

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

10 Civ. 457 (GLS/DRH)

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, DAVID L. SMITH,
LYNN A. SMITH, GEOFFREY R. SMITH, Trustee of
the David L. and Lynn A. Smith Irrevocable
Trust U/A 8/04/04, GEOFFREY R. SMITH,
LAUREN T. SMITH, and NANCY MCGINN,

Defendants,

LYNN A. SMITH, and
NANCY MCGINN,

Relief Defendants, and

GEOFFREY R. SMITH, Trustee of the
David L. and Lynn A. Smith Irrevocable
Trust U/A 8/04/04,

Intervenor.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO TRUST'S MOTION TO
AMEND THE ASSET FREEZE RELATING TO THE ADMINISTRATION
OF TRUST ASSETS AND THE PAYMENT OF CERTAIN EXPENSES

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Plaintiff Securities and Exchange Commission respectfully submits this memorandum of law in opposition to the motion of Geoffrey R. Smith, trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (the “Trust”), to allow reimbursement and payment of various fees and expenses from the frozen assets of the Trust.

PRELIMINARY STATEMENT

The Trust’s motion repeats arguments that have already been considered and rejected by this Court. One year ago, a law firm representing the Trust moved to unfreeze Trust assets to pay legal fees incurred in this matter. The Court denied that motion because depleting the Trust’s assets is contrary to the interests of the victims of the fraud, and that rationale remains compelling today. *See* Mem. Decision and Order filed February 11, 2011 (“2/11/2011 MDO”), Dkt. 277. Discovery, moreover, has uncovered additional evidence of misconduct by persons associated with the Trust, even beyond the already established facts showing intentional concealment of a critical document and false declarations. Dkt. 342. As a result, the equities do not support an exercise of discretion in favor of the Trust. For any of the following reasons, the Trust’s motion should be denied in its entirety.

First, this Court, which has found a likelihood of success on the merits on the SEC’s claims against the defendants, froze the Trust’s assets to preserve assets for the benefit of defrauded investors. The total amount of frozen funds, however, is at least \$100 million less than the amount owed to investors as a result of the defendants’ fraudulent scheme. The payment of attorneys’ fees from Trust assets, therefore, would deplete the amount available to investors and not be in the interests of these victims.

Second, the Trust and its representatives have unclean hands. The Court is well aware of the lies told by Lynn Smith, Jill Dunn (the Trust’s former lawyer), and David Wojeski (the former Trustee) in their efforts to conceal the Annuity Agreement. Discovery, however, has

revealed evidence of even more misconduct. In particular, David Smith testified in his deposition that he discussed the Annuity Agreement with John D'Aleo, a consultant retained by James Featherstonhaugh and Jill Dunn and who testified at the preliminary injunction hearing, and possibly others, as early as April 2010, and Geoffrey Smith admitted in his deposition to misrepresenting in his October 2010 declaration the date that he first learned of the Annuity Agreement.

Third, the Trust's request to reimburse David and Lynn Smith for funds they spent on Trust assets (primarily relating to the Sacandaga Lake property) should be denied. Those expenses were already paid from Trust assets that were procured through Lynn Smith's misconduct. Reimbursement from Trust assets would amount to double payment. David and Lynn Smith, moreover, used the Lake property as a second home during 2011. They received a benefit from the Lake house and therefore should be expected to pay toward its expenses.

Finally, the request for payment of additional Trust expenses and to grant Geoffrey Smith authority to make decisions regarding Trust investments should be denied. The Receiver, who has ably managed various and diverse in this case, should be given discretion to make decisions regarding payment of Trust expenses.

STATEMENT OF FACTS

The Trust

The Trust was originally funded in August 2004 with over \$4 million of Charter One stock contributed by David and Lynn Smith. *See* Memorandum-Decision and Order filed July 20, 2011 ("MDO IV"), Dkt. No. 342, 798 F.Supp.2d 412, 417. Prior to the creation of the Trust, the Charter One stock had been made available to further McGinn and Smith's business interests by being loaned out to serve as collateral for the IASG public offering. Dkt. No. 103-1, at 7

(Plaintiff's Memorandum of Law in Support of Application for Order to Show Cause and Emergency Relief); Dkt. 103-2, at ¶¶ 45-50 (Declaration of David Stoelting, dated August 3, 2010, in Support of Motion). Both David and Lynn Smith contributed to the purchase of the Charter One stock in 1992. *See* Declaration of Joshua M. Newville submitted herewith ("Newville Decl.") Ex. 2 at 326-331.

Although the Trust purported to be created for the purpose of benefitting the Smiths' two adult children, its real purpose was to conceal assets of David and Lynn Smith. At the time the Trust was created, the Smiths and Thomas Urbelis, as Trustee, entered into a private annuity agreement effective August 31, 2004. Dkt. No. 103-3 ("Annuity Agreement"). MDO IV, 798 F.Supp.2d at 418. The Annuity Agreement gave the Smiths a right to annuity payments of \$489,932 per year beginning in 2015 designed to repay them, with interest, the funds they had transferred to the Trust. *Id.*

The Trust's brokerage account, which contained more than \$4 million, was frozen when this action commenced on April 20, 2010, and the Trust intervened in an effort to unfreeze this account. Throughout expedited discovery in May and June 2010, and the 3-day evidentiary hearing held June 8, 9 and 10, 2010, the Trust's attorneys, representatives and Lynn Smith never disclosed the existence of the Annuity Agreement and they maintained that the Trust was created solely to benefit Geoffrey and Lauren.

On July 7, 2010, the Court granted the SEC's preliminary injunction motion but denied the freeze over the Trust assets because of a lack of evidence that David Smith was the beneficial owner of the Trust. MDO filed July 7, 2010 ("MDO I"), Dkt. No. 86 at 42, 752 F.Supp.2d 194, at 217-220. In the weeks after the court's ruling, a total of \$944,848 was transferred out of the Trust's brokerage account. *See* Trust Accounting, Dkt. 142-2 at 4; Dunn e-mail, Dkt. 261-6 at 8.

Of this amount, \$600,000 plus closing costs was distributed to Lynn Smith in connection with the sale of the Great Sacandaga Lake property to the Trust, \$101,096 was disbursed to the Trust's attorney Jill Dunn as attorney's fees and costs, and \$8,098.50 was disbursed as fees to then-trustee David Wojeski. *Id.*; *see also* MDO IV, 798 F.Supp.2d at 437.

Lynn Smith claims that "the bulk of the proceeds from [the \$600,000 lake property] sale went to pay for legal expenses." *See* Lynn Smith Decl., Dkt. 247-1 at 4, ¶14. According to the Trust's counsel, as of September 30, 2010 Lynn Smith paid \$115,000 to Featherstonhaugh, Wiley & Clyne LLP ("FWC") for legal representation, disbursements and expenses. Dkt. 146-2 at 3, ¶5.

The Court Re-Freezes the Trust's Assets

On July 27, 2010, the SEC was first provided with a copy of the Annuity Agreement by Thomas Urbelis, the former trustee. MDO IV, 798 F.Supp.2d at 420. On August 3, 2010, the SEC filed a motion for an order, *inter alia*, that the Court reconsider the asset freeze with respect to the Trust based on the newly-discovered Annuity Agreement. Dkt. 103. This relief was granted on a temporary basis. Dkt. 104. On November 22, 2010, following an evidentiary hearing in which counsel for the SEC and the Trust testified, the Court granted the SEC's motion for reconsideration and re-imposed the asset freeze over the Trust, finding that there was a substantial likelihood that David Smith possessed a substantial equitable and beneficial interest in the Trust through the Annuity Agreement. *See* Mem.-Decision & Order filed November 22, 2010 ("MDO II"), Dkt. 194, 752 F.Supp.2d 220. The Court also granted the SEC leave to file for sanctions against persons associated with the Trust.

On August 8, 2011, the Second Circuit Court of Appeals issued an opinion affirming the Court's decision to freeze the Trust. *Smith v. S.E.C.*, 432 F. App'x 10, 2011 WL 3438315 (2d

Cir. Aug. 8, 2011). The Court of Appeals ruled that David Smith was correctly viewed as the “equitable owner” of the Trust’s assets and that the veil between David Smith and the Trust could be “pierced” because of his “complete domination.” *Id.*

Sanctions against Lynn Smith, Dunn and Wojeski

On July 20, 2011, the Court issued MDO IV which, *inter alia*, imposed sanctions on defendant Lynn Smith, Trust attorney Jill Dunn, and former trustee David Wojeski. Dkt. 342. The Court found that Lynn Smith acted with subjective bad faith in failing to disclose the existence of the Annuity Agreement in her Statement of Assets filed with the Court (Dkt. 19), her affidavit (Dkt. 34), and in her testimony at her deposition and at the evidentiary hearing. *See* MDO IV, 798 F.Supp.2d at 426. The Court held that Dunn and Wojeski had acted with subjective bad faith in knowingly submitting declarations to the Court which falsely asserted they were not aware of the Annuity Agreement until after the SEC discovered it on July 27, 2010. *Id.* at 430, 433.

Accordingly, the Court ordered Lynn Smith to repay \$944,848 to the Receiver on behalf of the Trust because the funds would not have been disbursed but for Lynn Smith’s fraud on the Court. MDO IV, 798 F.Supp.2d at 437-438, 442. The Court also ordered Lynn Smith to reimburse the SEC \$51,232 for attorney’s fees and costs, publicly admonished both Dunn and Wojeski, and ordered them to repay the Trust the \$5,355 and \$13,834, respectively, that they received from the Trust after they learned of Lynn Smith’s fraud. *Id.* It also ordered that, if Lynn Smith failed to pay the \$944,848 amount to the Receiver by September 1, 2011, the Receiver would have judgment against her for any unpaid amount and, if she failed to return to the Receiver by September 1, 2011 the full amount of the \$600,000 sale price of the Sacandaga Lake property plus closing costs, the Receiver could proceed in any manner he deemed

economically most feasible to maximize the return on the property, including the sale or rental of the property, or portions thereof, depending on the Receiver's determination of market conditions. *Id.*

Lynn Smith has failed to pay any portion of the \$944,848 due to the Receiver, and because she has not returned the \$600,000 property purchase price, the Receiver now has authority to rent or sell the property. Dunn, Wojeski and Lynn Smith appealed the Court's July 20, 2011 sanctions order (MDO IV) to the Second Circuit Court of Appeals. Those appeals are fully briefed and oral argument is scheduled for March 13, 2012.

Facts Learned During Discovery Show That the Misconduct Regarding the Trust Was Pervasive

Additional facts have been established during discovery that cast significant doubt upon the good faith of the Trust and its counsel.

First, David Smith testified that he discussed the annuity at a meeting at FWC's office in late April 2010.

As David Smith testified at his deposition, shortly after this action began on April 20, 2010, Smith engaged his long-time friend Featherstonhaugh to "quarterback" the defense. Newville Decl. Ex. 2 at 376-377. In connection with the representation of Lynn Smith, Featherstonhaugh retained John D'Aleo, an accountant who he had known personally and professionally for 20 years. Newville Decl. Ex. 1, PI Tr. at 422-423. Dunn also retained D'Aleo on behalf of the Trust. *Id.* at 445-446. D'Aleo testified in the preliminary injunction hearing on June 10, 2010, that the Trust was nothing more than a standard irrevocable Trust. *Id.* at 446.

However, in late April 2010, David Smith discussed the Annuity Agreement during a meeting in Featherstonhaugh's office with D'Aleo and possibly with other FWC attorneys, and Lynn Smith. Newville Decl. Ex. 2 at 378-79, Ex. 3 at 404-406, 40-414. Smith testified that he

described and explained the private annuity concept to D'Aleo during that meeting. Newville Decl. Ex. 3 at 408. Featherstonhaugh was "in and out" of the meeting, and another FWC attorney and Lynn Smith likely attended. Newville Decl. Ex. 2 at 377, 395; Ex. 3 at 405-06, 410. At that time, Smith was "describing the private annuity" and was "still referring to it as the Private Annuity Trust" rather than the irrevocable trust. Newville Decl. Ex. 3 at 408. This testimony proves that D'Aleo knew that the Annuity Agreement existed and that the reason no gift taxes were due was because the stock was sold to the Trust in exchange for an annuity. Nevertheless, when D'Aleo prepared Lynn Smith's May 6, 2010 verified Statement of Assets, her annuity interest in the Trust was omitted. Dkt. 19 at 2.

Second, discovery has shown that Lynn Smith and the Trust repeatedly misrepresented that Lynn Smith alone funded the 1992 purchase of bank stock that was transferred in 2004 to the Trust. Newville Decl. Ex. 1 at 311-312, 365-66, Dkt. 34 at 2.¹ In fact, David Smith paid for a portion of the initial purchase of the bank stock with funds he borrowed from McGinn Smith & Co. In his deposition, David Smith first denied that he contributed any money to purchase the original Albank stock. Newville Decl. Ex. 2 at 323. However, when shown documents, he admitted that funds he borrowed from McGinn Smith & Co. were used to purchase a portion of the Albank stock later contributed to the Trust. *Id.* at 326-331, Newville Decl. Ex. 5, 6, 7 (PX 445, 446, 447). Lynn Smith thus falsely testified at the preliminary injunction hearing that the Albank stock was purchased solely from her assets (*see* Newville Decl. Ex. 1 at 311-312, 365-66), and falsely stated in her declaration that "[i]n approximately April 1992, using assets in my

¹ In 1992, David and Lynn Smith purchased 40,000 shares of stock at the initial offering of an Albany-area bank for \$400,000. By August 2004, through bank mergers and acquisitions, the number of shares had increased to approximately 100,000 and their value to over \$4 million. *See* MDO I at 203-04; MDO IV, 798 F.Supp.2d at 417.

stock account, I purchased 40,000 shares of Albark stock”. Dkt. 34 at 2, Pl. Ex. 449. In fact, the money came from both David and Lynn Smith.

Third, Geoffrey Smith admitted that his declaration filed on October 7, 2010 (Dkt. No. 148) contained a false statement with respect to when he first learned of the Annuity Agreement. As with the false declarations filed by Dunn and Wojeski, Geoffrey Smith’s October 5, 2010 declaration claimed that he first learned of the Annuity Agreement “in late July, only after the SEC claims to have discovered the document for the first time.” Dkt. 148 at 2, ¶5, PX 475. Geoffrey Smith admitted that this statement was false because he was fully aware of the Annuity Agreement by July 20 or 21, 2010. Newville Decl. Ex. 10 (G. Smith 12/9/11 Dep.) at 233-234. Indeed, Geoffrey Smith admitted that he discussed the terms of the Annuity Agreement with David Smith on July 20 or 21, 2010, and again during a July 22 meeting with David Smith and Wojeski at which they reviewed and discussed the Annuity Agreement summary that David Smith provided to Wojeski. Newville Decl. Ex. 10 at 219-225, 231-232. Notwithstanding the knowledge of the Annuity Agreement by Dunn, Wojeski, Geoffrey Smith and Lynn and David Smith, the Trust proceeded to close the sale of the Sacandaga Lake property on July 22, further dissipating the Trust’s liquid assets for the benefit of Lynn Smith. Newville Decl. Ex. 11 at 71-72; Ex. 12 (PX 461).

Fourth, Geoffrey Smith and Wojeski both filed declarations containing misstatements regarding the timing of the Trust’s \$200,000 distribution for a company created by Geoffrey Smith called Capacity One Management. Both declarations stated that the Trust’s July 16, 2010 transfer of \$200,000 to Geoffrey Smith for Capacity One was made “following execution of a term sheet with Capacity One Management”. Dkt. 148 at 3, ¶8; Dkt. 147 at 4, ¶7. Contrary to both declarations, however, the term sheet was not executed before the July 16, 2010 transfer.

Instead, emails produced by Wojeski demonstrate it was not negotiated or executed until mid-August (*see* Newville Decl. Ex. 17)² -- only after the SEC filed an Amended Complaint on August 3, 2010 alleging that the Trust's disbursements were fraudulent conveyances. Dkt. 100 at ¶¶ 138, 172.

Whether the term sheet was executed before or after the disbursement was no mere detail. To the contrary, Geoffrey Smith and Wojeski were motivated to characterize the \$200,000 transfer as a legitimate investment rather than a distribution to a beneficiary, because the consideration given is relevant to the SEC's fraudulent conveyance claims. *See generally*, May 9, 2011 MDO on motions to dismiss, 2011 WL 1770472, Dkt. 321 at 22-26, *citing* N.Y. Debt. & Cred. Law § 272. These false statements further call into question the good faith of the Trust and Geoffrey Smith, its current trustee and beneficiary.

Fifth, Lynn Smith's misconduct in obtaining liquid assets from the Trust has been magnified by her failure to pay any portion of the \$944,848 due to the Receiver or to return the \$600,000 property purchase price. Instead, she and David Smith have used those funds for their own purposes. Lynn Smith gave \$10,000 gifts to each of Geoffrey and Lauren Smith out of the \$600,000 in Trust assets she received. Newville Decl. Ex. 9 at 185-186; Ex. 14 at 86. Despite the transfer of the Sacandaga Lake property title to the Trust, the Smith family members, including David and Lynn, continue to use the property as a vacation home. Newville Decl. Ex.

² Although the Trust produced an undated term sheet purporting to summarize the terms of the investment (*see* Decl. Ex. 15 at TR0000361), emails between Geoffrey Smith and Wojeski regarding the term sheet demonstrate that it was not negotiated until well after the distribution was made on July 16. The initial draft of the term sheet was emailed by Wojeski to Geoffrey Smith on August 10, and proposed that 12% interest be paid on additional investments. Decl. Ex. 17, TR0000467-68, third bullet point. Geoffrey objected to the 12% provision (*id.* at TR0000469-472, 477-478), and Wojeski agreed to remove it in the final version of the term sheet, which was not executed until August 17. *Id.* at TR0000479-482. It appears that the unsigned letter dated July 16 purporting to serve as "consideration" for the Trust investment (Decl. Ex. 16 at TR0000465) was backdated as well -- Geoffrey Smith asked Wojeski for comments on the letter on August 10. *Id.* at TR0000466.

9 at 170. David and Lynn Smith spent several weeks living at the Sacandaga Lake property during the summer of 2011. *Id.*

The Trust's Motion

This Court previously denied a motion by prior Trust counsel, Iseman, Cunningham, Riester & Hyde, LLP, for an order unfreezing Trust assets to pay certain attorney's fees incurred in responding to the SEC's motion to re-freeze the Trust assets. *See* February 11, 2011 MDO, Dkt. 277. The Trust now seeks over \$152,778.82 in additional fees, expenses and reimbursements, as follows:

- 1) Legal fees owed to FWC in the amount of \$117,462.93 for representation from February 15, 2011 through January 31, 2012, *see* Featherstonhaugh Decl., Dkt. 441-2; Geoffrey Smith Decl., Dkt. 441-3 at ¶16;
- 2) \$18,319.62 in Sacandaga Lake property expenses that have or will shortly become due, comprised of \$5,330.13 for property taxes in arrears and \$12,989.49 for property and school taxes due 1/31/2012, G. Smith Decl., Dkt. 441-3 at ¶14(a)(i);
- 3) Reimbursement to David and Lynn Smith for \$16,996.27 in expenses they paid, primarily in connection with Sacandaga Lake property taxes, maintenance, utilities and insurance, *id.* at ¶14(a)(iii);
- 4) Anticipated but unspecified 2011 income taxes resulting, in part, from the Trust's investment in Pine Street Capital, *id.* at ¶12; and
- 5) Unspecified future Trust-related expenses. *Id.* at ¶15.

The Trust also seeks permission to provide the Trustee with limited authority to manage the Trust's existing investments. *Id.* at ¶17.

The Trust did not submit FWC time records in its application, although the firm has offered to provide them to the Court for *in camera* review. Featherstonhaugh Decl., Dkt. 441-2. It bears noting that Featherstonhaugh and FWC have also represented Lynn Smith in this matter since April 29, 2010, *see* Dkt. 19, and since filing an appearance on behalf of the Trust on February 16, 2011, the firm has also represented Lauren and Geoffrey Smith individually. Dkt. 282. It is unclear what percentage of the work for which the Trust seeks reimbursement is attributable to work performed by FWC solely for the Trust.

The Trust assets currently consist of approximately \$2,600,000 in cash and investments plus title to the Sacandaga Lake property, which the Smiths valued at \$600,000.

ARGUMENT

I. Assets Frozen For Investors Should Not Be Used Pay FWC's Fees

As this Court held in its February 11, 2011 MDO denying a request for attorney fees, the Trust is subject to the asset freeze imposed by the preliminary injunction. 2/11/2011 MDO, Dkt. 277 at 4. Thus, the motion for attorney fees “invokes not the authority of the Trust to pay legal fees and costs but the discretion of the Court to permit such payments.” *Id.* The issue presented is “whether a balancing of the interests of investors in preserving assets for possible later restitution is outweighed by the interest of the Trust [and its counsel] in paying [FWC’s] fees and costs.” *Id.* (citing *S.E.C. v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972) (holding that court must weigh “the disadvantages and possible deleterious effect of a freeze . . . against the considerations indicating the need for such relief.”)).

A party seeking to unfreeze assets must show that doing so would be “in the interests of the defrauded investors.” *SEC v. Grossman*, 887 F. Supp. 649,661 (S.D.N.Y. 1995), *aff’d*, 173 F.3d 846 (2d Cir. 1999); *see also SEC v. Forte*, 598 F. Supp. 2d 689, 692 (E.D. Pa. 2009)

(“Several courts have held that before they will unfreeze assets, the defendant must ‘establish that the modification is in the interest of the defrauded investors.’”) (*quoting Grossman*, 887 F. Supp. at 661). Courts regularly have denied or limited the payment of attorneys’ fees from frozen assets. *E.g.*, *SEC v. Private Equity Mgmt. Group, Inc.*, No. CV 09-2901, 2009 WL 2058247, at *2 (C.D. Cal. July 9, 2009) (denying request to amend asset freeze to allow payment of attorneys’ fees); *SEC v. Sekhri*, No. 98 CIV. 2320, 2000 WL 1036295, at * 2 (S.D.N.Y. July 26, 2000) (denying motion to release funds from asset freeze for attorneys’ fees).³

A. The Investors’ Interests in Preserving Assets Far Outweigh the Trust and its Counsel’s Interests in Fees

The balance weighs decidedly in favor of denying FWC’s motion for fees for the same reasons the Court denied prior Trust counsel’s application. Investor losses are approximately \$130 million. *See* Declaration of Kerri L. Palen dated February 24, 2012 at ¶ 3 (submitted in support of Plaintiff’s Opposition to Motions by Defendants David Smith and Timothy McGinn’s for Relief from the Asset Freeze). As the Court previously held, the “total amount of investors’ funds obtained through fraud by defendants dwarfs the value of the assets frozen by the SEC for the benefit of such investors” which is less than \$10 million:

There is no likelihood, then, that a surplus will exist from the frozen assets in the event the SEC prevails in this action. The investors, on whose behalf the assets were frozen, thus possess a heightened interest in having those assets maintained without further diminution pending the outcome of this action. This interest far outweighs that of either the Trust or [the Trust’s attorneys] in payment of the charged fees and costs before this action is fully resolved.

2/11/11 MDO at 5.

³ Contrary to the Trust’s assertion, the Trust must establish that lifting the asset freeze would be in the interest of the defrauded investors. The Trust’s desire for attorneys’ fees to defend a *civil* case does not implicate Sixth Amendment concerns, nor does this inquiry require the SEC to establish that the Trust assets are “tainted” by fraud. However, the Trust assets are indeed tainted, as set out in Plaintiffs’ Opposition to the Motions by Defendants David Smith and Timothy McGinn for Relief from the Asset Freeze, filed concurrently herewith.

B. FWC's Efforts were Primarily Necessitated by the Misconduct of Defendants, their Attorneys and Others in Concealing the Annuity Agreement

Funds frozen for the benefit of investors should not be used to pay for FWC's representation of the Trust over the past year, because this work was a direct result of misconduct by the Trust, its counsel, its trustees and David and Lynn Smith. There are two primary factual disputes that implicate the Trust as a separate entity. First, whether the Annuity Agreement gives David (and Lynn) Smith ownership over the Trust assets; and second, whether disbursements of funds from the Trust during the period of time it was unfrozen were made in good faith and for fair consideration.⁴ None of these facts would be at issue but for the misconduct by the defendants, their counsel and others in concealing the Annuity Agreement from the Court and the SEC, and attempting to cover up the discovery of the agreement in their quest to dissipate Trust assets. As this Court previously held, the "need for the Trust to retain additional counsel [for the November 16, 2010 evidentiary hearing] was necessitated by the conduct of David Smith, Lynn Smith, the then-Trustee, and then-counsel in concealing a document whose discovery gave rise to the SEC's motion for reconsideration." 2/11/11 MDO at 5-6. As with the prior application for fees, the use of frozen assets to compensate the Trust's counsel "would reward that misconduct at the substantial expense of investors." *Id.*

FWC and Dunn, the Trust's former lawyer, knew or should have known about the Annuity Agreement prior to the June 9, 2010 preliminary injunction hearing. In particular, David Smith described the annuity agreement and annuity concept to FWC's and Dunn's expert

⁴ A threshold issue is whether David and Lynn Smith created the Trust in good faith or as a fraudulent conveyance. However, the resolution of that issue does not require Trust representation because it hinges on the state of mind of David and Lynn Smith, who (in theory) are separate parties from the Trust, with their own counsel. If the SEC is successful on this claim then the Trust will no longer have separate existence, because the conveyance creating the Trust will be set aside. *See* May 9, 2011 MDO, Dkt. 321 at 23-25 (finding that the SEC has alleged a fraudulent conveyance claim and a "complete lack of good faith" in structuring the Trust).

D'Aleo and possibly to Dunn, Featherstonhaugh and other FWC attorneys during a meeting at the law firm during April 2010. Nonetheless, FWC, as counsel for Lynn Smith, and Dunn, as counsel for the Trust, allowed Lynn Smith to repeatedly and falsely assert that she and her husband had no interest in the Trust assets (Dkt. 34 at ¶6; Newville Decl. Ex. 1 at 388-89), and allowed D'Aleo to provide similar testimony (*Id.* at 445-46), notwithstanding their full awareness of the agreement providing for a substantial annuity to the Smiths.

In addition, Geoffrey Smith, Wojeski, Dunn, and David Smith all knew that Dunn had created a specious factual dispute regarding the discovery of the Annuity Agreement, because they had all discussed the Annuity Agreement and reviewed previously-undisclosed documents relating to the agreement in the days before the SEC asked Dunn about it on July 22, 2010. Newville Decl. Ex. 10 at 219-225, 231-232. They knew that documents describing the Annuity Agreement existed, but concealed those documents and allowed the Trust to further dissipate \$450,000 in liquid assets for the benefit of Lynn Smith. Geoffrey Smith admitted that he filed a declaration that falsely stated when he first learned of the Annuity Agreement. *Id.* At 233-234. Furthermore, Wojeski and Geoffrey Smith filed declarations falsely describing the circumstances of the \$200,000 distribution to Geoffrey Smith for his business Capacity One Management. Dkt 143 at 3; Dkt 147 at 4; Newville Decl. Ex. 17.

Finally, FWC also has already received \$115,000 from Lynn Smith from the funds she fraudulently caused to be released from the Trust. Dkt. 247-1 at ¶14; Dkt. 146-2 at ¶5. Under these circumstances, it is not in the interests of investors for the Trust to pay additional fees to FWC; nor does payment of these fees impact the maintenance of fairness in these legal proceedings. As the Court previously held:

To permit a further depletion of assets available to repay investors would reward that misconduct at the substantial expense of investors. Thus, the interest of the Trust here in

lifting the freeze to compensate [its attorneys] is diminished by the Trust's self-created necessity for such representation."

2/11/11 MDO at 6. There is also no other equitable reason for the Trust to pay FWC's fees.

When FWC appeared as counsel for the Trust, it understood that the Trust's funds were frozen for the benefit of investors and that payment of fees by the Trust was within the Court's discretion. As such, FWC's fees should not be paid by the Trust.

**C. David Smith, the Beneficial Owner of the Trust Assets,
Has Not Demonstrated He Is Unable to Pay Counsel
Using Other Assets**

David Smith had not adequately demonstrated that he is not able to pay counsel fees using other assets. This issue is discussed in detail in the SEC's brief opposing David Smith's motion to unfreeze assets, filed simultaneously with this brief.

II. The Fees Sought Are Excessive

Although FWC has already been paid at least \$115,000 for work on this case, it seeks to be paid an additional \$107,022.50 based on a claim that it billed 530.6 hours representing the Trust. Featherstonhaugh Decl., Dkt. 441-2 at 2. Because the Trust has not provided attorney time records in support of its application for fees, the SEC cannot fully evaluate the reasonableness of this request for fees. The SEC has legitimate concerns that the time billed is excessive and not subject to reimbursement because it (1) is excessive considering the limited number of facts that are truly at issue with respect to the Trust; (2) occurred as a result of misconduct on behalf of the Trust; and (3) is redundant of FWC's individual representation of defendants Lynn Smith, Geoffrey Smith and Lauren Smith. To the extent the Court entertains any application for fees, the SEC requests an opportunity to review the relevant time records and an opportunity to raise any additional appropriate objections.

I. David and Lynn Smith are Not Entitled to Reimbursement of Additional Fees and Expenses They Paid in Connection with the Trust Assets

The Trust also seeks to use Trust assets to reimburse David and Lynn Smith for \$16,996.27 in expenses they paid during 2010 and 2011, primarily in connection with Sacandaga Lake property taxes, maintenance, utilities and insurance. G. Smith Decl., Dkt. 441-3 at ¶14(a)(iii). Assuming the Smiths used a portion of the \$600,000 paid by the Trust to Lynn Smith to pay these expenses, it would constitute double-counting to reimburse David and Lynn Smith from Trust assets for expenses they already paid using Trust assets. David and Lynn Smith still have access to and use of the Lake property as a vacation home (and they lived there for several weeks during the summer of 2011). Newville Decl. Ex. 9 at 170. It is therefore reasonable to assume that they incurred these expenses for their own benefit. For example, they claim to have paid \$2,081.06 in electricity bills from August 2010 to January 2012 (Dkt. 441-3 at Ex. D) and \$1,738 in property maintenance and cleanup from December 2010 through October 2011 (Dkt. 441-3 at Ex. F) during the period of time they and their family members had use of the property as a vacation home. At the same time, Lynn Smith has failed to pay any portion of the \$944,848 she owes the Receiver and has failed to return the \$600,000 property purchase price. Assets frozen for the benefit of investors should not be used to reimburse David and Lynn Smith for expenses that they voluntarily undertook, with full knowledge that Trust assets were frozen.

Furthermore, the Trust would not be incurring these expenses if Lynn Smith had not fraudulently induced the Court to unfreeze the Trust assets, which were then used to purchase the Sacandaga Lake property. Nor would it be incurring these expenses if Lynn Smith had repaid the Trust the purchase price of the property and it had been returned to her. For these reasons and the reasons set forth in Section I above, this request for reimbursement should be denied.

II. The Receiver, Not Geoffrey Smith, Should Be Granted Sole Authority to Pay Necessary Expenses and Manage the Trust's Assets

The Trust seeks to release funds for the following expenses that it asserts have or will shortly become due:

- 1) \$18,319.62 in Sacandaga Lake property expenses, comprised of \$5,330.13 for property taxes in arrears and \$12,989.49 for property and school taxes due 1/31/2012, G. Smith Decl, Dkt. 441-3 at ¶14(a)(i);
- 2) Anticipated but unspecified 2011 income taxes resulting, in part, from the Trust's investment in Pine Street Capital. *Id.* at ¶12.

The Trust also requests Court permission “to establish something akin to a draw-down account” through which future Trust-related expenses could be paid, Dkt. 441-3 at ¶15, and to provide Geoffrey Smith with limited authority to manage the Trust's existing investments. *Id.* at ¶17.

The SEC objects to the release of frozen Trust assets to Geoffrey Smith and to allowing him to exercise authority over Trust assets. As a preliminary matter, 2011 income taxes are not yet due, and thus any request for payment of those expenses is premature. The SEC has no objection to the use of Trust funds for expenses necessary for the Trust to comply with its legal obligations, but requests that the Receiver be given full authority to manage the affairs of the Trust, evaluate the reasonableness of these requests, and pay necessary expenses as they become due.

For the reasons set forth in Section I above, Geoffrey Smith should not have authority over any Trust assets. Geoffrey Smith participated in the misconduct that resulted in dissipation of \$944,848 of liquid Trust assets. Before the Sacandaga Lake property was transferred, he knew that the Annuity Agreement existed, but allowed the Trust to further transfer \$450,000 in

liquid assets for the benefit of Lynn Smith. He admitted that he filed a declaration that falsely stated when he first learned of the Annuity Agreement and he filed a false declaration describing the circumstances of the \$200,000 distribution for his business. Under these circumstances it is reasonable to assume that Geoffrey Smith's interests are not aligned with the preservation of Trust assets for the benefit of investors, but instead are aligned with the very different interests of the Smith family. Instead, the Receiver should be given authority over all further requests to pay Trust expenses.

CONCLUSION

For the reasons stated above, the SEC requests that the Court deny the Trust's motion to amend the asset freeze to permit the payment of expenses and attorneys' fees.

Dated: February 24, 2012
New York, New York

Respectfully submitted,

s/ Joshua M. Newville
Attorney Bar Number: 516621
Attorney for Plaintiff
Securities and Exchange Commission
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Of Counsel:
David Stoelting
Kevin P. McGrath
Lara Shalov Mehraban

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

10 Civ. 457 (GLS/DRH)

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, DAVID L. SMITH,
LYNN A. SMITH, GEOFFREY R. SMITH, Trustee of
the David L. and Lynn A. Smith Irrevocable
Trust U/A 8/04/04, GEOFFREY R. SMITH,
LAUREN T. SMITH, and NANCY MCGINN,

Defendants,

LYNN A. SMITH, and
NANCY MCGINN,

Relief Defendants, and

GEOFFREY R. SMITH, Trustee of the
David L. and Lynn A. Smith Irrevocable
Trust U/A 8/04/04,

Intervenor.

DECLARATION OF JOSHUA M. NEWVILLE

I, Joshua M. Newville, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am an attorney in the Enforcement Division of the New York Regional Office of the Securities and Exchange Commission. I have been employed with the Commission since August 2010. I make this declaration for purpose of submitting to the Court certain documents in connection with Plaintiff's Opposition to the Trust's

Motion to Amend the Asset Freeze Relating to the Administration of Trust Assets and the Payment of Certain Expenses.

2. Attached hereto are true and accurate copies of the following:

DATE	DOCUMENT	EXHIBIT
6/10/2010	Transcript of Preliminary Injunction Hearing (excerpts) (Mislabelled as July 10, 2010)	1
12/14/2011	Deposition of David Smith (excerpts)	2
12/20/2011	Deposition of David Smith (excerpts)	3
1992	Pl. Ex. 445 – Loan Interest Statement for David Smith	4
3/23/1992	Pl. Ex. 446 – \$500,000 Receipt from Albany Savings Bank	5
3/27/1992	Pl. Ex. 447 – Letter from Albany Savings Bank to David L. Smith	6
4/1/1992	Pl. Ex. 448 – Letter from Albany Savings Bank to David L. Smith	7
5/26/2010	Pl. Ex. 449, Dkt 34 – Declaration of Lynn Smith dated 5/21/2010 (filed 5/26/2010)	8
11/16/2011	Deposition of Geoffrey Smith (excerpts)	9
12/9/2011	Deposition of Geoffrey Smith (excerpts)	10
12/08/2011	Deposition of Lynn Smith (excerpts)	11
7/22/2010	Pl. Ex. 461 – Statement of Sale and Deeds for Broadalbin (Sacandaga Lake) property	12
7/22/2010	Pl. Ex. 462 – Indemnity and Hold Harmless Agreement for the benefit of David Wojeski	13
11/28/2011	Deposition of Lauren T. Smith (excerpts)	14
Undated	Term Sheet – Capacity One Management, LLC, produced by the Trust (TR0000361)	15
7/16/2010 8/10/2010	Letter from Capacity One Management, LLC to David Wojeski with email dated 8/10/2010, produced by the Trust (TR0000465-466)	16
8/2010	August 2010 emails between David Wojeski and Geoffrey Smith with attachments, produced by the Trust (TR0000467-472, 477-482)	17

I declare under penalty of perjury that the foregoing is true and correct.

Executed: New York, New York
February 24, 2012

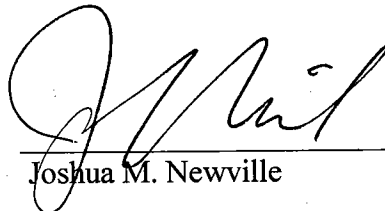

Joshua M. Newville

Exhibit 1

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF NEW YORK

3 SECURITIES AND EXCHANGE COMMISSION

4 Plaintiff,
5 -versus- 10-CV-457

6 MCGINN, SMITH & CO., INC.,
7 MCGINN, SMITH ADVISORS, LLC,
8 MCGINN, SMITH CAPITAL HOLDINGS CORP.,
9 FIRST ADVISORY INCOME NOTES, LLC,
10 FIRST EXCELSIOR INCOME NOTES, LLC,
11 FIRST INDEPENDENT INCOME NOTES, LLC,
12 THIRD ALBANY INCOME NOTES, LLC,
13 TIMOTHY M. MCGINN and DAVID L. SMITH,
14 Defendants,
15 and LYNN A. SMITH,
16 Relief Defendant.
17 -----

18 TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING (cont'd)
19 held in and for the United States District Court,
20 Northern District of New York, James T. Foley United
21 States Courthouse, 445 Broadway, Albany, New York,
22 on THURSDAY, JULY 10, 2010, the HON. DAVID R. HOMER,
23 United States District Court Magistrate Judge, Presiding.
24
25

19 **APPEARANCES:**

20 **FOR THE PLAINTIFF:**

21 SECURITIES AND EXCHANGE COMMISSION

22 BY: DAVID P. STOELTING, ESQ.

23 KEVIN P. McGRATH, ESQ.

24 LARA MEHRABAN, ESQ.

25

BONNIE J. BUCKLEY, RPR, CRR
UNITED STATES COURT REPORTER - NDNY

LYNN SMITH - DIRECT - STOELTING

1 Q. Are you looking at Exhibit 80? The handwritten

2 ...

3 A. Yes. Yes.

4 Q. Okay. Do you see the number --

5 A. December 31, 2007.

6 Q. Okay.

7 A. Assets cash and securities.

8 Q. Okay. Do you see under cash and securities, it
9 says number one, David L. Smith, Lynn A. Smith irrevocable
10 trust?

11 A. Yes.

12 Q. Okay. And does this refresh your recollection
13 that you counted the trust as your own cash asset?

14 A. No. This was just something that was taken from
15 our home that was in my husband's office. I don't know --
16 it wasn't any kind of official statement. It's just
17 something he was -- had in a folder.

18 Q. But you do agree that it's your husband's
19 handwriting?

20 A. Yes.

21 Q. Who created the trust?

22 A. I created the trust.

23 Q. And who funded --

24 A. We both created the trust. I funded the trust.

25 Q. So you and your husband would be the grantors?

BONNIE J. BUCKLEY, RPR, CRR
UNITED STATES COURT REPORTER - NDNY

LYNN SMITH - DIRECT - STOELTING

1 A. Yes.

2 Q. Do you know that term, "grantor"?

3 A. Yes.

4 Q. Did you understand that you and your husband were
5 the grantors?

6 A. Yes.

7 Q. And I think you just indicated that, but all the
8 money that was in the trust account came from, came from
9 you?

10 A. Yes.

11 Q. And what source did you use?

12 A. I used my brokerage account.

13 Q. And that's what we've been referring to as the
14 stock account?

15 A. The stock account.

16 Q. And the trust account, that's the only asset the
17 trust has, correct?

18 A. Yes.

19 Q. And the trust accountants are your accountants,
20 the Piaker firm, correct?

21 A. Accountant, yes.

22 Q. And do you know how -- do you know who selected
23 Piaker to be the trust accountants and tax preparers?

24 A. No. No.

25 Q. And who is the initial trustee?

**BONNIE J. BUCKLEY, RPR, CRR
UNITED STATES COURT REPORTER - NDNY**

LYNN SMITH - CROSS - FEATHERSTONHAUGH

1 Q. And you testified, I believe, that the money that
2 was used to settle that trust came from your stock account,
3 correct?

4 A. That is correct. Yes.

5 Q. And do you have personal knowledge of where
6 those -- where that money came from?

7 A. Yes.

8 Q. Could you tell us in your own words where that
9 money came from?

10 A. Yes. It was an investment of \$400,000 in Albank
11 stock and --

12 Q. Do you know approximately when that investment was
13 made?

14 A. Let's see ...

15 Q. By the investment, I'm talking about the purchase
16 of the Albank stock.

17 A. We owned it for 12 years before it became
18 4 million. So ...

19 Q. Would it have been the early '90s?

20 A. Yes. It was the early '90s, yes.

21 Q. And did that -- was that stock -- did it continue
22 to be called Albank during the time that you owned it?

23 A. No. I think it became Charter One, and then I'm
24 not sure what happened. It was a cash buy out or something
25 like that. And so we had cash.

**BONNIE J. BUCKLEY, RPR, CRR
UNITED STATES COURT REPORTER - NDNY**

LYNN SMITH - CROSS - FEATHERSTONHAUGH

1 Q. So the bank was acquired a number of times,
2 correct?

3 A. Yes.

4 Q. And in 2004, when the trust was settled, did you
5 actually -- as part of the settlement of trust, did you
6 transfer the shares or a certain portion of the shares of
7 Charter One into the trust?

8 A. Yes.

9 Q. And then the trust sold those shares, is that
10 correct?

11 A. That is correct.

12 Q. So the money that was initially placed in that
13 trust is money that you owned in the early 1990s; that was
14 your money that bought that stock, correct?

15 A. Yes.

16 Q. Mrs. Smith, when you came back to Schenectady, did
17 you continue teaching?

18 A. Yes.

19 Q. And for how long did you teach?

20 A. About ten years.

21 Q. And do you recall when you retired from teaching?

22 A. 1980.

23 Q. And what was the reason, if any, other than that
24 the kids were wearing you out?

25 A. We were expecting our first child.

**BONNIE J. BUCKLEY, RPR, CRR
UNITED STATES COURT REPORTER - NDNY**

LYNN SMITH - CROSS - DUNN

1 Q. You testified that you created the David and Lynn
2 Smith irrevocable trust in approximately August 2004, is
3 that correct?

4 A. Yes.

5 Q. What was the reason you created that trust?

6 A. We had the profits from the Albank stock in my
7 account. Since I had -- both of my parents had passed away
8 at 50 years old each, I wanted to have something for my two
9 kids so that if they wanted to start a business or buy a
10 home or do something, that I could actually see them reaping
11 benefits during my lifetime.

12 Q. All right. I'm handing you what's been marked as
13 Intervenor Number 7.

14 THE COURT: Seven?

15 MISS DUNN: Seven.

16 BY MISS DUNN:

17 Q. Can you identify that document?

18 A. Yes. Yes.

19 Q. Okay. What is it? You can flip through it. It's
20 a multi-page document.

21 A. It's the letter asking Tom Urbelis to be the
22 trustee for the irrevocable trust, and it's the actual
23 declaration of trust signed by David, Lynn, and Tom.

24 Q. Okay. And is that the document by which you
25 created the trust we're discussing?

LYNN SMITH - CROSS - DUNN

1 A. Yes.

2 Q. Did there come a time that Mr. Urbelis resigned as
3 trustee?

4 A. Yes.

5 Q. Did you take any action to appoint a successor
6 trustee?

7 A. Yes.

8 Q. Can you take a look at what has been pre-marked
9 Intervenor Exhibit 8? Can you identify that document?

10 A. Yes. Yes. It's the --

11 Q. What is it?

12 A. It's the appointment of a new trustee, Mr. David
13 Wojeski.

14 Q. All right. Did you and your husband sign this
15 document?

16 A. Yes, we did.

17 Q. All right. I'll take both of those.

18 How do you know Tom Urbelis?

19 A. He's been a long time friend of both Dave and
20 myself for 50 years. He's a lawyer, he's intelligent,
21 he's -- we see them, he and his wife and family maybe five
22 to six times a year. We're very close. He would be the
23 obvious person we thought to be trusting for our children.

24 Q. Do you respect him?

25 A. Yes.

**BONNIE J. BUCKLEY, RPR, CRR
UNITED STATES COURT REPORTER - NDNY**

D'ALEO - DIRECT - FEATHERSTONHAUGH

1 I moved up to the Capital District in the latter
2 part of 1980 when the firm opened up an office here. I was
3 asked to come up and help start the office and to run the
4 tax practice. Which I did. So I've been with Coopers &
5 Lybrand from -- now PricewaterhouseCoopers, from '68 through
6 1993. When I left the firm, I started my own consulting
7 firm which is Devonshire Business Consulting.

8 Q. And have you and I known one and another for a
9 while?

10 A. We've known each other for probably over 20 years.

11 Q. And we've known each other professionally and
12 personally, is that right?

13 A. Yes. You were my client, tax client and business
14 client.

15 Q. And did there come a time when I called you and
16 spoke to you about the case that's being tried here today?

17 A. Yes, you did. It was -- I believe it was about
18 the 27th or 28th of April and you indicated you had some
19 matter you were dealing with and could I possibly help you
20 out. I went down to your office. We discussed certain
21 things. And you gave me the general outline of what you
22 might ask me to do. And we decided to go forward from
23 there. I signed an accounting service agreement, I believe
24 it was on April 29th. And you outlined some of the things
25 you needed.

BONNIE J. BUCKLEY, RPR, CRR
UNITED STATES COURT REPORTER - NDNY

D'ALEO - DIRECT - FEATHERSTONHAUGH

1 The first thing you indicated to me that you did
2 need was --

3 Q. Well, you indicated to me, did you not, that in
4 order to provide those services, you would need to be paid
5 for them; correct?

6 A. Absolutely.

7 Q. And I agreed to pay you for them?

8 A. Yes, you did.

9 Q. And, in fact, you're being paid for your time
10 today?

11 A. Absolutely.

12 Q. Is that correct?

13 A. Or hope to be.

14 Q. Now, that takes care of your side, as to my
15 obligation. What did I initially ask you to do?

16 A. Well, initially you had indicated that you had to
17 report back to the Court to provide a compilation of Lynn
18 Smith's assets. So we had a discussion about that. I made
19 certain inquiries. You provided me with certain
20 information.

21 I did speak to Lynn Smith to gather some of the
22 information. You showed me copies of certain documents you
23 had. You had copies of brokerage statements and a few other
24 things. And we decided the format would be in the form of a
25 compilation.

**BONNIE J. BUCKLEY, RPR, CRR
UNITED STATES COURT REPORTER - NDNY**

D'ALEO - DIRECT - DUNN

1 THE COURT: Miss Dunn, any questions?

2 MS. DUNN: Your Honor, Mr. D'Aleo is a
3 summary witness for me as well, but for purposes of clarity,
4 I have no objection to Mr. Stoelting doing his
5 cross-examination of Mr. D'Aleo now, and then I would put on
6 my direct with him, if that would make sense for the record.
7 Or do you want -- I, I, I'm happy to go now if you would
8 like.

9 THE COURT: Why don't you go now, and then
10 Mr. Stoelting can cross-examine on both.

11 MS. DUNN: Okay.

12 MR. STOELTING: Actually, your Honor, it
13 would likely be Mr. McGrath.

14 THE COURT: I'm sorry. Mr. McGrath.

15 **DIRECT EXAMINATION BY MISS DUNN:**

16 Q. Mr. D'Aleo, did there come a time that an issue
17 came up during -- following your preparation of the asset
18 inventory for Lynn Smith that you were questioned as to why
19 you did not include within that asset inventory an NFS stock
20 account held under the name of the David and Lynn Smith
21 irrevocable trust by its trustee Thomas Urbelis?

22 A. Yes.

23 Q. And was there a reason that you -- or what was the
24 reason you didn't include that stock account in Lynn Smith's
25 inventory of assets?

D'ALEO - DIRECT - DUNN

1 A. Well, it was first indicated to me when we
2 inquired that it was an irrevocable trust, and that if it is
3 an irrevocable trust, then the assets were transferred into
4 the trust, that those assets are not owned by David or Lynn
5 Smith but, in fact, are owned by the trust.

6 Q. Okay. Did you review the trust declaration?

7 A. I did. I have seen a copy of it. I can't say I
8 looked at every line of it, but I have seen the declaration
9 of trust.

10 Q. Did you reach any conclusions regarding it when
11 you reviewed it?

12 A. It was a relatively standard trust document. And,
13 accordingly, it would meet the criteria of being a trust. A
14 trust is a separate entity, a legal entity. It's a separate
15 taxpayer. The assets that are put into it are -- is funded,
16 are assets owned by that entity, the trust.

17 Q. And did there come a time that you signed an
18 accounting services agreement with my law firm?

19 A. Yes, I did.

20 Q. Do you recall the date that you signed that
21 agreement?

22 A. I believe it was May 17th.

23 Q. Of this year?

24 A. Of 2010. Excuse me.

25 Q. Okay. I'm going to show you intervenor Exhibits

Exhibit 2

<p style="text-align: right;">Page 233</p> <p>1 2 UNITED STATES DISTRICT COURT 3 NORTHERN DISTRICT OF NEW YORK 4 ----- 5 SECURITIES AND EXCHANGE COMMISSION, 6 Plaintiff, 7 -vs- CVA #: 10 Civ. 457(GLS/DRH) 8 MCGINN, SMITH & CO., INC., MCGINN, SMITH 9 ADVISORS, LLC, MCGINN, SMITH CAPITAL HOLDINGS 10 CORP., FIRST ADVISORY INCOME NOTES, LLC, FIRST 11 EXCELSIOR INCOME NOTES, LLC, FIRST INDEPENDENT 12 INCOME NOTES, LLC, THIRD ALBANY INCOME NOTES, 13 LLC, TIMOTHY M. MCGINN, DAVID L. SMITH, LYNN A. 14 SMITH, GEOFFREY R. SMITH, Individually and as 15 Trustee of the David L. and Lynn A. Smith 16 Irrevocable Trust U/A 8/04/04, LAUREN T. SMITH, 17 and NANCY MCGINN, 18 19 Defendants. 20 LYNN A. SMITH, and NANCY MCGINN, 21 22 Relief Defendants, and 23 24 GEOFFREY R. SMITH, Trustee of the David L. and 25 Lynn A. Smith Irrevocable Trust U/A 8/04/04m 26 27 Intervenor 28 ----- 29 Deposition of DAVID L. SMITH, held 30 at the offices of Phillips Lytle, LLP., 31 Albany, New York, on December 14, 2011, 32 before DEBORAH R. SALESKI, Court 33 Reporter and Notary Public in and for 34 the State of New York.</p>	<p style="text-align: right;">Page 235</p> <p>1 2 EXHIBITS 3 No. Description Marked 4 530 Numerous Pages of Handwritten and 5 Typed Written Pages 236 6 7 531 E-Mail String 253 8 9 532 Three Pages of Handwritten Notes 10 Entitled TAIN 259 11 533 Fund Advances to MSTF 262 12 534 Two-Page Typewritten Document 13 Which Somebody's Written At the 14 Top in Handwriting F-I-I-N 262 15 535 Single Page of Handwritten Notes 262 16 536 Two-Page Typewritten Document With 17 Handwriting F-E-I-N 262 18 19 537 Set of Handwritten Notes Entitled 20 "F-E-I-N" 262 21 539 Series of Handwritten Notes Entitled 22 "F-I-I-N" 262 23 24 540 One-Page Cover E-Mail from Thomas 25 Livingston 302 26 541 Promissory Note Dated 27 January 23rd, 2004 313 28 29 542 letter from the Securities and 30 Exchange Commission dated 31 February 26, 2004 Elizabeth Coombs 32 On January 14th 336 33 543 Letter Dated August 4, 2004 Addressed 34 To Thomas Urbelis 338 35 36 544 David L. Smith, Lynn A. Smith 37 Financial Statement August 2005 363 38 545 David L. Smith, Lynn A. Smith 39 Financial Statement December 31, 2007 366</p>
<p style="text-align: right;">Page 234</p> <p>1 2 APPEARANCES: 3 For the Plaintiff: 4 KEVIN McGRATH, ESQ. 5 Senior Counsel 6 Division of Enforcement 7 United States Securities and Exchange Commission 8 3 World Financial Center, Suite 400 9 New York, New York 10281-1022 10 (212) 336-0578 11 12 For the Defendant David L. Smith: 13 DREYER BOYAJIAN, LLP 14 Attorneys at Law 15 75 Columbia Street 16 Albany, New York 12210 17 BY: WILLIAM DREYER, ESQ. 18 (518) 463-7784 19 20 Also Present: 21 David Stoelting, Securities and Exchange Commission 22 Lara Shalov Mehraban, Securities and Exchange Commission 23 William J. Brown, Esq. 24 Scott Ely, Esq. 25 26 * * * 27 28 29 30 31 32 33 34 35</p>	<p style="text-align: right;">Page 236</p> <p>1 D. Smith 2 DAVID L. SMITH, having been recalled as 3 a witness, being previously duly sworn by the notary 4 public present, testified further as follows: 5 6 EXAMINATION BY MR. McGRATH: 7 Q. Good morning, Mr. Smith. 8 A. Good morning. 9 Q. Just for the record you're represented by 10 Mr. Dreyer again here this morning? 11 A. I am. 12 Q. I'll just remind you again you're under oath. 13 All right. I'm going to mark, I think the 14 next exhibit is 530. It's a lengthy document and for now 15 I'd just ask you to mark this. It's a lengthy document. 16 For now I'm just going to direct your attention to one 17 page and we'll be coming back to it in a few minutes and 18 then later on we'll spend more time with it. So feel 19 free to look at the whole document before you answer my 20 questions, but my first question is going to be very 21 limited. 22 A. Okay. 23 (Whereupon, Exhibit 530 was marked for 24 identification, on this date.) 25 BY MR. McGRATH:</p>

Page 321

1 D. Smith
2 A. Well, it was -- it was -- but, again, the
3 point is because that didn't become aggravated until 2009
4 and whether I would have, at that time, C to the Fourth.
5 As I said, most the McGinn, Smith entities became
6 questionable as a result of both economics and regulatory
7 oversight as to whether they would be able to generate
8 fees.
9 Q. One second.
10 (Whereupon, there was a pause in the
11 proceeding.)
12 BY MR. McGRATH:
13 Q. It's almost noon. Go off the record for a
14 minute.
15 (Whereupon, a luncheon recess was then
16 taken.)
17 BY MR. McGRATH:
18 Q. We are back on the record. Good afternoon,
19 Mr. Smith. I'm going to ask you a series of question now
20 relating to the David and Lynn Smith Irrevocable Trust
21 and certain events surrounding that trust, just to get
22 you oriented. Can you describe as briefly as possible
23 the circumstances that led to the creation of the David
24 and Lynn Smith Irrevocable Trust?
25 A. I formed the trust.

Page 322

1 D. Smith
2 Q. Why did you form the trust?
3 A. Actually the concept came to me or the idea
4 came to me on a trip from New York City reading one of my
5 financial magazines that I often did to extend my
6 professional interest and education, and there was an
7 article on private annuity trust. It fit my
8 circumstances perfectly.
9 I was looking to both provide some estate planning
10 for my family. I was starting to acquire not a lot of
11 wealth, but enough that it needed some attention. Wanted
12 to gift some money to my children and at the same time
13 the private annuity trust enabled me to shelter a
14 substantial capital gain that I had or my wife -- I mean,
15 let me say for the record, that I often speak myself as
16 opposed to my wife and I don't want that to somehow
17 ultimately come back and be held against me, so when I
18 say I, Lynn had a large capital gain in her brokerage
19 account and acting as her advisor we were looking for a
20 way to shelter that.
21 Q. When you're referring to the large capital
22 gain in the brokerage account that you wanted to shelter,
23 what were the circumstances that led to the capital gain?
24 A. Lynn had made an investment in a local bank
25 stock called Albank back in I think 1992, had basically

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1 D. Smith
2 held onto the position. 2004 when we formed the trust,
3 there was a variety of dividends and splits and takeovers
4 all had resulted in approximately a tenfold increase.
5 The origin investment was 400,000 and had grown to about
6 \$4 and a half million.
7 Q. Had you contributed any money or any assets to
8 the purchase of the original Albank stock that
9 subsequently grew to the Charter One stock?
10 A. No.
11 Q. At any point between the initial purchase of
12 the Albank stock in approximately 1992 and the formation
13 of the trust -- which occurred in 2004, correct?
14 A. Correct.
15 Q. Did you contribute any money to any of the
16 stock that ended up being transferred into the --
17 A. No.
18 Q. -- trust?
19 A. No.
20 Q. I'm going to show you a document that's been
21 previously marked as Exhibit 443. It appears to be a
22 page from a, Bear Stearns Securities Corporation
23 statement page 1 of one and in the name of Lynn A. Smith,
24 [REDACTED], Clifton Park, New York. It says for
25 the period ending 9/25/93 then it has an account number

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1 D. Smith
2 and Social Security number next to that. Let me just ask
3 you, first, Mr. Smith, did you and your wife, Lynn Smith,
4 live at [REDACTED] in Clifton Park in 1992?
5 A. Yes.
6 Q. And if you look further down you'll see that
7 there is a transaction reflecting Albank Financial Corp.
8 shares in the amount of 40,688, is that the way you read
9 that series of transactions there in the middle of the
10 page?
11 A. Yes.
12 Q. I'm now going to show you a document marked
13 444, which is a one-page document entitled "Receipt" and
14 it states "We have this day debited your account and the
15 date of 3/16/92." The account number reads [REDACTED] 4091 [REDACTED]
16 and then it says \$354,000 and if you could go back to
17 Exhibit 443 and just confirm my reading that the same
18 account Number [REDACTED] 4091 is reflected in 443 and 444.
19 A. Yes.
20 Q. I'm now going to show you Exhibit 445. It's a
21 document McGinn, Smith & Co., Inc.; loan interest
22 officer, David L. Smith. And it -- with a loan date of
23 3/23/92. Payment date of 4/6/92. Principal amount of
24 \$150,000 and in the right-hand column it says
25 payment/advance \$100,000. That's the first of a number

<p style="text-align: right;">Page 325</p> <p>1 D. Smith</p> <p>2 of different entries here, that's the one I'm going to</p> <p>3 focus your attention on for purposes of my question. Do</p> <p>4 you recognize this Document 445?</p> <p>5 A. No, but I have some handwriting on it, so...</p> <p>6 Q. That was my going to be my next question. Is</p> <p>7 that your handwriting?</p> <p>8 A. That is my handwriting.</p> <p>9 Q. And the date is 7/20/92 and you've got a</p> <p>10 notation it looks like 5,000 and underneath it 35,000?</p> <p>11 A. Right.</p> <p>12 Q. Do you have any recollection as you sit here</p> <p>13 today what you intended by those notations?</p> <p>14 A. I do not.</p> <p>15 Q. All right. Do you agree that the reference to</p> <p>16 David L. Smith is to you?</p> <p>17 A. Correct.</p> <p>18 Q. And does this indicate -- well, strike that.</p> <p>19 What is your understanding of the entry on the</p> <p>20 line associated with the loan date, 3/23/92, for</p> <p>21 principal and the next column and what is your</p> <p>22 understanding of the entry for 100,000 in the far</p> <p>23 right-hand column underpayment/advance?</p> <p>24 A. It would appear that I was loaned \$100,000. I</p> <p>25 don't know why it would have, you know, principal of 150</p>	<p style="text-align: right;">Page 327</p> <p>1 D. Smith</p> <p>2 A. I do.</p> <p>3 Q. Okay. What was this transaction for?</p> <p>4 A. There was an opportunity to subscribe to</p> <p>5 Albany Savings Bank that was going public. The maximum</p> <p>6 subscription one could subscribe to I think was a half a</p> <p>7 million dollars. I attempted to subscribe to that,</p> <p>8 ultimately was cut back and I got whatever I got which I</p> <p>9 think was \$400,000.</p> <p>10 Q. And you see that the date of this \$500,000</p> <p>11 receipt from you is March 23, 1992, that's the same date</p> <p>12 reflected in Exhibit 445, that you appear to have been</p> <p>13 loaned or withdrew \$150,000 from McGinn, Smith & Co.,</p> <p>14 correct?</p> <p>15 A. That's correct.</p> <p>16 Q. And there's a debit as reflected in</p> <p>17 Exhibit 444 on 3/16/92 from your wife's, Lynn Smith's</p> <p>18 Bear Stearns account of 300 looks like 54,000 dollars</p> <p>19 several days earlier on 3/16/92.</p> <p>20 A. Mm-mm.</p> <p>21 Q. Does that refresh your recollection that you</p> <p>22 contributed part of the \$500,000 that was used to</p> <p>23 purchase the Albank stock in 1992?</p> <p>24 A. Well, I'll comment on that, but I don't think</p> <p>25 that's how you or at least I didn't take it as how you</p>
<p style="text-align: right;">Page 326</p> <p>1 D. Smith</p> <p>2 and advanced only 100 unless there was some sort of</p> <p>3 credit agreement that the firm gave me, you know, I don't</p> <p>4 know. It's sort of an unusual way we would have done</p> <p>5 business.</p> <p>6 But it looks like I was advanced \$100,000. I don't</p> <p>7 know if -- well, let me see, I'm trying to think how</p> <p>8 those things -- no, I'm misreading that. I apologize. I</p> <p>9 think that's what that is, is clearly there was a loan of</p> <p>10 \$150,000 and then there was a payment of 100 leaving a</p> <p>11 balance of 50 and then there was a payment of 8, leaving</p> <p>12 a balance of 42, dat, dat, dat, dat, dat. So that's how</p> <p>13 I would interpret that, there must have been a loan of</p> <p>14 150,000 and a subsequent payment, which looks like it was</p> <p>15 on 4/6. The loan was on 3/23 and roughly 13 days later</p> <p>16 or 14 days later \$100,000 was paid.</p> <p>17 Q. I'm going to show you now Exhibit 446. It is</p> <p>18 a one-page document. It's a receipt in the amount of</p> <p>19 \$500,000 dated March 23rd, 1992 received from David L.</p> <p>20 Smith \$500,000. And it says for and someone's written in</p> <p>21 stock purchase. There's a stamp Albany Savings Bank --</p> <p>22 A. Mm-mm.</p> <p>23 Q. -- March 23, 1992 and under the heading Albany</p> <p>24 Savings Bank there's a signature of Vickey Lobo. Do you</p> <p>25 recall this transaction?</p>	<p style="text-align: right;">Page 328</p> <p>1 D. Smith</p> <p>2 phrased the question. I thought you said did I</p> <p>3 contribute anything initially after the 40,000 shares and</p> <p>4 the answer was no.</p> <p>5 Q. I think my first question was: Did you make</p> <p>6 any initial contribution and then did you make any</p> <p>7 subsequent contribution. So let's go back to the first</p> <p>8 question, did you contribute some monies or other assets</p> <p>9 to the original purchase of the 40,688 Albank Financial</p> <p>10 Corporation shares?</p> <p>11 A. It would appear that I contributed \$50,000,</p> <p>12 yes.</p> <p>13 Q. 50 or 150?</p> <p>14 A. Well, only 50 because they only accepted</p> <p>15 \$400,000, they sent back 100. In fact, I think they sent</p> <p>16 back 104 or something like that.</p> <p>17 Q. Well, you contributed approximately 150,000 to</p> <p>18 the 500,000 initial transfer and then subsequently only a</p> <p>19 portion of that money was allocated to the --</p> <p>20 A. It wasn't an allocation, that's all the</p> <p>21 subscription was for.</p> <p>22 Q. I'm using the word allocation, a portion of</p> <p>23 that \$500,000 was used to purchase the 40,688 shares of</p> <p>24 Albank stock?</p> <p>25 A. That's correct.</p>

<p style="text-align: right;">Page 329</p> <p>1 D. Smith</p> <p>2 Q. I'm going to show you Exhibit 449, which is an</p> <p>3 affidavit that your wife executed in connection with this</p> <p>4 lawsuit on or about May 21st, 2010. And I would direct</p> <p>5 your attention, take whatever time you need to read it.</p> <p>6 Let me ask you first, did you see a version of this</p> <p>7 document before your wife signed it and submitted it to</p> <p>8 the court?</p> <p>9 A. I don't believe so, no.</p> <p>10 Q. Did you discuss it with her?</p> <p>11 A. No.</p> <p>12 Q. Did you know that she was going to be</p> <p>13 submitting an affidavit to the court in connection with</p> <p>14 this lawsuit describing the circumstances under which she</p> <p>15 came to be in possession of the Charter Bank stock that</p> <p>16 was ultimately transferred to the David and Lynn Smith</p> <p>17 Irrevocable Trust?</p> <p>18 A. I don't know. I've really been told to keep</p> <p>19 totally out of it and it wouldn't surprise me if an</p> <p>20 affidavit was submitted, but I wasn't specifically</p> <p>21 reviewing it or involved in it, no.</p> <p>22 Q. But my question is more narrow at this point.</p> <p>23 Did you have any discussions with your wife about the</p> <p>24 information that was included in this affidavit?</p> <p>25 A. No.</p>	<p style="text-align: right;">Page 331</p> <p>1 D. Smith</p> <p>2 Smith acknowledging receipt on 3/23/92 of your order for</p> <p>3 50,000 shares at the price of \$10 per share. And then it</p> <p>4 goes on to say that you're going to make some allocation</p> <p>5 along the lines you mentioned.</p> <p>6 And then let me show you 448, it's a letter</p> <p>7 dated April 1, 1992 from Albany Savings Bank addressed to</p> <p>8 you stating that we appreciate your interest in the stock</p> <p>9 offering of Albank Financial Corporation. Further down</p> <p>10 it says "Therefore your subscription is for 40,688</p> <p>11 shares" and there's a check back to you for --</p> <p>12 A. 93,674.85.</p> <p>13 Q. Right, attached to this. Do you remember</p> <p>14 receiving this letter?</p> <p>15 A. Now I do, sure.</p> <p>16 Q. And this is, in fact, how the 40,688 shares of</p> <p>17 Albank came to be acquired, correct, through this</p> <p>18 allocation?</p> <p>19 A. That's correct.</p> <p>20 Q. All right. Now, at the time that you decided</p> <p>21 to create the irrevocable trust, did you talk to your</p> <p>22 wife about it?</p> <p>23 A. Yes.</p> <p>24 Q. And who other than your wife did you talk to</p> <p>25 about setting up the trust before it was formed?</p>
<p style="text-align: right;">Page 330</p> <p>1 D. Smith</p> <p>2 Q. You see in paragraph 3 she states "In</p> <p>3 approximately April 1992 using assets in my stock</p> <p>4 account, I purchased 40,000 shares of Albank stock at \$10</p> <p>5 per share at the initial public offering when the bank</p> <p>6 was converted to Albany Savings Bank." And then jumping</p> <p>7 over to paragraph 5 she states "On August 4, 2004 my</p> <p>8 husband and I created the David L. and Lynn A. Smith</p> <p>9 Irrevocable Trust by signing a Declaration of Trust with</p> <p>10 the trustee. Although my husband and I were both</p> <p>11 designated as donors of the trust, I provided the initial</p> <p>12 and, to date, only asset transferred to the trust."</p> <p>13 Isn't it a fact based on the document that we've just</p> <p>14 walked through that, in fact, you contributed part of the</p> <p>15 monies that led to the growth of the asset that was</p> <p>16 contributed to the trust?</p> <p>17 A. That is true. My wife would have no</p> <p>18 understanding of that nor would I have until I saw the</p> <p>19 documents and took place 20 years ago, so...</p> <p>20 Q. All right.</p> <p>21 A. If you expect one to remember that is a bit --</p> <p>22 asking a lot.</p> <p>23 Q. Okay. Just to completed the record I'm going</p> <p>24 show you 447, which is a one-page document dated</p> <p>25 March 27th, 1992 from Albany Savings Bank to you David L.</p>	<p style="text-align: right;">Page 332</p> <p>1 D. Smith</p> <p>2 A. Daniel Blake, who was a financial planner out</p> <p>3 of Buffalo or Orchard Park, somewhere in that area, had</p> <p>4 been doing some insurance work for me and other members</p> <p>5 of the firm.</p> <p>6 Q. Anybody else?</p> <p>7 A. I don't believe I ever spoke to Bruce Hoover,</p> <p>8 who was the individual that Dan Blake ultimately got to</p> <p>9 draft it. I don't recall even having a conversation with</p> <p>10 him. I was really working with Dan. So I think just</p> <p>11 Dan.</p> <p>12 Q. Was one of the considerations that led to you</p> <p>13 creating the trust concern about the possibility that</p> <p>14 your wife and your assets could be subject to lawsuits by</p> <p>15 creditors in connection with your participation in the</p> <p>16 various McGinn, Smith & Co. Business entities?</p> <p>17 A. Absolutely not.</p> <p>18 Q. Was one of your considerations that your</p> <p>19 wife's assets could be attacked by creditors in</p> <p>20 connection with her investment or loan of monies to</p> <p>21 various McGinn, Smith & Co.'s assets?</p> <p>22 A. Absolutely not.</p> <p>23 Q. Or affiliates?</p> <p>24 A. No.</p> <p>25 Q. That had no consideration whatsoever?</p>

<p style="text-align: right;">Page 373</p> <p>1 D. Smith</p> <p>2 had not submitted this financial statement to the</p> <p>3 insurance department that Mr. Halderman was asking for</p> <p>4 and so we probably.</p> <p>5 Q. I'm sorry, go ahead. I'm listening.</p> <p>6 A. No, you weren't. No, you weren't. Probably</p> <p>7 needed it for the year 2007. It was probably long</p> <p>8 overdue and this letter was probably a reflection that</p> <p>9 they were getting around to preparing it.</p> <p>10 Q. So looking at 471 does not refresh your</p> <p>11 recollection that you submitted exhibit -- or a copy of</p> <p>12 Exhibit 545 to Piaker & Lyons?</p> <p>13 A. Could have been. Could not have been. I just</p> <p>14 don't know. I clearly submitted information to them, but</p> <p>15 whether it was this, I have no way of knowing.</p> <p>16 Q. Okay. At some point in time Mr. Urbelis</p> <p>17 resigned as the trustee of the Irrevocable Trust,</p> <p>18 correct?</p> <p>19 A. Yes.</p> <p>20 Q. And was that in approximately the spring of</p> <p>21 2010?</p> <p>22 A. Yes, it was.</p> <p>23 Q. What were the circumstances that led to his</p> <p>24 resignation, if you can briefly describe them, please.</p> <p>25 A. Well, in this case it is pretty brief. I was</p>	<p style="text-align: right;">Page 375</p> <p>1 D. Smith</p> <p>2 The fact was is that under the circumstances and the</p> <p>3 publicity that was being shared with the public at large,</p> <p>4 there was not a long line of people standing waiting for</p> <p>5 that position. So when Mr. Wojeski offered his services</p> <p>6 and he seemed like a knowledgeable and reputable</p> <p>7 individual, I accepted.</p> <p>8 Q. So it was your decision to retain him as the</p> <p>9 trustee?</p> <p>10 A. My wife and mine, yes.</p> <p>11 Q. You discussed it with your wife?</p> <p>12 A. She was present at the time is my</p> <p>13 recollection, yeah, I think so.</p> <p>14 Q. When you met with Mr. Wojeski?</p> <p>15 A. I believe so.</p> <p>16 Q. Whose decision was it to retain Ms. Dunn as</p> <p>17 the lawyer representing the trust in this case?</p> <p>18 A. Well, at the time it's a little cloudy because</p> <p>19 Urbelis resigned somewhere around April 12th, 13th, I'm</p> <p>20 guessing because I think it was -- I know April 10th was</p> <p>21 the day of infamy, so I think it was somewhere around</p> <p>22 that time.</p> <p>23 And upon -- I'm trying to remember if I met with</p> <p>24 Dunn before going to Florida or not. It's a little foggy</p> <p>25 to me to be honest with you, but I don't think I had, so</p>
<p style="text-align: right;">Page 374</p> <p>1 D. Smith</p> <p>2 driving back from Florida with my wife as a result of the</p> <p>3 circumstances that we now face. SEC had filed a civil</p> <p>4 lawsuit, had turned certain allegations and information</p> <p>5 over to the US Attorney's Office who had basically</p> <p>6 through the means of a search warrant had invaded my</p> <p>7 homes both in Florida and in Saratoga.</p> <p>8 I had flown down to Florida to pick up my wife under</p> <p>9 the circumstances. We were driving back and that</p> <p>10 evening -- one of the two evenings that it takes to drive</p> <p>11 back from Florida, my son called and said that he had</p> <p>12 gotten a Federal Express letter from my friend of</p> <p>13 50 years and trustee of the Irrevocable Trust that</p> <p>14 contained a -- literally a two-sentence paragraph that I</p> <p>15 hereby resign as your trustee, which I found quite</p> <p>16 distasteful and still do to this day.</p> <p>17 Q. And subsequently an individual by the name of</p> <p>18 Mr. Wojeski was appointed trustee of that trust, correct?</p> <p>19 A. That is correct.</p> <p>20 Q. What role did you have in his appointment?</p> <p>21 A. Well, it was presented to me. I approved it.</p> <p>22 Didn't know Mr. Wojeski, was introduced to me by Jill</p> <p>23 Dunn who was acting as the attorney for the trust at that</p> <p>24 time. Said she knew Dave. Dave came into Mr.</p> <p>25 Featherstonhaugh's office. We had a brief discussion.</p>	<p style="text-align: right;">Page 376</p> <p>1 D. Smith</p> <p>2 I guess the answer was is that the attorney for the</p> <p>3 trust, Jill Dunn, sort of acting on our behalf, we as</p> <p>4 donors, there was no longer a trustee, so I guess</p> <p>5 practicality would be that my and wife I accepted Mr.</p> <p>6 Wojeski's appointment.</p> <p>7 Q. Right. I think we'll all probably getting a</p> <p>8 little tired here but my question is: Who made the</p> <p>9 decision to retain Ms. Dunn?</p> <p>10 A. Oh, cancel that whole thing.</p> <p>11 Q. Let's go backward.</p> <p>12 A. I guess my wife and I would have made that</p> <p>13 decision upon the recommendation of Mr. Featherstonhaugh.</p> <p>14 Q. Did you sit town with Ms. Dunn and discuss</p> <p>15 with her the terms of the annuity agreement?</p> <p>16 A. I don't believe so, no.</p> <p>17 Q. Didn't you think it was important for her to</p> <p>18 be aware of all the facts relating to the Irrevocable</p> <p>19 Trust before she appeared on its behalf in court?</p> <p>20 MR. DREYER: Objection to the form. You</p> <p>21 may answer, if you can.</p> <p>22 A. You know being things were moving so fast to</p> <p>23 be honest with you, I just don't know. I mean, there</p> <p>24 was -- we were anxious to get -- to have an attorney. I</p> <p>25 had engaged Mr. Featherstonhaugh initially, asked him to</p>

<p style="text-align: right;">Page 377</p> <p>1 D. Smith</p> <p>2 sort of quarterback the whole process, of which he agreed</p> <p>3 to do. He was a long-time friend of my wife and I. He</p> <p>4 recommended a number of attorneys, Jill Dunn was one of</p> <p>5 them he recommended.</p> <p>6 MR. DREYER: Hold on here. Time out.</p> <p>7 MR. McGRATH: Let's take a quick break.</p> <p>8 (Whereupon, a discussion was held off the</p> <p>9 record.)</p> <p>10 BY MR. McGRATH:</p> <p>11 Q. Prior to Ms. Dunn appearing in court on behalf</p> <p>12 of the trust did you have any conversations with her</p> <p>13 regarding the annuity agreement?</p> <p>14 A. I believe so, but, I mean, I'm just -- can't</p> <p>15 be helpful as to specificity. I mean, I think I recall</p> <p>16 initially being in a meeting with Ms. Dunn and John</p> <p>17 D'Aleo and I think Mr. Featherstonhaugh was there also</p> <p>18 and may or may not have discussed the trust at that time.</p> <p>19 I don't have a recollection of sitting down with Ms.,</p> <p>20 Mrs. Dunn specifically for a discussion of the trust, but</p> <p>21 it may very well have happened. I just -- sorry, I can't</p> <p>22 be helpful there.</p> <p>23 Q. Do you recall providing her with any documents</p> <p>24 in connection with her representation of the trust?</p> <p>25 A. I'm quite certain I did not.</p>	<p style="text-align: right;">Page 379</p> <p>1 D. Smith</p> <p>2 there was another lawyer from Mr. Featherstonhaugh's firm</p> <p>3 present. I don't think Mr. Featherstonhaugh's was</p> <p>4 initially present and I don't think Ms. Dunn was present</p> <p>5 and I was sort of explaining what the private annuity</p> <p>6 concept --</p> <p>7 MR. DREYER: Objection. If this is a</p> <p>8 point in time, and I can clarify this, if this</p> <p>9 is a point in time where Featherstonhaugh's</p> <p>10 representing you, or Featherstonhaugh's firm</p> <p>11 is representing you, you can give Mr. McGrath</p> <p>12 the circumstance leading up to the</p> <p>13 conversation, but not the conversation itself.</p> <p>14 THE WITNESS: Okay.</p> <p>15 MR. DREYER: But if it's not at a time</p> <p>16 when Mr. Featherstonhaugh was representing you</p> <p>17 and you're appearing there and discussing the</p> <p>18 annuity agreement with persons who are not</p> <p>19 representing you, then you're free to discuss</p> <p>20 it with Mr. McGrath. Is that fair?</p> <p>21 MR. McGRATH: Yes, that's fair.</p> <p>22 THE WITNESS: Thank you for that</p> <p>23 clarification.</p> <p>24 A. Clearly I was -- that was the time I was</p> <p>25 represented by Mr. Featherstonhaugh.</p>
<p style="text-align: right;">Page 378</p> <p>1 D. Smith</p> <p>2 Q. Okay. To your knowledge did your wife have</p> <p>3 any discussions with Ms. Dunn regarding the annuity</p> <p>4 agreement on or before the preliminary injunction hearing</p> <p>5 that took place in June of 2010 in this case?</p> <p>6 A. I would think not.</p> <p>7 Q. Why do you say that?</p> <p>8 A. Because I can't imagine my wife would have had</p> <p>9 that discussion without me present.</p> <p>10 Q. You were following the events that were</p> <p>11 occurring in this case in the spring of 2010, correct?</p> <p>12 A. Yeah, that's fair.</p> <p>13 Q. And you were aware of the fact that the</p> <p>14 Securities and Exchange Commission was seeking to freeze</p> <p>15 certain assets contained in a stock account and the</p> <p>16 Irrevocable Trust?</p> <p>17 A. That is correct.</p> <p>18 Q. And in connection with that litigation do you</p> <p>19 recall discussing the annuity agreement with anyone</p> <p>20 during that time period leading up to the preliminary</p> <p>21 injunction hearing in June of 2010?</p> <p>22 A. The only recollection I have is the one I just</p> <p>23 stated a few moments ago and it was very early on in the</p> <p>24 process. I remember being in Mr. Featherstonhaugh's</p> <p>25 office. I remember Mr. D'Aleo being present. I think</p>	<p style="text-align: right;">Page 380</p> <p>1 D. Smith</p> <p>2 Q. All right. Do you recall having a copy of the</p> <p>3 annuity agreement in your possession between the time</p> <p>4 that the search warrants were executed of your residences</p> <p>5 and the preliminary injunction hearing in June of 2010?</p> <p>6 A. I did not.</p> <p>7 Q. How do you know that you didn't have a copy?</p> <p>8 A. Because I had no records. The only records</p> <p>9 that I was aware of in terms of having the annuity</p> <p>10 agreement was in a file that I kept in my office and, as</p> <p>11 I've testified earlier today or yesterday, we were moving</p> <p>12 and I had just thrown a lot of stuff in some boxes and I</p> <p>13 moved those boxes to my garage and that's when your</p> <p>14 friends made the visit and took all that. So I'm</p> <p>15 assuming it was in one of those boxes. I did not have</p> <p>16 the agreement at home. Even if I did, it would have been</p> <p>17 taken.</p> <p>18 So I know explicitly that I didn't have it because</p> <p>19 at some point after the trust had actually been ruled in</p> <p>20 favor to be unfrozen, I reached out to try to find the</p> <p>21 agreement because I had anticipated needing it.</p> <p>22 Q. Okay. Let me focus you on that now. What</p> <p>23 caused you to reach out to look for the private annuity</p> <p>24 agreement after the trust assets were unfrozen by the</p> <p>25 court?</p>

David L. Smith

December 14, 2011

<p style="text-align: right;">393</p> <p>1 D. Smith</p> <p>2 you were looking for the annuity agreement before you</p> <p>3 received the annuity agreement work papers?</p> <p>4 A. That I don't recall. I know I spoke to her</p> <p>5 about it after I got these work papers because</p> <p>6 conceptually, again, that was something important to us,</p> <p>7 but I don't know if I had a specific conversation prior</p> <p>8 to that.</p> <p>9 Q. Okay. Again, you got the work papers on</p> <p>10 July 20th. When in relation to your receipt, did you</p> <p>11 talk to your wife about the fact that this is what you</p> <p>12 found or had been given?</p> <p>13 A. Would have been within three, four days</p> <p>14 anyway, but I can't tell you with any certainty.</p> <p>15 Q. How many conversations did you attend with</p> <p>16 Mr. Wojeski and your son in connection with your son's</p> <p>17 business proposal?</p> <p>18 A. One.</p> <p>19 Q. Okay. Was any decision made at the end of</p> <p>20 that meeting as to what was going to happen?</p> <p>21 A. I think Mr. Wojeski was inclined. I don't</p> <p>22 know -- in fact, I'm pretty sure a definitive decision</p> <p>23 had not been reached. I think he wanted to think about,</p> <p>24 you know, the structure a little bit and look at the</p> <p>25 economics a little more. But I think -- certainly it's</p>	<p style="text-align: right;">395</p> <p>1 D. Smith</p> <p>2 that took place at Mr. Featherstonhaugh's office, I</p> <p>3 believe you said it was at a time when he was</p> <p>4 representing you, Mr. D'Aleo was present?</p> <p>5 A. Correct.</p> <p>6 Q. Without getting into the substance of whatever</p> <p>7 conversations took place that day, who else do you recall</p> <p>8 being present at that meeting?</p> <p>9 A. I recalled, and so testified, I think, another</p> <p>10 attorney in the room, but I don't know who it was and --</p> <p>11 Q. Nobody in this room looks familiar?</p> <p>12 A. No, I don't think it was Scott. I don't think</p> <p>13 I met Scott until quite a bit later.</p> <p>14 Q. So yourself, Mr. D'Aleo, Mr. Featherstonhaugh,</p> <p>15 another attorney whose name you can't recall?</p> <p>16 A. Mr. Featherstonhaugh came in and out. I don't</p> <p>17 think he was there the whole time to be honest with you.</p> <p>18 John D'Aleo and go back a long. We were old friend, so I</p> <p>19 was kind of -- I think Mr. Featherstonhaugh had engaged</p> <p>20 him and I was catching up with John and somehow this came</p> <p>21 up and we talked about it. That's my recollection.</p> <p>22 Q. And your recollection is that Mr. D'Aleo had</p> <p>23 been retained by Mr. Featherstonhaugh at that time in</p> <p>24 connection with the representation that he had with you?</p> <p>25 A. Yes, I'm certain of that.</p>
<p style="text-align: right;">394</p> <p>1 D. Smith</p> <p>2 the only time I was present with Geoff where we discussed</p> <p>3 it. Geoff might have met again with him subsequently.</p> <p>4 Q. Did the Hold Harmless Agreement come up at all</p> <p>5 in that conversation --</p> <p>6 A. No.</p> <p>7 Q. -- with Mr. Wojeski?</p> <p>8 A. No.</p> <p>9 Q. And I asked you previously whether you had any</p> <p>10 knowledge Mr. Wojeski had asked for this Hold Harmless</p> <p>11 Agreement in connection with the purchase of the lake</p> <p>12 property and you said no?</p> <p>13 A. Correct.</p> <p>14 Q. Do you have any understanding that he asked</p> <p>15 for this Hold Harmless Agreement in connection with the</p> <p>16 proposal that your son had made to him regarding a</p> <p>17 distribution for a business venture that your son had?</p> <p>18 A. No.</p> <p>19 Q. It didn't come up as far as --</p> <p>20 A. Did not come up.</p> <p>21 Q. -- you recall?</p> <p>22 A. Did not come up.</p> <p>23 Q. Okay. I'm going to ask you one more question</p> <p>24 and then we're done for today.</p> <p>25 Earlier you testified about a conversation</p>	<p style="text-align: right;">396</p> <p>1 D. Smith</p> <p>2 Q. Okay. All right. I think we'll leave it</p> <p>3 there. We're done for today.</p> <p>4 (Time: 2:40 p.m.)</p> <p>5 * * *</p> <p>6</p> <p>7</p> <p>8 * * *</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>



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Exhibit 3

<p style="text-align: right;">Page 401</p> <p>1 2 UNITED STATES DISTRICT COURT 3 NORTHERN DISTRICT OF NEW YORK 4 ----- 5 SECURITIES AND EXCHANGE COMMISSION, 6 Plaintiff, 7 -vs- CVA #: 10 Civ. 457(GLS/DRH) 8 MCGINN, SMITH & CO., INC., MCGINN, SMITH 9 ADVISORS, LLC, MCGINN, SMITH CAPITAL HOLDINGS 10 CORP., FIRST ADVISORY INCOME NOTES, LLC, FIRST 11 EXCELSIOR INCOME NOTES, LLC, FIRST INDEPENDENT 12 INCOME NOTES, LLC, THIRD ALBANY INCOME NOTES, 13 LLC, TIMOTHY M. MCGINN, DAVID L. SMITH, LYNN A. 14 SMITH, GEOFFREY R. SMITH, Individually and as 15 Trustee of the David L. and Lynn A. Smith 16 Irrevocable Trust U/A 8/04/04, LAUREN T. SMITH, 17 and NANCY MCGINN, 18 19 Defendants. 20 21 LYNN A. SMITH, and NANCY MCGINN, 22 23 Relief Defendants, and 24 25 GEOFFREY R. SMITH, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04m Intervenor ----- Deposition of DAVID L. SMITH, held at the offices of Phillips Lytle, LLP., Albany, New York, on December 20, 2011, before DEBORAH R. SALESKI, Court Reporter and Notary Public in and for the State of New York.</p>	<p style="text-align: right;">Page 403</p> <p>1 2 EXHIBITS 3 No. Description Marked 4 601 Letter dated January 13, 2005 452 5 602 Document with Eelmer Presbyterian On the Side 478 6 603 E-Mail From David Rees 486 7 604 E-Mail From David Rees to David Smith 8 Dated Sunday December 2nd, 2007 490 9 605 Letter Dated December 21, 2005 496 10 606 Consists of a Series of Balance Sheets For the Various Four Funds 498 11 607 E-Mail From Patricia Sicluna to Smith D., 12 Cc Steven Smith Dated August 11, 2005 519 13 608 Package of Materials 520 14 609 Letter From Martin Finn to You and Your wife on January 28, 2009 540 15 610 Letter From Dave Smith to David Franceski 16 Dated January 11, 2009 543 17 611 E-Mail String 548 18 612 E-Mail the Dated February 4, 2009 550 19 613 Letter Dated February 4th, 2010 From Mr. Dreyer to Mr. Elizabeth Coombs 554 20 614 Letter Dated February 7th from Mr. Dreyer 21 To Ms. Coombs 363 554 22 615 Five-Page Document Dated 4/4/2010 556 23 616 Series of Handwritten Notes 559 24 617 E-Mail From Patricia Sicluna Dated September 15, 2009 and an E-Mail From 25 Ms. Sicluna Dated October 27th, 2009 565</p>
<p style="text-align: right;">Page 402</p> <p>1 2 APPEARANCES: 3 For the Plaintiff: 4 KEVIN McGRATH, ESQ. Senior Counsel 5 Division of Enforcement United States Securities and Exchange Commission 6 3 World Financial Center, Suite 400 New York, New York 10281-1022 7 (212) 336-0578 8 9 For the Defendant David L. Smith: 10 DREYER BOYAJIAN, LLP Attorneys at Law 11 75 Columbia Street Albany, New York 12210 12 BY: WILLIAM DREYER, ESQ. (518) 463-7784 13 14 Also Present: 15 David Stoelting, Esq. 16 William J. Brown, Esq. 17 Scott Ely, Esq. 18 * * * 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 404</p> <p>1 D. Smith 2 DAVID L. SMITH, having been recalled as 3 a witness, being previously duly sworn by the notary 4 public present, testified further as follows: 5 6 EXAMINATION BY MR. McGRATH: 7 Q. Good morning, Mr. Smith. 8 A. Good morning, Mr. McGrath. 9 MR. McGRATH: For the record, David 10 McGrath and David Stoelting are appearing on 11 behalf of the SEC. Would counsel please 12 identify themselves. 13 MR. DREYER: William Dreyer on behalf of 14 Mr. Smith. 15 MR. ELY: Scott Ely on behalf of Lynn 16 Smith and the Lynn Smith, Dave Smith 17 Irrevocable Trust. 18 MR. BROWN: William J. Brown of Phillips 19 Lytle for the receiver. 20 BY MR. McGRATH: 21 Q. Mr. Smith, I'm going to remind you you're 22 still under oath. Okay. Do you recall you previously 23 testified about a conversation that you had with a 24 Mr. D'Aleo at the offices of Jim Featherstonhaugh 25 regarding the private annuity agreement?</p>

<p style="text-align: right;">Page 405</p> <p>1 D. Smith</p> <p>2 A. Yes.</p> <p>3 Q. You testified that that conversation occurred</p> <p>4 at the time that you believed you had retained or were</p> <p>5 considering retaining Mr. Featherstonhaugh's firm to</p> <p>6 represent you --</p> <p>7 A. That is correct.</p> <p>8 Q. -- in connection with this action?</p> <p>9 A. That is correct.</p> <p>10 Q. And I believe you also testified that</p> <p>11 Mr. Featherstonhaugh and Ms. Dunn, Jill Dunn, were</p> <p>12 present for some parts of that conversation; is that</p> <p>13 correct?</p> <p>14 A. I don't think I testified that way. My</p> <p>15 recollection was Mr. Featherstonhaugh certainly came in</p> <p>16 and out of the office. I don't recall if I met Ms. Dunn</p> <p>17 that day or not. I have no recollection of that.</p> <p>18 Q. All right. Who else do you recall being</p> <p>19 present at that meeting other than yourself, Mr. D'Aleo,</p> <p>20 Mr. Featherstonhaugh at various times?</p> <p>21 A. I testified, and I still have some</p> <p>22 recollection, that there was some other attorney from</p> <p>23 Jim's office. Again, he was not present to be</p> <p>24 representing us, I think he was just kind of in and out</p> <p>25 and I just don't know who it was.</p>	<p style="text-align: right;">Page 407</p> <p>1 D. Smith</p> <p>2 we had, we had one in the conference room in the evening</p> <p>3 where I engaged --</p> <p>4 MR. DREYER: Just getting ready to raise</p> <p>5 my hand as an indication when you start</p> <p>6 talking about conversations, just setting the</p> <p>7 stage for Mr. McGrath.</p> <p>8 A. Where I engaged Mr. Featherstonhaugh to be</p> <p>9 sort of controlling the case. We just didn't know how</p> <p>10 with so many moving parts. And at that time he</p> <p>11 introduced Jill Dunn, who he was recommending, would look</p> <p>12 after the trust. I believe Mr. Dreyer came in that</p> <p>13 evening. I'm -- I know Mr. McGinn was there and I think</p> <p>14 Mr. Jones was there and obviously Mr. Featherstonhaugh,</p> <p>15 so that's -- and I don't know if that was prior to -- I</p> <p>16 think that was the first meeting we had.</p> <p>17 And then the second meeting, and the one that</p> <p>18 you were asking me more specifically about, was in</p> <p>19 Mr. Featherstonhaugh's office, not in the boardroom, it</p> <p>20 was in a sort of a small conference room, I guess for</p> <p>21 lack of a better description, in the back. And that's</p> <p>22 where -- I know John was in there, he was -- he was</p> <p>23 reviewing some things. I had the discussion I talked</p> <p>24 about and Feathers [sic] was in and out and I just don't</p> <p>25 think Jill Dunn showed up that day. I don't think she</p>
<p style="text-align: right;">Page 406</p> <p>1 D. Smith</p> <p>2 Q. Was your wife present?</p> <p>3 A. I knew you were going to ask that and I have a</p> <p>4 feeling that she was. I think she was, yes, but I just</p> <p>5 can't swear to that. We had so many meetings those first</p> <p>6 few days and so I don't want to state that emphatically.</p> <p>7 I think she was, but I just don't know for sure.</p> <p>8 Q. The SEC action was filed on April 20th</p> <p>9 and we have a Notice of Appearance that was filed by</p> <p>10 Mr. Featherstonhaugh on behalf of Lynn Smith dated</p> <p>11 April 29th, 2010, so whatever meetings took place</p> <p>12 presumably took place sometime between April 20th and</p> <p>13 April 29, 2010.</p> <p>14 A. That would be correct.</p> <p>15 Q. Would that be a fair statement?</p> <p>16 A. Yes.</p> <p>17 Q. How many meetings do you recall attending at</p> <p>18 Mr. Featherstonhaugh's office during that time period?</p> <p>19 A. At least two.</p> <p>20 Q. Okay.</p> <p>21 A. And I just don't know which order. As I think</p> <p>22 I testified I was in Arizona, heard about the action,</p> <p>23 came back, flew down to Florida to pick up my wife and I</p> <p>24 think the meetings were post that. I just can't imagine</p> <p>25 that they were prior to that. So the two meetings that</p>	<p style="text-align: right;">Page 408</p> <p>1 D. Smith</p> <p>2 was there.</p> <p>3 Q. Your reference to the second meeting in the</p> <p>4 conference room to John, is John D'Aleo?</p> <p>5 A. Yes. I'm sorry.</p> <p>6 Q. You said that you showed him something, did</p> <p>7 you show him the Private Annuity Agreement?</p> <p>8 A. No, I didn't show him anything. What I</p> <p>9 believe I testified or should have testified, if I</p> <p>10 didn't, was that I was describing the private annuity,</p> <p>11 the trust had come up and at that time I was still</p> <p>12 referring to it as the Private Annuity Trust and I was</p> <p>13 describing exactly what the, you know, basics of the</p> <p>14 trust were.</p> <p>15 Q. Now, you eventually retained somebody else to</p> <p>16 represent you initially in connection with this civil</p> <p>17 action, correct?</p> <p>18 A. That is correct.</p> <p>19 Q. Who's that?</p> <p>20 A. It was Greenberg Tra --</p> <p>21 Q. Traurig.</p> <p>22 A. Yes. And Mike, Mike --</p> <p>23 Q. Mike Koenig.</p> <p>24 A. Thanks.</p> <p>25 Q. K-O-E-N-I-G.</p>

David L. Smith

December 20, 2011

<p>1 D. Smith</p> <p>2 A. Yes. Correct. Right.</p> <p>3 Q. Did you retain him prior to April 29th, 2010</p> <p>4 when Mr. Featherstonhaugh was retained on behalf of your</p> <p>5 wife, Lynn Smith?</p> <p>6 A. I don't believe so. I think that, again, at</p> <p>7 that meeting that we -- the first meeting, the boardroom</p> <p>8 meeting, where we were trying to get -- that was a name</p> <p>9 that was recommended to me and subsequently I was</p> <p>10 introduced to Mike as was, I guess, Mr. McGinn and I</p> <p>11 would guess it was some time after that that we retained</p> <p>12 him, probably maybe even 10 days, two weeks, who knows.</p> <p>13 Q. Without getting into any specific</p> <p>14 conversations or advice that was asked for or given, I</p> <p>15 just want to ask you whether the topic of the David and</p> <p>16 Lynn Smith Irrevocable Trust came up during the first</p> <p>17 meeting in the conference room -- I'm sorry, in the</p> <p>18 boardroom, that evening meeting, to your knowledge?</p> <p>19 A. No, it did -- well, it came up. There was no</p> <p>20 discussion of it. It came up in the sense that since</p> <p>21 these other parties were mentioned, he mentioned, you</p> <p>22 know, referenced, Jill Dunn, so I can't imagine it</p> <p>23 couldn't have -- it had to come up because my</p> <p>24 recollection is that she was there, so...</p> <p>25 Q. At the first meeting in the evening in the</p>	<p>1 D. Smith</p> <p>2 Mr. Featherstonhaugh at?</p> <p>3 A. Not a whole lot. He was kind of, my</p> <p>4 recollection is he was in and out. I think, you know,</p> <p>5 again, he was trying to coordinate where the various</p> <p>6 parties were going to be and, quite frankly, my</p> <p>7 recollection is there wasn't a whole lot accomplished at</p> <p>8 that meeting, but I do know he was in and out, but we</p> <p>9 didn't sit and counsel for a long time.</p> <p>10 Q. You have a clear recollection that that</p> <p>11 meeting took place before April 29, 2010?</p> <p>12 A. I do not. I'm just trying to -- I'm trying</p> <p>13 to -- the 20th was on like a Tuesday or Wednesday, I</p> <p>14 think, because I was in Arizona, I flew back, I flew to</p> <p>15 Florida, I drove back over the weekend. I remember</p> <p>16 driving back on a Saturday night, so my guess is that</p> <p>17 first meeting was probably the following Monday, which</p> <p>18 would probably be like the 20th, right? About five days.</p> <p>19 And then the second meeting was probably -- you know, if</p> <p>20 it was before the 29th, it would have been real close.</p> <p>21 It would have been the 27th or 28th, something like that.</p> <p>22 MR. DREYER: Go off the record.</p> <p>23 (Whereupon, a discussion was held off the</p> <p>24 record.)</p> <p>25 BY MR. McGRATH:</p>
<p>1 D. Smith</p> <p>2 boardroom?</p> <p>3 A. That is my recollection. Let me back up a</p> <p>4 little bit, though, because I'm not sure at that time</p> <p>5 whether Jim specifically was referring Ms. Dunn to handle</p> <p>6 the trust now that I think about it because she was</p> <p>7 someone that had worked with Bill and there was a lot of</p> <p>8 moving parts. I may want to correct my testimony. I'm</p> <p>9 not absolutely certain whether she was referenced as</p> <p>10 going to be handling the trust on that particular day.</p> <p>11 She was certainly in the room, I remember that</p> <p>12 specifically.</p> <p>13 Q. Okay. Was the Private Annuity Agreement a</p> <p>14 topic of conversation in that first meeting?</p> <p>15 A. I don't believe so, no, not at all.</p> <p>16 Q. So the second meeting, which took place in a</p> <p>17 conference room in Mr. Featherstonhaugh's office?</p> <p>18 A. It's an office, yes.</p> <p>19 Q. How long did that meeting last approximately?</p> <p>20 A. Maybe an hour.</p> <p>21 Q. Okay. And was your wife at that meeting?</p> <p>22 A. As I said a few moments ago, it's my belief</p> <p>23 she was. I -- you know, as I said, a lot of moving</p> <p>24 parts, but I think she was at that meeting.</p> <p>25 Q. Understood. And how much of that meeting was</p>	<p>1 D. Smith</p> <p>2 Q. Did you have any discussions with Jill Dunn</p> <p>3 other than what took place in Mr. Featherstonhaugh's</p> <p>4 office on or before April 29th? Sorry, my question is:</p> <p>5 Aside from the one or two meetings that you just</p> <p>6 referenced there, did you have any discussions with Jill</p> <p>7 Dunn either before or after April 29th regarding the</p> <p>8 Private Annuity Agreement?</p> <p>9 A. Well, I don't think before the 29th because,</p> <p>10 as I said, I think that second meeting we were right up</p> <p>11 against it and certainly subsequent to that, I don't</p> <p>12 remember a specific meeting, but I'm sure I had a</p> <p>13 discussion. I know Mr. Featherstonhaugh once she became</p> <p>14 engaged with the trust sort of left things to her and I</p> <p>15 obviously must have had some discussion. She would have</p> <p>16 wanted to know what it was all about. But I didn't keep</p> <p>17 a calendar or, you know, so I don't think it would be</p> <p>18 before the 29th if that's your specific question.</p> <p>19 Afterward I would have had -- certainly would have had</p> <p>20 some discussion.</p> <p>21 Q. Were you aware of the fact that at the</p> <p>22 preliminary injunction hearing in June of 2010 Jill Dunn</p> <p>23 argued on behalf of the trust that your wife, Lynn Smith,</p> <p>24 had no interest in any of the trusts, irrevocable trust</p> <p>25 assets?</p>



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David L. Smith

December 20, 2011

<p>413</p> <p>1 D. Smith</p> <p>2 A. I do, yes.</p> <p>3 Q. When did you learn that?</p> <p>4 A. Oh, sometime post, you know, the summer when</p> <p>5 the trust -- I think the whose issue came up again and,</p> <p>6 you know, there was another decision and we started to</p> <p>7 have a fair amount of discussions of what took place.</p> <p>8 Q. I think I previously asked you whether you had</p> <p>9 reviewed any of the submissions that your wife made to</p> <p>10 the court prior to them being submitted and your</p> <p>11 testimony was you did not?</p> <p>12 A. I don't believe I did.</p> <p>13 Q. All right. Did you become aware prior to the</p> <p>14 Preliminary Injunction Hearing in June of 2010 that your</p> <p>15 wife had made submissions to the court that indicated</p> <p>16 that she didn't have any interest in any of the trust</p> <p>17 assets either current or future?</p> <p>18 A. I don't know what the timing was. I know the</p> <p>19 discussion, certainly as it related to my wife, and</p> <p>20 virtually everyone who was involved was looking at that</p> <p>21 question regarding the irrevocable trust and I think</p> <p>22 the -- clearly the controversy, which ultimately followed</p> <p>23 was, did my wife remember or have any knowledge of the</p> <p>24 Private Annuity Agreement and I can be pretty blunt and</p> <p>25 say no. I mean, she obviously had signed it at one time,</p>	<p>415</p> <p>1 D. Smith</p> <p>2 MR. DREYER: The two-way discussion is I</p> <p>3 believe privileged.</p> <p>4 Q. Did you have any discussions with Mr. D'Aleo</p> <p>5 after that conversation in Mr. Featherstonhaugh's</p> <p>6 conference room regarding the Private Annuity Agreement</p> <p>7 or Private Annuity Trust?</p> <p>8 A. I don't believe so. I think that's the only</p> <p>9 time that I met with John.</p> <p>10 Q. Did you make any efforts to locate the Private</p> <p>11 Annuity Agreement after the SEC filed its case on</p> <p>12 April 20, 2010 and prior to the Preliminary Injunction</p> <p>13 Hearing in June of 2010?</p> <p>14 A. No.</p> <p>15 Q. Okay. Without getting into specifics did you</p> <p>16 have a discussion with Mr. D'Aleo about trying to find</p> <p>17 that document?</p> <p>18 A. No, because, you know, my recollection was, if</p> <p>19 it was asked, I didn't have any documentation. I knew</p> <p>20 that there had been a -- to the best of my recollection,</p> <p>21 there had been a file that I had at my office. I can</p> <p>22 tell you exactly where it was located and knowing that</p> <p>23 that had been removed the only discussion that I would</p> <p>24 have had with John and, again, I don't think I talked</p> <p>25 about the Private Annuity Agreement, I talked about I had</p>
<p>414</p> <p>1 D. Smith</p> <p>2 but her ability to remember anything about it would have</p> <p>3 been, as I think I've testified earlier last week, would</p> <p>4 be virtually zero.</p> <p>5 Q. You had had a conversation with Mr. D'Aleo</p> <p>6 about it prior to that Preliminary Injunction Hearing for</p> <p>7 sure?</p> <p>8 A. I had -- what I had, what I've testified, and,</p> <p>9 again, I think this is where a lot of the unfortunate</p> <p>10 controversy came, I had always referred to it as a</p> <p>11 Private Annuity Trust. In fact, in my letter to</p> <p>12 Mr. Robellus stated Private Annuity Trust. I sort of</p> <p>13 looked at it as a global thing and had not either because</p> <p>14 I don't have the background or didn't bother to make the</p> <p>15 distinction, that what we really had was an irrevocable</p> <p>16 trust and within that irrevocable trust was a Private</p> <p>17 Annuity Agreement. And evidently that whole distinction</p> <p>18 has proven to be a major issue. But my discussion with</p> <p>19 Mr. D'Aleo was, I talked to it as the Private Annuity</p> <p>20 Trust and I explained basically what the aspects of it</p> <p>21 were.</p> <p>22 MR. DREYER: Objection. You can describe</p> <p>23 the circumstances.</p> <p>24 THE WITNESS: But that's privileged</p> <p>25 information.</p>	<p>416</p> <p>1 D. Smith</p> <p>2 a file of backup material, due diligence may have</p> <p>3 mentioned the Private Annuity Trust again, not thinking</p> <p>4 so much that there was this separate agreement.</p> <p>5 Q. Okay. We've determined, according to the</p> <p>6 court docket, that Mr. Koenig appeared as your attorney</p> <p>7 on May 3rd, 2010.</p> <p>8 A. Yeah.</p> <p>9 Q. Three, four days after Mr. Featherstonhaugh</p> <p>10 appeared on behalf of your wife?</p> <p>11 A. Okay.</p> <p>12 Q. Does that change your recollection of anything</p> <p>13 you've testified to?</p> <p>14 A. No, I mean, again, he was -- he was mentioned</p> <p>15 on that first meeting, as I said. At some point we got</p> <p>16 together and he was engaged, but that sounds about right,</p> <p>17 May 3rd. I will know he was intending to represent us in</p> <p>18 terms of the preliminary hearing, so...</p> <p>19 Q. All right. You've previously testified about</p> <p>20 the contents of the Private Placement Memorandums, which</p> <p>21 I referred to in shorthand as PPM, from time to time on</p> <p>22 behalf of FIIN, FAIN, FEIN and TAIN, which I'll refer to</p> <p>23 as the Four Funds again, and I understand you have a</p> <p>24 different preference, but you understand what I mean --</p> <p>25 A. I do, yes.</p>



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Exhibit 4

MCGINN, SMITH & CO., INC.
 LOAN INTEREST
 OFFICER: David L. Smith

LOAN DATE	PAY DATE		PRINCIPAL		PAYMENT/ ADVANCE
03/23/92	04/06/92	0.12	150000.00	700.00	100000.00
04/07/92	05/08/92	0.12	50000.00	516.67	8000.00
05/09/92	06/02/92	0.12	42000.00	336.00	2000.00
06/03/92	06/30/92	0.12	40000.00	360.00	
				=====	
				1912.67	
07/01/92	07/17/92	0.12	41912.67	223.53	
Total Principal and Interest			42136.20		

1912.67

7/20/92 5000
 35000

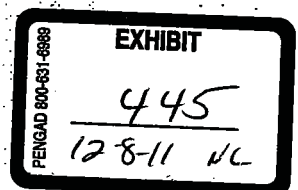


Exhibit 5

\$ 500,000.⁰⁰Albany, N. Y., March 23, 1992RECEIVED FROM David I Smith
five hundred thousand and ^{no}/₁₀₀ — Dollars,For stock purchase
ALB. SAV. BK.MAR 23 1992
01201 V. K. L.albany savings bank
FSABy Vicky Lobo
Authorized Signature

C-155 10M

Clarke American 0292

Union National BankChecks and other items are received
for deposit subject to the provisions
of the Uniform Commercial Code or
any applicable collection agreement.

Member FDIC

Reference	Amount	Date
935 LNS 207 4327041050 473474.25 5		

Receipt

FORM 40160

EXHIBIT

446

12-8-11 NL

PENGAD 800-631-6869

Exhibit 6



462
8233

March 27, 1992

David L. Smith
8 Beech Ridge Rd.
Clifton Park, NY 12065

Dear Subscriber:

We hereby acknowledge receipt on 03/23/92 of your order for 50000 shares at a price of \$10.00 per share, for a total payment of \$500000.00.

At this time, we cannot confirm the number of shares that will be issued to you. Such allocation will be made in accordance with the Plan of Conversion following completion of the Subscription offering and determination of the final price.

If you have any further questions please call our Conversion Center Hotline at (518)462-8233 or (800)252-4299.

Sincerely,

ALBANY SAVINGS BANK, FSB

117304

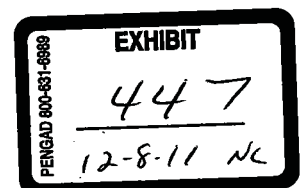


Exhibit 7



April 1, 1992

Reference 117304

David L. Smith
8 Beech Ridge Rd.
Clifton Park, NY 12065

Dear Charter Shareholder:

We appreciate your interest in the stock offering of ALBANK Financial Corporation. Due to the excellent response to our offering from account holders, the maximum number of shares to be issued to any individual subscriber has been reduced. Therefore, your subscription is 40688 shares. A check for the unfilled balance of your subscription and any interest is enclosed.

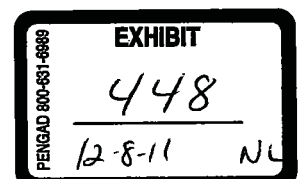
Your stock certificate will be issued within 5 business days of closing and mailed to you under separate cover.

We are expecting to close our conversion on April 1st, after which time, trading will begin on NASDAQ under the symbol ALBK.

Thank you again for your interest and we welcome you as a shareholder in ALBANK Financial Corporation.

Sincerely,

Herbert G. Chorbajian
Chairman, President and
Chief Executive Officer





REFERENCE
ALBANY FINANCIAL CORPORATION
STOCK PURCHASE

CHECK NUMBER 185988
AMOUNT

TAXPAYER ID: [REDACTED]

REFUND AMOUNT: 93120.00
INTEREST AMOUNT: 554.85

TAX YEAR 1992
INTEREST:
011730904

CHECK DATE: 03/31/92

CHECK TOTAL: 93674.85

DETACH AND RETAIN THIS STATEMENT. THE ATTACHED CHECK IS IN PAYMENT OF THE ITEMS DESCRIBED ABOVE. IF NOT CORRECT, PLEASE NOTIFY US PROMPTLY. NO RECEIPT DESIRED.



EXPENSE CHECK

DATE	CHECK NO.
03/31/92	185988

PAY

***NINETY THREE THOUSAND SIX HUNDRED SEVENTY FOUR & 85/100 DOLLARS

AMOUNT
*****93674.85

TO
THE
ORDER
OF

DAVID L. SMITH
CLIFTON PARK NY 12065

Tony Vg
David L. Smith
AUTHORIZED SIGNATURE

185988

Exhibit 8

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,

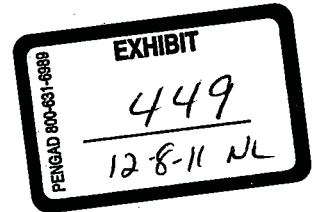
Relief Defendant.

AFFIDAVIT OF LYNN A. SMITH

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

LYNN A. SMITH, being duly sworn, deposes and says:

1. I am named as a Relief Defendant in this action. I make this affidavit at the request of proposed intervenor David M. Wojeski, CPA, with respect to his motion to intervene in this lawsuit to challenge the restraining order which froze the NFS/Fidelity brokerage account of the DAVID L. AND LYNN A. SMITH IRREVOCABLE TRUST U/A AUGUST 4, 2004, as listed on page 5 of Exhibit B to the Order to Show Cause,



Temporary Restraining Order, and Order Freezing Assets and Granting Other Relief, issued on April 20, 2010.

2. My father died in 1969, less than a year after my marriage to David Smith. My mother had died just months earlier and, being their only child, I was the sole heir of my father's estate. Part of my inheritance included my father's stock account, which I have continuously owned as my separate property since my father's death 41 years ago. After my husband became a stock broker in 1973, I moved the account from the brokerage firm used by my father, to my husband's employer at the time, Bache & Co. My husband has managed my account since that time.
3. In approximately April 1992, using assets in my stock account, I purchased 40,000 shares of Albank stock at \$10 per share at the initial public offering, when the bank was converted to Albany Savings Bank. I held this stock in my brokerage account for many years and, because of subsequent mergers and acquisitions involving Albany Savings Bank, Citizens Bank and Charter One Financial and the resulting stock splits and increases in value, my holdings in this banking institution increased to 110,735 shares of Charter One stock by 1999. Attached as Exhibit A to this affidavit is a copy of my brokerage statement for the period ending August 27, 1999, which is the oldest brokerage account statement I can presently locate. That statement shows my ownership of 110,735 shares of Charter One stock, valued at \$24.75 per share in August 1999.
4. By 2004, the stock account started by my father when I was a child had grown in value to more than \$6,500,000. I attribute the fact that I had accumulated these assets to the foresight of my father in creating and growing this account for my eventual benefit in the 1950's and 1960's. In keeping with his philosophy and in considering his untimely

Case 1:10-cv-00457-GLS-DRH Document 34 Filed 05/26/10 Page 3 of 3

death, I decided to take advantage of available estate planning laws to fund a trust for my children, from which they could benefit during my lifetime, instead of having these assets sit in a brokerage account until my death.

5. On August 4, 2004, my husband and I created the David L. and Lynn A. Smith Irrevocable Trust by signing a Declaration of Trust with the trustee. Although my husband and I were both designated as Donors of the trust, I provided the initial and, to date, only asset transferred to the trust. On September 1, 2004, I transferred 100,000 shares of Charter One stock, then valued at \$44.50 per share, to the trust. Attached hereto as Exhibit B is a copy of my September 2004 brokerage statement, which shows that stock transfer on page 5. To the best of my knowledge, there have not been any other contributions into the trust since its creation.
6. From the time the trust was created in August 2004, my husband and I have had no interest in or expectation of an interest in the David L. and Lynn A. Smith Irrevocable Trust. It exists solely, exclusively and permanently for the benefit of our children.


LYNN A. SMITH

Sworn to before me this
21st day of May, 2010.


Notary Public

JILL A. DUNN
Notary Public, State of New York
No. 02DU5024316
Qualified in Albany County
Commission Expires March 7, 20 14
April

EXHIBIT A

LYNN A SMITH

ACCOUNT NUMBER ██████████ 1 700
TAXPAYER NUMBER ██████████ 8058
LAST STATEMENT July 30, 1999

THE UNIVERSITY OF CHICAGO

LYNN A SMITH
8 BEECH RIDGE ROAD
CLIFTON PARK NY 12065-2728

What's In This Statement

3	Financial Summary
4	Your Portfolio Holdings
5	Transaction Detail

ACCOUNT EXECUTIVE **DAVID L. SMITH**
VISIT OUR WEBSITE **www.meghnsmlib.com**

Your Portfolio at a Glance

TOTAL VALUE OF SECURITIES THIS PERIOD	5,719,665
NET CREDIT BALANCE	605,706
NET EQUITY THIS PERIOD	\$6,325,371
NET EQUITY LAST STATEMENT	5,577,259
CHANGE SINCE LAST STATEMENT	748,113

Market Value of Your Portfolio

Cash & Equivalent	\$605,706	\$6,727,165	\$-7,500
Equities	\$1,108,463	\$4,474,698	\$-5,900

	Current market value	Last statement's market value	Short market value
1. Current market value			
2. Last statement's market value			
3. Short market value			

Important Notice

All checks to be credited to your account should be made payable to "Bear Stearns Securities Corp." and mailed to McGinn, Smith & Co., Inc.

SPC This summary is for informational purposes only. It is not intended as a tax document. The statement should be retained for your records. See reverse side for important information.

CLEARANCE AGENT

Real Securities Corp.
One Montecito Center North
Brooklyn, New York 11201-3659
(212) 272-1000

LYNN A SMITH

STATEMENT PERIOD July 31, 1999
THROUGH August 27, 1999

ACCOUNT NUMBER 91 700
TAXPAYER NUMBER 8058
LAST STATEMENT July 30, 1999

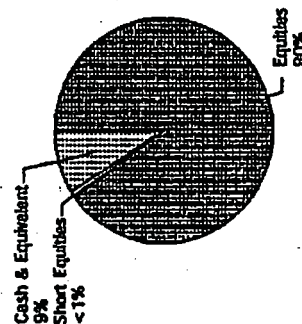
Income Summary

	THIS PERIOD	YEAR TO DATE
Dividends	18,377.60	53,836.60
Credit Balance Int.	4,400.84	47,448.88
Total	\$22,778.44	\$101,285.48
Margin Int. Paid	-18.05	-18.05

Portfolio Composition

	SHORT	LONG
Cash/Cash Equivalent		605,706
Equities	7,500	5,727,165
Total	\$7,500	\$6,332,871

Your Portfolio Allocation



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

Cash Flow Analysis

	THIS PERIOD
Opening Balance	\$1,108,462.59
Securities Sold	505,983.12
Dividends/Interest	22,778.44
Amount Credited	\$528,761.56
Securities Bought	-996,500.00
Funds Withdrawn	-35,000.00
Dividends/Interest Charged	-18.05
Amount Debited	\$-1,031,518.05
Net Cash Activity	-502,758.49
Closing Balance	\$605,706.10

Cash Balance Summary

	OPENING	CLOSING
Cash	533,818.92	28,863.26
Margin	574,643.67	576,842.84
Net Cash Balance	\$1,108,462.59	\$605,706.10

CLEARANCE AGENT

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

LYNN A SMITH

STATEMENT PERIOD July 31, 1998
THROUGH August 27, 1999

ACCOUNT NUMBER 700
TAXPAYER NUMBER 8058
LAST STATEMENT July 30, 1999

Your Portfolio Holdings

CASH & CASH EQUIVALENTS

DESCRIPTION	SYMBOL/CUSIP	QUANTITY	PRICE	MARKET VALUE	ESTIMATED ANNUAL INCOME
CASH BALANCE				605,706	
TOTAL CASH & CASH EQUIVALENTS				\$605,706	

EQUITIES

Equities & Options

DESCRIPTION	SYMBOL/CUSIP	ACCT TYPE	QUANTITY	PRICE	MARKET VALUE	ESTIMATED ANNUAL INCOME	CURRENT YIELD (%)
AMERICA ONLINE INC-DEL	AOL	MRGN	1,000	99.0630	99,063		
CALL AMER ONLINE SEP 095 *** EXP 09/18/1999	AOE195	MRGN	-10	7.5000	-7,500		
AT&T CORP	T	CASH	3,000	47.5000	142,500	2,640	1.8526
CHARTER ONE FINANCIAL INC WITH RIGHTS TO PURCHASE PREFERRED STK UNDER CERTAIN CIRCUMSTANCE	COFI	MRGN	110,735	24.7500	2,740,691	70,870	2.5858
QWEST COMMUNICATIONS INTERNATIONAL INC	QWST	MRGN	40,000	28.6250	1,145,000		
POINTE FINANCIAL CORP-FLA	PNTE	CASH	370	10.6250	3,931	74	1.8825
WHITE PINE SOFTWARE INC	WPNE	CASH	25,000	5.1880	129,700		
Total Equities & Options					\$4,253,385	\$73,584	

CLEARANCE AGENT

Bar, Susan's Securities Corp.
One Metrotech Center North
Brooklyn, New York 11201-3859
(212) 272-1000

LYNN A SMITH

STATEMENT PERIOD July 31, 1999
THROUGH August 27, 1999
ACCOUNT NUMBER 1 700
TAXPAYER NUMBER 8058
LAST STATEMENT July 30, 1999

Your Portfolio Holdings (continued)

Preferred Equities

DESCRIPTION	SYMBOL/CUSIP	ACCT TYPE	QUANTITY	PRICE	MARKET VALUE	ESTIMATED ANNUAL INCOME	CURRENT YIELD (%)
EIX TR I 7.875% CUM QLY INCOME PFD SEC SER A DUE 7/26/29 BYE (QUIPS)	EIXPRA	CASH	60,000	24.4380	1,466,280		
Total Preferred Equities					\$1,466,280	\$0	
TOTAL EQUITIES					\$5,719,665	\$73,584	

YOUR TOTAL ESTIMATED ANNUAL INCOME \$73,584

YOUR PRICED PORTFOLIO HOLDINGS \$6,325,371

Transaction Detail

INVESTMENT ACTIVITY

SETTLEMENT DATE	TRADE DATE	TRANSACTION	DESCRIPTION	SYMBOL/CUSIP	QUANTITY	PRICE	DEBIT AMOUNT	CREDIT AMOUNT
08/03/99		JOURNAL	TROY FINANCIAL CORPORATION	TRYF	513			
08/03/99		JOURNAL	TROY FINANCIAL CORP RSTD	9302132	-513			
08/10/99	08/08/99	SOLD	CALL AMER ONLINE AUG 090*** EXP 08/21/1999 OPEN CONTRACT	22799W9H3	-10	3.7500		3,749.87

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007

CLEARANCE AGENT

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

LYNN A SMITH

STATEMENT PERIOD July 31, 1999
THROUGH August 27, 1999
ACCOUNT NUMBER 1 700
TAXPAYER NUMBER 8058
LAST STATEMENT July 30, 1999

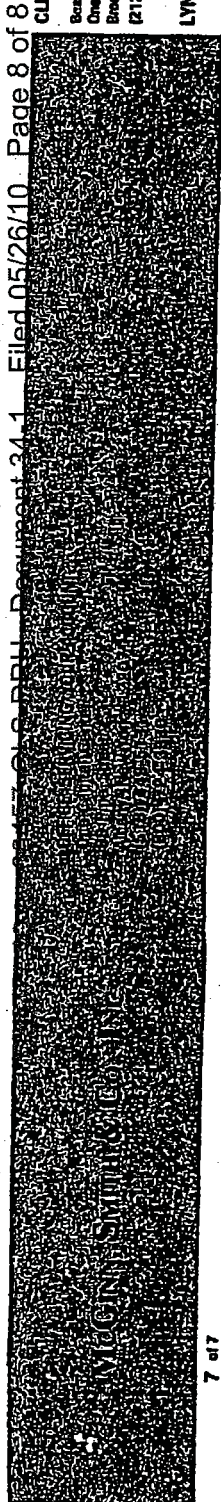
Transaction Detail (continued)

INVESTMENT ACTIVITY (continued)

SETTLEMENT DATE	TRADE DATE	TRANSACTION	DESCRIPTION	SYMBOL/USP	QUANTITY	PRICE	DEBIT AMOUNT	CREDIT AMOUNT
08/18/99	08/19/99	BOUGHT	EX TR I 7.875% CUM QTY INCOME PFD SEC SER A DUE 7/26/20 R/E (QUIPS) PROSPECTUS UNDER SEPARATE MAIL	EXFRA	40,000	24.7500	990,000.00	
08/23/99	08/20/99	SOLD	CALL AMER ONLINE SEP 095 *** EXP 09/18/1999 DISCRETIONARY ORDER OPEN CONTRACT	QAOE95	-10	7.2500		7,249.75
08/23/99	08/20/99	BOUGHT	CALL AMER ONLINE AUG 050 *** EXP 08/21/1999 DISCRETIONARY ORDER CLOSING CONTRACT	22799W9H3	10	6.5000	6,500.00	
08/25/99	08/20/99	SOLD	EX TR I 7.875% CUM QTY INCOME PFD SEC SER A DUE 7/26/20 R/E (QUIPS) AS OF 08/20/99	EXFRA	-20,000	24.7500		494,983.50
TOTAL							\$-996,500.00	\$505,983.12

DEPOSITS AND WITHDRAWALS

DATE	TRANSACTION	DESCRIPTION	DEBIT AMOUNT	CREDIT AMOUNT
08/09/99	FND WIRED	MDA#MB660737FNDSWIRED TO MFRS AND TRADERS TR CO AC# 19965 FD#02504	15,000.00	
08/20/99	FND WIRED	MDA#MB668741FNDSWIRED TO MFRS AND TRADERS TR CO AC# 0805 FD#03146	15,000.00	
08/25/99	CHECK	#20121-082598RAFT DEBIT	5,000.00	
TOTAL			\$-35,000.00	



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CLEARANCE AGENT

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

LYNN A SMITH

7 of 7

STATEMENT PERIOD July 31, 1989
THROUGH August 27, 1989
ACCOUNT NUMBER 1700
TAXPAYER NUMBER 8058
LAST STATEMENT July 30, 1989

Transaction Detail (continued)

DIVIDENDS

DATE	DESCRIPTION	SYMBOL/CUSIP	QUANTITY	RATE (%)	DEBIT AMOUNT	CREDIT AMOUNT
08/02/99	AT&T CORP REC 06/30/98 PAY 08/02/99	T	3,000	0.2200		660.00
08/20/99	CHARTER ONE FINANCIAL INC REC 08/06/99 PAY 08/20/99	COF	110,735	0.1600		17,717.60
TOTAL						\$18,377.60

INTEREST

DATE	DESCRIPTION	SYMBOL/CUSIP	QUANTITY	RATE (%)	DEBIT AMOUNT	CREDIT AMOUNT
08/23/99	INTEREST ON CREDIT BALANCE AT 4 1/2% 07/21 THRU 08/20			4.5000		4,400.84
08/23/99	FROM 07/21 THRU 08/20 @ 7 % BAL 581,111- AVBAL 2,994			7.0000	18.05	
TOTAL					\$-18.05	\$4,400.84



..... End of Statement.....

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EXHIBIT B

McGINN, SMITH & Co., Inc.

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

Best Securities Corp.
One Montecito Center North
Brooklyn, New York 11201-3859
(212) 272-1000

LYNN A SMITH

STATEMENT PERIOD September 1, 2004
THROUGH September 30, 2004

ACCOUNT NUMBER 800
TAXPAYER NUMBER On File
LAST STATEMENT August 31, 2004

What's In This Statement

Financial Summary	3
Your Portfolio Holdings	4
Transaction Detail	5
Your Messages	7



LYNN A SMITH
2 ROLLING BROOK DRIVE
SARATOGA SPRINGS NY 12866

Your Portfolio at a Glance

NET CREDIT BALANCE 2,097,228
NET EQUITY THIS PERIOD \$2,097,228
NET EQUITY LAST STATEMENT 6,549,556
CHANGE SINCE LAST STATEMENT -4,452,328

*This portfolio includes one or more unlisted securities that are not reflected in the Total Value of Securities and the Net Equity This Period.

Market Value of Your Portfolio

Cash & Equivalent	\$2,097,228
Equities	\$1,880,208
	\$0
Current market value	\$4,669,350
Last statement's market value	

SIPC This summary is for informational purposes only. It is not intended as a tax document.
This statement should be retained for your records. See reverse side for important information.

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2 of 7

STATEMENT BACKER IS PRINTED ON THIS PAGE

CLEARANCE AGENT
Bee, Stuart Seattle Corp.
One Westech Center North
Brooklyn, New York 11201-3859
(212) 272-1000

LYNN A SMITH

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CLEARANCE AGENT

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

LYNN A SMITH

OFFICE SERVICING YOUR ACCOUNT

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

McGINN, SMITH & Co., INC.

3 of 7

STATEMENT PERIOD September 1, 2004
THROUGH September 30, 2004

ACCOUNT NUMBER 1 800
TAXPAYER NUMBER On File
LAST STATEMENT August 31, 2004

Cash Flow Analysis

	THIS PERIOD
Opening Balance	\$1,880,206.18
Securities Sold	222,500.00
Dividends/Interest	1,521.98
Amount Credited	\$224,021.98
Funds Withdrawn	-7,000.00
Amount Debited	\$-7,000.00
Net Cash Activity	217,021.98
Closing Balance	\$2,097,228.16

Some day transactions of cash between account types are not included in this account's cash transactions, as well as debits for all other transactions this period, appear in Transaction Detail.

Cash Balance Summary

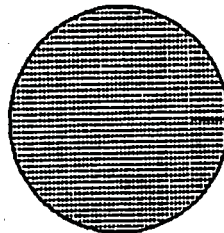
	OPENING	CLOSING
Cash	2,407,232.65	2,097,228.16
Margin	-527,026.47	0.00
Net Cash Balance	\$1,880,206.18	\$2,097,228.16

Income Summary

	THIS PERIOD	YEAR TO DATE
Dividends	0.00	88,200.00
Credit Balance Int.	1,521.98	8,450.09
Total	\$1,521.98	\$96,650.09

Portfolio Composition

Cash/Cash Equivalent	2,097,228
Total	\$2,097,228

Your Portfolio
AllocationCash & Equivalent
100%

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

V863

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McGinn, Smith & Co., Inc.

OFFICE SERVICING YOUR ACCOUNT
One Capital Center
99 Pine Street, 5th Floor
Albany, NY 12207
Tel: (518) 448-5131
Fax: (518) 448-4894

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

LYNN A SMITH

4 of 7

STATEMENT PERIOD September 1, 2004
THROUGH September 30, 2004
ACCOUNT NUMBER 1 800
TAXPAYER NUMBER On File
LAST STATEMENT August 31, 2004

Your Portfolio Holdings

CASH & CASH EQUIVALENTS

DESCRIPTION	SYMBOL/CUSIP	QUANTITY	PRICE	MARKET VALUE	ESTIMATED ANNUAL INCOME	CURRENT YIELD (%)
CASH BALANCE				2,097,228		
TOTAL CASH & CASH EQUIVALENTS				\$2,097,228		

EQUITIES**Equities & Options**

DESCRIPTION	SYMBOL/CUSIP	ACCT TYPE	QUANTITY	PRICE	MARKET VALUE	ESTIMATED ANNUAL INCOME	CURRENT YIELD (%)
CMET FIN HLDS INC ACCREDITED INVS	189758204	CASH	15,000	Unpriced			
Total Equities & Options				\$0	\$0	\$0	
TOTAL EQUITIES				\$0	\$0	\$0	

YOUR PRICED PORTFOLIO HOLDINGS**\$2,097,228**

1083

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OFFICE SERVICING YOUR ACCOUNT
Ona Capital Center
89 Pine Street, 5th Floor
Albany, NY 12207
Tel: (518) 448-5131
Fax: (518) 449-4894

LYNN A SMITH

STATEMENT PERIOD	THROUGH
September 1, 2004	September 30, 2004

ACCOUNT NUMBER	1 800
TAXPAYER NUMBER	On File
LAST STATEMENT	AUGUST 31, 2004

SETTLEMENT DATE	TRADE DATE	TRANSACTION	DESCRIPTION	SYMBOL/CLSP	QUANTITY	PRICE	DEBIT AMOUNT	CREDIT AMOUNT
09/01/04		JOURNAL	CHARTER ONE FINANCIAL INC TO ██████████ 6867	160903100	-100,000			
09/01/04		MERGER	CHARTER ONE FINANCIAL INC C343676 TO C343676 CASH MERGER @ \$44.50 PS	160903100	-5,000			222,500.00
TOTAL							\$222,500.00	

DATE	TRANSACTION	DESCRIPTION	DEBIT AMOUNT	CREDIT AMOUNT
08/03/04	FND WIRED	MIDA#IT378482FNDSWIRED TO MFRS AND TRADERS TR CO 765 F#404216 FTSL0090311728800	5,000.00	
09/07/04	CHECK	#26457-08070DRAFT DEBIT	2,000.00	
TOTAL			\$-7,000.00	

DATE	DESCRIPTION	SYMBOL/CUSIP	QUANTITY	RATE (%)	DEBIT AMOUNT	CREDIT AMOUNT
08/21/04	INTEREST ON CREDIT BALANCE					
	ACCT 0000 4091					
	AT 00.87500% 08/21 - 08/20					
TOTAL						\$1,521.98

CBRA

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

800, Stearns Securities Corp.
 One Metrotech Center North
 Brooklyn, New York 11201-3869
 (212) 272-1000

LYNN A SMITH

8 of 7

STATEMENT PERIOD September 1, 2004
 THROUGH September 30, 2004

ACCOUNT NUMBER 1 800
 TAXPAYER NUMBER On File
 LAST STATEMENT August 31, 2004

Transaction Detail (continued)**MISCELLANEOUS**

DATE	TRANSACTION	DESCRIPTION	DEBIT AMOUNT	CREDIT AMOUNT
09/02/04	JOURNAL	JOURNAL FROM TYPE 1 TO 2	304,526.47	
09/02/04	JOURNAL	JOURNAL FROM TYPE 1 TO 2		304,526.47
TOTAL			\$-304,526.47	\$304,526.47

027

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McGinn, Smith & Co., Inc.

OFFICE SERVICING YOUR ACCOUNT
One Capital Center
99 Pine Street, 5th Floor
Albany, NY 12207
Tel: (518) 448-5131
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One Madison Center North
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LYNN A SMITH

7 of 7

STATEMENT PERIOD September 1, 2004
THROUGH September 30, 2004
ACCOUNT NUMBER 1 800
TAXPAYER NUMBER On File
LAST STATEMENT August 31, 2004

Your messages**Bear, Stearns Securities Corp. Net Capital and Net Capital Requirements:**

At May 31, 2004 and July 31, 2004, the Company's net capital of approximately \$3.6 billion and \$3.6 billion was approximately 6.8% and 6.5% of aggregate debit items and exceeded the minimum regulatory net capital requirement of approximately \$1.1 billion and \$1.1 billion by approximately \$2.5 billion and \$2.5 billion, all respectively.

A complete copy of the Bear, Stearns Securities Corp. Statement of Financial Condition is available on the web site www.bsscfinancialstatement.com. Alternatively, to request a free printed copy please call - toll free 1-866-299-8331.



Securities and other assets in your account are the firm's collateral for any margin loan made to you. If the securities and other assets in your account decline in value, so does the value of the collateral supporting your loan, and, as a result, the firm can take action, such as issue a margin call and/or sell securities or other assets in any of your accounts held with the member, in order to maintain the required equity in the account. It is important that you fully understand the risks involved in trading securities on margin. These risks include the following:

- You can lose more funds than you deposit in the margin account.
- The firm can force the sale of securities or other assets in your account(s).
- The firm can sell your securities or other assets without contacting you.
- You are not entitled to choose which securities or other assets in your account(s) are liquidated or sold to meet a margin call.
- The firm can increase its "house" maintenance margin requirements at any time and is not required to provide you advance written notice.
- You are not entitled to an extension of time on a margin call.



***** End of Statement*****

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Exhibit 9

Page 1	Page 3
<p>1 2 UNITED STATES DISTRICT COURT 3 NORTHERN DISTRICT OF NEW YORK 4 ----- 5 SECURITIES AND EXCHANGE COMMISSION, 6 Plaintiff, 7 -vs- CVA #: 10 Civ. 457(GLS/DRH) 8 MCGINN, SMITH & CO., INC., MCGINN, SMITH 9 ADVISORS, LLC, MCGINN, SMITH CAPITAL HOLDINGS 10 CORP., FIRST ADVISORY INCOME NOTES, LLC, FIRST 11 EXCELSIOR INCOME NOTES, LLC, FIRST INDEPENDENT 12 INCOME NOTES, LLC, THIRD ALBANY INCOME NOTES, 13 LLC, TIMOTHY M. MCGINN, DAVID L. SMITH, LYNN A. 14 SMITH, GEOFFREY R. SMITH, Individually and as 15 Trustee of the David L. and Lynn A. Smith 16 Irrevocable Trust U/A 8/04/04, LAUREN T. SMITH, 17 and NANCY MCGINN, 18 19 Defendants. 20 21 LYNN A. SMITH, and NANCY MCGINN, 22 23 Relief Defendants, and 24 25 GEOFFREY R. SMITH, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04m Intervenor ----- Deposition of GEOFFREY R. SMITH, held at the offices of Phillips Lytle, LLP., Albany, New York, on November 16, 2011, before DEBORAH R. SALESKI, Court Reporter and Notary Public in and for the State of New York.</p>	<p>1 2 EXHIBITS 3 No. Description Marked 4 360 Plaintiff's First Request For Production of Documents From 5 Defendant Geoffrey R. Smith 8 6 361 E-Mail from Geoffrey Smith to David dated October 5th, 2010 19 7 8 362 Printout of an Excel File 45 9 10 363 One-Page document Bates number MS-E-1429736 containing two e-mails 55 11 364 E-Mail dated February 11, 2008 From Geoff Smith to Timothy McGinn 76 12 13 365 E-Mail dated February 2nd, 2008 From Geoff Smith to Andrew Guzzetti 80 14 366 Subset of Materials Produced to the SEC 83 15 367 E-Mail sent on September 24, 2008 To three individuals 91 16 17 368 E-Mail from Geoff Smith to Brian Mayer And Andrew Guzzetti 104 18 369 Declaration of Trust dated August 4th, 2004 from David L. Smith and Lynn A. Smith 108 19 370 Annuity Contract Between David L. Smith And Lynn A. Smith as Transferors and the David L. and Lynn A. Smith Irrevocable Trust 116 20 21 22 371 David and Lynn Smith Irrevocable Trust Transaction Detail By Account 154 23 372 Two-Page document Bates numbered 99 to 100 172 24 25 373 Article "How to Shield Assets Like The Rich" dated August 31st, 2010 174</p>
Page 2	Page 4
<p>1 2 APPEARANCES: 3 For the Plaintiff: 4 JOSHUA M. NEWVILLE, ESQ. Senior Counsel 5 Division of Enforcement United States Securities and Exchange Commission 6 3 World Financial Center, Suite 400 New York, New York 10281-1022 7 (212) 336-0578 8 9 For the Defendant Geoffrey R. Smith: 10 FEATHERSTONHAUGH, WILEY & CLYNE Attorneys at Law 11 99 Pine Street Albany, New York 12204 12 BY: JAMES FEATHERSTONHAUGH, ESQ. (518) 436-0786 13 14 15 Also Present: 16 David Stoelting, Securities and Exchange Commission 17 18 * * * 19 20 21 22 23 24 25</p>	<p>1 2 Exhibits Continued: 3 4 374 Ian Myers Complaint 178 5 6 375 E-Mail from Geoff Smith dated September 10th, 2008 to Andy Guzzetti and Brian Mayer 178 7 8 9 10 11 * * * 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

<p style="text-align: right;">Page 169</p> <p>1 G. Smith</p> <p>2 Q. There are three properties on the camp,</p> <p>3 correct?</p> <p>4 A. There are.</p> <p>5 Q. And if you were staying in the main house --</p> <p>6 A. Correct.</p> <p>7 Q. -- they would come up for the day and hang out</p> <p>8 and they wouldn't spend the night; is that your</p> <p>9 testimony?</p> <p>10 A. That's right.</p> <p>11 Q. Okay. How often did Lauren use the property</p> <p>12 during the 2010 timeframe?</p> <p>13 A. She was living in Colorado. She came home for</p> <p>14 several days. I'm sorry, did you say between 2009 and</p> <p>15 2010?</p> <p>16 Q. Let's just talk about 2010 for now.</p> <p>17 A. She was there for maybe two or three days over</p> <p>18 the summer of 2010.</p> <p>19 Q. How about in 2009?</p> <p>20 A. I'm trying to think when she moved out west.</p> <p>21 I think she moved -- I think she moved to Colorado in</p> <p>22 December of 09, so the previous summer she was probably</p> <p>23 there just about as much as I was. Weekends every couple</p> <p>24 of weeks.</p> <p>25 Q. How often were your parents at the camp</p>	<p style="text-align: right;">Page 171</p> <p>1 G. Smith</p> <p>2 A. Early '90s maybe.</p> <p>3 Q. What other properties do either of your</p> <p>4 parents have an interest in?</p> <p>5 A. Their home in Saratoga and their vacation home</p> <p>6 in Vero Beach, Florida.</p> <p>7 Q. Was there ever any property in West Virginia?</p> <p>8 A. Not that I know of.</p> <p>9 Q. Around December of 2010 Mr. Wojeski resigned</p> <p>10 as trustee of the trust; is that correct?</p> <p>11 A. That sounds correct.</p> <p>12 Q. Why did he resign?</p> <p>13 A. I don't know.</p> <p>14 Q. Did you discuss it with him?</p> <p>15 A. Not that I recall.</p> <p>16 Q. Did he ever call up and say I'm resigning</p> <p>17 you're the successor trustee or anything to that effect?</p> <p>18 A. No, those were discussions that were I believe</p> <p>19 handled by Mr. Featherstonhaugh's office.</p> <p>20 Q. How did you come to learn that you would be</p> <p>21 the trustee of the trust?</p> <p>22 A. When nobody else would do it, I was the last</p> <p>23 choice.</p> <p>24 Q. Did you look for other people to do it?</p> <p>25 A. I personally didn't, my parents did.</p>
<p style="text-align: right;">Page 170</p> <p>1 G. Smith</p> <p>2 property during 2009?</p> <p>3 A. Hardly ever.</p> <p>4 Q. Were they at the property more during 2010</p> <p>5 than they were during 2009?</p> <p>6 A. No, I would say it was about the same.</p> <p>7 Q. How about during 2011, who used the camp</p> <p>8 property?</p> <p>9 A. I spent some weekends up there with some</p> <p>10 friends of mine, my parents spent several weeks living up</p> <p>11 there. That's it. It's just a summer use place.</p> <p>12 Q. Not winterized?</p> <p>13 A. No.</p> <p>14 Q. Is there anyone else that has access to the</p> <p>15 camp property?</p> <p>16 A. No.</p> <p>17 Q. It sounds like the change in ownership from</p> <p>18 your mom to the trust did not change the -- did not</p> <p>19 change your parents' access to the property; is that</p> <p>20 correct?</p> <p>21 A. No, nor did it change mine or my sister's.</p> <p>22 Q. Are the camp properties being rented out at</p> <p>23 all?</p> <p>24 A. Not currently.</p> <p>25 Q. When was the last time they were rented?</p>	<p style="text-align: right;">Page 172</p> <p>1 G. Smith</p> <p>2 (Whereupon, Exhibit 372 was marked for</p> <p>3 identification, on this date.)</p> <p>4 BY MR. NEWVILLE:</p> <p>5 Q. I'm handing you a two-page document Bates</p> <p>6 numbered 99 to 100. The first page refers to an annuity</p> <p>7 PV table and there's a date of July 11th on it I'll</p> <p>8 represent to you this is part of the documents that were</p> <p>9 produced to the SEC by your counsel.</p> <p>10 A. That's right.</p> <p>11 Q. Do you recognize -- do you recognize this</p> <p>12 document?</p> <p>13 A. Yeah.</p> <p>14 Q. What is it?</p> <p>15 A. It is a spreadsheet that I created that would</p> <p>16 take the annuity payments and discount them back to today</p> <p>17 at various discount rates.</p> <p>18 Q. Okay. When did you prepare that document?</p> <p>19 A. Somewhere around this time, July of this past</p> <p>20 year.</p> <p>21 Q. 2010 or 2011?</p> <p>22 A. 2011.</p> <p>23 Q. 2011. Did you locate and provide a copy of</p> <p>24 the Excel spreadsheet to your counsel?</p> <p>25 A. I believe so. I'm not sure if I -- you know,</p>

<p style="text-align: right;">Page 185</p> <p>1 G. Smith</p> <p>2 sister's car which I then took.</p> <p>3 Q. When was that?</p> <p>4 A. 2005 maybe.</p> <p>5 Q. What kind of car was it?</p> <p>6 A. It was a Jeep Cherokee.</p> <p>7 Q. Do you recall receiving any transfers of money</p> <p>8 or gifts from your parents say greater than \$500 during</p> <p>9 the 2008 time 2008 time period?</p> <p>10 A. Not specifically.</p> <p>11 Q. Is it possible?</p> <p>12 A. It's possible.</p> <p>13 Q. It's possible that there were some?</p> <p>14 A. It's possible.</p> <p>15 Q. Okay. Is it possible that there were some</p> <p>16 transfers of greater than a thousand dollars to you from</p> <p>17 your parents during 2007?</p> <p>18 A. Yeah, that's possible.</p> <p>19 Q. Okay. How about during 2006?</p> <p>20 A. Certainly possible. Sometimes I got money for</p> <p>21 vacations and Christmas presents or something of that</p> <p>22 nature.</p> <p>23 Q. What about during 2009?</p> <p>24 A. No, I don't think so.</p> <p>25 Q. What about during 2010 prior to the SEC case?</p>	<p style="text-align: right;">Page 187</p> <p>1 G. Smith</p> <p>2 2010.</p> <p>3 Q. Okay. Are you aware of any other transfers or</p> <p>4 gifts of greater than a thousand dollars from your</p> <p>5 parents during 2010?</p> <p>6 A. No.</p> <p>7 Q. Anything during 2011?</p> <p>8 A. No.</p> <p>9 Q. You produced some bank statements to us, let's</p> <p>10 take a look at a few of those.</p> <p>11 (Whereupon, Exhibit 376 was marked for</p> <p>12 identification, on this date.)</p> <p>13 BY MR. NEWVILLE:</p> <p>14 Q. I'm handing you what's been marked as</p> <p>15 Exhibit 376. It's a set of I believe three or four</p> <p>16 different bank statements for Geoffrey R. Smith from [REDACTED]</p> <p>17 [REDACTED] and the statement period is April 24th, 2010</p> <p>18 through August 24th, 2010. Do you see that?</p> <p>19 A. Yeah.</p> <p>20 Q. Okay. Do you recognize these statements?</p> <p>21 A. Yep.</p> <p>22 Q. These are the statements for your [REDACTED]</p> <p>23 [REDACTED] accounts, correct?</p> <p>24 A. That's right.</p> <p>25 Q. Page 207, the second page of the PDF.</p>
<p style="text-align: right;">Page 186</p> <p>1 G. Smith</p> <p>2 A. No.</p> <p>3 Q. And after the SEC case was filed?</p> <p>4 A. Yeah, I received a gift and I don't know</p> <p>5 exactly when, but it was after the -- it was after the</p> <p>6 sale of the camps that was in the amount of \$10,000.</p> <p>7 Q. Why did you receive that gift?</p> <p>8 A. I don't know what the motives were.</p> <p>9 Q. Who did it come from?</p> <p>10 A. My mother.</p> <p>11 Q. Did you ever ask her about it?</p> <p>12 A. Yeah, it was explained to me as a tax strategy</p> <p>13 as most gifts are.</p> <p>14 Q. Did your sister receive a similar gift?</p> <p>15 A. I believe so.</p> <p>16 Q. In the amount of \$10,000?</p> <p>17 A. I'm not a tax accountant, but I think that's</p> <p>18 the maximum amount without it being taxable.</p> <p>19 Q. When did that transaction -- that gift take</p> <p>20 place?</p> <p>21 A. I can't be certain. It was in the form of a</p> <p>22 cashier's check. It was sometime after the sale of the</p> <p>23 camps.</p> <p>24 Q. During 2010?</p> <p>25 A. Yeah. I can't be certain. Sometime during</p>	<p style="text-align: right;">Page 188</p> <p>1 G. Smith</p> <p>2 A. Mm-mm.</p> <p>3 Q. There's a transaction date posted April 27th</p> <p>4 of 2010, a deposit of \$2,000 --</p> <p>5 A. Mm-mm.</p> <p>6 Q. -- Saratoga Springs branch.</p> <p>7 A. Yeah, I see it.</p> <p>8 Q. Does that seem like an accurate description?</p> <p>9 A. Yeah.</p> <p>10 Q. What do you recall about that deposit?</p> <p>11 A. I'm not sure what it is.</p> <p>12 Q. Do you know whether it was cash, a check?</p> <p>13 A. I don't know how to tell, but I would assume</p> <p>14 that it was a check. The only thing that's in my head is</p> <p>15 that I received from William Brown a final paycheck from</p> <p>16 McGinn, Smith. I can't remember what the amount was.</p> <p>17 Q. Take a look at the next page.</p> <p>18 A. Mm-mm.</p> <p>19 Q. May 5th there's a deposit of \$16,600.</p> <p>20 A. Mm-mm.</p> <p>21 Q. The reference is Lowe's, Saratoga, New York,</p> <p>22 what was that transaction?</p> <p>23 A. Right. I actually recall making that deposit</p> <p>24 I think. For the life of me I can't remember where those</p> <p>25 funds came from.</p>

Exhibit 10

<p style="text-align: right;">Page 204</p> <p>1 2 UNITED STATES DISTRICT COURT 3 NORTHERN DISTRICT OF NEW YORK 4 * * * * * 5 SECURITIES AND EXCHANGE COMMISSION, 6 Plaintiff, 7 -vs- 10 Civ. 457 (GLS/DRH) 8 McGINN, SMITH & CO., INC., 9 McGINN, SMITH ADVISORS, LLC, 10 FIRST ADVISORY INCOME NOTES, LLC, 11 FIRST EXCELSIOR INCOME NOTES, LLC, 12 FIRST INDEPENDENT INCOME NOTES, LLC, 13 THIRD ALBANY INCOME NOTES, LLC, 14 TIMOTHY M. McGINN, DAVID L. SMITH, 15 LYNN A. SMITH, GEOFFREY R. SMITH, 16 Individually and as Trustee of the David L. 17 and Lynn A. Smith Irrevocable Trust U/A 8/04/04, 18 LAUREN T. SMITH, and NANCY McGINN, 19 Defendants, 20 LYNN A. SMITH, and 21 NANCY McGINN, 22 Relief Defendants, and 23 GEOFFREY R. SMITH, Trustee of the 24 David L. And Lynn A. Smith Irrevocable 25 Trust U/A 8/04/04, Intervenor. * * * * *</p>	<p style="text-align: right;">Page 206</p> <p>1 G. Smith 2 I N D E X 3 4 E X A M I N A T I O N 5 6 Page 7 GEOFFREY SMITH 8 Examination by MR. NEWVILLE 209 9 10 E X H I B I T S 11 12 No. Description Page 13 472 Five-page document with 224 14 handwritten note on front 15 page "Attorney Bruce Hoover" 16 473 Mr. Wojeski's time records 227 17 Bates numbered TR-0000406 18 to 408 19 474 Indenture dated 7/22/2010 230 20 Bates numbered TR-0000289 21 to 294 22 475 Declaration of Geoffrey Smith 235 23 executed on October 5, 2010 24 476 Copies of checks drawn on 235 25 Geoffrey Smith's [REDACTED] [REDACTED] account 20 477 Additional bank records 246 21 with respect to Geoffrey Smith's 22 account at [REDACTED] 23 McGinn Smith & Co. account 24 statement for Geoffrey R. Smith 25 account number [REDACTED] 93</p>
<p style="text-align: right;">Page 205</p> <p>1 G. Smith 2 3 EXAMINATION BEFORE TRIAL of 4 GEOFFREY SMITH, held at Phillips Lytle, LLC, 5 Albany, New York, on December 9, 2011 before 6 NORA B. LAMICA, Court Reporter and Notary 7 Public in and for the State of New York. 8 9 APPEARANCES: 10 Attorneys for Plaintiff: 11 SECURITIES AND EXCHANGE COMMISSION 12 Attorneys at Law 13 3 World Financial Center, Room 400 14 New York, New York 10281 15 BY: JOSHUA NEWVILLE, ESQ. 16 Attorneys for Defendant Lauren Smith: 17 FEATHERSTONHAUGH, WILEY & CLYNE, LLP 18 Attorneys at Law 19 99 Pine Street 20 Albany, New York 12207 21 BY: SCOTT J. ELY, ESQ. 22 23 24 25</p>	<p style="text-align: right;">Page 207</p> <p>1 G. Smith 2 479 Account statement for 270 3 Lauren T. Smith in McGinn 4 Smith & Company, account number 5 [REDACTED] 07 for the period 6 ending 10/31/2009 7 480 E-mail dated April 21, 2009 275 8 between Tim McGinn and 9 Geoff Smith 10 481 E-mail from Geoff Smith to 277 11 Francine Kurtz dated 12 August 20, 2009 13 482 E-mail Bates stamped MS-E-3154930 278 14 from Geoff Smith to David McQuade 15 and others dated April 13, 2010 16 17 18 19 20 21 22 23 24 25</p>

<p style="text-align: right;">Page 216</p> <p>1 G. Smith</p> <p>2 earn five or six percent going forward and continue to</p> <p>3 meet the annuity payments without losing any value in its</p> <p>4 corpus.</p> <p>5 Q. And the -- let's say the trust remained at</p> <p>6 around say four million dollars. What kind of rate of</p> <p>7 return would it need to meet in order to make all of the</p> <p>8 annuity payments required?</p> <p>9 A. I'm not sure. I could do the calculation but</p> <p>10 I haven't.</p> <p>11 MR. ELY: As of what date?</p> <p>12 A. As of 2015 when the annuity payment starts?</p> <p>13 Q. Yes.</p> <p>14 A. I haven't done that calculation.</p> <p>15 Q. Okay. When the -- the trust was funded with</p> <p>16 Charter One stock, correct?</p> <p>17 A. Yes.</p> <p>18 Q. And the Charter One stock contributed to the</p> <p>19 trust around the same time the annuity agreement was</p> <p>20 entered into by the trust, correct?</p> <p>21 A. To the best of my recollection, yes.</p> <p>22 Q. And was the value of the annuity agreement in</p> <p>23 2004 roughly equal to the value of the Charter One stock</p> <p>24 contributed to the trust?</p> <p>25 A. Can you ask that again?</p>	<p style="text-align: right;">Page 218</p> <p>1 G. Smith</p> <p>2 transferred into the trust or else there would be some</p> <p>3 gift tax due on the remaining value.</p> <p>4 Q. Your understanding is the purpose is it's a</p> <p>5 transfer of rough equivalent value?</p> <p>6 A. That's right.</p> <p>7 Q. When you first discussed the trust with your</p> <p>8 father you understood that the trust assets were a gift</p> <p>9 from your parents to the trust for the benefit of you and</p> <p>10 your sister?</p> <p>11 A. Correct.</p> <p>12 Q. And your understanding was that the funds in</p> <p>13 the trust were in general not to be touched, correct?</p> <p>14 A. No. It wasn't understood that way. You know.</p> <p>15 In 2004 there was no reason to touch any of that money.</p> <p>16 You know. My family was well off. I had a job that was</p> <p>17 making ends meet. I didn't have any large expenditures.</p> <p>18 I wasn't getting married or having kids or buying a house</p> <p>19 or anything like that. I had no reason to touch that</p> <p>20 money. It was better off in an investment account trying</p> <p>21 to become more money.</p> <p>22 Q. Would it be fair to say that you didn't feel</p> <p>23 you had a need for the money throughout the 2004 to 2009</p> <p>24 time period?</p> <p>25 A. I'd say that's fair but I'd extend it to 2010.</p>
<p style="text-align: right;">Page 217</p> <p>1 G. Smith</p> <p>2 MR. NEWVILLE: Could you repeat it</p> <p>3 please?</p> <p>4 (Whereupon, the previously asked question</p> <p>5 was then read by Reporter.)</p> <p>6 A. I believe so.</p> <p>7 Q. And what do you base that understanding on?</p> <p>8 A. Just my recollection. You know. I don't even</p> <p>9 know if it's in the annuity agreement or any of those</p> <p>10 work papers but it could have been.</p> <p>11 Q. Your understanding is based on your</p> <p>12 recollection from back in 2004 or your recollection from</p> <p>13 much later?</p> <p>14 A. No, much later. I've testified to it before.</p> <p>15 I didn't know anything about the annuity agreement until</p> <p>16 sometime in the summer of 2010.</p> <p>17 Q. So after you found out about the annuity</p> <p>18 agreement you at some point calculated the value of the</p> <p>19 annuity agreement to compare to the value of the Charter</p> <p>20 One stock; is that correct?</p> <p>21 A. No, I didn't do that calculation. I think</p> <p>22 it's just my understanding that the annuity agreement was</p> <p>23 legitimately used as a method to defer gift tax. And so</p> <p>24 it would -- my common sense just tells me that it would</p> <p>25 have to be equal to the exact value of what was</p>	<p style="text-align: right;">Page 219</p> <p>1 G. Smith</p> <p>2 Q. In 2010 there was an investment of trust funds</p> <p>3 into the business that you had started, correct?</p> <p>4 A. That's right.</p> <p>5 Q. At that point in time you had determined there</p> <p>6 was a need for funds from the trust in order to fund your</p> <p>7 Capacity One business, correct?</p> <p>8 A. Well I think I've previously testified, but I</p> <p>9 can't remember, but there was discussion of me starting a</p> <p>10 business well before July of 2010 and there was a</p> <p>11 discussion amongst my father and I to have the trust</p> <p>12 invest in that business. We hadn't developed it to the</p> <p>13 point or I hadn't developed the business to the point</p> <p>14 that it was ready for discussion with Mr. Urbelis.</p> <p>15 Q. The discussion that you just referenced with</p> <p>16 your father about potentially funding your business with</p> <p>17 the trust assets, that took place in late 2009, correct?</p> <p>18 A. Yeah. To the best of my knowledge, yeah.</p> <p>19 Q. I want to go back and talk about some of the</p> <p>20 topics that you discussed last time we were here</p> <p>21 concerning the annuity agreement.</p> <p>22 A. Okay.</p> <p>23 Q. And I believe you testified, and correct me if</p> <p>24 I'm wrong, that on either July 20th or 21st you had</p> <p>25 received a call from David Wojeski asking if you knew</p>

<p style="text-align: right;">Page 220</p> <p>1 G. Smith</p> <p>2 what the private annuity agreement was; is that correct?</p> <p>3 A. Yes.</p> <p>4 Q. And you told him that you didn't know what it</p> <p>5 was and you called your father and asked him what the</p> <p>6 private annuity agreement was, correct?</p> <p>7 A. Correct.</p> <p>8 Q. And your father then told you he had entered</p> <p>9 into the annuity agreement in order to defer the gift tax</p> <p>10 on the contribution of the shares, correct?</p> <p>11 A. I believe so, yeah.</p> <p>12 Q. And during that conversation with your father,</p> <p>13 he told you that he had found some set of documents that</p> <p>14 referred to the annuity agreement or that somehow</p> <p>15 evidenced the annuity agreement, correct?</p> <p>16 A. He had told me that he had located some sort</p> <p>17 of work papers or receipt of the terms of the annuity.</p> <p>18 He didn't say anything about the annuity agreement. But</p> <p>19 yeah, he referenced some documents.</p> <p>20 Q. The documents had to do with the terms of the</p> <p>21 annuity agreement, correct?</p> <p>22 A. Yeah, I believe so.</p> <p>23 Q. And your father said that he had e-mailed</p> <p>24 those documents to Mr. Wojeski, correct?</p> <p>25 A. I don't know if he e-mailed them or faxed them</p>	<p style="text-align: right;">Page 222</p> <p>1 G. Smith</p> <p>2 be incurred on four million dollars during that</p> <p>3 conversation with your father?</p> <p>4 A. Not that I remember.</p> <p>5 Q. Did your father discuss whether he had</p> <p>6 discussed the annuity agreement with Jill Dunn?</p> <p>7 A. He did not.</p> <p>8 Q. At some point within a day or two after the</p> <p>9 conversation with your father on the 20th or 21st there</p> <p>10 was a meeting with Mr. Wojeski that you attended,</p> <p>11 correct?</p> <p>12 A. Mm-hmm.</p> <p>13 Q. And I believe you testified that the meeting</p> <p>14 between you and Mr. Wojeski was around the same time that</p> <p>15 the lake house or camp property was transferred, right?</p> <p>16 A. Yeah. That's how I recall it.</p> <p>17 Q. I believe you testified that closing took</p> <p>18 place on July 22, 2010, correct?</p> <p>19 A. I don't remember. Did you show me an exhibit</p> <p>20 that stated that date? I mean it sounds right but I'm</p> <p>21 not going to say that it's right and not see it.</p> <p>22 Q. We'll take a look at something a little later.</p> <p>23 I think you testified that at that meeting you discussed</p> <p>24 the annuity agreement with Mr. Wojeski and with your</p> <p>25 father, correct?</p>
<p style="text-align: right;">Page 221</p> <p>1 G. Smith</p> <p>2 but he said he sent the documents to Mr. Wojeski.</p> <p>3 Q. Did your father tell you anything else about</p> <p>4 the private annuity during that conversation?</p> <p>5 A. Not that I remember.</p> <p>6 Q. Did he mention whether he discussed the</p> <p>7 annuity agreement with Mr. Wojeski?</p> <p>8 A. He didn't mention it.</p> <p>9 Q. He mentioned that he either e-mailed or faxed</p> <p>10 the documents to Mr. Wojeski, correct?</p> <p>11 A. That's right.</p> <p>12 Q. But he didn't go any further and say "I</p> <p>13 discussed them with him", anything like that?</p> <p>14 A. No. Well, you know, I can't answer for</p> <p>15 somebody else. But judging by the fact that Wojeski</p> <p>16 called me to ask me what it was about, I would guess that</p> <p>17 they hadn't had a conversation.</p> <p>18 Q. Was there a particular reason your father was</p> <p>19 looking for documents related to the annuity agreement?</p> <p>20 A. Yeah. He didn't want to pay a gift tax on</p> <p>21 four million dollars.</p> <p>22 Q. Why was he concerned at that point about</p> <p>23 paying a gift tax on four million dollars?</p> <p>24 A. You know, I don't know.</p> <p>25 Q. Were you concerned about a gift tax having to</p>	<p style="text-align: right;">Page 223</p> <p>1 G. Smith</p> <p>2 A. Yeah, I believe so. We didn't -- well we</p> <p>3 discussed the numbers involved. We didn't discuss the --</p> <p>4 any of the legal terms of the annuity agreement because</p> <p>5 it wasn't there. You know. We basically ran some</p> <p>6 time-valued money calculations to see what sort of</p> <p>7 returns the trust needed to create or get to in order to</p> <p>8 get to that critical number that we spoke of earlier.</p> <p>9 Q. And what did you conclude in those discussions</p> <p>10 about the required amounts that the trust would need to</p> <p>11 meet?</p> <p>12 A. I don't remember specifically but it would</p> <p>13 likely be somewhere around that twenty-seven percent that</p> <p>14 I used when I created the present value table.</p> <p>15 Q. So when you -- during the meeting with</p> <p>16 Mr. Wojeski and your father it appears you concluded that</p> <p>17 the trust would require a pretty hefty rate of return in</p> <p>18 order to reach the level it could successfully meet the</p> <p>19 annuity agreement obligations; is that correct?</p> <p>20 A. Well that's a pretty subjective way to put it.</p> <p>21 You know. We were trying to calculate a number whereby</p> <p>22 when the trust began to make annuity payments it would no</p> <p>23 longer have to meet, as you say, a hefty rate of return.</p> <p>24 But if the trust was -- and I'm just throwing numbers out</p> <p>25 of the top of my head -- but if the trust was able to</p>

<p style="text-align: right;">Page 224</p> <p>1 G. Smith</p> <p>2 make twelve or thirteen percent every year going forward</p> <p>3 even through the beginning of those payments, that large</p> <p>4 initial return could be diminished. We were trying to</p> <p>5 come up with a number where what did the trust have to</p> <p>6 return until 2015 when it could then make a much less --</p> <p>7 far less risky return.</p> <p>8 Q. About how long did that meeting take?</p> <p>9 A. I'm guessing but maybe twenty, thirty minutes.</p> <p>10 (Exhibit 472 marked for identification.)</p> <p>11 Q. I'm handing you what's been marked as</p> <p>12 Exhibit 472. Exhibit 472 is a five-page document that</p> <p>13 appears to have been faxed. The front page has a</p> <p>14 handwritten note that says "Attorney Bruce Hoover" on it.</p> <p>15 Do you recognize Exhibit 472, Mr. Smith?</p> <p>16 A. I do and I wanted to clarify. In our last</p> <p>17 meeting or our last deposition you showed me a similar</p> <p>18 document that I think I testified I recognized. And now</p> <p>19 looking at this, this is the document that I recognize.</p> <p>20 The one you showed me last time I had never seen before.</p> <p>21 Q. I just handed you a copy of Exhibit 370 from</p> <p>22 -- that was marked at your deposition. Is that the</p> <p>23 exhibit you're referring to that you testified you -- you</p> <p>24 now believe you do not recognize?</p> <p>25 A. That's correct. Yeah.</p>	<p style="text-align: right;">Page 226</p> <p>1 G. Smith</p> <p>2 A. No.</p> <p>3 Q. Do you see that the second fax line on the</p> <p>4 first page appears to show that the fax was sent to</p> <p>5 David Smith at [REDACTED] 1492. And the date line is 7/20</p> <p>6 of '10. Do you see that?</p> <p>7 A. Yes.</p> <p>8 Q. Does that refresh your recollection at all as</p> <p>9 to when exactly the conversation occurred between you and</p> <p>10 your father about the existence of these pages?</p> <p>11 A. No. You know I think I testified that our</p> <p>12 conversation was either on the 20th or 21st. Because he</p> <p>13 apparently received this fax on the 20th doesn't</p> <p>14 necessarily mean that's when he called me. I don't know.</p> <p>15 Q. So at the meeting where you, Mr. Wojeski and</p> <p>16 your father discussed Exhibit 472, we talked about your</p> <p>17 discussion regarding the rate of return that was required</p> <p>18 for the trust assets, correct?</p> <p>19 A. Yeah.</p> <p>20 Q. What else did you discuss regarding the</p> <p>21 annuity agreement?</p> <p>22 A. Nothing as far as I remember. The chief</p> <p>23 reason I was at that meeting was to discuss the trust's</p> <p>24 investment in Capacity One. The investment had already</p> <p>25 been made but I was going there with prospective deals</p>
<p style="text-align: right;">Page 225</p> <p>1 G. Smith</p> <p>2 Q. I believe when we last met you testified that</p> <p>3 you may have seen the first few pages of Exhibit 370</p> <p>4 containing the pie chart?</p> <p>5 A. That's right, which is also in this exhibit.</p> <p>6 Q. By "this exhibit" you mean Plaintiff's</p> <p>7 Exhibit 472?</p> <p>8 A. 472.</p> <p>9 Q. So it appears that you've seen a copy of the</p> <p>10 page with the pie chart before, correct?</p> <p>11 A. Correct.</p> <p>12 Q. Could you tell me why you recognize</p> <p>13 Exhibit 472?</p> <p>14 A. I saw these five pages in Wojeski's office at</p> <p>15 that meeting.</p> <p>16 Q. That meeting is the meeting you believe may</p> <p>17 have taken place around July 22, 2010, correct?</p> <p>18 A. Yes.</p> <p>19 Q. Do you recognize the number in the fax line on</p> <p>20 the top of page 472? The number is [REDACTED] 1492.</p> <p>21 A. Yeah, I do.</p> <p>22 Q. What number is that?</p> <p>23 A. I believe that's my father's fax number.</p> <p>24 Q. Do you have any understanding as to why the</p> <p>25 date on that fax line is June 5, 2012?</p>	<p style="text-align: right;">Page 227</p> <p>1 G. Smith</p> <p>2 that my company was working on. I was basically showing</p> <p>3 Wojeski a lot of the work that I'd been doing. And that</p> <p>4 took up most of the meeting. It was only at the tail end</p> <p>5 that we ran these numbers and I remember -- I remember</p> <p>6 that being a very small part of the meeting. We ran a</p> <p>7 quick calculation on Wojeski's calculator and basically</p> <p>8 said "okay" and then we left.</p> <p>9 Q. Didn't anyone discuss whether this was a</p> <p>10 document that the SEC had been looking for for a few</p> <p>11 days?</p> <p>12 A. No, not that I remember.</p> <p>13 Q. You testified that your father was relieved</p> <p>14 that he had found documents relating to the annuity</p> <p>15 agreement; is that correct?</p> <p>16 A. Yes.</p> <p>17 Q. Did he express that sentiment to you or</p> <p>18 Mr. Wojeski during the in-person meeting you had?</p> <p>19 A. I don't recall.</p> <p>20 (Exhibit 473 marked for identification.)</p> <p>21 Q. I'm handing you what's been marked as</p> <p>22 Exhibit 473. It's a three-page document that was</p> <p>23 produced by Mr. Wojeski, Bates numbered TR-0000406 to</p> <p>24 408. It reports to be Mr. Wojeski's time records. Do</p> <p>25 you recognize this document?</p>

<p style="text-align: right;">Page 228</p> <p>1 G. Smith</p> <p>2 A. No.</p> <p>3 Q. You've never seen it before?</p> <p>4 A. No.</p> <p>5 Q. Well let's just take a look at the records for</p> <p>6 July 20, 2010, the bottom of the first page of</p> <p>7 Exhibit 473.</p> <p>8 A. Mm-hmm.</p> <p>9 Q. Do you see there's a reference to private</p> <p>10 annuity trust on July 20th?</p> <p>11 A. I do.</p> <p>12 Q. And flip to the next page of Exhibit 473. On</p> <p>13 the 20th there's an entry for one hour of work on</p> <p>14 read/research private annuity trust. Do you see that?</p> <p>15 A. I do.</p> <p>16 Q. On the 21st there's a half-hour of time</p> <p>17 apparently spent on the private annuity Phil Weir?</p> <p>18 A. Mm-hmm.</p> <p>19 Q. Then again on July 22nd there's an entry for</p> <p>20 two hours with the description "meet with Geoff Smith</p> <p>21 here." Do you see that?</p> <p>22 A. I do.</p> <p>23 Q. Does this document refresh your recollection</p> <p>24 at all of the time of the in-person meeting you had with</p> <p>25 Mr. Wojeski and David Smith?</p>	<p style="text-align: right;">Page 230</p> <p>1 G. Smith</p> <p>2 property to the trust?</p> <p>3 A. I don't remember. To my knowledge most of the</p> <p>4 discussion that I had with Wojeski about that transfer</p> <p>5 had taken place prior to the meeting we had.</p> <p>6 Q. The terms for that transfer had already</p> <p>7 been set at the time you met with Mr. Wojeski on the</p> <p>8 22nd?</p> <p>9 A. I believe so. They were -- I think they were</p> <p>10 prepared and signed by that day so the terms would have</p> <p>11 already been set.</p> <p>12 (Exhibit 474 marked for identification.)</p> <p>13 Q. Handing you what's been marked as Exhibit 474.</p> <p>14 It's a set of documents produced by the trust Bates</p> <p>15 numbered TR-0000289 to 294 produced by Mr. Wojeski on</p> <p>16 behalf of the trust. And it's an indenture dated the</p> <p>17 22nd of July, 2010. Do you recognize these documents?</p> <p>18 A. Just vaguely.</p> <p>19 Q. The document purports to be a transfer of</p> <p>20 ownership of certain property from Lynn Ann Smith to</p> <p>21 David Wojeski as trustee of the David L. and</p> <p>22 Lynn A. Smith Irrevocable Trust. Do you see that?</p> <p>23 A. Yes.</p> <p>24 Q. Is that a fair description?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 229</p> <p>1 G. Smith</p> <p>2 A. Timing in terms of the date it took place?</p> <p>3 Q. Yes.</p> <p>4 A. I'd guess he's keeping accurate records, so</p> <p>5 sure.</p> <p>6 Q. Was there any discussion as to whether it was</p> <p>7 appropriate to invest trust funds in Capacity One given</p> <p>8 the annuity payments that the trust was required to make?</p> <p>9 A. No. There wasn't any discussion about the</p> <p>10 appropriateness. You know. Wojeski as the trustee was</p> <p>11 at this point in time acting, in my belief, in his</p> <p>12 capacity to grow and wisely invest the trust corpus. I</p> <p>13 made an investment pitch to him as I would do to any</p> <p>14 perspective investor. You know. He did his due</p> <p>15 diligence with the materials I provided him and he</p> <p>16 concluded that it was a sound investment. In fact, I</p> <p>17 actually think that I was initially looking for \$500,000</p> <p>18 of funding because some of the deals that I was looking</p> <p>19 at required capital investment and he had concluded that</p> <p>20 that was too large of an investment. So we agreed on</p> <p>21 \$200,000 and I sort-of tried to figure out a different</p> <p>22 business plan on how to conclude those deals without</p> <p>23 funding.</p> <p>24 Q. During that in-person meeting on or about</p> <p>25 July 22nd, did you discuss the transfer of the lake camps</p>	<p style="text-align: right;">Page 231</p> <p>1 G. Smith</p> <p>2 Q. Is it your understanding that Exhibit 474</p> <p>3 evidences the transfer of ownership of the camp property?</p> <p>4 A. Yes.</p> <p>5 Q. You'll see it's dated July 22, 2010?</p> <p>6 A. I do.</p> <p>7 Q. Does that set that date a little bit more</p> <p>8 firmly in your mind as to when the closing of the camps</p> <p>9 property happened?</p> <p>10 A. Yes.</p> <p>11 Q. You testified the last time we met that</p> <p>12 Jill Dunn was at Wojeski's office the day you discussed</p> <p>13 the existence of the annuity agreement, correct?</p> <p>14 A. Yes.</p> <p>15 Q. And I think you testified she was walking out</p> <p>16 of Mr. Wojeski's office at the time you were walking in,</p> <p>17 correct?</p> <p>18 A. Correct.</p> <p>19 Q. Was your father already there when you</p> <p>20 arrived?</p> <p>21 A. I remember that he was there but he was in his</p> <p>22 car in the parking lot. We walked into the office</p> <p>23 together.</p> <p>24 Q. So you and your father walked into the office</p> <p>25 together and Ms. Dunn was already there and she was</p>

<p style="text-align: right;">Page 232</p> <p>1 G. Smith</p> <p>2 meeting with Mr. Wojeski, correct?</p> <p>3 A. Yes.</p> <p>4 Q. What was the purpose of Ms. Dunn's meeting</p> <p>5 with Mr. Wojeski, if you know?</p> <p>6 A. I think she was -- I think she had delivered</p> <p>7 this Exhibit 474. I think she had taken it from</p> <p>8 Steve Wiley's office to Wojeski to have him sign it and</p> <p>9 then she was leaving with it. I can't be absolutely sure</p> <p>10 but --</p> <p>11 Q. What was Steve Wiley's involvement?</p> <p>12 A. Well it says here that he prepared this</p> <p>13 document and I remember that he prepared or did the work</p> <p>14 on the transfer.</p> <p>15 Q. Do you remember the declaration you filed in</p> <p>16 this action, I believe it was in October of 2010?</p> <p>17 A. I do.</p> <p>18 Q. And you testified the last time we met that it</p> <p>19 was your understanding that you had learned of the</p> <p>20 existence of the annuity agreement after the SEC received</p> <p>21 it, correct?</p> <p>22 A. Correct.</p> <p>23 Q. What did you base that understanding on?</p> <p>24 A. Hearsay. I don't remember precisely what I</p> <p>25 based that understanding on. Just that's what I had been</p>	<p style="text-align: right;">Page 234</p> <p>1 G. Smith</p> <p>2 have discovered the document for the first time" would be</p> <p>3 inaccurate.</p> <p>4 Q. Why do you believe that's inaccurate now?</p> <p>5 A. Because at our last deposition you told me</p> <p>6 that the SEC claims to have discovered that document on</p> <p>7 the 25th or 26th or something.</p> <p>8 Q. I think I said the 27th but the record says</p> <p>9 what the record says.</p> <p>10 A. Yeah.</p> <p>11 Q. And --</p> <p>12 A. I'm also aware that Mr. Wojeski revised his</p> <p>13 original declaration to pinpoint that date as either the</p> <p>14 20th or 21st. I didn't revise my declaration. I wasn't</p> <p>15 instructed to do so.</p> <p>16 Q. You're aware that Ms. Dunn also revised her</p> <p>17 declaration, are you not?</p> <p>18 A. I would have to assume so.</p> <p>19 Q. Are you aware of any other statements in your</p> <p>20 declaration that you believe may be inaccurate at this</p> <p>21 time?</p> <p>22 MR. ELY: Go ahead and read the whole</p> <p>23 thing.</p> <p>24 THE WITNESS: I'm going to read the whole</p> <p>25 thing.</p>
<p style="text-align: right;">Page 233</p> <p>1 G. Smith</p> <p>2 told by somebody. I don't know who.</p> <p>3 Q. Do you recall roughly when you were told that?</p> <p>4 A. No.</p> <p>5 Q. And you don't recall who you discussed that</p> <p>6 timeframe with?</p> <p>7 A. I must have discussed that timeframe with</p> <p>8 Ms. Dunn.</p> <p>9 Q. Sitting here today do you still believe that</p> <p>10 your declaration filed in this action is accurate on that</p> <p>11 point?</p> <p>12 A. Can I read my declaration again?</p> <p>13 Q. Absolutely. Let's see if I can find a copy of</p> <p>14 it. I'm handing you a copy of the declaration of</p> <p>15 Geoffrey Smith. It's document 148 on the docket in this</p> <p>16 pending action. I'd just like to draw your attention to</p> <p>17 paragraph five.</p> <p>18 A. Well I would say that paragraph five is</p> <p>19 accurate in its first few sentences. I was not aware of</p> <p>20 the existence of the agreement any time prior or during</p> <p>21 the hearing or at any time leading up to the court's</p> <p>22 issuance of its decision on July 7th. And the first I</p> <p>23 learned of the existence of the annuity agreement was in</p> <p>24 late July. At this point I would testify that the</p> <p>25 remainder of that sentence "only after the SEC claims to</p>	<p style="text-align: right;">Page 235</p> <p>1 G. Smith</p> <p>2 (Exhibits 475 and 476 marked for</p> <p>3 identification.)</p> <p>4 A. I believe the rest of it's accurate.</p> <p>5 Q. Just for the record, Exhibit 475 is the</p> <p>6 declaration of Geoffrey R. Smith executed on October 5,</p> <p>7 2010. Mr. Smith, I'm handing you what's been marked as</p> <p>8 Exhibit 476. These are copies of checks drawn on your</p> <p>9 account that I've received from Bank of America and we'll</p> <p>10 talk about these in a little bit. But before we get to</p> <p>11 that I want to talk about the SEC's asset freeze that</p> <p>12 occurred in 2010. Do you recall that there was an asset</p> <p>13 freeze that was put in place on your parent's assets on</p> <p>14 roughly April 20, 2010? Do you recall that?</p> <p>15 A. Yes.</p> <p>16 Q. And then on July 12, 2010 some funds were</p> <p>17 released from the trust to pay for the down payment on</p> <p>18 the trust and those funds went to your parents. Do you</p> <p>19 recall that?</p> <p>20 A. Indirectly. They were first equally</p> <p>21 distributed to my sister and I and then to my parents.</p> <p>22 But yes, there was a down payment made.</p> <p>23 Q. From the time period from roughly April 20,</p> <p>24 2010 to July 12, 2010, your parents didn't really have</p> <p>25 any means to pay their bills, correct?</p>

Exhibit 11

<p style="text-align: right;">Page 1</p> <p>1 2 UNITED STATES DISTRICT COURT 3 NORTHERN DISTRICT OF NEW YORK 4 * * * * *</p> <p>5 SECURITIES AND EXCHANGE COMMISSION, 6 Plaintiff, 7 -vs- 10 Civ. 457 (GLS/DRH) 8 McGINN, SMITH & CO., INC., 9 McGINN, SMITH ADVISORS, LLC, 10 McGINN, SMITH CAPITAL HOLDINGS CORP., 11 FIRST ADVISORY INCOME NOTES, LLC, 12 FIRST EXCELSIOR INCOME NOTES, LLC, 13 FIRST INDEPENDENT INCOME NOTES, LLC, 14 THIRD ALBANY INCOME NOTES, LLC, 15 TIMOTHY M. McGINN, DAVID L. SMITH, 16 LYNN A. SMITH, GEOFFREY R. SMITH, 17 Individually and as Trustee of the David L. 18 and Lynn A. Smith Irrevocable Trust U/A 8/04/04, 19 LAUREN T. SMITH, and NANCY McGINN, 20 Defendants, 21 LYNN A. SMITH, and 22 NANCY McGINN, 23 Relief Defendants, and 24 GEOFFREY R. SMITH, Trustee of the 25 David L. And Lynn A. Smith Irrevocable Trust U/A 8/04/04, Intervenor. * * * * *</p>	<p style="text-align: right;">Page 3</p> <p>1 L. Smith 2 3 I N D E X 4 5 E X A M I N A T I O N 6 Page 7 LYNN A. SMITH 8 Examination by MR. STOELTING 7 9 10 E X H I B I T S 11 No. Description Page 12 443 One-page account statement 9 13 from Lynn Smith's stock 14 account, number [REDACTED] 091 15 444 Debit receipt for account 10 16 [REDACTED] 1 17 18 445 One-page document entitled 10 19 McGinn Smith & Co., Inc. loan 20 interest, officer David L. Smith, 21 loan date March 23, 1992, 22 principal \$150,000 23 24 446 Receipt from Albany Savings Bank 11 25 dated March 23, 1992 447 Letter from Albany Savings Bank 12 dated March 27, 1992 to David Smith 448 Letter dated April 1, 1992 from 13 the chairman, president and CEO of Albany Savings Bank to David Smith 449 Affidavit of Lynn Smith filed 14 on May 26, 2010 450 Selected pages from the IASG 17 prospectus dated July 23, 2003</p>
<p style="text-align: right;">Page 2</p> <p>1 L. Smith 2 3 EXAMINATION BEFORE TRIAL of 4 LYNN A. SMITH, held at Phillips Lytle, LLC, 5 Albany, New York, on December 8, 2011 before 6 NORA B. LAMICA, Court Reporter and Notary 7 Public in and for the State of New York. 8 9 APPEARANCES: 10 Attorneys for Plaintiff: 11 SECURITIES AND EXCHANGE COMMISSION 12 Attorneys at Law 13 3 World Financial Center, Room 400 14 New York, New York 10281 15 BY: DAVID STOELTING, ESQ. 16 BY: KEVIN MCGRATH, ESQ. 17 18 Attorneys for Defendant Lauren Smith: 19 FEATHERSTONHAUGH, WILEY & CLYNE, LLP 20 Attorneys at Law 21 99 Pine Street 22 Albany, New York 12207 23 BY: JAMES D. FEATHERSTONHAUGH, ESQ. 24 BY: SCOTT J. ELY, ESQ. 25</p>	<p style="text-align: right;">Page 4</p> <p>1 L. Smith 2 451 Chart prepared by SEC, 22 3 summary of transactions 4 452 involving Charter One stock 30 5 Complaint of Ian Meyers 6 453 against Integrated Alarm 33 7 Services Group, 47 pages 8 Settlement agreement and 9 releases 10 454 Check drawn on the account of 35 11 M&S Partners paid to the order 12 of Dowd & Marotta for Ian Meyers 13 \$136,000 14 455 Form-8K 39 15 456 Letter 42 16 457 Private annuity contract 49 17 458 Fax from Ron Simons to 59 18 David Smith Bates numbered 19 TR-520 to 548. 20 459 Declaration filed by 63 21 Mr. Featherstonhaugh on 22 September 3, 2010 23 460 Declaration of David Wojeski 67 24 filed November 17, 2010 25 461 Statement of sale, Bates 71 462 numbered TR-243 to 294 463 Indemnity and hold harmless 76 464 agreement 465 Chart 87 466 467 Series of form 1099s 92 468 and other documents 469 Letters of authorizations 93 470 for wire instructions</p>

<p style="text-align: right;">Page 69</p> <p>1 L. Smith</p> <p>2 Q. Did he tell you that it related to the annuity</p> <p>3 agreement?</p> <p>4 A. Yes, he did.</p> <p>5 Q. And did you ask him, "What are you talking</p> <p>6 about?"</p> <p>7 A. No.</p> <p>8 Q. What did you say?</p> <p>9 A. I don't know.</p> <p>10 Q. Did you have an understanding of what he meant</p> <p>11 by the phrase "the annuity agreement"?</p> <p>12 A. Yes, I guess. What date are we talking about</p> <p>13 again?</p> <p>14 Q. This was July 20, 2010 when your husband</p> <p>15 received a fax that he then immediately faxed to Wojeski</p> <p>16 -- immediately sent to Wojeski, the trustee of the trust?</p> <p>17 A. I don't know.</p> <p>18 Q. So my question is you've already testified</p> <p>19 that you recall him saying to you he received a fax</p> <p>20 relating to the annuity agreement?</p> <p>21 A. Yes.</p> <p>22 Q. So my question to you was when he said that to</p> <p>23 you, did you have an understanding what he was referring</p> <p>24 to?</p> <p>25 A. No.</p>	<p style="text-align: right;">Page 71</p> <p>1 L. Smith</p> <p>2 "Dad's really happy that he found the annuity"?</p> <p>3 A. No.</p> <p>4 Q. And it was just two days later that you signed</p> <p>5 the sale documents for the camp house, correct?</p> <p>6 A. I guess it was two days later if that's what</p> <p>7 you have there.</p> <p>8 (Exhibit 461 marked for identification.)</p> <p>9 Q. 461 is Bates numbered TR-243 to 294. It's the</p> <p>10 statement of sale for the -- what we call the camp house,</p> <p>11 that's the property in Broadalbin?</p> <p>12 A. Right.</p> <p>13 Q. And do you recall that on July 22nd, up until</p> <p>14 that point you were the owner of the -- of that property,</p> <p>15 correct?</p> <p>16 A. Yes.</p> <p>17 Q. And on July 22nd you sold the property to the</p> <p>18 trust, right?</p> <p>19 A. Yes.</p> <p>20 Q. And if you could look at the page that has</p> <p>21 TR-290 at the bottom?</p> <p>22 A. Yes. What am I looking at?</p> <p>23 Q. Do you see your signature?</p> <p>24 A. Yes.</p> <p>25 Q. And do you see that your signature is</p>
<p style="text-align: right;">Page 70</p> <p>1 L. Smith</p> <p>2 Q. And did you ask him?</p> <p>3 A. No.</p> <p>4 Q. Did he tell you what the annuity agreement was</p> <p>5 at that time?</p> <p>6 A. I don't remember.</p> <p>7 Q. Did he tell you why he was looking for it?</p> <p>8 A. No.</p> <p>9 Q. Did he tell you that he was going to fax it</p> <p>10 off to Wojeski?</p> <p>11 A. No.</p> <p>12 Q. Do you know if Wojeski had any knowledge of</p> <p>13 the annuity agreement before he received this fax from</p> <p>14 your husband?</p> <p>15 A. I don't know.</p> <p>16 Q. Do you know that your husband spoke to Geoff</p> <p>17 when he received this fax about the annuity agreement?</p> <p>18 MR. FEATHERSTONHAUGH: You're referring</p> <p>19 to Geoff Smith?</p> <p>20 MR. STOELTING: Yes.</p> <p>21 A. I don't know.</p> <p>22 Q. Do you remember Geoff coming to you and</p> <p>23 talking to you about this fax?</p> <p>24 A. No.</p> <p>25 Q. Do you remember Geoff coming to you and saying</p>	<p style="text-align: right;">Page 72</p> <p>1 L. Smith</p> <p>2 notarized as being made July 22, 2010?</p> <p>3 A. Yes.</p> <p>4 Q. Do you remember being at the closing?</p> <p>5 A. No. I don't remember. I don't remember if I</p> <p>6 was at the closing.</p> <p>7 Q. Just think about that for a minute.</p> <p>8 A. I am.</p> <p>9 Q. It was that camp house that you had owned for</p> <p>10 decades, right?</p> <p>11 A. Right.</p> <p>12 Q. And then the day came that you signed some</p> <p>13 documents selling it to the trust?</p> <p>14 A. Right.</p> <p>15 Q. And you don't remember going to Wojeski's</p> <p>16 office and signing, or somebody's office and signing</p> <p>17 these documents?</p> <p>18 A. I don't remember. I may have been in</p> <p>19 Steve Wiley's office. I don't know. I've been going</p> <p>20 there a lot. I don't remember.</p> <p>21 Q. Why did you decide the sell the camp house to</p> <p>22 the trust?</p> <p>23 A. Because all assets were frozen and we needed</p> <p>24 to pay our legal bills as well as put food on the table,</p> <p>25 etcetera, etcetera.</p>

<p style="text-align: right;">Page 73</p> <p>1 L. Smith</p> <p>2 Q. What does that have to do with selling the</p> <p>3 camp house to the trust?</p> <p>4 A. They were getting an asset and we were getting</p> <p>5 the money.</p> <p>6 Q. \$600,000?</p> <p>7 A. Yes.</p> <p>8 Q. Why couldn't the trust just give you \$600,000</p> <p>9 without acquiring the property?</p> <p>10 MR. FEATHERSTONHAUGH: I'll object to the</p> <p>11 form of that question. It calls for a legal</p> <p>12 conclusion. Mrs. Smith is not a lawyer.</p> <p>13 Q. I'm asking for what your understanding was.</p> <p>14 MR. FEATHERSTONHAUGH: Fair enough.</p> <p>15 A. Okay. Now that he spoke, I forgot what you</p> <p>16 said.</p> <p>17 Q. If the purpose was for the trust to transfer</p> <p>18 money to you for your living expenses, why didn't the</p> <p>19 trust just do that? What was the need for you to sell</p> <p>20 the camp house to the trust?</p> <p>21 A. Because I wanted them to have an asset. I</p> <p>22 wasn't going to take -- we hadn't taken any money out of</p> <p>23 the trust for ourselves. So they got the camps very</p> <p>24 reasonably and we paid some legal fees, obviously very</p> <p>25 little of them, and we used the money to live on.</p>	<p style="text-align: right;">Page 75</p> <p>1 L. Smith</p> <p>2 A. No.</p> <p>3 Q. Do you remember ever being with Wojeski at</p> <p>4 Mr. Featherstonhaugh's office at 99 Pine?</p> <p>5 A. Yes.</p> <p>6 Q. And how many occasions do you remember that</p> <p>7 happening?</p> <p>8 A. Maybe only once.</p> <p>9 Q. Was that probably at the closing of the sale?</p> <p>10 A. It may be when he became the trustee.</p> <p>11 Q. And do you have any recollection after you</p> <p>12 talked about it for a little while of who was present</p> <p>13 when you signed the closing documents?</p> <p>14 A. No. I don't remember.</p> <p>15 Q. And between July 20th when your husband</p> <p>16 received that fax about the annuity agreement, sent it to</p> <p>17 Wojeski the 20th, the 21st, the 22nd when you signed the</p> <p>18 documents, do you recall any conversations with anyone,</p> <p>19 Wojeski, your husband or your son Geoffrey about the</p> <p>20 annuity agreement?</p> <p>21 A. No.</p> <p>22 Q. Do you remember that Wojeski asked to be given</p> <p>23 a hold harmless agreement on the same day that you signed</p> <p>24 -- sold --</p> <p>25 A. I don't even know what a hold harmless</p>
<p style="text-align: right;">Page 74</p> <p>1 L. Smith</p> <p>2 Q. And how was the \$600,000 purchase price</p> <p>3 determined?</p> <p>4 A. I'm not sure of that but it was more than</p> <p>5 fair. I know that the place next door sold for --</p> <p>6 MR. FEATHERSTONHAUGH: Mrs. Smith, will</p> <p>7 you listen to the questions and answer them</p> <p>8 and help Mr. Stoelting and you.</p> <p>9 A. It's comparable to others.</p> <p>10 Q. The house next door sold for what?</p> <p>11 A. Six-hundred and this was three cottages for</p> <p>12 six-hundred. It may have been assessed. I'm not sure.</p> <p>13 Q. Do you know if an appraisal was done?</p> <p>14 A. That's what I meant. I don't remember. I</p> <p>15 wasn't there if it was.</p> <p>16 Q. Was that figure, the \$600,000, was that</p> <p>17 decided by you since you were the titleholder of the</p> <p>18 property?</p> <p>19 A. Yes.</p> <p>20 Q. Do you remember -- and you had met</p> <p>21 David Wojeski, right?</p> <p>22 A. Yes.</p> <p>23 Q. And you had been to his office?</p> <p>24 A. Never.</p> <p>25 Q. Never went to his office?</p>	<p style="text-align: right;">Page 76</p> <p>1 L. Smith</p> <p>2 agreement is, so no.</p> <p>3 Q. I'll show you in a minute but it's a piece of</p> <p>4 paper basically saying, "I promise not to sue you for</p> <p>5 anything that you might have done wrong." Do you</p> <p>6 remember giving that release to Mr. Wojeski?</p> <p>7 A. No.</p> <p>8 (Exhibit 462 marked for identification.)</p> <p>9 Q. Exhibit 462. It's called indemnity and hold</p> <p>10 harmless agreement for valuable consideration of receipt</p> <p>11 of which is hereby acknowledged. "We, David L. Smith and</p> <p>12 Lynn A. Smith of [REDACTED] Saratoga Springs,</p> <p>13 New York" -- and just skipping over the next phrase --</p> <p>14 "agree to release indemnify defendant and hold harmless</p> <p>15 David Wojeski from any and all claims" -- and then</p> <p>16 jumping to the bottom part -- "arising out of or related</p> <p>17 to the David L. and Lynn A. Smith Irrevocable Trust dated</p> <p>18 August 2, 2004, including but not limited to any</p> <p>19 financial transactions, investments, obligations or</p> <p>20 distributions and the potential tax consequences thereof</p> <p>21 relating to said trust, its donors and its beneficiaries</p> <p>22 and any and all financial institutions, third parties and</p> <p>23 government or quasi-government authorities." Does that</p> <p>24 refresh your recollection about signing that release for</p> <p>25 Wojeski?</p>

<p style="text-align: right;">Page 77</p> <p>1 L. Smith</p> <p>2 A. I see my signature so I signed it but I didn't</p> <p>3 -- when you talked about it I didn't remember it</p> <p>4 obviously.</p> <p>5 Q. That is your signature?</p> <p>6 A. Mm-hmm. Yes.</p> <p>7 Q. And you put the date next to it, 7/22/10?</p> <p>8 A. Yes, I did.</p> <p>9 Q. And that's the same date as the closing of the</p> <p>10 sale?</p> <p>11 A. Oh, it is? I don't know. Yes, I guess.</p> <p>12 Q. And that's two days after your --</p> <p>13 A. I don't know when.</p> <p>14 Q. If you could look on the first page of the</p> <p>15 sale --</p> <p>16 A. What?</p> <p>17 Q. If you look on the first page, it says</p> <p>18 July 22nd, right?</p> <p>19 A. Yes.</p> <p>20 Q. And that's the same day that you signed this</p> <p>21 release, correct?</p> <p>22 A. Mm-hmm. Yes.</p> <p>23 Q. And that's two days after your husband</p> <p>24 received the fax about the annuity agreement and then</p> <p>25 relayed it forward to Wojeski that we've established</p>	<p style="text-align: right;">Page 79</p> <p>1 L. Smith</p> <p>2 A. No. Actually I thought this was -- no. I see</p> <p>3 now.</p> <p>4 Q. Do you see it says July 22nd?</p> <p>5 A. Yes.</p> <p>6 Q. And he was appointed trustee after Urbelis</p> <p>7 resigned, right?</p> <p>8 A. Right.</p> <p>9 Q. And did you understand yourself, "Why am I</p> <p>10 signing this release now? Why didn't he ask for it when</p> <p>11 he was appointed?"</p> <p>12 A. No.</p> <p>13 Q. Did you have an understanding that something</p> <p>14 happened that all of a sudden Wojeski wanted a release?</p> <p>15 A. No.</p> <p>16 Q. So your testimony is you have no -- you had no</p> <p>17 understanding at the time of why you signed this?</p> <p>18 A. That is correct.</p> <p>19 Q. Do you remember who presented it to you for</p> <p>20 your signature?</p> <p>21 A. No.</p> <p>22 Q. Did you sign it at the same time you signed</p> <p>23 the sale documents?</p> <p>24 A. I don't remember.</p> <p>25 Q. Did anyone explain to you what the indemnity</p>
<p style="text-align: right;">Page 78</p> <p>1 L. Smith</p> <p>2 through Wojeski's declaration. So wasn't the reason for</p> <p>3 this release because Wojeski was concerned about the</p> <p>4 annuity agreement?</p> <p>5 MR. FEATHERSTONHAUGH: Object as to form.</p> <p>6 A. No, I don't think so.</p> <p>7 Q. Why do you think you signed a document</p> <p>8 releasing Wojeski from any and all claims, actions,</p> <p>9 compensations, etcetera, arising out of or related to the</p> <p>10 David and Lynn Irrevocable Trust?</p> <p>11 A. I thought it was just a routine thing that a</p> <p>12 trustee has signed. I don't know. I'm not a lawyer.</p> <p>13 Q. Why did you think that?</p> <p>14 A. I don't know. That's what I'm thinking right</p> <p>15 now. I don't remember that day.</p> <p>16 Q. I'm sorry. Go ahead.</p> <p>17 A. I don't remember. I signed it but I don't</p> <p>18 remember that day.</p> <p>19 Q. Well do you remember David or Wojeski saying</p> <p>20 in substance that in view of the annuity agreement that</p> <p>21 he was concerned about his liability?</p> <p>22 A. No.</p> <p>23 Q. Did you ask anyone why Wojeski didn't receive</p> <p>24 a hold harmless agreement at the time he was appointed</p> <p>25 trustee, which was the previous May 2010?</p>	<p style="text-align: right;">Page 80</p> <p>1 L. Smith</p> <p>2 and hold harmless agreement meant?</p> <p>3 A. I don't remember anyone explaining it. I'm</p> <p>4 reading it and I'm not that stupid. I pretty much get</p> <p>5 it.</p> <p>6 Q. I don't mean --</p> <p>7 A. I know. Nobody explained it to me that I</p> <p>8 remember.</p> <p>9 Q. I understand that you can sit here today and</p> <p>10 read it and figure out what it means but my question is</p> <p>11 whether anyone said anything to you in July 2010 about</p> <p>12 what the indemnity and hold harmless agreement meant?</p> <p>13 A. I don't remember anyone saying anything to me.</p> <p>14 I probably read it and then signed it. That's all I can</p> <p>15 say.</p> <p>16 Q. Do you remember when you read it before you</p> <p>17 signed it whether you developed an understanding of what</p> <p>18 it was?</p> <p>19 MR. FEATHERSTONHAUGH: Mrs. Smith, no one</p> <p>20 is interested in what you probably did.</p> <p>21 Please listen to Mr. Stoelting's question. If</p> <p>22 you have a memory, relay that to him. Do not</p> <p>23 guess or hypothesize what you did.</p> <p>24 THE WITNESS: All right.</p> <p>25 A. I don't remember.</p>

Exhibit 12

STATEMENT OF SALE

Lynn Ann Smith to David Wojeski, Trustee

Dated: July 22, 2010

Village

City or Town: Broadalbin

County: Fulton

State: New York

Purchase Price	\$600,000.00
Insurance Adjustment	\$
Fuel Oil Adjustment	\$
City Taxes (Adjusted)	\$
County Taxes (Adjusted)	\$ 2,136.62
Sewer Taxes (Adjusted)	\$
School Taxes (Adjusted)	\$ 156.38
	\$
Total Amount Due Seller	\$602,293.00

Credits to Purchaser

Amount Paid Down	\$150,000.00	
First Mortgage	\$	
Interest From	To	\$
Second Mortgage	\$	
Interest From	To	\$
Seller's Expenses (Assumed)	\$ 2,415.00	
	\$	
Village Taxes (Assumed)	\$	
City Taxes (Assumed)	\$	
County Taxes (Assumed)	\$	
Local Assessment (Assumed)	\$	
School Taxes (Assumed)	\$	
	\$	
Rents (Pro-rated)	\$	
	\$152,415.00	\$152,415.00
Balance Due	\$	\$449,878.00

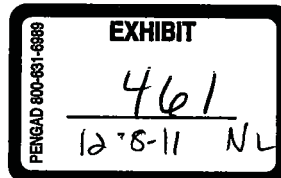
Expenses of Purchaser:

Total \$3,360.50
See Attached

Expenses of Seller:

Total \$2,415.00
See Attached

{WD030112.1}



TR0000243

SNEERINGER MONAHAN PROVOST REDGRAVE TITLE AGENCY, INC.

ALBANY/TROY
50 Chapel Street
Albany, NY 12217
518-434-0127
Fax-434-9997

SARATOGA
36 Remsen Street
Ballston Spa, NY 12020
518-885-8700
Fax-884-2564

HUDSON
420 Warren Street
Hudson, NY 12534
518-828-4351
Fax-828-7494

POUGHKEEPSIE
199 West Road, Suite 115
Pleasant Valley, NY 12569
845-471-5911
Fax-471-7680

DATE: July 22, 2010

CLOSER:

TITLE NUMBER: [REDACTED]
UNDERWRITER: First American Title Insurance Company of New York

Purchaser(s): DAVID WOJESKI; DAVID L. AND LYNN A. SMITH IRREVOCABLE TRUST

Seller(s): LYNN ANN SMITH

Applicant: Featherstonhaugh Conway & Clynch, LLP

Premises: [REDACTED] Broadalbin, NY

County: Fulton County

District: Section: 121.7

Premises: [REDACTED] Broadalbin, NY

County: Fulton County

District: Section: 121.7

Premises: [REDACTED] Broadalbin, NY

County: Fulton County

District: Section: 121.7

Purchase / Owners

Owner's Policy Amount: \$600,000.00

ITEM	BORROWER	SELLER	LENDER
OWNER'S POLICY PREMIUM	2,269.00		
Owner's Policy Endorsements:			
LOAN POLICY PREMIUM			
Loan Policy Endorsements:			
SUB-TOTAL	\$2,269.00	\$0.00	\$0.00
SEARCH CHARGES:			
Search - Title Search	250.00		
Tax Search - County (3)	165.00		
SERVICE FEES:			
Photocopies	10.00		
ADJUSTMENTS:			
SUB-TOTAL	\$425.00	\$0.00	\$0.00
SUB-TOTAL - SMFR CHARGES	\$2,694.00	\$0.00	\$0.00
FULTON COUNTY RECORDING FEES: FULTON COUNTY RECORDING FEES: FULTON COUNTY RECORDING FEES:			
() Deed Recording Fee (3 at \$55.50)	166.50		
TP-584 (3)		15.00	
NY State Transfer Tax		2,400.00	
RP5217 Filing Fee (1 at \$250/2 at \$125)	500.00		
SUB-TOTAL - RECORDING CHARGES	\$666.50	\$2,415.00	\$0.00
TOTALS	\$3,360.50	\$2,415.00	\$0.00

CLOSER IS RESPONSIBLE FOR ACCURACY OF ALL CHARGES

Title costs for this transaction may include charges for certain services not specified in the TIRSA Rate Manual and are provided by SMPR Title Agency Inc at the request of your lender or attorney. The issuance of the title policy is not dependent upon the performance of such additional services.

If this is a refinance transaction within ten years, you may be entitled to a reduced premium. Contact this company immediately for details.

TR0000244

THIS INDENTURE;

Made the 22nd day of July, Two
Thousand and Ten

State of New York }
County of } ss.:
Recorded on the _____ day of _____
O'clock _____ A.M. in
Liber _____ of DEEDS at page _____
and examined.

Clerk

Between

LYNN ANN SMITH, residing at _____, Saratoga
Springs, New York 12866

Party of the first part, and

DAVID WOJESKI, as Trustee of the David L. and Lynn A. Smith
Irrevocable Trust with an address of _____ East Greenbush,
New York 12061

Party of the second part,

Witnesseth that the parties of the first part, in consideration
of ONE AND NO/100 Dollars (\$1.00) lawful money of the United
States, and other good and valuable consideration paid by the
parties of the second part, do hereby grant and release unto the
party of the second part, its heirs and assigns forever, all of the
property described as follows:

All that tract or parcel of land situate in the Town of Broadalbin,
County of Fulton and State of New York, described as follows:

Beginning at a point which is N. 65 deg. 41 min. W. about 75 feet,
thence S. 52 deg. 43 min. W. 791.8 feet from a point in the
division between lands herein described and lands now or formerly
of Manchester to the south, and marked by an iron pin on the
westerly margin of Lakeview Road; running from said point of
beginning N. 37 deg. 27 min. W. 200 feet to a point; thence N. 52
deg. 43 min. E. 138.4 feet to a point; thence S. 37 deg. 27 min. E.
25 feet to a point; thence N. 52 deg. 43 min. E. 100 feet to a
point; thence S. 37 deg. 16 min. E. 175 feet more or less, along
the westerly margin of _____ to a point; thence S. 52 deg. 43
min. W. 237.8 feet, more or less to the point or place of
beginning.

Excepting and reserving from the aforesaid land any portion thereof
as may lie within _____ as shown on a map of lands of Samuel
Betor, Town of Broadalbin, Fulton County, New York, dated May 19,
1939.

Together with a right of way in common with others, along the forty
foot roadway known as _____ extending from the public
highway to the Sacandaga Reservoir, as shown on said map.

Being the same premises conveyed to Lynn Ann Smith by Lynn
Laskevich Smith, a/k/a Lynn Ann Smith, as sole heir under the Last
Will and Testament of Wasil Laskevich dated March 31, 1988 recorded
July 25, 1989 in the Fulton County Clerk's Office in _____

Subject to all covenants, conditions, restrictions and
easements of record affecting said premises.

Together with the appurtenances and all the estate and rights
of the party of the first part in and to said premises,

To have and to hold the premises herein granted unto the party
of the second part, its heirs and assigns forever.

(WD030103.1)

TR0000289

And said Party of the First Part covenants as follows:

First, That the party of the first part is seized of the said premises in fee simple, and has good right to convey same;

Second, That the party of the second part shall quietly enjoy the said premises;

Third, That said Party of the First Part will forever Warrant the title to said premises.

Fourth, That, in Compliance with Sec. 13 of the Lien Law, the grantor will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

In Witness Whereof, the party of the first part has hereunto set its hand and seal the day and year first above written.

In The Presence of

By: Lynn Ann Smith L.S.
Lynn Ann Smith

STATE OF NEW YORK :
COUNTY OF Albany : ss.:

On the 27th day of July, 2010, before me, the undersigned, personally appeared Lynn Ann Smith personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Stephen J. Wiley
Notary Public - State of New York
STEPHEN J. WILEY
Notary Public, State of New York
Qualified in Albany County
Commission Expires October 31, 2013

Tax Map No.:
Tax Billing Address: East Greenbush, New York 12061

DEED
WARRANTY WITH LIEN COVENANT

LYNN ANN SMITH
TO

DAVID WOJESKI, as Trustee of
The David L. and Lynn A. Smith
Irrevocable Trust

RECORD AND RETURN BY MAIL TO:
Stephen J. Wiley, Esq.
Featherstonhaugh, Wiley & Clynne, LLP
93 Pine Street
Albany, NY 12207
(518) 436-0786

(WD030103.1)

TR0000290

THIS INDENTURE,

Made the 20th day of July, Two
Thousand and Ten

State of New York

County of

Recorded on the _____ day of _____
O'clock _____ A.D., 2010 at _____
Libert _____ of DEEDS at page _____
and examined.

Clerk

Between

LYNN ANN SMITH, residing at _____
Saratoga Springs, New York 12866

Saratoga

Party of the first part, and

DAVID WOJESKI, as Trustee of the David L. and Lynn A Smith
Irrevocable Trust with an address of _____ East Greenbush,
New York 12061

Party of the second part,

Witnesseth that the parties of the first part, in consideration
of ONE AND NO/100 Dollars (\$1.00) lawful money of the United
States, and other good and valuable consideration paid by the
parties of the second part, do hereby grant and release unto the
party of the second part, its heirs and assigns forever, all of the
property described as follows:

All that tract or parcel of land, situate in the Town of Broadalbin,
County of Fulton and State of New York, bounded and described as follows:

Commencing at the most easterly corner of the parcel of land heretofore
conveyed by Samuel A. Bator to Wasil Laskevich, on the of the parties of
the second part hereto, by Warranty Deed dated May 22, 1945 and recorded
in Book 298 of Deeds at page 149, said point of beginning being also the
most southerly corner of the parcel of land being conveyed concurrently
herewith by the Executors of Samuel A. Bator, deceased, to Delbert
Galusha and Irene Galusha, his wife, and running thence from said point
of beginning in a southwesterly direction along said Laskevich parcel
Eighty (80) feet more or less to the boundary line of lands of Samuel A.
Bator as marked by a stone wall and as shown upon Map of Lands of Samuel
A. Bator as more fully described hereinafter; running thence south 38
deg. 07 min. east along said boundary line as shown on said map to the
point of intersection of the southeast line of Lot No. 5 as shown on said
map if the same were extended southwesterly in a straight line to said
boundary line; running thence in a northeasterly direction along said
extended southeast line of Lot No. 5 and along the southeast line of Lot
No. 5 to the west side of the Forty (40) foot roadway as shown on said
map; running thence in a northwesterly direction along the west side of
said Forty (40) foot roadway to said parcel begin conveyed concurrently
herewith to said Galusha; running thence in a southwesterly direction
along said Galusha parcel to the point and place of beginning.

Together with a right of way in common with others along the roadway
Forty (40) feet in width extending from the Public Highway to Sacandaga
Reservoir lands as shown on Map of Land of Samuel Bator, Town of
Broadalbin, Fulton County, New York, prepared by J.E. Carroll under date
of May 19, 1939 and filed January 12, 1949 in the Fulton County Clerk's
Office in _____

Excepting and reserving the lands heretofore conveyed by Wasil Laskevich
and Frances A. Laskevich, his wife to Anthony Spuzzy and Madeline Spuzzy
by deed dated September 21, 1951 and recorded in the Fulton County
Clerk's Office in _____

Being the same premises conveyed to Lynn Ann Smith by Lynn Laskevich
Smith, a/k/a Lynn Ann Smith, as sole heir under the Last Will and
Testament of Wasil Laskevich dated March 31, 1988 recorded July 25, 1989
in the Fulton County Clerk's Office in _____

Subject to all covenants, conditions, restrictions and
easements of record affecting said premises.

(W030108.1)

TR0000291

Together with the appurtenances and all the estate and rights of the party of the first part in and to said premises,

To have and to hold the premises herein granted unto the party of the second part, its heirs and assigns forever.

And said Party of the First Part covenants as follows:

First, That the party of the first part is seized of the said premises in fee simple, and has good right to convey same;

Second, That the party of the second part shall quietly enjoy the said premises;

Third, That said Party of the First Part will forever Warrant the title to said premises.

Fourth, That, in Compliance with Sec. 13 of the Lien Law, the grantor will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

In Witness Whereof, the party of the first part has hereunto set its hand and seal the day and year first above written.

In The Presence of

By: Lynn Ann Smith L.S.
Lynn Ann Smith

STATE OF NEW YORK :
COUNTY OF Albany : ss.:

On the 27th day of July, 2010, before me, the undersigned, personally appeared Lynn Ann Smith personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Stephen J. Wiley
Notary Public - State of New York
Notary Public, State of New York
Qualified in Albany County
Commission Expires October 31, 2012

Tax Map No.:
Tax Billing Address: East Greenbush, New York 12061

DEED

WARRANTY WITH LIEN COVENANT

LYNN ANN SMITH

TO

DAVID WOJESKI, as Trustee of
The David L. and Lynn A. Smith
Irrevocable Trust

RECORD AND RETURN BY MAIL TO:
Stephen J. Wiley, Esq.
Featherstonhaugh, Wiley & Clynne, LLP
99 Pine Street
Albany, NY 12207
(518) 436-0786

(WDO00108.1)

TR0000292

THIS INDENTURE,

Made the 22nd day of July, Two
Thousand and Ten.

State of New York }
County of } ss.:
Recorded on the day of
O'clock .M. in
Liber of DEEDS at page
and examined.

Clerk

Between

LYNN ANN SMITH, residing at [REDACTED] Saratoga
Springs, New York 12866

Party of the first part, and

DAVID WQJESKI, as Trustee of the David L. and Lynn A Smith
Irrevocable Trust with an address of [REDACTED] East Greenbush,
New York 12061

Party of the second part,

Witnesseth that the parties of the first part, in consideration
of ONE AND NO/100 Dollars (\$1.00) lawful money of the United
States, and other good and valuable consideration paid by the
parties of the second part, do hereby grant and release unto the
party of the second part, its heirs and assigns forever, all of the
property described as follows:

All that tract or parcel of land, situate in the Town of
Broadalbin, County of Fulton and State of New York, bounded and
described as follows:

Beginning at the northwesterly corner of property, now or formerly,
owned by one Delbert A. Galusha, on the southerly boundary line of
property of the Hudson River Regulating District, and running
thence in a Southwesterly direction for a distance of Eighty (80)
feet more or less; thence running in a Southeasterly direction for
a distance of One Hundred (100) feet, thence running in a
Northeasterly direction for a distance of Eighty (80) feet, more or
less, to property of Galusha; thence running in a Northwesterly
direction, along property of Galusha for a distance of One Hundred
(100) feet, the place of beginning.

With the right to use the existing right of way, as now laid out.

Being the same premises conveyed to Lynn Ann Smith by Lynn
Laskevich Smith, a/k/a Lynn Ann Smith, as sole heir under the Last
Will and Testament of Wasil Laskevich dated March 31, 1988 recorded
July 25, 1989 in the Fulton County Clerk's Office in [REDACTED]

Subject to all covenants, conditions, restrictions and
easements of record affecting said premises.

Together with the appurtenances and all the estate and rights
of the party of the first part in and to said premises,

To have and to hold the premises herein granted unto the party
of the second part, its heirs and assigns forever.

And said Party of the First Part covenants as follows:

First, That the party of the first part is seized of the said
premises in fee simple, and has good right to convey same.

Second, That the party of the second part shall quietly enjoy
the said premises;

Third, That said Party of the First Part will forever Warrant

(WDO30102.1)

TR0000293

the title to said premises.

Fourth, That, in Compliance with Sec. 13 of the Lien Law, the grantor will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

In Witness Whereof, the party of the first part has hereunto set its hand and seal the day and year first above written.

In The Presence of

By: Lynn Ann Smith L.S.
Lynn Ann Smith

STATE OF NEW YORK :
COUNTY OF Albany : ss.:

On the 24 day of July, 2010, before me, the undersigned, personally appeared Lynn Ann Smith personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Stephen J. Wiley
Notary Public - State of New York
Notary Public, State of New York
Qualified in Albany County
Commission Expires October 31, 2013

Tax Map No.:

Tax Billing Address: East Greenbush, New York 12061

DEED

WARRANTY WITH LIEN COVENANT

LYNN ANN SMITH

TO

DAVID WOJESKI, as Trustee of
The David L. and Lynn A. Smith
Irrevocable Trust

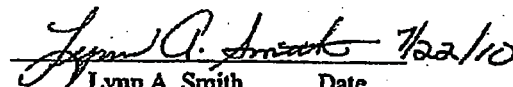
RECORD AND RETURN BY MAIL TO:
Stephen J. Wiley, Esq.
Featherstonhaugh, Wiley & Clynne, LLP
99 Pine Street
Albany, NY 12207
(518) 436-0786

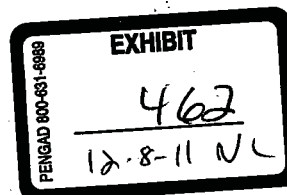
Exhibit 13

Indemnity and Hold Harmless Agreement

For valuable consideration, the receipt of which is hereby acknowledged, we, David L. Smith and Lynn A. Smith of [REDACTED] Saratoga Springs, New York, on behalf of ourselves and our heirs, devisees and assigns, jointly and severally hereby agree to release, indemnify, defend and hold harmless David Wojeski of [REDACTED] East Greenbush, New York, individually and as Trustee of the David L. Smith and Lynn A. Smith Irrevocable Trust dated August 4, 2004, of and from any and all claims, actions, compensation, obligations, tax assessments, liabilities, demands, contracts, agreements, judgments, at law and in equity, whether in existence now or which may accrue in the future, arising out of or related to the David L. Smith and Lynn A. Smith Irrevocable Trust dated August 2, 2004, including but not limited to, any financial transactions, investments, obligations or distributions, and the potential tax consequences thereof, relating to said Trust, its Donors and its beneficiaries, and any and all financial institutions, third parties and government or quasi-government authorities.


David L. Smith Date


Lynn A. Smith Date



TR0000242

Exhibit 14

<p style="text-align: right;">Page 1</p> <p>1 2 UNITED STATES DISTRICT COURT 3 NORTHERN DISTRICT OF NEW YORK 4 * * * * *</p> <p>5 SECURITIES AND EXCHANGE COMMISSION, 6 Plaintiff, 7 -vs- 10 Civ. 457 (GLS/DRH) 8 McGINN, SMITH & CO., INC., 9 McGINN, SMITH ADVISORS, LLC, 10 McGINN, SMITH CAPITAL HOLDINGS CORP., 11 FIRST ADVISORY INCOME NOTES, LLC, 12 FIRST EXCELSIOR INCOME NOTES, LLC, 13 FIRST INDEPENDENT INCOME NOTES, LLC, 14 THIRD ALBANY INCOME NOTES, LLC, 15 TIMOTHY M. McGINN, DAVID L. SMITH, 16 LYNN A. SMITH, GEOFFREY R. SMITH, 17 Individually and as Trustee of the David L. 18 and Lynn A. Smith Irrevocable Trust U/A 8/04/04, 19 LAUREN T. SMITH, and NANCY McGINN, 20 Defendants, 21 LYNN A. SMITH, and 22 NANCY McGINN, 23 Relief Defendants, and 24 GEOFFREY R. SMITH, Trustee of the 25 David L. And Lynn A. Smith Irrevocable Trust U/A 8/04/04, Intervenor. * * * * *</p>	<p style="text-align: right;">Page 3</p> <p>1 L. Smith 2 3 I N D E X 4 5 E X A M I N A T I O N S 6 Page 7 LAUREN SMITH 8 Examination by MR. NEWVILLE 6 9 10 E X H I B I T S 11 12 No. Description Page 13 409 Plaintiff's first request for 9 14 production of documents for 15 defendant Lauren T. Smith 16 dated September 14, 2010 17 410 RMR Wealth Management account 34 18 statement for Lauren T. Smith 19 from the time period June 6, 2010 20 to June 30, 2010 21 22 411 Five-page document containing 52 23 fax or e-mail attachment 24 412 One-page e-mail from Lauren Smith 53 25 to David Wojeski dated July 12, 2010 413 Bank account documents 73 414 Three pages of documents 75 containing some check disbursement inquiry, another document and an e-mail from Brian Mayer to Francine Kurtz dated May 6, 2010 415 Canceled checks 76</p>
<p style="text-align: right;">Page 2</p> <p>1 L. Smith 2 3 EXAMINATION BEFORE TRIAL of LAUREN SMITH, 4 held at Phillips Lytle, LLC, Albany, New York, 5 on November 28, 2011 before NORA B. LAMICA, 6 Court Reporter and Notary Public in and for 7 the State of New York. 8 9 APPEARANCES: 10 Attorneys for Plaintiff: 11 SECURITIES AND EXCHANGE COMMISSION 12 Attorneys at Law 13 3 World Financial Center, Room 400 14 New York, New York 10281 15 BY: JOSHUA M. NEWVILLE, ESQ. 16 BY: DAVID STOELTING, ESQ. 17 18 Attorneys for Defendant Lauren Smith: 19 FEATHERSTONHAUGH, WILEY & CLYNE, LLP 20 Attorneys at Law 21 99 Pine Street 22 Albany, New York 12207 23 BY: SCOTT J. ELY, ESQ. 24 25</p>	<p style="text-align: right;">Page 4</p> <p>1 L. Smith 2 416 [REDACTED] 3 [REDACTED] statements and an e-mail 4 [REDACTED] requesting statements from 5 6 417 Copies of canceled checks from 83 7 the David L. Smith and 8 Lynn A. Smith account made out 9 to Lauren T. Smith 10 418 One-page e-mail dated 90 11 July 25, 2011 from Lauren Smith to 12 PRabinovich@rmrwm.com 13 14 R E Q U E S T S 15 Page 79, Line 20 through Page 80, Line 5: 16 Q. Do you know where the statement for the period 17 of May 13, 2010 to June 10, 2010 time period is? 18 A. I do not. I was just print, print, print. I 19 may have skipped over one. I can provide that to you. 20 If you need me to go online right now I can do it. 21 MR. ELY: May what? 22 MR. NEWVILLE: May 13 to June 10, 2010. 23 Q. I just ask you work with your counsel to 24 provide that to us. 25 A. Of course.</p>

<p style="text-align: right;">Page 85</p> <p>1 L. Smith</p> <p>2 A. Yes.</p> <p>3 Q. A number of \$1,000 checks there, correct?</p> <p>4 A. Yes.</p> <p>5 Q. And I'm just curious why you wouldn't take a</p> <p>6 distribution from the trust for that kind of money?</p> <p>7 A. The distribution from the trust -- the trust</p> <p>8 was setup. I didn't know I had access to the money. The</p> <p>9 trust had been setup for my future. If I'm a little</p> <p>10 short on rent I feel I can ask my mom and my family for</p> <p>11 some support, for some help without digging into money</p> <p>12 that is suppose to be set aside for later in my life.</p> <p>13 Q. Again we've got additional checks from</p> <p>14 February, March, April, May and June of 2008 in the</p> <p>15 amount of \$1,000. Do you see that?</p> <p>16 A. Mm-hmm.</p> <p>17 Q. In addition another \$1,000 check in December</p> <p>18 of '08, a \$2,000 check in March of '09, a \$2,200 check in</p> <p>19 May of '09. Do you see those?</p> <p>20 A. Yes.</p> <p>21 Q. How would you describe these additional</p> <p>22 checks?</p> <p>23 A. They were still money to help pay my rent.</p> <p>24 Q. Did you provide anything in return for the</p> <p>25 checks that are referenced in Exhibit 417?</p>	<p style="text-align: right;">Page 87</p> <p>1 L. Smith</p> <p>2 also gave your brother Geoff a gift in the amount of</p> <p>3 \$10,000?</p> <p>4 A. I don't know.</p> <p>5 Q. Geoff didn't get married, did he?</p> <p>6 A. No, he did not.</p> <p>7 Q. I think we discussed this before, but after</p> <p>8 the SEC filed its lawsuit you were aware that your</p> <p>9 parents assets had been frozen, correct?</p> <p>10 A. Yes.</p> <p>11 Q. You're aware that their documents had been</p> <p>12 seized by the FBI?</p> <p>13 A. Yes.</p> <p>14 Q. Were you in New York at all during the time</p> <p>15 that occurred?</p> <p>16 MR. ELY: Is this the first time they</p> <p>17 froze or the second time?</p> <p>18 MR. NEWVILLE: When the documents were</p> <p>19 seized by the FBI.</p> <p>20 A. No, I was not here.</p> <p>21 Q. You're aware that your parents were undergoing</p> <p>22 some serious financial difficulties as a result of the</p> <p>23 asset freeze, weren't you?</p> <p>24 A. Yes.</p> <p>25 Q. And you're aware that a lot of work was done</p>
<p style="text-align: right;">Page 86</p> <p>1 L. Smith</p> <p>2 A. No.</p> <p>3 Q. These were gifts to you?</p> <p>4 A. Yes.</p> <p>5 Q. About how much money would you say you</p> <p>6 received over the 2006 to 2009 time period from your</p> <p>7 parents as gifts?</p> <p>8 A. I don't know. If you would like to add these,</p> <p>9 be my guest.</p> <p>10 Q. Did you receive any funds from your parents</p> <p>11 during the 2010 time period?</p> <p>12 A. No. I don't recall.</p> <p>13 Q. After the SEC filed its lawsuit at any point</p> <p>14 in time up until today do you recall any gifts from your</p> <p>15 parents?</p> <p>16 A. No.</p> <p>17 Q. Do you recall whether your mother gave you a</p> <p>18 \$10,000 gift after the camp properties were transferred</p> <p>19 into ownership?</p> <p>20 A. I was given money. I was just married this</p> <p>21 past September 24, 2011. I was given \$10,000 from my</p> <p>22 parents. Again, that you will see in my [REDACTED]</p> <p>23 account which I will not be touching because now that is</p> <p>24 my future money.</p> <p>25 Q. Is it your understanding that your parents</p>	<p style="text-align: right;">Page 88</p> <p>1 L. Smith</p> <p>2 in order to release the trust from the asset freeze, were</p> <p>3 you not?</p> <p>4 A. Yes.</p> <p>5 Q. And you're aware that a lot of work was done</p> <p>6 to attempt to release your mother's stock account from</p> <p>7 the asset freeze, were you not?</p> <p>8 A. I do not know.</p> <p>9 Q. You were aware that it was very important to</p> <p>10 your parents to release the trust assets from the asset</p> <p>11 freeze in order to help them pay their living expenses,</p> <p>12 weren't you?</p> <p>13 A. I do not know.</p> <p>14 Q. You're aware that your parents had substantial</p> <p>15 living expenses during that period of time they were not</p> <p>16 able to pay, correct?</p> <p>17 A. Correct.</p> <p>18 Q. And you're aware that your parents were</p> <p>19 incurring substantial legal fees that they were not able</p> <p>20 to pay, correct?</p> <p>21 A. Correct.</p> <p>22 Q. So at the time the camp property ownership was</p> <p>23 transferred, you knew that your parents required money in</p> <p>24 order to fund their living expenses and their legal fees,</p> <p>25 right?</p>

Exhibit 15



CAPACITY ONE MANAGEMENT, LLC

Summary of terms to be incorporated into the Operating Agreement of Capacity One Management, LLC

The David & Lynn Smith Irrevocable Trust ("the Trust") will make a \$200,000 investment in Capacity One Management, LLC ("Capacity One") in exchange for a 49% equity interest in such entity. In addition, the following terms will be incorporated into the final operating agreement.

- Voting will be based on one vote per share.
- The Trust will have priority distribution rights until 100% of its investment has been returned in full. Thereafter, the distributions will be split according to ownership.
- There will be no requirements for additional capital. However, if there is additional capital required the parties who fund the additional capital will have priority distribution rights before the original investors in proportion of the additional capital amounts.
- Losses will be allocated first to those with positive capital account balances and then according to ownership percentage.
- There will be no provision to restore a negative capital account balance and there will be no individual liability for LLC debts.
- A sale of the business will require the consent of 75% of outstanding membership units.

The above is agreed to by:

Geoffrey R. Smith, CFA
President
Capacity One Management, LLC

David Wojeski, Trustee
David & Lynn Smith Irrevocable Trust

TR0000361

Exhibit 16



CAPACITY ONE MANAGEMENT, LLC

July 16, 2010

David and Lynn Smith Irrevocable Trust
Trustee: David Wojeski

Dear David:

Please accept this letter as consideration for the investment by the David and Lynn Smith Irrevocable Trust in to Capacity One Management, LLC in the amount of \$200,000.00 in exchange for a 49% equity interest in the company. The equity will contain a preferred return of capital.

Best Regards,

Geoffrey R. Smith, CFA
President
Capacity One Management, LLC

TR0000465

Page 1 of 1

David M. Wojeski

From: Geoffrey Smith [geoff@capacityonemanagement.com]

Sent: Tuesday, August 10, 2010 10:33 AM

To: David M. Wojeski

Subject: investment agreement

Hi Dave,

Did you need to make any changes to the letter? If you make some changes just send it back to me and I'll sign it, scan it, and send it back in pdf form. Thanks.

Geoff

Geoffrey Smith, CFA
Managing Director
Capacity One Management, LLC
P: 917-623-8235
F: 518-583-1492
Geoff@capacityonemanagement.com

11/11/2010

TR0000466

Exhibit 17

Page 1 of 1

David M. Wojeski

From: David M. Wojeski
Sent: Tuesday, August 10, 2010 3:58 PM
To: 'Geoffrey Smith'
Subject: Capacity One Management term sheet.doc
Attachments: Capacity One Management term sheet.doc
take a look at this.

dave

11/11/2010

TR0000467



CAPACITY ONE MANAGEMENT, LLC

Summary of terms to be incorporated into the Operating Agreement of Capacity One Management, LLC

The David & Lynn Smith Irrevocable Trust ("the Trust") will make a \$200,000 investment in Capacity One Management, LLC ("Capacity One") in exchange for a 49% equity interest in such entity. In addition, the following terms will be incorporated into the final operating agreement.

- Voting will be based on one vote per share.
- The Trust will have priority distribution rights until 100% of its investment has been returned in full. Thereafter, the distributions will be split according to ownership.
- There will be no requirements for additional capital. However, if there is additional capital required and all parties do not participate at their equity level, the parties who fund the additional capital will be paid 12% on such additional capital and will have priority distribution rights before the original investors.
- Losses will be allocated first to those with positive capital account balances and then according to ownership percentage.
- There will be provision to restore a negative capital account balance and there will be no individual liability for LLC debts
- A sale of the business will require the consent of 75% of outstanding membership units.

The above is agreed to by:

Geoffrey R. Smith, CFA
President
Capacity One Management, LLC

David Wojeski, Trustee
David & Lynn Smith Irrevocable Trust

TR0000468

David M. Wojeski

From: Geoffrey Smith [gs[REDACTED]@gmail.com]

Sent: Tuesday, August 10, 2010 4:56 PM

To: David M. Wojeski

Subject: Re: Capacity One Management term sheet.doc

It looks good. However, is there a way to stipulate that if the Trust makes a further investment prior to a third party investment it will receive the same terms as the original \$200k? I guess what I'm saying is that I had originally planned on funding \$500k from the Trust (even before you became Trustee), and would like the Trust to invest an additional \$300k assuming that it becomes unfrozen and looks like a prudent investment judging from results on the first deal that has already been funded (our first promotion to sell the PGA National rooms is on deals.woot.com on Wednesday August 18th. There are 2 additional promotions in the pipeline if the first does not sell out). However I don't want to give up control of the company. Any ideas on if that can work?

Secondly, I don't love the idea of stipulating that additional investment will receive 12% because I don't want to be bound to an "interest" payment if the company is unsuccessful. I'd like all investors to have equity. I think the way to do this is for my stock to have anti-dilution provisions, right? Let me know what you think, and we can make a few changes. Then I'll sign, scan and send back to you.

Geoff

On Tue, Aug 10, 2010 at 3:57 PM, David M. Wojeski <dwojeski@wojeskico.com> wrote:
take a look at this.

dave

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11/11/2010

TR0000469

David M. Wojeski

From: David M. Wojeski
Sent: Tuesday, August 10, 2010 5:05 PM
To: 'Geoffrey Smith'
Subject: RE: Capacity One Management term sheet.doc
let me think about that tonite

From: Geoffrey Smith [mailto:geoffrey.smith@gmail.com]
Sent: Tuesday, August 10, 2010 4:56 PM
To: David M. Wojeski
Subject: Re: Capacity One Management term sheet.doc

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David M. Wojeski

From: Geoff Smith [redacted@gmail.com]
Sent: Tuesday, August 10, 2010 5:08 PM
To: David M. Wojeski
Subject: Re: Capacity One Management term sheet.doc
Sounds good.

Sent from my iPhone

On Aug 10, 2010, at 5:04 PM, "David M. Wojeski" <dwojeski@wojeskico.com> wrote:

let me think about that tonite

From: Geoffrey Smith [mailto:redacted@gmail.com]
Sent: Tuesday, August 10, 2010 4:56 PM
To: David M. Wojeski
Subject: Re: Capacity One Management term sheet.doc

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TR0000471

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TR0000472

David M. Wojeski

From: Geoffrey Smith [REDACTED]@gmail.com]

Sent: Wednesday, August 11, 2010 8:57 AM

To: David M. Wojeski

Subject: Re: Capacity One Management term sheet.doc

The other problem with the 12% on additional capital invested is that, if the business proves to be very successful, my cost of capital could in fact decrease and be less than 12%.

On Tue, Aug 10, 2010 at 3:57 PM, David M. Wojeski <dwojeski@wojeskico.com> wrote:
take a look at this.

dave

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TR0000477

David M. Wojeski

From: Geoffrey Smith [gs[REDACTED]@gmail.com]
Sent: Monday, August 16, 2010 3:20 PM
To: David M. Wojeski
Subject: Re: Capacity One Management term sheet.doc

Hi Dave,

Were you able to give my suggestions/comments any thought? I'd like to get the letter executed ASAP. Let me know, I'm free all week long.

Geoff

On Wed, Aug 11, 2010 at 8:56 AM, Geoffrey Smith <gs[REDACTED]@gmail.com> wrote:
The other problem with the 12% on additional capital invested is that, if the business proves to be very successful, my cost of capital could in fact decrease and be less than 12%.

On Tue, Aug 10, 2010 at 3:57 PM, David M. Wojeski <dwojeski@wojeskico.com> wrote:
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David M. Wojeski

From: David M. Wojeski
Sent: Tuesday, August 17, 2010 12:18 PM
To: 'Geoffrey Smith'
Attachments: 2010_08_17_12_17_52.pdf

11/11/2010

TR0000479



CAPACITY ONE MANAGEMENT, LLC

Summary of terms to be Incorporated into the Operating Agreement of Capacity One Management, LLC

The David & Lynn Smith Irrevocable Trust ("the Trust") will make a \$200,000 investment in Capacity One Management, LLC ("Capacity One") in exchange for a 49% equity interest in such entity. In addition, the following terms will be incorporated into the final operating agreement.

- Voting will be based on one vote per share.
- The Trust will have priority distribution rights until 100% of its investment has been returned in full. Thereafter, the distributions will be split according to ownership.
- There will be no requirements for additional capital. However, if there is additional capital required the parties who fund the additional capital will have priority distribution rights before the original investors in proportion of the additional capital amounts.
- Losses will be allocated first to those with positive capital account balances and then according to ownership percentage.
- There will be no provision to restore a negative capital account balance and there will be no individual liability for LLC debts.
- A sale of the business will require the consent of 75% of outstanding membership units.

The above is agreed to by:

Geoffrey R. Smith, CFA
President
Capacity One Management, LLC

 TRUSTEE

David Wojeski, Trustee
David & Lynn Smith Irrevocable Trust

TR0000480

David M. Wojeski

From: Geoffrey Smith [geoff@capacityonemanagement.com]
Sent: Tuesday, August 17, 2010 12:35 PM
To: David M. Wojeski
Subject: Executed agreement
Attachments: TrustEquityLetter0001.pdf

Dave,

Please find attached the executed agreement between Capacity One and the Trust. Thanks.

Geoff

Geoffrey Smith, CFA
Managing Director
Capacity One Management, LLC
P: 917-623-8235
F: 518-583-1492
Geoff@capacityonemanagement.com

11/11/2010

TR0000481



CAPACITY ONE MANAGEMENT, LLC

Summary of terms to be incorporated into the Operating Agreement of Capacity One Management, LLC

The David & Lynn Smith Irrevocable Trust ("the Trust") will make a \$200,000 investment in Capacity One Management, LLC ("Capacity One") in exchange for a 49% equity interest in such entity. In addition, the following terms will be incorporated into the final operating agreement.

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- Losses will be allocated first to those with positive capital account balances and then according to ownership percentage.
- There will be no provision to restore a negative capital account balance and there will be no individual liability for LLC debts.
- A sale of the business will require the consent of 75% of outstanding membership units.

The above is agreed to by:

Geoffrey R. Smith, CFA
President
Capacity One Management, LLC

David Wojeski, Trustee
David & Lynn Smith Irrevocable Trust

TR0000482