UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CASE NO.: 2:09-cv-229-FtM-29 SPC

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants,

SUN CAPITAL, INC., SUN CAPITAL HEALTHCARE, INC., FOUNDING PARTNERS STABLE-VALUE FUND, LP, FOUNDING PARTNERS STABLE-VALUE FUND II, LP, FOUNDING PARTNERS GLOBAL FUND, LTD, and FOUNDING PARTNERS HYBRID-VALUE FUND, LP,

Relief Defendants.

PLAINTIFF AND RECEIVER'S JOINT RESPONSE OPPOSING NON-PARTY NORTH SHORE COMMUNITY BANK & TRUST COMPANY, INC.'S MOTION TO CLARIFY AND/OR MODIFY THE TEMPORARY ASSET FREEZE

I. INTRODUCTION

The Court should deny non-party North Shore Community Bank & Trust Company, Inc.'s ("North Shore") Motion to Clarify and/or Modify the Temporary Asset Freeze [D.E. 144] because North Shore has not established why this Court should treat it any differently than any other creditor. In seeking to foreclose on the property located at 341 Sheridan Road, Winnetka, Illinois (the "Property") and exercise "offset rights" against a joint account of William and Pamela Gunlicks located at the bank, North Shore is trying to intervene in this action and thereby

accelerate its claim to investor funds that are the proceeds of the securities fraud in this action. North Shore's motion thus impermissibly seeks to have the Court favor its claim over other pre-receivership creditors, something this Court should reject.

Although not formally seeking to intervene in this matter, North Shore cites no other basis for allowing this Court to hear its claim or hold in its favor. Irrespective of the basis for the motion, we respectfully request that the Court deny North Shore's attempt to modify the asset freeze to allow them to seize frozen investor funds that should be preserved to satisfy the eventual disgorgement order in this case. We also request that to the extent that the Court permits North Shore to foreclose on the Property that the Court clarify that any proceeds in excess of the outstanding loan amount will be subject to the continuing asset freeze.

II. BACKGROUND

The Court is well acquainted with the factual and procedural history of this action, which has been the subject of extensive briefing, and accordingly we will not repeat it again here. The gist of the complaint is that Gunlicks and several investment funds he ran defrauded investors out of more than $550 million by misrepresenting how the factoring company the hedge funds were loaning money to was using the funds since no later than 2004.

Based on evidence of this fraud the Commission submitted at the outset of the case, the Court on April 20, 2009, granted an *ex parte* request for an asset freeze order with respect to Gunlicks, his company, Founding Partners Capital Management Co., and the group of funds we have referred to as the Founding Partner Relief Defendants. At the same time, this Court granted the Commission's emergency motion for the appointment of a Receiver over Founding Partners and the Founding Partners Relief Defendants [D.E. 9].

The April 20 asset freeze order stated in relevant part: "That any financial or brokerage institution or other person or entity holding any such funds or other assets, in the name, for the benefit or under the control of the Defendants or Founding Partners Relief Defendants, directly or indirectly, held jointly or singly, and which receives actual notice of this order by personal service, facsimile, or otherwise: shall hold and retain within its control and prohibit the withdrawal, removal, transfer, disposition, pledge, encumbrance, assignment, set off, sale, liquidation, dissipation, concealment, or other disposal of any such funds or other assets." (April 20 Order at 3).

On May 5, 2009, Gunlicks filed what he styled an Emergency Motion to Amend and/or Modify Order Freezing Assets and other Emergency Relief and Incorporated Memorandum of Law [D.E. 43, 45]. That same day, the Court held a show cause hearing as to the continuation of the asset freeze and heard oral argument from counsel. Two days later, the Court issued an Order [D.E. 56] holding that, based on the evidence submitted, the Commission had established a likelihood of success on the merits with respect to the underlying securities fraud claims against Gunlicks and Founding Partners. (Order at 6). Accordingly, the Court ordered that its Order Freezing Assets and Other Emergency Relief [D.E. 10] would continue in effect as to Gunlicks until further order of the Court. (Order at 10).

In its May 7 Order, the Court also addressed the portion of Gunlicks's motion challenging the scope of the asset freeze and seeking a modification to allow him to pay living expenses and attorneys' fees. The Court held that it was appropriate to freeze all of Gunlicks's assets, whether or not they were related to the alleged fraud, as long as the "reasonable approximation of the amount of disgorgement" exceeded Gunlicks's assets. (May 7 Order at 7-

8). The Court also denied Gunlicks's request for a modification of the asset freeze order to pay for living expenses and attorneys' fees. (May 7 Order at 9-10).

On May 19, 2009, Gunlicks filed a renewed motion to modify the asset freeze [D.E. 72]. The Court issued an Order on July 14, 2009 [D.E. 117] denying Gunlicks's general request to modify the asset freeze order on the grounds that the Commission had established a reasonable basis to believe that the amount of the ill-gotten gains, and therefore the amount subject to the asset freeze, approximates at least $27 million. (July 14 Order at 3). The Court also denied Gunlicks's request for significant monthly expenses related to five pieces of property. (July 14 Order at 3-4).

The Court, however, did approve requests for the payment of a $75,000 attorneys' fees retainer, $3,000 in living expenses, and a one-time payment of commercial airfare for Gunlicks and his wife, subject to certain conditions. (July 14 Order at 4-6). On July 31, 2009, the Court issued an Order modifying the July 14 Order and setting forth specific terms of disbursement for the amounts previously allowed. [D.E. 141].

On June 1, 2009, North Shore received actual notice of the Court's April 20, 2009 Order. On August 12, 2009, non-party North Shore filed the instant Motion to Clarify and/or Modify the Temporary Asset Freeze [D.E. 144].

III. MEMORANDUM OF LAW

A. The Court Should Deny North Shore's Attempt To Seize Investor Funds

North Shore seeks, without legal basis, to interject itself into this proceeding in order to exercise certain alleged foreclosure and setoff rights against Defendant Gunlicks and his wife as a result of non-payment on a $1,400,000 loan agreement that is secured by the Property located in Illinois. In particular, North Shore seeks to, among other things, offset the loan amount

against the approximately $113,000 that is frozen by order of this Court in a joint account at the bank. (Mem. at 4-5). Although not formally seeking to intervene in this matter, North Shore is nevertheless improperly attempting to advance its interests above those of the harmed investors and other creditors.

North Shore asserts that under Illinois law there is a contractually based debtor-creditor relationship between the bank and Mr. and Mrs. Gunlicks. (Mem. at 6). The bank further asserts that the relevant agreement gives the bank certain "offset rights" with respect to the Loan and the monies sitting in the join account. (Mem. at 6). In other words, North Shore is simply asserting its rights as a creditor with respect to a debt owned to it by Mr. and Mrs. Gunlicks. North Shore recognizes, however, that the freeze order in this case, by its very language directly restrains the bank from "transferring" or "setting off" any assets belonging to Defendant Gunlicks. (Mem. at 8).

North Shore offers no factual or legal basis for why this Court should modify the freeze order to allow them to exercise these purported offset rights and seize investor funds that should rightfully be preserved to satisfy a disgorgement order. First of all, North Shore appears not to acknowledge or recognize that all of the funds deposited in the joint account are ill-gotten gains that were fraudulently obtained from investors in the Founding Partners entities. Mr. and Mrs. Gunlicks's only source of income has been the fees that Defendants earned from the Founding Partners entities.[1] Similarly, since the Illinois Property was purchased in either 2005 or 2008 (*i.e.*, after the fraud in this cause commenced),[2] it was likely purchased with the proceeds of the

[1] Complaint ¶¶ 10, 22; Declaration of William Gunlicks [D.E. 72-2] ¶ 7; Declaration of Pamela Gunlicks [D.E. 72-3] ¶¶ 3-4, "William Gunlicks is my husband and he financially provides for me. I am unemployed and have no other source of income."

[2] Mrs. Gunlicks has declared that this property, located at 341 Sheridan Road, Winnetka, Illinois, was purchased in or about "2005." (Declaration of Pamela Gunlicks [D.E. 72-3] ¶ 10). This contradicts the claim in her husband's Declaration that, "My wife and I purchased real property located at 341 Sheridan Road, Winnetka, Illinois in 2008."

fraud, even if it is held solely in the name of Mrs. Gunlicks. North Shore is thus incorrect when it asserts that the asset freeze does not apply to it or the property. (Mem. at 10).

In support of its motion, North Shore relies on the decision in *SEC v. Lauer*, 2006 U.S. Dist. LEXIS 61392 (S.D. Fla. 2006), where the court agreed to a modification of the freeze and receivership orders to allow the United States Internal Revenue Service and a bank to foreclose on the defendant's property in order to assert certain liens. In contrast to the current situation, however, the property at issue in *Lauer* was purchased prior to the fraud having been committed and the modification request was not opposed by the Commission. *Id.* at *12-14.[3]

In *Lauer*, moreover, the court specifically directed that the freeze remain in place as to any proceeds from the sale of the defendant's residence that remained after the tax liens and mortgage were satisfied. 2006 U.S. Dist. LEXIS 61392, at *20-21. The freeze was lifted solely to allow the IRS and the bank to exercise their rights under a tax lien and security interest that were superior to any interest of a defrauded investor or other creditor. *Id.* at 12-13 and nn.6 & 7. Nothing in *Lauer* supports North Shore's contention that it should be allowed to interject itself into this litigation at this stage in the proceedings in order to exercise their creditor rights against a frozen bank account holding ill-gotten gains, and North Shore cites no other law to that effect.

North Shore contends that the "relief sought by North Shore will not prejudice any defrauded investor." (Mem. at 12). While this may arguably be true with respect to the bank exercising its lien against the Property,[4] it is certainly not true with respect to North Shore's

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(Declaration of William Gunlicks [D.E. 72-2] ¶ 13). Irrespective of which declaration is accurate, however, both dates are after the fraud in this case commenced.

[3] North Shore asserts that the "funds loaned by North Shore were used to purchase the Property." (Mem. at 11). It is not clear, however, whether North Shore means to suggest that only funds that were loaned by North Shore were used to purchase the Property. Mr. Gunlicks's May 9, 2009 Declaration states that the property was purchased in 2008 for $1,860,000. (Gunlicks's Declaration [D.E. 72-2] ¶ 13). Since the alleged loan amount is $1.4 million, this would suggest that at least some investor funds were used to purchase the Property.

[4] Although it is unclear what the accurate fair market value of the Property is at the moment, it is questionable whether a foreclosure sale is the best way to maximize the value of the property. In these situation, it may be

attempt to seize the investor funds in the frozen bank account. By seeking to exercise offset rights against the bank account, North Shore is impermissibly trying to accelerate its creditor claim ahead of the claims by investors and other potential creditors, and to have that claim heard first. Moreover, North Shore is attempting to do so without establishing any legal basis that its claim to the ill-gotten gains is superior to the investors and other creditors. *See* efforts, *SEC v. Huffman*, 996 F.2d 800, 803 (5th Cir. 1993) ("[T]he district court has broad discretion in fashioning the equitable remedy of a disgorgement order.") To the extent that the funds deposited in Mr. and Mrs. Gunlicks's joint account were derived from the securities fraud in this case, they should rightfully be the subject of a disgorgement order, rather than be used to satisfy debts of the wrongdoer in this case.

The setoff sought by North Shore, moreover, is at odds with a fundamental policy of the Receivership: equality among creditors. Setoff would permit an unsecured creditor to obtain full satisfaction of a debt at the expense of other unsecured creditors. In effect, the creditor seeking a setoff would receive a "preference." This principle cannot be invoked in a case where the general principles of setoff would not justify it. *See, e.g., United States v. Arizona Fuels Corp.*, 739 F.2d 455 (9th Cir. 1984) (holding that a creditor cannot setoff pre-receivership debts against receivership assets in his possession).

Similarly, in *Republic Supply Co. v. Richfield Oil Co.*, 59 F.2d 35 (9th Cir.1931), the court refused to allow a setoff of pre-receivership rights against the receiver under a single contract. The court specifically rejected the argument that the receiver must be subjected to the contractual obligations to the other party arising before the receivership in order to enforce the other party's contractual obligations to the receiver. On policy grounds, the court concluded that

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preferable to allow the sale to take place on a voluntary basis. It appears, however, that in this case Mr. and Mrs. Gunlicks has refused to cooperate. (Mem. at 2, 4).

allowing offset would create an impermissible "preference" in treatment among creditors. 59 F.2d at 37.

In *SEC v. Credit Bancorp, Ltd.*, 124 F. Supp. 2d 824 (S.D.N.Y. 2000), a non-party brokerage firm sought relief from an asset freeze order so that it could sell as much collateral as necessary to retire what it contended was a margin debt on the part of Credit Bancorp of approximately $3.4 million. The court denied this relief as "contrary to the interests of the receivership estate as it would interfere with the Receiver's efforts to marshal and take control over all [of the entity's] assets for the benefit of all the parties in interest." Id. at 826-27. The court noted that, if the brokerage firm later succeeded in proving that it was a *secured* creditor, then the debt owed to it would be satisfied by the assets of the receivership estate. Id. at 827.

North Shore has not, and cannot, demonstrate that it will be prejudiced if required to assert its claim before the Receiver along with all other creditors and claimants in due course. *See*, *e.g.*, *CFTC v. Chilcott Portfolio Mgmt., Inc.*, 725 F.2d 584, 586 (10th Cir. 1984) (affirming district court's denial of motion to intervene by non-party seeking the return of money from defendant where non-party was not foreclosed from asserting his claim to the court appointed receiver). Courts routinely deny attempts by investors or creditors to inject their individualized claim into an action brought by the Commission. *Credit Bancorp, Ltd.*, 194 F.R.D. 457, 467 (S.D.N.Y. 2000) ("[T]he majority of courts to have considered the subject of investor intervention under analogous circumstances have denied intervention.") (citing cases).

The district court in *SEC v. Byers*, 2008 U.S. Dist. LEXIS 100085, at *2-3 (S.D.N.Y Nov. 25, 2008), observed that the moving non-party was "not in a substantially different position from other creditors" and that as "a practical matter it did not make sense to allow individual victims and creditor to intervene as parties." It similarly makes no sense to allow North Shore to

interject itself into this litigation for the purpose of asserting its creditor claim to the funds that are frozen in the joint bank account. *See SEC v. Homa*, 2000 U.S. Dist. LEXIS 14582 (N.D. Ill. Sep. 29, 2000) (denying creditor's motion to intervene to assert its contractual interest in certain assets subject to the receivership); *SEC v. Novus Techs., LLC*, 2008 U.S. Dist. LEXIS 2044, at *3 (D. Utah Jan. 10, 2008) (denying bank's motion to intervene to assert claim for fraudulent loans made to defendants).[5]

IV. CONCLUSION

For all the foregoing reasons, the Court should deny North Shore's request to modify the asset freeze to allow them to exercise their purported offset rights against the joint bank account.

August 31, 2009

Respectfully submitted,

s/Jonathan Etra
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[5] Allowing North Shore to do so would only unnecessarily complicate these proceedings and encourage other creditors and claimants to file similar claims before this Court. *Novus Techs.*, 2008 Dist. LEXIS 2044, at 15 (noting the danger that other banks and investors may be encouraged to intervene, and stating that the "court believes it is best to consider the question of who owns which assets after they have been marshaled by the Receiver and not while the process is ongoing").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 31, 2009, I electronically filed the Plaintiff's Response to Defendant Pamela L. Gunlicks's Motion to Intervene and Motion to Amend and/or Modify the Court's Asset Freeze Order with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to received electronically Notices of Electronic Filing.

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