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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

SECURITIES AND EXCHANGE COMMISSION,

PLAINTIFF,

v.

BRIAN J. SMART, and
SMART ASSETS, LLC, a California limited liability
company,

DEFENDANTS.

**PLAINTIFF'S REPLY
MEMORANDUM IN
FURTHER SUPPORT OF
PLAINTIFF'S MOTION TO
STRIKE THE SECOND
DECLARATION OF BRIAN
J. SMART**

Civil No. 2:09cv00224 (DAK)

Judge Dale A. Kimball

Plaintiff, the Securities and Exchange Commission (the "Commission"), by and through its counsel of record, has filed a Motion to Strike the Second Declaration of Brian J. Smart. Defendants Brian J. Smart ("Smart") and Smart Assets LLC ("Smart Assets") have opposed this motion. The Commission, through its counsel, hereby

submits this reply memorandum in further support of Plaintiff's Motion to Strike the Second Declaration of Brian J. Smart.

ARGUMENT

This court should strike the Second Declaration of Brian J. Smart filed on March 11, 2010 because Mr. Smart invoked his Fifth Amendment privilege against self-incrimination during both investigative testimony and the deposition of Smart Assets. See Fitzsimons Decl. Exh. 41. Mr. Smart should not be permitted to enter a self-serving declaration while asserting the protections of the Fifth Amendment privilege against self-incrimination during discovery.

Mr. Smart testified for almost two hours at deposition prior to exercising his Fifth Amendment privilege. See Fitzsimons Decl. Exh. 41 at 85:16. It was not until Mr. Smart was confronted with documentary evidence that he requested a recess to confer with counsel. See Fitzsimons Decl. Exh. 41 at 85:1-85:17. Upon returning from the seven minute recess, Mr. Smart invoked his Fifth Amendment privilege to the majority of the Commission's counsel's questions. See Fitzsimons Decl. Exh. 41 at 85:18-86:5.

Defendants contend that because Mr. Smart offered limited testimony at deposition, he should now be allowed to testify. Mr. Smart exercised his Fifth Amendment privilege over five-hundred times at deposition, while tactically answering the few questions that assisted with his defense. Moreover, in their opposition brief, the Defendants cite to select portions of Mr. Smart's deposition transcript in order to give the appearance that Mr. Smart testified about the topics identified in his declarations. In reality, Mr. Smart exercised his Fifth Amendment privilege to the majority of the Commission's questions, including the subjects discussed in his second declaration. This

is another attempt by the Defendants to convert the protective shield of the Fifth Amendment into a sword. See SEC v. Softpoint, Inc., 958 F. Supp. 846, 857 (S.D.N.Y. 1997). Defendants can not do so.

In his declaration, Mr. Smart claims that he never made statements to Ms. Brown and Ms. Chaplin-Lee that their funds were held in “S&P index and mutual funds, IRAs, Roth 403 and 401k’s that were 100% secure and were offered by his employer: AIM Associates.” See Second Declaration of Brian J. Smart at ¶ 4. While Defendant’s opposition papers selectively cite the sections of the record that appear to demonstrate that Mr. Smart testified on his dealings with Ms. Brown and Ms. Chaplin-Lee, a closer look at the transcript gives a better picture of how Mr. Smart tactically invoked his Fifth Amendment privilege to questions relating to this topic:

Q: Did you tell Ms. Chaplin that you were going to invest her money in low-risk Principal-guaranteed investments?

A: I take the Fifth.

Q: Did you intentionally mislead Ms. Chaplin-Lee by telling her you were going to invest her money in low-risk principal-guaranteed investments?

A: Take the Fifth.

Q: Did you use Ms. Chaplin-Lee's money for your own personal expenses?

A: Take the Fifth.

Q: Did you use Ms. Chaplin-Lee's money –

A: Go back to that. No. I have to go back to that question. No. Repeat. Repeat the last one.

Q: Did you use Ms. Chaplin-Lee's money for your own personal expenses?

A: No.

Q: Did you use Ms. Chaplin-Lee's money to invest in real estate?

A: For you to say "use," I -- I did not touch her money. Her money went directly to them. So I don't understand the question itself.

Q: Whether you were an intermediary for her money to reach your investment or not. Did you –

A: I had nothing to do --

Q: -- use her money?

A: I had nothing to do with these people, so I don't -- I still don't understand the question, because if I have no connection with these people, how do I have any connection to use her money?

Q: Did you use Ms. Chaplin-Lee's money pursuant to a real estate investment in Smart Assets, LLC?

A: I take the Fifth. I don't understand.

See Fitzsimons Decl. Exh. 41 at 93:7-94:16.

Q: Did you intentionally mislead Ms. Chaplin-Lee regarding how you were going to use her money?

A: I take the Fifth.

See Fitzsimons Decl. Exh. 41 at 95:1-95:4.

Q: (By Mr. Fitzsimons) Did you ever receive any money from Ms. Dagmar Chaplin-Lee.

A: I take the Fifth.

See Fitzsimons Decl. Exh. 41 at 95:24-96:1.

Q: Did you use Ms. Logan Brown's money for reasons other than what you told her you'd use it for?

A: I take the Fifth.

Q: Did you use Ms. Logan Brown's money to invest in real estate?

A: I take the Fifth.

Q: Did you use Ms. Logan Brown's money for hard lending?

A: I take the Fifth.

Q: Did you intentionally mislead Ms. Logan Brown regarding how you were going to use her money?

A: No.

Q: Did you mislead Ms. Logan Brown regarding how you were going to use her money?

A: Speculative, but I take the Fifth.

See Fitzsimons Decl. Exh. 41 at 141:4-141:20.

Q: (By Mr. Fitzsimons) Did you mislead Ms. Logan Brown regarding the status of her investment in Smart Assets, LLC?

A: I take the Fifth.

Q: Did you intentionally mislead Ms. Logan Brown regarding the status of her investment with Smart Assets, LLC?

A: No.

Q: Did you routinely mislead Ms. Logan Brown with regard to

the status of her investment with Smart Assets, LLC?

A: I take the Fifth.

See Fitzsimons Decl. Exh. 41 at 143:9-143:20.

Mr. Smart also claims that the "Safe Guard VI" document "describes products that [Mr. Smart] was contemplating becoming involved with. [Mr. Smart] never offered or sold the Safe Guard products as described in this document, nor did [he] represent to any person that [he] had sold or would sell the products." See Second Declaration of Brian J. Smart at ¶ 7. Again, Defendants' selective citation to the transcript does not give the Court a complete picture of Mr. Smart's testimony on the subject:

Q: P-14 [the Smart Assets, LLC Safe Guard VI product information sheet referenced in Mr. Smart's declaration] lists that the "product objective" is for clients to "realize above-average returns without risking loss of principal." Is this true?

A: I take the Fifth.

Q: Was the Safe Guard VI a product that Smart Assets, LLC offered to clients that was principal-guaranteed?

A: I take the Fifth.

Q: Is Safe Guard VI an annuity product?

A: Say it again.

Q: Is Safe Guard VI an annuity product?

A: I take the Fifth.

Q: P-14 lists at the bottom "low-risk mutual funds, low-risk index funds." Was Ms. Brown's money invested in these low-risk mutual funds?

A: No.

Q: Was Ms. Brown's money invested in low-risk index funds?

A: No.

Q: Was Ms. Brown's investment with Smart Assets, LLC principal-guaranteed?

A: I take the Fifth.

Q: Who created this product information document?

A: I take the Fifth.

Q: Did you create P-14?

A: I take the Fifth.

Q: Did you give P-14 to Ms. Brown?

A: I take the Fifth.

Q: Did you create P-14 to mislead Ms. Brown to invest money with you in Smart Assets, LLC?

- A: I take the Fifth.
Q: Is P-14 a false and misleading product information sheet?
A: I take the Fifth.
Q: Was P-14 created in order to prompt the investment in Smart Assets, LLC?
A: I take the Fifth.
Q: Does P-14 contain misrepresentations?
A: I take the Fifth.
Q: Does P-14 reflect any product offered by Smart Assets, LLC?
A: I take the Fifth.
Q: When was P-14 created?
A: I don't know.
Q: Is P-14 a false and misleading document that you created --
A: I take the Fifth.
Q: -- to mislead the Browns?
A: I'm sorry, I thought you were done. I take the Fifth.

See Fitzsimons Decl. Exh. 41 at 126:20-128:20.

While Mr. Smart may have answered a few questions relating to the topics referenced in his declaration, it is clear from Mr. Smart's deposition transcript that he invoked his Fifth Amendment privilege in order to avoid answering the majority of the Commission's counsel's questions. Mr. Smart may not answer those questions that are convenient to his defense, while hiding behind the Fifth Amendment when the answers are less flattering. The Court should therefore strike Mr. Smart's second declaration.

CONCLUSION

For the foregoing reasons, this Court should STRIKE the Second Declaration of Brian J. Smart dated March 11, 2010.

Respectfully submitted this 15th day of April, 2010.

/s/ Jacob D. Krawitz
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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April, 2010, I caused to be filed the Plaintiff's Reply Memorandum in Further Support of Plaintiff's Motion to Strike the Second Declaration of Brian J. Smart through the Court's CM ECF System, and sent a true and correct copy of the same to:

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