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, DAVID L. SMITH, LYNN A. SMITH, DAVID M. WOJESKI, 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,	:	
Defendants,	:	
LYNN A. SMITH, and NANCY MCGINN,	:	
Relief Defendants, and	:	
DAVID M. WOJESKI, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04,	:	
Intervenor.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO TRUST'S MOTION TO VACATE

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Plaintiff Securities and Exchange Commission respectfully submits this memorandum of law in opposition to the motion of Defendant Geoffrey R. Smith ("G. Smith"), Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (the "Trust") to vacate that portion of Magistrate Judge David Homer's Decision and Order dated July 20, 2011 (the "July 20, 2011 Order") that granted the court-appointed Receiver "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[.]"

PRELIMINARY STATEMENT

When Judge Homer granted the SEC's motion for a preliminary injunction freezing the Trust's assets, he did so after finding that Lynn Smith ("L. Smith,") and others associated with the Trust, including Trustee David Wojeski and Trust attorney Jill Dunn, had deceive the Court, and after further finding that David Smith ("D. Smith") possessed a beneficial ownership interest in and controlled the Trust. *SEC v. Wojeski,* 752 F. Supp. 2d 220 (N.D.N.Y., 2010) ("MDO II); Dkt. No. 194. The Second Circuit affirmed that order. *Smith v. SEC,* 432 Fed. Appx. 10, 13, 2011 WL 343815 (2d Cir. 2011). On April 4, 2012, Judge Homer made clear that, under the terms of MDO II, the Receiver was assigned responsibility for management of all frozen assets, including Trust assets. *SEC v. McGinn, et al.* 2011 WL 1142516 at *7 (N.D.N.Y. Apr. 4, 2012), Dkt. No. 478. The Trust did not appeal.

Thus, the only valid questions before this Court are whether Judge Homer, in his July 20, 2011 Order, abused his discretion in granting the Receiver leave on behalf of the Trust to determine how best to maximize the return on an asset under his management, namely, the Great

Sacandaga Lake property (the "Lake Property"), and what additional guidance the Receiver should be given concerning how to maximize the value of that asset.

Rather than address these questions, G. Smith advances arguments that are either irrelevant, contradicted by prior factual and legal findings of this Court or legally baseless. G. Smith primarily argues that the Lake Property is the "rightful property" of the Trust, and that the July 20, 2011 Order improperly upset the status quo. Trust Br. at 1, 9-10. The Trust's purchase of the Lake Property, however, took place only through the misrepresentations and omissions of L. Smith, and with the assistance of the Trustee, David Wojeski, and the Trust's lawyer Jill Dunn, who were aware of the fraud by the date of that sale. The Trustee and Trust attorney compounded that fraud by submitting false affidavits and testimony in an effort to keep the Trust's assets unfrozen. The July 20, 2011 Order merely reinstated the status quo that existed prior to the fraud perpetrated on the Court by L. Smith and the Trust, but only if it was in the Trust's economic interest to do so. The Court was well within its equitable authority to undue the improper consequences of the fraud perpetrated on it.

G. Smith's argument that the Trust is being "punished" by the July 20, 2011 Order is simply wrong. That Order granted the Receiver leave to sell or rent the Lake Property only if L. Smith (and Dunn and Wojeski to the extent of their liability) did not repay the Trust and only if it will "maximize the possible return" on that property. A sale under such circumstances will be in the best interests of the Trust, regardless of who ultimately receives the Trust assets. If a sale or rental is not the best way to maximize the return on the Lake Property, the Receiver is not authorized to sell or rent it. G. Smith's argument that the July 20, 2011 Order improperly interferes with the Trustee's fiduciary duty under state law (Trust. Br. at 10-12) is also baseless and has already been rejected by Judge Homer in the April 4, 2012 MDO, Dkt. 478 at 18-20.

The Court's broad equitable powers to protect assets for the benefit of defrauded investors trumps state estate law.

Finally, G. Smith fails to propose any guidance this Court should give the Receiver concerning how to determine whether to sell or rent the Lake Property. As reflected in his Declaration filed on June 4, 2013, Dkt. 571, the Receiver has already spent over $39,000 of Trust funds paying real property taxes, insurance and utilities for the Lake Property. He also raises questions whether anyone is currently maintaining the property. Aside from two hearsay newspaper articles referencing general housing trends, G. Smith offers no evidence that the costs of maintaining the Lake Property for the next several years will be outweighed by any reliable expected appreciation of that property and there is a real danger that absent active maintenance, the property will further diminish in value.

The SEC proposes that the Court adopt the analysis recommended by the Second Circuit in its 2011 decision affirming Judge Homer's order authorizing the Receiver to sell the Smith's Vero Beach, FL vacation home. *Smith v. SEC,* 653 F.3d 121 (2d. Cir. 2011). The Second Circuit noted that before authorizing the sale, the Court "entered certain findings," regarding: (1) the market value of the property; (2) the expectations that the market for the property will improve in the foreseeable future; (3) whether the property is being maintained and whether additional debts are being incurred; (4) whether the equity in the property will be preserved; and (5) whether the value of the property will appreciate significantly to compensation for all the expenses being incurred. *Id.* at 128-129. Similarly, here, prior to a sale, the Receiver should be required to make an evidentiary submission to the Court addressing these topics, so that the Court can make findings prior to authorizing a sale. If the Court finds that a sale or rental of the Lake Property

will best maximize its value, then the Receiver should be given leave to obtain the best possible price for such a sale or rental.

STATEMENT OF FACTS

The Court's Initial Asset Freeze

On April 20, 2010, the SEC filed this action and, on the same date, the Court imposed a temporary asset freeze over the assets of all defendants and relief defendant Lynn Smith. Defendants David Smith and Timothy McGinn consented to the freeze; Lynn Smith, however, did not. The Trust appeared as an intervenor to dispute the freeze over its assets.

Following a three-day evidentiary hearing in June 2010, the Court on July 7, 2010, granted the Commission's motion for a preliminary injunction continuing the asset freeze as to all defendants and certain assets in L. Smith's name, including a stock account, a vacation property in Vero Beach, Florida and a checking account. *SEC v. McGinn Smith & Co., Inc. et al.*, 752 F. Supp. 2d. 194 (N.D.N.Y. 2010) ("MDO I") (Dkt. No. 86). The Court found that the Smiths had transferred the Vero Beach vacation home and the checking account from their joint names to L. Smith's name for the fraudulent purpose of shielding D. Smith's assets from potential creditors. *Id.* at 216-17. However, the Court, unaware of the Annuity Agreement, and persuaded by L. Smith's false statements that she and D. Smith did not have an interest in the Trust assets, vacated the freeze over the Trust's assets. *Id.* at 219.

In the weeks after the July 7, 2010 order, the Trust depleted its assets by nearly $1 million, including the purchase of the Lake Property from L. Smith in exchange for $600,000.

Following the disclosure of the Annuity Agreement, the Court re-froze the Trust Assets and the Lake Property and the SEC named L. Smith and the Trust as Defendants

After the Court vacated the freeze over the Trust, including the Lake Property, the SEC discovered a previously hidden document, the Annuity Agreement, which showed that, contrary

to Lynn Smith's prior sworn testimony, D. and L. Smith did maintain an ownership interest in the Trust. *SEC v. Wojeski,* 752 F.Supp.2d, 220, 232 (N.D.N.Y. 2010). Finding that the Agreement established that the SEC had a substantial likelihood of success of proving that the Trust was an asset of David Smith's, the Court extended the scope of the freeze to cover the Trust's assets. As a result, the Lake Property as an asset of the Trust also became subject to the freeze.

The SEC also amended the complaint to add fraudulent conveyance claims against L. Smith, the Trust, and Trust beneficiaries G. and Lauren Smith. The District Court denied motions to dismiss these fraudulent conveyance claims. *SEC v. McGinn Smith, Inc. et al.,* 2011 WL 1770472 (N.D.N.Y. May 9, 2011).

The Trust's purchase of the Lake Property was a direct result of L. Smith's deliberate concealments and misrepresentations, which the Trust's representatives knowingly aided

On July 20, 2011, the Court concluded that the release of nearly $1 million of Trust assets after the July 7, 2010 decision resulted from L. Smith's "false statements and omissions." *SEC v. Lynn Smith, et al.*, 798 F. Supp.2d 412, 424 (N.D.N.Y. 2011). *See also id.* at 437 ("As a direct and proximate result of Lynn Smith's concealment of the Annuity Agreement, the assets of the Trust were released from the asset freeze. . . . But for Lynn Smith's concealment of the Annuity Agreement, none of these disbursements [from the Trust] could or would have occurred.").

The Court further found that L. Smith acted in "subjective bad faith" and that her "testimony and contentions here have been consistently self-serving, contradicted by other evidence, and unworthy of belief[.]" *Id.* at 425. L. Smith was ordered to disgorge to the Receiver the $944,848 that was depleted from the Trust account and, if she failed to disgorge these funds, then the Receiver was granted leave on behalf of the Trust to obtain the maximum return on the Lake Property "including the sale or rental of that property." 798 F. Supp. 2d at

443. L. Smith never paid any of the disgorgement; had she done so the Receiver would have had no authority to sell the Lake Property.

In addition, the Court found that Dunn, the Trust's attorney, and Wojeski, the Trustee, were aware of the Annuity Agreement (and therefore of L. Smith's fraud on the Court) as of the day they participated in the Trust's purchase of the Lake Property from L. Smith. *Id.* at 426-433. It also found that Wojeski and Dunn filed false declarations that misrepresented when they became aware of the Annuity Agreement. Dunn and Wojeski were publicly admonished for deliberately filing false declarations and ordered to disgorge certain fees. *Id.* at 441-42.

On March 18, 2013, the Second Circuit affirmed the sanctions against Lynn Smith as "amply supported by the record" and further found that "it was entirely appropriate for the court to require Lynn Smith to disgorge herself of funds she obtained after that freeze was lifted in substantial reliance upon her false statements." *SEC v. Lynn Smith, et al.*, 710 F.3d 87, 98 (2d Cir. 2013)

The Receiver has expended funds and resources in connection with the Lake Property

Since the Receiver was given authority to sell or rent the Lake Property in July 2011, the Receiver has expended both time and resources into fulfilling his mandate. Nearly $40,000 has been expended by the Receiver to pay taxes, insurance and utility bills in connection with the Lake Property. Dkt. No. 571.

The appeal from the sanctions order

On March 18, 2013, the Second Circuit issued its decision affirming the sanctions order as to L. Smith, noting that "the record carries a circumstantial stench that only heroic credibility findings in [L.. Smith's] favor would dissipate." 710 F.3d at 98. The Court also dismissed, for lack of jurisdiction, Dunn and Wojeski's appeals from the sanctions imposed on them, and

remanded to allow the Trust to contest the opportunity the court's order regarding the disposition of the Lake Property. *Id.* at 89. The Second Circuit made clear, however, that: "We in no way suggest that the district court should determine that its prior order with respect to the Trust is inappropriate. We leave that to its sound discretion." *Id.* at 99. Indeed, anticipating that the court might re-affirm the prior order, the Second Circuit further directed that the "court should provide additional guidance to the receiver concerning how to determine whether to dispose of the property, if at all." *Id.*

ARGUMENT

I. THE DISTRICT COURT WAS WELL WITHIN ITS DISCRETION IN GRANTING THE RECEIVER LEAVE TO MAXIMIZE THE POSSIBLE RETURN ON A TRUST ASSET

G. Smith spends an extensive amount of his brief and Affidavit on irrelevant facts and issues. He ignores entirely the massive investor fraud for which his father was convicted just a few months ago in the parallel criminal case, ignores the repeated perjurious statements his mother submitted to this Court in order to defraud it into unfreezing the Trust's assets, and ignores the misrepresentations perpetrated by the Trustee, Wojeski, and the Trust attorney, Dunn, on this Court. [1]

G. Smith also seeks to relitigate the question whether the Trust was primarily formed for the benefit of the Smiths or their children. Judge Homer, however, has already found that the

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[1] L. Smith also falsely maintained that she used only her own assets to purchase the bank stock that, after conversion to Charter One stock, was used to fund the Trust. Disturbingly, G. Smith implies the same to this Court. ("Lynn Smith personally funded this irrevocable trust …"; Lynn Smith authorized David Smith, acting in his professional capacity, to purchase 40,000 shares of Charter One Stock at a market price of $10 per share."). Trust Br. at 4. Nowhere does G. Smith inform the Court that after L. Smith submitted sworn testimony claiming she alone purchased the bank stock, D. Smith admitted in his deposition, albeit only after being confronted with newly discovered documentary evidence, that he also contributed at least $50,000 of his own money to this founding purchase. See Attachment hereto.

Trust was created by the Smiths for their own benefit and that the children would benefit only if there was any money left after they repaid themselves their entire initial contribution, plus interest, in the form of yearly annuity payments extending until their deaths. That holding was affirmed by the Second Circuit, *Smith v. SEC,* 432 Fed. Appx, 10, 13, 2011 WL, 3438315 (2d. Cir. 2011)("To establish the first prong [in order to pierce the Trust's veil], it is sufficient to show here that David Smith could be considered the equitable owner of the Trust, such that he acted as though the Trust assets were 'his alone to manage and distribute.'" "We find no error in these conclusions" [i.e. Judge Homer's conclusions so finding]). These findings are not subject to relitigation.

G. Smith's substantive arguments have as little merit. He argues that the principal purpose of a freeze order is to preserve the status quo and that Judge Homer's July 20, 2011 Order "will drastically alter the status quo" by granting the Receiver leave to sell the Lake Property the Trust currently owns. Trust Br. at 9. However, this argument brazenly ignores the fact that the Lake Property was sold by L. Smith to the Trust during the brief window when the Court unfroze the Trust's assets due to the fraud L. Smith perpetrated on the Court. The Trust could not have purchased the Lake Property but for L. Smith's fraud, and with the assistance of the Trustee Wojeski and Trust attorney Dunn, who proceeded with the sale after being put on notice of L. Smith's fraud. Wojeski and Dunn compounded that fraud on the Court by dissipating Trust assets through other distributions, including to themselves, after they learned of the fraud and by later submitting knowingly false affidavits and, Dunn's case, testimony, to the Court in opposition to the Commission's motion to refreeze the Trust's assets. Thus, far from depriving the Trust of its "rightful" property and upsetting the status quo, Judge Homer's July 20, 2011 Order was designed to reinstate the status quo that existed prior to the fraud perpetrated

on the Court by L. Smith and the Trust, by returning the $600,000 in cash to the Trust and returning the Lake Property to L. Smith. The Court was well within its equitable authority to undue the improper consequences of the fraud perpetrated on it.

In particular, it is "well established" that Section 22(a) of the Securities Act of 1933 and Section 27 of the Securities Exchange Act of 1934 "confer general equity powers upon the district courts" that are "invoked by a showing of a securities law violation." *SEC v. Manor Nursing Ctrs., Inc.* 458 F. 2d 1082, 1103 (2d Cir. 1972)(citing 15 U.S.C. §§ 77v(a), 78aa. "[O]nce the equity jurisdiction of the district court properly has been invoked, the court has power to order all equitable relief necessary under the circumstances," *SEC v. Materia,* 745 F.2d 197, 200 (2d Cir. 1984), "including the impoundment of assets," *SEC v. Am. Bd. of Trade,* 830 F.2d 431, 438 (2d Cir. 1987). The purpose of such an asset freeze is to ensure "that any funds that may become due can be collected." *SEC v. Unifund SAL,* 910 F.2d 1028, 1041 (2d Cir. 1990) (describing asset freeze as "ancillary relief to facilitate enforcement of any disgorgement remedy that might be ordered in the event a violation [of securities laws] is established at trial"); *see also SEC v. Infinity Grp. Co.,* 212 F.3d 180, 197 (3d Cir. 2000) ("A freeze of assets is designed to preserve the status quo by preventing the dissipation and diversion of assets."). In this case, moreover, the Court's asset freeze order requires "mandates that the assets be maintained without dissipation of their value. that assets be maintained." Memorandum-Decision and Order, Dkt. 263 at 3.

The Second Circuit has also already noted in this case that the Court has broad equitable powers to protect assets for the benefit of defrauded investors, and to remedy sanctionable behavior. *SEC v. Smith,* 710 F.2d at 98 ("we note that '[d]istrict courts are given broad discretion in tailoring appropriate and reasonable sanctions.' *O'Malley v. N.Y.C. Transit Auth.,*

896 F.2d 704, 709 (2d Cir. 1990); Wright & Miller, Federal Practice & Procedure § 1336.3 ('[F]ederal courts retain broad discretionary power to fashion novel and unique sanctions to fit the particular case.'))"

In this case, the Second Circuit has already upheld Judge Homer's order freezing the Trust's assets. *See Smith v. SEC,* 432 Fed. Appx. 10, 2011 WL 3438315 (2d Cir. 2011)(denying L. Smith's appeal from Judge Homer's January 11, 2011 order denying her motion for reconsideration of its November 22, 2010 order freezing the Trust's corpus and denying her appeal from the July 10 order freezing the stock account). The Second Circuit has also upheld Judge Homer's order lifting the asset freeze to allow the Receiver to conduct an interlocutory sale of the Smiths' Florida vacation home to preserve the assets pending resolution of the merits of this case. *See Smith v. S.E.C.,* 653 F.3d 121 (2d Cir. 2011). In that decision, the Second Circuit stated that:

> In light of the "sweeping mandate manifest in the securities laws," *SEC v. Materia,* 745 F.2d 197, 200 (2d Cir. 1984), and the district court's broad equitable power to fashion ancillary relief when its jurisdiction under those laws has been involved, *see Unifund Sal,* 910 F.2d at 1041, it is clear that the magistrate judge did not abuse his discretion when he ordered the interlocutory liquidation of Lynn Smith's vacation house in light of its declining value and the diminishing equity in the property.

Id. at 129.

Thus, the Court was well within its discretion in granting the Receiver leave to consider selling the Lake Property to undo the fraud perpetrated on it by L. Smith and the Trust and to maximize the asset's value.

G. Smith also incorrectly claims that the Trust is "a wholly independent legal entity whose legitimacy has never been in question" Trust Br. at 10 and that the Court should not force the Trust to bear the consequences of L. Smith's sanction order. However, there have been numerous findings in this case that the Trust has, since its inception, been controlled by D. Smith

for the benefit of himself and his wife, and not their children. The Court found that "the conclusion is compelled that David Smith possessed an equitable and beneficial interest in the Trust through the Annuity Agreement and that his conduct in controlling the investments of Trust assets by the Trustee, paying the Trust's taxes, and, with his wife, paying the living expenses of his adult child was to protect the assets of the Trust to insure their existence when the Annuity Agreement payments were to commence and not simply to protect those assets for the use of his children." 752 F.Supp.2d at 232. That finding was upheld by the Second Circuit. 432 Fed.Appx. at *2.

The Smiths' actions after the Trust was temporarily unfrozen further underscore their control over the Trust. The Trust's acquiesence in purchasing the Lake Property from L. Smith in return for $600,000 was clearly done to free up that money for L. Smith and D. Smith to live on and to pay their legal bills, given that the majority of their other assets had been frozen. The Trust's current claim to this Court that it purchased the Lake Property for the purpose of diversification is contradicted by Trustee Wojeksi's contemporaneous explanation that he: "expended $100,000 plus closing costs to purchase property on Great Sacandaga Lake from Lynn Smith at the request of the beneficiaries, in order to retain it for their use." Wojeski Aff., Dkt. 147, ¶ 5. Wojeski made no reference to purchasing the Lake Property in order to diversify Trust assets, and there is no evidence that he considered purchasing other perhaps more attractive investment properties, nor is there any evidence that he conducted an analysis whether any expected appreciation in the property would be outweighed by costs of maintaining it, such as property taxes, utilities, repairs and maintenance costs. The Trust purchased the Lake Property from L. Smith to free up money for her and her husband's use and to keep the property under their control, and is just one more blatant example of how D. and L. Smith used the Trust to do

their bidding. Accordingly, G. Smith's newly minted claim to this Court that the Lake Property was purchased to diversify Trust assets simply begs credulity.

Finally, the Trust is not being "punished" by the July 20, 2011 Order nor is it being "deprived of its rightful assets." That Order grants the Receiver leave to sell or rent the Lake Property only if L. Smith failed to repay the Trust and only if it will "maximize the possible return" for that property. If a sale or rental is the best way to maximize the return, such a sale will be in the best interests of the Trust, regardless of who ultimately receives the Trust assets. If a sale or rental is not the best way to maximize the return on the Lake Property, the Receiver is not authorized to sell or rent it. If Judge Homer had wanted to "punish" the Trust, he could have ordered the Lake Property's sale even if it resulted in a loss. He clearly did not do so. The July 20, 2011 Order does not punish the Trust; it merely authorizes the Receiver to maximize the value of a Trust asset.

Thus, the Court was well within its discretion in granting the Receiver leave to consider how best to maximize the financial value of the Lake Property that was wrongfully sold to the Trust as part of a fraud on the Court.

II. THE DISTRICT COURT WAS NOT PRECLUDED BY STATE LAW FROM APPOINTING THE RECEIVER TO MANAGE THE TRUST'S FROZEN ASSETS

The Trust argues that under the EPTL, the trustee holds legal title to a trust's property, and only the trustee has the legal authority to authorize the sale or rental of trust property. Trust Br. at 10-11. However, as noted above, the Court's decision to freeze the Trust's assets has already been upheld by the Second Circuit, as has the Court's decision to authorize the Receiver to sell other real property covered by the asset freeze. Furthermore, the Trust fails to cite any federal authority that the Court lacks jurisdiction to appoint a Receiver over assets that belong to a Trust. Moreover, the Trust has waived any right it might otherwise have to challenge the

appointment of a Receiver over the Trust's assets. In particular, the Trust made such an argument in its motion to lift the asset freeze to permit the release of assets to pay certain relating to the Trust, reimbursing D. Smith and L. Smith for certain expenses they paid, and to confirm the authority of the Trustee to manage the Trust's investments.

In denying that motion in its entirety, the Court stated: "in MDO II, the assets of the Trust were frozen under the terms of the preliminary injunction, which assigned responsibility for the management of all such frozen assets to the Receiver. MDO II at 23. ... Thus, while Geoffrey Smith remains the Trustee of the Trust as an entity, control and management over all assets of the Trust have been removed to the Receiver. It is, therefore, the Receiver, and not the Trustee, who is responsible for, and has sole control over, the management of the Trust's assets, including the payment of all expenses, investment decisions, the preservation or sale of assets, and the like." 2012 WL 1142516 at * 8, Dkt No. 478 at 18-19.

The Court specifically rejected the Trust's argument that under New York Estate Powers and Trust Law only the trustee is empowered to manage a trust's assets, stating; "... the Trust has cited no authority for its proposition that state law supersedes the federal law which authorized the preliminary injunction." *Id.* The Trust did not appeal any portion of Judge Homer's April 4, 2012 MDO. Thus, the Trust cannot now argue that the Court exceeded its powers in appointing the Receiver, rather than the Trustee, to manage the Trust's assets. *See also SEC v. Solow*, 682 F.Supp.2d 1312, 1329 (S.D.Fla. 2010) ("This Court does not have to recognize the protections of tenancy by the entirety created by State law.").

III. THE COURT SHOULD ADOPT THE FACTORS SET FORTH IN SECOND CIRCUIT'S OPINION UPHOLDING THE SALE OF THE SMITHS' VERO BEACH PROPERTY IN CONSIDERING WHETHER TO SELL OR RENT THE LAKE PROPERTY

The Second Circuit stated that this court "should provide additional guidance to the receiver concerning how to determine whether to dispose of the property." This reference to "additional guidance" acknowledged that Judge Homer did provide some guidance in his 2011 order. First, he directed that the Receiver must proceed in the manner "he deems economically the most feasible to maximize the return on the property." Second, he directed the determination of whether a sale or rental of the property is appropriate should depend on "the receiver's determination of market conditions." July 20, 2011 Order at 41.

Additional guidance to the Receiver should focus on these concepts of maximizing the return and market conditions. Fortunately, the Second Circuit has provided a roadmap for this area in its 2011 decision affirming this Court's order authorizing the receiver to sell the Smith's Vero Beach, FL vacation home. In that case, the Second Circuit noted that before authorizing the sale, the Magistrate Judge "entered certain findings" regarding: (1) the market value of the property; (2) the expectations that the market for the property will improve in the foreseeable future; (3) whether the property is being maintained and whether additional debts are being incurred; (4) whether the equity in the property will be preserved; and (5) whether the value of the property will appreciate significantly to compensation for all the expenses being incurred. *Smith v. SEC*, 653 F.3d at 128-129. Prior to a sale, therefore, the Receiver should be required to make an evidentiary submission to the court addressing relevant areas, including these five topics, so that the Court can make findings prior to authorizing a sale. If the Court makes finds that a sale or rental of the Lake Property will best maximize its value, then the Receiver should be given free leave to obtain the best possible price for such a sale or rental.

CONCLUSION

For all the foregoing reasons, the Commission respectfully requests that the Trust's motion to vacate the July 20, 2011 Order be denied in its entirety and that the Court adopt the Commission's recommendations as set forth in Point Three herein concerning the guidance to be given the Receiver in determining whether to sell or rent the Lake Property.

Dated: New York, NY
June 4, 2013

Respectfully submitted,

Securities and Exchange Commission

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ATTACHMENT

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-vs- CVA #: 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, DAVID L. SMITH, LYNN A. SMITH, GEOFFREY R. SMITH, Individually and as Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, LAUREN T. SMITH, and NANCY McGINN,

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 8/04/04m

Intervenor

Deposition of DAVID L. SMITH, held at the offices of Phillips Lytle, LLP., Albany, New York, on December 14, 2011, before DEBORAH R. SALESKI, Court Reporter and Notary Public in and for the State of New York.

of different entries here, that's the one I'm going to focus your attention on for purposes of my question. Do you recognize this Document 445?

A. No, but I have some handwriting on it, so...

Q. That was my going to be my next question. Is that your handwriting?

A. That is my handwriting.

Q. And the date is 7/20/92 and you've got a notation it looks like 5,000 and underneath it 35,000?

A. Right.

Q. Do you have any recollection as you sit here today what you intended by those notations?

A. I do not.

Q. All right. Do you agree that the reference to David L. Smith is to you?

A. Correct.

Q. And does this indicate -- well, strike that.

What is your understanding of the entry on the line associated with the loan date, 3/23/92, for principal and the next column and what is your understanding of the entry for 100,000 in the far right-hand column underpayment/advance?

A. It would appear that I was loaned $100,000. I don't know why it would have, you know, principal of 150

and advanced only 100 unless there was some sort of credit agreement that the firm gave me, you know, I don't know. It's sort of an unusual way we would have done business.

But it looks like I was advanced $100,000. I don't know if -- well, let me see, I'm trying to think how those things -- no, I'm misreading that. I apologize. I think that's what that is, is clearly there was a loan of $150,000 and then there was a payment of 100 leaving a balance of 50 and then there was a payment of 8, leaving a balance of 42, dat, dat, dat, dat, dat. So that's how I would interpret that, there must have been a loan of 150,000 and a subsequent payment, which looks like it was on 4/6. The loan was on 3/23 and roughly 13 days later or 14 days later $100,000 was paid.

Q. I'm going to show you now Exhibit 446. It is a one-page document. It's a receipt in the amount of $500,000 dated March 23rd, 1992 received from David L. Smith $500,000. And it says for and someone's written in stock purchase. There's a stamp Albany Savings Bank --

A. Mm-mm.

Q. -- March 23, 1992 and under the heading Albany Savings Bank there's a signature of Vickey Lobo. Do you recall this transaction?

A. I do.

Q. Okay. What was this transaction for?

A. There was an opportunity to subscribe to Albany Savings Bank that was going public. The maximum subscription one could subscribe to I think was a half a million dollars. I attempted to subscribe to that, ultimately was cut back and I got whatever I got which I think was $400,000.

Q. And you see that the date of this $500,000 receipt from you is March 23, 1992, that's the same date reflected in Exhibit 445, that you appear to have been loaned or withdrew $150,000 from McGinn, Smith & Co., correct?

A. That's correct.

Q. And there's a debit as reflected in Exhibit 444 on 3/16/92 from your wife's, Lynn Smith's Bear Stearns account of 300 looks like 54,000 dollars several days earlier on 3/16/92.

A. Mm-mm.

Q. Does that refresh your recollection that you contributed part of the $500,000 that was used to purchase the Albank stock in 1992?

A. Well, I'll comment on that, but I don't think that's how you or at least I didn't take it as how you

phrased the question. I thought you said did I contribute anything initially after the 40,000 shares and the answer was no.

Q. I think my first question was: Did you make any initial contribution and then did you make any subsequent contribution. So let's go back to the first question, did you contribute some monies or other assets to the original purchase of the 40,688 Albank Financial Corporation shares?

A. It would appear that I contributed $50,000, yes.

Q. 50 or 150?

A. Well, only 50 because they only accepted $400,000, they sent back 100. In fact, I think they sent back 104 or something like that.

Q. Well, you contributed approximately 150,000 to the 500,000 initial transfer and then subsequently only a portion of that money was allocated to the --

A. It wasn't an allocation, that's all the subscription was for.

Q. I'm using the word allocation, a portion of that $500,000 was used to purchase the 40,688 shares of Albank stock?

A. That's correct.

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D. Smith

Q. I'm going to show you Exhibit 449, which is an affidavit that your wife executed in connection with this lawsuit on or about May 21st, 2010. And I would direct your attention, take whatever time you need to read it. Let me ask you first, did you see a version of this document before your wife signed it and submitted it to the court?

A. I don't believe so, no.

Q. Did you discuss it with her?

A. No.

Q. Did you know that she was going to be submitting an affidavit to the court in connection with this lawsuit describing the circumstances under which she came to be in possession of the Charter Bank stock that was ultimately transferred to the David and Lynn Smith Irrevocable Trust?

A. I don't know. I've really been told to keep totally out of it and it wouldn't surprise me if an affidavit was submitted, but I wasn't specifically reviewing it or involved in it, no.

Q. But my question is more narrow at this point. Did you have any discussions with your wife about the information that was included in this affidavit?

A. No.

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D. Smith

Q. You see in paragraph 3 she states "In approximately April 1992 using assets in my stock account, I purchased 40,000 shares of Albank stock at $10 per share at the initial public offering when the bank was converted to Albany Savings Bank." And then jumping over to paragraph 5 she states "On August 4, 2004 my husband and I created the David L. and Lynn A. Smith Irrevocable Trust by signing a Declaration of Trust with the trustee. Although my husband and I were both designated as donors of the trust, I provided the initial and, to date, only asset transferred to the trust." Isn't it a fact based on the document that we've just walked through that, in fact, you contributed part of the monies that led to the growth of the asset that was contributed to the trust?

A. That is true. My wife would have no understanding of that nor would I have until I saw the documents and took place 20 years ago, so...

Q. All right.

A. If you expect one to remember that is a bit -- asking a lot.

Q. Okay. Just to completed the record I'm going show you 447, which is a one-page document dated March 27th, 1992 from Albany Savings Bank to you David L.

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D. Smith

Smith acknowledging receipt on 3/23/92 of your order for 50,000 shares at the price of $10 per share. And then it goes on to say that you're going to make some allocation along the lines you mentioned.

And then let me show you 448, it's a letter dated April 1, 1992 from Albany Savings Bank addressed to you stating that we appreciate your interest in the stock offering of Albank Financial Corporation. Further down it says "Therefore your subscription is for 40,688 shares" and there's a check back to you for --

A. 93,674.85.

Q. Right, attached to this. Do you remember receiving this letter?

A. Now I do, sure.

Q. And this is, in fact, how the 40,688 shares of Albank came to be acquired, correct, through this allocation?

A. That's correct.

Q. All right. Now, at the time that you decided to create the irrevocable trust, did you talk to your wife about it?

A. Yes.

Q. And who other than your wife did you talk to about setting up the trust before it was formed?

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D. Smith

A. Daniel Blake, who was a financial planner out of Buffalo or Orchard Park, somewhere in that area, had been doing some insurance work for me and other members of the firm.

Q. Anybody else?

A. I don't believe I ever spoke to Bruce Hoover, who was the individual that Dan Blake ultimately got to draft it. I don't recall even having a conversation with him. I was really working with Dan. So I think just Dan.

Q. Was one of the considerations that led to you creating the trust concern about the possibility that your wife and your assets could be subject to lawsuits by creditors in connection with your participation in the various McGinn, Smith & Co. Business entities?

A. Absolutely not.

Q. Was one of your considerations that your wife's assets could be attacked by creditors in connection with her investment or loan of monies to various McGinn, Smith & Co.'s assets?

A. Absolutely not.

Q. Or affiliates?

A. No.

Q. That had no consideration whatsoever?

DECLARATION OF SERVICE

I, Kevin P. McGrath, pursuant to 28 U.S.C. § 1746, certify that on June 4, 2013, I served the following document:

- Plaintiff's Memorandum of Law in Opposition to the Trust's Motion to Vacate,

by means of the Court's CM/ECF system, and by email on the following individuals:

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