. SEC Br. at 14. In addition, the SEC case, which includes the $85 million raised in the fraudulent Four Funds

[2] Smith touts the Probation Office's report but fails to mention that it is nonpublic. The docket sheet for the entries cited by Smith state: "This document has been electronically lodged with the Court and is viewable by ONLY the attorney for the government, the attorney for the defendant, and the presiding judge. Any further distribution or dissemination is prohibited."

offerings after September 2003, should have a much larger disgorgement figure than the criminal case, which was limited to offerings after September 2006.

Smith does not cite to any case where a court adopted a restitution order as the equivalent of disgorgement in a parallel civil case. In fact, courts have recognized that "restitution and disgorgement are separate remedies. . . . 'a disgorgement order might be for an amount more or less than that required to make the victims whole. It is not restitution.'" *SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1085 (D.N.J. 1996) (quoting *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993).

Smith vaguely invokes the "rules of equity" as support, but he fails to identify which rule of equity. In fact, nothing could be more inequitable than the disgorgement amount he advocates. Smith should not receive the benefit of this Court's equity when his knowing violations of the securities laws have caused hundreds of investors' large financial losses.

Smith also blames the SEC for not challenging the loss amounts proposed by the Probation Office. Smith Br. at 7. The SEC, however, never received the Probation Office report. In any event, the US Attorney's Office has appealed Judge Hurd's sentence. SEC SMF ¶ 56.

Finally, in support of his mootness argument, Smith refers to language in the Judgment stating that the "cash value" of assets distributed by the Receiver to the victims of Smith's crimes "may be deducted from the total restitution amount." Smith Br. at 8-9; App. Ex. 10 at 6. This provision, however, governs only the calculation of "the total restitution amount" and says nothing about disgorgement in the SEC case. To the extent this provision reduces Smith's restitution to zero – which Smith seems to imply – leaving the hundreds of victims of his fraud uncompensated, then the rationale for a larger disgorgement number is even more compelling.

D. Summary Judgment is Warranted on the Section 5 Claim

Smith does not dispute that the SEC has established a *prima facie* case of a violation of Section 5(a) and (c) of the Securities Act. To avoid liability, therefore, Smith must show that an exemption from registration was available. SEC Br. at 12-13. Instead, Smith argues that the Four Funds were "specialty finance companies," and offers a July 2008 memorandum from outside counsel which argues that the Four Funds need to register under the Investment Company Act ("ICA"). Smith Br. at 9; Statement of Additional Facts ¶ 14. Whether the Four Funds needed to be registered under the ICA, however, is irrelevant to the Section 5 claim. Smith's other argument appears to be that the SEC improperly counted as unaccredited some unnamed investors "whose notes were paid by another family member who would be accredited." Smith Stmt. Add'l Facts, ¶ 14. Smith, however, does not identify any such investors and, in any event, the SEC did not count an investor as unaccredited if there was another investor at the same address. App. Ex. 2 ¶ 8. Smith does not question the SEC's evidence showing that each of the Four Funds had more than 35 unaccredited investors. App. Ex. 2, ¶ 9. Summary judgment should be entered on the Sixth Claim for Relief.

II. NO ISSUES OF MATERIAL FACT EXIST AS TO DAVID SMITH'S OWNERSHIP AND CONTROL OF THE STOCK ACCOUNT

Lynn Smith fails to identify any evidence to support her farfetched argument that she alone controlled the Stock Account. She also cites no authority supporting her claimed right to a jury trial on this issue and fails to challenge the extensive case law cited in the SEC's opening brief establishing this Court's authority to decide this question. *See* SEC's Memorandum of Law in support of its motion for summary judgment at pp. 14-17. Given the paucity of evidence in her favor – apart from her own discredited testimony – the Stock Account should be used to augment the meager funds available to the victims of McGinn and Smith's fraud.

A. Lynn Smith's Claim that the Stock Account Has Always Been in Her Name is False

The bedrock of Lynn Smith's defense is that the Stock Account has always been in her name since 1969. *See, e.g.,* L. Smith Aff. dated May 21, 2010, Dkt. No. 23 at ¶¶ 13-18. The evidence shows, however, that this claim is false. Moreover, there is overwhelming, indisputable evidence that David Smith jointly owned and controlled the Stock Account since 1991.

Account opening statements show that the Stock Account was opened in Lynn Smith's name on November 21, 1991. SEC SMF ¶ 338; App. Exs. 263, 264. Lynn Smith has not presented any documentary evidence to the contrary. Rather, she submits several documents – none of which were produced in discovery – that do not establish that a brokerage account solely in Lynn Smith's name existed before 1991. *See* Ex. A (stock certificates in Lynn Smith's name dating, it appears, from 1970); Ex. B (1970 letters discussing certain stocks she had inherited); Ex. C (letter to Lynn Smith's father referencing a stock that he owned).

Lynn Smith also claims she signed the new account statement in 1991 because Bear Stearns required it. Lynn Smith Opp. Br. at 9-10. This claim is unsupported. The only document showing the origins of this account is the account opening documents from 1991, showing that David and Lynn Smith ***both*** signed the letter of authorization to "journal all cash and securities" into the newly created Stock Account. SEC SMF ¶ 339; App. Ex. 284.

Moreover, the Smiths' joint financial statements for 1984, 1986, 1987 and 1989 report no securities held by either Lynn or David Smith, other than possibly small IRA accounts of unidentified contents (SEC SMF ¶¶ 345; 347) and the only securities listed on the 1984 joint financial statement are specifically identified as "Mr. Smith's securities" (SEC SMF ¶ 345; App. Ex. 181 at 3). And their joint financial statements for 1990 and 1991 report that they held cash and securities totaling $298,000 in 1990 and $302,000 in 1991, with no indication that any were

owned solely by Lynn Smith. SEC SMF ¶¶ 348, 350.[3]

Lynn Smith argues that she did not create these financial statements and does not regard them as accurate. L. Smith Opp. Br. at 11. This self-serving position has no merit in face of the overwhelming documentary evidence to the contrary, is insufficient to create a genuine dispute.[4]

B. Indisputable and Overwhelming Evidence Shows that David Smith Controlled the Stock Account

Lynn Smith argues that David Smith merely acted as a typical broker. However, David Smith's control over the Stock Account far surpassed that of a broker with discretionary authority. David Smith personally benefitted from the Stock Account. Indeed, Lynn Smith has admitted that: "David Smith repeatedly used funds transferred from the Stock Account to his checking account to pay large common expenses of him and L. Smith, such as mortgage payments on their primary residence in Saratoga Springs, New York, 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." *See* L. Smith Response to SEC SMF ¶ 373 – admitted; *see also* Lynn Smith's Response admitting to SEC SMF ¶¶ 361-370; 373-374, regarding numerous joint expenses paid from Stock Account.

Lynn Smith also admits David Smith received at least $2,585,000 in his checking account from the Stock Account between November 1992 and August 1999 with no transfers back (SEC SMF ¶ 372- admitted), and does not rebut the fact that David Smith received at least $4.7 million

[3] Contrary to Lynn Smith's claim, Opp. Br. at 10, the SEC has provided the actual financial statements for each of the referenced years to support its claim (see App. Exs. 181-187, 189, 192, 194, 197, 200, 203, 206-210; SEC SMF ¶ 343) and it is Lynn Smith who fails to provide any documentary evidence to support her claim of an account solely in her name before 1991.

[4] The SEC does not contend, as Lynn Smith suggests, that the Smiths transferred the Stock Account back and forth between March and May 1992. L. Smith Opp. Br. at 11-12. Rather, we agree it was in her name during that period but David Smith obviously considered it a joint asset.

in his checking account from the Stock Account between August 1999 and April 2010 with only $390,000 transferred back (SEC SMF ¶ 371). She tries to diminish this evidence by arguing that whether David Smith benefitted is "irrelevant." L. Smith Op. Br. at 14-15. However, as Lynn Smith has conceded (L. Smith Opp. Br. at 7-8), whether a defendant benefitted from an asset is a relevant factor in determining whether he beneficially owned and controlled it. This rampant commingling of assets between the Stock Account, David Smith's checking account and his businesses, discussed below, is incontrovertible evidence of a joint asset.

David Smith also contributed assets to the Stock Account. Lynn Smith now admits – after years of denial – that David Smith contributed a portion of the money used to purchase the ALBANK stock, which ultimately was converted into the Charter One stock that became one of the Stock Accounts most valuable assets. L. Smith Opp. Br. at 15-16. She also does not dispute that David Smith contributed $610,000 from his QTIP Trust to the Stock Account. *See* SEC SMF ¶¶421-422. Although she argues that the money was supposed to be transferred to another QTIP Trust six months later as part of estate planning (L. Smith Opp. Br. at 17),[5] but was not because "[u]nfortunately, Lynn never received the opportunity to transfer the proceeds back into the QTIP Trust," the more plausible explanation is that she and David Smith intentionally left the funds in the Stock Account for their joint benefit. She also concedes that David Smith deposited $38,430 from his IRA into the Stock Account and that this money is subject to any judgment against David Smith. L. Smith Br. at 18.[6]

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[5] Significantly, App. Ex. 301 which she cites contains a warning from their estate planning attorney that "these transfers will be scrutinized to determine if they were fraudulently conveyed."

[6] If nothing else, by Lynn Smith's own logic, if the $38,430 deposited into the Stock Account is available for a judgment against David Smith, so too should the $610,095 he

Unlike a mere broker, David Smith also benefitted from the repeated and massive transfers of millions of dollars from the Stock Account to and from his various business ventures over the years. For example, brokerage and bank records show transfers of approximately $17.2 million from the Stock Account to McGinn Smith entities and transfers of approximately $13.7 million from McGinn Smith entities to the Stock Account between 1999 and 2010. SEC SMF ¶¶ 401 and 402.

Lynn Smith's claim that the Stock Account transactions were treated no different than for other customers, which required "a letter of authorization signed by the customer after they were fully aware of the opportunity presented to them," L. Smith Opp. Br. at 13, is rebutted by the ample evidence that she signed blank letters of authorization ("LOA's") in bulk, which McGinn Smith employees used whenever David Smith needed to move money back and forth between his business ventures. *See, e.g.*, L. Smith Response to SEC SMF ¶¶ 434-442 (does not dispute; claims lack of knowledge or information). The frequency and complexity of the transfers between the Stock Account and the McGinn Smith businesses undermine Lynn Smith's claim that she gave advance, knowing approval for each such transaction. Indeed, David Smith stated that his wife "really didn't focus much on the business end of things," SEC SMF ¶ 470, and that "she just didn't have a lot of interest in those things." SEC SMF ¶ 469. Accordingly, undisputed evidence compels the conclusion that David Smith jointly owned and controlled the Stock Account.

C. **Lynn Smith's Deceit Is Part of the Record of this Case**

Lynn Smith argues that this Court should not consider evidence that she was found to

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deposited from his QTIP Trust into the Stock account in 2009.

have deliberately concealed evidence, and was sanctioned for doing so. L. Smith Opp. Br. at 19-20, citing to SEC SMF ¶¶ 335, 383, 384. She argues that credibility issues are for the jury to decide and that the record before the Court contains "sworn testimony from Lynn Smith that creates an issue of fact." *Id.* at 20. However, Lynn Smith does not dispute that this Court has the equitable discretion to determine what assets are available to satisfy a judgment against David Smith, including whether he jointly owned and controlled the Stock Account. *See* SEC Br. at 14-17. Lynn Smith's documented misrepresentations and omissions to this Court are part of the record of this case. In evaluating whether a jury could find in her favor, the Court should be able to take into account the prior findings.

D. **The Palen Declaration Is Properly Offered as a Summary Exhibit**

Lynn Smith's argument that the Court should disregard the Declaration of Kerri Palen is without merit. Ms. Palen's Declaration is not being offered as expert testimony, but rather as a summary of voluminous bank and brokerage records and other financial documents. *See* Federal Rule of Evidence 1006 (permitting the use of "a summary, chart, or calculation to prove the content of voluminous writing"). Such evidence is admissible and should be considered.

In addition, Lynn Smith's complaints about the accuracy of the Palen Declaration are unfounded. She first contends that the Palen Declaration improperly "suggests" that a payment of $380,000 from David Smith to the Stock Account on December 20, 2007 was a contribution by him to the Stock Account rather than repayment of a previous "bridge loan" from the Stock Account to MS Funding in November 29, 2007. L. Smith Opp. Br. at 20-21. The Palen Declaration, however, clearly states that the transfer was "[f]unded 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." App. Ex. 1 at 83 (Palen Ex. 25).

See also SEC's SMF ¶ 457 (stating that on December 20, 2007, $380,000 was "repaid by McGinn Smith Funding to the Stock Account via David Smith's checking account").

Lynn Smith also focuses on Palen Exhibit 24, which summarizes the known cash deposits and cash withdrawals into and out of the Stock Account from 1992 to 1999 and 1999 through 2010 as detailed in Palen Exhibit 25. Ms. Palen makes clear that for the period November 1991 through August 1999 "[b]rokerage statements were not available . . . therefore, I was only able to include transactions that I identified in LOA's, other account statement or accounting records." App. Ex. 1 at 25, 77. In addition, Palen also noted with respect to Exhibit 25, because of the absence of brokerage records prior to August 1999: "I am unable to verify that all transactions in the Stock Account prior to August 28, 1999 are included in Exhibit 25." Palen Decl. ¶ 78. Exhibit 24 does not contain any argument or make any conclusions, it merely summarizes known deposits and withdrawals from 1992 through 1999.

In addition, Lynn Smith's claim of an "unexplained discrepancy" between cash deposits and cash withdrawals between 1991 and 2010 also fails to recognize that Exhibit 24 does not purport to include cash flow from any stock transactions including, transfers into the Stock Account, proceeds of the sale of stock, income earned and gains recognized.

In an absurd argument, Lynn Smith ignores the fact that Exhibit 24 does not purport to list every transaction, and argues that because the known cash withdrawals are more than the known cash deposits, the Palen Declaration must be "a complete fabrication and falsehood." Lynn Smith Br. at 21. Notably, Lynn Smith does not dispute any particular deposit or withdrawal. Instead, through "elementary mathematics," she hopes to poke holes in a simple list of deposits and withdrawals. Unable to undermine anything in the Palen Declaration with actual evidence, however, Lynn Smith resorts to her usual fallback position of distortion and hyperbole.

Lynn Smith also incorrectly claims the Palen Declaration fails to acknowledge that "the majority of the disbursements from the Stock Account covered in the Palen Declaration were the purchases of the real estate in Vero Beach, Florida and Saratoga Springs, Florida, and also for tax purposes which were handled by David Smith, [and] the Palen Declaration lists 'not known' to the majority of them." L. Smith Opp. Br. at 21.

Exhibit 25, however, does list both the $100,000 transferred from the Stock Account on May 7, 2001, and the $300,000 transferred from the Stock account on June 19, 2001, to fund the down payment for the Vero Beach house, as received by David Smith, so these payments certainly were not among the unknown category. *See* SEC SMF ¶¶ 364-366. Exhibit 25 also reports a $70,000 transfer from the Stock Account to David Smith on June 19, 2003 and contains the clarifying note: "Funds were used to put a down payment on 2 Rolling Brook Dr. Saratoga Springs house purchase. The check was written out of David Smith's account." *See also* SEC SMF ¶ 370. Finally, Lynn Smith incorrectly argues that Palen Exhibit 25 fails to note that the $3,000,000 transfer from the Stock Account to IASG on January 14, 2003 was in exchange for a promissory note. In fact, Palen's note to that transaction states: "This represents Lynn Smith's cancellation of the 2-year note to be replaced by a promissory note from the company." [7]

[7] Her complaint that the transfer was actually $3,150,000, not $3,000,000, is unsupported, contradicted by the bank records Palen relied upon and immaterial. Also, only $5,500 out of $7,937,506 in disbursements from 11/21/92 to 8/27/990 and $302,050 out of $25,513,791 in disbursements from 8/28/99 to 4/5/10 were unidentified by Palen. If some of these were additional transfers from the Stock Account to David Smith, this just further supports the SEC's position that David Smith benefitted from the Stock Account.

III. DAVID SMITH BENEFICIALLY OWNED AND CONTROLLED THE SMITH TRUST ASSETS AND THEY SHOULD BE USED TO SATISFY THE REQUESTED JUDGMENT AGAINST HIM

The SEC has asked this Court to exercise its broad equitable powers to apply the assets in the Smith Trust to satisfy the requested judgment against David Smith because the evidence shows that he beneficially owned and controlled the assets in the Smith Trust. Alternatively, it seeks summary judgment on its claim that David and Lynn Smith fraudulently conveyed assets to and from the Smith Trust in violation of New York Debtors and Creditors Sections 276 and 278("NYDCL §§ 276 and 278"). The Smith Trust admits to most of the facts set forth in the SEC's SMF and the various arguments it asserts are without merit.

A. The Smith Trust's Claim that David and Lynn Smith's Actions Have No Relevance is Meritless

The Smith Trust does not challenge the extensive legal authority cited by the SEC in its opening brief, SEC Br. at 14-29, establishing this Court's broad equitable powers to apply the assets in the Smith Trust to satisfy a judgment against David Smith on the ground he beneficially owned and controlled those assets. Instead, it merely complains that the SEC is raising this theory for the first time. In fact, the SEC always has argued that the assets in the Smith Trust were beneficially owned and controlled by David Smith and that those assets should be disgorged. *See, e.g., SEC v. McGinn Smith*, 752 F. Supp. 2d 194, 217 (N.D.N.Y. July 7, 2010), Dkt. No. 86, App. Ex. 345 ("The SEC contends that the Trust is an appropriate relief defendant and that, in the alternative, even if it is not properly named as a relief defendant, David Smith was a beneficial owner of the trust over which he asserted dominion and control.").

The Smith Trust also argues that its assets cannot be "invaded" " because it is a spendthrift trust and a separate legal entity and that "the actions of their parents [David and Lynn Smith] are irrelevant as a matter of law." Smith Trust Opp. Br. at 2. However, it cites no

authority for these claims, which are directly contrary to the New York Debtor and Creditor Law ("NYDCL") § 276, which has no spendthrift trust exception: "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, is fraudulent as to both present and future creditors." *See also* SEC Trust Opp. Br. at 15-19. Pursuant to NYDCL § 278, a creditor may have such fraudulent conveyances set aside. Thus, NYDCL § 276 makes the Smiths' actions in creating and conveying assets to the Smith Trust directly relevant to whether that transfer can be set aside pursuant to NYDCL § 278.

B. **There are No Material Facts in Genuine Dispute**

The Smith Trust has admitted to most of the facts set forth in the SEC's SMF. Of the approximately 120 facts directly relevant to the SEC's motion as to the Smith Trust assets (SMF ¶¶ 35-46; 471-545; 586-618), the Smith Trust admits 108 of those facts, denies four facts, partially admits and partially denies 4 facts, and neither admits nor denied four facts. It also neither admits nor denies the evidence set forth in SMF ¶¶ 546-585 regarding the other fraudulent conveyances by David and Lynn Smith and others.[8]

C. There is No Genuine Dispute That Lynn Smith Hid the Annuity Agreement From the Court

The Smith Trust argues that there is a genuine dispute whether David and Lynn Smith hid the Annuity Agreement from the Court. However, the Smith Trust admits that prior to August 2010 Lynn Smith failed to inform the Court that the Smiths entered into the Annuity Agreement entitling them to annual payments of approximately $489,000 from the Smith Trust. Smith Trust Response to SEC SMF, Dkt. No. 778-3, at ¶ 494 ("Response"); (2) failed to produce

[8]The Smith Trust's failure to cite to record evidence in support of its denials means that fact is deemed admitted." *See, supra* at 3-6.

the Annuity Agreement in response to discovery requests (Response ¶ 502); (3) failed to disclose the Annuity Agreement or her and David Smith's rights to payments on a court-ordered Statement of Net Assets (Response ¶ 503); (4) failed to disclose the Annuity Agreement in her May 27, 2010 deposition despite being asked questions about her assets (Response ¶ 504); and (5) failed to disclose the Annuity Agreement during her testimony before the Court at the preliminary injunction hearing (Response ¶ 506). The Smith Trust also admits that Judge Homer found that Lynn Smith engaged in "fraud, misrepresentation, and misconduct' in concealing the Annuity Agreement (Response ¶ 37) and further found that Lynn Smith "acted with subjective bad faith" in concealing the Annuity Agreement (Response ¶ 38). *See* SEC SMF ¶¶ 37-40, 44.

The Smith Trust also does not set forth a single fact in its counterstatement that Lynn Smith's repeated concealment of the Annuity Agreement from April through July 2010 was anything but intentional or that her motive for concealing the Annuity Agreement was anything other than to defraud the Court. Thus, there is no genuine factual dispute that Lynn Smith hid the Annuity Agreement from the Court as part of her effort to shield those assets from investors.

D. There is No Genuine Dispute that the Smith Trust Benefitted David and Lynn Smith

The Smith Trust admits that David and Lynn Smith were entitled to receive $489,000 in annual annuity payments from the Smith Trust (Response ¶ 494) and that such payments would result in approximately $10 million in payments to them if they reached their expected life expectancy (Response ¶ 501). In addition, the Smith Trust's own expert, David Evans, has admitted that by entering into the Annuity Agreement with the Smith Trust, the Smiths obtained income and estate benefits, including: deferral and spreading out over many years of the capital gains tax they would otherwise have been subjected to immediately in 2004 when the Charter One stock was converted into cash as a result of a merger; the exclusion of the Charter One stock

from the Smiths' estate; and the avoidance of any gift tax because the stock was "sold" rather than gifted to the Smith Trust. *See* Evans Report dated September 2, 2010, at ¶¶ 28-30).

The only "facts" the Smith Trust cites are Lynn Smith's claim that the Smith Trust was created solely for the benefit of their children, and Geoffrey and Lauren Smith's testimony that they believed the Smith Trust was created for their benefit. *See* Opp. Br. at 4-5; Response ¶¶ 639-641. However, these assertions were refuted by the discovery of the Annuity Agreement. And Geoffrey and Lauren Smith's testimony as to why their parents created the Smith Trust does not suffice to create an issue of fact.[9]

The Smith Trust's reliance on Judge Homer's July 7, 2010 opinion at pp. 3 and 11, to support its claim that the Smith Trust was created for the benefit of the Smiths' children, is grossly misleading. *See* Smith Trust Opp. Br. at 4-5. Obviously, when Judge Homer considered the Annuity Agreement his understanding of the Trust changed, and he re-imposed the asset freeze and concluded that David Smith possessed "an equitable and beneficial interest in the Trust." SEC SMF ¶¶ 28-40. Given the indisputable evidence cited above, there can be no genuine dispute that David and Lynn Smith benefitted from the Smith Trust.[10]

[9] The Smith Trust admits that Lauren Smith never spoke to either David or Lynn Smith about any aspect of the Smith Trust and that Geoffrey Smith never spoke to his mother about the Smith Trust. Responses to SEC'S SMF ¶¶ 523; 527-28; 538.

[10] The Smith Trust also repeatedly and wrongly asserts that: "It has been conclusively established, and now conceded by the plaintiff, that the Trust is a validly created Trust …" See Opp. Br. at 1, 3, 12. The SEC has made no such concession and the Smith Trust provides no support for this claim. To the contrary, the SEC has consistently taken the position that the Smith Trust was created as part of a fraudulent scheme to defraud the Smiths' creditors.

E. There is No Genuine Dispute That David Smith Reported the Smith Trust Assets As His in Financial Documents

The Smith Trust argues that there is a genuine dispute whether David Smith reported the Smith Trust as his asset in financial documents, Smith Trust Opp. Br. at 3-11, but the Smith Trust has admitted that he did so. In fact, it admitted that David Smith listed the assets contained in the Smith Trust, totaling $4,453,022, as among the cash and securities owned by David and Lynn Smith, on his handwritten Financial Statement dated December 31, 2007. Response SMF ¶ 508; Opp. Br. at 10. Indeed, the document cited in support of this fact (App. Ex. 209) explicitly identifies the Smith Trust as one of David and Lynn Smiths' assets.

The Smith Trust has no explanation for this clear evidence, except to speculate that perhaps he listed the Smith Trust as an asset to obtain a loan from a third party. However, the Smith Trust has admitted that David Smith also described himself as the "beneficiary" of the Smith Trust when he prepared handwritten responses to a "Registration Notice and Questionnaire" for the Trustee to sign in connection with an proposed initial public offering of shares owned by the Smith Trust. *See* Response ¶ 509; App. Ex. 268, p. 5. He did so in response to a conflict of interest question whether "you or any of your affiliates or associates" have a material relationship with the underwriter. Moreover, even the most cursory comparison of David Smith's Financial Statements from July 2004 (App. Ex. 206), August 2005 (App. Ex. 207), October 2006 (App. Ex. 208), December 31, 2007 (App. Ex. 209), August 31, 2008 (App. Ex. 210), makes clear that the approximately $4.4 million in assets in the Smith Trust continued to be included as among the approximately $14 million in net assets consistently reported on the Smiths' Financial Statements both before and after they transferred the approximately $4.4 million in Charter One stock to the Smith Trust in 2004. *See also* SEC's SMF ¶¶ 507-508. Thus, it is indisputable that David Smith reported the Smith Trust assets as his own.

F. The Smith Trust Admits Virtually Every Relevant Fact in the SEC's SMF

The Smith Trust admits to the following material facts supporting the SEC's motion:

- In December 2003, David and Lynn Smith were named as defendants in a securities fraud suit based in part on loans made from the Stock Account to facilitate an allegedly fraudulent IPO; and the case was settled in 2004 for $200,000 (Response ¶¶ 471-475);

- In February 2004, the SEC sent David Smith a letter setting forth numerous violations by MS & Co. (Response ¶¶ 476-477);

- At the time of the transfer of the Charter One stock to the Smith Trust, David Smith was aware of the consequences of committing fraud and that his actions could result in significant financial loss (Response ¶ 478);

- At the time when the Charter One stock was transferred to the Smith Trust, the FIIN and FEIN fraudulent offerings, which raised $40 million from investors, were well underway (Response ¶ 485);

- The private placement memorandum for both offerings did not permit investments in affiliates of McGinn Smith but Smith from the beginning invested in affiliates; and as of December 31, 2003, 11% of investments were with affiliates and this grew to 32% by December 31, 2004 (Response ¶ 487);

- At the time of the transfer of the Charter One stock to the Smith Trust, the liabilities of FIIN and FEIN far exceeded their assets (Response ¶ 488);

- David Smith reported the Smith Trust assets as his own on financial documents (Response ¶ 508-509); see also App. Exs. 206-210);

- The Trustee, Thomas Urbelis, routinely signed documents as requested by David Smith and the documents often had instructions to sign immediately and overnight them back to Smith (Response ¶514-515);

- Urbelis took no responsibility for the Smith Trust's tax returns, relied upon David Smith for all investment decisions, never spoke to either of the ostensible beneficiaries of the Smith Trust regarding any aspect of the trust, made no distributions for the benefit of either of the ostensible beneficiaries of the trust, and, according to Lynn Smith's own testimony, the only thing he did was sign tax returns and" I don't think there is anything else he does." (Response SMF ¶¶ 513, 516, 519, 525, 530, 532);

- Neither David nor Lynn Smith ever informed their daughter Lauren that she was a beneficiary of the Smith Trust or had any conversation with her about the Trust (Response ¶ 527-528; 538);

- Despite the fact that Lauren Smith "went through a little bit of a rough period" including being unemployed, collecting unemployment insurance and requiring assistance in paying her rent, including receiving $22,1000 from her parents between March 2007 and May 2009 to pay her rent, Lauren Smith never requested a distribution from the Smith Trust and admitted that she did not know she could do so (Response ¶ 531, 539-541);

- David Smith paid taxes for the Smith Trust from his own money (Response ¶ 545);

- The only persons to receive a distribution from the Smith Trust, amounting to $95,000, were David and Lynn Smith (Response ¶ 543);

- Lynn Smith concealed of the Annuity Agreement despite an obligation to disclose all assets in April through June 2010 (Response ¶¶ 37-38; 502-504; 506).[11]

These admitted facts are more than sufficient for this Court to hold that David Smith beneficially owned and controlled the Smith Trust or, alternatively, that he and Lynn Smith fraudulently conveyed the Charter One stock to the Smith Trust to shield that asset from their present and future creditors.

Finally, the Smith Trust's reliance on *In re Vebeliunas*, 332 F.3d 85 (2d Cir. 2003) is misplaced. Most importantly, the Second Circuit in *Smith v. SEC* pointed out that in *Vebeliunas* "we assumed that New York courts would allow the veil of a trust to be pierced in situations where the complete domination of a trust has been shown" before affirming this Court's finding that the SEC would likely prove that David Smith was the equitable owner of the Smith Trust. *Smith v. SEC*, 432 Fed. Appx. 10 at 13 (2d Cir. 2011). In addition, in *Vebeliunas*, there was no evidence that the transfer of the property to the trust was part of a fraudulent conveyance or that

[11] David and Lynn Smith and the Smith Trust also either admit, or do not rebut, the ample evidence set forth in the SEC's SMF regarding the 2009 fraudulent conveyances of the Vero Beach house and the checking account (Response ¶¶ 558-571).

the trust was created to conceal assets. *Vebeliunas*, therefore, is clearly distinguishable.[12]

G. The Smith Trust Arguments Based on the Trustee's Powers are Without Merit

The Smith Trust advances several additional arguments based on state law as to why the terms of the trust and the annuity agreement allegedly prevent this Court from applying the Smith Trust assets to a judgment against David Smith. Smith Trust Opp. Br. at 4-6. However, as discussed above, given that David Smith beneficially owned the Smith Trust's assets, and given that the Smiths fraudulently conveyed assets to the Trust, , whatever contractual or statutory provisions that might otherwise bear on a Court's right to attach trust assets are irrelevant.

Accordingly, the SEC respectfully requests that the Court find that David Smith beneficially owned and controlled the Smith Trust and order that its assets be applied to satisfy the requested judgment against him; or alternatively, grant summary judgment on the SEC's claims that David and Lynn Smith fraudulently conveyed assets to and from the Smith Trust, in violation of NYDCL § 276, and order that those fraudulent conveyances be set aside and the assets made available to satisfy the requested judgment against David Smith.

[12] The Smith Trust also claims, without citation and incorrectly, that the SEC has "conceded" that the assets in the Smith Trust were "'clean' assets, not associated with any misdeeds of David L. Smith." More to the point, however, it is irrelevant whether the Smith Trust contains any proceeds of David Smith's fraud. Because David Smith beneficially owned and controlled the Smith Trust, its assets are available to satisfy a judgment against him regardless of their origin.

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that the Court grant its motion for summary judgment; and deny the motions for summary judgment filed by David Smith (including his cross-motion on damages), Lynn Smith and the Smith Trust.

Dated: New York, NY
August 27, 2014

Respectfully submitted,

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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.	:	

PLAINTIFF'S RESPONSES TO DAVID SMITH'S STATEMENT OF ADDITIONAL MATERIAL FACTS

David Stoelting
Kevin P. McGrath
SECURITIES AND EXCHANGE COMMISSION
200 Vesey Street
Brookfield Place
New York, N.Y. 10281-1022
August 27, 2014

Plaintiff Securities and Exchange Commission respectfully submits these Responses to David L. Smith's Statement of Additional Facts In Opposition to Plaintiff's Summary Judgment Motion And In Support Of His Cross-Motion For Summary Judgment On Damages (Dkt. 785 at 160-161).

David Smith Additional Fact 1:

On July 8, 2013, the United States Probation Office filed its Presentence Investigation Report related to Mr. Smith. *United States v. McGinn and Smith*, 1:12-cr-00028 (DNH); Dkt. Nos. 187, 219.

Response:

Deny. The Probation Office report was not filed and has remained under seal. *United States v. McGinn and Smith*, 12-cr-00028 (DNH); Dkt. 160, 161, 187, 188, 218, 219 (stating with regard to Presentence Report "This document has been electronically lodged with the Court and is viewable by ONLY the attorney for the government, the attorney for the defendant, and the presiding judge. It is not a filed document, therefore is not available for public inspection. Any further distribution or dissemination is prohibited.").

David Smith Additional Fact 2:

The United States Probation Office calculated the total loss amount related to the criminal convictions (including the tax convictions) to be in the total amount of $6,336,440.00. Plaintiff's App. Ex. 26 at 5.

Response:

See Response to Additional Fact 1.

David Smith Additional Fact 3:

The United States Attorney's Office presented a loss amount of $30,233,514.98. and filed its Sentencing Memorandum on July 24, 2013. *United States v. McGinn and Smith*, 1:12-cr-00028 (DNH); Dkt. No. 193.

Response:

Admit.

David Smith Additional Fact 4:

Mr. Smith filed his Sentencing Memorandum on July 24, 2013 and set forth reasons why the loss amount could not be calculated. *United States v. McGinn and Smith*, 1:12- cr-00028 (DNH); Dkt. No. 196.

Response:

Admit.

David Smith Additional Fact 5:

The Sentencing Memoranda were made available to the public, including the plaintiff and any victims prior to Mr. Smith's Sentencing on August 7, 2013. *United States v. McGinn and Smith*, 1:12-cr-00028 (DNH); Dkt. Nos. 193, 196, 210.

Response:

Deny. *See* Response to Additional Fact 1.

David Smith Additional Fact 6:

Mr. Smith was sentenced on August 7, 2013 before Hon. David N. Hurd. At no time prior or at sentencing did plaintiff or any of the victims challenge the Probation Office's loss calculation of $6,336,440.00 or proposed restitution amount. Plaintiff's App. Ex. 26.

Response:

Admit.

David Smith Additional Fact 7:

At the August 7, 2013, Judge Hurd found, based upon a preponderance of the evidence, that a total loss amount of $6,336,440.00 was appropriate. Plaintiff's App. Ex. 26 at 5.

Response:

Admit.

David Smith Additional Fact 8:

On August 13, 2013, Judge Hurd entered a Judgment against Mr. Smith which included that a criminal monetary penalty of restitution to victims in the amount of $5,748,722.00. Plaintiff's App. Ex. 10 at 5.

Response:

Admit.

David Smith Additional Fact 10:

Within the August 13, 2013 Judgment, Judge Hurd provided special instructions regarding the payment of Mr. Smith's criminal monetary penalties and stated:

> 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 and may be distributed to the victims by the Receiver as such assets are available for distribution, and for long as the Receiver is in operation. Plaintiff's App. Ex. 10 at 6.

Response:

Admit.

David Smith Additional Fact 11:

According to the Receiver's website, www.mcginnsmithreceiver.com, as of June 27, 2017, the Receiver has a total amount of $20,882,652.00 "on hand for distribution", which includes $15,847,500.00 of "General Funds" separate from any of Lynn Smith or Trust Assets.

Response:

Admit.

David Smith Additional Fact 12:

Mr. Smith filed his Notice of Appeal on his convictions and sentencing on August 16, 2013. *United States v. McGinn and Smith*, 1:12-cr-00028 (DNH); Dkt. No. 238.

Response:

Admit.

David Smith Additional Fact 13:

During jury deliberations at the criminal trial, Judge Hurd instructed the jury that they the conspiracy charge related to "misleading investors" or "FINRA". See D. Smith Ex. "T", Jury Instruction.

Response:

Deny. The full context of Judge Hurd's instructions is at Smith Ex. T.

David Smith Additional Fact 14:

It was Mr. Smith's understanding that the Four Funds were not investment companies but specialty finance companies not subjection to Regulation D. See D. Smith Ex. "U", Gersten Savage Letter dated July 1, 2008.

Response:

Deny. *See* SEC SMF ¶¶ 330.

David Smith Additional Fact 15:

Some of the investors in the Four Funds included related family members whose notes were paid by another family member who would be accredited. See Plaintiff's App. Ex. 2.

Response:

Deny. *See* App. Ex. 2.

Dated: New York, NY
August 27, 2014

Respectfully submitted,

s/ David Stoelting
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mcgrathk@sec.gov

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'S RESPONSES TO ADDITIONAL STATEMENT OF MATERIAL FACTS FILED BY GEOFFREY SMITH, TRUSTEE OF SMITH IRREVOCABLE TRUST U/A 8/4/04

David Stoelting
Kevin P. McGrath
SECURITIES AND EXCHANGE COMMISSION
200 Vesey Street
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New York, N.Y. 10281-1022
August 27, 2014

Plaintiff Securities and Exchange Commission ("SEC") respectfully submits these Responses to the additional Statement of Material Facts in Opposition to the SEC's Motion for Summary Judgment submitted by Defendants Geoffrey R. Smith, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, Geoffrey R. Smith and Lauren T. Smith (hereinafter referred to as the "Trust SMF").

Trust SMF 619:

Geoffrey R. Smith and Lauren T. Smith are the children of David L. Smith and Lynn A. Smith. Exhibit "B" P. 502-519.

Response:

Admitted.

Trust SMF 620:

The David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 is an irrevocable trust created by David L. Smith and Lynn A. Smith for the benefit of their children, Geoffrey R. Smith and Lauren T. Smith. Dkt. No. 691 at 3 and Exhibit "C".

Response:

Admitted that David and Lynn Smith created the Smith Trust but otherwise denied. The Smith Trust is an irrevocable trust in name only. It was created and funded by David and Lynn Smith through a fraudulent conveyance of Charter One stock to the Smith Trust to shield that asset from the Smiths' creditors. SEC's SMF ¶¶ 471-488. The Smith Trust was not created for the benefit of the Smiths' children but instead was created for the benefit of the Smiths. *Id. See also* SEC's SMF ¶¶ 494-501 (re: Annuity Agreement entitling the Smiths to yearly payments from the Smith Trust of $489,932 beginning in 2015 until their death); SEC's SMF ¶¶ 507-509(citing documents in which the Smiths admit the Smith Trust is one of their assets); SEC's SMF ¶ 544 (Lynn Smith admitted that if she needed money to pay personal taxes, her children would withdraw money from the Smith Trust for her to do so). Indeed, the children received no distributions from the Smith Trust for their benefit from the date of its creation until it was frozen by the Court and the only distribution was for the benefit of the Smiths. SEC's SMF ¶ 542 (App. Ex. 275). The Smith Trust was controlled by David Smith. SEC's SMF ¶¶ 471-545.

Trust SMF 621:

The Trust was originally funded from bank stock in the stock account owned by Lynn A. Smith in the early 1990's. Dkt. No. 86 at 11 (T 311-12,388, 391-92).

Response:

Denied. The Smith Trust was funded from bank stock originally jointly purchased by David and Lynn Smith and jointly owned by them from the date of purchase through its sale to the Smith Trust in 2004. SEC's SMF ¶¶ 375-381 (regarding David Smith's contribution to purchase of the ALBANK stock that was later converted into the Charter One stock used to fund the Smith Trust.

Trust SMF 622:

The bank stock utilized to fund the Trust remained untouched for 14 years in Lynn A. Smith's stock account. Dkt. No. 86 at 38

Response:

Denied. 105,000 shares of Charter One stock were loaned out of the Stock Account to KC Acquisitions (one of David Smith's businesses) from October 14, 2002 to July 29, 2003 in response to a "going concern" letter from its auditors. SEC's SMF ¶¶ 395-398.

Trust SMF 623:

The stock investment into the Trust represents untainted funds easily identifiable and severable from the stock account as a whole. Dkt. No. 86 at 38

Response:

Denied. The Charter One stock used to fund the Smith Trust was purchased in part from assets supplied by David Smith, and was an integral part of the Stock Account that was used as the central funding mechanism for all of David Smith's fraudulent business ventures. SEC SMF ¶¶

Trust SMF 624:

The Trust was neither created from, nor in possession of, ill-gotten funds. Dkt. No. 86 at 38-39

Response:

Denied. The Smith Trust was funded with assets fraudulently conveyed from the Stock Account that constituted the primary financing arm of David Smith's fraudulent business ventures. *See, e.g., supra* SEC Response to Smith Trust SMF 2, 4 and 5.

Trust SMF 625:

David L. Smith is not a beneficial owner of the Trust. Dkt. No. 86 at 41.

Response:

Denied. The movants misleadingly cite to this Court's July 7, 2010 initial findings regarding David Smith's interests in the Smith Trust before it became aware of the Annuity Agreement and the Smiths' rights to annuity payments from the Smith Trust. The Court later reversed those findings. *See below.* David and Lynn Smith were beneficial owners of the Smith Trust. They reported the Smith Trust as an asset on their Financial Statements (SEC SMF ¶¶ 507-508) and David Smith described himself as the "beneficiary" of the Smith Trust in a subscription agreement questionnaire (SEC SMF ¶ 509). *See also SEC v. McGinn Smith et al*, 11/22/10 Decision (Dkt. 194) at 21, where the Court held, after the Annuity Agreement came to light, that: "… the conclusion is compelled that David Smith possessed an equitable and beneficial interest in the Trust …); *Smith v. SEC*, 432 Fed. Appx. 10, 13 (2d Cir. 2011), 2011 WL 3438315 at *2, in which the Second Circuit found no error in the Court's conclusion that: "David Smith possessed an equitable and beneficial interest in the Trust."

Trust SMF 626:

David L. Smith did not exercise authority over the Trust and acted only as an advisor and broker. Dkt. No. 86 at 39-40; Ex. 345 (Decision of Magistrate Judge Homer, P. 39).

Response:

Denied. David Smith exercised authority over the Smith Trust beyond acting as its advisor and broker. He exercised all of the powers that the nominal Trustee, Thomas Urbellis, should have exercised, and had complete control over the use and disposition of the Smith Trust assets. SEC's SMF ¶¶ 511-519; 545; see also *Smith v. SEC*, 432 Fed. Appx. 10, 13, 2011 WL 3438315 at * 2 (2d Cir. 2011)(finding sufficient evidence to support a finding that David Smith exercised such control over the Smith Trust that it became his mere instrumentality).

Trust SMF 627:

The Trust has no limits on the type of distributions the beneficiaries, Geoffrey R. Smith or Lauren T. Smith, can request or receive from the Trust corpus. Dkt. No. 691 at 3; Dkt. No. 704, Attachment #5, Exhibit "C".

Response:

Denied. The Annuity Agreement between the Smith Trust and the Smiths required the Smith Trust to: "hold full title to the Property [the Charter One stock proceeds], free and clear of all liens and encumbrances, and there shall be no collateral liens of any kind on the Property or any other assets of the Transferee to secure payment of the obligations to the Transferors under this Agreement." SEC SMF ¶ 499 (App. Ex. 227 - Annuity Agreement at ¶ 3). Thus, the Smith Trust could not make any distributions to the nominal beneficiaries that would impair the Smith Trust's ability to satisfy its obligation to make annual annuity payments of $489,932 to the Smiths beginning in 2015 and continuing for the rest of their lives.

Trust SMF 628:

In November of 2004, Geoffrey R. Smith was advised by his father, David L. Smith, that a Trust had been created for the benefit of Geoffrey R. Smith and his sister, Lauren T. Smith, by his parents. Dkt. No. 704, Attachment #5, Exhibit "B" P. 505

Response:

Admitted that in November 2004, Geoffrey R. Smith was advised of the existence of the Smith Trust by his father David L. Smith. However, denied that David Smith told Geoffrey Smith that the Smith Trust had been created for the benefit of Geoffrey and Lauren Smith. Given the circumstances discussed above regarding the true purpose of the Smith Trust, to fraudulently shield assets from the Smiths' creditors (SEC's SMF ¶¶ 471-488); the additional incontestable fact that the Smiths also greatly benefitted from the Smith Trust through their rights to annuity payments (SEC's SMF ¶¶ 494-501 (re Annuity Agreement entitling the Smiths to yearly payments from the Smith Trust of $489,932 beginning in 2015 until their death); the fact that the Smiths reported the Smith Trust as among their assets (SEC's SMF ¶¶ 507-509(citing to documents in which the Smiths admit the Smith Trust is one of their assets); the fact that David Smith described himself as a "beneficiary" of the Smith Trust (SEC's SMF ¶ 509 - referencing the Deerfield Subscription Agreement App. Ex. 268); the fact that only the Smiths benefitted from distributions from the Smith Trust from its creation in 2004 and April 2010 when it was first frozen by the Court (SEC's SMF ¶ 542); and the fact that neither Geoffrey nor Lauren Smith ever spoke to the Trustee about the Smith Trust (SEC's SMF ¶ 525; 530) and neither requested distributions from the Smith Trust for their benefit (SEC's SMF ¶¶532; 542) even though Lauren Smith was experiencing significant financial difficulties during that period warranting her mother to send her monthly checks totaling $22,100 between March 2007 and May 2009 (SEC's SMF ¶¶ 539- 541); and Lauren Smith's admission that she did not know that she had "access to the money" except at some undefined future time (SEC's SMF ¶ 541), no reasonable trier of fact could conclude that David Smith would have lied to his son Geoffrey Smith and only told him the Smith Trust was created for his and his sister Lauren's benefit without also disclosing the Annuity Agreement which was for the obvious benefit of David and Lynn, and which substantially limited if not curtailed the Smith Trust's ability to make distributions to anyone but David and Lynn Smith, and explaining that the true reason the Smith Trust was created, which was to shield these assets from the Smiths creditors until well into the future when the Smiths would then withdraw them for their retirement.

Trust SMF 629:

That at the time that Geoffrey R. Smith was advised of the existence of the Trust in November of 2004, he briefly reviewed the Trust Indenture. Dkt. No. 704, Attachment #5, Exhibit "B" P. 505.

Response:
Admitted that Geoffrey Smith reviewed the Trust Indenture.

Trust SMF 630:

In approximately November of 2004, Lauren T. Smith was verbally advised of the existence of a Trust created by her parents, David L. and Lynn A. Smith. Dkt. No. 704, Attachment #5, Exhibit "B" P. 506.

Response:

Admitted.

Trust SMF 631:

Geoffrey R. Smith learned of an alleged Annuity Agreement associated with the Trust in 2010. Dkt. No. 704, Attachment #5, Exhibit "H".

Response:

Denied. For all the reason set forth in Response to Trust SMF 12, above, no reasonable trier of fact could conclude that David Smith lied to his son and did not disclose the existence of the Annuity Agreement to him when he explained the Smith Trust to him in 2004. It makes no sense, and it would have been an unnecessary lie for David Smith to have told his son that he and Lynn Smith had set up a Trust containing over $4 million in assets solely for their benefit free and clear of any restrictions and not tell him that the Smith Trust was contractually obligated to repay the Smiths $489,932 a year in annuity payments from those assets beginning in 2015 until their death. Such a lie would also have been futile given the likelihood that either the Trustee would disclose the existence of the Annuity Agreement to the beneficiaries or that they would have requested a distribution from the Smith Trust at some point between 2004 and 2015 when the first Annuity payment was due and the Annuity Agreement, and the parents' deception, would come to light at that time. Moreover, Geoffrey and Lauren Smith would certainly learn of the Annuity Agreement once payments began in 2015, thereby making it all the more implausible that the parents would deceive their children for such a lengthy period of time.

Trust SMF 632:

Geoffrey R. Smith did not have any knowledge of any claims or lawsuits against his father, David L. Smith, prior to the establishment of the Trust. Dkt. No. 704, Attachment #5, Exhibit "B" P. 528.

Response:

Admitted that the SEC has no direct evidence to the contrary but Geoffrey Smith's professed lack of knowledge of lawsuits in which his parents were named lacks plausibility.

Trust SMF 633:

Geoffrey R. Smith did not have any discussions with his father, David L. Smith, or his mother, Lynn A. Smith, regarding the establishment of the Trust prior to its creation. Dkt. No. 704, Attachment #5, Exhibit "B" P. 528.

Response:

Admitted that the SEC has no direct evidence to the contrary but Geoffrey Smith's professed lack of discussion of the Trust with his parents prior to its creation lacks plausibility.

Trust SMF 634:

Lauren Smith never spoke with David Smith about her investment portfolio or the Smith Trust. Plaintiff App. Ex. 256 (L. Smith 11/28/11 Deposition Tr. at 21:13-21; 26:8-10; 43:8-10; 53:3-7; 56: 16-19.

Response:

Admitted.

Trust SMF 635:

Geoffrey Smith handled all of Lauren Smith's investment accounts and Lauren Smith did not have much knowledge about those accounts. App. Ex. 256 (L. Smith 11/28/11
Deposition Tr. at 24:5-25; 26-35; 39:18-19; App. Ex. 248 (G. Smith 11/16/11 Deposition Tr. at 259:8-18.

Response:

Admitted.

Trust SMF 636:

Geoffrey Smith informed Lauren Smith about the Smith Trust in 2004, the same year of its creation and the same weekend he learned of it from David Smith. App. Ex. 256 (L. Smith 11/28/11 Deposition Tr. at 45:18-23; 47: 20-25; 48:2-3; App. Ex. 248 (G. Smith 11/16/11 Deposition Tr. at109:8-10; 119:19-25; 120:2-5).

Admitted.

Trust SMF 637:

David Smith did not have any discretionary authority over the Smith Trust. App. Ex. 283 (Deposition Tr. T. Urbelis 22:6-8).

Response:
Denied. See SEC's Responses to Trust SMF 626.

Trust SMF 638:

The Trustee of the Smith Trust consulted with David Smith regarding Trust investments and did make a determination that the investments that were entered into by the Smith Trust were prudent and appropriate. Id. at 12:24-25; 13; 14: 2-16; 25:25; 26:2-7.

Response:

Admitted that David Smith and Trustee Thomas Urbellis consulted regarding Trust investments but denied that Urbellis made any decisions other than to follow David Smith's advice regarding Trust investments. Urbellis testified he had no investment experience or time for it and relied upon David Smith. See App. Ex. 283: Deposition Tr. T. Urbelis 12:20-25; 13:2-25; 14:2-18.).

Trust SMF 639:

Lynn Smith testified that the Smith Family Trust was created for the benefit of Geoffrey and Lauren Smith. App. Ex. 252 (Deposition Tr. Lynn Smith 23:17-24; 39:16-25; 40:2); App. Ex. 253 (Deposition Tr. Lynn Smith 42:10-13; 49:3-7).

Response:

Admitted that Lynn Smith has so testified but denied that the Smith Trust was created for the benefit of the Smith children. See Response to Trust SMF 620.

Trust SMF 640:

Geoffrey Smith testified that the Smith Family Trust was set up for the benefit of him and Lauren Smith. App. Ex. 248 (Deposition Tr. G. Smith 109:14-19; 114:5-9; 120:6-8); App. Ex. 249 (Deposition Tr. Geoffrey Smith 218:7-11).

Response:

Admitted that Geoffrey Smith so testified but denied that the Smith Trust was created for the benefit of the Smith children. See Response to Trust SMF 620. Also, Geoffrey Smith's opinion is inadmissible hearsay and baseless speculation.

Trust SMF 641:

Lauren Smith testified that the trust was set up for the benefit of her and Geoffrey Smith. App. E. 256 (Deposition Tr. L. Smith 44:2-4; 45:20-23; 71:5-10.

Response:

Admitted that Lauren Smith so testified but denied that the Smith Trust was created for the benefit of the Smith children. See Response to Trust SMF 620. Also, Lauren Smith's opinion is inadmissible hearsay and baseless speculation, particularly given that it is undisputed that she never spoke to her parents about the Smith Trust. See, e.g., Trust SMF 634.

Dated: New York, NY
August 27, 2014

Respectfully submitted,

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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.	:	

PLAINTIFF'S RESPONSES TO LYNN SMITH'S "STATEMENT OF DISPUTED FACTS"

David Stoelting
Kevin P. McGrath
SECURITIES AND EXCHANGE COMMISSION
200 Vesey Street
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August 27, 2014

Plaintiff Securities and Exchange Commission ("SEC") respectfully submits these Responses to the "Statement of Disputed Facts" submitted by Lynn Smith as part of her Response to Plaintiff's Statement of Material Facts. Dkt. 783 at 3-4.

Neither Rule 56 nor Local Rule 7.1 provide for a "Statement of Disputed Facts"; as a result, it is unclear whether a response is required. Nevertheless, the SEC submits these Responses while noting that it has discussed each of these claims in more detail in its Reply Brief to Lynn Smith Opposition to the SEC's Motion for Summary Judgment.

L. SMITH DISPUTED FACT 1

Lynn Smith's Stock Account was created prior to 1991. Dkt.23, Dkt.34, Dkt.86 at p.7-9, Plaintiffs' SMF App.Ex.272 at p.325, 355-58; *See also,* L. Smith Exhibits "A", "B" and "C" attached hereto.

L. Smith Exhibit "A" represents various stock certificates from 1970 that were held in the individual name of Lynn A. Smith. Exhibit "B" represents various correspondence signed by Lynn Smith addressed to the attorney handling the estate of her father and also to Surrogate Court of Montgomery County. Exhibit "C" represents a letter from the Hayden, Stone Incorporated that demonstrates Lynn Smith's father, Mr. Wasil R. Laskevich, was a "customer" of the company. Exhibit "B" provides evidence that Lynn Smith was the sole heir to the estate of "Wasil R. Laskevich". Collectively Exhibits "A", "B" and "C" demonstrate that L. Smith individually inherited her father's account (the "Stock Account") at Hayden Stone in approximately 1971. The Stock Account contained the securities found in Exhibit "A". The Stock Account was eventually transferred to McGinn, Smith & Co., Inc. under the discretionary authority of David L. Smith.

RESPONSE

Denied. None of the cited documents constitute evidence that Lynn Smith maintained the Stock Account in her name prior to 1991. *See also,* SEC SMF ¶ 338; App. Exs. 263, 264.

L. SMITH DISPUTED FACT 2

Lynn Smith is the sole individual owner of the Stock Account. Dkt.23, Dkt.34. Plaintiffs' SMF App.Ex.272 at p.325, 355-58, *See also,* L. Smith Exhibits "A", "B" and "C" attached hereto.

RESPONSE

Denied. The cited documents do not constitute evidence that Lynn Smith is the sole owner of the Stock Account and her self-serving testimony to that effect is rebutted by the ample evidence that David Smith jointly owned and controlled the Stock Account. *See, e.g.*, Sec SMF ¶¶ 331-470.

L. SMITH DISPUTED FACT 3

Documented evidence exists that demonstrates L. Smith maintained a Stock Account in her individual name prior to 1991. *See*, L. Smith Exhibits "A", "B" and "C".

RESPONSE

Denied. The cited documents do not support this claim. *See also*, SEC SMF ¶ 338; App. Exs. 263, 264.

L. SMITH DISPUTED FACT 4

The Bear Stearns Report of New Account, dated November 11, 1991, does not establish that the Stock Account was created in 1991. Plaintiffs' SMF App. Ex. 263, 264, Dkt.23, Dkt.34, Plaintiffs' SMF App.Ex.272 at p.325, 355-58, L. Smith Exhibits "A", "B" and "C".

RESPONSE

Denied. SEC SMF Exs. 263 and 264 do establish that the Stock Account was opened as a new account in 1991.

L. SMITH DISPUTED FACT 5

McGinn, Smith & Co., Inc. began utilizing Bear Stearns as the clearing broker because Securities Settlement Corporation was purchased by another entity and ceased doing business. *See*, SEC News Digest, Issue 92-130, Administrative Proceedings Brought Against Securities Settlement Corporation, attached hereto as L. Smith Exhibit "D" 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.

SEC RESPONSE

Admitted.

L. SMITH DISPUTED FACT 6

Lynn Smith controlled the Stock Account. Dkt. 23, Dkt. 34. Accordingly, any benefit David Smith received was conferred by the goodwill of L. Smith. 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.

RESPONSE

Denied. *See, e.g.,* SEC SMF ¶¶ 331-470 regarding evidence of David Smith's joint ownership and control of the Stock Account.

L. SMITH DISPUTED FACT 7

David Smith's discretionary authority required him to act in Lynn Smith's best interest at all times and prohibited him withdrawing money from the Stock Account. Plaintiffs' SMF ¶ 357, Exhibit 221, Exhibit 222.

SEC RESPONSE

Denied. *See, e.g.,* SEC SMF ¶¶ 331-470 regarding evidence of David Smith's joint ownership and control of the Stock Account. Also, Exhibits 221 and 222 contain the caption "Full Trading Authorization With Privilege To Withdraw Money and Securities."

L. SMITH DISPUTED FACT 8

David Smith's contribution to the ALBANK stock purchase was a lawful gift to L. Smith. Plaintiffs' SMF App.Ex.243, Ex.237, Ex.238, Ex.235, Ex.239. As demonstrated by Ex.243, David Smith's contribution to the ALBANK stock was a gift to L. Smith because the shares were deposited exclusively into her account on September 18, 1992.

RESPONSE

Denied. Neither App. Ex. 243 nor any of the other cited documents contains any reference to a

"gift" or otherwise supports Lynn Smith's claim that David Smith's contribution to the purchase of this stock was a "gift," as opposed to a contribution to a joint asset.

L. SMITH DISPUTED FACT 9

The Smith's joint financial statements do not establish that David and Lynn Smith jointly owned the Stock Account. Plaintiffs' SMF ¶ 347- ¶ 355, App. Ex.183-189. The Smith joint financial statements were only created as to establish a compilation of the total assets held in the name of David Smith or Lynn Smith either individually or jointly. The Smith's joint financial statements are not a true characterization of legal title.

RESPONSE

Denied. Lynn Smith fails to cite to any record evidence that supports this claim. Indeed, Plaintiffs' SMF ¶¶ 347-355, App. Ex. 183-189, contain numerous instances where David Smith identified assets owned by him or Lynn Smith and he never once listed the Stock Account as an assets owned by Lynn Smith.

Dated: New York, New York
August 27, 2014

Respectfully submitted,

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EXHIBIT A

Summary of David Smith's Responses to the SEC SMF

Parties and Relevant Entities (¶¶ 1-19)
Admitted: SEC SMF 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

Jurisdiction and Venue (¶¶ 20-22)
Denied Without Citation to Record Evidence: SEC SMF 20, 21, 22

Procedural History (¶¶ 23-47)
Admitted: SEC SMF 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46
Denied Without Citation to Record Evidence: SEC SMF 23, 24, 34, 47

The Parallel Criminal Case (¶¶ 48-62)
Admitted: SEC SMF 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

Other Proceedings Against McGinn and Smith (¶¶ 63-66)
Admitted: SEC SMF 63, 64, 65, 66

Undisputed Facts Showing Violations of the Federal Securities Laws (¶¶ 67-330)

Evidence of McGinn and Smith's Violations (¶¶ 67-158)

Structure of the Four Funds and the PPM Disclosures (¶¶ 67-74)
Admitted: SEC SMF 68, 69, 70, 72, 73, 74

Payment of the Four Funds Proceeds to Redeem pre-2003 Offerings (¶¶ 75-97)
Admitted: SEC SMF 76, 85, 86, 87, 88, 89, 90, 93, 94, 95
Denied Without Citation to Record Evidence: SEC SMF 75, 77, 78, 79, 80, 81, 82, 83, 84, 91, 92, 96, 97

The Four Funds Unauthorized Investments in Affiliates (¶¶ 98-119)
Admitted: SEC SMF 100, 101, 102, 105, 107, 108, 109, 111, 112, 113, 115, 116, 117, 118
Denied Without Citation to Record Evidence: SEC SMF 98, 99, 103, 104, 106, 110, 114, 115, 116, 117, 119

The Four Funds Commingled Investor Funds and Redeemed Preferred Investors (¶¶ 120-121))
Denied Without Citation to Record Evidence: SEC SMF 120, 121

The Four Funds Ran a Cash Deficit (¶¶ 122-123)
Denied Without Citation to Record Evidence: SEC SMF 122, 123

Smith Instituted a Redemption Policy (¶¶ 124-136)
Denied Without Citation to Record Evidence: SEC SMF 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136,

Four Funds Default (¶¶ 137-144)
Admitted: SEC SMF 137, 139, 140, 141, 142, 143, 144
Denied Without Citation to Record Evidence: SEC SMF 138

McGinn and Smith Misused the Trust Offering Proceeds (¶¶ 145-150)
Admitted: SEC SMF 146, 147

NFS's Termination of MS & Co.'s Clearing Agreement (¶¶ 152-158)
Admitted: SEC SMF 152, 153, 154, 155, 156, 157, 158

Evidence from the Criminal Trial (¶¶ 159-330)

Four Funds Offering Proceeds Were Used for Unauthorized Purposes (¶¶ 159-173)
Admitted: SEC SMF 159, 160, 161, 163, 164 (first sentence), 166, 167, 171, 173
Denied Without Citation to Record Evidence: SEC SMF 165, 172

McGinn and Smith Misappropriated Investor Funds (¶¶ 174-179)
Admitted: SEC SMF 176, 177, 178 (first two sentences)
Denied Without Citation to Record Evidence: SEC SMF 178 (last sentence), 179

Money Was Transferred Between Issuers Depending on Need (¶¶ 180-194)
Admitted: SEC SMF 188, 189 (first sentence), 190, 192
Denied Without Citation to Record Evidence: SEC SMF 180, 181, 182, 183, 184, 185, 186, 187, 191, 193

Fraudulent MSTF Payments (¶¶ 195-219)
Admitted: SEC SMF 202, 210, 211, 212, 215
Denied Without Citation to Record Evidence: SEC SMF 196, 198, 199, 200, 201, 214, 216, 217, 218

Smith Directed that Accounting Entries Be Falsified (¶¶ 220-224)
Admitted: SEC SMF 224
Denied Without Citation to Record Evidence: SEC SMF 220, 221, 222, 223

McGinn and Smith Concealed the Firstline Bankruptcy from the Brokers (¶¶ 225-250)
Admitted: SEC SMF 225, 227, 228, 230, 232, 233 (first sentence), 235, 236, 240, 242, 245, 248
Denied Without Citation to Record Evidence: SEC SMF 226, 231, 243, 244, 246, 247

The Trust Offerings Were Driven by the Need for Cash to Prolong the Scheme (¶¶ 251-253)
Denied Without Citation to Record Evidence: SEC SMF 251, 252, 253

The FINRA Examinations (¶¶ 254-264)
Admitted: SEC SMF 254, 255, 256, 257 (first sentence)
Denied Without Citation to Record Evidence: SEC SMF 257 (second sentence), 258, 259, 260, 263, 264

Smith's 1999 Letter to McGinn (¶¶ 265-269)
Denied Without Citation to Record Evidence: SEC SMF 265, 266, 267, 268, 269

Misrepresentations and Omissions to Investors (¶¶ 270-330)
Admitted: SEC SMF 270, 271, 275, 276, 281, 282, 283, 286, 287, 288, 291, 292, 293, 294, 295, 298, 301, 305, 309, 313, 316, 318, 321, 322, 323, 325, 329, 330
Denied Without Citation to Record Evidence: SEC SMF 277, 278, 280, 289, 290, 297, 303, 304, 306, 307, 308, 310, 311, 312, 320, 326, 327, 328

Total Admitted: 170 (as up to paragraph 330)
Total Denied Without Citation to Record Evidence: 113 (as up to paragraph 330)

EXHIBIT B

Summary of David and Lynn Smith's Responses to the SEC SMF

David Smith Jointly Owned and Controlled the Stock Account (¶¶ 331-470)

The Stock Account Was Funded from a Joint Stock Account (¶¶ 331-356)
Admitted: SEC SMF 331, 332, 333, 336, 337, 341, 343, 344 (David Smith only), 345, 348, 350, 351 (David Smith only), 354
Denied Without Citation to Record Evidence: SEC SMF 335

David Smith Controlled the Stock Account (¶¶ 357-360)
Admitted: SEC SMF 357 (David Smith entirely, Lynn Smith that David Smith had discretion over the Stock Account), 358

The Stock Account Was Routinely Used to Pay the Smiths' Joint Expenses (¶¶ 361-374)
Admitted: SEC SMF 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 372, 373, 374
Denied Without Citation to Record Evidence: SEC SMF 371 (David Smith only)

David Smith Contributed Assets to the Stock Account Even After It Was Opened (¶¶ 375-388)
Admitted: SEC SMF 376, 377, 379, 380, 382, 385, 386, 387, 388
Denied Without Citation to Record Evidence: SEC SMF 383 (David Smith only), 384 (David Smith only)

The Stock Account's Assets Were Routinely Used by David Smith to Fund McGinn Smith and its Related Entities Business Interests (¶¶ 389-462)
Admitted: SEC SMF 390, 391, 392, 393, 394, 395 (David Smith only), 396 (Lynn Smith only), 397, 403 (David Smith only), 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 416, 417 (David Smith only), 418 (David Smith only), 425 (Lynn Smith only), 427, 429, 430, 431, 432, 433, 437 (David Smith only), 438 (David Smith only), 450, 451, 452 (David Smith only), 453 (Lynn Smith only), 454 (admission that Stock Account was repaid in the amounts set forth only), 455, 456, 457, 462
Denied Without Citation to Record Evidence: 434 (David Smith only), 435 (David Smith only), 439 (David Smith only), 440 (David Smith only), 441 (David Smith only), 442 (David Smith only), 443 (David Smith only), 444 (David Smith only), 445 (David Smith only), 446 (David Smith only), 447 (David Smith only), 448 (David Smith only), 449 (David Smith only), 453 (David Smith only), 461 (David Smith only)

Lynn Smith Had Minimal Input Into and Knowledge of the Transfers From the Stock Account (¶¶463-470)
Admitted: SEC SMF 463, 464, 466, 467, 468, 469, 470

EXHIBIT C

Summary of David Smith, Lynn Smith and Trust Account Responses to the SEC SMF

The Smiths Beneficially Owned and David Smith Controlled the Smith Trust (¶¶ 471-545)

Admitted: SEC SMF 471 (David Smith and Trust Account only), 472 (David Smith and Trust Account only), 473 (David Smith and Trust Account only), 474 (Lynn Smith and Trust only[1]), 475 (David Smith and Trust Account only), 476 (David Smith and Trust Account only), 477 (David Smith and Trust Account only), 479, 480, 481, 482, 482, 484 (Trust Account and Lynn Smith), 485 (Trust Account only), 486 (Trust Account only), 489, 490, 491, 492, 493, 494, 495, 496, 496, 498, 499, 500, 501 (Trust Account only), 502 (Lynn Smith and Trust Account only), 503 (Lynn Smith and Trust Account only), 504 (Lynn Smith and Trust Account only), 505 (Lynn Smith and Trust Account only), 506 (Lynn Smith and Trust Account only), 507 (Lynn Smith and David Smith only), 508, 509 (David Smith and Trust Account only), 510, 511, 512, 513 (David Smith and Trust Account only), 514 (David Smith and Trust Account only), 515 (David Smith and Trust Account only), 516, 517, 518, 519, 520 (David Smith and Trust Account only), 521 (David Smith and Trust Account only), 522 (David Smith and Trust Account only), 523, 524, 525 (Trust Account and David Smith only), 527 (David Smith and Trust Account only), 528 (David Smith and Trust Account only), 529, 530 (David Smith and Trust Account only), 531 (David Smith and Trust Account only), 532, 533 (David Smith and Trust Account only), 534 (David Smith and Trust Account only), 535 (David Smith and Trust Account only), 536 (David Smith and Trust Account only), 537 (David Smith and Trust Account only, 538 (David Smith and Trust Account only), 539 (David Smith and Trust Account only), 540, 541 (David Smith and Trust Account only), 543, 544, 545 (David Smith and Trust Account only)

Denied Without Citation to Record Evidence: SEC SMF 478 (David Smith and Trust Account only), 484 (David Smith only), 485 (David Smith only), 487 (David Smith and Trust Account only), 488 (David Smith and Trust Account only), 501 (David Smith only), 502 (David Smith only), 503 (David Smith only), 504 (David Smith only), 505 (David Smith only), 506 (David Smith only), 507 (Trust Account only), 526, 542 (David Smith only)

[1] David Smith did not respond to SEC SMF ¶ 474.

EXHIBIT D

Summary of David Smith, Lynn Smith and Trust Account Responses to the SEC SMF

Fruadulent Transfers by the McGinns and Smiths (¶¶ 546-618)

The Smiths Engaged in Additional Fraudulent Transfers of Their Assets in 2009 (¶¶ 546-557)

Admitted: SEC SMF 546 (David Smith only), 548 (David Smith only), 550 (David Smith only), 552 (David Smith and Lynn Smith only), 555 (David Smith only), 556 (David Smith only), 557 (David Smith only)

Denied Without Citation to Record Evidence: SEC SMF 549 (David Smith only), 551 (David Smith and Lynn Smith only)

The Smiths' Fraudulent Conveyance of Their Joint Checking Account (¶¶ 558-566)

Admitted: SEC SMF 558 (David Smith and Lynn Smith only), 559 (David Smith and Lynn Smith only), 560 (David Smith and Lynn Smith only), 561 (David Smith and Lynn Smith only), 562 (David Smith and Lynn Smith only), 563 (David Smith and Lynn Smith only), 564 (David Smith and Lynn Smith only), 566 (David Smith and Lynn Smith only)

Denied Without Citation to Record Evidence: SEC SMF 565 (David Smith and Lynn Smith only)

The Smiths' Fraudulent Transfer of Vero Beach House (¶¶ 567-571)

Admitted: SEC SMF 567 (David Smith and Lynn Smith only), 568 (David Smith and Lynn Smith only), 569 (David Smith and Lynn Smith only), 570 (David Smith and Lynn Smith only)

Denied Without Citation to Record Evidence: SEC SMF 571 (David Smith only)

Timothy and Nancy McGinn's Fraudulent Conveyance of Their Primary Residence (¶¶ 572-585)

Admitted: SEC SMF 572 (David Smith only), 573 (David Smith only), 574 (David Smith only), 575 (David Smith only), 576 (David Smith only), 577 (David Smith only), 578 (David Smith only), 579 (David Smith only), 580 (David Smith only), 581 (partially admitted by David Smith only)

Fraudulent Transfers From the Smith Trust After July 7, 2010 (¶¶ 586-610)

Admitted: SEC SMF 586, 587 (David Smith and Trust Account only), 588 (David Smith and Trust Account only), 589 (David Smith and Trust Account only), 590 (David Smith and Trust Account only), 591 (David Smith and Trust Account only), 592 (David Smith

and Trust Account only), 593 (David Smith and Trust Account only), 594 (David Smith and Trust Account only), 595 (Trust Account only), 596 (David Smith and Trust Account only), 597 (David Smith and Trust Account only), 598 (David Smith and Trust Account only), 599 (David Smith and Trust Account only), 600 (David Smith and Trust Account only), 601, 602 (David Smith and Trust Account only), 603, 604, 605, 606, 607, 608 (David Smith and Trust Account only), 609 (David Smith and Trust Account only)

Denied Without Citation to Record Evidence: SEC SMF 610 (David Smith only)

Recent Efforts By David and Lynn Smith to Defraud the Court and Their Creditors (¶¶ 611-618)

Admitted: SEC SMF 611 (David Smith and Lynn Smith only), 612 (David Smith and Lynn Smith only), 613 (David Smith and Lynn Smith only), 614 (David Smith and Lynn Smith only), 615, 616, 617, 618 (Lynn Smith and Trust Account only)

Denied Without Citation to Record Evidence: SEC SMF 618 (David Smith only)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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

DECLARATION OF SERVICE

I, David Stoelting, pursuant to 28 U.S.C. § 1746, certify that on August 27, 2014, I filed on the Court's ECF system the following documents:

- Plaintiff's Reply Memorandum of Law in Support of Motion for Summary Judgment;
- Exhibits A-D;
- Plaintiff's Responses to the Smith Trust's Additional Statement of Material Facts;
- Plaintiff's Responses to David Smith's Additional Statement of Material Facts; and
- Plaintiff's Responses to Lynn Smith's Statement of Disputed Facts.

and sent by electronic mail a copy of the above-referenced document to:

Nancy McGinn
nemcginn@yahoo.com
Pro Se

Dated: August 27, 2014
New York, New York

s/David Stoelting
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