

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.

NOTICE OF MOTION

PLEASE TAKE NOTICE, that upon the annexed Affidavit of James D. Linnan, Affidavit of Geoffrey R. Smith, Memorandum of Law, Statement of Material Facts and Notice to Pro Se Litigant, Nancy McGinn, and Exhibits, and upon all prior pleadings and proceedings heretofore had herein, a Motion will be made as follows:

DATE, PLACE AND TIME OF MOTION: September 4, 2014 at 9:00 a.m.

at the United States Courthouse, Broadway, Albany, New York or as soon thereafter as counsel can be heard.

TYPE OF MOTION: Movant seeks an Order of the Court for a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56.

Dated: Albany, New York
July 3, 2014

Respectfully submitted,

Linnan & Fallon, LLP
By /s/ James D. Linnan
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of the David L. and Lynn A. Smith Irrevocable Trust
U/A 8/04/04, GEOFFREY R. SMITH, LAUREN
T. SMITH, and NANCY MCGINN,

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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 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)

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

1. That I am an attorney duly admitted to practice before this Court and am the attorney for Geoffrey R. Smith, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, Geoffrey R. Smith, individually and Lauren T. Smith, individually, in the instant action.

2. I submit this Affidavit in support of my clients' motion for summary judgment pursuant to Federal Rules of Civil Procedure 56.

3. This Affidavit is submitted on my personal knowledge, the pleadings, court records, and when noted, upon information and belief, from information I have received and believe to be true and accurate.

4. Federal Rules of Civil Procedure Section 56(c), provides that a Court shall render judgment where the moving party demonstrates that "there is no genuine issue as to any material fact..." The central issues in this motion are (a) whether or not the establishment of the Trust on August 4, 2004 was a fraudulent transfer and if the distributions from the Trust during 2010 were fraudulent transfers and (b) whether the irrevocable spendthrift Trust may be controlled or invaded by the SEC.

5. A review of the plaintiff's Complaint reveals a series of conclusory statements that are unsupported by fact or even the allegation of fact.

6. The plaintiff contends that the establishment of the Trust in 2004 was a fraudulent conveyance intended to hide assets from future creditors.

7. The allegation is unsubstantiated by any facts alleged in the complaint or in the record.

8. The Court has already determined that the funds utilized to establish the Trust were funds that had absolutely no connection to the alleged misdeeds of David L. Smith. The

funds were directly attributable to an inheritance by Lynn A. Smith from her father in 1969, and the prudent investment of those funds. Magistrate Homer, in his Decision of July 7, 2010, found “It is undisputed that the Trust originated from bank stock in the stock account purchased in the early 1990s well prior to 2003 when the SEC alleges the scheme began here. Dkt No. 86 In fact, none of the named entities, except MS and Co. existed at that time. Thus, there is no proof that fraudulently obtained funds were deposited into the stock account prior to the purchase of the bank stock in the early 1990s.” Dkt. No. 86. .

9. In brief, the assets utilized to establish the Trust at its inception were “pure assets” and outside the taint of any alleged fraudulent activities by David L. Smith.

10. The Court is also reminded that the assets utilized to establish the Trust were assets inherited by Lynn Smith and held in Lynn Smith’s investment account. David Smith was never an owner of the assets that were transferred to establish this Trust.

11 At the time that this Trust was established, Lynn Smith, individually, in her own name, had an investment portfolio with liquid assets valued at over \$6,500,000.00. Dkt.No. 34 at 4. Lynn Smith had given discretionary authority to David L. Smith, her broker and husband, to manage this account, but it is incontrovertible that the asset used to establish this trust is uniquely traceable to the inheritance by Lynn Smith from her father in 1969.

12. The allegations in plaintiff’s Complaint, which plaintiff relies upon to plead a case against Geoffrey R. Smith and Lauren T. Smith, are nothing more than conclusory supposition by the plaintiff. Initially, the plaintiff’s claim that Geoffrey R. Smith and Lauren T. Smith, as beneficiaries, should have known that an alleged Annuity Agreement existed creating annuity rights in David L. Smith and Lynn A. Smith.

13. The plaintiff's allegation that the beneficiaries, Geoffrey R. Smith and Lauren T. Smith knew, or should have known, of the alleged Annuity Agreement is without a basis in fact.

14. The instant action that is brought against the Trust and its beneficiaries, Geoffrey R. Smith and Lauren P. Smith, is pled under Section 276 of the New York Debtor Creditor Law. That law states:

“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.”

15. A fraudulent transfer cannot be established by mere suspicion and must be proven by facts. It is not sufficient to rely on ambiguous facts that are consistent with their guilt or innocence. If the facts taken together are consistent with an honest intent, fraud has not been established as a matter of law. See Memo of Law

16. There are no facts in the record, or even allegations in the complaint, that the Smith children, Geoffrey and Lauren, had any knowledge that it was even claimed that their father was engaged in any alleged wrongdoing until such time as he was indicted.

17. Subsequent to his indictment, and to this day, their father has steadfastly denied his involvement in any wrongdoing and has maintained his innocence to his children, to the Courts, and to the world.

18. Plaintiff's burden under the NY Debtor Creditor Law is a heavy burden. Plaintiff must prove by clear and convincing evidence that there was actual intentional fraud. Plaintiff's claims that the children should have known is insufficient.

19. The allegation that the beneficiaries knew that their father, a respected and successful stockbroker, was the broker of record for the Trust account and was making trust investment decisions on behalf of the Trust, is not a “badge of fraud”. Geoffrey R. Smith, as a

beneficiary, regularly reviewed the Trust Account Statements, agreed with the investments, and even invested some of his own money in one of the securities. Ex B This allegation is again consistent with honest intent.

20. The sale of the lake property (the Sacandaga home inherited by Lynn A. Smith from her parents) to the Trust for a fair market value was not a fraudulent conveyance. Dkt. No. 604 Ex E ; Dkt. No. 626-1

21. The courts attention is directed to the Affidavit of Geoffrey Smith regarding the sale of the Lake Property to the trust Dkt. No. 626 at 15 Para 8-9. and Dkt No. 604

22. In total, the allegations of the plaintiff, as against the defendants, Geoffrey R. Smith and Lauren T. Smith, taken in their best light, do not sustain the elements of a fraudulent transfer.

23. The plaintiff's Complaint fails to state a viable cause of action as against the beneficiaries. There are not sufficient facts alleged to sustain the burden to prove the cause of action, even taking the pleadings in the light most favorable to the plaintiff. There are insufficient allegations to establish fraud with **actual intent**.

24. In the instant action, the plaintiff has elected to not identify any expert witnesses to be called at trial.

25. The plaintiff cannot rely upon opinions of experts in a motion for summary judgment if experts have not been identified in pre-motion discovery.

26. The instant defendants have identified experts to testify relative to the establishment of the Trust, the validity of the Trust, the validity of the transactions undertaken by the Trust, the validity of the investments made by the Trust, and the validity of the distributions from the Trust during its existence. Dkt No. 691

27. The Reports and testimony of the expert, John Deleo Dkt. No. 690 and the Report of David L. Evans Dkt. No. 691, reveals that the plaintiff's allegations regarding fraudulent intent are wholly without merit.

28. The Plaintiff's allegation that the sale of the Sacandaga Property, or the distributions to the Beneficiaries during 2010, were improper are not born out by the record.

29. Magistrate Homer, in his Decision of July 7, 2010, found, as a matter of law, that "because the Trust had virtually no limits on the types of distributions that beneficiaries could request, the money was properly requested and provided" Dkt. No. 86 at 40.

30. In making this finding, Magistrate Homer relied upon the transcript at Pages 534-535, 560 as cited in his Decision. Magistrate Homer's finding is supported, in addition to the testimony proffered at the Hearing, is supported by the opinions proffered by David L. Evans, defendant's expert in the field of Trusts and New York State Laws applicable thereto. Mr. Evans finds that "distributions under the income/principal property rights are subject to the full discretion of the Trustee. Dkt No. 691 at 3, Paragraph "7"

31. Mr. Evans further proffers the opinion that "the Trust does provide that the Trustee, and the Trustee alone, in his discretion, may terminate the Trust at any time. If the Trust is terminated, the then retained income and principal are paid to the beneficiaries in recognition of their "individual, and independent property rights".

32. In brief, the Trustee, in the Trustee's sole discretion, has an absolute right to make distributions to the beneficiaries, Geoffrey R. Smith and Lauren T. Smith, at any time in any amount. In addition, the Trustee, in the Trustee's sole discretion, has an absolute right to terminate the Trust and distribute the principal and accumulated interest to the beneficiaries.

33. Mr Evans report identifies the Laws of the State of New York and applies that Law to this case both on the issue of the alleged fraudulent transfer, and on the underlying issue of the authority of the Plaintiff to interfere with, control or invade the Trust. Dkt 691

34. Attached as Exhibit "A" is the Affidavit of Geoffrey R. Smith dated July 2, 2014. Attached hereto and marked as Exhibit "B" is the direct examination of Geoffrey R. Smith from the Preliminary Hearing of August 6, 2010 (Pages 502 through 519).

Dated: Albany, New York
July 2, 2014

Linnan & Fallon, LLP
By /s/ James D. Linnan
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Attorneys for Geoffrey R. Smith,
Trustee of the David L. and Lynn A. Smith
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and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenor.

AFFIDAVIT OF DEFENDANT/INTERVENOR,
GEOFFREY R. SMITH

GEOFFREY R. SMITH, being duly sworn, deposes and says:

1. That I am a beneficiary of the David L. and Lynn A. Smith Irrevocable Trust U/A August 4, 2004.
2. That sometime in 2004, I was advised that an Irrevocable Trust had been established by my parents for my sister, Lauren T. Smith, and myself.

3. I was unaware that there was any Private Annuity Agreement associated with the trust document until subsequent to the Preliminary Injunction Hearing. The only document I had ever seen prior to the Preliminary Injunction Hearing was the Trust Indenture.

4. At that time, in 2004, I was unaware of the existence of a tax shelter known as a Private Annuity Trust and did not associate the Trust, established by my parents, as having any attachment to an annuity.

5. At the time of the establishment of the Trust, or shortly thereafter, I had a conversation with my sister, Lauren T. Smith, and we collectively believed that the Trust was set aside to provide for some significant event in our adult lives and was not there for us to rely upon in our day-to-day lives.

6. At the time of the establishment of the Trust, I was aware that my parents' joint assets were valued at approximately \$19,000,000.00. I did not believe the Trust would be necessary for me or my sister as a source of funds in our daily lives.

7. At the time of the establishment of the Trust, I was aware that stock, and other assets owned by my mother and inherited by her from her family, had been prudently invested and was valued at several million dollars. I believed that the source of the funds utilized to establish the Trust was primarily, or exclusively, from funds which were the result of my mother's inheritance.

8. At the time of the establishment of the Trust in 2004, I was advised, and I believed, that the true intent of the Trust was to provide funds for my sister and me in our adult lives.

9. The funds received by my sister and me during 2010 have been the subject of Affidavits previously filed with the Court.

10. At the time of the distribution of these funds, I was not aware of any Annuity Agreement or annuity obligation of the Trust.

11. At the time of the distributions in July and August of 2010, the distributions were made for legitimate purposes and were not made with any intent to defraud any entity.

12. As previously set forth, at the time of the establishment of the Trust, and on or around Thanksgiving of 2004, I had a conversation with my sister, Lauren T. Smith, advising her of the existence of the Trust. It was our collective understanding and agreement that the Trust was established for our benefit to assist us in some significant way when we were adults and had established ourselves and our occupations. It was never our understanding that we were going to live like "trust fund kids" and request funds from the Trust whenever we wanted.

13. At the time the Trust was created and for years after, my sister was living in Boston and working. I was working and attempting to establish my life. Neither I, nor my sister, viewed the Trust as our piggy bank.

14. During those years, my sister and I would receive gifts from our parents; but, we were basically living on our own and establishing our lives as our parents had taught us to do.

15. During several years when the Trust was in existence, I was aware that my father, as a stockbroker and as the broker for my mother for her stock account, made investment decisions for my mother's account, the Trust account, and the accounts of many other individuals and Trusts for whom he was a broker.

16. The distribution of funds for my parents to pay their income taxes in 2010 was more a matter of convenience.

17. I became aware that my father had paid the income taxes for the Trust for several years.

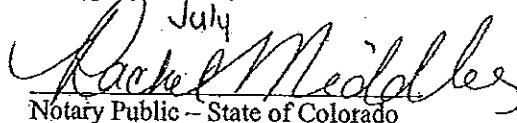
18. In 2010, at the time the taxes were due, my parents were both in Florida and I was staying in the house in Saratoga and became aware that the tax bill for their personal taxes was due. The amount of taxes due in 2009 was less than the amount my father had previously paid for income taxes due from the Trust. I felt for convenience, with them out of town, and

because the Trust owed him a significant amount of money for the taxes that he had paid on behalf of the Trust, that the easiest thing to do was obtain a check from the Trust and forward it to the accountants by the April 15th deadline. As an accommodation to my parents, I faxed an authorization and request to the Trustee who then transferred the funds directly into a checking account and a check was issued to the Internal Revenue Service.

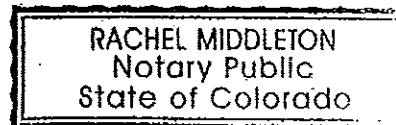
19. I never believed, and do not currently believe, that any of the funds contained in the Trust were funds earned by McGinn, Smith or any of the funds created by McGinn, Smith. My understanding of the source of the funds that were utilized to create the Trust were the funds earned on my mother's inheritance by prudent investing.


GEOFFREY R. SMITH

Sworn to before me this
2nd day of ~~June~~, 2014.

July

Notary Public - State of Colorado

Expires: 3/1/2016



JEFFREY SMITH - DIRECT - DUNN

1 MR. FEATHERSTONHAUGH: None, your Honor. At
2 this point, Relief Defendant Lynn Smith rests.

3 THE COURT: Thank you. Miss Dunn, any
4 witnesses?

5 MISS DUNN: Yes, your Honor. The trust calls
6 Jeffrey Smith.

7 JEFFREY SMITH,
8 having been duly sworn by the Clerk of the Court, was
9 examined and testified as follows:

10 DIRECT EXAMINATION BY MISS DUNN:

11 Q. Good morning, Mr. Smith.

12 A. Good morning.

13 Q. Can you please tell us your educational
14 background?

15 A. Sure. I graduated from high school in 1998 and
16 went on to attend Lehigh University. I graduated in 2002
17 with a BS in finance.

18 Q. Do you have any post-graduate education or
19 certifications?

20 A. Yes. I recently was awarded the chartered
21 financial analyst designation.

22 Q. Are you presently employed?

23 A. I am.

24 Q. Can you tell us your employment?

25 A. I'm employed by a company by the name of Access

BONNIE J. BUCKLEY, RPR, CRR
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JEFFREY SMITH - DIRECT - DUNN

1 Trade Management and I perform business development duties.
2 It's basically a sales job.

3 Q. All right. Going back to when you graduated from
4 college, can you tell us your employment history? And I'm
5 sorry, what year did you graduate from Lehigh?

6 A. 2002. In October of 2002, I got a job with a firm
7 called Bernstein Greenberg Trading. They were a commodities
8 option trading firm. And I took a position as an assistant
9 trader. And I worked on the New York Board of Trade
10 commodities exchange floor. I performed the duties of an
11 assistant trader for roughly four years, I think, at which
12 time I became a self-employed commodities option trader on
13 that same exchange. I held that position for about 18
14 months I believe. During that time I was a part-time
15 employee of McGinn, Smith, working as a registered
16 representative. And in 2008, I left my position as a
17 commodities trader and became a full-time employee of
18 McGinn, Smith.

19 Q. What did you do at McGinn, Smith?

20 A. I performed a number of duties. Primarily, I was
21 a -- I managed accounts of several clients that were friends
22 and colleagues of mine from my previous position. I raised
23 capital and managed those accounts.

24 Q. And did there come a time when you left the
25 employment of McGinn, Smith?

BONNIE J. BUCKLEY, RPR, CRR
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JEFFREY SMITH - DIRECT - DUNN

1 A. Yes.

2 Q. Or changed your employment within McGinn, Smith?

3 A. Yes. In December of 2009, when McGinn, Smith
4 ceased its broker dealer operations, I remained a part-time
5 employee of McGinn, Smith. And I was also a part-time
6 employee of RMR Wealth Management as a registered
7 representative there to continue to service the accounts
8 under my control.

9 Q. All right. Did there come a time when that
10 changed?

11 A. Yes. I resigned from RMR Wealth Management, I'm
12 unsure of the exact date, but it was something like
13 April 19 -- somewhere between April 19 and April 25th of
14 2010. And I also resigned from McGinn, Smith on -- around
15 the same time, I believe it was April 21st or 22nd.

16 Q. All right. And from the time you graduated
17 college in 2002 until April of 2010, where did you live?

18 A. I lived in the New York City area, mostly in
19 Manhattan, but I spent some time in Hoboken, New Jersey.

20 Q. And your work locations during that time period
21 from 2002 to April 2010, were you primarily working in New
22 York City?

23 A. That's correct.

24 Q. Did there come a time that you learned that a --
25 well, let me ask you this first: Are you the son of David

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1 L. and Lynn A. Smith?

2 A. Yes, I am.

3 Q. And this is your mother seated here in the
4 courtroom, is that correct?

5 A. That's her.

6 Q. Did there come a time that you learned that your
7 parents had created a trust for the benefit of you and your
8 sister?

9 A. Ah, yes.

10 Q. When did you first learn of that?

11 A. It was late 2004. My guess would be I learned of
12 it when I came home for Thanksgiving in 2004.

13 Q. All right. How did you learn of it?

14 A. To the best of my recollection, I had a sit down
15 with my father in his home office during that Thanksgiving
16 break and he told me that the trust had been created for my
17 benefit and my sister's benefit. And then he showed me the
18 declaration of trust and I read it through.

19 Q. Okay. And can you take a look at what I've put in
20 front of you as Intervenor Exhibit, I believe it's 11. Is
21 that 11? The one that's in your hand?

22 A. Seven.

23 Q. Seven. Sorry. Is that the trust declaration that
24 he showed you in the fall of 2004?

25 A. Yes, I believe it is. Yes.

BONNIE J. BUCKLEY, RPR, CRR
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JEFFREY SMITH - DIRECT - DUNN

1 Q. Did he -- did your father explain to you how the
2 trust was funded?

3 A. Yeah. He mentioned that my mother had transferred
4 stock from Charter Financial Bank into the trust to fund it.
5 It was an investment that I was aware of. And he told me of
6 the initial funding.

7 Q. Okay. Do you know when the initial funding was
8 made?

9 A. I didn't know the exact date at the time, but I, I
10 had assumed that it was just prior to our meeting,
11 relatively close to our meeting.

12 Q. All right. At the time that you had that
13 conversation with your father where you learned of the
14 trust, was it your understanding that the trust had been
15 fully funded at that time?

16 A. Yes.

17 Q. All right. And after that conversation with your
18 father, did you have any other conversations any time in
19 2004, 2005 with anyone else about the trust?

20 A. I had a conversation with my sister about it.

21 Q. What was the nature of that conversation?

22 A. I told her that we had a trust that we were both
23 the beneficiaries of and that it had roughly \$4 million in
24 it. She was happy to hear that.

25 Q. Who wouldn't be. You said you read through the

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1 trust -- withdrawn.

2 Did you have any conversations with Tom Urbelis
3 during that same time period concerning the trust?

4 A. No, I didn't.

5 Q. Do you know Tom Urbelis?

6 A. Yes. Very well.

7 Q. How do you know him?

8 A. I've known him for as long as I can remember. He
9 was a very close friend of my parents. He would spend
10 several weeks with his family at our camp house with -- you
11 know, and I would hang out and play with his kids. And we
12 would see each other at various holidays as well.

13 Q. All right. And do you know how to contact him
14 independent of your parents?

15 A. Yeah.

16 Q. Have you contacted him independent of your
17 parents?

18 A. I have.

19 Q. All right. And you said that when your father
20 showed you this declaration of trust, that you read it, is
21 that correct?

22 A. Yes.

23 Q. Did you see your name anywhere in the trust?

24 A. Um ... I'm sure that I did at the time. I, I
25 can't remember reading it, six years ago, but yes.

BONNIE J. BUCKLEY, RPR, CRR
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JEFFREY SMITH - DIRECT - DUNN

1 Q. All right. Were you aware after the trust was
2 created that the stock that your mother transferred to the
3 trust was held in a brokerage account?

4 A. Yes.

5 Q. And what was your understanding as to what
6 brokerage or clearing house was holding that stock?

7 A. I knew that the stock was held at McGinn, Smith
8 and -- well, I guess the brokerage was McGinn, Smith, and at
9 the time the account was held at Bear Stearns which was the
10 clearing firm.

11 Q. Okay. Can you explain the difference between a
12 brokerage and a clearing house?

13 A. Sure. You know, clearing firms are entities that
14 essentially provide protection in transactions between two
15 parties. In the case that one party is unable to fulfill
16 the obligations of a trade, the clearing house will be asked
17 to step in to protect the other side of that trade.

18 Q. And you stated that you understood this stock had
19 been funded from Al -- did you say Albank or -- you were
20 talking about bank stock. Which stock were you talking
21 about?

22 A. I believe at the time it had been Charter One Bank
23 or Charter Financial.

24 Q. Did you have any knowledge as to the origin of the
25 Charter One stock that your mother transferred into the

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1 trust account?

2 A. Yeah. It was Albank, which had been purchased or
3 acquired by Charter One Financial, and I believe Charter One
4 Financial at a later time was purchased by Citizens Bank.

5 Q. And throughout -- from the time the trust account
6 was created through McGinn, Smith with, I believe you said
7 Bear Stearns was the initial clearing firm, were account
8 statements issued for that trust account?

9 A. Yes.

10 Q. And do you have any knowledge as to who the
11 account statements were issued to?

12 A. Well, they were issued to the trust, and they were
13 sent in duplicate to Tom Urbelis and to my parents' home.

14 Q. Is that their home in Saratoga?

15 A. Ah, yes.

16 Q. Okay. And was -- did you have any expectation as
17 the beneficiary that you would receive account statements on
18 this account?

19 A. I don't know that I had any expectation that I
20 would receive statements, but I certainly reviewed the
21 statements. I knew where they were kept and I reviewed them
22 from time to time.

23 Q. Do you know when the account statements arrived at
24 the Smith family home in Saratoga, what happened to them,
25 how they were maintained?

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1 A. They were maintained in a binder, kept in my
2 father's office. I, I can't specifically remember if the
3 trust had its own binder. I know that there was a binder
4 full of statements from my own personal stock account and my
5 sister's. And I know that the trust statements were also in
6 a binder that was labeled.

7 Q. All right. So is it possible that the trust
8 account statements were maintained in a binder with your and
9 your sister's personal account statements?

10 MR. McGRATH: Objection. Leading.

11 THE COURT: Overruled.

12 A. It's possible.

13 Q. You said you don't recall whether the trust
14 statements were segregated or with yours and your sister's
15 statements.

16 A. I can't recall that now.

17 Q. All right. So you and your sister had your own
18 individual brokerage statements, is that what you're saying?

19 A. Yes.

20 Q. Were yours and your sister's account statements
21 also mailed to the family home in Saratoga?

22 A. They were. That was for convenience.

23 Q. Were they mailed there during times when that
24 wasn't your primary residence?

25 A. Absolutely. Yeah.

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1 Q. Why were yours and your sister's personal account
2 statements mailed to the family home in Saratoga?

3 A. We were both moving frequently. It was just
4 easier than to constantly change the mailing address on the
5 account. That's a tedious process with clearing firms.

6 Q. All right. And the -- your personal account
7 statements and the trust account statements, were they
8 available to you in the family home in Saratoga?

9 A. Sure. Yeah.

10 Q. And what did you do, if anything, to inform
11 yourself as to the status of the trust brokerage account?

12 A. I reviewed the statements probably quarterly;
13 maybe, maybe a little more frequently than that. As I
14 mentioned, I lived in Manhattan, and so from time to time I
15 would be coming home to visit or stopping through, and I
16 would, I would glance at the statements at that time.

17 Q. All right. And did you review any investments in
18 the account?

19 A. Yes.

20 Q. Did you have any opinions as you reviewed them
21 based on your experience as to the advisability of the
22 investments in the account?

23 A. I knew of two private placement investments in the
24 trust, one of which was Pine Street Capital, which I had
25 heard of my father speak of. I was comfortable with it.

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1 The other was Deerfield Triarc, which I at the time didn't
2 know a whole lot about but trusted that it was a worthwhile
3 investment. And the other investments were public
4 securities that I was familiar with.

5 Q. And with respect to either Deerfield or Pine
6 Street, did you conduct any independent research when you
7 saw that the trustee had invested in those private
8 placements?

9 A. I didn't conduct any research with respect to Pine
10 Street, and initially I didn't conduct any research with
11 respect to Deerfield. However, at one point, Deerfield
12 became a public company and I did do some research on that
13 company at that time and actually made an investment in the
14 public company in my personal stock account and recommended
15 it to a couple of my clients.

16 Q. Did you make money on that investment?

17 A. I can't recall. I traded it a little bit.

18 Q. All right. Did you ever contact Tom Urbelis to
19 discuss the investments?

20 A. No.

21 Q. As the beneficiary of the account, did you have
22 any expectation that you could control the investments in
23 any way?

24 A. I didn't have any expectation, no.

25 Q. How did you view the money that was in the

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1 account?

2 A. I viewed it as my money. Sort of a nest egg. I
3 felt like it was something I could fall back on if I became
4 unemployed or if I wanted to start my own business or or
5 build a house or something like that.

6 Q. And at the time the trust was created in 2004, you
7 and your sister were both in your 20s, is that correct?

8 A. Yes.

9 Q. All right. Were you both working?

10 A. Yes.

11 Q. Relatively self-sufficient?

12 A. I was self-sufficient. My sister was relatively
13 self-sufficient.

14 Q. Were either of you relying upon anyone else's
15 income?

16 A. My sister, I believe, got some cash from my mother
17 from time to time.

18 Q. All right. From August 2004, until December 2009,
19 were you ever involved in the preparation of the trust tax
20 returns?

21 A. No.

22 Q. And during that same time period, were you
23 involved in the management of the trust investments?

24 A. No.

25 Q. Did you request any distribution from the trustee

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1 as a beneficiary during that time period?

2 A. No.

3 Q. Did there come a time that you became involved in
4 paying of the trust taxes?

5 A. Yes.

6 Q. And can you tell me when that occurred?

7 A. April of this year.

8 Q. All right. And do you remember what date in April
9 you may have been become involved in it?

10 A. Yeah. On April 15th of this year, I contacted
11 Mr. Urbelis and requested a wire transfer to my mother's
12 account in order to pay taxes.

13 Q. All right. What did you tell Mr. Urbelis in that
14 conversation?

15 A. I asked him -- or, or I told him that, that I
16 needed money out of the trust for tax purposes and that I
17 would be sending him a letter of authorization to sign and
18 send back to RMR Wealth Management.

19 Q. All right. Do you recall what, if
20 anything, Mr. Urbelis said to you?

21 A. I think he said okay.

22 Q. And did you provide him with a proposed letter of
23 authorization?

24 A. I didn't physically provide it, but I was there
25 when it was provided.

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1 Q. Do you know who provided it to him?

2 A. Yeah. Brian Mayer.

3 Q. And who's Brian Mayer?

4 A. He was the office manager of RMR Wealth
5 Management. He was a partner there.

6 Q. Was RMR a clearing firm for this account on
7 April 15, 2010?

8 A. No. They were the wealth management firm. They,
9 they managed the account, and their broker dealer services
10 were provided by Dinosaur Capital and they were cleared
11 through National Financial Services.

12 Q. All right. I misunderstood. So on April 15th,
13 2010, you called Tom Ubelis and you asked him to -- or you
14 directed him to transfer \$95,000 by wire transfer to your
15 mother's checking account; is that your testimony?

16 A. Correct.

17 Q. Okay. How did you arrive at that dollar amount?
18 Did you have a conversation with Mrs. Smith, your mother?

19 A. No.

20 Q. Okay. How did you arrive at that dollar amount?

21 A. Ah, I had a conversation with my father. He had
22 the tax returns for the trust and for himself personally
23 that were prepared by Piaker & Lyons in front of him and --

24 Q. Did you have an understanding as to what the
25 \$95,000 represented?

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1 A. I knew that a portion of the 95,000 was to pay the
2 estimated trust taxes and a portion was to pay the estimated
3 taxes of my parents.

4 Q. Why did you request money from the trust brokerage
5 account to pay your parents' personal taxes?

6 A. It was April 15th and they on that date didn't
7 have the funds to make their tax payment, so I suggested
8 that I could help them do that.

9 Q. And how did you propose to do that?

10 A. I told my father that I would take a distribution
11 from the trust and deposit it in my mom's checking account.

12 Q. All right. So when you told Mr. Urbelis that you
13 wanted \$95,000 for tax purposes, did you explain to him that
14 a portion of it was for the trust taxes and a portion of was
15 for your parents' taxes?

16 A. No, I didn't.

17 Q. Is there any reason you didn't break that down for
18 him?

19 A. It was my money. I -- honestly, on that day, I
20 didn't think that it was that big of a deal. I expected to
21 get the portion of the taxes that my parents paid for their
22 joint tax bill back into the trust shortly afterwards, and
23 it was more of something that I just overlooked. I'm sure
24 that I can't speak for him, but I'm sure that Mr. Urbelis
25 would have approved --

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1. MR. McGRATH: Objection.

2. A. -- of the distribution.

3. MR. McGRATH: Objection.

4. THE COURT: Sustained as to the last portion
5. of the answer.

6. BY MISS DUNN:

7. Q. Had you ever before that date requested a
8. distribution from Mr. Urbelis?

9. A. No, I hadn't.

10. Q. And had he ever communicated to you any procedure
11. that you should follow if you wanted to request a
12. distribution?

13. A. Ah, no.

14. Q. Had he ever advised you that if you wanted a
15. distribution, you had to provide him with any written
16. documentation?

17. A. I was not advised of that, no.

18. Q. Were you ever told that you had to provide any
19. detail to any request, substantiate any amount of money that
20. you requested from the trust?

21. A. No.

22. Q. All right. Do you have a present need or
23. anticipate any need in the next 18 to 24 months to request a
24. distribution from the trust?

25. A. I do.

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1 Q. What would be the reason for that anticipation?

2 A. I would say that I'm under employed at the moment.
3 I don't have a salary income. I don't have health insurance
4 at the moment. And I have some credit card debt. I would
5 like to take care of those things. And I've also been
6 working for about a year to start a business of my own, and
7 I've considered taking a distribution to move that forward.

8 Q. Okay. And do you know whether your sister Lauren
9 has any reason to request a distribution, any need for funds
10 at this point in time?

11 MR. McGRATH: Objection. Hearsay.

12 THE COURT: If he knows. Overruled.

13 A. Yeah. She, she, she probably could use some
14 money. She was used to getting money from my mother from
15 time to time and she has been denied that in the last couple
16 of months.

17 Q. All right. Do you know whether Lauren has health
18 insurance?

19 A. She does.

20 Q. Mr. Smith, from the time you learned in the fall
21 of 2004 of the existence of this trust fund until you sit
22 here today, what has been your understanding as to who owns
23 the money in the trust fund?

24 A. I believed it to be owned by Lauren and I,
25 equally.

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1 Q. Thank you very much.

2 MISS DUNN: Nothing further.

3 THE COURT: Mr. McGrath.

4 MR. McGRATH: Thank you.

5 THE COURT: Please proceed.

6 CROSS-EXAMINATION BY MR. McGRATH:

7 Q. Good morning. My name is Kevin McGrath, and I'm
8 with the Securities & Exchange Commission.

9 A. Good morning.

10 Q. Let me take you back to your first -- your
11 employment with Access Trade Management.

12 A. Mm-hmm.

13 Q. When did you begin working with them?

14 A. Only a few weeks ago.

15 Q. What's your current salary?

16 A. Zero.

17 Q. How is your compensation to be based?

18 A. I'll be compensated on a commission basis in the
19 case that I procure a deal that's profitable.

20 Q. And what, if any, expectation do you have as to
21 what type of annual income you'll earn in your current
22 position if you're successful? What's the range, if you can
23 estimate?

24 A. When I was hired, I was told that depending on the
25 amount of work I put in, I could expect anywhere from zero

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1 dollars a year to \$1 million a year.

2 Q. And when you were employed at Bernstein
3 Greenberg -- is that the name of the company?

4 A. Yes.

5 Q. From 2002, approximately 2006, what was your
6 salary range during that period of time?

7 A. My salary was roughly \$35,000 a year.

8 Q. Did you receive any commissions or bonuses?

9 A. I received a bonus in each of those years.

10 Q. What was the bonus each year, if you can remember,
11 to the best of your recollection?

12 A. They ranged from about \$2,000 to I think about
13 \$12,000.

14 Q. So your highest salary at Bernstein Greenberg was
15 about 35,000, and your highest bonus was about \$12,000?

16 A. That's right.

17 Q. Did you receive any commissions?

18 A. No.

19 Q. Any other compensation?

20 A. No.

21 Q. So your total salary during that period of time
22 was approximately 30 -- sorry, 47,000 at its peak; is that
23 roughly...

24 A. Yes.

25 Q. Were you receiving any other source of income

JEFFREY SMITH - CROSS - McGRATH

1 during that period of time, 2002 to 2006, other than from
2 Bernstein Greenberg?

3 A. No, with the exception that at some point in 2006,
4 I was -- I began part-time employment at McGinn, Smith, and
5 I received some income there.

6 Q. All right. But let's just limit my question to
7 prior to that point in time. You didn't --

8 A. Prior to that point, no.

9 Q. Okay. Did you receive any gifts or monies from
10 your parents during that period of time?

11 A. Um...

12 Q. Other than whatever was put into the trust.

13 A. Not that I recall. There may have been a cell
14 phone bill paid on my behalf or something of that nature.

15 Q. Did you own any property between the years 2002
16 and 2006?

17 A. No.

18 Q. Do you currently own any property?

19 A. No.

20 Q. Have you ever owned any property?

21 A. No.

22 Q. So it would be fair to say you've always rented
23 apartments since you've been employed?

24 A. That's right.

25 Q. Has your salary been sufficient to meet your rent

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1 payments and your daily living expenses?

2 A. Yes.

3 Q. Now, in 2006 you became self-employed, you said,
4 for a period of time as a commodities trader?

5 A. Yes.

6 Q. And you did that for approximately 18 months?

7 A. I think so, yeah.

8 Q. Okay. What was your income during that period of
9 time from your commodities trading activity?

10 A. I believe my first full year of trading, I earned
11 somewhere around \$96,000.

12 Q. And then in the second six-month period?

13 A. Ah, I can't completely recall, but the number I
14 had in my head was that I made about \$80,000 a year, so I
15 would say about \$40,000.

16 Q. Were you based in New York during that period of
17 time?

18 A. Yes.

19 Q. And during the time that you were a commodities
20 trader, you also started some part-time work with McGinn,
21 Smith?

22 A. Correct.

23 Q. What type of salary or compensation did you
24 receive from McGinn, Smith?

25 A. I believe my starting salary was \$75,000 a year

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1 and I would earn commissions on the accounts that I managed.

2 Q. Do you remember roughly how much you earned in
3 commission the first year that you worked for McGinn, Smith?

4 A. I can't really recall. It was probably 5 or
5 \$6,000.

6 Q. And then you testified that at sometime in 2008
7 you became a full-time employee of McGinn, Smith?

8 A. Yes.

9 Q. Was that in the New York office?

10 A. Yes.

11 Q. Why did you decide to get out of the commodities
12 trading business?

13 A. Well, to be frank, I was making \$80,000 a year and
14 guys standing around me were making \$3 million a year. I
15 wasn't that good at it.

16 Q. All right. And when you joined McGinn, Smith in
17 2008, what was your total salary compensation package for
18 that year? If you can remember or estimate.

19 A. Well, now that I -- now that you ask the question
20 that way, I think I may have misspoken about my part-time
21 employment at McGinn, Smith. My salary was not \$75,000 a
22 year until I became a full-time employee.

23 I think when I was a part-time employee, I was --
24 I think I earned somewhere around \$35,000 a year. I can't
25 remember exactly, but it was around there.

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1 Q. And then when you became a full-time employee?

2 A. When I became a full-time employee, my salary was
3 \$75,000 a year to start.

4 Q. Did you receive any commission income?

5 A. Yes.

6 Q. Or bonuses in 2008?

7 A. Only commission income.

8 Q. Approximately how much?

9 A. I believe, I believe in 2008, I earned about --
10 somewhere around \$30,000 in commissions.

11 Q. And you were employed full time at McGinn, Smith
12 in 2009 as well until it ceased operations in December,
13 correct?

14 A. Yes.

15 Q. What was your salary and commission during that
16 year?

17 A. I took a salary cut in 2009 to help the business.
18 It was -- my salary was cut to 60,000. And I probably -- in
19 2009, I probably earned about 10 or \$15,000 in commission.

20 Q. During the period from 2006, when you first became
21 self-employed, until December 2009, when McGinn, Smith
22 ceased operation, did you have any income from any source
23 other than what you just testified to?

24 A. No.

25 Q. Did you receive any monies from your parents

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1 during that period of time, other than whatever was in the
2 trust?

3 MR. FEATHERSTONHAUGH: Your Honor, I would
4 like to object at this point on the grounds that if there's
5 any relevancy to these questions, either the direct
6 examination or in this case, I have no idea what it is.

7 THE COURT: All right.

8 MR. McGRATH: Well, if I may respond, your
9 Honor.

10 THE COURT: It's not necessary. Overruled.

11 A. No, I didn't receive any other monies.

12 Q. Now, let me direct your attention to when you
13 testified you first learned of the existence of the
14 irrevocable trust.

15 A. Mm-hmm.

16 Q. You testified that to the best of your memory, it
17 was sometime in around Thanksgiving of 2004, correct?

18 A. Yes.

19 Q. And you testified that your father told you about
20 the trust?

21 A. Yes.

22 Q. Was your mother present for that conversation?

23 A. No.

24 Q. Was it an in-person conversation?

25 A. It was.

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1 Q. And tell me again to the best of your memory what
2 you remember your father telling you in as much detail as
3 you can.

4 A. He said he wanted to talk to me about something.
5 He -- we sat in his office. He said that he and my mother
6 had opened a -- or created a trust account on behalf of my
7 sister and I. And to the best of my recollection, he told
8 me the, the approximate value of the trust.

9 Q. And what did he tell you the approximate value
10 was?

11 A. Approximately \$4 million.

12 Q. Do you have that trust document still in front of
13 you there?

14 A. Yes.

15 Q. Can you look on page 7, please?

16 A. Mm-hmm.

17 Q. It's Plaintiff's Exhibit 84. And there's a
18 signature line for David L. Smith. Do you see that?

19 A. Yes.

20 Q. Do you recognize that to be your father's
21 signature?

22 A. I do.

23 Q. And he's identified as a donor on that trust,
24 correct?

25 A. He is.

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1 Q. Now, what else do you remember your father telling
2 you about why they created the trust?

3 A. I can't really recall, other than he said that he
4 and my mother wanted to allow my sister and I to, you know,
5 have this money.

6 Q. Now, had you asked your father during this period
7 of time for any money for any reason?

8 A. No.

9 Q. Were you in need of \$2 million at this point in
10 time?

11 A. At that point in time, no.

12 Q. And is it your testimony that this sort of came as
13 a surprise to you, that you had not had any advance warning
14 that your mother and father were creating this trust before
15 this conversation in Thanksgiving?

16 A. It was a pleasant surprise that put me at ease.

17 Q. I'm sure it was. Would you describe you and your
18 family as close?

19 A. Yes.

20 Q. Were you aware of the fact that in December of
21 2003, your mother and father had been sued in connection
22 with the operation of the McGinn, Smith business by an
23 individual by the name of Ian Meyers?

24 A. Did you say that my mother and father were sued?

25 Q. Yes, that your mother and father were sued.

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1 A. I was unaware.

2 Q. Were you aware of the fact that your father had
3 been sued by anyone in or about December of 2003?

4 A. No. No.

5 Q. Had you had any discussions with your parents
6 about the fact that their assets might be in jeopardy prior
7 to your conversation with your father in Thanksgiving of
8 2004, when he informed you that they created an irrevocable
9 trust in the name of your -- on behalf of you and your
10 sister?

11 A. No.

12 Q. Let me just show you what I've marked as
13 Plaintiff's Exhibit 131 and ask you to take a look at the
14 caption here. Just read the caption for a second.

15 A. Up here?

16 Q. Yeah, please.

17 A. United States.

18 Q. No, I'm sorry, just read it to yourself.

19 A. Okay.

20 Q. And then turn to the last page. And when you
21 finish reading that, turn to page 48.

22 A. Mm-hmm.

23 Q. Do you see the date there? December 9, 2003?

24 A. Yes.

25 Q. All right. And do you see that there's a demand

JEFFREY SMITH - CROSS - McGRATH

1 for \$3 million?

2 A. I do.

3 Q. All right. And it's a fairly lengthy document.

4 You can feel free to look at it if you want, but just

5 looking at the caption, does that refresh your recollection

6 in any way that your mother and father and McGinn, Smith &

7 Company and Integrated Alarm Services and a number of other

8 entities were sued by an Ian Meyers in December 2003?

9 MISS DUNN: Objection, your Honor. The
10 witness did not testify he does not recall. He testified
11 that he was not aware of any such lawsuit. This is not a
12 refreshing of his recollection.

13 THE COURT: Sustained.

14 BY MR. McGRATH:

15 Q. Do you have any recollection of a lawsuit that was
16 filed by anybody against your mother or father prior to the
17 formation of the irrevocable trust in 2004?

18 MR. FEATHERSTONHAUGH: Your Honor, I would
19 like to once again--

20 MISS DUNN: Objection.

21 THE COURT: Overruled.

22 A. No.

23 Q. I would now ask you to look at that document and
24 I'll ask you the same question. Does that refresh your
25 recollection as to?

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1 MISS DUNN: I renew my objection.

2 A. I have no recollection.

3 THE COURT: Hang on. Overruled.

4 A. I have no recollection, so it couldn't refresh it.

5 Q. So this document does not refresh your
6 recollection?

7 A. No.

8 Q. Did you ever have a conversation with your mother
9 or father prior to Thanksgiving of 2004 in which they told
10 you that they had made a payment in settlement of any
11 lawsuit?

12 A. No.

13 Q. When you had the conversation with your father in
14 Thanksgiving 2004, did he make any reference to you that one
15 of the reasons they set up this trust was to protect family
16 assets from potential creditors of your mother or father or
17 the McGinn, Smith business?

18 A. No.

19 Q. Now, you said that you told your sister about the
20 existence of the trust?

21 A. Yes.

22 Q. And you said that she was very happy to hear that?

23 A. She was.

24 Q. When did you tell your sister?

25 A. Thanksgiving weekend, that -- you know, she was

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1 home too.

2 Q. So was it your understanding that she had not
3 heard of this before?

4 A. Ah, yes.

5 Q. Do you know why your parents hadn't told her prior
6 to this -- prior to you telling her?

7 A. Um, she, she most likely wouldn't understand it as
8 well as I did. And --

9 Q. She?

10 A. -- and they, you know, they, they probably wanted
11 me to tell her about it.

12 Q. Why do you say your sister wouldn't understand
13 that \$4 million had been given to you and her?

14 A. Well, she would understand it on that simple level
15 but not in any more detail.

16 Q. And that's the reason why you don't think your
17 parents told her before this?

18 A. Well, they wouldn't have told her before this
19 because, like me, she was living in Manhattan and we came
20 home together for the holiday.

21 Q. Had you had any conversations with your parents
22 between August 4, 2004, the date the declaration of trust
23 was signed, and Thanksgiving 2004?

24 A. Not that I recall.

25 Q. Would it be typical for you to go that many months

JEFFREY SMITH - CROSS - McGRATH

1 without talking to your parent?

2 A. I didn't say that I didn't talk to them. I don't
3 recall having a conversation about the trust.

4 Q. Okay. Do you recall having conversations or
5 with -- well, my question was would it be typical for you
6 during that period of time to go three or four months
7 without having a telephone conversation with your parents.

8 A. And my answer is that I'm sure that I had numerous
9 telephone conversations with both of them during that
10 period.

11 Q. Okay. Now, you testified that you have your own
12 personal stock account?

13 A. Yes.

14 Q. And can you tell me approximately how much money
15 is in that account today?

16 MISS DUNN: Objection. Relevance.

17 THE COURT: Overruled.

18 A. Today, the value I think is -- the value on the
19 account statement is roughly \$60,000.

20 Q. Okay. And did you start that account yourself?

21 A. No. It was a custodial account started by my
22 father shortly after I was born.

23 Q. Have you made any withdrawals from that account
24 for personal living expenses or other personal expenses
25 since, say, 2002?

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1 A. Ah, yes.

2 Q. Can you approximate how many or the range, without
3 getting into too much detail?

4 A. Maybe three or four times since that time I've
5 taken one or two thousand dollars out, if I was going on a
6 vacation or something like that.

7 Q. Okay. And you testified that you're aware of the
8 fact that your sister had a brokerage account -- or has a
9 brokerage account?

10 A. Yes.

11 Q. Do you have any knowledge as to how much money is
12 in her account today?

13 A. Yeah. It's, it's roughly the same. The accounts
14 were roughly the same value.

15 Q. Okay. The -- now, you testified that you were
16 aware of the fact that after the irrevocable trust was
17 created, that an investment was made in Pine Street Capital
18 Partners fund, is that correct?

19 A. Yes.

20 Q. How did you learn about that?

21 A. I believe my father told me about it.

22 Q. Okay. And is it your understanding that your
23 father recommended that the trust invest in that entity?

24 A. Yeah.

25 Q. Okay. Did your father recommend that the trust on

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1 your and your sister's behalf make any investments in First
2 Advisory Income Notes or First Excelsior Income Notes or
3 First Independent Income Notes or Third Albany Income Notes?

4 A. Well, the trust never made an investment in any of
5 those entities, so it would be my best guess that he didn't
6 recommend it.

7 Q. Okay. And to your knowledge, did your father ever
8 recommend that the trustees make any investments in any of
9 the other trusts that were formed and sold by McGinn, Smith
10 & Company from 2004 to the present?

11 A. No. But I've personally invested in those.

12 Q. But your father didn't recommend that any of the
13 money in that irrevocable trust, to your knowledge, be
14 invested in any of those trusts, correct?

15 A. To my knowledge, no.

16 Q. Okay. Now, you testified that you believe this
17 money in this trust is yours and your sister's correct?

18 A. Yes.

19 Q. Do you believe you can draw on that at any point
20 in time for whatever purpose that you want?

21 A. Within reason. I don't think it would be prudent
22 to buy a Ferrari with that money.

23 Q. Well, but based on your knowledge of the trust
24 document, do you have any limitation --

25 A. I don't think that there's any limitation in the

JEFFREY SMITH - CROSS - McGRATH

1 trust document to my knowledge.

2 Q. Okay. And the same with respect to your sister?
3 There's no limitation -- let me just finish the question.
4 To your knowledge, there's no limitation in the trust
5 document as to how or why your sister could withdraw money
6 or request that it be withdrawn?

7 A. There's no limitation in the request.

8 Q. Now, you testified that you were aware of the fact
9 that your mother had provided some money to your sister in
10 the last couple of years because she was unemployed or
11 needed the money?

12 A. Yes.

13 Q. Do you have any understanding as to why your
14 sister didn't withdraw some of the money that she had in the
15 irrevocable trust for that purpose?

16 A. Well, my understanding was that she was looking
17 for employment and didn't want to tap into the trust. My
18 understanding was that my mother was there to help her and
19 she didn't feel any need to access the trust.

20 Q. You testified that you had asked the trustee to
21 wire \$95,000 out of the account on or about April 15th of
22 this year, correct?

23 A. Yup.

24 Q. And you testified that you suggested -- well,
25 strike that.

JEFFREY SMITH - CROSS - McGRATH

1 Let me ask you, how did you first become aware of
2 the fact that your parents needed money to pay their taxes
3 in April of 2010?

4 A. Well, I had a conversation with my father.

5 Q. Tell me about that conversation. What did he say
6 to you and what did you say to him?

7 A. Well, I was also aware that it was tax time, so we
8 were discussing taxes, and I told him what my taxes were, he
9 told me what his taxes were and what the trust taxes were.
10 And he told me that he didn't have the money to pay those
11 taxes on that day. Neither him, nor my mother.

12 Q. So did he ask you to get in touch with
13 Mr. Urbelis?

14 A. No. I suggested that the trust could pay his
15 taxes.

16 Q. So your testimony is your father didn't say
17 anything to you about getting in touch with Mr. Urbelis;
18 this was just your idea?

19 A. It was my idea to use the trust. My father may
20 have said well, give Tom a call.

21 Q. Okay. And who, who initiated that phone call
22 between you and your father that day?

23 A. I can't recall.

24 Q. Okay. Do you and your father talk about taxes
25 every April 15th?

JEFFREY SMITH - CROSS - McGRATH

1 A. In the last several years, in the last seven or
2 eight years, yeah.

3 Q. Okay. And you testified that when you called
4 Mr. Urbelis, you just told him it was for taxes?

5 A. Correct.

6 Q. You testified that you didn't make it clear to him
7 that it was not just for the trust taxes, but that it also
8 involved your parents' taxes?

9 A. That's right.

10 Q. Did you have any concern that if you told him that
11 it was for your parents, that he might ask you some
12 questions?

13 A. I didn't.

14 Q. Well, are you aware of the fact that the trust is
15 for your benefit and not for your parents' benefit?

16 A. Yes, I am.

17 Q. And that didn't give you reason to believe that he
18 might ask you some questions at least if you told him that
19 the taxes were going to be for your parents and not for you
20 or for the trust?

21 A. I can't project whether or not he would have asked
22 me questions.

23 Q. No, I'm asking you whether or not you had any
24 concern that --

25 A. I --

JEFFREY SMITH - CROSS - McGRATH

1 Q. -- let me finish.

2 A. Okay.

3 Q. My question is, did you have any concerns in your
4 mind when you called Mr. Urbelis and just told him that you
5 wanted the distribution for taxes, that if you told him that
6 it was for your mother and father's personal taxes, and not
7 the taxes of the trust, that he would at least ask you some
8 questions? Did you have any concern in your mind about
9 that?

10 A. No, I didn't.

11 Q. You just thought that he would give you money out
12 of the trust that is set up for your benefit and not ask you
13 any questions about why it was going to your parents?

14 A. Um, can you ask me that question again?

15 Q. Yes. You thought that Mr. Urbelis would not ask
16 you any questions if you told him to give you money to help
17 pay your parents' taxes?

18 A. At the time it didn't cross my mind.

19 Q. I mean you understood that this irrevocable trust
20 meant that your parents were giving you the money and that
21 they would no longer have any right to it; that's the theory
22 behind that trust, correct?

23 A. Correct.

24 Q. And you had never asked Mr. Urbelis for any
25 distribution of that trust up until that point in time,

JEFFREY SMITH - CROSS - McGRATH

1 correct?

2 A. Correct.

3 Q. And your sister had never asked for any
4 distribution up until that point in time?

5 A. That's correct.

6 Q. And your testimony is that you never gave it any
7 thought that if you told him that the distribution, the very
8 first distribution that was going to come out of that trust
9 was going to go from you directly back to your parents to
10 pay their taxes, that he wouldn't ask you a question?

11 MISS DUNN: Objection. Asked and answered.

12 THE COURT: Sustained. Sustained.

13 BY MR. McGRATH:

14 Q. Were you aware of the fact that your parents had
15 previously or that your father had previously asked
16 Mr. Urbelis to wire money from the irrevocable trust to his
17 accounts?

18 A. I was not aware of that, no.

19 Q. Did you -- you testified that you reviewed the
20 trust statements, correct?

21 A. Correct.

22 Q. Did you notice any transfers on those statements
23 that were not authorized by you or your sister?

24 A. I didn't notice. I testified that I reviewed the
25 monthly statements from time to time, so it's quite possible

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JEFFREY SMITH - REDIRECT - DUNN

1 that I never looked at an April statement.

2 Q. Did you ask your parents why they didn't have
3 enough money to pay their own personal taxes in April 2010?

4 A. Well, I knew why.

5 Q. Why?

6 A. My mother's stock account was fully invested and
7 neither she nor my father had the cash in their checking
8 account.

9 Q. And of the \$95,000 that was wired out of the
10 irrevocable trust, approximately 66,000 of that went to your
11 parents for their taxes, correct?

12 A. Yes.

13 MR. McGRATH: No further questions. Thank
14 you.

15 THE COURT: Mr. Featherstonhaugh, do you have
16 any questions?

17 MR. FEATHERSTONHAUGH: I don't have any
18 questions.

19 THE COURT: Miss Dunn, will there be any
20 redirect?

21 MISS DUNN: Briefly.

22 THE COURT: All right. I'm going to hold you
23 to briefly.

24 **REDIRECT EXAMINATION BY MISS DUNN:**

25 Q. Mr. Smith, you testified a little bit on

JEFFREY SMITH - REDIRECT - DUNN

1 cross-examination about the purpose that you understood --
2 withdrawn.

3 Mr. McGrath was asking you whether you believed
4 there was any limitation on the purpose for which you could
5 make a request for a distribution. Do you recall that?

6 A. Yes.

7 Q. And you said, I believe, that you didn't
8 understand there to be any limitation on the request that
9 you could make --

10 A. Correct.

11 Q. -- is that correct?

12 A. Yes.

13 Q. All right. Did you have any understanding as to
14 the -- within the trust declaration, whether there's any
15 guidance in that declaration to the trustee as to the
16 purposes of distributions or the intentions of your parents
17 when they created the trust?

18 A. Not that I recall.

19 Q. Okay. Did you have any understanding that
20 distributions would be for, I believe you testified on
21 direct, starting a business, buying a home?

22 A. I don't think it specifically says that in the
23 trust.

24 Q. Okay. Do you think that it would appropriate to
25 make a request for a distribution for an emergency purpose?

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JEFFREY SMITH - REDIRECT - DUNN

1 A. Absolutely.

2 Q. Okay. And on April 14th, 15th of this year,
3 where were you physically when you had a conversation with
4 your father about taxes?

5 A. I was in Saratoga at my parents' home.

6 Q. And where were your parents?

7 A. They were in Vero Beach, Florida.

8 Q. And they were both there, correct?

9 A. Yes.

10 Q. All right. You had this conversation when you
11 were in Saratoga and they were in Florida. And did you
12 contact Mr. Urbelis from Saratoga?

13 A. Um...

14 Q. If you recall.

15 A. No. Actually, the initial conversation that I had
16 with my father was several days earlier, maybe even -- it
17 may have even been the 14th. And on that same day I drove
18 down to Manhattan, I was in the midst of moving, and I
19 physically went to the RMR Wealth Management office, and I
20 contacted Mr. Urbelis from there.

21 Q. Okay. And did you consider the payment of taxes
22 on time on April 15th to be an emergency or a significant
23 situation that needed to be addressed?

24 A. Yes.

25 MISS DUNN: Nothing further, your Honor.

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1 Thank you.

2 THE COURT: Mr. McGrath, anything further?

3 MR. McGRATH: No, your Honor, thank you.

4 THE COURT: Thank you. You may step down.

5 We'll take a ten-minute recess.

6 (Witness Jeffrey Smith excused.)

7 (Brief recess at 11:50 AM.)

8 (Court reconvened at 12:00 PM.)

9 THE COURT: Miss Dunn, any further witnesses?

10 MISS DUNN: Yes, your Honor. I call David

11 Wojeski.

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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.

**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
MOTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56 FOR SUMMARY
JUDGMENT**

Submitted by:

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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 8/04/94, Defendant Geoffrey R.
Smith and Defendant Lauren T. Smith*
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PRELIMINARY STATEMENT

Pursuant to Federal Rules of Civil Procedure 56 now pending before this Court is 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's motion for summary judgment against the plaintiff, Securities and Exchange Commission (SEC).

The SEC's case against the Trust, and its beneficiaries, Geoffrey R. Smith and Lauren T. Smith, is plead specifically under Section 276 of the New York Debtor and Creditor Law claiming that the Trust, and its beneficiaries, intentionally engaged in actual fraud in an attempt to defraud present and future creditors, including the SEC.

The plaintiff has a very heavy burden to prove by clear and convincing evidence that the Trust, and its beneficiaries, had actual intent to engage in fraud and, with that intent, did engage in fraudulent conduct with the intent to defraud creditors, including the SEC. The plaintiff's second amended complaint, and the plaintiff's response to discovery inquiries and testimony set forth in preliminary hearings by the SEC, have all relied upon conclusory supposition contending that the Trust, and its beneficiaries, engaged in actual, intentional fraudulent conduct. The SEC has not identified a specific piece of evidence or a specific witness who they claim will prove the defendants' culpability.

The SEC appears to rely upon various favorable rulings in preliminary matters by Magistrates who granted rulings based upon the substantial likelihood of success standard. The plaintiff's obligation in this motion, and at trial, will be clear and convincing evidence of actual intentional fraud based upon real proof. It is noteworthy and defendants' request the Court to seriously consider that the plaintiff has not identified a single expert witness to profer any expert opinions on the validity of the Trust, or its various transactions.

The record establishes that the defendant Smith Trust is a irrevocable spendthrift trust created under the laws of the State of New York. The trust is, therefore, not subject to the control or invasion by the creditors of the creators of the trust.

Defendants, Geoffrey R. Smith, Lauren T. Smith and the Smith Trust, now move this Court for summary judgment dismissing the claims as against the defendants, as there is no genuine issue of material fact regarding the plaintiff's claims. The Smith Trust being an irrevocable spendthrift trust under New York Law EPTL §7-1.5(a)(1) and §7-3.1, and CPLR §5205, is not subject to control or invasion by the creditors of David L. Smith or Lynn A. Smith, including the plaintiff, SEC. Defendants, Geoffrey R. Smith, Lauren T. Smith and the Smith Trust, respectfully submit that no issue of facts remain that establishes a direct cause of action against them and ask that the case pertaining to them be dismissed.

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall render summary judgment when the moving party demonstrates that "there is no genuine issue as to any material fact...". Fed. R. Civ. P. 56(c)(2). Under Rule 56, a "genuine" dispute exists when a rational fact finder, considering the evidence in the summary judgment record, could find in favor of the non-moving party. Ricci v. DeStefano, 557 U.S. 557, 586 (2009). A fact is considered "material" if it could affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The Second Circuit has determined the nonmoving party, in this instance the SEC, cannot "escape summary judgment by vaguely asserting the existence of some unspecified disputed material facts, or defeat the motion through mere speculation or conjecture." Western World Ins. Co. v. Stack Oil, Inc., 922 F.2d 118, 121 (2d Cir. 1990). The nonmoving party must "go beyond the pleadings and by...affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317 324 (U.S. 1986); See also, Alhovsky v. Ryan, et al., 658 F.Supp.2d 526, 531 (S.D.N.Y. 2009) (The nonmoving party must present "specific facts showing that there is a genuine issue for trial.") (quoting Fed. R. Civ. P. 56(c)). The party opposing summary judgment "may not rely on conclusory allegations or unsubstantiated speculation". Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998).

Once the moving party has established that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence showing a genuine issue remains, thus requiring

resolution at trial. (United States v. An Antique Platter of Gold, 991 E. Supp. 222, 228 (S.D.N.Y. 1997); Glazer v. Formica Corp., 964 F.2d 149, 154 (2d Cir. 1992). To survive a motion for summary judgment, the nonmoving party must make an affirmative showing of specific issues sufficient to establish that a genuine dispute of material fact remains. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

ARGUMENT

THE COURT SHOULD GRANT SUMMARY JUDGMENT IN FAVOR OF DEFENDANT 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 NOT CREATED A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER DEFENDANT 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 HAD ACTUAL INTENT UNDER SECTION 276 OF THE NEW YORK DEBTOR CREDITOR LAW TO HINDER, DELAY, OR DEFRAUD EITHER PRESENT OR FUTURE CREDITORS.

Rule 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. Fed. R. Civ. P. 56. 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. NO GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER DEFENDANT 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 HAD ACTUAL INTENT TO DEFRAUD BY CLEAR AND CONVINCING EVIDENCE.

The instant action is brought against 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 under §276 of the New York State Debtor and Creditor Law. The law states:

“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.”

The Court’s attention is directed to the plaintiff’s obligation to prove ‘actual intent, as distinguished from intent presumed in law...’ The burden of proving actual intent under the New York Statute is upon the party seeking to set aside the conveyance. In re Sharp Intern. Corp., C.A.2 (N.Y.) 2005, 403 F.3d 43, Hassett v. Goetzmann, 1998, 10 F.Supp.2d 181. New York Law requires that the plaintiff prosecuting an action under §276 of the Debtor and Creditor Law has the burden of proving actual intent to defraud on the part of the transferor by clear and convincing evidence, not merely a preponderance of the evidence. In re Singh, 2010, 434 B.R. 298.

The fraudulent intent of the transferor must be proven. It is not sufficient that the facts are ambiguous and as consistent with guilt as with innocence and if taken together they are consistent with an honest intent, the fraud is not established. Shultz v. Hoagland, 1881, 85 N.Y. 464. See, also, Roberts v. Buckley, 1895, 145 N.Y. 215, 39 N.E. 966; Crook v. Rindskopf, 1887, 105 N.Y. 476, 12 N.E. 174; Zimmer v. Hays, 1896, 8 A.D. 34, 40 N.Y.S. 397.

Under New York Law, for actual fraudulent conveyance, actual intent to defraud must be proven by clear and convincing evidence. U.S. v. McCombs, C.A.2 (N.Y.) 1994, 30 F.3d 310, on remand 928 F. Supp. 261. Actual intent to defraud, of the kind required in order to set transfer aside as having been made with actual intent to hinder, delay or defraud creditors, must be based on fact and cannot rest on mere suspicion. In re Kovler, 2000, 249 B.R. 238, supplemented 253 B.R. 592, corrected 329 B.R. 17.

Under the New York Uniform Fraudulent Conveyance Act (UFCA), the pleader is allowed to rely on badges of fraud to support his case, i.e. circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent. In re Sharp Intern. Corp., C.A.2 (N.Y.) 2005m 403 F.3d 43. In determining whether conveyance was fraudulent, New York courts will consider

badges of fraud which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent. Pen Pak Corp. v. LaSalle Nat. Bank of Chicago, (2 Dept. 1997) 240 A.D.2d 384, 658 N.Y.S.2d 407.

In the present action, the plaintiff has made an attempt to skirt around the 'actual intent' language of the statute by setting forth proposed badges of fraud to overcome their absolute lack of any clear and convincing evidence of fraudulent conveyance. The first badge of fraud set forth by the plaintiff alleges that Geoffrey R. Smith and Lauren T. Smith 'knew or should have known' that the true intent of the Trust was to pay an annuity in the future to David L. Smith and Lynn A. Smith. As set forth in the affidavit of Geoffrey R. Smith, sworn to on July 2, 2014, he did not know of the annuity. He was told by David L. Smith and believed the Trust was set up solely for the benefit of himself and his sister, Lauren T. Smith.

Plaintiff's second badge of fraud alleges that David L. Smith discussed the Trust with Geoffrey R. Smith around Thanksgiving 2004. Plaintiff's third badge of fraud alleges the Geoffrey R. Smith informed Lauren T. Smith of the Trust and thus intent was conveyed. Both of these allegations have well been established in prior testimony and hearings. How are these badges of fraud?

The facts established during testimony at preliminary proceedings and through discovery are that Geoffrey R. Smith, on one occasion, read the Trust document when he was advised by his father, David L. Smith, of the existence of the Trust at or around Thanksgiving in 2004. Ex B Geoffrey R. Smith was first advised of the existence of an Annuity Agreement subsequent to the Agreement being provided to the Court by the Trustee and the Trust's counsel in 2010. Ex B

There is no evidence in the record that Lauren T. Smith ever had access to the Trust Indenture or the Annuity Agreement at any time.

The plaintiff's assertion that the children of David Smith knew that he was engaging in fraudulent behavior and were secreting his assets from 2004 to the present, in the form of a Trust, is baseless. The only facts in the record are that Geoffrey did not know of any actions or law suits against his father, nor had he discussed the issue with his father prior to the trust establishment. Ex B p528

Neither Geoffrey R. Smith nor Lauren T. Smith had any knowledge of any alleged wrongdoing or any potential loss of their parents' wealth until well into 2010 or 2011. There is no basis for this and nothing in the record supports this conclusion.

Plaintiff's statements in their fourth badge of fraud are conclusory and self-serving. Geoffrey R. Smith and Lauren T. Smith were young adults making their own way in the world and not relying on distributions from the Trust which they understood was to be used in the future and not for living expense and frivolous purchases. The affirmative decisions by Geoffrey R. Smith and Lauren T. Smith to not use the Trust during the years 2004 – 2010 was not conduct that demonstrated their knowledge that the Trust was not created for their benefit, but rather demonstrative of their character to be independent and intent to retain the corpus of the Trust for their later life.

The plaintiff's allegations that the beneficiaries, Geoffrey R. Smith and Lauren T. Smith, periodically received financial support, or gifts, from their parents at a time when their parents' net worth was approximately \$19,000,000.00 is not a demonstration of fraudulent intent. It does not even rise to the level of an alleged "badge of fraud" as that term is defined. The facts alleged are consistent with honest intent and therefore insufficient to sustain the plaintiff's burden under Shultz v. Hoagland, 1881, 85 N.Y. 464 and the cases that follow.

The plaintiff's fifth alleged badge of fraud is equally without merit. As parents of Geoffrey R. Smith and Lauren T. Smith it was only a natural and common parental practice for David L. Smith and Lynn A. Smith to assist their children financially when they were in need, especially in light of the fact that there were ample parental financial resources with which to do so. If this is a badge of fraud, then all parents would be wearing one.

Also flawed is the plaintiff's sixth alleged badge of fraud. Geoffrey R. Smith has admitted that he knew that David L. Smith was making investment decisions for the Trust and had reviewed Trust account statements. David L. Smith's investment decisions for the Trust were sound, prudent and made money for the Trust. Isn't that what a person you rely upon to make investments is supposed to do? In fact, Geoffrey R. Smith invested some of his own money into one of the investment decisions that was

done to benefit the Trust. Lauren T. Smith has never seen the Trust document; did not know that David L. Smith was making investment decisions for the Trust; and, never saw any Trust account statements.

Plaintiff's seventh alleged badge of fraud is inconsistent with any fraud perpetrated by Geoffrey R. Smith. David L. Smith and Lynn A. Smith had consistently paid the taxes for the Trust. The \$95,000.00 distribution taken by Geoffrey R. Smith was merely a reimbursement to David L. Smith and Lynn A. Smith for the taxes paid by them for the Trust. It does not matter what David L. Smith and Lynn A. Smith used the money that was given to them to pay their personal income tax. The fact that they paid personal income tax with the money is irrelevant, as is the fact that monies were transferred directly into their account. In addition, Geoffrey R. Smith consulted with the Trustee of the Trust at the time of the transfer consented to the Trustee consented to and approved the distribution.

The plaintiff's eighth badge of fraud standing alone, as it does here, does not give rise to an inference of intent necessary to establish fraudulent conveyance.

Plaintiff's defective ninth badge of fraud alleges that Geoffrey R. Smith and Lauren T. Smith knew that David L. Smith faced creditors as a result of an action brought by the SEC and others and that the Court had frozen assets held by David L. Smith and/or Lynn A. Smith. Geoffrey R. Smith and Lauren T. Smith's knowledge as alleged is irrelevant and immaterial. Geoffrey R. Smith and Lauren T. Smith were the beneficiaries of the Trust at the time of the distributions and the distributions were approved by the then Trustee. As beneficiaries Geoffrey R. Smith and Lauren T. Smith's Trust distributions were taken within the full, unfettered discretion of the Trustee as specifically provided for under the Trust instrument. David L. Smith and Lynn A. Smith as annuitant creditors of the Trust had a contractual relationship with the Trustee. The contractual rights of David L. Smith and Lynn A. Smith were personal to them. There was absolutely no privity of contract between Geoffrey R. Smith and Lauren T. Smith as beneficiaries of the Trust and David L. Smith and Lynn A. Smith as annuitant creditors of the Trust. Others cannot perfect an interest in the contractual rights of David L. Smith and Lynn A. Smith until such time as the contract rights have been paid. It is only at the time that the payment is made that it becomes the separate property of the annuitants and subject to their own financial affairs. Until such a time that a

payment occurs, the Trustee holds title to the Trust property. The 'substantial liability to creditors' and 'frozen assets' are extraneous to any distributions taken by Geoffrey R. Smith and Lauren T. Smith.

The plaintiff's tenth badge of fraud alleges that Geoffrey R. Smith and Lauren T. Smith knew that the Trust had been subject to the asset freeze and that substantial effort was undertaken in order to release the assets of the Trust from the asset freeze. It is submitted that the same argument and reasoning applied to plaintiff's defective ninth badge of fraud be applied here.

Plaintiff's faulty eleventh badge of fraud is also without merit. There is no evidence before the Court that Geoffrey R. Smith had any knowledge of falsity or reckless disregard of the truth when he testified at the preliminary injunction hearing. To the contrary Geoffrey R. Smith has consistently and unwaveringly held fast that he had no knowledge of the annuity payments. It is mere speculation by the plaintiffs that Geoffrey R. Smith's testimony was false. There is no proof or evidence in this case that it would benefit Geoffrey R. Smith in any way to perjure himself.

The plaintiff's twelfth alleged badge of fraud alleges that when the asset freeze was lifted from the Trust a distribution was provided to Lynn A. Smith, purportedly in exchange for the Lake Property. The purchase of the Lake Property transaction was approved by the then Trustee within the full, unfettered discretion of the Trustee as specifically provided for under the Trust instrument. It is of no meaning or consequence what Lynn A. Smith did with her proceeds from the sale.

Magistrate Homer, in his Decision of July 7, 2010, found, as a matter of law, that "because the Trust had virtuously no limits on the types of distributions that beneficiaries could request, the money was properly requested and provided" Dkt. No. 86 at 40.

In making this finding, Magistrate Homer relied upon the transcript as cited in his Decision at Page 534-535, 560. Magistrate Homer's finding is supported, in addition to the testimony proffered at the Hearing, is supported by the opinions proffered by David L. Evans, defendants' expert in the field of Trusts and New York State Laws applicable thereto. Mr. Evans finds that "distributions under the income/principle property rights. In brief, the Trustee, in the Trustee's sole discretion, has an absolute right to make distributions to the beneficiaries, Geoffrey R. Smith and Lauren T. Smith, at any time in

any amount. In addition, the Trustee, in the Trustee's sole discretion, has an absolute right to terminate the Trust and distribute the principle and accumulated interest to the beneficiaries. As a matter of Law, the distributions to the beneficiaries to purchase Real Property, to start business, or to cover some of their living expenses. Dkt 691

The sale of the Lake Property (the Sacandaga home inherited by Lynn A. Smith from her parents) to the Trust for a fair market value was not a fraudulent conveyance. Dkt. No. 604 Ex E ; Dkt. No. 626-1

The courts attention is directed to the Affidavit of Geoffrey Smith regarding the sale of the Lake Property to the Trust Dkt. No. 626 at 15 Para 8-9. and Dkt No. 604. It is clearly established that a proper Market Analysis was obtained to establish the value of the property and fair market value was paid. There is no evidence in the record or offered by the plaintiff that the transfer was for anything but Fair Market Value. There is nothing in the record that any fraudulent intent was involved.

Finally, plaintiff's last alleged badge of fraud alleges fault that the beneficiaries of the Trust Geoffrey R. Smith and Lauren T. Smith did not obtain an independent appraisal or valuation of the Lake Property prior to its sale and continued the benefit and use of the Lake Property. The then Trustee with full, unfettered discretion as specifically provided for under the Trust instrument determined that the Lake Property was purchased by the Trust for fair consideration. The purchase of the Lake Property by the Trust was for the benefit of the beneficiaries as envisioned within the Trust. Because the Trust had no limits on the types of distributions the beneficiaries could request, the money for the purchase of the Lake Property was properly requested and provided. Once the request was approved by the then Trustee and the Lake Property purchased, Geoffrey R. Smith and Lauren T. Smith were free to use the Lake Property as they saw fit, including sharing its enjoyment with their parents. It is of no matter or consequence who the beneficiaries invited to visit or share in the Trust's acquired asset of the Lake Property.

For all of the reasons set forth above, the plaintiff has not alleged and cannot establish facts sufficient to create a question of fact and summary judgment should be granted to the defendants.

B. THE SMITH TRUST IS AN IRREVOKABLE SPENDTHRIFT TRUST AND THE PLAINTIFF CANNOT INVADE THE TRUST, MANAGE THE TRUST OR HAVE ANY PROPERTY RIGHTS IN THE TRUST

New York Law accepts the principle of the creation of a spendthrift trust and the restrictions such a trust places upon creditors. EPTL §7-1.5(a)(1) and §7-3.1, and CPLR §5205. The Smith Trust is, by its terms, an irrevocable trust. The annuity agreement as part of the trust documents contains spendthrift trust provisions.

Defendants Expert David L. Evans interpreted the Trust and its provisions in his report. Mr. Evans proffers the opinion “Under the Trust instrument, separate property rights and interest are created. These property rights and interest are vested in the beneficiaries. In the present case, the beneficiaries are Geoffrey Smith and Lauren Smith. Their interest consists of two components. During the ongoing periodic administration of the Trust, the beneficiaries may receive the income and principal distributions subject to the Trustee’s unfettered discretion. As specifically provided in the Trust instrument the income/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 691 at 4 para 16

Mr. Evans goes on to proffer as Page “4”, Paragraph “17”, “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.”

Mr. Evans goes on to proffer as Page “5”, Paragraph “20”, “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. Their existence serves merely as a measuring device by which the Trust continues its existence.”

It is noteworthy that Mr. Evans finds at Page “5”, Paragraph “21”, “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 principal of the Trust.”

The Trust, by its terms, is a “Spendthrift Trust”. Dkt No. 691 at 8, Paragraph “33”.

Pursuant to Paragraph “5” of the Asset Purchase Agreement, the transferors (David L. Smith and Lynn A. Smith) 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 clauses merely acknowledge that David L. Smith and Lynn A. Smith (Smiths) contractual rights are personal to them. Others (including the SEC) cannot perfect an interest in their contract rights.

Mr. Evans, at Paragraph “33”, goes on to state “Up until the contract rights have been paid (annuity payment actually made), such a provision permits a trustee to avoid interference in trust operations and the trustee’s administration of trust assets by other creditors, assignees, or others who might have an interest in the affairs of David L. Smith and Lynn A. Smith.” Dkt No. 691 at 8, Paragraph “33”.

Pursuant to the spendthrift provisions of the Trust, the SEC, as a creditor of David L. Smith and/or Lynn A. Smith, have no claim to or right to interfere with the assets of the Trust until such time as the Trustee makes actual payments to an annuitant.

The plaintiff having failed to disclose any experts, is bound by the opinions set forth above.

CONCLUSION

For the foregoing reasons the Court should grant summary judgment to the defendants herein upon the grounds (a) that the plaintiff’s complaint and the record fail to establish any fraudulent transfers per New York Debtor Creditor Law §276 on behalf of the Smith Trust or either of its beneficiaries, and, (b) that the Smith Trust being an irrevocable spendthrift trust under New York Law EPTL §7-1.5(a)(1) and §7-3.1, and CPLR §5205, is not subject to control or invasion by the creditors of David L. Smith or Lynn A. Smith, including the plaintiff, SEC.

Dated: Albany, New York
July 3, 2014

Linnan & Fallon, LLP

By /s/ James D. Linnan

James D. Linnan (Bar Roll# 102058)

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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.

**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, PURSUANT TO LOCAL RULE 7.1(A)(3)**

STATEMENT OF MATERIAL FACTS:

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

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".

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)

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

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

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

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

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

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"

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

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

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

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

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

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

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.

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.

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.

19. David L. Evans, Esq. proffers 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".

20. David L. Evans, Esq. proffers 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”.

21. David L. Evans, Esq. proffers 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”.

22. David L. Evans, Esq. proffers 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”.

23. David L. Evans, Esq. proffers 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 4/5, Paragraph “17”.

24. David L. Evans, Esq. proffers 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”.

25. David L. Evans proffers 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”.

26. David L. Evans proffers 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”.

27. David L. Evans, Esq. proffers 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”.

Dated: Albany, New York
July 3, 2014

Respectfully submitted,
Linnan & Fallon, LLP
By /s/ James D. Linnan
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