

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MARK R. CONWAY and
GROUNDSWELL PARTNERS LLC,

Defendants, and

GROUNDSWELL CAPITAL LP,

Relief Defendant.

JURY TRIAL DEMANDED

Case No. _____

05 - 12209 RWZ

COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF

Plaintiff Securities and Exchange Commission ("Commission") alleges the following in this emergency enforcement action against defendants Mark R. Conway ("Conway") and Groundswell Partners LLC ("Groundswell Partners") and Relief Defendant Groundswell Capital LP ("GLP"):

PRELIMINARY STATEMENT

1. Conway is a partner at Groundswell Partners, an entity which is the General Partner and the management company for Groundswell Capital LP ("GLP" or the "Fund"), an unregistered hedge fund. Conway has admitted – in a consented-to Wednesday, October 26, 2005 tape-recorded conversation with Aaron Behle ("Behle"), his Groundswell Partners partner – that, in 2000 or 2001, he took a large position in a stock and lost a large amount of money. Conway admitted that, in an effort to make up the loss, he diverged from the Fund's original

investment strategy without notifying investors. Moreover, Conway admitted that, in an effort to conceal the loss, he altered GLP-related documents, including financial statements, profit and loss spreadsheets and account statements sent to investors. Conway admitted that the altered account statements falsely inflated the amount of assets in the investors' accounts. There are currently approximately 75 investors in GLP. Since Conway's compensation is based, in part, on a percentage (approximately 1% annually) of the amount of assets under management, he has been – by overinflating the amount of assets under management – overcharging GLP investors for investment advisory services. Conway also admitted to Behle that, although the altered GLP-related documents indicate that the Fund should have approximately \$43 million in assets, the Fund's true value is currently only approximately \$14 million. Conway also admitted to Behle that he had, in the past, created a fictitious auditor and fictitious audit reports for GLP.

2. Conway also telephoned the Commission's Boston District Office ("BDO") late in the afternoon on Thursday, October 27, 2005 and spoke with Pauline R. Zelkin, a BDO staff member. Conway identified himself as an investment manager and stated that he wanted "to turn himself into Enforcement" for an unspecified fraud which he had committed. Conway scheduled a meeting through Ms. Zelkin, which was to occur with BDO Division of Enforcement personnel the next day, Friday, October 28, 2005. However, Conway failed to appear at the BDO on October 28 or ever since his October 27 telephone conversation with Ms. Zelkin.

3. As a result of the above, Conway and Groundswell Partners engaged in: (i) fraudulent or deceptive conduct in connection with the purchase or sale of securities, in violation of Section 10(b) of the Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder; (ii) fraudulent or deceptive conduct in connection with the offer or sale of securities, in violation of

Section 17(a) of the Securities Act of 1933 (“Securities Act”) and (iii) fraudulent or deceptive conduct with respect to investment advisory clients, in violation of Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 (“Advisers Act”).

4. Accordingly, the Commission seeks: (i) entry of a permanent injunction prohibiting defendants from further violations of the relevant provisions of the federal securities laws; (ii) disgorgement of defendants’ and relief defendant’s ill-gotten gains and unjust enrichment, plus pre-judgment interest; and (iii) the imposition of civil monetary penalties due to the egregious nature of defendants’ violations. In addition, because of the risk that defendants will continue violating the federal securities laws and the danger that any remaining investor funds will be dissipated or concealed before entry of a final judgment, the Commission seeks preliminary equitable relief to: (i) prohibit defendants from continuing to violate the relevant provisions of the federal securities laws; (ii) freeze defendants’ and relief defendant’s assets and otherwise maintain the status quo; (iii) require defendants and relief defendant to submit an accounting of investor funds and other assets in their possession; (iv) prevent defendants from destroying relevant documents; (v) prohibit defendants and relief defendant from continuing to accept or deposit investor funds; and (vi) authorize the Commission to undertake expedited discovery.

JURISDICTION

5. The Commission seeks a permanent injunction and disgorgement pursuant to Section 20(b) of the Securities Act [15 U.S.C. §77t(b)], Section 21(d)(1) of the Exchange Act [15 U.S.C. §78u(d)(1)], and Section 209(d) of the Advisers Act [15 U.S.C. §80b-9(d)]. The Commission seeks the imposition of a civil monetary penalty pursuant to Section 20(d) of the

Securities Act [15 U.S.C. §77t(d)], Section 21(d)(3) of the Exchange Act [15 U.S.C. §78u(d)(3)], and Section 209(e) of the Advisers Act [15 U.S.C. §80b-9(e)].

6. This Court has jurisdiction over this action pursuant to Sections 20(d) and 22(a) of the Securities Act [15 U.S.C. §§77t(d), 77v(a)], Sections 21(d), 21(e) and 27 of the Exchange Act [15 U.S.C. §§78u(d), 78u(e), 78aa], and Sections 209(3) and 214 of the Advisers Act [15 U.S.C. §80b-9(d), 80b-14]. The Court further has supplemental jurisdiction over the claim against the relief defendant GLP pursuant to 28 U.S.C. § 1367(a). Venue is proper in this District because much of defendants' wrongful conduct occurred here and at least some of the defrauded clients live here.

7. In connection with the conduct described in this Complaint, defendants directly or indirectly made use of the mails or the means or instruments of transportation or communication in interstate commerce.

DEFENDANTS

8. **Mark R. Conway** ("Conway"), age 44, was and is the portfolio manager for Groundswell Capital LP, a hedge fund located in Waltham MA, and a partner in and the President and Chief Operations Officer (COO) of Groundswell Partners LLC, the investment management company for Groundswell Capital LP. Conway is a resident of Waltham MA. Conway received a B.S. degree in Computer Science in 1983 from Rensselaer Polytechnic Institute in Troy, New York.

9. **Groundswell Partners LLC** ("**Groundswell Partners**"), located in Waltham, MA, is a Delaware Limited Liability Company established in 2000 and is the General Partner and management company for the limited partnership GLP, an unregistered hedge fund.

RELIEF DEFENDANT

10. **Groundswell Capital LP (“GLP”)**, located in Waltham MA, is a hedge fund started in approximately April 2000, which purportedly had a trading strategy that, based on quantitative and mathematical analyses, capitalized on intra-day price movements in order to earn a small positive return each day. The trading system would signal when to buy and sell the assets in the Fund. GLP appears to have net assets of approximately \$14 million and approximately 75 investors, some of which are Conway’s friends and relatives. Conway, acting through Groundswell Partners, was and is the portfolio manager for GLP.

STATEMENT OF FACTS

Conway’s Admissions Concerning His Fraudulent Conduct

11. On or about Wednesday, October 26, 2005, Conway consented to participate in a tape-recorded telephone conversation with Aaron Behle, the Chief Executive Officer and his partner in Groundswell Partners. Behle is also a consultant to GLP. Conway, acting through Groundswell Partners, is the portfolio manager of GLP, an unregistered hedge fund.

12. During the October 26, 2005 tape-recorded telephone conversation between Conway and Behle, Conway admitted to Behle that he engaged in fraudulent conduct related to the Fund between approximately 2000 or 2001 to October 2005. Specifically, Conway admitted that, either in 2000 or 2001, he took a large position in a stock and lost a large amount of money in relation to the size of the Fund. Conway also admitted that, in an effort to make up the loss, he diverged from the Fund’s original investment strategy soon after the loss without notifying investors. Specifically, Conway admitted that he, among other things, routinely violated the Fund’s declared investment strategy of not holding open securities positions overnight.

13. Conway also admitted, during the October 26 telephone conversation with Behle, that he attempted to cover up his losses by preparing fictitious Fund documents, including profit and loss statements, monthly investor account statements that were sent out to investors and numerous other internal documents. Conway also admitted that, though his altered documents indicate that the Fund had approximately \$43 million in assets, the Fund's actual value is approximately only \$14 million, of which approximately \$12 million is at Goldman Sachs and \$2 million is at Sovereign Bank.

14. Since Conway's and/or Groundswell Partners' compensation is based, in part, on a percentage (approximately 1% annually) of the amount of GLP assets under management, Conway and/or Groundswell Partners have been – by overinflating the amount of assets under management – overcharging GLP investors for investment advisory services.

15. Conway also admitted, during the October 26 telephone conversation with Behle, that, during the relevant period, he created a fictitious auditor and a fictitious e-mail account for the non-existent auditor. Conway also admitted that, for at least a portion of the relevant period, no audits were ever conducted of the Fund. The Commission staff has determined that at least one false audit report was provided to at least some of GLP's investors.

16. Conway also admitted, during the October 26 telephone conversation with Behle, that he brought new investors into the Fund during the relevant period so that, among other things, his family members, who were also investors, could potentially get their money back from the Fund. Conway further admitted that he made “a conscious decision” to act as he did, that “everything was a lie” and that his conduct amounted to “a fraud.”

17. On or about Thursday, October 27, 2005, at approximately 3:40 P.M., Conway telephoned the BDO and spoke with Pauline R. Zelkin, a BDO staff member. Conway identified himself as an investment manager and stated that he wanted "to turn himself into Enforcement" for an unspecified fraud which he had committed. Conway scheduled a meeting through Ms. Zelkin, which was to occur with BDO Division of Enforcement personnel the next day, Friday, October 28, 2005. However, Conway failed to appear at the BDO on October 28 or ever since his October 27 telephone conversation with Ms. Zelkin.

18. As a result of the above conduct, Conway and Groundswell Partners violated the federal securities laws' anti-fraud provisions.

FIRST CLAIM FOR RELIEF
(Violation of Section 10(b) of the Exchange Act and Rule 10b-5)

19. The Commission repeats and incorporates by reference the allegations in paragraphs 1-18 of the Complaint as if set forth fully herein.

20. Defendants, directly or indirectly, acting intentionally, knowingly or recklessly, by the use of means or instrumentalities of interstate commerce or of the mails, in connection with the purchase or sale of securities: (a) have employed or are employing devices, schemes or artifices to defraud; (b) have made or are making untrue statements of material fact or has omitted or is omitting to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading; or (c) have engaged or are engaging in acts, practices or courses of business which operate as a fraud or deceit upon certain persons.

21. As a result, Defendants have violated and, unless enjoined, will continue to violate Section 10(b) of the Exchange Act [15 U.S.C. §78j(b)] and Rule 10b-5 thereunder [17 C.F.R. §240.10b-5].

SECOND CLAIM FOR RELIEF
(Violation of Section 17(a) of the Securities Act)

22. The Commission repeats and incorporates by reference the allegations in paragraphs 1-18 of the Complaint as if set forth fully herein.

23. By reason of the foregoing, defendants, directly or indirectly, in the offer or sale of securities, by use of means or instruments of transportation or communication in interstate commerce or by the use of the mails, in the offer or sale of securities: (a) employed devices, schemes or artifices to defraud; (b) obtained money or property by means of untrue statements of material fact or omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (c) engaged in transactions, practices or courses of business which operated as a fraud or deceit upon the purchaser of securities in violation of Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)].

24. As a result, Defendants have violated and, unless enjoined, will continue to violate Section 17(a) of the Securities Act.

THIRD CLAIM FOR RELIEF
(Violation of Sections 206(1) and 206(2) of the Advisers Act)

25. The Commission repeats and incorporates by reference the allegations in paragraphs 1-18 of the Complaint as if set forth fully herein.

26. Defendants were “investment advisers” within the meaning of Section 202(a)(11) of the Advisers Act [15 U.S.C. §80b-2(a)(11)].

27. Defendants, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, acting intentionally, knowingly or recklessly: (i) have employed or are employing devices, schemes, or artifices to defraud; or (b) have engaged or are engaging in transactions, practices, or courses of business which operate as a fraud or deceit upon a client or prospective client.

28. As a result, Defendants have violated and, unless enjoined, will continue to violate Sections 206(1) and (2) of the Advisers Act [15 U.S.C. §§80b-6(1), (2)].

FOURTH CLAIM FOR RELIEF
(Unjust Enrichment)

29. Plaintiff repeats and incorporates by reference the allegations in paragraphs 1-18 of the Complaint as if set forth fully herein.

30. GLP has no legitimate interest in, or right to, the funds received or retained as a result of the fraudulent conduct of Defendants Conway and/or Groundswell Partners, which are currently being held by it, and therefore, in equity and good conscience, it should not be allowed to retain such funds.

31. As a result, GLP is liable for unjust enrichment and should be required to return its unjust enrichment, with prejudgment interest.

PRAYER FOR RELIEF

WHEREFORE, the Commission requests that this Court:

A. Enter a temporary restraining order, order freezing assets and order for other equitable relief in the form submitted with the Commission's motion for such relief and, upon further motion, enter a comparable preliminary injunction, order freezing assets and order for

other equitable relief;

B. Enter a permanent injunction restraining Defendants and each of their agents, servants, employees and attorneys and those persons in active concert or participation with them who receive actual notice of the injunction by personal service or otherwise, including facsimile transmission or overnight delivery service, from directly or indirectly engaging in the conduct described above, or in conduct of similar purport and effect, in violation of:

1. Section 10(b) of the Exchange Act [15 U.S.C. §78j(b)] and Rule 10b-5 thereunder [17 C.F.R. §240.10b-5];
2. Section 17(a) of the Securities Act [15 U.S.C. § 17q(a)];
3. Sections 206(1) and (2) of the Advisers Act [15 U.S.C. §80b-6(1), (2)];

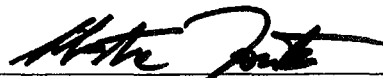
C. Require Defendants and Relief Defendant to disgorge their ill-gotten gains and unjust enrichment, plus pre-judgment interest, with said monies to be distributed in accordance with a plan of distribution to be ordered by the Court;

D. Order Defendants to pay an appropriate civil monetary penalty pursuant to Section 20(d) of the Securities Act [15 U.S.C. §77t(d)], Section 21(d)(3) of the Exchange Act [15 U.S.C. §78u(d)(3)], and Section 209(e) of the Advisers Act [15 U.S.C. §80b-9(e)];

E. Retain jurisdiction over this action to implement and carry out the terms of all orders and decrees that may be entered; and

F. Award such other and further relief as the Court deems just and proper.

Respectfully submitted,



Walter G. Ricciardi
District Administrator

David P. Bergers
Associate District Administrator

Martin F. Healey
Acting District Trial Counsel

Steven Quintero
Assistant District Administrator

Silvestre A. Fontes (Mass. Bar No. 627971)
Senior Trial Counsel

Philip Koski
Branch Chief

Lou Randazzo
Senior Counsel

Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
73 Tremont Street, Suite 600
Boston, MA 02108
(617) 573-8991 (Fontes)
(617) 424-5940 fax

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