

Counsel of Record:

Catherine E. Pappas
Mellon Independence Center
701 Market Street, Suite 2000
Philadelphia, PA 19106
Telephone: (215) 597-3100
Facsimile: (215) 597-2740
**(Counsel for Securities and Exchange
Commission)**

Patrick Artur, Esquire
Sanford I. Jablon, Esquire
Patrick Artur & Associates
1845 Walnut Street
24th Floor
Philadelphia, PA 19103
Telephone: (215) 561-9188
Facsimile: (215) 561-5135
(Counsel for Brenda B. Melton)

Kristin J. Telsey
Earp Cohn P.C.
20 Brace Road, 4th Floor
Cherry Hill, NJ 08034
Telephone: (856) 354-7700
Facsimile: (856) 354-0766
**(Counsel for David J. Greth,
Administrator of the Estate of Donald
Matthew Greth)**

**UNITED STATES DISTRICT COURT
for the
DISTRICT OF NEW JERSEY**

SECURITIES AND EXCHANGE COMMISSION,	:	
	:	
Plaintiff,	:	05-CV-5040 (RMB)
	:	
v.	:	Memorandum of Plaintiff, Securities and
	:	Exchange Commission, in Support of
	:	Plaintiff's Motion Seeking a
	:	Determination of the Ownership of
THE ESTATE OF DONALD MATTHEW GRETH, David J. Greth, Administrator, et al.	:	Certain Assets.
	:	
Defendants.	:	
	:	

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I. SUMMARY

The Securities and Exchange Commission (the “Commission”) respectfully submits this memorandum in support of its Motion Seeking a Determination of Ill-Gotten Gains (the “Commission Motion”). In sum, the Commission seeks a ruling by the Court pursuant to Rule 56 of the Federal Rules of Civil Procedure that all of the assets in the name of Donald Matthew Greth, or in which Donald Matthew Greth purportedly had an interest at the time of his death (the “Greth Assets”) are ill-gotten gains held in constructive trust for defrauded investors and, as such, should be turned over in their entirety to the Court for distribution, as appropriate, to those investors.

II. BACKGROUND

A. Procedural History

On October 21, 2005, the Commission filed this action against Donald M. Greth (“Greth”) and Brenda B. Melton (“Melton”) (collectively, “the Defendants”) alleging violations of Section 17(a) of the Securities Act of 1933 (“Securities Act”) [15 U.S.C. § 77q(a) Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. §78j(b), 17 C.F.R. 240.10b-5] (the “Civil Action”). The Commission additionally charged Greth with violations of Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 [15 U.S.C. § 80b-6(1), (2)]. The Commission alleged that, from at least June 2003, Greth and Melton (collectively, the “defendants”) engaged in a fraudulent scheme to deceive investors, misrepresenting and omitting multiple facts in connection with the offer and sale of shares in a fictitious “Christian” investment fund purportedly run by Greth. Complaint at ¶ 2. Of particular import to this motion, the Commission alleged that the defendants defrauded investors by misrepresenting that Greth would invest the money that they gave to him in a fictitious fund

when, in fact, there was no fund, and Greth made no investments. Rather, the defendants were conducting a “Ponzi scheme,” using money obtained from new investors to pay prior investors and to enrich themselves.¹ *See, e.g.*, Complaint at ¶¶ 12-29.

At the same time that it filed the Civil Action, the Commission sought and obtained from the Court a Temporary Restraining Order which, among other things, froze all of the defendants’ assets (the “TRO”). The TRO was extended indefinitely by two orders of preliminary injunction, freezing assets, and granting other relief (the “Preliminary Injunctions”), entered by the Court on October 31, 2005, upon the consent of each defendant.

On or about October 30, 2005, Greth died. On January 24, 2006, Greth’s brother, David, began the probate process, applying to the Camden County (New Jersey) Surrogate’s Court for appointment as the Administrator of his brother’s estate (the “Estate Proceeding”). On February 10, 2006, the Surrogate’s Court issued an Order Fixing Bond, and on March 9, 2006, the Surrogate’s Court issued an Administrator Short Certificate, appointing David J. Greth as Administrator of the Estate of Donald Matthew Greth (the “Estate”). On March 22, 2006, this Court granted the Commission’s motion to substitute the Estate in the place of defendant Greth so that the staff could pursue its disgorgement remedy against the frozen assets in Greth’s name.

On February 23, 2006, the Commission filed with the Court a proposed Final Judgment to which the Estate has consented (the “Proposed Judgment”). The Proposed Judgment, if

¹ The phrase “Ponzi scheme” generally describes an investment scheme unsupported by any underlying business venture. Earlier investors are paid high rates of interest out of monies invested by later investors. These payments of apparently real returns on initial investments attract additional investors. The scheme requires increasing numbers of participants so that the growing number of investors can be paid. Often the person running the scheme takes some investor money for personal use. Ultimately the scheme collapses when the number of new investors and/or investments dwindles and many investors not only do not receive their anticipated profits, but also lose their principal. *See Bald Eagle Area Sch. Dist. v. Keystone Fin., Inc.*, 189 F.3d 321, 323, n.1 (3d Cir. 1999); *United States v. Grasso*, 173 F.Supp. 2d 353, 359 n.5 (E.D. Pa. 2001).

approved by this Court, would require the Estate to pay \$1,377,984, comprised of \$1,272,874 in ill-gotten gains and \$105,110 in prejudgment interest. The Proposed Judgment explicitly provides that any assets or portion of assets in the name, possession, custody, and/or control of Greth at the time of his death, which are determined to be ill-gotten gains or derived from ill-gotten gains, as well as any disgorgement collected from third-party recipients of such ill-gotten gains from Greth ("Third-Party Recipients"), shall be deemed offsets to this liability.²

The Commission now seeks a determination from this Court that all assets in Greth's name, up to the amount of the monetary judgment against the Estate but less any collections from Third-Party Recipients, are ill-gotten gains.³ As such, they are held in constructive trust for victims of Greth's fraud and are not subject to the claims of creditors of the Estate.⁴ Upon the Court's ruling, and depending on the resulting value of the assets available to injured investors, the Commission hopes to file with the Court a plan of distribution.⁵

² Proposed Judgment, § II.

³ As a practical matter, such characterization would apply to all assets in Greth's name. As set forth below, the aggregate value of assets held by Greth at the time of his death, and the approximately \$80,000 that the Commission hopes to collect from Third-Party Recipients, will be substantially less than the monetary judgment against the Estate.

⁴ The Commission does not expect payment from the Estate on the Proposed Judgment until this issue is resolved.

⁵ The Commission notes that any amounts turned over to the Court may be subject to an offset of expenses paid pursuant to this Court's order dated April 17, 2006, entered by the consent of the parties. As stated in that Order, the Commission and the Estate have worked together to gather, evaluate, and as appropriate, liquidate assets held in Greth's name, thus averting the need to appoint a third party to assist in the gathering and liquidation of those assets. By the April 17, 2006 Order, and pursuant to an application process, certain reasonable fees of Estate Counsel incurred in connection with such efforts, as well as certain reasonable expenses incurred in connection with the maintenance, valuation, and preparation of illiquid assets for sale, can be paid out of funds collected by the Court.

B. Relevant and Undisputed Factual Background

1. Greth Defrauded Investors

Prior to his death, Greth attended a joint proffer session attended by staff of the Commission and federal criminal authorities (the “Proffer”). During the Proffer, and in the context of the Civil Action, Greth expressly admitted that he was running a Ponzi scheme.⁶ Riley Affidavit at ¶¶ 5-6. Greth further admitted that there was no investment fund, and that he did not invest any investor money. Riley Affidavit at ¶ 6. *See also* Affidavit of J. Paul Rihn (“Rihn Affidavit”) at ¶ 8. Rather, he deposited investor funds into one of three personal bank accounts (the “Bank Accounts”). Riley Affidavit at ¶ 7; Rihn Affidavit at ¶¶ 3-4. He then used the funds primarily to pay existing investors and for his own personal expenses, including the purchase of a Nissan 350z automobile (the “Nissan”), a piano, and, at least in part, a Chrysler Pacifica automobile (the “Pacifica”).⁷ Riley Affidavit at ¶¶ 6-8; Rihn Affidavit at ¶¶ 9-9.3.

Based on, among other things, its review of bank records, records from the defendants, and records and information submitted by investors, the Commission has identified 383 investors

⁶ There is no question but that Greth understood the meaning of “Ponzi Scheme.” As set forth in more detail in the Memorandum of Law in Support of Plaintiff’s Motion for A Temporary Restraining Order, Order Freezing Assets, Order to Show Cause, Preliminary Injunction, and Other Relief, and its accompanying Exhibits (the “TRO Memorandum”), incorporated herein by reference, Greth pled guilty in 1991 to a criminal Information charging him with securities fraud in connection with activity nearly identical to that alleged in this Civil Action (the “Criminal Action”). *See U.S. v. Greth*, Crim. No. 91-00205 (E.D. Pa. May 20, 1991). During the Proffer, Greth stated both that he was running the same scheme that formed the basis for the Criminal Action, and that he was running a Ponzi scheme. Affidavit of Special Agent Corey Riley (“Riley Affidavit”) at ¶ 5.

⁷ Greth paid \$18,000 to the dealer when he purchased the Pacifica, and financed the remaining amount through the dealer. The \$18,000 check was drawn on the Bank Accounts. Rihn Affidavit at ¶ 9.3. Prior to his death, Greth made 18 of the loan payments from the Bank Accounts, aggregating to \$11,188. Rihn Affidavit at ¶ 9.3. Based on information provided by the Estate, the lender holds a lien on the automobile and claims \$17,894.97 as an accelerated balance due on the loan.

who invested more than \$4 million with Greth.⁸ Rihn Affidavit at ¶ 3. Of these investors, 311 suffered losses exceeding \$2,187,280. Rihn Affidavit at ¶ 3.

2. The Disgorgement Calculation

As reflected in the Proposed Judgment, the Commission is seeking disgorgement from the Estate in the amount of \$1,377,984, or the amount by which Greth was enriched unjustly.⁹ The Commission calculated Greth's ill-gotten gains (\$1,272,874) by subtracting from the amount of investor money received by Greth: (a) the amount that he returned to investors, and (b) the amount by which the staff determined that his co-defendant, Brenda Melton, was unjustly enriched. Rihn Affidavit at ¶¶ 10-11. The Commission added to this amount the interest accrued during the time that he had the use of these ill-gotten gains, calculated using the interest rate charged by the Internal Revenue Service ("IRS") for underpayment of taxes, compounded quarterly. Rihn Affidavit at ¶ 12; *see* 26 U.S.C. § 6621(a)(2). This interest calculation is the computation specified in the Commission's Rules of Practice, 17 C.F.R. 201.600(b), and, as set forth below, has been accepted by federal district courts as an appropriate calculation in this context.

C. The Assets at Issue

Based on information provided to the Commission by the Estate, Greth, and from banks with respect to the Bank Accounts, the Commission believes that Greth held assets aggregating to just short of \$460,000, at the time of his death (the "Assets at Issue"). Included in this total is

⁸ The Commission solicited information from investors through investor questionnaires sent to all known investors, as well as through a public website set up specifically with respect to this Civil Action.

⁹ The Commission notes that the amount of disgorgement differs from actual investor loss insofar as the latter is sought through restitution, an alternative equitable remedy. Although sometimes the amount of disgorgement and restitution coincide, they differ in the present analysis. *See, e.g., SEC v. Hughes Capital Corp.*, 917 F.Supp. 1080, 1084-85, 1089 (D. N.J.), *aff'd*, 124 F.3d 449 (1997).

(approximately) \$440,000 in cash; and the Pacifica, which has an estimated value of, approximately, \$17,000, based on offers to purchase provided to the Estate. *See* Rihn Affidavit at ¶ 9.4.

The cash is comprised of, approximately, \$411,000 in the Bank Accounts (Rihn Affidavit at ¶ 3) and \$30,000 that the Estate obtained through the liquidation of the Nissan, the piano, and certain personal items.¹⁰ A Commission analysis of the Bank Accounts shows that, between January 2003 and October 2005, investor funds accounted for 96.27% of the deposits made to the Bank Accounts. Rihn Affidavit at ¶ 4. Greth's salary largely accounted for the remaining 3.73%. Rihn Affidavit at ¶ 5. The Commission is unaware of any other financial accounts held by Greth. Rihn Affidavit at ¶ 7.

III. LAW AND ARGUMENT

A. This Motion is Properly Before this Court.

The relief requested by the current motion is properly sought in this Court. In sum, the Court's decision on this matter will make clear whether Greth held any ownership interest in any of the Assets at Issue and, as such, define the parameters of the property properly subject to the jurisdiction of the New Jersey Surrogate Court.

Under New Jersey law, a decedent's estate is defined as "all property of a decedent ... as the property is initially constituted and as it exists from time to time during administration." N.J. Stat. § 3B:1-1 (2007). If this Court concludes that Greth obtained the Assets at Issue through wrongful acts, then Greth held those assets not as their owner, but as a constructive trustee for the original owners, and they are not part of his Estate. *See, e.g., Remington Rand Corporation-*

¹⁰ The Estate holds in escrow \$26,500 that it obtained in the sale of the Nissan, an additional \$2,000 through its sale of the piano, and approximately \$1,600 from the auction sale of Greth's other possessions.

Delaware v. Business Systems Incorporated, 830 F.2d 1260, 1269 (3d Cir. 1987) (Under state law, the imposition of a constructive trust upon a debtor's property generally confers on the true owner of the property an equitable interest in the property superior to that of the trustee).

The Commission notes that this Court would have jurisdiction over this matter even if the Civil Action and the Estate Proceeding are deemed to be parallel proceedings seeking relief with respect to identical or overlapping property. "The first court seized of jurisdiction over property, or asserting jurisdiction in a case requiring control over property, may exercise that jurisdiction to the exclusion of any other court." SEC v. Banner Fund International, 211 F.3d 602, 611 (D.C. Cir. 2000), *citing* Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195 (1935). This action was filed on October 21, 2006, almost five months prior to the institution of the Estate Proceeding. At that time, this Court froze all assets held by Greth at the time of his death to, among other things, preserve the Court's power to effectively order disgorgement and implement, as practicable, a subsequent plan for distributing any remaining assets to the victims. The Commission now asks that this Court further that goal by determining the ownership of the Assets at Issue.

B. The Judgment Requested by this Motion is Appropriate for Determination as a Matter as Law.

The facts as set forth herein are undisputed and provide to the Court the factual basis for determining, as a matter of law, that Greth had no right, title, or interest in the Assets at Issue but, rather, held them in constructive trust for the defrauded investors.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment:

shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Summary judgment “should ... be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. SEC v. DiBella, 409 F.Supp. 2d 122, 126 (D. Conn. 2006), *citing* Anderson v. Liberty Lobby, 477 U.S. 242, 247-48 (1986). *See also* Hughes Capital Corp., 917 F.Supp. at 1084.

In this case, the facts are not in dispute. Greth admitted his wrongful acts -- indeed, his fraud. Through these wrongful acts, he obtained more than \$4 million from investors to which he was not entitled and had no legitimate claim. Based on the Commission’s disgorgement calculation, more than \$1.2 million of the wrongfully obtained funds were misappropriated by Greth for his personal use. Presuming the accuracy of the estimates set forth above as the value of the Assets at Issue, less than half of this amount remains available for collection from Greth. The Commission now asks that the Court determine this remainder to be held in constructive trust for defrauded investors, and thus not part of the Estate.

1. Greth Held Investor Assets in a Constructive Trust.

Where a federal court has subject-matter jurisdiction, it has the authority to order all equitable relief necessary under the circumstances. SEC v. Materia, 745 F.2d 197, 200-201 (2d Cir.), *cert. denied*, 471 U.S. 1053 (1985). In Commission enforcement actions, the courts have ordered various forms of equitable relief -- including disgorgement, asset freezes, appointments of receivers and repatriation -- even though the jurisdictional sections of the securities statutes refer only to injunctions against violations. Materia, 745 F.2d at 201; *see also* SEC v. Antar, 831 F.Supp. 380, 398 (D. N.J. 1993). A constructive trust and disgorgement of unjustly retained

wealth are long-standing remedies that are within a court's equity powers. *See Antar*, 831 F.Supp. at 398 (D.N.J. 1993).¹¹

A constructive trust is a creature of state law. *Remington Rand*, 830 F.2d at 1269. It is a remedial device of equity; the "formula through which the conscience of equity finds expression." *SEC v. Antar*, 120 F.Supp. 2d 431, 447 (D. N.J.), *aff'd*, 2002 U.S. App. LEXIS 15502 (3d Cir. 2002).¹² Under New Jersey law, "generally all that is required to impose a constructive trust is a finding that there was some wrongful act, usually, though not limited to, fraud, mistake, undue influence . . . which has resulted in a transfer of property." *Antar*, 120 F.Supp. 2d at 447, *quoting D'Ippolito v. Castoro*, 51 N.J. 584, 589 (1968). Fraud is not essential to the imposition of a constructive trust; rather a constructive trust will be impressed in any case where failure to do so will result in unjust enrichment. *D'Ippolito v. Castoro*, 51 N.J. 584, 588-89 (1968). *See also Flanigan*, 175 N.J. at 609 (A wrongful act may be a mere mistake, as long as it results in a transfer or diversion of property that unjustly enriches the recipient).

¹¹ As stated by the district court in *Antar*:

In SEC enforcement actions, the courts have provided varied forms of equitable relief--including disgorgement, asset freezes, appointments of receivers and repatriation--even though the jurisdictional sections of the securities statutes refer only to injunctions against violations. A constructive trust and disgorgement of unjustly retained wealth--the relief sought against the nominal defendants--are long-standing remedies that are within a court's equity powers. *See, e.g., SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d Cir.) ("the Supreme Court . . . has upheld the lower courts in granting restitution, as an ancillary remedy in the exercise of the courts' general equity powers to afford complete relief"), *cert. denied*, 404 U.S. 1005, 92 S. Ct. 561, 30 L.Ed.2d 558 (1971); *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386, 122 N.E. 378, 380 (1919) (Cardozo, J.) ("[a] constructive trust is the formula through which the conscience of equity finds expression").

Antar, 831 F.Supp. at 398 (footnote omitted).

¹² "When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." *Antar*, 120 F.Supp. 2d at 447, *quoting Flanigan v. Munson*, 175 N.J. 597, 608 (2003) (additional citations omitted).

In this case, it is established by Greth's admissions, as well as through the Commission's review of records in this case, that Greth took money from investors under the pretense that he would invest it. It similarly is established that he did not invest the funds but, rather, placed them in the Bank Accounts and used them to perpetuate a Ponzi scheme -- using new investments to make "interest" payments to old investors. The Commission's analysis of records of the Bank Accounts confirms that he primarily used investor funds to pay investors and for personal expenses. To the extent that Greth did not return the funds to those who invested, he took their money under false pretenses and, thus, under New Jersey law, held the funds only as trustee for those investors. To find otherwise would unjustly enrich Greth and his Estate with the assets of the victimized investors.

2. Greth Held, at Least, \$1,377,984 in Constructive Trust for Investors.

According to the Commission's calculations, Greth was unjustly enriched by \$1,272,874 in investor funds, plus \$105,110 in interest that the investors could have earned had they retained their rightful ownership. Under the Proposed Judgment, filed with the Estate's consent to judgment on February 23, 2007, Greth would be ordered to disgorge these amounts, which aggregate to \$1,377,984.

Disgorgement is an equitable remedy aimed at "forcing a defendant to give up the amount by which he was unjustly enriched." SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir.), *cert. denied sub nom Lombardfin S.p.A. v. SEC*, 486 U.S. 1014 (1988) (*quoting SEC v. Commonwealth Chem Secs.* 574 F.2d 90, 102 (2d Cir. 1978)). *See also SEC v. Chester Holdings, Ltd.*, 41 F.Supp. 2d 505, 528 (D. N.J. 1999); Hughes Capital Corp., 917 F.Supp. at 1085. In meeting its burden for disgorgement, "[p]laintiff is not required to trace every dollar of proceeds . . . nor is plaintiff required to identify misappropriated monies which have been

commingled . . .” Hughes Capital Corp., 917 F.Supp. at 1085, *quoting* SEC v. Great Lakes Equities Co., 775 F.Supp. 211, 214 n. 21 (E.D. Mich.), *aff’d*, 12 F. 3d 214 (6th Cir. 1993). The disgorgement figure need only be a reasonable approximation of the amount of ill-gotten gains received by the defendant. Hughes Capital Corp., 917 F.Supp. at 1085, *citing* SEC v. First City Financial Corp., 890 F.2d 1215, 1232 (D.C. Cir. 1989).

The Commission calculated Greth’s disgorgement by subtracting from the amount of investor money received by Greth both the amount that he returned to investors through purported “interest” payments, as well as the amount by which the staff determined that his co-defendant, Brenda Melton, was unjustly enriched. Albeit conservative, this approach certainly is a reasonable approximation of the amount by which Greth was unjustly enriched.¹³

The addition of prejudgment interest is also appropriate insofar as Greth enjoyed, and investors were deprived of, the use of the misappropriated funds for, at least, the period at issue. *See, e.g., Hughes Capital Corp.*, 917 F.Supp. at 1090. The calculation used in this case to determine the amount of interest is that described in the Commission’s Rules of Practice for such computations (17 C.F.R. 201.600(b)) and has previously been accepted by courts for this purpose. *See Hughes Capital Corp.*, 917 F.Supp. at 1090.

¹³ The Commission notes that this approach is very conservative – another legitimate approach in this case would have been to equate investor losses with Greth’s unjust enrichment, because any amounts that Greth provided to investors as “interest” and/or amounts that he allocated to his co-defendant could be deemed irrelevant to the calculation. *See, e.g., SEC v. Benson*, 657 F.Supp. 1122, 1134 (S.D. N.Y. 1987) (It is irrelevant how defendants choose to spend the proceeds of their ill-gotten gains; such gains are subject to disgorgement regardless). The Commission used the more conservative approach in this matter in order to avert any opposition to the amount of the judgment that might prolong the litigation, and because it is unlikely that the judgment amount will affect the amount ultimately collected in this matter.

3. **The Assets at Issue Are Trust Property and Should Returned to the Injured Investors.**

The touchstone for a constructive trust under New Jersey law is unjust enrichment, and a showing of traceability is not required. Antar, 120 F.Supp. 2d at 447. *See also id.* at 448-449 (there is no requirement that the assets held in trust be traceable to the fraud if they could be used to satisfy the Commission's judgment). Where a trustee of a constructive trust wrongfully commingles trust funds with his own, equity will impress the trust on the entire mass with which the trust fund has been commingled and a levy will not attach to such commingled assets. SEC v. Paige, 1985 U.S. Dist. LEXIS 17336, *18 (D.D.C. 1985), *aff'd without opinion*, 810 F.2d 307 (D.C. Cir. 1987). Further, when another's assets are traced into a particular personal account, later withdrawals from the commingled account are rebuttably presumed to be the account holder's personal funds rather than the assets of another. TMG II v. U.S.A., 1 F.3d 36, 39-40 (D.C. Cir. 1993), *citing* Moyers v. Cummings, 17 App. D.C. 269 (1900), *aff'd sub nom* Consaul v. Cummings, 222 U.S. 262, (1911). *See also* SEC v. Banner Fund International, 211 F.3d 602, 617 (D.C. Cir. 2000) (a court, under its equitable powers, may order a wrongdoer to disgorge assets other than the actual property obtained by means of his wrongful act, limited only by the amount by which s/he was unjustly enriched. To hold otherwise would permit a defendant to carefully spend all the proceeds of a fraudulent scheme, while husbanding his other assets, to be immune from an order of disgorgement).¹⁴

¹⁴ The Commission notes that in Banner Fund, the Appellate Court elaborated on its prior, widely quoted statement in its First City opinion that the court may "exercise its equitable power only over property causally related to the wrongdoing." First City, 890 F.2d at 1231. In sum, the causal limitation simply applied to the *amount* of unjust enrichment, not the traceability of compensatory funds to the fraud. Banner Fund, 211 F. 3d at 617. *See also* Hughes Capital Corp., 917 F.Supp. at 1085 (*quoting* the referenced language in First City).

In this case, all assets in the Bank Accounts are, essentially, traceable to investors. This is especially true in view of the negligible legitimate assets deposited into the Bank Accounts during the relevant period, and the legal presumption that Greth spent his own assets prior to spending those held in trust. See TMG II, 1 F.3d at 39-40. See also Banner Fund, 211 F.3d at 617. The Commission's analysis of the records of the Bank Accounts reflects that 96.27% of all deposits made into the Bank Accounts during the relevant period was investor money. Similarly, the Nissan, the piano, and at least \$29,000 in payments on the Pacifica, including \$18,000 provided to the car dealer as a down payment, also are traceable to investor funds because Greth used funds from the Bank Accounts to pay for these assets. Accordingly, these assets, and/or any proceeds from the sales of these assets, are held in trust for the investors.¹⁵ See Flanigan, 175 N.J. at 608 (If the property has been sold the trust attaches to its proceeds in the hands of the defendant). Insofar as the amount of Greth's unjust enrichment far exceeds the total value of the Assets at Issue,¹⁶ the (minimal) remaining assets also should be deemed held in constructive trust for defrauded investors.¹⁷ See SEC v. Glauberman, 1992 U.S. Dist. LEXIS 10982, *5-6 (S.D. N.Y. 1992).

¹⁵ See In re Howard's Appliance Corp., 874 F.2d 88, 95 (2d Cir. 1989) (Under New Jersey law, the beneficiary of a constructive trust enjoys a position superior to that of any lien creditor or other creditors)

¹⁶ This remainder, comprised predominantly of the proceeds of the auction sale of Greth's other possessions at the time of his death, is valued at, approximately, \$1,600.

¹⁷ As stated above, the Commission hopes to collect an additional (approximately) \$80,000 from Third- Party Recipients. Pursuant to the Proposed Judgment, this amount will be offset against the Estate's total disgorgement obligation. Even with this offset, the total amount collected will fall far short of the total obligation.

IV. CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court enter the Order in the form attached hereto, finding that the Assets at Issue are held in trust for the investors defrauded by Greth, and ordering that these assets be turned over to the Court for distribution, as appropriate, to those investors.

Dated: February 27, 2007

Respectfully submitted,

s/Catherine E. Pappas

Catherine E. Pappas
Counsel for Plaintiff,
The United States Securities
and Exchange Commission
701 Market Street, Suite 2000
Philadelphia, PA 19106
Telephone: (215) 597-3100
Facsimile: (215) 597-2740