

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 CORRECTED MEMORANDUM OF LAW IN OPPOSITION
TO TRUST’S MOTION FOR RECONSIDERATION**

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Plaintiff Securities and Exchange Commission respectfully submits this corrected Memorandum of Law in Opposition to the Motion for Reconsideration, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, of David W. Wojeski, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (the "Trust"), of the Court's Memorandum-Decision and Order dated November 22, 2010 (the "Decision"). (*SEC v. Wojeski*, ___ F. Supp. 2d ___, 2010 WL 4780315 (N.D.N.Y. Nov. 22, 2010; Docket Entry "DE" # 194).

PRELIMINARY STATEMENT

The Trust's motion for reconsideration should be denied because it fails to meet its extremely high burden of establishing that the Decision freezing the Trust's assets needs to be reversed to prevent manifest injustice. Although the Trust contends that the Court made numerous clearly erroneous factual findings, it fails to identify any error that warrant reconsideration of the Decision.

The Trust contends that the Court made clearly erroneous factual findings regarding: 1) Jill Dunn's role in representing Thomas Urbelis, the Trust's former trustee, and in the attribution of Urbelis' knowledge of the Annuity Agreement to the Trust; 2) Dunn's use of the phrase "private annuity agreement" in a conversation with SEC attorneys David Stoelting and Kevin McGrath on July 22, 2010; and 3) David Smith's equitable and beneficial interest in and control over the Trust's assets.

First, the Trust relies heavily on the fact that Dunn did not represent Urbelis at his deposition or in responding to the SEC's subpoena served on him. However, the Court's decision to freeze the Trust's assets was based on its finding that the Annuity Agreement revealed that the Trust's assets were owned and controlled by David Smith. The question whether Dunn represented Urbelis had no bearing on that issue. While the Court made

references to Dunn's representation of Urbelis in connection with its preliminary finding that the Annuity Agreement was newly discovered evidence that the SEC could not have discovered through the exercise of due diligence, and its alternative preliminary finding of fraud, misrepresentation and misconduct by parties associated with the Trust, Dunn's ostensible representation of Urbelis was not necessary to either of those holdings.

Second, the Trust's reliance upon McGrath's testimony to support Dunn's claim that she used the phrase "private annuity trust" in her July 22 call with Stoelting and McGrath fails. McGrath did not hear Dunn use that phrase and his testimony corroborated Stoelting's testimony that he heard Dunn use the phrase "private annuity agreement." The Court was well within its discretion to credit the testimony of the SEC witnesses and reject Dunn's testimony, for the reasons stated in its Decision.

Finally, the Trust's argument the discovery of the Annuity Agreement should not have altered the Court's July 7 decision (*SEC v. McGinn Smith & Co., Inc. et al.*, ___ F. Supp. 2d ___, WL 4780317 (N.D.N.Y. July 7, 2010); DE # 86) ("July 7 Decision") because the Smiths were allegedly mere creditors of the Trust with "no ability to affect the assets of the trust or to control it," Trust Brief at 7, also fails. The Annuity Agreement cast in an entirely new light prior testimony and evidence regarding the reasons the Trust was created, how it was funded, who controlled the Trust's assets and what their intended ultimate disposition was. There was ample evidence to support the Court's holding that, in contrast to a genuine irrevocable trust, the Trust was created for the benefit of the Smiths, not their children, and that its assets remained under David Smith's direction and control.

ARGUMENT

Legal Standard for Motion for Reconsideration

The Trust moves for reconsideration of the Court's Decision pursuant to Fed. R. Civ. P. 60(b), which provides, in relevant part, that a court may relieve a party from an order for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered ...; (3) fraud ...misrepresentation, or misconduct by an opposing party; (4) the judgment is void ...; (5) the judgment has been discharged; or (6) any other reason that justifies relief."

As the Trust concedes, generally, a motion for reconsideration will not be granted absent: "1) an intervening change in controlling law; 2) the availability of new evidence not previously available; or 3) the need to correct a clear error of law or prevent manifest injustice." Trust Brief at 2, (*citing Gaston v. Coughlin*, 102 F. Supp. 2d 81, 83 (N.D.N.Y. 2000) *citing In re C-TC 9th Ave. Partnership*, 182 B.R. 1, 3 (N.D.N.Y. 1995) (McAvoy, C.J.)).

The Trust makes no argument that there is an intervening change in controlling law, that there is newly discovered evidence, or that there was a clear error of law. The sole ground on which the Trust bases its motion is that the "factual foundation on which the Court's recent reconsideration decision was predicated was clearly erroneous and should be corrected to prevent manifest injustice." (Trust Brief at 2.)

As this Court noted in its Decision, "the standard for reconsideration is strict and is committed to the discretion of the court." Decision at 5, (*citing Santiago v. Owens-III. Inc.*, No. 3:05 CV 405 (JBA), 2006 WL 1601182, at *1 (D. Conn. June 7, 2006); *Colodney v. Continuum Health Partners, Inc.*, No. 03 CV 7276 (DLC), 2004 WL 1857568, at *1 (S.D.N.Y. Aug. 18, 2004)). "Relief under Rule 60(b) is generally not favored and is properly granted only

upon a showing of exceptional circumstances. *Id.* (citing *Insurance Co. of N.A. v. Pub. Serv. Mut. Ins. Co.*, 609 F.3d 122, 130-31 (2d Cir. 2010) (internal quotation marks and citation marks omitted)). There is no such showing of exceptional circumstances here.

I. The Alleged Erroneous Factual Findings Were Either Not Clearly Erroneous or Not Material to the Court’s Holding Granting the SEC’s Motion for Reconsideration

A. The Fact That Dunn Did Not Represent Urbelis Does Not Alter the Validity of the Court’s Decision to Freeze the Trust’s Assets

The Court’s belief that Dunn represented Urbelis was based on a statement attributed to Dunn at Urbelis’ deposition that she was “Attorney for the witness, Thomas Urbelis.” DE # 46-6, Urbelis Deposition at 4. Unbeknownst to the Court, Urbelis corrected this attribution in errata sheets he sent to the court reporting service on June 29, 2010. (DE # 214-1, Dunn Decl. Exhibit E.) However, the fact that Dunn did not represent Urbelis does not alter the validity of the Court’s conclusion that the Annuity Agreement revealed that David Smith owned and controlled the Trust’s assets, or its predicate finding that the Annuity Agreement was newly discovered evidence that the SEC could not have discovered through the exercise of due diligence or its alternative predicate finding that parties associated with the Trust engaged in fraud, misrepresentations and misconduct.¹

The Court made reference to its belief that Dunn represented Urbelis at two points in its Decision: 1) when holding that the Annuity Agreement was newly discovered evidence that the SEC could not have discovered through the exercise of due diligence, (DE # 194, Decision at 12-13, 18); and 2) when holding, in the alternative, that the SEC’s motion for reconsideration should be granted based on fraud, misrepresentation and misconduct. *Id.* at 20, fn. 17. A review of

¹ Indeed, to be clear, the SEC has never suggested that Dunn *did* represent Urbelis or that Urbelis was the Trustee when he was served with the SEC subpoena.

those instances makes clear that correcting the Court's understandable misapprehension on this point does not alter the validity of any of the conclusions it reached.

First, the Court stated:

Finally, the diligence of the SEC in obtaining the Annuity Agreement may be fairly evaluated by comparison to that of others similarly situated. The Trust's attorney represented Urbelis in responding to the SEC's subpoena and at his deposition. See Dkt. No. 46-3 at 2. She thus had a duty of due diligence to discover the Annuity Agreement parallel to that of the SEC here. Moreover, unlike the SEC in its efforts, the Trust's counsel was unfettered by the existence of privileges or by adverse interests.

Id. at 18.

Although Dunn did not represent Urbelis at his deposition or in responding to the SEC subpoena, the Court was still correct that she had a "duty of due diligence" to discover the Annuity Agreement based on her legal representation of the Trust. The Court's point that she admittedly failed to discover the Annuity Agreement despite her greater access to people associated with the Trust (such as Lynn Smith, Urbelis and others) remains valid even though she did not represent Urbelis.² Indeed, Dunn's continuing assertion that she was not aware of the Annuity Agreement prior to July 27 despite her own due diligence further supports the Court's finding that the SEC could not have discovered it through its exercise of due diligence.³

Further, as the Court found, there was no reason for the SEC to suspect or inquire about any such agreement given the multiple representations and testimony of so many defense

² For example, Dunn submitted a sworn affidavit by Lynn Smith in support of the Trust. Dunn obviously had access to Lynn Smith, knew the Trust was a private annuity trust, knew about private annuity agreements and could have asked Lynn Smith or Smith's counsel about the private annuity trust and any private annuity agreements.

³ The Trust also argues that the SEC's tax expert Brit Geiger's email to the SEC on July 22 demonstrates that he "had knowledge of the concept of private annuity trusts" before the July 22 call" Dunn Declaration at ¶6. However, Geiger's email merely states "Call me. There is a different answer." Nov. 16 hearing, Plaintiff's Exhibit 1. There was no evidence that Geiger or anyone else at the SEC had knowledge of the Annuity Agreement prior to July 22, 2010.

witnesses that the Smiths had transferred the stock to the Trust with no strings attached. (DE # 194 at 5-8, 20, n. 17).⁴

Second, the fact that Dunn did not represent Urbelis does not affect the validity of the Court's finding that the Trust and those associated with it engaged in fraud, misrepresentation and other misconduct. Dunn alleges in her Declaration that the Court incorrectly and unfairly attributes Urbelis' knowledge and conduct to the Trust, (DE # 214-1 at ¶ 7). The Court's finding that opposing parties engaged in fraud, misrepresentation or misconduct was predicated on: "the conduct of those associated with the Trust – principally Urbelis and Lynn Smith – in failing to disclose the Annuity Agreement . . ." (DE # 194 at 20, fn.17). This factual finding is not in any way impacted by the fact that Dunn did not represent Urbelis.

The Court's finding of fraud, misrepresentation and misconduct by Lynn Smith was sufficient in itself to support the Court's alternative basis pursuant to Rule 60(b)(3) for reconsidering its July 7 Decision. Furthermore, the Court's reference to Lynn Smith and Urbelis as "associated with the Trust" was correct, given that Lynn Smith and her husband David Smith created and funded the Trust and Urbelis, David Smith's life-long friend, was its original trustee from 2004 up until mere weeks before his deposition. So Urbelis's knowledge and actions were properly attributed to the Trust.

Moreover, the Court's finding that Dunn and Wojeski, representatives of the Trust, engaged in fraud, misrepresentations and misconduct in that they: "engaged in false assertions on this motion as to when and how they learned of the existence of the Annuity Agreement" (DE # 194 at 20, n. 17) is also not altered by the fact that Dunn did not represent Urbelis.

⁴ The Court also has already properly rejected Dunn's claim that the SEC could have discovered the Annuity Agreement from the U.S. Attorney's Office, given that the SEC made an appropriate request for all such documents and did not receive the Annuity Agreement. (DE # 194 at 5-6).

Dunn also alleges in her Declaration that, because she did not represent Urbelis, and because the SEC had not served a prior document request on the Trust, she had no duty to supplement Urbelis's prior response to the SEC's subpoena, and no duty to respond to the SEC's letter dated July 27, 2010 requesting all documents concerning the Annuity Agreement. (DE # 214-1). Dunn Declaration at ¶¶ 7, 11-13, 21. However, even if Dunn did not have an obligation to update Urbelis's response to the SEC's subpoena, she did have an ethical obligation as an officer of the Court not to make affirmative misrepresentations, to prevent fraud on the Court, and not to elicit testimony she knew to be misleading or false. By submitting false declarations and failing to produce the email she received from Wojeski until the eve of the November 16 hearing, Dunn violated these ethical obligations.

Thus, most importantly, although the Court referenced Dunn's ethical obligation in connection with its holding that the SEC could not have discovered the Annuity Agreement through the exercise of due diligence, that finding is unimpeached regardless of whether Dunn had any duty to supplement Urbelis's prior production or to respond to the SEC's July 27 document request letter.

Finally, Dunn continues to distort the facts even in this motion. Dunn states that the July 21 email she received from Wojeski "contained, not an annuity agreement, but a "Policy Delivery Receipt. ..." (DE # 214-1 at ¶ 21), in an attempt to justify why she did not have a statutory or ethical disclosure obligation to respond to the SEC's July 27 2010 document letter request. This misrepresents what Dunn actually received. The document Wojeski emailed Dunn contained a page entitled in capital letters "PRIVATE ANNUITY CONTRACT" in which David Smith acknowledged that he had "received the above number contract certificate on the date of this receipt," with a signature dated "10/19/04." It set forth the annuitants, David and

Lynn Smith, the contract date, the face amount of the contract and the interest rate. Although the upper left corner of that page contained the legend “Policy Delivery Receipt” in smaller letters, it is misleading to describe this document simply as a “policy delivery receipt.” The Wojeski email also included what appears to be the cover page to the Annuity Agreement entitled “PRIVATE ANNUITY CONTRACT BETWEEN DAVID L. AND LYNN A. SMITH, AS TRANSFERORS AND THE DAVID L. AND LYNN A. SMITH IRREVOCABLE TRUST ...” (Emphasis in original), with attached pages that also contained a listing of contract terms.

For Dunn to describe these detailed documents as merely a “Policy Delivery Receipt” in an effort to excuse her failure to disclose this email sooner is truly astounding, particularly given the Court’s prior findings regarding her credibility.

B. The Court’s Finding that Dunn Referred to the “Private Annuity Agreement” in the July 22 Call was Not Clearly Erroneous

Dunn contends that the Court’s finding that she used the phrase “private annuity agreement” in her call with the SEC on July 22, 2010 was clearly erroneous because McGrath did not hear her use that phrase. (DE # 214-1 at ¶¶ 5-6). McGrath’s testimony provides no support for Dunn’s contention.

McGrath testified that he did not hear Dunn use the phrase “private annuity agreement” because he “started t[u]ning her out.” Nov. 16 hearing Tr. at 54. Further, McGrath testified that immediately after the call with Dunn, Stoelting told McGrath that he had heard Dunn say the reason no gift tax was due was because of a “private annuity agreement.” McGrath certainly did not testify that he heard Dunn use the phrase “private annuity trust” which Dunn claims to have said on the call. Thus, McGrath’s testimony does not support Dunn’s contention and, in fact, it

corroborates Stoelting's testimony that Stoelting heard Dunn use the phrase "private annuity agreement" during the call.⁵

In addition, in finding that Dunn used the phrase "private annuity agreement" during the call, the Court specifically found that Stoelting's and McGrath's demeanor during the hearing was more credible than Dunn's and that the SEC's version of events were "internally consistent and probable." (DE # 194 at 9-10.) In contrast, the Court found that "Dunn's testimony and assertions regarding the telephone conversation and discovery of the Annuity Agreement have been inconsistent and contradictory." *Id.* at 10. It also found that "Dunn's conduct since July 21 undermines her credibility." *Id.* at 11-12. The Court was well within its discretion in making these findings.⁶

C. The Court's Finding that David Smith had an Equitable and Beneficial Interest in the Assets in the Trust was Not Clearly Erroneous

The Trust also argues that the Court "misapprehended the effect of the Annuity Agreement and that it should not have caused the Court to reconsider its July 7, Order and freeze the Trust's assets." Trust Brief at 6-8. Contrary to the Trust's argument, the Annuity Agreement cast in an entirely new light the Trust's and Lynn Smith's prior testimony and evidence regarding the reasons the Trust was created, how it was funded, who controlled the Trust's assets and what their intended ultimate disposition was. There was ample evidence to support the

⁵ Dunn also contends that the Court clearly erred in stating that "McGrath did not recall this statement by Dunn." Dunn Decl. at ¶ 5. However, the Court also stated that: "McGrath did not hear Dunn refer to a "private annuity agreement . . ." Decision at 9. Thus, there can be no doubt that the Court correctly understood the import of McGrath's testimony.

⁶ Dunn also argues that the Court's reliance on her "breach of her ethical and statutory duties" in assessing her credibility was erroneous because the Court assumed she represented Urbelis and held his failure to produce the Annuity Agreement against her. Dunn Decl. ¶¶ 7, 11-13, 21. However, as discussed above, the Court had numerous bases to reject Dunn's testimony regardless of whether she breached any "ethical or statutory" duties and, in fact, the Court found that Dunn did violate her ethical duties aside from any obligation she may have had to respond to the SEC's subpoena and its July 27 letter.

Court's holding that, in contrast to a genuine irrevocable trust, the Trust was created for the benefit of the Smiths, not their children, who were unlikely to see any funds from the Trust, given the Trust's contractual obligations to the Smiths pursuant to the Annuity Agreement. Those intended benefits included not just tax avoidance, but asset protection from potential lawsuits, with the promised return of the money when the Smiths reached retirement age.

The Annuity Agreement also cast new light on why the Trustee did not distribute one penny of the Trust's assets to either of the Smiths children during the six years of its existence despite both children's financial difficulties, namely because the money was earmarked for the Smiths' retirement not for their children. The fact that Lynn Smith, Dunn, Wojeski, Urbelis, and others engaged in conduct designed to hide the existence of the Annuity Agreement from the Court and the SEC, because they knew that its discovery would undermine the allegedly "irrevocable" nature of the Trust, further supports the Court's finding that the assets in the Trust were beneficially and equitably owned and controlled by David Smith.

The cases cited by the Trust merely hold that a beneficiary of a valid trust does not have any legal ownership of the Trust assets. *See, e.g. Duvall v. English Evangelical Lutheran Church*, 53 N.Y. 500, 503 (1873) (holding that beneficiary of trust did not hold title to trust property but only equitable power of enforcement); *Buechel v. Bain*, 275 A.D.2d 65, 72 (2000), *aff'd*, 97 N.Y.2d 295 (2001) (same). They are not relevant to whether the trust form should be disregarded, or to whether a court has the equitable power to freeze trust assets, in circumstances such as this case where the Trust was created for fraudulent purposes, the parties associated with the Trust perpetrated a fraud on the Court, where the Trust's assets were always de facto owned and controlled by David Smith and where there is a high risk of dissipation of the Trust's assets absent a freeze.

Accordingly, the Trust has not shown that there was manifest injustice in freezing the Trust's assets based on the new light the Annuity Agreement shed on the true ownership and control of the Trust's assets.

CONCLUSION

For the reasons stated above, the Trust's Motion for Reconsideration should be denied in its entirety, except that the SEC has no objection to the Court amending its Decision to state that Dunn did not represent Urbelis in connection with this proceeding.

Dated: January 10, 2011
New York, New York

Respectfully submitted,

s/ Kevin McGrath
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DECLARATION OF SERVICE

I, Kevin McGrath, pursuant to 28 U.S.C. § 1746, certify that on January 10, 2011,

I filed on the Court's ECF system the following document:

- Plaintiff's Memorandum of Law in Opposition to the Trust's Motion for Reconsideration;

and sent by electronic mail a copy of the above-referenced document to:

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January 10, 2011

BY ECF

The Honorable David R. Homer
United States Magistrate 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)(DRH)

Dear Judge Homer:

Plaintiff respectfully requests leave to file a corrected brief correcting certain errors in the SEC's Response in Opposition re 214 Motion for Reconsideration by the David and Lynn Smith Irrevocable Trust (Docket # 250) submitted by ECF on Friday, January 7, 2010. Specifically, the corrections are:

- (1) Page 7, last sentence of first paragraph change from:

“the email she received from Urbelis” to

“the email she received from *Wojeski*”

- (2) Page 8, last paragraph on page, second and third sentences of paragraph change from:

“Further, McGrath testified that immediately after the call with Dunn, Stoelting told McGrath that he had heard Dunn say the reason no gift tax was due was because of a “private annuity trust.” McGrath certainly did not testify that he heard Dunn use the phrase “private annuity contract,” which Dunn claims to have said on the call.” to

“Further, McGrath testified that immediately after the call with Dunn, Stoelting told McGrath that he had heard Dunn say the reason no gift tax was due was because of a “private annuity *agreement*.” McGrath certainly did not testify that he heard Dunn use the phrase “private annuity *trust*,” which Dunn claims to have said on the call.”

Plaintiff apologizes for any confusion this may have caused.

The Honorable David R. Homer
January 10, 2011
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Respectfully submitted,

s/ Kevin McGrath

cc: Counsel of Record (by ECF)
Nancy McGinn (pro se) (by email)