UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	10-CV-457 (GLS/DRH)
-against-	:	
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 L. SMITH, 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.	:	
JILL A. DUNN, ESQ., DAVID M. WOJESKI, THOMAS J. URBELIS, ESQ. AND JAMES D. FEATHERSTONHAUGH, ESQ.,	:	
Non-Parties.	:	

NOTICE OF OBJECTIONS/APPEAL

Notice is hereby given that, pursuant to 28 U.S.C. § 636(b), Fed. R. Civ. P. 72 and Local Rule 72.1, non-party David M. Wojeski ("Wojeski") objects and appeals to the United States District Court for the Northern District of New York (Hon. Gary L. Sharpe, U.S.D.J.) from the following portions of the Memorandum-Decision and Order issued by United States Magistrate Judge David R. Homer on July 20, 2011 (Docket No. 342)("July 20th Decision"):

- "Wojeski now acknowledges that on July 20, 2010, David Smith telefaxed a copy of the Annuity Agreement and related documents. Wojeski Decl. (Docket No. 191) at ¶ 3. Wojeski forwarded the agreement to Dunn the next day by electronic mail. Dunn Decl. (Dkt. No. 188) at ¶ 3." July 20th Decision at p. 29 (emphasis added).

- "On the evening of November 15, 2010, Dunn filed a declaration acknowledge for the first time that she in fact had received a copy of the Annuity Agreement from Wojeski on July 21, 2010, the day before her conversation with the SEC. Dunn. Decl. (Dkt. No. 188)." July 20th Decision at p. 30 (emphasis added).

- "On November 17, 2010, Wojeski filed a declaration acknowledging receipt of a copy of the Annuity Agreement from David Smith on July 20, 2010 and explaining that 'in fathering documents to assist with the Trust's response to Plaintiff's discovery demands, I produced a five-page document that David Smith faxed to me on July 20, 2010....This document did not contain a signed contract or a copy of the "Private Annuity Agreement" that was apparently subsequently produced by Mr. Urbelis." July 20th Decision at p. 30 (emphasis added).

- "Wojeski's attempt to explain the false statement in his October declaration fails." July 20th Decision at p. 31 (emphasis added).

- "Second, Wojeski asserted in the October Declaration that he learned of the agreement first not from David Smith but from Dunn and the SEC. Wojeski asserted that '[t]he first I learned of the existence of an annuity agreement was in late July, when my attorney informed that the former trustee had just produced the agreement simultaneously to her and to the SEC's counsel.' Wojeski Decl. (Dkt. No. 47) at ¶ 2...Wojeski in fact learned of the agreement from David Smith, not from Urbelis, the SEC, or Dunn, and Wojeski then provided a copy to Dunn prior to Dunn's telephone conversation with the SEC. Thus, the record demonstrates by clear and convincing evidence that Wojeski made a false statement as to a material fact in his October declaration and has exacerbated that conduct by falsely claiming that the referencing in that "affidavit to "late July" was at worst an imprecise reference to the David Smith telefax on July 20, 2010 when in fact it explicitly referred to the communication fro Urbelis and the SEC to Dunn a week later." July 20th Decision at p. 31 (emphasis added).

- "...the SEC has demonstrated by clear and convincing evidence that Wojeski filed the October declaration containing a knowingly false statement ...Wojeski's deliberate conduct here suffices to constitute subjective bad faith and the SEC's motion for sanctions for that conduct is granted under Rule 11(c)(3) and the inherent power doctrine." July 20th Decision at p. 32.

- "Wojeski also received two disbursements from the Trust after July 7, 2010. Both were made on July 26, 2010, one for $8.098.50 and the second for $5,775.50. Dkt. No. 261-6 at 6. Both disbursements were thus received by Wojeski after he learned of the existence of the Annuity Agreement and this wrongful depletion of the Trust's assets thus occurred with Wojeski's complicity." July 20th Decision at p. 48.

- "...Dunn and Wojeski both knowingly filed declarations containing false statements in support of the Trust's opposition to the Sec's motion for

reconsideration. The bad faith with which Dunn and Wojeski acted in filing these false declarations was mitigated only minimally by their last minute filings of corrective declarations." July 20th Decision at p. 49.

Wojeski also objects to and appeals from the sanctions imposed on him by Magistrate Judge Homer's July 20th Decision, namely: (1) disgorgement of $13,834.00, (2) public admonishment and (3) Magistrate Judge Homer's direction to forward a copy of the July 20th Decision to the New York State Department of Education.

Dated: White Plains, New York
August 3, 2011

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2011, the foregoing non-party David M. Wojeski's Notice of Objections/Appeal was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, -against- 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 L. SMITH, 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. JILL A. DUNN, ESQ., DAVID M. WOJESKI, THOMAS J. URBELIS, ESQ. AND JAMES D. FEATHERSTONHAUGH, ESQ., Non-Parties.	:	10-CV-457 (GLS/DRH) **Non-Party David M. Wojeski's Objections Pursuant to Federal Rule of Civil Procedure 72(a)**

Non-Party David M. Wojeski ("Wojeski"), through his attorneys Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, respectfully submits these Objections to Magistrate Judge Homer's Memorandum-Decision and Order of July 20, 2011 ("July 20th Decision", Docket No. 342) granting the Securities and Exchange Commission's ("SEC") Motion for Sanctions, in part, by ordering that: (1) Wojeski disgorge $13,834.00 to the Receiver of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04; (2) Wojeski be publicly admonished for deliberately filing a false declaration; and (3) the Clerk of Court forward a copy of the July 20th Decision to the New York State Department of Education.

PRELIMINARY STATEMENT

Magistrate Judge Homer's July 20 Decision, as it relates to Wojeski, was not only a gross injustice but an overly punitive result that lacked any evidentiary support. It has unjustifiably stained the impeccable reputation of a local, well-respected accountant and placed his professional license in jeopardy based on conclusory assumptions of fact that fail to meet the heightened burden of proof required for sanctioning a non-party. Though the July 20th Decision correctly rejected the SEC's conspiracy theory that Wojeski was part of a larger scheme to conceal key evidence from the SEC, the July 20th Decision unfairly sanctioned Wojeski for intentionally submitting a false statement to the Court without any evidence to establish Wojeski's state of mind at the time and despite the fact that (1) the allegedly "false" statement was nothing more than a misinterpretation due to the ambiguity of the references prepared by Jill Dunn to the term "annuity agreement" and "late July," was not actually false, and had no detrimental effect on the proceedings, (2) Wojeski, on the advice of newly retained independent attorney for the Trust, voluntarily submitted a corrective affidavit less than a month later to clarify the meaning of his affidavit, and most importantly, (3) Wojeski lacked motive to mislead the Court and was never provided an opportunity to testify in his own defense! Moreover, the Court ignored Jill Dunn's conflict of interest when she prepared Wojeski's allegedly "false" statement. It is clear that, at the time, Jill Dunn's credibility was on the line and that Wojeski's allegedly "false" statement was curiously crafted in a way that served her own interests. However, to impute that motive to Wojeski is a clear error in the absence of any evidence whatsoever suggesting that Wojeski had his own motive to mislead the court.

Wojeski clearly stands apart from the other parties against whom the SEC sought sanctions and the evidence clearly establishes that Wojeski's conduct was nothing but honorable.

The SEC failed to meet its burden of demonstrating that Wojeski acted in bad faith and offered nothing more than conjecture and baseless allegations to support its motion. As such, the July 20th Decision, as it relates to Wojeski, must be vacated.

STATEMENT OF FACTS

For a full recitation of the facts originally submitted for Magistrate Judge Homer's consideration, this Court is respectfully referred to Wojeski's Memorandum of Law in Opposition to Plaintiff's Motion for Sanctions and Wojeski's Affidavit in Opposition to Plaintiff's Motion for Sanctions ("Wojeski Aff."), both dated March 21, 2011 (Docket Nos.[1] 305 and 306). For the purposes of these Objections, the following facts are deemed relevant to the Court's determination.

A. Wojeski's Limited Involvement as Trustee Prior to July 2010[2]

In or around April 2010, Jill A. Dunn ("Dunn') approached Wojeski about becoming the trustee of the David A. and Lynn A. Smith Irrevocable Trust U/A dated August 4, 2004 (the "Trust"), which had been temporarily restrained by the Court as part of a securities fraud litigation against, among others, David Smith, one of the Trust's donors. (Wojeski Aff. at ¶ 3). Wojeski requested all documents related to the Trust and Dunn provided Wojeski with certain documents regarding the Trust and Wojeski met with the Trust's outside accountant to review the Trust's records before agreeing to accept the appointment as successor trustee of the Trust, effective as of May 22, 2010. (Wojeski Aff. at ¶ 4-7). Upon accepting the appointment, Wojeski filed a motion to intervene in the underlying proceedings to ask the Court to lift the temporary

[1] All factual references refer to the Civil Docket for SEC v. McGinn, Smith & Co., Inc. et al., 10 cv 447, Northern District of New York.

[2] Wojeski submitted his resignation as trustee of the Trust on December 9, 2010 which, per the Trust agreement, became effective on January 8, 2011. (Wojeski Aff. at ¶ 28). On February 14, 2010, the Court ordered the substitution of Geoffrey Smith as trustee of the Trust. Id. As such, Wojeski's duties as trustee have ceased and he is no longer a party to the Action. Id.

restraining order because it was based on a false allegation that the Smiths maintained a beneficial interest in the Trust. (Wojeski Aff. at ¶ 8-9). By Order, dated July 7, 2010, the Court lifted the temporary restraining order, concluding that the SEC has failed to demonstrate that the Smiths maintained a beneficial interest in the Trust. (Wojeski Aff. at ¶ 15).

B. Wojeski Received Evidence of the Trust's "Private Annuity Contract" and Immediately Forwarded it to His Attorney

On July 20, 2010, Wojeski received an unsolicited facsimile from David Smith enclosing a five-page document that purported to be the policy delivery receipt from a "Private Annuity Contract," executed on October 19, 2004, between David L. Smith & Lynn A. Smith, as transferors and The David L. & Lynn A. Smith Irrevocable Trust U/A Dated August 31, 2003, transmitted together with an illustration of a "Private Annuity Contract." (Wojeski Aff. at ¶ 18). The next day, Wojeski e-mailed the facsimile to the Trust's attorney, Jill Dunn. (Wojeski Aff. at ¶ 19). Several days later, Dunn informed Wojeski that the SEC was in possession of a private annuity agreement ("Annuity Agreement") that related to the Trust, (Wojeski Aff. at ¶ 20), which Wojeski assumed was the same document that he had received by facsimile on July 20, 2010.

C. SEC's Files a Motion for Reconsideration Based on Newly Discovered Annuity Agreement

By motion, dated August 3, 2010, the SEC filed a motion for reconsideration ("Motion for Reconsideration", Docket No. 103) of the July 7, 2010 Order alleging that the Annuity Agreement had not previously been disclosed by any party, the Annuity Agreement proves that the Smiths are beneficial owners of the Trust and that the preliminary injunction freezing the Trust's assets was warranted. (Wojeski Aff. at ¶ 21). In opposition to the SEC's Motion for Reconsideration, Dunn submitted an affidavit to the Court, dated September 3, 2010, that stated

that she first learned about the Annuity Agreement on July 27th when it was produced by the Trust's former trustee to the SEC. (Docket No. 134). This was a key statement because it was in direct contradiction to the SEC's allegation that Dunn mentioned the Annuity Agreement in a July 22nd telephone conversation with the SEC and fed suspicion that Dunn knew about the Annuity Agreement far earlier than she admitted. A month later, Dunn prepared an affidavit on Wojeski's behalf dated October 7, 2010 ("October Affidavit", Docket No. 147) that corroborated her story and stated that "the first I learned of the existence of the Annuity Agreement was in late July, when my attorney informed me that the former trustee had just produced the agreement simultaneously to her and to the SEC's counsel." (Wojeski Aff. at ¶ 22).

When Wojeski signed the October Affidavit, he believed that he was stipulating to the fact that he learned of the existence of the Annuity Agreement in late July, which in his mind was referring to the July 20th date that he received the fax of the illustration of a "Private Annuity Contract." (Wojeski Aff. at ¶ 23). Wojeski was not aware that Dunn had received a different document, that being a copy of the Annuity Agreement. Id. At the time, he did not realize that the "late July" reference had a different meaning to Dunn, who drafted the affidavit on his behalf. Id. Unsurprisingly, it was three months since the events in question and the specific nature of when and how events occurred was not entirely clear. Although Wojeski did not see any problem with the October Affidavit at the time, in hindsight, he acknowledged that his October Affidavit could have been clearer in specifying a specific date. Id. As such, on the advice of the new independent attorney for the Trust, he voluntarily submitted a clarifying affidavit, dated November 17, 2010 ("November Affidavit," Docket No. 191), stating that "the first I learned of the possible existence of an annuity was in late July, when I received documents faxed to me by David Smith" to clarify his prior statement about when he first learned of the

existence of the Annuity Agreement. Id. After hearing testimony from Dunn (but not Wojeski), the Magistrate Judge Homer granted the SEC's Motion for Reconsideration finding that the Annuity Agreement did provide the Smiths with a beneficial interest in the Trust. (Docket No. 194). Notably, Magistrate Judge Homer noted that Dunn's version of the facts surrounding how she learned of the Annuity Agreement lacked credibility. Id. Remember, it was Dunn that prepared Wojeski's October Affidavit.

D. The SEC Files a Motion for Sanctions

By motion, dated January 21, 2011, the SEC moved for sanctions against Lynn Smith, the former trustee, Dunn and Wojeski. In relevant part to the Objections stated herein, the SEC alleged that Wojeski's October and November Affidavits were knowingly false and suggested that Wojeski intentionally lied about when he learned about the Annuity Agreement and actively concealed its existence in order to continue receiving payments from the Trust.

E. Magistrate Judge Homer Grants Motion for Sanctions, in part, as Against Wojeski

On July 20, 2011, Magistrate Judge Homer issued his decision and order on the SEC's motion for sanctions. Ultimately, Magistrate Judge Homer did not find any evidence that Wojeski participated in a scheme to conceal the Annuity Agreement. However, Magistrate Judge Homer did find that Wojeski willfully mislead the SEC and the court about when he learned about the Annuity Agreement. Magistrate Judge Homer did not find Wojeski's corrective November Affidavit to be credible and determined that Wojeski acted in bad faith, undermined the truth-seeking process and unnecessarily complicated preparations for the evidentiary hearings for the Motion for Reconsideration when he filed the October Affidavit.

STANDARD OF REVIEW

The applicable standard of review to be applied by a district court in its review of sanctions imposed by a magistrate judge is the subject of heated debate in the Second Circuit as discussed in length in dueling opinions by Judges Jose A. Cabrenes and Pierre Leval in Kiobel v Millson, 592 F.3d 78 (2d Cir. 2010); see also Wik v. City of Rochester, 2010 U.S. Dist. LEXIS 77531 (W.D.N.Y. July 30, 2010)(In applying a *de novo* review to order granting sanctions, "[t]he authority of a Magistrate Judge to finally resolve a motion for sanctions under Rule 11 is unsettled in the Second Circuit); R.F.M.A.S., Inc. v. So, 271 F.R.D. 13, *3-4 (S.D.N.Y. 2010)("A magistrate judge to whom a district judge has referred pre-trial matters may decide non-dispositive motions by issuing a memorandum and order, which is reviewable by the district judge for clear error, but may only opine on dispositive motions by means of a report and recommendation, subject to the district judges *de novo* review. [However], a motion for sanctions straddles the line between dispositive and non-dispositive motions).

Though the competing opinions in Kiobel reached different results, both agreed that it is a question that must be resolved by Congress. Judge Leval provided the most reasonable solution for district court's faced with this issue:

> In the meantime, because the question remains undecided, district judges would be well advised to review magistrate judge orders imposing sanctions both *de novo* and under a deferential standard. If the district court makes clear that, regardless of whether the standard of review is deferential or de novo, it would impose the same sanction, the issue of the magistrate judge's power will be moot, as it will be in the case in which the district court rejects the sanction on either standard.

It is our position that the July 20th decision should be reviewed by this court *de novo* since it is effectively a dispositive matter as it relates to Wojeski, a non-party. See Kiobel, infra at *23 ("a Rule 11 sanction, though it arises in the context of an underlying action, is the functional equivalent of an independent claim."). However, we believe that this Court will reach

the same conclusion regardless of whether it reviews the July 20th decision *de novo* or under a deferential standard, so we do not find it is necessary to expound the debate here and will instead reserve the debate for the lawmakers.

ARGUMENT

THE JULY 20TH DECISION INCORRECTLY APPLIED THE STANDARD USED TO JUSTIFY SANCTIONING A NON-PARTY BY FINDING THAT WOJESKI ACTED IN BAD FAITH WITHOUT A SCINTILLA OF CLEAR EVIDENCE

A. Sanctions Pursuant to the Court's Inherent Power to Sanction Are Disfavored and Must be Based on Clear Evidence of Bad Faith or Evidence of Harassment, Delay or Improper Purpose

The July 20th Decision accurately described the Court's inherent power to impose sanctions for conduct undertaken in bad faith:

> "Sanctions may be considered under this authority when a party or attorney acts 'in bad faith, vexatiously, wantonly or for oppressive reasons.' DLC Mgmt. Corp. v. Town of Hyde Park, 163 F.3d 124, 136 (2d Cir. 1998)(quoting Chambers, 501 US. at 45). A Court 'must find bad faith in order to impose such sanctions and **bad faith must be shown by clear evidence'** that the actions in question are taken for harassment or delay…or other improper purpose.' United States v. Int'l Bhd. Of Teamsters, 948 F.2d 1338, 1345 (2d Cir. 1991)(emphasis added).

(July 20th decision at p.11). The July 20th Decision also included the appropriate warning that courts should not wield such a power without justification:

> "'A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees.' Chambers, 501 U.S at 50; see also DLC Mgmt. Corp., 163 F.3d at 136; United States v. International Brotherhood of Teamsters, 948 F.2d 1338, 1345 (2d Cir. 1991)("**Because of the potency of the court's inherent power, courts must take pains to exercise restraining and discretion when wielding it**. Accordingly, this court has required a finding of bad faith for the imposition of sanctions under the inherent power doctrine.)(emphasis added); LaGrande v. Adecco, 233 F.R.D. 253, 258 (N.D.N.Y 2005)(Before the Court exercises of its enormous power to sanction, it should do so with restraint and should be reserved for when a party acts in bad faith, vexatiously, wantonly or for oppressive reasons).' To impose sanctions under the Court's inherent authority, then, there must exist clear and convincing evidence that an individual's conduct was not merely negligent but was undertaken with subjective bad faith. See Schlaiber Nance & Co., Inc. v. Estate of Warhol, 194 F.3d 323, 338

> (2d Cir. 1999); Podany v. Stephens, 318 F. Supp. 2d 146, 154 (S.D.N.Y. 2004)(noting that as in any inquiry into a person's state of mind, consideration must be given to circumstantial evidence and not simply to the objective truthfulness of the statements in question)."

(July 20th Decision at p. 11-12). There is no question that a court must exercise extreme caution in invoking its inherent power to sanction and base any such sanction only on clear evidence of bad faith. Yet, as discussed below, Magistrate Judge Homer failed to exercise this extreme caution when he sanctioned Wojeski without any evidence of the requisite bad faith or even allowing him to be heard in Court.

B. There is No Evidence that Wojeski Intentionally Submitted a False Statement in his October Affidavit; Let Alone Submitted a False Statement in Bad Faith

1. Any Misinterpretation of Wojeski's October Affidavit is Attributable to Dunn's Ambiguous Wording, Not Wojeski's Bad Faith, Which is Further Supported by Magistrate Judge Homer's Own Mistake in Quoting the November Affidavit

The July 20th Decision hinges on Wojeski's statement in his October Affidavit that:

> The first I learned of the existence of an annuity agreement was in late July, when my attorney informed me that the former trustee had just produced the agreement simultaneously to her and to the SEC's counsel.

(October Affidavit at ¶ 2). This statement is doubly ambiguous because it was not clear at the time whether "late July" meant July 20th or July 27th, and whether the "agreement" referred to the illustration of the "Private Annuity Contract" faxed to Wojeski or the Annuity Agreement received by Dunn a week later. Wojeski clarified these points in his November Affidavit by stating:

> The first I learned of the possible existence of an annuity was in late July, when I received documents faxed to me by David Smith…this document did not contain a signed contract or a copy of the "Private Annuity Agreement" that was apparently subsequently produced by [the former trustee].

(November Affidavit at ¶ 2, 3). Wojeski further clarified:

> On October 6, when I reviewed the Declaration drafted by my attorney, eleven (11) weeks had passed since the events at issue. At the time, I did not realize that [annuity illustration] was different from the document she received from [the former trustee] on July 27 and, in briefly reviewing the draft declaration, I thought that the two events had occurred at the same time.

(November Affidavit at ¶ 4). The potential for confusion caused by these ambiguities is demonstrated in the July 20th Decision, which incorrectly stated that "Wojeski now acknowledges that on July 20, 2010, David Smith telefaxed to Wojeski a copy of the Annuity Agreement and related documents." (July 20th Decision at p. 29). Wojeski did not receive a copy of the Annuity Agreement on July 20th, but rather received a five-page document that did not contain a signed contract or a copy of the Annuity Agreement. (November Affidavit at Exhibit A). It was not until a week later that a copy of the Annuity Agreement was produced to the SEC. (Docket No. 103 at Exhibit 1). Thus, when Wojeski stated the following in his October Affidavit:

> The first I learned of the existence of an annuity agreement was in late July, when my attorney informed me that the former trustee had just produced the agreement simultaneously to her and to the SEC's counsel.

(October Affidavit at ¶ 2), this was not an incorrect statement! Though Wojeski had anticipated that there may be some type of annuity agreement in existence when he received the facsimile on July 20th, he had no notice that an Annuity Agreement existed until a week later when he was told by Dunn that the actual Annuity Agreement was produced to the SEC. Thus, because of these ambiguities, Wojeski's statement could be read two ways, both of which are truthful: Wojeski learned on July 20th of the illustration of the "Private Annuity Contract" or he learned later that month that the Annuity Agreement had been produced to the SEC. While Wojeski intended the former interpretation, the latter is true as well.

Since either interpretation of Wojeski's statement would be a correct statement of fact, Magistrate Judge Homer erred in finding that Wojeski submitted a false statement to the court.

Furthermore, Magistrate Judge Homer not only misquoted Wojeski's November Affidavit, but his misstatement regarding the documents received by Wojeski on July 20th, served as the basis for his decision to sanction Wojeski. As such, this error alone serves as a basis for vacating the July 20th Decision.

2. Wojeski Had No Motive to Mislead the Court

The central issue here is whether Wojeski intentionally, or just inadvertently, failed to clarify the facts in his October Affidavit regarding when he learned about the Annuity Agreement. When the October Affidavit was submitted to the Court, the timing of when Dunn learned about the Annuity Agreement was of particular importance to Dunn because, one month prior, she had submitted her own sworn statement to the Court stating that she could not have mentioned the Annuity Agreement during her July 22nd phone conversation with the SEC because she didn't learn about the Annuity Agreement until July 27th when it was produced simultaneously to her and to the SEC's counsel. It is not surprising, therefore, that Dunn drafted Wojeski's October Affidavit in a way that corroborated her own story. Even the SEC noted that Wojeski's only possible motive to submit the statement in such a way would be to protect Dunn's own credibility and the July 20th decision also noted this coincidence. (Motion for Reconsideration at p. 15; July 20th Decision at p. 31). Though there is no clear evidence that Dunn intentionally crafted Wojeski's affidavit to serve her own interests, there is certainly a reasonable inference to be drawn.

To be clear, it was Dunn's credibility that was at risk. It was Dunn, who was at risk for being caught in a lie regarding when she learned about the Annuity Agreement, who stood anything to gain by the wording of Wojeski's October Affidavit. As far as Wojeski's interest was concerned, it made no difference to the SEC, the court or the Motion for Reconsideration

whether Wojeski learned about the possible existence of the Annuity Agreement on July 20st or July 27th. The important point was that Wojeski learned about the possible existence of the Annuity Agreement after the temporary restraining order was lifted weeks prior, making the Annuity Agreement new evidence by which the Motion for Reconsideration could be based. Certainly, as a fiduciary, Wojeski had an interest in protecting the Trust and preventing the imposition of a preliminary injunction against the Trust's assets, but that was a fight that was going to be fought regardless based on a defense that the Annuity Agreement did not change the irrevocable nature of the Trust. Wojeski had nothing to gain by telling the Court he heard about the Annuity Agreement a week later than he received certain documents that may have suggested a possible annuity agreement. Wojeski had nothing to gain by protecting Dunn. The Annuity Agreement had been discovered and the real issue was whether the existence of the Annuity Agreement was a valid basis for a preliminary injunction against the Trust's assets.

Nonetheless, Magistrate Judge Homer made a conclusory jump in logic that Wojeski willfully mislead the Court without pointing to any evidence supporting a finding that Wojeski's actions were intentional! It defies reasoning that Wojeski would intentionally mislead the Court in order to corroborate Dunn's version of the facts and then voluntarily submit a clarifying affidavit less than a month later putting forth a completely reasonable explanation as to why his October Affidavit was written as such. It is entirely plausible that Wojeski briefly conflated the two events that occurred less than a week apart and did not understand the significance of the distinction between the two events. It is equally plausible that Wojeski failed to recall that the document he received on July 20th was not a copy of the actual Annuity Agreement that was produced to the SEC a few days later. It is also possible, or even likely, that Dunn took advantage of an unsuspecting Wojeski in crafting the October Affidavit to serve her own

interests. One thing is clear: there is absolutely no basis for questioning Wojeski's credibility when he was never asked to testify on his own behalf and there is no evidence whatsoever to prove that he is anything but a reputable professional who was misguided by his attorney. It was patently unjust for Magistrate Judge Homer to impute Dunn's motive and Dunn's credibility issues to Wojeski and this Court should vacate the July 20th Decision as it relates to Wojeski on that basis alone.

3. Wojeski's Unintentional Misstatement Had No Practical Effect on the Preliminary Injunctions Proceedings

The July 20th Decision stated that the basis for sanctioning Wojeski was that the October Affidavit "undermined the truth-seeking process [and] unnecessarily complicated preparations for the evidentiary hearing concerning the Dunn-SEC telephone conversation." (Motion for Reconsideration at p. 32). This reasoning is flawed for two reasons. First, Magistrate Judge Homer grossly exaggerated the importance of the Dunn-SEC telephone conversation that took place on July 22, 2010. The entire basis for the Motion for Reconsideration was the newly discovered Annuity Agreement. Though the SEC tried to suggest a far-fetched conspiracy theory about how the key players conspired to conceal the Annuity Agreement from the beginning, a theory that was completed rejected by Magistrate Judge Homer, the conspiracy theory was ancillary to the principal argument: that the newly discovered Annuity Agreement provided the Smiths with a beneficial interest in the Trust and served as a basis to impose a preliminary injunction on the Trust's assets. The Court held an evidentiary hearing at which Dunn testified regarding when she learned about the Annuity Agreement because, at the time, the SEC was still pursuing its conspiracy theory and attempting to demonstrate that Dunn knew about the Annuity Agreement all along. In the end, it made no practical difference whether Dunn learned about the Annuity Agreement on July 21st or July 27th. The important part was that the Annuity

Agreement was newly discovered evidence and, therefore, the Motion for Reconsideration was appropriate.

Second, it is inconceivable how Wojeski's October Affidavit "undermined the truth-seeking process" and "unnecessarily complicated preparations for the evidentiary hearing concerning the Dunn-SEC telephone conversation" since Wojeski voluntarily submitted a clarifying November Affidavit that actually simplified the SEC's burden at the evidentiary hearing. The July 20th Decision even admits that there is no evidence that the October Affidavit caused the SEC to expend any additional time or resources to prepare for the evidentiary hearing! (July 20th Decision at p. 49).

Wojeski should be recognized for his voluntary efforts to clarify the record on the Motion for Reconsideration, not chastised for an insignificant misinterpretation of his words about events that had nothing to do with him and did not have any effect on the underlying proceedings. Most importantly, in the absence of clear evidence that Wojeski acted in bad faith to protect Dunn, the SEC's motion to impose sanctions on Wojeski must be vacated. Ferron v. Echoster Satellite, 658 F. Supp. 2d 859 (S.D. Ohio 2009)(denying motion for sanctions based on lack of evidence suggesting bad faith on the part of a non-party); Feldman v. Davidson, 2009 U.S. Dist. LEXIS 36921 (S.D. Fla. April 13, 2009)(denying motion for sanctions against non-party based only on circumstantial evidence); Kant v. Seton Hall University, 2009 U.S. Dist. LEXIS 116451 (D. N.J. December 14, 2009)(declining to impose sanctions against non-party absence any indication of bad faith).

C. The Basis for Calculating Wojeski's Sanctions Lacks Reason

1. The Disgorged Funds Have No Relation to the Alleged Misconduct

After rejecting the SEC's conspiracy theory and finding that there was no evidence that Wojeski knew about the Annuity Agreement before July 20, 2010, Magistrate Judge Homer found that the false statement in Wojeski's October Affidavit was a basis for imposing sanctions. Then, Magistrate Judge Homer searched for a way to sanction Wojeski for submitting the October Affidavit, but clearly struggled to find a way, and ultimately used the date that Wojeski learned about the Annuity Agreement as a cut-off date for disgorgement of money received from the Trust after that date. However, it is incongruous to disgorge funds that Wojeski received from the Trust on July 26, 2010 for alleged misconduct that took place three months later. The July 20th Decision does not even find that Wojeski had committed any wrongdoing by July 26, 2010!

As set forth in the SEC's Motion for Reconsideration, disgorgement is an equitable remedy designed to "force [a party] to give up the amount to which he was unjustly enriched." SEC v. Cavanagh, 445 F.3d 105, 117 (2d Cir. 2006). To follow logically, any sanctions against Wojeski should be based on allegedly ill-gotten gains received from the Trust after the October Affidavit was submitted. The fees received by Wojeski on July 26th were compensation for a considerable about of work he performed for the Trust from his appointment, through the intervention into the underlying action, through his testimony in the temporary restraining order hearings and for three months of general duties as trustee of the Trust. These were well-earned fees for three months of work and have no relation to the conduct at issue. The July 20th Decision offered no grounds that these funds were obtained by ill-gotten means or resulted in unjust enrichment. These payments were received in exchange for services rendered and are

entirely just. As such, this Court should vacate the portion of the July 20th Decision ordering Wojeski to disgorge his Trustee fees.

2. The Disgorged Funds Were Unjustly Calculated

Even if this Court upholds the disgorgement of the fees Wojeski received from the Trust, the amount of disgorged funds were unjustly calculated. The July 20th Decision correctly stated that Wojeski received two disbursements from the Trust on July 26th, one for $8,098.50 and the second for $5,755.50. However, the July 20th decision ignored the fact that only the first payment was for Wojeski's trustee fees. The second payment was a reimbursement from the Trust for fees paid to a title company earlier that month. (Motion for Reconsideration at p. 14). Thus, the second payment does not represent ill-gotten gains, the second payment was merely a reimbursement for a Trust expense. As such, if the Court upholds the disgorgement aspect of the July 20th decision as it relates to Wojeski, the amount disgorged should be reduced to $8,098.50.

D. Ordering the July 20th Decision to be Forwarded to the Department of Education is Overly Punitive

Even if this Court finds that Magistrate Judge Homer properly ordered Wojeski to disgorge funds to the Trust as a result of his conduct in submitting the October Affidavit, this Court should still vacate the part of the July 20th Decision that ordered the decision to be sent to the New York State Department of Education. The July 20th Decision specifically rejected any type of punitive sanction against Wojeski, yet a public admonishment for filing a false affidavit and ordering the Clerk of Court to forward the July 20th Decision to the Department of Education is punitive in nature. The act of alerting the regulatory body that oversees accountants serves to permanently tarnish Wojeski's professional reputation, far more than his reputation has already suffered as a result of being involved in the last year of legal proceedings in a high profile case in

the community in which he practices. Without clear evidence that Wojeski acted in bad faith, this part of the July 20th Decision is overly punitive, unjust and without basis.

Conclusion

For the reasons provided herein, non-party David M. Wojeski respectfully requests that the July 20, 2011 Decision of Magistrate Judge Homer, stating, in part, that: (1) David M. Wojeski disgorge $13,834.00; (2) Wojeski be publicly admonished for deliberately filing a false declaration and (3) the Clerk of Court forward a copy of the decision to the New York State Department of Education, be vacated.

Dated: White Plains, New York
August 3, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2011, the foregoing non-party David M. Wojeski's Objections Pursuant to Federal Rule of Civil Procedure 72(a) was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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