UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

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

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

FOUNDING PARTNERS CAPITAL MANGEMENT, 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.
_____/

REPLY IN SUPPORT OF WILLIAM L. GUNLICKS' RENEWED EMERGENCY MOTION TO MODIFY THE ASSET FREEZE AND MEMORANDUM OF LAW

Defendant William L. Gunlicks, through undersigned counsel, hereby replies to Plaintiff's Response to Mr. Gunlick's renewed emergency motion to modify this Court's Order freezing all of his personal assets. In support of this Motion, Mr. Gunlicks submits the following:

I. Introduction

The Securities and Exchange Commission's ("SEC") Response to Defendant William L. Gunlicks' Renewed Emergency Motion to Modify the Asset Freeze ("Response") is fraught with misstatements and misrepresentations. [D.E. 86]. Namely,

the SEC claims money is lost, while at the same time identifying the location of the money – in the hands of Sun Capital Healthcare, Inc. – and secured by security agreements for the benefit of the Founding Partners entities, as noted in the offering documents. The SEC further fails to distinguish between a loss and disgorgement.

The SEC also points the finger at Mr. Gunlicks for, among other things, failing to provide sufficient support or even official documentation for the value of his assets. A claim the SEC makes even though it was under their very direction that Mr. Gunlicks was evicted from the Founding Partners Capital Management Co.'s ("FP") offices where the information is contained. Now, only the SEC and the receiver have access to FP offices. Even if Mr. Gunlicks was given permission to enter FP offices to collect his personal belongings, he cannot because he has absolutely no funds to travel to those offices. Mr. Gunlicks' lack of funds is also under the direction of the SEC. It seems inherently unfair for the SEC to raise that Mr. Gunlicks should not be entitled to a modification of an asset freeze for his failure to provide documentation when the SEC is holding the documentation hostage. Mr. Gunlicks, is once again, forced to battle a powerful government agency, the SEC, with both hands tied behind his back and a blindfold over his eyes.

II. $550 million loaned under legitimate credit security agreements is not a loss.

Black's Law Dictionary defines "loss" as "the act of losing or the thing lost." Webster's Dictionary defines "loss" as "a person, thing or quantity that is lost." The SEC continues to misstate in its Response that Mr. Gunlicks is responsible for a $550 million

loss. At the same time, the SEC points to Sun Capital Healthcare, Inc. ("Sun Capital") as having received the $550 million. [D.E. 14] and [D.E. 77].

Specifically, the Complaint alleges that there was a business relationship between Sun Capital and FP spanning several years. This Court has stated that "the evidence thus far supports, that there was a business relationship, spanning a number of years, between the Founding Partners entities and their principal and Sun Capital, pursuant to written agreements and/or oral agreements or modifications." [D.E. 89]. This Court further found that "the evidence establishes that Sun Capital has a legitimate ownership interest in the loan proceeds [$550 million], and therefore cannot be a proper relief defendant." [D.E. 70]. Accordingly, it is clear to everyone, but the SEC, that the $550 million is not "a thing or quantity that is lost." The $550 million is very much found. It is in the hands of Sun Capital pursuant to legitimate written agreements and/or oral agreements. Not only is the $550 million in the hands of Sun Capital, it is in the hands of Sun Capital pursuant to a legitimate secured loan transaction as contemplated for in FP's offering documents.

III. Disgorgement is the amount defendant profited from wrongdoing, nothing more.

The SEC correctly cites that a court may impose an interim asset freeze on all of a defendant's assets up to the amount of the defendant's ill-gotten gains to preserve funds for equitable remedies such as disgorgement. [D.E. 86] (citing *CFTC v. Levy*, 541 F.3d 1102, 1114 (11th Cir. 2008)). The SEC, however, fails to cite to the second part of the disgorgement standard, which states that "the power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any

further sum would constitute a penalty assessment." *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005) (citing *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978)); *see also SEC v. Kirkland*, 521 F. Supp. 2d 1281 (M.D. Fla. 2007) ("remedy of disgorgement is designed ... to deprive wrongdoer of his unjust enrichment..."); *SEC v. Dibella*, 409 F. Supp. 2d 122 (D.Conn. 2006) ("the primary purpose of disgorgement is not to compensate investors. Unlike damages, it is a method of forcing defendant to give up the amount by which he was unjustly enriched.") (internal citations omitted); *SEC v. K.W. Brown and Company*, 555 F. Supp. 2d 1275 (S.D. Fla. 2007) (concluding that defendants should only be ordered to disgorge the profits they personally obtained from fraud); *SEC v. Moran*, 944 F. Supp. 286, 295 (S.D.N.Y. 1996) (ordering disgorgement in the amount, which represents profits made by the defendant at the expense of his clients);

In *ETS Payphones, Inc.*, for instance, the SEC continually cited to $300 million as the total amount of ill-gotten gains received by the defendant. *Id.* The appellate court found that $300 million was not the proper disgorgement figure. *Id.* The court found that the defendant personally received $3.04 million in compensation and that one of the defendant's companies had received approximately $18.4 million in compensation and therefore, the disgorgement figure was approximately $21 million. *Id.*

Here, the asset freeze on Mr. Gunlicks' assets should be limited to the amount he personally profited from the alleged fraud. The Court has found the amount to be $5,912,500. [D.E. 56]. The Court arrived at this figure by multiplying FP's management fee, 1.75%, by the $550 million loaned to Sun Capital. [D.E. 56]. We believe that the figure is less than $5,912,500 because the $550 million collected and loaned to Sun

Capital was not wholly obtained by the alleged misrepresentations. Namely, by the SEC's own assertions less than half of the money loaned to Sun Capital was used for riskier investments. [D.E. 1]. The remaining funds were properly loaned for short term receivables.

The SEC, on the other hand, places the management fee figure at $27 million. It is unclear how the SEC arrives at this figure. The SEC claims that this is the amount that Mr. Gunlicks and FP received in fees and royalty payments. The SEC does not subtract from this figure non-Sun Capital investments and investments in Sun Capital, which were used for short term receivables. Further, this figure does not subtract operating fees and expenses necessary to run the FP offices. *See SEC v. Thomas James Associates, Inc.*, 738 F. Supp. 88, 95 (W.D.N.Y. 1990) ("when exercising its equity jurisdiction to order disgorgement of unjust enrichment, a court may consider as an offset the expenses incurred by defendant in garnering such unjust enrichment").

As a result of the lack of support provided by the SEC to substantiate the $27 million figure, we request that the Court unfreeze assets belonging to Mr. Gunlicks that exceed the $5,912,500 figure arrived at by the Court.

IV. The SEC's Attack on Mr. Gunlicks' Estimate of Personal Assets

The SEC attacks Mr. Gunlicks' reasonable estimate of personal assets. As mentioned numerous times in Mr. Gunlicks' declaration, he was evicted from FP offices and forced to leave without any of his personal documents, files, computer, etc. Documentation regarding his investments in FP were maintained at the FP offices, obviously, he does not have access to this information and can only provide the Court

with a conservative estimate from his memory of the values of his investments. Further, all of Mr. Gunlicks' personal assets are frozen. He does not have the funds to pay an appraiser to value his real estate property. If the SEC would like to pay for appraisals, Mr. Gunlicks is happy to oblige. But until then, Mr. Gunlicks can only rely on the free information provided by county tax information on county websites.

V. At Minimum, the Asset Freeze Should Be Modified to Permit Payment of Expenses to Preserve Assets, Living Expenses, and Attorney's Fees.

The Fifth Circuit has recognized that restraints on assets should be tailored to allow defendants to pay ordinary living expenses and attorneys' fees. *See United States v. Their*, 801 F.2d 1463, 1474 (5th Cir. 1987), *amended at* 809 F.2d 249 (noting that an asset freeze should allow defendants access to funds sufficient to provide for household living expenses and legal fees). Additionally, courts generally grant requests for living expenses and attorneys' fees when the defendants have represented that they have no other sources of income. *SEC v. Dowdell,* 175 F. Supp. 2d 850 (W.D. Va. 2001) (finding defendants entitled to release of frozen assets to provide for living expenses and attorneys' fees); *SEC v. Duclaud Gonzalez De Castilla*, 170 F. Supp. 2d 427 (S.D.N.Y. 2001) (modifying order freezing assets to permit defendants to pay legal fees); *SEC v. Infinity Group Co.*, 212 F.3d 180 (3d Cir. 2000) (mentioning that district court had modified order to provide defendants money to pay living expenses and attorneys' fees); *Federal Savings & Loan Ins. Corp. v. Dixon*, 835 F.2d 554 (5th Cir. 1987) (concluding that "some kind of allowance must be made to permit each defendant to pay reasonable attorneys' fees").

The Asset Freeze Order has made it impossible for Mr. Gunlicks to preserve assets the SEC believes it is entitled to. Specifically, Mr. Gunlicks has five pieces of real estate that may be foreclosed on if the asset freeze continues without modification. The SEC states that Mr. Gunlicks' request for preservation of these assets is unreasonable. At the same time, the SEC wants the Court to freeze all of Mr. Gunlicks' assets to protect investors. If the SEC truly believes Mr. Gunlicks is liable for a $550 million loss, it is unclear how the SEC is going to collect even a fraction of this money when this litigation is over to return to the investors. Mr. Gunlicks mortgage payments have gone unpaid since April 20, 2009. By the time this litigation is over, most, if not, all of Mr. Gunlicks real estate properties will be foreclosed on leaving no money for the investors the SEC claims it is trying to protect.

The SEC misrepresents to this Court that Mr. Gunlicks has failed to show that he has no other sources of income as required by case law. Mr. Gunlicks and his wife provided sworn declarations affirming that neither Mr. Gunlicks nor his wife had any other source of income. [D.E. 72]. These declarations were attached to Mr. Gunlicks Renewed Motion to Modify the Asset Freeze Order. [D.E. 72].

Additionally, Mr. Gunlicks provided all the documentary support available to him at the time of filing the Renewed Motion to Modify the Asset Freeze Order. Since filing the Motion, Mr. Gunlicks has located additional documents to support his living expenses request, which are attached hereto as Exhibit "A".

Finally, in its Response, the SEC blatantly continues to misrepresent the facts. Specifically, the SEC states that Mr. Gunlicks failed to file a sworn statement with the

Court, which is required in order to request a modification of an asset freeze order. Mr. Gunlicks filed a sworn declaration, which he signed under penalty of perjury, with his Renewed Motion to Modify the Asset Freeze Order. [D.E. 72 at Exhibit "B"]. Any arguments deriving from Mr. Gunlicks' failure to provide a sworn document are just wrong and purely a product of misrepresentation by the SEC to this Court.

VI. Mr. Gunlicks and Cooperation

The undersigned counsel has attempted to negotiate acceptable allowances with the SEC. The undersigned counsel is informed by the SEC that in most cases like Mr. Gunlicks, the SEC will agree to provide monetary relief to defendants if cooperation is given to the receiver to help identify and recover assets. While Mr. Gunlicks has offered to assist the Receiver and the SEC, Mr. Gunlicks is inherently prejudiced under this scenario because Mr. Gunlicks is not alleged to have, nor has he, secreted FP assets. All the money coming in and out of FP was well documented in audits, financial statements, and the company books. Accordingly, the Receiver does not need Mr. Gunlicks' help in identifying and recovering assets of FP.

Further, while Mr. Gunlicks' could have provided assistance to the Receiver in repatriating funds from Bermuda that belonged to one of the funds identified in this action, Founding Partners Global Fund, LTD, because of the strong-arm tactics of the SEC and the conflicted predecessor receiver's inability to act, this avenue of marshalling assets is no longer available. Apparently, as a result of the delay in contacting the banks in the Caribbean, the Cayman Islands has appointed a liquidator over the funds.

The SEC and Receiver have now stated that should they subjectively determine that Mr. Gunlicks has cooperated sufficiently so as to identify and collect hidden or unknown assets, they will be willing to consider a limited release of funds for Mr. Gunlicks living expenses and attorneys' fees. As noted in Mr. Gunicks' sworn statements and his filings, his cooperation will not result in the Receiver and SEC identifying any hidden or secreted assets – because there are none. Thus, under the highly limited definition of the term "cooperation" and "good faith" proposed by the SEC and the Receiver, Mr. Gunlicks' good faith cooperation will not result in identification of hidden assets that would form the resources from which they would consider allowing him living expenses.

Accordingly, under the circumstances, Mr. Gunlicks' asks this Court to modify the asset freeze order.

VII. Conclusion

For the foregoing reasons, as well as those established in Mr. Gunlicks' original motion, Mr. Gunlicks requests that this Court grant a modification of the asset freeze order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 24, 2009, I electronically filed the foregoing 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 identified on the attached Service List in the manner specified, via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to received electronically Notices of Electronic Filing.

CERTIFICATE OF SERVICE

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