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 MOTION

PLEASE TAKE NOTICE that upon all the pleadings and proceedings heretofore had herein, Defendant/Intervenor, Geoffrey R. Smith, Trustee of the David L. and Lynn A. Smith Irrevocable Trust moves before a term of this Court to be held on the 20th of October, 2011 at 9:30 a.m., or at any other date convenient to the Court, before the Honorable Gary L. Sharpe, United States District Judge, United States District Court for

the Northern District of New York, 445 Broadway, Albany, New York for an Order to stay that portion of the July 20, 2011 Decision and Order which authorized the Receiver to either sell or rent the Trust's property in order to satisfy the inability of the Relief Defendant/Defendant to comply with the Court's disgorgement and sanctions Order pending appeal.

PLEASE TAKE FURTHER NOTICE that pursuant to Local Rule 7.1(b)(2), opposition papers must be filed and served not less than seventeen days prior to the return date.

DATED: September 12, 2011

Featherstonhaugh, Wiley & Clyne, LLP

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

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

Intervenor.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR STAY OF ENFORCEMENT PENDING APPEAL OF THAT PORTION OF THE JULY 20, 2011 DECISION AND ORDER GRANTING SOLE AUTHORITY TO THE RECEIVER TO SELL OR RENT THE TRUST'S PROPERTY IN ORDER TO SATISFY THE INABILITY OF LYNN SMITH TO COMPLY WITH THIS COURT'S SANCTIONS AND DISGORGEMENT ORDER

Featherstonhaugh, Wiley & Clyne, LLP
Attorneys for Defendant/Intervenor, Geoffrey R. Smith, Trustee for the David L. and Lynn A. Smith Irrevocable Trust
Albany, New York 12207

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Rules

Defendant/Intervenor, Geoffrey R. Smith, Trustee of the David L. and Lynn A. Smith Irrevocable Trust ("Trust") respectfully moves this Honorable Court for an entry of an Order temporarily staying the enforcement of that portion of this Court's Decision and Order entered July 20, 2011 to authorize the Court-appointed Receiver for the McGinn-Smith properties, William J. Brown, Esq. (the "Receiver") to sell or rent the Trust's Great Sacandaga Lake property as a consequence of Lynn Smith's ("Relief Defendant/Defendant") inability to satisfy the terms of the Order pending appeal of that portion of the Decision and Order, and granting any further relief that to the Court may seem just and proper.

THE URGENCY

This memorandum is filed in support of the motion for a temporary stay of enforcement of that portion of the July 20, 2011 Decision and Order which, among other things, granted the Receiver sole authority to sell or rent the Trust's Great Sacandaga Lake property in order to satisfy the inability of the Relief Defendant/Defendant to comply with this Court's disgorgement and sanctions order.

STATEMENT OF FACTS

On July 7, 2010, this Court 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, this Court 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.

In its decision, this Court determined that the Plaintiff, Securities and Exchange Commission ("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). This 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. This Court 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, this 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).

This Court 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 this 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 Court 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).

The July 7, 2010 Decision and Order also 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).

The Relief Defendant/Defendant determined that it was necessary to sell the Great Sacandaga Lake property. Geoffrey and Lauren Smith, the two sole beneficiaries of the Trust, had for their entire lives enjoyed vacationing at the property 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,[1] purchased the Great Sacandaga Lake property from the Relief Defendant/Defendant on July 22, 2010.[2] 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

[1] Dkt. No. 32-1.

[2] 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.

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 Trust and defendant David Smith and the Relief Defendant/Defendant, and contractually obligated the Trust to pay the Smith's an annuity payment of $489,932 beginning in 2015. In an Order dated August 3, 2010 (Dkt. No. 104), this Court granted the SEC permission to move against the Trust but in the form of a Motion for Reconsideration.

Prior to the ruling on the SEC's motion, this Court 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[3] 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[4] and request the document. That hearing took place on November 16, 2010. On November 22, 2010 this Court 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). This Court, *sua sponte*[5], 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, this Court also granted the SEC leave to move for sanctions against several individuals,

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

[4] 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).

[5] 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.

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 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 this Court's invitation and moved for sanctions against the Relief Defendant/Defendant and several other parties in their individual capacities. Neither the Trust nor Geoffrey Smith, as Trustee were named as a party in the SEC's motion. (Dkt. No. 261; Dkt. No. 342). On July 20, 2011, this Court 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..."[6] in order to satisfy any inability by the Relief Defendant/Defendant to comply with the disgorgement and sanctions Order by September 1, 2011. (Dkt. No. 342 at 50-51). The Relief Defendant/Defendant did not meet the September 1, 2011 deadline.

[6] Dkt. No. 342.

ARGUMENT

Pursuant to Fed. R. Civ. P. 62(c), this Court has the authority to grant a stay pending appeal. Rule 62(c) provides:

> While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.[7]

In determining whether or not to grant a stay pending appeal, courts must consider the following factors:

> (1) whether a stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 129 S. Ct. 1749, 1761 (U.S. 2009).

The first two factors in this analysis are the most critical. Id. Additionally, in considering these four factors, the Second Circuit has stated "'that the degree to which a factor must be present varies with the strength of the other factors, meaning that "more of one [factor] excuses less of the other.'" McCue v. City of New York (in re World Trade Ctr. Disaster Site Litig.), 503 F.3d 167, 170 (2nd Cir. 2007), citing, Thapa v. Gonzales, 460 F.3d 323, 334 (2nd Cir. 2006). In other words, the factors are viewed on a "sliding scale," and "[t]he necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other stay factors." Thapa v. Gonzales at 334-35, citing, Mohammed v. Reno, 309 F.3d 95, 101 (2nd Cir. 2002). To obtain a stay

[7] Where there is reason to believe that an appeal will be taken, there is no reason why the Court should not make an order preserving the status quo during the expected appeal. *See* 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, §2094.

pending appeal, "the movant need not always show a 'probability of success' on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that that the balance of the equities weighs heavily in favor of granting the stay." LaRouche v. Kezer, 20 F.3d 68, 72 (2nd Cir. 1994). (internal quotations omitted). Ultimately, a stay should be granted in order to preserve the status quo. Kidder, Peabody & Co. v. Maxus Energy Corp., 925 F.2d 556, 565 (2nd Cir. 1991).

As to the first factor, the Trust respectfully submits that there are three errors in the July 20, 2011 Decision and Order ("Order") which support a "strong showing that [it] is likely to succeed on the merits." Nken, 129 S. Ct. at 1761. These errors include: (1) the Order is contrary to law in that it violates the Trust's due process rights by compelling the sale or rental of a non-named non-culpable party's property to satisfy a monetary sanction imposed upon an independent third party; (2) the Order is contrary to law in that it usurps the rights and fiduciary duties of the Trustee; and (3) the Order is contrary to law in that it imposes an improper remedy which in effect penalizes a non-named, non-culpable party.

(1) Due Process

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 neither the Trustee nor the Trust were a party to the sanctions Order and neither was subject to sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure or the Court's inherent power under the terms of the Order. However, the July 20, 2011 Order forces the Trust to bear the consequences of the Relief Defendant/Defendant's sanctions by granting 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..." for the Relief Defendant/Defendant's inability 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. The Court authorized the Trust to intervene as a consequence of its independent legal existence. Moreover, it is uncontested that the Trust is the sole vested 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 vested owner, the Order violates the Trust's due process protections in that it unilaterally effectuates a taking of its real property to satisfy an independent third party's sanction and disgorgement order without notice and a reasonable opportunity to contest the Order. That the Order states that the Receiver's sale is on behalf of the Trust does nothing to diminish the fact that the Trust was never afforded notice and an opportunity to object to

the Court's directive that the Trust's property be liquidated for the Relief Defendant/Defendant's failure to meet the terms of 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 Court's deadline, the Order inequitably forces the Trust to bear the consequences of a third party's alleged wrongdoing without having 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)).

(2) **The Order Usurps the Rights and Fiduciary Duties of the Trustee**

The Order is also in error in that it usurps the Trust's rights as an autonomous vested owner of real property by granting sole authority to the Receiver of the McGinn-Smith entities to sell or rent the Trust's property as a consequence of the Relief Defendant/Defendant's inability to satisfy the disgorgement Order and pay for the SEC's attorneys' fees. The Record is clear in that the Receiver only has authority over the McGinn-Smith entities. (Dkt. No. 5). The Receiver has no legal authority over the assets of the Trust. The Receiver owes no fiduciary duties to the Trust. As a matter of law, the Receiver owes no duties to safeguard the interests of the Trust's beneficiaries, including maintaining title to their property. The Trustee is under a duty to the beneficiaries to administer the Trust solely in the interest of the beneficiaries. Matter of Heller, 6 N.Y.3d (N.Y. 2006). As a matter of law, only the Trustee possesses the authority to effectuate the sale of the Trust's assets. On balance, to paraphrase Chief Judge Cardozo's famous statement, it is the Trustee - and not the Receiver - that that is held to "the punctilio of a honor the most sensitive" in safeguarding the assets of the Trust for the interests of its beneficiaries. Meinhard v. Salmon, 249 N.Y. 458, 464 (N.Y. 1928).

Contrary to the language of the Order, the Trust was not harmed by the alleged actions or inactions of the Relief Defendant/Defendant. The Trust is, however, harmed in

a real and permanent nature by the Order in that the Order grants the Receiver sole authority 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. 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). Given the foregoing, the Order unilaterally usurps the Trust of its vested property rights by an individual who, as a matter of law, owes no duties to the Trust or its beneficiaries.

(3) **The Order Imposes an Inappropriate Remedy**

It is further respectfully submitted that the July 20, 2011 Order is in error in that it 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 Court to support the 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 remedy imposed by the July 20, 2011 Order is contrary to law in that the Relief Defendant/Defendant was not found guilty of violating federal securities laws. Consequently, the Order requiring the Relief Defendant/Defendant to "disgorge" $944,848 is an erroneous remedy as a matter of law. With the asset freeze in place the Relief Defendant/Defendant did not "disgorge" $944,848 on or before September 1, 2011, and pursuant to the terms of the Order, the Trust is forced to suffer the compulsory sale or rental of its property without an opportunity to be heard or object.

Given the foregoing, it is respectfully submitted that the Trust has met its burden of demonstrating a likelihood of success on its appeal.

As to the second factor, by disregarding the fiduciary duties of the Trustee and ordering the sale of its real property without affording the Trust an opportunity to be heard, the beneficiaries of the Trust will be irreparably injured as a consequence of the sale of its property absent a stay. Without injunctive relief, the Trust will suffer actual irreparable harm in that its ownership rights in its property will be eliminated. The irreparable harm suffered as a consequence of the loss of its title to its real property is "'neither remote nor speculative, but actual and imminent.'" Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 975 (2nd Cir. 1989), citing, Consolidated Brands, Inc. v. Mondi, 638 F. Supp 152, 155 (E.D.N.Y. 1986). Real property by its very nature is unique and exclusive. As such, the Receiver's sale of the Trust's property will directly impose upon the Trust and its beneficiaries an actual irreparable harm for which a monetary award cannot be adequate. *See* Tucker Anthony Realty Corp., 888 F.2d at 975. Given the longstanding and memorable history with the property, the Great Sacandaga Lake property was purchased by the Trust to preserve the asset for the benefit of the named beneficiaries. Should the property be sold by the Receiver as a consequence of this Court's disgorgement order against the Relief Defendant/Defendant, the Trust and the beneficiaries will suffer irreparable injury. Given the foregoing, it is respectfully submitted that the Trust has satisfied its burden as to the second factor.

As to the third factor, it is respectfully submitted that the issuance of a stay will not substantially injure the other parties interested in this proceeding. By granting a stay pending appeal, the Court will maintain the status quo in this matter and afford the Trust

the opportunity to be heard. However, should a stay pending appeal not be granted, the only party that will be injured is the Trust given that (1) all assets are presently frozen; (2) the Trust purchased the property in order to continue to enjoy the longstanding benefits of the property; (3) the Trust risks losing title to the Great Sacandaga Lake property; and (4) no other parties to this proceeding are at risk for the loss of property during the pendency of any stay. Consequently, the third factor weighs in favor of granting a stay.

Finally, the public interest lies in favor of a stay. There is a real public interest in safeguarding the rights of legitimate owners of real property from governmental takings without notice and an opportunity to present their objections. Additionally, there is a real public interest of protecting the rights of non-culpable parties from being subjected to sanctions for the alleged actions or inactions of independent third parties. The granting of a stay pending appeal is in the public interest because it will preserve the status quo while a higher court considers the merits of Mrs. Smith's claims. See Connecticut Hosp. Assoc. v. O'Neill, 863 F. Supp. 59, 61 (D. Conn. 1994). By maintaining the status quo, title to the Trust's Great Sacandaga Lake property will continue to be held by the Trust until such time as its appeal has been decided. This factor further weighs in favor of granting a stay.

By this motion, the Trust respectfully requests of this Honorable Court the opportunity to have all of its rights and arguments fully considered before it is subjected to the sale or rental of its property in order to satisfy the inability of the Relief Defendant/Defendant to comply with the disgorgement and sanctions order set forth in the Court's July 20, 2011 Decision and Order.

CONCLUSION

For the reasons stated, it is respectfully requested that this Court grant a stay of enforcement of that portion of the July 20, 2011 Decision and Order which authorized the Receiver to either sell or rent the Trust's property in order to satisfy the inability of the Relief Defendant/Defendant to comply with the Court's disgorgement and sanctions Order pending appeal.

Dated: September 12, 2011

Respectfully submitted,

Featherstonhaugh, Wiley & Clyne, LLP

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