

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.

AFFIDAVIT OF DEFENDANT/ RELIEF DEFENDANT, LYNN A. SMITH

LYNN A. SMITH, being duly sworn, deposes and says:

1. I respectfully submit this affidavit in support of the Movant's request seeking permission to amend the Declaration of Trust of the David L. & Lynn A. Smith Irrevocable Trust U/A Dated August 4, 2004 (hereinafter "the Trust"), which will effectuate the cancellation of the Private Annuity Contract dated August 31, 2004.

2. It is my understanding that the overall purpose of the Movant's proposed Amendment is to cancel and void the obligation of the Trust to make annuity payments to the Trust Donors, which are myself and my husband, David L. Smith. In support of the Movant's efforts, I hereby set forth that it is my desire to amend the Declaration of Trust to eliminate paragraph SIXTH:(10), which allows the Trustee "[T]o purchase property from the Donors in exchange for a private annuity payable to the Donors[.]" *See*, Declaration of Trust, attached hereto as Exhibit "A".

3. Next, it is my desire to cancel and void the Private Annuity Contract dated August 31, 2004 between David L. Smith & Lynn A. Smith, As Transferors and The David L. & Lynn A. Smith Irrevocable Trust U/A Dated August 31, 2004, Transferee. *See*, Private Annuity Contract, attached hereto as Exhibit "B". In the alternative, I hereby renounce all rights to future annuity payments from the Trust.

4. It is my further understanding that the Trust Amendment will also allow the Trust to retain full title and interest in the property previously transferred to the Trust along with all principle and income earned by the Trust.

5. As this Court may recall, the Trust was created by myself and my husband to secure the financial future of my two children, just like my father had previously done for me. My two children, Geoffrey R. Smith and Lauren T. Smith, are the sole beneficiaries of the Trust.

6. The Declaration of Trust makes clear that:

FIRST: ... [t]he Trustee shall manage, invest and reinvest the trust estate to satisfy all obligations of the Trust and the Trust shall be divided and managed in two (2) separate and equal shares for each child and any issue of such child (the "Beneficiaries) and collect the income thereof and, until the death of the second Donor to die, shall distribute so much of the net income and principal as the Trustee

shall determine in his discretion to provide for the education, health, support and maintenance of the Beneficiaries from the each child's respective trust share...

7. On August 31, 2004, my husband and I apparently entered into a Private Annuity Contract with the Trust which resulted in the Trust being required to make annual payments of \$489,932 to myself and my husband beginning in September of 2015. The purpose of the Private Annuity Contract was to avoid significant federal gift tax obligations.

8. The significant gift tax obligation resulted from the low basis in the Charter One stock that was used to fund the Trust in 2004. The Charter One stock was originally purchased from my individual stock account in 1992 for \$400,000 at the recommendation of my stockbroker who happened to also be my husband. *See, Summary of Transactions Involving Charter One Stock, attached hereto as Exhibit "C".*

9. On August 31, 2004, 100,000 shares of Charter One stock valued at approximately \$4,447,000 was used to fund the Trust. On a later date, the Private Annuity Contract was executed to avoid the Trust becoming obligated to pay gift taxes that would have become due at that time.

10. Upon information and belief, the applicable gift tax exclusion amount in 2004 was \$1,500,000. It is my understanding that the individual gift tax exclusion amount in 2013 has increased to \$5,250,000. *See, What's New – Estate and Gift Tax Changes, Published on the IRS website, attached hereto as Exhibit "D".*

11. Due to the dramatic increase in the IRS gift tax exclusion amount, there is no longer a need for the Private Annuity Contract because the Trust's total value is below the 2013 threshold. As such, it is my desire to amend the Trust to cancel and void the

annuity contract obligations, or in the alternative, to renounce any interest in future annuity payments by the Trust. I believe that the Trust Amendment will allow the Trust to continue with its original purpose, which is for the benefit of my children.

12. I have spoken with my husband David L. Smith, who is presently incarcerated in the Brooklyn Metropolitan Detention Center, and he respectfully consents to all the information set forth above.

WHEREFORE, I respectfully request this Court to grant permission to the Movant's that allows the Trust to be amended which will cancel and void the Private Annuity Contract, and consider any further relief against the Commission which would be just under the circumstances.


LYNN A. SMITH

Sworn to before me this
3rd day of January, 2014.


Notary Public - State of Colorado

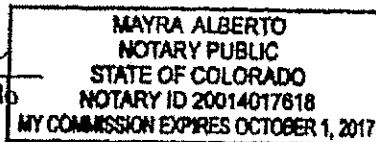


EXHIBIT A

DECLARATION OF TRUST

THIS INDENTURE is made the 4th day of AUGUST, 2004, between David L. Smith and Lynn A. Smith, residing at 2 Rolling Brook Drive, Saratoga Springs, New York 12866, (herein called the "Donors"), and Thomas Urbelis, with offices at 6 Eastman Road, Andover, Massachusetts 01810-4009 (the "Trustee") and shall be known as the DAVID A. & LYNN A. SMITH IRREVOCABLE TRUST U/A DATED AUGUST 4, 2004.

WITNESSETH:

The Donors hereby transfer and deliver unto the Trustee the property described in Schedule A, attached hereto, the receipt of which is hereby acknowledged by the Trustee. The Donors have two (2) children, Geoffrey R. Smith and Lauren T. Smith. This Trust is created for the benefit of the Donors' children and their issue. *-not attached*

TO HAVE AND TO HOLD such property unto the Trustee, IN TRUST, NEVERTHELESS, as follows:

FIRST: During the lives of the Donors, the Trustee shall manage, invest and reinvest the trust estate to satisfy all obligations of the Trust and the Trust shall be divided and managed in two (2) separate and equal shares for each child and any issue of such child (the "Beneficiaries") and collect the income thereof and, until the death of the second Donor to die, shall distribute so much of the net income and principal as the Trustee shall determine in his discretion to provide for the education, health, support and maintenance of the Beneficiaries from the each child's respective trust share, taking into account any other resources of the Beneficiaries and the tax status of each Beneficiary. Consistent with these provisions the Trustee shall have the power (i) to sprinkle the current income and/or the principal to one or more Beneficiaries, from each such Beneficiary's respective share, as the Trustee shall deem necessary to provide for the education, health, support and maintenance of each Beneficiary and (ii) in each tax year to make the trust either a "simple" trust or "complex" trust under applicable federal and state tax laws.

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 principal thereof, and any income then accrued or held, to each child, or if such child is predeceased, to the issue of such child in equal shares, and if there are no issue, then to other child, and if such other child is predeceased, then to the issue of such other child in equal shares, although it is the Donor's desire this trust be administered as herein provided.

If in any year a contribution is made to the trust estate by the Donors, the Trustee shall promptly notify each of the Beneficiaries, or, if any such person shall be a minor, his or her parent or guardian other than the Donors, of such contribution, and each such beneficiary, or such parent or guardian acting on a Beneficiary's behalf during such Beneficiary's minority, shall have the right at any time within thirty (30) days of receipt of such notice to withdraw from the trust estate an amount not in excess of the lesser of the following: (i) such Beneficiary's pro rata share of the amount of such contribution and (ii) the annual exclusion available to the Donors for United States Federal gift tax purposes with respect to the Beneficiary's pro rata share of such contribution, after taking into account any other gifts made by the Donors to such person in that year. In satisfaction of such right of withdrawal, the Trustee may distribute to a Beneficiary any asset held in the trust estate (including any insurance policies or any interests in such policies or borrow against such policies), valued as of

the date of withdrawal. Such right of withdrawal shall not be cumulative with respect to any prior contributions made to the trust and, if such right of withdrawal is not exercised within such thirty (30) day period, it shall lapse, provided that the amount with respect to which the right of withdrawal shall lapse for any Beneficiary in any year shall not exceed the maximum annual amount with respect to which a power of appointment may lapse and not be considered a release of such power for United States Federal gift tax purposes under Section 2514 of the Internal Revenue Code of 1986, or any provision successor thereto, as in effect for that year (hereinafter, the "maximum lapse amount"), and if any Beneficiary has a right of withdrawal in any year which shall exceed the maximum lapse amount, the power for the beneficiary for that year shall lapse only to the extent of the maximum lapse amount, and any excess withdrawal right shall continue to be exercisable by the Beneficiary, but shall lapse, in the next succeeding year, or years, to the extent of the maximum lapse amount for such year, on the second day of such year. The right of withdrawal hereunder shall be exercised by written notice delivered to the Trustee. The Donors may instruct the Trustee that any Beneficiary shall not have a withdrawal right as described in this article with respect to any contribution during the calendar year, and to disregard a demand by any Beneficiary with respect to any contribution made by the Donors. Each right of withdrawal granted hereunder is personal to the person holding such right and shall expire if he or she dies, is adjudicated bankrupt, shall take advantage of any of the provisions of the bankruptcy act or of any federal or state statute relating to insolvency, shall make an assignment for the benefit of his or her creditors, or shall be adjudicated an incompetent.

SECOND: Upon the death of the second Donor to die, the Trustee shall collect, as principal of the trust estate, the net proceeds of any insurance policies then included in the trust estate and payable to the Trustee, or any other benefits or proceeds payable to the Trustee as beneficiaries, after deduction of all charges against such policies or benefits by way of advances, loans, premiums or otherwise, and any amounts so collected shall be divided equally and added to each share for each child of the Donors. The Trustee may use any part of the income or principal of the trust estate to meet expenses incurred in collecting any such proceeds or benefits. If, however, the Trustee in their discretion shall determine that the income and principal on hand in the trust estate may not be sufficient to meet any expenses and obligations to which the Trustee may be subjected in any litigation to enforce payment of any insurance policy, benefits or proceeds then included in the trust estate, then the Trustee shall not be required to enter into or maintain any litigation to enforce payment of any such amounts until he shall have been indemnified to his satisfaction against all such expenses and obligations. The Trustee is authorized to compromise and adjust any such claims, upon such terms and conditions as they may deem advisable, and the decision of the Trustees in this respect shall be binding and conclusive upon all persons then or thereafter interested in the trust estate.

THIRD: Upon the death of the second Donor to die, the Trustee shall administer and distribute the each trust share hereunder, including the remaining principal of the such trust share, and any income, to the child for whom such trust share is held, or if such child is predeceased, to the issue of such child in equal shares, and if there are no issue, then to other child, and if such other child is predeceased, then to the issue of such other child in equal shares.

FOURTH: If any person whose life measures the duration of a trust hereunder and any remainderman of such trust shall die under such circumstances that there is reasonable doubt as to who died first, then such person whose life measures the duration of such trust shall be conclusively

deemed to have survived such remainderman for the purposes of all provisions of this Indenture.

FIFTH: If any principal or income of any trust created hereunder shall become payable to or be set apart to be distributed to a minor, the Trustee shall have absolute discretion either to pay over such principal or income at any time to the guardian of the property of such minor appointed in any jurisdiction, or to any custodian for such minor under the Uniform Transfers to Minors Act of any state (including the Trustee or a custodian designated by the Trustee) or to retain the same for such minor during minority. In paying over any property to a custodian, the Trustee may direct that the property be retained until the beneficiary reaches the age of twenty-one. In case of retention, the Trustee may apply such principal or income, and any income therefrom, to the support, maintenance, education or other benefit of such minor, irrespective of the other resources of such minor or of his or her parents or guardians. Any such application may be made either directly or by payments to such guardian of the property or parent of such minor or to the person with whom such minor may reside, in any case without requiring any bond, and the receipt of any such person shall be a complete discharge to the Trustee, who shall not be bound to see to the application of any such payment. In holding any property for any minor, the Trustees shall have all the powers and discretion hereinafter conferred.

SIXTH: Without limitation of the powers conferred by statute or general rules of law, the Trustee is specifically authorized and empowered with respect to any property held by them:

- (1) To retain any property transferred to any trust hereunder, as long as the Trustee in his absolute discretion shall deem it advisable to do so;
- (2) To invest any funds in any stocks, bonds, limited partnership interests or other securities or property, real or personal (including any securities of or issued by any corporate trustee or investment in any common or commingled fund or funds maintained by any corporate trustee), notwithstanding that such investments may not be of the character allowed to trustees by statute or general rules of law, and without any duty to diversify investments, the intention hereof being to give the broadest investment powers and discretion to the Trustees;
- (3) To sell (at public or private sale, without application to any court) or otherwise dispose of any property, whether real or personal, for cash or on credit, in such manner and on such terms and conditions as the Trustee may deem best, and no person dealing with the Trustee shall be bound to see to the application of any moneys paid;
- (4) To manage, operate, repair, improve, mortgage and lease for any period (whether expiring before or after the termination of any trust created hereunder) any real estate;
- (5) Except to the extent prohibited by law, to cause any securities to be registered in the name of the Trustee's nominee, or to hold any securities in such condition that the Trustee will pass by delivery;
- (6) To employ such attorneys, accountants, custodians, investment counsel, real estate consultants and other persons as the Trustee may deem advisable in the administration

of any trust hereunder, and to pay them such compensation as the Trustee may deem proper, without any diminution of or offset against the commissions to which the Trustee shall be entitled by law;

(7) To maintain margin accounts with one or more individuals, partnerships, associations, banks or other corporations on such terms and conditions as the Trustee in his discretion shall determine, and to conduct such transactions in such accounts as he shall so determine, and to pledge all or any portion of any trust hereunder as security for the payment of the respective debit balances in such accounts;

(8) To engage in any arbitrage transactions and transactions involving short sales, and to buy or sell or write options for the purchase or sale of securities or other property (commonly known as puts and calls), whether covered or uncovered;

(9) To use any securities or brokerage firm in the purchase or sale of stocks, bonds or other securities or property for the account of any trust hereunder and to pay such firm such brokerage commissions or other compensation in connection therewith as the Trustees may deem proper, notwithstanding that the Trustee may be members of, or otherwise connected with, such firm, and without diminution of or offset against the commissions to which the Trustee may be entitled by law;

(10) To purchase property from the Donors in exchange for a private annuity payable to the Donors;

(11) To distribute any income or principal of any trust hereunder in cash or in kind and, if in kind, in a fashion other than pro rata, having regard in such event to the characteristics, including tax characteristics, of the property being distributed and to income, needs and tax status of the recipient;

(12) To borrow such amounts, from such persons (including the Trustee or any beneficiary of any trust hereunder) and for such purposes as the Trustee may deem advisable and to pledge any assets of any trust hereunder to secure the repayment of any amounts so borrowed;

(13) To lend such amounts, to such persons, for such purposes and upon such terms (whether secured or unsecured) as the Trustee may deem advisable;

(14) In general, to exercise all powers in the management of the trust estate which any individual could exercise in the management of property owned in his own right.

SEVENTH: Any trust estate held hereunder may be increased from time to time by the addition of such property as may be added to it by the Donors or by any other person with the consent of the Trustee.

EIGHTH: The Trustee is empowered to pay any taxes which may become payable from time to time with respect to the trust estate, or any transfer thereof or transaction affecting the same,

under the laws of any jurisdiction which the Trustee is advised may validly tax the same.

NINTH: (A) If the Trustee hereunder shall die or is unable or unwilling to act as trustee, then the Donors may appoint a Trustee, independent of the Donors. Any such appointment so made may be revoked by the maker thereof, by written instrument, duly executed and acknowledged, at any time prior to the happening of the event upon which it is to become effective, and a new appointment may be made as above provided. Upon the happening of the event upon which such appointment is to take effect and upon qualifying as hereinafter provided any successor Trustee so appointed shall become a Trustee hereunder, as though originally named herein.

(B) Any Trustee acting hereunder may resign and be discharged from any trust created hereunder by giving, personally or by mail, written notice of resignation, duly acknowledged, to the Donors, or if they shall not then be living, to the remaindermen of such trust (or if any income beneficiary shall be a minor, to either of his or her parents or to the guardian of his or her property). Such notice shall specify the date when such resignation shall take effect, which date (except as the persons entitled to such notice shall otherwise consent) shall be at least thirty days after the service or mailing thereof.

(C) In case any Trustee at any time acting hereunder for any reason shall cease to act, the retiring Trustee or his or her personal representative, as the case may be, shall upon the effective date of his or her resignation or upon his or her death turn over the trust estate or any portion of it under his or her control to the Trustee who shall thereafter be acting hereunder, and shall execute and deliver all instruments which may be deemed necessary more effectively to vest title in such Trustee.

(D) Any successor Trustee appointed as above provided and then entitled to act shall qualify as such by delivering or mailing written acceptance of such trust, duly acknowledged, to any other Trustee then acting hereunder and to the income beneficiaries or, if any be minors, to their parent or the adult with whom they reside.

(E) The Trustee shall have sole authority to make decisions required or authorized by this Indenture. Either Geoffrey R. Smith or Lauren T. Smith shall serve as co-trustee for the limited and express purpose of executing such documents or instruments to fulfill decisions and actions taken by the Trustee, in the absence of the Trustee to execute any such document or instrument.

TENTH: The Trustee at any time acting hereunder at any time may render an account of their proceedings to the income beneficiary of any trust during the accounting period (or, if such person shall have died during or after the accounting period, to his or her personal representative); provided, however, that if any person to whom an account would be so rendered shall be a minor, such account instead may be rendered to either of such minor's parents other than an accounting Trustee or the guardian of his or her property. If approved in writing by the parties to whom such account shall have been rendered as above provided, such account shall be final, binding and conclusive upon all persons who may then or thereafter have any interest in the trust estate. The Trustee also at any time may render a judicial account of his proceedings.

In an accounting or other proceeding in which all persons interested in any trust hereunder are required by law to be served with process, if a party to the proceeding has the same or a similar interest as a person under a disability, it shall not be necessary to serve process upon the person under a disability, it being the Donors' intention to avoid the appointment of a guardian ad litem wherever possible.

ELEVENTH: Except as otherwise expressly provided herein, all estates, powers, trusts, duties and discretion herein created or conferred upon the Trustee shall extend to any Trustee who at any time may be acting hereunder, whether or not named herein.

No bond or other security shall be required of any trustee hereunder in any jurisdiction.

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.

THIRTEENTH: (A) This article states the Donors' tax purposes in creating this trust, and all provisions of this trust shall be construed so as best to effect these purposes and to the extent required, the Trust shall be reformed to effect these overriding tax purposes and no Trustee shall exercise any discretion in a manner that may reasonably be expected to frustrate the accomplishment of any of these purposes:

(1) All gifts made to this trust shall be complete gifts of present interests for federal gift tax purposes.

(2) The assets of this trust shall be excluded from the Donors' gross estates for federal estate tax purposes.

(3) This trust shall be a separate taxpayer for federal income tax purposes. At no time shall this trust be deemed to be owned by the Donors for federal income tax purposes.

(B) The Trustee is authorized to grant to, or, if granted, to take away from, a Beneficiary by an instrument in writing, signed and delivered to the Beneficiary, the power to appoint, by will admitted to probate, any part or all of the principal of a trust share held for such Beneficiary. This power of appointment, if granted, shall be exercisable only by a specific reference thereto in the Beneficiary's will and shall not be deemed to have been exercised by any general residuary article contained therein.

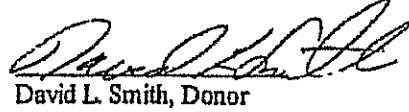
(C) The Trustee may exercise the authority granted to them hereunder for any reason whatsoever, whether to take advantage of any generation-skipping transfer exemption under Chapter 13 of the Internal Revenue Code, to reduce the overall transfer taxes payable upon a distribution or the death of a Beneficiary or for any other reason.

(D) Upon the death of any Beneficiary hereunder, if any estate, transfer, succession or other inheritance taxes, and any interest and penalties thereon, are imposed on such Beneficiary's estate by reason of the fact that any portion of the property held by the Trustee in trust hereunder is included in such Beneficiary's estate for Federal estate tax purposes and if no direction is made in such Beneficiary's will by specific reference to such trust concerning the payment of such taxes, and any interest and penalties thereon, then the Trustee shall pay from the principal of such trust an amount equal to such taxes, interest and penalties imposed by the United States or any state or subdivision thereof, so that such Beneficiary's estate shall not be required to bear any larger amount of estate, transfer, succession or inheritance taxes, and any interest and penalties thereon, than it would have had to pay if the property held in such trust were not included in such Beneficiary's estate.

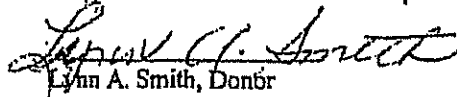
IN WITNESS WHEREOF, the parties hereto have duly executed this instrument under seal as of the day and year first above written.



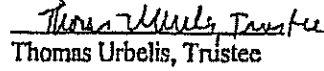
DANIEL S. BLAKE
NOTARY PUBLIC - STATE OF NY
QUALIFIED IN ERIE CO.
MY COMMISSION EXPIRES 9-5-2005



David L. Smith, Donor



Lynn A. Smith, Donor



Thomas Urbelis, Trustee

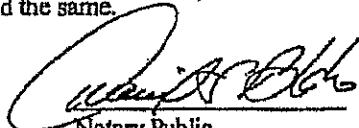
STATE OF NEW YORK)

SS:

COUNTY OF ERIE)

DANIEL S. BLAKE
NOTARY PUBLIC - STATE OF NY
QUALIFIED IN ERIE CO.
MY COMMISSION EXPIRES 9-5- 2005

On this 4th day of August, 2004, before me personally came David A. Smith, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.


Notary Public

STATE OF NEW YORK)

SS:

COUNTY OF ERIE)

DANIEL S. BLAKE
NOTARY PUBLIC - STATE OF NY
QUALIFIED IN ERIE CO.
MY COMMISSION EXPIRES 9-5- 2005


On this 4 day of August, 2004, before me personally came Lynn A. Smith, to me known and known to me to be the individual described in and who executed the foregoing instrument, and she acknowledged to me that she executed the same.


Notary Public

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

On this 9th day of August, 2004, before me, the undersigned notary public, personally appeared Thomas J. Urbelis, proved to me through satisfactory evidence of identification, which is personal knowledge, to be the person whose name is signed on the preceding or attached document, and acknowledged that he signed it voluntarily for its stated purpose.


Lori Ann Durrane Hawe/Notary Public
My Commission Expires:

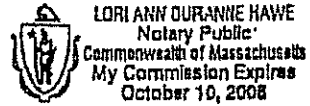


EXHIBIT B

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PRIVATE ANNUITY CONTRACT

BETWEEN

DAVID L. SMITH & LYNN A. SMITH, AS TRANSFERORS

AND

THE DAVID L. & LYNN A. SMITH IRREVOCABLE TRUST

U/A DATED AUGUST 31, 2004, TRANSFEREE

CONTRACT TERMS

Effective Date: August 31, 2004
First Payment Date: September 26, 2015
Term of Contract: Last to Die of Transferors
Face Amount: \$4,447,000
Periodic Payment: \$489,932
Annuity Interest Rate: 4.6%

PRIVATE ANNUITY AGREEMENT

This Agreement is made as of this 31st day of August, 2004, among David L. Smith (Date of Birth: [REDACTED]) and Lynn A. Smith (Date of Birth: [REDACTED]) (the "Transferors"), residing at [REDACTED], Saratoga Springs, New York 12866, and the David L. & Lynn A. Smith Irrevocable Trust U/A Dated August 15, 2004 (the "Transferee"), with offices at 6 Eastman Road, Andover, Massachusetts 01810-4009.

Recitals

A. The Transferors are the owners of 100,000 shares of stock (the "Property") of Charter One Financial, Inc. and the Transferors desire to sell the Property to the Transferee to be relieved of the burden and risk associated with owning and managing the Property in order to receive investment income and a portion of the principal on a regular basis; and

B. The Transferors are willing to sell, assign and convey the Property to the Transferee, provided that the Transferee agrees to pay the Transferors certain regular sums as hereinafter set forth regardless of the amount of income or return the Transferee receives from the Property and the Transferee is willing to accept the Property and to assume ownership and management of the Property; and

C. Transferee agrees to annuitize the value of the Property in the belief that the transaction will result in a net gain, after payment of the obligations hereunder to the Transferors, for the Transferee and its beneficiaries, although the Transferors and the Transferee are aware and acknowledge that there are no guarantees that the annuity obligations can be met;

NOW, THEREFORE, in consideration of the foregoing premises and the mutual promises of the parties set forth below, it is agreed as follows:

1. The Transferors hereby sell, assign and convey to the Transferee all right, title and interest in and to the Property. The Transferors and Transferee shall execute and deliver such documents and instruments to effectuate the foregoing sale, assignment and conveyance.

2. Transferee, in consideration of the sale, assignment and conveyance of the Property, hereby agrees to pay or cause to be paid to the Transferors the sum of \$489,932 per year, commencing on September 26, 2015, and shall continue on the 26th day of each September thereafter for and during the full term of the natural life of the last to die of the Transferors. Said payments are based on an annuity interest rate of 4.6%, per annum. At the death of the last to die of the Transferors, the Transferee shall cease making payments, and there shall be no further sums owned to the Transferors, or to the estate of either Transferor. In the event any payment under this Agreement is not made within ten (10) days of the date due, a late payment penalty of four percent (4%) of the amount past due shall be added to the amount owing and shall be payable by the Transferee.

3. 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.

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4. If the Transferors request to sever the joint nature of the annuity provided by this Agreement, the Transferee, in its discretion, shall create two (2) separate annuities, one for each Transferor payable to each Transferor until the death of such Transferor. The Transferee shall recalculate the annuity payments based upon a sum of one-half of any unpaid balance then owing under this Agreement. The Transferee shall use the same rate of interest and the same annuity factors to recalculate the annuities that are used in this Agreement and the Transferee shall use the separate life expectancies of each Transferor. Transferee shall further attempt, as far as possible, to conform each annuity with existing tax laws and rulings for the best tax treatment for each Transferor and the Transferee. The Transferors shall equally bear the cost associated with severing the annuity hereunder and creating separate annuities.

5. It is an express term and condition of this Agreement that the rights of, income or amounts 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.

6. (a) Neither party shall be responsible for breach of any of its obligations hereunder caused by "Force Majeure" or acts of God, such as, but not limited to, insurrection, fire, flood, strikes, lockouts, accident or labor unrest.

(b) All notices and demands upon the parties hereto permitted or required to be given hereunder shall be in writing and shall be deemed to have been duly and sufficiently given if delivered personally, sent by registered or certified mail, return receipt requested, in a properly stamped envelope addressed as set forth above.

(c) The captions contained in this Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement.

(d) This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which will be considered one and the same instrument.

(e) Except as herein otherwise specifically provided, this Agreement shall be binding upon and inure to the benefit of the parties and their legal representatives, successors and assigns.

(f) The interpretation, validity and performance of this Agreement shall be governed by the laws of the State of New York.

(g) The invalidity or unenforceability of any particular provision or provisions of this Agreement shall not affect the other provisions hereof and in the event any particular provision or provisions are determined to be invalid or unenforceable, this Agreement shall be construed in all respects as if such invalid or unenforceable provision or provisions were omitted.

(h) This Agreement contains the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior understandings or agreements, whether written or oral.

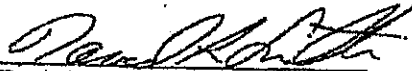
(i) This Agreement may not be modified or amended except in a writing signed

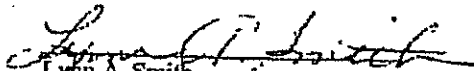
~~Case 1:10-cv-00457-GLS-DRH Document 103-3 Filed 08/03/10 Page 5 of 5~~

by each of the parties hereto.

(j) No waiver by either party of any condition or the breach of any covenant or provision contained herein, whether by conduct or otherwise, shall be deemed to be or construed as a further or continuing waiver of such condition or breach of any other provision hereof, and the failure of either party to require performance of any provision hereof shall not affect the right of that party to enforce the same.

In Witness Whereof, this agreement has been signed as of the date first set forth above.


David L. Smith


Lynn A. Smith

The David L. & Lynn A. Smith Irrevocable
Trust U/A Dated August 4, 2004

By: _____
Thomas Urbelis, Trustee

Private Annuity

9/7/2004

Transfer Date: 8/2004
\$7520 Rate: 4.80%
FMV of Property: \$7,399,348
Client's Basis: \$387,600
Payment Period: Annual
Payment Timing: End
Number of Annuitants: 2
Age(s): 58, 69

Annuity Factor: 16.1028
Payout Frequency Factor: 1.0000
Annual Payout: \$489,932

Joint Life Expectancy: 31.1 Years
Reg. 1.72-5(a)(2) Life Exp. Adj. Factor: -0.5
Tax-Free Portion: \$12,883
Capital Gain Portion: \$229,145
Ordinary Income Portion: \$248,123

Tax Breakdown of Payments to Seller

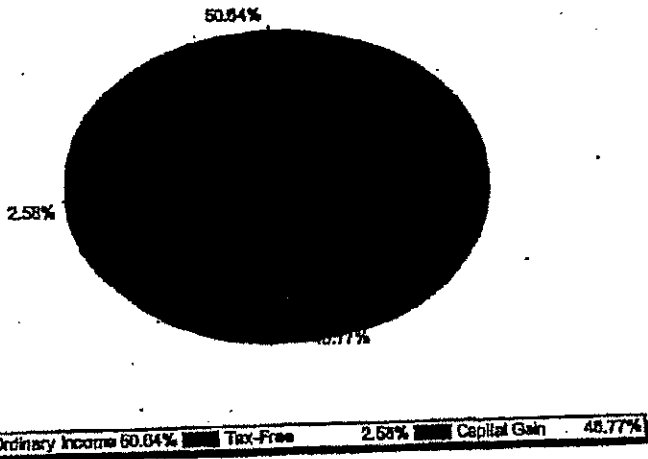


EXHIBIT C

**SUMMARY OF TRANSACTIONS INVOLVING
CHARTER ONE STOCK HELD IN STOCK ACCOUNT
(SOURCE: BROKERAGE ACCOUNT STATEMENTS FOR ACCT. NO. ██████████091)**

DATE	NUMBER of SHARES	MARKET PRICE (AT CLOSE)	VALUE (AT CLOSE)	NOTES
1992	40,000	\$10	\$400,000	L. Smith's Affidavit in Support of Smith Trust's Motion to Intervene.
8/27/1999 ¹	110,735	\$24.75	\$2,740,691	
9/24/1999	110,735	\$23.125	\$2,560,747	
10/29/1999	116,271	\$24.563	\$2,855,965	Acquired 5,536 shares as stock dividend.*
11/26/1999	116,271	\$22.3130	\$2,594,355	
12/31/1999	116,271	\$19.125	\$2,223,683	
1/28/2000	114,071	\$18.8130	\$2,146,018	Journal of 2,200 shares to ██████████065 LOA on 1/4/2000. (No other information provided in statement as to where shares went.)
2/25/2000	114,071	\$15.938	\$1,818,064	
3/31/2000	114,071	\$21	\$2,395,491	
4/28/2000	114,071	\$20.313	\$2,317,124	
5/26/2000	114,071	\$21.9380	\$2,502,490	
6/30/2000	114,071	\$23	\$2,623,633	
7/28/2000	114,071	\$21.375	\$2,438,268	
8/25/2000	114,071	\$22.813	\$2,602,302	
9/29/2000	114,071	\$24.375	\$2,780,481	
10/27/2000	119,774	\$21.938	\$2,627,602	Acquired 5,703 shares as stock dividend.*
11/30/2000	119,774	\$24	\$2,874,576	
12/29/2000	119,600	\$28.875	\$3,453,450	174 shares delivered to ██████████418 on 12/27/00. (No other information provided in statement as to where shares went.)
1/26/2001	119,600	\$27.125	\$3,244,150	
2/23/2001	119,600	\$28.51	\$3,409,796	
3/30/2001	119,600	\$28.3	\$3,384,680	
4/27/2001	119,600	\$29.22	\$3,494,712	
5/25/2001	119,600	\$30.150	\$3,605,940	

¹ Date of first available brokerage statement for Stock Account.

* Note regarding stock dividends: The brokerage statements list these acquisitions as stock purchases with no purchase price. For the years from 1999 to 2002, the relevant Forms 10-Q explain that a 5% stock dividend was issued, which explains why no purchase price was listed for the acquisition of the shares.

**SUMMARY OF TRANSACTIONS INVOLVING
CHARTER ONE STOCK HELD IN STOCK ACCOUNT
(SOURCE: BROKERAGE ACCOUNT STATEMENTS FOR ACCT. NO. ██████████091)**

DATE	NUMBER of SHARES	MARKET PRICE (AT CLOSE)	VALUE (AT CLOSE)	NOTES
6/29/2001	117,600	\$31.9	\$3,751,440	Sold 2,000 shares on 6/20/01 for \$31.04/share for gross profit of \$62,077.93
7/27/2001	100,600	\$31.78	\$3,197,068	Sold total of 17,100 shares from 7/3-7/23 for \$31.30 to \$32.74/share for total gross profit of \$541,421.89.
8/31/2001	100,600	\$29.2	\$2,937,520	
9/28/2001	105,630	\$28.22	\$2,980,879	Acquired 5,030 shares by stock dividend.*
10/26/2001	105,630	\$27.27	\$2,880,530	
11/30/2001	105,630	\$27.55	\$2,910,107	
12/31/2001	105,430	\$27.15	\$2,862,425	200 shares delivered to ██████████418 on 12/20/01. (No other information provided in statement as to where shares went.)
1/25/2002	105,430	\$29.7	\$3,131,271	
2/22/2002	105,430	\$29.32	\$3,091,208	
3/28/2002	105,430	\$31.22	\$3,291,525	
4/26/2002	105,430	\$35.07	\$3,697,430	
5/31/2002	100,000	\$36.2	\$3,620,000	Sold total of 5,430 shares on 5/16/02 for \$35.23 to \$35.49/share for gross profit of \$192,096.19.
6/28/2002	100,000	\$34.38	\$3,438,000	
7/26/2002	100,000	\$31.62	\$3,162,000	
8/30/2002	100,000	\$33.7	\$3,370,000	
9/27/2002	100,000	\$30.03	\$3,003,000	
10/25/2002	0	0	0	Acquired 5,000 shares by stock dividend.* On 10/14/02, 105,000 shares journaled to ██████████674. (No other information provided in statement as to where shares went.)
11/29/2002	0	0	0	No Charter One shares in account.
12/31/2002	0	0	0	No Charter One shares in account.
1/31/2003	0	0	0	No Charter One shares in account.
2/28/2003	0	0	0	No Charter One shares in account.
3/28/2003	0	0	0	No Charter One shares in account.

**SUMMARY OF TRANSACTIONS INVOLVING
CHARTER ONE STOCK HELD IN STOCK ACCOUNT
(SOURCE: BROKERAGE ACCOUNT STATEMENTS FOR ACCT. NO. ██████████091)**

DATE	NUMBER of SHARES	MARKET PRICE (AT CLOSE)	VALUE (AT CLOSE)	NOTES
4/25/2003	0	0	0	No Charter One shares in account.
5/30/2003	0	0	0	No Charter One shares in account.
6/27/2003	0	0	0	No Charter One shares in account.
7/25/2003	0	0	0	No Charter One shares in account.
8/29/2003	105,000	\$31	\$3,255,000	On 7/29/03, 105,000 shares journaled from ██████████674. (No other information provided in statement as to where shares came from.)
9/30/2003	105,000	\$30.6	\$3,213,000	
10/31/2003	105,000	\$31.96	\$3,355,800	
11/28/2003	105,000	\$33.22	\$3,488,100	
12/31/2003	105,000	\$34.55	\$3,627,750	
1/30/2004	105,000	\$36.21	\$3,802,050	
2/27/2004	105,000	\$36.22	\$3,803,100	
3/31/2004	105,000	\$35.36	\$3,712,800	
4/30/2004	105,000	\$33.37	\$3,503,850	
5/28/2004	105,000	\$43.96	\$4,615,800	
6/30/2004	105,000	\$44.19	\$4,639,950	
7/30/2004	105,000	\$44.41	\$4,663,050	
8/31/2004	105,000	\$44.47	\$4,669,350	
9/30/2004	0	0	0	On 9/1/04, 100,000 shares journaled to Smith Trust account. 5,000 subject to cash merger for gross profit of \$222,500.

Total Shares Sold From August 1999 to September 2004 = 29,530
(including 5,000 shares subject to cash merger)

Total Shares transferred out of account from
from August 1999 to September 2004 = 2,574

Gross Profits from Sales of Charter One stock:

June 2001	\$62,077.93
July 2001	\$541,421.89
May 2002	\$192,096.19
September 2004	\$222,500.00
TOTAL	= \$1,018,096.01

EXHIBIT D



Small Business/Self-Employed

- [Industries/Professions](#)
- [International Taxpayers](#)
- [Self-Employed](#)
- [Small Business/Self-Employed Home](#)

Small Business/Self-Employed Topics

- [A-Z Index for Business](#)
- [Forms & Pubs](#)
- [Starting a Business](#)
- [Deducting Expenses](#)
- [Businesses with Employees](#)
- [Filing/Paying Taxes](#)
- [Post-Filing Issues](#)
- [Closing Your Business](#)

What's New - Estate and Gift Tax Form 706 Changes

The applicable exclusion amount is \$1,500,000 (2004-2005), \$2,000,000 (2006-2008), \$3,500,000 (2009), \$5,000,000 (2010-2011), \$5,120,000 (2012) and \$5,250,000 (2013).

For Estate Tax returns after 12/31/1976, Line 4 of [Form 706, United States Estate \(and Generation-Skipping Transfer\) Tax Return](#), (PDF) lists the cumulative amount of adjusted taxable gifts within the meaning of IRC section 2503. The computation of gift tax payable (Line 7 of Form 706) uses the IRC section 2001(c) rate schedule in effect as of the date of the decedent's death, rather than the actual amount of gift taxes paid with respect to the gifts.

With the top bracket tax rates decreasing from 55 percent (in 2001) down to 35 percent (in 2010) and a periodic drop in rates in-between, the IRS has encountered situations where gift taxes paid were greater than the tax calculated using the rate in effect at the date of death.

It appears that some Form 706 software used by practitioners require a manual input of the gift tax payable line. Some preparers are reporting gift taxes actually paid rather than calculating the gift tax payable under date of death rates. These errors result in underpayment of estate tax due. Cases with this issue will involve estates where large gifts were made during life and at a time when tax rates were higher than at date of death. (Posted 6-5-06)

Beginning January 1, 2011, estates of decedents survived by a spouse may elect to pass any of the decedent's unused exemption to the surviving spouse. This election is made on a timely filed estate tax return for the decedent with a surviving spouse. Note that simplified valuation provisions apply for those estates without a filing requirement absent the portability election. See the Instructions to Form 706 for additional information.

Exclusions

- The annual exclusion for gifts is \$11,000 (2004-2005), \$12,000 (2006-2008), \$13,000 (2009-2012) and \$14,000 (2013).
- The applicable exclusion amount is increased to \$5,000,000 for estates of decedents dying on or after December 31, 2009.
- The applicable exclusion amount for gifts is \$1,000,000 (2010), \$5,000,000 (2011), \$5,120,000 (2012) and \$5,250,000 (2013).

Federal Transfer Certificates (International)

For more information about securing a transfer certificate, please see:

- [Transfer Certificate Requirements for U.S. Citizens](#)
- [Transfer Certificates for Non-U.S. Citizens](#)

Form 706 Filing Instructions

The instructions (which include rate schedules) may be found on the [Forms and Publications - Estate and Gift Tax](#).

There are few significant changes to Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. The one change that will impact all filers is the elimination of the allowable State Death Tax Credit; for decedents dying in 2005 and later years, it is a deduction.

Note that the due date for filing a Form 706 for estates of decedents dying in 2010 is September 19, 2011. A draft of [Form 706](#) (PDF) for decedent's dying in 2010 is available.

If you are filing a request for an extension of time to file an estate or gift tax return, remember that the request must go to the Cincinnati Service Center, even if you file your income or other tax returns elsewhere.

The instructions to Form 706 contain detailed guidance on completing the form and the required documentation to include with estate tax returns being filed solely to elect portability.

Important information for Form 709

Time for filing clarification: Page 4 of the Instructions for Form 709 states (Under When to File) that "... you must file the 2009 Form 709 on or after January 1 ...). It may not be clear, but this means that returns should not be filed until January 1 of the year following the year in which the gift is made. In other words, any gifts made in 2010 will not be due (and cannot be processed) until after December 31, 2010.

Individuals who make certain qualifying gifts are required to file Form 709, United States Gift Tax Return.

The instructions to Form 709 provide guidance when using a deceased spouse's unused exemption (DSUE).

References/Related Topics

- [Estate and Gift Taxes](#)
- [Estate Tax](#)
- [Frequently Asked Questions on Estate Taxes](#)
- [Gift Tax](#)
- [Frequently Asked Questions on Gift Taxes](#)
- [Filing Estate and Gift Tax Returns](#)
- [Forms and Publications - Estate and Gift Tax](#)
- [Publication 950](#)

Page Last Reviewed or Updated: 03-Sep-2013