

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

10 Civ. 475 (GLS)

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

Defendants.

**PLAINTIFF’S RESPONSE TO THE RECEIVER’S
REPORT DATED OCTOBER 10, 2013**

The Receiver’s Report makes clear that delaying a sale of the Sacandaga Lake Property will harm investors by reducing the amount of any future recovery. “[T]he cost of holding the Property is a net loss . . . even if the Property were rented for a portion of the year.” Report at 9. Moreover, even if the value of the Property remains steady, “under no circumstances will the current equity in the Property . . . be preserved.” Report at 10. The Report’s conclusion does not mince words: “[a] successful sale or sales best preserves equity for the defrauded investors[.]” Report at 11.

The Property is no different than the Smiths’ Vero Beach house that this Court also ordered sold. See Memorandum-Decision and Order dated Feb. 1, 2011, Dkt. 263, at 10 (ordering that “the Court-appointed Receiver . . . is given sole authority to take all necessary steps to effectuate a sale of the Florida Property”). In affirming this Court’s order to sell the Vero Beach house, the Second Circuit found that “it is likely that the current equity in the property will continue to diminish during the pendency of this action.” *Smith v. SEC*, 653 F.3d

121, 129 (2d Cir. 2011). Likewise, the Report establishes that the Property's equity cannot be maintained. It should be sold for the same reasons this Court ordered the Smiths' Vero Beach to be sold.

Since economic considerations strongly favor a sale of the Property, the Smiths' children may argue that their familial interests in the Property should suffice to prevent a sale. This argument, however, was previously rejected by this Court: "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." Memorandum-Decision and Order dated Oct. 6, 2011, Dkt. 397, at 9.

Moreover, the recent criminal conviction of David Smith essentially ensures that a judgment based on collateral estoppel will be entered against him in the SEC case. And the fact that the Trust is likely to be found to be an asset of David Smith's means that the Trust's assets likely would be available to satisfy that Judgment. Judge Homer froze the trust as an asset of David Smith's and found that "the SEC has satisfied its burden of showing a substantial likelihood of success as to the Trust." Memorandum-Decision and Order dated Nov. 11, 2010, Dkt. 194, at 23. On appeal, the Second Circuit rejected the Trust's arguments and affirmed. *Smith v. SEC*, 2011 WL 3438315, at *2 (2d Cir. Aug. 8, 2011). In addition, Judge Sharpe found that the facts "evidence a complete lack of good faith exercised by David and Lynn Smith in creating, funding and structuring the Trust." Memorandum-Decision and Order dated May 9, 2011, Dkt. 321, at 24 (denying Trust's motion to dismiss).

Finally, notwithstanding the rhetorical observations in the Report about considering the “Smith Interests,” it should be emphasized that the Receiver’s duty is to act on behalf of “the interests of allegedly defrauded investors.” Memorandum-Decision and Order dated Oct. 6, 2011, Dkt. 397, at 9.

Accordingly, we respectfully request that the Court enter an order directing the Receiver to sell the Sacandaga Lake Property.

Dated: New York, NY
November 7, 2013

Respectfully submitted,

Securities and Exchange Commission

By **s/ Kevin P. McGrath**
Attorney Bar Number 106326
David Stoelting
Attorney Bar Number 516163
Attorneys for Plaintiff
Brookfield Place, 200 Vesey St., Suite 400
New York, NY 10281
Tel: (212) 336-0533 (McGrath)
(212) 336-0174 (Stoelting)
Fax: (212) 336-1322
E-mail: mcgrathk@sec.gov
stoeltingd@sec.gov