

**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,
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,

Case No.: 1:10-CV-457

(GLS/DRH)

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.

NOTICE OF MOTION

PLEASE TAKE NOTICE, that upon the accompanying Memorandum of Law in Support of David L. Smith's Motion to Modify the Asset Freeze to Permit the Release of the Irrevocable Life Insurance Trust, Declarations of David L. Smith and William J. Dreyer and accompanying exhibits submitted in support thereof, defendant David L. Smith will move this Court before the

Honorable David R. Homer, at the United States Courthouse, 445 Broadway, Albany, New York, at a date and time to be determined by the Court, for an order granting the release of the David L. Smith Irrevocable Life Insurance Trust for Mr. Smith's payment of attorneys' fees and costs in his parallel criminal case.

Dated: April 26, 2012
Albany, New York

DREYER BOYAJIAN/LLP



WILLIAM J. DREYER, ESQ.

Bar Roll No.: 101539

Attorneys for Defendant David L. Smith

75 Columbia Street

Albany, New York 12210

Telephone: (518) 463-7784

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**MEMORANDUM OF LAW IN SUPPORT OF DAVID L. SMITH'S MOTION
TO MODIFY THE ASSET FREEZE TO PERMIT THE RELEASE OF
THE IRREVOCABLE LIFE INSURANCE TRUST**

PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted in support of defendant David L. Smith's Motion to Modify the Asset Freeze to Permit the Release of the Irrevocable Life Insurance Trust so that he may advance his attorneys' fees and expenses that will be necessarily incurred in defending his criminal case.¹ On April 18, 2012, this Court granted Mr. Smith leave to move to release the life insurance trust from the asset freeze as it was not considered in this Court's April 4, 2012 Memorandum and Order which granted in part and denied in part Mr. Smith's initial motion to modify the asset freeze. Mr. Smith further makes this Motion pursuant to the Fifth and Sixth Amendments of the United States Constitution.

FACTUAL BACKGROUND

This Court's Preliminary Injunction Order issued on July 22, 2010, froze all of Mr. Smith's assets and the assets of Lynn Smith, his wife, and assets of the defendant Trust. On February 10, 2012, Mr. Smith moved to release certain Smith family assets for the advancement of attorneys' fees and expenses, upon which this Court granted the release of \$181,000 from Mr. Smith's 401-k account and \$8,135 from his IRA. Mr. Smith's February 10, 2012 motion papers included an itemization of the total amount of Smith family assets that are frozen and listed the irrevocable life insurance trust ("insurance trust"), which is the subject of this Motion. See Dkt. No. 440-2, ¶ 7.

ARGUMENT

I. Legal Standard of Release for Legal Fees

The Fifth and Sixth Amendments provide Mr. Smith the right to access funds unrelated to the alleged wrongdoing to pay his legal fees and costs. *See S.E.C. v. Coates*, 1994 WL 455558 at

¹ This motion does not waive Mr. Smith's right to seek a modification for release for attorneys' fees related to his civil case.

*3 (S.D.N.Y. Aug. 23, 1994), Dkt. No. 440-1. “Although a court may impose an asset freeze in a civil case, notwithstanding a companion criminal case, the circumstances dictate that the court pay particular attention to the defendant’s Fifth and Sixth Amendment rights.” *Id.* The Second Circuit in *U.S. v. Monsanto*, 924 F.2d 1186 (2d Cir. 1991) (*Monsanto IV*), *cert. denied* 112 S.Ct. 382 (1992), concluded that a defendant’s constitutional rights, “require an adversary, post-restraint, pre-trial hearing as to probable cause that (a) the defendant committed the crimes that provide a basis for forfeiture, and (b) the properties specified as forfeitable in the indictment are properly forfeitable.” 924 F.2d at 1203. Although the *Monsanto* line of cases involved the propriety of an asset freeze in the context of a criminal forfeiture action, the standard cited in *Monsanto IV* has been applied to the propriety of an asset freeze in civil cases affecting a defendant’s right to counsel in a parallel criminal case. *See Coates*, 1994 WL 455558; *S.E.C. v. FTC Capital Markets, Inc.*, 2010 WL 1181061 (S.D.N.Y. Apr. 30, 2009); *Commodity Futures Trading Com’n v. Walsh*, 2010 WL 882875 (S.D.N.Y. Mar. 9, 2010), Dkt. No. 440-1.

In order for the court to grant a post-restraint, or *Monsanto* hearing, a criminal defendant must make a needs-based showing that the requested frozen funds are necessary to pay his legal defense fees. *See S.E.C. v. Sekhri*, 2000 WL 1036295 (S.D.N.Y. 2000). Once a defendant shows “that without the advancement of the frozen funds, [he] will be unable to pay defense counsel’s fees in the criminal action . . . the [Government] is required to demonstrate that the frozen funds are traceable to fraud.” *FTC Capital Markets, Inc.*, 2010 WL 11810616 at *7, *see Coates*, 1994 WL 455558 at *3 (*Monsanto* hearing granted, requiring the SEC to show the extent the defendant’s personal assets were traceable to the alleged fraud). Thus the burden shifts to the

Government to make a probable cause showing that the restrained funds are traceable to the alleged fraud. *Coates*, 1994 WL 455558 at *4.²

II. David L. Smith's Motion for Release for Legal Fees

The portion of funds from Mr. Smith's 401-k account and IRA permitted to be released by this Court are insufficient to pay for the continued legal representation in his parallel criminal case. It is estimated that the value of the liquidated assets after withholdings will be \$120,000 or less, substantially short of the \$300,000 necessary for his attorneys to defend the criminal proceedings. See Dreyer Decl. ¶¶ 5, 8. Thus, Mr. Smith is seeking approval from the Court to permit the insurance trust's primary beneficiary, Lynn Smith, to apply to the trustee-to-be-appointed for a loan against the cash surrender value of the insurance policy to pay for Mr. Smith's legal fees in his criminal case. See Smith Decl. ¶ 17.

This Court previously found that Mr. Smith made the required showing of necessity and that the requested \$300,000 in attorneys' fees if the criminal case proceeds through trial is reasonable. See Dkt. No. 478, ps. 6, 14. Therefore, such arguments need not be recited here. As to the traceability aspect of the insurance trust funds, this Court has previously reviewed the related documents in camera and found that "[t]hey contain no indication that they were made in furtherance of any crime of fraud." See Dkt. 424, p. 24. To the extent that the SEC alleges that the insurance trust is tainted by contributions by Mr. Smith post-2004, it is averred that this amount is minimal and may easily be identified and severable from the principal of the insurance trust and the untainted portion should be released. See Smith Decl. ¶¶ 11, 14.

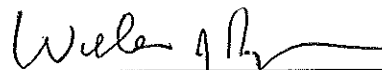
² In this respect, although it is not the burden of the defense to show, it is maintained that the funds requested are not traceable to any of the alleged wrongdoing.

CONCLUSION

Based on the foregoing and the accompanying declarations of David L. Smith and William J. Dreyer, Mr. Smith respectfully requests that his Motion to Modify the Asset Freeze to Permit the Release of the Irrevocable Life Insurance Trust be granted.

Dated: April 26, 2012
Albany, New York

DREYER BOYAJIAN LLP



WILLIAM J. DREYER, ESQ.

Bar Roll No.: 101539

Attorneys for Defendant David L. Smith

75 Columbia Street

Albany, New York 12210

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and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenor.

DECLARATION OF DAVID L. SMITH

DAVID L. SMITH hereby declares under penalty of perjury:

1. I am a defendant in the above-captioned action and I am also a defendant in a criminal case before Judge David N. Hurd: *United States of America v. Timothy M. McGinn and David L. Smith*, 1:12-cr-028 (DNH).

2. I make this Declaration in support of my Motion to Modify the Asset Freeze to Permit the Release of the Irrevocable Life Insurance Trust to pay my attorneys' fees and costs associated with the defense in the parallel criminal proceeding against me. Additionally, I make this Declaration pursuant to this Court's Order dated April 18, 2012, granting leave to move to release the life insurance trust from the asset freeze.

3. For the purposes of this Declaration, I repeat and reallege the statements previously provided in my February 10, 2012 Declaration and my March 2, 2012 Supplemental Declaration and incorporate them herein. See Dkt. Nos. 440-2, 456-2.

4. I am specifically asking this Court to consider the release of the David L. Smith Irrevocable Life Insurance Trust ("insurance trust") as a source from which to pay my attorneys' fees and costs for continued representation by Dreyer Boyajian LLP in my criminal case.

5. In my September 30, 2011 financial statement provided to the SEC, I stated that "[t]he assets and liabilities listed on the statement [were] either wholly owned by David L. Smith or represent his interest in jointly held property with his wife [and] [t]he statement does not include assets belonging to his wife or any trust held or controlled by a separate trust or trustee." Therefore, the insurance trust was not disclosed to the SEC at that time.

6. Nevertheless, its existence was disclosed and provided in the David L. Smith Privilege Log, submitted to the Court and the SEC on October 26, 2011. Additionally, the insurance trust was previously listed as a frozen Smith family asset and represented as "Irrevocable Life Insurance Trust: Lynn Smith, beneficiary, \$160,000 cash value." See Dkt. No. 440-2, ¶ 7.

7. The insurance trust consists of a single \$350,000 life insurance policy that I purchased through Thrivent Financial for Lutherans (Contract No. 2092980) and was issued on

March 25, 1984. See Ex. "A", Thrivent Statement dated March 26, 2012. The SEC has had the Thrivent Financial for Lutherans annual statements for the years 2005 to 2010 in their possession since at least April 20, 2010.

8. The Irrevocable Life Insurance Trust Agreement was executed on January 3, 1989, which assigned to the trustee, Thomas J. Urbelis, the \$350,000 whole life insurance policy on the insured, David Lee Smith. See Ex. "B", Trust Agreement dated January 3, 1989.

9. The agreement names my wife, Lynn Smith, as the primary beneficiary and provides that the insurance trust is irrevocable, relinquishing my rights to alter, amend, revoke or terminate the agreement or trust. See Ex. "B", p. 21.

10. Between 1984 and sometime around 2002, the policy's annual premiums of \$5,350 were paid by both my wife and I, before any of the alleged fraud occurred. It is estimated that the total amount contributed during this time period is \$96,300.¹

11. It is estimated that between 2003 and 2007, the dividends from the policy began paying for at least half of the annual premium, with my wife and I contributing approximately \$7,500 over those four years.

12. After 2007 to present, the Thrivent insurance premiums have been completely paid by the policy's annual dividends.

13. The current cash surrender value of the Thrivent policy is \$169,030.83, however, this amount includes the paid-up additional insurance amount of \$1,030.63. It is therefore estimated the actual cash surrender value is \$168,000. See Ex. "A". This policy is the only asset of the insurance trust.

¹ The amounts referenced within this Declaration are estimations provided to the best of declarant's knowledge. Exact amounts are unavailable as Thrivent will only release that information to the trustee, who has yet to be named.

14. Although it is vigorously maintained that this asset is untainted, to the extent the Court finds that my contributions are traceable to the alleged fraud, it is averred that this amount is minimal and can be easily severable from the principal of the insurance trust.

15. Currently, there is no trustee for the insurance trust because Mr. Urbelis resigned as trustee on July 27, 2010, and Bank of America, N.A., U.S. Trust (formerly Norstar Bank) declined to serve as successor trustee. See **Ex. "C"**, Urbelis Letter, dated July 27, 2010 and **Ex. "D"**, U.S. Trust Letter, dated March 9, 2012.

16. Although the trust agreement calls for a corporate trustee, I plan on seeking the appointment of my son, Geoffrey R. Smith, as successor trustee through probate proceedings in Saratoga County. Geoffrey R. Smith currently serves as the trustee for the David L. and Lynn A. Irrevocable Trust and holds a bachelor of arts in finance and a post-graduate professional designation of Certified Financial Analyst (CFA).

17. Should this Court permit the release of the insurance trust funds and a successor trustee is thereafter appointed, Lynn Smith, through her attorneys Featherstonhaugh, Wiley & Clyne, LLP, will apply for a loan/disbursement against the cash surrender value of the policy to be used for the payment of the legal fees associated with my criminal case. See **Ex. "E"**, Lynn Smith Letter, dated April 24, 2012.

18. It is estimated that \$7,000 will need to be allocated to pay for the borrowing costs which will become due in 2013, resulting in an estimated \$161,000 available to pay my attorneys' fees and costs in my criminal case.

19. Other than a portion of the funds from my 401-k account and IRA, which have been permitted to be released pursuant to this Court's April 4, 2012 Memorandum and Order, I have no other available assets with which to pay my attorneys.

20. Despite the release of the 401-k account and IRA, I believe that the expected liquidated amount after tax withholdings of approximately \$120,000 is still insufficient to cover the anticipated legal fees and necessary expenses related to the defense in my criminal case. As such, unless the insurance trust is released from the asset freeze and the cash value is provided, I will be unable to retain counsel of my choice in my criminal case.

Pursuant to 18 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct.

Executed on: April 25, 2012


DAVID L. SMITH

EXHIBIT

A



Insurance Statement

Thrivent ID	As of Date	Page
507326255	March 26, 2012	1 of 2

001670TL\$172



David L Smith Rev Tr

% Thomas Urbelis

6 Eastman Rd

Andover MA 01810-4009

Your financial representative is available to assist you.

James T Clouser CFP

Call: 781-577-2181

Visit: www.thrivent.com

E-mail: mail@thrivent.com

Call: Customer Service Support at 800-Thrivent
(800-847-4836)

Contract Information

Contract Number

2092980

Product

Whole Life with Premiums Payable to Age 98

Issue Date

03/25/1984

Coverage

\$350,000.00

Insured

David Lee Smith

Owner

David L Smith Rev Tr

Premiums

Premiums are currently paid to 3/25/2013.

Premiums on this contract are currently billed
annually in the amount of

\$5,350.00

Insurance Statement

Thrivent ID 507325265	As of Date March 26, 2012	Page 2 of 2
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Contract Values

Death Benefit 03/25/2012

Base Coverage	\$350,000.00
Paid-Up Additional Insurance	1,587.99

Death Benefit	\$351,587.99
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Cash Surrender Value 03/25/2012

Guaranteed Cash Value	\$168,000.00
Cash Value of Paid-Up Additional Insurance	1,030.63

Cash Surrender Value	\$169,030.63
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During the past year, the Guaranteed Cash Value increased by \$6,650.00.

Dividend Information

The current dividend option is Reduce Premiums/Excess to Paid-Up Additions.

The 2012 dividend of \$5,375.50 was used as follows:

Applied to premium due	\$5,350.00
Applied to purchase \$39.29 of Paid-Up Additional Insurance	25.50

Total 2012 Dividend	\$5,375.50
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Important Information

Important Contract Owner Notice:

You should consider requesting more detailed information about your contract to understand how it may perform in the future. You should not consider replacement of your contract or make changes in your coverage without requesting a current illustration. You may annually request, without charge, such an illustration by calling 800-847-4836, or writing to Thrivent Financial for Lutherans at 4321 N. Ballard Road, Appleton, WI 54919 or contacting your financial representative (insurance producer). If you do not receive a current illustration of your contract within 30 days from your request, you should contact your state insurance department.

Upon receipt, please review this document for accuracy. You should promptly report any inaccuracies, discrepancies, or complaints to Thrivent Financial for Lutherans (on behalf of Thrivent Investment Management Inc.) by either calling 800-847-4836 or, by writing to Thrivent Financial for Lutherans at 4321 N. Ballard Rd., Appleton WI 54919-0001. You should re-confirm any oral communications regarding inaccuracies, discrepancies or complaints in writing to further protect your rights.

Neither Thrivent Financial for Lutherans nor its respective representatives and employees provide tax advice. For complete details, consult with your tax adviser.

Thrivent Financial's strength and stability means \$304 million in dividends back to eligible members in 2011. Your dividend is shown on this statement. Dividends are not guaranteed.

Strength, Stability and Support In An Ever Changing Economy

While the economy may feel like it's been uncertain for some time, Thrivent Financial is committed to doing everything possible to help ensure our members are informed and their financial needs are being met. Our strength and stability have enabled us to deliver on our promise to be there when our 2.5 million members need us most.

To learn more or to connect with a financial representative to review your financial strategy, visit thrivent.com/strength.



EXHIBIT B

IRREVOCABLE LIFE INSURANCE TRUST AGREEMENT

TRUST AGREEMENT made and executed as of the 3rd day of January, 1989, by and between DAVID L. SMITH, now residing at Saratoga County, New York [hereinafter called the "Settlor"], and THOMAS J. URBELIS, now residing at Massachusetts [hereinafter called the "Trustee"]:

W I T N E S S E T H

WHEREAS, the Settlor has caused his life to be insured as evidenced by the insurance policies listed in Schedule A attached hereto; and

WHEREAS, the Settlor desires to establish an irrevocable trust and to transfer and assign to the Trustee all his right, title and interest in the insurance policies listed in Schedule A attached hereto.

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, the Settlor does hereby irrevocably assign, convey, transfer, and deliver to the Trustee all his right, title and interest in and to the policies of insurance listed in Schedule A attached hereto and made a part hereof, and the Settlor has caused the Trustee to be named owner and beneficiary of such policies;

To have and to hold the same and any other property that the Trustee may hereafter at any time hold or acquire pursuant

to the terms hereof (all of which property is hereafter sometimes collectively referred to as the "Trust") IN TRUST for the following uses and purposes:

ARTICLE I

DISPOSITIVE PROVISIONS

The Trustee shall hold, manage, invest and reinvest the Trust Estate, shall collect the income therefrom, and, after payment of the premiums and other charges on the insurance policies as provided in Article III herein and the expenses of administration, shall apply the net income and the principal of the Trust as follows:

A. During the lifetime of the Settlor, the Trustee shall distribute the net income or the Trust to LYNN A. SMITH, Settlor's spouse, and to Settlor's children, in such amounts as the Trustee deems, in his sole discretion, appropriate for their support, maintenance and medical care. The Trustee may accumulate all undistributed Trust income.

B. During the lifetime of the Settlor, LYNN A. SMITH, Settlor's spouse, and Settlor's children, shall have the power to annually withdraw an amount equal to the lesser of \$5,000.00 or the aggregate of all additions to the Trust Estate in each such year. This power of withdrawal shall be non-cumulative from year-to-year.

In the event LYNN A. SMITH, Settlor's spouse, and Settlor's children, predecease the Settlor, the issue of Settlor's children, shall have the power, during the lifetime of the Settlor, to annually withdraw an amount equal to the

lesser of \$5,000.00 or the aggregate of all additions to the Trust Estate in each such year. Further, in such event each of said beneficiary's annual power of withdrawal shall not exceed their pro-rata share of the lesser of \$5,000.00 or the aggregate of all additions to the Trust Estate in each such year and their power of withdrawal shall be non-cumulative from year to year.

The Trustee shall notify each beneficiary within thirty days of any transfer or other contribution to the Trust Estate of his or her right of withdrawal. Each of said beneficiaries desiring to exercise his or her right of withdrawal must submit a written request for withdrawal to the Trustee within thirty days of his or her receipt of notice of any transfer or contribution to the Trust Estate. Payment of the amount requested in writing as herein provided, shall be made by the Trustee within thirty days after the receipt of said request. The Trustee may, in his sole discretion, satisfy said request by a distribution in cash or in kind, or both.

If during any year any beneficiary entitled to said right of withdrawal has not attained the legal age of majority, said beneficiary's right to withdraw from the Trust Estate may be exercised by said beneficiary's parent, unless said parent made a transfer to the Trust Estate, or by a legal guardian appointed for such purpose.

C. Upon the death of the Settlor, the Trustee shall distribute the remainder of the Trust as follows:

1. The Trustee shall pay to or apply for the benefit of Settlor's spouse, LYNN A. SMITH, and Settlor's children, such amounts from the net income and principal of the Trust as the Trustee deems, in his sole discretion, necessary for the medical care, support, education, (including, but not limited to, pre-school, private elementary, private secondary, college, and post-graduate education of Settlor's children) and welfare of Settlor's spouse and children. Settlor desires that the Trustee give primary consideration to the support of Settlor's said spouse. The Trustee may make unequal payments of income and principal, which shall not be considered advancements, and he may accumulate all or any portion of the Trust income. Any decision of the Trustee with respect to the exercise of said discretionary powers, made in good faith, shall fully protect the Trustee and shall be binding and conclusive upon all persons interested in this Trust.

2. Upon the death of Settlor's spouse, or upon Settlor's death if she shall predecease Settlor, the Trustee shall divide the remainder of the Trust into equal shares for each of Settlor's living children and each of Settlor's predeceased children who have left issue then living. The Trustee shall distribute and use said equal shares as follows:

(i) Each of Settlor's children who have attained the age of 25 years shall receive one-half of his or her equal share outright;

(ii) Each of Settlor's children who have attained the age of 30 years shall receive his or her entire equal share outright;

(iii) The issue of each of Settlor's deceased children shall receive their entire share outright.

(iv) Each share, or parts thereof, not distributed pursuant to the above provisions shall be held in a separate TRUST to be distributed by the Trustee, hereinafter named.

The Trustee shall take control and management of said Trusts and shall invest and reinvest and keep the same invested and receive the income therefrom and after paying the reasonable and proper expenses of the Trusts, pay and distribute the income therefrom and the principal thereof as follows:

(a) The Trustee shall pay to or apply for the account of each beneficiary such amounts of the net income and principal from each beneficiary's respective Trust as the Trustee deems in his sole discretion, is appropriate.

The Trustee may distribute the income and principal from each beneficiary's respective Trust for the medical care, support, education and welfare of each beneficiary; however, the Trustee shall not limit all Trust distributions to such purposes. In particular, the Trustee may invade the principal and distribute up to \$50,000.00 of any such Trust to the respective beneficiary of such Trust for a down payment on the purchase of such beneficiary's first home

and up to \$50,000.00 of any such Trust for an investment in a business in which such respective beneficiary shall have at least a 51% interest.

The Trustee may accumulate all or any portion of the Trust income.

(b) The Trustee shall pay to each beneficiary when he or she attains age 25 years, one-half of the then remainder from such beneficiary's respective Trust; and when he or she attains age 30 years, the remainder from such beneficiary's respective Trust.

(c) Upon the death of any of Settlor's children for whom a Trust has been created, the then remainder of such Trust shall be distributed to his or her issue then living, or, if none, then to Settlor's issue. If, however, any such distribution shall be made to any of Settlor's children who are then beneficiaries of any Trust created by this Agreement, such distribution shall not be paid outright to such child, but shall be added to said child's Trust, to be held, administered, and distributed in accordance with the provisions contained herein.

D. If at any time during the administration of any Trust created herein, the Trustee deems the continuation of said Trust uneconomical and not in the best interests of the beneficiaries thereof, the Trustee may terminate said Trust and distribute the assets, free of the Trust, to the current income and principal beneficiaries in the proportions to which they are entitled.

E. Notwithstanding the above, if Settlor's spouse predeceases Settlor and all of Settlor's children have attained the age of 30 years or sooner died, the Trustee shall pay the remainder of this Trust to Settlor's issue.

F. If Settlor's spouse predeceases Settlor and all of Settlor's issue predecease him, or, if at the time of the termination of any Trust created herein, none of Settlor's issue are then living, the balance of any such Trust shall be paid over by the Trustee as follows:

(a) If either Settlor's brother-in-law, WILLIAM H. CHILDS, or Settlor's sister-in-law, SHIRLEY J. CHILDS, or both survive Settlor and/or are alive at the termination of any Trust, the Trustee shall carve out an amount necessary to provide Settlor's brother-in-law, WILLIAM H. CHILDS, and Settlor's sister-in-law, SHIRLEY J. CHILDS, with a total yearly income of \$50,000.00 and shall hold such carved-out amount in a separate trust for their benefit. The Trustee shall pay to WILLIAM H. CHILDS and SHIRLEY J. CHILDS, or the survivor of them, from the income and principal of that Trust an annual sum of \$50,000.00 until the death or the last to die of WILLIAM H. CHILDS and SHIRLEY J. CHILDS at which time this Trust shall terminate and the remainder of this Trust shall be paid over to the Foundation to be created as hereinafter provided in (b). Such \$50,000.00 sum shall be annually adjusted for changes in the Cost of Living.

(b) The Trustee shall cause a not-for-profit

Foundation to be formed called the LYNN A. SMITH AND DAVID L. SMITH FOUNDATION, the purposes of which shall be to provide support and education for disadvantaged or sick children. The balance of any such Trust, less any amounts required to be carved out under subparagraph (b) above, shall be paid over to that Foundation.

Notwithstanding the above, if the Trustee shall determine, upon the death of Settlor that any sum or all of the assets of the Trust are properly included in Settlor's Estate as gifts made within three years of Settlor's death as defined in Section 2035 of the Internal Revenue Code of 1986, the Trustee shall pay such asset or assets to Settlor's Estate.

G. The Trustee shall not be liable for any payments made pursuant to the provisions of this Agreement in the absence of gross negligence or bad faith.

H. Notwithstanding the above, if LYNN A. SMITH ceases to be married to Settlor or is not married to the Settlor at the time of Settlor's death, or is legally separated at that time from Settlor, or, if she and Settlor have been living apart for a period of at least 180 continuous days, then in any of those events and for the purposes of this Trust, LYNN A. SMITH shall be deemed to have predeceased the Settlor.

ARTICLE II

RIGHTS OF TRUSTEE IN INSURANCE POLICIES

The Trustee is hereby vested with all right, title and interest in and to all policies of insurance composing part of

the Trust Estate and is authorized and empowered, as absolute owner of such policies, to exercise and enjoy, for the purpose of the Trust herein created all the options, benefits, rights and privileges under the same including the right to borrow upon such policies and to pledge them for a loan or loans. The insurance companies which have issued such policies are hereby authorized and directed to recognize the Trustee as absolute owner of such policies of insurance and as fully entitled to all options, rights, privileges and interests under such policies, and any receipts, releases and other instruments executed by the Trustee in connection with the same shall be binding and conclusive upon the insurance company and upon all persons interested in this Trust. Settlor hereby relinquishes all rights and powers in such policies and will, at the request of the Trustee execute all other instruments reasonably required to effectuate this total relinquishment.

ARTICLE III

PAYMENT OF PREMIUMS

A. The Trustee shall invest and reinvest the Trust Estate and collect the income therefrom; and shall apply such income to the payment of the premiums or the charges on the insurance policies that compose part of the Trust Estate.

B. If the net income is insufficient to pay such premiums or other charges at any time, the Trustee shall notify the Settlor and the beneficiaries of the Trust in writing of

such insufficiency. The Settlor and the beneficiaries or any of them may furnish the necessary funds for the payment of the premiums or other charges; but they shall not be obligated or required to do so. Any funds furnished as the result of said notice shall be applied by the Trustee to the payment of the premiums or other charges; and the excess, if any, of such funds shall be added to the principal of the Trust Estate.

C. IF, at any time, the net income of the Trust Estate and the funds furnished by the Settlor and the beneficiaries are insufficient to pay the premiums or other charges on the policies of insurance, the Trustee shall not be liable for its failure to do so. However, in the event of such insufficiency, the Trustee may, in his absolute discretion, pay the premiums or other charges, or any of them, and the Trustee may obtain the necessary funds therefor by selling at public or private sale, without notice to the Settlor or the beneficiaries of the Trust or any other person, a sufficient portion of the principal of the Trust; by borrowing on the security of the principal of the Trust or any part thereof or on any of the insurance policies; by applying the dividends on any of the policies; or by surrendering any of the policies for their cash surrender values. The Trustee may also, in its absolute discretion, convert any policy on which premiums have not been paid due to insufficient funds into a paid-up policy pursuant to the terms of such policy.

D. In the event the Trustee receives the cash value of all such policies upon forfeiture for the non-payment of premiums and there shall be no other trust property, this Trust shall terminate and the principal thereof together with any accumulated or accrued income thereon shall be forthwith paid over, free and clear of the conditions of this Trust to my children or my children are not then living, then to the issue my children, or if there are no surviving issue my children then to the heirs at law and next of kin of the Settlor.

ARTICLE IV

COLLECTION OF INSURANCE PROCEEDS

A. Upon the death of the Settlor, the proceeds of all insurance policies which are a part of the Trust Estate shall be collected by the Trustee. The Trustee shall have the full authority to take any action in regard to the collection of said proceeds that in his discretion deems best and to pay the expense thereof out of the Trust Estate. The Trustee is authorized to but shall not be required to enter into or maintain any litigation to enforce payment of such proceeds until he shall have been indemnified to his satisfaction against all expenses and liabilities to which he might in his judgment be subjected by any such action on their part. The Trustee shall have full authority to make any compromise or settlement with respect to such policies, that he may deem expedient, and to give to the insurance company all the

necessary and proper releases and acquittances and full discharges of all their liabilities under such policies.

B. No insurance company whose policy shall be deposited hereunder and who shall make payment of the proceeds thereof to the Trustee shall be required to inquire into or take notice of any of the provisions of this Agreement or to see to the application or disposition of the proceeds of such policy; and the receipt of the Trustee to any such insurance company shall be effectual to release and discharge them for any payment so made and shall be binding upon every beneficiary of the Trusts hereby created.

C. In the event Settlor becomes wholly or partially disabled within the meaning of any or all of such policies of insurance, the Trustee shall pay or apply any disability payments due under such policies of insurance to or for the account of LYNN A. SMITH, Settlor's spouse and Settlor's children or, if LYNN A. SMITH and Settlor's children are not then living, then to the issue of Settlor's children or, if there are no issue of my children then living, then to the issue of Settlor.

ARTICLE V

POWERS OF TRUSTEE

In the administration of the Trust, the Trustee or his Successor shall be vested with the powers and be subject to the limitations set forth in the Estates, Powers and Trust Law,

Section 11-1.1 to 11-2.2, inclusive or comparable statute of the State of New York. In addition, without limitation by reason of specification, the Trustee shall be vested with the following discretionary powers:

A. The Trustee shall have the sole power, in his uncontrolled discretion, to hold as an investment hereunder any property, real or personal, in the same form of investment as that in which it shall have been received by him, although the same may not be of the character permitted for investment hereunder or for the investment of trust funds by the laws of the State of New York, and, in addition, the Trustee shall have the sole power in his uncontrolled discretion from time to time to sell any such property and to invest and reinvest the proceeds thereof.

B. The Trustee in making investments and reinvestments of any monies belonging to said Trust fund, shall not be limited to securities of the character permitted for the investment of trust funds by the laws of the State of New York, but instead shall have the power, in his sole discretion, at any time and from time to time, to invest in, and to purchase and hold for investment, such other stocks, mutual funds, unsecured obligations, bonds or other property he may select and in addition to and in no way limiting the power and authority of the Trustee to invest in shares of a common trust fund or funds as he in his absolute and uncontrolled discretion shall deem advisable, and from time to time to alter and vary

any investment at any time made or held. The Trustee shall not be liable for any loss or depreciation occasioned by the purchase or retention of any securities or property purchased or retained by him provided that it shall have acted in good faith in such purchase or retention; and in no event shall the Trustee be liable for any error of judgment or for anything done or omitted to be done pursuant to the power herein given, except for his own willful misconduct.

C. The Trustee shall have the power to make loans, secured or unsecured, with or without interest and without responsibility or liability therefore, including but not limited to loans to the Administrator or Executor of the Settlor's estate whether or not such Administrator or Executor may be a Trustee hereunder, to a corporation or any other business entity in which the decedent or her heirs has or had an interest; provided further, however, that any loan to Settlor shall only be made if adequate security is provided and reasonable interest is charged,

D. The Trustee shall have the fullest power and authority to continue any business or businesses which are part of this Trust, whether in corporate form, a proprietorship, joint venture, partnership or other, to settle and discontinue any of them, at such time or times, as the Trustee, in its sole discretion, deems advisable for the best interests of this Trust; and, in the discretion of the Trustee, to transfer the assets of any said business to a corporation or corporations to

be formed for the purpose of conducting the said business or businesses, and to retain the stock or other securities received in exchange therefor as an investment of this even though the said stock or securities may not be an investment authorized by law or by this Trust, and in the discretion of the Trustee, to use the property of this Trust, not invested in the said business or businesses at the time of my death, for the debts and liabilities of the said business or businesses.

ARTICLE VI

ADDITIONAL PROPERTY

The Settlor or any other person may, from time to time by will or otherwise, but with the consent of the Trustee, deliver or cause to be delivered to the Trustee to be held pursuant to the terms, provisions and conditions of this Trust Agreement, cash, securities, insurance policies of any nature, or other property, real or personal, of any nature and in any form whatsoever. All property which shall be delivered to and accepted by the Trustee shall be held in the Trust herein set forth.

ARTICLE VII

DISTRIBUTIONS TO MINORS

Notwithstanding anything to the contrary herein contained, in the event that any person entitled to a share of the principal of the Trust fund shall, at the time of distribution

thereof, be a minor under the age of twenty-one (21) years, the same shall vest in interest, but not in possession and shall remain in the custody of the Trustee (subject to all the general powers herein conferred upon the Trustee as well as those conferred upon the Trustee by law) until such minor attains the age of twenty-one (21) years, and, during the period of such minority, the Trustee may, from time to time do the following:

A. The Trustee may apply the corpus of such property and the income therefrom or so much thereof as, in the Trustee's uncontrolled discretion, the Trustee may deem necessary and proper for his or her comfortable welfare, maintenance, support, education, recreation and medical requirements, or

B. The Trustee may pay over to the parent, guardian, or person with whom such minor resides such part of the income or corpus as the Trustee may deem proper for the comfortable welfare, maintenance, support, education, recreation and medical reimbursements of such minor and the receipt by such parent, guardian or person shall be full acquittance to the Trustee and the Trustee shall not be required to see to the application of the sums paid over to such parent, guardian or person, or

C. The Trustee may accumulate any income not so paid over.

Upon the minor attaining the age of twenty-one (21) years, the Trustee shall thereupon transfer and pay over the corpus of

such property as then constituted, together with all accrued and accumulated income then on hand to such beneficiary. In the event that such minor shall die before attaining the age of twenty-one (21) years, the Trustee shall thereupon transfer and pay over such property, as then constituted, together with all accrued and accumulated income then on hand to the executors or administrators of such beneficiary. It is the intention by this Article to create in the Trustee a power in trust with respect to any property passing absolutely to a beneficiary who shall be under twenty-one (21) years of age at the time title thereto vests in him or her, as the case may be, and it is expressly provided that the authority vested in the Trustee shall be construed as a power only and shall not operate to suspend the absolute ownership of such property by such minor or prevent the absolute vesting thereof in him or her, as the case may be.

Anything to the contrary above notwithstanding, the Trustee may effect distribution of part or all of such property payable to such minor beneficiary by means of distribution to a custodian in accordance with Section 7-4.8 of the Estates, Powers and Trust Law.

ARTICLE VIII

COMPENSATION OF TRUSTEE

A. After the death of the Settlor, or if during his lifetime, any property (other than policies of insurance) or

payment which is in excess of the amounts necessary to maintain the policies of insurance composing part of the Trust Estate is transferred to the Trustee, the Trustee shall be entitled to such annual commission from said property or payment as may be allowed to testamentary Trustees by the laws of the State of New York; and in any event the Trustee shall be entitled to its standard minimum fee which may be in effect from time to time. Such commissions may be charged currently or deferred in the discretion of the Trustee to the extent permitted by the laws of said State, and may be charged to principal or income or partly to each in the discretion of the Trustee.

B. The Trustee shall have the right to make a reasonable charge each year for its services in preparing income and other tax returns for the Trust Estate. Such charge shall be made to the corpus of the Trust Estate or to the income thereof or partly to one and partly to the other in the discretion of the Trustee.

ARTICLE IX

RESIGNATION AND SUCCESSOR TRUSTEE

A. In the event THOMAS J. URBELIS shall die, become disqualified or resign as Trustee, the Settlor hereby nominates, constitutes and appoints NORSTAR BANK, presently located at Albany, New York, Successor Trustee of the Trust created herein. The Successor Trustee shall be vested with the powers and be subject to the limitations granted to the Trustee herein.

B. Any Successor Trustee shall have, from and after its appointment or succession to office hereunder, all the title, interest, rights and powers, including discretionary rights and powers, which are by the provisions of this Agreement and the laws of the State of New York granted to and vested in the Trustee herein named.

C. If at any time after the death of Settlor's said spouse, a majority of the beneficiaries age 21 years or older of any Trust created hereunder wish to remove a Corporate Trustee and have a Successor Trustee appointed to administer any of the Trust funds created under this agreement, such beneficiaries, as the case may be, may:

1. Remove the Corporate Trustee upon giving thirty days written notice to such Corporate Trustee and upon approval of the Individual Trustee, if any;

2. Fill any vacancy caused by the removal; and,

3. Approve the accounts of and release any Corporate Trustee ceasing to act, without liability to themselves. Such release shall be binding upon all persons with the same effect as those approved by a court of competent jurisdiction.

Each Successor Trustee appointed to fill the vacancy of a Corporate Trustee shall be another corporation organized under the laws of the United States or of any state thereof, having corporate power and authority to administer such Trust. Without any conveyance or order of court, any Successor Trustee shall have, from and after its appointment or succession to

office hereunder, all the title, interest, rights and powers, including discretionary rights and powers, which are by the provisions of this Will and Laws of the State of New York, granted to and vested in the Trustee named herein.

ARTICLE X

GOVERNING LAW

The Trust shall take effect upon acceptance by the Trustee and in all respects shall be construed and governed by the laws of the State of New York.

ARTICLE XI

MISCELLANEOUS PROVISIONS


- A. The Trustee hereby accepts the Trust herein created.
- B. Any words or pronouns concerning or referring to the Trustee shall be construed as masculine, feminine or neuter, or singular or plural, as the sense requires.
- C. No bond or other security shall be required of the Trustee or his Successor in any jurisdiction.
- D. The term "policies" and "insurance companies" as used herein shall be construed to mean the singular as well as the plural as the case may be.

ARTICLE XII

AMENDMENT AND REVOCATION

This Agreement and the Trust hereby created are irrevocable, and the Settlor hereby relinquishes all right to alter, amend, revoke or terminate this Agreement or the Trust created hereby.

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



DAVID L. SMITH



THOMAS J. URBELIS

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

On the 3rd day of January, 1989, before me personally came DAVID L. SMITH to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Gary J. Jakaitis
Notary Public

GARY J. JAKAITIS
Notary Public, State of New York
No. 4868478

Qualified in Albany County
Commission Expires July 28, 1920

STATE OF MASSACHUSETTS)
COUNTY OF SUFFOLK)ss.:

On the 3rd day of January, 1989, before me personally came THOMAS J. URBELIS, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Julie A. Emerson
Notary Public

AGREEMENT BY AND BETWEEN DAVID L. SMITH
AND THOMAS J. URBELIS

SCHEDULE A

\$5.00

Cash delivered to and accepted
by THOMAS J. URBELIS, as
Trustee, simultaneously with the
execution of this Trust
Agreement by DAVID L. SMITH.

0703w

EXHIBIT C

July 27, 2010

FedEx

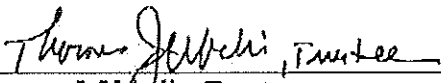
David Smith
2 Rolling Brook Drive
Saratoga Springs, NY 12866

Dear Dave:

I hereby resign as Trustee of the Irrevocable Life Insurance Trust Agreement between David L. Smith and Thomas J. Urbelis.

Enclosed is the Thrivent Financial for Lutherans Insurance Statement as of March 25, 2010 and the Notice of Premium Due with a Due Date of March 25, 2010.

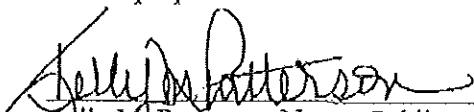
Very truly yours,


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

Commonwealth of Massachusetts

Suffolk, ss.

On this 27th day of July, 2010, before me, the undersigned notary public, personally appeared Thomas J. Urbelis proved to me through satisfactory evidence of identification, which was personal knowledge, to be the person whose name is signed on the preceding document in my presence and acknowledged to me that he signed it voluntarily for its stated purpose.


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



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

EXHIBIT D



Trust Services
Bank of America, N.A.

March 09, 2012

David L. Smith
2 Rolling Brook Dr.
Saratoga Springs, N.Y. 12866

Re: Declination letter The David L. Smith Irrevocable Life Insurance Trust

Dear Mr. Smith:

As you are aware, we are named as successor trustee of the The David L. Smith Irrevocable Life Insurance Trust dated January 3, 1989. We have reviewed the governing documents and their provisions. Additionally, we have considered your representation that the only asset in the trust is a Life Insurance policy, with you as the owner and insured. After careful review of this information, please be advised that Bank of America, N.A. does hereby decline to serve as successor trustee.

Should you have any questions or concerns with regard to this matter, please feel free contact me at 1-866-461-7285, and we will be happy to assist you.

Sincerely,

A handwritten signature in black ink, appearing to read "Cesar L. Teixeira". The signature is fluid and cursive, with a large, stylized "C" and "T".

Cesar L. Teixeira
Trust Officer

Fax: 866.307.1374

U.S. Trust, RH102-L1-03
P O Box 366, Providence, RI 02901-9972

EXHIBIT E



**FEATHERSTONHAUGH,
WILEY & CLYNE, LLP**
ATTORNEYS AND COUNSELLORS AT LAW

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PHONE: (518) 436-0786
FAX: (518) 427-0452

Via Facsimile Transmission
(518) 463-4039 & First Class Mail

April 24, 2012

William Dreyer
Dreyer & Boyajian
75 Columbia Place
Albany, New York 12207

Re: Securities Exchange Commission v. McGinn, Smith & Co., Inc., et al.
Case No: 1:10-CV-457 (GLS/DRH)

Dear Mr. Dreyer:

As you know this firm represents Lynn Smith in connection with the above referenced civil action.

I am writing this letter with the express permission of our client, Lynn Smith authorizing your firm to make an application to the Federal District Court seeking the release of assets associated with David L. Smith's Irrevocable Insurance Trust, dated January 3, 1989 of which Lynn Smith is the named beneficiary to pay for David Smith's legal defense in the pending criminal action. It is our understanding that the Life Insurance Trust has an estimated value of \$160,000.00.

Please be advised that Mrs. Smith's agreement to help finance her husband's defense in the criminal matter should not be construed in any way as a waiver of any defenses that she has raised in the SEC's present civil action concerning assets in which she has claimed exclusive ownership.

Very truly yours,

Featherstonhaugh, Wiley & Clyne, LLP

A handwritten signature in black ink, appearing to read 'James D. Featherstonhaugh', written over a horizontal line.

James D. Featherstonhaugh

JDF:cc
cc: Lynn Smith

**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,
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,

Case No.: 1:10-CV-457

(GLS/DRH)

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 WILLIAM J. DREYER

WILLIAM J. DREYER hereby declares under penalty of perjury:

1. I am an attorney duly admitted to practice in this Court. I am a partner in the law firm of Dreyer Boyajian LLP, counsel to David L. Smith in the above-captioned case and in the

parallel criminal action, *United States of America v. Timothy M. McGinn and David L. Smith*, 1:12-cr-028 (DNH).

2. I submit this Declaration in support of David L. Smith's Motion to Modify the Asset Freeze to Permit the Release of the Irrevocable Life Insurance Trust.¹

3. For the purposes of this Declaration, I repeat and reallege the statements previously provided in my February 10, 2012 Declaration and my March 2, 2012 Supplemental Declaration and incorporate them herein. See Dkt. Nos. 440-3, 446-2.

4. This Court's April 4, 2012 Memorandum & Order granted in part Mr. Smith's prior motion for the release of attorneys' fees, permitting \$181,000 from his 401-k account and \$8,135 from his IRA to be released.

5. Due to the substantial tax withholdings related to liquidating \$181,000 from Mr. Smith's 401-k, it is estimated that the true value of both assets amounts to \$120,000 or less.

6. A joint conference was held on April 17, 2012 where the releasability of the insurance trust was discussed between parties. The details surrounding the creation and current status of the insurance trust are set forth in more detail in the Declaration of David L. Smith dated April 25, 2012.

7. The estimated cash surrender value of the insurance trust, after borrowing costs, is \$161,000. Although not an asset of Mr. Smith, its existence was previously disclosed to the SEC and identified as Item No. 76 on the privilege log submitted to this Court. Additionally, Lynn Smith identified the insurance trust as an asset in her privilege log to this Court. Because privilege was asserted, the Court reviewed the documents related to the insurance trust *in camera* and found that the life insurance trust "contain[s] no indication that [it was] made in furtherance

¹ The Motion does not waive David L. Smith's right to seek a modification for release for attorneys' fees related to his civil case. Currently, the civil proceedings are stayed until Mr. Smith's criminal proceedings are complete.

of any crime or fraud”, and denied the SEC’s motion to obtain the production of these documents accordingly. See Dkt. No. 424, p. 23.

8. Dreyer Boyajian LLP will be unable to continue to represent Mr. Smith in his criminal case for the estimated \$120,000 that is expected to come from the 401-k account and IRA. Unless the cash surrender value of the insurance trust is ultimately released to our firm, we have informed Mr. Smith that we will need to withdraw from representation.²

9. Should the Court allow the funds from the insurance trust be available for the named beneficiary, Lynn Smith, to apply to the to-be-appointed trustee, Dreyer Boyajian LLP will request that all released funds be deposited to an escrow account. To the extent that such funds exceed \$250,000, we agree to spend the excess funds on costs related to expert witnesses and living expenses for the criminal trial in Utica, which will likely be in excess of one month in duration.

10. It is respectfully requested that the Court grant relief sought in this Motion.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: April 26, 2012



WILLIAM J. DREYER

² Hon. Randolph F. Treece granted the attorneys Dreyer and Jones’ application to appear at arraignment for that limited purpose pending resolution of the issues herein.