

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.

**PLAINTIFF’S OPPOSITION TO RELIEF DEFENDANT
LYNN SMITH’S MOTION TO DISMISS**

Plaintiff Securities and Exchange Commission (SEC) respectfully submits this
Opposition to Relief Defendant Lynn Smith’s Motion to Dismiss dated June 9, 2010. As set
forth below, Ms. Smith’s Motion should be denied on the ground that Magistrate Judge
Homer, after a three day hearing and with the benefit of an extensive evidentiary record,

issued an Order on July 7, 2010 rejecting the very same arguments advanced by Ms. Smith in her Motion. That Order is the law of this case. Alternatively, the Motion is mooted by the Amended Complaint that the SEC filed earlier today.

Background

Ms. Smith moves for an Order pursuant to Federal Rules of Civil Procedure (FRCP) Rules 12(b)(1) and 12 (b)(6) dismissing the plaintiff's complaint as to her for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The complaint contained a claim for relief against Ms. Smith as a Relief Defendant based on her receipt, without consideration, of proceeds of the fraudulent and illegal sales of securities alleged in detail in the complaint. The complaint sought disgorgement of all ill-gotten gains by Ms. Smith. (Complaint, Seventh Claim for Relief).

Ms. Smith argues that there is a lack of subject matter jurisdiction and a failure to state a claim for relief against her because the SEC failed to sufficiently allege that she was a proper relief defendant who had received ill-gotten gains without consideration. (See, e.g., L. Smith Memorandum of Law, at 3). She further argues that: "The critical inquiry, for both subject matter jurisdiction and the availability of disgorgement from Lynn Smith is whether she is properly named as a relief defendant. This inquiry turns upon the "legitimate claim" test, that is, whether Lynn Smith is a mere custodian of assets received gratuitously from the Defendants or whether she has a legitimate interest of her own in assets that were received for consideration." *Id.*

Magistrate Judge Homer's Finding That Ms. Smith is a Proper Relief Defendant Is Dispositive

Magistrate Judge Homer rejected the very same arguments advanced by Ms. Smith in his Memorandum-Decision and Order dated July 7, 2010. (Docket # 86). He held, *inter*

alia, that: “Therefore, the SEC has demonstrated a substantial likelihood of success in proving that Lynn Smith is an appropriate relief defendant with respect to the Stock Account and that her Stock Account includes ill-gotten gains to which she has no legitimate claim of ownership. Accordingly, the SEC’s motion on the Stock Account on this ground is granted and the Stock Account shall remain frozen.” *Id.* at 33. Ms. Smith did not seek reconsideration of, and did not appeal, the Order.

Accordingly, Magistrate Judge Homer’s Order, issued after Ms. Smith’s Motion was filed, and finding that she was in fact properly named as a Relief Defendant, is dispositive of Ms. Smith’s motion.

The SEC’s Amended Complaint Renders the Motion to Dismiss Moot

On August 2, 2010, the SEC filed an Amended Complaint (Docket # 100), as of right, in accordance with FRCP Rule 15(a). (See also, Letter Motion of David Stoelting dated June 24, 2010, seeking an extension of time to respond to Relief Defendant’s Motion, including filing an Amended Complaint (Docket # 81), and Court’s Order dated June 28, 2010 granting the Letter Motion and extending time to file responsive papers to August 2, 2010.) The Amended Complaint also names Lynn Smith as a Relief Defendant, and adds a claim of fraudulent conveyance, based on certain facts alleged in the original complaint, additional facts adduced at the preliminary injunction hearing held before Magistrate Judge Homer on June 9 through 11, 2010, as well as numerous additional facts. (See, e.g., Docket # 100, ¶¶ 107 through 138). Because the complaint that Ms. Smith moves to dismiss has been superseded by the Amended Complaint, her Motion is moot.

CONCLUSION

Wherefore, for all of the foregoing reasons, the SEC respectfully requests that the Court deny Ms. Smith's motion in its entirety.

Dated: New York, New York
August 2, 2010

Respectfully submitted,

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