



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
New York Regional Office
Three World Financial Center
New York, NY 10281

DIVISION OF
ENFORCEMENT

Kevin P. McGrath
Senior Trial Counsel
(212) 336-0533 (direct)
(212) 336-1322 (fax)

August 11, 2011

BY ECF

The Honorable Gary L. Sharpe
United States District 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 Sharpe:

Plaintiff Securities and Exchange Commission hereby requests that its time to respond to Jill Dunn's Objections to Memorandum-Decision and Order of United States Magistrate Judge David R. Homer Filed July 20, 2011 ("July 20 MDO") be set for August 29, 2011, the same date the Commission's responses to Objections filed by Lynn Smith, Geoffrey Smith, Trustee of the David and Lynn Smith Irrevocable Trust (the "Smith Trust"), and David Wojeski are due.

The Commission has asked Benjamin Zelermyer, counsel for Dunn, to assent to this request and he has declined to do so. The Commission respectfully submits that consolidating its time to respond to these four related sets of objections is in the interests of judicial economy.

On July 20, 2011, Magistrate Judge Homer issued a MDO which imposed various sanctions on Dunn, Lynn Smith and Wojeski arising out of their false statements and misconduct in concealing an annuity agreement that was highly relevant to the preliminary injunction hearing, and a subsequent motion for reconsideration, that were before Magistrate Judge Homer upon the consent of all parties. Dunn filed her Notice of Objections/Appeal to the July 20 MDO on August 1, 2011, ostensibly pursuant to 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(a) and (b) and Local Rule 72.1(a) and (b), and set a return date of September 1, 2011. (Dkt. # 351; 351-1). Assuming Local Rule 72.1(b)(2) applies, which the Commission disputes, the Commission's response would be due this Monday, August 15, 2011.¹

On August 3, 2011, Lynn Smith filed her Notice of Objections (Dkt. # 356; 356-1), Wojeski filed his Notice Objections/Appeal (Dkt. # 355; 355-1) and Geoffrey Smith, as Trustee of the Smith Trust, filed his Notice of Objections (Dkt. # 357; 357-1). Lynn Smith, Geoffrey Smith and Wojeski all also moved ostensibly pursuant to 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(a) and (b) and Local Rule 72.1(a) and

¹ Dunn also filed an Order to Show Cause seeking a stay of the sanctions imposed on her (Dkt. # 353), to which the Commission responded on August 10, 2011 (Dkt. # 362).

The Honorable Gary L. Sharpe
August 11, 2011
Page 2

(b), and set a return date of September 15, 2011. Assuming Local Rule 72.1(b)(2) applies, which the Commission disputes, the Commission's time to respond to these three Objections would be August 29, 2011.

As set forth in more detail in the Commission's Opposition to Dunn's request for a stay of sanctions, it is the Commission's position that because this matter was referred to Magistrate Judge Homer pursuant to 28 U.S.C. § 636(c), any appeal must be taken directly to the Second Circuit, pursuant to Fed. R. Civ. P. 73(c). (Dkt # 362 at 2-5). Accordingly, the movants are not entitled to pursue their "Objections" or "Appeals" before the District Court and, indeed, there is no provision in the Local Rules governing the timing of objections or appeals to the District Court from orders entered by the Magistrate Judge pursuant to Rule 636(c).

Nevertheless, without waiving its objections to the applicability of Local Rule 72.1(a) and (b) to the current filings, the Commission is prepared to file its opposition to the Objections/Appeals of Lynn Smith, Geoffrey Smith as Trustee to the Smith Trust and Wojeski on August 29, 2011.

Given that the issues presented by Dunn's Objections are based on the same set of facts and give rise to the same legal questions presented in the Lynn Smith, Geoffrey Smith and Wojeski Objections, including the threshold question whether the moving parties even have the right to object to or appeal the July 20 MDO to the District Court, and, if so, common questions as to Judge Homer's factual findings, his authority to impose sanctions, the propriety of the sanctions imposed, and the relevant standard of review, if any, it is in the interests of judicial economy that the Commission respond to these identical issues in one consolidated brief.

Wherefore, the Commission respectfully requests that the Court grant its request that its time to respond to Dunn's Objections be set for August 29, 2011.

Respectfully submitted,

/s

Kevin P. McGrath
Attorney Bar Number 106326
Attorney for Plaintiff
Securities and Exchange Commission

cc. Benjamin Zelermyer, Esq.
Stephen Hanse, Esq.
James Featherstonhaugh, Esq.
Fred Knopf, Esq.
All by ECF and email

SO ORDERED:


U.S. District Judge

Date: August 12, 2011