

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

THE SMITH BARNEY DIVISION OF	:	CIVIL ACTION
CITIGROUP GLOBAL MARKETS INC.	:	
(formerly known as Salomon Smith	:	
Barney Inc.),	:	
	:	
Plaintiff,	:	
	:	
	:	NO. 04-5176
	:	
v.	:	
	:	
VINCENT T. LOWRY,	:	
	:	
Defendant.	:	

MEMORANDUM AND ORDER

BUCKWALTER, S.J.

November 9, 2004

Plaintiff seeks a preliminary injunction. At an *ex parte* proceeding on November 5, 2004, the court granted an injunction pending a hearing which was held on November 8, 2004.

The evidence submitted at that hearing in support of the plaintiff's motion for a preliminary injunction consisted of the declaration of Stephen J. Dimodica. In response, the defense introduced the declaration of Vincent T. Lowry.

As all counsel know, the first hurdle to securing an injunction is to show that there is a likelihood that plaintiff will succeed on the merits. This does not require showing a certainty of success. It does, however, require more than merely raising substantial *prima facie* questions on the merits of the claim. See Professional Plan Examiners of N.J. v. Lefante, 750 F.2d 282, 289 (3rd Cir. 1984).

Simply raising substantial *prima facie* issues, as plaintiff's sole declaration does, is no substitute for concluding there is a probability of success on the merits, particularly when, as in this case, the sole declaration of the defendant is equally or more persuasive on the merits of the case.

I cannot conclude from the evidence presented at the hearing that plaintiff has shown a reasonable probability of eventual success in the litigation. For example, the apparent smoking gun, Exhibit "K" of plaintiff's declaration, being the email concerning the Wachovia Commission Recapture Program, is plausibly, at least for purposes of this petition for an injunction, explained by defendant's declaration as being not violative of any contract he had with plaintiff.

Based upon the foregoing, the following ORDER is entered:

AND NOW, this 9th day of November, 2004, it is hereby **ORDERED** that plaintiff's motion for a preliminary injunction and temporary restraining order (Docket No. 2) is **DENIED**, it appearing that plaintiff has failed to show a reasonable likelihood of success on the merits.

The Temporary Restraining Order entered November 5, 2004 is **VACATED**.

BY THE COURT:

RONALD L. BUCKWALTER, S.J.