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SHAWN T. MAY

November 18, 2013

Hon. Christian F. Hummel  
James T. Foley Court House  
445 Broadway  
Albany, New York 12207

**Re: Securities and Exchange Commission  
v. McGinn, Smith & Col, Inc., et. al.  
Case No.: 1:10-CV-457**

Dear Judge Hummel:

As you are aware, I am the attorney for the David L. and Lynn A. Smith Irrevocable Trust regarding the above-captioned matter. I believe that under EPTL Section 7-1.9, the parties to the Trust have an absolute right to amend the Trust. I am enclosing a document which would accomplish an Amendment to the Trust.

While I believe the parties have a right to undertake this action, I am mindful of the current outstanding Court Order and did not wish to place my clients in the position where they could be in violation of a Court Order. I am, therefore, forwarding the proposed documents to the Court with this application for permission from the Court to permit my clients to execute and file same in accordance with the statute.

Very truly yours,

/S/ James D. Linnan

JAMES D. LINNAN  
BAR ROLL NUMBER: 102058

JDL:phb  
Enclosure  
cc.: Service List

**AMENDMENT TO TRUST**

WHEREAS, a Declaration of Trust, dated August 4, 2004, between David L. Smith and Lynn A. Smith, then residing at 2 Rolling Brook Drive, Saratoga Springs, New York, created a Trust for the benefit of the creators' children and their issue, namely Geoffrey R. Smith and Lauren T. Smith, and

WHEREAS, at the time of the creation of the Trust, the United States Internal Revenue Code provided that gift tax be assessed upon the transfer of funds between creators/parents and beneficiaries/children in the amount gifted to fund this Trust, and

WHEREAS, at the time of the creation of the Trust, the United States Internal Revenue Code further provided that in the event a Private Annuity Agreement was created at the time of the funding of the Trust, which authorized private annuity payments in the future to the creators of the said Trust, that the gift made at the funding of the said Trust could pass without the imposition of gift tax, and

WHEREAS, it was the desire of the parties to take advantage of the then applicable private annuity contract provision to allow the creation and funding of the Trust, and the gift made pursuant thereto, to be made without the imposition of gift taxes so that the Beneficiaries would receive the full benefit of the gift without the payment of gift tax, and

WHEREAS, the Private Annuity Contract between David L. Smith and Lynn A. Smith, as Transferors, and the David L. and Lynn A. Smith Irrevocable Trust U/A Dated August 04, 2004 established and created a Trust that complied with the applicable provisions of the Internal Revenue Code and Regulation and thus permitted the passing of the gift made in the Trust Agreement without the imposition of any gift tax upon the Beneficiaries, and

WHEREAS, the Internal Revenue Code has, from time to time, been amended to provide the funds transferred at the time of the creation of the said Trust, together with the accumulated principle and interest earned thereon, may now be gifted to the adult children of the Trust creators, namely Geoffrey R. Smith and Lauren T. Smith, without the imposition of any gift tax, and

WHEREAS, it has been and continues to be, the desire of the Trust creators, David L. Smith and Lynn A. Smith, to create and fund the said Trust for the sole benefit of their adult children, without the imposition of any gift taxes.

NOW, THEREFORE, and pursuant to New York State Estates, Powers and Trust Law, Section 7-1.9, the creators, David L. Smith and Lynn A. Smith, by the execution of this document, do hereby amend and modify the terms and conditions of the Trust Agreement, as follows:

FIRST: The Private Annuity Agreement between David L Smith and Lynn A. Smith, as Transferors, and the David L. And Lynn A. Smith Irrevocable Trust U/A Dated August 04, 2004, as Transferee, is cancelled and voided and the obligation of the Trust to pay annuity payments to the Trust's Donors created therein is in all respects cancelled and the Trust is relieved from any obligation to pay any money to the Donors at any time in the future, and that the annuity obligation heretofore existing, obligating the Trust to make payments in the future to the benefit of David L. Smith and Lynn A. Smith is terminated and cancelled.

SECOND: That the David L. and Lynn A. Smith Irrevocable Trust U/A Dated August 31, 2004 shall retain full title and interest in the property previously transferred to the Trust and all principle and income earned by the Trust, during its existence, free and clear of all liens and encumbrances.

THIRD: That in all other respects, the Declaration of Trust, dated August 4, 2004, shall remain in full force and effect.

FOURTH: This document may be executed and acknowledged in separate parts by the parties hereto with the same force and effect as if the singular original had been executed by the parties.

\_\_\_\_\_  
DAVID L. SMITH

\_\_\_\_\_  
LYNN A. SMITH

STATE OF NEW YORK        )  
COUNTY OF                ) ss.:

On the \_\_\_\_ day of \_\_\_\_\_ in the year 2013, before me, the undersigned, a Notary Public in and for said State, personally appeared DAVID L. 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 he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
NOTARY PUBLIC

STATE OF NEW YORK        )  
COUNTY OF                ) ss.:

On the \_\_\_\_ day of \_\_\_\_\_ in the year 2013, before me, the undersigned, a Notary Public in and for said State, personally appeared LYNN A. 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 he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
NOTARY PUBLIC

The undersigned, being the remaining interested parties in the David L. and Lynn A. Smith Irrevocable Trust U/A Dated August 04, 2004 hereby acknowledge that we have read the foregoing Amendment to Trust and consent to the terms and conditions contained therein. It is further acknowledged that by the execution of this consent, the parties acknowledge that they are the only remaining interested parties in the aforesaid Trust, that there are no other children, or issue, of Geoffrey R. Smith or Lauren T. Smith and that they individually and collectively consent to the amendments set forth in the within document.

THE DAVID L AND LYNN A. SMITH  
IRREVOCABLE TRUST U/A DATED  
AUGUST 04, 2004

By: \_\_\_\_\_  
GEOFFREY R. SMITH  
TRUSTEE

\_\_\_\_\_  
GEOFFREY R. SMITH

\_\_\_\_\_  
LAUREN T. SMITH

STATE OF )  
COUNTY OF ) ss.:

On the \_\_\_\_ day of \_\_\_\_\_ in the year 2013, before me, the undersigned, a Notary Public in and for said State, personally appeared DAVID L. SMITH, AS TRUSTEE OF THE DAVID L. AND LYNN A. SMITH IRREVOCABLE TRUST A/U DATED AUGUST 04, 2004, 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 he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
NOTARY PUBLIC

STATE OF )  
COUNTY OF ) ss.:

On the \_\_\_\_ day of \_\_\_\_\_ in the year 2013, before me, the undersigned, a Notary Public in and for said State, personally appeared GEOFFREY R.. 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 he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
NOTARY PUBLIC

STATE OF )  
COUNTY OF ) ss.:

On the \_\_\_\_ day of \_\_\_\_\_ in the year 2013, before me, the undersigned, a Notary Public in and for said State, personally appeared LAUREN T. 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 he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
NOTARY PUBLIC