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.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO REQUEST BY ISEMAN TO LIFT PRELIMINARY INJUNCTION TO PERMIT PAYMENT OF ATTORNEYS' FEES

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Plaintiff Securities and Exchange Commission respectfully submits this memorandum of law in opposition to the motion of Iseman, Cunningham, Riester & Hyde LLP ("Iseman") to allow the payment of Iseman's legal fees and costs from the frozen assets of the David L. and Lynn A. Smith Irrevocable Trust (the "Trust").

PRELIMINARY STATEMENT

Iseman's request that the Court lift the asset freeze to allow the Trust to pay counsel fees and costs of $83,628.05 should be denied for three reasons:

First, this Court froze the Trust's assets to protect defrauded investors in the event of a final judgment in this action. The amount of frozen funds is substantially less than the amount owed to investors as a result of the defendants' fraudulent scheme. This Court has held that the SEC has demonstrated a substantial likelihood of success that it will prove that the Trust is a David Smith asset (November 22, 2010 Memorandum-Decision and Order, Docket #194, at 21-23 (__ F. Supp. 2d __, 2010 WL 4780315 (N.D.N.Y. Nov. 22, 2010)). As David Smith has asserted his Fifth Amendment rights and failed to provide any accounting of his assets, Iseman's request should be denied. Moreover, Iseman's request should be denied for the same reasons that the Court already has denied all three prior requests for carve-outs in this matter. (Docket #211, 221.)

Second, assets preserved to repay investors should not be used to pay Iseman's fees because Iseman's appearance was necessitated by the misconduct of defendants, their attorneys and others in concealing the Private Annuity Agreement ("Annuity Agreement") from the Court and the SEC.

Finally, the fees are excessive and far beyond those charges reasonable and necessary to represent Ms. Dunn as a witness to the telephone conversation at the November 16, 2010 hearing. Any fees should not include Iseman's redundant and excessive charges, which include

substantial time billed by multiple partners, and substantial time spent regarding the Court's question whether the Annuity Agreement was signed by all parties and remains effective, for which Iseman's involvement was not necessary.

STATEMENT OF FACTS

On August 3, 2010, the SEC filed a motion seeking, among other relief, that the Court reconsider the asset freeze with respect to the Trust. (Docket #103.) In connection with that motion, SEC attorney David Stoelting summarized a telephone conversation that took place on July 22, 2010 between himself, SEC attorney Kevin McGrath and Ms. Dunn, in which the SEC learned of the existence of the Annuity Agreement. (Docket #103-2, at ¶ 36.) On the same day, the Court granted the SEC's application for an order to show cause and emergency relief and, among other relief, temporarily froze the assets of the Trust. (Docket #104.)

On September 3, 2010, Ms. Dunn filed papers in opposition to the SEC's motion in which she disputed Mr. Stoelting's recollection of the July 22 conversation. (Docket #134 at ¶¶ 35, 44-45.) On October 7, 2010, the Court issued an order seeking testimony regarding (1) the telephone conversation and (2) whether the Annuity Agreement was signed by all parties and remains binding and effective. (Docket #150.) The Trust stipulated as to the second issue (Docket #177) and a hearing was held on November 16, 2010 regarding the telephone conversation (Docket #150, 156).

Because Ms. Dunn created a factual issue with respect to the July 22, 2010 telephone conversation, she became a witness at the hearing and could not appear on behalf of the Trust with respect to the telephone conversation. (Iseman Decl., Docket #229-1, at ¶ 8.) As a result, Iseman appeared as special counsel at the hearing.

On November 22, 1010, the Court issued an order granting the SEC's motion for reconsideration and continuing the asset freeze over the Trust. (Docket #194.) Iseman now seeks over $83,000 in fees in connection with a hearing regarding one telephone conversation. Although the SEC only has access to Iseman's redacted invoice and, therefore, cannot fully evaluate the reasonableness of much of Iseman's time, the invoice shows that Iseman is seeking payment for over 50 hours of time spent by a partner practicing in the area of Trust and Estates law, for over 160 hours spent by two other partners and for substantial time billed after the November 16 hearing. (Docket #229-1, Ex. A.)

ARGUMENT

I. Assets Frozen For Investors Should Not Be Used Pay Iseman's Fees

A party seeking to unfreeze assets must show that doing so would be "in the interests of the defrauded investors." *SEC v. Grossman*, 887 F. Supp. 649,661 (S.D.N.Y. 1995), *aff'd*, 173 F.3d 846 (2d Cir. 1999); *see also SEC v. Forte*, 598 F. Supp. 2d 689, 692 (E.D. Pa. 2009) ("Several courts have held that before they will unfreeze assets, the defendant must 'establish that the modification is in the interest of the defrauded investors.'") (*quoting Grossman*, 887 F. Supp. at 661). A court must weigh "the disadvantages and possible deleterious effect of a freeze . . . against the considerations indicating the need for such relief." *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972).

Courts regularly have denied or limited the payment of attorneys' fees from frozen assets. *E.g., SEC v. Private Equity Mgmt. Group, Inc.*, No. CV 09-2901, 2009 WL 2058247, at *2 (C.D. Cal. July 9, 2009) (denying request to amend asset freeze to allow payment of attorneys' fees); *SEC v. Sekhri*, No. 98 CIV. 2320, 2000 WL 1036295, at * 2 (S.D.N.Y. July 26, 2000) (denying motion to release funds from asset freeze for attorneys' fees); *see also SEC v. Petters,* No. 09-

1750, 2010 WL 4922993, at *1-2 (D. Minn. November 29, 2010) (on application by law firms for payment of fees from frozen funds, considering the need to preserve funds for defrauded victims and the maintenance of fairness in the legal proceedings and reducing amount of attorneys' fees to an amount that is "fair and equitable under the circumstances"); *SEC v. Dowdell*, 175 F. Supp. 2d 850, 855-56 (W.D. Va. 2001) (applying balancing test and indicating approval for reasonable fees necessary to conduct fair preliminary injunction hearing).[1]

A. There Should Be No Carve-Out of Assets of David Smith

On August 3, 2010, the Court froze the assets of the Trust on an emergency basis pending adjudication of the SEC's motion for reconsideration of the preliminary injunction order. (Docket #104.) In its November 22, 2010 Memorandum-Decision and Order, the Court continued the asset freeze over the Trust, and found that, among other things, the SEC demonstrated a substantial likelihood of success that it will prove that the Trust is an asset of David Smith. (Docket #194, at 21-23.) David Smith has invoked his Fifth Amendment rights since the inception of this case and has never provided a full accounting of his assets. As courts have routinely denied requests for carve-outs where defendants have not provided a full-accounting of their assets, Iseman's request for attorneys' fees and costs should be denied. *See* Memorandum-Decision and Order dated December 15, 2010, Docket #221, at 7-8 (denying McGinn's request for a carve out to pay expenses for Florida home because, among other reasons, McGinn has declined on Fifth Amendment grounds to provide an accounting of his assets); *SEC v. Stein*, No. 07 Civ. 3125, 2009 WL 1181061, at *1 (S.D.N.Y. Apr. 30, 2009)

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[1] Iseman does not cite any case law in support of its application for fees. Instead, Iseman cites the Sixth Article of the Declaration of Trust, NY Estates, Powers and Trusts Law and the Restatement of the Law for Trusts, all of which stand for the undisputed proposition that a trust is authorized to incur reasonable and proper expenses, including attorney's fees, in connection with its administration. (Iseman Memorandum of Law, Docket #229-2, at 4-5.)

(denying carve-out in the absence of full-accounting); *see also SEC v. Cherif*, 933 F.2d 403, 417 (7th Cir. 1991) (affirming denial of carve-out where district court drew adverse inference from defendants' refusal pursuant to the Fifth Amendment to provide accounting). Moreover, the Court already has considered and denied all three prior requests for carve-outs from the asset freeze in this action (Lynn Smith's request for a carve out for living expenses and attorneys' fees (Docket #211); David Smith's request for a carve-out of his 401(k) account (Docket #221) and Tim McGinn's request for a carve-out for fees associated with his Florida home (*Id.*)). The result should be the same here.

B. Iseman's Appearance was Necessitated by the Misconduct of Defendants, their Attorneys and Others in Concealing the Annuity Agreement

Iseman argues that the Trust was "duty bound" to seek legal representation in connection with the dispute raised by Ms. Dunn. (Iseman Memo of Law, Docket #229-2 at 5.) Iseman's appearance in this case, however, was necessitated by the misconduct by the defendants, their counsel and others in concealing the Annuity Agreement from the Court and the SEC. In particular, Dunn created a specious factual dispute regarding the July 22 telephone call, which required a hearing to determine the credibility of the participants to that call and required separate counsel to represent Dunn at the hearing. Under these circumstances, it is not in the interests of investors to pay Iseman's fees; nor does payment of these fees impact the maintenance of fairness in these legal proceedings.

There is also no other equitable reason for the Trust to pay Iseman's fees. When Iseman intervened, it understood that the Trust's funds were frozen (Order dated August 3, 2010, Docket #104) and that payment of fees by the Trust was within the Court's discretion. As such, Iseman's fees should not be paid by the Trust.

II. The Fees Sought Are Excessive

In any event, the over $83,000 in fees and costs sought by Iseman is unreasonable and excessive. First, the Trust did not need separate counsel to represent it in connection with whether the Annuity Agreement was signed and effective, as Ms. Dunn was not a witness on that point. Iseman's fees with respect to this issue are redundant and unnecessary. For example, Iseman states that it was required to spend considerable time on the substantive tax and state-law issues in connection with determining whether to stipulate that the Annuity Agreement was binding and effective. (Docket #229-1, Iseman Decl. ¶¶ 14-15.) A trust and estate attorney at Iseman, Richard Frankel, alone billed over 54 hours to this matter. The Trust, however, already had retained a tax law expert who had engaged in a lengthy review of the agreements and prepared an expert report. Also, Dunn was not in any way precluded from advising the Trust whether to stipulate as to this issue and she would not have been a witness on this issue at the hearing had there been no stipulation.

Second, although the SEC only has access to Iseman's redacted time details and cannot fully evaluate the reasonableness of much of the time Iseman has billed, it is questionable whether it was necessary and reasonable for two partners at Iseman to have billed over 160 hours to prepare for a hearing concerning one telephone conversation. Finally, it is unclear why Iseman billed time to this matter after the November 16, 2010 hearing. Especially considering the very limited purpose for which Iseman was retained and the limited funds available to repay investors, any payment of Iseman's fees should be limited to only the reasonable and necessary fees incurred in connection with representing Ms. Dunn at the November 16 hearing regarding the telephone conversation. *E.g., Petters,* 2010 WL 4922993, at *1-2 (limiting fees to an amount that is "fair and equitable under the circumstances"); *Dowdell*, 175 F. Supp. 2d at 855-56

(indicating approval for reasonable fees necessary to conduct fair preliminary injunction hearing).

CONCLUSION

For the reasons stated above, the SEC requests that the Court deny Iseman's motion to lift the asset freeze as to the Trust to allow the payment of Iseman's fees.

Dated: January 7, 2011
New York, New York

Respectfully submitted,

s/ Lara Shalov Mehraban
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DECLARATION OF SERVICE

I, Lara Shalov Mehraban, pursuant to 28 U.S.C. § 1746, certify that on January 7, 2011, I filed on the Court's ECF system the following document:

- Plaintiff's Memorandum of Law in Opposition to Request by Iseman to Lift Preliminary Injunction to Permit Payment of Attorneys' Fees; and

and sent by electronic mail a copy of the above-referenced document to:

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Appearing Pro Se

Dated: January 7, 2011
New York, New York

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