

expanding the scope of the deposition of Ms. Mehraban beyond the area set forth in paragraph 1 of the 5/25/10 Order.

Dated: New York, NY
May 31, 2010

Respectfully submitted,

s/ David Stoelting
Attorney Bar Number: 516163
Attorney for Plaintiff
Securities and Exchange Commission
3 World Financial Center, Room 400
New York, NY 10281
Telephone: (212) 336-0174
Fax: (212) 336-1324
E-mail: stoeltingd@sec.gov

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

10 Civ. 457
(GLS/DRH)

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,

Defendants, and

LYNN A. SMITH,

Relief Defendant.

**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF
EMERGENCY MOTION FOR A PROTECTIVE ORDER**

Plaintiff Securities and Exchange Commission respectfully submits this memorandum of law in support of its emergency motion for a protective order to prohibit relief defendant Lynn. A. Smith (“Smith”) from expanding the scope of the deposition of an SEC attorney beyond the Court’s Order entered May 25, 2010.

PRELIMINARY STATEMENT

On May 25, 2010, the Court granted Smith’s oral request to depose SEC attorney Lara Shalov Mehraban, who had submitted a declaration in support of the SEC’s motion for a preliminary injunction. The scope of the deposition of Ms. Mehraban is stated in the Court’s Order (attached hereto as Exhibit A): “Lynn Smith may depose M[e]hraban

concerning the results of M[e]hraban's [interviews of investors referred to in her declaration]." Exh. A, at 2.

Despite the plain language of the Order, Smith insists she has a right to ask questions regarding at least a dozen other areas. Exh. 2, at 2 (e-mails from Smith's counsel). Plaintiff therefore respectfully requests that the Court make clear that the scope of the deposition is governed by paragraph 1 of the Order, so that the deposition of Ms Mehraban can proceed on the afternoon of June 1, 2010, as required by the Order.

ARGUMENT

I. THE PERMISSIBLE SCOPE OF THE DEPOSITION OF MS. MEHRABAN IS SET FORTH IN PARA. 1 OF THE 5/25/10 ORDER

The Court's Order clearly states that the scope of the deposition of Ms. Mehraban is limited to the investor interviews referenced in paragraph 11 of Ms. Mehraban's declaration. Smith, however, denies that the Order contains any such limitation. Exh. 2. Instead, Smith, however, insists that she is entitled to question Ms. Mehraban about any area of the declaration as long as Smith believes that area is not based on the documentary record. *See* Exh. 2. Smith is wrong. For the following reasons, plaintiff's motion for a protective order prohibiting questions outside the scope of paragraph 1 of the Order should be granted.

First, the Order is clear that the only permissible questions are those pertaining to the investor interviews referenced in paragraph 11 of Ms. Mehraban's declaration. Smith appears to believe that she can ask about any area of the declaration as long as Smith believes that there is "no reference to a documentary basis" for that portion of the declaration. *See* Exh. 2. This contradicts the plain language of paragraph 1 of the Order,

which limits the deposition to one area and provides no avenue for Smith to widen the scope.

Second, the Order directly contradicts Smith's view that there are numerous portions of Ms. Mehraban's declaration that "make[] no reference to a documentary basis." Exh. 2. Contrary to Smith's argument, the Order finds that the Mehraban declaration "generally summarizes documents and information from a variety of sources." Exh. A, at 1. The only portion of the Mehraban declaration that the Order identifies as not being a summary of documents and information is the investor interviews. As for the rest of the declaration, the Order finds that "the records themselves are available" and therefore "not properly the subject of a deposition." Exh. A, at 2.

Third, Smith fails to identify any portions of Ms. Mehraban's declaration that are not summaries of documents or information. All of the paragraphs referred in Exhibit 2 hereto, the email from Smith's counsel, merely refer to portions summarizing offering materials or other documents, and Smith simply ignores the ample documentary evidence that is referenced. For example, Smith's counsel argues that "[o]bviously, I am entitled to learn the amount of 'enormous up-front fees'" referred to in paragraph 20 of the Mehraban declaration. Exh. 2, at 2. The sources of these fees, however, are set forth in paragraphs 21 through 31 of the Mehraban declaration. Smith also asserts that the declaration does not provide a documentary basis for the statement in paragraph 83 that "MS & Co. continued to solicit investors . . . throughout 2009." Exh. 2. Again, however, the documentary basis for this representation is in the Mehraban declaration: paragraphs 84, 85 and 86 describe the solicitation of investors throughout 2009.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that its emergency motion for a protective order, limiting the scope of the deposition of Ms. Mehraban to the area referenced in paragraph 1 of the Order, be granted.

Dated: New York, NY
May 31, 2010

Respectfully submitted,

s/ David Stoelting
Attorney Bar Number: 516163
Attorney for Plaintiff
Securities and Exchange Commission
3 World Financial Center, Room 400
New York, NY 10281
Telephone: (212) 336-0174
Fax: (212) 336-1324
E-mail: stoeltingd@sec.gov

EXHIBIT A

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

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

McGINN, SMITH & CO., INC., et al.,

Defendants.

ORDER

A conference was held on May 25, 2010 with counsel for all appearing parties concerning discovery issues related to the motion of the plaintiff Securities and Exchange Commission (SEC) for a preliminary injunction. In particular, from that conference, it appears that the relief defendant Lynn A. Smith ("Lynn Smith") has noticed for deposition Lara Shalov Mahraban ("Mahraban"), an attorney in the Enforcement Division of the New York Regional Office of the SEC. In support of the SEC's motion for a preliminary injunction, the SEC submitted the declaration of Mahraban. Mahraban Decl. (Docket No. 4-3). That declaration generally summarizes documents and information from a variety of sources. *Id.* However, the declaration also reports the results of interviews with unnamed investors conducted by Mahraban. *See, e.g.*, Mahraban Decl. at ¶ 11 ("Moreover, several investors that I interviewed with another SEC staff attorney stated that MS & Co. [McGinn and David Smith's company] did not provide them with [certain information] prior to their investment. One investor told us that Smith steered him away from investing in blue chip stocks such as General Electric as too risky, and told him that the MS & Co. private placements were safer.")

The SEC objects to the deposition of Mahraban on various grounds including that her testimony is protected by the attorney-client privilege and work product doctrine. The SEC is

scheduled to take the deposition of Lynn Smith prior to the hearing on the motion for a preliminary injunction. It appears to the Court that any claim of attorney-client privilege, work product doctrine, or other such protection such as any law enforcement privilege has been waived to the extent that it is reported in Mahraban's declaration and relied upon for relief here by the SEC. To that extent, therefore, Lynn Smith is entitled to depose Mahraban. However, statements in the declaration merely summarizing the contents of reports, documents, and other records are not properly the subject of a deposition of Mahraban where the records themselves are available.

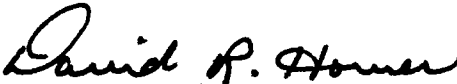
WHEREFORE, it is hereby

ORDERED that:

1. Lynn Smith's request for an order compelling SEC to produce Mahraban for oral deposition on June 1, 2010 is **GRANTED** to the extent that Lynn Smith may depose Mahraban concerning the results of Mahraban's interviews such as that reported above to the extent disclosed in Mahraban's declaration;
2. Defendants McGinn and David Smith are granted an extension until May 27, 2010 at 5:00 p.m. to file any papers opposing SEC's motion for a preliminary injunction; and
3. On or before June 1, 2010 at 12:00 Noon, all parties shall disclose to all other parties (a) a list of the witnesses, if any, the party intends to call to testify at the hearing on June 2, 2010, and (b) copies of the exhibits, if any, which any party intends to introduce at evidence at the hearing on June 2, 2010.

IT IS SO ORDERED.

Dated: May 25, 2010
Albany, New York



David R. Homer
U.S. Magistrate Judge

Stoelting, David

EXHIBIT B

From: James Featherstonhaugh [JDF@fwc-law.com]
Sent: Sunday, May 30, 2010 5:38 PM
To: Stoelting, David
Subject: RE: SEC v. McGinn Smith

Of course I am going to conduct the deposition in compliance with the courts order and opinion as I understand them. At this point I frankly think you are being silly. If you make an application please attach both this email and my last one.

James D. Featherstonhaugh
Featherstonhaugh, Wiley & Clyne, LLP
99 Pine Street
Albany, NY 12207
Telephone: (518) 436-0786
Facsimile: (518) 427-0452
jdf@fwc-law.com

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Under U.S. Treasury regulations, we are required to inform you that any advice contained in this e-mail or any attachment hereto is not intended to be used, and cannot be used, to avoid penalties imposed under the Internal Revenue Code.

From: Stoelting, David [mailto:StoeltingD@SEC.GOV]
Sent: Saturday, May 29, 2010 9:28 AM
To: James Featherstonhaugh
Subject: RE: SEC v. McGinn Smith

Jim – I ask that you rethink your position. We will fully comply with the Court's Order and make Lara available for a deposition on June 1 in Albany, following the Trustee's deposition. The permissible scope of the deposition is clearly set forth in para. 1 of the Court's Order. Unless you agree to conduct the deposition in compliance with the Order, we will make an emergency motion for a protective order on Monday.

David

From: James Featherstonhaugh [mailto:JDF@fwc-law.com]
Sent: Friday, May 28, 2010 4:41 PM
To: Stoelting, David
Subject: RE: SEC v. McGinn Smith

David,

5/31/2010

While I expect the deposition of Ms. Mehraban to be limited and not expansive and I am cognizant of Judge Homer's Opinion and Order in that statements in the declaration merely summarizing the contents of reports, documents, and other records are not properly the subject of a deposition of Ms. Mehraban where the records themselves are available. I would note the following paragraphs are an example where the declaration of Ms. Mehraban makes no reference to a documentary basis for the statements included therein – 9,11,13,16,17,20,22,29,31,55,60,83,84 and 87. For example, Paragraph 20 states under penalty of perjury that "MS & Co. extracted enormous up-front fees from the Trusts, some of which appear to be dubious or non-existent services." Obviously, I am entitled to learn the amount of "enormous up-front fees" and which services Ms. Mehraban is swearing were dubious or non-existent. Likewise, in Paragraph 83 Ms. Mehraban without reference to any documentary substantiation flatly states "Notwithstanding these financial woes, MS & Co. continued to solicit investors for the Funds and the existing Trusts, as well as new Trusts and other entities throughout 2009." Once again, it is not my intention to review those areas the Court has proscribed and I do not expect the deposition to be of great length or breadth. However, I am unwilling to arbitrarily limit myself prior to the deposition itself. As you know, FRCP 30(c) provides a remedy in the event you feel a privilege is being invaded and I have no doubt that you will be willing to employ that remedy should you feel the need arise.

Jim

James D. Featherstonhaugh
Featherstonhaugh, Wiley & Clyne, LLP
99 Pine Street
Albany, NY 12207
Telephone: (518) 436-0786
Facsimile: (518) 427-0452
jdf@fwc-law.com

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Under U.S. Treasury regulations, we are required to inform you that any advice contained in this e-mail or any attachment hereto is not intended to be used, and cannot be used, to avoid penalties imposed under the Internal Revenue Code.

From: Stoelting, David [mailto:StoeltingD@SEC.GOV]
Sent: Friday, May 28, 2010 12:54 PM
To: James Featherstonhaugh
Subject: SEC v. McGinn Smith

Jim - The Order is clear that the only proper subject of the deposition is Lara's communications with investors, which para. 1 makes clear. This is further obvious from the Whereas clause saying:

However, statements in the declaration merely summarizing the contents of reports, documents, and other records are not properly the subject of a deposition of Mahraban where the records themselves are available.

5/31/2010

The Court is saying that the rest of the declaration -- except for the once reference about communicaitons with investors -- can be addressed through the documents themselves.

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