

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

**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, DAVID L. SMITH,
LYNN A. SMITH, DAVID M. WOJESKI, 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,**

**ANSWER TO SECOND
AMENDED COMPLAINT**
10 Civ. 457 (GLS/DRH)

Defendants,

**LYNN A. SMITH, and
NANCY MCGINN,**

Relief Defendants, and

**DAVID M. WOJESKI, Trustee of the
David L. and Lynn A. Smith Irrevocable
Trust U/A 8/04/04,**

Intervenor.

Defendant David L. Smith, by his attorneys, Dreyer Boyajian LLP, as and for an answer to the plaintiff's second amended complaint, herein alleges as follows:

1. Denies each and every allegation and/or statement contained in paragraphs 1, 2, 3, 4, 5, 6, 16, 17, 18, 19, 20, 21, 22, 41, 45, 46, 47, 48, 51, 52, 54, 56, 57, 58, 59, 63, 64, 66, 70, 72, 76, 83, 84, 85, 86, 87, 90, 91, 92, 96, 97, 98, 100, 102, 104, 105, 107, 110, 112, 113, 115, 118, 120, 131, 132, 133, 136, 138, 139, 143, 155, 156, 162, 163, 166, 167, 168, 170, 175, 178, 179, 181, 182, 184, 185, 186, 187, 188, 189, 191, 192, 193, 195, 196, 197, 200, 201, 202, 207, 208 and 209 of the Complaint and refers all questions of law to the court.

2. Admits the allegations contained in paragraphs 34, 35, 36, 37, 42, and 43 of the Complaint.

3. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations and/or statements contained in paragraphs 28, 37, 55, 56, 103, 106, 117, 121, 123, 140, 149, 150, 151, 153, 157, 158, 159, 160, 161, 164, 165, 171, 172, 173, 174, 204, 205, 210 and 211 of the Complaint, except deny all statements, suggestion, or inference of fraud, and refers all questions of law to the Court.

4. Denies every allegation and/or statement contained in paragraphs 44, 45, 53, 60, 61, 62, 65, 67, 69, 71, 73, 74, 75, 77, 78, 79, 80, 81, 82, 88, 89, 93, 94, 95, 99, 108, 109, 111, 114, 124, 125, 126, 134, 135, 137, 145, 146, 148, 152, of the Complaint and respectfully refers the court to the original documents and emails referenced therein, to the extent they exist.

5. Denies each and every allegation and/or statement contained in paragraph 7, 8, 9, 10, 11, 12, 13, 14, 15, and 154 of the Complaint as to the allegations of fraud and refers the Court to the Docket for accurate information regarding the procedural history of this case.

6. No response is required to paragraphs 23, 24, and 25 of the Complaint.

7. Neither admit nor deny the allegations set forth in paragraphs 26, 27, 177, 196, 199 and 200 of the Complaint, which state legal conclusions to which no responsive pleading is required, but to the extent said allegations are deemed factual, and denies each and every such allegations and refer questions of law to the Court.

8. Admits the allegations contained in paragraph 29 of the Complaint except deny Smith owns about 50% of MS & Co. and about 50% of MS Advisors, and affirms that David Smith is 66 years old.

9. Admits McGinn, Smith & Co., Inc. ("MS & Co.") is a registered broker-dealer and

New York corporation founded in 1981 by Smith and McGinn and has its principal place of business at 99 Pine Street, Albany, New York and denies all other allegations contained in paragraph 30 of the Complaint.

10. Admits the allegation in paragraph 31 that MS Advisors is a New York corporation with its principal place of business at 99 Pine Street, Albany, New York, but denies that 20% of that corporation is owned by MS Partners, and does not have knowledge or information sufficient to respond to the date MS Advisors was registered with the Commission, and denies all other allegations in that paragraph.

11. Admits allegations contained in paragraph 32 except denies knowledge and information sufficient to form a belief as to the truth of the allegation set forth as to the indenture trustee for the Funds and the trustee for all the Trusts created between 2006 and 2009.

12. Admits the allegations set forth in paragraph 38 as to the statement that McGinn and Smith founded MS & Co. in 1980 and the firm registered as a broker-dealer in 1981 and McGinn sold 40% of his interest in MS & Co. to Partner 3 but denies knowledge and information as to the year that sale took place. Admits McGinn became the chief executive officer of IASG but returned to MS & Co. in 2006 and denies all other allegations contained in paragraph 38 of the Complaint.

13. Denies the allegation set forth in paragraph 39 as to Smith responsible for the majority of the investment decisions for the Funds and does not have information and knowledge sufficient to respond to the allegation that among other functions, McGinn served as a signatory on behalf of various McGinn Smith Entities that received loans from the Funds, but admits all other allegations and/or statements contained in that paragraph.

14. Admits allegations and/or statements contained in paragraph 40 of the Complaint to

the extent that MS & Co. acted as the placement agent for debt offerings by the Four Funds and MS Capital served as the Trustee and Servicing Agent for each of the Four Funds. Denies all other allegations contained in paragraph 40 of the Complaint.

15. Lacks knowledge and information sufficient to form a belief as to the allegations contained in paragraphs 49, 101, and 119 of the Complaint and respectfully refers the Court to the original emails referenced therein to the extent such email exists. Defendant refers the Court to the document itself and denies all other accusations and characterizations.

16. Lacks information and knowledge sufficient to form a belief as to the allegation in paragraph 68 of the Complaint that MS & Co. acted as a placement agent for the Cruise Charter Venture Trust 08 (“CCV Trust”) between 2006 and 2009 but admits all other allegations and/or statements set forth therein.

17. Lacks knowledge and information sufficient to form a belief as to the allegation set forth in paragraph 116 of the Complaint that on October 14, 2002, the 105,000 shares of Charter One Stock were journaled out of the Stock Account and denies all other allegations and/ or statements therein.

18. Admits the allegation contained in paragraph 122 of the Complaint that a house in Vero Beach, Florida was transferred to L. Smith after being previously held in joint ownership. Deny as to the allegation it was without consideration and lacks knowledge and information as to all other allegations and statements set forth in paragraph 122 of the Complaint.

19. Admits the allegations and/or statements set forth in paragraph 127 of the Complaint as to Charter One publicly announced that it was being acquired in an all-cash deal by Citizens Financial Group, which paid \$44.50 per share, with the deal completed on August 31, 2004, but denies knowledge and information as to the date of May 4, 2004.

20. Admits the allegations and/ or statements contained in paragraphs 128 and 129 of the Complaint but deny knowledge and information as to the date of September 1, 2004.

21. Admits the allegation contained in paragraph 130 of the Complaint to the extent it is alleged that the funds were transferred directly from the Smith Trust to L. Smith but denies all other allegations and/or statements.

22. Admits the allegation contained in paragraph 141 of the Complaint to the extent it is alleged that Smith and L. Smith transferred title to a house in Vero Beach, Florida, which had been jointly held to L. Smith but lack knowledge and information as to the year 2009.

23. Admits the allegation contained in paragraph 142 of the Complaint as to Smith and L. Smith caused a joint checking account at a Bank of America to be transferred to L. Smith but lack knowledge and information as to the year 2009.

24. Defendant respectfully refers the Court to the Docket in response to the allegations contained in paragraphs 144, 147, and 154 of the Complaint.

25. Admits the allegation contained in paragraph 169 of the Complaint to the extent the funds were transferred directly from the Smith Trust to L. Smith but deny all other allegations and/or statements.

26. Repeat the above responses with respect to the allegations of paragraphs 176, 180, 183, 190, 194, 198, 203, and 206 of the Complaint as if fully set forth herein.

FIRST AFFIRMATIVE DEFENSE

The action and relief sought is in whole or in part barred by the applicable statute of limitations and/or the equitable doctrine of laches.

SECOND AFFIRMATIVE DEFENSE

The SEC does not have authority to bring claims of violations of the New York Debtor

and Creditor law.

THIRD AFFIRMATIVE DEFENSE

The SEC is barred from pursuing this action by the doctrine of equitable estoppel.

FOURTH AFFIRMATIVE DEFENSE

Due to the complexity of the case and lengthy period of time covered by the Complaint, Defendant cannot fully anticipate all affirmative defenses that may be applicable at this time and, accordingly, reserves the right to assert additional affirmative defenses if and to the extent such affirmative defenses are applicable.

DEMAND FOR A JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Defendant demands that his matter be tried before a jury.

WHEREFORE, Defendant demands judgment dismissing the Second Amended Complaint.

DATED: July 29, 2011

DREYER BOYAJIAN LLP

By: 

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