

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

SCOTT I. KUPERSMITH and
FREDERICK C. CHELLY,

Defendants.

11 Civ. 6277 (KSH) (PS)

BCF CASE

[PROPOSED] FINAL JUDGMENT AS TO DEFENDANT SCOTT I. KUPERSMITH

The Securities and Exchange Commission having filed a Complaint and Defendant Scott

I. Kupersmith having entered a general appearance; consented to the Court's jurisdiction over Defendant and the subject matter of this action; consented to entry of this Final Judgment; waived findings of fact and conclusions of law; and waived any right to appeal from this Final Judgment:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant and Defendant's agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise are permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rules 10b-5 and 10b-21 promulgated thereunder [17 C.F.R. §§ 240.10b-5 and 240.10b-21], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

- (a) to employ any device, scheme, or artifice to defraud;
- (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading;
- (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person; or
- (d) to submit an order to sell an equity security while deceiving a broker or dealer, a participant of a registered clearing agency, or a purchaser about his intention or ability to deliver the security on or before the settlement date, and failing to deliver the security on or before the settlement date.

II.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant and Defendant's agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Judgment by personal service or otherwise are permanently restrained and enjoined from violating Section 17(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

- (a) to employ any device, scheme, or artifice to defraud;
- (b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements

made, in light of the circumstances under which they were made, not misleading;

or

- (c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

III.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is liable for disgorgement of \$640,000, representing his ill-gotten gains as a result of the conduct alleged in the Complaint, together with prejudgment interest. However, Defendant's obligation to pay disgorgement and prejudgment interest shall be deemed satisfied upon entry of this Final Judgment by the restitution orders to be entered against him in *United States of America v. Scott Kupersmith*, 2:12-cr-00375 (DNJ) (KSH) ("*United States v. Kupersmith*") and *The People of the State of New York v. Scott Kupersmith et al.*, Ind. No. 04360/2011 (Sup. Ct. N.Y. County) ("*New York v. Kupersmith*"), provided that Defendant does not withdraw his guilty pleas in *United States v. Kupersmith* or *New York v. Kupersmith* and the total amount of restitution imposed on him exceeds \$640,000.

IV.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Consent is incorporated herein with the same force and effect as if fully set forth herein, and that Defendant shall comply with all of the undertakings and agreements set forth therein.

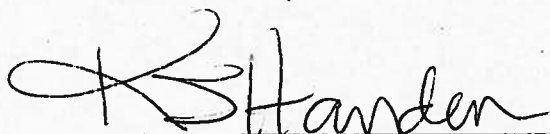
VI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

VII.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice.

Dated: March 6, 2013


UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

SCOTT I. KUPERSMITH and
FREDERICK C. CHELLY,

Defendants.

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: 11 Civ. 6277 (KSH) (PS)

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: ECF CASE

CONSENT OF DEFENDANT SCOTT I. KUPERSMITH

1. Defendant Scott I. Kupersmith ("Defendant") acknowledges having been served with the Complaint in this action, enters a general appearance, and consents to the Court's jurisdiction over Defendant and over the subject matter of this action.

2. Defendant has pleaded guilty to criminal conduct related to certain matters alleged in the Complaint in this action. Specifically, Defendant pleaded guilty to an Information charging him with securities fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff, and 17 C.F.R. § 240.10b-5, in *United States of America v. Scott Kupersmith*, 2:12-cr-00375 (DNJ) (KSH) ("*United States v. Kupersmith*"), before the United States District Court for the District of New Jersey. In connection with that plea, Defendant admitted the facts set out in his plea allocution. The Information and transcript of Defendant's plea allocution in *United States v. Kupersmith* is attached as Exhibit A to this Consent. Additionally, Defendant pleaded guilty to, *inter alia*, one count of Scheme to Defraud in the First Degree in violation of New York Penal Law § 190.65(1)(b) and one count of Securities Fraud in violation of General Business Law § 352-c(5), before the Supreme Court of the State of New York for the County of New York in *The People of the State of New York v. Scott Kupersmith et al.*, Ind. No. 04360/2011 (Sup. Ct. N.Y. County)

(“*New York v. Kupersmith*”). In connection with that plea, Defendant admitted the facts set out in his plea allocution in *New York v. Kupersmith* that is attached as Exhibit B to this Consent. This Consent shall remain in full force and effect regardless of the existence or outcome of any further proceedings in *United States v. Kupersmith* or *New York v. Kupersmith*.

3. Defendant hereby consents to the entry of the final Judgment in the form attached hereto (the “Final Judgment”) and incorporated by reference herein, which, among other things:

(a) permanently restrains and enjoins Defendant from violation of Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”) [15 U.S.C. § 78j(b)] and Rules 10b-5 and 10b-21 promulgated thereunder [17 C.F.R. §§ 240.10b-5 and 240.10b-21] and Section 17(a) of the Securities Act of 1933 (the “Securities Act”) [15 U.S.C. § 77q(a)]; and

(b) orders that while Defendant is liable to pay disgorgement of \$640,000, representing his ill-gotten gains, together with prejudgment interest, such obligation to pay disgorgement and prejudgment interest shall be deemed satisfied by the restitution orders to be entered in the criminal actions against him in *United States v. Kupersmith* and *New York v. Kupersmith*, provided that Defendant does not withdraw his guilty pleas in *United States v. Kupersmith* or *New York v. Kupersmith* and the total amount of restitution imposed on him exceeds \$640,000.

4. Defendant waives the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

5. Defendant waives the right, if any, to a jury trial and to appeal from the entry of the Final Judgment.

6. Defendant enters into this Consent voluntarily and represents that no threats, offers, promises, or inducements of any kind have been made by the Commission or any member, officer, employee, agent, or representative of the Commission to induce Defendant to enter into this Consent.

7. Defendant agrees that this Consent shall be incorporated into the Final Judgment with the same force and effect as if fully set forth therein.

8. Defendant will not oppose the enforcement of the Final Judgment on the ground, if any exists, that it fails to comply with Rule 65(d) of the Federal Rules of Civil Procedure, and hereby waives any objection based thereon.

9. Defendant waives service of the Final Judgment and agrees that entry of the Final Judgment by the Court and filing with the Clerk of the Court will constitute notice to Defendant of its terms and conditions. Defendant further agrees to provide counsel for the Commission, within thirty days after the Final Judgment is filed with the Clerk of the Court, with an affidavit or declaration stating that Defendant has received and read a copy of the Final Judgment.

10. Consistent with 17 C.F.R. § 202.5(f), this Consent resolves only the claims asserted against Defendant in this civil proceeding. Defendant acknowledges that no promise or representation has been made by the Commission or any member, officer, employee, agent, or representative of the Commission with regard to any criminal liability that may have arisen or may arise from the facts underlying this action or immunity from any such criminal liability. Defendant waives any claim of Double Jeopardy based upon the settlement of this proceeding, including the imposition of any remedy or civil penalty herein. Defendant further acknowledges that the Court's entry of a permanent injunction may have collateral consequences under federal or state law and the rules and regulations of self-regulatory organizations, licensing boards, and

other regulatory organizations. Such collateral consequences include, but are not limited to, a statutory disqualification with respect to membership or participation in, or association with a member of, a self-regulatory organization. This statutory disqualification has consequences that are separate from any sanction imposed in an administrative proceeding. In addition, in any disciplinary proceeding before the Commission based on the entry of the injunction in this action, Defendant understands that he shall not be permitted to contest the factual allegations of the Complaint in this action.

11. Defendant understands and agrees to comply with the Commission's policy "not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings." 17 C.F.R. § 202.5. In compliance with this policy, Defendant acknowledges the guilty pleas for related criminal conduct described in paragraph 2 above, and Defendant agrees: (i) not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis; and (ii) that upon the filing of this Consent, Defendant hereby withdraws any papers filed in this action to the extent that they deny any allegation in the complaint. If Defendant breaches this agreement, the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket. Nothing in this paragraph affects Defendant's: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which the Commission is not a party.

12. Defendant hereby waives any rights under the Equal Access to Justice Act, the Small Business Regulatory Enforcement Fairness Act of 1996, or any other provision of law to seek from the United States, or any agency, or any official of the United States acting in his or

her official capacity, directly or indirectly, reimbursement of attorney's fees or other fees, expenses, or costs expended by Defendant to defend against this action. For these purposes, Defendant agrees that Defendant is not the prevailing party in this action since the parties have reached a good faith settlement.

13. In connection with this action and any related judicial or administrative proceeding or investigation commenced by the Commission or to which the Commission is a party, Defendant (i) agrees to appear and be interviewed by Commission staff at such times and places as the staff requests upon reasonable notice; (ii) will accept service by mail or facsimile transmission of notices or subpoenas issued by the Commission for documents or testimony at depositions, hearings, or trials, or in connection with any related investigation by Commission staff; (iii) with respect to such notices and subpoenas, waives the territorial limits on service contained in Rule 45 of the Federal Rules of Civil Procedure and any applicable local rules, provided that the party requesting the testimony reimburses Defendant's travel, lodging, and subsistence expenses at the then-prevailing U.S. Government per diem rates; and (iv) consents to personal jurisdiction over Defendant in any United States District Court for purposes of enforcing any such subpoena.

14. Defendant agrees that the Commission may present the Final Judgment to the Court for signature and entry without further notice.

15. Defendant agrees that this Court shall retain jurisdiction over this matter for the purpose of enforcing the terms of the Final Judgment.

Dated: July 2, 2012

Scott Kupersmith
Scott I. Kupersmith

On July 2nd, 2012, 20, SCOTT KUPERSMITH, a person known to me, personally appeared before me and acknowledged executing the foregoing Consent.

Jerry Bykes
Notary Public
Commission expires:

JERRY BYKES
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires May 23, 2017
2017

7/2/12
JRL