**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF NEW YORK**

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

No. 10-CV-457 (GLS/DRH)

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

Defendants.

JILL A. DUNN, ESQ.,

Non-Party.

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**APPEARANCES:**

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**DAVID R. HOMER**
**U.S. MAGISTRATE JUDGE**

**MEMORANDUM-DECISION AND ORDER**

Presently pending are the motions of non-party Jill A. Dunn, Esq. ("Dunn") and

defendant Geoffrey R. Smith, Trustee of David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 ("Trust") to stay pending appeal this Court's memorandum decision and order filed July 20, 2011.[1] Dkt. Nos. 352, 376. Plaintiff Securities and Exchange Commission ("SEC") opposes the motions. Dkt. Nos. 362, 370, 393. Also pending are the SEC's motion for an order and judgment against defendant Lynn Smith and Lynn Smith's request to withhold entry of the order and judgment pending determination of the Trust's motion to stay. Dkt. Nos. 390, 392. For the reasons which follow, the motions to stay are denied and the SEC's motion for entry of an order and judgment as to Lynn Smith is granted.

## I. Background

### A. Facts

In a motion filed on January 31, 2011, the SEC moved for sanctions against various defendants, non-parties, and attorneys for conduct concerning documents related to an annuity agreement. Dkt. No. 261. In a memorandum-decision filed July 20, 2011, the motion was granted in part and denied in part. MDO IV. Familiarity with that decision is assumed. See also note 1 supra. As relevant to the pending motions, that decision granted the SEC's motion as to Lynn Smith and ordered the following relief:

> A. On or before September 1, 2011, Lynn Smith shall disgorge to the Receiver on behalf of the Trust a total of $944,848.00 jointly and severally with Dunn and Wojeski to the extent indicated below and shall pay to the SEC a total of $51,232.00 for

[1] See S.E.C. v. Smith, No. 10-CV-457 (GLS/DRH), 2011 WL 2909319 (N.D.N.Y. July 20, 2011) (Dkt. No. 342) ("MDO IV"); see also S.E.C. v. McGinn, Smith & Co., 752 F. Supp. 2d 194 (N.D.N.Y. 2010) (Dkt. No. 86) ("MDO I"), vacated in part on reconsideration, 752 F. Supp. 2d 220 (N.D.N.Y. 2010) (Dkt. No. 194) ("MDO II"); S.E.C. v. Wojeski, No. 10-CV-457 (GLS/DRH) (N.D.N.Y. decision filed Jan. 11, 2011) (Dkt. No. 254) ("MDO III").

> attorneys' fees and costs incurred by the SEC; and B. If Lynn Smith fails to disgorge and pay such amounts on or before September 1, 2011:
>
> > I. The SEC may have judgment against Lynn Smith for any amount which remains unpaid; and
> >
> > ii. The Receiver is granted leave on behalf of the Trust 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, in whole or in part, in which case Lynn Smith will be entitled to offset any amount recovered by the Receiver for the property, less costs, against the total amount owed . . . .

MDO IV at 50-51. As to Dunn, the SEC's motion was granted to the extent that:

> A. On or before September 1, 2010, Dunn shall disgorge to the Receiver on behalf of the Trust a total of $5,355.00 jointly and severally with Lynn Smith and, if such amount is not disgorged by that date, the SEC may have judgment against Dunn for any amount which remains unpaid; [and]
>
> B. She is publicly admonished for deliberately filing a false declaration . . . .[2]

MDO IV at 51.

Notices of appeal from this decision have been filed by Lynn Smith, Dunn, and the Trust. Dkt. Nos. 351 (Dunn notice to district court), 356 (L. Smith notice to district court), 357 (Trust notice to district court), 379 (L. Smith notice to court of appeals),[3] 380 (Trust

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[2]The decision also directed the Clerk to forward a copy of the decision to the New York State Committee on Professional Standards for the Appellate Division, Third Department. MDO IV at 51 n.24.

[3]Lynn Smith has filed a notice of appeal but has not moved for a stay. See Dkt. No. 392 at 1 (request by counsel for Lynn Smith and the Trust to withhold entry of judgment against Lynn Smith pending decision on the Trust' motion for a stay but making no reference to any motion to stay by Lynn Smith).

notice to court of appeals), 381 (Dunn notice to court of appeals).[4] Lynn Smith has failed to disgorge or pay the amounts required by the decision. See Dkt. No. 390. Dunn timely remitted the amount she was ordered to disgorge (Dkt. No. 394), MDO IV containing the public admonishment of Dunn was publicly filed on July 20, 2011 (Dkt. No. 342), and a copy of the decision was forwarded to the Committee on Professional Standards on July 20, 2011 (confirmed by Court-only clerk's Office staff notes).

**B. Procedural History of These Motions**

The proceeding underlying the SEC's motion for sanctions was the SEC's motion for a preliminary injunction freezing the assets of the defendants and relief defendants. See MDO I. Upon the filing of MDO IV on July 20, 2011, Dunn appealed the decision to the district court on August 1, 2011 and simultaneously moved for a stay of the decision pending determination of her appeal. Dkt. Nos. 351-53. The SEC responded, contending that the district court lacked jurisdiction to hear such an appeal and that any appeal must proceed in the court of appeals. Dkt. No. 362. In text orders filed August 1 and 22, 2011, the district court agreed with the SEC and denied Dunn's appeal as well as those of Lynn Smith and the Trust. Lynn Smith, the Trust, Dunn, and Wojeski then filed notices of appeal to the court of appeals. Dkt. Nos. 379-81, 383.

It does not appear that Dunn's motion for a stay pending appeal was decided by the district court, but given the basis of the district court's determination that it lacks jurisdiction

[4]Sanctions were also imposed against David M. Wojeski ("Wojeski"), the former Trustee of the Trust. MDO IV at 51. Wojeski has also filed a notice of appeal to the court of appeals but has not moved for a stay of the decision from which he appeals.

over any appeal of MDO IV and its referral of the Trust's similar motion for a stay to this Court, Dunn's motion as well as that of the Trust are deemed referred to this court for determination. See Text Order filed Aug. 22, 2011 (denying Dunn's appeal for lack of jurisdiction); Dkt. No. 376 (noting that the Trust's motion for a stay pending appeal has been referred to this court for determination).

As noted, Lynn Smith has neither disgorged nor paid the amounts directed in MDO IV and, while she has filed a notice of appeal from that decision, she has not moved for a stay pending appeal. On September 27, 2011, when Lynn Smith failed to remit such payments, the SEC moved for the entry of an order and judgment against Lynn Smith regarding the unpaid amounts. Dkt. No. 390. Lynn Smith requested that any decision on this motion be held in abeyance pending resolution of the Trust's motion for a stay of MDO IV. Dkt. No. 392.

## II. Discussion

A motion for a stay pending appeal is governed by Fed. R. Civ. P. 62(c), which provides in pertinent part that ""[w]hile 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." A stay pending appeal under Rule 62(c) "is not a matter of right, even if irreparable injury might otherwise result." Niken v. Holder, 129 S. Ct. 1749, 1760 (2009) (citation and quotation marks omitted). Rather, such a motion requires "an exercise of judicial discretion, and [t]he propriety of its issue is dependent upon the circumstances of the particular case." Id. (internal quotation marks and citations omitted). "The party

requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." Id. at 1761 (citations omitted).

> The exercise of discretion requires a court to balance four factors:
>
> (1) whether the 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 the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Niken, 129 S. Ct. at 1761 (internal quotation marks and citations omitted); see also In re World Trade Center Disaster Site Litigation, 503 F.3d 167, 170 (2d Cir. 2007); Knipe v. Skinner case. No. 91-CV-1338, 1993 WL 241329, at *1 (N.D.N.Y. June 25, 1993). "[T]he 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." In re World Trade Ctr. Disaster Site Litig., 503 F.3d at 170 (internal quotation marks and citations omitted). The first two factors are the "most critical." Niken, 129 S. Ct. at 1761. A stay should be granted "only when it is necessary to preserve the status quo pending the appeal." Kidder, Peabody & Co. v. Maxus Energy Corp., 925 F.2d 556, 565 (2d Cir. 1991) (citations omitted). "Maintaining the status quo means that a controversy will still exist once the appeal is heard." 12 Moore's Federal Practice § 62.06[1] (3d ed. 2009).

As to the first factor, the moving party must make a "strong showing that [s]he is likely to succeed on the merits." Niken, 129 S. Ct. at 1761. This requires a demonstration of more than a mere possibility of prevailing on appeal but less than a likelihood. See Safeco Ins. Co. of Am. v. M.E.S., Inc., No. 09-CV-3312 (ARR)(ALC), 2010 WL 5437208, at *7 (E.D.N.Y. Dec. 17, 2010) (citing cases). "The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury [the moving party]

will suffer absent the stay." Mohammed v. Reno, 309 F.3d 95, 101 (2d Cir. 2002) (internal quotation marks and citation omitted).

**A. Dunn**

It is assumed arguendo that Dunn has satisfied the first factor that she has made a strong showing that she will succeed on the merits of her appeal and the third factor that the issuance of a stay will not substantially injure the SEC. It is further assumed arguendo that the fourth factor, the public interest, is at worst neutral on this motion. Dunn's motion is, however, resolvable solely by consideration of the second factor – whether Dunn will be irreparably injured absent a stay.

MDO IV directed three things as to Dunn – (1) the disgorgement of $5,355.00 by September 1, 2011; (2) a public admonishment contained in MDO IV; and (3) a direction to the Clerk's Office to forward a copy of MDO IV to the Committee on Professional Standards. MDO IV at 51. All three events have already occurred. Dunn timely remitted the $5,355.00 in the form of the uncashed check in that amount which she received from the Trust. Dkt. No. 394 at 2. Even if that check were returned to her, she is enjoined from using that money by the injunction entered on August 3, 2010. Dkt. No. 104 at 5-6. If the stay is not entered, the money will simply remain in the custody of the Receiver and available for return to Dunn if she prevails on her appeal. The public admonishment has already occurred in the filing of MDO IV and cannot be affected by a stay, but could be stricken or withdrawn if Dunn prevails on her appeal. The Clerk's Office also has already forwarded MDO IV to the Committee on Professional Standards. Any action to be taken by that committee lies solely within its discretion and may be undertaken or declined by that

committee regardless of the outcome of Dunn's appeal. Accordingly, a stay would have no effect on that event as well.

Thus, Dunn can identify no harm, let alone any irreparable harm, that will result if a stay is not entered. Where, as here, a stay will be of no effect and will not alter the status quo, the other three factors are outweighed even where they support the application of the moving party. See Kidder, Peabody & Co., 925 F.2d at 565 (holding that a stay should only issue to preserve the status quo); Safeco Ins. Co. of Am. v. M.E.S., Inc., No. 09-CV-3312 (ARR)(ALC), 2010 WL 5437208, at *6 (E.D.N.Y. Dec. 17, 2010) (same); see also 12 J. Moore et al., Moore's Federal Practice § 62.06[1] (3d ed. 2011) ("Maintaining the status quo means that a controversy will still exist once the appeal is heard.") (emphasis in original). Accordingly, in the absence of a showing of any harm if a stay is not entered, Dunn's motion must be denied.

**B. The Trust**

The Trust was not directly the subject of any sanctions ordered in MDO IV. However, MDO IV directed in part as to Lynn Smith that if she failed to disgorge and pay the amounts ordered, the Receiver could sell or rent the Great Sacandaga Lake property as the Receiver deemed appropriate. MDO IV at 50-51. The Trust now moves to stay that portion of MDO IV pending its appeal. Trust Mem. of Law (Dkt. No. 376-1) at 1.

The Trust has failed to meet its burden as to any of the four factors governing stays. As to the first factor, the Trust has failed to demonstrate that it will likely succeed on its appeal. The portion of MDO IV from which the Trust appeals simply authorizes the Receiver to take whatever steps he deems appropriate to maximize the return on the

property.[5] The arguments articulated here by the Trust for its appeal have previously been raised and rejected both in this Court and in the Second Circuit Court of Appeals concerning the Receiver's sale of a second vacation property owned by Lynn Smith. See Mem.-Decision & Order filed Feb. 1, 2011 (Dkt. No. 263) (granting Receiver's motion to sell a Florida vacation property of Lynn Smith), aff'd, __ F.3d __, 2011 WL 3437561 (2d Cir. Aug. 8, 2011). The Trust, therefore, cannot show a likelihood that it will prevail on its appeal.

As to the second factor, the Trust contends that it will suffer irreparable harm in the absence of a stay because the beneficiaries of the Trust – Lynn Smith's two adult children – will be denied the use of the property for vacations and the property holds sentimental value for them as it has been part of their entire lives. Trust Mem. of Law at 13. However, it is the Trust, not the Smith children, which owns the property. Having opted for the benefits of ownership by the Trust rather than themselves, the children cannot now assert a harm to any cognizable ownership or possessory interest. Moreover, the Trust's financial interest in the property, its only cognizable interest here, is identical to that of the receiver – to avoid dissipation of the value of the property and to realize the maximum return on that value. Thus, the Trust has also failed to demonstrate any irreparable harm.

As to the third factor, the interests of allegedly defrauded investors, on whose behalf the Receiver acts, could suffer substantial injury if the Receiver is stayed from taking action with respect to the property. At present, the property is titled to the Trust, but the trust's assets are frozen under the control of the Receiver pending the outcome of this action.

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[5]The Receiver was already authorized to take such steps and this portion of MDO IV simply confirmed that authority. See Order filed Apr. 20, 2010 (Dkt. No. 5) at 9-10 (describing authority of Receiver).

This action remains in an extended period of discovery with motions, trial, and appeals yet to occur. It thus appears likely that the litigation of this action will extend for another two years or more before any final resolution. It also appears that the appeal of MDO IV will likely take another six to twelve months for resolution. In the meantime, the property remains unused, deteriorating with time or incurring additional expenses for maintenance, diminishing in value. In the absence of rental or sale of the property, either investors or the Trust will realize a diminished return on the property. Therefore, the third factor also weighs strongly against the issuance of a stay. As to the fourth factor, the public interest also weighs against issuance of a stay for substantially the same reason.

Accordingly, as the Trust has failed to meet its burden of demonstrating a sufficient basis for the issuance of a stay, its motion for a stay pending its appeal is denied.[6]

**C. Lynn Smith**

Lynn Smith has not sought a stay and has not disgorged or paid the amounts required by MDO IV. The SEC moves for entry of an order and judgment upon that failure and Lynn Smith requested that entry of those orders be withheld pending disposition of the motion until the Trust's motion to stay has been decided. Dkt. Nos. 390, 392. As the Trust's motion to stay is decided herein, the SEC's motion is granted and Lynn Smith's request is denied.

[6]The SEC argues in the alternative that the portion of MDO IV for which the Trust seeks a stay is not subject to the stay provision of Rule 62(c). SEC Mem. of Law (Dkt. No. 393) at 3-4. Given the disposition on the merits of the Trust's motion, this argument will not be addressed.

## III. Conclusion

For the reasons stated above, it is hereby

**ORDERED** that:

1. Dunn's motion for a stay pending appeal (Dkt. No. 352) is **DENIED**;

2. The Trust's motion for a stay pending appeal (Dkt. No. 376) is **DENIED**; and

3. The SEC's motion for entry of an order and judgment as to Lynn Smith (Dkt. No. 390) is **GRANTED** and Lynn Smith's request to withhold entry of such order and judgment (Dkt. No. 392) is **DENIED**.

**IT IS SO ORDERED.**

DATED: October 6, 2011

David R. Homer
U.S. Magistrate Judge