

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

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

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

FOUNDING PARTNERS CAPITAL MANAGEMENT
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.

RECEIVER'S MOTION FOR AN ORDER TO SHOW CAUSE WHY THE GUNLICKS CHILDREN, WILLIAM L. GUNLICKS, AND THEIR ILLINOIS COUNSEL SHOULD NOT BE HELD IN CONTEMPT OF COURT FOR VIOLATING THE RECEIVERSHIP ORDER AND SANCTIONING THEM TO COERCE COMPLIANCE WITH THE COURT'S ORDER AND INCORPORATED REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 3.01(e), Daniel S. Newman, as Court-appointed Receiver (the "Receiver") for defendant Founding Partners Capital Management Company ("FPCMC") and relief defendants Founding Partners Stable-Value Fund, L.P.; Founding Partners Stable-Value Fund II, L.P.; Founding Partners Global Fund, Ltd.; and Founding Partners Hybrid-Value Fund, L.P. (collectively, the "Receivership Entities"), by and through undersigned counsel, respectfully files this motion for an order to show cause why plaintiffs in an action brought by them in Illinois state court, which asserts claims belonging to the Receivership Entities, William L.

BROAD and CASSEL

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Gunlicks, who negotiated the fee arrangement pursuant to which that action was brought, and their counsel, should not be held in contempt for violating this Court's Order Appointing Receiver (the "Receivership Order") and sanctioning them to coerce compliance with the Court's Order. In support thereof, the Receiver states as follows:

I. INTRODUCTION

Mr. Gunlicks' three children -- Nissa Cox, Annalee Good, and William V. Gunlicks (collectively, the "Gunlicks Children")--in their individual capacities as well as purported minority shareholders in FPCMC and under purported trust agreements recently filed a lawsuit in Illinois state court (the "Illinois Action") against the Receivership Entities' former legal counsel, Mayer Brown LLP (and certain of its employees) (collectively "Mayer Brown") and former outside auditor, Ernst & Young U.S., LLP ("E&Y") for professional malpractice and breach of contract. *See* Complaint filed in Case No. 2010 L 010353 attached as Exhibit A (the "Illinois Complaint").¹

As discussed more fully below, the circumstances surrounding the Illinois Action and the Illinois Action itself are violative of this Court's Order Appointing Replacement Receiver [D.E. 73] (the "Receivership Order") for a variety of reasons. First, the claims asserted by the Gunlicks Children in the Illinois Action are claims that belong to the Receivership Entities; thus, they are claims that may solely be asserted by the Receiver. The Gunlicks Children are, therefore, violating this Court's Receivership Order by initiating the Illinois Action themselves and refusing to stay it.

Second, the pendency of the Illinois Action is interfering with the Receiver's administration of the Receivership Entities by usurping from the Receiver his exclusive power to

¹ The Illinois Action was filed by Jay Paul Deratany, of The Deratany Firm and William Delaney, of Delaney Law (collectively, "Illinois Counsel").

administer and control the actions by and on behalf of the Receivership Entities. Such interference is also a violation of this Court's Order.

Third, Mr. Gunlicks has violated the Receivership Order by negotiating the contingency fee agreement pursuant to which the Illinois Action was initiated. The fee arrangement apparently would transfer potential recoveries from the Receivership Estate for the benefit victim-investors to Illinois Counsel and the Gunlicks family.²

Fourth, the Gunlicks Children and Mr. Gunlicks' Illinois Counsel have been complicit in their clients' contumacious conduct by filing and refusing to stay the Illinois Action, thereby maintaining a lawsuit pursuant to that contingency fee agreement.

In addition to the violations of the Receivership Order, it appears that the purported trusts under which the Gunlicks Children are suing were recipients of fraudulent transfers from FPCMC. In fact, the "trusts" received a total of at least \$251,730.00 from FPCMC only four months prior to the inception of the receivership, which transfers were not disclosed by Mr. Gunlicks to the SEC or to the Receiver.

Furthermore, to the extent that the Gunlicks Children, Mr. Gunlicks and Illinois Counsel are permitted to persist with their contumacious acts, the receivership estate would likely incur additional costs in the form of the Receiver having to intervene in the Illinois Action in order to attempt to stay that proceeding. In sum, not only would this be inefficient, it would be inequitable given that during the course of this receivership, innocent investors that have initiated their own litigation outside of these proceedings have consistently—either by order or consent—agreed to stay prosecution of their claims, yet in this instance, the Gunlicks family—with Mr. Gunlicks himself as the driving force behind the Illinois Action—seem to believe that they

² The fee arrangement negotiated by Defendant Gunlicks and Illinois Counsel has not been disclosed.

should be afforded different treatment. That simply should not be permitted to occur.

Based upon the foregoing and as more fully discussed below, the Gunlicks Children, Mr. Gunlicks and their Illinois Counsel should be required to show cause why they should not be held in contempt for violating this Court's Receivership Order and sanctioning them to coerce compliance with the Court's Order. The Receiver also seeks an order sanctioning the Gunlicks Children, Mr. Gunlicks and their Illinois Counsel and requiring them to pay into the receivership the fees and expenses associated with the Receiver having to file the instant Motion.

II. FACTUAL BACKGROUND

A. Commencement of the Receivership

On April 20, 2009, the United States Securities and Exchange Commission ("SEC") filed a five-count securities fraud complaint against the Receivership Entities and William Gunlicks, alleging that the Receivership Entities and Mr. Gunlicks had engaged, and were engaging in, a scheme to defraud investors and violate the federal securities laws. (D.E.1). In the Complaint, the SEC sought, among other relief, entry of a temporary retraining order and a preliminary injunction freezing the Relief Defendants' assets and appointment of a receiver.

On April 20, 2009, this Court entered an order appointing a receiver (the "Initial Receiver") for the Receivership Entities. (D.E. 9). On May 13, 2009, the Initial Receiver was removed (D.E. 70), and on May 20, 2009, she was replaced, pursuant to the Receivership Order, by the present Receiver.

B. The Receivership Order

The Receivership Order appointed the Receiver as "replacement Receiver over [the Receivership Entities]" and authorizes, empowers, and directs the Receiver to, among other

things, “[t]ake immediate possession of all property, assets and estates of every kind of [the Receivership Entities], whatsoever and wheresoever located, including but not limited to...rights of action...and to administer such assets as is required in order to comply with the directions contained in this Order....” Receivership Order at ¶2(a).

The Receivership Order further authorizes the Receiver to “...institute such actions and legal proceedings, for the benefit of and on behalf of Founded Partners....” *Id.* at ¶2(b).

The Receivership Order also sets forth obligations on individuals formerly affiliated with the Receivership Entities and prohibits their interference with the Receiver’s commission of his duties.

For example, Paragraph 3(a) states:

[The Receivership Entities], and all of their directors, officers, agents...*shareholders*, and other persons who are in custody, possession, or control of any assets, books, records, or other property of [the Receivership Entities] shall deliver forthwith upon demand such property, *money*, books and records to the Receiver....

(Emphasis added).

Paragraph 3(c) states:

Unless authorized by the Receiver, [the Receivership Entities], and their principals shall take no action, nor purport to take any action, in the name of or on behalf of [the Receivership Entities].

Paragraph 3(d) of the Receivership Order states:

[The Receivership Entities], and their principals and respective officers, agents...shall take no action, directly or indirectly, to hinder, obstruct, or otherwise interfere with the Receiver in the conduct of the Receiver’s duties or to interfere in any manner, directly or indirectly, with the custody, possession, management, or control by the Receiver of the funds, assets, premises, and choses in action described above.

Finally, the Receivership Order also expressly sets forth a stay on actions relating to the

Receivership Entities:

During the period of this receivership, all persons, including creditors, banks, investors, or others, with actual notice of this Order, are enjoined from . . . in any way disturbing the assets or proceeds of the receivership *or from prosecuting any actions or proceedings which involve the Receiver or which affect the property of Founding Partners* or the Founding Partners Relief Defendants.

Id. at ¶5 (emphasis added).

C. The Illinois Action

On September 9, 2010, the Gunlicks Children, in their individual capacities as well as purported minority shareholders in FPCMC and under certain purported trust agreements,³ initiated the Illinois Action against Mayer Brown and E&Y— the Receivership Entities’ former legal and accounting professionals--without consulting with or obtaining authorization from the Receiver.

In the Illinois Action, the Gunlicks Children allege that since August 2007, the Gunlicks Children were minority shareholders each holding 4.5% of the stock in FPCMC, totaling 13.5% of the shares of FPCMC. *See* Illinois Complaint at ¶3.

The Gunlicks Children further allege that Mr. Gunlicks on behalf of himself, and all shareholders in FPCMC, and FPCMC itself purportedly entered into an attorney-client agreement with Mayer Brown pursuant to which, they further allege, Mayer Brown was to and did provide legal advice to FPCMC through April 2009. *Id.* at ¶4.⁴

³ The Illinois Complaint does not attach the trust agreements under which the Gunlicks Children purport to be suing.

⁴ It is noteworthy that certain of the claims in the Illinois Complaint are inconsistent. For example, Paragraph 12 of the Illinois Complaint states that in February, 2000, FPCMC purportedly entered into an attorney-client agreement with Mayer Brown. Illinois Complaint at ¶12. Paragraph 13 alleges that “Plaintiffs...were the direct and/or intended beneficiaries of the attorney client contract.” *Id.* at ¶13. Based upon the allegations set forth in Paragraph 3 of the Illinois Complaint, the Gunlicks Children were not, however, shareholders in FPCMC at the time the agreement was allegedly executed.

With regard to E&Y, the Gunlicks Children allege that it was engaged by Mr. Gunlicks and the “managers” of FPCMC to audit the “four funds” now in receivership. *Id.* at ¶17.⁵

Based upon these purported relationships with the Receivership Entities’ former professionals, the Gunlicks Children claim that each of Mayer Brown and E&Y deviated from the applicable professional standard of care and breached the purportedly applicable agreements⁶ with FPCMC thereby causing them damage to them.

D. The Fee Arrangement Negotiated by Mr. Gunlicks

Upon learning about the Illinois Action and later receiving the Motion to Intervene filed in the Sun Litigation⁷, the Receiver inquired of Illinois Counsel (among other things) the manner by which it was being compensated by the Gunlicks Children and/or Mr. Gunlicks for those filings. *See* Email to M. Descalzo from M. Visiedo-Hidalgo dated December 13, 2010, attached as Exhibit B.

In response, Illinois Counsel initially represented that “Mr. Delaney and I are receiving no (that’s ZERO) funds from Mr. Gunlicks for representation of him in Newman, as receiver vs. Sun Capital.” *See* Email from J. Deratany dated December 13, 2010, attached as Exhibit C.

⁵ Although the Illinois Complaint has no allegations relating to when the alleged “contractual agreement” with E&Y was executed, the Illinois Complaint generally alleges that “[o]n or about September 1996 and at all times relevant, and continuing through December 2008,” (*Id.* at ¶16) E&Y had certain duties relating to the provision of accounting advice. In fact, E&Y served as the Receivership Entities’ outside auditor and audited the Receivership Entities’ financial statements for the fiscal years 2000-2007. Thus, like the relationship between the Receivership Entities and Mayer Brown, the Receivership Entities’ professional relationship with E&Y pre-dated the Gunlicks’ Children’s purported ownership in FPCMC by several years.

⁶ The Illinois Complaint does not attach the agreements upon which the breach of contract claims are based. Section 2-606 of the Illinois Code of Civil Procedure provides that if a claim “is founded upon a written instrument, a copy thereof must be attached to the pleading as an exhibit or recited therein, unless the pleader attache[d] to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her.” 735 ILCS 5/2-606 (West 2004). The copy of the Illinois Complaint provided to the Receiver does not attach any such affidavit.

⁷ “Sun Litigation” refers to the case styled *Daniel S. Newman, as Receiver v. Sun Capital, Inc., et al.*, Case No. 09-445, currently pending before this Court.

Upon further inquiry, Mr. Deratany further confirmed that Illinois Counsel has “a contingency fee representation agreement for *his* INDIVIDUAL claims against the law firm and accounting firm.” *See* Email from J. Deratany dated December 16, 2010, attached as Exhibit D.

In other words, Mr. Gunlicks—who consented to a judgment in this case (D.E. 201) and who has been afforded monthly disbursements during the course of this litigation—appears to have privately negotiated a fee arrangement, which apparently would transfer potential recoveries from the Receivership Estate for the benefit victim-investors to Illinois Counsel and the Gunlicks family.

Notably, in response to Receiver’s counsel’s inquiry regarding source of funds, Mr. Gunlicks’ Florida counsel, Carlton Fields, expressly disavowed any role in the filings at issue (*i.e.*, the Motion to Intervene and the Illinois Action). *See* Email from W. Tache dated December 13, 2010, attached as Exhibit E.

E. The Gunlicks Children and Illinois Counsel Refuse to Stay the Illinois Action

Prior to filing this Motion, the Receiver and his counsel made multiple overtures to Illinois Counsel to attempt to explain to them the Receiver’s position concerning the impropriety of the Illinois Action and to request that they voluntarily stay that case. Illinois Counsel has refused to do so.

Illinois Counsel first informed the Receiver of the Illinois Action when they sent a letter to the Receiver November 17, 2010, indicating that they intended to file a Motion to Intervene in the Sun Litigation and referencing in a footnote the fact that the Illinois Action had been filed. *See* Letter dated November 17, 2010 from Illinois Counsel to the Receiver attached as Exhibit F.

Thereafter, on November 22, 2010, during a telephone conference with Illinois Counsel, the Receiver and his counsel explained that it was their belief that the Illinois Action appeared to

be a violation of the Receivership Order and requested additional documentation from Illinois Counsel relating to the other purported shareholders in FPCMC.

On December 3, 2010, Receiver's counsel also sent an e-mail to Illinois Counsel following up on the documents requested of them by the Receiver during the telephone conference that took place the prior week. *See* E-mail from M. Visiedo-Hidalgo to Illinois Counsel dated December 3, 2010, attached as Exhibit G.

Rather than provide the requested information to the Receiver or even respond to counsel's e-mail, however, on December 10, 2010, Illinois Counsel filed the Motion to Intervene in the Sun Litigation on behalf of Mr. Gunlicks and the Gunlicks Children in a manner contrary to the letter and spirit of Local Rule 3.01(g). (Sun Litigation, D.E. 216)⁸.

In response and upon further investigation of the Illinois Complaint and the relevant circumstances, on December 13, 2010, Receiver's counsel advised Illinois Counsel that it was the Receiver's position that the Illinois Action violated the Receivership Order because it was based upon claims belonging to FPCMC, and, therefore, such claims could only be asserted by the Receiver, and requested Illinois Counsel to confirm whether their clients would agree to immediately stay that litigation. *See* Letter dated December 13, 2010, to Illinois Counsel attached as Exhibit H. Although Illinois Counsel promised a formal response to that correspondence the next day (*see* Exhibit C), one never came.

Therefore, on December 16th, Receiver's counsel again advised Illinois Counsel of the Receiver's objection to the pendency of the Illinois Action and once again inquired whether they would agree to immediately stay that litigation. *See* E-mail from M. Visiedo-Hidalgo to J. Deratany dated December 16, 2010, attached as Exhibit I.

⁸ The Receiver is filing his response in opposition to the Motion to Intervene in the Sun Litigation contemporaneously with this Motion.

Illinois' Counsel's responses, which included accusing counsel of "drinking some pretty powerful kool-aid" (see Email from J. Deratany to M. Visiedo-Hidalgo dated December 16, 2010, attached as Exhibit J), confirmed that "our clients intend to stand upon their collective rights in the cook County Law suit...."

III. VIOLATIONS OF THE RECEIVERSHIP ORDER BY THE GUNLICKS CHILDREN, DEFENDANT GUNLICKS AND ILLINOIS COUNSEL

The Gunlicks Children, Mr. Gunlicks and Illinois Counsel⁹ have violated the Receivership Order in multiple respects.

First, the Gunlicks Children (and Mr. Gunlicks to the extent that he has joined as a plaintiff in the Illinois Action)¹⁰ have violated the Receivership Order by initiating the Illinois Action and brazenly refusing to stay it. The Receivership Order is clear that only the Receiver may assert claims on behalf of the Receivership Entities. Receivership Order at ¶¶2(a), 2(b), 5. The claims asserted in the Illinois Action arise from the relationships that existed between the Receivership Entities and Mayer Brown and the Receivership Entities and E&Y. The Illinois Action is, therefore, based upon claims that belong to the Receivership Entities, and only the Receiver may pursue those claims on behalf of the Receivership Entities.¹¹

⁹ Defendant Gunlicks, the Gunlicks Children and Illinois Counsel had notice of the Receivership Order and the multiple provisions therein that have been violated by them. The original Order Appointing Receiver and Order Freezing Assets and Other Emergency Relief dated April 20, 2009 was served on Defendant Gunlicks, as well as his son, William V. Gunlicks, on April 20, 2009 at the Receivership Entities' Chicago offices. Thereafter, Defendant Gunlicks was represented by Carlton Fields, who is still counsel of record in this case and, therefore, received the Receivership Order. Additionally, the Receiver was contacted by William Delaney—one of the two Illinois Counsel—as early as June, 2009, on behalf of William V. Gunlicks. Simply put, the Gunlicks Children, Defendant Gunlicks, and Illinois Counsel have no plausible deniability of knowledge of the Receivership Order.

¹⁰ It has not been confirmed whether Defendant Gunlicks has joined the Illinois Action as a plaintiff.

¹¹ At best, the Illinois Action is a veiled attempt by the Gunlicks Children to make a derivative claim on behalf of FPCMC (to the extent that their purported interests in FPCMC are actually legitimate and recognizable). A derivative action is a lawsuit brought by the shareholders of a corporation *on behalf of* the corporation against a third party. *Fox v. Prof'l Wrecker Operators of Florida, Inc.*, 801 So.2d 175, 179 (Fla. 5th DCA 2001) (derivative action is a cause of action brought by a stockholder to enforce a right of action that exists on behalf of a corporation) (cited in *Lewis v. Seneff*, 654 F. Supp. 2d 1349, 1361 (M.D. Fla. 2009)). The Receiver is, therefore, still the only proper

Second, the Gunlicks Children are also violating the Receivership Order by directly interfering with the conduct of the Receiver's duties and his management and control of such claims. Paragraph 3(d) of the Receivership Order expressly prohibits principals and agents (among others) of the Receivership Entities from taking any action "to hinder, obstruct, or otherwise interfere with the Receiver in the conduct of the Receiver's duties or to interfere in any manner, directly or indirectly, with the custody, possession, management, or control by the Receiver of the funds, assets, premises, and *choses in action* described above." (Emphasis added).

As has been reported to this Court, the Receiver has in the past negotiated tolling agreements with both Mayer Brown and E&Y in order to toll the period for asserting potential claims against those entities. *See* Receiver's First Report at p. 25 (D.E. 177). The Receiver also sought Court approval to retain Beus Gilbert PLLC ("Beus Gilbert") as lead litigation counsel in yet-to-be filed actions against third party professionals. *See* Receiver's Unopposed Amended Emergency Motion to Retain Litigation Counsel (D.E. 242). The Court ultimately approved that retention (D.E. 246), and the Receiver, in consultation with his Beus Gilbert, is actively evaluating the Receivership Entities' claims against their former professionals. The Illinois Action is already improperly and unnecessarily interfering with these efforts and will continue to do so unless abated.

Third, Mr. Gunlicks has violated Paragraph 3(d) of the Receivership Order by unilaterally--without the Receiver's consent or authorization and without this Court's approval — negotiating the fee arrangement pursuant to which the Illinois Action was brought. To make matters worse, that fee agreement apparently would transfer potential recoveries from the

party to assert claims "on behalf of" FPCMC under the Receivership Order.

Receivership Estate for the benefit victim-investors to Illinois Counsel and the Gunlicks family. Consequently, Mr. Gunlicks - a named defendant in this action who has consented to a judgment against him - single-handedly set into motion several of the contumacious acts described in this Motion.

Finally, the Receiver respectfully submits that Illinois Counsel has itself also violated the Receivership Order by permitting the foregoing to take place and by being complicit in its clients' contumacious conduct. The Receivership Order expressly enjoins those with knowledge thereof from, among other things, "*prosecuting any actions or proceedings which involve the Receiver or which affect the property of Founding Partners or the Founding Partners Relief Defendants.*" Receivership Order at ¶5. Such "property" clearly includes claims that belong to the Receivership Entities which only may be asserted by the Receiver. Notably, Illinois Counsel has also been particularly belligerent in purportedly responding to Receiver's counsel's multiple overtures, not only for information, but also as to whether they and their clients insist on pursuing the Illinois Action notwithstanding this Court's clear directives to the contrary.¹² As a result, Illinois Counsel has already forced the Receiver to spend precious receivership resources trying to stop the improper conduct described in this Motion, which should otherwise be available for the benefit of the victims of Mr. Gunlicks' fraud.

IV. THE GUNLICKS CHILDREN'S PURPORTED INTERESTS IN FPCMC

The Receiver's investigation of the Gunlicks Children's claims of ownership in FPCMC also revealed several other troubling facts which this Court should be made aware.

¹² In fact, just this morning, Illinois Counsel actually alluded to suing the Receiver's counsel's law firm in the context of counsel's request, yet again, for documentation. See E-mail from J. Deratany dated December 30, 2010 attached as Exhibit K.

A. The Gunlicks Children's Purported Interests in FPCMC are Unsubstantiated

As an initial matter, the Gunlicks Children have failed to substantiate their claim that they have any direct or indirect interests in FPCMC. The purported stock certificates, which purport to vest ownership of stock in FPCMC in the trusts, are undated, and reference a purported Shareholder's Agreement that has never been produced to the Receiver. Moreover, certain of the Receiver's records contradict the claims of the Gunlicks children. The Receivership records include signed tax returns for 2007, which assert that Mr. Gunlicks is the 100% owner of FPCMC. *See* Form K-1 attached as Exhibit L.¹³ Although the stock certificates are undated, the Gunlicks Children allege in the Illinois Action that they received their interests in 2007, which is contradicted by the signed tax returns in files of FPCMC.

In correspondence to Illinois Counsel, the Receiver's counsel asked Illinois counsel for Mr. Gunlicks and the Gunlicks Children for proof of ownership, and noted that the Receiver's documents demonstrated that Mr. Gunlicks was in fact the sole owner of FPCMC. *See* Exhibit H. Illinois Counsel ignored the Receiver's request and filed the Motion to Intervene in the Sun Litigation without referencing this important prior correspondence.

B. Even if the Gunlicks Children Could Prove Their Claimed Interests in FPCMC, Those Interests Are Shams and Served Only As Conduits for Fraudulent Transfers

The limited documentation in the Receiver's possession relating to the trusts indicates that they were nothing more than conduits through which Gunlicks was able to make fraudulent transfers to his children shortly before the inception of the Receivership. Indeed, it appears that notwithstanding their alleged creation in August of 2007, the trusts did not seek federal tax identification numbers until November 17, 2008 (*See* Document Bates-labeled CHI000050758

¹³ The document has been redacted to protect the personal and financial information set forth therein.

attached as Exhibit M), and did so solely for the purpose of receiving \$83,910.00 each from FPCMC only a few weeks later (and exactly four months prior to the inception of the Receivership).¹⁴ In other words, the trusts, which were created by Mr. Gunlicks for the purported benefit of his three children, received monies from FPCMC pre-receivership, and FPCMC was itself at that time, according to the Gunlicks Children, owned and operated by Mr. Gunlicks and the Gunlicks Children. Thus, the trusts were, in fact, recipients of fraudulent transfers.¹⁵

V. THE GUNLICKS CHILDREN, MR. GUNLICKS AND ILLINOIS COUNSEL SHOULD BE REQUIRED TO SHOW CAUSE WHY THEY SHOULD NOT BE HELD IN CONTEMPT OF COURT

A. This Court has the Inherent Power to Enforce the Receivership Order and Impose Sanctions for Civil Contempt Against the Gunlicks Children, Mr. Gunlicks and their Illinois Counsel

Federal courts have the inherent power to impose submission to their lawful mandates and to achieve the orderly disposition of cases. *See Chambers v. Nasco, Inc.* 501 U.S. 32, 43-44 (1991). In order to prove civil contempt, the petitioning party must prove by clear and convincing evidence that the underlying order was violated. *Howard Johnson Co. Inc. v. Khimani*, 892 F. 2d 1512, 1516 (11th Cir. 1990). Moreover, "the focus of the court's inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnors in

¹⁴ At the time of the transfers, FPCMC and Defendant Gunlicks, specifically, had reason to believe that the Receivership Entities' collateral was at risk. For example, Philip Fues, FPCMC's former Chief Credit Officer previously attested that in the fall of 2008, a forensic accounting firm was hired to verify the financial information provided by Sun Capital to Stable Value concerning its finances and Stable Value's collateral. *See* Declaration of Philip Fues attached as Exhibit N. The results of that forensic investigation then prompted an email on December 4, 2008 - only a few weeks prior to the transfers and on which Defendant Gunlicks was copied - requesting information from Sun Capital based upon tests performed on Sun Capital's financials by the forensic accountants.

¹⁵ The Receiver recently uncovered these transactions and will be making a demand for the proceeds from the Gunlicks Children in short order.

complying with the order, but whether in fact their conduct complied with the order at issue." *Id.* Once a district court finds a party in contempt, it has "broad discretion in fashioning a contempt sanction." *Sizzler Family Steak Houses v. W. Sizzlin Steak House, Inc.*, 793 F.2d 1529, 1536 n.8 (11th Cir. 1986); *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1304 (11th Cir. 1991). A civil contempt fine can be used to compensate a complainant for losses suffered as a result of noncompliance with a court order. *See International Union, UMW v. Bagwell*, 512 U.S. 821, 826-27 (1994) (*quoting United States v. Mine Workers of America*, 330 U.S. 258, 303-304, (1947)).

B. Mr. Gunlicks, the Gunlicks Children and their Illinois Counsel Are In Contempt of the Receivership Order

The Gunlicks Children, Mr. Gunlicks and Illinois Counsel¹⁶ have violated the Receivership Order in the various ways outlined in Section III above.

Indeed, the Illinois Action is nothing more than an attempt by the Gunlicks Children and Mr. Gunlicks to circumvent this Court's Receivership Order by asserting claims under the guise that they belong to the Gunlicks Children when, in fact, they actually belong to the Receivership Entities, and, therefore, to the Receiver. The Gunlicks Children made these claims partially on behalf of "trusts" which appear to be nothing more than mere instrumentalities of Mr. Gunlicks' fraud. It is possible that Mr. Gunlicks and the Gunlicks Children's failure to disclose and surrender the proceeds of the transfers described in Section IV of this Motion is also a violation

¹⁶ Defendant Gunlicks, the Gunlicks Children and Illinois Counsel had notice of the Receivership Order and the multiple provisions therein that have been violated by them. The original Order Appointing Receiver and Order Freezing Assets and Other Emergency Relief dated April 20, 2009 was served on Defendant Gunlicks, as well as his son, William V. Gunlicks, on April 20, 2009 at the Receivership Entities' Chicago offices. Thereafter, Defendant Gunlicks was represented by Carlton Fields, who is still counsel of record in this case and, therefore, received the Receivership Order. Additionally, the Receiver was contacted by William Delaney—one of the two Illinois Counsel—as early as June, 2009, on behalf of William V. Gunlicks. Simply put, the Gunlicks Children, Defendant Gunlicks, and Illinois Counsel have no plausible deniability of knowledge of the Receivership Order.

of Paragraph 3(a) of the Receivership Order which expressly requires directors, officers and shareholders of the Receivership Entities who hold any property of the Receivership Entities to deliver such property, including “money”, to the Receiver. The ruse in Illinois was prompted by a defendant in this case, Mr. Gunlicks, who took it upon himself to unilaterally negotiate the fee arrangement which apparently would transfer potential recoveries from the Receivership Estate for the benefit victim-investors to Illinois Counsel and the Gunlicks family and which served as the impetus to the circumstances leading to the filing of this Motion.

C. Other Factors Necessitating the Relief Requested

As a result of the Gunlicks Children, Mr. Gunlicks and Illinois Counsel’s violations of the Receivership Order, the Receiver has been forced to expend receivership resources in attempting—albeit unsuccessfully—to voluntarily obtain compliance from Mr. Gunlicks, the Gunlicks Children and Illinois Counsel with the Receivership Order. If not curtailed, their actions have additional consequences that merit serious consideration.

Waste. If the Illinois Action is not abated, the Receiver will need to retain local counsel in Illinois to intervene in that action and attempt to stay it. To the extent those efforts are unsuccessful, the receivership might also have to incur the costs associated with appealing a negative ruling in that regard. In the meantime, the Illinois Action will interfere (and arguably already has interfered) with the Receiver’s ability to evaluate and effectively pursue his claims against Mayer Brown and E&Y. Additionally, to the extent that the proceeds of the transfers described in Section IV above are not surrendered to the Receiver, the receivership will have to incur the additional expense of filing an independent lawsuit to recover those funds.

Dangerous Precedent. If the Illinois Action is permitted to proceed, it is possible if not likely that investors who lack the Gunlicks’ culpability will seek to initiate their own actions

based upon claims that they believe should be considered, administered and/or asserted by the Receiver. As a result, the Receiver will be forced to administer the receivership on multiple fronts, which is not a cost-efficient proposition, and there will be more risk for inconsistent rulings and depletion of potential sources of recovery.

Inequitable Results. Finally, during the course of this litigation, investor-victims of Mr. Gunlicks' fraud have sought to initiate and/or have initiated their own actions and—by order or consent—have agreed to stay those cases. It would be wholly inequitable to *not* require the same result of the Gunlicks.

VI. MR. GUNLICKS, THE GUNLICKS CHILDREN AND ILLINOIS COUNSEL SHOULD BE SANCTIONED

As demonstrated herein, the Illinois Action is improper and never should have been filed. Once filed, it should have been stayed in the manner that other investor-victims of Mr. Gunlicks' fraud have more sensibly done in the past. The filing of the Illinois Action and the refusal of Illinois Counsel, themselves and on behalf of their clients, to stay it--particularly in light of Receiver's counsels multiple overtures to Illinois Counsel regarding their improper filings--has caused the Receivership Estate to expend time and resources in preparing this Motion and has caused and will cause the Court to waste its own valuable time. An award of sanctions against Mr. Gunlicks, the Gunlicks Children, and their counsel is appropriate, pursuant to the Court's inherent power to impose sanctions. *See, e.g., In re Sunshine Stores, Inc.*, 456 F.3d 1291, 1304 (11th Cir.2006) ("Federal courts have the inherent power to impose sanctions on parties, lawyers, or both."); *see also Leor Exploration & Production, LLC v. Aguiar*, 2010 WL 3782195, at *10 (S.D.Fla. Sept. 28, 2010) ("The key to unlocking a court's inherent power is a finding of bad

faith...A party demonstrates bad faith by, inter alia, delaying or disrupting the litigation or hampering enforcement of a court order.”) (internal citations omitted).

Sanctions are also appropriate pursuant to 28 U.S.C. § 1927, which provides that “[a]ny attorney...who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.” See, e.g., *Smith v. Trans-Siberian Orchestra*, 2010 WL 2949290, at *9 (M.D.Fla. July 26, 2010) (the purpose of Section 1927 “is to limit abuses of judicial processes and to discourage dilatory practices by attorneys.”); *Footman v. Cheung*, 341 F.Supp. 2d 1218, 1223 (M.D.Fla. 2004) (a party demonstrates bad faith by “hampering enforcement of a court order.”); *Hickman v. Wal-Mart Stores, Inc.*, 152 F.R.D. 216, 220 (M.D.Fla. 1993) (“Sanctions may be imposed to punish parties that are guilty of ‘willful bad faith and callous disregard’ of court orders.”) (internal citations omitted).

In the instant case, as demonstrated above, the Gunlicks Children, Mr. Gunlicks and Illinois Counsel have long been aware of the Receivership Order, and its grant of exclusive authority to the Receiver to act on behalf of FPCMC and the Receivership Entities. Furthermore, a glance of the docket in this case would reflect multiple instances where outside litigation was initiated by investor victims but stayed on consent of the investor victims who recognized that maintaining separate actions would violate the Court's Orders and the Receiver's court-appointed duties. Notwithstanding the Receiver's multiple overtures, however, Illinois Counsel, themselves and on behalf of their clients, have willfully and intentionally disregarded the mandates of the Receivership Order by insisting on pursuing the Illinois Action, thus violating its terms and forcing the expenditure of Receivership and judicial resources. By doing so, they are

hampering not only enforcement of the Receivership Order but the Receivership itself. In such circumstances, an award of sanctions is highly appropriate.

VII. CONCLUSION

Based upon the foregoing, the Receiver respectfully requests that the Court enter an order (i) requiring the Gunlicks Children, Mr. Gunlicks, and Illinois Counsel to show cause why they should not be held in contempt of court for violating the Receivership Order in the manner more fully described above and (ii) sanctioning them to enforce compliance with the Receivership Order.

MEET AND CONFER CERTIFICATION

As described in the Motion, Receiver's counsel conferred with Illinois Counsel for the Gunlicks' Children prior to filing this Motion. Illinois Counsel and the Gunlicks Children have refused to voluntarily stay the Illinois Action.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 3.01(j), the Receiver respectfully requests that this Court permit oral argument on the instant motion. It is estimated that the time needed for argument is approximately one hour.

Respectfully submitted,

BROAD AND CASSEL

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By: /s/ Jonathan Etra

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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel who are not authorized to receive electronically Notices of Electronic Filing.

In addition, I certify that on December 30, 2010, I caused the foregoing document to be sent by e-mail and facsimile to:

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