

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

McGINN, SMITH & CO., et. al.,

Defendants.

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10 Civ. 457 (GLS/DRH)

Expert Opinion of David L. Evans regarding  
the Trust and New York State laws.

September 2, 2010

David L. Evans  
Martin, Shudt, Wallace, DiLorenzo &  
Johnson  
279 River Street  
P.O. Box 1530  
Troy, New York 12181

**David L. Evans**

1. I have been retained by The Dunn Law Firm, PLLC, counsel for the David L. Smith & Lynn A. Smith Irrevocable Trust u/a dated August 4, 2004, and the law firm of Featherstonhaugh, Wiley & Clyne, LLP, counsel for Lynn A. Smith, to provide expert analysis and opinions concerning the property rights created by the Trust instrument, property rights held by the beneficiaries of the Trust, the duties and responsibility of the Trustee and the impact and consequences of certain investment activities undertaken by the Trustee.

**Qualifications**

2. I am of counsel to the law firm of Martin, Shudt, Wallace, DiLorenzo & Johnson, a firm offering a variety of corporate, individual and trust/estate legal services.
3. I am an attorney admitted to practice law in the courts of New York State and the United States Federal Tax Court. I have 31 years of experience in tax, trust and estate law, and contract law in the state of New York. I am a Certified Public Accountant. I have substantial experience with tax and financial accounting issues. A copy of my curriculum vitae is attached as Exhibit A.
4. The law firm of Martin, Shudt, Wallace, DiLorenzo and Johnson is being compensated at an hourly rate of \$385 per hour for my substantive work in this matter. For deposition and testimony at trial the firm will be compensated at an hourly rate of \$485 per hour for my time.
5. My analysis, conclusions and opinions contained herein are based on my experience and knowledge, and on the documents and other relevant information made available to me by counsel and through publicly available sources. If additional relevant documentation or information is subsequently provided to me, my opinions and conclusions herein provided may be supplemented. The documents that I have reviewed in formulating my opinion include those cited herein and additional documents are listed in Exhibit B.

#### **Declaration of Trust**

6. On August 4, 2004, David L. Smith and Lynn A. Smith entered into and created an inter vivos irrevocable trust known as the David L. Smith & Lynn A. Smith Irrevocable Trust u/a dated August 4, 2004(the "Trust"). A copy of the trust instrument is attached as Exhibit C.
7. The irrevocable trust created a split interest between the Trustee and the beneficiaries. The beneficiaries are Geoffrey Smith and Lauren Smith. The beneficiaries received property rights in the form of first, a discretionary income/principal interest and then, a mandatory remainder interest. Distributions under the income/principal property right are subject to the full discretion of the Trustee. The Trustee is under no obligation to make any distributions during the life of the Trust.
8. Upon the passing of the survivor of David L. Smith and Lynn A. Smith the Trust will terminate. The beneficiaries, Geoffrey Smith and Lauren Smith, or their issue, will then receive their pro-rata share of the then assets of the Trust.
9. The Trust does provide that the Trustee and the Trustee alone, in his discretion, may terminate the Trust at any time. If the Trust is terminated, the then retained income and principal are paid to the beneficiaries in recognition of their, individual, and independent property rights.

#### **Trust Assets**

10. The Trustee is charged with the duties and responsibility to administer the independent assets of the Trust. Contained within the powers of the Trustee is the power to buy, sell and otherwise invest the funds and assets of the Trust.
11. In exercising its fiduciary duties and responsibilities, the Trustee on August 31, 2004, entered into an Asset Purchase Agreement. Pursuant to this Asset Purchase Agreement, the Trustee acquired 100,000 shares of the common stock of Charter One Financial, Inc. The Trustee purchased these shares. See Asset Purchase Agreement attached as Exhibit D.
12. The consideration provided for the purchase was an annuity payment. Under this annuity payment the Trust is obligated to pay a fixed periodic payment of \$489,932.00 per annum for so long as David L. Smith and Lynn A. Smith survive. These annuity payments are to commence on September 26, 2015.

13. From August 4, 2004, to the present the Trustee has maintained separate books and records and managed the assets of the Trust. The separate, segregated accounts constitute independent assets of the Trust entity. The beneficial ownership of the Trust property is fully vested in the beneficiaries of the Trust, Geoffrey Smith and Lauren Smith or their issue.

#### The Trust

14. Under New York State Law, an irrevocable trust such as the Trust is recognized as a separate and distinct entity. A trustee holds property for the benefit of others designated in the trust instrument. Under New York Law, a trustee holds title to the trust property. No other party holds legal title in the trust property. Others, such as the beneficiaries, are entitled to bring an action to enforce the terms of the trust.<sup>1</sup>
15. A trustee has the fiduciary duty and responsibility to marshal, manage and disburse trust assets for as long as the trust exists. Specifically, the trustee is obligated to administer the trust property in accordance with the intent of the settlers of the trust as evidenced in the instrument creating the trust.<sup>2</sup>
16. Under the Trust instrument, separate property rights and interests are created.. These property rights and interests are vested in the beneficiaries. In the present case, the beneficiaries are Geoffrey Smith and Lauren Smith. Their interest consists of two components. During the ongoing periodic administration of the Trust, the beneficiaries may receive the income and principal distributions subject to the Trustee's unfettered discretion. As specifically provided in the Trust instrument these income/principal distributions are made within the full discretion of the Trustee to provide for the health, education, maintenance and support of the beneficiaries during the term of the Trust. Upon the passing of the survivor of David L. Smith and Lynn A. Smith, the Trust will terminate and the beneficiaries will have the right to receive all of the then remaining property in the Trust.
17. The Trust provides for its continuation for a finite period of time. The finite period of time is measured by the death of the survivor of David L. Smith and Lynn A. Smith. The

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<sup>1</sup> See New York State EPTL § 7-2.1(a); Duvall v English Evangelical Lutheran Church, 53 NY 500, 503 (1873); Buechel v Bain, 275 AD2d 65, 72, 713 NYS2d 332, 338 [2000] aff'd 97 NY2d 295, 766 NE2d 914; 740 N.Y.S.2d 252 (2001)

<sup>2</sup> See Colorado & S. Ry. Co. v Blair, 214 NY 497, 511-512 108 NE 840, 842 (1914)

Trustee does have the discretionary ability to terminate the Trust before the end of the measuring lives.

18. The Trustee does have powers, duties and responsibilities. These powers, duties and responsibilities are established by New York State Law and are supplemented by specific provisions provided for in the Trust instrument.<sup>3</sup> In summary fashion, the Trustee is obligated to operate the Trust, separate and distinct from his own affairs and the affairs of anyone else. As provided for by the trust instrument, the Trustee has a fiduciary duty to respond to and provide for the property interests of the individual beneficiaries.<sup>4</sup>
19. Under New York State law, in discharging its fiduciary duty to administer the trust assets, a trustee is subject to the authority of the applicable court. The applicable court in the case of an inter vivos trust is either the Surrogate or the Supreme Court of the County in which the trust property is located.<sup>5</sup> A court to whose jurisdiction a trust is subject may exercise its equitable powers and control over the administration of a trust.<sup>6</sup> Moreover, the trustee is obligated to account for his or her actions in administering an estate or trust and may be compelled to do so in a judicial proceeding.<sup>7</sup>
20. It is true that the lives of David L. Smith and Lynn A. Smith constitute the measuring lives upon which the Trust continues its existence. Upon their passing, the Trust will terminate. This does not create any interest in the Trust for David L. Smith or Lynn A. Smith. Their existence serves merely as a measuring device by which the Trust continues its existence.
21. David L. Smith and Lynn A. Smith have no property rights in the assets of the Trust. This is true for either the income or for the principal of the Trust.

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<sup>3</sup> In the absence of any limitations contained in the trust instrument, the trustee will have the powers delineated in Article 11 of the EPTL, including the power to invest the trust assets under a standard of ordinary prudence and make disbursements for the maintenance of the trust (see EPTL §§ 11-1.1, 2.1-2.2).

<sup>4</sup> The "trustee owes the beneficiar[ies] an undivided duty of loyalty" (Mercury Bay Boating Club v San Diego Yacht Club, 76 NY2d 256, 270, 557 NE2d 87, 95 557 NYS2d 851, 859 [1990]). The duty of loyalty owed by the trustee to the beneficiary is, as Justice Cardozo stated, "something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior" (Meinhard v Salmon, 249 NY 458, 464, 164 NE 545, 546 [1928]).

<sup>5</sup> See SCPA § 1509.

<sup>6</sup> See EPTL § 11-1.1 (c); Matter of Herzog, 301 NY 127, 138, 93 NE2d 336, 341 (1950).

<sup>7</sup> See SCPA Article 22; Matter of Hunter, 4 NY3d 260, 267, 827 NE2d 269, 273 794 NYS2d 286, 290 (2005).

## Annuity

22. The Trust is a separate entity in being. The Trustee is required to invest, manage and account for the Trust property. In the course of exercising the Trustee's discretion and duties, the Trustee is authorized to purchase and sell assets. The annuity contract entered into on August 31, 2004, is a separate, independent transaction. Pursuant to this transaction, the Trustee has purchased an asset which becomes the property of the Trust. The consideration provided for this purchase consists of a fixed annuity payment which becomes a general obligation of the Trust.
23. David L. Smith and Lynn A. Smith are sellers. The benefit of the bargain is that they become annuitant-creditor(s) of the Trust. As annuitant-creditors of the Trust, they have no collateral interest in the assets of the Trust nor do they have the power to manage the Trust or control the Trustee in any manner. What they do have is the promise of fixed future payments.
24. The Trust offers to the annuitant-creditors something they could not have without the Trust. The Trust has the ability to liquidate a substantially appreciated single asset without the proceeds being subjected to an immediate, punishing income tax. This deferral of immediate income taxation provides additional funds/assets that the Trust can manage and eventually honor its annuitant-creditor obligations.
25. The Trust also provides diversification. Prior to the sale, the annuitant-creditors possessed a single stock. The Trust has the ability to create a varied and diversified portfolio minimizing investment risk. While the annuitant-creditors have no collateral interests in the Trust assets, the now diversified portfolio, undiminished by income taxes is available to the Trust to support the Trust's general contract obligations to the annuitant-creditors.
26. To the annuitant-creditors, the private annuity sale presents mortality risks. If both annuitant-creditors should die prior to the IRS determined actuarial tables, they will receive cash less than what the fair market value of the annuity payments were on the sale date. However, if either annuitant-creditor outlives the IRS determined actuarial tables, they will experience a gain. The annuitant-creditors will receive more than what they could have otherwise realized from the sale.
27. What the annuitant-creditors have are contract rights. The Trustee has no higher fiduciary duty owed to the annuitant-creditors. If the annuitant-creditors wanted a

fiduciary like relationship with the Trustee they must have bargained for and specified such in the contract. In this case, they did not do so. The annuitant-creditors relationship with the Trustee is that of contract. New York law imposes on the Trustee the obligation to follow the agreed upon terms of their agreement. Not all relationships rise to the higher standard of a fiduciary. Contract party relations are governed by the law of contracts...the give and take of normal commercial relations. In New York the law does not impose the much greater strictures and responsibility of a fiduciary on contracting parties.<sup>8</sup>

#### **Private Annuity-Tax Plan**

28. A private annuity transaction is a useful tool of income and estate tax planning. For income tax purposes, it is used to spread the income taxable gain generated by the sale of highly appreciated assets over the life expectancy of the sellers. For estate tax purposes a private annuity, by design, has payments that end on the death of the seller/transferees. Because the property belongs to the buyer/Trust from the instant the private annuity is created, the property is no longer, from that moment on, an asset of the sellers. Therefore, at death there is no asset to include in one's prospective taxable estate; the property properly belongs to the buyer/Trust and the annuity ceases.
29. Under tax rules applicable to private annuities entered into in 2004, the Trust received an income tax basis equal to the fair market value of the private annuity.<sup>9</sup> Therefore, when the Trust sells the purchased property, it may offset the sale proceeds with its tax basis. With the private annuity value equal to the purchased asset's fair market value, there would be no taxable income on the sale by the Trust. The Trust assets are then undiminished by income taxes.
30. The income tax on the gain built into the stock is not avoided but is merely deferred. Gain is recognized for income tax purposes by the annuitants ratably as the annuity payments are received. Therefore, the income tax is paid, but it is deferred over the life of the annuitants.<sup>10</sup>

<sup>8</sup> See Northeast General Corporation v. Wellington Advertising, Inc. et al., 82 NY 2d 158 (1993).

<sup>9</sup> See Revenue Ruling 55-119, 1955-1 CB 352 (1955).

<sup>10</sup> See Revenue Ruling 69-74, 1969-1 CB 43 (1969).



### **Power to Terminate**

31. Specific inquiry has been made regarding the impact of the Trustee's power to terminate this Trust. See Trust instrument paragraph First. Under this paragraph First, the Trustee has full discretion as to whether or not to terminate the Trust. If the Trustee exercises his discretion to terminate the Trust, the Trust assets are transferred to the beneficiaries consisting of Geoffrey Smith and Lauren Smith. These transfers to Geoffrey Smith and Lauren Smith are in recognition of their property interest in the Trust assets. All interests, including then existing liabilities, would be transferred to Geoffrey Smith and Lauren Smith. At no time will any interest, pursuant to the exercise of this discretionary power to terminate the Trust, pass to David L. Smith or Lynn A. Smith.
32. In my experience, this is a fairly typical provision of inter vivos, irrevocable trusts. The provision provides a trustee the ability to terminate trusts that are uneconomic to continue. If a trust's assets become negligible, the cost to maintain a separate trust entity becomes untenable. As a matter of convenience, this provision allows the Trustee to end the trust rather than to continue its fiduciary duty subject to the expenses associated with the separate existence of the Trust.

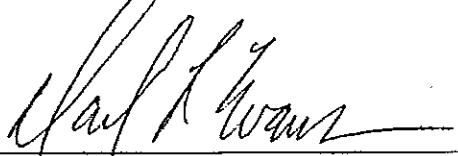
### **Annuity Contract**

33. Inquiry has been made regarding the implications associated with the limitations provided in the Asset Purchase Agreement, paragraph 5. Paragraph 5 expressly provides that the transferors shall not be able to assign, pledge, hypothecate, mortgage or otherwise allow their annuity interest to be subject to attachment, execution, judgment, garnishment, anticipation or other dispensation or impairment. Such anti-alienation clauses merely acknowledge that David L. Smith's and Lynn A. Smith's contractual rights are personal to them. Others cannot perfect an interest in their contract rights. Once the contract rights have been reduced to a payment, this anti-alienation provision no longer applies to such payment. Up until the contract rights have been paid, such a provision permits a trustee to avoid interference in trust operations and the trustee's administration of trust assets by other creditors, assignees, or others who might have an interest in the affairs of David L. Smith and Lynn A. Smith.
34. In my experience and in my opinion, this is not an unusual provision. It facilitates the administration of the purchase contract. The contract obligor (the Trust) is not required to track the property rights or activity of the contract obligee. The obligor Trust can continue without ongoing, operational interference from others. Once the obligor Trust



satisfies its obligation, then, and only then, the payment made becomes the separate property of the annuitants and subject to their own financial affairs.

Respectfully submitted this 2nd day of September 2010.

A handwritten signature in black ink, appearing to read "David L. Evans", written over a horizontal line.

David L. Evans  
Martin, Shudt, Wallace, DiLorenzo & Johnson  
279 River Street  
P.O. Box 1530  
Troy, New York 12181

EXHIBIT A

**DAVID L. EVANS, J.D., CPA**

Martin, Shudt, Wallace, DiLorenzo & Johnson  
The Dauchy Building  
279 River Street  
P.O. Box 1530  
Troy, New York 12181

(518) 469-6339

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**KEY EXPERIENCE** Technical management and administrative experience in providing tax services to businesses and financial institutions, including:

- Mergers and Acquisitions
- Deal Planning/Structure
- IRS Audits
  - Compliance
  - Large Case Audits
  - Representation
- Compensation
  - Qualified and Nonqualified Planning
- Valuation
  - Intangibles and business operations
- State and Local Jurisdiction
  - Nexus Planning
  - Audit Representation
  - Compliance
- Ownership and Management Succession Planning
- Appeals (IRS and States)
  - Representation
  - IRS Appeals Division
  - Various State Commissions/Boards
- Estate/Gift Tax Minimization Planning Administration Estate Litigation

**EDUCATION**

Bachelor of Business Administration,  
Summa Cum Laude, Hofstra University

Juris Doctor, Cum Laude  
State University of New York at Buffalo

**PROFESSIONAL HISTORY**

**MARTIN, SHUDT, WALLACE, DILORENZO & JOHNSON**  
Director of Tax Services

**UHY Advisors NY, Inc.**  
Managing Director

**Admitted To Practice**  
New York State Bar, Tax Court, U.S. Supreme Court

**Certified Public Accountant**

**Series 7 Securities License**

**NYS Tax Commission Hearing Officer**

**EXPERIENCE AND  
PROFESSIONAL  
ACCOMPLISHMENTS**

Experience includes:

**Mergers and Acquisitions:** Structured acquisitions; both taxable and nontaxable. Have done transactions involving acquisition of assets valued in excess of \$100 billion.

**SEC:** Forensic review and defense of corporate financial activities. Developed, prepared, reviewed and defended Tax provisions in SEC periodic filings and registrations.

**IRS – PRIVATE LETTER RULINGS:** Prepared, submitted and defended requests for private letter rulings regarding continuity of interest requirements, types of consideration in reorganizations, charitable status of private foundations and related transactions, employment status of 1000 member vow of poverty community and use of annual exclusion for gifts of family limited partnership units.

**IRS Large Case Audit:** Prepared for and represented before the IRS, institutions subject to the large case audit program. Services included information management, presentation of data and utilization of large case audit special procedures.

**VARIOUS STATES:** Rulings regarding nexus, charitable status, applicable use of investment incentives and sample audit techniques/application.

**Executive Compensation Planning:** Developed tax planning for executive compensation. Planning has included both qualified and nonqualified deferred compensation arrangements. Experience includes employment contracts and buy/sell agreements (negotiation and structure of contracts), deferred compensation including the development of plans to defer the tax on compensation, and qualified plans (profit sharing, 401(k) and nonqualified plans ("Rabbi-Trusts, VEBAs and nonfunded accounts.) Developed nonqualified compensation arrangements with structures of Section 409A, 475, 163(m) and 280G.

**IRS Appeals Representation:**

- Have successfully defended acquisitions, including both tax free reorganizations and taxable acquisitions of entire entities or branches of entities.
- Defended the non-accrual of interest on non-performing loans.
- Defended bad debt reserve computations and recapture subsequent to Tax Reform Act of 1986.
- Successfully defended valuations of businesses and financial assets for income, estate and gift tax purposes.

- Planned for and defended nonqualified deferred compensation plans
  - Preserving tax deferral for employees
  - Minimization of FICA tax application

**Unitary Tax Examinations/Adjudications:**

- Planned for and actively defended unitary determinations in several states. In non-unitary states, have alternatively contested forced combinations and sought combinations, depending upon appropriate circumstances.
- 

**State and Local Issues:**

- Reviewed and developed nexus factors for states.
- Have planned sales/use tax applicable to reorganizations and multi-state transactions.

**Net Fee Income from Financial Products:**

- Developed plans and approach concerning tax affect of adopting FASB 91.

**Mortgage Servicing Rights:**

- Planned tax treatment for either the purchase or sale of residential mortgage servicing rights.
- Developed and defended valuation method for capitalizing mortgage servicing rights and then amortizing them over an assigned life.

**Securitization of Assets**

- Tax structure and affect of monetarization of financial assets.

**Valuations**

- He has performed valuation analysis, financial analysis, forensic accounting and litigation services for a wide range of professional and business interests in many different industries.
- Special interest in valuation of intangibles and valuation of discrete business units.
- Testified in support of valuation opinions rendered.
- Valuations used in mergers, acquisitions, dispositions, estate tax matters, debtor/creditor relations, matrimonial actions, and contractual arrangements among business participants.

### Valuation, Litigation and Consulting Experience

Valuation experience includes numerous appraisal and analytical assignments for businesses and professional practices for the following purposes: estate, gift and income tax, shareholder litigation, marital dissolution, succession and tax planning, employee stock ownership plans, incentive stock option plans, recapitalizations, S-corporation conversions, purchase price allocation, and mergers and acquisitions. Experience includes the evaluation of employee stock options, professional licenses, advanced degrees, royalties and other intangible assets.

Litigation experience includes preparation of: valuation opinions, damage calculations, and other forensic and financial analysis.

Have performed numerous analytical engagements involving financial analysis and forecasting, financial statement analysis, expense verification and forensic accounting. He also has substantial experience with respect to the creation and maintenance of large databases and the analysis of electronic data.

Specific experience includes, but is not limited to, the following industries and sectors:

- Retail
  - ♦ Electronics retailer.
  - ♦ Franchised new and used automobile dealerships.
  - ♦ Distributors of electrical supplies and fixtures.
  - ♦ Retailer of building blocks and related masonry products.
  - ♦ Office supplies and stationery store.
  - ♦ Hardware and home improvement center.
- Wholesale/Distribution
  - ♦ Auto body parts distributor.
  - ♦ Office furniture distributor.
  - ♦ Regional distributor of beer and soft drink products.
- Manufacturing
  - ♦ Manufacturer of solar energy products.
  - ♦ Manufacturer of specialty molded plastics.
  - ♦ Fabricator of precision components for the semiconductor, computer and medical industries.
  - ♦ Manufacturer of industrial fabrics.
  - ♦ Toy manufacturer.
  - ♦ Fiberglass strand manufacturer.
  - ♦ Knitter of men's hosiery and specialty yarns.
  - ♦ Specialty window treatments manufacturer.
  - ♦ Manufacturer of valves for municipal water systems.
- Technology
  - ♦ Cellular telecommunications providers.
  - ♦ Internet service provider.
  - ♦ Manufacturer of mechanical robotic devices.

- ♦ Computer networking designer and installer.
- ♦ Software developer.
- Healthcare
  - ♦ Medical equipment leasing company.
  - ♦ Medical billing service.
  - ♦ Dental practice.
  - ♦ Anesthesiology practice.
  - ♦ Pediatrics practice.
  - ♦ Cardiology practice.
  - ♦ Speech therapy practice.
  - ♦ Chiropractic practice.
  - ♦ Surgery practice.
  - ♦ Nursing home operators.
  - ♦ Nursing home real estate companies.
- Construction/Contracting
  - ♦ Commercial and residential construction contractor.
  - ♦ Ready-mixed concrete producer and building materials retailer.
  - ♦ Commercial facilities contractor.
- Professional Services
  - ♦ Certified public accounting firms.
  - ♦ Law firms.
  - ♦ Engineering and consulting firms.
- Other Valuation Services
  - ♦ Garnet mining operation.
  - ♦ Slate quarrying and fabrication operation.
  - ♦ Bus line service operator.
  - ♦ Partnerships owning HUD Section 8 projects.
  - ♦ Local and long distance trucking firm.
  - ♦ Mortgage broker.
  - ♦ Specialized poultry farming operation.
  - ♦ Locksmith.
  - ♦ Property and casualty insurance agency.
  - ♦ Real estate management and leasing agency
  - ♦ Funeral homes.
  - ♦ Computer leasing services.
  - ♦ Trucking services.
  - ♦ Full service advertising agency.
  - ♦ Provided forensic accounting services to determine extent of employee theft and fraud.
- Holding Companies
  - ♦ Family limited partnerships.
  - ♦ Investment holding companies.
  - ♦ Owners and operators of rental real estate property.
- Royalties & Other Intangibles
  - ♦ Law licenses.
  - ♦ CPA licenses.
  - ♦ Medical licenses.



- ♦ Master's degrees.
- ♦ Engineering licenses.
- ♦ Teaching certificate.

**Trust and Estates**

- Trust Documents
- Estate Documents
- Estate Administration
- Estate Accountings
- Estate Litigation

**PROFESSIONAL  
AND  
COMMUNITY  
ACTIVITIES**

American Institute of Certified Public Accountants

Past Chairman, Tax Division Executive Committee  
of the New York State Society of Certified Public Accountants

New York State Bar Association

- Member, New York State Tax Matters Committee

Estate Planning Council of Eastern New York

- Past President

Former Member, Commissioner's Advisory Group (NYS)

Exhibit B

**Exhibit B**

- A. Declaration of Trust for the David L. & Lynn A. Smith Irrevocable Trust u/a dated August 4, 2004.
- B. Asset Purchase Agreement: Private Annuity contract dated August 31, 2004.
- C. David L. Lynn A. Smith Irrevocable Trust u/a 8/4/ 04 tax returns:
  - 1) 2004 U.S. Income Tax Return for Estates and Trusts Form 1041
  - 2) 2004 NYS Fiduciary Income Tax Return Form IT-205
  - 3) 2005 U.S. Income Tax Return for Estates and Trusts Form 1041
  - 4) 2005 NYS Fiduciary Income Tax Return Form IT-205
  - 5) 2006 U.S. Income Tax Return for Estates and Trusts Form 1041
  - 6) 2006 NYS Fiduciary Income Tax Return Form IT-205
  - 7) 2007 U.S. Income Tax Return for Estates and Trusts Form 1041
  - 8) 2007 NYS Fiduciary Income Tax Return Form IT-205
  - 9) 2008 U.S. Income Tax Return for Estates and Trusts Form 1041
  - 10) 2008 NYS Fiduciary Income Tax Return Form IT-205
- D. SEC Memorandum of Law dated August 3, 2010.
- E. Private Annuity Computation.
- F. Revenue Ruling 69-74, 1969-1 CB 43 (1969).
- G. Revenue Ruling 55-119, 1955-1 CB 352 (1955).
- H. IRC Section 7520.



## DECLARATION OF TRUST

THIS INDENTURE is made the 4<sup>th</sup> 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.

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 names of the Trustee's nominees, 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.

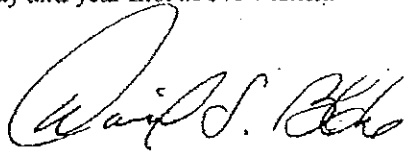
(3) This trust shall be a separate taxpayer for federal income tax purposes. At no time shall this trust be deemed to be owned by the Donors for federal income tax purposes.

(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.

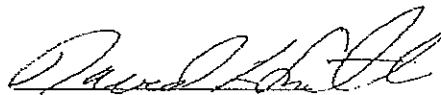
(C) The Trustee may exercise the authority granted to them hereunder for any reason whatsoever, whether to take advantage of any generation-skipping transfer exemption under Chapter 13 of the Internal Revenue Code, to reduce the overall transfer taxes payable upon a distribution or the death of a Beneficiary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

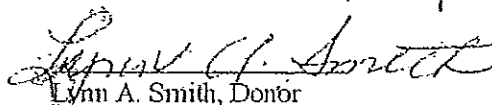
IN WITNESS WHEREOF, the parties hereto have duly executed this instrument under seal  
as of the day and year first above written.



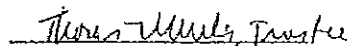
DANIEL S. BLAKE  
NOTARY PUBLIC - STATE OF NY  
QUALIFIED IN ERIE CO.  
MY COMMISSION EXPIRES 9-5-2005



David L. Smith, Donor



Lynn A. Smith, Donor

  
Thomas Urbelis, Trustee

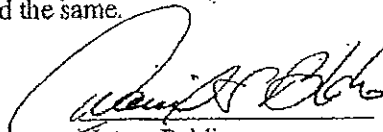
STATE OF NEW YORK )

COUNTY OF ERIE )

SS:

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

On this 4<sup>th</sup> 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 )

COUNTY OF ERIE )

SS:

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

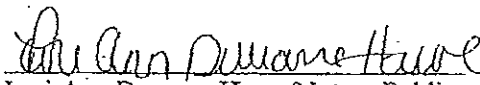
On this 4 day of August, 2004, before me personally came Lynn A. Smith, to me known and known to me to be the individual described in and who executed the foregoing instrument, and she acknowledged to me that she executed the same.

  
Notary Public

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

On this 9<sup>th</sup> 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:



LORI ANN DURRANE HAWE  
Notary Public  
Commonwealth of Massachusetts  
My Commission Expires  
October 10, 2008

Exhibit D



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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%

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### PRIVATE ANNUITY AGREEMENT

This Agreement is made as of this 31<sup>st</sup> 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 26<sup>th</sup> 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 owed 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

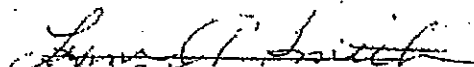
~~Case 1:10-cv-00457-GLS-DRH Document 103-3 Filed 08/03/10 Page 5 of 5~~

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