UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

10 Civ. 457 (GLS/CFH)

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,

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.

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO SMITH TRUST AND GEOFFREY AND LAUREN SMITH'S MOTION FOR SUMMARY JUDGMENT

David Stoelting,
Kevin P. McGrath
SECURITIES AND EXCHANGE COMMISSION
200 Vesey Street
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August 11, 2014

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Plaintiff Securities and Exchange Commission respectfully submits this memorandum of law, and the accompanying Response to the Statement of Material Facts, in opposition to the motion for summary judgment filed by Defendant/Intervenor Geoffrey R. Smith, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, (the "Smith Trust") and Defendants Geoffrey R. Smith and Lauren T. Smith.

Preliminary Statement

The Smith Trust and the Smith children (the "movants") argue that the SEC's fraudulent conveyance claims relating to them are based on conclusory allegations unsupported by any specific evidence that they acted with actual intent to defraud. Br. at 1, 3-9. They also argue that the Smith Trust is an irrevocable spendthrift trust and therefore not subject to control or invasion by the creditors of the creators of the Smith Trust. *Id.* at 1, 10-11. Both arguments are legally and factually unfounded.

The Second Amended Complaint ("SAC") charges that the following transactions involving the Smith Trust were fraudulent:

(1) David and Lynn Smith fraudulently transferred 100,000 shares of Charter One stock to the Smith Trust in 2004 (SAC, ¶ 207(a));

(2) the Smith Trust received fraudulently conveyed assets (SAC ¶ 208); and

(3) after July 7, 2010, the Smith Trust fraudulently transferred:

(a) $150,000 to Lynn Smith indirectly through Geoffrey and Lauren Smith for the purchase of the Sacandaga Lake property (SAC ¶ 210 (a));

(b) $449,878 to Lynn Smith in exchange for the Sacandaga Lake property (SAC ¶ 210(b));

(c) $296,500 to Geoffrey Smith, including $75,000 that he gave to Lynn Smith as a down payment for the Sacandaga Lake property, and $200,000 for a company he created (SAC ¶ 210(c)); and

(d) $35,000 to Lauren Smith, including $75,000 that she gave to Lynn Smith as a down payment for the Sacandaga Lake property (SAC ¶ 210(d)).

The movants primarily argue that there is no evidence that Geoffrey and Lauren Smith had actual intent to defraud creditors as purportedly required by New York Debtor and Creditor Law Section 276 ("NYDCL § 276"). In particular, they argue that there is no evidence that, prior to any of the above-referenced distributions from the Smith Trust, Geoffrey and Lauren Smith were aware of the Annuity Agreement, which required the Smith Trust to pay their parents $489,932 a year from Smith Trust assets beginning in 2015 and until their death. They also argue that the other "badges of fraud" set forth in the SAC, most of which they do not deny, do not support a finding that they acted with actual intent to defraud.

This argument fails. Under NYDCL § 276, it is only the intent of the transferor that is relevant, not that of the transferee. Indeed, even movants repeatedly acknowledge that, under NYDCL § 276, it is the "fraudulent intent of the transferor [that] must be proven." Br. at 4. Geoffrey and Lauren Smith were not the transferors for any of the charged transactions. Rather, the transferors whose intent is relevant are David and Lynn Smith who created the Smith Trust, transferred 100,000 shares of Charter One stock to the Smith Trust in 2004 to shield that asset from their creditors, and who controlled the Smith Trust with respect to all transfers into and out of the trust. Geoffrey and Lauren Smith's intent is irrelevant as to the relevant transfers.

Given that the movants have failed to even address the intent of David and Lynn Smith, far less establish that no reasonable trier of fact could conclude that David and Lynn Smith did not intend to defraud creditors through these transactions, movants' motion for summary judgment on this ground should be denied. [1]

[1] Indeed, to the contrary, as discussed below, there is overwhelming evidence that David and Lynn Smith acted with actual intent to defraud creditors when they transferred the Charter One stock to the Smith Trust in 2004, and when they caused the post-July 7, 2010 distributions from the Smith Trust to Lynn, Geoffrey and Lauren Smith.

Second, Geoffrey and Lauren Smith were not the recipients of the two most substantial transfers: the 100,000 shares of Charter One stock transferred to the Smith Trust (SAC, ¶ 207(a), and the $449,878 transferred to Lynn Smith (SAC ¶ 210(b)). Thus, as neither transferors nor transferees, Geoffrey and Lauren Smith's intent is entirely irrelevant to these claims. [2]

Finally, although a "purchaser" of a fraudulent conveyance can seek protection from NYDCL § 276 under NYDCL § 278, if he had no knowledge of the fraud and provided "fair consideration" for the purchase, this is an affirmative defense. Movants did not raise this defense in their Answer to the SAC and thus cannot do so going forward. They also have not relied upon this defense in this motion and could not do so for the further reasons that they were not "purchasers" and did not provide "fair consideration" for the distributions they received from the Smith Trust. Thus, even if movants had or were permitted to raise a defense under NYDCL § 278, they fail to meet the first prong of that defense, namely that they were "purchasers" who provided "fair consideration" for the conveyances to them, thereby rendering moot the second prong, concerning their knowledge of the fraud. Moreover, even if their lack of knowledge was determinative, they have not established that there are sufficient undisputed facts to support a finding that they were not aware of the fraud or that they are otherwise entitled to summary judgment as to any of the fraudulent conveyances.

The movants' second argument, that the Smith Trust is an irrevocable spendthrift trust and therefore not subject to control or invasion by the creditors of the creators of the Smith Trust,

[2] Movants do not make clear whether their motion is intended to apply only to the three charged transfers to Geoffrey and Lauren Smith, or also to the transfers from David and Lynn Smith to the Smith Trust and the transfer from the Smith Trust to Lynn Smith. Presumably, the motion is not intended to address these two transfers, for which Geoffrey and Lauren Smith were neither transferors nor recipients. Moreover, Geoffrey Smith did not become Trustee of the Smith Trust until well after all of the transfers in question. However, given this uncertainty, we address why their intent is irrelevant as to all charged transfers.

is equally flawed. Br. at 10-11. Movants provide no statutory or legal support for this argument. Instead, they rely upon the conclusory and outdated legal claims of their expert, David Evans, made in September 2010, which are themselves unsupported by any citation to relevant statutes or case law. Moreover, movants' argument that creditors may not reach conveyances to irrevocable spendthrift trusts, even if they are proven to be fraudulent, is contradicted by the plain language of NYDCL § 276 which provides that: "*Every conveyance* made and every obligation incurred with actual intent … to hinder, delay, or defraud either present or future creditors, is fraudulent …." (emphasis added). Thus, movants' argument that David and Lynn Smith, and by extension their creditors, do not have the right to access trust assets based solely on their right to annuity payments from the Smith Trust has no relevance where, as here, the Smiths fraudulently conveyed those assets to the trust. Nor is that argument relevant where, as here, the trust was actually owned and controlled by its creators. Similarly, movants' argument that creditors of beneficiaries of a spendthrift trust normally do not have the right to attach trust assets to satisfy claims against the beneficiaries again has no relevance where the assets were fraudulently conveyed to the trust and also where the monies have already been disbursed from the trust, as is the case here with respect to three distributions from the Smith Trust to Geoffrey and Lauren Smith.

Accordingly, the movants' motion for summary judgment should be denied in its entirety.

ARGUMENT

POINT ONE

MOVANTS FAIL TO ESTABLISH THAT NO REASONABLE TRIER OF FACT COULD CONCLUDE THAT DAVID AND LYNN SMITH MADE THE CHARGED CONVEYANCES WITH INTENT TO DEFRAUD CREDITORS

The movants argue that no genuine issue of material fact exists as to whether Geoffrey and Lauren Smith, as beneficiaries of the Smith Trust, had the actual intent to defraud investors. Trust Br. at 3-9. However, it is the intent of the transferor, not the intent of the transferee, that determines whether a conveyance is fraudulent. The movants have failed to even address the intent of the transferors of the conveyances at issue, David and Lynn Smith, and arguably the Trustee of the Smith Trust at the time of the conveyances in question, David Wojeski. Far less have they established that there are sufficient undisputed facts to compel a finding that the transferors did not have the actual intent to defraud, delay or hinder their creditors when they made these transfers. Accordingly, their motion for summary judgment should be denied.[3]

The SAC alleges that a number of conveyances, including the above-referenced conveyances at issue here, were fraudulent under NYDCL § 276 and, under NYDCL § 278, seeks to void and set them aside and recover the monies fraudulently conveyed. *See,* SAC, ¶¶ 139-175; Eighth Claim for Relief, ¶¶ 206-211.

Section 276 provides that: "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either

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[3] Given the compelling evidence that the Smith Trust was actually owned and controlled and the alter ego of David and Smith, we submit that it is his and Lynn Smith's intent, rather than that of the straw Trustee, that would be determinative as to the intent of the Smith Trust in connection with the conveyances in question. In any event, the Trustee, Wojeski, was aware of the Annuity Agreement before the Smith Trust purchased the Sacandaga Lake property from Lynn Smith and thus knew of, and abetted, the fraud she had perpetrated on the Court in unfreezing the Smith Trust assets.

present or future creditors, is fraudulent as to both present and future creditors." It is by now well-settled that NYDCL § 276 requires proof only of the transferor's fraudulent intent, not that of the transferee. *See, e.g., In Re Dreier LLP,* 452 B.R.391, 432-433 (Bankr. S.D.N.Y. 2011)("The text of NYDCL § 276 juxtaposed against other sections of the NYDCL compel the conclusion that it is the transferor's intent alone, and not the intent of the transferee, that is relevant under NYDCL § 276."); *Accord Picard v. Cohmad Secs. Corp. (In re Bernard L. Madoff Inv. Sec. LLC),* 454 B.R. 317, 331 (Bankr. S.D.N.Y. 2011)("[T]he analysis since provided by the court in *Dreier* convincingly demonstrates that it is the transferor's intent alone, and not the intent of the transferee, that is relevant under NYDCL § 276." (internal quotation marks omitted)); *Schneider v. Barnard*, 508 B.R. 533, 545-547 (E.D.N.Y. 2014). [4]

Indeed, movants themselves repeatedly acknowledge that, under NYDCL § 276, it is the "fraudulent intent of the transferor [that] must be proven." Br. at 4. They further state: "New York law requires that the plaintiff prosecuting an action under §276 … has the burden of proving actual intent to defraud on the part of the transferor by clear and convincing evidence…." *Id.*[5]

Geoffrey and Lauren Smith were not the transferors for any of the charged transactions. Rather, the transferors whose intent is relevant are: (1) David and Lynn Smith with respect to the

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[4] The *Dreier* case contains an extensive discussion of why certain earlier cases holding that the transferee's intent was relevant under NYDCL § 276 were wrongly decided and based on a reliance on two cases that did not in fact support that conclusion. *See In Re Dreier LLP,* 452 B.R. at 427-435.

[5] Moreover, the SEC need only prove the transferor's intent to hinder or delay, and not necessarily an intent to defraud. *In Re Jacobs*, 394 B.R. 646, 658 (Bankr. E.D.N.Y. 2008). Thus, here, the Smiths' conveyance of over $ 4 million in stock to the Smith Trust in 2004, in return for an Annuity Agreement that would not start paying out money to them until 2015 would support a finding that they attempted to hinder or delay their creditors.

transfer of the 100,000 shares of Charter One stock by them to the Smith Trust in 2004 (SAC ¶ 207(a)); and (2) David and Lynn Smith, who controlled the Smith Trust with respect to the $449,878 distribution from the Smith Trust to Lynn Smith and the three distributions from the Smith Trust to Geoffrey and Lauren Smith after July 7, 2010 (SAC ¶ 210(a)-(d)). Geoffrey and Lauren Smith's intent is irrelevant as to all of these transfers.[6]

Accordingly, the movants' argument that they are entitled to summary judgment as to the conveyances alleged to be fraudulent under NYDCL § 276 because there is no evidence as to their fraudulent intent in receiving the distributions fails as a matter of law.

Moreover, the movants fail to cite any statute or case law that the transferees intent is determinative as to whether a fraudulent conveyance has occurred. Although movants do not reference this statute, under NYDCL § 278(1), a creditor may have the fraudulent conveyance set aside, or disregard the conveyance and attach or levy execution upon the property conveyed, except as to a "purchaser for fair consideration without knowledge of the fraud at the time of the purchase" or one who has derived title from such a purchaser. However, "[c]ase law and the statutory framework confirm that NYDCL § 278(1) is an affirmative defense and the burden of proof under the section 278(1) affirmative defense is on the defendant, not the plaintiff." *In re Dreier, supra,* 452 B.R. at 434, citing *FDIC v. Malin,* 802 F. 2d 12, 18 (2d Cir. 1986)("[transferee] must also satisfy the remaining elements of section 278 to claim its benefits."); *United States v. Orozco-Prada,* 636 F. Supp. 1537, 1542 (S.D.N.Y. 1986)("the burden of proof rests with [the transferees] to establish that, indeed, they were *bona fide* purchasers for valuable consideration and had neither actual nor constructive knowledge that the

[6] Although Geoffrey Smith is the current Trustee of the Smith Trust, he was not the Trustee at the time of any of the conveyances in question, so his intent is not attributable to the Smith Trust in its role as either transferor or transferee for any of the conveyances in question.

conveyance from [the transferors] was fraudulent"); *Mendelsohn v. Jacobowitz (In re Jacobs),* 394 B.R. 646, 659 (Bankr. E.D.N.Y. 2008)(placing the burden on the "innocent purchaser" to "affirmatively show good faith in order to take advantage of' the NYDCL § 278 defense).

Movants did not rely upon NYDCL § 278 in their motion. Nor may they do so given that they did not raise NYDCL § 278 as an affirmative defense in their answer. *See Answer* of Defendant/Intervenor Geoffrey Smith, Smith Trust Trustee, and Defendants Geoffey Smith and Lauren Smith to SAC, Dkt. 346, at ¶¶ 206-221(affirmative defense under NYCDL § 278 not raised). Moreover, they have not even attempted to establish that they purchased or received the transfers in question for "fair consideration" and any such argument would be factually baseless. Accordingly, even if movants had, or could, attempt to assert a belated "good faith" defense under NYDCL § 278, any such defense would be unavailing. [7] [8]

Finally, although the SEC need not establish that Geoffrey and Lauren Smith were aware of the fraud, the SAC sets forth extensive evidence constituting "badges of fraud" evidencing Geoffrey and Lauren's knowledge of the fraud. *See,* SAC, ¶¶ 162-175. Where direct evidence is lacking, actual intent may be proven by circumstantial evidence. *In Re le Café Crème*, 244 B.R. 221, 239 (Bankr. S.D.N.Y. 2000). The Second Circuit has identified these "badges of fraud" as circumstantial evidence giving rise to an inference of actual intent: "(1) the lack or inadequacy of

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[7] Under New York law, "the concept of fair consideration has two components – the exchange of fair value and good faith - and both are required." *Lippe v. Bairnco Corp.,* 249 F.Supp. 2d 357, 376-77 (S.D.N.Y. 2003); *see also* NYDCL § 272; N. Y. C.P.L.R. § 5202(a); *SEC v. Universal Express, Inc.,*2008 WL 1944803 at *5-6 (S.D. N.Y. Apr. 30, 2008)(Lynch, J). Although the Smith Trust apparently received a 49% interest in Geoffrey Smith's new business venture in return for its $200,000 distribution (*see* G. Smith 11.16.11 Deposition at 157-158), movants proffer no evidence that constituted "fair consideration" for a minority interest in a speculative venture.

[8] Moreover, as Geoffrey and Lauren Smith were neither transferors nor transferees as to the conveyance of the Charter One stock to the Smith Trust or the Smith Trusts' conveyance of $449, 878 to Lynn Smith in return for the Sacandaga Lake property, their intent is clearly irrelevant as to these transactions.

consideration; (2) the family, friendship or close associate relationship between the parties; (3) the retention of possession, benefit or use of the property in question; (4) the financial condition of the party sought to be charged both before and after the transaction in question; (5) the existence or cumulative effect of a pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors; and (6) the general chronology of the events and transactions under inquiry." *Id.* (citing *In Re Kaiser*, 722 F.2d 1574, 1582 (2d Cir. 1983)). Finally, where the transfers were made in the course of executing a Ponzi scheme, the debtor's fraudulent intent is presumed under New York Debtor and Creditor Law. *In re Bernard L. Madoff Inv. Securities LLC*, 458 B.R. 87, 104 (Bankr. S.D.N.Y. 2011).

The movants do not factually dispute most of the badges of fraud set forth in the SAC but instead essentially argue why each fact, standing alone, is not sufficient to establish their knowledge. Indeed, movants concede or do not dispute virtually all of the facts the SEC alleges are "'badges of fraud," including that:

(1) Geoffrey and Lauren Smith were told of the existence of the Smith Trust shortly after it was created in 2004; SAC, ¶ 163; admitted: Br. at 5.

(2) On or about Thanksgiving 2004, David Smith discussed the Smith Trust with Geoffrey Smith and provided him with the trust agreement; SAC ¶ 164; admitted: Br. at 5.

(3) on or shortly after Thanksgiving 2004, Geoffrey Smith informed Lauren Smith that they were the named beneficiaries of the Smith Trust; SAC ¶ 165; admitted Br. at 5.

(4) Geoffrey and Lauren Smith never requested or received any distribution from the Smith Trust from its creation in 2004 through April 14, 2010, even though Geoffrey Smith had been working to start his own company since at least October 2009 and Lauren Smith was unemployed for a year during the 2008-2010 time period; SAC ¶ 166; admitted as to lack of distributions: Br. at 6.

(5) from 2004 to 2010, G. Smith and L.T. Smith periodically received financial support directly from Smith and L. Smith rather than taking any distributions from the Smith Trust. (SAC ¶ 167; Admitted, Br. at 6). Smith and L. Smith also paid the Smith Trust's taxes directly from their accounts rather than allowing the Smith Trust to pay its own tax liabilities; SAC ¶ 167; not addressed in Br.

(6) Geoffrey and Lauren Smith knew or should have known that David Smith made the investment decisions for the Smith Trust and received all of the trust account statements. SAC ¶ 168; admitted at to Geoffrey Smith's knowledge; denied as to Lauren Smith's knowledge, Br. at 6-7.

(7) the only distribution of Smith Trust assets to its stated beneficiaries before July 7, 2010 occurred on April 15, 2010, when Geoffrey Smith requested a distribution of $95,000, which he gave to David and Lynn Smith to pay their personal taxes. The funds were transferred directly from the Smith Trust to Lynn Smith's checking account; SAC ¶ 169; admitted, Br. at 7.

(8) there was a close family relationship between the Smiths and Urbelis, who was a close family friend; SAC ¶ 170; implicitly conceded, Br. at 7.

(9) Geoffrey and Lauren Smith knew that David Smith faced substantial liability to creditors as a result of this action brought by the SEC, various FINRA arbitrations, and other complaints by investors, and that the Court had frozen assets held by David Smith or jointly held by David and Lynn Smith. SAC ¶ 171; implicitly conceded, movants merely argue such knowledge irrelevant. Br. at 7.

(10) Geoffrey and Lauren Smith knew that the Smith Trust had been subject to the asset freeze in this matter and that substantial effort was undertaken in order to release the assets of the Smith Trust from the asset freeze. SAC ¶ 172; implicitly conceded, movants merely argue such knowledge irrelevant. Br. at 8.

(11) with knowledge of falsity or reckless disregard of the truth, Geoffrey Smith testified at the preliminary injunction hearing that from 2004 onward he believed that the trust assets were owned by him and Lauren Smith equally, while failing to mention his parents' interest in annuity payments from the Smith Trust. SAC ¶ 173; denied that Geoffrey Smith knew of the Annuity Agreement when he testified at the preliminary injunction hearing, Br. at 8.

(12) when the Smith Trust assets were released from the asset freeze, almost $600,000 of the total amount distributed was provided to Lynn Smith, purportedly in exchange for the Lake Property. This transaction provided cash to Lynn Smith in exchange for the only other significant asset owned by David and Lynn Smith that was not subject to the asset freeze. Lynn Smith appears to have paid $115,000 from these funds to her counsel. SAC ¶ 174; admitted, Br. at 8.

(13) no independent appraisal or valuation of the Lake Property was completed before it was sold to the Smith Trust (SAC ¶ 175, denied STB at 9); and David and Lynn Smith, along with Geoffrey and Lauren Smith have continued to share possession, benefit and use of the Lake Property. SAC ¶ 175; admitted, Br. at 9.

Thus, Geoffrey and Lauren Smith do not contest virtually all of the "badges of fraud" evidencing their awareness of the fraud. Rather, essentially taking each fact separately, they argue why it is not enough to establish their knowledge of the fraud. However, while these facts alone are sufficient to establish their knowledge, these are not the only facts relevant to their knowledge. The following additional facts set forth in the SEC's Statement of Material Facts ("SMF") are not reasonably in dispute: (1) David and Lynn Smith's reported the Smith Trust's assets as their own in numerous financial documents (SEC SMF ¶¶ 507-509); (2) David Smith identified himself as a beneficiary of the Smith Trust (SEC SMF ¶ 509); (3) David and Lynn Smith engaged in numerous other transactions to shield their assets from creditors, including the transfers of their jointly owned-Vero Beach house and checking account to Lynn Smith's name alone (SEC SMF ¶¶ 546-571); [9] (4) Lynn Smith's numerous sanctionable lies to the Court; (5) David Smith paid the Smith Trust taxes one year (SEC SMF ¶ 545); (6) the only withdrawal from the Smith Trust was for the benefit of David and Lynn Smith to pay their taxes (SEC SMF ¶ 542); (7) and Geoffrey and Lauren Smith never attempted to withdraw a single penny from that Trust, despite the fact that Lauren Smith experienced substantial financial difficulties during this period (SEC SMF ¶¶ 525; 532; 542).

Based on these facts, a reasonable trier of fact could well conclude that David and Lynn Smith created the Smith Trust to shield those assets from their creditors, not for the benefit of

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[9] In determining fraudulent intent, courts can look to defendant's relevant conduct extending years after the transfer in questions as evidence of intent. See *U.S. v. Eversoff,* (E.D.N.Y. Sept. 30, 2003, 2012 WL 1514860 (in determining fraudulent intent, court considered defendant's actions five years after transfer in question).

their children. The trier of fact could also well conclude that it is inherently implausible that David and Lynn Smith would have lead their adult children to believe that they were the immediate beneficiaries of a trust containing over $ 4 million dollars, without also telling them that the trust was contractually obligated to use that money to make annual annuity payments of over $489,000 to their parents beginning in 2015 and continuing until their death. Indeed, withholding that crucial limitation of the use of Smith Trust assets would not only have been cruelly misleading, but it would be doomed to fail, given the high probability that, at some point between 2004 and 2015 when the first annuity payment was due, one or both of the adult children would request a distribution from the trust, at which point the parents' deception would be revealed. At the latest, the children would have learned of their parents' deception when the annuity payments became due in 2015. There is no logical reason why the Smiths would attempt to deceive their adult children in this way.

Thus, a reasonable trier of fact could well conclude that Geoffrey and Lauren Smith were made aware of the Annuity Agreement as early as 2004, as corroborated by the Smiths' children's decision not to request a single distribution form the Smith Trust during that entire period despite at least Lauren Smith's undisputed financial difficulties. Accordingly, even if Geoffrey and Lauren Smith's knowledge of the fraud was determinative to whether the conveyances in question were fraudulent, which it is not, they have failed to establish that they were not aware of the fraud.

Moreover, Geoffrey Smith's claim that "it would not benefit [him] to perjure himself" regarding his knowledge of the Annuity Agreement, Br. at 8, is plainly wrong. Geoffrey Smith has an extremely powerful motive to perjure himself in an attempt to retain the assets in the Smith Trust for his and his sister's benefit and defeat the SEC's efforts to reach those assets for

the benefit of investors defrauded by his father. Indeed, the instant motion makes a number of false and misleading statements in a continuing effort to shield the Smith Trust assets from David Smith's creditors.

For example, Geoffrey Smith claims that he "was first advised of the existence of an Annuity Agreement subsequent to the Agreement being provided to the Court by the Trustee and the Trustee's counsel in 2010." Br. at 5. This claim is demonstrably false as Geoffrey Smith has previously admitted that he learned of the Annuity Agreement in the Trustee's Office no later than July 20 or July 21, 2010, SEC's SMF ¶¶ 597-600, prior to the Smith Trust's distribution of $$449,878 to Lynn Smith on July 22, 2010, SEC SMF ¶602, and well before the Annuity Agreement was discovered by the SEC on July 27, 2010 and subsequently provided to the Court. *See* D. Stoelting Declaration, Dkt. 103-2 at ¶ 8.

In addition, movants engage in several highly misleading representations in connection with this motion. For example, in support of their argument as to why the Smith Trust's distribution of $449,878 to Lynn Smith in exchange for the Sacandaga Lake property was permissible, they misleadingly suggest that Judge Homer's July 7, 2010 MDO provides approval for this transaction, by quoting his statement that: "because the Trust had virtuously (sic) no limits on the types of distributions that beneficiaries could request, the money was properly requested and provided," citing Dkt. No. 86 at 40. STB at 8. However, that decision was obviously well before the actual July 20, 2010 transaction in question and Judge Homer was referring to entirely different distributions. Most importantly, they ignore the fact that Judge Homer completely changed his findings as to the Smith Trust after he became aware of the fraud perpetrated upon him by Lynn Smith in withholding evidence of the Annuity Agreement, and they ignore the fact that Judge Homer subsequently refroze the Smith Trust on the ground that

it's assets were owned and controlled of David Smith. The movants citation to Judge Homer's language is grossly misleading and improper.

Movants compound this misleading quotation by not only ignoring the fact that Judge Homer's reversed that decision, but by then trying to support that earlier decision by citation to an opinion of their proffered expert, David Evans, dated September 2, 2010, which itself fails to take into account any of Judge Homer's subsequent findings of fact or conclusions of law regarding the Smith Trust.

In addition, Geoffrey and Lauren Smith's claim that their decision not to withdraw any money from the Smith Trust between 2004 and 2010 was because of "their character to be independent and intent to retain the corpus of the Trust for their later life." br. at 6 and not because they knew of the Annuity Agreement, is contradicted by their actions. Far from evincing a desire to be independent, during this period Lauren Smith has admitted that she was unemployed and collected unemployment insurance for approximately a year and a half after the Smith Trust was created (SEC SMF ¶ 531). In addition, between March 2007 and May 2009, Lauren Smith received 19 checks totaling $22,100 from her mother to help her pay rent when she went through 'a rough period." SEC SMF ¶ 539-540). Indeed, she admitted that: "I didn't know I had access to the money" in the Smith Trust. SEC SMF ¶ 540. In addition, contrary to their claim that they wanted to be independent and wanted to use the Trust for a much later time in their life, as soon as the Smith Trust was unfrozen by the Court in early July 2010, Geoffrey Smith requested a distribution of $200,000 to start a speculative business venture and over $21,000 to pay off credit card debts and other expenses and Lauren Smith requested over $8,000 to pay off credit card debts. This was in addition to the $75,000 each withdrew to pay Lynn Smith as a down payment for the Sacandaga Lake property. SEC SMF ¶¶ 588-594.

Geoffrey and Lauren Smith also assisted in the distribution of approximately $600,000 from the Smith Trust to their mother, in exchange for the Sacandaga Lake property, which David and Lynn Smith continued to enjoy even after its "purchase" by the Smith Trust, again evidencing that the Smith Trust was truly designed to benefit the Smith parents, not their children. SEC SMF ¶¶ 588-593; 601-603.[10] However, after the Smith Trust's assets were temporarily unfrozen but still obviously vulnerable to continuing litigation by the SEC and their parents' creditors, they had no compunction withdrawing from it. Thus, their actions belie their claim that they did not previously withdraw monies because they considered the Smith Trust to be for "their later life." Br. at 6. In fact, they did not previously withdraw monies because they knew that the money in the Smith Trust was parked there for their parents' future, not theirs.

Accordingly, movants' argument that they are entitled to summary judgment because they had no intent to defraud creditors is both legally and factually baseless.

POINT TWO

THE ASSETS FRAUDULENTLY CONVEYED BY THE SMITHS TO THE SMITH TRUST ARE NOT THEREBY SHIELDED FROM THEIR CREDITORS OR THIS COURT

The movants argue that the Smith Trust is an irrevocable spendthrift trust under New York Law EPTL § 7-1.5(a)(1) and § 7-3.1, and New York CPLR § 5205 and therefore is not subject to control or invasion by the creditors of David L. Smith or Lynn A. Smith, including the SEC. Smith Trust Br. at 10-11. They also argue that David and Lynn Smith's rights to annuity

[10] Any argument that the Smith children were not prejudiced by this transaction because the Smith Trust received the Sacandaga Lake property in return for the $600,000 is unavailing. Even if the property was worth $600,000, surely it would have been inherited by the Smith children at some point anyway, so there was no need from their standpoint for the Smith Trust to expend $600,000 of its assets that would otherwise have arguably been available for the children. The net effect of the transaction was to reduce the assets ultimately available to the Smith children by $600,000, particularly given that Lynn Smith promptly spent that money for her own benefit.

payments do not permit them to access the Smith Trust assets prior to such payments and therefore their creditors may not reach those assets. *Id.* However, movants fail to explain how these cited provisions of New York law support their position and fail to provide any case law in support of their argument. Instead, they merely repeat the conclusory opinions of their proffered expert David L. Evans setting forth the same argument, which are themselves unsupported by any relevant statutory authority or case law. Moreover, movants' argument that one can fraudulently shield assets from creditors by conveying them to a spendthrift or irrevocable trust is contradicted by the plain language of NYDCL § 276, which applies to all fraudulent conveyances.

As discussed above, NYDCL § 276 provides: "*Every conveyance made and every obligation incurred* with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." (emphasis added). By its plain terms, this provision applies to "every conveyance" that is fraudulent. It makes no exception for fraudulent conveyances to spendthrift trusts or irrevocable trusts. Movants fail to cite to any statute or case that exempts fraudulent conveyances to such trusts from NYDCL § 276.

Thus, even assuming, *arguendo*, that creditors of the creator of an irrevocable or spendthrift trust might not otherwise get access to assets of that trust, such a rule does not apply when assets are fraudulently conveyed to such trust by the creator for the specific purpose of shielding those assets from his creditors. Such an outcome is unsupported by any statute or case law, and would serve no legitimate public policy or interest. *See, e.g., U.S. v. Bennett,* 2003 WL 22208286 at *1-2 (S.D.N.Y. Sept. 24, 2003)(court found that transfer of house to irrevocable trust was fraudulent conveyance under NYDCL §§ 275 and 276; court held that defendant and

his wife engaged in a conspiracy to defraud creditors that began when the defendant was involved in a securities and bank fraud scheme that was "ongoing, massive, and defendant knew that ultimately this house of cards would have to collapse.") Here, David Smith and his wife transferred stock to the Smith Trust while he knew the Four Funds were already underwater and that the scheme would eventually collapse which it did.

Moreover, the scant authorities cited by movants do not support their argument. For example, New York EPTL § 7-1.5(a)(1) merely provides that:

> (a) The interest of a beneficiary of any trust may be assigned or otherwise transferred, except that:
>
> > (1) The right of a beneficiary of an express trust to receive the income from property and apply it to the use of or pay it to any person may not be transferred by assignment or otherwise unless a power to transfer such right, or any part thereof, is conferred upon such beneficiary by the instrument creating or declaring the trust.

This provision, dealing with the right of a named beneficiary of a trust to assign his right to income to another, has no relevance to whether the creditors of the creator of a trust can, pursuant to NYDCL §§276 and 278, access assets fraudulently conveyed to that trust or assets held in the name of a trust which is in fact the alter ego of the creator of the trust.

The movants also cite but do not discuss New York EPTL § 7-3.1(a), which provides that: "A disposition in trust for the use of the creator is void as against the existing creditors or subsequent creditors of the creator." This provision actually supports the SEC's right to access the assets of the Smith Trust which were conveyed there for the benefit of its creators, David and Lynn Smith, as evidenced by the Annuity Agreement, and the Smiths obvious efforts to shield the trust assets from their creditors. Furthermore, while N.Y. EPTL § 7-3.1(b)(1) does shield from creditors assets in certain trusts established as part of a retirement account, N.Y. EPTL § 7-3.1(b)4) specifically provides that additions to such an asset shall "not be exempt from

application to the satisfaction of a money judgment if …(ii) deemed to be fraudulently conveyances under article ten of the debtor and creditor law." Thus, this provision provides no support for the movants argument.

Finally, while movants do not cite which provision of New York C.P.L.R. § 5205 they rely upon or why, they presumably rely upon N.Y. CPLR § 5205(c)(1) which provides generally that "all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment." This provision on its face makes clear that it has no application where, as here, the judgment debtor, namely David Smith and his wife, created the Smith Trust.

In addition, while the SEC is seeking to recover certain distributions from the Smith Trust to Geoffrey and Lauren Smith, the so-called spendthrift provisions have no application to these distributions, as the monies have already left the Smith Trust and been received by Geoffrey and Lauren Smith. Movants fail to cite any statute or case that precludes creditors of a beneficiary of a spendthrift trust from reaching assets after they have left the trust.

Moreover, while N.Y. CPLR § 5205(c)(2), like N.Y. EPTL § 7-3.1(b)(1) above, does shield from creditors assets in certain trusts established as part of a retirement account, N.Y. CPLR § 5205(c)(5), like N.Y. EPTL § 7-3.1(b)4) specifically provides that additions to such an asset shall "not be exempt from application to the satisfaction of a money judgment if …(ii) deemed to be fraudulently conveyances under article ten of the debtor and creditor law." Thus, even though certain provisions of New York law shield certain assets from judgment creditors, including assets conveyed to certain trusts, those provisions exclude from their protection assets fraudulently conveyed to such trusts.

Moreover, the movants fail to even acknowledge the two legal basis on which the SEC has proceeded against the assets in the Smith Trust: (1) that the Smith Trust is the alter ego of David Smith who so dominated and controlled the Smith Trust for his own benefit such that the assets are in fact his assets; and (2) David and Lynn Smith fraudulently conveyed assets to the Smith Trust in violation of New York Debtor-Creditor law Section 276.[11]

The evidence supporting both claims has been discussed at length above. In addition, the Second Circuit has already affirmed that the Court can pierce the veil of the Smith Trust form where it finds that it has been dominated by the trust's creator. Moreover, it has also found that the facts here, which cannot reasonably be disputed, support a finding that in fact the Smith Trust was the alter ego for David Smith. In *Smith v. SEC,* 432 Fed. Appx. 10, 13; 2011 WL 3438315 at *2 (2d Cir. 2011), the Second Circuit upheld the district court's decision to freeze the assets of the Smith Trust on the ground that they were in fact assets of David Smith. The Court noted that in *In re Vebeliunas,* 332 F.3d 85 (2d Cir. 2003), "we assumed that New York courts would allow the veil of a trust to be pierced in situations where the complete domination of a trust has been shown." *Id.* The Second Circuit further noted that it had stated in *Vebeliunas* that, to make such a showing: "… the SEC must establish that (1) the owner of the Trust exercised such control that the Trust had become a mere instrumentality of the owner; (2) the owner used this control to commit a fraud or 'other wrong'; and (3) the fraud or wrong resulted in injury or loss,"

[11] In the SEC's motion for summary judgment, we have set forth evidence supporting a finding that David Smith beneficially owned and controlled the Smith Trust and its assets, and asked the Court, in the exercise of its equitable powers, to order the disgorgement of the assets currently contained in the Smith Trust as assets of David Smith. If the Court grants the SEC's motion for summary judgment on this ground, movant's summary judgment motion is mooted with respect to those assets currently in the Smith Trust and, for purposes of this motion, the Court would need only address the fraudulent conveyances from the Smith Trust to Geoffrey and Lauren Smith.

id., citing *Vebeliunas,* 332 F.3 at 91-92. The Court then explained that to establish the first prong concerning control, "here it is sufficient to show that David Smith could be considered the equitable owner of the Trust, such that he acted as though the Trust assets were 'his alone to manage and distribute.'" *id.,* citing *Vebeliunas,* 332 F.3 at 92.

The Second Circuit found no error in the district court's conclusion that "David Smith possessed an equitable and beneficial interest in the Trust" based on its factual findings that: (1) the annuity agreement entitled David and Lynn Smith to annual annuity payments of approximately $500,000 beginning in 2015 and continuing until their deaths or the Trust was exhausted; (2) David Smith had functioned as an investment advisor of the Trust; (3) David Smith had paid approximately $100,000 in taxes owed by the Trust without reimbursement by the Trust; (4) Lynn Smith had paid expenses incurred by the Smiths' daughter, which would ordinarily have been paid by the Trust; and (5) during the nearly six years between the Trust's creation and the present litigation, only one disbursement was made from the Trust and that was for the benefit of David Smith. *Id.* The Second Circuit accordingly upheld the district court's order freezing the assets in the Smith Trust as assets of David Smith to be frozen for the benefit of investors.

Thus, the movants' argument that they are entitled to summary judgment on the ground that the Smith Trust is a spendthrift trust and therefore cannot be reached by the beneficiaries' creditors is baseless. [12]

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[12] Indeed, to the contrary, as set forth more fully in the SEC's memorandum of law in support of its motion for summary judgment, and the supporting Statement of Material Facts, the Court should grant summary judgment in the SEC's favor on all claims.

Finally, even if New York state law provided a relevant exemption as to certain assets otherwise beyond the reach of creditors, it is well-settled that state law need not apply if "some federal interest requires a different result." *Butner v. United States,* 440 U.S. 48, 55 (1979), cited with approval in *Travelers Cas. & Sur. Co. v. Pac. Gas and Elec. Co.,* 549 U.S. 443, 451 (2007). *See also, SEC v. Aragon Capital Advisors, LLC*, No. 07 Civ. 919 (FM), 2011 WL 3278907, *7 (S.D.N.Y. July 26, 2011) (on Commission contempt motion for non-payment of disgorgement, Court held, "[w]hether New Jersey law exempts [defendant's] IRA accounts from attachment has no bearing on his obligations pursuant to the Final Judgment," and defendant's "reliance on New Jersey law cannot save him from a finding of contempt"); *SEC v. Solow*, 682 F.Supp.2d 1312, 1325, 1329 (S.D.Fla.2010) (assets transferred to defendant's wife after verdict were subject to disgorgement order; "a district court can ignore state law exemptions as well as other state law limitations on the ability to collect a judgment in fashioning a disgorgement order;" "This Court does not have to recognize the protections of tenancy by the entirety created by State law."); *SEC v. Musella*, 818 F.Supp. 600, 602 (S.D.N.Y. 1993) ("extent to which [defendant's] assets and income would be exempt from attachment under New York law does not alter his duty to pay the amount he owes under the [disgorgement] order"); *SEC v. AMX, Int'l, Inc. et al.*, 872 F. Supp. 1541, 1544 (N.D. Tex. 1994)(defendant subject to disgorgement order not entitled to rely on "state law homestead exemption …. [defendant's home is considered an asset subject to the disgorgement order … [b] y selling his home or obtaining a loan on his home [defendant] could begin to pay equitable remedy[.]

Indeed, previously in this case, the Court ordered the sale of the Smiths' Vero Beach home, in the exercise of its equity powers to protect of wasting asset covered by the asset freeze, over Lynn Smith's objection, in part, that it was protected under the Florida state law "homestead exemption." *SEC v. Lynn Smith,* 10-CV457, MDO dated 2/1/11; Dkt. No. 263 at pp 6-7. The Court cited *United States v. Rogers*, 461 U.S. 677, 701 (1983)(noting that the

Supremacy Clause "provides the underpinning for the Federal Government's right to sweep aside state-created [homestead] exemptions" under §7403). The Second Circuit affirmed the Court's order directing the Receiver to sell the Florida home, '[i]n light of the 'sweeping mandate manifest in the securities laws,' *SEC v. Materia*, 745 F.2d 197, 200 (2d Cir. 1984), and the district court's broad equitable power to fashion ancillary relief when its jurisdiction under those laws has been involved, *see Unifund Sal,* 910 F.2d at 1041." The Second Circuit also cited 15 U.S.C. § 78u(d)(5), which provides, in relevant part, that: "the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors."

Thus, even if New York law precluded this Court from reaching assets fraudulently conveyed to and from the Smith Trust, which it does not, this Court's broad equitable powers would trump such state law restrictions and empower it to reach such assets for the benefit of defrauded investors.

CONCLUSION

Accordingly, for all the foregoing reasons, movants' motion for summary judgment should be denied in its entirety.

Dated: New York, NY
August 11, 2014

Respectfully submitted,

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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,** *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.*	:	**10 Civ. 457 (GLS/CFH)**

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S RESPONSE TO STATEMENT OF MATERIAL FACTS FILED BY SMITH TRUST AND GEOFFREY AND LAUREN SMITH

David Stoelting,
Kevin P. McGrath
SECURITIES AND EXCHANGE COMMISSION
200 Vesey Street
Brookfield Place
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August 11, 2014

Plaintiff Securities and Exchange Commission ("SEC") respectfully submits these Responses to the Statement of Material Facts 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 (hereinafter referred to as the "Trust SMF").

Trust SMF 1:

Geoffrey R. Smith and Lauren T. Smith are the children of David L. Smith and Lynn A. Smith. Exhibit "B" P. 502-519.

Response:

Admitted.

Trust SMF 2:

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. Dkt. No. 691 at 3 and Exhibit "C".

Response:

Admitted that David and Lynn Smith created the Smith Trust but otherwise denied. The Smith Trust is an irrevocable trust in name only. It was created and funded by David and Lynn Smith through a fraudulent conveyance of Charter One stock to the Smith Trust to shield that asset from the Smiths' creditors. SEC's SMF ¶¶ 471-488. The Smith Trust was not created for the benefit of the Smiths' children but instead was created for the benefit of the Smiths. *Id. See also* SEC's SMF ¶¶ 494-501 (re: Annuity Agreement entitling the Smiths to yearly payments from the Smith Trust of $489,932 beginning in 2015 until their death); SEC's SMF ¶¶ 507-509(citing documents in which the Smiths admit the Smith Trust is one of their assets); SEC's SMF ¶ 544 (Lynn Smith admitted that if she needed money to pay personal taxes, her children would withdraw money from the Smith Trust for her to do so). Indeed, the children received no distributions from the Smith Trust for their benefit from the date of its creation until it was frozen by the Court and the only distribution was for the benefit of the Smiths. SEC's SMF ¶ 542 (App. Ex. 275). The Smith Trust was controlled by David Smith. SEC's SMF ¶¶ 471-545.

Trust SMF 3:

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).

Response:

Denied. The Smith Trust was funded from bank stock originally jointly purchased by

David and Lynn Smith and jointly owned by them from the date of purchase through its sale to the Smith Trust in 2004. SEC's SMF ¶¶ 375-381 (regarding David Smith's contribution to purchase of the ALBANK stock that was later converted into the Charter One stock used to fund the Smith Trust.

Trust SMF 4:

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

Response:

Denied. 105,000 shares of Charter One stock were loaned out of the Stock Account to KC Acquisitions (one of David Smith's businesses) from October 14, 2002 to July 29, 2003 in response to a "going concern" letter from its auditors. SEC's SMF ¶¶ 395-398.

Trust SMF 5:

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

Response:

Denied. The Charter One stock used to fund the Smith Trust was purchased in part from assets supplied by David Smith, and was an integral part of the Stock Account that was used as the central funding mechanism for all of David Smith's fraudulent business ventures. SEC SMF ¶¶

Trust SMF 6:

The Trust was neither created from, nor in possession of, ill-gotten funds. Dkt. No. 86 at 38-39

Response:

Denied. The Smith Trust was funded with assets fraudulently conveyed from the Stock Account that constituted the primary financing arm of David Smith's fraudulent business ventures. *See, e.g., supra* SEC Response to Smith Trust SMF 2, 4 and 5.

Trust SMF 7:

During its existence David L. Smith did not exercise authority over the Trust and acted only as an advisor and broker. Dkt. No. 86 at 39-40

Response:

Denied. David Smith exercised authority over the Smith Trust beyond acting as its advisor and broker. He exercised all of the powers that the nominal Trustee, Thomas Urbellis, should have exercised, and had complete control over the use and disposition of the Smith Trust assets. SEC's SMF ¶¶ 511-519; 545; see also *Smith v. SEC,* 432 Fed. Appx. 10, 13, 2011 WL 3438315 at * 2 (2d Cir. 2011)(finding sufficient evidence to support a finding that David Smith exercised such control over the Smith Trust that it became his mere instrumentality).

Trust SMF 8:

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

Response:

Denied. The movants misleadingly cite to this Court's July 7, 2010 initial findings regarding David Smith's interests in the Smith Trust before it became aware of the Annuity Agreement and the Smiths' rights to annuity payments from the Smith Trust. The Court later reversed those findings. *See below.* David and Lynn Smith were beneficial owners of the Smith Trust. They reported the Smith Trust as an asset on their Financial Statements (SEC SMF ¶¶ 507-508) and David Smith described himself as the "beneficiary" of the Smith Trust in a subscription agreement questionnaire (SEC SMF ¶ 509). *See also SEC v. McGinn Smith et al,* 11/22/10 Decision (Dkt. 194) at 21, where the Court held, after the Annuity Agreement came to light, that: "… the conclusion is compelled that David Smith possessed an equitable and beneficial interest in the Trust …); *Smith v. SEC,* 432 Fed. Appx. 10, 13 (2d Cir. 2011), 2011 WL 3438315 at *2, in which the Second Circuit found no error in the Court's conclusion that: "David Smith possessed an equitable and beneficial interest in the Trust."

Trust SMF 9:

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, Exhibit "C"

Response:

Denied. The Annuity Agreement between the Smith Trust and the Smiths required the Smith Trust to: "hold full title to the Property [the Charter One stock proceeds], free and clear of all liens and encumbrances, and there shall be no collateral liens of any kind on the Property or any other assets of the Transferee to secure payment of the obligations to the Transferors under this Agreement." SEC SMF ¶ 499 (App. Ex. 227 - Annuity Agreement at ¶ 3). Thus, the Smith Trust could not make any distributions to the nominal beneficiaries that would impair the Smith Trust's ability to satisfy its obligation to make annual annuity payments of $489,932 to the Smiths beginning in 2015 and

continuing for the rest of their lives.

Trust SMF 10:

On July 22, 2010, the Trust purchased real property in Broadalbin, New York located on the banks of the Great Sacandaga Lake for $600,000.00. Dkt. No. 626-1 at 1-9

Response:

Admitted.

Trust SMF 11:

Prior to the purchase of the real property in Broadalbin, New York, the Trust obtained a property profile and market analysis from Leah Slocum to determine the proper market value. Dkt. No. 604, Exhibit "E", Dkt. No. 626-1

Response:

Admitted.

Trust SMF 12:

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. Exhibit "B" P. 505

Response:

Admitted that in November 2004, Geoffrey R. Smith was advised of the existence of the Smith Trust by his father David L. Smith. However, denied that David Smith told Geoffrey Smith that the Smith Trust had been created for the benefit of Geoffrey and Lauren Smith. Given the circumstances discussed above regarding the true purpose of the Smith Trust, to fraudulently shield assets from the Smiths' creditors (SEC's SMF ¶¶ 471-488); the additional incontestable fact that the Smiths also greatly benefitted from the Smith Trust through their rights to annuity payments (SEC's SMF ¶¶ 494-501 (re Annuity Agreement entitling the Smiths to yearly payments from the Smith Trust of $489,932 beginning in 2015 until their death); the fact that the Smiths reported the Smith Trust as among their assets (SEC's SMF ¶¶ 507-509(citing to documents in which the Smiths admit the Smith Trust is one of their assets); the fact that David Smith described himself as a "beneficiary" of the Smith Trust (SEC's SMF ¶ 509 - referencing the Deerfield Subscription Agreement App. Ex. 268); the fact that only the Smiths benefitted from distributions from the Smith Trust from its creation in 2004 and April 2010 when it was first frozen by the Court (SEC's SMF ¶ 542); and the fact that neither Geoffrey nor Lauren Smith ever spoke to the Trustee about the Smith Trust (SEC's SMF ¶ 525; 530) and neither requested distributions from the Smith Trust for their benefit (SEC's SMF

¶¶532; 542) even though Lauren Smith was experiencing significant financial difficulties during that period warranting her mother to send her monthly checks totaling $22,100 between March 2007 and May 2009 (SEC's SMF ¶¶ 539- 541); and Lauren Smith's admission that she did not know that she had "access to the money" except at some undefined future time (SEC's SMF ¶ 541), no reasonable trier of fact could conclude that David Smith would have lied to his son Geoffrey Smith and only told him the Smith Trust was created for his and his sister Lauren's benefit without also disclosing the Annuity Agreement which was for the obvious benefit of David and Lynn, and which substantially limited if not curtailed the Smith Trust's ability to make distributions to anyone but David and Lynn Smith, and explaining that the true reason the Smith Trust was created, which was to shield these assets from the Smiths creditors until well into the future when the Smiths would then withdraw them for their retirement.

Trust SMF 13:

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. Exhibit "B" P. 505

Response:

Admitted that Geoffrey Smith reviewed the Trust Indenture.

Trust SMF 14:

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. Exhibit "B" P. 506

Response:

Admitted.

Trust SMF 15:

Geoffrey R. Smith learned of an alleged Annuity Agreement associated with the Trust in 2010. Exhibit "H"

Response:

Denied. For all the reason set forth in Response to Trust SMF 12, above, no reasonable trier of fact could conclude that David Smith lied to his son and did not disclose the existence of the Annuity Agreement to him when he explained the Smith Trust to him in 2004. It makes no sense, and it would have been an unnecessary lie for David Smith to have told his son that he and Lynn Smith had set up a Trust containing over $4 million in assets solely for their benefit free and clear of any restrictions and not tell him that the

Smith Trust was contractually obligated to repay the Smiths $489,932 a year in annuity payments from those assets beginning in 2015 until their death. Such a lie would also have been futile given the likelihood that either the Trustee would disclose the existence of the Annuity Agreement to the beneficiaries or that they would have requested a distribution from the Smith Trust at some point between 2004 and 2015 when the first Annuity payment was due and the Annuity Agreement, and the parents' deception, would come to light at that time. Moreover, Geoffrey and Lauren Smith would certainly learn of the Annuity Agreement once payments began in 2015, thereby making it all the more implausible that the parents would deceive their children for such a lengthy period of time.

Trust SMF 16:

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. Exhibit "B" P. 528.

Response:

Admitted that the SEC has no direct evidence to the contrary but Geoffrey Smith's professed lack of knowledge of lawsuits in which his parents were named lacks plausibility.

Trust SMF 17:

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. Exhibit "B" P. 528.

Response:

Admitted that the SEC has no direct evidence to the contrary but Geoffrey Smith's professed lack of discussion of the Trust with his parents prior to its creation lacks plausibility.

Trust SMF 18:

Defendants, Geoffrey R. Smith, Lauren T. Smith and the Smith Trust noticed David L. Evans, Esq. as an expert regarding Trusts and New York State Law pertaining to Trusts. Dkt No. 691.

Response:

Admitted that Defendants Geoffrey R. Smith, Lauren T. Smith and the Smith Trust noticed David L. Evans, Esq. as an expert regarding Trusts and New York State Law pertaining to Trusts but denied that Evans is such an expert. Evans' opinion contains legal conclusions not properly the basis for expert testimony. His opinions are also

unsupported by any legal authority and do not meet the standards for expert testimony set forth in Daubert and should not be considered or given any weight by the court. Evans' opinions are also not facts of the type contemplated within the local rules dealing with Statement of Material Facts to which a response is required.

Trust SMF 19:

David L. Evans, Esq. profers (sic) the expert opinion that the Trustee, and the Trustee alone, in his discretion, may terminate the Trust at any time. Dkt. No. 691 at 3, Paragraph "9".

Response:

Admitted that David Evans proffers the opinion that the Trustee, and the Trustee alone, in his discretion, may terminate the Trust at any time.

Denied, however, that this proffer is correct as the Declaration of Trust contains no such provision (*see* Declaration of Trust – App. Ex. 369) and further denied on ground that any such provision in the Declaration of Trust would be overridden by the Smith Trust's contractual obligations to David and Lynn Smith pursuant to the subsequently entered into Annuity Agreement in which the Smith Trust agreed not to jeopardize the Charter One stock the Smiths sold to it before the Smith Trust satisfied its annuity payment obligations to the Smiths (*see* Annuity Agreement – App. Ex. 370 at ¶ 3).

Trust SMF 20:

David L. Evans, Esq. profers the opinion that "Under New York State Law, an irrevocable trust such as the trust is recognized as a separate and distinct entity. The Trustee holds the property for the benefit of other designated in the Trust instrument. Under New York Law, a Trustee holds title to the property. No other party holds legal title to the Trust property." Dkt. No. 691 at 4, Paragraph "14".

Response:

Admitted that David Evans proffers the above-referenced opinion but denied that that opinion has any relevance to cases involving fraudulent conveyances of assets to a trust to shield them from creditors of the trust's creator, see, e.g. NYDCL § 276, or to cases where the creator of the trust continues to exercise ownership and control over the trust assets. *See, e.g., Smith v. SEC,* 432 Fed. Appx. 10, 13 (2d Cir. 2011), 2011 WL 3438315 at *2; *In re Vebeliunas,* 332 F.3d 85 (2d Cir. 2003).

Trust SMF 21:

David L. Evans, Esq. profers the opinion "Under the Trust instrument, separate property

rights and interests are created. These property rights and interest are vested in the beneficiaries. In the present case, the beneficiaries are Geoffrey R. Smith and Lauren T. Smith." Dkt. No. 691 at 4, Paragraph "16".

Response:

Denied. *See* Response to Trust SMF 20, above.

Trust SMF 22:

David L. Evans, Esq. profers the opinion that "As specifically provided in the Trust instrument these incomes/principal distributions are made within the full discretion of the Trustee to provide for the health, education, maintenance and support of the beneficiaries during the term of the trust" Dkt. No. 691 at 4, Paragraph "16".

Response:

Denied. *See* Response to SMF 20, above. In addition, David Smith, not the nominal Trustee, controlled the Smith Trust. *See* Response to Trust SMF 12, above.

Trust SMF 23

David L. Evans, Esq. profers the opinion that "The Trust provides for its continuation for a finite period of time. The finite period of time is measured by the death of the survivor of David L. Smith and Lynn A. Smith. The Trustee does have the discretionary ability to terminate the Trust before the end of the measuring lives." Dkt. No. 691 at 415, Paragraph "17".

Response:

Admitted that the Smith Trust provides for its continuation for a finite period of time measured by the death of the survivor of David L. and Lynn A. Smith.

Denied, however, that the Trustee has the discretionary ability to terminate the Trust before the end of the measuring lives for the same reasons set forth in Response to Trust SMF ¶ 19, above, asserting the same claim and for the reasons set forth in Response to Trust SMF ¶ 20, as to why the trust form should be disregarded.

Trust SMF 24

David L. Evans, Esq. profers the opinion that "It is true that the lives of David L. Smith and Lynn A. Smith constitute the measuring lives upon which the Trust continues its existence. Upon their passing, the Trust will terminate. This does not create any interest in the Trust for David L. Smith or Lynn A. Smith." Dkt. No. 691 at 5, Paragraph "20".

Response:

Admitted that: "the lives of David L. Smith and Lynn A. Smith constitute the measuring lives upon which the Trust continues its existence. Upon their passing, the Trust will terminate."

Denied, however, that: "This does not create any interest in the Trust for David L. Smith or Lynn A. Smith." Evans does not provide any legal or statutory authority in support of his assertion nor does he cite to any language in the Declaration of Trust to this affect. Moreover, as discussed above, as evidenced by the Annuity Agreement, and as held by the Court on numerous occasions, David and Lynn Smith do possess an interest in the Smith Trust. Furthermore, they considered themselves as the true beneficiaries of the Smith Trust. See, e.g., Response to Trust SMF ¶¶ 12, 20, above.

Trust SMF 25

David L. Evans profers the opinion that "David L. Smith and Lynn A. Smith have no property rights in the assets of the Trust. This is true for either the income or for the principle of the Trust" Dkt. No. 691 at 5, Paragraph "21".

Response:

Denied. As set forth above, David and Lynn Smith have a beneficial interest in the Smith Trust though their entitlement to annuity payments. In addition, as set forth above, David and Lynn Smith fraudulently conveyed the Charter One stock to the Smith Trust in an attempt to shield those assets from their creditors and David Smith has always exercised full dominion and control over the assets in the Smith Trust to preserve those assets for the benefit of himself and his wife Lynn Smith. *See, e.g.,* Responses to Trust SMF ¶¶ 12, 20, above.

Trust SMF 26

David L. Evans profers the opinion that "David L. Smith and Lynn A. Smith are sellers. The benefit of the bargain is that they become annuitant-creditors of the Trust. As annuitant-creditors of the Trust, they have no collateral interest in the assets of the Trust, nor do they have the power of manage the Trust or control the Trust in any manner." Dkt. No. 691 at 6, Paragraph "23".

Response:

Denied. As set forth above, David and Lynn Smith have a beneficial interest in the Smith Trust though their entitlement to annuity payments. In addition, as set forth above, David and Lynn Smith fraudulently conveyed the Charter One stock to the Smith Trust in an attempt to shield those assets from their creditors and David Smith has always exercised full dominion and control over the assets in the Smith Trust to preserve those assets for the benefit of himself and his wife Lynn Smith. *See, e.g.,* Responses to Trust SMF ¶¶

12, 20, above.

Trust SMF 27

David L. Evans, Esq. profers the opinion that "Paragraph *5* (Private Annuity Contract) expressly provides that the transferors shall not be able to assign, pledge, hypothecate, mortgage or otherwise allow their annuity interest to be subject to attachment, execution, judgment, garnishment, anticipation or other dispensation or impairment. Such anti-alienation causes merely acknowledge that David L. Smith's and Lynn A. Smith's contractual rights are personal to them. Others cannot perfect an interest in their contract right." Dkt. No. 691 at 8, Paragraph "33".

Response:

Admitted that Paragraph 5 of the Private Annuity Contract states that "the transferors shall not be able to assign, pledge, hypothecate, mortgage or otherwise allow their annuity interest to be subject to attachment, execution, judgment, garnishment, anticipation or other dispensation or impairment."

Denied, however, that David and Lynn Smith's "contractual rights" are personal to them and that others cannot perfect an interest in their contract right. *See*, *e.g.,* Response to Trust's SMF ¶ 20, above; New York Debtor and Creditors Law Sections 276, 278 and cases cited in SEC's Memorandum of Law in Opposition to Smith Trust Motion for Summary Judgment.

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Respectfully submitted,

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