UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

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, LYNN A. SMITH, GEOFFREY R. SMITH, 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,

Case No.: 1:10-CV-457 (GLS/DRH)

Defendants,

LYNN A. SMITH and NANCY McGINN,

Relief Defendants, and

GEOFFREY R. SMITH, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenor.

NOTICE OF OBJECTIONS

Notice is hereby given that, pursuant to 28 U.S.C. § 636(B)(1), Rule 72(a) and (b), Fed. R. Civ. P., and Local Rule 72.1(a) and (b), Defendant/Intervenor, Geoffrey R. Smith, Trustee of the David L. and Lynn A. Smith Irrevocable Trust, objects and appeals to the United States District Court for the Northern District of New York (Hon. Gary L. Sharpe, *U.S.D.J.*) from the Memorandum-Decision and Order issued by United States

Magistrate Judge David R. Homer filed on July 20, 2011 (Dkt. No. 342), and upon all prior proceedings and filings herein, Defendant/Relief Defendant Lynn A. Smith will move on Thursday, September 15, 2011, at 9:00 a.m., or at any other date convenient to the Court, before the United States Magistrate Judge, United States District Court for the Northern District of New York, 445 Broadway, Albany, New York.

Dated: August 3, 2011

Featherstonhaugh, Wiley & Clyne, LLP

By: s/ Stephen B. Hanse
Bar Roll No. 514950
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DEFENDANT/INTERVENOR, GEOFFREY R. SMITH, TRUSTEE OF THE DAVID L. AND LYNN A. SMITH IRREVOCABLE TRUST OBJECTIONS TO MAGISTRATE JUDGE DAVID R. HOMER'S JULY 20, 2011 MEMORANDUM-DECISION AND ORDER AND MEMORANDUM OF LAW IN SUPPORT OF OBJECTIONS

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PRELIMINARY STATEMENT

Pursuant to 28 U.S.C. §636(b)(1), Rule 72(a) and (b) of the Federal Rules of Civil Procedure, and Local Rule of Practice 72.1 for the United States District Court for the Northern District of New York, Defendant/Intervenor, Geoffrey R. Smith, Trustee of the David L. and Lynn A. Smith Irrevocable Trust ("Trust") respectfully submits this memorandum of law in support of its objections to that portion of the Magistrate Judge David R. Homer's Memorandum-Decision and Order dated July 20, 2011 ("Order") which authorized William J. Brown, Receiver for the McGinn-Smith entities ("Receiver"), "to take whatever action he deems in his judgment to be financially appropriate to obtain the maximum possible return on the Great Sacandaga Lake property, including the sale or rental of that property..." if Lynn Smith ("Relief Defendant/Defendant") is unable to satisfy the disgorgement and sanctions Order by September 1, 2011. (Dkt. No. 342 at 50-51).

As set forth below, the Order should be reversed or modified because it is contrary to law in that it compels the liquidation or rental of real property owned by a party not subject to the Magistrate's disgorgement and sanctions Order to satisfy a judgment rendered against a separate party sanctioned under the Order. Specifically, the Order compels the sale or rental of the Trust's Great Sacandaga Lake property if the Relief Defendant/Defendant is unable to "disgorge" $944,848[1] and pay $51,232 in attorneys' fees by September 1, 2011. (Dkt. No. 342 at 50-51).

First, as a matter of law, the Trust and the Relief Defendant/Defendant are two independent legal parties in the underlying action. (*See* Case No. 1:10-CV-457). It is

[1] The Magistrate's July 20, 2011 Order orders Lynn Smith to disgorge to the Receiver on behalf of the Trust a total of $944,848 jointly and severally with Dunn and Wojeski to the limited extent set forth in the Order. (Dkt. No. 342 at 50).

undisputed that the Trust is the only party that holds title to the Great Sacandaga Lake property. At no point in time did the Trust assert that it was harmed in any manner as a consequence of its purchase of the Great Sacandaga Lake property. The Order erroneously effectuates a taking of the Trust's property without due process of law by compelling the sale or rental of the Trust's Great Sacandaga Lake property without providing the Trust notice and a reasonable opportunity to object. (Dkt. No. 342). In addition to violating the Trust's due process protections, the Order, as it relates to the Trust, runs afoul of Rule 11 of the Federal Rules of Civil Procedure which authorizes the imposition of sanctions only after a party has been afforded notice and a reasonable opportunity to respond. (FRCP §11(c)(1)).

Second, the Order erroneously imposes the remedy of "disgorgement" upon the Relief Defendant/Defendant, which in turn imposes final and considerable harm upon the Trust in the sale or rental of the Great Sacandaga Lake property should the Relief Defendant/Defendant be unable to satisfy the Magistrate's disgorgement Order by September 1, 2011. It is well established that the primary purpose of disgorgement is to force a defendant to give up the amount he or she was unlawfully enriched following the determination by a district court that a party has violated federal securities laws. *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474 (2nd Cir. 1996). *See also, SEC v. Seibald*, 1997 WL 605114 (S.D.N.Y Sept. 30, 1997); *SEC v. Blue Bottle Ltd.*, 2007 U.S. Dist. LEXIS 95992 (S.D.N.Y. 2007), *citing*, *SEC v. Patel*, 61 F.3d 137 (2nd Cir. 1995). By erroneously ordering the Relief Defendant/Defendant to "disgorge" $944,848 while subject to the asset freeze, the Magistrate's Order ensures the liquidation of the Trust's property without notice and an opportunity to present its objections.

Third, the Order unilaterally usurps the legal rights of the Trust as owners of real property. Pursuant to the terms of the Order, the Receiver, who has no legal authority over the Trust's assets, is granted complete power to determine the terms and conditions of any sale or rental of the Trust's Great Sacandaga Lake property. In compelling the liquidation or rental of property owned by a non-culpable party by an individual with no fiduciary duty to the Trust to satisfy an order of disgorgement erroneously imposed upon a separate independent party, the Order is of clear error and contrary to law. Consequently, this Court should sustain the Trust's objections to the Magistrate's Order.

STATEMENT OF FACTS

On July 7, 2010, the Magistrate issued a Decision and Order in which it denied the SEC's application to freeze the corpus of the Trust and ordered that its assets be released from the asset freeze. (Dkt. No. 86). Although, the Trust was neither named as a relief defendant nor a defendant, but was rather authorized to intervene, the Magistrate analyzed the appropriateness of the freeze based on two alternative legal theories: (1) whether the Trust was a proper relief defendant or alternatively, (2) whether David Smith exercised sufficient control as to create an equitable ownership interest warranting the piercing of the Trust. *Id.*

To support his decision as it relates to the Trust, the Magistrate determined that the SEC did not demonstrate a likelihood of success that it would prove that the Trust was an appropriate relief defendant. (Dkt. No. 86 at 37-39). The Magistrate's decision was based on the fact that the Trust was not created with ill-gotten gains or that the purchase of the bank stock that was used to fund the Trust was not fraudulent or otherwise illegal. The Magistrate found that the stock investment from Relief

Defendant/Defendant's Stock Account used to fund the Trust represented "untainted funds easily identifiable and severable from the [Lynn Smith's] stock account as a whole." Since the Trust neither received nor was created with ill-gotten gains, the Court held that the SEC did not have a legitimate claim to its corpus based upon a relief defendant analysis. (Dkt. No. 86 at 39).

The Magistrate then analyzed whether the Trust should be subject to the asset freeze based on the theory that Defendant David Smith was the equitable owner of the Trust. (Dkt. No. 86 at 39-41). The evidence which the Court found insufficient to hold David Smith as an equitable owner in the Trust included testimony and documents demonstrating that David Smith had functioned as the investment advisor for the Trust; David Smith had paid approximately $100,000 in taxes owed by the Trust without reimbursement from the Trust; and Lynn Smith had paid expenses incurred by the Smiths' daughter, a beneficiary of the Trust, which would ordinarily have been paid by the Trust. The Magistrate held that Defendant David Smith could not be deemed to have an equitable ownership interest in the Trust because the "record is devoid of any proof that David Smith 'exercised considerable authority over [the trust] to the point of completely disregarding [its] form and acting as though its assets [were] his alone to manage and distribute...'" (Dkt. No. 86 at 39, *citing*, *In re Vebeliunas,* 332 F.3d 85, 92 (2nd Cir. 2003).

Also in his July 7, 2010 Decision and Order, the Magistrate held that "[a]s to the Great Sacandaga Lake camp, the record demonstrates without contradiction that this property was inherited by Lynn Smith from her father in 1969, remained in her name alone since that time, David Smith's only interest in the asset was periodically to vacation

at the property with his family, and David Smith never controlled the asset in any way...[t]herefore, the SEC's motion as to the Great Sacandaga Lake camp is denied and the asset freeze in the TRO as to the camp is vacated." (Dkt. No. 86 at 37).

As a consequence of her other assets being frozen, the Relief Defendant/Defendant determined that it was necessary to sell the Great Sacandaga Lake property in order to pay her daily living expenses and mount a defense. Geoffrey and Lauren Smith, the two sole beneficiaries of the Trust, had for their entire lives enjoyed vacationing at the Camp and had countless memories of their times on the Great Sacandaga Lake. Upon learning of the Relief Defendant/Defendant's decision to sell the property, the Trust, pursuant to the terms of its Declaration,[2] purchased the Great Sacandaga Lake property from the Relief Defendant/Defendant on July 22, 2010.[3] Under the terms of the purchase and sale agreement, title to the Camp was exclusively vested in the Trust. Since that time, the Trust has maintained sole ownership of the Great Sacandaga Lake property.

Following the July 7, 2010 Decision and Order, the SEC filed an Emergency Motion for Temporary Restraining Order to re-freeze the Trust based upon the discovery of an Annuity Agreement which it obtained from the original Trustee of the Trust. (Dkt. No. 103-3). This Annuity Agreement was entered into by the Irrevocable Trust and defendant David Smith and the Relief Defendant/Defendant and contractually obligated the Irrevocable Trust to pay the Smith's an annuity payment of $489,932 beginning in

[2] Dkt. No. 32-1.

[3] The purchase and sale of the Great Sacandaga Lake property was conducted in a business-like manner. There was a written contract of purchase and sale utilizing the standard Capital Region Board of Realtors contract which called for a closing date. The closing occurred on the closing date after the issuance of title insurance when the deed was passed and the consideration was paid.

2015. In an Order dated August 3, 2010 (Dkt. No. 104), the Magistrate granted the SEC permission to move against the Trust but in the form of a Motion for Reconsideration.

Prior to ruling on the SEC's motion, the Magistrate held an evidentiary hearing to consider testimony concerning a telephone call that took place on July 22, 2010 between the Trust's previous attorney Jill Dunn[4] and two SEC attorneys wherein it was alleged that Ms. Dunn disclosed the existence of the Annuity Agreement. The SEC argued that it was this telephone call that led to the discovery of the Annuity Agreement on July 27, 2010 when it was prompted to contact Thomas Urbelis[5] and request the document. That hearing took place on November 16, 2010. On November 22, 2010 the Magistrate granted the SEC's Motion for Reconsideration and "re-froze" the Trust's assets on the grounds that David Smith possessed an equitable and beneficial ownership interest in the Trust based on the Annuity Agreement. (Dkt. No. 194). The Magistrate, *sua sponte*[6], also found in the alternative that reconsideration was warranted under Rule § 60(b)(3) of the Federal Rules of Civil Procedure. In addition to granting the SEC's motion on reconsideration, the Magistrate also granted the SEC leave to move for sanctions against several individuals, including the Relief Defendant/Defendant, for failing to disclose the Annuity Agreement. (Dkt. No. 194 at 24). The Annuity Agreement in this matter establishes Defendant David Smith and the Relief Defendant/Defendant as independent annuitant creditors. (Dkt. No. 103-3). The express terms of the Annuity Agreement do

[4] Jim Featherstonhaugh of Featherstonhaugh, Wiley and Clyne, LLP first appeared as Attorney of Record for the Trust on February 15, 2011. (Dkt. No. 282).

[5] Thomas Urbelis was the original Trustee of the Trust. While the SEC sought sanctions against Mr. Urbelis, the July 20, 2011 Order held that the SEC had failed to demonstrate that he acted with subjective bad faith in his failure to produce the Annuity Agreement. (Dkt. No. 342 at 36).

[6] The Court in MDO II indicated that "the SEC also seeks reconsideration under FRCP 60(b)(3) based on fraud." However, because the Court *sua sponte* changed the SEC application seeking a temporary restraining order to a motion for reconsideration, this point was not specifically raised by the SEC prior to MDO II.

not establish either party as beneficial and equitable owners or grant either party any power to exercise authority or control over the Trust in any manner. (Dkt. No. 103-3). Furthermore, the terms of the Declaration of Trust are clear in that Geoffrey and Lauren Smith are the sole named beneficiaries of the Trust. (Dkt. No. 32-1).

On January 31, 2011, the SEC accepted the Magistrate's invitation and moved for sanctions against the Relief Defendant/Defendant and several other parties in their individual capacities. No party was named in its capacity as Trustee of the Trust. (Dkt. No. 261; Dkt. No. 342). On July 20, 2011, the Magistrate issued a Decision and Order which, among other things, ordered the Relief Defendant/Defendant to "disgorge" $944,848 and pay $51,232 in attorneys' fees by September 1, 2011. The Order further authorized the Receiver "to take whatever action he deems in his judgment to be financially appropriate to obtain the maximum possible return on the Great Sacandaga Lake property, including the sale or rental of that property..."[7] in order to satisfy any inability by the Relief Defendant/Defendant to satisfy the disgorgement and sanctions Order by September 1, 2011. (Dkt. No. 342 at 50-51).

ARGUMENT

Objections to a magistrate judge's ruling on a motion for sanctions should be sustained when the district judge, upon independent review of the merits, determines that any portion of the order is "of clear error or contrary to law." Fed. R. Civ. P. 72(a); 28 U.S.C. §636(b)(1)(A). The Trust respectfully submits that the Magistrate Judge's Order is of clear error and contrary to law with respect to that portion of his ruling that authorized the Receiver "to take whatever action he deems in his judgment to be financially appropriate to obtain the maximum possible return on the Great Sacandaga

[7] Dkt. No. 342.

Lake property, including the sale or rental of that property..." in order to satisfy any inability by the Relief Defendant/Defendant to satisfy the disgorgement and sanctions Order by September 1, 2011. (Dkt. No. 342 at 50-51).

POINT I

The Magistrate's Order Is Contrary To Law In That It Compels The Sale Or Rental Of The Trust's Real Property To Satisfy The Disgorgement And Sanctions Order Against The Relief Defendant/Defendant.

Pursuant to Rule 11(c)(3) of the Federal Rules of Civil Procedure, a court on its own may order a party to show cause why conduct specifically described in the order has not violated Rule 11(b) of the Federal Rules of Civil Procedure. Generally, Rule 11 of the Federal Rules of Civil Procedure establishes the standards attorneys and parties must meet when filing pleadings, motions, or other documents in court. A court also possesses inherent authority to impose sanctions for conduct untaken in bad faith. Sanctions imposed pursuant to the inherent powers doctrine require a highly specific finding of bad faith. *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 338 (2nd Cir. 1999), *citing*, *Milltex Indus. Corp. v. Jacquard Lace Co.*, 55 F.3d 34, 38 (2nd Cir. 1995).

The Record is clear that the Trust was not subject to sanctions pursuant to either Rule 11 of the Federal Rules of Civil Procedure or the Court's inherent power. However, the Magistrate's July 20, 2011 Order goes well beyond sanctioning the individuals named in the Order by imposing harm of a significant and potentially final nature upon the Trust by erroneously authorizing the Receiver "to take whatever action he deems in his judgment to be financially appropriate to obtain the maximum possible return on the Great Sacandaga Lake property, including the sale or rental of that property..." should

the Relief Defendant/Defendant be unable to "disgorge" $944,848 and pay attorneys' fees of $51,232 by September 1, 2011. (Dkt. No. 342 at 50-51).

There is nothing in the Record contesting the fact that the Trust was validly established in 2004 and is a legally independent entity authorized by law to purchase real property. Moreover, it is uncontested that the Trust is the sole legal owner of the Great Sacandaga Lake property as a consequence of its July 22, 2010 purchase of the property from the Relief Defendant/Defendant. As the sole legal owner of this property, the Order violates the Trust's due process protections in that it unilaterally compels the sale or rental of its real property without notice and a reasonable opportunity to contest the Order.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (U.S. 1950). While the Court reiterated the maxim in *Mullane* that "[t]he fundamental requisite of due process of law is the opportunity to be heard," the Court stated that "[t]his right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id.* (internal citations omitted). The Court's decision in *Mullane* "did not go so far as to hold that due process 'requires that a property owner receive actual notice before the government may take his property,'" (citing *Dusenbery v. United States*, 534 U.S. 161 (U.S. 2002)), "but it did require the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the

pendency of the action and afford them an opportunity to present their objections.'" *Luessenhop v. Clinton County*, 466 F.3d 259, 269 (2nd Cir. 2006), citing, *Mullane*, at 314. The "requirement of 'notice reasonably calculated' must be made in good faith, for, as Justice Jackson noted, 'when notice is a person's due, process which is a mere gesture is not due process.'" *Luessenhop v. Clinton County*, at 269, citing, *Mullane* at 315.

In addition to violating the Trust's due process protections, the Order violates Rule 11 of the Federal Rules of Civil Procedure. By imposing a disgorgement and sanctions Order on the Relief Defendant/Defendant which will result in the sale or rental of the Trust's property if the Relief Defendant/Defendant is unable to satisfy the September 1, 2011 deadline, the Magistrate's Order in effect authorizes the imposition of sanctions on the Trust - a party that has not been afforded notice and a reasonable opportunity to respond pursuant to the provisions of Rule 11 of the Federal Rules of Civil Procedure. (FRCP §11(c)(1)).

Nowhere in the Record leading up to the July 20, 2011 Order is there any notice to the Trust that the Magistrate intended to compel the sale or rental of its Great Sacandaga property as a provision of satisfying its disgorgement and sanctions Order imposed against the Relief Defendant/Defendant. As the sole legal owner of the Great Sacandaga Lake property it is clear error to compel the sale or rental of the Trust's property without affording it notice and an opportunity to present objections. Consequently, this Court should sustain the Trust's objections to the Magistrate's July 20, 2011 Order.

POINT II

The Magistrate's Order Is Contrary To Law In That It Compels The Sale Or Rental Of Real Property Owned By The Trust To Satisfy An Order Of Disgorgement Which Is Not A Proper Remedy.

The Order erroneously imposes the remedy of "disgorgement" upon the Relief Defendant/Defendant, which in turn imposes final and considerable harm upon the Trust. Specifically, the Order requires the Relief Defendant/Defendant to "disgorge to the Receiver on behalf of the Trust a total of $944,848...". It is well established that the primary purpose of disgorgement is to force a defendant to give up the amount he or she was unlawfully enriched following the determination by a district court that a party has violated federal securities laws. *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474 (2nd Cir. 1996). *See also, SEC v. Seibald*, 1997 WL 605114 (S.D.N.Y Sept. 30, 1997); *SEC v. Blue Bottle Ltd.*, 2007 U.S. Dist. LEXIS 95992 (S.D.N.Y. 2007), *citing, SEC v. Patel*, 61 F.3d 137 (2nd Cir. 1995).

Each and every decision relied upon by the Magistrate to support his July 20, 2011 disgorgement Order against the Relief Defendant/Defendant concerns defendants subject to disgorgement as a remedy for being found guilty of violating federal securities laws. To be sure, *SEC v. China Energy Sav. Tech., Inc.*, No. 06-CV-6402 (ADS)(AKT), 2008 WL 6572372 (E.D.N.Y. Mar. 28, 2008) requires defendants found to have violated federal securities laws to disgorge over $29 million; *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450 (2nd Cir. 1996) upheld a disgorgement order from the United States District Court for the Southern District of New York against certain defendants found by the District Court to have violated federal securities laws; *SEC v. Posner*, 16 F.3d 520 (2nd Cir. 1994) upheld a disgorgement order from the United States District Court for the

Southern District of New York against two defendants found by the District Court to have violated federal securities laws; *SEC v. Robinson*, No. 00 Civ. 7452, 2002 WL 1552049, at *7 (S.D.N.Y. July 16, 2002) concerns a magistrate's recommendation that a defendant found guilty of violating federal securities law pursuant to a default judgment be required to disgorge $420,000; *SEC v. McCaskey*, No. 98 Civ. 6153, 2002 WL 850001, at *4 (S.D.N.Y. Mar. 26, 2002) concerns a magistrate's recommendation that a certain defendant found guilty of violating federal securities laws be subject to a civil penalty and not an order of disgorgement.

The Magistrate's July 20, 2011 Order concluded that the Relief Defendant/Defendant acted with subjective bad faith in failing to disclose the existence of the Annuity Agreement. (Dkt. No. 342 at 19-20). However the remedy imposed by the Order is contrary to law in two critical aspects. First, contrary to every case cited by the Magistrate, the Relief Defendant/Defendant was not found guilty of violating any federal securities laws. Moreover, the Defendant/Relief Defendant is not even alleged to have violated any federal securities laws. Consequently, his Order requiring her to "disgorge" $944,848 is an erroneous remedy as a matter of law and fact. With the Magistrate's asset freeze in place it is highly probable that the Relief Defendant/Defendant will be unable to "disgorge" $944,848 by September 1, 2011, and consequently the Trust's property will be subjected to the unilateral sale or rental by the Receiver following that date without any opportunity to be heard or object.

Second, contrary to the underlying basis for the Magistrate's disgorgement and sanctions Order, the clear language of the Annuity Agreement establishes defendant David Smith and the Relief Defendant/Defendant as independent annuitant creditors.

(Dkt. No. 103-3). The Annuity Agreement does not establish them as beneficial and equitable owners of the Trust or grant them any power to exercise any authority or control over the Trust's principal. *Id.* As a matter of law, the "determining characteristic of an annuity is that the annuitant has an interest only in the payments themselves and not in principal fund or any source from which they may be derived." *In re Lynch*, 321 B.R. 114, 118 (Bankr. S.D.N.Y. 2005), citing, *Commonwealth v. Beisel*, 338 Pa. 519, 521 (Pa. 1940). An annuity contract provides an annuitant only a contract right to possible fixed future payments should the annuitant survive – a contract right that that does not bestow beneficial and equitable ownership or any property rights in an annuities principal.

It is clear error to authorize the sale or rental of the Trust's Great Sacandaga Lake property as a consequence of the Relief Defendant/Defendant's inability to satisfy the Magistrate's erroneous disgorgement Order. Consequently, this Court should sustain the Trust's objections to the Magistrate's Order.

POINT III

The Magistrate's Order Is Contrary To Law In That It Compels The Sale Or Rental Of The Trust's Great Sacandaga Lake Property By The Receiver Who Has No Authority Over The Trust's Assets.

The Order completely disregards the Trust's rights as autonomous legal property owners by granting sole authority in the Receiver of the McGinn-Smith entities to either sell or rent the Trust's property should the Relief Defendant/Defendant be unable to satisfy the disgorgement order and pay for the SEC's attorneys' fees by September 1, 2011. The Record is clear in that the Receiver only has authority over the McGinn-Smith entities. (Dkt. No. 5). Given that he is without legal authority to act as a receiver over the Trust, the Receiver, as a matter of law, owes no fiduciary duties to the Trust. The Order

erroneously effectuates a taking of the Trust's property by utilizing the Receiver to unwind the Trust's purchase of the Great Sacandaga property while failing to revert title to the Trust's property back to the Relief Defendant/Defendant. As such, the Order deprives the Trust of its property should the Relief Defendant/Defendant be unable to adhere to the September 1, 2011 timeframe – a timeframe that is unrealistic given the broad nature of the Magistrate's asset freeze. Moreover, pursuant to the terms of the Order, the Trust is denied any right to determine the terms and conditions of any sale or rental given that the sale or rental price of the Trust's property is left solely to the discretion of the Receiver. (Dkt. No. 342 at 50-51).

Under all circumstances, the Trust was never apprised of the Magistrate's intention to compel the sale or rental of its real property upon the Relief Defendant/Defendant's failure to satisfy a disgorgement Order and sanction penalty until such Order was issued on July 20, 2011. In failing to provide notice to the Trust of its order to compel the liquidation or rental of the Trust's property in its disgorgement and sanction Order, the Magistrate failed to afford the Trust even a "mere gesture" of due process. The Record is clear that at no time prior to the issuance of the July 20, 2011 sanction Order did the Magistrate provide notice reasonably calculated, under all circumstances, to the Trust of the pendency of the liquidation of its property. Moreover, the remedy of disgorgement as employed by the Magistrate is not available against a party who has not been found guilty of violating federal securities laws, let alone not even alleged to have violated such laws. Furthermore, the Order unilaterally usurps the Trust of its vested property rights by an individual who, as a matter of law, owes no

fiduciary duties to the Trust. Consequently, this Court should sustain the Trust's objections to the Magistrate's July 20, 2011 Order.

CONCLUSION

For the foregoing reasons, this Court should sustain the Trust's objections to the Magistrate Judge's July 20, 2011 Order which authorized the Receiver "to take whatever action he deems in his judgment to be financially appropriate to obtain the maximum possible return on the Great Sacandaga Lake property, including the sale or rental of that property..." if the Relief Defendant/Defendant is unable to satisfy the disgorgement and sanctions Order by September 1, 2011.

DATED: August 3, 2011

Respectfully submitted,

Featherstonhaugh, Wiley & Clyne, LLP

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