UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff-Appellee,

vs.

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

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

Defendants, and

LYNN A. SMITH,

Relief Defendant-Appellant.

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

Intervenor.

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

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PRELIMINARY STATEMENT

On April 20, 2010, simultaneous with the commencement of this action and a parallel criminal investigation, plaintiff SEC filed a motion for a preliminary injunction seeking an asset freeze over a five-page list of bank and brokerage accounts. Neither the Complaint nor any of the affidavits submitted in support of the motion made any mention of the last account on the list, a stock brokerage account owned by the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04. Nevertheless, the District Court issued a Temporary Restraining Order and Asset Freeze Order against the Trust's brokerage account held by RMR Wealth Management in New York City.

In its application for the TRO and Asset Freeze Order, Plaintiff did not put forth any evidence to support the inclusion of the Smith Trust such that an order and in fact did not allege any ownership interest in the account by any named defendant or relief defendant. Plaintiff's Complaint was devoid of any mention whatsoever of the creation of the Trust, the Trust's assets, its beneficiaries or Trustee. Following Judge Kahn's issuance of a Temporary Restraining Order, plaintiff did not bother to notify or serve[1] the then-Trustee, Thomas J. Urbelis, or either of the beneficiaries of the stock account with the Complaint, the motion papers or the Temporary Restraining Order. The Trustee successfully sought intervention in this action to oppose the motion for a preliminary injunction against the Trust's assets.

On July 7, 2010, having reviewed Plaintiff's Complaint, three lengthy affidavits with four volumes of exhibits, all of which were submitted in support of Plaintiff's motion for a preliminary injunction, and having conducted a three-day evidentiary hearing in June, received

[1] At all times relevant hereto, the former Trustee Thomas Urbelis was a resident of Massachusetts, Geoffrey Smith was a resident of New York and Lauren Smith was a resident of Colorado.

the testimony of more than ten witnesses, reviewed hundreds of hearing exhibits and deposition transcripts, considered the legal memoranda of the parties, and having deliberated for nearly a month, this Court issued a lengthy Memorandum-Decision and Order which granted in part and denied in part the SEC's motion for a preliminary injunction. Relevant to the instant motion for reconsideration is the Court's denial of the SEC's motion for a preliminary injunction to restrain the assets of the Trust's stock account.

STATEMENT OF FACTS

Although the Court is well aware of the procedural history of the case and the hearing on the preliminary injunction motion, the portion of the litigation which occurred outside of court is highly relevant to this motion. In attempting to influence the Court's perspective on the circumstances surrounding the purported "discovery" of the Private Annuity Agreement, SEC counsel David Stoelting submitted a Declaration wherein he repeatedly asserted that no one told the SEC about a private annuity agreement and thus characterizes the document as "recently discovered" and "concealed" from the SEC and the Court. Nothing could be further from the truth. Notably, while insisting that no witness ever referred to the private annuity, Mr. Stoelting carefully avoids stating under oath that the SEC ever asked anyone about a private annuity and leaves the Court to fill in the blanks through assumption and innuendo.

The facts relevant to this motion for reconsideration, including the availability of the evidence which the SEC submits should justify reconsideration, are set forth in the affidavits of Jill A. Dunn, attorney for the Trust, and James D. Featherstonhaugh, attorney for Lynn Smith, and will not be reiterated here.

POINT I

PLAINTIFF'S MOTON FOR INJUNCTIVE RELIEF BASED ON ITS AMENDED COMPLAINT MUST BE DENIED.

The SEC's application for an Order to Show Cause is made pursuant to Federal Rule of Civil Procedure 54(b) which provides that:

> any order or other decision, however designated … may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

In the application for an Order to Show Cause, plaintiff sought both a temporary restraining order freezing the accounts of the Trust, Geoffrey Smith and Lauren Smith during the pendency of the motion and a preliminary injunction restraining the same accounts. The Court granted the requested TRO but, in signing the Order to Show Cause, added handwritten notations to limit the scope of the application by **"...deeming this application as a motion (1) to reconsider the portion of the order filed July 7 2010 [86] as to the trust, and (2) for a preliminary injunction as to Nancy McGinn..."** See Court Document 104; Court Text Notice filed 8/4/10 at 8:50am. In doing so, the Court significantly curtailed the relief that may be granted in this motion.

The signed Order to Show Cause did not incorporate the SEC's application for preliminary injunctive relief against the Trustee, Geoffrey Smith or Lauren Smith as newly named defendants in a state law claim asserted in the Amended Complaint. Since the Court would not have had jurisdiction on July 7, 2010 over as yet unnamed parties and as yet unasserted claims, it now lacks jurisdiction to order injunctive relief against those parties in reconsidering the July 7, 2010 Order.

The SEC's attempt to retroactively recoup monies which were expended lawfully and in good faith by the Trustee in reliance on this Court's decision is inherently unfair. The Trustee

acted in good faith upon the Court's decision and upon advice of counsel in moving funds out of the RMR Wealth Management account and into bank accounts controlled exclusively by him, rather than continuing to allow a broker and clearinghouse 150 miles away to manage the account. The Trustee expended $600,000 plus closing costs to acquire real property from Lynn Smith at the behest of the beneficiaries so that they would not be in danger of losing their family vacation home. The lakefront property was a sound investment purchased at fair market value. This Court had declared the property to be Lynn Smith's separate property inherited from her father in 1969. Neither the real property nor the funds used to acquire it were encumbered or under restraint by this or any court at the time of the purchase. The Trustee's expenditure of funds for legal and accounting bills, health insurance and living expenses for the beneficiaries and for investments were legitimate expenditures made in specific reliance on this Court's July 7, 2010 Order. Since the issuance of the current TRO, the Trustee has been unable to expend funds to pay the Trust's taxes or additional legal bills.

The present TRO and any request for injunctive relief over the accounts of Geoffrey and Lauren Smith is acutely unfair and an abuse of litigation by the SEC. From the face of the Amended Complaint, it is clear that these two individuals have only been named in this action as a result of actions which occurred after this Court filed its decision and order on July 7. Presumably, the SEC was able to convince the Court to issue a temporary order over these individuals only as a result of the many half-truths, innuendos and false accusations that defense counsel concealed evidence, when in fact, it is the plaintiff's counsel who has concealed from this Court the material fact that all of the evidence on which this motion rests was either in the hands of the SEC or could have been discovered with due diligence. The devastating effect of

the current TRO has left Lauren Smith penniless in Colorado, she having unwittingly allowed her paychecks to be direct-deposited into a bank account which was frozen without notice to her.

On this motion for reconsideration, there is no jurisdiction to impose a retroactive asset freeze over individuals named in an Amended Complaint that was filed well after the issuance of the decision sought to be reconsidered.

The scope of the application and therefore the issues before this Court for purposes of this motion are limited to (1) whether any "new" evidence has been discovered that would warrant reconsideration of the decision reached after a three-day evidentiary hearing and nearly a month of deliberation, and (2) if such evidence is deemed to be newly discovered, whether it would have resulted in a different outcome as it relates to "the portion of the Order filed July 7, 2010 relating to the Trust." See Documents 86, 104.

POINT II

PLAINTIFF HAS FAILED TO MEET THE APPLICABLE LEGAL STANDARD TO SUCCEED IN ITS MOTION FOR RECONSIDERATION.

In its motion, the SEC contends that it has obtained "new" evidence that is of such significance that if it had been before the Court during the original preliminary injunction hearing, it would have changed the outcome of the Court's order denying the freezing of assets in the David L. and Lynn A. Smith Irrevocable Trust (the "Trust"). We respectfully disagree.

A. Legal Standard on Motion for Reconsideration.

A party seeking reconsideration of a Court's prior order must meet "a demanding standard." Sumner v. McCall, 103 F. Supp. 2d 555, 558 (NDNY 2000). A motion for reconsideration is not a vehicle for "presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple.'" Sequa Corp. v. GBJ Corp., 156

F.3d 136, 144 (2d Cir. 1998). Unlike the Emperor Nero, "litigants cannot fiddle as Rome burns," (Vasapolli v. Rostoff, 39 F.3d 27, 36 (1st Cir. 1994)) or to use litigation like a "game of hopscotch," in which parties switch from one legal theory to a new one "like a bee in search of honey." Cochran v. Quest Software, Inc., 328 F.3d 1, 11 (1st Cir. 2003).

In this District, there are only three possible grounds upon which a motion for reconsideration may be granted:

1) an intervening change in controlling law;

2) the availability of new evidence *not previously available;* or

3) the need to correct a clear error of law or prevent manifest injustice.

Gaston v. Coughlin, 102 F.Supp.2d 81 (N.D.N.Y. 2000) citing C-TC 9th Avenue Partnership v. Norton Company, 182 B.R.1 (N.D.N.Y.). Because plaintiff does not make any argument regarding an intervening change in controlling law, the first ground need not be considered.

With respect to the second ground, motions for reconsideration are "not vehicles for bringing before the Court theories or arguments that were not advanced earlier. Nor may the motion present evidence which was available but not offered at the original [motion]." C-TC 9th Avenue Partnership, supra citing Natural Resource Defense Council, Inc. v. United States Environmental Protection Agency, 705 F.Supp. 698 (D.D.C.) *vacated on other grounds* 707 F.Supp. 3 (D.D.C. 1998). Similarly, they are not to be treated as motions for "initial consideration" (National Ecological Foundation v. Alexander, 496 F.3d 466, 477 (6th Cir. 2007)), and courts routinely decline to consider new arguments or new evidence on reconsideration where those arguments or evidence were available earlier. Moran Vega v. Cruz-Burgos, 537 F.3d 14, 18, n.2 (1st Cir. 2008).

In Travelers Cas. & Sur. Co. v. Crow & Sutton Associations, 228 F.R.D. 125 (N.D.N.Y. 2005), the Court described Rule 60(b)(2) as contemplating "newly discovered evidence which by due diligence could not have been discovered in time" for the disposition at issue. Fed.R.Civ.P. 60(b)(2). Here, the SEC must meet an "onerous standard" by showing that: (i) newly discovered evidence was of facts in existence at the time of the dispositive proceeding; (ii) it was justifiably ignorant of those facts despite due diligence; (iii) the evidence is admissible and of such importance that it probably would have changed the outcome; and (4) the evidence is not merely cumulative or impeaching. Id. at 127-128. Moreover, the newly discovered evidence must be "highly convincing." Kotlicky v. US Fid. & Guar. Co., 817 F.2d 6. 9 (2d Cir. 1987). Evidence is not newly discovered if it was in the moving party's possession prior to the entry of judgment. Johnson v. Askin Capital Mgmt., L.P., 202 F.R.D. 112, 114 (S.D.N.Y. 2001).

With respect to the third ground, the Second Circuit held that "it is not enough, … that the [moving party] now makes a more persuasive argument …The law of the case will be disregarded only when the Court has 'a clear conviction of error' with respect to a point of law on which the previous decision was predicated. Fogel v. Chestnutt, 668 F.2d 100, 109 (2nd Cir. 1981). The Second Circuit does not allow reconsideration to permit counsel to reevaluate litigation strategy. Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986) (attorney's failure to evaluate carefully the legal consequences of a chosen course of action provides no basis for relief from a judgment); see U.S. v. O'Neil, 709 F.2d 361, 373 (5th Cir. 1983). "Although obviously better informed than foresight, an argument based on hindsight is not a ground upon which a court may grant Rule 60(b) relief." Nemaizer, 793 F.2d at 62; See also, Goldstein v. State of New York, 2001 Westlaw 893867 (SDNY Aug. 7, 2001)) (that counsel did not think of a particular strategy on theory does not justify reconsideration). "[A]n attorney's actions, whether

arising from neglect, carelessness or inexperience, are attributable to the client, who has a duty to protect his own interests by taking such legal steps as are necessary. Ackerman v. United States, 340 U.S. 193, 197-98, 71 S. Ct. 209, 211, 212, 95 L. Ed. 207 (1950). To rule otherwise would empty the finality of judgments rule of meaning.

B. The SEC has not met its burden of demonstrating the existence of "newly discovered" evidence.

The SEC advances three pieces of evidence it characterizes as "new" and argues that the July 7 decision would have been different had that evidence been before the Court. A close review of the "new" evidence being proffered clearly demonstrates that the motion should be denied because the purportedly new material was either offered or accepted into evidence or it "was available but not offered" at the original hearing. C-TC 9th Avenue Partnership at 701-02. Moreover, even if the Court follows the SEC's perilous leap over a giant chasm and finds this evidence to be "newly discovered" for purposes of this motion for reconsideration, such a finding does not alter the July 7 decision as it relates to the Trust.

1. Charter One Stock

It is undisputed and a part of the hearing record considered by this Court that Lynn Smith's separately owned Charter One stock, which the Court correctly found was acquired by her in the early 1990's with the use of her inheritance and which never changed form until sold by the Trust, was pledged as collateral by her to KC Acquisition in October 2002 and was returned to her in the same manner, intact and unchanged in July 2003, more than a year before it was used to fund the Trust. The SEC now contends that this information, already in evidence, supports a claim that the stock was fraudulently conveyed to the Trust and should be considered David Smith's property.

The SEC argues that the single loan of this stock warrants reconsideration on a theory that the stock was not left exclusively in Lynn Smith's account but was once loaned to David Smith's business. This argument is wholly without merit. The brokerage statements were produced by Lynn Smith's attorneys to the SEC during discovery and were in evidence. The letters of authorization were obtained by the SEC either from the Receiver or from the FBI and were in evidence. Lynn Smith was subject to cross-examination twice by the SEC counsel about this transaction, first at her deposition and then at the hearing. The facts that the SEC now purports to be critical, "new" evidence were indisputably in evidence and before the Court in rendering its decision on July 7. As noted, evidence is not newly discovered if it was in the movant's possession prior to the entry of judgment. Johnson, supra at 114.

In an attempt to excuse its failure to address this, the SEC has chosen to footnote its counsel's fecklessness by first claiming that the evidence is "new" but then conceding that the evidence was available at the hearing. In a further bold move, the SEC then attempts to avoid responsibility by asserting that they "did not develop the evidence" because "counsel for the Trust and Lynn Smith did not specifically argue that the Charter One stock had been unchanged or untouched prior to its transfer to the Trust Account." To the extent one can comprehend such an argument, the SEC's 'logic' is built on faulty premises.

First, the SEC clearly misapprehends the applicable burden of proof at the hearing. Neither the Trust nor Lynn Smith was required to prove anything, as it was the SEC seeking the preliminary injunction. Second, it was unnecessary to argue, specifically or otherwise, that the 100,000 shares of Charter One stock that funded the Trust was "unchanged" or "untouched" prior to its transfer to the Trust because there is no evidence whatsoever, even this so-called "newly discovered" evidence, which could possibly show otherwise. Even following the SEC's

tortured reasoning, the Court's findings cannot be disturbed because the Charter One stock was intact and unchanged the entire time that Lynn Smith owned it, even when she pledged it as collateral from October 2002 until July 2003. She never sold it, liquidated it or otherwise converted it from its form as shares of Charter One stock. She always owned it, even when she loaned it as collateral[2] in 2002. The Charter One stock that was sold between 2001 and 2004 was not the same shares used to create the Trust; they were separate and distinct shares of stock that she received as dividends from Charter One, as recognized by this Court on pages 37 – 39 of its July 7 decision, and were unrelated to the 100,000 shares used to fund the Trust. The SEC cannot blame its adversaries for not taking the time to explain this to them or to help them understand the evidence which they put before the Court.

In short, the evidence concerning the single use of Charter One stock as collateral was before the Court and the facts surrounding the loan were contained in the Ian Meyers complaint, which the SEC unsuccessfully offered into evidence. That the SEC didn't "fully develop" evidence in its possession is insufficient to justify considering these new arguments under the very narrow limitations of a motion for reconsideration.

Even if the Court could possibly rationalize how this could constitute "new" evidence justifying reconsideration, the temporary pledge the Charter One stock has no impact on the Court's decision to release the Trust from the SEC asset freeze. In its July 7, 2010 Order, the Court found that "there is no proof that fraudulently obtained funds were deposited into the Stock Account prior to the purchase of the bank stock in the early 1990s". This stock was

[2] This hypothecation of stock is not unusual, is often done by clearinghouses through margin accounts, and did not result in a severance of Lynn Smith's title to the stock. In fact, the documents relied upon by the SEC demonstrate that the shares were the subject of a "journal" transaction rather being "transferred" or "sold," a distinction which is acknowledged in Mr. Stoelting's declaration. See Stoelting Decl. ¶ 44, 45, 49.

"untouched for the fourteen years it remained in the stock account while it grew in value from the $400,000 to over $4 million by market forces alone." (DE 86 at 37-38). After determining the source of the Charter One stock, the Court concluded that "this stock investment represents untainted funds easily identifiable and severable from the stock account as a whole." (DE 86 at 38). Nothing here is changed by this new argument.

Similarly, there is no dispute that Lynn Smith sold Charter One stock over the years. As the Court acknowledged, she acquired substantial amounts of Charter One stock over the course of many years as a direct result of the use of her inheritance. There is no evidence, however, that she ever sold the bulk of that stock, which was the 100,000 shares of Charter One that she eventually transferred to the Trust. Mr. Stoelting's chart shows 29,000 shares of Charter One sold by her between 1999 and 2004. When she funded the Trust in August 2004, she still owned an *additional* 100,000 shares, even after selling off, by the SEC's account, more than 29,000 shares prior to that date. This evidence merely "reveals" that Lynn Smith sold some of the Charter One stock which she received as a result of the market forces acknowledged by the Court. The account statements, all of which were in evidence at the hearing, conclusively demonstrate that the 100,000 shares of Charter One stock were obtained with untainted funds derived from her inheritance and they were easily identifiable and severable from the stock account as a whole, as found by this Court on July 7. The SEC's suggestions to the contrary with the use of a new "summary chart" and Mr. Stoelting's misleading references to "revelations" and his characterizations of the transactions which were already before the Court does not change the character or nature of the stock in 2004 or the Court's findings and conclusions.

2. The Private Annuity Agreement

The SEC places great weight on the "discovery" of the Annuity Agreement between the Smiths and the Trust and deems this to be "critical" evidence not disclosed despite "diligent efforts" on the part of the SEC. The SEC further contends that the "Annuity Agreement directly contradicts sworn statements, document production and testimony prior to and during the preliminary injunction hearing" based on claims "that the Smiths had no continuing interest in the assets of the Trust and that the Smiths transferred approximately $4,450,000 of Charter One stock to the Trust solely for the benefit of their two children" (Stoelting D. ¶9). Despite the emphatic nature of Mr. Stoelting's Declaration, this Agreement does not constitute "new" evidence that warrants reconsideration and even if the Court determines the Annuity Agreement constitutes "new" evidence, the SEC provides an unsophisticated, partial, exaggerated and inaccurate explanation as to the extent of David and Lynn Smith's interest in the Trust. On the contrary, as substantiated by the expert report submitted by David Evans, Esq. attached to the Declaration of Jill A. Dunn, neither David Smith nor Lynn Smith have a property right in the assets of the Trust despite the existence of a separate, unsecured contractual agreement in the form of a future private annuity payment. Accordingly, the so-called "new" evidence does not alter the Court's original decision to release the asset freeze as it relates to the Trust based on its finding that "the Trust benefits did not flow to David Smith and he did not exercise control over them such that he treated the corpus as his own." (see July 7, 2010 Decision and Order, pages 40-41). The determination that David Smith is not the beneficial owner of the Trust remains valid despite the existence of the Annuity Agreement because the annuity agreement does not give him any access to or rights in the Trust corpus.

The SEC contends that the Annuity Agreement is "new" evidence that was not disclosed despite its efforts to obtain all documents and evidence relevant to the assets of David and Lynn Smith and the Trust. However, this contention is nothing more than a veiled attempt to conceal its ineptitude in developing the facts of its own case based on materials the SEC had in its possession that could have led to the disclosure of this document early on in the process. For example, the SEC has known of the existence of the David L. and Lynn A. Smith Irrevocable Trust since the beginning of this litigation and has been in possession of this Trust Agreement at least since May 29th when it was provided by the former Trustee to the SEC.[3] That Trust instrument, if read, clearly provides the Trustee with the power:

> (10) To purchase property from the Donors in exchange for a *private annuity* payable to the Donors. (emphasis added)

Even more, this Declaration of Trust was produced along with a transmittal letter from David L. Smith to the former Trustee enclosing the Trust Document. The letter begins:

> 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 …

This transmittal letter along with the Declaration was marked as Exhibit 17 for purposes of identification at the deposition of Thomas Urbelis and as Intervenor Exhibit 7 when it was admitted into evidence during the preliminary injunction proceeding.

Incredibly, the letter was the subject of several questions by the SEC during the Urbelis deposition, none of which targeted Mr. Smith's characterization of the Trust as a "Private Annuity Trust". See Deposition Transcript of Thomas Urbelis, dated June 1, 2010. On page 20, the examiner directs Mr. Urbelis' attention to the transmittal letter and pursues her line of

[3] It was also provided to the SEC on May 24, 2010 by counsel for the Trust.

questioning beginning with David Smith's reference that "he was not eligible to exercise any direct control over the Trust or its investments" (pgs. 20, 21-24). She further questions Mr. Urbelis over the next sentence of the letter "We will discuss some options to accomplish that at a later date" (pgs. 22, 9-11). And even further as to the next paragraph of the letter that references "Bruce Hoover of Sullivan & Oliverio in Buffalo" (pgs. 23, 14-17). Yet she never asked about a private annuity, as referenced in the first sentence of the letter.

Simply stated, the letter's reference to a "Private Annuity" and the Trust provision relating to a private annuity demonstrates that the SEC failed to conduct the requisite due diligence that could have possibly lead to the evidence that is now being proffered as "new" for purposes of this motion. Instead, without acknowledging its own ineptitude, the SEC attacks Lynn Smith, Thomas Urbelis, legal counsel and witnesses called on behalf of Mrs. Smith and the Trust for intentionally failing to disclose the Annuity Agreement despite their never having the wherewithal to request it. The SEC is not entitled to a second chance to litigate its claim against the Trust based on this evidence when it is clear that lack of timely discovery of the Annuity Agreement was the result of the government's neglect rather than any attempt by Lynn Smith or the Trust to conceal its existence.

Even if the Court deems the Private Annuity Agreement "new" evidence for purposes of this motion, the Court's finding that David Smith was not an equitable owner of the Trust remains intact. Reference is made to the expert opinion that was issued by David L. Evans that explains the legal interrelationship between the irrevocable trust and the contractual agreement in the form of an annuity between the Trust and David and Lynn Smith. Despite the existence of the Annuity Agreement, the Trust remains as a separate legal instrument in which the beneficial ownership of the Trust is fully vested in the beneficiaries.

The beneficiaries' interests consist of two components. During the ongoing periodic administration of the Trust, the beneficiaries may receive the income and principal distributions subject to the Trustee's unfettered discretion to provide for their health, education, maintenance and support. Upon the passing of the survivor of David and Lynn Smith, the Trust will terminate and the beneficiaries will have the right to receive all of the then remaining property in the Trust. The Trustee is obligated to operate the Trust, separate and distinct from his own affairs and the affairs of anyone else. The Trustee has a fiduciary duty to respond to and provide for the property interests of the individual beneficiaries. **Significantly, David and Lynn Smith have no property rights in the assets of the Trust.** (See Dunn Decl. Ex. A).

The Annuity Agreement is a separate independent contractual transaction that was authorized by Declaration of Trust ¶6(10) in which Lynn and David Smith retain an interest in the Trust only as potential, unsecured creditors of the Trust. As annuitant - creditors of the Trust, they have no collateral interest in the assets of the Trust nor do they have the power to manage the Trust or control the Trustee in any manner. The Trustee's obligation to Lynn and David Smith is contractual in nature, as opposed to the higher fiduciary obligations it owes to Geoffrey and Lauren as the Trust beneficiaries.

In its Order dated July 7, 2010, the Court found in favor of releasing the Trust from the asset freeze based on the factual finding that the SEC "failed to demonstrate that David Smith exercised considerable authority over [the Trust] to the point of completely disregarding its form and acting as though its assets [were] his alone to manage and distribute." SEC v. McGinn, Smith & Co., et al., *citing* In re: Vebeliunas, 332 F.3d at 92. The Court found that the extent of Mr. Smith's involvement in the Trust consisted of acting as its broker with the former Trustee, who was indisputably the one who maintained control of the assets. The Court further found that

Mr. Smith did not distribute the assets of the Trust to himself and "the record does not support the conclusion that David Smith considered the Trust his own property." Id. at page 39-40.

Lynn Smith and the Trust and its beneficiaries do not dispute that the SEC has a right to freeze the contingent benefits David Smith may be eligible for under the Annuity Agreement should he survive long enough to begin receiving payments, based on his consent to the preliminary injunction. But it is inappropriate and inconsistent with the purpose of the Trust to freeze the assets in the Trust when in fact those annuity payments may never have to be made or because of circumstances may not be able to be made. As to Relief Defendant Lynn Smith, there is no basis to freeze her annuity payments since the source of those payments are from untainted Trust assets. As to the Trustee and the beneficiaries, freezing the assets will serve only to stymie the Trustee's ability to grow the assets of the Trust.

3. The Undated, Handwritten Letter of David Smith

The third and final piece of "new" evidence that the SEC purports to be so significant as to have the effect of changing the outcome of the original hearing if its existence had been known is Exhibit 14, the handwritten letter attributed to David Smith and seized from his residence on April 20, 2010.

In addition to being written in 1999 or 2000 about events which are not in issue in this lawsuit and consequently being completely irrelevant, Exhibit 14 is not newly discovered evidence. It has been in the possession of the U.S. Attorney's office since April 20, 2010 and could have been, and more than likely was, shared with the SEC well before the hearing pursuant to the information sharing arrangement between these two agencies. The Court should direct the SEC to identify when it first learned of the existence of the document, when it received the document and the extent of information sharing it has received from the U.S. Attorney's office. The document was either in the possession of the SEC or available to it before or during the

hearing and certainly before the decision was issued, and as such, it should not be considered by the Court in a motion for reconsideration.

The SEC is seeking to use this evidence in furtherance of a fraudulent conveyance theory, now presented for the first time under the statutory authority of the New York State Creditor and Debtor law. Regardless of the moniker the SEC now elects to use for this claim, the SEC raised and pursued this argument in the original preliminary injunction hearing. SEC attorney Kevin McGrath cross–examined Geoffrey Smith on the issue of whether the Trust was created to shield assets from potential creditors. Hearing Transcript 527-530. The SEC also offered for introduction (marked for identification as Plaintiff's Exhibit 131) the 2003 Ian Meyers civil lawsuit which named both Lynn and David Smith as defendants. The purpose of Mr. McGrath's line of questioning was clear as depicted in the following colloquy:

> Q: When you had a conversation with your father in Thanksgiving 2004, did he make any reference to you that one of the reasons they set up this trust was to protect family assets from potential creditors of your mother or father or the McGinn, Smith businesses?
>
> A: No.[4]
>
> Hearing Transcript, p. 530, 13-18.

In its summation, having failed to submit any proof tending to show that David Smith exercised ownership or control over the Trust stock account, SEC counsel argued that the creation of the Trust was intended to shield assets of David Smith from creditors. The argument was an attempt to dissuade the Court from following the authority of the Vebeliunas case. The Court rejected the SEC's fraudulent conveyance theory because it determined that the specific

[4] It is noteworthy that the SEC elected not to pursue this line of questioning with Lynn Smith, since she was a named defendant in that lawsuit, despite having the opportunity to examine her under oath on two occasions. They would not have liked the answer since the Ian Meyers lawsuit was resolved with a letter of apology and the return of the plaintiff's original investment in the amount of $200,000. (Hearing Transcript at page 570-572)

stock used to fund the Trust was derived solely from the separate property of Lynn Smith and was "easily identifiable", "severable" and "untainted" from the other assets in her stock account, thereby rendering David or Lynn Smith's intent or state of mind completely irrelevant.

Similarly, Exhibit 14 does not support this previously advanced theory or make it any more persuasive, since neither Lynn nor David Smith's intent is relevant in light of the fact that the funds within the Trust came from Lynn Smith's separate assets that cannot be traced to any ill-gotten gains. To the extent that Lynn Smith's intent in creating the Trust is relevant, the Smith letter exonerates Lynn Smith of having any actual knowledge of the troubles facing McGinn Smith & Co.:

> I have not shared any of this with Lynn, I assume because I have determined it won't be helpful. (Smith Letter at page 5)

As previously noted earlier, motions for reconsideration are "not vehicles for bringing before the Court theories or arguments that were not advanced earlier". C-TC 9th Avenue Partnership, supra. The SEC possessed or could have possessed all of the evidence at the time of the hearing which it now asserts could support a claim of fraudulent conveyance of the Charter One stock to the Trust in 2004. The Court considered the arguments and the evidence presented and rejected that theory, based on the Cavanagh and Heden cases. Regardless of the reason, the SEC chose not to argue the evidence available at the hearing in the same manner as it now argues in this motion. The SEC cannot advance a new or different argument now because it was unhappy with the success or lack thereof of its earlier efforts.

Finally, it is the position of the Trust and Lynn Smith that the Court's consideration of the SEC's fraudulent conveyance theory pursuant to the New York State Debtor and Creditor law is inappropriate at this time. Apart from the fact that it is doubtful this Court has supplemental jurisdiction over the state claim or that the SEC can somehow be deemed a

"creditor" under the law, a cause of action under this statute was not included in the SEC's original complaint. Since this is a motion for reconsideration based on an order arising from the original pleadings, the court does not have subject matter jurisdiction to consider the claim. Moreover, unlike §279 of the Debtor and Creditor which specifically permits a court to restrain a defendant from disposing of his property, §278 of the Debtor and Creditor Law, on which the SEC relies to maintain its asset freeze over Geoffrey and Lauren Smith, does not provide creditors with the same statutory remedy to restrain funds. The SEC's only remedy under §278 is to either attach or levy on the property alleged to have been fraudulently conveyed pursuant to the New York Civil Practice Law and Rules. Save Way Oil Co. v. 284 Eastern Parkway Corp. et al., 453 N.Y.S. 2d 554 (Civil Ct Kings County 1982).

CONCLUSION

For the foregoing reasons the Plaintiff's Motion for Reconsideration of that portion of the July 7, 2010 Order relating to the Trust should be denied.

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s/Jill A. Dunn

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