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; AND	:	
DAVID L. SMITH,	:	
Defendants, and	:	
LYNN A. SMITH,	:	
Relief Defendant.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION FOR STAY FILED BY DAVID SMITH AND TIMOTHY MCGINN

May 24, 2010

Plaintiff Securities and Exchange Commission respectfully submits this memorandum of law in opposition to the motion filed by defendants David Smith and Timothy McGinn seeking a stay of their depositions.

ARGUMENT

I. DEFENDANTS' MOTION FOR A STAY OF THEIR DEPOSITIONS SHOULD BE DENIED

Pursuant to Part XX of the Order to Show Cause entered April 20, 2010, the SEC has the right to "[t]ake depositions, subject to two(2) days calendar notice[.]" Accordingly, on April 28, 2010, the SEC served a Notice of Depositions which scheduled the depositions of Smith and McGinn for May 12 and 13, 2010. On May 17, 2010, the SEC served a revised Notice which rescheduled the Smith and McGinn depositions for May 26 and 27, 2010. Copies of these Notices are attached hereto.

Smith and McGinn have not been charged with any crimes by the U.S. Attorney's Office.[1] Nevertheless, the basis for their motion to stay their depositions is purported concern over their criminal status. They argue that "the defendants' Fifth Amendment rights are at stake" and that if the motion for a stay is not granted "the very fabric of their constitutional rights, not to incriminate oneself, will be undermined." Defs. Br. at 2. Although it is undisputed that a district court may stay a civil proceeding during the pendency of a parallel criminal proceeding, Smith and McGinn fail to cit any special circumstances justifying a stay in this case.

The fact that Smith and McGin may invoke the Fifth Amendment right against self-incrimination does not warrant a stay. "Courts have held that the defendant must make the choice whether to plead the fifth amendment, rather than forcing a delay in plaintiff's discovery."

[1] Moreover, it should be noted that in 2009 and 2010, Smith and McGinn testified extensively during the investigation conducted by the Financial Industry Regulatory Authority (FINRA).

Favaloro v. S/S Golden Gate, 687 F. Supp. 475 (N.D. Cal. 1987) (denying defendant's request to stay his deposition); *National Life Ins. Co. v. Hartford Acc. and Indemnity Co.*, 615 F.2d 595, 598, (3d Cir. 1980) ("a witness cannot relieve himself of the duty to answer questions that may be put to him by a mere blanket invocation of the privilege. . . . the privilege against self-incrimination in a civil proceeding may not be asserted prior to the propounding of the questions."; *United States v. Chandler*, 380 F.2d 993, 997 (2d Cir. 1967) ("[t]he witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself – his say-so does not of itself establish the hazard of incrimination.")

There is nothing stopping Smith and McGinn from asserting their Fifth Amendment privileges against self-incrimination. "The choice between testifying, or invoking the Fifth Amendment, may be difficult, but it does not create a basis for a stay." *Comptroller of the Currency v. Lance,* 632 F. Supp. 437, 442 (N.D. Ga. 1986). *See also Gellis v. Casey*, 338 F. Supp. 651, 653 (S.D.N.Y. 1972); *United States v. Simon*, 373 F.2d 649, 653 (2d Cir.) *vacated as moot*, 389 U.S. 425 (1967) ("We cannot agree that `civilized standards of procedure and evidence' require that a witness under indictment be given the option of nonappearance in any proceedings in related civil or criminal proceedings until his own trial is concluded")..

In *SEC v. Grossman*, 121 F.R.D. 207, 210 (S.D.N.Y. 1987), the court specifically addressed this issue with respect to a Commission enforcement action, and rejected the defendant's argument: "The Court appreciates the defendant's dilemma; however, it does not find that their situation merits a stay on all civil proceedings in this case." In *Musella*, 38 Fed. R. Serv. 2d 426, 427 (S.D.N.Y. 1983), the court stated "[t]he discomfort of defendant's position does not rise to the level of a deprivation of due process. Others have faced comparable circumstances; the choice may be unpleasant, but it is not illegal, and must be faced." In

addition, in *Gellis v. Casey*, 338 F. Supp. 651 (S.D.N.Y. 1972) the court stated generally, "[p]laintiff has no constitutional right to be relieved of the burden of the choice he faces. There is no violation of due process where a party is faced with the choice of testifying or invoking the Fifth Amendment. . . . Any witness in a civil or criminal trial who is himself under investigation or indictment is confronted with the dilemma of choosing to testify or to invoke his privilege against self-incrimination. Nevertheless, he must make the choice despite any extra legal problems and pressures that might follow." *Id.* at 653 (citations omitted).

Similarly, in *SEC v. United Brands Co.*, 21 Fed. R. Serv. 2d 64 (D.D.C. 1975), the Court refused to stay a Commission enforcement action in view of the pendency of a criminal investigation, ruling that timely assertion of the Fifth Amendment privilege during discovery afforded adequate protection to the individuals involved, and that in view of the fact that, as here, no criminal action had yet been brought, the defendant would not be unduly burdened by defending the civil action.

It requires extraordinary circumstances for a Court to stay civil discovery pending the outcome of related criminal matters. *Weil v. Markowitz*, 829 F.2d 166, 174 n.17 (D.C. Cir. 1987). "There is no general federal constitutional, statutory, or common law rule barring the simultaneous prosecution of separate civil and criminal actions by different federal agencies against the same defendant involving the same transactions. . . . This principle is fully applicable when the SEC and Justice Department each seek to enforce the federal securities laws through separate civil and criminal actions. . . ." *SEC v. First Fin. Group of Tex., Inc.*, 659 F.2d 660, 666-7 (5th Cir. 1981).

CONCLUSION

For the foregoing reasons, Smith and McGinn's motion for a stay as to their depositions should be denied.

Dated: New York, NY
May 24, 2010

Respectfully submitted,

s/ David Stoelting
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McGINN, SMITH CAPITAL HOLDINGS CORP.,	
FIRST ADVISORY INCOME NOTES, LLC,	**DEPOSITIONS**
FIRST EXCELSIOR INCOME NOTES, LLC,	
FIRST INDEPENDENT INCOME NOTES, LLC,	
THIRD ALBANY INCOME NOTES, LLC,	
TIMOTHY M. MCGINN, AND	
DAVID L. SMITH,	
Defendants, and	
LYNN A. SMITH,	
Relief Defendant.	

PLEASE TAKE NOTICE that, pursuant to Rules 26 and 30 of the Federal Rules of Civil Procedure, Section XX of the Order to Show Cause entered April 20, 2010, and the Consent Order entered on May 7, 2010, plaintiff Securities and Exchange Commission, by its attorneys, will take the deposition upon oral examination of the following individuals:

NAME	DATE	LOCATION
David L. Smith	May 25, 2010 10:00 a.m.	Phillips Lytle LLP 30 South Pearl Street Albany, NY 12207
Timothy M. McGinn	May 26, 2010 10:00 a.m.	Phillips Lytle LLP 30 South Pearl Street Albany, NY 12207
Lynn A. Smith	May 27, 2010 10:00 a.m.	Phillips Lytle LLP 30 South Pearl Street Albany, NY 12207

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PLEASE TAKE NOTICE that, pursuant to Rules 26 and 30 of the Federal Rules of Civil Procedure, and Section XX of the Order to Show Cause entered April 20, 2010, plaintiff Securities and Exchange Commission, by its attorneys, will take the deposition upon oral examination of the following individuals:

NAME	DATE	LOCATION
Lynn A. Smith	May 11, 2010 10:00 a.m.	Phillips Lytle LLP 30 South Pearl Street Albany, NY 12207
David L. Smith	May 12, 2010 10:00 a.m.	Phillips Lytle LLP 30 South Pearl Street Albany, NY 12207
Timothy M. McGinn	May 13, 2010 10:00 a.m.	Phillips Lytle LLP 30 South Pearl Street Albany, NY 12207

The depositions will be recorded by sound, sound-and-visual and/or stenographic means and will continue day to day until completed.

Dated: New York, New York
April 28, 2010

s/David Stoelting
Attorney Bar Number: 516163
Attorney for Plaintiff
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