UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

Case No. 10-CV-457 (GLS/DRH)

-against-

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

Defendants.

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DECLARATION OF BENJAMIN ZELERMYER

I, Benjamin Zelermyer, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am admitted to practice in the State of New York and in this District, *inter alia*. I represent Jill A. Dunn, Esq., in connection with the motion by plaintiff Securities and Exchange Commission for sanctions against Ms. Dunn and others.

2. Attached hereto are true and accurate copies of the following documents:

EXHIBIT NO.	DESCRIPTION	DOCKET NO.
1	Memorandum Decision and Order dated July 7, 2010	86
2	Memorandum Decision and Order dated November 22, 2010	194
3	Memorandum Decision and Order dated January 11, 2011	254
4	Temporary Restraining Order dated April 20, 2010	5
5	List of Accounts	5-2
6	Excerpts from Transcript of Hearing of November 16, 2010	

7	Order Granting Leave to Intervene dated May 28, 2010	39
8	Consents to Jurisdiction	12
9	Trust's Consent to Jurisdiction	59
10	Transcripts of Hearing of June 9, 10 and 11, 2010 (cover pages only)	87, 88, 89
11	Order Denying SEC's Request to Freeze Trust dated July 23, 2010	95
12	Excerpts from Dunn Declaration dated September 3, 2010	134
13	Annuity Agreement dated August 31, 2004	103-3
14	Excerpts from Amended Complaint dated August 2, 2010	100
15	Excerpts from SEC Memorandum of Law dated August 3, 2010	103-1
16	Excerpts from Transcript of Hearing of June 11, 2010	89
17	Order to Show Cause dated August 3, 2010	104
18	Declaration of Service dated January 31, 2011	262
19	Wojeski e-mail to Dunn dated July 21, 2010	188-1
20	Excerpts from Transcript of Urbelis Deposition taken June 1, 2010	46-6
21	Letter to Urbelis from David Smith with Declaration of Trust attached (Urbelis Deposition Exhibit 17)	46-7

22	Excerpts from SEC Reply Memorandum dated September 14, 2010	142
23	SEC letter request for documents dated July 27, 2010	134-2
24	Dunn letter to SEC dated July 29, 2010	134-2
25	Excerpts from SEC First Request for documents dated September 17, 2010	261-5
26	Dunn Declaration dated November 15, 2010	188
27	Wojeski Indemnity Agreement dated July 22, 2010	261-5
28	Urbelis Indemnity Agreement dated November 10, 2008	261-6
29	SEC's Exhibit List dated November 12, 2010	184
30	Excerpts from SEC Opposition to Iseman Application re: Payment of Fees dated January 7, 2011	248
31	Excerpts from Memorandum Decision and Order on Iseman Application re: Payment of Fees dated February 11, 2011	277

I declare under penalty of perjury that the foregoing is true and correct.

Executed: Norwalk, Connecticut
March 21, 2011

s/ Benjamin Zelermyer
BENJAMIN ZELERMYER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

No. 10-CV-457 (GLS/DRH)

McGINN, SMITH & CO., INC.; McGINN, SMITH ADVISORS, LLC; McGINN, SMITH CAPITAL HOLDINGS CORP.; FIRST ADVISORY INCOME NOTES, LLC; FIRST EXCELSIOR INCOME NOTES, LLC; FIRST INDEPENDENT INCOME NOTES, LLC; THIRD ALBANY INCOME NOTES, LLC; TIMOTHY M. McGINN; and DAVID L. SMITH,

Defendants.

LYNN A. SMITH,

Relief Defendant.

DAVID M. WOJESKI, Trustee of David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04.

Intervenor.

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DAVID R. HOMER
U.S. MAGISTRATE JUDGE

MEMORANDUM-DECISION AND ORDER

Presently pending are the motions[1] of (1) plaintiff Securities and Exchange Commission ("SEC") for a preliminary injunction freezing the assets of the defendants and of relief defendant[2] Lynn A. Smith ("Lynn Smith") and granting related relief pending a final disposition of the complaint herein (Dkt. No. 4, 5), and (2) intervenor David M. Wojeski, Trustee of David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 ("Trust") lifting the temporary restraining order ("TRO") freezing the Trust and awarding costs and attorney's

[1]These matters were referred to the undersigned for decision pursuant to 28 U.S.C. § 636(c). Dkt. Nos. 12, 59.

[2]A relief defendant, or nominal defendant, is not accused of wrongdoing but may be joined in an action to facilitate the recovery of relief. Janvey v. Adams, 588 F.3d 831, 834 (5th Cir. 2009) (citing SEC V. Cavanagh, 445 F.3d 105, 109 n.7 (2d Cir. 2006)).

fees (Dkt. No. 31).[3] For the reasons which follow, both motions are granted in part and denied in part.

I. Facts[4]

Defendants Timothy M. McGinn ("McGinn") and David L. Smith ("David Smith") joined to form McGinn, Smith & Co., Inc. ("MS & Co.") in 1981 with a principal place of business at 99 Pine Street, Albany, New York. Through its own employees and through related entities, MS & Co. offered financial services to clients, including investment advice and stock brokerage services as well as investments in securities which it sold. McGinn presently serves as Chairman and Smith as President of MS & Co. Compl. (Dkt. No. 1) at ¶ 16, 17. Lynn Smith is married to David Smith. The Trust was created in 2004 for the benefit of the Smiths' two adult children. The SEC was created, inter alia, to regulate the purchases and sales of securities and acts to enforce compliance with laws and regulations governing such transactions. See 15 U.S.C. § 78a et seq.

A. McGinn, David Smith, and the MS & Co. Entities

The SEC's complaint alleges that from September 2003 to October 2005, MS & Co. and its related entities raised over $120 million from over 900 investors solicited primarily by McGinn and David Smith. Compl. ¶ 1; Mehraban Decl. I (Dkt. No. 4-3) at ¶¶ 2, 3 The

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[3]The Trust was previously granted leave to intervene for this and related purposes. Dkt. No. 39.

[4]The facts found herein are based on the sworn statements submitted by the parties, the exhibits attached thereto, the testimony of the witnesses at the hearing on June 9-11, 2010, and the exhibits received at that hearing.

investments were made in four funds[5] which made over twenty unregistered debt offerings.[6] David Smith managed the funds and their investments while McGinn acted on behalf of MS & Co. and its related entities. Compl. ¶¶ 16, 17. Smith prepared and approved the Private Placement Memorandum (PPM) for each fund, which were essentially identical for all and which were given to investors. Mehraban Decl. I at ¶¶ 3-5. The SEC alleges that in a variety of ways, the defendants misrepresented to investors the true nature of the Four Funds, how the funds would be invested, the diligence with which the defendants had investigated the recipients of the funds' investments, the accreditation of investors, and had failed to register the Four Funds as securities as the law required. Id. at ¶¶ 6-13.

The SEC also alleges that the defendants raised additional capital through trust offerings. Beginning in November 2006, the defendants obtained from investors over $23 million for investment in over eighteen trusts. Mehraban Decl. I at ¶ 14. Potential investors were advised by defendants that the funds were created for specific purposes, such as the purchase of contracts for security alarm services, broadband cable services, telephone services, and luxury cruises. Id. at ¶ 15. Investors were to receive annual returns of 7.75-

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[5]First Advisory Income Notes, LLC; First Excelsior Income Notes, LLC; First Independent Income Notes, LLC; and Third Albany Income Notes, LLC (collectively the "Four Funds").

[6]The debt offerings were described as

> various public and/or private investments, which may include, without limitation, debt securities, collateralized debt obligations, bonds, equity securities, trust preferreds, collateralized stock, convertible stock, bridge loans, leases, mortgages, equipment leases, securitized cash flow instruments, and any other investments that may add value to our portfolio (individually an "Investment" and collectively, the "Investments").

PPMs of Four Funds (Dkt. Nos. 4-6 through 9) at 1.

13% on their investments with the investment principle to be returned at the maturity date 18-60 months from the date of the offering. Id. at ¶ 17. From these trust funds, defendants charged fees under various rubrics totaling over 30% of the total invested in the funds, much of which was not disclosed to investors. Id. at ¶¶ 20-47. Given the high fees, both disclosed and undisclosed, charged to the funds by the defendants, the high rates of return promised investors were not reasonably possible.

In 2008, the defendants began advising investors that interest payments could not be made as promised, promised interest rates would be reduced and maturity dates extended, and defendant would no longer charge fees to the funds. Mehraban Decl. I at ¶¶ 54-56. In 2008, MS & Co. lost over $1.8 million. Id. at ¶ 57. Clients complained to authorities about how their investments were being handled and an investigation of the defendants was undertaken by the Financial Industry Regulatory Authority (FINRA).[7] Maya Decl. (Dkt. No. 4-3) at ¶ 3. As events unfolded in 2009, defendants evidenced increasing desperation to satisfy investors' complaints,[8] meet payroll, and continue their operations. Id. at ¶¶ 58-80.

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[7]FINRA was created by statute in 2007 as the only officially registered national securities association. Nat'l Ass'n of Sec. Dealers, Inc. v. SEC, 431 F.3d 803, 804 (D.C. Cir. 2005). "By virtue of its statutory authority, [FINRA] wears two institutional hats: it serves as a professional association, promoting the interests of its] members ... and it serves as a quasi-governmental agency, with express statutory authority to adjudicate actions against members who are accused of illegal securities practices and to sanction members found to have violated the Exchange Act or [SEC] regulations issued pursuant thereto." Id. (citing 15 U.S.C. § 78o-3(b)(7)). In its self-regulatory role, FINRA requires members to arbitrate disputes with clients, an arbitration may result in an award of damages to a client against a member, and FINRA may investigate the conduct of a member and impose sanctions. See Karsner v. Lothian, 532 F.3d 876, 880 (D.C. Cir. 2008).

[8]Clients began inquiring of their brokers at MS & Co. whether they had become victims of a Ponzi scheme. Mehraban Decl. I at ¶¶ 69, 73; see also United States v. Treadwell, 593 F.3d 990, 993 n.2 (9th Cir. 2010) ("The term Ponzi scheme refers to a

McGinn and David Smith also took certain steps to protect their own assets from the claims of investors, including transferring title to real estate held jointly with their wives into the names of the wives alone. T. 280-81, 301-02, 372.[9] Nevertheless, defendants continued to solicit and raise capital for the Four Funds through 2009 without advising potential investors of, for example, the reduced interest rates, extended maturity dates, and failures to pay earlier investors as represented. Id. at ¶¶ 81-85.

According to the SEC, as of the date of the commencement of this action, the defendants had raised over $120 million in investments in outstanding funds and over $80 million in principle is currently owed to investors. It appears that MS & Co. and its related entities possessed less than $1 million in assets for the benefit of investors as of that date. First Report of the Receiver (Dkt. No. 49) at 5.

B. The Present Motion

On April 20, 2010, the SEC commenced this action by filing a complaint[10] alleging

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fraudulent scheme in which, rather than paying investor returns from investment income, initial investors are paid off with new contributions from additional investors. . . . Although this may appear to be a good deal for participants at the outset, the underlying economics mean that such a scheme must eventually collapse, when the flow of new funds can no longer support payments required on the earlier funds invested. On collapse, the investors lose their remaining investments.") (citation omitted) (describing history of Ponzi schemes).

[9]"T." followed by a number refers to the page of the transcript of the hearing on June 9-11, 2010.

[10]On April 19 and 20, 2010, law enforcement authorities applied for and received eight search warrants in connection with a criminal investigation of the defendants. See In re Search Warrants Issued Apr. 19 &20, 2010, No. 10-M-204 (N.D.N.Y. FILED May 12, 2010) at Dkt. No. 38, p. 1. The search warrants were executed in succeeding days. Id. at pp. 1-2. Criminal charges have not been filed, but the investigation remains ongoing. In

that the conduct described above constitutes past and ongoing violations of § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a); § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); Rule 10b-5 under the 1934 act, 17 C.F.R. § 240.10b-5; and related provisions. Compl. at ¶¶ 7-12. To preserve defendants' assets for the benefit of investors in the event it prevails here, the SEC simultaneously sought and received the TRO appointing a receiver to take possession of defendants' assets and of MS & Co. and its related entities, freezing defendants' assets pending the outcome of this action, freezing the assets of Lynn Smith, ordering verified accountings, and related relief. Dkt. Nos. 4, 5. A receiver was appointed and the assets of the defendants and Lynn Smith were frozen pending a hearing. TRO at 7.

Prior to the commencement of the hearing on June 9, 2010, McGinn and David Smith consented to a preliminary injunction continuing the freeze of their assets. Dkt. No. 61. Through the receiver, the remaining defendants also consented to such an order. T. 40. Without objection, the SEC's motion for a preliminary injunction as to all defendants will be granted. Issues remain, however, as to both Lynn Smith and the Trust.

C. Lynn Smith

Lynn Smith has been married to David Smith for forty-two years. Smith Aff. (Dkt. No. 23) at ¶ 2; T. 271, 357. Lynn Smith's father died shortly after her marriage leaving her, inter alia, a stock account then valued at approximately $60,000 ("Stock Account") and a camp

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re Search Warrants, No. 10-M-204, at Dkt.No. 37.

on Great Sacandaga Lake.[11] Lynn Smith Aff. ¶¶ 13, 14; T. 326, 355-58. These inheritances have always been maintained solely in Lynn Smith's name. Lynn Smith Aff. ¶ 17; T. 355-59. In addition, in 2009, David Smith and Lynn Smith transferred title to a vacation property in Vero Beach, Florida ("Vero Beach home") into the name of Lynn Smith alone. T. 280-81, 372.[12] In 2009, Lynn Smith also opened a checking account solely in her name after the Smiths had maintained only a single joint checking account for the previous forty years. T. 281-83, 374, 403-04. Thereafter, funds from the joint checking account were transferred into her account along with other funds and it was used to pay the Smiths' joint obligations. T. 282-83; 374-75.

The Stock Account was managed for the first few years by the firm retained by Lynn Smith's father. Lynn Smith Aff. at ¶¶ 14, 15; T. 358-59. However, David Smith became a licensed broker in the mid-1970s and assumed management of the account. T. 360. Over the years, the Smiths used proceeds from the account, inter alia, to purchase their jointly owned primary residences, pay the costs of college educations for their two children, purchase two jointly owned vacation homes in Vermont and later in Florida, and create a Trust in both their names. T. 279-81; 328-29; 350-51; 368-72; see also subsection I(D) infra. Notwithstanding these expenditures, however, the value of the Stock Account grew

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[11]Great Sacandaga Lake is located northwest of Albany and north of Amsterdam in the southern part of the Adirondack Mountains.. In their August 2008 financial statement, the Smiths estimated the value of this property at $700,000 with no mortgage. Pl. Ex. 18 at 1. In her testimony here, Lynn Smith estimated its value at $600,000. Lynn Smith Aff. at ¶¶ 13, 14. No evidence has been presented that David Smith ever held an ownership interest in this camp.

[12]In the August 2008 financial statement, the Smiths valued the property at $2.4 million and stated that the amount of the outstanding mortgage was $902,786. Pl. Ex. 18 at 1.

from a low of $10,000 in the 1970s to a high of over $7 million in 2001. T. 326-27; 349; 363-64. As of January 2010, the account's value was approximately $2.1 million. T. 364; see also T. 349-50 (explaining that approximately $2 million remained in the account subsequent to the creation of the Trust).

Although title to the Stock Account always has remained in the name of Lynn Smith alone, David Smith enjoyed unfettered control over the account.[13] For at least the last ten years, David Smith engaged in Stock Account transactions using authorizations signed in blank by Lynn Smith,[14] or with her signature signed by David Smith, and completed by

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[13]Lynn Smith asserts that she always maintained sole control over the Stock Account and that David Smith acted only as her broker on the account. T. 176-77, 363. She testified that she signed blank account authorizations, and approved David Smith signing her name to others, for her own convenience. T. 384-86. She also testified that she knew of and approved all Stock Account transactions and that, while she approved every transaction proposed by David Smith until 2009, she rejected David Smith's request to loan over $300,000 to MS & Co. to help meet the company's obligations. T. 335-39, 386-87. However, Lynn Smith also testified that when she and David Smith transferred assets previously held jointly or solely in David Smith's name into Lynn Smith's name alone, and when she opened a checking account in her name alone for the first time in her marriage, she took these actions to clarify her financial independence from her husband and not to shield their assets from recovery by investors in light of the FINRA proceedings. T. 375-76, 405. Given that the Smiths had maintained a joint checking account for the previous forty years of their marriage, the fact that real property purchased during their marriage had always been maintained jointly in both their names, the timing of these transfers of title to Lynn Smith as the threat of investors recovering from David Smith mounted, the unfailingly self-serving content of Lynn Smith's testimony, the improbability of that testimony in material respects, the absence of credible corroborating evidence, inconsistencies in her testimony, and the Court's observations of Lynn Smith as she testified, the Court finds incredible her testimony regarding the reasons for these transactions as well as verbal communications with David Smith. Her testimony on those subjects is rejected.

[14]Lynn Smith would sign 10-15 forms in blank at a time and provide them to David Smith for his use in completing transactions on the Stock Account. T. 175-84, 341-43, 384-86. David Smith then gave these blank but signed authorizations to a subordinate to be maintained in the subordinate's desk for use as directed by David Smith. T. 175-84, 384-86, 413-14.

David Smith or a subordinate at MS & Co. T. 175-84; 339-41.[15] Besides investments, David Smith used the Stock Account to make numerous short-term loans to MS & Co. related entities, all of which were repaid from MS & Co. related accounts. See, e.g., T. 341 (bridge loan to TDM Benchmark for $100,000 on March 18, 2010), 433-34 (bridge loan to McGinn Smith Funding for $375,000 on November 29, 2007), 437 (bridge loan to TDMM Cable Funding for $366,000 on June 5, 2009); see also Pl. Ex. 72, Ex. 2 (summary of deposits and withdrawals from Stock Account). David Smith also made two loans to McGinn totaling over $900,000 of which over $700,000 remains unpaid. T. 124-25, 278-79. In 2009, David Smith also caused assets held solely in his name totaling approximately $364,000 to be transferred to the Stock Account with no apparent reason other than to shield those assets from investors. T.290-92, 296-301.

As to the Vero Beach home, the Smiths had purchased a vacation home in Vermont with funds from the Stock Account to be used for skiing vacations when their children, both competitive skiers, were younger. T. 369, 371-72. When the children entered college approximately nine years ago, the Smiths sold the Vermont home and purchased the Vero Beach home again using funds from the Stock Account. T. 371-72. The property was used and enjoyed jointly by the Smiths. T. 372. Title to the Vero Beach home was held jointly in the names of David Smith and Lynn Smith until 2009 when the Smiths caused the title to be transferred into Lynn Smith's name alone. T. 372.

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[15]Over $1.7 million in such loans were made by David Smith to both MS & Co. companies and MS & Co. employees. T. 341, 433-39. They ranged in amounts from $100,000 to $900,000. T. 124-25, 278-79, 341, 433-39. While most loans were repaid within days or weeks with interest, it does not appear that each were memorialized in a writing signed by the loan recipient. T. 433-39.

D. The Trust

In the early 1990s, David Smith caused the Stock Account to purchase 40,000 shares of stock at the initial offering of an Albany-area bank for $400,000. T. 349, 365, 390, 508-09. By August 2004, through bank mergers and acquisitions, the number of shares had increased to approximately 100,000 and their value to over $4 million. T. 313, 365-66, 450-52, 486-87, 508-09, 526. With that stock, David and Lynn Smith created the Trust for the benefit of their two children, now ages thirty and twenty-seven. T. 311-12, 388, 391-92, 450-52, 486-87, 505-06, 526. Thomas Urbelus was selected by the Smiths as Trustee of the Trust and remained in that position until his resignation on April 22, 2010. Urbelus Dep. Tr. (Dkt. No. 66-1) at 10-11, 49-51; T. 312-13, 320, 323, 388-89. Urbelus had remained friends with the Smiths since childhood and the families spent significant time together each year. Urbelus Dep. Tr. at 7-10; T. 313, 389, 507, 566. Urbelus was employed as a lawyer in Boston specializing in real estate. Urbelus Dep. Tr. at 5-6; T. 313.

Throughout Urbelus' tenure as Trustee, David Smith functioned as the Trust's investment advisor and broker. Urbelus Dep. Tr. at 12-14; T. 315-18. When David Smith determined that the Trust should buy or sell an asset, he would prepare the appropriate authorizations, forward them to Urbelus for his signature, receive them back, and complete the transaction. Urbelus Dep. Tr. at 21-22. . At Urbelus' request, David Smith also caused the tax returns for the Trust to be prepared by the Smiths' accountant. Urbelus Dep. Tr. at 11-14; T. 393-94, 448. In most years, David Smith would then issue a personal check to pay the taxes owed by the Trust and Urbelus would cause the Trust to issue checks to Smith in reimbursement. T. 135, 137, 145-48, 394-96, 449, 456-60. In several years, however, David Smith was not reimbursed for paying the Trust's taxes in amounts totaling

approximately $100,000. T. 464-66.

From the creation of the Trust until approximately April 14, 2010, the only distributions from the Trust were those to David Smith to reimburse him for paying the Trust's taxes. Urbelus Dep. Tr. at 18, 30-31; T. 135, 137, 145-48, 449, 456-60, 492-98, 553. The only other distribution from the Trust occurred on April 14 or 15, 2010 after David Smith advised his son Jeffrey Smith, that David and Lynn Smith lacked sufficient cash on hand to pay their personal taxes. T. 347, 463, 515-16, 535-36, 540. Jeffrey Smith, the Smiths' son and a beneficiary of the Trust, then directed Urbelus to transfer approximately $95,000 from the Trust to Lynn Smith's checking account, approximately $60,000 of which was used to pay David and Lynn Smith's taxes. Urbelus Dep. Tr. at 16-17; T. 101, 320-21, 397, 416, 463, 513-16; Pl. Ex. 72, Ex. 1. Following Urbelus' resignation as Trustee, David and Lynn Smith selected David Wojeski, an Albany-area Certified Public Accountant, as the new Trustee. T. 548-49.

II. Discussion

A. Legal Standard

1. Preliminary Injunction

Pursuant to § 20(b) of the Securities Act[16] and § 21(d) of the Exchange Act,[17] the

[16] This Section provides that:

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, the Commission may, in its discretion, bring an action in any district court of the United States, or United States court of any Territory, to enjoin such acts or practices, and upon a proper

Securities and Exchange Commission ("SEC") is entitled to seek injunctive relief in the face of alleged statutory violations. 15 U.S.C. §§ 77t(b), 78u(d). "The crafting of a remedy for violations of the [securities acts] lies within the district court's broad equitable discretion." SEC v. Fischbach Corp., 133 F.3d 170, 175 (2d Cir. 1997); see also SEC v. Unifund Sal, 910 F.2d 1028, 1035 (2d Cir. 1990) ("When Congress grants district courts jurisdiction to enjoin those violating or about to violate federal statutes, it is authorizing the exercise of equity practice with a background of several hundred years of history.") (internal quotation marks and citations omitted); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1103 (2d Cir. 1972) (explaining the equitable powers granted to the district court and holding that when there is "a showing of a securities law violation, the court possesses the necessary power to fashion an appropriate remedy.").

In the Second Circuit, injunctions sought by the SEC do not require a "show[ing of] a risk of irreparable harm or the unavailability of remedies at law. Unifund, 910 F.2d at 1036

> showing, a permanent or temporary injunction or restraining order shall be granted without bond.

15 U.S.C. § 77t(b).

[17] This Section provides that:

> Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, [or the rules of exchanges and other registered entities] . . ., it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

15 U.S.C. § 78u(d).

(citations omitted). Thus, "[a] preliminary injunction enjoining violations of the securities law is appropriate if the SEC makes a substantial showing of likelihood of success as to both a current violation and the risk of repetition." SEC v. Cavanagh, 155 F.3d 129, 132 (2d Cir.1998) (citing Unifund, 910 F.2d at 1039-40). However, a less burdensome standard is involved with freezing assets, requiring the SEC to "establish only that it is likely to succeed on the merits, or that an inference can be drawn that the party has violated the federal securities laws." SEC v. Byers, No. 08-CV-7104, 2009 WL 33434, at *3 (S.D.N.Y. Jan. 7, 2009) aff'd — F.3d —, 2010 WL 2366539 (2d Cir. June 15, 2010) (citing Cavanagh, 155 F.3d at 136 ("The standard of review for an injunction freezing assets of a relief defendant is whether the SEC has shown that it is likely to succeed on the merits."), Unifund, 910 F.2d at 1041 (finding an asset freeze appropriate because "[t]here is a basis to infer that the appellants traded on inside information . . . . ")); see also SEC v. Heden, 51 F. Supp. 2d 296, 298 (S.D.N.Y. 1999) ("Unlike a preliminary injunction enjoining a violation of the securities laws, which requires the SEC to make a substantial showing of likelihood of success as to both a current violation and the risk of repetition, an asset freeze requires a lesser showing.") (citations omitted).

Such asset freezes may "apply to non-parties, such as relief defendants allegedly holding the funds of defendants." Heden, 51 F. Supp. 2d at 299 (citations omitted). In these cases, a showing of future statutory violations is not necessary "because [the SEC] is not accusing the [relief] defendant of any wrongdoing." Cavanagh, 155 F.3d at 136 (citing Unifund, 910 F.2d at 1041 ("[T]he freeze order does not place appellants at risk of contempt in all future securities transactions. It simply assures that any funds that may become due can be collected.")); see also Byers, 2009 WL 33434, at *3 (explaining that relief defendants

"have not been accused of wrongdoing, but are merely in possession of assets or property that the SEC claims is ill-gotten and seeks to recover.") (citations omitted).

2. Relief Defendants

"Federal courts may order equitable relief against a person who is not accused of wrongdoing in a securities enforcement action where that person: (1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds." Cavanagh, 155 F.3d at 136. "The burden rests with the Commission to show that the funds in the possession of [the relief defendant] are ill-gotten." FTC v. Bronson Partners, LLC, 674 F. Supp. 2d 373, 392 (D. Conn. 2009) (citations omitted).

"The ill-gotten gains must be linked to the unlawful practices of the liable defendants." Bronson Partners, LLC, 674 F. Supp. 2d at 392. Where "it would be difficult, if not impossible, to trace specific . . . [fraudulently obtained funds], a freeze order need not be limited . . . to funds that can be directly traced to defendant's illegal activity [because] . . . the defendant should not benefit from the fact that he commingled his illegal profits with other assets." Byers, 2009 WL 33434, at *3 (citations omitted); see also SEC v. Aragon Capital Mgmt., LLC, 672 F. Supp. 2d 421, 443 (S.D.N.Y. 2009) (holding that tracing proceeds of illegal funds is unnecessary and, "where tainted funds have been commingled with potentially legitimate funds, the SEC is entitled to obtain disgorgement from the entire pool of funds.").

If disgorgement of "fraudulently obtained profits" becomes necessary, the court is granted the ability "to determine how and to whom the money will be distributed," keeping in mind that "[t]he primary purpose of disgorgement . . . is to deter violations of the securities

laws by depriving violators of their ill-gotten gains." SEC v. Fishbach, 133 F.3d 170, 175 (2d Cir. 1997) (citations omitted). "Although disgorged funds may often go to compensate securities fraud victims for their losses, such compensation is a distinctly secondary goal. Thus the measure of losses need not be tied to the losses suffered by defrauded investors . . . ." Id. at 175-76. Rather, the measure of damages revolves around the defendants' "unjust enrichment . . . [with the] court . . . focus[ed] on the extent to which a defendant has profited from his fraud." SEC v. Universal Exp., Inc., 646 F. Supp. 2d 552, 563 (S.D.N.Y. 2009) (citations omitted) (hereinafter "Universal Exp. II").

The second factor is met when "the SEC is likely to be able to show that [the relief defendant] gave no consideration for the [ill-gotten gains received] . . . . " Cavanagh, 155 F.3d at 137; see also FTC v. Bronson Partners, LLC, 674 F. Supp. 2d 373, 392 (D. Conn. 2009) ("A relief defendant can show a legitimate claim to the funds received by showing that some services were performed in consideration for the monies."); Aragon Capital Mgmt., 672 F. Supp. 2d at 444 (classifying relief defendants as "gratuitous transferees who had no legal claim against the pooled funds . . . ."). For legitimate interests to be established, more than conclusory evidence need be proffered. CRTC v. Kimberlynn Creek Ranch, Inc., 276 F.3d 187, 192 (4th Cir. 2002) ("[A] claimed ownership interest must not only be recognized in law; it must also be valid in fact. Otherwise, individuals and institutions holding funds on behalf of wrongdoers would be able to avoid disgorgement . . . simply by stating a claim of ownership, however specious."); SEC v. Better Life Club of Am., Inc., 995 F. Supp. 167, 182-83 (D.D.C. 1998) (examining assets of relief defendant and concluding that supposed payment for an informal loan given without documentation was subject to disgorgement because "investors received no value on this loan, and it is highly suspect that [the relief

defendant] gave any value to [the defendant]," but mortgage payments for which the relief defendant held cancelled checks and a recorded credit for the down payment of a car likely represented untainted funds which were subject to return to the relief defendant).

Other courts have held that establishment of a debtor-creditor relationship provides sufficient evidence of a legitimate ownership interest. See Janvey v. Adams, 588 F.3d 831, 835 (5th Cir. 2009) (concluding that receipt of "proceeds pursuant to written certificate of deposit agreements . . . well before the underlying SEC enforcement action . . . ." constituted a debtor-creditor relationship which provided a legitimate ownership interest in relief defendants"); SEC v. Founding Partners Capital Mgmt., 639 F. Supp. 2d 1291, 1294 (M.D. Fla. 2009) (finding a legitimate ownership interest where relief defendant "received the loan proceeds pursuant to written loan agreements . . . which g[ave the relief defendant] certain rights and obligations . . . .").

Regardless of the relationship between the relief defendant and the defendant, "it is not appropriate to continue [an] asset freeze with respect to the amount . . . ." initially deposited in the relief defendant's account or that which was used to purchase a legitimate investment which was used in a fraudulent manner. Heden, 51 F. Supp. 2d at 302. "There is no authority for the proposition that the Cavanagh test applies to any assets of a relief defendant other than the profits from an illegal trade." Id. at 302 n.4; see also Cavanagh, 155 F.3d at 137 ("[T]he frozen assets are limited to the proceeds of the stock at issue, and the preliminary injunction has no effect on any assets of [relief defendant's] that are not the product of the alleged securities law violations.").

3. Joint Ownership

Where a defendant and relief defendant jointly own an asset, the central inquiry concerns "the element of control [implicating] . . . the concept of equitable ownership." In re Vebeliunas, 332 F.3d 85, 92 (2d Cir. 2003) (citations omitted).[18] Such ownership is established when "an individual . . . exercises considerable authority over the [asset] . . . acting as though its assets are his alone to manage and distribute . . . ." Id. (internal quotation marks and citations omitted); see also Whiting v. Dow Chemical Co., 523 F.2d 680 (2d Cir. 1975) ("In a traditional sense, in the absence of a statutory definition, a beneficial owner would be a person who does not have the legal title to the securities but who is, nevertheless, the beneficiary of a trust or joint venture . . . .").

In Heden, the court considered whether a continued freeze on relief defendants' accounts was appropriate where relatives of the relief defendants used their accounts to broker transactions which allegedly violated the Securities and Exchange Act. SEC v. Heden, 51 F. Supp. 2d 296 (S.D.N.Y. 1999). The court discussed the actions of two different defendants and relief defendant accounts. The first defendant claimed ownership over, and had a power of attorney for, the relief defendant's account for at least seven years, repeatedly used the relief defendant's principal in the account to facilitate stock purchases, made transactions between his personal accounts and that of the relief defendant, and made such transactions in the face of specific prohibitions from defendant's

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[18] This case also discusses piercing a trust pursuant to the alter ego theory under New York law. Vebeliunas, 332 F.3d at 91. The court held that, in those cases where New York courts allowed a trust to be pierced, there was a showing "that the respective parties used trusts to conceal assets or engaged in fraudulent conveyances to shield funds from adverse judgments." Id.

employer. Id. at 300. The second defendant had full control over the relief defendant's account, though it had only been in existence for a month, but the second defendant had no interest in the account, had not benefitted from the account, and had not used the account as his own. Id. at 301. The court held that:

> If an asset belonging to a relief defendant is, in reality, also an asset of a defendant, then the freeze sought is against the defendant's assets. . . Accordingly, it is inappropriate to apply the two-part Cavanagh test to determine whether a 'relief defendant's' principal should remain frozen. Rather, [the court] need only determine whether the SEC has met its burden of showing that it is likely to succeed on the merits.

Heden, 51 F. Supp. 2d at 299-300. In determining joint ownership, the Heden court considered a defendant's control over the asset, the length of time the asset had been held, whether the defendant had an interest in and benefitted from the asset, whether the defendant had transferred assets from his name into the asset, whether he or she contributed to acquire the asset initially, and whether the defendant ever withdrew any funds from the asset. Id. at 301. Where a defendant treated an asset as his own, the asset should be treated as that of the defendant and the Cavanagh test becomes irrelevant. Id. at 300.

However, the Second Circuit also examined a similar issue with respect to piercing the veil of a trust in which the trustee's husband had been fraudulently using the trust as his own. Vebeliunas, 332 F.3d 85. In that case, the wife created an irrevokable trust, to which she was the sole trustee, and to which her husband was a 20% beneficiary of the distributions from the trust. Id. at 88. The husband nevertheless fraudulently represented to various creditors that he was the full beneficiary and had present access and ownership over the trust's corpus. Id. at 88-89. Criminal and bankruptcy proceedings ensued. Id. at

89. The Second Circuit refused to pierce the trust on behalf of the husband's creditors because even though the husband "exercised control over the trust and its property . . . and paid virtually all of the expenses associated with the . . . trust . . . , spouses routinely administer each other's assets and conduct business on behalf of each other"[19] and such actions did not confer equitable ownership of the trust's corpus upon the husband. Vebelinunas, 332 F.3d at 93. "The mere fact that [the husband] acted as an agent for his wife does not divest her of her equitable ownership . . . ." Verbelinunas, 332 F.3d at 93.

4. Adverse Inferences

On February 1-3 and 12, 2010, David Smith testified under oath in the FINRA proceeding and the transcript of that testimony was offered in evidence here by the SEC. Pl. Exs. 20-23. The SEC sought the testimony of McGinn and David Smith for the hearing on this motion.[20] Both declined to testify on the ground of their Fifth Amendment privilege against self-incrimination, and, in lieu of an appearance at the hearing, both signed declarations stating that they asserted their Fifth Amendment privilege as to all matters

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[19] The Second Circuit also outlined a litany of factors which, it concluded, did not establish equitable ownership by the husband. Vebeliunas, 332 F.3d at 92. The court stated that "none of the [trust] benefits flowed solely to [the husband]. Rather, all of the benefits . . . flowed jointly to him and his wife, which is consistent with [the wife's] equitable ownership of the property." Id. Moreover, the husband's receipt and use of the trust corpus, primarily property and rent proceeds, "did not evidence control over the property, as spouses routinely share certain financial assets, such as streams of income . . . [and] a homeowner would be expected to allow her spouse . . . to live rent-free in her home." Id. Lastly, as New York is not a community property state, actions such as filing joint tax returns regarding the property in question did not indicate that equitable ownership was granted to the husband. Id.

[20] The Trust also sought to call David Smith as its witness. See Trust Mem. of Law (Dkt. No. 80) at 1.

alleged in the complaint and in the pending motion for a preliminary injunction. Pl. Exs. 128, 129. The SEC contends that on this motion, it is entitled to adverse inferences against the defendants as well as against Lynn Smith and the Trust from the invocation of privilege by McGinn and David Smith. SEC Mem. of Law (Dkt. No, 74). Lynn Smith and the Trust oppose the contention. Dkt. Nos. 79, 80.

A party testifying in a civil proceeding retains the right under the Fifth Amendment to refuse to answer questions if the answers might tend to incriminate him or her, but an adverse party may then be entitled to have the trier of fact "'draw a negative inference from the invocation of that right.'" Wechsler v. Hunt Health Sys., Ltd., No. 94-CV- 8294(PKL), 2003 WL 21998980, at *2 (S.D.N.Y. Aug. 22, 2003) (quoting Baxter v. Palmigiano, 425 U.S. 308, 318-20 (1976)); see also Brink's, Inc. v. City of New York, 717 F.2d 700, 710 (2d Cir. 1983). Any inference drawn from the invocation of the privilege must be reasonable under the circumstances. See Brink's, Inc., 717 F.2d at 710. Thus, on these motions, the invocation of the Fifth Amendment privilege by David Smith and McGinn will permit whatever negative inferences are reasonable under the circumstances in favor of the SEC at least as to the defendants. Willingham v. County of Albany, 593 F. Supp. 2d 446, 452 (N.D.N.Y. 2006).

The circumstances presented here, however, include two significant obstacles to the SEC's contention. First, David Smith testified for four days at the FINRA proceedings only two months before the complaint herein was filed. The transcript of David Smith's testimony from that proceeding comprises 1,091 pages. Pl. Exs. 20-23. The FINRA investigation and the allegations in this case substantially overlap and the questions answered by David Smith during his FINRA testimony address matters about which the SEC sought David

Smith's testimony at the hearing in this case. Compare Pl. Ex. 20-23 with Pl. Ex. 128 at ¶ 6(A)-(II).. The purpose underlying the allowance of an adverse inference in civil cases is equitable, not punitive, and serves to vitiate the prejudice to the party denied evidence by invocation of the privilege. See United States v. 4003-05 5th Ave., 55 F.3d 78, 82-83 (2d Cir. 1995). In those instances where David Smith answered a question during the FINRA hearing, the SEC has not been denied David Smith's testimony as to an answered question and no basis exists for an adverse inference there. Thus, the SEC is entitled to adverse inferences only to the extent that the questions to which David Smith asserted the privilege were not otherwise answered during his testimony in the FINRA investigation.

To that limited extent, then, the SEC is entitled to adverse inferences against McGinn and David Smith. They have consented to the relief sought in this motion, however, and the question of what inferences may be drawn against them is largely moot. The second impediment relates to the SEC's contention that adverse inferences should be drawn against Lynn Smith and the Trust and is not moot. In LiButti v. United States, 107 F.3d 110 (2d Cir. 1997), the Second Circuit held that where one party declines to answer questions in a civil case on the basis of the Fifth Amendment privilege against self-incrimination, adverse inferences may be drawn against another associated with the witness depending on the circumstances of the particular case. Id. at 120-21. The court identified "a number of non-exclusive factors" to guide this determination, including the nature of the relevant relationships, the degree of control over the non-testifying witness, the compatibility of the interests between the non-testifying witness and the party, and the role of the non-testifying witness in the litigation. Id. at 123-24. However, "[w]hether these or other circumstances unique to a particular case are considered by the trial court, the overarching concern is

fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth." Id. at 124.

Although LiButti concerned inferences to be drawn from a non-party's invocation of the privilege, its analysis is equally applicable here where the SEC seeks to apply adverse inferences from a party's invocation of the privilege against two purported relief defendants with interests in the outcome of this motion but who are non-parties. See Willingham, 593 F. supp. 2d at 453 (applying adverse inferences to one party but not others under LiButti); John Paul Mitchell Sys. v. Quality King Distrib., Inc., 106 F. Supp. 2d 462, 471 (S.D.N.Y. 2000) (relying on LiButti to support determination to apply adverse inferences against defendants' company on motion for a preliminary injunction).

As to the first LiButti factor, David Smith has been married to Lynn Smith for forty-two years. They closely share marital, familial, financial, and social ties. For purposes of this analysis, this relationship could not be closer. As to the Trust, David Smith was a co-grantor of the Trust, has always advised on and managed its investments, helped select a childhood friend as its first trustee, assumed responsibility for the Trust's tax returns and payments, and paid those taxes without reimbursement on occasion. Therefore, the relationship between David Smith and the Trust was also very close. While David Smith exercised control over Lynn Smith's finances and influence over those of the Trust, it cannot be said that either Lynn Smith or the Trust exercised any degree of control over David Smith.[21] The interests of David Smith and of Lynn Smith and the Trust are, and have

[21]The Stock Account was always held solely in Lynn Smith's name and, therefore, it was within her power to control David Smith's management of the account. There is no credible evidence that Lynn Smith ever did so, however, perhaps due to the account's impressive growth under David Smith's management. In these circumstances, Lynn

always been, identical. Finally, David Smith plays a central role both in this litigation and, more importantly here, in the financial affairs of Lynn Smith and the Trust as a whole.

Balancing these factors, it is clear that neither Lynn Smith nor the Trust controlled David Smith for purposes of this analysis. Nevertheless, given the nature of the relationships, the complete identity of interests, and David Smith's role both in this litigation and as to Lynn Smith and the Trust, the absence of significant control over David Smith is far outweighed by the other factors. Accordingly, any adverse inferences which can be drawn from David Smith's invocation of his privilege should be applied against Lynn Smith and the Trust.

The question then becomes what adverse inferences should be drawn and what evidentiary weight should they carry. The SEC contends that the following three inferences should be drawn:

> First, adverse inferences should be drawn against Smith and McGinn concerning the evidence regarding likelihood of success on the merits.
> Second, adverse inferences should be drawn against David Smith concerning the evidence regarding the David and Lynn Smith Irrevocable Trust, the Stock Account, the Checking Account, and the Vero Beach house; and against Timothy McGinn as to the Niskayuna house.
> Third, adverse inferences should be drawn against Lynn Smith, based on David Smith's assertion of the Fifth Amendment, with regard to all issues concerning the Trust, the Stock Account, the Checking Account, and the Vero Beach house

Pl. Mem. of Law (Dkt. No. 74) at 1. These contentions, however, appear to confuse evidentiary inferences with issue preclusion. An inference permits a finder of fact to conclude that evidence of a particular fact exists which is unfavorable to the party against

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Smith's failure to exercise any control for decades over David Smith's management of the Stock Account manifests the absence of control.

whom the inference is drawn. See Henning v. Union Pacific R. Co., 530 F.3d 1206, 1219-20 (10th Cir. 2008); An adverse inference is permissive, not mandatory, and an adverse inference alone is insufficient to establish entitlement to relief. See JHP & Associates, LLC v. N.L.R.B., 360 F.3d 904, 910 (8th Cir. 2004) (holding that adverse inference rule is permissive); 3M v. Pribyl, 259 F.3d 587, 606 n. 5 (7th Cir. 2001) (explaining that the adverse inference which the jury could permissibly have drawn did not relieve the plaintiff of the burden of proving the elements of its claims); SEC v. Colello, 139 F.3d 674, 677-78 (9th Cir. 1998) (holding that adverse inference alone insufficient to support a motion for summary judgment); Flinzler v. Marriott Intern., 81 F.3d 1148, 1158-59 (1st Cir. 1996) (holding that adverse inferences are permissive, not mandatory); Daniels v. Pipefitters' Ass'n Local Union No. 597, 983 F.2d 800, 802 (7th Cir. 1993) (finding that the adverse inference to be drawn from the invocation of the Fifth Amendment is permissive rather than mandatory).

Although immaterial in light of the consent of David Smith and McGinn to the preliminary injunction, an adverse inference is appropriate against them as to the likelihood of success on the merits on this motion. Lynn Smith has nominally opposed that element of the SEC's motion. However, it pertains solely to the named defendants and requires the SEC to demonstrate that it is more likely than not that it will prevail on the merits of this action as to the defendants. Lynn Smith is named only as a relief defendant and is involved, therefore, only in questions of relief if the SEC prevails on its claims. The Trust does not oppose the SEC's motion as to that element. An adverse inference against David Smith and McGinn on this element is also supported by equitable considerations where such inferences are drawn against parties declining to provide evidence rather than against third parties. For the same reason as well as the existence and strength of evidence

corroborating those inferences also appear reliable.

A different conclusion is compelled as to Lynn Smith and the Trust, however. While adverse inferences against them are permissible under LiButti as discussed supra, other factors lead to the conclusion that they should not be drawn. First, as to Lynn Smith, David Smith's testimony at the FINRA proceeding included answers to certain questions relevant here. For example, David Smith testified that he and his wife had maintained separate finances for twenty years although they always filed joint tax returns. Pl. Ex. 20 at 278-79. David Smith declined to answer other questions about his wife's finances. Id. at 279-92. Serious questions exist about the credibility of David Smith's limited testimony as they do for Lynn Smith's testimony. See note 12 supra. However, as to those questions which are relevant here and which David Smith answered in the FINRA proceeding, the SEC has obtained sworn answers rendering unwarranted adverse inferences as to those matters.

Moreover, not only the SEC but also Lynn Smith and the Trust were deprived of the testimony of David Smith. As noted, the Trust had served a subpoena on David Smith to testify at the hearing on this motion. Trust Mem. at 1. David Smith's invocation of his Fifth Amendment privilege thus denied his testimony to the parties against whom the SEC seeks the adverse inferences, just as the SEC was denied. Therefore, in these circumstances, imposing adverse inferences against Lynn Smith and the Trust would be inequitable and the reliability of any such inferences is substantially undermined.

Finally, on the record of this case, the importance of the adverse inferences is insignificant. The exhibits include voluminous records of the transactions of the defendants, Lynn Smith, and the Trust. The record also includes the testimony of numerous witnesses, live and by deposition and affidavit, during three days of testimony. In these circumstances,

that evidence, particularly the documentary evidence, far outweighs the probative value of any inferences to be drawn from David Smith's invocation of privilege. Therefore, whether adverse inferences are, or are not drawn, as to any matter at issue on this motion would not affect the outcome in any respect.

Accordingly, adverse inferences from the invocation of the Fifth Amendment privilege against self-incrimination by David Smith and McGinn will be drawn against those two defendants but not against Lynn Smith or the Trust.

B. Likelihood of Success

Section 10(b) of the Exchange Act "prohibit[s] fraud, manipulation, or insider trading . . . ." 15 U.S.C. §78j; see also Ganino v. Citizens Utilities Co., 228 F.3d 154, 161 (2d Cir. 2000) ("Section 10(b) of the Exchange Act bars conduct involving manipulation or deception . . . that [is] intended to mislead investors by artificially affecting market activity, and deception being misrepresentation, or nondisclosure intended to deceive.").[22] Also, Section 17(a) of the Securities Act functions in conjunction with Section 10(b) of the Exchange Act to "prohibit fraud in the offer, purchase, and sale of securities." SEC v. Global Telecom Servs., L.L.C., 325 F. Supp. 2d 94, 111 (D. Conn. 2004) (citations omitted). Similarly, Section 15(c) of the Exchange Act "prohibits a broker or dealer from using any manipulative or deceptive device . . . to induce or attempt to induce the purchase or sale of any security."

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[22] Rule 10b-5 prohibits the same conduct in connection with the purchase or sale of securities as does § 10(b) of the Exchange Act. See Cyber Media Group, Inc. v. Island Mortgage Network, Inc., 183 F. Supp. 2d 559, 569 (E.D.N.Y. 2002) (citing IBM Corp. Sec. Litig., 163 F.3d 102, 106 (2d Cir. 1998)) (discussing the test which applies to both provisions).

SEC v. George, 426 F.3d 786, 792 (6th Cir. 2005).

To prove any, or all, of these violations, the SEC must establish that the defendant made material false statements or omissions[23], with scienter[24], in connection with the securities exchange. See Ganino, 228 F.3d at 161(holding that for a Section 10(b) violation the SEC must prove "that the defendant, in connection with the purchase or sale of securities, made a materially false statement or omitted a material fact, with scienter, and that the plaintiff's reliance on the defendant's action caused injury to the plaintiff.") (citations omitted); Global Telecom., 325 F. Supp. 2d at 111(concluding that in order to prevail on a § 17(a) violation the SEC must show that "defendant (1) ma[de] a material misrepresentation or a material omission as to which he had a duty to speak, or used a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities.") (citations omitted); George, 426 F.3d at 792 ("The elements of a § 15(c)(1) violation are the same as those for a violation of [Section 10(b) of the Exchange Act and Rule 10b-5], with a similar scienter requirement that a statement be made with knowledge or reasonable grounds to believe that it is untrue or misleading.") (internal quotations and citations omitted) .

"Section 5 of the Securities Act prohibits issuers, underwriters and dealers from

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[23] A statement or fact "is material if there is a substantial likelihood that a reasonable [investor] would consider it important . . . ." Basic Inc. v. Levinson, 485 U.S. 224, 232 (1988) (internal quotation marks and citations omitted).

[24] Scienter is defined as an "intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976). In the Second Circuit, scienter can be established by reckless conduct. See e.g., Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 44-48 (2d Cir. 1978). Such conduct "is, at the least, conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." Id. at 47.

selling or offering to sell unregistered securities." SEC v. Tecumseh Holdings Corp., No. 03-CV-5490, 2009 WL 4975263, at * 2 (S.D.N.Y. Dec. 22, 2009) (citations omitted). In order to establish a violation of this section the SEC must prove "(1) [t]hat the defendant directly or indirectly sold or offered to sell securities[25]; (2) that no registration statement was in effect for the subject securities; and (3) that interstate means were used in connection with the offer or sale." SEC v. Universal Exp., Inc., 475 F. Supp. 2d 412, 422 (S.D.N.Y. 2007) (hereinafter "Universal Exp. I") (citations omitted). "Liability does not require that the defendant actually passed title of the security. Any person engaged in steps necessary to the distribution of the unregistered security is liable under Section 5." Tecumseh, 2009 WL 4975263, at *3 (citations omitted).

Sections 206(1) and 206(2) of the Advisers Act "prohibits investment advisers from employing any device, scheme, or artifice to defraud any client or prospective client . . . [or] engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." SEC v. Treadway, 430 F. Supp. 2d 293, 338 (S.D.N.Y. 2006) (citing 15 U.S.C. § 80(b)(6)(1) & (2)) (internal quotation marks omitted).

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[25] A Second Circuit test, adopted by the Supreme Court, dictates the method by which the court should "decid[e] whether a transaction involves a 'security.'" Reves v. Ernst & Young, 494 U.S. 56, 66 (1990). Securities are defined first by the motivation of the seller, stating that "[i]f the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a 'security.'" Id. Second, the court evaluates "the plan of distribution." Id. (internal question marks and citations omitted). Third, the court determines "the reasonable expectations of the investing public," naming those instruments securities to which the public attaches such a definition. Id. (citations omitted). Finally, the court is to consider "whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary." Id. at 67 (citations omitted).

"Section 206(1) requires fraudulent intent, while § 206(2) requires only negligence." Id. (citations omitted). By enacting this provision, Congress "establishe[d] a statutory fiduciary duty for investment advisers to act for the benefit of their clients, requiring advisers to exercise the utmost good faith in dealing with clients, to disclose all material facts, and to employ reasonable care to avoid misleading clients." SEC v. Moran, 922 F. Supp. 867, 895-96 (S.D.N.Y. 1996) (citations omitted). Additionally, § 206(4) also prohibits investment advisors from "directly or indirectly . . . engag[ing] in any transaction, practice, or course of business which is fraudulent, deceptive, or manipulative." 15 U.S.C. §80b-6(4).[26]

Finally, § 7(a) of the Investment Company Act prohibits interstate commerce, namely the offering or selling of securities, by unregistered investment companies. 15 U.S.C. § 80a-7.

1. The Defendants

From the unrebutted submissions of the SEC, the SEC has demonstrated a substantial likelihood of success on its claims against McGinn, David Smith, and the other named defendants. See, e.g., Mehraban Decl. I; Pl. Exs. 1-67. Moreover, as discussed supra, adverse inferences are drawn against McGinn, David Smith, and the other

[26] Section 206(4) is applicable to pooled investment vehicles. 17 C.F.R. § 275.206(4)-8. Pooled investment vehicles are "any investment company as defined in section 3(a) of the Investment Company Act . . . ." Id. § 275.206(4)-8(b). An investment company, pursuant to the Investment Act, is one which "is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities." 15 U.S.C. § 80a-3. Liability may be found where an investment adviser makes a false statement of material fact to an investor, realized or prospective, or fails to disclose material facts necessary to make statements made to investors be truthful. 17 C.F.R. § 275.206(4)-8(a).

defendants, which were controlled by McGinn and David Smith, from the invocation of the Fifth Amendment privilege by McGinn and David Smith. Finally, all defendants have consented to the entry of the relief sought by the SEC in this motion. Accordingly, the SEC has satisfied its burden of proof on this element of its motion and the motion is granted as to all defendants.

2. Lynn Smith

The SEC has argued that Lynn Smith is an appropriate relief defendant and thus the asset freeze should continue as to assets held presently in her name alone.. Those assets include the Stock Account, the Vero Beach home, the Great Sacandaga camp, and Lynn Smith's checking account. In the alternative, the SEC also contends that David Smith is a joint owner of the Stock Account, the Vero Beach home, and the checking account so that, even if Lynn Smith is not properly named as a relief defendant, these assets are still a personal asset of his which should remain frozen. Lynn Smith argues that the SEC has failed to establish that she is appropriately named as a relief defendant as these assets do not contain or derive from ill-gotten gains and she has always maintained sole ownership and control of them.

a. Relief Defendant

In this instance, Lynn Smith has likely received ill-gotten gains throughout the multiple deposits into her stock account after 2003 when the fraudulent scheme involving the Four Funds alleged by the SEC commenced. Since 2003, Lynn Smith has been

refunded over $1 million from MS & Co. and its related individuals and entities in loan repayments. These payments include $375,000 in December 2007 (T. 434); $325,000 in June and July of 2009 (T. 98-99, 115-18, 381-82); $100,000 in March 2010 (T. 438-39); and $185,000 in October 2006 and May 2007 (T. 124-25). These payments derived from fraudulently obtained investments. As such, Lynn Smith received loan repayments from ill-gotten gains. Because all of these payments were commingled with potentially legitimate funds, separating the legitimately held funds in the Stock Account and the checking account from the fraudulently obtained funds would be nearly impossible and the SEC is entitled to freeze the entirety of the accounts. Aragon Capital Mgmt., 672 F. Supp. 2d at 443.

Moreover, Lynn Smith has failed to establish a legitimate interest in the return of the funds which she received from MS & Co. after 2003. It is undisputed that Lynn Smith provided McGinn Smith with multiple loans, the number and amounts of which increased in recent years. T. 330. Lynn Smith testified that she was a bona fide creditor and was entitled to repayment of those loans with interest. T. 378-81. However, Lynn Smith was unaware how many loans she has made, to whom the loans were made, what they were for, or what the interest rates and payment schedules were. T. 330-32, 409-11.[27] Lynn Smith made two loans to McGinn totaling $915,000 ($900,000 in 2004 and another $15,000 in 2009) and was only recently repaid $185,000, $85,000 in October 2006 and $100,000 in May 2007. T. 124-25, 278-79, 431-33; Pl. Ex. 75. Additionally, Lynn Smith made loans of $2 million $6 million for which she had no recollection of terms or conditions. T. 339, 345-46, 379. Such conduct belies any claim of a legitimate creditor-debtor relationship.

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[27] See also note 13 supra.

Accordingly, these claims by Lynn Smith are rejected. Kimberlynn Creek Ranch, 276 F.3d at 192.

In support of her claims of being a bona fide creditor, Lynn Smith testified that she always made the final decision as to whether to approve any loans or transactions from the Stock Account. These decisions were memorialized in letters of authorization signed by Lynn Smith which provided consent for monetary transfers from the Stock Account to third parties. When Lynn Smith pre-signed the letters of authorization, the forms were blank as to the amount of the transfers from the Stock Account. T. 219. The forms were pre-signed, in batches of 10-15 at a time, or Lynn Smith's signature was signed by David Smith which David Smith would use at his option. T. 341-43, 384-86. No other client provided pre-signed authorization forms to MS & Co. to be utilized whenever deemed appropriate. T. 191, 218. These authorizations were maintained by one of David Smith's subordinates for use by David Smith. T. 384-86, 413-14. Such uninformed, casual, and informal transactions in the amounts at issue here corroborate the conclusion that there was no consideration and no contractual relationship which would entitle Lynn Smith to repayment as an arms length, disinterested creditor. Founding Partners Capital, 639 F. Supp. 2d at 1294; Better Life Club, 995 F. Supp. at 182-83.

Therefore, the SEC has demonstrated a substantial likelihood of success in proving that Lynn Smith is an appropriate relief defendant with respect to the Stock Account and that her Stock Account includes ill-gotten gains to which she has no legitimate claim of ownership. Accordingly, the SEC's motion as to the Stock Account on this ground is granted and the Stock Account shall remain frozen.

b. Equitable or Joint Ownership

The SEC contends that Lynn Smith's assets are also subject to its motion because they were jointly owned by David Smith. As to the Stock Account, even if Lynn Smith is not an appropriate relief defendant or the legitimate funds in her Stock Account could be separated, it is of no consequence because David Smith was the joint owner of the Stock Account. Since the Stock Account was one of his assets, "it is inappropriate to apply the two-part Cavanagh test . . . [r]ather, [the court] need only determine whether the SEC has met its burden of showing that it is likely to succeed on the merits." Heden, 51 F. Supp. 2d at 299-300. To determine whether David Smith was the joint owner of the Stock Account, various factors must be considered. They include the length of time the Stock Account was established and David Smith's access to that account, whether David Smith had an interest in and benefitted from the Stock Account, and whether David Smith freely transferred his own assets into the Stock Account or withdrew the account's assets for his purposes. Heden, 51 F. Supp. 2d at 301.

The Stock Account has been in existence for approximately forty-two years. Lynn Smith Aff. at ¶¶ 13, 14; T. 326, 355-58. David Smith had unfettered control over the account, acting as its broker, for approximately thirty-five years. T. 360. As previously discussed, David Smith directed transfers from the account at his sole option by the blank letters of authorization which Lynn Smith signed. The letters of authorization were used at the direction of David Smith to transfer money from the account into the MS & Co.-related businesses for bridge loans and for operating expenses usually in the range of $100,000 - $1 million. See. e.g., T. 339-40, 433 (bridge loan to MS Funding for $375,000); T. 341 (bridge loan to TDM Benchmark of $100,000); T. 437-38 (bridge loan to TDMM Cable

Funding for $366,000); T. 341-42. For these reasons, it is clear that David Smith had complete access to and control over the account and that such access and control were maintained for decades.

Additionally, David Smith benefitted from the Stock Account. First, the account was used to purchase jointly owned residences including their primary residences and vacation homes in Vermont and Florida and finance their children's college educations. T. 279-81, 328-29, 350-51, 368-72, 404. Furthermore, the account was used to fund MS & Co.'s operating expenses as MS & Co. increasingly experienced difficulties meeting its obligations in 2008-10. T. 329-31, 378. These loans ensured that MS & Co. would continue to operate. T. 410-11. Thus, David Smith utilized the Stock Account as a personal line of credit for his business interests to further his personal and professional endeavors.

Finally, the record establishes that David Smith treated the Stock Account as his own. As previously discussed, David Smith used the account to make bridge loans to keep his business going. Furthermore, David Smith occasionally deposited his assets into the stock account. In 2009, David Smith directed that $38,430 be deposited into the Stock Account, proceeds from assets held by David Smith in his name alone since the late 1990s. Dkt. No. 23, Lynn Smith Aff. at ¶33(a); T.298, 435, 474-75. Additionally, David Smith also had the funds of a trust, totaling $326,304 and a note receivable totaling $410,000, both in his name alone, deposited in the Stock Account. T. 290-92, 296, 436-37, 475-76; Pl. Ex. 118. Thus, David Smith also deposited his personal assets into the Stock Account.

The record establishes that David Smith acted almost identically to the defendant, Goran Heden, in the Heden case. Like Heden, Smith "viewed and treated the [stock] account and his own account[s] interchangeably." Heden, 51 F. Supp. 2d at 300. Smith

had access and control over the account for decades, he had both a personal and professional interest in the Stock Account and benefitted from its funds in both his home-life and career, and he commingled funds between the Stock Account and his business and personal accounts. As such, the SEC need not establish that Lynn Smith is a proper relief defendant but only that there is a likelihood of success against David Smith to continue the asset freeze as to the Stock Account. The SEC has made such a showing. Therefore, in the alternative, the SEC's motion for as to the stock account is granted on this ground as well.

The record as to the Vero Beach home and the checking account in Lynn Smith's name is essentially the same. The Vero Beach home was purchased with proceeds derived from the Stock Account and was held jointly by the Smiths until 2009 when it was transferred into the name of Lynn Smith alone without fair consideration. The Smiths maintained a joint checking account throughout their marriage from which they paid their various expenses. Also in 2009, Lynn Smith opened a checking account in her name for the first time and thereafter deposited funds and paid expenses into and out of the account which had previously been deposited into and paid from the joint checking account. These actions in 2009 followed the commencement of the FINRA proceedings in which David Smith faced the distinct possibility that his assets could be seized to pay judgments awarded to investors. The two assets were treated no differently by the Smiths after the 2009 transfers and were at all time used jointly by the Smiths for their mutual benefit. Thus, the SEC has demonstrated a likelihood of success in proving that these assets were jointly owned by David Smith and that the 2009 transfers into Lynn Smith's name alone were solely for the fraudulent purpose of shielding David Smith's assets from seizure. The SEC's

motion as to these assets is also granted.

As to the Great Sacandaga Lake camp, the record demonstrates without contradiction that this property was inherited by Lynn Smith from her father in 1969, remained in her name alone since that time, David Smith's only interest in the asset was periodically to vacation at the property with his family, and David Smith never controlled the asset in any way. Thus, on this record, there exists no likelihood of success that the SEC will demonstrate that David Smith was a joint, equitable, or beneficial owner of the property. Therefore, the SEC's motion as to the Great Sacandaga Lake camp is denied and the asset freeze in the TRO as to the camp is vacated.

3. The Trust

The SEC contends that the Trust is an appropriate relief defendant and, that in the alternative, even if it is not properly named as a relief defendant, David Smith was a beneficial owner of the trust over which he asserted dominion and control. The Trust contends that it cannot be pierced under the alter ego theory and that David Smith is not the equitable owner of the Trust.

a. Relief Defendant

The SEC has failed to demonstrate a likelihood that it will prove that the Trust is an appropriate relief defendant. First, the SEC has not established that the Trust was created with ill-gotten gains. It is undisputed that the Trust originated from bank stock in the Stock Account purchased in the early 1990s well prior to 2003 when the SEC alleges the scheme

began here. T. 349. In fact, none of the named entities except MS & Co. existed at that time. T. 363. Thus, there is no proof that fraudulently obtained funds were deposited into the Stock Account prior to the purchase of the bank stock in the early 1990s.

This stock was untouched for the fourteen years it remained in the Stock Account while it grew in value from $400,000 to over $4 million by market forces alone. No testimony or proof was offered that additional capital was invested into the stock or that the portfolio was otherwise modified since the 1990s. Accordingly, this stock investment represents untainted funds easily identifiable and severable from the stock account as a whole. See Heden, 51 F. Supp. 2d at 302 & n.4 (explaining that it is inappropriate to freeze assets initially used to purchase legitimate investments, regardless of the authenticity of the later transfers with the stock, but, the subsequently earned proceeds of the stock, if fraudulently obtained, may represent ill-gotten gains); Better Life Club, 995 F. Supp. 182-83 (finding mortgage payments and trade-in credit untainted and provable funds that were probably reimbursable since they were not ill-gotten). As such, the Cavanagh factors cannot be fulfilled because the Trust was neither created from nor in possession of ill-gotten funds.

Second, there is no evidence that the purchase or sale of the bank stock was fraudulent or otherwise illegal. By all accounts, the stock was purchased for value. Thus, appropriate consideration was provided for the purchase and the Smiths had a legitimate interest in the eventual growth, sale, and proceeds of the bank stock at a time predating the commencement of the scheme alleged herein. See, e,.g., Cavanagh, 155 F.3d at 137 (explaining that a legitimate interest in funds arises when relief defendants can demonstrate that they gave consideration in the exchange). Therefore, the SEC has failed to

demonstrate a likelihood of success on this ground that the Trust is an appropriate relief defendant as the SEC has failed to prove that the Trust received or was created with ill-gotten gains or that it had no legitimate claim to its corpus.

b. Equitable or Joint Ownership

The SEC has also failed to demonstrate that David Smith was an equitable owner in the Trust Account. The record is devoid of any proof that David Smith "exercise[d] considerable authority over [the trust] to the point of completely disregarding [its] form and acting as though its assets [were] his alone to manage and distribute . . . ." In re Vebeliunas, 332 F.3d at 92. David Smith acted as the broker for the Trust. See T. 556 (explaining that the current trustee believes that a prudent trustee would hire an investment advisor to preserve, protect, and grow the corpus of the trust). The original trustee, Urbelus, possessed the authority to utilize a broker to assist him in his duty to preserve the Trust corpus. As trustee, Urbelus retained the final authority for approving distributions and authorizations. T. 418. While David Smith advised him on the appropriate assets to buy and sell, Urbelus provided the final consent and signed the appropriate authorizations. T. 418. Unlike the Stock Account, there were no pre-signed forms from Urbelus that David Smith could use at any time. T. 216. Each suggested transaction was discussed, a form was sent from David Smith to Urbelus, Urbelus signed the form, and the requested action was taken soon thereafter. Therefore, David Smith did not exercise authority over the Trust but acted as an advisor and broker. Urbelus was indisputably the one who maintained control of the assets.

Furthermore, David Smith did not distribute the assets to himself and the record does

not support the conclusion that David Smith considered the Trust his own property. On occasion, David and Lynn Smith provided their children with financial support, presumably including when they paid the Trust's taxes, for the stated benefit of conserving the trust corpus and assisting their children. T. 135-37, 145-49, 187-88, 399. Such tax payments from David Smith for the Trust and, by extension, his children are insufficient to establish equitable ownership. In re Vebeliunas, 332 F.3d at 93 (refusing to pierce a trust based on equitable ownership even though the husband paid all expenses of the trust because "spouses routinely administer each other's assets and conduct business on behalf of each other.").

David Smith received money from the Trust on one occasion which was unrelated to the payment of the Trust's taxes. However, that distribution was requested and authorized by his son, Jeffrey, a beneficiary of the trust. T. 398, 513-16. Because the Trust had virtually no limits on the types of distributions the beneficiaries could request, the money was properly requested and provided. T. 534-35, 560. Once Jeffrey Smith's request was approved by the trustee, he was free to use it as he saw fit, including sharing it with his parents. T. 398, 560. He used the money to help his parents meet their tax obligations. This action is insufficient to establish control and ownership by David Smith. Moreover, this single use of the Trust for the benefit of David Smith differs materially from the pattern of such use of the Stock Account over a period of years. Furthermore, even though a benefit was temporarily conferred, this assistance was still insufficient to act as total reimbursement for all of the financial help David and Lynn provided to the Trust for the prior payments of the Trust's taxes. No other distributions were requested or provided to David Smith. Thus, the Trust's benefits did not flow to David Smith and he did not exercise control over them

such that he treated the corpus as his own.

Accordingly, there is no likelihood that the SEC will prove that David Smith was the beneficial owner of the Trust. Therefore, the SEC's motion as to the Trust is denied and the Trust's motion to vacate the asset freeze in the TRO as to the Trust is granted. While the Trust also seeks an award of attorney's fees and costs incurred in connection with this proceeding, it has offered no authority for such an award. Finding that the SEC acted to freeze the Trust in good faith and with sufficient cause, the Trust's motion for an award of attorney's fees and costs is denied.

4. McGinn Residence

In 2009, McGinn transferred title to his residence in Niskayuna, New York from a title held jointly by he and his wife, Nancy McGinn, into his wife's name alone. T. 302. The stated consideration was $1 and the transaction occurred after commencement of the FINRA proceedings, complaints from investors, and as David Smith was transferring various properties held jointly with his wife into her name alone. T. 301-02. The SEC contends that McGinn's residence remains subject to the TRO asset freeze and is included within McGinn's consent to the preliminary injunction at issue here. Pl. Mem. of Law (Dkt. No. 47) at 16-17. McGinn contends that because title to the residence is now held solely by Nancy McGinn and because she has not been named as a defendant or relief defendant, the residence was not included in the TRO asset freeze nor in the preliminary injunction to which he consented. Dkt. No. 71.

There exists no dispute that the residence is now held solely in Nancy McGinn's name. Therefore, while the SEC would appear to have demonstrated sufficient cause to

include the residence in the asset freeze as with the Smiths' assets transferred into Lynn Smith's name alone, Nancy McGinn is not a party to this action in any capacity. Unless and until she is, this Court lacks jurisdiction to restrain her actions with respect to any property presently titled to her alone. See NASCO, Inc. v. Calcasieu Television & Radio, Inc., 124 F.R.D. 120, 134-35 (N.D. La. 1989) (holding that court lacked jurisdiction to restrain property allegedly involved in fraudulent transfer until question of title holder had been resolved). Accordingly, the Niskayuna residence now titled to Nancy McGinn alone is not included within the TRO asset freeze nor within the preliminary injunction to which McGinn has consented.

III. Conclusion

For the reasons stated above, it is hereby

ORDERED that:

1. The SEC's motion for a preliminary injunction continuing the asset freeze as to the defendants and Lynn Smith (Dkt. No. 4) is:

A. **GRANTED** as to all defendants;

B. **GRANTED** as to Lynn Smith for the Stock Account, Vero Beach home and her checking account;

C. **DENIED** as to Lynn Smith for the Great Sacandaga Lake camp as to which the asset freeze is **VACATED**; and

D. **DENIED** as to the Trust as to which the asset freeze is **VACATED**; and

2. The Trust's motion to lift the TRO as to the Trust and for attorney's fees and costs (Dkt. No. 31) is:

A. **GRANTED** as to the TRO and the TRO is **VACATED** as to the Trust; and

B. **DENIED** as to attorney's fees and costs.

IT IS SO ORDERED.

DATED: July 7, 2010
Albany, New York

David R. Homer
United States Magistrate Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

No. 10-CV-457 (GLS/DRH)

DAVID M. WOJESKI, Trustee of David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04.

Defendant.

APPEARANCES:

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DAVID R. HOMER
U.S. MAGISTRATE JUDGE

MEMORANDUM-DECISION AND ORDER

Plaintiff Securities and Exchange Commission ("SEC") previously moved for a preliminary injunction freezing the assets of the defendants and certain related parties. Dkt. Nos. 4,5. Among those assets was the David L. and Lynn A. Smith Irrevocable Trust U/A

EXHIBIT 2

8/04/04 ("Trust"), which cross-moved to lift the temporary restraining order as to the Trust. Dkt. No. 31. Following an evidentiary hearing, an order was entered granting the SEC's motion in part but denying its motion and granting the cross-motion of the Trust as to the Trust's assets. Dkt. No. 86. Familiarity with that decision is assumed. Presently pending is the SEC's motion for reconsideration of that decision as to the Trust and for an order freezing the Trust's assets pending the outcome of this action. Dkt. No. 103. The Trust opposes the motion. Dkt. Nos. 147-49. For the reasons which follow, the SEC's motion for reconsideration is granted and, upon reconsideration, its motion for a preliminary injunction as to the Trust is granted.

I. Background

The decision denying the SEC's motion to freeze the Trust was filed on July 7, 2010. Dkt. No. 86.[1] In relevant part, that decision found that the SEC had failed to meet its burden of demonstrating either that the Trust was created with or the repository of ill-gotten funds or that defendant David L. Smith was an equitable or joint owner of the Trust. Dkt. No. 86 at 37-41. The Trust's assets, which had been frozen by a temporary restraining order filed April 20, 2010 (Dkt. No. 5), were unfrozen and at least $1 million of the approximately $4 million of the Trust's assets were distributed before the Trust was again frozen. Mehraban

[1]The SEC sought to freeze the assets of the Trust upon its contention that defendant David Smith possessed an equitable or beneficial interest in the Trust. The Trust's motion to intervene was granted and it appeared at that time as a non-party. On August 2, 2010, the SEC filed an amended complaint which, inter alia, named the Trust as a defendant. Am. Compl. (Dkt. No. 100) at ¶ 28.

Reply Decl. (Dkt. No. 142-1).[2]

The Trust was created by David and Lynn Smith on August 4, 2004 in a "Declaration of Trust" for the benefit of the Smiths' two children. Dkt. No. 32-1. The Declaration of Trust was signed by the Smiths and by Thomas Urbelis ("Urbelis") as the Trustee. Id. at 7. Notwithstanding the purported irrevocable character of the Trust, the Smiths and Urbelis as Trustee entered into a second agreement effective on the same date, August 31, 2004, entitled "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." Dkt. No. 103-3 ("Annuity Agreement"). The Annuity Agreement required the Trust to make annual payments from the Trust to the Smiths of $489,932.00 beginning September 26, 2015 and continuing until the last of David or Lynn Smith died or the annuity was exhausted. Id. When the payments commenced in 2015, the Smiths would be ages 69 and 70 with the longest life expectancy of either being fifteen years. Id. at Ex. 2. Assuming no other distributions from the Trust, the distributions under the Annuity Agreement would exhaust the Trust's assets with the fifteenth and final payment to the Smiths. Id. at Ex. 2. If the Trust assets were not exhausted before the last of the Smiths died, the remaining assets would remain with the Trust for the benefit of the Smiths' children. Id.

The existence of the Annuity Agreement was not disclosed to the SEC at any time prior to the Court's decision on July 7, 2010. Stoelting Decl. (Dkt. No. 103-2) at ¶¶ 9-34. On July 22, 2010, David Stoelting ("Stoelting") and Kevin P. McGrath ("McGrath"), Esqs.

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[2] Approximately $600,000 was paid to Lynn Smith for the purchase of a family vacation property. Mehraban Reply Decl.

attorneys for the SEC, spoke by telephone with Jill A. Dunn ("Dunn"), Esq., attorney for the Trust. Stoelting Decl. at ¶ 36; Dunn Decl. (Dkt. No. 134) at ¶ 35. As discussed infra, what was said by Dunn in this conversation is disputed by the participants. Compare Stoelting Decl. at ¶ 36 ("During the course of a brief conversation, Ms. Dunn disclosed the existence of a private annuity agreement involving the Smiths and the Trust. This was the first time any person, attorney or agent associated with David or Lynn Smith or the Trust disclosed the existence of a private annuity agreement involving the Trust to the SEC.") with Dunn Decl. at ¶ 35 ("Stoelting's assertion that I made a reference, passing or otherwise, to a 'private annuity agreement' in a telephone call on July 22, 210 is simply and unequivocally false."). Following this conversation, the SEC contacted Urbelis, who produced a copy of the Annuity Agreement to the SEC on July 27, 2010. Stoelting Decl. at ¶¶ 37-39. The present motion followed on August 3, 2010.[3]

II. Discussion

A. Reconsideration

Under Fed. R. Civ. P. 60(b), "the court may relieve a party or its legal representative from a final . . . order[] or proceeding for the following reasons: . . . (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)[4][, or] (3) fraud (whether previously called intrinsic or

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[3]The motion was initiated with an order to show cause entered upon the SEC's application which again restrained the assets of the Trust and granted various other temporary relief. Dkt. No. 103.

[4]Rule 59(b) requires that a motion for a new trial be filed within twenty-eight days after the entry of judgment.

extrinsic), misrepresentation, or misconduct by an opposing party . . . ." Where, as here, a party seeks reconsideration on the ground of new evidence, the moving party must demonstrate (1) evidence existing at the time of the prior decision, (2) the evidence could not have been discovered in the exercise of reasonable diligence, (3) that evidence is admissible, and (4) the evidence would probably change the result of the prior ruling. See Bahar v. United States, No. 08 Civ. 4738(WHP), 2009 WL 2382977, at *1 (S.D.N.Y. Aug. 4, 2009) (citing Kahn v. NYU Med. Ctr., No. 06 Civ. 13455(LAP), 2008 WL 190765, at *2 (S.D.N.Y. Jan. 15, 2008), aff'd, No. 08-0502, 2009 WL 2171322 (2d Cir. May 21, 2009)). The standard for reconsideration is strict and is committed to the discretion of the court. See Santiago v. Owens-Ill., Inc., No. 3:05 CV 405(JBA), 2006 WL 1601182, at *1 (D. Conn. June 7, 2006); Colodney v. Continuum Health Partners, Inc., No. 03 Civ. 7276(DLC), 2004 WL 1857568, at *1 (S.D.N.Y. Aug. 18, 2004). "Relief under Rule 60(b) is generally not favored and is properly granted only upon a showing of exceptional circumstances." Insurance Co. of N.A. v. Pub. Serv. Mut. Ins. Co., 609 F.3d 122, 130-31 (2d Cir. 2010) (internal quotation marks and citation omitted).

There exists no dispute on this record that the Annuity Agreement existed at the time of the prior decision and that it is admissible on the SEC's motion for a preliminary injunction as to the Trust. However, the Trust contends that the SEC could have discovered the Annuity Agreement prior to the decision in the exercise of reasonable diligence and that, even if the Annuity Agreement is considered, the SEC's motion for a preliminary injunction as to the Trust would still be denied.

Before the decision on July 7, 2010, the SEC sought discovery of information in multiple ways which should have revealed the existence of the Annuity Agreement. First,

the SEC examined documents made available by the United States Attorney's Office which had been seized from various premises associated with, inter alia, David Smith. The Annuity Agreement was not provided. Stoelting Decl. at ¶ 18. After July 22, 2010, the SEC specifically requested of the criminal investigators a copy of the Annuity Agreement if any had been seized and a copy of the agreement was thereafter provided. Stoelting Testimony at 45-46.[5]

Second, Lynn Smith was required to file a verified financial statement, which she did on May 5, 2010. That statement contained no reference to the Annuity Agreement. Dkt. No. 19. David Smith asserted his Fifth Amendment privilege against self-incrimination in declining to provide a verified financial statement, but a list of accounts he provided omitted any reference to the Annuity Agreement. Dkt. Nos. 17, 22. On May 10, 2010, the SEC served Lynn Smith with a request to produce documents. Dkt. No. 103-5. Requests 9-11 and 17 all required Lynn Smith to produce the Annuity Agreement, but she did not. Id. at 5-6;[6] Stoelting Decl. at ¶¶ 13, 14. In an affidavit filed May 21, 2010, Lynn Smith stated that "[f]rom the time the trust was created in August 2004, my husband and I have had no interest in or expectation of an interest in the . . . Trust. It exists solely, exclusively and permanently for the benefit of our children." Dkt. No. 34 at ¶ 6 (emphasis added). In a deposition by the SEC on May 27, 2010, Lynn Smith was asked numerous questions which reasonably should have elicited disclosure of the Annuity Agreement, but she again failed to

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[5]References to the pages of the testimony of Stoelting, McGrath, and Dunn are to the pages of the transcript of the evidentiary hearing on November 16, 2010.

[6]For example, Request No. 9 sought "[d]ocuments sufficient to show all assets . . . held or purchased and/or sold since January 1, 2000, directly or indirectly, by or for the benefit of Lynn A. Smith . . . ." Dkt. No. 103-5 at 5.

disclose its existence. Dkt. No. 46-3 at 39-41, 46, 79-87. Lynn Smith also testified at the hearing on the SEC's motion for a preliminary injunction on June 10, 2010. Lynn Smith again failed to disclose the existence of the Annuity Agreement despite numerous questions for which disclosure would reasonably have been required. Dkt. No. 88 at 320, 388, 391-92.[7]

Third, on May 28, 2010, the SEC served a subpoena on Urbelis as the then Trustee for the Trust. Dkt. No. 103-7. Requests No. 1-4 and 7[8] required Urbelis to disclose the Annuity Agreement. Id. at 2-3. The Annuity Agreement was not among documents provided by Urbelis in response to the subpoena. Stoelting Decl. at ¶ 17. Urbelis was deposed by the SEC on June 1, 2010. Dkt. No. 46-6. Urbelis failed to disclose the existence of the Annuity Agreement during the deposition despite being asked questions and giving answers which reasonably should have elicited such disclosure.

Thus, three individuals – David Smith, Lynn Smith, and Urbelis – had actual knowledge of the Annuity Agreement by virtue of having signed it. David Smith's assertion of his Fifth Amendment privilege precluded the SEC from discovering the Annuity Agreement from him. Lynn Smith failed to disclose the Annuity Agreement in response to a document demand and when giving testimony under oath on two separate occasions.[9] Prior to the July 7, 2010 decision, Urbelis also failed to disclose the Annuity Agreement

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[7]As to these non-disclosures, Lynn Smith now asserts through her attorney that she inadvertently failed to recall the Annuity Agreement. Featherstonhaugh Decl. (Dkt. No. 133) at ¶ 5.

[8]Request 7 requested "[a]ll documents concerning the Trust." Dkt. No. 103-7 at 3.

[9]See Decision of July 7, 2010 (Dkt. No. 86) at 9 n.13 (rejecting Lynn Smith's testimony as incredible).

even though served with a subpoena which required him to produce that agreement and even though he testified at a deposition during which he was asked questions which should have elicited disclosure of the Annuity Agreement. Therefore, the SEC asked questions of the only individuals with actual knowledge of the Annuity Agreement which should have led to its disclosure.

1. The SEC's Discovery of the Annuity Agreement

The Trust contends that these efforts failed to meet the reasonable diligence requirement of Rule 60(b)(2). First, the Trust contends that the event which the SEC asserts led to its discovery of the Annuity Agreement did not occur, compelling the conclusion that the SEC has fabricated the basis for its discovery of that agreement. That event was the telephone call among the SEC's attorneys, Stoelting and McGrath, and the Trust's attorney, Dunn, on July 22, 2010. The SEC asserts that during this conversation, Dunn disclosed the existence of the Annuity Agreement, this caused the SEC to contact Urbelis, and Urbelis provided a copy of the agreement to the SEC.[10] Stoelting Decl. at ¶ 40; Stoelting Testimony at 6-12. McGrath does not recall this statement by Dunn. McGrath Testimony at 54. The Trust agrees that the July 22, 2010 telephone conversation among Stoelting, McGrath, and Dunn occurred but denies that Dunn made any reference to the Annuity Agreement. Dunn Decl. at ¶ 35 (describing the SEC's assertion as "a disgusting

[10]The copy provided by Urbelis to the SEC bears the signatures of David and Lynn Smith but not that of Urbelis as Trustee. Dkt. No. 103-3 at 5. Neither an original nor a copy of the Annuity Agreement bearing the signatures of all parties has been provided here. However, the parties have stipulated that the Annuity Agreement was in existence and effective on and after August 31, 2004, and that it remains in effect unchanged to date. Dkt. No. 177.

attempt to mislead the Court"); Dunn Testimony at 84.

These contradictory assertions present a clear question of credibility on the material issue raised by the Trust whether Dunn disclosed the existence of the Annuity Agreement in the July 22, 2010 telephone conversation. A hearing was held on November 16, 2010 at which Stoelting, McGrath, and Dunn each testified concerning the telephone call. For the reasons which follow, the Court finds credible the description of the telephone conversation offered by Stoelting and rejects as not credible the testimony of Dunn.

First, the testimony of Stoelting is consistent and comports with probability. He and McGrath both testified that they were in the process of preparing a second application to restrain the Trust's assets. This application was premised on the theory that the Trust owed up to 50% of its assets in gift and capital gains taxes, which it had never paid, because those assets had been donated to the Trust by David and Lynn Smith according to the record of the prior hearing. Dunn had asserted in a conference with the Court on the morning of July 22, 2010 that no such taxes were owed. Stoelting Testimony at 4-6; McGrath Testimony at 51-53. Shortly after the conference with the Court, Stoelting and McGrath telephoned Dunn to determine the basis for her contention that no taxes were owed. Dunn asserted that no taxes were owed because of the "private annuity agreement" and, in response to Stoelting's next question, that a copy of the agreement was "in the binders," referring to the documents provided to the SEC by the Trust earlier in the case Stoelting Testimony at 6. McGrath did not hear Dunn refer to a "private annuity agreement" but did hear her say that the SEC had not even read its own documents. McGrath Testimony at 54-55. According to Dunn, she made no reference to a "private annuity agreement" but did refer to a "private annuity trust." Dunn Testimony at 58, 84. Dunn's

reference led the SEC to consult their tax expert who advised that in 2004, a procedure existed to create an irrevocable trust in conjunction with a private annuity agreement which allowed individuals in the Smiths' circumstances to avoid gift and capital gains taxes. Stoelting Testimony at 9-11. The SEC then contacted Urbelis to determine if such an annuity agreement existed which led to Urbelis producing the Annuity Agreement to the SEC on July 27, 2010. Stoelting Decl. at ¶ 39.

The SEC version of events is internally consistent and probable. The reason for the telephone call to Dunn and the question which elicited the reference to the "private annuity agreement" both followed naturally and probably from their context and prior events. Moreover, Dunn's reference to a "private annuity trust" would not have engendered any suspicions for the SEC as did her reference to a "private annuity agreement." As discussed infra, the term "private annuity trust" had been utilized previously in the case and had reasonably been taken by the SEC to refer to the Declaration of Trust. Dunn's reference to a "private annuity agreement," however, was the first such reference by anyone associated with the Trust and naturally and probably raised the SEC's suspicions. No other reason for the SEC re-contacting Urbelis at that time appears other than Dunn's disclosure and, while Dunn denies the disclosure, the Trust offers no plausible explanation for the SEC seeking the Annuity Agreement from Urbelis at that time other than mere speculation. The Court also finds more credible the demeanor and manner of the testimony of Stoelting and McGrath than that of Dunn.

Second, Dunn's testimony and assertions regarding the telephone conversation and discovery of the Annuity Agreement have been inconsistent and contradictory. Dunn's first response on this motion was that (1) the SEC had falsely asserted that she disclosed the

Annuity Agreement in the July 22, 2010 telephone conversation, (2) she could not have made any reference to the Annuity Agreement in the telephone conversation because she did not learn of its existence until July 27, 2010, and (3) David Wojeski ("Wojeski"), the successor Trustee, also did not learn of the existence of the Annuity Agreement until July 27, 2010. Dunn Decl. (Dkt. No. 134) at ¶¶ 24-36; Wojeski Decl (Dkt. No. 147) at ¶ 2.[11] However, in a supplemental declaration, Dunn advised that she had in fact received notice of the existence of the Annuity Agreement in an email from Wojeski on July 21, 2010, the day before the telephone conversation with the SEC, although she claims that she did not read it until after July 27, 2010. Dkt. No. 188. This new version was filed fifteen hours before the start of the evidentiary hearing at which she was to testify on November 16, 2010, six weeks after she filed a declaration asserting she had not known of the agreement before July 27, 2010, and over two months after she prepared a declaration for Wojeski stating that he too had not known of the agreement until July 27, 2010.[12] The timing, sequence, and character of these events undermine the credibility of Dunn's assertions. Furthermore, Dunn now testifies that she did refer in the July 22, 2010 telephone call to a "private annuity trust" even if she did not use the phrase "private annuity agreement." Dunn Testimony at 58, 84.

Third, Dunn's conduct since July 21, 2010 undermines her credibility on this issue. She acknowledges receiving notice of the Annuity Agreement in an email from her client,

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[11]Dunn prepared Wojeski's declaration. Dunn Testimony at 79-80.

[12]On November 17, 2010, Wojeski filed a supplemental declaration stating that he had in fact learned of the Annuity Agreement on July 20, 2010 when he received by telefax the documents he provided to Dunn the next morning. Dkt. No. 191.

Wojeski, on July 21, 2010 but claims that she did not read it until days later or remember it weeks later. Dkt. No. 188 at ¶ 3; Dunn Testimony at 76. Her explanation is that she may have been distracted by a real estate closing, other clients, and a death in the family. Dkt. No. 188 at ¶ 4. Neither the claims that she ignored or forgot her client's email nor that she forgot the Annuity Agreement thereafter are credible, particularly where the existence of the Annuity Agreement was arguably dispositive on the Trust's motion to freeze the Trust's assets. Furthermore, after July 27, 2010, the SEC demanded production from Dunn of all documents related to the Annuity Agreement. Stoelting Testimony at 46-49 & Hearing Exs. 16, 21. Without explanation, Dunn still failed to provide copies of the documents sent to her by Wojeski on July 21, 2010. Dunn Testimony at 78-83.[13] Moreover, neither Dunn nor the Trust ever supplemented its production of documents to the SEC in response to the SEC's May 2010 subpoena until hours before the evidentiary hearing on November 16, 2010. Dkt. No. 188.

The fact that the decision on July 7, 2010 resolved the SEC's motion as to the Trust did not relieve Dunn or the Trust of its duty to supplement its response to the subpoena whenever they discovered the Annuity Agreement documents. See Fed. R. Civ. P. 26(e); C. Wright, A. Miller, & R. Marcus, Federal Practice and Procedure § 2049, p. 601 (1994); see also Metropolitan Opera Ass'n, Inc. v. Local 100, Hotel Employees & Restaurant Employees Int'l Union, No. 00 Civ. 3613(LAP), 2004 WL 1943099, at *25 (S.D.N.Y. Aug. 27, 2004) ("the individual defendants and their counsel may not engage in parallel know-

[13]At least one page of the documents provided by Wojeski on July 21, 2010 was not among the pages provided to the SEC by Urbelis on July 27, 2010. Compare Dkt. No. 188-1 at 5 (receipt for delivery of "Private Annuity Contract") with Dkt. No. 103-3 (copy of documents provided to SEC by Urbelis).

nothing, do-nothing, head-in-the-sand behavior in an effort consciously to avoid knowledge of or responsibility for their discovery obligations and to obstruct plaintiff's wholly appropriate efforts to prepare its case."). This continuing duty even after the July 7, 2010 decision carries particular force here where the significance of the Annuity Agreement documents to that decision was readily apparent from their face. Dunn's explanations for her conduct after July 21, 2010 and her breach of ethical and statutory duties render incredible her denial that she referred to the "private annuity agreement" in the July 22, 2010 telephone conversation.

Finally, all three attorneys are officers of the court and honor-bound to provide truthful testimony. All three attorneys also possess the same motivation to prevail in this action on behalf of their respective clients. However, Dunn additionally possesses a strong financial motive to avoid having the Trust's assets frozen. Following the July 7, 2010 decision, the Trust's assets were released from restraint back to the Trustee. Among other expenditures immediately thereafter, the Trust distributed to Dunn on July 9 and 31, 2010 a total of $101,096.40. Dkt. No. 142-2 at 4. Dunn thus possesses a financial interest in avoiding an order restraining the Trust's assets which might require return of legal fees already paid or prevent payment of legal fees in the future.

Therefore, the Court finds that the SEC did not discover the existence of the Annuity Agreement until disclosed by Dunn in the telephone conversation with the SEC attorneys on July 22, 2010 and did not obtain a copy of it until July 27, 2010.

2. The SEC's Diligence

The Trust further contends that the SEC failed to exercise reasonable diligence to discover the Annuity Agreement prior to the decision on July 7, 2010. The Trust contends that the SEC should have discovered the existence of the annuity Agreement prior to July 7, 2010 because (1) the Declaration of Trust authorized the Trustee "[t]o purchase property from the [Smiths] in exchange for a private annuity payable to the [Smiths]" (Dkt. No. 32-1 at 4, ¶ 10 (emphasis added)); and (2) a letter in August 2004 from David Smith to Urbelis, provided to the SEC by Urbelis in response to the subpoena, referred to "the Private Annuity Trust." Trust Mem. of Law (Dkt. No. 135) at 14-16. The Trust contends that reasonable diligence required the SEC to question Urbelis and others at depositions and the evidentiary hearing about these two references, such questioning would have led to the disclosure of the agreement prior to July 7, 2010, and the failure to make such inquiries of Urbelis and others constituted a lack of reasonable diligence.

These contentions fail for several reasons. First, the requirement of Rule 60(b)(2) is that the SEC have exercised reasonable diligence to discover the Annuity Agreement before the July 7, 2010 decision, not that it pursued every conceivable lead. Reasonable diligence requires that the movant acted with some promptness where the facts and circumstances would put a person of common knowledge and experience on notice that some evidence might exist. See Centex Homes v. S. Car. State Plastering, LLC, No. 4:08-cv-2495-TLW, 2010 WL 2998519, at *2 (D. S.C. July 28, 2010); Lin v. Lin, No. 08-00229 JNS/BMK, 2008 WL 4369771, at *5 (D. Haw. Sept. 24, 2008); Days Inns of M., Inc. v. P&N Enter., Inc., No. 3:97CV01374 (AWT), 2006 WL 2801248, at *5 (D. Conn. Sept. 29, 2006) (holding that reasonable diligence in other circumstances means acting in good faith and

with ordinary care); Fehribach v. Ernst & Young, LLP, No. 1:03-cv-0551-JDT-WTL, 2006 WL 1994846, at *6 (S.D. Ind. July 14, 2006).

Second, the reference in the 2004 David Smith cover letter to a "private annuity trust"[14] was reasonably read by the SEC as a reference to the Declaration of Trust since the Trust provided the letter to the SEC with only the Declaration of Trust attached. Stoelting Testimony at 23-24. This naturally led the SEC to conclude that the reference in the David Smith letter was to the Declaration of Trust rather than to the Annuity Agreement. The reference in the Declaration of Trust authorizing the Trustee to enter into a private annuity agreement with the Smiths did not indicate the existence of such an agreement but was only one of fourteen separately enumerated powers of the Trustee. Dkt. No. 32-1 at 3-4. Without more, neither reasonably gave notice of the existence of the Annuity Agreement as would have obliged the SEC, in the exercise of reasonable care and diligence, to seek its disclosure with greater specificity from the Trust or Lynn Smith.

Furthermore, the language of the Declaration of Trust was that of a gift of assets by the Smiths to their children, not of a contract for future consideration. The Declaration refers to the Smiths as "donors" and not as "transferors," "sellers," or other terms commonly used to refer to a party to a contract. Dkt. No. 32-1 at 1. It further states that "[t]he Donors hereby transfer and deliver unto the Trustee the property described in Schedule A, attached

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[14]The record in this case includes documents entitled "Declaration of Trust" (Dkt. No. 32-1), "Private Annuity Contract" (Dkt. No. 103-3 at 2), and a "Private Annuity Agreement" (Dkt. no. 103-3 at 3). Instruments known as "private annuity trusts" exist. See Dunn Testimony at 62-68. However, no document entitled "Private Annuity Trust" can be found in the record of this case.

hereto, the receipt of which is hereby acknowledged by the Trustee. . . ." Id.[15] In common usage, "donor" means "[o]ne who gives something without receiving consideration for the transfer." Black's Law Dictionary 526 (8th ed. 2004). With reference to trusts, the term may refer to one who creates or transfers the power to control. See N.Y. Est. Powers & Trusts § 10-2.2(a) (McKinney 2002). Thus, a fair reading of the Declaration of Trust would have led the SEC reasonably to conclude that the Trust assets derived from a gift to the Trust by the Smiths to provide for their children rather than in return for an annuity contract or other consideration not mentioned in the Declaration.

Before the July 22, 2010 telephone conversation, this reading was corroborated by the testimony and statements of those associated with the Trust. See, e.g., Dkt. No. 23 at ¶ 23 (Lynn Smith affidavit filed May 21, 2010 stating that she and David Smith created the Trust "to provide for my children's future"); Dkt. No. 46-3 at 39-40 (Lynn Smith testimony at deposition by SEC on May 27, 2010 that the purpose of the Trust was for the children to "have the rewards, reap the rewards of my husband's business"); Dkt. No. 88 at 388 (testimony of Lynn Smith on June 10, 2010 that she and David Smith created the Trust "so that if [their children] wanted to start a business or buy a house or do something, that I could actually see them reaping benefits during my lifetime"), 391-92 (by signing the Declaration of Trust, she intended to transfer $4 million in assets to the Trust and, thereafter, had no control over or expectation of receiving any money from the Trust); Stoelting Decl. at ¶ 32 (quoting successor Trustee as stating in affidavit dated May 25, 2010 that under the

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[15]No copy of a "Schedule A" was attached to the signed copy of the Declaration of Trust filed by the Trust nor to the copy filed by the Trust's expert witness. See Dkt. Nos. 32-1, 134-1. None has ever been submitted in the record of this case and it appears that none exists. See Stoelting Testimony at 25-26.

Declaration of Trust, David and Lynn Smith "have no interest, whether present, future or reversionary, in the trust, its income or its assets as it is irrevocable by its own terms and pursuant to [New York law]."); Dkt. No. 89 at 625 (argument of Trust's attorney on June 11, 2010 that upon signing the Declaration of Trust, Lynn Smith "relinquished all title, ownership, control, beneficial, equitable, actual or legal any interest whatsoever in that stock was gone from her hands the moment she transferred it. . . .").[16]

Thus, from the language of the Declaration of Trust and from the representations of those associated with the Trust, it was reasonable for the SEC to conclude that the Declaration constituted the sole, relevant authorizing document. Since the SEC's discovery of the Annuity Agreement, the Trust has altered its position that the Declaration alone effectuated the transfer of David and Lynn Smith's assets to the Trust as a gift and without consideration. The Trust now contends that the transfer was actually accomplished with the Annuity Agreement which, with the Declaration, constituted a contract between David and Lynn Smith and the Trust for the transfer of the Smiths' assets to the Trust in return for the annuity, transforming David and Lynn Smith from "donors" to "annuitants" and "creditors" of the Trust. See Opinion of Trust's Expert Witness (Dkt. No. 134-1) at ¶ 23 ("David Smith and Lynn Smith are sellers. The benefit of the bargain is that they become annuitant-creditor(s) of the Trust. . . ."). In these circumstances the failure of the SEC to pursue discovery of the Annuity Agreement prior to July 7, 2010 by asking more precise questions was not unreasonable.

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[16] See also note 17 infra.

Third, by serving a subpoena on the Trust for categories of documents which should have included the Annuity Agreement and by demanding the same from Lynn Smith, the SEC reasonably sought its disclosure from the two parties to the agreement with actual notice of its existence who were in a position to respond. Urbelis and Lynn Smith failed to disclose the Annuity Agreement as they were required to do. Reasonable diligence requires ordinary care, good faith, and promptness, all of which the SEC has demonstrated here. The fact that the SEC did not describe the document sought precisely as a "private annuity agreement" does not obviate the SEC's reasonable diligence.

Fourth, the Trust's contention rests on the assumption that Lynn Smith and Urbelis would have disclosed the Annuity Agreement if the SEC had employed precisely that wording in its requests and questions. Based on the prior proceedings in this case, the Trust's assumption is unsupportable. Furthermore, to allow the Trust to avoid the full consideration of evidence on this motion because of its own failure to disclose the Annuity Agreement may allow it to profit from its own wrongful conduct in failing to disclose the agreement prior to July 7, 2010.

Finally, the diligence of the SEC in obtaining the Annuity Agreement may fairly be evaluated by comparison to that of others similarly situated. The Trust's attorney represented Urbelis in responding to the SEC's subpoena and at his deposition. See Dkt. No. 46-6 at 2. She thus had a duty of due diligence to discover the Annuity Agreement parallel to that of the SEC here. Moreover, unlike the SEC in its efforts, the Trust's counsel was unfettered by the existence of privileges or by adverse interests. The Trust's counsel too had knowledge of the two documents which the Trust now contends should have placed the SEC on notice to inquire in more detail about the Annuity Agreement. The Trust's

counsel asserts that while she exercised due diligence in her representation of the Trust, she was unaware of the Annuity Agreement until after the July 7, 2010 decision. Dkt. No. 188.

Others as well failed to learn of the Annuity Agreement. Lynn Smith's counsel, representing one of the individuals with actual knowledge of the agreement and also unfettered by privilege or adverse interest, also asserts that he failed to discover the existence of the Annuity Agreement until after July 27, 2010 when it was provided by the SEC. Featherstonhaugh Decl. (Dkt. No. 133) at ¶ 4. He too presumably exercised due diligence in representing Lynn Smith in her response to the SEC's document demand and during the evidentiary hearing. Wojeski, as successor Trustee to Urbelis, had a fiduciary duty of at least ordinary care to the Trust and its beneficiaries to identify any obligation of the Trust, such as the Annuity Agreement. Also unfettered by privilege or adverse interest, he too claims that he did not learn of the existence of the Annuity Agreement until after the July 7, 2010 decision. Dkt. No. 191. In short, all those with obligations of diligence at least equal to that of the SEC and without the limitations of privilege or adverse interest also failed to discover the existence of the Annuity Agreement further supporting the SEC's contention that it exercised reasonable diligence.

Thus, the SEC exercised the reasonable diligence in the circumstances of this case required by Rule 60(b)(2). The Trust's other contention is that the SEC has failed to meet its burden of demonstrating that if the Annuity Agreement had been discovered and admitted as evidence prior to the July 7, 2010 decision, the result of the motion for a preliminary injunction as to the Trust would probably have been different. For the reasons set forth in subsection B infra which is incorporated herein by reference, the court finds that

the SEC has also met its burden as to that requirement. The SEC having done so, this motion presents the exceptional case where a party has satisfied the stringent requirements to obtain reconsideration of a decision based on newly discovered evidence. The SEC's motion for reconsideration is granted under Rule 60(b)(2)[17] and the Court will reconsider that portion of the July 7, 2010 decision which denied the SEC's motion for a preliminary injunction as to the Trust.

B. The Effect of the Annuity Agreement[18]

In the absence of the Annuity Agreement, this Court found in the July 7, 2010 decision that, inter alia, the SEC had failed to demonstrate a likelihood of success that it would prove that David Smith possessed any interest in the Trust. Dkt. No. 86 at 39-41.

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[17]The SEC also seeks reconsideration under Rule 60(b)(3) based on fraud, misrepresentation, or misconduct. As described supra, the conduct of those associated with the Trust – principally Urbelis and Lynn Smith – in failing to disclose the Annuity Agreement satisfies the requirements for fraud, misrepresentation, and misconduct. Their failure to disclose the agreement was exacerbated by their statements and testimony that the Trust was created solely to benefit the Smiths' children without disclosing the additional fact that the Trust was also created to pay a substantial annuity in the future to David and Lynn Smith. The SEC's claims under Rule 60(b)(3) are further corroborated by the false assertions of Dunn and Wojeski on this motion as to when and how they learned of the existence of the Annuity Agreement. The SEC has presented substantial evidence of such conduct by the Trust, through Urbelis, and Lynn Smith. Lynn Smith's assertion that she simply forgot the agreement that was to pay her and her husband nearly $500,000 annually in their later years is rejected as incredible. See also Dkt. No. 86 at 9 n.13. Therefore, in the alternative, the SEC's motion for reconsideration is also granted under Rule 60(b)(3).

[18]The trust contends that in light of the Second Circuit's recent decision in S.E.C. v. Rajaratnam, __ F.3d __, 2010 WL 3768060 (2d Cir. Sept. 29, 2010), the Court may not consider any evidence derived from the the April 2010 searches by criminal investigators. Because the Annuity Agreement alone suffices to decide the motion at issue herein, the evidence proffered by the SEC obtained by criminal investigators during the searches will not be considered and this argument need not be addressed here.

The evidence which the Court found insufficient included testimony and documents demonstrating that David Smith had functioned as the investment advisor for the Trust, David Smith had paid approximately $100,000 in taxes owed by the Trust without reimbursement from the Trust, and Lynn Smith had paid expenses incurred by the Smiths' daughter, a beneficiary of the Trust, which would ordinarily have been paid by the Trust. Id. When the Annuity Agreement is added to the analysis, however, the conclusion is compelled that David Smith possessed an equitable and beneficial interest in the Trust through the Annuity Agreement and that his conduct in controlling the investments of Trust assets by the Trustee, paying the Trust's taxes, and, with his wife, paying the living expenses of his adult child was to protect the assets of the Trust to insure their existence when the Annuity Agreement payments were to commence and not simply to protect those assets for the use of his children.[19]

The Trust contends, however, that the Annuity Agreement did not in fact create any interest in the Trust for David Smith. The Trust argues first that the agreement created no present interest in the Trust for David Smith because no money was owed to him, and he could not enforce the agreement, until the first payment is due in 2015. In support of this argument, the Trust offers the expert opinion to this effect of an attorney with expertise in the law of trusts. Dkt. No. 134-1. The question here, however, is not limited to whether David Smith has a present interest in the Trust which entitles him to payments. It is undisputed that no such interest will accrue to David Smith until 2015. However, as the

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[19]This conclusion also constitutes the final requirement for the SEC to obtain reconsideration under Rule 60(b)(2) that if the Annuity Agreement had been discovered and considered prior to the July 7, 2010 decision, the result as to the Trust would have been different. See subsection A supra.

expert opinion acknowledges, the Annuity Agreement creates in David Smith the contract rights of an annuitant and a creditor. Id. at ¶¶ 23, 27. This suffices to demonstrate that David Smith possesses a substantial interest in the Trust, however described.

The Trust's second contention is that because the Trustee was authorized by the Declaration of Trust to exhaust the assets of the Trust for the benefit of the named beneficiaries, the Smiths' children, there is no guarantee that the Trust will be able to honor the Annuity Agreement when the first payment comes due in 2015. Hypothetically, this assertion is true. The existence or amount of assets of the Trust which will be available in 2015 is presently uncertain. The Trust has not exhausted its assets and still possesses assets with substantial value. Whether those assets will be available in 2015 cannot be determined at present with certitude, but the possibility that any of the Trust's assets will be available to satisfy the Trust's obligations under the Annuity Agreement suffices. Moreover, for the nearly six years following its creation until the onset of this litigation, the Trustee made only a single disbursement from the Trust, one that did not occur until 2010 and one that was substantially for the benefit of David Smith. The conduct of the Trust in the six years of its existence supports the conclusion that a substantial portion of its assets are intended to be maintained to fulfill the Annuity Agreement and that the possibility that the Trustee will exhaust the Trust for the benefit of the beneficiaries remains remote.

With the Annuity Agreement, then, the SEC has demonstrated a substantial likelihood of success that it will prove that David and Lynn Smith created the Trust and the Annuity Agreement together to avoid gift and capital gains taxes approaching 50% of the $4.5 million value of the Trust assets, that David Smith maintained control of the investment of Trust assets after the Trust was created, and that he and his wife paid Trust taxes and

the living expenses of a Trust beneficiary to insure that the annuity payments required by the Annuity Agreement could be made beginning in 2015. Therefore, the SEC has satisfied its burden of showing a substantial likelihood of success as to the Trust and, upon reconsideration, the SEC's motion for a preliminary injunction as to the Trust is granted.

III. Conclusion

WHEREFORE, for the reasons stated above, it is hereby

ORDERED that:

1. The SEC's motion for reconsideration of that portion of this Court's decision filed July 7, 2010 which denied the SEC's motion for a preliminary injunction as to the Trust (Dkt. No. 103) is **GRANTED**;

2. That portion of this Court's decision filed July 7, 2010 (Dkt. No. 86) which denied the SEC's motion for a preliminary injunction as to the Trust (Dkt. No. 4) and granted the Trust's motion to lift the temporary restraining order as to the Trust (Dkt. No. 31) is **VACATED**;

3. The SEC's motion for a preliminary injunction as to the Trust (Dkt. No. 4) is **GRANTED**;

4. The Trust's motion to vacate the temporary restraining order as to the Trust (Dkt. No. 31) is **DENIED**; and

5. The SEC is granted leave to move for sanctions against the Trust, Wojeski, Urbelis, Dunn, Lynn Smith, and Lynn Smith's counsel for the conduct described herein without the necessity of the pre-motion conference required by N.D.N.Y.L.R. 7.1(b)(2), and any such motion shall be filed on or before **January 31, 2011**.

IT IS SO ORDERED.

DATED: November 22, 2010
Albany, New York

David R. Homer
U.S. Magistrate Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

No. 10-CV-457 (GLS/DRH)

DAVID M. WOJESKI, Trustee of David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04.

Defendant.

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DAVID R. HOMER
U.S. MAGISTRATE JUDGE

MEMORANDUM-DECISION AND ORDER

On April 20, 2010, plaintiff Securities and Exchange Commission ("SEC") moved for a preliminary injunction which, in pertinent part, sought to freeze the assets of now defendant David M. Wojeski, as Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 ("Trust"). Dkt. No. 4. Following a hearing, the SEC's motion was denied as to the Trust's assets in a Memorandum-Decision and Order filed July 7, 2010. Dkt. No. 86 ("MDO I"). On August 3, 2010, the SEC moved for reconsideration of that portion of

EXHIBIT 3

MDO I which denied its motion as to the Trust. Dkt. No. 103. Following a second hearing on a limited factual issue, that motion was granted in a Memorandum-Decision and Order filed November 22, 2010 and, upon reconsideration, the SEC's motion to freeze the assets of the Trust was granted. Dkt. No. 194 ("MDO II"). Familiarity with MDO I and II is assumed. On December 6, 2010, the Trust moved for reconsideration of MDO II. Dkt. No. 214. The SEC opposes the motion. Dkt. Nos. 250, 251. For the reasons which follow, the Trust's motion is denied.

The first basis asserted by the Trust is that timely knowledge of the Annuity Agreement should be imputed to the SEC from the seizure of that document by law enforcement authorities in searches on April 20, 2010. Trust Mem. of Law (Dkt. No. 214-3) at 3-4. As neither the United States Attorney's Office, the Federal Bureau of Investigation, the Internal Revenue Service, nor any other criminal law enforcement entity is a party to this action, none was obliged to provide the Annuity Agreement to the SEC and it appears that none did until months after its discovery by the SEC on July 27, 2010 from Thomas Urbelis ("Urbelis"), the Trust's former Trustee. Prior to July 27, 2010, the SEC had no knowledge of the Annuity Agreement – actual, constructive, or imputed. The fact that law enforcement authorities provided the Annuity Agreement to the SEC months later does not obviate the finding in MDO II that the SEC acted with due diligence to discover the existence of the Annuity Agreement and that the Trust and those associated with it acted fraudulently to conceal its existence.

Second, the Trust contends that it was clearly erroneous to find that the Trust's counsel, Jill A. Dunn, Esq. ("Dunn") represented Urbelis when he testified at a deposition in response to the SEC's subpoena. Trust Mem. of Law at 4-6. At the time of MDO II, the

uncontradicted record contained a copy of the transcript of Urbelis' deposition. Dkt. No. 46-6. That transcript reflects that Urbelis was represented by Dunn. Id. at 2. It now appears that following review of that transcript, Urbelis corrected it to note that he was not represented by Dunn. Dunn Decl (Dkt. No. 214-1) at ¶ 7-12, 16-19 & Ex. E (Dkt. No. 214-2 at 13-20). The correction concerning Dunn's representation of Urbelis was never made a part of the record until the Trust filed the motion at issue here.

A motion for reconsideration may not be used to fill gaps in a record where the facts were known to the moving party, or were discoverable in the exercise of due diligence, prior to the filing of the original pleadings. Lopez v. Smiley, 375 F. Supp. 2d 19, 21-22 (D. Conn. 2005); Benitez v. Mailoux, No. 9:05-CV-1160 (NAM)(RFT), 2008 WL 4757361, at *2 (N.D.N.Y. Oct. 29, 2008) (Mordue, C.J.). Evidence in the possession of the moving party at the time of the original motion will not suffice to establish newly discovered evidence. In re Ethylene Propylene Diene Monomer (EPAM), 681 F. Supp. 2d 141, 179 (D. Conn. 2009); 4 B's Realty 1530 CR39, LLC v. Toscano, No. 08-CV-2694 (ADS)(ETB), 2009 WL 702011, at *3 (E.D.N.Y. Mar. 12, 2009). It appears that the corrections to the transcript of Urbelis' deposition were known and available to the Trust well before the Trust filed its response to the SEC's motion. See Dunn Decl. at ¶ 19. Therefore, the evidence upon which the Trust relies to correct the record was not newly discovered but was known to its attorney months prior to the filing of the Trust's pleadings on the SEC's motion. The Trust's effort to supplement and correct the record comes too late.

In the alternative, however, even considering as fact that Dunn did not represent

Urbelis at his deposition,[1] this change does not alter the conclusions in MDO II. Dunn's representation related first to whether the SEC had satisfied its burden of demonstrating due diligence in its discovery of the Annuity Agreement. MDO II at 12-13, 18. In evaluating the SEC's efforts, those efforts were compared to others in positions similar to or more favorable than that of the SEC to discover the agreement. These included Dunn. Even though she did not represent Urbelis, Dunn was in a more favorable position to discover the Annuity Agreement in a timely manner since she enjoyed access to those with actual knowledge of the agreement (Urbelis, David Smith, and Lynn Smith) and was unimpeded by claims of privilege or adverse interest. The fact that in these circumstances she, as well as others similarly situated, failed to discover the agreement supported the SEC's contention that it had satisfied the requirements of due diligence and refuted the Trust's argument to the contrary. Thus, on this point Dunn's representation of Urbelis was a minor point among multiple reasons why the SEC had demonstrated due diligence. The correction as to Dunn's representation of Urbelis does not alter the conclusion.

The second reference concerned the alternative finding that the Annuity Agreement had been withheld from the SEC by those associated with the Trust through fraud, concealment, and misrepresentation. MDO II at 20 n.17. The fact that Dunn did not represent Urbelis at his deposition does not affect this conclusion in any way.

The Trust further asserts that the Court erred in finding that Dunn was obliged to supplement Urbelis' response to the SEC's subpoena to provide a copy of the Annuity

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[1]The SEC does not dispute either that Dunn did not in fact represent Urbelis or that the SEC was aware of this fact throughout these proceedings. See Pl. Mem. of Law (Dkt. No. 250) at 4-8.

Agreement after she received actual notice of its existence on July 21, 2010. Dunn Decl. at ¶ 11-13. As it now appears that Dunn did not represent Urbelis, she was in fact under no obligation to supplement his response to the subpoena. This point, however, was only one of several relating to the determination of Dunn's credibility. On this issue, the facts remain unaltered that Dunn received actual knowledge of the existence of the Annuity Agreement on July 21, 2010, thereafter prepared declarations for herself and Wojeski asserting that they had no knowledge of the agreement until advised of it by the SEC on July 27, 2010, and failed to disclose her receipt of notice of the agreement on July 21, 2010 until the eve of the hearing four months later. On this record, the new fact that Dunn had no obligation to supplement Urbelis' response to the SEC subpoena does not affect the finding as to Dunn's ethical conduct or her credibility.

Next, the Trust contends that the finding that Dunn used the phrase "private annuity agreement" in a telephone conversation with SEC attorneys David Stoelting ("Stoelting") and Kevin McGrath ("McGrath") on July 22, 2010 was clearly erroneous because McGrath did not hear her use that phrase. Dunn Decl. at ¶¶ 5-6. The Court found in MDO II that while Stoelting recalled Dunn using that phrase, McGrath did not. MDO II at 8. Dunn takes issue with the wording of MDO II that McGrath did not "recall" her use of that phrase contending that his actual testimony was that McGrath did not "hear" Dunn use the phrase. Dunn Decl. at ¶ 5. The description of McGrath's testimony does not affect the conclusion in MDO II that for the reasons described therein, McGrath's testimony otherwise corroborated Stoelting's testimony, Stoelting's testimony was credible, Dunn's was not, and Dunn used the phrase "private annuity agreement" in that conversation.

Finally, the Trust contends that it was clear error to find that the SEC had

demonstrated a substantial likelihood that it would prove that David Smith possessed a beneficial or equitable interest in the Trust. Dunn Decl. at ¶ 23; Trust Mem. of Law at 6-8; see also MDO II at 20-23. The Trust rests its argument principally on the fact that the SEC offered no expert opinion to counter that offered by the Trust. However, as noted in MDO II, the Trust's expert asserted only that the Smiths had no present interest in the Trust, a fact that was not at issue. He did not assert that the Smiths had no interest in the Trust as well he could not in light of the Annuity Agreement. Contrary to the contention of the Trust that the Court was clearly erroneous in according significant weight to the Annuity Agreement, the discovery of that agreement was critical to the disposition of the SEC's motion to freeze the Trust's assets. Indeed, on the issue of the Smiths' interest in the Trust, the Annuity Agreement constituted the proverbial "smoking gun." The Trust's recognition of this truth is demonstrated by the lengths to which those associated with them and the Trust went to conceal the existence of the Annuity Agreement in the face of legal, ethical, and professional obligations to the contrary.

Accordingly, finding that the Trust has failed to meet its burden of demonstrating any cause for reconsideration of MDO II, it is hereby

ORDERED that the Trust's motion for reconsideration (Dkt. No. 214) is **DENIED** in all respects.

IT IS SO ORDERED.

DATED: January 11, 2011
Albany, New York

David R. Homer
U.S. Magistrate Judge

1:10-CV-457 (GLS/RFT)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

MCGINN, SMITH & CO., INC.;
MCGINN, SMITH ADVISORS LLC;
MCGINN, SMITH CAPITAL HOLDINGS CORP.;
FIRST ADVISORY INCOME NOTES, LLC;
FIRST EXCELSIOR INCOME NOTES, LLC;
FIRST INDEPENDENT INCOME NOTES, LLC;
THIRD ALBANY INCOME NOTES, LLC;
TIMOTHY M. MCGINN; AND
DAVID L. SMITH,

Defendants, and

LYNN A. SMITH,

Relief Defendant.

**ORDER TO SHOW CAUSE,
TEMPORARY RESTRAINING ORDER,
AND ORDER FREEZING ASSETS AND GRANTING OTHER RELIEF**

On the Application of Plaintiff Securities and Exchange Commission (the "Commission") for an Order:

(1) directing defendants McGinn, Smith & Co., Inc. ("MS & Co."); McGinn, Smith Advisors LLC ("MS Advisors"); McGinn, Smith Capital Holdings Corp. ("MS Capital"); First Advisory Income Notes, LLC ("FAIN"); First Excelsior Income Notes, LLC ("FEIN"); First Independent Income Notes, LLC ("FIIN"); Third Albany Income Notes, LLC ("TAIN"); Timothy M. McGinn; David L. Smith (collectively, the "Defendants") to show cause why an Order should not be entered, pending a final disposition of this action:

EXHIBIT 4

(a) preliminarily enjoining:

(i) MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith from violating Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77e(a) and 77e(c);

(ii) MS & Co., MS Advisors, MS Capital, McGinn and Smith from violating Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a) and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b) and Exchange Act Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5;

(iii) MS & Co., MS Advisors, McGinn and Smith from violating Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 ("Advisers Act"), 15 U.S.C. §§ 80b-6(1) and (2), and Rule 206(4)-8 thereunder, 17 C.F.R. §275.206(4)-8;

(iv) MS & Co. from violating Section 15(c)(1)(A) of the Exchange Act, 15 U.S.C. § 78(o)(1), and Smith and McGinn from aiding and abetting this violation; and,

(v) FAIN, FEIN, FIIN and TAIN from violating Section 7(a) of the Investment Company Act of 1940 ("Company Act"), 15 U.S.C. § 80a-7.

(b) freezing the Defendants' and Lynn Smith's (the "Relief Defendant") assets;

(c) directing McGinn and Smith (the "Individual Defendants") to provide verified accountings for themselves and MS & Co., MS Advisors, MS

Capital, FAIN, FEIN, FIIN and TAIN (the "Entity Defendants"), and the Relief Defendant to provide a verified accounting for herself;

(d) appointing a receiver for the Entity Defendants and all other entities McGinn and/or Smith control or have an ownership interest in (collectively the "MS Entities"); and

(e) prohibiting the destruction, alteration or concealment of documents

(2) pending adjudication of the foregoing, an Order:

(a) temporarily restraining the Defendants from violating the aforementioned statutes and rules;

(b) freezing the Defendants' and Relief Defendant's assets;

(c) directing each of the Individual Defendants to immediately provide the verified accounts for themselves and the Entity Defendants, and the Relief Defendant to provide the verified accounts for herself;

(d) appointing a temporary receiver for the MS Entities;

(e) prohibiting the destruction, alteration or concealment of documents by the Defendants; and

(f) providing that the parties may take expedited discovery in preparation for a preliminary injunction hearing on this Order to Show Cause.

This Court has considered: (1) the Complaint filed by the Commission, dated April 20, 2010; (2) the Declaration of Israel Maya, executed on April 20, 2010, and the exhibits thereto; (3) the Declaration of Lara Shalov Mehraban, executed on April 20, 2010, and the exhibits thereto; and (4) the memorandum of law in support of Plaintiff Commission's application, dated April 20, 2010.

Based upon the foregoing documents, the Court finds that a proper showing, as required by Section 20(b) of the Securities Act, Section 21(d) of the Exchange Act, Section 209(d) of the Advisers Act, and Section 42(d) of the Company Act, has been made for the relief granted herein, for the following reasons:

1. It appears from the evidence presented that, unless temporarily restrained, (1) Defendant MS & Co. has violated, and will continue to violate, Sections 5(a) and 5(c) of the Securities Act, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Exchange Act and Rule 10b-5, Section 206(1), 206(2), and 206(4) of the Advisers Act and Adviser Act Rule 206(4)-8, and Section 15(c)(a)(1) of the Exchange Act; (2) Defendant MS Advisors has violated, and will continue to violate, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Exchange Act and Rule 10b-5, Section 206(1), 206(2), and 206(4) of the Advisers Act and Adviser Act Rule 206(4)-8; (3) Defendant MS Capital has violated, and will continue to violate, Sections 5(a) and 5(c) of the Securities Act, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Exchange Act and Rule 10b-5; (4) Defendants FAIN, FEIN, FIIN and TAIN have violated, and will continue to violate, Section 7(a) of the Company Act; and (5) Defendants McGinn and Smith have violated, and will continue to violate Sections 5(a) and 5(c) of the Securities Act, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Exchange Act and Rule 10b-5, and Section 206(1), 206(2), and 206(4) of the Advisers Act and Adviser Act Rule 206(4)-8, and Defendants McGinn and Smith have aided and abetted, and will continue to aid and abet MS & Co.'s violation of Section 15(c)(a)(1) of the Exchange Act.

2. It appears that the Defendants and Relief Defendant may attempt to dissipate, deplete, or transfer from the jurisdiction of this Court, funds, property and other assets that could

be subject to an order of disgorgement or an order imposing civil penalties. It appears that an order freezing the Defendants' and Relief Defendant's assets, as specified herein, is necessary to preserve the *status quo,* to protect investors and clients of the Defendants from further transfers of funds and misappropriation, to protect this Court's ability to award equitable relief in the form of disgorgement of illegal profits from fraud and civil penalties, and to preserve the Court's ability to approve a fair distribution for victims of the fraud.

3. It appears that an order requiring each of the Individual Defendants and Relief Defendant to provide a verified accounting of their assets, money and property held directly or indirectly by the Defendants and Relief Defendant, or by others for the direct and indirect beneficial interest of the Defendants and Relief Defendant, is necessary to effectuate and ensure compliance with the freeze imposed on the Defendants' and Relief Defendant's assets.

4. It appears that the Defendants may attempt to destroy, alter or conceal documents.

5. It appears that the appointment of a receiver for the MS Entities is necessary to (i) preserve the *status quo*; (ii) ascertain the extent of commingling of funds among the MS Entities; (iii) ascertain the true financial condition of the MS Entities and the disposition of investor funds; (iv) prevent further dissipation of the property and assets of the MS Entities; (v) prevent the encumbrance or disposal of property or assets of the MS Entities and the investors; (vi) preserve the books, records and documents of the MS Entities; (vii) be available to respond to investor inquiries; (viii) protect investors' assets; and (ix) determine whether the MS Entities should undertake bankruptcy filings.

6. Good and sufficient reasons have been shown why procedure other than by notice of motion is necessary.

7. This Court has jurisdiction over the subject matter of this action and over the

Defendants and Relief Defendant, and venue properly lies in this District.

NOW, THEREFORE,

I.

IT IS HEREBY ORDERED that the Defendants show cause, if there be any, to this Court at 3:00 p.m. on the 3rd day of May 2010, in Room 6 Ct. of the James T. Foley United States Courthouse, 445 Broadway, Albany, NY 12207-2924, why this Court should not enter an Order pursuant to Rule 65 of the Federal Rules of Civil Procedure, Section 20 of the Securities Act, and Section 21 of the Exchange Act, Section 209(d) of the Advisers Act, and Section 42 of the Company Act preliminarily enjoining:

(1) MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith from violating Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§ 77e(a) and 77e(c);

(2) MS & Co., MS Advisors, MS Capital, McGinn and Smith from violating Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a) and Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) and Exchange Act Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5;

(3) MS & Co., MS Advisors, McGinn and Smith from violating Sections 206(1), 206(2), and 206(4) of the Advisers Act, 15 U.S.C. §§ 80b-6(1) and (2), and Rule 206(4)-8 thereunder, 17 C.F.R. §275.206(4)-8;

(4) MS & Co., from violating Section 15(c)(1)(A) of the Exchange Act, 15 U.S.C. § 78(o)(1), and Smith and McGinn from aiding and abetting this violation; and,

(5) FAIN, FEIN, FIIN and TAIN from violating Section 7(a) of the Company Act, 15 U.S.C. § 80a-7.

II.

IT IS FURTHER ORDERED that the Defendants show cause at that time why this Court should not also enter an Order directing that, pending a final disposition of this action, the Defendants, the Relief Defendant, and each of their financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, hold and retain within their control, and otherwise prevent, any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal of any assets, funds, or other property (including money, real or personal property, securities, commodities, choses in action or other property of any kind whatsoever) of, held by, or under the direct or indirect control of the Defendants and Relief Defendant, including but not limited to, the MS Entities, including but not limited to, those entities listed on Exhibit A, whether held in any of their names or for any of their direct or indirect beneficial interest wherever situated, in whatever form such assets may presently exist and wherever located within the territorial jurisdiction of the United States courts, and directing each of the financial or brokerage institutions, debtors and bailees, or any other person or entity holding such assets, funds or other property of the Defendants and Relief Defendant to hold or retain within its or his control and prohibit the withdrawal, removal, transfer or other disposal of any such assets, funds or other properties including but not limited to, all assets, funds, or other properties held in the accounts listed on Exhibit B, as well as each real estate parcel owned directly or indirectly by the MS Entities, including but not limited to, those entities listed on Exhibit A.

III.

IT IS FURTHER ORDERED that the Defendants show cause at that time why this

Court should not also enter an Order enjoining and restraining them, and any person or entity acting at their direction or on their behalf, or any other person, from destroying, altering, concealing or otherwise interfering with the access of Plaintiff Commission and the receiver to any and all documents, books and records, that are in the possession, custody or control of the Defendants, and each of their officers, agents, employees, servants, accountants, financial or brokerage institutions, attorneys-in-fact, subsidiaries, affiliates, predecessors, successors and related entities, including but not limited to, the MS Entities, including but not limited to, those entities listed on Exhibit A, that refer, reflect or relate to the allegations in the Complaint, including, without limitation, documents, books, and records referring, reflecting or relating to the Defendants' finances or business operations.

IV.

IT IS FURTHER ORDERED that the Defendants show cause at that time why this Court should not also enter an Order directing each of the Individual Defendants to serve upon Plaintiff Commission, within three (3) business days, or within such extension of time as the Commission agrees to, a verified written accounting each signed by Defendants McGinn and Smith and also signed by the officer or employees of the Entity Defendants who are most knowledgeable about the assets, liabilities and general financial condition of each of the Defendants, and verified accountings signed by each of the Individual Defendants and the Relief Defendant identifying their own assets, liabilities and general financial condition, if any, under penalty of perjury. Each of the Defendants and Relief Defendant shall serve such sworn updated written accountings by hand delivery, facsimile transmission to (212) 336-1324 or overnight courier service on the Commission's counsel, David Stoelting, Esq., Securities and Exchange Commission, 3 World Financial Center, New York, NY 10281.

V.

IT IS FURTHER ORDERED that Individual Defendants and Relief Defendant shall file with the Court and serve on the Commission, within three (3) business days following service of this Order, a list of all accounts at all banks, brokerage firms or financial institutions (including the name of the financial institution and the name and number on the account), tax identification numbers, telephone or facsimile transmission numbers (including numbers of pagers and mobile telephones), electronic mail addresses, World Wide Web sites or Universal Records Locators, Internet bulletin board sites, online interactive conversational spaces or chat rooms, Internet or electronic mail service providers, street addresses, postal box numbers, safety deposit boxes, and storage facilities used or maintained by them or under their direct or indirect control, at any time from January 1, 2005 to the present including but not limited to information concerning the MS Entities, including but not limited to, those entities listed on Exhibit A.

VI.

IT IS FURTHER ORDERED that the Defendants show cause at that time why this Court should not also enter an Order appointing or continuing the appointment of a receiver for the MS Entities and all entities they control or have an ownership interest in including but not limited to, those entities listed on Exhibit A, to (i) preserve the *status quo*, (ii) ascertain the extent of commingling of funds among the MS Entities; (iii) ascertain the true financial condition of the MS Entities and the disposition of investor funds; (iv) prevent further dissipation of the property and assets of the MS Entities and all entities they control or have an ownership interest in; (v) prevent the encumbrance or disposal of property or assets of the MS Entities and the investors; (vi) preserve the books, records and documents of the MS Entities;) (vii) be available to respond to investor inquiries; (viii) protect the assets of the MS Entities from further

dissipation; and (ix) determine whether the MS Entities should undertake bankruptcy filings.

To effectuate the foregoing, the receiver would be empowered to:

(a) Take and retain immediate possession and control of all of the assets and property, and all books, records and documents of the MS Entities including but not limited to, the entities listed on Exhibit A, and the rights and powers of it with respect thereto including the powers set forth in the management agreements and LLC agreements and/or operating agreements applicable to any LLCs or other property or entities owned or controlled by the Defendants;

(b) Have exclusive control of, and be made the sole authorized signatory for, all accounts at any bank, brokerage firm or financial institution that has possession or control of any assets or funds of the MS Entities including but not limited to, the entities listed on Exhibit A;

(c) Pay from available funds necessary business expenses required to preserve the assets and property of the MS Entities including but not limited to, the entities listed on Exhibit A, including the books, records, and documents of the MS Entities and all entities they control or have an ownership interest in, notwithstanding the asset freeze imposed by paragraph II, above;

(d) Take preliminary steps to locate assets that may have been conveyed to third parties or otherwise concealed;

(e) Take preliminary steps to ascertain the disposition and use of funds obtained by the Defendants resulting from the sale of securities issued by MS Entities including but not limited to, the entities listed on Exhibit A;

(f) Engage and employ persons, including accountants, attorneys and experts, to

assist in the carrying out of the receiver's duties and responsibilities hereunder;

(g) Report to the Court and the parties within 45 days from the date of the entry of this Order, subject to such reasonable extensions as the Court may grant, the following information:

1. All assets, money, funds, securities, and real or personal property then held directly or indirectly by or for the benefit of the MS Entities and all entities they control or have an ownership interest in, including but not limited to, real property, bank accounts, brokerage accounts, investments, business interests, personal property, wherever situated, identifying and describing each asset, its current location and value;

2. A list of secured creditors and other financial institutions with an interest in the receivership assets;

3. To the extent practicable, a list of investors in the MS Entities including but not limited to, the entities listed on Exhibit A;

(h) The receiver's preliminary plan for the administration of the assets of the receivership, including a recommendation regarding whether bankruptcy cases should be filed for all of a portion of the assets subject to the receivership and a recommendation whether litigation against third parties should be commenced on a contingent fee basis to recover assets for the benefit of the receivership.

VII.

IT IS FURTHER ORDERED that, pending a hearing and determination of the Commission's Application for Preliminary Injunction, MS & Co., MS Capital, FAIN, FEIN, FIIN, TAIN, McGinn and Smith and each of them, their agents, servants, employees, and

attorneys-in-fact, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service, or otherwise, are temporarily restrained from, directly or indirectly, singly or in concert, in the offer or sale of any security, by use of any means or instruments of transportation or communication in interstate commerce or by use of the mails to offer or sell securities through the use or medium of a prospectus or otherwise when no registrations statement has been filed or is in effect as to such securities and when no exemption from registration is available in violation of Sections 5(a) and 5(c) of the Securities Act.

VIII.

IT IS FURTHER ORDERED that, pending a hearing and determination of the Commission's Application for Preliminary Injunction, MS & Co., MS Advisors, MS Capital, and each of their financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, are temporarily restrained from violating, directly or indirectly, Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

(a) to employ any device, scheme, or artifice to defraud;

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

IX.

IT IS FURTHER ORDERED that, pending a hearing and determination of the Commission's Application for Preliminary Injunction, MS & Co., MS Advisors, MS Capital, and each of their financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, who receive actual notice of this Order by personal service, facsimile service, or otherwise, are temporarily restrained from violating Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

(a) to employ any device, scheme, or artifice to defraud;

(b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

X.

IT IS FURTHER ORDERED that, pending a hearing and determination of the Commission's Application for Preliminary Injunction, MS & Co., and each of its officers,

agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, who receive actual notice of this Order by personal service, facsimile service, or otherwise, are temporarily restrained from violating Section 15(c) of the Exchange Act, 15 U.S.C. § 78(o)(c), and 17 C.F.R. § 240.10b-3, by while acting as a broker or dealer, directly or indirectly, making use of the mails or any instrumentality of interstate commerce, or any facility of any national securities exchange, to effect any transaction in, or to induce or attempt to induce the purchase or sale of any security otherwise than on a national exchange of which it is a member, by means of any manipulative, deceptive or other fraudulent device or contrivance, or to use or employ, in connection with the purchase or sale of any security otherwise than on a national securities exchange, any act, practice, or course of business defined by the Commission to be included within the term "manipulative, deceptive or other fraudulent device or contrivance" as such term is used in Section 15(c)(1) of the Exchange Act.

XI.

IT IS FURTHER ORDERED that, pending a hearing and determination of the Commission's Application for Preliminary Injunction, the Individual Defendants, and each of their financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, who receive actual notice of this Order by personal service, facsimile service, or otherwise, are temporarily restrained from aiding and abetting any broker's or dealer's violations of Section 15(c) of the Exchange Act, 15 U.S.C. § 78(o)(c), by providing substantial assistance

to an individual or entity, which, while acting as a broker or dealer, directly or indirectly, makes use of the mails or any instrumentality of interstate commerce, or any facility of any national securities exchange, to effect any transaction in, or to induce or attempt to induce the purchase or sale of any security otherwise than on a national exchange of which it is a member, by means of any manipulative, deceptive or other fraudulent device or contrivance, or to use or employ, in connection with the purchase or sale of any security otherwise than on a national securities exchange, any act, practice, or course of business defined by the Commission to be included within the term "manipulative, deceptive or other fraudulent device or contrivance" as such term is used in Section 15(c)(1) of the Exchange Act.

XII.

IT IS FURTHER ORDERED that pending a hearing and determination of the Commission's Application for Preliminary Injunction, MS & Co., MS Advisors and each of their officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, who receive actual notice of this Order by personal service, facsimile service, or otherwise, are temporarily restrained from violating Sections 206(1), 206(2) and 206(4) of the Advisers Act, 15 U.S.C. §§ 80b-6(1) and (2), and Rule 206(4)-8 thereunder, 17 C.F.R. §275.206(4)-8, while acting as an investment advisor, by the use of the mails or any means or instrumentality of interstate commerce, directly or indirectly to employ any device, scheme or artifice to defraud any client or prospective client; to engage in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client; to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative.

XIII.

IT IS FURTHER ORDERED that, pending a hearing and determination of the Commission's Application for Preliminary Injunction, FAIN, FEIN, FIIN, and TAIN and each of their officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, who receive actual notice of this Order by personal service, facsimile service, or otherwise, are temporarily restrained from violating Section 7(a) of the Company Act, 15 U.S.C. § 80a-7, while acting as an investment company, shall directly or indirectly, offer for sale, sell, or deliver after sale, by the use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person; or offer for sale, sell, or deliver after sale any such security or interest, having reason to believe that such security or interest will be made the subject of a public offering by use of the mails or any means or instrumentality of interstate commerce; purchase, redeem, retire, or otherwise acquire or attempt to acquire, by use of the meals or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person; control any investment company which does any of the acts enumerated above; engage in any business in interstate commerce; or control any company which is engaged in any business in interstate commerce.

XIV.

IT IS FURTHER ORDERED that, pending a hearing and determination of the Commission's Application for a Preliminary Injunction, the Defendants, and each of their

financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them and all other persons or entities who receive actual notice of such Order by personal service, facsimile service or otherwise, and each of them, hold and retain within their control, and otherwise prevent, any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal of any assets, funds, or other property (including money, real or personal property, securities, commodities, choses in action or other property of any kind whatsoever) of, held by, or under the direct or indirect control of the Defendants, including but not limited to, entities owned or controlled by, related to, or associated or affiliated with the MS Entities including but not limited to, those entities listed on Exhibit A, whether held in any of their names or for any of their direct or indirect beneficial interest wherever situated, in whatever form such assets may presently exist and wherever located within the territorial jurisdiction of the United States courts, and directing each of the financial or brokerage institutions, debtors and bailees, or any other person or entity holding such assets, funds or other property of the Defendants to hold or retain within its or his control and prohibit the withdrawal, removal, transfer or other disposal of any such assets, funds or other properties including but not limited to, all assets, funds, or other properties held in the accounts listed in Exhibt B, as well as each real estate parcel owned directly or indirectly by the MS Entities including but not limited to, those entities listed on Exhibit A.

XV.

IT IS FURTHER ORDERED that, pending a hearing and determination of the Commission's Application for a Preliminary Injunction, the Defendants, any person or entity acting at their direction or on their behalf, and any other third party including but not limited to any investor, be and hereby are enjoined and restrained from destroying, altering, concealing or

otherwise interfering with the access of Plaintiff Commission and the receiver to any and all documents, books, and records that are in the possession, custody or control of the Defendants and each of their respective officers, agents, employees, servants, accountants, financial or brokerage institutions, or attorneys-in-fact, subsidiaries, affiliates, predecessors, successors and related entities, including but not limited to, the MS Entities, that refer, reflect or relate to the allegations in the Complaint, including, without limitation, documents, books and records referring, reflecting or relating to the Defendants' finances or business operations, or the offer, purchase or sale of securities and the use of proceeds therefrom; and (2) ordered to provide all reasonable cooperation to the receiver in carrying out his duties set forth herein.

XVI.

IT IS FURTHER ORDERED that, pending a hearing and determination of the Commission's Application for a Preliminary Injunction, each of the Defendants shall file with this Court and serve upon Plaintiff Commission, within three (3) business days, or within such extension of time as the Commission agrees to, a verified written accounting signed by each of the Individual Defendants, and the officers or employees of the MS Entities who are most knowledgeable about the assets, liabilities and general financial condition of the each of the Defendants, if any, under penalty of perjury, of:

(1) All assets, liabilities and property currently held, directly or indirectly, by or for the benefit of each Defendant, including, without limitation, bank accounts, brokerage accounts, investments, business interests, loans, lines of credit, and real and personal property wherever situated, describing each asset and liability, its current location and amount;

(2) All money, property, assets and income received by each such Defendant for his

direct or indirect benefit from the other Defendants, at any time from January 1, 2005 through the date of such accounting, describing the amount, disposition and current location of each of the items listed;

(3) The names and last known addresses of all bailees, debtors, and other persons and entities that currently are holding the assets, funds or property of each Defendant; and

(4) All assets, funds, securities and real or personal property invested by each such Defendant, or any other person controlled by them, and the disposition of such assets, funds, securities, real or personal property.

Each Individual Defendant and the officers or employees of the Entity Defendants who are most knowledgeable about the assets, liabilities and general financial condition of the Defendants, if any, shall verify the Entity Defendant's accounting and serve such sworn statements of asset identifying information by hand delivery, facsimile transmission to (212) 336-1324 or overnight courier service on the Commission's counsel, David Stoelting, Esq., Securities and Exchange Commission, 3 World Financial Center, New York, NY 10281. Each of the Individual Defendants is required to provide the Commission with an accounting for his own personal assets, liabilities and general financial condition, and also provide an accounting for each of the Entity Defendants. The Relief Defendant is required to provide the Commission with an accounting for her own personal assets, liabilities and general financial condition.

XVII.

IT IS FURTHER ORDERED that William J. Brown, pending further order of this Court, be and hereby is appointed to act as receiver for the MS Entities including

but not limited to, those entities listed on Exhibit A, to (1) preserve the *status quo*; (2) ascertain the true financial condition of the MS Entities and the disposition of investor funds; (3) determine the extent of commingling of funds between the MS Entities; (4) prevent further dissipation of the property and assets of the MS Entities; (5) prevent the encumbrance or disposal of property or assets of the MS Entities; (6) preserve the books, records and documents of the MS Entities; (7) be available to respond to investor inquiries; and (8) determine if the MS Entities and all entities they control or have an ownership interest in should undertake a bankruptcy filing. To effectuate the foregoing, the receiver is hereby empowered to:

(a) Take and retain immediate possession and control of all of the assets and property of the MS Entities including but not limited to, those entities listed on Exhibit A, and all books, records and documents of MS Entities, and the rights and powers of it with respect thereto;

(b) Have exclusive control of, and be made the sole authorized signatory for, all accounts at any bank, brokerage firm or financial institution that has possession or control of any assets or funds of MS Entities including but not limited to, those entities listed on Exhibit A;

(c) succeed to all rights to manage all properties owned or controlled, directly or indirectly, by the MS Entities, including but not limited to, those entities listed on Exhibit A, pursuant to the LLC and operating agreement relating to each entity;

(d) Pay from available funds necessary business expenses required to preserve the assets and property of MS Entities and all entities they control or have an ownership interest in, including the books, records, and documents of the Defendants, notwithstanding the asset freeze imposed above;

(e) Take preliminary steps to locate assets that may have been conveyed to third parties or otherwise concealed;

(f) Take preliminary steps to ascertain the disposition and use of funds obtained by the Defendants resulting from the sale of securities issued by the Defendants and the entities they control;

(g) Engage and employ persons, including accountants, attorneys and experts, to assist in the carrying out of the receiver's duties and responsibilities hereunder;

(h) Take all necessary steps to gain control of the Defendants' interests in assets in foreign jurisdictions, including but not limited to taking steps necessary to repatriate foreign assets; and

(i) Take such further action as the Court shall deem equitable, just and appropriate under the circumstances upon proper application of the receiver.

XVIII.

IT IS FURTHER ORDERED that no person or entity, including any creditor or claimant against any of the Defendants, or any person acting on behalf of such creditor or claimant, shall take any action without further order of this Court to interfere with the taking control, possession, or management of the assets, including but not limited to the filing of any lawsuits, liens or encumbrances or bankruptcy cases to impact the property and assets subject to this order.

XIX.

IT IS FURTHER ORDERED that the Defendants shall pay the reasonable costs, fees and expenses of the receiver incurred in connection with the performance of his duties described

herein, including but not limited to the reasonable costs, fees and expenses of all persons who may be engaged or employed by the receiver to assist him in carrying out his duties and obligations. All applications for costs, fees and expenses of the receiver and those employed by him shall be made by application to the Court setting forth in reasonable detail the nature of such costs, fees and expenses and shall conform to the Fee Guidelines that will be supplied by the U.S. Securities and Exchange Commission.

XX.

IT IS FURTHER ORDERED that discovery is expedited as follows: pursuant to Rules 26, 30, 31, 33, 34, 36 and 45 of the Federal Rules of Civil Procedure, and without the requirement of a meeting pursuant to Fed. R. Civ. P. 26(f), the parties and the receiver may:

(1) Take depositions, subject to two (2) calendar days' notice by facsimile or otherwise;

(2) Obtain the production of documents, within three (3) calendar days from service by facsimile or otherwise of a request or subpoena from any persons or entities, including non-party witnesses; and

(3) Service of any discovery requests, notices, or subpoenas may be made by personal service, facsimile, overnight courier, or first-class mail on an individual, entity or the individual's or entity's attorney; and

(4) The receiver may take discovery in this action without further order of the Court.

XXI.

IT IS FURTHER ORDERED that a copy of this Order and the papers supporting the Commission's Application be served upon the Defendants and Relief Defendant on or before Wednesday, April 21, 2010, by personal delivery, facsimile, overnight courier, or first-class

mail.

XXII.

IT IS FURTHER ORDERED that the Defendants and Relief Defendant shall deliver any opposing papers in response to the Order to Show Cause above no later than Tuesday, April 27, 2010, at 4:00 p.m. Service shall be made by delivering the papers, using the most expeditious means available, by that date and time, to the New York Regional Office of the Commission at 3 World Financial Center, Room 4300, New York, New York 10281, Attn: David Stoelting Esq., or such other place as counsel for the Commission may direct in writing. The Commission shall have until Thursday, April 29, 2010, at 5:00 p.m., to serve, by the most expeditious means available, any reply papers upon the Defendants and Relief Defendants, or upon their counsel, if counsel shall have made an appearance in this action.

XXIII.

IT IS FURTHER ORDERED that this Order shall be, and is, binding upon the Defendants and Relief Defendants and each of their respective officers, agents, servants, employees, attorneys-in-fact, subsidiaries, affiliates and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service, or otherwise.

UNITED STATES DISTRICT JUDGE

Issued at : 2 : 00 p.m.
April 20, 2010
Albany, New York

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
Mercantile Bank	[redacted]1998	107th Assoc. LLC Trust 07	
Mercantile Bank	[redacted]1987	107th Associates LLC	
M&T Bank	[redacted]6850	107th Associates LLC	
M&T Bank	[redacted]3478	74 State Street Capital LP	Operating
M&T Bank	[redacted]7062	74 State Street Capital LP	
M&T Bank	[redacted]5288	Acquisition Trust 03	Operating Account
Whitney National Bank	[redacted]9335	Benchmark Communication LLC	
M&T Bank	[redacted]0805	Capital Center Credit Corp	Operating
M&T Bank	[redacted]2250	Capital Center Credit Corp	Careclub Depository, 99 Pine St
JPMorganChase	[redacted]6587	Capital Center Credit Corp	Special Account Michael Lewy Attn: David Rees
NFS/Fidelity	[redacted]8178	Capital Center Credit Corp	C/O MCGINN SMITH & CO INC ATTN DAVID P REES
JPMorganChase	[redacted]4817	Capital Center Credit Corp c/o McGinn Smith & Co	
Monterey Bank	[redacted]6854	Charter Cruise Ventures	dba YOLO Cruises
M&T Bank	[redacted]3133	CMS Financial	
M&T Bank	[redacted]6985	CMS Financial Services Corp.	
M&T Bank	[redacted]2064	CMS Financial Services Corp.	
Monterey Bank	[redacted]6846	Cruise Charter Ventures	dba YOLO Cruises
Mercantile Bank	[redacted]3972	Cruise Charter Ventures LLC	
Mercantile Bank	[redacted]1307	Cruise Charter Ventures LLC	
Mercantile Bank	[redacted]2808	Cruise Charter Ventures Trust 08	
M&T Bank	[redacted]3528	First Advisory Income Notes	Operating
M&T Bank	[redacted]7489	First Advisory Income Notes	Escrow
M&T Bank	[redacted]9147	First Excelsior Income Notes LLC	Alarm Accum Account
M&T Bank	[redacted]9139	First Excelsior Income Notes LLC	Operating
Charter One Bank	[redacted]863-8	First Excelsior Income Notes LLC	Escrow
JPMorganChase	[redacted]5928	First Excelsior Income Notes LLC	
NFS/Fidelity	[redacted]9280	First Excelsior Income Notes LLC	
M&T Bank	[redacted]6013	First Independent Income Notes	Operating
M&T Bank	[redacted]9279	First Independent Income Notes	Monitoring Contract Accum
Charter One Bank	[redacted]003-6	First Independent Income Notes	Timothy McGinn
JPMorganChase	[redacted]6893	First Independent Income Notes	
JPMorganChase	[redacted]0087	First Independent Income Notes	
NFS/Fidelity	[redacted]8934	First Independent Income Notes	
Mercantile Bank	[redacted]1921	FirstLine Senior Trust 07 DTD 5/19/07	McGinn Smith Capital Holdings Corp. TTEE
M&T Bank	[redacted]5028	FirstLine Sr Trust 07	
M&T Bank	[redacted]5366	FirstLine Sr Trust 07 Series B	
Mercantile Bank	[redacted]0733	FirstLine Sr Trust 07 Series B	McGinn Smith & Co Inc Trustee
M&T Bank	[redacted]5010	FirstLine Trust 07	
Mercantile Bank	[redacted]910	FirstLine Trust 07 DTD 5/19/07	McGinn Smith Capital Holdings Corp. TTEE
Mercantile Bank	[redacted]0722	FirstLine Trust 07 Series B	McGinn Smith & Co Inc Trustee, UAD 10/16/07
M&T Bank	[redacted]5358	FirstLine Trust 07 Series B	
M&T Bank	[redacted]6413	Fortress Trust 08	c/o McGinn Smith Capital Holdings Corp.
Mercantile Bank	[redacted]9187	Fortress Trust 08 UTD 9/10/08	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]6165	Integrated Excellence Jr Trust	
Mercantile Bank	[redacted]3994	Integrated Excellence Jr Trust 08 DTD 5/28/08	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]6173	Integrated Excellence Sr Trust	

EXHIBIT 5

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
Mercantile Bank	[redacted]3983	Integrated Excellence Sr Trust 08 DTD 5/27/08	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]6868	IP Investors LLC	
M&T Bank	[redacted]3783	James J. Carroll Charitable Fund	
M&T Bank	[redacted]6815	JGC Trust 00	Operating c/o McGinn Smith
Mercantile Bank	[redacted]1674	Luxury Cruise Center Inc	
Mercantile Bank	[redacted]0446	Luxury Cruise Center Inc	
Mercantile Bank	[redacted]0435	Luxury Cruise Charter Inc. Payables	
M&T Bank	[redacted]3996	M&S Partners	
JPMorganChase	[redacted]3443	McGinn Smith & Co	
JPMorganChase	[redacted]5670	McGinn Smith & Co	
NFS/Fidelity	[redacted]0167	MCGINN SMITH & CO DELIGIANNIS MASTER ACCOUNT	
NFS/Fidelity	[redacted]0035	MCGINN SMITH & CO AVERAGE PRICE ACCOUNT	
JPMorganChase	[redacted]4300	McGinn Smith & Co Capital A/C	
JPMorganChase	[redacted]4302	McGinn Smith & Co Corporate Bond A/C Attn: David Rees	
JPMorganChase	[redacted]4306	McGinn Smith & Co Deposit Account Attn: David Rees	
JPMorganChase	[redacted]4305	McGinn Smith & Co Error Account Attn: David Rees	
JPMorganChase	[redacted]4301	McGinn Smith & Co Firm Trading A/C Attn: David Rees	
JPMorganChase	[redacted]4303	McGinn Smith & Co Govt Bond A/C Attn: David Rees	
NFS/Fidelity	[redacted]1007	MCGINN SMITH & CO INC	
NFS/Fidelity	[redacted]0051	MCGINN SMITH & CO INC ALBANY BTAM $ DIFFERENCE	
NFS/Fidelity	[redacted]0043	MCGINN SMITH & CO INC ALBANY BTAM MASTER ACCOUNT	
NFS/Fidelity	[redacted]1007	MCGINN SMITH & CO INC DAVID L SMITH	
NFS/Fidelity	[redacted]0175	MCGINN SMITH & CO INC DELIGIANNIS $ DIFFERENCE	
NFS/Fidelity	[redacted]0086	MCGINN SMITH & CO INC NYC BTAM UNALLOCATED	
NFS/Fidelity	[redacted]0728	MCGINN SMITH & CO INC REVENUE ACCOUNT	
NFS/Fidelity	[redacted]0060	MCGINN SMITH & CO INC ALBANY BTAM UNALLOCATED	
NFS/Fidelity	[redacted]0205	MCGINN SMITH & CO INC BOYLAN $ DIFFERENCE	
NFS/Fidelity	[redacted]0191	MCGINN SMITH & CO INC BOYLAN MASTER ACCOUNT	
NFS/Fidelity	[redacted]0183	MCGINN SMITH & CO INC DELIGIANNIS UNALLOCATED	
NFS/Fidelity	[redacted]0116	MCGINN SMITH & CO INC ERROR ACCOUNT	
NFS/Fidelity	[redacted]0230	MCGINN SMITH & CO INC RABINOVICH $ DIFFERENCE	
NFS/Fidelity	[redacted]0221	MCGINN SMITH & CO INC RABINOVICH MASTER ACCOUNT	
NFS/Fidelity	[redacted]0248	MCGINN SMITH & CO INC RABINOVICH UNALLOCATED	

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
NFS/Fidelity	[redacted]0140	MCGINN SMITH & CO INC SANCHIRICO $ DIFFERENCE	
NFS/Fidelity	[redacted]0132	MCGINN SMITH & CO INC SANCHIRICO MASTER ACCOUNTS	
NFS/Fidelity	[redacted]0159	MCGINN SMITH & CO INC SANCHIRICO UNALLOCATED	
NFS/Fidelity	[redacted]0108	MCGINN SMITH & CO INC SYNDICATE ACCOUNT	
JPMorganChase	[redacted]4304	McGinn Smith & Co Municipal Bond Account Attn: David Rees	
JPMorganChase	[redacted]9815	McGinn Smith & Co Reserve A/C Residual Bal	
NFS/Fidelity	[redacted]0019	MCGINN SMITH & CO RISKLESS PRINCIPAL	
JPMorganChase	[redacted]4307	McGinn Smith & Co Syndicate A/C	
M&T Bank	[redacted]1081	McGinn Smith & Company	Dividend
M&T Bank	[redacted]4734	McGinn Smith & Company	
M&T Bank	[redacted]3569	McGinn Smith Advisors LLC	
M&T Bank	[redacted]6044	McGinn Smith Alarm Trading LLC	
M&T Bank	[redacted]4351	McGinn Smith Capital Holdings	MSCH Paying Agent for Vidsoft Inc.
M&T Bank	[redacted]3551	McGinn Smith Capital Holdings	Payment Agent for Vigilant Privacy Corp.
M&T Bank	[redacted]3803	McGinn Smith Capital Holdings	
JPMorganChase	[redacted]3573	McGinn Smith Capital Holdings	
NFS/Fidelity	[redacted]5734	MCGINN SMITH CAPITAL HOLDINGS	
M&T Bank	[redacted]6783	McGinn Smith Capital Holdings Corp	Hannan Reserve Account
Mercantile Bank	[redacted]1635	McGinn Smith Funding LLC	
Monterey Bank	[redacted]6838	McGinn Smith Funding LLC	
M&T Bank	[redacted]8925	McGinn Smith Holdings LLC	
NFS/Fidelity	[redacted]2944	MCGINN SMITH INCENTIVE PL CUST IRA OF TIMOTHY MCGINN	
JPMorganChase	[redacted]8246	McGinn Smith Incentive Savings Plan	
Mercantile Bank	[redacted]9022	McGinn Smith Independent Services Corp	
M&T Bank	[redacted]6975	McGinn Smith Independent Services Corp	
M&T Bank	[redacted]6051	McGinn Smith Licensing Company LLC	
Mercantile Bank	[redacted]3083	McGinn Smith Transaction Funding Corp	
M&T Bank	[redacted]6207	McGinn Smith Transaction Funding Corp	
Mercantile Bank	[redacted]8857	McGinn Smith Transaction Funding Corp	2nd Offering Account
M&T Bank	[redacted]6036	McGinn Smith Acceptance Corp	
JPMorganChase	[redacted]0294	McGinn, Tim (Union Bank of California Cust Adams Keegan Retirement Svgs Plan, FBO Tim McGinn A/C # [redacted]5003)	
NFS/Fidelity	[redacted]2745	McGinn, Timothy M.	
M&T Bank	[redacted]2675	McGinn, Timothy M.	
M&T Bank	[redacted]9504	McGinn, Timothy M.	
Mercantile Bank	[redacted]2171	MR Cranberry LLC	c/o Timothy McGinn
NFS/Fidelity	[redacted]4272	MR Cranberry LLC	
M&T Bank	[redacted]6421	MSFC Security Holdings LLC	
Mercantile Bank	[redacted]9220	NEI Capital LLC	
M&T Bank	[redacted]5833	Pacific Trust 02	Operating
M&T Bank	[redacted]9626	Pine Street Capital Management LLC	
M&T Bank	[redacted]6478	Pine Street Capital Partners	
M&T Bank	[redacted]9535	Pine Street Capital Partners LP	Operating
Mercantile Bank	[redacted]9687	Prime Vision Communication Mgmt Keys Cove LLC	c/o McGinn Smith & Co
Bank of Florida	[redacted]5976	Prime Vision Communications LLC	

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
Mercantile Bank	[redacted]9698	Prime Vision Communications of Cutler Cay LLC	c/o McGinn Smith & Co
Mercantile Bank	[redacted]9518	Prime Vision Funding of Cutler Cove LLC	c/o McGinn Smith & Co
Mercantile Bank	[redacted]9529	Prime Vision Funding of Key Cove LLC	c/o McGinn Smith & Co
M&T Bank	[redacted]5767	RTC Trust 02	Accum
M&T Bank	[redacted]5775	RTC Trust 02	Operating
JPMorganChase	[redacted]6792	RTC Trust II	
M&T Bank	[redacted]0635	SAI Trust 00	
Charter One Bank	[redacted]823-3	SAI Trust 00	
M&T Bank	[redacted]8966	SAI Trust 03	Jr
M&T Bank	[redacted]4620	SAI Trust 03	Sr
M&T Bank	[redacted]7729	Security Participation Trust I	
M&T Bank	[redacted]9410	Security Participation Trust II	Accum
M&T Bank	[redacted]9288	Security Participation Trust II	Operating
M&T Bank	[redacted]8123	Security Participation Trust III	Operating
M&T Bank	[redacted]8115	Security Participation Trust III	Accum
M&T Bank	[redacted]5460	Security Participation Trust IV	
Charter One Bank	[redacted]023-6	Security Participation Trust Oper	
M&T Bank	[redacted]4492	Seton Hall Associates	McGinn & Smith
NFS/Fidelity	[redacted]2208	Smith, David L.	
M&T Bank	[redacted]9965	Smith, David L.	
NFS/Fidelity	[redacted]0916	Smith, Lynn A.	
NFS/Fidelity	[redacted]0912	Smith, Lynn A.	
Bank of America	[redacted]	Smith, Lynn A.	
Mercantile Bank	[redacted]9507	TDM Cable Funding LLC	c/o McGinn Smith & Co
Mercantile Bank	[redacted]9573	TDM Cable Funding LLC / TDM Cable Trust 06	c/o McGinn Smith & Co
M&T Bank	[redacted]4765	TDM Cable Funding LLC TDM Verifier Trust 07 Operating	TDM Verifier Trust 07 Operating
M&T Bank	[redacted]4500	TDM Cable Funding LLC Trust 06 Account	Trust 06 Account
M&T Bank	[redacted]5234	TDM Luxury Cruise Trust 07	
Mercantile Bank	[redacted]2086	TDM Luxury Cruise Trust 07 DTD 7/16/07	McGinn Smith Capital Holdings Corp - TTEE
Mercantile Bank	[redacted]437	TDM Verifier Trust 07	Escrow
Mercantile Bank	[redacted]4216	TDM Verifier Trust 07R	
M&T Bank	[redacted]5738	TDM Verifier Trust 08	
Mercantile Bank	[redacted]1030	TDM Verifier Trust 08 DTD 12/11/07	McGinn Smith Capital Holdings Corp - TTEE
Mercantile Bank	[redacted]9132	TDM Verifier Trust 08R DTD 12/11/07	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]6736	TDM Verifier Trust 09	
Mercantile Bank	[redacted]4007	TDM Verifier Trust 09 DTD 12/15/08	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]7064	TDM Verifier Trust 11	
M&T Bank	[redacted]0409	TDM Verifier Trust 11	
M&T Bank	[redacted]7056	TDMM Benchmark Trust 09	
Mercantile Bank	[redacted]9077	TDMM Cable Funding LLC	
Mercantile Bank	[redacted]4139	TDMM Cable Jr Tr 09 DTD 1/16/09	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]5728	TDMM Cable Jr Trust 09	
Mercantile Bank	[redacted]4150	TDMM Cable Sr Tr 09 DTD 1/16/09	McGinn Smith Capital Holdings Corp - TTEE
M&T Bank	[redacted]5710	TDMM Cable Sr Trust 09	
M&T Bank	[redacted]5462	Third Albany Income Notes	Escrow
NFS/Fidelity	[redacted]9884	Third Albany Income Notes	
M&T Bank	[redacted]9550	Third Albany Income Notes	Operating
M&T Bank	[redacted]8593	Third Albany Income Notes	Alarm Accum
JPMorganChase	[redacted]6988	Third Albany Income Notes	

Exhibit B
Known Bank Accounts

Institution	Account Number	Name of Account Holder	Account Name 2
NFS/Fidelity	[redacted]9671	[redacted] TTEE David L Smith & Lynn A Smith, Irrev Tr U/A [redacted]04	

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

- -

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-versus- 10-CV-457

(EVIDENTIARY HEARING)

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

Defendants.

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TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of New York, at the James T. Foley United States Courthouse, 445 Broadway, Albany, NY 12207, on **TUESDAY, NOVEMBER 16, 2010**, before the **HON. DAVID R. HOMER**, United States District Court Magistrate Judge.

APPEARANCES:

FOR THE PLAINTIFF:
U.S Securities & Exchange Commission
BY: LARA SHALOV MEHRABAN, ESQ.; JACK KAUFMAN, ESQ; KEVIN P. McGRATH, ESQ.; and DAVID P. STOELTING, ESQ.

FOR THE DEFENDANTS:
ISEMAN, CUNNINGHAM, RIESTER & HYDE, LLP
BY: ROBERT H. ISEMAN, ESQ., and JAMES P. LAGIOS, ESQ.

JILL DUNN, ESQ.
WILLIAM J. BROWN, ESQ.
MARTIN RUSSO, ESQ.
ALISON COHEN, ESQ.

EXHIBIT 6

(Court commenced at 9:15 AM.)

THE CLERK: Today is Tuesday, November 16, 2010, in the matter of the Securities and Exchange Commission versus McGinn, Smith & Co, Inc., et al., case number 10-CV-457. Could we have appearances for the record, please?

MS. MEHRABAN: Yes. It's Lara Mehraban for the Securities and Exchange Commission.

MR. KAUFMAN: Jack Kaufman for the SEC.

MR. McGRATH: Kevin McGrath. Good morning, your Honor.

THE COURT: Good morning.

MR. STOELTING: David Stoelting for plaintiff.

MR. ISEMAN: Robert H. Iseman and James P. Lagios Iseman, Cunningham, Riester & Hyde, special counsel to the trust for the purpose of handling the testimony ordered by the Court in this hearing.

THE COURT: Good morning.

MS. DUNN: Jill Dunn on behalf of the trust and Geoffrey Smith and Lauren Smith.

MR. BROWN: William J. Brown for the receiver.

MR. RUSSO: Martin Russo and Alison Cohen on behalf of David Smith and Tim McGinn.

THE COURT: Good morning. We're present for the evidentiary hearing that was ordered on the issue of the

telephone conversation on July 22, 2010. The burden is with the SEC. Call your first witness, please.

MS. MEHRABAN: Your Honor, there's one matter before we start. Last night, at about 6:30, we received an affidavit from Miss Dunn that contained a very significant retraction regarding the private annuity agreement and we just wanted to make sure before we began that your Honor was aware of that affidavit.

THE COURT: I am.

MS. MEHRABAN: Okay. So we will call David Stoelting.

THE CLERK: Mr. Stoelting, raise your right hand, please.

D A V I D S T O E L T I N G,

having been duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. MEHRABAN:

Q Mr. Stoelting, do you recall a conference with the Court on July 22, 2010?

A Yes.

Q And did you call Jill Dunn after that conference?

A Yes.

Q When did you call her?

A Immediately after the conference with the Court.

Q Why did you call her?

A To ask her a question.

Q What question did you ask her?

A We asked her why she'd made a representation to the Court during the court conference that the trust did not owe a gift tax.

Q And why were you asking her that question?

A Well, at the time, we were preparing a temporary restraining order to freeze the trust account and part of the basis for that motion was that the trust would have owed a significant gift tax based on the transfer of the Charter One stock worth about four-and-a-half million dollars to the trust from Lynn Smith. And it had been described all along as a simple transfer to the trust, that the trust received the stock free and clear, that David and Lynn had no present or future or continuing interest in that stock once it landed in the trust account.

So, we had consulted with a tax expert, who advised us that there would be a very significant gift tax due from David and Lynn Smith as a result of gifting the stock to the trust of 30 to 40 percent of the value of the stock. In addition, the trust would assume the donors or the transferors' basis, and because they had bought that stock very low and then it had risen in value, there would also be a very significant capital gains tax on that that

the trust would have had to pay.

So, there would have been an enormous gift tax and there would have been a big capital gains that would have wiped out about -- at least half of the value of the trust and that would seem to be contradictory to their testimony that, you know, that it was sort of an estate planning move.

Q Okay. What was your reaction to Miss Dunn's statement that no taxes were owed?

A Well, it was very surprising, when we were on the phone with Judge Homer, and I said, well, we were going to offer evidence that a gift tax was owed and during the call with the Court, Miss Dunn interrupted and said very emphatically that no gift tax was owed by the Smiths and it was very surprising to us because we -- you know, we had a different understanding of the gift tax issue at the time.

Q You mentioned an expert. Who was that expert?

A Brit Geiger.

Q Was the sole reason you called Miss Dunn to ask her about her statement that no taxes were owed?

A Yes.

Q Okay. Let's turn to the call with Miss Dunn. Where were you for that call?

A In my office.

Q Who was with you?

A Kevin McGrath.

Q Where was he sitting?

A I was sitting behind my desk and he was sitting in a chair across from my desk.

Q And you called her on speaker phone?

A Yes.

Q Okay. Describe the call with Miss Dunn, please.

A Well, we had Jill's cellphone number, so we dialed the number and she picked up the phone and we asked her about the basis of her statement to the Court that there was no gift tax due. And Jill was very angry during that call and was yelling at us about different things, but I eventually steered her back to the reason for the call and said, "Why did you tell the Court there was no gift tax due," and she said, "It's a private annuity agreement."

Q Continue.

A And we asked her -- or I asked her about the basis for that statement, and she said, "It's in the binders." So, since we had never seen a private annuity agreement up to that point in any of the exhibits or any of the documents during the call, I again asked, "Where is the agreement," and she said, "It's in the binders."

Q Did she say that she had spoken to anyone -- any third party about the fact that no gift taxes were owed?

A Yes. She said that she had consulted with experts about the issue of the gift tax, of accountants, and that

A Well, it's from Brit to me and it says, "Call me. There is a different answer."

Q Okay. So what did you do next?

A We called him and -- Kevin and I called him back from my office again, and by this time, Brit was at the airport waiting for his flight out of town and he told us that he had given it some more thought and he said that there was an arrangement that was available in the '04/'05/'06 time frame in which you could have the irrevocable trust agreement like we had in our case and you would also have a separate annuity agreement, and that somehow the effect of the trust agreement with the annuity agreement would mean two things: One, that there would be no gift tax due because it was not a gift, it was a purchase and sale -- in other words, a purchase by the trust and a sale by the donors; and the trust would also take the asset that's transferred at the donor's basis so you would avoid gift tax and you would avoid capital gains tax.

Q Okay. Was there anything else about your call?

A That's basically what I remember. But Brit said that there must be an annuity agreement out there somewhere.

Q Okay. So what happened next?

A We continued to look through our files and through our documents for the agreement, but the next morning we called Mr. Urbelis, who had been the original trustee of the

trust, who had been appointed in August of 2004 up through the end of April 2010.

Q Okay. Where were you when you called Mr. Urbelis?

A In my office.

Q Who was with you?

A Mr. McGrath and you were with me.

Q Okay. You were on speaker phone?

A Yes.

Q Describe your call with Mr. Urbelis.

MR. ISEMAN: Your Honor, I am gonna object as this being outside of your order.

THE COURT: Sustained.

MS. MEHRABAN: I have no further questions.

THE COURT: Thank you. Mr. Iseman.

CROSS-EXAMINATION

BY MR. ISEMAN:

MR. ISEMAN: May I come up here?

THE COURT: Yes.

Q Good morning, Mr. Stoelting.

A Good morning.

Q As I understand it, your call with Miss Dunn was preceded by a call with --

THE COURT: Mr. Iseman, with all due respect, if you would step back a little bit. Among other things, we are all gonna get neck strain if you stand there.

Q Were you speaking to Mr. McGrath?

A Yes.

Q And you made the decision together to call Ms. Dunn at that time, is that right?

A Yes.

Q Now, prior to calling Miss Dunn, had you given any consideration as to whether or not there was, in fact, no gift tax due in this transaction that created the trust?

A Yes.

Q And what consideration did you give prior to calling Miss Dunn as to whether or not a gift tax was, in fact, required?

A We had sought and obtained an opinion from Mr. Geiger.

Q And when did you obtain that opinion?

A It would have been after Judge Homer's decision unfreezing the trust account on July 7th and the time of the call to Jill on July 22nd.

Q And so after Judge Homer's decision, you and Mr. McGrath, I take it, became focused on this question of whether or not a gift tax return was due?

A Yes.

Q You thought that was important to your case?

A Yes.

Q And you were proceeding to try to find a way to

get reconsideration of what the Court had ruled?

A Yes.

Q You wanted a second bite at the apple?

A We thought that the trust -- we thought that we had grounds to try to re-freeze the trust account.

Q And do you recall two days before -- pardon me, three days before the call with Ms. Dunn sending an e-mail to Mr. Featherstonhaugh concerning the gift tax issue?

A I think so.

Q And was that approximately September 19th -- I'm sorry, July 19th?

A It's possible.

Q And in that e-mail communication with Mr. Featherstonhaugh, did you ask Mr. Featherstonhaugh to produce gift tax returns or to affirm that no gift tax return was due?

A I remember sending an e-mail to Jim asking him generally whether the trust or I think the Smiths ever filed a gift tax return. We did not have a gift tax return from them, so I just wanted to confirm that there was not one in existence.

Q And did you consider before you made this e-mail communication with Mr. Featherstonhaugh whether or not a gift tax was required in the context of a private annuity trust?

A No.

Q That's something that was never -- never crossed your mind?

A No.

Q Did you discuss it with Mr. McGrath or anyone else at the SEC as to whether or not a gift tax return was required in the context of a private annuity trust?

A At what point in time?

Q At the time that you sent the e-mail to Mr. Featherstonhaugh?

A No.

Q After you sent the e-mail to Mr. Featherstonhaugh, am I correct that you engaged Mr. Brit Geiger, is that right?

A He may have already been engaged by that time.

Q When do you think you first engaged Mr. Geiger?

A Sometime after July 7th and when I sent that e-mail.

Q And did you ask Mr. Geiger any time prior to the call with Miss Dunn as to whether a private annuity trust, the creation of a private annuity trust could be achieved without the payment of any gift tax?

A No.

Q Did Mr. Geiger make any comments to you as to whether a private annuity trust could be achieved without

the payment of any gift tax?

A At what point in time?

Q Prior to your call with Miss Dunn?

A No.

Q Now, I would like to direct your attention to the morning of July 21st at 9:30 in the morning. Do you recall having a meeting with Mr. Geiger?

A No.

MR. ISEMAN: Just a second, your Honor.

(Pause in proceedings.)

BY MR. ISEMAN:

Q Let me ask you to look at Defendants' Exhibit 3 marked for identification and ask you whether that refreshes your recollection that on the morning of July 21st, the day before your call with Ms. Dunn, you met with Mr. Geiger.

THE COURT: Is that marked?

MR. ISEMAN: Pardon me?

THE COURT: Is that marked for identification?

MR. ISEMAN: It is.

THE COURT: Okay.

MR. KAUFMAN: We need to get a copy, your Honor.

THE COURT: Please proceed.

A What's your question?

MR. ISEMAN: Would you read it back, please?

(Record read back.)

A Not specifically. I had a number of meetings and discussions with Mr. Geiger during this period of time. No.

Q Is this e-mail that you wrote to Mr. Geiger on July 20th at 7:09 PM?

A It appears to be.

Q And you maintain your e-mails in the ordinary course of your business?

A Yes.

MR. ISEMAN: I offer it.

MS. MEHRABAN: No objection.

THE COURT: Defendants' Exhibit 3 is received in evidence.

(Defendants' Exhibit 3 received.)

BY MR. ISEMAN:

Q Mr. Stoelting, let me ask you to look at Defendants' Exhibit 3 in evidence and direct your attention to the center of the document where you write, "We look forward to seeing you tomorrow morning at 9:30"?

A Yes.

Q And who is the "we" that's referred to in that e-mail?

A I don't know. I presume Mr. McGrath -- some combination of myself, Miss Mehraban and Mr. McGrath.

Q And was the purpose of the meeting on July 21st, the day before your call with Miss Dunn and the call with

the Court, was that to consult with Mr. Geiger concerning tax issues?

A At the time, we were preparing the amended complaint and the temporary restraining order papers, so it would have been in connection with that.

Q And in fact, your focus at that time was on the tax issue and whether or not gift tax was required when a private annuity trust was funded, isn't that right?

A Yes, that was one of our focuses.

MS. MEHRABAN: Objection, that's misleading question.

THE COURT: Sustained. You referred to a private annuity trust.

MR. ISEMAN: Yes.

THE COURT: When you do that are you referring to the trust that's -- that you represent here or are you referring to the annuity agreement?

MR. ISEMAN: I am referring to a private annuity trust.

THE COURT: What is that?

MR. ISEMAN: It is the document that is referred to and has been referred to in the hearing before the Court and was described by Mr. Smith in his cover letter to the private annuity --

THE COURT: And again I ask you: Are you

referring to the trust, which is created by the declaration of trust, or are you referring to the annuity agreement, which was created by a document called a private annuity agreement?

MR. ISEMAN: I'm referring --

THE COURT: You're combining the phrases "trust" and "agreement," and I don't know which one you're talking about.

MR. ISEMAN: Let me rephrase the question.

BY MR. ISEMAN:

Q When you met with Mr. Geiger, you and whoever met with him, on July 21st at 1:30 (sic), was the purpose of your meeting to discuss with Mr. Geiger the tax issues surrounding the Smith family trust?

A Well, when you say "Smith family trust," what do you mean?

Q I mean the trust that is described in the trust document, in the declaration of trust.

A You mean the David and Lynn Smith irrevocable trust, that was the purpose of the discussion. I don't specifically remember that meeting, but that was generally what we were discussing with Brit at that time.

Q And in fact, you were focused on the tax issue in preparation for your presentation to the Court the next day?

A Well, again, the question that we asked Brit to

MR. ISEMAN: I am happy to stipulate to the --

THE COURT: I can take judicial notice of that.

MS. MEHRABAN: Yeah. I just want a complete document.

THE COURT: Any objection?

MS. MEHRABAN: No.

THE COURT: Defendants' Exhibits 8 and 9 are received in evidence.

(Defendants' Exhibits 8 and 9 received.)

BY MR. ISEMAN:

Q Directing your attention, Mr. Stoelting, to Defendants' Exhibits 8 and 9, my question for you is whether prior to your call with Ms. Dunn on July 22nd you provided either of these two documents to Mr. Geiger?

A We did.

Q And when did you provide those documents to Mr. Geiger?

A Sometime between July 7th and July 22nd.

Q And Defendants' Exhibit 8, in the first line, contains the words, in capital letters, "private annuity trust," isn't that right?

A It's not in capital letters. The first letter of each word is capitalized.

Q Okay. When you see letters -- when you see the first letter in each word in a term capitalized, does that

THE COURT: Sustained.

BY MR. ISEMAN:

Q The e-mail says, does it not, Mr. Stoelting, that "we look forward to seeing you tomorrow" -- I stand corrected -- "at 9:30"?

THE COURT: Tomorrow would be July 22nd, wouldn't it?

MR. ISEMAN: Yes. No, July 21st. The e-mail is dated July 20th.

THE COURT: All right.

A What's your question?

Q The e-mail states -- the intention was to meet with Mr. Geiger at 9:30 on the morning of July 21st, and my question is whether in the meeting with Mr. Geiger, the day before your call with the Court, when you were discussing the declaration of trust and the cover letter and the tax issues pertaining to the declaration of trust, whether you discussed with him anything pertaining to the concept of a private annuity trust?

A I don't specifically recall the meeting, but we never discussed a private annuity trust with Mr. Geiger prior to the phone conversation with Miss Dunn on July 22nd.

Q Prior to the call with Ms. Dunn, had you concluded or formed any conclusion as to why Mr. Smith used the term "private annuity trust" in the August 4, 2004, letter that

was part of the exhibit that you offered in the hearing before Judge Homer?

A No.

Q Did it occur to you to make any investigation concerning that term?

A No.

Q Did you think the term might be important?

A I don't recall specifically what I thought about that term.

Q Did you think it was important to make any inquiry concerning the power of the trustee in the declaration of trust that allowed the trustee to purchase property for the donor in exchange for a private annuity payable to the donors?

A Well, we took the deposition of the trustee and asked him about his powers and he did not mention that power.

Q Did you ask him whether or not --

THE COURT: Mr. Iseman, the issue in the hearing is the telephone conversation --

MR. ISEMAN: I understand.

THE COURT: -- on the 22nd. These matters have all been addressed thoroughly by the parties in the affidavits. I understand the positions.

MR. ISEMAN: I understand that, I am just trying

to create the context for the call which I think --

THE COURT: I have more context than I need. I want to hear about the call.

MR. ISEMAN: All right.

(Pause in proceedings.)

BY MR. ISEMAN:

Q When you asked Ms. Dunn the question of why she told the Court that no gift tax return was required, did you consider, before you asked the question, whether she would say that there was no gift tax return required because this was a private annuity trust?

A No.

Q That was never in your mind?

A I had no idea what her response was gonna be.

Q Now, the call, you testified that you got her on her cellphone and you had her on the speaker phone and Mr. McGrath was with you, is that right?

A Yes.

Q And there was no one else there?

A For the call with Miss Dunn on July 22nd?

Q And --

A Is that your question?

Q Yes.

A Correct. It was the two of us in my office.

Q And you began the call with a question concerning

declaration that this was "the first time any person, attorney, agent or anyone associated with David or Lynn Smith or the trust disclosed the existence of a private annuity agreement involving the trust to the SEC." Is that what you said?

A That's what it says.

Q And you did not consider the letter of Mr. Smith covering the declaration of trust where it mentions private annuity trust to be a disclosure of a private annuity trust?

A It is not a disclosure of a private annuity agreement.

Q As a matter of fact, did you or your colleagues conclude and tell the Court that when you looked at the letter from Mr. Smith that covered the declaration of trust that you thought the reference to a private annuity trust was a mistake?

A Did I say that?

Q Do you know whether you or your colleagues have taken that position with the Court, that we didn't pay any attention to it 'cause we thought it was a mistake?

A I don't recall.

MR. ISEMAN: Your Honor, I'm going to make reference to a reply memorandum which has also been filed with the Court in this application and signed, of course, as the Court rules require. It's marked as Defendants'

Exhibit 12 for identification. It's part of the same document number and submittal as the declaration but a reply memorandum. I take it that the Court would take notice of it, I don't need to offer it?

THE COURT: Can you give me the date or the docket number, if you have it, of the document, the document number?

MR. ISEMAN: The document number is document 142.

THE COURT: Okay.

MR. ISEMAN: And it is a reply memorandum that is signed by Kevin McGrath.

BY MR. ISEMAN:

Q Were you aware -- have you seen Mr. McGrath's reply memorandum to the Court in this matter?

A Yes.

Q And you read it before it was submitted?

A I don't recall because I was on trial at this time in another case.

Q Well, let me point you to -- this is signed by Mr. McGrath, there's no question about that, is that right?

A If you say so.

Q Well, do you want to look at it (indicating)?

A Okay.

Q And Mr. McGrath says in this reply memorandum in discussing the private annuity trust, he says, "Thus, David

Smith's one reference to a private annuity trust was most recently understood to be either a misunderstanding or a mischaracterization by him."

MS. MEHRABAN: The document speaks for itself, your Honor.

Q Is that --

THE COURT: Sustained.

Q Do you agree with that, Mr. Stoelting?

MS. MEHRABAN: Objection.

THE COURT: Overruled.

A Do I agree with what?

Q The statement I just read you (indicating).

A Yes.

Q And was there -- are you aware of any investigation that was conducted by you or Mr. McGrath before you dismissed the description in Mr. Smith's letter of private annuity trust as a mischaracterization or a mistake?

A Well, we asked if -- I don't know what you call an investigation. We asked Mrs. Smith, the trustee and numerous other witnesses why the trust was created, what its purpose was, whether or not the Smiths had any continuing interests in the assets of the trust, who owned the assets that were transferred to the trust. We asked all those questions and did not -- no one ever responded about an

annuity agreement.

THE COURT: Is this for context, Mr. Iseman?

MR. ISEMAN: It is, your Honor.

THE COURT: I understand the context.

MR. ISEMAN: May I ask one additional question?

THE COURT: One more.

BY MR. ISEMAN:

Q You -- the SEC --

MR. ISEMAN: Two more, if I may.

THE COURT: One more. Make it good.

Q In the SEC's deposition of Mr. Urbelis, in the course of asking Mr. Urbelis numerous questions about the letter of Mr. Smith, did they ever ask Mr. Urbelis, did you, your agency, ever ask Mr. Urbelis what a private annuity trust was or whether he executed on the power contained in the declaration of the trust to purchase a private annuity?

A No.

MS. MEHRABAN: The record speaks for itself.

THE COURT: The deposition of Mr. Urbelis is part of the record in this case. Objection is sustained.

BY MR. ISEMAN:

Q Did you make any inquiries of -- withdraw that.

You're aware, are you not, Mr. Stoelting, that the Federal Bureau of Investigation and the Internal Revenue Service raided the homes of some of the parties in this

litigation?

THE COURT: Are we gonna get to the telephone conversation, Mr. Iseman? We are back in April now.

MR. ISEMAN: Well, I want to ask the witness whether or not he has had any contact with the people who took a private annuity trust file.

THE COURT: What's that got to do with the telephone conversation on the 22nd?

MR. ISEMAN: It provides context for their intention when they spoke to Ms. Dunn, their knowledge and intention, and it goes to the veracity of the declaration and his statement that notwithstanding due diligence --

THE COURT: All right. Overruled. I'm overruling my own objection, just for the record.

BY MR. ISEMAN:

Q Are you aware that the Federal Bureau of Investigation and the Internal Revenue Service raided the homes and business locations of some of the parties to this litigation?

A Well, I'm aware of a search warrant that was executed by the FBI and the IRS on April 20th.

Q And are you aware of whether or not they seized documents in executing that search warrant?

A I understand that they did.

Q And have you made any request to the Department of

Justice or the Internal Revenue Service to produce to the Securities and Exchange Commission any file seized that was marked private annuity trust?

A We did at the end of October, I believe.

Q The end of October of what year?

A 2010.

Q You mean last month?

A Yes.

Q And did you make any inquiry of the Justice Department or the IRS prior to your call with Ms. Dunn?

A Can you be more specific?

Q Concerning the private annuity trust files?

A No.

Q Did you know -- do you know whether such a file exists?

A Private annuity trust files?

Q A file pertaining to a private annuity trust. In October, when you asked, when you got around to asking the FBI and the IRS about whether they had taken, in executing the search warrant, documents pertaining to a private annuity trust, what did they tell ya?

A They didn't tell me anything.

MS. MEHRABAN: Objection. I don't know that that matter is in evidence. I mean, I don't know if the question is based in evidence.

THE COURT: Sustained. We are getting pretty far afield from the narrow issue in this hearing, Mr. Iseman.

BY MR. ISEMAN:

Q Is there a file that you were told existed by the FBI or the IRS that pertains to the private annuity trust that's the subject of this litigation?

MS. MEHRABAN: Objection.

THE COURT: Sustained.

BY MR. ISEMAN:

Q Is there a file that you learned existed from -- in October, from the IRS or the FBI, that pertains to the declaration of trust that is the subject matter of this litigation?

A We had asked for files relating to the trust and the Smiths' financials prior to the call with Miss Dunn, prior to the PI hearing.

Q And what were you told then?

A I didn't have the conversation myself.

Q Who did?

A One of my colleagues, I'm not sure who.

Q Was it reported -- was the answer reported to you?

A Yes.

Q And what was the answer?

A I don't know what the answer was, but all files relating to the trust were provided to us and we provided

those files to Miss Dunn and the other defendants.

Q And did you learn of any additional files in October?

A Yes.

Q And what additional files did you learn about in October?

A Well, I don't know about additional files, but we did learn that in another file, not the trust files, there was a copy of the annuity agreement.

Q And who produced the file containing the copy of the annuity agreement?

A I don't know who -- what do you mean?

Q Well, what agency, was it the IRS, the FBI?

A I'm not sure.

Q And was it your understanding that the private annuity agreement was taken by whichever agency it was in the execution of the search warrant during the spring of 2010?

A I don't -- I assume that, but I would be speculating. I don't really know.

Q And you assumed that, therefore, this was a document that was available to you throughout this litigation?

A No.

Q It was in the possession of the United States?

A Of either the IRS or the FBI, but I don't know when they -- I don't actually know when they got possession of it.

THE COURT: When did this conversation with the IRS or the FBI occur?

THE WITNESS: I don't know because I didn't have the conversation, but I believe it was late October.

THE COURT: Did it occur before or after your conversation with Miss Dunn?

THE WITNESS: Oh, after.

MR. ISEMAN: I have nothing further.

THE COURT: Any redirect?

MS. MEHRABAN: Can I have one minute, your Honor?

THE COURT: Yes.

(Pause in proceedings.)

REDIRECT-EXAMINATION

BY MS. MEHRABAN:

Q Mr. Iseman asked you whether you had asked Miss Dunn on the phone call on July 22nd to produce the private annuity agreement, correct?

A Yes.

Q Can you explain the tone of the conversation with Miss Dunn, please?

A Well, she was very angry and she was yelling at us throughout the call, so it was hard to get our questions in.

Q Okay. What happened next?

A David and I sort of looked at each other and laughed. And then I remember David saying something to the effect of, "What did she say about a private annuity agreement?" And I said, "I didn't catch that." And he said, "She said something about the reason there was no gift tax due is because it's a private annuity agreement," and I said I didn't hear that, I frankly started toning her out, and then we discussed for a few minutes what that could mean, we couldn't figure it out, and we decided to place a call to Brit Geiger.

Q Had you ever heard, before your conversation with David, that the reason no taxes were due on the transfer of the stock to the trust was because of a private annuity?

A No.

Q Okay. What happened next?

A David placed a call to Brit Geiger. He was the tax attorney that we were speaking with about the tax consequences and our understanding of how the trust had been set up. He was -- he had told us earlier he was heading out to the airport, so I believe he was in a car when we spoke to him. David relayed the substance of the conversation with Jill Dunn, and although I don't have a very clear memory of what he said at that time, my recollection was he said words to the effect of it didn't make any sense to him

based on what we were telling him.

Later on, David and I started looking through binders for this annuity agreement. We hadn't found it. At some point, Mr. Geiger spoke again, I forgot whether he called us back or David called him, but we had a second conversation and the substance of that was he said that it's possible that they may have entered into a separate agreement, a private annuity agreement pursuant to which there would have been a sale of the stock to the trust in return for payments that the Smiths would receive and that if there was such an agreement, there should be a separate document to that effect.

MS. MEHRABAN: No further questions.

THE COURT: Thank you. Mr. Iseman, Mr. Lagios?

CROSS-EXAMINATION

BY MR. ISEMAN:

Q Mr. McGrath, did you hear during the conversation with Ms. Dunn anything said about a binder?

A I don't remember the word "binder." I remember her saying, "You people don't look at your own documents."

Q And as I understand it from Mr. Stoelting's testimony, the task fell to you to prepare the first draft of the declaration?

A Yes.

Q And were you the author of the words "passing

MS. MEHRABAN: No, your Honor.

THE COURT: Thank you. You may step down.

(Witness was excused.)

THE COURT: I take it that's all your witnesses?

MS. MEHRABAN: We were gonna call Miss Dunn.

THE COURT: Oh, you're calling Miss Dunn?

MS. MEHRABAN: Yes.

THE COURT: All right.

THE CLERK: Miss Dunn, raise your right hand.

J I L L D U N N,

having been duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. MEHRABAN:

Q Miss Dunn, on the afternoon of July 22, 2010, you took part in a telephone conference with the Court, correct?

A Yes.

Q On this telephone conference, the SEC stated that gift taxes and capital gains taxes should have been paid with respect to the transfer of the Charter One stock to the trust, correct?

A Their characterization to the judge and their argument to the judge was to the effect that Lynn Smith had testified at the hearing that she had created a trust for tax and estate planning purposes and that they believed that

gift tax returns should have been filed or capital gains paid. That's my recollection.

Q Okay. And you stated on the telephone conference that no gift taxes were due, correct?

A Yes, I did.

Q Okay. Shortly after the conference, you received a call from Mr. Stoelting and Mr. McGrath, correct?

A Almost immediately after the phone conference.

Q Okay. And Mr. Stoelting asked you why no gift taxes were due, correct?

A I thought it was Mr. McGrath speaking, but if it was Mr. Stoelting, then perhaps it was Mr. Stoelting.

Q Okay. And you stated that the reason no gift taxes were owed was because this was a private annuity trust, correct?

A I believe I stated no gift tax returns were filed because no gift tax was due.

Q Okay. Did you also state that no gift tax return was filed and no gift taxes were due because this was a private annuity trust?

A Yes, I did.

Q Okay. At the time of your call, what was your understanding of why no gift taxes would be due if it was a private annuity trust?

A It was my understanding that the characterization

of a private annuity trust was such that the tax implications were such -- I'm sorry, let me start that again. My understanding was that there was no capital gains realized and no gift tax required because it was a private annuity trust. That was the explanation that had been provided to me.

Q What about a private annuity trust made it that no gift taxes were due or no capital gains were due?

A I understood it to be a tax -- an estate planning vehicle that deferred the payment of tax and the realization of gain until money was paid out of the trust.

Q On the call, you also informed Mr. Stoelting and Mr. McGrath that you consulted with accountants on the gift tax issue, correct?

A Correct.

Q How many accountants did you speak to?

A Two.

Q Was one of those accountants Mr. D'Aleo?

A Yes.

Q When did you speak with him?

A I first met him, I believe --

MR. ISEMAN: Your Honor, we are getting outside of the call and I object.

THE COURT: Sustained.

BY MS. MEHRABAN:

Q When did you first speak with Mr. D'Aleo concerning the gift tax issue?

MR. ISEMAN: Same objection.

THE COURT: Same ruling.

BY MS. MEHRABAN:

Q Okay. You said -- at the time of the call with Mr. Stoelting and Mr. McGrath, you said you didn't know of the existence of any private annuity agreement, correct?

A That's correct.

Q Okay. You said you didn't know of the existence of any private annuity agreement until July 27, 2010, when you received it from Mr. Urbelis, correct?

A That's correct.

Q Okay. By July 22, 2010, you knew that it was a private annuity trust, correct?

A I knew it was a private annuity trust well before July 22nd.

Q Okay. When did you learn that it was a private annuity trust?

A I would say the end of April or early May.

THE COURT: All right. You're using the word "it" to refer to a private annuity trust. Are you talking about the declaration of trust or the annuity agreement?

Q Let me ask you that question. When you say it's a

private annuity trust, what do you mean?

A I knew that it had been characterized as a private --

THE COURT: You knew that what had been characterized?

THE WITNESS: The trust vehicle, the letter --

THE COURT: Is that the declaration of trust or the annuity agreement or both?

THE WITNESS: I think they're two -- I think that the declaration --

THE COURT: When you say "it," what are you referring to?

THE WITNESS: I'm talking globally about the concept of the trust. The first time I heard the trust mentioned, it was characterized as a private annuity trust. When I subsequently received what I requested as trust documents, I received a declaration of trust. There was no private annuity agreement provided to me and the first time I ever saw this private annuity agreement that was apparently executed by David and Lynn Smith was on July 27th when I received it from Tom Urbelis. They're two separate documents and I saw them at two separate points in time.

THE COURT: When you refer to "the vehicle," are you referring to the declaration of trust then?

THE WITNESS: The concept of the estate and tax

plan was to utilize something known as a private annuity trust. It had been characterized to me as a private annuity trust early on, in late April or early May. I did not know whether or not all of the steps that would be necessary to truly make it a private annuity trust had been undertaken. I received in May, from Tom Urbelis, a declaration of trust. I think I also received that declaration from Mr. Featherstonhaugh. That declaration of trust, that document that I was working from, did not have a Schedule A attached, it did not have a private annuity agreement attached. I wondered in my mind what form, if there was an annuity affiliated with it, what form that annuity would take. In my mind, I didn't know if it would take the form of some type of external document, such as something purchased from like a Metropolitan Life, some external annuity company, or if it would just be a certificate issued or if it would be a letter or an agreement. I had no idea. And the thought crossed my mind that all of the steps might not have been taken to effectuate the entire plan, step one, step two, step three. I was working from a declaration of trust.

BY MS. MEHRABAN:

Q Just to be clear, Miss Dunn, at the time you received the documents from Mr. Urbelis, you had no reason to think that the document production from Mr. Urbelis did

not contain all of the documents related to the trust, correct?

A The production I received from him in May? Yes, that's correct.

Q Okay. You understood that the declaration of trust did not create a private annuity trust, correct?

A I understood that the declaration of trust created an irrevocable inter-vivose trust.

Q You understood that the declaration of trust did not create a private annuity trust, correct?

A That's correct.

Q Okay. You knew that there had to be a separate agreement in connection with the private annuity, correct?

A I expected that there had to be some other form or document. I didn't know whether it would take the form of an agreement, of a certificate, of a letter or some other written obligation, or if it would take the form of a purchase of an annuity from an external source.

Q Okay. As part of your due diligence in representing the trust, you looked on the website of the National Association of Private Annuity Trusts, correct?

A I did briefly look at it, yes.

Q Okay. And you looked at the documents on the website?

MR. ISEMAN: I am gonna object to it as being

outside the scope of the call.

THE COURT: Overruled.

A I looked at some of them.

Q Okay. And the documents that you looked at were helpful to you in understanding the basic nature of a private annuity trust, correct?

A Yes.

Q All right. The website for that National Association of Private Annuity Trusts is in your declaration, it's www.NAPAT.org, correct?

A That's correct.

Q Okay. The website says that "A private annuity is a contractual" --

MR. ISEMAN: I am gonna object as to the characterization of what the website says.

THE COURT: Sustained.

BY MS. MEHRABAN:

Q Okay. Let me show you a document. Oh, it's document 8, Exhibit 8. So I'm showing you a printout from the website www.NAPAT.org. This is the address of the website that you looked at, correct?

THE COURT: What's the exhibit number?

THE WITNESS: 8.

MS. MEHRABAN: Plaintiff's 8.

A This is the address of the website I viewed.

MS. MEHRABAN: Okay. I am gonna offer this into evidence.

THE COURT: Any objection?

MR. ISEMAN: I have no objection.

THE COURT: Plaintiff's Exhibit 8 is received in evidence.

(Plaintiff's Exhibit 8 received.)

BY MS. MEHRABAN:

A Miss Mehraban, this is dated 11/15/2010 and I don't know whether the content is the same as it was when I reviewed it.

Q Okay. Well, let me direct your attention to the last page of the document. The last page of the document is a link, "What is a PAT," private annuity trust, correct?

A Um-hum, yes.

Q And it says, "A private annuity is a contractual agreement of sale between two private parties, usually the seller, the annuitant, the parent, of an asset transfers property to a family member, the obligor, the children or heirs, in exchange for a special payment contract, an annuity of substantially equal value. The obligor is then responsible for making annuity payments to the annuitant during his or her lifetime." Did I read that correctly?

A Yes.

Q Okay. You remember generally that the website

informed you that a private annuity trust involved a contractual agreement of sale of an asset, correct?

MR. ISEMAN: Object to the form of the question.

A No, that's not correct.

THE COURT: Overruled.

Q What do you remember?

A I -- at what point in time?

Q When you looked at the website.

A At which point in time?

Q The first time.

A I reviewed portions of the website. As I testified earlier, I don't know whether this is the same. I know that I read descriptions of the distinction between a private annuity and a private annuity trust. And as indicated on the page you're referring to, there is a distinction between the trust and the annuity. And I understood there would be a distinction.

Q Do you have any reason to think that this document is different from what you saw when you looked at it the first time?

A I have no reason to think that it's the same or different. I don't -- I don't know. And I don't believe that I printed it the first time that I looked at it.

Q And did you look at it more than once?

A I believe I looked at it, at the website, once in

May and again probably in August.

Q Okay. You said that the website drew a distinction between private annuity and private annuity trust, okay?

A I said this draws a distinction between it, what I'm looking at right now, yes (indicating).

Q Okay. So the next paragraph reads, "What is a private annuity trust? A private annuity trust is a specialized and sophisticated trust designed to give structure and convention to the private annuity contract. The trust may sell and use the proceeds to provide an income stream for the life of the annuitant." Did I read that correctly?

A Yes, you did.

Q Was that your understanding at the time?

A That's my understanding of the intention behind a private annuity trust and what it allows individuals to do.

Q So, after consulting with this website, you understood, did you not, that the only way to avoid gift and capital gains taxes that would have been due on the transfer of the Charter One stock from the Smiths to the trust was if the Smiths had sold the stock to the trust in exchange for an asset of substantially equal value, correct?

A I don't know that my understanding was as succinct or sophisticated as your characterization or that my

understanding was achieved all at one point in time.

Q Okay. Well, after consulting the website, what was your understanding?

A My understanding was that a private annuity trust is a term of art or a tax and estate planning vehicle, that it's highly specialized. That it is -- it allows individuals to place assets into a trust for the purpose of deferring capital gains and that there are several steps that would need to be taken from start to finish in order to achieve the intention or benefits of the concept behind this vehicle that was allowed by the IRS.

Q Okay. And I believe you stated earlier you understood at the time that the declaration of trust was not sufficient in and of itself to do all of those things?

A I think that's correct, the declaration of trust created the trust itself, it created the entity or the trust that was necessary as point one in a multi-step process.

Q Okay. In addition to doing this research, in fact, you had a document showing all of the terms of the private annuity agreement before the July 22, 2010, call with Mr. Stoelting and Mr. McGrath, correct?

A I do not believe that I saw any such document prior to that conversation.

Q It was in your possession, correct?

A I believe it was in my in box. I have since

learned that it was in my in box on July 21st. I do not believe I read it prior to the conversation.

Q Okay. And this was an e-mail that you received from your client, Mr. Wojeski?

A That's correct.

Q Okay. I am gonna show you a document that we've marked as Plaintiff's Exhibit 22.

MS. MEHRABAN: Your Honor, I know this was filed last night, but the copy that I have was from Miss Dunn's e-mail and so it doesn't have the ECF number on it. But I am sure I can get that for you if you want it.

THE COURT: Thanks, I have it. It's 188.

MS. MEHRABAN: All right, thank you.

BY MS. MEHRABAN:

Q This document attaches as Exhibit A the e-mail you received from your client, Mr. Wojeski, correct?

A Yes, it does.

Q Okay. And if you turn to the next page, it contains an e-mail from someone named Nanci Pipo at South Towns Financial Group to David Smith, or a fax or an e-mail?

A It appears to.

Q The next page of the document, which is page 205 of the fax, it's entitled "private annuity contract," correct?

A That's correct.

A I don't believe I did.

Q Did you discuss with Mr. Wojeski that the first payment date for -- under this agreement is September 26, 2015?

A At what point in time?

Q Prior to your call with Mr. McGrath and Mr. Stoelting.

A No.

Q At the same time that you received this e-mail, you were working on an indemnity agreement for Mr. Wojeski, correct?

A I prepared an indemnification agreement for Mr. Wojeski, I believe, on July 22, 2010.

Q Okay. And this agreement -- this is been marked as Plaintiff's Exhibit 10.

MS. MEHRABAN: And I am gonna offer it into evidence.

THE COURT: What is it?

MS. MEHRABAN: This is the -- an indemnity and hold harmless agreement signed by David Smith and Lynn Smith on July 22, 2010.

THE WITNESS: Are you asking me if this is the document I prepared?

MS. MEHRABAN: No, I'm offering it into evidence. There's no question yet.

THE WITNESS: Oh, okay.

MR. ISEMAN: We have no objection.

THE COURT: Plaintiff's Exhibit 10 is received in evidence.

MS. MEHRABAN: Thank you.

(Plaintiff's Exhibit 10 received.)

BY MS. MEHRABAN:

Q In this agreement, David and Lynn Smith agree to indemnify and hold harmless Mr. Wojeski for all claims arising out of the trust, okay?

MR. ISEMAN: I am gonna object because the agreement will speak for itself.

THE COURT: This is a foundation question. Overruled.

A That's correct.

Q Okay. David and Lynn Smith are not the beneficiaries of the trust, correct?

A Correct.

Q So the only circumstances in which they would hold Mr. Wojeski harmless is if there was something in the trust that gave them an interest in the trust, correct?

A No, that's not correct.

Q Okay. Why would they sign an indemnity and hold harmless with Mr. Wojeski?

A Mr. Wojeski had become the trustee of this trust

in the midst of very significant litigation and following the lifting of the asset freeze as to the trust, the beneficiaries had communicated with him and requested some financial assistance from the trust and they had requested that he -- that the trust purchase the family vacation home, I believe to avoid their mother having to sell it to raise money, and he asked for a general assurance that he was not going to have complaints or inter-family disputes concerning those different transactions. And I advised him that at some point in time while Mr. Urbelis was the trustee of this trust, he had prepared an indemnification and hold harmless agreement that David and Lynn Smith signed during his -- to give him protection and indemnification as a result of his performance of his duties as trustee and that I could do the same in these circumstances. And I pulled the indemnification agreement that had been prepared by Mr. Urbelis several years earlier and which had been offered into evidence at the hearing, and I, in essence, retyped it, changed the names, maybe cleaned up a few words and presented it to Mr. Wojeski and I said, "Does this give you what you want?" He said, "Yeah, that's great." And it was done in the context of the real estate closing for the purchase of the property and the Smiths signed this agreement at the time that Mrs. Smith signed all of the closing documents.

Q Okay. So it's just a coincidence that it was signed the day after Mr. Wojeski e-mailed you the terms of the private annuity contract?

A The real estate closing or the real estate transaction had been underway more than a week at that point and we were scheduled to close on it on July 22nd. And as I testified earlier, the e-mail from Mr. Wojeski on July 21st is not something that I believe I saw on that day. I had many other client matters and personal matters going on, I had spent a considerable amount of time working on this case and, frankly, once Judge Homer's decision came in, I put this matter aside and was working on other issues and I didn't look at that document until at least probably a week or more after I apparently received it.

Q So it was a coincidence, correct?

A I think, Miss Mehraban, that you can characterize things as you characterize them and I'll characterize them as I characterize them.

Q So you don't agree with the statement that it's a coincidence?

MR. ISEMAN: It's asked and answered and argumentative.

THE COURT: I don't think it's answered. Overruled.

A It's a fact that the real estate closing was

underway and the indemnification agreement was prepared and signed in conjunction with the real estate closing. That an e-mail was sent to me the day before that I didn't see at that time is of no moment, and if you want to call it a coincidence, I have no quibble with that.

Q You spoke to Mr. Wojeski about the real estate deal, correct?

A Yes.

Q Okay. And the real estate deal closed on July 22, 2010, correct?

A Yes.

Q For the purchase by the trust of the camp house --

A Yes.

Q -- from Lynn Smith? Okay.

During your conversations with Mr. Wojeski prior to July 22, 2010, he did not mention to you that he had received an e-mail or a fax from David Smith containing the terms of the private annuity contract?

A I don't believe he did, no.

Q On July 27, 2010, the same day you received the private annuity agreement from Mr. Urbelis, you received a document request in the form of a letter from the SEC, correct?

A I received a letter from the SEC.

Q In that letter was contained a document request,

correct?

A I think that Mr. Stoelting was requesting information from me, yes.

Q Mr. Stoelting, in fact, asked you for all documents related to the private annuity agreement, correct?

A Yes, he did.

Q And you had the e-mail from Mr. Wojeski by the time you received that letter, correct?

A I now know that I had it at that time, yes.

Q And in response to the letter, you didn't look at your e-mails?

A No, I didn't. Because the letter was -- at the time that the letter was received, this litigation had concluded as to this trust. The intervention was granted for the specific purpose of addressing the preliminary injunction motion, it was limited to that. I had never received any kind of discovery demands, the case was closed, in my mind, and I don't believe there was any basis for making a discovery demand and I didn't undertake any search for any documents.

Q Just to be clear, we are talking about -- I'm showing you Plaintiff's 16, which has already been admitted into evidence. This is the letter requesting documents?

A Yes.

Q And the first sentence of the second paragraph

says, "Please produce all documents concerning the private annuity agreement and any other agreements between David Smith and/or Lynn Smith and the irrevocable trust, including, but not limited to, all correspondence, drafts, revisions and amendments on or before July 29, 2010," correct?

A That's what -- yes, that's what the letter says.

Q Okay. And you did not provide any documents in response to this letter?

A That's correct. And the second sentence after that says, "Such documents are responsive to the documents' request search done on Lynn Smith." This letter was addressed to two attorneys.

Q That's correct. Okay. In the affidavit you submitted last night, you retracted the statement you made in your declaration about having no document regarding the private annuity agreement before July 27, 2010, correct?

A I corrected my prior statement, yes.

Q And that's because of the e-mail sent to you by Mr. Wojeski?

A That's correct.

Q You also submitted a declaration by Mr. Wojeski in connection with the trust certified to the SEC's motion, correct?

A That's correct.

Q Did you draft that declaration?

A I did.

MS. MEHRABAN: Can I have Exhibit 21? 20.

Q I am gonna show you what has been marked as Plaintiff's Exhibit 20. It was e-filed and it's document 147.

Paragraph 2 of this declaration, the last sentence, says, "The first I learned of the existence of an annuity agreement was in late July, when my attorney informed me that the former trustee had just produced the agreement simultaneously to her and to the SEC's counsel." Is that correct?

A That's correct.

Q Okay. And you now know that that statement's not accurate, right?

A That's correct.

Q Okay. I'm gonna show you...

(Pause in proceedings.)

Q Exhibit 13 is Bates stamped TR0000520 through 548. These are documents produced by the trustee to the SEC in response to the SEC's document request, correct?

A That's correct.

Q And these are from the trust files?

A No. This is not from the trust -- you mean the trustee's file?

Q Sorry, the trustee's file.

A No, it's not.

Q Where is it from?

A This is a document which John D'Aleo gave to me at the end of September.

Q 2010?

A 2010.

Q Under what circumstances did he give you the document?

A He was in -- I saw him in the office and he said that he had been given this document by Dave Smith, who had just recently gotten it from Ron Simons, and he said this, you know, describes what the -- might explain this annuity.

Q Why was he giving it to you?

A Why was he giving it to me?

Q Yes.

A Because I am representing the trust and he thought I might be interested in it.

MS. MEHRABAN: Okay. I am gonna offer this into evidence.

MR. ISEMAN: No objection.

THE COURT: Plaintiff's Exhibit 13 is received in evidence.

(Plaintiff's Exhibit 13 received.)

THE COURT: What's the date of the document

production to the SEC?

MS. MEHRABAN: The document request was September 17, 2010. The document production was, I believe, delivered this past Saturday, which is November 13th.

THE WITNESS: The original response was November 2nd, and then the document production occurred Friday or Saturday, I believe.

BY MS. MEHRABAN:

Q Mr. Urbelis sent you documents on May 21, 2010, correct?

A Correct.

Q Okay. And he sent a copy of those documents to the SEC on May 29, 2010, correct?

A That is my understanding, yes.

Q Okay. And you had asked Mr. Urbelis to send you all documents related to the trust, correct?

A I did.

Q Okay. And you reviewed the documents he sent you?

A I did.

Q Okay. Included in the documents you received was the declaration of trust, correct?

A Yes.

Q As well as the cover letter from Mr. Smith, correct?

A Yes.

Q Okay. And this is the cover letter that used the phrase "private annuity trust"?

A Yes.

Q Okay. And at the time you received those documents from Mr. Urbelis, you had no reason to think that the document production from him did not contain all of the documents related to the trust, correct?

A No reason whatsoever.

Q Okay.

MS. MEHRABAN: One minute, your Honor.

(Pause in proceedings.)

MS. MEHRABAN: No further questions, your Honor.

MR. McGRATH: One minute, your Honor?

MS. MEHRABAN: Sorry.

THE COURT: Yes.

(Pause in proceedings.)

MS. MEHRABAN: No further questions, your Honor.

THE COURT: Thank you.

MR. ISEMAN: May I?

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. ISEMAN:

Q Ms. Dunn, at any time during the telephone conversation between you and Mr. Stoelting and Mr. McGrath of the SEC on July 22nd following the call with the Court,

did you use the term "private annuity agreement"?

A Absolutely not. And that's why Mr. McGrath did not hear those words during the conversation, because I didn't use them.

MS. MEHRABAN: Objection.

THE COURT: Sustained as to what Mr. McGrath may have heard.

BY MR. ISEMAN:

Q And had you ever seen a private annuity agreement --

A Absolutely not.

Q -- as of the date of that call?

A Absolutely not.

MR. ISEMAN: Nothing further.

THE COURT: Anything further?

MS. MEHRABAN: No, your Honor.

THE COURT: You may step down.

(Witness was excused.)

THE COURT: Anything further, Mr. Iseman?

MR. ISEMAN: No, your Honor.

THE COURT: All right. I take it there's nothing further from the SEC?

MS. MEHRABAN: No, your Honor.

THE COURT: Is there anything further today?

MR. ISEMAN: No, your Honor.

MS. MEHRABAN: No, your Honor.

THE COURT: All right. Decision is reserved. Thank you.

(This matter adjourned at 11:12 AM.)

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C E R T I F I C A T I O N

I, THERESA J. CASAL, RPR, CRR, CSR, Official Court Reporter in and for the United States District Court, Northern District of New York, do hereby certify that I attended at the time and place set forth in the heading hereof; that I did make a stenographic record of the proceedings held in this matter and caused the same to be transcribed; that the foregoing is a true and correct transcript of the same and whole thereof.

s/Theresa J. Casal

THERESA J. CASAL, RPR, CRR, CSR

USDC Court Reporter - NDNY

DATED: November 26, 2010

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

No. 10-CV-457
(GLS/DRH)

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

Defendants.

ORDER

A conference was held on-the-record on May 27, 2010. As directed during that conference, it is hereby

ORDERED that:

1. The motion of proposed intervenor David Wojeski, as Trustee of the David L. and Lynn A. Smith Irrevocable Trust (Docket No. 31-34) is **GRANTED** to the limited extent that Mr. Wojeski as Trustee is granted leave to intervene to seek relief from the Temporary Restraining Order and to oppose plaintiff's motion for a preliminary injunction as to the Irrevocable Trust;

2. The hearing on plaintiff's motion for a preliminary injunction is hereby adjourned to **June 9, 2010** at **10:30 a.m.**;

3. The parties are granted leave to take limited discovery they deem appropriate with all such discovery to be completed on or before **June 4, 2010**; and

4. On or before **June 8, 2010 at 12:00 Noon** all parties participating in the hearing on plaintiff's motion for a preliminary injunction shall serve on all others participating in the hearing

EXHIBIT 7

(a) a list of all witnesses whom that party intends to call to testify at the hearing, and (b) copies of all documents which a party intends to offer in evidence at the hearing.

IT IS SO ORDERED.

Dated: May 28, 2010
Albany, New York

David R Homer
United States Magistrate Judge

AO 85A (Rev. 01/09) Notice, Consent, and Reference of a Dispositive Motion to a Magistrate Judge

UNITED STATES DISTRICT COURT

for the

Northern District of New York

Securities and Exchange Commission *Plaintiff* v. McGinn, Smith & Co., Inc., et al. *Defendant*	)	Civil Action No. 10-457 GLS-DRH

NOTICE, CONSENT, AND REFERENCE OF A DISPOSITIVE MOTION TO A MAGISTRATE JUDGE

Notice of a magistrate judge's availability. A United States magistrate judge of this court is available to conduct all proceedings and enter a final order dispositive of each motion. A magistrate judge may exercise this authority only if all parties voluntarily consent.

You may consent to have motions referred to a magistrate judge, or you may withhold your consent without adverse substantive consequences. The name of any party withholding consent will not be revealed to any judge who may otherwise be involved with your case.

Consent to a magistrate judge's consideration of a dispositive motion. The following parties consent to have a United States magistrate judge conduct any and all proceedings and enter a final order as to each motion identified below *(identify each motion by document number and title).*

Motions: Plaintiff's Motion for a Preliminary Injunction

Parties' printed names	*Signatures of parties or attorneys*	*Dates*
Securities and Exchange Commission	s/David Stoelting	04/27/2010
David Smith and Timothy McGinn		4/27/10
Lynn Smith		

Reference Order

IT IS ORDERED: The motions are referred to a United States magistrate judge to conduct all proceedings and enter a final order on the motions identified above in accordance with 28 U.S.C. § 636(c).

Date: April 28, 2010

Gary L. Sharpe
District Judge's signature

Gary L. Sharpe, U.S. District Judge
Printed name and title

Note: Return this form to the clerk of court only if you are consenting to the exercise of jurisdiction by a United States magistrate judge. Do not return this form to a judge.

EXHIBIT 8

AO 85A (Rev. 01/09) Notice, Consent, and Reference of a Dispositive Motion to a Magistrate Judge

UNITED STATES DISTRICT COURT

for the

Northern District of New York

Securities and Exchange Commission *Plaintiff* v. McGinn, Smith & Co., Inc., et al. *Defendant*	)	Civil Action No. 10-457 GLS-DRH

NOTICE, CONSENT, AND REFERENCE OF A DISPOSITIVE MOTION TO A MAGISTRATE JUDGE

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Consent to a magistrate judge's consideration of a dispositive motion. The following parties consent to have a United States magistrate judge conduct any and all proceedings and enter a final order as to each motion identified below *(identify each motion by document number and title)*.

Motions: Plaintiff's Motion for a Preliminary Injunction

Parties' printed names	*Signatures of parties or attorneys*	*Dates*
Securities and Exchange Commission	s/David Stoelting	04/27/2010
David Smith and Timothy McGinn	David L. Smith	4/27/2010
Lynn Smith		

Reference Order

IT IS ORDERED: The motions are referred to a United States magistrate judge to conduct all proceedings and enter a final order on the motions identified above in accordance with 28 U.S.C. § 636(c).

Date: April 29, 2010

Gary L. Sharpe
District Judge's signature

Gary L. Sharpe, U.S. District Judge
Printed name and title

Note: Return this form to the clerk of court only if you are consenting to the exercise of jurisdiction by a United States magistrate judge. Do not return this form to a judge.

AO 85A (Rev. 01/09) Notice, Consent, and Reference of a Dispositive Motion to a Magistrate Judge

UNITED STATES DISTRICT COURT

for the

Northern District of New York

Securities and Exchange Commission *Plaintiff* v. McGinn, Smith & Co., Inc., et al. *Defendant*	)	Civil Action No. 10-457 GLS-DRH

NOTICE, CONSENT, AND REFERENCE OF A DISPOSITIVE MOTION TO A MAGISTRATE JUDGE

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Consent to a magistrate judge's consideration of a dispositive motion. The following parties consent to have a United States magistrate judge conduct any and all proceedings and enter a final order as to each motion identified below *(identify each motion by document number and title)*.

Motions: Plaintiff's Motion for a Preliminary Injunction

Parties' printed names	*Signatures of parties or attorneys*	*Dates*
Securities and Exchange Commission	s/David Stoelting	04/27/2010
David Smith and Timothy McGinn		
Lynn Smith	s/James Featherstonhaugh	04/27/2010

Reference Order

IT IS ORDERED: The motions are referred to a United States magistrate judge to conduct all proceedings and enter a final order on the motions identified above in accordance with 28 U.S.C. § 636(c).

Date: April 29, 2010

Gary L. Sharpe
District Judge's signature

Gary L. Sharpe, U.S. District Judge
Printed name and title

Note: Return this form to the clerk of court only if you are consenting to the exercise of jurisdiction by a United States magistrate judge. Do not return this form to a judge.

AO 85A (Rev. 01/09) Notice, Consent, and Reference of a Dispositive Motion to a Magistrate Judge

UNITED STATES DISTRICT COURT

for the

Northern District of New York

Securities and Exchange Commission
Plaintiff
v.
McGinn, Smith & Co, Inc., et. al.
Defendant

Civil Action No. 10-CV-457 GLS-DRH

NOTICE, CONSENT, AND REFERENCE OF A DISPOSITIVE MOTION TO A MAGISTRATE JUDGE

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Consent to a magistrate judge's consideration of a dispositive motion. The following parties consent to have a United States magistrate judge conduct any and all proceedings and enter a final order as to each motion identified below *(identify each motion by document number and title).*

Motions: Plaintiff's Motion for a Preliminary Injunction

Parties' printed names	*Signatures of parties or attorneys*	*Dates*
David Wojeski as Intervenor	Jill A Doran	6/8/10

Reference Order

IT IS ORDERED: The motions are referred to a United States magistrate judge to conduct all proceedings and enter a final order on the motions identified above in accordance with 28 U.S.C. § 636(c).

Date: June 8, 2010

Gary L. Sharpe
District Judge's signature
Gary L. Sharpe U.S.D.J
Printed name and title

Note: Return this form to the clerk of court only if you are consenting to the exercise of jurisdiction by a United States magistrate judge. Do not return this form to a judge.

EXHIBIT 9

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

-versus- 10-CV-457

McGINN, SMITH & CO., INC.,
McGINN, SMITH ADVISORS, LLC,
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC,
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. McGINN and DAVID L. SMITH,
Defendants,
and LYNN A. SMITH,
Relief Defendant.

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING

held in and for the United States District Court, Northern District of New York, James T. Foley United States Courthouse, 445 Broadway, Albany, New York, on WEDNESDAY, JULY 9, 2010, the HON. DAVID R. HOMER, United States District Court Magistrate Judge, Presiding.

APPEARANCES:

FOR THE PLAINTIFF:

SECURITIES AND EXCHANGE COMMISSION

BY: DAVID P. STOELTING, ESQ.

KEVIN P. McGRATH, ESQ.

LARA MEHRABAN, ESQ.

EXHIBIT 10

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

-versus- 10-CV-457

McGINN, SMITH & CO., INC.,
McGINN, SMITH ADVISORS, LLC,
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC,
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. McGINN and DAVID L. SMITH,
Defendants,
and LYNN A. SMITH,
Relief Defendant.

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING (cont'd) held in and for the United States District Court, Northern District of New York, James T. Foley United States Courthouse, 445 Broadway, Albany, New York, on THURSDAY, JULY 10, 2010, the HON. DAVID R. HOMER, United States District Court Magistrate Judge, Presiding.

APPEARANCES:

FOR THE PLAINTIFF:

SECURITIES AND EXCHANGE COMMISSION

BY: DAVID P. STOELTING, ESQ.

KEVIN P. McGRATH, ESQ.

LARA MEHRABAN, ESQ.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

-versus- 10-CV-457

McGINN, SMITH & CO., INC.,
McGINN, SMITH ADVISORS, LLC,
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC,
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. McGINN and DAVID L. SMITH,
Defendants,
and LYNN A. SMITH,
Relief Defendant.

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING (cont'd) held in and for the United States District Court, Northern District of New York, James T. Foley United States Courthouse, 445 Broadway, Albany, New York, on FRIDAY, JULY 11, 2010, the HON. DAVID R. HOMER, United States District Court Magistrate Judge, Presiding.

APPEARANCES:

FOR THE PLAINTIFF:

SECURITIES AND EXCHANGE COMMISSION

BY: DAVID P. STOELTING, ESQ.

KEVIN P. McGRATH, ESQ.

LARA MEHRABAN, ESQ.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

No. 10-CV-457
(GLS/DRH)

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

Defendants.

ORDER

On July 22, 2010, a telephone conference was held with counsel for plaintiff Securities and Exchange Commission (SEC) and counsel for intervenor David M. Wojeski as Trustee of David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 ("Trust"). The conference was held at the request of the SEC. The SEC advised that it intends shortly to file an amended complaint alleging inter alia that the Trust was created by a fraudulent conveyance and to renew its motion to freeze the Trust pending the outcome of this case based on new evidence. The Trust opposed the request. Finding insufficient cause for the relief sought by the SEC during the conference, it is hereby

ORDERED that the request of the SEC for an order freezing the Trust is **DENIED** without prejudice to renewal by formal motion; and

IT IS FURTHER ORDERED that the request of the Trust for an order compelling release of the assets of the Trust to the Trustee is **DENIED** without prejudice to renewal in a formal motion.

IT IS SO ORDERED.

Dated: July 23, 2010
Albany, New York

David R. Homer
United States Magistrate Judge

EXHIBIT 11

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

McGINN, SMITH & CO., INC.,
McGINN, SMITH ADVISORS, LLC,
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. McGINN, AND
DAVID L. SMITH,

Defendants, and

LYNN A. SMITH,

Relief Defendant,

DAVID M. WOJESKI, Trustee of David L. and
Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenor.

Case No.: 1:10-CV-457 (GLS/DRH)

DECLARATION OF JILL A. DUNN IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

I, JILL A. DUNN, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury, the following facts:

1. I am an attorney admitted to practice before this Court and am the attorney for David M. Wojeski, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (hereinafter "the Trust"), the Intervenor in this action. I make this affidavit in opposition to

EXHIBIT 12

theory, they now advance a new theory, equally unavailing, but this one was unfairly launched with ethical salvos directed at the attorneys in this case.

July 22, 2010 Telephone Conversations

35. In a disgusting attempt to mislead the Court into thinking that I, or my client, or Lynn Smith, or her attorney, or Trustee David Wojeski, or Geoffrey Smith, or the former trustee Thomas Urbelis (once again the SEC apparently cannot settle on a theory) withheld, concealed or failed to produce a Private Annuity Agreement, Mr. Stoelting states:

> "Despite these diligent efforts, the SEC did not learn of the existence of a private annuity agreement (the "Annuity Agreement") between the Smiths and the Trust until July 22, 2010, when the Trust's attorney, Jill Dunn, made a passing reference to it during a telephone call with the SEC's attorneys." Stoelting Decl. ¶ 4.

While it may add color to the story of the SEC's supposed "Ah ha!" moment, David Stoelting's assertion that I made a reference, passing or otherwise, to a "private annuity agreement" in a telephone call on July 22, 210 is simply and unequivocally false.

36. I can state with absolute certainty that I did not make that statement because I did not know of the existence of the private annuity agreement until I received it from Thomas Urbelis on July 27, 2010, the same day that the SEC received it. The Court should note also that, after receiving the annuity agreement from Mr. Urbelis, Mr. Stoelting wrote to counsel of record and advised us that he had obtained the agreement from Mr. Urbelis and demanded that we produce other documents in our possession relating to the annuity. Neither I nor Mr. Wojeski had any documents in our possession relating to the private annuity other than the courtesy copy of the documents I received from Mr. Urbelis on July 27 when Mr. Stoelting received them.

37. On July 29, 2010, I responded accordingly in writing and a copy of his letter and mine is attached hereto as Exhibit B. Quite simply, I received the document the same day that the SEC did. Despite my written statement to him that I did not have the private annuity agreement in my possession prior to July 27, Mr. Stoelting proceeded to file the instant motion several days later, and included a barrage of false assertions to lead this Court to believe that I and others concealed this document from the Court and the SEC. He did not provide the Court with my July 29 letter, and his misleading statements were clearly designed to seduce this Court into issuing a TRO freezing the Trust account and the accounts of Geoffrey and Lauren Smith before allowing counsel to be heard. While his efforts in that regard were initially successful, this type of deceitful conduct is sanctionable and he should not be rewarded with the granted of this motion for reconsideration.

38. The sum, substance and circumstances of the telephone conversation on July 22, 2010 was as follows. At approximately 3:45 pm on July 22, 2010, I received an email from David Stoelting apprising me of the SEC's intention to file an Amended Complaint and requesting that I commit that there would be no transfers or withdrawals from the Trust's brokerage account at RMR Wealth Management until such time as they could file the Complaint and seek a TRO freezing the Trust account. There was no basis for the request and I refused to accede to it.

39. The Court may recall that Mr. Stoelting then placed a call to chambers and requested a telephone conference. The Court held the conference with me, Mr. Stoelting and Mr. McGrath on the line.

40. Mr. Stoelting presented the SEC's argument to the Court in support of its verbal request to freeze the Trust account. As the Court pointed out during that call, the SEC's request

was actually a request for reconsideration of the July 7 decision and it was being made after the expiration of the time allowed by the Local Rules for motions for reconsideration.

41. Mr. Stoelting proceeded to explain that the SEC would be filing an Amended Complaint to assert a cause of action under the New York Debtor and Creditor Law and that they believed they had evidence to support its claim that Lynn Smith's transfer of Charter One stock to the Trust in August 2004 was a fraudulent conveyance in violation of state law. In support of that theory, they cited four pieces of evidence:

> 1) That Lynn Smith couldn't have engaged in estate planning or received a tax benefit by creating the Trust in 2004 because no gift tax return was filed for 2004, and they opined that she would have realized capital gains in the absence of a gift tax return having been filed;
>
> 2) That a "personal confession" of David Smith written years before the funds alleged in the complaint were created would demonstrate fraudulent intent in the creation of the Trust;
>
> 3) That there was evidence that the Charter One stock which funded to the Trust had been used once as collateral for the Integrated Alarm Services Group IPO in 2003; and
>
> 4) That the SEC conducted a broker/dealer examination of McGinn, Smith & Co., Inc. in late 2003 and 2004 which should have put David Smith on notice that he may face future liability.

The SEC argued that the above-cited facts would support their theory that the Trust had been used to fraudulently conceal assets from creditors of the Smiths in 2004.

42. In response, I pointed out that no gift tax returns were filed because none were required, that I had never seen the alleged letter but that David Smith's intent was irrelevant because the Charter One stock was the inherited property of Lynn Smith, that the pledge of Charter One Stock as collateral for IASG was in evidence at the hearing and therefore was before

the Court when the July 7 decision was issued, and that any audits or examinations by the SEC would not constitute new evidence since the SEC is the plaintiff herein and they were aware of any examinations or audits they had conducted.

43. The Court denied the request without prejudice to renewal in writing.

44. After the call with the Court ended, Mr. Stoelting and Mr. McGrath apparently hit *69 and dialed me back at my home, demanding to know why I said that no gift tax returns were required. I stated that it was my understanding that because this was a *private annuity trust*, no gains were realized and no gift tax returns were required to be filed. They asked what gave me that understanding. I said that I had consulted with accountants about the issue and was confident in our position. Mr. McGrath then demanded to know what I hadn't produced a copy of an accountant's report to that effect. I stated that I had no obligation to produce any reports from my consultant and that in any event, no report had been created. I stated that no fewer than four accountants testified at the preliminary injunction hearing and that if they had questions or theories about capital gains or gift tax returns or private annuity trusts, they should have asked those questions at the hearing.

45. Mr. McGrath and Mr. Stoelting abruptly ended the call after I complained to them of the rudeness and unprofessionalism they were demonstrating by demanding an immediate response to their surprise request to have my client relinquish rights that had been adjudicated by the Court. During the entire conversation, which probably lasted less than three minutes, I never used the phrase "private annuity agreement" even once, because I didn't know a private annuity agreement existed until July 27. I did refer to the trust as a Private Annuity Trust, which should not have come as any surprise to anyone involved in this case, given the transmittal letter of David Smith characterizing it as such. While it's entirely possible that my statement prompted

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%**

EXHIBIT 13

PRIVATE ANNUITY AGREEMENT

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

Recitals

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

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

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

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

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

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

3. Transferee shall hold full title to the Property, free and clear of all liens and encumbrances, and there shall be no collateral liens of any kind on the Property or any other assets of the Transferee to secure payment of the obligations to the Transferors under this Agreement.

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

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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S APPLICATION FOR AN ORDER TO SHOW CAUSE AND EMERGENCY RELIEF

SECURITIES AND EXCHANGE COMMISSION
New York Regional Office
3 World Financial Center
New York, NY 10281-1022
(212) 336-0174 (Stoelting)

August 3, 2010

EXHIBIT 15

Decl. Ex. 1 at 1.

The Annuity Agreement further provides that in return for the Smiths selling to the Trust all right, title and interest in the Charter One stock, the Trust "agrees to pay or cause to be paid to the Transferors the sum of $489,932 per year, commencing on September 26, 2015 and shall continue on the 26th day of each September thereafter for and during the full term of the natural life of the last to die of the Transferors." The Agreement further imposes "a late penalty of four percent" if payment is not made within ten days. Decl. Ex. 1 ¶¶ 1, 2.

A separate one-page document entitled "Private Annuity" references David and Lynn Smith's ages as 58 and 59 at the time they sold the stock to the Trust, and sets forth a joint life expectancy of 31 years from August 2004. Decl. Ex. 2. The Smiths therefore have a joint life expectancy of 20 years from the date the payment obligations are scheduled to begin in 2015. The annual payment of $489,932, if paid out over the twenty-year joint life expectancy, will therefore entitle David and/or Lynn Smith to receive payments of approximately $9,798,640 from the Trust.

The SEC's Efforts to Discover the Annuity Agreement

During weeks of discovery related to the Trust and three hearing days, neither Lynn Smith nor the former Trustee, who knew of the Annuity Agreement, nor any other witness, including the current Trustee, produced the Agreement or even referred to it.

Lynn Smith. Lynn Smith's "Statement of Net Assets" failed to identify her annuity interest in the Trust. Decl. ¶ 5. Lynn Smith also did not produce the Annuity Agreement in response to the Commission's document request, or disclose it in response to questions at her deposition and at the hearing. Decl. ¶¶ 12-14.

Lynn Smith provided two Affidavits regarding the Trust. Her Affidavit in opposition to the order to show cause dated May 21, 2010, stated that the purpose of the Trust was "to provide security for my children's future." Decl. ¶ 20. In her other Affidavit of the same date in support of the Trustee's motion to intervene, she stated that the Trust's purpose was "to fund a trust for my children, from which they could benefit during my lifetime" and that "I provided the initial and, to date, only asset transferred to the trust. On September 1, 2004, I transferred 100,000 shares of Charter One stock, then valued at $44.50 per share, to the trust." Decl. ¶ 21. This Affidavit further stated that "[f]rom the time the trust was created in August 2004, my husband and I have had no interest in or expectation of an interest in the David L. and Lynn A. Smith Irrevocable Trust. It exists solely, exclusively and permanently for the benefit of our children." Decl. ¶¶ 45-48 (DE 34 ¶ 6).

Ms. Smith made numerous misrepresentations during her deposition with an apparent intention to conceal the Annuity Agreement. For example, Ms. Smith testified that the purpose of the Trust was to enable her children "to have the rewards, reap the rewards of my husband's business." Decl. ¶ 23 (DE 46, Ex. 2 at 39-40). During the hearing, Ms. Smith was asked "what was your understanding as to what your interest in that stock would be after that date of transfer?" Her response failed to acknowledge the interest created by the Annuity Agreement; instead, Ms. Smith just said"[i]t belonged to Jeffrey and Lauren." Decl. ¶ 28. These responses fail to disclose that a critical purpose of the Trust was to provide an income stream to the Smiths, and that the Annuity Agreement does create a present and future interest of the Smiths in the Trust's assets.

Thomas Urbelis. Mr. Urbelis, the Trustee for nearly six years from the creation of the Trust until two days after this action began, concealed the Annuity Agreement. Urbelis received a subpoena asking for, among other things, all documents concerning the Trust, but he failed to produce the Annuity Agreement. Decl. ¶ 15, Ex. 5. Urbelis also failed to disclose the Annuity Agreement during his deposition, despite being asked numerous questions regarding the Trust's nature and purpose. For example, he testified as to his duties as Trustee: "my first duty as I saw it was if they [Goeff or Lauren] needed money or some kind of assistance was to provide it. . . . I wanted the money to be fairly secure for, if and when the kids needed it." Decl. ¶¶ 25-26 (DE 46, Ex. 11 at 11-12). Mr. Urbelis failed to disclose that he also had duties and responsibilities with regard to the Annuity Agreement.

Geoffrey Smith. Smith testified that the Trust was an irrevocable Trust, and never disclosed the Annuity Agreement or the Trustee's future payment obligations to his parents. Decl. ¶ 30.

David Wojeski. The new Trustee did not make any reference to the Annuity Agreement or the obligations it imposes on the Trust and the Trustee. Decl. ¶¶ 31-32.

Counsel. In her closing, Jill Dunn, counsel for the Trust, represented categorically that when Lynn Smith transferred the Charter One stock into the Trust account "all title, ownership, control, beneficial, equitable, actual, or legal any interest whatsoever in that stock was gone from [Lynn Smith's] hands the moment she transferred it." Decl. ¶ 34.

ARGUMENT

I. THE ASSET FREEZE SHOULD COVER THE TRUST

A. The July 7 Order Vacating the Asset Freeze as To the Trust Should Be Reconsidered Based On Newly Discovered Evidence, or the Fraudulent Conveyance Evidence, Under Federal Rule of Civil Procedure 54(b)

Federal Rule of Civil Procedure 54(b) provides that "any order or other decision, however designated . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). The Second Circuit has found that Rule 54(b) allows a district court to change a decision when "'new evidence'" has been discovered or when there is a "'need to prevent a clear error or prevent a manifest injustice.'" *Official Committee of Unsecured Creditors of Color Title, Inc. v. Coopers & Lybrand LLP*, 322 F.2d 147 (2d Cir. 2003) (quoting *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir.1992)); *see also System Mgt. Arts Inc. v. Avesta Tech., Inc.*, 160 F.Supp.2d 580 (583 (S.D.N.Y. 2001) ("A Rule 54(b) motion is not untimely . . . if the evidence upon which the motion is based on newly-discovered.").

The Annuity Agreement constitutes newly discovered evidence justifying reconsideration of the July 7 order vacating the asset freeze as to the Trust. The SEC exercised due diligence in an effort to discover the Agreement. Had it been disclosed, the Agreement would have changed the outcome of the preliminary injunction hearing because the factual conclusions behind the Court's July 7 order as to the Trust are no longer supported by the evidence. For example, the decision states that David Smith acted only "as an adviser and broker" for the Trust. DE 86 at 39. The Annuity Agreement, however, shows that David Smith had a far more significant role over the

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

-versus- 10-CV-457

McGINN, SMITH & CO., INC.,
McGINN, SMITH ADVISORS, LLC,
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC,
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. McGINN and DAVID L. SMITH,
Defendants,
and LYNN A. SMITH,
Relief Defendant.

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING (cont'd) held in and for the United States District Court, Northern District of New York, James T. Foley United States Courthouse, 445 Broadway, Albany, New York, on FRIDAY, JULY 11, 2010, the HON. DAVID R. HOMER, United States District Court Magistrate Judge, Presiding.

APPEARANCES:

FOR THE PLAINTIFF:

SECURITIES AND EXCHANGE COMMISSION

BY: DAVID P. STOELTING, ESQ.

KEVIN P. McGRATH, ESQ.

LARA MEHRABAN, ESQ.

BONNIE J. BUCKLEY, RPR, CRR
UNITED STATES COURT REPORTER - NDNY

EXHIBIT 16

injunction motion, they've never alleged until this argument that what they're really saying is that no, Mrs. Smith, you're not a relief defendant, you're somehow Mr. Smith or Mr. Smith owns all your assets. They've never alleged it. I don't think there's any basis on which the Court can rule on that. Now, there have been other cases where people, as your Honor has referred to a couple of them, those were cases where that was the underlying allegation. That's not the underlying allegation here.

Your Honor, thank you very much for your time and attention.

THE COURT: Thank you. Miss Dunn.

MS. DUNN: Thank you, your Honor. Your Honor, when the trustee of this irrevocable trust sought to intervene in this action, as you can see by our opening motion papers, it was not just unclear, but there was absolutely nothing in the complaint or in the TRO or in any of the declarations or exhibits, voluminous though they were, submitted in support of either the filing of the action or the TRO that made any reference whatsoever to the David and Lynn Smith irrevocable trust which was created on August 4, 2004. The only reference in -- throughout the entire set of papers was the fifth page, standing alone on that page, as almost an afterthought where they reference the irrevocable trust brokerage account. There was no

showing made as to why this account should be included. In the opening papers, the trustee challenged the SEC to identify some theory, any theory at all on which we could then reply and brief the issue as to what the nature of this claim against the trust is. And I have to admit that I'm still confused what the plaintiff's theory is against this trust. Despite having filed its response papers to the motion, and I considered -- and obviously this hearing is a hearing on the motion, but all of the papers that have been filed through affidavit and exhibits are all part and parcel of the evidence to be considered by the Court, as well as the memoranda of law that have been filed by the parties with respect to this motion. And despite having had the opportunity to brief this issue at length, after a couple of different extensions of time, today is the first day that I have ever heard that the SEC is claiming that there was any kind of fraud in the creation of this trust which was created nearly six years ago. This, frankly, was a surprise to hear it. There's no evidence to support the allegation. The -- it's uncontroverted that a trust came into existence by the declaration of trust. That is black letter law. There are numerous cases, some of them were cited in my brief, that a trust comes into creation by the document through which it's written. And there's been no dispute by the SEC that that trust came in creation in August 2004.

There was not a trust estate's expert called to testify, there was no affidavits submitted, there was no estate planning expert testimony to refute that that trust came into existence. Even the plaintiff's own accountants never examined the trust document, the trust declaration. They never examined the trust tax returns. They didn't go out and ask for a copy of the application for the taxpayer ID number. They didn't ask for the tax return. They didn't ask for the transcript of the taxes that were paid. They proposed to you a chart that Miss Daniello prepared where she left blanks next to certain dollar amounts in a way to suggest that David Smith somehow stole money from this trust. Nothing could be further from the truth. We have spent nearly three days demonstrating time and time again every single penny that went into that account by Lynn Smith on September 1, 2004. Every single penny has been accounted for. Not by the party who bears the burden of proof, but by the intervenor. Every penny. Even the $66,000 that they take issue with, Mr. Smith, Jeffrey Smith, testified that he and he alone requested Tom Urbelis to transfer that money to his mother's account. That was solely the direction of a beneficiary of the account. It was his right to do it, unfettered unquestionable right to request a distribution from the trust. He acknowledged he told Mr. Urbelis it was for tax purposes. Mr. Urbelis testified in his deposition,

he considered that to mean for the trust tax purposes as had been the practice every year of the trust existence. No one has questioned whether or not the trust taxes were paid other than in this suggestive manner by the SEC. In fact, Mr. Stoelting stood here a moment ago and conceded that every penny that was distributed out of that trust account has been accounted for. It either went to pay its investment or its capital cash calls to Pine Street Partners or it was used to pay taxes. He disputes that a portion of it was used at Jeffrey Smith's decision and in his discretion to assist his parents. But we heard from Mr. Smith, his mother didn't know that he was doing that. His mother didn't ask him to make that distribution. His father didn't ask him to make that distribution. He and he alone made that suggestion that he had the ability to request this money. It was an emergency situation. He knew his parents did not have available cash. His mother's money was tied up in equity investments. It is not unreasonable for him to use money from his trust fund for purposes that he sees fit.

There has been no response whatsoever from the plaintiff on any manner in any conceivable way in which the case at bar can be distinguished from the clear controlling authority of the Second Circuit in the 2003 decision concerning *Babbitt versus Vebeliunas*.

THE COURT: What about the contention of the SEC that the trust was formed with ill gotten gains?

MS. DUNN: I think that -- even if --

THE COURT: Wouldn't that distinguish it from *Vebeliunas*?

MS. DUNN: No, I don't think it would, for two reasons. One is that the Court can't disregard the trust form unless there was something illegal in its creation. There was no evidence, particularly given your evidentiary ruling concerning a proposed exhibit of the plaintiff, there was no evidence that there was any fraudulent conveyance in August 2004.

If you look at the plaintiff's complaint -- there's two reasons I say that. If you look at the plaintiff's complaint, even though the initial investments were created for those two funds, I believe it was in the fall of 2003, there's no allegation in the complaint that any distributions were made of the investors' money. I believe the first allegation of a distribution was -- there's a phrase, I think it's paragraph 35 of the complaint, I'm not positive, but it makes a reference to as early as 2006, is the phrase. So it is impossible on the evidence and the pleadings before the Court for the SEC to prove any fraudulent conveyance in 2004, in August 2004. The only evidence that is before the Court is that Lynn

Smith acquired that stock, all that stock in 1992, April 1992 was the IPO offering of Albank. Mrs. Smith acquired 40,000 shares of Albank stock. It's in her affidavit which she submitted in support of the Intervenor's motion. She obtained that stock at a purchase of $400,000. That $400,000 was unquestionably drawn from her stock account in April 1992. A stock account which she originally inherited from her father in 1969. The fact that that grew, that stock account grew over that number of years is a reflection of both the market during that time period and the performance of the stocks and the investment decisions that were made. There have been no allegation there was any fraud whatsoever in 1992. She acquired the Albank stock in April 1992. She held it for, we know, seven years, because we heard John D'Aleo's testimony and we have her brokerage account statement as early as 1999 showing her owning 110 shares of Charter One stock. She testified that that stock between 1992 and 1999, as a result of mergers and acquisitions of a local bank from Albank -- Albany Savings Bank, I believe, originally to Albank to Charter One, Citizens Bank, it was the same traunch of assets. It was converted and it grew as a result of mergers and acquisitions. She didn't lose any of her ownership rights of that stock at any time between the time she acquired it in 1992 and 1999. She had it in her account from 1999, and

then in 2004, they do an estate planning. She testified they were doing estate planning for a number of years. She's talked about the work they did with Martin Finn. There was evidence in the record that this particular trust was created upon the advice of an attorney in Buffalo. This was not something that, you know, somebody took out a piece of paper and said I'm putting this stock into a trust for my children. This is a formal declaration of trust. We've heard two experienced CPAs testify --

THE COURT: Would you have any argument against the freezing here if this had been created from a stock account solely in the name of David Smith?

MS. DUNN: Well, that's not the circumstances we have here.

THE COURT: I understand.

MS. DUNN: I don't know. It would depend on what time period you're talking about.

THE COURT: August 2004.

MS. DUNN: In August 2004. There's been no evidence of any fraud or fraudulent intent in August of 2004. Even in the complaint itself it references as early as 2006. There is no proof of any fraudulent intent, there's not even an allegation of any fraudulent acts during those initial funding of those first two funds that were created.

We even heard testimony of a non-party witness, Timothy Welles, who explained this type of private placement investments, who said that they can continue raising money for -- after -- up to a year after the closing. So even under the best of circumstances, if that first offering was done in September 2003, we're already in September 2004 and they could still be raising money. And there's been no allegation in the complaint by the plaintiff that any money was distributed or improperly taken at the moment of the offering or during that one year cycle of the offering.

So, yes, if that money was David Smith's in 2004, it absolutely belongs to the trustee of this trust as we stand here today.

The law is clear in the Second Circuit that you are required to look at New York law before disregarding the form of the trust. There are several reasons that that should not be done here. The *Vebeliunas* case -- and I know I'm slaughtering the name...

THE COURT: Well, one of us is. Probably both of us.

MS. DUNN: I'm trying. It is, I think, quite difficulty, if not impossible, to distinguish the facts from that case from the facts in this case with one exception. The debtor husband of that case had already been indicted

and may have been convicted of fraud at the time this law was established. It is very clear that Mrs. Vebeliunas was the trustee of an irrevocable trust. She purchased the asset that was in that trust from an inheritance which she took and grew with investment decisions. She owned the property. In that case the property was the family residence. The -- there were no allegations that the trust was actually used to conceal assets in that. There was no allegation that the debtor put any assets into the trust.

Consistent with the plaintiff's case here, there is -- the Second Circuit said that there was insufficient evidence to establish that the consideration paid was inadequate. In this instance, we heard two accountants testify that in the creation of this trust, there were clearly tax benefits created that came into existence as a result of the creation of the trust.

In that case, Judge Pooler took pains to recognize that New York is not a community property state. She specifically stated and acknowledged that the debtor husband managed certain ministerial business matters for the trustee wife and paid virtually all of the expenses associated with the irrevocable trust. But, quote, was never the equitable owner nor in control of the irrevocable Vart trust because spouses routinely administer each other assets and conduct business on behalf of one another.

While I don't represent Mrs. Smith, I am one of those lady lawyer progressive feminists, and I do think that the theories advanced by the SEC in this case not only don't comport with Second Circuit law, they don't comport with reality in the way people conduct their lives.

New York is not a community property state. The money that Mrs. Smith used to invest in this trust was her rightful money. She testified that she -- and it's never been contradicted, that she believes at all times that when she transferred that stock into the trust account, she relinquished all title, ownership, control, beneficial, equitable, actual, or legal any interest whatsoever in that stock was gone from her hands the moment she transferred it. She identified the letter of authorization by which the transfer was effectuated. We saw that she testified that it was created for estate planning purposes. David Smith -- there's not one piece of evidence that David Smith has ever transferred a single penny into this trust. Never. There was no evidence whatsoever that he owned the Charter One shares.

THE COURT: What about the $100,000 of unreimbursed taxes that he paid? Wasn't that a benefit to the trust?

MS. DUNN: It may be a benefit to the trust, but as a donor of the trust, he actually was entitled to

make a contribution to the trust, but ironically didn't make a contribution to the trust. None of the money that's in the trust account that's frozen was David Smith's, and he didn't transfer anything in.

Specifically, in the Second Circuit ruling in the *Vebeliunas* case, that even in an instance where the debtor husband in that case paid all of the expenses, every single expense of the trust in that case was paid by the debtor husband, even under that set of facts, the Second Circuit refused to pierce the trust. They considered it ministerial. David Smith is entitled as a donor to make a contribution to the trust, which he didn't do. He's entitled to pay an expense on behalf of the trust. He's entitled to pay the accountant's fee on the trust if he chose to do so. That has no bearing on whether or not the assets in the trust belong to him. It could be construed as a gift. It could be construed as a mistake. It's very possible --

THE COURT: It can also be construed as his property. It's some evidence of a lot of things, depending on what facts are found.

MS. DUNN: But that property -- that hundred thousand dollars was not paid into the trust, it was paid to the taxing authorities.

THE COURT: But the trust realized a hundred

thousand dollar benefit, don't you agree?

MS. DUNN: So if David Smith is a creditor of the trust, then that's a separate issue, but there's not a penny that came into the trust of that money. At this point if he's a creditor of the trust and he wants to make a claim, that's an issue to be decided in New York courts, you know, perhaps by the receiver. But I wouldn't concede that point whatsoever. The case law is very clear, he's entitled to make payments on behalf of the trust. The point is the trust is this bundle of rights, and if he takes assets over here and sends them over here to the IRS and the Tax and Finance, nobody has penetrated that trust. Nor should this Court.

You discussed with Mr. Stoelting this issue of beneficial owner and equitable owner. And I don't think he's drawing a distinction, and I don't know that the case law does. I don't think that it matters. Because in this case, very clearly, the trust is the record owner of the brokerage account. And its clear under case law that the trustee is the equitable owner of the trust assets. In that regard, we've heard under -- examination by the plaintiff's attorneys, suggestions have been made and characterizations were made in its memo of law painting Mr. Urbelis as a figure head and characterizing him as confused, saying he didn't care. This man is an engineer, he's got an MBA, he's

got a law degree, he's been a lawyer in Boston for almost 30, probably 35, 40 years. He understands fiduciary duties. I urge you to read his deposition transcript. He took pains to explain to Miss Mehraban during his deposition that he understood exactly what his duties were. He understood that David Smith didn't have the authority to transfer money in and out of this account. It was not going to be treated in the ordinary sense. He took pains to explain that he's on the board of a charitable organization where their investment advisor has authority to make trades on the account and produces a report once a year. He knew that wasn't going to be the case here. And the SEC is the only party we've heard from who's ever disregarded that form. Every single witness, including every single SEC witness, took the stand and testified that there are just reams of information, reams of paper showing that Tom Urbelis authorized every single transaction out of that account. Every penny. Money to Pine Street Capital Partners, every transfer into David or Lynn Smith's checking accounts which we tied were payments to pay the taxes, every penny that was accounted for, every penny in the trust account was authorized by Tom Urbelis. There's been no testimony or suggestion that those weren't his signatures. He authenticated his signature. His deposition, which he voluntarily came here to do the day after Memorial Day, when

he was not under the subpoena power of this Court, as a resident of the State of Massachusetts, he volunteered to come here and lay out exactly what he did, his relationship with the Smith family over the past 50, 55 years, how he's familiar with the children, he's familiar with their needs, he is familiar with his fiduciary duty. Ironically, one of the suggestions that the Court should take note of that the plaintiff made was that the payments, the transfers of large amounts of money in the years from 2005 forward to pay the trust taxes, that they were suspect in some way because those amounts varied year by year. That argument is ludicrous.

THE COURT: I understand your position on that. And I don't believe I need to hear anything else.

MS. DUNN: All right. Thank you.

The other point that they're making is that Mr. Stoelting has said -- has characterized Mr. Urbelis as a signature. And that's important for a couple of reasons. First of all, he's characterizing him as a mere signature, but he's disregarding Mr. Urbelis' testimony where he went to lengths to describe that not only was this trust invested upon his decision through McGinn, Smith, but his personal accounts, David Smith was his personal broker, his wife's broker, he's got IRAs invested, and he's the trustee of other Urbelis family trusts that were also handled by

McGinn, Smith. He talked to David Smith all the time about various investment decisions. He testified that they had conversations about his investments. Dave would call him up and make a recommendation about an investment. They would have a conversation about the investment. There's documentation in the record that shows Patty Sicluna from McGinn, Smith writing a letter to Mr. Urbelis and separating out each of the different investment decisions that he had made when he decided to invest in Pine Street Capital Partners. He made that decision with respect to this trust, another trust he's the trustee of, his personal account, his wife's account. All of those things demonstrated that he had conversations. He testified in his deposition that at any time he had questions about documents, he would have a conversation with David Smith about these investments, he would make a decision about the investment authorize it, and then the staff at McGinn, Smith would send him the paperwork that was required to sign. So it's somewhat misleading to suggest that somebody just put a piece of paper in front of him and he signed just a signature page and faxed it back. There's ample evidence that that is not what happened.

There was also testimony by Mr. Urbelis that at times he would get paperwork and he would recall other paperwork he had signed and sometimes that was confusing and he would make a call to say well, what is this about? And

he said Dave always answered his questions, always returned his calls, they always had these conversations.

The SEC's witness Brian McQuade took the stand and said he had several conservations with Mr. Urbelis concerning paperwork. Importantly, Mr. McQuade also stated he never kept -- never even saw any kind of pre-signed letter of authorization from Mr. Urbelis. He also testified on direct examination by the SEC's counsel that David Smith very rarely gave him direction concerning this irrevocable trust account.

The bottom line is I would be concerned if there was no signatures, if there were no documentary evidence from Tom Urbelis authorizing all of these transactions. It's ironic that the SEC wants to have it both ways. On the one hand they want to disregard the form of this trust, when everybody else involved in it well before anybody knew of this action, everybody regarded the form of the trust. Every formality was follow every step of the way. All of the signatures that were required were obtained. And the trustee has never contradicted any of that. He answered every single question Miss Mehraban put to him. He travelled here voluntarily to offer that testimony to the SEC at their request on very short notice because of the time frame we had in this litigation. There is no evidence whatsoever that anybody other than Tom

Urbelis, as the trustee, was the equitable owner of this property. He was the record owner of the brokerage account and the equitable owner of the assets.

Lastly, on this issue of relief defendant versus beneficial owner, I started in my remarks with the comment that I still don't know the theory of relief that's being advanced against this trust. I asked in my papers, is it relief defendant or is it this alter ego theory? And at times, in the plaintiff's response, they sometimes want to treat it as a relief defendant because under their understanding of that law, they think they can capture any assets up to the amount claimed in the complaint. Which I submit to you is incorrect. I think there's an absolute obligation to identify the specific ill gotten gains, which none can be identified for, with respect to this trust whatsoever. So faced with the inability to identify any penny transferred into this trust account by David Smith or any other named defendant, save Lynn Smith of the official funding, the SEC then substitutes a theory and says oh, well, he had beneficial control and domination over this account.

THE COURT: Is it your position that strict tracing is required?

MS. DUNN: No, I don't think strict tracing is required. I think strict sourcing is required. And I

think there's a very clear distinction. I understand from my criminal practice the whole concept of seizure of assets and the fact that prosecutors and plaintiffs can acquire substitute assets on a disgorgement argument. But that's an instance where you have a stash of money that is used to buy a boat and of course you can get back the equivalent value of that money. But in this instance, you -- they have to prove that there was some ill gotten gain and they have to identify the amount of the ill gotten gain.

Sourcing, on the other hand, is identifying, in fact, that it is ill gotten in the first instance and identifying the amount of money when it came in and where it came from. If that money has left the hand of the relief defendant, they can then invoke the substitute assets or anti-tracing argument and get to it that way. And I don't dispute that that is the applicable law here. But in this instance they don't seem to be willing to do that. They want to advance this argument that David Smith had some kind of Svengali like control over all accounts that ever existed in McGinn, Smith. And I think it's disingenuous that to argue that a stockbroker who's managing an account, how he manages hundreds if not thousands of accounts, somehow acquires beneficial ownership of that account. There's been no proof in the record. There are no material facts in dispute as I stand here at this moment concerning David and

Lynn Smith irrevocable trust that could prevent you from ruling right from the bench right now. There's simply no proof. They've acknowledged that every penny that came out of the account has been traced to either Pine Street Capital Partners, a legitimate investment that everybody let out of the case on Wednesday, and payments to taxes.

THE COURT: Well, that's the second reference to letting them out of the case.

MS. DUNN: I'm sorry. (crosstalk.)

THE COURT: The conditions --

MS. DUNN: Relieving them from the --

THE COURT: The conditions under which they were relieved were extremely restrictive.

MS. DUNN: I understand.

THE COURT: You make it sound like they walked away free and clear.

MS. DUNN: I understand that.

THE COURT: They didn't.

MS. DUNN: But on his argument, Mr. Stoelting acknowledged that Pine Street Partners is a good investment it's a sound investment. And you know --

THE COURT: Sounded pretty good to me.

MS. DUNN: Well, I would agree. I'm sure Tim Welles would be happy to hear that.

So, in any event, your Honor, just in

conclusion, there is simply no one other than the SEC who has ever disregarded the form of this trust. There was no fraud in its creation. There's -- it has never been used to conceal assets. Even under a liberal construction of the complaint, there's nothing in the complaint to suggest that any money was distributed from those early investment funds that were created less than a year before this trust was created. This is money that belongs to Jeff and Lauren Smith. They're entitled to it. They should be released and the account should be released immediately from the asset freeze order. And I would submit that, while I do reserve the right to respond to anything the SEC submits concerning a negative inference to be drawn, even if you were to decide today to draw that negative inference, the weight of the inference, aside from the admissibility, the weight of the inference has clearly been rebutted, not just by the evidence and testimony I've offered, but by every witness the SEC offered that I cross-examined and every document that is in evidence supports the fact that this is a trust, a trust is a trust. All of the case law I've submitted indicates and supports, this is clearly, under Second Circuit and New York State law it's a trust, it cannot be disregarded and should be released from the asset freeze order.

THE COURT: Thank you.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, *Plaintiff,* *v.* 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, DAVID M. WOJESKI, 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, *Defendants,* LYNN A. SMITH, and NANCY MCGINN, *Relief Defendants, and* DAVID M. WOJESKI, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, *Intervenor.*	:	10 Civ. 457 (GLS/DRH)

ORDER TO SHOW CAUSE

On Emergency Application of Plaintiff Securities and Exchange Commission for an Order:

1. Granting Plaintiff's Application for an Order to Show Cause and Emergency Relief;

EXHIBIT 17

2. Directing defendants David L. Smith, Lynn A. Smith, David M. Wojeski, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (the "Smith Trust"), Geoffrey Smith and Lauren Smith and Relief Defendant Nancy McGinn to show cause why an order should not be entered pending a final disposition of this action:

(a) freezing the assets of the Smith Trust and, as to Nancy McGinn, the property and residence located at 26 Port Huron Drive, Niskayuna, New York (the "Niskayuna property") and any ill-gotten gains; and

(b) (i) directing the return of all distributions, payments or transfers made out of all accounts held by the Smith Trust on or after July 7, 2010; or (ii) alternatively, freezing the assets of Geoffrey Smith and Lauren Smith in the amount of all distributions, payments or transfers they received from the Smith Trust on or after July 7, 2010;

3. Pending adjudication of the foregoing, a Temporary Restraining Order:

(a) freezing the assets of the Smith Trust and, as to Nancy McGinn, the Niskayuna property and any ill gotten gains;

(b) freezing the assets of Geoffrey Smith and Lauren Smith in the amount of all distributions, payments or transfers they received from the Smith Trust on or after July 7, 2010; and

(c) directing the Smith Trust to provide a verified accounting of all distributions, payments or transfers of assets held by the Smith Trust since July 7, 2010 within three business days of receipt of this Order.

The Commission having filed the Complaint on April 20, 2010; and the Commission that same day having filed an Order to Show Cause seeking emergency relief; and the Court

having entered an Order dated April 20, 2010 (the "April 20 Order") granting a temporary restraining order; asset freeze and other relief against defendants McGinn, Smith & Co., Inc. ("MS & Co."); McGinn, Smith Advisors LLC ("MS Advisors"); McGinn, Smith Capital Holdings Corp. ("MS Capital"); First Advisory Income Notes, LLC ("FAIN"); First Excelsior Income Notes, LLC ("FEIN"); First Independent Income Notes, LLC ("FIIN"); Third Albany Income Notes, LLC ("TAIN"); Timothy M. McGinn ("McGinn"); David L. Smith ("Smith") and Lynn A. Smith; and appointing a temporary Receiver over MS & Co., MS Advisors, MS Capital, FAIN, FEIN, FIIN and TAIN, and all other entities McGinn or Smith control or have an ownership interest in, including but not limited to the entities listed on Exhibit A to the April 20 Order.

The Court having granted the motion to intervene by David M. Wojeski, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (the "Smith Trust") on June 1, 2010.

The Court having conducted a hearing on Plaintiff's Motion for a Preliminary Injunction motion on June 9 to 11, 2010.

The Court having issued an Order on July 7, 2010, granting the Plaintiff's Motion for a Preliminary Injunction continuing the freeze over the assets of Relief Defendant Lynn Smith but vacating the freeze over the assets of the Smith Trust.

The Court having entered the Preliminary Injunction Order on July 22, 2010.

The Commission having filed an Amended Complaint on August 2, 2010 seeking relief against MS & Co., MS Advisors, MS Capital, FAIN, FEIN, FINN, TAIN, McGinn, Smith, Lynn A. Smith, the Smith Trust, Geoffrey R. Smith, Lauren T. Smith and Nancy McGinn (collectively the "Defendants"), and Lynn A. Smith and Nancy McGinn

(collectively the "Relief Defendants"), and adding an eighth claim for relief for fraudulent conveyance.

The Commission having filed an Application for an Order to Show Cause and Emergency Relief on August 3, 2010.

The Court has considered (1) the Memorandum of Law in Support of Plaintiff's Application for an Order to Show Cause and Emergency Relief; (2) the Declaration of David Stoelting, executed on August 3, 2010 and the Exhibits thereto; (3) the Declaration of Roseann Daniello, executed on August 2, 2010, and the Exhibit thereto; (4) the testimony and exhibits received into evidence at the hearing on the preliminary injunction on June 9 to 11, 2010; and (5) all prior proceedings herein.

Based on the foregoing, the Court finds that a proper showing, as required by Section 20(b) of the Securities Act of 1933 ("Securities Act"), and Section 21(d) of the Securities Exchange Act of 1934 ("Exchange Act"), has been made for the relief granted herein.

It appears that Defendants Smith, L. Smith, the Smith Trust, Nancy McGinn, Geoffrey Smith and Lauren Smith and Relief Defendant Nancy McGinn may attempt to dissipate, deplete or transfer from the jurisdiction of this Court, funds, property and other assets that could be subject to an order of disgorgement. It appears that an order freezing the assets of the Smith Trust and Nancy McGinn (and alternatively Geoffrey Smith and Lauren Smith), as specified herein, is necessary to protect this Court's ability to award equitable relief in the form of disgorgement of illegal profits fraud, and to preserve the Court's ability to approve a fair distribution for victims of the fraud.

NOW, THEREFORE, deeming this application as a motion to reconsider the portion of the order dated July 7, 2010 (Dkt. No. 86) as to the Nancy McGinn Trust, and [illegible] any objection to Nancy McGinn

DRH 8/3/10

IT IS ORDERED that Defendants Smith, Lynn Smith, the Smith Trust, Nancy McGinn, Geoffrey Smith and Lauren Smith and Relief Defendants Lynn Smith and Nancy McGinn show cause, if there be any, to this Court at 10:00 a.m. of the 18th day of August, 2010 in the Courtroom of Magistrate Judge Homer, at the James T. Foley U.S. Courthouse, 445 Broadway, Albany, New York, 12207-2924, why this Court should not enter an Order pursuant to Rules 54 and 65 of the Federal Rules of Civil Procedure, Section 20 of the Securities Act, and Section 21 of the Exchange Act, directing that, pending a final disposition of this action:

(1) the Smith Trust and each of its financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service or otherwise, and each of them, hold and retain within their control, and otherwise prevent, any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal of any assets, funds, or other property (including money, real or personal property, securities, commodities, choses in action or other property of any kind whatsoever) of, held by, or under the direct or indirect control of the Smith Trust, whether held in any of its names or for any of its direct or indirect beneficial interest wherever situated, in whatever form such assets may presently exist and wherever located within the territorial jurisdiction of the United States courts, and directing each of the financial or brokerage institutions, debtors and bailees, or any other person or entity holding such assets, funds or other property of the Smith Trust to hold or retain within its, his or her control and

prohibit the withdrawal, removal, transfer or other disposal of any such assets, funds or other properties;

(2) (a) all funds distributed, paid or transferred out of the Smith Trust on or after July 7, 2010 be returned to the Smith Trust; or (b) alternatively, Geoffrey Smith and Lauren Smith and each of their financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service or otherwise, and each of them, hold and retain within their control, and otherwise prevent, any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal of all distributions, payments or transfers received by them from the Smith Trust on or after July 7, 2010 (including money, real or personal property, securities, commodities, choses in action or other property of any kind whatsoever) of, held by, or under the direct or indirect control of Geoffrey Smith or Lauren Smith, whether held in any of their names or for any of their direct or indirect beneficial interest wherever situated, in whatever form such assets may presently exist and wherever located within the territorial jurisdiction of the United States courts, and directing each of the financial or brokerage institutions, debtors and bailees, or any other person or entity holding such assets, funds or other property of Geoffrey Smith or Lauren Smith to hold or retain within its, his or her control and prohibit the withdrawal, removal, transfer or other disposal of any such assets, funds or other properties;

(3) Nancy McGinn, and each of her financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service or otherwise, and each of them, hold and retain within their control, and otherwise

prevent, any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal of the Niskayuna property and all ill-gotten gains (including money, real or personal property, securities, commodities, choses in action or other property of any kind whatsoever) of, held by, or under the direct or indirect control of Nancy McGinn, whether held in any of her names or for any of her direct or indirect beneficial interest wherever situated, in whatever form such assets may presently exist and wherever located within the territorial jurisdiction of the United States courts, and directing each of the financial or brokerage institutions, debtors and bailees, or any other person or entity holding such assets, funds or other property of Nancy McGinn to hold or retain within its, his or her control and prohibit the withdrawal, removal, transfer or other disposal of any such assets, funds or other properties.

Opposing papers shall be filed and served on or before the 16th day of August, 2010. Reply papers shall be filed and served on or before the 16th day of August, 2010.

IT IS FURTHER ORDERED that pending an adjudication of the foregoing:

(1) the Smith Trust and each of its financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service or otherwise, and each of them, hold and retain within their control, and otherwise prevent, any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal of any assets, funds, or other property (including money, real or personal property, securities, commodities, choses in action or other property of any kind whatsoever) of, held by, or under the direct or indirect control of the Smith Trust, whether held in any of its names or for any of its direct or indirect beneficial interest wherever

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situated, in whatever form such assets may presently exist and wherever located within the territorial jurisdiction of the United States courts, and directing each of the financial or brokerage institutions, debtors and bailees, or any other person or entity holding such assets, funds or other property of the Smith Trust to hold or retain within its, his or her control and prohibit the withdrawal, removal, transfer or other disposal of any such assets, funds or other properties;

(2) Geoffrey Smith and Lauren Smith and each of their financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service or otherwise, and each of them, hold and retain within their control, and otherwise prevent, any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal of any distributions, payments or transfers received by them from the Smith Trust on or after July 7, 2010 (including money, real or personal property, securities, commodities, choses in action or other property of any kind whatsoever) of, held by, or under the direct or indirect control of Geoffrey Smith or Lauren Smith, whether held in any of their names or for any of their direct or indirect beneficial interest wherever situated, in whatever form such assets may presently exist and wherever located within the territorial jurisdiction of the United States courts, and directing each of the financial or brokerage institutions, debtors and bailees, or any other person or entity holding such assets, funds or other property of Geoffrey Smith or Lauren Smith to hold or retain within its, his or her control and prohibit the withdrawal, removal, transfer or other disposal of any such assets, funds or other properties;

(3) the Smith Trust provide a verified accounting of all distributions, payments or transfers from the Smith Trust on or after July 7, 2010 within three business days of receipt of this Order; and

(4) Nancy McGinn and each of her financial and brokerage institutions, officers, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service or otherwise, and each of them, hold and retain within their control, and otherwise prevent, any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal of the Niskayuna property and all ill-gotten gains (including money, real or personal property, securities, commodities, choses in action or other property of any kind whatsoever) of, held by, or under the direct or indirect control of Nancy McGinn, whether held in any of her names or for any of her direct or indirect beneficial interest wherever situated, in whatever form such assets may presently exist and wherever located within the territorial jurisdiction of the United States courts, and directing each of the financial or brokerage institutions, debtors and bailees, or any other person or entity holding such assets, funds or other property of Nancy McGinn to hold or retain within its, his or her control and prohibit the withdrawal, removal, transfer or other disposal of any such assets, funds or other properties.

IT IS FURTHER ORDERED that this Order shall be, and is, binding upon the Defendants and Relief Defendants and each of their respective officers, agents, servants, employees, attorneys-in-fact, subsidiaries, affiliates and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service, or otherwise.

IT IS FURTHER ORDERED that the Preliminary Injunction Order dated July 22, 2010 remains in full force and effect, except to the extent modified by this Order.

Dated: 8/3/10, 2010
Albany, New York

David R. Homer
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	
v.	:	**10 Civ. 457 (GLS/DRH)**
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, DAVID M. WOJESKI, 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,	:	
Defendants,	:	
LYNN A. SMITH, and NANCY MCGINN,	:	
Relief Defendants, and	:	
DAVID M. WOJESKI, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04,	:	
Intervenor.	:	

DECLARATION OF SERVICE

I, David Stoelting, pursuant to 28 U.S.C. § 1746, certify that on January 31, 2011, I filed on the Court's ECF system the following documents:

- Notice of Motion;
- Memorandum of Law in Support of Plaintiff's Motion for Sanctions; and
- Declaration of Lara Shalov Mehraban and accompanying Exhibits A to I;

EXHIBIT 18

And on January 31, 2011, I sent by electronic mail a copy of the above-referenced documents to:

Nancy McGinn
26 Port Huron Drive
Niskayuna, NY 12309
nemcginn@yahoo.com
Appearing Pro Se

And I sent by electronic mail (on January 31, 2011) and UPS Overnight (on February 1, 2011) a copy of the above-referenced documents to:

Thomas E. Peisch, Esq.
Conn Kavanaugh Rosenthal Peisch & Ford, LLP
Ten Post Office Square
Boston, MA 02109
tpeisch@ckrpf.com
Counsel for Thomas Urbelis

Dated: February 1, 2011
New York, New York

s/David Stoelting
Attorney Bar Number: 516163
Attorney for Plaintiff
Securities and Exchange Commission
3 World Financial Center, Room 400
New York, NY 10281
Telephone: (212) 336-0533
Fax: (212) 336-1324
E-mail: stoeltingd@sec.gov

Jill Dunn

From: David M. Wojeski [dwojeski@wojeskico.com]
Sent: Wednesday, July 21, 2010 10:21 AM
To: jdunn708@nycap.rr.com
Attachments: Pvt Annuity.pdf

<<Pvt Annuity.pdf>>

EXHIBIT 19

Dave,

Per our conversation, please see the attached. The first four pages are from the annuity contract. The three pages after that are documents that were in the file that I thought might be relevant.

Nanci

Nanci L. Pipe, CLU, CLTC
Vice President & Partner
Southtowns Financial Group, Inc.
6195 W. Quaker St.
Orchard Park, NY 14127
office: (716) 662-0070
toll free fax: (888) 461-2613
PLEASE NOTE: OUR NEW FAX NUMBER

x SFG Circle No Website

Attorney:
Bruce Hoover
716-566-5432

Policy Delivery Receipt

PRIVATE ANNUITY CONTRACT

Annuitant(s): David L. & Lynn A. Smith

Contract Date: August 31, 2004

Face Amount: $4,447,000

Rate: 4.6%

I acknowledge that I received the above number contract certificate on the date of this receipt.

Owner's Signature _____ Date 10/18/04

Agent's Signature _____

COPY

PRIVATE ANNUITY CONTRACT

BETWEEN

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

AND

THE DAVID L. & LYNN A. SMITH IRREVOCABLE TRUST U/A DATED AUGUST 31, 2004, TRANSFEREE

****

CONTRACT TERMS

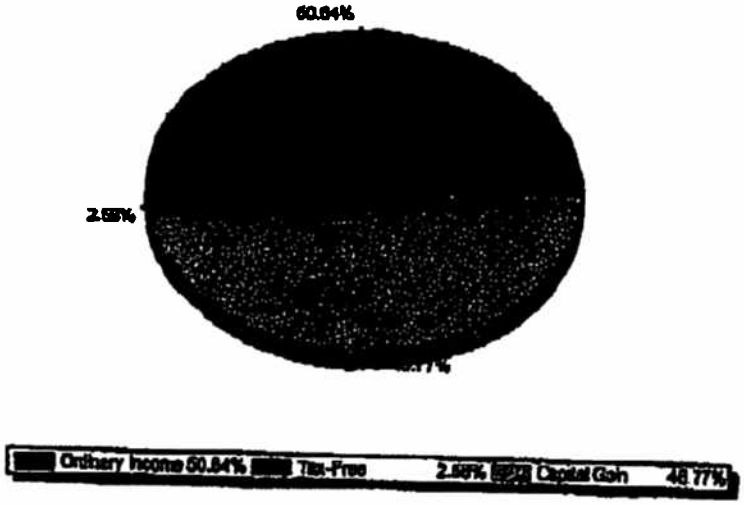
Effective Date:	**August 31, 2004**
First Payment Date:	**September 26, 2015**
Term of Contract:	**Last to Die of Transferors**
Face Amount:	**$4,447,000**
Periodic Payment:	**$489,932**
Annuity Interest Rate:	**4.6%**

Private Annuity 9/7/2004

Transfer Date:	8/2004
§7520 Rate:	4.60%
FMV of Property:	$7,399,346
Client's Basis:	$387,500
Payment Period:	Annual
Payment Timing:	End
Number of Annuitants:	2
Age(s):	58, 58

Annuity Factor:	15.1028
Payout Frequency Factor:	1.0000
Annual Payout:	$489,932
Joint Life Expectancy:	31.1 Years
Reg. 1.72-6(a)(2) Life Exp. Adj. Factor:	-0.5
Tax-Free Portion:	$12,683
Capital Gain Portion:	$229,145
Ordinary Income Portion:	$246,123

Tax Breakdown of Payments to Seller



$ 4,447,000 4.60%

0.000127778 daily
0.003833333 monthly

3983 days of interest until 1st payment

$7,399,346.07 Future Value at date of distribution

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
----------X
SECURITIES AND EXCHANGE COMMISSION,
Plaintiff, index No.
10 CIV.457
-against- (GLS)(DRH)
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 MCGINN and DAVID L. SMITH;

Defendants,
-and-
LYNN SMITH,
Relief Defendant.
----------X

EXAMINATION BEFORE TRIAL of THOMAS URBELIS, a Non-Party Witness, taken by the plaintiff, pursuant to Court order, held at the office of Philips Lytle, 30 South Pearl Street, Albany, New York, on June 1, 2010, at 12:20 p.m. taken before George Malinowski, a Notary Public of the State of New York.

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APPEARANCES:
UNITED STATES SECURITIES EXCHANGE & COMMISSION
Attorneys for Plaintiff
3 World Financial Center
New York, New York 10281
BY: LARA S. MEHRABAN, ESQ.
-and-
DAVID STOELTING, ESQ.

FEATHERSTONHAUGH WILEY & CLYNE, LLP
Attorneys for Relief Defendant,
Lynn Smith
99 Pine Street
Albany, New York 12207
BY: JAMES D. FEATHERSTONHAUGH, ESQ.

GREENBERG TRAURIG, LLP
Attorneys for Timothy McGinn and
David L. Smith
54 State Street
Albany, New York 12207
BY: EMILY P. FEYRER, ESQ.

THE DUNN LAW FIRM, PLLC
Attorneys for the Witness
99 Pine Street, suite 210
Albany, New York 12207
BY: JILL A. DUNN, ESQ.

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STIPULATIONS

IT IS HERE BY STIPULATED AND AGREED by and between the attorneys for the respective parties herein, that filing, sealing and certification be and the same are hereby waived.

IT IS FURTHER STIPULATED AND AGREED that all objections, except as to the form of the question shall be reserved to the time of the trial.

IT IS FURTHER STIPULATED AND AGREED that the within deposition may be signed and sworn to before any officer authorized to administer an oath, with the same force and effect as if signed and sworn to before the Court and that a copy of this examination shall be furnished without charge to the attorney representing the witness testifying herein.

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T. Urbelis

THOMAS URBELIS,
having been first duly sworn by a Notary Public, was examined and testified as follows:

MS. MEHRABAN: My name is Lara S. Mehraban. I represent the plaintiff, Securities and Exchange Commission. With me is my colleague, David Stoelting.

MS. MEHRABAN: If I could have everyone's appearance for the record, please.

MR. FEATHERSTONHAUGH: James Featherstonhaugh from Featherstonhaugh, Wiley & Clyne. Attorneys for relief defendant, Lynn Smith.

MS. FEYRER: Emily Feyrer, from the law firm of Greenberg Traurig. I am here on behalf of the defendants, Timothy McGinn and David L. Smith.

MS. DUNN: Jill Dunn from The Dunn Law Firm. I am the attorney for the witness, Thomas Urbelis.

EXAMINATION BY

EXHIBIT 20

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T. Urbelis
MS. MEHRABAN:
Q Would you please state your name for the record.
A Thomas Urbelis.
Q Would you please state your current home address.
A 6 Eastman Road, Andover, Massachusetts 01810.
Q Can you tell me your educational background after high school, please.
A I graduated from Union College in 1967. I graduated from the University of Rochester, Graduate School of Management in 1969. I graduated from Boston College Law School in 1978, and I've attended professional education courses since then.
Q Can you walk me through your professional experience after you graduated from law school?
A You mean?
Q As a lawyer.
A In practices?
Q Yes.
A I started, after I graduated from law

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T. Urbelis
school, I started with a firm in Boston called Withington, Cross, Park & Groden, I worked there as an associate, and I became partner in 1983. In 1990, four of the partners including myself spun off and started our own firm in Boston. Over the years, one or two would drop out, and I'm not exactly sure which years they were, but currently I'm partner with Urbelis & Fieldsteel.
Q What type of law do you practice?
A I primarily practice in the area of municipal law, I represent cities and towns. I'm town counsel, that's C-O-U-N-S-E-L that's counsel in the form of Government, for towns. I perform special legal services for other towns. I do quite a bit of land court litigation resulting from that because of decisions that one of the regulatory boards might make, like, I don't know what you call it here, but the planning board or zoning board of appeals or conservation commission of the Board of Health. So I'll represent the communities in those mostly land court and administrative-type of litigations. I also

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T. Urbelis
serve as special counsel on occasion to municipalities with regard to civil rights defense, where the municipality or its employees or officers are sued for civil rights violations; so I'll participate in the defense of those. That's how my practice has evolved as to what I pretty much do now.
(Plaintiff's Exhibit 16, subpoena to serve on deposition marked for identification as of today's date.)
Q This is the subpoena I sent you on Friday. Your appearance today is pursuant to the subpoena.
A Yes, it is.
Q When did you first meet David Smith?
A Approximately '56, '57. Well, 50 years ago.
Q How?
A We grew up in the same town and went to the same schools.
MR. FEATHERSTONHAUGH: May I interject about Exhibit 16?
MS. MEHRABAN: Sure.
MR. FEATHERSTONHAUGH: Exhibit 16

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T. Urbelis
I think asks for, in addition for the witness' appearance, for various documents, and I wonder if any documents were produced in response to the subpoena, and if they have been if we might have copies of them?
MS. MEHRABAN: Sure. My understanding is that the only documents that were produced to me were produced to Ms. Dunn.
A Let me clarify that. There is one letter that Ms. Dunn had asked me for, it's the letter that Dave sent me that we talked about, which I sent over the weekend. So that's one that you don't have.
MS. MEHRABAN: So I can get you copies of all those documents, but most of them are exhibits.
A But what I sent is exactly what I sent to Ms. Dunn.
MR. FEATHERSTONHAUGH: Okay.
A Can I clarify that's not total, I mean I haven't --
Q You haven't completed your search for

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T. Urbelis

documents?
A As I explained to you, you know, I got the subpoena at 2 o'clock, Friday. And my office was closing early, and, you know, I offered to send her the documents to have copies of the documents that I had sent to Ms. Dunn, and I was leaving right then for the holiday weekend, Memorial Day weekend, out of state and I haven't done anything since. I got a phone call or we got a phone call Sunday night.
Q Do you want to go off the record?
A My daughter was --
MS. MEHRABAN: Let's go off the record.
(Whereupon, an off the record discussion was held.)
MS. MEHRABAN: Back on the record.
Q I believe you just explained to me how you knew David Smith.
A Yes, we been friends more than 50 years, we met in junior high.
Q Would the answer be the same with respect to Lynn Smith?

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T. Urbelis

A Same.
Q How did you become trustee with the David L. and Lynn A. Smith Trust?
A I don't know if it was Dave calling me or Lynn -- probably Dave, I don't remember -- and asked me to be the trustee for the children's trust.
Q Prior to that time, had you been a trustee for any trust for David Smith or Lynn Smith?
A I am a trustee of a life insurance trust on Dave's life; that's it.
Q How long have you been a trustee for that trust?
A Maybe 20 years.
Q Have you ever represented David Smith or Lynn Smith in your capacity as an attorney?
A I never represented Lynn. In 1980 when Dave and Tim McGinn were starting their firm, they asked me if I knew any lawyers in Boston, and one of the partners in the firm that was associated with us did that kind of work; so he worked with them in setting up their company and getting the appropriate regulatory

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T. Urbelis

approvals.
Q And were you involved in that representation?
A No. There was another time in the early '80s, '84, '85, '86, around there, where there was some litigation that McGinn, Smith was involved in with regard to I believe a real estate developer and the case was in Massachusetts and I represented the company and the case was settled, but ever since then, since that, I've -- no, I haven't represented them as an attorney. I never represented any of them.
Q As a trustee for this trust, what did you do?
A Well, I -- let me tell you what I took as my duties as I saw them. My very first duty obviously was to make sure the kids were okay.
Jeff and Lauren, I've known them since they were born. And I think that's -- I don't know if I'm speculating -- that might be one of the reasons besides knowing me, they might have wanted someone who knew the kids and what

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T. Urbelis

their personalities were and needs and things like that; so I've known Jeff and Lauren ever since they were born. So, my first duty as I saw it was if they needed money or some kind of assistance was to provide it.
Another consideration for me was I wanted to make sure in a situation like this that the taxes got paid, so I wanted an assurance that I was not going to be responsible for preparing tax returns, and I make no bones about it, I have an accountant that does mine and I don't understand it. So I have an accountant that does that, and I wanted the same professional expertise to deal with the tax returns. I wanted to make sure I had an assurance that they were going to get done on a timely basis and they were going to get paid.
With regard to the investments and the trust, I did not see my duties as making the trust double, triple, quadruple over time. I wanted the money to be fairly secure for, if and when the kids needed it. And I looked to Dave to provide advice to me with regard to

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T. Urbelis
understanding.
Q Did Jeff send you or anyone send you any documents of what the tax liabilities were on the trust?
A Well, I received a document from a gentleman, I think, Brian Maher in New York who -- I'm not exactly sure who he is. He's with the clearinghouse, RMR.
Jeff had called me and said, all right, we'll fax up the document to sign to transfer the money, and Jeff, they tried a couple of times and it didn't come through the fax machines.
So I called Mr. Maher, and he e-mailed me the form that they prepared for me to sign to transfer the funds.
Q Did you ever see any documents prior to authorizing the transfer showing how much the taxes were for the trust?
A For this year?
Q For any given year.
A Well, I can tell you I didn't this year, I haven't reviewed all the documents, I don't know.

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T. Urbelis
Q The trust only made a few distributions over the years; is that correct?
MS. DUNN: Objection to the form of the question.
A The trust, yeah, well, it depends on what you mean by the distributions. Money going out of the trust?
Q That's what I mean.
A Correct, that was for taxes.
Q Do you recall distributions other than for taxes?
A No.
Q I'm going to show you some documents.
(Plaintiff's Exhibit 17, letter marked for identification of today's date.)
Q I'm handing you Plaintiff's 17. If you can take a look at it and let me know what it is?
A Yes, Exhibit 17 is a letter that I received from Dave Smith. I assume that this is the attachment that's attached, although, I don't have any independent memory. I just assume that this is the trust that was

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T. Urbelis
referenced, it seems to make sense that it's dated the same date.
Q I represent to you that this is a document that you sent me.
A Again, I'm assuming that's what it was. It looks like there is a delivery slip here. Yeah, this is a letter that Dave Smith sent to me.
Q And it's attaching the declaration of trust?
A Right. Is this the one that I signed? Well, that's what I mean, so I don't think he sent me this one with my signature, so, I mean I may have just stapled it together to keep the signed one with the letter. It doesn't make sense that he sent me one, but maybe he did.
No, actually, I think the handwriting where it says August 4th, looks like my handwriting on the first paragraph, so I'm not exactly sure what the sequence was, but as I say, this is a signed one. I think I also sent you a blank one or one that wasn't signed by me, if I recall, so that may be what was

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T. Urbelis
included in the letter.
MR. FEATHERSTONHAUGH: Could I impose on you just for the clarity of the record to actually describe the document.
MS. MEHRABAN: Sure. Plaintiff's Exhibit 17 is an 11-page document dated August 4th, 2004. The first page is a letter from David Smith to Thomas Urbelis. The second page through the tenth page is the signed declaration of trust and the last page is an Airborne Express receipt.
MR. FEATHERSTONHAUGH: Thank you.
Q I'm going to direct your attention to the letter, the first paragraph of the letter, the fifth sentence.
A Yeah.
Q It says:
"You and I will be able to consult on investments, but I am not eligible to exercise any direct control over the trust or its investments."
What's your understanding as to what

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T. Urbelis
that means?
A That I could consult with Dave on investments, but obviously I'm the only one that can sign a transfer or acquisition or disposition of any of the investments. He couldn't do it on his own.
I mean I'm on the board of trustees of a charitable organization, where our accountant or our investment advisor buys and sells stock and every year gives us a report.
My experience with that led me to conclude in my mind that that wasn't going to happen here, based on that sentence, that our investment advisor for this charitable organization, which I sit on the board, has given authority to the investment advisor during the year to sell IBM, buy GE, to do whatever you think is best, and then tell us at the end of the year, give us a report as to what you have done.
Q In other words, is it fair to say that you --
MS. DUNN: Objection to the form of the question.

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T. Urbelis
MR, FEATHERSTONHAUGH: Objection to the form of the question.
MS. MEHRABAN: I'll rephrase the question.
Q In other words, David Smith did not have discretionary authority over the account?
A I didn't think so.
Q The next sentence, "We will discuss some options to accomplish that at a later date," what does the "that" refer to?
MS. DUNN: Objection to the form of the question.
A To consult on investments.
Q What options did you discuss with David Smith about how to accomplish investments?
A I don't recall. I don't recall any discussion.
Q What other options would there have been?
A I don't know.
Q The last sentence says, "We will discuss a fee for your services at that time, also."
A Right.
Q Did you discuss with David Smith at any

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T. Urbelis
time a fee for your services?
A Yes, I did.
Q What was that discussion?
A Dave said, you know, we want to pay you. We want to see you get fairly compensated based upon what other trustees handling this kind of a trust get compensated. So let me know what you think is fair.
I said, I'm not going to bother, I'm not going to take anything.
Q Why did you say that?
A Because they're my friends.
Q The next paragraph refers to someone named Bruce Hoover of Sullivan & Oletheros (phonetic) in Buffalo, did you ever speak to Bruce Hoover?
A No, not that I recall.
Q The final sentence says:
"The trust was drawn at the direction of Daniel Blake of Buffalo."
Did you ever speak to Daniel Blake?
A I don't think so.
Q If you turn the page, please, this is the actual declaration of trust; is it not?

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T. Urbelis
A Yes, it looks like it is; if it's got my signature on it, that's the one. Yeah, this is it.
Q I don't have any other questions on that.
(Plaintiff's 18, a three-page document marked for identification of today's date.)
Q This is a three-page document, the first two pages are a letter from Patty Sicluna to you, Mr. Urbelis, and the third page appears to be -- I'm not exactly sure.
A The third page doesn't belong there. I some how I misplaced that. I just copied everything that was in it; so you got something that means nothing to you, it has no effect on anything.
Q So, we'll just talk about the first two pages then of Exhibit 18. If you can take a look at it and let me know what it is.
MR. FEATHERSTONHAUGH: Might I ask for the clarity of the record, if all counsel agreed, that it would be better just to remove the third page, so that

Investment Bankers • Investment Brokers

99 Pine Street
Albany, NY 12207
518-449-5131
Fax 518-449-4894
www.mcginnsmith.com

August 4, 2004

Mr. Thomas Urbelis
Urbelis, Fieldsteel & Balin, LLP
155 Federal Street
Boston, MA 02110

Dear Tom:

Thanks for agreeing to be the Trustee for the Private Annuity Trust that I spoke to you about. Please sign and have notarized the Declaration of Trust and apply for the tax ID number. Return to me ASAP, as they are originals. Tax returns will be done by Piaker & Lyons, the accountants for the firm and Lynn and I. You and I will be able to consult on investments, but I am not eligible to exercise any direct control over the Trust or its investments. We will discuss some options to accomplish that at a later date. We will discuss a fee for your services at that time also.

The Trust was drawn by Bruce Hoover of Sullivan and Oliverio in Buffalo, New York. His number is 716-854-5300, and you may call if you have any questions. Geoff is the alternative Trustee. The Trust was drawn at the direction of Daniel Blake of Buffalo who researched the concept at my direction.

Regards,

David L. Smith
President

DLS/pas

Enclosures

EXHIBIT 21

DECLARATION OF TRUST

THIS INDENTURE is made the 4th day of AUGUST, 2004, between David L. Smith and Lynn A. Smith, residing at [redacted] Saratoga Springs, New York 12866, (herein called the "Donors"), and Thomas Urbelis, with offices at 6 Eastman Road, Andover, Masschusetts 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, [redacted] and [redacted]. 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, of 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, of 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 stock, 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.

<u>NINTH:</u> (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 Identure. Either [redacted] or [redacted] 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.

<u>TENTH:</u> 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 <u>ad litem</u> 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 no 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.

David L. Smith, Donor

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

Lynn A. Smith, Donor

Thomas Urbelis, Trustee

Thomas Urbelis, Trustee

STATE OF NEW YORK)
: SS:
COUNTY OF ERIE)

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

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

Notary Public

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

STATE OF NEW YORK)
: SS:
COUNTY OF ERIE)

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

Notary Public

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

Lori Ann Durrane Hawe/Notary Public
My Commission Expires:

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

1 Sender Account Number

FROM (Company) MCGINN SMITH & CO.

Street Address 99 PINE STREET

City ALBANY | State NY | ZIP CODE (Required) 12207

Sent by (Name/Dept) | Phone (Required) (518)449-5131

Preprint Format No.

2 TO (Company) PLEASE PRINT NEATLY McGinn Smith + Co.

Street Address 99 Pine Street

City Albany | State NY | ZIP CODE (Required) 12207

Attention: (Name/Dept) David L. Smith | Phone (Required) 518 449 5131

Description

Sender's Signature ▶ | Date | Airborne Signature | Date

3 Payment — Sender will be billed unless marked otherwise. Bill to:

☐ Receiver ☐ 3rd Party — Account No. (Required if 3rd Party)

☐ Paid in Advance — Check No. — Amount

Billing Reference (will appear on invoice) MSCO

Origin ALB

Airbill Number 9254325032

4 Service Type — One box must be checked. Assumed Express mode unless noted. 10:30 A.M. Extra charge. Next Afternoon over 5 lbs charged at the Express rate.

Express (Letter – 150 lbs)

Next Afternoon (Letter – 5 lbs)

*Service may vary by destination, visit www.airborne.com

5 # of Pkgs 1 | **6** Weight (LBS) LTR (subject to correction) | **7** Packaging — One box must be checked: ☒ Letter Express ☐ Express Pack ☐ Other Packaging

Special Instructions

☐ Saturday Delivery — Extra charge, Express only, Not available to all locations

☐ Hold at Airborne

☐ Lab Pack Service

☐

Declared Value ☐ or Asset Protection ☐ — Shipment Valuation $ .00

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	
v.	:	**10 Civ. 457(GLS/DRH)**
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, DAVID M. WOJESKI, 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,	:	
Defendants,	:	
LYNN A. SMITH, and NANCY MCGINN,	:	
Relief Defendants, and	:	
DAVID M. WOJESKI, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04,	:	
Intervenor.	:	

PLAINTIFF'S REPLY MEMORANDUM IN RESPONSE TO OPPOSITION OF DEFENDANTS LYNN SMITH, THE TRUSTEE, AND GEOFFREY AND LAUREN SMITH AND IN FURTHER SUPPORT OF ITS MOTION FOR AN ORDER TO SHOW CAUSE AND EMERGENCY RELIEF

EXHIBIT 22

documents related to the Trust, obtained a court-ordered financial statements from Lynn Smith, and questioned numerous witnesses during days of deposition and hearing testimony regarding all aspects of the Trust. No witness referred to the Trust as a private annuity trust, or referred to any private annuity agreement, or admitted that the Charter One stock was "sold" to the Trust. No one produced a single document referring to the existence of a private annuity agreement. To the contrary, Ms. Smith's testimony affirmatively misled the Commission and the Court into believing the stock was "transferred" to the Trust solely for the benefit of the Smith children, with no restrictions.

Second, Ms. Smith failed to disclose the annuity agreement when the Commission asked her why her husband listed the Trust as an asset on his financial statements (PI Hrg. Tr. at 303-311) and failed to report her right to annuity payments on her court-ordered financial statement, as her counsel now concedes she should have done.

Third, the Smith cover letter makes no reference to any private annuity "agreement"; the Trust document itself is not called a Private Annuity Trust, but rather an Irrevocable Trust, and it makes no reference to any private annuity agreement between the Trust and the Smiths. Thus, David Smith's one reference to a private annuity "trust" was most reasonably understood to be either a misunderstanding or mischaracterization by him. The Commission obviously could not question David Smith directly, given his refusal to answer questions in reliance on his Fifth Amendment right not to incriminate himself.[3]

Finally, while the defendants vigorously chastise the Commission for not unearthing the annuity agreement sooner, they themselves claim to have been totally ignorant of its existence despite their own due diligence in preparing for the hearing and their obvious greater

[3] While the Trust document did give the Trustee the power to enter into annuity agreements, it was just one of many powers granted to the Trustee.

opportunities to inquire freely of their clients as to all of the circumstance surrounding the creation of the Trust. Accepting counsel at their word, they cannot have it both ways, arguing that the Commission failed to exercise due diligence while claiming that their own due diligence failed to unearth the agreement. (*E.g.*, Dunn Aff. ¶¶ 47-50).

The Trust Defendants also argue that the Commission should have asked the Trustee about the reference to the private annuity trust. However, Mr. Urbelis did not produce the private annuity agreement in response to the Commission's document request, and he represented to Ms. Mehraban that he had produced all documents relevant to the Trust. (Mehraban Decl. ¶5.) Ms. Dunn attempts to excuse Mr. Urbelis' failure by stating that his production of documents and deposition testimony were voluntarily. (Dunn Aff. ¶ 54-58). However, the Commission was entitled to assume that, as an officer of the court, Mr. Urbelis made a diligent search for all relevant documents whether his production and appearance was voluntary or compelled and he so represented to Ms. Mehraban. The Trust Defendants' argument is also defeated by Ms. Dunn's admission that, despite her own due diligence (Dunn Aff. ¶¶ 47-50), she too was unable to discover the existence of this agreement from the Trustee.

Finally, the argument that the Commission did not serve any discovery requests on the Trust is also beside the point given that Ms. Dunn states that neither she nor the current Trustee were in possession of the annuity agreement.[4]

---

[4] The Trust defendants erroneously argue that the Commission proffers the evidence relating to 1) the 2003-2004 broker/dealer audit, 2) the loan of the Charter One stock from October 2002 to July 2003 to further David Smith's business interest; and 3) the Ian Meyer lawsuit as newly discovered evidence. (*See, e.g.*, Dunn Aff. at ¶¶ 11-16). However, the Commission does not contend that this evidence was discovered after the July 7 hearing. Rather, the Commission submits that, in order to avoid manifest injustice to investors defrauded by the Smiths, the meaning, relevance, admissibility, weight and conclusions to be drawn from all relevant evidence should be reassessed by the court in light of the newly discovered evidence concerning the annuity agreement and the blatant fraud perpetrated by Ms. Smith in concealing and lying about the Trust.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
New York Regional Office
Three World Financial Center
New York, NY 10281

DIVISION OF
ENFORCEMENT

David Stoelting
Senior Trial Counsel
(212) 336-0174 (direct)
(212) 336-1324 (fax)

July 27, 2010

BY EMAIL/US MAIL

The Dunn Law Firm
Received
JUL 30 2010

James D. Featherstonhaugh
Featherstonhaugh, Wiley & Clyne, LLP
99 Pine Street
Albany, New York 12207

Jill Dunn
99 Pine Street
Albany, New York 12207

Re: *SEC v. McGinn, Smith & Co., Inc., et al.*, 10-CV-457 (GLS/RFT)

Dear Jim and Jill:

We received today from Mr. Urbelis certain documents pursuant to Subpoena, including a Private Annuity Agreement dated as of August 31, 2004, between David Smith and Lynn Smith, and the David L. and Lynn A. Smith Irrevocable Trust, and other documents concerning a David Smith life insurance policy.

Please produce all documents concerning the Private Annuity Agreement and any other agreements between David Smith and/or Lynn Smith and the Irrevocable Trust, including but not limited to all correspondence, drafts, revisions and amendments, on or before July 29, 2010. Such documents are responsive to the documents request served on Lynn Smith.

Very truly yours,

David Stoelting

EXHIBIT 23

The Dunn Law Firm PLLC
99 Pine Street, Suite 210
Albany, New York 12207
(518) 694-8380 telephone
(518) 935-9353 facsimile

Jill A. Dunn

Admitted in New York
and the District of Columbia

July 29, 2010

VIA ELECTRONIC MAIL ONLY

David Stoelting, Esq.
Senior Trial Counsel
Securities and Exchange Commission
Three World Financial Center
New York, NY 10281

Re: SEC v. McGinn, Smith & Co., Inc., et al.
Civil Action No. 10-CV-457 (GLS/DRH)

Dear Mr. Stoelting:

I write in response to your demand letter of July 27, 2010. Please be advised that I am not producing any documents in response to your demand, for the following reasons.

First, you have never served me with any discovery request at any time and, in the absence of any such request, I had no obligation to provide you with documents other than the exhibits I used at depositions and offered into evidence at the hearing. I have fulfilled my obligations in that regard.

Second, the Order granting the Trustee's motion to intervene was limited to the preliminary injunction hearing, and the Order to Show Cause which permitted the parties to conduct expedited discovery pending that hearing was dissolved by the issuance of Judge Homer's decision and order on July 7, 2010. Thus, there is no longer any mechanism by which you may serve a new demand to produce documents, in an expedited fashion or otherwise, other than with a non-party subpoena. Moreover, as I indicated when we spoke last Friday, there is absolutely no factual or legal basis for you to name the Trust or the Trustee as a defendant or relief defendant in this lawsuit. Regardless of the moniker you may attach to your claim, the Court has conclusively ruled on that issue.

Third, you may recall that, in an email sent by Mr. Urbelis on May 28, he advised your colleague, Lara Mehraban, that he was providing her with copies of all documents he had previously provided to me. I had no reason to believe that Mr. Urbelis did not produce, to both of us, all documents in his possession which relate to the David L. and Lynn A. Smith Irrevocable Trust. I have no reason to believe that

EXHIBIT 24

there were any documents which he produced to me that were not also produced to your office, either in that initial overnight delivery to Ms. Mehraban, or in the subsequent delivery which I believe we each simultaneously received earlier this week.

From my perspective, it appears that Mr. Urbelis acted in good faith in responding to the SEC's "subpoena" to him, a subpoena which was "served" by email outside the jurisdiction of this Court on the Friday afternoon before a holiday weekend, when his office was closing early and he was going out of state. It appears that he did the best he could under the timeline which your office imposed upon him. The documents he apparently located this week, after gratuitously conducting yet another search at your request, would not have changed the outcome. In fact, the Private Annuity Agreement further supports the Trust's position, and I regret that I did not have it to use at the hearing.

I trust that answers your inquiry. If you have further questions, feel free to contact me.

Very truly yours,

THE DUNN LAW FIRM PLLC

By: 
Jill A. Dunn

JAD/jc

Cc: James D. Featherstonhaugh, Esq.
Martin Kaplan, Esq.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	
Plaintiff,	
v.	
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, DAVID M. WOJESKI, 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,	**10 Civ. 457 (GLS/DRH)**
Defendants,	
LYNN A. SMITH, and NANCY MCGINN,	
Relief Defendants, and	
DAVID M. WOJESKI, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04,	
Intervenor.	

PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT DAVID M. WOJESKI, TRUSTEE OF THE DAVID L. AND LYNN A. SMITH IRREVOCABLE TRUST U/A 8/04/04

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, plaintiff Securities and Exchange Commission requests that defendant David M. Wojeski, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, produce the following documents at the

EXHIBIT 25

Commission's offices at 3 World Financial Center, Suite 400, New York, N.Y. 10281, on or before October 17, 2010.

INSTRUCTIONS

1. Each Request requires the production of each responsive document in its entirety, including all non-identical copies, drafts, and identical copies containing different handwritten notations, without abbreviation, expurgation, or redaction.

2. Claims of privilege with respect to any document, or portion of any document, shall be made pursuant to Rule 26(b)(5) of the Federal Rules of Civil Procedure.

3. If any document sought by this Request once was, but no longer is, within a responding party's possession, control or custody, please identify each such document and its present or last known custodian, and state: (a) the reason why the document is not being produced; and (b) the date of the loss, destruction, discarding, theft or other disposal of the document.

4. No part of the document request shall be left unanswered merely because an objection is interposed to another part of the document request.

5. Unless otherwise indicated, this Request seeks documents from January 1, 2003 onward.

6. This Request is ongoing in nature, and the responding party should continue to produce responsive documents as they are found or created on an ongoing basis.

DEFINITIONS

1. "And" as well as "or" shall be construed in either the disjunctive or conjunctive form as necessary to bring within the scope of the request any information which may otherwise be construed to be outside its scope.

2. "Communication" means any transmittal of information (in the form of facts, ideas, inquiries, or otherwise). Communication includes but is not limited to, e-mail, instant messages, faxes, text messages, notes of meetings, phone logs, and letters.

3. "Concerning" means relating to, referring to, describing, evidencing, or constituting.

4. "Document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a), including without limitation audio files, voicemail messages, electronic spreadsheets and drafts of electronic spreadsheets or other computerized data, including email messages (deleted or otherwise, and whether located at your offices or at your employees' residences or property, or on central or official databases, your servers and backup servers, local databases, internet-based e-mail servers, individual employees' hard drives, discs or personal digital assistants), notes, memoranda, work papers, paper files, desk files, draft workpapers). A draft or non-identical copy is a separate document within the meaning of this

term.

5. "G. Smith" shall mean Geoffrey R. Smith and any person or entity acting on his behalf.

6. "LT. Smith" shall mean Lauren T. Smith and any person or entity acting on her behalf.

7. "Lynn Smith" shall mean Lynn A. Smith and any person or entity acting on her behalf.

8. "Piaker & Lyons" shall mean Piaker & Lyons Certified Public Accounts, any current or former employee of Piaker & Lyons, and any person or entity acting on its behalf.

9. "Smith" shall mean David L. Smith and any person or entity acting on his behalf.

10. "Trust" shall mean the David L. & Lynn A. Smith Irrevocable Trust U/A, dated August 4, 2004.

11. "Urbelis" shall mean to Thomas J. Urbelis and any person or entity acting on his behalf.

12. "You" or "yours" shall mean to David M. Wojeski and any person or entity acting on his behalf.

DOCUMENTS REQUESTED

1. All documents concerning the Trust, including but not limited to documents concerning the private annuity agreement (the "Annuity Agreement") between Smith and Lynn Smith and the Trust.

2. All documents concerning transfers of money or other assets from the Trust.

3. All documents concerning the purchase of securities, real property or other assets by the Trust.

4. All documents concerning banking, brokerage or other accounts held by or for the benefit of the Trust, including but not limited to account opening documents and monthly statements.

5. All documents concerning taxes due, owing and paid by the Trust.

6. All documents concerning communications with the following persons and entities concerning the Trust, including but not limited to, the Annuity Agreement:

a. Smith;

b. G. Smith;

c. LT. Smith;

d. Lynn Smith;

e. Piaker & Lyons; and

f. Urbelis.

Dated: New York, New York
September 17, 2010

s/David Stoelting
Attorney Bar Number 516163
Attorney for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
New York Regional Office
3 World Financial Center, Suite 400
New York, New York 10281-1022
Telephone: (212) 336-0174
Fax: (212) 336-1324
E-mail: StoeltingD @sec.gov

Of Counsel:
Michael Paley
Kevin McGrath
Lara Mehraban
Linda Arnold

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

McGINN, SMITH & CO., INC.,
McGINN, SMITH ADVISORS, LLC,
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. McGINN, AND
DAVID L. SMITH,

Defendants, and

LYNN A. SMITH,

Relief Defendant and

DAVID M. WOJESKI, Trustee of the David L.
and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenor.

Case No.: 1:10-CV-457 (GLS/DRH)

DECLARATION OF JILL A. DUNN

I, Jill A. Dunn, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury, the following:

1. I respectfully submit this declaration to correct certain statements which appear in my Declaration dated September 3, 2010 (the "September Declaration").

2. In paragraph 36 of my September Declaration I stated as follows: "Neither I nor Mr. Wojeski had any documents in our possession relating to the private annuity other than the

EXHIBIT 26

courtesy copy of the documents I received from Mr. Urbelis on July 27 when Mr. Stoelting received them."

3. In assisting with the Trust's response to Plaintiff's discovery demands, and in preparing for the evidentiary hearing scheduled for November 16, 2010, I became aware that on July 21, 2010, David Wojeski e-mailed to me the documents attached to this Declaration as Exhibit A. I did not recall receiving or seeing the document attached as Exhibit A at the time I prepared the September Declaration, and my recollection has not been refreshed by seeing Exhibit A.

4. My attention on July 20, 21, and 22, 2010, was focused heavily on the Trust's real estate closing which took place on July 22, 2010, and on other unrelated client matters and personal issues, including a death in the family. This might explain why I failed to remember the documents attached as Exhibit A when I prepared my September Declaration.

5. I make this declaration for the sole purpose of correcting the record before the Court, and no actual or implied waiver of any applicable privilege, including the attorney-client and attorney work product privileges, is intended.

DATED: November 15, 2010

s/Jill A. Dunn
Jill A. Dunn (Bar Roll No. 506942)
Attorney for Intervenor
THE DUNN LAW FIRM PLLC
99 Pine Street, Suite 210
Albany, New York 12207-2776
Telephone (518) 694-8380
Fax (518) 935-9353
Email: JDunn708@nycap.rr.com

Indemnity and Hold Harmless Agreement

For valuable consideration, the receipt of which is hereby acknowledged, we, David L. Smith and Lynn A. Smith of 2 Rolling Brook Drive, Saratoga Springs, New York, on behalf of ourselves and our heirs, devisees and assigns, jointly and severally hereby agree to release, indemnify, defend and hold harmless David Wojeski of 75 Troy Road, East Greenbush, New York, individually and as Trustee of the David L. Smith and Lynn A. Smith Irrevocable Trust dated August 4, 2004, of and from any and all claims, actions, compensation, obligations, tax assessments, liabilities, demands, contracts, agreements, judgments, at law and in equity, whether in existence now or which may accrue in the future, arising out of or related to the David L. Smith and Lynn A. Smith Irrevocable Trust dated August 2, 2004, including but not limited to, any financial transactions, investments, obligations or distributions, and the potential tax consequences thereof, relating to said Trust, its Donors and its beneficiaries, and any and all financial institutions, third parties and government or quasi-government authorities.

David L. Smith 7/22/10 — David L. Smith Date

Lynn A. Smith 7/22/10 — Lynn A. Smith Date

EXHIBIT 10

EXHIBIT 27

INDEMNITY AGREEMENT

For valuable consideration, the receipt of which is hereby acknowledged, we, David L. Smith and Lynn A. Smith of [redacted] Saratoga Springs, New York, on behalf of ourselves and our heirs, devisees and assigns, jointly and severally hereby agree to release, indemnify, defend and hold harmless Thomas J. Urbelis of 6 Eastman Road, Andover, Massachusetts individually and as Trustee of the David L. Smith and Lynn A. Smith Irrevocable Trust dated August 4, 2004, of and from any and all claims, actions, compensation, obligations, tax assessments, liabilities, demands, contracts, agreements, judgments, at law and in equity, whether in existence now or which may accrue in the future, arising out of or related to the David L. Smith & Lynn A. Smith Irrevocable Trust dated August 4, 2004 with Thomas J. Urbelis, Trustee, including but not limited to, financial transactions and obligations with National Financial Services LLC, McGinn Smith & Co., Inc., and any and all other financial institutions and government authorities.

David L. Smith 4/6/08 Date Lynn A. Smith 4/6/08 Date

PLAINTIFF'S EXHIBIT 31 Case ID 6-1-10

EXHIBIT 28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	
v.	:	**10 Civ. 457 (GLS/DRH)**
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, DAVID M. WOJESKI, 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,	:	
Defendants,	:	
LYNN A. SMITH, and NANCY MCGINN,	:	
Relief Defendants, and	:	
DAVID M. WOJESKI, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04,	:	
Intervenor.	:	

PLAINTIFF'S EXHIBIT LIST IN CONNECTION
WITH EVIDENTIARY HEARING ON NOVEMBER 16, 2010

Plaintiff Securities and Exchange Commission respectfully submits the following exhibit list:

EXHIBIT 29

HRG. EXH.	DATE	DOCUMENT	DE
	7/22/2010	Email from Brit Geiger to David Stoelting	
		Documents received from Thomas Urbelis on 7/27/2010	103
	7/22/2010	Voicemail from Brit Geiger to Kevin McGrath	
		Transcript of voicemail from Brit Geiger	
		Private Annuity Agreement[1]	
	7/20/2010	Email from David Stoelting to Brit Geiger	
	7/22/2010	Letter from Kevin McGrath to Brit Geiger	
		Excerpts from website www.napat.org	
		All papers filed by Plaintiff in connection with Plaintiff's Motion for Reconsideration	
		All papers filed by the Trust in opposition to Plaintiff's Motion for Reconsideration	
	11/23/2010	Email from Kevin McGrath re: McGinn Smith – Irrevocable Trust	
	11/27/2010	Letter from Stoelting to Featherstonhaugh and Dunn	
	11/29/2010	Letter from Dunn to Stoelting	
		Drafts of Stoelting Declaration	
		Documents produced by the Trust in response to Plaintiff's document request dated September 17, 2010	
		All documents listed on the Trust's exhibit list dated November 12, 2010	

Plaintiff's witness list is included in the stipulation filed on November 12, 2010.

Respectfully submitted,

Dated: November 12, 2010
New York, NY

s/ Lara Shalov Mehraban
Attorney Bar Number 516339
Attorney for Plaintiff
Securities and Exchange Commission
3 World Financial Center
New York, New York 10281-1022
212.336.0591 (tel)
212.336.1348 (fax)
mehrabanl@sec.gov

[1] Document received from the IRS on October 25, 2010 from a folder entitled "Private Annuity".

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	
v.	:	**10 Civ. 457 (GLS/DRH)**
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, DAVID M. WOJESKI, 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,	:	
Defendants,	:	
LYNN A. SMITH, and NANCY MCGINN,	:	
Relief Defendants, and	:	
DAVID M. WOJESKI, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04,	:	
Intervenor.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO REQUEST BY ISEMAN TO LIFT PRELIMINARY INJUNCTION TO PERMIT PAYMENT OF ATTORNEYS' FEES

EXHIBIT 30

II. The Fees Sought Are Excessive

In any event, the over $83,000 in fees and costs sought by Iseman is unreasonable and excessive. First, the Trust did not need separate counsel to represent it in connection with whether the Annuity Agreement was signed and effective, as Ms. Dunn was not a witness on that point. Iseman's fees with respect to this issue are redundant and unnecessary. For example, Iseman states that it was required to spend considerable time on the substantive tax and state-law issues in connection with determining whether to stipulate that the Annuity Agreement was binding and effective. (Docket #229-1, Iseman Decl. ¶¶ 14-15.) A trust and estate attorney at Iseman, Richard Frankel, alone billed over 54 hours to this matter. The Trust, however, already had retained a tax law expert who had engaged in a lengthy review of the agreements and prepared an expert report. Also, Dunn was not in any way precluded from advising the Trust whether to stipulate as to this issue and she would not have been a witness on this issue at the hearing had there been no stipulation.

Second, although the SEC only has access to Iseman's redacted time details and cannot fully evaluate the reasonableness of much of the time Iseman has billed, it is questionable whether it was necessary and reasonable for two partners at Iseman to have billed over 160 hours to prepare for a hearing concerning one telephone conversation. Finally, it is unclear why Iseman billed time to this matter after the November 16, 2010 hearing. Especially considering the very limited purpose for which Iseman was retained and the limited funds available to repay investors, any payment of Iseman's fees should be limited to only the reasonable and necessary fees incurred in connection with representing Ms. Dunn at the November 16 hearing regarding the telephone conversation. *E.g., Petters,* 2010 WL 4922993, at *1-2 (limiting fees to an amount that is "fair and equitable under the circumstances"); *Dowdell*, 175 F. Supp. 2d at 855-56

(indicating approval for reasonable fees necessary to conduct fair preliminary injunction hearing).

CONCLUSION

For the reasons stated above, the SEC requests that the Court deny Iseman's motion to lift the asset freeze as to the Trust to allow the payment of Iseman's fees.

Dated: January 7, 2011
New York, New York

Respectfully submitted,

s/ Lara Shalov Mehraban
Attorney Bar Number: 516339
Attorney for Plaintiff
Securities and Exchange Commission
3 World Financial Center, Room 400
New York, NY 10281
Telephone: (212) 336-0591
Fax: (212) 336-1348
E-mail: mehrabanl@sec.gov

Of Counsel:
David Stoelting
Kevin McGrath
Haimavathi Varadan Marlier
Joshua Newville

DECLARATION OF SERVICE

I, Lara Shalov Mehraban, pursuant to 28 U.S.C. § 1746, certify that on January 7, 2011, I filed on the Court's ECF system the following document:

- Plaintiff's Memorandum of Law in Opposition to Request by Iseman to Lift Preliminary Injunction to Permit Payment of Attorneys' Fees; and

and sent by electronic mail a copy of the above-referenced document to:

Nancy McGinn
26 Port Huron Drive
Niskayuna, NY 12309
nemcginn@yahoo.com
Appearing Pro Se

Dated: January 7, 2011
New York, New York

s/Lara Shalov Mehraban
Attorney Bar Number: 516339
Attorney for Plaintiff
Securities and Exchange Commission
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Fax: (212) 336-1348
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

No. 10-CV-457 (GLS/DRH)

DAVID M. WOJESKI,[1] Trustee of David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04.

Defendant.

APPEARANCES:

DAVID STOELTING, ESQ.
Attorney for Plaintiff
Room 400
3 World Financial Center
New York, New York 10281

OF COUNSEL:

KEVIN McGRATH, ESQ.
LARA MEHREBAN, ESQ,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
Attorney for David M. Wojeski
3 Gannett Drive
White Plains, New York 10604

FRED N. KNOPF, ESQ.

FEATHERSTONHAUGH, WILEY & CLYNE, LLP
Attorney for Defendant Trust
Suite 207
99 Pine Street
Albany, New York 12207

JAMES D. FEATHERSTONHAUGH, ESQ.

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[1]It appears that David M. Wojeski has been replaced as Trustee by Geoffrey R. Smith, a beneficiary of the Trust. See Dkt. Nos. 264 (Notice of Appearance on behalf of Wojeski identifying him as the "former" Trustee), 273 (order approving substitution of counsel for, inter alia, Geoffrey Smith and identifying him as "Trustee" of the Trust). However, no substitution of Geoffrey Smith for Wojeski as the named party representing the Trust has been made. See Fed. R. Civ. P. 25. Accordingly, Wojeski remains the named defendant as Trustee of the Trust.

EXHIBIT 31

for the Trust to retain additional counsel for representation at the evidentiary hearing was necessitated by the conduct of David Smith, Lynn Smith, the then-Trustee, and then-counsel in concealing a document whose discovery gave rise to the SEC's motion for reconsideration. See generally MDO II. To permit a further depletion of assets available to repay investors would reward that misconduct at the substantial expense of investors. See Thus, the interest of the Trust here in lifting the freeze to compensate Iseman Cunningham is diminished by the Trust's self-created necessity for such representation.

For these reasons, then, the interests of investors in maintaining the asset freeze for their benefit in the event the SEC prevails in this action substantially outweighs the interests of Iseman Cunningham, the Trust, and those associated with the Trust in lifting the asset freeze to permit payment of the fees and costs incurred for the legal services rendered by Iseman Cunningham.[2]

III. Conclusion

For the reasons stated above, it is hereby **ORDERED** that the motion of Iseman

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[2]The SEC also contends that the fees and costs charged by Iseman Cunningham are excessive. SEC Mem. of Law at 6-7. The contention is supported by the fact that the Trust required the services of Iseman Cunningham only to represent its original counsel at the evidentiary hearing as the original counsel remained competent to address the second issue regarding the annuity agreement. Furthermore, an attorney at Iseman Cunningham specializing in trusts and estates charged over $19,000 in the eleven days before the hearing where the Trust had already retained, and submitted the expert report of, another attorney specializing in this area who was already familiar with the matter. Finally, while there were numerous records to review in preparation for the evidentiary hearing, that hearing involved only three witnesses, lasted only two hours, and concerned only one brief telephone call. Substantial support thus exists for the SEC's contention. However, since the amount of fees and costs to be paid need not be reached in light of the holding herein, this contention will not be addressed.

Cunningham to lift the asset freeze to permit payment of its legal fees and costs (Dkt. No. 229) is **DENIED**.

IT IS SO ORDERED.

DATED: February 11, 2011
Albany, New York

David R. Homer
U.S. Magistrate Judge