

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.

**DECLARATION OF JILL A. DUNN IN SUPPORT OF
MOTION TO INTERVENE FOR LIMITED PURPOSE**

I, JILL A. DUNN, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury, the following:

1. I am an attorney duly licensed to practice law before this Court and am the attorney for David M. Wojeski, CPA, as Trustee of the David L. and Lynn A. Smith Irrevocable Trust, an irrevocable trust which was created under the New York Estate, Powers and Trusts Law under agreement dated August 4, 2004. I respectfully submit this declaration upon information and belief in support of the Trustee's application for

an Order to Show Cause and his motion to intervene for the limited purpose of seeking an order lifting the current asset freeze order as to the trust's brokerage account, opposing the Plaintiff's motion for a preliminary injunction as to that account, and taking such other action as is appropriate to protect the interests of the trust. The basis for my information and belief is my review of the Complaint, Order to Show Cause, Declarations and Exhibits filed by the Plaintiff, all other pleadings and documents on file with the Court, my review of the Declaration of Trust and Trustee Appointment, the trust's tax returns and account statements, and my communications with the Donor of the trust, Lynn A. Smith, the initial trustee, Thomas J. Urbelis, and the successor trustee, David M. Wojeski.

2. The Trustee seeks to intervene as of right pursuant to Federal Rules of Civil Procedure 24 on the grounds that the Trustee claims an interest relating to an account which is subject to the present temporary restraining order freezing its assets, and the Trustee is so situated that disposing of the pending motion for a preliminary injunction will impair or impede the Trustee's ability to protect its interest, and none of the existing parties to this litigation can adequately represent the interests of the Trustee.
3. This application for an Order to Show Cause does not seek any temporary or injunctive relief. Rather, the Trustee is proceeding by Order to Show Cause to shorten the notice period and establish a method for service of process so that the trust may seek intervention and appear at the hearing on the Plaintiff's motion for a preliminary injunction, currently set for Wednesday, June 2, 2010. Because no party

to this litigation represents the interests of this trust, it is imperative that the Trustee be heard on the preliminary injunction motion

4. On Friday, May 21, 2010, I attempted to contact Plaintiff's counsel, David Stoelting, Esq., by telephone to discuss this motion and to seek his consent to the application for the Order to Show and to the relief requested in the underlying motion. I left a detailed message on his voice mail to that effect and mailed him a letter the same day. On Monday morning, May 24, 2010, Mr. Stoelting returned my call and we spoke about the trust account and the relief requested in this motion. I answered several questions he had about the trust and its brokerage account, and then provided him, by electronic mail, with a proposed Order to Show Cause, my declaration, an unsigned copy of the trustee's affidavit with exhibits and the signed affidavit of Lynn Smith with exhibits. I asked him to indicate whether he would consent to any or all of the relief requested in the motion. To date, I have heard nothing further from him.
5. I request permission for the Trustee to intervene as of right for the limited purpose of moving to lift the temporary restraining order which froze the trust's account and opposing the Plaintiff's request for a preliminary injunction, as it relates to the David L. and Lynn A. Smith Irrevocable Trust. I respectfully submit that the interests of judicial economy will be better served by addressing all interests affected by the preliminary injunction motion in one hearing, and the Trustee has no desire or reason to participate as a party to this litigation other than to address the order freezing its assets.
6. The Complaint in this action does not contain any factual allegations regarding, nor does it make any direct or indirect references, to the David L. and Lynn A. Smith

Irrevocable Trust, despite the breadth, depth and extent of detail of pleading in the 35-page Complaint and the presumably thorough review of evidence that would have been undertaken by the various lawyers from the Securities and Exchange Commission before commencing a case of such magnitude and asking a federal judge to act *ex parte* in freezing the assets held in 173 different bank and investment accounts listed on Exhibit B to the Order to Show Cause.

7. In the absence of any reference to the trust or any factual allegation connecting the trust to the remaining allegations in the Complaint, the formulation of a responsive pleading solely to satisfy Rule 24 (c) would unnecessarily elevate form over substance and would not serve the interests of justice. Additionally, the Trustee has no interest in the litigation other than the application of the restraining order to the trust's brokerage account. In the event that the Court will not dispense with the filing of a proposed responsive pleading, I request leave to submit such pleading forthwith.
8. On the merits of the motion for a preliminary injunction, Plaintiff has failed to justify imposing a continued restraining order against this trust account. In support of the *ex parte* application for an Order to Show Cause and asset freeze and its motion for a preliminary injunction, Plaintiff summarized its proof into three attorneys' Declarations with four voluminous exhibits. Those declarations and exhibits are also devoid of any reference to existence of this irrevocable trust or the trust account frozen by the TRO.
9. Moreover, a review of the Order to Show Cause obtained by the Plaintiff on April 20, 2010 and of the Court's docket in this case, demonstrates that Plaintiff did not seek to nor did it ultimately effectuate service of process in any manner upon the Trustee or

the beneficiaries of this trust, which also raises substantive jurisdictional issues. The TRO did not place the trust or the trust account under the control of a receiver, nor is there any factual or legal basis for doing so. Without relief from this Court, the trust's brokerage account will remain in limbo indefinitely and its assets will be in peril.

10. Without a factual basis for or even an actual allegation suggesting that any of the Defendants or Relief Defendant have any claim to this irrevocable trust and its assets, Plaintiff is not entitled to a preliminary injunction restraining the assets of this account, and the current temporary restraining order freezing this account should be lifted. Continuing the asset freeze during the pendency of this litigation will deprive the trust beneficiaries of their rights under the trust and imperil the assets contained in the trust's brokerage account, since there is no ability for anyone to manage those assets, make investment decisions, pay its taxes or take any other actions required of the Trustee in his fiduciary capacity.

WHEREFORE, I respectfully request that the Court issue the submitted Order to Show Cause and grant the Trustee's motion in all respects.

Dated: May 26, 2010

s/Jill A. Dunn
Jill A. Dunn (Bar Roll No. 506942)
Attorney for Proposed Intervenor
THE DUNN LAW FIRM PLLC
99 Pine Street, Suite 210
Albany, New York 12207-2776
Telephone (518) 694-8380
Fax (518) 935-9353
Email: JDunn708@nycap.rr.com