

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

McGINN, SMITH & CO., INC., et al.

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

Defendants.

**DECLARATION OF DAVID WOJESKI IN OPPOSITION TO
PLAINTIFF'S MOTION FOR RECONSIDERATION**

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

1. Pursuant to permission granted by the Court, I submit this surreply affidavit in opposition to the Plaintiff's motion for reconsideration of the Court's Memorandum-Decision and Order issued on July 7, 2010 which vacated a temporary restraining order imposed against the stock account of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (hereinafter "the Trust"), of which I am the Trustee. This declaration is based on matters within my personal knowledge except where indicated that they are made upon information and belief and in those instances, I believe them to be true and correct.

2. I understand that the SEC claims that I did not disclose or refer to a private annuity agreement during the preliminary injunction hearing held on June 9 – 11, 2010. I was present during and provided sworn testimony at that hearing. I answered every question posed to me truthfully and completely. I am familiar with private annuity trusts ; however, the SEC attorneys never asked me any question that would have elicited a discussion of or opinion about

private annuity trusts in general or specifically in relation to the Trust at issue in this case. I was not aware that any such annuity may have existed at any time prior to or during the hearing, or at any time leading up to and following the Court's issuance of its decision on July 7, 2010. The first I learned of the existence of an annuity agreement was in late July, when my attorney informed me that the former trustee had just produced the agreement simultaneously to her and to the SEC's counsel.

3. I have reviewed the annuity agreement at issue. I believed then and continue to believe that the rights and obligations created by the Declaration of Trust are superior in priority to and entirely separate and distinct from any agreements that may have been entered into by the former trustee. I do not believe that an annuity agreement supersedes my fiduciary obligations as Trustee or the rights of the beneficiaries, or that it gives David or Lynn Smith an ownership interest in or control over the assets of the Trust.

4. On or about July 8, 2010, I provided a copy of this Court's July 7, 2010 Memorandum-Decision and Order to Phil Rabinovich at Dinosaur Securities, the broker/dealer in New York City which holds the Trust's stock account. Despite this Court's order vacating the asset freeze as to the Trust, I experienced inordinate delays and refusals to transfer money out of the account. Upon information and belief, Glenn Grossman, CEO of Dinosaur Securities, was in regular contact with the SEC counsel in this case regarding my requests to transfer money pursuant to this Court's July 7 order. Upon information and belief, apparently while working in concert with the SEC to delay and hinder the enforcement of this Court's order unfreezing the Trust's stock account, Dinosaur Securities delayed or refused to comply with routine wire transfer instructions, all in violation of this Court's July 7 order. After complying with my initial instruction to wire money for legal fees to my attorney on July 12, and without citing any legal

authority, a representative of Dinosaur Securities informed me that they would only effectuate a wire transfer from the Trust stock account to another account held in my name as Trustee or in the name of one of the beneficiaries of the Trust.

5. Since the issuance of this Court's order on July 7, 2010, I have used the assets of the Trust to pay attorney, consulting and trustee fees, to make limited distributions to the Trust beneficiaries in the amount of \$8,000 to Lauren Smith to assist her with living expenses, health insurance and credit card debt, and \$21,500 to Geoffrey Smith to assist him with living expenses, health insurance and credit card debt. I also expended \$600,000 plus closing costs to purchase property on Great Sacandaga Lake from Lynn Smith at the request of the beneficiaries, in order to retain it for their use, and \$200,000 to make an equity investment in Capacity One Management LLC, which was formed by Geoffrey Smith in early July 2010. I have effectuated these payments by wire transfers because it was the most expedient method and because I had not yet opened a bank account for the Trust.

6. After the Court's July 7 decision was issued, Geoffrey Smith requested a distribution so that he could fund his start-up company. I counseled him against an outright distribution because of the potential tax consequences. Instead, and based on the business plan and financial analysis which he presented to me, I offered to make an investment in the company as Trustee because I believed it was appropriate to use the Trust to assist one of the beneficiaries, and the business would return a profit to the Trust if successful. In exchange for its capital contribution, the Trust received a 49% equity interest in the company and is expected to receive a profit of 15 – 25% above the return of its initial investment. This is a very favorable rate of return, and the Trust is a priority investor, such that it will be repaid its investment before any

other investor is paid. The investment in Capacity One Management, a company created and operated solely by a beneficiary of the Trust, is an appropriate use of the Trust assets.

7. Following execution of a term sheet with Capacity One Management, a copy of which is attached hereto as Exhibit A, I instructed Dinosaur Securities to transfer of \$200,000 from the Trust's stock account to the bank account of Capacity One Management. Dinosaur Securities refused to effectuate the wire transfer, in essence, holding the Trust account hostage while they reported back to the SEC. On July 16, I instructed Dinosaur to wire \$200,000 to Geoffrey Smith's bank account and Geoffrey Smith then transferred the money to Capacity One Management the same day. I did not make a "distribution" of \$200,000 from the Trust to Geoffrey Smith.

8. As a result of Dinosaur Securities' interference with the Trust account and its failure to comply with the Court's July 7 order, I instructed Dinosaur to transfer \$2 million from the Trust stock account to an account at a bank in the Capital Region so that I would have exclusive control over the funds for which I am responsible as Trustee. I ordered this transfer in the fulfillment of my fiduciary obligations and in the exercise of my professional judgment. Upon information and belief, Mr. Grossman again delayed that wire transfer, and instead notified David Stoelting, who then sought an emergency order from this Court to prevent the transfer from occurring. This Court denied the SEC's request and the transfer was subsequently accomplished. Following that transfer, I closed on the purchase of the lakefront property.

WHEREFORE, I declare under penalty of perjury that the foregoing is true and correct, and respectfully request that the Court deny the SEC's motion in all respects.

Executed on: October 6, 2010


DAVID WOJESKI, TRUSTEE