UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. **10 Civ. 457 (GLS/DRH)**

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

Defendants,

LYNN A. SMITH, and
NANCY MCGINN,

Relief Defendants, and

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

Intervenor.

PLAINTIFF'S OPPOSITION TO RELIEF DEFENDANT AND DEFENDANT LYNN A. SMITH'S MOTION TO DISMISS

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Plaintiff Securities and Exchange Commission ("SEC") respectfully submits this Memorandum of Law in Opposition to Relief Defendant and Defendant Lynn A. Smith's Motion to Dismiss (the "Motion"), filed on December 15, 2010.

PRELIMINARY STATEMENT

Ms. Smith's Motion should be denied for three reasons. First, the Court already has rejected Ms. Smith's argument that she was not properly named as a relief defendant. *See S.E.C. v. McGinn, Smith & Co., Inc. et al.*, ___ F. Supp. 2d ___, 2010 WL 4780317 (N.D.N.Y. July 7, 2010) (Docket # 86). This ruling followed a three-day evidentiary hearing in which Ms. Smith, among others, testified. The Court found that the SEC demonstrated a substantial likelihood of success on the merits that Ms. Smith is a proper relief defendant with respect to a brokerage account maintained in her name (the "Stock Account") and, accordingly, froze this asset.[1] This holding is the law of the case and is dispositive of Ms. Smith's Motion. Given the higher burden the SEC already met to obtain the asset freeze, it defies logic for Ms. Smith to now argue that the Amended Complaint should be dismissed because the SEC somehow has failed to meet less onerous pleading requirements.

Second, even when considered independent of its July 7 Order, the Court should deny the Motion because the Amended Complaint sets forth specific facts that are more than sufficient to indicate that (1) the Stock Account, which Lynn and David Smith used to purchase a house in Vero Beach, Florida (the "Vero Beach house") and set up an irrevocable trust (the "Trust") in which they maintained a ownership interest, includes ill-gotten gains to which Ms. Smith has no legitimate claim, and (2) these gains were linked to her husband's violations of the securities laws. Thus, the Amended Complaint adequately alleges that Ms. Smith is a relief defendant.

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[1] Ms. Smith then (six weeks later) filed a Notice of Appeal of the July 7 Order with the Second Circuit Court of Appeals. That appeal is pending.

Third, the Amended Complaint properly pleads claims against Ms. Smith under Section 276 of the New York Debtor and Creditor Law. It sets forth specific facts alleging that David and Lynn Smith's conveyance of approximately 100,000 shares of Charter One Financial, Inc. stock (the "Charter One stock") from the Stock Account to the Trust in 2004, and the conveyance of their jointly held Vero Beach house to Ms. Smith's sole custody in 2009, were part of a fraudulent scheme to ensure that the ill-gotten gains from the securities fraud were protected from future creditors. Notably, the Court already has determined that Ms. Smith fraudulently concealed her ownership interest in the Trust and that the SEC showed a likelihood of success in proving that the 2009 Vero Beach house transfer was for the fraudulent purpose of shielding this asset from creditors. *S.E.C. v. Wojeski*, ___ F. Supp. 2d ___, 2010 WL 4780315, at *9 n.17 (N.D.N.Y. Nov. 22, 2010) (Docket #194) (Trust); Docket #86, at 36 (Vero Beach house). Moreover, and contrary to Ms. Smith's assertions, New York courts have long recognized prejudgment creditors, including government agencies, as "creditors" under the Debtor and Creditor Law. Accordingly, the SEC respectfully requests that the Court deny Ms. Smith's Motion.

ARGUMENT

I. THE AMENDED COMPLAINT PROPERLY NAMES LYNN SMITH AS A RELIEF DEFENDANT

A. The Court's Decision That The SEC Demonstrated A Substantial Likelihood Of Success In Proving That Ms. Smith Is A Relief Defendant Is Dispositive Of Her Motion

Ms. Smith's argument that she is not properly named as a relief defendant in this action because the SEC has not alleged that her assets "were the result of fraud or otherwise ill-gotten," *see* Mot. at 7, already has been rejected by the Court. This is dispositive of her Motion. On July 7, 2010, the Court froze Ms. Smith's Stock Account because the account "received loan

repayments from ill-gotten gains." Docket #86, at 32. Thus, "the SEC has demonstrated a substantial likelihood of success in proving that Lynn Smith is an appropriate relief defendant with respect to the Stock Account and that her Stock Account includes ill-gotten gains to which she has no legitimate claim of ownership." *Id.* at 33.

Indeed, the burden that the SEC already met to freeze the Stock Account is more onerous than that which it must now meet to survive Ms. Smith's Motion. *Compare S.E.C. v. Byers*, No. 08-CV-7104, 2009 WL 33434, at *3 (S.D.N.Y. Jan. 7, 2009) (to freeze assets, SEC must establish that "it is likely to succeed on the merits") *with Ashcroft v. Iqbal,* 556 U.S. ___, 129 S. Ct. 1937, 1949 (2009) (complaint must state a claim to relief that is merely "plausible on its face") (emphasis added). Obviously, then, the SEC has set forth particularized facts that go above and beyond what is necessary to survive a motion to dismiss. Under these circumstances, Ms. Smith's Motion is moot. *See New York Civil Liberties Union v. New York City Transit Auth.*, 675 F. Supp. 2d 411, 439-40 (S.D.N.Y. 2009) (denying defendant's motion to dismiss as moot where court addressed defendant's arguments in granting plaintiff injunctive relief).

The Court's Order of July 7, concluding that the SEC showed a substantial likelihood of success on the merits in proving that Ms. Smith is properly named as a relief defendant, is binding in this litigation.[2] The law of the case doctrine "commands that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages of the same case unless cogent and compelling reasons militate otherwise." *Johnson v. Holder*, 564

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[2] The parties voluntarily consented, pursuant to 28 U.S.C. § 636(c), to have Magistrate Judge Homer conduct all proceedings on the SEC's Motion for a Preliminary Injunction and to enter a final order on the same. *Notice, Consent, and Reference of a Dispositive Motion to a Magistrate Judge* (Docket #12) (Apr. 28, 2010). District Judge Sharpe entered this consent order on June 8, 2010. *Reference Order* (Docket #59) (Jun. 8, 2010). Thus, Magistrate Judge Homer's decisions have the same binding effect on this litigation as final orders issued by the district judge.

F.3d 95, 99 (2d Cir. 2009) (denying review of earlier decision) (emphasis added). Such reasons include "an intervening change in law, availability of new evidence, or 'the need to correct a clear error or prevent manifest injustice.'" *Id.* at 99-100 (citation omitted). Ms. Smith's Motion fails to set forth a single reason, yet alone a "cogent or compelling" one, why this Court should not adhere to the Court's well-reasoned decision. Thus, the Court's Order of July 7 is dispositive of her Motion and the SEC respectfully requests that the Court reject Ms. Smith's arguments regarding her status as a relief defendant.[3]

B. The Amended Complaint Sets Forth Specific Facts Indicating That Ms. Smith Is Properly Named As A Relief Defendant

Even aside from the Court's prior decision, no basis exists to dismiss the Amended Complaint. In considering a motion to dismiss, the court must accept as true all facts alleged in the complaint and must draw all reasonable inferences in favor of the plaintiff. *In re Reserve Fund Sec. and Deriv. Litig.*, ___ F. Supp. 2d. ___, 2010 WL 685013, at *5 (S.D.N.Y. Feb. 24, 2010) (denying motion to dismiss SEC's complaint). Moreover, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 129 S. Ct. at 1949 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Amended Complaint sets forth specific facts that readily permit an inference that (1) the Stock Account includes ill-gotten gains to which Ms. Smith has no legitimate claim, and (2) these gains were linked to her husband's violations of the securities laws. *See S.E.C. v. Cavanaugh*, 155 F.3d 129, 136 (2d Cir. 1998) (affirming asset freeze of relief defendant's bank account).

[3] The Court's finding that the SEC demonstrated a likelihood of success on the merits that Ms. Smith is a proper relief defendant also moots her argument that the Court lacks subject matter jurisdiction over her. *See* Mot. at 12-13; *see also* Section II, *infra*.

The Amended Complaint sufficiently pleads that Ms. Smith's Stock Account was both a repository for ill-gotten gains and integral to Mr. Smith's fraud. The SEC has expressly pled that Ms. Smith granted Mr. Smith both "beneficial ownership and unfettered control over the Stock Account for at least fifteen years." Am. Compl. ¶ 109 (Docket #100) (Aug. 2, 2010). The Amended Complaint alleges that Ms. Smith allowed her husband to use the Stock Account to finance the activities of MS & Co. related entities and employees, to freely transfer money (including proceeds from his scheme to defraud investors) into and out of the Stock Account, and to transfer his personal assets into the Stock Account. *Id.* at ¶¶ 107-13. In 2009, Mr. Smith stated "Lynn and I have to shift money around between us." *Id.* at 114. The Amended Complaint further states: "Internal emails during the period of the fraud show employees of MS & Co. freely transferring money into and out of the Stock Account, which contained ill-gotten gains." *Id.* at ¶ 109. These facts are more than sufficient to infer, as this Court did, that Ms. Smith's "Stock Account includes ill-gotten gains" resulting from the securities fraud. *See* Docket #86, at 31-33; *see also Cavanaugh*, 155 F.3d at 137 ("[a]llowing [relief defendant] to now claim valid ownership of [ill-gotten gains] would allow almost any defendant to circumvent the SEC's power to recapture fraud proceeds[.]").

Moreover, the Amended Complaint pleads specific facts showing that the Stock Account, which contained ill-gotten gains, was integral to the Smith's creation of the Trust and their purchase of the Vero Beach house. In particular, the Amended Complaint alleges that David and Lynn Smith sold the Stock Account's main asset—approximately 100,000 shares of Charter One stock—to the Trust in 2004. *Id.* at ¶ 120. On the day of the sale, the stock was converted through a cash merger to $4.45 million in cash. *Id.* at ¶¶ 122-24. This stock was the sole asset of the Trust. *Id.* at ¶ 120. Through an annuity agreement (the "Annuity Agreement") that granted

to the Smiths annuity payments from the Trust of $489,932 per year from September 26, 2015 until the last to die of Lynn and David Smith, the Smiths retained a significant ownership interest in the Trust. *Id.* at ¶¶ 120-23. These facts contradict Ms. Smith's assertion that the Trust contained "untainted assets."[4] *See* Mot. at 4; *see also In re Reserve Fund*, 2010 WL 685013, at *5 ("court must draw all reasonable inferences in favor of plaintiff"). Similarly, the proceeds derived from the Stock Account were used to fund the Vero Beach house purchase. Docket #86, at 36.

Finally, Ms. Smith's contends that the SEC's demand for disgorgement is "suspect" because the agency has not alleged how the defendants profited from their violations of the securities laws. *See* Motion at 8-9. Ms. Smith's contention is flawed. The Amended Complaint specifically describes how the defendants received funds and enjoyed luxuries flowing from their unlawful scheme. Ms. Smith received $1.8 million without consideration from the McGinn Smith entities during the scheme and the SEC has set forth specific amounts and dates in the Amended Complaint. Am. Compl. ¶¶ 107-08. McGinn, Smith, and other senior MS & Co. employees frequently received large sums of cash from the McGinn Smith entities with no repayment requirements. *Id.* ¶¶ 99-101. The Amended Complaint sets forth specific dollar amounts that MS & Co. paid for the Smith family's luxury cars and for Mr. McGinn's country club fees. *Id.* at ¶ 106. These are precisely the type of unlawful "profits" that courts have found

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[4] The Court should reject Ms. Smith's incorrect contention that the Court froze the Trust assets based on Mr. Smith's ownership interest alone. *See Mot.* at 4. On August 3, 2010, the Court granted the SEC a temporary restraining order freezing the Trust based on the SEC's discovery of the Annuity Agreement. *Order to Show Cause* (Docket #104) (Aug. 3, 2010). On November 22, 2010, the Court froze the Trust assets, in part based on the SEC's "substantial evidence of . . . [fraudulent] conduct by . . . Lynn Smith" with respect to the Trust. Docket #194, at 20, n.17. This finding was <u>independent</u> of the Court's conclusions regarding David Smith's ownership interest in the Trust.

sufficient to grant the SEC's demands for disgorgement.[5] *S.E.C. v. Amisi Tech., Inc.*, 650 F. Supp. 2d 296, 306 (S.D.N.Y. 2009) (disgorgement appropriate where securities fraud funded defendant's car purchases); *S.E.C. v. Kirkland*, 521 F. Supp. 2d 1281, 1291 (M.D. Fla. 2007) (SEC entitled to disgorgement where fraud funded defendant's personal expenses, including his mortgage and car payments and his memberships to private clubs); *S.E.C. v. Better Life Club of Am., Inc.*, 995 F. Supp. 167, 182 (D.D.C. 1998) (supposed payment for informal loan given without documentation subject to disgorgement because "investors received no value on this loan, and it is highly suspect that [the relief defendant] gave any value to [the defendant]").

Thus, the Amended Complaint sets forth specific allegations that easily permit an inference that Ms. Smith is a proper relief defendant in this litigation.

II. THE AMENDED COMPLAINT ALLEGES SPECIFIC FACTS THAT ARE MORE THAN SUFFICIENT TO NAME LYNN SMITH AS A DEFENDANT FOR VIOLATIONS OF THE NEW YORK DEBTOR AND CREDITOR LAW

A. This Court Has Jurisdiction Over The SEC's State Law Claim

Ms. Smith's argument that this Court lacks "supplemental jurisdiction" under 28 U.S.C. § 1367 is without merit.[6] As an initial matter, Ms. Smith ignores that this Court has independent

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[5] Ms. Smith's argument that the SEC has failed to "demonstrate the reasonable and approximate value" of the ill-gotten gains confuses the pleading requirements that the SEC must meet in order to maintain this action with the ultimate burden the SEC must meet to successfully disgorge any ill-gotten gains. *See* Mot. at 11-12 (emphasis added). To survive a motion to dismiss, the Amended Complaint need not *prove* the value of the ill-gotten gains; rather, the SEC must—as it has—set forth specific facts showing how the defendants profited from their unlawful scheme.

[6] As argued in Section I, *supra*, the Court has already concluded that the SEC has demonstrated a substantial likelihood of success on the merits that Ms. Smith is a relief defendant in this litigation. Thus, the Court has original jurisdiction over Ms. Smith with respect to the SEC's federal claims. *See Cavanaugh*, 155 F. 3d at 136 (federal courts may order equitable relief against relief defendants); *see also S.E.C. v. Colello*, 139 F.3d 674, 676 (9th Cir. 1998) ("[I]t is unnecessary to obtain subject matter jurisdiction over [the nominal defendant] once jurisdiction of the defendant is established").

subject matter jurisdiction over the SEC's state law claim pursuant to 28 U.S.C. § 1345, which states that "[e]xcept as otherwise provided by Act of Congress the district courts shall have original jurisdiction of all civil actions, suits, or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." Section 1345 does not prohibit state law claims in SEC actions, nor does it narrow jurisdiction. As the SEC is an agency of the United States, 28 U.S.C. § 1345 provides an independent basis of subject matter jurisdiction. *See U.S. v. City of Arcata*, ___ F.3d ___, 2010 WL 5129220, at *3 (9th Cir. Dec. 17, 2010) ("regardless of the outcome of the federal question jurisdiction, the district court has independent subject matter jurisdiction" of government's claim) (emphasis in original).

The Court also has supplemental jurisdiction over the SEC's state law claim. Federal courts have supplemental jurisdiction over "all other claims [i.e. state law claims] that are so related . . . that they form part of the same case or controversy." 28 U.S.C. § 1367(a); *see also Caiola v. Citibank, N.A., New York*, 295 F.3d 312, 331 (2d Cir. 2002) (reinstating state law fraud and other claims forming part of the same case or controversy as federal securities claim). To be part of the same case or controversy, "[t]he state and federal claims must derive from a common nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The exercise of supplemental jurisdiction is appropriate in two circumstances: "where the facts underlying the federal and state claims substantially overlap[ ] . . . or where presentation of the federal claim necessarily [brings] the facts underlying the state claim before the court." *In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig.*, 510 F. Supp. 2d 299, 322 (S.D.N.Y. 2007) (citation omitted) (rejecting defendant's argument that the court lacked supplemental jurisdiction over state law claims). Indeed, "[a] federal court's exercise of pendent jurisdiction over plaintiff's state law claims, while not automatic, is a favored and normal course of action."

Promisel v. First Am. Artificial Flowers, Inc., 943 F.2d 251, 254 (2d Cir. 1991) (affirming exercise of supplemental jurisdiction over state law claim).

The SEC has properly stated a claim against Ms. Smith under Section 276 of the Debtor and Creditor Law and, as discussed below, this claim is inextricable from its federal claims.[7] Under Section 276, a conveyance made "with actual intent . . . to hinder, delay, or defraud either present or future creditors is fraudulent as to both present and future creditors.'" N.Y. CRED. & DEBT. LAW § 276. In order to set aside a fraudulent conveyance, a party must "plead actual intent to defraud with the particularity required by Fed. R. Civ. P. 9(b)." *Eclaire Advisor Ltd. as Trustee to Daewoo Int'l (Am.) Corp.*, 375 F. Supp. 2d 257, 268 (S.D.N.Y. 2005) (denying motion to dismiss Section 276 claim). Circumstantial evidence may be used to infer actual intent to defraud and there are certain "badges of fraud" to be used when determining if actual intent exists, which include: (1) the inadequacy of consideration received, (2) the close relationship between the parties to the transfer, (3) information that the transferor was insolvent by the conveyance, (4) suspicious timing of transactions or existence of pattern after the debt had been incurred or a legal action against the debtor had been threatened, or (5) the use of fictitious parties. *Id.* at 268-69.

The SEC has pleaded with particularity that David and Lynn Smith's fraudulent conveyance of the Charter One stock to the Trust, and their fraudulent conveyance of the Vero Beach house from joint ownership to Ms. Smith's sole ownership, both in order to shield assets from future creditors, are part of the unlawful scheme perpetrated by the defendants on McGinn Smith investors. Am. Compl. ¶¶ 119-33, 136, 170-73; *see also In re MTBE*, 510 F. Supp. 2d at

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[7] Ms. Smith's status as a defendant, as opposed to a relief defendant, is purely related to the SEC's state law claim. The same is true for Nancy McGinn, the Smith Trust, Geoffrey Smith, and Lauren Smith.

322. These transfers represent the final steps in the Smiths' scheme to ensure that the ill-gotten gains flowing from Mr. Smith's securities fraud remained protected and, in the case of the annual income the Smiths will derive from the Trust, concealed. Contrary to Ms. Smith's innocent portrayal of the Stock Account assets, *see* Mot. at 17-18, the Court already has found that despite maintaining the Stock Account in her name, Ms. Smith gave her husband "unfettered control over the account."[8] Docket #86, at 9; *see also* Am. Compl. ¶ 109 (D. Smith "exercised beneficial ownership and unfettered control over the Stock Account for at least fifteen years" and L. Smith allowed him to draw upon the Account for "business and personal needs without restrictions"). The Court concluded that the "SEC has demonstrated a substantial likelihood of success in proving that . . . the Stock Account includes ill-gotten gains" resulting from the securities fraud. Docket #86, at 33.

Further, the circumstantial evidence set forth in the Amended Complaint is sufficient to infer that the Smiths created the Trust in order to shield the ill-gotten gains resulting from the securities fraud. Am. Compl. ¶¶ 119-33; *see also Eclaire*, 375 F. Supp. 2d 268-69 (court must consider suspicious timing of transfer, including timing relative to legal actions pending against defendant). Under the guise of contributing assets to their children, David and Lynn Smith fraudulently conveyed major Stock Account assets, i.e. the Charter One stock, to the Trust in 2004 in order to "protect the assets of the Trust to insure their existence when the Annuity Agreement payments [to the Smiths] were to commence." Docket #194, at 21; Am. Compl. ¶¶ 126-33. The SEC has alleged that, at the time of this transfer,

- Ms. Smith had given her husband beneficial ownership and unfettered control of the Stock Account, including the Charter One stock, for fifteen years, Am. Compl. ¶ 109;

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[8] In so finding, the Court expressly rejected Ms. Smith's contention that she maintained sole control over the Stock Account as "incredible." Docket #86, at 9 n.13.

- The Charter One stock was the dominant asset within the Stock Account and was used to further the Smith's business interests, *id.* at ¶ 110-12;
- The Stock Account was used to loan money to troubled McGinn Smith entities and as a repository for Mr. Smith's personal assets and ill-gotten gains from the McGinn Smith entities, *id.* at ¶¶ 109, 113;
- Ms. Smith had already made two $3 million loans using these very assets to facilitate a public offering of a McGinn Smith entity and she was a named defendant in a securities fraud suit that centered on these loans, *id.* at ¶ 130;
- The same year the securities lawsuit settled, David and Lynn Smith fraudulently created the Trust and entered into the Annuity Agreement to preserve their ownership interest in the $4.45 million in cash received from the Charter One buy-out, *id.* at ¶¶ 130-31; and
- Ms. Smith later concealed her ownership interest from the Court and the SEC, *id.* at ¶ 133.

These facts are sufficient to conclude that the Smiths fraudulently conveyed the Trust assets to protect them from future creditors and that they were motivated by the securities fraud described in the Amended Complaint.

The SEC has adequately alleged that the transfer of the Vero Beach home was yet another attempt by Ms. Smith and her husband to protect the gains resulting from her husband's fraud. Am. Compl. ¶ 136. The Smiths jointly purchased Vero Beach house with proceeds derived from the Stock Account, which the Court already has concluded contained ill-gotten gains. *See* Docket #86, at 33. In 2009, after holding joint title to the house for over 8 years, the Smiths abruptly transferred it to Ms. Smith's sole custody without fair consideration. Docket #86, at 36; *see also Eclaire*, 375 F. Supp. 2d 268-69 (court should consider relationship of parties and inadequacy of consideration). On these facts, the Court concluded that the SEC "demonstrated a likelihood of success in proving that . . . [the transfer of the home was] solely for the fraudulent purpose of shielding David Smith's assets from seizure." Docket #86, at 36

(granting freeze of Vero Beach home). Thus, both the Amended Complaint and the Court's findings make clear that David and Lynn Smith's fraudulent transfers were steps they took to protect the spoils of Mr. Smith's fraud.

B. SEC Is A "Creditor" Under Section 276 of The Debtor And Creditor Law

The Court should reject Ms. Smith's argument that the SEC is not a "creditor" for purposes of the New York State Debtor and Creditor law. *See* Mot. at 22-25. The term "creditor" enjoys a broad definition: a creditor is "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." N.Y. Debtor and Creditor Law § 270. New York courts, including this one, have long recognized that a government agency seeking to protect the public is properly considered a creditor under the law. *See U.S. v. Hansel*, 42 F. Supp. 2d 201, 203 (N.D.N.Y. 1999) (government is a creditor under New York law where defendant fraudulently conveyed stock to his wife and others to avoid tax liabilities); *see also U.S. v. Kaplan*, 267 F.2d 114 (2d. Cir. 1959) (government is a creditor under New York law where defendant fraudulently conveyed real property to his wife to avoid tax liability); *Crabb v. Mager's Estate*, 66 A.D.2d 20, 24-25 (N.Y. Supr. Ct. 4th App. Div. 1979) (commissioner of department of social services is a creditor against estate of recipient of medical assistance where transfer of homestead without fair consideration rendered deceased ineligible for medical assistance). Indeed, in recent cases in this Circuit, the SEC's status as a "creditor" under New York's Debtor and Creditor Law has been assumed without comment. *See Commodity Futures Trading Comm'n v. Walsh*, 618 F.3d 218 (2d. Cir. 2010) (implying SEC is a creditor under law by certifying certain questions of law to New York Court of Appeals without certifying standing question); *S.E.C. v. Shainberg*, No. 07-CV-8814, 2010 WL 972204 (S.D.N.Y.

Mar. 17, 2010) (implying SEC is a creditor under law by considering SEC's claims without comment on standing).

The reasoning inherent in the federal bankruptcy laws, which recognize the SEC as a creditor, is analogous. *See In re Hodge*, 216 B.R. 932, 936 (S.D. Ohio 1998) (SEC was a "creditor" to whom disgorgement and civil penalties for securities fraud violations were owed even though debtor was required to disgorge money to district court and Treasury and not SEC); *see also* 11 U.S.C. § 523(a)(7), (19) (bankruptcy does not discharge a debtor from "fine, penalty, or forfeiture payable to and for the benefit of a governmental unit" or from debts arising out of violations of the federal securities laws). Regardless of whether the SEC distributes the disgorged profits to individual investors who suffered losses or to the Treasury, these profits remain a debt owed by culpable defendants to the government. Accordingly, the SEC is a creditor under Section 276 of New York's Debtor and Creditor Law.

CONCLUSION

For the foregoing reasons, the SEC respectfully requests that the Court deny Ms. Smith's Motion to Dismiss.

Dated: New York, NY
January 7, 2011

Respectfully submitted,

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DECLARATION OF SERVICE

I, Lara Shalov Mehraban, pursuant to 28 U.S.C. § 1746, certify that on January 7, 2011, I filed on the Court's ECF system the following document:

- Plaintiff's Opposition to Relief Defendant and Defendant Lynn A. Smith's Motion to Dismiss;

and sent by electronic mail a copy of the above-referenced document to:

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Dated: January 7, 2011
New York, New York

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