

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

**SECURITIES AND EXCHANGE
COMMISSION,**

NOTICE OF MOTION

Plaintiff,

Civil Action No.

-vs-

1:10-CV-00457

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

GLS/DRH

Defendants.

PLEASE TAKE NOTICE:

MOTION BY:

THE DUNN LAW FIRM PLLC

Attorneys for Trustee

David Wojeski

Office and Post Office Address

99 Pine Street, Suite 210

Albany, New York 12207

DATE, TIME AND PLACE OF HEARING:

January 20, 2011—9:30 a.m.

United States District Court

Northern District of New York

James T. Foley U.S. Courthouse

445 Broadway, Fifth Floor

Albany, New York 12207

SUPPORTING PAPERS:

Declaration of Jill A. Dunn, Esq. dated December 6, 2010, with exhibits thereto; Memorandum of Law dated December 6, 2010.

RELIEF REQUESTED:

An Order, pursuant to Fed. R. Civ. P. 60, granting movant reconsideration of the Memorandum-Decision and Order filed November 22, 2010.

GROUND FOR RELIEF:

The November 22, 2010 Decision is based on a misapprehension of material facts resulting in

clear error by the Court, which should be corrected prior to seeking appellate review.

DEMAND FOR ANSWERING PAPERS:

Pursuant to Rule 7.1(b)(1) of the Local Rules for the United States District Court for the Northern District of New York, movants demand that any opposing papers be served on the undersigned attorneys no later than seventeen (17) days prior to the return date of the motion.

DATED: December 6, 2010

THE DUNN LAW FIRM PLLC

By: /s/ Jill A. Dunn
Jill A. Dunn
Bar Roll No. 506942

Attorneys for Trustee
David M. Wojeski
Office and Post Office Address
99 Pine Street, Suite 210
Albany, New York 12207
Telephone: (518) 694-8380
Facsimile: (518) 935-9353
E-Mail: jdunn708@nycap.rr.com

CERTIFICATE OF SERVICE

I, Jill A. Dunn, certify, as counsel for David M. Wojeski, Trustee, that on the 6th day of December, 2010, a true and correct copy of the foregoing Notice of Motion and the papers on which it was based were served upon all counsel of record, including the following, via ECF:

David Stoelting, Esq.
Attorney for Plaintiff
Securities and Exchange Commission
3 World Financial Center, Room 400
New York, NY 10281

William J. Brown, Esq.
Phillips Lytle LLP
Receiver for Entity Defendants
3400 HSBC Center
Buffalo, NY 14203-2887

Martin Kaplan, Esq.
Gusrae, Kaplan, Bruno & Nusbaum, PLLC
Attorneys for Defendants David L. Smith and Timothy M. McGinn
120 Wall Street
New York, NY 10005

James D. Featherstonhaugh, Esq.
Featherstonhaugh, Wiley and Clyne LLP
99 Pine Street, Suite 207
Albany, NY 12207

and by regular mail upon:

Nancy McGinn
26 Port Huron Drive
Niskayuna, NY

s/ Jill A. Dunn
Jill A. Dunn
Bar Roll No. 506942

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,

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

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:

1. I respectfully submit this declaration in support of the motion of David M. Wojeski, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (hereinafter "Wojeski") for reconsideration of the Court's Memorandum-Decision and Order filed November 22, 2010.

2. This motion is made pursuant to Federal Rules of Civil Procedure Rule 60(b) and Local Rule 7.1(g) to correct clear errors in the Court's November 22, 2010 Decision ("the Reconsideration Decision"). I respectfully submit that the Court should exercise its discretion to correct the errors in its Decision, as set forth below, on the grounds that doing so will prevent judicial inconvenience and expense by avoiding the expenditure of resources to seek corrective action on appeal.

3. In its Reconsideration Decision, the Court made several factual findings which are clearly incorrect and not supported by the evidence. The combined effect of those findings formed the basis for the Court's summary conclusions that Wojeski and the Trust's counsel had access to a document which was not available to the SEC and led to the Court's revisiting its prior decision and its invitation for a sanctions motion against, inter alia, the Trust, Wojeski and your declarant. Based on the schedule set by the Court, the time to appeal will expire before plaintiff is required to decide whether to pursue a motion for sanctions. Thus, seeking to resolve these errors by motion practice seems more efficient than waiting to pursue them on appeal.

4. The subject findings relate to (1) the July 22, 2010 telephone call between plaintiff's counsel and this declarant and (2) the interactions between Thomas Urbelis, the former Trustee, and this declarant, on behalf of the successor Trustee, David Wojeski and the imputation of Urbelis' purported knowledge to the Trust, and (3) the effect of the Annuity Agreement on the July 7 Memorandum-Decision and Order (MDO). I respectfully request that the Court reconsider these findings and conclusions.

5. Among the factual findings which are clearly erroneous are the conclusions made concerning the telephone conversation on July 22, 2010 between your declarant and counsel for the SEC. On page 8, in considering the testimony regarding the question whether this declarant

used the phrase “private annuity agreement”, the Court found that “McGrath does not recall this statement by Dunn.” This finding is clearly erroneous, as the official transcript of the hearing indicates that McGrath testified that he did not hear those words. McGrath Testimony, p. 54, line 8. David Stoelting also testified that Kevin McGrath acknowledged to him contemporaneously with the call that he “did not hear” what Stoelting claimed to have heard, which was the phrase “private annuity agreement.” Stoelting Testimony, p. 9, line 3). Kevin McGrath’s testimony was consistent with your declarant’s testimony that she did not use the phrase “private annuity agreement” during that conversation.

6. The Court’s subsequent conclusion that “[t]he SEC version of events is internally consistent and probable” is clearly erroneous. The SEC did not contest your declarant’s description of the phone conversation when it filed its reply papers on September 14. The SEC’s testimony at the hearing was internally inconsistent, and the evidence suggests that plaintiff’s counsel related your declarant’s reference to a “private annuity trust” to their tax expert, Brit Geiger, who had already been working on the tax issues involved with the Trust. Geiger’s email to plaintiff’s counsel, which was entered into evidence at the November 16, hearing, demonstrated that Geiger had knowledge of the concept of private annuity trusts before the phone conversations and that he reached his own conclusions as to the nature of the documents that Stoelting and McGrath should request from Urbelis.

7. With respect to the interactions between Urbelis and your declarant on behalf of the Trust and Wojeski, at several points in the Reconsideration Decision, the Court incorrectly imputes Urbelis’ knowledge and the extent of his document production to the Trust, to Wojeski and to this declarant as the Trust’s counsel. On page 7 of the Reconsideration Decision, the Court found that “on May 28, 2010, the SEC served a subpoena on Urbelis as the then Trustee

for the Trust. Dkt No. 103-7.” On page 12, the Court states “[t]he fact that the decision on July 7, 2010 resolved the SEC’s motion as to the Trust did not relieve Dunn or the Trust of its duty to supplement its response to the subpoena whenever they discovered the Annuity Agreement documents.” On page 18, the Court references “a subpoena [served] on the Trust for categories of documents which should have included the Annuity Agreement.” Also on page 18, the Court attributes “wrongful conduct” to the Trust for the failure of Urbelis to produce all documents in May. All of these findings and other similar statements sprinkled throughout the decision are clearly erroneous because no such subpoena was served on the Trust and the Trust, Wojeski and this declarant did not have any control over Urbelis’ response to the SEC’s subpoena.

8. This finding, although clearly erroneous and lacking in record support, irreparably tainted the remainder of the conclusions reached by the Court. I respectfully submit that these findings should be corrected to prevent manifest injustice and to correct the Reconsideration Decision.

9. On May 28, 2010, when he received a subpoena from the SEC, Thomas Urbelis was not the Trustee of this Trust. Urbelis had given notice of his resignation as Trustee on April 22, 2010, to take effect on May 27, 2010. Attached hereto as Exhibit A is a copy of his resignation letter.

10. On Friday, May 14, 2010, your declarant first spoke with Urbelis regarding the impending appointment of Wojeski as successor Trustee. On May 17, 2010, Urbelis revised his resignation to take effect on May 17, 2010. Attached hereto as Exhibit B is a copy of his May 17 letter revising the effective date of his resignation. David Wojeski was appointed Trustee effective May 17, 2010 and retained your declarant the same day. Attached hereto as Exhibit C is the appointment of Wojeski as successor Trustee.

11. Thus, Urbelis was not the Trustee of the Trust on May 28, 2010 when he received and responded to the SEC subpoena, nor was he the Trustee of the Trust when he was deposed on June 1, 2010. At all times relevant to this motion, Thomas Urbelis was a non-party witness. There is no basis for imputing Urbelis' actions, knowledge or conduct to the Trust after the effective date of his resignation, since he was no longer authorized to act on the Trust's behalf after May 17, 2010.

12. The converse is also true. The SEC did not serve a subpoena duces tecum or any discovery demands on the Trust or on Wojeski as Trustee at any time prior to the discovery of the private annuity agreement in late July 2010. The only demand by the SEC was a letter written jointly to your declarant and Lynn Smith's attorney dated July 27, 2010. That letter made specific reference to a document demand previously served on Lynn Smith, but did not reference any document demand served on the Trust. At the time of the letter, the SEC had already received the annuity agreement from Urbelis.

13. The findings and conclusions of the Reconsideration Decision are clearly erroneous in that the Court faults your declarant and the Trust for not supplementing "its production of documents to the SEC in response to the SEC's May 2010 subpoena until hours before the evidentiary hearing on November 16, 2010." However, it was Thomas Urbelis, not the Trust, Wojeski or this declarant, who received and responded to a subpoena in May 2010. For that reason, there was nothing for the Trust, Wojeski or this declarant to supplement in late July. The discovery responses served on the SEC on November 2 and 13 were served in response to a discovery demand served by the SEC in September, and related to the claims raised in the Amended Complaint. They were wholly unrelated to the subpoena served on Urbelis.

14. Similarly, on page 12-13 of the Reconsideration Decision, the Court's attribution

of fault to declarant for not supplementing a response to a subpoena served on Urbelis, and the Court's reliance on a "continuing duty" to supplement, coupled with its reference to a "breach of ethical and statutory duties" relating to disclosure obligations, are also clearly erroneous because the subpoena in question was a non-party subpoena served on Thomas Urbelis after he resigned as Trustee. At that time, the SEC was well aware that this declarant had appeared on behalf of Wojeski as Trustee in the motion to intervene. The SEC's counsel did not serve the Urbelis subpoena on me for a response in May; rather, they communicated directly with Urbelis. No similar subpoena or corresponding document demand was served upon Wojeski as successor Trustee, or upon this declarant as attorney for the Trust, at any time prior to the conclusion of this matter as to the Trust by the issuance of the Court's decision on July 7, 2010.

15. I did not provide any input or advice to Urbelis in his response to the subpoena, nor was my client, Wojeski, served with a corresponding subpoena or document demand any time prior to the issuance of the MDO on July 7. The only document demand sent to the Trust prior to September 2010 was the July 27, 2010 letter from plaintiff's counsel, to which I responded on July 29. At that time, the Trust was no longer a party to this action, and your declarant responded accurately by calling attention to the fact that no document demand¹ had been served on the Trust, that the matter had been concluded as to the Trust with the issuance of the July 7 decision, and that if the annuity agreement had been in my or the Trust's possession at the time of the hearing, I would have offered it into evidence.

16. The Court's findings and conclusions rest on the faulty premise that your

¹ The first Request for Production of Documents by Plaintiff was served on the Trust on September 17, 2010 in the context of the litigation of the Amended Complaint. A response with objections was served on the SEC on November 2, 2010 pursuant to an agreed-upon extension and a supplemental disclosure was made on November 12.

declarant represented Thomas Urbelis and that Urbelis was acting on behalf of the Trust. This premise represents clear error and should be corrected without the need for an appeal. On page 18 of the Reconsideration Decision, the Court found that “The Trust’s attorney represented Urbelis in responding to the SEC’s subpoena and at his deposition. See Dkt. No. 46-6 at 2.” Your declarant has never represented Thomas Urbelis at any time whatsoever.

17. When I contacted Urbelis by telephone on May 14, 2010 to notify him that a successor trustee was being appointed, I requested that he transfer any trust instruments, documents and records in his possession or within his direct or indirect control to me for the successor trustee. I made the request verbally in that initial telephone conversation, then in writing later the same day and again in writing on May 18. He asked me to provide him with documentation demonstrating Wojeski’s appointment as Trustee before he would send me the Trust’s documents. Attached hereto as Exhibit D are copies of my letters to him. On May 22, 2010, I received a package of photocopied documents from Urbelis, and he later produced to the SEC’s counsel a copy of the same package with the addition of my correspondence to him. See Dkt No. 46-6, at p. 8.

18. I had no control over or input into Urbelis’ response to the SEC’s subpoena in late May, nor did I have any reason to think that Urbelis did not turn over to me and to the SEC all documents related to this Trust in May. Urbelis had tendered his resignation as Trustee three weeks before I had any contact with him. Regardless of whether the Court concludes that Urbelis’ failure to disclose the annuity agreement was deliberate or inadvertent, his actions were undertaken solely on his own behalf as a non-party witness and not on behalf of or at the direction of the Trust, Wojeski or me. If Urbelis failed to disclose documents to the SEC or the Court, then he also failed to disclose those same documents to the Trust, to Wojeski as successor

Trustee, and to your declarant as counsel to the successor Trustee.

19. The only possible basis for the Court's conclusion that I represented Urbelis is in the transcript of Urbelis' deposition testimony taken on June 1, 2010, where the stenographer inexplicably indicated that my appearance was on behalf of "the witness Thomas Urbelis." I did not appear on behalf of Urbelis; I appeared on behalf of the Intervenor Trustee, and did not realize the stenographer's mistake until I received Urbelis' deposition errata sheets, which he executed on June 29, 2010 and sent to all counsel. Since the hearing had concluded, I attached no significance to this error until the Reconsideration Decision was issued which relied so heavily on this mistaken conclusion that I represented Urbelis in response to the subpoena production or at his deposition. Attached hereto as Exhibit E is a copy of Urbelis' errata sheets, which should serve as a supplement to the transcript of his testimony attached to the affidavit of Lara Mehraban and cited by the Court. See Dkt. No. 46-6. Since the SEC communicated directly with Urbelis throughout this litigation, they obviously did not believe that I represented him either.

20. The Court's Reconsideration Decision imputes control over and unfettered access to the former Trustee, Thomas Urbelis, by this declarant and her client, David Wojeski, as successor Trustee. This was simply not the case. Urbelis acted independently of the Trust, Wojeski and me. The tenor of the Court's decision, however, including its references to an alleged breach of purported ethical and statutory duties of disclosure and its invitation of a sanctions motion, speaks volumes as to the import of this error and the significance that the Court places on its belief that an attorney/client relationship existed between this declarant and Urbelis. This declarant had no more access to or control over Thomas Urbelis than did plaintiff's counsel. As indicated by Urbelis in his deposition, he provided the SEC with the same

documents he provided to me. See Dkt. No. 46-6, p. 8. As indicated in his deposition errata sheets, I did not serve as Urbelis' attorney. See Exhibit E.

21. With respect to the Court's finding that I had a duty to supplement a prior subpoena response, even if the Court finds that I received constructive notice of the possible existence of an annuity agreement by the receipt of an email on July 21, 2010 which contained, not an annuity agreement, but a "Policy Delivery Receipt", such a finding does not create any statutory or ethical disclosure obligation under the Federal Rules or applicable case law, nor does it resurrect a case which concluded as to the Intervenor when the decision was issued denying the preliminary injunction as to the Trust on July 7, 2010. The Trustee was granted leave to intervene for the limited purpose of opposing the motion for a preliminary injunction. See Dkt. No. 39. The TRO which had frozen the Trust account on April 20 was vacated by the Court's decision on July 7. See Dkt. No. 86. When the decision was issued, the Trustee's limited intervention had concluded and was not continued by a request for a stay or the timely filing of a motion for reconsideration.

22. There was no fraud or collusion on behalf of the Trust through its successor Trustee or its counsel to conceal any documents or information from the SEC or the Court, and there was and is no evidence to suggest that this declarant was aware, constructively or actually, prior to July 21, of the possibility that a private annuity agreement might have actually been entered into by the Trust. See Dunn Testimony, p. 60-62.

23. Lastly, the SEC did not contest the conclusions and expert testimony provided in the expert witness report submitted by the Trust. In the absence of any countervailing evidence, we respectfully submit that it was clear error to find that David Smith possesses a substantial interest in the Trust sufficient to freeze the Trust's assets.

WHEREFORE, I respectfully request that the Court reconsider its decision of November 22, 2010 and release the Trust's assets from the asset freeze.

DATED: December 6, 2010

s/Jill A. Dunn
Jill A. Dunn (Bar Roll No. 506942)
Attorney for the Trust
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

April 22, 2010

FedEx


David and Lynn Smith
2 Rolling Brook Drive
Saratoga Springs, NY 12866

RE: David A. & Lynn A. Smith
Irrevocable Trust U/A dated August 4, 2004

Dear Dave and Lynn:

I hereby resign as Trustee of the above-referenced Trust. This resignation shall take effect on May 27, 2010.

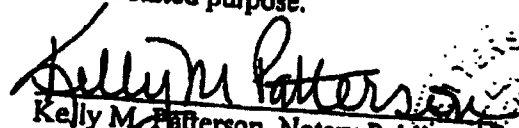
Very truly yours,


Thomas J. Urbelis, Trustee
6 Eastman Road
Andover, MA 01810

Commonwealth of Massachusetts

Suffolk, ss.

On this 22nd day of April, 2010, before me, the undersigned notary public, personally appeared Thomas J. Urbelis proved to me through satisfactory evidence of identification, which was personal knowledge, to be the person whose name is signed on the preceding document in my presence and acknowledged to me that he signed it voluntarily for its stated purpose.


Kelly M. Patterson, Notary Public
My Commission Expires: 3/1/13



KELLY M. PATTERSON
Notary Public
Commonwealth of Massachusetts
My Commission Expires
March 1, 2013

EXHIBIT B

May 17, 2010

**By Fax (518) 935-9353
and U.S. Mail**


Jill A. Dunn, Esq.
The Dunn Law Firm, PLLC
99 Pine Street, Suite 210
Albany, NY 12207

RE: David and Lynn Smith Irrevocable Trust

Dear Ms. Dunn:

In accordance with your May 14, 2010 correspondence to me, I hereby revise my April 22, 2010 letter to Dave and Lynn by substituting an effective date of May 17, 2010 for my resignation as Trustee of the above-referenced Trust.

Very truly yours,



Thomas J. Jrbelis
6 Eastman Road
Andover, MA 01810

EXHIBIT C

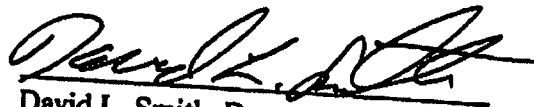
TRUSTEE APPOINTMENT

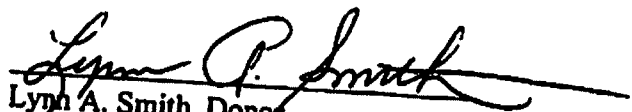
The following are additional instructions to be applied to the Declaration of Trust made on the 4th day of August, 2004, by and between David L. Smith and Lynn A. Smith (the "Donors") and Thomas Urbelis (the "Trustee"), which created the **DAVID A. & LYNN A. SMITH IRREVOCABLE TRUST U/A DATED AUGUST 4, 2004** for the benefit of the Donors' children, Geoffrey R. Smith and Lauren T. Smith and their issue:

Pursuant to the NINTH provision of said Declaration of Trust, Thomas Urbelis has notified the Donors of his resignation as trustee of the **DAVID A. & LYNN A. SMITH IRREVOCABLE TRUST U/A DATED AUGUST 4, 2004**, effective May 17, 2010.

It is hereby declared that, pursuant to the NINTH provision of said Declaration of Trust, the Donors hereby accept the resignation of Thomas Urbelis and consent to the resignation taking effect on May 17, 2010, and further appoint David Wojeski, CPA, 75 Troy Road, East Greenbush, New York 12061, as successor trustee of this trust, whose appointment shall take effect on May 17, 2010.

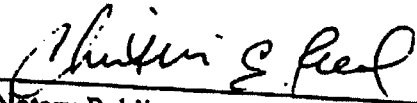
IN WITNESS WHEREOF we have hereunto duly executed this instrument under seal this 17th day of May 2010.


David L. Smith, Donor

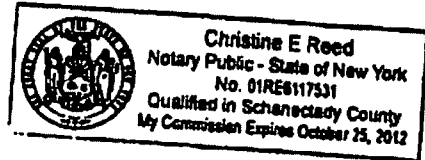

Lynn A. Smith, Donor

STATE OF NEW YORK)
)
 ss.:)
)
 COUNTY OF ALBANY)

On this 17th day of May, 2010, before me personally came David L. 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.

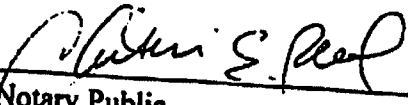


Notary Public



STATE OF NEW YORK)
)
 ss.:)
)
 COUNTY OF ALBANY)

On this 17th day of May, 2010, 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

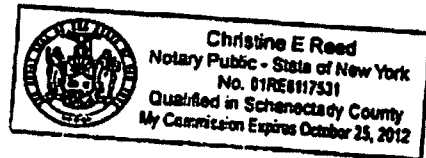


EXHIBIT D

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

May 14, 2010

VIA FACSIMILE AND REGULAR MAIL

Thomas J. Urbelis, Esq.
Urbelis & Fieldsteel LLP
155 Federal Street
Boston, MA 02110-1727

Re: David A. & Lynn A. Smith Irrevocable Trust

Dear Mr. Urbelis:

Thank you for speaking with me today. David and Lynn Smith will consent to your resignation taking effect on May 17, 2010. I will forward a successor trustee appointment to you on Monday upon receipt of a letter from you rescinding your prior resignation letter and substituting a resignation to take effect May 17. Please give me a call at your earliest convenience to discuss the transfer of any trust instruments, documents and records in your possession or within your direct or indirect control.

Thank you for your anticipated cooperation.

Very truly yours,

THE DUNN LAW FIRM PLLC

By:



Jill A. Dunn

JAD/jc
Enc.

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

May 18, 2010

VIA FACSIMILE AND REGULAR MAIL

Thomas J. Urbelis, Esq.
Urbelis & Fieldsteel LLP
155 Federal Street
Boston, MA 02110-1727

Re: David A. & Lynn A. Smith Irrevocable Trust

Dear Mr. Urbelis:

Thank you for your letter yesterday regarding the effective date of your resignation. Enclosed please find a copy of the Trustee Appointment. Please give me a call at your earliest convenience so we may discuss the transfer of all trust instruments, documents and records in your possession or within your direct or indirect control to David Wojeski.

Thank you for your anticipated cooperation.

Very truly yours,

THE DUNN LAW FIRM PLLC

By: 
Jill A. Dunn

JAD/jc
Enc.

TRUSTEE APPOINTMENT

The following are additional instructions to be applied to the Declaration of Trust made on the 4th day of August, 2004, by and between David L. Smith and Lynn A. Smith (the "Donors") and Thomas Urbelis (the "Trustee"), which created the **DAVID A. & LYNN A. SMITH IRREVOCABLE TRUST U/A DATED AUGUST 4, 2004** for the benefit of the Donors' children, Geoffrey R. Smith and Lauren T. Smith and their issue:

Pursuant to the NINTH provision of said Declaration of Trust, Thomas Urbelis has notified the Donors of his resignation as trustee of the **DAVID A. & LYNN A. SMITH IRREVOCABLE TRUST U/A DATED AUGUST 4, 2004**, effective May 17, 2010.

It is hereby declared that, pursuant to the NINTH provision of said Declaration of Trust, the Donors hereby accept the resignation of Thomas Urbelis and consent to the resignation taking effect on May 17, 2010, and further appoint David Wojeski, CPA, 75 Troy Road, East Greenbush, New York 12061, as successor trustee of this trust, whose appointment shall take effect on May 17, 2010.


IN WITNESS WHEREOF we have hereunto duly executed this instrument under seal this 17th day of May 2010.


David L. Smith, Donor

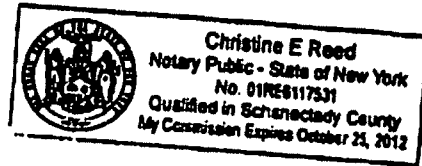

Lynn A. Smith, Donor

STATE OF NEW YORK)
)
) ss.:)
)
 COUNTY OF ALBANY)

On this 17th day of May, 2010, before me personally came David L. 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.

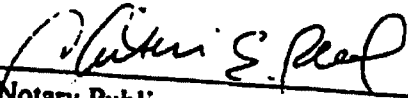


 Notary Public



STATE OF NEW YORK)
)
) ss.:)
)
 COUNTY OF ALBANY)

On this 17th day of May, 2010, 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

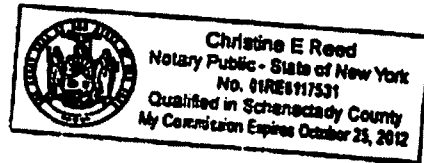


EXHIBIT E

June 1, 2010

65

DEPOSITION ERRATA SHEET

Our Assignment No. 310714
Case Caption: SEC vs. MCGINN, SMITH & CO.,

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury
that I have read the entire transcript of
my Deposition taken in the captioned matter
or the same has been read to me, and
the same is true and accurate, save and
except for changes and/or corrections, if
any, as indicated by me on the DEPOSITION
ERRATA SHEET hereof, with the understanding
that I offer these changes as if still under
oath.

Signed on the 29th day of
JUNE, 2010.

Thomas Urbelis

THOMAS URBELIS



ESQUIRE
an Alameda Group Company

Toll Free: 800.944.9454
Facsimile: 212.557.5972

Suite 4715
One Penn Plaza
New York, NY 10119
www.esquireolutions.com

DEPOSITION ERRATA SHEET

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Page No. 4 Line No. 23-24 Change to: Delete "I am the attorney for the witness Thomas Urbelis."

Reason for change: Ms. Dunn did not say those words and she is not my attorney.

Page No. 6 Line No. 22 Change to: Change "of" to "or"

Reason for change: _____

Page No. 9 Line No. 6 Change to: Change "her" to "you"

Reason for change: _____

Page No. 10 Line No. 22 Change to: Add "I" between "that" and "was"

Reason for change: _____

Page No. 10 Line No. 23 Change to: Delete "us"

Reason for change: _____

Page No. 11 Line No. 21 Change to: Change "Jeff" to "Geoff"

Reason for change: _____

Page No. 12 Line No. 3 Change to: Change "Jeff" to "Geoff"

Reason for change: _____

SIGNATURE: Thomas Urbelis DATE: JUNE 29, 2010

THOMAS URBELIS



ESQUIRE
an Alexander's Callis Company

Toll Free: 800.944.9454
Facsimile: 212.557.5972

Suite 4715
One Penn Plaza
New York, NY 10119
www.esquireolutions.com

Thomas Urbelis

June 1, 2010

67

DEPOSITION ERRATA SHEET

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Page No. 13 Line No. 8 Change to: Delete "I don't have time to"

Reason for change: _____

Page No. 14 Line No. 5 Change to: Change "who" to "whom"

Reason for change: _____

Page No. 14 Line No. 9 Change to: Change "his" to "this"

Reason for change: _____

Page No. 14 Line No. 11 Change to: Change the first "is" to "that"

Reason for change: _____

Page No. 15 Line No. 10 Change to: Change "Jeff" to "Geoff"

Reason for change: _____

Page No. 15 Line No. 21 Change to: Change "Jeff" to "Geoff"

Reason for change: _____

Page No. 15 Line No. 23 Change to: Change "Jeff" to "Geoff"

Reason for change: _____

SIGNATURE: Thomas Urbelis DATE: JUNE 19, 2010

THOMAS URBELIS



ESQUIRE
an Alexander's Group Company

Toll Free: 800.944.9454
Facsimile: 212.557.5972

Suite 4715
One Penn Plaza
New York, NY 10119
www.esquireolutions.com

DEPOSITION ERRATA SHEET

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Page No. 16 Line No. 13 & 14 Change to: Change "Jeff" to "Geoff"

Reason for change: _____

Page No. 17 Line No. 10 & 12 Change to: Change "Jeff" to "Geoff"

Reason for change: _____

Page No. 24 Line No. 15 Change to: Delete the first "I"

Reason for change: _____

Page No. 30 Line No. 15 Change to: Change "Quade" to "McQuade"

Reason for change: _____

Page No. 31 Line No. 7 Change to: Delete "it"

Reason for change: _____

Page No. 31 Line No. 10 Change to: Delete "on the old interest of trust accounts" and substitute "into an interest account"

Reason for change: _____

Page No. 31 Line No. 14 & 15 Change to: Change "ULTA" to "IOLTA"

Reason for change: _____

SIGNATURE: Thomas Urbelis DATE: JUNE 29, 2010

THOMAS URBELIS



ESQUIRE
an Alexander's Group Company

Toll Free: 800.944.9454
Facsimile: 212.557.5972

Suite 4715
One Penn Plaza
New York, NY 10119
www.esquireolutions.com

DEPOSITION ERRATA SHEET

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Page No. 32 Line No. 16 Change to: Change "need" to "needed"

Reason for change: _____

Page No. 34 Line No. 21 Change to: Change "called" to "call"

Reason for change: _____

Page No. 38 Line No. 3 Change to: Change "George" to "Georgia"

Reason for change: _____

Page No. 42 Line No. 15 Change to: Change "in" to "on"

Reason for change: _____

Page No. 42 Line No. 24 Change to: Delete the first "for"

Reason for change: _____

Page No. 48 Line No. 6 Change to: Change "doesn't" to "don't"

Reason for change: _____

Page No. 49 Line No. 2 Change to: Delete the third "I"

Reason for change: _____

SIGNATURE: Thomas Urbelis DATE: JUNE 29, 2010

THOMAS URBELIS



ESQUIRE
an Alexander's & Co. Company

Toll Free: 800.944.9454
Facsimile: 212.557.5972

Suite 4715
One Penn Plaza
New York, NY 10119
www.esquireolutions.com

DEPOSITION ERRATA SHEET

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Page No. 52 Line No. 24 Change to: Change the first
"that" to "and"

Reason for change: _____

Page No. 53 Line No. 12, 20, 21 & 23 Change to: Change "Jeff" to
"Geoff"

Reason for change: _____

Page No. 54 Line No. 12 Change to: Change "he" to "I"

Reason for change: _____

Page No. 57 Line No. 8 Change to: Change "Cioche" to
"Kolojay"

Reason for change: _____

Page No. 58 Line No. 5 Change to: After "know" insert
"why"

Reason for change: _____

Page No. 58 Line No. 7 Change to: Change the second
"I" to "he"

Reason for change: _____

Page No. 58 Line No. 9 Change to: Change "her" to "him"

Reason for change: _____

SIGNATURE: Thomas Urbelis DATE: JUNE 19 2010

THOMAS URBELIS



ESQUIRE
an Alexander's Company

Toll Free: 800.944.9454
Facsimile: 212.557.5972

Suite 4715
One Penn Plaza
New York, NY 10119
www.esquireolutions.com

DEPOSITION ERRATA SHEET

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Page No. 58 Line No. 10 Change to: Change "wife" to "wife's"

Reason for change: _____

Page No. 59 Line No. 2 Change to: Delete "to"

Reason for change: _____

Page No. 59 Line No. 7 Change to: Delete "exactly"

Reason for change: _____

Page No. 59 Line No. 13 Change to: "caused" is incorrect

Reason for change: _____

Page No. 61 Line No. 2 Change to: Change "Jeff" to "Geoff"

Reason for change: _____

Page No. _____ Line No. _____ Change to: _____

Reason for change: _____

Page No. _____ Line No. _____ Change to: _____

Reason for change: _____

SIGNATURE: Thomas Urbelis DATE: JUNE 19, 2010

THOMAS URBELIS



ESQUIRE
an Alexander's Galle Company

Toll Free: 800.944.9454
Facsimile: 212.557.5972

Suite 4715
One Penn Plaza
New York, NY 10119
www.esquiresolutions.com

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff-Appellee,

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,

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

Defendants, and

LYNN A. SMITH,

Relief Defendant-Appellant.

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

Intervenor.

**MEMORANDUM OF LAW IN SUPPORT
OF MOTION FOR RECONSIDERATION**

POINT I

**THE TRUST'S MOTON FOR RECONSIDERATION
SHOULD BE GRANTED**

A. Legal Standard on Motion for Reconsideration

In this District, a motion for reconsideration may be granted upon a showing of:

- 1) an intervening change in controlling law;
- 2) the availability of new evidence not previously available; or
- 3) the need to correct a clear error of law or prevent manifest injustice.

Gaston v. Coughlin, 102 F.Supp.2d 81 (NDNY 2000) citing C-TC 9th Avenue Partnership v. Norton Company, 182 B.R.1 (NDNY). The Second Circuit has held that the law of the case may be disregarded when the Court has 'a clear conviction of error' with respect to a point of law on which the previous decision was predicated. Fogel v. Chestnutt, 668 F.2d 100, 109 (2nd Cir. 1981). In this case, the factual foundation on which the Court's recent reconsideration decision was predicated was clearly erroneous and should be corrected to prevent manifest injustice. The Court's conclusions regarding the effect of the Annuity Agreement are also clearly erroneous and based on a misapprehension of the evidence.

**B. The Trust Defendants have met the Legal Standard
for Reconsideration**

The belated discovery of the Private Annuity Agreement has presented the Court with serious questions as to whether anyone is at fault for not discovering the document in advance of the issuance of the July 7 decision or, ideally, in advance of the preliminary injunction hearing conducted for three days in June. In its Reconsideration Decision, the Court places the blame on Urbelis and Lynn Smith, upon a finding that, as parties to the agreement, they should have recalled its existence, and then takes the further step of

imputing that purported knowledge or recollection to the Trust, its successor Trustee and its counsel. The basis for this imputation is an erroneous finding that the Trust's counsel represented Urbelis when he responded to the SEC's subpoena and when he was deposed on June 1. The SEC's recent motion for reconsideration and the evidentiary hearing held on November 16 revealed three separate sources for this annuity agreement. Because Urbelis was not represented by the Trust, and none of the sources of the agreement were the Trust, its successor Trustee or its counsel, it is clear error to hold the discovery of the annuity agreement against the Trust.

First, the United States Attorney's Office and/or the Federal Bureau of Investigation were in possession of this document since April 20, 2010, apparently having seized it during the execution of a search warrant issued by this Court for the search of the Smith residences and McGinn, Smith & Co., Inc. offices. Since it was seized by the federal government, it was not in the possession of David or Lynn Smith during the litigation of the preliminary injunction motion. Pursuant to an information sharing agreement among sister federal agencies, the SEC had virtually unfettered access to the documents in the possession of the federal prosecutors and have used those seized documents to further its civil enforcement action, even without the owners of the documents having had an opportunity to challenge the search or the evidence seized. The SEC has admitted that the annuity agreement was provided to them by the Justice Department in late October upon the SEC's request. Although the SEC had access to the seized files since April, the Court has not imputed the Department of Justice's failure to discover the document to the SEC, nor has the SEC explained why it did not obtain the

document from this same source months earlier. The Justice Department's failure to search its seized files more carefully clearly cannot be imputed to the Trust.

Second, Thomas Urbelis, the former Trustee was in possession of the document and did not disclose it to the Trust's counsel despite three requests, one verbal and two written, which she made to him in May, nor to the SEC in response to its subpoena, also sent to him in May. Specifically, the Trust's counsel requested that Urbelis "transfer any trust instruments, documents and records in [his] possession or within [his] direct or indirect control." See Dunn Declaration, Exhibit D. Neither the successor Trustee nor the Trust's counsel had access to Urbelis' files. The Trust's counsel did not represent Urbelis at any time, and Urbelis provided her with the same documents he provided to the SEC. See Dunn Declaration ¶ 10-20.

Urbelis apparently discovered the document only after conducting a search of his home files at the request of the SEC, and he produced it on July 27 simultaneously to the SEC, the Trust's counsel and Lynn Smith's counsel. The SEC always had direct access to Urbelis, and never believed that he was represented by the Trust's counsel. Moreover, the SEC did not serve any discovery demands or subpoenas on Wojeski as the successor Trustee, on the Trust itself or on the Trust's counsel at any time prior to Urbelis' production to the SEC of the private annuity agreement on July 27. Even if the SEC was unaware of the existence of the annuity agreement, it did not seek any documents or information of any kind from the successor Trustee until September, and only after naming the successor Trustee directly in the Amended Complaint. The evidence is clear that the successor Trustee and the Trust's counsel were in no better position to discover

the annuity agreement than was the SEC¹ and any finding to the contrary is clearly erroneous.

Third, if not the annuity agreement itself, at least documents relating to it were in the possession of a financial group in Western New York, who produced them to David Smith on July 20, 2010. The Trust previously served a witness subpoena on David Smith to testify at the preliminary injunction hearing and was denied access to his testimony by virtue of his invocation of his Fifth Amendment right not to testify in the civil proceeding. This Court correctly declined to draw a negative inference against the Trust because the Trust was denied the ability to cross-examine David Smith about matters relating to the Trust. The successor Trustee and his counsel cannot be faulted for not obtaining documents and information from David Smith after having subpoenaed him to seek such documents and information and being denied that access.

The correct conclusion to be drawn from the evidence presented on the SEC's motion for reconsideration is that the successor Trustee, the Trust and the Trust's counsel exercised due diligence in attempting to obtain all documents relevant to the Trust and cannot be blamed for the prior Trustee's failure to produce this agreement sooner. Thomas Urbelis had already resigned as Trustee and his resignation was effective and binding by the time the SEC sent him a non-party witness subpoena on May 28, 2010. The Trust's counsel did not represent Urbelis and the SEC was never under the impression that Urbelis was represented by the Trust's counsel, as they freely communicated directly with him, which they could not have done if he was represented by counsel. The successor Trustee's counsel had sought all documents related to the

¹ The SEC was likely in a better position than the successor Trustee or his counsel, since it, unlike private attorneys, has nationwide subpoena power and substantial investigatory resources at its disposal. Additionally, it had access to the files seized pursuant to search warrant from the Smith's residence.

Trust from Urbelis and believed that all such documents had been produced. Urbelis produced the document in question to all counsel as soon as he located it, and his failure to produce it sooner is not the fault of the successor Trustee, the Trust or the Trust's counsel. The Trust had no ability to compel Urbelis to appear or produce documents and should not be held responsible for the incompleteness or timeliness of his production.

C. The Court Misapprehended the Effect of the Annuity Agreement

As demonstrated by the expert witness report submitted by David Evans, Esq., neither David Smith nor Lynn Smith have a property right in the assets of the Trust despite the existence of a separate, unsecured contractual agreement in the form of a private annuity. In the Reconsideration Decision, the Court did not rely on or cite to any evidence nor did it make any findings that the Smiths have the ability to pierce the irrevocability of this Trust. The SEC did not submit any evidence to contradict the Evans report, and the existence of the private annuity agreement should not have altered the Court's original decision to release the asset freeze as it relates to the Trust based on its finding that "the Trust benefits did not flow to David Smith and he did not exercise control over them such that he treated the corpus as his own."

Without modifying or making any new factual findings, the Court, in its Reconsideration Decision, summarily found that "the SEC has demonstrated a substantial likelihood of success that it will prove that David and Lynn Smith created the Trust and the Annuity Agreement together to avoid gift and capital gains taxes approaching 50% of the \$4.5 million value of the Trust assets, that David Smith maintained control of the investment of Trust assets after the Trust was created, and that he and his wife paid Trust taxes and the living expenses of a Trust beneficiary to insure that the annuity payments

required by the Annuity Agreement could be made beginning in 2015.” These findings are insufficient as a matter of law to support the reconsideration granted to the plaintiff.

The Court disregards as irrelevant the fact that David Smith, as a creditor or contract annuitant, does not have a present interest in the Trust, finding instead that his interest as a creditor by virtue of the Annuity Agreement gives him an equitable and beneficial interest in the Trust assets. This conclusion is contrary to law, however, because only the Trustee of an irrevocable trust holds title to the Trust assets. See Dkt No. 134-1 (Evans Report, § 14; citing EPTL § 7.2-1(a); Duvall v. English Evangelical Lutheran Church, 53 NY 500, 503 (1873); Buechel v. Bain, 275 AD2d 65, 72 (2000), *aff'd*, 97 NY2d 295 (2001)).

The determination that David Smith is not the beneficial owner of the Trust remains valid despite the existence of the Annuity Agreement. No evidence has been offered by the plaintiff to justify modifying the Court’s prior finding that the Trust was not a proper defendant or that it would be a proper relief defendant. Lynn and David Smith’s only interest, as potential, unsecured creditors of the Trust, can be addressed with an asset freeze limited to that future, unsecured interest. As creditors of the Trust, they have no ability to affect the assets of the trust or to control it in any way. The Trustee’s apparent contractual obligation under the Annuity Agreement is subordinate to his duty to manage to manage and grow the Trust assets through investments.

The Court’s previous finding that the SEC “failed to demonstrate that David Smith exercised considerable authority over [the Trust] to the point of completely disregarding its form and acting as though its assets [were] his alone to manage and

distribute” (citing In re: Vebeliunas, 332 F.3d at 92) should not have been disturbed, as no new evidence has been offered to show any breach of the integrity of the Trust.

CONCLUSION

For the foregoing reasons, the Trust respectfully requests that the Court grant this motion for reconsideration and correct the clearly erroneous factual findings on which its November 22, 2010 decision was predicated.

DATED: December 6, 2010

THE DUNN LAW FIRM PLLC

By: /s Jill A. Dunn
Jill A. Dunn
Bar Roll No. 506942
Attorneys for Trustee
David M. Wojeski
Office and Post Office Address
99 Pine Street, Suite 210
Albany, New York 12207
Telephone: (518) 694-8380
Facsimile:(518) 935-9353
E-Mail: jdunn708@nycap.rr.com