

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

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

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

FOUNDING PARTNERS CAPITAL MANAGEMENT
and WILLIAM L. GUNLICKS,

Defendants,

FOUNDING PARTNERS STABLE-VALUE FUND, LP,
FOUNDING PARTNERS STABLE-VALUE FUND II, LP,
FOUNDING PARTNERS GLOBAL FUND, LTD., and
FOUNDING PARTNERS HYBRID-VALUE FUND, LP,

Relief Defendants.

**RECEIVER'S MOTION FOR APPROVAL OF
ADDENDUM TO BEUS GILBERT REPRESENTATION AGREEMENT**

Receiver Daniel S. Newman, not individually, but solely in his capacity as receiver (the "Receiver") for Founding Partners Capital Management Co. ("FPCMC"), 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 ("Hybrid Value") (collectively, the "Receivership Entities"), by and through undersigned counsel, respectfully files this motion for approval of an addendum to his representation agreement with Beus Gilbert PLLC ("Beus"), which acts as his counsel in *Newman v. Mayer Brown LLP, et al.*, Case No. 10-49061, pending in the Circuit Court for Broward County, Florida ("Broward Litigation").

1. On April 20, 2009, the United States Securities and Exchange Commission (the “SEC”) filed a Complaint against FPCMC and William L. Gunlicks (“Gunlicks”) alleging that FPCMC and Gunlicks engaged, and were engaging in, a scheme to defraud investors and violate the federal securities laws. In the Complaint, the SEC sought, among other relief, entry of a temporary restraining order and a preliminary injunction.

2. On April 20, 2009, the Court entered an order (the “Initial Order Appointing Receiver”) appointing a receiver (the “Initial Receiver”) over the Receivership Entities. The Initial Receiver was subsequently removed by Court Order dated May 13, 2009. On May 20, 2009, the Court entered an order (the “Receivership Order”) appointing Daniel S. Newman, Esq. as the replacement receiver (the “Receiver”) over the Receivership Entities. [D.E. 73].

3. The Receivership Order allows the Receiver to “appoint one or more special agents, employ legal counsel, actuaries, accountants, clerks, consultants and assistants as the Receiver deems necessary and to fix and pay their reasonable compensation and reasonable expenses.” [D.E. 73 at ¶ 2(d)].

4. The Receiver initiated the Broward Litigation by filing suit against Mayer Brown and Ernst & Young, LLP (“E&Y”). The Receiver alleges that Mayer Brown and E&Y breached various duties to the Receivership Entities and aided and abetted Gunlicks's massive fraud and own breaches of fiduciary duties, resulting in the Receivership Entities' loss of hundreds of millions of dollars.

5. Pursuant to Section 2 of the Receivership Order, the Receiver sought permission to retain Beus as his attorneys in the Broward Litigation. [D.E. 242.] The Receiver attached a copy of the Legal Representation Agreement (the “Representation Agreement”) with Beus to his motion. [D.E. 242-2.]

6. On August 18, 2010, the Court approved the Receiver's retention of Beus as counsel in the Broward Litigation, as well as the proposed Representation Agreement. [D.E. 246.]

7. The Representation Agreement provides that:

- a. Beus, with the Receiver's consent, may retain experts and consultants to perform services necessary in the Broward Litigation. [D.E. 242-2, ¶ 2.2(a)].
- b. The Receiver may seek to obtain prior Court approval before paying any costs or expenses for experts or consultants. *Id.*, ¶ 2.2(d).
- c. At the Receiver's request, Beus may advance any costs, charges, or expenses incurred in connection with the retainer of experts or consultants. *Id.*, ¶ (2.3(d).
- d. Any amounts paid by Beus to the experts or consultants, if not reimbursed within 90 days of receipt of Beus's bill, will accrue interest at the Arizona statutory rate of 10% per annum until paid. *Id.*

8. The Representation Agreement further provides that the Receiver is responsible for and will pay all costs and expenses for experts or consultants, regardless of the amount of recovery in the Broward Litigation. *Id.*, ¶ 2.1(a).

9. The Receiver and his counsel have determined that a significant number of experts and consultants are required for the Broward Litigation. Although not necessarily required by the Representation Agreement, the Receiver recently moved for Court approval, and obtained approval, to hire one such individual. *See e.g.* [D.E. 490.]

10. The Broward Litigation has grown and become more complex, requiring numerous experts and consultants on a large variety of issues. As such, the Receiver has opted to take advantage of Sections 2.2(a) and 2.3(d) of the Representation Agreement, which provides that

Beus may retain any experts or consultants directly, and advance any related costs, to be repaid at Arizona's statutory interest rate of 10% per annum.

11. This will allow for a more efficiency and flexibility in retaining and paying the Receiver's experts in the Broward Litigation, and is expressly permitted by the Representation Agreement already approved by the Court.

12. Because the Receiver has agreed to allow Beus to retain and advance payment to experts and consultants pursuant to Sections 2.2(a) and 2.3(d) of the Representation Agreement, Beus in turn has agreed to relieve the Receiver from that portion of Section 2.1(a) that requires the Receiver to reimburse Beus for all expert and consultant fees and costs, regardless of the outcome and recovery in the Broward Litigation.

13. As such, the Receiver and Beus have agreed to enter into an addendum to the Representation Agreement (the "Addendum"), which provides that the Receiver is only responsible for reimbursing Beus any costs or expenses it advances on experts and consultants, as described above, if there is a recovery in the Broward Litigation and the Receiver's percentage of the recovery, as provided in Section 2.1(a), exceeds the total amount advanced by Counsel on experts and consultants. A copy of the proposed Addendum is attached as **Exhibit A**.

14. To be clear, if no recovery is obtained or the Receiver's percentage of the recovery is less than the amount Beus advances for experts and consultants, the Receivership Estate will *not* be required to reimburse Beus for those advances.

15. Nothing within this Motion or the Addendum modifies, amends, or changes Beus's percentage fee recovery set forth in the Representation Agreement at Paragraph 2.1(a).

16. Entry into this Addendum is in the best interests of the Receivership Estate. Beus is free to retain and advance payment to as many experts and consultants as it deems necessary, in

consultation and with consent of the Receiver, to succeed in the Broward Litigation. The Receiver, and thus the Receivership Estate, will not be responsible for reimbursing those payments unless the total recovery in the Broward Litigation exceeds the amount expended on experts and consultants. In addition, the Receiver will no longer be forced to expend attorneys' fees seeking to have experts and consultants approved by the Court, although the Receiver still has the option of seeking such Court approval under Section 2.2(d) of the Representation Agreement.¹

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that this Court enter an order approving the proposed Addendum to the Representation Agreement with Beus Gilbert PLLC, a copy of which is attached as **Exhibit A**.

MEET AND CONFER REQUIREMENT

Counsel for the Receiver has conferred with SEC regarding the relief sought in this Motion. The SEC does not object to the relief sought herein.

Respectfully submitted,

NELSON MULLINS BROAD AND CASSEL

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By: /s/ Jonathan Etra
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Christopher Cavallo, Esq.
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¹ At a minimum, the Receiver will provide information in his status reports to the Court on the experts and consultants that have been retained.

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2019, I electronically filed this document with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel who are not authorized to receive electronically Notices of Electronic Filing.

By: /s/ Jonathan Etra
Jonathan Etra, Esq.

SERVICE LIST

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