

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 GEOFFREY R. SMITH IN OPPOSITION TO
PLAINTIFF'S MOTION FOR RECONSIDERATION**

I, Geoffrey R. Smith, pursuant to 28 U.S.C. § 1746, declares 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") on April 20, 2010.

2. My sister and I were not parties to this action when the Court issued its decision on July 7, 2010, although I attended and testified at the hearing on the preliminary injunction motion. Nevertheless, on August 3, 2010, my sister's and my bank accounts were frozen by the Court in a temporary restraining order which was issued without notice to us or an opportunity to be heard. Neither my sister nor I were served with the Order by the Plaintiff prior to its implementation by the banks, and its issuance has caused significant disruption to our lives.

3. Although my sister and I were named as defendants in one state law claim in the Amended Complaint which was filed August 3, 2010, the allegations on which that claim are based explicitly refer to the fact that the Trustee acted in reliance upon the lawful order of this Court issued on July 7, 2010. Neither my sister nor I have been accused of any wrongdoing, violations of the securities law or any other statutes, yet our bank accounts were frozen without notice to either of us, apparently based on the false allegations of the SEC counsel that various individuals, including my attorney, the trustee and me withheld or concealed the existence of a private annuity agreement apparently entered into by my parents and the former trustee of the Trust, Thomas Urbelis.

4. I understand that the SEC claims that I did not disclose or refer to this private annuity agreement during the preliminary injunction hearing held on June 9 – 11, 2010. Although I was not a party, I was present during and provided sworn testimony at that hearing. I answered every question posed to me truthfully and completely. I believed then and continue to believe that, notwithstanding any contracts which may have been entered in by the former trustee, my sister and I are the sole and exclusive beneficiaries of the irrevocable trust created by my parents and funded by my mother in 2004.

5. The simple, undisputable truth is I was not aware of the existence of any such private annuity agreement at any time prior to or during the hearing, or in fact 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, only after the SEC claims to have discovered the document for the first time.

6. On or about July 1, 2010, I formed Capacity One Management LLC and listed my residence address in Saratoga Springs as the business address of the company. Although I share

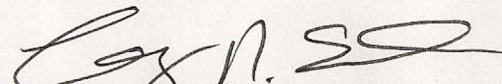
the same address as my parents, neither of them has any interest or participation in or control over my company.

7. Shortly after this Court vacated the restraining order against the Trust, I requested a distribution from the Trustee to enable me to launch this business. I had been building financial models to forecast cash flows and investor returns for Capacity One for more than a year. Upon presenting my business plan and financial analysis to him, the Trustee decided to invest \$200,000 in the company instead of making an outright distribution to me. It is my understanding that he did so to avoid negative tax consequences and to increase the value of the Trust's assets. In return for that \$200,000 investment, the Trust received a 49% equity interest in Capacity One and is expected to receive a return of at least 15% and up to 25% of its investment.

8. Following execution of a term sheet, the Trustee informed me that the broker/dealer which was housing the Trust's stock account had refused his instruction to effectuate a wire transfer of \$200,000 from the Trust's stock account directly to the bank account of Capacity One Management. The Trustee then instructed the broker/dealer to wire the money to my personal bank account, whereupon I transferred it to the account of Capacity One on the same day that I received it from the Trust. I did not, in fact, receive a distribution of \$200,000 from the Trust.

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 5, 2010


GEOFFREY R. SMITH