

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.

**AFFIDAVIT OF DAVID M. WOJESKI
IN SUPPORT OF MOTION TO INTERVENE**

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

DAVID M. WOJESKI, CPA, being duly sworn, deposes and says:

1. I am a registered Certified Public Accountant in the State of New York and am the founder and Managing Director of the accounting firm Wojeski & Company, CPAs, P.C. I am the duly appointed Trustee of the David L. and Lynn A. Smith Irrevocable Trust, and am the proposed Intervenor in this action. I make this affidavit upon information and

belief, and my information and belief is based upon my review of the Declaration of Trust dated August 4, 2004, copies of the trust's tax returns from 2004 to 2008, copies of the trust's brokerage statements from September 2004 to April 2010, and a general knowledge of investment transactions, estate planning laws, methods of trust creation, particularly as they relate to generally accepted principles of accounting.

2. I respectfully move this Court to issue an order permitting me to intervene in this action as of right for the limited purpose of (a) asking this Court to lift the temporary restraining order and asset freeze as it relates to the David L. and Lynn A. Smith Irrevocable Trust U/A August 4, 2004 brokerage account held at NFS/Fidelity, as listed on page 5 of Exhibit B of the Temporary Restraining Order issued by the Court on April 20, 2010; (b) opposing the Plaintiff's request for a preliminary injunction, solely as it relates to the same account; and (c) taking any other action necessary in this litigation to protect the interests of this trust and to fulfill my duties as its Trustee.
3. I make this motion pursuant to Federal Rules of Civil Procedure 24 on the grounds that, as the Trustee of this Irrevocable Trust, I am charged with the fiduciary duty of managing and protecting the trust's assets and carrying out the directives contained in the Declaration of Trust which was entered into on August 4, 2004. A copy of the Declaration of Trust entered into on August 4, 2004, along with the Trustee Appointment nominating me as successor trustee, is attached hereto as Exhibit A. I reviewed this Declaration of Trust prior to accepting my appointment as successor trustee, and have since reviewed the trust's tax returns and its brokerage account statements. Based on more than 20 years experience as a Certified Public Accountant, including in estate planning and trust creation, it is my opinion that this Declaration of Trust is an estate

planning devise and is a textbook example of an irrevocable trust formed under agreement between the Donors and the initial trustee on August 4, 2004.

4. The Temporary Restraining Order issued on April 20, 2010 froze the trust's stock account at NFS/Fidelity, which is the only asset of this trust. By freezing the trust's only asset, particularly without notice, the Court has prohibited any stock trades, transfers or other management decisions necessary to preserve the trust assets and protect the interests of the beneficiaries of this irrevocable trust. Given the ongoing volatility of the stock market, the continuation of a restraining order against the trust's account will irreparably imperil the corpus of the trust, prevent me from carrying out the purpose and intent of the trust and deprive the intended beneficiaries of their interest in the trust.
5. I respectfully submit that I have standing to intervene in this action because none of the existing parties to this litigation can adequately represent the interests of this Irrevocable Trust. By the terms of the Declaration of Trust, the Donors, David L. Smith and Lynn A. Smith, have no control over the trust or its assets, other than the power to appoint a successor trustee. Similarly, they have no interest, whether present, future or reversionary, in the trust, its income or its assets, as it is irrevocable by its own terms and pursuant to provisions of the New York Estates, Powers & Trusts Law.
6. The only other existing relationship between this irrevocable trust and any party named in this litigation is with McGinn, Smith & Co., Inc., which is the broker for the trust's stock account, an account held by the clearinghouse NFS/Fidelity. That stock account, which was frozen by the April 20, 2010 TRO, is the account at issue herein. In that TRO, McGinn, Smith & Co., Inc. was placed under the control of a Court-appointed Receiver, William J. Brown, Esq., and its ability to serve as a broker was suspended. Neither the

trust nor the trust's stock account was placed under the control of the Receiver, nor is there any basis or need for receivership of the trust. The trust's brokerage account had been managed by McGinn, Smith & Co., Inc., an entity which is now prohibited from serving as the broker on this account. The Receiver in control of McGinn, Smith & Co., Inc. has no ability or legal authority to provide me with stock advice or to conduct stock trades for this account, which was the only role served by McGinn, Smith & Co., Inc. with respect to this account. Indeed, the very fact that McGinn, Smith & Co., Inc. is in receivership and that David L. Smith, the principal broker for the trust's account, is no longer providing broker services, necessitates the lifting of the TRO as to this account, so that I can place the account with an independent broker to be managed without interference in or by this litigation or any of the parties thereto.

7. For the foregoing reasons, as contemplated by Fed. R. Civ. P. 24, I have an interest relating to an account which is subject to the current temporary order freezing assets, and, as Trustee, I am uniquely situated such that disposing of the pending motion for a preliminary injunction will impair or impede my ability to protect the interests of the trust and its beneficiaries, and none of the existing parties to this litigation can adequately represent my interest as the Trustee of this irrevocable trust.
8. Turning to the merits of the Plaintiff's motion for a preliminary injunction, I respectfully submit that the Court should deny the motion as it relates to the stock account owned by the Irrevocable Trust, as listed on page 5 of Exhibit B to the Plaintiff's Order to Show Cause. This account is not owned by any defendant or relief defendant named in this lawsuit, nor does any defendant or relief defendant have any direct or indirect control over, nor any present, future or reversionary interest, in this account, nor has the Plaintiff

asserted any factual or legal basis whatsoever for including this account within the ambit of the asset freeze.

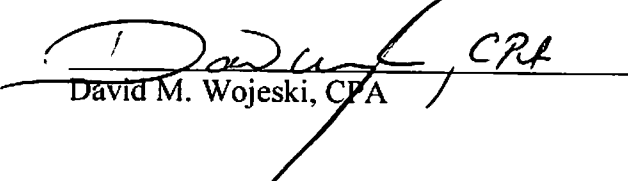
9. The David L. and Lynn A. Smith Irrevocable Trust, although it was named after its Donors, is a separate and distinct legal entity formed under the laws of the State of New York nearly six years ago and funded with stock owned solely by Donor Lynn A. Smith, as indicated in her sworn affidavit with exhibits. Mrs. Smith's affidavit and its exhibits prove that the source of the assets in the trust's stock account was 100,000 shares of Charter One stock that Mrs. Smith transferred to the trust on September 1, 2004. Exhibit A of her affidavit corroborates her statement that she had held this stock since at least 1999. According to both the Donor's sworn affidavit and the documentary evidence, she funded this irrevocable trust exclusively with stock she had purchased in 1992, long before any of the acts alleged in the Complaint could possibly have occurred. (See Affidavit of Lynn A. Smith, sworn to on May 21, 2010).
10. Attached hereto as Exhibit B is a copy of the Irrevocable Trust's stock account statement from September 2004, which shows the receipt of 100,000 shares of Charter One Financial Corporation stock on September 1, 2004. The statement also shows that, on the same day, the trust sold the shares of Charter One stock, generating \$4,450,000. The value of the account has fluctuated over time, as one would reasonably expect the assets in any stock brokerage account to fluctuate by virtue of investments made and sold, taxes paid, and the economic effect of the volatility in the stock market over the last few years.
11. With the exception of the inclusion of this stock account on the last page of Exhibit B to the April 20, 2010 Order to Show Cause, Plaintiff has been no other reference to this stock account or to the existence of this irrevocable trust in the Complaint, the April 20,

2010 Order to Show Cause, or the SEC Declarations and Exhibits. Similarly, Plaintiff has not alleged or proven that any defendant or relief defendant has any present or future beneficial interest in the brokerage account or the irrevocable trust, that the account or the trust are under the control of any defendant or relief defendant, or that the source of the funds in the account represent any of the “ill-gotten gains” alleged elsewhere in the Complaint.

12. The absence of any factual basis for including this account within the asset freeze is reason enough to release the account from the asset freeze order. The evidence submitted in support of this motion conclusively demonstrates that Plaintiff’s motion for a preliminary injunction further restraining the assets in this account during the pendency of this action should be denied as to this account.
13. I have also confirmed that the accountant for the trust prepared an extension to file the trust’s 2009 federal and state tax returns. In conjunction with the extension, payment of the estimated taxes was authorized and submitted in a timely manner to the IRS. However, because of the *ex parte* asset freeze order, the estimated tax check was returned unpaid. Because the extension is only valid with the payment of the estimated taxes, the *ex parte* freeze order has already caused the trust to be in default of its tax obligations, and the continuation of this asset freeze will result in the continued accrual of interest and penalties, thus further imperiling the assets of the trust and harming the interests of its beneficiaries.
14. Given the lack of a factual basis for including the account owned by this irrevocable trust in its original request to freeze assets, the failure of the Plaintiff to serve the trustee or the beneficiaries with the Order to Show Cause and Order Freezing Assets, and the resultant

inability to manage, preserve and protect the assets of the trust during the pendency of that order, I respectfully request that the Court consider ordering the Plaintiff to pay the trust for the reasonable costs and attorneys fees required to make this motion and/or any penalties and interest imposed or to be imposed by the Internal Revenue Service or the New York State Department of Taxation and Finance.

WHEREFORE, I respectfully request that the Court grant this motion to intervene for the limited purpose of lifting the restraining order and asset freeze as it relates to the David L. and Lynn A. Smith Irrevocable Trust U/A August 4, 2004 brokerage account held at NFS/Fidelity, as listed on page 5 of Exhibit B of the Temporary Restraining Order issued by the Court on April 20, 2010, opposing the Plaintiff's request for a preliminary injunction, as it relates to the same account, and awarding such other and further relief as this Court deems proper and just.


David M. Wojeski, CPA

Sworn to before me this
25th day of May, 2010.


Notary Public

JILL A. DUNN
Notary Public, State of New York
No. 02DU5024316
Qualified in Albany County
Commission Expires ~~March~~ 14
April 10

EXHIBIT A

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, 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.

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.

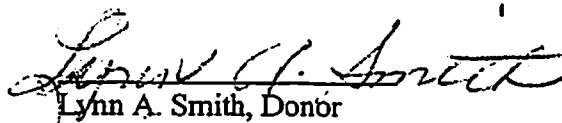
IN WITNESS WHEREOF, the parties hereto have duly executed this instrument under seal
as of the day and year first above written.



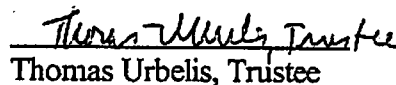
DANIEL S. BLAKE
NOTARY PUBLIC - STATE OF NY
QUALIFIED IN ERIE CO.
MY COMMISSION EXPIRES 9-5-2005



David L. Smith, Donor



Lynn A. Smith, Donor



Thomas Urbelis, Trustee

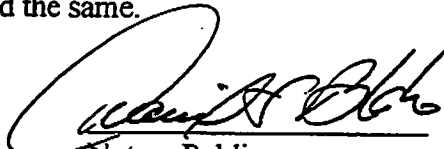
STATE OF NEW YORK)

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

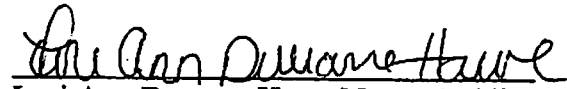
On this 4 day of August, 2004, before me personally came Lynn A. Smith, to me known and known to me to be the individual described in and who executed the foregoing instrument, and she acknowledged to me that she executed the same.


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

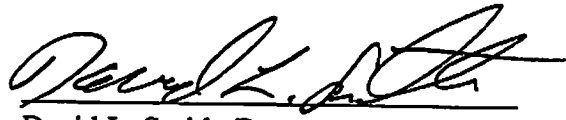
TRUSTEE APPOINTMENT

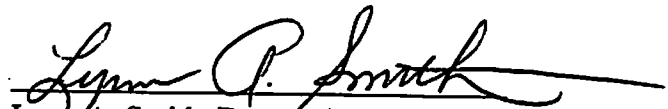
The following are additional instructions to be applied to the Declaration of Trust made on the 4th day of August, 2004, by and between David L. Smith and Lynn A. Smith (the "Donors") and Thomas Urbelis (the "Trustee"), which created the **DAVID A. & LYNN A. SMITH IRREVOCABLE TRUST U/A DATED AUGUST 4,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

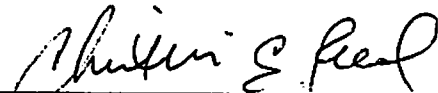
IN WITNESS WHEREOF we have hereunto duly executed this instrument under seal this 17th day of May 2010.


David L. Smith, Donor

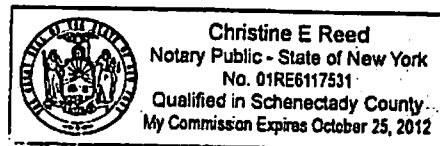

Lynn A. Smith, Donor

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

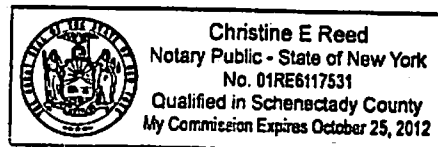


EXHIBIT B

V863

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STATEMENT BACKER IS PRINTED ON THIS PAGE

CLEARANCE AGENT
Beav. Stearns Securities Corp.
One Wall Street Center North
Brooklyn, New York 11201-3859
(212) 272-1000

DAVID L SMITH &

027

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V863

McGINN, SMITH & Co., Inc.

OFFICE SERVICING YOUR ACCOUNT
 One Capital Center
 99 Pine Street, 5th Floor
 Albany, NY 12207
 Tel: (518) 449-5131
 Fax: (518) 449-4894

CLEARANCE AGENT

Bear, Stearns Securities Corp.
 One Metrotech Center North
 Brooklyn, New York 11201-3859
 (212) 272-1000

DAVID L SMITH &

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STATEMENT PERIOD September 1, 2004

THROUGH September 30, 2004

ACCOUNT NUMBER 6967 800

TAXPAYER NUMBER On File

LAST STATEMENT

Cash Flow Analysis

	THIS PERIOD
Opening Balance	\$0.00
Securities Sold	4,450,000.00
Dividends/Interest	927.00
Amount Credited	\$4,450,927.00
Net Cash Activity	4,450,927.00
Closing Balance	\$4,450,927.00

Income Summary

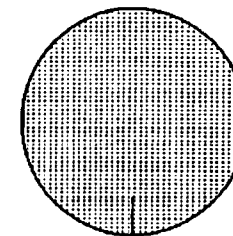
	THIS PERIOD	YEAR TO DATE
Credit Balance Int.	927.00	927.00
Total	\$927.00	\$927.00

Portfolio Composition

Cash/Cash Equivalent	4,450,927
Total	\$4,450,927

Cash Balance Summary

	OPENING	CLOSING
Margin	0.00	4,450,927.00
Net Cash Balance	\$0.00	\$4,450,927.00

Your Portfolio Allocation

Cash & Equivalent
100%

Unshaded portions denote debit balance and/or short market values. The allocation percentage is derived from the absolute market value of your portfolio.

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 One Metrotech Center North
 Brooklyn, New York 11201-3859
 (212) 272-1000

DAVID L SMITH &

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STATEMENT PERIOD September 1, 2004
 THROUGH September 30, 2004

ACCOUNT NUMBER ██████████ 6967 800
 TAXPAYER NUMBER On File
 LAST STATEMENT

Your Portfolio Holdings**CASH & CASH EQUIVALENTS**

DESCRIPTION	SYMBOL/CUSIP	QUANTITY	PRICE	MARKET VALUE	ESTIMATED ANNUAL INCOME	CURRENT YIELD (%)
CASH BALANCE				4,450,927		
TOTAL CASH & CASH EQUIVALENTS				\$4,450,927		

YOUR PRICED PORTFOLIO HOLDINGS	\$4,450,927
--------------------------------	-------------

Transaction Detail**INVESTMENT ACTIVITY**

SETTLEMENT DATE	TRADE DATE	TRANSACTION	DESCRIPTION	SYMBOL/CUSIP	QUANTITY	PRICE	DEBIT AMOUNT	CREDIT AMOUNT
09/01/04		JOURNAL	CHARTER ONE FINANCIAL INC FROM ██████████ 04091	160903100	100,000			
09/01/04		MERGER	CHARTER ONE FINANCIAL INC CASH MERGER @ \$44.50 P/S	160903100	-100,000			4,450,000.00
TOTAL								\$4,450,000.00

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DAVID L SMITH &

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Transaction Detail (continued)**INTEREST**

DATE	DESCRIPTION	SYMBOL/CUSIP	QUANTITY	RATE (%)	DEBIT AMOUNT	CREDIT AMOUNT
09/21/04	INTEREST ON CREDIT BALANCE					927.00
	ACCT ██████████ 6967					
	AT 00.37500% 08/21 - 09/20					
TOTAL						\$927.00

STATEMENT PERIOD September 1, 2004

THROUGH September 30, 2004

ACCOUNT NUMBER ██████████ 6967 800

TAXPAYER NUMBER On file

LAST STATEMENT