

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

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**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.*

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Defendant Timothy M. McGinn, by his attorney, E. STEWART JONES, PLLC, 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, 149, 150, 151, 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 refer all questions of law to the court.

2. 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.

3. Denies knowledge or information sufficient to form a belief as to the Commission's purposes and what the Commission seeks as contained in paragraphs 23, 24, and 25.

4. Denies knowledge or information sufficient to form a belief as to the validity of the legal conclusions stated, but with respect to any and all statements that may be considered to be actual allegations or accusations, denies the same as to paragraphs 26, 27, 177, 196, 199 and 200.

5. Denies paragraph "28" insofar as it alleges an "indirect" co-ownership as that term is undefined.

6. Denies knowledge or information sufficient to form a belief as to paragraph 29.

7. 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 deny all other allegations contained in paragraph 30 of the Complaint.

8. 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.

9. 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.

10. Denies knowledge or information sufficient to form a belief as to allegations contained in paragraphs 34, 35, and 36.

11. 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. Denies all other allegations contained in paragraph 38 of the Complaint.

12. Denies knowledge or information sufficient to form a belief as to the particulars contained in paragraph 39.

13. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations and/or statements contained in paragraphs 55, 56, 103, 106, 117, 121, 123, 140, 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 refer all questions of law to the Court.

14. 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, 153 of the Complaint and respectfully refers the court to the original documents and emails referenced therein, to the extent they exist.

15. 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. Deny all other allegations contained in paragraph 40 of the Complaint.

16. Admits the allegations contained in paragraphs 42 and 43.

17. 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.

18. Denies paragraph 50, denies information sufficient to form a belief as to paragraphs 51 and 52, and denies all paragraphs under the characterization "Additional Misrepresentations and Omissions", and specifically paragraphs 53 through 58, which are alleged to support the above characterization.

19. Denies all paragraphs under the Complaint heading on page 20 of the Complaint, "The PPMs Misled Investors as to the True Purpose of the Trusts", and specifically each paragraph thereunder, paragraphs 72, 73, 74, 75 and 76, which paragraphs are alleged to support the labeling description above recited.

20. Denies each paragraph under the label and description on page 21 of the Complaint, "Benchmark 09 Trust PPM Misrepresented How Proceeds Would Be Used", and more specifically denies paragraphs 77, 78, 79 and 80, which are alleged in support of that label.

21. Denies present information sufficient to form a belief as to the content of paragraph 101.

22. Denies the two paragraphs that are alleged in support of the Complaint label and description contained on page 26, "MS & Co. Did Not Disclose that the Proceeds Would Be Commingled", and specifically denies paragraphs 102 and 103 alleged in support of that characterization.

23. Denies knowledge and information sufficient to form a belief as to paragraphs 116, 117, 119 and 123.

24. Denies each and every paragraph contained in the Complaint under the characterization "Additional Fraudulent Transfers" on page 35 of the Complaint, and specifically denies paragraphs 139 through 143 set forth under that characterization.

25. Denies information sufficient to form a belief as to all paragraphs alleged under the Complaint characterization on page 36, "Fraudulent Transfers from the Smith Trust to G. Smith, L.T. Smith and L. Smith", and specifically paragraphs 144 through 175, which are alleged in support of the above characterization.

26. Denies paragraph 38 insofar as it alleges that McGinn and Smith have actively controlled virtually every aspect of the McGinn Smith Entities' operations.

27. Repeats the above responses with respect the allegations of paragraphs 176, 180, 183, 190, 194, 198, 203 and 206 of the Complaint as if fully in the length 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

**E. STEWART JONES, PLLC**

/s/ E. Stewart Jones, Jr.

**E. STEWART JONES, JR., ESQ.**

**Bar Roll No.: 103064**

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