

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,

Defendants, and

LYNN A. SMITH,

Relief Defendant, and

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

Intervenor.

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

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the declaration of Robert H. Iseman, dated December 17, 2010 (together with all exhibits thereto), the Memorandum of Law, dated December 17, 2010, and all proceedings previously held herein, the undersigned, will move this Court at a motion term to be held before Honorable David R. Homer at the United States District Court for the Northern District of New York, James T. Foley U.S. Courthouse, 445 Broadway, Albany, New York, on **January 20, 2010 at 9:30 a.m.** (the "Return Date"), or as soon thereafter as counsel may be heard, for an Order:

- a) lifting the preliminary injunction put down in this case to the limited extent necessary to allow Mr. David Wojeski, as Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (the "Trust"), to pay as an administrative expense of the Trust the invoice for ICRH's services in connection with the November 16, 2010, evidentiary hearing in this case; and
- b) awarding such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to Rule 7.1(b)(1) of the Local Rules for the United States District Court for the Northern District of New York, movant demands that any opposing papers be served on the undersigned no later than seventeen (17) days prior to the Return Date of this motion.

DATED: December 17, 2010

ISEMAN, CUNNINGHAM, RIESTER & HYDE, LLP

By: s/ Robert H. Iseman
Robert H. Iseman (Bar Roll No. 103039)
ISEMAN, CUNNINGHAM, RIESTER
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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 David L. and Lynn A.
Smith Irrevocable Trust U/A 8/04/04,

Intervenor.

DECLARATION OF ROBERT H. ISEMAN

I, Robert H. Iseman, 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 brought by Iseman, Cunningham, Riester & Hyde, LLP ("ICRH"), for (i) a limited lifting of the preliminary injunction to allow Mr. David Wojeski, as Trustee, to pay as an administrative expense of the Trust the invoice for our firm's professional services and disbursements, a copy of which is attached to this Declaration as **Exhibit A** (in redacted form due to the privileged nature of the

itemized entries), and (ii) leave to file with the Court an unredacted version of Exhibit A for the Court's *in camera* review to protect the attorney-client privilege such review become necessary.

Prior Request

2. The relief requested in this motion was originally requested as a part of ICRH's motion to withdraw as counsel for the Trust, which was brought on November 29, 2010, pursuant to an proposed Order to Show Cause entered on November 30, 2010 (Docket No. 206). The Court struck from the proposed Order to Show Cause the relief requested in paragraph 1 of this Declaration and granted leave for a motion for such relief to be brought by separate motion on regular notice.

3. The Court granted ICRH's motion to withdraw as counsel to the Trust on December 15, 2010 (Docket No. 218), effective immediately (the "Withdrawal Date").

4. The fees sought in this motion include the services identified in the original proposed Order to Show Cause, plus the additional services provided to the Trust through the Withdrawal Date.

Background

5. Within weeks of the Court's decision of July 7, 2010, lifting a freeze on the Trust's assets, a dispute arose among Jill Dunn, Esq., David Stoelting, Esq., and Kevin McGrath, Esq., surrounding what, if anything, was said, by whom and to whom, during a July 22, 2010, telephone conversation about a private annuity agreement that was not before the Court when it reached its July 7 decision.

6. Following the July 22 telephone call, plaintiff filed with the Court a motion to reconsider its July 7 decision (Docket Nos. 103, 142), and counsel for the Trust and counsel for Lynn Smith filed papers in opposition (Docket Nos. 133-135, 147-149).

7. On October 7, 2010, the Court ordered the participants in the July 22 telephone call to appear and give testimony, subject to cross examination, at an evidentiary hearing, which was ultimately scheduled for November 16, 2010. The Court posited two questions for the hearing: The first pertained to the effectiveness of the private annuity agreement; the second pertained to the July 22 telephone call.

8. Ms. Dunn was both counsel to the Trust and a participant to the telephone call. The Witness Advocate Rule precluded her from acting as both a witness and an advocate. The same ethical proscription applied to Plaintiff. The problem was resolved by (i) the Trust retaining ICRH to appear as special counsel on behalf of the Trust at the evidentiary hearing, and (ii) Plaintiff stipulating that Messrs. Stoelting and McGrath would not function as advocates at the hearing.

ICRH's Role in Preparing For and Appearing At the Evidentiary Hearing

9. ICRH's involvement in this litigation was brief but intense. We were first contacted on November 1, 2010, approximately two weeks before the scheduled evidentiary hearing.

10. During a lengthy meeting on the evening of November 1, Jill Dunn, counsel to the Trust, provided an overview of the case and copies of a number of papers from the docket. She informed us that (i) she was leaving the next day for a previously scheduled vacation, and that she would be out of the country from approximately November 3, 2010, through approximately November 10, 2010, and (ii) discovery demands were outstanding, to which she had interposed timely objections.

11. On November 2, 2010, counsel to the Trust notified plaintiff that she had collected responsive documents for production pending resolution of her objections. At that

time, it was not clear to us whether or not the documents in Ms. Dunn's possession would need to be produced in advance of the November 16 evidentiary hearing.

12. On November 3, 2010, we delivered to the trustee, David Wojeski, our proposed retainer agreement, and we were formally retained on November 5, 2010. We filed our Notice of Appearance as Special Counsel on November 8, 2010 (Docket No. 174).

13. During the week of November 8, 2010, it became apparent that significant unplanned preparations would be required for a responsible appearance at the evidentiary hearing. The two-week timeframe required several attorneys more-or-less to clear their calendars and work schedules. Had additional time been available, the engagement might have been staffed by fewer attorneys, but in any event, given the history of this litigation and the state of the record we found, it is clear that significant issues needed to be carefully evaluated and addressed in advance of the evidentiary hearing – no matter what the timeframe might have been.

14. ICRH was required to play a substantive role in researching the status of the Trust and the private annuity agreement, conferring and/or negotiating with Plaintiff and other parties, and counseling the trustee on the advisability of stipulating on the authenticity and effectiveness of the private annuity agreement.

15. To allow us to understand the tax and state-law substantive issues surrounding the trust and the private annuity agreement, Richard Frankel of our firm, who regularly practices in the area of trusts and estates, was required to study the expert opinion of the Trust's expert, David L. Evans, and independently research the Internal Revenue Code, a number of state statutes, and state and federal common law. Mr. Frankel's counsel was needed to advise the Trust on whether to enter into the stipulation concerning issue number one in the Court's October 7 order.

16. During our preparations and our continued interviews of the trustee during the week of November 8, we discovered issues surrounding certain statements that previously had been entered in the record by the Trust's counsel before we were retained. To get to the bottom of the matter and to allow us to function properly at the evidentiary hearing, we had to conduct an unusually detailed review of the various lengthy transcripts, affidavits, and declarations that had been filed in this action, with careful attention to a complicated timeline of events. We also needed to meet with counsel to the Trust upon her return from vacation beginning on November 11 for several sessions to confirm our understanding of certain events. We thereafter mutually agreed that the record must be corrected.

17. In addition to the above, we discovered the existence of documents which needed to be produced before the hearing could proceed, which required that we (i) perform a *de novo* review of documents, (ii) participate in additional meetings and preparation sessions, (iii) prepare appropriate redactions to partially privileged documents and a privilege log, and (iv) participate in a telephonic conference with the Court to obtain certain discovery rulings, all under considerable time pressure.

18. Given the weighty nature of the issues we encountered, the public policy considerations presented in this case, the need to defend our client zealously, and our responsibility to fulfill our duties as officers of the Court, we believe the fees and disbursements set forth in our invoice are reasonable and appropriate.

**The Trust's Organizational Documents Allow the Trustee to Pay Legal Fees
And Other Administrative Expenses Associated with Managing the Trust**

19. Article SIXTH of the Trust (attached to this Declaration as **Exhibit B**) authorizes the Trustee to "[w]ithout limitation of the powers conferred by statute or general rules of law, the Trustee is specifically authorized and empowered with respect to any property held by them

(6) To employ such attorneys, . . . as the Trustee may deem advisable in the administration of any trust hereunder, and to pay them such compensation as the Trustee may deem proper, without any diminution of or offset against the commissions to which the Trustee shall be entitled by law”

20. This power is consistent with New York Estates, Powers, and Trusts Law Section 11-1.1(b)(22), which provides “[i]n addition to those expenses specifically provided for in this paragraph, [the trustee is authorized] to pay all other reasonable and proper expenses of administration from the property of the estate or trust, including the reasonable expense of obtaining and continuing his bond and any reasonable counsel fees he may necessarily incur.”

21. The Trust is to be construed and regulated by the law of New York. Trust Article TWELTH.

22. Until the issues in this litigation are resolved, the interests of all parties are served by allowing the trustee to pay administrative expenses, such taxes, property management fees, legal fees, and professional services of the trustee. Our legal fees are such a necessary and appropriate legal expense.

Conclusion

23. I respectfully request that the Court grant the relief sought in this motion.

DATED: December 17, 2010

s/Robert H. Iseman

Robert H. Iseman (Bar Roll No. 103039)
ISEMAN, CUNNINGHAM, RIESTER
& HYDE, LLP
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Email: riseman@icrh.com

EXHIBIT A

I SEMAN, CUNNINGHAM, RIESTER & HYDE, LLP

9 Thurlow Terrace
Albany, NY 12203
518-462-3000

Tax Identification No.: 14-1740336

David L. & Lynn A. Smith Irrevocable Trust
c/o Wojeski & Company CPAs, P.C.
75 Troy Road
East Greenbush, NY 12061

Statement Date: December 16, 2010
Statement No. 100396
Account No. 2577.0000

Page: 1

Attn: David M. Wojeski, CPA

Re: SEC v. McGinn Smith & Co., Inc.

FOR LEGAL SERVICES rendered through 12/16/2010 as follows:

		Hours	
11/01/2010	RHI	4.75	
	RHI	0.50	
11/02/2010	RAF	4.40	
	RHI	3.00	
	RHI	0.10	
	RHI	0.10	
	JPL	0.50	0.010
	JPL	0.70	0.000
	JPL	0.80	0.000
	JPL	1.00	
11/03/2010	RAF	6.50	
	RHI	3.75	
	JPL	3.30	
	JPL	1.00	
11/04/2010	RAF	1.40	
	RHI	2.30	
	BMC	0.60	
	JPL	5.10	
11/05/2010	RAF	6.00	
	JPL	0.60	

David L. & Lynn A. Smith Irrevocable Tru
 Account No. 2577.0000
 Re: SEC v. McGinn Smith & Co., Inc.

Statement Date: 12/16/2010
 Statement No. 100396
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		Hours
	JPL	1.30
	JPL	0.40
11/07/2010	RAF	0.20
	JPL	1.00
11/08/2010	RAF	1.20
	RAF	3.80
	RAF	1.50
	RAF	1.50
	RHI	2.50
	RHI	0.30
	BMC	0.60
	JPL	1.00
	JPL	1.00
	JPL	1.00
	JPL	1.50
		5.90
	MKL	1.00
	MKL	1.00
11/09/2010	JPL	0.20
	JPL	1.70
	JPL	1.00
	JPL	2.40
	JPL	0.50
	JPL	1.20
	RAF	5.00
11/10/2010	JPL	2.30
	JPL	2.00
	JPL	1.50
	RAF	6.25
	RHI	1.60
11/11/2010	JPL	3.90
	JPL	0.60
	JPL	2.30
	JPL	1.40
	JPL	0.80
	JPL	2.00
	RAF	7.50

David L. & Lynn A. Smith Irrevocable Tru
 Account No. 2577.0000
 Re: SEC v. McGinn Smith & Co., Inc.

Statement Date: 12/16/2010
 Statement No. 100396
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		Hours
	RHI	9.00
11/12/2010	RAF	
	LKC	0.30
	JPL	2.90
	JPL	0.40
	JPL	2.50
	JPL	0.40
	JPL	2.90
	JPL	
	JPL	1.40
	JPL	2.00
	RHI	
		3.25
	MKL	4.70
	MKL	1.00
	MAA	
		2.20
11/13/2010	JPL	1.60
	JPL	4.00
	JPL	0.80
	RHI	
		6.00
11/14/2010	JPL	1.80
11/15/2010	JPL	1.00
	JPL	0.60
	JPL	3.80
	JPL	0.30
	JPL	0.30
	JPL	0.20
	JPL	2.80
	JPL	0.90
	RAF	0.10
	RHI	
		6.30
11/16/2010	RHI	
		4.50
	RAF	
		0.10
	JPL	1.00
	JPL	3.90
	JPL	0.30

David L. & Lynn A. Smith Irrevocable Tru
 Account No. 2577.0000
 Re: SEC v. McGinn Smith & Co., Inc.

Statement Date: 12/16/2010
 Statement No. 100396
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		Hours	
	JPL	0.50	
11/17/2010	RHI	0.60	
	RHI	1.00	n/c
	JPL	2.70	
	JPL	0.40	
11/18/2010	JPL	0.50	
11/22/2010	RAF		
		1.70	
	JPL	3.60	
	RHI	1.75	
11/23/2010	RAF		
		3.00	
	JPL	3.00	
	RHI	0.60	
11/24/2010	JPL		
		2.75	
	RAF	3.00	
11/28/2010	JPL	1.40	
	JPL	1.50	
11/29/2010	RAF		
		0.10	
	RAF	0.10	
	RAF		
		0.70	
	JPL	3.60	
	JPL	0.80	
	JPL	0.30	
11/30/2010	JPL	0.80	
	JPL	0.20	
	JPL	0.80	
12/01/2010	JPL		
		1.10	
	JPL	0.40	
12/02/2010	JPL	0.60	
	JPL	0.20	
12/06/2010	JPL	0.30	
	JPL		
		0.60	
12/07/2010	JPL	0.50	

David L. & Lynn A. Smith Irrevocable Tru
 Account No. 2577.0000
 Re: SEC v. McGinn Smith & Co., Inc.

Statement Date: 12/16/2010
 Statement No. 100396
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		Hours		
12/09/2010	JPL	0.20		
12/13/2010	JPL	0.20		
12/14/2010	JPL	0.20		
12/15/2010	JPL	0.30		
	JPL	0.30		
		229.80	82,709.25	
		1.00		

Time Summary

<u>Timekeeper</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
(RHI) Robert H. Iseman, Esq.	50.90	\$500.00	\$25,450.00
(BMC) Brian M. Culnan, Esq.	1.20	275.00	330.00
(RAF) Richard A. Frankel, Esq.	54.35	350.00	19,022.50
(JPL) James P. Lagios, Esq.	110.55	325.00	35,928.75
(LKC) Laurie K. Chisolm, Esq.	2.90	225.00	652.50
(MAA) Marc A. Antonucci, Esq.	2.20	200.00	440.00
(MKL) Meghan Lohman (Paralegal)	7.70	115.00	885.50

Disbursements

11/29/2010		7.00
11/29/2010		177.29
11/29/2010		493.20
11/29/2010		135.04
12/10/2010		1.77
12/16/2010		104.50
		918.80

Total fees/disp on this invoice 83,628.05

Balance Due (including any previous balance) \$83,628.05

This invoice is payable upon receipt.
 A late fee is added to balances unpaid 30 days after invoice date at rate of
 1.0% (12% APR).

This invoice contains information that is confidential and privileged attorney-client communication and is solely for the use of the addressee. This document should not be disclosed to any other person.

EXHIBIT B

DECLARATION OF TRUST

THIS INDENTURE is made the 4th day of AUGUST, 2004, between David L. Smith and Lynn A. Smith, residing at 2 Rolling Brook Drive, Saratoga Springs, New York 12866, (herein called the "Donors"), and Thomas Urbelis, with offices at 6 Eastman Road, Andover, Massachusetts 01810-4009 (the "Trustee") and shall be known as the **DAVID A. & LYNN A. SMITH IRREVOCABLE TRUST U/A DATED AUGUST 4, 2004.**

WITNESSETH:

The Donors hereby transfer and deliver unto the Trustee the property described in Schedule A, attached hereto, the receipt of which is hereby acknowledged by the Trustee. The Donors have two (2) children, Geoffrey R. Smith and Lauren T. Smith. This Trust is created for the benefit of the Donors' children and their issue.

TO HAVE AND TO HOLD such property unto the Trustee, **IN TRUST, NEVERTHELESS**, as follows:

FIRST: During the lives of the Donors, the Trustee shall manage, invest and reinvest the trust estate to satisfy all obligations of the Trust and the Trust shall be divided and managed in two (2) separate and equal shares for each child and any issue of such child (the "Beneficiaries") and collect the income thereof and, until the death of the second Donor to die, shall distribute so much of the net income and principal as the Trustee shall determine in his discretion to provide for the education, health, support and maintenance of the Beneficiaries from the each child's respective trust share, taking into account any other resources of the Beneficiaries and the tax status of each Beneficiary. Consistent with these provisions the Trustee shall have the power (i) to sprinkle the current income and/or the principal to one or more Beneficiaries, from each such Beneficiary's respective share, as the Trustee shall deem necessary to provide for the education, health, support and maintenance of each Beneficiary and (ii) in each tax year to make the trust either a "simple" trust or "complex" trust under applicable federal and state tax laws.

During the lives of the Donors, the Trustee is authorized, in his discretion, at any time to terminate each trust share and thereupon to pay over and distribute the principal thereof, and any income then accrued or held, to each child, or if such child is predeceased, to the issue of such child in equal shares, and if there are no issue, then to other child, and if such other child is predeceased, then to the issue of such other child in equal shares, although it is the Donor's desire this trust be administered as herein provided.

If in any year a contribution is made to the trust estate by the Donors, the Trustee shall promptly notify each of the Beneficiaries, or, if any such person shall be a minor, his or her parent or guardian other than the Donors, of such contribution, and each such beneficiary, or such parent or guardian acting on a Beneficiary's behalf during such Beneficiary's minority, shall have the right at any time within thirty (30) days of receipt of such notice to withdraw from the trust estate an amount not in excess of the lesser of the following: (i) such Beneficiary's pro rata share of the amount of such contribution and (ii) the annual exclusion available to the Donors for United States Federal gift tax purposes with respect to the Beneficiary's pro rata share of such contribution, after taking into account any other gifts made by the Donors to such person in that year. In satisfaction of such right of withdrawal, the Trustee may distribute to a Beneficiary any asset held in the trust estate (including any insurance policies or any interests in such policies or borrow against such policies), valued as of

the date of withdrawal. Such right of withdrawal shall not be cumulative with respect to any prior contributions made to the trust and, if such right of withdrawal is not exercised within such thirty (30) day period, it shall lapse, provided that the amount with respect to which the right of withdrawal shall lapse for any Beneficiary in any year shall not exceed the maximum annual amount with respect to which a power of appointment may lapse and not be considered a release of such power for United States Federal gift tax purposes under Section 2514 of the Internal Revenue Code of 1986, or any provision successor thereto, as in effect for that year (hereinafter, the "maximum lapse amount"), and if any Beneficiary has a right of withdrawal in any year which shall exceed the maximum lapse amount, the power for the beneficiary for that year shall lapse only to the extent of the maximum lapse amount, and any excess withdrawal right shall continue to be exercisable by the Beneficiary, but shall lapse, in the next succeeding year, or years, to the extent of the maximum lapse amount for such year, on the second day of such year. The right of withdrawal hereunder shall be exercised by written notice delivered to the Trustee. The Donors may instruct the Trustee that any Beneficiary shall not have a withdrawal right as described in this article with respect to any contribution during the calendar year, and to disregard a demand by any Beneficiary with respect to any contribution made by the Donors. Each right of withdrawal granted hereunder is personal to the person holding such right and shall expire if he or she dies, is adjudicated bankrupt, shall take advantage of any of the provisions of the bankruptcy act or of any federal or state statute relating to insolvency, shall make an assignment for the benefit of his or her creditors, or shall be adjudicated an incompetent.

SECOND: Upon the death of the second Donor to die, the Trustee shall collect, as principal of the trust estate, the net proceeds of any insurance policies then included in the trust estate and payable to the Trustee, or any other benefits or proceeds payable to the Trustee as beneficiaries, after deduction of all charges against such policies or benefits by way of advances, loans, premiums or otherwise, and any amounts so collected shall be divided equally and added to each share for each child of the Donors. The Trustee may use any part of the income or principal of the trust estate to meet expenses incurred in collecting any such proceeds or benefits. If, however, the Trustee in their discretion shall determine that the income and principal on hand in the trust estate may not be sufficient to meet any expenses and obligations to which the Trustee may be subjected in any litigation to enforce payment of any insurance policy, benefits or proceeds then included in the trust estate, then the Trustee shall not be required to enter into or maintain any litigation to enforce payment of any such amounts until he shall have been indemnified to his satisfaction against all such expenses and obligations. The Trustee is authorized to compromise and adjust any such claims, upon such terms and conditions as they may deem advisable, and the decision of the Trustees in this respect shall be binding and conclusive upon all persons then or thereafter interested in the trust estate.

THIRD: Upon the death of the second Donor to die, the Trustee shall administer and distribute the each trust share hereunder, including the remaining principal of the such trust share, and any income, to the child for whom such trust share is held, of if such child is predeceased, to the issue of such child in equal shares, and if there are no issue, then to other child, and if such other child is predeceased, then to the issue of such other child in equal shares.

FOURTH: If any person whose life measures the duration of a trust hereunder and any remainderman of such trust shall die under such circumstances that there is reasonable doubt as to who died first, then such person whose life measures the duration of such trust shall be conclusively

deemed to have survived such remainderman for the purposes of all provisions of this Indenture.

FIFTH: If any principal or income of any trust created hereunder shall become payable to or be set apart to be distributed to a minor, the Trustee shall have absolute discretion either to pay over such principal or income at any time to the guardian of the property of such minor appointed in any jurisdiction, or to any custodian for such minor under the Uniform Transfers to Minors Act of any state (including the Trustee or a custodian designated by the Trustee) or to retain the same for such minor during minority. In paying over any property to a custodian, the Trustee may direct that the property be retained until the beneficiary reaches the age of twenty-one. In case of retention, the Trustee may apply such principal or income, and any income therefrom, to the support, maintenance, education or other benefit of such minor, irrespective of the other resources of such minor or of his or her parents or guardians. Any such application may be made either directly or by payments to such guardian of the property or parent of such minor or to the person with whom such minor may reside, in any case without requiring any bond, and the receipt of any such person shall be a complete discharge to the Trustee, who shall not be bound to see to the application of any such payment. In holding any property for any minor, the Trustees shall have all the powers and discretion hereinafter conferred.

SIXTH: Without limitation of the powers conferred by statute or general rules of law, the Trustee is specifically authorized and empowered with respect to any property held by them:

- (1) To retain any property transferred to any trust hereunder, as long as the Trustee in his absolute discretion shall deem it advisable to do so;
- (2) To invest any funds in any stocks, bonds, limited partnership interests or other securities or property, real or personal (including any securities of or issued by any corporate trustee or investment in any common or commingled fund or funds maintained by any corporate trustee), notwithstanding that such investments may not be of the character allowed to trustees by statute or general rules of law, and without any duty to diversify investments, the intention hereof being to give the broadest investment powers and discretion to the Trustees;
- (3) To sell (at public or private sale, without application to any court) or otherwise dispose of any property, whether real or personal, for cash or on credit, in such manner and on such terms and conditions as the Trustee may deem best, and no person dealing with the Trustee shall be bound to see to the application of any moneys paid;
- (4) To manage, operate, repair, improve, mortgage and lease for any period (whether expiring before or after the termination of any trust created hereunder) any real estate;
- (5) Except to the extent prohibited by law, to cause any securities to be registered in the names of the Trustee's nominees, or to hold any securities in such condition that the Trustee will pass by delivery;
- (6) To employ such attorneys, accountants, custodians, investment counsel, real estate consultants and other persons as the Trustee may deem advisable in the administration

of any trust hereunder, and to pay them such compensation as the Trustee may deem proper, without any diminution of or offset against the commissions to which the Trustee shall be entitled by law;

(7) To maintain margin accounts with one or more individuals, partnerships, associations, banks or other corporations on such terms and conditions as the Trustee in his discretion shall determine, and to conduct such transactions in such accounts as he shall so determine, and to pledge all or any portion of any trust hereunder as security for the payment of the respective debit balances in such accounts;

(8) To engage in any arbitrage transactions and transactions involving short sales, and to buy or sell or write options for the purchase or sale of securities or other property (commonly known as puts and calls), whether covered or uncovered;

(9) To use any securities or brokerage firm in the purchase or sale of stocks, bonds or other securities or property for the account of any trust hereunder and to pay such firm such brokerage commissions or other compensation in connection therewith as the Trustees may deem proper, notwithstanding that the Trustee may be members of, or otherwise connected with, such firm, and without diminution of or offset against the commissions to which the Trustee may be entitled by law;

(10) To purchase property from the Donors in exchange for a private annuity payable to the Donors;

(11) To distribute any income or principal of any trust hereunder in cash or in kind and, if in kind, in a fashion other than pro rata, having regard in such event to the characteristics, including tax characteristics, of the property being distributed and to income, needs and tax status of the recipient;

(12) To borrow such amounts, from such persons (including the Trustee or any beneficiary of any trust hereunder) and for such purposes as the Trustee may deem advisable and to pledge any assets of any trust hereunder to secure the repayment of any amounts so borrowed;

(13) To lend such amounts, to such persons, for such purposes and upon such terms (whether secured or unsecured) as the Trustee may deem advisable;

(14) In general, to exercise all powers in the management of the trust estate which any individual could exercise in the management of property owned in his own right.

SEVENTH: Any trust estate held hereunder may be increased from time to time by the addition of such property as may be added to it by the Donors or by any other person with the consent of the Trustee.

EIGHTH: The Trustee is empowered to pay any taxes which may become payable from time to time with respect to the trust estate, or any transfer thereof or transaction affecting the same,

under the laws of any jurisdiction which the Trustee is advised may validly tax the same.

NINTH: (A) If the Trustee hereunder shall die or is unable or unwilling to act as trustee, then the Donors may appoint a Trustee, independent of the Donors. Any such appointment so made may be revoked by the maker thereof, by written instrument, duly executed and acknowledged, at any time prior to the happening of the event upon which it is to become effective, and a new appointment may be made as above provided. Upon the happening of the event upon which such appointment is to take effect and upon qualifying as hereinafter provided any successor Trustee so appointed shall become a Trustee hereunder, as though originally named herein.

(B) Any Trustee acting hereunder may resign and be discharged from any trust created hereunder by giving, personally or by mail, written notice of resignation, duly acknowledged, to the Donors, or if they shall not then be living, to the remaindermen of such trust (or if any income beneficiary shall be a minor, to either of his or her parents or to the guardian of his or her property). Such notice shall specify the date when such resignation shall take effect, which date (except as the persons entitled to such notice shall otherwise consent) shall be at least thirty days after the service or mailing thereof.

(C) In case any Trustee at any time acting hereunder for any reason shall cease to act, the retiring Trustee or his or her personal representative, as the case may be, shall upon the effective date of his or her resignation or upon his or her death turn over the trust estate or any portion of it under his or her control to the Trustee who shall thereafter be acting hereunder, and shall execute and deliver all instruments which may be deemed necessary more effectively to vest title in such Trustee.

(D) Any successor Trustee appointed as above provided and then entitled to act shall qualify as such by delivering or mailing written acceptance of such trust, duly acknowledged, to any other Trustee then acting hereunder and to the income beneficiaries or, if any be minors, to their parent or the adult with whom they reside.

(E) The Trustee shall have sole authority to make decisions required or authorized by this Identure. Either Geoffrey R. Smith or Lauren T. Smith shall serve as co-trustee for the limited and express purpose of executing such documents or instruments to fulfill decisions and actions taken by the Trustee, in the absence of the Trustee to execute any such document or instrument.

TENTH: The Trustee at any time acting hereunder at any time may render an account of their proceedings to the income beneficiary of any trust during the accounting period (or, if such person shall have died during or after the accounting period, to his or her personal representative); provided, however, that if any person to whom an account would be so rendered shall be a minor, such account instead may be rendered to either of such minor's parents other than an accounting Trustee or the guardian of his or her property. If approved in writing by the parties to whom such account shall have been rendered as above provided, such account shall be final, binding and conclusive upon all persons who may then or thereafter have any interest in the trust estate. The Trustee also at any time may render a judicial account of his proceedings.

In an accounting or other proceeding in which all persons interested in any trust hereunder are required by law to be served with process, if a party to the proceeding has the same or a similar interest as a person under a disability, it shall not be necessary to serve process upon the person under a disability, it being the Donors' intention to avoid the appointment of a guardian ad litem wherever possible.

ELEVENTH: Except as otherwise expressly provided herein, all estates, powers, trusts, duties and discretion herein created or conferred upon the Trustee shall extend to any Trustee who at any time may be acting hereunder, whether or not named herein.

No bond or other security shall be required of any trustee hereunder in any jurisdiction.

TWELTH: This Declaration and the trust(s) created hereunder shall be irrevocable, shall take effect upon acceptance by the Trustee and in all respects shall be construed and regulated by law of the State of New York. No beneficial interest under this trust, whether income or principal, is subject to anticipation, assignment, pledge, sale, or transfer in any manner, and no beneficiary may anticipate, encumber, or charge such interest. Each beneficiary's interest, while in the possession of the Trustees will not be liable for or subject to the debts, contracts, obligations, liabilities, accounts and/or creditors of any beneficiary.

THIRTEENTH. (A) This article states the Donors' tax purposes in creating this trust, and all provisions of this trust shall be construed so as best to effect these purposes and to the extent required, the Trust shall be reformed to effect these overriding tax purposes and no Trustee shall exercise any discretion in a manner that may reasonably be expected to frustrate the accomplishment of any of these purposes:

(1) All gifts made to this trust shall be complete gifts of present interests for federal gift tax purposes.

(2) The assets of this trust shall be excluded from the Donors' gross estates for federal estate tax purposes.

(3) This trust shall be a separate taxpayer for federal income tax purposes. At no time shall this trust be deemed to be owned by the Donors for federal income tax purposes.

(B) The Trustee is authorized to grant to, or, if granted, to take away from, a Beneficiary by an instrument in writing, signed and delivered to the Beneficiary, the power to appoint, by will admitted to probate, any part or all of the principal of a trust share held for such Beneficiary. This power of appointment, if granted, shall be exercisable only by a specific reference thereto in the Beneficiary's will and shall not be deemed to have been exercised by any general residuary article contained therein.

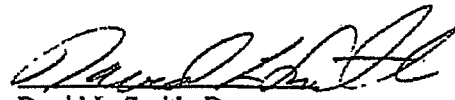
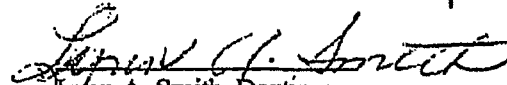
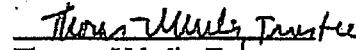
(C) The Trustee may exercise the authority granted to them hereunder for any reason whatsoever, whether to take advantage of any generation-skipping transfer exemption under Chapter 13 of the Internal Revenue Code, to reduce the overall transfer taxes payable upon a distribution or the death of a Beneficiary or for any other reason.

(D) Upon the death of any Beneficiary hereunder, if any estate, transfer, succession or other inheritance taxes, and any interest and penalties thereon, are imposed on such Beneficiary's estate by reason of the fact that any portion of the property held by the Trustee in trust hereunder is included in such Beneficiary's estate for Federal estate tax purposes and if no direction is made in such Beneficiary's will by specific reference to such trust concerning the payment of such taxes, and any interest and penalties thereon, then the Trustee shall pay from the principal of such trust an amount equal to such taxes, interest and penalties imposed by the United States or any state or subdivision thereof, so that such Beneficiary's estate shall not be required to bear any larger amount of estate, transfer, succession or inheritance taxes, and any interest and penalties thereon, than it would have had to pay if the property held in such trust were not included in such Beneficiary's estate.

IN WITNESS WHEREOF, the parties hereto have duly executed this instrument under seal as of the day and year first above written.



DANIEL S. BLAKE
NOTARY PUBLIC - STATE OF NY
QUALIFIED IN ERIE CO.
MY COMMISSION EXPIRES 9-5-2005

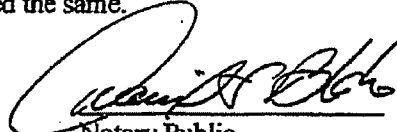

David L. Smith, Donor
Lynn A. Smith, Donor
Thomas Urbelis, Trustee

STATE OF NEW YORK)
 :
COUNTY OF ERIE)

SS:

DANIEL S. BLAKE
NOTARY PUBLIC - STATE OF NY
QUALIFIED IN ERIE CO.
MY COMMISSION EXPIRES 9-5- 2005

On this 4th day of August, 2004, before me personally came David A. 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)
 :
COUNTY OF ERIE)

SS:

DANIEL S. BLAKE
NOTARY PUBLIC - STATE OF NY
QUALIFIED IN ERIE CO.
MY COMMISSION EXPIRES 9-5- 2005

On this 4 day of August, 2004, 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

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

On this 9th day of August, 2004, before me, the undersigned notary public, personally appeared Thomas J. Urbelis, proved to me through satisfactory evidence of identification, which is personal knowledge, to be the person whose name is signed on the preceding or attached document, and acknowledged that he signed it voluntarily for its stated purpose.



Lori Ann Durrane Hawe/Notary Public

My Commission Expires:



LORI ANN DURANNE HAWE
Notary Public
Commonwealth of Massachusetts
My Commission Expires
October 10, 2008


TRUSTEE APPOINTMENT

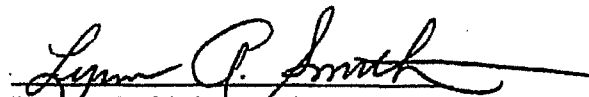
The following are additional instructions to be applied to the Declaration of Trust made on the 4th day of August, 2004, by and between David L. Smith and Lynn A. Smith (the "Donors") and Thomas Urbelis (the "Trustee"), which created the **DAVID A. & LYNN A. SMITH IRREVOCABLE TRUST U/A DATED AUGUST 4, 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.

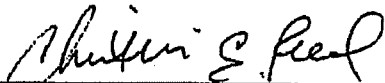
IN WITNESS WHEREOF we have hereunto duly executed this instrument under seal this 17th day of May 2010.


David L. Smith, Donor

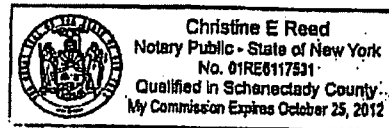

Lynn A. Smith, Donor

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.

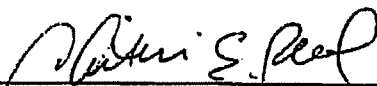


Notary Public

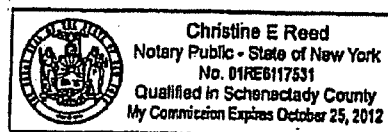


STATE OF NEW YORK)
 ss.:)
COUNTY OF ALBANY)

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



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,

Defendants, and

LYNN A. SMITH,

Relief Defendant, and

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

Intervenor.

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

MEMORANDUM OF LAW

ISEMAN, CUNNINGHAM, RIESTER
& HYDE, LLP
Richard A. Frankel (Bar Roll No. 103734)
9 Thurlow Terrace
Albany, New York 12203
T: (518) 462-3000
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Email: rfrankel@icrh.com

This Memorandum of Law is respectfully submitted in support of a motion brought by Iseman, Cunningham, Riestler & Hyde, LLP ("ICRH") for relief from the preliminary injunction issued in this action to allow Mr. David Wojeski, as Trustee of the David A. & Lynn A. Smith Irrevocable Trust U/A dated August 4, 2004 ("Trust"), to pay on behalf of the Trust the invoice of our firm's services as an administrative expense of the Trust.

Factual Background.

As the Court is aware, a dispute arose in this action among Jill Dunn, Esq., an attorney for the Trust, and David Stoetling, Esq., and Kevin McGrath, Esq., attorneys for the Plaintiff, surrounding what was said and to whom during a July 22, 2010, telephone conversation. On October 7, 2010, the Court ordered the participants to the July 22 telephone call to appear and give testimony subject to cross examination at an evidentiary hearing, which was ultimately held on November 16, 2010.

Given that Ms. Dunn was both counsel to the Trust and a participant to the July 22 telephone call, and therefore a witness at the evidentiary hearing, issues arose under the Witness Advocate Rule, which were resolved by (i) the Trust retaining ICRH to appear as special counsel on behalf of the Trust to appear at the evidentiary hearing, and (ii) Plaintiff stipulating that Messrs. Stoetling and McGrath would not function as advocates at the hearing.

ICRH was first contacted in connection with this engagement by counsel to the Trust and counsel to Ms. Lynn Smith on November 1, 2010, approximately two weeks before the evidentiary hearing was scheduled to take place.

Upon being retained, it became quickly apparent that significant preparation would be required for the evidentiary hearing as described in the Declaration of Robert H. Iseman, Esq. filed in support of this application ("Iseman Declaration"). ICRH appeared as special counsel to

the Trust at the November 16, 2010 evidentiary hearing and has now concluded its engagement and seeks payment of its legal fees.

POINT I

**THE TRUSTEE PROPERLY INCURRED AN EXPENSE OF THE TRUST IN
RETAINING ATTORNEYS TO DEFEND IT AND PROTECT ITS RIGHTS IN THE
WITHIN PROCEEDING.**

Article SIXTH of the Trust (attached to the Iseman Declaration as Exhibit B) provides, in part, that “[w]ithout limitation of the powers conferred by statute or general rules of law, the Trustee is specifically authorized and empowered with respect to any property held by them (6) To employ such attorneys, . . . as the Trustee may deem advisable in the administration of any trust hereunder, and to pay them such compensation as the Trustee may deem proper, without any diminution of or offset against the commissions to which the Trustee shall be entitled by law”

This power is consistent with New York Estates, Powers, and Trusts Law Section 11-1.1(b) (22) which authorizes a trustee “[i]n addition to those expenses specifically provided for in this paragraph, to pay all other reasonable and proper expenses of administration from the property of the estate or trust, including the reasonable expense of obtaining and continuing his bond and any reasonable counsel fees he may necessarily incur.” The Trust by its own terms states that it is to be construed and regulated by the law of New York. See Trust Article TWELTH.

More to the point, the “trustee can properly incur expenses for reasonable counsel fees and other costs in bringing, defending, or settling litigation as appropriate to proper administration or performance of the trustee's duties. . . . The right of indemnification applies even though the trustee is unsuccessful in the action, as long as the trustee's conduct was not imprudent or otherwise in violation of a fiduciary duty.” Restatement of the Law, Third, Trusts 2007, § 88, cmt. d. While the Restatement points out that “[m]ore complicated issues are

presented by costs incurred by trustees in controversies . . . Ultimately, however, the matter of the trustee's indemnification is within the discretion of the trial court. . . .” Id.

It cannot be disputed that the Trust required representation in the dispute that arose between its counsel, Ms. Dunn, and counsel for the Plaintiff. Due to the fact that Ms. Dunn was both counsel to the Trust and a witness at a Court ordered hearing, issues arose under the Witness Advocate Rule. Regardless of the Court’s holding concerning testimony of the Trustee, and the ultimate disposition of the evidentiary hearing, the Trustee was duty bound to seek appropriate legal representation for the Trust to preserve and defend the Trust assets. Accordingly, the Trustee was in his rights as a Trustee to engage counsel and to pay them. But for the Court’s injunction the Trustee would have paid these fees. Since a “trustee can properly incur reasonable expenses in employing lawyers, . . . so far as such employment is appropriate to the sound administration of the trust” (Restatement of the Law, Third, Trusts 2007, § 88, cmt c), it is respectfully requested that the Court lift the preliminary injunction and allow the Trustee to pay the ICRH invoice.

CONCLUSION

It is respectfully submitted that the Court grant the relief requested in this motion.

DATED: December 17, 2010

s/Richard A. Frankel

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