

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

*Plaintiff,*

v.

10 Civ. 457(GLS/DRH)

McGINN, SMITH & CO., INC.,  
McGINN, SMITH ADVISORS, LLC,  
McGINN, SMITH CAPITAL HOLDINGS CORP.,  
FIRST ADVISORY INCOME NOTES, LLC,  
FIRST EXCELSIOR INCOME NOTES, LLC,  
FIRST INDEPENDENT INCOME NOTES, LLC,  
THIRD ALBANY INCOME NOTES, LLC,  
TIMOTHY M. MCGINN, DAVID L. SMITH,  
LYNN A. SMITH, DAVID M. WOJESKI, Trustee of  
the David L. and Lynn A. Smith Irrevocable  
Trust U/A 8/04/04, GEOFFREY R. SMITH,  
LAUREN T. SMITH, and NANCY MCGINN,

*Defendants,*

LYNN A. SMITH, and  
NANCY MCGINN,

*Relief Defendants, and*

DAVID M. WOJESKI, Trustee of the  
David L. and Lynn A. Smith Irrevocable  
Trust U/A 8/04/04,

*Intervenor.*

**DECLARATION OF DAVID STOELTING**

I, David Stoelting, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am an attorney in the Enforcement Division of the New York Regional Office of the Securities and Exchange Commission ("SEC"). I have been employed

with the SEC since February 2004. I make this declaration in support of the SEC's motion for an order to show cause and for emergency relief.

**Background**

2. On April 20, 2010, in order to halt an ongoing fraud, maintain the status quo and preserve assets for injured investors, the SEC filed its Complaint and request for certain emergency relief. On the same day, the Court issued an Order to Show Cause, Temporary Restraining Order and Order Freezing Assets and Granting Other Relief (the "April 20 Order") granting the SEC's application for emergency relief, including a freeze over the Defendants' and Relief Defendant's assets, the appointment of a receiver over the McGinn Smith entity defendants, expedited discovery and verified accountings. The asset freeze included a brokerage account that was the sole asset of the Trust.

3. On June 1, 2010, the Court granted the Trust's motion to intervene, and after a three-day hearing on June 9 to 11, the Court issued an order on July 7, 2010 continuing the freeze on the assets of the Defendants' and Relief Defendant, but not on the assets of the Trust.

**Discovery of Undisclosed Annuity Agreement between the Smiths and the Trust**

4. In order to obtain the freeze over the assets of the Defendants and Relief Defendant Lynn Smith, the SEC made diligent efforts to obtain all documents and evidence relevant to the assets of David and Lynn Smith and the Trust. Despite these diligent efforts, the SEC did not learn of the existence of a private annuity agreement (the "Annuity Agreement") between the Smiths and the Trust until July 22, 2010, when the Trust's attorney, Jill Dunn, made a passing reference to it during a telephone call

with the SEC's attorneys. The SEC did not obtain a copy of the Annuity Agreement until July 27, 2010, when it was produced by Thomas Urbelis, the Trust's prior trustee, in response to a direct request by the SEC that he search through his files again for any such document.

**The Annuity Agreement**

5. The Annuity Agreement, a copy of which is attached hereto as Exhibit 1, discloses, for the first time, that David and Lynn Smith sold the Charter One stock to the Trust in return for the right to jointly receive annuity payments of \$489,932 a year beginning in 2015 from the Trust and continuing until the death of the last to die.

6. The Annuity Agreement provides, in relevant part, that:

The Transferors [previously defined as David and Lynn Smith] are the owners of 100,000 shares of stock (the "Property") of Charter One Financial, Inc. and the Transferors desire to sell the property to the Transferee to be relieved of the burden and risk associated with owning and managing the Property in order to receive investment income and a portion of the principal on a regular basis.

(Exhibit 1 at 1, Recital A).

7. The Annuity Agreement further provides, *inter alia*, that in return for the Transferors selling, assigning and conveying to the Transferee all right, title and interest in the Property, the Transferee agrees to pay or cause to be paid to the Transferees the sum of \$489,932 per year, commencing on September 26, 2015 and continuing on the 26<sup>th</sup> day of each September thereafter for and during the full term of the natural life of the last to die of the Transferors. (Exhibit 1, ¶¶ 1 and 2).

8. A separate one-page document entitled "Private Annuity" also provided to the Commission by Mr. Urbelis on July 27, 2010, references the ages of the annuitants as 58 and 59 (Lynn and David Smith's ages, respectively, in August 2004),

and sets forth a joint life expectancy of 31 years from August 2004. (This document is attached as Exhibit 2.) The Smiths therefore have a joint life expectancy of 20 years from the date the payment obligations are scheduled to begin in 2015. The annual payment of \$489,932, if paid out over the twenty-year joint life expectancy, would therefore entitle David and/or Lynn Smith to receive payments of approximately \$9,798,640 from the Trust.

**Lynn Smith and the Trust Did Not Disclose the Annuity Agreement Despite the Commission's Diligent Efforts**

9. The Annuity Agreement directly contradicts the numerous sworn statements, document productions and testimony prior to and during the preliminary injunction hearing held on June 9 to 11, 2010. Throughout these proceedings, Lynn Smith, her attorney, the Trustee, the Trust's attorney, and numerous witnesses called on behalf of Ms. Smith and the Trust, claimed that the Smiths had no continuing interest in the assets of the Trust and that the Smiths had transferred approximately \$4,450,000 of Charter One stock to the Trust solely for the benefit of their two children.

**Lynn Smith Statement of Net Assets**

10. On May 5, 2010, Relief Defendant Lynn Smith filed a Verified Statement of Net Assets as of March 31, 2010 (Docket Entry ("DE") 19). The Verified Statement contained a sworn "Verification" by Lynn Smith that she had provided information to the accountant who had prepared it, and that she "personally reviewed the document and believe[s] that it fairly represents [her] own personal assets, liabilities and general financial condition as of March 31, 2010." The L. Smith Verified Statement did not contain any reference to her joint right, together with her husband, to receive almost \$10 million in annuity payments from the Trust.

11. David Smith asserted his constitutional right not to incriminate himself and declined to provide a verified accounting of his assets. (DE 22). He filed a list of accounts that did not include any reference to the Annuity Agreement. (DE 17).

The SEC's Document Request to Lynn Smith

12. On May 10, 2010, the SEC served Plaintiff's First Request For Production Of Documents To Relief Defendant Lynn A. Smith, attached hereto as Exhibit 3. The Annuity Agreement would have been responsive to each of the following requests:

Request 9:

Documents sufficient to show all assets and liabilities held, or purchased and/or sold since January 1, 2000, directly or indirectly, by or for the benefit of Lynn A. Smith, including without limitation, bank accounts, brokerage accounts, investments, business interests, loans, lines of credit and real and personal property wherever situated.

Request 10:

Documents sufficient to show all assets and liabilities jointly held, or purchased and/or sold since January 1, 2000, directly or indirectly, by or for the benefit of Lynn A. Smith and Smith, including, without limitation, bank accounts, brokerage accounts, investments, business interest, loans, lines of credit and real and personal property wherever situated.

Request 11:

Documents sufficient to identify all bailees, debtors, and other persons and entities that currently are holding any of your assets, funds or property (including, but not limited to, any property owned jointly with Smith).

Request 17:

All documents concerning any transfer of assets, since January 1, 2003, to any member of your immediate family.

13. On May 21, 2010, Lynn Smith submitted Relief Defendant's Response To Plaintiff's First Request For Production Of Documents together with certain documents responsive to the Plaintiff's First Request, attached hereto as Exhibit 4. Neither the Annuity Agreement nor any documents referencing such an agreement were produced. In response to Request 9, Lynn Smith affirmatively stated: "A description of the assets and liabilities of Relief Defendant Lynn A. Smith has previously been provided to the Plaintiff herein. Other than the documents enclosed herewith and those in the possession of the Plaintiff, FINRA, or the United States Department of Justice, Relief Defendant Lynn A. Smith has no additional documents responsive to this demand."

14. Lynn Smith stated that she did not have any documents responsive to Requests 10, 11 and 17 but she affirmatively stated, in response to Request 10, that she did have a joint checking account during a portion of the relevant time period. See Exhibit 4, Responses 10, 11 and 17.

The SEC's Document Subpoena to the Former Trustee

15. On May 28, 2010, the SEC served a Subpoena upon Thomas Urbelis, the Trustee of the Trust from the date of its creation until his resignation on April 22, 2010 (which became effective on May 27, 2010). The subpoena required him to appear to be deposed on June 1, 2010 and further required him to produce certain documents described in the Subpoena Attachment. The Subpoena and Subpoena Attachment are attached hereto as Exhibit 5.

16. The subpoena contained numerous requests seeking all documents relating to David Smith, Lynn Smith, the beneficiaries of the Trust, the Trust itself, and

the duties and responsibilities of the Trustee, among other documents. (Exhibit 5, ¶¶ 1-8).

17. Mr. Urbelis produced documents in response to this subpoena on May 29, 2010. He did not produce the Annuity Agreement or any other document that disclosed the existence of any such agreement.

18. The Commission also reviewed documents related to Lynn and David Smith and the Trust that were made available to the SEC by the United States Attorney's Office for the Northern District of New York. The Annuity Agreement was not contained in those documents.

Sworn Statements and Pre-hearing Testimony of Lynn Smith

19. Lynn Smith has made numerous statements under oath regarding the circumstances surrounding the creation and operation of the Trust, the assets transferred to it and the assets of David Smith and herself. At no time did she make any reference to the material fact that the 100,000 Shares of Charter One stock were sold to the Trust pursuant to the Annuity Agreement.

20. On May 21, 2010, Lynn Smith filed a sworn affidavit in opposition to the SEC's Order to Show Cause (DE 23). In the affidavit, she stated:

In August 2004, to provide security for my children's future apart from my stock account, my husband and I created the David L. Smith and Lynn A. Smith Irrevocable Trust. My children were adults, had completed college, and could begin making financial decisions on their own. I alone personally funded this irrevocable trust by transferring 100,000 shares of Charter One Financial Inc. stock from my stock account to the trust's account. This irrevocable trust had been managed since its inception by Tom Urbelis, a longtime friend. (DE 23, ¶ 23)

21. Also on May 21, 2010, Lynn Smith signed a sworn affidavit (DE 34), in support of the motion to intervene filed by the Trustee of the Trust. In that affidavit, she stated, *inter alia*:

. . . . I decided to take advantage of available estate planning laws to fund a trust for my children, from which they could benefit during my lifetime, instead of having these assets sit in a brokerage account until my death. (DE 34, ¶ 4).

. . . . On September 1, 2004, I transferred 100,000 shares of Charter One stock, then valued at \$44.50 per share, to the trust. . . . To the best of my knowledge, there have not been any other contributions into the trust since its creation. (DE 34, ¶ 5).

From the time the trust was created in August 2004, my husband and I have had no interest in or expectation of an interest in the David L. and Lynn A. Smith Irrevocable Trust. It exists solely, exclusively and permanently for the benefit of our children. (DE 34, ¶ 6).

22. Lynn Smith also was deposed on May 27, 2010. Ms. Smith was asked numerous questions designed to identify all assets of herself and David Smith. She was also asked numerous questions concerning the circumstances relating to the creation of the Trust and concerning any interest she and David Smith had with respect to the assets transferred to the Trust. At no time during that deposition did she provide any testimony referencing the existence of the Annuity Agreement that was entered into in connection with the transfer of Charter One stock to the Trust nor did she ever reference the existence of any right she and David Smith had to collect millions of dollars from the Trust. (The complete transcript is at DE 46, Ex. 2.)

23. For example, she provided the following testimony:

**Q Okay. Let me just ask you, what is your understanding of the purpose of the trust?**

**A** The trust, the purpose of the trust was our children are 27 and 30 years old. Presently, we started this about four years ago,



this particular trust and I wanted them to be able to have an opportunity to if they wanted to start a business, own a home, I wanted them to have the rewards, reap the rewards of my husband's business and so we both agreed on putting that in the trust. (DE 46, Ex.2 at 39-40).

**Q So, the trust was created, you would agree, for your children not for you and your husband?**

A Exactly. (DE 46, Ex.2 at 40).

**Q Do you understand that you have the ability to take money out of the trust if you want to?**

[objection to form]

A We cannot take money out of the trust. (DE 46, Ex.2 at 41).

**Q We've talked about the irrevocable trust. Was that something you thought of as an asset under your control?**

[objection to form]

A Specifically, under my control?

**Q Yes.**

A No.

**Q Or your joining with your husband?**

A No.

**Q Why not?**

A I thought that the trustee and my two children would have control of the trust fund. (DE 46, Ex. 2 at 79).

24. Ms. Smith was also asked why the Trust was listed as an asset on the document entitled David L. Smith, Lynn A. Smith Financial Statement and dated August 2008 (attached at DE 46, Ex. 6). She was also asked why the Smith's Statement of Financial Condition dated August 31, 2008 and prepared by their accountants also appeared to include the Trust's assets (attached at DE 46, Ex. 7) In response to all such questions, Ms. Smith responded that she did not know. She never disclosed the existence of the Annuity Agreement as an explanation for the inclusion of the Trust's assets on the Smith financial statement. (DE 46, Ex. 2 at 79-87). (*See also* L. Smith's responses to similar questions at preliminary hearing; PI at 303-311).

Testimony of Former Trustee

25. On June 1, 2010, Mr. Urbelis was deposed. He was asked numerous questions concerning the Trust and concerning any interest Lynn and David Smith had with respect to the assets transferred to the Trust. At no time during that deposition did he refer to the existence of the Annuity Agreement nor did he reference the existence of any right that Lynn and David Smith had to collect money from the Trust. (The complete transcript is at DE 46, Ex. 11).

26. For example, Mr. Urbelis provided the following testimony:

**Q As a trustee for this trust, what did you do?**

A Well, I -- let me tell you what I took as my duties as I saw them. My very first duty obviously was to make sure the kids were okay. Jeff and Lauren, I've known them since they were born. And I think that's -- I don't know if I'm speculating -- that might be one of the reasons besides knowing me, they might have wanted someone who knew the kids and what their personalities were and needs and things like that; so I've known Jeff and Lauren ever since they were born. So, my first duty as I saw it was if they needed money or some kind of assistance was to provide it.

Another consideration for me was I wanted to make sure in a situation like this that the taxes got paid, so I wanted an assurance that I was not going to be responsible for preparing tax returns, and I make no bones about it, I have an accountant that does mine and I don't understand it. So I have an accountant that does that, and I wanted the same professional expertise to deal with the tax returns. I wanted to make sure I had an assurance that they were going to get done on a timely basis and they were going to get paid.

With regard to the investments and the trust, I did not see my duties as making the trust double, triple, quadruple over time. I wanted the money to be fairly secure for, if and when the kids needed it. And I looked to Dave to provide advice to me with regard to the prudent investment or appropriate investments to make in the trust. (DE 46, Ex. 11 at 11-13).

**Q You said that your first goal in being the trustee was to make sure the children were okay.**

A Right.

**Q How did you do that?**

A Well, I knew what the kids were up to. I mean, my wife and I are very good friends with Dave and Lynn. And again, we have

kids that are fairly close to the same ages of Jeff and Lauren, and my wife and Lynn raised a couple of teenagers at the same time. So we had a lot of conversations about what the kids are up to and which kid is doing what, and just that I knew about what they were doing and whether they needed money. So, I mean, obviously if I knew one of them was in a tough spot, I would have stepped in, but that was never brought to my attention or I never became aware of it. (DE 46, Ex. 11 at 15)

27. At no time did Mr. Urbelis disclose the material fact that one of his responsibilities was ensuring that there were sufficient assets in the Trust to enable it to fulfill its obligation to make millions of dollars of payments to David and Lynn Smith beginning in 2015 and continuing until their deaths.

Hearing Testimony of Lynn Smith

28. Lynn Smith testified at the preliminary hearing on June 10, 2010. At no time during her testimony did she make any reference to the existence of the private annuity agreement, despite many questions to which the existence of the agreement was responsive. She provided the following testimony:

**Q And do you know if the trust agreement allows you and David to take money out of the trust account?**

A It does not allow us to take money out.

**Q. Who are the beneficiaries of the trust?**

A Jeffrey Ryan Smith and Lauren Tate Smith, my two children. (PI at 320).

**Q You testified that you created the David and Lynn Smith Irrevocable trust in approximately August 2004, is that correct?**

A Yes.

**Q What was the reason you created that trust?**

A We had the profits from the Albank stock in my account. Since I had -- both of my parents had passed away at 50 years old each, I wanted to have something for my two kids so that if they wanted to start a business or buy a home or do something, that I could actually see them reaping benefits during my lifetime. (PI at 388).

**Q Can you describe what that document is [Plaintiff's Exhibit 126]?**

A It's the transfer of a hundred thousand shares of Charter One Financial into the irrevocable trust.

**Q And is that your signature on that document?**

A Yes.

**Q And do you recall signing the document?**

A Yes

**Q What did you intend to do when you signed this**

A I -- what did I intend to do?

**Q What did you intend the effect of this document to accomplish?**

A It was -- I intended it -- to put the \$4 million into an irrevocable trust for Jeffrey and Lauren Smith.

**Q And when you transferred that stock into the irrevocable trust for Jeffrey and Lauren, what was your understanding as to what your interest in that stock would be after that date of transfer?**

A After that date of transfer, that was no longer -- belong to me anymore. It belonged to --

**Q And -- I'm sorry?**

A It belonged to Jeffrey and Lauren.

**Q Did you believe any time after September 1, 2004, when that you transferred this stock, at any time did you believe the money in that irrevocable trust account was yours?**

A No. (PI at 391-92).

29. Ms. Smith further testified that her daughter had lost her job and was unemployed for a year (PI at 375), that she provided 12 months' rent and paid a tuition bill for a six-month course for her daughter (PI at 399), a Trust beneficiary, out of her funds, and that he hid the extent of the payments from her husband, who she said might consider the payments too generous. (PI at 405). When asked by the Trustee's attorney:

**Q Is there a reason why you didn't tell Lauren to go off and talk to Tom Urbelis and ask him for the money?**

A I never considered it. I had --

**Q Did you --**

A I had money to give her. And I didn't, I didn't want her to go and -- to the fund for something frivolous, or in my estimation frivolous. (PI at 399).

Testimony of Geoffrey Smith

30. The Smiths' son Geoffrey Smith also did not disclose the existence of the Annuity Agreement when he described what his father told him about the Trust:

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

A Yes.

**Q And you testified that your father told you about the trust?**

A Yes.

**Q Was your mother present for that conversation?**

A No.

**Q Was it an in-person conversation?**

A It was.

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

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

**Q And what did he tell you the approximate value was?**

A Approximately \$4 million. (PI at 525).

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

A It was a pleasant surprise that put me at ease. (PI at 527).

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

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

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

A Correct. (PI at 538).

Affidavit and Testimony of the Trustee and the Accounting Expert

31. In his Affidavit dated May 25, 2010 (DE 32), David Wojeski, the newly appointed Trustee of the Trust, did not disclose the existence of the Annuity Agreement and stated that the Smiths had no interest in the Trust or its income or assets:

By the terms of the Declaration of Trust, the Donors, David L. Smith and Lynn A. Smith, have no control over the trust or its assets, other than to appoint a successor trustee. Similarly, they have no interest, whether present, future or reversionary, in the trust, its income or its assets, as it is irrevocable by its own terms and pursuant to provisions of the New York Estates, Powers & Trusts Law. (DE 32, ¶ 5).

32. Mr. Wojeski also did not disclose the existence of the Annuity Agreement when questioned regarding the Trust at trial. (*See, e.g.*, PI at 544-568). Indeed, he affirmatively testified that he had the right to liquidate the Trust immediately and issue two million dollar checks to each of the two beneficiaries. (PI at 562).

33. Mr. D'Aleo, an accountant retained to conduct an analysis of Ms. Smith's assets and the Trust's assets and liabilities also did not disclose the existence of the Annuity Agreement. (*See, e.g.*, PI at 445-454). Indeed, both Mr. Wojeski and Mr. D'Aleo testified at length to the due diligence each undertook to learn as much as they could about the Trust; yet neither of them was apparently informed of or discovered the existence of the Annuity Agreement (or, if they were aware of it, they did not disclose it).

#### Summation of Trust Attorney

34. The attorney for the Trustee also never referenced the Annuity Agreement. Indeed, to the contrary, she argued to the Court that Lynn Smith had no interest whatsoever in the Trust:

The money that Mrs. Smith used to invest in this trust was her rightful money. She testified that she -- and it's never been contradicted, that she believes at all times that when she transferred that stock into the trust account, she relinquished *all title, ownership, control, beneficial, equitable, actual, or legal any interest whatsoever in that stock was gone from her hands the moment she transferred it*. She identified the letter of authorization by which the transfer was effectuated. We saw that

she testified that it was created for estate planning purposes. David Smith -- there's not one piece of evidence that David Smith has ever transferred a single penny into this trust. Never. There was no evidence whatsoever that he owned the Charter One shares. (PI at 625) (emphasis added).

**Discovery of the Annuity Agreement**

35. On July 22, 2010, Kevin McGrath and I participated in a conference call with the Court, and Ms. Dunn, the attorney for the Trust, concerning the SEC's emergency oral application for a temporary restraining order freezing the assets of the Trust. The Court denied the oral motion without prejudice to filing a written motion.

36. Immediately following that conference call, Mr. McGrath and I called Ms. Dunn back. During the course of a brief conversation, Ms. Dunn disclosed the existence of a private annuity agreement involving the Smiths and the Trust. This was the first time any person, attorney or agent associated with David or Lynn Smith or the Trust disclosed the existence of a private annuity agreement involving the Trust to the SEC.

37. On the following morning of Friday, July 23, 2010, I placed a call to Mr. Urbelis. I advised him of Ms. Dunn's reference to a private annuity agreement and asked him if he was aware of any such agreement between the Trust and David and/or Lynn Smith. He stated that vaguely recalled something about an annuity but he was not sure. He agreed that if any agreement existed it would be responsive to the Subpoena previously served upon him. He then told us that he was looking at a file that he had at his office and he stated that it did not contain any such agreement. He agreed to look further and get back to us.

38. On Monday, July 26, 2010, I called Mr. Urbelis and left a message for him to call me. He called me back later that day and told me that he had found the private annuity agreement. He said he would mail it to me by overnight mail.

39. On Tuesday, July 27, 2010, I received the Annuity Agreement from Mr. Urbelis, along with the one-page document (Exhibits 1 and 2). Later that day, together with Mr. McGrath and Ms. Mehraban, I called Mr. Urbelis and asked him why he had not produced this document in response to the Subpoena previously served upon him. He stated that he did not realize that he had the document, that the document had not been in his office file and that he had found it at home. We then asked him whether he had any other documents related to the Trust that would be responsive to the Subpoena. He confirmed that he did not.

40. Mr. Urbelis further stated that he did not have a copy of the Agreement signed by him and he did not recall whether he signed it. He also stated that he had no reason to believe the agreement was altered at any time during his Trusteeship. When asked what obligations he understood the agreement to place on the Trust, he said that his concern was the beneficiaries and he knew he did not have to pay the annuity for years. When asked what he would have done if the beneficiaries requested distributions that impaired the Trust's ability to honor its obligations under the Annuity Agreement, he said he would have consulted with a trust attorney. When asked if he had discussed the private annuity agreement with the beneficiaries, he said he did not recall. When asked did he not think it would be important to share with the beneficiaries the fact that the stock transferred to the Trust was encumbered by an



obligation to pay the Smiths a sizeable annual annuity, he declined to answer the question and ended the call.

**L. Smith's Use of Charter One Stock to Facilitate Smith's Business Interests**

41. Attached as Exhibit 6, is a certified copy of a civil complaint filed by Ian Meyer in December 2003 against various defendants including David Smith, Lynn Smith, Timothy McGinn, Mary Ann McGinn. McGinn Smith & Co. and others, and seeking \$3,000,000 in damages arising out of the defendants actions in connection with the operation of various businesses including Integrated Alarm Services Group, Inc., ("IASG), Integrated Alarm Services, Inc. ("IASI"); KC Acquisitions, and First Integrated Capital Corp. The complaint alleges, inter alia, that sometime after October 2002, Lynn Smith loaned \$ 3 million to KC Acquisition and \$3 million to IASI to help facilitate the IASG initial public offering.

42. Attached as Exhibit 7 is an excerpt from the IASG offering statement, attached as Exhibit E to Ian Meyer's complaint, referenced above. It states, in relevant part, that part of the proceeds of the offering will be used to repay L. Smith for \$3 million that she loaned to KC Acquisitions and \$3 million that she loaned to IASI prior to its acquisition in January 2003.

43. Upon information and belief, the suit was settled in the spring of 2004 with the payment of \$200,000 to Mr. Meyer and a letter from him stating that certain unspecified allegations, and certain causes of action against the law firm and accountant defendants, were unfounded.

44. Attached as Exhibit 8 is a summary chart prepared at my direction, compiled from a review of L. Smith's brokerage statements. It sets forth the number of

shares of Charter One stock, their market price per share and total value each month for the period August 27, 1999 through September 30, 2004. The chart reveals that for the period October 25, 2002 through July 26, 2003, no shares of Charter One stock were contained in L. Smith's brokerage account. On July 29, 2003, the Charter One shares were journaled back in to the Stock Account. The chart also shows that the Smiths sold a total of over 29,000 shares of Charter One stock during the period of August 1999 to September 2004 for total gross proceeds of over \$1 million, and they also transferred over 2,500 shares out of the Stock Account. Finally, the chart shows the significant growth in the value of the Charter One stock, particularly in the months after the cash merger was announced.

45. Attached as Exhibit 9 is a copy of a brokerage statement for L. Smith for the period September 28, 2002 through October 25, 2002, which shows that 105,000 Charter One shares were journaled from her account on October 14, 2002. This resulted in a reduction in the value of her equities holdings from \$3,552,199 to \$426,227.

46. Attached as Exhibit 10 is a letter of authorization dated October 14, 2003, signed by Lynn Smith, authorizing the transfer of 105,000 shares of Charter One stock to the account of KC Acquisition Corp.

47. Attached as Exhibit 11 is a copy of a brokerage statement for L. Smith for the period January 1, 2003 through January 31, 2003, which shows that \$3,000,000 was wired to Charter Bank on January 14, 2003 "to purchase Integrated Alarm Systems (2 Yr); thereby reducing the total value of her brokerage account to \$20,573, from a total of \$6,835,095 as of September 27, 2003.

48. Attached as Exhibit 12 is a copy of a brokerage statement for L. Smith for the period July 26, 2003 through August 29, 2003, which shows the return of 105,000 shares of Charter One stock, with a market value of \$3,255,000 to the account on July 29, 2003.

49. Attached as Exhibit 13 is a copy of a letter of authorization signed by David Smith, Treasurer, KC Acquisition Corp., and dated July 29, 2003, directing McGinn, Smith to journal \$399.09 and 105,000 shares of Capital One stock from the KC Acquisition account to Lynn Smith's account.

50. L. Smith also admitted in her testimony at the preliminary hearing that she loaned \$6 million in order to allow the public offering of IASG to go forward and that the \$6 million came from her stock account. (PI at 346).

#### **Additional Documents**

51. Attached hereto as Exhibit 14, are 28 pages of handwritten notes addressed to "Tim" and signed by "DLS" and "Dave". Upon information and belief, the notes were found in David Smith's desk pursuant to a search warrant executed on April 20, 2010. The notes were subsequently provided to the SEC by the U.S. Attorney's Office.

52. Attached as Exhibit 15 is a copy of a letter dated February 26, 2004, from Steven Vitulano, Branch Chief of the SEC's Broker-Dealer Inspection Program, addressed to David Smith, President, McGinn, Smith, informing him that the SEC's inspection had found various violations of the rules and regulations promulgated under the Securities Exchange Act of 1934 and by the National Association of Securities Dealers.

53. Attached as Exhibit 16 is a press release filed with the SEC on August 31, 2004 by Citizen's Financial Group announcing its acquisition of Charter One on that date pursuant to its purchase of the common shares of Charter One at a price of \$44.50 cash per share. The press release notes that the proposed acquisition was announced on August 4, 2004.

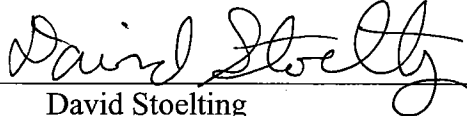
54. Attached as Exhibit 17 is a copy of an email received from Glenn Grossman, from the Dinosaur Group, stating that the Trustee has caused four transfers from the Trust account totaling \$474,574.40 between July 12, 2010 and July 16, 2010.

55. In addition, upon information and belief, on July 22, 2010, Mr. Grossman contacted Mr. McGrath and advised him that the Trustee had directed the transfer of an additional \$2 million to an account at another financial institution in the name of the Trust.

56. In the telephonic conference call among myself, the Court and counsel for the Trust on July 22, 2010, I presented certain evidence to the Court and requested an emergency asset freeze over the Trust assets. The Court denied my request without prejudice, and I stated that the SEC intended to seek such relief promptly. However, the discovery of the existence of the Annuity Agreement after the July 22 call and its production on July 27, 2010, *see infra* ¶¶ 35-37, caused the SEC to revise its factual and legal analyses to account for the newly discovered evidence, which prevented an earlier filing. The emergency relief sought in this application is appropriate because of evidence set forth above of the defendants' fraudulent conduct, including fraudulent conveyances, the risk of dissipation of assets and the evidence that funds are being withdrawn from the Trust account. *See supra* ¶¶ 54-55.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: New York, New York  
August 3, 2010

  
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David Stoelting