UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	
v.	:	**10 Civ. 457 (GLS/DRH)**
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.	:	

NOTICE OF MOTION

PLEASE TAKE NOTICE that, pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 7.1(a)(3) of the Local Rules of Practice for the United States District Court for the Northern District of New York, and upon the Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment; the Statement of Material Facts in Support of Plaintiff's Motion for Summary Judgment; the Appendix to Plaintiff's Statement of Material

Facts, and the Exhibits thereto; and upon all prior proceedings and filings herein, plaintiff Securities and Exchange Commission will move, on any other date convenient to the Court, before the Honorable Gary Sharp, United States District Judge, United States District Court, Northern District of New York, 445 Broadway, Albany, NY, for an order granting Plaintiff's motion for summary judgment against Timothy M. McGinn, David L. Smith, Lynn A. Smith, Geoffrey R. Smith, Lauren T. Smith, and Nancy McGinn, imposing the requested sanctions, and ordering that all frozen assets be distributed by the Receiver to the victims of the defendants' fraud.

PLEASE TAKE FURTHER NOTICE that pursuant to the Court's Text Order dated July 3, 2014, response papers are due to be filed on or before August 4, 2014, and reply papers are to be filed on or before August 20, 2014.

Dated: New York, NY
July 8, 2014

Respectfully submitted,

s/ David Stoelting
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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

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

David Stoelting
Kevin P. McGrath
SECURITIES AND EXCHANGE COMMISSION
200 Vesey Street, Room 400
Brookfield Place
New York, NY 10281-1022

July 8, 2014

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Plaintiff Securities and Exchange Commission respectfully submits this memorandum of law in support of its motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 7.1(a)(3) of the United States District Court for the Northern District of New York, against David L. Smith, Timothy M. McGinn, Lynn A. Smith, Geoffrey R. Smith and Nancy McGinn.

PRELIMINARY STATEMENT

Timothy McGinn and David Smith masterminded a series of fraudulent offerings from 2003 through 2009 that raised over $126 million from more than 800 investors. Last year, after being indicted in connection with those offerings – the same offerings at issue in this case – McGinn and Smith were tried and convicted by a jury, and sentenced to prison terms of 15 and 10 years, respectively.

As the facts in the criminal case are largely identical to the SEC's case, McGinn and Smith are collaterally estopped from contesting liability in the SEC action. On this basis, therefore, and on the basis of the additional evidence submitted by the SEC, judgments should be entered against McGinn and Smith, and they should be ordered to disgorge the total amount raised in the fraudulent offerings minus the amount returned to investors.

To satisfy the anticipated judgments against McGinn and Smith – and to contribute to the meager funds available to compensate their many victims – the Court should look to more than $5 million that has been frozen since 2010, primarily brokerage accounts in the name of Lynn Smith (the "Stock Account") and a trust (the "Smith Trust"). This Court, following a three-day evidentiary hearing, previously found that the SEC had shown a likelihood of success of proving that David Smith exercised beneficial ownership and control over these assets, and the US Court of Appeals for the Second Circuit affirmed. The evidence shows that David Smith exercised

complete control over the brokerage account, which served as a *de facto* financing arm of the fraudulent broker-dealer owned by McGinn and Smith. Similarly, David Smith controlled all aspects of the trust account. Smith and McGinn beneficially owned and controlled all of the additional assets in question, including the Smiths' checking account and Florida vacation home, and McGinn's Niskayuna residence. Alternatively, McGinn and Smith fraudulently conveyed these assets in order to hinder or deceive creditors. In any event, all of the frozen assets should be added to the funds already gathered by the Receiver for distribution to the victims.

STATEMENT OF UNDISPUTED FACTS

The SEC relies on and incorporates herein its Statement of Material Facts in Support of its Motion for Summary Judgment ("SMF"), filed herewith, as its statement of undisputed material facts that support summary judgment against David L. Smith, Timothy M. McGinn, Lynn A. Smith, Geoffrey R. Smith and Nancy McGinn. Factual citations in this memorandum of law are to the paragraph numbers in the SMF.

ARGUMENT

I. Collateral Estoppel From the Jury's Conviction in the Parallel Criminal Case Establishes that Summary Judgment Should Be Granted on the First, Second, Third and Fourth Claims for Relief

A. Legal Standards for Summary Judgment and Collateral Estoppel

Summary judgment is appropriate if the moving party demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Once the plaintiff makes the required showing, the burden shifts to the defendant who "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586

(1986). To defeat a summary judgment motion, the opposing party "must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Id.* at 587 (emphasis in original).

Summary judgment is appropriate on the first four claims in the Second Amended Complaint ("SAC"). App. Ex. 297. The allegations in the SAC are closely tracked by the charges in the Superseding Indictment ("Indictment"), App. Ex. 6, to which McGinn and Smith were convicted. "It is well-settled that a criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case." *U.S. v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978); *see also SEC v. Eisenberg*, 1996 U.S. Dist. LEXIS 8756 at *12 (S.D.N.Y. 1996) (finding estoppel for questions "distinctly put in issue and directly determined in the criminal prosecution"), *citing Emich Motors Corp v. General Motors Corp.*, 340 U.S. 558, 569 (1951); *SEC v. Freeman*, 290 F. Supp. 2d 401, 405 (S.D.N.Y. 2003) ("the Government may rely on the collateral estoppel effect of the conviction in support of establishing the defendant's liability in the subsequent civil action.").

Under the doctrine of collateral estoppel, all facts material to an underlying criminal conviction are binding in a subsequent civil action. *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 43 (2d Cir. 1986), cert. denied, 480 U.S. 948 (1987); *Podell*, 572 F.2d at 35 (criminal conviction by guilty plea constitutes estoppel in subsequent civil proceeding).

A wire fraud conviction will support a finding of estoppel in a civil securities fraud action where, as here, the facts that supported the criminal conviction rest on the same set of facts that establish civil liability for securities fraud. *SEC v. Dimensional Entm't Corp.*, 493 F. Supp. 1270, 1277 (S.D.N.Y. 1980) (finding that although jury acquitted defendant of securities fraud, the factual allegations underlying the criminal wire fraud convictions were sufficient to establish

violations of the securities laws in a subsequent civil proceeding); *see also SEC v. Opulentica*, 479 F. Supp. 2d 319, 326-28 (S.D.N.Y. 2007) (awarding summary judgment on the Commission's Section 17(a) claim because defendant's guilty plea to Section 10(b) and Rule 10b-5 in the parallel criminal case satisfied all of the elements of Section 17(a)).

B. Collateral Estoppel Requires Summary Judgment on the Securities Law Claims (First, Second, Third and Fourth Claims for Relief)

Smith's and McGinn's convictions for conspiracy, wire fraud, mail fraud and securities fraud, and the entry of final judgments, are sufficient to collaterally estop them from contesting the SEC's securities fraud charges. The fact that an appeal is pending does not affect the finality of the judgments for purposes of collateral estoppel. *SEC v. Resnick*, 604 F. Supp. 2d 773, 779 n.5 (D.Md. 2009).

1. The Indictment and the SAC Allege the Same Violations

The Superseding Indictment (App. Ex. 6) and the SAC (App. Ex. 297) concern the same defendants (McGinn and Smith), the same offerings (Trusts, Four Funds and MSTF), and both allege violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.

There is also significant overlap in the conduct alleged. For example, both instruments allege that McGinn and Smith continued to sell Firstline after its bankruptcy (App. Ex. 6 at 6-11; 297 at 26); took improper "loans" from various McGinn Smith entities (App. Ex. 6 at 15-17; 297 at 27-28); backdated promissory notes to disguise the illegal loans (App. Ex. 6 at 18; 297 at 28); and diverted funds from Trust Offerings to benefit MS & Co. or to pay investors in earlier offerings (App. Ex. 6 at 14-17; 297 at 20). Although some facts are alleged in the Indictment do not appear in the SAC, "[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).

2. Exchange Act 10(b)/Rule 10b-5/Securities Act Section 17(a) (First and Second Claims for Relief)

Section 10(b) of the Exchange Act makes it "unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." To establish a violation of Section 10(b) and Rule 10b-5, the Division must show: (1) a materially false or misleading statement or omission or use of a fraudulent device, (2) in connection with the purchase or sale of securities, and (3) scienter. *See, e.g.*, *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999); *Basic Inc. v. Levinson*, 485 U.S. 224, 235 n.13 (1988).

Section 17(a) of the Securities Act prohibits fraud in the offer or sale of securities, using the mails or the instruments of interstate commerce. Section 17(a)(1. *Aaron v. SEC*, 446 U.S. 680, 697 (1980); *SEC v. Softpoint,* 958 F. Supp. 846 861-62 (S.D.N.Y. 1997)..

Rules 10b-5(a) and 10b-5(c), which also implement Section 10(b) of the Exchange Act, prohibit the use of any "device, scheme, or artifice to defraud" or any other "act, practice or course of business which operates . . . as a fraud or deceit" in connection with the purchase or sale of securities, with scienter. *See In re Global Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 335-36 (S.D.N.Y. 2004) ("[A] cause of action exists under [Rule 10b-5] subsections (a) and (c) for behavior that constitutes participation in a fraudulent scheme, even absent a fraudulent statement by the defendant.").

"Scienter 'may be established through a showing of reckless disregard for the truth.' 'Reckless conduct is, at the least, conduct which is highly unreasonable and which represents an

extreme departure from the standards of ordinary case to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" *SEC v. Milan Capital Group, Inc.*, 2000 WL 1682761, at *5 (S.D.N.Y. Nov. 9, 2000) (*citing SEC v. McNulty*, 137 F.3d 732, 741 (2d Cir. 1998) and *Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 570 F.2d 38, 47 (2d Cir. 1978)).

The evidence from the criminal trial overwhelmingly establishes a fraudulent scheme, material misrepresentations and omissions, scienter and materiality. McGinn and Smith organized and operated a brazen scheme that lasted for years, through two dozen offerings, and victimized over 800 investors. SMF ¶¶ 159-328. The scheme involved numerous material misrepresentations and omissions by Smith and McGinn, through their PPMs and other communications to investors. They took millions of dollars of investor funds for themselves and for MS & Co. App. Ex. 115, 358.

Smith knew by late 2007 that the Four Funds, which had raised a total of $85 million, had lost 50% of their value and "were under water by . . . forty million dollars." SMF ¶ 162. Smith nevertheless continued to solicit new investments in the Four Funds but concealed from investors the material information about their collapse. SMF ¶¶ 159-173. In January 2008, Smith sent to investors the first of several letters to investors that blamed the overall economic climate for the Funds' problems. SMF ¶¶ 165-166. These letters falsely attributed the Funds' liquidity problems to economic conditions. *Id.*

Although Four Funds investors were told that their interest payments had stopped by late November 2008, Smith and McGinn continued to pay certain preferred investors, and they continued to organize new offerings. SMF ¶¶ 168-170. They also used Four Funds proceeds to

redeem investors in pre-2003 Trusts, such as RTC, and to pay MS & Co.'s payroll. SMF ¶¶ 171-173.

The extreme financial pressures within MS & Co., exacerbated by the collapse of the Four Funds, compelled the Trust Offerings, which prolonged the scheme by bringing in new investor money. SMF ¶¶ 180-194, 251-253.

Smith and McGinn, who alone had the authority to direct transfers, took money from a series of Trust offerings to benefit themselves and Matthew Rogers, a senior vice president. SMF ¶¶ 174-179. McGinn received a total of $1.3 million and Smith received a total of $1.5 million from the Trust offerings; none of these payments were authorized by the relevant PPMs. *Id.* Smith told the accounting staff to make false accounting entries to cover up these payments. SMF ¶ 176-179.

Smith and McGinn's misuse of the $6.75 million raised in the MSTF offering was particularly egregious. SMF ¶¶ 195-219. They used the MSTF offering proceeds to make payments to investors in other offerings, including the Four Funds and SAI, a pre-2003 offering, and to pay a favored investor. *Id.* Smith acknowledged to MS & Co.'s CFO that these payments "[were not] allowed by the private placement [memorandum]." SMF ¶ 201.

Smith and McGinn's scienter is also proven through the Firstline debacle. These offerings loaned nearly $7 million to a Utah-based alarm company named Firstline, Inc. According to the PPM, the investors would be repaid by Firstline. McGinn, however, knew about a dispute between Firstline and one of its dealers, ADT. SMF ¶¶ 225-230. This dispute led to a lawsuit by ADT against Firstline and, on January 25, 2008, to a bankruptcy filing by Firstline. SMF ¶ 228.

McGinn and Smith knew that the bankruptcy filing meant that Firstline would be unable to repay the loan, and that therefore there would be no funds to pay Firstline's investors. SMF ¶¶ 229-230. Instead of disclosing the truth to the investors and to MS & Co.'s brokers, McGinn and Smith paid Firstline investors from other offerings, which not authorized by the PPMs. SMF ¶¶ 231-250. McGinn and Smith also concealed the bankruptcy from MS & Co.'s registered representatives, who continued to sell Firstline securities to their customers. SMF ¶¶ 231, 236.

In October 2009, McGinn and Smith met with an outside lawyer, Jay Kaplowitz. McGinn and Smith told Kaplowitz that "they had taken monies from some of the funds, and used them as advances for other of the funds." SMF ¶ 208. Kaplowitz told them that "what you did was wrong" SMF ¶ 209.

On October 10, 2009, Smith a handwritten letter to Kaplowitz which admitted to wrongdoing. Smith wrote that "there is no place in the PPM of MSTF that permits fees payable to MS." SMF ¶ 211. Kaplowitz thought that they were admitting to "a crime" and he warned McGinn and Smith not to "alter the records to reflect another way of accounting for the advances they took out." SMF ¶¶ 216-217.

Smith and McGinn did not follow their lawyer's advice. Instead, they directed their accounting staff to create false accounting entries to hide the money they had taken. SMF ¶¶ 220-224. MS & Co.'s accounting staff created backdated promissory notes to provide to FINRA investigators. SMF ¶¶ 261-264. Smith also wrote in an internal memorandum that "we obviously should not have used MSTF as our personal bank, but [McGinn] had access to the cash" SMF ¶ 224.

Twelve investors testified at the trial. SMF ¶¶ 270-328. They uniformly testified that they believed that the PPMs accurately stated the use of funds and that it would have been

important to them to know that the PPMs' representations were not true. The compelling testimony of these investors proves that McGinn and Smith's misrepresentations and omissions were material. *Id.*

As the foregoing summary demonstrates, summary judgment is warranted against McGinn and Smith on the First and Second Claims for Relief in the SAC. App. Ex. 297 at 41-43.

3. Exchange Act 15(c)(1)/Rule 10b-3 (Third Claim for Relief)

Section 15(c) (1) of the Exchange Act and Rule 10b-3 of the Exchange Act prohibit brokers and dealers from using any "manipulative, deceptive, or other fraudulent device[s] or contrivance[s]" in connection with securities transactions. *See* 15 U.S.C. § 78o(c)(1)(A).

The SEC's claim of aiding and abetting claim against McGinn and Smith is proven by establishing: "(1) the existence of a primary violation of the Exchange Act; (2) that the aider-abettor had knowledge of the primary violation; and (3) that the aider-abettor knowingly and substantially participated in the wrongdoing." *SEC v. Pasternak,* 561 F.Supp.2d 459, 500 (D.N.J. 2008) (internal quotation and citations marks omitted). The elements required to prove a violation under section 15(c)(1) are equivalent to those required under Securities Act section 17(a), including that the defendant acted negligently. *See Aaron,* 446 U.S. at 707–08 (Blackmun, J., concurring in part and dissenting in part); *SEC v. George,* 426 F.3d 786, 792 (6th Cir. 2005).

As demonstrated above, the evidence from the criminal case and the convictions establish the elements of a claim under Section 15(c)(1); therefore, summary judgment is warranted on the Third Claim for Relief in the SAC. App. Ex. 297 at 43-44.

4. Advisers Act Sections 206(1), 206(2), 206(4)/Rule 206(4)-8 (Fourth Claim for Relief)

Sections 206 (1), (2) (and (4) of the Advisers Act, and Rule 206(4)–8 thereunder, prohibit

investment advisers from engaging in securities fraud. Specifically, Section 206 of the Advisers Act provides that:

> It shall be unlawful for any investment adviser, by use of the mails, or any means or instrumentality of interstate commerce, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud any client or prospective client;
>
> (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client; [or]
>
> * * *
>
> (4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative.

15 U.S.C. §§ 80b–6.

Under Section 206, an investment adviser is a fiduciary, and "Courts have imposed on a fiduciary an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' his clients.." *SEC v. Capital Gains Res. Bur., Inc.* 375 U.S. 180, 194 (1963) (citations omitted).

Courts have interpreted sections 206(1) and 206(2) to include essentially the same elements as a section 17(a) claim, except that section 206(1) requires proof of fraudulent intent on the part of the primary actor, whereas the SEC need only allege negligence to state claims under sections 206(2) and 17(a)(2) and (3). *See, e.g., SEC v. PIMCO Advisors Fund, Mgt., LLC,* , 341 F. Supp. 2d 454, 470 (S.D.N.Y. 2004).

Under Rule 206(4)–8, any investment adviser "to a pooled investment vehicle" violates Section 206–4 by making "any untrue statement of a material fact or ... omit[ting] to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled

investment vehicle ...." 17 C.F.R. § 275.206(4)–8(a)(1). An adviser also violates Section 206(4), if he "[o]therwise engage[s] in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle." 17 C.F.R. § 275.206(4)–8(a)(2). Although scienter is required in connection with Section 206(1), it is not required in connection with Sections 206(2) or 206(4). *Steadman v. SEC,* 603 F.2d 1126, 1134 (5th Cir.1979); *SEC v. Steadman,* 967 F.2d 636, 647 (D.C.Cir.1992).

MS Advisors and MS & Co. are considered investments advisers under Section 202(a)(11) of the Investment Advisers Act. *See* 15 U.S.C. § 80b-2(a)(11) (defining an investment adviser as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities").

The evidence from the criminal trial and the convictions establish the primary violations, and the knowing and substantial assistance by McGinn and Smith is apparent. Summary judgment on the Fourth Claim for relief is warranted.

II. Summary Judgment is also Warranted Based on Additional Evidence

Substantial evidence – in addition to the evidence from the criminal case – demonstrates that no issues of material fact remain as to McGinn's and Smith's violations of the securities laws. SMF ¶¶ 67-158. In particular, this evidence shows that the fraudulent misuse of the $86 million raised in the Four Funds offerings began almost immediately in 2003, when Smith and McGinn secretly diverted $2 million to redeem investors in an earlier MS & Co. offering. SMF ¶¶ 87-90. App. Ex. 1, the Declaration of Kerri L. Palen, and the exhibits attached thereto, provides significant and compelling additional evidence of the scope and duration of McGinn and Smith's fraud.

III. No Issues of Fact Exist on the Sixth Claim for Relief (Section 5(a) and (c) of the Securities Act)

Although Smith and McGinn were not charged in the indictment with Section 5 violations, summary judgment is still appropriate based on the evidence. *See SEC v. Gordon*, 522 Fed.Appx. 448, 2013 WL 1632696, *450 (10th Cir. 2013) (affirming summary judgment on Section 5 claim even though, in parallel criminal case, defendant "was not charged in the indictment for a § 5 violation, and . . . the criminal case did not address whether sales of unregistered securities were subject to an exemption from registration").

Sections 5(a) and 5(c) prohibit the offer and sale of securities in interstate commerce unless a registration statement is filed with the Commission or is in effect, or the transactions are exempt or fall within a safe-harbor from registration. 15 U.S.C. §§ 77e(a), (c); *Matter of Kirby et al.*, No. 3-9602, 2000 WL 1787908, at *8 (Dec. 7, 2000). Thus, "registration [is required] for *any* sale by *any* person of *any* security, unless it is specifically exempted from the registration provisions." *Matter of Bloomfield et al.*, No. 3-13871, 2011 WL 1591553, at *24 (Apr. 26, 2011), *aff'd,* 2014 WL 768828 (S.E.C. Feb. 27, 2014) (citing Thomas Lee Hazen and David L. Ratner, *Securities Regulations in a Nutshell* § 10 (10th ed. 2009)) (emphasis in original).

To establish a *prima facie* case, the SEC must prove that: (1) Smith and McGinn offered to sell or sold a security; (2) using the mails or interstate means to sell or offer the security; and (3) no registration statement was filed or was in effect as to the security. *See SEC v. Cavanagh*, 1 F. Supp. 2d 337, 361 (S.D.N.Y. 1998), *aff'd,* 155 F.3d 129 (2d Cir. 1998). Scienter is not required to establish a Section 5 violation. *See SEC v. Softpoint, Inc.,* 958 F. Supp. 846, 859-60 (S.D.N.Y. 1997), *aff'd,* 159 F.3d 1348 (2d Cir. 1998). The burden of proof then shifts to the defendants to show that an exemption or safe-harbor from registration was available. *See SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953); *Bloomfield*, 2011 WL 1591553, at *25.

The evidence establishes a *prima facie* Section 5 violation. MS & Co., co-owned by Smith and McGinn, sold the Four Funds notes. SMF ¶ 179. The Four Funds were sold securities to investors located throughout the country, and used the means and instrumentalities of interstate commerce. SMF ¶¶ 179, 180. Finally, no registration statement was filed with the Commission or was in effect with respect to the Four Funds offerings. SMF ¶ 181.

No exemption from registration applies. Although the Four Funds' PPMs claimed exemptions from registration under Securities Act Section 4(2) and Rule 506 of Regulation D, *see* SMF ¶ ___, neither exemption applies. Section 4(2) provides an exemption for non-public offerings.[1] In considering whether this exemption applies, "the Supreme Court has held that courts must examine whether allowing the exemption is consistent with the promotion of 'full disclosure of information thought necessary to informed investment decisions' and whether 'the class of persons affected needs the protection of the [Securities] Act.'" *Matter of Giesige*, No. 3-12747, 2008 WL 4489677, at *24 (Oct. 7, 2008), *aff'd,* 2009 WL 1507584 (S.E.C. May 29, 2009) (citing *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d. 1, 11 (D.D.C. 1998) & *SEC v. Ralston Purina Co.*, 346 U.S. at 124-25). The Court must consider "the number of offerees, the relationship of the offerees to each other and the issuer, the manner of the offering, information disclosure or access, and the sophistication of the offerees." *Giesige*, 2008 WL 4489677, at *24 (citation omitted) (concluding that the offering was public given the number of investors).

Each of the Four Funds had hundreds of investors. SMF ¶ __; *see also SEC v. Murphy*, 626 F.2d 633, 645 (9th Cir. 1980) (the more offerees, the more likelihood that the offering is public). Each of the Four Funds, moreover, had more than 35 unaccredited investors who did not have access to the type of information normally provided in a registration statement. SMF ¶

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[1] Section 4(2) has been re-designated as Section 4(a)(2) by the JOBS Act.

For the Rule 506 exemption to apply, the Four Funds could issue securities up to only 35 unaccredited investors. *See* 17 C.F.R. § 230.506(b)(2). Each of the Four Funds, however, had more than 35 unaccredited investors, so the Rule 506 exemption does not apply. *See* SMF ¶ 183.

IV. The Court Should Order Meaningful Sanctions

A. Smith And McMinn Should Be Ordered To Disgorge $124 Million - The Proceeds Of Their Fraud

The SEC seeks an order holding Smith and McMinn jointly and severally liable for disgorgement of at least $124 million, the proceeds of their fraud still owed to investors (*see,* Receiver's July 1, 2014 Declaration at ¶ 3; App. Ex. 3), plus prejudgment interest, and directing that all assets under the Receiver's control be distributed to Smith and McGinnis victims, with credit to Smith and McMinn for all amounts paid out by the Receiver. As of June 27, 2014, the Receiver has assets totaling $20,882,652, including approximately $2,328,323 held in the Stock Account and $2,706,829 held in the Smith Trust. App. Ex. 3 at ¶ 5. The Receiver estimates that additional recoveries may increase to $6 to $ 8 million, bringing the total accounts to approximately $26.9 to $28.9 million. *Id.* at ¶ 6. Assuming all such assets are returned to investors, that will still, unfortunately, leave investor losses of approximately $100 million.

The "primary purpose of disgorgement as a remedy for violation of the securities law is to deprive violators of their ill-gotten gains, thereby effectuating the deterrence objectives of those laws." *SEC v. First Jersey Securities, Inc.,* 101 F.3d 1450, 1474 (2d Cir. 1996)(citations omitted). The Court has broad discretion in calculating the disgorgement amount. *First Jersey,* 101 F. 3d at 1474-75. Furthermore, the SEC need only present a "reasonable approximation of profits causally connected to the violation." *SEC v. First Jersey Sec., Inc.,* 890 F. Supp. 1185, 1211 (S.D.N.Y. 1995), *aff'd in relevant part,* 101 F.3d 1450 (2d Cir. 1996); *SEC v. First City Fin. Corp.,* 890 F. 2d 1215, 1231 (D.C. Cir. 1989). The burden then shifts to the defendant to

prove that the requested relief is not a "reasonable approximation" of unjust enrichment. *First City Fin. Corp,* 890 F. 2d at 1232.

Here, the SEC seeks disgorgement of all proceeds of the offering fraud remaining unpaid to investors. Courts have long recognized the importance of requiring securities law violators to disgorge the full proceeds of their fraud, minus funds returned to investors. *See, e.g., SEC v. Manor Nursing Ctrs., Inc.* 458 F.2d 1082, 1104 (2d Cir. 1972)("We hold that it was appropriate for the district court to order [defendants] to disgorge the proceeds received in connection with the [securities] offering"); *SEC v. Pittsford Capital Income Partners LLC,* 2007 U.S. Dist. LEXIS 62338, at *53 (W.D.N.Y. Aug. 23, 2007), *aff'd,* 2008 U.S. LEXIS 29909 (2d Cir. Dec. 31, 2008) (disgorgement in investment fraud case was amount raised from investors minus amount returned to investors); *SEC v. Robinson,* 2002 WL 1552049, * 9 (S.D.N.Y. July 16, 2002) (in fraudulent stock offering case "it is appropriate to order disgorgement of the entire (gross) proceeds received in connection with the offering."); *SEC v. Sahley*, 1994 WL 9682, *1 (S.D.N.Y. Jan. 10, 1994) (ordering disgorgement of entire $950,000 raised in offering fraud); *SEC v. Rosenfeld,* 2001 WL 118612 at * 2 (S.D.N.Y. Jan. 9, 2001. The evidentiary standard for determining appropriate disgorgement is preponderance of the evidence. *See, e.g., SEC v. Gann,* 2008 U.S. Dist. LEXIS 25562 at *34 (N.D. Tex. Mar. 31, 2008), *aff'd,* 565 F. 3d 932 (5th Cir. 2009); *SEC v. Koenig,* 532 F. Supp. 2d 987, 994 (N.D. Ill. 2007), *aff'd*, 557 F.3d 736 (7th Cir. 2009).

Smith and McGinn engaged in a long-standing criminal fraud scheme. They should be held responsible for repaying all of the unpaid principal they raised from their victims.

Accordingly, the Court should hold Smith and McGinn jointly and severally liable for disgorgement of at least $124 million, plus prejudgment interest. [2]

The Court has the equitable power to direct the Receiver to pay over the frozen assets to investors. "Once the district court has found federal securities law violations, it has broad equitable power to fashion appropriate remedies,..." *First Jersey,* 202 F.3d 1450, 1474 (2d Cir. 1996). "[I]t is 'well established' that Section 22(a) of the Securities Act of 1933 [15 U.S.C. Section 77y(a)] and Section 27 of the Securities Exchange Act of 1934 [15 U.S.C. Section 78aa] 'confer general equity powers upon the district courts' that are 'invoked by a showing of a securities law violation.'" *Smith v. SEC,* 653 F.3d 121, 127 (2d Cir. 2011)(*quoting from SEC v. Manor Nursing Ctrs., Inc.,* 458 F. 2d 1082, 1103 (2d Cir. 1972). "[O]nce the equity jurisdiction of the district court properly has been invoked, the court has power to order all equitable relief necessary under the circumstances." *SEC v. Materia,* 745 F.2d 197, 20 (2d Cir. 1984). *See, also,* Exchange Act Section 21(d)(5), 15 U.S.C. Section 78u(d)(5)(in any action brought by the Commission, a "Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.)"

The Court's equitable powers are far-reaching. Indeed, in this case, the Second Circuit has already affirmed the Court's broad equitable power to order a pre-judgment sale of the Smiths' Vero Beach residence because it was declining in value, stating: "In light of the 'sweeping mandate manifest in the securities laws," *SEC v. Materia,* 745 F.2d 197, 200 (2d Cir. 1984), and the district court's broad equitable power to fashion ancillary relief when its

[2] The Court has discretion to order prejudgment interest. *First Jersey,* 101 F. 3d at 1476. The Commission requests that the Court award prejudgment interest using the IRS underpayment rate frequently used in SEC enforcement actions. Prejudgment interest is also appropriate on amounts disgorged by a relief defendant. *See, e.g., SEC v. Rosenthal,* 650 F.3d 156, n.1 (2d Cir. 2011). Imposing prejudgment interest on the Relief Defendants is particularly appropriate here given their misconduct.

jurisdiction under those laws has been involved, *see Unifund SAL,* 910 F. 2d at 1041, it is clear that the magistrate judge did not abuse his discretion…." *Smith v. SEC,* 653 F.3d at 129.

The Court's equitable powers include ordering the turnover of assets nominally in third parties names. In *SEC v. Zubkis,* No. 97 Civ. 8086 (JGK), 2005 WL 1560489 at *4 (S.D.N.Y. June 30, 2005), the Court held that: "The Court may use this broad equitable power to order the turnover of assets nominally held by third parties where the third party lacks a legitimate claim to the assets." Similarly, in *SEC v. Roor,* No. 99 Civ. 3372 (HB), 2004 WL 1933578 at * 10 (S.D.N.Y. Aug. 30, 2004), the Court entered an order for the post-judgment turnover of frozen assets. *See also SEC v. Montle,* 65 Fed. Appx. 749, 752 (2d Cir. 2003); *SEC v. Enrenkrantz King Nussbaum, Inc.,* No. 05-CV-4643, 2013 WL 831181 at *4 (E.D.N.Y. Feb. 14, 2013); *SEC v. Softpoint, Inc.,* No. 95-CV- 2951, 2012 WL 1681167 at * 3 (S.D.N.Y. May 9, 2012). Because disgorgement is an equitable remedy, the Court can order disgorgement of assets held in a relief defendant's name but actually owned by the defendant without any requirement for a jury trial. *See, e.g., SEC v. Commonwealth Chem. Sec., Inc.,* 574 F.2d 90, 95-97 (2d Cir. 1978); *SEC v. Rind,* 991 F.2d 1486, 1493 (9th Cir. 1993).

The Court has already invoked its equitable powers in freezing numerous assets to protect them for investors. Now that Smith and McGinn have been found guilty of multiple securities laws violations and their liability for the related violations charged in this action has also been established, the Court should fully implement the purpose of the asset freeze by directing the Receiver to apply all of the frozen assets for the benefit of investors.

B. The Stock Account Should Be Applied to Satisfy the Judgment Against David Smith

1. The Court Has Already Found That David Smith Owned and Controlled The Stock Account

The Court has already found, after the three day preliminary injunction hearing, and based on a voluminous documentary record, that David Smith was the "joint owner" of the Stock Account. *SEC v. McGinn Smith,* 752 F. Supp. 2d 194, 215 (N.D.N.Y. 2010); MDO dated July 7, 2010 (Dkt. No. 86). The Court found that: "Smith had access and control over the account for decades, he had both a personal and professional interest in the Stock Account and benefitted from its funds in both his home-life and career, and he commingled funds between the Stock Account and his business and personal accounts." *Id.* at 216. The Court further found that: "Thus, David Smith utilized the Stock Account as a personal line of credit for his business interests to further his personal and professional endeavors." *Id.* The Court froze the Stock Account as an asset of David Smith's to be secured to satisfy any judgment against him. *Id.* at 216-217.

The Court alternatively found that the Stock Account should be frozen because it contained ill-gotten proceeds of David Smith's fraudulent conduct, stating: "Lynn Smith has likely received ill-gotten gains throughout the multiple deposits into her stock account after 2003 when the fraudulent scheme involving the Four Funds alleged by the SEC commenced. Since 2003, Lynn Smith has been refunded over $1 million from MS & CO and its related individuals and entities in loan repayments. .... These payments derive from fraudulently obtained investments." *Id.* at 214. The Court rejected Lynn Smith's claim that she was a bona fide creditor entitled to repayment of the "loans," noting that: "Lynn Smith was unaware how many loans she has made, to whom the loans were made, what they were for, or what the interest rates and payment schedules were. T.330-32. 409-11.' *Id.* at 215. It concluded that: "Such uninformed,

casual, and informal transactions in the amounts at issue here corroborate the conclusion that there was no consideration and no contractual relationship that would entitle Lynn Smith to repayment as an arm's length, disinterested creditor." *Id.* at 215.

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

> …the timing of these transfers of title to Lynn Smith as the threat of investors recovering from David Smith mounted, the unfailingly self-serving content of Lynn Smith's testimony, the improbability of that testimony in material respects, the absence of credible corroborating evidence, inconsistencies in her testimony, and the Court's observations of Lynn Smith as she testified, the Court finds incredible her testimony regarding the reasons for these transactions as well as verbal communications with David Smith. Her testimony on these subjects is rejected.

Id. at 203, fn. 13.

The Second Circuit affirmed the Court's findings that "David Smith treated Lynn Smith's stock account as his own" citing *SEC v.* Heden, 51 F. Supp. 2d 296, 300 (S.D.N.Y. 1999). *Smith v. SEC,* 432 Fed. Appx. 10, 2011WL 3438315 (2d Cir. 2011) at * 2.[3]

2. The Additional Evidence That David Smith Owned and Controlled the Stock Account is Overwhelming

The facts upon which the Court found that David Smith controlled the Stock Account are indisputable. Moreover, the evidence developed subsequent to the preliminary injunction hearing makes all the more unassailable the conclusion that David Smith jointly owned and controlled the Stock Account.

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[3] Significantly, the Court's finding that Lynn Smith's testimony was "incredible" was made even before it became aware of Lynn Smith's fraud on the Court by failing to disclose the Annuity Agreement that entitled her and David Smith to yearly annuity payments of $489,932 from the Smith Trust beginning in 2015 while she repeatedly stated that she and David Smith had no present or future interest in the Smith Trust or its assets. *See, SEC v. McGinn Smith,* 752 F.Supp.2d 220, 224-225; 231 fn.17 (N.D.N.Y. Nov. 22, 2010) (Dkt. No.194), discussed below.

David Smith Funded the Creation of the Stock Account

The Court accepted Lynn Smith's testimony that the Stock Account originated from a $60,000 inheritance she received from her father in the 1960s and that the assets in the Stock Account grew from investment earnings on that original inheritance. *See, SEC v. McGinn Smith,* 752 F. Supp. 2d at 201-202. That testimony is demonstrably false. In fact, subsequently obtained evidence makes clear that the Stock Account was opened in 1991 and funded with assets from a joint David and Lynn Smith brokerage account, that prior financial statements of the Smiths reported only jointly held stock and cash and there is no documented evidence of any account solely in Lynn Smith's name. See, e.g., SMF at ¶¶333-356.

David Smith Had Full Discretionary Control Over the Stock Account

David Smith had full trading authorization over, and the right to withdraw money from, the Stock Account, since December 1991. SMF ¶ 357. "Most" investment decisions were made by David Smith. SMF ¶ 358. Lynn Smith did not know whether any money from the Stock Account was used to invest in any McGinn Smith entities. She left those decisions to David Smith. SMF ¶ 359; SMF ¶¶ 463-470. Lynn Smith conceded that David Smith was allowed to use the Stock Account for his own benefit on numerous occasions during the at least 15 years preceding 2010. SMF ¶ 360.

David Smith Routinely Used the Assets in the Stock Account For His and His Family's Personal Benefit

In its July 7, 2010 decision, the Court found that David Smith jointly owned the Stock Account based, in part, on evidence that David Smith and his family jointly benefitted from it, noting that it was used to purchase the jointly owned Vero Beach house, a ski lodge and to fund the Smiths' children' education. *SEC v. McGinn Smith,* 752 F. Supp. 2d at 216. This evidence

is indisputable. The Smiths financed the purchase of their prior primary residence in Clifton Park from the Stock Account. SMF ¶ 362. In the mid-1980s, the Stock Account was used to purchase a ski condominium in Vermont for approximately $125,000. SMF ¶ 363. Money from the Stock Account was used to purchase a residence in Vero Beach Florida in the name of David and Lynn Smith in 2001. SMF ¶¶ 364-365. In 2003 money from the Stock Account was used to purchase Smiths' residence in Saratoga Springs, N.Y. in both their names. SMF ¶ 370. The Smiths financed their two children's college education from the Stock Account. SMF ¶ 367. This evidence alone is sufficient for this Court to find that David Smith jointly owned the Stock Account.

Moreover, David Smith personally benefitted from the Stock Account far more than the Court was aware in its July 7, 2010 decision. For example, bank records show that between August 28, 1999 and April 5, 2010, approximately $4.7 million was transferred from the Stock Account to David Smith's checking account, and only $390,000 was transferred from David Smith's checking account back to the Stock Account. App. Ex. 1 (Palen Exhibit 24). And from November 21, 1992 through August 27, 1999, a period for which incomplete records exist, at least $2,585,000 was transferred from the Stock Account to David Smith's checking account, with no known transfers back to the Stock Account. *Id.* at page 2.

The Stock Account was also frequently used to fund common expenses and fund assets that benefitted both David and Lynn Smith. SMF ¶¶ 373-374. The Stock Account contributed approximately $142,500 to IRAs for David, Lynn, Geoffrey and Lauren Smith over the years. SMF ¶ 368. David Smith repeatedly used funds transferred from the Stock Account to his checking account to pay large common expenses of him and Lynn Smith, such as mortgage payments on their primary residence in Saratoga Springs and their home in Vero Beach, Florida,

golf club dues, federal and state taxes, payments to their children Geoffrey and Lauren Smith, car payments and insurance. SMF ¶¶ 373-374; App. Ex. 1 (Palen Ex 26).

David Smith Contributed Substantial Assets to the Stock Account

The Court noted in its July 7, 2010 decision that David Smith made several transfers into the Stock Account, including a $38,430 deposit and funds from a trust totaling $326,304 as well as a $410,000 note. *See SEC v. McGinn Smith,* 752 F. Supp. 2d at 216. However, David Smith contributed more assets into the Stock Account than the Court was aware. Most significantly, the Court accepted Lynn Smith's testimony that the Stock Account's most valuable asset, the Charter One bank stock that was later transferred to the Smith Trust, was purchased solely from assets in the Stock Account that she had inherited from her father. *See SEC v. McGinn Smith,* 752 F. Supp. 2d at 217-218. *See also* App. Ex. 254 (L. Smith 5/21/10 Affidavit, Dkt. 34, at ¶ 3. ("In approximately April 1992, using assets in my stock account, I purchased 40,000 shares of Albank stock at $10 per share at the initial public offering. .. I held this stock in my brokerage account for many years ….").

Lynn Smith's testimony was false. In fact, David Smith purchased 40,688 shares of ALBANK stock for approximately $406,325 dollars, using portions of $352,000 withdrawn from the Stock Account and portions of $150,000 that he borrowed from McGinn Smith. SMF ¶¶ 376-380. Moreover, David Smith actually purchased all 40,688 shares of ALBANK stock in his name, not Lynn Smith's, and the ALBANK stock was not deposited into the Stock Account until September 18, 1992, more than five months after David Smith purchased them in his name. SMF ¶381; App. Ex. 239.

The Stock Account Was the Central Funding Mechanism For David Smith's Businesses and His Fraudulent Schemes

The Court found in its July 7, 2010 decision that David Smith used the Stock Account to make a number of bridge loans to his companies and concluded that: "Thus, David Smith utilized the Stock Account a personal line of credit for his business interests to further his personal and professional endeavors." *SEC v. McGinn Smith,* 752 F. Supp. 2d at 216; *see also, id.* at 214-216(re bridge loans totaling over $1 million). The Court concluded that these loan "repayments derived from fraudulently obtained investments" and that because they were commingled with potentially legitimate funds, separating the legitimate and fraudulent funds would be "nearly impossible." *Id.* at 214-215. However, there were far more transfers than the Court was aware.

Bank records show that just between 1999 and 2010, there were withdrawals of approximately $17.2 million from the Stock Account going to David Smith's various business entities and approximately $13.7 million in known transfers back from those entities to the Stock Account. SMF ¶¶ 400-401. Bank records for the period prior to 1999, for which the records are incomplete, also show millions of dollars being transferred from the Stock Account to David Smith's businesses and back. SMF ¶¶ 415-416. The sheer number, complexity and rapidity of these transactions, combined with the piles of blank LOAs Lynn Smith signed, and which were kept in a McGinn Smith employee's desk for ready use, makes Lynn Smith's claim that David Smith obtained her specific consent before each such transfer "incredible," as the Court found.

Thus, David Smith freely used the Stock Account as the central funding mechanism for his numerous businesses. His business proceeds were also continually funneled into and out of the Stock Account in the millions of dollars. Accordingly, David Smith jointly owned and controlled the Stock Account and the Receiver should be directed to apply the Stock Account's assets for the benefit of the investors.

C. The Smith Trust Assets Should be Applied to Satisfy the Disgorgement Order Against David Smith

The Court has already found, and the Second Circuit has affirmed several times, that David and Lynn Smith are beneficial owners of the Smith Trust's assets. The evidence supporting those findings is overwhelming and supports entry of an order by this Court, in the exercise of its equitable powers in disgorgement matters, directing the Receiver to apply the Smith Trust's assets for the benefit of investors.[4]

On May 4, 2004, Charter One publicly announced that it was being acquired in an all-cash deal by Citizens Financial Group, which paid $44.50 per share. The deal was completed on August 31, 2004. SMF ¶ 479. David and Lynn Smith knew, therefore, that their Charter One stock would be converted to cash as a result of the buy-out. *Id.* In August 2004, David and Lynn Smith created the Smith Trust pursuant to a Declaration of Trust. SMF ¶ 480. The Smiths funded the Trust by selling 100,000 shares of Charter One stock, valued at $44.50 per share, to the Smith Trust pursuant to an Annuity Agreement that entitled the Smiths to yearly annuity payments from the Smith Trust of $489,000 a year beginning in September 2015 and continuing until the death of the last of the Smiths. SMF ¶¶ 494-500. On the same day, the Charter One merger occurred, and the Smith Trust was credited with $4,450,000 in cash. SMF ¶¶ 482-484.

Both David and Lynn Smith signed the Annuity Agreement with the Smith Trust and it is a valid and enforceable agreement. SMF ¶ 495. The Annuity Agreement stated that the Smiths "are the owners of 100,000 shares of stock … and desire to sell the Property to the Transferee to be relieved of the burden and risk associated with owning and managing the Property in order to

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[4] This would render moot the SEC's fraudulent conveyance claim against the Smiths and the Smith Trust relating to the transfer of the Charter One stock to the Smith Trust in 2004. However, although the Court need not reach this claim, summary judgment on that claim is also warranted, as discussed below. .

receive investment income and a portion of the principal on a regular basis." SMF ¶ 498. The Annuity Agreement required the Smith Trust to: "hold full title to the Property, 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." SMF ¶ 499. The annual payment of $489,932, if paid out over the Smiths' calculated 20-year joint life expectancy from when the first payment is due, entitle the Smiths to payments totaling approximately $10 million from the Smith Trust. SMF ¶¶ 500-502. .

The Smiths Hid the Annuity Agreement From the Court to Preserve the Smith Trust's Assets for Themselves

Lynn Smith's egregious conduct in hiding the Annuity Agreement from the Court is further evidence that the Smiths created the Smith Trust for their own benefit. In Affidavits submitted to the Court in opposition to the freeze of the Stock Account and the Smith Trust, Lynn Smith repeatedly stated that she and her husband had no interest in the assets of the Smith Trust. See, e.g., L. Smith's May 21 2010 Affidavit - Dkt. 23; May 21, 2010 Affidavit -Dkt. 34 and June 9, 2010 Affidavit - Dkt. 69-1. For example, Lynn Smith stated: "From the time the trust was created in August 2004, my husband and I have had no interest in or expectation of an interest in the David L. and Lynn A. Smith Irrevocable Trust. It exists solely, exclusively and permanently for the benefit of my children." App. Ex. 254 (Dkt. 34, at ¶ 6). Lynn Smith failed to produce of a copy of the Annuity Agreement in response to discovery requests, SMF ¶ 502; failed to disclose the Annuity Agreement on the Court ordered Statement of Net Assets as of March 31, 2010 SMF ¶ 503; failed to disclose the Annuity Agreement during her May 27, 2010 deposition SMF ¶ 504, and failed to disclose the Annuity Agreement during her testimony at the preliminary injunction hearing SMF ¶ 505.

The Court sanctioned Lynn Smith for her deceitful conduct after the Annuity Agreement came to light, noting that "Lynn Smith's testimony and contentions here have been consistently self-serving, contradicted by other evidence and unworthy of belief unless corroborated by compelling independent evidence." 7/20/11 decision at p. 18 (Dkt. No. 342)." The Second Circuit affirmed the Court's findings and imposition of a sanction against Lynn Smith, noting with respect to Lynn Smith's conduct that: "Indeed, the record carries a circumstantial stench that only heroic credibility findings in her favor would dissipate." *SEC v. Smith,* 710 F.3d 87 (2d Cir. 2013).[5]

The Smith Trust Benefitted the Smiths, Not the Purported Beneficiaries

From its creation in August 2004 until 2010, neither of the purported beneficiaries of the Smith Trust, the Smiths' children Geoffrey and Lauren Smith, received a single distribution from the Smith Trust for their benefit. SMF ¶¶ 532, 542. This was despite the fact that Lauren was experiencing financial difficulties that caused Lynn Smith to send her monthly payments totaling over $22,000 for rent between 2007 and 2009. SMF ¶¶ 531; 539-542. Moreover, neither David not Lynn Smith even informed Lauren that she was a beneficiary of the Trust; she learned of it through one conversation with her brother and did not understand that she had the right to request distributions from the Smith Trust. SMF ¶¶ 527-530; 533-538. Indeed, the only

[5] The Court ordered Lynn Smith to disgorge to the Receiver on behalf of the Smith Trust a total of $944,848, jointly and severally with Dunn and Wojeski, and pay the SEC $ 51,232 for attorneys fees and costs. The $944,848 was the amount distributed from the Smith Trust after the Court lifted the asset freeze based on Lynn Smith's false claims. The Court directed the Receiver to sell the Sacandaga Lake property if Lynn Smith did not satisfy the disgorgement order by September 1, 2011, which she did not. The Receiver recently sold the Sacandaga Lake property realizing net proceeds of $546,204. *Notice of Sale* (Dkt.No. 693). Wojeski was ordered to pay $13,834 and Dunn was ordered to pay $5,355, (7/20/11MDO, Dkt. 342 at 51), which they have done. Thus, Lynn Smith still owes the Receiver $379,455 on behalf of the Smith Trust.

distribution from the Smith Trust was to allow David and Lynn Smith to pay their federal and state taxes in 2010. SMF ¶¶ 542-544.

The Smiths appointed their life-long friend Thomas Urbelis, a municipal law lawyer, as Trustee but Urbelis made clear that he did not want to be involved in dealing with trust issues such as paying taxes, and he deferred to David Smith's advice in managing the Smith Trust's assets. In essence, he ceded all control of the Smith Trust to David Smith. Indeed, neither beneficiary recalled ever having a discussion with the Trustee about the Smith Trust. SMF ¶¶ 510-519; 525-530.

The Smiths' Reported the Smith Trust As Their Asset in Financial Documents

In a Financial Statement date August 2008, the Smiths listed the assets in the Smith Trust as among their assets. SMF ¶ 87. In addition, a handwritten Financial Statement dated December 31, 2007 prepared by David Smith also listed assets the Smith Trust's assets, totaling $4,453,022 as one of the Smiths' assets. SMF ¶ 508. Moreover, in a subscription agreement submitted on behalf of the Smith Trust, David Smith described himself as the "beneficiary" of the Smith Trust, stating: "David Smith, beneficiary of the David L. Smith and Lynn A. Smith Trust dated 8/4/04 as the principal shareholder and president and CEO of the McGinn, Smith & Co , a member of the NASD. McGinn. Smith is an investment banking firm that has served as an underwriter." SMF ¶ 509.

The Court held that: "…the conclusion is compelled that David Smith possessed an equitable and beneficial interest in the Trust through the Annuity Agreement and that his conduct in controlling investments of Trust assets by the Trustee, paying Trust taxes, and, with his wife , paying the living expenses of his adult child was to protect the assets of the Trust to insure their

existence when the Annuity Agreement payments were to commence and not simply to protect those assets for the use of his children." 11/22/10 MDO (Dkt. 194) at 21.

The Second Circuit affirmed the Court's decision to refreeze the Smith Trust. It began by noting that:

> In *In re Vebuliunas,* 332 F. 3d 85 (2d Cir. 2003), 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. We concluded that, to make such a showing, the SEC must establish that (1) the owner of the Trust exercised such control that the Trust had become a mere instrumentality of the owner; (2) the owner used this control to commit a fraud or 'other wrong'; and (3) the fraud or wrong resulted in injury or loss. *Id.* at 92.

Smith v. SEC, 432 Fed. Appx. at 13; 2011 WL 3438315 at *2.

Applying that standard to this case, the Court stated: "To establish the first prong concerning control, it is sufficient to show here that David Smith could be considered the equitable owner of the Trust, such that he acted as though the Trust assets were 'his alone to manage and distribute.' *Id.* at 92." *Id.* The Second Circuit concluded that it found no error in the Court's conclusion that "David Smith possessed an equitable and beneficial interest in the Trust." *Id*.

In affirming the Court's sanctions against Lynn Smith, the Second Circuit again reviewed the facts regarding the Smith Trust and concluded: "These facts clearly establish that Lynn Smith had an ongoing substantial interest in the Trust whether or not it was technically an ownership interest." *SEC v. Smith,* 710 F.3d 87, 98 (2d Cir. 2013). It further noted that: "We have already upheld the freeze on the Trust's assets based on the finding that the Trust was for the benefit of David Smith. *See, Smith v. SEC,* 432 F. App'x 10, 12 (2d Cir. 2011)." *Id.* Thus, the evidence that David Smith possessed an equitable and beneficial interest in the Smith Trust is

overwhelming and the Smith Trust's assets should be paid over to investors as a David Smith asset subject to disgorgement.[67]

C. The Court Should Enjoin McGinn and Smith From Future Securities Laws Violations

The Court should permanently enjoin McGinn and Smith from future violations of Sections 5(a), 5(c), 17(a) and 20(b) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Section 15(c)(1) of the Exchange Act and Rule 10b-3 thereunder, and Sections 206(1), 206(2) and 206(4) of the Advisors Act and Rule 206(4)-8 thereunder . Section 21(d)(1) of the Exchange Act, Section 20(b) of the Securities Act and Section 209(d) of the Advisors Act entitle the SEC to obtain permanent injunctive relief upon a showing that: (1) violations of the securities laws occurred; and (2) there is a reasonable likelihood that violations will occur in the future. *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 99 (2d Cir. 1978). In considering whether there is a reasonable likelihood that a defendant will commit future violations, courts in this Circuit weigh various factors, including: (1) the fact that the defendant has been found liable for illegal conduct; (2) the degree of scienter involved; (3) the isolated or repeated nature of the violations; (4) the sincerity of the defendant's assurances against future

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[6] Because David Smith continued to own and enjoy the benefits of the Vero Beach house and the Checking Account after their fraudulent transfer to Lynn Smith, and Timothy McGinn continued to own and enjoy the Niskayuna residence after he fraudulently transferred it to Nancy McGinn, the Court has the equitable power to also order disgorgement of these assets as assets of David Smith and Timothy McGinn, without reaching the SEC's alternative fraudulent conveyance claims as to these transfers. However, for efficiency sake, these assets are discussed in the fraudulent conveyance portion of the brief.

[7] Moreover, even if David Smith did not own the Smith Trust's assets, his portion of the annuity payments would be subject to disgorgement upon receipt and it would be appropriate for the Court to freeze so much of the Smith Trust's assets as necessary to ensure such payments were made and order them disgorged by David Smith upon receipt.

violations; and (5) whether the defendant might be in a position where future violations could be anticipated. *SEC v. Cavanagh*, 155 F.3d 129, 135 (2d Cir. 1998).

The serious nature of McGinn and Smith's conduct is demonstrated by their criminal convictions. In addition, their conduct involved a high degree of scienter, was repetitive, occurred over many years, involved hundreds of victims, and they both denied any wrongdoing in their testimony at the criminal trial, thereby offering no assurances against future violations. McGinn and Smith should be permanently enjoined.

D. The Court Should Permanently Bar McGinn From Serving As An Officer Or Director

The Court should impose an officer and director bar on McGinn, who was CEO of IASG, a publically traded company. Both the Exchange Act and the Securities Act give the Court express authority to impose officer and director bars: "… if the person's conduct demonstrates unfitness to serve as an officer or director . . . ." 15 U.S.C. §§ 77t(e) and 78u(d)(2). In deciding whether to impose an officer and director bar, a court may consider: "(1) the egregiousness of the underlying securities law violation; (2) the defendant's repeat offender status; (3) the defendant's role or position when he engaged in the fraud; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood that misconduct will recur." *SEC v. Patel*, 61 F.3d 137, 141 (2d Cir. 1995). Based on McGinn's egregious, repeated, lengthy, unrepentant conduct that resulted in over $100 million in investor losses, he should not be permitted to serve on the board of a public company again.

E. The Court Should Impose The Maximum Penalty On McGinn And Smith

The Court should impose the maximum penalty on McGinn and Smith pursuant to Section 20(d) of the Securities Act, Section 21(d)(3) of the Exchange Act , and Section 209(e) of

the Advisers Act. The penalty provisions set forth an escalating three tier penalty structure for securities laws violations depending upon the egregiousness of the conduct. The statute provides for civil penalty amounts that shall not exceed the greater of the defendant's gross pecuniary gain, here at least $124 million, or alternatively, an amount ranging from $7,500 per violation for natural persons (for first tier penalties) to $150,000 per violation for natural persons (for third tier penalties).[8]

Section 20(d) of the Securities Act and Section 21(d)(3)(B)(iii) of the Exchange Act provide for "third tier" penalties for securities violations involving "fraud, deceit, manipulation, or deliberate or reckless disregard for a regulatory requirement" that also "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." McGinn and Smith's conduct involved fraud, deceit, and deliberate disregard for regulatory requirements and resulted in substantial losses to investors. The SEC requests that the Court impose the maximum penalty. While there are multiple ways to calculate what constitutes a violation, it is unlikely that any "per violation" calculation of the penalty would result in a higher penalty than the $124 million in gross proceeds, which the Commission accordingly requests.

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[8] These were the maximum penalties per violation during the latest period of the fraudulent conduct. See 17 C.F.R. §§ 201.1001 and 201.1002 (adjusting the statutory penalty amounts for inflation pursuant to the Federal Debt Collection Act of 1996).

V. Summary Judgment Is Warranted As To The Smiths' Fraudulent Transfers Of The Vero Beach House, The Checking Account, The 2004 Transfer of the Charter One Stock to the Smith Trust, the Post July 7, 2010 Transfers And The McGinns' Fraudulent Transfer Of Their Niskayuna House[9]

In 2004, the Smiths fraudulently transferred the Charter One stock to the Smith Trust in the face of the Smiths' mounting legal and financial problems to shield this valuable asset from creditors. In 2009, David and Lynn Smith transferred their jointly owned Vero Beach home and their joint checking account into Lynn Smith's name alone, and Timothy McGinn transferred a residence he purchased in 2003 in his name to his wife Nancy's name alone. These transfers took place after the FINRA investigation began, after a number of investor arbitrations were filed and after Smith and McGinn had admitted to investors that the Four Funds were insolvent. These conveyances were all fraudulent, as were the Smiths' post-July 7 2010 conveyances from the Smith Trust that had been unfrozen based on the Smiths fraudulent misrepresentations and omissions to the Court.

To sustain its burden of proof that a conveyance is fraudulent under New York's Debtor and Creditor Law § 276, the SEC must prove that "(1) the thing transferred has value out of which the creditor could have realized a portion of its claim; (2) that this thing was transferred or disposed of by debtor; and (3) that the transfer was done with actual intent to defraud." *In Re Flutie New York Corp.*, 310 B.R. 31, 56 (Bankr. S.D.N.Y. 2004) (citing *Gentry v. Kovler (In re Kovler)*, 249 B.R. 238, 243 (Bankr. S.D.N.Y. 2000). The SEC need only prove the transferor's intent to hinder or delay, and not necessarily an intent to defraud. *In Re Jacobs*, 394 B.R. 646, 658 (Bankr. E.D.N.Y. 2008); *see In re Dreier LLP*, 452 B.R. 391, 432-33 (Bankr. S.D.N.Y.

[9] As noted above, the Court need not reach the fraudulent conveyance claims as to the Vero Beach proceeds, the Lynn Smith Checking Account, the Niskayuna residence and the Smith Trust if it decides to order disgorgement of these assets on the ground that they were assets of Smith and McGinn even after the fraudulent transfers.

2011)) (stating that "it is the transferor's intent alone, and not the intent of the transferee, that is relevant under NYDCL § 276."). Such intent must be proven by clear and convincing evidence. *See In Re Jacobs*, 394 B.R. at 658. Where direct evidence is lacking, actual intent may be proven by circumstantial evidence. *In Re le Café Crème*, 244 B.R. 221, 239 (Bankr. S.D.N.Y. 2000). The Second Circuit has identified these "badges of fraud" as circumstantial evidence giving rise to an inference of actual intent: "(1) the lack or inadequacy of consideration; (2) the family, friendship or close associate relationship between the parties; (3) the retention of possession, benefit or use of the property in question; (4) the financial condition of the party sought to be charged both before and after the transaction in question; (5) the existence or cumulative effect of a pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors; and (6) the general chronology of the events and transactions under inquiry." *Id.* (citing *In Re Kaiser*, 722 F.2d 1574, 1582 (2d Cir. 1983)). Finally, where the transfers were made in the course of executing a Ponzi scheme, the debtor's fraudulent intent is presumed under New York Debtor and Creditor Law. *In re Bernard L. Madoff Inv. Securities LLC*, 458 B.R. 87, 104 (Bankr. S.D.N.Y. 2011). All of the below conveyances were enveloped in "badges of fraud" and the Court should enter summary judgment in the Commission's favor as to each of these conveyances.

The Smiths' Fraudulent Conveyance of the Vero Beach House

The Smiths purchased the Vero Beach house in 2001 in both their names using assets from the Stock Account. SMF ¶ 567. The Vero Beach house remained in both Smiths' name until 2009, when the Smiths transferred title to Lynn Smith's name alone. *Id.* By the end of 2007, David Smith knew that the Four Funds were deeply underwater. SMF ¶¶ 122-144 In 2008, David Smith sent three letters to the Four Funds investors, noting that the Four Funds were increasingly in difficulty. In the October 2008 letter, he unilaterally reduced interest payments

for all notes and extended maturity dates of the notes, some until 2023. In 2008 and 2009, McGinn Smith found itself in need of capital for both working capital and regulatory purposes. SMF ¶¶ 137-144.

Internal McGinn Smith emails in 2009 reveal a constant need to raise millions of dollars, a growing desperation to meet payroll and interest payments to investors and assuage investors complaining of a Ponzi scheme. SMF ¶ 549. Also in 2009, FINRA commenced an investigation of McGinn Smith that caused great concern within the company, and McGinn and Smith were named as respondents in a number of FINRA arbitrations filed by customers. SMF ¶¶ 208-219. 532. In a January 7, 2009 letter to his financial planner, Smith stated: "Also, I am interested in reducing my exposure to personal liability as a result of the very litigious business that I am in. You mentioned transferring my share in the Vero Beach house and Saratoga residence to Lynn or a Trust." SMF ¶ 555. In January 2009, Smith also acknowledged in an e-mail to McGinn that "Lynn and I have to shift money around between us." SMF ¶ 557.

The Smiths' Fraudulent Conveyance of the Checking Account

From the beginning of their marriage in 1968, the Smiths maintained a joint checking account from which they paid their household bills. SMF ¶ 558 David Smith's payroll checks from McGinn Smith were routinely deposited into the joint checking account. SMF ¶ 559. . In or about July 2009, Lynn Smith opened a checking account at the Bank of America in her name only. SMF ¶ 560. Between July 15, 2009 and April 8, 2010, David Smith payroll checks totaling $129,096.67 were deposited into the Lynn Smith checking account. SMF ¶ 563. Lynn Smith stated that she opened the checking account in her name only because she wanted "to have some independence" and wanted to be able to write checks to her unemployed daughter without David Smith looking over her shoulder, not to shield assets from creditors. SMF ¶ 564. However, Lynn Smith had been writing $1,000 checks to her daughter Lauren Smith to assist in rent

payments from the Smiths' joint checking account almost every month from at least March 2007 without any need for a separate checking account. SMF ¶ 565. The Court found Lynn Smith's testimony concerning the reasons she opened the checking account "incredible." *SEC v. McGinn Smith et al.,* 752. F. Supp.2d 194 at 203, fn. 13; 7/7/10 MDO, Dkt. No. 86 at p. 9, fn. 13.

The Court froze the Vero Beach residence and the Checking Account in its July 7, 2010 decision, finding that: " … the SEC has demonstrated a likelihood of success in proving that these assets were jointly owned by David Smith and that the 2009 transfers into Lynn Smith's name alone were solely for the fraudulent purpose of shielding David Smith's assets from seizure. *SEC v. McGinn Smith*, 752 F. Supp. 2d at 217.[10]

The McGinns Fraudulently Conveyed the Niskayuna Residence From Timothy McGinn to Nancy McGinn

Timothy McGinn purchased the house in Niskayuna in 2003 in his own name. SMF ¶ 572. Timothy McGinn and Nancy McGinn began living together at that time. SMF ¶ 573. They were married in July 2006. SMF ¶ 574. When the McGinns purchased a house in Florida in approximately 2008, they purchased it in both Timothy and Nancy McGinn's name. SMF ¶ 585. N. McGinn 11/28/11 Dep. at 60:6-22.

On October 13, 2009, Timothy McGinn attended the testimony of William Lex, a McGinn Smith broker, in connection with a FINRA arbitration hearing arising from a customer filed against Timothy McGinn, David Smith, McGinn Smith Advisors, McGinn Smith Capital

[10] On February 2, 2011, the Court granted the SEC's motion to lift the asset freeze to permit the sale of the Vero Beach house because it was declining in value. Dkt. 263. The Second Circuit affirmed the Court's decision: "… although the equitable relief sought goes beyond mere preservation of the status quo, the SEC's showing of its likelihood of success on the merits with respect to both the underlying securities law violation and David Smith's joint ownership of the Florida house constitutes a sufficiently 'persuasive showing of its entitlement to a preliminary injunction' to justify the 'more onerous burdens of the injunction its seeks." *Smith v. SEC,* 653 F.3d 121, 129 (2d Cir. 2011).

Holdings Corp., Lex, and others. SMF ¶ 576. The claimants were seeking compensatory damages of $2,577,000, commissions, interest, attorneys' fees and punitive damages. SMF ¶ 577. Timothy McGinn emailed Nancy McGinn from his iPhone: "Lex is very poor witness. We have important points to make. David and I will do so Thurs & Friday. I hate the retail business.' SMF ¶ 578. Six days later, on October 19, 2009, Timothy McGinn transferred title to his residence located in Niskayuna, New York to Nancy McGinn for one dollar consideration. SMF ¶ 579. [11] Timothy McGinn was the one who brought up the idea of making the transfer of the Niskayuna residence in October 2009. SMF ¶ 582. On December 31, 2009, a FINRA arbitration panel held that McGinn Smith and Co, Lex and David Smith were jointly and severally liable to the claimants for $805,111 in compensatory damages and other fees. Timothy McGinn was not found liable for any payments. SMF ¶ 581.

There is no plausible explanation for the Smiths' sudden decisions to put the checking account and the Vero Beach house in Lynn Smith's name alone, and Timothy McGinn's sudden decision to transfer the Niskayuna house to Nancy McGinn other than to shield these assets from investors. Accordingly, if the Court has not alternatively ordered these assets disgorged as assets of David Smith and Timothy McGinn, summary judgment should be entered in the SEC's favor as to these fraudulent conveyances.

The 2004 Fraudulent Conveyance of the Charter One Stock to the Smith Trust

If the Court finds that David Smith jointly owned and controlled the Smith Trust, it can order that asset subject to disgorgement without the need to reach this alternative claim that the Charter One stock was fraudulently conveyed to the Smith Trust. However, summary judgment

[11] The Niskayuna residence was a five bedroom home which Timothy McGinn bought for approximately $600,000 in 2003 and put approximately $235,000 in improvements into the home. SMF ¶ 580.

in the SEC's favor is also warranted as to this claim. At the time of the transfer of the Charter One stock to the Smith Trust, the FIIN and FEIN fraudulent offerings were well underway. The FIIN offering dated September 15, 2003 and the FEIN offering dated January 16, 2004 each raised $20 million from investors. SMF ¶¶ 485. The private placement memoranda for both offerings did not permit investments in affiliates but Smith from the beginning invested with affiliates. SMF ¶ 486. As of December 31, 2003, 11% of the investments were with affiliates, and this grew to 32% by December 31, 2004. SMF ¶¶486-487. Smith therefore knew that he would likely become liable to the defrauded investors and/or to the SEC as a result of his ongoing violations of the federal securities laws. *Id.* In addition, at the time of the transfer to the Smith Trust, the liabilities of FIIN and FEIN already exceeded their assets. SMF ¶ 488. As a result, Smith knew that he would be unable to meet the payment obligations of these Funds to investors. *Id.*

Also, in December 2003, David Smith, Lynn Smith, Timothy McGinn, MS & Co. and other entities controlled by Smith and McGinn were named as defendants in *Meyers v. Integrated Alarm Services Group, Inc.,* a federal civil securities fraud suit arising from the June 2003 initial public offering of IASG. The complaint alleged 23 causes of action and sought $3 million in damages for each claim. The complaint included allegations relating to two $3 million loans by Lynn Smith to certain entities to facilitate a public offering of IASG. The Stock Account was used to make these loans. The case was settled in the spring of 2004 and included payments totaling $200,000 to the plaintiff from M&S Partners and IASG. Lynn Smith and David Smith were signatories to the Settlement Agreement. SMF ¶¶ 471-475. .

In addition, on February 26, 2004, the SEC sent David Smith a letter setting forth violations of various rules and regulations under the Exchange Act and the National Association

of Securities Dealers, Inc. rules that McGinn Smith had been found to have violated. SMF ¶ 476. David Smith was fully aware that his actions could result in significant financial loss. For example, in his handwritten "personal confession" to McGinn, Smith had previously written that:

> The business has become addicted to the cash flow from the trust business, and without that we will have a difficult time surviving. . . . The default of the trusts will drastically reduce revenues, cause us to lose brokers and at least their confidence in us, bring on crushing litigation and devastating publicity and I am convinced prosecution by regulators or worse. . . . I am overwhelmed by the thought of the financial losses, the humiliation, the perceived betrayal of trust. . . . I, unlike you, feel that we are vulnerable to criminal prosecution. . . .

SMF ¶ 478.

This evidence supports a finding that the Smiths fraudulently conveyed the Charter One stock to the Smith Trust to shield it from the Smiths creditors and warrants summary judgment in the SEC's favor on this claim.

The July 2010 Fraudulent Conveyances From the Smith Trust

On July 9, 2010, two days after the Court unfroze the Smith Trust, $95,741 was wired from the Smith Trust to the Dunn Law Firm. On July 12, 2010, $96,500 was wired from the Smith Trust to Geoffrey Smith, who used $75,000 of that money to Lynn Smith a partial down payment for the Sacandaga Lake property and used the remaining $21,500 to pay off credit card debt, for health insurance and other small uses. On or about the same day, $75,000.00 was wired from the Smith Trust to Lauren Smith who used that money as a down payment to her parents for the purchase of the Sacandaga Lake property; she also received $1,800 which she used as a rent security deposit and $6,200 to pay off credit card debt. On July 16, 2010, $200,000 was transferred from the Smith Trust to Geoffrey Smith, for an investment in his new business. SMF ¶¶ 586-594; 602-603. .

On July 20, 2010, David Smith faxed documents relating to the Annuity Agreement to David Wojeski, the Smith Trust Trustee, including a "Private Annuity Contract" signed by David Smith on October 19, 2004 and a contract term sheet evidencing the Smith Trust's obligation to make yearly payments of $489,932 to the Smiths beginning in September 2015. Wojeski's time sheets reflect that on July 20, 2010, he read and did research regarding private annuity trusts. Geoffrey Smith learned of the Annuity Agreement no later than July 20, or July 21, 2010 when he received a telephone call from Wojeski asking about the Annuity Agreement. Following the call, Geoffrey Smith spoke with David Smith about the Annuity Agreement on either July 20 or July 21, 2010. SMF ¶¶ 595-604.

Geoffrey Smith and David Smith met with Wojeski at Wojeski's office on July 21, 2010. Geoffrey Smith and Wojeski calculated how much money the Smith Trust would need to earn to meet its annuity payment obligations to the Smiths. On July 22, 2010, Lynn Smith sold the Sacandaga Lake property to the Smith Trust. On July 23, 2010, $449,878 was wired from the Smith Trust's to Lynn Smith as the remainder of the payment for the Smith Trust's purchase of the Sacandaga Lake property. SMF ¶¶ 599-603.

Thus, David Smith, Wojeski, the Trustee, Jill Dunn, the Smith Trust's attorney, and Geoffrey Smith were all aware of the Annuity Agreement prior to the Smith Trust's use of Trust proceeds to purchase the Sacandaga Lake property from Lynn Smith on July 21, 2010 and all four also knew that the Court was not aware of the Annuity Agreement when it unfroze the Smith Trust. Also, the Smiths were aware of the Annuity Agreement before all such post-July 7, 2010 fraudulent transfers out of the Smith Trust for their benefit. No reasonable trier of fact could conclude that these transfers were not fraudulent conveyances. Accordingly, the Court

should enter summary judgment in the SEC's favor as to all of these fraudulent conveyances from the Smith Trust.

CONCLUSION

For the foregoing reasons, plaintiff SEC respectfully requests that the Court grant its motion for summary judgment.

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