

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

**Case No.: 1:10-CV-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, 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.

**RELIEF/DEFENDANT LYNN A. SMITH'S ANSWER TO PLAINTIFF'S
SECOND AMENDED COMPLAINT**

The Relief Defendant/Defendant, Lynn A. Smith ("Lynn Smith") by and through her attorneys, Featherstonhaugh, Wiley & Clyne, LLP, as and for an answer to the Plaintiff's Second Amended Complaint dated June 8, 2011 alleges as follows:

1. The allegations contained in Paragraph 1 constitute legal arguments or conclusions to which no response is required. To the extent that allegations are made against Lynn Smith, to which a response is required, they are denied. To the extent the

allegations are made against any other party, this Relief Defendant/Defendant lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 1.

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

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

4. Denies the allegations in Paragraph 4 as they relate to her husband David Smith; Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 4 as they relate to Timothy McGinn.

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

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

7. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 7 and refers the Court to the Complaint referenced in said Paragraph.

8. Admits the allegations set forth in Paragraph 8.

9. Admits the allegations set forth in Paragraph 9.

10. Admits that after several weeks of discovery, the Court conducted a hearing on June 9 through June 11, 2010 in which the testimony of several individuals were taken and refers the Court to the transcript for the substance of said testimony.

11. 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 finding of fact and law.

12. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 12.

13. Admits that the Plaintiff filed an Amended Complaint in August 2010 seeking emergent relief and refers the Court to the Amended Complaint referenced in said Paragraph 13.

14. Admits the Court issued a Memorandum-Decision and Order on November 22, 2010 and refers the Court to said Order as to the Court's findings of fact and law.

15. Admits the Court issued a Memorandum-Decision and Order on December 1, 2010 and refers the Court to said Order as to the Court's findings of fact and law.

16. The allegations contained in Paragraph 16 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 Relief Defendant/Defendant, to which a response is required, they are denied. To the extent the allegations are made against any other party, Relief Defendant/Defendant lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 16.

17. The allegations contained in Paragraph 17 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 Relief Defendant/Defendant, to which a response is required, they are denied. To the extent the allegations are made against any other party, Relief Defendant/Defendant lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 17.

18. The allegations contained in Paragraph 18 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 Relief Defendant/Defendant, to which a response is required, they are denied. To the extent the allegations are made against any other party, Relief Defendant/Defendant lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 18.

19. The allegations contained in Paragraph 19 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 Relief Defendant/Defendant, to which a response is required, they are denied. To the extent the allegations are made against any other party, Relief Defendant/Defendant lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 19.

20. The allegations contained in Paragraph 20 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 Relief Defendant/Defendant, to which a response is required, they are denied. To the extent the allegations are made against

any other party, Relief Defendant/Defendant lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 20.

21. The allegations contained in Paragraph 21 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 Relief Defendant/Defendant, to which a response is required, they are denied. To the extent the allegations are made against any other party, Relief Defendant/Defendant lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 21.

22. Denies the allegations in Paragraph 22 as it relates to Relief Defendant/Defendant Lynn Smith; lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 22 as it relates to N. McGinn.

23. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 23 and refers all questions of law to the Court.

24. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 24 and refers all questions of law to the Court.

25. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 25 and refers all questions of law to the Court.

26. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 26 and refers all questions of law to the Court.

27. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 27 and refers all questions of law to the Court.

28. Admits that Timothy McGinn is a resident of Schenectady, New York but lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 28.

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

30. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 30.

31. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 31.

32. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 32.

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

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

35. 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 original Complaint.

36. Admits the allegations set forth in Paragraph 36.

37. Admits the allegations set forth in Paragraph 37.

38. – 111. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraphs 38 through 111.

112. Denies the allegations set forth in Paragraph 112.

113. Denies the allegations set forth in Paragraph 113.

114. Denies the allegations in Paragraph 114 except admits that Lynn Smith maintained a brokerage account at McGinn, Smith & Co. which in 2010 was transferred to NFS/RMR Capital Management.

115. Admits that this Relief Defendant/Defendant acquired 40,000 shares of a predecessor to Charter One Financial Inc. in her stock account but lacks knowledge and information sufficient to form a belief as to the remaining allegations in Paragraph 115.

116. Denies the allegations set forth in Paragraph 116.

117. Denies the allegations in Paragraph 117.

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

119. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 119.

120. Denies the allegations set forth in Paragraph 120.

121. Denies the allegations set forth in Paragraph 121.

122. Denies the allegations set forth in Paragraph 122 except admits that the title of the Vero Beach home was transferred to Lynn Smith.

123. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 123.

124. Denies the allegations set forth in Paragraph 124 and refers the Court to the Declaration of Trust for its terms.

125. Denies the allegations in Paragraph 125 and refers the Court to the Private Annuity Agreement referenced as to its terms and conditions.

126. Denies the allegations contained in Paragraph 126 except admits 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.

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

128. Admits that at some point in 2004, 100,000 shares of Charter One stock was transferred from the stock account to the Trust account but lacks knowledge or information and belief as to the remaining allegations in Paragraph 128.

129. Admits that soon after the Stock was transferred to the Smith Trust, the shares were converted to cash but lacks knowledge or information sufficient to form a belief as to the remaining allegations in Paragraph 129.

130. Denies the allegations in Paragraph 130 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.

131. Denies the allegations set forth in Paragraph 131.

132. Denies the allegations set forth in Paragraph 132.

133. Denies the allegations set forth in Paragraph 133.

134. Denies the allegations set forth in Paragraph 134.

135. Denies the allegations set forth in Paragraph 135.

136. Denies the allegations set forth in Paragraph 136.

137. Denies the allegations set forth in Paragraph 137.

138. Denies the allegations set forth in Paragraph 138.

139. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 139.

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

141. Denies the allegations set forth in Paragraph 141.

142. Denies the allegations set forth in Paragraph 142.

143. Denies the allegations set forth in Paragraph 143.

144. Admits the allegations set forth in Paragraph 144.

145. Denies the allegations set forth in Paragraph 145.

146. Denies the allegations set forth in Paragraph 146.

147. Neither admits nor denies the allegations in Paragraph 147 and refers the Court to the Memorandum Decision and Order dated July 7, 2010.

148. Admits that certain disbursements were made by the Smith Trust sometime after July 7, 2010 but lacks knowledge to confirm the remaining allegations in Paragraph 148 absent a formal accounting.

149. Admits that Relief Defendant/Defendant was paid for the fair market value of the Lake Property by the Smith Trust and indirectly received the additional funds from the Trust (through the Trust beneficiaries) as a down payment to purchase the Lake Property but is without knowledge as to the remaining allegations in Paragraph 149.

150. Admits that disbursements were made by the Smith Trust to Geoffrey Smith but lacks knowledge to confirm the remaining allegations of Paragraph 150 absent a formal accounting.

151. Admits that disbursements were made by the Trust to Lauren Smith but lacks knowledge to confirm the remaining allegations of Paragraph 151 absent a formal accounting.

152. Admits that Jill Dunn, counsel for the Smith Trust, was paid for her legal services but lacks knowledge to confirm the remaining allegations in Paragraph 152 absent a formal accounting.

153. Admits that David Wojeski, the former trustee of the Smith Trust was paid for his professional services but lacks knowledge to confirm the remaining allegations in Paragraph 153 absent a formal accounting.

154. Admits the Court re-froze the Smith Trust on August 3, 2010 and refers the Court to its Memorandum-Decision and Order for its finding of fact and legal conclusions; denies the remaining allegations in Paragraph 154.

155.-175. Denies the allegations set forth in Paragraphs 155 through 175.

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)

176. Relief Defendant/Defendant repeats and reiterates the responses contained in Paragraphs numbered “1” through “175” above as if fully set forth herein.

177. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 177 of the Second Amended Complaint.

178. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 178 of the Second Amended Complaint.

179. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 179 of the Second 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)

180. Relief Defendant/Defendant repeats and reiterates the responses contained in Paragraphs numbered “1” through “179” above as if fully set forth herein.

181. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 181 of the Second Amended Complaint.

182. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 182 of the Second 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)

183. Relief Defendant/Defendant repeats and reiterates the responses contained in Paragraphs numbered “1” through “182” above as if fully set forth herein.

184. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 184 of the Second Amended Complaint.

185. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 185 of the Second Amended Complaint.

186. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 186 of the Second Amended Complaint.

187. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 187 of the Second Amended Complaint.

188. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 188 of the Second Amended Complaint.

189. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 189 of the Second 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)

190. Relief Defendant/Defendant repeats and reiterates the responses contained in Paragraphs numbered “1” through “189” above as if fully set forth herein.

191. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 191 of the Second Amended Complaint.

192. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 192 of the Second Amended Complaint.

193. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 193 of the Second Amended Complaint.

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

194. Relief Defendant/Defendant repeats and reiterates the responses contained in Paragraphs numbered “1” through “193” above as if fully set forth herein.

195. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 195 of the Second Amended Complaint.

196. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 196 of the Second Amended Complaint.

197. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 197 of the Second 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)

198. Relief Defendant/Defendant repeats and reiterates the responses contained in Paragraphs numbered “1” through “197” above as if fully set forth herein.

199. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 199 of the Second Amended Complaint.

200. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 200 of the Second Amended Complaint.

201. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 201 of the Second Amended Complaint.

202. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 202 of the Second Amended Complaint.

SEVENTH CLAIM FOR RELIEF
(Relief Relief Defendant/Defendants)

203. Relief Defendant/Defendant repeats and reiterates the responses contained in Paragraphs numbered “1” through “202” above as if fully set forth herein.

204. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 204 of the Second Amended Complaint.

205. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 205 of the Second 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 Relief Defendant/Defendant, Geoffrey Smith, and Lauren Smith)

206. Relief Defendant/Defendant repeats and reiterates the responses contained in Paragraphs numbered “1” through “205” above as if fully set forth herein.

207. a) Denies the allegations set forth in Paragraph 207(a).

b) Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 207(b).

c) Denies the allegations set forth in Paragraph 207(c).

208. Denies the allegations set forth in Paragraph 208; lacks knowledge or information sufficient to form a belief as to the allegations concerning Nancy McGinn.

209. Denies the allegations set forth in Paragraph 209.

210. Denies the allegations set forth in Paragraphs 210 (a), (b), (c) and (d).

211. Denies the allegations set forth in Paragraph 211.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE,
RELIEF DEFENDANT/DEFENDANT LYNN A. SMITH ALLEGES AS
FOLLOWS:

212. Relief Defendant/Defendant repeats and reiterates the responses contained in Paragraphs numbered “1” through “211” above as if fully set forth herein.

213. Any money that Relief Defendant Lynn Smith received from David Smith, Timothy McGinn or any McGinn Smith entity were from legitimate sources that do not constitute ill-gotten gains.

**AS AND FOR A SECOND AFFIRMATIVE DEFENSE,
RELIEF DEFENDANT/DEFENDANT LYNN A. SMITH ALLEGES AS
FOLLOWS:**

214. Relief Defendant/Defendant repeats and reiterates the responses contained in Paragraphs numbered “1” through “213” above as if fully set forth herein.

215. Any money that was given to Lynn Smith by David Smith, Timothy McGinn or any McGinn Smith entity was for consideration and/or for a fair exchange for value.

**AS AND FOR A THIRD AFFIRMATIVE DEFENSE,
RELIEF DEFENDANT/DEFENDANT LYNN A. SMITH ALLEGES AS
FOLLOWS:**

216. Relief Defendant/Defendant repeats and reiterates the responses contained in Paragraphs numbered “1” through “215” above as if fully set forth herein.

217. The SEC does not have the authority to bring claims of violations of the New York Debtor and Creditor law.

**AS AND FOR A FOURTH AFFIRMATIVE DEFENSE,
RELIEF DEFENDANT/DEFENDANT LYNN A. SMITH ALLEGES AS
FOLLOWS:**

218. Relief Defendant/Defendant repeats and reiterates the responses contained in Paragraphs numbered “1” through “217” above as if fully set forth herein.

219. The stock used to fund the Smith Trust represents untainted funds identifiable and severable from other assets in Lynn Smith’s stock account.

**AS AND FOR A FIFTH AFFIRMATIVE DEFENSE,
RELIEF DEFENDANT/DEFENDANT LYNN A. SMITH ALLEGES AS
FOLLOWS:**

220. Relief Defendant/Defendant repeats and reiterates the responses contained in Paragraphs numbered “1” through “119” above as if fully set forth herein.

221. Lynn Smith is the sole and legal owner of the stock account over which David Smith has no equitable ownership rights.

**AS AND FOR A SIXTH AFFIRMATIVE DEFENSE,
RELIEF DEFENDANT/DEFENDANT LYNN A. SMITH ALLEGES AS
FOLLOWS:**

222. Relief Defendant/Defendant repeats and reiterates the responses contained in Paragraphs numbered “1” through “221” above as if fully set forth herein.

223. Any and all transfers of stock, deeds to real property or any other asset from or to Lynn Smith were legitimate transactions and not made with intent to defraud any present or future creditors.

**AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE,
RELIEF DEFENDANT/DEFENDANT LYNN A. SMITH ALLEGES AS
FOLLOWS:**

224. Relief Defendant/Defendant repeats and reiterates the responses contained in Paragraphs numbered “1” through “223” above as if fully set forth herein.

225. Lynn Smith is not liable for any Federal Securities Law violations alleged by the Securities and Exchange Commission in the Second Amended Complaint.

**AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE,
RELIEF DEFENDANT/DEFENDANT LYNN A. SMITH ALLEGES AS
FOLLOWS:**

226. Relief Defendant/Defendant repeats and reiterates the responses contained in Paragraphs numbered “1” through “225” above as if fully set forth herein.

227. In the event it is determined that Lynn Smith is the recipient of ill-gotten gains resulting from the alleged violations of Federal Securities Law by David Smith, Timothy McGinn or any McGinn Smith entity, any disgorgement from any of her accounts should be limited to the amount she actually received.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Relief Defendant/Defendant, Lynn A. Smith demands a trial by jury in this action of all issues so triable.

WHEREFORE, the Relief Defendant/Defendant demands judgment dismissing the Second Amended Complaint.

DATED: July 29, 2011

Respectfully submitted,

Featherstonhaugh, Wiley & Clyne, LLP

By: _____


Scott J. Ely, Esq.

Bar Roll No. 511635

*Attorneys for Relief Defendant/Defendant,
Lynn A. Smith*

99 Pine Street, Suite 207

Albany, NY 12207

Tel: (518) 436-0786

Fax: (518) 427-0452

TO: David Stoelting
Securities and Exchange Commission
Attorney for Plaintiff
3 World Financial Center, Room 400
New York, NY 10281
stoeltingd@sec.gov

Kevin McGrath
Securities and Exchange Commission
Attorney for Plaintiff
3 World Financial Center, Room 400
New York, NY 10281
mcgrathk@sec.gov

William J. Dreyer
Dreyer Boyajian LLP
Attorneys for David L. Smith
75 Columbia Place

Albany, New York 12207
wdreyer@dreyerboyajian.com

E. Stewart Jones, Jr.
E. Stewart Jones Law Firm
Attorneys for Timothy M. McGinn
28 Second Street
Troy, New York 12181
esjones@esjlaw.com

Nancy McGinn
29 Port Huron Drive
Schenectady, NY 12309
nemcginn@yahoo.com

William Brown, Esq.
Phillips Lytle LLP
Attorneys for Receiver
3400 HSBC Center
Buffalo, N.Y. 14203
WBrown@phillipslytle.com