

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

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

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

DAVID M. WOJESKI,¹ Trustee of David L. and
Lynn A. Smith Irrevocable Trust U/A 8/04/04.

Defendant.

APPEARANCES:

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OF COUNSEL:

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FRED N. KNOPF, ESQ.

JAMES D. FEATHERSTONHAUGH, ESQ.

¹It appears that David M. Wojeski has been replaced as Trustee by Geoffrey R. Smith, a beneficiary of the Trust. See Dkt. Nos. 264 (Notice of Appearance on behalf of Wojeski identifying him as the "former" Trustee), 273 (order approving substitution of counsel for, *inter alia*, Geoffrey Smith and identifying him as "Trustee" of the Trust). However, no substitution of Geoffrey Smith for Wojeski as the named party representing the Trust has been made. See Fed. R. Civ. P. 25. Accordingly, Wojeski remains the named defendant as Trustee of the Trust.

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DAVID R. HOMER
U.S. MAGISTRATE JUDGE

MEMORANDUM-DECISION AND ORDER

Presently pending is the motion of non-party Iseman, Cunningham, Riester & Hyde, LLP (“Iseman Cunningham”) for an order unfreezing the assets of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (“Trust”) to pay certain attorney’s fees owed to Iseman Cunningham. Dkt. Nos. 229, 256. Plaintiff Securities and Exchange Commission (“SEC”) opposes the motion. Dkt. No. 248. For the reasons which follow, Iseman Cunningham’s motion is denied.

I. Background

In a decision filed July 7, 2010, the SEC’s motion for a preliminary injunction freezing certain assets of the defendants was granted in part and denied in part. Dkt. No. 86 (“MDO I”). Familiarity with that decision is assumed. One of the assets for which the SEC’s motion was denied was the Trust. *Id.* at 42. On August 3, 2010, the SEC moved for reconsideration of that portion of MDO I which denied its request to freeze the Trust. Dkt. No. 103. The Trust responded in opposition to that motion. Dkt. Nos. 133-35. Because of

issues of fact raised by the parties' submissions concerning the existence of an annuity agreement and what occurred during a telephone call among counsel, an evidentiary hearing was ordered at which the three attorneys involved in the call, including then-counsel for the Trust, would be required to testify. Dkt. No. 150. That order was entered on October 7, 2010 and the hearing was held on November 16, 2010. Id.; Minute Entry dated 11/16/10.

On November 1, 2010, Iseman Cunningham was first contacted concerning possible representation of the Trust at the evidentiary hearing. Iseman Decl. (Dkt. No. 229-1) at ¶ 9. The firm was retained for that purpose on November 5, 2010 and remained counsel for the Trust on the issues raised by the SEC's motion for reconsideration through the hearing on November 16, 2010. Id. at ¶¶ 12-18. On November 22, 2010, an order was entered granting the SEC's motion for reconsideration of MDO I and granting the preliminary injunction as to the Trust, thus freezing the Trust's assets pending the outcome of this action. Dkt. No. 194 ("MDO II"). Familiarity with that order is assumed. On November 24, 2010, Iseman Cunningham sought an order to show cause seeking to be relieved as counsel for the Trust and lifting the asset freeze to permit the Trust to pay attorney's fees to Iseman Cunningham. Dkt. No. 201. The request was granted as to its request to be relieved as counsel but denied without prejudice to renewal in a motion as to payment of attorney's fees. Dkt. No. 206. The motion to withdraw as counsel was granted on December 16, 2010. Dkt. No. 218.

The present motion was filed on December 17, 2010. Dkt. No. 229. Iseman Cunningham seeks to lift the asset freeze to permit the Trust to pay it a total of \$83,628.05 in attorney's fees and costs incurred during its representation of the Trust. Iseman Decl. Ex. A. The time sheets submitted by Iseman Cunningham reflect essentially that three

attorneys worked nearly full-time for eleven days prior to the hearing on November 16, 2010 at hourly rates ranging from \$325 to \$500. The evidentiary hearing lasted approximately two hours at which three witnesses testified, two SEC attorneys and then-counsel for the Trust. MDO II at 9.

II. Discussion

There exists no dispute that the Trust is authorized by its originating document to pay attorneys' fees and related costs incurred on behalf of the Trust. Iseman Cunningham Mem. of Law (Dkt. No. 229-2) at 4-5; SEC Mem. of Law (Dkt. No. 248) at 4 n.1. The holding in MDO II, however, subjects the Trust to the asset freeze in the preliminary injunction. Thus, Iseman Cunningham's motion invokes not the authority of the Trust to pay legal fees and costs but the discretion of the Court to permit such payments. The asset freeze serves to protect the interests of investors in obtaining the return of funds if the SEC proves in this action that defendants obtained the investments by fraud. MDO I at 14; S.E.C. v. Infinity Group Co., 212 F.3d 180, 197 (3d Cir. 2000) ("A freeze of assets is designed to preserve the status quo by preventing the dissipation and diversion of assets.") (citations omitted). On this motion, therefore, the issue presented is not simply whether the Trust may incur and pay such legal fees and costs – it may – but whether a balancing of the interests of investors in preserving assets for possible later restitution is outweighed by the interests of the Trust and Iseman Cunningham in paying Iseman Cunningham's fees and costs. See S.E.C. v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1106 (2d Cir. 1972).

Here, for at least three reasons, the balance weighs decidedly in favor of denying Iseman Cunningham's motion. First, the record to date demonstrates that the total amount

of investors' funds obtained through fraud by defendants dwarfs the value of assets frozen by the SEC for the benefit of such investors in the event the SEC prevails in this action. Compare Am. Compl. (Dkt. No. 100) at ¶¶ 1, 6 (alleging losses to over 900 investors of approximately \$84 million)with MDO I at 6-12 (less than \$10 million appears available to repay defrauded investors). There is no likelihood, then, that a surplus will exist from the frozen assets in the event the SEC prevails in this action. The investors, on whose behalf the assets were frozen, thus possess a heightened interest in having those assets maintained without further diminution pending the outcome of this action. This interest far outweighs that of either the Trust or Iseman Cunningham in payment of the charged fees and costs before this action is fully resolved.

Second, the Trust was subjected to the asset freeze after a determination that David Smith possessed a beneficial interest in the Trust. MDO II at 20-23. In these circumstances, the Trust must be viewed as an asset of David Smith. So viewed, the asset freeze over the Trust should not be lifted absent a showing that David Smith is unable to satisfy obligations related to those assets from other, unfrozen sources. To date, David Smith has asserted the protection of his Fifth Amendment privilege against self-incrimination in declining to provide an accounting of his assets. In the absence of an accounting from David Smith, neither the Trust nor Iseman Cunningham can meet its burden of demonstrating that any need exists to lift the asset freeze on the Trust to permit payment of legal expenses. See S.E.C. v. Duclaud Gonzalez de Castilla, 107 F. Supp. 2d 427, 430 (S.D.N.Y. 2001).

Third, the Trust was already represented by counsel when Iseman Cunningham was retained and had been represented by that same counsel throughout this action. The need

for the Trust to retain additional counsel for representation at the evidentiary hearing was necessitated by the conduct of David Smith, Lynn Smith, the then-Trustee, and then-counsel in concealing a document whose discovery gave rise to the SEC's motion for reconsideration. See generally MDO II. To permit a further depletion of assets available to repay investors would reward that misconduct at the substantial expense of investors. See Thus, the interest of the Trust here in lifting the freeze to compensate Iseman Cunningham is diminished by the Trust's self-created necessity for such representation.

For these reasons, then, the interests of investors in maintaining the asset freeze for their benefit in the event the SEC prevails in this action substantially outweighs the interests of Iseman Cunningham, the Trust, and those associated with the Trust in lifting the asset freeze to permit payment of the fees and costs incurred for the legal services rendered by Iseman Cunningham.²

III. Conclusion

For the reasons stated above, it is hereby **ORDERED** that the motion of Iseman

²The SEC also contends that the fees and costs charged by Iseman Cunningham are excessive. SEC Mem. of Law at 6-7. The contention is supported by the fact that the Trust required the services of Iseman Cunningham only to represent its original counsel at the evidentiary hearing as the original counsel remained competent to address the second issue regarding the annuity agreement. Furthermore, an attorney at Iseman Cunningham specializing in trusts and estates charged over \$19,000 in the eleven days before the hearing where the Trust had already retained, and submitted the expert report of, another attorney specializing in this area who was already familiar with the matter. Finally, while there were numerous records to review in preparation for the evidentiary hearing, that hearing involved only three witnesses, lasted only two hours, and concerned only one brief telephone call. Substantial support thus exists for the SEC's contention. However, since the amount of fees and costs to be paid need not be reached in light of the holding herein, this contention will not be addressed.

Cunningham to lift the asset freeze to permit payment of its legal fees and costs (Dkt. No. 229) is **DENIED**.

IT IS SO ORDERED.

DATED: February 11, 2011
Albany, New York

A handwritten signature in black ink that reads "David R. Homer". The signature is written in a cursive style and is positioned above a horizontal line.

David R. Homer
U.S. Magistrate Judge