



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

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**DIVISION OF
ENFORCEMENT**

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May 18, 2011

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:

Pursuant to Northern District of New York Local Rule 7.1(b)(2), plaintiff Securities and Exchange Commission respectfully requests a pre-motion conference. The SEC seeks permission to make a motion to compel the production of documents requested pursuant to a subpoena served on Martin Finn, Esq. of Lavelle & Finn LLP and to obtain a ruling that the crime-fraud exception to the attorney-client privilege applies to any testimony concerning communications between Finn, and any other members or employees of Lavelle & Finn, and the Smiths concerning the subject matter of the subpoenaed materials.

On April 7, 2011, the SEC issued a Rule 45 subpoena to Mr. Finn requesting all communications between Finn and defendants David Smith and Lynn Smith, including all documents concerning, *inter alia*, his advice to the Smiths regarding estate planning, asset protection and transfers of money or other assets. David and Lynn Smith, through counsel, have asserted the attorney-client privilege with respect to these documents and David Smith's counsel has further asserted the privilege as to any anticipated testimony by Mr. Finn or other members or employees of Lavelle & Finn concerning the subpoenaed communications and documents. William Keniry, counsel for Lavelle & Finn and Mr. Finn, has advised the SEC that, in light of the Smiths' privilege assertion, his clients will not produce privileged documents in Lavelle & Finn's possession.

It is the SEC's position that the crime-fraud exception to the attorney-client privilege applies to the subpoenaed documents and communications between Finn or others at Lavelle & Finn and David and Lynn Smith. The subpoenaed documents and communications are directly relevant, *inter alia*, to the allegations underlying the Eighth Claim for Relief in the Amended Complaint: that David Smith and Lynn Smith made transfers of the Smiths' assets with the "actual intent to hinder, delay or defraud either present or future creditors" including the transfer of 100,000 shares of Charter One stock into the David L. and Lynn A. Smith Irrevocable Trust ("Trust") and the transfer of the Smiths' Vero Beach house from joint ownership to Lynn Smith.

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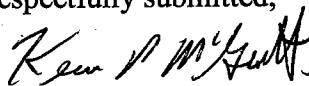
For the crime-fraud exception to apply, the SEC must show that there is probable cause to believe that: (1) a fraud or crime has been committed; and (2) the communications in question were in furtherance of the fraud or crime. *United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997).

With respect to the first part of this inquiry, the SEC has already demonstrated at least probable cause that David Smith engaged in a fraudulent scheme to deceive and defraud investors in violation of Sections 10(b) and 15(c) of the Exchange Act, Section 17(a) of the Securities Act and Sections 206(1) and 206(2) of the Advisers Act. (*See, e.g.*, Dkt. 86 at 30-31). It has also already demonstrated at least probable cause that David and Lynn Smith engaged in fraudulent conduct to protect the proceeds of that scheme from their creditors and from seizure. (*See, e.g.*, Dkt. 86 at 33-36). The Court has also already found that the 2009 transfers of certain assets by David and Lynn Smith into Lynn Smith's name alone, including the Vero Beach house, "were solely for the fraudulent purpose of shielding David Smith's assets from seizure." (Dkt. 86 at 36) The Court has also found that David Smith maintained control of the David and Lynn Smith Irrevocable Trust to preserve the Smiths' interest in annuity payments from the Trust and that Lynn Smith fraudulently failed to disclose the Smiths' interest in the Trust. (Dkt. 194 at 20 n.17, 21-23).

With respect to the second part of the inquiry, there is probable cause to believe that the subpoenaed documents and communications in question were in furtherance of the alleged fraud. During the relevant time period, Finn advised David and Lynn Smith regarding estate planning and asset protection objectives. David and Lynn Smith were concerned with the threat of substantial litigation exposure when they sought Finn's advice. In early 2009, David Smith met with Finn regarding his efforts "to shift money around between" him and Lynn Smith. (Pls. PI Ex. 77). Finn proposed a transfer of certain assets held by David Smith to Lynn Smith to further the Smiths' "estate planning and asset protection objectives" and provided advice regarding the law of fraudulent conveyances. (Pls. PI Ex. 118). The communications between Finn and the Smiths were thus in furtherance of the Smiths' efforts to transfer assets for fraudulent purposes. Moreover, the SEC need not establish that Finn knew of the Smiths' fraudulent intent or that he gave advice with the intent to further the Smiths' fraud; it need only establish probable cause that the advice was used by the Smiths in furtherance of their fraud.

The SEC has conferred with Mr. Keniry, counsel for Mr. Finn, William Dryer, counsel for Mr. Smith, and Scott Ely, co-counsel for Lynn Smith, and has been unable to reach a resolution of this issue. Accordingly, the SEC seeks leave to file a motion to compel Mr. Finn to comply with the April 7, 2011 subpoena and for a ruling that the crime-fraud exception to the attorney-client privilege applies to any testimony concerning communications between Finn, and any other members or employees of Lavelle & Finn, and the Smiths concerning the subject matter of the subpoenaed materials.

Respectfully submitted,



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cc: William Dreyer, Esq., by email
James Featherstonhaugh, Esq., by email
William Keniry, Esq., by email
Scott Ely, Esq., by email