UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	
v.	:	**10 Civ. 457 (GLS)**
McGINN, SMITH & CO., INC., et al.,	:	
Defendants.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION BY THE DAVID L. AND LYNN A. SMITH IRREVOCABLE TRUST TO AMEND TRUST AND VACATE DAVID AND LYNN SMITH'S RIGHTS TO ANNUITY PAYMENTS

Securities and Exchange Commission
New York Regional Office
Brookfield Place, 200 Vesey St., Suite 400
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January 24, 2014

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INTRODUCTION

Plaintiff Securities and Exchange Commission respectfully submits this Memorandum of Law in opposition to the motion of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (the "Trust") to permit the Trust and its creators, David Smith and Lynn Smith, to: (1) amend the Trust to remove the Trust's authorization to enter into a private annuity agreement with David Smith and Lynn Smith; (2) to "cancel, terminate and void" the Private Annuity Contract dated August 31, 2004 between the Trust and the Smiths; and (3) to permit the Smiths to "renounce all rights and benefits they may have in the said Trust or pursuant to the Private Annuity Contract." Trust Notice of Motion at 2.

The Smiths are currently jointly entitled to yearly payments of $489,932 commencing on September 26, 2015 and continuing until their death, pursuant to the Private Annuity Contract (the "Annuity Agreement") entered into between the Trust and the Smiths on August 31, 2004. *See* Exhibit B to Affidavit of Defendant/Relief Defendant Lynn A. Smith, dated January 3, 2014, at paragraph 2, Dkt. No. 662-2[1]. Lynn Smith now implausibly claims that she and her incarcerated husband want to disavow any interest in this sizeable amount of money so that their children can enjoy it, despite the fact that she and David Smith have filed numerous affidavits with this Court claiming that they do not have sufficient funds to live on and to pay their myriad, sizeable ongoing expenses and accumulated bills, including large legal bills. Obviously, the Smiths expect that their two children, the beneficiaries of the Trust, will funnel the Trust assets to them and/or pay their bills for them after they "renounce" their rights to this money. This

[1] All references to "Dkt. No.," unless otherwise noted, are to docket filings in the instant case, *S.E.C. v. McGinn Smith,* 10-CV-457 (N.D.N.Y.)(GLS/CFH). All references to "MDO" are to Memorandum-Decisions and Orders issued in the instant case.

motion is yet one more attempt by the Smiths to improperly shield their assets from current and future creditors. There are numerous reasons why this motion should be denied.

First, this Court has held on multiple occasions that, pursuant to the asset freeze imposed on the Trust, the Trustee has no authority to act on behalf of the Trust. Thus, the Trustee is prohibited from even filing this motion. Second, the Smiths' proposed renunciation of their rights to the annuity payments is contrary to the terms of the preliminary injunction entered in this case, which prohibits "any withdrawal, transfer, pledge encumbrance, assignment, dissipation, concealment or other disposal of any assets, funds or other property" subject to the freeze order. The Smiths' proposed renunciation is also directly contrary to the best interests of investors, as it will deprive them of assets necessary to satisfy the potentially enormous judgments, exceeding $100 million, the Smiths face in this case.

Furthermore, the Smiths' ostensible attempt to renounce rights to annuity payments will be rendered moot if the SEC obtains summary judgment against David Smith based on the collateral estoppel effect of his criminal conviction and the Trust assets are deemed his for purposes of satisfying any judgment against him. Alternatively, if the SEC prevails on its fraudulent conveyance claim against the Smiths for transferring stock to the Trust in 2004, the Trust will then be stripped of all of its assets and unable to make these payments. Thus, there is no legitimate reason to decide this motion at this time.

Finally, the cases cited by the Trust do not support its argument that a trust beneficiary has an absolute right to renounce his interest, even if the purpose is to deprive creditors of those assets, and are otherwise inapposite. First, none of the Trust's cases involved assets subject to a federal injunction and the Trust fails to cite any authority for the proposition that state law supersedes federal law in cases such as this. This renders New York's Estates, Powers and

Trusts Laws ("EPTL") moot. Moreover, EPTL § 2-1.11 is intended to allow a beneficiary to renounce a gift bestowed upon him by will or trust, based on the principle that a beneficiary need not be forced to accept a gift bestowed upon him. Here, in contrast, the Smiths seek to renounce their contract rights to annuity payments, not gifts bestowed upon them involuntarily. The Trust cites no cases permitting a person to renounce contract rights in order to frustrate creditors. Moreover, even if § 2-1.11 otherwise applied, the Smiths are barred, under § 2-1.11(g) from renouncing interests over which they have already exercised control, such as the Trust assets David Smith has been found by this Court to have controlled. The Smiths also failed to execute a renunciation within the nine months required under § 2-1.11(c)(2). Finally, the right to renounce benefits to frustrate creditors, even if § 2-1.11(c) applies, is not absolute. Indeed, as even the cases cited by the Trust make clear, there are numerous public policy reasons why a beneficiary cannot renounce his rights.

For all the foregoing reasons, the Motion to Amend the Trust should be denied in its entirety.

POINT I

THE TRUSTEE LACKS AUTHORITY UNDER THE FREEZE ORDER TO FILE THIS MOTION OR TAKE ANY ACTIONS CONCERNING THE TRUST

The Trust moves for permission to amend the Trust to vacate its authority to enter into annuity agreements and to void its obligations to the Smiths under the Annuity Agreement. However, this Court has repeatedly held that the Trustee has no authority to act on behalf of the Trust until this case is resolved. Specifically, in rejecting the Trust's prior motion for an order authorizing the Trustee to expend Trust assets for certain expenses, the Court stated: "That injunction [freezing the Trust's assets] was upheld on the Trust's appeal and, therefore, it is now the law of the case that management of the Trust's assets for the duration of this action is

committed to the Receiver." The Court further made clear that: "Pending the outcome of this action, the Trustee has no duty or authority to act in any way with respect to the Trusts' assets." *S.E.C. v. McGinn Smith,* 10-CV-457, 2012 WL 1142516, at *8 (N.D.N.Y. Apr. 4, 2012). Dkt. No. 478 at 19. This Court reiterated its ruling that the Receiver, not the Trustee, had sole authority to act on behalf of the Trust in denying a subsequent motion by the Trust challenging the Receiver's authority to sell the Great Sacandaga Lake property held by the Trust. MDO dated Sept. 11, 2013, Dkt. No. 592, at 8.

Thus, this motion should be denied because the Trustee has "no authority to act in any way with respect to the Trust's assets," including seeking to amend the Trust to assist the Smiths in improperly dissipating an asset subject to the freeze order.

POINT II

THE MOTION TO MODIFY THE ASSET FREEZE IS NOT IN THE BEST INTERESTS OF THE INVESTORS AND SHOULD BE DENIED

The assets held by the Trust were frozen pursuant to the MDO dated Nov. 22, 2010, Dkt. No. 194, at 23; *S.E.C. v. Wojeski et al.,* 752 F.Supp.2d 220, 232-233 (N.D.N.Y. Nov. 22, 2010), and in accordance with the terms of the preliminary injunction entered in this case (Dkt. No. 4). As this court has previously noted: " [t]he preliminary injunction freezing the defendants' assets was entered to insure the availability of those assets to compensate the alleged victims of defendants' conduct in the event the SEC prevails in this action." *S.E.C. v. McGinn Smith,* 10-CV-457 (GLS/DRH), 2012 WL 1142516 (N.D.N.Y. Apr. 4, 2012) at *2. The preliminary injunction, *inter alia*, prohibits the Trust and the Smiths from making "any withdrawal, transfer, pledge encumbrance, assignment, dissipation, concealment or other disposal of any assets, funds or other property..." of the assets subject to the asset freeze pending the final disposition of this action. *See* Dkt. 4 at p. 7, Section II. In other words, it prohibits precisely what the Smiths and

the Trust seek to do here, renounce or dispose of the Smiths' rights to assets subject to the freeze order.

A party seeking to unfreeze assets must show that doing so would be "in the interests of the defrauded investors." *SEC v. Grossman*, 887 F. Supp. 649, 661 (S.D.N.Y. 1995), *aff'd*, 173 F.3d 846 (2d Cir. 1999); *see also SEC v. Forte*, 598 F. Supp. 2d 689, 692 (E.D. Pa. 2009) ("Several courts have held that before they will unfreeze assets, the defendant must 'establish that the modification is in the interest of the defrauded investors.'") (quoting *Grossman*, 887 F. Supp. at 661). A court must weigh "the disadvantages and possible deleterious effect of a freeze . . . against the considerations indicating the need for such relief." *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972). As this court stated in response to the most recent request by the Smiths and their children to modify the asset freeze: "What defendants are asking the Court to again consider is, despite the stated purpose of the asset freeze, whether defendants have demonstrated that release of those assets . . . would be 'in the best interests of the defrauded investors.' (citation omitted) " MDO dated Jan. 8, 2014, Dkt. No. 667, at 8. The Trust's motion should be denied because it is directly contrary to the best interests of the defrauded investors as it will deprive them of assets available to satisfy any judgments against the Smiths in this case.

Pursuant to the Annuity Agreement, the Smiths are jointly entitled to yearly payments of $489,932 commencing on September 26, 2015 and continuing until their death. The Trust and the Smiths claim that they wish to void the Trust's obligation to make these annuity payments to the Smiths "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." Trust Memorandum of Law ("MOL") at 3. *See also* Lynn Smith Declaration, Dkt. 662, at ¶¶ 10-11. Lynn Smith's ostensible reason for seeking

to void the Annuity Agreement, or alternatively renounce her and her husband's right to the annuity payments, at this time is because the Internal Revenue Service increased the individual gift tax exclusion from $1,500,000 in 2004 to $5,250,000 in 2013, such that the alleged sole purpose for the Annuity Agreement, avoidance of gift taxes, no longer applies. *Id.*

However, if one takes Lynn Smith at her word, and her sole motivation is to free these assets for her children, there is no need for the Smiths to renounce their rights under the Annuity Agreement at this time, or for the Court to decide this motion at this time, given that no assets will thereby be unfrozen for the benefit of the Smith children until after the case is resolved.[2] Similarly, if this is the Smiths only motive, there is no reason to decide this issue at this time given that the Smiths' ostensible "renunciation" will be rendered moot if the Trust assets are held to be assets of David Smith and subject to any judgments imposed against him, either in this case based on the collateral estoppel effect of his criminal conviction, or in the related criminal case. Alternatively, if the SEC prevails on its fraudulent conveyance claims against the Smiths, the sale of the Capital One bank stock to the Trust will be voided and set aside, thus stripping the Trust of any assets to make annuity payments, and thereby also rendering the instant motion moot. *See*, SAC, Dkt. No. 334, at p. 48-49 (Eight Claim for Relief).

Unfortunately, however, Lynn Smith once again misleads this Court as to both the original motivation for the Smiths' creation of the Trust and Annuity Agreement and their motivations for now seeking to renounce their entitlement to annuity payments. First, her claim that avoidance of gift taxes was the sole motive for the creation of the Trust and the Annuity Agreement is contradicted by the indisputable evidence that the Capital One bank stock used to

[2] Although it is also possible that the Trust and the Smiths have in mind a two-step plan to move to lift the asset freeze as to the Trust if the Court were to grant the instant motion, arguing that David Smith then no longer has an interest in the Trust assets.

fund the Trust and the Annuity Agreement was about to be converted to cash by the bank, subjecting the Smiths to enormous capital gains taxes. SAC at ¶¶ 127-129, Dkt. 334. It is also directly contradicted by the Smiths own Recital in the Annuity Agreement that: "The Transferors are the owners of 100,000 shares of stock (the "Property') of Capital 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…" Exhibit B to Lynn Smith Affidavit dated January 3, 2014, Dkt. No. 662-2 at 3, Recital A. Thus, by their own admissions, the Smiths entered into the Trust and the Annuity Agreement for the stated purpose of receiving the benefits of the proceeds of the Capital One stock without the "burden and risk" associated with holding it directly, not as Lynn Smith now claims, to make a free and clear gift of a sizeable portion of their retirement funds to their children.[3]

Similarly, Lynn Smith's claim that the Smiths' sole motivation for renouncing their right to the annuity payments at this time is to make these assets available solely for her children defies common sense. Lynn Smith and her husband have repeatedly urged this Court to lift the asset freeze because of the severe financial hardships they allege to be suffering under. Most recently, on October 18, 2013, Lynn Smith filed a Motion to Modify the Asset Freeze to Provide Living Expenses, Release Certain Accounts in the Names of Geoffrey and Lauren Smith and to Provide Counsel Fees. Dkt. Nos. 610, 636, 638 and 639. In her affidavit in support of her motion, Lynn Smith stated that she had monthly income of $965 (Dkt. 610-1 at ¶ 7,17); and a

[3] Lynn Smith's benign characterization of the reason why the Trust and Annuity Agreement were created is also contrary to the allegations in the Second Amended Complaint that she and her husband created the Trust and Annuity Agreement as one of a series of fraudulent conveyances by the Smiths to shield those assets from their current and future creditors, including investors defrauded by McGinn Smith through offerings that were already underwater. *See, e.g.* SAC, Dkt. No. 334 , at ¶¶ *124-138; 203-211.*

monthly negative cash flow of $4,144 (*id.* at ¶ 17); that she owed $17,000 in credit card debt (*id.* at ¶ 8); that she had been unable to pay her mortgage in over two years and was worried that her home would soon be taken away from her (*id.);* that she owed $900,000 under the sanctions order (*id.* at ¶ 9) (actually almost $1 million, see MDO dated July 20, 2011, Dkt. No. 342, at 50); that she owes the law firm of Featherstonhaugh Wiley & Clyne $441,573 (*id.* at ¶ 30) and that her husband owes approximately $40,000 in restitution to the New York State Department of Labor for reimbursement of unemployment expenses (id. at 18). She stated that: Meeting simple daily living expenses has become so difficult that … I applied for food stamps. (*id.* at ¶ 5).

In addition, David Smith has been ordered to pay restitution, jointly and severally with his co-defendant, in the amount of $5,748,722 to the McGinn Smith investors and pay $241,014 to the Internal Revenue Service in connection with his sentence in the parallel criminal case. *United States v. McGinn and Smith*, 12-CR-28 (DNH), Dkt. Nos. 108; 232. *See also,* David Smith's Motion to Modify the Asset Freeze to Permit the Release of Funds to Pay Criminal Trial Transcript Costs (Dkt. No. 620) and his Declaration therein stating, *inter alia*, that he had no source of income or unrestrained assets to pay the $14,000 cost for obtaining the transcript of his criminal trial. Dkt. No. 620-2 at ¶ 5.

Thus, Lynn Smith's representation that the Smiths, in the face of these enormous documented debts and claimed substantial financial hardships, would now truly renounce their rights to yearly income of $489,932 begs credulity.

Although Lynn Smith fails to acknowledge this in her affidavit, the Trust's Memorandum of Law implicitly reveals the Smiths' true motivation for this motion, the hope that by ostensibly renouncing their claim to the annuity payments, they will be able to retroactively and

prospectively relieve themselves of title to these assets before any judgments attach, thereby shielding these assets from their creditors. Such a result is clearly not in the best interests of investors and is expressly prohibited by the asset freeze in this case.

As this Court has noted on numerous occasions, the total claims against the McGinn Smith Estate amount to at least $100 million and dwarfs the "cash on hand value of $14 million, with just under $3.4 million coming from frozen assets of the relief defendants." MDO dated Sept. 11, 2013, Dkt. No. 592 at 16 . This Court has also stated: "The investors, on whose behalf the assets were frozen, thus possess a heightened interest in having those assets maintained without further diminution pending the outcome of this action." MDO dated Feb. 11, 2011, Dkt. 277, at 4-5.

For all of these reasons, the Smiths' attempt to renounce their right to annuity payments should be denied. It is not in the best interest of investors or otherwise warranted.

POINT III

NEW YORK TRUST AND ESTATES LAW DOES NOT TRUMP A FEDERAL INJUNCTION AND, IN ANY EVENT, IS NOT RELEVANT TO THE INSTANT MOTION

The Trust contends that it is entitled to amend the Trust, pursuant to New York EPTL § 7-1.9, and that the Smiths have an absolute right to renounce their rights to annuity payments, pursuant to EPTL § 2-1.11(c), notwithstanding the injunction freezing these assets and even if that has an adverse effect on their creditors. Trust Memorandum of Law at 6-10. However, the Trust fails to cite even one case holding that whatever rights they may otherwise have under New York law supersedes the injunction in effect in this case under federal law. This Court has rejected two analogous motions by the Trust arguing that the Trust's rights and powers under New York law trump the federal injunction here. *See* MDO dated Sept. 11, 2013, Dkt. No. 592, at 8 (denying Trust's argument that, under New York's EPTL laws, only the Trustee had the

authority to sell the Great Sacandaga Lake property)("Any additional citation to state law is again unpersuasive as the Trust has still failed to cite any 'authority for its proposition that state law supersedes the federal law which authorized the preliminary injunction,'" citing *S.E.C. v. McGinn Smith,* 10-CV-457, 2012 WL 1142516, at *8 (N.D.N.Y. Apr. 4, 2012) where this Court rejected the Trust's argument that, under New York EPTL, the Trustee was entitled to use frozen assets to pay certain expenses on behalf of the Trust).

Similarly, federal courts have also held that any rights a trust or estate beneficiary may have under New York law do not trump federal interests, as even the following cases cited by the Trust hold. *See, e.g., United States v. Comparato,* 22 F.3d 455, 458 (2d Cir. 1994)("We hold that, once state law provided [the appellees] with a vested interest in the proceeds of the malpractice action [brought by their deceased son's estate], federal law controlled whether their interests were exempt from levy by the United States," (citing *United States v. Rodgers,* 461 U.S. 677, 683 (1983))…. We reject appellant's contention that the retroactive ownership provisions in § 2-1.11 may defeat federal tax liens that attached prior to the attempted renunciations"); *Application of Adler,* 869 F.Supp. 1021, 1027-1028 (E.D.N.Y. 1994)(federal tax lien attached to wife's interest in wrongful death proceeds notwithstanding renunciation under § 2-1.11). *See also, Rodriguez v. Escambron Dev. Corp.,* 740 F.2d 92, 98 (1st Cir. 1984)(the legal fiction of retroactive ownership recognized in the adverse possession statute could not be invoked to defeat federal tax liens).

Accordingly, absent any authority that New York law supersedes federal law, the Trust's reliance upon New York EPTL is unavailing and its motion should be summarily denied.

Moreover, the Trust fails to cite any cases where a party seeks, pursuant to § 2-1.11, to renounce their right to monies they have contracted for, as opposed to monies bestowed upon

them through a trust or estate. § 2-1.11(c)(1) provides, in relevant part, that: "Any beneficiary of a disposition may renounce all or part of such beneficiary's interest ...." However, § 2-1.11(b)(1) provides that: "the term 'disposition' shall include a disposition created under a will or trust agreement including, without limitation, [various transfers], or any other disposition or transfer created by any testamentary or nontestamentary instrument, or by operation of law ..." While one of the referenced transfers is a "transfer created by a life insurance policy or annuity contract," it is not clear that that extends to annuity contracts created by the person who seeks to renounce their benefits, as opposed to annuity contracts created by others and gifted as part of a trust or estate to the person seeking to renounce.

Indeed, the public policy underlying § 2-1.11 suggests otherwise. That policy was discussed in another case cited by the Trust, *Matter of Scrivani's Estate,* 116 Misc.2d 204, 208, 455 N.Y.S. 2d 505, 509 (1982), where the Court noted that: "The law forces no one to accept a gift. To hold otherwise may impose an unintended hardship on the recipient intended to be benefitted, as by triggering unanticipated and unnecessary additional tax liability. Moreover, it may frustrate the intent of the deceased, who sought to benefit the distributee and not a private or public creditor. *See,* Rohan, Practice Commentary to EPTL Sec. 2-1.11 (McKinney ed. 1981) at 260; Third Report N.Y.S. Temporary Comm. On Estates, NYS Legis. Documents, 1964 no. 19 at 257-58). Obviously, these policy considerations underlying § 2-1.11 have no relevance to individuals such as the Smiths who are not seeking to renounce unanticipated gifts or inheritances, but rather "renounce" contract rights they created and knowingly entered into for their own benefit.

The Trust fails to cite any case where a party who contracted to receive annuity payments was permitted to rely upon § 2-1.11 to renounce their rights to such payments and shield them

from their creditors. Such a policy would not be consistent with the intent behind § 2-1.11 or public policy generally. Indeed, New York EPTL § 7-3.1(a) provides that: "A disposition in trust for use of the creator is void as against the existing or subsequent creditors of the creator." *See also* Turano, *Practice Commentaries to EPTL § 7-3.1* (McKinney ed. 2014): "This section reenacts a principal that derives from earliest statutes (1787) and cases (citation omitted) that a person may not avoid his present or future creditors by placing his property in trust for his own benefit; his interest in the trust are immediately and always available to his creditors, even if he needs it for his own support. *Dillon v. Spilo,* 250 A.D. 543, 294 N.Y.S. 876 (1st Dep't 1937), *affirmed,* 275 N.Y. 275, 9 N.E. 2d 864 (1937)."

Moreover, even if §2-1.11 otherwise applies, § 2-1.11(g) provides that: "A renunciation may not be made under this section with respect to any property which a renouncing person has accepted .... For purposes of this paragraph, a person accepts an interest in property if such person .... exercises control as beneficial owner over all or part thereof .. or otherwise indicates acceptance of all or part of such interest." Here, where this Court has already found that the SEC has demonstrated a substantial likelihood of success that it will prove that David Smith possessed a "substantial interest" in the Trust and "maintained control of the investment of the Trust assets after the Trust was created," (MDO dated Nov. 22, 2010, Dkt. No. 194 at 22), the Smiths are barred by § 2-1.11(g) from now trying to renounce that interest. *See also, e.g.,* MDO dated Sept. 11, 2013, Dkt. No. 592, at 7("Thus, the Trust's claims that the Smiths did not have any control or ownership interest in the Trust is disingenuous at best.")[4]

[4] Moreover, under §2-1.11(c)(2), a party must renounce their rights within nine months of the effective date of the disposition. Pursuant to § 2-1.11(b)(2), for dispositions created by trust agreement, the effective date is the date as of which the transfer in trust is irrevocable. For the disposition created by any other testamentary or nontestamentary instrument, [other than by will or trust agreement], the effective date is the date of the event when the beneficiary is finally

Furthermore, even assuming the Smiths are otherwise entitled to renounce their rights to the annuity agreement, the right to do so to frustrate creditors is not, as the Trust claims, absolute. Indeed, as even the cases cited by the Trust make clear, there are numerous public policy reasons why a beneficiary cannot renounce his rights. For example, in *Matter of Molloy v. Bane,* 212 A.D2d 171, 631 N.Y.S.2d 910 (2d Dept. 1995), the Court upheld the termination of petitioner's Medicaid benefits due to her renunciation of her interest in her daughter's estate which would have potentially made assets available to her. The Court stated; "Indeed, while the petitioner argues that EPTL 2-1.11 confers upon beneficiaries an *absolute* right to renounce a disposition, the petitioner's characterization of this right is far too broad." *Id.* 214 A.D.2d at 175. While noting that the "policy underlying statutes recognizing that a right to renounce 'are based upon the concept that no one should be forced to accept an inheritance or a gift ...'" 214 A.D.2d at 174 (citations omitted), the Court stated that this policy has to be "balanced against" the "equally recognized policy that public aid is not without limits, and one who receives public aid may not with impunity hide assets that might otherwise be used to pay for their care." *Id.* Indeed, while recognizing that there were lower court cases which implicitly supported a contrary result, referring among others to *In the Matter of Schiffman* 105 Misc.2d 1025, 430 N.Y.S.2d 229 (1980)(involving an administrator's right to renounce decedent's intestate share of predeceased son's estate) relied upon by the Trust here, the Court held that any such rulings inconsistent with the present case were "hereby overruled." 214 A.D.2d at 176.

The other cases cited by the Trust are equally unavailing both because state law does not trump federal law and because they deal with inheritances or gifts, not the right of a party to a

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ascertained. Here, regardless of which provision applies, the Smiths created the Irrevocable Trust and entered into the Annuity Agreement on August 31, 2004, Accordingly, even assuming § 2-1.11 otherwise applies, the Smiths cannot renounce the rights thereunder almost fourteen years later.

contract to renounce that right. *See, e.g., Estate of Vizzi, 120* Misc.2d 161, 465 N.Y.S.2d (1994)(also pre *Molloy*; court held that a hearing was required to determine whether two estate beneficiaries, who had received Medicaid services, had the requisite mental capacity to execute renunciations); *Estate of Oot, 95* Misc.2d 702, 408 N.Y.S.2d 303 (Sur. 1978) (pre-*Molloy,* (denied application to revoke renunciation of a legacy); *Matter of Scrivani's Estate,* 116 Misc.2d 204, 210-211, 455 N.Y.S. 2d 505,510-511 (1982)(conservator denied leave to renounce inheritance on behalf of ward which might adversely affect ward's entitlement to Medicaid benefits); *Cassata v. Cassata,* 148 A.D.2d 944, 538 N.Y.S.2d 960 (4th Dept. 1989), *appeal dismissed,* 74 N.Y.2d 892, 547 N.Y.S.2d 849(held only that a plaintiff's failure to affirm his acceptance of a trust in writing did not constitute a renunciation of the trust benefits); *Matter of Heffner*, 132 Misc.2d 361, 503 N.Y.S.2d 669 (1986)(held only that petitioners could make an anticipatory renunciation of potential future right to testamentary power of appointment). [5]

CONCLUSION

For all the foregoing reasons, the Trust's motion should be denied in its entirety.

Dated: New York, NY
January 24, 2014

Respectfully submitted,

Securities and Exchange Commission

By **s/ Kevin P. McGrath**
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[5] The cases cited by the Trust regarding its right to amend the Trust under EPLT § 7-1.9(a) (MOL at 6-7) are all also inapposite both because none deal with an attempt to amend a trust to defeat a federal injunction freezing trust assets and because, as noted above, the Trustee is barred by the injunction in this case from taking any action with respect to the trust, including attempting to assist the Smiths in dissipating assets held by the Trust but belonging to the Smiths.

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