

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE**

IN RE:	)	
	)	MDL Docket No. 02-1335-B (PJB)
	)	
TYCO INTERNATIONAL, LTD.,	)	This document relates to:
SECURITIES LITIGATION	)	Securities Action
	)	Civil Action No. 02-266-PB
	)	
	)	Individual Actions
	)	(Tyco v. Kozlowski; Tyco v. Kozlowski
	)	and Swartz)
	)	

**PLAINTIFFS TYCO INTERNATIONAL LTD. AND TYCO INTERNATIONAL (U.S.)  
INC.’S MEMORANDUM IN SUPPORT OF THEIR MOTION FOR TEMPORARY  
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiffs Tyco International Ltd. and Tyco International (US) Inc. (collectively, “Tyco”), respectfully submit this memorandum of law in support of their motion pursuant to Fed. R. Civ. P. 65(a) and (b) for a temporary restraining order and preliminary injunction to prevent Defendant L. Dennis Kozlowski (“Kozlowski”) from dissipating his assets in advance of judgment, and in support of Tyco’s request for expedited discovery concerning Kozlowski’s assets and the generous divorce settlement Kozlowski appears to have just agreed to give his now-former wife.

**Preliminary Statement**

As Chairman and Chief Executive Officer of Tyco between 1995 and 2002, Kozlowski was paid over \$325 *million* in W-2 compensation. Not content with that sum, he stole hundreds of millions of dollars more from the company. In 2005, he was convicted by a jury of his peers of twelve counts of grand larceny, eight counts of falsifying business records and other crimes he committed during his seven-year rampage through Tyco’s treasury.

Kozlowski is currently in a New York state prison serving 8 1/3 to 25 years.

While Kozlowski was required as part of his criminal sentence to make restitution to Tyco of \$98 million, the value of some of the stolen assets for which he was convicted, Tyco is entitled to the return of *all* the moneys paid to or taken by Kozlowski from Tyco during his criminal spree. Tyco's Amended Complaint, among other claims, invokes the venerable common law doctrines relating to "faithless servants" and "disloyal agents" to impose a constructive trust upon, and obtain disgorgement of, the hundreds of millions of dollars in W-2 compensation and other monies paid to Kozlowski. Tyco seeks the disgorgement also of the tens of millions of dollars in unlawful short-swing trading profits Kozlowski generated. In addition, Tyco has asserted claims for hundreds of millions of dollars for other damages resulting from Kozlowski's wrongful activities.

Until just a few days ago, Kozlowski's assets were safely under the control of the New York Supreme Court in a civil forfeiture action filed by the District Attorney of New York County. The 2002 court order restraining the transfer of his assets, however, was vacated by the New York court last week, with the consent of the District Attorney, after Kozlowski paid the fines and restitution amounts required by his criminal sentence.

Coincident with the lifting of the New York restraining order, news reports suggest that Kozlowski may use his newly regained control over these assets—which by law belong to Tyco—to frustrate this Court's exercise of its equitable powers of disgorgement and constructive trust. This summer, Kozlowski is reported to have agreed to funnel a substantial portion of his assets to Karen Mayo Kozlowski, the woman he married in 2001 a year before he was indicted, through a consensual divorce settlement. Kozlowski's divorce attorney said regarding the settlement that "[s]he'll do well. . . . *She should be getting millions from the settlement.*" The "millions" of dollars that Dennis Kozlowski has agreed to pay his wife, however, are the millions that he earned or stole from Tyco. For the reasons discussed below, that money is not his to give

nor is it Karen Kozlowski's to take. It is Tyco's property and Tyco has a significant, overriding interest in protecting the assets that Kozlowski stole from Tyco as well as other assets that Kozlowski is legally required to return to Tyco.

Because of the New York court's recent action, Tyco is required to ask this Court for emergency relief. Tyco seeks a temporary restraining order and preliminary injunction against Kozlowski and all others acting in concert with him or who have notice, prohibiting the transfer of his assets (except as required to pay his bills in the ordinary course) so as not to frustrate and hinder this Court's exercise of its equitable and other powers. Tyco also seeks expedited discovery in advance of the preliminary injunction hearing to discover whether and to what extent Kozlowski has dissipated or plans to dissipate his assets.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **I. Tyco's Claims Against Kozlowski**

Beginning at least as early as 1995, Kozlowski as Chairman and Chief Executive Officer of Tyco engaged in numerous schemes to misappropriate Tyco's money and assets for himself and others while concealing his thievery from Tyco's Board of Directors and Compensation Committee.

The Amended Complaint<sup>1</sup> alleges twelve common law causes of action stemming from these schemes, including breach of fiduciary duty, fraud, conversion, and breach of contract. (Am. Compl. ¶¶ 108-173.) The Amended Complaint seeks equitable remedies, including constructive trust, disgorgement, an accounting, and unjust enrichment, as well as damages at law. (*Id.* ¶¶ 140-50, 162-64.)

Pursuant to the "faithless servant" and "disloyal agent" doctrines, Tyco seeks to

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<sup>1</sup> Throughout this memorandum, "Amended Complaint" refers to the amended complaint asserting various common law and equitable causes of action filed by Tyco in the Southern District of New York on April 1, 2003 and transferred to this Court in the consolidated MDL proceeding.

impose a constructive trust upon “*all of Kozlowski’s actual compensation*, unauthorized amounts taken from the Company as purported compensation, and benefits obtained from the Company during the course of his unlawful conduct, and all proceeds obtained from the use thereof.” (*Id.* prayer ¶ C) (emphasis added).

Thus the Amended Complaint asks the Court to use its equitable powers to require the disgorgement and return to Tyco of *all* of Kozlowski’s W-2 compensation since 1995—the date of the first alleged disloyal act (*id.* ¶ 17)—amounting to more than \$325 million. (*Id.* ¶ 6(g); Declaration of Matthew R. A. Heiman “Heiman Decl.” ¶ 6.)

In addition, the Amended Complaint seeks remedies for Kozlowski’s larcenous schemes such as (i) the “New York relocation program” and other property transactions through which Kozlowski used as yet undetermined amounts of Tyco’s money (in the tens of millions) to rent and purchase numerous lavish properties for himself (Am. Compl. ¶¶ 17-24); (ii) improper “business expenses” including, but not limited to, \$20 million in artwork, antiques and furnishings for his personal residences (*Id.* ¶ 6); and (iii) \$43 million in “charitable contributions” by Tyco that were for Kozlowski’s personal benefit (*Id.* ¶ 104-05). These schemes are detailed in Tyco’s September 17, 2002 8-K (the “2002 8-K”), which sets forth the result of the extensive investigation by outside counsel following Kozlowski’s resignation. (*See* Heiman Decl. ¶¶ 3-5, Ex. A.)

The amounts Tyco seeks in these claims are in addition to Kozlowski’s abuses of Tyco’s Key Employee Loan (“KEL”) program and of various unauthorized “bonus” programs, which were the subject of his criminal conviction and restitution award. As detailed in the Amended Complaint and the 2002 8-K, Kozlowski unlawfully enriched himself personally at Tyco’s expense through abuse of the KEL program and the so-called “TyCom Bonus,” “ADT Bonus” and “Flag Telecom Bonus” in the amount of at least \$110 million and cost the company at least an additional \$100 million in unapproved and improper benefits to others. (*See* Am.

Compl. ¶ 6, detailing alleged damages; ¶¶ 25-32, describing abuse of and indebtedness under the KEL program; ¶¶ 44-53, regarding the TyCom Bonus; ¶¶ 54-63, regarding the ADT bonus; ¶¶ 64-73, regarding the Flag bonus; ¶ 74 summarizing damages resulting from the unauthorized bonus programs; Heiman Decl. ¶¶ 3-5, Ex. A.). Thus, the restitution award of approximately \$98 million does not even cover half of Tyco's direct damages resulting from Kozlowski's abuse of the KEL program and "bonus" programs, much less any of Tyco's claims for constructive trust and disgorgement.

In addition, Tyco seeks to recover the millions of dollars in "short swing" profits that Kozlowski earned in accordance with Section 16(b) of the Securities Exchange Act of 1934 (the "Section 16(b) Complaint"). It is undisputed that Kozlowski is subject to the requirements of Section 16(b). It is also undisputed that the purchases and sales occurred within the statutory six month period. The securities laws require Kozlowski to disgorge these ill-gotten profits.

## **II. Kozlowski's Criminal Conviction and the New York Civil Forfeiture Action**

Kozlowski was indicted on September 12, 2002 by the District Attorney for the County of New York for enterprise corruption, conspiracy and multiple counts of larceny and of falsifying business records stemming from his fraudulent conduct as Tyco's Chairman and CEO. (Am. Compl. ¶ 106, Ex. 34.) In June 2005, Kozlowski was convicted on twelve counts of grand larceny stemming from the TyCom, ADT, and Flag telecom "bonuses" and the unpaid KEL loan amounts, as well as eight counts of falsifying business records and one count of conspiracy. (Heiman Decl. ¶¶ 7-9.) He was sentenced to serve 8 1/3 – 25 years in prison and ordered to pay restitution to Tyco in the amount of \$97,778,296. (*Id.*) The conviction was affirmed by the New York Appellate Division and is on review to the Court of Appeals. *People v. Kozlowski*, 846 N.Y.S.2d 44 (N.Y. App. Div. 2007), *leave to appeal granted*, 883 N.E.2d 1264 (N.Y. 2008).

In connection with the criminal proceedings, the District Attorney initiated a civil forfeiture action in the Supreme Court of the State of New York against Kozlowski and

codefendant Mark H. Swartz, styled *Robert M. Morgenthau v. L. Dennis Kozlowski and Mark H. Swartz*, New York Supreme Court, New York County, Index No. 403698/02. On September 10, 2002, the Court entered a temporary restraining order which, *inter alia*, froze Kozlowski's assets, wherever located, to the extent of \$600 million (the "New York TRO").<sup>2</sup> (Heiman Decl., ¶10, Ex. B.)

Relying on the New York TRO, which effectively froze all of Kozlowski's assets that might be available for a judgment in the instant litigation, Tyco did not seek a duplicative restraint on assets in this Court. (*Id.* ¶ 11.)

Just last week, however, on September 22, 2008, the New York court entered an order, which had been signed on September 17, dismissing the civil forfeiture action and vacating the New York TRO. (*Id.*, ¶ 12. Ex. C.) The order was entered in accordance with a stipulation between Kozlowski and the District Attorney reciting, among other things, that the restitution and fine ordered pursuant to the criminal conviction had been paid. (*Id.*)

Although Kozlowski has paid the restitution portion of his criminal sentence to Tyco, approximately \$98 million, that amount does not come close to covering the assets and proceeds that are the subject of the instant litigation. As detailed above, the restitution award does *not* include (among other claims) the more than \$325 million in W-2 compensation, the \$43 million in alleged "charitable contributions" personally benefiting Kozlowski, the tens of millions dollars in improper expenses for various properties as well as improper personal expenses, the short-swing profits alleged in the Section 16(b) Complaint, or the more than \$120

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<sup>2</sup> The temporary restraining order attached Kozlowski's assets in New York and also enjoined Kozlowski and Swartz "and all persons or entities having property of said defendants in their possession, and those persons and entities having knowledge of the order, from transferring, assigning, disposing of, encumbering, secreting any legal, equitable, custodial or beneficial interest of [Kozlowski and Swartz] including, but not limited to, any legal, equitable, custodial or beneficial interests that [Kozlowski and Swartz] have in any real or personal property wherever located, whether jointly or individually held, or any debts owed to said persons, to the extent of Six Hundred Million Dollars (\$600,000,000.00)."

million Kozlowski improperly awarded to other senior executives.

With the New York TRO vacated and the New York District Attorney's civil forfeiture action terminated, Kozlowski is now free to transfer, conceal, or dissipate his assets—monies which *belong to Tyco* pursuant to the constructive trust and disgorgement remedies sought in this case—and will thus be able to defeat any equitable remedy ordered by this Court and evade collection of a judgment.

### **III. The Florida Divorce Proceeding and Threatened Dissipation of Assets**

Tyco has very specific grounds to fear the imminent dissipation of Kozlowski's assets in frustration of an eventual judgment in addition to Kozlowski's pattern of criminality, fraud and deceit, for which he is now serving a prison sentence.

On July 31, 2006, Kozlowski's wife of five years, Karen Mayo Kozlowski, filed a petition for divorce in the Circuit Court of Palm Beach County, Florida, styled *Kozlowski v. Kozlowski*. (Heiman Decl. ¶13.) The divorce petition sought, *inter alia*, an equitable distribution of marital property under Fla. Stat. § 61.075(1). (*Id.*)

About two and a half months ago, the parties announced a confidential settlement of the divorce action. (Heiman Decl., ¶¶14-17, Ex. D.) The circumstances surrounding the divorce settlement, as well as public statements by the parties' lawyers about it, suggest that the Kozlowskis' agreement may be a scheme to transfer assets and avoid judgment, disguised as an amicable divorce settlement.

The couple married in May of 2001 and did not have children together. Yet, according to Kozlowski's divorce attorney Martin Haines, "Karen will be a wealthy lady [as a result of the settlement], and Dennis will have some money one day when he's permitted to leave jail.... Is it fair? Who the hell knows. Is it something Dennis wanted to do? Absolutely." (Heiman Decl., ¶ 15, Ex. D.) Haines was also reported as saying that "She'll do well. ... *She should be getting millions from the settlement.*" (Heiman Decl., ¶ 16, Ex. D) (emphasis added.)

Meanwhile, Karen Kozlowski’s attorney said that “[t]he terms of their marital settlement agreement, although confidential, is a reflection of [her] support and commitment [to Kozlowski].” (Heiman Decl., ¶ 17, Ex. D.)

The details of the divorce settlement are not available to the public or to Tyco, and Tyco does not know what assets or how much are potentially subject to transfer pursuant to the Kozlowskis’ agreement. The statements from the parties’ attorneys, however, describe a very generous settlement made in favor of Karen Kozlowski after a relatively brief marriage with no children. This raises the clear suspicion that the divorce settlement is actually an asset transfer arrangement designed to take assets out of Kozlowski’s name and place them in the hands of a “supporter,” but out of reach of this Court and his creditors.

This Court should not allow the exercise of its equitable powers to be so easily frustrated and rendered a nullity. Tyco seeks an immediate halt to any out-of-the-ordinary transfers and expedited discovery in order to prevent the dissipation of millions of dollars of Kozlowski’s assets—assets which belong to Tyco.

## **ARGUMENT**

### **I. A TRO and Preliminary Injunction Are Warranted to Prevent the Dissipation of Kozlowski’s Assets and to Secure the Availability of Equitable Relief and the Satisfaction of a Judgment.**

A request for a preliminary injunction is determined according to “the familiar four-part test: likelihood of success on the merits, irreparable injury absent relief, harm to the defendant if relief is granted, and any public interest considerations.” *Micro Signal Research, Inc. v. Otus*, 417 F.3d 28, 31 (1st Cir. 2005). The “sine qua non of this four-part inquiry is likelihood of success on the merits.” *Esso Standard Oil Co. v. Monroig-Zavas*, 445 F.3d 13, 18 (1st Cir. 2006). Where there is notice and opportunity to be heard, “the standards for issuing a TRO are substantively similar to those for a preliminary injunction.” *Fairchild Semiconductor Corp. v. Third Dimension (3D) Semiconductor, Inc.*, 564 F. Supp. 2d 63, 66 (D. Me. 2008). In



this case, each of these factors weighs in favor of granting the injunction.

Particularly where the plaintiff seeks equitable relief—disgorgement and constructive trust—a preliminary injunction is appropriate to protect the Court’s ability to grant such relief and do equity. *United States ex rel. Rahman v. Oncology Assocs. P.C.*, 198 F.3d 489, 494-501 (4th Cir. 1999) (preliminary injunction freezing assets appropriate where complaint sought constructive trust on funds or property alleged to be the proceeds or profits of fraudulent conduct alleged in the complaint); *see also Fairview Mach. & Tool Co. v. Oakbrook Int’l, Inc.*, 77 F. Supp. 2d 199, 204-05 (D. Mass. 1999) (citing *Rahman*, holding preliminary injunction barring sale of machinery appropriate where equitable relief is sought touching assets subject to freeze).

**A. Tyco Will Succeed on the Merits of its Claims.**

In addition to pleading claims based on those acts for which Kozlowski was criminally convicted—twelve counts of grand larceny, eight counts of falsifying business records, and conspiracy—Tyco’s Amended Complaint documents the numerous other larcenous acts that Kozlowski knowingly concealed from Tyco’s Board. Tyco also alleges numerous instances where Kozlowski induced and conspired with Mark Swartz and other former senior officers and agents of Tyco to breach their fiduciary duties to the Company. The substantial and undisputed evidence of Kozlowski’s thievery, deceit and self-dealing is well known to this Court.

The approximately \$98 million in restitution that Kozlowski paid Tyco in connection with his grand larceny convictions does not even scratch the surface of the money and assets that Kozlowski wrongfully pilfered from Tyco. Kozlowski’s breaches of fiduciary duty caused millions of dollars in damages, as summarized in paragraph 6 of the Amended Complaint. These include, but are not limited to, more than \$120 million in unauthorized bonuses that Kozlowski awarded to senior executives (other than himself) without Board

approval, \$43 million in company charitable contributions that enriched Kozlowski and an as yet undetermined amount of damages (in the tens of millions) arising out of Kozlowski's use of Tyco's money to purchase and rent numerous and lavish properties. Tyco is legally entitled to recoup all of these funds.

Moreover, in accordance with the principles of the long-standing common law doctrines regarding claims against "faithless servants" and "disloyal agents" for breach of their fiduciary duties and duty of loyalty, Kozlowski's long history of theft and self-dealing entitles Tyco to recoup *all* of the compensation paid to him back to the date of the first faithless act.

Under the Restatement (Second) of Agency § 469 (1958):

An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a willful and deliberate breach of his contract of service, *he is not entitled to compensation even for properly performed services* for which no compensation is apportioned.

(emphasis added). Under this doctrine, a pattern of disloyal conduct may warrant forfeiture of *all* of the "faithless servant's" compensation. *See Phansalkar v. Andersen Weinroth & Co.*, 344 F.3d 184, 201-04 (2d Cir. 2003) (applying New York law); *see also In re Blumenthal*, 822 N.Y.S.2d 27, 28-29 (N.Y. App. Div. 2006) (holding that *all* compensation dating from the first disloyal act was subject to disgorgement).<sup>3</sup>

Kozlowski's willful and repeated breaches of fiduciary duty, and the pattern of misconduct by which Kozlowski placed his own interests ahead of Tyco's demonstrate that Kozlowski has forfeited all of his compensation from Tyco. Tyco is entitled to disgorgement of, among other things, the more than \$325 million in W-2 compensation paid to Kozlowski between 1995 and 2002.

Whether the total amount of damages assessed against Kozlowski is \$300 million,

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<sup>3</sup> The Restatement (Third) of Agency, issued in 2006, reiterates these principles. *See* § 8.01, comment d(2).

\$500 million or more, there can be no reasonable dispute that Tyco will prevail on the merits of at least its breach of fiduciary duty and other similar claims.<sup>4</sup> Tyco’s satisfaction of this “touchstone of the preliminary injunction inquiry” strongly counsels in favor of granting the injunction. *Philip Morris, Inc. v. Harshbarger*, 159 F.3d 670, 674 (1st Cir. 1998).

Tyco is also likely to succeed on its Section 16(b) claim. Section 16(b) of the Exchange Act requires covered actors to disgorge “any profit realized ... from any purchase and sale, or any sale and purchase, of any equity security” of company stock within a six-month period unless such transaction is otherwise exempt from Section 16(b) liability under applicable SEC rules and regulations. In its Amended Complaint, Tyco alleges that Kozlowski engaged in these prohibited “short-swing” transactions, purchasing and selling *millions* of shares of Tyco stock within the six-month statutory period. (*See* Section 16(b) Complaint, ¶ 102.)

It is undisputed that Kozlowski is subject to the requirements of Section 16(b). It is also undisputed that the purchases and sales occurred within the statutory six month period. Moreover, as set forth in the Amended Complaint, none of these transaction meet any of the exceptions set forth in 17 C.F.R. §240.16 (“Rule 16b-3”). (*See* Section 16(b) Complaint, ¶ 9.) Though the parties may dispute the proper measurement of Kozlowski’s ill-gotten short-swing profits, Tyco is likely to succeed on the merits of this claim as well.

Kozlowski’s numerous and varied breaches of fiduciary duty are well-known to this Court and fully supported by the evidence. Because Tyco *will* succeed on the merits of its claims, a preliminary injunction and temporary restraining order are fully warranted.

**B. Tyco Will Suffer Irreparable Harm If an Injunction Is Not Granted.**

Even where “only money is at stake,” a court may find the prospect of irreparable

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<sup>4</sup> Tyco’s other claims against Kozlowski include inducing breach of fiduciary duty, conspiracy to breach fiduciary duty, fraud, constructive fraud, accounting, constructive trust, breach of contract, declaratory judgment, unjust enrichment, conversion and contribution. These claims are supported by the same facts that support Tyco’s breach of fiduciary claim.

injury sufficient to justify the preliminary injunction where “a defendant’s assets might be dissipated before the end of a case, leaving a prevailing plaintiff as a practical matter without a way to collect damages.” *In re Websecure, Inc. Sec. Litig.*, Civ. A. No. 97-10662-GAO, 1997 WL 770414, at \*3 (D. Mass. Nov. 26, 1997) (citations omitted); *see also Micro Signal Research*, 417 F.3d at 30-32 (affirming preliminary injunction to secure assets to satisfy money judgment); *SEC v. Fife*, 311 F.3d 1, 8-11 (1st Cir. 2002) (affirming preliminary injunction to freeze assets upon showing of likelihood of success on securities claims); *SEC v. Pinez*, 989 F. Supp. 325, 336 (D. Mass. 1997) (granting motion for preliminary injunction to freeze assets to preserve remedies in SEC enforcement action); *St. Paul Fire & Marine Ins. Co. v. Ellis & Ellis*, 951 F. Supp. 5, 7 (D. Mass. 1996) (granting preliminary injunction freezing assets upon showing of likelihood of success on the merits).

Here, though, there is more – undeniable claims for equitable relief, including disgorgement, constructive trust and unjust enrichment, based on Kozlowski’s criminal violations of his fiduciary duty and duty of loyalty to Tyco, as detailed above.

In determining whether there is a danger of a dissipation of assets sufficient to justify a preliminary injunction, courts consider the defendant’s fraudulent conduct forming the basis of the allegations. *See, e.g., Micro Signal*, 417 F.3d at 31 (Defendant’s “*probable fraud*, his prevarications about repayment [of the disputed sum], and the switch of the business [to a new company] are ample indication of the need for” the preliminary injunction freezing assets) (emphasis added); *Fife*, 311 F.3d at 10 (considering defendant’s “past conduct, the defendants’ occupations, and their continued defense that their past conduct was blameless” in determining that securities violations were likely to recur and the preliminary injunction was justified).

As the Court is aware, Kozlowski’s fraudulent conduct is of massive proportions. The Amended Complaint reveals a pattern of theft and misappropriation of hundreds of millions of dollars of Tyco assets along with a prolonged and affirmative campaign of misrepresentations

to Tyco's Board of Directors and Compensation Committee about what he was doing. (*See Am. Compl.* ¶ 3.) Kozlowski's larceny earned him a lengthy prison sentence, and he has yet to show any remorse or accept any responsibility for his actions.

Moreover, Tyco has specific reason to fear the imminent dissipation of assets now under Kozlowski's control which rightfully belong to Tyco and upon which Tyco seeks a constructive trust. The New York TRO has just been lifted. Kozlowski has recently reached a divorce settlement, the terms of which are confidential. The parties' attorneys announced that the divorce settlement will involve the transfer of "millions" to Kozlowski's wife of five years—that she will do "very well" and that it was what "Dennis wanted to do."

These statements, the short duration of the couple's marriage, and the fact that they had no children together, strongly suggest that the settlement was more than just very generous—but that it may well be an artifice designed to transfer Kozlowski's assets in name only, placing them beyond the reach of creditors and even the equitable powers of this Court and into the hands of his "supportive" wife whom he married just a year before he was indicted.

Because the settlement is confidential, Tyco has no way of knowing with certainty how much is at stake, what may be transferred to Karen Kozlowski, and what assets are assets over which Tyco has an equitable claim in this case—assets that legally belong to Tyco.

In any event, it is plain that the divorce settlement is sure to involve a sizeable potential transfer of assets from Dennis to Karen Kozlowski. In these circumstances, Tyco "is entitled to reasonable security that its claim will not be made worthless, despite its merit, because prior to the conclusion of the case the defendants' assets should be dissipated [in such a transfer]. Should that occur, it would be the kind of harm that is irreparable." *St. Paul Fire & Marine Ins. Co.*, 951 F. Supp. at 6.

**C. The Balance of the Hardships and the Public Interest Favor Granting the Injunction.**

The balance of the hardships weighs heavily in favor of granting the preliminary injunction. As discussed above, Tyco faces irreparable harm—the dissipation of assets necessary to satisfy judgment it is likely to obtain—in the absence of an injunction. Meanwhile, limiting Kozlowski’s use of assets to paying expenses in the ordinary course while he is incarcerated can cause no serious harm to him. It would serve only to preserve the status quo. Indeed, since September 2002, until last week, Kozlowski’s assets had been totally subject to the control of the New York District Attorney and courts. Granting the injunction in this case would represent, at most, merely a continuation of those conditions.

Moreover, ensuring full recovery of Kozlowski’s stolen assets, short-swing profits, and damages resulting from fraud, conversion and breach of fiduciary duty can only serve the public interest. *St. Paul Fire & Marine Ins. Co.*, 951 F. Supp. at 7.

**D. Injunction Bond**

Given Tyco’s size and assets as shown on its publicly filed financial statements, Tyco urges that no bond is necessary “to pay the costs and damages sustained by” Kozlowski in the unlikely event he is found to have been wrongfully enjoined or restrained. See Fed.R.Civ.P. 65(c); Heiman Decl., ¶ 19, Ex. F.

**II. The Court Should Grant Leave for Tyco to Take Limited Expedited Discovery Regarding Kozlowski’s Assets and the Financial Settlement in the Divorce Proceeding.**

Tyco seeks expedited and limited discovery to identify Kozlowski’s assets and the terms of the recent divorce settlement. This procedure has been accepted by courts in this Circuit under similar circumstances. *See, e.g., Century-ML Cable Corp. v. Carillo Diaz*, 43 F. Supp. 2d 166, 170 (D.P.R. 1998) (continuing injunction which “provided for expedited discovery and a freeze of those defendants’ business and personal assets”).

Tyco proposes to serve on Kozlowski seven interrogatories and four document requests. (Heiman Decl. ¶ 18, Ex. E.) These discovery requests are limited principally to identifying Kozlowski's current assets, any actual or contemplated asset transfers since the New York TRO was lifted and the financial terms of the divorce agreement between Dennis and Karen Kozlowski. Tyco's request to take expedited and limited discovery of Kozlowski is reasonable and necessary under the circumstances. Tyco is at a distinct disadvantage in not knowing what Kozlowski has done or plans to do with funds that are rightfully the property of Tyco. Moreover, the terms of the divorce settlement are unknown to Tyco. The discovery process is the only avenue available to Tyco to learn this information. Furthermore, the requested discovery will aid the Court in appropriately fashioning the contours of the preliminary injunction should the Court decide to issue one.

Finally, an order compelling Kozlowski to answer this discovery will not cause him to suffer any undue burden. Kozlowski's assets have been subject to a temporary restraining order for six years under the stewardship of the New York courts. Accordingly, Kozlowski should be able to compile a list of his assets in short order. The terms of the divorce settlement can be produced with little or no effort. To the extent Kozlowski has acted to quickly dispose of any assets since the New York TRO was lifted, Tyco's interest in learning of the dissipation outweighs any burden on Kozlowski in describing it. In the event Kozlowski has not disposed of any assets, he can so prove.

### **CONCLUSION**

For the foregoing reasons, Tyco respectfully requests that the Court grant its motion for temporary restraining order and preliminary injunction and grant Tyco leave to conduct the expedited discovery it needs to support the preliminary injunction.

Dated: October 3, 2008

Respectfully Submitted,

/s/ Edward A. Haffer

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