

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

10 Civ. 457 (GLS/DRH)

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

Defendants,

LYNN A. SMITH, and
NANCY MCGINN,

Relief Defendants, and

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

Intervenor.

STIPULATION

IT IS HEREBY STIPULATED BY AND BETWEEN plaintiff Securities and
Exchange Commission and defendant and Intervenor David M. Wojeski, Trustee of the
David L. and Lynn A. Smith Irrevocable Trust U/A 08/04/04 (the "Trust"), that:

1. Attached as Exhibit A is a copy of a Private Annuity Agreement dated August 31, 2004 (the “Annuity Agreement”).

2. Since August 31, 2004, the Annuity Agreement has been, and continues to be, a valid, binding and enforceable contract.

3. Since August 2004, there has been no modification or amendment of the Annuity Agreement.

4. With respect to the first issue framed in the Court’s order of October 7, 2010 (the “Hearing Order”), regarding the status of the Annuity Agreement, although the signature of the prior Trustee does not appear on Exhibit A, the Annuity Agreement is, in fact, a binding and enforceable contract.

5. With respect the second issue framed in the Hearing Order regarding what occurred on the July 22, 2010, telephone conversation:

a) Plaintiff’s witnesses for the November 16, 2010, evidentiary hearing (the “Evidentiary Hearing”) will be comprised of David Stoelting, Kevin McGrath, Jill Dunn and Brit Geiger;

b) the examination of Jill Dunn at the Evidentiary Hearing on behalf of plaintiff will not be conducted by David Stoelting or Kevin McGrath;

c) the Trust’s witnesses for the Evidentiary Hearing will be comprised of David Stoelting, Kevin McGrath, Jill Dunn and Brit Geiger; and

d) the examinations of David Stoelting and Kevin McGrath on behalf of the Trust at the Evidentiary Hearing will not be conducted by Jill Dunn.

6. Both plaintiff and the Trust reserve the right to object to the testimony of any witness.

DAVID M. WOJESKI, Trustee of the David M.
and Lynn A. Smith Irrevocable Trust

s/Robert H. Iseman

Attorney Bar Number 103039

Iseman, Cunningham, Riester & Hyde, LLP

9 Thurlow Terrace

Albany, NY 12203

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Attorney for David M. Wojeski, Trustee of David L. and
Lynn A. Smith Irrevocable Trust, U/A 08/04/04

Dated: November 12, 2010
Albany, New York

SECURITIES AND EXCHANGE COMMISSION

s/ David Stoelting

Attorney Bar Number: 516163

Securities and Exchange Commission

3 World Financial Center, Room 400

New York, NY 10281

Telephone: (212) 336-0174

Fax: (212) 336-1324

E-mail: stoeltingd@sec.gov

Attorney for Plaintiff

Dated: November 12, 2010
New York, New York

EXHIBIT A

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: March 26, 1945) and Lynn A. Smith (Date of Birth: September 20, 1946) (the "Transferors"), residing at 2 Rolling Brook Drive, 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.

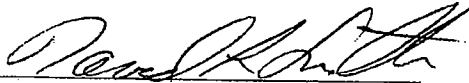
(h) This Agreement contains the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior understandings or agreements, whether written or oral.

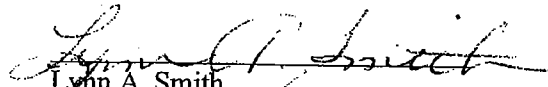
(i) This Agreement may not be modified or amended except in a writing signed

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