

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 Defendant 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 AND
DEFENDANTS, GEOFFREY R. SMITH AND LAUREN T. SMITH'S ANSWER
TO PLAINTIFF'S SECOND AMENDED COMPLAINT**

The Defendant/Intervenor, Geoffrey R. Smith, Trustee of the David L. and Lynn A. Smith Irrevocable Trust ("Smith Trust"), and Defendants Geoffrey R. Smith and Lauren T. Smith, individually and as beneficiaries of the Smith Trust (collectively "Defendants") by and through their attorneys, Featherstonhaugh, Wiley & Clyne, LLP, as

and for an answer to the Plaintiff's Second Amended Complaint dated June 8, 2011 allege 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 the Defendants, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendants lack knowledge or information sufficient to form a belief as to those allegations.

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 the Defendants, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendants lack knowledge or information sufficient to form a belief as to those allegations.

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 the Defendants, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendants lack knowledge or information sufficient to form a belief as to those allegations.

4. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 4.

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

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

7. Defendants lack 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. Defendants admit the allegations that set forth in Paragraph 8.

9. Defendants admit the allegation that the Smith Trust opposed entry of the preliminary injunction order but lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 9.

10. Defendants admit that after several weeks of discovery, the Court conducted a hearing on June 9 through 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. Defendants admit 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.

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

13. Defendants admit 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, Defendants deny the remaining allegations set forth in Paragraph 13.

14. Defendants admit 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. Defendants admit 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 Defendants, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendants lack knowledge or information sufficient to form a belief as to those allegations.

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 Defendants, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendants lack knowledge or information sufficient to form a belief as to those 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 Defendants, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendants lack knowledge or information sufficient to form a belief as to those allegations.

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 Defendants, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendants lack knowledge or information sufficient to form a belief as to those allegations.

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 Defendants, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendants lack knowledge or information sufficient to form a belief as to those 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 Defendants, to which a response is required, they are denied. To the extent the allegations are made against any other party, Defendants lack knowledge or information sufficient to form a belief as to those allegations in Paragraph 21.

22. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 22 and refer all questions of law to the Court.

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

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

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

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

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

28. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 28.

29. Defendants admit 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 allegation in Paragraph 29.

30. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 30 of the Second Amended Complaint.

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

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

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

34. Defendants admit the allegations set forth in Paragraph 34.

35. Defendants admit the allegations set forth in Paragraph 35.

36. Defendants admit that Lynn A. Smith is the wife of David Smith, a resident of Saratoga Springs, and was at the age of 64 at the time of the filing of the original Complaint.

37. Defendants admit that Nancy McGinn is the wife of Timothy McGinn and a resident of Schenectady, New York.

38.-123. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraphs 38 through 123.

124. Defendants admit the allegations set forth in Paragraph 124.

125. Neither admits nor denies and refers the Court to the respective legal instruments referenced in Paragraph 125.

126. Neither admits nor denies and refers the Court to the Private Annuity Agreement reference in Paragraph 126.

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

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

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

130. Denies the allegations set forth in Paragraph 130.

131.-142. Lacks knowledge or information sufficient to form a belief as to the allegations in Paragraphs 131 through 142.

143. Defendants deny the allegations set forth in Paragraph 143 except to admit that in July 2010 Geoffrey and Lauren Smith received distributions from the Smith Trust.

144. Defendants admit the allegations set forth in Paragraph 144.

145. Defendants deny the allegations set forth in Paragraph 145.

146. Defendants deny the allegations set forth in Paragraph 146.

147. Defendants neither admit nor deny the allegations in Paragraph 147 and refer the Court to Memorandum Decision and Order, dated July 7, 2010.

148. Defendants admit that certain disbursements were made by the Smith Trust sometime after July 7, 2010 but are without knowledge to confirm the remaining allegations in Paragraph 148 absent a formal accounting.

149. Defendants admit that Lynn Smith was paid for the fair market value of the Lake Property but lack knowledge to confirm the remaining allegations in Paragraph 149 absent a formal accounting.

150. The Smith Trust and Geoffrey Smith admit that Geoffrey Smith received a disbursement from the Smith Trust, \$200,000 of which was used to invest in a company Geoffrey Smith created, Capacity One Management LLC but denies the remaining allegations in Paragraph 150. Defendant Lauren Smith lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 150.

151. Defendants admit that Lauren Smith received \$83,500 but deny the remaining allegations in Paragraph 151.

152. The Smith Trust and Geoffrey Smith admit that Jill Dunn, counsel for the Smith Trust, was paid for her legal services but lack knowledge to confirm the remaining allegations in Paragraph 152 absent a formal accounting. Defendant Lauren Smith lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 152.

153. The Smith Trust and Geoffrey Smith admit that David Wojeski, the former trustee of the Smith Trust was paid for his professional services but lack knowledge to confirm the remaining allegations in Paragraph 153 absent a formal accounting. Defendant Lauren Smith lacks knowledge or information sufficient to form a belief as to the allegations in Paragraph 153.

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

155. Defendants deny the allegations set forth in Paragraph 155.

156. Defendants deny the allegations set forth in Paragraph 156.

157. Defendants deny the allegations set forth in Paragraph 157.

158. Defendants deny the allegations set forth in Paragraph 158.

159. Defendants deny the allegations set forth in Paragraph 159.

160. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 160.

161. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 161.

162. Defendants deny the allegations set forth in Paragraph 162.

163. Defendants deny the allegations set forth in Paragraph 163.

164. Defendants deny the allegations set forth in Paragraph 164.

165. Defendants deny the allegations set forth in Paragraph 165.

166. Defendants deny the allegations set forth in Paragraph 166.

167. Defendants deny the allegations set forth in Paragraph 167.

168. Defendants deny the allegations set forth in Paragraph 168.

169. Defendants deny the allegations set forth in Paragraph 169.

170. Defendants deny the allegations set forth in Paragraph 170.

171. Defendants deny the allegations set forth in Paragraph 171.

172. Defendants deny the allegations set forth in Paragraph 172.

173. Defendants deny the allegations set forth in Paragraph 173.

174. Defendants deny the allegations set forth in Paragraph 174.

175. Defendants deny the allegations set forth in Paragraph 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. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “175” above as if fully set forth herein.

177. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 177.

178. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 178.

179. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 179.

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. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “179” above as if fully set forth herein.

181. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 181.

182. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 182.

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. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “182” above as if fully set forth herein.

184. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 184.

185. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 185.

186. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 186.

187. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 187.

188. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 188.

189. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 189.

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. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “189” above as if fully set forth herein.

191. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 191.

192. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 192.

193. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 193.

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

194. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “193” above as if fully set forth herein.

195. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 195.

196. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 196.

197. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 197.

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. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “197” above as if fully set forth herein.

199. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 199.

200. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 200.

201. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 201.

202. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 202.

SEVENTH CLAIM FOR RELIEF
(Relief Defendant/Intervenors)

203. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “202” above as if fully set forth herein.

204. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 205.

205. Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 205.

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

206. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “205” above as if fully set forth herein.

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

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

c) Defendants lack knowledge or information sufficient to form a belief as to the allegations in Paragraph 207(c).

208. Defendants deny the allegations set forth in Paragraph 208 as it relates to the Smith Trust and Lynn Smith and lack knowledge or information sufficient to form a belief as to the allegations concerning Nancy McGinn.

209. Defendants deny the allegations set forth in Paragraph 209.

210. (a) Defendants deny the allegations set forth in Paragraph 210(a).

(b) Defendants deny the allegations set forth in Paragraph 210(b).

(c) Defendants deny the allegations set forth in Paragraph 210 (c).

(d) Defendants deny the allegations set forth in Paragraph 210 (d).

211. The allegations contained in Paragraph 211 constitute legal arguments or conclusions to which no response is required. To the extent that allegations are made against the Defendants, to which a response is required, they are denied.

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

212. Defendants repeat and reiterate the responses contained in Paragraphs numbered "1" through "211" above as if fully set forth herein.

213. 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:**

214. Defendants repeat and reiterate the responses contained in Paragraphs numbered "1" through "213" above as if fully set forth herein.

215. 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:**

216. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “215” above as if fully set forth herein.

217. 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 Defendant/Intervenor is fully vested in the beneficiaries, Geoffrey and Lauren Smith.

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

218. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “217” above as if fully set forth herein.

219. 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:**

220. Defendants repeat and reiterate the responses contained in Paragraphs numbered “1” through “219” above as if fully set forth herein.

221. 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 Smith Trust and Defendants

Geoffrey R. Smith and Lauren T. Smith, individually and as beneficiaries of the Smith Trust demands trial by jury in this action of all issues so triable.

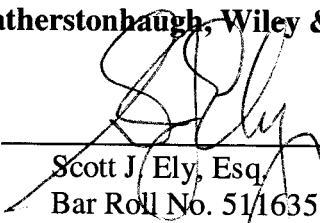
WHEREFORE, the Defendants demand judgment dismissing the Plaintiff's Second Amended Complaint.

DATED: July 29, 2011

Respectfully submitted,

Featherstonhaugh, Wiley & Clyne, LLP

By: _____


Scott J. Ely, Esq.
Bar Roll No. 511635

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