

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.

**THE RECEIVER'S MOTION
FOR AUTHORIZATION TO PAY FEES TO SPECIAL COUNSEL**

Receiver Daniel S. Newman, not individually, but solely in his capacity as the Court-appointed receiver ("Receiver") for Founding Partners Capital Management Company; Founding Partners Stable-Value Fund, L.P.; Founding Partners Stable-Value Fund II, L.P.; Founding Partners Global Fund, Ltd.; and Founding Partners Hybrid-Value Fund, L.P. (collectively, the "Receivership Entities"), files this Motion for Authorization to Pay Fees ("Motion") to Beus Gilbert McGroder PLLC ("Beus") and Grossman Roth Yaffa Cohen, P.A. ("Grossman") (together, "Special Counsel"), and requests that this Court enter an Order authorizing him to pay Special Counsel for certain professional services incurred during the litigation against Mayer Brown LLP in Broward County, Florida (the "Broward Litigation").

The Receiver respectfully requests that this Court authorize the Receiver to pay Special Counsel its Court-approved fee.¹ The requested payment, if approved, will be made from the Receivership Estate after receipt of the First Settlement Payment, following the expiration of the appeals period for the Court's Final Settlement Approval and Bar Order Regarding Receiver's Litigation With Mayer Brown ("Approval and Bar Order") and the February 12, 2021 Partial Final Judgment ("Final Judgment"), which expiration occurs on or about April 13, 2021.

The SEC has reviewed this Motion and has no objection to the relief sought herein.

I. RETENTION OF RECEIVER, SPECIAL COUNSEL, AND APPROVAL OF SETTLEMENT AGREEMENT WITH MAYER BROWN LLP

A. The SEC's Motion

On April 20, 2009, the SEC filed its Complaint [D.E. 1] and its Emergency Motion to Appoint a Receiver [D.E. 3]. This Court granted the SEC's Emergency Motion to Appoint a Receiver on the same date. [D.E. 9].

In its Complaint, the SEC sought to permanently enjoin Founding Partners and its principal William L. Gunlicks from violating antifraud provisions of the federal securities laws and a December 2007 SEC cease and desist order against them. [D.E. at 1]. The SEC also sought to protect and preserve approximately \$550 million of investor assets at risk. *Id.* On May 13, 2009, the SEC filed a Motion to Appoint a Replacement Receiver. [D.E. 71].

B. The Court Appoints Daniel Newman, Esq., as Replacement Receiver

On May 20, 2009, the Court entered its Order Appointing Replacement Receiver and appointed Daniel Newman, Esq., as Receiver for the Receivership [D.E. 73, the "Receivership Order"]. The Order placed the Receiver in charge of the Receivership Entities. *Id.* at 2-3. Pursuant

¹ The Receiver will file a separate motion for approval to pay Special Counsel's unreimbursed expenses incurred during the Broward Litigation.

to the Receivership Order, the Receiver was granted “full and exclusive power, duty, and authority to: administer and manage the business affairs, funds, assets, choses in action and any other property of Founding Partners and the Founding Partners Relief Defendants; marshal and safeguard all of the assets of Founding Partners and the Founding Partners Relief Defendants; and take whatever actions are necessary for the protection of investors.” *Id.* at 1-2. The Receivership Order required the Receiver to, among other things:

- Take immediate possession of and administer the assets of the Receivership Entities;
- Investigate the way the affairs of the Receivership Entities were conducted;
- Institute such actions and legal proceedings, for the benefit and on behalf of the Receivership Entities and their investors and other creditors as the Receiver deems necessary;
- Employ professionals as the Receiver deems necessary and pay their reasonable compensation;
- Engage persons in the Receiver’s discretion to assist the Receiver in carrying out the Receiver’s duties and responsibilities;
- Defend, compromise or settle legal actions in which the Receivership Entities or the Receiver is a party; and
- Make payments and disbursements from the funds and assets taken into control as necessary in discharging the Receiver’s duties.

Id. at 3-8.

C. The Receiver Retains Special Counsel

On August 18, 2010, the Receiver obtained Court approval to retain Beus as Special Counsel (“Order Authorizing Retention and Payment”). [D.E. 246]. As part of the Court-approved terms of Beus’s retention, Beus is entitled to an award of one-third (33.333%) “of any and all sums recovered either as a result of trial or by way [of] settlement after a lawsuit has been instituted.” [D.E. 242-2, §2.1(a)]. For the last ten years, the Receiver has periodically sought approval of

Special Counsel's incurred expenses, pursuant to the terms of Beus's retainer agreement. Beus is also entitled to an award of incurred expenses not yet paid, including expert witness costs,² but the Receiver will seek approval to pay those expenses by separate motion.

As disclosed in the Receiver's various fee applications [*see, e.g.*, D.E. 494, n.6], Grossman serves as local counsel in the Broward Litigation without any additional fees incurred by the Receivership Estate. Pursuant to Grossman's agreement with Beus, Grossman shares in Beus's one-third recovery. As with Beus, the Receiver will seek approval to pay Grossman's expenses in a separate motion.

C. The Receiver Sues Mayer Brown

On December 30, 2010, the Receiver, represented by Special Counsel, sued Mayer Brown LLP ("Mayer Brown"), which was former counsel to Receivership Entities, along with the Receivership Entities' former auditor Ernst & Young ("E&Y"), for malpractice, among other claims. The lawsuit was filed in the Seventeenth Judicial Circuit in and for Broward County, Florida (previously defined as the Broward Litigation).

D. Approval of Mayer Brown Settlement

The Receiver and Mayer Brown agreed to a settlement in principle. In connection with those discussions, the parties sought to stay the Broward Litigation on July 15, 2020. After months of negotiation preparing the settlement documents, the Receiver filed his Motion for Approval of Settlement Agreement with Mayer Brown on November 3, 2020 ("Motion for Approval"). [D.E. 508]. The Court held a hearing on the Motion for Approval on February 3, 2021.

² In July 2019, the Receiver and Beus agreed to a Court-approved addendum of Beus's retainer agreement that gave additional protections to the Receivership Estate. [D.E. 496; 497]. The addendum provided that Beus would cover all expert witness fees without reimbursement unless and until it was successful in the Broward Litigation. As such, the Receiver now seeks leave to reimburse Beus for the expert witness related expenses incurred to date in the Broward Litigation and as to the proceedings against Ernst & Young LLP.

On February 5, 2021, the Court entered its Approval and Bar Order. [D.E. 527]. Pursuant to the Court-approved settlement, the Receiver will obtain \$390 million, beginning with a First Settlement Payment of \$370 million, and with interest on part of the deferred payments of the balance, over a period of four years. [*Id.*, p. 3]. On February 10, 2021, the Court in the Broward Litigation entered a Final Judgment pursuant to the Settlement Agreement, dismissing the Receiver's claims against Mayer Brown. On February 12, 2021, the Court entered its Partial Final Judgment [D.E. 528]. At present, \$365 million of the \$370 million First Settlement Payment is being held in a trust account by counsel for Mayer Brown's insurers, until the appeals period on the Partial Final Judgment has concluded.

II. REQUEST FOR FEE

The Receiver and Special Counsel, assisted by experts and consultants, worked diligently to fulfill the Receiver's obligations and prosecute the Broward Litigation. The Receiver's recovery of \$390 million is an extraordinary result that would not have been possible without representation by Special Counsel. The Receiver's Motion for Approval and the Court's Approval and Bar Order discuss the Broward Litigation, the necessity of retaining Special Counsel, and the results obtained by the Receiver in detail. Specifically, the Court's Approval and Bar Order notes that the \$390 million Settlement Amount will allow for a substantial distribution to Approved Claimants after payment of creditor claims, fees and costs, and litigation reserves. [D.E. 527, p. 7]. The Court also found the Settlement was "reached following an extensive investigation of the facts and active litigation of claims and defenses, and that it resulted from vigorous, good-faith, arm's-length negotiations involving experienced and competent counsel representing both Parties, including two formal mediations conducted over a period of years." [*Id.*, p. 7].

The Receiver respectfully requests leave to pay Special Counsel its award for the recovery in the Broward Litigation in accordance with this Court's prior Order Authorizing Retention and Payment. This amounts totals \$130,000,000.00 in the aggregate ("Total Fee Award"). Specifically, the Receiver seeks approval of the Total Award, with leave to pay Special Counsel the Total Award from the Settlement Amount as funds are received. As the Court is aware, the Receiver will obtain the full Settlement Amount over time. There is the First Settlement Payment of \$370 million, with the remainder paid in parts, with interest. [D.E. 508, p. 6]. The Receiver will pay Special Counsel one-third of First Settlement Payment and then one-third of each subsequent payment, until the total Settlement Amount is received.³

III. THIS MOTION SHOULD BE APPROVED

A. Court's Orders

As discussed above, the Court already approved the retention of Special Counsel, and its fee for a successful recovery, in its Order Authorizing Retention and Payment. [D.E. 246]. Moreover, the Court acknowledged Special Counsel's fee in its Approval and Bar Order. [D.E. 527, p. 7] (considering Special Counsel's fee goes from "33.3% to 40% if there is an appeal post-trial" as a factor in favor of settlement).

B. Relevant Authority

The Receiver's contingency fee contract with Special Counsel, as approved by the Court, is valid. Valid contingency fee contracts are enforced under Florida law. The law is clear that "the

³ The Court-Approved engagement letter with Special Counsel provides for a recovery of 33-1/3% "of any and all sums recovered either as a result of trial or by way [of] settlement after a lawsuit has been instituted," with the fee calculated as a percentage of the "gross recovery," which is defined as the "total amounts of monies recovered in a judgment or settlement in the Matter, including punitive damages, attorneys' fees, interest, and the fair market value of any property recovered whether by settlement or judgment, without reduction for the fees, charges, and expenses paid by Client or advanced by Counsel ..." Thus, Special Counsel's fee is earned as the payments of the settlement amounts with Mayer Brown are actually recovered.

attorney, who has obtained the contracted contingency, is entitled to his stated fees under the contingency fee contract and not quantum meruit.” *Zaklama v. Mount Sinai Med. Ctr.*, 906 F.2d 650, 653 (11th Cir. 1990) (enforcing a 50% contingency agreement; “[a] client may not accept the benefits of a valid contingency fee contract and subsequently contest his obligations thereunder”). Florida “courts uniformly declare that once the contingency (the recovery) has been obtained, the attorney is entitled to the contingency fee under the terms of the contingency contract.” *Eakin v. United Tech. Corp.*, 998 F. Supp. 1422, 1435 (S.D. Fla. 1998) (rejecting claim that earned contingency fee was excessive); *Cooper v. Ford & Sinclair, P.A.*, 888 So. 2d 683, 690 (Fla. 4th DCA 2004) (“The contingency requirement had been met and the attorneys were entitled to rely upon the provisions of the written contingency fee contract to determine the amount of their fee.”); *King v. Nelson*, 362 So. 2d 727, 728 (Fla. 2d DCA 1978) (rejecting argument to limit compensation to *quantum meruit* where plaintiff agreed to a settlement before discharging his attorneys); *see also Eakin v. United Tech. Corp.*, 998 F. Supp. 1422, 1429 (S.D. Fla. 1998) (“If Acosta obtained the contingency, he will be entitled to his contingency fee under the contract.”); *Town of Medley v. Kimball*, 358 So. 2d 1145, 1146-47 (Fla. 3d DCA 1978) (affirming enforcement of contingency fee agreement as “clear, concise and unambiguous”).

Under governing law, following a determination that services were rendered, and costs expended, in furtherance of the Receivership, the Court may award compensation for those fees and costs. When determining an award of attorneys’ fees incurred during a receivership, the Court should give consideration to the factors for compensation that the Eleventh Circuit articulated in *In re Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292 (11th Cir. 1988): (1) the time and labor required; (2) the novelty and difficulty of the question involved; (3) the skill requisite to perform the legal service properly; (4) the likelihood, if apparent to the client, that the

acceptance of the particular employment will preclude other employment by the lawyer; (5) the fee customarily charged in the locality for similar legal services; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or by the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the lawyer or lawyers performing the services; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) any awards in similar cases. *See also Securities & Exchange Comm’n v. Elliot*, 953 F. 2d 1560, 1577 (11th Cir. 1992). The Receiver respectfully suggests that his request for fees for payment of his attorneys and other professionals meets the criteria for this compensation.

In the SEC Action, the Court’s Receivership Order requires the Receiver to “administer such assets as is required in order to comply with the directions contained in this Order, and to hold all other assets pending further order of this Court.” [D.E. 73 at 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 . . .” *Id.* at 4-5. The Court further authorized payment of these professionals from the funds held by the Receivership. *Id.* at 6. Pursuant to this provision, the Court authorized the retention of counsel for the Receiver. [*See, e.g.*, D.E. 78].

Payment to Special Counsel is also appropriate and warranted in consideration of the 11th Circuit multi-factor test propounded in *In re Norman*, as follows.

1. The First Factor

Special Counsel expended considerable time and effort to perform the work necessary to obtain the settlement with Mayer Brown and corresponding \$390 million recovery. The Receiver’s Motion for Approval and the Court’s Approval and Bar Order discuss the Broward Litigation in detail.

[D.E. 527, pp. 6-7]. Beus's and Grossman's records reflect that they have invested more than 100,000 hours (including more than 25,000 hours from the most senior and name partners in both firms) and more than \$35 million in recorded billable time in the litigation to date, with no promise of payment except from a successful resolution of the Receiver's claims.

In approving the Settlement with Mayer Brown, the Court found the Broward Litigation was "hard-fought and active." *Id.* The Receiver reported, and the Court accepted, that there were "four different appeals to the Fourth District Court of Appeal, three of them concerning the claims against Mayer Brown, and extensive discovery and motion practice." *Id.* There were hearings on "many discovery motions and six separate motions for partial summary judgment," four of which were decided before the Broward Litigation was stayed. *Id.* Discovery was also "extensive," with millions of documents having been produced by parties and non-parties, and dozens of depositions. *Id.* Discovery was so contentious that a special master was appointed to handle the parties' issues. [D.E. 508, p. 30].

The Receiver and Mayer Brown "engaged in two formal mediations in an effort to resolve" the Broward Litigation. [D.E. 527. Pp. 6-7]. Neither of the mediations were successful, and the parties "active[ly] and vigorous[ly] litigat[ed] for more than a year and a half after the conclusion of the second mediation." *Id.*

In summary, Special Counsel spent significant time:

- Handling motion practice and general case management in the Broward Litigation, which was extensive and included substantive summary judgment briefing, described above;
- Addressing and responding to discovery in the Broward Litigation, including hundreds of requests for admission and written interrogatories;
- Handling four different appeals to the Fourth District Court of Appeal, three of which related to claims against Mayer Brown;

- Handling production and review of millions of documents produced by parties and non-parties;
- Handling dozens of depositions, including the depositions of many non-party witnesses, many of them over multiple days, and some of them very contentious, requiring the involvement of a special master;
- Engaging in two formal mediations in an effort to resolve the Broward Litigation, neither of which resulted in a settlement; and
- Assisting the Receiver in keeping investors apprised of the progress of the Broward Litigation, including hosting informational calls for investors regarding the Broward Litigation.

Additional detailed descriptions of Special Counsel’s time and work in the Broward Litigation can be found in the Receiver’s various reports to the Court. [*see, e.g.*, D.E. 500 (Eleventh Report); 493 (Tenth Status Report)].

2. The Second and Third Factors

The Court has already considered these factors and found that the Broward Litigation was a complex and time-consuming litigation. [D.E. 527, pp. 7-8]. In support of its Approval and Bar Order, the Court found, among other things, “(i) significant issues exist as to the merits and value of the claims asserted against Mayer Brown by the Receiver; [and] (ii) such claims raise complex and difficult issues of law and fact that would require a substantial amount of time and expense to litigate, with uncertainty regarding whether such claims would be successful[.]” [*Id.*] For that reason, the Court approved the Settlement and entered the Approval and Bar Order and entered the Final Judgment. The Receiver submits that the Broward Litigation was unusually difficult and challenging, having been litigated ten years. The Receiver obtained a successful result because of Special Counsel’s many years of dedicated effort to pursuing these claims, and their particular skill and expertise in this kind of litigation.

3. The Seventh and Eighth Factors

The results obtained have been significant, especially given the complex, challenging nature of this Receivership and the numerous demands on the Receiver and Special Counsel. The Receiver and his professionals engaged in significant, time-consuming work that was the subject of this Motion. The work that is the subject of this Motion was necessary to recover monies for the Receivership Estate through the Broward Litigation.

The Receiver and Special Counsel kept investors fully informed during the settlement process. This included the Receiver and Special Counsel hosting numerous telephone conferences to explain to investors the results to be obtained in the Settlement, if it were supported by investors and approved. Thus, before holders of approved claims were asked to submit consents to the Settlement, the Receiver and Special Counsel told them what Special Counsel's fee arrangement was and the impact that would have on the amount of funds for distribution. With this knowledge, approximately 98% of the holders of approved claims gave the Receiver executed consents, and no one objected to the Settlement.

4. The Other Factors

In view of the numerous, varied, and time-sensitive demands on Special Counsel during the Broward Litigation, they were impeded in efforts to accept and pursue litigation on behalf of other potential clients, for a period of many years. (Factor 4). Moreover, Special Counsel assumed a substantial risk of nonpayment for years of work if they were not successful in obtaining a substantial recovery for the Receivership Estate.

There is significant support in the legal community for the one-third contingency percentage recovery this Court approved and has referenced in several of its orders. [*see, e.g.*, D.E. 246; D.E. 527]. When the Receiver obtained approval to hire Special Counsel, the Receiver did

not have the resources or means to pursue the Broward Litigation, except with a contingency fee arrangement. Special Counsel was extraordinarily flexible in its representation of the Receiver, agreeing to forego years of expense reimbursements until after the Settlement was approved, and covering millions of dollars of expert witness related costs without reimbursement unless a successful result was obtained in the Broward Litigation. (Factors 5-7, 10-11).

While the Receiver seeks approval to pay Special Counsel a large amount of money, consisting of one-third of the recovery, that is only due to the extraordinarily large settlement obtained for the benefit of the Receivership Estate—the largest receivership settlement known to the Receiver and Special Counsel for these types of claims. (Factor 12).

CONCLUSION

For these reasons, the Receiver, Daniel S. Newman, respectfully requests that this Court enter an Order authorizing the payment of \$130,000,000 to Special Counsel, to be paid as the funds constituting the Settlement Amount are received.

Dated: April 6, 2021.

Respectfully submitted,

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By: /s/ Jonathan Etra
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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel who are not authorized to receive electronically Notices of Electronic Filing.

By: /s/ Jonathan Etra
Jonathan Etra

SERVICE LIST

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