



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

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

DIVISION OF
ENFORCEMENT

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December 7, 2010

BY ECF

The Honorable David R. Homer
United States Magistrate Judge
United States District Court
Northern District of New York
United States Courthouse
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 pre-motion conference with regard to the SEC's anticipated motion to amend the Preliminary Injunction Order to allow for the sale of a property located in Vero Beach, Florida.

The Court initially froze the Vero Beach house as part of the TRO Order entered April 20, 2010, and the asset freeze was continued following the preliminary injunction hearing. *See* Memorandum-Decision and Order dated July 7, 2010 (Docket # 86) at 36-37, 43 (finding that SEC has demonstrated a likelihood of success in proving that the Vero Beach house was "jointly owned by David Smith and that the 2009 transfer[] into Lynn Smith's name alone were solely for the fraudulent purpose of shielding David Smith's assets from seizure").

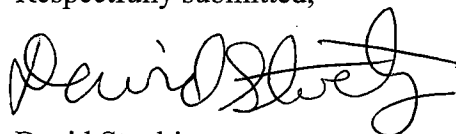
We have conferred with counsel for the Smiths, who have not expressed opposition to the sale of the Vero Beach house. There appears to be substantial equity in the Vero Beach house, which is at risk unless it is sold, because the costs and expenses that continue to accrue are not being paid. The net proceeds from the sale would be deposited with the Court pending the resolution of this action.

Although counsel for Mr. Smith questioned the cost of having the Receiver overseeing the sale, we believe this is the most efficient way to proceed. The Receiver has agreed to act promptly to list the house and to take steps to effectuate the sale. If the Smiths are allowed control over the sale of the house, the SEC is concerned that the sale will be delayed, which will only result in additional costs and expenses accruing. The Receiver has estimated his fees for his role in overseeing the sale at between \$1,500 and \$3,000.

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Given that all parties recognize the necessity for this sale, we do not believe that the usual briefing process should be required. We therefore respectfully request that the Court conduct a telephonic hearing on the proposed Order (attached hereto).

Respectfully submitted,

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

David Stoelting

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

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.

**ORDER MODIFYING ASSET FREEZE
TO ALLOW THE SALE OF CERTAIN PROPERTY**

WHEREAS on April 20, 2010, the Commission filed a Complaint and an Order to Show Cause seeking emergency relief and, on that same date, the Court granted the Commission's request for a temporary restraining order that, among other things, froze the assets of the defendants and the relief defendant (the "Freeze Order") and, on July 22, 2010,

the Court entered the Preliminary Injunction Order that, among other things, continued the Freeze Order over the assets of the defendants and relief defendant; and

WHEREAS, the property located at [REDACTED], Vero Beach, Florida is currently subject to the Freeze Order (the “Florida Property”);

NOW, THEREFORE,

I.

IT IS ORDERED that the Court-appointed Receiver, William J. Brown (the “Receiver”), is given sole authority to take all necessary steps to effectuate a sale of the Florida Property, including the retention of a prominently known real estate agent in that community, and the Freeze Order is hereby modified to permit the Receiver or the Smiths (with the Receiver’s prior written consent) to enter into a contract for the purchase and sale of the Florida Property, and to close a sale of the Florida Property subject to the following terms and conditions:

A. The Receiver shall provide the Commission with a copy of any contract proposed to be accepted for sale of the Florida Property (the “Contract”) within three days of its execution, along with a proposed list of distributions (the “Distribution List”) to be made from the proceeds of such sale. The Distribution List may include, among other things, the mortgagor of the Florida Property, and any usual and customary costs of closing, including broker, attorney, and recording fees, and transfer taxes.

B. The Commission may within one week from the delivery of the Contract and the Distribution List object to the terms of the Contract, and such objections may include the sale price or the proposed distributions. The Court will resolve such objections on motion by the Commission or the Receiver if the Commission and the Receiver do not reach agreement

on such objections. The Commission and the Receiver shall not object to a request for an expedited hearing.

C. The balance of any funds remaining after payment of the Distribution List shall be paid to the Clerk of this Court, together with a cover letter identifying the Smiths as defendants in this action, setting forth the title and civil action number of this action and the name of this Court, and specifying that payment is made pursuant to this Order. The Receiver shall send a copy of the documents sent to the Clerk of the Court to David Stoelting, Senior Trial Counsel, Securities and Exchange Commission, 3 World Financial Center, Room 400, New York, New York 10281-1022, and to the Smiths. The Clerk shall deposit the funds in an interest bearing account with the Court's Registry Fund. These funds, together with any interest and income earned thereon, shall be held by the Registry Fund until further order of this Court.

E. The Commission and the Receiver shall provide such documents as the purchaser of the Florida Property may reasonably require to evidence the Commission's and the Receiver's consent and authority to convey title to the Florida Property.

F. The Receiver shall consult with the Smiths, and the Smiths shall cooperate with the Receiver in the listing, showing and closing of the sale of the Florida Property

II.

IT IS FURTHER ORDERED that, except as modified herein, the Preliminary Injunction Order and in the temporary restraining order entered August 3, 2010 remain in full force and effect.

Dated: Albany, New York
_____, 2010

DAVID R. HOMER
United State Magistrate Judge