IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

SECURITIES AND EXCHANGE COMMISSION	§	
	§	
Plaintiff,	§	
vs.	§	CIVIL ACTION NO. 6:99CV667
	§	
SUNPOINT SECURITIES, INC., VAN R. LEWIS, III, and MARY ELLEN WILDER	§	
	§	
Defendants.	§	

ORDER

The above entitled and numbered civil action was referred to United States Magistrate Judge Harry W. McKee pursuant to 28 U.S.C. §636. The Report of the Magistrate Judge which contains his proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration. The defendant, Van R. Lewis, has filed objections to the Report and Recommendation. Objections to the report were due on January 22, 2001. The defendant filed his objections to the report with the Clerk on January 29, 2001, seven days beyond the deadline for objections. The Court has reviewed Defendant's objections and hereby adopts the Report of the United States Magistrate Judge as the findings and conclusions of this Court.

The Report of the Magistrate recommends granting Plaintiff's Motion for Summary Judgment on the amount of disgorgement against the defendant, Van R. Lewis. The Report also recommends directing the defendant to pay pre-judgment interest. It is on these recommendations Defendant Lewis makes his objections to the Report.

Defendant Van R. Lewis filed objections to the Magistrate Judge's Report and

Recommendation seven days beyond the deadline for objections as provided by the local rules for the Eastern District of Texas, on January 29, 2001. Although Defendant Lewis' objections are late under the rules, this Court briefly address the objections. The plaintiff filed a response approximately one month after Lewis filed his objections, on February 27, 2001.

The defendant first objects on the grounds that the Magistrate Judge drew an adverse inference from Lewis' assertion of his Fifth Amendment right, allegedly causing a reversal of the summary judgment standard which requires all reasonable inferences be drawn in favor of the non-movant. This is in fact not the standard or the methods the Court employed; the Court correctly applied the required standards for summary judgment and the findings of the Magistrate are found to be correct.

The Report explained the well understood rule that under established law, a defendant's assertion of his Fifth Amendment right can and may lead to an adverse inference. This inference could and may be drawn by the Court against Lewis in this case. It did not, however, lead the Court to reverse the summary judgement standard and undermine its reasoning. Lewis' assertion of his Fifth Amendment Privilege against self-incrimination created substantial problems for the SEC to overcome; it was denied a source of information which could have conceivably be determinative in the search for the true facts of the case. In the event that the Court may have found it reasonable to draw an adverse inference from Lewis' assertion of the Fifth Amendment, it is completely within the discretion of the Court to draw such an adverse inference, even within the ambit of summary judgment standards. *SEC v. Colello,* 139 F.3d 674, 677(9th Cir.1998).

However, as stated previously, the facts themselves supports the recommendation and did not turn on Lewis' silence.

Defendant Lewis objects to the Court's reliance on the deposition testimony of Mary Ellen Wilder, the chief financial officer of Sunpoint Securities. Lewis argues Wilder's testimony regarding the approximate amount of the shortfall contains inadmissable hearsay because it is based on statements from one of Wilder's subordinates at Sunpoint, Doug Dieter. The Court found Wilder's testimony concerning the shortfall reliable evidence, because it was based on her personal knowledge, due in part to the fact that she was the chief financial officer of Sunpoint Securities and held a substantial amount of responsibility for the financial operations and regulatory compliance of Sunpoint. The Magistrate's Report stated:

> Defendant Wilder was the Chief financial officer of Sunpoint Secrities and had the ultimate responsibility of Sunpoint's financial books and records. . . . Lewis utilizes and states this fact in his list of statements of genuine issues filed with the Court. It is counter-intuitive [and] grossly inaccurate to argue Defendant Wilder was unaware or lacked personal knowledge of the growth and approximate amount of the shortfall when she was the chief financial officer of Sunpoint . . . Wilder testified she and Lewis applied customer funds to achieve Sunpoint's net capital requirements, satisfy operating expenses, acquire securities in companies, clear an unallowable asset from Sunpoint's books and records and repurchase investor notes issued by a Lewis affiliate.

Rep.&Rec. 9-10.

Further, Wilder's testimony about Dieter's statement is not inadmissible hearsay under the Federal Rules of Evidence. A statement by a "party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" falls within the exceptions to the hearsay rule under Federal Rule of Evidence 801(d)(2)(D). Dieter worked at Sunpoint and was supervised by Wilder during his employment there. Dieter acted within the scope of his agency at the time he made the statements about the shortfall to Wilder. *Corely v. Burger King Corp.*, 56 F.3d 709, 710 (5th Cir.1995).

Lewis also objects that the $25 million amount is not a proper and reasonable assessment for he should not be required to repay or disgorge money he did not personally receive and which, at this point, has not been precisely accounted for by records or receipts. Lewis, however, as the Magistrate's report noted, was the CEO and sole shareholder of Sunpoint as well as the one who instructed the diversion of funds to accounts other than the correct customer accounts.

The PriceWaterhouseCoopers report and accounting prepared by Lisa Poulin (the "PWC report") states approximately $25 million dollars of customer funds were diverted from the proper customer accounts and were not used for investment by Sunpoint for Sunpoint customers. The $25 million dollar amount is further supported by the testimony of Wilder and Doug Dieter, both former employees with personal knowledge of the accounting methods used at Sunpoint. The evidence shows Lewis was in direct receipt of $7.9 million of customer funds and indirectly in receipt of, by means of Sunpoint's

operating account, an additional $6.2 million. The remainder of $11 million in customer funds was diverted by Sunpoint to satisfy its business expenses. The fact that the remaining missing funds are not precisely accounted for does not excuse Lewis of his duty owed to his customers and required by the law.

Lewis has not provided independent evidence supporting what the proper disgorgement amount should be and thus has not satisfied his burden of proof. *SEC v. First City Financial Corp.,* 890 F.2d 1215, 1231-1233(D.C.Cir.1989). Lewis does nothing more than reiterate the arguments made in his response to the SEC's motion for summary judgment, which were found unpersuasive by the Magistrate Judge as well as this Court.

A disgorgement order for $25 million against Lewis is not an improper penalty, as Lewis argues it is in his objections to the Report. A disgorgement in this amount only requires the defendant to disgorge customer funds he improperly and fraudulently diverted. Holding Lewis jointly and severally liable does not impermissibly penalize Lewis, it only requires him to repay the funds which were entrusted to him by his clients and to compensate the injured parties for the wrongful deprivation of their assets. *SEC v. First Jersey Securities, Inc.,* 101 F.3d 1450, 1475(2d Cir.1996).

It is within the discretion of a Court to require a defendant to pay prejudgment interest. In enforcement actions such as the action against Van R. Lewis and Sunpoint, prejudgment interest is routinely ordered based on the disgorgement amount, *Id.,* at 1476-1477, and this Court finds it is proper, in its discretion and upon recommendation of the Magistrate Judge, to order Lewis to pay prejudgment interest in this case.

Accordingly it is,

ORDERED Plaintiff's Motion for Summary Judgment Regarding Disgorgement Amount of $25,374,952.00 is granted. (Doc. #87).

Further it is

ORDERED Defendant Van R. Lewis III is to pay prejudgment interest at the rate determined by the United States Department of the Treasury's rate, 6.052 percent, for a time period beginning November 19, 1999 to the date of payment. (Doc. #87).

Further it is

ORDERED Plaintiff's Motion to Preclude Defendant Van R. Lewis from Offering Evidence Regarding Proper Amount of Disgorgement in light of the granting of Plaintiff's Motion for Summary Judgment (Doc. #87), is denied as moot. (Doc. #89).

Further it is

ORDERED Defendant Van R. Lewis' Motion for the Release of Funds from Carve-Out, due to the parties' resolution of the matter, is denied as moot. (Doc. # 96).

SIGNED this 24th day of April, 2001.

JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE