

CIVIL CASE MANAGEMENT PLAN

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

v.

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

10 CV 457 (GLS/DRH)

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**IT IS HEREBY ORDERED that**, pursuant to Rule 16(b), Federal Rules of Civil Procedure, a status and scheduling conference will be held in this case before the Honorable David R. Homer, United States Magistrate Judge on September 2, 2010, at 9:00 A.M. at the United States Courthouse, at Albany, New York.

Counsel for all parties or individuals appearing pro se in the above-captioned action are directed to confer in accordance with Fed. R. Civ. P. 26(f) with respect to all of the agenda items listed below. That meeting must be attended in person or, if counsel for the parties are not located in the same city and do not agree to meet in person, then by telephone, and must be held at least **twenty-one (21) days** before the scheduled Rule 16 Conference. Following that Rule 26(f) meeting, a report of the results of that meeting, in the format set forth below, must be filed with the clerk within **fourteen (14) days** after the date of the Rule 26(f) meeting or not later than **ten (10) days** prior to the scheduled Rule 16 conference with the Court, whichever date is earlier. Matters which the Court will discuss at the status conference will include the following: (insert a separate subparagraph as necessary if the parties disagree):

**1) JOINDER OF PARTIES:** Any application to join any person as a party to this action shall be made on or before November 1, 2010.

**2) AMENDMENT OF PLEADINGS:** Any application to amend the pleadings to this action shall be made on or before November 1, 2010.

**3) DISCOVERY:** All discovery in this action shall be completed on or before March 31, 2011. **(Discovery time table is to be based on the complexity of the action)**

**4) MOTIONS:** All motions, including discovery motions, shall be made on or before May 31, 2011. **(Non-Dispositive motions including discovery motions may only be brought after the parties have complied with Section IX of General Order #25)**

**5) PROPOSED DATE FOR THE COMMENCEMENT OF TRIAL:** The action will be ready to proceed to trial on or before September 13, 2011. It is anticipated that the trial will take approximately 15 days to complete. The parties request that the trial be held in Albany, N.Y. **(The proposed date for the commencement of trial must be within 18 months of the filing date).**

**6) HAVE THE PARTIES FILED A JURY DEMAND: YES.**

**7) DOES THE COURT HAVE SUBJECT MATTER JURISDICTION?  
ARE THE PARTIES SUBJECT TO THE COURT'S JURISDICTION?  
HAVE ALL PARTIES BEEN SERVED?**

Plaintiff asserts that the Court has subject matter jurisdiction and that the parties are subject to the Court's jurisdiction. Defendant and Relief Defendant Lynn Smith and Defendant David Wojeski, Trustee, Geoffrey R. Smith and Lauren T. Smith dispute subject matter jurisdiction and Defendant Lauren T. Smith disputes that she is subject to the Court's jurisdiction. All parties have been served or have otherwise waived service.

**8) WHAT ARE THE FACTUAL AND LEGAL BASES FOR PLAINTIFF'S CLAIMS AND DEFENDANT'S DEFENSES (INCLUDE COUNTERCLAIMS & CROSSCLAIMS, IF APPLICABLE)?**

#### **SEC's Response**

The SEC alleges various violations of the federal securities laws and New York fraudulent conveyance laws, as set forth more fully in the Amended Complaint.

#### **Certain Defendants' Responses**

At all times, defendants Timothy McGinn and David Smith acted in compliance with the federal securities laws in connection with the offer and sale of securities. Defendants Timothy McGinn and David Smith made adequate disclosures of all material facts and lacked the requisite intent to violate the federal securities laws. Each of the offerings of securities was made in compliance with the federal securities laws. At all times, Timothy McGinn and David Smith lacked the requisite intent to violate the New York State fraudulent conveyance laws.

In addition to the forgoing, Defendants Wojeski, as Trustee, Geoffrey Smith and Lauren Smith's defenses and counterclaims will be fully set forth in their formal response to the amended complaint. In the interim, they assert that they have not received any assets which were fraudulently conveyed, that each and every act alleged against them in the amended complaint was undertaken in good faith and pursuant to a lawful federal court order, that the amended

complaint lacks any merit as against them, is patently frivolous, and that they are entitled to full dismissal of the complaint and an award of attorney's fees.

Relief Defendant Lynn Smith is not properly named in this lawsuit since she was not the recipient of any ill-gotten gains. To the extent of any monies that were received by Lynn Smith from any one of the main Defendants, was based on an arms length transaction with consideration.

Defendant Lynn Smith lacked the requisite intent to violate the New York State fraudulent conveyance laws and that each and every act alleged against her in the Amended Complaint was undertaken in good faith and pursuant to a lawful court order. The Court lacks jurisdiction to adjudicate the pendent state claim.

#### **9) WHAT FACTUAL AND LEGAL ISSUES ARE GENUINELY IN DISPUTE?**

The Defendants have not yet answered or otherwise moved with respect to the Amended Complaint. Accordingly, it is too early to tell what factual and legal issues are genuinely in dispute.

##### **Certain Defendants' Responses**

Defendants Wojeski, as Trustee, Geoffrey Smith and Lauren Smith dispute each and every allegation of wrongdoing alleged in the complaint and affirmatively assert that they have not received any assets which were fraudulently conveyed, that each and every act alleged against them in the amended complaint was undertaken in good faith, that the amended complaint lacks any merit as against them, is patently frivolous, and that they are entitled to full dismissal of the complaint and an award of attorney's fees. As to Lynn Smith, she has not been properly named as a relief defendant in the lawsuit. Plaintiff has failed to state a cause of action for which relief may be granted and lacks subject matter over her as a relief defendant. She is also wrongly named as a defendant. Not only has the Plaintiff failed to state a cause of action against which relief be granted, the Plaintiff lacks subject matter jurisdiction over her based on its allegation she has violated the New York State fraudulent conveyance statute.

#### **10) CAN THE ISSUES IN LITIGATION BE NARROWED BY AGREEMENT OR BY MOTIONS?**

Although there may be issues that can be narrowed by agreement or motions, the parties will be in a better position to answer this question after the completion of discovery.

##### **Certain Defendants' Responses**

Defendants Wojeski, as Trustee, Geoffrey Smith and Lauren Smith assert that the amended complaint fails to state a claim against them for which relief can be granted and that there are no genuine issues of material fact that will prevent an award of summary judgment in

their favor at the earliest opportunity. Lynn Smith, both as Relief Defendant and Defendant asserts that the Plaintiff has failed to state a cause of action for which relief may be granted and that the Plaintiff lacks subject matter jurisdiction over her. Lynn Smith, as both Relief Defendant and Defendant will make dispositive motions in furtherance of these defenses.

**ARE THERE DISPOSITIVE OR PARTIALLY DISPOSITIVE ISSUES APPROPRIATE FOR DECISION ON MOTION?**

The parties will be in a better position to answer this question after the completion of discovery.

**Certain Defendants' Responses**

Defendant/Relief Defendant Lynn Smith, Defendants Wojeski, as Trustee, Geoffrey Smith and Lauren Smith assert that their involvement in this case can and should be disposed of as a matter of law before they are required to undertake the enormous burden and expense of discovery set forth in this plan.

**11) WHAT SPECIFIC RELIEF DO THE PARTIES SEEK? WHAT ARE THE DAMAGES SOUGHT?**

The SEC seeks: 1) an order freezing the assets of the Smith Trust and the assets of Nancy McGinn, Geoffrey Smith and Lauren Smith to the extent they received proceeds or distributions from the Smith Trust without consideration; 2) an order permanently restraining and enjoining the Defendants, Relief Defendants, and any other person acting on their behalf, from destroying, altering, concealing or otherwise interfering with the SEC's access to all relevant documents, books and records; 3) an order directing the return of all assets transferred to the Smith Trust after July 7, 2010; 4) a final judgment permanently restraining and enjoining Timothy McGinn, David Smith, MS & Co., MS Advisors, MS Capital and the Four Funds (FAIN, FEIN, FIIN and TAIN) and their agents, etc., from committing future violations of the charged securities laws and rules promulgated thereunder, and from aiding and abetting the same; 5) a final judgment directing Timothy McGinn, David Smith, MS & Co., MS Advisors, MC Capital and the Four Funds to disgorge their ill-gotten gains, plus prejudgment interest; 6) a final judgment directing Timothy McGinn, David Smith, MS & Co., MS Advisors, MS Capital and the Four Funds to pay civil monetary penalties; 7) a final judgment permanently prohibiting Timothy McGinn from serving as an officer or director of any issuer that has securities registered under the Exchange Act or which is required to file certain reports under the Exchange Act; 8) a final judgment directing Timothy McGinn, David Smith, Nancy McGinn, Lynn Smith, the Smith Trust, Geoffrey Smith and Lauren Smith to return all assets fraudulently conveyed, or their equivalent value, and to pay attorneys' fees, in accordance with New York fraudulent conveyance laws; and 9) an order granting such other relief as the Court deems just and proper.

Defendants Timothy McGinn and David Smith request dismissal of all claims alleged against them and the release of their assets. Defendant/Relief Defendant Lynn Smith, Defendants Wojeski, as Trustee, Geoffrey Smith and Lauren Smith seek dismissal of each and

every claim alleged against them, the release of their assets and an award of attorney's fees on the grounds that the amended complaint was filed in violation of Rule 11 of the Federal Rules of Civil Procedure.

**12) DISCOVERY PLAN:**

**A. Mandatory Disclosures**

The parties will exchange the mandatory disclosures required under Rule 26(a)(1) on or before September 17, 2010 .

**B. Subjects of Disclosure**

The parties jointly agree that discovery will be needed to address the following subjects:

All claims and defenses raised in the Amended Complaint and the Defendants' and Relief Defendants' answers.

**C. Discovery Sequence**

Describe the parties' understanding regarding the timing of the discovery, and state whether it is anticipated that discovery will be phased to address different issues in stages.

Discovery will begin immediately as to the SEC, defendants McGinn and Smith, and the McGinn Smith Entities. Discovery between the SEC and Lynn Smith, the Smith Trust, Lauren Smith, Geoffrey Smith and Nancy McGinn will begin after completion of the Rule 26 scheduling and discovery conference.

**D. Written Discovery**

Describe the written discovery demands which the parties contemplate serving under Rules 33, 34 and 36, including when they will be promulgated, the areas to be covered, and whether there is any need for any party to exceed the number of interrogatories permitted under Rule 33.

The First Set of Document Requests and Interrogatories shall be served no later than September 30, 2010. It is not currently anticipated that the parties will need to exceed the number of Interrogatories set forth in F.R.C.P. 33.

The First Set of Requests for Admission shall be served no later than January 14, 2011.

### **E. Depositions**

Set forth the parties' expectations regarding depositions, including the approximate number to be taken, their location, a general description of the deponents, and an indication of whether any non-party fact depositions are anticipated.

The SEC, and the defendants McGinn and Smith together, each anticipate taking approximately 25 depositions (for a total of 50 depositions). This number of depositions is necessary because there are a large number of putative investor witnesses. It is anticipated that each deposition of an investor witness will only take a few hours. Defendant and/or Relief Defendant Lynn Smith, anticipate taking up to 10 depositions. Defendants Wojeski, Trustee, Lauren Smith and Geoffrey Smith anticipate taking fewer than 5 depositions beyond those anticipated to be taken by other parties.

### **F. Experts**

Set forth the parties' expectations regarding the retention of experts, and identify any particular issues to be addressed by the court concerning the retention and exchange of the information regarding experts, including whether the parties seek a variance from the expert disclosure requirements of the form uniform pretrial scheduling order typically issued by the court (i.e., initial expert disclosure at least ninety days, responsive expert disclosures at least forty-five days, and rebuttal reports due at least thirty days, before the close of discovery).

The parties will be in a better position to assess whether they will call experts after the Court rules on Plaintiff's motion for reconsideration and after Defendants and Relief Defendants dispositive motions, if any, against the Amended Complaint are resolved. The parties do not currently anticipate seeking a variance from the normal expert disclosure requirements but respectfully request the right to seek such a variance should the need subsequently arise.

### **G. Electronic Discovery**

Set forth the parties' understanding and expectations regarding discovery of electronically stored information. This description should include any agreements reached with respect to the retention of electronically stored information and the manner in which it will be produced, if requested. The parties should also identify any agreements regarding the manner in which electronically stored information subject to claims of privilege or work product protection will be handled, and whether a court order will be requested, either on stipulation or otherwise, to address this issue. If an agreement has been reached on the entry of such an order, provide a brief description of the provisions which will be included in a proposed order.

It is anticipated that issues may arise involving the attorney/client privilege, common interest doctrine and spousal privilege, among others. The parties are currently negotiating a possible agreement addressing how documents which were seized by the FBI and are subject to potential claims of privilege and/or work product will be handled. To the extent such an agreement is not reached prior to the status conference, the parties may ask the court to address these questions.

#### **H. Protective Orders**

If the parties anticipate requesting a protective order from the court pursuant to Rule 26(c), describe the basis for the request and nature of the proposed protective order.

It is anticipated that issues may arise involving the attorney/client privilege, common interest doctrine and spousal privilege, among others. The parties are currently negotiating a possible agreement addressing how documents which were seized by the FBI and are subject to potential claims of privilege or work product will be handled. To the extent such an agreement is not reached prior to the status conference, the parties may ask the court to address these questions.

#### **I. Anticipated Issues Requiring Court Intervention**

Provide a brief description of any discovery related issues which, the parties reasonably anticipate, may require court intervention.

The parties are not currently aware of any discovery issues that may require court intervention aside from those set forth above. However, the parties respectfully request the right to raise any such issues with the court should the need subsequently arise.

#### **13) IS IT POSSIBLE TO REDUCE THE LENGTH OF TRIAL BY STIPULATIONS, USE OF SUMMARIES OR STATEMENTS, OR OTHER EXPEDITED MEANS OF PRESENTING EVIDENCE?**

Yes, but it is too soon to decide which stipulations or other means of expediting the presentation of evidence will be appropriate and agreeable to the parties.

**IS IT FEASIBLE AND DESIRABLE TO BIFURCATE ISSUES FOR TRIAL?**

The parties do not currently anticipate bifurcating issues for trial.

**14) ARE THERE RELATED CASES PENDING BEFORE THE JUDGES OF THIS COURT?**

No.

**15) IN CLASS ACTIONS, WHEN AND HOW WILL THE CLASS BE CERTIFIED?**

Not applicable.

**16) WHAT ARE THE PROSPECTS FOR SETTLEMENT? Please circle below the prospect for settlement:**

1-----2-----3-----4-----5-----6-----7-----8-----9-----10  
(VERY UNLIKELY) 0 0 0 0 0 0 0 0 0 0 0 0 (LIKELY)

Cannot be evaluated prior to completion of discovery and Motions for Summary Judgment and/or Dismissal have been decided.

**HOW CAN SETTLEMENT EFFORTS BE ASSISTED?**

*(Do not indicate any monetary amounts at this time, settlement will be explored by the Magistrate Judge at the time of the initial status conference)*

Settlement discussions are premature at this time.

**COMPLETE QUESTION 17 ONLY IF YOUR FILING ORDER COVER SHEET WAS CHECKED AS AN ADR TRACK CASE. THE PROGRAMS LISTED BELOW ARE COURT-ANNEXED AND NON-BINDING.**

**17) IF YOUR CASE WAS SELECTED AS A QUALIFYING CONTRACT, TORT, OR NON-PRISONER CIVIL RIGHTS ACTION, PLEASE SELECT THE PREFERRED ADR METHOD.**

- \_\_\_\_\_ ARBITRATION
- \_\_\_\_\_ MEDIATION
- \_\_\_\_\_ EARLY NEUTRAL EVALUATION

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Pursuant to Fed. R. Civ. P. 26(f) a meeting was held on August 16, 2010 at Albany, N.Y. and was attended by:

Kevin McGrath and David Stoelting for Plaintiff(s) SEC;



Martin Russo and Alison Cohen for Defendants Timothy McGinn and David Smith;

James Featherstonhaugh for Defendant and Relief Defendant Lynn Smith;

Jill Dunn for Defendant and Relief Defendant David Wojeski, Trustee of the Smith Trust, Geoffrey R. Smith and Lauren T. Smith; and

William Brown, Receiver, for the McGinn Smith Entity Defendants.

Nancy McGinn, who has not yet retained counsel, was provided a draft of this plan and an opportunity to respond. She has not yet done so. She will be provided with this submission and advised of the date of the Rule 16 conference.

At the Rule 16(b) conference, the Court will issue an order directing the future proceedings in this action. The parties are advised that failure to comply with this order may result in the imposition of sanctions pursuant to Federal Rules of Civil Procedure 16(f).

***Please detach this case management plan form and return the completed form to the clerk for filing at least ten (10) days in advance of the conference date.***

Case Management Plan  
Form Date - 06/13/2007