



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

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DIVISION OF
ENFORCEMENT

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August 19, 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 respectfully seeks clarification from the Court concerning its August 11, 2011 Order in which it ruled that it lacked jurisdiction to consider Jill Dunn's motion for a stay of the sanctions imposed by the Memorandum-Decision and Order of United States Magistrate Judge David R. Homer Filed July 20, 2011 ("July 20 MDO"). In that Order, the Court also directed that "any appeal should be directed to the Court of Appeals." The Court stated it "concurs with the rationale stated by the SEC concerning the courts lack of jurisdiction." In its opposition to the motion for a stay (Dkt. 362), the Commission had argued that because this matter had been referred to Magistrate Judge Homer pursuant to 28 U.S.C. § 636(c) with the consent of all parties, any appeal from Judge Homer's decision to impose sanctions must be taken directly to the Second Circuit, pursuant to Fed. R. Civ. P. 73(c). (Dkt # 362 at 2-5).

The Commission has asked Benjamin Zelermyer, counsel for Dunn, whether he intends to withdraw Dunn's Notice of Objections/Appeal to the July 20 MDO (Dkt. # 351; 351-1) in view of the Court's August 11 holding that it lacks jurisdiction to hear any appeal from Judge Homer's July 20 MDO. Mr. Zelermyer has stated that he does not intend to do so. He has pointed, *inter alia*, to the Court's August 12, 2011 Order (Dkt # 364) granting the SEC's request (Dkt. 363) to set August 29, 2011 as its date to respond to Dunn's Notice of Objections/Appeal, as evidence that the Court did not intend its August 11 Order to be dispositive of Dunn's Notice of Objections/Appeal.

However, the Commission filed its request for the August 29, 2011 response date prior to the Court's issuance of its August 11 Order directing that "any appeal be directed to the Court of Appeals." Given the clear dictates of Fed. R. Civ. P 73(c), the Court's ruling that it lacks jurisdiction and its clear statement that any appeals be taken directly to the Court of Appeals, Dunn's insistence that the Commission must nevertheless respond on August 29, 2011 to her jurisdictionally baseless Objections/Appeal is frivolous and a waste of judicial resources.

The Honorable Gary L. Sharpe
August 19, 2011
Page 2

The Court's August 11 Order is also the law of the case as to Lynn Smith, Wojeski and the Trust as they all also consented to Magistrate Judge Homer's jurisdiction to hear the preliminary injunction matter from which these sanctions arise. (See Dkt. 12, Lynn Smith's consent; and Dkt. 59, Wojeski's consent as Trustee of the Smith Trust.) Accordingly, the Commission should not be required to respond to the Notices of Objections/Appeals filed by Lynn Smith, David Wojeski and Geoffrey Smith, as Trustee of the Smith Trust, given that they were also filed pursuant to the same faulty jurisdictional grounds rejected by the Court in ruling on Dunn's Motion for a Stay, i.e. 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(a) and (b) and Local Rule 72.1(a) and (b). See Lynn Smith's Notice of Objections (Dkt. 356); Wojeski's Notice of Objections/Appeal (Dkt. 355) and Geoffrey Smith's Notice of Objections (Dkt. 357). However, counsel for Lynn Smith and Geoffrey Smith has taken the same position as Dunn's counsel. Counsel for Wojeski has not responded to the Commission's inquiry.

The Commission respectfully submits that the Court's August 11 ruling that it lacks jurisdiction to consider Dunn's Objections/Appeals should be the law of the case as to all four pending Objections/Appeals to Judge Homer's July 20 MDO, and that it is an inefficient use of resources to require the Commission to respond to Objections/Appeals mooted by the Court's August 11 Order.

Accordingly, the Commission respectfully requests that the Court enter an Order making clear to the movants that it lacks jurisdiction to consider any of the Notices of Objections/Appeal from Judge Homer's July 20 MDO for the reasons set forth in its August 11 Order, denying all Objections/Appeals from the July 20 MDO (Dkt. 351, Dunn; Dkt. 355, Wojeski; Dkt. 356, Lynn Smith; and Dkt. 357, Geoffrey Smith as Trustee) for lack of jurisdiction and directing that any appeals from the July 20 MDO be directed to the Court of Appeals.¹

Respectfully submitted,

/s Kevin P. McGrath
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Attorney for Plaintiff
Securities and Exchange Commission

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

¹ Alternatively, if the Court's jurisdiction to consider any of the pending Objections/Appeals from Judge Homer's July 20 MDO is still in question, the Commission respectfully requests that it be permitted to brief only the jurisdictional issue on August 29, 2011 and that a further date for the Commission to respond to the substantive issues raised by these Objections/Appeals be set only when and if the Court rules that it has jurisdiction to hear any of these Objections/ Appeals.