UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED

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Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	Civil Action No. H-01-3624
	§	**(Consolidated)**
	§	
Plaintiffs,	§	CLASS ACTION
	§	
vs.	§	
	§	
ENRON CORP., et al.,	§	
	§	
Defendants.	§	

AMALGAMATED'S SUPPLEMENTAL BRIEF IN RESPONSE TO UNIFIED SUBMISSION OF DEFENDANTS REGARDING THE COURT'S AUTHORITY TO ENTER AN ORDER FREEZING DEFENDANTS' INSIDER TRADING PROCEEDS AND REQUIRING ACCOUNTING

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I. INTRODUCTION

In a colloquy with plaintiff's counsel, at the close of the December 7 hearing, the Court framed the issue: does *Grupo Mexicano* pose a legal barrier to plaintiff's injunctive relief – a constructive trust over defendants' insider-sales proceeds? December 7, 2001 Hearing Transcript ("Tr.") at 97. Counsel's response pulled no punches: if the Court reads *Grupo Mexicano* as broadly as defendants urge, plaintiff will lose. But, since then, as apparent from defendants' Joint Brief, defendants do not take the position that *Grupo Mexicano* is as damning as they originally suggested. Defendants do not (and cannot) avoid the fact that the Supreme Court in *Grupo Mexicano*, in Judge Niemeyer's words, "carefully circumscribed" its holding. *Grupo Mexicano* was a straight-forward breach of contract case – no equitable relief was prayed for, no equitable interest in an asset was claimed, and no statutory provision was involved that empowered the Court to grant equitable relief – petitioner merely sought money damages. Tr. at 16. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 310-11, 325 (1999). It was ***not*** a suit brought under the securities acts where disgorgement and accounting were sought, and where plaintiffs claimed an equitable interest in defendants' allegedly illegal insider-trading proceeds.

The Court has the authority to enforce Amalgamated's equitable remedies under the federal securities laws. This lawsuit properly asserts insider trading claims under §§10(b) and 20A for disgorgement of insider-trading proceeds under the Exchange Act, which expressly authorizes district courts to grant equitable relief under §§27 and 28(a), and also non-fraud claims as to publicly traded debt issued pursuant to SEC-filed Registration Statements under §11 of the Securities Act, which also grants equitable powers to the court pursuant to §22.

Far from a nuclear attack on defendants' ***assets***, plaintiff targets ***only*** defendants' insider-sales proceeds – a finite category that they cannot bring themselves to mention even once in their Joint Brief. Plaintiff does not seek a prejudgment seizure of general assets to secure a money judgment, but rather a constructive trust over a very specific subset of those assets – $1.1 billion from their insider trading – which, to answer defendants' question, ***is*** a claim for equitable relief. Defs' Brf. at 2, 4. And granting plaintiff's relief will not leave defendants bereft of their ability to defend

themselves as they claim, because their defense is funded by more than $400 million in directors' and officers' insurance – insurance they paid for with Enron's shareholders' monies.

Plaintiff seeks uncommon but not unfair injunctive relief – a constructive trust over $1.1 billion and an accounting of defendants' insider-sales proceeds from the sale of 17 million Enron shares. In contrast, defendants' illicit partnerships, financial-statement manipulations, and misrepresentations and omissions about the true status of Enron's business and its prospects, destroyed the nation's seventh-largest company, wiped out thousands of former employees' retirement dollars, and cost investors billions.

Moreover, justification for the relief sought by Amalgamated is heightened by the public interest at stake regarding the Enron fraud. Indeed, this is an extraordinary case, the historic scope and specter of which is front-page news:

- "Enron's Woes Touch Firms Around World," *The Wall Street Journal*, 11/30/01: the Company's "financial travails reverberated around the globe, roiling everything from paper manufacturers in Scandinavia to bank trading rooms in Tokyo." (Attached hereto as Ex. A).

- "Energy Giant's Disaster Devastates 401(k) Plans," *U.S.A Today*, 11/30/01: "Many of the 11,000 participants in Enron's 401(k) plan are watching tens of thousands of retirement dollars – in some cases, hundreds of thousands – vaporize." (Attached hereto as Ex. B).

- "The Enron Disaster: Lies. Arrogance. Betrayal. How Ken Lay and His Team Destroyed America's Seventh-Largest Corporation," *Fortune*, 12/24/01: "Why Enron Went Bust: Start with arrogance. Add greed, deceit, and financial chicanery. What do you get? A company that wasn't what it was cracked up to be." (Attached hereto as Ex. C).

- "Behind Enron's Fall: A Culture of Operating Outside Public's View: Hidden Deals With Officers and Minimal Disclosure Finally Cost it its Trust," *The Wall Street Journal*, 12/5/01: "One partnership, whose existence Enron didn't reveal for four years, was part of an arrangement that inflated earning by several hundred million dollars during that period." (Attached hereto as Ex. D).

- "Enron: Running on Empty," *BusinessWeek*, 12/10/01: "The fall of mighty Enron Corp. – just months ago one of the most valuable companies in America – is a collapse of mind-boggling proportions." (Attached hereto as Ex. E).

- "Enron Slashes Profits Since 1997 by 20%," *The Wall Street Journal*, 11/9/01; The Company "reduced its previously reported net income dating back to 1997 by $586 million, or 20%, mostly due to improperly accounting for its dealings with partnerships run by some company officers." (Attached hereto as Ex. F).

- "The Biggest Bust: Workers and Stockholders are Enron's Worst Casualties," *U.S. News & World Report*, 12/10/01. (Attached hereto as Ex. G).

- "The Enron Debacle: Byzantine deals have shattered the energy outfit's credibility," *BusinessWeek*, 11/12/01: "And when an analyst challenged former CEO Jeffrey K. Skilling

in a conference call to produce Enron's balance sheet, Skilling called him and 'ass –.'" (Attached hereto as Ex. H).

And, congressional hearings regarding the Enron fraud are proceeding, demonstrating further the public interest in this action. The constructive trust and accounting sought by Amalgamated will preserve a small but critical remedy for Enron's public investors while the Court has an opportunity to render a meaningful decision on the merits of this action.

II. THIS COURT IS AUTHORIZED TO ENTER A TRO AND/OR PRELIMINARY INJUNCTION FREEZING INSIDER TRADING PROCEEDS IN FURTHERANCE OF PLAINTIFF'S CLAIMS UNDER THE FEDERAL SECURITIES LAWS

Defendants concede, expressly or impliedly, that the Supreme Court's decisions in *Grupo Mexicano*, *DeBeers,* and *Deckert*, instruct whether this Court has the authority to enter a prejudgment freeze or constructive trust over insider trading proceeds. *See* Defs' Brf. at 3-7, 13 (extensively discussing or misconstruing such cases). They also concede that if Amalgamated asserts a cognizable equitable claim sufficiently related to a defendant's insider trading proceeds, this Court has the authority to freeze defendants' insider trading proceeds. *See* Defs' Brf. at 4 (although no reported decision in history has referred to that authority as such, defendants call that "the Narrow 'Equitable Interest' Exception").

However, defendants foist upon the Court the notion that Amalgamated must look to common law equity to state Amalgamated's claim. Defs' Brf. at 7-9. And defendants make the incredible assertion that the federal securities laws – broad remedial statutes – do not provide equitable relief for Amalgamated. Defs' Brf. at 10 ("II. Plaintiff's Federal Securities Claims Provide the Court No Additional Power to Grant the Requested Relief").

Internally consistent, and likewise disingenuous, defendants claim that in *Deckert*, the Supreme Court did ***not*** decide that the Securities Act provided equitable relief. Defs' Brf. at 13. Defendants are wrong on all accounts. *Grupo Mexicano* and *Central Bank* did not gut this Court of its broad remedial powers under the federal securities laws. *See infra*, §II.A.2. Nor is common law "tracing" over the National Securities Exchanges required as defendants suggest when they ignore federal law under §§10(b) and 20A of the Exchange Act. *See infra*, §II.B.2. And the Supreme Court

itself in *Grupo Mexicano*, contrary to defendants' recitation of the law, recognized that in *Deckert*, it decided that the Securities Act permitted equitable relief. *See infra*, §II.A.2.a.

A. An Order Freezing Insider Trading Proceeds and Requiring Accounting Is Proper When (as Here) It Is in "Aid of the Recovery" Sought by Plaintiff's Cognizable Claims in Equity

The issue submitted by this Court concerning the Court's authority to freeze insider trading proceeds is governed by the Supreme Court's decision in *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940).

1. *Deckert v. Independence Shares Corp.*

In *Deckert*, the plaintiffs alleged claims of misrepresentation and concealment in connection with the sale of securities and sought relief of rescission and restitution under the Securities Act. *See* 311 U.S. at 289. The plaintiffs also requested appointment of a receiver, alleging that defendants' assets were in danger of dissipation and depletion. *See id.* at 285. Plaintiffs moved for an injunction freezing defendants' assets and the district court entered an order prohibiting any defendant "from transferring or otherwise disposing of" a specified amount of money. *Id.* at 286.

On review of the court's order, the Supreme Court ***affirmed*** the district court's power to freeze defendants' assets in a unanimous decision. The Supreme Court held that the preliminary injunction freezing assets was proper where the suit sought equitable relief (rescission and restitution) and the asset freeze would be "in aid of the recovery sought by the bill." *Id.* at 289. *Accord United States ex rel. Rahman v. Oncology Assocs.*, 198 F.3d 489, 494-98 (4th Cir. 1999) (Niemeyer, Cir. Judge).

Consistent with their overreaching claim that Amalgamated must somehow rely on the common law existing in the English Courts of Chancery as of 1789 to remedy its claims, defendants suggest that the Supreme Court in *Deckert* never decided that the district court had the power to freeze defendants' assets on the basis that the Securities Act authorized the relief sought. Defs' Brf. at 13 ("*Deckert* expressly recognized that its plaintiffs (unlike Plaintiff here) had asserted the requisite elements of a common law claim for equitable relief ....").

Preposterous is defendants' claim that the Court in *Deckert* relied upon a "common law claim for equitable relief" (Defs' Brf. at 13) in order to determine the district court's power to freeze

defendants' assets. To the contrary, the Supreme Court in *Deckert* held that the Securities Act established a "statutory right" to the relief sought, which plaintiff could enforce in equity. *See* 311 U.S. at 287-88. The Supreme Court concluded, "[t]his is plainly a suit to enforce a liability or duty created by the Act." *Id.* at 290. And, when the Supreme Court in *Grupo Mexicano* approved but distinguished *Deckert*, it stated, "[a]fter deciding that the Securities Act permitted equitable relief, we concluded that the bill stated a cause of action for the equitable remedies of rescission of the contracts and restitution of the consideration paid." 527 U.S. at 325.

Thus, when a plaintiff asserts a cognizable claim to certain assets of the defendant (here, insider trading proceeds), or seeks a remedy involving those assets, a court may invoke equity to preserve the status quo pending judgment, to further, or "in aid of," the recovery sought by the lawsuit. *Deckert*, 311 U.S. at 289. *See also De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220 (1945) ("same character as that which may be granted finally"); *Rahman*, 198 F.3d at 496-97 ("nexus between the assets sought to be frozen through an interim order and the ultimate relief requested"). And, when interim equitable relief is authorized and the public interest is involved, "'[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *United States v. First Nat'l City Bank*, 379 U.S. 378, 383 (1965).[1] *Accord Rahman*, 198 F.3d at 497.

Accordingly, this Court has the power to freeze defendants' insider trading proceeds and order an accounting if (1) Amalgamated asserts cognizable claims in equity involving defendants' insider trading proceeds, and (2) the constructive trust and accounting are "in aid of the recovery" sought by Amalgamated's claims. *See* 198 F.3d at 496-97. In determining if the constructive trust and accounting are reasonably "in aid of the recovery" sought by Amalgamated, the Court "may take into account that a court of equity has enhanced authority when the public interest is involved." *Id.* at 497.

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[1]Here, as elsewhere, citations and footnotes are omitted and emphasis is added unless otherwise noted.

2. *Grupo Mexicano* and *Central Bank* Do Not Gut Amalgamated's Right to Enforce Equitable Remedies Under the Federal Securities Laws

Defendants suggest that *Grupo Mexicano* limited Amalgamated's equitable remedies to those available at common law as of 1789. Defs' Brf. at 4-9. They further assert that under *Central Bank*, the federal securities laws do not provide this Court authority to preserve plaintiff's equitable remedies because "[n]one of these statutes expressly authorizes a prejudgment restraint on a defendant's assets in favor of a plaintiff claiming under any of them." Defs' Brf. at 4-9, 10-13. Thus, according to defendants, after *Grupo Mexicano* and *Central Bank*, there are no equitable remedies available to Amalgamated under the broad remedial statutes of the Securities Act and the Exchange Act, including the broadest remedial provision of the federal securities laws, §10(b).

a. In *Grupo Mexicano* the Supreme Court "Carefully Circumscribed" Its Holding

Grupo Mexicano did ***not*** limit Amalgamated to common law equitable remedies and then brand a "Narrow 'Equitable Interest' Exception" purportedly under *Deckert*, as defendants contend.[2] Defs' Brf. at 3-4. If there is an exception to be cast here, it is the opposite of what defendants portray. As Judge Niemeyer stated in *Rahman*:

> ***Grupo Mexicano's holding is carefully circumscribed, providing specifically that the general equitable powers of the federal courts do not include the authority to issue preliminary injunctions in actions solely at law.***

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[2]And defendants' recitation of the common law equitable remedies available to Amalgamated is incomplete, at best. There is no doubt that the court's equitable rights at common law are apparently as broad as the federal securities laws, both of which emphasize adaptability of circumstances of the case. As Blackstone noted in his commentaries:

> [T]here are also peculiar courts of equity established for the benefit of the subject; to detect latent frauds and concealments, which the process of the courts of law is not adapted to reach; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to the misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law.

Blackstone Commentaries, Book I, Part I, Section III.

Further, the notion of constructive trusts have long been a part of equity jurisprudence. Constructive trusts are described in the case of *Keech v. Sandford*, 25 E.R. 223, Sel. Cas. t. King 61, 2 Eq. Cas. Abr. 741, which issued in 1726.

198 F.3d at 496. Indeed, Judge Niemeyer observed that the Supreme Court itself in *Grupo Mexicano* expressly limited the issue before it:

> This case presents the question whether, in an action for money damages, a United States District Court has the power to issue a preliminary injunction preventing the defendant from transferring assets ***in which no lien or equitable interest is claimed.***

527 U.S. 310. The Supreme Court similarly confined its holding in *Grupo Mexicano*:

> [W]e hold that the District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents' contract claim for ***money damages***.

Id. at 313. Thus, in *Grupo Mexicano*, the Supreme Court "was not presented with, nor did it choose to address" any of the myriad situations in which equitable remedies may be claimed and preserved by a prejudgment order. *Rahman*, 198 F.3d at 496.[3]

Numerous decisions by district courts post-*Grupo Mexicano* are consistent with Judge Niemeyer's analysis in *Rahman*. *See, e.g., Suppressed v. Suppressed*, 109 F. Supp. 2d 902, 904 & n.2 (N.D. Ill. 2000) ("in a suit seeking equitable relief, a restraint on transfer of assets may be appropriate .... Section 553(c)(3)(A)(i) provides for 'damages' consisting of disgorgement of the defendant's profits, an equitable remedy, making a temporary asset freeze permissible.... There is no question that an accounting is an equitable remedy traditionally available in cases in which the defendant holds or held an asset in which the plaintiff has an interest."); *Quantum Corp. Funding, Ltd. v. Assist You Home Health Care Servs.*, 144 F. Supp. 2d 241, 249 (S.D.N.Y. 2001) ("This issue in *Grupo Mexicano*, as other courts have recognized, was whether a district court has the power to enjoin assets in which the potential judgment creditor has absolutely no equitable interest.... *Grupo Mexicano* is therefore distinguishable.");*Kozeny*, 115 F. Supp. 2d at 1250 ("distinguishable"because

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[3]Obviously, Amalgamated is entitled to, and does, claim and preserve equitable remedies here. Nonetheless, it bears note that, as courts after *Grupo Mexicano* have held, a prejudgment restraint on assets where plaintiff's claims are for damages may be proper. In *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725 (9th Cir. 1999), the Court of Appeals for the Ninth Circuit held that even where the ultimate relief sought was damages, a prejudgment equitable injunction could be appropriate after *Grupo Mexicano* "where it has been shown that the defendant intended to frustrate any judgment on the merits by transferring assets." *Id.* at 729. The Ninth Circuit further held that the injunction was distinguishable from the injunction in *Grupo Mexicano* because it did "not completely prohibit Appellants from taking any action with regard to their assets." *Id.* at 730. And in *Nat'l Union Fire Ins. Co. v. Kozeny*, the court held that because there was a "strong nexus between the assets enjoined and Plaintiffs' claims for money damages[,] *Grupo* is not inconsistent with the preliminary injunctions issued in this case." 115 F. Supp. 2d 1243, 1250 (D. Colo. 2000).

"there is a strong nexus between the assets enjoined and Plaintiffs' claims for money damages"); *Trafalgar Power, Inc. v. Aetna Life Ins.Co.*, 131 F. Supp. 2d 341, 350 (N.D.N.Y. 2001) ("distinguishable"); *Fairview Machine & Tool Co. v. Oakbrook Int'l, Inc.*, 77 F. Supp. 2d 199, 202-04 (D. Mass. 1999) (same); *FTC v. Verity Int'l, Ltd.*, No. 00 Civ. 7422 (LAK), 2001 U.S. Dist. LEXIS 6097, at *6 (S.D.N.Y. May 14, 2001) (same) (equitable claim for disgorgement); *CSC Holdings, Inc. v. Greenleaf Elecs.*, No. 99 C 7249, 2000 U.S. Dist. LEXIS 7675, at *30-*31 (N.D. Ill. June 1, 2000) (same).

b. *Central Bank* Did Not Strip This Court of Its Equitable Powers

Contrary to what defendants claim at page 10 of their brief, this Court is ***not*** stripped of its flexible equitable powers to enforce the relief to which Amalgamated is entitled because neither the Securities Act nor the Exchange Act "expressly authorizes a prejudgment restraint on a defendant's assets in favor of a plaintiff claiming under any of them." If the Supreme Court's decision in *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994), eliminated all remedies in the federal securities laws not expressly spelled out in such detail as defendants require, then, presumably, defendants could cite to a decision under *Central Bank* supporting such an alarming proposition. Defendants do not, and Amalgamated is unaware of such a case.

This is because the Supreme Court's decision in *Central Bank* dealt ***not*** with ***remedies***, but with the "***scope of conduct*** prohibited by §10(b)." 511 U.S. at 173. In *Central Bank,* the Court held that the "statutory text controls the definition of conduct covered by §10(b)" and refused to find an implied private action for aiding and abetting under that statute. *Id.* at 174-75. Here, Amalgamated is not asking this Court to unearth the right to an equitable remedy. Rather, Amalgamated merely asks that this Court exercise its equitable powers to ***enforce*** plaintiff's rights, as provided under §22 of the Securities Act, and §§27 and 28(a) of the Exchange Act.

Indeed, when determining the ***right to enforce remedies*** under the federal securities laws, which are intended to be broad remedial statutes, *see infra*, at 11-12, the Supreme Court interprets the relevant statutes in quite a different manner. Addressing the same sort of "express language" argument raised by defendants here, the Court in *Deckert* stated "[t]hat [the Securities Act] does not

authorize the bill in so many words is no more significant than the fact that it does not in terms authorize execution to issue on a judgment." 311 U.S. at 288. Interpreting §22 of the Securities Act, which mirrors §27 of the Exchange Act, both of which authorize this Court to enforce Amalgamated's remedies here, the Supreme Court in *Deckert* held:

> We think the Securities Act does not restrict purchasers seeking relief under its provisions to a money judgment. On the contrary, the Act as a whole indicates an intention to establish a statutory right which the litigant may enforce in designated courts by such legal or equitable actions or procedures as would normally be available to him....
>
> Moreover in §22(a) specified courts are given jurisdiction "of all suits in equity and actions at law brought ***to enforce*** any liability or duty created by this subchapter." The power ***to enforce*** implies the power to make effective the right of recovery afforded by the Act.

311 U.S. at 287-88 (emphasis in original). Thus, the Supreme Court in *Deckert* held that the Securities Act established a "statutory right" to the relief sought, which plaintiff could enforce in equity.[4]

In the face of arguments that the plain language of §27 of the Exchange Act somehow limits the powers of courts to enforce equitable remedies, courts have repeatedly recognized that §27 gives district courts equity powers to enforce private and SEC remedies under the Exchange Act. *See, e.g., J.I. Case Co. v. Borak*, 377 U.S. 426, 433-34 (1964); *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir. 1971). Approving *Deckert*, the Supreme Court has interpreted the equitable powers of district courts under §27 of the Exchange Act in the same manner as §22 of the Securities Act:

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[4]Similarly, in *De Beers*, the Supreme Court found that a district court's authority to grant preliminary injunctive relief would be "exercised according to the general principles which govern the granting of equitable relief" where a statute (the Sherman Act) generally conferred jurisdiction on the district courts "'to prevent and restrain violations'" of the statute. 325 U.S. at 218-19. Under these general principles, the Supreme Court held that a district court:

> [O]f course, has the power, pending final action in this respect, to restrain action or conduct violative of the statute. A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally.

Id. at 220. The Supreme Court in *De Beers* recognized *Deckert* as such a case involving "a fund or property" subject to an preliminary injunction. *Id.* & n.11. As it did with *Deckert*, in *Grupo Mexicano*, the Supreme Court approved of *De Beers*. 527 U.S. at 326-27.

> Section 27 grants the District Courts jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by this title ...." In passing on almost identical language found in the Securities Act of 1933, the Court found the words entirely sufficient to fashion a remedy to rescind a fraudulent sale, secure restitution and even to enforce the right to restitution against a third party holding assets of the vendor. *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940). This significant language was used: "The power ***to enforce*** implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case."

J.I. Case Co., 377 U.S. at 433-34 (emphasis in original). As the Supreme Court stated in *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391 (1970), "we cannot fairly infer from the Securities Exchange Act of 1934 a purpose to circumscribe the courts' power to grant appropriate remedies."

This analysis is wholly consistent with *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), cited by defendants at page 11 of their brief. In *Touche Ross*, the question was whether §17(a) of the Exchange Act provided for an implied private right of action for damages against accountants for misstatements in certain required filings. The Court answered this question in the negative. In passing, the Court noted that §27 creates no cause of action of its own force. *Id.* at 577. Amalgamated is not basing its cause of action on §27. Rather, §27, once invoked, serves as a means by which the court is granted the power to exercise equity to make effective a plaintiff's right of recovery under the Exchange Act.

If there could be any question that this Court has all equitable powers available to it, §28(a) of the Exchange Act resolves that question:

> [T]he rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that my exist at law or in equity ....

15 U.S.C. §78bb. Thus, regardless of whether the Exchange Act expressly provides for specific equitable remedies or not, district courts retain all equitable powers to enforce rights under the Exchange Act. *See, e.g.*, *Paul F. Newton & Co. v. Texas Commerce Bank*, 630 F.2d 1111, 1118 (5th Cir. 1980) (§28(a) provides that "the rights and remedies created by the Securities Exchange Act did not displace, but were in addition to, all other rights and remedies that might exist at law or in equity"); *SEC v. Investors Sec. Corp.*, 560 F.2d 561, 566-67 (3d Cir. 1977).

B. Amalgamated Asserts Cognizable Claims in Equity Involving Defendants' Insider Trading Proceeds

Although they apparently claim that each of them is not liable under §§10(b) and 20A for insider trading ("unsubstantiated allegations ... which Defendants vigorously dispute"), defendants do not dispute that Amalgamated has pleaded claims for insider trading under §§10(b) and 20A. Defs' Brf. at 3 n.1. (As set forth at pages 16-20 of Amalgamated's *Ex Parte* Application, Amalgamated adequately pleads claims for insider trading and contemporaneity under §§10(b) and 20A.) According to defendants, though, Amalgamated has no equitable remedies under the federal securities laws. Defs' Brf. at 15. However, this Court does have the power to enforce equitable remedies for any liability under the Securities Act and the Exchange Act, *see supra*, §II.A.2, and, as shown below, courts have recognized the equitable remedies under §§10(b) and 20A which Amalgamated seeks here.

Finally, although defendants do not dispute Amalgamated has satisfied the requirements for contemporaneous trading under Amalgamated's insider trading claims, defendants apparently suggest this is not enough, and that Amalgamated must perform the impossible task of "tracing" over a National Securities Exchange. Defs' Brf. at 7-9. That is incorrect. *See infra,* §II.B.2.

1. Amalgamated's Statutory Claims Entitle It to Equitable Remedies

Defendants assert that Amalgamated's claims have no equitable remedies because "[n]one of the statutory provisions" Amalgamated relies upon under the federal securities laws "contain any language which creates a cause of action other than a damages claim, much less any language creating a constructive trust in Defendants' assets." Defs' Brf. at 15. This "express language" attack on Amalgamated's rights has been rejected over and over again by the Supreme Court and circuit courts.

Defendants' supposed statutory construction argument fails here, as it does with §27. Defendants attempt to summarize for the "convenience" of the Court §§10(b), 20A, 20(a), and 11. *See* Defs' Brf. at 16. Defendants then spin each statute to suit their purpose. But they do not (and cannot) cite case law supporting their cramped interpretation of Amalgamated's rights under those

statutes. This is because courts do ***not*** so interpret ***remedial legislation***, especially statutes intended to be as broad in scope as here.

As the Supreme Court stated in *Herman & MacLean v. Huddleston*:

> In enacting the 1934 Act, Congress stated that its purpose was to "impose requirements necessary to make [securities] regulation and control reasonably complete and effective. 15 U.S.C. §78b." ... [Thus the Supreme Court has] repeatedly recognized that securities laws combating fraud should be construed "not technically and restrictively, but flexibly to effectuate [their] remedial purposes."

459 U.S. 375, 386-87 (1983) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971); *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972)). Accordingly, this Court should be,

> guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes. The Securities Exchange Act quite clearly falls into the category of remedial legislation.

Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). And the Fifth Circuit has held repeatedly,

> that the Exchange Act and the Securities Act should be construed broadly to effectuate the statutory policy affording extensive protection to the investing public.

Meason v. Bank of Miami, 652 F.2d 542, 549 (5th Cir. 1981). Likewise, the Fifth Circuit in *Newton* stated, "[t]he Federal securities statutes are remedial legislation and must be construed broadly, not technically and restrictively." 630 F.2d at 1118.[5]

In support of their argument that plaintiff's claims are legal and not equitable, defendants rely on the Eleventh Circuit's decision in *Rosen* as a case "virtually identical" to here. Defs' Brf. at 18. But they ignore the key distinguishing feature – the plaintiff in *Rosen* brought ***only damages claims***:

> We start with the basic proposition, which ultimately controls this case, that the appellees seek to recover money damages for violations of federal securities laws and state common law. ***The foregoing discussion of the factual background makes clear that the appellees' claims are legal, not equitable in nature. For each cause of action asserted against Moses, the appellees seek monetary relief, not an injunction of any sort.***

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[5]*Accord Spector v. L Q Motor Inns, Inc.*, 517 F.2d 278, 286 (5th Cir. 1975) ("The terms of the [Securities Exchange Act of 1934] are to be broadly construed to effectuate its remedial purpose."); *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 479 (5th Cir. 1974) ("We begin our analysis by noting that the 1933 and 1934 Acts are remedial in nature, and hence are to be broadly construed."); *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 592 (5th Cir. 1974) ("In interpreting the securities laws we must keep in mind the broad Congressional purpose.... The securities laws are intended to protect investors, not merely to test the ingenuity of sophisticated corporate counsel.").

Rosen v. Cascade Int'l, 21 F.3d 1520, 1526 (11th Cir. 1994). Describing the factual background, the court in *Rosen* explained: "None of these complaints requests a permanent injunction as an alternative remedy for any of the stated causes of action." *Id.* at 1525. Moreover, the *Rosen* court also explained that plaintiffs' insider trading claims for disgorgement "were not pending at the time the district court issued the preliminary injunction challenged in this appeal." *Id.* at 1524-25 & nn.4, 8. And, strictly interpreting plaintiffs' prayer, the *Rosen* court rejected plaintiffs' "suggestion that they successfully invoked the district court's equitable jurisdiction through their requests for any additional relief as may appear 'just and proper' at the conclusion of each complaint." *Id.* at 1526 n.12. Thus, in *Rosen*, the court did not analyze, nor did it address, the equitable remedies to which plaintiffs otherwise would have been entitled under the federal securities laws.

Absent any claim for equitable relief, the Eleventh Circuit held that in *Rosen*, the district court lacked the authority to enter an injunction freezing defendants' assets because the plaintiff sought ***only damages*** remedies and ***not equitable relief***. *Id.* Here, in contrast, Amalgamated seeks equitable relief.[6]

Section 10(b) provides an equitable remedy of disgorgement against those who trade on the basis of inside information. As the Second Circuit held in *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156 (2d Cir. 1980), disgorgement is appropriate for §10(b) and Rule 10b-5 insider trading violations:

> The disgorgement measure ... partially duplicates disgorgement remedies available in proceedings by the SEC or others.... However, as between the various alternatives we are persuaded, after weighing the pros and cons, that the disgorgement measure ... offers the most equitable resolution of the difficult problems created by conflicting interests.

Id. at 172-73. *Accord* 10 L. Loss & J. Seligman, *Securities Regulation*, at 4617-18 (3d ed. 1993) ("[i]njunctive relief has also been regularly approved in private actions implied under Rule 10b-5,

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[6]The only other case which defendants cite for the proposition that plaintiff is only entitled to damages remedies under the federal securities laws is a copyright case, *Feltner v. Colombia Pictures TV*, 523 U.S. 340 (1998). *See* Defs' Brf. at 17. In *Feltner*, the court determined whether a party found liable for copyright infringement was entitled to have a jury trial to determine the amount of statutory damages. The case simply makes the unremarkable statement that the general rule is that monetary relief is a legal remedy. 523 U.S. at 353. It in no way touches on what is at issue here.

§14(e) ... and the Investment Company Act").[7] Obviously, SEC insider trading cases are more common, where disgorgement is recognized as the typical remedy for insider trading violations. *See SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989).

Likewise, under §20A, the "***court's equitable power*** may be sufficient to grant additional relief [under §20A]." 2 *Bromberg and Lowenfels on Securities Fraud & Commodities Fraud* §7.4 (1260) (2d ed. 1990). Indeed, the measure of "damages" under 20A is clearly a measure of disgorgement, which is an equitable remedy. Section 20A(b)(1) states the amount a plaintiff may recover "shall not exceed the profit gained or loss avoided in the transaction." This form of recovery is recognized by the Fifth Circuit as a disgorgement remedy. *See, e.g., SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) ("The trial court acted ***properly within its equitable powers*** in ordering Pullman to ***disgorge the profits he obtained*** by fraud.... The court's power to order disgorgement extends only to the amount with interest by which the ***defendant profited from his wrongdoing***."); *SEC v. Patel*, 61 F.3d 137, 139 (2d Cir.1995) ("In the exercise of its ***equity*** powers, a district court may order the ***disgorgement*** of profits acquired through securities fraud. 'Disgorgement need only be a reasonable approximation of profits causally connected to the violation.'"). Indeed, post-*Grupo Mexicano* decisions recognize that disgorgement measures of "damages" are equitable remedies and therefore *Grupo Mexicano* is not applicable. *See Suppressed,* 109 F. Supp. at 904.

Defendants misapprehend the plain language of §20A by claiming only the SEC may seek disgorgement. Defs' Brf. at 16. Section 20A contains no such limitation. Rather, §20A provides that a plaintiff's disgorgement remedy will be "diminished" by any amount disgorged in an SEC enforcement action. §20A(b)(2). *See also Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 734 F. Supp. 1071, 1076 (S.D.N.Y 1990) ("Thus, the Court finds that once ill-gotten gains have been

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[7]"Disgorgement of ill-gotten gain may be appropriate when the remedy is based in terms of restitution and unjust enrichment rather than any compensable loss to the plaintiff. Thus, for example a suit against someone who has traded on inside information in breach of a duty to the plaintiff is often said to be in the nature of restitution and thus disgorgement of profits in the proper measure." 2 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* §12.12[2], at 537 (4th ed. 2002). "The disgorgement measure has also been incorporated into the private right of action in the hands of contemporaneous traders, which was enacted as part of the Insider Trading and Securities Fraud Enforcement Act." *Id.* at n.45.

disgorged to the SEC, there remains no unjust enrichment and, therefore, no basis for further disgorgement in a private action.").

When addressing the equitable remedies which the Court may fashion and to which Amalgamated is entitled in this case (not specific SEC statutory remedies), there is no reason to distinguish between cases in which the SEC is a plaintiff and cases prosecuted by private plaintiffs. *See, e.g., Texas Gulf Sulphur*, 446 F.2d at 1307-08 ("restitution" or disgorgement of insider trading profits). In *Texas Gulf Sulfur*, the Second Circuit said, concerning the court's equitable powers under §27 of the Exchange Act, "[w]hile *Mills* was dealing with relief to private litigants, we deem the [same remedies] to be fully applicable in enforcement actions by the SEC." *Id.* at 1308. As a leading treatise notes, "[i]njunctive relief has also been regularly approved in private actions under Rule 10b-5, §14(e) ... and the Investment Company Act. ***In these areas there is no reason to distinguish between the SEC as plaintiff and private plaintiffs***." Loss & Seligman, *supra*, at 4617-18.

There are numerous SEC cases involving disgorgement remedies and asset freezes.[8] Nonetheless, while private actions for disgorgement and accounting are not common, there is ample precedent in private actions for its equitable remedies under §§10(b) and 20A of the Exchange Act, which Amalgamated seeks to preserve:

- *International Controls Corp. v. Vesco*, 490 F.2d 1334, 1340-41, 1347, 1354 (2d Cir. 1974) (asset freeze under §10(b));
- *O'Connor v. Dean Witter Reynolds, Inc.*, 529 F. Supp. 1179, 1182-83 (S.D.N.Y. 1981) (TRO freezing insider trading proceeds under §§10(b) and 14(e));
- *Neomontitis v. Blackie*, No. SA CV 94-379 AHS (RWRx), Order (C.D. Cal. June 20, 1994) (under §§10(b) and 20A, freeze of insider trading proceeds; accounting of insider trading proceeds) (attached as Ex. 10 to Jaconnette Decl. in Support of Plaintiff's *Ex Parte* Application);

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[8]*See, e.g., SEC v. First Jersey Sec.*, 101 F.3d 1450 (2d Cir. 1996) (disgorgement); *SEC v. Unioil*, 951 F.2d 1304 (D.C. Cir. 1991) (disgorgement); *SEC v. Deyon*, 977 F. Supp. 510 (D. Me. 1997) (disgorgement), *aff'd*, 201 F.3d 428 (1st Cir. 1998); *SEC v. Materia*, 745 F.2d 197 (2d Cir. 1984) (discussing disgorgement, asset freezes, appointments of receivers, repatriation of assets, constructive trusts, and restitution); *SEC v. Milan Capital Group, Inc.*, [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶90,906 (S.D.N.Y. 2000) (asset freeze); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972) (asset freeze); *SEC v. Homa*, [2000-2001 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶91,268 (N.D. Ill. 2000) (asset freeze). *See also* cases cited at 13-14 & nn.11-12 of Amalgamated's *Ex Parte* Application.

- *Miller v. Telios Pharms., Inc.*, No. 94-1554-IEG (RBB), Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction to Freeze or to Impose a Constructive Trust Over Remaining Proceeds From Public Stock Offering (S.D. Cal. Jan. 11, 1995) (under §10(b), freeze of insider trading proceeds; accounting of use, disposition and location of the proceeds; segregation of proceeds to be invested in United States Treasury securities) (attached as Ex. 11 to Jaconnette Decl. in Support of Plaintiff's *Ex Parte* Application);

- *In re Cal. Micro Devices Sec. Litig.*, No. C-94-2817-VRW, Preliminary Injunction Order (N.D. Cal. May 29, 1996) (under §§10(b) and 20A, freeze of insider trading proceeds) (attached as Ex. 12 to Jaconnette Decl. in Support of Plaintiff's *Ex Parte* Application);

- *Jefferies & Co. v. Arkus-Duntov*, 357 F. Supp. 1206, 1215-16 (S.D.N.Y. 1973) (freeze order enjoining payment of proceeds from insider trading under §10(b) of the Exchange Act and §12 of the Securities Act); and

- *Barton v. Hurtado*, No. 82-M-2164, 1983 U.S. Dist. LEXIS 17324, at *11 (D. Colo. Apr. 28, 1983) (in private action for specific performance under §10(b) of the Exchange Act and §17(a) of the Securities Act the court may "'fashion an appropriate remedy'").

2. Common Law Tracing Requirements Do Not Apply to Or Defeat Amalgamated's Insider Trading Claims

According to defendants, Amalgamated can obtain a constructive trust over their insider trading proceeds "***if, and only if***, it can trace the exact shares it purchased directly to the exact shares sold by the Defendants," and, because it is "impossible to match any individual sale of shares with any individual purchase," one cannot issue. Defs' Brf. at 7, 8 (emphasis in original). But Amalgamated's insider trading claims under §§10(b) and 20A have no such tracing requirement.

A person is liable for insider trading under §20A "to any person who, ***contemporaneously*** with the purchase or sale of securities that is the subject of such violation, has ***purchased*** (where such violation is based on a sale of securities) or ***sold*** (where such violation is based on a purchase of securities) securities of the same class." 15 U.S.C. §78t-1(a). Likewise, this Court observed in *In re Browning-Ferris Indus. Sec. Litig.*, 876 F. Supp. 870, 909 (S.D. Tex. 1995), that under §10(b), "[a] private cause of action for insider trading exists ... for persons who traded ***contemporaneously*** with the insider."

In *Browning*, this Court recognized that some courts interpret the contemporaneous standard for insider trading loosely, while others are more strict. 876 F. Supp. at 909. Even the "strict" interpretation cited by this Court in *Browning* required, at most, that a plaintiff's contemporaneous

trades occur "after the wrongful insider transaction" and the trades not occur "more than a few days apart from defendants' transactions." *Alfus v. Pyramid Tech. Corp.*, 745 F. Supp. 1511, 1522 (N.D. Cal. 1990) (cited in *Browning*, 876 F. Supp. at 909). ***None of these decisions cited by this Court in Browning required tracing.***

As the court in *In re Microstrategy Inc. Sec. Litig.*, 115 F. Supp. 2d 620 (E.D. Va. 2000) explained:

> ***This inquiry into contemporaneity proceeds from a recognition that "since identifying the party in actual privity with the insider is virtually impossible in transactions occurring on an anonymous public market, the contemporaneous standard was developed as a more feasible avenue by which to sue insiders."***

Id. at 662. *Accord In re Sec. Litig. BMC Software Inc.*, No. H-00-0359, 2001 U.S. Dist. LEXIS 18713, at *132 n.53 (S.D. Tex. Oct. 1, 2001) (Harmon, J.) ("'***contemporaneous*** standard was developed as a more feasible avenue by which to sue insiders'"). Thus, the insider trading claims which Amalgamated brings were intended specifically to allow private plaintiffs such as Amalgamated the opportunity to recover ill-gotten gains from insiders like defendants who trade on material, non-public information. Imposing a tracing requirement for relief, as defendants urge the Court to do, would contravene the plain language of the Exchange Act, frustrate Congress' intent and be quite inconsistent with the remedial purposes of the federal securities laws.[9]

Defendants incorrectly rely on *In re Kennedy & Cohen, Inc.*, 612 F.2d 963 (5th Cir. 1980), and *United States v. Benitez*, 779 F.2d 135 (2d Cir. 1985), in support of their tracing argument: *Kennedy* and *Benitez* are bankruptcy, not securities fraud, cases. In *Kennedy*, the Fifth Circuit based its decision on the bankruptcy scheme which creates priorities for certain creditors. *Kennedy* held imposing a constructive trust on commingled funds of a bankrupt entity "would tend to thwart or

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[9]Congress intended the definition of "contemporaneous" in §20A to be consistent with that definition made by courts:

> The bill does not define the term "contemporaneous," which has developed through case law. *See, e.g.*, *Wilson v. Comtech Telecommunications Corp.*, 648 F.2d 88 (2d Cir. 1981); *Shapiro v. Merrill, Lynch, Pierce, Fenner and Smith, Inc.*, 495 F.2d 228 (2d Cir. 1974); *O'Connor & Associates v. Dean Witter Reynolds, Inc.*, 559 F. Supp. 800 (S.D.N.Y. 1983).

H.R. Rep. No 100-910, at 27 (1988), *reprinted in* 1988 U.S.C.C.A.N. 6043.

obstruct the scheme of federal bankruptcy" law by altering the priorities of creditors. 612 F.2d at 966. The priorities of creditors under the federal bankruptcy scheme has nothing to do with disgorging illegal insider trading proceeds of defendants in a securities fraud case who are not bankrupt.

Defendants' lead case, *Benitez*, also arises under bankruptcy law and thus suffers from the same flaws as *Kennedy*. But defendants' reliance on *Benitez* in support of their tracing argument is especially perplexing, as the sentence following defendants' cited passage expressly acknowledges the "***need to relax strict tracing requirements*** in some circumstances." *Benitez*, 779 F.2d at 140 (citing *Rogers v. Rogers*, 473 N.E.2d 226 (N.Y. 1984)). This is precisely what was done with respect to insider trading claims under the Exchange Act.

C. The Constructive Trust and Accounting Amalgamated Requests Are "In Aid of the Recovery" Ultimately Sought by Amalgamated

As demonstrated herein, there must be a nexus between Amalgamated's cognizable insider trading claims and the insider trading proceeds of defendants to engage this Court's equitable powers. *See supra*, §II.A.1. Defendants do not dispute that the constructive trust and accounting which Amalgamated requests would be "in aid of the recovery" ultimately sought by Amalgamated, if Amalgamated has claims in equity under the federal securities laws. Amalgamated is entitled to, and alleges, claims in equity against defendants, and it is clear that the constructive trust and accounting requested here are "in aid of the recovery" of Amalgamated's disgorgement claims.

First, Amalgamated alleges insider trading claims for disgorgement, which is widely recognized as the remedy for such claims. *See supra*, §II.B.1. These claims relate perfectly to defendants' insider trading proceeds, as it is the proceeds which must be disgorged. This is more than enough of a nexus between Amalgamated's allegations and the defendants' insider trading proceeds. "It is enough at this time to determine that the bill contains allegations which, if proved, entitle petitioners to some equitable relief." *Deckert*, 311 U.S. at 289. *Accord Rahman*, 198 F.3d at 498. Likewise, the relief Amalgamated seeks is of the "same character as that which may be granted finally," because the insider trading proceeds are what will be "dealt with" in any final

disgorgement order entered in this case. *De Beers*, 325 U.S. at 220. *Accord Rahman*, 198 F.3d at 498.

Second, the constructive trust and accounting requested by Amalgamated are reasonably designed to aid this Court in giving the relief which Amalgamated requests on behalf of itself and the Class. *See Rahman*, 198 F.3d at 498. The admissions of Enron, and the public record and allegations made by Amalgamated of the severe nature of this fraud, which involved concealment through limited partnerships in the Cayman Islands and sophisticated financial manipulations by certain officers and directors of Enron – all adept at the manipulations employed – demonstrate that there is a threat of dissipation of the insider trading proceeds in this case. Moreover, Amalgamated has submitted the declaration of Professor Marc Steinberg, a former enforcement attorney at the SEC, who, based on his experience in prosecuting fraud cases, testifies that there is a threat of dissipation or depletion of the insider trading proceeds in this case.

Indeed, one defendant – Fastow – has already shown himself to be a flight risk, using an Enron jet (despite that Fastow was fired by Enron) through pre-cleared customs to fly out of the country soon after the SEC commenced its investigation of Fastow. Fastow has since returned, but he refused to comply with a subpoena of the SEC requiring him to produce documents and appear for testimony, and the SEC has moved for an order to show cause to enforce its subpoena. *See* Ex. I attached hereto.

The present record is sufficient to demonstrate a risk of dissipation of the insider trading proceeds enabling this Court the power to grant preliminary relief. As the Supreme Court held in *Deckert*, allegations that defendants engaged in "fraudulent misrepresentations and concealments" and that assets were in danger of dissipation and depletion, 311 U.S. at 285, were "enough at this time to determine" whether plaintiff could be entitled, upon proof, to some equitable relief, and that the court below had power to enter a temporary injunction freezing assets. *Id.* at 289-90. Likewise, in *Int'l Controls Corp.*, a temporary restraining order freezing assets was entered when a perpetrator fled the country upon allegations of fraud, despite that the assets in question were remaining in the country. 490 F.2d at 1340-41. And in *Neomontitis*, *Miller*, and *Cal. Micro Devices*, freeze orders were entered based on allegations of threat of dissipation in light of the severe nature of the fraud

demonstrated to the courts. *See supra*, at 15-16. In *Nguyen v. FundAmerica, Inc.*, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,498 (N.D. Cal. 1998), plaintiff demonstrated a likelihood of success on the merits of securities fraud claims and that was relied upon by the court in entering a freeze order. *Id.* at 97,586. *See also Rahman*,198 F.3d at 495 (claims of "'serious allegations of extensive fraud' involving millions of dollars"); *Republic of Panama v. Air Panama Internacional, S.A.*, 745 F. Supp. 669, 674 (S.D. Fla. 1988) (allegations that property that would likely be beyond the reach of the court and irretrievably dissipated).

The order Amalgamated requests would freeze defendants' insider trading proceeds ***only***, and would require an accounting so that defendants' insider trading proceeds may be identified and located. Once those insider trading proceeds are located, it is reasonable to determine that the proceeds should be invested so as to prevent their dissipation. As Amalgamated's counsel indicated at the hearing on December 7, and as provided in the order proposed, if there is any undue hardship that will be placed upon any of the defendants by the constructive trust, that matter may be raised before the Court and dealt with appropriately. However, to impose a constructive trust over insider trading proceeds here or to disgorge those proceeds requires preservation of those proceeds. *See Rahman*, 198 F.3d at 498.

Finally, the effect of the order Amalgamated seeks is limited. Contrary to what defendants repeat throughout their brief, the order Amalgamated requests focuses on insider trading proceeds - it does not apply to all of defendants' ***assets*** and does not prevent the insider trading proceeds from being invested. Indeed, after *Grupo Mexicano*, such orders which are limited and do not "completely prohibit ... action with regard to ... assets" have been upheld ***even in cases where the ultimate relief sought was money damages***. *Walczak*, 198 F.3d at 729-30 (distinguishing *Grupo Mexicano*).

Accordingly, the constructive trust and accounting which Amalgamated seeks fall squarely within the equity powers of this Court as recognized by *Grupo Mexicano*, *De Beers* and *Deckert*.

D. Justification For the Relief Sought By Amalgamated Is Heightened By the Public Interest At Stake Regarding the Enron Fraud

A court of equity has enhanced authority to provide relief when the public interest is favored. *See, e.g., First Nat'l City Bank*, 379 U.S. at 383. Defendants, although disputing their culpability,

do ***not*** dispute that the Enron fraud, so massive in dimension, is a matter of public interest. The argument at §II.C.2-3 in Amalgamated's *Ex Parte* Application, as well as the articles attached to the Jaconette Declaration in support of that Application already demonstrate that there is a significant public interest at stake here. And, as demonstrated by the articles attached hereto, the public interest has only heightened since Amalgamated filed its *Ex Parte* Application. Indeed, congressional hearings concerning the Enron fraud are proceeding.

This action furthers the public interest at stake. As the Supreme Court has emphasized, "private actions provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to Commission action.'" *Batemen Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co.*, 377 U.S. at 432). According to the Congress of 1995, private actions are an "indispensable tool with which defrauded investors can recover their losses," "promote ... confidence in our capital markets and help to deter wrongdoing." H.R. Conf. Rep. No. 104-369, at 31 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 730. Here, "[t]he public interest in preserving the integrity of the marketplace, and the enforcement of federal ... laws designed to protect investors and consumers, sharply favors the plaintiffs." *Nguyen*, ¶95,498, at 97,586.

Compromised investor confidence in the integrity of the capital markets calls for the prompt yet not unfair relief sought by Amalgamated. The constructive trust sought by Amalgamated will preserve a small but critical remedy for Enron's public investors while the Court has an opportunity to render a meaningful decision on the merits of this action. Conversely, the public interest would be harmed if the Individual Defendants were permitted to unjustly enrich themselves at plaintiff's expense and deprive shareholders adequate recovery through dissipation of the massive insider trading proceeds they reaped.

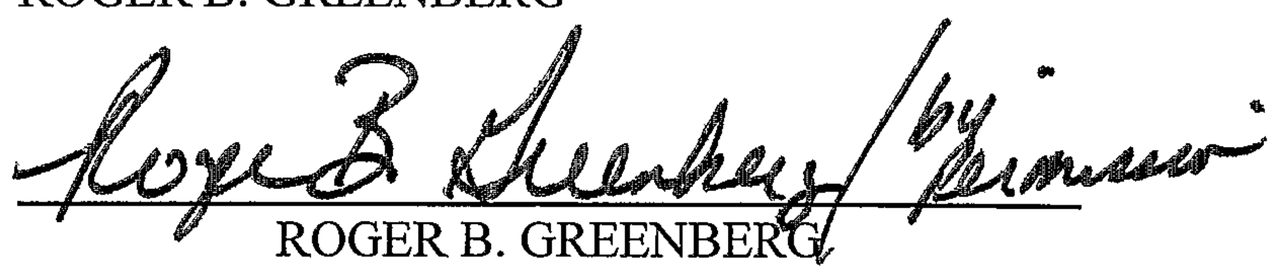
III. CONCLUSION

For all of the reasons stated herein, this Court has the authority to enter an order freezing defendants' insider trading proceeds and requiring an accounting as set forth in Amalgamated's *Ex Parte* Application.

DATED: December 21, 2001

Respectfully submitted,

SCHWARTZ, JUNELL, CAMPBELL
& OATHOUT, LLP
ROGER B. GREENBERG



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DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interest in the within action, that declarant's business address is 401 B Street, Suite 1700, San Diego, California 92101.

2. That on December 21, 2001, declarant served the AMALGAMATED'S SUPPLEMENTAL BRIEF IN RESPONSE TO UNIFIED SUBMISSION OF DEFENDANTS REGARDING THE COURT'S AUTHORITY TO ENTER AN ORDER FREEZING DEFENDANTS' INSIDER TRADING PROCEEDS AND REQUIRING ACCOUNTING by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3 That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of December, 2001, at San Diego, California

Mo Maloney

The Exhibit(s) May

Be Viewed in the

Office of the Clerk