Filing # 109235270 E-Filed 06/22/2020 07:50:42 PM

IN THE CIRCUIT COURT OF THE 17TH 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, L.P.,

Plaintiff,

vs.

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

Defendants.

Case No. 10-49061 (19)

RECEIVER'S MOTION FOR SANCTIONS FOR MAYER BROWN'S DISCOVERY MISCONDUCT

At its core, a trial is a search for the truth. We expect attorneys to act honorably and in good faith in discovery – by scrupulously producing documents that have been requested and accurately describing documents that have been withheld. Indeed, the justice system only works when all of the facts – both favorable and unfavorable – are known. *See Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 995 (Fla. 1999) ("Only when ***all*** relevant facts are before the judge and jury can the 'search for truth and justice' be accomplished.") (emphasis in original).

The Receiver has learned that Mayer Brown, or its lawyers, doctored a key document before producing it, in a way that gave Mayer Brown an unfair advantage in

this case – and undermining the Receiver's ability to receive a fair trial.[1] In brief, these are the facts:

- Of course, litigants must produce documents in litigation as the documents appear in their clients' files. To do otherwise would be to present a false version of the facts.

- Jenner & Block, the law firm representing Mayer Brown, altered the January 23, 2002 engagement letter between Mayer Brown and Founding Partners by substituting William Gunlicks' signature page for the unsigned page of the letter that was kept in Mayer Brown's files. It then produced the signed version to us, as if this version had been in Mayer Brown's files.

- It matters whether the letter was signed or unsigned. A *signed* letter could strengthen Mayer Brown's case that Founding Partners (through its representative, Gunlicks) agreed in writing to what was in it – namely, a purported conflict waiver. An unsigned version, like the one that actually appeared in Mayer Brown's files, would not have done so.

- Mayer Brown, through its lawyers at Jenner & Block, has used the fabricated engagement letter to support a claim for relief that it filed with this Court – a clear and disturbing discovery violation and a breach of trust.[2]

- Mayer Brown did not disclose that the letter was fabricated until December 12, 2019 – more than three years after producing it to the Receiver – in correspondence from April A. Otterberg of Jenner & Block to the Receiver's counsel, Mark O'Connor.

- Mayer Brown made this admission only after the Receiver provided Mayer Brown with a deposition notice that required its representative to testify about the engagement letter in question.

[1] This case involves malpractice and other claims against the law firm Mayer Brown in connection with its representation of Founding Partners Capital Management Company (FPCM). Specifically, Mayer Brown was involved in drafting documents and giving advice regarding loans by a hedge fund operated by FPCM, that made loans to Sun Capital, Inc. and Sun Capital Healthcare, Inc.

[2] Relying on what appeared to be a signed conflict waiver, Mayer Brown took the position that Founding Partners, the lender in a Credit and Security Agreement with Sun Capital Healthcare, Inc., the borrower, waived a conflict of interest that arose due to Mayer Brown's representation of a Sun Capital related entity, MasterFactor that shared the same principals (Howard Koslow and Lawrence Leder) with Sun Capital.

Mayer Brown's manipulation of evidence is part of a pattern of discovery abuses where Mayer Brown and its lawyers have attempted to hide or manipulate the truth.

We summarize just a few examples of Mayer Brown's other discovery abuses below: [3]

- In a related court proceeding in Chicago in 2012 (the lawsuit of William Gunlicks against Mayer Brown), Mayer Brown represented in open court that the firm had instituted a litigation hold two years earlier (2010). Counsel for Mayer Brown resisted, but eventually agreed to the entry of a court order stating that Mayer Brown "would preserve all files relating to" Mayer Brown's representation of Founding Partners and Gunlicks. Recent disclosures regarding the fabrication of a document, and late production make us doubt that a litigation hold was put into place in 2010. *See*, for example, footnote 9, below.

- On February 12, 2015, the Receiver served his first request for production of documents on Mayer Brown. In 2017, Mayer Brown began producing documents based on agreed search terms, including "Gunlicks" (the name of the principal of Founding Partners), the last names of Sun Capital's principals ("Baronoff," "Leder," and "Koslow"), "MFI" (an acronym for Sun Capital affiliate MasterFactor, Inc.), and the email domain name for Sun Capital ("suncapitalinc"). As recently as last month, Mayer Brown has produced documents including these search terms. This means they were viewed and withheld in the past by Mayer Brown or its lawyers.

- On November 14, 2018, Judge O'Hara (the Chicago judge presiding over an ancillary proceeding involving Gunlicks) ordered Mayer Brown to produce its entire Founding Partners file to Gunlicks.

- Mayer Brown has certified no less than four times that its document production is complete. Its partner Lauren Noll, who serves as its Global Claims Counsel, has signed three declarations of completeness – most

[3] More details about Mayer Brown's discovery violations may be found in the following motions which are now pending before the Court: (1) Renewed Motion to Compel Improperly Withheld Documents Based on Invalid Assertions of Privilege, filed May 5, 2020, Supplement filed June 5, 2020; (2) Motion to Compel Mayer Brown to Produce 37,000 Improperly Withheld Documents, filed May 6, 2020, Supplement filed June 5, 2020; and (3) Motion to Compel Mayer Brown to Produce a Representative to Testify on Its Behalf in Compliance with Rule 1.310(b)(6) and for Sanctions, filed June 5, 2020.

recently on January 15, 2019. Since then, Mayer Brown has produced additional documents on **ten occasions**.

- On February 11, 2020, this Court again questioned the completeness of Mayer Brown's document production with its outside attorney April Otterberg. After Ms. Otterberg equivocated, this Court demanded that she respond "without modifiers." Ms. Otterberg consulted with her colleague, lead lawyer David Bradford, and then represented that the production was complete. At the time, the Court said, "if any other production, so to speak, comes up later, someone's going to have to do some explaining as to how that occurred."

- On February 20, 2019, Ms. Otterberg told this Court that Mayer Brown had "filtered out" 37,000 documents from its electronic database. Those documents were not produced or logged. On May 27, 2020, Mayer Brown said it had re-reviewed the 37,000 documents, this time, resulting in its production of yet more documents to the Receiver, including documents relating to a previously undisclosed conflict of interest. Mayer Brown has yet to have "explained" how its late productions occurred.

- Mayer Brown blocked the Receiver's efforts to question its representative at Mayer Brown's deposition. It armed its representative, Lauren Noll, with a lawyer-authored "script" to make sure she stuck to a lawyer-approved party line. In the end, Mayer Brown's efforts were successful; its representative refused to answer questions that its attorneys had not anticipated (and not addressed in the script).

- After 56 depositions have been taken, Mayer Brown has acknowledged misdescribing documents it has withheld as privileged. It also has abandoned its claims of privilege for hundreds of documents, implicitly acknowledging that they were not privileged in the first place. The Receiver needed to file multiple motions to obtain these documents – and struggle through eight different iterations of Mayer Brown's privilege log. And more issues remain with the log.

- Mayer Brown concealed its conflict of interest resulting from its concurrent representation of Founding Partners Capital Management and an entity called MasterFactor.[4] Despite the obvious importance of the MasterFactor representation, Mayer Brown never disclosed it – only belatedly acknowledging the representation – and refused to produce MasterFactor

[4] This case involves a series of transactions where FPCM loaned investor funds to an entity called Sun Capital; Mayer Brown's client MasterFactor was owned and controlled by the Sun Capital principals – Peter Baronoff, Lawrence Leder, and Howard Koslow.

documents or to log them as privileged. It only produced MasterFactor documents after this Court ordered it to do so on July 12, 2019.

- On April 16, 2019, this Court initially granted Mayer Brown's motion to block discovery of the MasterFactor conflict of interest, noting that Founding Partners had apparently waived any such conflict in writing. The Receiver filed a motion for reconsideration, including expert reports from Mary Robinson, an expert in the field of attorney ethics and professional responsibility, and Patricia D. White, former Dean and professor of law at the University of Miami School of Law. Both experts concluded that the Founding Partners / MasterFactor representations created a conflict of interest which could not be waived. They also concluded that the so-called waiver was not effective in any event. Ms. Robinson stated in her report that "MB's concurrent representation of Founding Partners [and] the MasterFactor clients created a conflict of interest that could not be waived and that was not effectively waived by Founding Partners." For the full Robinson and White Expert Reports, *see* Receiver's Motion for Reconsideration or Clarification of the Court's Order Regarding MasterFactor Discovery, filed June 10, 2019.

- On July 12, 2019, the Court granted the Receiver's motion for reconsideration without allowing Mayer Brown to submit a response. It said: "The Receiver may proceed with discovery of evidence relating to the MasterFactor conflict of interest." Mayer Brown asked the Court to vacate its order because it had not been permitted to file a response, but the Court refused to do so.

Mayer Brown's misbehavior, which strikes at the integrity of the judicial process, should trigger the harshest sanctions possible, including striking Mayer Brown's answer and its affirmative defenses and withdrawing the *pro hac vice* admissions of the out-of-state lawyers who were responsible for falsifying evidence and other misconduct.

I. INTRODUCTION

Mayer Brown admits that it altered a 2002 engagement letter and produced the altered version to us in discovery. This letter included a purported conflict waiver that appeared to have been signed by William Gunlicks.[5]

In this lawsuit, the Receiver has argued that Mayer Brown's representation of MasterFactor, and other entities, created a conflict of interest that impaired its concurrent representation of Founding Partners. Mayer Brown responded with what appeared to be a silver bullet – that Founding Partners (through William Gunlicks) waived any such conflict *in writing* in this engagement letter. Mayer Brown told us the letter had been found in its files. It marked the 8-page document with consecutive Bates numbers, including the page bearing Mr. Gunlicks' signature. It referred to the document as "signed." It used the document in court filings and questioned witnesses about it at their depositions.

But the document was not what it appeared to be. After we noticed that the signature page included "fax tracks" but the other pages did not, we asked Mayer Brown for an explanation. It has now admitted that the Bates-stamped document "does not appear to have been maintained by Mayer Brown in the form in which it was provided to you." Letter from April Otterberg to Mark O'Connor, Dec. 12, 2019, Ex. 1, at 1; *see also id.* at 2 (In February 2014, "Jenner & Block provided a copy of the January 23, 2002

[5] We dispute that the letter, signed or unsigned, was a legally effective waiver. But that is an issue for another day.

engagement letter ***that substituted Mr. Gunlicks' signature page for the unsigned page of the letter*** [included in Mayer Brown's file].") (emphasis added).

Ms. Otterberg does not say who substituted the signature page in the January 23, 2002 engagement letter. Nor does she try to argue that the pages were swapped unintentionally – say, as the result of a clerical error. In the end, we understand her letter to mean that a Jenner attorney looked at the document from Mayer Brown's files, noticed that it was not signed by Mr. Gunlicks, perhaps removed a staple or other method of binding, replaced the unsigned page with a signed page, and Bates-numbered the entire document to make it appear that Mr. Gunlicks had returned a signed version of the letter to Founding Partners. In fact, Mayer Brown Global Claims Counsel, Lauren Noll admitted that it was Jenner & Block that substituted the page. Depo. Tr. of Lauren Noll, December 17, 2019, Ex. 16, 80:10-14.

Even though Mayer Brown knows it presented the altered engagement letter to the Court in an effort to block the Receiver's efforts to obtain discovery into its conflicts of interest and also used it to coax inaccurate testimony from witnesses who assumed the document was genuine, Mayer Brown has not notified the Court of its deception. Its failure to do so is nearly as troubling as its manipulation of evidence in the first place.

Jenner & Block's fabrication of a document, intended to bolster its position in this lawsuit, is so far beyond the pale that it should prompt the Court to impose significant sanctions. And this episode, along with other discovery abuses we have raised separately, leads us to wonder what other evidence Mayer Brown or its lawyers has manipulated in this lawsuit.

II. BACKGROUND

A. The January 23, 2002 Engagement Letter is a Key Document in this Case.

The January 23, 2002 engagement letter ("Letter"), documenting Founding Partners Capital Management Company's representation of Mayer Brown, is an important piece of evidence in this malpractice lawsuit.

In addition to laying out the scope of the representation, the Letter also included a purported conflict waiver, under which FPCM allegedly waived Mayer Brown's conflict of interest created by its concurrent representation of FCPM and Sun Capital and its related entities.[6] The parties dispute whether Mr. Gunlicks received the entire engagement letter, or just the signature page.[7] In either event, Mr. Gunlicks faxed the signed signature page to Mayer Brown.

The issue of what was sent is critical, as its resolution is likely to shed light on whether Mr. Gunlicks received or reviewed the purported waiver. And the waiver of conflicts involving Sun Capital is particularly consequential as Mayer Brown has consistently blamed Sun Capital and its related entities for the investors' losses.

[6] Legal ethics experts Mary Robinson and Patricia White, the former Dean and professor of law at the University of Miami Law School, have opined that the conflict of interest was not waivable and that the waiver prepared by Mayer Brown was ineffectual because it was sought *after* all of the conflicted work had been performed. *See* Receiver's Motion for Reconsideration or Clarification of the Court's Order Regarding MasterFactor Discovery, filed June 10, 2019. In any event, Mayer Brown never informed the SEC or the investors of the MasterFactor conflict.

[7] We understand that it is Mr. Gunlicks has indicated that he only received the signature page. Mayer Brown says electronic evidence shows that he received the whole engagement letter. Ultimately, it will be up to the jury to resolve this factual dispute.

B. In Response to the Receiver's Request, Mayer Brown Produces a Fabricated Version of the Letter, Which Includes a Substituted Signature Page.

In early 2014, as the parties were preparing for mediation, the Receiver asked Mayer Brown to provide copies of its engagement letters with any Founding Partners entities. Email from Scot Stirling to Jeffrey Colman and April Otterberg, Jan. 27, 2014, Ex. 2 (email chain).

Mayer Brown's lawyer, April Otterberg, responded: "As we discussed this afternoon, attached are … five engagement letters with Mayer Brown related to Founding Partners …" Email from April Otterberg to Scot Stirling, Jan. 29, 2014, Ex. 2 (email chain). Ms. Otterberg further noted that "four of the engagement letters were ***found in Mayer Brown's files*** (2000, 2001, ***2002***, and 2008) …" *Id.* (emphasis added). The 2002 Letter included Mr. Gunlicks' signature on behalf of Founding Partners.

A few days later, on February 5, 2014, Mayer Brown filed a mediation brief that referenced the *fabricated* Letter with the substituted signature page as an exhibit. On that same date, Ms. Otterberg sent copies of the exhibits to the mediator and counsel for the Receiver. Email from April Otterberg to Jonathan Marks, Scot Stirling, et al., Feb. 5, 2014. Ex. 3. The Letter was marked with consecutive Bates numbers MB 00012-MB 00018, Ex. 4.

When Mayer Brown began producing documents during discovery, three years later, it again marked the signed Letter with consecutive Bates numbers. MB 00000012-MB 00000018, Ex. 5.

C. Mayer Brown Uses the Fabricated Letter in Court.

During the first half of 2019, one of the most contentious issues before this Court was whether the Receiver would be permitted to take discovery regarding Mayer Brown's conflicted representation of Sun Capital affiliate MasterFactor, Inc. One of the key issues in that battle was whether Mr. Gunlicks had knowingly waived Mayer Brown's conflict of interest. Mayer Brown introduced the fabricated Letter to bolster its claim that Gunlicks was fully aware of and consented to the conflict of interest.

In its Reply in Support of Motion for Protective Order Regarding MasterFactor Discovery, Ex. 6, Mayer Brown attached the signed Letter as an exhibit. Mayer Brown wrote:

> even if there had been an actual or potential conflict of interest related to Mayer Brown's legal services for MasterFactor, which there was not, any ***such conflict was expressly waived many years ago in the January 2002 letter***. (Ex. 53, Jan. 23, 2002 Ltr. to Gunlicks at MB 0000014.)

Id. at 27 (emphasis added), Ex. 6.

In its Reply, Mayer Brown described the Letter as follows: "Engagement Letter between Mayer Brown and Founding Partners Capital Management Company, dated January 23, 2002 ***(signed)*** (MB 00000012)." Exhibits to Mayer Brown LLP's Briefing in Support of Its Motion for Protective Order Regarding MasterFactor Discovery, Ex. 7, p. 3 (emphasis added).

The Court ruled in Mayer Brown's favor, specifically stating that it had relied on the Letter in reaching its conclusion: "The Court is further persuaded by the ***engagement letter proffered by Mayer Brown from January 23, 2002 that explicitly advised that***

Founding Partners waived any past, current, and future conflict relating to Mayer Brown's representation of the Master Factor/World Factor transaction." Order on Mayer Brown's Motion for Protective Order Regarding MasterFactor Discovery, Apr. 16, 2019, Ex. 8, ¶ 2 (emphasis added). Mayer Brown's affirmative use of the signed Letter paid off, at least in the near term.[8]

D. Mayer Brown Uses the Fabricated Letter in Depositions.

Mayer Brown used the fabricated Letter as an exhibit in depositions, presenting it as an original, unaltered, and authentic document.

1. Before Admitting it Fabricated the Letter, Mayer Brown Used the Fabricated Document at the Rule 1.310(b)(6) Deposition of Hybrid-Value Fund.

Mayer Brown first marked the Letter as an exhibit on November 8, 2017, over two years before it came clean about altering the document. The document was marked as Deposition Exhibit 81, and was used in the deposition of Robert Mills, the Receiver's 1.310(b)(6) designee for Hybrid-Value Fund (a receivership entity). Depo. Tr. of Robert Mills, Nov. 8, 2017, Ex. 9, 176:22-177:21 (introduced by April Otterberg, counsel for Mayer Brown).

2. Before Admitting That it Fabricated the Letter, Mayer Brown Said Nothing When the Receiver Used It as an Exhibit.

In April 2019, the Receiver used this document at the deposition of Marc Klyman, a former Mayer Brown attorney and a key witness in the case. Counsel for the Receiver

[8] The Court vacated its Order on July 12, 2019, when it granted the Receiver's Motion for Reconsideration. Mayer Brown had not yet admitted it had manipulated the Letter when the Receiver prepared and filed his Motion for Reconsideration.

asked questions about the Letter (not knowing that it had been manipulated). When the document was presented to Mr. Klyman, Klyman's personal attorney Raymond Schreck took issue with the irregularity of the facsimile transmission on the signature page: "Take a look at the four pages. As you can see, the fourth page has fax transmission information along the top, where the first three do not." Depo. Tr. of Marc Klyman, Apr. 12, 2019, Ex. 10, 112:12-15. Counsel for Mayer Brown eventually intervened, trying to stop Mr. Schreck from speaking further:

> MR. D. BRADFORD: I – I'm going to --
>
> MR. SCHRECK: No, no, no, no, no.
>
> MR. D. BRADFORD: -- caution counsel not to get into discussions --

Id. at 113:6-9.

3. Before Admitting that it Fabricated the Letter Mayer Brown Used it as an Exhibit at a Deposition on September 10, 2019.

Mayer Brown next used the document at the deposition of William Hart, who directed investments into receivership entities through a company he owned and controlled. Counsel for Mayer Brown used the copy of the document that was contained in a group exhibit of engagement letters that had been prepared by the Receiver—Deposition Exhibit 900. *See* Depo. Tr. of William Hart, Sept. 10, 2019, Ex. 11, 345:6-348:18, ("BY MR. [JASON] BRADFORD: I'm going to hand you what's been previously marked as Exhibit 900. If you could turn to Bates stamped MB 12 here. … And this is a January 23, 2002 engagement letter from Marc Klyman to Bill Gunlicks. Do you see that?").

During the Hart deposition, counsel for the Receiver pointed out to the witness through questioning the irregularities of the document. *See id.* at 384:12-385:20 ("And the first time you see a fax header is on this page that purportedly has Mr. Gunlicks' signature. Do you see that? … You didn't see a fax header on any of the preceding pages that would show that this document was all one, correct? … Does that cause you to have suspicion about the validity of this document to stand for anything that could have possibly been provided to or executed by Mr. Gunlicks?").

4. Mayer Brown Used the Fabricated Document in Two Receivership Rule 1.310(b)(6) Depositions in Late November 2019, Weeks Before It Admitted Fabricating It.

Mayer Brown used the document again in November 2019, in two 1.310(b)(6) depositions, again involving Robert Mills. In the deposition for Global Fund, counsel for Mayer Brown again represented the document as a complete document. *See* Depo. Tr. of Robert Mills, Nov. 19, 2019, Ex. 12, 969:3-5 (David Bradford stating: "For the record, this is the January 23, 2002 engagement letter between Mayer Brown and Founding Partners Capital management, correct?"). Counsel for Mayer Brown then elicited testimony from Mr. Mills regarding the document being a complete document bearing Mr. Gunlicks' signature. *See id.* at 971:5-9 (Questioning by David Bradford: "Q. And Mr. Gunlicks agreed to that conflict waiver, did he not?" and receiving a response: "THE WITNESS:· He signed the document.").

A few days later, in the 1.310(b)(6) deposition of Stable-Value II Fund, counsel for Mayer Brown again introduced the document as a legitimate exhibit. Depo. Tr. of

Robert Mills, Nov. 22, 2019, Ex. 13, 472:3-477:22 (April Otterberg introducing Deposition Exhibit 81 as a previously-marked exhibit).

E. Mayer Brown Admits it Fabricated the Letter.

Because the fax tracks on the signed signature page raised questions about the letter's authenticity, Receiver identified the January 23, 2002 engagement as a topic for Mayer Brown's 1.310(b)(6) deposition. Then, on December 12, 2019, just five days before the deposition, April Otterberg of Jenner & Block wrote to Receiver's counsel, stating: "MB 00000012-18 does not appear to have been maintained by Mayer Brown in the form in which it was provided to you." *See* Ltr. to Mark O'Connor from April Otterberg, Dec. 12, 2019, Ex. 1. Ms. Otterberg acknowledged that Jenner & Block "... substituted Mr. Gunlicks' signature page for the unsigned page of the letter."

For the first time, Mayer Brown revealed that the version of the engagement letter in Mayer Brown's actual files included a blank signature page, Ex. 14, – meaning that the document did not show that Founding Partners had signed off on the purported waiver. The only signed signature page from Gunlicks that exists in Mayer Brown's files is the page that was transmitted by facsimile by Marc Klyman on January 25, 2002 with a variety of other documents unrelated to the engagement letter. *See* Facsimile of Jan. 25, 2002, Ex. 15. The fabricated document included consecutive Bates numbers, leaving the

false impression that it was produced as maintained in Mayer Brown's files.[9]

F. After the Admission: Mayer Brown Refuses to Answer Questions About the Fabrication and Fails to Disclose its Wrongdoing to the Court.

Five days after Mayer Brown's admission, the Receiver had the opportunity to ask Mayer Brown's representative about the fabricated Letter at Mayer Brown's deposition. Topics 16 and 21 concerned the Letter. But rather than answering the questions, Ms. Noll stonewalled, referring the Receiver's counsel to the Otterberg Letter. When counsel for the Receiver asked follow-up questions, Ms. Noll refused to answer, stating that those questions were not listed on the notice. Depo. Tr. of Lauren Noll, dated Dec. 17, 2019, Ex. 16, at 96:8-21.

Since then, Mayer Brown has made no effort to notify the Court that it had attached a fabricated document to a motion it had filed or that the same exhibit had been used at depositions.

G. Mayer Brown's Other Discovery Violations.

The production of the altered document – a manipulation of key evidence – is one of many discovery transgressions, which are addressed at length in separately filed motions and summarized here as well. *See* footnote 3, above.

[9] Page 8 of the Letter (MB 00000018) indicates that blind carbon copies were sent to the Managing Partner, the Conflicts Partner, the Records Center, and the Accounting Department of Mayer Brown. This was one of the topics noticed for Mayer Brown's 1.310(b)(6) deposition. Lauren Noll, on behalf of Mayer Brown, testified that she met with those departments and individuals at Mayer Brown, and no additional copies of the engagement letter could be located. Depo. Tr. of Lauren Noll, Dec. 17, 2019, Ex. 16, 80:16-87:13.

1. Mayer Brown's Corporate Representative Comes to the 1.310(b)(6) Deposition with a Script and Will not Deviate from It.

Mayer Brown blocked the Receiver's efforts to obtain a meaningful 1.310(b)(6) deposition. Its representative, Lauren Noll, showed up with a 63-page, single-spaced script authored by Mayer Brown's attorneys, and read scripted answers into the record. If the Receiver asked questions that were not in the script, Ms. Noll flatly refused to answer, stating that she was not prepared to answer the question, or giving some other excuse.[10] This approach thwarted the Receiver's right to question his opponent's representative about key issues in the case. The Receiver needed frank responses to his questions, including the opportunity to seek on-the-spot clarification or further explanation of Mayer Brown's positions. What he got was something akin to written responses to discovery: attorney-scripted responses without a reasonable attempt to follow up. This was not a good faith response to the Receiver's deposition notice; it was obstruction. For more information, *see* Receiver's Motion to Compel Mayer Brown to Produce a Representative to Testify on Its Behalf in Compliance with Rule 1.310(b)(6) and For Sanctions, filed June 2, 2020.

2. Mayer Brown has Abandoned Claims of Privilege on 46% of its Original Privilege Log Entries.

Mayer Brown has now served eight versions of its privilege log, and has, to date, abandoned all claims of privilege on 46% of the documents it originally claimed were privileged. In the process, Mayer Brown has had to admit that some documents were not

[10] Mayer Brown's General Counsel, Andrew Marovitz, was present at the deposition but did nothing to stop Mayer Brown's obstruction.

privileged in the first place. One example involves a chain of internal Mayer Brown emails. Initially, Mayer Brown withheld these emails, claiming they involved legal advice from in-house counsel. It took two motions to get Mayer Brown to admit that no in-house attorneys were involved in the emails.

In another example, Mayer Brown withheld documents from two attorneys, Michael Richman and Robert Curley, falsely claiming that the two had been "designated" as in-house counsel. Mayer Brown eventually turned over the documents after the Receiver showed that the attorneys were not acting as in-house counsel. In fact, they were representing Mayer Brown's client Founding Partners, not the Mayer Brown firm, as evidenced by the fact that Mayer Brown had billed Founding Partners for their work.

All of this leads the Receiver to suspect that still more documents have been improperly withheld. For more information, *see* Receiver's Renewed Motion to Compel Production of Improperly Withheld Documents Based on Invalid Assertions of Privilege, filed May 5, 2020, as well as the Supplement to the same motion, filed June 5, 2020.

3. Mayer Brown Attempted to Shut Down the Receiver's Discovery Efforts by Repeatedly (and Falsely) Representing that All Documents Had Been Produced.

Mayer Brown has made repeated declarations, under oath, that all relevant documents have been located and produced – in an apparent effort to shut down the Receiver's continuing efforts to obtain documents and information. In fact, these declarations were incorrect, as Mayer Brown has (begrudgingly) continued to produce documents to us.

In 2012, in a related lawsuit in Chicago, Mayer Brown told Cook County Judge Griffin that Founding Partners documents were subject to a litigation hold starting in 2010.[11] Judge Griffin said that "Mayer Brown will be under court order to secure them, protect them and not in any way diminish them, okay?" *See* Tr. of Hearing, Feb. 1, 2012, Ex. 29 at 16. In response, Mr. Colman (of the Jenner firm) said Mayer Brown had "secured these files for two years." *Id.* After Mr. Colman initially balked at having the court entering an order requiring Mayer Brown to preserve the file, Judge Griffin remarked, "Now I wonder what's going on," and then issued a written preservation order. Cook Co., Ill. Order, Feb. 1, 2012, Ex. 30. In light of recent events, the Receiver doubts that all relevant documents have been preserved.[12] *See* footnote 9, above.

---

[11] "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212, 218 (S.D.N.Y. 2003). "A party's discovery obligations do not end with the implementation of a 'litigation hold -- to the contrary, that's only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents." *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004).

[12] In fact, Mayer Brown should have placed a litigation at least as early as December 16, 2003, when it received a Wells Notice from the SEC. *See* Wells Notice, December 16, 2003, Ex. 31. The Wells Notice states that the Office of Compliance Investigations and Examinations ("OCIE") intended to recommend that the Commission, "take legal action" against FPCM and Mr. Gunlicks. Richard Breeden, the former Chairman of the SEC, has confirmed that Mayer Brown should have placed a document hold on all relevant documents when it learned of the December 16, 2003 Wells Notice and the threat of litigation by the SEC against its clients. *See* Expert Report of Richard C. Breeden, December 21, 2018, Ex. 32. Claudius Sokenu, a former Mayer Brown attorney, testified that while he was working at Mayer Brown, "there wasn't a Mayer Brown document hold on those documents" relating to its representation of FPCM and Mr. Gunlicks in the SEC investigation. *See* Sokenu Deposition, November 14, 2018 at 573–74, Ex. 33 ("I don't know of any reason, when I was there, why -- why there would be a document hold on Founding Partners matters. That would suggest some kind of knowledge of litigation or impending litigation, and I didn't have that knowledge.") Mr. Sokenu worked on the response to the SEC investigation from December 2003 through January 2008 and negotiated the Cease and Desist Order with the SEC and discussed tolling agreements with the SEC. In an email from Mr. Sokenu to Mr. Gunlicks on July 10, 2006, Mr. Sokenu stated that the SEC wanted Mr. Gunlicks to sign a tolling agreement so the SEC would not lose some of their claims for statute of limitations reasons. *See* Email from C. Sokenu to W. Gunlicks, July 10, 2006, MB 00017170, Ex. 34. In light of these facts, Mr. Sokenu – and the Mayer Brown firm – clearly understood that

On February 12, 2015, the Receiver served on Mayer Brown his first request for production. In 2017, Mayer Brown began producing documents based on agreed search terms, which included the following search terms: "Gunlicks" (the name of the principal of Founding Partners), the last names of Sun Capital's principals ("Baronoff," "Leder," and "Koslow"), "MFI" (an acronym for Sun Capital affiliate MasterFactor, Inc.), and the email domain name for Sun Capital ("suncapitalinc"). Mayer Brown has made late productions of documents as recently as last month, which include these search terms. This means they were viewed and withheld in the past by Mayer Brown or its lawyers. For more information regarding search terms, *see* Receiver's Response to Motion for Protective Order Regarding MasterFactor Discovery, filed March 11, 2019, and Receiver's Motion for Reconsideration or Clarification of the Court's Order Regarding MasterFactor Discovery, filed June 10, 2019.

In ancillary proceedings in Chicago, Judge O'Hara ordered Mayer Brown to certify that all documents had been produced.[13] Tr. of Proceedings, Cook Co., Ill., Nov. 14, 2018, 13:6-13, Ex. 17 ("So you're going to produce an affidavit saying that we've done the search, we've turned over the documents, we don't have these other documents …"). In response, Lauren Noll, Global Claims Counsel for Mayer Brown, submitted a

---

the SEC was contemplating litigation against FPCM and Mr. Gunlicks. A litigation hold should have been ordered at that time.

[13] Mr. Bradford also made a baseless assertion at that hearing (where no representative of the Receiver was present) regarding the Receiver's views on completeness of document production. Mr. Bradford said "--and the Receiver is satisfied with production obviously." Tr. of Proceedings, Cook Co., Ill., Nov. 14, 2018, 29:20-21, Ex. 17. Mr. Bradford did not consult with us before making this statement.

six-page declaration of completeness, supported by 185 pages of exhibits. Declaration of Lauren Noll, Nov. 20, 2019, Ex. 18.

On November 26, 2018, Judge O'Hara ordered Mayer Brown to produce another affidavit. In doing so, he wondered out loud why it took six pages for Mayer Brown to state that all documents had been located and turned over. Tr. of Proceedings, Cook Co., Ill. Nov. 26, 2018, Ex. 19, 9:3-10 ("Well, how about who's going to just give a simple affidavit that all the documents have been produced?"). Judge O'Hara directed that the new affidavit be one or two pages long at most. *Id.* at 13:13-14:4. Ms. Noll executed a two-page affidavit on Dec. 17, 2018, Ex. 20.

On January 8, 2019, Judge Murphy ordered Mayer Brown to submit a third affidavit of completeness in this action. Ms. Noll executed a third affidavit of completeness on January 15, 2019, Ex. 21. Since that last affidavit was executed, Mayer Brown has produced additional documents on ten occasions.

In February of this year, counsel for Mayer Brown again represented – in response to the Court's questions from the bench – that it had produced all documents. *See* Colloquy Between Court and April Otterberg, Tr. of Proceedings, Feb. 11, 2020, 76:1-23, Ex. 22. At that time, the Court asked Jenner & Block to respond to its questions without "modifiers." The Court cautioned that if additional documents were produced after making that representation, Mayer Brown would have some explaining to do: ***"… if any other production, so to speak, comes up later, someone's going to have to do some explaining as to how that occurred."*** *Id.* at 53:3-9, Ex. 22 (emphasis supplied).

Three months after Mayer Brown's lawyers promised, without "modifiers," that its production was complete, Mayer Brown produced hundreds of additional documents. *See* Letter from April Otterberg to Mark O'Connor et al., May 27, 2020, Ex. 23. In our pending Motion to Compel, we are seeking to force Mayer Brown to "do some explaining as to how that occurred."

The documents in Mayer Brown's recent production were included in a set of 37,000 documents that Mayer Brown "filtered" from an electronic database; Mayer Brown says it previously reviewed that set and found no relevant materials.

The recent production includes several squarely relevant documents concerning another (previously undisclosed) Mayer Brown conflict. They show that Marc Klyman, a Mayer Brown attorney who represented Founding Partners, was approached about representing Healthcare Financial Resource Corp., an entity that (Klyman later learned) was related to Sun Capital. *See* Email from Frank Scroggins to Marc Klyman, with attachments, June 25, 2003, MB 00721758, Ex. 24 (identifying Lawrence Leder as CEO at MB 00721770). Mayer Brown ultimately declined to represent the entity, but Klyman noted there was a conflict and initially ordered Mayer Brown attorneys to stop work on all Founding Partners matters. *See* Email from Marc Klyman to J. Dwyer, H. Honarvar, and M. Butowsky, June 26, 2003, MB 00697103, Ex. 25 (email chain) ("A conflict has just arisen that, if not resolved, may require us to withdraw from this matter. Bill Gunlicks is not yet aware of this issue"); Memorandum to File, Marc Klyman, July 3, 2003, MB 00720516, Ex. 26 ("I did not tell Bill Gunlicks the name of the potential client or what the confidential information was. … Bill asked whether we could continue to

represent him if he consented to such confined information, even though we could not disclose the confidential information to him.").

This is just another example of Mayer Brown's withholding of its conflicts of interest – and the tremendous lengths it took for us to uncover them. For additional information, *see* Motion to Compel Mayer Brown to Produce 37,000 Improperly Withheld Documents, filed May 6, 2020, as well as the Supplement to the same motion, filed June 5, 2020.

III. ARGUMENT

A. Mayer Brown's Conduct Warrants Severe Sanctions.

There is no sanction that will put Receiver in the position it would have been in had Mayer Brown timely and properly complied with its discovery obligations and orders of the Court, but, the most appropriate sanction, given the egregiousness of the conduct outlined above, is the striking of Mayer Brown's pleadings and the entry of a default judgment, or the striking of Mayer Brown's affirmative defenses.

"Sanctions for [discovery] abuses are governed by Florida Rule of Civil Procedure 1.380(b)." *Martin v. Laidlaw Tree Serv., Inc.*, 619 So. 2d 435, 438 (2d DCA 1993). "Pursuant to Florida Rule of Civil Procedure 1.380, the striking of a party's pleadings as a sanction for discovery misconduct is authorized." *Cook v. Custom Marine Distrib., Inc.*, 29 So. 3d 462 (4th DCA 2010); *Wallraff v. T.G.I. Friday's, Inc.*, 490 So. 2d 50, 51 (Fla. 1986) (interpreting Rule 1.380 sanctions to not require violation of a direct court order). To warrant such severe sanctions, however, "the conduct of the offending party must, reflect bad faith, willful disregard, gross indifference, deliberate callousness, or a

deliberate and contumacious disregard of the court's authority." 619 So. 2d at 439 (quotation marks omitted); *see also Maffai v. Cnty. of Suffolk*, 36 A.D.3d 765, 766 (N.Y. App. Div. 2007) (noting that "a court may strike parts of a pleading as a sanction against a party who has failed to comply with court-ordered discovery").

Sanctions are particularly warranted because Mayer Brown affirmatively used the manipulated evidence to obtain relief from the Court. Under these circumstances, there was "fraud on the court." Black's Law Dictionary defines that term as follows:

> In a judicial proceeding, a lawyer's or a party's misconduct so serious that it undermines or is intended to undermine the integrity of the proceeding. Examples are bribery of a juror and ***introduction of fabricated evidence***.

Black's Law Dictionary 804 (11th ed. 2019).

The Fourth District Court of Appeals explains "fraud on the court" as follows:

> The requisite fraud on the court occurs where it can be demonstrated, clearly and convincingly, that a party has ***sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense***. When reviewing a case for fraud, the court should consider the proper mix of factors and carefully balance a policy favoring adjudication on the merits with competing policies to maintain the integrity of the judicial system. Because dismissal sounds the death knell of the lawsuit, courts must reserve such strong medicine for instances where the defaulting party's misconduct is correspondingly egregious. The trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action when a plaintiff has perpetrated a fraud on the court, or where a party refuses to comply with court orders. Because dismissal is the most severe of all possible sanctions, however, it should be employed only in extreme circumstances.

Arzuman v. Saud, 843 So. 2d 950, 952 (4th DCA 2003) (citations and internal quotation marks omitted; emphasis added). Here, of course, the Receiver is not seeking dismissal, but rather the striking of Defendant Mayer Brown's answer.[14]

B. The Court Should Strike Mayer Brown's Pleadings and Enter a Default Judgment.

In *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993), the Florida Supreme Court articulated a six-factor test that the trial court must consider when determining "whether dismissal with prejudice is warranted." Although this Motion seeks sanctions against a defendant, rather than a plaintiff, the factors are still instructive:

> 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience;
>
> 2) whether the attorney has been previously sanctioned;
>
> 3) whether the client was personally involved in the act of disobedience;
>
> 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion;
>
> 5) whether the attorney offered reasonable justification for noncompliance; and
>
> 6) whether the delay created significant problems of judicial administration.

[14] Such severe sanctions may be appropriate when a party commits fraud on the Court. *See Morgan v. Campbell*, 816 So. 2d 251, 253 (2d DCA 2002) ("a trial court has the inherent authority to dismiss an action when the plaintiff has perpetrated a fraud on the court"); *Tri Star Inv., Inc. v. Miele*, 407 So. 2d 292, 293 (2d DCA 1981) (holding that power to dismiss action due to fraud on court "is indispensable to the proper administration of justice, because no litigant has a right to trifle with the courts"); *Bob Montgomery Real Estate v. Djokic*, 858 So. 2d 371, 372 (4th DCA 2003) ("dismissal is an available remedy for knowingly submitting forged or altered documents with the intent to deceive"); *Kornblum v. Schneider*, 609 So. 2d 138, 139 (4th DCA 1992) (trial court has discretion to impose severe sanctions when party has perpetrated a fraud on the court); *Savino v. Fla. Drive In Theatre Mgmt., Inc.*, 697 So. 2d 1011, 1012 (4th DCA 1997) (same); *Desimone v. Old Dominion Ins. Co.*, 740 So. 2d 1233, 1234 (4th DCA 1999) (same); *Palm Beach Fla. Hotel v. Nantucket Enter.*, Inc., 2013 WL 686433 (Palm Beach Co. Cir. Ct. Feb. 25, 2013) (holding that court "has the inherent power to sanction litigants who have perpetrated a fraud on the Court by manipulating evidence" and striking defenses in cases involving manipulation of a document).

Id.; see also Toll v. Korge, 127 So. 3d 887-88 (3d DCA 2013) (applying *Kozel* factors and entering default judgment against defendant for discovery abuses). The Court said that "upon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative." Here, the *Kozel* factors are met and there is no viable alternative less severe than a default judgment.

C. Mayer Brown and Its Attorneys Engaged in Egregious Conduct.

By doctoring evidence and engaging in other discovery misconduct, Mayer Brown and its lawyers have engaged in bad faith tactics, satisfying the first, third, fourth, fifth, and sixth factors of *Kozel*.

Like the offending party in *Wenwei Sun v. Aviles*, Mayer Brown "w[as] supposed to give truthful and accurate answers," and could have disclosed certain evidence, but "repeatedly chose not to do so out of some sort of purported desperation." 53 So. 3d 1075, 1077 (5th DCA 2010) (affirming the striking of a plaintiff's pleadings for "utterly deceitful behavior"). Because this conduct can be properly described as "utterly deceitful," it "most certainly fits the standard" for striking Mayer Brown's pleadings. *Id.* at 1078.

In Florida, "bad faith 'games playing' with the court and opposing counsel in delaying and thwarting the orderly process of discovery" warrants the striking of a party's pleadings and the entry of a default judgment. *HZJ, Inc. v. Wysocki*, 511 So. 2d 1088, 1089 (3d DCA 1987); *Asper v. Maxy Aviation Servs., L.C.*, 915 So. 2d 271 (4th

DCA 2005) (affirming sanction of striking a defendant's pleadings due to its willful noncompliance with court order to turn over bank records).

For example, in *Bistricer v. Oceanside Acquisitions, LLC*, a party's pleadings were stricken where the record demonstrated "protracted" "discovery abuses," and, as here, the offending party had falsely "assured the Defendants that, except for certain telephone bills, all documents responsive to discovery requests and orders had been produced." 59 So. 3d 215, 219 (3d DCA 2011); *see also Kranz v. Levan*, 602 So. 2d 668, 669 (3d DCA 1992) (striking plaintiff's pleadings and dismissing complaint where "plaintiffs never fully complied with all of the trial court's discovery orders and withheld vital documents in the case"); *Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees & Rest. Employees Int'l Union*, 212 F.R.D. 178, 221–22 (S.D.N.Y. 2003)[15] (striking pleadings where "counsel's repeated representations that all responsive documents had been produced," which "were made without any real reflection or concern for their obligations under the rules governing discovery and, in the absence of an adequate search for responsive documents," was "not merely negligent but was aggressively willful").

Without question, the conduct of Mayer Brown rises to the level of bad faith and gross indifference. It is implausible that Mayer Brown's discovery abuses were the result of innocent neglect or inexperience, and Mayer Brown cannot offer any reasonable justification for its noncompliance, the fifth *Kozel* factor. Mayer Brown, one of the largest law firms in the world, is a sophisticated litigant, well aware of its discovery

[15] *See Wallraff v. T.G.I. Friday's, Inc.*, 490 So. 2d 50, 51 (Fla. 1986) (interpreting Rule 1.380 sanctions as analogous to the federal rule).

obligations and with experienced in-house and trial counsel to guide it. When served with discovery requests, Mayer Brown knew that it was required to make a reasonable search of its records to identify responsive documents and yet failed to do so. *See First Coast Energy, L.L.P. v. Mid-Continent Cas. Co.*, No. 3:12-CV-281-J-32MCR, 2015 WL 5159140, at *18-20 (M.D. Fla. Sept. 2, 2015) (conduct "indicat[ing] that Defendant made no reasonable inquiry to ensure that all responsive documents have been produced" constituted "at a minimum, gross negligence rising to the level of bad faith").

Notably, Mayer Brown was not forthcoming with discovery until it was caught red-handed – that is, until the Receiver, by his own investigation and expenditure of his own resources, identified issues. *See O'Vahey v. Miller,* 644 So. 2d 550, 551 (3d DCA 1994) (holding that the plaintiff's repeated lies in discovery, uncovered only by the "assiduous efforts of opposing counsel," "constituted such serious misconduct" that dismissal of the case was required). For example, it was only after the Receiver – alerted by the fax tracks on the signature page – began to question Mayer Brown about the fabricated Letter that its attorney, April Otterberg, came clean about her law firm's fabrication of evidence.

But the Receiver should not have to be a Sherlock Holmes, seeking to uncover undisclosed issues with the integrity of the evidence Mayer Brown produces. Litigation is not a game where a party needs to be on the lookout for clues that the documents it receives are not what they appear to be. Instead, Mayer Brown should have affirmatively disclosed its fabrication – or, better yet, not have fabricated the evidence in the first place.

We are entitled to see the documents as they were maintained in Mayer Brown's files, not as reconstructed by lawyers during the course of this lawsuit.

Mayer Brown's conduct was clearly intentional and cannot be explained by neglect or inexperience.

Additionally, there is no question that Mayer Brown itself was involved in the disobedience. For example, Lauren Noll, a Mayer Brown partner and the firm's Global Claims Counsel, submitted *three* false declarations to courts, all of which were under oath. Ms. Noll was obstructive during the 1.310(b)(6) deposition and gave scripted answers. Mayer Brown's General Counsel was present for the two days of Ms. Noll's testimony. Ms. Noll was in the courtroom when Ms. Otterberg represented that all documents had been produced, and Mayer Brown's General Counsel has been present in Court for many hearings involving Mayer Brown's misconduct.

D. The Receiver Has Been Significantly Prejudiced by Mayer Brown's Discovery Abuses.

As to the fourth and sixth factors of *Kozel*, Mayer Brown's noncompliance has prejudiced Plaintiff through undue expense and delay and has placed unwarranted burdens on the judicial system. Over five years ago, the Receiver requested documents from Mayer Brown. Today, they continue to trickle in, after repeated false representations of complete production. The Receiver has had to file motion after motion to get what he is entitled to under the rules. Counsel for Mayer Brown altered a document, and only revealed the truth five years later, when its back was to the wall. By

this point, many depositions in the case had been completed and the litigation strategy nearly finalized.

The Receiver has been prejudiced by not having access to the withheld evidence and by relying on an altered document for years. Over 50 depositions have been taken in this case. The Receiver has had to take and defend depositions without documents that should have been produced years ago. Even worse, 47 depositions were taken before the Receiver learned that a key document in the case had been altered by Mayer Brown's attorneys. Of course, Mayer Brown's counsel knew all along that the document had been altered. How can such a wrong ever be righted?

Simply ordering the parties to re-take depositions in light of the withheld evidence, will not remedy the discovery abuses and will only further delay the trials in this case, which Mayer Brown likely would welcome. As one court explained, if this "Court were to reopen discovery instead of entering a default judgment, it would be rewarding Defendant for its dilatory conduct." *First Coast Energy, L.L.P.* 2015 WL 5159140, at *20. Even if the Court were to permit some of the depositions in this case to be redone, the prejudice caused by the delay is clear. *See Ferrante v. Waters*, 383 So. 2d 749 (4th DCA 1980) (affirming a trial court order pursuant Fla. R. Civ. P. 1.380(b), striking defendant's pleadings and granting a default judgment on liability in favor of plaintiffs in a personal injury case on the basis of a six-month lapse during which defendant failed to respond to interrogatories).

But for Covid-19, discovery would have closed and the trial would be a few months away.[16] Importantly, under Rule 1.380, "even if all discovery is ultimately produced and the opposing party is not substantially prejudiced by the delay" sanctions may still be imposed so long as the Court finds that the party "has engaged in a pattern designed to thwart discovery evincing a 'continuous pattern of willful, contemptuous and contumacious disregard of lawful court orders concerning its obligation to comply with reasonable discovery requests.'" *Amlan, Inc. v. Detroit Diesel Corp.*, 651 So. 2d 701, 703 (4th DCA 1995) (quoting *AVD Enters., Inc. v. Network Sec. Acceptance Corp.,* 555 So. 2d 401, 402 (3d DCA 1989)). And, in an order striking a party's pleadings, "no 'magic words' are required but rather only a finding that the conduct upon which the order is based was equivalent to willfulness or deliberate disregard." *Commonwealth Fed. Savings & Loan Ass'n. v. Tubero*, 569 So. 2d 1271, 1273 (Fla. 1990).

A severe sanction should be imposed in this case "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Nat'l Hockey League v. Metro. Hockey Club, Inc.,* 427 U.S. 639, 643 (1976). Also, a mere award of monetary sanctions will not be a deterrent to other well-funded parties and lawyers who may consider engaging in similar discovery abuses in future cases.

[16] We only assume that counsel for Mayer Brown was planning to present the altered document to this Court once again – at trial.

E. The Court Should Revoke *Pro Hac Vice* Status for the Responsible Attorneys.

The Receiver further requests that the Court withdraw its order granting the Motion for Admission Pro Hac Vice for April Otterberg, *see* Order of Aug. 1, 2011, and its order granting the Motion for Admission Pro Hac Vice for David Bradford, *see* Order of Apr. 13, 2017.

As demonstrated repeatedly above, Ms. Otterberg played a central role in the discovery misconduct outlined in this motion. She has made inaccurate statements to this court regarding the completeness of document production, she transmitted an altered document to Receiver's counsel, and has admitted in open court to being the architect of Mayer Brown's discovery efforts. *See* Tr. of Proceedings, Feb. 20, 2019, Ex. 27, 82:15-20 ("Your Honor, I've been with this case from the very beginning and was involved in every step of the way.").

Nor was Ms. Otterberg alone in her discovery misconduct. Mr. Bradford, as lead counsel in this case, bears responsibility for the misconduct. Ms. Otterberg required Mr. Bradford's encouragement and assistance in making the misrepresentations "without modifiers" to the Court that production was complete. Moreover, Mr. Bradford made similar misrepresentations to the court in Cook County when he stated in January 2019 that "[w]e have provided everything that was asked for by the receiver. We have provided everything that was asked for by Mr. Gunlicks other than privileged documents. … So, Sun Capital documents, if a document referenced Sun Capital, we turned it over." Tr. of Proceedings Jan. 17, 2019, Ex. 28, 169:21-170:9. Recent productions have shown

such claims to be incorrect. In addition, as detailed above, Mr. Bradford used the altered document to seek admissions from the representative of a receivership entity. Such misconduct is not mere advocacy – but demonstrate Mr. Bradford's, Ms. Otterberg's, and Mayer Brown's gross indifference to their discovery obligations.

"'A trial court may revoke the status of pro hac vice whenever it appears that counsel's conduct during any stage of the proceeding, including the taking of depositions, adversely impacts the administration of justice.'" *Brooks v. AMP Serv. Ltd.*, 979 So. 2d 435, 438 (4th DCA 2008) (quoting *State Indus., Inc. v. Jernigan*, 751 So. 2d 680, 682 (5th DCA 2000)).

F. Alternative Relief.

As an alternative to a default judgment against Mayer Brown, the Court may strike certain of its defenses. Where information and evidence withheld from discovery bears directly on a particular defense, that defense may be stricken. *See, e.g.*, *Sphinx Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 6:01-CV-1462ORL19KRS, 2003 WL 24871000, at *11 (M.D. Fla. Mar. 21, 2003) (precluding defendant from presenting evidence opposing a finding on a key issue of control in lieu of striking pleadings, where defendant engaged in "obstreperous course of conduct" during discovery, including withholding discovery); *Cape Cave Corp. v. Charlotte Asphalt, Inc.*, 384 So. 2d 1300, 1301 (2d DCA 1980) (affirming order striking "defense of payment," as a sanction for failure to produce documents, but allowing defendant to proceed with other defenses).

Here, because Mayer Brown withheld evidence critical to issues bearing upon its intervening/superseding causes and third party at fault regarding Sun and its principals,

the Court should strike some or all of these defenses. It is appropriate, at a minimum, to preclude Mayer Brown from asserting certain of its defenses, in the Court's discretion. *See, e.g.*, *Cape Cave Corp.*, 384 So. 2d at 1301.

The Receiver further requests, as alternative relief, that at trial the Court impose an adverse inference instruction consistent with Florida Standard Jury Instructions in Civil Cases 301.11. *See Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 780 (4th DCA 2006).

Alternatively, the Court may award Plaintiff's counsel the fees and costs for past and future efforts necessitated by the Defendant's discovery abuses.

IV. CONCLUSION

The Court should strike Mayer Brown's Answer and Affirmative Defenses to the Receiver's Fourth Amended Complaint and revoke permission for attorneys David Bradford and April Otterberg to appear *pro hac vice* in this case. In the alternative, the Court should conclude as a matter of law – and so instruct the jury – that Mayer Brown represented Sun Capital, and that the fabricated Letter did not operate to waive Mayer Brown's conflicts of interest, and that Mayer Brown represented Founding Partners under an unwaivable conflict.

Respectfully submitted this 22nd day of June, 2020.

By *s/ Stuart Z. Grossman*

GROSSMAN ROTH YAFFA COHEN, P.A.
Stuart Z. Grossman (FL Bar No. 156113)
Rachel Wagner Furst (FL Bar No. 45155)
2525 Ponce de Leon Boulevard, Suite 1150
Coral Gables, Florida 33134
Telephone: (305) 442-8666
Facsimile: (305) 285-1668
szg@grossmanroth.com
rwf@grossmanroth.com

BEUS GILBERT MCGRODER PLLC
Leo R. Beus (PHV 88446)
Patrick J. McGroder (PHV 1012289)
Scot C. Stirling (PHV 88379)
Mark S. O'Connor (PHV - 121439)
701 North 44th Street
Phoenix, Arizona 85008
Telephone: (480) 429-3000
Facsimile: (480) 429-3100
lbeus@beusgilbert.com
p3@beusgilbert.com
sstirling@beusgilbert.com
moconnor@beusgilbert.com

SERVICE LIST

David J. Bradford, Esq. Reid J. Schar, Esq. April A. Otterberg, Esq. Jason M. Bradford, Esq. Jenner & Block, LLP 353 North Clark Street Chicago, IL 60654 Tel: (312) 222-9350 Fax: (312) 527-0484 dbradford@jenner.com RSchar@jenner.com aotterberg@jenner.com jbradford@jenner.com *Counsel for Mayer Brown, LLP*	Eugene K. Pettis, Esq. Debra J. Klauber, Esq. Haliczer Pettis & Schwamm, P.A. 100 S.E. Third Avenue 7th Floor Fort Lauderdale, FL 33394 Tel: (954) 523-9922 Fax: (954) 522-2512 EPettis@hpslegal.com DKlauber@hpslegal.com service@hpslegal.com *Counsel for Mayer Brown, LLP*
Edward A. Marod, Esq. Gunster, Yoakley & Stewart, PA 777 S. Flagler Drive Suite #500 East W. Palm Beach, FL 33401 Tel: (561) 655-1980 emarod@gunster.com dpeterson@gunster.com eservice@gunster.com *Counsel for Defendant Ernst &Young, LLP*	Steven M. Farina, Esq. Katherine M. Turner, Esq. Jena R. Neuscheler, Esq. Adrienne E. Van Winkle, Esq. Williams & Connolly, LLP 725 Twelfth Street NW Washington, DC 20005 Tel: (202) 434-5000 sfarina@wc.com kturner@wc.com jneuscheler@wc.com avanwinkle@wc.com *Counsel for Defendant Ernst & Young, LLP*
Jonathan Etra, Esq. Christopher Cavallo, Esq. Nelson Mullins Broad and Cassel One Biscayne Tower – 21st Floor 2 South Biscayne Blvd. Miami, FL 33131 Tel: (305) 373-9400 Fax: (305) 373-9443 jonathan.etra@nelsonmullins.com chris.cavallo@nelsonmullins.com *Co-Counsel for Plaintiff*	

EXHIBIT

1

April A. Otterberg
Tel +1 312 840 8646
Fax +1 312 840 8746
AOtterberg@jenner.com

December 12, 2019

BY EMAIL

Mark S. O'Connor
BEUS GILBERT MCGRODER PLLC
701 North 44th Street
Phoenix, Arizona 85008

Re: *Newman v. Mayer Brown LLP*
(Broward County Circuit Court, 17th Judicial Circuit, Case No. 10-49061)

Dear Mark:

I write concerning Topic 21 of the Receiver's Amended Third Notice of Rule 1.310(b)(6) Deposition of Mayer Brown LLP, which seeks information regarding the fax header that appears on the signature page of the January 23, 2002 engagement letter between FPCM and Mayer Brown.

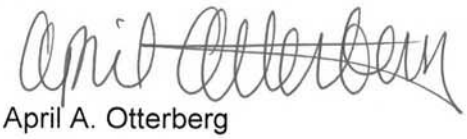
As explained in our December 2, 2019 letter, we have identified evidence to demonstrate that the January 23, 2002 engagement letter indeed was faxed to Mr. Gunlicks and that the reason the fax header appears on the page of the letter that Mr. Gunlicks signed is because Mr. Gunlicks faxed only the signature page back to Mr. Klyman. Specifically, (a) iManage indicates that the very same letter was printed out of iManage several times on January 23, 2002, the same day it was faxed to Mr. Gunlicks; (b) Mayer Brown's records indicate that an eight-page fax was sent to Mr. Gunlicks on that day; (c) eight pages matches the total length of the engagement letter fax, which appears to have included a one-page fax cover page, a one-page cover letter from Mr. Klyman indicating he was enclosing the engagement letter for review, the four-page engagement letter, and the two-page Mayer Brown schedule of non-fee charges to clients; and (d) Mr. Gunlicks sent a nine-page fax to Mayer Brown on January 25, 2002, which included the signature page of the engagement letter along with other items.

In investigating the matters addressed in Topic 21, we have determined that the document appearing at MB 00000012 – 18 does not appear to have been maintained by Mayer Brown in the form in which it was provided to you. Rather, the letter was maintained by Mayer Brown in the form it was faxed to Mr. Gunlicks on January 23, 2002, without any fax transmittal information at the top (since an outbound fax to Mr. Gunlicks would not bear information on the top of the page about the transmittal or receipt of the fax by Mr. Gunlicks), as indicated in the two copies of the letter produced at MB 00468125 – 31 and MB 00467886 – 92 (*see also* the copy of the letter produced before this litigation was filed, at RCV-MB-004-001647 – 53 and the

iManage copy at MB 00711771 – 77). (The fax cover sheet and Mr. Klyman's cover letter were maintained separately; production versions are located at MB 00398764 – 65.) Mr. Gunlicks thereafter returned the signature page as part of a nine-page fax, so that signature page bears fax transmittal information showing transmission to Mr. Gunlicks, receipt by Mr. Gunlicks, and return receipt by Mr. Klyman. (MB 00170748 – 56.)

In connection with Mayer Brown's mediation brief that was provided to the Receiver's counsel in February 2014, Jenner & Block provided a copy of the January 23, 2002 engagement letter that substituted Mr. Gunlicks' signature page for the unsigned page of the letter. This was before document production took place in this case, but Bates numbers were applied to the materials attached to Mayer Brown's mediation brief to aid in the identification of the materials. The document was later re-produced in 2017 as part of Mayer Brown's formal production efforts since it had been previously provided to the Receiver.

Regards,



April A. Otterberg

cc: Leo Beus, Pat McGroder, Scot Stirling, Stuart Grossman, and Rachel Furst,
Counsel for the Receiver
Eugene Pettis, Debra Klauber, David Bradford, Reid Schar, and Jason Bradford,
Counsel for Mayer Brown LLP

EXHIBIT 2

From: Scot Stirling
Sent: Wednesday, January 29, 2014 5:14 PM
To: Robert Stirling; Abigail Terhune; Sarah Letzkus; Malcolm Loeb; Danna Brandt; Bart Dewey; Elvis Sulejmani; Kristen Hullinger
Subject: Fwd: Founding Partners
Attachments: MB 00001.pdf; MB 00007.pdf; MB 00012.pdf; MB 00019.pdf; MB 00027.pdf; MB 00039.pdf

Sent from my Samsung Galaxy S®4

-------- Original message --------
From: "Otterberg, April A."
Date:01/29/2014 4:55 PM (GMT-07:00)
To: Scot Stirling ,"Colman, Jeffrey D"
Subject: RE: Founding Partners

Scot,

As we discussed this afternoon, attached are (1) five engagement letters with Mayer Brown related to Founding Partners, and (2) what we believe to be the final Wells submission in the first SEC proceeding involving Founding Partners.

As we noted during our call, four of the engagement letters were found in Mayer Brown's files (2000, 2001, 2002, and 2008), but one (from 2004) was included by Mr. Gunlicks as an exhibit to a filing in 2012 in his Illinois case against Mayer Brown. We're providing you that 2004 letter in the form it was attached to that filing (*i.e.*, with an exhibit stamp that presumably was added by Mr. Gunlicks' counsel). In addition, as we stated, our efforts to locate engagement letters were not exhaustive given that we so far have not engaged in discovery in this case and, in fact, are engaging in mediation in an effort to see if both parties will be able to avoid the costs and burdens associated with discovery.

I believe this email should go through with its attachments, but just to be sure I'm not running into a size limitation on your inbox, please confirm when you get a chance that you've received this email.

Regards,
April

From: Scot Stirling [mailto:sstirling@beusgilbert.com]
Sent: Wednesday, January 29, 2014 4:29 PM
To: Colman, Jeffrey D; Otterberg, April A.
Subject: RE: Founding Partners

Now is good – I'm at (480) 429-3032 (my direct line)

Scot Stirling

BEUS GILBERT PLLC

701 North 44th Street | Phoenix, AZ 85008
Direct: 480.429.3032 | Cell: 602.318.3650
Main: 480.429.3000 | Fax: 480.429.3100
Email: sstirling@beusgilbert.com
Secretary: Kristen Bosley | 480.429.3106 **| kbosley@beusgilbert.com**

From: Colman, Jeffrey D [mailto:JColman@jenner.com]
Sent: Wednesday, January 29, 2014 3:26 PM
To: Scot Stirling; Otterberg, April A.
Subject: RE: Founding Partners

Scot—

Are you free to speak with us now-- or in the AM?

Jeff

Jeffrey D. Colman
Jenner & Block LLP
353 N. Clark Street
Chicago, IL 60654-3456
Tel (312) 923-2940
Fax (312) 840-7340
JColman@jenner.com
www.jenner.com

From: Colman, Jeffrey D
Sent: Monday, January 27, 2014 1:53 PM
To: Scot Stirling; Otterberg, April A.
Subject: RE: Founding Partners

Scot

No apologies necessary. I am out of the office today. I will speak with April and one of us will respond to your request Tuesday-- or Wednesday at the latest. Bests, Jeff

---

From: Scot Stirling [mailto:sstirling@beusgilbert.com]
Sent: Monday, January 27, 2014 6:23 AM
To: Colman, Jeffrey D; Otterberg, April A.
Subject: Founding Partners

Jeff and April, I apologize for this belated request but have been preoccupied with preserving trial testimony of an expert witness in hospice care and got way off schedule.

When we met in your offices, you suggested that if there were any particular items we might need to better prepare for the mediation next month, you might be able to provide them in response to an informal request.

We would appreciate it if you could provide to us the final copy of the Wells submission and any correspondence with the SEC in connection with the first SEC investigation (the one that was settled by consent). Also, if you can provide a complete set of any engagement letters with any of the Founding Partners entities, we would like to confirm that we have a complete set of those documents.

I am going to be tied up in a mediation all day today and likely tomorrow (in NYC so eastern time), but by this afternoon we'll be in separate breakout rooms and I should have time to talk if you need to speak to me about this. Thanks.

Scot Stirling
(602 318 3650) (cell)

Sent from my Samsung Galaxy S®4

This Beus Gilbert e-mail message, and any attachment hereto, is intended only for use by the addressee(s) named herein and may contain legally privileged and/or confidential information. If you are not the intended recipient(s), or the employee or agent responsible for delivery of this message to the intended recipient(s), you are hereby notified that any use, dissemination, distribution or copying of this e-mail message, and/or any attachment hereto, is strictly prohibited. If you have received this e-mail in error, please immediately notify the sender and permanently delete the original and any copy of this message, its attachments, and any printout thereof. Thank you.

EXHIBIT

3

From: Leo Beus
Sent: Wednesday, February 5, 2014 2:56 PM
To: Founding Partners Team
Subject: FW: Newman v. Mayer Brown -- Mayer Brown's Mediation Submission (Email 1 of 6)
Attachments: Mediation Brief of Mayer Brown LLP.pdf; Authorities.zip

Leo R. Beus

BEUS GILBERT PLLC
701 North 44th Street | Phoenix, AZ 85008
Direct: 480.429.3001 | Main: 480.429.3000 | Fax: 480.429.3111
Email: lbeus@beusgilbert.com
Secretary: Pat Gaghagen | 480.429.3101 **| pgaghagen@beusgilbert.com**

From: Otterberg, April A. [mailto:AOtterberg@jenner.com]
Sent: Wednesday, February 05, 2014 2:54 PM
To: 'jmarks@marksadr.com'
Cc: 'ddeaton@marksadr.com'; 'ebailey@marksadr.com'; Colman, Jeffrey D; Leo Beus; Scot Stirling
Subject: Newman v. Mayer Brown -- Mayer Brown's Mediation Submission (Email 1 of 6)

Jonathan:

Here is the first of six emails containing Mayer Brown's mediation submission. You should have already received a hard copy set of exhibits to Mayer Brown's brief; this was sent yesterday by UPS.

Attached to this email are the following: (1) Mayer Brown's mediation brief, in PDF form; and (2) a .ZIP file containing the caselaw and other legal authorities cited in the brief. I'll send the electronic versions of the exhibits in the next five emails.

I will also send a separate email to you with our mediation brief in the requested Word format. Our brief is 37 pages; we previously conferred with Scot Stirling on that, and he indicated there is no objection to Mayer Brown submitting a few extra pages beyond the 35-page limit in the parties' mediation agreement.

Please let me know if you have any difficulty opening any of the materials I'm sending today.

Best regards,
April

April A. Otterberg
Jenner & Block LLP
353 N. Clark Street
Chicago, IL 60654-3456
Tel (312) 840-8646

Fax (312) 840-8746
AOtterberg@jenner.com
www.jenner.com

EXHIBIT

4

MAYER, BROWN & PLATT

190 SOUTH LA SALLE STREET

CHICAGO, ILLINOIS 60603-3441

MARC L. KLYMAN
DIRECT DIAL (312) 701-8053
DIRECT FAX (312) 706-8158
mklyman@mayerbrown.com

MAIN TELEPHONE
312-782-0600
MAIN FAX
312-701-7711

January 23, 2002

Mr. William L. Gunlicks
Founding Partners Capital
Management Company
5100 N. Tamiami Trail, Suite 119
Newgate Center
Naples, Florida 34103

Dear Bill:

This letter confirms our agreement for the provision of legal services by Mayer, Brown & Platt ("MBP", "we", "our" or "us") to Founding Partners Capital Management Company ("Founding Partners", "you" or "your") in connection with the proposed credit and security agreement (the "Credit Agreement") between Founding Partners Stable-Value Fund, L.P. (the "Stable-Value Fund") and Sun Capital, Inc. ("Sun Capital").

We understand that Schulte Roth & Zabel represents you in connection with all dealings between you and the Stable-Value Fund, between you and investors in the Stable-Value Fund, and between the Stable-Value Fund and investors in the Stable-Value Fund. We also understand that you will rely on Schulte Roth & Zabel to advise you in connection with (i) any "blue sky" or state securities law matters (and any federal securities law matters, international securities law matters, other securities law matters, investment company law matters, investment adviser law matters and commodities law matters) relating to you, the Stable-Value Fund, or any affiliate of you or the Stable-Value Fund, and (ii) any other state, local, federal, international or other legal and regulatory matters (including, without limitation, tax law matters, ERISA law matters,

corporate law matters and partnership law matters) relating to you, the Stable-Value Fund, and any affiliate of you or the Stable-Value Fund.

You agree to pay the reasonable fees and other charges billed by us in connection with this representation. Our fees for services are based on time (at quarter hour increments) spent on specific projects, computed at our hourly rates for those persons performing the services required. Other charges for which we will bill you for this engagement are described on the enclosed schedule of charges, which is subject to adjustment from time to time by MBP. Please note that MBP's fees and other charges incurred in connection with this representation are not contingent upon (i) the closing of or any funding under the Credit Agreement, (ii) payment of such fees and other charges by Sun Capital, or (iii) the successful completion of any other project by you. We anticipate submitting to you monthly invoices for the professional (lawyer and paralegal) services rendered and other charges and expenses incurred. Payment is due upon receipt of our statement and in no event later than 30 days thereafter.

We will assume without independent verification, as we understand you have your own procedures for this, that the Credit Agreement has been duly authorized by you and by the Stable-Value Fund, that you and the Stable-Value Fund have obtained all necessary consents and approvals prior to entering into the Credit Agreement or any documents relating to the Credit Agreement or relating to Sun Capital, that all signatures and documents are genuine and that all persons and entities executing documents have the legal capacity to contract. Unless we have agreed to do so, we will not (i) cause Uniform Commercial Code or other searches to be made or (ii) check compliance with periodic refiling or re-recording requirements. We do not undertake any responsibility for assuring that, with respect to the Credit Agreement or any document relating to the Credit Agreement, any of Sun Capital, you or the Stable-Value Fund (or any other person or entity) will be complying with applicable state, local, federal, international or other laws and regulations, including, without limitation, governmental reporting and licensing requirements, ERISA matters, and federal, international, state or local tax matters. We will not undertake any "due diligence" or other investigations unless we have agreed to do so.

You may limit or expand the scope of our representation from time to time, provided that any such expansion is agreed to by us.

You agree that MBP may represent other persons or entities whose interests are adverse to you (or adverse to the Stable-Value Fund, your subsidiaries, other partnerships in which you are a partner or related companies). For the purpose of determining whether a conflict of interest exists, it is only you who we will represent and not the Stable-Value Fund, your subsidiaries, any partnerships in which you are a partner or any related companies. As you know, Sun Capital and the principals of Sun Capital have been involved in a proposed securitization of trade receivables, including trade receivables held by Sun Capital and other factoring companies. The proposed securitization transaction (which may be preceded by one or more loans from SunTrust Bank) has been referred to from time to time as the "MasterFactor" or the "WorldFactor" transaction. We understand that the other parties to such transaction may include CDC, Union Planters Bank, SunTrust Bank, Centre or their respective affiliates. We have represented,

currently represent or may in the future represent Sun Capital, CDC, Union Planters Bank, SunTrust Bank, Centre or their respective affiliates. You hereby waive any conflict of interest relating to our past, current and future representation of Sun Capital, CDC, Union Planters Bank, SunTrust Bank, Centre, any of their respective affiliates or any of the other parties to the MasterFactor/WorldFactor transaction.

Following termination of our engagement, any otherwise nonpublic information you have supplied to us which is retained by us will be kept confidential in accordance with applicable rules of professional conduct. At your request, your papers and property will be returned to you; our own files, including lawyer work product, pertaining to the matter will be retained by us. For various reasons, including the minimization of unnecessary storage expenses, we reserve the right to destroy or otherwise dispose of any such items retained by us within a reasonable time after the termination of the engagement.

Our attorney-client relationship will be considered terminated if more than 12 months have elapsed from the last time you requested and we furnished any billable services to you. If you later retain us to perform further or additional services, our attorney-client relationship will be revived, subject to these and any supplemental terms of engagement. The fact that we may inform you from time to time of developments in the law which may be of interest to you, by newsletter or otherwise, should not be understood as a revival of an attorney-client relationship. Moreover, we have no obligation to inform you of such developments in the law unless we are engaged in writing to do so.

This letter constitutes the entire understanding between you and MBP, and supersedes all prior understandings, written or oral, relating to its subject matter. Any change must be made or confirmed in writing. If this letter correctly reflects your understanding of the terms and conditions of our engagement, please indicate your acceptance by signing the enclosed copy of this letter in the space provided below and returning it to our office, to my attention.

This letter may be executed in more than one counterpart, and by the parties hereto on separate and different counterparts. A signature to this letter transmitted by facsimile transmission will be the equivalent of an original signature.

MAYER, BROWN & PLATT

6

On behalf of MBP, I thank you for the opportunity to be of service.

Sincerely yours,

Marc L. Klyman

Agreed as of the date
first above written:

FOUNDING PARTNERS CAPITAL MANAGEMENT COMPANY

By: _____
William L. Gunlicks
President and CEO

4939771

Mayer, Brown & Platt

U. S. Offices

Schedule of Non Fee Charges to Clients

November 20, 2000

I. Long Distance Telephone.

We purchase our long-distance telephone service from telecommunications providers at discounted rates. We charge clients at rates calculated to recover our cost.

II. Automated Research.

We purchase services from Lexis and Westlaw at fixed monthly rates which are substantially below their published rates. We charge clients for the Lexis and Westlaw connections at rates calculated to recover our cost.

III. Telefax Service.

We charge clients $1.00 per page, plus applicable long distance telephone charges regardless of length at our discounted rates. There is no charge for incoming telefaxes.

IV. Duplicating.

We charge clients for internal photocopies at the rate of $.15 per page. Outside photocopying is charged at actual out-of-pocket cost.

V. Secretarial, Word Processing and Proofreading Services.

We accrue for client accounts document preparation charges at the rate of $40 per hour for word processors, secretaries and proofreaders generally when documents (originals or amendments) of over 10 pages are prepared or for secretarial overtime.

4939771

VI. Postage.

We charge clients at cost for postage when the cost of mailing is $1.00 or more.

VII. Out-of-pocket Disbursements.

The following types of disbursements when related to a client matter are charged at the firm's cost:

Advances on behalf of clients (e.g., tax payments, filing fees, title charges)
Consultants' and expert witnesses' fees and expenses
Courier and messenger services
Court reporters
Equipment when purchased solely for a client matter
Meals
Outside services (including cost of litigation support services purchased from outside vendors)
Service of process
Records searches
Supplies (when amounts are large or type of supply item is special)
Tax return processing charges
Taxis, mileage, parking (local)
Travel (airfares, hotels, meals, car rentals, taxis and incidentals)
Trial exhibits
Witness fees and costs
Other items not covered above that are directly attributable to a client matter

VIII. Items Not Charged to Clients.

Administrative overhead
Air conditioning and electricity for overtime work
Client entertainment
Local and suburban telephone calls
Refreshments during meetings
Rent for conference rooms

bcc: Managing Partner
Conflicts Partner
Records Center
Accounting Department

EXHIBIT

5

MAYER, BROWN & PLATT

190 SOUTH LA SALLE STREET

CHICAGO, ILLINOIS 60603-3441

MARC L. KLYMAN
DIRECT DIAL (312) 701-8053
DIRECT FAX (312) 706-8158
mklyman@mayerbrown.com

MAIN TELEPHONE
312-782-0600
MAIN FAX
312-701-7711

January 23, 2002

Mr. William L. Gunlicks
Founding Partners Capital
Management Company
5100 N. Tamiami Trail, Suite 119
Newgate Center
Naples, Florida 34103

Dear Bill:

This letter confirms our agreement for the provision of legal services by Mayer, Brown & Platt ("MBP", "we", "our" or "us") to Founding Partners Capital Management Company ("Founding Partners", "you" or "your") in connection with the proposed credit and security agreement (the "Credit Agreement") between Founding Partners Stable-Value Fund, L.P. (the "Stable-Value Fund") and Sun Capital, Inc. ("Sun Capital").

We understand that Schulte Roth & Zabel represents you in connection with all dealings between you and the Stable-Value Fund, between you and investors in the Stable-Value Fund, and between the Stable-Value Fund and investors in the Stable-Value Fund. We also understand that you will rely on Schulte Roth & Zabel to advise you in connection with (i) any "blue sky" or state securities law matters (and any federal securities law matters, international securities law matters, other securities law matters, investment company law matters, investment adviser law matters and commodities law matters) relating to you, the Stable-Value Fund, or any affiliate of you or the Stable-Value Fund, and (ii) any other state, local, federal, international or other legal and regulatory matters (including, without limitation, tax law matters, ERISA law matters,

corporate law matters and partnership law matters) relating to you, the Stable-Value Fund, and any affiliate of you or the Stable-Value Fund.

You agree to pay the reasonable fees and other charges billed by us in connection with this representation. Our fees for services are based on time (at quarter hour increments) spent on specific projects, computed at our hourly rates for those persons performing the services required. Other charges for which we will bill you for this engagement are described on the enclosed schedule of charges, which is subject to adjustment from time to time by MBP. Please note that MBP's fees and other charges incurred in connection with this representation are not contingent upon (i) the closing of or any funding under the Credit Agreement, (ii) payment of such fees and other charges by Sun Capital, or (iii) the successful completion of any other project by you. We anticipate submitting to you monthly invoices for the professional (lawyer and paralegal) services rendered and other charges and expenses incurred. Payment is due upon receipt of our statement and in no event later than 30 days thereafter.

We will assume without independent verification, as we understand you have your own procedures for this, that the Credit Agreement has been duly authorized by you and by the Stable-Value Fund, that you and the Stable-Value Fund have obtained all necessary consents and approvals prior to entering into the Credit Agreement or any documents relating to the Credit Agreement or relating to Sun Capital, that all signatures and documents are genuine and that all persons and entities executing documents have the legal capacity to contract. Unless we have agreed to do so, we will not (i) cause Uniform Commercial Code or other searches to be made or (ii) check compliance with periodic refiling or re-recording requirements. We do not undertake any responsibility for assuring that, with respect to the Credit Agreement or any document relating to the Credit Agreement, any of Sun Capital, you or the Stable-Value Fund (or any other person or entity) will be complying with applicable state, local, federal, international or other laws and regulations, including, without limitation, governmental reporting and licensing requirements, ERISA matters, and federal, international, state or local tax matters. We will not undertake any "due diligence" or other investigations unless we have agreed to do so.

You may limit or expand the scope of our representation from time to time, provided that any such expansion is agreed to by us.

You agree that MBP may represent other persons or entities whose interests are adverse to you (or adverse to the Stable-Value Fund, your subsidiaries, other partnerships in which you are a partner or related companies). For the purpose of determining whether a conflict of interest exists, it is only you who we will represent and not the Stable-Value Fund, your subsidiaries, any partnerships in which you are a partner or any related companies. As you know, Sun Capital and the principals of Sun Capital have been involved in a proposed securitization of trade receivables, including trade receivables held by Sun Capital and other factoring companies. The proposed securitization transaction (which may be preceded by one or more loans from SunTrust Bank) has been referred to from time to time as the "MasterFactor" or the "WorldFactor" transaction. We understand that the other parties to such transaction may include CDC, Union Planters Bank, SunTrust Bank, Centre or their respective affiliates. We have represented,

currently represent or may in the future represent Sun Capital, CDC, Union Planters Bank, SunTrust Bank, Centre or their respective affiliates. You hereby waive any conflict of interest relating to our past, current and future representation of Sun Capital, CDC, Union Planters Bank, SunTrust Bank, Centre, any of their respective affiliates or any of the other parties to the MasterFactor/WorldFactor transaction.

Following termination of our engagement, any otherwise nonpublic information you have supplied to us which is retained by us will be kept confidential in accordance with applicable rules of professional conduct. At your request, your papers and property will be returned to you; our own files, including lawyer work product, pertaining to the matter will be retained by us. For various reasons, including the minimization of unnecessary storage expenses, we reserve the right to destroy or otherwise dispose of any such items retained by us within a reasonable time after the termination of the engagement.

Our attorney-client relationship will be considered terminated if more than 12 months have elapsed from the last time you requested and we furnished any billable services to you. If you later retain us to perform further or additional services, our attorney-client relationship will be revived, subject to these and any supplemental terms of engagement. The fact that we may inform you from time to time of developments in the law which may be of interest to you, by newsletter or otherwise, should not be understood as a revival of an attorney-client relationship. Moreover, we have no obligation to inform you of such developments in the law unless we are engaged in writing to do so.

This letter constitutes the entire understanding between you and MBP, and supersedes all prior understandings, written or oral, relating to its subject matter. Any change must be made or confirmed in writing. If this letter correctly reflects your understanding of the terms and conditions of our engagement, please indicate your acceptance by signing the enclosed copy of this letter in the space provided below and returning it to our office, to my attention.

This letter may be executed in more than one counterpart, and by the parties hereto on separate and different counterparts. A signature to this letter transmitted by facsimile transmission will be the equivalent of an original signature.

MAYER, BROWN & PLATT

On behalf of MBP, I thank you for the opportunity to be of service.

Sincerely yours,

Marc L. Klyman

Agreed as of the date
first above written:

FOUNDING PARTNERS CAPITAL MANAGEMENT COMPANY

By: _____
William L. Gunlicks
President and CEO

493977.1

Mayer, Brown & Platt

U. S. Offices

Schedule of Non Fee Charges to Clients

November 20, 2000

I. Long Distance Telephone.

We purchase our long-distance telephone service from telecommunications providers at discounted rates. We charge clients at rates calculated to recover our cost.

II. Automated Research.

We purchase services from Lexis and Westlaw at fixed monthly rates which are substantially below their published rates. We charge clients for the Lexis and Westlaw connections at rates calculated to recover our cost.

III. Telefax Service.

We charge clients $1.00 per page, plus applicable long distance telephone charges regardless of length at our discounted rates. There is no charge for incoming telefaxes.

IV. Duplicating.

We charge clients for internal photocopies at the rate of $.15 per page. Outside photocopying is charged at actual out-of-pocket cost.

V. Secretarial, Word Processing and Proofreading Services.

We accrue for client accounts document preparation charges at the rate of $40 per hour for word processors, secretaries and proofreaders generally when documents (originals or amendments) of over 10 pages are prepared or for secretarial overtime.

4939771

VI. Postage.

We charge clients at cost for postage when the cost of mailing is $1.00 or more.

VII. Out-of-pocket Disbursements.

The following types of disbursements when related to a client matter are charged at the firm's cost:

Advances on behalf of clients (e.g., tax payments, filing fees, title charges)
Consultants' and expert witnesses' fees and expenses
Courier and messenger services
Court reporters
Equipment when purchased solely for a client matter
Meals
Outside services (including cost of litigation support services purchased from outside vendors)
Service of process
Records searches
Supplies (when amounts are large or type of supply item is special)
Tax return processing charges
Taxis, mileage, parking (local)
Travel (airfares, hotels, meals, car rentals, taxis and incidentals)
Trial exhibits
Witness fees and costs
Other items not covered above that are directly attributable to a client matter

VIII. Items Not Charged to Clients.

Administrative overhead
Air conditioning and electricity for overtime work
Client entertainment
Local and suburban telephone calls
Refreshments during meetings
Rent for conference rooms

bcc: Managing Partner
Conflicts Partner
Records Center
Accounting Department

EXHIBIT

6

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,	)	No. 10-49061
Plaintiff,	)	Judge John J. Murphy
v.	)	
ERNST & YOUNG, LLP, a Delaware Limited Liability Partnership; and MAYER BROWN LLP, an Illinois Limited Liability Partnership,	)	
Defendants.	)	

MAYER BROWN LLP'S REPLY IN SUPPORT OF MOTION FOR A PROTECTIVE ORDER REGARDING MASTERFACTOR DISCOVERY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The Receiver's counsel does not provide any valid reason to set the clock back in this case by at least a year, in order to accommodate his untimely demand for discovery related to an entirely new and tangential theory. The Receiver's operative (and final) complaint, which he filed in early 2018 after nearly a *decade* of opportunity to investigate and obtain discovery, does not mention MasterFactor, and does not allege any conflict-of-interest theory that conceivably could relate to MasterFactor.

The Court is well aware of how much time and effort it has taken to achieve the progress attained in this case so far. In reliance on the theories the Receiver *did* plead (and has pled from the outset of this case in 2010), Mayer Brown undertook extensive discovery efforts—substantially completing its document production, obtaining voluminous third-party document productions from Sun[1] and others, and conducting nearly 40 depositions. None of those efforts concerned MasterFactor. As Mayer Brown demonstrated in its opening brief, the Receiver's effort to expand and change the case through discovery regarding a supposed MasterFactor "conflict" is nothing more than an attempt to re-boot his case, in disregard of all the work that has taken place to date.

The Receiver offers no convincing reason he should be granted a "do-over." Although he attempts to justify his demand to reset discovery by asserting that Mayer Brown somehow "hid[] the ball" (Resp. 8), that accusation does not withstand scrutiny. The Receiver even admits (as he must) that "a number of documents related to MasterFactor, Inc. were in [his] possession *for some time* during the pendency of this action." (*Id.* at 31 (emphasis added).) That is an understatement. The Receiver and his counsel had more than enough to put them on notice of any issues regarding

[1] Mayer Brown uses the same defined terms it used in its opening brief. For clarity, "Sun Capital" refers to Sun Capital, Inc. and "Sun Healthcare" refers to Sun Capital Healthcare, Inc. "Sun" refers to the two entities together.

MasterFactor before they even filed this lawsuit, but they *chose* not to allege anything about MasterFactor or to pursue any discovery on this topic until late 2018. For example, since the time he was appointed in the spring of 2009, the Receiver had (from FPCM's own files) a document that specifically identified Mayer Brown as counsel to MasterFactor. (*E.g.*, Ex. 12, MasterFactor Analysis at RCV-FP-NAP-0020956.)[2] He also has had, since early 2010, a document showing Sun Capital's potential payment of fees to Mayer Brown relating to MasterFactor. (Ex. 25, Jan. 10, 2002 Fax to Gunlicks at RCV-MB-004-002179.) And—to make the situation even more apparent—he has also possessed since *early 2010* the January 23, 2002 engagement letter between FPCM and Mayer Brown that expressly disclosed that: (i) the "principals of Sun Capital" and several other parties were involved in a potential transaction referred to as "MasterFactor"; (ii) Mayer Brown had represented or might in the future represent parties (including Sun) in relation to such a potential transaction; and (iii) FPCM *waived any potential conflict of interest* related to Mayer Brown's legal services concerning that transaction. (Ex. 2, Jan. 23, 2002 Ltr. to Gunlicks.) That letter put the Receiver squarely on notice—months before he filed this lawsuit and eight years before he filed his Fourth Amended Complaint—of the exact issue that he now incorrectly asserts was "hidden" from him (*i.e.*, a potential conflict of interest involving Mayer Brown, FPCM, Sun, and MasterFactor, which was waived by FPCM in 2002).

Despite all of this information at their fingertips since 2010 and earlier, the Receiver's counsel nonetheless decided not to reference MasterFactor, any potential MasterFactor transaction, or any possible conflict of interest related to it in any of the Receiver's complaints in this case, or in any of his discovery requests (until now). Those decisions were no doubt informed by the fact that any alleged conflict had been disclosed and waived years before the purchases of allegedly

[2] "Ex." refers to exhibits cited in either Mayer Brown's motion or this reply brief. Exhibits 1–29 were attached to Mayer Brown's motion. Exhibits 30–57 are attached to this reply brief.

improper DSH and workers' compensation receivables that have been at the center of the Receiver's claims against Mayer Brown and the SEC's complaint against FPCM before that. Even now, the Receiver does not explain what caused him, in late 2018, to suddenly attempt to challenge that waiver, when he has known about it for nearly a decade. Nor can he do so, because the Receiver learned nothing in the last few months that he did not already know or have the means of finding out with minimal diligence long ago.

Mayer Brown would suffer substantial prejudice if the Receiver is permitted to pursue this untimely discovery about MasterFactor, while the Receiver would suffer none if the Court properly enters a protective order. To defend itself against the theories the Receiver actually *has* alleged, none of which concern MasterFactor, Mayer Brown has gathered millions of pages of documents from its own files and the files of third parties, and has taken dozens of depositions. As explained below, not only would the Receiver's new MasterFactor-related theory require extensive additional document production efforts from multiple sources (even putting aside whether documents created nearly 20 years ago can even be found), but it also would require re-opening virtually every deposition taken in this case. Most, if not all, of the remaining depositions in the case would be delayed while the parties work through the document issues first.

Against the prejudice that Mayer Brown would suffer, the Receiver has failed to identify any reason why he has a basis to challenge the January 2002 conflict waiver or why it would even matter to his existing claims if he could do so. In the Receiver's 36 pages of briefing on this motion, the Court will not find a single sentence explaining why Mayer Brown's representation of MasterFactor for 18 months between July 2000 and January 2002 supposedly matters to this case, except his hazy assertion that it allegedly will somehow "help to explain the circumstances and the reasons for Mayer Brown's betrayal of its duties" to Founding Partners. (Resp. 3.) That claim

makes no sense on its face: the Receiver cannot explain how this representation—which ended in January 2002 (years before the alleged purchases of DSH and workers' compensation receivables that are at the heart of his complaint), which was disclosed to FPCM, and for which FPCM expressly waived all potential conflicts—could matter to the outcome of this case, let alone warrant sweeping new discovery at this late stage.

The Receiver's MasterFactor "conflict" theory is too little and too late to warrant reopening document productions and depositions—including the depositions of the 29 Assignors deposed to date. Mayer Brown thus respectfully requests a protective order quashing the Receiver's various discovery requests related to MasterFactor and WorldFactor, including the depositions he seeks of two former Mayer Brown attorneys who never touched the Founding Partners matters.

ARGUMENT

I. The Receiver Should Not Be Granted A Do-Over To Pursue MasterFactor Discovery.

The Receiver's response brief is largely an attempt to excuse the failure of the Receiver's counsel to seek MasterFactor-related discovery before now. The Receiver argues vaguely that the "details of MasterFactor became clear" only "relatively recently" (Resp. 31); that Mayer Brown somehow engaged in "a deliberate effort to conceal its relationship with MasterFactor" (*id.* at 10); and that he did not understand Mayer Brown's plain statement (made in March 2017) that it objected to producing or logging documents related to its representation of clients other than the receivership entities (*id.* at 8). All of these excuses fail.

As demonstrated throughout this brief, the Receiver has had ample information for years about MasterFactor and the associated 2002 conflict waiver to have pursued discovery specifically directed to those subjects had he wished. He elected *not* to do so. None of his discovery requests before December 2018 even mentioned the subject of MasterFactor. Mayer Brown was

transparent with the Receiver about the search terms and other parameters it used to collect and review its own documents for potential production to the Receiver, as well as the parameters used to facilitate the production of documents from nine different Sun-related entities in response to subpoenas issued by Mayer Brown. The Receiver's counsel knew, among other things, that none of these efforts included "MasterFactor" as a search term and that the vast majority of the Sun document search parameters did not even include the time period related to the 2002 conflict waiver concerning MasterFactor or work that preceded it. Mayer Brown completed these extensive document collection and production efforts and conducted nearly forty depositions based on the resulting universe of documents. The Receiver's claims that he was "misled" are unfounded and provide no reason why he should be entitled to a "do-over" on all of this discovery.

A. The Receiver Has Long Possessed Information Related To MasterFactor.

The Receiver cannot deny that, since the inception of the receivership, he both knew about the 2002 MasterFactor conflict waiver and possessed many documents related to MasterFactor. In an effort to minimize his knowledge, the Receiver acknowledges that "documents related to MasterFactor, Inc. were in [his] possession for some time," but he argues that those documents did not tell him that Mayer Brown represented MasterFactor. (Resp. 31.) This argument is both erroneous and self-defeating. It is erroneous because the Receiver has possessed, since the inception of the receivership in 2009, a presentation (referenced throughout the Receiver's response brief), that identified MasterFactor as the "issuer" of securities and Mayer Brown as the "***counsel to the issuer***." (Ex. 12, MasterFactor Analysis at RCV-FP-NAP-0020956 (emphasis added).) The argument is self-defeating because if, as the Receiver now contends (Resp. 4), he believed that the 2002 conflict waiver involved Mayer Brown representing Sun Capital as its client in relation to a transaction called MasterFactor, then he had even more reason to timely investigate the transaction and the waiver. At a minimum, the January 2002 letter put him on plain notice of

the issue.[3] The Receiver's failure to seek any discovery that even mentioned MasterFactor was his own decision—and, frankly, a reasonable one—not anything he can blame on Mayer Brown.

Indeed, the Receiver quotes from or otherwise relies upon multiple MasterFactor-related documents throughout his response brief, without ever explaining that he has possessed these documents (several of which reference Mayer Brown) for *years*:

Description	**Bates Number**	**Document Source**	**Date Obtained by Receiver**	**Notes**
Sept. 2001 MasterFactor Receivables Trust Series 2001-1 Credit, Collateral, and Securities Analysis Presented to Standard & Poor's (Ex. 12)	RCV-FP-NAP-0020880 to -20997	FPCM files in Naples, Florida	Inception of receivership in 2009	Says Mayer Brown represents MasterFactor; contains Gunlicks' handwritten notes
Oct. 5, 2001 Memo from Gunlicks to Peter Baronoff and Howard Koslow, re Commitment to Fund MasterFactor, Inc. with subordinated debt/equity to support its Commercial Paper Program (Ex. 14)	RCV-FP-NAP-0021305	FPCM files in Naples, Florida	Inception of receivership in 2009	Mentions Mayer Brown in context of MasterFactor; signed by Gunlicks
Oct. 8, 2001 Fax from Gunlicks to Peter Baronoff and Howard Koslow, cc to Marc Klyman, re MasterFactor Commitment Letter (Ex. 31)	RCV-FP-NAP-0020608	FPCM files in Naples, Florida	Inception of receivership in 2009	Mentions Mayer Brown in context of MasterFactor; signed by Gunlicks
Oct. 19, 2001 Memo from Gunlicks to Howard Koslow and Fred Leder re Possible MasterFactor, Inc. Commercial Paper Financing at SunTrust Bank (Ex. 32)	RCV-FP-NAP-0020783	FPCM files in Naples, Florida; FPCM electronic files	Inception of receivership in 2009	Indicates potential dealings between Gunlicks and MasterFactor
Oct. 28, 2001 Memo from Gunlicks to Howard Koslow and Fred Leder re Comments on MasterFactor Inc. Packet for SunTrust Bank Mtg. on Oct. 31, 2001 (Ex. 33)	RCV-FP-NAP-0020782	FPCM files in Naples, Florida	Inception of receivership in 2009	Indicates potential dealings between Gunlicks and MasterFactor; signed by Gunlicks

[3] The January 2002 engagement letter is Bates-stamped with the prefix "RCV-MB." Documents bearing the "RCV-MB" Bates prefix were produced by Mayer Brown to the Receiver in approximately February 2010, eight months before the Receiver filed this lawsuit, and then re-produced by the Receiver to Mayer Brown in December 2016. (Ex. 30, Nov. 28, 2016 S. Stirling Ltr. to A. Otterberg.)

The Receiver also had multiple other documents referencing MasterFactor for *years*, including several that also variously referenced FPCM, Mr. Gunlicks, the Sun principals, and Mayer Brown. A sampling of these kinds of documents, their sources, and when the Receiver obtained them, is listed in Exhibit 34 to this brief.

Along with all of those documents, the Receiver has also had access—for years—to the principals who previously owned Sun Capital and Sun Healthcare, some of whom also apparently owned interests in MasterFactor. As part of the Sun Litigation settlement, these individuals—Peter Baronoff, Howard Koslow, and Lawrence Leder—agreed to cooperate with the Receiver in connection with this lawsuit. (*E.g.*, Ex. 35, Leder Consulting Agreement at SC03502112, ¶ 10.) And they have done so. (*See, e.g.*, Ex. 36, Oct. 17, 2016 P. Baronoff email.) The Receiver was free to ask these Sun principals any questions he had about any aspect of those persons' dealings with Mayer Brown, including related to MasterFactor. Indeed, the Receiver's counsel *did* ask questions about MasterFactor and WorldFactor in depositions of Mr. Koslow and Mr. Leder taken in the fall of 2009 in the Sun Litigation (Ex. 37, Sept. 30, 2009 Koslow Dep. Tr. 133:3-19; 135:2-140:13; Ex. 38, Oct. 15, 2009 Leder Dep. Tr. 239:15-241:12; 244:18-24), but then elected not to make any allegations about MasterFactor when he filed this case a year later. The Receiver also presumably could have sought whatever documents he wanted from Sun and the Sun principals related to MasterFactor, both when he sued Sun and after he settled that litigation and joined the board of its successor entity.

In sum, the Receiver's failure to seek discovery related to MasterFactor in this case was not for lack of information and notice. Rather, it reflects a judgment that MasterFactor is far attenuated from this case and does not support any claim against Mayer Brown. The documents the Receiver relies upon show that FPCM waived any potential conflict of interest (*see* Ex. 2) and

that Mayer Brown's representation of MasterFactor ended in early 2002, years before the alleged purchases of receivables by Sun that the Receiver contends were improper. (*See, e.g.*, Ex. 20, Excerpts of Fourth Am. Compl. ¶¶ 107, 112 (referring to uses of monies purportedly beginning in 2004).) The Receiver's late apparent change-of-heart to try to assert a "MasterFactor" theory is no reason for a discovery do-over.

B. The Parties Have Undertaken Substantial Discovery Efforts Without Any "MasterFactor" Request By The Receiver.

While the Receiver had access to the above information concerning MasterFactor, the parties made substantial discovery efforts—including enormous document productions and dozens of depositions—without any discovery request from the Receiver that even mentioned the word "MasterFactor." The Receiver can provide no valid reason to turn back the clock on these efforts and begin them anew.

In circumstances such as those in this case, where parties have agreed on discovery parameters and have proceeded to take discovery in reliance on those parameters, courts routinely reject efforts to expand discovery beyond agreed-upon parameters. *See, e.g.*, *Teledyne Instruments, Inc. v. Cairns*, No. 6:12-cv-854-ORL-28, 2013 WL 5781274, at *7 (M.D. Fla. Oct. 25, 2013) (denying discovery seeking "to expand discovery well beyond the parameters agreed by the parties"); *Moses H. Cone Mem'l Hosp. Operating Corp. v. Conifer Physician Servs., Inc.*, No. 1:13CV651, 2016 WL 430494, *4 (M.D.N.C. Feb. 3, 2016) (denying discovery where the parties "heavily negotiated for an extensive period of time about how to produce documents, what search terms were going to be used, and which custodians would be subject to discovery" (internal quotation marks omitted)). The Receiver provides no reason to rule otherwise here.

1. Without Any "MasterFactor" Request, The Parties Agreed On Document Production Parameters, And Mayer Brown Produced Tens Of Thousands of Documents.

Pursuant to the June 7, 2017 agreed case scheduling order, discovery was to proceed in phases—first document production, followed by deposition discovery—with the parties agreeing to "substantially complete" their productions of documents in response to the other's first set of requests by a set deadline of June 30, 2017. (Ex. 18, June 7, 2017 Order ¶ 3.) The purpose of this phasing was to ensure that the parties had the majority of documents they needed before depositions began. (*See, e.g.*, Ex. 39, Apr. 7, 2017 Email from D. Bradford to S. Stirling.)

Mayer Brown expended considerable resources to make sure it produced documents in satisfaction of the agreed June 2017 deadline. Mayer Brown is a large law firm with millions of documents, and the Receiver requested documents from over a 17-year period. For Mayer Brown to search for and then produce responsive non-privileged documents, it was necessary to design and agree upon a collection-and-review protocol. As Mayer Brown has explained previously, it proposed to the Receiver a detailed protocol for Mayer Brown's collection and review of hard copy and electronic documents. (Mot. 7–9.) Mayer Brown designed the protocol by reference to the case pleadings, the Receiver's document requests, and Mayer Brown's objections. Mayer Brown was transparent with the Receiver regarding those parameters, and it gave the Receiver every opportunity to ask questions and to propose additional steps to collect or search for documents. (*See, e.g.*, Ex. 8, Dec. 8, 2016 Ltr. to S. Stirling; Ex. 9, Jan. 30, 2017 Ltr. to S. Stirling; Ex. 10, Mar. 8, 2017 Ltr. to S. Stirling.) Indeed, when the Receiver asked Mayer Brown to run an additional search term, Mayer Brown complied. (Ex. 10, Mar. 8, 2017 Ltr. to S. Stirling.)

During the course of these search-protocol discussions in late 2016 and early 2017, not once did the Receiver raise any question or issue regarding MasterFactor or the 2002 conflict waiver. The Receiver did not propose the terms "MasterFactor" or "WorldFactor" to be included

in the over 200 collection search terms run across email files associated with 80 individuals who billed time to an FPCM matter number. Nor did the Receiver ask for those terms to be part of the dozens of broad searches run to identify the portion of the collected email that would be reviewed for potential production to the Receiver. The Receiver also did not ask Mayer Brown to collect any documents found in files related to other clients besides FPCM, or to collect any email related to attorneys or other personnel who billed time to matters other than those involving FPCM. Pursuant to the agreed parameters, Mayer Brown made extraordinary efforts to produce tens of thousands of documents before the scheduling order's June 30, 2017 deadline. (Mot. 9.) There is no basis for a "do-over" now.

2. Mayer Brown Obtained Hundreds Of Thousands Of Sun And Promise Documents Without Any "MasterFactor" Request From The Receiver.

Throughout 2017 and 2018, Mayer Brown also made significant efforts to advance important third-party discovery, all without any notice from the Receiver that "MasterFactor" or the 2002 conflict waiver were supposedly part of his case. In the summer of 2017, Mayer Brown subpoenaed the former principals of Sun and a number of Sun- and Promise-related entities (together, the "Sun Successor Entities"). Following Mayer Brown's motion to compel, Mayer Brown negotiated with the Sun Successor Entities the scope and parameters of their production efforts in response to the subpoenas. The Court entered an agreed order identifying those parameters in December 2017. (Ex. 27, Dec. 5, 2017 Order.) Importantly, the December 2017 order made clear that, for nearly all categories of documents to be collected, Mayer Brown was targeting the timeframe January 1, *2004* and later. (*Id.* at Ex. C) That timeframe was consistent with the timeframe that the Receiver alleges with respect to Sun's purchases of supposedly improper receivables (*e.g.*, Ex. 20, Excerpts of Fourth Am. Compl. ¶¶ 107, 112), but was

inconsistent with the timeframe of the 2002 waiver letter and Mayer Brown's work in connection with MasterFactor.

After the Court's December 2017 order regarding the Sun-related subpoenas, Mayer Brown undertook substantial efforts to collect documents and data from the Sun Successor Entities and facilitate the production of such materials to the parties in this case. *All* of these efforts—which involved substantial negotiations and back-and-forth with counsel for the Sun Successor Entities (all at Mayer Brown's expense)—were undertaken in reliance on an understanding of what was—and was not—at issue in the Receiver's lawsuit. This included decisions about what to collect from the Sun Successor Entities and negotiations with the Sun Successor Entities for a reasonable production once the large volume of data they possessed became clear. Specifically, after the December 2017 Order was entered, Mayer Brown (at its own, substantial expense, including through several on-site visits) collected 1,154,213 electronic documents and 99,444 hard-copy documents from the Sun Successor Entities. (Ex. 40, Apr. 9, 2018 Ltr. to S. Stirling at 1.) Mayer Brown then negotiated parameters with the Sun Successor Entities, including specific search terms and date restrictions, to narrow the collected material to a scope the Sun Successor Entities would agree to produce. Mayer Brown then worked with an e-discovery vendor (again, at Mayer Brown's expense) to apply those negotiated parameters and identify the set of documents that the Sun Successor Entities would produce. (*Id.*) These efforts—which Mayer Brown fully disclosed to the Receiver nearly a year ago, in April 2018 (*id.*)—resulted in the production between April and July 2018 of 636,310 documents, principally related to the conduct of Sun's business.[4]

None of these extensive collection and production efforts were directed to any MasterFactor allegations or designed to capture MasterFactor-related documents. Although the

[4] Additional document production efforts are ongoing, related to financial and other reporting from the various Sun Successor Entities.

Receiver tries to make much of the fact that "MFI" was listed as a search term in the Court's December 2017 Order (Resp. 26-29), as the Receiver knows, that term was *not* used to create the set of documents ultimately produced by the Sun Successor Entities. The Receiver was fully aware of that fact, as in April 2018, Mayer Brown informed the Receiver's counsel of the final parameters used to create the Sun Successor Entities' production (which did not include "MFI"); the Receiver did not object to the parameters identified by Mayer Brown. (Ex. 40, Apr. 9, 2018 Ltr. to S. Stirling, at enclosure titled "Sun/Promise Search Term Parameters".) Regardless, at no point did the Receiver's counsel ever suggest that the terms "MasterFactor" or "WorldFactor" should be included in the Sun parameters, or that Mayer Brown should expand the negotiated date restrictions to encompass the time period prior to 2004. Once again, there is no basis for a "do-over."

3. Mayer Brown Undertook Dozens Of Depositions Without Any Reference To MasterFactor.

The parties' substantial discovery efforts went beyond documents. In reliance on the fact that document productions were "substantially complete" as of the fall of 2017, Mayer Brown began taking depositions with the expectation that the issues in the litigation were limited to those raised in the complaint and that documents related to those issues had been produced. Mayer Brown took 36 depositions, including depositions of five former employees of FPCM, 29 assignors, and various others, such as a Rule 1.310(b)(6) deposition of Hybrid-Value Fund. In *none* of those depositions was the word "MasterFactor" uttered, as the Receiver had not identified MasterFactor or anything related to it as an issue in the case. For example, Mayer Brown did not ask any of the Assignors it deposed whether they would have altered any investment decision had they known that Mayer Brown represented MasterFactor for 18 months before January 2002. Nor did Mayer Brown have the opportunity to follow-up on any such assertion by testing it with cross-

examination. Each of those depositions will need to be reopened to the extent the Receiver is permitted to attempt to establish a new MasterFactor "conflict" theory.

C. The Receiver's Do-Over Arguments Fail.

Against all of the foregoing, the Receiver makes three principal arguments: (a) that he believed the term "MFI" would cover MasterFactor-related discovery (Resp. 26-29); (b) that he made generalized discovery requests that did not mention MasterFactor but supposedly should have resulted in the production of MasterFactor-related documents (*id.* at 4-7); and (c) that Mayer Brown has been "hiding the ball" (*id.* at 7-10). Each argument fails.

1. The Receiver Did Not Ask Mayer Brown To Search For MasterFactor Documents Or To Collect MasterFactor Files.

First, as reviewed above, the Receiver *agreed* to Mayer Brown using document collection and review parameters that did not target "MasterFactor" or "other client" alleged conflict issues. (*E.g.*, Mot. 8.) The Receiver nonetheless now latches on to a single *collection* term that was proposed by Mayer Brown—"MFI"—which he contends he understood to refer to MasterFactor. (Resp. 27.) But if the Receiver had intended to propose MasterFactor-related search terms, he surely would have proposed the word *"MasterFactor"* as well as variants (such as "master" within two words of "factor," and "master factor"), not merely a three-letter acronym. Moreover, as Mayer Brown expressly disclosed and the Receiver agreed, the "MFI" term was used as a *collection* term, not a *review* term—meaning that "MFI" was only used (along with many other terms) to gather the initial set of documents, *not* to identify the documents that would actually be reviewed for responsiveness, privilege, and potential production to the Receiver. (Ex. 9, Jan. 30, 2017 Ltr. from A. Otterberg to S. Stirling.) If the Receiver had intended Mayer Brown to review and produce responsive documents containing the term "MFI," he no doubt would have insisted that "MFI" be used as part of the *review* search terms.

Indeed, if the Receiver believed that the "MFI" term addressed MasterFactor-related documents, then his agreement that "MFI" would *not* be used as a review term reflects a decision that MasterFactor was not a topic he was pursing in discovery—*i.e.*, the Receiver agreed that the one term he understood to be focused on MasterFactor would *not* be used for the actual review and production of documents. And the Receiver doubled-down on that decision when it came to the Sun documents, where he knew that neither "MasterFactor" nor "MFI" were used to create the production from the Sun Successor Entities, and that the Sun Successor Entities' production was largely limited to the period 2004 and later.[5] The Receiver's own decisions are inconsistent with any claimed belief that MasterFactor-related discovery had been requested.

2. Mayer Brown Responded Properly To The Receiver's Document Requests.

Second, the Receiver argues that two of his general document requests (which did not mention MasterFactor) should have resulted in the production of MasterFactor-related documents, but here, too, he is incorrect. The Receiver first points to his general request for documents related to "SCI" (meaning Sun Capital, Inc.) and argues that this generic request called for MasterFactor-related documents because "SCI" was defined in his requests to include "affiliate[s]." (Resp. 4-5.) Mayer Brown, however, objected to this definition as overly broad and unduly burdensome, and made clear it was focusing on Sun Capital, Inc. itself (and not the grab-bag of people and entities listed in the definition). (Ex. 11, Mayer Brown's Resps. to Receiver's First Req. for Produc. of Docs. ¶¶ 22–23, 57.) "[I]f the description of the items sought is too broad and lacks

[5] The Receiver makes much of comments made by counsel for Mayer Brown during a February 20 hearing indicating that the term "MFI" meant "Multi Factor Strategy Fund." (Resp. 28–29.) Those were statements made in the middle of a hearing when the Receiver's counsel mentioned "MFI" for the first time, and counsel suspected, mid-hearing, that "MFI" may have been a fund name ("MF") with the Roman numeral "I" behind it. Mayer Brown's counsel cannot now fully recreate—years later—all the details surrounding the creation of the original search terms list.

sufficient specificity necessary for one to know what is demanded, no action can be taken against a party for his failure to produce the uncertain items." *Buckley Dev. Co., Ltd. v. Tagrin*, 270 So. 2d 433, 434 (Fla. 3d DCA 1972). Mayer Brown also clearly stated at the outset that it would only be producing responsive, non-privileged documents (subject to its various other objections) that were located and identified through the agreed search and review parameters (Ex. 11, Mayer Brown's Resps. to Receiver's First Req. for Produc. of Docs. 10-11, ¶ 27), which did not encompass MasterFactor.

But even putting those objections aside, the Receiver nowhere explains why MasterFactor would be considered an "affiliate" of SCI (Sun Capital, Inc.) under the definitions and instructions provided in his requests for production. The Receiver's definition of "SCI" included the word "affiliate" only in a long list of individuals and entities such as "director[s]," "parent[s]," "accountant[s]," and "other person[s] *purporting to act on [SCI's] behalf*." (Ex. 41, Feb. 12, 2015 Receiver's First Reqs. for Produc. of Docs. at 9, ¶ 13.) The Receiver does not contend that MasterFactor ever purported to act on Sun Capital's behalf.[6] Recognizing this flaw in his argument, the Receiver now attempts to incorporate the definition of "affiliate" contained in the Sun Capital, Inc. CSA, but that definition appears nowhere in his document requests. (Resp. 6.) A party served with a discovery request can only respond based on the request's actual language, not an attempted re-write of the request years later.

Even under the definition of "Affiliate" used in the Sun Capital, Inc. CSA, it does not appear that MasterFactor was an "Affiliate" of Sun Capital, as the Receiver now asserts. Under the Sun Capital, Inc. CSA, an entity is deemed an "Affiliate" if Sun Capital owns 5% of the entity's

[6] The Receiver claims that SCI and MasterFactor "were owned and controlled by the same people." (Resp. 4.) An exhibit the Receiver attached to his response brief contradicts this claim, as it shows there were 31 owners of MasterFactor, and that the three principals of Sun owned only 18% of MasterFactor. (Ex. 42, June 2, 2005 F. Leder Email.)

stock or the entity is "controlled by or under direct or indirect common control" with Sun Capital. (Ex. 43, Excerpts of Sun Capital CSA at NAP000008869, § 1.2.) The Receiver does not contend that Sun Capital owned 5% of MasterFactor's stock. As for "control," Florida's securities law statute defines control as the "power to direct or cause the direction of the management or policies of a person, whether through the ownership of voting securities, by contract, or otherwise." Fla. Stat. § 517.021(5). Thus, in the securities context, "the law is settled that a person's status [even] as a director does not alone amount to the requisite power to control." *In re Par Pharm., Inc. Secs. Litig.*, 733 F. Supp. 668, 679 (S.D.N.Y. 1990); *see also Brown v. Enstar Grp., Inc.*, 84 F.3d 393, 396 (11th Cir. 1996) ("The burden is on the plaintiff to show that a defendant is a controlling person.").

Here, the documents the Receiver relies upon show that the Sun Capital principals owned only a *minority* interest (18%, or if spouses are included, 36%), not a controlling interest in MasterFactor. (Ex. 44, 2001-2002 Sun Capital Uniform Business Reports; Ex. 42, June 2, 2005 F. Leder Email.)[7] And according to public filings, of the four officers and directors identified in MasterFactor's annual report in effect when the Sun Capital, Inc. CSA was executed in early 2002, Howard Koslow is the only person that overlapped with Sun Capital, Inc.'s listing of officers and directors on its annual report covering the same period. (Ex. 44, 2001-2002 Sun Capital Uniform Business Reports; Ex. 45, 2001 MasterFactor Uniform Business Report.) That was necessarily insufficient to control the board's decisions. Thus, even if Mayer Brown somehow had been obligated to import the definition of "Affiliate" from the Sun Capital, Inc. CSA into the Receiver's

[7] *See* Ronald J. Colombo, Law of Corp. Offs. and Dirs.: Rts., Duties and Liabs. § 19:3 (Oct. 2018) ("Minority stock ownership in isolation is insufficient to establish control.").

requests for production (which it was not), those requests did not call for the production of MasterFactor-related documents.[8]

The Receiver also argues that documents related to MasterFactor were responsive to his request for "any actual or proposed transaction between Founding Partners" and any "person" with whom Mayer Brown had a "professional relationship," but this argument also misses the mark. (*See* Resp. 6–7.) As a threshold matter, Mayer Brown searched for documents potentially responsive to this request through the agreed search term and collection protocol disclosed to the Receiver in 2016 and 2017 (*see* Ex. 11, Mayer Brown's Resps. to Receiver's First Req. for Produc. of Docs. 10-11, ¶ 27); as noted, that protocol was not designed to target documents related to MasterFactor. Mayer Brown also objected to the vagueness of the request. (*Id.* at 46.); *see Buckley Dev. Co., Ltd.*, 270 So. 2d at 434 (where document request is broad and lacks specificity, a party cannot be faulted for failure to produce uncertain items.) Additionally, the documents that the Receiver has possessed since the inception of the receivership reflect that no "actual or proposed transaction" actually materialized between MasterFactor and FPCM beyond preliminary and ultimately immaterial steps.[9]

[8] Under the Sun Capital, Inc. CSA, an individual who is an officer or director could personally qualify as an "Affiliate" (Ex. 43, Excerpts of Sun Capital CSA at NAP000008869, § 1.2), but that does not mean every entity of which the person is an officer or director is an Affiliate. If it did, then, for example, the Boy Scouts of America would be deemed an Affiliate if a Sun Capital officer was an officer or director of that organization.

[9] In particular, it appears from the documents produced by the Receiver that Mr. Gunlicks expressed interest in an FPCM-managed entity providing "subordinated capital" to MasterFactor in October 2001, if primary funding could be obtained, which never occurred. (Ex. 13, Oct. 17, 2001 Gunlicks Memo.) These documents also reflect that Mr. Gunlicks was well aware of Mr. Klyman's work for MasterFactor and hoped to benefit from it. (*Id.*) However, Mr. Gunlicks and the Sun principals appear to have eventually decided that Stable-Value I (not MasterFactor) would provide funding to Sun Capital for the purchase of commercial receivables. (Ex. 29, Nov. 6, 2001 H. Koslow fax.)

3. Mayer Brown Did Not "Hide The Ball" About MasterFactor.

Third, the Receiver argues that Mayer Brown "hid[] the ball" in not producing (or logging) documents related to MasterFactor (Resp. 8), but this is incorrect and unfair. As shown above, the Receiver had substantial information about MasterFactor and could have made direct requests for MasterFactor discovery if he believed it important. Indeed, the Receiver's counsel's assertion that he believed Masterfactor was a "transaction" and not an entity (Resp. 22 n.4) is belied by the documents in the Receiver's possession for years that identify MasterFactor as an *entity* (*see, e.g.*, Ex. 12, MasterFactor Analysis), as well as Mr. Leder's deposition testimony taken by the Receiver in the Sun Litigation in 2009 (Ex. 38, Oct. 15, 2009 Leder Dep. Tr. 239:15-241:12). As discussed, his new assertion that he somehow believed (incorrectly) that Mayer Brown represented Sun Capital rather than MasterFactor (Resp. 16-20) only makes it more unreasonable for him not to have raised these issues until now. There can be no doubt that the Receiver possessed more than enough information to put him on inquiry notice that Mayer Brown had a role with respect to something called "MasterFactor" that involved Sun Capital and that was the subject of a conflict waiver given by FPCM in 2002. *Cf. Goodlet v. Steckler*, 586 So. 2d 74, 75 (Fla. 2d DCA 1991) (for inquiry notice, "[t]he critical question is what minimum facts are essential to give the plaintiff *notice* that a timely investigation should begin in order to discover any additional facts").

Nor did Mayer Brown "hide the ball" by not producing or logging privileged documents involving other clients. The Receiver cannot dispute that Mayer Brown has an obligation under the rules of professional conduct to maintain client confidences (and the attorney-client privilege). (*See* Mot. 13–14.) Consequently, when responding to the Receiver's document requests, Mayer Brown repeatedly and expressly advised the Receiver that it was complying with its obligation to maintain client confidences and would not produce or log "other client" information. (Mot. 8–9; Ex. 11, Mar. 13, 2017 Mayer Brown's Resps. to Receiver's First Req. for Produc. of Docs. at 2,

13; Ex. 46, Aug. 8, 2017 Ltr. from J. Bradford to S. Stirling.) There was (and is) no basis for Mayer Brown to have disregarded its obligations under the rules of professional conduct, especially where (as explained) the Receiver never previously asked about a representation of MasterFactor.

Mayer Brown also was clear—including in the very letter transmitting its privilege log to the Receiver in August 2017—that it was not providing a privilege log concerning documents that related to or referred to other clients of the firm. (Ex. 46, Aug. 8, 2017 Ltr. from J. Bradford to S. Stirling.) The Receiver never asked Mayer Brown to provide an item-by-item log of documents related to its other clients, nor was there a basis for him to do so, since Mayer Brown's confidentiality obligations extend to all "information relating to the representation of a client," Ill. R. Prof'l Conduct 1.6(a), and it would have been nearly impossible to create a privilege log without disclosing such information (and certainly unduly burdensome to do so). For each reason, the Receiver's assertion that he was misled by Mayer Brown is unfounded and provides no basis for a discovery "re-do."

II. Mayer Brown Would Be Unfairly Prejudiced If The Receiver Is Permitted To Pursue MasterFactor-Related Discovery At This Stage.

The Receiver's demands for MasterFactor-related discovery are not only late, but they also would substantially prejudice Mayer Brown and derail the case schedule if they are permitted.

A. MasterFactor Discovery Would Impose An Undue Burden On Mayer Brown And Derail This Case.

Mayer Brown demonstrated that the Receiver's demanded MasterFactor discovery would turn the clock back on this litigation by well over one year and place an undue burden on Mayer Brown. (Mot. 17–21.) The Receiver's response does not alter either conclusion.

1. The Receiver's Requests Would Require Burdensome And Time-Consuming Electronic Discovery.

Mayer Brown has shown that the Receiver's request for MasterFactor documents is unduly burdensome. (Mot. 17–18.) The Receiver's attempt to minimize this burden ignores reality. His position regarding backup tapes is illustrative. Over eight years into this litigation, the Receiver is demanding that Mayer Brown undertake the process of attempting to restore disaster recovery backup tapes to determine if email exists related to a representation that ended close *to two decades ago* from individuals who left Mayer Brown long before this lawsuit began. (*Id*.) This demand itself is unduly burdensome. A party is obligated to take only reasonable steps to collect electronically-stored information. *See* Fla. R. Civ. P. 1280(d). Where the requested information is not reasonably accessible, a protective order is appropriate unless the requesting party shows good cause. *See id.* Mayer Brown has already shown that the electronically-stored information the Receiver now wants Mayer Brown to retrieve is not reasonably accessible. (*See* Ex. 26, Aff. of L. Noll.) And while the Receiver has solicited a declaration concluding that "restoring emails from backup tapes is a very straight forward process" (Resp. 24), that is not the standard, and the case law rejects such a conclusion. "Requested data maintained on backup tapes is typically classified as *inaccessible*." *Helmert v. Butterball, LLC*, No. 4:08CV00342 JLH, 2010 WL 2179180, at *8 (E.D. Ark. May 27, 2010) (emphasis added).

This presumptive inaccessibility and corresponding burden of restoring back-up tapes certainly applies here. As Mayer Brown's expert explains, a substantial portion of the burden lies in attempting to determine whether a back-up tape contains the information being sought. (Ex. 47, Decl. of M. Feilen ¶ 10.) This involves finding, from within more than 70,000 disaster recovery tapes maintained by Mayer Brown, specific disaster recovery tapes that may contain email associated with attorneys who billed time to a MasterFactor matter number. (*Id.* ¶ 9.) Just the step

to locate the right set of disaster recovery tapes requires extracting the data from the tape into a readable form. (*Id.* ¶ 10.) Even if Mayer Brown personnel had to extract data from just one month's worth of disaster recovery tapes, the cost to do so is significant; a forensic expert could charge upward of $275,000 merely to take that step. (*Id.* ¶ 11.) And the burden to identify where data exists (if at all) on disaster recovery tapes is just step one; if relevant data were located and could be restored, there would be the additional cost of exporting those files for processing, processing the data, and reviewing and producing responsive, non-privileged documents. (*Id.* ¶ 12.) The Receiver has not come close to demonstrating good cause for requiring Mayer Brown to undertake this extraordinary burden.

2. The Receiver's MasterFactor Theory Would Require Mayer Brown To Reopen Depositions And Other Discovery Efforts, And Otherwise To Undertake Further Discovery To Defend Itself.

Mayer Brown also has shown that the Receiver's requests for MasterFactor-related discovery would require Mayer Brown to conduct burdensome *additional* discovery to defend itself against the Receiver's new theory. (Mot. 18–19.) The Receiver has no answer to this showing of burden. (*See* Resp. 23–25.)

The Receiver's requests for MasterFactor-related discovery would require new depositions of virtually every witness who has been deposed to date *and* would open the gates to a new, expansive (and expensive) frontier of discovery. Although the nature of the Receiver's "MasterFactor" theory is hazy at best, it appears it is premised on the claim that Mayer Brown had a motive to hide misconduct by Sun because Mayer Brown represented MasterFactor, which was minority-owned by certain Sun principals, starting in July 2000 and ending in January 2002, two years before (according to the Receiver) the Sun misconduct began. Further, although all the offering materials prepared by Mayer Brown expressly disclosed to investors that Mayer Brown could have conflicts of interest (*e.g.*, Ex. 48, 2000 Stable-Value I Supp. at CHI000022943), the

Receiver seeks to contend that investors would not have invested in the Founding Partners Funds if only they had known that Mayer Brown represented MasterFactor for a brief period more than nine years before the Receiver was appointed.

To defend against this unfounded theory, if it were allowed, Mayer Brown would have to investigate and secure discovery related to the interactions between MasterFactor, FPCM, and Mr. Gunlicks at least between 2000 and 2002, and whether any of those facts were relevant to any investor's decision-making. Purely from a document production standpoint, this investigation and discovery would involve securing costly and time-intensive document production from the Sun Successor Entities for the 2000 to 2002 period, seeking supplemental document discovery from Ernst & Young and all 38 Assignors, and serving numerous additional document subpoenas on entities and persons who were involved with MasterFactor (including Fred Leder, Robert Gottlieb, and at least some others of the 31 owners of MasterFactor).

This burden would necessarily also include re-deposing Assignors and former FPCM employees. The Receiver argues that the need to re-depose these witnesses is "highly speculative," and, in any event, unwarranted. (*See* Resp. 25.) But he is wrong on both scores. The Receiver now suggests (in a new, unpled theory) that it would have been material for investors to have known that Mayer Brown had represented MasterFactor. It would be unfair to allow Assignors to appear at trial and make such a self-serving claim without Mayer Brown first having the ability to test such an assertion in deposition—and to elicit additional testimony to demonstrate the assertion is absurd. (Mot. 20.) There is nothing speculative about Mayer Brown's need to defend itself if the Receiver is permitted to present this new theory.

Nor did Mayer Brown already have the opportunity to ask Assignors about MasterFactor. Mayer Brown did not ask Assignors about MasterFactor or about any alleged conflict of interest

because neither MasterFactor nor an alleged representation of other clients was at issue when those depositions were taken. Mayer Brown properly relied on the Receiver's complaint in deposing the Assignors, as "[d]iscovery is limited to those matters relevant to the litigation as framed by the parties' pleadings." *Rousso v. Hannon*, 146 So. 3d 66, 69 (Fla. 3d DCA 2014). Moreover, Mayer Brown could not ask questions about a different former client during depositions in this case without running afoul of its professional obligations to maintain client confidences, including protecting a client's identity.[10]

In addition, if the MasterFactor theory becomes part of this case, then the remaining depositions of Mayer Brown witnesses (including Marc Klyman), the Sun Capital principals, the as-yet-undeposed Assignors, and the as-yet-undeposed Receivership entities could not proceed until Masterfactor document discovery is complete. Even Ernst & Young depositions could not proceed before MasterFactor document discovery, as it appears that information about the Masterfactor representation may have been shared with Ernst & Young. (Ex. 49, April 12, 2004 Fax from Millward & Co. at EY-SUN-PERM-001258.) Other depositions required by the Receiver's new theory (if allowed)—such as those related to the MasterFactor owners—and the re-opening of depositions already taken also could not go forward before the new documentary discovery was completed. Given the burdens associated with the additional document production activities (from Mayer Brown and others), and accounting for the time necessary to review those additional documents, these various depositions could not be commenced for many months.

[10] *See, e.g.*, IL Adv. Op. 12-03 (Ill. St. Bar. Ass'n), 2012 WL 346858, at *2 (Jan. 2012) ("[A]n attorney should consider his or her client's identity to be confidential information which cannot be disclosed without the client's consent."); ABA Formal Op. 09-455 ("[T]he persons and issues involved in a matter generally are protected by Rule 1.6 and ordinarily may not be disclosed unless an exception to the Rule applies or the affected client gives informed consent.").

B. Resolving Client Confidentiality Issues Would Further Delay Discovery Related To MasterFactor.

Even if this Court were to authorize the Receiver's requested MasterFactor-related discovery, Mayer Brown could not provide such information because its representation of MasterFactor remains confidential as against the Receiver. At a minimum, the Court would need to engage in additional proceedings related to these confidentiality and privilege issues, further setting back the discovery schedule. The Receiver's claim that MasterFactor has waived any privilege falls short. The Receiver's counsel submits two letters purportedly from Lawrence Leder and Fred Leder in their capacities as *minority shareholders* and officers of MasterFactor, stating that they "waive any attorney-client privilege between MasterFactor, Inc., and Mayer Brown LLP." (Resp. 11 & n.3.) But, in general, only a company's board of directors and *not* its officers can waive a company's privilege. *See* Fla. Stat. § 607.0841. The Receiver has not provided any evidence that MasterFactor's board of directors (or provisions in its bylaws) authorized the Leders to waive any attorney-client privilege held by MasterFactor, let alone demonstrated that the company has provided informed consent for a waiver.

Without the appropriate consents, Mayer Brown would be exposed to the unacceptable risk that one or more of the apparently 31 owners of MasterFactor would accuse it of violating its professional obligations by providing client confidences to the Receiver, a stranger to the corporation. It is the Receiver's burden to show that he has obtained informed client consent to the disclosure of confidential and/or privileged information. *Cf. Shell Oil Co. v. Par Four P'ship*, 638 So. 2d 1050, 1051 (Fla. 5th DCA 1994) (party seeking disclosure bears the burden of proving that privilege does not apply to facially privileged documents). The Receiver's failure to meet that burden is but one more reason why the Court should not permit MasterFactor discovery.

C. The Receiver's Delay In Asserting His MasterFactor Claims Has Denied Mayer Brown The Ability To Fully Defend Itself.

The prejudice to Mayer Brown in allowing MasterFactor-related discovery would go well beyond these substantial burdens and the overall delay of the case. The passage of time, in which the Receiver has litigated this case for eight years without saying one word about MasterFactor, also prejudices Mayer Brown. (*See* Mot. 21–24.) For example, if the Receiver's MasterFactor claims had been previously part of this case, Mayer Brown would have pursued additional or different discovery from individuals who worked at FPCM around the time of Mayer Brown's work for MasterFactor (which, as discussed, pre-dates the alleged wrongful purchases of DSH and workers' compensation receivables set forth in the complaint), to further establish the January 2002 conflict waiver and otherwise defend against the Receiver's theories. One such individual was W. Terrell Upson, one of FPCM's managing directors in and around 2001. (*See* Ex. 50, FPCM 2001 ADV Part II at MB 00083658.) Mr. Upson, however, passed away in late 2017. (*See* Ex. 51, Dec. 24, 2017 Upson Obituary.) Mayer Brown is unable to depose Mr. Upson because of the Receiver's delay in asserting his new MasterFactor theories. There may be others who are similarly now unavailable to Mayer Brown, including the many individuals and entities that appear to have owned interests in MasterFactor. For each reason, Mayer Brown would suffer substantial prejudice if the Court permits the Receiver to go forward with his tardy and unfounded MasterFactor "conflict of interest" theory.

III. The Receiver Would Not Be Prejudiced By A Protective Order.

In contrast, the Receiver would not be prejudiced by a protective order against his MasterFactor-related discovery. The Receiver has failed to explain how Mayer Brown's representation of MasterFactor could give rise to a new claim that would not be time-barred, or provide relevant evidence to support his existing claims.

A. The MasterFactor Theory Does Not Support A New Claim.

It is far too late for the Receiver to seek leave to amend to assert a new claim based on Mayer Brown's representation of MasterFactor or the legal fees for that representation paid by Sun Capital. At the outset, more than a year has passed since the agreed November 30, 2017 deadline for seeking leave to amend. (*See* Ex. 18, June 7, 2017 Scheduling Order ¶ 4.) In addition, as the Receiver appears to recognize, any attempt to add such a claim would be futile for multiple reasons.

First, the MasterFactor representation did not give rise to a conflict of interest because MasterFactor was not adverse to FPCM in any transaction or litigation. The Receiver attempts to conjure an adversity by contending that the representation of MasterFactor was a *de facto* representation of Sun Capital (Resp. 3), but the very documents the Receiver relies upon establish that MasterFactor and Sun Capital were separate corporations with different ownership and different boards of directors. (*See* Part I.C.2, above.) The Receiver argues that the 2002 conflict waiver letter implies that Mayer Brown actually represented Sun, but the letter addressed *potential* conflicts of interest that might exist then or in the future; it did not concede the existence of an *actual* conflict, nor did it state that Mayer Brown, in fact, represented Sun Capital.[11] (*See* Ex. 2, Jan. 23, 2002 Ltr. to Gunlicks at MB 00000013-14.) In fact, Mr. Koslow, who was then the sole

[11] The Receiver suggests that Mayer Brown admits Sun was a client, because, pursuant to Florida Rule of Civil Procedure 1.285(a), it clawed back a document from its document production that concerned a site assessment at a Promise hospital. (Resp. 34.) This is untrue. Mayer Brown's initial production of the site assessment was improperly attached to another, privileged, document and produced as a single record. Mayer Brown appropriately clawed back this improperly combined record pursuant to Rule 1.285(a) and withheld the privileged document. On August 8, 2017, Mayer Brown reproduced the responsive and non-privileged site assessment that the Receiver argues about. Mayer Brown made this clear to the Receiver in a letter when it produced its amended privilege log on February 18, 2019 and again on March 9, 2019, after receiving a specific inquiry from the Receiver concerning this document, which was shortly *before* the Receiver filed his response brief on this motion. (Ex. 52, Mar. 9, 2019 Email from J. Bradford to M. O'Connor.) Mayer Brown does not contend and has never contended that Promise or Sun were clients of the firm.

common officer and director of Sun Capital and MasterFactor (*see* Part I.C.2., above), wrote a memo in November 2001 noting that Mayer Brown and Mr. Gunlicks had discussed the fact that Mayer Brown "represented *MasterFactor* and Founding Partners" (Ex. 29, Nov. 6, 2001 Memo from H. Koslow to B. Vasquez).

Second, as Mayer Brown has demonstrated, it is not unusual for parties to a transaction to pay the attorneys' fees for their counterparty, *see, e.g.*, *SMWNPF Holdings, Inc. v. Devore*, 165 F.3d 360, 366-67 (5th Cir. 1999); *Guinness Mahon Cayman Tr., Ltd. v. Windels, Marx, Davies & Ives*, 684 F. Supp. 375, 378 (S.D.N.Y. 1988), and those payment arrangements do not create an attorney-client relationship or give rise to a conflict of loyalties (Mot. 22); *see also* Fla. Bar R. 4-1.8(f) (contemplating payment of fees by a third party and requiring the attorney to maintain loyalty to the client and client confidentiality). The Receiver cites no law to the contrary.

Third, even if there had been an actual or potential conflict of interest related to Mayer Brown's legal services for MasterFactor, which there was not, any such conflict was expressly waived many years ago in the January 2002 letter. (Ex. 53, Jan. 23, 2002 Ltr. to Gunlicks at MB 0000014.) The Receiver argues that the letter does not explicitly state that Mayer Brown represented MasterFactor, but this argument ignores that the waiver includes *all* "parties to the MasterFactor/WorldFactor transaction," of which Masterfactor was one. (*Id.*) The waiver also includes all "other persons or entities whose interests are adverse to [FPCM]" or "adverse to the Stable-Value Fund." (*Id*. at MB 0000013.)

Fourth, even pretending that there was a conflict (there was none) and that any potential conflicts were not waived (they were), neither FPCM nor any investor could plausibly claim to have been misled. As noted, each of the supplemental offering materials drafted by Mayer Brown expressly disclosed that Mayer Brown had or could have conflicts of interest and that and that

Mayer Brown was not providing a legal opinion, or advising or representing investors. (*E.g.*, Ex. 48, 2000 Stable-Value I Supp. at CHI000022943.) For example, a supplement dated December 2000 that Mayer Brown drafted regarding Global Fund expressly stated that "Mayer Brown & Platt has represented, currently represents and may in the future represent persons and entities whose interests are adverse to the Borrower [Sun], the Fund [Global Fund], the Company [FPCM], the Lender [Stable-Value I], the Investment Manager [FPCM], the General Partner [FPCM], [and] investors" and that "Mayer, Brown & Platt is not providing a legal opinion" to any of them. (Ex. 54, Global Fund Ltd. Supp. at MB 00034417.) In short, FPCM and investors were fully informed that Mayer Brown had conflicts of interest or could have conflicts of interest; the Receiver cannot plausibly claim otherwise for the first time—nearly twenty years after the fact.[12]

In all events, as Mayer Brown demonstrated in its opening brief (Mot. 21-24), any new claim based on Mayer Brown's representation of MasterFactor would be time-barred. The Receiver does not even attempt to show otherwise.[13] Mayer Brown's representation of MasterFactor ended in January 2002. (Ex. 26, Aff. of L. Noll ¶ 3.) Before it ended, Mr. Gunlicks, on behalf of FPCM, was well aware of Mayer Brown's work for MasterFactor and in fact signed an express waiver. (Mot. 22-23.) The time for any alleged claim related to MasterFactor therefore expired long before the Receiver was appointed. (*Id.* at 24.) The relation back doctrine does not salvage the Receiver's MasterFactor claims, either, because they are based on a set of facts distinct from those alleged in his complaint. *See, e.g.*, *Lefebvre v. James*, 697 So. 2d 918, 920 (Fla. 4th DCA 1997) (reversing denial of motion for directed verdict where new theory did not relate back).

[12] The Receiver also argues that Mayer Brown failed to disclose that a "conflict of interest existed with respect to Sun Capital Healthcare, Inc." (Resp. 32.) But as noted, the Receiver does not (and cannot) demonstrate that Mayer Brown ever represented Sun. (Mot. 21-22.)

[13] In a heading, the Receiver asserts that his "Theories Are Not 'Time-Barred,'" but fails to provide any argument in support of the purported timeliness of his new claims. (Resp. 31.)

Thus, the Receiver's new theory—asserted for the first time nearly two decades after the MasterFactor representation ended—will not support a new claim, and there is no reason to allow discovery into this representation.

B. MasterFactor Discovery Is Irrelevant To The Receiver's Existing Claims.

Unable to state a new claim premised on MasterFactor, the Receiver attempts to justify his new sweeping discovery requests by arguing that this nearly 20-year-old representation is somehow relevant to the claims he *did* assert. (Resp. 32–33.) But the Receiver's response brief offers no explanation for how Mayer Brown's representation of MasterFactor between July 2000 and January 2002 is somehow relevant to the "DSH and workers' compensation" theory contained in his complaint. There is good reason for this glaring omission: no such connection exists. Mayer Brown's representation of MasterFactor ended well before 2004, which is when the Receiver alleges (and has alleged as the foundation of his case in this Court for the past eight years) that Sun Healthcare began its purportedly wrongful purchase of DSH and workers' compensation receivables. (Mot. 23.) The Receiver's various attempts to manufacture a nexus between his new "conflicts of interest" allegations and the case he has actually pled all lack merit, for at least four reasons.

First, the Receiver suggests that Sun Capital's agreement in January 2002 to pay $132,000 to Mayer Brown for its fees in connection with the proposed MasterFactor transaction gave Mayer Brown a motive to conceal wrongdoing by Sun. (*See* Resp. 14–15.) However, as noted, an agreement by a party to pay fees does not create a conflict of loyalties (*see* Mot. 21-22), and in all events, according to the complaint, the "wrongdoing" by Sun Healthcare did not allegedly begin until 2004, well after the fee agreement. Relatedly, the Receiver contends that Mayer Brown "failed to disclose that Sun Capital, Inc. was unable to pay its obligations to Mayer Brown" (Resp. 33), but he fails to cite any support for that assertion or Mayer Brown's supposed knowledge of

such a fact, let alone explain its relevance to his claims that loan proceeds were used to purchase DSH and workers' compensation receivables. Further, investors were on notice that Sun had limited assets and that the receivables, not Sun itself, were the collateral for the loans from Stable-Value I. (Ex. 48, 2000 Stable-Value I Supp. at CHI000022927.)

In addition, and perhaps most importantly, the Receiver has possessed since early 2010 a January 2002 document that *expressly referenced* "indebtedness of Sun Capital Inc. to Mayer, Brown & Platt relating to the 'MasterFactor transactions' and related matters." (Ex. 25, Jan. 10, 2002 Fax to Gunlicks at RCV-MB-004-002179.) The Receiver has had every opportunity since filing his lawsuit to request further documents on that specific subject. He has no excuse for first seeking to do so only nearly 18 months after document production was substantially completed and after nearly 40 depositions have been taken.

Second, the Receiver attempts to play up connections between Sun and MasterFactor because the corporations shared some common minority owners and officers.[14] The Receiver spends pages of his response brief quoting from a presentation that he says shows the "interrelationship between MasterFactor and Sun Capital" and MasterFactor's "double identity." (Resp. 16–18.) The implication appears to be that MasterFactor *was* Sun Capital, and that Mayer Brown was "conflicted" as a result. But this assertion is also wrong. (*See* Part I.C.2, above.)[15] Further, for over eight years, the Receiver has had the very documents he now relies upon to argue

[14] As Mayer Brown has explained (and the Receiver does not dispute), the fact that Sun Capital and MasterFactor shared owners does not mean that Mayer Brown's representation of MasterFactor was also a representation of Sun Capital. It is well-settled that an attorney's representation of one company does not create an attorney-client relationship with every owner of that company, much less a relationship with separate companies that have some common ownership. (Mot. 21–22.)

[15] The Receiver also concedes this point by, among other things, submitting two "waivers" from MasterFactor's officers and shareholders that purport to provide consent for the disclosure of documents related to Mayer Brown's representation of MasterFactor. (Resp. 11 & n.3.)

about the relationship between MasterFactor and Sun Capital. (*See, e.g.*, Ex. 25, Jan. 10, 2002 Fax to Gunlicks.) Again, the time to seek discovery about these issues passed long ago.

Third, the Receiver's assertion that Mr. Gunlicks was "misled" about Mayer Brown's "conflicted representation of MasterFactor" (Resp. 19) is both false and irrelevant to the Receiver's failure to seek discovery. Nowhere does the Receiver explain how Mayer Brown's representation of MasterFactor was "conflicted." (*Id.* at 19–21.) And as Mayer Brown has demonstrated, Mr. Gunlicks was well aware of Mayer Brown's role with respect to MasterFactor and waived any alleged conflict the Receiver now imagines. (Mot. 22–23.) Once again, to the extent the Receiver wanted to explore Mayer Brown's MasterFactor work, he could have done so years ago. The January 23, 2002 engagement letter that Mr. Gunlicks signed and that the Receiver now cites as evidence of Mr. Gunlicks being "misled" (Ex. 53, Jan. 23, 2002 Ltr. to Gunlicks)—which specifically mentions Sun Capital and Mayer Brown's work related to MasterFactor—was in his possession before he filed this lawsuit and well before discovery in this case commenced.

Fourth, if the Receiver's existing claims are somehow broad enough to encompass MasterFactor, then his complaint does not satisfy Florida pleading standards, including the particularity required for fraud-based claims. *See, e.g.*, *Goldberg v. Merrill Lynch Credit Corp.*, 35 So. 3d 905, 907 (Fla. 2010) (pleadings must contain "ultimate facts" supporting each element of a cause of action); *Hembd v. Dauria*, 859 So. 2d 1238, 1239 (Fla. 4th DCA 2003) (requiring fraud to be alleged "with precision"). Indeed, in defending against Mayer Brown's motion to dismiss more than three years ago, the Receiver argued that the pleadings "[]must be [']sufficiently clear and direct to make it unnecessary for the respondent or the court to be clairvoyant in ascertaining the nature of the claim.'" (Receiver's Resp. to Mayer Brown's Mot. to Dismiss at 52 (quoting *Parker v. Panama City*, 151 So. 2d 469, 472 (Fla. 1st DCA 1963)).) Injecting

MasterFactor into this case based on the Receiver's bald assertions that it is somehow relevant to "support" his existing claims would mean the complaint violates this basic standard.

CONCLUSION

For the foregoing reasons, and those set forth in its opening brief, Mayer Brown respectfully requests that the Court enter a protective order quashing the Receiver's MasterFactor and WorldFactor discovery requests, which include the noticed depositions of Diane Citron and John Dedyo, two former Mayer Brown attorneys who worked on MasterFactor matters but had no involvement in Founding Partners matters, as well as the Receiver's Third Request for Production of Documents to Defendant Mayer Brown LLP. For the same reasons, this protective order should preclude questioning regarding MasterFactor or WorldFactor at any deposition of a Mayer Brown attorney and in any Rule 1.310(b)(6) deposition of Mayer Brown, and quash any document requests in the Receiver's Fourth Request for Production of Documents related to MasterFactor or WorldFactor.

Dated: March 28, 2019

Respectfully submitted,

MAYER BROWN LLP

By: s/ Eugene K. Pettis
One of Its Attorneys

David J. Bradford (Ill. Bar # 0272094)
Reid J. Schar (Ill. Bar # 6243821)
April A. Otterberg (Ill. Bar # 6290396)
Jason M. Bradford (Ill. Bar # 6302455)
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
Telephone: (312) 222-9350
Fax: (312) 527-0484
Admitted *Pro Hac Vice*

Eugene K. Pettis (Fla. Bar # 508454)
Debbie P. Klauber (Fla. Bar # 55646)
HALICZER, PETTIS & SCHWAMM
One Financial Plaza
100 S.E. 3rd Avenue, Seventh Floor
Fort Lauderdale, FL 33394
Telephone: (954) 523-9922
Fax: (954) 522-2512

Attorneys for Mayer Brown LLP

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Mayer Brown LLP's Reply In Support Of Motion For A Protective Order Regarding MasterFactor Discovery** was served by Florida's E-filing Portal to counsel of record listed below this 28th day of March, 2019.

Leo R. Beus (lbeus@beusgilbert.com)
Scot C. Stirling (sstirling@beusgilbert.com)
BEUS GILBERT PLLC
701 N. 44th Street
Phoenix, AZ 85008-6504
Telephone: (480) 429-3000
Facsimile: (480) 429-3100
Counsel for Plaintiff

Jonathan Etra (jonathan.etra@nelsonmullins.com)
Christopher Cavallo
(chris.cavallo@nelsonmullins.com)
NELSON MULLINS RILEY & SCARBOROUGH LLP
One Biscayne Tower – 21st Floor
2 South Biscayne Blvd.
Miami, FL 33131
Telephone: (305) 373-9400
Facsimile: (305) 373-9443
Counsel for Plaintiff

Stuart Z. Grossman (szg@grossmanroth.com)
Rachel W. Furst (rwf@grossmanroth.com)
GROSSMAN ROTH YAFFA COHEN, PA
2525 Ponce de Leon Blvd.
Suite 1150
Coral Gables, FL 33134
Telephone: (305) 442-8666
Facsimile: (305) 285-1668
Counsel for Plaintiff

Edward A. Marod (emarod@gunster.com)
GUNSTER, YOAKLEY & STEWART, P.A.
777 S. Flagler Drive, Suite 500 East
West Palm Beach, FL 33401
Telephone: (561) 655-1980
Counsel for Defendant Ernst & Young LLP

Steven M. Farina (sfarina@wc.com)
Katherine M. Turner (kturner@wc.com
Jena R. Neuscheler (jneuscheler@wc.com)
Adrienne E. Van Winkle
(avanwinkle@wc.com)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 434-5000
Counsel for Ernst & Young, LLP

s/ Eugene K. Pettis
Eugene K. Pettis (Fla. Bar # 508454)

EXHIBIT

7

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,	)	No. 10-49061
v.	)	Judge John J. Murphy
ERNST & YOUNG, LLP, a Delaware Limited Liability Partnership; and MAYER BROWN LLP, an Illinois Limited Liability Partnership,	)	
Defendants.	)	

EXHIBITS TO MAYER BROWN LLP'S BRIEFING IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER REGARDING MASTERFACTOR DISCOVERY

Exhibit[1]	Description
1	Receiver's Third Request for Production of Documents to Defendant Mayer Brown LLP, dated Jan. 23, 2019
2	Engagement Letter between Mayer Brown and Founding Partners Capital Management Company, dated Jan. 23, 2002 (unsigned) (RCV-MB-004-001647)
3	Excerpts from Receiver's First Report, *SEC v. Founding Partners Mgmt. Co.*, No. 09-cv-229 (M.D. Fla. Nov. 16, 2009)
4	Receiver's First Interim Application for Allowance and Payment of Fees and Expenses, *SEC v. Founding Partners Mgmt. Co.*, No. 09-cv-229 (M.D. Fla. Nov. 13, 2009)
5	Receiver's Second Interim Application for Allowance and Payment of Fees and Expenses, *SEC v. Founding Partners Mgmt. Co.*, No. 09-cv-229 (M.D. Fla. May 18, 2010)
6	Excerpts from Joint Motion for Expedited Approval of Proposed Procedure to Obtain Court Approval of the Proposed Settlement Transaction, *Newman v. Sun Capital, Inc.*, No. 09-cv-445 (M.D. Fla. Dec. 9, 2011)
7	Excerpts from Complaint, *Newman v. Ernst & Young, LLP*, No. 10-49061 (Fla. Cir. Ct. Dec. 30, 2010)
8	Letter from D. Jimenez-Ekman to S. Stirling, dated Dec. 8, 2016
9	Letter from A. Otterberg to S. Stirling, dated Jan. 30, 2017

[1] "Exhibit" refers to exhibits cited in either Mayer Brown's motion or this reply brief. Exhibits 1–29 were attached to Mayer Brown's motion. Exhibits 30–57 are attached to this reply brief.

Exhibit[1]	Description
10	Letter from A. Otterberg to S. Stirling, dated Mar. 8, 2017
11	Mayer Brown LLP's Responses to Plaintiff's First Request for Production of Documents, dated Mar. 13, 2017
12	MasterFactor Receivables Trust Series 2001-1, Presentation re Credit Collateral and Structural Analysis, Presented to Standard & Poor's (RCV-FP-NAP-0020880)
13	Memorandum from W. Gunlicks to P. Baronoff and H. Koslow re MasterFactor, Inc. Financing, dated Oct. 17, 2001 (RCV-FP-NAP-0021310)
14	Letter from W. Gunlicks to P. Baronoff and H. Koslow re Commitment to fund MasterFactor, Inc. with subordinated debt/equity to support its Commercial Paper Program, dated Oct. 5, 2001 (RCV-FP-NAP-0021305)
15	Email from K. Borgra to M. Klyman enclosing draft fee arrangement letter, dated Nov. 7, 2001 (MB 00557830)
16	Letter from D. Citron to Sun Capital re Trade Receivables Fee Arrangement and Conflict Waiver, dated Jan. 30, 2002 (SC01108371)
17	Email from F. Leder to E. Reeman re wire transfer instructions, dated July 2, 2001 (MB 00426913)
18	Agreed Order Regarding Case Schedule & Certain Discovery, *Newman v. Ernst & Young, LLP*, No. 10-49061 (Fla. Cir. Ct. June 7, 2017)
19	Order on Receiver's Motion to Amend and to Add Claim for Punitive Damages Against Mayer Brown LLP, *Newman v. Ernst & Young, LLP*, No. 10-49061 (Fla. Cir. Ct. Jan. 26, 2018)
20	Excerpts from Fourth Amended Complaint, *Newman v. Ernst & Young, LLP*, No. 10-49061 (Fla. Cir. Ct. Feb. 1, 2018) (exhibits omitted)
21	Amended Motion to Compel Production of Improperly Withheld Documents, *Newman v. Ernst & Young, LLP*, No. 10-49061 (Fla. Cir. Ct. Jan. 3, 2019)
22	Order on Plaintiff's Amended Motion to Compel Production of Improperly Withheld Documents, *Newman v. Ernst & Young, LLP*, No. 10-49061 (Fla. Cir. Ct. Jan. 8, 2019)
23	Mayer Brown LLP's Responses to Receiver's Third Request for Production of Documents, dated Feb. 17. 2019
24	Email from T. Murdock to J. Bradford, dated Feb. 7, 2019
25	Fax from M. Klyman to W. Gunlicks, H. Koslow, and B. Vazquez enclosing Sun Capital documents, dated Jan. 10, 2002 (RCV-MB-004-002138)
26	Affidavit of Lauren R. Noll in Support of Mayer Brown LLP's Motion for Protective Order, dated Feb. 15, 2019
27	Order on Mayer Brown's Motion to Compel Production of Subpoenaed Documents from Sun Capital-Related Parties, *Newman v. Ernst & Young, LLP*, No. 10-49061 (Fla. Cir. Ct. Dec. 5, 2017)
28	Excerpts from MasterFactor Receivables Trust 2001-1 Due Diligence Meeting (excerpt of RCV-FP-NAP-0020570)
29	Nov. 2001 Fax from H. Koslow to B. Vazquez regarding MasterFactor deal (SC02685295)
30	Letter from S. Stirling to A. Otterberg, dated Nov. 28, 2016
31	Fax from W. Gunlicks to P. Baronoff and H. Koslow, cc to M. Klyman, re Commitment Letter, dated Oct. 8, 2001 (RCV-FP-NAP-0020608)

Exhibit[1]	Description
32	Memo from W. Gunlicks to P. Baronoff and H. Koslow re Possible MasterFactor, Inc. Commercial Paper Financing at Sun Trust Bank, dated Oct. 19, 2001 (RCV-FP-NAP-0020783)
33	Memo from W. Gunlicks to H. Koslow and F. Leder re Comments on MasterFactor, Inc. Packet for Sun Trust Bank Mtg., dated Oct. 28, 2001 (RCV-FP-NAP-0020782)
34	Listing of Some of the Documents Referencing MasterFactor Available to the Receiver Before He Filed This Lawsuit
35	Consulting Agreement between L. Leder and Promise Healthcare, Inc., effective as of Dec. 1, 2012 (SC03502110)
36	Email from P. Baronoff to K. Reuben and E. Tamine re call, dated Oct. 17, 2016 (SC02075668)
37	Excerpts from Transcript of Deposition of H. Koslow, *Newman v. Sun Capital, Inc.*, No. 09-cv-445 (M.D. Fla. Sept. 30, 2009) (RCV-BC-0000159)
38	Excerpts from Transcript of Deposition of L. Leder, *Newman v. Sun Capital, Inc.*, No. 09-cv-445 (M.D. Fla. Oct. 15, 2009) (RCV-BC-0000388)
39	Email from D. Bradford to S. Stirling, dated Apr. 7, 2017
40	Letter from A. Otterberg to S. Stirling, dated Apr. 9, 2018
41	Excerpts from Plaintiff's First Request for Production of Documents to Defendant Mayer Brown LLP, dated Feb. 12, 2015
42	Email from F. Leder to L. Leder re MasterFactor Stock Register Ledger, dated June 2, 2005 (SC00959303)
43	Excerpts of Credit and Security Agreement between Sun Capital, Inc., as Borrower, and Founding Partners Stable-Value Fund, L.P., as Lender, dated Jan. 24, 2002 (NAP000008863)
44	Sun Capital, Inc. May 2001 and Jan. 2002 Uniform Business Reports
45	MasterFactor, Inc. Sept. 2001 Uniform Business Report
46	Letter from J. Bradford to S. Stirling, dated Aug. 8, 2017
47	Declaration of M. Feilen, dated Mar. 28, 2019
48	Confidential Supplement to Confidential Memorandum of Founding Partners Stable-Value Fund, L.P., dated June 2000 (CHI000022922)
49	Fax from Millward & Co. CPAs to B. Dodek re World Factor, dated Apr. 12, 2004 (EY-SUN-PERM-001240)
50	Founding Partners Capital Management ADV Part II, dated 2001 (MB 00083658)
51	Obituary of W. Upson, dated Dec. 24, 2017
52	Email from J. Bradford to M. O'Connor, dated Mar. 9, 2019
53	Engagement Letter between Mayer Brown and Founding Partners Capital Management Company, dated Jan. 23, 2002 (signed) (MB 00000012)
54	Confidential Supplement to Confidential Memorandum Relating to Class A and Class B Shares of Founding Partners Global Fund, Ltd., dated Dec. 2000 (MB 00034382)
55	Materials re MasterFactor, Inc. Program Meeting at the Corporate Offices of Centre Solutions, dated Sept. 7, 2001 (RCV-FP-NAP-0021830)

Exhibit[1]	Description
56	Meeting Materials re MasterFactor, Inc. Proposed Commercial Conduit Funding, at the offices of SunTrust Equitable Securities Corp., dated Oct. 31, 2001 (RCV-FP-NAP-0021254)
57	Meeting Materials re MasterFactor, Inc. Proposed Commercial Conduit Funding, presented to Westdeutsche Landesbank, dated Nov. 7, 2001 (RCV-FP-NAP-0021790)

EXHIBIT

8

IN THE CIRCUIT COURT FOR THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO: CACE10-049061 (19)

DANIEL S. NEWMAN, as Receiver for FOUNDING PARTNERS STABLE VALUE FUND, L.P., FOUNDING PARTNERS STABLE VALUE FUND II, LP; FOUNDING PARTNERS GLOBAL FUND, LTD.; and FOUNDING PARTNERS HYBRID-VALUE FUND, LP,

Plaintiff,

vs.

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

Defendants.

_____/

ORDER ON MAYER BROWN'S MOTION FOR PROTECTIVE ORDER REGARDING MASTERFACTOR DISCOVERY

This cause came before the Court on Mayer Brown LLP's ("Mayer Brown") Motion for Protective Order Regarding MasterFactor Discovery ("Motion"). Having reviewed the briefs, accompanying materials, and argument of the parties, it is hereby **ORDERED AND ADJUDGED** that Mayer Brown's Motion is **GRANTED** as set forth below:

1. The Court is mindful of the well-settled rule that discovery is limited to the matters contained in the pleadings. The Court has reviewed the operative Fourth Amended Complaint ("Complaint") and has determined that the Complaint is devoid of reference or allegations pertaining to (a) MasterFactor or (b) Mayer Brown's conflict of interest with other clients. The Receiver's MasterFactor theory is tangential to the issues that form the crux of the

Complaint, namely Mayer Brown's obligation to preclude Sun Capital from investing in workers compensation receivables and to instruct Founding Partners to issue disclosures related to those investments. Accordingly, the discovery sought by the Receiver would cause significant burden and delay in a case that has now spanned nearly nine (9) years.

2. The Court is further persuaded by the engagement letter proffered by Mayer Brown from January 23, 2002 that explicitly advised that Founding Partners waived any past, current, and future conflict relating to Mayer Brown's representation of the Master Factor/World Factor transaction.

3. Based on the foregoing, the Court hereby quashes the Receiver's MasterFactor and WorldFactor discovery requests, specifically: (a) the Receiver's Third Request for Production of Documents dated January 23, 2019; (b) quashes Request Nos. 5, 6, and 24, and the portions of Request Nos. 7, 11, and 15 that concern MasterFactor or WorldFactor, in the Receiver's Fourth Request for Production of Documents dated February 13, 2019; (c) quashes Topic Nos. 5, 6, and 24, and the portions of Topic Nos. 7, 11, and 14 that concern MasterFactor or WorldFactor, in the Receiver's February 13, 2019 Second Notice of Taking Videotaped Rule 1.310(b)(6) Deposition of Mayer Brown; (d) quashes the subpoenas and deposition notices directed to Diane Citron and John Dedyo; and (e) bars the Receiver from seeking other discovery related to the proposed MasterFactor or WorldFactor transaction and Mayer Brown's representation of MasterFactor, Inc.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida on this 16 day of April, 2019.

HONORABLE JOHN J. MURPHY III
CIRCUIT COURT JUDGE

Copies to:
Counsel of Record

EXHIBIT 9

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

No.: 10-49061

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,

Plaintiffs,

v.

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

Defendants.

~~~~~~

CONFIDENTIAL
VIDEOTAPED DEPOSITION OF ROBERT MILLS

Pages: 1-282

Wednesday, November 8, 2017
9:19 AM - 6:10 PM
Haliczer, Pettis & Schwamm, P.A.
One Financial Plaza
100 Southeast Third Avenue
Suite 700
Fort Lauderdale, Florida

Stenographically Reported By:

Tamra K. Piderit
Florida Professional Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Certified LiveNote Reporter
~~~~~~

A. Okay. I'm with you.
Q. The top paragraph references Schulte Roth & Zabel?
A. Right.
Q. And providing certain advice and legal services. Did Schulte Roth provide the legal services and advice that are described in this paragraph?
MR. STIRLING: Object to the form.
A. Can I read it?
Q. Absolutely.
A. (Witness reviewing document.)
I mean, as far as I am aware. I mean, I can't speak specifically for what other services they were providing to FPCM. It is a representative of the Hybrid fund, but this is what it says.
Q. You have no reason to believe that they didn't provide the advice and services that are described in this paragraph?
MR. STIRLING: Object to the form.
A. I don't have any -- I don't have any knowledge one way or another on that.
Q. Okay.
(Document marked as Exhibit 81 for identification)
BY MS. OTTERBERG:
Q. Exhibit 81.

A. Right.
Q. Did you review this document in preparation for your deposition today?
A. I have probably seen it.
Q. I'm sorry, did you review it in preparation for your deposition today?
A. I said I'm sure I saw it.
Q. Okay. And what is this document?
A. This is an engagement letter between Mayer Brown and FPCM.
Q. And if we look at the second paragraph that is on the first page of this document, there is, again, a reference to Schulte Roth & Zabel?
A. Right.
Q. Did Schulte Roth & Zabel provide the legal services and advice that are described in this paragraph?
MR. STIRLING: Object to the form.
A. This is as of January 2002, and I don't -- I don't know. I mean, I don't recall seeing any time entries from anyone at Schulte Roth after 2001, so I don't know. I just can't speak to this.
Q. Did you see -- are you aware of any letter or other communication from Schulte to Hybrid or FPCM or Gunlicks that says we are no longer representing you?
A. From Schulte to Gunlicks saying we are no longer

EXHIBIT 10

*** CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER ***

IN THE CIRCUIT COURT

OF THE SEVENTEENTH JUDICIAL CIRCUIT

IN AND FOR BROWARD COUNTY, FLORIDA

DANIEL S. NEWMAN, et al.,)

Plaintiffs,)

vs.) No. 10-49061

ERNST & YOUNG, LLP, a)

Delaware limited liability)

partnership, et al.,)

Defendants.)

VOLUME I

The ** CONFIDENTIAL ** videotaped deposition of MARC LEWIS KLYMAN, called for examination, taken pursuant to the provisions of the Code of Civil Procedure and the Rules of the Supreme Court of the State of Illinois pertaining to the taking of depositions for the purpose of discovery, taken before DINA G. MANCILLAS, a Certified Shorthand Reporter within and for the State of Illinois, CSR No. 84-3400 of said State, at Suite 600, 200 West Jackson Boulevard, Chicago, Illinois, on April 12, 2019, at 9:00 a.m.

BY THE WITNESS:

A. I'd have to look at it.

BY MR. BEUS:

Q. You don't know without reading it word for word?

A. In order to determine if I've seen this letter or something, I have to look at all the pages to make sure it's what I've seen.

MR. SCHRECK: And, Mr. Beus, I will only say this one time in a very friendly way to hopefully expedite the deposition.

Take a look at the four pages. As you can see, the fourth page has fax transmission information along the top, where the first three do not.

So since Mr. Klyman is seeing these for the first time when you're handing them, whether or not these were assembled differently from the versions he may have seen in preparation for this deposition.

And I will say one more thing, too. Mr. Klyman, just the other day, we were looking at documents. This is probably going too far, but I want to make sure I understand this.

I thought it was the document that we had seen, etc. Finally, he -- I said, We've got to really -- are you really sure? Well, yeah, can you -- we're under oath. You're looking at it.

MR. D. BRADFORD: I -- I'm going to --

MR. SCHRECK: No, no, no, no, no.

MR. D. BRADFORD: -- caution counsel not to get into discussions --

MR. SCHRECK: No, no, no, no, no, no, no, no. We're -- no, we're trying to cut to the chase.

And Mr. Klyman looked at it, and he saw at the bottom of that document on the face a legend that somehow there had been a stamp on it of August on a June document. I had never noticed it before, and that was my oversight what was being shown to him.

I'm just saying that what he's doing right now, Mr. Beus, because of how you're asking the questions, is requiring him to look at them. He doesn't want -- if you want to ask faster questions, pointedly about the questions, you may, if you want to do it like you're asking, but he has found

EXHIBIT 11

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, Plaintiffs, vs. ERNST & YOUNG, LLP, a Delaware Limited Liability Partnership; and MAYER BROWN LLP, an Illinois Limited Liability Partnership, Defendants.	) No. 10-49061

* * * CONFIDENTIAL * * *

The videotaped deposition of WILLIAM HART, taken in the above-entitled cause, on September 10, 2019, at 353 North Clark Street, Suite 4500, Chicago, Illinois, at the time of 1:05 p.m., pursuant to Notice.

Reported By: Gina M. Luordo, CSR, RPR, CRR

License No.: 084-004143

MR. O'CONNOR: Object to the form of the question. Lack of foundation.

MR. PORTERFIELD: Object to form.

THE WITNESS: Yes.

BY MR. BRADFORD:

Q. I'm going to hand you what's been previously marked as Exhibit 900. If you could turn to the page Bates stamped MB 12 here.

A. Okay.

Q. And this is a January 23, 2002 engagement letter from Marc Klyman to Bill Gunlicks. Do you see that?

A. Yes.

Q. And if you turn to Page 2 of this engagement letter --

A. Yes.

Q. -- which is dated about eight days before the letter that we just looked at -- I'm sorry. Seven days before the letter we just looked at with Sun Capital, Inc., correct?

A. This is seven days before the waiver.

Q. Yes. And you were asking if the waiver also had to be mutual, correct?

A. Yes.

Q. And you'll see at the bottom of Page 2 in

the last paragraph there that there is a statement that says you agree. You you understand in this letter to mean Bill Gunlicks, correct? I'm sorry. Founding Partners Capital Management?

A. Founding Partners, yes.

Q. You agree that Mayer, Brown & Platt may represent other persons and entities whose interests are adverse to you or adverse to the Stable Value Fund, your subsidiaries or other partnerships in which you are a partner or related company. Do you see that language?

MR. O'CONNOR: Form.

THE WITNESS: Yes.

BY MR. BRADFORD:

Q. And there's a further disclosure. If you skip the next sentence, it says as you know, Sun Capital and the principals of Sun Capital had been involved in a proposed securitization of trade receivables, including trade receivables held by Sun Capital and other factoring companies. The proposed securitization transaction, which may be preceded by one or more loans from Sun Trust Bank, has been referred to from time to time as the MasterFactor or WorldFactor transaction.

Do you see that language?

A. Yes.

Q. And so you understand that there was a disclosure to Founding Partners Capital Management of the -- of the work related to the MasterFactor transaction, correct?

MR. O'CONNOR: Object to the form of the question. Also lack of foundation.

MR. PORTERFIELD: Objection to form.

THE WITNESS: Yes.

BY MR. BRADFORD:

Q. And if you go to Page -- the bottom of Page 2, there's also a disclosure that says we have represented, currently represent or may represent in the future Sun Capital, CDC, Union Planters Bank, Sun Trust Bank Center or their respective affiliates. You hereby waive any conflict of interest relating to our past, current or future representation of Sun Capital, CBC, Union Planters Bank, Sun Trust Bank Center or any of the respective affiliates or any of the other parties to the MasterFactor or WorldFactor transaction.

Do you see that language?

MR. O'CONNOR: Form and foundation.

THE WITNESS: I do.

BY MR. BRADFORD:

Q. And so this letter is both a disclosure to Founding Partners Capital Management of that work related to the MasterFactor transaction as well as potential conflicts and a waiver of such conflicts. Do you have that understanding after reading this letter?

MR. O'CONNOR: Object to the form of the question. Lack of foundation.

THE WITNESS: I understand what you're saying, yes, and I understand what that says.

BY MR. BRADFORD:

Q. And do you understand that that is what this letter does?

MR. PORTERFIELD: Object to form.

MR. O'CONNOR: Form.

THE WITNESS: I understand that that's what this says, yeah.

BY MR. BRADFORD:

Q. And if you turn to the page Bates stamped MB 0001, you'll see that in the second paragraph, and Mr. O'Connor showed you a different version that we marked as an exhibit of this -- of some of these letters, which are all -- these engagement letters are all contained within this exhibit, but

and look at it and tell me if you see any type of facsimile header on it.

A. No.

Q. And if you look at the first page dated January 23, 2002, you don't see a fax header on that page, right?

A. Correct.

Q. Nothing on Page 2, correct?

A. Correct.

Q. No fax header on Page 3. Do you see that?

A. Correct.

Q. And the first time you see a fax header is on this page that purportedly has Mr. Gunlicks's signature. Do you see that?

A. Yes.

Q. You didn't see a fax header on any of the preceding pages that would show that this document was all one, correct?

A. Correct.

Q. And did you note that -- did you notice that while this letter is dated January 23, 2002, the fax isn't dated until January 25, 2002, three days later?

MR. BRADFORD: Mischaracterizes the document. There's a fax header that says January 23, 2002

underneath the January 25, 2002.

MR. O'CONNOR: Well, I think we can see that there's one that's cut off.

THE WITNESS: I do see that.

BY MR. O'CONNOR:

Q. I think that's what the speaking objection was intended to draw your attention to, but you see that?

A. Yes.

Q. But you also see that this was sent back to Klyman on January 25, 2002?

A. Yes.

Q. And do you see a signature by Marc Klyman?

A. No.

Q. Does that strike you as odd?

A. It's not a complete document.

Q. Does that cause you to have suspicion about the validity of this document to stand for anything that could have possibly been provided to or executed by Mr. Gunlicks?

MR. BRADFORD: Form. Foundation.

THE WITNESS: It looks unclear. It's not -- it's clear that it's not a completed document, so I agree with you.

EXHIBIT 12

IN THE CIRCUIT COURT OF THE 17TH 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,	:	
vs.	:	Case No. 10-49061
ERNST & YOUNG, LLP, a Delaware Limited Liability Partnership and MAYER BROWN, LLP, an Illinois Limited Liability Partnership,	:	
Defendants.	:	

- - - - - - - - - - - - - - - - - -

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

RESUMED VIDEOTAPED DEPOSITION OF

ROBERT T. MILLS

VOLUME IV

GLOBAL FUND

NOVEMBER 19, 2019

9:05 A.M.

Stamp 13, which is the second page of the document -- I'm sorry, let me withdraw that.

For the record, this is the January 23, 2002 engagement letter between Mayer Brown and Founding Partners Capital Management, correct?

A. Correct.

Q. And on Page 2 of the engagement letter, in the last paragraph, there is a reference to waivers of conflicts of interest. Do you see that?

It starts with, "You agree that MBP may represent other persons or entities whose interests are adverse to you."

A. I do.

Q. And it goes on to say, in the third sentence of that paragraph, quote, As you know, Sun Capital, and the principals of Sun Capital, have been involved in a proposed securitization of trade receivables, including trade receivables held by Sun Capital and other factoring companies, period. Do you see where I'm reading.

MR. O'CONNOR: Object to the form.

THE WITNESS: I do.

MR. O'CONNOR: I apologize, I withdraw it.

Center or any of their respective affiliates or any of the other factors to the MasterFactor, slash, WorldFactor transaction." Do you see that?

A. I do.

Q. And Mr. Gunlicks agreed to that conflict waiver, did he not?

MR. O'CONNOR: Object to the form of the question.

THE WITNESS: He signed the document.

BY MR. BRADFORD:

Q. And let me show you what I think was marked previously as 1200. Do you have that 1200 in front of you? That was the January 30, 2001 letter. It might be easier if I give you another copy.

A. Is it one that we marked today.

Q. Yeah, I think it was one that counsel showed you previously.

A. Let me see it.

Q. Of course. This was the letter that addressed the payment of fees related to the MasterFactor transaction.

A. Yeah, I've seen that.

Q. And would you acknowledge that Mr. Gunlicks was copied, shown as a cc on that

*** CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER ***

IN THE CIRCUIT COURT

OF THE SEVENTEENTH JUDICIAL CIRCUIT

IN AND FOR BROWARD COUNTY, FLORIDA

DANIEL S. NEWMAN, et al.,)
Plaintiffs,)
vs.) No. 10-49061
ERNST & YOUNG, LLP, a)
Delaware limited liability)
partnership, et al.,)
Defendants.)

VOLUME III

STABLE VALUE

The ** CONFIDENTIAL ** resumed videotaped deposition of ROBERT T. MILLS, called for examination, taken pursuant to the provisions of the Code of Civil Procedure and the Rules of the Supreme Court of the State of Illinois pertaining to the taking of depositions for the purpose of discovery, taken before DINA G. MANCILLAS, a Certified Shorthand Reporter within and for the State of Illinois, CSR No. 84-3400 of said State, at Suite 700, 353 North Clark Street, Chicago, Illinois, on November 22, 2019, at 9:36 a.m.

BY THE WITNESS:

A. Yes.

(Document tendered.)

BY MS. OTTERBERG:

Q. This is a document that's been previously marked as Exhibit 81, and Mr. Mills, this is a document you've seen before, correct?

A. I have.

Q. And you reviewed it in connection with your preparation to testify as Stable Value II's representative?

A. I did.

Q. What is this document?

A. It's an engagement letter between Mayer Brown and FPCM dated January 23rd, 2002.

Q. And this is an engagement letter on -- if I understand your testimony, you're relying on as Stable Value II's representative to suggest that Mayer Brown had an obligation -- or, undertook an obligation to assess the adequacy of the collateral of transactions that the Stable Value I Fund was going to enter into?

A. Yes.

Q. And what is it in this document that is

your evidence for that assertion?

A. The first sentence.

Q. Which is?

A. "This letter confirms our agreement for the provision of legal services by Mayer, Brown & Platt to Founding Partners Capital Management Company in connection with the proposed credit and security agreement between Founding Partners Stable Value Fund and Sun Capital, Inc."

Q. And any other portion of this letter that you're relying on to support your assertion about Mayer Brown undertaking a supposed obligation to assess the adequacy of the collateral of Stable Value I's transactions?

A. I mean, there may be other provisions, but that one pretty well covers it.

Q. And so nothing more that you can point me here to, sitting here today?

A. I think that -- I think that about covers it.

Q. On Page 2 of this document, which is Bates 13, the second full paragraph, the end of that second full paragraph. Are you with me?

A. Uh-huh.

Q. The last sentence says, "We will not undertake any due diligence or other investigations unless we have agreed to do so."

Do you see that?

A. I do.

Q. None of the three engagement letters that we just reviewed, dated January 2000, January 2001, January 2002, mention the Lagniappe transaction, correct?

A. They don't say "Lagniappe."

Q. Well, they don't mention a transaction that -- I understand they don't have the word "Lagniappe." That's true, right?

A. Right.

Q. They also don't describe the transaction that we have been referring to in the course of this deposition as the "Lagniappe transaction," correct?

A. That's true.

Q. And, in fact, each of the engagement letters that we just reviewed talks about a specific transaction or a specific agreement that Mayer Brown is -- is going to be advising in connection with, right?

MR. S. STIRLING: Object to the form.
BY THE WITNESS:
A. Yeah. I think that's right.
BY MS. OTTERBERG:
Q. Okay. And so it's your contention again, as Stable Value II's representative, that despite the language that says, "Mayer Brown is going to advise in connection with a particular agreement," Mayer Brown also was undertaking an obligation to advise on the adequacy of the collateral supporting any agreement or any transaction that Stable Value I was ever going to enter into?
MR. S. STIRLING: Object to the form.
BY THE WITNESS:
A. Could you restate that question?
MS. OTTERBERG: Can you read it back for me, please?
(Said record was read by the reporter.)
BY THE WITNESS:
A. Well, that's not true.
BY MS. OTTERBERG:
Q. And why is it not true?

A. To say "advise with respect to any transaction that Founding Partners would ever enter into," that's --

Q. Well -- so now I'm not --

A. "Would ever enter into"?

Q. So now I'm not understanding your testimony because we have reviewed these three engagement letters -- let me start over.

On the one hand, you're saying that Mayer Brown undertook an obligation to advise with respect to the adequacy of the collateral for the Lagniappe transaction. That's your testimony, correct?

A. Absolutely.

Q. And then the language in the three engagement letters that you're pointing to reference particular agreements that are not the Lagniappe transaction, correct?

MR. S. STIRLING: Object to --

BY THE WITNESS:

A. That's exactly the point, yes.

MR. S. STIRLING: Object to the form.

BY MS. OTTERBERG:

Q. So where is it that the alleged

obligation on the part of Mayer Brown to advise on the adequacy of the collateral for the Lagniappe transaction is purportedly documented in these engagement letters?

A. First sentence of every one of them.

Q. Which does not mention the Lagniappe transaction in any way, shape, or manner, correct?

A. It doesn't say "Lagniappe."

Q. And does not reference a transaction that is -- does not reference a transaction that is of the kind that we're talking about in -- when referring to the word "Lagniappe," correct?

A. Correct.

Q. These three engagement letters that we're referring to, January 2000, January 2001, January 2002, in your testimony about engagement letters that you believe show Mayer Brown had an obligation to advise on the adequacy of the collateral of Stable Value I's transactions, were you referring to other engagement letters or only these three?

A. Any of them that are out there.

(Document tendered.)

EXHIBIT 14

MAYER, BROWN & PLATT

190 SOUTH LA SALLE STREET

CHICAGO, ILLINOIS 60603-3441

MARC L. KLYMAN
DIRECT DIAL (312) 701-8053
DIRECT FAX (312) 706-8158
mklyman@mayerbrown.com

MAIN TELEPHONE
312-782-0600
MAIN FAX
312-701-7711

January 23, 2002

Mr. William L. Gunlicks
Founding Partners Capital
Management Company
5100 N. Tamiami Trail, Suite 119
Newgate Center
Naples, Florida 34103

Dear Bill:

This letter confirms our agreement for the provision of legal services by Mayer, Brown & Platt ("MBP", "we", "our" or "us") to Founding Partners Capital Management Company ("Founding Partners", "you" or "your") in connection with the proposed credit and security agreement (the "Credit Agreement") between Founding Partners Stable-Value Fund, L.P. (the "Stable-Value Fund") and Sun Capital, Inc. ("Sun Capital").

We understand that Schulte Roth & Zabel represents you in connection with all dealings between you and the Stable-Value Fund, between you and investors in the Stable-Value Fund, and between the Stable-Value Fund and investors in the Stable-Value Fund. We also understand that you will rely on Schulte Roth & Zabel to advise you in connection with (i) any "blue sky" or state securities law matters (and any federal securities law matters, international securities law matters, other securities law matters, investment company law matters, investment adviser law matters and commodities law matters) relating to you, the Stable-Value Fund, or any affiliate of you or the Stable-Value Fund, and (ii) any other state, local, federal, international or other legal and regulatory matters (including, without limitation, tax law matters, ERISA law matters,

corporate law matters and partnership law matters) relating to you, the Stable-Value Fund, and any affiliate of you or the Stable-Value Fund.

You agree to pay the reasonable fees and other charges billed by us in connection with this representation. Our fees for services are based on time (at quarter hour increments) spent on specific projects, computed at our hourly rates for those persons performing the services required. Other charges for which we will bill you for this engagement are described on the enclosed schedule of charges, which is subject to adjustment from time to time by MBP. Please note that MBP's fees and other charges incurred in connection with this representation are not contingent upon (i) the closing of or any funding under the Credit Agreement, (ii) payment of such fees and other charges by Sun Capital, or (iii) the successful completion of any other project by you. We anticipate submitting to you monthly invoices for the professional (lawyer and paralegal) services rendered and other charges and expenses incurred. Payment is due upon receipt of our statement and in no event later than 30 days thereafter.

We will assume without independent verification, as we understand you have your own procedures for this, that the Credit Agreement has been duly authorized by you and by the Stable-Value Fund, that you and the Stable-Value Fund have obtained all necessary consents and approvals prior to entering into the Credit Agreement or any documents relating to the Credit Agreement or relating to Sun Capital, that all signatures and documents are genuine and that all persons and entities executing documents have the legal capacity to contract. Unless we have agreed to do so, we will not (i) cause Uniform Commercial Code or other searches to be made or (ii) check compliance with periodic refiling or re-recording requirements. We do not undertake any responsibility for assuring that, with respect to the Credit Agreement or any document relating to the Credit Agreement, any of Sun Capital, you or the Stable-Value Fund (or any other person or entity) will be complying with applicable state, local, federal, international or other laws and regulations, including, without limitation, governmental reporting and licensing requirements, ERISA matters, and federal, international, state or local tax matters. We will not undertake any "due diligence" or other investigations unless we have agreed to do so.

You may limit or expand the scope of our representation from time to time, provided that any such expansion is agreed to by us.

You agree that MBP may represent other persons or entities whose interests are adverse to you (or adverse to the Stable-Value Fund, your subsidiaries, other partnerships in which you are a partner or related companies). For the purpose of determining whether a conflict of interest exists, it is only you who we will represent and not the Stable-Value Fund, your subsidiaries, any partnerships in which you are a partner or any related companies. As you know, Sun Capital and the principals of Sun Capital have been involved in a proposed securitization of trade receivables, including trade receivables held by Sun Capital and other factoring companies. The proposed securitization transaction (which may be preceded by one or more loans from SunTrust Bank) has been referred to from time to time as the "MasterFactor" or the "WorldFactor" transaction. We understand that the other parties to such transaction may include CDC, Union Planters Bank, SunTrust Bank, Centre or their respective affiliates. We have represented,

currently represent or may in the future represent Sun Capital, CDC, Union Planters Bank, SunTrust Bank, Centre or their respective affiliates. You hereby waive any conflict of interest relating to our past, current and future representation of Sun Capital, CDC, Union Planters Bank, SunTrust Bank, Centre, any of their respective affiliates or any of the other parties to the MasterFactor/WorldFactor transaction.

Following termination of our engagement, any otherwise nonpublic information you have supplied to us which is retained by us will be kept confidential in accordance with applicable rules of professional conduct. At your request, your papers and property will be returned to you; our own files, including lawyer work product, pertaining to the matter will be retained by us. For various reasons, including the minimization of unnecessary storage expenses, we reserve the right to destroy or otherwise dispose of any such items retained by us within a reasonable time after the termination of the engagement.

Our attorney-client relationship will be considered terminated if more than 12 months have elapsed from the last time you requested and we furnished any billable services to you. If you later retain us to perform further or additional services, our attorney-client relationship will be revived, subject to these and any supplemental terms of engagement. The fact that we may inform you from time to time of developments in the law which may be of interest to you, by newsletter or otherwise, should not be understood as a revival of an attorney-client relationship. Moreover, we have no obligation to inform you of such developments in the law unless we are engaged in writing to do so.

This letter constitutes the entire understanding between you and MBP, and supersedes all prior understandings, written or oral, relating to its subject matter. Any change must be made or confirmed in writing. If this letter correctly reflects your understanding of the terms and conditions of our engagement, please indicate your acceptance by signing the enclosed copy of this letter in the space provided below and returning it to our office, to my attention.

This letter may be executed in more than one counterpart, and by the parties hereto on separate and different counterparts. A signature to this letter transmitted by facsimile transmission will be the equivalent of an original signature.

On behalf of MBP, I thank you for the opportunity to be of service.

Sincerely yours,

Marc L. Klyman

Agreed as of the date
first above written:

FOUNDING PARTNERS CAPITAL MANAGEMENT COMPANY

By:_____
William L. Gunlicks
President and CEO

Mayer, Brown & Platt

U. S. Offices

Schedule of Non Fee Charges to Clients

November 20, 2000

I. Long Distance Telephone.

We purchase our long-distance telephone service from telecommunications providers at discounted rates. We charge clients at rates calculated to recover our cost.

II. Automated Research.

We purchase services from Lexis and Westlaw at fixed monthly rates which are substantially below their published rates. We charge clients for the Lexis and Westlaw connections at rates calculated to recover our cost.

III. Telefax Service.

We charge clients $1.00 per page, plus applicable long distance telephone charges regardless of length at our discounted rates. There is no charge for incoming telefaxes.

IV. Duplicating.

We charge clients for internal photocopies at the rate of $.15 per page. Outside photocopying is charged at actual out-of-pocket cost.

V. Secretarial, Word Processing and Proofreading Services.

We accrue for client accounts document preparation charges at the rate of $40 per hour for word processors, secretaries and proofreaders generally when documents (originals or amendments) of over 10 pages are prepared or for secretarial overtime.

4939771

VI. Postage.

We charge clients at cost for postage when the cost of mailing is $1.00 or more.

VII. Out-of-pocket Disbursements.

The following types of disbursements when related to a client matter are charged at the firm's cost:

Advances on behalf of clients (e.g., tax payments, filing fees, title charges)
Consultants' and expert witnesses' fees and expenses
Courier and messenger services
Court reporters
Equipment when purchased solely for a client matter
Meals
Outside services (including cost of litigation support services purchased from outside vendors)
Service of process
Records searches
Supplies (when amounts are large or type of supply item is special)
Tax return processing charges
Taxis, mileage, parking (local)
Travel (airfares, hotels, meals, car rentals, taxis and incidentals)
Trial exhibits
Witness fees and costs
Other items not covered above that are directly attributable to a client matter

VIII. Items Not Charged to Clients.

Administrative overhead
Air conditioning and electricity for overtime work
Client entertainment
Local and suburban telephone calls
Refreshments during meetings
Rent for conference rooms

bcc: Managing Partner
Conflicts Partner
Records Center
Accounting Department

EXHIBIT 15

6

On behalf of MBP, I thank you for the opportunity to be of service.

Sincerely yours,

Marc L. Klyman

Agreed as of the date
first above written:

FOUNDING PARTNERS CAPITAL MANAGEMENT COMPANY

By _____
William L. Gunlicks
President and CEO

4939771

FOUNDING PARTNERS
CAPITAL MANAGEMENT COMPANY

Private Investment Management & Counsel
Naples • Marco Island • Chicago • Bermuda • Grand Cayman
www.foundingpartnerscapital.com

5100 N. Tamiami Trail, Suite 119, Newgate Center, Naples, FL 34103
Telephone: 941-514-2900 Facsimile: 941-514-2901
E-mail: foundingcapital@cs.com

FAX TO:	Marc K. Klyman	FAX #:	312-706-8158
COMPANY:	Mayer, Brown & Platt		
FROM:	William L. Gunlicks		
DATE:	January 25, 2002	PAGE 1 OF:	Nine
COPY TO:			

SUBJECT: **Sun Capital Funding and signed Engagement Letter**

Certificate No. 1

SUN CAPITAL, INC
CERTIFICATE OF PRESIDENT & CHIEF OPERATING OFFICER

January 24, 2002

I, Howard Koslow, am the duly elected and acting President and Chief Operating Officer of Sun Capital, Inc., a Florida corporation (the "Company"). In connection with Section 5.2.1 of the Credit and Security Agreement, dated as of January 23, 2002 (as amended, amended and restated or otherwise modified from time to time, the "Credit and Security Agreement"), between the Company and Founding Partners Stable-Value Fund, L.P., I hereby certify as follows:

1. I have carefully examined the Credit and Security Agreement and each of the other Program Documents to which the Company is a party.

2. As of the date hereof, the Availability Termination Date has not occurred.

3. The representations and warranties contained in Section 7 of the Credit and Security Agreement are true and correct on and as of the date hereof with the same force and effect as though made on and as of the date hereof (except as to any representation or warranty which refers to a specific earlier date, which representation and warranty was true and correct as of such earlier date).

4. No Default exists on the date hereof prior to or immediately after giving effect to the Loan to be made on the date of this certificate.

5. No material Adverse Effect has occurred since the date of the Credit and Security Agreement.

6. The funds received from such Loan shall be applied only for the purposes contemplated by Section 2.2 of the Credit and Security Agreement.

7. After giving effect to such Loan, no Borrowing Base Deficiency exists.

8. As of the date hereof, the Borrowing Base equals $ 2,760,000.00

Capitalized terms used but not defined herein shall have the meanings set forth in the Credit and Security Agreement.

IN WITNESS WHEREOF, I have hereunto signed my name as of the date first above written.

Name: Howard B. Koslow
Title: President & Chief Operating Officer

SUN CAPITAL, INC.

LOAN BORROWING AUTHORIZATION

DATE: January 24, 2002

TO: FOUNDING PARTNERS STABLE-VALUE FUND, L.P.

Pursuant to our Credit and Security Agreement and the attached Certificate of the President and Chief Operating Officer, you are hereby authorized to transfer loan Proceeds to Guaranty Business Credit Corporation Account as indicated below:

BANK:	Guaranty Bank For the Account of Guaranty Business Credit Corp. Southeast Region-Collection Account
ABA#:	314970664
ACCOUNT#:	3800589156
AMOUNT:	$1,298,732.82
REFERENCE:	Sun Capital, Inc. payoff
CLOSING DATE:	January 24, 2002

AUTHORIZATION:

PETER BARONOFF
Chief Executive Officer

Guaranty BUSINESS CREDIT

PAYOFF LETTER

January 23, 2002

Sun Capital, Inc.
929 Clint Moore Road
Boca Raton, FL 33487
Attn: Howard Koslow

Re: Termination of Loan and Security Agreement dated as of September 27, 1996 (as at any time amended, the "Loan Agreement") between Sun Capital, Inc. ("Borrower") and Guaranty Business Credit Corporation, as assignee of Capital Business Credit, a division of Capital Factors, Inc. ("Lender")

Gentlemen:

Lender has been informed that Borrower intends to terminate the Loan Agreement on January 23, 2002 (the "Termination Date") and to satisfy in full all loans and other obligations of Borrower to Lender outstanding on the effective date of such termination (collectively, the "Obligations"), including, but not limited to, all principal, interest, legal fees and other charges outstanding or payable under the Loan Agreement, plus $107,000.00 to serve as cash collateral to secure uncollected funds on the Termination Date and checks returned or dishonored subsequent to the Termination Date. Borrower has advised Lender that satisfaction of the Obligations will be effected by the wire transfer to Lender from Borrower or Borrower's designee of immediately available funds in an amount sufficient to satisfy the full amount of the Obligations on the date of payment.

To facilitate Borrower's wire transfer of funds to satisfy the Obligations, please be advised that the total Obligations on January 23, 2002 consist of the following:

Principal Balance	$1,095,804.26
Accrued Interest	11,413.04
Collateral Mgmt. Fee	1,000.00
Legal Expense	1,200.00
Bank Charges for Returned Items	100.00
US Bank Stop Payment	82,215.52
NSF Cash Collateral Fund	107,000.00
Total Obligations	$1,298,732.82

The amount set forth above (the "Payoff Amount") is an accurate statement of the Obligations only to 12:00 noon (eastern time) on January 23, 2002. Thereafter, the Payoff Amount shall be increased in the amount of $273.95 per day.

Lender agrees that its liens and security interests in the assets of Borrower shall terminate and the Loan Agreement, other Loan Documents (as defined in the Loan Agreement) and any subordination agreements in favor of Lender relating to Borrower shall terminate if and when Lender receives (a) a wire transfer from Borrower of immediately available federal funds, for the account of Lender, to satisfy the Payoff Amount and (b) a copy of this letter fully executed by Borrower and acknowledged by Peter R. Baronoff and Howard B. Koslow (collectively, the "Guarantors").

400 Northridge Road, Suite 1100
Atlanta, GA 30350
ph: 770.642.5200 / fax: 770.642.5230
www.gbcc.guarantygroup.com

MEMBER FDIC

Instructions for the wire transfer of funds by Borrower to Lender are as follows:

Guaranty Bank
Dallas, TX
For the Account of Guaranty Business Credit Corporation
Southeast Region - Collection Account
Account No.: 3800589156
ABA Routing No.: 314 970 664
Reference: Sun Capital, Inc. Payoff

Following Lender's receipt of the Payoff Amount in the manner set forth above, Lender (i) authorizes Borrower to file Uniform Commercial Code financing statements (without signatures as permitted by Revised Article 9 of the Uniform Commercial Code) in applicable public filing offices from time to time in order to terminate any Uniform Commercial Code financing statements previously filed by Lender (or its predecessor in interest, Capital Business Credit or Capital Factors, Inc.) against Borrower relating to the Loan Agreement or relating to the transactions contemplated by the Loan Agreement, and (ii) agrees, to deliver to Borrower, at Borrower's expense, any documents and agreements requested by Borrower from time to time in order to evidence termination of Lender's liens and security interest in assets of Borrower, termination of any insurance endorsements in favor of Lender relating to Borrower and otherwise to evidence termination of the Loan Agreement, other Loan Documents (as defined in the Loan Agreement) and any subordination agreements in favor of Lender relating to Borrower.

No termination of Lender's liens and security interests in Borrower's assets shall operate to terminate or impair (i) Borrower's indemnifications of Lender under the Loan Agreement or otherwise, (ii) Guarantors' indemnifications of Lender under the General Continuing Guaranties or otherwise or (iii) Borrower's or Guarantors' indemnifications herein, each of which shall survive such termination.

By their acceptance hereof, Borrower acknowledges and agrees that (a) Lender reserves all of its rights with respect to each check and other instrument or payment item received by Lender from Borrower or any of Borrower's account debtors prior to full payment of the Obligations as contemplated hereby (such checks, instruments or other payment items being collectively called "Checks"); (b) Lender has credited to Borrower's account the face amount of all such Checks, but Lender has not yet received full and final credit or payment therefore; and (c) notwithstanding the full payment of the Obligations, Borrower or Guarantor shall reimburse and pay to Lender, promptly after Lender's demand therefor made at any time within ninety (90) days after the date hereof, in immediately available funds, the full face amount of any Check that is made or presented prior to the date hereof or within sixty (60) days after the date hereof and is hereafter dishonored or returned to Lender or remains unpaid for any reason plus any bank charges and all other reasonable costs incurred by Lender that arise as a result of any such dishonor or return.

As noted above, in consideration of Lender's agreement to terminate its security interest and liens in the assets of Borrower as set forth herein, Borrower has agreed to provide Lenders with cash collateral in the amount of $107,000.00 ("Cash Collateral") to secure any debt owing from Borrower to Lender arising after the Termination Date due to returned or dishonored Checks or uncollected funds for which

credit has previously been extended by Lender. For a period of 30 days from the Termination Date, Lender may charge against the Cash Collateral any amounts for which Borrower has agreed to reimburse Lender in this Agreement. Upon the expiration of such 30 day period, the Cash Collateral (net of charges authorized and made by Lender) shall be returned to Borrower by wire transfer.

Effective as of the date hereof, Borrower, Guarantors and Lender hereby agree and acknowledge that Lender shall have no further obligation to make Loans or extend other financial accommodations to or for the benefit of Borrower under the Loan Agreement or otherwise.

Borrower and each Guarantor, on behalf of itself and on behalf of all those entities claiming by, through, or under it, together with their heirs, executors, successors and assigns (collectively referred to in this paragraph as the "Borrower Releasors"), for good and valuable consideration, including, without limitation, the execution of this Agreement by Lender and Lender's release of its liens, does hereby unconditionally remise, release, acquit and forever discharge Lender, Lender's past and present officers, directors, shareholders, employees, agents, attorneys, parent corporations, subsidiaries, affiliates, successors and assigns, and the heirs, executors, trustees, administrators, successors, and assigns of any such persons and entities (collectively referred to in this paragraph as the "Lender Releasees"), of and from any and all manner of actions, causes of action, suits, claims, counterclaims, liabilities, obligations, defenses, and demands whatsoever (if any), at law or in equity, or disputed or undisputed, which any of the Borrower Releasors ever had, now has, or hereafter can, shall, or may claim to have against any of the Lender Releasees for or by reason of any cause, matter, or thing whatsoever, arising from the beginning of the world to the date of execution of this Agreement.

This Agreement shall be governed by and construed under the laws of the State of Georgia without reference to principles of conflicts of laws, as the same may from time to time be in effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. This Agreement may be executed in one or more counterparts, each of which shall constitute an original, but all of which taken together shall be one and the same instrument. Any signature delivered by a party by facsimile transmission shall be deemed to be an original signature hereto.

Very truly yours,

GUARANTY BUSINESS CREDIT CORPORATION ("Lender")

By: Mark Lewis

Title: Vice President

[Signatures continued on the following page]

The above and foregoing is acknowledged, accepted and agreed to:

SUN CAPITAL, INC. ("Borrower")

By: _____

Title: President

Acknowledged and agreed to by Guarantors:

_____ (Guarantor)
Peter R. Baronoff

_____ (Guarantor)
Howard B. Koslow

SUN CAPITAL, INC.

LOAN BORROWING AUTHORIZATION

DATE: January 24, 2002

TO: FOUNDING PARTNERS STABLE-VALUE FUND, L.P.

Pursuant to our Credit and Security Agreement and the attached Certificate of the President and Chief Operating Officer, you are hereby authorized to transfer loan Proceeds to our Union Planter Bank Factor Account as indicated below:

BANK: Union Planters Bank
Factor Account
Boca Raton FC

ABA#: 084000084
Sun Capital, Inc. Factor Account

ACCOUNT#: 4250013340

AMOUNT: $1,461,267.18

CLOSING DATE:

AUTHORIZATION:

PETER BARONOFF
Chief Executive Officer

EXHIBIT 16

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, Plaintiffs, vs. ERNST & YOUNG, LLP, a Delaware Limited Liability Partnership; and MAYER BROWN LLP, an Illinois Limited Liability Partnership, Defendants.	) No. 10-49061

* * * CONFIDENTIAL * * *

The videotaped deposition of LAUREN NOLL, taken in the above-entitled cause, on December 17, 2019, at 353 North Clark Street, Suite 4500, Chicago, Illinois, at the time of 8:28 a.m., pursuant to Notice.

Reported By: Gina M. Luordo, CSR, RPR, CRR

License No.: 084-004143

BY MR. O'CONNOR:

Q. And you know that now, according to Ms. Otterberg's letter, it was not produced in the correct format?

MR. PETTIS: Object to the form and foundation.

THE WITNESS: I'm not sure I agree with your phrasing. I see the sentence we talked about in the letter.

BY MR. O'CONNOR:

Q. The signature page was substituted by Jenner Block?

MR. PETTIS: Object to the form. Form. Foundation.

THE WITNESS: Yes.

BY MR. O'CONNOR:

Q. Look at Topic 16, if you would, Ms. Noll. You've reviewed Topic 16?

A. Yes.

Q. And what did you do to prepare to respond to Topic 16 today?

A. I reviewed the January 23, 2002 engagement letter.

Q. You reviewed the copy that is under Tab 3?

A. I believe so. I spoke to various people, as set out in the notes, to investigate the topic.

I spoke with the individual who served as Mr. Klyman's administrative assistant during this time frame from early 2002. I spoke to an individual who worked in the firm's word processing department at that time.

I also spoke with Debora De Hoyos, who was the firm's managing partner at the time. I spoke with personnel in the firm's accounting department, personnel in the firm's conflicts department -- can I just finish, please, and personnel in the firm's records center.

Q. I need clarification. That's the only reason I'm trying to stop you.

A. Sure.

Q. These people, where are you looking at in your answer?

A. I'm referring to my notes in response to question or Topic 16.

Q. I just found it. Thank you.

A. Okay.

Q. So who is the person that you identified that you spoke to in the accounting department?

A. I don't recall exactly. I spoke to, I think, one or two different individuals to investigate the question.

Q. And did you look to see if a file was maintained in the accounting department that contained the engagement letter?

A. I spoke to the people I just listed, all of whom told me that there was no reasonable way to locate other copies of this letter other than in the client files for the matter number from which I understand multiple copies have been produced.

Q. Let me break that down. So is it fair to say that when you spoke to the accounting department, you were unable to obtain a copy of the January 23, 2002 engagement letter that is Tab 3, Bates MB 12 through 18, fair?

MR. PETTIS: Object to the form. Foundation.

THE WITNESS: No, that's not fair. Based on those conversations, they could not identify any reasonable way to look for the document other than the manner I just described in the client matter files.

BY MR. O'CONNOR:

Q. Let me see if I can try it maybe simpler.

You asked accounting do you have a copy of this engagement letter?

MR. PETTIS: Object to the form.

THE WITNESS: I asked whether there would be a

file, how records may have been maintained at that time, and that's when they came to the conclusion in discussions with me that there would be no reasonable way today, you know, in 2019 to look for a 2002 document, again, other than as found in the client matter files from where we did locate and produce copies of this document.

BY MR. O'CONNOR:

Q. Now, let's just make sure you and I are on the same page. According to Tab 3, when I talk about Tab 3, you understand the one I'm talking about? It's MB 12 through 18.

A. Yes.

Q. It says BCC managing partner, conflicts department, record center and accounting department, correct?

A. I'm sorry. Could you read that again?

Q. Sure. You can look at it, too, Page 18. It says BCC, and then it says four different departments. Do you see that?

A. Yes.

Q. And what's your understanding of the use -- what does BCC mean?

A. Just looking at this word on the page, I understand it to mean blind carbon copy.

Q. And so when you talked to the accounting department, the result of your discussion was you did not get a copy of Tab 3, fair?
MR. PETTIS: Form.
THE WITNESS: Correct.
BY MR. O'CONNOR:
Q. And then you say that you went to the managing partner?
A. I spoke to the individual who was the managing partner at that time of this letter.
Q. Who was that?
A. That's Ms. De Hoyos.
Q. Who?
A. Debra De Hoyos.
Q. Where is Ms. De Hoyos at now?
A. At Mayer Brown.
Q. She's no longer the managing partner?
A. Correct. She's no longer the managing partner.
Q. But she was the managing partner at the time this document was generated?
A. She was the managing partner in January 2002.
Q. And based upon your discussions with her, you did not receive a copy from any file that was

maintained by Ms. De Hoyos as the managing partner?
A. Correct. She was not aware of any reasonable place to look.
Q. You didn't get a copy of the engagement letter from her, fair?
A. Correct.
Q. Then you went to the conflicts partner, correct?
A. Yes. I spoke to individuals in our conflicts department.
Q. Who were the individuals?
A. I believe it was Chuck Regan, R-e-g-a-n.
Q. And what is Mr. Regan's position? Is Mr. Regan an attorney?
A. Yes.
Q. And what is his position in conflicts?
A. I believe he is the lead conflicts attorney. Sitting here, I'm not exactly sure of the precise words in the title, but something to that effect.
Q. And was he involved in the conflicts department back in January of 2002?
A. I don't think so.
Q. But based upon your discussions with him and the questions you posed to him, you did not get

a copy of the January 23, 2002 engagement from the conflicts department or the conflicts partner, fair?

A. Correct subject to what I said before. We were not aware of any other reasonable place to look.

Q. Well, you looked and questioned, and nobody gave you a copy of the document, fair?

MR. PETTIS: Object to the form.

THE WITNESS: That's not exactly what I said. I made this inquiry in an attempt to respond to the question, and none of these individuals could identify for me any other place to look besides the client matter files where one would expect to find an engagement letter relating to this matter and in fact, where we did find it.

BY MR. O'CONNOR:

Q. All right. Let me just make sure that you and I are on the same page.

When you went to the managing partner, you did not get a copy from any managing partner file, fair?

A. Correct.

MR. PETTIS: Object to form.

BY MR. O'CONNOR:

Q. When you went to the conflicts partner, you did not get a copy of the engagement from any type of conflict file or anything that was maintained by a conflicts partner, correct?

A. Correct.

Q. When you went to the records center, you did not obtain a copy of this document maintained by any file in the records center; is that true?

MR. PETTIS: Object to form.

THE WITNESS: I don't think that's exactly true. We did locate this letter in the client matter files.

BY MR. O'CONNOR:

Q. And which letters did you find?

A. I believe multiple copies of this engagement letter were found in the client matter files for Founding Partners matters.

Q. And they were unsigned letters?

MR. PETTIS: Object to the form. Foundation.

THE WITNESS: I don't -- I have not prepared to answered questions regarding any specific documents in terms of the production. I know we've looked at the letters that provide explanation as to what was found where, and I reviewed those letters, and

understanding as to whether there was a disclosure of that substitution anytime before December 12, 2019?

MR. PETTIS: Object to form. Scope. Foundation.

THE WITNESS: I have not prepared to answer that question.

BY MR. O'CONNOR:

Q. You can't answer it as you sit here today whether you're aware of any disclosure prior to December 12, 2019 or discussion to disclose the substitution before December 12, 2019?

MR. PETTIS: Same objection. Form. Foundation. Scope.

THE WITNESS: Counsel, my understanding is I'm not here in a personal capacity. I'm here on behalf of the firm to respond to the topics listed in the notice. I have spent a lot of time doing that, and the question you've asked me is not listed anywhere among the topics, and I have not prepared to answer it.

MR. O'CONNOR: Your Honor, I think the question just is a very simple straightforward question. I think the topics do talk about irregularity of this specific document, and I'm just asking when this

EXHIBIT 17

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

DANIEL S. NEWMAN, as RECEIVER for FOUNDING 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., Plaintiffs, -vs- ERNST & YOUNG, LLP, a Delaware Limited Liability Partnership, and MAYER BROWN LLP, and Illinois Limited Liability Partnership, Defendants.	No. 2017 L 009824

REPORT OF PROCEEDINGS at the hearing of the above-entitled cause before the Honorable James N. O'Hara, Judge of said Court, taken before Christine Bechtold, Certified Shorthand Reporter within and for the County of Cook and State of Illinois, at Daley Center, Room 2206, Chicago, Illinois, commencing at the hour of 11:01 a.m., on the 14th day of November, A.D., 2018.

disrespectful to your cocounsel, so let's focus on it step by step.

We'll do it in an orderly matter and it's going to get to the bottom of it. It's taking some time but it's going to happen.

So you're going to produce an affidavit saying that we've done the search, we've turned over the documents, we don't have these other documents but it's come to your attention through a court reported proceeding that there were other documents that you don't have but there were -- the client has that were part of his file. Right?

MR. BRADFORD: That's right.

THE COURT: You're going to produce that. And then you can take a look at that and we'll see where we're at.

MR. BRADFORD: We would like the same from them, your Honor, that they be required -- because we're going to start a deposition tomorrow, which is what he's arranged with our opposing counsel. We need his documents for that deposition. He actually has our documents. All I'm going to do is affirm that he has what we could find. But we came in before he came in to try to get his documents so we could take this

Florida case if -- for the receiver's benefit. He's not even in the court. So that's not anything we've agreed to or even discussed this morning.

MR. DELANEY: Your Honor, as we draft in the order as articulated upon the record, one, Mayer Brown will turn over everything in compliance with the statute within seven days.

MR. BRADFORD: No question.

MR. DELANEY: Two, the parties agree if documents are produced that haven't been turned over or produced, the parties agreed on the record earlier that they would sit for additional depositions as needed.

Number three, everything is entered and continued until the 26th. That was the articulated stated agreement on the record. It's drafted in our order.

What counsel ignores is the fact that we agreed to a mutuality of confirmation. So we object to the order counsel drafted. It ignores the seven-day compliance and it ignores the fact that if documents are identified and subsequently turned over, the parties agreed upon the record --

THE COURT: Well, it says they're going to do

it in seven days.

MR. BRADFORD: In seven days, yes.

THE COURT: That's number one.

MR. BRADFORD: Right. Number two, there's mutuality that if Mr. Gunlicks wants to reopen his deposition because some document later appears that should have been given to him, he has that right, as we do.

We've been here talking about Mr. Gunlicks' deposition. When he says "the parties," it's very confusing because of the caption of the case which has the Florida case on it. I want to be clear, we're not ordering parties who are not before the Court today to do anything. We're giving rights with respect to parties who are not before the Court. The Florida Court, which has had this case since 2009, is handling the discovery in that case. Mayer Brown has provided depositions to the receiver in that case --

THE COURT: Let me ask you this question.

MR. BRADFORD: -- and the receiver is satisfied with production obviously.

THE COURT: Let me ask you this question. What in the course of these depositions as you found out that there are documents that Mr. Gunlicks had

that Mayer Brown didn't have and they're Mayer Brown documents, they were authored by Mayer Brown personnel, what about the depositions of those people from Mayer Brown then?

MR. BRADFORD: That would be between the receiver and Mayer Brown. The receiver knows what has been produced to the receiver. The receiver hasn't asked the Florida Court for anything further from Mayer Brown. And if the receiver wants to reopen a deposition in the Florida litigation over which this Court has no jurisdiction, it's a Florida deposition, then of course they're free to do that and we would expect that that would be worked out with the receiver.

But he's not a party to our underlying litigation. The only reason he's before your Honor is we sought to take his deposition as a third-party witness. He already sued Mayer Brown and lost. This whole issue came up in his lawsuit that went up to the Illinois Appellate Court and he lost already on his case. So all that discovery was dealt with in his case, this whole statutory file thing was dealt with in his case. He's now trying to interject himself into litigation in Florida in which Ernst & Young is a

EXHIBIT 18

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

DANIEL S. NEWMAN, as RECEIVER for 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., Plaintiffs, v. ERNST & YOUNG, LLP, a Delaware Limited Liability Partnership, and MAYER BROWN LLP, and Illinois Limited Liability Partnership, Defendants.	No. 2017-L-009824 Judge James N. O'Hara Calendar "A"

DECLARATION OF LAUREN R. NOLL IN SUPPORT OF MAYER BROWN'S RESPONSE TO WILLIAM L. GUNLICKS'S 735 ILCS 5/8-2005 REQUEST FOR DOCUMENTS

I, Lauren R. Noll, declare:

1. I am a partner at Mayer Brown LLP ("Mayer Brown"), one of the defendants in *Daniel S. Newman v. Ernst & Young, LLP and Mayer Brown LLP*, Case No. 10-49061 (Broward County Cir. Ct., 17th Judicial Cir.) (the "Florida Litigation"). As part of my responsibilities at Mayer Brown, I advise Mayer Brown on claims brought against Mayer Brown, including the Florida Litigation, along with Mayer Brown's outside counsel, Jenner & Block LLP ("Jenner & Block") and Haliczer, Pettis & Schwamm, P.A. This Declaration is based on my personal knowledge, or based on my review of the materials, attached hereto, that are associated with discovery in the Florida Litigation.

2. I am aware that, in October 2018, Mr. Gunlicks, though his counsel, William Delaney, made a request, through Jenner & Block, that Mayer Brown produce records pursuant to 735 ILCS 5/8-2005, concerning Mayer Brown's joint representation of Founding Partners Capital Management Company ("FPCM") and Mr. Gunlicks (the former CEO of FPCM), or a representation by Mayer Brown of Mr. Gunlicks individually in relation to his role at FPCM. As described further below, Mayer Brown has made two productions to Mr. Gunlicks, through his counsel, in response to this request. After following the search protocols that are described more fully below, Mayer Brown is not aware of any additional, non-privileged documents in its possession, control, or custody that are reasonably accessible to it and that would be subject to production in response to Mr. Gunlicks' request.

3. Mayer Brown has recently learned that Mr. Gunlicks may have in his possession or control documents related to his former role at FPCM that Mr. Gunlicks has not provided to Mayer Brown. Without seeing the documents, Mayer Brown cannot determine whether it ever had possession of these documents, or if they are included within the productions already provided to Mr. Gunlicks. Mayer Brown has been seeking documents from Mr. Gunlicks by subpoena in this Court or pursuant to a Wisconsin subpoena since June 2018.

4. Mr. Gunlicks, jointly with FPCM, retained Mayer Brown to provide certain services pursuant to a January 5, 2004 engagement letter. Although Mayer Brown represented FPCM before that date, Mayer Brown does not believe that those representations included Mr. Gunlicks, personally, as a client. Mayer Brown also represented FPCM on other matters after the January 5, 2004 engagement letter, but with the exception of a very limited time period in early 2009, Mayer Brown does not believe that those representations included Mr. Gunlicks, personally, as a client. As a result, documents related to Mayer Brown's representation of Mr. Gunlicks

pursuant to the January 5, 2004 engagement letter and in early 2009 overlap with and are generally the same as the documents related to Mayer Brown's representation of FPCM pursuant to that same engagement letter and in the 2009 time period. As discussed below, Mayer Brown made reasonable efforts to search for and produce responsive non-privileged documents related to its representation of FPCM in connection with the Florida Litigation and has now produced those same documents, as well as additional documents, to Mr. Gunlicks, as described below.

5. Based on my review of the discovery correspondence in the Florida Litigation that is attached hereto, on February 12, 2015, the plaintiff in that case, Daniel S. Newman, in his capacity as Receiver for four investment funds (the "Receiver"), served Mayer Brown with his first request for production of documents ("Receiver's Request"). The Receiver's Request is attached as Exhibit A. The Receiver's Request called for the production of, among other things, documents related to Mayer Brown's prior representation of FPCM and documents that referenced Mr. Gunlicks.

6. Mayer Brown, through its counsel at Jenner & Block, made reasonable efforts to search for and collect documents that were potentially responsive to the Receiver's Request, using the process and searches described in letters sent by Jenner & Block to the Receiver's counsel on December 8, 2016, January 30, 2017, and March 8, 2017. The letters are attached hereto as Exhibit B. I understand from my review of this discovery correspondence that the Receiver did not object to the use of the process or searches described in Exhibit B and asked for only one addition to those searches, which did not identify any additional documents. The process and searches described in Exhibit B would have identified the documents in Mayer Brown's possession that were responsive to Mr. Gunlicks's Section 5/8-2005 request, along with additional documents that

are above and beyond what an attorney or law firm is required to produce in response to a request under Section 5/8-2005.

7. On March 13, 2017, Mayer Brown responded to the Receiver's Request in the Florida Litigation. A copy of Mayer Brown's response to the Receiver's Request is attached hereto as Exhibit C. Mayer Brown thereafter produced to the Receiver all non-privileged documents in its possession or control that (a) were responsive to the Receiver's Request (subject to Mayer Brown's written objections as set forth in Exhibit C), and (b) were identified after following the search and review processes described in the letters attached as Exhibit B. Mayer Brown also produced privilege logs to the Receiver on August 8 and September 12, 2017. The privilege logs described documents that Mayer Brown withheld from production to the Receiver on the basis of privilege.

8. In 2018, Mayer Brown revisited certain of its document collection and production efforts and made an additional production to the Receiver in the Florida Litigation on August 28, 2018. The efforts that resulted in that production are described in the cover letter that accompanied that production and an interrogatory response that Mayer Brown issued on November 14, 2018. The August 28, 2018 letter and the interrogatory response are attached as Exhibit D.

9. On November 8, 2018, Mayer Brown turned over to Mr. Gunlicks, through Mr. Delaney, copies of all documents that Mayer Brown had previously produced to the Receiver in response to the Receiver's Request in the Florida Litigation. A copy of the letter that accompanied that production to Mr. Gunlicks, care of Mr. Delaney, is attached as Exhibit E. Mayer Brown understands that the Receiver had previously produced these same materials to Mr. Gunlicks shortly after October 23, 2018. Mayer Brown's production to Mr. Gunlicks, care of Mr. Delaney,

included work product that an attorney or law firm is not required to produce in response to a Section 5/8-2005 request.

10. Separately, on October 30, 2018, Mayer Brown tendered to Mr. Gunlicks, through Mr. Delaney, additional documents that either were withheld from production to the Receiver or produced only in redacted form to the Receiver. The basis for withholding or the redaction in the production to the Receiver was the fact that the contents of those documents included communications that related solely to a non-Mayer Brown attorney's representation of Mr. Gunlicks individually. A copy of the letter that accompanied the October 30 production to Mr. Gunlicks, through his counsel, is attached as Exhibit F. In making the production to Mr. Gunlicks, care of his counsel, Mayer Brown removed the redactions related to a non-Mayer Brown attorney's representation of Mr. Gunlicks individually, but continued to redact language reflected legal advice being sought by Mayer Brown attorneys on behalf of Mayer Brown or those individual attorneys. Mayer Brown produced this set of documents to Mr. Gunlicks, care of Mr. Delaney, in response to Mr. Gunlicks' Section 5/8-2005 request, even though such documents also included work product that an attorney or law firm is not required to produce in response to a Section 5/8-2005 request. In addition, Mayer Brown is continuing to review the privilege log that accompanied its productions in the Florida Litigation. In the event Mayer Brown determines that any documents identified on that log are not subject to privilege as to Mr. Gunlicks, Mayer Brown intends to produce such documents to Mr. Gunlicks, even if such documents consist of work product that an attorney or law firm is not required to produce under section 5/8-2005.

11. Mayer Brown does not believe that Mr. Gunlicks has complied with Section 5/8-2005. However, Mayer Brown has made the productions described in paragraphs 9 and 10 to Mr.

Gunlicks, care of Mr. Delaney, and complied with any obligations it would have under Section 5/8-2005 as if Mr. Gunlicks had complied with Section 5/8-2005.

I declare under the penalty of perjury under the laws of the State of Illinois that the foregoing is true and correct.

Dated this 20th day of November 2018.

By: _____

Lauren R. Noll
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
Telephone: (312) 782-0600
Fax: (312) 701-7711

EXHIBIT 19

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

DANIEL S. NEWMAN, as RECEIVER for 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.,

Plaintiffs,

-vs-) No. 17 L 009824

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

Defendants.

REPORT OF PROCEEDINGS at the hearing of the above-entitled cause before the Honorable James N. O'Hara, Judge of said Court, taken before Liza M. Perez, CSR within and for the County of Cook and State of Illinois, at the Daley Center, Room 2206, Chicago, Illinois, at 10:00 a.m. on the 26th day of November, 2018, A.D.

going on in this nine-year pending case, all of which documents now have been produced to Mr. Delaney.

THE COURT: Okay. Well, how about who's going to just give a simple affidavit that all the documents have been produced?

MR. SCHAR: We believe --

MR. BRADFORD: That's what this affidavit is.

MR. SCHAR: -- that's what this affidavit is.

THE COURT: So this six pages it takes that long to say that?

MR. DELANEY: Your Honor, in fact, it doesn't say that. What it says is --

THE COURT: Well, you have a motion to strike.

MR. DELANEY: Yeah.

MR. BRADFORD: And we'd like to respond.

THE COURT: Well, respond to it. We'll take care of it. We'll address it.

MR. DELANEY: So if we could set the time schedule contemporaneous so that we brief -- what we requested in the break the Court suggested we take was we give them ten days to respond, we'll take five. And the Court has now set a 21-day date; we can enter and continue everything for that 21-day date.

In the document they've produced, they have 27 general objections and 200 singular objections. So we're back to this issue of --

THE COURT: No. We're back to -- then that's just going to be -- it's going to be simple. It's going to be a certificate of completeness.

MR. DELANEY: Okay. And then, your Honor, drafted jointly by the parties so we don't have this back and forth to waste the Court's time?

THE COURT: Oh, that yours and his are the same?

MR. SCHAR: Your Honor --

THE COURT: It's a pretty simple certificate of completeness.

MR. SCHAR: I understand, your Honor. Just to make two points.

One is that he's asking for documents pursuant to a statute, not pursuant to discovery, and there's no certificate of completeness required. Mayer Brown represented this client for a period of over ten years.

THE COURT: I know. And 150 attorneys worked on the clock. What they didn't work out -- did not work at it and charge for things and not look at the

documents. They have to be somewhere. And you're going to do a certificate of completeness. It's going to be a simple -- it's going to be one or two pages at most.

MR. BRADFORD: We'll draft something up, your Honor.

MR. DELANEY: And your Honor, could we have that expedited briefing schedule? Ten days to reply, five days to respond?

THE COURT: No. I'm going to give them the time, and then after that we'll do expedited. We'll get it done once we get past this.

What else?

MR. DELANEY: So what briefing schedule would your Honor like on that?

MR. BRADFORD: We would like till December 17 to respond to all pending motions and the counterclaimants.

THE COURT: Over your objection, this time I'm going to give it to them.

MR. DELANEY: Understood.

THE COURT: And then work out what responses you need to get in.

MR. DELANEY: And then for -- and let me

EXHIBIT 20

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

DANIEL S. NEWMAN, as RECEIVER for 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.,	No. 2017-L-009824
Plaintiffs,	Judge James N. O'Hara
v.	Calendar "A"
ERNST & YOUNG, LLP, a Delaware Limited Liability Partnership, and MAYER BROWN LLP, and Illinois Limited Liability Partnership,	
Defendants.	

MAYER BROWN'S AFFIDAVIT OF COMPLETENESS IN RESPONSE TO WILLIAM L. GUNLICKS'S 735 ILCS 5/8-2005 REQUEST FOR DOCUMENTS

I, Lauren R. Noll, declare:

1. I am a partner at Mayer Brown LLP ("Mayer Brown"), one of the defendants in *Daniel S. Newman v. Ernst & Young, LLP and Mayer Brown LLP*, Case No. 10-49061 (Broward County Cir. Ct., 17th Judicial Cir.) (the "Florida Litigation"). As part of my responsibilities at Mayer Brown, I advise Mayer Brown on claims brought against Mayer Brown, including the Florida Litigation. This affidavit is based on my personal knowledge and on my review of certain materials associated with discovery in the Florida Litigation.

2. I am aware that, in October 2018, Mr. Gunlicks made a request that Mayer Brown produce records pursuant to 735 ILCS 5/8-2005, concerning Mayer Brown's joint representation of Founding Partners Capital Management Company ("FPCM") and Mr. Gunlicks (the former

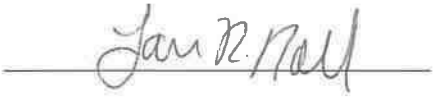
CEO of FPCM), or a representation by Mayer Brown of Mr. Gunlicks individually in relation to his role at FPCM.

3. Without conceding that Gunlicks has made a proper request under 735 ILCS 5/8-2005, Mayer Brown has conducted a reasonable search for documents that would be responsive to a 735 ILCS 5/8-2005 request as described in paragraph 2 above, and, in addition to other documents, produced them to Mr. Gunlicks' counsel. Mayer Brown is not aware of any additional, non-privileged documents in its possession, control, or custody that are reasonably accessible to it and that would be subject to production in response to Mr. Gunlicks' request.

4. Accordingly, Mayer Brown certifies that its production is complete consistent with its obligations to produce records pursuant to a 735 ILCS 5/8-2005 request in the form described in paragraph 2 above.

I declare under the penalty of perjury under the laws of the State of Illinois that the foregoing is true and correct.

Dated this 17th day of December 2018.

By: 

Lauren R. Noll
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
Telephone: (312) 782-0600
Fax: (312) 701-7711

EXHIBIT 21

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,	)	No. 10-49061
v.	)	Honorable John J. Murphy III
ERNST & YOUNG, LLP, a Delaware Limited Liability Partnership; and MAYER BROWN LLP, an Illinois Limited Liability Partnership,	)	
Defendants.	)	

AFFIDAVIT OF LAUREN R. NOLL REGARDING THE PRODUCTION OF DOCUMENTS TO WILLIAM L. GUNLICKS IN RESPONSE TO HIS REQUEST FOR A CLAIMED "PERSONAL FILE"

I, Lauren R. Noll, being sworn, certify that the following statements are true:

1. I am a partner at Mayer Brown LLP ("Mayer Brown"), one of the defendants in this matter. As part of my responsibilities at Mayer Brown, I advise Mayer Brown on claims brought against Mayer Brown, including this lawsuit, along with Mayer Brown's outside counsel, Jenner & Block LLP ("Jenner & Block") and Haliczer, Pettis & Schwamm, P.A. The facts in this affidavit are based on my personal knowledge, the review by others at my direction of certain documents and business records maintained by Mayer Brown, or my review of the attached materials that are associated with discovery in this matter.

2. This affidavit is submitted pursuant to the proceedings that took place in this Court on January 8, 2019, requiring Mayer Brown to submit an affidavit addressing the issue of the

production of documents to William L. Gunlicks in response to his request, purportedly pursuant to an Illinois statute, for a claimed "personal file" from Mayer Brown. I have given two prior affidavits on this issue, both of which were previously filed in Illinois state court. These two affidavits, dated November 20, 2018 and December 17, 2018, are attached as Exhibit 1. I submit this affidavit to provide additional details with respect to the facts set forth in those affidavits, and I continue to affirm the truth of the statements in those affidavits.

3. As described in this affidavit and in my prior affidavits attached as Exhibit 1 (exhibits to those affidavits omitted), Mayer Brown's records indicate that it represented Mr. Gunlicks on narrow subject matters for limited periods of time during which it also represented Founding Partners Capital Management Company ("FPCM"), of which he was then CEO. I will refer to Mayer Brown's concurrent representation of FPCM and Mr. Gunlicks during that limited period and on limited subject matters as the "Concurrent FPCM/Gunlicks Representation," though Mayer Brown's records indicate that it represented FPCM—but not Mr. Gunlicks—on additional matters during that same period of time.

4. Mayer Brown's records also reflect a separate individual representation of Mr. Gunlicks and his wife, Pamela Gunlicks, as part of certain real estate and estate planning services offered to executives of Continental Bank. Specifically, Mayer Brown identified: (1) a real estate matter concerning the purchase of a residence, which was opened on December 19, 1978, with last time recorded for that matter on December 19, 1978; (2) a real estate matter concerning the sale of a residence, which was opened sometime in 1979, with the last time recorded for that matter on January 1, 1982, and (3) a matter for drafting wills, which was opened sometime in 1969 with the last time recorded for that matter on December 7, 1987. These matters do not appear to be within the scope of the requests made by Mr. Gunlicks for his "personal file" and do not appear related

to the litigation the Receiver has brought against Mayer Brown. Mayer Brown has made efforts to search for records maintained in relation to each of these three matters. Mayer Brown has located copies of wills for Mr. Gunlicks and his wife. Mr. Gunlicks's will is in the process of being produced to him. Mayer Brown will produce a copy of the will to the Receiver upon an appropriate waiver from Mr. Gunlicks.

5. Also as described further below, Mayer Brown's records do not indicate that Mayer Brown provided a sole and individual attorney-client representation to Mr. Gunlicks in relation to his role at FPCM at any time between 1999 and 2009. As a consequence, Mayer Brown did not distinguish between FPCM and Mr. Gunlicks in maintaining records related to the Concurrent FPCM/Gunlicks Representation and did not create any distinct "personal file" solely for Mr. Gunlicks' portion of the Concurrent FPCM/Gunlicks Representation.

6. For the reasons set forth in this affidavit, and after undertaking the search and production efforts detailed below and in the attachments to this affidavit, Mayer Brown is unaware of any non-privileged documents in its possession, control, or custody that are reasonably accessible to it, that have not been produced to Mr. Gunlicks, and that comprise files maintained by Mayer Brown in connection with the Concurrent FPCM/Gunlicks Representation.

Overview of Mayer Brown's Efforts to Search Its Files Related to Founding Partners

7. In connection with this litigation, Mayer Brown took a number of steps in an effort to identify documents in its possession, control, or custody that related to its representation of FPCM or referenced Mr. Gunlicks and that otherwise were responsive to the Receiver's requests for production issued in this litigation. That effort covered the period and subject matters of the Concurrent FPCM/Gunlicks Representation, as well as the periods and subject matters in which Mayer Brown represented only FPCM and not Mr. Gunlicks.

8. The steps taken to identify such documents were described in detail and disclosed to the Receiver's counsel in letters sent by Jenner & Block to the Receiver's counsel on December 8, 2016, January 30, 2017, and March 8, 2017. Among other things, email files maintained by 87 of the Mayer Brown attorneys or employees who billed time to a Founding Partners matter number were collected and then searched according to a protocol disclosed to the Receiver. Other forms of electronically stored data and hard-copy documents were also collected and searched, again as described in detail by Jenner & Block to the Receiver's counsel. The letters outlining Mayer Brown's efforts are attached as Exhibit 2. I understand from my review of this discovery correspondence that the Receiver did not object to the use of the process or searches described in Exhibit 2 and, in response to Mayer Brown's disclosures, asked for only one addition to those searches, which did not identify any additional documents. I also understand from my review of this discovery correspondence that the Receiver did not ask Mayer Brown to search files related to additional custodians, or to search files associated with other matter numbers not associated with FPCM. *See* Exhibit 2, March 8, 2017 letter.

9. In the spring and summer of 2018, and after receiving discovery inquiries on document matters from the Receiver, Mayer Brown made additional efforts to locate documents potentially concerning the subject matter of the FPCM representation or the Concurrent Gunlicks/FPCM Representation. Among other things, at my direction, and in coordination with Mayer Brown's outside counsel at Jenner & Block, Mayer Brown took the step of revisiting previously unsuccessful attempts to restore backup tapes that could have contained email related to Mayer Brown lawyers James Dwyer and Thomas Mueller, each of whom had left the firm years before the Receiver was appointed in April 2009. These additional efforts in 2018 resulted in the restoration of Mr. Dwyer's and Mr. Mueller's email, as it existed on Mayer Brown's servers, at

the time of their respective departures from Mayer Brown. Thereafter, Mayer Brown made an additional production to the Receiver on August 28, 2018, consisting of (a) emails that were identified from the restored Dwyer and Mueller email files by following the same protocols described in the correspondence with the Receiver on December 8, 2016, January 30, 2017, and March 8, 2017, along with (b) additional documents that Mayer Brown identified as part of its follow up in response to the Receiver's discovery inquiries. The efforts that resulted in that production are described in the cover letter that accompanied that production and an interrogatory response that Mayer Brown issued on November 14, 2018. The August 28, 2018 letter and the interrogatory response are attached as Exhibit 3.

10. Through the efforts described in paragraphs 8 and 9, Mayer Brown identified and produced 62,884 documents to the Receiver, consisting of 695,602 pages and additional native files for which page counts are not available. That production included documents concerning the periods and subject matters of the Concurrent FPCM/Gunlicks Representation, as well as the periods and matters in which Mayer Brown represented only FPCM and not Mr. Gunlicks.

11. Mayer Brown has produced these same documents to Mr. Gunlicks, with one addition. On October 30, 2018, Mayer Brown tendered to Mr. Gunlicks, through his counsel William Delaney, 137 pages of additional documents that Mayer Brown either withheld from production to the Receiver or produced only in redacted form to the Receiver, because the documents reflected a different law firm's representation of Mr. Gunlicks after the receivership was created. A copy of the letter that accompanied the October 30 production to Mr. Gunlicks, through his counsel, is attached as Exhibit 4. Including this set of documents, Mayer Brown has produced a total of 695,739 pages of documents to Mr. Gunlicks. During Mr. Gunlicks' partial deposition, counsel for Mr. Gunlicks marked 34 of the 137 pages that Mayer Brown produced to

Mr. Gunlicks on October 30, so these additional 34 pages are now also in the Receiver's possession. Mayer Brown will provide the remaining 103 pages of documents to the Receiver if Mr. Gunlicks consents to the same or the Court determines Mayer Brown is authorized to do so.

Detail Regarding Mayer Brown's Search Efforts

12. Mayer Brown performed a search for hard-copy and electronic documents related to its representation of FPCM as described in the letters attached as Exhibit 2. That search encompassed both the limited periods and subject matters of the Concurrent FPCM/Gunlicks Representation, and the additional periods and subject matters in which Mayer Brown represented only FPCM.

13. Mayer Brown also has taken additional steps to confirm that it does not possess any separate files related to a representation of Mr. Gunlicks in connection with his role with FPCM. These efforts include the matters discussed in the following paragraphs 14 through 20.

Engagement Letters.

14. Mayer Brown provided legal services to FPCM pursuant to five engagement letters between Mayer Brown and FPCM. The 2000, 2001, and 2002 engagement letters state that Mayer Brown represents only FPCM. The fourth letter, from January 2004, identifies both FPCM and Mr. Gunlicks as Mayer Brown's clients. The fifth engagement letter, dated in February 2008, states that Mayer Brown is to provide legal services to FPCM, and does not identify Mr. Gunlicks as a client.

15. The subject matter for each representation is identified in each engagement letter. The 2004 engagement letter is limited to Mayer Brown representing both FPCM and Mr. Gunlicks in connection with a U.S. Securities & Exchange Commission ("SEC") investigation. This engagement letter is dated after the date of a "Wells Notice" in which the SEC staff informed Mr.

Gunlicks that they intended to recommend to the SEC that the SEC take legal action against Mr. Gunlicks and FPCM. Mayer Brown also acknowledges that in early 2009, it briefly represented Mr. Gunlicks (and FPCM) in connection with the SEC's second investigation into FPCM, but that representation of Mr. Gunlicks was narrow, brief, and transitioned to counsel at a different law firm, Carlton Fields.

16. Mayer Brown's Business Intake and Conflicts Department (or "BI/C" as it is often referred to) tracks client engagement letters. At my direction, BI/C has searched for and confirmed that it does not maintain a copy of any Mayer Brown engagement letter in which Mr. Gunlicks is identified as Mayer Brown's sole and individual client in relation to his role at FPCM.

New Matter Memoranda.

17. It is, and for some time has been, Mayer Brown's practice to create a memorandum to document the details of matters when they are opened. These are called "new matter memoranda." A new matter memorandum identifies, among other information, the name of the client, a description of the matter, and the unique matter number assigned to that particular engagement. At my direction, relevant personnel within Mayer Brown have performed a search for and have confirmed that Mayer Brown does not possess a new matter memorandum identifying Mr. Gunlicks as Mayer Brown's sole and individual client at any point between 1999 and 2009.

Matter Database.

18. Mayer Brown maintains a database in which it tracks its matter numbers and the associated client and matter information. The specific client's or clients' names are associated with each matter number. This database contains client and matter information beginning no later than 1969. At my direction, relevant personnel within Mayer Brown have checked this database and confirmed that it does not contain a matter number where Mr. Gunlicks is identified as Mayer

Brown's sole and individual client in relation to his role at FPCM at any point between 1999 and 2009.

Documents Stored By Matter Numbers.

19. Mayer Brown uses iManage, a document management solution, to store electronic documents. Documents are generally organized in iManage by matter number. iManage contains documents dating back many years, including documents that were maintained on Mayer Brown's prior document management system and transferred over to iManage when that system was implemented. Because there is no matter number in Mayer Brown's system where Mr. Gunlicks is identified as Mayer Brown's sole and individual client in relation to his role at FPCM, Mayer Brown has not identified a matter number to use to query the iManage system in an attempt to identify electronic documents related to such a purported representation. As part of its document collection efforts in this case, Mayer Brown has performed various other queries of the iManage system, as described in the letters attached as Exhibit 2.

20. Mayer Brown maintains offsite file storage for archived hard-copy documents associated with matter numbers. Documents are organized in the offsite storage facilities by matter number, and the facilities contain archived hard copy materials dating back many years. Because there is no matter number where Mr. Gunlicks is identified as Mayer Brown's sole and individual client in relation to his role at FPCM, Mayer Brown has not identified a matter number to use to query indices associated with the offsite hard-copy documents related to such a purported representation.

Mayer Brown's Production Efforts

21. As described above, Mayer Brown's production efforts in this litigation have resulted in the production, to date, of 695,602 pages of documents to the Receiver in this litigation.

22. Mayer Brown also produced privilege logs to the Receiver on August 8 and September 12, 2017. The privilege logs described documents that Mayer Brown withheld from production to the Receiver on the basis of a privilege held by Mayer Brown. As communicated to the Receiver, Mayer Brown did not include in its privilege log documents regarding the subject matter of the Receiver's actual or threatened claims that were dated or compiled after the prior Receiver requested a tolling agreement from Mayer Brown on May 20, 2009. *See* Exhibit 5, at ¶ 11 and Exhibit 6, June 20, 2017 Letter.

23. The 695,602 pages of documents, described above, that Mayer Brown has produced to the Receiver in this litigation encompass all non-privileged documents in its possession or control that (a) were responsive to the Receiver's requests for production issued in this litigation (subject to Mayer Brown's written objections as set forth in Exhibit 5), and (b) were identified after following the search and review processes described in the letters attached as Exhibit 2.

I declare under penalty of perjury under the laws of the State of Florida that the foregoing is true and correct.

Dated this 15th day of January 2019.

By: _____

Lauren R. Noll
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
Telephone: (312) 782-0600
Fax: (312) 701-7711

EXHIBIT 22

IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA
CASE NO.: 10-49061

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,

Plaintiffs,

vs.

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

Defendants.

Fort Lauderdale, Florida
Tuesday - February 11, 2020
10:05 A.M. - 11:55 A.M.

The above-styled case came on for hearing before The Honorable Jack Tuter, presiding Judge, at the Broward County Courthouse, Fort Lauderdale, Florida on the 11th day of February, 2020.

MR. GROSSMAN: I would hope -- I would hope we have it, we all have it.

THE COURT: So, you just want at the end of the day a level playing field that everything's been produced, that's what can be asked about at the deposition and nothing else and, if any other production, so to speak, comes up later, someone's going to have to do some explaining as to how that occurred.

MR. GROSSMAN: I think that's what we need.

THE COURT: Anything else?

MR. GROSSMAN: No, sir.

THE COURT: Thank you.

Gene, what do you guys say?

MR. PETTIS: Yes, judge.

A lot of issues have come up and I appreciate you allowing us to --

THE COURT: And I don't usually hear for an hour and-a-half.

MR. PETTIS: I understand, Judge, but some points have been made here that are just not accurate.

First of all, this is our motion to take the deposition. It's not a motion to compel

THE COURT: Ma'am, I'm not asking you to do any further search. That's not what's before me.

I'm trying to get some kind of satisfaction that I can put in an order that Mayer Brown is going to represent that the Gunlicks file has been completely produced to the best of their information and there are no other client files accessible to you that would be subject to production for this gentleman so he can sit for his deposition.

MS. OTTERBERG: I think, Judge, I think the answer to that is, yes, based on reasonably accessible, what we know about --

THE COURT: Don't give me modifiers. Don't give me modifiers.

MS. OTTERBERG: 'm trying to --

THE COURT: Just say yes. Straight answer, yes, Judge, we can live with that.

MS. OTTERBERG: The answer is yes, we can live with that.

THE COURT: All right. Very good.

Thank you.

MR. PETTIS: Judge, there was one other issue, if you have five minutes. The only

EXHIBIT 23

April A. Otterberg
Tel +1 312 840 8646
Fax +1 312 840 8746
AOtterberg@jenner.com

May 27, 2020

BY EMAIL & SECURE FILE TRANSFER

Mark S. O'Connor
BEUS GILBERT PLLC
701 North 44th Street
Phoenix, Arizona 85008

Adrienne Van Winkle
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005

William Delaney
DELANEY LAW
444 N. Wabash Ave.
Third Floor
Chicago, IL 60611

Re: *Newman v. Mayer Brown LLP*
(Broward County Circuit Court, 17th Judicial Circuit, Case No. 10-49061)

Dear Counsel:

With this letter, we are sending you a .ZIP file containing documents being produced by Mayer Brown, bearing production numbers MB 00720462 to MB 00722159. In addition, certain other documents, as identified below, were included in prior productions but are being re-produced at their original Bates numbers, with fewer or no redactions compared to their previously-produced versions. We are also enclosing an updated privilege log as Exhibit A to this letter. The updated privilege log is discussed further below.

The documents being produced by Mayer Brown in this supplemental production are those identified after Mayer Brown undertook the extraordinary effort of re-assessing, now, the population of documents that were reviewed for this matter in 2017 and determined to be not responsive to the discovery requests then pending from the Receiver. Mayer Brown was not required to undertake this re-review effort, and it did so only because the Receiver and Mr. Delaney have continued to challenge the reasonableness of Mayer Brown's document production, notwithstanding Judge Tuter's orders accepting Mayer Brown's representations with respect to its document production efforts and his direction that the Gunlicks deposition should proceed. We want to put to rest these unfounded and continued excuses for not proceeding with the Gunlicks deposition.

Our re-review and today's production reflect that Mayer Brown's document production efforts were, in 2017 and at all times since then, reasonable, appropriate, and transparent. Mayer Brown

is producing 325 documents today, which represents *less than one-third of one percent* of the total number of documents that Mayer Brown reviewed in 2017 for potential production in this case. We do not believe that any of these documents have any substantive significance to the case. Moreover, a sizeable volume of the 325 documents were identified for production now, and not earlier, only because our extensive review at this time identified certain technical or related issues that caused these documents not to have been produced earlier. Other documents being produced today were not produced in 2017 because the face of such documents did not indicate any apparent connection to Founding Partners matters. These issues, discussed more fully below, are not unlike the "miscommunication and resulting coding errors" that led the Receiver to produce 153 additional documents to Mayer Brown only in February 2020, rather than earlier. (*See* Feb. 26, 2020 Ltr. from L. Dobson.) As also explained below, a number of the documents that are now being produced in this supplemental production are merely different versions or slightly different copies of documents that were previously produced by Mayer Brown or the Receiver himself.

That Mayer Brown has identified these issues and has produced these documents now further demonstrates that Mayer Brown has made—both in 2017 and at all times since—"good faith, diligent, and reasonable efforts" to respond to the Receiver's discovery requests. 2016 Fla. Handbook on Civil Discovery Practice 83; *see, e.g., E.I. DuPont De Nemours & Co. v. Sidran*, 140 So. 3d 620, 627, 641 (Fla. 3d DCA 2014) (defendant's "diligent efforts" to "satisfy counsel's discovery requests" were sufficient even though the defendant could not "represent that no other documents existed or might exist").

As you know, we were transparent in 2017 about the process Mayer Brown followed to respond to the Receiver's document requests, and we were again transparent when the Receiver and Mr. Gunlicks first took issue with that process more than eighteen months after that effort was completed. We also were transparent as we made additional document collections and productions in the fall of 2019, in response to the Receiver's first-time-ever requests for production directed to the MasterFactor representation and additional new requests for production set forth in four separate sets of requests for production. Accordingly, below, we provide detail about this supplemental production.

I. Materials Included in the Production.

The materials in this production come from one of three sources: (a) the email and email families identified through applying the agreed-upon search terms, listed in my January 30, 2017 letter to Scot Stirling, to the email that was collected as described in our letter dated December 8, 2016 (the "2017 Email Review Population"); (b) documents saved to Mayer Brown's iManage system as described in our December 8, 2016 letter (the "Founding Partners iManage Population"); and (c) documents stored in hard copy at Mayer Brown under a Founding Partners matter number or

by an individual Mayer Brown attorney or employee who billed time to a Founding Partners matter number (the "Founding Partners Hard Copy Population").

These three categories of materials comprise 98,556 documents ("the 2017 Review Population"), omitting 124 documents that were inadvertently excluded from our 2017 review due to an error by Mayer Brown's e-discovery vendor, as discussed in Section I.A below.[1] Of the documents in the 2017 Review Population, a total of 62,688 (over 63%) were produced in 2017, 2018, or 2019, accounted for on Mayer Brown's December 20, 2019 privilege log, or described in prior correspondence in which Mayer Brown provided information about the document in connection with a clawback request or a production. Our recent review efforts concerned the remaining 35,868 documents from the 2017 Review Population that, before today's production, remained unproduced as not responsive or were not discussed in correspondence or listed on the privilege log.[2]

A. Emails and Email Families Inadvertently Not Reviewed in 2017.

Sixty-one of the documents being produced today are email and the attachments to those emails (together called "email families"), where at least one member of the email family hit on one of the following search strings and no other search string set forth in my January 30, 2017 letter:

- Sun Capital Credit Agreement
- Sun Capital /2 Transaction
- ("Sun Capital" OR "Sun Bankruptcy") AND (TRO or "restraining order").

There are a total of 124 documents in the 2017 Email Review Population where at least one member of an email family hit on one or more of these three search strings, and no other search string. Mayer Brown's e-discovery vendor inadvertently did not include these 124 documents in the 2017 Review Population. We did not know that these documents had not been reviewed in

[1] As we have noted in prior correspondence, Mayer Brown's 2017 Review Population included certain hard-copy documents that were not unitized correctly at the time of the 2017 review process—*i.e.*, pages in a single document were incorrectly split into multiple documents in our review database, or multiple documents were incorrectly grouped together as a single document in the database. Because many instances of improper unitization have since been corrected, the specific current document counts for the "2017 Review Population" vary slightly from what they would have been in 2017. Nevertheless, the unproduced population assessed for this re-review is substantively identical to what it was in 2017.

[2] This population has sometimes been referred to as the "37,000 documents," but that figure is incorrect. That "37,000" figure appears to be one that counsel for the Receiver and for Mr. Gunlicks identified based on approximate review and production numbers that I provided to the court at a February 2019 hearing in Broward County. (*See* Feb. 20, 2019 Broward Cnty. Hr'g Tr. 85:9-18.)

2017 until undertaking this recent re-review process. As a result of this issue, these documents were not reviewed in 2017 and therefore were not considered for production in 2017.

Sixty-one of these emails and email families are responsive to the Receiver's discovery requests and are being produced today. These 61 documents constitute nearly 20 percent of the documents being produced today. Forty-eight of these documents are versions of the same or similar email chains in which various persons discuss the language for a proposed revised TRO in the *Annandale* litigation in the spring of 2009. The other 13 documents from this population that are being produced today are partially duplicative of each other and either are not substantive or concern Founding Partners work not at issue in this litigation.

Mayer Brown is not producing 63 documents from this population of 124 documents not reviewed in 2017. Nineteen of these documents "hit" on one or more of the three search strings noted above but were determined to be false positives that did not concern the Founding Partners representation. The remaining 44 documents were pulled into the review population only because they are merely family members of those 19 documents; these family members did not hit on any search terms or search strings set forth in my January 30, 2017 letter.

B. iManage Documents.

Forty-one documents being produced today come from the Founding Partners iManage Population.[3] Most of these documents do not expressly refer to Founding Partners or any person or party relevant to this matter, and their potential relevance can be ascertained only by assessing other documents or information in the case. For example, there are snippets of legal briefs or draft agreements that nowhere reference Founding Partners (and that relate to briefs or agreements that were produced long ago). Other documents in this set of materials are generally administrative in nature, such as file listings or cover sheets, and others are duplicative in substance with other materials previously produced in a different form.

C. Hard-Copy Documents.

The production includes 28 documents that come from the Founding Partners Hard Copy Population. We learned that, in several instances, documents had not been unitized appropriately prior to scanning, which meant that pages were incorrectly separated from other pages, including pages that could have revealed a connection to Founding Partners. We undertook significant effort to identify, assess, and resolve these technical unitization issues for purposes of today's

[3] An additional document being produced today comes from iManage but was among the documents collected and reviewed in 2019 (in response to new requests for production and new developments in the case), as described in other correspondence. This document, which was withheld in full previously and logged on Mayer Brown's privilege log since November 2019, is now being produced with redactions as noted in Section I.D, below.

production. Among the documents with unitization issues are several Founding Partners invoices that we believe were sent by mail to the Receiver's counsel on or about September 29, 2009, enclosed with a letter that was produced in 2017 at MB 00160031. Mayer Brown previously produced several of the invoices that appear to have been enclosed with this letter at MB 00669441, MB 00669459, MB 00669511, and MB 00669546. As a result of identifying this unitization issue, and for the sake of completeness, Mayer Brown is now producing the remaining invoices that appear to have accompanied this letter at MB 00721387, MB 00721391, MB 00721395, and MB 00721405. These documents were not included with Mayer Brown's earlier productions because they are dated after the date cutoff of April 20, 2009 identified in Mayer Brown's March 13, 2017 Responses to the Receiver's First Requests for Production of Documents ("March 2017 RFP Responses"). Mayer Brown also is re-producing MB 00669546. This document was previously produced with a privilege redaction and included on Mayer Brown's privilege log. (It was also produced separately to the Receiver, without redactions, under the March 4, 2019 Agreed Order Governing the Use of Privileged Information (the "Non-Waiver Order").) The entry on the privilege log corresponding to this document (#423) has been removed from the enclosed updated privilege log, and the document is being re-produced in full under its original MB Bates number, MB 00669546. Mayer Brown is no longer asserting a privilege as to this document.

Today's production includes two documents from the Founding Partners Hard Copy Population that reflect the results of two conflict checks (MB 00721337 and MB 00721377). None of the Receiver's 2017 document requests specifically asked Mayer Brown to produce the results of conflict checks, and neither set of conflict check results being produced today references Founding Partners in any way. Mayer Brown is nonetheless producing these conflict check results because other case information, not apparent on either document's face, suggests the conflict checks were run in connection with Mayer Brown's Founding Partners work. These two documents contain redactions to protect the confidential information associated with other Mayer Brown clients or matters.

Also being produced from the Founding Partners Hard Copy Population is a new matter memorandum MB 00721410 for matter number 04371606, together with a few additional pages. This document is a very close duplicate to other versions of this new matter memorandum that Mayer Brown previously produced. Specifically, the new matter memorandum for this matter number was previously produced, without the second page of the memorandum, at MB 00697276. The second page was previously produced, without the signatures that appear on the version being produced today, at MB 00697232. Finally, the additional pages that accompany the new matter memorandum being produced today are included as part of the previously-produced MB 00697276. Those additional pages—in both the previously-produced MB 00697276 and today's MB 00721410—include one page of privileged email communications that have been redacted. Consistent with how the previously produced version was treated (*see* privilege log entry #404), the additional copy being produced today (MB 00721410) has been

added to Mayer Brown's privilege log, as new entry #699, and is being separately produced without redactions to the Receiver (and not to Ernst & Young or Mr. Gunlicks) under the Non-Waiver Order.[4]

Three documents being produced from the Founding Partners Hard Copy Population appear to be printouts of emails or portions of email families that were provided to Mayer Brown by Founding Partners in about March 2009, as part of the document production effort in the then-pending SEC matter (MB 00721443, MB 00721445, and MB 00721447). These materials have cover sheets that reference their collection from Founding Partners. The underlying emails and attachments originally came from Founding Partners' files and thus have already been produced by the Receiver. Specifically, the original, Founding Partners version of MB 00721447 was produced by the Receiver previously at FP_EDD_00923839. MB 00721445 is the attachment to the email previously produced by Mayer Brown at MB 00693208; the original Founding Partners versions of this email and its attachment were previously produced by the Receiver, twice, at FP_EDD_00169205 through -206 and FP_EDD_01090422 through -423. Similarly, MB 00721443 is the attachment to the email previously produced by Mayer Brown at MB 00193823. The original Founding Partners version of this email and attachment were previously produced by the Receiver at FP_EDD_00118313 through -316.

Other types of documents from the Founding Partners Hard Copy Population now being produced include documents that do not reference Founding Partners on their face but are believed to relate to Founding Partners based on other information, or documents that are not substantive, such as fax transmission forms, word processing forms, and file cover pages. Other hard-copy materials included in today's production are at least partially duplicative of materials found in various places in Mayer Brown's prior productions, such as MB 00721417, a January 3, 2002 fax involving UCC searches that was previously produced in May 2017, with additional folder cover pages, at MB 00059034.

Mayer Brown also is producing three hard-copy documents that were not part of the 2017 Founding Partners Hard Copy Population but instead come from a small set of hard-copy documents that was addressed in 2018, as described in Jason Bradford's August 28, 2018 letter. During our recent efforts to assess the 2017 Review Population, we learned for the first time that, in 2018, Mayer Brown's e-discovery vendor incorrectly loaded two of these hard-copy documents into our review database, with the result that the two documents were not made visible to Mayer Brown's counsel for review and therefore not previously considered for production. These two documents are now being produced at MB 00720462 and MB 00720463. One of these documents is a fax transmission confirmation sheet. The associated fax cover sheet was produced at MB 00691162 in August 2018. The other document, which is a September 12, 2007

[4] Mr. Gunlicks and his counsel have not yet responded to our request that they consent to this order, per our email dated March 4, 2020, so we are unable to produce these materials to Mr. Gunlicks.

letter from the SEC, also is not new to this case, as Mr. Gunlicks attached this letter to his Third Amended Complaint filed in 2012 Cook County, Illinois, against Mayer Brown. Obviously, both Mr. Gunlicks and the Receiver have had that complaint and its exhibits, including the September 12, 2007 letter, for a number of years. Moreover, that complaint and its exhibits appear in the document production in this case in numerous places. (*E.g.*, IND-MILL-01376, IND-MILL-01546, MTVRN_016090, MTVRN_016259, MTVRN_018812, MTVRN_018985, MTVRN_019158, and RCV-SEC-PLD-08177.) After we identified the technical error in loading this fax transmission confirmation page and the September 12, 2007 letter, we also decided also to assess any remaining unproduced documents that had been loaded in connection with the August 28, 2018 production. Through that effort, we identified one document that was inadvertently coded as nonresponsive, which is now being produced at MB 00720464.

D. Other Email and Email Families.

The remaining 191 documents in today's production are emails and their attachments from the 2017 Email Review Population. The 191 documents are internally very duplicative, as that figure includes multiple different versions of the same email chains.

A number of these emails are at least partially duplicative of documents previously produced by Mayer Brown or the Receiver. One example of that situation is MB 00721805 through -884, which is a December 5, 2002 email chain with attached materials related to Lincoln Hospital. The 79-page attachment was previously produced by Mayer Brown, with some minor differences such as an exhibit slip sheet, at MB 00173084 through -162. Other emails being produced today simply concern scheduling or logistical matters associated with Founding Partners work; another example is emails that merely note the receipt of a phone call without any other substance.

Some emails now being produced relate to Mayer Brown's representation of MasterFactor, Inc. Except for one document, the duplicative attachment to MB 00721885 discussed below, none of these documents mention Founding Partners or Mr. Gunlicks, and none are of any consequence to this case. These documents were not included in our 2019 MasterFactor search and production efforts (following the court order permitting MasterFactor discovery) because they do not contain the agreed-upon terms "MasterFactor" or "Master Factor," or, as to two email families discussed next, because of technical issues that prevented their inclusion in the 2019 MasterFactor production review. Specifically, the attachment to MB 00721774 is a Microsoft Word document with an embedded image of text. It has no actual text. Accordingly, while the image included the word "MasterFactor," this document does not have any extracted text that allowed this document to be searched, and therefore it was not included in our 2019 review. This attachment and its cover email, without the forwarded request to print, were produced previously at MB 00697586 and MB 00697587. Similarly, the attachment to MB 00721885 mentions MasterFactor on its face, but the optical character recognition for this attachment did not correctly recognize the characters in the image of the document. As a result, this document also was not included in our 2019 review

process. This attachment was previously produced at MB 00697455, and a more complete version of this email chain was previously produced at MB 00505077. Most of the other MasterFactor-related materials being produced today that do not contain the word "MasterFactor" also are at least partially, if not fully, duplicative of other documents that Mayer Brown produced in 2019.

Also among the email files being produced is MB 00721758, which is a June 25, 2003 email from someone named Frank Scroggins, directed to Marc Klyman. This email concerns a proposed representation of an entity called Healthcare Financial Resources, Inc. That entity never became a client of Mayer Brown. Particularly in light of Mayer Brown's objections to the Receiver's document requests (which have not been overruled), this document is not responsive to those requests and thus not subject to production in this litigation. Mayer Brown is producing this document, without waiving any of those objections or its broader objection to producing non-responsive documents, because this specific document relates to a topic that was raised at Mr. Klyman's deposition on April 16, 2019. During that deposition, Mr. Klyman discussed his recollection regarding a consultation that he had with Mayer Brown firm counsel Jim Gladden in relation to a potential representation that Mayer Brown did not accept. Along with the June 25, 2003 email, Mayer Brown is also producing, or producing with less information withheld, certain documents that previously appeared on Mayer Brown's privilege log. One is a memorandum that concerns the consultation with Mr. Gladden; this memorandum appears on Mayer Brown's privilege log as entry #676. That document, which was added to the privilege log in November 2019 once it was identified in connection with our 2019 review efforts, is being produced today in redacted form, whereas it was previously withheld entirely. Mayer Brown also is now removing from its privilege log and producing, in full, the documents that had been listed at log entry numbers 4, 5, 6, 12, 13, 14, 30, 31, 43, 391, 392, 393, 453, 487, and 488.[5] It had appeared that these communications concerned advice provided by Mr. Gladden, and they were originally placed on the privilege log for that reason. Further investigation suggests that the initial consultation with Mr. Gladden occurred after the date of most of these materials. As a result, these materials are now being produced. These changes to Mayer Brown's privilege log are among those listed in the chart found in Section I.E, below.

E. Redacted Documents & Privilege Log Updates.

Sixty-six documents of the 325 documents being produced today, some of which are described elsewhere in this letter, contain redactions.

[5] Ten of these documents were previously produced in redacted form and now are being produced in full under the same Bates numbers as the previously produced versions.

1. Privileged Documents.

Four of these 66 documents contain redactions for Mayer Brown's assertion of its own attorney-client privilege:

- One is a redacted version of log entry #676, which is addressed in Section I.D above and which was previously included on Mayer Brown's privilege log as a document withheld in its entirety.

- Another document, which is new log entry #698, is an email family that contains privileged communications in the email chain; it is being produced because its attachment includes a non-privileged responsive document that is being produced without redaction.

- New log entry #699 is addressed above in Section I.C; this document contains a privileged email exchange that is identical to that included with log entry #404.

- Finally, new log entry #700 contains portions of a privileged email exchange that is identical to log entry numbers #456 and #457.

Mayer Brown is separately producing less-redacted versions of log entry #699 and #700 to the Receiver only (and not to Ernst & Young or Mr. Gunlicks) under the Non-Waiver Order.

The enclosed privilege log contains the three new entries identified in this Section I.E, as well as the removal or modification of certain log entries as noted above in Sections I.C and I.D. We also have added a new column on the far right of the log, to identify the total number of pages withheld for each of the documents on the privilege log that have been withheld in full. Of course, for documents that have not been withheld in full, Mayer Brown has produced redacted versions that show the precise page count of these documents. Otherwise, the privilege log remains the same as the December 20, 2019 version.[6] This chart summarizes the updates to the privilege log (other than the new column addressing page counts):

[6] Our letter accompanying Mayer Brown's February 18, 2019 production and privilege log discussed certain documents in Mayer Brown's files that related to Carlton Fields's representation of Mr. Gunlicks after April 20, 2009. Based on productions of such materials made to Mr. Gunlicks (including as described in our November 21, 2018 letter) and the adjustments made to the privilege log as set forth in our February 18, 2019 letter, Mayer Brown's February 2019 log (and all versions of the log thereafter) have not included items that do not involve an assertion of Mayer Brown's own privilege and relate solely to Carlton Fields's representation of Mr. Gunlicks after April 20, 2009. Log entries 72, 129, 138, 226, 321, 505, 513, and 523 were removed from Mayer Brown's privilege log and produced to Mr. Gunlicks in February 2019. Mayer Brown will produce these items to the Receiver upon receiving permission from Mr. Gunlicks. Mayer Brown also produced a copy of Mr. Gunlicks' 1981 will to Mr. Gunlicks in January 2019. This will has nothing to

Nature of the Change	Affected Log Entries	Bates (new number or replacement of prior version)
Removal of entry because document is being produced in full	4, 5, 6, 12, 13, 14, 30, 31, 43, 391, 392, 393, 423, 453, 487, and 488	MB 00697103, MB 00697104, MB 00720532, MB 00697105, MB 00697106, MB 00720535, MB 00696850, MB 00720545, MB 00697109, MB 00667175, MB 00667176, MB 00721312, MB 00669546, MB 00697131, MB 00673238, MB 00721804
Revision of entry because a previously withheld document is being produced in redacted form	676	MB 00720516
New entry to reflect additional items over which Mayer Brown asserts its own privilege	698, 699, 700	MB 00720647, MB 00721410, MB 00721802

2. Other Client and Metadata Redactions.

Sixty-four documents being produced today contain redactions for information concerning clients or potential clients of Mayer Brown, other than MasterFactor, Founding Partners Capital Management Company ("FPCM"), or Mr. Gunlicks, denoted by the text "Other MB Client Information."[7] Redactions have been applied as narrowly as feasible consistent with Mayer Brown's professional obligations to maintain client confidences and the attorney-client privilege related to these other clients. *E.g.*, IL Adv. Op. 12-03 (Ill. State Bar Ass'n), 2012 WL 346858, at *2 (Jan. 2012) ("[A]n attorney should consider his or her client's identity to be confidential information which cannot be disclosed without the client's consent."); ABA Formal Op. 09-455 ("[T]he persons and issues involved in a matter generally are protected by Rule 1.6 and ordinarily may not be disclosed unless an exception to the Rule applies or the affected client gives informed consent."). For the avoidance of doubt, none of the "other client" redactions refer to MasterFactor, FPCM, Mr. Gunlicks, or any Founding Partners Fund. Moreover, we have told you on a number of occasions that Mayer Brown never represented Sun Capital, Inc., Sun Capital Healthcare, Inc., WorldFactor, the Sun Capital principals (Peter Baronoff, Lawrence Leder, and Howard Koslow), their spouses (Malinda Baronoff, Carole Leder, and Jane Koslow), Promise Healthcare, Inc., Success Healthcare, LLC, or any of the entities listed on the first two pages of Annex I to the

do with this case, and the will was not part of the 2017 Review Population. Nonetheless, Mayer Brown will also produce this document to the Receiver upon receiving permission from Mr. Gunlicks.

[7] Two of these documents also have redactions for Mayer Brown's attorney-client privilege, as described above.

Receiver's settlement agreement with Sun Capital (BC-EF-0007051 through -7052). Thus, none of the "other client" redactions in this production refer to any of these persons or entities.

Similarly, 31 of the documents being produced today contained information related to clients other than MasterFactor, FPCM, or Mr. Gunlicks in the file name, email subject line, or other metadata of the document. Consistent with our prior practice, as to each of these documents, the word "Redacted" has been substituted for the confidential client information contained in the metadata of the document. These documents are identified on Exhibit B to this letter.

Finally, there are 10 additional documents that consist solely of non-responsive "other client" information, but this non-responsive information was part of an email family that was responsive. These "other client" documents have been slip-sheeted instead of produced with full-page redactions.

II. Remaining Non-Responsive Materials.

Mayer Brown does not intend to produce the remaining 35,687 unproduced documents (*i.e.*, the remainder of the 2017 Review Population plus the 63 unproduced documents from the 124 documents inadvertently excluded from the 2017 Review Population). Nearly all of these documents have been determined to be non-responsive not once, but now *at least twice*, in this case. We will be responding to the Receiver's motion to compel the production or review of these non-responsive documents in due course. For now, we wanted to provide details on what is included in the non-responsive documents, which further demonstrates that Mayer Brown has complied—fully—with its discovery obligations in this case.

A. Large Volume of Materials Totally Unrelated to this Case.

Our re-review confirmed, once again, that the expansive nature of the search terms and search strings applied to collected email pulled thousands of documents into the 2017 Email Review Population that have zero to do with this case. Indeed, within the 2017 Email Review Population combined with the 124 documents inadvertently excluded from that population, there are 33,039 emails or email attachments that are dated on or before April 20, 2009 and that remain either unproduced as non-responsive or not identified in our privilege log or other correspondence. Only 8,219 of those documents actually "hit" on a search term or search string set forth in my January 30, 2017 letter. The remaining 24,820 documents did ***not*** "hit" on any search term or search string and instead were pulled into the 2017 Email Review Population solely because they are family members of documents that did "hit" on one or more search terms or search strings. Put another way, ***nearly 70%*** of the 35,687 documents from the 2017 Review Population combined with the 124 documents that remain either unproduced as non-responsive or unlisted on the privilege log or in correspondence ***never*** "hit" on ***any*** search term or search string used to create the 2017 Review Population.

The search terms and search strings used to create the 2017 Email Review Population were intentionally broad, so that we could have confidence that emails that actually were responsive to the Receiver's discovery requests would be reviewed. Of course, the fact that an email "hit" on a given search term or search string does not show the document is responsive to any discovery requests in this case. The Receiver's own production demonstrates that, since the Receiver himself used search terms and search strings to identify his own emails (maintained at his law firm) for potential review and production to Mayer Brown. (*E.g.*, Apr. 1, 2020 Ltr. from S. Grossman.) So far as we can tell (even though the Receiver thus far has refused to answer the question), the Receiver has *not* produced to Mayer Brown all of the documents that "hit" on these search terms. That is consistent with the notion that a "hit" does not indicate responsiveness to discovery requests, but it is *inconsistent* with the Receiver's arguments as to Mayer Brown's production efforts in this case.

As one example of the breadth of Mayer Brown's search terms and search strings, the following search string was listed in my January 30, 2017 letter and was used to pull email and email families into the 2017 Email Review Population:

> ((credit w/5 security w/5 agreement) OR CSA) AND ("Founding Partners" OR FPCM* OR foundingpartnerscapital OR Gunlicks OR "Stable Value" OR "Stable-Value" OR "Multi Strategy" OR "Hybrid Value" OR "Global Fund" OR "Equity Fund" OR "Sun Capital" OR SCI OR SCHI OR (Success w/3 (Hospital OR Healthcare)) OR (Superior w/3 (Hospital OR Healthcare)) OR (Promise w/3 (Hospital OR Healthcare)))

This search generates numerous false positives because many of the terms used are generic and not specific to Founding Partners issues. "CSA" is an abbreviation not just for "Credit and Security Agreement," but also such terms as "Client Service Administrator" or "Canadian Securities Administrators." "Credit and Security Agreement" is also a generic term. Those generic terms combine with other generic terms in this search string—like "global fund," "equity fund," "stable value" and "multi strategy"—to pull into the 2017 Email Review Population a number of documents that have nothing to do with this case. Indeed, the terms "global fund," "equity fund," and "stable value fund," are such common terms in the investment management and hedge fund industries that these terms have definitions in the online investment encyclopedia, Investopedia.

As another example, many search strings used to create the 2017 Email Review Population incorporated the abbreviation "SCI," which sometimes stands for Sun Capital, Inc. But our review of the 2017 Email Review Population demonstrates that this term is also very generic and stands for many other entities or things. It "hits" on such terms as "TS/SCI clearance," which is an abbreviation for a Top Secret/Secure Compartmented Information security clearance; a newsletter called "Structured Credit Investor" that is sometimes abbreviated as SCI; the "Boston

SCI" abbreviation for the company Boston Scientific; the Bluebook abbreviation for "Science" in a legal journal that has "Science" in its title; and even documents where the word "science" happens to be hyphenated. None of these documents has anything to do with this case.

The search term "Founding Partners," which was run on its own as a search term across collected email, without any additional modifiers, itself hits on thousands of non-responsive documents—"founding partners of Mayer Brown," "founding partners of X entity," "two of X entity's founding partners," and so forth. Our recent review re-confirms the obvious fact that a hit on the search term "Founding Partners" does not demonstrate responsiveness to any discovery requests in this case.

Given the expansiveness of the search terms and search strings, there are many more examples like these where search terms or search strings identified documents that have nothing to do with this case. In addition, apart from the 2017 Email Review Population, there are instances where documents related to other matters handled by Mayer Brown were inadvertently filed under a Founding Partners matter number; those documents, too, were part of our review process and are also not responsive to any document request in this litigation. There is no basis in fact or law to require Mayer Brown to produce these non-responsive materials, whether to the Receiver or for review by the Special Master or the Court.

B. Duplicates.

Some of the materials being produced today are duplicative of each other or partially duplicative of materials previously produced. However, during the review process, we came across a small number of additional materials that we were able to confirm were completely duplicative of materials produced by Mayer Brown long ago, such as a second copy of a memo or an email. A few of these documents are complete duplicates of documents that appear on Mayer Brown's current privilege log. In general, Mayer Brown is not producing documents that are complete duplicates of documents previously produced (or adding entries to its privilege log that reflect duplicate documents). Mayer Brown has no obligation to produce duplicate materials under Florida law. *See, e.g.*, Fla. R. Civ. P. 1.280(d)(2) ("[T]he court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that the discovery sought is unreasonably cumulative or duplicative.").

C. Markups of Other-Client Materials.

Mayer Brown is not producing documents that reflect a produced Founding Partners document being used as a starting point or edited for use in work for another client of the Firm. It is not feasible to redact such documents to eliminate the references to and confidential information of the other client, and in any event, the work being performed in the editing process as to each of these documents is for a different client of the Firm. We do not believe these materials are responsive to any discovery requests issued by the Receiver.

D. Production Consistent with Agreed-Upon Parameters.

In re-reviewing the unproduced 2017 Review Population, we adhered to the production parameters that Mayer Brown set out in March 2017 RFP Responses. The Receiver has not disputed these parameters or Mayer Brown's objections, and as a matter of law, there was agreement on the scope of Mayer Brown's production effort.[8] *See, e.g.*, *Teledyne Instruments, Inc. v. Cairns*, No. 6:12-cv-854-ORL-28, 2013 WL 5781274, at *7 (M.D. Fla. Oct. 25, 2013) (denying discovery seeking "to expand discovery well beyond the parameters agreed by the parties"); *Moses H. Cone Mem'l Hosp. Operating Corp. v. Conifer Physician Servs., Inc.*, No. 1:13CV651, 2016 WL 430494, *4 (M.D.N.C. Feb. 3, 2016) (denying discovery where the parties "heavily negotiated for an extensive period of time about how to produce documents, what search terms were going to be used, and which custodians would be subject to discovery" (internal quotation marks omitted)).

One agreed-upon parameter was a date cutoff. Mayer Brown's March 2017 RFP Responses indicated that Mayer Brown did not intend to produce materials dated after April 20, 2009, which is the day the Receiver was appointed for Founding Partners. As you know, upon the Receiver's appointment, Mayer Brown no longer had authority to act for any Founding Partners entity, and any and all representation of FPCM and Mr. Gunlicks came to an end. Mayer Brown also indicated in the March 2017 RFP Responses that it would not log privileged documents relevant to this litigation that were dated after May 20, 2009. Consequently, although Mayer Brown's prior productions do include some materials that are dated after April 20, 2009, documents after such date generally were excluded from this second review process or were considered non-responsive because of their date.

Mayer Brown also objected, in its March 2017 RFP Responses, to the Receiver's requests for production 14, 15, 16, and 17. Those requests for production sought "time sheets, day timers or other time reporting documents." Mayer Brown objected to the breadth of the requests and indicated that final invoices issued by Mayer Brown to Founding Partners would be produced, to the extent located in the 2017 Review Population. The Receiver has never taken issue with these objections. Based on these agreed parameters, Mayer Brown generally did not produce in 2017, and is not producing now, emails that contain or reference draft time entries, draft Founding Partners invoices, or emails discussing or related to draft invoices.

The Receiver's Request for Production No. 43 in the Receiver's First Set of Requests for Production sought "[a]ny and all employment records or personnel files or other similar documents including, but not limited to, evaluations, bonuses, memoranda and termination notices for any and all of your employees, directors, officers and representatives who provided services to or on

[8] For the avoidance of doubt, and consistent with the Court's July 12, 2019 order permitting MasterFactor discovery, Mayer Brown has not withheld documents on the basis that they involve client confidences of or work performed for MasterFactor.

behalf of Founding Partners." In 2017, Mayer Brown objected to this request in full, given the total lack of relevance of such documents, among other considerations. The Receiver has never taken issue with these objections. Based on this agreed parameter, Mayer Brown generally did not produce in 2017, and is not producing now, employment records, personnel files, compensation memos, and similar personnel- or staffing-related materials.

Consistent with the agreed parameters reflected more broadly in Mayer Brown's March 2017 RFP Responses, Mayer Brown generally has not produced, and does not intend to produce, documents that are administrative in nature or that relate to internal matters at Mayer Brown that were not part of Mayer Brown's representation of FPCM, Mr. Gunlicks, or MasterFactor. These include the following types of documents (among other similar types of materials) that are not responsive, that are not reasonably calculated to lead to the discovery of admissible evidence, and that would be unduly burdensome to produce: contact lists, RSVP lists, mailing lists, matter lists that simply identify a Founding Partners as a matter but reference many (sometimes hundreds) of other matters in the Firm, client-matter number lists maintained by individual attorneys, billable hours reports, and documents containing information to assist in business development discussions that are not specific to Founding Partners.

E. Administrative or "Junk" Emails Provided by Founding Partners Around March 2009.

Mayer Brown's productions in this case from 2017 include many documents that were located in Mayer Brown's files solely because they were provided by FPCM to Mayer Brown in about March 2009, in connection with work to address the document requests propounded by the SEC in the then-pending SEC matter. These materials were stored by Mayer Brown in hard copy and are part of the Founding Partners Hard Copy Population. They can be identified in Mayer Brown's production through the cover pages that accompany the emails and their attachments, such as those found at MB 00144789, MB 00144903, and MB 00144914 (all produced in 2017), which say "Imported Folders," followed by other information about the email or attachment, such as from, sent date, and subject line. Where the cover pages and underlying emails contained responsive information, those materials were produced in 2017 (and three additional cover pages and emails or attachments are being produced today, as noted in Section I.C, above).

There are several hundred more of these cover pages, or cover pages with emails or attachments, that Mayer Brown did not produce in 2017, and is not now producing, because they are (or are cover pages for) purely junk and/or irrelevant emails and in all events should be duplicated in materials produced by the Receiver from Founding Partners' files. Examples of these junk email materials, which we expect to be located in the Receiver's productions of Founding Partners documents, are American Airlines and Southwest Airlines fare emails, investment news and other newsletters distributed *en masse* to an unknown volume of recipients, and conference notices or advertisements similarly distributed *en masse*. There are also a volume of Mayer Brown client or news alerts, not targeted specifically to FPCM or any client, that bear the same "Imported Folders"

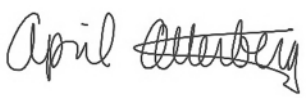
cover pages and that we expect are found in the files the Receiver produced from Founding Partners. None of these documents is responsive to the Receiver's discovery requests, and they should all be duplicative of materials the Receiver collected and produced from Founding Partners.

* * *

Documents in today's production have been branded with "Confidential" or "Highly Confidential" designations pursuant to the Order Governing the Use of Confidential Discovery Information entered December 9, 2016. These designations are indicated in the load file for each document and, with the exception of files being produced in native form, branded on the images themselves.

The .ZIP file containing the production will be sent to you via secure file transfer. Please let us know if you have any questions or issues accessing the production. The Receiver's counsel will receive a separate .ZIP file containing the two documents being produced, with certain redactions removed, under the Non-Waiver Order.

Regards,



April A. Otterberg

cc: Leo Beus, Pat McGroder, Scot Stirling, Stuart Grossman, and Rachel Furst,
Counsel for the Receiver
Eugene Pettis, Debra Klauber, David Bradford, Reid Schar, and Jason Bradford,
Counsel for Mayer Brown LLP

From: Frank Scroggins <fscroggins@reynoldswright.com>
Sent: Wednesday, June 25, 2003 11:53 AM
To: Klyman, Marc L. <mklyman@mayerbrown.com>
Subject: HFR
Attach: HFRbuspla07.ZIP

To: Marc Klyman

Marc,

Please see the summary business plan of the Hospital receivables deal we discussed. A few things I like on the structure of their plan are:

1. The book of business already exists and can be " readily transferred" to the New Company.
2. 80% of the receivables will be from AAA insurance companies, the balance from AA.
3. They will discount the receivables on average 80% to further mitigate risk.
4. They have their own proprietary software to handle all phases of each transaction.
5. They have recorded no losses under this system in the past.
6.There will be a replacement pool for any receivables deemed unacceptable.
7. The funding vehicle handles all monies.

Please call me with any questions.

Best Regards,

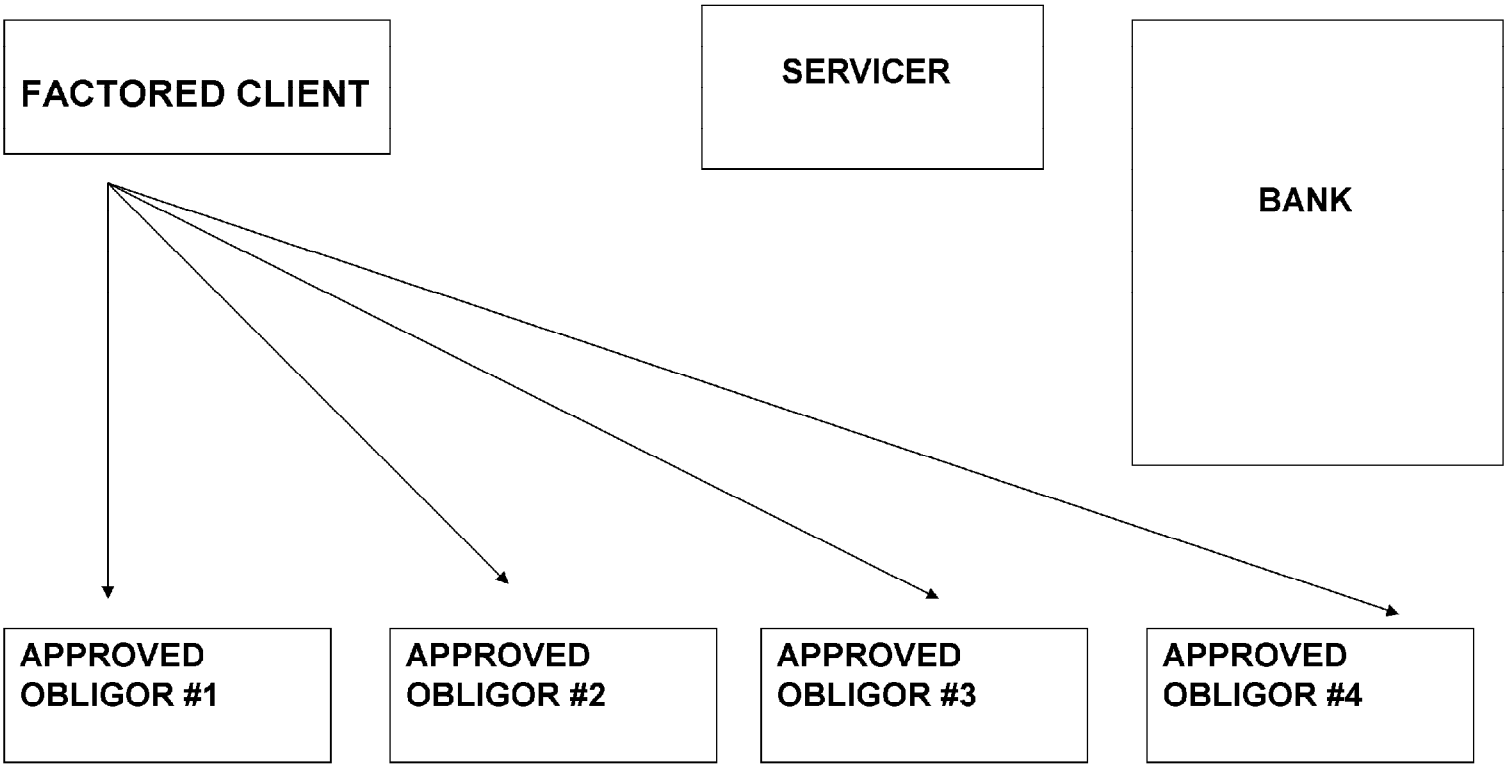
Frank

Frank Scroggins
Managing Director
Reynolds Securities LLC
(910) 793-9206

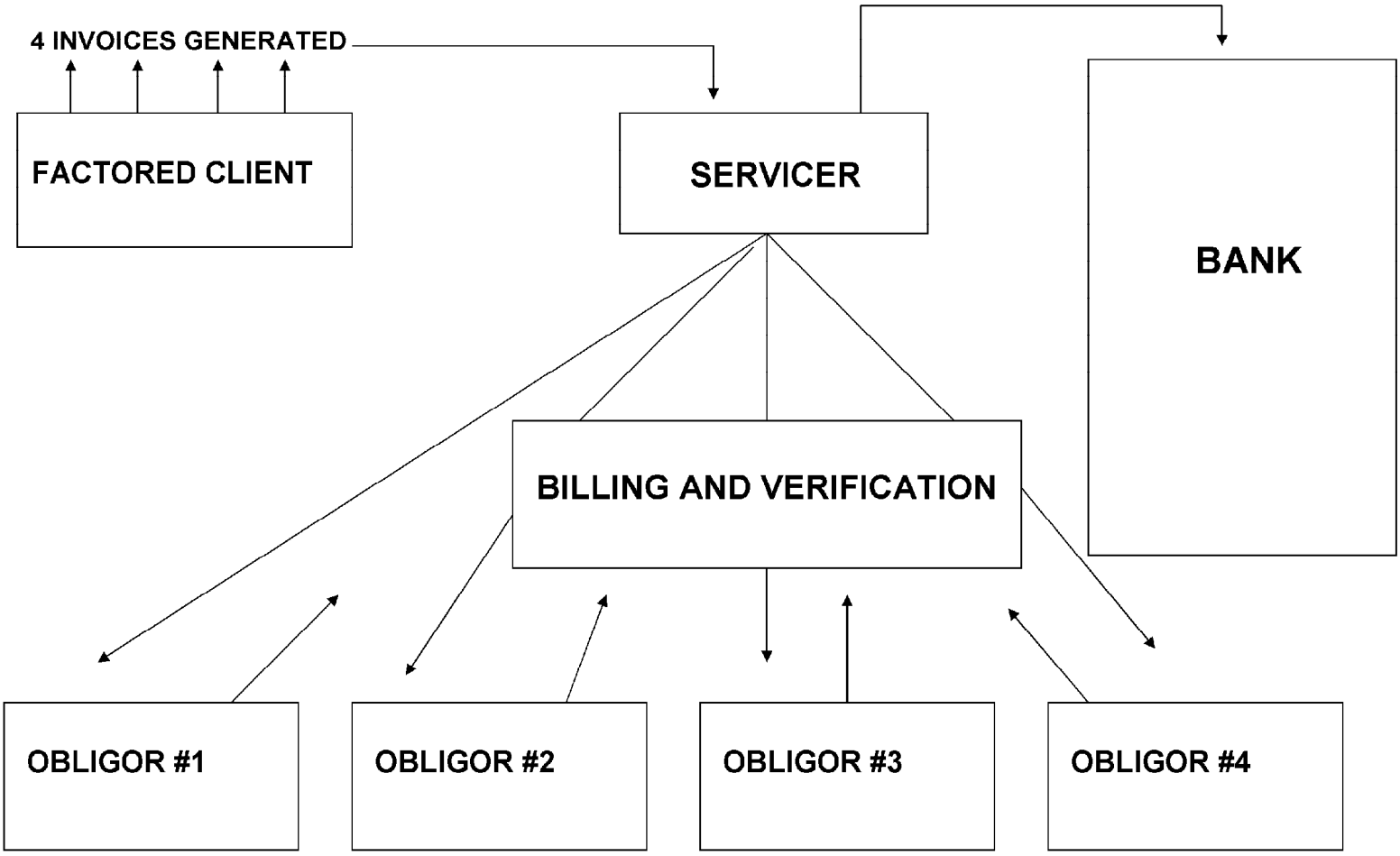
HEALTHCARE FINANCIAL RECEIVABLES

FLOW CHART

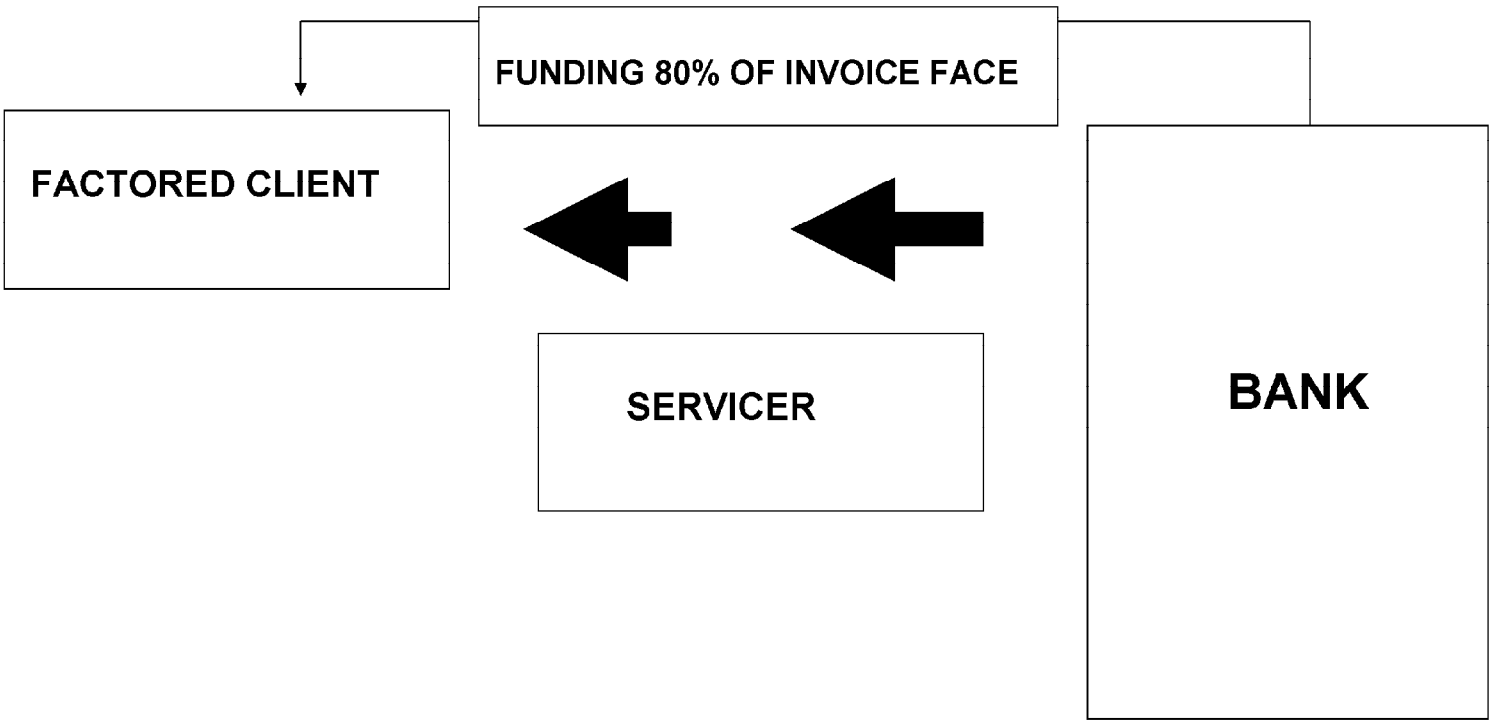
APPENDIX 1



1. FACTORED CLIENT PERFORMS SERVICE, OR DELIVERS PRODUCT TO THE SATISFACTION OF THE OBLIGATOR. OBLIGOR MUST BE APPROVED BY SERVICER.



2. FOUR INVOICES ARE GENERATED AND ARE SUBMITTED TO THE SERVER FOR PROCESSING. THE SERVICER SENDS OUT INVOICES FOR BILLING AND VERIFICATION (NOTICE OF ASSIGNMENT) TO OBLIGORS AND FORWARDS THE INVOICE TO FOUNDING PARTNERS WITH WIRE INSTRUCTIONS FOR FUNDING.



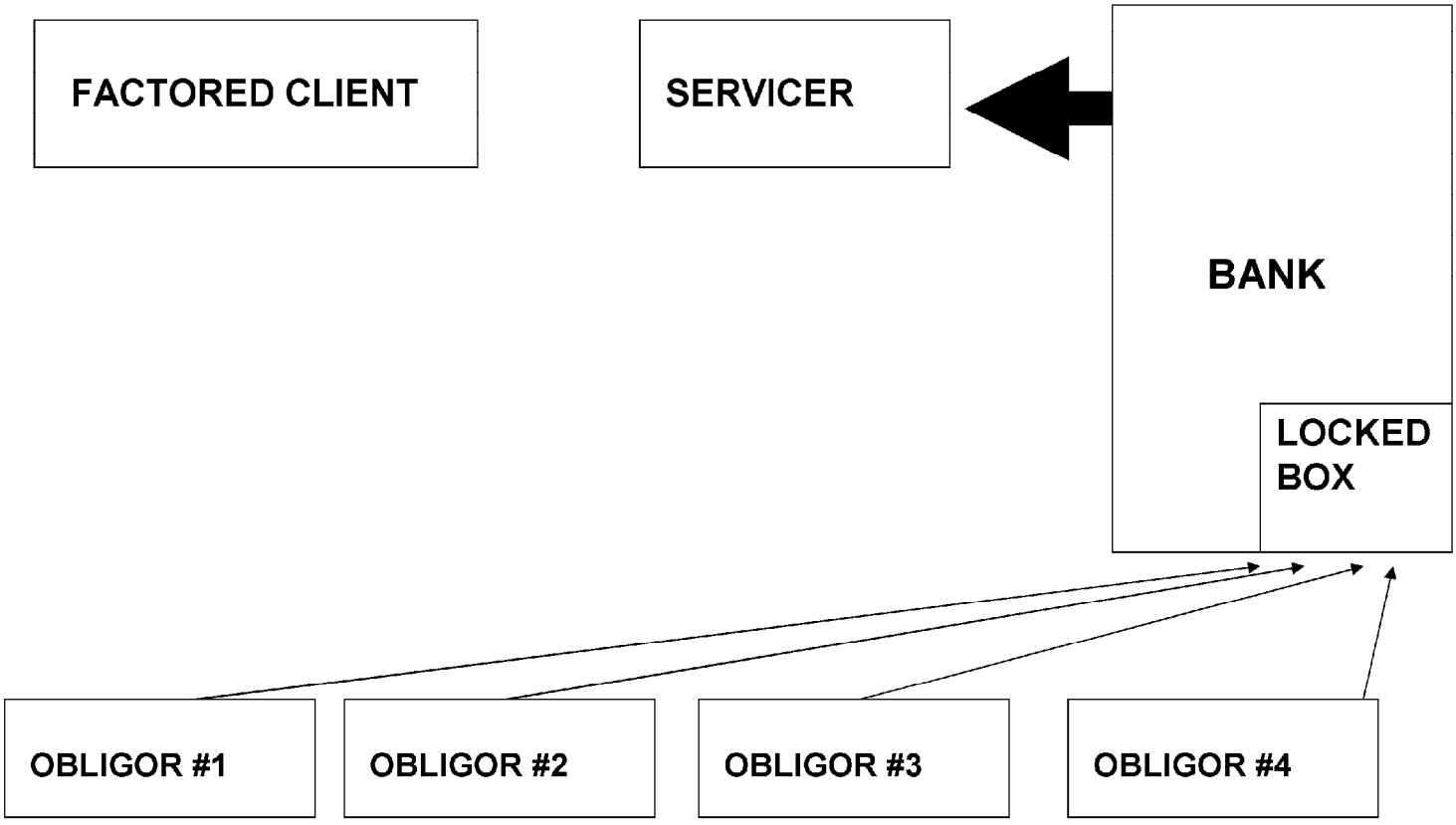
OBLIGOR #1

OBLIGOR #2

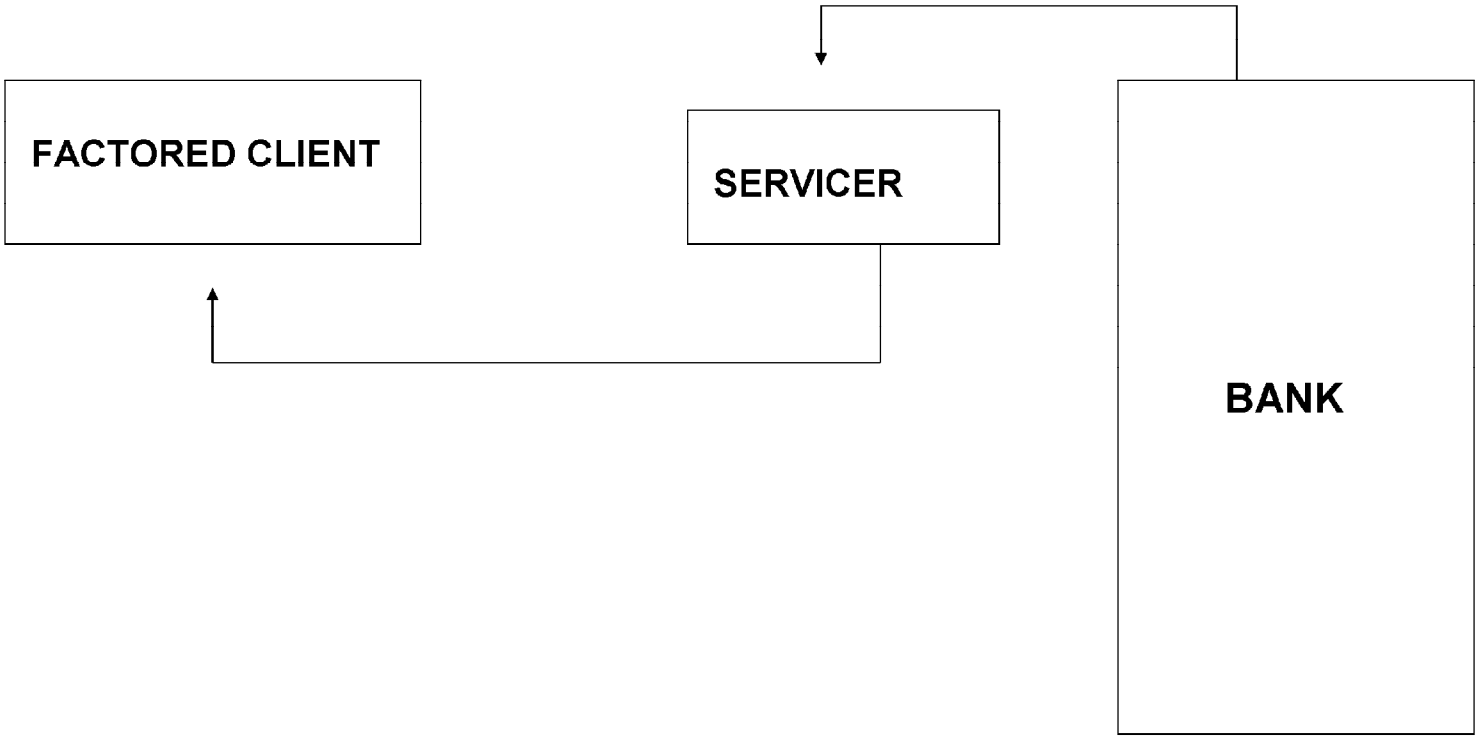
OBLIGOR #3

OBLIGOR #4

3. BANK FUNDS FACTORED CLIENTS 80% OF INVOICE DIRECTLY TO FACTORED CLIENT. VERIFICATION OF FUNDING IS PROVIDED TO SERVICER.

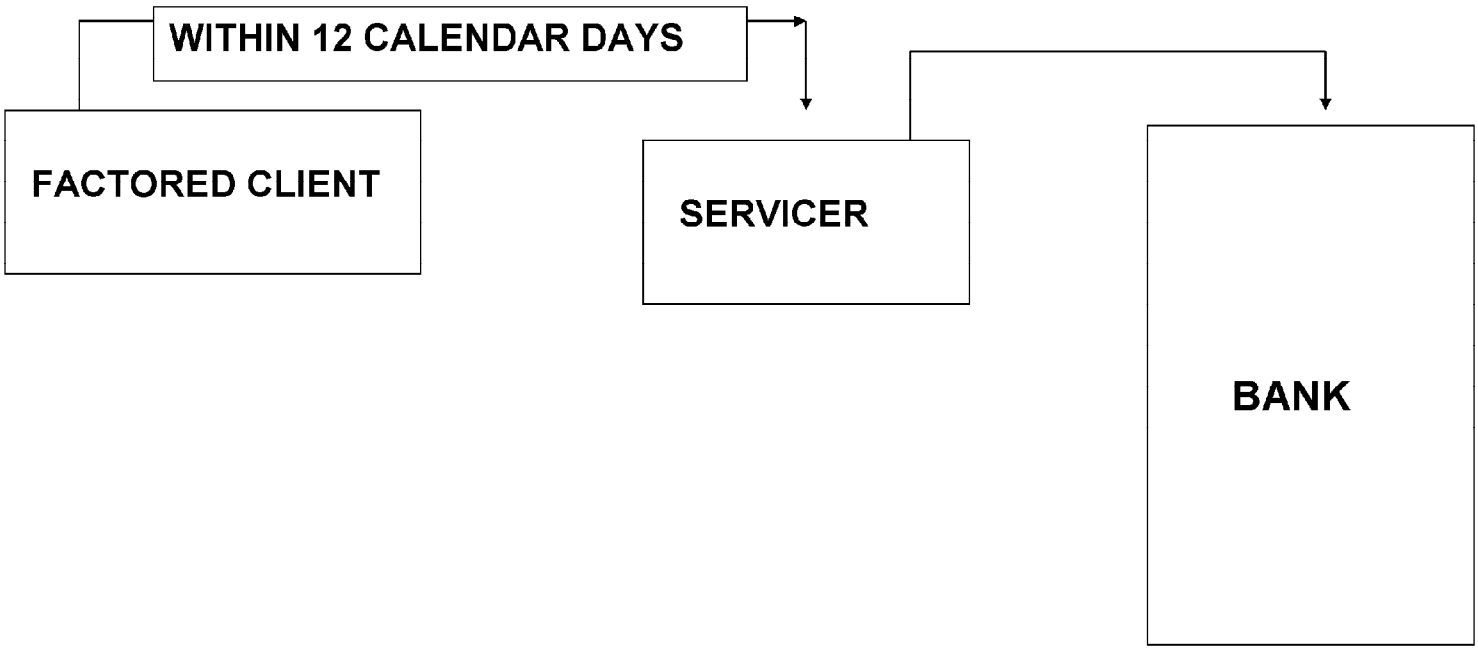


4. OBLIGORS PAY BILLS TO BANK'S LOCKED BOX. NOTIFICATION OF PAYMENT GOES TO SERVICER, INDICATING INVOICE NUMBER, AMOUNT AND OBLIGOR



OBLIGOR #1 | OBLIGOR #2 | OBLIGOR #3 | OBLIGOR #4

5. BANK RETURNS 20% RESERVE, LESS FEES TO SERVICER. AND RETURNS RESERVE, LESS FEES TO CLIENT.



OBLIGOR #1 | OBLIGOR #2 | OBLIGOR #3 | OBLIGOR #4

6. NEW FACTORED CLIENT MUST RETURN NEW RECEIVABLES TO SERVICER FOR REVIEW WITHIN 12 CALENDAR DAYS IN ORDER TO MAINTAIN FACTOR'S FUNDING. SERVICER THEN PROCESSES AND FORWARDS RECEIVABLES TO BANKS. OR FINDS OTHER RECEIVABLES FOR REPLACEMENT FUNDING

The Company

Organization

Healthcare Financial Resources, Inc is established as a sub "S" Corporation, incorporated in Florida, and its offices are located within the Boca Raton area. The company believes this geographic location will provide the middle management, and clerical personnel necessary for the daily functioning of this business. Upper management is already in place.

Factoring Industry

Healthcare financing is a lucrative field. The industry is boundless. According to the Healthcare Financing Administration last year over 1.58 trillion dollars was spent on healthcare. This equate to about 15% of our total gross domestic product. These figures represent a 9% annual compound growth rate for the last 10yrs.

There are two significant reasons why this growth trend will continue:

- Favorable demographic trends, including growth in the number of citizens over 65 in the U.S. population.
- Advances in medical technology that have increased demand for healthcare services by expanding the types of diseases that can effectively be treated.

Healthcare Financial Resources has identified a significant market opportunity and developed a strategy ideally suited for providing funding to the medical community through factoring. Factoring in the United States is a $125 billion market; while the niche market of medical receivables is a small percentage of this market. The need for medical receivable funding has not yet been the focus of the factoring industry. While funding sources do exist for some medical factoring, in most cases these entities provide limited lines of credit. A common theme woven within the factoring community is the lack of expertise to provide services to the healthcare industry.

This creates an attractive business opportunity. Since HFR advance marketing has already begun, and certain accounts have been pinpointed, quick time to market will be important for achieving success. Healthcare Financial now seeks a funding relationship to move forward with this great opportunity. Healthcare Financial key personnel are experienced with this type of funding and can prove a three-year track record with zero losses due to bad debt or non-payment.

Definition of Terms

At this point it becomes (imperative) to define those terms and concepts applicable to the process known as Factoring.

1. The Factor (Healthcare Financial Resources)- is the person or entity, which engages in the business of providing cash flow to businesses by "asset based" funding. The process is neither a loan nor a debt of any kind, it is in fact a purchase (actual transfer of title) of accounts receivable in exchange for cash. The process involves two stages, the advance, which immediately funds a specific percentage of the collectible value of the invoice, and the reserve, which is paid to the Factored client upon the Factor's receipt of full payment by the obligor (less pre-arranged fees). The full process for this funding follows.

2. The Agreement- businesses that desire to Factor their receivables, will first sign an agreement with the Factor. This document will include the following: a) guaranteed completion of work or services, or delivery of good in acceptable delivery for and condition, for each invoice Factored. b) Guaranteed assignment of payment and transfer of title to Factor, upon Factor's receipt and funding of acceptable invoices. c) Acceptance of a UCC-1, first lien on all receivables owned by that Factored client, as security for payment of each Factored receivable both in part or its entirety. d) Acceptance of terms and conditions regarding fees to be paid by Factored client. e) Agreement for full, modified or no recourse, with respect to defaulted payments. f) Acceptance of general procedures associated with bank transfers, wire, and routine business transactions.

3. Invoice Available for Funding- upon completion of work, services, or delivery of goods, the Factored client will fax an invoice to the Factor for Funding. The invoice is on the letterhead of the Factored client, and will contain all the information needed for proper presentation to the obligor.

4. Underwriting- the invoice is forwarded to the Factor's underwriting department for appropriate due diligence on this particular item. This department will ascertain if this obligor pays on time and if in fact the invoice is correct. D&B/A.M. Best data is used for collection of such information with the underwriter's full understanding of insurance requirements. Upon primary acceptance of this invoice an "assignment/verification" is provided.

5. Assignment/Verification (N.O.A.) A fax is then sent to the obligor in order to ascertain that the service was performed, or goods were delivered in appropriate condition. This communication also requires the obligor to acknowledge that this bill has been assigned to the Factor, with the exception of certain third party payers such as Medicare and Medicaid, and payment will be made as per included instructions. According to the terms of the invoice (30,40,45 days) the obligor will make payment payable to the Factored client, however it will be sent to the Factor's bank. Obligor "signs off" that work was completed, acknowledges N.O.A. (notice of assignment), and faxed same back to the Factor. This entire process is expedited by phone contact with the obligor confirming receipt of fax and getting verbal affirmation that the customer is "real" and understands the terms of payment.

6. Underwriting Again- Authorized personnel then review the completed package and signatures are applied to prepare for funding.

7. Funding- The entire advance i.e. 80% of the invoice, is sent out by bank wire to the Factored client. Upon payment of the receivable by the obligor, the Factored client receives the reserve, less appropriate fees.

   This entire process can usually be completed in a matter of two hours, very often is less time. Also note that when invoices to previously contracted obligors are Factored, the process is completed in under an hours. Healthcare Financial key personnel have been using these procedural techniques successfully for three years now with zero losses.

Product Strategy

Healthcare Financial Resources plans to address the market need. Our program will:

- Provide immediate cash flow for medical providers
- Allow clients better cash flow management solutions
- Offer competitive rates on funds in use
- Provide full back office processing for all receivables.
- Allow for client expansion

Healthcare Financial Resources goal is to acquire funds through private investment, Investment funds or Bank Lines of Credit. Triple A (AAA) rated third party insurance providers will comprise a majority of the obligors to which funds will be advanced. These obligors are financially sound and loss potential is minimal. Advance rates of 75% to 80% will mitigate risk further. As a receivable service company, Healthcare Financial Resources has principals that have years of receivables servicing experience and underwriting expertise affording it's servicing operation the depth of knowledge needed for a successful business.

Marketing

The targeted market for Healthcare Financial Resources is the healthcare industry. This industry is currently under serviced by the factoring community, as explained earlier in this plan.

Healthcare Financial Resources will actively market to acute care hospitals, medical labs, rehab centers, MRI centers, associated physician groups, dialysis facilities, out patient facilities and clinics, DME companies and various other specialty facilities. The marketing approach will be quite diversified. The utilization of direct salespeople and a large broker network already comprised from previous ventures. This we feel will be the most expeditious and efficient way to reach the marketplace. Current client commitments are already in place with some large acute care facilities. These opportunities can be taken advantage of as soon as funding is available.

Audit Procedures

Prior to bringing on any new clients, Healthcare Financial Resources first conducts a rigorous audit of all client receivables. This is a mandatory process that enables us to understand completely the relationship between the soon to be factored client and the agreements in place with all third party providers. Here is where we determine the appropriate advance rate and the net collectability of all invoices. This procedure is facilitated by HFR auditing specialists and is fee based. The typical fee for an audit depending upon the size of the client is $5,000.00 - $35,000.00. The client in two installments pays this fee. Fifty percent in advance, and the balance after the first funding.

Software System

Healthcare Financial Resources has developed it's own proprietary software product to facilitate transaction flow and mitigate loss "Medfactorplus".

Medfactorplus capabilities:

1. The orderly processing of each individual claim customized to the disbursement obligation of each third party provider
2. The automated valuation of each claim based on the audit results.
3. The system monitors and controls concentration percentages and limits by obligor, by client and by entire portfolio. The system will red flag administrators when concentration issue become a concern.
4. The system monitors, on an ongoing basis, the audit results valuations against the actual amounts paid by the obligor.
5. The system will not allow funding when concentration issues are broached.
6. The system determines concentration alignment and resumes funding.

Competitive Analysis

Currently, some of the larger factoring companies have a Healthcare division but none currently focus the majority of their assets in the niche market of Healthcare financing. The management team of Healthcare Financial Resources believes this is due to the intricacies needed to determine the correct valuations of the receivables.

Our management team not only has the ability and expertise to make proper valuations but Mr. Leder has developed and refined our proprietary software system allowing us to monitor and maintain close scrutiny over such valuations. The software will alert us to such potential areas of concern; concentration of receivables with any one insurance provider; accuracy of all claims in accordance with the allowance available from the insurance company.

The combination of the experienced management team and a highly advance software system developed specifically for this purpose, gives Healthcare Financial Resources the competitive edge it needs to thrive without any concern for the larger factors already in place in this market.

Management Team

Lawrence E. Leder, CEO, has been involved in servicing the healthcare industry for over thirty (30) years. Mr. Leder was in charge of the nationwide audit of the Medicare program, when he was a supervisory auditor for the U.S. General Accounting Office (GAO). He provided testimony to the House Ways and Means Committee regarding the implementation of this new program.

Mr. Leder left the GAO to go into his own healthcare consulting practice and was subsequently recruited by Coopers & Lybrand, one of the Big 8 Accounting firms at that time. Mr. Leder was the healthcare manager and reimbursement specialist for five (5) years for the New York office of Cooper & Lybrand.

In 1983, Mr. Leder left Coopers & Lybrand to continue his own healthcare consulting business. His major client was the Archdiocese of the City of New York, which included providing management, rate setting and reimbursement services to Cardinal Cook Health Center, St. Claire's Hospital, Cabrini Hospital, St. Vincents Hospital and Our Lady of Mercy Hospital. Mr. Leder has also been very active in supplying testimony to various state rate setting Commission for the Medicaid program.

In 1995, Mr. Leder turned his attention to the factoring industry, and in particular medical receivables. He has provided consulting services to various banks and other asset based lending institutions regarding valuation and collectability of medical receivables.

Since 1998, Mr. Leder has been the CFO and Executive V.P. for a large southeastern-based financial service company specializing in medical factoring.

Mr. Leder is a Certified Public Accountant with degrees from N.Y. Tech and St. Johns University.

Lou Saslow - President, Lou has spent the last eight (8) years as CEO and President of First Capital Funding. First Capital Funding was identified by the leading equipment finance associations, as one of America's fastest growing equipment leasing companies in 1999. Medical equipment became a niche market of First Capital's and gave Mr.Saslow the clear-cut understanding of the challenges hospitals face today and the importance of alternative cash flow solutions. Mr. Saslow has been a guest speaker at various conferences regarding the benefits of equipment leasing and cash flow preservation.

Prior to First Capital Funding, Mr. Saslow was President of Caricom Investments. A leading private label manufacturer of disposable HBA products. Mr. Saslow was responsible for the introduction of consumer product lines to rival Kimberly Clarke and Proctor & Gamble in the Caribbean marketplace.

Fred Leder- Sr. VP, Following a 13 year career as an educator and supervisor for the New York City Board of Education, Fred Leder became a mortgage backed and asset backed securities trader for various Wall Street firms. He has structured and analyzed the structure of many fixed income instruments and has provided funding solutions for the medical community through asset backed securitizations. Most recently Mr. Leder serves as Vice President of Business Development for a Southeastern financial service firm. In this capacity he trains, educates and interfaces with receivable finance brokers and high-level medical services professionals. Mr. Leder has developed marketing strategies and sales tools focused toward increased sales volumes. Mr. Leder holds degrees from NYU, Manhattanville College and Fordham University.

Robert Gottlieb-VP Sales & Marketing, Bob a seasoned sales professional, was with Marriot Corporation for over 23 years. He has extensive expertise interfacing with top-level executives in the medical industry and has serviced the medical community through the sale of food service products. Most recently, Mr. Gottlieb has been active in the sale of medical receivables finance services for a large southeastern financial services firm. He has an in depth understanding of financial products and has been an integral part in creating innovative cash flow solutions for the medical community.

David A. Lipton, David earned his undergraduate degree at the State University of New York in 1986, and his law degree, magna cum laude, from Syracuse University School of Law in 1989. While in law school, Mr. Lipton was named an Andrews Scholar from 1987-1989. Additionally, he became the Neil Brewster Scholar from 1988-1989. As a law student, Mr. Lipton was a Senior Editor of the Syracuse Journal of International Law and Commerce. Furthermore, Mr. Lipton was inducted into the Justinian Honorary Law Society for his accomplishments as a law student. Upon graduation, Mr. Lipton attended New York University's Masters in Tax/LLm Program.

Upon graduating from law school, Mr. Lipton was hired by Arthur Anderson & Co. accounting firm, where he worked in the Corporate Reorganization and Structuring Department. Over the years, his area of expertise became large corporation mergers and acquisitions. In 1993, Mr. Lipton founded the law firm D. Lipton & Associates. He has been admitted to the bars of New York, Washington, D.C., and Georgia. Past cases have sent Mr. Lipton to a myriad of courts, including the United States Federal Tax Court.

Mr. Lipton is responsible for many legal matters of the company. He will help coordinate outside counsel as required, and advises on all legal requirements and ramifications for various company projects.

Working Capital

The management team of Healthcare Financial Resources is prepared to invest $400,000.00 to fund the startup of this operation. These proceeds will be used to procure Class A office space, purchase of necessary equipment, staffing, and daily operations. This working capital investment will be more than enough to fund the company until generated fees commence.

Use of Proceeds

Healthcare Financial Resources is looking for a fifty million dollar commitment from our funding partner. These funds will be used to purchase accounts receivable from healthcare providers. Initially only forty five million will be used for this purpose. Five million will always be left in reserve for additional funding needs should they arise. As illustrated in flowchart diagrams, these proceeds will never be in Healthcare Financial Resources control. The funding partner will always fund the Healthcare client directly. When the bank is paid by the third party insurance provider, the bank will in-turn fund Healthcare Financial Resource their share of fee income. This offers the funding partner an extra level of protection.

Risk Factors

Although a great deal of planning and market research has been done in order to have a successful and profitable business, there are no guarantees or assurances regarding the success of this business venture. Economic cycles occurring throughout the life of this relationship can influence clients toward or away from factoring as a means of business financing. A decrease in utilization of funds can represent less of a return on investment to the funding entity. A strong management team, proven track record, unique software system, and existing client base should give comfort to our funding partner. We, the management, believe the market conditions are right for this type of product and risk is minimal.

Conclusion

We, the management, of Healthcare Financial Resources believe this is the ideal opportunity to enter this marketplace swiftly and successfully. Utilizing existing relationship will almost immediately guarantee success to this project and a nice return for our funding partner. Risks are minimal, as long as we adhere to our auditing strategies. As stated earlier in this plan, these techniques have been utilized in the marketplace for over three years with zero losses. We welcome the opportunity to discuss with you this safe investment.

EXHIBIT

25

From: Klyman, Marc L.
Sent: Friday, June 27, 2003 12:14:47 AM
To: Honarvar, Houdin
CC: Butowsky, Michael; Dwyer, James
Subject: RE: Founding Partners--Stop Work

Houdin,

I would wait until the conflict mentioned in my email has been resolved. Hopefully, I'll know more tomorrow or Monday.

Regards,

Marc

-----Original Message-----
From: Honarvar, Houdin
Sent: Thursday, June 26, 2003 11:08 PM
To: Klyman, Marc L.
Cc: Butowsky, Michael; Dwyer, James
Subject: RE: Founding Partners--Stop Work

Marc,

Per your request, we will stop working on Founding Partners immediately. FYI, Mr. Gunlicks is awaiting a revised draft of the documents. Would you prefer that we stay out of touch with him during this period?

Regards,

Houdin

-----Original Message-----
From: Klyman, Marc L.
Sent: Thursday, June 26, 2003 12:31 PM
To: Dwyer, James; Honarvar, Houdin; Butowsky, Michael
Subject: Founding Partners--Stop Work

Please stop work on the Founding Partners matter. A conflict has just arisen that, if not resolved, may require us to withdraw from this matter. Bill Gunlicks is not yet aware of this issue. I will contact you once I learn more.

Thanks.

EXHIBIT 26

MEMORANDUM

July 3, 2003

TO: File

FROM: Marc Klyman

RE: Founding Partners

On June 24, 2003, I received a voicemail message from Delilah Flaum, in which she (i) forwarded to me a voicemail message that she had received from Frank Scroggins at Reynolds Securities and (ii) asked me if I wanted to call Scroggins. The message from Scroggins indicated that he has a client in the healthcare receivables business (the "Reynolds Client"), that he was looking to put together a securitization transaction for the Reynolds Client, and that he saw an article written by Delilah when searching the internet. He asked her to call him.

On June 25, 2003, I spoke to Frank Scroggins. He told me that the Reynolds Client has been factoring health care receivables for several years, and that the Reynolds Client wanted to split up with its lender. He asked me whether he could send me the business plan of the Reynolds Client.

On June 25, 2003, I received an email from Scroggins. Attached to the email was a business plan for the Reynolds Client. The business plan identified the management team for the Reynolds Client, which included at least two people who have been officers or employees of Sun Capital Healthcare Inc. or its affiliates.

MBR&M represents Founding Partners, which is the sole lender to Sun Capital. I have worked on the loan documentation between Founding Partners and Sun Capital. Bill Gunlicks is our contact at Founding Partners. It appears that the Reynolds Client will be in direct competition with Sun Capital. (According to a telephone call I had with Scroggins on June 30, Sun Capital does not know that its employer(s) are working at the Reynolds Client.)

In a telephone call with Jim Gladden on June 30, 2003, Jim and I discussed Privileged

Privileged

Privileged

On July 2, 2003, I spoke by telephone to Bill Gunlicks. I told him what Jim had advised me to say (as described in paragraph (b) above). I did not tell Bill Gunlicks the name of the potential client or what the confidential information was. I told Bill that the information was not about him personally. Bill asked whether we could continue to represent him if he consented to such confined information, even though we did not disclose the confidential information to him. I told Bill that I would go back to our claims counsel for further guidance regarding this matter.

Later on July 2, 2003, I spoke by telephone with Jim Gladden. Jim said Privileged

Privileged

On July 3, 2003, I was on the phone with Jim Gladden when my secretary came into my office with a message that Peter Baranoff of Sun Capital was calling. I told that to Jim Gladden, who said Privileged

Privileged

Peter Baranoff called me again after I got off the phone with Jim Gladden. Baranoff said that Bill Gunlicks had called him and told him that I had said that there was confidential information that I could not reveal to him but that I had to put our relationship on hold.

Baranoff asked me a number of questions about what the information was, and I did not tell him. He called me back later that day and asked me if the information had to do with _____ that he had asked Leder if there was anything Peter should know, and that Leder told him about Frank Scroggins. Baranoff said that Leder had had a rift with Peter Baranoff in the past, and that Leder had considered leaving and had been talking to Frank Scroggins. Peter said that he had previously patched things up with Larry, and that Larry was going to stay at Sun Capital and would sign a non-compete agreement with Sun Capital.

I then called Jim Gladden and Jim said Privileged

Privileged

EXHIBIT 27

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: 10-49061 (19)

DANIEL S. NEWMAN, as Receiver for FOUNDING PARTNERS STABLE VALUE FUND, L.P., FOUNDING PARTNERS STABLE VALUE FUND, IL.,L.P., FOUNDING PARTNERS GLOBAL FUND, LTD and FOUNDING PARTNERS HYBRID-VALUE FUND, L.P.,

Plaintiffs,

vs.

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

Defendants.
_____/

HEARING
Pages 1-129

*****NON-CONFIDENTIAL PORTIONS ONLY*****

Wednesday, February 20, 2019
9:00 a.m. - 12:18 p.m.

Broward County Courthouse
201 Southeast 6th Street
Room 4900
Fort Lauderdale, FL 33301

Honorable John J. Murphy, III

Stenographically Reported By:
JANINE P. CARROLL, Court Reporter

MR. BEUS: Yeah.

If you take a look at the document transaction team. We may have not done a good job agreeing to MFI, so they need to run a search for Master Factor, or Master, or factor.

But look where it says transition team. That document was not produced and not on a privilege log. Look at the names on it that there is no dispute about. Mr. Koslow, that's on the word search term. Mr. Baronoff, on the word search term. Lawrence Leder, on the terms.

Let me tell you what had to happen. They had to go through this and find those and say it doesn't use MFI so we'll throw it away.

THE COURT: Excuse me, one second, counsel.

Ma'am, you're the person who conducted this, I take it?

MS. OTTERBERG: Your Honor, I've been with this case from the very beginning and was involved in every step of the way.

THE COURT: Counsel's point is that Koslow is mentioned in the search term, and if that was true that this document should have come up within the search. Is that right or wrong?

MS. OTTERBERG: So two things with that, Your

EXHIBIT 28

IN THE CIRCUIT COURT OF COOK COUNTY

COUNTY DEPARTMENT - LAW DIVISION

- - - - - - - - - - - - - - - - -x

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, L.P.,

Plaintiffs,

vs. No. 10-49061

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

Defendant.

- - - - - - - - - - - - - - - - -x

REPORT OF PROCEEDINGS at the hearing of the above-entitled cause taken by Amy M. Spee, CSR, RPR, CRR, before the Honorable James N. O'Hara, on January 17, 2019, at 12:04 p.m.

MR. DELANEY: And, your Honor, this was the --

THE COURT: One second. I asked a simple question. I got the answer. Okay.

MR. DELANEY: I understand, but I want to -- this is crucial. This is the November 2000 retainer signed by Mark Klyman. If you see the circled red marking, this is the Sun Capital entities. This is an unwaivable conflict.

THE COURT: This is MB --

MR. DELANEY: 001 through 5, your Honor.

THE COURT: And Founding Partners collectively is Sun Capital. Okay.

MR. BEUS: See, they haven't given us a privilege log, a list of what they're withholding. We don't have anything. Those documents are just out there.

MR. D. BRADFORD: This is simply untrue. We have provided everything that was asked for by the receiver. We have provided everything that was asked for by Mr. Gunlicks, other than privileged

documents.

THE COURT: So what you're saying is that the matters that weren't produced by you have not -- that you might have but have not been asked for, to witness: The Sun documents?

MR. D. BRADFORD: So Sun Capital documents, if a document referenced Sun Capital, we turned it over.

There is this third party that involves Master Factor. That's a separate client. Master Factor is outside the complaint, got nothing to do with the complaint, was never asked for before now.

For the first time in December, Mr. Beus decided he had a theory to pursue about Master Factor, and he asked us for those documents for the first time. We're going to submit that dispute to Judge Murphy as to whether we need to produce those or log those or not.

THE COURT: One second.

What role, if any, did Mr. Gunlicks play in Master Factor?

EXHIBIT 29

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

WILLIAM GUNLICKS, individually and as majority shareholder of Founding Partners Capital Management Company, NISSA COX, individually and as a minority shareholder of Founding Partners Capital Management Company, and suing under Trust Number 61-6357311, ANNALEE GOOD, individually and as a minority shareholder of Founding Partners Capital Management Company, and suing under Trust Number 61-6357312, WILLIAM V. GUNLICKS, individually and as a minority shareholder of Founding Partners Capital Management Company, and suing under Trust Number 61-6357313, Plaintiffs,	)	Case No. 10 L 10353
vs.	)	
MAYER BROWN LLP, an Illinois Limited Liability Partnership, MICHAEL BUTOWSKY, as an agent, employee and/or servant of MAYER BROWN LLP, JOHN LAWLOR, as an agent, employee and/or servant of MAYER BROWN LLP, Defendants.	)	

TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause at Room 2303, Daley Center, Chicago, Illinois on the 1st day of February, A.D. 2012, at 9:41 a.m.

BEFORE: HONORABLE JOHN C. GRIFFIN.

APPEARANCES:

DELANEY LAW,
(444 North Wabash Avenue, Third Floor,
Chicago, Illinois 60611,
312-276-0263), by:
MR. WILLIAM DELANEY,
bill@delaney-law.com,
appeared on behalf of the Plaintiffs;

JENNER & BLOCK LLP,
(353 North Clark Street,
Chicago, Illinois 60654-3456,
312-222-9350), by:
MR. JEFFREY D. COLMAN,
jcolman@jenner.com,
appeared on behalf of the Defendants;

VANASCO GENELLY & MILLER,
(33 North LaSalle Street, Suite 2200,
Chicago, Illinois 60602,
312-786-5100), by:
MR. MATTHEW M. SHOWEL,
mshowel@vgmlaw.com,
appeared on behalf of the Intervenor Receiver.

REPORTED BY: VICTORIA C. CHRISTIANSEN, RPR, CRR,
Illinois CSR No. 84-3192.

THE CLERK: No. 11, Cox vs. Mayer Brown.

MR. COLMAN: Good morning, your Honor. Jeff Colman for Mayer Brown.

MR. SHOWEL: Matthew Showel for the receiver. I believe counsel for the plaintiff's out there.

MR. DELANEY: Good morning, Judge. William Delaney on behalf of the plaintiffs.

Judge, I'm tendering to the Court a set of courtesy copies for the February 6 hearing which was previously set.

Judge, counsel and I just chatted outside, counsel for the intervening party. Counsel has filed a motion to intervene and scheduled it for today instead of piggybacking it on the 6th.

I haven't had a chance to review this motion yet, so we need a briefing schedule on the motion to intervene.

MR. SHOWEL: Well, your Honor, I thank counsel for presenting the motion for me.

The entire reason we are here to intervene is to object to the discovery requests counsel has made.

MR. DELANEY: Judge --

THE COURT: No, let him finish.

MR. DELANEY: Thank you.

MR. SHOWEL: We're most certainly amenable to a briefing schedule, but the entire point of our intervention is that we want to object to this discovery request, so if there's going to be a hearing held on the 6th, we'd like to be able to file our objection in advance of that and counter-present our arguments.

Now, our arguments will largely probably mirror those of Mayer Brown; however, we have interests separate of those of Mayer Brown. As you know, my client, the receiver in the SEC action in Florida, is suing Mayer Brown on the exact same facts in Florida, so we are adverse parties.

As your Honor is also probably aware, my client was appointed receiver in the SEC action and was put in charge of all assets having anything to do whatsoever with Founding Partners, which would include the documents that counsel is seeking in this matter.

So as I say, my client has a duty to defend the assets of the receiver and to marshal all the assets of the receiver, including all these

documents, and so the entire point of our intervention is to object to this discovery request.

So we're fine with having a briefing schedule. We just think that -- it's our position that if we're going to have a briefing schedule on our motion to intervene, then we need to push back the hearing on the discovery motion until after such time as counsel's had his opportunity to brief our motion.

MR. DELANEY: If I may be heard, Judge, first, to clarify for the record, I'm unclear exactly who counsel -- William Delaney on behalf of plaintiffs here. Counsel has indicated he represents what entity, I'm not certain on that.

MR. SHOWEL: Well, I represent the receiver --

MR. DELANEY: So Daniel Newman through his --

MR. SHOWEL: No, not in his individual capacity; in his capacity as receiver.

MR. DELANEY: Okay.

MR. SHOWEL: It's very simple. He's been appointed receiver for all of the Founding Partner entities in the action in which your client, William Gunlicks, is named as a defendant.

My client has been given the responsibility of marshalling all of the assets, including these documents that --

MR. DELANEY: Judge, if I may --

THE COURT: Okay. Let him finish.

MR. DELANEY: First, I would ask the Court to strike from the record all the improper argument that counsel has injected into the record because counsel, as he stands here before this Court, has sought leave to intervene; he has not been granted leave to intervene.

So he has improperly before the cart before the horse. Instead of getting this Court's permission to intervene, he has attempted to argue the purpose of his intervention, which I appreciate, it's a stylistic approach, but the bottom line is this: There is a motion --

THE COURT: Okay. That's denied.

What do you want to say about this?

MR. DELANEY: I would like leave to brief the motion to intervene. With regards to the February 6 hearing date, there is no reason whatsoever in law, fact or this case for this Court to change that date.

If this Court deems to allow the intervenor to enter this case, that's fine. I simply want my ability to brief that issue.

The fact of the existence of a receivership is correct, but the issues before this Court, Judge, are Defendant Mayer Brown's obligations pursuant to Illinois statute and plaintiffs' motion for Rule 224 ruling, Illinois Supreme Court Rule 224.

So, Judge, the February 6 date stands and should stand because this Court set it, it's been briefed, and we're prepared to move forward on that hearing.

The intervening party did not file an emergency motion, has improperly brought this argument before the Court without permission to intervene and is seeking to derail a hearing date that has already been briefed, and the Court is holding the courtesy copies for the matters that are set for February 6.

So, Judge, we would simply request leave to file the responsive filing to the motion to intervene and a hearing date on that motion, and the February 6 date, Judge, there's no reason for

it to change.

Lastly, Judge, the issue is this: Defendant Mayer Brown has a statutory obligation that they're seeking to evade. Intervenor apparently is seeking to help Mayer Brown evade its statutory obligation.

Irrespective of what intervenor and Mayer Brown's crafty legal theories are, the obligation for the February 6 tolling date of the statutory obligation that is Mayer Brown, the defendant's, does not change.

They can argue, which they are attempting to do -- and fascinatingly, Judge, as counsel explained to the Court, the receivership entity, Founding Partners Capital Management, Incorporated, maintains a parallel case in Broward County, Florida. The receivership entity is represented by a law firm from Arizona in the companion case in Broward County.

That case, Judge, was filed four months after the case that currently pends before this honorable Court, so they are four months behind our filing.

Judge, the receiver -- while counsel has

attempted to articulate the scope of the receivership duties, I would respectfully point out that counsel is wrong both on the language and the scope of the duties.

There is no duty to defend against documents. Judge, the issue before this Court is a simple CD-ROM of documents.

Mayer Brown is the party that represented and rendered legal services to William Gunlicks and the receivership entity, Founding Partners Capital Management, Incorporated. That's undisputed.

This motion that sits before the Court -- because there currently pends a 2-615 motion filed by the same defendant that's seeking to evade its statutory obligations here in Illinois and hide the file from the plaintiff in your case. Judge, that motion is going to be fully briefed this week. I believe the filing due date is the 14th of February for the responsive pleading, and the relevant issues before this Court, the dispositive issues are about the legal services rendered by Mayer Brown, and the answer to those legal services rendered are in the file.

Mr. Gunlicks was represented individually by Mayer Brown in multiple instances, as detailed in fact and in exhibit in the pending motions before the Court and in the third amended complaint.

Now, counsel has spun a theory that the receivership has a duty to defend somehow. We're not talking about defending and we're not talking about assets.

The receivership was entered into on April 20, 2009.

THE COURT: Can I ask you a question?

MR. DELANEY: Please, Judge.

THE COURT: What's the prejudice to you if we don't go ahead with the hearing on February 6?

MR. DELANEY: You would be allowing the intervening party the ability to accomplish its intervening goals without a hearing on the right to intervene, number one. That would be an extreme prejudice.

Number two --

THE COURT: Well --

MR. DELANEY: But I'm answering the Court.

THE COURT: Well, but I don't understand.

That's an extreme prejudice?

MR. DELANEY: There is a statutory obligation Mayer Brown has. This is the issue before you in the court.

THE COURT: All right. Well, to do what again? To --

MR. DELANEY: To deliver a copy of the client file. The law firm that rendered legal services to the plaintiffs in this case --

THE COURT: Right.

MR. DELANEY: -- has a statutory obligation in Illinois within 60 days to tender the file.

THE COURT: Okay.

MR. DELANEY: They have that obligation tolling on February 6.

These arguments that have been crafted and presented to the Court now with the intervening party, also by Defendant Mayer Brown --

THE COURT: So if you got them on March 6, what's the prejudice?

MR. DELANEY: You have before you a motion to dismiss. In that motion to dismiss, the same defendant that is hiding the file argues that my client, Mr. Gunlicks, wasn't a client of Mr. --

Mayer Brown.

THE COURT: Right. So you need this stuff for the motion that's pending?

MR. DELANEY: Absolutely, Judge.

THE COURT: So if I hold the motion to dismiss until March 20, how are you prejudiced?

MR. DELANEY: We're delaying the case again.

It's a statutory obligation, Judge. If the Court says there's an issue with the documents, I would suggest, Judge, the Court enter a protective order for Mayer Brown to comply with its statutory obligation, and then we --

THE COURT: Which I might do.

MR. DELANEY: If I may, Judge, may I finish?

But again, the issue here remains Mayer Brown's duty under Illinois statute. The issues presented by the intervening party, they're important, but ultimately they have no bearing on the statutory obligation Defendant Mayer Brown has in the State of Illinois.

MR. SHOWEL: They most certainly do, your Honor. These --

THE COURT: Wait.

How long do you want to respond to the

motion to intervene?

MR. DELANEY: 21 days, sir.

THE COURT: Okay. 21 days to respond.

How long do you want to reply?

MR. SHOWEL: 14 days, your Honor, but if I may, the primary reason we're trying to intervene is to attack this discovery request, so --

THE COURT: Yeah, the February 6 -- and I'll put off their motion to dismiss, too.

We're going to do this orderly. We can't put toothpaste back in the tube, so we're going to do this in an orderly manner.

21 days to respond is 2/22, 14 days to reply would be 3/7. We'll set the clerk's status on this motion and, frankly, we can set it on all the other motions.

Do we have your motion fully briefed, the motion to dismiss?

MR. DELANEY: We will, Judge. That will be filed by the end of the week.

THE COURT: Okay. Well, let's have all of the -- we'll have three motions pending. We'll have the clerk's status on 3/8 at 8:45. All of the movants have to bring in two copies.

You know what? I'll have you hold on to these, counsel.

(WHEREUPON, certain documents were tendered to counsel.)

MR. DELANEY: I understand.

THE COURT: Everybody bring in -- here's your folder back.

(WHEREUPON, said document was tendered to counsel.)

MR. DELANEY: Thank you, Judge.

THE COURT: Bring in two copies of the motion, reply and the response, any documents you're attacking in the motion, and then we'll set it for a hearing within two weeks of that date, any or all of it, but that -- you know, I...

MR. DELANEY: I understand, Judge.

My question to the Court, then, is: On February 6, there's a statutory obligation Defendant Mayer Brown must comply with, so what I would request, if the Court -- and I'm not clear. Is the Court intending to strike the February 6 date?

THE COURT: Yes.

MR. DELANEY: Okay. Now, Judge, what I would

ask that the Court do to protect the rights and interests of the plaintiffs in this pending case is order Defendant Mayer Brown to tender to this Court a copy of the file.

That's the issue. Mayer Brown has stunningly said they -- it's too onerous to --

THE COURT: I'm going to order Mayer Brown to secure the file and in no way have anything bad happen to it --

MR. COLMAN: That has already --

THE COURT: -- until this motion is heard. I don't need it in here. We'll lose it.

MR. DELANEY: May I make a suggestion, Judge? Could we have the file delivered to a document production company, the file can be produced -- it's going to be produced whether it's produced on February 6 or at a later date, but the point is this: I do not want the defendant to evade their obligations under Illinois law, so if this -- if the issue here is -- counsel thinks that the intervention motion will succeed and he will convince this Court that the receiver has some duty to hide these documents in the like manner defendant wants to. That's his goal.

My position, Judge, is if these documents are in control of the document production company, the only question then before the Court --

THE COURT: Mayer Brown will be under court order to secure them, protect them and not in any way diminish them, okay?

Put that in the order, and that does it.

MR. COLMAN: Your Honor, may I say a few things, please? I know --

THE COURT: Well, you know --

MR. COLMAN: I haven't had a chance -- I haven't had a chance to say a word.

THE COURT: Well, are you disagreeing with what I've said or done?

MR. COLMAN: I only would like to say the following, your Honor: Mayer Brown has secured these files for two years.

As an officer of the court, I ask you please not to impose a court order on something that as professionals we have been doing for two years.

A court order -- without notice to us of a request for a court order, it's just not necessary, and I respectfully ask that you --

THE COURT: What's the prejudice of that?

MR. COLMAN: Because court orders -- I've been involved in the Shockman cases, I've been involved in many cases where court orders -- where you have a lawyer coming in front of you -- and this was going to be my second point -- who talks about how my client has evaded, crafted, hidden, makes all kinds of pejorative statements that are false --

THE COURT: Okay. If you want to fool around with this, I'll set a hearing on it on Friday.

MR. DELANEY: We have a hearing scheduled for February 6.

THE COURT: No, no, no, on this issue of protecting the file.

I don't get it, counsel. I really don't get it, because -- I don't like the fact that you say, "We're going to do it, but we don't want to be ordered to do it." Now I wonder what's going on.

MR. COLMAN: There's nothing wrong.

THE COURT: Well, I wonder. I mean, when you say, "We're going to do it, but I don't want to be ordered to do it; I don't want to agree to do it, but we're going to do it" -- that's what you're saying.

MR. COLMAN: Your Honor, I'll put it in the order that you've ordered us to do it. I was just raising --

THE COURT: And I appreciate it, but, I mean -- okay.

MR. COLMAN: I'll put it in the order.

THE COURT: Okay, great.

MR. COLMAN: May I say one other thing, please?

THE COURT: Sure.

MR. COLMAN: Two other things. I'm sorry.

You said that the hearing would be set within two weeks of March 8.

THE COURT: Yeah.

MR. COLMAN: I leave the country on March 8 and do not get back until March 26.

THE COURT: We'll accommodate you.

MR. COLMAN: Thank you.

And the other thing I wanted to tell you, your Honor, as an officer of the court is that in the proceedings in Florida, the receiver has filed a motion to -- it's a renewed motion for a rule to show cause -- I'm just telling you as an officer of the court that down in the federal court

proceedings in Florida, the receiver has asked for a rule to show cause why counsel here and his clients should not be held in contempt, and one of the things that they are requesting as relief is an order from the federal court that these plaintiffs dismiss this litigation.

I just wanted you to know that that's --

MR. SHOWEL: I'm sorry, your Honor. I should have brought that to your attention.

MR. DELANEY: If I may, Judge, as interesting as this renewed motion is, it is almost identical in form, substance and content to a motion the receiver filed in December --

THE COURT: Okay.

MR. DELANEY: -- and -- but I just want to make the Court understand, Judge, Judge Steele denied this petition once already and making crystal clear that Illinois law is for Illinois courts.

The receiver is crafting an argument to take a second bite of the apple when he already lost it. The issue is moot.

We have authority to proceed in this court. Judge Steele is well aware of this case.

It was filed before the first rule to show cause was denied.

So this smoke and mirrors, Judge, is another attempt to evade the obligations under Illinois law, and I want the Court to understand there is a 74-year-old man and his wife on the verge of being evicted because of a malpractice case that Mayer Brown is --

THE COURT: You know --

MR. DELANEY: -- the defendant in.

THE COURT: -- I appreciate you bringing that to my attention. I certainly am not going to get into the substance of it.

MR. DELANEY: Certainly.

THE COURT: Okay. So that will be the order. Thanks.

MR. DELANEY: Thank you, Judge.

MR. COLMAN: Thank you, your Honor.

(WHICH WERE ALL THE PROCEEDINGS HAD IN THE FOREGOING CAUSE ON THIS DATE.)

STATE OF ILLINOIS)
) SS:
COUNTY OF DuPAGE)

I, VICTORIA C. CHRISTIANSEN, a Certified Shorthand Reporter of the State of Illinois, do hereby certify that I reported in shorthand the proceedings had at the hearing aforesaid, and that the foregoing is a true, complete and correct transcript of the proceedings of said hearing as appears from my stenographic notes so taken and transcribed under my personal direction.

IN WITNESS WHEREOF, I do hereunto set my hand at Chicago, Illinois, this 1st day of February, 2012.

Certified Shorthand Reporter
C.S.R. Certificate No. 84-3192.

EXHIBIT 30

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

GUNLICKS, et al.	
v.	No. 2010 L010353
MAYER BROWN, et al.	

ORDER

This matter comes before the Court on the Motion of Daniel S. Newman to Intervene, IT IS HEREBY ORDERED that:

1. Plaintiffs shall have until February 22 to respond to the Motion to Intervene.

2. Newman shall have until March 7 to reply.

3. A Clerk's status shall be held on March 8, 2012 at 8:45 AM at which time the Court shall be provided with 2 copies of the materials relating to (a) the Motion to Intervene, (b) Mayer Brown's Motion to Dismiss the current complaint and (c) Plaintiff Gunlicks' Motion to Compel Discovery.

4. Those 3 motions will be set for hearing sometime after March 26, 2012.

5. The hearing set for February 6 is stricken and will be reset.

6. Mayer Brown is ordered to preserve all files relating to the subject matter of the complaint in this case.

Atty. No.: 05003
Name: Jeffrey D. Colman
Atty. For: Mayer Brown
Address: 353 N. Clark Street
City/State/Zip: Chicago, IL 60654
Telephone: (312) 923-2940

ENTERED:

/Judge John C. Griffin -1981/
Judge Judge's No.

EXHIBIT 31

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
SOUTHEAST REGIONAL OFFICE
SUITE 1800
801 BRICKELL AVENUE
MIAMI, FLORIDA 33131
(305) 982-6300
Writer's Direct: (305) 982-6345

December 16, 2003

Via Federal Express & Facsimile (847) 784-9522
Mr. William L. Gunlicks
Founding Partners Capital Management Company
5100 North Tamiami Trail, Suite 119
Naples, Florida 34103

Re: In the Matter of Founding Partners Capital Management Co. (FL-02891)

Dear Mr. Gunlicks:

This letter confirms our telephone conversation of December 15, 2003. We contacted you because it is our understanding that you and Founding Partners are not currently represented by counsel. You and Founding Partners are entitled to be represented by an attorney in this matter. If you and Founding Partners hire an attorney, please have that person contact us as soon as possible.

In our telephone conversation, we told you that the staff of the Securities and Exchange Commission (the "Commission") intends to recommend that the Commission take legal action against you and Founding Partners Management Company ("Founding Partners") alleging that you and Founding Partners violated certain provisions of federal law. These provisions include Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder; Sections 206(1)-(2), 206(4) and 207 of the Investment Advisers Act of 1940 and Rule 206(4)-1(a)(5) thereunder; and, Section 7(a) of the Investment Company Act of 1940 and Rule 270.2a-7 thereunder.

The facts that we believe support charges against you and Founding Partners include, among other things, the offer and sale of unregistered securities, the misappropriation of investor funds by breaching your fiduciary duties and defrauding actual and prospective clients and the investors of Founding Partners Equity Fund, L.P., Founding Partners Stable-Value, L.P. ("Stable-Value") and Founding Partners Global Fund, Ltd. (collectively, the "Funds") through a series of misrepresentations and omissions in the Funds' offering materials regarding the use of investor funds through Stable-Value's healthcare and commercial receivable investment programs. In addition to the misappropriation and misuse of investor funds, you and Founding Partners created and distributed false and misleading offering materials, monthly Stable-Value performance reports, Commission investment adviser registration forms, part II and a disclosure brochure; misrepresented Stable-Value as a money-market in Nelson Information; and, failed to register Stable-Value as an investment company. In connection with the contemplated action, the staff may seek a permanent injunction, civil penalties, an accounting and disgorgement of proceeds.

EXHIBIT 919
FOR ID 11-13-18 DM

The Commission has a procedure to permit persons involved in its investigations to present reasons why they should not be the subjects of such legal action. This letter describes how you and Founding Partners can make such a presentation. If you and Founding Partners would like to make a presentation arguing why the Commission should not take legal action against you and Founding Partners, you may do so in writing or on videotape. Any written presentation should be limited to 40 pages, and any video presentation should not exceed 12 minutes. Your presentation may include reasons of law, policy or fact that you believe the Commission should consider. We have enclosed a document that describes in greater detail the process for making these presentations, called Securities Act Release No. 5310, Procedures Relating to the Commencement of Enforcement Proceedings and Termination of Staff Investigations. The Commission rule that pertains to these presentations is Rule 5(c) of the Commission's Rules on Informal and Other Procedures, 17 C.F.R. §202.5(c).

It is entirely voluntary on your part whether to make a presentation for yourself and Founding Partners. You and Founding Partners are not required to make one. If you wish to make a written or videotaped presentation, however, you should forward it to me by no later than January 5, 2003. Any presentation should be sent to:

John C. Mattimore
Assistant Regional Director, Southeast Regional Office
Securities & Exchange Commission
1800 Brickell Avenue, Suite 1800
Miami, Florida 33131

If we make an enforcement recommendation to the Commission on this matter, we will forward any presentation that you make to the Commission.

Please be advised that the Commission may use the information or statements contained in such a presentation as evidence against you and Founding Partners in any lawsuit that it brings. This practice is explicitly provided for in two other documents I have enclosed, called Form 1661, Supplemental Information for Regulated Entities Directed to Supply Information Other Than Pursuant to a Commission Subpoena, in the section on Routine Uses of Information (section G); and, Form 1662, Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena, in the section on Routine Uses of Information (Item 4). Please also be advised that any

presentation you make may be discoverable by third parties through various legal processes. These third parties include private parties and other federal or state departments, offices or agencies.

If you have any questions, please contact me at (305) 982-6345.

Sincerely,

Robbie L. Mayer
Senior Counsel

Enclosures

EXHIBIT 32

EXPERT REPORT OF RICHARD C. BREEDEN

Background and Qualifications

I graduated from Stanford University in 1972 and from the Harvard Law School in 1975. From 1976-1981, I practiced corporate law in New York City, and from 1985-1988, in Washington, D.C. (after working in government, as described below, in the interim). My law practice focused on corporate transactions, including initial public offerings and public and private offering of other types of securities. I worked on M&A transactions, bank loans, exchange offers, joint venture agreements and various types of financing transactions. In my law practice I represented different securities underwriters in connection with numerous public offerings and related due diligence. I also served as lender's counsel for a major money center bank, working on both the extension of credit and also situations involving defaulted credits.

For approximately four years (1982-1985, and 1989), I served in the White House as a senior economic, legal and financial advisor to George H.W. Bush during his terms as Vice President and President (41) of the United States. Most notably, as Assistant to the President in 1989, I was primarily responsible for developing the President's plan to restructure and stabilize the U.S. savings and loan system.

From 1989 to 1993 I served as Chairman of the United States Securities and Exchange Commission (the "Commission" or "SEC") after being appointed by President George H.W. Bush and unanimously confirmed by the United States Senate. As Chairman of the SEC, I was responsible for enforcing the federal securities laws and serving as primary regulator of the U.S. securities markets, which had an aggregate value of more than $5 trillion at the time. As SEC Chairman I led the agency in discharging its responsibilities to define and enforce all disclosure, accounting and audit requirements under the U.S. securities laws, as well as federal corporate governance standards through the SEC's proxy rules.

During my tenure as Chairman, the SEC commenced more than 1,200 enforcement actions under the securities laws. These included actions relating to fraudulent financial reporting, as well as false or misleading disclosure, market manipulation, violation of accounting and auditing requirements, failure to maintain proper books and records and other offenses. As SEC Chairman I worked in close coordination with the U.S. Department of Justice in investigating violations of securities laws.

After serving as chairman of the worldwide financial services industry practice at the accounting firm Coopers & Lybrand LLP, I left to start my own firm in 1996 to assist

companies in turnaround and restructuring activities, as well as consulting on a wide variety of issues for companies, courts and government agencies. In this connection, I served as Chapter 11 trustee of The Bennett Funding Group, which was the scene of a $2.5 billion Ponzi-style securities fraud. Over a period of years I was successful in recovering and distributing more than 60% of losses of unsecured investors in the Bennett case. During this time I served as CEO of a publicly traded finance company owned by the Bennett bankruptcy estate, and negotiated asset-backed financing lines involving hundreds of millions for this firm.

In June 2002, I was appointed by U. S. District Judge Jed S. Rakoff of the Southern District of New York to serve as Corporate Monitor of WorldCom, Inc. WorldCom was the scene of the largest financial fraud in U.S. history, and the ensuing bankruptcy was by far the largest ever undertaken. For approximately four years, I served as Court's representative in overseeing the highly successful restructuring of the firm in bankruptcy, including approving all internal and external compensation, leading the internal investigation of the financial fraud, assisting federal authorities with related criminal and civil investigations, and overseeing the firm's largest-ever accounting restatement.

In 2005 I was appointed corporate monitor of KPMG LLP by the U.S. Department of Justice to oversee implementation of a deferred prosecution agreement ("DPA") relating to criminal tax shelter fraud at LPMG. As monitor I oversaw an overhaul of the firm's compliance program to bring it into compliance with U.S. Sentencing Commission guidelines, and participated in the firm's internal investigations of its personnel and decisions concerning sanctions for unethical behavior. My team also was responsible for overseeing the firm's exit from certain areas of tax practice, and for monitoring all tax opinions issued by the firm in the United States.

In June, 2005 I founded Breeden Capital Management, LLC ("BCM"), an investment adviser registered with the SEC in the U.S., and the FCA in the United Kingdom. BCM managed a series of limited partnerships that invested in U.S. and European equity securities on behalf of large public pension funds and other institutional investors. At its peak, the firm had assets under management of nearly $1.6 billion. I functioned as Chief Investment Officer of BCM and approved all investments by the firm.

I have served on the boards of more than 15 companies in the U.S., the United Kingdom, Germany and Spain, and have chaired or served as a member of the audit committee of numerous publicly traded companies. I also serve as a Trustee of the George H. W. Bush Presidential Library Foundation, on the Standing Advisory Group of the Public Company Accounting Oversight Board (PCAOB) in Washington, D.C., and on

the board of the Pardee RAND Graduate School, which is the largest Ph.D program in public policy studies in the U.S.

Introduction

I have been retained by Beus Gilbert PLLC, counsel for the Receiver Daniel S. Newman, in the matter entitled *Daniel S. Newman v. Mayer Brown LLP*, to render expert opinions on two matters. The first relates to the SEC's so-called Wells Notice and Wells Submission processes, and corresponding preservation of documents by prospective defendants' and respondents' counsel. The second relates to risk disclosure pertaining to the investments in the funds that are in receivership.

This Report is based on my review of documents and information provided to me by the Beus Gilbert law firm as of the date of this Report. I reserve the right to revise or supplement any of the opinions provided herein based upon my review of any additional information that is brought to my attention after the date of this Report.

The Wells Process

1. As noted above, during my tenure at the Commission, I oversaw and voted on more than 1,200 enforcement actions by the Commission. In addition to other areas of the Commission's activities, I am fully familiar with all aspects of the Commission's enforcement program and processes.

2. An important part of the Commission's enforcement process is the issuance of so-called "Wells Notices". A typical Wells Notice is a written communication from the Commission staff (the "Staff") to a person or entity under investigation for possible violations of one or more provisions of the federal securities laws. The purpose of a Wells Notice is to provide formal notification that the Staff has made a preliminary decision to recommend that the Commission commence an enforcement proceeding in either federal court, or in an administrative proceeding. In addition, a Wells Notice gives the potential defendant a fair degree of specificity in the exact charges that the Staff has determined to recommend to the Commission for its authorization.

3. In a Wells Notice, the prospective respondent or defendant is also advised that he/she/it may make a submission to the Enforcement Division and Commission concerning the proposed enforcement action. The prospective respondent's or defendant's response is referred to as a "Wells Submission".

4. The Wells Notice practice, which is now codified in Rule 5(c) of the SEC's "Rules on Informal and Other Procedures", is based on recommendations made in 1972 by an advisory committee chaired by John Wells. As the Commission stated in

the original Wells Release, the objective of the practice is for the Commission "not only to be informed of the findings made by its staff but also, where practicable and appropriate, to have before it the position of persons under investigation at the time it is asked to consider enforcement action." See Securities Act of 1933 Release No. 5310, "Procedures Relating to the Commencement of Enforcement Proceedings and Termination of Staff Investigations." There are particular situations where a Wells Notice would not be provided, [1] though in the majority of cases a Wells Notice is issued to prospective respondents and defendants.

5. The Staff cannot commence an enforcement proceeding in court or before an administrative law judge without the formal approval of the Commission itself. When fully staffed, the Commission has five members, each of whom is appointed by the President subject to advice and consent of the United States Senate. The five (or fewer, if there are vacancies at any given time) Commissioners each have an equal vote as to instituting enforcement actions. Actions are decided in a "Closed Meeting" of the Commission, which is not open to the public or to defendants. The Chairman of the Commission decides which cases should be on the agenda for approval at each Closed Meeting.

6. In advance of a meeting where a potential action is on the agenda, both the Wells Notice and the Wells Submission, if any, of a potential defendant are provided to the members of the Commission as part of the briefing materials relating to the proposed enforcement action. The Commissioners (including the Chairman) and their staffs may also receive additional memoranda or briefings from the Enforcement Division, Office of General Counsel, or other members of the Staff in advance of considering and voting upon an enforcement recommendation of the Staff.

7. During my tenure as Chairman, I received and reviewed many hundreds of Wells Submissions, or memoranda from the Staff evaluating the contents of Wells Submissions.

8. Because enforcement recommendations are discussed with the Chairman of the Commission before being added to the agenda for a Commission meeting, I have extensive experience regarding the Staff's responses to Wells Submissions, and

[1] For example, where immediate enforcement action is necessary for the protection of investors and providing a Wells Notice and waiting for a Wells Submission is not practical (for example, where an emergency action is needed to obtain a temporary restraining order to stop an ongoing Ponzi scheme or other fraud); where providing a Wells Notice may allow potential defendants to move assets out of the country in advance of an asset freeze, or where there is a parallel criminal investigation that may be adversely affected by providing a Wells Notice. *See* SEC Enforcement Manual, ¶2.4.

the frequency of occasions in which an enforcement recommendation was cancelled or modified as a result of a Wells Submission.

9. The Wells Notice process gives potential defendants a "last chance" to persuade the Staff and the Commission that charges should not be authorized, or that the charges or proposed penalties described in the Wells Notice should be reduced. In my experience, defense counsel and their clients realize the opportunity that is being provided, and therefore a potential defendant has a very strong incentive to present its "best case". During my tenure Wells Submissions were rarely successful in dissuading the Commission from instituting any form of enforcement action. However, there was a considerably greater likelihood that particular charges or potential sanctions might be adjusted as a result of a Wells Submission.

10. In my opinion the issuance of a Wells Notice to a person or entity under investigation would signify to both the subject and their counsel that there was an extremely high likelihood that some enforcement proceeding would be brought against the subject. Among other things, experienced counsel understand that a Wells Notice is not issued until after the Staff has reached a decision to recommend an enforcement action.

11. In issuing a Wells Notice, the Staff appreciates that the particularity of the notice gives the subject and counsel a specific warning of the violations to be charged. It can do so without fear of destruction of relevant evidence because, with such knowledge, a subject and/or the subject's counsel could be subject to charges of "obstruction of justice" in violation of one or more of the provisions in Title 18, Part 1, Chapter 73 if documentary or other evidence was subsequently destroyed. In addition, a regulated defendant might also be exposed to charges relating to the adequacy of their books and records under Commission regulations if relevant documents ultimately proved to be missing. Thus, document retention after receiving a Wells Notice is a matter of potential criminal and civil liability for both a defendant and/or counsel.

12. This is one reason, among others, that counsel for the subjects or potential subjects of a Commission investigation generally go to great lengths to retain all potentially relevant documents. In addition, in the eyes of the Staff and Commission, a counsel's failure to retain relevant documents would undermine the credibility of his or her client who is under investigation, as well as the credibility and professionalism of counsel.

13. Issues of production of documents and other evidence are frequently discussed among the Commissioners and Staff at Closed Meetings. In my personal experience, any suggestion that a subject or subject's counsel was not forthcoming with all requested documents or other evidence would be prejudicial to the subject. The Staff will advise the Chairman and Commissioners of other details involved in the subject's or counsel's behavior toward an investigation, including the timeliness and quality of document production to the Staff. I have seen many cases where counsel's lack of cooperation in document production or a company's inability to produce relevant documents led to additional charges against the subject of an investigation.

14. On December 16, 2003, the Commission issued a Wells Notice to William L. Gunlicks ("Gunlicks") and Founding Partners Capital Management Company ("FPCM"). The Wells advised Gunlicks and FPCM that the Staff intended to recommend that the Commission institute an enforcement action against Gunlicks and FPCM for violations of various provisions of the federal securities laws, including the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934.[2] The Wells Notice included a recitation of facts the staff believed supported its intended charges against Gunlicks and FPCM, including that they had defrauded actual and prospective clients and investors in funds managed by FPCM "through a series of misrepresentations and omissions in the Funds' offering materials regarding the use of investor funds through Stable-Value's [*i.e.*, Founding Partners Stable-Value, L.P's] healthcare and commercial receivable investment programs".[3]

15. As a result of having been given detailed notice of the Staff's intent to charge particularized violations of law, it is my opinion that no later than December 16, 2003, securities counsel for Gunlicks and FPCM would have anticipated the near certainty of litigation with the Commission and would have recognized the imperative of retaining all relevant documents.

Disclosure

16. As former Chairman of the Commission I also have extensive experience reviewing disclosure rules and practices in connection with offerings of securities. During my tenure, the Commission would receive and act upon thousands of offering documents every year. In addition, as Chairman I was ultimately

[2] The Wells Notice indicates that the Staff's enforcement recommendation was communicated orally to Gunlicks the previous day.

[3] The Wells Notice followed an April 22, 2002 seven page deficiency letter the staff issued to Gunlicks, as President of FPCM, as a result of the Staff's examination of FPCM. Subsequent to the issuance of the deficiency letter and also before the Wells was issued, at the Staff's request, Gunlicks provided additional documents and acceded to the Staff's request for on-the-record testimony.

responsible for prudential, or safety and soundness, regulation of all large broker dealers, securities markets, mutual funds and other participants in U.S. capital markets.

17. I also have considerable personal experience as an investor. For approximately eight years I served as the Founder, Chairman and Chief Investment Officer of an SEC-registered investment adviser. Our firm managed investments for a series of related equity investment partnerships with peak assets under management "AUM") of nearly $1.6 billion. In this capacity I was ultimately responsible for making all investments of the firm, and these partnerships often took concentrated investment positions of significant percentage size. As a result, I have extensive experience both as a regulator and as an investor in evaluating credit, interest rate and liquidity risks, among others.

18. My opinions stated herein regarding the failure to disclose what I believe to be material information are based on my expertise as the primary regulator of U.S. capital markets, as well as my experience as an investor in evaluating the risks associated with large investments or financings. I continue to be an active investor of my own assets.

19. The background information that follows is based on a review of documents and information provided to me by counsel for the receiver, and publicly available information about FPCM.

A. Background

20. Gunlicks formed FPCM in 1996. It was a registered Investment Adviser until August 21, 2014, when its registration was revoked by the Commission.

21. Beginning in 2000, two of the funds established by FPCM were dedicated to implement an investment strategy that involved loans by the hedge funds to a medical receivables factoring company. The two funds were:

    a. Founding Partners Stable-Value Fund, L.P. ("Stable Value");[4] and
    b. Founding Partners Stable-Value II ("Stable-Value II").

FPCM was the general partner of the first three funds and the investment manager for Global.

[4] Stable-Value was previously known as Founding Partners Multi-Strategy Fund LP. It will be referred to throughout as Stable-Value.

22. In April 1996 Schulte Roth & Zabel prepared an offering memorandum (the "Offering Memorandum") for Stable-Value.

23. In June 2000, a Confidential Supplement to the Offering Memorandum (the "June 2000 Supplement") was issued. As described in the Supplement, Stable-Value's investment strategy involved lending its assets, *i.e.*, subscription money it received from its investors, to Sun Capital Healthcare, Inc. ("Healthcare") pursuant to various Credit and Security Agreements. Healthcare in turn would use borrowings under the credit facilities to purchase healthcare receivables relating to delivery of medical, surgical, diagnostic or other health care goods or services (collectively, "Healthcare Receivables"). Healthcare was an affiliate of Sun Capital, Inc. ("Sun Capital"), and the two entities had common ownership.[5]

24. In general, the Credit and Security Agreements created an asset-backed credit facility. In an asset-backed facility, the lender looks to a portfolio of pledged assets, in addition to the general credit of the borrower, for repayment of credit advances. In this case, repayment of the loans and interest due on the loans was wholly dependent upon the collectability of the Healthcare Receivables. The liquidity of the Healthcare Receivables was also particularly important to the viability of the financing structure due to the risk of investor redemptions at Stable-Value.

25. According to the June 2000 Supplement, the Healthcare Receivables would be those that were payable by certain types of third parties—insurance companies, Blue Cross/Blue Shield plans and government-sponsored programs, such as Medicare and Medicaid. The fund's disclosures also indicated that the Healthcare Receivables would be short-term in nature, with maximum maturities of 120 days. This limitation would have been quite important to investors concerned about liquidity risks.

B. Risk Factors

26. The investment strategy devised by Gunlicks and implemented by Stable-Value carries with it a number of significant risks including particularly both credit and liquidity risks. In January 2000, Gunlicks and FPCM retained Mayer, Brown & Platt ("Mayer Brown") to prepare the "Risk Factor" section of the June 2000 Supplement to advise existing and prospective investors of the risks associated with Stable-Value's investment strategy.

[5] Healthcare and Sun Capital are at times collectively referred to as "the Sun Capital entities".

27. The retention of Mayer Brown was confirmed in a letter dated January 20, 2000 (the "Retainer Agreement") from Marc L. Klyman of Mayer Brown and countersigned by William L. Gunlicks, the President and CEO of FPCM. In the Retainer Agreement, Mayer Brown stated:

"We understand that you will provide the Supplements to investors in the Partnership prior to obtaining any new funds from such investors in order to make any loan under the Lending Facilities (and, with respect to funds already invested by investors in the Partnership, prior to using such funds to make any loan under the Lending Facilities)".

28. Thus, both FPCM as the Investment Adviser and Mayer Brown as Gunlicks' and FPCM's counsel knew that Stable-Value was obligated to inform existing investors and prospective investors of the material investment risks before it could use their money for this investment strategy.

29. Mayer Brown drafted a 17-page Risk Factor section for the June 2000 Supplement describing various risks associated with an investment in Stable-Value.

30. As noted above, Sun Capital, was an affiliate of the borrower, Healthcare, i.e., the entity that received financing from Stable-Value. I have reviewed documents, including an invoice from Mayer Brown dated January 23, 2002, reflecting that Mayer Brown represented Sun Capital as early as November 2000 in connection with the development of a factoring program.

31. On January 23, 2002, FPCM entered into another retainer agreement with Mayer Brown (the "January 2002 Retainer Agreement"). The January 2002 Retainer Agreement set forth FPCM's retention of Mayer Brown in connection with a proposed credit and security agreement between Stable-Value and Sun Capital—Mayer Brown's pre-existing client. This agreement was executed on January 24, 2002.

32. Also in January 2002, Mayer Brown represented Stable-Value in connection with funding three bridge loans totaling $900,000 that were made by Healthcare to Sun Capital.

33. In May 2002, another Supplement to Stable-Value's offering materials was issued (the "May 2002 Supplement"). The May 2002 Supplement, which was also prepared by Mayer Brown, did not disclose any information about the creditworthiness or solvency of Healthcare or Sun Capital.

C. Omissions

34. Investments in a limited partnership, such as Stable-Value, whose strategy involved financing the purchase of receivables by another company presents significant risks. As a threshold matter, Stable-Value's investors would have to absorb any losses on the receivables purchased by Healthcare unless Healthcare had adequate capital to absorb losses and still pay principal and interest on its credit advances from Stable-Value. Absent an adequate solvency, or capital, buffer at Healthcare, the investors of Stable-Value would be directly exposed to losses on the receivables selected by Healthcare or others.

35. Lending to companies that factor receivables is substantially similar to the risks of other types of asset-backed securities or credit facilities. The borrower's (*i.e.*, the factoring company's) ability to repay the principal and interest on such loans is dependent upon the amount and timeliness of payments it receives in satisfaction of the receivables it purchased. This is analogous to the credit risks of a mortgage-backed security, where the ultimate value of the securitized pool of loans will depend on the payments made by obligors on the underlying mortgage loans. Many other types of asset backed financing structures have been utilized in markets to allow specialized loan originators to package and sell their receivables in order to fund new originations. Whether such a program is financing healthcare, credit card, car loan, mortgage loan or other receivables, the risks for investors in these types of funds include:

a. the quality of the underlying credit underwriting performed by the originator of the receivables;
b. the health of the broader economy, as well as the particular sector that may be involved (*e.g.*, healthcare);
c. the financial health and solvency of the entity that purchases and pools loans or receivables, and its ability to absorb fluctuations in collection and default rates on the receivables it purchases;
d. the risks of both default and delayed payment of underlying receivables in response to either macroeconomic factors or individual borrower credit issues;
e. the ongoing compliance by the factoring company/pool originator with credit, maturity or other selection criteria defining the loans or receivables that are to be included in any such program;
f. the ability of the originators of loans in any such pool to replace loans that violate representations and warranties concerning the nature of loans or receivables that are being financed;

g. the impact of changes in market interest rates;
h. the availability of buyers for loans or other receivables held by the borrower in the event the borrower has a need for liquidity;
i. the ability to find sufficient receivables with the credit quality and maturity that are intended for the pool; and
j. changes in undertakings made to the lender in connection with the types and quality of receivables it purchases.

36. If the underlying receivables are not performing as anticipated, or the factoring company purchases known under-performing receivables, this would materially affect the value of the securities.

37. To put it simply, if the factoring company (here, Healthcare) is unable to fully and timely pay the principal and interest due on advances under its credit facility used to fund receivable purchases, investors in the lending fund (Stable-Value) will suffer adverse economic consequences.

38. Stable-Value's primary stated investment strategy involved making repeated loans to Healthcare (and thereafter to Sun Capital) that would fund purchase of Healthcare Receivables by the Healthcare and commercial and trade receivables by Sun Capital. If Healthcare and Sun Capital violated the parameters for the types and quality of receivables they purchased, this would have a material adverse effect on the value of investments in Stable-Value.

39. In my opinion, the risks described in paragraphs 34-38 are highly material, and do not appear to have been adequately disclosed. If there were factors involved with either Healthcare or Sun Capital that created a risk that they would deviate from the types and quality of receivables they purchased, in my opinion that those factors should have been disclosed.

40. According to the Commission's enforcement action, beginning in 2004 Healthcare and Sun Capital started purchasing receivables that did not conform to the parameters described in the Stable-Value offering materials that Mayer Brown prepared.

41. As stated in the Commission's complaint against FPCM and Gunlicks, the non-conforming receivables were "longer-term, less liquid and much riskier in nature".[6] For example, the Sun Capital entities purchased a) receivables from financially troubled hospitals that would need to remain operating in order to

[6] *SEC v. Founding Partners Capital Management Co.*, 2:09-CV-229 (M.D. FLA), Complaint filed 4/20/2009, ¶3.

collect the receivables, and made working capital loans to these hospitals and b) workers compensation receivables that take several years to collect.[7]

42. According to the Commission's complaint, as of the time it filed its enforcement action against FPCM and Gunlicks in April 2009, the Sun Capital entities owed $550 million to Stable-Value and had ceased making interest payments to Stable-Value on this loan. In addition, only 32% of the $550 million receivables portfolio of Healthcare (financed by Stable-Value) was composed of the less risky, short-term Healthcare Receivables.

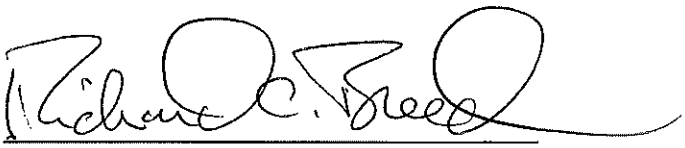
43. Thus, as of April 2009, more than half of Stable-Value's portfolio was invested in loans that were used by the Sun Capital entities to purchase non-conforming receivables and more risky loans than had been represented to Stable Value or its investors. The offering materials prepared by Mayer Brown that I have reviewed do not appear to have disclosed the risk of this eventuality.

44. Sun Capital may have had solvency issues dating back to at least January 2002, when Mayer Brown represented Stable-Value in connection with its funding of bridge loans to provide working capital to Sun Capital.

45. Given the fact that Stable-Value was investing virtually all its funds into loans to Healthcare or Sun Capital, a reasonable investor would have desired to understand every possible aspect of the operations and management of these entities, their history, and as much information as possible regarding their current financial condition and liquidity.

[7] *Id.*

Respectfully submitted,



Date: December 21, 2018
Greenwich, CT

Richard C. Breeden

EXHIBIT 33

*** CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER ***

IN THE CIRCUIT COURT

OF THE SEVENTEENTH JUDICIAL CIRCUIT

IN AND FOR BROWARD COUNTY, FLORIDA

DANIEL S. NEWMAN, et al.,)
Plaintiffs,)
vs.) No. 10-49061
ERNST & YOUNG, LLP, a)
Delaware limited liability)
partnership, et al.,)
Defendants.)

*** VOLUME II ***

The ** CONFIDENTIAL ** resumed videotaped deposition of CLAUDIUS SOKENU, called for examination, taken pursuant to the provisions of the Code of Civil Procedure and the Rules of the Supreme Court of the State of Illinois pertaining to the taking of depositions for the purpose of discovery, taken before DINA G. MANCILLAS, a Certified Shorthand Reporter within and for the State of Illinois, CSR No. 84-3400 of said State, at Suite 4500, 353 North Clark Street, Chicago, Illinois, on November 14, 2018, at 9:00 a.m.

(Said record was read by the reporter.)

MR. J. BRADFORD: Object to form.

BY THE WITNESS:

A. No, I was not aware.

BY MR. BEUS:

Q. Was there ever a document hold on Founding Partners' documents as of the time you left in January of '09?

A. I don't believe so.

MR. BEUS: You could take a break.

BY THE WITNESS:

A. I'm sorry. Before we take a break, I just need to clarify something.

My answer is with respect to the documents that we received from Founding Partners in connection with the SEC. When I left Mayer Brown, there wasn't a Mayer Brown document hold on those documents, to the best of my recollection.

And I -- if there was, I wouldn't know -- I don't know the reason why there would be.

BY MR. BEUS:

Q. Let me make sure I understand this.

As of the time you left --

A. Right.

Q. -- there had been a document hold placed on which documents?

MR. J. BRADFORD: Mischaracterizes his prior testimony.

BY THE WITNESS:

A. That's not what I said. What I said was, I think your question was -- and I may have it wrong. I think your question was, was there a document hold at Mayer Brown on Founding Partners matters? That's how I understood your question.

BY MR. BEUS:

Q. Fair enough.

A. And I don't believe that to be the case because I don't know of any reason, when I was there, why -- why there would be a document hold on Founding Partners matters. That would suggest some kind of knowledge of litigation or impending litigation, and I didn't have that knowledge.

MR. BEUS: Okay. Let's take the break.

MR. WOHL: Okay.

THE VIDEOGRAPHER: We are going off the video record at 11:41 a.m.

EXHIBIT 34

From: Sokenu, Claudius O.
Sent: Monday, July 10, 2006 4:38:15 PM
To: William L. Gunlicks (foundingcapital@cs.com)
CC: Mueller, Thomas M.
Subject: Founding Partners

Attached is the SEC's new proposed settlement order in blackline. Please give us a call at your convenience to discuss. My initial reaction is there isn't much by way of substantive changes that we haven't discussed. I would like to discuss some of their factual assertions when we talk.

Also, they still want to us to sign a tolling agreement. My sense is they are worries that, should the Commission turn down the proposed settlement offer (which is possible but unlikely), they will look foolish if they then cannot bring some of their claims because of statute of limitations concerns.

Let's talk at your convenience.

Claudius O. Sokenu
Litigation Practice
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
☎: 212-506-2629
🖷: 212-849-5629
✉: csokenu@mayerbrownrowe.com
http://www.mayerbrownrowe.com/lawyers/profile.asp?hubbardid=S522747219&lawyer_name=Sokenu%2C+Claudius++O%2ET%2E