



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

New York Regional Office
Three World Financial Center
New York, NY 10281

DIVISION OF
ENFORCEMENT

David Stoelting
Senior Trial Counsel
(212) 336-0174 (direct)
(212) 336-1324 (fax)

September 3, 2010

BY ECF AND U.S. MAIL

The Honorable David R. Homer
United States Magistrate Judge
United States District Court
Northern District of New York
United States Courthouse
445 Broadway
Albany, New York 12207

Re: *SEC v. McGinn, Smith & Co., Inc., et al.*, 10 CV 457 (GLS)(DRH)

Dear Judge Homer:

I write to request a conference pursuant to Local Rule 7.1(b)(2), which provides that a court conference is required before the filing of a non-dispositive motion. The proposed motion would request that the Court: (1) amend the preliminary injunction order entered on July 22, 2010 to specify that certain defendants and relief defendants may not incur debt on any credit or debit card or through any other credit arrangement without prior Court approval; and (2) compel the Smiths and McGinn to disclose (i) all credit and debit cards in their possession, and (ii) all expenses, payments, and sources of funds used to pay expenses since the imposition of the asset freeze on April 20, 2010, and going forward on a monthly basis.

Background

On April 20, 2010, the Court entered an Order that, among other things, temporarily froze the assets of the defendants and the relief defendant. On July 22, 2010, following a hearing, the Court entered a Preliminary Injunction Order that froze the assets of the defendants and the relief defendant until the resolution of this case.

After the Court's April 20 Order, the Smiths and McGinn continued to make charges on their credit cards. McGinn has charged approximately \$4,000 on a Citibank MasterCard in his name and over \$500 on an American Express Card in his name during the period from April 21 to July 2, 2010. Smith has charged over \$5,000 on a Citibank MasterCard in his name during the period from April 21 to June 22, 2010, including a \$1,000 cash advance taken on June 15, 2010. Lynn Smith has charged over \$600 on a Citibank Exxon Mobil card in her name. The SEC is not aware whether additional charges have been made on these credit cards after the end of June 2010, or on any other credit cards after April 20, 2010.

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In her deposition on May 27, 2010, and at the hearing (Tr. at 272-73), Lynn Smith testified that she had been using credit cards following the entry of the asset freeze on April 20. On June 30 and July 1, 2010, the SEC served document subpoenas on a number of parties, including American Express Company and Citibank. Copies of these subpoenas were provided to defense counsel. In response, the SEC received, among other things, account statements from Citibank and American Express.

Plaintiff has raised the issue of the credit card usage with defense counsel on several occasions. Defense counsel responded that the asset freeze order did not prevent their clients from using their credit cards. On September 1, 2010, plaintiff again raised these charges with counsel for Smith and McGinn and he would not agree to stop his clients' credit card usage.

The Need for the Motion

The credit card usage significantly undermines the purpose of the asset freeze, which is intended to preserve the status quo for the duration of the litigation. Credit card debt creates new creditors and claims that did not exist when the asset freeze was imposed, and also potentially diminishes the assets available to the victims of the fraud.

The Smiths and McGinn also are deceiving the credit card companies by continuing to accumulate charges without telling these companies that they currently have no means to pay back this debt. This credit card usage – coupled with the fact that the Smiths and McGinn have not requested any carve-out for living expenses in the six-months since the asset freeze was imposed – raises questions whether there are, or have been, other violations of the asset freeze.

The purpose of an asset freeze in a Commission action is to “facilitate enforcement of any disgorgement remedy that might be ordered in the event a violation [of the securities laws] is established at trial.” *SEC v. Unifund SAL*, 910 F.2d 1028, at 1041 (2d Cir. 1990). An asset freeze preserves the status quo with respect to a defendant's assets from the time of imposition. By incurring credit card debt without prior Court approval, defendants McGinn and Smith and relief defendant Lynn Smith are potentially impairing the Commission's disgorgement remedy. Moreover, if the Court does not amend the PI Order, defendants Smith and McGinn and relief defendant Lynn Smith could charge thousands of dollars on their credit cards without Court approval through the duration of this litigation.

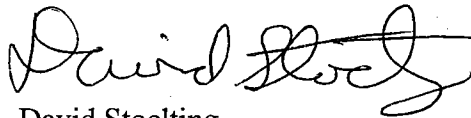
Under Section 20(b) of the Securities Act of 1933 and Section 21(d) of the Securities Exchange Act of 1934, the Court has broad discretion in fashioning equitable relief. 15 U.S.C. § 77t(b); 15 U.S.C. § 78u(d)(5) (“In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.”). Accordingly, plaintiff requests leave to file a motion requesting that the Court amend the PI Order to prohibit defendants Smith and McGinn and relief defendant Lynn Smith from incurring debt without prior Court approval on any credit or debit cards or through any other credit arrangement.

Moreover, the position of the Smiths and McGinn that they have the right to accumulate credit card debt in the face of the asset freeze without prior Court approval or informing the credit card companies of the freeze – and the fact that they have never asked for a carve-out to cover living expenses – raises a red flag.

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Accordingly, plaintiff requests leave to file a motion asking that the Court order that the Smiths and McGinn provide an accounting of their expenditures, payments and liabilities since April 20, including all credit cards used since that time; and that they report to the Court each month with a report showing their expenses, payments and funds received. The monthly reports will provide Court oversight over the Smiths and McGinn and is necessary to ensure compliance with the asset freeze.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David Stoelting". The signature is fluid and cursive, with a long horizontal stroke at the end.

David Stoelting

cc (by e-mail): Martin Russo, Esq.
James Featherstonhaugh, Esq.
Jill Dunn, Esq.