UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs. Case No. 2:09-cv-229-FtM-29DNF

FOUNDING PARTNERS CAPITAL MANAGEMENT CO., WILLIAM L. GUNLICKS and PAMELA L. GUNLICKS,

Defendants,

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OPINION AND ORDER

This matter comes before the Court on plaintiff's Motion to Set Disgorgement and Prejudgment Interest, and Impose a Civil Penalty Against Defendant William L. Gunlicks (Doc. #288) filed on May 4, 2011. No response has been filed and the time to respond has expired. The Securities and Exchange Commission (SEC) seeks a final judgment finding William L. Gunlicks liable for disgorgement of $28,635,966.55, plus pre-judgment interest of $2,193,842.31, for a total of $30,829,808.86, and ordering a civil penalty of $1,000,000.

I.

On March 3, 2010, the Court entered an Order (Doc. #200) granting a request for entry of judgment of permanent injunction, and noting that the consent judgment would resolve all issues of

liability, but that the parties intended to "resolve the remaining issues of disgorgement, pre-judgment interest, and a civil money penalty." (Doc. #200, p. 2.) The Judgment (Doc. #201) was entered the next day and included the following relevant language:

> **IT IS FURTHER ORDERED AND ADJUDGED** that Gunlicks shall pay disgorgement of ill-gotten gains, prejudgment interest thereon, and a civil penalty pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d), and Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3). **The Court shall determine the amounts of the disgorgement and civil penalty upon motion of the Commission.** Prejudgment interest shall be calculated from April 20, 2009, based on the rate of interest used by the Internal Revenue Service for the underpayment of federal income tax as set forth in 26 U.S.C. § 6621(a)(2). In connection with the Commission's motion for disgorgement and/or a civil penalty, and at any hearing held on such a motion: (a) Gunlicks will be precluded from arguing that he did not violate the federal securities laws as alleged in the complaint; (b) Gunlicks may not challenge the validity of the Consent or this Judgment; (c) solely for the purposes of such motion, the allegations of the complaint shall be accepted as and deemed true by the Court; and (d) the Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence, without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure. In connection with the Commission's motion for disgorgement and/or a civil penalty, the parties may take discovery, including discovery from appropriate non-parties.

(Doc. #201, p. 5)(emphasis added).

II.

Based on the consented judgment, the allegations in the Complaint are accepted and deemed true. The Court summarized the Complaint on May 7, 2009, in an Opinion and Order as follows:

The five-count securities fraud Complaint (Doc. #1) names Founding Partners Capital Management Company ("Founding Partners") and William L. Gunlicks (Gunlicks) as defendants, while two Sun Capital entities and the four other Founding Partners entities are named as relief defendants (i.e., nominal defendants). Founding Partners is described as a Florida corporation registered as an investment advisor with the SEC. Gunlicks is described as the president, CEO, and sole shareholder of Founding Partners, and the beneficiary of management fees obtained by Founding Partners. Both Founding Partners and Gunlicks consented to an SEC order in 2007 requiring them to cease and desist from committing or causing any violations of Section 17(a)(2) of the Securities Act of 1933.

The Complaint alleges that Founding Partners and Gunlicks (collectively, "defendants") operate three hedge funds and one mutual fund, each of which made loans to the two Sun Capital relief defendants, Sun Capital, Inc. and Sun Capital Healthcare, Inc. (collectively, "Sun Capital"). Sun Capital, Inc. utilizes the loans from Founding Partners to fund the purchase of accounts receivables; Sun Capital Healthcare, Inc. utilizes the loans from Founding Partners to purchase accounts receivable from healthcare providers.

The SEC alleges that since 2001, Founding Partners has made loans to Sun Capital through its primary fund, Founding Partners Stable-Value Fund, LP ("Stable-Value"), to finance Sun Capital's discounted purchase of receivables. The loans were made pursuant to written loan agreements, which allowed Sun Capital to use the loan proceeds to purchase healthcare and commercial receivables. Sun Capital could draw on the loans to purchase the receivables (typically from healthcare providers) and then repay the loans after collecting the receivables from the payors. Sun Capital paid Stable-Value interest at approximately 1.3% per month; after receiving the monthly interest payment, Stable Value would re-lend the money to Sun Capital, and the process would be repeated. Founding Partners charged Stable-Value a 1.75% annualized management fee on the total balance of the loan. While no automatic distributions were made to Founding Partners' investors, redemptions were available on a quarterly basis with 60 days written notice.

> Defendants are alleged to have solicited funds from investors based upon representations that the Stable-Value loans to Sun Capital constituted a safe investment opportunity. Defendants' representations are alleged to have included that Sun Capital was factoring short-term (i.e., collected within 150 days), highly liquid receivables that fully secured the loans made by Stable-Value to Sun Capital. The SEC alleges that despite these representations to investors, beginning in 2004, defendants permitted Sun Capital to purchase longer-term receivables that were less liquid and much riskier, such as workers' compensation receivables and Disproportionate Share (DSH) receivables, and to use loan proceeds to make working capital loans to financially troubled hospitals that it had purchased. Defendants are alleged to have continued to solicit investors without disclosing the change in use of the underlying loans and the increased risks presented, and to have failed to tell investors of the changes by Sun Capital and their effects on the safety of the investments. It is alleged that Sun Capital currently owes $550 million on the Stable-Value loans, only 32% of which is invested in and secured by the less risky, short-term receivables that defendants had described to their investors. The $550 million constitutes 99% of Stable-Value's portfolio, and all that remains of investors' money are Sun Capital receivables and any other assets of Sun Capital securing the loans. The SEC alleges that the investors' money is at immediate risk of being used to support Sun Capital's working capital requirements and of being diverted directly to defendants.
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> Additionally, the SEC alleges that defendants have recently received significant redemption requests, most of which have not been honored, but that defendants have continued to solicit investors without disclosing these redemption requests. Further, the SEC alleges that defendants falsely represented to investors that they had audited financial statements for 2007, failed to disclose the consent Order in the SEC administrative proceeding, failed to provide a copy of the consent order to each current and prospective client as required by the Order, and used fund assets to pay personnel expenses.

(Doc. #56, pp. 3-6.) At the time, the Court considered $5,912,500.00 as the amount of ill-gotten gain, in the absence of

a more specific figure. (Id. at p. 9.) Later, in declining to modify the previously imposed freeze order, the Court agreed that the amount was at least $27 million. (Doc. #117, pp. 23.)

III.

"The SEC is entitled to disgorgement upon producing a reasonable approximation of a defendant's ill-gotten gains. [ ] The burden then shifts to the defendant to demonstrate that the SEC's estimate is not a reasonable approximation. [ ] Exactitude is not a requirement; '[s]o long as the measure of disgorgement is reasonable, any risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty.'" SEC v. Calvo, 378 F.3d 1211, 1217 (11th Cir. 2004)(internal citations omitted). "But, the 'power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment.'" SEC v. ETS Payphones, Inc., 408 F.3d 727, 735 (11th Cir. 2005)(quoting SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978)).

The Declaration of Tonya Tullis (Tullis), a Certified Public Accountant and Staff Accountant with the Miami Regional Office of the SEC, provides that the financial statements of Founding Partners Capital Management Company (Found Partners) and Founding Partners Stable-Value Fund, LP (Stable-Value) were reviewed and audited. Upon review, Tullis found that Stable-Value paid management fees in excess of $23,000,000 from 2004 through 2008,

and also paid royalty fees in excess of $8,000,000 to Founding Partners Bermuda Capital.[1] Tullis also found that for 2008, Founding Partners received $1,370,824.58 in management fees from Stable-Value, and $245,211.53 in management fees from Founding Partners Hybrid-Value Fund, LP. (Doc. #86-2.)

The SEC states that Founding Partners, of which Mr. Gunlicks was the sole owner, held a 42.2% ownership interest in Founding Partners Bermuda Capital and therefore $3,594,863.97 of the $8,518.635.00 was received by Founding Partners. The SEC does not seek the $245,211.53 in fees because the Hybrid-Value Fund was not fully invested in the Stable-Value Fund. (Doc. #288, p. 9 n.5.) The SEC seeks the entire $28,635,966.55 in management and royalty fees ($23,670,278.00 + 3,594,863.97 + 1,370,824.58) as ill-gotten gains because the fees were earned while Mr. Gunlicks was perpetrating a fraud. The SEC also seeks pre-judgment interest from April 30, 2009, through March 31, 2011, as consented to in the Judgment, in the amount of $2,193,842.31, for a total of $30,829,808.86. (Doc. #289, Exh. A.) The SEC further seeks the imposition of a $1,000,000.00 civil penalty.

The Court finds that the SEC has established that the amount of ill-gotten profits in the form of management and royalty fees received by Mr. Gunlicks totals $28,635,966.55, without opposition

[1]Tab 1 to the Declaration reflects the exact amount as $23,670,278.00 in management fees and $8,518.635.00 in royalty fees.

from Mr. Gunlicks. The Court further finds that the pre-judgment interest calculation is appropriate and that the SEC is entitled to the requested pre-judgment interest in the amount of $2,193,842.31. The Court further finds that the imposition of a $1,000,000.00 civil monetary penalty is appropriate in light of the admitted allegations in the Complaint.

Accordingly, it is now

ORDERED:

1. Plaintiff's Motion to Set Disgorgement and Prejudgment Interest, and Impose a Civil Penalty Against Defendant William L. Gunlicks (Doc. #288) is **GRANTED** and a supplemental final judgment will be entered against William L. Gunlicks and in favor of plaintiff for disgorgement, pre-judgment interest, and a civil monetary penalty as follows:

A. Defendant William L. Gunlicks shall pay disgorgement in the amount of $28,635,966.55, representing the ill-gotten gains received;

B. Defendant William L. Gunlicks shall further pay pre-judgment interest in the amount of $2,193,842.31; and

C. Defendant William L. Gunlicks is assessed a civil penalty in the amount of $1,000,000.00.

2. The Clerk shall enter a Supplemental Judgment accordingly, with the Court retaining jurisdiction over the implementation of

any terms for payment. The Clerk is further directed to terminate defendant William L. Gunlicks on the docket as a pending defendant.

DONE AND ORDERED at Fort Myers, Florida, this 13th day of June, 2011.

JOHN E. STEELE
United States District Judge

Copies:
Counsel of record