

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

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

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

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

Defendants.

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ORDER TO SHOW CAUSE

On the Application of Jill A. Dunn, Esq. (“Dunn”), pursuant to Rule 62, Fed. R. Civ. P., for an Order staying the sanctions imposed on Dunn by the Memorandum–Decision and Order of United States Magistrate Judge David R. Homer filed July 20, 2011 (“July 20, 2011, Decision”), pending review thereof by this Court, and upon consideration of the Objections and Memorandum of Law filed August 1, 2011, and the Declaration of Benjamin Zelermyer, Esq, dated August 1, 2011, in support of Dunn’s objections to the July 20, 2011, Decision, and reasonable advance notice of the application of this Order to Show Cause having been given to the plaintiff in this action, and sufficient cause having been shown, it is hereby

ORDERED that plaintiff Securities and Exchange Commission show cause, if there be any, to this Court at _____ on the ___ day of _____, 2011, in the Courtroom of Hon. Gary L. Sharpe, *U.S.D.J.*, at the James T. Foley U.S. Courthouse, 445 Broadway, Albany, New York, 12207-2924, why this Court should not enter an Order sustaining Dunn’s objections to July 20, 2011, Decision; rejecting the findings and conclusions adverse to Dunn set forth therein; and vacating (i) the direction that Dunn disgorge the sum of \$5,355, (ii) the public admonishment of Dunn and (iii) the direction to the Clerk of the Court to forward a copy of the

July, 20, 2011, Decision to the Committee on Professional Standards for the Appellate Division, Third Department; and it is further

ORDERED that opposing papers, if any, shall be filed and served no later than _____, 2011, and that reply papers, if any, shall be served and filed no later than _____, 2011; and it is further

ORDERED that pending the filing of this Court's disposition of Dunn's objections thereto, the sanctions imposed on Dunn by the July 20, 2011, Decision are stayed in all respects.

Dated: August __, 2011
Albany, New York

HON. GARY L. SHARPE, *U.S.D.J.*

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

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

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

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

Defendants.
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**DECLARATION OF BENJAMIN ZELERMYER, ESQ.
IN SUPPORT OF ORDER TO SHOW CAUSE**

BENJAMIN ZELERMYER declares, pursuant to 28 U.S.C. § 1746, under the penalties for perjury under the laws of the United States of America:

1. I am a member of the Bar of this Court and counsel to the law firm of Steinberg & Cavaliere, LLP, attorneys for non-party Jill A. Dunn, Esq. (“Dunn”), in connection with the motion by plaintiff Securities and Exchange Commission to impose sanctions against Dunn and in connection with Dunn’s objections to and appeal from the sanctions imposed by United States Magistrate Judge David R. Homer, in a Memorandum-Decision and Order filed July 20, 2011 (Dkt. No. 342; “July 20, 2011, Decision”).

2. Earlier today, I filed Dunn’s Notice of Objections/Appeal and Objections and Memorandum of Law in support of her objections to the July 20, 2011, Decision (Dkt. Nos. 351, 351-1).

3. I submit this Declaration in support of Dunn’s Application for an Order to Show Cause including a stay of the sanctions imposed on Dunn by the July 20, 2011, Decision pending review by this Court.

4. The standard procedure for review of a decision, or a report and recommendations, by a magistrate judge is inadequate here. While Magistrate Judge Homer characterizes his decision as having been rendered either with the consent of the parties—other than Dunn, who did *not* consent to the SEC’s sanctions motion being heard by a magistrate judge—or as “non-dispositive,” or suggests that the decision may be treated as a report and recommendation (July 20, 2011, Decision, pp. 12-13, n. 8), the sanctions imposed take effect immediately.

5. Dunn has been directed to disgorge \$5,355 to a receiver by September 1, 2011, and if she does not, judgment may be entered against her. July 20, 2011, Decision, p. 51. Under Local Rule 7.1, the next available date upon which this Court may hear Dunn’s objections is September 1, 2011.

6. More important, Dunn has already been publicly admonished by the July 20, 2011, Decision, and the Clerk of the Court has been directed to forward a copy of the decision to the Committee on Professional Standards for the Appellate Division, Third Department (July 20, 2011, Decision, p. 51), which may lead to the initiation of disciplinary proceedings against her.

7. These sanctions cannot be considered “non-dispositive” or in the nature of mere recommendations. They are clearly dispositive of the motion for sanctions by a magistrate judge who did not have jurisdiction to render a judgment in the absence of Dunn’s consent. *See* Dunn’s Objections and Memorandum of Law, pp. 3-5.

8. As shown in Dunn’s Objections and Memorandum of Law, the July 20, 2011, Decision gives short shrift to the jurisdictional issues and, far from exercising the caution, restraint and discretion required when sanctions are considered, flies in the face of undisputed

documentary refutation of the critical factual finding underlying Magistrate Judge Homer's conclusions.

9. Accordingly, for both substantive and procedural reasons, there is more than ample ground to suggest that Magistrate Judge Homer's findings and conclusions will be rejected by this Court, yet unless a temporary stay is granted, Dunn will suffer irreparable harm to her reputation. Without her consent to a magistrate judge's jurisdiction, and without any opportunity for review, she has been publicly admonished.

10. Without her consent to a magistrate judge's jurisdiction, and without any opportunity for review, the Clerk of the Court has been directed to forward Magistrate Judge Homer's decision to disciplinary authorities, which may result in the initiation of further proceedings against her.

11. In the name of due process and simple fairness, these circumstances call for a temporary stay of the sanctions incorrectly and improperly imposed by Magistrate Judge Homer.

12. The sanctions imposed by the July 20, 2011, Decision should be stayed pending review by this Court, and the Order to Show Cause requested by Dunn should be issued.

13. In accordance with Local Rule 7.1(e), on Friday, July 29, I telephoned the lead SEC attorney, David Stoelting, Esq., and informed him that I intended to file this Application today.

August 1, 2011

Benjamin Zelermyer
Bar Roll # 516663