

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 TENTH STATUS REPORT

Daniel S. Newman, as Court-appointed receiver (the "Receiver") for Defendant Founding Partners Capital Management Company ("FPCMC") and the Relief Defendants Founding Partners Stable-Value Fund, L.P.; Founding Partners Stable-Value Fund II, L.P.; Founding Partners Global Fund, Ltd.; and Founding Partners Hybrid-Value Fund, L.P. (collectively, the "Receivership Entities"), respectfully files his Tenth Status Report (the "Tenth Report"). This Tenth Report addresses information and issues that occurred from approximately November 2017 to January 15, 2019 (the "Reporting Period").

BROAD and CASSEL

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I. INTRODUCTION

On April 20, 2009, the United States Securities and Exchange Commission filed its complaint (“SEC Action”) against FPCMC and William L. Gunlicks (“Gunlicks”), alleging that FPCMC and Gunlicks had engaged, and were engaging, in a scheme to defraud investors and violate the federal securities laws. [D.E. 1]. In the Complaint, the SEC sought, among other relief, entry of a temporary restraining order and a preliminary injunction. After reviewing the SEC’s submission, on April 20, 2009 the Court entered an Order Freezing Assets of Founding Partners and Gunlicks (the “Asset Freeze Order”). The Asset Freeze Order also applies to Founding Partners Stable-Value Fund, L.P., (“Stable-Value”), Founding Partners Stable-Value Fund II, L.P. (“Stable-Value II”), Founding Partners Global Fund, Ltd., (“Global Fund”) and Founding Partners Hybrid-Value Fund, L.P. (“Hybrid-Value”) (collectively, “Founding Partners Funds”).

On April 20, 2009, the Court also entered an order (the “Initial Receivership Order”) appointing a receiver (the “Initial Receiver”) for Founding Partners and the Founding Partners Funds (collectively, the “Receivership Entities”). [D.E. 9]. The Initial Receiver was subsequently removed by Court Order on May 13, 2009. [D.E. 70]. Daniel S. Newman, Esq. (the “Receiver”) was appointed Replacement Receiver by Court Order on May 20, 2009 (the “Receivership Order”), which Order superseded the Initial Receivership Order. [D.E. 73]. The Receivership Order provides that the Receiver shall, among other things:

- (a) Take immediate possession of all property, assets and estates of every kind of Founding Partners and each of the Founding Partners Relief Defendants, whatsoever and wheresoever located, including but not limited to all offices maintained by Founding Partners and the Founding Partners Relief Defendants, rights of action, books, papers, data processing records, evidences of debt, bank accounts, savings accounts, certificates of deposit, stocks, bonds, debentures and other securities, mortgages, furniture, fixtures, office supplies and equipment, and all real property of Founding Partners and the Founding Partners Relief Defendants wherever situated, and to

administer such assets as is required in order to comply with the directions contained in this Order... ; and

- (b) Investigate the manner in which the affairs of Founding Partners and the Founding Partners Relief Defendants were conducted and institute such actions and legal proceedings, for the benefit and on behalf of Founding Partners or the Founding Partners Relief Defendants and their investors and other creditors as the Receiver deems necessary against those individuals, corporations, partnerships, associations and/or unincorporated organizations which the Receiver may claim have wrongfully, illegally or otherwise improperly misappropriated or transferred money or other proceeds directly or indirectly traceable from investors in Founding Partners and the Founding Partners Relief Defendants ...

II. LITIGATION UPDATE

A. The Broward Litigation

i. Procedural Update and Deadlines

As previously reported, the Receiver, represented by Court-approved special counsel, sued the Receivership Entities' former auditor Ernst & Young ("E&Y"), along with the Receivership Entities' former counsel Mayer Brown LLP ("Mayer Brown"). The lawsuit was filed in the Seventeenth Judicial Circuit in and for Broward County, Florida (the "Broward Litigation").

On November 30, 2017, pursuant to a court-ordered deadline in the Broward Litigation, the Receiver filed a Motion to Amend his Complaint to seek leave to pursue a claim for punitive damages against Mayer Brown.¹ Proceedings against E&Y were stayed at that time pending the issuance of the Mandate from the 4th DCA on the arbitrability of claims against E&Y. The Receiver's motion was opposed by Mayer Brown, and a written proffer and a courtroom presentation of the evidence supporting a claim for punitive damages against Mayer Brown were made to the trial court in January. The trial court denied leave to amend the pleadings to seek

¹ As the Court is aware, Florida requires seeking leave of Court to assert claims for punitive damages.

punitive damages by order entered on January 26, 2018 (the “Amendment Order”). The Receiver may request leave to amend to seek punitive damages after obtaining additional discovery from Mayer Brown.

Other limited amendments to the Complaint were allowed by the Amendment Order, and the Fourth Amended Complaint incorporating those amendments was filed and served on February 1, 2018.² Mayer Brown filed its Answer & Affirmative Defenses to the Fourth Amended Complaint on February 12, 2018.

On January 19, 2018, the 4th DCA issued its Mandate from the appeal from the trial court’s orders compelling arbitration of claims against E&Y. Following the issuance of the Mandate, the trial court stayed all proceedings against E&Y with respect to the non-arbitrable claims, pending completion of the arbitration of the Receiver’s arbitrable claims against E&Y (discussed further in subpart iii below).

Following the stay of the non-arbitrable claims against E&Y, the trial court entered an Agreed Order on February 16, 2018, modifying the Scheduling Order³ for the claims against Mayer Brown. The trial court modified the Scheduling Order again on March 20 and August 14, in light of the extensive and continuing document production from the Sun Capital-Related Parties (and to some extent from E&Y), and the desire to complete that document and electronic discovery before taking the depositions of certain witnesses.

On August 16, 2018, Mayer Brown filed a Motion for Modification of the Scheduling Order just entered on August 14, and a Motion to Stay proceedings in the Broward Litigation

² The amendments were limited to five paragraphs of the Complaint, related to Founding Partner’s innocent decision makers.

³ As described in the Receiver’s Ninth Status Report [D.E. 478, p. 4], on April 20, 2017, the trial court approved an Order regarding the case schedule and certain discovery (the “Scheduling Order”).

pending completion of the E&Y arbitration, with certain potential exceptions. The Receiver filed a Response in Opposition to the Motion to Stay on September 18. At a hearing on September 28, the parties agreed to extend the deadline for completing fact discovery to January 31, 2019, and argued the Motion to Stay.

On October 11, 2018, the trial court denied Mayer Brown's Motion to Stay. On October 12, 2018, Mayer Brown filed another motion seeking a 90 day stay of the proceedings to allow for appellate review of the October 11 order denying Mayer Brown's request for a stay pending completion of the E&Y arbitration. Mayer Brown's request for stay pending appeal was argued at a hearing on October 24 and was denied.

On October 29, 2018, Mayer Brown filed a Petition for Writ of Certiorari with respect to the trial court's order denying its request for a stay pending the E&Y arbitration.

ii. Discovery

The parties have been engaged in active discovery since the summer of 2017. The Receiver has responded to several sets of written discovery propounded by Mayer Brown and has produced approximately four million pages of documents. Mayer Brown has responded to the Receiver's written discovery and has produced hundreds of thousands of pages in response to these discovery requests. E&Y has also produced documents in response to a request for production of documents treated as a subpoena duces tecum, in addition to those obtained by the Receiver in connection with this action and the Sun Capital litigation, but has otherwise taken the position that additional document discovery from E&Y is available only by order of the arbitration panel in the E&Y arbitration.

Discovery is also being sought from non-party witnesses. Last year, the parties estimated that between 80 and 100 depositions would take place. Approximately 40 persons or entities have

since been deposed, including persons formerly employed at Founding Partners Capital Management (Judy Aller, Chris Bowers, Will Gunlicks, and one day of the deposition of Philip Fues, which should be completed in November); a partnership representative for the Founding Partners Hybrid Value Fund LP; a representative of Berkowitz Pollack Brant (accounting and valuation advisors and consultants to the Receiver); and most of the 38 investors who assigned their claims to the Receiver, or representatives or financial advisors for those investors. Certain Mayer Brown attorneys have also been deposed. Further, William Gunlicks has been deposed although the deposition has not been concluded.

On November 27, 2017, an Amended Agreed Order was entered to compel the production of documents from the Sun Capital-Related Parties, and an extensive production of documents and electronic files commenced in 2018 and is continuing to this date. The Receiver's special counsel believes that document production is now substantially complete, although certain legacy accounting records and reports from some of those entities are still being produced, and the parties have only recently agreed (as of September 20) upon the terms of a Protocol for sharing access to the Factor/SQL database produced by the Sun Capital-Related Parties⁴ as part of that production, which the Receiver's special counsel is reviewing. Furthermore, on January 8, 2019, the Broward County Court heard argument on several motions. The Receiver filed a Motion to Compel Production, challenging Mayer Brown's withholding of documents on the basis of privilege, and its failure to turn over records related to its representation of Sun Capital, Inc. and/or a Sun Capital affiliate, relating to a "Master Factor Transaction." The Court deferred ruling on the Motion to Compel, directed the parties to meet and confer further to resolve the document and privilege

⁴ Including Sun Capital Healthcare, Inc., Sun Capital, Inc., Promise Healthcare, Inc., Success Healthcare, Inc., and their affiliates.

issues if possible, and indicated that it will promptly decide any unresolved document or privilege issues after 30 days. The Receiver's separate motion for Protective Order and Sanctions relating to other discovery conduct was denied. The Court indicated that it would grant Mayer Brown's Motion for Appointment of a Special Master to monitor the deposition of William Gunlicks, by agreement of the parties, and the parties are discussing the selection of an appropriate special master. The Court also stated that it would grant Mayer Brown's Motion to Sequester witness William Gunlicks, until the completion of Mr. Gunlicks' deposition testimony.

More than three and one-half million pages of documents and other electronic records have been produced by the Sun Capital-Related Parties to date. The Receiver's special counsel expects that the depositions of the Sun Capital principals and other witnesses related to those entities will be scheduled as this document discovery is completed.

iii. E&Y Appeal and Arbitration Update

As reported in the Receiver's Ninth Status Report [D.E. 478, pp. 5-6], on July 5, 2017, the Florida Fourth District Court of Appeals ("Fourth DCA") affirmed the trial court's Order compelling arbitration for all claims against E&Y. On July 27, 2017, the Receiver filed a Motion for Clarification and Rehearing with the Fourth DCA. By Order dated October 11, 2017, the Fourth DCA reversed in part and affirmed in part the Order compelling arbitration for all claims against E&Y, as follows. The Fourth DCA affirmed the trial court ruling compelling arbitration of all of the claims of Founding Partners, and the claims of the Assignors for breach of fiduciary duty and aiding and abetting breach of fiduciary duty (the "arbitrable claims"). However, the Fourth DCA reversed the trial court's Order compelling arbitration of the Assignors' negligent misrepresentation, fraud, and aiding and abetting breach of statutory duty counts against E&Y (the "non-arbitrable claims").

Following the issuance of the Mandate on January 19, 2018, new counsel appeared in the Broward Litigation for E&Y, including four attorneys from the law firm of Williams & Connolly in Washington, D.C., joining lawyers from the Gunster law firm who had previously appeared for E&Y.

On January 29, 2018, E&Y moved in the Broward Litigation for a stay of all proceedings concerning the non-arbitrable claims pending the completion of the arbitration of the arbitrable claims. The Motion was granted by Order entered February 28, the effect of which stayed proceedings on the non-arbitrable claims against E&Y only, with the Receiver's claims against Mayer Brown to proceed pursuant to the scheduling order previously entered in the Broward Litigation.

On August 23, 2018, the Receiver commenced an arbitration against E&Y under the Rules of the American Arbitration Association ("AAA") in the Miami Regional Office of the AAA. On October 5, 2018, E&Y responded to the demand for arbitration with an objection to proceeding under the rules of the AAA, rather than under the rules of the International Institute for Conflict Prevention & Resolution ("CPR"). The Receiver is preparing a response to the E&Y objections to the authority of the AAA to arbitrate the claims described in the Receiver's Complaint and Demand for Arbitration. The disagreement concerns the history of a series of engagement letters, executed over a period of years, including different provisions for the manner of arbitrating disputes. The Receiver's special counsel raised the issue in the Broward Litigation and in the 4th DCA appeal from the order compelling arbitration with E&Y, but the issue was not decided in the 4th DCA opinion, which said that questions about the arbitrability of the Receiver's claims were to be determined by the arbitrators.

The Receiver and E&Y are in the process of responding to a AAA list of potential arbitrators and addressing issues related to the manner of selecting arbitrators under the AAA rules. The panel of arbitrators has not yet been selected. The Receiver and E&Y chose party-selected arbitrators under AAA rules, with the Receiver selecting Hon. Mary Barzee Flores and E&Y selecting Barbara Mentz. The party-selected arbitrators selected a third arbitrator to serve as the chair of the arbitration panel, and on January 15, 2019, Charles Moxley was confirmed as panel Chair. However, on the same date the parties were notified that Judge Barzee will have to discontinue her service in the matter due to her appointment to a state government position, and that the Receiver will need to select another arbitrator. As a result, the arbitration panel has not been finalized, and the preliminary hearing in the arbitration has not yet been scheduled.

iv. Mediation

The Receiver and Mayer Brown are scheduled to attend mediation on January 23 and 24, 2019.

v. Investor Conference Call

On October 26, 2018, the Receiver's counsel in the Broward Litigation provided an update on the status of the litigation to investors during an investor conference call.

vi. Outlook on Broward Litigation

Although Mayer Brown is pursuing a petition for writ of certiorari in the Fourth District Court of Appeal, complaining of the trial court's denial of a Motion to Stay proceedings in the Broward Litigation, and to postpone the trial of the Mayer Brown claims until after the conclusion of the Receiver's arbitration with Ernst & Young, Mayer Brown has not sought a stay of discovery in the trial court while its petition for certiorari is pending. Thus, the Broward Litigation is

proceeding with fact discovery of witnesses in various states, including depositions of investors and employees or representatives of FPCM, Mayer Brown, and of the Sun Capital-Related Parties.

As referenced above, the parties are scheduled to participate in a court-ordered mediation in January, postponed from November because of the need to complete certain important depositions, and because, at the time, one of the former Mayer Brown partners refused to appear and to testify without an express waiver of the attorney-client privilege from William Gunlicks. The Receiver expects that all of those issues, and other depositions and related fact discovery will be concluded in the spring, with expert reports and depositions expected to follow promptly after that. At the same time, the Receiver anticipates that discovery in the arbitration against Ernst & Young will proceed behind the discovery in the Broward Litigation, and with the arbitration to follow the trial or any potential settlement of the Broward Litigation.

Although there can be no guarantees in any complex litigation, the Receiver's counsel has expressed confidence in the Broward Litigation, the arbitration against E&Y, and the positions taken in both.

III. HYBRID HOLDINGS UPDATE

A. Realty Capital Partners, LLC

As indicated in the Receiver's prior reports, Hybrid Value owns an investment in RCP Capital Partners LLP ("RCP"). [D.E. 294]. RCP managed thirteen investment properties, consisting of residential and commercial developments located in 6 different states. During the Reporting Period, several attempts have been made by Hybrid Value to sell its current holdings back to RCP and other limited partners of the project. Those attempts to date have been unsuccessful. As a result of several capital calls, Hybrid Value's interest in RCP has been diluted over time.

B. Advanced Diamond Technologies

As indicated in the Receiver's prior reports, Hybrid Value invested money in Advanced Diamond Technologies ("ADT"). [D.E. 294]. ADT reported in October 2018 that it is negotiating a potential sale of the majority of its assets, which, after paying off financial obligations, would result in payments to all equity holders of a portion of their capital. The Receivership Estate would potentially be eligible to receive a portion of such payments. At this time, no final deal has been presented, but the Receiver and his professionals have had conversations with individuals at ADT about the potential deal in an effort to maximize any recovery for the Receivership Estate.

IV. MISCELLANEOUS

A. Requests to Recognize Transfers of Interests

From time to time, the Receiver receives requests from investors to recognize transfers of their interests, in whole or in part, on the Receivership book and records. These are transfers the Receiver is not involved with, other than to update his books and records to reflect their occurrence. The Receiver files motions seeking permission from the Court before acknowledging these transfers.

B. Petters Demand Letter

On or about May 3, 2018, counsel for the Trustee of the Petters Company, Inc. Liquidating Trust contacted the Receiver regarding a potential claim against the Receivership Estate. The Receiver is in the process of analyzing that claim, but has agreed to discuss a tolling agreement with regard to any such claims.

C. Promise Bankruptcy

It has come to the Receiver's attention that on November 5, 2018, Promise Healthcare Group, LLC, among others, filed a voluntary petition for relief under chapter 11 of the Bankruptcy

code. *See In re: Promise Healthcare Group, LLC, et al.*, Case No. 18-12491-CSS, United States Bankruptcy Court for the District of Delaware.

V. FEE APPLICATION

The Receiver will be filing an Twelfth Application for Fees and Expenses Incurred by the Receiver, Retained Counsel, and Other Professionals shortly after filing this Tenth Report.

CONCLUSION

The Receiver will be filing additional reports with the Court to advise the Court of the status of the Receivership.

Dated: January 22, 2019.

Respectfully submitted,

NELSON MULLINS BROAD AND CASSEL

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By: /s/ Jonathan Etra
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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2019, 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 Notices of Electronic Filing.

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

SERVICE LIST

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