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October 15, 2010

By FedEx and ECF

Honorable David R. Homer
United States Magistrate Judge
United States District Court for the
Northern District of New York
James T. Foley U.S. Courthouse
445 Broadway, Room 441
Albany, NY 12207

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

Dear Judge Homer:

We represent defendants David L. Smith and Timothy M. McGinn (the "Defendants") in the above-referenced matter, and write to request a conference pursuant to Local Rule 7.1(b)(2) to seek permission to file a non-dispositive motion. The parties have met and conferred by letter and have been unable to agree to a disposition without Court intervention. The proposed motion would seek to have the Court order the Securities and Exchange Commission ("SEC") to (i) immediately cease and desist using documents and information in its possession, custody and control which are derived from the execution of a search warrant against our clients, and (ii) return such documents and information to the appropriate United States Government agencies.

The basis for the proposed motion is the recent decision by the United States Court of Appeals for the Second Circuit in SEC v. Rajaratnam, et ano, Docket No. 10-462-cv (2d Cir. Sept. 29, 2010). After reviewing Rajaratnam, and considering its implications in this matter, we are convinced that the SEC is in possession of documents in violation of our clients' rights. As you know, in mid-April 2010 the Federal Bureau of Investigation ("FBI") and the Internal

GUSRAE, KAPLAN, BRUNO & NUSBAUM PLLC

Honorable David R. Homer

October 15, 2010


Page 2

Revenue Service (“IRS”) obtained a search warrant and executed it against our clients (the “Government Search”). Despite a demand to the United States Attorney’s Office, our clients have never been provided with the search warrant affidavit and have not had an opportunity to challenge the propriety of either the search warrant or the Government’s execution of the search. We understand from documents that the SEC has relied upon in this case, and from conversations with Lara Mehraban, that the United States Government has turned over significant amounts of “evidence” it obtained by virtue of the Government Search. Prior to the decision in Rajaratnam, the SEC produced to us four terabytes of raw data which apparently represent at least a portion of the information seized during the Government Search.

We believe that pursuant to Rajaratnam, the SEC should not have possession, custody or control of documents and information seized in the Government Search. First, our clients have not had an opportunity to challenge the propriety of the search warrant or its execution, and it may be that all or part of the documents and information garnered thereby were illegally obtained. Second, as Rajaratnam makes clear, even if the search warrant was properly executed and the documents and information legitimately seized, the SEC is not entitled to have information which is irrelevant to the instant matter. Our clients have important Fourth Amendment privacy rights which must be protected and which clearly have been violated by virtue of the United States Government’s wholesale production to the SEC of documents and information seized during the search.

Based on the foregoing, we respectfully request a conference to seek leave to file the above-described motion. Thank you in advance for your consideration.

Sincerely,


Martin P. Russo

cc: David Stoelting
U.S. Securities and Exchange Commission
New York Regional Office
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Suite 400
New York, NY 10281-1022

GUSRAE, KAPLAN, BRUNO & NUSBAUM PLLC

Honorable David R. Homer

October 15, 2010

Page 3

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