

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

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, AND
DAVID L. SMITH,

**Case No.: 1:10-CV-457
(GLS/DRH)**

Defendants, and

LYNN A. SMITH,

Relief Defendant.

ORDER TO SHOW CAUSE

Upon the application of the Proposed Intervenor, David Wojeski as Trustee of the David L. and Lynn A. Smith Irrevocable Trust, and upon the Declaration of Jill A. Dunn, attorney for the Proposed Intervenor, executed on May 26, 2010, and upon the affidavit of David Wojeski as Trustee of the David A. and Lynn A. Smith Irrevocable Trust, sworn to on the 25th day of May, 2010, and upon the affidavit of Lynn A. Smith, Donor of the David A. and Lynn A. Smith Irrevocable Trust, sworn to on the 21st day of May, 2010, and upon the Complaint filed April 20, 2010, and upon the Order to Show Cause with Temporary Restraining Order and Order Freezing Assets and Granting Other Relief, issued April 20, 2010,

WHEREFORE, the Court finds that a proper showing has been made for the relief granted herein, for the following reasons:

1. On April 20, 2010, the Court (Kahn, J.) issued an *ex parte* order which temporarily restrained the assets contained in more than 170 different accounts, including a brokerage account in the name of the trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A August 4, 2004.
2. Since that time, no person or entity has had authority to manage the account or otherwise protect the assets in the account or the interests of the beneficiaries of the trust.
3. The Court is scheduled to hold a hearing on the motion for a preliminary injunction on June 2, 2010.
4. It appears from the evidence before the Court that David Wojeski, as Trustee of the David L. and Lynn A. Smith Irrevocable Trust and/or the beneficiaries of said trust will be harmed if a decision is made on said motion for a preliminary injunction without the interests of the trust being adequately represented.
5. The Court finds that David Wojeski as Trustee of the David L. and Lynn A. Smith Irrevocable Trust has standing to intervene for the limited purpose of addressing the asset freeze order because the trustee has an interest in an account which is subject to the order freezing assets and he is uniquely situated such that disposing of the pending motion for a preliminary injunction without granting his motion to intervene would impair or impede his ability to protect the interests of the trust and its beneficiaries, and none of the existing parties to this litigation can adequately represent his interests as the Trustee of this irrevocable trust.

6. It further appears from the pleadings heretofore had herein and the evidence submitted in support of this Order to Show Cause, that good and sufficient reasons have been shown why procedure other than notice of motion is necessary.

NOW, THEREFORE, it is hereby

I.

ORDERED, that the above named Plaintiff, Defendants and Relief Defendant show cause, if there be any, to this Court at _____ on the ____ day of _____, 2010, in Courtroom ____ of the James T. Foley Federal Courthouse, 445 Broadway, Albany, New York 12207, why this Court should not enter an Order pursuant to Rule 24 of the Federal Rules of Civil Procedure, granting the motion of David Wojeski as Trustee to intervene on behalf of non-party “David L. and Lynn A. Smith Irrevocable Trust” for the limited purpose of moving to lift the temporary restraining order and asset freeze, opposing the Plaintiff’s request for a preliminary injunction as it relates to the David L. and Lynn A. Smith Irrevocable Trust, and seeking such other and further relief as this Court finds proper and just, including payment of the Proposed Intervenor’s costs and attorneys fees on this motion.

II.

IT IS FURTHER ORDERED, that the Plaintiff, Defendants and Relief Defendant show cause at that time why this Court should not also enter an order vacating the prior order of this Court freezing the NFS/Fidelity account of the DAVID L. AND LYNN A. SMITH IRREVOCABLE TRUST U/A AUGUST 4, 2004, as referenced in the April 20, 2010 Order to Show Cause, Exhibit B, page 5, denying the Plaintiff’s motion for a preliminary injunction as it relates to said account, and granting such other and further relief as this Court finds appropriate, ordering the Plaintiff to pay the Proposed Intervenor’s costs and attorney’s fees on this motion.

III.

IT IS FURTHER ORDERED that a copy of this Order and the papers upon which it was granted be served upon Plaintiff, Defendant McGinn, Defendant Smith and Relief Defendant Lynn Smith on or before May ____, 2010 by personal delivery, facsimile, overnight courier or first-class mail to their attorneys, and upon all remaining Entity Defendants by serving the Court Appointed Receiver, William J. Brown, Esq. by personal delivery, or by facsimile, overnight courier, or first-class mail to him at any business office maintained by Phillips Lytle, LLP, on or before the ____ day of _____, 2010, and that such service be and it hereby is deemed good and sufficient service.

IV.

IT IS FURTHER ORDERED that Plaintiff, Defendants and Relief Defendant shall file and serve by ECF any opposing papers in response to this Order to Show Cause above no later than May ____, 2010, and that Proposed Intervenor shall file and serve by ECF any reply papers no later than _____, 2010.

V.

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

Issued at: _____ a.m./p.m.
May ____, 2010
Albany, New York

UNITED STATES _____ JUDGE