UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

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

FOUNDING PARTNERS CAPITAL MANAGEMENT, 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.

OPINION AND ORDER

This matter comes before the Court pursuant to an order to show cause contained in the Order Freezing Assets and Other Emergency Relief (Doc. #10) entered on April 20, 2009. This temporary "freeze order" was entered on an *ex parte* basis at the request of plaintiff Securities and Exchange Commission (SEC) against the two defendants and four of the six relief defendants.[1] Defendant William L. Gunlicks filed an Emergency Motion to Amend and/or Modify Order Freezing Assets and Other Emergency Relief

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[1]These four relief defendants are 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.

(Doc. #43) on May 5, 2009. Defendant also filed supporting documents (Doc. #45). The Court construes sections I and II of Gunlicks' motion to be responsive to the order to show cause. Defendant Gunlicks challenges the validity and scope of the freeze order as it relates to his personal assets. The Court heard oral argument on May 5, 2009. Section III of defendant's motion requests exemptions from the freeze order for asset preservation expenses, living expenses, and attorneys' fees. The SEC filed its Response (Docs. ##50, 52) on May 6, 2009.

I.

It is clear that a district court does not have the authority to issue an asset freeze order when plaintiff seeks only money damages. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999); Rosen v. Cascade Int'l, 21 F.3d 1520, 1530 (11th Cir. 1994). A district court can, however, issue an asset freeze order where equitable relief is sought by the SEC, Levi Strauss & Co. v. Sunrise Int'l Trading, 51 F.3d 982, 987 (11th Cir. 1995), even if the request for equitable relief is coupled with requests for money damages and a civil penalty. SEC v. ETS Payphones, Inc., 408 F.3d 727, 734 (11th Cir. 2005). Disgorgement is an equitable remedy, and its request provides a proper basis upon which an asset freeze order may be issued. ETS Payphones, Inc., 408 F.3d at 734. Thus, it is clear "that a district court may freeze a defendant's assets to ensure the adequacy of a disgorgement remedy." Commodity Futures Trading Comm'n v. Levy,

541 F.3d 1102, 1114 (11th Cir. 2008) (citing ETS Payphones, Inc., 408 F.3d at 734; Commodity Futures Trading Comm'n v. Muller, 570 F.2d 1296, 1301 (5th Cir. 1978)). In this case, the Complaint seeks disgorgement as part of the requested relief (Doc. #1, p. 18), and therefore the Court has the authority to issue the freeze order.

II.

Defendant Gunlicks argues that the order freezing his personal assets must be lifted because the likelihood of success by the SEC on the merits of the case "is dubious," as a review of the documents submitted by the SEC establishes that the SEC has "overstated its case." (Doc. #43, p. 5.) The SEC concedes that it must "make a prima facie showing that the Defendants violated the securities laws in order to obtain an asset freeze," (Doc. #6, p. 16) but argues that such a showing has been made.

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[2] 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

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[2]These entities are Sun Capital, Inc. and Sun Capital Healthcare, Inc.

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.

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.

Defendant Gunlicks relies upon the documents submitted to the Court by the SEC (Doc. #6) to support his argument that there is not a likelihood of success on the merits. The Court has reviewed each exhibit, with particular emphasis on the items cited by defendant in his motion (Doc. #43, pp. 5-12). The Court is satisfied that the evidence before it supports the SEC's burden of establishing a likelihood of success on the merits. The Court finds that the SEC has established a prima facie case, i.e., has presented sufficient evidence to withstand a directed verdict

motion, United States SEC v. Carrillo, 115 F.3d 1540, 1542 (11th Cir. 1997), and that defendant has not identified material which significantly undermines the SEC's likelihood of success on the merits. Additionally, the Court finds that any issue of jurisdiction over Founding Partners Global Fund, Ltd. will not impact the likelihood of the SEC's success as to Gunlicks individually. Therefore, the Court rejects these portions of defendant's argument.

III.

Defendant Gunlicks also challenges the scope of the asset freeze order as it relates to his personal assets that have no connection with the alleged fraudulent conduct, such as assets which were obtained prior to the allegedly fraudulent activities. Defendant argues that such assets may not be the subject of a freeze order. The Court disagrees.

A district court may enter an order freezing all of a defendant's assets, even though the assets are not related to the alleged fraud and it is not certain whether disgorgement will be ordered or the amount of such disgorgement, if ordered. Levy, 541 F.3d at 1114-15. Such a freeze order may "remain in effect until the district court determines whether it can make an informed determination of the amount of unlawful proceeds retained by [defendant], and, if it can, what that amount may approximate." Levy, 541 F.3d at 1114 (quoting Commodity Futures Trading Comm'n v. American Metals Exch. Corp., 991 F.2d 71, 79 (3d Cir. 1993)).

The SEC has the burden of showing the amount of assets subject to disgorgement, and therefore available for freezing, but this burden is light. ETS Payphones, Inc., 408 F.3d at 735. The SEC must demonstrate "a reasonable approximation of a defendant's ill-gotten gains . . . Exactitude is not a requirement." ETS Payphones, Inc., 408 F.3d at 735 (quoting SEC v. Calvo, 378 F.3d 1211, 1217 (11th Cir. 2004)).[3] Disgorgement is not unlimited; 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." ETS Payphones, Inc., 408 F.3d at 735 (quoting SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978)). "The purpose of disgorgement is . . . to deprive the wrongdoer of his ill-gotten gain." Blatt, 583 F.2d at 1335. The Court compares the reasonable approximation of the amount of disgorgement with defendant's assets to determine if a full asset freeze is necessary or if some assets can be excluded. ETS Payphones, Inc., 408 F.3d at 735-36.

The Court is not convinced at this point that the $550 million figure cited by the SEC would be the amount of disgorgement. While the Complaint states that the $550 million is "at risk" (Doc. #1,

[3] "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; so long as the measure of disgorgement is reasonable, any risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." Calvo, 378 F.3d at 1217 (internal quotations and citations omitted).

p. 1), this amount does not appear to represent the wrongful profit or ill-gotten gain obtained by defendant Gunlicks and/or Founding Partners. The Complaint alleges that Founding Partners charged a management fee of 1.75% annually; multiplying this by the $550 million lent to Sun Capital would seem to give a reasonable, if probably understated, amount of the ill-gotten gain obtained by Gunlicks. This amount, $5,912,500.00, will be utilized by the Court in the absence of the presentation of a more specific figure by the SEC.

Defendant Gunlicks has not presented any specific information about his assets,[4] or whether his assets exceed the $5,912,500.00 amount. In the absence of more specific information, the Court will continue the full asset freeze (subject to consideration of defendant's request for relief as to asset preservation expenses, living expenses and attorneys' fees). The Court is willing to re-visit the amount subject to the asset freeze upon motion by either party, if more specific information is presented.

IV.

Defendant Gunlicks requests that the Court modify the freeze order as to his personal assets to exempt payment related to the preservation of assets, living expenses, and attorneys' fees. The Court has discretion to modify the freeze order under the appropriate circumstances, but defendant has provided no factual

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[4]The Court had denied the portion of the SEC's *ex parte* motion that requested an accounting.

basis that would allow the Court to make a reasoned decision as to whether any modification should be made, or the amounts that should be exempted. In the absence of such a factual basis, the Court declines to modify the freeze order. Defendant may file another motion if its factual support is adequately demonstrated.

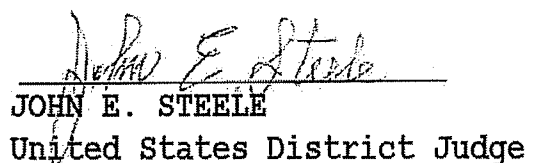
Accordingly, it is now

ORDERED:

1. The Court finds that its Order Freezing Assets and Other Emergency Relief (Doc. #10) shall **continue in effect** as to defendant William L. Gunlicks until further order of the Court.

2. Defendant William L. Gunlicks' Emergency Motion to Amend and/or Modify Order Freezing Assets and Other Emergency Relief (Doc. #43) is **DENIED.**

DONE AND ORDERED at Fort Myers, Florida, this 7th day of May, 2009.



JOHN E. STEELE
United States District Judge

Copies:
Counsel of record