UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

DAVID M. WOJESKI, Trustee of David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04.

Defendant.

APPEARANCES:

DAVID STOELTING, ESQ.
Attorney for Plaintiff
Room 400
3 World Financial Center
New York, New York 10281

JILL A. DUNN, ESQ.
Attorney for Defendant Trust
Suite 210
99 Pine Street
Albany, New York 12207

OF COUNSEL:

ANDREW CALAMARI, ESQ.
MICHAEL PALEY, ESQ.
KEVIN McGRATH, ESQ.
LARA MEHREBAN, ESQ,
LINDA ARNOLD, ESQ.
JACK KAUFMAN, ESQ.

DAVID R. HOMER
U.S. MAGISTRATE JUDGE

MEMORANDUM-DECISION AND ORDER

On April 20, 2010, plaintiff Securities and Exchange Commission ("SEC") moved for a preliminary injunction which, in pertinent part, sought to freeze the assets of now defendant David M. Wojeski, as Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 ("Trust"). Dkt. No. 4. Following a hearing, the SEC's motion was denied as to the Trust's assets in a Memorandum-Decision and Order filed July 7, 2010. Dkt. No. 86 ("MDO I"). On August 3, 2010, the SEC moved for reconsideration of that portion of

MDO I which denied its motion as to the Trust. Dkt. No. 103. Following a second hearing on a limited factual issue, that motion was granted in a Memorandum-Decision and Order filed November 22, 2010 and, upon reconsideration, the SEC's motion to freeze the assets of the Trust was granted. Dkt. No. 194 ("MDO II"). Familiarity with MDO I and II is assumed. On December 6, 2010, the Trust moved for reconsideration of MDO II. Dkt. No. 214. The SEC opposes the motion. Dkt. Nos. 250, 251. For the reasons which follow, the Trust's motion is denied.

The first basis asserted by the Trust is that timely knowledge of the Annuity Agreement should be imputed to the SEC from the seizure of that document by law enforcement authorities in searches on April 20, 2010. Trust Mem. of Law (Dkt. No. 214-3) at 3-4. As neither the United States Attorney's Office, the Federal Bureau of Investigation, the Internal Revenue Service, nor any other criminal law enforcement entity is a party to this action, none was obliged to provide the Annuity Agreement to the SEC and it appears that none did until months after its discovery by the SEC on July 27, 2010 from Thomas Urbelis ("Urbelis"), the Trust's former Trustee. Prior to July 27, 2010, the SEC had no knowledge of the Annuity Agreement – actual, constructive, or imputed. The fact that law enforcement authorities provided the Annuity Agreement to the SEC months later does not obviate the finding in MDO II that the SEC acted with due diligence to discover the existence of the Annuity Agreement and that the Trust and those associated with it acted fraudulently to conceal its existence.

Second, the Trust contends that it was clearly erroneous to find that the Trust's counsel, Jill A. Dunn, Esq. ("Dunn") represented Urbelis when he testified at a deposition in response to the SEC's subpoena. Trust Mem. of Law at 4-6. At the time of MDO II, the

uncontradicted record contained a copy of the transcript of Urbelis' deposition. Dkt. No. 46-6. That transcript reflects that Urbelis was represented by Dunn. Id. at 2. It now appears that following review of that transcript, Urbelis corrected it to note that he was not represented by Dunn. Dunn Decl (Dkt. No. 214-1) at ¶ 7-12, 16-19 & Ex. E (Dkt. No. 214-2 at 13-20). The correction concerning Dunn's representation of Urbelis was never made a part of the record until the Trust filed the motion at issue here.

A motion for reconsideration may not be used to fill gaps in a record where the facts were known to the moving party, or were discoverable in the exercise of due diligence, prior to the filing of the original pleadings. Lopez v. Smiley, 375 F. Supp. 2d 19, 21-22 (D. Conn. 2005); Benitez v. Mailoux, No. 9:05-CV-1160 (NAM)(RFT), 2008 WL 4757361, at *2 (N.D.N.Y. Oct. 29, 2008) (Mordue, C.J.). Evidence in the possession of the moving party at the time of the original motion will not suffice to establish newly discovered evidence. In re Ethylene Propylene Diene Monomer (EPAM), 681 F. Supp. 2d 141, 179 (D. Conn. 2009); 4 B's Realty 1530 CR39, LLC v. Toscano, No. 08-CV-2694 (ADS)(ETB), 2009 WL 702011, at *3 (E.D.N.Y. Mar. 12, 2009). It appears that the corrections to the transcript of Urbelis' deposition were known and available to the Trust well before the Trust filed its response to the SEC's motion. See Dunn Decl. at ¶ 19. Therefore, the evidence upon which the Trust relies to correct the record was not newly discovered but was known to its attorney months prior to the filing of the Trust's pleadings on the SEC's motion. The Trust's effort to supplement and correct the record comes too late.

In the alternative, however, even considering as fact that Dunn did not represent

Urbelis at his deposition,[1] this change does not alter the conclusions in MDO II. Dunn's representation related first to whether the SEC had satisfied its burden of demonstrating due diligence in its discovery of the Annuity Agreement. MDO II at 12-13, 18. In evaluating the SEC's efforts, those efforts were compared to others in positions similar to or more favorable than that of the SEC to discover the agreement. These included Dunn. Even though she did not represent Urbelis, Dunn was in a more favorable position to discover the Annuity Agreement in a timely manner since she enjoyed access to those with actual knowledge of the agreement (Urbelis, David Smith, and Lynn Smith) and was unimpeded by claims of privilege or adverse interest. The fact that in these circumstances she, as well as others similarly situated, failed to discover the agreement supported the SEC's contention that it had satisfied the requirements of due diligence and refuted the Trust's argument to the contrary. Thus, on this point Dunn's representation of Urbelis was a minor point among multiple reasons why the SEC had demonstrated due diligence. The correction as to Dunn's representation of Urbelis does not alter the conclusion.

The second reference concerned the alternative finding that the Annuity Agreement had been withheld from the SEC by those associated with the Trust through fraud, concealment, and misrepresentation. MDO II at 20 n.17. The fact that Dunn did not represent Urbelis at his deposition does not affect this conclusion in any way.

The Trust further asserts that the Court erred in finding that Dunn was obliged to supplement Urbelis' response to the SEC's subpoena to provide a copy of the Annuity

[1]The SEC does not dispute either that Dunn did not in fact represent Urbelis or that the SEC was aware of this fact throughout these proceedings. See Pl. Mem. of Law (Dkt. No. 250) at 4-8.

Agreement after she received actual notice of its existence on July 21, 2010. Dunn Decl. at ¶ 11-13. As it now appears that Dunn did not represent Urbelis, she was in fact under no obligation to supplement his response to the subpoena. This point, however, was only one of several relating to the determination of Dunn's credibility. On this issue, the facts remain unaltered that Dunn received actual knowledge of the existence of the Annuity Agreement on July 21, 2010, thereafter prepared declarations for herself and Wojeski asserting that they had no knowledge of the agreement until advised of it by the SEC on July 27, 2010, and failed to disclose her receipt of notice of the agreement on July 21, 2010 until the eve of the hearing four months later. On this record, the new fact that Dunn had no obligation to supplement Urbelis' response to the SEC subpoena does not affect the finding as to Dunn's ethical conduct or her credibility.

Next, the Trust contends that the finding that Dunn used the phrase "private annuity agreement" in a telephone conversation with SEC attorneys David Stoelting ("Stoelting") and Kevin McGrath ("McGrath") on July 22, 2010 was clearly erroneous because McGrath did not hear her use that phrase. Dunn Decl. at ¶¶ 5-6. The Court found in MDO II that while Stoelting recalled Dunn using that phrase, McGrath did not. MDO II at 8. Dunn takes issue with the wording of MDO II that McGrath did not "recall" her use of that phrase contending that his actual testimony was that McGrath did not "hear" Dunn use the phrase. Dunn Decl. at ¶ 5. The description of McGrath's testimony does not affect the conclusion in MDO II that for the reasons described therein, McGrath's testimony otherwise corroborated Stoelting's testimony, Stoelting's testimony was credible, Dunn's was not, and Dunn used the phrase "private annuity agreement" in that conversation.

Finally, the Trust contends that it was clear error to find that the SEC had

demonstrated a substantial likelihood that it would prove that David Smith possessed a beneficial or equitable interest in the Trust. Dunn Decl. at ¶ 23; Trust Mem. of Law at 6-8; see also MDO II at 20-23. The Trust rests its argument principally on the fact that the SEC offered no expert opinion to counter that offered by the Trust. However, as noted in MDO II, the Trust's expert asserted only that the Smiths had no present interest in the Trust, a fact that was not at issue. He did not assert that the Smiths had no interest in the Trust as well he could not in light of the Annuity Agreement. Contrary to the contention of the Trust that the Court was clearly erroneous in according significant weight to the Annuity Agreement, the discovery of that agreement was critical to the disposition of the SEC's motion to freeze the Trust's assets. Indeed, on the issue of the Smiths' interest in the Trust, the Annuity Agreement constituted the proverbial "smoking gun." The Trust's recognition of this truth is demonstrated by the lengths to which those associated with them and the Trust went to conceal the existence of the Annuity Agreement in the face of legal, ethical, and professional obligations to the contrary.

Accordingly, finding that the Trust has failed to meet its burden of demonstrating any cause for reconsideration of MDO II, it is hereby

ORDERED that the Trust's motion for reconsideration (Dkt. No. 214) is **DENIED** in all respects.

IT IS SO ORDERED.

DATED: January 11, 2011
Albany, New York

David R. Homer
U.S. Magistrate Judge