

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, 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 Defendant, and

GEOFFREY R. SMITH, Trustee of the David L.
and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenor.

**AFFIDAVIT OF JAMES D. LINNAN IN OPPOSITION TO THE PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

STATE OF NEW YORK)
 ss.:
COUNTY OF ALBANY)

JAMES D. LINNAN, being duly sworn, deposes and says:

1. That I am the attorney for the defendant, Geoffrey R. Smith, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, and its beneficiaries, Geoffrey R. Smith and Lauren T. Smith, (hereinafter collectively "Trust).

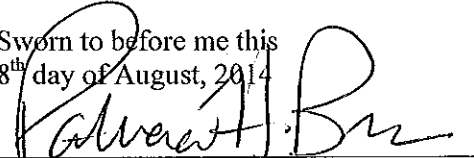
2. Pending simultaneous with the instant motion, is a motion by the defendant, Trust, and its beneficiaries, for summary judgment. Appended to the defendant, Trust's motion is Dkt 691, which is the Report of the defendant, Trust's expert in the area of Estates and Trusts, as regulated and interpreted by the Estates, Powers and Trusts Law of the State of New York. The defendant, Trust's expert is David L. Evans.

3. Attached hereto and marked as Exhibit "A" is an Affidavit from David L. Evans verifying, under oath, that the contents of his Report are true, accurate and given under oath so as to be evidence in admissible form to be considered by the Court in the instant motion and in the defendant, Trust's, now pending summary judgment motion.

4. The defendant, Trust, in an effort to eliminate unnecessary redundancy, respectfully refers the Court to the Memorandum of Law and Argument, Dkt 704-4 @ 1-16, submitted by the Trust in its application for summary judgment and incorporates the legal arguments contained therein, as opposition to the instant motion by plaintiff for summary judgment, as if fully set forth herein.

Dated: Albany, New York
August 8, 2014

Sworn to before me this
8th day of August, 2014


NOTARY PUBLIC

PATRICIA H. BROWN
Notary Public, State of New York
No. 01BR6068215
Qualified in Albany County
Commission Expires Dec. 31, 2011


JAMES D. LINNAN Bar Roll# 102058)

Linnan & Fallon, LLP
Attorneys for Geoffrey R. Smith,
Trustee of the David L. and Lynn A. Smith
Irrevocable Trust U/A 8/04/04, Geoffrey R. Smith and
Lauren A. Smith
61 Columbia Street
Albany, N.Y. 12210
518-449-5400
jdlinnan@linnan-fallon.com
www.linnan-fallon.com

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

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McGINN, SMITH & CO., INC.,
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TIMOTHY M. McGINN, 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 Defendant, and

GEOFFREY R. SMITH, Trustee of the David L.
and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenor.

**AFFIDAVIT OF DAVID L. EVANS IN SUPPORT OF 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'S MOTION FOR SUMMARY
JUDGMENT**

STATE OF NEW YORK)

ss.:

COUNTY OF ALBANY)

DAVID L. EVANS, being duly sworn, deposes and says:

1. That I am an attorney, admitted to practice in the State of New York. On September 2, 2010 I authored an expert opinion regarding the David L. Smith and Lynn A. Smith Irrevocable Trust U/A dated August 4, 2004 concerning the property rights created by the Trust instrument, property rights held by the beneficiaries of the Trust and the duties and responsibility of the trustee, together with the impact and consequences for certain investment activities undertaken by the trustee.

2. Contained the report at page 2 is a list of my qualifications to give these opinions. In addition, appended to the report as Exhibit "A" is a copy of my curriculum vitae.

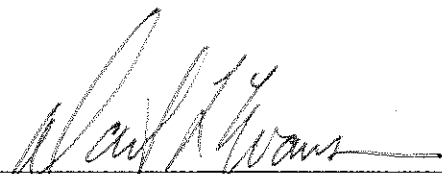
3. Appended to the report at Exhibit "B" is a list of the documents that I reviewed in the preparation of my report. Appended as Exhibit "C" is a copy of the Declaration of Trust which is the document that established the David L. and Lynn A. Smith Irrevocable Trust U/A dated August 4, 2004, which is the subject of my report. Attached as Exhibit "D" is a copy of an alleged private annuity contract between David L. Smith and Lynn A. Smith as transferors and the David L. and Lynn A. Smith Irrevocable Trust U/A August 31, 2004 transferee.

4. I am advised that my report together with its appended exhibits was filed with the Federal District Court for the Northern District of New York in the above captioned matter under docket number 691.

5. All of the statements made by me and contained in the report are true and accurate.

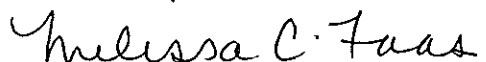
6. All of the opinions proffered by me in the report are true and accurate opinions based upon my knowledge of the law and my review of the documents enumerated in the exhibit set forth above.

7. By the execution of this affidavit, I affirm the truth of the statements made by me and the opinions proffered by me in my report and incorporate those statements and opinions into this affidavit as if more fully set forth herein.



DAVID L. EVANS, ESQ.

Sworn to before me this
18 day of July, 2014.



Notary Public

MELISSA C. FAAS
Notary Public, State of New York
No. 01FA4921707
Qualified in Rensselaer County
Commission Expires Feb. 22, 2018

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
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McGINN, SMITH & CO., INC.,
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TIMOTHY M. MCGINN, 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.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT/INTERVENOR GEOFFREY R.
SMITH, TRUSTEE OF THE DAVID L. AND LYNN A. SMITH IRREVOCABLE TRUST U/A
8/04/04, DEFENDANT GEOFFREY R. SMITH AND DEFENDANT, LAUREN T. SMITH'S
OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Submitted by:

Linnan & Fallon, LLP
James D. Linnan, Esq.
Bar Roll No. 102058
*Attorneys for Defendant/Intervenor
Geoffrey R. Smith, Trustee of the David
L. and Lynn A. Smith Irrevocable Trust
U/A 8/04/04, Defendant Geoffrey R.
Smith and Defendant Lauren T. Smith*
61 Columbia Street, Suite 300
Albany, NY 12210

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PRELIMINARY STATEMENT

Geoffrey R. Smith, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (hereinafter “Trust”) and its beneficiaries, Geoffrey R. Smith and Lauren T. Smith, were brought into this action on a Second Amended Complaint alleging the singular cause of action of a violation of the New York State Debtor Creditor Law, Section 276. The pleadings, and the discovery provided in the instant action, are consistent with a claim by the SEC that the transfer of funds to the Trust, and the distribution of funds from the Trust, were undertaken in violation of the New York State Debtor Creditor Law and were, in fact, fraudulent conveyances as that term is defined in New York Law.

The plaintiff now seeks summary judgment on multiple theories, in addition to the theories pled in their complaint. The defendant, Trust, and its beneficiaries, were brought into the action by a single cause of action.

The SEC claims that acts, or omissions, on behalf of the defendant, David L. Smith, and additional acts and/or omissions by Lynn A. Smith, the Creators of the Trust, give the plaintiff a claim against the Trust assets. It has been established, and is now conceded by the plaintiff, that the Trust was a legally established Trust existing pursuant to the laws of the State of New York. It has, likewise, been established, and is conceded, that the assets funding the Trust were “clean” assets, not associated with any misdeeds of David L. Smith. It has further been established that the Trust, following its establishment in 2004, never received any additional funds from David L. or Lynn A. Smith. The Trust, and its beneficiaries, take no position as to the validity of the claims against David L. Smith and Lynn A. Smith. The defendant, Trust, and its beneficiaries, rely on the legal principle that the actions of their parents are irrelevant as a matter of law.

The Trust, as a separate legal entity, cannot and has not been invaded by the Creators, David L. Smith and Lynn A. Smith. The Trust is a Spendthrift Trust, as that term is defined by New York Law and is not subject to assignment, pledge, hypothecation, mortgage, attachment, execution, judgment, garnishment, anticipation or other disposition or impairment brought on by the Creators or their creditors.

Pending simultaneously with this motion, is a motion brought on by the Trust for summary judgment in favor of the Trust releasing the Trust from its Court imposed restrictions and dismissing the claims as against the Trust assets.

ARGUMENT

THE COURT SHOULD DENY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT/INTERVENOR GEOFFREY R. SMITH, TRUSTEE OF THE DAVID L. AND LYNN A. SMITH IRREVOCABLE TRUST U/A 8/04/04, DEFENDANT GEOFFREY R. SMITH AND DEFENDANT LAUREN T. SMITH BECAUSE THE EVIDENCE BEFORE THE COURT HAS CREATED GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER DAVID L. AND LYNN A. SMITH HID THE ANNUITY AGREEMENT FROM THE COURT TO PRESERVE THE SMITH TRUST'S ASSETS FOR THEMSELVES; THE SMITH TRUST BENEFITTED DAVID L. AND LYNN A. SMITH NOT THE PURPORTED BENEFICIARIES; AND, DAVID L. SMITH REPORTED THE SMITH TRUST AS HIS ASSET IN FINANCIAL DOCUMENTS.

The plaintiff's theory of recovery as against the Trust, and its beneficiaries, is based upon the premise that the sins of the father should be visited upon his children. In preliminary proceedings, it was established, and the plaintiff has now conceded, that the Trust was created with "clean" money that was not derived from any alleged misdoings of David L. Smith or any of his companies. In addition, it has been established and conceded that the Trust was neither created from, nor in possession of, ill gotten funds. Dkt No. 86 at 38-39; Ex. 345 (Decision of Magistrate Judge Homer P. 37-38). The Trust was validly created, under New York law, at a time when David L. Smith and Lynn A. Smith had a verifiable joint net worth in excess of \$13 million dollars with over \$10 million being liquid assets. App. Ex. 206. As a validly established Trust in the State of New York, this Court is constrained to interpret and control the operation of that Trust, and the distribution of the proceeds from that Trust, in accordance with the terms of the Trust Documents and in compliance with the Estates, Powers and Trusts Law of the State of New York.

Federal Rule of Civil Procedure 56(c) mandates summary judgment against a party who fails to establish an element essential to that party's case, and on which that party will bear the

burden of proof at trial. In such a situation, there can be “no genuine issue as to any material fact,” due to the failure of proof concerning an essential element of the nonmoving party’s case which renders all other facts immaterial. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (U.S. 1986). Moreover, the summary judgment analysis is not altered by the fact that the plaintiff in this case is the Securities and Exchange Commission. See, SEC v. Research Automation Corp., 585 F.2d 31, 33-34 (2d Cir. 1978). Notably, one of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims. Celotex, at 323-324.

A. THE SMITH TRUST ASSETS SHOULD NOT BE APPLIED TO SATISFY THE DISGORGEMENT ORDER AGAINST DAVID L. SMITH.

The plaintiff argues, at Section C of their Memorandum of Law, that David L. and Lynn A. Smith have a contractual right to annuity payments from the Trust and that the annuity rights of David L. and Lynn A. Smith should be applied to payments for disgorgement of assets owned by David L. Smith.

The defendant, Trust, was brought into the instant action solely and exclusively on a cause of action based upon the New York State Debtor Creditor Law Section 276 on a fraudulent conveyance theory. By the plaintiff’s own admission, (Dkt. 708 at 28, footnote 4) the plaintiff’s theory argued at Section C of their Memorandum would render moot the SEC’s fraudulent conveyance claim against the Trust.

The plaintiff now wishes to advance a theory to the Court to request summary judgment on a legal theory not heretofore plead by the plaintiff in this action.

As more fully set forth in defendant, Trust’s Memorandum (Dkt. 704 at 4) submitted in support of the Trust’s motion for summary judgment pending simultaneously before this Court, the validly established Trust was established for the benefit of the adult children of David L.

Smith and Lynn A. Smith. App. Ex. 345 (Decision of Magistrate Judge Homer, P. 3, 11); Dkt. 691 at 3 and Dkt. 704, Attachment #5, Exhibit "C"; App. Ex. 252 (Deposition Tr. Lynn Smith 23:17-24; 39:16-25; 40:2); App. Ex. 253 (Deposition Tr. Lynn Smith 42:10-13; 49:3-7); App. Ex. 248 (Deposition Tr. G. Smith 109:14-19; 114:5-9; 120:6-8); App. Ex. 249 (Deposition Tr. Geoffrey Smith 218:7-11); App. Ex. 256 (Deposition Tr. L. Smith 44:2-4; 45:20-23; 71:5-10).

The Trust was established as a Spendthrift Trust and claims by the creditors of David L. and Lynn A. Smith are without merit and must be defeated. The Private Annuity Agreement states in pertinent part at paragraph "5":

"It is an express term and condition of this Agreement that the rights of, income or amounts payable hereunder to the Transferors shall not be subject to assign, pledge, hypothecation, mortgage, pledge, attachment, execution, judgment, garnishment, anticipation or other disposition or impairment." (Dkt. 704 at 4 Paragraph 13-14; EPTL Section 7-1.5(a)(1); 7-3.1; and CPLR Section 5205).

The Trust documents and the Estates, Powers and Trusts Law authorize the Trustee, in the Trustee's sole discretion, to make distributions to the beneficiaries of the Trust (Geoffrey R. Smith and Lauren T. Smith) without the interference of any outside entity, including the Court. Id.; Dkt. 691 at 4 Paragraph 6. In addition, pursuant to the Trust documents and the EPTL interpretation of those documents, the Trustee has an absolute right to terminate the Trust and distribute the principle, together with accumulated interest, to the beneficiaries, without regard to the effect upon David L. Smith, Lynn A. Smith or their alleged creditors. Dkt. 691 at 3 Paragraph 9. The Private Annuity Agreement states in part at paragraph "C":

"although the Transferors and the Transferee are aware and acknowledge that there are no guarantees that the annuity obligation can be met."

The Trust, by its terms and the purported Annuity Agreement executed by the parties, provides that the creators, David L. Smith and Lynn A. Smith, have the absolute right, to divide the future annuity payments so that one-half of the payment is paid to David L. Smith and one-

half is paid to Lynn A. Smith. The Private Annuity Agreement states in pertinent part at paragraph "4":

"If the Transferors request to sever the joint nature of the annuity provided by this Agreement, the Transferee, in its discretion, shall create two separate annuities, one for each Transferor payable to each Transferor until the death of such Transferor."

For the reasons set forth hereafter, the annuity rights of David L. Smith are defeated by, and subject to, the absolute right of the Trustee to terminate the Trust. The Trustee's right to distribute proceeds from the Trust to the beneficiaries defeats any obligations to David L. Smith or Lynn A. Smith. However, in the alternative, the Disgorgement Order of David L. Smith is entitled to, at an absolute maximum, one-half of the annuity payments.

B. THE ALLEGED HIDING OF THE ANNUITY AGREEMENT FROM THE COURT IS IRRELEVANT TO THE RIGHTS OF THE TRUST AND ITS BENEFICIARIES.

In the instant action, the validly established Trust was established for the benefit of two named beneficiaries who have absolutely no connection with or involvement in, the affairs of David L. Smith and/or Lynn A. Smith or the administration of the Trust until such time as Geoffrey R. Smith was named Trustee on January 28, 2011. The plaintiffs do not allege, and the facts do not support, that Geoffrey R. Smith and/or Lauren T. Smith engaged in any misdeeds, any fraud or any other activities which would render their personal assets subject to the claims of the plaintiff herein.

The plaintiff argues that the alleged misdeeds of Lynn A. Smith and David L. Smith in failing to disclose the Annuity Agreement, prior to its disclosure by the Trust's former attorney should be utilized as a reason to punish the Trust and seize the Trust assets.

The alleged actions of Lynn A. Smith and David L. Smith are irrelevant to the rights of the Trust, and its beneficiaries.

The Trust, and its beneficiaries, do not admit, nor do they deny, any allegations made by the plaintiff as against David L. Smith or Lynn A. Smith. The Trust, and its beneficiaries, are not in the position to have actual knowledge of such activities. The Trust, and its beneficiaries, are not subject to any sanctions for the actions of David L. Smith and/or Lynn A. Smith. In brief, the actions alleged by the plaintiff as against David L. Smith and/or Lynn A. Smith are irrelevant to the rights of the Trust and the beneficiaries of that validly established Trust.

C. THE SMITH TRUST WAS ESTABLISHED FOR THE BENEFIT OF THE BENEFICIARIES AND HAS NOT BENEFITTED DAVID L. SMITH OR LYNN A. SMITH.

The plaintiff claims that the previous proceedings had in this action have established that David L. Smith had control over and, therefore, ownership of the Trust and its assets. The plaintiff has improperly broadened the scope of the Magistrate Court and the Second Circuit Appellate Court's decisions on the narrow issue of whether or not the Trust assets should remain frozen pending a final resolution of many questions of fact in the underlying action. Importantly, Rule 54(b) of the Federal Rules of Civil Procedure states that prior to entry of a final judgment, an interlocutory order or other form of decision is subject to revision at any time before entry of judgment adjudicating all claims and the rights and liabilities of all parties. Additionally, the law of the case doctrine relied upon by plaintiff is a discretionary doctrine that "does not constitute a limitation on the court's power." Mayer v. Cornell University, Inc. 909 F.Supp. 81 at 83 N.D.N.Y. 1995), *quoting* Childress v. Taylor, 798 F.Supp. 981, 993 (S.D.N.Y. 1992). A court may reconsider its own prior rulings "when those previous decisions were substantially erroneous or when reconsideration is necessary to avoid injustice." Id., *quoting* Scottish Air, 152 F.R.D. at 25. Again, however, the previous rulings did not find that the Smith Family Trust was a beneficial asset of David Smith. It is noteworthy that Magistrate Hummel, in his Decision on the

defendant, Trust's motion for permission to modify the Trust in accordance with the Trust documents, found that there were outstanding questions of fact relative to the ultimate ownership of the Trust, which could only be determined at trial and that the defendant, Trust's motion was premature. Magistrate Hummel's Decision states "In the event that the Trust is not deemed a beneficial asset of David L. Smith, the monies will be returned to the Smith children, as well as control of the Trust." Magistrate Hummel's Decision clearly recognizes the fact that the previous proceedings before Magistrate Homer did not, as a matter of law, establish the law of the case. Dkt. 667 Paragraph 13.

The plaintiff relies upon the holdings in the case of In Re Vebeliunas 332 F. 3rd 85 (2 D Cir. 2003). First, it is noteworthy, that this is the only case cited by the SEC in their Memorandum of Law relative to their motion regarding the Trust and its beneficiaries. Secondly, the plaintiff's reliance upon this case is misplaced at best. In the In Re Vebeliunas case, Vanda Vebeliunas created an irrevocable trust was the sole trustee and her husband, the debtor was named as a beneficiary who was eligible to receive "20% of all of the distributions from the Corpus of the Trust." Id. at 88. Litas Investing Company, Inc. ("Litas"), of which debtor was an insider, owned a parcel of property known as Lattingtown Estate. Litas transferred the title to Lattingtown Estate to the Vanda Irrevocable Trust in exchange for Vanda Vebeliunas' inheritance. Lattingtown Estate contained a main house, cottage and swimming pool where the debtor and his wife lived without paying rent to the Trust. Debtor subsequently obtained two personal loans in the combined amount of \$1,700,000.00 by fraudulently claiming ownership of Lattingtown Estate and pledging the property as collateral for the loans. When debtor defaulted on the loans and declared bankruptcy the two banks attempted to pierce the Trust veil and acquire Lattingtown Estate. The Court found that while debtor might have

claimed to own Lattingtown Estate, it was actually his wife, Vanda, who “was the equitable owner of both the Trust and Lattingtown Estate.” Id. at 92. The Vebeliunas Court also noted that there was no evidence that the transfer of Lattingtown Estate to the Trust was part of a fraudulent conveyance or that the Trust was created to conceal assets. Id. Finally, the Court found that debtor was not the equitable owner of the Trust despite the fact that he may have benefited from the Trust by living at the Trust property without paying rent and taking deductions on he and his wife’s income taxes for real estate taxes relating to Lattingtown Estate. Id. The Court reasoned that although debtor benefited from the Trust, these benefits “flowed jointly to him and his wife” and did not confer “control of the Trust or transfer . . . ownership in Lattington Estate to [debtor].” Id.

In the instant action, it is undisputed that the Smith Family Trust is a validly created trust funded by legitimate funds of Lynn Smith which she inherited from her father, not from ill gotten gains. Neither David L. Smith nor Lynn A. Smith has received any benefit from the Trust to this day. Again, as noted in Judge Homer’s Decision, the only distributions made from the Trust were made to Trust beneficiaries. The distributions, of any nature, to the beneficiaries were fully authorized by the Trust document and by the Estates, Powers and Trusts Law. Geoffrey R. Smith, on one occasion, obtained a distribution of funds that were eventually utilized to pay income tax then due and owing by the Creators, David L. Smith and Lynn A. Smith. Again, as found by Judge Homer, this distribution was made from the Trust to a beneficiary, Geoffrey R. Smith, which was a lawful distribution. In addition, as also noted in Judge Homer’s Decision, this distribution was made at a time when David L. Smith had previously paid taxes due from the Trust and, in fact, the Trust owed David L. Smith money which he had previously advanced for the payment of Trust taxes. A review of the Record, in

total, clearly demonstrates that neither David L. Smith nor Lynn A. Smith received any benefit financially, or otherwise, from the Trust. Assuming arguendo that this payment of taxes can be considered benefiting from the Trust, any benefit would have flowed jointly to David Smith and Lynn Smith and, as in the Vebeliunas case, does not transfer ownership or control of the Trust to David Smith. In addition, including the Trust corpus on a financial statement does not confer ownership or control over the Trust anymore than pledging Lattingtown Estate as security for a loan transferred ownership or control of the property to debtor, in In Re Vebeliunas.

D. DAVID L. AND LYNN A. SMITH ALLEGED REPORTING OF THE SMITH TRUST AS THEIR ASSET IN FINANCIAL DOCUMENTS IS IRRELEVANT.

It is submitted to the Court that it is unclear why David L. Smith included the Trust document as a listed asset in his handwritten 2007 personal financial statement. App. Ex. 209. The Smith Trust is not an individually enumerated asset on any other David L. Smith financial statement. However, as discussed above, this does not confer ownership or control of the trust.

The actions of David L. Smith and/or Lynn A. Smith, as more fully set forth above, are irrelevant to the Trust. Assuming, arguendo, that David L. Smith falsely reported the ownership of the Smith Trust on his financial statement for the purpose of obtaining credit to borrow funds from some third party source. Even if that is true, it is irrelevant to the instant action. As previously set forth, the Trust is a separate legal entity having its own legal existence, separate and apart from David L. Smith. The Trustee did not engage in any activity that financially benefitted David L. Smith and did not consent to the use of Trust assets as collateral for any such loans. In addition, as more fully set forth herein, the Trust is a Spendthrift Trust and is not subject to the claims of the creditors of the grantors herein.

The Trust documents, including the purported Annuity Agreement, establishes an absolute right in the parties to exercise the option to split the annuity of payments to provide for individual payments to Lynn A. Smith and David L. Smith, as the annuity payments become due. The Private Annuity Agreement states in pertinent part at paragraph “4”:

“if the Transferors request to sever the joint nature of the annuity provided by this Agreement, the Transferee, in its discretion, shall create two separate annuities, one for each Transferor payable to each Transferor until the death of such Transferor.”

The defendant, Trust, has been precluded from exercising this option by the stay pending within this action. As no annuity payments are due until 2015, no rights or obligations have ripened, the Trust, its beneficiaries, and its Creators, have a right to exercise the options set forth in the Trust document. The Courts of the State of New York have recognized that such exercise of rights under a Trust document may be undertaken even if it is to the detriment of the creditors of the Creator of the Trust. EPTL §7-1.5(a)(1) and §7-3.1, and CPLR §5205. The defendant, Trust, in the alternative, respectfully prays that the Court authorize the Trust, by its Trustee, with the consent of its beneficiaries and at the behest of the creators, be given the right to split the annuity payments as established in the Trust document so that David L. Smith would receive 50 percent of the annual annuity, while Lynn A. Smith would receive 50 percent of the annual annuity. While the Trust continues to press the Court that the Trustee has an absolute right to terminate the Trust and to distribute the Trust assets to the beneficiaries, in the event the Court disagrees with the Trust’s position, the Trust should, in the alternative, be permitted to allow the parties to exercise the option contained in the Trust documents to split the annuity payments accordingly.

CONCLUSION

The plaintiff's motion for summary judgment, as against the defendant, Trust, and its beneficiaries, upon the grounds that were not contained in the Second Amended Complaint must be denied. The plaintiff's request for summary judgment upon the plaintiff's cause of action under Section 276 of the New York Debtor Creditor Law must be denied, as there is no evidence in the Record to support the plaintiff's contention that any transfer of funds associated with the Trust fall under the definition of a "fraudulent transfer".

As to all issues raised by the plaintiff in their motions, there are substantial questions of fact regarding the intent of the parties.

It has been conclusively determined, and now conceded by the plaintiff, that the Trust is a validly created Trust organized and operated pursuant to the Estates, Powers and Trusts Law of the State of New York. It has been established, and now conceded by the plaintiff in their papers, that the funds utilized to establish the Trust were "clean" funds. It has been established and conceded that no additional funds were deposited into the Trust by either Creator after the initial creation of the Trust in 2004. The Trust, by its terms as defined by New York EPTL, is a Spendthrift Trust immune from any claims from the creditors of the Creators. The Trustee, pursuant to the Trust documents and interpreted pursuant to New York EPTL, has an absolute right to terminate the Trust and distribute principal and/or accumulated interest to the beneficiaries at any time.

For all of the reasons set forth herein, the plaintiff's motion for summary judgment should be denied. For the reasons set forth herein and for the reasons set forth in the defendant, Trust's, motion for summary judgment now pending and the stay imposed upon the Trust, should be lifted and the action pending against the Trust dismissed.

Dated: Albany, New York
August 8, 2014

Respectfully submitted,

Linnan & Fallon, LLP
By /s/ James D. Linnan
James D. Linnan (Bar Roll# 102058)
*Attorneys for the David L. and Lynn
A. Smith Irrevocable Trust U/A 8/04/04,
Geoffrey R. Smith and Lauren T. Smith*
61 Columbia Street
Albany, N.Y. 12210
518-449-5400
jdlinnan@linnan-fallon.com
www.linnan-fallon.com

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

James D. Featherstonhaugh, Esq.
Featherstonhaugh, Wiley & Clyne LLP
*Attorneys for Defendant/Relief
Defendant, Lynn A. Smith*
99 Pine Street, Suite 207
Albany, NY 12207
jdf@fwc-law.com

William J. Dreyer
Dreyer Boyajian LLP
Attorneys for David L. Smith
75 Columbia Place
Albany, New York 12207

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
One Canalside
125 Main Street
Buffalo New York 14203-2887
WBrown@phillipslytle.com

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, 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.

**RESPONSE SUBMITTED BY DEFENDANTS, 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, TO PLAINTIFF'S STATEMENT OF
MATERIAL FACTS
PURSUANT TO RULE 7.1(a)(3)**

Pursuant to Rule 7.1(a)(3) of the Local Rules of this Court, defendants and non-moving parties, Geoffrey R. Smith and Lauren T. Smith, respond to plaintiff's Statement of Material Facts as follows:

1-34. Defendants neither admit nor deny the allegations.

35. Admit.

36. Defendants admit that the quoted portion of this Court's prior decision regarding freezing of the Trust is accurately quoted. Defendants deny, however, that David Smith exercised control over the Trust. App. Ex. 283 (Deposition Tr. T. Urbelis 21:3-7; 22:6-8).

37. Admit.

38. Admit.

39. Admit.

40. Admit.

41. Admit.

42. Admit.

43. Admit.

44. Admit.

45. Admit.

46. Admit.

47 – 470. Defendants neither admit nor deny the allegations.

471. Admit.

472. Admit.

473. Admit.

474. Admit.

475. Admit.

476. Admit.

477. Admit.

478. Defendants admit that David Smith was aware of the consequences of committing fraud at the time of the transfer of the Charter One stock to the Smith Trust in 2004 by virtue of him being a licensed securities trader. Defendants deny that the letter apparently drafted in 2009 is evidence of David Smith's knowledge.

479. Admit.

480. Admit.

481. Admit.

482. Admit.

483. Admit.

484. Admit.

485. Admit.

486. Admit.

487. Defendants deny the knowledge being imputed to David Smith and the inference being made by plaintiffs that the Smith Trust was created for fraudulent purposes.

488. Defendants deny the knowledge being imputed to David Smith and the inference being made by plaintiffs that the Smith Trust was created for fraudulent purposes.

489. Admit.

490. Admit.

491. Admit.

492. Admit.

493. Admit.

494. Admit.

495. Admit.

496. Admit.

497. Admit.

498. Admit.

499. Admit.

500. Admit.

501. Admit.

502. Admit.

503. Admit.

504. Admit.

505. Admit.

506. Admit.

507. Deny. The financial statement does not list the Smith Trust as part of the Smith's cash and securities assets.

508. Admit.

509. Admit.

510. Admit.

511. Admit.

512. Admit.

513. Admit.

514. Admit.

- 515. Admit.
- 516. Admit.
- 517. Admit.
- 518. Admit.
- 519. Admit.
- 520. Admit.
- 521. Admit.
- 522. Admit.
- 523. Admit.
- 524. Admit.
- 525. Admit.
- 526. Deny. David Smith is not and has never been the trustee of the Smith Trust.
- 527. Admit.
- 528. Admit.
- 529. Admit.
- 530. Admit.
- 531. Admit.
- 532. Admit.
- 533. Admit.
- 534. Admit.
- 535. Admit.
- 536. Admit.
- 537. Admit.

538. Admit.

539. Admit.

540. Admit.

541. Admit.

542. Deny. Prior to the freeze D. Smith did not benefit from the trust and any funds removed were used to pay trust taxes, reimburse David Smith for trust expenses paid by him or was considered a loan approved by the beneficiaries to pay personal taxes of David and Lynn Smith. Plaintiff App. Ex. 248 (G. Smith 11/16/11 Deposition Tr. at 113:5-9; 134:20-23; 144:9-25; 145:2-20); App. Ex. 283 (Deposition Tr. T. Urbelis 16:22-25; 17:2); . Ex. 345 (Decision of Magistrate Judge Homer, P. 39-40).

543. Admit.

544. Admit.

545. Admit.

546-585. Defendants neither admit nor deny the allegations.

586. Admit.

587. Admit.

588. Admit.

589. Admit.

590. Admit.

591. Admit.

592. Admit.

593. Admit.

594. Admit.

595. Admit.

596. Admit.

597. Admit.

598. Admit.

599. Admit.

600. Admit.

601. Admit.

602. Admit.

603. Admit.

604. Admit.

605. Admit.

606. Admit.

607. Admit.

608. Admit.

609. Admit.

610. Deny. Geoffrey Smith learned of the annuity agreement in July of 2010 and did not see a copy of the annuity agreement until it was presented to him by the SEC. App. Ex. 248 (Deposition Tr. G. Smith at 116:18-25; 118:13-18; 119:2-13; 125:17-23

611-614. Defendants neither admit nor deny the allegations.

615. Admit.

616. Admit.

617. Admit.

618. Admit.

**DEFENDANTS, GEOFFERY R. SMITH and
LAUREN T. SMITH, SUBMIT THE FOLLOWING
STATEMENTS OF MATERIAL FACTS IN
OPPOSITION TO PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT BASED UPON THE FACTS
AND DISCUSSION IN THE ACCOMPANYING
MEMORANDUM OF LAW, PLAINTIFF IS ENTITLED TO AN ORDER
DENYING DEFENDANT'S MOTION**

619. Geoffrey R. Smith and Lauren T. Smith are the children of David L. Smith and Lynn A. Smith. Dkt. No. 704, Exhibit "B" P. 502-519.

620. The David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 is an irrevocable trust created by David L. Smith and Lynn A. Smith for the benefit of their children, Geoffrey R. Smith and Lauren T. Smith. App. Ex. 345 (Decision of Magistrate Judge Homer, P. 3, 11); Dkt. No. 691 at 3 and Dkt. No. 704, Attachment #5, Exhibit "C".

621. The Trust was originally funded from bank stock in the stock account owned by Lynn A. Smith in the early 1990's. Dkt. No. 86 at 11 (T 311-12, 388, 391-92)

622. The bank stock utilized to fund the Trust remained untouched for 14 years in Lynn A. Smith's stock account. Dkt. No. 86 at 38

623. The stock investment into the Trust represents untainted funds easily identifiable and severable from the stock account as a whole. Dkt. No. 86 at 38

624. The Trust was neither created from, nor in possession of, ill gotten funds. Dkt. No. 86 at 38-39; Ex. 345 (Decision of Magistrate Judge Homer, P. 37-38).

625. David L. Smith is not a beneficial owner of the Trust. Dkt. No. 86 at 41.

626. David L. Smith did not exercise authority over the Trust and acted only as an investment advisor and broker. Dkt. No. 86 at 39-40; . Ex. 345 (Decision of Magistrate Judge Homer, P.39).

627. The Trust has no limits on the type of distributions the beneficiaries, Geoffrey R. Smith or Lauren T. Smith, can request or receive from the Trust corpus. Dkt. No. 691 at 3; Dkt. No. 704, Attachment #5, Exhibit "C".

628. In November of 2004, Geoffrey R. Smith was advised by his father, David L. Smith, that a Trust had been created for the benefit of Geoffrey R. Smith and his sister, Lauren T. Smith, by his parents. Dkt. No. 704, Attachment #5, Exhibit "B" P. 505

629. That at the time that Geoffrey R. Smith was advised of the existence of the Trust in November of 2004, he briefly reviewed the Trust Indenture. Dkt. No. 704, Attachment #5, Exhibit "B" P. 505

630. In approximately November of 2004, Lauren T. Smith was verbally advised of the existence of a Trust created by her parents, David L. and Lynn A. Smith. Dkt. No. 704, Attachment #5, Exhibit "B" P. 506

631. Geoffrey R. Smith learned of an alleged Annuity Agreement associated with the Trust in 2010. Dkt. No. 704, Attachment #5, Exhibit "H"

632. Geoffrey R. Smith did not have any knowledge of any claims or lawsuits against his father, David L. Smith, prior to the establishment of the Trust. Dkt. No. 704, Attachment #5, Exhibit "B" P. 528.

633. Geoffrey R. Smith did not have any discussions with his father, David L. Smith, or his mother, Lynn A. Smith, regarding the establishment of the Trust prior to its creation. Dkt. No. 704, Attachment #5, Exhibit "B" P. 528.

634. Lauren Smith never spoke with David Smith about her investment portfolio or the Smith Trust. Plaintiff App. Ex. 256 (L. Smith 11/28/11 Deposition Tr. at 21:13-21; 26:8-10; 43:8-10; 53:3-7; 56: 16-19.

635. Geoffery Smith handled all of Lauren Smith's investment accounts and Lauren Smith did not have much knowledge about those accounts. App. Ex. 256 (L. Smith 11/28/11 Deposition Tr. at 24:5-25; 26-35; 39:18-19; App. Ex. 248 (G. Smith 11/16/11 Deposition Tr. at 259:8-18.

636. Geoffery Smith informed Lauren Smith about the Smith Trust in 2004, the same year of its creation and the same weekend he learned of it from David Smith. App. Ex. 256 (L. Smith 11/28/11 Deposition Tr. at 45:18-23; 47: 20-25; 48:2-3; App. Ex. 248 (G. Smith 11/16/11 Deposition Tr. at 109:8-10; 119:19-25; 120:2-5).

THE ORIGINAL TRUSTEE TESTIFIED THAT DAVID SMITH WAS NOT A BENEFICIAL OWNER OF AND DID NOT EXERCISE CONTROL OVER THE SMITH FAMILY TRUST

637. David Smith did not have any discretionary authority over the Smith Trust. App. Ex. 283 (Deposition Tr. T. Urbelis 22:6-8).

638. The Trustee of the Smith Trust consulted with David Smith regarding Trust investments and did make a determination that the investments that were entered into by the Smith Trust were prudent and appropriate. Id. at 12:24-25; 13; 14: 2-16; 25:25; 26:2-7.

LYNN SMITH, GEOFFREY SMITH AND LAUREN SMITH TESTIFIED THAT THE SMITH FAMILY TRUST WAS SET UP FOR THE BENEFIT OF THE CHILDREN GEOFFREY AND LAUREN SMITH.

639. Lynn Smith testified that the Smith Family Trust was created for the benefit of Geoffery and Lauren Smith. App. Ex. 252 (Deposition Tr. Lynn Smith 23:17-24; 39:16-25; 40:2); App. Ex. 253 (Deposition Tr. Lynn Smith 42:10-13; 49:3-7).

640. Geoffrey Smith testified that the Smith Family Trust was set up for the benefit of him and Lauren Smith. App. Ex. 248 (Deposition Tr. G. Smith 109:14-19; 114:5-9; 120:6-8); App. Ex. 249 (Deposition Tr. Geoffrey Smith 218:7-11).

641. Lauren Smith testified that the trust was set up for the benefit of her and Geoffrey Smith. App. E. 256 (Deposition Tr. L. Smith 44:2-4; 45:20-23; 71:5-10).

Dated: Albany, New York

August 5, 2014

Respectfully submitted,
Linnan & Fallon, LLP

By _____
James D. Linnan (Bar Roll# 102058)
*Attorneys for 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*
61 Columbia Street
Albany, N.Y. 12210
518-449-5400
jdlinnan@linnan-fallon.com
www.linnan-fallon.com

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

James D. Featherstonhaugh, Esq.
Featherstonhaugh, Wiley & Clyne LLP
Attorneys for Defendant/Relief
Defendant, Lynn A. Smith
99 Pine Street, Suite 207
Albany, NY 12207
jdf@fwc-law.com

William J. Dreyer
Dreyer Boyajian LLP
Attorneys for David L. Smith
75 Columbia Place
Albany, New York 12207

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
One Canalside
125 Main Street
Buffalo New York 14203-2887
WBrown@phillipslytle.com