

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,

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

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.

**TRUST'S MEMORANDUM OF LAW IN REPLY TO SEC'S OPPOSITION TO
MOTION SEEKING THE RELEASE OF CERTAIN TRUST ASSETS FOR
TRUST RELATED EXPENSES AND LEGAL FEES**

Featherstonhaugh, Wiley & Clyne, LLP
*Attorneys for Defendants/Intervenor Geoffrey
R. Smith, Trustee of the David L. and Lynn A.
Smith Irrevocable Trust U/A 8/04/04 and
Geoffrey R. Smith and Lauren T. Smith*
Albany, New York 12207
Tel. No.: (518) 436-0786

POINT I

THE TRUST'S REQUEST TO PAY FWC LEGAL FEES SHOULD NOT BE PRECLUDED BASED ON UNFOUNDED ALLEGATIONS OF MISCONDUCT BY THE ATTORNEYS AT FWC

The application for attorney fees is limited to legal services that were provided by Featherstonhaugh, Wiley & Clyne, LLP when the firm was first retained by the Trust on February 15, 2011 after the discovery of the private annuity agreement and after the resolution of the Securities and Exchange Commission's ("SEC") motion for reconsideration. Accordingly, this Court should disregard the SEC's attacks on the character and ethics of the attorneys at FWC and consider this application on its merits.

POINT II

THE LEGAL FEES SOUGHT BY THE TRUST TO PAY FWC HAVE BEEN LEGITIMATELY EARNED

The Trust has offered to submit its legal fees *in camera* to the Court so that it may determine whether FWC's legal fees are reasonable. The Trust objects to providing such invoices to the SEC since the entries on these bills are privileged.

POINT III

THE TRUST'S REQUEST TO PAY ITS OWN EXPENSES SHOULD NOT BE PRECLUDED BASED ON UNFOUNDED ALLEGATIONS OF MISCONDUCT BY THE PRESENT TRUSTEE

The SEC's attacks on the current Trustee, Geoffrey Smith has no bearing on the merits of this application. First, they portray Geoffrey Smith as a liar for having submitted a false statement as to when he believed he first learned of the discovery of the annuity agreement. While Geoffrey Smith did admit in his deposition that this was a mistaken misstatement of fact, such misstatement has absolutely no bearing on the issue

of fraud on his part concerning the Trust's purchase of the Sacandaga Lake property, since he was neither the Trustee at the time nor was he a party to the real estate transaction.

The SEC further attempts to discredit Geoffrey Smith based on the timing of when he received a distribution for his start up company and when the Trust actually entered into term sheet with Capacity One Management. Whether this is true or not, it is unclear what relevance this has to the Trustee's request to be able to fulfill his obligations as a Trustee to administer and pay the legitimate expenses of the Trust.

The SEC's reference to these misstatements and certain alleged misstatements of Lynn Smith are not relevant to this application and fails to support the government's untenable position that the expenses of the Trust should not be paid.

POINT IV

THE TRUST REMAINS ITS OWN LEGAL ENTITY WITH OBLIGATIONS TO PAY ITS OWN EXPENSES

There currently exists a valid Trust Declaration that maintains its legal independence from the grantors who originally funded the Trust. The Private Annuity Agreement only gives David Smith a future contingent interest in annuity payments beginning in the year 2015. No Court to date has invalidated either the Trust entity or the existing annuity contract and therefore David Smith, is not, as a matter of law the current beneficial owner. Therefore, this Court need not consider whether David Smith has adequately demonstrated that he is not able to pay counsel fees using other assets beyond the assets of the Trust. Indeed that obligation to pay the expenses of the Trust and to

reimburse expenses paid on behalf of the Trust rests entirely with the Trustee utilizing assets from the Trust for such purposes.

POINT V

**THE RECEIVER SHOULD NOT BE GRANTED
SOLE AUTHORITY TO PAY EXPENSES AND
MANAGE THE TRUST'S ASSETS**

The SEC opposes the Trustee's request that he be provided with limited authority to pay certain expenses of the Trust and to manage the investments. Instead, the SEC has recommended that the Receiver take over these responsibilities. The Court should reject this suggestion for the following reasons.

First, the original temporary restraining order authorized the SEC to appoint a receiver to marshal and manage the assets of the McGinn & Smith entities not the assets of an unrelated entity, such as the Trust.

Second, delegating the obligations of the Trustee to the Receiver violates the terms of the Declaration of Trust which governs the Trust's administration.

Third, the Receiver is inherently conflicted in taking over the Trustee's obligations since his loyalty is to the investors and not to the beneficiaries of the Trust.

In seeking to delegate the duties of the Trustee to the Receiver, the SEC ignores the fact that the Trust remains a separate legal entity and that there are beneficiaries who continue to have a vested interest in the Trust. It simply would not be appropriate or legal to place the Receiver in such a position where his interests potentially contradict the interests of those beneficiaries. Accordingly, the Court should reject the SEC's proposal to have the Receiver take over the administration of the Trust.

CONCLUSION

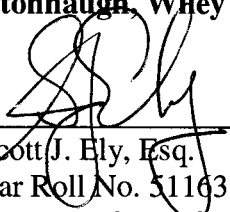
For the reasons set forth herein, the Trust's application to release limited funds from the present asset freeze to pay certain expenses of the Trust and to provide the Trustee with limited authority to administer the Trust assets should be granted in all respects.

DATED: March 2, 2012

Respectfully submitted,

Featherstonhaugh, Wiley & Clyne, LLP

By: _____


Scott J. Ely, Esq.
Bar Roll No. 511635
*Attorneys for Defendants/Intervenor
Geoffrey R. Smith, Trustee of the
David L. and Lynn A. Smith
Irrevocable Trust U/A 8/04/04
Geoffrey R. Smith and Lauren T.
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