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Admitted in New York
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September 24, 2010

Via CM/ECF Only
Hon. David R. Homer
United States Magistrate Judge
445 Broadway
Albany, NY 12207

Re: SEC v. McGinn, Smith, et al.
10-CV-457 (GLS/DRH)

Dear Judge Homer:

The purpose of this letter is (1) to seek permission to file a surreply to the pending motion of the plaintiff for reconsideration of your July 7, 2010 Memorandum-Decision and Order as to the Trust and (2) to inquire about the scheduling of any further proceedings on this motion so that we may address the impending deadline of September 30, 2010 for responding to the Amended Complaint.

First, the basis for filing a surreply would be to respond to new points raised by the plaintiff for the first time in their reply papers. The areas to be covered by the surreply would be (1) the SEC's suggestion in Footnote 1 that the Court should not rely on the sworn declarations of the undersigned counsel and James Featherstonhaugh on behalf of our clients to refute the SEC's claim that we withheld evidence which was never in our or our respective clients' possession; (2) the SEC's argument, advanced without statutory or case law support, that the Court should exercise "broad equitable powers" in the absence of any jurisdictional basis or statutory authority to freeze assets under the New York Debtor and Creditor Law; (3) the SEC's arguments regarding the Trust's investment in a business created and operated by a beneficiary of the Trust; and (4) the SEC's mischaracterization of David Evans' report and conclusions.

SEC counsel David Stoelting's own sworn declaration in support of the motion was rife with double and triple hearsay, yet his colleagues step forth now to shield him while suggesting that defendants, who did not bear any burden of proof at the preliminary injunction hearing, and do not bear the present burden of proving the existence of newly discovered evidence, cannot rely upon their own counsel's sworn

declarations to refute Mr. Stoelting's accusations. The burden-shifting strategy of the SEC can either be wholly disregarded by the Court, or it can be addressed with the submission of affidavits from the appropriate parties. Similarly, despite Mr. Stoelting remaining silent in the SEC's reply papers after accusing longstanding practitioners of this court with concealing evidence, we also reiterate our request that the Court direct him and all SEC counsel of record to set forth under oath the date on which they learned of the existence of Exhibit 14 and the date on which the SEC received a copy of it from the U.S. Attorney's Office.

Second, in an order entered August 16, 2010 (Document 118), the Court indicated that a further conference would be scheduled following the filing of papers in opposition to the motion and any reply papers to be filed by the plaintiff for the purpose of determining a schedule for completion of the litigation regarding this motion. I respectfully submit that because the determination of the pending motion for reconsideration may affect the nature or manner of responses to the Amended Complaint, the litigation of this motion should be completely before the filing of dismissal motions.

For example, if the Court grants the plaintiff's motion for reconsideration, the Court would be reaching beyond the scope of the pleadings under which the July 7 order was issued and beyond its own jurisdictional limitations to reach defendants' assets based on plaintiffs' claims under the New York Debtor and Creditor Law. By asking the Court to invoke "broad equitable powers", Plaintiff concedes that the restrictions of the New York Debtor and Creditor Law do not allow for the relief it now seeks. See Plaintiff's Reply Memorandum at p. 10 (Document 142). Similarly, in faulting defendants for not citing authority for the lack of a jurisdictional basis for the relief it requests, Plaintiff again misapprehends which party bears the burden of asserting proper jurisdictional grounds. Simply put, this Court's equitable powers, however broadly the Court may construe them, cannot be used as a wholesale substitute for jurisdiction under New York law where none exists. If the Court agrees that it lacks jurisdiction to impose an asset freeze against the Trustee or Geoffrey or Lauren Smith under the original complaint or against any party under the Debtor and Creditor Law in the context of this motion for reconsideration, then it must deny the instant motion and allow the parties to move forward to litigate the jurisdictional issues in the context of the Amended Complaint in dismissal motions before the District Court. My clients have no interest in dissipating or jeopardizing their assets while this litigation moves forward, but a wide-ranging asset freeze based on a TRO issued without an opportunity to be heard, apparently on the basis of Mr. Stoelting's accusations against defense counsel, serves only to prevent them from paying taxes, living expenses and the very professional fees which allow them to litigate this case on the merits.

For the foregoing reasons, I request permission to file a surreply and respectfully submit that, in the interests of judicial economy, it may be more productive for dismissal motions to be filed after we have received the Court's decision on the pending motion for reconsideration. In that regard, the current deadline for answering or moving against the Amended Complaint is next Thursday, September 30, 2010.

Thank you for your consideration.

Very truly yours,

THE DUNN LAW FIRM PLLC

By: *s/Jill A. Dunn*
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JAD/jc

Cc: Counsel of Record (via CM/ECF only)
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