

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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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.*

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**GEOFFREY SMITH, AS TRUSTEE OF THE TRUST, GEOFFREY SMITH,  
INDIVIDUALLY, AND LAUREN SMITH, BY THEIR ATTORNEYS, LINNAN &  
FALLON, LLP, AS AND FOR A MEMORANDUM OF LAW IN REPLY TO THE  
PLAINTIFF'S MEMORANDUM  
SUBMIT AS FOLLOWS:**

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**PRELIMINARY STATEMENT**

This Reply Memorandum of Law by the David A. and Lynn A. Smith Irrevocable Trust U/A dated August 4, 2004 (the "Trust"), Geoffrey Smith and Lauren Smith by and through their attorneys, Linnan and Fallon, LLP is submitted in response to the SEC'S opposition to the motion to modify the asset freeze and provide attorney fees.

As this Court is well aware, the assets utilized to fund the Trust were identifiable assets which had been held by Lynn A. Smith since 1994 and were the proceeds of an inheritance of Lynn A. Smith. Furthermore, Lynn Smith's individual assets were prudently invested from the date the funds were obtained until they were used to fund the Trust and are not subject to any allegations of fraudulent activity. Dkt. 86. As stated by Lynn Smith in her affidavit in support of the underlying motion, the Trust was established for the benefit of her children, just like what her father had done for her. Dkt. 568-1 at p.7. The Declaration of Trust states in the preamble "This Trust is created for the benefit of the Donors' children and their issue."

The Trust has never been accused of, or found guilty of, any inappropriate behavior or any fraud or misdeeds. The beneficiaries, Geoffrey R. Smith and Lauren T. Smith, have never been accused of any wrong doing and have never been found to have undertaken any activity which was unlawful, illegal or contrary to the best interest of the Trust assets. Yet, the SEC has taken every step within their power to deprive the beneficiaries of access to the Trust, and also to freeze the personal accounts of the beneficiaries. The SEC has portrayed lawful transactions involving the Trust and its beneficiaries, which occurred when the Trust was not the subject of the asset freeze, as "fraudulent transactions".

**STATEMENT OF THE FACTS**

The Declaration of Trust authorizes the Trustee, at Paragraph SIXTH, the authority to invest in real property (Sixth (2)) and the authority to manage, operate, repair and lease real property (Sixth (4)).

The Trustee, utilizing the powers vested in him by the Declaration of Trust, purchased the Sacandaga Lake property for the sum of \$600,000.00. The funds (\$600,000.00) paid for the real property were paid from the Trust to Lynn A. Smith in exchange for the title to the real property. \$75,000.00 of the purchase price was distributed to Lauren T. Smith who immediately transferred the funds to her mother, Lynn A. Smith. Geoffrey R. Smith received \$75,000.00 and immediately transferred it to his mother. The \$75,000.00 payment to each of these individuals was merely a convenience and was transferred to the Seller of the property, Lynn A. Smith, immediately. This total \$150,000.00 transfer of funds was not a distribution of Trust assets, but was a partial payment for an asset (the "Sacandaga Lake" property) that was purchased lawfully by the Trust. Neither Lauren T. Smith nor Geoffrey R. Smith received any benefit from that \$150,000.00. Upon the closing of title, the Trust received an asset that was of equal or greater value at the time of this expenditure.

The Declaration of Trust states at paragraph SIXTH (2) that the Trustee has the authority to "invest any funds in any stock, bonds, limited partnership interest..."

In July of 2010, the Trust, acting by the Trustee, invested \$200,000.00 in a start up business known as Capacity One Management LLC. The Trustee, utilizing his discretion and

authority under the Trust document, invested in the business and obtained an interest in the business. (See exhibit A) Immediately upon the creation of this business, the business flourished and earned money. Almost immediately, the Trust asset of ownership of a percentage of the Capacity One Management LLC business was worth more than the \$200,000.00 invested. The expenditure of \$200,000.00 in July of 2010 was not a distribution to Geoffrey R. Smith; it was the purchase of an investment, namely a percentage interest in a business. This activity by the Trustee was a lawful exercise of his authority under the Trust Agreement.

The Declaration of Trust specifically states in pertinent part as follows:

During the lives of the donors, the Trustee is authorized, in his discretion, at any time to terminate each trust share and thereupon to pay over and distribute the principle thereof and any income then accrued or held to each child....

The Declaration of Trust also states in the first paragraph that the Trustee has the power to distribute the property held in the Trust for the benefit of the beneficiaries. The declaration states:

During the lives of the donors, the Trustee shall manage, invest.....and collect the income thereof and, until the death of the second donor to die, shall distribute so much of the net income and principle as the Trustee shall determine in his discretion to provide for the education, health, support and maintenance of the beneficiaries....

Lauren T. Smith, as the beneficiary of the Trust, did receive a distribution from the Trust, by the Trustee, pursuant to the authority contained in the Trust Agreement in the sum of \$8,500.00. This distribution was specifically authorized by the Declaration of Trust. Geoffrey R. Smith did receive a distribution from the Trust in the sum of \$21,000.00, again pursuant to the authority granted to the Trustee by the Trust Agreement. This distribution was specifically authorized by the Declaration of Trust.

The Trust Annuity Agreement establishes a clear spendthrift provision which states in pertinent part at paragraph 3 as follows:

Transferee shall hold full title to the Property, free and clear of all liens and encumbrances, and there shall be no collateral liens of any kind on the Property or any other assets of the Transferee to secure payment of the obligations to the Transferors under this Agreement.

The Declaration of Trust states at paragraph TWELTH:

This Declaration and the trust(s) created hereunder shall be irrevocable, shall take effect upon acceptance by the Trustee and in all respects shall be construed and regulated by law of the State of New York. No beneficial interest under this trust, whether income or principal, is subject to anticipation, assignment, pledge, sale, or transfer in any manner, and no beneficiary may anticipate, encumber, or charge such interest. Each beneficiary's interest, while in the possession of the Trustees will not be liable for or subject to the debts, contracts, obligations, liabilities, accounts and/or creditors of any beneficiary.

The spendthrift provision is further reinforced by Paragraph 4 of the Annuity Agreements states:

It is an expressed term and condition of the this Agreement that the rights of, income or accounts payable hereunder to the transferors shall not be subject to assignment, pledge, hypothecation, mortgage, pledge, attachment, execution, judgment, garnishment, anticipation or other disposition or impairment.

Finally, the Court should be aware that the Trustee is authorized by the Declaration of Trust at paragraph Sixth (6) to "employ such attorneys...as the Trustee may deem advisable...".

## ARGUMENT

### POINT I

#### **THE FREEZE OVER GEOFFREY R. SMITH AND LAUREN T. SMITH ACCOUNTS SHOULD BE REMOVED.**

In opposing the motion to modify the asset freeze, the SEC claims that distributions made to the beneficiaries by the Trustee in July of 2010 were a wrongful invasion of the Trust. Dkt. 630 at p.10. The SEC's opinion regarding what constitutes a "wrongful invasion" is irrelevant

and the court should only consider whether the distributions to the beneficiaries constitute a fraudulent conveyance. A fraudulent transfer is defined as a “conveyance made and every obligation incurred with actual intent... to hinder, delay, or defraud either present or future creditors”. N.Y. Debt. & Cred. Law § 276 (McKinney). To establish a “fraudulent Transfer” the SEC would be obligated to prove by clear and convincing evidence that the property of the trust was disposed of by the Trustee with the actual intent to defraud lawful creditors of the Trust. In this case, the property of the estate (money) was transferred in exchange for property (real estate and an interest in a LLC) of value and no fraud can be found. Counsel submits that none of the elements necessary to establish a fraudulent transfer were present in the transactions.

Furthermore, a simple review of the bank statements and wire transfer documents and establish that Geoffrey R. Smith received a distribution of \$21,000.00 and that Lauren T. Smith received a distribution of \$8,500.00 in July of 2010. Dkt. 610-7 at p.8; Dkt. 142-2 at p.4. Since the remaining funds can be easily traced from the Trust, to the individual beneficiaries, and finally to Lynn A. Smith, there is simply no merit to the SEC’s argument that this was a “wrongful invasion” because the funds were a payment for real property which was lawfully acquired by the Trust. Dkt. 142; Dkt. 610-1 at p.5.

Under the Trust documents, the Trustee had an absolute right, in their sole discretion, at any time during the Trust’s existence, to pay over and distribute the principle or income that accrued within the Trust to either beneficiary. Therefore, the distributions to the beneficiaries in July of 2010 were lawful and done pursuant to the provisions of the Trust and were not in any way a fraudulent transfer or a “wrongful invasion”. Dkt. 568-2 at p.13 ¶1.

The SEC also wrongfully asserts in the response in opposition that the funds disbursed to Geoffrey R. Smith and ultimately to Capacity One Management in the sum of \$200,000.00 is

chargeable as against Geoffrey R. Smith. Dkt. 630 at p.10. The Trust received, in consideration for the \$200,000.00, an interest in Capacity One Management LLC and, therefore, received actual benefit for the amount paid. As Capacity One Management LLC was a startup company, no bank accounts were available for the Trust to transfer the funds directly to Capacity One Management LLC, so the funds were transferred first to Geoffrey R. Smith, who then transferred the funds to Capacity One Management. Simultaneously, appropriate documents were prepared, executed and delivered vesting in the Trust the title to the percentage interest in Capacity One Management LLC. See, Letter from Geoffrey Smith to Trustee, attached hereto as Exhibit "A".

The SEC also wrongfully alleges that the transactions involving the Trust beneficiaries that occurred after the Trust was released from the asset freeze were fraudulent. Dkt. 334 at p.48-49. This is the only allegation made against the beneficiaries as being engaged in any fraudulent conduct. However, the plaintiffs have failed to recognize that the beneficiaries had a right to receive such distributions and all proceeds were obtained at a time when the trust was released from the asset freeze. The discovery of the annuity agreement did not concern the Trust Beneficiaries. The Beneficiaries were not a party to the Agreement and had no knowledge of its existence or content. As such, the Trust Beneficiaries should not be subject to a possible disgorgement remedy and/or asset freeze simply because they exercised their lawful right to receive a small distribution from the Trust when it was not frozen.

Even if the Court ruled that the distributions to the beneficiaries were unlawful, the amount of the assets held pursuant to the freeze is disproportionate. \$150,000 of the total distributions has been accounted for in the sanction order against Lynn Smith. Dkt. 630 at p.10. Therefore, the SEC has "double counted" by freezing Geoffrey and Lauren Smith's assets while also sanctioning Lynn Smith in the amount of the proceeds received by the sale of the camp.

Geoffrey and Lauren did not benefit from this \$150,000.00 and Geoffrey and Lauren's accounts should be released from the asset freeze in the interest of fairness. This is nothing more than a thinly veiled attempt by the Plaintiff to starve the innocent Smith children into submission. Any freeze applied to the assets of the Beneficiaries should be lifted or should be limited to an amount equal to the funds actually received by each of them.

**POINT II**

**THE FREEZE OF THE TRUST ASSETS SHOULD BE LIFTED**

The SEC is attempting to claim, as creditors of David L. Smith, that they have a right to the assets of the Trust in which he was a co-creator. Dkt. 630 at p.8.

As set forth above, the Trust Annuity Agreement specifically provides that the property held by the Trust shall be free and clear of all liens and encumbrances and there shall be no collateral liens of any kind on the property or any other assets of the transferee to secure payment of the obligation of the transferors under this Agreement. Dkt. 568-2 at p.14 ¶3. This spendthrift provision specifically prohibits the very action that the SEC is now attempting to take.

The Trust, as transferee, obtained the property free and clear and the creditors of the transferors were specifically prohibited from claiming a lien or encumbrance upon the property so transferred. The SEC, as creditors of the transferor, David L. Smith, (and arguably Lynn A. Smith), can possess no legal right which is greater than the right of David L. Smith, individually. David L. Smith had no legal ability to encumber the Trust assets and the SEC, therefore, does not possess that ability.

In addition, the beneficiaries, Geoffrey R. Smith and Lauren T. Smith, had no legal right or ability to encumber the Trust assets or to incur debts on behalf of the Trust. This additional



spendthrift provision is set forth in the Declaration of Trust at Paragraph TWELTH. Once again, the SEC is claiming that they have some right to a lien or encumbrance upon the Trust assets as a result of alleged distributions from the Trust to the beneficiaries. Here again, the SEC's argument must fail due to the spendthrift nature of the Trust and the legal impossibility of the beneficiaries to encumber the Trust. In brief, the Trust, and its assets, are beyond the reach of any of the creditors of the Creators or Beneficiaries of the Trust and thus beyond the reach of the SEC in this matter.

The Court's attention is further directed to the Annuity Agreement, Paragraph 4, which prohibits the creators of the Trust (David L. Smith and Lynn A. Smith) from assigning, pledging, hypothecation, mortgage, pledge, attachment, execution, judgment, or garnishment of the future payments of income which were created by the Annuity Agreement. Once again, since the owner of those rights, namely David L. Smith and Lynn A. Smith, could not encumber these future rights, the SEC cannot claim a right to the Trust assets.

The Trustee, acting on behalf the Trust, had an absolute right to purchase real property and in 2010 exercising this right, purchased the Sacandaga Lake property for the sum of \$600,000.00. This purchase was done pursuant to specific authority within the Trust and was undertaken only after a value for the property was determined by the utilization of professional real estate brokers. This was a transfer of real property in exchange for money in which the Trust obtained an asset of equal value. This cannot be said to have been a fraudulent transfer as that term is defined. The Real Estate is still owned by the trust and the Court has received appraisals evidencing that the Trust did receive value for the transfer of funds in the purchase transaction. The appraisals received recently by the Court establish that this transaction was not a fraudulent transfer, and the transaction should not be a basis for imposing a freeze on any

assets. Since the Trust has never been accused of any wrongdoing, and due to the language set forth in the Declaration of Trust, the asset freeze on the assets of the Trust property should be lifted.

**POINT III**

**FUNDS SHOULD BE RELEASED FROM THE TRUST  
TO PAY THE TRUST'S ATTORNEYS**

The Trust, acting through the Trustee, has the specific authority under Paragraph SIXTH of the Declaration of Trust to "employ such attorneys...as the Trustee may deem advisable...".

The Trust employed the services of Linnan & Fallon, LLP pursuant to a signed Retainer Agreement and has incurred legal expenses in excess of \$23,000.00.

The SEC, and its Receiver, are attempting to deprive the Trust, and its beneficiaries, of the most basic right to counsel so that the Trust, and its beneficiaries, will cave into the threats and bullying of the SEC. The Trust, and the beneficiaries, being entitled to a valid defense and being lawfully entitled to employ such attorneys as they deem advisable to undertake that defense should be allowed to pay, from the Trust assets, for that defense. The Trust, and its beneficiaries, should not be faced with the task of preparing for and proceeding to a jury trial without the benefit of appropriately compensated counsel.

Dated: Albany, New York  
November 18, 2013

Linnan & Fallon, LLP  
By /s/ James D. Linnan  
James D. Linnan (Bar Roll #102058)  
*Attorneys for the David L. and Lynn  
A. Smith Irrevocable Trust, Geoffrey  
Smith and Lauren T. Smith*  
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# **EXHIBIT A**



**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

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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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.*

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**DECLARATION OF JAMES D. LINNAN IN SUPPORT OF AN APPLICATION  
FOR LEGAL FEES TO BE PAID FROM THE TRUST**

I, JAMES D. LINNAN, pursuant to 28 USC Section 1746, declare under penalty of perjury, the following facts:

1. That I am an attorney admitted to practice before this Court and am the attorney for Geoffrey R. Smith, Trustee of the David L. and Lynn A. Smith Irrevocable Trust and

Geoffrey R. Smith and Lauren T. Smith. As attorney for these individuals, I am familiar with the facts and circumstances of this proceeding and the previous proceedings before this Court.

2. The original motion was filed for various reliefs including, but not limited to, an application for the release of funds for the payment of legal fees.

3. After the filing of the motion, your affiant was substituted in as the attorney for the Trust and its beneficiaries.

4. Since this motion was filed, your Affiant has incurred legal fees in excess of \$23,000.00. ( See attached B) Additional work has been performed since this bill was totaled and significant additional work is anticipated.

5. Cited in the Memorandum filed simultaneously herewith, the Trustee, by the Trust documents, has the absolute authority to retain legal counsel for the purpose of preserving the integrity and the assets of the Trust.

6. Your affiant and his law firm, operating as the attorney for the Trust, is entitled to payment for legal fees earned in the representation of the Trust.

7. It is anticipated that significant additional legal work will be needed to fend off the improper and unlawful intrusion into the Trust that has been undertaken by the Securities and Exchange Commission and to defend the assets of the Trust from the proposed actions of the Receiver.

8. The appraisals, filed in this action, clearly indicate that the Receiver is not acting in the best interest of the Trust and is merely attempting to liquidate the Trust's assets to ease the administration of the Trust.

9. One can only speculate as to how an unsolicited offer to purchase the Trust's assets was received by the Receiver in an amount equal to approximately two-thirds of the value of the Sacandaga Lake property.

10. The Trust, the Trustee and the beneficiaries strongly oppose the forced sale at a significantly reduced value of the Trust's property.

11. The time expended and the fees earned in the defense of the Trust and in the affirmative pursuit of preserving the integrity of the Trust maximizing the Trust's assets are fees appropriately earned and well within the authority of the trust.

12. As set forth in detail in the Memorandum, the Trust has never been found to have been engaged in any unlawful activity and the beneficiaries are not, and have not, been accused of any improprieties or unlawful activity.

13. The attempted steamrolling over the beneficiaries' rights is improper and required extensive legal work.

Dated: Albany, New York  
November 18, 2013

Linnan & Fallon, LLP  
By /s/ James D. Linnan  
James D. Linnan (Bar Roll #102058)

*Attorneys for the David L. and Lynn  
A. Smith Irrevocable Trust, Geoffrey  
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# **EXHIBIT B**



**LINNAN & FALLON, LLP**

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David L. and Lynn A. Smith Irrevocable Tr  
Geoffrey R. Smith, Trustee  
433 North Spring Street  
Aspen, CO 81611

November 18, 2013

File #: 2230-001  
Inv #: 28819

**RE:** David L. Smith & Lynn A. Smith Irrevocable Trust v. Securities and  
Exchange Commission

DATE	DESCRIPTION	HOURS	AMOUNT	LAWYER
Sep-19-13	Meeting @ Feathers office	1.20	600.00	JDL
Sep-26-13	Review Trust docs and court docs. Research re: EPTL	2.20	1,100.00	JDL
Sep-29-13	Legal research re: Trust	0.50	37.50	CPP
Sep-30-13	Review law and court documents	1.40	700.00	JDL
Oct-02-13	Prep for and phone conference with client and Feathers	0.50	250.00	JDL
Oct-04-13	Meeting with Mrs. Smith @ Feathers office	0.40	200.00	JDL
	Preparation of and forward consent to change atty. forms	0.40	200.00	JDL
	Legal research re: Trust	2.00	150.00	CPP
Oct-07-13	Legal research re: Trust	2.70	202.50	CPP
Oct-11-13	Legal research re: Trust	1.00	75.00	CPP
Oct-18-13	Legal research re: Trust	3.20	240.00	CPP
Oct-21-13	Legal research re: Trust	1.70	127.50	CPP

Oct-22-13	Jonathan McArdle - here - review of file and make calls to atts on Smith Trust	1.00	500.00	JDL
Oct-23-13	Draft and file letter motion to extend time to reply to report.	0.40	200.00	JDL
Oct-25-13	Legal research re: Trust	2.25	168.75	CPP
Oct-28-13	Legal research re: Trust	0.40	30.00	CPP
Oct-30-13	Call with Feathers re tax opinioin on Trust waiver by David and Lynn. Telephone call to Geoffrey R. Smith.	0.40	200.00	JDL
Oct-31-13	Phone call with client. Review emails and docs received from client phone call with appraiser.	2.20	1,100.00	JDL
Nov-01-13	Emails with client and Appraiser.	0.40	200.00	JDL
Nov-04-13	Phone call to Appraiser. Phone call with client Lauren. Review law and facts re: renunciation.	2.70	1,350.00	JDL
Nov-06-13	Preparation declaration, objections to receivers report and client affidavits. Communication with Appraiser.	5.20	2,600.00	JDL
Nov-07-13	Final edits of documents, review appraisals and income statement. Emails and phone calls with client.	6.10	3,050.00	JDL
Nov-13-13	Review and outline Memo from SEC.	4.70	2,350.00	JDL
Nov-15-13	Preparation of Memo and declaration in opposition to SEC filing.	3.10	1,550.00	JDL
Nov-16-13	Phone calls with client edit court documents.	5.10	2,550.00	JDL
Nov-18-13	Edit court documents and draft amendment to trust and consent.	6.80	3,400.00	JDL
	Totals	57.95	\$23,131.25	

<b>Total Fees &amp; Disbursements</b>	<b>\$23,131.25</b>
Previous Balance	\$0.00
Previous Payments	\$0.00
<b>Balance Due Now</b>	<b>\$23,131.25</b>