

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

McGINN, SMITH & CO., INC., et al.,

Defendants.

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:
:
: **10 Civ. 457 (GLS/DRH)**
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:
:
:
:

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

Defendant David Smith asks that, in order to fund his defense in the parallel criminal case, the Court allow his wife, defendant Lynn Smith, to apply for a loan from the trustee of an irrevocable trust after the trustee has obtained a loan from an insurance company. *See* Smith Br. at 3; Declaration of David L. Smith dated Apr. 25, 2012, ¶ 17; Declaration of William J. Dreyer dated Apr. 26, 2012, ¶ 9.

For the following reasons, the motion should be denied.

First, Lynn Smith should not be allowed to borrow funds and then transfer those funds to D. Smith because she is subject to two Court-ordered obligations to pay any funds in her possession to the Receiver and to the SEC. The Court’s *Order Directing Payment of Money to Receiver* entered October 6, 2011 (the “Order”) provides that “L. Smith is liable for disgorgement of \$925,659 . . . [and that] L. Smith shall satisfy this obligation by paying \$925,659 to the Receiver.” Dkt. 398. A separate *Judgment* entered the same day (the “Judgment”) states that “L. Smith is liable [to the SEC] for attorney’s

fees and costs in the amount of \$51,232.” Dkt. 399. Lynn Smith has not made any payments to satisfy either the Order or the Judgment.

Any funds Lynn Smith receives from the trustee pursuant to the proposed loan transaction should be used to satisfy her payment obligations. Once the trust disburses funds to Lynn Smith, those funds should be either paid to the Receiver or frozen by this Court. Any funds received by Lynn Smith, equal to the amount of the Judgment for \$51,232, are also are subject to attachment under New York law. *See* Dkt. 221, at 5 n.1 (Court’s finding that funds in David Smith’s 401(k) plan are not protected after they reach the beneficiary). As a result, L. Smith should not be permitted to evade her payment obligations by directing funds borrowed from the trust toward her husband’s criminal defense.

Second, when David Smith created this irrevocable trust he surrendered his rights to the trust assets. Having Lynn Smith act as the functional equivalent of a pass-through for the benefit of D. Smith violates the express terms of the trust agreement, which provides that D. Smith has irrevocably transferred “all of his right, title and interest in the insurance polic[y]” to the Trustee. *See* D. Smith Decl., Ex. B, at 2. David Smith’s motion seeks to use this irrevocable trust to benefit himself rather than to provide for the beneficiaries as the trust agreement requires.

Finally, D. Smith concedes that any insurance premiums paid after September 2003, when the fraud is alleged to have begun, should be deducted from any funds that are released. *See* Smith Br. at 3 (“this amount is minimal and may easily be identified and severable from the principal of the insurance trust”). According to Smith and premium notices available to the SEC, a total of \$7,500 was paid as premium during the period of

the fraud. *See* Declaration of David Stoelting dated May 9, 2012, ¶¶ 3-4, Ex. A; Smith Decl. ¶ 11. As a result, if the Court were to grant any portion of D. Smith's motion, then \$7,500 of any loan proceeds should be paid to the Receiver or frozen by the Court.

WHEREFORE, plaintiff respectfully requests: (1) that D. Smith's motion be denied in its entirety; (2) to the extent that any loan proceeds are distributed to L. Smith, that they be frozen pursuant to the Order and the Judgment; and (3) to the extent that not all loan proceeds are frozen, that \$51,232 of any such proceeds be transferred to the Receiver in satisfaction of the Judgment; and that \$7,500 of any loan proceeds, representing the amount of premiums paid during the period of the fraud, be paid to the Receiver or frozen by the Court

Dated: New York, NY
May 9, 2012

Respectfully submitted,

s/ David Stoelting

Attorney Bar Number: 516163

Attorney for Plaintiff

Securities and Exchange Commission

3 World Financial Center, Room 400

New York, NY 10281

Telephone: (212) 336-0174

Fax: (212) 336-1324

E-mail: stoeltingd@sec.gov

Of Counsel:

Kevin McGrath

Lara Shalov Mehraban

Joshua Newville

approximate \$7,500, which is the same amount that David Smith provides in his declaration. *See* Declaration of David Smith dated April 26, 2012 (Dkt. 484-2), ¶ 11.

5. The notices for 2008 to 2010 indicate that the premiums for these years were fully paid from dividends.

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

Dated: New York, New York
May 9, 2012



David Stoelting


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DAVID L SMITH REV TR
 ANDOVER MA 01810-

WHOLE LIFE PAID-UP AT 98

During the last year your contract cash value increased by \$7,000.00 (withdrawals, if any, not fully reflected). In addition, the 2005 dividend of \$3,237.50 will be:
 Applied to premium due \$ 3,237.50

NOTICE OF PREMIUM DUE

DUE DATE: March 25, 2005

Contract:

Insured: DAVID LEE SMITH
Owner: DAVID L SMITH REV TR

PREMIUM INFORMATION

| | |
|---------------------------|-------------|
| Premium Due For 12 Months | \$ 5,350.00 |
| Less: 2005 Dividend | - 3,237.50 |

| | |
|--------------------------|--------------------|
| TOTAL PAYMENT DUE | \$ 2,112.50 |
|--------------------------|--------------------|

*Have you updated your beneficiary information recently? Changes in your life (such as marriage, children, or purchase of a home) could mean you need to check your beneficiary. For information, please contact your financial associate:
 RICHARD I ELDRIDGE FIC (518)437-1818*

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 THRIVENT FINANCIAL FOR LUTHERANS
 PO BOX 8062
 APPLETON WI 54912-8062

MARK AN "X" IN THIS BOX WHEN MAKING CHANGES OR CORRECTIONS

| Contract | Date Due |
|----------|---------------------|
| | MAR 25, 2005 |

Please make check payable to Thrivent Financial for Lutherans.
 Include your contract number on your remittance.

| | |
|---------------------------|-------------|
| Premium Due For 12 Months | \$ 5,350.00 |
| Less: 2005 Dividend | - 3,237.50 |

| | |
|--------------------------|--------------------|
| TOTAL PAYMENT DUE | \$ 2,112.50 |
|--------------------------|--------------------|



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DAVID L SMITH REV TR

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WHOLE LIFE PAID-UP AT 98

During the last year your contract cash value increased by \$7,000.00 (withdrawals, if any, not fully reflected). In addition, the 2006 dividend of \$3,489.50 will be:
 Applied to premium due \$ 3,489.50

NOTICE OF PREMIUM DUE

DUE DATE: March 25, 2006

Contract:

Insured: DAVID LEE SMITH
 Owner: DAVID L SMITH REV TR

PREMIUM INFORMATION

| | |
|---------------------------|-------------|
| Premium Due For 12 Months | \$ 5,350.00 |
| Less: 2006 Dividend | - 3,489.50 |

| | |
|--------------------------|--------------------|
| TOTAL PAYMENT DUE | \$ 1,860.50 |
|--------------------------|--------------------|

Have you updated your beneficiary information recently? Changes in your life (such as marriage, children, or purchase of a home) could mean you need to check your beneficiary. For information, please contact your financial associate:
GREGORY MENGEL MBA (518)218-0060

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| Contract Number | Date Due |
|-----------------|---------------------|
| | MAR 25, 2006 |

Please make check payable to Thrivent Financial for Lutherans. Include your contract number on your remittance.

| | |
|---------------------------|-------------|
| Premium Due For 12 Months | \$ 5,350.00 |
| Less: 2006 Dividend | - 3,489.50 |

| | |
|--------------------------|--------------------|
| TOTAL PAYMENT DUE | \$ 1,860.50 |
|--------------------------|--------------------|

|||||
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WHOLE LIFE PAID-UP AT 98

During the last year your contract cash value increased by \$7,000.00 (withdrawals, if any, not fully reflected). In addition, the 2007 dividend of \$4,070.50 will be:
 Applied to premium due \$ 4,070.50

**NOTICE OF
 PREMIUM DUE**

DUE DATE: March 25, 2007

Contract:

Insured: DAVID LEE SMITH
 Owner: DAVID L SMITH REV TR

PREMIUM INFORMATION

| | |
|---------------------------|-------------|
| Premium Due For 12 Months | \$ 5,350.00 |
| Less: 2007 Dividend | - 4,070.50 |

| | |
|--------------------------|--------------------|
| TOTAL PAYMENT DUE | \$ 1,279.50 |
|--------------------------|--------------------|

Have you updated your beneficiary information recently? Changes in your life (such as marriage, children, or purchase of a home) could mean you need to check your beneficiary. For information, please contact your financial associate:
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Contract Number

Date Due

MAR 25, 2007

Please make check payable to Thrivent Financial for Lutherans.
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| | |
|---------------------------|-------------|
| Premium Due For 12 Months | \$ 5,350.00 |
| Less: 2007 Dividend | - 4,070.50 |

| | |
|--------------------------|--------------------|
| TOTAL PAYMENT DUE | \$ 1,279.50 |
|--------------------------|--------------------|



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WHOLE LIFE PAID-UP AT 98

During the last year your contract cash value increased by \$7,000.00 (withdrawals, if any, not fully reflected). In addition, the 2008 dividend of \$5,456.50 will be:

| | | |
|--|----|----------|
| Applied to premium due | \$ | 5,350.00 |
| Applied to purchase \$178.71 of Paid-Up Additional Insurance | \$ | 106.50 |

Total Paid-Up Additional Insurance will be \$178.71.

NOTICE OF PREMIUM DUE

DUE DATE: March 25, 2008

Contract:

Insured: DAVID LEE SMITH
 Owner: DAVID L SMITH REV TR

PREMIUM INFORMATION

| | | |
|-----------------------------|----|----------|
| Premium Due For 12 Months | \$ | 5,350.00 |
| Less: Portion 2008 Dividend | - | 5,350.00 |

NO PAYMENT REQUIRED

Have you updated your beneficiary information recently? Changes in your life (such as marriage, children, or purchase of a home) could mean you need to check your beneficiary. For information, please contact your financial associate:
GREGORY MENGEL MBA (518)218-0060

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Contract Number

Date Due

MAR 25, 2008

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NO PAYMENT REQUIRED



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WHOLE LIFE PAID-UP AT 98

During the last year your contract cash value increased by \$7,002.39 (withdrawals, if any, not fully reflected). In addition, the 2009 dividend of \$5,767.88 will be:

| | | |
|------------------------------|-------------|----------|
| Applied to premium due | \$ | 5,350.00 |
| Applied to purchase | \$685.81 of | |
| Paid-Up Additional Insurance | \$ | 417.88 |

Total Paid-Up Additional Insurance will be \$864.52.

Have you updated your beneficiary information recently? Changes in your life (such as marriage, children, or purchase of a home) could mean you need to check your beneficiary. For information, please contact your financial associate:
GREGORY MENGEL MBA (518)453-3500



Insured: DAVID LEE SMITH

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NOTICE OF PREMIUM DUE

DUE DATE: March 25, 2009

Contract:

Insured: DAVID LEE SMITH
 Owner: DAVID L SMITH REV TR

PREMIUM INFORMATION

| | | |
|-----------------------------|----|----------|
| Premium Due For 12 Months | \$ | 5,350.00 |
| Less: Portion 2009 Dividend | - | 5,350.00 |

NO PAYMENT REQUIRED

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Contract Number

Date Due

MAR 25, 2009

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NO PAYMENT REQUIRED



Insurance Statement

| | | |
|-------------|----------------|--------|
| Thrivent ID | As of Date | Page |
| [REDACTED] | March 25, 2010 | 1 of 2 |

[REDACTED]
[REDACTED]
David L Smith Rev Tr
% Thomas Urbelis

[REDACTED]
Andover MA 01810-[REDACTED]

Your financial representative is available to assist you.

Bryan J Schmeling FIC

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Visit: www.thrivent.com

E-mail: mail@thrivent.com

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

Contract Information

Contract Number

[REDACTED]

Issue Date

03/25/1984

Insured

David Lee Smith

Owner

David L Smith Rev Tr

Premiums

Premiums are currently paid to 3/25/2011.

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

\$5,350.00

Product

Whole Life with Premiums Payable to Age 98

Coverage

\$350,000.00

Insurance Statement

Thrivent ID

As of Date

Page

March 25, 2010

2 of 2

Contract Values**Death Benefit 03/25/2010**

| | |
|------------------------------|--------------|
| Base Coverage | \$350,000.00 |
| Paid-Up Additional Insurance | 1,335.60 |

Death Benefit **\$351,335.60**

Cash Surrender Value 03/25/2010

| | |
|---|--------------|
| Guaranteed Cash Value | \$154,350.00 |
| Cash Value of Paid-Up Additional Insurance | 831.62 |

Cash Surrender Value **\$155,181.62**

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 2010 dividend of \$5,643.32 was used as follows:

| | |
|--|-------------------|
| Applied to premium due | \$5,350.00 |
| Applied to purchase \$471.08 of Paid-Up Additional Insurance | 293.32 |
| Total 2010 Dividend | \$5,643.32 |

Important Information**Important Contract Owner Notice:**

You should consider requesting more detailed information about this contract to understand how it may perform in the future. You should not consider replacement of a contract or make changes in your coverage without requesting an illustration of benefits, including death benefit, accumulated value and cash surrender value. This is available upon request by contacting your financial representative, calling us at 800-847-4836, or writing to Thrivent Financial for Lutherans, 4321 N. Ballard Road, Appleton WI 54919-0001. 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.