

LINNAN & FALLON, LLP

Attorneys at Law

JAMES D. LINNAN
CHARLENE S. FALLON

61 Columbia Street, Suite 300
Albany, New York 12210-2736

(518) 449-5400
Telefax No. (518) 449-5262
www.linnan-fallon.com
E-mail: lawinfo@linnan-fallon.com

GLENS FALLS OFFICE
(518) 798-1400
HUDSON OFFICE
(518) 828-9400
CATSKILL OFFICE
(518) 943-9400

SHAWN T. MAY

January 15, 2014

Hon. Gary L. Sharpe, Chief Judge
James T. Foley U.S. Courthouse
445 Broadway, Room 112
Albany, NY 12207

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

Dear Judge Sharpe:

Please accept this letter as my request for permission to file an amended Memorandum of Law with my original motion papers. On January 3, 2014, I, without the benefit of my support staff at approximately 8:30 p.m., filed the Memorandum of Law in support of my motion which was filed earlier that day. Today, I discovered that I inadvertently filed a "draft" of the Memorandum of Law and not the final copy.

The attached Memorandum of Law is identical to the one filed on January 3, 2014, with the exception of the insertion of appropriate legal cites and the correction of spelling and grammatical errors.

My apology to the Court and counsel for any inconvenience I have caused.

Very truly yours,

/S/ James D. Linnan

JAMES D. LINNAN
BAR ROLL NUMBER: 102058

JDL:phb
Enclosure
cc.: Service List

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, 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.

MEMORANDUM OF LAW

PRELIMINARY STATEMENT

The Declaration of Trust creating the David L. and Lynn A. Smith Irrevocable Trust U/A dated August 4, 2004 provided at Paragraph "SIXTH:(10)" authorized the Trust "to purchase property from the Donors in exchange for a private annuity payable to the Donors".

Pursuant to the authority contained in the Declaration of Trust, at set forth above, the Donors executed a Private Annuity Contract dated August 31, 2004.

At the time of the creation of the Trust, the United States Internal Revenue Code and its regulations provided for the imposition of gift tax upon gifts in the amount and type utilized to fund the instant Trust. The Code, and its regulations, further provided that such gifts could be made free of gift tax if the Trust provided for private annuity payments to the Creators of the Trust. (26 USC 2039, as amended by, PL 97-34 (HR 4242), AUGUST 13, 1981, 95 Stat 172). The David L. and Lynn A. Smith Irrevocable Trust U/A dated August 4, 2004 was a “private annuity trust” under the provisions of the Internal Revenue Code and, therefore, the documents and funds utilized to create and fund the Trust permitted the corpus of the Trust to pass to the Trust without the imposition or payment of any gift tax.

Pursuant to the terms of the Private Annuity Contract, created for the purpose of qualifying the Trust as a gift tax free private annuity trust, the vesting of annuity payments to the Trust Creators commences September 26, 2015. No payments, by way of annuity payments or otherwise, have been made to the Trust’s Creators to this date.

The Internal Revenue Code and its regulations have been amended and modified and now provide for the allowance of gifts in excess of the total amount of the Trust principle, without the imposition of any gift tax. (*Generally*, IRC §2503(b)(1); *see also*, IRC §2505; IRC §2010; *as amended by*, PL 111-312 [HR 4853], December 17, 2010). There is, therefore, no further need for the Private Annuity Contract.

The Trust’s Creators, David L. Smith and Lynn A. Smith, and the Trust, by its Trustee, Geoffrey R. Smith, wish to now amend the Declaration of Trust to remove Paragraph “SIXTH:(10)”, thus terminating the authority of the Trust to enter into or participate in private annuity contracts with the Trust’s Creators. This amendment would cancel, terminate and void

the Private Annuity Contract, which was entered into pursuant to the authority granted in the original Declaration of Trust.

All interested parties in the Trust, including the Creators of the Trust, the Trustee and the Beneficiaries are adults and all consent to the Amendment of the Trust and the termination of the Private Annuity Contract.

The Trust, by its terms in the Declaration of Trust, was created for the benefit of the Donors' children and their issue, namely, Geoffrey R. Smith and Lauren T. Smith. The Creators of the Trust wish to carry out the original stated purpose of the Trust and provide a Trust for the sole benefit of their adult children and their issue. To facilitate this, the Trust Creators further wish to renounce any interest they may have in the Trust assets pursuant to Section 2-1.11 of the EPTL. (McKinney's EPTL § 2-1.11; *Estate of Munch*, 125 Misc.2d 610, 480 N.Y.S.2d 95 (Sur. 1984)).

The parties hereto are seeking the permission of the Court to execute, deliver, and file the Amendment of Declaration of Trust and to allow the creators of the Trust to renounce all beneficial interest in the Trust. As the parties are currently operating under a temporary restraining order, limiting the party's ability to undertake the proposed actions, court permission is necessary.

STATEMENT OF FACTS

The Declaration of Trust authorizes the Trustee, at Paragraph "SIXTH:(10)", "to purchase property from the Donors in exchange for a private annuity payable to the Donors".

The Private Annuity Contract between David L. Smith and Lynn A. Smith and the Trusts, bearing the date of August 31, 2004, was signed by David L. Smith and Lynn A. Smith.

The Private Annuity Contract was authorized, created and executed for the sole purpose of making the Trust a "private annuity trust" under the terms of the Internal Revenue Code as it pertained to the imposition and collection of gift taxes.

The subject Trust was, therefore, a qualified private annuity trust and was thus able to transfer assets of value to the Trust, without the imposition or payment of any gift tax.

The United States Internal Revenue Code and its regulations have been amended to now permit the transfer of gifts, without the imposition or collection of gift taxes, in amounts greater than the current value of Trust assets. There is, therefore, no further need for a private annuity trust provision or the existence of a Private Annuity Contract.

No payments have been made to any party pursuant to the Private Annuity Contract. Private annuity payments to the Creators of the Trust are scheduled to commence September 26, 2015.

The Creators of the Trust wish to exercise their right under EPTL Section 7-1.9 to amend the Trust. The Trustee, on behalf of the Trust, wishes to amend the Trust. The beneficiaries are all adults and all consent to the Amendment of the Trust.

EPTL Section 7-1.9, entitled the Revocation of Trust, deals with the revoking or amending of a Trust. It states that with the written consent acknowledged by all of the persons

beneficially interested in a Trust of property, the Creators may revoke or amend, in whole or in part, any portion of the Trust that they have created. (EPTL § 7-1.9(a)).

The Creators of the Trust, David L. Smith and Lynn A. Smith, also wish to exercise their rights under EPTL Section 2-1.11 to renounce any property interest they have now, or in the future, to the Trust and its assets. New York EPTL Section 2-1.11(c)(1) states, “any beneficiary ... may renounce all or part of such beneficiary’s interest...” and EPTL Section 2-1.11(c)(2) sets forth the proper procedure to undertake such renunciation.

The parties stand ready, willing, and able to execute and deliver all documents necessary to comply with the various provisions of the New York Estates, Powers and Trust Law upon the granting of permission to undertake such action by the Court.

ARGUMENT

POINT I

THE GRANTORS HAVE AN ABSOLUTE RIGHT TO AMEND THE TRUST.

The Trust was created in the State of New York, and states at Paragraph “TWELTH” of the Declaration of Trust that the Trust “in all respects shall be construed and regulated by law of the State of New York”. The Estates, Powers and Trusts Law of the State of New York Section 7-1.9 gives the absolute authority to the Creators of the Trust to amend or revoke a Trust Agreement. Section 7-1.9 states in pertinent part as follows:

“Upon the written consent, acknowledged or proved in the manner required by law of this State for the recording of a conveyance of real property, of all of the persons beneficially interested in a trust of property, heretofore or hereafter created, the Creator of such Trust may revoke or amend the whole or any part thereof by an instrument in writing, acknowledged or proved in like manner, and thereupon the Estate of the Trust ceases with respect to any part of such property the disposition of which has been revoked”.

The power of the Creator of the Trust to amend the Trust with the consent of all interested parties named in the Trust is absolute. (*In re Dodge's Trust*, 25 N.Y.2d 273, 303 N.Y.S.2d 847 (N. Y. 1969); *Guaranty Trust Co. of New York v. Armstrong*, 43 N.Y.S.2d 897, (N.Y. 1943), *affirmed*, 268 A.D. 763, 49 N.Y.S.2d 286, *affirmed*, 294 N.Y. 666; *Culver v. Title Guarantee & Trust Co.*, 269 A.D. 627, 58 N.Y.S.2d 116 (1 Dept. 1945). *See also, In re Isaacs' Trust*, 83 N.Y.S.2d 808 (N.Y. 1948); *In re Woodward's Trust*, 284 A.D. 459, 132 N.Y.S.2d 266 (4 Dept. 1954) *appeal denied*, 284 A.D. 838, 132 N.Y.S.2d 924). The controlling statute, EPTL Section 7-1.9, states that a Creator may revoke or amend the whole or any part of a Trust, upon the acknowledged consent of all persons beneficially interested in the Trust, and places no other burden upon the Creator who wishes to amend or revoke an irrevocable Trust. (*Perosi v LiGreci*,

98 A.D.3d 230, 948 N.Y.S. 629 (2 Dept. 2012); *In re Mergenhagen*, 50 A.D.3d 1486, 856 N.Y.S.2d 389 (4 Dept. 2008); *Rosner v. Caplow*, 105 Misc.2d 592, 432 N.Y.S.2d 577 (1980)).

Upon the amendment of the Declaration of Trust, pursuant to the provisions of the statute, “the Estate of the Trust ceases with respect to any part of such property the disposition of which has been revoked.” (EPTL 7-1.9(a)). Therefore, upon the amendment of the Declaration of Trust to remove the authority to participate in private annuity agreements, the Private Annuity Agreement is voided and its terms are cancelled.

POINT 2

**THE GRANTORS HAVE AN ABSOLUTE RIGHT
TO RENOUNCE ANY RIGHTS THEY HAVE IN THE TRUST**

The Grantors authorized the Trust to enter into the Private Annuity Contract by paragraph SIXTH(10) of the Declaration of Trust. This was done to qualify the Trust as a private annuity trust. Pursuant to that authority, the Grantors signed the Private Annuity Contract to complete the creation of a qualified private annuity trust. The Private Annuity Contract purports to make the Grantors lifetime beneficiaries of the Trust. The Private Annuity Contract was an integral part of the Trust formation and was, therefore, a part of the Trust. While taking a different form, the Trust was effectively a trust with a limited or defined life estate in the Grantors with a remainder to the children or their issue. The Declaration of Trust and the Private Annuity Contract, taken together, are the Trust Documents. (EPTL § 1-2.1; *In re Martin*, 17 A.D.3d 598, 793 N.Y.S.2d 458 (2 Dept. 2005)). Neither document has any meaning without the other, nor would the Trust exist without the documents taken together. The Grantors are essentially lifetime beneficiaries of the Trust.

EPTL Section 2-1.11(c) provides, in part, “any beneficiary of a disposition may renounce all or part of such beneficiary’s interest.” (EPTL § 2-1.11 (c)(1)). Any party who has an interest in a trust may renounce that right by complying with the provisions of the statute. The right to renounce, like the right to amend a trust, is absolute and merely requires the party wishing to exercise that right to comply with the statutes relative to the procedure set forth in the statute. (*Cassata v. Cassata*, 148 A.D.2d 944, 538 N.Y.S.2d 960 (4 Dept. 1989), *appeal dismissed*, 74 N.Y.2d 892, 547 N.Y.S.2d 849; *Matter of Heffner*, 132 Misc.2d 361, 503 N.Y.S.2d 669 (1986)). Here, the Grantors wish to exercise their right of renunciation relative to any rights they may

have as a result of the Declaration of Trust and the Private Annuity Agreement. The Grantors are prepared to execute and deliver all documents necessary to carry out that renunciation once permission is granted by this court.

There is a valid reason for the Grantors to amend the Trust and renounce any rights to the Trust assets. The change in the federal tax law pertaining to gift taxes makes the private annuity provision of the Declaration of Trust and the Private Annuity Contract unnecessary to preserve the assets and avoid the payment of gift tax. The motive of the person wishing to exercise their right of renunciation is irrelevant. (*Matter of Molloy v Bane*, 214 A.D.2d 171, 631 N.Y.S.2d 910 (2 Dept. 1995); *Matter of Schiffman*, 105 Misc2d 1025, 430 N.Y.S.2d 229 (1980); *Matter of Scrivani's Estate*, 116 Misc.2d 204, 455 N.Y.S.2d 505 (1982); *Estate of Oot*, 95 Misc. 2d 702, 408 N.Y.S.2d 303 (Sur. 1978)). It is well settled that a person who has an income or distribution interest in a trust may renounce for any reason, even if it has an adverse effect upon creditors of the person renouncing. (*See, Molloy; Scrivani's Estate; Estate of Oot*).

In New York, a renunciation is deemed “retroactive to the creation of the disposition” and it “has the same effect with respect to the renounced interest as though the renouncing person had predeceased the creator.” (EPTL § 2-1.11(d)). This statute creates a legal fiction that allows distributees to avoid attachment by creditors or the payment of taxes. (*United States v Comparato*, 22 F.3d 455, 456 (2nd Cir. 1994); *Application of Adler*, 869 F.Supp. 1021 (E.D.N.Y. 1994); *Scrivani's Estate* 455 N.Y.S.2d at 509; *Estate of Vizzie*, 120 Misc.2d 161, 465 N.Y.S.2d 677 (1983)).

CONCLUSION

The Grantors, with the consent of the Trustee and the Beneficiaries, have the absolute right to amend the Declaration of Trust to delete and remove paragraph SIXTH:(10) thus

revoking the right of the trust to enter into or participate in private annuity agreements. The Grantors also have an absolute right to renounce their rights to lifetime payments from the Trust thus terminating the Private Annuity Agreement, retroactive to the date of its creation.

Dated: Albany, New York

Respectfully submitted,

January 3, 2014

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*
61 Columbia Street
Albany, N.Y. 12210
518-449-5400
jdlinnan@linnan-fallon.com
www.linnan-fallon.com

TO:

David Stoelting
Securities and Exchange Commission
Attorney for Plaintiff
3 World Financial Center, Room 400
New York, NY 10281
stoeltingd@sec.gov

Kevin McGrath
Securities and Exchange Commission
Attorney for Plaintiff
3 World Financial Center, Room 400
New York, NY 10281
mcgrathk@sec.gov

James D. Featherstonhaugh, Esq.
Featherstonhaugh, Wiley & Clyne LLP
*Attorneys for Defendant/Relief
Defendant, Lynn A. Smith*
99 Pine Street, Suite 207
Albany, NY 12207
jdf@fwc-law.com

William J. Dreyer
Dreyer Boyajian LLP
Attorneys for David L. Smith
75 Columbia Place
Albany, New York 12207

E. Stewart Jones, Jr.
E. Stewart Jones Law Firm
Attorneys for Timothy M. McGinn
28 Second Street
Troy, New York 12181
esjones@esjlaw.com

Nancy McGinn
29 Port Huron Drive
Schenectady, NY 12309
nemcginn@yahoo.com

William Brown, Esq.
Phillips Lytle LLP
Attorneys for Receiver
One Canalside
125 Main Street
Buffalo New York 14203-2887
WBrown@phillipslytle.com