

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,

*Plaintiff,*

vs.

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

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

*Defendants,*

LYNN A. SMITH and NANCY McGINN,

*Relief Defendants, and*

GEOFFREY R. SMITH, Trustee of the David L.  
and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

*Intervenor.*

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**THE DAVID L. AND LYNN A. SMITH IRREVOCABLE TRUST  
REPORT SUBMITTED WITH OBJECTIONS TO THE  
RECEIVERS REPORT REGARDING TRUST SACANDAGA  
PROPERTY AS DIRECTED BY MEMORANDUM-DECISION  
AND ORDER DATED SEPTEMBER 11, 2013 (Dkt. 592).**

**Preliminary Statement**

This Memorandum submitted by counsel to the David L. and Lynn A. Smith Irrevocable Trust (hereinafter the "Trust"), strongly objects to the conclusions and recommendations of the Receiver regarding a proposed sale of property held by the Trust on the Great Sacandaga Lake. Counsel for the Trust believes that renting the property will maximize its value and the property should not be sold for less than \$600,000.

**Introduction**

The September 11, 2013 Memorandum-Decision and Order issued by Magistrate Hummel instructed the Receiver to file a formal report with the Court to determine "whether selling or renting the property, or a combination of both, will maximize its value." Dkt. 592 at p.19. In that Decision and Order the Court specifically determined that:

[T]he Trust is not to be harmed by the sale, the Trust is to be made whole as that [REDACTED] would be placed back into the asset freeze which, if the Trust ultimately prevails, will be returned to it... [this] ensures the best financial fitness for the Trust.

Dkt. 592 at. p.9-10.

The Receiver has concluded that a sale of the Property is the best course of action. Dkt. 604 at. p.3. The conclusion by the Receiver is erroneous. The Receiver has overlooked the Court's determination that "the Trust now stands in line with the many victims that have already been identified in this case". Dkt. 592 at. p.9. The Receiver's report also ignores the proposition that the Trust is a separate and distinct entity that has never been accused of violating any securities laws.

The report submitted by the Receiver, William Brown, admits that it was prepared to "...first protect the interests of the defrauded McGinn Smith investors and secondarily to consider (to the extent possible) the 'Smith Interests' without differentiation of who among the Smith Interests may have a greater or lesser interest." Dkt. 604, at p.3. This is erroneous because it co-mingles the Trust's separate interest with the interests of David and Lynn Smith. Any recommendations regarding the property should be based solely on the best interest of the Trust. Therefore, the Receiver's recommendations are misleading because they are not in the best interest of the Trust. The Receiver's recommendations simply continue the longstanding practice of selling assets below market value to raise the cash reserves under his control.

This report is submitted to the Court mindful of the Trust's separate and independent existence and also considers the best interests of the Trust's beneficiaries while determining the best method of maximizing the value of the property. Counsel for the Trust hereby submits that renting the property would maximize its value. The Receiver's recommendation of immediately placing the property on the market at a value less than [REDACTED] will not maximize the property value and will cause obvious financial harm to the Trust. To support this conclusion this report is accompanied by a review appraisal report prepared by Mayfair Appraisal Services. The report prepared by Mayfair Appraisal Services gives more accurate forecasts, property valuation numbers and discredits the report submitted by Conti Appraisal & Consulting, LLC (hereinafter the "Conti Report").

**Valuation of 111 Betor Road**

The review appraisal prepared by Mayfair Appraisal Services strongly disagrees with the Conti Report in terms of overall property value. The Mayfair Appraisal report values the main house located at 111 Betor Road at [REDACTED] while the Conti Report values the property at [REDACTED]. The [REDACTED] difference in valuation is attributed to the Mayfair Appraisal report challenging the statement of facts contained in the Conti Report. As identified on the second page of the Addendum submitted by Mayfair Appraisal services, the adjustments submitted in the Conti Report are (i) not warranted, (ii) excessive, (iii) applied incorrectly, and (iv) are not supported by the facts. Mayfair Appraisal Services did not agree with the Conti Report's subject market value being based on a price per square foot adjustment because buyers within the subject market are typically concerned with overall beach quality and lake permit size as opposed to the structures land to structure ratio. The Mayfair Appraisal Services report also highlights that the Conti Report's use of percentage adjustments was conducted erroneously because percentage adjustments are typically applied when the appraiser can gather market data to determine a percentage increase or decrease in median or average sales prices between different time periods. Those issues are not applicable to this particular situation.

**Comparable Market Data**

The Receiver retained Conti Appraisal and Consulting, LLC to prepare a summary appraisal report to provide a professional opinion of market value of the property. The Conti Report states on page 27 that:

For the reader's interest (5) competing listings are provided in the addenda with an asking price range from [REDACTED] having (been on the market) from 62 to 318 days...

**IMPROVED SALES SUMMARY: 111 BETOR ROAD**

#	LOCATION	SALES PRICE	SALE DATE	SIZE GBA SF	LOT SIZE (ACRES)	LAKE PERMIT LINEAR FEET	OVERALL CONDITION	SALES PRICE/SF
1	134 Betor Road, Broadalbin Book: 2013/Page: 21733 (same street) (tax map shows 83' of lake frontage; listing show 57') SBL: 12L.7-2-2 & -3	[REDACTED]	08/26/13	±1,608	0.35	57'	GOOD	[REDACTED]
2	130 Charles Lane, Broadalbin Book: 2013/Page: 19991 SBL: 90.12-1010	[REDACTED]	05/24/13	±1,920	0.14	50'	GOOD-VGOOD	[REDACTED]
3	166 Priddle Point Road, Mayfield Book: 2012/Page: 14499 SBL: 104.19-2-13	[REDACTED]	07/13/12	±1,250	0.12	64'	GOOD-VGOOD	[REDACTED]
Subject	111 Betor Road Broadalbin	N/A	N/A	±1,738	0.14	45'	GOOD	N/A

As noted in the reports prepared by Mayfair Appraisal Services, the “comparables” provided by the Conti Report are misleading and inaccurate. This report will examine each “comparable” in depth and articulate credible facts that discredit the Conti Report’s valuation process and determination of comparable properties. This report identifies two other properties on the Great Sacandaga Lake, located at 87 Lakeside Avenue and 16 Heather Lane, which the Court should construe as realistic and accurate comparable properties when determining a final valuation.

1. 134 Betor Road, Broadalbin, New York

Although this dwelling is within close proximity of the Trust’s property, a more precise analysis of the property reveals that seller was motivated by a quick sale and not by “maximizing the value of the property”. As such, the sale of 134 Betor Road for [REDACTED] does not reflect the true market value. May Appraisal Services prepared an in depth analysis of the 134 Betor Road transaction by speaking directly to the listing agent,

which the Conti Report failed to do. The listing agent of 134 Betor Road stated that there was a large price reduction within the first 30 days that the property was placed on the market because the seller was constructing a new home and wanted to sell the property as quickly as possible. The property at 134 Betor Road was originally listed for [REDACTED]. Less than 30 days later, the price was reduced by [REDACTED]. It should be noted by the Court that property previously sold in 2005 for [REDACTED].

The Conti Report applied a 5% discount adjustment due to the land-to-building ratio. This is completely unnecessary because a buyer of any lake front property is more concerned with overall Lake Frontage and not with the total available lake front. For the reasons stated, and others provided for in the Mayfield Appraisal Report, the sale of the property located at 134 Betor Road is not a true comparable.

2. 130 Charles Lane, Broadalbin, New York

The dwelling located at 130 Charles Lane is not a true comparable due to the inferior beach quality and significantly smaller total lake frontage. Furthermore, the property at 130 Charles Lane has a beach front that is obstructed by large rocks. This is not mentioned in the Conti Report. The Conti Report factors in a [REDACTED] discount for a fire pit. Shockingly, the Conti Report did not discover that the property owned by the Trust also has a fire pit. Therefore, the [REDACTED] discount of [REDACTED] is excessive and unnecessary. Finally, the Conti Report provides no explanation for the "conditional adjustment". Since both 134 Charles Lane and the Trust's property have similar interior amenities and features, a "conditional adjustment" is also unnecessary.

3. 155 Priddle Point Road, Mayfield, New York

The Mayfield Appraisal Report makes clear that the [REDACTED] condition adjustment is erroneous. The property located at 155 Priddle Point is over 50 years old and has a gross living area that is significantly smaller than the property owned by the Trust. Therefore, a positive adjustment should have been reflected in the Conti Report instead of a negative adjustment. This is further evidence that the Conti Report is not credible because it is tailored to meet the Receiver's intention of conducting a forced sale.

Mayfield Appraisal Services Comparables

The Mayfield Appraisal Service report identifies and recommends two other properties that should be used for comparison, instead of those listed in the Conti Report. Those properties are located at 87 Lakeside Ave, and 16 Heather Lane.

4. 87 Lakeside Ave., Northville, New York

87 Lakeside Avenue was not identified in the original appraisal. This dwelling is very similar in condition to the Trust's property. The sale of this dwelling was completed recently on August 23, 2013. The adjustments were very minimal and the sale price of this property was [REDACTED]. This is a more appropriate comparable property value than anything provided for in the Conti Report.

5. 16 Heather Lane, Northville, New York

16 Heather Lane sold on October 26, 2012 for [REDACTED]. This property is comparable to the Trust's property because it is a lakefront property, with similar beachfront access, permits, and landscaping, all of which are attractive features for any

buyer seeking a home with lakefront access on the Great Sacandaga. Although this property does have superior amenities and a full basement, even after factoring those adjustments in, it still represents a more complete and true comparative value.

#### Valuation of 109 Betor Road

The property located at 109 Betor Road consists of 2 seasonal dwelling on a single parcel of land. Mayfair Appraisal Services performed an interior and exterior inspection of the subject property and examined all assessment data provided by the Conti Report. The Conti Report used a [REDACTED] price per square foot to determine the subject market value. The Conti Report estimated the property at 109 Betor Road to be [REDACTED] total square feet, which equates to a total value of [REDACTED]. However, the actual square footage of both structures located at 109 Betor Road is [REDACTED]. Therefore it is the opinion of Mayfair Appraisal Services that the total value of the property is equal to [REDACTED].

As Counsel to the Trust, it is also hereby submitted that the property at 109 Betor Road should not be sold separately because the two separate cottages and the accompanying land do not have beach access if sold separately. However, if the properties located at 106, 109 and 111 Betor Road are sold as one single unit, the total price of the single property should be adjusted upwards because of the communal beach and front lawn access. Conversely, it is hereby submitted that it will become easier to rent the properties located at 109 and 111 Betor Road separately which would provide further positive cash flow.



**Annual Rental Income and Expense Projections**

As identified by the affidavit submitted by the Trustee, Geoffrey Smith, the Rental Budget submitted by the Receiver, sets forth unnecessary expenses and costs, and projects inaccurate revenue projections. According to the Receiver's "Rental Budget" renting the property during 2014 will produce a negative cash flow of [REDACTED]. If the property is rented during the 2015 season, the cash flow will further decrease to [REDACTED]. This is completely erroneous.

According to the Operating Income Statement prepared by Mayfield Appraisal Services, rental of the main house and the two additional cottages that contain two bedrooms each will provide a forecasted revenue of [REDACTED] per year. Thus, if the properties were to be rented for both the 2014 and 2015 rental seasons which run from Memorial Day through Labor Day, the total revenue produced would be [REDACTED]. This is a [REDACTED] difference in revenue from the Receiver's Rental Budget. This astonishing difference can not be overlooked by the Court. When combined with the fact that the Trustee has not even begun to market the property for the upcoming rental season, yet has already received numerous inquiries into the property's availability, renting this highly desirable and unique property should not be problematic.

The difference in positive cash flow is attributed to numerous factors and a reduction of unnecessary expenses that were set forth by the Receiver. For example, the Receiver underestimated the rental season at 10 weeks. There is a 14 week period from Memorial Day to Labor Day in 2014 which should be taken into account. Additionally, Mayfair Appraisal Services has contacted the contractor who has been responsible for

snow removal on that section of the lake in previous years and obtained an estimate of snowplowing services at [REDACTED]. This is a dramatic decrease in price when compared to [REDACTED] as alleged by the Receiver. It should also be noted that the contractor stated it is uncommon for driveways this area to be plowed in the winter months. Finally, the Court should recognize that the Mayfair Appraisal Service Operating Income Statement identifies that the Receiver's Rental Budget provides expenses that will occur on a yearly basis. Since the subject properties are typically only occupied during the summer months the electricity, trash removal, and various other expenses are grossly overestimated and should be discounted. It should also be noted that the Mayfair Appraisal Services reports takes into consideration depreciation of appliances and property maintenance (such as roof repairs). The Receiver's report has ignored these valuation techniques, while the Mayfair Appraisal Report has taken them into account and still attributed a positive cash flow projection.

**Conclusion**

For the reasons set forth in this Memorandum, it is hereby submitted that the Receiver's Report and accompanying appraisal by Jacqueline Conti should not persuade the Court to enter a judgment to sell the Sacandaga Lake Property. The Court made clear in the September 11, 2013 Order that the Trust is not to be harmed by the sale of the property and the Receiver was instructed to determine the best method to "maximize the value of the property." Based upon the thorough and detailed analysis set forth by Mayfair Appraisal Services, the properties value will be maximized by renting it for the upcoming seasons. The Trust is a separate entity that has not been accused of any wrongdoing and should be deprived of its assets due to the wrongdoing of others.

Dated: Albany, New York  
November 7, 2013

Linnan & Fallon, LLP

By 

James D. Linnan (Bar Roll #102058)

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LYNN A. SMITH, GEOFFREY R. SMITH, Trustee  
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U/A 8/04/04, GEOFFREY R. SMITH, LAUREN  
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*Intervenor.*

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**AFFIDAVIT OF DEFENDANT/ INTERVENOR, GEOFFREY R.  
SMITH**

**GEOFFREY R. SMITH**, being duly sworn, deposes and says:

1. I respectfully submit this affidavit in opposition to the Receiver's Report Regarding Smith Trust Sacandaga Property as Directed by Memorandum-Decision and Order Dated September 11, 2013 (Dkt. 592).

2. I graduated from Lehigh University in 2002 after receiving a B.S. in finance with a concentration in accounting. After graduation I passed the Series 7 and Series 63 examinations and became a licensed stock broker and registered representative. I have continued to pursue my

professional education and received the prestigious title of Chartered Financial Analyst ("CFA") in 2009.

3. Upon my grandfather's death in 1969, my mother received an inheritance that was composed of a trust containing approximately [REDACTED] and property located at Betor-Smith Road, Broadablin, New York. This property was on located the Great Sacandaga Lake. Today, the property is composed of a main cabin, two smaller cabins, tennis courts, an undeveloped lot, and a private beach with lakefront access.

4. Throughout my childhood my sister and I have spent a significant amount of time at the property with my parents and other family members. As a result, the property has great sentimental value and represents a piece of my family history. As Trustee and beneficiary of the Trust, my desire is to hold onto the property and preserve its use for future generations of my family and allow it to appreciate in value.

5. Heretofore, and prior to the Trust, my mother remodeled the main house on the property located on the Great Sacandaga Lake. During that time, my mother spent over [REDACTED] on remodeling costs, and an additional [REDACTED] in the landscaping the lawn and improving the beachfront. My mother's records reveal that [REDACTED] was spent on bulldozing of the beach and hauling in high quality sand to improve the beach. This has

resulted in the property becoming the only beach on the entire Sacandaga Lake that has a sandy beachfront. Every other "beach" on the lake is full of stones and large rocks that make them difficult to walk on, and unpleasant to wade into the lake due to the high volume of clay and mud within the lake.

6. In August of 2004, my parents David and Lynn Smith, created a private annuity trust that is titled The David L. and Lynn A. Smith Irrevocable Trust (hereinafter the "Trust"). My sister, Lauren T. Smith, and I are the sole beneficiaries of the Trust's assets after the private annuity contract is fulfilled. As Trustee and primary beneficiary of the Trust, I strongly oppose the Receiver's proposal of selling any property lawfully owned by the Trust.

7. My mother, Lynn Smith, funded the Trust in 2004 with [REDACTED] shares of Charter One Financial, Inc. stock that was valued at [REDACTED] that was previously held in her individual stock account. The Charter One Financial stock was first purchased by my mother in 1992 and was an extraordinarily successful investment. In 1992, on the advice of my father, David Smith, who was also my mother's stockbroker, my mother purchased [REDACTED] shares of Charter One Stock at a market price of \$10.00 per share. By August of 1999, based upon various dividends, acquisitions, and stock splits, my mother had acquired a total of [REDACTED] shares of Charter One

stock. The investment in the Charter One Stock continued its strong performance until August of 2004.

8. On July 22, 2010, the Trust purchased the property from my mother through a validly executed purchase and sale agreement. The Trust purchased the property for [REDACTED] after a real estate expert prepared a market analysis of the property and determined that value to be fair market value. Dkt. 604 at Exhibit "E". The transaction provided my mother with much needed liquidity and ensured that the property would remain in my family for future generations. At the time of the transaction, I was only a beneficiary of the Trust, and not the Trustee. I became the Trustee on January 28, 2011. However, my sister and I have fully supported the decision for the Trust to purchase the property.

9. In July of 2010, I believed my family's unique property on the Great Sacandaga Lake would be a favorable investment opportunity for the Trust because it would allow the Trust to diversify its assets by taking advantage of low housing prices and improving market conditions.

10. Although Magistrate Homer has imposed sanctions on the former Trustee and attorney for the Trust in connection with their involvement in the alleged concealment of the private annuity contract, no one has ever alleged that the Trust has violated any laws. As stated by

Magistrate Homer in his decision of July 7, 2010, "it is undisputed that the Trust originated from bank stock in the stock account purchased in the early 1990's well prior to 2003 when the SEC alleges the scheme began here. T.349. In fact, none of the named entities except MS & Co. existed at that time. Thus, there is no proof that fraudulently obtained funds were deposited into the stock account prior to the purchase of the bank stock in the early 1990's." Dkt. 86.

11. I have personally reviewed the Receiver's Report and the accompanying appraisal prepared by Conti Appraisal and Consulting, LLC. I believe that both reports grossly misrepresent the true value of the property and are completely biased.

12. I would first like to bring to the Court's attention that there are numerous misrepresentations that are set forth in both of the reports submitted by the Receiver. For example, it is common knowledge that buyers are more interested in assessing the property when the lake levels are at their highest not lowest. This is because the lake is at the highest level in the spring and a buyer can access how much of their landscaping and lawn will be water soaked or underwater. In October, when the lake is at its lowest, there is no risk of water damage to the lawn, and the beach is merely



longer. Therefore, this is the worst possible time to market property on the Great Sacandaga Lake.

13. Furthermore, my family was able to secured tenants for the full rental seasons during the period from 1983 to 1998. Due to the expansion of internet rental websites such as homeaway.com and others, renting this attractive property will require little effort. Renting out the property has never caused our insurance costs to increase. Therefore it is unnecessary for the Receiver to include additional costs for insurance due to renting the property.

14. I have informed the Receiver that I am willing to manage the rental process and secure tenants for weekly rentals free of charge. The Receiver has chosen to ignore my offers. I have not marketed the property for rental in any form, yet I have already received 4 requests from friends eager to rent the property for this coming summer season. This is evidence that demonstrates how desirable this property truly is. . One request that I have received has come from a family of 12 that has contacted me to inquire into renting all 3 dwellings over Memorial Day weekend.

15. The Receiver has also erroneously used a rental period of [REDACTED] weeks at [REDACTED] This is an obvious attempt to undervalue the rental proceeds. I have repeatedly presented to the Receiver that the rental period,

which I am well familiar with, runs from Memorial Day through Labor Day. This represents a 15 week period in 2014. I have also found numerous comparable rentals that average [REDACTED] per week, not [REDACTED]. Based upon simple calculations, the potential rental income is [REDACTED], not [REDACTED]. Even after factoring in a [REDACTED] vacancy adjustment, rental income would be [REDACTED].

16. To further reduce costs, I would more than willing to make arrangements for lawn care, opening/closing costs, beach preparation and repairs, as well as cleaning fees following rental stays. This costs would be performed free of charge by neighbors who could enjoy access to a portion or our property or by family friends who can accompany my mother while attending to these simple tasks.

17. The Receiver's report ignores the fact that nearly all of the winter and off-season maintenance has been performed free of charge by a family friend and neighbor. The Receiver is well aware of this, but inaccurately reported that the maintenance was done solely by myself or my father. Our neighbors are still available and we have continued to maintain strong positive relationships with them.

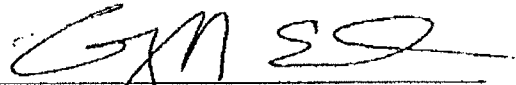
18. Next, I believe that engaging in snow plowing contract for [REDACTED] is a completely unnecessary expense. The road has not been plowed

in the winter for 60 plus years. The Receiver is also suddenly concern with a risk of vandalism and/or fire. It should be noted that there has not been a single incident or report of vandalism or fire in the 70 year history of the property and surrounding area.

19. Next, the Receiver's report is erroneous because it fails to mention the tennis court on the property, the view of the lake from the second cottage, and also does not mention that my family is willing to waive any liability of the Receiver for damage of personal property associated with renting. Therefore, there is no need for the Receiver to purchase additional insurance to cover damage to our personal property and furnishing. The Receiver is apparently trying to inflate the costs associated with renting the property, and is trying understate the income potential, in order to conduct a forced sale at a significantly reduced price.

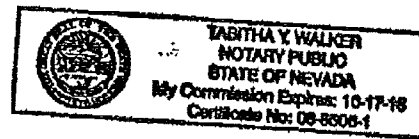
20. After speaking with counsel for the Trust, we have come to the conclusion that placing the property on the market with a listing price below [REDACTED] will harm the Trust and is not in anybody's best interest. I strongly oppose the Receiver's recommendations.

WHEREFORE, I respectfully ask this Court to issue an Order to allow the Trust to continue to hold the property and provide for its rental so as to maximize the value of the property.



GEORGEY R. SMITH

Sworn to before me this  
6<sup>th</sup> day of November, 2013.

  
Notary Public State of Nevada

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*Intervenor.*

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**DECLARATION OF JAMES D. LINNAN IN SUPPORT OF AN OBJECTION  
TO THE REPORT OF THE RECEIVER, WILLIAM J. BROWN**

I, JAMES D. LINNAN, pursuant to 28 USC Section 1746, declare under penalty of perjury, the following facts:

1. That I am an attorney admitted to practice before this Court and am the attorney for Geoffrey R. Smith, Trustee of the David L. and Lynn A. Smith Irrevocable Trust and

Geoffrey R. Smith and Lauren T. Smith. As attorney for these individuals, I am familiar with the facts and circumstances of this proceeding and the previous proceedings before this Court.

2. I make this Declaration in support to the Objection to the Report of the Receiver, William J. Brown, dated October 10, 2013.

3. Filed herewith is an Affidavit of Geoffrey R. Smith, Trustee of the David L. and Lynn A. Smith Irrevocable Trust, which sets forth facts pertinent to an evaluation of the Receiver's Report from an individual who has actual knowledge of all of the facts and issues pertaining to the property.

4. Filed herewith is a copy of an Appraisal Reviews issued by Ryan M. DeVarne of Mayfair Appraisals. A review of the Appraisal Review will reveal that Mr. DeVarne is well qualified in the area of appraisals and appraisal critiques and reviews.

# The review of Mayfair Appraisal Services properly challenges the methodology used by and the assumptions made by Conti Appraisal & Consulting, LLC in the Receivers appraisal. The questionable methodology and assumptions clearly undermines the validity of that appraisal and the conclusions drawn therein.

5. In addition, Mr. DeVarne establishes that the rental income has been significantly undervalued; the associated rental expenses have been significantly overstated. Mr. DeVarne's Review establishes that a rental of the subject property will allow this property to operate with a positive cash flow on an annual basis and will not be a cash drain on the Trust.

6. A review of the Mr. DeVarne Report confirms that it would be beneficial to the Trust and the ultimate receiver of the Trust assets, whomever that may be, to hold the property and not force a sale at below market value at this time.

7. The beneficiaries and Trustee understand that the Court has imposed a Receiver upon the Trust, pursuant to a claim from the Securities and Exchange Commission in which the SEC alleges that it may be entitled to a portion of the Trust assets.

8. While the ultimate determination of the Securities and Exchange Commission claim is premature at this time, the Trust, and its beneficiaries, again urges the Court to consider that there is a substantial probability that the Securities and Exchange Commission's claim will not stand.

9. The Court has already determined that the funds utilized to establish the Trust were funds that had absolutely no connection to the alleged misdeeds of David L. Smith. The funds were directly attributable to an inheritance by Lynn A. Smith from her father in 1969, and the prudent investment of those funds. Magistrate Homer, in his Decision of July 7, 2010, found "It is undisputed that the Trust originated from bank stock in the stock account purchased in the early 1990's well prior to 2003 when the SEC alleges the scheme began here. T.349. In fact, none of the named entities, except MS and Co. existed at that time. Thus, there is no proof that fraudulently obtained funds were deposited into the stock account prior to the purchase of the bank stock in the early 1990's." Dkt. 86. .

10. In brief, the assets utilized to establish the Trust at its inception were "pure assets" and outside the taint of any alleged fraudulent activities by David L. Smith.

11. The Court is also reminded that the assets utilized to establish the Trust were assets inherited by Lynn Smith and held in Lynn Smith's investment account. David Smith was never an owner of the assets that were transferred to establish this Trust.

12. At the time that this Trust was established, Lynn Smith, individually, in her own name, had an investment portfolio with liquid assets valued at over [REDACTED] See Dkt.34p4

Lynn Smith had given discretionary authority to David L. Smith, her broker and husband, to manage this account, but it is uncontrovertibly that the asset used to establish this trust is uniquely traceable to the inheritance by Lynn Smith from her father in 1969.

13. The SEC, in its Second Amended Complaint, claims that David Smith was attempting to protect his assets from future claims which may have flowed from his alleged fraudulent dealings at the time this Trust was created.

14. This argument highlights the weakness of the SEC's claim and the desperation of its pleadings.

15. None of David Smith's assets, however obtained, were utilized to create this Trust and the SEC's allegation of a connection is totally baseless. As set forth above, David L. Smith did have discretionary authority over Lynn Smith's stock account. However, the specific stock utilized to establish and fund this trust is uniquely identifiable and it alone was purchased with funds inherited by Lynn Smith and held in kind until this Trust was established and funded.

16. It has been, and will continue to be, the position of the beneficiaries of the Trust and the Trustee that the Trust was created solely for the benefit of the children of the donors, namely Geoffrey R. Smith and Lauren T. Smith. This is specifically set forth in the Declaration of Trust as follows: "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 (2) children, Geoffrey R. Smith and Lauren T. Smith. This Trust is created for the benefit of the donor's children and their issue".

17. The Court's attention is further drawn to the Declaration of Trust dated August 4, 2004 and the Private Annuity Contract executed on August 31, 2004 establishing the funding of the Trust. Paragraph "5" of the Annuity Agreement states in pertinent part "It is an expressed



term and condition of this Agreement that the rights of, income or amounts payable hereunder to the Transferors shall not be subject to assignment, pledge, hypothecation, mortgage, pledge, attachment, execution, judgment, garnishment, anticipation or other disposition of impairment". This is a typical "spend thrift" provision that prevents any creditor of the "donors" from making a claim on the Trust assets subsequent to its inception.

18. The Courts of New York have repeatedly upheld the validity of such "spend thrift" provisions and have blocked claims against Trust property, such as the claims that are made in the instant matter by the SEC.

19. The terms of the Trust documents, as enforced and administered by the laws of the State of New York, shield the Trust assets from the SEC claims.

# The Trust that is the subject of this matter is a Private Annuity Trust.

20. The Private Annuity Trust was a creation of the Internal Revenue Code and was applicable during a limited period of time when, pursuant to the IRS Code, gift tax could be lawfully avoided for gifts made in a manner such as the gifts in the instant Trust.

21. With the passage of time and subsequent amendments to the IRS Code, the necessity of Private Annuity Trust instruments solely for the purpose of the lawful avoidance of gift taxes were no longer necessary.

22. As a result of the amendments to the Federal Statute, the gift made by David L. and Lynn A. Smith pursuant to the Trust of August 4, 2004, as funded by the Private Annuity Trust Agreement of August 31, 2004 to their two children, Geoffrey R. Smith and Lauren T. Smith, no longer requires a Private Annuity Trust to pass gift tax free. Therefore, the need for the annuity portion of the Trust Agreement and the terms contained therein has passed and is no

longer necessary to preserve the asset gifted to the beneficiaries by their parents and shield it from gift taxes.

23. The donors of the Trust, David L. Smith and Lynn A. Smith, in concert with the Trustee, Geoffrey R. Smith, and the beneficiaries, Geoffrey R. Smith and Lauren T. Smith, have the absolute right under the New York Estates, Powers and Trust Law Section 7-1.9 to amend that portion of the Trust that pertains to the establishment of the Private Annuity and to make the Trust an absolute gift to the beneficiaries. The Trustee, donors, and beneficiaries, utilizing 7-1.9, have the absolute right to revise the Trust, extinguish the annuity and make the gift absolute, thus terminating the annuity before its first annuity payment would be due in 2015 under its terms.

24. The Trust, therefore, argues that the Trust assets should be preserved in their current form without interference by the Receiver until such time as all of the above matters can be appropriately litigated and the rights of the parties finally adjudicated.

25. The Trust, by its Trustee, and the beneficiaries individually, urge the Court to consider that the claims of the SEC, as against this Trust, are tenuous at best.

26. This argument is made to the Court to dissuade the Court from forcing the untimely sale of the Sacandaga Lake property.

27. While it is clearly established by the Report of Mr. DeVarnne that the Trust will benefit by retaining the property for whoever ultimately receives its assets, the Trustee and beneficiaries have a very strong nonmonetary attachment to this premises and respectfully urge

the Court to direct that the Trust retain title and possession in the real property at The Great Sacandaga Lake to insure the preservation of the assets pending the Courts ultimate determination of the various claims.

Dated: Albany, New York  
November 7, 2013

Linnan & Fallon, LLP  
By           /s/ James D. Linnan            
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