

**STEINBERG & CAVALIERE, LLP**

50 MAIN STREET  
WHITE PLAINS, NY 10606

TELEPHONE: (914) 761-4200  
FACSIMILE: (914) 761-4256

JEFFREY G. STEINBERG  
KEVIN F. CAVALIERE

STEVEN A. COPLOFF  
RONALD W. WEINER  
BENJAMIN ZELERMYER  
BARRY S. GOLD  
JAMES F. CREIGHTON  
ROBERT P. PAGANO

ONE EXCHANGE PLAZA  
55 BROADWAY  
SUITE 1600  
NEW YORK, NY 10006

WRITER'S DIRECT  
DIAL NUMBER

**(203) 855-8698**

August 19, 2011

VIA ECF

Hon. Gary L. Sharpe, *U.S.D.J.*  
James T. Foley – U.S. Courthouse  
445 Broadway  
Albany, NY 12207

Re: *Securities and Exchange Commission v. McGinn, Smith & Co., Inc.*, 10 Civ. 457 (GLS) (DRH)

Dear Judge Sharpe:

We represent non-party Jill A. Dunn, Esq., in connection with Ms. Dunn's objections to and appeal from the Memorandum–Decision and Order of United States Magistrate Judge David R. Homer filed July 20, 2011 (Dkt. No. 342). We write in response to the letter (Dkt. No. 370) we received this morning from Kevin P. McGrath, Esq., one of the attorneys for plaintiff Securities and Exchange Commission (“SEC”), seeking clarification of the Court's “Text Only Order” entered August 11, 2011.

Although we do not oppose clarification of the Court's August 11 Order, we did not suggest to the SEC that the Court's August 12 Order (Dkt. No. 364) was evidence of the Court's intention. We pointed out that the Court's August 12 Order setting a briefing schedule was entered after the entry of the August 11 Order regarding Ms. Dunn's application for a stay. In our view, the sequence and combined effect of the two Orders sequence is ambiguous and therefore we suggested the need for clarification to the SEC.

Further, we noted that the Court's August 11 Order did not expressly rule on either Ms. Dunn's application for a stay or her objections to and appeal from Magistrate Judge Homer's July 20 Memorandum–Decision and Order. We also noted our expectation that in due course, this Court would render a formal ruling reflecting the Court's findings, reasoning and conclusions, and from which, if appropriate, an appeal could be taken to the Court of Appeals.

Finally, Rule 73(c) is part of the broader set of rules dealing with proceedings before magistrate judges by consent of the parties and deals specifically with appeal from

**E-MAIL: BZLAW@OPTONLINE.NET**

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“a judgment entered at a magistrate judge’s direction.” Apart from the fact that no judgment has been entered at the direction of Magistrate Judge Homer, Ms. Dunn, for herself, did not consent to any proceedings before a magistrate judge. Indeed, Ms. Dunn raised this issue with the Court at the earliest opportunity (Dkt. No. 267, Text Orders entered February 7 and 8, 2011); in opposition to the SEC’s motion for sanctions (Dkt. No. 300, p. 7); and again in her objections to and appeal from Magistrate Judge Homer’s July 20 Memorandum–Decision and Order (Dkt. No. 351-1, pp. 4-5).

Our suggestion that clarification was needed was plainly not frivolous. Especially in light of Ms. Dunn’s jurisdictional objection, neither is her refusal to simply withdraw her objections/appeal in the absence of a formal ruling by this Court, thereby risking waiver of an important legal right based on an inference as to what the Court intended.\*

Respectfully,

s/ Benjamin Zelermyer

Benjamin Zelermyer  
Bar Roll No. 516663

Cc: All counsel (via ECF)

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\* The SEC has already briefed the jurisdictional issue in response to Ms. Dunn’s application for a stay (Dkt. No. 362, pp. 2-5), and has already been granted an extension of time to respond to Ms. Dunn’s objections/appeal (Dkt. No. 364). There is no reason to further delay resolution of this matter by bifurcating the SEC’s response, allowing it second bite at the jurisdictional issue and postponing indefinitely its opposition on the merits.