UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
New York Regional Office
Brookfield Place, 200 Vesey Street, Suite 400
New York, NY 10281-1022

DIVISION OF
ENFORCEMENT

David Stoelting
SeniorTrial Counsel
(212) 336-0174 (direct)
(212) 336-1324 (fax)

November 21, 2013

BY ECF

The Honorable Christian F. Hummel
United States Magistrate Judge
United States District Court
Northern District of New York
United States Courthouse
Albany, New York 12207

Re: *SEC v. McGinn, Smith & Co., Inc., et al.*, 10 CV 457 (GLS)(DRH)

Dear Judge Hummel:

I write regarding the letter dated November 19, 2013, submitted to Your Honor from James D. Linnan, counsel to the David and Lynn Smith Irrevocable Trust (Dkt. 635). Mr. Linnan's cover letter states that he is merely seeking "permission from the Court to permit my clients to execute and file" an amendment to the Declaration of Trust. The attached "Amendment to Trust," however, would extinguish a valuable asset that is currently subject to the Court's asset freeze.

Mr. Linnan (with the apparent consent of the Smiths) seeks to declare the Private Annuity Agreement–which requires the Trust to make annual payments of $489,932 to David and Lynn Smith beginning in September 2015– to be "cancelled and voided." The Annuity Agreement, of course, and its intentional concealment by Lynn Smith and others, has been the subject of extensive proceedings before this Court as well as the Second Circuit. It should be apparent from these decisions that considerable issues exist regarding the legitimacy of the Trust and the purpose of the Annuity Agreement. *See SEC v. Smith*, 710 F.3d 87, 98 (2d Cir. 2013) ("The court's finding that Lynn Smith acted in bad faith in not revealing her interest in the Trust is amply supported by the record.")

Moreover, Lynn Smith has just filed a motion in which she claims to have only minimal ability to sustain herself financially. If that is true, then it is inexplicable that she would agree, in good faith, to release an asset that is supposed to pay her and David Smith $489,932 per year beginning in 2015.

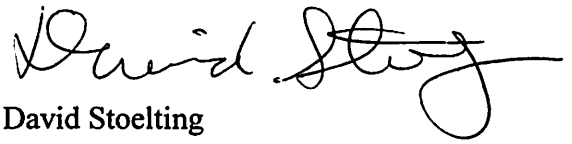
In any event, Mr. Linnan's request should be denied because he has failed to adhere to the Local Rules, which provide that:

> Prior to making any non-dispositive motion before the assigned Magistrate Judge, the parties must make **good faith efforts among themselves to resolve or reduce all differences relating to the non-dispositive issue**. If, after conferring, the parties are unable to arrive at a mutually satisfactory resolution, the party seeking relief must then request a court conference with the assigned Magistrate Judge. **A court conference is a prerequisite to filing a non-dispositive motion before the assigned Magistrate Judge.**

Local Rules of Practice for the Northern District of New York § 7.1(b)(2) (emphasis in original).

Mr. Linnan made no effort to follow these procedures. Prior to filing his letter, he did not contact anyone at the SEC to advise us of his intentions, and he also did not request the mandatory pre-motion conference with the Court. As a result, Mr. Linnan's application should be rejected. Mr. Linnan should be required to follow the Local Rules and seek permission from the Court to file a motion and present it for what it really is: a motion to modify the asset freeze to permit elimination of the Trust's payment obligation to the Smiths required by the Annuity Agreement.

Respectfully submitted,



David Stoelting

cc (by e-mail and ECF): All counsel
Nancy McGinn