

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.

ORDER TO SHOW CAUSE

On Emergency Application of Plaintiff Securities and Exchange Commission for an

Order:

1. Granting Plaintiff's Application for an Order to Show Cause and Emergency

Relief;

2. Directing defendants 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 (the “Smith Trust”), Geoffrey Smith and Lauren Smith and Relief Defendant Nancy McGinn to show cause why an order should not be entered pending a final disposition of this action:

(a) freezing the assets of the Smith Trust and, as to Nancy McGinn, the property and residence located at 26 Port Huron Drive, Niskayuna, New York (the “Niskayuna property”) and any ill-gotten gains; and

(b) (i) directing the return of all distributions, payments or transfers made out of all accounts held by the Smith Trust on or after July 7, 2010; or (ii) alternatively, freezing the assets of Geoffrey Smith and Lauren Smith in the amount of all distributions, payments or transfers they received from the Smith Trust on or after July 7, 2010;

3. Pending adjudication of the foregoing, a Temporary Restraining Order:

(a) freezing the assets of the Smith Trust and, as to Nancy McGinn, the Niskayuna property and any ill gotten gains;

(b) freezing the assets of Geoffrey Smith and Lauren Smith in the amount of all distributions, payments or transfers they received from the Smith Trust on or after July 7, 2010; and

(c) directing the Smith Trust to provide a verified accounting of all distributions, payments or transfers of assets held by the Smith Trust since July 7, 2010 within three business days of receipt of this Order.

The Commission having filed the Complaint on April 20, 2010; and the Commission that same day having filed an Order to Show Cause seeking emergency relief; and the Court

having entered an Order dated April 20, 2010 (the “April 20 Order”) granting a temporary restraining order; asset freeze and other relief against defendants McGinn, Smith & Co., Inc. (“MS & Co.”); McGinn, Smith Advisors LLC (“MS Advisors”); McGinn, Smith Capital Holdings Corp. (“MS Capital”); First Advisory Income Notes, LLC (“FAIN”); First Excelsior Income Notes, LLC (“FEIN”); First Independent Income Notes, LLC (“FIIN”); Third Albany Income Notes, LLC (“TAIN”); Timothy M. McGinn (“McGinn”); David L. Smith (“Smith”) and Lynn A. Smith; and appointing a temporary Receiver over MS & Co., MS Advisors, MS Capital, FAIN, FEIN, FIIN and TAIN, and all other entities McGinn or Smith control or have an ownership interest in, including but not limited to the entities listed on Exhibit A to the April 20 Order.

The Court having granted the motion to intervene by David M. Wojeski, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (the “Smith Trust”) on June 1, 2010.

The Court having conducted a hearing on Plaintiff’s Motion for a Preliminary Injunction motion on June 9 to 11, 2010.

The Court having issued an Order on July 7, 2010, granting the Plaintiff’s Motion for a Preliminary Injunction continuing the freeze over the assets of Relief Defendant Lynn Smith but vacating the freeze over the assets of the Smith Trust.

The Court having entered the Preliminary Injunction Order on July 22, 2010.

The Commission having filed an Amended Complaint on August 2, 2010 seeking relief against MS & Co., MS Advisors, MS Capital, FAIN, FEIN, FINN, TAIN, McGinn, Smith, Lynn A. Smith, the Smith Trust, Geoffrey R. Smith, Lauren T. Smith and Nancy McGinn (collectively the “Defendants”), and Lynn A. Smith and Nancy McGinn

(collectively the “Relief Defendants”), and adding an eighth claim for relief for fraudulent conveyance.

The Commission having filed an Application for an Order to Show Cause and Emergency Relief on August 3, 2010.

The Court has considered (1) the Memorandum of Law in Support of Plaintiff’s Application for an Order to Show Cause and Emergency Relief; (2) the Declaration of David Stoelting, executed on August 3, 2010 and the Exhibits thereto; (3) the Declaration of Roseann Daniello, executed on August 2, 2010, and the Exhibit thereto; (4) the testimony and exhibits received into evidence at the hearing on the preliminary injunction on June 9 to 11, 2010; and (5) all prior proceedings herein.

Based on the foregoing, the Court finds that a proper showing, as required by Section 20(b) of the Securities Act of 1933 (“Securities Act”), and Section 21(d) of the Securities Exchange Act of 1934 (“Exchange Act”), has been made for the relief granted herein.

It appears that Defendants Smith, L. Smith, the Smith Trust, Nancy McGinn, Geoffrey Smith and Lauren Smith and Relief Defendant Nancy McGinn may attempt to dissipate, deplete or transfer from the jurisdiction of this Court, funds, property and other assets that could be subject to an order of disgorgement. It appears that an order freezing the assets of the Smith Trust and Nancy McGinn (and alternatively Geoffrey Smith and Lauren Smith), as specified herein, is necessary to protect this Court’s ability to award equitable relief in the form of disgorgement of illegal profits fraud, and to preserve the Court’s ability to approve a fair distribution for victims of the fraud.

NOW, THEREFORE,

IT IS ORDERED that Defendants Smith, Lynn Smith, the Smith Trust, Nancy McGinn, Geoffrey Smith and Lauren Smith and Relief Defendants Lynn Smith and Nancy McGinn show cause, if there be any, to this Court at _____ of the ___ day of August, 2010 in the Courtroom of Magistrate Judge Homer, at the James T. Foley U.S. Courthouse, 445 Broadway, Albany, New York, 12207-2924, why this Court should not enter an Order pursuant to Rules 54 and 65 of the Federal Rules of Civil Procedure, Section 20 of the Securities Act, and Section 21 of the Exchange Act, directing that, pending a final disposition of this action:

(1) the Smith Trust and each of its financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service or otherwise, and each of them, hold and retain within their control, and otherwise prevent, any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal of any assets, funds, or other property (including money, real or personal property, securities, commodities, choses in action or other property of any kind whatsoever) of, held by, or under the direct or indirect control of the Smith Trust, whether held in any of its names or for any of its direct or indirect beneficial interest wherever situated, in whatever form such assets may presently exist and wherever located within the territorial jurisdiction of the United States courts, and directing each of the financial or brokerage institutions, debtors and bailees, or any other person or entity holding such assets, funds or other property of the Smith Trust to hold or retain within its, his or her control and

prohibit the withdrawal, removal, transfer or other disposal of any such assets, funds or other properties;

(2) (a) all funds distributed, paid or transferred out of the Smith Trust on or after July 7, 2010 be returned to the Smith Trust; or (b) alternatively, Geoffrey Smith and Lauren Smith and each of their financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service or otherwise, and each of them, hold and retain within their control, and otherwise prevent, any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal of all distributions, payments or transfers received by them from the Smith Trust on or after July 7, 2010 (including money, real or personal property, securities, commodities, choses in action or other property of any kind whatsoever) of, held by, or under the direct or indirect control of Geoffrey Smith or Lauren Smith, whether held in any of their names or for any of their direct or indirect beneficial interest wherever situated, in whatever form such assets may presently exist and wherever located within the territorial jurisdiction of the United States courts, and directing each of the financial or brokerage institutions, debtors and bailees, or any other person or entity holding such assets, funds or other property of Geoffrey Smith or Lauren Smith to hold or retain within its, his or her control and prohibit the withdrawal, removal, transfer or other disposal of any such assets, funds or other properties;

(3) Nancy McGinn, and each of her financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service or otherwise, and each of them, hold and retain within their control, and otherwise

prevent, any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal of the Niskayuna property and all ill-gotten gains (including money, real or personal property, securities, commodities, choses in action or other property of any kind whatsoever) of, held by, or under the direct or indirect control of Nancy McGinn, whether held in any of her names or for any of her direct or indirect beneficial interest wherever situated, in whatever form such assets may presently exist and wherever located within the territorial jurisdiction of the United States courts, and directing each of the financial or brokerage institutions, debtors and bailees, or any other person or entity holding such assets, funds or other property of Nancy McGinn to hold or retain within its, his or her control and prohibit the withdrawal, removal, transfer or other disposal of any such assets, funds or other properties.

Opposing papers shall be filed and served on or before the ___ day of August, 2010.

Reply papers shall be filed and served on or before the ___ day of August, 2010.

IT IS FURTHER ORDERED that pending an adjudication of the foregoing:

(1) the Smith Trust and each of its financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service or otherwise, and each of them, hold and retain within their control, and otherwise prevent, any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal of any assets, funds, or other property (including money, real or personal property, securities, commodities, choses in action or other property of any kind whatsoever) of, held by, or under the direct or indirect control of the Smith Trust, whether held in any of its names or for any of its direct or indirect beneficial interest wherever

situated, in whatever form such assets may presently exist and wherever located within the territorial jurisdiction of the United States courts, and directing each of the financial or brokerage institutions, debtors and bailees, or any other person or entity holding such assets, funds or other property of the Smith Trust to hold or retain within its, his or her control and prohibit the withdrawal, removal, transfer or other disposal of any such assets, funds or other properties;

(2) Geoffrey Smith and Lauren Smith and each of their financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service or otherwise, and each of them, hold and retain within their control, and otherwise prevent, any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal of any distributions, payments or transfers received by them from the Smith Trust on or after July 7, 2010 (including money, real or personal property, securities, commodities, choses in action or other property of any kind whatsoever) of, held by, or under the direct or indirect control of Geoffrey Smith or Lauren Smith, whether held in any of their names or for any of their direct or indirect beneficial interest wherever situated, in whatever form such assets may presently exist and wherever located within the territorial jurisdiction of the United States courts, and directing each of the financial or brokerage institutions, debtors and bailees, or any other person or entity holding such assets, funds or other property of Geoffrey Smith or Lauren Smith to hold or retain within its, his or her control and prohibit the withdrawal, removal, transfer or other disposal of any such assets, funds or other properties;

(3) the Smith Trust provide a verified accounting of all distributions, payments or transfers from the Smith Trust on or after July 7, 2010 within three business days of receipt of this Order; and

(4) Nancy McGinn and each of her financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service or otherwise, and each of them, hold and retain within their control, and otherwise prevent, any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal of the Niskayuna property and all ill-gotten gains (including money, real or personal property, securities, commodities, choses in action or other property of any kind whatsoever) of, held by, or under the direct or indirect control of Nancy McGinn, whether held in any of her names or for any of her direct or indirect beneficial interest wherever situated, in whatever form such assets may presently exist and wherever located within the territorial jurisdiction of the United States courts, and directing each of the financial or brokerage institutions, debtors and bailees, or any other person or entity holding such assets, funds or other property of Nancy McGinn to hold or retain within its, his or her control and prohibit the withdrawal, removal, transfer or other disposal of any such assets, funds or other properties.

IT IS FURTHER ORDERED that this Order shall be, and is, binding upon the Defendants and Relief Defendants and each of their respective officers, agents, servants, employees, attorneys-in-fact, subsidiaries, affiliates and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service, or otherwise.

IT IS FURTHER ORDERED that the Preliminary Injunction Order dated July 22, 2010 remains in full force and effect, except to the extent modified by this Order.

Dated: _____, 2010
Albany, New York

UNITED STATES MAGISTRATE JUDGE