

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,
LYNN A. SMITH, GEOFFREY R. 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,

LYNN A. SMITH and NANCY McGINN,

Relief Defendants, and

GEOFFREY R. SMITH, Trustee of the David L.
and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenor.

**DEFENDANT/INTERVENOR
GEOFFREY R. SMITH,
TRUSTEE OF THE DAVID L.
AND LYNN A. SMITH
IRREVOCABLE TRUST
ANSWER TO AMENDED
COMPLAINT**

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

The Defendant/Intervenor, Geoffrey R. Smith, Trustee of the David L. and Lynn A. Smith Irrevocable Trust (“Smith Trust”), by his attorneys, Featherstonhaugh, Wiley & Clyne, LLP, as and for an answer to the Plaintiffs’ Amended Complaint dated August 2, 2010 allege as follows:

1. The allegations contained in Paragraph 1 of the Amended Complaint constitute legal arguments or conclusions to which no response is required. To the extent

that allegations are made against the Smith Trust, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendant/Intervenor lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 1 of the Amended Complaint.

2. The allegations contained in Paragraph 2 of the Amended Complaint constitute legal arguments or conclusions to which no response is required. To the extent that allegations are made against the Smith Trust, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendant/Intervenor lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 2 of the Amended Complaint.

3. The allegations contained in Paragraph 3 of the Amended Complaint constitute legal arguments or conclusions to which no response is required. To the extent that allegations are made against the Smith Trust, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendant/Intervenor lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 3 of the Amended Complaint.

4. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 4 of the Amended Complaint.

5. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 5 of the Amended Complaint.

6. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 6 of the Amended Complaint.

7. Admits that the Commission filed a Complaint on April 20, 2010 and was granted emergent relief including an asset freeze, a receiver over McGinn & Smith Entities, expedited discovery and verified accounting; admits that the Smith Trust was authorized to intervene on or about June 1, 2010; denies the remaining allegations in Paragraph 7.

8. Admits that after several weeks of discovery, the Court conducted a hearing on June 9 through 11, 2010 on the Commission's preliminary injunction motion and the Smith Trust's motion to remove the asset freeze as to the Smith Trust; admits that the Court issued a Memorandum-Decision and Order on July 7, 2010 and refers the Court to said Order as to the Court's findings of fact and law. The remaining allegations in Paragraph 8 are denied.

9. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 9.

10. The allegations contained in Paragraph 10 of the Amended Complaint constitute legal arguments or conclusions to which no response is required and refers all questions of law to the Court. To the extent that allegations are made against the Smith Trust, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendant/Intervenor lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 10.

11. The allegations contained in Paragraph 11 of the Amended Complaint constitute legal arguments or conclusions to which no response is required and refers all questions of law to the Court. To the extent that allegations are made against the Smith Trust, to which a response is required, they are denied. To the extent the allegations are

made against any other party, Defendant/Intervenor lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 11.

12. The allegations contained in Paragraph 12 of the Amended Complaint constitute legal arguments or conclusions to which no response is required and refers all questions of law to the Court. To the extent that allegations are made against the Smith Trust, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendant/Intervenor lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 12.

13. The allegations contained in Paragraph 13 of the Amended Complaint constitute legal arguments or conclusions to which no response is required and refers all questions of law to the Court. To the extent that allegations are made against the Smith Trust, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendant/Intervenor lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 13.

14. The allegations contained in Paragraph 14 of the Amended Complaint constitute legal arguments or conclusions to which no response is required and refers all questions of law to the Court. To the extent that allegations are made against the Smith Trust, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendant/Intervenor lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 14.

15. The allegations contained in Paragraph 15 of the Amended Complaint constitute legal arguments or conclusions to which no response is required and refers all questions of law to the Court. To the extent that allegations are made against the Smith

Trust, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendant/Intervenor lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 15.

16. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 16 of the Amended Complaint.

17. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 17 of the Amended Complaint and refers all questions of law to the Court.

18. The allegations in Paragraph 18 do not constitute factual allegations but rather prayers for relief for which no response is required. To the extent the allegations are made against the Smith Trust to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendant/Intervenor lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 18.

19. The allegations in Paragraph 19 do not constitute factual allegations but rather prayers for relief for which no response is required to the extent the allegations are made against the Smith Trust to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendant/Intervenor lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 19.

20. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 20 of the Amended Complaint and refers all questions of law to the Court.

21. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 21 of the Amended Complaint and refers all questions of law to the Court.

22. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 22 of the Amended Complaint.

23. Admits that David L. Smith is a resident of Saratoga Springs, New York; and was 65 years of age at the time of the filing of the Amended Complaint; lacks knowledge or information sufficient to form a belief as to the remaining allegations in Paragraph 23 of the Amended Complaint.

24. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 24 of the Amended Complaint.

25. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 25 of the Amended Complaint.

26. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 26 of the Amended Complaint.

27. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 27 of the Amended Complaint.

28. Denies that David Wojeski is the trustee of the Smith Trust, but admits the remaining of the allegations in Paragraph 28 of the Amended Complaint.

29. Admits that Geoffrey R. Smith is a resident of New York, New York, and was the age of 30 at the time of filing of Amended Complaint and is the son of David and Lynn Smith.

30. Admits that Lauren T. Smith is a resident of Aspen, Colorado, is the daughter of David and Lynn Smith, and was 28 at the time of the filing of the Amended Complaint and is the daughter of David and Lynn Smith.

31. Admits that Lynn A Smith is the wife of David Smith and a resident of Saratoga Springs, and was 64 at the time of the filing of the Amended Complaint.

32. Admits that Nancy McGinn is the wife of Timothy McGinn and a resident of Schenectady, New York but lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 32 of the Amended Complaint.

33. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 33 of the Amended Complaint.

34. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 34 of the Amended Complaint.

35. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 35 of the Amended Complaint.

36. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 36 of the Amended Complaint.

37. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 37 of the Amended Complaint.

38. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 38 of the Amended Complaint.

39. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 39 of the Amended Complaint.

40. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 40 of the Amended Complaint.

41. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 41 of the Amended Complaint.

42. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 42 of the Amended Complaint.

43. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 43 of the Amended Complaint.

44. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 44 of the Amended Complaint.

45. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 45 of the Amended Complaint.

46. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 46 of the Amended Complaint.

47. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 47 of the Amended Complaint.

48. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 48 of the Amended Complaint.

49. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 49 of the Amended Complaint.

50. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 50 of the Amended Complaint.

51. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 51 of the Amended Complaint.

52. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 52 of the Amended Complaint.

53. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 53 of the Amended Complaint.

54. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 54 of the Amended Complaint.

55. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 55 of the Amended Complaint.

56. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 56 of the Amended Complaint.

57. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 57 of the Amended Complaint.

58. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 58 of the Amended Complaint.

59. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 59 of the Amended Complaint.

60. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 60 of the Amended Complaint.

61. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 61 of the Amended Complaint.

62. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 62 of the Amended Complaint.

63. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 63 of the Amended Complaint.

64. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 64 of the Amended Complaint.

65. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 65 of the Amended Complaint.

66. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 66 of the Amended Complaint.

67. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 67 of the Amended Complaint.

68. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 68 of the Amended Complaint.

69. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 69 of the Amended Complaint.

70. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 70 of the Amended Complaint.

71. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 71 of the Amended Complaint.

72. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 72 of the Amended Complaint.

73. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 73 of the Amended Complaint.

74. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 74 of the Amended Complaint.

75. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 75 of the Amended Complaint.

76. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 76 of the Amended Complaint.

77. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 77 of the Amended Complaint.

78. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 78 of the Amended Complaint.

79. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 79 of the Amended Complaint.

80. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 80 of the Amended Complaint.

81. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 81 of the Amended Complaint.

82. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 82 of the Amended Complaint.

83. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 83 of the Amended Complaint.

84. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 84 of the Amended Complaint.

85. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 85 of the Amended Complaint.

86. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 86 of the Amended Complaint.

87. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 87 of the Amended Complaint.

88. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 88 of the Amended Complaint.

89. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 89 of the Amended Complaint.

90. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 90 of the Amended Complaint.

91. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 91 of the Amended Complaint.

92. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 92 of the Amended Complaint.

93. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 93 of the Amended Complaint.

94. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 94 of the Amended Complaint.

95. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 95 of the Amended Complaint.

96. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 96 of the Amended Complaint.

97. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 97 of the Amended Complaint.

98. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 98 of the Amended Complaint.

99. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 99 of the Amended Complaint.

100. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 100 of the Amended Complaint.

101. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 101 of the Amended Complaint.

102. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 102 of the Amended Complaint.

103. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 103 of the Amended Complaint.

104. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 104 of the Amended Complaint.

105. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 105 of the Amended Complaint.

106. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 106 of the Amended Complaint.

107. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 107 of the Amended Complaint.

108. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 108 of the Amended Complaint.

109. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 109 of the Amended Complaint.

110. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 110 of the Amended Complaint.

111. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 111 of the Amended Complaint.

112. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 112 of the Amended Complaint.

113. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 113 of the Amended Complaint.

114. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 114 of the Amended Complaint.

115. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 115 of the Amended Complaint.

116. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 116 of the Amended Complaint.

117. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 117 of the Amended Complaint.

118. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 118 of the Amended Complaint.

119. Admits the allegation set forth in Paragraph 119 but denies that David Smith was a grantor of the Smith Trust and refers the Court to the Declaration of Trust for its terms.

120. Denies the allegations in Paragraph 120 except to admit that David and Lynn Smith entered into a Private Annuity Agreement with the Smith Trust and refers the Court to its terms and conditions.

121. Denies the allegations in Paragraph 121 except to admit that there exists a document that sets forth the terms of future annuity payments to Lynn and David Smith and refers the Court to its terms.

122. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 122 of the Amended Complaint.

123. Admits the allegations set forth in Paragraph 123 of the Amended Complaint.

124. Admits the allegations set forth in Paragraph 124 of the Amended Complaint.

125. Denies the allegations in Paragraph 125 except to admit that Geoffrey and Lauren Smith are the beneficiaries to the Smith Trust and that a \$95,000.00 distribution was used to pay his parents' personal income tax.

126. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 126 of the Amended Complaint.

127. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 127 of the Amended Complaint.

128. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 128 of the Amended Complaint.

129. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 129 of the Amended Complaint.

130. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 130 of the Amended Complaint.

131. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 131 of the Amended Complaint.

132. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 132 of the Amended Complaint.

133. Denies the allegations set forth in Paragraph 133 of the Amended Complaint.

134. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 134 of the Amended Complaint.

135. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 135 of the Amended Complaint.

136. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 136 of the Amended Complaint.

137. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 137 of the Amended Complaint.

138. Denies the allegations set forth in Paragraph 138 of the Amended Complaint except to admit that in July 2010 Geoffrey and Lauren received distributions from the Smith Trust.

FIRST CLAIM FOR RELIEF
Violations of Section 17(a) of the Securities Act
(Against MS & Co., MS Advisors, MS Capital, McGinn and Smith)
(Antifraud violations)

139. Defendant/Intervenor repeats and reiterates the response contained in Paragraphs number “1” through “138” above as if fully set forth herein.

140. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 140 of the Amended Complaint.

141. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 141 of the Amended Complaint.

142. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 142 of the Amended Complaint.

SECOND CLAIM FOR RELIEF
Violations of Section 10(b) of the Exchange Act and Rule 10b-5
(Against MS & Co., MS Advisors, MS Capital, McGinn and Smith)
(Antifraud violations)

143. Defendant/Intervenor repeats and reiterates the response contained in Paragraphs number “1” through “142” above as if fully set forth herein.

144. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 144 of the Amended Complaint.

145. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 145 of the Amended Complaint.

THIRD CLAIM FOR RELIEF
Violations, and Aiding and Abetting Violations, of
Section 15(c)(1) of the Exchange Act, 15 U.S.C. §240.10b-3
(Against MS & Co., MS Advisors, MS Capital, McGinn and Smith)
(Violations of Antifraud Provisions by Brokers)

146. Defendant/Intervenor repeats and reiterates the response contained in Paragraphs number “1” through “145” above as if fully set forth herein.

147. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 147 of the Amended Complaint.

148. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 148 of the Amended Complaint.

149. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 149 of the Amended Complaint.

150. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 150 of the Amended Complaint.

151. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 151 of the Amended Complaint.

152. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 152 of the Amended Complaint.

FOURTH CLAIM FOR RELIEF
Violations of Sections 206(1), 206(2) and 206(4)
of the Advisers Act and Rule 206(4)-8
(MS & Co., MS Advisors, McGinn and Smith)

153. Defendant/Intervenor repeats and reiterates the response contained in Paragraphs number “1” through “152” above as if fully set forth herein.

154. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 154 of the Amended Complaint.

155. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 155 of the Amended Complaint.

156. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 156 of the Amended Complaint.

FIFTH CLAIM FOR RELIEF
Violations of Sections 7(a) of the Investment Company Act
(FAIN, FEIN, FIIN and TAIN)

157. Defendant/Intervenor repeats and reiterates the response contained in Paragraphs number “1” through “156” above as if fully set forth herein.

158. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 158 of the Amended Complaint.

159. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 159 of the Amended Complaint.

160. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 160 of the Amended Complaint.

SIXTH CLAIM FOR RELIEF
Violations of Sections 5(a) and 5(c) of the Securities Act
(MS & Co., MS Capital, the Four Funds, McGinn and Smith)

161. Defendant/Intervenor repeats and reiterates the response contained in Paragraphs number “1” through “160” above as if fully set forth herein.

162. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 162 of the Amended Complaint.

163. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 163 of the Amended Complaint.

164. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 164 of the Amended Complaint.

165. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 165 of the Amended Complaint.

SEVENTH CLAIM FOR RELIEF
(Relief Defendants)

166. Defendant/Intervenor repeats and reiterates the response contained in Paragraphs number “1” through “165” above as if fully set forth herein.

167. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 167 of the Amended Complaint.

168. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 168 of the Amended Complaint.

EIGHTH CLAIM FOR RELIEF
Violations of Section 276 of New York Debtor and Creditor Law
(David Smith, Lynn Smith, Tim McGinn, Nancy McGinn,
the Smith Trust, Geoffrey Smith, and Lauren Smith)

169. Defendant/Intervenor repeats and reiterates the response contained in Paragraphs number “1” through “168” above as if fully set forth herein.

170. a) Denies the allegations set forth in Paragraph 170(a).

b) Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 170(b).

c) Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 170(c).

171. Denies the allegations set forth in Paragraph 171 of the Amended Complaint; lacks knowledge or information sufficient to form a belief as to the allegations concerning Nancy McGinn or Lynn Smith.

172. Denies the allegations set forth in Paragraph 172 of the Amended Complaint.

173. Denies the allegations set forth in Paragraph 173 of the Amended Complaint.

**AS AND FOR A FIRST AFFIRMATIVE DEFENSE,
THE TRUST ALLEGES AS FOLLOWS:**

174. Defendant/Intervenor repeats and reiterates the response contained in Paragraphs number “1” through “173” above as if fully set forth herein.

175. The Smith Trust has not received nor was it ever funded with ill gotten gains allegedly resulting from David Smith’s violation of federal securities laws.

**AS AND FOR A SECOND AFFIRMATIVE DEFENSE,
THE TRUST ALLEGES AS FOLLOWS:**

176. Defendant/Intervenor repeats and reiterates the response contained in Paragraphs number “1” through “175” above as if fully set forth herein.

177. The SEC does not have the authority to bring claims of violation of the New York Debtor and Creditor Law.

**AS AND FOR A THIRD AFFIRMATIVE DEFENSE,
THE TRUST ALLEGES AS FOLLOWS:**

178. Defendant/Intervenor repeats and reiterates the response contained in Paragraphs number “1” through “177” above as if fully set forth herein.

179. As an Irrevocable Trust, neither Lynn Smith nor David Smith have legal or equitable title in the Smith Trust Corpus and despite the existence of a private annuity agreement, the beneficial ownership of the Smith Trust is fully vested in the beneficiaries, Geoffrey and Lauren Smith.

**AS AND FOR A FOURTH AFFIRMATIVE DEFENSE,
THE TRUST ALLEGES AS FOLLOWS:**

180. Defendant/Intervenor repeats and reiterates the response contained in Paragraphs number “1” through “179” above as if fully set forth herein.

181. Any right of disgorgement the SEC may have in the event of a judgment against David Smith is limited to his share of any annuity payments he may receive should he survive to 2015 and beyond.

**AS AND FOR A FIFTH AFFIRMATIVE DEFENSE,
THE TRUST ALLEGES AS FOLLOWS:**

182. Defendant/Intervenor repeats and reiterates the response contained in Paragraphs number “1” through “181” above as if fully set forth herein.

183. As a matter of law, the corpus of the Smith Trust is immune from any right of disgorgement the SEC may have in the event of a judgment against David Smith.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Defendant/Intervenor, Geoffrey R. Smith, Trustee of the David L. and Lynn A. Smith Irrevocable Trust demands trial by jury in this action of all issues so triable.

WHEREFORE, the Smith Trust demands judgment dismissing the Amended Complaint.

DATED: May 23, 2011

Respectfully submitted,

~~Featherstonhaugh, Wiley & Clyne, LLP~~

By: _____


Scott J. Ely, Esq.

Bar Roll No. 511635

Attorneys for Defendant/Intervenor,

Geoffrey R. Smith, Trustee of the

*David L. and Lynn A. Smith Irrevocable
Trust*

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