



NEW YORK
REGIONAL OFFICE

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
BROOKFIELD PLACE, 200 VESEY STREET, SUITE 400
NEW YORK, NY 10281-1022

June 5, 2020

BY ECF

The Honorable Gary L. Sharpe
United States District Judge
United States District Court
Northern District of New York
United States Courthouse
Albany, New York 12207

Re: SEC v. McGinn, Smith & Co., Inc., et al., 10-cv-457 (GLS)(CFH)

Dear Judge Sharpe:

On behalf of plaintiff SEC, I submit for the Court's review and approval two Turnover Orders pertaining to accounts in the name of Relief Defendant Geoffrey R. Smith ("G. Smith"), as well as a proposed Order releasing from the asset freeze an IRA account in G. Smith's name.

As discussed in more detail below, the SEC also proposes allocating a portion of a brokerage account which the Court has found to be a joint asset of Defendant David L. Smith ("D. Smith") and Relief Defendant Lynn A. Smith ("L. Smith") to satisfy not just D. Smith's disgorgement obligations relating to the investment fraud, as the SEC has previously requested and the Court approved, but also to satisfy the joint-and-several payment obligations of G. Smith, L. Smith and D. Smith arising from certain fraudulent transfers. The Smiths have consented to the proposed Orders and to the allocation proposal.

The Proposed Orders

The proposed Turnover Orders require Bank of America (BOA) and National Financial Services LLC (NFS) to transfer to the Receiver, for the benefit of the victims, funds totaling \$53,372.11 in four financial accounts in the name of G. Smith.¹ A separate Order requires NFS to release an IRA account in the name of G. Smith holding approximately \$14,000.

¹ The proposed Turnover Order to BOA includes an account in the name of Defendant McGinn containing \$4.70.

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The Allocation of the Stock Account to Satisfy Joint-and-Several Obligations

If the Court enters the proposed Turnover Orders, and after the funds are transferred, the SEC will submit for the Court's review a Satisfaction of Judgment that, if approved, would apply approximately 18% of the assets in a \$2.2 million stock account jointly owned by D. Smith and L. Smith to satisfy the joint-and-several payment obligations of D. Smith, L. Smith and G. Smith arising from the fraudulent July 2010 transfers, as well as a separate 2011 sanctions judgment against L. Smith.

The July 2010 Fraudulent Transfers. In April 2010, the SEC's motion for a temporary restraining order and asset freeze over the assets of Defendants D. Smith and Timothy McGinn was granted, and William J. Brown, Esq., was appointed as Receiver over the assets of McGinn Smith & Co., Inc. and affiliated entities. Following a preliminary injunction hearing in early June 2010, Judge Homer extended the asset freeze over a broad range of assets and financial accounts, including a brokerage account in the name of L. Smith (the "Stock Account"). *SEC v. McGinn, Smith & Co., Inc., et al.*, 752 F. Supp.2d 194, 216-217 (N.D.N.Y. 2010).

Judge Homer, however, denied the SEC's request to freeze an account in the name of a trust created by David and Lynn Smith (the "Trust Account"). *Id.* at 218-219. As soon as the freeze was lifted, in July 2010, nearly \$1 million was transferred from the Trust Account to L. Smith, the Smiths' adult children, G. Smith and Lauren T. Smith ("L.T. Smith"), and to the Smiths' attorney and accountant. *Wojeski*, 752 F. Supp.2d 220, 221 (N.D.N.Y. 2010) (Trust Account was "unfrozen and at least \$1 million of the approximately \$4 million of the Trust's assets were distributed before the Trust was again frozen").

In August 2010, the SEC filed a motion for reconsideration based on newly discovered evidence that the Smiths had failed to disclose. Following a hearing, Judge Homer granted the SEC's motion to extend the asset freeze over the Trust Account and invited the SEC to move for sanctions. *Wojeski*, 752 F. Supp.2d at 233.

In July 2011, Judge Homer ordered the return of the funds that had been transferred out of the Trust Account. *SEC v. Smith, et al.*, 798 F. Supp.2d 412, 437 (N.D.N.Y. 2011). Judge Homer also granted the SEC's motion for sanctions, and ordered L. Smith to reimburse the SEC \$51,232 in attorney fees that were incurred as a result of her conduct. *Id.* at 442. In October 2011, a judgment in this amount was entered against L. Smith. *See* Dkt. 398.

The Final Judgments. The two Final Judgments entered on June 25, 2015 (Dkt. 835, 837) made the obligation to return the funds transferred out of the Trust Account in July 2010 joint and several among D. Smith and L. Smith and, for the funds they received, G. Smith and L.T. Smith.²

² In a series of opinions, the Second Circuit rejected all appellate arguments raised by the Smiths and affirmed every judgment and order of the District Court that they challenged. *Smith v. SEC*, 432 Fed. Appx. 10 (2d Cir. 2011) (affirming preliminary injunction); *Smith v. SEC*, 653 F. 3d 121 (2d Cir. 2011) (affirming

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As a result of an offset from an asset sale by the Receiver (Dkt. 837 at 4), and the satisfaction of L.T. Smith's obligation (Dkt. 900), the remaining joint-and-several payment obligation arising from the July 2010 transfers is \$442,368. If the funds in the proposed Turnover Orders are subtracted, the total joint-and-several obligation is reduced to \$389,000.59.

Application of Stock Account to Satisfy Judgments. Practical considerations of fairness and equity favor applying a portion of the Stock Account to satisfy the outstanding joint-and several payment obligations arising from the fraudulent transfers, as well as the sanctions judgment against L. Smith.

First, it appears unlikely that collection efforts from the Smiths will result in recoveries that would increase the funds available to victims. D. Smith and L. Smith are in their mid-70s. The Smiths have represented to the SEC that L. Smith lives on a modest pension and social security, has no ability to satisfy her payment obligations, and that the likelihood of her having the financial means to do so is remote. D. Smith was just released from prison, is in a halfway house, and also appears to have scant prospects of paying his disgorgement obligation in full. And although G. Smith is younger and is employed, he has represented that he has insufficient assets, apart from the accounts subject to the proposed Turnover Orders, to satisfy his portion of the joint-and-several payment obligation.

Second, after the release of this joint-and-several obligation, D. Smith will remain liable, on a joint and several basis with Defendant Timothy McGinn, for approximately \$99 million in disgorgement, plus pre- and post-judgment interest, and post-judgment discovery of that debt under Federal Rule of Civil Procedure 69(a) can be pursued. To date, the Receiver has distributed approximately \$6.8 million to the victims, and the Receiver's most recent disclosure on mcginnsmithreceiver.com states that his accounts hold approximately \$15.8 million. Accordingly, it appears that even in a best case scenario, after the distribution of all Receivership assets, D. Smith and T. McGinn will remain liable for more than \$75 million, plus pre- and post-judgment interest.

Third, it is appropriate and consistent with fairness to permit the Smiths to use a relatively small portion (18%) of the Stock Account to extinguish their shared payment obligation, as well as L. Smith's separate 2011 judgment, because D. Smith is "a joint owner" of the Stock Account and the account is in L. Smith's name (Dkt. 835 at 7).

Fourth, the victims are not materially impacted by this allocation because regardless of how the funds are credited among the various judgment debtors, all of the funds in the Stock Account (as well as the Trust Account) will be distributed to victims in accordance with the Court-approved Distribution Plan.

orders re asset freeze and property sales); *SEC v. Smith*, 710 F. 3d 87 (2d Cir. 2013) (affirming sanctions); *SEC v. Smith*, 646 Fed. Appx. 42 (2d Cir. 2016) (affirming Final Judgments).

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Finally, applying a portion of the Stock Account to satisfy the joint-and-several obligation is consistent with the D. Smith Final Judgment, which states that the assets of the Stock Account shall be applied to D. Smith's "payment obligations" under the Final Judgment, Dkt. 835 at 7, and D. Smith's obligation to return the July 2010 transfers is a "payment obligation." As D. Smith's obligation is joint and several, this also satisfies L. Smith's and G. Smith's payment obligations. And although it is not a joint-and-several debt, it is also appropriate to apply \$51,232 from the jointly held Stock Account to satisfy L. Smith's obligation under the October 2011 sanctions judgment.

We acknowledge that this application of the Stock Account represents a departure from the SEC's prior position. At the summary judgment stage, the SEC argued that the funds in the Stock and Trust Accounts should be applied to D. Smith's disgorgement obligation (SEC Mem. of Law filed July 8, 2014, at 18-23, Dkt. 708-1), and the Court agreed. *See* 98 F. Supp.3d at 524 ("the Court grants the SEC's request to apply the Stock Account to the [D. Smith] disgorgement order"). In addition, the *Order to Liquidate Securities Pursuant to Final Judgment and Make Transfers to the Receiver* dated November 6, 2019 (Dkt. 1089), which directed NFS to liquidate the securities in the Trust and Stock Accounts and transfer the proceeds to the Receiver, also provided that the Stock and Trust Accounts apply to D. Smith's payment obligation under Part VI of his Final Judgment.³

In any event, and notwithstanding the prior understanding, the more general language in the Final Judgment directing that the Stock Account assets be used to satisfy D. Smith's "payment obligations" does not explicitly exclude application of the Stock Account to satisfy the Smiths' other payment obligations. Given that more than ten years have passed since this case began, moreover, and with the Receivership looking to wind up later this year, the SEC believes it is appropriate and consistent with principles of practicality and equity to resolve these debts.

³ The current proposal, which allocates about 18% of the Stock Account to satisfy the joint-and-several obligations for the fraudulent transfers under Part VII of the D. Smith Final Judgment, would effectively modify the 11.6.19 Order.

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Conclusion

The SEC respectfully requests that the Court enter the proposed Orders, to which the Smiths have consented. If the Court enters the proposed Orders, and after the Receiver has received all funds transfers, the SEC will submit a Satisfaction of Judgment to the Court consistent with the foregoing.

Respectfully submitted,

/s David Stoelting

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cc (by email and ECF):

Justin Weddle, Esq., limited-purpose counsel for D., L. and G. Smith
William J. Dreyer, Esq., counsel to D. Smith
E. Stewart Jones, Esq., counsel to T. McGinn
William J. Brown, Esq., Receiver

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

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.

10 Civ. 475 (GLS/CFH)

ORDER MODIFYING ASSET FREEZE

WHEREAS on April 20, 2010, plaintiff Securities and Exchange Commission (“SEC”) commenced this action by filing a Complaint as well as a motion for a temporary restraining order (“TRO”) seeking to freeze certain assets of the defendants and relief defendants, and the Court granted the TRO and the Order Freezing Assets on that day (Dkt. 5);

WHEREAS, on July 22, 2010, the Court entered a Preliminary Injunction Order (Dkt. 96) that, among other things, continued the asset freeze that had been provisionally in effect since April 20, 2010;

WHEREAS, among the assets frozen pursuant to the Preliminary Injunction Order was an individual retirement account (“IRA”) in the name of Relief Defendant Geoffrey R. Smith (“G. Smith”) held at National Financial Services, LLC, Account Number RMR-XXX9995 (the “G. Smith IRA Account”);

WHEREAS, on June 25, 2015, the Court entered a Final Judgment as to G. Smith and others (Dkt. 837) (the “Final Judgment”) which, among other things, requires G. Smith to return certain assets that had been fraudulently conveyed;

WHEREAS, G. Smith has requested that the G. Smith IRA Account be released from the asset freeze because the G. Smith IRA Account is exempt from execution under New York State law, specifically N.Y. Civ. Prac. Law and Rules § 5205, and that this exemption cannot be disregarded because the Final Judgment is not a disgorgement order, and G. Smith was not found to have violated the federal securities laws,

NOW, THEREFORE,

I.

IT IS ORDERED that, on consent of the SEC and G. Smith, the Preliminary Injunction Order is modified such that the G. Smith IRA Account is released from the asset freeze.

II.

IT IS FURTHER ORDERED that with the exception of the modification set forth herein and in certain prior Court orders, the asset freeze as set forth in the Preliminary Injunction Order remains in full effect.

SO ORDERED

UNITED STATES DISTRICT JUDGE

Dated: Albany, New York
_____, 2020

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.

10 Civ. 457-GLS-CFH

**[PROPOSED] TURNOVER ORDER (FED. R. CIV. P. 69(a) AND
NY CPLR §§ 5225(b) AND 5227) TO BANK OF AMERICA**

The Plaintiff-Judgment Creditor Securities and Exchange Commission (the “Commission”) having moved for a turnover order pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and New York Civil Practice Law and Rules (“NY CPLR”) §§ 5225(b) and 5227, directed to the Respondent Bank of America, and the Court having considered the papers submitted on such motion, and it appearing that such an order should be issued, it is hereby:

I.

ORDERED that the Respondent Bank of America turn over to the Court-appointed Receiver, William J. Brown, Esq. (the “Receiver”) certain property in its hands described as the balances in the following accounts:

<u>Account Title</u>	<u>Account Number</u>	<u>Balance (approx.)</u>
Geoffrey R. Smith	--6219	\$1,950.98
Geoffrey R. Smith	--2199	\$1,163.43
Timothy McGinn/ Nancy E. McGinn	--5452	\$4.70

Bank of America shall, within 14 days of the service of this turnover order, make such payment to the Receiver, for inclusion in the receivership estate in this action and distribution pursuant to the Court-approved Plan. Payment shall be: (a) made by United States postal money order, certified check, bank cashier's check, or bank money order; (b) made payable to "William J. Brown, Receiver"; (c) hand-delivered or mailed to William J. Brown, Phillips Lytle LLP, Omni Plaza, 30 South Pearl Street, Albany, NY 12207; and (d) submitted with a copy of this Order and a cover letter that identifies: (i) Bank of America as submitting the payment and (ii) the name and number of this proceeding (*SEC v. McGinn Smith & Co., Inc.*, 10-cv-457 (N.D.N.Y.)). Further, Respondent shall simultaneously transmit photocopies of evidence of payment, the cover letter sent to the Receiver, and this Order to David Stoelting, Senior Trial Counsel, Division of Enforcement, Securities and Exchange Commission, 200 Vesey Street, Suite 400, New York, NY 10281.

II.

ORDERED that this Court shall retain jurisdiction to enforce compliance with this Order.

Dated: Albany, New York
_____, 2020

UNITED STATES DISTRICT JUDGE

<u>Account Holder</u>	<u>Financial Institution</u>	<u>Account No.</u>	<u>Balance (approx.)</u>
Geoffrey R. Smith	NFS	RMR XX0493	\$50,253

NFS shall, within 14 days of the service of this turnover order, make such payment to the Receiver, for inclusion in the receivership estate in this action and distribution pursuant to the Court-approved Plan. Payment shall be: (a) made by United States postal money order, certified check, bank cashier's check, or bank money order; (b) made payable to "William J. Brown, Receiver"; (c) hand-delivered or mailed to William J. Brown, Phillips Lytle LLP, Omni Plaza, 30 South Pearl Street, Albany, NY 12207; and (d) submitted with a copy of this Order and a cover letter that identifies: (i) NFS as submitting the payment and (ii) the name and number of this proceeding (*SEC v. McGinn Smith & Co., Inc.*, 10-cv-457 (N.D.N.Y.)). Further, Respondent shall simultaneously transmit photocopies of evidence of payment, the cover letter sent to the Receiver, and this Order to David Stoelting, Senior Trial Counsel, Division of Enforcement, Securities and Exchange Commission, 200 Vesey Street, Suite 400, New York, NY 10281.

II.

ORDERED that this Court shall retain jurisdiction to enforce compliance with this Order.

Dated: Albany, New York
 _____, 2020

UNITED STATES DISTRICT JUDGE