Case No.: 1:10-CV-457

(GLS/DRH)

UNITED	STATE	S DISTI	RICT	COU	RT
NORTHE	ERN DIS	TRICT	OF N	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

LYNN A. SMITH,

Relief Defendant and

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

#### **DECLARATION OF JILL A. DUNN**

- I, Jill A. Dunn, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury, the following:
- I respectfully submit this declaration to correct certain statements which appear in my Declaration dated September 3, 2010 (the "September Declaration").
- 2. In paragraph 36 of my September Declaration I stated as follows: "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."

3. In assisting with the Trust's response to Plaintiff's discovery demands, and in

preparing for the evidentiary hearing scheduled for November 16, 2010, I became aware that on

July 21, 2010, David Wojeski e-mailed to me the documents attached to this Declaration as

Exhibit A. I did not recall receiving or seeing the document attached as Exhibit A at the time I

prepared the September Declaration, and my recollection has not been refreshed by seeing

Exhibit A.

4. My attention on July 20, 21, and 22, 2010, was focused heavily on the Trust's real

estate closing which took place on July 22, 2010, and on other unrelated client matters and

personal issues, including a death in the family. This might explain why I failed to remember the

documents attached as Exhibit A when I prepared my September Declaration.

5. I make this declaration for the sole purpose of correcting the record before the

Court, and no actual or implied waiver of any applicable privilege, including the attorney-client

and attorney work product privileges, is intended.

DATED: November 15, 2010

s/Jill A. Dunn

Jill A. Dunn (Bar Roll No. 506942)

Attorney for Intervenor

THE DUNN LAW FIRM PLLC

99 Pine Street, Suite 210

Albany, New York 12207-2776

Telephone (518) 694-8380

Fax (518) 935-9353

Email: JDunn708@nycap.rr.com

# Exhibit A

### Jill Dunn

From: David M. Wojeski [dwojeski@wojeskico.com]

Sent: Wednesday, July 21, 2010 10:21 AM

To: jdunn708@nycap.rr.com

Attachments: Pvt Annuity.pdf

<< Pvt Annuity.pdf>>

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Dave,

Per our conversation, please see the attached. The first four pages are from the annuity contract. The three pages after that are documents that were in the file that I thought might be relevant.

#### Nanci

Nanci L. Pipo, CLU, CLTC Vier President & Partner Southtowns Firancial Geoup, Inc. 6195 W. Qinker St. Orchard Park, NY 14127 office; (716) 662-0070 foll free face (888) 461-2613

PLEASE NOTE OUR NEW FAX NUMBER

X SFG Circle No Website Attornez: Bruce Hoover 716-566-5432

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# Policy Delivery Receipt

## PRIVATE ANNUITY CONTRACT

Annuitant(s):

David L. & Lynn A. Smith

**Contract Date:** 

August 31, 2004

Face Amount:

\$4,447,000

Rate:

4.6%

I acknowledge that I received the above number contract certificate on the date of this receipt.

Owner's Signature

Date /2/05

Agent's Signature

COPY

## 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%

11:11 07/20/10GMT-04 Fg 04-08

Private Annuity

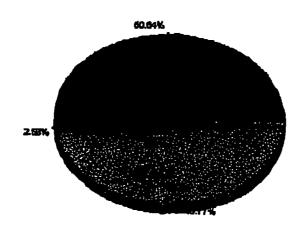
9/7/2004

Transfer Data:	8/2004
§7520 Rate:	4.60%
FMV of Property:	\$7,399,346
Client's Bacis:	\$387,500
Payment Period:	Annual
Payment Timing:	End
Number of Annuitants:	2
Age(s):	68. 59

Annulty Factor.	15.1028	
Payout Frequency Factor:	1.0000	
Annual Payout	\$489,832	

Joint Life Expectancy: Reg. 1.72-6(a)(2) Life Exp. Adj. Factor; 31.1 Years -0.5 Tax-Free Portion: \$12,683 Capital Gain Portion: \$229,145 Ordinary Income Portion \$248,123

# Tax Breakdown of Paymonts to Seller



Ordinary Income 50.84% Tex-Pres 2.50% (EVE) Choice Goin 48 77% \$ 4,447,000 4.60%

0.000127778 daily 0.003833333 monthly

3985 days of interest until 1st payment

\$7,399,346.07 Future Value at date of distributum