UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CASE NO.:

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 PARNTERS GLOBAL FUND, LTD, and FOUNDING PARTNERS HYBRID-VALUE FUND, LP,	)
	)
Relief Defendants.	)

PLAINTIFF'S *EX PARTE* EMERGENCY MOTION FOR ASSET FREEZE ORDER AND OTHER RELIEF, AND MEMORANDUM OF LAW IN SUPPORT

I. INTRODUCTION

Plaintiff Securities and Exchange Commission brings this emergency action to freeze the assets of Defendants Founding Partners Capital Management Company ("Founding Partners") and William L. Gunlicks (collectively "Defendants"), and Relief Defendants Sun Capital, Inc., Sun Capital Healthcare, Inc. (together "Sun Capital"), 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 (collectively "Founding Partners Relief Defendants"). The

Defendants have fraudulently raised approximately $550 million in connection with funds they operate. They have loaned this money to Relief Defendants Sun Capital, Inc., Sun Capital Healthcare, Inc. (together "Sun Capital"), which has used it to invest in, among other things, certain long-term, risky healthcare receivables, and to make working capital loans to a number of troubled hospitals.

As explained below, an asset freeze is necessary to prevent further dissipation of investors' funds and preserve assets that could be used to pay disgorgement and civil penalties. Therefore, the Commission requests that this Court, on an emergency basis, issue an order: (1) freezing the assets of the Defendants and Founding Partners Relief Defendants to preserve funds and maintain the status quo; (2) preventing the Defendants and Founding Partners Relief Defendants from destroying or altering documents; (3) obligating the Defendants and Founding Partners Relief Defendants to respond to discovery on an expedited basis; (4) requiring the Defendants and Founding Partners Relief Defendants to provide sworn written accountings of all assets within 10 days; and (5) setting a show-cause hearing to determine whether to issue a continuing Asset Freeze Order. In addition, by separate motion, the Commission asks the Court to appoint a Receiver over Founding Partners and its funds to further protect investors' assets.

II. DEFENDANTS AND RELIEF DEFENDANTS

A. Defendants

Founding Partners is a Florida corporation with its principal place of business in Naples, Florida. (Ex. 1). Founding Partners is registered with the Commission as an investment adviser. (Ex. 2). In December 2007, Founding Partners consented to the entry of a Commission order censuring it and ordering it to cease and desist from committing or causing any violations of Section 17(a)(2) of the Securities Act of 1933 ("Securities Act"). *In the Matter of Founding*

Partners Capital Management Co. and William Gunlicks, Administrative Proceeding File No. 3-12896. (Ex. 3).

Gunlicks, 66, is the president, CEO, and sole shareholder of Founding Partners, and as such is the primary beneficiary of Founding Partners' management fees. (Ex. 4; Ex. 5.B at p.33). In the same administrative proceeding against Founding Partners, Gunlicks consented to the entry of a Commission order requiring him to cease and desist from committing or causing any violations of Section 17(a)(2) of the Securities Act. (Ex. 3).

B. Relief Defendants

Sun Capital, Inc. is a Florida corporation with its principal place of business in Boca Raton, Florida. (Ex. 6). Sun Capital, Inc. provides accounts receivable funding for commercial companies with loans from Founding Partners' funds. (Ex. 5.R; Ex. 14 (Koslow Tr. 10-11, 20-21)). Sun Capital is not registered with the Commission.

Sun Capital Healthcare, Inc. is a Florida corporation with its principal place of business in Boca Raton, Florida. (Ex. 7). Sun Capital Healthcare is in the business of purchasing accounts receivable from healthcare providers with loans from Founding Partners' funds. (Ex. 5.A at pp.1, 4; Ex. 5.Q; Ex. 14 (Koslow Tr. 11)). Sun Capital Healthcare is not registered with the Commission.

Founding Partners Stable-Value Fund, LP, f/k/a Founding Partners Multi-Strategy Fund, LP ("Stable-Value"), is a Delaware limited liability partnership with its principal place of business in Naples, Florida. Founding Partners is the general partner of Stable-Value. (Ex. 8; Ex. 5.E at p.1). Stable-Value loans investor funds to Sun Capital and Sun Capital Healthcare for the purchase of commercial and healthcare receivables. (Ex. 5.A at p.4). Stable-Value and its securities are not registered with the Commission.

Founding Partners Stable-Value Fund II, LP ("Stable-Value II") is a Delaware limited liability partnership with its principal place of business in Naples, Florida. Founding Partners is the general partner of Stable-Value II. (Ex. 9; Ex. 5.G at p.5). Stable-Value II's portfolio was entirely invested in Stable-Value as of December 2008. Stable-Value II and its securities are not registered with the Commission.

Founding Partners Global Fund, Ltd. ("Global Fund") is a Cayman company registered as a mutual fund in the Cayman Islands. Founding Partners is Global Fund's investment manger. (Exs. 5.J and 5.K). As of December 2008, approximately 84% of Global Funds' portfolio was invested in Stable-Value. (Ex. 5.L at p.1-3). Global Fund and its securities are not registered with the Commission.

Founding Partners Hybrid-Value Fund, LP ("Hybrid-Value Fund") is a Delaware limited partnership with its principal place of business in Naples, Florida. Founding Partners is its general partner. (Ex. 10; Ex. 5.CC at p.4). Hybrid-Value Fund's investment strategy consists of investing its assets in diversified equities and fixed-income structured financial portfolio programs. (Ex. 11 at p.4). Approximately 21% of Hybrid-Value Fund's portfolio was invested in Stable-Value as of December 31, 2008. (Ex. 5.N at p.1). Hybrid-Value Fund and its securities are not registered with the Commission.

III. FACTUAL SUPPORT FOR THE ASSET FREEZE

A. Overview

Founding Partners and Gunlicks operate three hedge funds and one mutual fund that made or invested in loans to Sun Capital. (Ex. 5.A at p.2 & 4; Ex. 5.Q). The Defendants represented to investors that their primary fund, 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 of approximately 1.3% each month. (Ex. 5.Q § 3.1; Ex. 5.R § 3.1; Ex. 5.A). Founding Partners and Gunlicks represented that Sun Capital was factoring short-term (collected within 150 days), highly liquid receivables, and that these receivables fully secured the loan to Sun Capital. (Ex. 12 (Merrick Aff. ¶ 3.d); Ex. 5.U at p.8, n.2; Ex. 5.T at p.2 of the monthly report; Ex. 12 (Murphy Aff. ¶ 4) (Seay Aff. at p. 3) (Merrick Aff. ¶ 8); Ex. 13 (Wisdom Tr. 37:21-38:25); Ex. 5.FF).

Unbeknownst to investors, the Defendants, beginning in 2004, permitted Sun Capital to start purchasing receivables that were longer-term, less liquid, and much riskier in nature. Among other things, Sun Capital purchased these new receivables from often troubled hospitals that needed to remain operating in order to collect the receivables. (Ex. 14 (Koslow Tr. 36-37)). Founding Partners and Gunlicks also permitted Sun Capital to use loan proceeds to make working capital loans to these hospitals so they would remain afloat. (Ex. 14 (Koslow Tr. 29-31)). In addition, the Defendants allowed Sun Capital to invest in workers-compensation receivables that take an average of almost three years to collect and are purchased in bulk. (Ex. 14 (Koslow Tr. 35 & 80)).

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 now owes $550 million on the Stable-Value loan, which constitutes 99% of Stable-Value's portfolio. (Ex. 15; Ex. 5.T (January 31, 2009 Report)). Only 32% of this loan amount, however, is invested in and secured by the less risky, short-term receivables that Founding Partners and Gunlicks described to investors. (Ex. 15 (Sun Capital's February 2009 Financial Statement)).

Sun Capital has ceased making interest payments on the outstanding loan from Stable-Value. (Ex. 14 (Koslow Tr. 147; Ex. 16 at p.1; Ex. 17 at p.8). All that remains of the money

investors placed with Stable-Value is the Sun Capital receivables and any other assets of Sun Capital securing the loan, including ownership interests in the troubled hospitals. (Ex. 15).

The investor assets are at immediate risk of being used to support Sun Capital's working capital requirements and of being diverted directly to Founding Partners and Gunlicks. Among other things, the Defendants have specifically arranged with Sun Capital to begin diverting $400,000 in monthly payments directly to Founding Partners. (Ex. 16; Ex. 14 (Koslow Tr. 154-55)). Sun Capital will make these payments from money collected on receivables securing the Stable-Value loans. (Id.). A freeze order is necessary to secure these receivables and the proceeds flowing from them for the protection of Stable-Value's investors.

In addition, Gunlicks is trying to avoid redemption requests he cannot satisfy by convincing investors to exchange their partnership interests in the secured loan Stable-Value holds for other riskier investments. (Ex. 16; Ex. 17 at pp.9-11).[1]

B. Sun Capital's Factoring Of Receivables

Since 2001, Founding Partners has made loans to Sun Capital through its Stable-Value fund to finance Sun Capital's discounted purchase of receivables. (Ex. 5.A at pp.1, 4; Ex. 5.Q; Ex. 5R; Ex. 14 (Koslow Tr. 10-11, 20-21)). These loans are the primary focus of Stable-Value's investment program and represent 99% of its portfolio. (Ex. 5.T (Monthly Performance Report for January 31, 2009)). Founding Partners' three other funds, Stable-Value II, Global Fund, and Hybrid-Value Fund, are invested in part or in whole in Stable-Value. (Ex. 5.AA).

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[1] On March 30, 2009, four Founding Partners investors sued Gunlicks, Founding Partners and Stable-Value in Texas state court based on some of the same misconduct we allege, and obtained a temporary restraining order barring Gunlicks and Founding Partners from, among other things, modifying the original Agreements or negotiating any recapitalization of Sun Capital. Annandale Partners, LP v. Founding Partners Stable-Value Fund, LP, case no. DC-09-03473 (Tex. 298th Dist. filed Mar. 25, 2009). On April 16, 2009, he parties agreed to a temporary injunction that in essence extended the terms of the temporary retraining order. The emergency relief we seek here is still necessary and appropriate because, in addition to questions over the jurisdiction of the Texas court, its actions still leave investor funds at immediate risk. The additional relief of an asset freeze will preserve investor funds.

Pursuant to the written loan agreements between Stable-Value and Sun Capital, Sun Capital could use the loan proceeds to purchase healthcare and commercial receivables, although it has focused almost exclusively on purchasing healthcare receivables. Under the agreements, Sun Capital could drawn on the loans to purchase the receivables, and then repay the loans after collecting the receivables from the payors. (Ex. 5.Q; Ex. 5.R). Sun Capital charged its factoring clients a fee of approximately 3% per month until it collected the receivables, and paid Stable-Value interest of approximately 1.3% per month. (Ex. 5.A; (Ex. 5.Q § 3.1; Ex. 5.R § 3.1). After receiving the monthly interest payments from Sun Capital, Stable-Value then re-loaned the money to Sun Capital. (Ex. 18).

Founding Partners charged Stable-Value a 1.75% annualized management fee on the total loan balance. (Ex. 5.A (2000 Amendment to Stable Value PPM at p.21)). Stable-Value investors did not receive any automatic distributions from the fund. (Ex. 5.S). According to fund documents, however, redemptions were available on a quarterly basis if requested in writing with at least sixty days notice. (Ex. 5.A at pp.xii, 22; Ex. 5.E).

C. Safety Of The Stable-Value Investment

The cornerstone of Founding Partners' 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's performance reports represented that as of January 2007, approximately 93% of the healthcare receivable payors were rated Aa or above by rating firms such as Moody's, Standard & Poor's, and A.M. Best. (Ex. 5.T).

Founding Partners' monthly performance reports reassured investors that "the loans are secured by the healthcare receivables." (Ex. 5.T at p.2 of each monthly report). Gunlicks represented to investors that the loans were collateralized according to strict criteria such that the underlying receivables would only be "investment grade." (Ex. 12 (Murphy Aff. ¶ 4, Seay Aff. at p.3, and Merrick Aff. ¶ 8)). Moreover, Gunlicks explained to investors that the loan agreements provided that all of Sun Capital's assets, including the receivables, collateralized the loan balance and any accrued interest. (Ex. 13 (Wisdom Tr. 37:21-38:25); Ex. 5.FF).

Founding Partners and Gunlicks also represented to investors that the collateral would consist only of short-term receivables. (Ex. 5.U at p.8). For example, Gunlicks told investors that no 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. (Ex. 12 (Merrick Aff. ¶ 3.d)).

D. An Undisclosed Change In Strategy

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 on un-adjudicated workers-compensation claims. (Ex. 14 (Koslow Tr. 35, 80)). 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. (Id.). 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. (Id.) For instance, Sun Capital purchased some workers-compensation receivables for $11.5 million that had a face

value of $23 million. Sun Capital's financial statements show that as of February 2009, it held approximately $53 million of workers-compensation receivables. (Ex. 15 at p.2).

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). (Ex. 14 (Koslow Tr. 36-37)). 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. (Id.)

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. (Ex. 14 (Koslow Tr. 36-37); Ex. 5.V). As of February 2009, Sun Capital held approximately $158 million in DSH receivables. (Ex. 15 at p.2).

In 2004, Sun Capital's principals, through two separate corporations, began purchasing distressed hospitals in 2004. (Ex. 14, (Koslow Tr. 29-30)). Sun Capital subsequently began using Stable-Value funds to provide working capital loans to these hospitals. (Ex. 14 (Koslow Tr. 30-31)). In particular, Sun Capital drew on the Stable-Value loans to make advances to these hospitals to support their operations. (Ex. 14, (Koslow Tr. 30-31)). As of February 2009, Sun

Capital had approximately $63 million in these related-party loans using funds received from Stable-Value. (Ex. 15).

E. Gunlicks Agreed To The Strategy Change

Gunlicks would not allow Sun Capital to repay any principal on the loans because he wanted to maintain a stable return for his investors by having Stable-Value's assets fully invested in loans to Sun Capital. (Ex. 14, (Koslow Tr. 25)). As a result, in 2004, Sun Capital, forced to look beyond the typical health care receivable for additional investment opportunities, discussed with Gunlicks the possibility of purchasing workers-compensation and DSH receivables. (Ex. 14 (Koslow Tr. 26-28, 36, 174-75)). Gunlicks approved the purchases and, among other things, waived the requirement in the loan agreement that Sun Capital purchase healthcare receivables with a 150-day collection period. (Ex. 14, (Koslow Tr. 36)). Gunlicks also approved using Stable-Value borrowings to help Sun Capital's principals operate the hospitals. (Ex. 14, (Koslow Tr. 30-31)).

F. Sun Capital Ceases Its Factoring Operations

Subsequently, the arrangement between Stable-Value and Sun Capital changed significantly. In the fall of 2008, Founding Partners received a flood of redemption requests for Stable-Value, which totaled approximately $382 million (or 70% of the fund assets) by year end. (Ex. 5.EE). Founding Partners faced severe liquidity problems and could not satisfy the redemptions. As a result, in October 2008, Founding Partners instructed Sun Capital not to take on any new factoring clients, and later added it would not allow Sun Capital to borrow further to support existing factoring clients. (Ex. 19 at p.3; Ex. 5.C).

In November 2008, Sun Capital told Gunlicks it was exiting the factoring business. Sun Capital indicated it planned to solely focus on the operation of the hospitals. (Ex. 19 at 3; Ex. 14

(Koslow Tr. 131-33, 143-45, 153)). Sun Capital's principals and Gunlicks discussed a future plan to raise capital to repay all Sun Capital borrowings from Stable-Value. At that time, Sun Capital's principals told Gunlicks they needed $8-12 million in working capital from Stable-Value to keep the hospitals operating and protect $120 million in DSH receivables. (Ex. 19; Ex. 14 (Koslow Tr. 131-33)). Subsequently, Founding Partners provided Sun Capital with approximately $24 million in additional investor funds and reinvested monthly interest payments from Sun Capital. (Ex. 5.F).

Founding Partners and Sun Capital's recapitalization plan requires raising new capital by offering Stable-Value investors the opportunity to invest additional capital and to convert their Stable-Value investments into equity and mezzanine debt in a new proposed healthcare provider program. (Ex. 20 p.4). Since as early as January 2009, Gunlicks has been meeting with Stable-Value investors to push this recapitalization plan. (Id.). In a March 2009 conference call with investors, Gunlicks represented that Sun Capital will not make any additional interest payments to Stable-Value until it completes its recapitalization plan and that as part of the plan Stable-Value and Sun Capital will execute mutual releases for "all claims, including claims of fraud" between the parties. (Ex. 14 (Koslow Tr. 154-55); Ex. 17 at p.12).

G. The Fraud

1. Misrepresentations Regarding The Loans To Sun Capital

As set forth above, Gunlicks and Founding Partners represented to investors orally and in offering materials, monthly reports, and audited financials that the Stable-Value investment opportunity was an investment in loans to Sun Capital that were fully secured by short-term, liquid receivables. (Ex. 12 (Merrick Aff. ¶ 3.d and exhibit 3 at p.2); Ex. 5.U at p.8, n.2; Ex. 5.T at p.2 of the monthly report; Ex. 12 (Murphy Aff. ¶ 4) (Seay Aff. at p. 3) (Merrick Aff. ¶ 8); Ex.

13 (Wisdom Tr. 37:21-38:25); Ex. 5.FF). They also represented Sun Capital would collect these receivables in less than 150 days or have them replaced with new receivables or covered by other funding. (Ex. 5.U at p.8; Ex. 12 (Merrick Aff. ¶ 3.d)). 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. (Ex. 5.A; Ex. 5B; Ex. 5.U). Furthermore, Gunlicks did not tell Stable-Value and Stable-Value II investors that 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. (Ex. 12 (Merrick Aff. p.8; Seay Aff. p.3)).

Founding Partners's 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. (Ex. 5.T). For instance, as of February 2009, the collateral portfolio was 55% comprised of these riskier, less liquid receivables, yet the monthly performance reports noted only that the loans were secured by healthcare receivables. (Ex. 5.T; Ex. 15).

Founding Partners and Gunlicks also misled investors with monthly performance reports showing eight years of stable monthly returns of approximately 1.08% based on loans to Sun Capital that health care receivables purportedly secured. (Ex. 5.T). They did not disclose that since no later than January 2008, the total amount of receivables (traditional 150-day receivables, workers-compensation receivables, and DSH receivables) has been less than the balance of the loans to Sun Capital. (Ex. 5.FF; Ex. 13 (Wisdom Tr. 37-38). For example, as of February 28, 2009, approximately $63 million of the collateral was comprised of loans by Sun Capital to

related parties and a $450,000 loan to Sun Capital's CFO for the purchase of a house. (Ex. 15; Ex. 14 (Koslow Tr. 183-93)).

Founding Partners did not disclose that since at least early November 2008, Sun Capital has been borrowing from Stable-Value to make working capital advances to factoring clients to protect the DSH receivables securing a portion of the Stable-Value loan. (Ex. 19).

Moreover, despite the representations to investors regarding the receivables not aging beyond 150 days, Gunlicks effectively allowed a substantial increase in the aging of the collateral. Sun Capital's collateral report for December 31, 2008, indicates that approximately $136 million of Sun Capital's receivables, including workers-compensation and DSH, have been outstanding for more than 150 days. (Ex. 5.V). Furthermore, Sun Capital had approximately $40 million in additional workers-compensation and DSH receivables less than 120 days old, most of which by their very nature Sun Capital is not likely to collect within 150 days. (Id.). The age of these receivables directly contradicted Founding Partners and Gunlicks's representations to investors regarding the collateral securing the loan and the disclosures found in the most recent audited financial statements.

2. Misrepresentation Of The Investment Opportunity

Despite knowing since at least early November 2008 that Sun Capital was exiting the factoring business, Gunlicks continued to solicit unwitting investors into Stable-Value through at least January 2009 based on the premise that Sun Capital was still using funds to factor receivables. (Ex. 19; Ex. 5AA). In January, Gunlicks raised $5 million for Stable-Value from the Archdiocese of New Orleans without disclosing that Sun Capital was exiting the factoring business. (Ex. 5.I; Ex. 13 (Wisdom Tr. 70-73)). Gunlicks instead represented to the Archdiocese that Sun Capital was purchasing healthcare receivables. (Ex. 21 p.1).

Gunlicks also did not inform the Archdiocese prior to its investment that Stable-Value was facing significant redemption requests. Gunlicks merely represented that Stable-Value had two unsatisfied redemption requests totaling $11 million as a result of the decline in the markets when, in fact, Stable-Value was facing $358 million in redemption requests. (Ex. 13 (Wisdom Tr. 49-53); Ex. 21; Ex. 22 (Eckholdt Tr. 59-60). Furthermore, Gunlicks and Founding Partners failed to disclose to the Archdiocese that they had suspended redemptions in Stable-Value altogether. (Ex. 23 (Arnold Tr. 56-57)).

3. Misrepresentation Of Having Audited Financials

Founding Partners and Gunlicks falsely represented to investors that 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. (Ex. 5.A; Ex. 5B at p.58). Gunlicks made the same promise in letters he sent to new investors throughout 2008. (Ex. 5.X). Stable-Value and Stable-Value II did not have audited financial statements for 2007. In fact, the Defendants fired their auditors in February 2009 after they were prevented from expanding their audit of the healthcare receivables because Sun Capital would not provide the necessary documentation, and they have been replaced by new auditors who are in the process of doing the audits for 2007 and 2008. (Ex. 24). Founding Partners also sent all investors monthly performance reports throughout 2008 indicating audited financials were available upon request.

4. Failure To Disclose Prior Commission Action

Founding Partners and Gunlicks 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"). (Ex. 3). 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. (Ex. 5.A; Ex. 5.B; Ex. 28 ¶ 10 ; Ex. 27 ¶ 16).

In addition, the Commission's Order required Founding Partners to provide a copy of the Order to all of its current and prospective clients as well as any investors and any potential investors for one year, which it did not do. (Ex. 3).

5. Misuse Of Investor Funds

Founding Partners and Gunlicks improperly used fund assets to pay personnel expenses. In 2008, Founding Partners' CFO received approximately $200,000 in payments from Stable-Value, Stable-Value II, and Hybrid-Value Fund. (Ex. 25). These payments were contrary to the funds' written representations that the general partners would bear the general administrative and personnel costs of the funds. (Ex. 5.E at p.8, § 2.07(c); Ex. 5.G at p.12 § 4.1.1; Ex. 5.CC at p. 8 § 2.07(c)). For example, the Stable-Value limited partnership agreement states, "The Partnership shall not pay directly or reimburse the General Partner for its operation and overhead expenses, including employee salaries, . . . administrative services and secretarial, clerical and other personnel." (Ex. 5.E at p.8, § 2.07(c)). The Stable-Value offering materials stated that Founding Partners "will bear the administrative expenses of the Partnership" and provide "administrative services, and secretarial, clerical and other personnel." (Ex. 5.A (1996 PPM) at pp.25-26).

V. LEGAL ARGUMENT

A. The Defendants Violated the Anti-Fraud Provisions of the Federal Securities Laws

Although the Commission is not seeking a temporary restraining order in this action, the Commission must nevertheless make a prima facie showing that the Defendants violated the securities laws in order to obtain an asset freeze. The Complaint alleges the Defendants violated Section 17(a) of the Securities Act, Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, and Sections 206(1), (2), and (4) of the Investment Advisers Act of 1940 ("Advisers Act") and Rule 206(4)-8 promulgated thereunder.

Section 17(a) of the Securities Act, which proscribes fraudulent conduct in the offer or sale of securities, and Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, which proscribe fraudulent conduct in connection with the purchase or sale of securities, prohibit essentially the same type of sales practices. United States v. Naftalin, 441 U.S. 768 (1979). To establish a violation, the Commission must show: (1) a misrepresentation or omission (2) that is material (3) in the offer of or in connection with the purchase or sale of a security (4) made with scienter (5) in interstate commerce. SEC v. Chemical Trust, No. 00-8015-CIV-Ryskamp, 2000 WL 33231600 at *9 (S.D. Fla. Dec. 19, 2000); SEC v. Hasho, 784 F. Supp. 1059, 1106 (S.D.N.Y. 1992).

1. Founding Partners and Gunlicks Made False Statements and Omissions

As demonstrated above, Founding Partners and Gunlicks misrepresented to investors the safety of the investment and omitted to disclose the true nature of the collateral to investors in fund documents, offering materials, and notes to the audited financial statements for Stable-Value I and Stable-Value II. Gunlicks and Founding Partners consented to Sun Capital's

purchase of the riskier workers-compensation and DSH receivables without informing investors. Gunlicks and Founding Partners knew or were severely reckless in not knowing that workers-compensation and DSH receivables carried a higher risk of nonpayment than healthcare receivables with shorter collectability periods. By not disclosing to investors that a substantial portion of the Stable-Value portfolio was invested in these riskier receivables, and instead telling investors the receivables were investment grade and that their collateralization followed Founding Partners's strict criteria, Gunlicks and Founding Partners misrepresented the character and type of collateral.

Throughout 2008, Gunlicks and Founding Partners also misrepresented the availability of 2007 audited financial statements for the funds, when in fact they did not exist. Gunlicks and Founding Partners also failed to disclose to some investors a prior Commission action against them. Finally, they also did not disclose to investors that contrary to the terms of the Stable-Value and Stable-Value II partnership agreements, they were using Stable-Value's assets to pay Founding Partners's CFO.

2. Founding Partners and Gunlicks's False Statements and Omissions were Material

The general standard for assessing materiality enunciated in TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976), has been applied in the Eleventh Circuit to require a finding that "a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action." SEC v. Carriba Air, Inc., 681 F.2d 1318, 1323 (11th Cir. 1982) (quoting TSC Indus., 426 U.S. at 449). Under that standard, Founding Partners and Gunlicks's false statements and omissions were material.

A reasonable investor would certainly think it was important that Sun Capital was purchasing longer-term, less-liquid, riskier receivables than Gunlicks and Founding Partners disclosed. A reasonable investor would also consider it significant that Stable-Value was making loans to Sun Capital for working capital infusions to troubled hospitals, and that Stable-Value's portfolio was therefore no longer 100% secured by short-term receivables.

In addition, a reasonable investor would consider it important that the funds did not have audited financials for 2007, and that Founding Partners and Gunlicks had been the subject of a prior Commission action. See, e.g., SEC v. Scott, 565 F. Supp. 1513, 1526 (S.D.N.Y.1983) (holding defendant violated Section 10(b) and Section 17(a) for, among other things, failing to disclose prior fraud convictions); SEC v. Freeman, No. 77C2319, 1978 WL 1068, at *4 (N.D. Ill. March 3, 1978) ("[I]t is difficult to conceive of information which would have a greater influence on an investor's decision than a prior history of fraud or other securities-related misconduct on the part of the dominant figure in the enterprise.").

3. Founding Partners and Gunlicks Acted With Scienter

Section 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 require a finding of scienter in order to establish a violation. Aaron v. SEC, 446 U.S. 680 (1980). The Supreme Court has defined scienter as "intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 192 (1976). The Supreme Court has not decided whether recklessness alone satisfies the scienter requirement. Aaron, 446 U.S. at 686 n.5. Lower courts, however, including the Eleventh Circuit, have concluded that scienter may be established by a showing of knowing misconduct or extreme departure from the standards of ordinary care. SEC v. Carriba Air, 681 F.2d at 1324.

A finding of scienter is not required to establish a violation of Section 17(a)(2) or (3) of the Securities Act. Aaron, 446 U.S. at 696-97. Sections 17(a)(2) and (3) prohibit, in connection with the offer or sale of securities, fraudulent or deceitful business practices and obtaining money by untrue statements or omissions of material facts. Violations of these sections may be established by showing negligence. SEC v. Hughes Capital Corp., 124 F.3d 449, 453-54 (3d Cir. 1997).

Here, the evidence establishes that Gunlicks and Founding Partners acted with the requisite scienter. Acting on behalf of Founding Partners, Gunlicks reviewed and approved all offering materials for the funds, and made oral representations to investors about the nature of Sun Capital's investments that were materially false and misleading. Gunlicks was consulted and approved Sun Capital's decision to begin investing in less-liquid, longer-term, riskier receivables from troubled hospitals. Gunlicks also approved Sun Capital's decision to make working capital contributions to these troubled hospitals in order to keep them operating.

Gunlicks and Founding Partners misrepresented the availability of 2007 audited financial statements for the funds, when they knew the funds did not have audited financial statements for 2007. Moreover, Gunlicks and Founding Partners knew or were severely reckless in not knowing that they failed to disclose to some investors a prior Commission action against them. Finally, as parties to the Stable-Value and Stable-Value II partnership agreements, Gunlicks and Founding Partners knew or were severely reckless in not knowing that using Stable-Value's assets to pay Founding Partners's CFO was a misuse of investor funds.

4. The Conduct Was In Connection With the Purchase and Sale of Securities

The Commission must show that the fraudulent conduct of Founding Partners and Gunlicks occurred in connection with the purchase or sale of securities. The Supreme Court has

held that the federal courts should broadly interpret this "in connection with" requirement of the securities laws to effectuate their remedial purpose. SEC v. Zandford, 535 U.S. 813, 819 (2002); SEC v. Rana Research, 8 F.3d 1358, 1362 (9th Cir. 1993) (press releases were in connection with stock trading); In re Ames Dep't Stores Sec. Litig., 991 F.2d 953, 966 (annual reports and Commission filings met "in connection with" test).

The fraudulent conduct by Gunlicks and Founding Partners was in connection with the purchase and sale of securities because it was done for the express purpose of inducing investors to invest in one of the Founding Partners funds. The Defendants made the misrepresentations and omissions in written materials that were directly related to the nature and operation of the funds and orally to investors who were considering whether to make an investment in the funds.

The interstate commerce element is also established here. As described above, Gunlicks and Founding Partners solicited investors throughout the United States, including most recently the Archdiocese of New Orleans.

B. Founding Partners and Gunlicks Violated the Antifraud Provisions of the Advisers Act

Founding Partners and Gunlicks also violated Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder. Section 202(a)(11) of the Advisers Act defines an investment adviser "as any person who, for compensation, engages in the business of advising others ... as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." This definition includes a general partner of a hedge fund or investment manager of a limited partnership, such as Founding Partners, who manages a fund's investments for compensation. Abrahamson v. Fleschner, 568 F.2d 862, 869-70 (2d Cir. 1977), cert. denied, 436 U.S. 913 (1978).

The Supreme Court has held that the Advisers Act establishes a statutory fiduciary duty for investment advisers to act for the benefit of their clients. Transamerica Mortgage Adviser, Inc. v. Lewis, 444 U.S. 11, 17 (1979). An adviser's fiduciary duties include "an affirmative duty of utmost good faith, and full and fair disclosure of all material facts." SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191-94 (1963); Decker v. SEC, 631 F.2d 1380, 1384 (10th Cir. 1980).

The standard for establishing violations of the fraud provisions of the Advisers Act is similar to the standard already outlined above with respect to Sections 17(a) and 10(b). Section 206(1) of the Advisers Act prohibits any investment adviser from, directly or indirectly, employing any device, scheme or artifice to defraud any client or prospective client. Section 206(2) of the Advisers Act prohibits any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client. Scienter is required for a violation of Section 206(1), but not for Section 206(2). Steadman v. SEC, 603 F.2d 1126, 1134 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981); Capital Gains, 375 U.S. at 184, 191-92.

Section 206(4) of the Advisers Act prohibits an investment adviser from, directly or indirectly, engaging in any act, practice, or course of business that is fraudulent, deceptive, or manipulative. Rule 206(4)-8, which became effective on September 10, 2007, defines such prohibited conduct. Advisers to "pooled investment vehicles" are barred from making false or misleading statements to investors or prospective investors in those pools or otherwise defrauding investors or prospective investors. Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles (SEC Rel. No. IA-2628, Aug. 9, 2007).

Pooled investment vehicles include hedge funds, private equity funds, venture capital funds, and other types of offered pools that invest in securities. Id. This rule is modeled on Sections 206(1) and (2) of the Advisers Act and prevents advisers to investment pools from making a misstatement or omission, which renders statements that were made misleading, of a material fact to current or prospective investors. Scienter is not required – conduct that is negligently, recklessly, or deliberately deceptive is sufficient. Id. Founding Partners is the adviser and the general partner or investment manager for each of the funds, and made investment decisions for the funds in exchange for compensation.

As discussed above, Founding Partners and Gunlicks made misrepresentations and omissions concerning the safety of the investment, the existence of audited financials, the prior Commission Order, and the state of Sun Capital's factoring operations. Founding Partners also misused investor funds. These misstatements and omissions were material because a reasonable investor would have considered them significant.

With respect to scienter, the evidence establishes that Gunlicks was involved in every aspect of Founding Partners's fraud and breaches of fiduciary duty. Gunlicks carried out Founding Partners's responsibilities as investment adviser and made the investment decisions for all of the funds. Moreover, Gunlicks substantially assisted Founding Partners's fraud by raising money from investors by misrepresenting the security and character of the loans to Sun Capital, lulling investors about the safety of their investment with monthly performance reports stating healthcare receivables secured the loans, and improperly diverting fund assets to pay at least one of Founding Partners's employees. Gunlicks also failed to disclose the Commission's prior Order against him. Further, as Founding Partners's sole shareholder, Gunlicks benefitted entirely from Founding Partners's management fees earned by defrauding investors.

Accordingly, Founding Partners and Gunlicks violated Sections 206(1), (2), and (4) of the Advisers Act and Rule 206(4)-8 thereunder.

C. An Order Freezing Assets Is Warranted To Preserve Investor Funds

In its Complaint, the Commission seeks injunctive relief, disgorgement of the Defendants' and the Relief Defendants' ill-gotten gains, prejudgment interest, and civil penalties. The ancillary remedy of an asset freeze is appropriate here to prevent the Defendants and Founding Partners Relief Defendants from dissipating the proceeds of the fraudulent scheme and to ensure sufficient funds are ultimately available to satisfy any final judgment the Court might enter ordering the payment of disgorgement, prejudgment interest or civil penalties.

1. The Court Has The Power To Enter An Asset Freeze

This Court has the authority to enter an *ex parte* order temporarily freezing the assets of the Defendants and the Founding Partners Relief Defendants under Federal Rule of Civil Procedure 65, Sections 20(b) and 22(a) of the Securities Act, Section 21(d) of the Exchange Act, and its broad equitable powers. SEC v. Rogatinsky, Case No. 03-60648-Civ-Martinez, Temporary Restraining Order Freezing Assets (S.D. Fla. April 4, 2003); SEC v. American Financial Group of Aventura, Case No. 02-22198-Civ-Graham, Order Granting *ex parte* Motion for Temporary Asset Freeze (S.D. Fla. July 25, 2002); SEC v. Johnson, Case No. 01-7874-Civ-Hurley, Order Granting *ex parte* Motion for Asset Freeze (S.D. Fla. Dec. 12, 2001). (Copies of Orders attached as Ex. 29).

In each of those cases, the judges found the Commission had made a sufficient showing that each of the defendants had violated the securities laws and would dissipate assets if not restrained. In each of those cases, the judges then entered emergency *ex parte* orders freezing

defendants' and relief defendants' assets without entering a temporary restraining order directing the defendants not to violate the securities laws.

Rule 65 is the mechanism by which courts may grant emergency relief granting asset freezes. Trafalgar Power Inc. v. Aetna Life Ins. Co., 131 F.Supp.2d 341, 350 (N.D.N.Y. 2001) (court is empowered to grant preliminary relief freezing assets in case seeking equitable relief under Rule 65). Rule 65, therefore, allows the Court to enter an order granting an asset freeze against the Defendants and Relief Defendants.

2. The Securities Laws Also Confer Jurisdiction on the Court

Section 21(d)(1) of the Exchange Act allows courts to enter "a temporary restraining order or a permanent injunction" against "any person . . . engaged or . . . about to engage in acts or practices constituting a violation" of the securities laws. 15 U.S.C. § 78u(d)(1) (emphasis added). The Sarbanes-Oxley Act of 2002 amended Section 21(d) of the Exchange Act to also allow any federal court to grant "any equitable relief that may be appropriate or necessary." 15 U.S.C. § 78u(d). On their face, these provisions give district courts the ability to enter asset freeze orders as equitable relief.

Moreover, several courts have held even before Congress added the expansive language of the Sarbanes-Oxley Act to Section 21(d) that this statute conferred authority on district courts to use their equitable powers to enter asset freezes.[2] SEC v. Asset Recovery and Management Trust, S.A., 340 F.Supp.2d 1305, 1308 (M.D. Ala. 2004) ("When there is a showing of a securities law violation, the freezing of assets may be appropriate to ensure that the assets will be available to compensate public investors") (citations omitted); SEC v. Current Fin. Servs., 62 F.Supp.2d 66, 67-68 (D.D.C. 1999) ("District courts have the equitable power to use ancillary

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[2] Sections 20(b) and 22(a) of the Securities Act also confer equitable powers to this Court to enter an asset freeze.

remedies to preserve assets, as conferred by Section 20(b) and 22(a) of the Securities Act of 1933 and by Section 21(d) of the Securities Exchange Act of 1934."); SEC v. United Communications, Ltd., 899 F. Supp. 9, 11-12 (D.D.C. 1995) ("District courts have power to grant any proper form of ancillary relief necessary to effectuate the purpose of the securities statutes . . . and by now it is well established that the ditstrict courts have the power to use these ancillary remedies to preserve assets.").

2. The Court's Equitable Powers Empower it to Fashion Ancillary Relief

Pursuant to their general equity powers, federal courts may order ancillary relief to effectuate the purposes of the federal securities laws. SEC v. Unifund SAL, 910 F.2d 1028, 1041 (2nd Cir. 1990); Levi Strauss & Co. v. Sunrise Int'l Trading Co., 51 F.3d 982, 987 (11th Cir. 1995) (a request for equitable relief invokes the district court's inherent equitable powers to order preliminary relief, including an asset freeze); SEC v. Cavanagh, 155 F.3d 129, 136 (2nd Cir. 1998) (federal courts may order equitable relief against a person who is not accused of wrongdoing in a securities enforcement action); SEC v. R.J. Allen & Assoc., 386 F. Supp. 866, 881 (S.D. Fla. 1974) (once the equity jurisdiction of the court has been invoked by a securities law violation, the Court possesses the necessary power to fashion an appropriate remedy);

When there are concerns that defendants might dissipate assets, or transfer them beyond the jurisdiction of the Court, the Court need only find some basis for inferring a violation of the federal securities laws to impose an asset freeze. Unifund SAL, 910 F.2d at 1041-42. See also SEC v. Margolin, 1992 U.S. Dist. LEXIS 14872 at *19-*20 (S.D.N.Y. Sept. 30, 1992) (court issued freeze order based on "sufficient showing" that an asset freeze was necessary to prevent defendants from "secreting or dissipating" assets); SEC v. Householder, Case No. 02 C 4128, 2002 WL 1466812 (N.D. Ill. July 8, 2002) (federal courts have the power to freeze a defendant's assets to ensure

that the defendants will not secrete or dissipate assets); SEC v. Grossman, 1987 U.S. Dist. LEXIS 1666, at *35-*36 (S.D.N.Y. Feb. 17, 1987) ("[a]n order freezing assets may be imposed even in the absence of a preliminary injunction").

The evidence the Commission has presented in support of an asset freeze provides more than a sufficient basis for inferring the Defendants violated the federal securities laws by, among other things, fraudulently making numerous misstatements and omissions in connection with their description of the Sun Capital loan program.

An asset freeze is appropriate to maintain the status quo and to prevent dissipating investors' funds. Having received hundreds of millions of dollars in ill-gotten gains through their fraudulent misrepresentations and omissions, the Defendants are facing substantial liability for disgorgement and civil penalties. Courts have frequently recognized that an order requiring disgorgement will be rendered meaningless unless they impose an asset freeze prior to the entry of final judgment. United States v. Cannistraro, 694 F. Supp. 62, 71 (D.N.J. 1988), *aff'd in part and vacated in part*, 871 F.2d 1210 (3rd Cir. 1989); R.J. Allen & Assocs., Inc., 386 F. Supp. at 881 ("[a]s to the issue of an asset freeze, the court certainly has the ability to ensure that the defendants' assets are not secreted or dissipated before entry of final judgment concluding this action").

An asset freeze "facilitate[s] enforcement of any disgorgement remedy that might be ordered" and may be granted "even in circumstances where the elements required to support a traditional Commission injunction have not been established." Unifund SAL, 910 F.2d at 1041. In addition, courts in Commission enforcement cases have also issued such orders to preserve assets for payment of monetary penalties. See Id., citing United States v. First National City Bank, 379 U.S. 378, 385 (1965), and for payment of prejudgment interest. SEC v. Bremont, 954 F. Supp. 726, 733 (S.D.N.Y. 1997).

The Founding Partners Relief Defendants' assets should also be frozen in order to effectuate relief. SEC v. Hickey, 322 F.3d 1123 (9th Cir. 2003) (court's broad power to reach assets of third parties in order to effect order in securities fraud actions authorized the freeze of non-parties' assets to protect and give life to disgorgement and contempt orders).

Typically, the Commission "must show that the nominal defendant has received ill-gotten funds *and* that he does not have a legitimate claim to those funds." SEC v. Colello, 139 F.3d 674, 677 & n.3 (9th Cir. 1998) (italics in original) (footnotes omitted); SEC v. George, 426 F.3d 786, 798 (6th Cir. 2005); SEC v. Cherif, 933 F.2d 403, 414, n.11 (7th Cir. 1991). Third parties do not have a legitimate claim to the funds where they have no ownership claim to them. Cherif, 933 F.2d at 414 n.11.

An asset freeze over Stable-Value, Stable-Value II, Global Fund, and Hybrid-Value Fund is appropriate because these funds hold the investments of the defrauded investors. The Commission has identified bank accounts held by Gunlicks, Founding Partners, Stable-Value, Stable-Value II, Hybrid-Value Fund, and Global Fund that have contained and may still contain investor funds. (Exh. 26). An asset freeze order would prevent further dissipation of investor funds and preserve funds to satisfy an order requiring disgorgement, prejudgment interest, and civil penalties when a final judgment is rendered.

D. An Order Prohibiting Destruction or Alteration of Records, Requiring a Sworn Accounting, and Expedited Discovery

The Commission seeks an immediate order prohibiting the Defendants and Founding Partners Relief Defendants from destroying or altering records. This order will prevent the disappearance or destruction of documents before investors' claims can be adjudicated and help assure that whatever equitable relief might ultimately be appropriate is available. R.J. Allen, 386 F. Supp. at 866.

The Commission also seeks an Order allowing the parties to conduct discovery on an expedited basis and requiring the Defendants and Founding Partners Relief Defendants to file with this Court, within ten days, a sworn written accounting. This expedited discovery pending the Commission's request for a continuing Asset Freeze Order is needed, for among other reasons, to allow the Commission to trace assets of the Defendants and Founding Partners Relief Defendants. This will allow the Commission to take appropriate steps to insure that all of the relevant assets are preserved and protected for Stable-Value's investors.

E. Request For A Continuing Asset Freeze Order and a Hearing

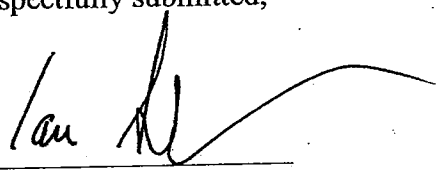
Finally, the Commission requests that the Court set a show cause hearing as set forth in our proposed order within 10 business days and order the Defendants and Founding Partners Relief Defendants to show cause, if any, why the Court should not issue a continuing Asset Freeze Order over them.

VI. CONCLUSION

For the foregoing reasons, the Court should grant the Commission's motion for an order: (1) freezing the assets of the Defendants and the Founding Partners Relief Defendants to preserve funds and maintain the status quo; (2) preventing the Defendants and the Founding Partners Relief Defendants from destroying or altering any documents; (3) obligating the Defendants and the Founding Partners Relief Defendants to respond to discovery on an

expedited basis; (4) requiring the Defendants and the Founding Partners Relief Defendants to provide a sworn written accounting of all assets within ten days; and (5) setting a show cause hearing. For the Court's convenience, a proposed order is attached.

Respectfully submitted,

April 20, 2009 By: 

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