

**IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA**

DANIEL S. NEWMAN, as RECEIVER for
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,

Plaintiff,

v.

ERNST & YOUNG LLP, a Delaware Limited
Liability Partnership; and MAYER BROWN
LLP, an Illinois Limited Liability Partnership,

Defendants.

Case No. 10-49061(19)

Honorable John J. Murphy, III

**ORDER ON ERNST & YOUNG LLP'S MOTION TO STAY LITIGATION OF
NON-ARBITRABLE CLAIMS PENDING COMPLETION OF ARBITRATION**

THIS CAUSE having come before the Court upon Defendant Ernst & Young LLP's ("EY") Motion to Stay Litigation of Non-Arbitrable Claims Pending Completion of Arbitration (the "Motion"); the Court having reviewed such Motion, the Receiver's response, Mayer Brown LLP's ("Mayer Brown") response, and EY's reply memorandum; the Court having heard the argument of counsel for EY, the Receiver, and Mayer Brown during the February 20, 2018 hearing on the Motion; and the Court having received and reviewed the presentations submitted by EY and the Receiver during such hearing,

It is ORDERED AND ADJUDGED as follows:

1. On May 20, 2016, this Court sent to arbitration the Receiver's claims against EY. The Receiver appealed that order to the Fourth District Court of Appeals. In the nineteen months

since then, the Receiver has continued to litigate his claims against Mayer Brown in EY's absence. Fact discovery is set to close on May 11, 2018.

2. The Fourth DCA affirmed EY's right to arbitrate as to most of the Receiver's claims, but reversed as to certain claims. Of the seven causes of action asserted against EY by the Receiver, six have been found to be arbitrable in whole or in part. The only non-arbitrable claims against EY are a portion of Count II (negligent misrepresentation), a portion of Count III (fraud), and Count X (aiding and abetting breach of statutory duties).

3. This Court has the authority to stay the Receiver's non-arbitrable claims against EY pending completion of the arbitration. *Klay v. All Defendants*, 389 F.3d 1191, 1204 (11th Cir. 2004); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Melamed*, 453 So. 2d 858, 861 (Fla. 4th DCA 1984). In light of all the circumstances presented here, this Court will exercise its discretion and issue such a stay.

4. A stay of the Receiver's non-arbitrable claims is warranted because the arbitrable and non-arbitrable claims overlap substantially. The claims involve the same parties, as well as the same factual allegations, legal issues, and causes of action. Indeed, as pleaded by the Receiver, the arbitrable and non-arbitrable claims rest on the same 589 paragraphs of the Fourth Amended Complaint.

5. The non-arbitrable and arbitrable claims also arise out of the same alleged losses. The Receiver has alleged that the Funds lost approximately \$550 million as a result of loans made to Sun Capital, Inc. and Sun Capital Healthcare, Inc., and that the Assignors contributed a portion of those amounts to the Funds by way of their investments. The Receiver, in connection with his arbitrable claims, seeks recovery of all losses incurred by the Funds (including that

portion contributed by the Assignors). Thus, the arbitrable claims seek recovery of all losses at issue, while the non-arbitrable claims only seek recovery of a subset of those losses.

6. If the Receiver were to prevail against EY on its arbitrable claims and recover the amounts sought, the Funds would be made whole. If the Funds' losses were recouped in their entirety from EY, then all losses attributable to the assigned claims would be satisfied. Moreover, all recoveries on both the arbitrable and non-arbitrable claims will go directly to the Receiver.

7. Accordingly, this Court finds that the arbitrable claims predominate and that the outcome of the non-arbitrable claims are dependent on findings to be made in the arbitration. *See Klay*, 389 F.3d at 1204.

8. A stay is also necessary to protect EY's bargained-for arbitral rights. *See Petrik v. Reliant Pharm., Inc.*, No. 8:07-cv-1462-T-24, 2007 WL 3283170, at *3 (M.D. Fla. Nov. 5, 2007). This Court and the Fourth DCA have held that EY has a right to arbitrate the arbitrable issues and claims. Because of the substantial overlap of the arbitrable and non-arbitrable claims, the decision of the first forum to reach a final adjudication may give rise to issue preclusion in the later proceeding. *See Kowallek v. Lee Rehm*, 183 So. 3d 1175, 1177 (Fla. 4th DCA 2016) (“[I]ssue preclusion, ‘bars relitigation of the same issue between the same parties which has already been determined by a valid judgment,’ even where the present and former cause of action are not the same.” (citation omitted)). Thus, if the non-arbitrable claims were to go to judgment before the arbitration, this could vitiate EY's bargained-for right to have an arbitrator determine the common factual and legal issues underlying the Receiver's arbitrable claims.

9. The Court further finds that it would not be “feasible” to reintegrate EY into the litigation at this stage of the proceedings. *See Klay*, 389 F.3d at 1204. During EY's nineteen-

month absence from the case, the Receiver and Mayer Brown have diligently pursued discovery, exchanging millions of pages of documents and taking eighteen depositions. Introducing EY into the case at this point—less than three months before the close of fact discovery—would require a lengthy extension of the discovery deadlines so that EY could have sufficient time to review the discovery record. Additional depositions would need to be postponed until EY had the opportunity to “catch up.” And, as the Receiver concedes, the eighteen depositions already taken in EY’s absence would need to be re-opened so that EY could examine those witnesses. Mayer Brown, although it takes no position on EY’s Motion, objects to any extension of the discovery deadlines. This Court finds that pausing, extending, and re-opening discovery—all of which would be required in the absence of a stay—is neither feasible nor efficient.

10. Finally, a stay may promote judicial economy because the arbitration could resolve the Receiver’s claims against EY in their entirety. *See Murdock v. Santander Consumer USA Inc.*, No. 2:15-cv-268-FtM-38CM, 2016 WL 3913135, at *2 (M.D. Fla. July 20, 2016). The arbitrators’ findings on overlapping issues, for example, could determine the outcome of the non-arbitrable claims. EY has consented to a “reasoned” arbitration award that will allow for findings by the arbitrators to be applied, as appropriate, to the non-arbitrable claims.

11. In light of the foregoing considerations, the Court finds that a stay is warranted.

12. EY’s Motion to Stay Litigation of Non-Arbitrable Claims Pending Completion of Arbitration therefore is **GRANTED** and all claims against EY are STAYED pending completion of the arbitration.

13. The Receiver and EY shall submit a brief joint status report every six months informing the Court of the status of the arbitration. The first joint status report is due August 24, 2018.

14. Within thirty days of a final award in arbitration, the Receiver and EY shall file a joint notice apprising the Court of the outcome. If further litigation is necessary, the Receiver and EY shall set forth in the joint notice their proposal(s) for further proceedings in litigation.

15. This Order does not stay the Receiver's claims against Mayer Brown. Nothing herein alters the existing deadlines between the Receiver and Mayer Brown.

16. This Order is without prejudice to the rights of the Receiver and Mayer Brown to obtain discovery from EY relating to the ongoing claims between them, including documents and testimony.

DONE AND ORDERED in Fort Lauderdale, Broward County, Florida, on this 23 day of Feb, 2018.



HONORABLE JOHN J. MURPHY, III
Circuit Court Judge

Copies furnished to all counsel.