

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.

STATEMENT OF MATERIAL FACTS

Relief Defendant/Defendant, Lynn A. Smith, by and through her attorneys, Featherstonhaugh, Wiley & Clyne, LLP, submit the following Statement of Material Facts of which Relief Defendant/Defendant contends there is no genuine issue, in accordance with Local Rule 7.1(a)(3). For a more complete statement of procedural posture of this action the Relief Defendant refers the Court to the Affidavit of James D. Featherstonhaugh filed in support of this

motion. Pursuant to Northern District Local Rule 7.1(a)(3), the following facts are either undisputed or described in the light most favorable to the nonmoving party. Costello v. City of Burlington, 632 F.3d 41, 45 (2d Cir. 2011).

1. The individual stock account in the name of Lynn A. Smith, held at RMR Wealth Management, account number RMR-040916, was initially created in 1969 with a \$60,000 initial investment that came from an inheritance from her father's estate. Dkt. Nos. 86 at 7, 23 at 4, 69-1 at 4.

2. Lynn Smith's individual brokerage account has remained at all times, in her individual name. Dkt. Nos. 86, 23 at 4, 69-1 at 4.

3. The Plaintiff's theory of allegedly fraudulent activity began in 2003. See, Dkt. No. 334 at 2 (quoting "from at least 2003 through April 2010, McGinn and Smith used MS & Co., a registered broker-dealer and investment adviser, MS Advisors, an investment adviser, and MS Capital, as well as dozens of affiliated entities they own or control (collectively, "the McGinn Smith Entities"), to raise over \$136 million in more than 20 unregistered debt offerings. The debt offerings, including the Four Funds and numerous trust entities (the "Trusts"), have been sold to more than 900 investors").

4. In November of 2002, Lynn Smith's stock account was valued at \$3,617,797.00. On March 31, 2010 Lynn Smith's stock account was valued at \$2,118,511.06. See, Lynn Smith brokerage statement from November 2002, and March 2010.

5. Lynn Smith has been married to David Smith since 1968. Dkt. No. 23.

6. David Smith has been the broker of record of Lynn Smith's individual stock account since the mid-1970's until he surrendered his securities licenses due to the related criminal investigation. Dkt. Nos. 86 at 34, Dkt. No. 23.

7. David Smith, as the broker of record for Lynn Smith's individual stock account, had discretionary authority over the account at all times. Dkt. Nos. 87-89. See also, Preliminary Injunction Hearing Transcript at page 327 quoting:

LYNN SMITH – DIRECT- STOELTING

- Q: And did Mr. Smith have authority to buy or sell securities in this stock account without getting your approval first?
- A: Without getting my approval?
- Q: Yes.
- A: Did he have a discretionary – as he – when he was a stock broker? I pretty much always gave approval.
- Q: Okay. But my question was whether he could have the authority to buy or sell securities on his own without asking you first.
- A: He could.
- Q: So I think you referred to that as discretionary authority?
- A: I believe a lot of investors have that with their brokers. And he was my husband.
- Q: I'm just trying to establish that he did have discretionary authority.
- A: Yes. Yes.
- Q: And could Mr. – did Mr. Smith have the authority to take – to make cash – to take cash out of the account without your approval?
- A: No.

8. On June 5, 2009 Lynn Smith made a \$366,000 bridge loan to TDMM Cable Funding. Dkt. No. 23, ¶27 (quoting “two payments, one for \$160,800 and one for \$175,00 were made to my account from TDMM Cable in repayment of a loan in the amount of \$366,000 which I made to TDMM cable from my stock account on 6/5/04.” [*sic*]).

9. The bridge loan was repaid to Lynn Smith in two installments; one for \$160,800 and one for \$175,000 from TDMM Cable in repayment of a loan in the amount of \$366,000 which was made to TDMM Cable from Lynn Smith's stock account on June 5, 2004. Id.

10. A June 5, 2009 promissory note in the amount of \$366,000 reflects a loan Lynn Smith made to TDMM Cable Funding. See, June 5, 2009 Promissory Note payable to Lynn A. Smith signed by Timothy McGinn.

11. The TDMM Cable Jr. Trust 09 Preferred Placement Memorandum states:

TDM will use the proceeds of the loan together with funds provided by TDMM Cable Sr. Trust 09 to purchase the operating assets and customer accounts of Broadband Solutions LLC and HipNET LLC and to pay certain pre-closing expenses estimated to be approximately \$400,000.

Dkt. Nos. 4-19 at 8-9.

12. Lynn Smith's brokerage account statement from April 2006 indicates a check received for \$4,500 on April 13, 2006. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 431, lines 10-17 (quoting "A: Okay. Item two is a check received on April 13, 2006. I'm looking now at the statement, the first document which is funds received into Lynn Smith's accounts. That shows a check received on that date for 4500...").

13. Lynn Smith's brokerage account statement from October 4, 2006 also indicates a similar deposit for \$85,000. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt.no.87-89, p.431, lines 18-24 (quoting "...[t]he next item is an item on October 4th, 2006, in the amount of \$85,000. That we were able to find because you provided me with the copy of a check from Tim McGinn that indicated that it was a partial repayment of a loan that had been made...").

14. On October 15, 2004 Tim McGinn signed a promissory note valued at \$970,000 which was addressed to Lynn A. Smith. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 432, lines 17-21 (quoting "A: Yes. That is a promissory note dated October 15th, 2004, for the \$970,000 that Mr. McGinn borrowed from Lynn Smith...").

15. The October 2004 statement to Lynn Smith's brokerage account indicates a deposit equal to the amount of \$970,000. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 432, lines 21-24 (quoting "Q: Did you cross check the date of the check and the amount against the Lynn Smith account statement? A: Yes, I did.).

16. On May 14, 2007 a deposit of \$100,000 was made into Lynn Smith's brokerage account. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 433, lines 9-13 (quoting "...I believe that it probably was attached in the second page of Exhibit 15G. Shows the check, made payable to the amount of a hundred thousand dollars, and the memo says loan.").

17. The May 14, 2007 deposit into Lynn Smith's brokerage account was the partial repayment of a promissory note signed by Tim McGinn and the memo section states "loan". Id.

18. On November 29, 2007 Lynn Smith made a \$375,000 bridge loan from her brokerage account to McGinn Smith Funding. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 433, lines 21-25 (quoting "...This relates to repayment of a bridge loan in the amount of 375,000 that was made by Miss Smith on November 29th, 2007, to McGinn Smith Funding").

19. On December 21, 2007 Lynn Smith received a deposit from a wire transfer in the amount of \$380,000 into her brokerage account. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 433, line 10- 434, line 18 (quoting "...Next item is item seven. It's dated 12/20/2007. Also says transaction. Check received in the amount of \$300,000. Okay...").

20. This transaction was complicated by the fact that the repayment of the bridge loan originally went to David Smith's account at M&T Bank on December 12, 2007 in error. After David Smith discovered the error, he transferred \$380,000 to Lynn Smith's account on December 21, 2007. Id.

21. On February 4, 2009 Lynn Smith's brokerage account received a deposit of \$38,430.46. See, John D'Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at

435, lines 18-20 (quoting “[i]t was funds that, no question, belonged to David Smith. He simply deposited this \$38,000 into his wife’s account”).

22. On February 20, 2009 a deposit from David Smith in the amount of \$326,304.11 was made into Lynn Smith’s brokerage account. See, John D’Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89 at 436, lines 19-21 (quoting “[t]he next item is what we refer to as item 11. It’s a deposit on February 20th, 2009. It is from David Smith in the amount of \$326,304.11”).

23. As it relates to the deposit into Lynn Smith’s brokerage account on March 18, 2010 in the amount of \$100,000, it was made as a repayment of a loan made to TDMM Benchmark on March 16, 2010. See, John D’Aleo Preliminary Injunction hearing testimony at Dkt. Nos. 87-89, at 438, lines 24-26 (quoting “A. Yes. We have item 13, which was a deposit on March 18, 2010, in the amount of \$100,000.”).

Dated: July 8, 2014

Featherstonhaugh, Wiley & Clyne, LLP

By: s/James D. Featherstonhaugh
James D. Featherstonhaugh
Bar Roll No. 101616
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
426 8th Avenue
Troy, New York 12182
nemcginn@yahoo.com

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

James D. Linnan
Linnan & Fallon
*Attorneys for the David L. and Lynn A. Smith
Irrevocable Trust, Geoffrey Smith and
Lauren T. Smith*
61 Columbia Street
Albany, NY 12210
jdlinnan@linnan-fallon.com