

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, : 10-CV-457 (GLS/DRH)

-against- :

McGINN, SMITH & CO., INC., McGINN, SMITH :
ADVISORS, LLC, McGINN, SMITH CAPITAL :
HOLDINGS CORP., FIRST ADVISORY INCOME :
NOTES, LLC, FIRST EXCELSIOR INCOME NOTES, :
LLC, FIRST INDEPENDENT INCOME NOTES, LLC, :
THIRD ALBANY INCOME NOTES, LLC, TIMOTHY :
M. McGINN, DAVID L. SMITH, LYNN A. SMITH, :
GEOFFREY L. SMITH, Trustee of the David L. and Lynn :
A. Smith Irrevocable Trust U/A 8/04/04, GEOFFREY R. :
SMITH, LAUREN T. SMITH and NANCY McGINN, :

Defendants. :
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AFFIDAVIT OF DAVID M. WOJESKI IN OPPOSITION TO PLAINTIFF SECURITIES AND EXCHANGE COMMISSION’S MOTION FOR SANCTIONS

STATE OF NEW YORK)
) s.s.:
COUNTY OF ALBANY)

David M. Wojeski, being duly sworn deposes and says the following under the penalty of perjury:

1. I hereby submit this affidavit in opposition to the Securities and Exchange Commission’s (“SEC”) Motion for Sanctions, dated January 31, 2011. This affidavit is based on matters within my personal knowledge.

2. I am a registered Certified Public Account in the State of New York and am the Managing Director of the accounting firm Wojeski & Company, CPAs, P.C.

Appointment as Trustee of the David A. & Lynn A. Smith Irrevocable Trust

3. In or around April 2010, Jill A. Dunn (“Dunn”) approached me about becoming the trustee of the David A. & Lynn A. Smith Irrevocable Trust U/A Dated August 4, 2004 (the “Trust”). Before accepting the engagement, I sought basic information regarding the Trust’s features and the powers granted to the trustee to ensure that it would not be an engagement that required extensive work or contained a risk of significant litigation. At that time, I requested a copy of the Trust’s agreement and any other documents that related to the Trust’s agreement through Dunn.

4. In response to my request for the Trust’s documents, Dunn provided me with the Declaration of Trust, dated August 4, 2004 (“Declaration of Trust”) only, which I reviewed in its entirety. As discussed with Dunn and upon review of the Declaration of Trust, I learned that the Trust was established by David and Lynn Smith as a simple, irrevocable trust for the benefit of their two children, Geoffrey and Lauren Smith.

5. Once I was satisfied that the Declaration of Trust established an uncomplicated, irrevocable trust in compliance with state and federal law, I met with the Trust’s accountant, John D’Aleo (“D’Aleo”) and Dunn, to review the Trust’s activity since its inception. D’Aleo showed me a “roll forward” that he prepared for the Trust to demonstrate how the Trust was initially funded and how each deposit and withdrawal from the Trust was allocated. We also reviewed the Trust’s tax returns to confirm that the Trust’s tax liabilities were satisfied and were consistent with the Trust’s “roll forward.” At the conclusion of this meeting, I requested copies of the documentation to support D’Aleo’s “roll forward,” which I understood to be the Trust’s tax returns from 2004 to 2008 and copies of the Trust’s brokerage account statements from September 2004 to April 2010 for my review.

6. After agreeing certain numbers from the Trust's tax returns and the Trust's brokerage statements to the "roll forward," I agreed to accept the appointment as trustee of the Trust.

7. By Trust Appointment, dated May 14, 2010, I was duly appointed as successor trustee of the Trust, effective as of May 22, 2010, following Urbelis' resignation.

Motion to Intervene and Lift the Temporary Restraining Order on the Trust's Assets

8. At the time that I was appointed trustee of the Trust, I was aware that the SEC had frozen the Trust's sole asset, its NFS/Fidelity brokerage account, as part of pending litigation against several parties, including the Trust's donors David and Lynn Smith (the "Action"), by temporary restraining order, dated April 20, 2010. I understood the basis for the temporary restraining order was an allegation that David Smith was a beneficial owner of the Trust.

9. Upon the recommendation of Dunn, I filed a motion on May 26, 2010 requesting that the Court issue an order permitting me to intervene in the Action for the limited purpose of asking the court to lift the temporary restraining order and asset freeze on the Trust's NFS/Fidelity brokerage account and to oppose the SEC's request for a preliminary injunction with regard to the same account ("Motion to Intervene") in furtherance of my duties as trustee.

10. As set forth in my Motion to Intervene, based on my review of the Declaration of Trust, the Trust's brokerage account statements and the Trust's tax returns and my experience as a Certified Public Accountant for over twenty years, I opined that the Declaration of Trust was a planning devise and a textbook example of an irrevocable trust formed under an agreement between David and Lynn Smith and the initial trustee on August 4, 2004. My review of the Trust's documents, as provided to me by Dunn, demonstrated that the Trust had been funded at its inception with 100,000 shares of Charter One Financial Corporation ("Charter One") stock,

which was further evidenced by the Trust's brokerage account statement from September 2004, which showed the receipt of 100,000 shares of Charter One stock on September 1, 2004 and the subsequent sale of the stock for \$4,450,000.

11. I further opined that by the terms of the Declaration of Trust, neither David Smith nor Lynn Smith maintain any control over the Trust or its assets, other than the power to appoint a successor trustee. In addition, I opined that neither David Smith nor Lynn Smith have any interest, whether present, future or reversionary, in the trust, its income or its assets, as it is irrevocable by its own terms and pursuant to provisions of the New York Estates, Powers & Trusts Law.

12. By Order, dated May 28, 2010, my Motion to Intervene was granted by the Court.

Opposition to the SEC's Motion for a Preliminary Injunction

13. On June 11, 2010, I provided testimony to the Court in connection with the SEC's pending motion for a preliminary injunction, which would have effectively continued the Court's restraint of the Trust's brokerage account.

14. The testimony I provided to the Court on June 11, 2010 was consistent with the statements I made in connection with my Motion to Intervene. Once again, based on my review of the Declaration of Trust, the Trust's tax returns and Trust's brokerage account statements, I testified that the Trust was an irrevocable trust and that neither David Smith nor Lynn Smith had any interest, whether present, future or reversionary, in the trust, its income or its assets.

15. By Order, dated July 7, 2010, the Court lifted the temporary restraining order as to the Trust's brokerage account, concluding that the SEC has failed to demonstrate either that the Trust was created with or the repository of ill-gotten funds or that David L. Smith was an equitable or joint owner of the Trust ("July 7, 2010 Order").

The Acts Taken in Further Administration of the Trust in July 2010

16. Once the restraint on the Trust's brokerage account was lifted, I took several actions in my role as trustee in July 2010 to further the administration of the Trust. Specifically, I used the Trust's assets to pay attorney, consultant and trustee fees, to make limited distributions to the Trust beneficiaries in the amount of \$8,000 to Lauren Smith to assist her with living expenses, health insurance and credit card debt, and \$21,500 to Geoffrey Smith to assist him with living expenses, health insurance and credit card debt. I also expended \$600,000 plus closing costs to purchase property on Great Sacandaga Lake from Lynn Smith at the request of the beneficiaries, in order to retain it for their use, and \$200,000 to make an equity investment in Capacity One Management LLC, which was formed by Geoffrey Smith in early 2010. Each and every action taken during July 2010 was in fulfillment of my fiduciary obligations as trustee of the Trust and in the exercise of my professional judgment.

17. In connection with the purchase of the Great Sacandaga Lake property, I insisted that an independent market assessment of the property take place prior to the sale, which caused some friction between me and, as I was told indirectly, Lynn Smith. As such, I also discussed with Dunn obtaining an indemnification from David and Lynn Smith to protect me from any liability in connection with the sale of the property to the Trust. Upon advice from Dunn, who had a copy of a general indemnification executed by Urbelis and the Smiths while Urbelis was still the trustee of the Trust, I asked the Smiths to execute an identical indemnification that indemnified me against any and all claims that may arise or relate to the Trust. The Smiths executed the indemnification on July 22, 2010, on the same date that the property was sold.

18. On July 20, 2010, I received a facsimile from David Smith enclosing a five-page document that purported to be the policy delivery receipt from a "Private Annuity Contract,"

executed on October 19, 2004, between David L. Smith & Lynn A. Smith, as transferors and The David L. & Lynn A. Smith Irrevocable Trust U/A Dated August 31, 2003, transfer together with an illustration of the “Private Annuity Contract.”

19. The next day, I e-mailed the facsimile that I received from David Smith to Dunn.

20. Several days later, Dunn informed me that the SEC had a copy of a private annuity agreement related to the Trust (“Annuity Agreement”).

SEC’s Motion for Reconsideration

21. By motion, dated August 3, 2010, the SEC filed a motion for reconsideration of the July 7, 2010 Order alleging that the Annuity Agreement had not previously been disclosed by any party and the Annuity Agreement demonstrated that David and Lynn Smith were beneficial owners of the Trust and that a preliminary injunction freezing the assets of the Trust was warranted.

22. In opposition to the SEC’s motion for reconsideration, Dunn prepared an affidavit on my behalf stating that I had no prior knowledge of the Annuity Agreement when I provided testimony at the preliminary injunction hearing on June 11, 2010 or at any time leading up to and following the Court’s July 7, 2010 Order (“October Affidavit”). Specifically, the October 7, 2010 Affidavit stated that “the first I learned of the existence of the Annuity Agreement was in late July, when my attorney informed me that the former trustee had just produced the agreement simultaneously to her and to the SEC’s counsel.”

23. When I signed the October Affidavit, I was stipulating to the fact that I learned of the existence of the annuity agreement in late July, which in my mind was referring to the July 20th date that I received the fax of the annuity illustration. I was not aware that this “late July” reference had a different meaning to Dunn, who drafted the affidavit on my behalf. Although I

did not see any problem with the October Affidavit at the time, in hindsight, I acknowledged that it would have been clearer had the exact date of July 20th been used. As such, upon advice of counsel, I submitted a clarifying affidavit, dated November 17, 2010 (“November Affidavit”), stating that “the first I learned of the possible existence of an annuity was in late July, when I received documents faxed to me by David Smith” to clarify my prior statement about when I first learned of the existence of the Annuity Agreement.

24. Though I submitted the November Affidavit to clarify the statement made in my October 7, 2010 affidavit, upon advice from counsel, the principle contention made in opposition to the SEC’s motion for reconsideration remained consistent: I had no knowledge of the existence of the Annuity Agreement when I first moved to intervene in the Action in May, when I testified at the preliminary injunction hearing in June or when the July 7, 2010 Order was issued by the Court. Moreover, upon review of the actual Annuity Agreement in November 2010, I did not believe that the Annuity Agreement gave David Smith or Lynn Smith an ownership interest in or control over the assets of the Trust, but rather, a future interest in a stream of payments.

25. At all relevant times I provided truthful testimony to the Court and did not conceal the existence of the Annuity Agreement. I only received information suggesting that an annuity agreement may exist just days before the SEC obtained the Annuity Agreement on its own and, in fact, I did not even see the Annuity Agreement in question until November 2010 at Jim Lagios’ office.


26. Both my October Affidavit and November Affidavit contained truthful accounts of the facts as understood by me at the time.

27. Though my duties as trustee include the identification of any obligation of the Trust, such as the Annuity Agreement, I first learned of the existence of the Annuity Agreement in late July 2010, I did not see a copy of the Annuity Agreement until November 2010 and I strongly refute any allegation that suggests otherwise.

Geoffrey Smith is Substituted as Trustee

28. I submitted my resignation as trustee of the Trust on December 9, 2010 which, per the Trust agreement, became effective January 8, 2011. As such, my duties as trustee ceased on that date and I am no longer a party to the Action. On February 14, 2010, the Court ordered the substitution of Geoffrey Smith as trustee of the Trust.

WHEREFORE, I respectfully request that the Court deny the SEC's motion for sanctions as against me, and any such other and further relief as this Court deems just and proper.



David M. Wojeski, CPA

Signed and sworn before me this
21 day of March, 2011



Notary Public

MICHAEL RUGER
Notary Public - State of New York
No. 01RU6108796
Qualified in Saratoga County
My Commission Expires April 19, 2011