

11-3843-cv (L)
SEC v. Lynn A. Smith, et al.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2011

(Argued: March 13, 2012 Decided: March 18, 2013)

Docket Nos. 11-3843-cv(L), 11-3845-cv(con), 11-3848-cv (con),
11-3851-cv(con), 11-4238-cv(con)

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

LYNN A. SMITH, LAUREN T. SMITH, GEOFFREY R. SMITH, TRUSTEE OF
THE DAVID L. AND LYNN A. SMITH IRREVOCABLE TRUST U/A 8/04/04,

Defendants-Appellants,

JILL A. DUNN, DAVID M. WOJESKI,

Non-Party Appellants,

MCGINN, SMITH & COMPANY, INCORPORATED, MCGINN, SMITH ADVISORS,
LLC, MCGINN SMITH CAPITAL HOLDINGS CORPORATION, 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, NANCY MCGINN,

Defendants.*

B e f o r e: WINTER, LIVINGSTON, Circuit Judges, and RAKOFF,
District Judge.**

*The clerk of court is instructed to conform the caption in
accordance herewith.

**The Honorable Jed S. Rakoff of the United States District Court for
the Southern District of New York, sitting by designation.

1 Appeal from an order of the United States District Court
2 for the Northern District of New York (David Homer, Magistrate
3 Judge) imposing sanctions against several individual appellants
4 and authorizing a receiver to dispose of property owned by an
5 irrevocable trust. We dismiss in part, affirm in part, and
6 remand with regard to the disposition of the trust's real
7 property.

8
9 JAMES D. FEATHERSTONHAUGH,
10 Featherstonhaugh, Wiley & Clyne, LLP,
11 Albany, New York, for Defendant-
12 Appellant Lynn A. Smith.

13
14 STEPHEN B. HANSE, Featherstonhaugh,
15 Wiley & Clyne, LLP, Albany, New York,
16 for Defendants-Appellants Geoffrey R.
17 Smith, Trustee of the David L. and
18 Lynn A. Smith Irrevocable Trust U/A
19 8/04/04, Lauren T. Smith and Geoffrey
20 R. Smith.

21
22 BENJAMIN ZELERMYER, Steinberg &
23 Cavaliere, LLP, White Plains, New
24 York, for Non-Party Appellant Jill A.
25 Dunn, Esq.

26
27 FRED N. KNOPF, Wilson, Elser,
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29 White Plains, New York, for Non-Party
30 Appellant David M. Wojeski.

31
32 KEVIN P. MCGRATH, Senior Trial
33 Counsel, Securities and Exchange
34 Commission, New York, New York, (Mark
35 D. Cahn, General Counsel, Michael A.
36 Conley, Deputy General Counsel, Jacob
37 H. Stillman, Solicitor, Christopher
38 Paik, Securities and Exchange
39 Commission, Washington, D.C. on the
40 brief), for Plaintiff-Appellee.

1 WINTER, Circuit Judge:

2 This appeal arises out of a proceeding brought to remedy
3 securities fraud and recover assets -- to be distributed to
4 victims -- that were the fruits of the fraud. The issues
5 before us relate to enforcement of, and compliance with, an
6 order freezing various assets.

7 Appellants, the David L. and Lynn A. Smith Irrevocable
8 Trust U/A 8/04/04 (the "Trust") and various individuals, appeal
9 from Magistrate Judge Homer's¹ order directing the disposition
10 of the Trust's assets and sanctioning: (i) Lynn Smith, a
11 defendant in the action, and (ii) non-parties Jill Dunn,
12 attorney for the Trust, and David M. Wojeski, one-time trustee
13 of the Trust. The order against Lynn Smith provided that, in
14 the event of her failure to satisfy the sanctions against her,
15 a receiver would dispose of a piece of real property owned by
16 the Trust if doing so would maximize the return on that
17 property.

18 This appeal raises questions concerning our jurisdiction
19 to hear interlocutory appeals of sanctions orders; the
20 propriety of the sanctions imposed; and whether it was error
21 for the magistrate judge to give the receiver authority to
22 dispose of Trust assets without first providing notice and an
23 opportunity for the Trust to be heard.

¹ The parties consented to have the issue of the asset freeze decided by a magistrate as provided by 28 U.S.C. § 636(c).

1 We dismiss the appeals of Jill Dunn and David Wojeski for
2 lack of jurisdiction, affirm the sanction order as to Lynn
3 Smith, and remand to allow the Trust to contest the court's
4 order regarding the disposition of Trust property and for the
5 magistrate judge to give additional guidance to the receiver as
6 to disposition of the Trust property.

7 BACKGROUND

8 The origins and provisions of the Trust, which was created
9 in August 2004, are central to the issues on appeal. David and
10 Lynn Smith created the Trust with themselves as donors and
11 their adult children as beneficiaries. The Trust was funded by
12 100,000 shares of stock held in Lynn Smith's name. The shares
13 were worth approximately \$4.5 million. The shares were not
14 given outright to the Trust but were transferred pursuant to an
15 annuity agreement that would pay the Smiths approximately
16 \$490,000 per year beginning in 2015 and ending either when both
17 David and Lynn Smith died or when the Trust's assets were
18 exhausted. As discussed infra, contrary to the district
19 court's orders, the existence of this annuity was not revealed
20 until late July 2010, and its discovery gave rise to the
21 sanctions imposed.

22 In April 2010, the SEC filed the present complaint against
23 David Smith and various related individuals and corporations
24 alleging violations of the securities laws. Lynn Smith, his

1 wife, was included in the action as a relief defendant² and
2 later as a defendant under New York law who had received a
3 fraudulent conveyance. The SEC also moved to freeze the assets
4 of all of the defendants. In response, the district court
5 issued an order that, inter alia, froze Lynn Smith's assets and
6 directed her to provide "an accounting [of her] own personal
7 assets, liabilities and general financial condition."

8 Lynn Smith's April 29 statement of accounts and list of
9 assets included no mention of any interest in the Trust or in
10 the annuity that was to be paid to her and David Smith by the
11 Trust. On May 26, she filed an affidavit stating explicitly
12 that she and David Smith "had no interest in or expectation of
13 an interest in the [Trust]. It exists solely, exclusively and
14 permanently for the benefit of our children." Finally, at a
15 hearing concerning the asset freeze on June 10, Lynn Smith
16 stated that she had no ownership interest in the stock that was
17 transferred to the trust and that the funds in the Trust were
18 solely for the benefit of her children.

19 On July 7, 2010, after considering the blatantly
20 misleading information before it, the court released the freeze
21 on the Trust's assets, concluding that David Smith had no

² A relief defendant is an individual who "holds the subject matter of the litigation in a . . . possessory capacity." Commodities Futures Trading Comm'n v. Walsh, 618 F.3d 218, 225 (2d Cir. 2010) (quoting SEC v. Colello, 139 F.3d 674, 676 (9th Cir. 1998)). In the context of securities enforcement actions, relief defendants are individuals who are not accused of having violated the securities laws themselves, but who are believed to be in possession of profits from such violations. They are named as parties to aid the recovery of funds to be paid to victims. See id.

1 beneficial ownership in the trust. Shortly after the lifting
2 of the freeze, the Trust made several expenditures. Jill Dunn,
3 the Trust's attorney, received \$101,096 for lawyer's fees and
4 costs; David Wojeski, then the sole trustee, received \$8,098.50
5 in fees for his work as trustee; and the Trust purchased a
6 vacation home in New York from Lynn Smith for \$600,000.

7 On July 20, Wojeski received a fax containing an e-mail
8 from an individual at Southtowns Financial Group that stated,
9 "[t]he first four pages [attached] are from the annuity
10 contract. The three pages after that are documents that were
11 in the file that I thought might be relevant." The pages that
12 followed included a "Policy Delivery Receipt" for a "PRIVATE
13 ANNUITY CONTRACT," which was signed by David Smith; the first
14 page of a private annuity agreement, which identified David and
15 Lynn Smith as annuitants; and a page providing the key terms of
16 the contract. The next day, July 21, Wojeski forwarded the fax
17 to Dunn via e-mail.

18 On July 22, during a teleconference with the court to
19 discuss the SEC's intended motion to re-freeze the Trust's
20 assets, the SEC attorneys informed the court that they were
21 going to offer evidence that the Smiths owed a significant
22 amount in gift taxes for transferring the stock to the Trust
23 and that the Trust also owed a capital gains tax. Dunn argued
24 that no gift tax was owed, but provided no supporting details
25 for that assertion. The SEC attorneys, David Stoelting and

1 Kevin McGrath, then called Dunn to inquire as to why she
2 believed that the Smiths did not owe gift taxes from the
3 transfer to the Trust. Stoelting testified that Dunn told them
4 that no tax was owed because of "a private annuity agreement."
5 Dunn, on the other hand, asserted that she told the attorneys
6 that the Trust was a "private annu-ity trust."³ After the
7 call, the SEC attorneys contacted the original trustee for more
8 information, who sent a copy of the full annuity agreement to
9 the SEC and Dunn on July 27.

10 After receiving the agreement, the SEC sought
11 reconsideration of the prior order lifting the freeze on the
12 Trust's assets in view of the Smiths' interest in the Trust.
13 The Trust challenged the motion, arguing that reconsideration
14 was inappropriate because the SEC could have discovered the
15 annuity before the original proceeding to freeze the Trust's
16 assets. In support, the Trust submitted affidavits from both
17 Dunn and Wojeski. Dunn's affidavit asserted that she did not
18 disclose the agreement to the SEC on the telephone call of July
19 22. It stated that Dunn "could state with absolute certainty
20 that [she] did not make [the statement that there was a private
21 annuity agreement] because [she] did not know of the existence
22 of the private annuity agreement until [she] received it . . .
23 on July 27, 2010, the same day the SEC received it." It

³ The other SEC attorney did not remember hearing Dunn say anything about an annuity agreement. However, the SEC attorney also testified that he was not paying attention during that part of the conversation.

1 further stated that "[n]either I nor Mr. Wojeski had any
2 documents in our possession relating to the private annuity
3 other than the courtesy copy of the documents I received . . .
4 on July 27" Wojeski's affidavit stated that he first
5 learned of the existence of the annuity agreement in late July
6 when Dunn informed him that both she and the SEC had received
7 the agreement from the former trustee.

8 A hearing concerning the motion for reconsideration was
9 scheduled for November 16, 2010. The day before that hearing,
10 Dunn submitted a corrective affidavit stating that she had
11 recently discovered the July 21 e-mail from Wojeski containing
12 the documents referencing the annuity and that her prior
13 affidavit was incorrect. She stated that she did not recall
14 the documents when she composed her prior affidavit because, at
15 the time she received the e-mail, she was focusing her
16 attention on the Trust's purchase of the New York vacation
17 home, other client matters, and personal issues. A day after
18 the hearing, Wojeski also submitted a corrective affidavit
19 stating that when he reviewed his first affidavit -- prepared
20 by Dunn -- he did not realize that the documents he had
21 received on July 20 were different from the contract produced
22 on July 27 and that he thought the two events had happened at
23 the same time. He also implied that the affidavit was not
24 incorrect, only imprecise, because he did learn of the annuity
25 in late July.

1 The court granted the SEC's motion and reinstated the
2 freeze on the Trust's assets. The court found the SEC's
3 evidence to be more credible. It specifically found that Dunn
4 had mentioned the annuity agreement during the telephone call
5 on July 22. Magistrate Judge Homer noted, inter alia, the
6 logical consistency and probability of a reference by Dunn to
7 the private annuity agreement being elicited by questions from
8 the SEC concerning the reason Dunn believed no gift tax was
9 owed by Smith. The court also granted the SEC leave to move
10 for sanctions, which the Commission did.

11 After considering all parties' arguments, the court
12 sanctioned Lynn Smith for her failure to disclose the annuity
13 in her list of accounts and assets and for her statements that
14 she had no present or future interest in the Trust. The court
15 found Lynn Smith's argument that she had forgotten about the
16 annuity unconvincing in light of the considerable size of the
17 payments that she would receive from the annuity. The court
18 also found that Lynn's efforts to preserve the assets of the
19 Trust were inconsistent with her alleged forgetfulness, noting
20 that no payments had been disbursed from the Trust to the named
21 trust beneficiaries, the Smith children, prior to 2010 and also
22 that Lynn had personally covered a year's worth of her
23 daughter's expenses even though they were of a type for which
24 the Trust was created. The court then sanctioned Lynn Smith
25 under both Rule 11(c)(3) and the inherent powers of the court.

1 She was ordered to repay the Trust \$944,848, which included the
2 \$600,000 that the Trust paid to purchase the New York vacation
3 home, and to pay the SEC \$51,232 in attorney and expert fees.

4 The court also sanctioned Wojeski and Dunn for their
5 statements that they first learned of the annuity agreement on
6 July 27, rather than on July 20 and 21 respectively. The
7 magistrate judge found that it was not credible that Dunn
8 ignored a client's e-mail for six days. Moreover, he found
9 that Dunn's explanation that she did not remember reading the
10 e-mail to be incredible because the documents were of such
11 importance that Dunn must have immediately known their
12 significance. Finally, the court elaborated on its prior
13 finding that Dunn had told the SEC attorneys about the annuity
14 on July 22 by finding that the false statements were made
15 deliberately because: (i) it was improbable that Dunn had
16 ignored a client e-mail for at least six days, (ii) Dunn's
17 first reference to a "private annuity trust" came the day after
18 Wojeski sent an e-mail disclosing the trust to her, and (iii)
19 the financial stakes for Dunn -- over \$100,000 -- provided
20 ample motivation to conceal the Trust's existence. Dunn was

1 sanctioned under Rule 11(c)(3),⁴ 28 U.S.C. § 1927,⁵ and the
2 inherent power of the court. She was ordered to pay \$5,355,
3 the amount she had been paid by the Trust after July 21. She
4 was also publicly admonished and reported to the New York State
5 Bar.

6 With regard to Wojeski, the court noted that his affidavit
7 had the effect of corroborating Dunn's false affidavit. The
8 court also rejected Wojeski's contention that the original
9 affidavit, in stating that he first learned of the agreement
10 from Dunn in late July, was simply imprecise rather than false.
11 In doing so, the court noted that the original affidavit stated
12 not only that Wojeski had learned about the agreement in late
13 July, which was not necessarily incorrect, but also that he
14 learned that information from Dunn, which was clearly untrue.
15 Therefore, the court found that not only had Wojeski made a
16 false statement in his original affidavit, but that it was
17 disingenuous for him to say that his original affidavit was an
18 imprecise reference to him receiving the fax on July 20.
19 Wojeski was sanctioned under both Rule 11(c)(3) and the

⁴ By making a representation to the court, whether by pleading, written motion, or other paper, one certifies that the "the factual contentions have evidentiary support." Fed. R. Civ. P. Rule 11(b). Rule 11(c)(3) provides, "[o]n its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in [an] order has not violated Rule 11(b)." If a court determines that a Rule 11(b) violation has occurred, it may "impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." Rule 11(c)(1).

⁵ Section 1927 provides, "Any attorney . . . of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

1 inherent power of the court. He was ordered to repay \$13,384,
2 the amount he had received from the Trust in payment and
3 reimbursements after July 20; was publicly admonished; and was
4 reported to the state licensing authority for accountants.

5 Finally, the court authorized the receiver, who had
6 previously been appointed to oversee the corporations owned by
7 David Smith and his co-defendants, to proceed in whatever
8 manner he deemed best to maximize the return on the vacation
9 property that the Trust had purchased from Lynn Smith if she
10 did not repay the \$600,000 by September 1, 2011. The order
11 stated:

12 [I]f Lynn Smith fails to return to the
13 Receiver by September 1, 2011 the full amount
14 of the \$600,000.00 sale price of the property
15 plus closing costs, the Receiver may proceed
16 in whatever manner he deems economically most
17 feasible to maximize the return on this
18 property. This may include the sale or
19 rental of the property, or portions thereof,
20 depending on the receiver's determination of
21 market conditions. Lynn Smith and the Trust
22 shall cooperate reasonably with the Receiver
23 and any designee to facilitate the sale or
24 rental of the property.

25
26 This appeal followed.

27 DISCUSSION

28 a) Appellate Jurisdiction

29 Our appellate jurisdiction is generally limited to final
30 decisions of district courts, those that "end[] the litigation
31 on the merits and leave[] nothing for the court to do but
32 execute the judgment." See Cunningham v. Hamilton Cnty., Ohio,

1 527 U.S. 198, 204 (1999) (quoting Van Cauwenberghe v. Biard,
2 486 U.S. 517, 521-22 (1988)). This limitation accords
3 deference to trial judges, prevents piecemeal litigation, and
4 conserves the resources of both the opposing party and the
5 judiciary by preventing numerous successive appeals. See
6 Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374
7 (1981).

8 An exception to this general rule is the collateral order
9 doctrine, see Cunningham, 527 U.S. at 204, under which federal
10 appellate courts have jurisdiction over “decisions that are
11 conclusive, that resolve important questions separate from the
12 merits, and that are effectively unreviewable on appeal from
13 the final judgment in the underlying action.” Id. (quoting
14 Swint v. Chambers Cnty. Comm’n, 514 U.S. 35, 42 (1995)).

15 However, the collateral order doctrine is not one requiring a
16 fact-specific, case-by-case analysis. Rather, it is applied
17 categorically. Therefore, even if a particular appeal
18 satisfies the three conditions, we still lack jurisdiction if
19 the appeal is of a type that does not generally fall within the
20 doctrine. See Cunningham, 527 U.S. at 206 (“Perhaps not every
21 discovery sanction will be inextricably intertwined with the
22 merits, but we have consistently eschewed a case-by-case
23 approach to deciding whether an order is sufficiently
24 collateral.”).

1 A statutory exception to the final order requirement is
2 found in 28 U.S.C. § 1292, which provides appellate
3 jurisdiction over appeals of preliminary injunctions.
4 Jurisdiction under this provision extends to issues that are
5 “inextricably bound up with” those injunctions. Lamar Adver.
6 of Penn, LLC v. Town of Orchard Park, 356 F.3d 365, 371 (2d
7 Cir. 2004) (citing 28 U.S.C. § 1292(a)(1)). Review of such
8 issues is “a narrowly tailored exception to the final judgment
9 rule,” Amador v. Andrews, 655 F.3d 89, 95 (2d Cir. 2011), and
10 issues will be deemed inextricably intertwined with appellate
11 review of preliminary injunctions only where “review of ‘the
12 otherwise unappealable issue is necessary to ensure meaningful
13 review of the appealable one.’” Id. (quoting Britt v. Garcia,
14 457 F.3d 264, 273 (2d Cir. 2006)).

15 Applying these principles to the present matter, we agree
16 with the SEC that we lack jurisdiction over the appeals of Dunn
17 and Wojeski. However, we have jurisdiction over the appeal of
18 Lynn Smith.

19 1. Appeals of Dunn and Wojeski

20 Dunn and Wojeski argue that we have jurisdiction over
21 their appeals under the collateral order doctrine.

22 In Cunningham, the Supreme Court, addressing an appeal of
23 sanctions imposed under Fed. R. Civ. P. 37(a),⁶ held that “a

⁶ Rule 37 provides for sanctions, including costs and reasonable attorney’s fees, against parties or persons unjustifiably resisting discovery. See Rule 37 advisory committee’s note on 1970 amendments.

1 sanctions order imposed on an attorney is not a 'final
2 decision' under § 1291," and is therefore not immediately
3 appealable. 527 U.S. at 202-03, 210. In reaching this
4 conclusion, the Court relied heavily on the fact that review of
5 sanctions orders could not remain entirely separate from the
6 merits of the underlying litigation because the propriety of
7 those orders may require courts to inquire into the importance
8 of information sought, the adequacy of responses, and the
9 truthfulness of those responses. See id. at 205-06.
10 Therefore, review of the sanctions "would differ only
11 marginally from an inquiry into the merits." Id. at 206.

12 The Court also pointed out that an attorney's appeal from
13 a sanction order fails to satisfy the third prong of the
14 collateral order doctrine because those orders are not
15 unreviewable on appeal of a final judgment. See id. at 206-09.
16 Despite the fact that attorneys are not parties to the
17 underlying case, the "effective congruence of interests between
18 clients and attorneys counsels against treating attorneys like
19 other nonparties for purposes of appeal." Id. at 207.
20 Moreover, unlike civil contempt orders for defiance of a
21 district court's enforcement order, which are considered final
22 and therefore appealable, Dynegy Midstream Servs. v.
23 Trammochem, 451 F.3d 89, 92 (2d Cir. 2006), sanctions orders do
24 not seek to compel compliance with existing court orders, but
25 are available as a deterrent to delaying tactics and the

1 imposition of unnecessary costs on adversaries. Willy v.
2 Coastal Corp., 503 U.S. 131, 138-39 (1992). Allowing immediate
3 appeal of those orders would be counterproductive because it
4 would allow the sanctioned party to cause additional delays and
5 costs. Cunningham, 527 U.S. at 207-09.

6 As noted, Cunningham addressed appellate jurisdiction only
7 with regard to Rule 37 sanctions. Therefore, our appellate
8 jurisdiction turns on whether the holding in Cunningham also
9 applies to sanctions imposed under Rule 11, 28 U.S.C. § 1927,
10 and the inherent power of the court.

11 Several other circuits have held that Cunningham precludes
12 interlocutory appeals of sanctions imposed under these other
13 sources of authority. See Douglas v. Merck & Co., 456 F. App'x
14 45 at *47 n.1 (2d Cir. Jan. 23, 2012)⁷ (Slip Op.) (citing
15 Stanley v. Woodford, 449 F.3d 1060, 1063-65 (9th Cir. 2006) (§
16 1927 and inherent power sanctions); Comuso v. National R.R.
17 Passenger Corp., 267 F.3d 331, 339 (3d Cir. 2001) (abrogating
18 precedent or appealability of Rule 11 and discovery sanctions
19 and holding inherent power sanctions not immediately
20 appealable); Empresas Omajede, Inc. v. Bennazar-Zequeira, 213

⁷ However, the panel in Douglas, which was faced with an interlocutory appeal of sanctions imposed under the district court's inherent power, chose not to consider whether Cunningham categorically precluded interlocutory appeals of inherent-power sanctions because the specific facts of that case did not satisfy the collateral order test. See Douglas, 456 F. App'x 45 at *47.

1 F.3d 6, 9 n.4 (1st Cir. 2000) (inherent power sanctions)).⁸ In
2 addition, we have also suggested that in the wake of Cunningham
3 “a sanctions order against an attorney does not satisfy the
4 requirements of the collateral order doctrine.” New Pac.
5 Overseas Grp. (U.S.A.) v. Excal Int’l Dev. Corp., 252 F.3d 667,
6 670 (2d Cir. 2001). However, like Cunningham, that case
7 directly addressed sanctions imposed only under Rule 37.⁹ See
8 id.

9 We conclude that Cunningham applies to appeals of
10 sanctions imposed under Rule 11 as well as under the district
11 court’s inherent powers because, like Rule 37 sanctions, these
12 appeals will often implicate the merits of the underlying
13 action. Sanctions based on these other authorities often
14 require courts to evaluate the completeness or truthfulness of
15 responses and whether a party’s claims are without merit. See

⁸ The reasoning for concluding that Cunningham precludes immediate appeals of sanction orders has differed slightly among the circuits. For example, the Third Circuit has asserted that the Supreme Court created “a per se rule that sanctions orders are inextricably intertwined with the merits of the case.” Comuso, 267 F.3d at 339. On the other hand, the Ninth Circuit has looked to the rationale used by the Court in Cunningham and concluded that the “reasons underlying Cunningham’s bar against immediate appeal from Rule 37(a) sanctions orders apply equally” to other types of sanctions. Stanley, 449 F.3d at 1064 (quoting Cato v. Fresno City, 220 F.3d 1073, 1074 (9th Cir. 2000)). The latter reasoning leaves open the possibility that some types of sanctions may be immediately appealable if the rationale underlying the Cunningham decision does not apply. We need not address these issues because, as discussed infra, the reasoning applied in Cunningham applies to the types of sanctions present in this matter.

⁹ We note that, in a recent opinion, two members of a panel stated in separate concurring opinions that we have jurisdiction over the immediate appeal of Rule 11 sanctions. See Kiobel v. Millson, 592 F.3d 78, 87 (2d Cir. 2010) (Cabranes, J., concurring); id. at 107 (Jacobs, C.J., concurring). However, neither opinion discussed Cunningham, both relying entirely on precedent preceding that decision. See id. at 87, 107.

1 e.g., Lawrence v. Richman Grp. of CT LLC, 620 F.3d 153, 156 (2d
2 Cir. 2010) (Rule 11); Revson v. Cinque & Cinque, P.C., 221 F.3d
3 71, 78-79 (2d Cir. 2000) (inherent powers and § 1927).

4 The fact that the particular sanctions before us were
5 imposed in the context of an ancillary proceeding, and required
6 evaluation of the accuracy and truthfulness of appellants, does
7 not alter the analysis. Although the particular issue giving
8 rise to the sanctions here -- Lynn Smith's monetary interest in
9 the Trust -- does not necessarily implicate the merits of the
10 underlying securities fraud prosecution, ancillary proceedings
11 often do implicate the underlying claims. See, e.g., Commodity
12 Futures Trading Comm'n v. Walsh, 618 F.3d 218, 225 (2d Cir.
13 2010) (to freeze the assets of a relief defendant the
14 government must show that they are likely to succeed in
15 disgorging the funds, which requires, in part, that the assets
16 are ill-gotten, which deals directly with the merits of the
17 underlying action). Therefore, sanctions in these contexts
18 also "often will be inextricably intertwined with the merits of
19 the action," Cunningham, 527 U.S. at 205, and, even if that is
20 not necessarily the case here, the requisite categorical
21 analysis is not altered.

22 Finally, the particular sanctions here do not meet the
23 third prong of the collateral order doctrine. As was the case
24 in Cunningham, the fact that Dunn and Wojeski are not parties
25 to this action, and are no longer acting as the attorney and

1 trustee for the Trust does not render the issues unreviewable
2 on appeal. The Supreme Court squarely rejected a similar
3 concern with regard to the appeals of attorneys, see id. at
4 206-07, and its reasoning is equally applicable to Wojeski as a
5 trustee. Trustees, like attorneys, act on behalf of a party
6 and have a fiduciary duty to that party. See Black's Law
7 Dictionary "trustee" (9th ed. 2009); Saltzman v. Comm'r, 131
8 F.3d 87, 90 (2d Cir. 1997) ("[P]ursuant to the inexorable
9 dictates of trust law, [the trustees] owed the trust
10 beneficiaries the absolute duty of undiluted loyalty.").
11 Therefore, the appeals of Dunn and Wojeski also fail to satisfy
12 the final prong of the collateral order doctrine. We,
13 therefore, dismiss these appeals.¹⁰

14 2. Appeal of Lynn Smith

15 We conclude that we have jurisdiction over Lynn Smith's
16 appeal under 28 U.S.C. § 1292(a)(1) because the sanctions order
17 against her is inextricably intertwined with the order of
18 injunction against the Trust.

19 An appeal is inextricably bound up with an injunction if
20 the court cannot resolve the issue of the injunction without
21 considering the additional appeal. See Lamar Adver., 356 F.3d
22 at 372. Here, the order directing the receiver to sell or

¹⁰ Like the Court in Cunningham, we recognize that our conclusion may create hardships for Dunn and Wojeski. However, that fact does not serve to grant jurisdiction. See Cunningham, 527 U.S. at 209-10 ("Should these hardships be deemed to outweigh the desirability of restricting appeals to 'final decisions,' solutions other than an expansive interpretation of § 1291's 'final decision' requirement remain available.").

1 rent the property owned by the Trust was contingent on whether
2 Lynn Smith satisfied the order of sanctions against her by the
3 specified date. Therefore, if the order of disgorgement
4 against Lynn Smith is invalid, the court's order regarding the
5 disposal of the Trust's property is moot. Lynn Smith's appeal
6 is, therefore, inextricably bound up with the Trust's appeal of
7 the injunction,¹¹ and we have jurisdiction over her appeal.

8 b) Sanctions Against Lynn Smith

9 We review a lower court's imposition of sanctions for
10 abuse of discretion. See Storey v. Cello Holdings, LLC, 347
11 F.3d 370, 387 (2d Cir. 2003). A court abuses its discretion
12 when it bases "its ruling on an erroneous view of the law or on
13 a clearly erroneous assessment of the evidence." Id. at 387-88
14 (internal citations and quotations omitted). "An assessment of
15 the evidence is clearly erroneous where the reviewing court 'is
16 left with the definite and firm conviction that a mistake has
17 been committed.'" Wolters Kluwer Fin. Servs., Inc. v.
18 Scivantage, 564 F.3d 110, 113 (2d Cir. 2009) (quoting Zervos v.
19 Verizon N.Y., Inc., 252 F.3d 163, 168 (2d Cir. 2001)), and the
20 imposition of sanctions was "made with[out] restraint and
21 discretion." Schlaifer Nance & Co. v. Estate of Warhol, 194
22 F.3d 323, 334 (2d Cir. 1999).

¹¹ Wojeski also asserts that his appeal is inextricably bound up with the injunction against the Trust; however, he does not explain how the order of sanctions against him in any way affects the injunction against the Trust. His only argument is that the sanctions order was issued in the context of a preliminary injunction proceeding. However, 28 U.S.C. § 1292(a) provides jurisdiction over orders, not over proceedings, and there is nothing in Wojeski's briefs that would suggest that review of his appeal is vital to deciding the appeal of the Trust.

1 Under Rule 11(c)(3) and the inherent power of the court,
2 sanctions are appropriate where an individual has made a false
3 statement to the court and has done so in bad faith. See In re
4 Pennie & Edmonds LLP, 323 F.3d 86, 90 (2d Cir. 2003) (Rule
5 11(c)(3)); DLC Mgmt. Corp. v. Town of Hyde Park, 163 F.3d 124,
6 136 (2d Cir. 1998) (inherent power). Lynn Smith argues that
7 she did not make any false statements, that there was
8 insufficient evidence that she acted in bad faith, and that
9 disgorgement is not an appropriate sanction. We address those
10 arguments in turn.

11 Whether Lynn Smith made false statements, and whether she
12 did so in bad faith, are questions of fact that will not be
13 disturbed unless clearly erroneous. See Agiwal v. Mid Island
14 Mortg. Corp., 555 F.3d 298, 302 (2d Cir. 2009). The findings
15 of the magistrate judge on these issues were certainly not
16 clearly erroneous.

17 Lynn Smith was ordered to list her accounts and assets.
18 The annuity in question is clearly an asset. See Black's Law
19 Dictionary, "asset" (9th ed. 2009) (defined as something that
20 is owned and has value). The fact that her children were
21 listed as the sole beneficiaries of the Trust hardly means that
22 the Trust as arranged was for the sole benefit of the children.
23 Viewing the Trust as a whole, it was undoubtedly created, at
24 least in part, to benefit Lynn and David Smith because, as Lynn
25 Smith acknowledges in her brief, it allowed them to defer

1 capital gains taxes. Similarly, the payments to Lynn Smith
2 under the annuity contract were contingent on the Trust
3 retaining sufficient assets to make those payments. These
4 facts clearly establish that Lynn Smith had an ongoing
5 substantial interest in the Trust whether or not it was
6 technically an ownership interest.¹²

7 The court's finding that Lynn Smith acted in bad faith in
8 not revealing her interest in the Trust is amply supported by
9 the record. First, the size of the annuity payments is easily
10 sufficient to support an inference that Lynn Smith did not
11 simply forget about the annuity, but rather purposely chose to
12 omit it. Second, Lynn Smith concededly supported her daughter
13 for approximately a year, despite the fact that the stated
14 purpose of the Trust was to provide financial assistance to the
15 Smiths' children when needed. This provision of means to the
16 daughter supports a finding that Lynn Smith was seeking to
17 preserve the Trust's assets so as to protect her future
18 payments under the annuity agreement and was fully aware of her
19 interest in the Trust. Finally, the fact that Lynn Smith sold
20 her vacation home to the Trust soon after the original asset
21 freeze was lifted indicates a motive to falsify the required
22 reports in order to gain access to the Trust's funds. While
23 these facts may not compel as a matter of law a finding that

¹² We have already upheld the freeze on the Trust's assets based on the finding that the Trust was for the benefit of David Smith. See Smith v. SEC, 432 F. App'x 10, 12 (2d Cir. 2011).

1 Lynn Smith made false statements to the court in bad faith, we
2 are not "left with the definite and firm conviction that a
3 mistake has been committed." Wolters Kluwer, 564 F.3d at 113
4 (internal quotations omitted). Indeed, the record carries a
5 circumstantial stench that only heroic credibility findings in
6 her favor would dissipate.

7 Finally, with regard to Lynn Smith's claim that
8 disgorgement is not a proper sanction, we note that "[d]istrict
9 courts are given broad discretion in tailoring appropriate and
10 reasonable sanctions." O'Malley v. N.Y.C. Transit Auth., 896
11 F.2d 704, 709 (2d Cir. 1990); Wright & Miller, Federal Practice
12 & Procedure § 1336.3 ("[F]ederal courts retain broad
13 discretionary power to fashion novel and unique sanctions to
14 fit the particular case."). In the present context --
15 proceedings initiated to preserve assets in order to compensate
16 victims of the alleged fraud -- it was entirely appropriate for
17 the court to require Lynn Smith to disgorge herself of funds
18 she obtained after that freeze was lifted in substantial
19 reliance upon her false statements.

20 c) Order Authorizing the Disposition of Trust Property
21

22 The order authorizing the receiver to dispose of the
23 vacation home was issued as part of the sanction order.
24 Therefore, it is also reviewed under an abuse of discretion
25 standard. See United States v. Seltzer, 227 F.3d 36, 39 (2d
26 Cir. 2000).

1 The Trust argues that the lower court abused its
2 discretion because it did not provide the Trust with notice
3 that the court intended to give the receiver the authority to
4 dispose of Trust assets and an opportunity to be heard prior to
5 issuing the order. In addition, the Trust also makes various
6 substantive arguments that were not addressed in the district
7 court. Those arguments include the contention that this order
8 usurps the role of the trustee and forces the Trust to bear the
9 costs of Lynn Smith's actions even though the Trust was not
10 accused of wrongdoing. In response, the SEC asserts that the
11 Trust will not bear any additional costs because the receiver
12 was instructed to dispose of the property only if doing so
13 would maximize the return on that property. The SEC also
14 asserts that the Trust's other arguments are unavailing in
15 light of the fact that the veil of the Trust's separate legal
16 existence has been pierced as to David Smith.

17 The Trust also raises concerns that the order gives very
18 little direction to the receiver as to how he or she is to
19 determine what course of action to take. This, the Trust
20 argues, gives the receiver nearly complete discretion and
21 precludes effective judicial review.

22 We believe it appropriate to allow the magistrate judge to
23 consider the Trust's arguments in the first instance. We in no
24 way suggest that the district court should determine that its
25 prior order with regard to the Trust is inappropriate. We

1 leave that to its sound discretion. However, the court should
2 provide additional guidance to the receiver concerning how to
3 determine whether to dispose of the property, if at all.

4 CONCLUSION

5 For the foregoing reasons, we dismiss the appeals of Dunn
6 and Wojeski, affirm the sanctions against Lynn Smith, and
7 remand for further proceedings in accordance with this opinion.