UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

McGINN, SMITH & CO., INC.,
McGINN, SMITH ADVISORS, LLC,
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. McGINN, AND
DAVID L. SMITH,

Defendants, and

Case No.: 1:10-CV-457 (GLS/DRH)

LYNN A. SMITH,

Relief Defendant,

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

Intervenor.

DECLARATION OF JILL A. DUNN IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

I, JILL A. DUNN, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury, the following facts:

1. I am an attorney admitted to practice before this Court and am the attorney for David M. Wojeski, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (hereinafter "the Trust"), the Intervenor in this action. I make this affidavit in opposition to

Plaintiff's motion to reconsider that portion of the court's order filed July 7, 2010 relating to the Trust. I make this affidavit based on my personal knowledge, court records and, in instances where indicated, upon my information and belief.

Background and Jurisdictional Issues

2. On August 24, 2010, I filed a Notice of Appearance on behalf of Geoffrey Smith and Lauren Smith, the two beneficiaries of the Smith Trust. Neither of these individuals were parties to this action when the court rendered the July 7, 2010 decision which is the subject of the instant motion for reconsideration, yet their bank accounts were frozen by the Court in the TRO which initiated this motion on August 3, 2010.

3. Because Lauren and Geoffrey Smith were not parties to the Complaint which provided the procedural framework for the preliminary injunction hearing and resultant decision now under reconsideration, it is manifestly unfair and contrary to jurisdictional requirements that their bank accounts were frozen in this motion when they were not parties to the action in which the subject decision was issued, and the TRO was issued without notice to them or an opportunity to be heard thereon.

4. David Wojeski, Geoffrey Smith and Lauren Smith have not been accused of violating any securities laws nor have they committed any wrongdoing whatsoever, yet their reputations are being slandered with false accusations that they concealed evidence, and, in the case of Geoffrey and Lauren Smith, their lives were virtually halted without warning by the freezing of their personal bank accounts with plaintiff's inclusion of them in a TRO obtained without notice to them and with the use of reckless and false accusations and seriously misleading statements to this Court in plaintiff's August 3, 2010 application.

5. With respect to Lauren Smith, who lives in Colorado and works two restaurant jobs, her paychecks had been directly deposited into her bank account by her employer. The SEC effectuated the recent TRO freezing her bank account *before* notifying her that the order had been issued. Thus, without notice or an opportunity to be heard by the Court, she has been unable to access to her earned wages, and additional paychecks were subsequently automatically deposited into that bank account during the administrative time taken by her employer to modify the payroll direct deposit instructions.

6. The Trustee and Geoffrey and Lauren Smith are now named in an Amended Complaint in one cause of action only, a lone state law claim purportedly asserted under the New York Debtor and Creditor Law. This cause of action was not alleged in the original complaint nor was the Debtor and Creditor Law cited by the SEC at the hearing or in prior legal briefs, despite the fact that the Trust was previously frozen and the SEC already argued that the Trust was the product of a fraudulence conveyance. This statute is now being cited for the first time on reconsideration, but the factual basis, that is, whether the Trust was created with fraudulently obtained assets, was already conclusively decided against the plaintiff.

7. This Debtor and Creditor Law cause of action, on its face, is asserted against Geoffrey and Lauren Smith exclusively as a result of actions undertaken by the Trustee as the successful Intervenor, actions which were taken in *specific, direct and deliberate reliance upon the lawful order of this Court entered on July 7, 2010.* This newly stated cause of action is a different name for the SEC's previously unsuccessful theory that the Trust was the alter ego of David Smith. Because this is a motion for reconsideration of a decision rendered before they were named as parties to this action, there is no jurisdictional basis for freezing the bank

accounts of Lauren and Geoffrey Smith on this motion, nor is a blanket asset freeze available to the SEC under applicable provisions of the Debtor and Creditor Law.

8. This affidavit is intended both to oppose the plaintiff's motion for reconsideration and to correct the litany of half-truths and misleading innuendo which were put before this court by the SEC's counsel and which recklessly and baselessly impugn my personal integrity and professional credibility as a longstanding practitioner in this Court.

9. Specifically, the SEC, through its attorney David Stoelting, has accused me and, essentially, every attorney and witness who appeared on behalf of either the Trust or Lynn Smith, of an apparently elaborate conspiracy to conceal evidence from this Court. Nothing could be further from the Truth and it's frankly shocking that he would resort to this type of smear tactic. The false accusation that everyone involved in this case "failed to disclose" information and "concealed" evidence that was ***never*** requested by the SEC is clearly designed to mask the ineptitude of the SEC's counsel in this case, which was demonstrated repeatedly during the hearing and in summation, when Mr. Stoelting could not articulate a theory, cogent or otherwise, to justify freezing the Trust account despite repeated prompting by the Court.

The SEC's "New" Evidence.

10. Having justifiably lost the asset freeze motion over the Trust on its merits following a three-day evidentiary hearing, the SEC now returns with little more than a bowl of sour grapes to ask the Court to repair its case based on "new evidence" that was either in the SEC's actual possession and/or offered into evidence at the hearing or which would have been discovered in the exercise of due diligence.

11. In addition to the private annuity agreement, which is addressed below, the SEC argues that they have other "new" evidence to support its theory that the Trust was created with

fraudulently conveyed assets, a theory which they presented at the hearing and which was not accepted by the Court.

12. As a point of fact, all of the remaining evidence submitted by the SEC was in its possession or was available to it at the time of the hearing. Specifically, in the case of (1) the 2003-2004 broker/dealer audit, (2) the single isolated instance of Lynn Smith's loan of Charter One stock in October 2002 and its return in July 2003, and (3) the federal lawsuit filed by Ian Meyers, all of this proof was in the possession of the SEC and presented at the hearing.

13. In the case of the letter seized from David Smith's residence, addressed more fully below, this document was in the possession of the SEC's sister agencies since April 20, agencies which have provided the SEC with evidence throughout this litigation. In support of its claim of "newly discovered" evidence, the SEC offers 28 pages of undated notes seized from the home of David Smith on April 20, 2010 by the Federal Bureau of Investigation pursuant to a search warrant signed by this Court and urges the Court to treat this as "newly discovered" evidence of fraud for purposes of reconsidering its July 7 decision. Stoelting Decl. ¶ 51, Ex. 14.

14. Upon information and belief, the U.S. Attorney's office and the SEC have engaged in routine sharing of information and exchange of documents since the simultaneous commencement of this civil case and a parallel criminal investigation on April 20, 2010. Upon information and belief, lawyers for the SEC have routinely communicated with representatives from the U.S. Attorney's office throughout this litigation. The SEC lawyers routinely visited the Albany office of the U.S. Attorney throughout the course of the three day evidentiary hearing in June and may have received some form of technical or substantive assistance from the U.S. Attorney's office.

15. In his Declaration, Mr. Stoelting states that this undated letter, seized on April 20, 2010, was "subsequently" provided to the SEC by the United States Attorney's. Stoelting Decl. ¶ 51. He has carefully avoided stating that the SEC received this document after the June hearing or after the issuance of the July 7 decision.

16. The Court should direct Mr. Stoelting and/or all SEC counsel of record on this case to state under oath the date on which the SEC learned of the existence of Exhibit 14, the date on which the SEC received this document from the U.S. Attorney's office and the nature and extent of assistance and information the SEC has received from the U.S. Attorney's office in the pursuit of this case. With that information, the Court will be better able to make an informed decision as to whether Exhibit 14 constitutes "new" evidence and the extent of the coordination of the parallel civil suit and criminal investigation.

The SEC's "Proof" of Concealment of the Private Annuity Agreement

17. Mr. Stoelting devotes more than 12 pages of his sworn declaration to coloring the facts to seduce the reader into thinking that the SEC requested evidence concerning an annuity, that the SEC asked a witness whether an annuity existed, that the SEC asked a witness what a "Private Annuity Trust" involved, and that each and every witness and their counsel knew of the annuity agreement and conspired to withhold information and evidence. See Stoelting Decl. pp. 4-15.

18. In considering Mr. Stoelting's accusations concerning the alleged concealment of evidence, the Court should pay careful attention to the words and phrases selected for his sworn declaration. He never once asserts that he or anyone from the SEC ever asked a single question about a private annuity or even the nature of the "Private Annuity Trust" as it was characterized by David Smith in his transmittal letter of August 4, 2004, which was in evidence at the hearing.

19. Despite pages upon pages of suggestions that evidence was concealed or witnesses lied under oath, Mr. Stoelting never once avers that the SEC asked a witness if he or she knew whether there was an annuity associated with the private annuity trust, until late July when they asked the former Trustee, who responded that he had a "vague" recollection. As a point of fact, in deposing Thomas Urbelis, the former Trustee, SEC counsel Lara Mehraban asked him about his understanding with respect to just about every sentence in David Smith's cover letter except the one in which referred to a "Private Annuity Trust." It is inconceivable to characterize the SEC's efforts on this point as anything close to diligent.

20. Rather, Mr. Stoelting's references to testimony all accuse the witnesses of "failing to refer" to the existence of an annuity in response to a question which clearly was not designed to prompt such testimony. The references in his declaration to purported "failure to disclose" by witnesses and by this declarant are all based on the erroneous assumption that the individual knew of the existence of an annuity. See Stoelting Decl. ¶ 19, 22, 24, 25, 27, 28, 30, 31, 32, 33.

Expert Opinion on Private Annuity Trust and Private Annuity Agreement

21. It was, is and will remain true that David and Lynn Smith do not, have never and will not have any interest in the inter vivos, irrevocable trust created by agreement on August 4, 2004, nor do they, did they or will they ever have an interest in or ownership or control over the assets of that Trust. However, as we have learned in the past few weeks, they apparently are parties to a private annuity agreement which grants them an interest, not in the assets of the Trust, but in a contract right to a future payment scheduled to begin in 2015, provided that they are both living at that time. As set forth below, it appears that the Trustee, Thomas Urbelis, was in possession of what may be the only copy of the annuity and did not recall its existence or find

it in his initial attempt to produce documents related to the Trust. There is no evidence to justify attributing his mistake to me or my clients.

22. Having become aware of the existence of that annuity for the first time within the last several weeks and because the SEC has suggested in this motion that witnesses were untruthful or misleading in their understanding of the Trust and its legal effect, Mr. Featherstonhaugh and I jointly retained a legal and accounting expert to give us an objective opinion as to the nature and effect of the Trust, the annuity agreement and the rights and responsibilities of the Trustee, the donors/annuitants and the beneficiaries. Attached as Exhibit A to this declaration is a copy of that opinion, given by David Evans, JD, CPA, of the law firm Martin, Shudt, Wallace, DiLorenzo and Johnson, of Troy, New York.

23. It is clear from Mr. Evan's opinion that every bit of testimony given at the hearing by the various witnesses on behalf of Lynn Smith and the Trust were not only truthful, but were completely accurate in their understanding that David and Lynn Smith did not and do not have any interest whatsoever in the Trust or its assets, and that the Trustee's responsibility is to the beneficiaries of the Trust. Any contractual rights of third parties are secondary to the rights and interests of the beneficiaries of the Trust, and the annuity agreement does not modify the powers and duties of the Trustee which were created in the Declaration of Trust nor should it change the Court's July 7 decision as it relates to the Trust.

The Purported Discovery of the Private Annuity Agreement

24. With respect to the private annuity agreement, as set forth below, neither I nor my clients were in possession or aware of the existence of this specific private annuity agreement produced by Mr. Urbelis on July 27, 2010. However, the SEC should have surmised, well before the Court's July 7 decision, that some type of annuity might exist and they should have asked

him about it well before July 22. David Smith's cover letter transmitting the Declaration of Trust referred to it as a "Private Annuity Trust" and paragraph (10) of the powers given to the Trustee in that Declaration specifically authorized the Trustee to purchase property from the donors of the Trust in exchange for a private annuity payable to the Donors.

25. During the course of my own due diligence in this case, I spent time conducting research about Private Annuity Trusts. There is a plethora of information readily available to anyone who conducts even a rudimentary internet search on this subject.

26. For example, I discovered the existence of the National Association of Private Annuity Trusts. The fact that the SEC "did not disclose" to me the existence of the NAPAT website (www.napat.org) does not mean that they actively concealed it from me, a leap Mr. Stoelting expects this Court to take on every page of his Declaration. Indeed, many of the documents available on that website are helpful in understanding the basic nature of a private annuity trust. I learned that the explanation in David Smith's August 4, 2004 transmittal letter, that he could "consult on investments" but would "not be eligible to exercise any direct control over the Trust or its investments," seems to reflect a very common understanding by donors in the use of these unique trust vehicles.

27. It's difficult to imagine how the numerous lawyers and accountants assigned to this case by the SEC could have read the documents which were indisputably in evidence before this Court and not ask a single question to determine whether there was an annuity, unless they had concluded, as I did, that the existence of an annuity would not have changed the circumstances of this case. The specific provisions of the Declaration of Trust authorized it and David Smith's letter referred to it, yet they never thought to ask about a private annuity. Surely, if the SEC legitimately believed that the existence of an annuity was even remotely relevant to

this case, their counsel, Lara Mehraban, would have inquired into this subject when she had the former trustee under oath when he voluntarily appeared at a deposition on June 1, 2010.

28. During Urbelis' testimony, Ms. Mehraban questioned him at length about most of the sentences in David Smith's cover letter, yet she never asked him why it was characterized as a "Private Annuity Trust" or whether he had ever entered into a private annuity as Trustee. She didn't examine him about the various clauses in the Trust that might have elicited testimony relating to the private annuity. Rather, she asked him questions which she apparently thought would elicit testimony supporting the SEC's theory as to the Trust. At that time, the SEC's theory was that the Trust was a sham, was not irrevocable and that Thomas Urbelis was a mere figurehead.

29. In conducting Urbelis' deposition, the SEC counsel was not in a search for information, truth or justice. They were searching for evidence helpful to their case, and they made a calculated decision not to explore the nature of the trust or the subject of a private annuity with the Trustee, both of which were apparent on the face of the documents which were considered by the Court. Had they done so, they probably would have gleaned the same information from Mr. Urbelis at his June 1 deposition.

30. Nevertheless, when the SEC contacted Mr. Urbelis by telephone on July 23 to inquire about a private annuity, he didn't evade their questions in any way, nor did he conceal any information or documents. In recounting to me earlier this week his several conversations with the SEC lawyers, Mr. Urbelis stated that he told them he had a vague recollection of an annuity, and agreed to search his files again to see whether he had anything like that in his possession, in his office or his home.

31. Mr. Urbelis advised me that he made another gratuitous search through his office and home that weekend and that he found the annuity agreement mixed in with other papers in his home. He said he did not conceal the existence of the annuity from the SEC or from me; he simply provided all of us in May with a copy of the Trust file from his office, which he believed contained everything in his possession relating to the Trust.

32. The SEC lawyers called Urbelis again on July 26 and 27, and he again answer their questions until they became argumentative with him and questioned his judgment when he stated that he had not advised either of the beneficiaries of the existence of an annuity. In light of the fact that Mr. Urbelis informed the SEC lawyers that he had not produced the document to me and had not informed the beneficiaries of its existence, is it indeed disingenuous for Mr. Stoelting to suggest to this Court that the beneficiaries, the new Trustee or I withheld information concerning the annuity from the SEC or the Court.

33. That the SEC counsel jogged Urbelis' memory about a private annuity or prompted him to conduct a more thorough search by asking him a direct question about it leads to the unavoidable conclusion that the SEC could have inquired about the existence of a private annuity sooner had they acted with diligence in investigating and preparing their case.

34. I would be remiss if I did not posit that that the SEC lawyers may have always surmised that an annuity agreement could have been entered into, but concluded that the existence of the annuity would not have bolstered their original theory as to the Trust, which was that it was not truly irrevocable. If the SEC counsel determined that the existence of an annuity agreement would not have advanced their original theory of the case as presented at the hearing in June, they may have avoided asking questions about it. Having failed to prove their original

theory, they now advance a new theory, equally unavailing, but this one was unfairly launched with ethical salvos directed at the attorneys in this case.

July 22, 2010 Telephone Conversations

35. In a disgusting attempt to mislead the Court into thinking that I, or my client, or Lynn Smith, or her attorney, or Trustee David Wojeski, or Geoffrey Smith, or the former trustee Thomas Urbelis (once again the SEC apparently cannot settle on a theory) withheld, concealed or failed to produce a Private Annuity Agreement, Mr. Stoelting states:

> "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." Stoelting Decl. ¶ 4.

While it may add color to the story of the SEC's supposed "Ah ha!" moment, David Stoelting's assertion that I made a reference, passing or otherwise, to a "private annuity agreement" in a telephone call on July 22, 210 is simply and unequivocally false.

36. I can state with absolute certainty that I did not make that statement because I did not know of the existence of the private annuity agreement until I received it from Thomas Urbelis on July 27, 2010, the same day that the SEC received it. The Court should note also that, after receiving the annuity agreement from Mr. Urbelis, Mr. Stoelting wrote to counsel of record and advised us that he had obtained the agreement from Mr. Urbelis and demanded that we produce other documents in our possession relating to the annuity. Neither I nor Mr. Wojeski had any documents in our possession relating to the private annuity other than the courtesy copy of the documents I received from Mr. Urbelis on July 27 when Mr. Stoelting received them.

37. On July 29, 2010, I responded accordingly in writing and a copy of his letter and mine is attached hereto as Exhibit B. Quite simply, I received the document the same day that the SEC did. Despite my written statement to him that I did not have the private annuity agreement in my possession prior to July 27, Mr. Stoelting proceeded to file the instant motion several days later, and included a barrage of false assertions to lead this Court to believe that I and others concealed this document from the Court and the SEC. He did not provide the Court with my July 29 letter, and his misleading statements were clearly designed to seduce this Court into issuing a TRO freezing the Trust account and the accounts of Geoffrey and Lauren Smith before allowing counsel to be heard. While his efforts in that regard were initially successful, this type of deceitful conduct is sanctionable and he should not be rewarded with the granted of this motion for reconsideration.

38. The sum, substance and circumstances of the telephone conversation on July 22, 2010 was as follows. At approximately 3:45 pm on July 22, 2010, I received an email from David Stoelting apprising me of the SEC's intention to file an Amended Complaint and requesting that I commit that there would be no transfers or withdrawals from the Trust's brokerage account at RMR Wealth Management until such time as they could file the Complaint and seek a TRO freezing the Trust account. There was no basis for the request and I refused to accede to it.

39. The Court may recall that Mr. Stoelting then placed a call to chambers and requested a telephone conference. The Court held the conference with me, Mr. Stoelting and Mr. McGrath on the line.

40. Mr. Stoelting presented the SEC's argument to the Court in support of its verbal request to freeze the Trust account. As the Court pointed out during that call, the SEC's request

was actually a request for reconsideration of the July 7 decision and it was being made after the expiration of the time allowed by the Local Rules for motions for reconsideration.

41. Mr. Stoelting proceeded to explain that the SEC would be filing an Amended Complaint to assert a cause of action under the New York Debtor and Creditor Law and that they believed they had evidence to support its claim that Lynn Smith's transfer of Charter One stock to the Trust in August 2004 was a fraudulent conveyance in violation of state law. In support of that theory, they cited four pieces of evidence:

> 1) That Lynn Smith couldn't have engaged in estate planning or received a tax benefit by creating the Trust in 2004 because no gift tax return was filed for 2004, and they opined that she would have realized capital gains in the absence of a gift tax return having been filed;
>
> 2) That a "personal confession" of David Smith written years before the funds alleged in the complaint were created would demonstrate fraudulent intent in the creation of the Trust;
>
> 3) That there was evidence that the Charter One stock which funded to the Trust had been used once as collateral for the Integrated Alarm Services Group IPO in 2003; and
>
> 4) That the SEC conducted a broker/dealer examination of McGinn, Smith & Co., Inc. in late 2003 and 2004 which should have put David Smith on notice that he may face future liability.

The SEC argued that the above-cited facts would support their theory that the Trust had been used to fraudulently conceal assets from creditors of the Smiths in 2004.

42. In response, I pointed out that no gift tax returns were filed because none were required, that I had never seen the alleged letter but that David Smith's intent was irrelevant because the Charter One stock was the inherited property of Lynn Smith, that the pledge of Charter One Stock as collateral for IASG was in evidence at the hearing and therefore was before

the Court when the July 7 decision was issued, and that any audits or examinations by the SEC would not constitute new evidence since the SEC is the plaintiff herein and they were aware of any examinations or audits they had conducted.

43. The Court denied the request without prejudice to renewal in writing.

44. After the call with the Court ended, Mr. Stoelting and Mr. McGrath apparently hit *69 and dialed me back at my home, demanding to know why I said that no gift tax returns were required. I stated that it was my understanding that because this was a *private annuity trust,* no gains were realized and no gift tax returns were required to be filed. They asked what gave me that understanding. I said that I had consulted with accountants about the issue and was confident in our position. Mr. McGrath then demanded to know what I hadn't produced a copy of an accountant's report to that effect. I stated that I had no obligation to produce any reports from my consultant and that in any event, no report had been created. I stated that no fewer than four accountants testified at the preliminary injunction hearing and that if they had questions or theories about capital gains or gift tax returns or private annuity trusts, they should have asked those questions at the hearing.

45. Mr. McGrath and Mr. Stoelting abruptly ended the call after I complained to them of the rudeness and unprofessionalism they were demonstrating by demanding an immediate response to their surprise request to have my client relinquish rights that had been adjudicated by the Court. During the entire conversation, which probably lasted less than three minutes, I never used the phrase "private annuity agreement" even once, because I didn't know a private annuity agreement existed until July 27. I did refer to the trust as a Private Annuity Trust, which should not have come as any surprise to anyone involved in this case, given the transmittal letter of David Smith characterizing it as such. While it's entirely possible that my statement prompted

them to go back and reread the Trust Declaration and David Smith's transmittal letter, both of which were in evidence, I never uttered the phrase "private annuity agreement" during that call.

Lack of Due Diligence by the SEC

46. Lead counsel for the SEC David Stoelting summarily asserts that:

> "the SEC made diligent efforts to obtain all documents and evidence relevant to the assets of David and Lynn Smith and the Trust."

As demonstrated in the accompanying Memorandum of Law, the Court must determine whether the claimed "newly discovered evidence" could have been discovered by the plaintiff in the exercise of due diligence prior to the issuance of the order sought to be reconsidered. Mr. Stoelting would have the Court dispense with its obligation to consider and determine that question of fact by essentially taking his word for it that the SEC was diligent. Mr. Stoelting has offered no facts to support his claim of "diligence" and the following facts conclusively demonstrate otherwise.

47. On or about May 17, 2010, I was retained by David Wojeski to represent the Trust in this litigation. I immediately began gathering information concerning the Trust, the parties to the trust document and the investments of the Trust. I engaged an accounting consultant to help me understand and present any accounting, tax or estate plan issues. In the course of my initial investigation that week, I called Thomas Urbelis, who had served as Trustee from the creation of the Trust on August 4, 2004 until his resignation on or about April 22, 2010. I obtained his telephone number from his law firm's website, which is readily available through a simple Google search. I introduced myself as the attorney who had been retained by the successor Trustee of the Trust. He asked me for a copy of the appointment of the new trustee, which I sent to him. I asked him a variety of questions concerning his professional background

and experience, his relationship with the Smith family, his duties under the Trust and the manner in which he fulfilled them, whether he had made any distributions or investments, what if any involvement David or Lynn Smith had with respect to the performance of his role as Trustee and the reason for his resignation. We did not discuss an annuity or anything related to an annuity agreement. He answered all of my questions in a very straightforward, professional and courteous manner and all of the information he provided to me was entirely consistent with the testimony he gave at his deposition two weeks later.

48. I also asked Mr. Urbelis to provide me with all documents related to the Trust. He said he would have someone in his office copy his file and send it to me. It was apparent during our conversation that he had the file in front of him while we were speaking, as he referred to documents in it at different times to refresh his memory. A few days later, I received a package of documents from him. I reviewed the contents upon receipt and again in preparing this Declaration. The Private Annuity Agreement at issue was not in that package of documents. The first time I ever saw or learned of its existence was when I received it from Mr. Urbelis on July 27, 2010 the same day the SEC received it. When I received that initial set of documents from him on or about May 21, a copy of which he provided to the SEC on May 29, I had no reason to think it did not contain all of the documents relating to the Trust.

49. Also in the course of my initial investigation, I read the Declaration of Trust from start to finish and reviewed the tax returns and stock account statements. Taking into consideration my own research, knowledge and experience and my consultations with an independent estate planning lawyer and with a certified public accountant, I concluded that the Trust was irrevocable, that there was nothing unusual about it, and that David and Lynn Smith had no power or control over this Trust other than the power to appoint a successor Trustee.

50. I conducted all of the foregoing acts in the exercise of due diligence pursuant to Rule 11 of the Federal Rules of Civil Procedure, my obligations as an officer of the Court and the standards for professional responsibility. I took all of these actions prior to seeking the SEC's consent to allow the Trustee to intervene in the litigation to oppose the motion for a preliminary injunction as to the Trust and eventually filing a motion to that effect.

51. On May 26, 2010, having heard nothing from Mr. Stoelting in response to my request for the SEC's consent to intervention, I filed the Trustee's motion to intervene by Order to Show Cause. Even in the face of a filed motion, Lynn Smith's scheduled deposition, and an impending court conference scheduled for 3:00 p.m. on May 27, Mr. Stoelting did not consent to the intervention until the court conference, which occurred less than one hour after he concluded the deposition of Lynn Smith.

52. At the May 27 conference, the Court adjourned the pending hearing of the preliminary injunction at the request of the SEC so that they could conduct discovery regarding the Trust. The Court set the hearing to commence on Wednesday, June 9, 2010.

53. During the intervening time period, the SEC did not serve any discovery demands on the Trust and did not seek to depose the new Trustee or either of the beneficiaries. To the best of my knowledge, the only discovery conducted during that time was the voluntary deposition give by Mr. Urbelis and previously noticed depositions taken by Mr. Featherstonhaugh.

54. It is important to note that Mr. Urbelis' participation in this litigation has been entirely voluntary. The SEC repeatedly and wrongly asserts that it "served a subpoena upon Thomas Urbelis," that the purported subpoena "required him to appear to be deposed on June 1, 2010 and further required him to produce certain documents." Stoelting Decl. ¶ 15. Presumably,

the SEC is aware that Mr. Urbelis, an attorney who works in Boston and lives in Andover, Massachusetts, resides and works well outside the jurisdictional boundaries of the Northern District of New York.

55. In fact, despite months of preparation for this lawsuit and seven weeks of expedited discovery prior to the preliminary injunction hearing, the SEC's first contact with Thomas Urbelis was a telephone call to him on Friday, May 28, 2010, fully five weeks after obtaining the first TRO freezing the Trust account. Mr. Urbelis has advised me that, during that initial call, the lawyers for the SEC asked him a series of questions very similar to the questions I asked during my initial conversation with him. They asked him to produce documents related to the Trust and he agreed. He advised me that they did not "serve" a "subpoena" on him but instead emailed him their document request in the form of a subpoena. He stated that it wasn't valid service and that the "subpoena" was overly broad.

56. He advised me that he called Lara Mehraban after receiving her email and told her that their request was far too broad, that he was not going to parse through 50 years worth of communications with Dave and Lynn Smith, most of which were personal to him and unrelated to this lawsuit, particularly since his office was closing early that day and he was going out of state for the Memorial Day weekend. He agreed to send her a copy of everything he had sent to me and to appear in Albany the following Tuesday, June 1, which was the very next business day. Mr. Urbelis further advised me that Ms. Mehraban did not voice any objection and in fact provided him with her home address to receive the package the next day, which was a Saturday. Mr. Urbelis confirmed his plans with her in an email.

57. Despite having obtained an asset freeze over the Trust account in April, not one of the SEC's many attorneys and investigators contacted Thomas Urbelis, the longtime Trustee of

the Trust, until after the new Trustee moved to intervene in the action for the purpose of opposing the motion for a preliminary injunction. They never served Urbelis with the April 20 TRO and they never served him with a "subpoena" of any kind. He voluntarily drove to Albany and submitted to a sworn deposition, which everyone knew would be used at the hearing, as he could not be compelled to attend the hearing in person.

58. The SEC's lack of diligence in their contacts with Thomas Urbelis, a non-party not under the control of any party or counsel to this litigation and their failure to fully explore his memory during his deposition testimony should preclude the Court's consideration of the private annuity agreement, which could have been discovered with reasonable diligence before the Court issued its July 7 decision.

59. Mr. Stoelting's lengthy sworn declaration is devoid of even a single fact on which the Court could base a finding of due diligence. Rather, he repeatedly asserts numerous instances where party and non-party witnesses alike purportedly failed to answer a question that he and his colleagues never thought to pose: "Did this Private Annuity Trust ever purchase a private annuity?" Nowhere is his 21-page declaration with multiple exhibits does he ever assert that he or any of his colleagues ever asked anyone with any knowledge of this Trust about a private annuity. He characterizes the questions posed to Lynn Smith, Geoffrey Smith, David Wojeski, John D'Aleo and Thomas Urblis as "relating to the Trust" but the undisputed fact is that, despite David Smith's reference to this Trust as a Private Annuity Trust in his August 4, 2004 transmittal letter, the SEC has never asked a single person about an annuity.

60. On the contrary, Mr. Stoelting's assertion that the SEC "made diligent efforts" is belied by the facts. The Court should take note that Mr. Stoelting has not set forth any information regarding the investigation undertaken by the SEC, a massive federal agency with

upwards of 4,000 employees, and the seemingly unlimited resources available to it through information sharing among federal agencies and partners, to determine whether the Trust had any assets or liabilities other than the stock account. The SEC's approach seems to be to run to Court crying that the sky is falling, get a shockingly wide-ranging, *ex parte* TRO, fail to serve people directly affected by the TRO, and then expect the defendants and their attorneys to explain basic legal concepts to them so that they can develop a theory and prove a case.

61. The SEC has failed to put forth any evidence which was not in its possession, available to it or readily apparent from the evidence prior to the Court's July 7 decision. There is no basis on which this motion for reconsideration should be granted.

62. The merits of the Debtor and Creditor Law claim against the Trust, Geoffrey Smith and Lauren Smith will be addressed in response to the Amended Complaint. In the interim, however, because the Court has deemed this to be a motion for reconsideration, there is no jurisdictional basis to freeze the bank accounts of Geoffrey and Lauren Smith, since they were not named in the complaint or the motion which resulted in the July 7 decision under reconsideration. Their accounts should be unfrozen immediately.

WHEREFORE, I respectfully request that the Court deny the plaintiff's motion in all respects.

Dated: September 3, 2010

s/Jill A. Dunn

Jill A. Dunn (Bar Roll No. 506942)
Attorney for Proposed Intervenor
THE DUNN LAW FIRM PLLC
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Email: JDunn708@nycap.rr.com

EXHIBIT

A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	
v.	:	**10 Civ. 457 (GLS/DRH)**
McGINN, SMITH & CO., et. al.,	:	
Defendants.	:	

Expert Opinion of David L. Evans regarding the Trust and New York State laws.

David L. Evans
Martin, Shudt, Wallace, DiLorenzo & Johnson
279 River Street
P.O. Box 1530
Troy, New York 12181

September 2, 2010

David L. Evans

1. I have been retained by The Dunn Law Firm, PLLC, counsel for the David L. Smith & Lynn A. Smith Irrevocable Trust u/a dated August 4, 2004, and the law firm of Featherstonhaugh, Wiley & Clyne, LLP, counsel for Lynn A. Smith, to provide expert analysis and opinions concerning the property rights created by the Trust instrument, property rights held by the beneficiaries of the Trust, the duties and responsibility of the Trustee and the impact and consequences of certain investment activities undertaken by the Trustee.

Qualifications

2. I am of counsel to the law firm of Martin, Shudt, Wallace, DiLorenzo & Johnson, a firm offering a variety of corporate, individual and trust/estate legal services.

3. I am an attorney admitted to practice law in the courts of New York State and the United States Federal Tax Court. I have 31 years of experience in tax, trust and estate law, and contract law in the state of New York. I am a Certified Public Accountant. I have substantial experience with tax and financial accounting issues. A copy of my curriculum vitae is attached as Exhibit A.

4. The law firm of Martin, Shudt, Wallace, DiLorenzo and Johnson is being compensated at an hourly rate of $385 per hour for my substantive work in this matter. For deposition and testimony at trial the firm will be compensated at an hourly rate of $485 per hour for my time.

5. My analysis, conclusions and opinions contained herein are based on my experience and knowledge, and on the documents and other relevant information made available to me by counsel and through publicly available sources. If additional relevant documentation or information is subsequently provided to me, my opinions and conclusions herein provided may be supplemented. The documents that I have reviewed in formulating my opinion include those cited herein and additional documents are listed in Exhibit B.

Declaration of Trust

6. On August 4, 2004, David L. Smith and Lynn A. Smith entered into and created an inter vivos irrevocable trust known as the David L. Smith & Lynn A. Smith Irrevocable Trust u/a dated August 4, 2004(the "Trust"). A copy of the trust instrument is attached as Exhibit C.

7. The irrevocable trust created a split interest between the Trustee and the beneficiaries. The beneficiaries are Geoffrey Smith and Lauren Smith. The beneficiaries received property rights in the form of first, a discretionary income/principal interest and then, a mandatory remainder interest. Distributions under the income/principal property right are subject to the full discretion of the Trustee. The Trustee is under no obligation to make any distributions during the life of the Trust.

8. Upon the passing of the survivor of David L. Smith and Lynn A. Smith the Trust will terminate. The beneficiaries, Geoffrey Smith and Lauren Smith, or their issue, will then receive their pro-rata share of the then assets of the Trust.

9. 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.

Trust Assets

10. The Trustee is charged with the duties and responsibility to administer the independent assets of the Trust. Contained within the powers of the Trustee is the power to buy, sell and otherwise invest the funds and assets of the Trust.

11. In exercising its fiduciary duties and responsibilities, the Trustee on August 31, 2004, entered into an Asset Purchase Agreement. Pursuant to this Asset Purchase Agreement, the Trustee acquired 100,000 shares of the common stock of Charter One Financial, Inc. The Trustee purchased these shares. See Asset Purchase Agreement attached as Exhibit D.

12. The consideration provided for the purchase was an annuity payment. Under this annuity payment the Trust is obligated to pay a fixed periodic payment of $489,932.00 per annum for so long as David L. Smith and Lynn A. Smith survive. These annuity payments are to commence on September 26, 2015.

13. From August 4, 2004, to the present the Trustee has maintained separate books and records and managed the assets of the Trust. The separate, segregated accounts constitute independent assets of the Trust entity. The beneficial ownership of the Trust property is fully vested in the beneficiaries of the Trust, Geoffrey Smith and Lauren Smith or their issue.

The Trust

14. Under New York State Law, an irrevocable trust such as the Trust is recognized as a separate and distinct entity. A trustee holds property for the benefit of others designated in the trust instrument. Under New York Law, a trustee holds title to the trust property. No other party holds legal title in the trust property. Others, such as the beneficiaries, are entitled to bring an action to enforce the terms of the trust.[1]

15. A trustee has the fiduciary duty and responsibility to marshal, manage and disburse trust assets for as long as the trust exists. Specifically, the trustee is obligated to administer the trust property in accordance with the intent of the settlers of the trust as evidenced in the instrument creating the trust.[2]

16. Under the Trust instrument, separate property rights and interests are created.. These property rights and interests 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 these 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. Upon the passing of the survivor of David L. Smith and Lynn A. Smith, the Trust will terminate and the beneficiaries will have the right to receive all of the then remaining property in the Trust.

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

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[1] See New York State EPTL § 7-2.1(a); Duvall v English Evangelical Lutheran Church, 53 NY 500, 503 (1873); Buechel v Bain, 275 AD2d 65, 72, 713 NYS2d 332, 338 [2000] affd 97 NY2d 295, 766 NE2d 914; 740 N.Y.S.2d 252 (2001)

[2] See Colorado & S. Ry. Co. v Blair, 214 NY 497, 511-512 108 NE 840, 842 (1914)

Trustee does have the discretionary ability to terminate the Trust before the end of the measuring lives.

18. The Trustee does have powers, duties and responsibilities. These powers, duties and responsibilities are established by New York State Law and are supplemented by specific provisions provided for in the Trust instrument.[3] In summary fashion, the Trustee is obligated to operate the Trust, separate and distinct from his own affairs and the affairs of anyone else. As provided for by the trust instrument, the Trustee has a fiduciary duty to respond to and provide for the property interests of the individual beneficiaries.[4]

19. Under New York State law, in discharging its fiduciary duty to administer the trust assets, a trustee is subject to the authority of the applicable court. The applicable court in the case of an inter vivos trust is either the Surrogate or the Supreme Court of the County in which the trust property is located.[5] A court to whose jurisdiction a trust is subject may exercise its equitable powers and control over the administration of a trust.[6] Moreover, the trustee is obligated to account for his or her actions in administering an estate or trust and may be compelled to do so in a judicial proceeding. [7]

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.

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.

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[3] In the absence of any limitations contained in the trust instrument, the trustee will have the powers delineated in Article 11 of the EPTL , including the power to invest the trust assets under a standard of ordinary prudence and make disbursements for the maintenance of the trust (see EPTL §§ 11-1.1, 2.1-2.2).

[4] The "trustee owes the beneficiar[ies] an undivided duty of loyalty" (Mercury Bay Boating Club v San Diego Yacht Club, 76 NY2d 256, 270, 557 NE2d 87, 95 557 NYS2d 851, 859 [1990]). The duty of loyalty owed by the trustee to the beneficiary is, as Justice Cardozo stated, "something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior" (Meinhard v Salmon, 249 NY 458, 464, 164 NE 545, 546 [1928]).

[5] See SCPA § 1509.

[6] See EPTL § 11-1.1 (c); Matter of Herzog, 301 NY 127, 138, 93 NE2d 336, 341 (1950).

[7] See SCPA Article 22; Matter of Hunter, 4 NY3d 260, 267, 827 NE2d 269, 273 794 NYS2d 286, 290 (2005).

Annuity

22. The Trust is a separate entity in being. The Trustee is required to invest, manage and account for the Trust property. In the course of exercising the Trustee's discretion and duties, the Trustee is authorized to purchase and sell assets. The annuity contract entered into on August 31, 2004, is a separate, independent transaction. Pursuant to this transaction, the Trustee has purchased an asset which becomes the property of the Trust. The consideration provided for this purchase consists of a fixed annuity payment which becomes a general obligation of the Trust.

23. David L. Smith and Lynn A. Smith are sellers. The benefit of the bargain is that they become annuitant-creditor(s) 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 to manage the Trust or control the Trustee in any manner. What they do have is the promise of fixed future payments.

24. The Trust offers to the annuitant-creditors something they could not have without the Trust. The Trust has the ability to liquidate a substantially appreciated single asset without the proceeds being subjected to an immediate, punishing income tax. This deferral of immediate income taxation provides additional funds/assets that the Trust can manage and eventually honor its annuitant-creditor obligations.

25. The Trust also provides diversification. Prior to the sale, the annuitant-creditors possessed a single stock. The Trust has the ability to create a varied and diversified portfolio minimizing investment risk. While the annuitant-creditors have no collateral interests in the Trust assets, the now diversified portfolio, undiminished by income taxes is available to the Trust to support the Trust's general contract obligations to the annuitant-creditors.

26. To the annuitant-creditors, the private annuity sale presents mortality risks. If both annuitant-creditors should die prior to the IRS determined actuarial tables, they will receive cash less than what the fair market value of the annuity payments were on the sale date. However, if either annuitant-creditor outlives the IRS determined actuarial tables, they will experience a gain. The annuitant-creditors will receive more than what they could have otherwise realized from the sale.

27. What the annuitant-creditors have are contract rights. The Trustee has no higher fiduciary duty owed to the annuitant-creditors. If the annuitant-creditors wanted a

fiduciary like relationship with the Trustee they must have bargained for and specified such in the contract. In this case, they did not do so. The annuitant-creditors relationship with the Trustee is that of contract. New York law imposes on the Trustee the obligation to follow the agreed upon terms of their agreement. Not all relationships rise to the higher standard of a fiduciary. Contract party relations are governed by the law of contracts…the give and take of normal commercial relations. In New York the law does not impose the much greater strictures and responsibility of a fiduciary on contracting parties,[8]

Private Annuity-Tax Plan

28. A private annuity transaction is a useful tool of income and estate tax planning. For income tax purposes, it is used to spread the income taxable gain generated by the sale of highly appreciated assets over the life expectancy of the sellers. For estate tax purposes a private annuity, by design, has payments that end on the death of the seller/transferors. Because the property belongs to the buyer/Trust from the instant the private annuity is created, the property is no longer, from that moment on, an asset of the sellers. Therefore, at death there is no asset to include in one's prospective taxable estate; the property properly belongs to the buyer/Trust and the annuity ceases.

29. Under tax rules applicable to private annuities entered into in 2004, the Trust received an income tax basis equal to the fair market value of the private annuity.[9] Therefore, when the Trust sells the purchased property, it may offset the sale proceeds with its tax basis. With the private annuity value equal to the purchased asset's fair market value, there would be no taxable income on the sale by the Trust. The Trust assets are then undiminished by income taxes.

30. The income tax on the gain built into the stock is not avoided but is merely deferred. Gain is recognized for income tax purposes by the annuitants ratably as the annuity payments are received. Therefore, the income tax is paid, but it is deferred over the life of the annuitants.[10]

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[8] See Northeast General Corporation v. Wellington Advertising, Inc. et al., 82 NY 2d 158 (1993).
[9] See Revenue Ruling 55-119, 1955-1 CB 352 (1955).
[10] See Revenue Ruling 69-74, 1969-1 CB 43 (1969).

Power to Terminate

31. Specific inquiry has been made regarding the impact of the Trustee's power to terminate this Trust. See Trust instrument paragraph First. Under this paragraph First, the Trustee has full discretion as to whether or not to terminate the Trust. If the Trustee exercises his discretion to terminate the Trust, the Trust assets are transferred to the beneficiaries consisting of Geoffrey Smith and Lauren Smith. These transfers to Geoffrey Smith and Lauren Smith are in recognition of their property interest in the Trust assets. All interests, including then existing liabilities, would be transferred to Geoffrey Smith and Lauren Smith. At no time will any interest, pursuant to the exercise of this discretionary power to terminate the Trust, pass to David L. Smith or Lynn A. Smith.

32. In my experience, this is a fairly typical provision of inter vivos, irrevocable trusts. The provision provides a trustee the ability to terminate trusts that are uneconomic to continue. If a trust's assets become negligible, the cost to maintain a separate trust entity becomes untenable. As a matter of convenience, this provision allows the Trustee to end the trust rather than to continue its fiduciary duty subject to the expenses associated with the separate existence of the Trust.

Annuity Contract

33. Inquiry has been made regarding the implications associated with the limitations provided in the Asset Purchase Agreement, paragraph 5. Paragraph 5 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 clauses 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 rights. Once the contract rights have been reduced to a payment, this anti-alienation provision no longer applies to such payment. Up until the contract rights have been paid, 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.

34. In my experience and in my opinion, this is not an unusual provision. It facilitates the administration of the purchase contract. The contract obligor (the Trust) is not required to track the property rights or activity of the contract obligee. The obligor Trust can continue without ongoing, operational interference from others. Once the obligor Trust

satisfies its obligation, then, and only then, the payment made becomes the separate property of the annuitants and subject to their own financial affairs.

Respectfully submitted this 2nd day of September 2010.

David L. Evans
Martin, Shudt, Wallace, DiLorenzo & Johnson
279 River Street
P.O. Box 1530
Troy, New York 12181

EXHIBIT A

DAVID L. EVANS, J.D., CPA

Martin, Shudt, Wallace, DiLorenzo & Johnson
The Dauchy Building
279 River Street
P.O. Box 1530
Troy, New York 12181

(518) 469-6339 **devans@martinshudt.com**

KEY EXPERIENCE

Technical management and administrative experience in providing tax services to businesses and financial institutions, including:

- Mergers and Acquisitions
- Deal Planning/Structure
- IRS Audits
  - Compliance
  - Large Case Audits
  - Representation
- Compensation
  - Qualified and Nonqualified Planning
- Valuation
  - Intangibles and business operations
- State and Local Jurisdiction
  - Nexus Planning
  - Audit Representation
  - Compliance
- Ownership and Management Succession Planning
- Appeals (IRS and States)
  - Representation
  - IRS Appeals Division
  - Various State Commissions/Boards
- Estate/Gift Tax
  - Minimization Planning
  - Administration
  - Estate Litigation

EDUCATION

Bachelor of Business Administration,
Summa Cum Laude, Hofstra University

Juris Doctor, Cum Laude
State University of New York at Buffalo

PROFESSIONAL HISTORY

MARTIN, SHUDT, WALLACE, DiLORENZO & JOHNSON
Director of Tax Services

UHY Advisors NY, Inc.
Managing Director

Admitted To Practice
New York State Bar, Tax Court, U.S. Supreme Court

Certified Public Accountant

Series 7 Securities License

NYS Tax Commission Hearing Officer

EXPERIENCE AND PROFESSIONAL ACCOMPLISHMENTS

Experience includes:

Mergers and Acquisitions: Structured acquisitions; both taxable and nontaxable. Have done transactions involving acquisition of assets valued in excess of $100 billion.

SEC: Forensic review and defense of corporate financial activities. Developed, prepared, reviewed and defended Tax provisions in SEC periodic filings and registrations.

IRS – PRIVATE LETTER RULINGS: Prepared, submitted and defended requests for private letter rulings regarding continuity of interest requirements, types of consideration in reorganizations, charitable status of private foundations and related transactions, employment status of 1000 member vow of poverty community and use of annual exclusion for gifts of family limited partnership units.

IRS Large Case Audit: Prepared for and represented before the IRS, institutions subject to the large case audit program. Services included information management, presentation of data and utilization of large case audit special procedures.

VARIOUS STATES: Rulings regarding nexus, charitable status, applicable use of investment incentives and sample audit techniques/application.

Executive Compensation Planning: Developed tax planning for executive compensation. Planning has included both qualified and nonqualified deferred compensation arrangements. Experience includes employment contracts and buy/sell agreements (negotiation and structure of contracts), deferred compensation including the development of plans to defer the tax on compensation, and qualified plans (profit sharing, 401(k) and nonqualified plans ("Rabbi-Trusts, VEBAs and nonfunded accounts.) Developed nonqualified compensation arrangements with structures of Section 409A, 475, 163(m) and 280G.

IRS Appeals Representation:

- Have successfully defended acquisitions, including both tax free reorganizations and taxable acquisitions of entire entities or branches of entities.
- Defended the non-accrual of interest on non-performing loans.
- Defended bad debt reserve computations and recapture subsequent to Tax Reform Act of 1986.
- Successfully defended valuations of businesses and financial assets for income, estate and gift tax purposes.

- Planned for and defended nonqualified deferred compensation plans
    - Preserving tax deferral for employees
    - Minimization of FICA tax application

Unitary Tax Examinations/Adjudications:

- Planned for and actively defended unitary determinations in several states. In non-unitary states, have alternatively contested forced combinations and sought combinations, depending upon appropriate circumstances.
-

State and Local Issues:

- Reviewed and developed nexus factors for states.
- Have planned sales/use tax applicable to reorganizations and multi-state transactions.

Net Fee Income from Financial Products:

- Developed plans and approach concerning tax affect of adopting FASB 91.

Mortgage Servicing Rights:

- Planned tax treatment for either the purchase or sale of residential mortgage servicing rights.
- Developed and defended valuation method for capitalizing mortgage servicing rights and then amortizing them over an assigned life.

Securitization of Assets

- Tax structure and affect of monetarization of financial assets.

Valuations

- He has performed valuation analysis, financial analysis, forensic accounting and litigation services for a wide range of professional and business interests in many different industries.
- Special interest in valuation of intangibles and valuation of discrete business units.
- Testified in support of valuation opinions rendered.
- Valuations used in mergers, acquisitions, dispositions, estate tax matters, debtor/creditor relations, matrimonial actions, and contractual arrangements among business participants.

Valuation, Litigation and Consulting Experience

Valuation experience includes numerous appraisal and analytical assignments for businesses and professional practices for the following purposes: estate, gift and income tax, shareholder litigation, marital dissolution, succession and tax planning, employee stock ownership plans, incentive stock option plans, recapitalizations, S-corporation conversions, purchase price allocation, and mergers and acquisitions. Experience includes the evaluation of employee stock options, professional licenses, advanced degrees, royalties and other intangible assets.

Litigation experience includes preparation of: valuation opinions, damage calculations, and other forensic and financial analysis.

Have performed numerous analytical engagements involving financial analysis and forecasting, financial statement analysis, expense verification and forensic accounting. He also has substantial experience with respect to the creation and maintenance of large databases and the analysis of electronic data.

Specific experience includes, but is not limited to, the following industries and sectors:

- Retail
  - Electronics retailer.
  - Franchised new and used automobile dealerships.
  - Distributors of electrical supplies and fixtures.
  - Retailer of building blocks and related masonry products.
  - Office supplies and stationery store.
  - Hardware and home improvement center.

- Wholesale/Distribution
  - Auto body parts distributor.
  - Office furniture distributor.
  - Regional distributor of beer and soft drink products.

- Manufacturing
  - Manufacturer of solar energy products.
  - Manufacturer of specialty molded plastics.
  - Fabricator of precision components for the semiconductor, computer and medical industries.
  - Manufacturer of industrial fabrics.
  - Toy manufacturer.
  - Fiberglass strand manufacturer.
  - Knitter of men's hosiery and specialty yarns.
  - Specialty window treatments manufacturer.
  - Manufacturer of valves for municipal water systems.

- Technology
  - Cellular telecommunications providers.
  - Internet service provider.
  - Manufacturer of mechanical robotic devices.

- Computer networking designer and installer.
- Software developer.

- Healthcare
  - Medical equipment leasing company.
  - Medical billing service.
  - Dental practice.
  - Anesthesiology practice.
  - Pediatrics practice.
  - Cardiology practice.
  - Speech therapy practice.
  - Chiropractic practice.
  - Surgery practice.
  - Nursing home operators.
  - Nursing home real estate companies.

- Construction/Contracting
  - Commercial and residential construction contractor.
  - Ready-mixed concrete producer and building materials retailer.
  - Commercial facilities contractor.

- Professional Services
  - Certified public accounting firms.
  - Law firms.
  - Engineering and consulting firms.

- Other Valuation Services
  - Garnet mining operation.
  - Slate quarrying and fabrication operation.
  - Bus line service operator.
  - Partnerships owning HUD Section 8 projects.
  - Local and long distance trucking firm.
  - Mortgage broker.
  - Specialized poultry farming operation.
  - Locksmith.
  - Property and casualty insurance agency.
  - Real estate management and leasing agency
  - Funeral homes.
  - Computer leasing services.
  - Trucking services.
  - Full service advertising agency.
  - Provided forensic accounting services to determine extent of employee theft and fraud.

- Holding Companies
  - Family limited partnerships.
  - Investment holding companies.
  - Owners and operators of rental real estate property.

- Royalties & Other Intangibles
  - Law licenses.
  - CPA licenses.
  - Medical licenses.

- Master's degrees.
- Engineering licenses.
- Teaching certificate.

Trust and Estates

- Trust Documents
- Estate Documents
- Estate Administration
- Estate Accountings
- Estate Litigation

PROFESSIONAL AND COMMUNITY ACTIVITIES

American Institute of Certified Public Accountants

Past Chairman, Tax Division Executive Committee
of the New York State Society of Certified Public Accountants

New York State Bar Association
- Member, New York State Tax Matters Committee

Estate Planning Council of Eastern New York
- Past President

Former Member, Commissioner's Advisory Group (NYS)

EXHIBIT B

Exhibit B

A. Declaration of Trust for the David L. & Lynn A. Smith Irrevocable Trust u/a dated August 4, 2004.

B. Asset Purchase Agreement: Private Annuity contract dated August 31, 2004.

C. David L. Lynn A. Smith Irrevocable Trust u/a 8/4/ 04 tax returns:

1) 2004 U.S. Income Tax Return for Estates and Trusts Form 1041
2) 2004 NYS Fiduciary Income Tax Return Form IT-205
3) 2005 U.S. Income Tax Return for Estates and Trusts Form 1041
4) 2005 NYS Fiduciary Income Tax Return Form IT-205
5) 2006 U.S. Income Tax Return for Estates and Trusts Form 1041
6) 2006 NYS Fiduciary Income Tax Return Form IT-205
7) 2007 U.S. Income Tax Return for Estates and Trusts Form 1041
8) 2007 NYS Fiduciary Income Tax Return Form IT-205
9) 2008 U.S. Income Tax Return for Estates and Trusts Form 1041
10) 2008 NYS Fiduciary Income Tax Return Form IT-205

D. SEC Memorandum of Law dated August 3, 2010.

E. Private Annuity Computation.

F. Revenue Ruling 69-74, 1969-1 CB 43 (1969).

G. Revenue Ruling 55-119, 1955-1 CB 352 (1955).

H. IRC Section 7520.

EXHIBIT C

DECLARATION OF TRUST

THIS INDENTURE is made the 4th day of AUGUST, 2004, between David L. Smith and Lynn A. Smith, residing at [redacted] (herein called the "Donors"), and Thomas Urbelis, with offices at 6 Eastman Road, Andover, Massachusetts 01810-4009 (the "Trustee") and shall be known as the **DAVID A. & LYNN A. SMITH IRREVOCABLE TRUST U/A DATED** AUGUST 4, **2004**.

WITNESSETH:

The Donors hereby transfer and deliver unto the Trustee the property described in Schedule A, attached hereto, the receipt of which is hereby acknowledged by the Trustee. The Donors have two (2) children, Geoffrey R. Smith and Lauren T. Smith. This Trust is created for the benefit of the Donors' children and their issue.

TO HAVE AND TO HOLD such property unto the Trustee, **IN TRUST, NEVERTHELESS,** as follows:

FIRST: During the lives of the Donors, the Trustee shall manage, invest and reinvest the trust estate to satisfy all obligations of the Trust and the Trust shall be divided and managed in two (2) separate and equal shares for each child and any issue of such child (the "Beneficiaries) and collect the income thereof and, until the death of the second Donor to die, shall distribute so much of the net income and principal as the Trustee shall determine in his discretion to provide for the education, health, support and maintenance of the Beneficiaries from the each child's respective trust share, taking into account any other resources of the Beneficiaries and the tax status of each Beneficiary. Consistent with these provisions the Trustee shall have the power (i) to sprinkle the current income and/or the principal to one or more Beneficiaries, from each such Beneficiary's respective share, as the Trustee shall deem necessary to provide for the education, health, support and maintenance of each Beneficiary and (ii) in each tax year to make the trust either a "simple" trust or "complex" trust under applicable federal and state tax laws.

During the lives of the Donors, the Trustee is authorized, in his discretion, at any time to terminate each trust share and thereupon to pay over and distribute the principal thereof, and any income then accrued or held, to each child, of if such child is predeceased, to the issue of such child in equal shares, and if there are no issue, then to other child, and if such other child is predeceased, then to the issue of such other child in equal shares, although it is the Donor's desire this trust be administered as herein provided.

If in any year a contribution is made to the trust estate by the Donors, the Trustee shall promptly notify each of the Beneficiaries, or, if any such person shall be a minor, his or her parent or guardian other than the Donors, of such contribution, and each such beneficiary, or such parent or guardian acting on a Beneficiary's behalf during such Beneficiary's minority, shall have the right at any time within thirty (30) days of receipt of such notice to withdraw from the trust estate an amount not in excess of the lesser of the following: (i) such Beneficiary's pro rata share of the amount of such contribution and (ii) the annual exclusion available to the Donors for United States Federal gift tax purposes with respect to the Beneficiary's pro rata share of such contribution, after taking into account any other gifts made by the Donors to such person in that year. In satisfaction of such right of withdrawal, the Trustee may distribute to a Beneficiary any asset held in the trust estate (including any insurance policies or any interests in such policies or borrow against such policies), valued as of

the date of withdrawal. Such right of withdrawal shall not be cumulative with respect to any prior contributions made to the trust and, if such right of withdrawal is not exercised within such thirty (30) day period, it shall lapse, provided that the amount with respect to which the right of withdrawal shall lapse for any Beneficiary in any year shall not exceed the maximum annual amount with respect to which a power of appointment may lapse and not be considered a release of such power for United States Federal gift tax purposes under Section 2514 of the Internal Revenue Code of 1986, or any provision successor thereto, as in effect for that year (hereinafter, the "maximum lapse amount"), and if any Beneficiary has a right of withdrawal in any year which shall exceed the maximum lapse amount, the power for the beneficiary for that year shall lapse only to the extent of the maximum lapse amount, and any excess withdrawal right shall continue to be exercisable by the Beneficiary, but shall lapse, in the next succeeding year, or years, to the extent of the maximum lapse amount for such year, on the second day of such year. The right of withdrawal hereunder shall be exercised by written notice delivered to the Trustee. The Donors may instruct the Trustee that any Beneficiary shall not have a withdrawal right as described in this article with respect to any contribution during the calendar year, and to disregard a demand by any Beneficiary with respect to any contribution made by the Donors. Each right of withdrawal granted hereunder is personal to the person holding such right and shall expire if he or she dies, is adjudicated bankrupt, shall take advantage of any of the provisions of the bankruptcy act or of any federal or state statute relating to insolvency, shall make an assignment for the benefit of his or her creditors, or shall be adjudicated an incompetent.

SECOND: Upon the death of the second Donor to die, the Trustee shall collect, as principal of the trust estate, the net proceeds of any insurance policies then included in the trust estate and payable to the Trustee, or any other benefits or proceeds payable to the Trustee as beneficiaries, after deduction of all charges against such policies or benefits by way of advances, loans, premiums or otherwise, and any amounts so collected shall be divided equally and added to each share for each child of the Donors. The Trustee may use any part of the income or principal of the trust estate to meet expenses incurred in collecting any such proceeds or benefits. If, however, the Trustee in their discretion shall determine that the income and principal on hand in the trust estate may not be sufficient to meet any expenses and obligations to which the Trustee may be subjected in any litigation to enforce payment of any insurance policy, benefits or proceeds then included in the trust estate, then the Trustee shall not be required to enter into or maintain any litigation to enforce payment of any such amounts until he shall have been indemnified to his satisfaction against all such expenses and obligations. The Trustee is authorized to compromise and adjust any such claims, upon such terms and conditions as they may deem advisable, and the decision of the Trustees in this respect shall be binding and conclusive upon all persons then or thereafter interested in the trust estate.

THIRD: Upon the death of the second Donor' to die, the Trustee shall administer and distribute the each trust share hereunder, including the remaining principal of the such trust share, and any income, to the child for whom such trust share is held, of if such child is predeceased, to the issue of such child in equal shares, and if there are no issue, then to other child, and if such other child is predeceased, then to the issue of such other child in equal shares.

FOURTH: If any person whose life measures the duration of a trust hereunder and any remainderman of such trust shall die under such circumstances that there is reasonable doubt as to who died first, then such person whose life measures the duration of such trust shall be conclusively

deemed to have survived such remainderman for the purposes of all provisions of this Indenture.

FIFTH: If any principal or income of any trust created hereunder shall become payable to or be set apart to be distributed to a minor, the Trustee shall have absolute discretion either to pay over such principal or income at any time to the guardian of the property of such minor appointed in any jurisdiction, or to any custodian for such minor under the Uniform Transfers to Minors Act of any state (including the Trustee or a custodian designated by the Trustee) or to retain the same for such minor during minority. In paying over any property to a custodian, the Trustee may direct that the property be retained until the beneficiary reaches the age of twenty-one. In case of retention, the Trustee may apply such principal or income, and any income therefrom, to the support, maintenance, education or other benefit of such minor, irrespective of the other resources of such minor or of his or her parents or guardians. Any such application may be made either directly or by payments to such guardian of the property or parent of such minor or to the person with whom such minor may reside, in any case without requiring any bond, and the receipt of any such person shall be a complete discharge to the Trustee, who shall not be bound to see to the application of any such payment. In holding any property for any minor, the Trustees shall have all the powers and discretion hereinafter conferred.

SIXTH: Without limitation of the powers conferred by statute or general rules of law, the Trustee is specifically authorized and empowered with respect to any property held by them:

(1) To retain any property transferred to any trust hereunder, as long as the Trustee in his absolute discretion shall deem it advisable to do so;

(2) To invest any funds in any stocks, bonds, limited partnership interests or other securities or property, real or personal (including any securities of or issued by any corporate trustee or investment in any common or commingled fund or funds maintained by any corporate trustee), notwithstanding that such investments may not be of the character allowed to trustees by statute or general rules of law, and without any duty to diversify investments, the intention hereof being to give the broadest investment powers and discretion to the Trustees;

(3) To sell (at public or private sale, without application to any court) or otherwise dispose of any property, whether real or personal, for cash or on credit, in such manner and on such terms and conditions as the Trustee may deem best, and no person dealing with the Trustee shall be bound to see to the application of any moneys paid;

(4) To manage, operate, repair, improve, mortgage and lease for any period (whether expiring before or after the termination of any trust created hereunder) any real estate;

(5) Except to the extent prohibited by law, to cause any securities to be registered in the names of the Trustee's nominees, or to hold any securities in such condition that the Trustee will pass by delivery;

(6) To employ such attorneys, accountants, custodians, investment counsel, real estate consultants and other persons as the Trustee may deem advisable in the administration

of any trust hereunder, and to pay them such compensation as the Trustee may deem proper, without any diminution of or offset against the commissions to which the Trustee shall be entitled by law;

(7) To maintain margin accounts with one or more individuals, partnerships, associations, banks or other corporations on such terms and conditions as the Trustee in his discretion shall determine, and to conduct such transactions in such accounts as he shall so determine, and to pledge all or any portion of any trust hereunder as security for the payment of the respective debit balances in such accounts;

(8) To engage in any arbitrage transactions and transactions involving short sales, and to buy or sell or write options for the purchase or sale of securities or other property (commonly known as puts and calls), whether covered or uncovered;

(9) To use any securities or brokerage firm in the purchase or sale of stocks, bonds or other securities or property for the account of any trust hereunder and to pay such firm such brokerage commissions or other compensation in connection therewith as the Trustees may deem proper, notwithstanding that the Trustee may be members of, or otherwise connected with, such firm, and without diminution of or offset against the commissions to which the Trustee may be entitled by law;

(10) To purchase property from the Donors in exchange for a private annuity payable to the Donors;

(11) To distribute any income or principal of any trust hereunder in cash or in kind and, if in kind, in a fashion other than pro rata, having regard in such event to the characteristics, including tax characteristics, of the property being distributed and to income, needs and tax status of the recipient;

(12) To borrow such amounts, from such persons (including the Trustee or any beneficiary of any trust hereunder) and for such purposes as the Trustee may deem advisable and to pledge any assets of any trust hereunder to secure the repayment of any amounts so borrowed;

(13) To lend such amounts, to such persons, for such purposes and upon such terms (whether secured or unsecured) as the Trustee may deem advisable;

(14) In general, to exercise all powers in the management of the trust estate which any individual could exercise in the management of property owned in his own right.

SEVENTH: Any trust estate held hereunder may be increased from time to time by the addition of such property as may be added to it by the Donors or by any other person with the consent of the Trustee.

EIGHTH: The Trustee is empowered to pay any taxes which may become payable from time to time with respect to the trust estate, or any transfer thereof or transaction affecting the same,

under the laws of any jurisdiction which the Trustee is advised may validly tax the same.

NINTH: (A) If the Trustee hereunder shall die or is unable or unwilling to act as trustee, then the Donors may appoint a Trustee, independent of the Donors. Any such appointment so made may be revoked by the maker thereof, by written instrument, duly executed and acknowledged, at any time prior to the happening of the event upon which it is to become effective, and a new appointment may be made as above provided. Upon the happening of the event upon which such appointment is to take effect and upon qualifying as hereinafter provided any successor Trustee so appointed shall become a Trustee hereunder, as though originally named herein.

(B) Any Trustee acting hereunder may resign and be discharged from any trust created hereunder by giving, personally or by mail, written notice of resignation, duly acknowledged, to the Donors, or if they shall not then be living, to the remaindermen of such trust (or if any income beneficiary shall be a minor, to either of his or her parents or to the guardian of his or her property). Such notice shall specify the date when such resignation shall take effect, which date (except as the persons entitled to such notice shall otherwise consent) shall be at least thirty days after the service or mailing thereof.

(C) In case any Trustee at any time acting hereunder for any reason shall cease to act, the retiring Trustee or his or her personal representative, as the case may be, shall upon the effective date of his or her resignation or upon his or her death turn over the trust estate or any portion of it under his or her control to the Trustee who shall thereafter be acting hereunder, and shall execute and deliver all instruments which may be deemed necessary more effectively to vest title in such Trustee.

(D) Any successor Trustee appointed as above provided and then entitled to act shall qualify as such by delivering or mailing written acceptance of such trust, duly acknowledged, to any other Trustee then acting hereunder and to the income beneficiaries or, if any be minors, to their parent or the adult with whom they reside.

(E) The Trustee shall have sole authority to make decisions required or authorized by this Identure. Either Geofrey R. Smith or Lauren T. Smith shall serve as co-trustee for the limited and express purpose of executing such documents or instruments to fulfill decisions and actions taken by the Trustee, in the absence of the Trustee to execute any such document or instrument.

TENTH: The Trustee at any time acting hereunder at any time may render an account of their proceedings to the income beneficiary of any trust during the accounting period (or, if such person shall have died during or after the accounting period, to his or her personal representative); provided, however, that if any person to whom an account would be so rendered shall be a minor, such account instead may be rendered to either of such minor's parents other than an accounting Trustee or the guardian of his or her property. If approved in writing by the parties to whom such account shall have been rendered as above provided, such account shall be final, binding and conclusive upon all persons who may then or thereafter have any interest in the trust estate. The Trustee also at any time may render a judicial account of his proceedings.

In an accounting or other proceeding in which all persons interested in any trust hereunder are required by law to be served with process, if a party to the proceeding has the same or a similar interest as a person under a disability, it shall not be necessary to serve process upon the person under a disability, it being the Donors' intention to avoid the appointment of a guardian ad litem wherever possible.

ELEVENTH: Except as otherwise expressly provided herein, all estates, powers, trusts, duties and discretion herein created or conferred upon the Trustee shall extend to any Trustee who at any time may be acting hereunder, whether or not named herein.

No bond or other security shall be required of any trustee hereunder in any jurisdiction.

TWELTH: This Declaration and the trust(s) created hereunder shall be irrevocable, shall take effect upon acceptance by the Trustee and in all respects shall be construed and regulated by law of the State of New York. No beneficial interest under this trust, whether income or principal, is subject to anticipation, assignment, pledge, sale, or transfer in any manner, and no beneficiary may anticipate, encumber, or charge such interest. Each beneficiary's interest, while in the possession of the Trustees will not be liable for or subject to the debts, contracts, obligations, liabilities, accounts and/or creditors of any beneficiary.

THIRTEENTH. (A) This article states the Donors' tax purposes in creating this trust, and all provisions of this trust shall be construed so as best to effect these purposes and to the extent required, the Trust shall be reformed to effect these overriding tax purposes and no Trustee shall exercise any discretion in a manner that may reasonably be expected to frustrate the accomplishment of any of these purposes:

(1) All gifts made to this trust shall be complete gifts of present interests for federal gift tax purposes.

(2) The assets of this trust shall be excluded from the Donors' gross estates for federal estate tax purposes.

(3) This trust shall be a separate taxpayer for federal income tax purposes. At no time shall this trust be deemed to be owned by the Donors for federal income tax purposes.

(B) The Trustee is authorized to grant to, or, if granted, to take away from, a Beneficiary by an instrument in writing, signed and delivered to the Beneficiary, the power to appoint, by will admitted to probate, any part or all of the principal of a trust share held for such Beneficiary. This power of appointment, if granted, shall be exercisable only by a specific reference thereto in the Beneficiary's will and shall not be deemed to have been exercised by any general residuary article contained therein.

(C) The Trustee may exercise the authority granted to them hereunder for any reason whatsoever, whether to take advantage of any generation-skipping transfer exemption under Chapter 13 of the Internal Revenue Code, to reduce the overall transfer taxes payable upon a distribution or the death of a Beneficiary or for any other reason.

(D) Upon the death of any Beneficiary hereunder, if any estate, transfer, succession or other inheritance taxes, and any interest and penalties thereon, are imposed on such Beneficiary's estate by reason of the fact that any portion of the property held by the Trustee in trust hereunder is included in such Beneficiary's estate for Federal estate tax purposes and if no direction is made in such Beneficiary's will by specific reference to such trust concerning the payment of such taxes, and any interest and penalties thereon, then the Trustee shall pay from the principal of such trust an amount equal to such taxes, interest and penalties imposed by the United States or any state or subdivision thereof, so that such Beneficiary's estate shall not be required to bear any larger amount of estate, transfer, succession or inheritance taxes, and any interest and penalties thereon, than it would have had to pay if the property held in such trust were no included in such Beneficiary's estate.

IN WITNESS WHEREOF, the parties hereto have duly executed this instrument under seal as of the day and year first above written.

DANIEL S. BLAKE
NOTARY PUBLIC - STATE OF NY
QUALIFIED IN ERIE CO.
MY COMMISSION EXPIRES 9-5-2005

David L. Smith, Donor

Lynn A. Smith, Donor

Thomas Urbelis, Trustee

STATE OF NEW YORK)
: SS:
COUNTY OF ERIE)

DANIEL S. BLAKE
NOTARY PUBLIC - STATE OF NY
QUALIFIED IN ERIE CO.
MY COMMISSION EXPIRES 9-5- 2005

On this 4th day of August, 2004, before me personally came David A. Smith, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

Notary Public

STATE OF NEW YORK)
: SS:
COUNTY OF ERIE)

DANIEL S. BLAKE
NOTARY PUBLIC - STATE OF NY
QUALIFIED IN ERIE CO.
MY COMMISSION EXPIRES 9-5- 2005

On this 4 day of August, 2004, before me personally came Lynn A. Smith, to me known and known to me to be the individual described in and who executed the foregoing instrument, and she acknowledged to me that she executed the same.

Notary Public

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

On this 9th day of August, 2004, before me, the undersigned notary public, personally appeared Thomas J. Urbelis, proved to me through satisfactory evidence of identification, which is personal knowledge, to be the person whose name is signed on the preceding or attached document, and acknowledged that he signed it voluntarily for its stated purpose.

Lori Ann Durrane Hawe/Notary Public
My Commission Expires:

LORI ANN DURANNE HAWE
Notary Public
Commonwealth of Massachusetts
My Commission Expires
October 10, 2008

EXHIBIT D

PRIVATE ANNUITY CONTRACT

BETWEEN

DAVID L. SMITH & LYNN A. SMITH, AS TRANSFERORS

AND

THE DAVID L. & LYNN A. SMITH IRREVOCABLE TRUST U/A DATED AUGUST 31, 2004, TRANSFEREE

****

CONTRACT TERMS

Effective Date:	August 31, 2004
First Payment Date:	September 26, 2015
Term of Contract:	Last to Die of Transferors
Face Amount:	$4,447,000
Periodic Payment:	$489,932
Annuity Interest Rate:	4.6%

PRIVATE ANNUITY AGREEMENT

This Agreement is made as of this 31st day of August, 2004, among David L. Smith (Date of Birth: [redacted]) and Lynn A. Smith (Date of Birth: [redacted]) (the "Transferors"), residing at [redacted], Saratoga Springs, New York 12866, and the David L. & Lynn A. Smith Irrevocable Trust U/A Dated August 15, 2004 (the "Transferee"), with offices at 6 Eastman Road, Andover, Massachusetts 01810-4009.

Recitals

A. The Transferors 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; and

B. The Transferors are willing to sell, assign and convey the Property to the Transferee, provided that the Transferee agrees to pay the Transferors certain regular sums as hereinafter set forth regardless of the amount of income or return the Transferee receives from the Property and the Transferee is willing to accept the Property and to assume ownership and management of the Property; and

C. Transferee agrees to annuitize the value of the Property in the belief that the transaction will result in a net gain, after payment of the obligations hereunder to the Transferors, for the Transferee and its beneficiaries, although the Transferors and the Transferee are aware and acknowledge that there are no guarantees that the annuity obligations can be met;

NOW, THEREFORE, in consideration of the foregoing premises and the mutual promises of the parties set forth below, it is agreed as follows:

1. The Transferors hereby sell, assign and convey to the Transferee all right, title and interest in and to the Property. The Transferors and Transferee shall execute and deliver such documents and instruments to effectuate the foregoing sale, assignment and conveyance.

2. Transferee, in consideration of the sale, assignment and conveyance of the Property, hereby agrees to pay or cause to be paid to the Transferors the sum of $489,932 per year, commencing on September 26, 2015, and shall continue on the 26th day of each September thereafter for and during the full term of the natural life of the last to die of the Transferors. Said payments are based on an annuity interest rate of 4.6%, per annum. At the death of the last to die of the Transferors, the Transferee shall cease making payments, and there shall be no further sums owned to the Transferors, or to the estate of either Transferor. In the event any payment under this Agreement is not made within ten (10) days of the date due, a late payment penalty of four percent (4%) of the amount past due shall be added to the amount owing and shall be payable by the Transferee.

3. Transferee shall hold full title to the Property, free and clear of all liens and encumbrances, and there shall be no collateral liens of any kind on the Property or any other assets of the Transferee to secure payment of the obligations to the Transferors under this Agreement.

4. If the Transferors request to sever the joint nature of the annuity provided by this Agreement, the Transferee, in its discretion, shall create two (2) separate annuities, one for each Transferor payable to each Transferor until the death of such Transferor. The Transferee shall recalculate the annuity payments based upon a sum of one-half of any unpaid balance then owing under this Agreement. The Transferee shall use the same rate of interest and the same annuity factors to recalculate the annuities that are used in this Agreement and the Transferee shall use the separate life expectancies of each Transferor. Transferee shall further attempt, as far as possible, to conform each annuity with existing tax laws and rulings for the best tax treatment for each Transferor and the Transferee. The Transferors shall equally bear the cost associated with severing the annuity hereunder and creating separate annuities.

5. It is an express term and condition of this Agreement that the rights of, income or amounts payable hereunder to the Transferors shall not be subject to assignment, pledge, hypothecation, mortgage, pledge, attachment, execution, judgment, garnishment, anticipation or other disposition or impairment.

6. (a) Neither party shall be responsible for breach of any of its obligations hereunder caused by "Force Majeure" or acts of God, such as, but not limited to, insurrection, fire, flood, strikes, lockouts, accident or labor unrest.

(b) All notices and demands upon the parties hereto permitted or required to be given hereunder shall be in writing and shall be deemed to have been duly and sufficiently given if delivered personally, sent by registered or certified mail, return receipt requested, in a properly stamped envelope addressed as set forth above.

(c) The captions contained in this Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement.

(d) This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which will be considered one and the same instrument.

(e) Except as herein otherwise specifically provided, this Agreement shall be binding upon and inure to the benefit of the parties and their legal representatives, successors and assigns.

(f) The interpretation, validity and performance of this Agreement shall be governed by the laws of the State of New York.

(g) The invalidity or unenforceability of any particular provision or provisions of this Agreement shall not affect the other provisions hereof and in the event any particular provision or provisions are determined to be invalid or unenforceable, this Agreement shall be construed in all respects as if such invalid or unenforceable provision or provisions were omitted.

(h) This Agreement contains the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior understandings or agreements, whether written or oral.

(i) This Agreement may not be modified or amended except in a writing signed

by each of the parties hereto.

(j) No waiver by either party of any condition or the breach of any covenant or provision contained herein, whether by conduct or otherwise, shall be deemed to be or construed as a further or continuing waiver of such condition or breach of any other provision hereof, and the failure of either party to require performance of any provision hereof shall not affect the right of that party to enforce the same.

In Witness Whereof, this agreement has been signed as of the date first set forth above.

David L. Smith

Lynn A. Smith

The David L. & Lynn A. Smith Irrevocable
Trust U/A Dated August 4, 2004

By:_____
Thomas Urbelis, Trustee

EXHIBIT

B

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
New York Regional Office
Three World Financial Center
New York, NY 10281

DIVISION OF
ENFORCEMENT

David Stoelting
Senior Trial Counsel
(212) 336-0174 (direct)
(212) 336-1324 (fax)

July 27, 2010

BY EMAIL/US MAIL

James D. Featherstonhaugh
Featherstonhaugh, Wiley & Clyne, LLP
99 Pine Street
Albany, New York 12207

Jill Dunn
99 Pine Street
Albany, New York 12207

Re: ***SEC v. McGinn, Smith & Co., Inc., et al.*****, 10-CV-457 (GLS/RFT)**

Dear Jim and Jill:

We received today from Mr. Urbelis certain documents pursuant to Subpoena, including a Private Annuity Agreement dated as of August 31, 2004, between David Smith and Lynn Smith, and the David L. and Lynn A. Smith Irrevocable Trust, and other documents concerning a David Smith life insurance policy.

Please produce all documents concerning the Private Annuity Agreement and any other agreements between David Smith and/or Lynn Smith and the Irrevocable Trust, including but not limited to all correspondence, drafts, revisions and amendments, on or before July 29, 2010. Such documents are responsive to the documents request served on Lynn Smith.

Very truly yours,

David Stoelting

The Dunn Law Firm PLLC
99 Pine Street, Suite 210
Albany, New York 12207
(518) 694-8380 telephone
(518) 935-9353 facsimile

Jill A. Dunn

Admitted in New York
and the District of Columbia

July 29, 2010

VIA ELECTRONIC MAIL ONLY

David Stoelting, Esq.
Senior Trial Counsel
Securities and Exchange Commission
Three World Financial Center
New York, NY 10281

Re: SEC v. McGinn, Smith & Co., Inc., et al.
Civil Action No. 10-CV-457 (GLS/DRH)

Dear Mr. Stoelting:

I write in response to your demand letter of July 27, 2010. Please be advised that I am not producing any documents in response to your demand, for the following reasons.

First, you have never served me with any discovery request at any time and, in the absence of any such request, I had no obligation to provide you with documents other than the exhibits I used at depositions and offered into evidence at the hearing. I have fulfilled my obligations in that regard.

Second, the Order granting the Trustee's motion to intervene was limited to the preliminary injunction hearing, and the Order to Show Cause which permitted the parties to conduct expedited discovery pending that hearing was dissolved by the issuance of Judge Homer's decision and order on July 7, 2010. Thus, there is no longer any mechanism by which you may serve a new demand to produce documents, in an expedited fashion or otherwise, other than with a non-party subpoena. Moreover, as I indicated when we spoke last Friday, there is absolutely no factual or legal basis for you to name the Trust or the Trustee as a defendant or relief defendant in this lawsuit. Regardless of the moniker you may attach to your claim, the Court has conclusively ruled on that issue.

Third, you may recall that, in an email sent by Mr. Urbelis on May 28, he advised your colleague, Lara Mehraban, that he was providing her with copies of all documents he had previously provided to me. I had no reason to believe that Mr. Urbelis did not produce, to both of us, all documents in his possession which relate to the David L. and Lynn A. Smith Irrevocable Trust. I have no reason to believe that

there were any documents which he produced to me that were not also produced to your office, either in that initial overnight delivery to Ms. Mehraban, or in the subsequent delivery which I believe we each simultaneously received earlier this week.

From my perspective, it appears that Mr. Urbelis acted in good faith in responding to the SEC's "subpoena" to him, a subpoena which was "served" by email outside the jurisdiction of this Court on the Friday afternoon before a holiday weekend, when his office was closing early and he was going out of state. It appears that he did the best he could under the timeline which your office imposed upon him. The documents he apparently located this week, after gratuitously conducting yet another search at your request, would not have changed the outcome. In fact, the Private Annuity Agreement further supports the Trust's position, and I regret that I did not have it to use at the hearing.

I trust that answers your inquiry. If you have further questions, feel free to contact me.

Very truly yours,

THE DUNN LAW FIRM PLLC

By: 
Jill A. Dunn

JAD/jc

Cc: James D. Featherstonhaugh, Esq.
Martin Kaplan, Esq.