UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MEYERS DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff v. FOUNDING PARTNERS CAPITAL MANAGEMENT, CO., and WILLIAM L. GUNLICKS, Defendants, 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.	)	CASE NO.: 2:09-CV-229-FtM-29 SPC

MOTION TO STRIKE PLAINTIFF'S MOTION TO SET DISGORGEMENT AND PRE-JUDGMENT INTEREST AND IMPOSE A CIVIL PENALTY AGAINST DEFENDANT WILLIAM GUNLICKS [D.E. 288], TO VACATE THE COURT'S OPINION AND ORDER [D.E. 292] AND VACATE THE SUPPLEMENTAL JUDGMENT [D.E. 293]

Defendant, WILLIAM GUNLICKS, hereby moves to strike Plaintiff's Motion To Set Disgorgement and Pre-Judgment Interest, and Impose a Civil Penalty Against Defendant and in furtherance thereof states as follows:

1. On May 4, 2011, Plaintiff filed its Motion to Set Disgorgement and Prejudgment Interest and Impose a Civil Penalty (hereinafter "Motion for Disgorgement") against Defendant, WILLIAM L. GUNLICKS.

2. In Plaintiff's Motion for Disgorgement, Attorney for the Plaintiff signed a Certificate of Service, stating that service had been made on May 4, 2011. See Motion for Disgorgement attached hereto as Exhibit "A".

3. However, the notice for the Motion for Disgorgement was not filed until twelve (12) days later, on May 16, 2011. See Letter to William Gunlicks, dated May 16, 2011 attached hereto as Exhibit "B".

4. Further, there has been a stay entered by the Court as to Founding Partners "until further notice by the Court."

5. Much of the Motion for Disgorgement, in fact nearly all of it, is directed towards the conduct of Defendant, FOUNDING PARTNERS.

6. In its own Motion, Plaintiff, SEC, cites to sections of the original Complaint [D.E. 1] which are sections alleging acts against FOUNDING PARTNERS, as well as Defendant, GUNLICKS, in his capacity of manager of FOUNDING PARTNERS.

7. Observing the above, even though the Motion for Disgorgement was titled against GUNLICKS, he cannot respond without stepping into the shoes of FOUNDING PARTNERS, which while now under receivership, also has a hold on the litigation as to the conduct of FOUNDING PARTNERS through the acts of its agent GUNLICKS.

8. Rule 5(1)(D), Federal Rules of Civil Procedure, requires:

> "**(1) In General.** Unless these rules provide otherwise, each of the following papers must be served on every party:..**(D)** a written motion, except one that may be heard *ex parte*."

9. Further, pursuant to Rule 12, Federal Rules of Civil Procedure, a defendant may present a defense for "insufficient service of process."

10. Despite Defendant, WILLIAM GUNLICKS, being sent a copy by regular mail on May 4, 2011, service was not made until May 16, 2011.

11. In the letter directed towards GUNLICKS, which can be assumed to have been received five days later according to the F.R.C.P.'s own rules on time computation, no mention was made of a response deadline or the need to seek counsel.

12. At that time, GUNLICKS was not represented in this action, and he was receiving copies of some actions in this matter, but not most. It would seem copies of pleadings in this action were randomly sent to him after either SEC or receiver made a unilateral decision that he should be provided same.

13. Undersigned counsel entered a Court appearance in late May, unaware of the deadline imposed against GUNLICKS despite inadequate notice and a stay of the proceedings against FOUNDING PARTNERS, which essentially makes responding to the Motion for Disgorgement impossible.

14. For all these reasons, the relief sought by Defendant should be granted.

15. As a result of insufficient and improper service, lack of due process, confusion regardung the stay which impacts the ability to respond, Defendant being unrepresented at the time the

Motion was mailed to him, failure for the Court to set a deadline and the SEC's failure to provide notice that a response may be required, Plaintiff's Motion for Disgorgement should be striken and the two resulting Orders vacated, whereby meeting Defendant's due process rights and revisiting these issues should the Court wish to entertain the SEC's Motion at this time.

16. If the Court is inclined to rule on the Motion, proper notice should be given, an opportunity to be heard on lifting the stay as to GUNLICKS' ability to adequately respond to the SEC's Motion, and another opportunity for Defendant to be heard on the Motion after discovery hsa been conducted.

17. Discovery on the issue of disgorgement is not only an entitlement of a defendant, this Court has already ruled that Defendant shall be given the opportunity to conduct discovery "after a Motion for Disgorgement is made." [D.E. 288].

18. Further, this Court has already ruled that Defendant is entitled to discovery on the Motion for Disgorgement [D.E. 288]. See Page 7 of Order regarding Consent of William L. Gunlicks [D.E. 200]

19. This Court ordered that "in connection with Commission's Motion [D.E. 288] parties may take discovery, including discovery from appropriate non-parties" [D.E. 200]

20. Without proper notice and an opportunity to be heard, Defendant, WILLIAM GUNLICKS is not only prejudiced but would suffer a deprivation of property without due process of law.

WHEREFORE, Defendant, WILLIAM GUNLICKS, requests that this Honorable Court grant this Motion to Strike Plaintiff's Motion for Disgorgement and Pre-Judgment Interest, and Impose a Civil Penalty to Vacate the Court's Opinion and Order [D.E. 292] and Vacate the Supplemental

Judgment [D.E. 293].

MEMORANDUM OF LAW

Failure to serve a party with a paper enumerated under F.R.C.P. 5(a), results in the paper effectively becoming an *ex parte* communication and therefore is improper. *Tonneson v. Marlin Yacht Mfg., Inc.*, 171 Fed. Appx. 810, 814 (11th Cir. 2006) (reversible error for District Court to dismiss case based on affidavit not served on the other parties).

Further, under Rule 60(b)(1) of the Federal Rules of Civil Procedure, the court may provide relief on the grounds of "mistake, inadvertance, surprise, or excusable neglect." In *Utah ex rel. Div. of Forestry, Fire, & State Lands v. US*, 528 F.3d 712, 722-23 (10th Cir. 2008), the court lists types of mistakes for which relief may be sought under Rule 60(b)(1).

Among mistakes listed in *Utah ex rel.*, are "when a judge has made a substantive mistake of law or fact." 528 F.3d at 723. Because this Honorable Court acted under the incorrect assumption that Defendant, WILLIAM GUNLICKS, was properly served and was on notice May 4, 2011 of the Motion for Disgorgement, the Order [D.E. 292] and Supplemental Judgment [D.E. 293] entered on June 13, 2011 should be vacated.

Further, in *Gaines v. Hadi*, the court recognized that "the essential requirements of due process are notice and the opportunity to respond." 2006 WL 6035742 (S.D. Fla. 2006) (citing *Cleveland Bd. of Educ. v. Loundermill*, 470 U.S. 532, 541 (1985)).

In re General Development Corp., the court recognized the longstanding protection afforded under the Fifth Amendment of the United States Constitution providing that no person shall be "deprived of life, liberty or property, without due process of law." 165 B.R. 685, 688 (S.D. Fla. 1994) That court recognized that property interests "cannot be impaired without notice and an

opportunity to be heard." *Id.* (citing *City of New York v. New York, New Haven & Hartford Railroad Co.*, 344 U.S. 293, 73 S.Ct. 299 (1953)).

A Motion for Disgorgement and subsequent Order granting disgorgement in amounts in excess of Thirty Million Dollars, certainly contemplates a property interest vested in Defendant, WILLIAM GUNLICKS.

Further, the type of prejudice suffered by WILLIAM GUNLICKS, by denying him an opportunity to be heard, is precisely the type of violation of due process contemplated by the Fifth Amendment of United States Constitution.

WHEREFORE, Defendant, WILLIAM GUNLICKS, respectfully requests that this Honorable Court VACATE Plaintiffs Motion for Disgorgement [D.E. 288] and this Court's Order and Supplemental Judgment [D.E. 292, 293].

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing electronically filed with the Clerk of the Court using CM/ECF this 7th day of July, 2011, who will forward copies to all counsel of record.

/s/ Gabrielle Lyn D'Alemberte
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CASE NO. 2:09-cv-229-JES-SPC

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants,

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'S MOTION AND MEMORANDUM OF LAW TO SET DISGORGEMENT AND PREJUDGMENT INTEREST, AND IMPOSE A CIVIL PENALTY AGAINST DEFENDANT WILLIAM L. GUNLICKS

Plaintiff Securities and Exchange Commission moves the Court for a final judgment finding Defendant William L. Gunlicks liable for disgorgement of $28,635,966.55, plus prejudgment interest of $2,193,842.31, for a total disgorgement payment of $30,829,808.86, and ordering him to pay a civil penalty of $1,000,000.

I. PROCEDURAL AND FACTUAL HISTORY

A. Procedural History

On April 20, 2009, the Commission filed a Complaint for Injunctive Relief against Gunlicks and Founding Partners Capital Management Company ("Founding Partners") and naming as relief defendants certain related entities. At the same time, the Commission sought, among other things,

EXHIBIT "A"

an emergency temporary freeze order with respect to the assets of Gunlicks and Founding Partners and the funds they managed, which the Court granted that same day. The Court also appointed a Receiver over Founding Partners and the related relief defendant funds. [D.E. 9, 73].

On March 4, 2010, the Court entered a Judgment of Permanent Injunction and Other Relief as to Gunlicks (the "Judgment") [D.E. 201]. The Judgment restrained and enjoined Gunlicks from violating the anti-fraud and other provisions of the federal securities laws, required him to pay disgorgement, prejudgment interest, and a civil penalty, and ordered that the amounts of disgorgement and prejudgment interest be set by the Court upon the Commission's motion. [D.E. 201 at p.5]. The Judgment further ordered that, in connection with such motion, Gunlicks would be precluded from arguing he did not violate the federal securities laws as alleged in the Complaint, and the Court shall accept as and deem true the allegations in the Complaint. *Id.*

The only remaining issues for the Court to determine in this motion with respect to Gunlicks are the (1) amount of disgorgement, with prejudgment interest,[1] and (2) the amount of the civil money penalty the Court should order him to pay. In support of this motion, the Commission refers to the declaration of Tonya Tullis, a certified public accountant in the Commission's Miami Regional Office, along with supporting exhibits [D.E. 86-1];[2] and the Commission's prejudgment interest calculation from April 20, 2009 through May 4, 2011 (the date of this motion) (attached as Exhibit A).

On April 8, 2010, the Court entered an order staying all deadlines for 120 days in this matter [D.E. 207]. The Court granted additional stays, consistent with stays in the related

[1] The Judgment orders that 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).

[2] Ms. Tullis's declaration and exhibits was previously filed as Attachment A in support of the Commission's Response to Defendant William L. Gunlicks's Renewed Emergency Motion to Modify the Asset Freeze [D.E. 86].

Receivership Litigation before this Court.[3] [D.E. 240, 264]. On April 25, 2011, the Court granted the Commission's motion to extend the stay against the Founding Partners Entities pending notification by the parties that the stay is due to be lifted. [D.E. 284].

B. The Allegations in the Complaint

According to the Judgment Gunlicks consented to, the Complaint's allegations are deemed true for purposes of this motion. Gunlicks therefore cannot dispute that, as the Complaint alleges, Gunlicks (operating through Founding Partners) violated the antifraud provisions of the federal securities laws and put at risk approximately $550 million of investor assets. [D.E. 1 ¶ 1].

Gunlicks and Founding Partners operated three hedge funds and one mutual fund that made or invested in loans to two borrowers, Sun Capital, Inc. and Sun Capital Healthcare, Inc. (collectively "Sun Capital"). Since 2001, the Defendants represented to investors that their primary fund, Founding Partners Stable-Value Fund, LP ("Stable-Value"), loaned money to Sun Capital to purchase discounted commercial and healthcare receivables, and that Sun Capital would in turn pay Stable-Value interest on the loan. Founding Partners and Gunlicks represented Sun Capital was factoring short-term (collected within 150 days), highly liquid receivables, and that these receivables fully secured the loan to Sun Capital. [D.E. 1 ¶¶ 2, 20-21, 33].

Unbeknownst to investors, Gunlicks, beginning in 2004, permitted Sun Capital to start purchasing receivables that were longer-term, less liquid, and much riskier in nature. [D.E. 1 ¶ 30]. Among other things, Sun Capital purchased these new receivables from often troubled hospitals that needed to remain operating in order to collect the receivables. Gunlicks also permitted Sun Capital to use investor proceeds to make working capital loans to these hospitals

[3] *Daniel S. Newman, as Receiver for Founding Partners Capital Management Company, et al. v. Sun Capital, Inc., et al.*, U.S. District Court, Middle District of Florida, Case No. 2:09-CV-445-FTM-99SPC.

so they would remain afloat. In addition, the Gunlicks allowed Sun Capital to invest in workers compensation receivables that took an average of almost three years to collect. [D.E. 1 ¶ 3].

Founding Partners and Gunlicks continued to solicit investors for Stable-Value without disclosing the change in the underlying investments and new risks they presented. Sun Capital owes $550 million on the Stable-Value loan, which constituted 99% of Stable-Value's portfolio.[4] Only 32% of this loan amount, however, was invested in and secured by the less risky, short-term receivables Founding Partners and Gunlicks described to investors. [D.E. 1 ¶ 4].

The cornerstone of Defendants' presentation of the Stable-Value investment opportunity was the safety of the loans to Sun Capital. Stable-Value's offering materials stated the loans were secured by healthcare receivables that "are the payment obligations of Federal and State government agencies, and certain U.S. insurance companies rated by various rating firms." Founding Partners' monthly performance reports reassured investors that "the loans are secured by the healthcare receivables." Gunlicks represented to investors that the loans were collateralized according to strict criteria such that the underlying receivables would only be "investment grade." [D.E. 1 ¶ 23].

Founding Partners and Gunlicks also represented the collateral would consist *only* of short-term receivables. For example, Gunlicks told investorsno receivable in the collateral base would be older than 150 days, and that any receivables reaching that age would be replaced with receivables less than 150 days old or covered directly by other funds received. [D.E. 1 ¶ 24, 33].

Beginning in 2004, Sun Capital began to invest in receivables of a materially different character than what Founding Partners had represented to investors. At first, Sun Capital began purchasing workers-compensation receivables, which carried more risk because they were based

[4] Founding Partners' three other funds, Founding Partners Stable-Value Fund II, LP ("Stable-Value II"), Founding Partners Global Fund, Ltd. ("Global Fund"), and Founding Partners Hybrid-Value Fund, LP ("Hybrid-Value Fund"), were invested in part or in whole in Stable-Value. [D.E. 1 ¶¶ 14-16, 20].

on un-adjudicated workers-compensation claims. These receivables also took an average of almost three years to collect, creating greater liquidity risks for Sun Capital and, in turn, for Stable-Value investors seeking to redeem their interests. These receivables also did not present the option for Sun Capital to return any uncollectible amounts because Sun Capital purchased them in bulk at a discount. Sun Capital's financial statements show that as of February 2009, it held approximately $53 million of workers-compensation receivables. [D.E. 1 ¶ 25].

Later in 2004, Sun Capital began purchasing a risky type of healthcare receivable called "Disproportionate Share" receivables (commonly referred to in the industry as "DSH" receivables). DSH receivables are a special type of Medicare and Medicaid receivable the government pays in two parts to healthcare providers in poor or underserved areas. The government makes the first payment at the normal reimbursement rate and in the normal collection period. The second payment is an amount in excess of the normal rate, which the government pays on average two years after the date of service, and only if the provider is still operating. [D.E. 1 ¶ 26].

DSH receivables are thus considerably riskier than standard healthcare receivables. They add significant liquidity risks due to their collection delays. More importantly, they add a "going concern" risk that ties their collectability to the provider's ability to continue to operate successfully. Although Sun Capital first purchased DSH receivables in 2004, these purchases escalated in 2008 to 84% more than the prior year. As of February 2009, Sun Capital held approximately $158 million in DSH receivables. [D.E. 1 ¶¶ 27-28].

The fund documents, offering materials, and financial statements for Stable-Value did not disclose that Sun Capital invested in workers-compensation or DSH receivables, or these receivables' longer collection periods and materially increased collection risk. [D.E. 1 ¶ 34].

Furthermore, Gunlicks did not tell Stable-Value and Stable-Value II investors the collateral for their investments included workers-compensation or DSH receivables or that these types of receivables took longer to collect and, in the case of the DSH receivables, had additional inherent "going concern" risks. [D.E. 1 ¶ 35]. Founding Partners' monthly performance reports also failed to disclose Sun Capital's investment in these alternative receivables or that they represented a significant portion of the collateral behind Stable-Value's loan. [D.E. 1 ¶ 36].

In 2004, Sun Capital's principals, through two separate corporations, began purchasing distressed hospitals. Sun Capital subsequently began using Stable-Value funds to provide working capital loans to these hospitals. In particular, Sun Capital drew on the Stable-Value loans to make advances to these hospitals to support their operations. As of February 2009, Sun Capital had approximately $63 million in these related-party loans using funds received from Stable-Value. Gunlicks never disclosed this to investors. [D.E. 1 ¶¶ 29, 37-8].

Founding Partners and Gunlicks also falsely represented to investors their funds had available 2007 audited financial statements. Stable-Value and Stable-Value II's offering materials stated investors would receive audited financial statements within 120 days of the close of the calendar year. Gunlicks made this same promise in letters and monthly performance reports sent to investors throughout 2008. In fact, Stable-Value and Stable-Value II did not have audited financial statements for 2007. [D.E. 1 ¶¶ 44-45].

Founding Partners and Gunlicks also failed to disclose to investors that in December 2007, the Commission entered an order against them finding that Founding Partners caused Stable-Value to pay an undisclosed fee to a related entity, and caused several of its funds to engage in transactions inconsistent with their offering memoranda. *In the Matter of Founding Partners Capital Management Company and William Gunlicks* (Securities Act Rel. No. 8866,

Advisers Act Rel. No. 2680, Dec. 3, 2007) (the "Order"). The Commission charged Founding Partners with willfully violating Section 17(a)(2) of the Securities Act and charged Gunlicks with causing these violations. Stable-Value's offering materials touted Gunlicks' business acumen and experience, but failed to disclose the Order. [D.E. 1 ¶¶ 46-47].

II. MEMORANDUM OF LAW

THE COURT SHOULD ORDER DISGORGEMENT, PREJUDGMENT INTEREST, AND A CIVIL PENALTY

A. Disgorgement and Prejudgment Interest

Disgorgement is designed both to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws. *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989); *SEC v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985); *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988); *SEC v. Manor Nursing Centers*, 458 F.2d 1082, 1103-1104 (2d Cir. 1972) ("The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable").

Courts are empowered to order wrongdoers to disgorge the amount of their profits from the wrongdoing. *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005). A district court has broad discretion in calculating the amount to be disgorged. *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996), *cert. denied*, 522 U.S. 812 (1997). The SEC is entitled to disgorgement "upon producing a reasonable approximation of a defendant's ill-gotten gains." *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004). "The SEC's burden for showing the amount of assets subject to disgorgement . . . is light: 'a reasonable approximation of a defendant's ill-gotten gains [is required] . . . . Exactitude is not a requirement.'" *ETS*

Payphones, Inc., 408 F.3d at 735 (quoting *Calvo*, 378 F.3d at 1217); *First Jersey Sec., Inc.*, 101 F.3d at 1475.

The burden then shifts to the defendant to clearly demonstrate the Commission's estimate is not a reasonable approximation. *Calvo*, 378 F.3d. at 1217; *First City Fin. Corp.*, 890 F.2d at 1232. Any risk of uncertainty about the amount to be disgorged "should fall on the wrongdoer whose illegal conduct created that uncertainty," *Calvo*, 378 F.3d at 1217, and all doubts "are to be resolved against the defrauding party." *SEC v. First City Fin. Corp.*, 688 F.Supp. 705, 727 (D.D.C. 1988), *aff'd*, 890 F.2d 1215 (D.C. Cir. 1989).

Prejudgment interest is imposed, at the discretion of the court, to divest those found liable of violating the federal securities laws of any benefit accrued from the use of the ill-gotten gains. *SEC v. Warde*, 151 F.3d 42, 50 (2d Cir. 1998); *First Jersey Sec., Inc.*, 101 F.3d at 1475 (imposing the IRS underpayment rate); *SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1090 (D.N.J. 1996), *aff'd*, 124 F.3d 449 (3d Cir. 1997). A defendant's wrongdoing justifies awards of prejudgment interest in accord with the doctrines of fundamental fairness. *Tome*, 638 F. Supp. at 639. The Judgment orders that prejudgment interest be imposed on any disgorgement amount and "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)." [D.E. 201 at p.5].

B. Amount of Disgorgement and Prejudgment Interest

Apart from putting at risk approximately $550 million in investor funds during the course of the fraud, Gunlicks, as the sole owner of the management company Founding Partners, earned at least $28,635,966.55 in fees from 2004 through 2008. [D.E. 86-1]. First, during this period Stable-Value paid Founding Partners a management fee totaling $23,670,278. [D.E. 86-1 ¶ 4

and p.5 of 84]. During this same time period, Stable-Value paid royalty fees in excess of $8 million to Founding Partners Bermuda Capital (f/k/a Stewards and Partners Ltd.), in which Founding Partners held a 42.2% ownership interest. [D.E. 86-1 at pp.5 & 19 of 84]. Based on its percentage ownership, Founding Partners would have received $3,594,863.97. Finally, during 2008 alone, Founding Partners received $1,370,824.58 in management fees from Stable Value II. [D.E. 86-1 ¶ 5].[5]

The Court should require Gunlicks to disgorge the entire $28,635,966.55 as ill-gotten gains because he earned these fees during the time that he was perpetrating a fraud with respect his management of Founding Partners. *SEC v. Universal Express, Inc.*, 475 F. Supp. 2d 412, 428 (S.D.N.Y. 2007) (ordering CEO and in-house counsel's compensation disgorged because money was received during period of securities violations); *SEC v. Rogers*, 2000 WL 642467, at *1 (9th Cir. May 18, 2000) ("To the extent that compensation flows from ill-gotten gains, the offending parties should be required to disgorge such to prevent unjust enrichment.") (citations omitted); *FTC v. QT, Inc.*, 512 F.3d 858, 864 (7th Cir. 2008) (affirming plaintiff's reasonably estimated disgorgement amount where defendant could make no showing that any of its profits were legitimate because the sole source of its profits were from wrongdoing). The Commission's calculation of the management fees Gunlicks earned from 2004 through 2008 is a reasonable estimate of the ill-gotten gains he received as a result of the fraud alleged in the Complaint. Accordingly, Gunlicks has the burden of clearly demonstrating this estimate is not a reasonable approximation.

In doing so, Gunlicks may not argue that the Court should reduce the amount of disgorgement based on his subsequent use of the money. The purposes for which he used the ill-

[5] The total amount of management fees, $28,635,966.55, does not include $228,305 in fees Stable-Value II paid during 2007 because the financial statement is in rough draft form, or $245,211.53 in fees the Hybrid-Value Fund paid in 2008 alone because this fund was not fully invested in the Stable-Value Fund. [D.E. 86-1 ¶ 5, pp.83-84].

gotten funds is not material to the calculation of disgorgement. *SEC v. J.T. Wallenbrock & Assoc.*, 440 F.3d 1109, 1115 (9th Cir. 2006) (affirming district court's calculation of disgorgement and reasoning that "[n]either the deterrent purpose of disgorgement nor the goal of depriving a wrongdoer of unjust enrichment would be served were we to allow these defendants . . . to 'escape disgorgement by asserting that expenses associated with this fraud were legitimate'") (citation omitted); *SEC v. Universal Express, Inc.*, 2009 WL 2486057, at *7-11 (S.D.N.Y. Aug. 14, 2009) (concluding "it is irrelevant for disgorgement purposes how the defendant chose to dispose of the ill-gotten gains; subsequent investment of these funds, payments to charities, and/or payment to co-conspirators are not deductible from the gross profits subject to disgorgement."); *SEC v. Benson*, 657 F. Supp. 1122, 1134 (S.D.N.Y. 1987) (finding "[t]he manner in which [the defendant] chose to spend his misappropriations is irrelevant as to his objection to disgorge."); *Hughes Capital Corp.*, 917 F. Supp. at 1087 (stating that the "overwhelming weight of authority holds that securities laws violators may not offset their disgorgement liability with business expenses.").

In addition to disgorgement, Gunlicks should pay pre-judgment interest because he has enjoyed access to the fraudulently raised funds over a period of time. Requiring him to pay prejudgment interest is consistent with the equitable purpose of the remedy of disgorgement. *Hughes Capital Corp.*, 917 F. Supp. at 1090. A defendant's wrongdoing justifies awards of prejudgment interest in accord with the doctrines of fundamental fairness. *SEC v. Tome*, 638 F. Supp. 638, 639 (S.D.N.Y. 1986). In this case, the Judgment Gunlicks consented to requires him to pay prejudgment interest from April 30, 2009. [D.E. 201 at p.5].

The Commission calculated pre-judgment interest in accordance with the delinquent tax rate established by the Internal Revenue Service, 26 U.S.C. § 6621(a)(2), and assessed on a

quarterly basis, from April 20, 2009 to May 4, 2011 (the date of this motion).[6] Based on the principal amount of $28,635,966.55 in ill-gotten gains, applying this rate over the stated period of time results in a total prejudgment interest amount of $2,193,842.31, for a total disgorgement and prejudgment interest obligation of $30,829,808.86. The Commission has attached a Prejudgment Interest Report as Exhibit A.

C. Amount of Civil Money Penalty

The Commission seeks a Third Tier civil penalty of $1,000,000 against Gunlicks pursuant to Section 20(d) of the Securities Act and Section 21(d) of the Exchange Act, each of which establishes the same three tiers of potential penalties. The purposes of civil penalties are to punish the individual violator as well as deter future violations. *SEC v. Palmisano,* 135 F.3d 860, 866 (2d Cir. 1998); *SEC v. K. W. Brown*, 555 F. Supp. 2d 1275, 1314 (S.D. Fla. 2007); *SEC v. Tanner,* 2003 WL 21523978, at *2 (S.D.N.Y. July 3, 2003); *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 17 (D.D.C. 1998); *SEC v. Lybrand,* 281 F. Supp. 2d 726, 729 (S.D.N.Y. 2003) ("A monetary penalty is designed to serve as a deterrent against securities law violations,").

Under the First Tier for both statutes, the Court may impose a penalty of up to (i) $6,500 on a natural person and $65,000 on an entity for each violation or (ii) the gross amount of pecuniary gain to the defendant as a result of the violation. Under the Second Tier, the Court may impose a penalty of up to (i) $65,000 on a natural person and $325,000 on an entity for each violation or (ii) the gross amount of pecuniary gain to the defendant as a result of the violation. The Second Tier applies where the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

[6] The Commission's prejudgment interest calculator only calculates interest based on complete quarters.

Under the Third Tier the Court may impose a penalty of up to (i) $130,000 on a natural person and $650,000 on an entity for each violation or (ii) the gross amount of pecuniary gain to the defendant as a result of the violation. The Third Tier applies to cases in which the requirements of a Second Tier penalty are present *and* the violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons. 15 U.S.C § 77t(d); 15 U.S.C. § 78u(d)(3).[7]

Gunlicks's conduct merits a substantial Third Tier penalty. As alleged in the Complaint, Gunlicks made numerous material misrepresentations and omissions regarding the use of investor funds over a number of years, ultimately putting at risk approximately $550 million in investor funds. Accordingly, Gunlicks's conduct involved "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." *Meadows v. SEC*, 119 F.3d 1219, 1228 (5th Cir. 1997); *see also SEC v. Hilker*, 2007 WL 174091 at *3 (D. Colo. Jan. 18, 2007) (court imposed third tier civil penalties based on complaint's allegation that defendants' fraudulent conduct created a significant risk of substantial losses to investors); *SEC v. KS Advisors, Inc.*, 2006 WL 288227, at *3 (M.D. Fla. Feb. 6, 2006) (imposing Third Tier penalties equal to the amount of disgorgement). In view of the public policy objectives underlying the imposition of a civil money penalty, the Commission submits that a substantial penalty is necessary and appropriate to punish Gunlicks for his unlawful activities and to deter him and others from engaging in violations of the federal securities laws.

[7] The figures for all three tiers come from the Federal Civil Penalties Inflation Adjustment Act of 1990, which adjusted the potential penalty amounts to account for inflation, based on violation dates. 17 C.F.R. §§ 201.1001-1003. The figures cited herein correspond to the relevant time period during which Gunlicks perpetrated the fraud alleged in the Complaint.

Factors courts have considered in determining the appropriate amount of the penalty include the egregiousness of the violations, the isolated or repeated nature of the violations, the degree of scienter involved and the deterrent effect given the defendant's financial worth. *K.W. Brown*, 555 F. Supp. 2d at 1315; *SEC v. Yun*, 148 F. Supp. 2d 1287 (M.D. Fla. 2001). As described above, from 2004 until the Court-appointed Receiver took over Founding Partners in 2009, Gunlicks directed all of the activities of Founding Partners and directly benefited from the fraud by more than $28 million in fees. Gunlicks repeatedly made material misrepresentations and omissions about the Stable-Value's loans to Sun Capital, and in particular failed to disclose the increasingly risky nature of the investment in light of Sun Capital's shifting use of the money. These misrepresentations and omissions were repeated year over year in oral presentations, offering materials, and monthly investor reports.

Gunlicks conduct demonstrates a high degree of scienter. Instead of disclosing to investors what he knew about Sun Capital, Gunlicks continued throughout this period to falsely tout the investment as highly liquid, safe, and full secured by the underlying assets (purportedly short-term health care receivables). Even on the eve of the fund's collapse in January 2009, Gunlicks raised $5 million from the Archdiocese of New Orleans without informing the Archdiocese that Stable-Value was facing significant redemption requests, and continued to misrepresent that Sun Capital was purchasing healthcare receivables with the funds. [D.E. 1 ¶¶ 40-43].[8] Gunlicks is also a recidivist whom the Commission has already previously charged with causing Founding Partners to violate the federal securities laws [D.E. 1 ¶¶ 46-47], something he failed to disclose to investors. Today, with the Receiver locked in protracted

[8] The Archdiocese of New Orleans has filed and stayed a separate lawsuit against Gunlicks and Founding Partners in Louisiana state court per agreement with this Court. [D.E. 224].

litigation with the Sun Capital entities and their principals, it is entirely unclear how much, if any, of the $550 million will be returned to investors.

This conduct merits the Court imposing on Gunlicks a significant Third Tier penalty both as punishment, and as a deterrent to him and to others who might consider committing fraud. *See KS Advisors, Inc.*, 2006 WL 288227, at *3 (imposing penalties equal to the amount of disgorgement). While the Court has the discretion to impose in this case a penalty equal to the more than $28 million in ill-gotten gains received by Gunlicks, the Commission respectfully submits that a $1 million penalty would more appropriately balance the nature of the conduct, and the need for punishment and deterrence, with a recognition that Gunlicks will already be required to make a significant disgorgement payment. *See, e.g., Palmisano,* 135 F.3d at 863 (affirming order of disgorgement of $9.2 million and $500,000 penalty); *K.W. Brown,* 555 F. Supp. 2d at 1317-18 (ordering penalty of $4.5 million); *Lybrand*, 281 F. Supp. 2d at 729 (ordering disgorgement of nearly $8 million and penalty of $1.1 million against defendants).

CONCLUSION

WHEREFORE, the Commission respectfully requests the Court enter a final judgment finding Gunlicks liable for disgorgement of $28,635,966.55, plus prejudgment interest of $2,193,842.31, for a total disgorgement payment of $30,829,808.86, and ordering him to pay a civil penalty of $1,000,000.

Respectfully submitted,

May 4, 2011

By: s/C. Ian Anderson

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 4, 2011, I electronically filed the foregoing document 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 receive electronically Notices of Electronic Filing.

s/C. Ian Anderson
C. Ian Anderson

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May 16, 2011

Via First Class U.S. Mail

William L. Gunlicks
341 Sheridan Road
Winnetka, IL 60093

RE: SEC v. Founding Partners Capital Management, Co., et al.
Case No.: 2:09-cv-00229-JES-SPC (M.D. Fla.)

Dear Mr. Gunlicks:

Enclosed is a courtesy copy of Plaintiff Securities and Exchange Commission's Motion and Memorandum of Law to Set Disgorgement and Prejudgment Interest, and Impose a Civil Penalty against Defendant William L. Gunlicks.

Very truly yours,

C. Ian Anderson
Senior Trial Counsel

cc: William Delaney, Esq. (w/o encl.)

EXHIBIT "B"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MEYERS DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff v. FOUNDING PARTNERS CAPITAL MANAGEMENT, CO., and WILLIAM L. GUNLICKS, Defendants, 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.	)	CASE NO.: 2:09-CV-229-FtM-29 SPC

ORDER

This matter comes before the Court on the Defendant, WILLIAM GUNLICKS', Motion to Strike Plaintiffs' Motion to Set Disgorgement and Pre-Judgment Interest and Impose a Civil Penalty Against Defendant, WILLIAM L. GUNLICKS[D.E. 288], To Vacate the Court's Opinion and Order [D.E. 292] and Vacate the Supplemental Judgment [D.E. 293]. Finding good cause, the Court will Vacate Court's Opinion and Order [D.E. 292] and Vacate Supplemental Judgment [D.E. 293].

Accordingly it is now **ORDERED**:

The Defendant's Motion to Strike Plaintiffs' Motion to Set Disgorgement and Pre-Judgment

Interest and Impose a Civil Penalty Against Defendant, WILLIAM L. GUNLICKS [D.E. 288], To Vacate the Court's Opinion and Order [D.E. 292] and Vacate the Supplemental Judgment [D.E. 293] is **GRANTED**.

DONE and **ORDERED** at Fort Myers, Florida, this _____ day of _____, 2011.

_____

United States District Judge