UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5401

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

HUGHES CAPITAL CORP., et al.,

Defendants,

HOWARD ACKERMAN, SUSAN LACHANCE
and LIONEL REIFLER,

Defendants-Appellants.

On Appeal from the United States District
Court for the District of New Jersey

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLEE

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The Securities and Exchange Commission concurs in the appellants' statement of subject matter and appellate jurisdiction.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This matter has not been before this Court previously. A related private action is pending in the United States District Court for the District of New Jersey. Wiley v. Hughes Capital Corp., Civ. A. No. 89-1444 (D.N.J.). See Wiley v. Hughes Capital Corp., 746 F. Supp. 1264 (D.N.J. 1990).

PRELIMINARY STATEMENT

This securities fraud action arises out of a sham initial public offering ("IPO") of common stock and warrants of defendant Hughes Capital Corporation ("Hughes"), a corporate shell with no on-going business, and the subsequent manipulation of the price of Hughes stock in the secondary market. Defendants completed the sham public offering of Hughes securities (consisting of units of common stock and warrants that could be converted to common stock) by acquiring all the offered securities themselves and in the names of nominees and aliases, rather than selling the securities to the public as represented in the prospectus. This created the false appearance of a public market for the stock.

The defendants then conducted a fraudulent public relations campaign designed to stimulate and maintain unjustified investor interest in Hughes stock. That campaign included the dissemination of a series of news announcements to the effect that Hughes had successfully negotiated to acquire four independent, thriving businesses. No disclosure was made that, in fact, each of the companies to be acquired was owned or controlled by the defendants, that one of the companies was dormant and had never generated any revenue, and that another one was in, or had recently emerged from, bankruptcy. The business potential, earnings, and/or available financing of the other two companies, as well as the nature of these businesses, were misrepresented.

The dissemination of the false news in the market, together with other manipulative activities and the defendants' control of the supply of Hughes stock, succeeded within a few months in pushing the price of a share of Hughes stock from $2 to $15. By selling stock and warrants while the price of Hughes stock was inflated, the defendants obtained almost $2 million from their unlawful scheme. These funds were deposited in the bank accounts of eight corporations, primarily shell corporations with no business operations, that were owned or controlled by the defendants. From there the proceeds of the scheme were disbursed to defendants and other shell corporations in numerous small withdrawal transactions designed to conceal the ultimate destination of the ill-gotten gains and the identities of those who benefited from them.

The Securities and Exchange Commission brought this action against Hughes, the underwriter for the Hughes IPO and persons associated with that firm, and seven other individuals who participated in the scheme. This appeal from a summary judgment in favor of the Commission is brought by three of the latter defendants: (1) Lionel Reifler, one of the masterminds of the scheme, who directed the illegal activities; (2) Reifler's wife, Susan Lachance, who made false and misleading public statements about purported acquisitions by Hughes, facilitated the shifting of funds to and from various bank accounts in her name and the names of companies of which she was a principal, and, with her husband, lived affluently off the illegal profits from the

scheme; and (3) Howard Ackerman, an accountant, who facilitated the sham IPO, concealing the defendants' purchases of the Hughes stock, and who was instrumental in disbursing the illegal profits from the scheme to the defendants and laundering the money so that the Commission could not trace it.

Reifler did not contest before the district court the allegations that he committed securities fraud. He merely sought to limit the amount of his liability for disgorgement of illegal profits. In this Court, he contends, along with Lachance and Ackerman, that evidence was improperly excluded that might have reduced the appellants' disgorgement liability. Lachance and Ackerman contest the determination that they committed securities fraud, and Lachance contends that she should not be held jointly and severally liable with her husband (Reifler) and three other defendants to disgorge approximately $1.4 million in illegal profits that disappeared after flowing through the eight bank accounts operated for the defendants' collective benefit.

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether the district court properly granted summary judgment against Lachance for violating Section 17(a)(2) of the Securities Act of 1933, 15 U.S.C. 77q(a)(2) (which makes it unlawful in the offer or sale of securities to obtain money or property by means of a materially false or misleading statement), where the undisputed evidence shows that Lachance: (a) publicly touted as arms-length transactions Hughes' acquisition of two companies in which she was an owner without disclosing that her

husband was an owner of Hughes; (b) used two different last names in press releases concerning these transactions, thereby enhancing the appearance of independent transactions; (c) made statements giving the impression that her companies to be acquired by Hughes were thriving businesses, when in fact one was in, or had only recently emerged from, bankruptcy and the other had never generated any revenue; and (d) made statements that Hughes had the capital to develop the acquired businesses, when she had no reasonable basis for that statement.

2. Whether the district court properly granted summary judgment against Ackerman for violating Section 17(a)(3) of the Securities Act, 15 U.S.C. 77q(a)(3) (which makes it unlawful in the offer or sale of a security to engage in any practice or course of business that would operate as a fraud or deceit upon the purchaser), where the undisputed evidence shows that Ackerman: (a) facilitated defendants' purchases of the Hughes stock in the sham IPO and concealed their identities; and (b) was instrumental in disbursing the proceeds of the illegal scheme to the defendants in numerous transactions that obscured who ultimately was enriched, when he admits there was no legitimate business purpose for the hundreds of transactions in which he moved money in and out of the defendants' bank accounts.

3. Whether the district court abused its discretion in holding Lachance jointly and severally liable with her husband and three other defendants (who have not appealed) for disgorgement of illegal profits that were unquestionably received

by the defendants but could not be traced by the Commission to any particular defendant, where Lachance: (a) was a substantial participant, not merely a tangential actor, in the defendants' violations of the securities laws; (b) was a signatory on six of the eight accounts through which the illegal proceeds passed, and endorsed and signed checks and other documents that were used to hide where the funds went; (c) received substantial benefits from the illegal profits generated from the scheme; and (d) submitted no admissible evidence to satisfy her conceded burden of showing she received only a specific amount of the proceeds.

4. Whether the district court properly excluded as hearsay: (a) photocopies of check stubs altered by the defendants after the commencement of this litigation (the originals allegedly having been lost); and (b) a purported summary of where the proceeds of the fraud went that was prepared for use in this litigation by Ackerman on the basis of the altered check stubs and missing deposit books, and on the basis of Reifler's purported recollections years after the events.

COUNTERSTATEMENT OF THE CASE

A. Course Of Proceedings And Disposition In The Court Below

On December 13, 1988, the Commission filed a complaint (Amended Complaint, R. 178) 1/ against Hughes, Ackerman,

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1/ "R. __" refers to the record entry on the district court's docket sheet. "[name] Dcl. __" refers to a declaration by a member of the Commission's staff and "[name] Dcl. Ex.__" refers to the accompanying exhibits. "[name] Dep. __" refers to depositions. "Br. __" refers to the appellants' opening brief. "Br. App. Ex __" refers to the appendix to appellants' brief.

Lachance, Reifler, Gilbert Beall, John Knoblauch, Frederic Mascolo, and Ira Victor (the "issuer defendants") 2/ for violations of the antifraud provisions Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. Following extensive discovery, on September 2, 1993, the district court granted the Commission summary judgment against defendants Hughes, Reifler, 3/ Beall, and Knoblauch. The court held that these defendants had committed securities fraud, and it enjoined them from future violations of the antifraud provisions (R. 155, 156). The court denied summary judgment as to Ackerman, Lachance, Mascolo and Victor on the ground that there were disputed issues of fact bearing on the scienter required to establish fraud under Section 17(a)(1) of the Securities Act, 15 U.S.C. 77q(a)(1), and Section 10(b) of the Exchange Act (R. 156 at 29).

2/ F.D. Roberts Securities, Inc., the underwriter for the Hughes offering, and five persons formerly associated with the firm were also named in the Commission's complaint ("underwriter defendants"). Simultaneously with the filing of the complaint, the underwriter defendants consented to the entry of permanent injunctions against future violations of the provisions of the federal securities laws alleged in the complaint. Some of these defendants pled guilty to related criminal violations of the federal securities laws. See discussion in Wiley v. Hughes Capital Corp., 746 F. Supp. at 1274-75.

3/ Reifler did not contest liability before the district court in this civil action (R. 156 at 28). In August 1989, he also pled guilty in a criminal case to securities fraud and conspiracy to commit securities fraud in connection with the same events. United States v. Lionel Reifler, Crim. No. 89-287 (NHP)(D.N.J. August 15, 1989). See Wiley v. Hughes Capital Corp., 746 F. Supp. at 1274.

The Commission renewed its motion for summary judgment as to defendants Ackerman, Lachance, Mascolo and Victor, limited to violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act, 15 U.S.C. 77q(a)(2) and (3) -- which do not require scienter, and are satisfied by a showing of negligence. In an opinion dated December 9, 1994, the court granted the Commission's motion, finding Lachance and Mascolo negligently liable under Section 17(a)(2) and Ackerman negligently liable under Section 17(a)(3) (R. 208, 209). 4/

The Commission then filed a motion in limine to exclude, in connection with the upcoming disgorgement proceedings, certain documents relied upon by defendants in opposing the Commission's request for summary judgment. On October 17, 1995, the court granted the Commission's evidentiary motion, finding that the circumstances under which the documents were created "suggest a lack of trustworthiness" (R. 244).

Thereafter, the court granted the Commission's pending summary judgment motion as to disgorgement. In an opinion dated February 16, 1996 (R. 252, 253), the court held each of the issuer defendants, except for Hughes, individually liable to disgorge amounts of the proceeds of the fraudulent scheme they admitted receiving. Hughes, Reifler, Beall, Knoblauch, and Lachance were also held jointly and severally liable to disgorge the balance of the scheme's illegal profits. On June 14, 1996,

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4/ The district court found Victor liable under Section 17(a)(3) in a separate opinion dated June 16, 1995 (R. 216, 217).

the court awarded prejudgment interest and denied defendants' motion for reconsideration (R. 260, 261, 262). Reifler, Lachance and Ackerman appeal (R. 263).

B. The Facts

In late 1985, Reifler and Beall acquired Hughes -- a shell corporation with no assets or operating history -- to serve as a vehicle for a public "blank check" securities offering 5/ (Shine Dcl. ¶¶22-26). Reifler and Beall 6/ concealed their ownership and control of Hughes by recruiting others to act as owners in their place (R. 156 at 4; Shine Dcl. ¶¶24-28; Br. 4). 7/

1. Closing The Sham IPO

The Hughes IPO took place on August 25, 1986 and consisted of 90,000 units of securities selling at $2 per unit. Each unit consisted of one share of common stock and 21 warrants (Shine

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5/ A blank check offering is one in which the issuing company has no existing operations and has yet to identify any particular business objectives (Shine Dcl., Ex. 1 at 12).

6/ Beall was Reifler's business associate in a number of ventures (Shine Dcl. ¶ 5). During the relevant period, Beall was an officer or shareholder of various corporations that acquired Hughes common stock when the IPO was closed (Shine Dcl. Ex. 8, 10), and he shared offices with Reifler, Lachance and Ackerman (Shine Dcl. Ex 10).

7/ Presumably Reifler's identity was concealed because disclosure of his criminal history would have made it difficult, if not impossible, for the fraud to succeed. Reifler testified in this proceeding that he had six felony convictions between 1968 and 1976, involving securities fraud, mail and wire fraud, the sale of unregistered securities and the operation of an unregistered brokerage firm, passing bad checks, tax evasion, and extortion. His imprisonment ended in February 1978 (Shine Dcl. Ex. 6; Reifler Dep. 121-31, 138-43, 152-53, 161-62; see also Lachance 2d 12/10/93 Dep. at 39-49).

Dcl., Ex. 1 at 1). Despite representations in the registration statement that it was a public offering, the entire IPO was sold to 33 securities brokerage accounts controlled by the defendants ("controlled" accounts) that had been opened at F.D. Robert Securities, Inc. ("F.D. Roberts") on or about August 12, 1986 (Shine Dcl. ¶¶51-52, Ex. 38-39).

The controlled accounts included seventeen accounts opened in the names of entities and individuals located in Florida. Among the account-holders were Lachance, who is Reifler's spouse; Lionel Lachance, a Reifler alias; Vivian Fleet, an alias for Gilbert Beall's spouse; Ray Fleet, who was Beall's brother-in-law; Reifler's minor daughter, Denise Lachance; Reifler's housekeeper; Ackerman; and entities for which Reifler, Beall, Lachance and Ackerman were officers and directors (Shine Dcl. ¶¶53-64, Ex.39; Ackerman Dep. 334-41). Reifler and Beall retained control of the proceeds derived from the subsequent sale of Hughes securities from the controlled accounts (Shine ¶¶53-64, 66-70, 120). 8/

Ackerman played a major role in closing the sham offering. 9/ In May 1986, he agreed to serve as an officer and

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8/ An additional sixteen accounts were opened in the names of individuals residing in or near Denver, Colorado. Victor, a business associate of Reifler's, persuaded these individuals to open accounts with F.D. Roberts by offering to pay for the Hughes IPO units purchased and assuring them against any losses (Shine Dcl. ¶¶ 7, 65, Ex. 38, 39, 41).

9/ Ackerman, an accountant, maintained his office in the same suite of offices occupied by Reifler and Lachance and, at various times, by Beall, Victor, and Mascolo. He functioned (continued...)

director of several corporations whose affairs were directed by Reifler, including, most importantly, Lachance Group, Inc. ("Lachance Group"), which funded the sham IPO and eventually received and disbursed large amounts of the proceeds of the fraud (Ackerman Dep. 82, 131-34; 140-42; 144; 146-49). Ackerman was the only authorized signatory on the bank account for one of these companies and was one of several signatories on the bank accounts of the others (R. 208 at 9-10; Ackerman Dep. 131-33, 136-38). Ackerman knew these companies were mere shells with no employees or operations (Ackerman Dep. 102, 142-43, 149-50).

In order to close the IPO on August 25, 1986 Ackerman directed the transfer of $94,000 from a North Carolina Lachance Group bank account to previously inactive Florida bank accounts in the names of Lachance Group and other Reifler-directed shell companies (R. 208 at 10; Shine Dcl. ¶¶66-70, Ex. 46; Ackerman Dep. 304-06). Ackerman then used these funds to buy cashier's checks that were used to conceal the defendants' purchases of the Hughes securities ostensibly offered to the public in the IPO (R. 208 at 10; Ackerman Dep. 320-41). Ackerman had the cashier's checks made payable to the escrow agent for the Hughes offering; and he instructed that the checks reflect that they were purchased by persons and entities in whose names the Florida group of controlled brokerage accounts had been opened at F.D.

9/(...continued)
as an accountant for several privately-held entities controlled by Reifler, Lachance, and Beall (R. 208 at 30; Shine Dcl. ¶10; Ackerman Dep. 872-73.

Roberts (R. 208 at 10; Shine Dcl. ¶68, Ex. 44, 45, 47; Ackerman Dep. 320-41). 10/ These cashier's checks were delivered to the escrow agent by Knoblauch 11/ as payment for the securities purportedly purchased by the nominees identified as the purchasers of the cashier's checks (Shine Dcl. Ex. 48).

2. Fraudulently Stimulating Investor Interest In Hughes Securities

Immediately prior to the commencement of secondary trading in Hughes stock, the Hughes IPO units were split into their common stock and warrant components. F.D. Roberts then purchased 90,000 shares from the controlled accounts, comprising the entire common stock component of the Hughes IPO, at a price of $2.25 per share (Shine Dcl. ¶¶89-90, Ex. 37; Maldowan Dcl. Attachments). The issuer defendants retained all of the warrants in the controlled accounts, enabling them to maintain control over 95 per cent of the issuable stock (Shine Dcl. ¶90).

To increase and maintain the market price of Hughes securities, the issuer defendants devised a series of misleading press announcements in August 1986 regarding Hughes' purported merger with four other entities (R. 252 at 3; Shine Dcl. ¶77, Ex. 50). These releases were issued in September and October 1986

10/ Similarly, Victor used money wired to him from bank accounts controlled by Reifler and Beall to purchase cashier's checks in the names of the individuals in whose names the Denver group of controlled brokerage accounts were opened (Shine Dcl. ¶66-67, Ex. 43).

11/ Knoblauch acted as chairman and chief operating officer of Hughes from March 1986 through at least July 1987. Knoblauch previously worked with Reifler and Beall on an earlier business venture (Shine Dcl. ¶9).

through Communications Group Inc., a Florida public relations firm. Two of these four entities were Susan Lachance Interior Design ("SLID") and Flat Rock Developers, Inc. ("Flat Rock"). Lachance was president of both companies. She was sole owner of SLID and part owner of Flat Rock (Shine Dcl. ¶6; Lachance Dep. 15, 373, 376). 12/

Lachance participated in formulating press releases (Lachance Dep. 410-17, 432-44; Reifler Dep. 749-50, 781-82) that, among other things, misleadingly portrayed purported transactions between her companies and Hughes as arms-length deals, without disclosing her marital relationship with Reifler or that Reifler was an owner of Hughes. Lachance's use of the name "Susan Reifler" in one release and "Susan Lachance" in the other also created the misleading appearance that the two target companies were run by two unaffiliated persons who had made independent business judgments that a merger with Hughes was desirable (Shine Dcl. Ex. 55, 58; Lachance Dep. 442). The press releases also misleadingly conveyed an impression that Lachance's businesses were thriving when in fact their financial condition was far different. Finally, Lachance stated in the press releases that

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12/ Misleading press releases were also issued concerning Hughes' purported mergers with Conserdyne Corporation, a company that marketed investments in alternative energy projects in which Knoblauch had a majority interest, and Insuranshares of America, which was controlled by Reifler and Mascolo. These releases were issued in September and October 1986 (Shine Dcl. ¶¶18-19, 78-88). The releases misrepresented the earnings, financing, business opportunities, and/or the nature of these businesses (R. 156 at 9-10; Shine Dcl. ¶¶79-80, 85-86, 107-10).

Hughes had the capital needed to expand Lachance's businesses, when she had no reasonable basis for those statements and Hughes, in fact, did not have sufficient capital to fund the businesses it was purportedly negotiating to acquire.

3. Hiding The Fraudulently Obtained Hughes Proceeds And The Identity Of Those Who Benefited From Them

The misinformation in the press releases and the manipulative activities of the underwriter defendants caused Hughes securities to rise in price to $15 per share by January 1987 (Shine Dcl. ¶121, Ex. 37, 74, 75; Maldowan Dcl. Attachments). During this time the issuer defendants sold large quantities of the stock warrants they had retained in the controlled accounts. Between December 15, 1986 and February 2, 1987, 199,700 warrants were sold from the controlled accounts, generating at least $1,157,587.50 in proceeds (R. 208 at 7; Shine Dcl. ¶¶121-142, Ex. 37, 74, 75, 78; Maldowan Dcl. Disgorgement Worksheet).

Ackerman handled much of the ill-gotten gains as they were received from the fraudulent sale of Hughes securities. Ackerman admitted that he received checks issued by the brokerage firm through which Hughes securities were sold, and that he deposited checks into eight corporate bank accounts (R. 208 at 11-12; Shine Dcl. Ex. 78; Ackerman Dep. 373-74, 506-07). These included checks payable to the nominees he had designated as purchasers of the cashier's checks that he had bought for the Hughes IPO (Shine Dcl. Ex. 78; Ackerman Dep. 372-87).

In total, Ackerman deposited at least $1,140,643 of the illegal profits into the eight corporate accounts. Reifler, Lachance, Beall, and Ackerman were directors, officers and/or owners of the eight corporations in whose names the accounts were held (R. 208 at 7; Shine Dcl. ¶¶4-6, Ex. 8). Three of these eight bank accounts had been dormant except for transactions related to the fraudulent closing of the IPO (Schwartz Dcl. ¶¶ 9-11, 14-17, 29-32), and another three of the accounts were not even opened until they were needed to receive the illegal profits (Schwartz Dcl. ¶¶18, 22 and 35). Ackerman was authorized to sign for all eight bank accounts (Schwartz Dcl. ¶9, 14, 18, 22, 26, 31, 35, 38).

After the illegal profits were deposited in the eight accounts controlled by the defendants, they were rapidly disbursed in a series of relatively small transactions, frequently only $1,000 or $2,000 at a time (Schwartz Dcl. ¶¶11, 12, 16, 19, 23, 24, 27, 32, and 36). Many of the transfers were back and forth between various of the eight accounts in which the proceeds were originally deposited; other transfers were made to the defendants and to other entities they controlled. These transfers were unrelated to any regular business activity carried on by those entities (Ackerman Dep. 242-46, 305, 309, 487-88; Reifler Dep. 1006-07). In addition, Ackerman withdrew thousands of dollars in cash from these accounts and generally gave the money to Reifler, keeping no record of the transfer to Reifler or what Reifler did with the money. (Ackerman Dep. 507-10).

Lachance facilitated efforts to hide the proceeds. She was signatory on six of the eight accounts that received the proceeds (R. 208 at 7; Schwartz Dcl. ¶¶18, 22, 26, 31, 35, and 38). She endorsed checks representing the proceeds from the scheme for deposit into her own companies' bank accounts (R. 208 at 7; Shine Dcl. ¶127; Lachance Dep. 252-53, 450; R. 187, Ex. D), and wrote and endorsed various documents and checks at Reifler's request without inquiring why she was being asked to do so (Lachance Dep. 341-44, 450).

When appointing a trustee to locate the funds, the district court noted that the defendants "have not seriously disputed the basic fact that * * * substantial efforts have been made to secrete the proceeds" (R. 70 at 11). Even defendants' own evidence, the court found, "supports the SEC's position [that] these accounts were used to further the above money-laundering scheme" (R. 70 at 16-17 n.13). Indeed, during his deposition, Reifler himself stated in describing the money transfers (Reifler Dep. 1006-07):

> Many times, not just once, that the same amount of money, less small amounts or plus small amounts, would move to five or six banks * * * . To this day, I don't have an answer as to what the purpose was. * * * It's as if you carried all your money in your right front pocket, and then you decided to carry some in your left pocket, some in your left rear pocket, some in your right rear, some in your left coat pocket, in your right pocket, some in your vest pocket. It doesn't make sense.

After defendants finished moving the proceeds of their scheme in and out of the eight corporate bank accounts, those

accounts generally reverted to a state of inactivity (R. 69 at 5; Schwartz Dcl. ¶¶13, 17, 20, 21, 24, 25, 33, 34, and 37).

4. Reifler, Lachance And Ackerman Shared In The Illegal Profits.

Defendants do not contest that defendants, as a group, received $1,950,562 (R. 252 at 8-9). 13/ Where the illegal profits went after initially being deposited in the eight bank accounts controlled by the defendants, however, is uncertain. During the course of this litigation, defendants, who once possessed the records of deposits and withdrawals for these accounts, claim to have lost the deposit books and check stubs from which the flow of funds could be analyzed. (Ackerman Dep. 622-31, 872-73; Reifler Dep. 45, 60, 62, 76, 276; Br. App. 5 at 4). As a result, with the exception of about a half-million dollars that various of the issuer defendants admit receiving individually, the Commission could not determine with certainty where the ill-gotten gains went after they left defendants' eight accounts in which they were initially placed. 14/

13/ This total includes $134,225 netted by Hughes from the IPO; $1,255,087 received from the sale of stock and warrants; and $561,250 paid by investors to exercise the warrants in order to obtain stock (Maldowan Dcl. ¶10-23 & Disgorgement worksheet; Shine Dcl. ¶123).

14/ The defendants proffered photocopies of altered check stubs containing notations that purported to describe the destination of these funds and an exhibit (Exhibit 13 to the Ackerman deposition), a nearly 500-page document containing 17 schedules that purported to describe the movement of money through the eight accounts. Exhibit 13 purportedly summarized the notations on the photocopied stubs and on still missing deposit books. Exhibit 13 was initially submitted on November 17, 1993, in support of Reifler's (continued...)

Lachance benefited substantially from the fraud. It is undisputed that over $85,000 of the fraudulent proceeds were deposited in the SLID bank account (for her interior design firm). Moreover, an undetermined amount of additional illegal profits were expended for Lachance's benefit through Lachance Group, Reifler, and corporate entities they controlled. Ackerman testified, for example, that he paid SLID's rent (Ackerman Dep. 482-83, 498-99, 537-38), as well as at least part of SLID's payroll (Ackerman Dep. 79-80, 557-60), from the bank accounts of the Lachance Group, the corporate entity that initially received the largest share of the illegal profits (Schwartz Dcl. ¶¶ 27, 32). Lachance acknowledges that she drove a Mercedes during the 1986-87 period that was rented by Lachance Group (Lachance Dep. 184-85). Similarly, Lachance's housekeeper's pay (Ackerman Dep. 557-59) and at least part of the other Reifler/Lachance "household" expenses (Ackerman Dep. 560-61) were paid by Ackerman out of the Lachance Group accounts. Finally, Lachance testified that Reifler paid for a substantial portion of the family

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14/(...continued)
cross motion for summary judgment dated October 16, 1992. As discussed below, these documents were created after the litigation commenced in circumstances that led the district court to conclude that they lacked "trustworthiness." Accordingly, the district court excluded them from evidence (R. 243 at 4).

Reifler claims, on the basis of the excluded documents, to have received only $78,434 of the illegal profits (Reifler Dep. 997-1000). He maintains that he allowed other defendants who are not parties to this appeal to receive the vast bulk of the nearly $2 million in proceeds of the illegal scheme he organized (Reifler Dep. 1036).

expenses during the period of the fraud (Lachance Dep. 178-79, 241), a time when Reifler's only income consisted of proceeds from the fraud (Reifler Dep. 125-26, 951-52).

The district court concluded that of the $1,950,562 in ill-gotten gains that the issuer defendants received from the Hughes scheme, $556,311 was indisputably allocable to particular defendants (R. 252 at 17). 15/ Accordingly, the district court held Hughes, Reifler, Lachance, Beall, and Knoblauch jointly and severally liable for $1,394,252, the remainder of the ill-gotten gains (R. 252 at 17-19).

STANDARD OF REVIEW

A court of appeals' review of a grant of summary judgment is plenary. United States v. Koreh, 59 F.3d 431, 438 (3d Cir. 1995); Coolspring Stone Supply, Inc. v. American States Life Ins. Co., 10 F.3d 144, 146 (3d Cir. 1993). An order of disgorgement is reviewed for an abuse of discretion. CFTC v. American Metals Exchange Corp., 991 F.2d 71, 76 (3d Cir. 1993). See also SEC v. First Jersey Securities, Inc., 101 F.3d 1450, 1474-75 (2d Cir. 1996).

SUMMARY OF THE ARGUMENT

The district court correctly granted summary judgment, holding Lachance and Ackerman liable under Section 17(a)(2) and

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15/ The court found Reifler, Lachance, and Ackerman individually liable to disgorge the amounts they admitted receiving: $78,434, $85,232.41, and $5,644.17, respectively. It also held Beall individually liable to disgorge $217,300; Mascolo $137,700; Knoblauch $24,000; and Victor $8,000 (R. 252 at 13-17).

17(a)(3) of the Securities Act, respectively. Lachance made false and misleading public statements that contributed to the manipulation of Hughes stock; Ackerman engaged in deceptive practices when he facilitated the closing of the sham IPO and the concealment of the defendants' purchases of Hughes stock, and when he disbursed the money from the Hughes scheme to the defendants in transactions designed to hide the illegal proceeds.

The district court did not abuse its discretion in ordering Lachance to pay disgorgement, because it applied well-established legal principles to the facts of this case and reached an equitable result. Disgorgement serves the purpose of depriving wrongdoers of their ill-gotten gains; and, where defendants' conduct prevents the Commission from tracing precisely how much of those ill-gotten gains each defendant received, it is appropriate to hold defendants jointly and severally liable. In such circumstances, any uncertainty about the amount of illegal profit received by particular defendants can only be overcome if those defendants provide evidence to limit their liability. In this case, where the Commission proved that Lachance was a substantial participant in defendants' violations, received hundreds of thousands of dollars more than she admitted in illegal profits from the scheme, and engaged in activities that hid the proceeds, it was particularly appropriate to impose on her the burden to come forward with affirmative evidence as to the precise amount by which she benefited from the Hughes scheme. She failed to carry that burden (even though she concedes she

must). The evidence proffered by appellants to limit their disgorgement liability (the photocopies of altered check stubs and Ackerman Exhibit 13, the purported summary of altered check stubs and lost bank deposit books) was properly excluded by the district court as "untrustworthy." Finally, the district court correctly held Lachance liable to disgorge $85,000 individually, since she does not deny receiving it. She only denies keeping all of it.

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED THE COMMISSION'S MOTION FOR SUMMARY JUDGMENT AGAINST LACHANCE AND ACKERMAN.

Lachance and Ackerman were held liable for violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act, respectively, on the basis of documentary evidence and their own deposition testimony about what they did and said. They do not dispute the material facts: Lachance made statements in press releases which even she admits created a false and misleading impression (Lachance Dep. 434); Ackerman assisted in closing the sham IPO while concealing defendants' purchases of Hughes stock and disbursed the profits from the subsequent manipulation of Hughes stock to the defendants in transactions designed to launder the funds, when even he admits there could be no legitimate business purpose for most of the transactions (Ackerman Dep. 242-46, 305, 309, 488).

As a preliminary matter, both of these defendants, in arguing that a trial is necessary, misconstrue the Securities Act and the standard for summary judgment. Although they acknowledge

that Sections 17(a)(2) and 17(a)(3) are satisfied by a showing of negligence, they mistakenly argue that negligence depends on a defendant's subjective state of mind (Br. 16, 32-34). To the contrary, negligence is determined on an objective basis. Metzgar v. Playskool, Inc., 30 F.3d 459, 464 (3d Cir. 1994). And in this case sufficient undisputed facts were presented to permit a determination that Lachance and Ackerman were at least negligent. Lachance made statements that, on an objective basis, she should have known were misleading; Ackerman engaged in fraudulent transactions that, on an objective basis, he should have known had no legitimate business purpose. Summary judgment can be appropriate in securities fraud cases where negligence is an issue, and, indeed, even where scienter or other mental state is an issue. 16/

Lachance and Ackerman have not pointed to any specific fact that would create a genuine issue for trial. Fed. R. Civ. P. 56(e) requires the non-moving party to set forth "specific facts" showing that there is a "genuine issue" for trial. Matsushita

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16/ See SEC v. Research Automation Corp., 585 F.2d 31 (2d Cir. 1978) (holding summary judgment appropriate where certified public accountant must have understood nature of his actions in aiding and abetting securities fraud); SEC v. Federated Alliance Group, Inc., 1996 WL 484036 *1 n.3 (W.D.N.Y. Aug. 21, 1996) (in the face of Commission evidence, defendants' unsubstantiated conclusory assertions about reliance on counsel not sufficient to withstand summary judgment on securities fraud claim); SEC v. Scherm, 854 F. Supp. 900 (N.D. Ga. 1993) (Commission presented sufficient evidence and defendants failed to present any evidence to create a genuine dispute); SEC v. Profit Enterprises, Inc., 1992 WL 420904 (D.D.C. 1992) (summary judgment on securities fraud claim appropriate where defendant made misstatements that she either knew or should have known were false).

Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Lachance and Ackerman have asserted only that a judge should have the opportunity to assess demeanor and credibility before finding them negligent (Br. 16-17, 34). But the facts necessary for summary judgment are undisputed and the district judge made no credibility determinations in granting summary judgment.

A. Lachance Violated Section 17(a)(2) of the Securities Act By Making False And Misleading Public Statements That, Among Other Things, Touted Hughes' Acquisitions Of SLID And Flatrock As Though They Were Arms-Length Transactions Between Thriving Businesses.

The district court correctly held Lachance liable for violating Section 17(a)(2) of the Securities Act. That provision makes it unlawful "to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made * * * not misleading * * * ." An omitted fact is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988) (quoting TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976)). As Lachance acknowledges (Br. 15), the Securities Act does not require scienter for a violation of Section 17(a)(2). Aaron v. SEC, 446 U.S. 680, 701-02 (1980). Accordingly, Lachance may be held liable under Section 17(a)(2) "for omitting disclosure of [material facts] negligently -- in other words, for failing to

disclose [material facts] about which [she] should have known." SEC v. Steadman, 967 F.2d 636, 643 (D.C. Cir. 1992).

As part of the effort to arouse and sustain unwarranted investor interest in Hughes securities, press releases were issued by Lachance touting Hughes' prospective mergers with Lachance's design firm, SLID, and with the housing development firm of which she was president and part owner, Flat Rock. 17/ Lachance was involved in formulating the releases about her companies (Lachance Dep. 410-17, 430-38, 442-44; Reifler Dep. 749-50), and she edited them (Reifler Dep. 781-82). These

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17/ An October 1, 1986 release announced that SLID had "entered into preliminary discussions regarding possible acquisition by Hughes Capital Corp., a publicly held acquisition and asset management company with headquarters in Boca Raton, Fla." (Shine Dcl. Ex. 55, 58). The release described SLID as "a 12-year-old space planning and design firm headquartered in Fort Lauderdale" and quoted Susan "Lachance," president of SLID, as saying:

> If negotiations result in an acceptable offer, it would provide the capital that would enable us to expand more broadly and on a national basis into the commercial, institutional and hospitality industries, as well as the luxury home market (Shine Dcl. Ex. 55).

Similarly, an October 3, 1986 release concerning Flat Rock announced preliminary negotiations with Hughes, described Flat Rock as a privately-held development company, and quoted Susan "Reifler," president of Flat Rock, as saying:

> If negotiations result in an acceptable acquisition offer, it would provide us with the capital to accelerate development of Flatrock Estates in Flat Rock, N.C.
>
> Further, it would make it possible to bring to fruition our plans to build similar enclaves of luxury, fully furnished single-family homes in other upscale markets (Shine Dcl. Ex. 58).

releases contained statements that were rendered false and misleading by the omission of material information. 18/

Each release misleadingly portrayed the purported merger as an arms-length transaction by speaking in terms of "negotiations" and stating that SLID and Flat Rock had "entered into preliminary discussions regarding a possible acquisition by Hughes." In fact, there was nothing arms-length about these so-called "negotiations," and Lachance knew it. Lachance was married to the owner of Hughes. Certainly, any reasonable investor considering the purchase of Hughes securities would have thought it significant that these acquisitions were based, not on an arms-length, independent assessment of business opportunity presented by a merger with Hughes, but on a marital relationship between the owner of Hughes and the president of the two target companies. The false impression of arms-length transactions was

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18/ Lachance points (Br. 14) to an affidavit she submitted below (Affidavit of Lachance dated October 19, 1992) in which she stated that she "never even saw the press release" concerning Flat Rock. Even assuming, however, that Lachance did not actually see the release, there is undisputed evidence that the release was formulated by her. Lachance testified at length at her deposition concerning her formulation of the release's contents, and she did not dispute, at that time, her authorship of the release (Lachance Dep. 431-44). Also, Reifler testified that some of the language in this release was changed at Lachance's direction when she reviewed a draft of the release (Reifler Dep. 781-82). This evidence of Lachance's participation in creating the release is not contradicted by her affidavit, which says only that she did not see the release before it was disseminated.

But, even if there were a conflict between Lachance's affidavit and her earlier testimony, summary judgment may not be defeated simply by submitting a conclusory affidavit that contradicts earlier testimony. See, infra, at 41.

perpetuated in later press releases in December 1986 (Shine Dcl. Ex. 63).

The releases also were misleading in failing to inform investors that "Susan Lachance," the president of SLID, and "Susan Reifler," the president of Flat Rock, were, in fact, the same person. 19/ By using two different names, the press releases created the appearance that the two target companies were run by two unaffiliated persons who had made independent business judgments that a merger with Hughes was desirable (Shine Dcl. Ex. 55, 58; Lachance Dep. 442).

Both releases also misleadingly portrayed the companies to be acquired by Hughes as successful, thriving business enterprises. The SLID release said that the merger with Hughes would allow it to "expand" "more broadly and on a national basis" into additional lines of business (Shine Dcl. Ex. 55). In fact, as Lachance knew, SLID was in, or had only recently emerged from, a lengthy bankruptcy (Lachance Dep. 109-11, 266-67). The Flat Rock release similarly touted the merger as enabling it to "accelerate" development of Flatrock Estates and "bring to fruition our plans to build similar enclaves of luxury, fully furnished single-family homes in other upscale U.S. markets" (Shine Dcl. Ex. 58). Lachance knew Flat Rock was dormant and had

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19/ Since defendant Lionel Reifler, Susan Lachance's husband, concealed his interest in Hughes (Br. 4), the use of the name "Susan Reifler" by Lachance would not have alerted investors to her marital relationship with an owner of Hughes. The purported negotiations between Flat Rock and Hughes still appeared to be an arms-length transaction even though Lachance used her married name in that press release.

never generated any revenue, and she even admitted in deposition testimony that her use of the term "accelerate" in the Flat Rock release implied that the company had ongoing operations (Shine Dcl. ¶83; Lachance Dep. 373-75, 434, 436). Any reasonable investor considering the purchase of Hughes securities would have thought these facts important. Hughes' only function was to acquire other companies and, therefore, it was only as viable as the businesses it acquired.

The press releases also misleadingly stated that Hughes would provide SLID and Flat Rock with capital, when in fact Hughes had insufficient capital for the proposed business expansions. Lachance contends that in making these statements she reasonably relied on Knoblauch and Reifler, and that she is entitled to a trial on the reasonableness of her reliance (Br. 14-17). The undisputed facts show, however, that she touted Hughes' ability to supply capital in press releases directed at investors even though she had no basis for making these representations (R. 208 at 6; Lachance Dep. 401-03, 416). Lachance admits that Reifler never told her anything about Hughes' financial condition and that she never asked to see the books for Hughes or other financial records (Lachance Dep. 401-03, 414, 416, 424). 20/ She testified only that she could not

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20/ Lachance attempted to create a factual issue by submitting a carefully worded affidavit stating that Knoblauch "sent [her] the financial statements of Hughes" (Affidavit of Susan Lachance dated October 19, 1992). However, she did not state that she actually read the statements and relied on them. In any event, if she had so stated, she would have (continued...)

recall, but thought that Knoblauch "led her to believe" that Hughes "was a large company which had substantial capital" (Lachance Dep. 412-16). And she said she "trusted" her husband (Lachance Dep. 416), although she knew he was already a repeated swindler with several criminal convictions (Shine Dcl. Ex 6; Reifler Dep. 129-31, 138-43, 152-53, 161-62; see also Lachance 2d 12/10/93 Dep. at 39-49). See, supra, note 7. These facts, which are not in dispute, provided the district court with sufficient basis to conclude, as a matter of law, that Lachance was negligent in making statements about Hughes' financial condition.

In any event, even if Lachance's statements about Hughes' finances are disregarded, summary judgment is supported by the other representations and omissions that Lachance admits. She unquestionably failed to disclose her marital relationship with an owner of Hughes, failed to disclose that Susan Reifler and Susan Lachance were the same person, and failed to disclose that her two purportedly thriving businesses to be acquired by Hughes were either coming out of bankruptcy or without revenues or business.

20/(...continued)
contradicted her earlier deposition testimony that she had not seen any Hughes' financial record before she issued the releases. Here again, Lachance cannot raise a genuine issue of fact by simply contradicting her earlier testimony. See, infra, at 41.

B. Ackerman Violated Section 17(a)(3) Of The Securities Act By Engaging In Practices That Operated As A Fraud Upon Hughes Investors And For Which He Admits There Was No Legitimate Business Purpose.

The district court correctly held Ackerman liable under Section 17(a)(3) of the Securities Act. That provision makes it unlawful "to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser [of securities]." The Securities Act does not require scienter for a violation of Section 17(a)(3). Aaron v. SEC, 446 U.S. at 701-02. Ackerman is liable if he knew or should have known that his activities operated as a fraud upon investors. See SEC v. Steadman, 967 F.2d at 643.

Ackerman executed the transactions necessary to make it appear that Hughes had successfully sold all the shares offered in the IPO to the public, while concealing the fact that Reifler and his associates had purchased the entire IPO. To this end, Ackerman directed funds from a North Carolina Lachance Group bank account to be deposited in Florida bank accounts held in the names of three shell corporations that he knew had no business operations requiring these funds (Shine Dcl. Ex. 46; Ackerman Dep. 102, 143, 150, 328-30). The money placed in these three accounts was used to purchase cashier's checks. Ackerman personally purchased at least seven of the cashier's checks and had them made payable to the escrow agent for the Hughes offering (Shine Dcl. ¶68, Ex. 45, 46; Ackerman Dep. 330-37). He directed that each check reflect that it had not been purchased by him, but by a person in whose name a nominee account had been opened

at the F.D. Roberts brokerage firm (Shine Dcl. ¶¶125-41). These names included Lionel Lachance, Reifler's alias; Vivian Fleet, the maiden name of Beall's spouse which Ackerman admits was used as an alias; Denise Lachance, Reifler's minor daughter; and several shell corporations which Ackerman knew had no business operations (Ackerman Dep. 334-41, 386). Ackerman never communicated with the nominees (Ackerman Dep. 340). Five additional cashier's checks, also made payable to the escrow agent, were purchased in the names of other nominees, including Ackerman himself (Shine Dcl. Ex. 47; Ackerman Dep. 320-28). The checks were delivered to the escrow agent as payment for Hughes securities to close the IPO (Shine Dcl. ¶ 70).

Ackerman also played a major role in hiding the proceeds of the subsequent fraudulent sales of Hughes securities into the market at manipulated prices. He received checks for the proceeds from the brokerage firm through which the securities were sold, and he deposited them into the eight corporate bank accounts for which he was an authorized signatory (Shine Dcl. ¶¶ 143-52, Ex. 74, 75, 78; Ackerman Dep. 506-07). The corporations in whose names the eight accounts were maintained had no regular business operations, and six of the eight accounts were either opened with the deposit of the Hughes proceeds or were dormant prior to the deposit of the proceeds (Schwartz Dcl. ¶¶ 9-11, 14, 18, 22, 29-32, 35). The checks deposited in these accounts included checks payable to each of the nominees Ackerman had designated as purchasers on the cashier's checks he bought to

close the IPO (Shine Dcl. 143-52; Ackerman Dep. 372-87). Ackerman himself was one of those nominees (Shine Dcl. Ex. 47).

Ackerman then rapidly disbursed the proceeds in numerous relatively small transactions back and forth among the eight accounts, to accounts in the names of entities the defendants controlled, to certain defendants and to other individuals and entities (Schwartz Dcl. ¶¶ 12, 16, 19, 23, 24, 27, 32, 33, 36). In addition, Ackerman withdrew thousands of dollars in currency from the accounts and kept no record of their use and destination (Ackerman Dep. 507-10).

By his actions, Ackerman created the false appearance that the Hughes IPO had been successfully sold to the public in accordance with the prospectus. To create the facade of a successful IPO is a fraudulent practice because it misleads investors to believe that others have made favorable investment decisions concerning the value of the security. See Svalberg v. SEC, 876 F.2d 181, 183 (D.C. Cir. 1989); A.J. White & Co. v. SEC, 556 F.2d 619, 623 (1st Cir.), cert. denied, 434 U.S. 969 (1977).

Fraudulent practices also include efforts to avoid detection of the fraud. See SEC v. Holschuh, 694 F.2d 130, 143-44 (7th Cir. 1982). Ackerman was involved in the use of undisclosed nominee accounts, which has been determined to be a fraudulent device under Section 17(a), see SEC v. Kimmes, 799 F. Supp. 852, 859 (N.D. Ill. 1992), aff'd, 997 F.2d 287 (7th Cir. 1993), the use of aliases, which certainly evidence fraudulent activity, see, e.g., United States v. Saavedra, 684 F.2d 1293, 1298 (9th

Cir. 1982); and an elaborate scheme to launder the fraud proceeds.

The district court correctly held: "[W]hen viewed as a whole it is clear that Ackerman was negligent for not questioning the transactions he completed. Ackerman's role was not merely executing a few isolated transactions; he completed many transactions at different stages of the scheme, including many that had no proper business purpose (R. 208 at 31). No trial was necessary. Summary judgment was properly granted against Ackerman.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN HOLDING LACHANCE LIABLE FOR DISGORGEMENT.

Defendants did not dispute in the district court that they collectively received almost $2 million from the Hughes scheme (Br. App. 4). 21/ From that total, the district court deducted amounts that were traced to specific defendants. It then held Lachance and her husband, Reifler (along with three other defendants who have not appealed), jointly and severally liable for the $1.4 million that the defendants prevented the Commission from tracing. Before this Court, Lachance argues that she should not have been held jointly and severally liable. Contrary to her

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21/ The Commission had calculated, with precision, the total amount of ill-gotten gains. With its motion for summary judgment as to relief, the Commission filed the supporting declaration of Craig Maldowan, an accountant on the Commission's staff, which established $1,950,562.98 as the amount by which the issuer defendants profited from the sale of worthless Hughes securities (Maldowan Dcl. ¶3). Uncertainty remained, however, as to the precise amount by which each defendant had been unjustly enriched.

arguments, the circumstances of this case fully justify the disgorgement ordered by the district court. 22/

In order to avoid joint and several liability, Lachance has the burden, as she concedes (Br. 20), of demonstrating that she received the benefit of only a limited amount of the illegal proceeds. It was the defendants' money-laundering activities that prevented the Commission from ascertaining the exact amount by which she and the other defendants benefited from their fraud. Other circumstances also make it appropriate that Lachance bear this burden. First, her participation in the fraudulent scheme was substantial; she was not merely a tangential actor. Second, it is certain that Lachance received hundreds of thousands of dollars in benefits from the fraudulent scheme, even if the

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22/ Lachance also erroneously argues (Br. 18, 22) that her individual liability to disgorge $85,000 should be reduced by $32,000 that she admits receiving but then, allegedly the next day, passed along to her co-defendant, Mascolo. In the first place, there is no evidentiary basis for her claim that this money was transferred to Mascolo. Reifler testified that the transfer was made based on something Ackerman purportedly told him (Ackerman Dep. 799-804) and on Ackerman Exhibit 13, which, as discussed below, is inadmissible.

In any event, regardless of what happened to the money after it went into Lachance's business account, the fact remains that she received the ill-gotten gains. What she did with them afterward is irrelevant. The object of disgorgement is to take away the profits realized from the defendants' misconduct, not the amount of money the defendants have left after laundering and spending the bulk of the proceeds. See, e.g., SEC v. Great Lakes Equities, 775 F. Supp. at 214; SEC v. Jet Travel Services, Inc., [1975-76 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,317 at 98,609 (M.D. Fla. 1975). Once Lachance was shown to have received proceeds from the fraud, she may be required to disgorge them. See SEC v. Great Lakes Equities Co., 775 F. Supp. at 214; SEC v. Benson, 657 F. Supp. 1122, 1134 (S.D.N.Y. 1987).

precise amount is not certain; she and her husband lived lavishly on the proceeds, and the proceeds were also used to subsidize her business. Third, Lachance's own actions assisted in the defendants' laundering of the fraudulent proceeds and thus helped prevent the Commission from tracing the proceeds. As discussed below, Lachance failed to satisfy her burden. She submitted no admissible evidence that would support limiting her liability. Rather, she relied entirely on materials manufactured for this litigation, which the district court properly excluded from evidence.

A. A Court Has Broad Equitable Power To Hold Defendants Jointly And Severally Liable For Disgorgement, Especially Where -- As Here -- Defendants' Conduct Prevents The Commission From Tracing The Ill-Gotten Gains To Particular Defendants And Defendants Fail To Provide Admissible Evidence Limiting Their Liability.

"Once the district court has found federal securities law violations, it has broad equitable power to fashion appropriate remedies * * *." SEC v. First Jersey Securities, 101 F.3d at 1474. See also SEC v. Blavin, 760 F.2d 706, 713 (6th Cir. 1985). Disgorgement, the remedy ordered here, "is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violation of the securities laws." SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989). As this Court said in CFTC v. American Metals Exchange Corp., 991 F.2d 71, 76 n.9 (3d Cir. 1993): "[A]llowing a violator to retain the profits from his violations would frustrate the purposes of the regulatory scheme * * *." Similarly the Second Circuit recently explained: "The deterrent effect of an SEC enforcement

action would be greatly undermined if securities law violators were not required to disgorge illicit profits." First Jersey, supra (quoting SEC v. Manor Nursing Centers, 458 F.2d 1082, 1103 (2d Cir. 1972)).

In ordering disgorgement in cases involving multiple violators, courts will hold them jointly and severally liable where it is equitable to do so. 23/ In the present case, as Lachance concedes (Br. 20), the burden was on her to prove how much she received from the fraudulent scheme in order to avoid joint and several liability. See SEC v. World Gambling, 555 F. Supp. 930, 932 (S.D.N.Y. 1983), aff'd, 742 F.2d 1440 (2d Cir.), cert. dismissed, 465 U.S. 1112 (1984) (violator held liable jointly and severally, where he "failed to prove that he received less than any specific amount, or even that he received less than a given amount"). "[S]ince calculating disgorgement may at times be a near impossible task, the risk of uncertainty should fall on the wrongdoer whose illegal conduct created the uncertainty."

23/ See, e.g., SEC v. First Jersey Securities, Inc., 101 F.3d at 1475; Hateley v. SEC, 8 F.3d 653, 656 (9th Cir. 1993); SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987), cert. denied sub nom. Lombardfin S.p.A. v. SEC, 486 U.S. 1014 (1988) (aff'g, 638 F. Supp. 638, 639-40 (S.D.N.Y. 1986)); SEC v. Cross Fin. Ser., Inc., 908 F. Supp. 718, 734-35 (C.D. Cal. 1995); SEC v. Graystone Nash, Inc., 820 F. Supp. 863 (D.N.J. 1993), rev'd on other grounds, 25 F.3d 187 (3d Cir. 1994); SEC v. Interlink Data Network of Los Angeles, Inc., [1993-1994 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶98,049 (C.D. Cal. 1993); SEC v. Great Lakes Equities Co., 775 F. Supp. 211, 214 (E.D. Mich. 1991), aff'd, 12 F.3d 214 (6th Cir. 1993); SEC v. World Gambling Corp., 555 F. Supp. at 931; SEC v. Micro-Therapeutics, Inc., [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶99,086 (S.D.N.Y. 1983); SEC v. R.J. Allen & Assoc., Inc., 386 F. Supp. 866, 881 (S.D. Fla. 1974).

See also SEC v. Interlink Data Network of Los Angeles, Inc., 1993-1994 Transfer Binder (CCH) Fed. Sec. L. Rep. ¶ 98,049 at 98,476 (C.D. 1994) (because the defendants "refused to say what they did with the money" * * * "each defendant should be held jointly and severally liable for return of the entire amount."). See First Jersey Securities, 101 F.3d at 1475; SEC v. Lorin, 76 F.2d 458, 462 (2d Cir. 1996); SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995); SEC v. First City Financial Corp., 890 F.2d at 1232; SEC v. Great Lakes Equities Co., 775 F. Supp. 211, 214 n.22 (E.D. Mich. 1991), aff'd, 12 F.3d 214 (6th Cir. 1993).

The circumstances of this case illustrate the need for imposing joint and several liability and for placing the burden of proof on the defendant. The defendants here, including Lachance, do not dispute that their scheme generated nearly $2 million in illegal profits or that much of the money flowed through the eight bank accounts to which Reifler, Lachance, and Ackerman had access. Nor do defendants dispute that the money then flowed to various defendants, their companies, family members, friends and employees. Rather, each defendant points to the others as having been the ultimate recipients of these profits. At the same time, their conduct has made it infeasible or impossible for the Commission to ascertain the amounts received by each defendant. It is particularly appropriate to place the burden on the defendants to come forward with evidence to limit their liability; and it is equitable to hold a defendant

jointly and severally liable with the others should he fail to do so.

B. The Altered Check Stubs And Ackerman Exhibit 13 Were Properly Excluded As "Untrustworthy."

Critical to Lachance's argument that she received the benefit of very little of the illegal profits from the fraud are documents that defendants offered to show who received the ill-gotten gains -- photocopies of altered check stubs and the summary exhibit referred to as Ackerman Exhibit 13. The district court properly concluded, however, that these materials were untrustworthy and inadmissible. 24/

The photocopied check stubs purport to show to whom or for what purpose the fraudulent proceeds were disbursed after the defendants received them in the eight bank accounts that were operated for their collective benefit. But Ackerman admitted in deposition testimony that he had altered the original information contained on the check stubs long after the transactions and before he copied them (Ackerman Dep. 745, 756-57, 840). He could no longer recall what information was changed or added (Ackerman Dep. 779, 840, 873). Ackerman testified that some original stubs were altered based on discussions he had with Reifler at the time Exhibit 13 was created for the purposes of this litigation (R.

24/ Defendants claim that the original check stubs were lost and proffered the photocopies in their place. At first the defendants claimed that the original check stubs were provided to the U.S. Department of Justice (Reifler Dep. 45). Defendants later claimed that the documents were lost when SLID moved from Fort Lauderdale to Boca Raton (Br. App. Ex. 5 at 4).

243 at 4; Ackerman Dep. 501-03, 551, 744). He further testified that "he could not determine what the original notations were or remember why they were altered" (R. 243 at 5; See also, R. 224, Ex. 3; Ackerman Dep. 779). From the photocopies it is not possible to say with certainty what were the original notations and what were the alterations (Ackerman Dep. 757, 762, 799, 840, 873). As the district court noted, "without the originals, the SEC is unable to determine which notations were made contemporaneously with the transactions" (R. 243 at 5). The district court also pointed out that "at least one of the photocopies submitted appears to have notations that were erased or written over" (R. 243 at 5; R. 224, Ex.3; Ackerman Dep. 770-77, 779).

The summary exhibit was largely based on the altered check stubs and missing deposit books. Ackerman testified that the summary exhibit was also based to some extent on Reifler's recollections of the transactions (Ackerman Dep. 501-03, 551, 744, 779). Reifler testified in deposition that he could not remember the basis for his recollections (Reifler Dep. 996, 1002-04). 25/ Since the altered check stubs are neither contemporaneous nor reliable and the deposit books are not available at all, the summary exhibit does not summarize available admissible evidence. The summary exhibit, therefore,

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25/ In fact, there are three different versions of Exhibit 13. With each version a progressively smaller amount of the fraudulent proceeds is allocated to Reifler: $173,723, $97,843, and $78,434, respectively. (Reifler Dep. 996-98).

is not admissible. E.g., United States v. Pelullo, 964 F.2d 193, 204 (3d Cir. 1992).

Defendants contend that the photocopies of check stubs are admissible under the business records exception to the hearsay rule contained in Federal Rule of Evidence 803(6). That rule provides that business records may be admitted into evidence where it can be established that the person who created the records had the knowledge to make accurate statements, the records were created contemporaneously with the actions that were the subject of the record, and the records were created and kept in the regular course of business, unless the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness. United States v. Furst, 886 F.2d 558, 571 (3d Cir. 1989), cert. denied, 493 U.S. 1062 (1990).

Defendants' contention is meritless. The altered check stubs were not created contemporaneously with the transactions they purport to describe; nor were they created and maintained in the regular course of business. Rather, they were created in their altered form for the purpose of defending this litigation. As the district court pointed out, Ackerman testified that the only information he recorded on the check stubs in the ordinary course of business was the amount, payee, and account number (Ackerman Dep. 90-91, 551). The notations on the photocopies of the check stubs, in contrast, were made by Ackerman either when he prepared Exhibit 13 or at some other unspecified time after the checks had been written (Ackerman Dep. 757, 839-40, 848,

850). It is not even very clear that Ackerman, who supposedly entered the information on the photocopied check stubs, had the knowledge required under the business records exception to make accurate statements, since he did not create the records on the basis of his own information. Ackerman and Reifler both testified that some of the notations were based on conversations Ackerman had with Reifler at the time of the creation of Exhibit 13 in 1989, around two years after the checks were written (Ackerman Dep. 501-02, 744; Reifler Dep. 1001). Finally, the check stubs were altered when Ackerman and Reifler were defending this litigation and had a motive to minimize in the records the amount of money Ackerman, Reifler and Lachance received from the illegal scheme. In determining whether proffered evidence is "trustworthy," a court may consider the impact of motive. United States v. Casoni, 950 F.2d 893, 912 (3d Cir. 1991). See Fed. R. Evid. 803(6). 26/

26/ Even the original, unaltered check stubs would not be admissible under the ordinary business exception to the hearsay rule, since they were created for the purpose of laundering the fraud proceeds -- in order to create an inaccurate record of where the money went -- rather for the purpose of creating an accurate record of business transactions. The circumstances are of the kind considered under Rule 803(6) to "indicate lack of trustworthiness."

Ackerman admitted in his deposition that the corporations in whose name the bank accounts were maintained generally had no legitimate business, and that the numerous withdrawals of cash and transfers of funds among the accounts and the defendants had no legitimate business purpose (Ackerman Dep. 142-43, 144, 149-50, 242-46, 307-09). See also Schwartz Decl. at 9-11, 14-17, 18, 21, 22, 29-32, 35. These accounts were used to launder the proceeds of the fraud and make it difficult to determine who ultimately was enriched. See R. 70 at 4-7.

Defendants contend that during his deposition Ackerman "was never asked the litany of questions, the answers to which would satisfy the foundation requirements of Rule 803(6)" and that "[a]t trial, defense counsel will elicit from Ackerman the facts necessary to lay such a foundation" (Br. 27 n.6). Ackerman could not, however, credibly lay the necessary foundation, because he could only do so by directly contradicting his deposition testimony concerning these documents. See, e.g., Hackman v. Valley Fair, 932 F.2d 239, 241 (3d Cir. 1991) ("When, without a satisfactory explanation, a nonmovant's affidavit contradicts earlier deposition testimony, the district court may disregard the affidavit in determining whether a genuine issue of material fact exists."); Trans-Orient Marine Corp. v. Star Trading Marine, Inc., 925 F.2d 566, 572-73 (2d Cir. 1991). In any event, promises by counsel to produce evidence at trial do not create disputed issues of fact when no affidavits are offered on summary judgment. See Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990). See also Quiroga v. Hasbro, Inc., 934 F.2d 497 (3d Cir.), cert. denied, 502 U.S. 940 (1991).

Defendants further contend that the photocopies of the altered check stubs should be admitted under the best evidence rule, since the originals have been lost. The best evidence rule requires that the original of a document be submitted as evidence except in special circumstances. Fed. R. Evid. 1002. A duplicate is admissible when the original is unavailable only if there is no genuine question as to the authenticity of the

original. Fed. R. Evid. 1003. This requirement is not met here. The check stubs were altered long after the events they purport to record. The authenticity of the altered stubs as a true record of the transactions is in question. Only examination of the stubs themselves, not photocopies, could reveal which notations were added later.

The defendants also assert that the photocopied checks stubs are admissible under Rule 1003 because "the cancelled checks were available to compare the stubs to the checks for authenticity" (Br. 24). The defendants did not produce those cancelled checks, however, even though the checks were requested in discovery. Reifler and Ackerman repeatedly testified that the checks could not be found (Ackerman Dep. 620, 624-30; Reifler Dep. 60, 62-76, 926, 1096-98). See also R. 170. In any event, even if the checks should reappear, they would not corroborate that a given person received the funds directed by the check to be paid him because the defendants admitted that the payee on some of the cancelled checks was not the person who actually received the designated funds. For example, Lachance testified that although Denise Lachance, the minor daughter of Reifler and Lachance who had been a nominee purchaser in the IPO, was the payee on a $50,000 check from the proceeds of the Hughes scheme, the $50,000 actually went to Beall, another defendant involved in the scheme (Lachance Dep. 257-58). Moreover, the checks obviously could not corroborate the various alterations made years later on the check stubs (Ackerman Dep. 501-03, 744, 840).

Finally, the defendants contend that Ackerman Exhibit 13 is admissible as a summary exhibit under Fed. R. Evid. 1006 (Br. 24). However, "[i]t is well established that summary evidence is admissible under Rule 1006 only if the underlying materials upon which the summary is based are admissible." United States v. Pelullo, 964 F.2d at 204. Moreover, the Federal Rules of Evidence require that the original or an accurate reproduction of the underlying materials be available for examination by the other party. Fed. R. Evid. 1001(4) and 1006. As discussed above, the photocopies of the altered check stubs are not admissible and the originals, which were allegedly lost by the defendants, are not available for examination. Similarly, defendants offer no deposit books to support Ackerman Exhibit 13. The summary of altered check stubs and missing deposit books therefore is not admissible. Moreover, although the defendants contend that Exhibit 13 is an "accurate summary of voluminous writings" (Br. 24), it is apparent from Ackerman's testimony that Exhibit 13 actually conflicts with the information contained on several photocopied check stubs (Ackerman Dep. 769, 814, 843, 848). Such inconsistency further undercuts the reliability of the proffered "summary."

C. The Undisputed Evidence Demonstrated That It Was Equitable To Hold Lachance Jointly And Severally Liable.

1. Lachance Was A Substantial Participant In The Fraudulent Scheme. Lachance participated in various aspects of the fraudulent scheme and was vital to its success. She

formulated and edited false and misleading press releases touting purported acquisitions of her companies by Hughes as though these were arms-length transactions when they were not. She promoted the false and misleading impression that her companies were thriving businesses when they were not. She was a signatory on six of the eight bank accounts into which much of the illegal proceeds flowed, and thus potentially had access to hundreds of thousands of dollars in illicit proceeds from the scheme. She was aware that her minor daughter had received $50,000 for the sale of Hughes stock and then, for no apparent reason, had given that money to Beall, who, with Lachance's husband, was a secret owner of Hughes. 27/ The undisputed evidence reveals her intimate involvement in the scheme. See, e.g., Hateley v. SEC, 8 F.3d 653, 656 (9th Cir. 1993) (joint and several liability is not an abuse of discretion where violators "acted collectively").

Lachance suggests (Br. 18) that because she was found to have violated Section 17(a)(2), which requires only negligence and not scienter, she cannot be held jointly and severally liable. Joint and several liability, however, is appropriate for any violator of the securities laws, whether the defendant acted

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27/ Among the nominee purchasers of Hughes securities in the IPO (in addition to Lachance herself) had been Lachance's minor daughter, Denise, and the Reiflers' housekeeper. According to Lachance, she knew that Denise and the housekeeper had been interested in purchasing Hughes stock. Lachance further testified that she was aware that Denise, who is purported to have purchased $10,000 of stock, made money on her investment (Lachance Dep. 257-58, 380-84), and that the approximately $50,000 in proceeds were given to Beall (Lachance Dep. 258).

negligently, recklessly or intentionally. Joint and several liability was imposed in this case so that violators would not be allowed to retain the proceeds of their wrongdoing just because they successfully prevented the Commission from proving exactly how much each of them received. This concern to take away from the wrongdoer the profit obtained from wrongdoing remains applicable regardless of which provision of the securities laws is violated or the defendant's degree of culpability. Moreover, although the district court based its summary judgment on the undisputed facts showing at least negligence, Lachance was not a mere tangential actor in the fraud. As we have shown above, she was a substantial, culpable participant.

2. Lachance Received Hundreds Of Thousands Of Dollars In Benefits. The undisputed evidence also demonstrates, contrary to Lachance's contention (Br. 19), that she benefited substantially from the ill-gotten gains of the defendants' scheme -- indeed, she lived off the fraudulent proceeds (R. 252 at 18). Ackerman testified that much of the Reifler family's household expenses were paid out of the Lachance Group accounts (Ackerman Dep. 560-61), which received the largest initial deposits of the fraudulent proceeds, $420,377 (R. 156 at 15 n.6; Shine Dcl. ¶¶ 125-26, 129, 131, 135, and 141). Ackerman also testified that the salary of Lachance's housekeeper was paid from the Lachance Group accounts (Ackerman Dep. 558-59). Lachance acknowledges that the rent on the Mercedes she drove was paid from the Lachance Group accounts (Lachance Dep. 184-85); and, while she

was not certain which account paid for Reifler's Jaguar, she admitted it too was paid for through the corporate accounts that had received the fraudulent proceeds (Lachance Dep. 185-86).

Lachance, whose own legitimate income was no more than $52,000 per year (Lachance Dep. 179; Lachance 2d 12/10/93 Dep. 22), testified that she paid for little of her own living expenses because Reifler (whose income came solely from the fraudulent scheme) took care of all the family's financial matters (Lachance Dep. 179; Reifler Dep. 125-26, 951-52). Reifler also financially supported their minor daughter who was living with them at the time (Lachance Dep. 241), and paid all credit card bills (Lachance Dep. 257). Lachance explained that, since "he's the head of the household," Reifler opened all of the mail, so she never even saw the bills (Lachance Dep. 255-57). While Lachance paid some "incidental expenses," such as doctor bills, dry cleaning, and some of the food (Lachance Dep. 178-79), Reifler paid the rest. Lachance purports not to have known whether Reifler had a personal checking account or just paid bills from various corporate accounts (Lachance 2d 12/10/93 Dep. 38).

Since, as noted, Reifler had no other income, the money he used to support his family could only have come from the fraudulent proceeds. And the amount he supplied from those proceeds was substantial. The Reiflers drove luxury cars including a Masserati, Porsche, Jaguar and two Mercedes; purchased BMW automobiles for their daughters (Knoblauch Dep.

151; Lachance Dep. 185-86, 475-77; Mascolo Dep. 486); employed a full-time housekeeper; and resided in the highly affluent St. Andrews Country Club development in Boca Raton (Ackerman Dep. 558-59; Vivian Beall Dep. 49, 58-59; Knaublauch Dep. 151; Mascolo Dep. 484, 486; Reifler Dep. 3). 28/ Even if some of their expensive assets had been acquired prior to the fraud, this evidence shows that the Reiflers lived well beyond the means of a middle-income family and that Lachance's $52,000 a year could not have played a major role in supporting the family.

Lachance also benefited substantially from the fraudulent proceeds in her capacity as the sole owner of SLID. All of the rent and part of the payroll for SLID were paid out of the Lachance Group accounts (Ackerman Dep. 80, 498-99, 558-60). In addition, over $80,000 in fraudulent proceeds were deposited in SLID's bank account (R. 252 at 15-16; R. 94 at 9; Reifler Dep. at 42-43).

Joint and several disgorgement is particularly suited where, as in this case, there is evidence that the proceeds were shared

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28/ Reifler, Lachance, and their minor daughter impressed others with their "elaborate life-style," which reportedly included extensive collections of jewels, clothes, and furs. E.g., Knoblauch 150-51, 182 (Lachance had "rings, necklaces and earrings of precious stones, and gold for every outfit," which Knoblauch estimated at more than half-a-million dollars in value; Denise, the minor daughter, had "more clothes than most clothing stores," including a couple of mink coats); Mascolo Dep. 492-97 (Reifler and Lachance wore jeweled Rolex watches; and Lachance had what appeared to be gold, pearl and diamond jewelry for every outfit and nothing but the best clothes; "[T]hey didn't cheat themselves out of anything"); V. Beall Dep. 58-60 ("They spent considerable amounts of money and bought considerable amounts of jewelry").

jointly by multiple defendants (Lachance and Reifler) by virtue of the existence of a joint relationship between them. Indeed, even non-violators who are determined to have shared the proceeds may be held liable for joint and several disgorgement. In SEC v. Musella, 818 F. Supp. 600, 602-03 (S.D.N.Y. 1993), the violator's spouse -- who unlike Lachance was not held to have violated the securities laws herself -- was effectively held jointly and severally liable with the violator where funds from the spouse's business were used by the violator in the perpetration of the fraud and the violator supported the spouse so that the spouse substantially benefited from the fraudulent proceeds. 29/

3. Lachance's Activities Contributed To Hiding The Ill-Gotten Gains. As noted, Lachance's actions facilitated the hiding of the fraudulent proceeds. As an authorized signatory, she signed documents and endorsed checks at her husband's request without any inquiry and without any legitimate business reason for the transactions (R. 182, Ex. D; Lachance Dep. 341-44, 450). Money flowing into her company's bank account was handed over to other defendants for no apparent business reason. See CFTC v. American Board of Trade, Inc., 803 F.2d 1242, 1252 (2d Cir. 1986) (where "the defendants' own recalcitrance and system of

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29/ Conversely, a defendant who is extensively involved in the fraud, but who is not found to have substantially benefited from the profits beyond amounts traceable to him, might not be held jointly and severally liable. Thus, the district court appears to have decided that the equities did not weigh in favor of holding Ackerman jointly and severally liable, even though he violated Section 17(a)(3).

recordkeeping have so obscured matters," joint and several liability is appropriate).

4. Lachance Failed To Carry Her Burden Of Providing Admissible Evidence To Limit Liability. Although Lachance concedes that she has the burden of proof if she is to avoid joint and several liability (Br. 20), in responding to the Commission's summary judgment motion she made no effort to show that she received only a specific amount of the proceeds beyond her reliance on Exhibit 13. Since that document was properly held inadmissible, as discussed above, Lachance failed to carry her burden.

In these circumstances, a trial is not required. Lachance's reliance (Br. 20-23) on United States v. Alcan Aluminum Corp., 964 F.2d 252, 268 (3d Cir. 1992), and CFTC v. American Metals Exchange Corp., 991 F.2d at 82, is misplaced. Neither case supports her contention that a trial is required here. In both cases, unlike this case, the parties submitted evidence raising material factual disputes. See Alcan, 964 F.2d at 257-268; American Metals, 991 F.2d at 76. Lachance, in contrast, wants a trial in order to allow her the opportunity to submit evidence she failed to submit in response to the summary judgment motion. Alcan and American Metals did not abrogate the requirement that an opponent of summary judgment "set forth specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "Neither wishful thinking nor 'mere promise[s] to produce admissible evidence at trial,' nor conclusory responses

unsupported by evidence, will serve to defeat a properly focused Rule 56 motion." Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990) (citations omitted). 30/

CONCLUSION

For the forgoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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30/ Relying on Sections 433A and 881 of the Restatement (Second) of Torts, Lachance argues for a trial so that she may satisfy her burden of proof as to apportioning "harm" (Br. 20). Here again, Lachance has failed to present any evidence on this point in opposition to summary judgment, and she may not defeat summary judgment now simply by promising to do so later. Furthermore, this is not a private action seeking damages. The test for determining disgorgement is the amount of the ill-gotten gains received by the defendants, not the harm done to the victims of the Hughes scheme. American Metals, 991 F.2d at 71 (pointing out that disgorgement turns on the amount of illegal profits received, not investor losses).