

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

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SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

No. 10-CV-457  
(GLS/DRH)

McGINN, SMITH & CO., INC. et al.,

Defendants.

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**DAVID R. HOMER  
U.S. MAGISTRATE JUDGE**

**ORDER**

Plaintiff Securities and Exchange Commission (“SEC”) commenced this action by filing a complaint alleging that defendant McGinn, Smith & Co., Inc. (“MS & Co.”) and related entities and individuals violated § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a); § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); Rule 10b-5 under the 1934 act, 17 C.F.R. § 240.10b-5; and related provisions. Compl. (Dkt. No. 1) at ¶¶ 7-12. The SEC simultaneously sought a temporary restraining order and preliminary injunction to, inter alia, freeze certain assets pending the outcome of this action, the motion was contested by defendants Lynn A. Smith<sup>1</sup> and David M. Wojeski, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04 (“Trust”),<sup>2</sup> an evidentiary hearing was held, and in a Memorandum-Decision and Order filed July 7, 2010 (“MDO”), the SEC’s motion

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<sup>1</sup>Lynn Smith was named as a relief defendant in the original complaint. Compl. at 1. In an amended complaint filed on August 2, 2010, Lynn Smith was named as a party defendant. Am. Compl. (Dkt. No. 100) at 1..

<sup>2</sup>The Trust’s motion to intervene in this action was granted and the Trust participated in the SEC’s motion for a preliminary injunction as an intervenor. MDO at 1. The Trust was named as a party defendant in the amended complaint. Am. Compl. at 1.

was granted in major part as to Lynn Smith and denied as to the Trust. MDO (Dkt. No. 86).<sup>3</sup> One effect of this order was to unfreeze the assets of the Trust and return control to the trustee.

On August 3, 2010, the SEC moved for reconsideration of that portion of the MDO denying its motion to freeze the assets of the Trust pending the outcome of this action on the ground of newly discovered evidence. Dkt. Nos. 103, 106. On the same date, an order was entered freezing the assets of the Trust and related assets pending the outcome of the SEC's motion to intervene. Dkt. No. 104. The Trust responded to the SEC's motion<sup>4</sup> and the SEC filed a reply. Dkt. Nos. 133-35, 142. The submissions of the SEC and the Trust raise certain questions of fact and credibility requiring an evidentiary hearing. Those questions are as follows:

**1. The Annuity Agreement.** A principal basis for the SEC's motion is that there existed an annuity agreement between David and Lynn Smith and the Trust obligating the Trust to pay David and Lynn Smith approximately \$490,000.00 each year beginning in 2015 for the remainder of both their lives or until the Trust's assets were depleted. See Stoelting Decl. (Dkt. No. 103-2) at ¶ 5 & Ex. 1(Dkt. No. 103-3) ("Annuity Agreement"). The SEC has produced what purports to be a copy of the Annuity Agreement. Dkt. No. 103-3. The copy produced, however, bears the signatures of David and Lynn Smith for themselves

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<sup>3</sup>Familiarity with the MDO is assumed.

<sup>4</sup>Lynn Smith also filed an opposition to the SEC's motion. Dkt. No. 133. The SEC's motion seeks reconsideration only of that portion of the MDO denying its request to freeze the assets of the Trust. The determinations regarding Lynn Smith in the MDO are not subjects of the motion. See also Dkt. No. 128 (Notice of Appeal of the MDO filed by Lynn Smith). Only the Trust, therefore, and not Lynn Smith has standing to oppose the SEC's motion for reconsideration.

but not the signature of the trustee of the Trust as would be necessary to effectuate the agreement. Id. at 5. The submissions of the SEC and the Trust appear to acknowledge or assume the existence of the Annuity Agreement. Absent an unequivocal stipulation, however, a question remains whether the Annuity Agreement was signed by all parties and remains effective.

**2. The Telephone Conversation.** The SEC asserts that its first suspicion that the Annuity Agreement existed occurred in a telephone conversation on July 22, 2010 between two SEC attorneys and the attorney for the Trust. According to the SEC attorneys, “the Trust’s attorney, Jill Dunn, made a passing reference to [the Annuity Agreement] . . .” which led to its discovery. Stoelting Decl. at ¶ 4. According to the Trust’s attorney, however, “[i]n a disgusting attempt to mislead the Court . . . [and w]hile it may add color to the story of the SEC’s supposed ‘Ah ha!’ moment, David Stoelting’s assertion that I made a reference, passing or otherwise, to a ‘private annuity agreement’ in a telephone call on July 22, 2010 is simply and unequivocally false.” Dunn Decl. (Dkt. No. 134) at ¶ 35; see also ¶ 36 (“I can state with absolute certainty that I did not make that statement . . .”). If the SEC’s version of this conversation is false, then the asserted timing and cause of its discovery of the Annuity Agreement and the principal basis for its motion for reconsideration may not exist. A determination of what occurred in the conversation thus becomes material to a determination of the SEC’s motion. What occurred in the telephone conversation rests on an assessment of the credibility of the testimony of the participants, a determination which cannot be made solely on the written submissions and requires the testimony and cross-examination of the participants.

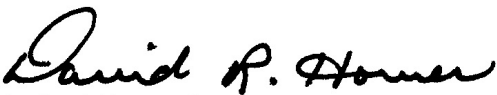
As the movant here, the SEC bears the burdens of both production and persuasion on these questions.

WHEREFORE, it is hereby

**ORDERED** that an evidentiary hearing will be held on **November 4, 2010 at 10:00 a.m.** and continuing to conclusion to hear testimony and evidence on these issues.

**IT IS SO ORDERED.**

DATED: October 7, 2010  
Albany, New York

  
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David R. Homer  
U.S. Magistrate Judge