

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION	)	
	)	
Plaintiff,	)	
	)	1:10 CV 457 GLS/DRH
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, and	)	
DAVID L. SMITH,	)	
	)	
Defendants, and	)	
	)	
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.	)	

**AFFIDAVIT OF THOMAS J. URBELIS**

Now comes Thomas J. Urbelis, and being duly-sworn, does hereby depose and say as follows:

1. My name is Thomas J. Urbelis. I am 65 years old, and I live in Andover, Massachusetts. I practice law in Boston with the law firm of Urbelis & Fieldsteel, LLP. I have

been a practicing lawyer since 1978, and concentrate my practice in the representation of municipalities and their officials and employees. I am a member and past president of the Massachusetts City Solicitors and Town Counsel Association. I am a member in good standing of both the Massachusetts and New York bars, although I do not practice in New York. This affidavit is submitted on the basis of my own personal knowledge, except where noted.

2. I am submitting this affidavit in support of my opposition to the SEC's motion for sanctions against me. This affidavit will establish that I did not, at any time, engage in fraud or other misconduct. This affidavit also will demonstrate that the Court has been given inaccurate and misleading information about my conduct in this matter, and about my deposition testimony. Through this affidavit, I intend to correct the record.

3. Before turning to the misleading information that was provided to the Court by the SEC's attorneys, I wanted to provide the Court with some background about my relationship with David and Lynn Smith, and my role as Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A Dated August 4, 2004 (the "Trust"). Very little of this information was covered in my June 1, 2010 deposition.

**A. Background of Relationship with David and Lynn Smith**

4. I have known David L. Smith since childhood. We grew up together in Amsterdam, New York. I have known his wife, Lynn, since before they were married, and I have known their two children since birth.

5. Over the years, as a result of my friendship with Dave Smith, I invested in various McGinn Smith entities. I invested my retirement funds and my wife's retirement funds with McGinn Smith, along with monies that I held in trust for my children and nephew, monies that

my wife inherited from her mother and aunt, and monies that belonged to my mother. I did redeem some of those investments over the years, but I assume that I will never see much of the money I invested with McGinn Smith.

6. In or about August, 2004, Dave Smith asked if I would serve as the trustee of a trust that he was setting up for the benefit of his children, Lauren and Geoffrey Smith. I did not think this was an unusual request, as I had served as a trustee of small education trusts established for my own children and my nephew. I also felt comfortable serving as trustee of such a trust, because I have known Lauren and Geoff since they were born, and I had children close in age to them. I did have a concern about being responsible for determining any taxes due from the Trust, but Dave assured me that his accountants would be responsible for making those determinations. I therefore agreed to serve as trustee of the Trust.

7. I did not participate in the conception or drafting of the Trust, which apparently was done by Dave's advisors in Buffalo, New York. I understood that the Trust had some tax planning advantages, but I did not understand the exact nature of those benefits nor did I believe that I needed to have that knowledge to serve as Trustee.

8. On or about August 4, 2004, I received a letter from Dave enclosing a Declaration of Trust. (Exhibit A). This cover letter and the Declaration of Trust both were marked as exhibits at my June 1, 2010 deposition. I do not have any present recollection of discussing this letter with Dave, or anyone else. I do not recall speaking with the Buffalo attorney who had drafted the Declaration of Trust, or Daniel Blake, the other individual referenced in the cover letter. I signed the Declaration of Trust and had my signature notarized, returned the originals to Dave, then put the Declaration of Trust in a file drawer cabinet in my office at my law firm. I

also signed and submitted an application for a federal employer identification number for the Trust.

9. As Trustee, I invested the Trust's assets, based on investment advice received from Dave Smith. I also received periodic statements regarding the Trust's investments, and I could see that the Trust's investments were stable. (To the best of my memory, the total value of the Trust's assets was always around \$4 million). Around tax time each year, I also received notification of the amount of monies that should be disbursed from the Trust to pay the Trust's taxes. I did not play any role in these tax determinations, as I would not have been qualified to perform such a task.

10. At some point, likely in 2004, I also received a copy of the Private Annuity Agreement ("PAA") that has become a focus in this matter, but I do not remember how or when I received it. I do not recall ever seeing a copy of the PAA with my signature on it, and I do not know if a fully-signed copy exists. It seems logical that I would have discussed the PAA with Dave at some point in time, likely at the time I received it, but I do not recall such a conversation.

11. As I will explain later in this affidavit, at some point in time I apparently brought the PAA to my house, where it was mis-filed in a stack of loose papers along with a copy of a life insurance trust that had been established for Dave Smith in 1989. I have no memory of reviewing the terms of the PAA, or having discussions with anyone regarding the terms of the PAA, during the years in which I served as Trustee.

12. I do not remember ever doing any calculations to confirm that there were sufficient funds in the Trust to make annuity payments to Dave and Lynn. I never thought that

the assets in the Trust had to be managed so that annuity payments could be made to Dave and Lynn.

13. I served as trustee of the Trust without compensation for a little more than five-and-a-half years. During that period, I never made any distributions from the Trust to Lauren or Geoff, and neither ever asked me for a distribution. I did not find this unusual or surprising, because I had served as trustee of my nephew's trust for twelve years and then made a distribution to him of the entire amount in the Trust. Additionally, I knew (or at least believed) that Dave and Lynn Smith were wealthy, and that Lauren and Geoff did not need distributions from the Trust to meet their day-to-day needs. This was not inconsistent, in my mind, with the notion that Dave and Lynn had established the trust for the children's benefit, because I had children who also were young adults, and could see the benefits of having funds set aside for major purchases or expenditures (such as homes, investment properties, graduate school tuitions, or businesses) they might want to make. To my knowledge, neither Lauren or Geoff ever expressed an interest in making that kind of significant purchase or expenditure during the years in which I served as trustee.

**B. Resignation as Trustee**

14. In late 2009, I became concerned about the status of my accounts with McGinn Smith, because I received notices that certain funds would no longer have an authorized custodian, and the account balances on several of my accounts seemed to have dropped precipitously. Around this same time, my wife and I had to move my mother into a nursing home, and we needed to obtain cash from some of our accounts to pay those monthly fees. On a

number of occasions, I requested additional information about my accounts from Dave, but he was unable to give me answers to my questions.

15. On or about April 21, 2010, I read newspaper accounts about the filing of this lawsuit against McGinn Smith. Based on what I read, I assumed that all of my investments with McGinn Smith were at risk. I was upset and shocked (to say the least), and therefore decided that I could no longer serve as an impartial fiduciary for the Smith children. On April 22, 2010, I sent a notice of my resignation as Trustee of the Trust to Dave and Lynn Smith, by overnight mail, effective as of May 27, 2010, per the terms of the Trust. (Exhibit B). I did not give Dave or Lynn any advance notice of my intent to resign as Trustee.

16. In mid-May, 2010, I was contacted by Attorney Jill Dunn, who identified herself as counsel for the successor trustee. To the best of my knowledge, I had never met or communicated with Ms. Dunn before this call. Ms. Dunn told me that Dave and Lynn Smith had determined a successor trustee, and she asked me to agree to a new effective resignation date of May 17, 2010. She also asked me to send her copies of any documents I had relating to the Trust, and I agreed to do so. During this telephone call, we discussed the Trust and my role as Trustee. I did not mention the PAA because I did not then recall its existence.

17. I understand that the successor Trustee, David Wojeski, subsequently filed a motion for leave to intervene in this action, for purposes of vacating a restraining order that had been entered against the Trust's assets. I played no role in the drafting or filing of these pleadings. I did not know David Wojeski prior to his appointment as successor trustee, and I have never communicated with him.

18. On May 20, 2010, I sent Ms. Dunn by overnight mail a copy of the file I maintained in my office for the Trust. The package I sent Ms. Dunn did not include the PAA, because it was not in my office file for the Trust and I did not then know that a copy of it was at my house. If the PAA had been in the Trust file at my office, or if I had then known that I had it at my house, I certainly would have sent it to Ms. Dunn along with the other Trust paperwork.

**C. Communications with SEC Prior to June 1, 2010 Deposition**

19. On Friday, May 28, 2010, at approximately 2:00 p.m., I received a telephone call at my office in Boston from Attorneys Lara Mehraban and David Stoelting. At the time of this call, I was preparing to leave the office to spend the long Memorial Day weekend in New Hampshire with my wife and some friends.

20. Ms. Mehraban and Mr. Stoelting explained that they were attorneys with the SEC, and they told me about the SEC's lawsuit against McGinn Smith. They then asked whether I was available to appear for a deposition the following week, prior to a hearing scheduled for June 9, 2010, to give testimony relating to the Trust. I said that this would be a hardship, given the holiday weekend and the short notice, but I ultimately agreed to travel to Albany for deposition on the next business day, which was Tuesday, June 1, 2010.

21. Ms. Mehraban and Mr. Stoelting also asked if I had any documents relating to the Trust. I said that I did, and volunteered to send copies of the same documents I had already sent to Ms. Dunn. Neither Ms. Mehraban nor Mr. Stoelting said anything during this telephone call about serving me with a subpoena, and I did not expect to receive a subpoena, as I had already agreed to send documents and to appear for deposition in Albany voluntarily.

22. Minutes later, Ms. Mehraban e-mailed me a document that purported to be a subpoena, requiring my appearance in Albany for deposition on June 1<sup>st</sup>, and requiring me to bring documents. (Exhibit C). I looked at the subpoena and immediately noticed that the categories of documents requested were far broader than those I had discussed with the SEC's counsel on the telephone.

23. Ms. Mehraban then sent me a second e-mail, at 2:21 p.m., asking me to send documents responsive to the subpoena to what I assume is her home address in New York City. I e-mailed her back at 3:21 p.m., indicating that as agreed, I would send her copies of the documents I had produced to Ms. Dunn, but would not have time to look for additional documents before the deposition. Ms. Mehraban sent me a reply e-mail, at 3:36 p.m., saying "I understand. Have a nice weekend. See you Tuesday." (Exhibit D).

24. I did not speak with Ms. Dunn, Mr. Wojeski, Lynn Smith, Dave Smith, or any of their attorneys between the time of my telephone call with Mr. Stoelting and Ms. Mehraban, and my appearance at the deposition on June 1<sup>st</sup>.

25. I have never considered, nor has anyone ever suggested to me, at any time, that I should conceal the existence of the PAA or the annuity component of the Trust from the SEC, or from any other entity or individual.

**D. June 1, 2010 Deposition**

26. In order to appear at the deposition, I left my home on Monday, May 31, 2010 (Memorial Day) and stayed in a hotel on Monday evening, at my own expense. I made the trip to Albany even though my daughter was in the midst of a medical crisis beginning on Sunday,



May 30, 2010, and continuing through the day of my deposition. I informed the attorneys at the deposition of this medical crisis.

27. On Tuesday, June 1, 2010, I appeared for deposition, without an attorney, as it never had occurred to me to retain one. I answered all of the questions I was asked honestly and to the best of my ability. A complete copy of my deposition transcript, along with the errata sheet I sent to the court reporter on June 29, 2010, are attached at Exhibit E.

28. After the deposition was concluded, I asked Mr. Stoelting if my presence would be required at the hearing on June 9, 2010. He said my testimony would not be necessary, and further stated that the SEC could not subpoena me anyway.

29. A few days after the deposition, Dave Smith called me to ask about my daughter's health. We had no discussions concerning my deposition testimony, or anything relating to the PAA or the Trust. I have not spoken to Dave Smith since this brief telephone call, which took place in early June, 2010.

30. After my June 1, 2010 deposition, I did conduct an additional search for documents relating to the Trust. I looked through the file cabinets at my office one more time, and I also looked through some file cabinets I kept at my home. I did not find anything else relating to the Trust except for copies of the Trust's tax returns, which I sent to the SEC by overnight mail on June 7, 2010.

31. After receiving and reviewing a copy of the transcript from my deposition, I noticed that the stenographer erroneously had identified Ms. Dunn as my attorney. I corrected this error in my errata sheet, which I sent to the stenographer per his written instructions.

(Exhibit F). I now understand that this errata sheet was never provided to the Court before the Court issued its November 22, 2010 decision

32. Approximately a week after my deposition, Ms. Dunn asked me if I would be willing to travel to Albany for the hearing on the Trust's motion to lift the freeze on its assets. Because I had agreed to come to Albany at the SEC's request, I thought it would only be fair to agree to Ms. Dunn's request. I traveled to Albany on Thursday, June 10, 2010, and stayed overnight in a hotel, again at my own expense, in anticipation of testifying on Friday, June 11<sup>th</sup>. That morning, I met with Ms. Dunn and Attorney James Featherstonehaugh at 8:30 a.m., only to learn that they did not need me to testify. I checked out of my hotel and was back on the road to Boston by 9:00 a.m.

**E. First Set of Misrepresentations By The SEC**

33. In his August 3, 2010 Declaration, at ¶¶ 15-17 (Doc. No. 103-2), Mr. Stoelting stated:

On May 28, 2010, the SEC served a subpoena upon Thomas Urbelis, the Trustee of the Trust for the date of its creation until his resignation on April 22, 2010 (which became effective on May 27, 2010). The subpoena required him to appear to be deposed on June 1, 2010, and further required him to produce certain documents described in the Subpoena Attachment. The Subpoena and Subpoena Attachment are attached hereto as Exhibit 5.

The subpoena contained numerous requests seeking all documents relating to David Smith, Lynn Smith, the beneficiaries of the Trust, the Trust itself, and the duties and responsibilities of the Trustee, among other documents.

Mr. Urbelis produced documents in response to this subpoena on May 29, 2010. He did not produce the [PAA] or any other document that disclosed the existence of any such agreement.

These statements are misleading in several respects. First, the "subpoena" did not require me to appear for deposition, or to produce documents, because I received the subpoena at my

office in Boston, Massachusetts, more than 100 miles from the SEC's offices in New York City, and more than 100 miles from the location of the deposition and document production, in Albany. The "subpoena," therefore, had no legal force or effect. Second, even though the "subpoena" requested production of various categories of documents, I specifically told Ms. Mehraban that because of time constraints, I was sending her only the documents I had sent to Ms. Dunn. Ms. Mehraban did not object to this, nor did she insist that I make a more complete search for documents over the Memorial Day weekend. Exhibit D.

34. I do not know why the SEC did not inform the Court that the "subpoena" sent to me on May 28, 2010, was not legally enforceable, and that I agreed to appear for the deposition voluntarily. I also do not know why the SEC did not inform the Court about my e-mail exchange with Ms. Mehraban on May 28<sup>th</sup>, when she specifically acknowledged that she understood that I would not have time to complete an exhaustive search for documents prior to my deposition on June 1, 2010. I believe the Court would have found these facts relevant in making its prior findings regarding my conduct.

**F. Second Set of Misrepresentations by the SEC.**

35. At ¶ 9 of his Declaration, Mr. Stoelting stated:

Throughout these proceedings, Lynn Smith, her attorney, the Trustee, the Trust's attorneys, and numerous witnesses called on behalf of Ms. Smith and the Trust claimed that the Smiths had no continuing interest in the assets of the Trust and that the Smiths had transferred approximately \$4,450,000 of Charter One Stock to the Trust solely for the benefit of their two children.

36. At ¶ 25 of his Declaration, Mr. Stoelting stated:

On June 1, 2010, Mr. Urbelis was deposed. He was asked numerous questions concerning the Trust and concerning any interest Lynn and David Smith had with respect to the assets transferred to the Trust.

37. These statements are misleading as they relate to my testimony. I was not asked any questions at my deposition as to whether the Smiths had a “continuing interest in the assets of the Trust,” or any similar question. I was not asked any questions at my deposition “concerning any interest Lynn and David Smith had with respect to the assets transferred to the Trust,” or any similar question.

38. I testified truthfully at my deposition that in my role as Trustee, I viewed my duty as running to the beneficiaries of the Trust, Lauren and Geoff Smith. This view is consistent with the language of the Declaration of Trust, and with my very general understanding of fiduciary law.

39. I do not know why Mr. Stoelting stated under oath that I had been asked “numerous questions” at my deposition that, in fact, I was never asked.

**G. Discovery of the PAA**

40. On Friday, July 23, 2010, I received a telephone call from the SEC’s counsel. I believe Mr. Stoelting, Ms. Mehraban, and Mr. McGrath all were on the telephone. They asked me whether I knew anything about the terms of a private annuity agreement relating to the Trust. I responded that I had a vague recollection of the terms of such an agreement, and I indicated that I would conduct an additional search for documents at my office and at my home.

41. Over the following weekend, July 24-25, 2010, I conducted a further search for documents at my home. On this occasion, I looked through several loose stacks of paper that had been moved from my home office to another room in my home, to accommodate some houseguests. I am embarrassed to say that I found the PAA in one of these piles of paper, mixed

in with a copy of a 1989 life insurance trust that had been established for Dave Smith. (I had identified this life insurance trust at my June 1, 2010 deposition).

42. On Monday, July 26, 2010, I sent a further package of documents to the SEC by overnight mail. Included in this package were the PAA (not signed by me), a one-page document relating to the tax implications of the annuity (not prepared by me), and copies of documents relating to Dave Smith's life insurance trust, in case those were of interest. I sent copies of the documents to Ms. Dunn and Mr. Featherstonehaugh at the same time.

43. My discovery of these documents reminded me that I had never resigned as trustee of Dave Smith's life insurance trust. On July 27, 2010, I sent a letter of resignation as Trustee of the Life Insurance Trust to Dave Smith, by overnight mail. On July 28, 2010, I sent copies of the Life Insurance Trust Agreement, my letter of resignation, and other documents relating to the life insurance trust to the SEC, again by overnight mail.

44. After I sent the PAA to the SEC, the SEC's counsel called to ask why I had not done so prior to my deposition. I truthfully responded that I did not realize I had it, and that I had not thought of the PAA until the telephone call I received on July 23, 2010, which triggered my memory of there being some kind of annuity agreement. I told the SEC that the PAA had not been in my office file for the Trust, and instead had been mis-filed at my home with a copy of Dave Smith's life insurance trust.

**H. Third Set of Misrepresentations By the SEC.**

45. At ¶ 27 of his Declaration, Mr. Stoelting stated:

At no time did Mr. Urbelis disclose the material fact that one of his responsibilities was ensuring that there were sufficient assets in the Trust to enable it to fulfill its obligation to make millions of dollars of payments to David and Lynn Smith beginning in 2015 and continuing until their deaths.

46. This paragraph of Mr. Stoelting's declaration is misleading because it implies that I was attempting to conceal information about the Trust that I considered to be material from the SEC. There is no truth to this implication. I certainly had no intent or reason to hide the annuity aspect of the Trust from the SEC. As set forth above, I never had a reason to consult the PAA during my tenure as trustee, I did not remember that I had the PAA when I sent Trust documents to the successor trustee's counsel, and I did not have a copy of the PAA in the file I maintained for the Trust. As I testified at deposition, I viewed my role as trustee as that of a fiduciary for Geoff and Lauren Smith, in the event they needed funds from the Trust. I do not ever remember concluding on my own, or being told by anyone else, that I was responsible for ensuring that there were funds in the Trust sufficient to make annuity payments to Dave and Lynn starting in 2015. Further, the SEC's statement is also plainly wrong, because under the terms of the Declaration of Trust, the Trust could have been terminated at any time with the entire amount in the Trust distributed to the beneficiaries.

47. On October 20, 2010, the SEC sent me a subpoena in connection with the November 16, 2010 hearing on the SEC's motion for reconsideration. On October 29, 2010, Ms. Mehraban sent me a follow-up e-mail, asking me to confirm that I would appear at the hearing. (Exhibit H). In her October 29<sup>th</sup> e-mail, Ms. Mehraban advised me that a provision of the Dodd-Frank Act, effective July 22, 2010, provided the SEC with nationwide service of process. (On information and belief, the SEC later withdrew this subpoena, after the parties to the action stipulated that the PAA was in full force and effect.).

**I. Fourth Set of Misrepresentations by the SEC.**

48. The SEC made additional misrepresentations to this Court at the November 16, 2010 hearing on the SEC's motion for reconsideration. At the hearing, Mr. Stoelting was asked why he never made an inquiry concerning the Trustee's power, as set forth in the Declaration of Trust, to "purchase property from the Donors in exchange for a private annuity payable to the Donors." (Hearing Transcript, copy attached at Exhibit G, p. 28). Mr. Stoelting testified:

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

(Id.)

49. This statement was misleading in two respects. First, I was no longer the Trustee of the Trust at the time of my June 1, 2010 deposition. Second, and more significantly, the SEC never asked me any questions at my deposition about the powers assigned to the Trustee by the Declaration of Trust. In fact, other than marking the document as a deposition exhibit, the SEC did not ask me any questions about the Declaration of Trust at all. Thus, Mr. Stoelting's testimony that the SEC asked me about my powers as Trustee was untrue.

50. Mr. Stoelting also mischaracterized my testimony at a later point in the hearing. When asked to explain whether the SEC had investigated the use of the phrase "private annuity trust" in David Smith's August 4, 2004 letter to me, Mr. Stoelting testified as follows:

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.

(Hearing Transcript, Exhibit G, pp. 40-41).



51. While the SEC may have posed these questions to other witnesses, this testimony was misleading as it pertained to me. The SEC never asked me at my deposition “whether or not the Smiths had any continuing interests in the assets of the trust,” or any similar question, or “who owned the assets that were transferred to the trust,” or any similar question.

52. I did not testify at the November 16, 2010 hearing, nor did I draft or review any of the pleadings and affidavits filed in opposition to the SEC’s motion for reconsideration. In particular, I had no involvement in the drafting or filing by Ms. Dunn and Mr. Wojeski of a “corrected” set of affidavits on the eve of the hearing.

**J. Fifth Set of Misrepresentations by the SEC.**

53. In its January 31, 2011 Memorandum of Law in Support of Plaintiff’s Motion for Sanctions, the SEC makes the following statements:

To persuade the Court to unfreeze \$3.5 million, L. Smith, Wojeski, Dunn, Urbelis and others misrepresented the nature and purpose of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (the “Trust”). ....

...

Those associated with the Trust had a clear financial motive in misrepresenting the nature of the Trust.

Memorandum of Law, p. 1.

54. These statements are untrue as they pertain to me. I had no “clear financial motive” to assist anyone in lifting the freeze on the assets of the Trust. I am not a beneficiary of the Trust, I have never received one penny of compensation for my services as Trustee, and by the time of my deposition, I had resigned as Trustee. I did not receive any disbursements from the Trust after this Court lifted the freeze on the Trust’s assets. Further, as set forth above, I was



an investor in McGinn Smith, and as of the time of my deposition testimony, I believed that I had lost a good part of the monies I had invested for myself and other family members.

55. I have been a practicing lawyer for 32 years and have never had any disciplinary action taken against me. I am extremely upset that the SEC has made misleading and inaccurate statements in court filings about my deposition testimony and my conduct in this matter, resulting in the comments made by the Court about me in its November 22, 2010 decision. I am town counsel for two towns, including my hometown of Andover, Massachusetts. As a result, the filing of the SEC's motion for sanctions against me has been reported prominently in the local press. This has caused great personal anguish to me and to my family, and has resulted in the sullyng of my previously-unblemished professional reputation.

56. I respectfully request that the Court, upon consideration of this affidavit and the attached documents, deny the SEC's motion for sanctions and issue a correction to its November 22, 2010 decision, amending or deleting the comments made about my deposition testimony and my conduct.

57. I am willing to appear before the Court to answer any further questions the Court may have about this matter.

Signed under the penalties of perjury this 21st day of March, 2011.

  
\_\_\_\_\_  
Thomas J. Urbelis

A

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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

## DECLARATION OF TRUST

THIS INDENTURE is made the 4<sup>th</sup> day of AUGUST, 2004, between David L. Smith and Lynn A. Smith, residing at 2 Rolling Brook Drive, Saratoga Springs, New York 12866, (herein called the "Donors"), and Thomas Urbelis, with offices at 6 Eastman Road, Andover, Massachusetts 01810-4009 (the "Trustee") and shall be known as the **DAVID A. & LYNN A. SMITH IRREVOCABLE TRUST U/A DATED AUGUST 4, 2004.**

### WITNESSETH:

The Donors hereby transfer and deliver unto the Trustee the property described in Schedule A, attached hereto, the receipt of which is hereby acknowledged by the Trustee. The Donors have two (2) children, Geoffrey R. Smith and Lauren T. Smith. This Trust is created for the benefit of the Donors' children and their issue.

**TO HAVE AND TO HOLD** such property unto the Trustee, **IN TRUST,** **NEVERTHELESS,** as follows:

**FIRST:** During the lives of the Donors, the Trustee shall manage, invest and reinvest the trust estate to satisfy all obligations of the Trust and the Trust shall be divided and managed in two (2) separate and equal shares for each child and any issue of such child (the "Beneficiaries") and collect the income thereof and, until the death of the second Donor to die, shall distribute so much of the net income and principal as the Trustee shall determine in his discretion to provide for the education, health, support and maintenance of the Beneficiaries from the each child's respective trust share, taking into account any other resources of the Beneficiaries and the tax status of each Beneficiary. Consistent with these provisions the Trustee shall have the power (i) to sprinkle the current income and/or the principal to one or more Beneficiaries, from each such Beneficiary's respective share, as the Trustee shall deem necessary to provide for the education, health, support and maintenance of each Beneficiary and (ii) in each tax year to make the trust either a "simple" trust or "complex" trust under applicable federal and state tax laws.

During the lives of the Donors, the Trustee is authorized, in his discretion, at any time to terminate each trust share and thereupon to pay over and distribute the principal thereof, and any income then accrued or held, to each child, or if such child is predeceased, to the issue of such child in equal shares, and if there are no issue, then to other child, and if such other child is predeceased, then to the issue of such other child in equal shares, although it is the Donor's desire this trust be administered as herein provided.

If in any year a contribution is made to the trust estate by the Donors, the Trustee shall promptly notify each of the Beneficiaries, or, if any such person shall be a minor, his or her parent or guardian other than the Donors, of such contribution, and each such beneficiary, or such parent or guardian acting on a Beneficiary's behalf during such Beneficiary's minority, shall have the right at any time within thirty (30) days of receipt of such notice to withdraw from the trust estate an amount not in excess of the lesser of the following: (i) such Beneficiary's pro rata share of the amount of such contribution and (ii) the annual exclusion available to the Donors for United States Federal gift tax purposes with respect to the Beneficiary's pro rata share of such contribution, after taking into account any other gifts made by the Donors to such person in that year. In satisfaction of such right of withdrawal, the Trustee may distribute to a Beneficiary any asset held in the trust estate (including any insurance policies or any interests in such policies or borrow against such policies), valued as of

the date of withdrawal. Such right of withdrawal shall not be cumulative with respect to any prior contributions made to the trust and, if such right of withdrawal is not exercised within such thirty (30) day period, it shall lapse, provided that the amount with respect to which the right of withdrawal shall lapse for any Beneficiary in any year shall not exceed the maximum annual amount with respect to which a power of appointment may lapse and not be considered a release of such power for United States Federal gift tax purposes under Section 2514 of the Internal Revenue Code of 1986, or any provision successor thereto, as in effect for that year (hereinafter, the "maximum lapse amount"), and if any Beneficiary has a right of withdrawal in any year which shall exceed the maximum lapse amount, the power for the beneficiary for that year shall lapse only to the extent of the maximum lapse amount, and any excess withdrawal right shall continue to be exercisable by the Beneficiary, but shall lapse, in the next succeeding year, or years, to the extent of the maximum lapse amount for such year, on the second day of such year. The right of withdrawal hereunder shall be exercised by written notice delivered to the Trustee. The Donors may instruct the Trustee that any Beneficiary shall not have a withdrawal right as described in this article with respect to any contribution during the calendar year, and to disregard a demand by any Beneficiary with respect to any contribution made by the Donors. Each right of withdrawal granted hereunder is personal to the person holding such right and shall expire if he or she dies, is adjudicated bankrupt, shall take advantage of any of the provisions of the bankruptcy act or of any federal or state statute relating to insolvency, shall make an assignment for the benefit of his or her creditors, or shall be adjudicated an incompetent.

**SECOND:** Upon the death of the second Donor to die, the Trustee shall collect, as principal of the trust estate, the net proceeds of any insurance policies then included in the trust estate and payable to the Trustee, or any other benefits or proceeds payable to the Trustee as beneficiaries, after deduction of all charges against such policies or benefits by way of advances, loans, premiums or otherwise, and any amounts so collected shall be divided equally and added to each share for each child of the Donors. The Trustee may use any part of the income or principal of the trust estate to meet expenses incurred in collecting any such proceeds or benefits. If, however, the Trustee in their discretion shall determine that the income and principal on hand in the trust estate may not be sufficient to meet any expenses and obligations to which the Trustee may be subjected in any litigation to enforce payment of any insurance policy, benefits or proceeds then included in the trust estate, then the Trustee shall not be required to enter into or maintain any litigation to enforce payment of any such amounts until he shall have been indemnified to his satisfaction against all such expenses and obligations. The Trustee is authorized to compromise and adjust any such claims, upon such terms and conditions as they may deem advisable, and the decision of the Trustees in this respect shall be binding and conclusive upon all persons then or thereafter interested in the trust estate.

**THIRD:** Upon the death of the second Donor to die, the Trustee shall administer and distribute the each trust share hereunder, including the remaining principal of the such trust share, and any income, to the child for whom such trust share is held, or if such child is predeceased, to the issue of such child in equal shares, and if there are no issue, then to other child, and if such other child is predeceased, then to the issue of such other child in equal shares.

**FOURTH:** If any person whose life measures the duration of a trust hereunder and any remainderman of such trust shall die under such circumstances that there is reasonable doubt as to who died first, then such person whose life measures the duration of such trust shall be conclusively

deemed to have survived such remainderman for the purposes of all provisions of this Indenture.

**FIFTH:** If any principal or income of any trust created hereunder shall become payable to or be set apart to be distributed to a minor, the Trustee shall have absolute discretion either to pay over such principal or income at any time to the guardian of the property of such minor appointed in any jurisdiction, or to any custodian for such minor under the Uniform Transfers to Minors Act of any state (including the Trustee or a custodian designated by the Trustee) or to retain the same for such minor during minority. In paying over any property to a custodian, the Trustee may direct that the property be retained until the beneficiary reaches the age of twenty-one. In case of retention, the Trustee may apply such principal or income, and any income therefrom, to the support, maintenance, education or other benefit of such minor, irrespective of the other resources of such minor or of his or her parents or guardians. Any such application may be made either directly or by payments to such guardian of the property or parent of such minor or to the person with whom such minor may reside, in any case without requiring any bond, and the receipt of any such person shall be a complete discharge to the Trustee, who shall not be bound to see to the application of any such payment. In holding any property for any minor, the Trustees shall have all the powers and discretion hereinafter conferred.

**SIXTH:** Without limitation of the powers conferred by statute or general rules of law, the Trustee is specifically authorized and empowered with respect to any property held by them:

- (1) To retain any property transferred to any trust hereunder, as long as the Trustee in his absolute discretion shall deem it advisable to do so;
- (2) To invest any funds in any stocks, bonds, limited partnership interests or other securities or property, real or personal (including any securities of or issued by any corporate trustee or investment in any common or commingled fund or funds maintained by any corporate trustee), notwithstanding that such investments may not be of the character allowed to trustees by statute or general rules of law, and without any duty to diversify investments, the intention hereof being to give the broadest investment powers and discretion to the Trustees;
- (3) To sell (at public or private sale, without application to any court) or otherwise dispose of any property, whether real or personal, for cash or on credit, in such manner and on such terms and conditions as the Trustee may deem best, and no person dealing with the Trustee shall be bound to see to the application of any moneys paid;
- (4) To manage, operate, repair, improve, mortgage and lease for any period (whether expiring before or after the termination of any trust created hereunder) any real estate;
- (5) Except to the extent prohibited by law, to cause any securities to be registered in the names of the Trustee's nominees, or to hold any securities in such condition that the Trustee will pass by delivery;
- (6) To employ such attorneys, accountants, custodians, investment counsel, real estate consultants and other persons as the Trustee may deem advisable in the administration



of any trust hereunder, and to pay them such compensation as the Trustee may deem proper, without any diminution of or offset against the commissions to which the Trustee shall be entitled by law;

(7) To maintain margin accounts with one or more individuals, partnerships, associations, banks or other corporations on such terms and conditions as the Trustee in his discretion shall determine, and to conduct such transactions in such accounts as he shall so determine, and to pledge all or any portion of any trust hereunder as security for the payment of the respective debit balances in such accounts;

(8) To engage in any arbitrage transactions and transactions involving short sales, and to buy or sell or write options for the purchase or sale of securities or other property (commonly known as puts and calls), whether covered or uncovered;

(9) To use any securities or brokerage firm in the purchase or sale of stocks, bonds or other securities or property for the account of any trust hereunder and to pay such firm such brokerage commissions or other compensation in connection therewith as the Trustees may deem proper, notwithstanding that the Trustee may be members of, or otherwise connected with, such firm, and without diminution of or offset against the commissions to which the Trustee may be entitled by law;

(10) To purchase property from the Donors in exchange for a private annuity payable to the Donors;

(11) To distribute any income or principal of any trust hereunder in cash or in kind and, if in kind, in a fashion other than pro rata, having regard in such event to the characteristics, including tax characteristics, of the property being distributed and to income, needs and tax status of the recipient;

(12) To borrow such amounts, from such persons (including the Trustee or any beneficiary of any trust hereunder) and for such purposes as the Trustee may deem advisable and to pledge any assets of any trust hereunder to secure the repayment of any amounts so borrowed;

(13) To lend such amounts, to such persons, for such purposes and upon such terms (whether secured or unsecured) as the Trustee may deem advisable;

(14) In general, to exercise all powers in the management of the trust estate which any individual could exercise in the management of property owned in his own right.

**SEVENTH:** Any trust estate held hereunder may be increased from time to time by the addition of such property as may be added to it by the Donors or by any other person with the consent of the Trustee.

**EIGHTH:** The Trustee is empowered to pay any taxes which may become payable from time to time with respect to the trust estate, or any transfer thereof or transaction affecting the same,

under the laws of any jurisdiction which the Trustee is advised may validly tax the same.

**NINTH:** (A) If the Trustee hereunder shall die or is unable or unwilling to act as trustee, then the Donors may appoint a Trustee, independent of the Donors. Any such appointment so made may be revoked by the maker thereof, by written instrument, duly executed and acknowledged, at any time prior to the happening of the event upon which it is to become effective, and a new appointment may be made as above provided. Upon the happening of the event upon which such appointment is to take effect and upon qualifying as hereinafter provided any successor Trustee so appointed shall become a Trustee hereunder, as though originally named herein.

(B) Any Trustee acting hereunder may resign and be discharged from any trust created hereunder by giving, personally or by mail, written notice of resignation, duly acknowledged, to the Donors, or if they shall not then be living, to the remaindermen of such trust (or if any income beneficiary shall be a minor, to either of his or her parents or to the guardian of his or her property). Such notice shall specify the date when such resignation shall take effect, which date (except as the persons entitled to such notice shall otherwise consent) shall be at least thirty days after the service or mailing thereof.

(C) In case any Trustee at any time acting hereunder for any reason shall cease to act, the retiring Trustee or his or her personal representative, as the case may be, shall upon the effective date of his or her resignation or upon his or her death turn over the trust estate or any portion of it under his or her control to the Trustee who shall thereafter be acting hereunder, and shall execute and deliver all instruments which may be deemed necessary more effectively to vest title in such Trustee.

(D) Any successor Trustee appointed as above provided and then entitled to act shall qualify as such by delivering or mailing written acceptance of such trust, duly acknowledged, to any other Trustee then acting hereunder and to the income beneficiaries or, if any be minors, to their parent or the adult with whom they reside.

(E) The Trustee shall have sole authority to make decisions required or authorized by this Indenture. Either Geoffrey R. Smith or Lauren T. Smith shall serve as co-trustee for the limited and express purpose of executing such documents or instruments to fulfill decisions and actions taken by the Trustee, in the absence of the Trustee to execute any such document or instrument.

**TENTH:** The Trustee at any time acting hereunder at any time may render an account of their proceedings to the income beneficiary of any trust during the accounting period (or, if such person shall have died during or after the accounting period, to his or her personal representative); provided, however, that if any person to whom an account would be so rendered shall be a minor, such account instead may be rendered to either of such minor's parents other than an accounting Trustee or the guardian of his or her property. If approved in writing by the parties to whom such account shall have been rendered as above provided, such account shall be final, binding and conclusive upon all persons who may then or thereafter have any interest in the trust estate. The Trustee also at any time may render a judicial account of his proceedings.

In an accounting or other proceeding in which all persons interested in any trust hereunder are required by law to be served with process, if a party to the proceeding has the same or a similar interest as a person under a disability, it shall not be necessary to serve process upon the person under a disability, it being the Donors' intention to avoid the appointment of a guardian ad litem wherever possible.



**ELEVENTH:** Except as otherwise expressly provided herein, all estates, powers, trusts, duties and discretion herein created or conferred upon the Trustee shall extend to any Trustee who at any time may be acting hereunder, whether or not named herein.

No bond or other security shall be required of any trustee hereunder in any jurisdiction.

**TWELTH:** This Declaration and the trust(s) created hereunder shall be irrevocable, shall take effect upon acceptance by the Trustee and in all respects shall be construed and regulated by law of the State of New York. No beneficial interest under this trust, whether income or principal, is subject to anticipation, assignment, pledge, sale, or transfer in any manner, and no beneficiary may anticipate, encumber, or charge such interest. Each beneficiary's interest, while in the possession of the Trustees will not be liable for or subject to the debts, contracts, obligations, liabilities, accounts and/or creditors of any beneficiary.

**THIRTEENTH.** (A) This article states the Donors' tax purposes in creating this trust, and all provisions of this trust shall be construed so as best to effect these purposes and to the extent required, the Trust shall be reformed to effect these overriding tax purposes and no Trustee shall exercise any discretion in a manner that may reasonably be expected to frustrate the accomplishment of any of these purposes:

(1) All gifts made to this trust shall be complete gifts of present interests for federal gift tax purposes.

(2) The assets of this trust shall be excluded from the Donors' gross estates for federal estate tax purposes.

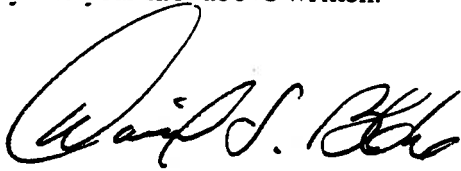
(3) This trust shall be a separate taxpayer for federal income tax purposes. At no time shall this trust be deemed to be owned by the Donors for federal income tax purposes.

(B) The Trustee is authorized to grant to, or, if granted, to take away from, a Beneficiary by an instrument in writing, signed and delivered to the Beneficiary, the power to appoint, by will admitted to probate, any part or all of the principal of a trust share held for such Beneficiary. This power of appointment, if granted, shall be exercisable only by a specific reference thereto in the Beneficiary's will and shall not be deemed to have been exercised by any general residuary article contained therein.


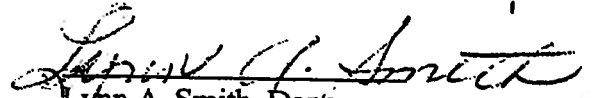
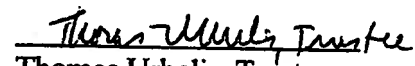
(C) The Trustee may exercise the authority granted to them hereunder for any reason whatsoever, whether to take advantage of any generation-skipping transfer exemption under Chapter 13 of the Internal Revenue Code, to reduce the overall transfer taxes payable upon a distribution or the death of a Beneficiary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

(D) Upon the death of any Beneficiary hereunder, if any estate, transfer, succession or other inheritance taxes, and any interest and penalties thereon, are imposed on such Beneficiary's estate by reason of the fact that any portion of the property held by the Trustee in trust hereunder is included in such Beneficiary's estate for Federal estate tax purposes and if no direction is made in such Beneficiary's will by specific reference to such trust concerning the payment of such taxes, and any interest and penalties thereon, then the Trustee shall pay from the principal of such trust an amount equal to such taxes, interest and penalties imposed by the United States or any state or subdivision thereof, so that such Beneficiary's estate shall not be required to bear any larger amount of estate, transfer, succession or inheritance taxes, and any interest and penalties thereon, than it would have had to pay if the property held in such trust were not included in such Beneficiary's estate.

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



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

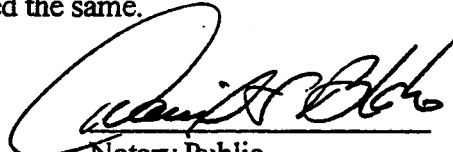
  
David L. Smith, Donor  
Lynn A. Smith, Donor  
Thomas Urbelis, Trustee

STATE OF NEW YORK     )  
                                      :  
COUNTY OF ERIE     )

SS:

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

On this 4<sup>th</sup> day of August, 2004, before me personally came David A. Smith, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

  
Notary Public

STATE OF NEW YORK     )  
                                      :  
COUNTY OF ERIE     )

SS:

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

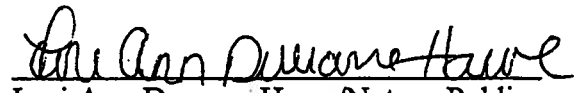
On this 4 day of August, 2004, before me personally came Lynn A. Smith, to me known and known to me to be the individual described in and who executed the foregoing instrument, and she acknowledged to me that she executed the same.

  
Notary Public

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

On this 9<sup>th</sup> day of August, 2004, before me, the undersigned notary public, personally appeared Thomas J. Urbelis, proved to me through satisfactory evidence of identification, which is personal knowledge, to be the person whose name is signed on the preceding or attached document, and acknowledged that he signed it voluntarily for its stated purpose.

  
Lori Ann Durrane Hawe/Notary Public  
My Commission Expires:



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

**B**

April 22, 2010

**FedEx**

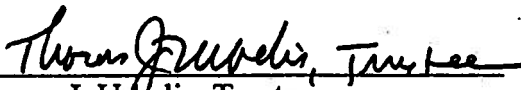
David and Lynn Smith  
2 Rolling Brook Drive  
Saratoga Springs, NY 12866

RE: David A. & Lynn A. Smith  
Irrevocable Trust U/A dated August 4, 2004

Dear Dave and Lynn:

I hereby resign as Trustee of the above-referenced Trust. This resignation shall take effect on May 27, 2010.

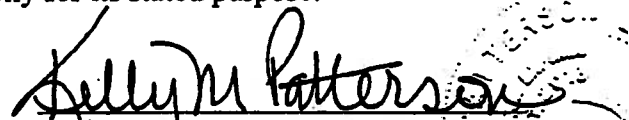
Very truly yours,

  
Thomas J. Urbelis, Trustee  
6 Eastman Road  
Andover, MA 01810

Commonwealth of Massachusetts

Suffolk, ss.

On this 22<sup>nd</sup> day of April, 2010, before me, the undersigned notary public, personally appeared Thomas J. Urbelis proved to me through satisfactory evidence of identification, which was personal knowledge, to be the person whose name is signed on the preceding document in my presence and acknowledged to me that he signed it voluntarily for its stated purpose.

  
Kelly M. Patterson, Notary Public  
My Commission Expires: 3/1/13



KELLY M. PATTERSON  
Notary Public  
Commonwealth of Massachusetts  
My Commission Expires  
March 1, 2013

C

Case 1:10-cv-00457-GLS -DRH Document 103-7 Filed 08/03/10 Page 2 of 8

**Mehraban, Lara**

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**From:** Mehraban, Lara  
**Sent:** Friday, May 28, 2010 2:18 PM  
**To:** 'tju [REDACTED]';  
**Cc:** Stoelting, David; 'James Featherstonhaugh'; 'koenigm [REDACTED]'; 'jdunn [REDACTED]';  
**Subject:** Subpoena to Thomas J. Urbelis

Mr. Urbelis,  
Please see the attached subpoena. I noticed the deposition for Tuesday, June 1, at noon.

Regards,

Lara



Urbelis  
subpoena.PDF

Lara Shalov Mehraban  
U.S. Securities and Exchange Commission  
New York Regional Office  
Three World Financial Center  
Suite 400  
New York, NY 10281-1022  
tel. [REDACTED]  
fax [REDACTED]

**PRIVILEGED & CONFIDENTIAL:** This email message (including any attachments) from the United States Securities and Exchange Commission is for the exclusive use of the intended recipient(s) and may contain confidential, non-public, and privileged information. If you are not the intended recipient, please do not read, distribute, or take action in reliance upon this message. If you have received this email in error, please notify the sender immediately by return email and promptly delete this message and its attachments from your computer system. The sender of this email does not intend to waive any privileges that may apply to the contents of this email or any attachments to it.



AO 88A (Rev. 06/09) Subpoena to Testify at a Deposition in a Civil Action

## UNITED STATES DISTRICT COURT

for the

Northern District of New York

Securities and Exchange Commission

Plaintiff

v.

McGinn, Smith, &amp; Co., Inc., et al.

Defendant

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

(If the action is pending in another district, state where: )

## SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Thomas J. Urbells, Esq.

Urbells &amp; Fieldsteel, LLP, 155 Federal St. Boston, MA 02110-1727, 617-338-2200

**Testimony:** YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization that is *not* a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place: Phillips Lytle, LLP  
30 South Pearl St.  
Albany, NY

Date and Time:

06/01/2010 12:00 pm

The deposition will be recorded by this method: Reporter

**Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

See Attached

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 05/28/2010

CLERK OF COURT

OR

s/ Lara Shalov Mehraban

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party)

Plaintiff

, who issues or requests this subpoena, are:

Lara Shalov Mehraban, Senior Counsel  
Securities and Exchange Commission, 3 World Financial Center, New York, New York 10281  
mehrabanl@sec.gov, (212) 336-0591

AO 88A (Rev. 06/09) Subpoena to Testify at a Deposition in a Civil Action (Page 2)

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

**PROOF OF SERVICE***(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)*

This subpoena for *(name of individual and title, if any)* Thomas J. Urbelis, Esq.  
 was received by me on *(date)* 05/28/2010

☒ I served the subpoena by delivering a copy to the named individual as follows: By E-MAIL  
 \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* 05/28/2010 ; or

☐ I returned the subpoena unexecuted because: \_\_\_\_\_  
 \_\_\_\_\_

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also  
 tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of  
 \$ \_\_\_\_\_

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ 0.00

I declare under penalty of perjury that this information is true.

Date: 05/28/2010

s/ Lara Shalov Mehraban  
*Server's signature*

Lara Shalov Mehraban  
*Printed name and title*  
 Senior Counsel  
 Securities and Exchange Commission  
 3 World Financial Center  
 New York, NY 10281  
*Server's address*

Additional information regarding attempted service, etc:

**Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)****(c) Protecting a Person Subject to a Subpoena.**

**(1) Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

**(2) Command to Produce Materials or Permit Inspection.**

**(A) Appearance Not Required.** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

**(B) Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

**(i)** At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

**(ii)** These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

**(3) Quashing or Modifying a Subpoena.**

**(A) When Required.** On timely motion, the issuing court must quash or modify a subpoena that:

**(i)** fails to allow a reasonable time to comply;

**(ii)** requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

**(iii)** requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

**(iv)** subjects a person to undue burden.

**(B) When Permitted.** To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

**(i)** disclosing a trade secret or other confidential research, development, or commercial information;

**(ii)** disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

**(iii)** a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

**(C) Specifying Conditions as an Alternative.** In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

**(i)** shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

**(ii)** ensures that the subpoenaed person will be reasonably compensated.

**(d) Duties in Responding to a Subpoena.**

**(1) Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

**(A) Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

**(B) Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

**(C) Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

**(D) Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

**(2) Claiming Privilege or Protection.**

**(A) Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

**(i)** expressly make the claim; and

**(ii)** describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

**(B) Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

**(e) Contempt.** The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

**SUBPOENA ATTACHMENT**

**Thomas J. Urbelis**

**May 28, 2010**

**INSTRUCTIONS**

1. This Subpoena requires the production of each responsive document in its entirety, including all non-identical copies, drafts, and identical copies containing different handwritten notions, without abbreviation, expurgation, or redaction.
2. Claims of privilege with respect to any document, or portions of any documents, shall be made as required by Rule 45(d)(2) of the Federal Rules of Civil Procedure.
3. If any document sought by this Subpoena once was, but no longer is, within your 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. Unless otherwise indicated, this Subpoena seeks documents from January 1, 2004 onward.
5. This Subpoena is ongoing in nature, and you should continue to produce responsive documents as they are found or created on an ongoing basis.

**DEFINITIONS**

1. "Communication" means any transmittal of information (in the form of facts, ideas, inquiries, or otherwise) including, but not limited to, e-mail, instant messages, faxes, text messages, notes of meetings, phone logs, and letters.
2. "Concerning" means relating to, referring to, describing, evidencing, or constituting.

3. "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.

4. "Trust" shall refer to the David L. & Lynn A. Smith Irrevocable Trust U/A, dated August 4, 2004.

5. "Your" shall refer to Thomas J. Urbelis and any person or entity acting on his behalf.

**DOCUMENTS SUBPOENAED**

1. All documents concerning David L. Smith, including but not limited to documents concerning the Trust.

2. All documents concerning communications with David L. Smith, including but not limited to documents concerning the Trust.

3. All documents concerning Lynn A. Smith, including but not limited to documents concerning the Trust.

4. All documents concerning communications with Lynn A. Smith, including but not limited to documents concerning the Trust.

5. All documents concerning the beneficiaries of the Trust, including but not limited to documents concerning the Trust.

6. All documents concerning communications with the beneficiaries of the Trust, including but not limited to documents concerning the Trust.

7. All documents concerning the Trust.

8. All documents concerning your duties and responsibilities as Trustee of the Trust.

**D**



address

Page 1 of 2

**Thomas J. Urbelis**

---

**From:** Mehraban, Lara [MehrabanL@sec.gov]  
**Sent:** Friday, May 28, 2010 3:36 PM  
**To:** Thomas J. Urbelis  
**Cc:** Stoelting, David  
**Subject:** RE: address

I understand. Have a nice weekend. See you Tuesday.

Lara Shalov Mehraban  
U.S. Securities and Exchange Commission

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**From:** Thomas J. Urbelis [mailto:tju@uf-law.com]  
**Sent:** Friday, May 28, 2010 3:21 PM  
**To:** Mehraban, Lara  
**Subject:** RE: address

Ms. Mehraban.....I made copies of documents I sent to Attorney Dunn as we discussed and will send them overnight. My office is closing shortly for the holiday weekend and I am going out of state today for the weekend. The subpoena is so broad that there is no way I can respond further by Tuesday. I will plan on being there at noon.

Thomas Urbelis

---

**From:** Mehraban, Lara [mailto:MehrabanL@sec.gov]  
**Sent:** Friday, May 28, 2010 2:21 PM  
**To:** Thomas J. Urbelis  
**Subject:** address

Mr. Urbelis,

You can send the documents responsive to the subpoena to me over the weekend at the following address:

Lara Shalov Mehraban

100 Riverside Drive (Apt. 5c)

New York, NY 10024

Thanks very much. You can reach me at (212) 336-0591 if you have questions.

Lara Shalov Mehraban

7/28/2010



address

Page 2 of 2

U.S. Securities and Exchange Commission  
New York Regional Office  
Three World Financial Center  
Suite 400  
New York, NY 10281-1022  
tel. 212.336.0591  
fax 212.336.1348

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7/28/2010

**E**

**Condensed Transcript**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,  
Plaintiff,

-against-

Index No.  
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 MCGINN and DAVID L. SMITH;  
Defendants,

-and-

LYNN SMITH,  
Relief Defendant.

EXAMINATION BEFORE TRIAL OF

THOMAS URBELIS

June 1, 2010  
12:20 p.m.

30 South Pearl Street  
Albany, New York

Reported by: George Malinowski



Telephone: 212.687.8010  
Toll Free: 800.944.9454  
Facsimile: 212.557.5972

One Penn Plaza  
Suite 4715  
New York, N.Y. 10119



Thomas Urbelis

June 1, 2010

<p style="text-align: center;">5</p> <p>1 T. Urbelis</p> <p>2 MS. MEHRABAN:</p> <p>3 Q Would you please state your name for the</p> <p>4 record.</p> <p>5 A Thomas Urbelis.</p> <p>6 Q Would you please state your current home</p> <p>7 address.</p> <p>8 A 6 Eastman Road, Andover, Massachusetts</p> <p>9 01810.</p> <p>10 Q Can you tell me your educational</p> <p>11 background after high school, please.</p> <p>12 A I graduated from Union College in 1967.</p> <p>13 I graduated from the University of Rochester,</p> <p>14 Graduate School of Management in 1969. I</p> <p>15 graduated from Boston College Law School in</p> <p>16 1978, and I've attended professional education</p> <p>17 courses since then.</p> <p>18 Q Can you walk me through your</p> <p>19 professional experience after you graduated</p> <p>20 from law school?</p> <p>21 A You mean?</p> <p>22 Q As a lawyer.</p> <p>23 A In practices?</p> <p>24 Q Yes.</p> <p>25 A I started, after I graduated from law</p>	<p style="text-align: center;">7</p> <p>1 T. Urbelis</p> <p>2 serve as special counsel on occasion to</p> <p>3 municipalities with regard to civil rights</p> <p>4 defense, where the municipality or its</p> <p>5 employees or officers are sued for civil</p> <p>6 rights violations; so I'll participate in the</p> <p>7 defense of those. That's how my practice has</p> <p>8 evolved as to what I pretty much do now.</p> <p>9 (Plaintiff's Exhibit 16, subpoena</p> <p>10 to serve on deposition marked for</p> <p>11 identification as of today's date.)</p> <p>12 Q This is the subpoena I sent you on</p> <p>13 Friday. Your appearance today is pursuant to</p> <p>14 the subpoena.</p> <p>15 A Yes, it is.</p> <p>16 Q When did you first meet David Smith?</p> <p>17 A Approximately '56, '57. Well, 50 years</p> <p>18 ago.</p> <p>19 Q How?</p> <p>20 A We grew up in the same town and went to</p> <p>21 the same schools.</p> <p>22 MR. FEATHERSTONHAUGH: May I</p> <p>23 interject about Exhibit 16?</p> <p>24 MS. MEHRABAN: Sure.</p> <p>25 MR. FEATHERSTONHAUGH: Exhibit 16</p>
<p style="text-align: center;">6</p> <p>1 T. Urbelis</p> <p>2 school, I started with a firm in Boston called</p> <p>3 Withington, Cross, Park &amp; Groden, I worked</p> <p>4 there as an associate, and I became partner in</p> <p>5 1983. In 1990, four of the partners including</p> <p>6 myself spun off and started our own firm in</p> <p>7 Boston. Over the years, one or two would drop</p> <p>8 out, and I'm not exactly sure which years they</p> <p>9 were, but currently I'm partner with Urbelis &amp;</p> <p>10 Fieldsteel.</p> <p>11 Q What type of law do you practice?</p> <p>12 A I primarily practice in the area of</p> <p>13 municipal law, I represent cities and towns.</p> <p>14 I'm town counsel, that's C-O-U-N-S-E-L that's</p> <p>15 counsel in the form of Government, for towns.</p> <p>16 I perform special legal services for other</p> <p>17 towns. I do quite a bit of land court</p> <p>18 litigation resulting from that because of</p> <p>19 decisions that one of the regulatory boards</p> <p>20 might make, like, I don't know what you call</p> <p>21 it here, but the planning board or zoning</p> <p>22 board of appeals or conservation commission of</p> <p>23 the Board of Health. So I'll represent the</p> <p>24 communities in those mostly land court and</p> <p>25 administrative-type of litigations. I also</p>	<p style="text-align: center;">8</p> <p>1 T. Urbelis</p> <p>2 I think asks for, in addition for the</p> <p>3 witness' appearance, for various</p> <p>4 documents, and I wonder if any documents</p> <p>5 were produced in response to the</p> <p>6 subpoena, and if they have been if we</p> <p>7 might have copies of them?</p> <p>8 MS. MEHRABAN: Sure. My</p> <p>9 understanding is that the only documents</p> <p>10 that were produced to me were produced</p> <p>11 to Ms. Dunn.</p> <p>12 A Let me clarify that. There is one</p> <p>13 letter that Ms. Dunn had asked me for, it's</p> <p>14 the letter that Dave sent me that we talked</p> <p>15 about, which I sent over the weekend. So</p> <p>16 that's one that you don't have.</p> <p>17 MS. MEHRABAN: So I can get you</p> <p>18 copies of all those documents, but most</p> <p>19 of them are exhibits.</p> <p>20 A But what I sent is exactly what I sent</p> <p>21 to Ms. Dunn.</p> <p>22 MR. FEATHERSTONHAUGH: Okay.</p> <p>23 A Can I clarify that's not total, I mean I</p> <p>24 haven't --</p> <p>25 Q You haven't completed your search for</p>



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Thomas Urbelis

June 1, 2010

<p style="text-align: center;">9</p> <p>1 T. Urbelis</p> <p>2 documents?</p> <p>3 A As I explained to you, you know, I got</p> <p>4 the subpoena at 2 o'clock, Friday. And my</p> <p>5 office was closing early, and, you know, I</p> <p>6 offered to send her the documents to have</p> <p>7 copies of the documents that I had sent to Ms.</p> <p>8 Dunn, and I was leaving right then for the</p> <p>9 holiday weekend, Memorial Day weekend, out of</p> <p>10 state and I haven't done anything since. I</p> <p>11 got a phone call or we got a phone call Sunday</p> <p>12 night.</p> <p>13 Q Do you want to go off the record?</p> <p>14 A My daughter was --</p> <p>15 MS. MEHRABAN: Let's go off the</p> <p>16 record.</p> <p>17 (Whereupon, an off the record</p> <p>18 discussion was held.)</p> <p>19 MS. MEHRABAN: Back on the record.</p> <p>20 Q I believe you just explained to me how</p> <p>21 you knew David Smith.</p> <p>22 A Yes, we been friends more than 50 years,</p> <p>23 we met in junior high.</p> <p>24 Q Would the answer be the same with</p> <p>25 respect to Lynn Smith?</p>	<p style="text-align: center;">11</p> <p>1 T. Urbelis</p> <p>2 approvals.</p> <p>3 Q And were you involved in that</p> <p>4 representation?</p> <p>5 A No. There was another time in the early</p> <p>6 '80s, '84, '85, '86, around there, where there</p> <p>7 was some litigation that McGinn, Smith was</p> <p>8 involved in with regard to I believe a real</p> <p>9 estate developer and the case was in</p> <p>10 Massachusetts and I represented the company</p> <p>11 and the case was settled, but ever since then,</p> <p>12 since that, I've -- no, I haven't represented</p> <p>13 them as an attorney. I never represented any</p> <p>14 of them.</p> <p>15 Q As a trustee for this trust, what did</p> <p>16 you do?</p> <p>17 A Well, I -- let me tell you what I took</p> <p>18 as my duties as I saw them. My very first</p> <p>19 duty obviously was to make sure the kids were</p> <p>20 okay.</p> <p>21 Jeff and Lauren, I've known them since</p> <p>22 they were born. And I think that's -- I don't</p> <p>23 know if I'm speculating -- that might be one</p> <p>24 of the reasons besides knowing me, they might</p> <p>25 have wanted someone who knew the kids and what</p>
<p style="text-align: center;">10</p> <p>1 T. Urbelis</p> <p>2 A Same.</p> <p>3 Q How did you become trustee with the</p> <p>4 David L. and Lynn A. Smith Trust?</p> <p>5 A I don't know if it was Dave calling me</p> <p>6 or Lynn -- probably Dave, I don't remember --</p> <p>7 and asked me to be the trustee for the</p> <p>8 children's trust.</p> <p>9 Q Prior to that time, had you been a</p> <p>10 trustee for any trust for David Smith or Lynn</p> <p>11 Smith?</p> <p>12 A I am a trustee of a life insurance trust</p> <p>13 on Dave's life; that's it.</p> <p>14 Q How long have you been a trustee for</p> <p>15 that trust?</p> <p>16 A Maybe 20 years.</p> <p>17 Q Have you ever represented David Smith or</p> <p>18 Lynn Smith in your capacity as an attorney?</p> <p>19 A I never represented Lynn. In 1980 when</p> <p>20 Dave and Tim McGinn were starting their firm,</p> <p>21 they asked me if I knew any lawyers in Boston,</p> <p>22 and one of the partners in the firm that was</p> <p>23 associated with us did that kind of work; so</p> <p>24 he worked with them in setting up their</p> <p>25 company and getting the appropriate regulatory</p>	<p style="text-align: center;">12</p> <p>1 T. Urbelis</p> <p>2 their personalities were and needs and things</p> <p>3 like that; so I've known Jeff and Lauren ever</p> <p>4 since they were born. So, my first duty as I</p> <p>5 saw it was if they needed money or some kind</p> <p>6 of assistance was to provide it.</p> <p>7 Another consideration for me was I</p> <p>8 wanted to make sure in a situation like this</p> <p>9 that the taxes got paid, so I wanted an</p> <p>10 assurance that I was not going to be</p> <p>11 responsible for preparing tax returns, and I</p> <p>12 make no bones about it, I have an accountant</p> <p>13 that does mine and I don't understand it. So</p> <p>14 I have an accountant that does that, and I</p> <p>15 wanted the same professional expertise to deal</p> <p>16 with the tax returns. I wanted to make sure I</p> <p>17 had an assurance that they were going to get</p> <p>18 done on a timely basis and they were going to</p> <p>19 get paid.</p> <p>20 With regard to the investments and the</p> <p>21 trust, I did not see my duties as making the</p> <p>22 trust double, triple, quadruple over time. I</p> <p>23 wanted the money to be fairly secure for, if</p> <p>24 and when the kids needed it. And I looked to</p> <p>25 Dave to provide advice to me with regard to</p>



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Thomas Urbelis

June 1, 2010

<p style="text-align: center;">13</p> <p>1 T. Urbelis</p> <p>2 the prudent investment or appropriate</p> <p>3 investments to make in the trust.</p> <p>4 Q Were you compensated in your position as</p> <p>5 trustee?</p> <p>6 A No.</p> <p>7 Q Do you have any background in investing?</p> <p>8 A Not really, no, I don't have time to.</p> <p>9 Q Did you make any investment decisions as</p> <p>10 trustee of the trust that were not based on</p> <p>11 recommendations from David Smith?</p> <p>12 A I don't think so. There really weren't</p> <p>13 that many. I mean, over the six or seven</p> <p>14 years, six years, there really -- I think if</p> <p>15 you look at other investments, there really</p> <p>16 weren't that many transactions. I mean, there</p> <p>17 were a couple big ones, but I mean it wasn't</p> <p>18 like there were six or seven, continually six</p> <p>19 or seven transactions. I mean, there were</p> <p>20 some, it was mostly talking to Dave.</p> <p>21 I felt a couple of things. One, this</p> <p>22 trust in my mind was kind of unique because</p> <p>23 the person who was one of the donors was in</p> <p>24 the business of investments, so it's not like</p> <p>25 the person who was the donor was a dentist or</p>	<p style="text-align: center;">15</p> <p>1 T. Urbelis</p> <p>2 Q You said that your first goal in being</p> <p>3 the trustee was to make sure the children were</p> <p>4 okay.</p> <p>5 A Right.</p> <p>6 Q How did you do that?</p> <p>7 A Well, I knew what the kids were up to.</p> <p>8 I mean, my wife and I are very good friends</p> <p>9 with Dave and Lynn. And again, we have kids</p> <p>10 that are fairly close to the same ages of Jeff</p> <p>11 and Lauren, and my wife and Lynn raised a</p> <p>12 couple of teenagers at the same time. So we</p> <p>13 had a lot of conversations about what the kids</p> <p>14 are up to and which kid is doing what, and</p> <p>15 just that I knew about what they were doing</p> <p>16 and whether they needed money.</p> <p>17 So, I mean, obviously if I knew one of</p> <p>18 them was in a tough spot, I would have stepped</p> <p>19 in, but that was never brought to my attention</p> <p>20 or I never became aware of it.</p> <p>21 Q Did you have conversations with Jeff</p> <p>22 Smith?</p> <p>23 A Yeah, I've talked to Jeff.</p> <p>24 Q How often?</p> <p>25 A Probably, well, probably more often.</p>
<p style="text-align: center;">14</p> <p>1 T. Urbelis</p> <p>2 a musician or athlete, and I had to go pay</p> <p>3 somebody to get advice. The person, it was,</p> <p>4 if you will, an in-house expert right there.</p> <p>5 Secondly, it was somebody who I had</p> <p>6 invested money with. So, obviously if it was</p> <p>7 good enough for me to consult with Dave to get</p> <p>8 his advice for my personal investments, it was</p> <p>9 good enough to ask him about his trust.</p> <p>10 And another thought in my mind has</p> <p>11 always been is this is his children's money</p> <p>12 and who else will you give advice to, but</p> <p>13 someone who is dealing with your children's</p> <p>14 money? So I felt very comfortable with regard</p> <p>15 to the investment side of what I was doing to</p> <p>16 consult with Dave, and Mr. Simons was the</p> <p>17 certified public accountant who was doing the</p> <p>18 taxes.</p> <p>19 Q And where was Mr. Simons employed?</p> <p>20 A He has an accounting firm in Syracuse.</p> <p>21 Q Is it Piaker &amp; Lyons?</p> <p>22 A Yes.</p> <p>23 Q Were any distributions ever made by the</p> <p>24 trust to the beneficiaries of the trust?</p> <p>25 A I don't think so.</p>	<p style="text-align: center;">16</p> <p>1 T. Urbelis</p> <p>2 You mean about the trust?</p> <p>3 Q Yes.</p> <p>4 A I recall -- I think -- I'm just trying</p> <p>5 to recall -- as I was driving up here and I</p> <p>6 think about when the trust was created, I</p> <p>7 joked with both of them.</p> <p>8 I said, you guys better be nice to me</p> <p>9 because you may want me at some point. We</p> <p>10 joked about it, and I really haven't had any</p> <p>11 substantive conversations with Lauren about</p> <p>12 it.</p> <p>13 Jeff, I had a recent conversation with</p> <p>14 Jeff, he called me. I think it was April 15th</p> <p>15 this year and said that, you know, it was tax</p> <p>16 time. So every year around April 15th, I'd</p> <p>17 transfer money, make sure that taxes got paid.</p> <p>18 And he was also, for a period of time, the</p> <p>19 account representative on the trust, he was</p> <p>20 not just the beneficiary, he was the actual</p> <p>21 representative.</p> <p>22 Q And your understanding is that the money</p> <p>23 that was transferred was to pay taxes on the</p> <p>24 trust?</p> <p>25 A Pay taxes, yes, that was my</p>



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Thomas Urbelis

June 1, 2010

<p style="text-align: center;">17</p> <p>1 T. Urbelis</p> <p>2 understanding.</p> <p>3 Q Did Jeff send you or anyone send you any</p> <p>4 documents of what the tax liabilities were on</p> <p>5 the trust?</p> <p>6 A Well, I received a document from a</p> <p>7 gentleman, I think, Brian Maher in New York</p> <p>8 who -- I'm not exactly sure who he is. He's</p> <p>9 with the clearinghouse, RMR.</p> <p>10 Jeff had called me and said, all right,</p> <p>11 we'll fax up the document to sign to transfer</p> <p>12 the money, and Jeff, they tried a couple of</p> <p>13 times and it didn't come through the fax</p> <p>14 machines.</p> <p>15 So I called Mr. Maher, and he e-mailed</p> <p>16 me the form that they prepared for me to sign</p> <p>17 to transfer the funds.</p> <p>18 Q Did you ever see any documents prior to</p> <p>19 authorizing the transfer showing how much the</p> <p>20 taxes were for the trust?</p> <p>21 A For this year?</p> <p>22 Q For any given year.</p> <p>23 A Well, I can tell you I didn't this year,</p> <p>24 I haven't reviewed all the documents, I don't</p> <p>25 know.</p>	<p style="text-align: center;">19</p> <p>1 T. Urbelis</p> <p>2 referenced, it seems to make sense that it's</p> <p>3 dated the same date.</p> <p>4 Q I represent to you that this is a</p> <p>5 document that you sent me.</p> <p>6 A Again, I'm assuming that's what it was.</p> <p>7 It looks like there is a delivery slip here.</p> <p>8 Yeah, this is a letter that Dave Smith sent to</p> <p>9 me.</p> <p>10 Q And it's attaching the declaration of</p> <p>11 trust?</p> <p>12 A Right. Is this the one that I signed?</p> <p>13 Well, that's what I mean, so I don't think he</p> <p>14 sent me this one with my signature, so, I mean</p> <p>15 I may have just stapled it together to keep</p> <p>16 the signed one with the letter. It doesn't</p> <p>17 make sense that he sent me one, but maybe he</p> <p>18 did.</p> <p>19 No, actually, I think the handwriting</p> <p>20 where it says August 4th, looks like my</p> <p>21 handwriting on the first paragraph, so I'm not</p> <p>22 exactly sure what the sequence was, but as I</p> <p>23 say, this is a signed one. I think I also</p> <p>24 sent you a blank one or one that wasn't signed</p> <p>25 by me, if I recall, so that may be what was</p>
<p style="text-align: center;">18</p> <p>1 T. Urbelis</p> <p>2 Q The trust only made a few distributions</p> <p>3 over the years; is that correct?</p> <p>4 MS. DUNN: Objection to the form</p> <p>5 of the question.</p> <p>6 A The trust, yeah, well, it depends on</p> <p>7 what you mean by the distributions. Money</p> <p>8 going out of the trust?</p> <p>9 Q That's what I mean.</p> <p>10 A Correct, that was for taxes.</p> <p>11 Q Do you recall distributions other than</p> <p>12 for taxes?</p> <p>13 A No.</p> <p>14 Q I'm going to show you some documents.</p> <p>15 (Plaintiff's Exhibit 17, letter</p> <p>16 marked for identification of today's</p> <p>17 date.)</p> <p>18 Q I'm handing you Plaintiff's 17. If you</p> <p>19 can take a look at it and let me know what it</p> <p>20 is?</p> <p>21 A Yes, Exhibit 17 is a letter that I</p> <p>22 received from Dave Smith. I assume that this</p> <p>23 is the attachment that's attached, although, I</p> <p>24 don't have any independent memory. I just</p> <p>25 assume that this is the trust that was</p>	<p style="text-align: center;">20</p> <p>1 T. Urbelis</p> <p>2 included in the letter.</p> <p>3 MR. FEATHERSTONHAUGH: Could I</p> <p>4 impose on you just for the clarity of</p> <p>5 the record to actually describe the</p> <p>6 document.</p> <p>7 MS. MEHRABAN: Sure. Plaintiff's</p> <p>8 Exhibit 17 is an 11-page document dated</p> <p>9 August 4th, 2004. The first page is a</p> <p>10 letter from David Smith to Thomas</p> <p>11 Urbelis. The second page through the</p> <p>12 tenth page is the signed declaration of</p> <p>13 trust and the last page is an Airborne</p> <p>14 Express receipt.</p> <p>15 MR. FEATHERSTONHAUGH: Thank you.</p> <p>16 Q I'm going to direct your attention to</p> <p>17 the letter, the first paragraph of the letter,</p> <p>18 the fifth sentence.</p> <p>19 A Yeah.</p> <p>20 Q It says:</p> <p>21 "You and I will be able to consult</p> <p>22 on investments, but I am not eligible to</p> <p>23 exercise any direct control over the</p> <p>24 trust or its investments."</p> <p>25 What's your understanding as to what</p>



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Thomas Urbelis

June 1, 2010

<p style="text-align: center;">21</p> <p>1 T. Urbelis</p> <p>2 that means?</p> <p>3 A That I could consult with Dave on</p> <p>4 investments, but obviously I'm the only one</p> <p>5 that can sign a transfer or acquisition or</p> <p>6 disposition of any of the investments. He</p> <p>7 couldn't do it on his own.</p> <p>8 I mean I'm on the board of trustees of a</p> <p>9 charitable organization, where our accountant</p> <p>10 or our investment advisor buys and sells stock</p> <p>11 and every year gives us a report.</p> <p>12 My experience with that led me to</p> <p>13 conclude in my mind that that wasn't going to</p> <p>14 happen here, based on that sentence, that our</p> <p>15 investment advisor for this charitable</p> <p>16 organization, which I sit on the board, has</p> <p>17 given authority to the investment advisor</p> <p>18 during the year to sell IBM, buy GE, to do</p> <p>19 whatever you think is best, and then tell us</p> <p>20 at the end of the year, give us a report as to</p> <p>21 what you have done.</p> <p>22 Q In other words, is it fair to say that</p> <p>23 you --</p> <p>24 MS. DUNN: Objection to the form</p> <p>25 of the question.</p>	<p style="text-align: center;">23</p> <p>1 T. Urbelis</p> <p>2 time a fee for your services?</p> <p>3 A Yes, I did.</p> <p>4 Q What was that discussion?</p> <p>5 A Dave said, you know, we want to pay you.</p> <p>6 We want to see you get fairly compensated</p> <p>7 based upon what other trustees handling this</p> <p>8 kind of a trust get compensated. So let me</p> <p>9 know what you think is fair.</p> <p>10 I said, I'm not going to bother, I'm not</p> <p>11 going to take anything.</p> <p>12 Q Why did you say that?</p> <p>13 A Because they're my friends.</p> <p>14 Q The next paragraph refers to someone</p> <p>15 named Bruce Hoover of Sullivan &amp; Olettheros</p> <p>16 (phonetic) in Buffalo, did you ever speak to</p> <p>17 Bruce Hoover?</p> <p>18 A No, not that I recall.</p> <p>19 Q The final sentence says:</p> <p>20 "The trust was drawn at the</p> <p>21 direction of Daniel Blake of Buffalo."</p> <p>22 Did you ever speak to Daniel Blake?</p> <p>23 A I don't think so.</p> <p>24 Q If you turn the page, please, this is</p> <p>25 the actual declaration of trust; is it not?</p>
<p style="text-align: center;">22</p> <p>1 T. Urbelis</p> <p>2 MR, FEATHERSTONHAUGH: Objection</p> <p>3 to the form of the question.</p> <p>4 MS. MEHRABAN: I'll rephrase the</p> <p>5 question.</p> <p>6 Q In other words, David Smith did not have</p> <p>7 discretionary authority over the account?</p> <p>8 A I didn't think so.</p> <p>9 Q The next sentence, "We will discuss some</p> <p>10 options to accomplish that at a later date,"</p> <p>11 what does the "that" refer to?</p> <p>12 MS. DUNN: Objection to the form</p> <p>13 of the question.</p> <p>14 A To consult on investments.</p> <p>15 Q What options did you discuss with David</p> <p>16 Smith about how to accomplish investments?</p> <p>17 A I don't recall. I don't recall any</p> <p>18 discussion.</p> <p>19 Q What other options would there have</p> <p>20 been?</p> <p>21 A I don't know.</p> <p>22 Q The last sentence says, "We will discuss</p> <p>23 a fee for your services at that time, also."</p> <p>24 A Right.</p> <p>25 Q Did you discuss with David Smith at any</p>	<p style="text-align: center;">24</p> <p>1 T. Urbelis</p> <p>2 A Yes, it looks like it is; if it's got my</p> <p>3 signature on it, that's the one. Yeah, this</p> <p>4 is it.</p> <p>5 Q I don't have any other questions on</p> <p>6 that.</p> <p>7 (Plaintiff's 18, a three-page</p> <p>8 document marked for identification of</p> <p>9 today's date.)</p> <p>10 Q This is a three-page document, the first</p> <p>11 two pages are a letter from Patty Sicluna to</p> <p>12 you, Mr. Urbelis, and the third page appears</p> <p>13 to be -- I'm not exactly sure.</p> <p>14 A The third page doesn't belong there. I</p> <p>15 some how I misplaced that. I just copied</p> <p>16 everything that was in it; so you got</p> <p>17 something that means nothing to you, it has no</p> <p>18 effect on anything.</p> <p>19 Q So, we'll just talk about the first two</p> <p>20 pages then of Exhibit 18. If you can take a</p> <p>21 look at it and let me know what it is.</p> <p>22 MR. FEATHERSTONHAUGH: Might I ask</p> <p>23 for the clarity of the record, if all</p> <p>24 counsel agreed, that it would be better</p> <p>25 just to remove the third page, so that</p>



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Thomas Urbelis

June 1, 2010

<p style="text-align: center;">25</p> <p>1 T. Urbelis</p> <p>2 Exhibit 18 is a two-page document?</p> <p>3 MS. MEHRABAN: I think it's fine,</p> <p>4 let's leave it.</p> <p>5 Q What are the first two pages of Exhibit</p> <p>6 18?</p> <p>7 A It's a letter from Ms. Sicluna. It</p> <p>8 looks like -- well, the first paragraph</p> <p>9 relates to the David and Lynn Smith Trust.</p> <p>10 The other paragraphs relate to investments</p> <p>11 that I or my wife had made, and I'd rather not</p> <p>12 get into that.</p> <p>13 The first paragraph relates to the fact</p> <p>14 that Dave had recommended that the trust</p> <p>15 invest in Pine Street Capital Partners LP, and</p> <p>16 Patty was sending me the documents to sign.</p> <p>17 Q What did you and David discuss about the</p> <p>18 investment of Pine Street Capital?</p> <p>19 A I don't remember the details. I just</p> <p>20 don't remember exactly what we talked about.</p> <p>21 Q Did you discuss the investment of Pine</p> <p>22 Street Capital with the beneficiaries of the</p> <p>23 trust at all?</p> <p>24 A No.</p> <p>25 Q Before agreeing to invest in Pine Street</p>	<p style="text-align: center;">27</p> <p>1 T. Urbelis</p> <p>2 if I can have a second to look at it,</p> <p>3 too?</p> <p>4 MS. MEHRABAN: Sure.</p> <p>5 Q What is this document?</p> <p>6 A This was something, again, that Patty</p> <p>7 Sicluna had sent to me to effectuate the</p> <p>8 investment that's shown.</p> <p>9 Q How did the trust come to be invested in</p> <p>10 Deerfield Tri Arc Capital Corp.?</p> <p>11 A Dave and I talked about it.</p> <p>12 Q What did you discuss?</p> <p>13 A I don't recall the exact discussion, but</p> <p>14 I -- he explained to me what it was and I</p> <p>15 mean, I really don't remember the details of</p> <p>16 it.</p> <p>17 Q Did you discuss the investment in</p> <p>18 Deerfield Tri Arc with the beneficiaries of</p> <p>19 the trust?</p> <p>20 A No.</p> <p>21 Q I don't have any other questions about</p> <p>22 that.</p> <p>23 (Plaintiff's Exhibit 20, a</p> <p>24 one-page document marked for</p> <p>25 identification of today's date.)</p>
<p style="text-align: center;">26</p> <p>1 T. Urbelis</p> <p>2 Capital, did you determine that investing in</p> <p>3 Pine Street Capital would meet the goals of</p> <p>4 the trustee of the trust?</p> <p>5 A Yeah, I did do that because it was also</p> <p>6 something that I was considering investing in,</p> <p>7 personally.</p> <p>8 Q How did you do that?</p> <p>9 MS. DUNN: Objection to the form</p> <p>10 of the question.</p> <p>11 MR. FEATHERSTONHAUGH: Objection</p> <p>12 to the form of the question.</p> <p>13 A I talked to Dave.</p> <p>14 Q Can I just ask who William Camisa is?</p> <p>15 A That's my nephew.</p> <p>16 Q I don't have any other questions about</p> <p>17 this document.</p> <p>18 (Plaintiff's Exhibit 19, an</p> <p>19 eight-page document marked for</p> <p>20 identification of today's date.)</p> <p>21 Q Exhibit 19 is an eight-page document.</p> <p>22 The first page is a fax and the second page is</p> <p>23 a subscription agreement for Deerfield Tri Arc</p> <p>24 Capital Corp.</p> <p>25 MR. FEATHERSTONHAUGH: Can I ask</p>	<p style="text-align: center;">28</p> <p>1 T. Urbelis</p> <p>2 Q Exhibit 20 is a one-page legal size</p> <p>3 document.</p> <p>4 MR. FEATHERSTONHAUGH: The title</p> <p>5 of mine is cut off, is it cut off on</p> <p>6 every document?</p> <p>7 MS. MEHRABAN: It's cut off on all</p> <p>8 of them.</p> <p>9 A The one I sent you I think is also cut</p> <p>10 off.</p> <p>11 Q Can you tell us what this document is?</p> <p>12 A This looks like -- I think this was a</p> <p>13 Bear Stearns. Bear Stearns was going to be</p> <p>14 doing the clearing for the investments, and</p> <p>15 this was something I had to sign as the</p> <p>16 trustee to have Bear Stearns do it.</p> <p>17 Q Who filled out the document?</p> <p>18 A I didn't, I don't know who did.</p> <p>19 Q You did not check the box "Real Estate"?</p> <p>20 A No.</p> <p>21 Q Or "Private Placements"?</p> <p>22 A No, I just -- it doesn't look like any</p> <p>23 of my handwriting, it does look like my</p> <p>24 signature, though.</p> <p>25 Q Okay. I don't have any other questions</p>



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Thomas Urbelis

June 1, 2010

<p style="text-align: center;">29</p> <p>1 T. Urbelis</p> <p>2 of this document.</p> <p>3 (Plaintiff's Exhibits 21 and 22, a</p> <p>4 one-page document marked for</p> <p>5 identification as of today's date.)</p> <p>6 Q They're both one-page documents. You</p> <p>7 can take a look at them, I think they go</p> <p>8 together.</p> <p>9 A Yeah, I think they do, too. They</p> <p>10 probably do, I don't see any date.</p> <p>11 Q No, there is no date.</p> <p>12 A Well, the March 1st up here, the letter</p> <p>13 on Exhibit 21, and then it looks like I signed</p> <p>14 Exhibit 22 on March 25th, but I can't tell</p> <p>15 what year. But in any event, Exhibits 21 and</p> <p>16 22, they relate to the trust's acquisition of</p> <p>17 Pine Street Capital Partners LP Investment.</p> <p>18 Q Was there more than one investment in</p> <p>19 Pine Street Capital Partners or is this all</p> <p>20 the same investment?</p> <p>21 A There may have been two --</p> <p>22 MS. DUNN: Objection to the form.</p> <p>23 A There may have been two. I think there</p> <p>24 were two.</p> <p>25 (Plaintiff's Exhibit 23, a</p>	<p style="text-align: center;">31</p> <p>1 T. Urbelis</p> <p>2 think people were rushing to get the taxes</p> <p>3 paid and this is the way it was done; I think</p> <p>4 it's the way it went.</p> <p>5 Where did the check come from? The</p> <p>6 check came from Dave who then sent it to my</p> <p>7 law firm, which I wanted it to have absolutely</p> <p>8 nothing to do with the trust, which is why I</p> <p>9 said I don't want to do this anymore where it</p> <p>10 goes on the old interest of trust accounts,</p> <p>11 which is like an escrow account. So that's</p> <p>12 the way it was done this year, but it wasn't</p> <p>13 done like that after, where it goes into my</p> <p>14 ULTA account, and then I incur a check out of</p> <p>15 my ULTA account to make sure the taxes got</p> <p>16 paid.</p> <p>17 So I said, I don't want to do that</p> <p>18 anymore, I want to keep my law firm out of it,</p> <p>19 they're not my clients.</p> <p>20 Q What about the last page?</p> <p>21 A The handwritten -- I don't know. Oh,</p> <p>22 I'm sorry, it's on Dave's letterhead. It</p> <p>23 looks like Dave's handwriting.</p> <p>24 Q Do you know what it is?</p> <p>25 A Well, it's got my law firm there, it's</p>
<p style="text-align: center;">30</p> <p>1 T. Urbelis</p> <p>2 four-page document marked for</p> <p>3 identification of today's date.)</p> <p>4 Q Plaintiff's Exhibit 23 is a four-page</p> <p>5 compilation of documents that I believe you</p> <p>6 produced stapled.</p> <p>7 A Okay, that doesn't mean they're all</p> <p>8 together, that may have been for my</p> <p>9 bookkeeping convenience.</p> <p>10 Q Why don't you walk through them and tell</p> <p>11 me what they are.</p> <p>12 MS. DUNN: For the record, I'm</p> <p>13 curious about it, they weren't stapled</p> <p>14 when I received them.</p> <p>15 A This is a letter to me from David Quade</p> <p>16 of McGinn Smith discussing the payment for the</p> <p>17 2004 taxes.</p> <p>18 In the beginning, this kind of -- this</p> <p>19 was the first year we kind of stumbled through</p> <p>20 the method to do this. So this is the way it</p> <p>21 was done, this was the way it was done which I</p> <p>22 don't think you'll see anything like that in</p> <p>23 the other ones.</p> <p>24 The money was just transferred out of</p> <p>25 the account after that, but after this, I</p>	<p style="text-align: center;">32</p> <p>1 T. Urbelis</p> <p>2 got my phone number, overnight, it looks like</p> <p>3 it says 1800 federal filing, state -- I don't</p> <p>4 know, it must be the calculation for that year</p> <p>5 or the numbers that were needed to pay the</p> <p>6 taxes that year.</p> <p>7 Q But you don't know whether it's part of</p> <p>8 the same document?</p> <p>9 A No, I don't know.</p> <p>10 (Plaintiff's Exhibits 24 and 25,</p> <p>11 documents marked for identification of</p> <p>12 today's date.)</p> <p>13 A Yeah, 24 and 25, I think we talked about</p> <p>14 this in one of the exhibits, I'm not sure</p> <p>15 which one, but about the Deerfield Capital.</p> <p>16 This is just further documents that need to be</p> <p>17 executed with regard to the acquisitions of</p> <p>18 this investment.</p> <p>19 25 is -- it's my signature on 25, so it</p> <p>20 looks like that may be something that -- well,</p> <p>21 I don't know. It looks like -- I don't know,</p> <p>22 but it does look like my signature.</p> <p>23 Q You don't know what Exhibit 25 relates</p> <p>24 to?</p> <p>25 A I think it relates to this investment,</p>



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Thomas Urbelis

June 1, 2010

<p style="text-align: center;">33</p> <p>1 T. Urbelis</p> <p>2 if I look – well, it doesn't say that, so I'd</p> <p>3 just be guessing.</p> <p>4 Q Did you discuss these documents with</p> <p>5 David Smith before you signed them?</p> <p>6 A I can't say I discussed each page of</p> <p>7 every document, but we did discuss the</p> <p>8 investment.</p> <p>9 Q What does this document relate to with</p> <p>10 respect to the investment?</p> <p>11 MS. DUNN: I'm going to object to</p> <p>12 the form of the question. He said he</p> <p>13 doesn't recognize Exhibit 25 other than</p> <p>14 his signature.</p> <p>15 MS. MEHRABAN: I'm sorry, I was</p> <p>16 referring to Exhibit 24.</p> <p>17 A Well, Exhibit 24 represents the</p> <p>18 documents – it relates to documents with the</p> <p>19 Deerfield Tri Arc Capital Corp. acquisition.</p> <p>20 Q Just to take you back to Exhibit 19, the</p> <p>21 investment for Deerfield Tri Arc was made in</p> <p>22 December '04?</p> <p>23 A I don't know the dates.</p> <p>24 MS. DUNN: Was that a question?</p> <p>25 MS. MEHRABAN: Yes.</p>	<p style="text-align: center;">35</p> <p>1 T. Urbelis</p> <p>2 it was May or something. And then I got this</p> <p>3 and I just didn't understand what all the</p> <p>4 documents represented, why there were further</p> <p>5 documents.</p> <p>6 Q Did Dave call you in response to your</p> <p>7 fax?</p> <p>8 A I don't have a specific recollection,</p> <p>9 but he must have because he always did when I</p> <p>10 asked him to talk about one of the</p> <p>11 investments, especially this one, it seemed to</p> <p>12 me, from my standpoint, a little confusing as</p> <p>13 to what was going on.</p> <p>14 Q You don't recall anything about your</p> <p>15 discussion?</p> <p>16 A No, it was five years ago. I don't know.</p> <p>17 (Plaintiff's Exhibit 27, a</p> <p>18 three-page compilation of faxes from</p> <p>19 David Smith to Thomas Urbelis marked for</p> <p>20 identification of today's date.)</p> <p>21 Q This is a three-page compilation, it's a</p> <p>22 fax from David to you and then the fax</p> <p>23 transmittal confirmation and then a signed</p> <p>24 authorization.</p> <p>25 A Did the second page come from me? I</p>
<p style="text-align: center;">34</p> <p>1 T. Urbelis</p> <p>2 A Exhibit 19, it says we received it in</p> <p>3 December of '04. As to follow-up documents,</p> <p>4 they both look like 50,000 shares.</p> <p>5 MR. FEATHERSTONHAUGH: So when you</p> <p>6 say both, can you just tell me which</p> <p>7 exhibits?</p> <p>8 THE WITNESS: I'm talking about</p> <p>9 Exhibits 19 and 24.</p> <p>10 A So I don't know the exact time frame on</p> <p>11 these, but I'm not just guessing. It looks</p> <p>12 like they both talk about 50,000 shares.</p> <p>13 Well, it discusses the acquisition, I don't</p> <p>14 recall the sequence of these, I'm sorry.</p> <p>15 (Plaintiff's Exhibit 26, fax to</p> <p>16 David Smith from Thomas Urbelis marked</p> <p>17 for identification of today's date.)</p> <p>18 Q Exhibit 26 is a fax to David Smith from</p> <p>19 you, a 26-page fax, and it's dated June 7th,</p> <p>20 2005.</p> <p>21 A This was, I did say that Dave called me</p> <p>22 on this. I think I was confused with all</p> <p>23 these documents because I had signed something</p> <p>24 in December, and then I had signed something</p> <p>25 and I don't know if it was the last exhibit,</p>	<p style="text-align: center;">36</p> <p>1 T. Urbelis</p> <p>2 don't think any of these three pages came from</p> <p>3 me. Oh, I don't recognize it. I don't</p> <p>4 recognize the second page here.</p> <p>5 Q Do you recognize the first page and the</p> <p>6 third page?</p> <p>7 A I –</p> <p>8 Q Let me give you another document that</p> <p>9 might clarify your recollection.</p> <p>10 MR. FEATHERSTONHAUGH: Could we</p> <p>11 let him finish his answer?</p> <p>12 A I don't really know on Exhibit 27 here.</p> <p>13 Q Let me give you another document that</p> <p>14 might refresh your recollection.</p> <p>15 (Plaintiff's Exhibit 28, document</p> <p>16 marked for identification of today's</p> <p>17 date.)</p> <p>18 A Yeah, Exhibit 28 is my signature. To</p> <p>19 compare it, it looks the same as Exhibit 27.</p> <p>20 Q Did you discuss with David Smith the</p> <p>21 wire of \$92,105 prior to you signing the</p> <p>22 authorization?</p> <p>23 A I don't remember. I mean it was here,</p> <p>24 as I said when I first started the deposition,</p> <p>25 every April I would send money for taxes.</p>



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Thomas Urbelis

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<p style="text-align: center;">37</p> <p>1 T. Urbelis</p> <p>2 Somebody would let me know.</p> <p>3 Q Is it your understanding that the</p> <p>4 \$92,105 was the tax liability for the trust</p> <p>5 for 2005?</p> <p>6 A It looks like it, yeah.</p> <p>7 Q Did you discuss this wire transfer with</p> <p>8 the beneficiaries of the trust before?</p> <p>9 A No.</p> <p>10 (Plaintiff's Exhibit 29, a</p> <p>11 three-page compilation of documents</p> <p>12 marked for identification of today's</p> <p>13 date.)</p> <p>14 Q Exhibit 29 is a three-page compilation</p> <p>15 of documents. If you could take a look at it</p> <p>16 and tell me what it is, please.</p> <p>17 A I don't know if I've seen the third</p> <p>18 page. Did I send this to you, I don't recall</p> <p>19 it?</p> <p>20 Q I'm not 100 percent sure actually, if</p> <p>21 not, then I found it in the e-mails.</p> <p>22 A Okay, I don't recall the third page.</p> <p>23 Q What about the first and second pages?</p> <p>24 A Well, the second page has my firm's name</p> <p>25 up on top, so I assume I received it.</p>	<p style="text-align: center;">39</p> <p>1 T. Urbelis</p> <p>2 Q Exhibit 30 is a two-page document, a fax</p> <p>3 cover and an authorization.</p> <p>4 A Right. It looks like my signature and</p> <p>5 again this is tax season. So I'm assuming</p> <p>6 that's what this one is, the outline of the</p> <p>7 particular memory, but I'm assuming that's</p> <p>8 what that one is.</p> <p>9 Q Did you have a discussion with David</p> <p>10 Smith prior to signing this authorization?</p> <p>11 A I don't remember.</p> <p>12 Q Is it your understanding --</p> <p>13 A Did it come with something?</p> <p>14 Q If you flip over the page it's a</p> <p>15 two-sided.</p> <p>16 A Oh, sorry. I don't remember seeing the</p> <p>17 back side of this.</p> <p>18 MS. DUNN: For the record,</p> <p>19 counsel, can you identify who -- did you</p> <p>20 receive this document in a back-to-back</p> <p>21 format?</p> <p>22 MS. MEHRABAN: I did.</p> <p>23 MR. FEATHERSTONHAUGH: Could I</p> <p>24 ask, for the purposes of the record, Mr.</p> <p>25 Urbelis, when you say you're referring</p>
<p style="text-align: center;">38</p> <p>1 T. Urbelis</p> <p>2 Q You assume you received or sent it?</p> <p>3 A Oh, it's from me to George. Oh, I'm</p> <p>4 sorry. Yeah, I guess I sent the second page.</p> <p>5 Q And what about the first page?</p> <p>6 A It looks like the first page is what I</p> <p>7 sent.</p> <p>8 Q What is the first page?</p> <p>9 A Again, that was with the transactions</p> <p>10 with the Deerfield Capital Corp., a conversion</p> <p>11 to common shares.</p> <p>12 Q Did you discuss this with David Smith</p> <p>13 prior to signing it?</p> <p>14 A This stuff was confusing to me, so I</p> <p>15 needed an explanation.</p> <p>16 Q Who did you discuss it with?</p> <p>17 A I don't think I ever discussed anything</p> <p>18 with anybody other than Dave.</p> <p>19 Q Do you recall your discussion with Dave</p> <p>20 regarding this letter?</p> <p>21 A No, not specifically.</p> <p>22 (Plaintiff's Exhibit 30, a</p> <p>23 two-page document consisting of a fax</p> <p>24 cover and authorization marked for</p> <p>25 identification of today's date.)</p>	<p style="text-align: center;">40</p> <p>1 T. Urbelis</p> <p>2 to seeing the back side, could you tell</p> <p>3 me which side you're calling the back</p> <p>4 side?</p> <p>5 THE WITNESS: The front side is</p> <p>6 the one with the plaintiff's exhibit on</p> <p>7 it.</p> <p>8 MR. FEATHERSTONHAUGH: Well I</p> <p>9 don't have that, so --</p> <p>10 THE WITNESS: The one with my</p> <p>11 signature on the bottom, April 11th,</p> <p>12 2008 where it looks like I signed it,</p> <p>13 April 14th, 2008. That's what I</p> <p>14 consider the front side. I don't</p> <p>15 believe I've seen the back side.</p> <p>16 MS. MEHRABAN: And I do believe I</p> <p>17 got it as a double-sided document, but I</p> <p>18 don't, off the top of my head I don't</p> <p>19 know the source. I'm not sure if it was</p> <p>20 in the -- I'm not sure I do, that's</p> <p>21 correct.</p> <p>22 MS. DUNN: So we moved on from the</p> <p>23 documents Mr. Urbelis produced in</p> <p>24 response to the subpoena?</p> <p>25 MR. FEATHERSTONHAUGH: We have a</p>



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<p style="text-align: center;">41</p> <p>1 T. Urbelis</p> <p>2 couple.</p> <p>3 MS. MEHRABAN: I have them in</p> <p>4 chronological order, so it's mixed.</p> <p>5 Q The \$110,636, is it your understanding</p> <p>6 that that represents the trust tax liability</p> <p>7 for 2007?</p> <p>8 A I -- again, I don't know if how the</p> <p>9 accounting, I don't know if it was for prior</p> <p>10 taxes, estimated taxes, but my understanding</p> <p>11 is it was for taxes, I mean --</p> <p>12 Q And taxes related to the trust?</p> <p>13 A Taxes related to the trust.</p> <p>14 Q Okay, that's it for that document,</p> <p>15 thank you.</p> <p>16 (Plaintiff's Exhibit 31, a</p> <p>17 two-page document marked for</p> <p>18 identification for today's date.)</p> <p>19 Q Exhibit 31 is a two-page document titled</p> <p>20 "Indemnity Agreement" and the second page is</p> <p>21 an e-mail from you.</p> <p>22 A The two documents are totally unrelated,</p> <p>23 so I don't know how they're stapled together.</p> <p>24 MS. DUNN: These documents were</p> <p>25 not stapled together when I received</p>	<p style="text-align: center;">43</p> <p>1 T. Urbelis</p> <p>2 else they won't do it, and it had an indemnity</p> <p>3 clause in there that I had to sign which I</p> <p>4 felt very uncomfortable with.</p> <p>5 And so I called Dave, and I said I</p> <p>6 really -- I'm really uncomfortable with</p> <p>7 signing this because even though I'm signing</p> <p>8 as trustee, it still says that NFS could at</p> <p>9 some point invoke that in some future</p> <p>10 circumstance that I can't even predict. I</p> <p>11 said that I felt very uncomfortable with it.</p> <p>12 And Dave said, well, why don't you draft</p> <p>13 something up that Lynn and I could sign that</p> <p>14 would make you feel comfortable with having</p> <p>15 you do NFS for the trust; so I did, I drafted</p> <p>16 this.</p> <p>17 Q By "this" you mean the first page of</p> <p>18 Exhibit 31?</p> <p>19 A Yes.</p> <p>20 Q Okay, I have no other questions on this</p> <p>21 document.</p> <p>22 (Plaintiff's Exhibit 32, a</p> <p>23 five-page form marked for identification</p> <p>24 of today's date.)</p> <p>25 Q Exhibit 32 is a form that's a five-page</p>
<p style="text-align: center;">42</p> <p>1 T. Urbelis</p> <p>2 them from Mr. Urbelis, so I'm not sure</p> <p>3 how they got attached. I don't believe</p> <p>4 they were even together. You know,</p> <p>5 they're two years apart.</p> <p>6 MS. MEHRABAN: I believe that I</p> <p>7 had copied documents in the manner in</p> <p>8 which I received them, but it's possible</p> <p>9 there was a mistake.</p> <p>10 Q So let's talk about the first page.</p> <p>11 A Sure. The first page is called an</p> <p>12 indemnity agreement.</p> <p>13 Q What is this?</p> <p>14 A It's an indemnity agreement signed by</p> <p>15 Dave and Lynn Smith in November 10th, 2008.</p> <p>16 Q Why was this signed on this date?</p> <p>17 A Because at that time or right around</p> <p>18 that time, the trust was -- I think that's</p> <p>19 when they were transferring the National</p> <p>20 Financial Services as a clearing agent and I</p> <p>21 had to sign a document that I felt very</p> <p>22 uncomfortable with.</p> <p>23 There was an NFS standard form that I</p> <p>24 assume they make for all of their people for</p> <p>25 whom they provide clearing services sign or</p>	<p style="text-align: center;">44</p> <p>1 T. Urbelis</p> <p>2 document. If you could tell me what this</p> <p>3 relates to? I guess first, if you could tell</p> <p>4 me if this is your signature on the last page?</p> <p>5 A Yeah, it looks like it.</p> <p>6 MR. FEATHERSTONHAUGH: Maybe I</p> <p>7 have the wrong thing. I have -- my</p> <p>8 Exhibit 32 is two separate forms, with a</p> <p>9 total of five pages but they appear to</p> <p>10 be different.</p> <p>11 MS. MEHRABAN: I think you're</p> <p>12 right, there are two forms; the first</p> <p>13 one is two pages and the second one is</p> <p>14 three pages.</p> <p>15 Q Is that your signature on the first page</p> <p>16 of Exhibit 32 on the bottom?</p> <p>17 A It looks like it is, although, did I</p> <p>18 produce this to you? I don't think I did. I</p> <p>19 just don't recognize it, I don't think I have</p> <p>20 this in my file.</p> <p>21 Q But is that your signature?</p> <p>22 A Yes.</p> <p>23 Q But do you know what this transfer of</p> <p>24 assets form relates to?</p> <p>25 A I don't know, it looks like it's -- I</p>



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Thomas Urbelis

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<p style="text-align: center;">45</p> <p>1 T. Urbelis</p> <p>2 don't know, I'd have to study it, I don't want</p> <p>3 to give you a misleading answer.</p> <p>4 MR. FEATHERSTONHAUGH: May I</p> <p>5 inquire as to where did this document</p> <p>6 come from? The one I have is not quite</p> <p>7 legible, but the larger portions are</p> <p>8 legible.</p> <p>9 MS. MEHRABAN: It's from the</p> <p>10 e-mails that McGinn Smith &amp; Company</p> <p>11 produced to FINRA.</p> <p>12 MS. DUNN: So is that an</p> <p>13 attachment to an e-mail? It doesn't</p> <p>14 appear to be an e-mail.</p> <p>15 MR. STOELTING: We received</p> <p>16 production from FINRA that has been</p> <p>17 available to everyone from the</p> <p>18 beginning.</p> <p>19 MS. DUNN: I'm just intervening</p> <p>20 from last week, so I don't have any of</p> <p>21 the production that you're referring to.</p> <p>22 He's testified he doesn't recognize the</p> <p>23 document, so.</p> <p>24 MS. MEHRABAN: And that his</p> <p>25 signature is on it.</p>	<p style="text-align: center;">47</p> <p>1 T. Urbelis</p> <p>2 ask so I understand you, are you</p> <p>3 representing that these two documents</p> <p>4 are related somehow?</p> <p>5 MR. STOELTING: Just let her ask</p> <p>6 the question, please.</p> <p>7 MR. FEATHERSTONHAUGH: Excuse me,</p> <p>8 counsel, I doubt your colleague will</p> <p>9 need your advice, but I'm simply</p> <p>10 inquiring as to whether you're</p> <p>11 representing that.</p> <p>12 MS. MEHRABAN: I believe that</p> <p>13 they're related, but I'm asking the</p> <p>14 witness to explain; if he can't explain,</p> <p>15 he can't explain.</p> <p>16 A I can't explain.</p> <p>17 Q Do you recognize the National Financial</p> <p>18 Services Alternative Investments Addendum and</p> <p>19 Custody Agreement?</p> <p>20 A No.</p> <p>21 (Plaintiff's Exhibit 33, a</p> <p>22 two-page document marked for</p> <p>23 identification of today's date.)</p> <p>24 Q This is a two-page document and I can</p> <p>25 represent to you that this I printed off our</p>
<p style="text-align: center;">46</p> <p>1 T. Urbelis</p> <p>2 MS. DUNN: He recognizes his</p> <p>3 signature, but I don't know about you</p> <p>4 getting too far into the document.</p> <p>5 MS. MEHRABAN: You can interrupt</p> <p>6 me, if I go too far.</p> <p>7 Q It's on page three of the document,</p> <p>8 National Financial Services Alternative</p> <p>9 Investments Addendum and Custody Agreement.</p> <p>10 You testified earlier that it is your</p> <p>11 signature on the third page, Mr. Urbelis.</p> <p>12 A It looks like it, yes.</p> <p>13 MS. DUNN: My page 3 doesn't have</p> <p>14 a signature.</p> <p>15 MR. FEATHERSTONHAUGH: Neither</p> <p>16 does mine.</p> <p>17 MS. MEHRABAN: It's the last page</p> <p>18 of Exhibit 32.</p> <p>19 MS. DUNN: It is my third page.</p> <p>20 MS. MEHRABAN: It is the third</p> <p>21 page of the National -</p> <p>22 MR. FEATHERSTONHAUGH: Could I ask</p> <p>23 a question, counsel -</p> <p>24 MS. MEHRABAN: Let me finish.</p> <p>25 MR. FEATHERSTONHAUGH: I need to</p>	<p style="text-align: center;">48</p> <p>1 T. Urbelis</p> <p>2 e-mail system, which was the e-mail that</p> <p>3 McGinn Smith &amp; Co. produced to us, but you</p> <p>4 produced it to me in a different format, it's</p> <p>5 the exact same e-mail.</p> <p>6 A This one, Exhibit 33? I doesn't think</p> <p>7 so.</p> <p>8 Q It's in a different format, it's just</p> <p>9 that the type was different.</p> <p>10 MS. MEHRABAN: Let's go off the</p> <p>11 record for a second.</p> <p>12 (Whereupon, an off the record</p> <p>13 discussion was held.)</p> <p>14 MS. MEHRABAN: Back on the record.</p> <p>15 Q Look at the document and if you could</p> <p>16 let me know if you've seen it before?</p> <p>17 A This first one, this first page, Exhibit</p> <p>18 33?</p> <p>19 Q Yes.</p> <p>20 A I don't recall seeing this, no.</p> <p>21 Q What about the second page?</p> <p>22 A I don't know.</p> <p>23 Q Do you remember signing something</p> <p>24 allowing for the payment of taxes in April,</p> <p>25 2009?</p>



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<p style="text-align: center;">49</p> <p>1 T. Urbelis</p> <p>2 A I don't recall, but I certainly I must</p> <p>3 had, April comes tax time, I just don't</p> <p>4 recognize this document.</p> <p>5 (Plaintiff's Exhibit 34, a</p> <p>6 three-page document, marked for</p> <p>7 identification of today's date.)</p> <p>8 Q Exhibit 34 is a three-page document.</p> <p>9 The first page is a letter and the second two</p> <p>10 pages are related to shipping.</p> <p>11 Do you recognize this document?</p> <p>12 A Yes.</p> <p>13 Q What is it?</p> <p>14 A It's a copy of a letter that I sent to</p> <p>15 Dave and Lynn.</p> <p>16 Q It's a resignation letter; is it not?</p> <p>17 A Yes.</p> <p>18 Q And it's dated April 22nd, 2010.</p> <p>19 A Yes.</p> <p>20 Q Why did you resign on April 22nd, 2010?</p> <p>21 A I resigned because of this lawsuit. I</p> <p>22 was made aware that there was a lawsuit and I</p> <p>23 read the Albany Times Union articles and</p> <p>24 according to that, 80 or 90 million dollars</p> <p>25 that McGinn Smith had allegedly received from</p>	<p style="text-align: center;">51</p> <p>1 T. Urbelis</p> <p>2 actual conflict of interest, but certainly an</p> <p>3 appearance of a conflict of interest, and I</p> <p>4 really didn't want to continue that.</p> <p>5 Q And if I understand, is it correct that</p> <p>6 that was because you were a personal investor</p> <p>7 as well?</p> <p>8 A I and my family, yes. So when all of</p> <p>9 those things added up, I couldn't -- I could</p> <p>10 not in good faith continue my duties. I'm</p> <p>11 sure I certainly wouldn't do anything to hurt</p> <p>12 the kids, but I didn't want to have any kind</p> <p>13 of appearance of impropriety.</p> <p>14 Q Did you speak to the beneficiaries of</p> <p>15 the trust before resigning?</p> <p>16 A No.</p> <p>17 Q And the resignation shall take effect on</p> <p>18 May 27th, 2010, is that because of the terms</p> <p>19 of the declaration of trust?</p> <p>20 A Yeah, according the trust I had to give</p> <p>21 30 days notice.</p> <p>22 Q I have no other questions about that.</p> <p>23 Let's take a five-minute break.</p> <p>24 (Whereupon, a five minute recess</p> <p>25 took place.)</p>
<p style="text-align: center;">50</p> <p>1 T. Urbelis</p> <p>2 investors, that there was only \$500,000 left</p> <p>3 and since I and my family and the trust were</p> <p>4 investors, \$500,000 from 90 million, I think</p> <p>5 that was the number that was in the paper,</p> <p>6 something in that range, it was very</p> <p>7 disconcerting.</p> <p>8 I was told by a friend that Dave could</p> <p>9 not speak with any of the investors and Dave</p> <p>10 or Lynn could not speak with any of the</p> <p>11 investors. And at that time, there was a</p> <p>12 great deal of turmoil for me.</p> <p>13 I came to the conclusion that because I</p> <p>14 and my family were investors, that I could not</p> <p>15 really fulfill my fiduciary duty with regard</p> <p>16 to the trust and the kids, where the trust was</p> <p>17 an investor and I also was an investor.</p> <p>18 So it just in my mind I couldn't talk to</p> <p>19 anybody, I couldn't talk to Dave or Lynn about</p> <p>20 it, to my understanding. There was no way</p> <p>21 that I could continue in a fiduciary capacity,</p> <p>22 so I resigned.</p> <p>23 I just thought I was clearly, in my</p> <p>24 mind, because of the lawsuit and the</p> <p>25 allegations that were in there, and if not, an</p>	<p style="text-align: center;">52</p> <p>1 T. Urbelis</p> <p>2 Q I'm going to ask you to look at again</p> <p>3 Plaintiff's Exhibit 28.</p> <p>4 A Okay.</p> <p>5 Q This is a wire authorization, correct?</p> <p>6 A Yes.</p> <p>7 Q And it's your signature on the bottom; I</p> <p>8 believe you testified to that earlier.</p> <p>9 A Yes.</p> <p>10 Q And this wire went to David Smith; is</p> <p>11 that correct?</p> <p>12 A Yeah, I think what happened, and I</p> <p>13 didn't get into the details of these things</p> <p>14 with the accountant, but I think I just</p> <p>15 assumed the money went kind of, like we talked</p> <p>16 about 2004, 2005, it came out of the -- out of</p> <p>17 their account and he had or Mr. Simons, who</p> <p>18 was making sure that the taxes get paid and</p> <p>19 filed, I just assumed that there was a way,</p> <p>20 you know, that either he brought the check to</p> <p>21 Mr. Simons or Mr. Simons got the check or Dave</p> <p>22 wrote the check to the IRS. I didn't care as</p> <p>23 long as I wasn't getting notices from the IRS</p> <p>24 that the State of New York -- that the taxes</p> <p>25 weren't getting paid.</p>



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<p style="text-align: center;">53</p> <p>1 T. Urbelis</p> <p>2 I did get something in 2009 that they</p> <p>3 lost one of the returns or something. So that</p> <p>4 as to how the mechanics of how the taxes were</p> <p>5 getting paid, I left that up to Mr. Simons.</p> <p>6 Q Do you know what David Smith did with</p> <p>7 these funds?</p> <p>8 A Do I know what he did with them, no.</p> <p>9 Q Did you ever discuss with the</p> <p>10 beneficiaries of the trust any payments from</p> <p>11 the trust?</p> <p>12 A Well, yeah, I talked to Jeff this past</p> <p>13 month.</p> <p>14 Q What did you talk to him about?</p> <p>15 A He called me, he said -- I think I</p> <p>16 testified about that.</p> <p>17 MR. FEATHERSTONHAUGH: I think he</p> <p>18 already testified to this, but.</p> <p>19 Q Refresh my recollection.</p> <p>20 A Jeff called me, and I signed the thing</p> <p>21 for Mr. Maher. That was Jeff's initiation.</p> <p>22 Q Was that the only time you talked to</p> <p>23 Jeff Smith regarding the payments from the</p> <p>24 trust?</p> <p>25 A I think so.</p>	<p style="text-align: center;">55</p> <p>1 T. Urbelis</p> <p>2 Q Unfortunately, we have one page. This</p> <p>3 is one page of an account statement, and I'm</p> <p>4 going to ask you about the transaction on June</p> <p>5 30th, 2006.</p> <p>6 A 2006? Is this the trust account?</p> <p>7 Q Yes.</p> <p>8 MR. FEATHERSTONHAUGH: Could I</p> <p>9 ask, maybe it's here and -- does this</p> <p>10 say whose account statement is it part</p> <p>11 of, an account statement?</p> <p>12 MS. MEHRABAN: It's page 6, the</p> <p>13 account number is listed at the top and</p> <p>14 that's the trust account. I don't have</p> <p>15 the complete account statement, so I'll</p> <p>16 just show you page 6.</p> <p>17 Q I'm going to direct you to the transfer</p> <p>18 of a check for \$83,830 on June 30th of 2006;</p> <p>19 do you recall what that was for?</p> <p>20 A No, I don't, I'm sorry.</p> <p>21 (Plaintiff's Exhibit 37, a letter</p> <p>22 marked for identification of today's</p> <p>23 date.)</p> <p>24 Q What is this document?</p> <p>25 MR. FEATHERSTONHAUGH: I haven't</p>
<p style="text-align: center;">54</p> <p>1 T. Urbelis</p> <p>2 Q In the past year, did David Smith ask</p> <p>3 you to loan any funds from the trust to McGinn</p> <p>4 Smith &amp; Company?</p> <p>5 A To McGinn Smith, not that I recall.</p> <p>6 Q What about to any other entity related</p> <p>7 to McGinn Smith?</p> <p>8 A I don't recall that, no.</p> <p>9 (Plaintiff's Exhibit 35, an e-mail</p> <p>10 marked for identification of today's</p> <p>11 date.)</p> <p>12 A Yes, this is the e-mail that he received</p> <p>13 from Mr. Maher this year.</p> <p>14 Q This is what you were just describing to</p> <p>15 us?</p> <p>16 A Yes.</p> <p>17 Q So, the letter of authorization relates</p> <p>18 to the payment of taxes?</p> <p>19 A Yes.</p> <p>20 Q At least that was your understanding?</p> <p>21 A That was my understanding.</p> <p>22 Q Thank you.</p> <p>23 (Plaintiff's Exhibit 36, one page</p> <p>24 of an account statement, marked for</p> <p>25 identification of today's date.)</p>	<p style="text-align: center;">56</p> <p>1 T. Urbelis</p> <p>2 had a chance, this is the first time</p> <p>3 I've seen it, may I have a couple</p> <p>4 minutes to read it, please.</p> <p>5 MS. MEHRABAN: Sure. Off the</p> <p>6 record.</p> <p>7 (Whereupon, a discussion off the</p> <p>8 record was held.)</p> <p>9 MS. MEHRABAN: Back on the record.</p> <p>10 Q Mr. Urbelis, what is this document?</p> <p>11 A It's a letter dated May 2, 2010 which I</p> <p>12 received from Dave Smith.</p> <p>13 Q Can you read the first sentence?</p> <p>14 A "I understand from a comment that you</p> <p>15 made to Jim Featherstonhaugh that you have</p> <p>16 lost a great deal of money through McGinn</p> <p>17 Smith."</p> <p>18 Q What comment did you make to Jim?</p> <p>19 A I told him that I lost a great deal of</p> <p>20 money through my accounts at McGinn Smith.</p> <p>21 Q How did you speak to him?</p> <p>22 A Mr. Featherstonhaugh, he called me.</p> <p>23 Q Did you respond to this letter?</p> <p>24 A Yes, I did, I think you have it.</p> <p>25 (Plaintiff's Exhibit 38, a letter</p>



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Thomas Urbelis

June 1, 2010

<p style="text-align: center;">57</p> <p>1 T. Urbelis</p> <p>2 from Thomas Urbelis to David Smith,</p> <p>3 marked for identification of today's</p> <p>4 date.)</p> <p>5 Q What is Exhibit 38?</p> <p>6 A It's a letter I wrote to Dave Smith.</p> <p>7 Q Who is Timmy?</p> <p>8 A Tim Cioche, yeah, a mutual friend.</p> <p>9 Q Did you meet with Dave Smith as a result</p> <p>10 of this letter?</p> <p>11 A No.</p> <p>12 Q Did you speak to him after writing this</p> <p>13 letter?</p> <p>14 A Yes.</p> <p>15 Q When?</p> <p>16 A It was the -- whatever date this is, I</p> <p>17 think this is the middle of the week, I talked</p> <p>18 with Dave that Saturday, briefly, and I talked</p> <p>19 to him again I believe it was -- he called and</p> <p>20 I couldn't -- I know something was going on at</p> <p>21 the house. I couldn't talk to him and then he</p> <p>22 called me, I believe it was either that next</p> <p>23 Monday or Tuesday.</p> <p>24 Q Tell me about that conversation.</p> <p>25 A He called me and like I said in my</p>	<p style="text-align: center;">59</p> <p>1 T. Urbelis</p> <p>2 substantiation regarding to the actuality of</p> <p>3 what was going on with Pine Street Capital</p> <p>4 Limited Partners, something like that.</p> <p>5 He said that, you know, my investments</p> <p>6 were still good, substantially good, he didn't</p> <p>7 know exactly the exact numbers and asked me if</p> <p>8 I had obviously seen the newspapers about the</p> <p>9 lawsuit, and I expressed concern to him, hoped</p> <p>10 he and Lynn were okay.</p> <p>11 He said that he didn't do anything</p> <p>12 wrong, that he's not liable for any of the</p> <p>13 allegations that were caused. He said, you</p> <p>14 know, once all the information comes out, you</p> <p>15 know, it's unfortunate that it's gotten to</p> <p>16 this, but he said once the information comes</p> <p>17 out, he said it will show that he is not</p> <p>18 liable, that he did nothing wrong, that's what</p> <p>19 he said.</p> <p>20 He said Lynn and he were having trouble</p> <p>21 paying their bills because of the freeze on</p> <p>22 the accounts, so that was making it difficult</p> <p>23 for them. That's about all I can remember at</p> <p>24 this point.</p> <p>25 Q Do you remember any other discussions</p>
<p style="text-align: center;">58</p> <p>1 T. Urbelis</p> <p>2 letter, I thought that they couldn't -- Dave</p> <p>3 couldn't talk to us but that's obviously some</p> <p>4 kind of a miscommunication, and I wanted to</p> <p>5 let him know I resigned as trustee.</p> <p>6 Well, let me back up. The very first</p> <p>7 thing I said when I called was, how's Lynn.</p> <p>8 He told me she wasn't doing well. I talked</p> <p>9 about that with him and expressed to her, my</p> <p>10 wife, and my concern about Lynn. So we talked</p> <p>11 about that for a bit, and I told him I wanted</p> <p>12 to explain why I didn't have the opportunity,</p> <p>13 I didn't think I could talk to them, so I</p> <p>14 wanted to explain to him the reason. I did</p> <p>15 it, it was obviously I thought based upon what</p> <p>16 I saw in the papers that I had a potential if</p> <p>17 not actual conflict of interest and also I was</p> <p>18 trying to carry out my duties as trustee;</p> <p>19 that's the same thing I told you a little</p> <p>20 while ago.</p> <p>21 And then we talked about that and then</p> <p>22 he talked further about what he had told me in</p> <p>23 the letter about our investments and explained</p> <p>24 those to me, and told me to give Tim Wells a</p> <p>25 call if I had further questions or wanted more</p>	<p style="text-align: center;">60</p> <p>1 T. Urbelis</p> <p>2 regarding the trust?</p> <p>3 A No, I would just -- it was why I</p> <p>4 resigned, nothing subsequent about the trust,</p> <p>5 it was just why I resigned.</p> <p>6 Q Okay. I have nothing further on this</p> <p>7 document.</p> <p>8 (Plaintiff's Exhibit 39, document</p> <p>9 for the appointment of new trustee to</p> <p>10 the trust, marked for identification of</p> <p>11 today's date.)</p> <p>12 Q Have you seen this document before?</p> <p>13 A Yes, I have.</p> <p>14 Q What is it?</p> <p>15 A It's the appointment of a new trustee</p> <p>16 for the trust, to my understanding.</p> <p>17 Q Do you know David Wojesky?</p> <p>18 A No.</p> <p>19 Q Did you have any involvement in who was</p> <p>20 appointed as the trustee for the trust?</p> <p>21 A No. I don't think -- I know I may have</p> <p>22 met him, but I don't recall.</p> <p>23 Q Do you remember a transfer of \$95,000</p> <p>24 from the trust to Lynn Smith in April of this</p> <p>25 year?</p>



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Thomas Urbelis

June 1, 2010

<p style="text-align: center;">61</p> <p>1 T. Urbelis</p> <p>2 A Yeah, that's the one that Jeff called me</p> <p>3 about and Mr. Maher sent me the form, I think.</p> <p>4 Q What was your understanding of what that</p> <p>5 was for?</p> <p>6 MR. FEATHERSTONHAUGH: I believe</p> <p>7 he testified to that three times now.</p> <p>8 MS. MEHRABAN: I believe the</p> <p>9 answer wasn't quite clear.</p> <p>10 (Continued on the next page to</p> <p>11 accommodate jurat.)</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: center;">63</p> <p>1</p> <p>2 I N D E X</p> <p>3 WITNESS EXAMINATION BY PAGE</p> <p>4 THOMAS URBELIS MS. MEHRABAN 4</p> <p>5 EXHIBITS</p> <p>6 PLAINTIFF'S DESCRIPTION PAGE</p> <p>7 16 Subpoena 7</p> <p>8 17 Letter 18</p> <p>9 18 Three-page document 24</p> <p>10 19 Eight-page document 26</p> <p>11 20 One-page document 27</p> <p>12 21 One-page document 29</p> <p>13 22 One-page document 29</p> <p>14 23 Four-page document 29</p> <p>15 24 Documents 32</p> <p>16 25 Documents 32</p> <p>17 26 Fax 34</p> <p>18 27 Three-page compilation 35</p> <p>19 Of faxes</p> <p>20 28 Document 36</p> <p>21 29 Three-page compilation 37</p> <p>22 Of Documents</p> <p>23 30 Two-page document 38</p> <p>24 31 Two-page document 41</p> <p>25 32 Five-page document 43</p> <p>33 Two-page document 47</p>
<p style="text-align: center;">62</p> <p>1 T. Urbelis</p> <p>2 A Taxes for the trust.</p> <p>3 Q For the trust?</p> <p>4 A Yes.</p> <p>5 MS. MEHRABAN: I don't have any</p> <p>6 other questions. Thank you very much.</p> <p>7 MR. FEATHERSTONHAUGH: I have no</p> <p>8 questions for Mr. Urbelis on behalf of</p> <p>9 the relief defendant.</p> <p>10 MS. DUNN: I have no questions.</p> <p>11 THE WITNESS: Thank you very much.</p> <p>12 -oOo-</p> <p>13 (Whereupon, the deposition of THOMAS</p> <p>14 URBELIS was concluded at 2:08 p.m.)</p> <p>15</p> <p>16</p> <p>17 THOMAS URBELIS</p> <p>18 Subscribed and sworn to</p> <p>19 Before me, this ____ day</p> <p>20 of _____, 2010.</p> <p>21</p> <p>22</p> <p>23 NOTARY PUBLIC</p> <p>24</p> <p>25</p>	<p style="text-align: center;">64</p> <p>1</p> <p>2</p> <p>3 I N D E X</p> <p>4 Of</p> <p>5 EXHIBITS</p> <p>6 (Continued)</p> <p>7 PLAINTIFF'S DESCRIPTION PAGE</p> <p>8 34 Three-page document 49</p> <p>9 35 E-Mail 54</p> <p>10 36 Account statement 54</p> <p>11 37 Letter 55</p> <p>12 38 Letter 56</p> <p>13 39 Document appointment of 60</p> <p>14 new trustee to the trust</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

Thomas Urbelis

June 1, 2010

<p style="text-align: center;">65</p> <p>1 DEPOSITION ERRATA SHEET</p> <p>2</p> <p>3</p> <p>4 Our Assignment No. 310714</p> <p>5 Case Caption: SEC vs. MCGINN, SMITH &amp; CO.,</p> <p>6</p> <p>7</p> <p>8 DECLARATION UNDER PENALTY OF PERJURY</p> <p>9 I declare under penalty of perjury</p> <p>10 that I have read the entire transcript of</p> <p>11 my Deposition taken in the captioned matter</p> <p>12 or the same has been read to me, and</p> <p>13 the same is true and accurate, save and</p> <p>14 except for changes and/or corrections, if</p> <p>15 any, as indicated by me on the DEPOSITION</p> <p>16 ERRATA SHEET hereof, with the understanding</p> <p>17 that I offer these changes as if still under</p> <p>18 oath.</p> <p>19 Signed on the _____ day of</p> <p>20 _____, 20____.</p> <p>21</p> <p>22 _____</p> <p>23 THOMAS URBELIS</p> <p>24</p> <p>25</p>	<p style="text-align: center;">67</p> <p>1 DEPOSITION ERRATA SHEET</p> <p>2 Page No. _____ Line No. _____ Change to: _____</p> <p>3</p> <p>4 Reason for change: _____</p> <p>5 Page No. _____ Line No. _____ Change to: _____</p> <p>6</p> <p>7 Reason for change: _____</p> <p>8 Page No. _____ Line No. _____ Change to: _____</p> <p>9</p> <p>10 Reason for change: _____</p> <p>11 Page No. _____ Line No. _____ Change to: _____</p> <p>12</p> <p>13 Reason for change: _____</p> <p>14 Page No. _____ Line No. _____ Change to: _____</p> <p>15</p> <p>16 Reason for change: _____</p> <p>17 Page No. _____ Line No. _____ Change to: _____</p> <p>18</p> <p>19 Reason for change: _____</p> <p>20 Page No. _____ Line No. _____ Change to: _____</p> <p>21</p> <p>22 Reason for change: _____</p> <p>23</p> <p>24 SIGNATURE: _____ DATE: _____</p> <p>25 THOMAS URBELIS</p>
<p style="text-align: center;">66</p> <p>1 DEPOSITION ERRATA SHEET</p> <p>2 Page No. _____ Line No. _____ Change to: _____</p> <p>3</p> <p>4 Reason for change: _____</p> <p>5 Page No. _____ Line No. _____ Change to: _____</p> <p>6</p> <p>7 Reason for change: _____</p> <p>8 Page No. _____ Line No. _____ Change to: _____</p> <p>9</p> <p>10 Reason for change: _____</p> <p>11 Page No. _____ Line No. _____ Change to: _____</p> <p>12</p> <p>13 Reason for change: _____</p> <p>14 Page No. _____ Line No. _____ Change to: _____</p> <p>15</p> <p>16 Reason for change: _____</p> <p>17 Page No. _____ Line No. _____ Change to: _____</p> <p>18</p> <p>19 Reason for change: _____</p> <p>20 Page No. _____ Line No. _____ Change to: _____</p> <p>21</p> <p>22 Reason for change: _____</p> <p>23</p> <p>24 SIGNATURE: _____ DATE: _____</p> <p>25 THOMAS URBELIS</p>	<p style="text-align: center;">68</p> <p>1</p> <p>2 CERTIFICATE</p> <p>3 I, GEORGE MALINOWSKI, a shorthand reporter</p> <p>4 and Notary Public within and for The State of</p> <p>5 New York, do hereby certify:</p> <p>6 That the witness whose testimony is</p> <p>7 hereinbefore set forth was duly sworn by me,</p> <p>8 and the foregoing transcript is a true record</p> <p>9 of the testimony given by such witness(es).</p> <p>10 I further certify that I am not related to</p> <p>11 any of the parties to this action by blood or</p> <p>12 marriage, and that I am in no way interested</p> <p>13 in the outcome of this matter.</p> <p>14</p> <p>15 _____</p> <p>16</p> <p>17 GEORGE MALINOWSKI</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>



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Thomas Urbelis

June 1, 2010

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DEPOSITION ERRATA SHEET

Our Assignment No. 310714

Case Caption: SEC vs. MCGINN, SMITH & CO.,

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that I have read the entire transcript of my Deposition taken in the captioned matter or the same has been read to me, and the same is true and accurate, save and except for changes and/or corrections, if any, as indicated by me on the DEPOSITION ERRATA SHEET hereof, with the understanding that I offer these changes as if still under oath.

Signed on the 29<sup>th</sup> day of

JUNE, 2010.

Thomas Urbelis

THOMAS URBELIS



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Thomas Urbelis

June 1, 2010

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## DEPOSITION ERRATA SHEET

Page No. 4 Line No. 23-24 Change to: Delete "I am the attorney for the witness Thomas Urbelis."

Reason for change: Ms. Dunn did not say those words and she is not my attorney.

Page No. 6 Line No. 22 Change to: Change "of" to "or"

Reason for change: \_\_\_\_\_

Page No. 9 Line No. 6 Change to: Change "her" to "you"

Reason for change: \_\_\_\_\_

Page No. 10 Line No. 22 Change to: Add "I" between "that" and "was"

Reason for change: \_\_\_\_\_

Page No. 10 Line No. 23 Change to: Delete "us"

Reason for change: \_\_\_\_\_

Page No. 11 Line No. 21 Change to: Change "Jeff" to "Geoff"

Reason for change: \_\_\_\_\_

Page No. 12 Line No. 3 Change to: Change "Jeff" to "Geoff"

Reason for change: \_\_\_\_\_

SIGNATURE: Thomas Urbelis DATE: JUNE 29 2010

THOMAS URBELIS



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Thomas Urbelis

June 1, 2010

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## DEPOSITION ERRATA SHEET

Page No. 13 Line No. 8 Change to: Delete "I don't have time to"

Reason for change: \_\_\_\_\_

Page No. 14 Line No. 5 Change to: Change "who" to "whom"

Reason for change: \_\_\_\_\_

Page No. 14 Line No. 9 Change to: Change "his" to "this"

Reason for change: \_\_\_\_\_

Page No. 14 Line No. 11 Change to: Change the first "is" to "that"

Reason for change: \_\_\_\_\_

Page No. 15 Line No. 10 Change to: Change "Jeff" to "Geoff"

Reason for change: \_\_\_\_\_

Page No. 15 Line No. 21 Change to: Change "Jeff" to "Geoff"

Reason for change: \_\_\_\_\_

Page No. 15 Line No. 23 Change to: Change "Jeff" to "Geoff"

Reason for change: \_\_\_\_\_

SIGNATURE: Thomas Urbelis DATE: JUNE 29, 2010

THOMAS URBELIS



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June 1, 201

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## DEPOSITION ERRATA SHEET

Page No. 16 Line No. 13 & 14 Change to: Change "Jeff" to  
"Geoff"

Reason for change: \_\_\_\_\_

Page No. 17 Line No. 10 & 12 Change to: Change "Jeff" to  
"Geoff"

Reason for change: \_\_\_\_\_

Page No. 24 Line No. 15 Change to: Delete the first "I"

Reason for change: \_\_\_\_\_

Page No. 30 Line No. 15 Change to: Change "Quade" to  
"McQuade"

Reason for change: \_\_\_\_\_

Page No. 31 Line No. 7 Change to: Delete "it"

Reason for change: \_\_\_\_\_

Page No. 31 Line No. 10 Change to: Delete "on the old  
interest of trust accounts" and substitute "into an interest account"

Reason for change: \_\_\_\_\_

Page No. 31 Line No. 14 & 15 Change to: Change "ULTA" to  
"IOLTA"

Reason for change: \_\_\_\_\_

SIGNATURE: Thomas Urbelis DATE: JUNE 29, 2010

THOMAS URBELIS



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June 1, 2010

Thomas Urbelis

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## DEPOSITION ERRATA SHEET

Page No. 32 Line No. 16 Change to: Change "need" to  
"needed"

Reason for change: \_\_\_\_\_  
 Page No. 34 Line No. 21 Change to: Change "called" to  
"call"

Reason for change: \_\_\_\_\_  
 Page No. 38 Line No. 3 Change to: Change "George" to  
"Georgia"

Reason for change: \_\_\_\_\_  
 Page No. 42 Line No. 15 Change to: Change "in" to "on"

Reason for change: \_\_\_\_\_  
 Page No. 42 Line No. 24 Change to: Delete the first  
"for"

Reason for change: \_\_\_\_\_  
 Page No. 48 Line No. 6 Change to: Change "doesn't" to  
"don't"

Reason for change: \_\_\_\_\_  
 Page No. 49 Line No. 2 Change to: Delete the third "I"

Reason for change: \_\_\_\_\_

SIGNATURE: Thomas Urbelis DATE: JUNE 29, 2010

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June 29, 2010

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## DEPOSITION ERRATA SHEET

Page No. 52 Line No. 24 Change to: Change the first  
"that" to "and"

Reason for change: \_\_\_\_\_

Page No. 53 Line No. 12, 20, 21 & 23 Change to: Change "Jeff" to  
"Geoff"

Reason for change: \_\_\_\_\_

Page No. 54 Line No. 12 Change to: Change "he" to "I"

Reason for change: \_\_\_\_\_

Page No. 57 Line No. 8 Change to: Change "Cioche" to  
"Kolojay"

Reason for change: \_\_\_\_\_

Page No. 58 Line No. 5 Change to: After "know" insert  
"why"

Reason for change: \_\_\_\_\_

Page No. 58 Line No. 7 Change to: Change the second  
"I" to "he"

Reason for change: \_\_\_\_\_

Page No. 58 Line No. 9 Change to: Change "her" to "him"

Reason for change: \_\_\_\_\_

SIGNATURE: Thomas Urbelis DATE: JUNE 29, 2010

THOMAS URBELIS



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Thomas Urbelis

June 1, 2010

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## DEPOSITION ERRATA SHEET

Page No. 58 Line No. 10 Change to: Change "wife" to  
"wife's"

Reason for change: \_\_\_\_\_

Page No. 59 Line No. 2 Change to: Delete "to"

Reason for change: \_\_\_\_\_

Page No. 59 Line No. 7 Change to: Delete "exactly"

Reason for change: \_\_\_\_\_

Page No. 59 Line No. 13 Change to: "caused" is incorrect

Reason for change: \_\_\_\_\_

Page No. 61 Line No. 2 Change to: Change "Jeff" to  
"Geoff"

Reason for change: \_\_\_\_\_

Page No. \_\_\_\_\_ Line No. \_\_\_\_\_ Change to: \_\_\_\_\_

Reason for change: \_\_\_\_\_

Page No. \_\_\_\_\_ Line No. \_\_\_\_\_ Change to: \_\_\_\_\_

Reason for change: \_\_\_\_\_

SIGNATURE: Thomas Urbelis DATE: JUNE 1, 2010

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**F**

**Date:** 06/03/2010  
**To:** THOMAS URBELIS  
**From:** DIRECTOR OF PRODUCTION  
**RE:** SEC vs. MCGINN, SMITH & CO.  
**File:** 16703  
**Deposition of:** THOMAS URBELIS  
**Deposition Date:** 06/01/2010  
**Original Transcript Recipient:** DAVID STOELTING, ESQ.  
**cc:** All counsel present

Your signature is required as acknowledgment that you have read the transcript of your deposition in the above-referenced matter.

Please complete the following steps within 30 days of the date of this memorandum:

- Read the enclosed condensed copy of the transcript of your deposition
- Make any corrections necessary on the Errata sheet only
- Sign the bottom of the Errata sheet
- Sign the Certificate
- Return only the following to our offices within 30 days of receipt of this memorandum:
  - Original, executed Certificate
  - Completed, signed Errata sheet

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G

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF NEW YORK

3 -----  
4 SECURITIES AND EXCHANGE COMMISSION,  
5 Plaintiff,

6 -versus-

10-CV-457  
(EVIDENTIARY HEARING)

8 MCGINN, SMITH & CO., INC., et al.,  
9 Defendants.  
10 -----

11 TRANSCRIPT OF PROCEEDINGS held in and for the  
12 United States District Court, Northern District of New  
13 York, at the James T. Foley United States Courthouse,  
14 445 Broadway, Albany, NY 12207, on TUESDAY, NOVEMBER 16,  
15 2010, before the HON. DAVID R. HOMER, United States District  
16 Court Magistrate Judge.

17 **APPEARANCES:**

18 **FOR THE PLAINTIFF:**  
19 U.S. Securities & Exchange Commission  
20 BY: LARA SHALOV MEHRABAN, ESQ.; JACK KAUFMAN, ESQ.; KEVIN P.  
21 MCGRATH, ESQ.; and DAVID P. STOELTING, ESQ.

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

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

THERESA J. CASAL, RPR, CRR  
UNITED STATES DISTRICT COURT - NDNY

(Court commenced at 9:15 AM.)

1 THE CLERK: Today is Tuesday, November 16, 2010,  
2 in the matter of the Securities and Exchange Commission  
3 versus McGinn, Smith & Co, Inc., et al., case number  
4 10-CV-457. Could we have appearances for the record,  
5 please?

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

8 MR. KAUFMAN: Jack Kaufman for the SEC.

9 MR. MCGRATH: Kevin McGrath. Good morning, your  
10 Honor.

11 THE COURT: Good morning.

12 MR. STOELTING: David Stoelting for plaintiff.

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

17 THE COURT: Good morning.

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

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

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

23 THE COURT: Good morning. We're present for the  
24 evidentiary hearing that was ordered on the issue of the  
25

THERESA J. CASAL, RPR, CRR  
UNITED STATES DISTRICT COURT - NDNY

3 **Stoelting - Direct - Mehraban**

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

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

9 THE COURT: I am.

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

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

14 D A V I D S T O E L T I N G,  
15 having been duly sworn by the Clerk of the Court, was  
16 examined and testified as follows:

17 **DIRECT EXAMINATION**

18 **BY MS. MEHRABAN:**

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

21 A Yes.

22 Q And did you call Jill Dunn after that conference?

23 A Yes.

24 Q When did you call her?

25 A Immediately after the conference with the Court.

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4 **Stoelting - Direct - Mehraban**

1 Q Why did you call her?

2 A To ask her a question.

3 Q What question did you ask her?

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

7 Q And why were you asking her that question?

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

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

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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.

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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

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she was essentially sure of that issue, that no gift tax was due.

Q Did Mr. McGrath have any reaction that you could see while you were on the phone?

A Well, I was doing the talking because the speaker phone was facing me and he was sitting back in his chair --

MR. ISEMAN: I am gonna object to Mr. McGrath's -- or Mr. Stoelting's interpretation of what Mr. McGrath might have been thinking. He will be a witness and he can speak for him.

THE COURT: Sustained as to what he was thinking.

BY MS. MEHRABAN:

Q I am asking was there anything that you saw in Mr. McGrath's reaction?

MR. ISEMAN: Same objection.

THE COURT: Overruled.

A Yes.

Q Please describe.

A I observed during the phone call Mr. McGrath was leaning back in his chair and as Jill continued to yell at us throughout the call, Mr. McGrath kind of waved his arms like this at me (indicating), which I understood to mean just end the call and get off because we're not making any progress.

Q How did the call end?

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A Well, it ended with Kevin making that motion (indicating), and we -- or I had thought that I had obtained as much information as I was going to obtain about why no gift tax was due and it was clear we weren't gonna find out where this agreement was other than Miss Dunn's statement to us it was in the binders, so we ended the call.

Q Okay. You heard Miss Dunn use the words "private annuity agreement"?

A Yes.

Q Okay. About how long was the call with Miss Dunn?

A Maybe two or three minutes.

Q Okay. Was the call with Miss Dunn the first time you had heard that the reason that no gift taxes were due was because of a private annuity?

A Yes.

Q Okay. Other than the declaration of trust that created the trust, were you aware of any agreement or agreements that the trust had entered into at that time?

A Before that call, no.

Q Okay. What happened next?

A Well, we -- since Jill had said "in the binders," we immediately started looking through the binders in the exhibits to see if there was any private annuity agreement there and we could not find it.

Immediately after the call, after we hung up, I

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1 said to Mr. McGrath, "What is this private annuity agreement  
2 that she's talking about?" And Kevin indicated to me that  
3 he did not hear what I heard, and I said, "Yes, she did say  
4 private annuity agreement," and he said, "okay," and then we  
5 went and looked in the binders for the agreement.

6 Q Did you do anything else after the call?

7 A Yes. We called Brit Geiger, the consulting expert  
8 that we were using.

9 Q Why did you call Mr. Geiger?

10 A Because we wanted to see if he had any familiarity  
11 about -- with this annuity arrangement and we wanted to  
12 relate to him the conversation with Ms. Dunn.

13 Q Okay. Did you reach Mr. Geiger?

14 A Yes. We called him on his cellphone. He was on  
15 his way out of town to the airport and we talked to him and  
16 Mr. Geiger -- we related to him the conversation with Jill  
17 and asked if this could be an annuity and Mr. Geiger said --

18 MR. ISEMAN: Objection to Mr. Geiger's statement.  
19 It's hearsay.

20 THE COURT: Overruled. Hearsay is admissible at  
21 this hearing.

22 Q Please continue.

23 A Mr. Geiger told us that no, that he had reviewed  
24 the declaration of trust and that this was basically an  
25 irrevocable trust and that he was confident in his original

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

3 Q Okay. So what did you do next?

4 A We called him and -- Kevin and I called him back  
5 from my office again, and by this time, Brit was at the  
6 airport waiting for his flight out of town and he told us  
7 that he had given it some more thought and he said that  
8 there was an arrangement that was available in the  
9 '04/'05/'06 time frame in which you could have the  
10 irrevocable trust agreement like we had in our case and you  
11 would also have a separate annuity agreement, and that  
12 somehow the effect of the trust agreement with the annuity  
13 agreement would mean two things: One, that there would be  
14 no gift tax due because it was not a gift, it was a purchase  
15 and sale -- in other words, a purchase by the trust and a  
16 sale by the donors; and the trust would also take the asset  
17 that's transferred at the donor's basis so you would avoid  
18 gift tax and you would avoid capital gains tax.

19 Q Okay. Was there anything else about your call?

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

22 Q Okay. So what happened next?

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

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1 position that there would be a significant gift tax due.

2 Q Okay. What happened next?

3 A Well, we continued looking for the annuity  
4 agreement and then about 45 minutes later, I received an  
5 e-mail from Mr. Geiger.

6 Q I am gonna show you a document that's been  
7 previously marked as Exhibit 1.

8 MR. KAUFMAN: Would you like a copy, your Honor?

9 MS. MEHRABAN: Can I approach?

10 THE COURT: Yes.

11 MS. MEHRABAN: Would you like a copy, your Honor?

12 THE COURT: Not yet.

13 BY MS. MEHRABAN:

14 Q What is this document?

15 A This is the e-mail that Brit sent to me on  
16 July 22nd at 5:33 PM.

17 MS. MEHRABAN: I would offer this into evidence,  
18 your Honor.

19 THE COURT: Any objection?

20 MR. ISEMAN: I have no objection.

21 THE COURT: All right. Exhibit 1 is received in  
22 evidence.

(Plaintiff's Exhibit 1 received.)

23 BY MS. MEHRABAN:

24 Q Tell me what the e-mail says.

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**Stoelting - Cross - Iseman**

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

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

4 A In my office.

5 Q Who was with you?

6 A Mr. McGrath and you were with me.

7 Q Okay. You were on speaker phone?

8 A Yes.

9 Q Describe your call with Mr. Urbelis.

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

12 THE COURT: Sustained.

13 MS. MEHRABAN: I have no further questions.

14 THE COURT: Thank you. Mr. Iseman.

**CROSS-EXAMINATION**

15 BY MR. ISEMAN:

16 MR. ISEMAN: May I come up here?

17 THE COURT: Yes.

18 Q Good morning, Mr. Stoelting.

19 A Good morning.

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

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

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13

*Stoelting - Cross - Isaman*

1 Q As I understand it, your call with Miss Dunn was  
2 preceded by a call with the Court, is that correct?

3 A Yes.

4 Q And the purpose of that call was for you to make  
5 an emergency application for a temporary restraining order  
6 in support of an amended complaint that you were going to  
7 file, is that right?

8 A Yes.

9 Q And your amended complaint had not yet been filed,  
10 had it?

11 A It had not.

12 Q And the theory of that amended complaint was a  
13 cause of action or a claim under the debtor and creditor  
14 law?

15 A Well, it was fraudulent conveyance.

16 Q Fraudulent conveyance. And during the course of  
17 the conversation with the Court, as I understand it, you  
18 made the argument that the lack of a gift tax would be  
19 relevant to the question of whether or not there was a  
20 fraudulent conveyance in the creation of the trust, is that  
21 right?

22 A Yes.

23 Q And then you heard Ms. Dunn say that no gift tax  
24 return was required, is that right?

25 A Yes.

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*Stoelting - Cross - Isaman*

1 Q And the call then concluded with the Court denying  
2 the application without prejudice to filing on appropriate  
3 papers, is that right?

4 A Correct.

5 Q And then you testified, I think, that you called  
6 Ms. Dunn back?

7 A Yes.

8 Q And do you recall hitting \*69 to call her back?

9 A I did not hit \*69.

10 Q Your testimony is that you called her on her  
11 cellphone?

12 A Yes.

13 Q And how much time elapsed from the conclusion  
14 of the call with the Court to the time that you called  
15 Miss Dunn?

16 A I don't specifically recall.

17 Q An hour?

18 A No.

19 Q Half an hour?

20 A Less.

21 Q Five minutes?

22 A Maybe in between five minutes and a half an hour.

23 Q And during the five minutes and half an hour, what  
24 were you doing?

25 A Sitting in my chair.

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*Stoelting - Cross - Isaman*

1 Q Were you speaking to Mr. McGrath?

2 A Yes.

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

5 A Yes.

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

9 A Yes.

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

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

15 Q And when did you obtain that opinion?

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

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

22 A Yes.

23 Q You thought that was important to your case?

24 A Yes.

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

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*Stoelting - Cross - Isaman*

1 get reconsideration of what the Court had ruled?

2 A Yes.

3 Q You wanted a second bite at the apple?

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

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

9 A I think so.

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

12 A It's possible.

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

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

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

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*Stoelting - Cross - Iseman*

1 A No.

2 Q That's something that was never -- never crossed

3 your mind?

4 A No.

5 Q Did you discuss it with Mr. McGrath or anyone else

6 at the SEC as to whether or not a gift tax return was

7 required in the context of a private annuity trust?

8 A At what point in time?

9 Q At the time that you sent the e-mail to

10 Mr. Featherstonhaugh?

11 A No.

12 Q After you sent the e-mail to Mr. Featherstonhaugh,

13 am I correct that you engaged Mr. Brit Geiger, is that

14 right?

15 A He may have already been engaged by that time.

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

17 A Sometime after July 7th and when I sent that

18 e-mail.

19 Q And did you ask Mr. Geiger any time prior to the

20 call with Miss Dunn as to whether a private annuity trust,

21 the creation of a private annuity trust could be achieved

22 without the payment of any gift tax?

23 A No.

24 Q Did Mr. Geiger make any comments to you as to

25 whether a private annuity trust could be achieved without

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*Stoelting - Cross - Iseman*

1 A Not specifically. I had a number of meetings and

2 discussions with Mr. Geiger during this period of time. No.

3 Q Is this e-mail that you wrote to Mr. Geiger on

4 July 20th at 7:09 PM?

5 A It appears to be.

6 Q And you maintain your e-mails in the ordinary

7 course of your business?

8 A Yes.

9 MR. ISEMAN: I offer it.

10 MS. MEHRABAN: No objection.

11 THE COURT: Defendants' Exhibit 3 is received in

12 evidence.

13 (Defendants' Exhibit 3 received.)

14 BY MR. ISEMAN:

15 Q Mr. Stoelting, let me ask you to look at

16 Defendants' Exhibit 3 in evidence and direct your attention

17 to the center of the document where you write, "We look

18 forward to seeing you tomorrow morning at 9:30"?

19 A Yes.

20 Q And who is the "we" that's referred to in that

21 e-mail?

22 A I don't know. I presume Mr. McGrath -- some

23 combination of myself, Miss Mehraban and Mr. McGrath.

24 Q And was the purpose of the meeting on July 21st,

25 the day before your call with Miss Dunn and the call with

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*Stoelting - Cross - Iseman*

1 the payment of any gift tax?

2 A At what point in time?

3 Q Prior to your call with Miss Dunn?

4 A No.

5 Q Now, I would like to direct your attention to the

6 morning of July 21st at 9:30 in the morning. Do you recall

7 having a meeting with Mr. Geiger?

8 A No.

9 MR. ISEMAN: Just a second, your Honor.

10 (Pause in proceedings.)

11 BY MR. ISEMAN:

12 Q Let me ask you to look at Defendants' Exhibit 3

13 marked for identification and ask you whether that refreshes

14 your recollection that on the morning of July 21st, the day

15 before your call with Ms. Dunn, you met with Mr. Geiger.

16 THE COURT: Is that marked?

17 MR. ISEMAN: Pardon me?

18 THE COURT: Is that marked for identification?

19 MR. ISEMAN: It is.

20 THE COURT: Okay.

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

22 THE COURT: Please proceed.

23 A What's your question?

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

25 (Record read back.)

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20

*Stoelting - Cross - Iseman*

1 the Court, was that to consult with Mr. Geiger concerning

2 tax issues?

3 A At the time, we were preparing the amended

4 complaint and the temporary restraining order papers, so it

5 would have been in connection with that.

6 Q And in fact, your focus at that time was on the

7 tax issue and whether or not gift tax was required when a

8 private annuity trust was funded, isn't that right?

9 A Yes, that was one of our focuses.

10 MS. MEHRABAN: Objection, that's misleading

11 question.

12 THE COURT: Sustained. You referred to a private

13 annuity trust.

14 MR. ISEMAN: Yes.

15 THE COURT: When you do that are you referring to

16 the trust that's -- that you represent here or are you

17 referring to the annuity agreement?

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

19 trust.

20 THE COURT: What is that?

21 MR. ISEMAN: It is the document that is referred

22 to and has been referred to in the hearing before the Court

23 and was described by Mr. Smith in his cover letter to the

24 private annuity --

25 THE COURT: And again I ask you: Are you

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*Stoelting - Cross - Iseman*

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

5 MR. ISEMAN: I'm referring --

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

9 MR. ISEMAN: Let me rephrase the question.

10 BY MR. ISEMAN:

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

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

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

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

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

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

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1 look into was whether or not, based on the declaration of  
2 trust creating the David and Lynn Smith irrevocable trust  
3 there would be a gift tax owing as a result of the transfer  
4 of the Charter One stock into the trust.

5 Q Let me show you Defendants' Exhibit 8 marked for  
6 identification --

7 MR. ISEMAN: -- which was an exhibit received in  
8 evidence, your Honor, marked, I believe, looks like  
9 June 1st, a letter from Mr. Smith to Mr. Urbelis.

10 MS. MEHRABAN: The only objection I have is this  
11 is not a complete document.

12 THE COURT: What's the date?

13 MR. ISEMAN: The date is August 4, 2004.

14 THE COURT: Nothing's been offered, so the  
15 objection is overruled as moot.

16 MS. MEHRABAN: Okay.

17 BY MR. ISEMAN:

18 Q Mr. Stoelting, did you have any conversations with  
19 Mr. Geiger prior to your calls with Ms. Dunn concerning a  
20 term called "private annuity trust"?

21 A No.

22 Q Have you seen this letter from Mr. Smith to  
23 Mr. Urbelis before?

24 A Yes.

25 Q And in fact, did the Securities and Exchange

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*Stoelting - Cross - Iseman*

1 Commission offer this as an exhibit in the hearing that was  
2 held before Judge Homer?

3 A We did not offer this letter. We offered the  
4 letter with the declaration of trust that was attached to  
5 it.

6 Q Let me show you Defendants' Exhibit 9, which is a  
7 document entitled "declaration of trust" and add to it what  
8 I showed you before, Defendants' Exhibit 8, which is the  
9 cover letter, and ask you whether that is an exhibit that  
10 you offered during the hearing before Judge Homer?

11 A We offered the letter and the declaration of  
12 trust, which was the form in which we received it from  
13 Mr. Urbelis, the two things together.

14 Q And the documents that I have before you now,  
15 Defendants' 8 and 9 together comprise the exhibit that you  
16 offered into evidence, isn't that right?

17 A Yes.

18 MR. ISEMAN: Your Honor, to the extent that they  
19 are required since they were admitted in the other hearing,  
20 I would offer them here.

21 THE COURT: Any objection?

22 MS. MEHRABAN: The only objection is that the  
23 document that had previously been admitted into evidence  
24 does have the final page, which is a Fed Ex receipt from  
25 Mr. Smith.

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*Stoelting - Cross - Iseman*

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

2 THE COURT: I can take judicial notice of that.

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

5 THE COURT: Any objection?

6 MS. MEHRABAN: No.

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

9 (Defendants' Exhibits 8 and 9 received.)

10 BY MR. ISEMAN:

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

15 A We did.

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

18 A Sometime between July 7th and July 22nd.

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

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

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

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*Stoelting - Cross - Iseman*

1 tell you that perhaps that term is a term of art?

2 A Possibly. I don't know.

3 Q Did you provide Mr. Geiger with a copy of the  
4 declaration of trust at the same time you provided him a  
5 copy of the cover letter? The cover letter being  
6 Defendants' 8 and the trust being Defendants' 9.

7 A Yes.

8 Q And did you discuss with Mr. Geiger prior to your  
9 call with Ms. Dunn the powers that were accorded to the  
10 trustee under the declaration of the trust?

11 A I don't recall discussing that.

12 Q Did you specifically discuss with Mr. Geiger  
13 paragraph 6, subparagraph 10, which reads what? You read it  
14 for me.

15 A "To purchase property from the donors in exchange  
16 for a private annuity payable to the donors."

17 Q Was that provision within the declaration of trust  
18 at any time prior to the call with Ms. Dunn subject of a  
19 conversation between you and Mr. Geiger?

20 A No.

21 THE COURT: By the way, Mr. Iseman, does  
22 Exhibit 9, which you just offered, contain a Schedule A?

23 MR. ISEMAN: It does not.

24 THE COURT: Do you have one?

25 MR. ISEMAN: I do not. We've consulted with

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*Stoelting - Cross - Iseman*

1 Miss Dunn and I saw an e-mail from the SEC yesterday, we  
2 have not been able to locate one, we will continue to look  
3 for one, but we have not found a Schedule A.

4 BY MR. ISEMAN:

5 Q Now, the meeting that happened at 1:30 on the  
6 21st, did that meeting involve the discussion of either --  
7 the meeting with Mr. Geiger -- did that meeting involve the  
8 discussion of either Defendants' 8 or Defendants' 9?

9 A I don't specifically recall the meeting.

10 Q Is it your practice -- withdraw that.

11 Is it the policy of the Securities and Exchange  
12 Commission to have its attorneys keep notes of meetings?

13 A I'm not aware of any such policy.

14 Q Is it your personal practice to keep notes of  
15 meetings?

16 A No. Sometimes.

17 Q Do you recall whether you kept any notes of this  
18 meeting?

19 A What meeting?

20 Q The meeting with Mr. Geiger at 1:30 on July 21st,  
21 the day before the call with Miss Dunn, when you were  
22 discussing tax issues pertaining to the declaration of  
23 trust.

24 MS. MEHRABAN: Objection. That wasn't the time of  
25 the meeting in the e-mail.

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*Stoelting - Cross - Iseman*

1 THE COURT: Sustained.

2 BY MR. ISEMAN:

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

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

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

10 THE COURT: All right.

11 A What's your question?

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

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

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

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*Stoelting - Cross - Iseman*

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

3 A No.

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

6 A No.

7 Q Did you think the term might be important?

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

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

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

18 Q Did you ask him whether or not --

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

21 MR. ISEMAN: I understand.

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

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

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*Stoelting - Cross - Iseman*

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

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

4 MR. ISEMAN: All right.

5 (Pause in proceedings.)

6 BY MR. ISEMAN:

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

12 A No.

13 Q That was never in your mind?

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

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

18 A Yes.

19 Q And there was no one else there?

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

21 Q And --

22 A Is that your question?

23 Q Yes.

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

25 Q And you began the call with a question concerning

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*Stoelting - Cross - Iseman*

1 why Ms. Dunn made the statement to the Court about the gift  
2 tax, that was the reason for the call?

3 A Yes.

4 Q And did you make any notes of the telephone  
5 conversation with Miss Dunn?

6 A No.

7 Q Do you know whether Mr. McGrath did?

8 A I don't know.

9 Q And after the call was completed and other than  
10 your declaration of August 3rd, are you aware of any  
11 documents that were created after the call or  
12 contemporaneous with the call that recorded the -- what was  
13 said by whom --

14 A Yes.

15 Q -- by whom to whom? And what would those  
16 documents be?

17 A Well, there were drafts of the August 3rd  
18 declaration that you have that also reflected what was said  
19 in the call.

20 Q Other than the drafts and other than your  
21 declaration, are there any other documents that you're aware  
22 of that record what was said in the call?

23 A I believe that we produced to you all documents  
24 that we had that reflected on the content of the call.

25 Q Did you report on the content of the call to

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*Stoelting - Cross - Iseman*

1 Mr. Geiger?

2 A Yes.

3 Q And when was that?

4 A It was shortly after we ended the call with  
5 Miss Dunn.

6 Q Mr. Stoelting, let me show you Defendants'  
7 Exhibit 7 for identification and ask you if that's your  
8 declaration.

9 A Yes.

10 Q And when was -- when did you begin work on this  
11 declaration?

12 A Sometime between July 7th and August 3rd.

13 Q The portions -- the declaration --

14 MR. ISEMAN: Your Honor, I don't know whether this  
15 is before the Court as part of the application. I would  
16 propose to offer it into evidence, however.

17 THE COURT: Do you have a document number on it?

18 MR. ISEMAN: The docket number is 10-CIV-457.

19 THE COURT: Is it 103-2? Is there a date on the  
20 declaration?

21 MR. ISEMAN: There is. Yeah, it is August 3rd,  
22 2010.

23 THE COURT: I just want to make sure it's the same  
24 one, yes. It's also already been filed as document 103-2.  
25 It doesn't need to be offered. I'll take notice of it.

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*Stoelting - Cross - Iseman*

1 MR. ISEMAN: Take notice of that?

2 THE COURT: Yes. But please feel free to use it.

3 BY MR. ISEMAN:

4 Q Let me direct your attention, Mr. Stoelting, to  
5 paragraph 4 of your declaration and ask you whether or not  
6 paragraph 4 includes statements concerning your telephone  
7 conversation with Miss Dunn?

8 A Yes.

9 Q And when was -- and let me also ask you to look at  
10 paragraph 36 of your declaration. Does that contain  
11 information that you recorded in your declaration concerning  
12 your telephone conversation with Miss Dunn?

13 A Yes, it does.

14 Q And do you recall how soon after your call with  
15 Miss Dunn it was that you began to prepare this portion of  
16 your declaration?

17 A No.

18 Q There were several drafts, I think you testified,  
19 of this particular declaration, were there not?

20 A Correct.

21 Q And were those drafts reviewed by other people?

22 A Yes.

23 Q Reviewed by Mr. McGrath?

24 A Yes.

25 Q Anyone else?

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*Stoelting - Cross - Iseman*

1 A I believe that my colleagues would have reviewed  
2 it -- would have reviewed the draft. In fact, I think  
3 Mr. McGrath had taken the job of preparing the declaration.  
4 Q So this declaration was prepared by Mr. McGrath  
5 for your signature, is that right?  
6 A He drafted it initially.  
7 Q And you, as you sit here today, believe the  
8 contents to be true as an officer of the court, this is your  
9 declaration?  
10 A Absolutely.  
11 Q Now, did you review the words of the declaration  
12 carefully?  
13 A Of course.  
14 Q And you view all of the words in the declaration  
15 to be important to convey accurately your understanding of  
16 the call, is that right?  
17 A Yes.  
18 Q Let me ask you to look at the second sentence in  
19 the declaration on paragraph 4 and it reads, does it not,  
20 "Despite these diligent efforts, the SEC did not learn of  
21 the existence of a private annuity agreement (the "annuity  
22 agreement") between the Smiths and the trust until July 22,  
23 2010, when the trust attorney, Jill Dunn, made a passing  
24 reference to it during a telephone call with the SEC's  
25 attorneys." Do I read that correctly?

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*Stoelting - Cross - Iseman*

1 reference?"  
2 A That's what it says.  
3 Q Now, please turn to paragraph 36. Is this a  
4 paragraph that you drew or that Mr. McGrath drew?  
5 A Well, as I said, Mr. McGrath prepared the initial  
6 draft, I reviewed it along the way and signed it when it was  
7 complete.  
8 Q And the various drafts that were prepared of the  
9 declaration, were they edits that you made or edits that  
10 Mr. McGrath made?  
11 A Which edits?  
12 Q Any of the edits in the draft, did you edit the  
13 declaration or did you speak to Mr. McGrath and did he edit  
14 the declaration?  
15 A I believe I did make edits.  
16 Q Now, in the first sentence of paragraph 36, you  
17 declared and swore as an officer of the court, did you not,  
18 that, "Immediately following that conference call,  
19 Mr. McGrath and I called Ms. Dunn back," and you go on to  
20 say, "During the course of a brief conversation, Ms. Dunn  
21 disclosed the existence of a private annuity agreement  
22 involving the Smiths and the trust." That what it says?  
23 A That's what it says.  
24 Q No place in paragraph 36 does it say that Ms. Dunn  
25 told you there was a private annuity agreement, does it?

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*Stoelting - Cross - Iseman*

1 A Yes.  
2 Q And was the term "passing reference" a term that  
3 you used or one that was suggested by Mr. McGrath?  
4 A I don't recall.  
5 Q The fourth paragraph of your declaration never  
6 makes the statement that Ms. Dunn told you that there was a  
7 private annuity agreement, does it?  
8 A I think it does.  
9 Q It uses the term "passing reference to it," isn't  
10 that right?  
11 A "It" refers to private annuity agreement.  
12 Q And by the words "passing reference," you were  
13 intending to condition your statement, were you not?  
14 A No.  
15 Q Do the words "passing reference" have significance  
16 to you?  
17 A Every word has significance.  
18 Q Why did you not say in paragraph 4 that Miss Dunn,  
19 in a simple, declarative statement, told me that there was a  
20 private annuity agreement?  
21 A Well, she did tell me there was a private annuity  
22 agreement, but the purpose of paragraph 4 was to condense  
23 that conversation to the essential, which was she told me  
24 during the call there was a private annuity agreement.  
25 Q But you chose to refer to it as a "passing

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*Stoelting - Cross - Iseman*

1 A It does say that.  
2 Q Well, Mr. Stoelting, is it -- when the existence  
3 of a document is disclosed, it can be disclosed in different  
4 ways, can it not?  
5 THE COURT: The document speaks for itself.  
6 What's next?  
7 BY MR. ISEMAN:  
8 Q When Ms. Dunn made the -- withdraw that.  
9 In your declaration, Mr. Stoelting, you chose not  
10 to state that Miss Dunn told you that the private annuity  
11 agreement was in a binder?  
12 A Correct. The -- well, I don't know if I chose  
13 that, but the declaration does not contain her statement,  
14 "It's in the binders."  
15 Q And why did you think that was not an important  
16 fact to include in the declaration?  
17 A I don't recall.  
18 Q This was bombshell news to you, wasn't it?  
19 A It was very important, because it changed  
20 completely what we had previously understood about the trust  
21 from all the evidence that had been presented at the  
22 preliminary injunction hearing.  
23 Q Well, did you say to Ms. Dunn, "Ms. Dunn, do you  
24 have this document?"  
25 A We asked her where the agreement is, I asked her

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1 where the agreement is.

2 Q Did you say, "Miss Dunn, produce the document"?

3 A No. I said, "Where is the agreement?" She said,  
4 "It's in the binders."

5 Q Did you ask her to e-mail it to you? Did you say  
6 you'd send the FBI over to pick it up?

7 MS. MEHRABAN: Objection. I think that question  
8 was asked and answered.

9 THE COURT: Overruled.

10 A I did not say I would send the FBI to pick it up.

11 Q Did you ask her to produce it?

12 A Well, I asked her where it is, and she said, "It's  
13 in the binders."

14 Q Did you say to her, "You have an obligation as an  
15 officer of the court to produce this document to me which we  
16 had requested before, during the hearing, I want it today"?

17 A I didn't say that. About four days later, I sent  
18 her a letter asking her for additional documents about the  
19 agreement.

20 Q Four days later?

21 A Or whenever that follow-up letter was.

22 Q Wasn't that important?

23 A It was important.

24 (Pause in proceedings.)

25 Q Mr. Stoelting, you said in paragraph 36 of your

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

6 A That's what it says.

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

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

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

17 A Did I say that?

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

21 A I don't recall.

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

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

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

8 MR. ISEMAN: The document number is document 142.

9 THE COURT: Okay.

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

12 BY MR. ISEMAN:

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

15 A Yes.

16 Q And you read it before it was submitted?

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

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

21 A If you say so.

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

23 A Okay.

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

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

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

6 Q Is that --

7 THE COURT: Sustained.

8 Q Do you agree with that, Mr. Stoelting?

9 MS. MEHRABAN: Objection.

10 THE COURT: Overruled.

11 A Do I agree with what?

12 Q The statement I just read you (indicating).

13 A Yes.

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

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

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1 annuity agreement.

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

3 MR. ISEMAN: It is, your Honor.

4 THE COURT: I understand the context.

5 MR. ISEMAN: May I ask one additional question?

6 THE COURT: One more.

7 BY MR. ISEMAN:

8 Q You -- the SEC --

9 MR. ISEMAN: Two more, if I may.

10 THE COURT: One more. Make it good.

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

17 A No.

18 MS. MEHRABAN: The record speaks for itself.

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

21 BY MR. ISEMAN:

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

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

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1 litigation?

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

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

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

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

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

15 BY MR. ISEMAN:

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

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

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

24 A I understand that they did.

25 Q And have you made any request to the Department of

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

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

5 Q The end of October of what year?

6 A 2010.

7 Q You mean last month?

8 A Yes.

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

11 A Can you be more specific?

12 Q Concerning the private annuity trust files?

13 A No.

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

16 A Private annuity trust files?

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

22 A They didn't tell me anything.

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

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

3 BY MR. ISEMAN:

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

7 MS. MEHRABAN: Objection.

8 THE COURT: Sustained.

9 BY MR. ISEMAN:

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

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

17 Q And what were you told then?

18 A I didn't have the conversation myself.

19 Q Who did?

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

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

22 A Yes.

23 Q And what was the answer?

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

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*Stoelting - Cross - Iseman*

1 those files to Miss Dunn and the other defendants.  
 2 Q And did you learn of any additional files in  
 3 October?  
 4 A Yes.  
 5 Q And what additional files did you learn about in  
 6 October?  
 7 A Well, I don't know about additional files, but we  
 8 did learn that in another file, not the trust files, there  
 9 was a copy of the annuity agreement.  
 10 Q And who produced the file containing the copy of  
 11 the annuity agreement?  
 12 A I don't know who -- what do you mean?  
 13 Q Well, what agency, was it the IRS, the FBI?  
 14 A I'm not sure.  
 15 Q And was it your understanding that the private  
 16 annuity agreement was taken by whichever agency it was in  
 17 the execution of the search warrant during the spring of  
 18 2010?  
 19 A I don't -- I assume that, but I would be  
 20 speculating. I don't really know.  
 21 Q And you assumed that, therefore, this was a  
 22 document that was available to you throughout this  
 23 litigation?  
 24 A No.  
 25 Q It was in the possession of the United States?

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*Stoelting - Redirect - Mehraban*

1 A Of either the IRS or the FBI, but I don't know  
 2 when they -- I don't actually know when they got possession  
 3 of it.  
 4 THE COURT: When did this conversation with the  
 5 IRS or the FBI occur?  
 6 THE WITNESS: I don't know because I didn't have  
 7 the conversation, but I believe it was late October.  
 8 THE COURT: Did it occur before or after your  
 9 conversation with Miss Dunn?  
 10 THE WITNESS: Oh, after.  
 11 MR. ISEMAN: I have nothing further.  
 12 THE COURT: Any redirect?  
 13 MS. MEHRABAN: Can I have one minute, your Honor?  
 14 THE COURT: Yes.  
 15 (Pause in proceedings.)

**REDIRECT-EXAMINATION****BY MS. MEHRABAN:**

16 Q Mr. Iseman asked you whether you had asked  
 17 Miss Dunn on the phone call on July 22nd to produce the  
 18 private annuity agreement, correct?  
 19 A Yes.  
 20 Q Can you explain the tone of the conversation with  
 21 Miss Dunn, please?  
 22 A Well, she was very angry and she was yelling at us  
 23 throughout the call, so it was hard to get our questions in.  
 24  
 25

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*Stoelting - Redirect - Mehraban*

1 Q And why didn't you ask her to produce the private  
 2 annuity agreement on that phone call?  
 3 A Well, it was all we could do to even, you know,  
 4 interrupt her from her yelling to get any question in, but  
 5 we did -- I thought the question of "where is the agreement"  
 6 was the equivalent of, you know, "if you have it, give it to  
 7 us."  
 8 Q And what was her response?  
 9 A "It's in the binders."  
 10 Q Okay. I am gonna show you a document that's been  
 11 previously marked as Exhibit 16. What is this document?  
 12 A It's a letter that I sent to Jill Dunn and James  
 13 Featherstonhaugh dated July 27, 2010.  
 14 MS. MEHRABAN: I am gonna offer this letter into  
 15 evidence.  
 16 MR. ISEMAN: No objection.  
 17 THE COURT: What's the document number, Exhibit  
 18 Number?  
 19 MS. MEHRABAN: It's Plaintiff's 16.  
 20 THE COURT: Plaintiff's Exhibit 16 is received in  
 21 evidence.  
 22 (Plaintiff's Exhibit 16 received.)  
 23 BY MS. MEHRABAN:  
 24 Q And what are you asking Miss Dunn and  
 25 Mr. Featherstonhaugh in this letter?

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*Stoelting - Redirect - Mehraban*

1 A Well, this was sent on the day that we received  
 2 the actual private annuity agreement from Mr. Urbelis, which  
 3 would have been the Tuesday after the original phone call  
 4 with Jill on the 22nd, which was a Thursday. So --  
 5 MR. ISEMAN: Your Honor, the letter will speak for  
 6 itself. I object to the characterization of it.  
 7 THE COURT: Sustained.  
 8 MS. MEHRABAN: Okay.  
 9 BY MS. MEHRABAN:  
 10 Q I am gonna show you another document that's been  
 11 previously marked as Plaintiff's Exhibit 21. What's this  
 12 letter?  
 13 A This is a letter that I received from Jill Dunn in  
 14 response to my letter of the 27th, and Jill's letter is  
 15 dated July 29th.  
 16 MS. MEHRABAN: I am gonna offer this into evidence  
 17 as well.  
 18 MR. ISEMAN: No objection.  
 19 THE COURT: Plaintiff's Exhibit 21 is received in  
 20 evidence.  
 21 (Plaintiff's Exhibit 21 received.)  
 22 BY MS. MEHRABAN:  
 23 Q In response to your request on July 27th for  
 24 documents, did Jill Dunn indicate in this letter that she  
 25 was going to be producing any documents?

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1 A No.

2 Q And did she give a reason?

3 A She gave several reasons.

4 Q And was any of those reasons that she didn't have  
5 any documents?

6 MR. ISEMAN: The letter will speak for itself. I  
7 think she's asking him to interpret the letter. She's got  
8 the exhibit in evidence.

9 THE COURT: Overruled.

10 A Well, I did not understand -- the letter does not  
11 say that she does not have any responsive documents. It  
12 just says, "I am not producing any documents."

13 Q Okay.

14 MS. MEHRABAN: No further questions.

15 THE COURT: Mr. Iseman.

**REXCROSS-EXAMINATION**

17 BY MR. ISEMAN:

18 Q If I understand you, Mr. Stoelting, your testimony  
19 is that when this bombshell information was presented to you  
20 during this telephone call that you didn't ask Jill Dunn to  
21 send her a copy of -- to send you a copy of this document  
22 that was so important because she was yelling at you, is  
23 that your testimony?

24 MS. MEHRABAN: Objection.

25 THE COURT: Sustained.

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1 MR. ISEMAN: Nothing further.

2 THE COURT: All right. You may step down.

3 (Witness was excused.)

4 THE COURT: Take a brief recess.

5 (Short recess taken at 10:18 AM.)

6 (Court reconvened at 10:28 AM.)

7 THE COURT: Call your next witness, please.

8 MS. MEHRABAN: We are gonna call Kevin McGrath.

9 **K E V I N M C G R A T H,**

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

**DIRECT EXAMINATION**

13 BY MS. MEHRABAN:

14 Q Mr. McGrath, were you present by telephone for a  
15 conference with the Court on July 22, 2010?

16 A Yes.

17 Q What happened after the call with the Court?

18 A After the call, Dave Stoelting and I decided to  
19 call Miss Dunn.

20 Q How soon after the call with the Court did you  
21 call Miss Dunn?

22 A Within a couple minutes.

23 Q Where were you for the call with Miss Dunn?

24 A In Mr. Stoelting's office.

25 Q Who was there?

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1 A Just myself and Mr. Stoelting.

2 Q Where were you sitting?

3 A I was sitting on the other side of his desk.

4 Q What was the purpose of your call to Miss Dunn?

5 A Well, in the prior call with the Court, we had  
6 made a motion for a temporary restraining order to try to  
7 stop the trust from the movement of about \$2 million out of  
8 an account that we had identified. Part of the basis for  
9 the motion was our understanding that the conveyance of the  
10 stock to the trust originally had been done in a fraudulent  
11 manner and part of our reason for believing that was that we  
12 believed that the way it had been done, based on the  
13 evidence that had been presented to us at the trial and in  
14 discovery created a very large tax obligation that would  
15 have been incurred by the Smiths in donating the stock to  
16 the trust, which would have resulted in a large capital  
17 gains tax -- I'm sorry, gift tax, and a large capital gains  
18 tax that would have been incurred by the trust when it sold  
19 the stock, which would have, in our understanding, wiped out  
20 a large part of the corpus. Mr. Stoelting had made a  
21 representation to the Court that it was our belief that  
22 there was a gift tax obligation and that gift tax returns  
23 should have been filed.

24 In the call with the Court, Miss Dunn had made a  
25 very strong statement to the effect that there was no gift

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1 tax returns due. That surprised David and I. After the  
2 call with the Court, we discussed Miss Dunn's statement and  
3 we decided to call her back to find out why she had said  
4 there were no gift tax returns due.

5 Q Was asking Miss Dunn about her statement that no  
6 taxes were due the sole purpose of your call to her?

7 A Yes.

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

9 A David placed the call. I remember David asking  
10 Ms. Dunn why she had made the statement that there were no  
11 gift tax returns due. Her response was, "You people think  
12 we're all a bunch of Hicks up here, that we don't give any  
13 thought to what we do. I've consulted with several  
14 accountants and they've all told me that no gift tax returns  
15 are due."

16 At that point, I remember asking her if she would  
17 be willing to share with us any reports that the accountants  
18 had prepared to support that position and I said to her that  
19 if we were wrong in our theory, we'd rather know about it  
20 now before we filed anything with the Court. I remember her  
21 response being words to the effect that "you people are  
22 unbelievable, you've got a lot of nerve asking us to do your  
23 homework for you, you don't look at your own documents."  
24 She said she resented the fact that we had sent her an  
25 e-mail about 3 o'clock in the afternoon asking her to drop

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1 everything she was doing to get on a conference call with  
2 the Court. She said she had her own life to live, words to  
3 that effect. I think she said something about she was  
4 preparing to go to a funeral the next day, she may have said  
5 something about having a sick baby at home, but she was  
6 going on about her being upset with us in a lot of different  
7 ways. And about that point in the conversation, I started  
8 to make a motion to Mr. Stoelting, like this (indicating),  
9 indicating just end the call.

10 MS. MEHRABAN: Indicating that the witness is  
11 waving his hand.

12 A I'm waving my hand to shut the call down. Once  
13 Miss Dunn finished saying whatever she was saying at that  
14 point, David said, "Thank you very much, Jill," and  
15 disconnected the phone.

16 Q In her declaration, Miss Dunn stated that you  
17 demanded to know why she hadn't produced a copy of an  
18 accountant's report saying no gift taxes were due. Did you  
19 make such a demand?

20 A No. Well, I wouldn't have demanded to know why  
21 she hadn't produced such a report because I didn't think she  
22 had a legal obligation to do so. But I asked her if she  
23 would be willing to produce it because if we were wrong, we  
24 wanted to know about it before we filed a motion with the  
25 Court.

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1 Q Okay. What happened next?

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

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

15 A No.

16 Q Okay. What happened next?

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

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1 based on what we were telling him.

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

13 MS. MEHRABAN: No further questions.

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

## CROSS-EXAMINATION

16 BY MR. ISEMAN:

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

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

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

24 A Yes.

25 Q And were you the author of the words "passing

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1 reference to it"?

2 A I don't remember who actually put those words in.  
3 I did the first draft, it's a very lengthy affidavit, it  
4 covered a lot of different topics. I know that David  
5 reviewed it and Lara Mehraban reviewed it and it went  
6 through a number of different changes, so I don't remember  
7 specifically whether I put that phrase in or not.

8 Q You did not provide any declaration to the Court  
9 concerning the call with Miss Dunn, did you?

10 A No.

11 Q And was that because your recollection was  
12 different than Mr. Stoelting's recollection?

13 A No. When we prepared the affidavit, we didn't  
14 have any expectation that Miss Dunn would have a different  
15 recollection of the call so we didn't feel the need to put  
16 two affidavits in.

17 Q When the declaration speaks of a "passing  
18 reference to it," was that intended by you to provide a  
19 hedge or condition on the language to accommodate the fact  
20 that you did not hear everything that Mr. Stoelting heard?

21 A I don't remember that being the specific reason,  
22 but it was a brief conversation with Miss Dunn so everything  
23 was very short.

24 MR. ISEMAN: Nothing further.

25 THE COURT: Any redirect?

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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 O 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

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

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

A Yes, I did.

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

A Almost immediately after the phone conference.

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

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

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

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

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

A Yes, I did.

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

A It was my understanding that the characterization

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

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

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

12 Q On the call, you also informed Mr. Stoelting and  
13 Mr. McGrath that you consulted with accountants on the gift  
14 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 --

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

THE COURT: Sustained.

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BY MS. MEHRABAN:

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

MR. ISEMAN: Same objection.

THE COURT: Same ruling.

BY MS. MEHRABAN:

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

A That's correct.

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

A That's correct.

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

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

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

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

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

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

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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

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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

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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

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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](http://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](http://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.

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

3 THE COURT: Any objection?

4 MR. ISEMAN: I have no objection.

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

7 (Plaintiff's Exhibit 8 received.)

8 BY MS. MEHRABAN:

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

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

15 A Um-hum, yes.

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

24 A Yes.

25 Q Okay. You remember generally that the website

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

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

4 A No, that's not correct.

5 THE COURT: Overruled.

6 Q What do you remember?

7 A I -- at what point in time?

8 Q When you looked at the website.

9 A At which point in time?

10 Q The first time.

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

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

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

24 Q And did you look at it more than once?

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

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1 May and again probably in August.

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

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

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

14 A Yes, you did.

15 Q Was that your understanding at the time?

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

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

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

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1 understanding was achieved all at one point in time.

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

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

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

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

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

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

24 Q It was in your possession, correct?

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

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1 learned that it was in my in box on July 21st. I do not  
2 believe I read it prior to the conversation.  
3 Q Okay. And this was an e-mail that you received  
4 from your client, Mr. Wojeski?  
5 A That's correct.  
6 Q Okay. I am gonna show you a document that we've  
7 marked as Plaintiff's Exhibit 22.  
8 MS. MEHRABAN: Your Honor, I know this was filed  
9 last night, but the copy that I have was from Miss Dunn's  
10 e-mail and so it doesn't have the ECF number on it. But I  
11 am sure I can get that for you if you want it.  
12 THE COURT: Thanks, I have it. It's 188.  
13 MS. MEHRABAN: All right, thank you.  
14 BY MS. MEHRABAN:  
15 Q This document attaches as Exhibit A the e-mail you  
16 received from your client, Mr. Wojeski, correct?  
17 A Yes, it does.  
18 Q Okay. And if you turn to the next page, it  
19 contains an e-mail from someone named Nanci Pipo at South  
20 Towns Financial Group to David Smith, or a fax or an e-mail?  
21 A It appears to.  
22 Q The next page of the document, which is page 205  
23 of the fax, it's entitled "private annuity contract,"  
24 correct?  
25 A That's correct.

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1 Q Okay. This document was signed, it looks like, by  
2 David Smith, correct?  
3 A I can't read the handwriting, but that's what it  
4 appears likely to be.  
5 Q Okay. When did you first see this document?  
6 A I saw it -- I know that I saw it on -- do you mean  
7 the document in terms of the entire document with the e-mail  
8 from Mr. Wojeski?  
9 Q No.  
10 A Or are you talking about just that one page?  
11 Q Just Exhibit A, just this page.  
12 A Just Exhibit A or just this page?  
13 Q Just this page.  
14 A I don't recall specifically when I saw it, I  
15 believe it was -- I don't recall specifically the first time  
16 I saw it.  
17 Q Okay. The next page of the document is also  
18 entitled private annuity contract, correct?  
19 A Yes.  
20 Q And this contains the terms of the agreement,  
21 correct?  
22 A It contains the words contract terms.  
23 Q Okay. And it shows that the periodic payments for  
24 the contract are \$489,932?  
25 A Well, it contains references, but it doesn't

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1 contain any kind of contract.  
2 Q It states that the contract terms -- the periodic  
3 payment under the contract terms are \$489,932, for example,  
4 correct?  
5 A Those are the words on this page. As I said, it  
6 doesn't -- this document doesn't contain a contract.  
7 Q Well, what is this document?  
8 A I don't know.  
9 Q And you received this from Mr. Wojeski, correct?  
10 A Yes.  
11 Q Okay. And you discussed it with Mr. Wojeski at  
12 the time?  
13 A My discussions with my client are privileged and I  
14 don't know what time you're referring to.  
15 Q I'm referring to --  
16 A You say "at the time."  
17 Q Prior to July 22, 2010.  
18 A No, I did not.  
19 Q Okay. Did you discuss with Mr. Wojeski at any  
20 time prior to July 22, 2010, your conversation with  
21 Mr. Stoelting and Mr. McGrath, the terms of the private  
22 annuity contract?  
23 A I'm sorry, could you repeat that question?  
24 MR. ISEMAN: Can we have that read back?  
25 (Record read back.)

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1 MR. ISEMAN: Object to the form of the question.  
2 I don't understand it.  
3 THE COURT: Do you understand the question?  
4 THE WITNESS: No, I don't, because --  
5 THE COURT: All right.  
6 THE WITNESS: Okay.  
7 THE COURT: Objection is sustained.  
8 BY MS. MEHRABAN:  
9 Q Okay. I'll ask it again. At any time prior to  
10 your call with Mr. Stoelting and Mr. McGrath on July 22,  
11 2010, did you discuss with Mr. Wojeski the terms of the  
12 private annuity agreement?  
13 A I did not know that a private agreement -- private  
14 annuity agreement existed prior to that time and no, I did  
15 not discuss the terms of a private annuity agreement with  
16 Mr. Wojeski prior to that date.  
17 Q Did you discuss with him the terms of the private  
18 annuity trust?  
19 A Again, I have to state that my communications with  
20 my client are confidential, but we had several  
21 communications regarding the trust and the declaration of  
22 trust.  
23 Q Well, did you discuss with Mr. Wojeski that the  
24 periodic payments under the private annuity trust were  
25 \$489,932 a year?

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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.

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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

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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.

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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

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

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

8 A Yes.

9 Q Okay. And the real estate deal closed on July 22,  
10 2010, correct?

11 A Yes.

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

13 A Yes.

14 Q -- from Lynn Smith? Okay.

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

19 A I don't believe he did, no.

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

24 A I received a letter from the SEC.

25 Q In that letter was contained a document request,

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1 correct?

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

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

6 A Yes, he did.

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

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

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

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

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

24 A Yes.

25 Q And the first sentence of the second paragraph

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

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

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

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

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

18 A I corrected my prior statement, yes.

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

21 A That's correct.

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

25 A That's correct.

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1 Q Did you draft that declaration?

2 A I did.

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

4 Q I am gonna show you what has been marked as  
5 Plaintiff's Exhibit 20. It was e-filed and it's document  
6 147.

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

13 A That's correct.

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

16 A That's correct.

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

18 (Pause in proceedings.)

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

22 A That's correct.

23 Q And these are from the trust files?

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

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1 Q Sorry, the trustee's file.

2 A No, it's not.

3 Q Where is it from?

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

6 Q 2010?

7 A 2010.

8 Q Under what circumstances did he give you the  
9 document?

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

14 Q Why was he giving it to you?

15 A Why was he giving it to me?

16 Q Yes.

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

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

21 MR. ISEMAN: No objection.

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

24 (Plaintiff's Exhibit 13 received.)

25 THE COURT: What's the date of the document

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1 production to the SEC?

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

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

8 BY MS. MEHRABAN:

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

11 A Correct.

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

14 A That is my understanding, yes.

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

17 A I did.

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

19 A I did.

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

22 A Yes.

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

25 A Yes.

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

3 A Yes.

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

8 A No reason whatsoever.

9 Q Okay.

10 MS. MEHRABAN: One minute, your Honor.

11 (Pause in proceedings.)

12 MS. MEHRABAN: No further questions, your Honor.

13 MR. McGRATH: One minute, your Honor?

14 MS. MEHRABAN: Sorry.

15 THE COURT: Yes.

16 (Pause in proceedings.)

17 MS. MEHRABAN: No further questions, your Honor.

18 THE COURT: Thank you.

19 MR. ISEMAN: May I?

20 THE COURT: Yes.

21 CROSS-EXAMINATION

22 BY MR. ISEMAN:

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

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Dunn - Cross - Iseman

1 did you use the term "private annuity agreement"?

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

5 MS. MEHRABAN: Objection.

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

8 BY MR. ISEMAN:

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

11 A Absolutely not.

12 Q -- as of the date of that call?

13 A Absolutely not.

14 MR. ISEMAN: Nothing further.

15 THE COURT: Anything further?

16 MS. MEHRABAN: No, your Honor.

17 THE COURT: You may step down.

18 (Witness was excused.)

19 THE COURT: Anything further, Mr. Iseman?

20 MR. ISEMAN: No, your Honor.

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

23 MS. MEHRABAN: No, your Honor.

24 THE COURT: Is there anything further today?

25 MR. ISEMAN: No, your Honor.

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*Duan - Cross - Iseman*

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

THERESA J. CASAL, RPR, CRR  
UNITED STATES DISTRICT COURT - NDNY

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# REDACTED

**From:** "Mehraban, Lara" <MehrabanL@sec.gov>

**Date:** Fri, 29 Oct 2010 15:27:33 -0400

**To:** Thomas J. Urbelis<tju@uf-law.com>

**Cc:** Stoelting, David<StoeltingD@SEC.GOV>; McGrath, Kevin<McGrathK@SEC.GOV>

**Subject:** Subpoena Dated October 20, 2010

Dear Mr. Urbelis,

On October 20, 2010, I sent you a subpoena to appear at an evidentiary hearing in federal court in Albany, NY on November 16, 2010. Please confirm by Wednesday, November 3, 2010 that you accept service of the subpoena. Please also confirm that you will appear in court in Albany on November 16, 2010.

In addition, please note that Section 929E of the recently-enacted Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), effective July 22, 2010, provides for nationwide service of subpoenas by the SEC in federal district court proceedings.

Section 929E of Dodd-Frank amended Section 22(a) of the Securities Act, Section 27 of the Exchange Act, Section 44 of the Investment Company Act and Section 214 of the Investment Advisers Act to add the following language:

In any action or proceeding instituted by the Commission under this title in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence.

Feel free to give me or David Stoelting a call if you have any further questions. You can reach me at (212) 336-0591 and David at (212) 336-0174.

Regards,

Lara

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New York Regional Office  
Three World Financial Center  
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New York, NY 10281-1022  
tel. 212.336.0591  
fax 212.336.1348

1/28/2011