

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 IN SUPPORT OF THE APPLICATION
OF THE DAVID L. AND LYNN A. SMITH IRREVOCABLE TRUST
U/A 8/04/04 TO AMEND THE TRUST**

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PRELIMINARY STATEMENT

The Declaration of Trust dated August 4, 2004 sets forth the frame work to create a Trust for the children of the Trust Creators. The Private Annuity Contract was the document that provided the funding of the Trust. The Trust was, therefore, created by the joint and collective provisions of the Declaration of Trust and the Private Annuity Contract and are, therefore, the "Trust Documents".

Pursuant to the "Trust Documents", the Trust was a Qualified "Private Annuity Trust" as that term was defined by the Internal Revenue Code in existence at the time of the Trust Creation in August of 2004.

The Trust Creators and all persons with a beneficial interest now wish to amend the Trust pursuant to EPTL 7-1.9. The Creators and beneficiaries wish to amend the "Trust Documents", including the Declaration of Trust and the Private Annuity Contract to terminate the private annuity provisions set forth in the Trust.

Pursuant to 7-1.9, the Creators and all persons with a beneficial interest consent to this amendment.

ARGUMENT

POINT I

The Creators of the Trust, not the Trustee, has the authority under 7-1.9 to amend a Trust. All persons with a beneficial interest in the trust are required to consent. The Creators' right and ability to amend the Trust is governed by the New York State Estates, Powers and Trusts Law.

The right to amend the Trust can only be restricted by Federal Law intervention following the attachment of an actual lien or judgment upon the Trust or its proceeds. In each of the cases cited by the Plaintiff for authority that federal rights supersede the absolute right of the Grantors to amend the Trust under New York EPTL, there was already a federal tax lien imposed upon the party or the proceeds. *United States v. Comparato*, 22 F 3rd 455 (2nd Cir. 1994); *United States v. Rogers*, 461 U.S. 677 (1983) and *Application of Adler*, 869 F. Supp. 1021(E.D.N.Y. 1994). In each of the cases cited, a federal tax lien had been established, filed and served prior to the parties attempting to exercise their rights under New York State Estates, Powers and Trusts Law. The filing and serving of the tax lien afforded the Court federal jurisdiction over the property and gave federal liens priority over state's statutory rights relative to that property. This is not analogous to the instant action.

In the instant case, there is merely a provisional remedy in place in the form of an injunction and asset freeze. The Plaintiff has cited no authority which establishes that a litigant cannot exercise his state's rights under New York State Estates, Powers and Trusts Law regarding property that is subject to a provisional remedy. The SEC has not cited such authority because there is no such authority.

Plaintiff also argues that the current provisional remedy prevents the Trustee from amending the Trust due to the language of the current Order preventing the Trustee from doing

anything to impair or transfer trust assets. EPTL 7-1.9 does not require the Trustee to participate in any way in the Amendment process. The right to amend is a right of the Trust Creators and can be exercised by the Creators with the consent of the Beneficiaries', with or without the Trustee's approval or participation.

The Plaintiff further misinterprets public policy regarding this issue. In citing EPTL 7-3.1(a) and the practice commentaries that follow, the plaintiff is arguing facts and law that are totally inapplicable to the instant matter. The provisions cited by plaintiff regarding EPTL 7-3.1 pertain to trusts in which the Creator is the sole beneficiary or the so called Illusory Trust. Clearly, that is not applicable in this action.

The public policy argument in this matter is strongly in favor of the Grantor's right to amend the Trust as proposed. Movant's original Memorandum of Law addresses this issue. In addition, the Court is respectfully referred to the legislative history of EPTL Section 7-1.9 and its application by the Courts.

"The legislative history of New York Estates, Powers & Trusts Law § 7-1.9 demonstrates that the statute was intended to enhance, not restrict, the modifiability of trusts. See generally Recommendation of the Law Revision Commission to the Legislature Relating to the Revocation of Inter Vivos Trusts, Report of the Law Revision Commission for 1951, at 83... There is no indication in the legislative history, nor have the courts held, that in seeking to expand the flexibility of trusts, the legislature intended to limit, abrogate or circumscribe the well-established equitable power of courts charged with enforcing trusts. Cf. *In re Dodge's Trust*, 25 N.Y.2d 273, 281, 303 N.Y.S.2d 847, 854, 250 N.E.2d 849, 854 (1969). Rather, the statute must be viewed as supplementing the courts' broad-based equitable authority to permit deviation to effectuate a trust's purpose."

(*In re Joint E. & S. Districts Asbestos Litig.*, 878 F. Supp. 473, 531 (E.D.N.Y. 1995) *aff'd* in part, *vacated* in part *sub nom.* *In re Joint E. & S. Dist. Asbestos Litig.*, 78 F.3d 764 (2d Cir. 1996) and *aff'd sub nom.* *In re Joint E. & S. Dist. Asbestos Litig.*, 100 F.3d 944 (2d Cir. 1996) and *aff'd sub nom.* *In re Joint E. & S. Dist. Asbestos Litig.*, 100 F.3d 945 (2d Cir. 1996)).

In the instant matter, no lien has been established or served, no judgment has been adjudicated or filed and no federal process has attached to the property of this Trust. Absent such a federal attachment, state authority to amend the Trust controls. The Grantors or Creators of the Trust have the absolute power to amend the "Trust Documents" and this Court lacks authority to restrict that right.

Plaintiff's reliance upon case law involving Medicaid eligibility and ERISA benefits are inapplicable as those cases involve specific provisions of statutes which are not involved in the instant action.

The SEC continues to rely on "the best interest of the investors". The issue of the "best interest of the investors" is not the threshold question in the instant application. The instant application deals with the very narrow and unique issue of the Creator's rights under New York State EPTL to amend a "Trust Document" and whether or not that right can be abridged by the mere pendency of a potential claim. A review of the very cases cited by the Plaintiff and referenced above, clearly indicates that the parties in the cited cases had an absolute right to exercise their EPTL right under state law, but failed to do so in a timely fashion and forfeited that right once a federal tax lien had attached or was levied and served. The Trust Creators in the instant application have not waived their rights as no lien or judgment has been taken or filed.

Movant in this matter respectfully submits to the Court that the right of the Creators of the Trust to amend and the rights of the Beneficiaries to consent has not, and may not, be abridged in this matter.

CONCLUSION

The application of the Trust to permit the Creators to amend the Trust, pursuant to EPTL Section 7-1.9 should be granted.

Dated: Albany, New York

Respectfully submitted,

January 31, 2014

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