INITIAL DECISION RELEASE NO. 496
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15024

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of		
	:	
WALTER V. GERASIMOWICZ,	:	INITIAL DECISION
MEDITRON ASSET MANAGEMENT, LLC, and	:	July 12, 2013
MEDITRON MANAGEMENT GROUP, LLC	:	

APPEARANCES: Howard A. Fischer and Catherine E. Lifeso for the Division of Enforcement, Securities and Exchange Commission

William M. Dailey for Respondents Walter V. Gerasimowicz, Meditron Asset Management, LLC, and Meditron Management Group, LLC

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision (ID) orders Walter V. Gerasimowicz (Gerasimowicz), Meditron Asset Management, LLC (MAM), and Meditron Management Group, LLC (MMG), to pay disgorgement, jointly and severally, of $3,143,029.41, plus prejudgment interest, and pay third-tier civil penalties, jointly and severally, of $1,950,000.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings (OIP) on September 14, 2012, pursuant to Section 8A of the Securities Act of 1933 (Securities Act), Section 21C of the Securities Exchange Act of 1934 (Exchange Act), Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 (Advisers Act), and Section 9(b) of the Investment Company Act of 1940 (Investment Company Act). On May 3, 2013, the Commission issued an order (Continuation Order), pursuant to Respondents' offer of settlement, making various findings of facts and conclusions of law and imposing cease-and-desist orders and other sanctions on Respondents and ordering Respondents to pay disgorgement and third-tier civil penalties in amounts to be determined by additional proceedings. 106 SEC Docket 67638 (May 3, 2013). As agreed upon by the parties, the

determination of disgorgement and penalties is being made by means of summary disposition, pursuant to 17 C.F.R. § 201.250. Walter V. Gerasimowicz, Admin. Proc. No. 3-15024 (A.L.J. Apr. 19, 2013) (unpublished). Familiarity with the findings of facts and conclusions of law in the Continuation Order is assumed for the purpose of this ID.

The findings and conclusions in this ID are based on the record, including the Damages Brief of the Division of Enforcement (Division) (Damages Brief), responsive pleadings, and those attachments admitted into evidence, infra.[1] Preponderance of the evidence was applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 97-104 (1981). All arguments and proposed findings and conclusions that are inconsistent with this ID were considered and rejected.

B. Allegations and Arguments of the Parties

The Division proposes that Respondents pay a total of $3,220,538.42[2] in disgorgement and proposes five options for determining the amount of third-tier civil penalties, which, when calculated using the maximum amounts of third-tier civil penalties for Gerasimowicz, MAM, and MMG, range from $20,800,000 to $228,800,000. Damages Brief, pp. 15-16. Respondents assert, in addition to an inability to pay disgorgement, interest, or penalties, that $418,909.89[3] is the appropriate disgorgement maximum. Response, pp. 6, 8. Respondents do not propose a specific penalty amount, and agree that third-tier penalties are appropriate, but contend that the Division's proposals for penalties would be too severe, due to the remedies already imposed upon Gerasimowicz. Id., pp. 10-12. Respondents assert, in addition, that they were minimally enriched by their actions. Id., p. 11.

C. Exhibits Admitted into Evidence

The following items, which are included in the parties' pleadings, are admitted into evidence:

> Declaration of Doreen Rodriguez in Support of the Division's Damages Brief (Rodriguez Decl.) and Exhibit 1 to the Rodriguez Decl.;

[1] Respondents filed a Response to the Division's Damages Brief (Response) and the Division filed a Reply in Further Support of the Division's Application for Damages (Reply).

[2] The Division argues Respondents should disgorge $2,720,140.44 in improper transfers and $500,397.98 in ill-gotten management fees. Damages Brief, p. 10 (citing exhibits not admitted); Reply, p. 8.

[3] Respondents argue that the maximum amount of management fees subject to disgorgement is $391,909.89 and that they should only be subject to disgorgement one percent of the illicit transfers from the Meditron Fundamental Value/Growth Fund (Meditron Fund) to SMC Electrical Contracting, Inc. (SMC). Response, pp. 6, 8. Respondents rounded that number to $27,000.

Second Declaration of Doreen Rodriguez in Support of Division's Reply Brief (Reply) (Rodriguez Reply Decl.);

Declaration of Gerasimowicz in Support of Response (Gerasimowicz Decl.) with Exhibit A, 2011 tax returns for Meditron Real Estate Partners, LLC (MREP); Exhibit B, a schedule of profit and loss and capital percentages for MREP investors from 2007 to 2011; and Exhibit C, a judgment in an adversary proceeding to the bankruptcy proceeding of Theodore Doumazios, former president of SMC, with attachments;

Declaration of Jerelyn Creutz in Support of the Response (Creutz Decl.) with attached Exhibit D, a series of charts prepared by Creutz concerning expenses and payments to and from Respondents; and

Selected Trial Exhibits 12, 15, 16, 47-48, 90, 142-145, 164, and 165 attached to the Response.[4]

II. SANCTIONS

As discussed below, Respondents will be, jointly and severally, ordered to disgorge $3,143,029.41 plus prejudgment interest and to pay, jointly and severally, a third-tier civil penalty of $1,950,000.

A. Disgorgement

Sections 8A(e) of the Securities Act, 21B(e) of the Exchange Act, and 203(j) of the Advisers Act authorize disgorgement of ill-gotten gains from Respondents. Disgorgement is an equitable remedy that requires a violator to give up wrongfully-obtained profits causally related to the proven wrongdoing. See SEC v. First City Fin. Corp., Ltd., 890 F.2d 1215, 1230-32 (D.C. Cir. 1989); see also Hateley v. SEC, 8 F.3d 653, 655-56 (9th Cir. 1993). It returns the violator to where he would have been absent the violative activity.

Management and incentive fees are appropriately disgorged where they constitute ill-gotten gains earned during the course of fraudulent activities. SEC v. Kapur, No. 11 Civ. 8094, 2012 WL 5964389, at *3-*4 (S.D.N.Y. Nov. 29, 2012); SEC v. Radical Bunny, LLC, No. 09-cv-1560, 2011 WL 1458698, at *8 (D. Ariz. Apr. 12, 2011), aff'd, No. 11-16275, 2013 WL 3456657 (9th Cir. July 10, 2013); Joseph John VanCook, Exchange Act Release No. 61039A (Nov. 20, 2009), 97 SEC Docket 22664, 22691. However, the Commission distinguishes between amounts earned through legitimate activities and those connected to violative activities, and it falls on the Division to show what a reasonable approximation of the fees constituted unjust enrichment. See Joseph John VanCook, 97 SEC Docket at 22691.

[4] The facts of the pleadings of the party against whom the motion for summary disposition is made shall be taken as true, except as modified by stipulations or admissions made by that party, or by facts officially noted pursuant to 17 C.F.R. § 201.323. 17 C.F.R. § 201.250(a).

The amount of the disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation. See Laurie Jones Canady, Exchange Act Release No. 41250 (Apr. 5, 1999), 69 SEC Docket 1468, 1487 n.35 (quoting SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996)), petition for review denied, 230 F.3d 362 (D.C. Cir. 2000); see also SEC v. First Pac. Bancorp, 142 F.3d 1186, 1192 n.6 (9th Cir. 1998) (holding disgorgement amount only needs to be a reasonable approximation of ill-gotten gains); accord First City Fin. Corp., 890 F.2d at 1230-31.

Respondents will be held jointly and severally liable for the disgorgement because Gerasimowicz owned the other Respondents and was their alter ego during the violative activities. See Daniel R. Lehl, 55 S.E.C. 843, 874-75 & n.65 (2005) (citing First Pac. Bancorp, 142 F.3d at 1191 (citing SEC v. Hughes Capital Corp., 124 F.3d 449, 455 (3d. Cir. 1997); First Jersey Sec., Inc., 101 F.3d at 1475; Hateley, 8 F.3d at 656)). Additionally, joint and several liability takes account of Gerasimowicz's financial circumstances.

1. Misappropriated Meditron Fund Assets

The Division argues that Respondents should disgorge ill-gotten gains of "over $2.7 million," which represents the full amount of money illicitly siphoned from investors in the Meditron Fund. Damages Brief, pp. 6, 10. Respondents argue that disgorgement cannot be larger than the $2,650,000 amount stipulated to in the Continuation Order as the amount of funds diverted from the Meditron Fund to SMC and its creditors. Response, p. 5 n.3; Continuation Order, p. 2.

Respondents further argue that because they collectively owned only one percent of the equity in MREP, the owner of SMC, any disgorgement amount should be capped at one percent of the total diverted funds. Response, p. 5. Respondents' rationale is that SMC was the beneficiary of the ill-gotten gains, and that the other MREP investors, not Respondents, enjoyed the benefit of ninety-nine percent of the diverted funds. Id.

Though the Continuation Order states that the amount diverted from the Meditron Fund was "approximately" $2,650,000, and the Division claims that Respondents siphoned more than $2.7 million from the Meditron Fund, the materials submitted by the Division supporting additional funds are exhibits that were unsworn, and thus not admitted into evidence.[5] See, e.g., Damages Brief, Exs. 149, 256-58. Accordingly, the amount of diverted funds considered for the purpose of disgorgement is $2,650,000, the amount specified in the Continuation Order.

Respondents' argument that they should only be liable for one percent of the funds diverted from the Meditron Fund to SMC misses the point entirely. By misappropriating funds, Respondents enjoyed the choice of where to direct the funds. See SEC v. Benson, 657 F. Supp. 1122, 1134 (S.D.N.Y. 1987); SEC v. Rosenfeld, No. 97-cv-1467, 2001 WL 118612, at *2 (S.D.N.Y Jan. 9, 2001). Respondents misappropriated the funds and used them to prop up the fledgling SMC. The fact that those diverted funds failed to keep SMC afloat, and the investments were lost, is irrelevant to the disgorgement analysis. Respondents, accordingly, shall disgorge $2,650,000, the amount of diverted funds as stipulated in the Continuation Order.

[5] See 17 C.F.R. § 201.250(a).

2. Management and Incentive Fees

The Division argues in its Damages Brief that Respondents received ill-gotten management and incentive fees of $811,093.15 from the Meditron Fund. Damages Brief, p. 10; Rodriguez Decl. The Division arrived at this number by culling all payments made by the Meditron Fund to Gerasimowicz and to MAM, identified in the Meditron Fund's own ledgers as, inter alia, "Management Fees," "Performance Fees," "HF Fees," "Incentive Fees," as well as drawings by Gerasimowicz. Rodriguez Decl., Ex. 1; Trial Ex. 12. In its Reply, the Division conceded that it mistakenly included in its calculation $200,000 paid from the Meditron Fund to Gerasimowicz, which represented redemption payments not subject to disgorgement. Reply, p. 8 n.3; Rodriguez Reply Decl., p. 2. The Division also conceded some legitimate business expenses, but disputed others, agreeing to an initial offset of $228,520.16. Reply, p. 7. The Division reasonably prorated that amount by 48.44 percent, the amount Respondents argue represents MAM revenues attributable to the Meditron Fund, to $110,695.17. The Division, after these calculations, recommends $500,397.98 in disgorgement. Id., pp. 7-8; Creutz Decl., pp. 2-3.

After the Division met its burden of establishing that its recommended disgorgement amount "reasonably approximate[d] the [Respondents'] unjust enrichment," the burden shifted to Respondents to demonstrate that a lesser amount was appropriate. Rosenfeld, 2001 WL 118612, at *2 (citing First City Fin. Corp., 890 F.2d at 1232). Respondents did not meet that burden.

Respondents argue in their Response that the Division's proposal is too penalizing, and that they should only be ordered to disgorge $391,909.89. Response, pp. 3, 6-8; Creutz Decl., pp. 2-3. That disgorgement counterproposal represents two categories of ill-gotten benefits: (1) payments from the Meditron Fund to or for the benefit of Gerasimowicz[6] and (2) "net" payments by MAM to or for the benefit of Gerasimowicz, prorated to account for the percentage of MAM's revenue attributable to the Meditron Fund. Creutz Decl., Ex. D, pp. 6, 8. That analysis is incomplete. Using only these components, Respondents focus upon the downstream benefits to Gerasimowicz, individually, failing to account for any benefits to the other Respondents.

Respondents also contend that MAM had legitimate business expenses of $1,196,276 that were not taken into consideration by the Division. Response, p. 3. A court may, in its discretion, deduct from a respondent's profits legitimate expenses paid while garnering those profits. Rosenfeld, 2001 WL 118612, at *2. Respondents may not, however, "group expenses under a broad category of business costs and expect deductions." Id. Respondents neither specify which expenses were legitimate nor demonstrate the legitimacy of those expenses. Response, p. 3. Respondents also fail to demonstrate what impact those expenses had on what they portray as "net" payments to or for the benefit of Gerasimowicz.

[6] The first component, as calculated by Respondents, totals $273,000 paid directly to Gerasimowicz from the Meditron fund. Creutz Decl., Ex. D, p. 8. That total, however, includes the $200,000 identified by the Division as legitimate redemptions by Gerasimowicz, leaving only $73,000. Id., p. 6; Rodriguez Reply Decl., p. 3.

The Division's recommended fee disgorgement analysis includes payments occurring after September 2011, the end of the Relevant Period. Continuation Order, p. 5; Rodriguez Decl., Ex. 1, p. 3. Those payments, totaling $7,368.57, will be discounted from the Division's recommendation, and the Respondents shall disgorge $493,029.41.

B. Prejudgment Interest

Respondents argue that prejudgment interest is unnecessary in this matter due to Gerasimowicz's permanent bar, his advanced age, his unemployment, and his current efforts to recover investors' lost investments. Response, p. 9. Both Respondents and the Division cite case law that emphasizes courts' "broad discretion" in deciding whether prejudgment interest is appropriate. Response, pp. 8-9; Reply, p. 8. The Division urges the court to order prejudgment interest based upon public interest factors and Respondents' egregious violations. Reply, pp. 8-9.

Pursuant to 17 C.F.R. § 201.600(a), "[p]rejudgment interest *shall* be due on any sum required to be paid pursuant to an order of disgorgement." (emphasis added). Unlike in federal court cases, on which the parties rely, "except in the most unique and compelling circumstances, prejudgment interest should be awarded on disgorgement, among other things, in order to deny a wrongdoer the equivalent of an interest free loan from the wrongdoer's victims." Terence Michael Coxon, 56 S.E.C. 934, 971 (2003); cf. First Jersey Sec., Inc., 101 F.3d at 1476 ("'The decision whether to grant prejudgment interest and the rate used if such interest is granted are matters confided to the district court's broad discretion . . . .'") (quoting Endico Potatoes, Inc. v. CIT Group/Factoring, Inc., 67 F.3d 1063, 1071 (2d Cir. 1995)).

There are no unique or compelling reasons why prejudgment interest should not accrue in accordance with 17 C.F.R. § 201.600. Respondents shall pay prejudgment interest on the $3,143,029.41 disgorgement, in accordance with 17 C.F.R. § 201.600(b), with interest accruing from October 1, 2011.[7]

C. Civil Money Penalty

Sections 21B of the Exchange Act, 203(i) of the Advisers Act, and 9(d) of the Investment Company Act authorize the Commission to impose civil money penalties for violations of the Securities, Exchange, Advisers, or Investment Company Acts or rules thereunder. In considering whether a penalty is in the public interest, the Commission may consider six factors: (1) fraud; (2) harm to others; (3) unjust enrichment; (4) previous violations; (5) deterrence; and (6) such other matters as justice may require. See Sections 21B(c) of the Exchange Act, 203(i)(3) of the Advisers Act, and 9(d)(3) of the Investment Company Act; New Allied Dev. Corp., 52 S.E.C. 1119, 1130 n.33 (1996); First Sec. Transfer Sys., Inc., 52 S.E.C. 392, 395-96 (1995); see also Jay Houston Meadows, 52 S.E.C. 778, 787-88 (1996), aff'd, 119 F.3d 1219 (5th Cir. 1997); Consol. Inv. Servs., Inc., 52 S.E.C. 582, 590-91 (1996).

[7] The violative conduct ran through September 2011. Continuation Order, p. 5. Pursuant to 17 C.F.R. § 201.600(a), interest shall be due from the first day of the month following the violation – October 1, 2011 – through the last day of the month preceding the month in which payment of disgorgement is made.

As to Respondents, there are no mitigating factors. They violated the antifraud provisions, so their violative actions "involved fraud [and] reckless disregard of a regulatory requirement" within the meaning of Sections 21B(b)(3) of the Exchange Act, 203(i)(2) of the Advisers Act, and 9(d)(2) of the Investment Company Act. Deterrence requires substantial penalties against Respondents because of the abuse of the fiduciary duty owed to advisory clients. See Schield Mgmt. Co., Exchange Act Release No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 862.

Penalties are in the public interest in this case. Penalties in addition to the other sanctions ordered are necessary for the purpose of deterrence. See Sections 21B(c)(5) of the Exchange Act, 203(i)(3)(E) of the Advisers Act, and 9(d)(3)(E) of the Investment Company Act; see also H.R. Rep. No. 101-616 (1990). A third-tier penalty, which the parties agreed to, is appropriate because Respondents' violative acts involved fraud and resulted in the risk of substantial losses to other persons and gains to themselves. See Sections 21B(b)(3) of the Exchange Act, 203(i)(2)(C) of the Advisers Act, and 9(d)(2)(C) of the Investment Company Act. Under those provisions, for each violative act or omission after March 3, 2009, the maximum third-tier penalties are $150,000 for a natural person and $725,000 for any other person. 17 C.F.R. § 201.1004. The provisions, like most civil penalty statutes, leave the precise unit of violation undefined. See Colin S. Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79 Colum. L. Rev. 1435, 1440-41 (1979).

The events at issue will be considered as thirteen courses of action, one for each investor in the Meditron Fund harmed by Respondents' fraudulent conduct. See Continuation Order, p. 3; see also Steven E. Muth, 58 S.E.C. 770, 813 (2005) ("we believe that a civil money penalty based on the number of customers that [the respondent] defrauded . . . is appropriate."). Since MAM and MMG were essentially one-man operations and were Gerasimowicz's alter ego in the violative activities, a third-tier penalty will be ordered against Respondents, jointly and severally. See Gualario & Co., LLC, Initial Decision Release No. 452, 103 SEC Docket 51339, 51358-59 (A.L.J. Feb. 14, 2012). Each violation will be assessed a penalty of $150,000, the maximum amount allowed for violations by individuals. 15 U.S.C. § 78u-2(b)(3) (as modified by 17 C.F.R. § 201.1004). A total third-tier penalty amount of $1,950,000 will be ordered against Respondents, jointly and severally.

D. Ability to Pay

Gerasimowicz states in his declaration, in support of his position that he would be unable to pay any civil penalties, "I have effectively become personally bankrupt, having lost all my hard-earned, lifelong net worth . . . ." Gerasimowicz Decl., p. 1. He has not, however, introduced any evidence to support such an assertion. The Commission requires that a respondent claiming inability to pay must provide financial information supporting that claim before the administrative law judge. Terry T. Steen, 53 S.E.C. 618, 627 (1998); see 17 C.F.R. § 201.630(b), (e); see also Muth, 58 S.E.C. at 814 ("It is well settled that an applicant bears the burden of demonstrating the inability to pay."). Gerasimowicz has not demonstrated an inability to pay any disgorgement, interest, or penalties that may be ordered in this proceeding.

IV. ORDER

IT IS ORDERED that, pursuant to Sections 8A(e) of the Securities Act, 21B(e) of the Exchange Act, and 203(j) of the Advisers Act, Walter V. Gerasimowicz, Meditron Asset Management, LLC, and Meditron Management Group, LLC, jointly and severally, DISGORGE $3,143,029.41 plus prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to 17 C.F.R. § 201.600(b). Pursuant to 17 C.F.R. § 201.600(a), prejudgment interest is due from October 1, 2011, through the last day of the month preceding the month in which payment is made.

IT IS FURTHER ORDERED that, pursuant to Sections 21B of the Exchange Act, 203(i) of the Advisers Act, and 9(d) of the Investment Company Act, Walter V. Gerasimowicz, Meditron Asset Management, LLC, and Meditron Management Group, LLC, jointly and severally, PAY A CIVIL MONEY PENALTY of $1,950,000.

Payment of penalties and disgorgement plus prejudgment interest shall be made on the first day following the day this Initial Decision becomes final. Payment shall be made by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order, payable to the Securities and Exchange Commission. The payment, and a cover letter identifying the Respondent(s) and Administrative Proceeding No. 3-15024, shall be delivered to: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Bld., Oklahoma City, Oklahoma 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111(h) of the Commission's Rules of Practice, 17 C.F.R. § 201.111(h). If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

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Carol Fox Foelak
Administrative Law Judge