

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION

CASE NO.: 2:09-CV-229-JES-NPM

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.

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**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 Ernst & Young LLP (“EY”) in Broward County, Florida (the “Broward Litigation”), in arbitration before the American Arbitration Association (“AAA”) (the “AAA Arbitration”), and in arbitration before the International Institute for Conflict Prevention & Resolution (“CPR”) (the “CPR Arbitration” and together with the AAA Arbitration, the “Arbitrations”).

The Receiver respectfully requests that this Court authorize the Receiver to pay Special Counsel their Court-approved fee. The requested payment, if approved, will be made immediately from the Receivership estate upon entry of such an order, as the Receiver is in receipt of settlement funds from EY.

The Securities and Exchange Commission (“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 ERNST & YOUNG 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 Capital Management 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 Receivership Order placed the Receiver in charge of the Receivership Entities. *Id.* at 2-3. Pursuant 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 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." [D.E. 242-2, §2.1(a)]. For the last thirteen years, the Receiver has periodically sought approval of Special Counsel's incurred expenses, pursuant to the terms of Beus's retainer agreement.

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 and the Arbitrations without any additional fees incurred by the Receivership Estate. Pursuant to Grossman's agreement with Beus, Grossman shares in Beus's one-third recovery.

### **D. The Receiver Sues EY**

On December 30, 2010, the Receiver, represented by Special Counsel, sued EY, which was former auditor to Receivership Entities, along with the Receivership Entities' former counsel Mayer Brown LLP ("Mayer Brown"), 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).

The Receiver amended his Complaint on four occasions, and in the course of such amendments, added claims of thirty-eight assignors, who were investors in the Founding Partners funds.

**E. Motion Practice in Broward Litigation**

On June 22, 2011, EY moved the Broward County Circuit Court to compel arbitration of all the Receiver's claims. EY argued the arbitration clauses in engagement letters with three of the four Founding Partners funds required the Receiver's claims to be arbitrated. On September 8, 2015, EY filed a revised Motion to Compel arbitration.

After the revised motion was fully briefed, the Broward County Circuit Court heard oral argument on April 27, 2016. On May 20, 2016, the Broward County Circuit Court granted EY's revised Motion to Compel arbitration of all claims against it.

**F. Appeal Regarding Arbitration**

The Receiver filed an interlocutory appeal challenging the Broward County Circuit Court's ruling regarding arbitration. On July 5, 2017, the Florida Fourth District Court of Appeal affirmed the trial court's decision. The Receiver filed a motion for rehearing, and in an October 11, 2017 order, the Court of Appeal affirmed the Broward County Circuit Court's order in part (finding that the Receiver's claims standing in the shoes of the audited funds were arbitrable) and reversed in part (finding that the assigned claims were not arbitrable).

Following remand, the Broward County Circuit Court stayed the Receiver's assigned claims pending resolution of any arbitration.

### **G. Arbitration Proceedings**

On August 17, 2018, the Receiver filed a Complaint for Damages and Demand for Arbitration, before the AAA, with the case captioned *Newman v. Ernst & Young LLP*, AAA Case No. 01-18-0003-2029. In his AAA Complaint, the Receiver brought all the arbitral claims against EY in a single proceeding. EY challenged AAA's authority to hear claims related to certain audit years, filing a motion to dismiss for lack of arbitral authority on June 28, 2019. On March 27, 2020, the AAA panel granted EY's motion to dismiss those claims related to engagement letters that mentioned CPR as the arbitral forum. On March 10, 2021, in a Complaint for Damages and Demand for Arbitration, the Receiver brought the dismissed claims in a proceeding before CPR, with the case captioned *Newman v. Ernst & Young LLP*, CPR Case No. G-21-63-S.

Based on the various court and arbitral orders, EY and the Receiver understood that the AAA Arbitration would proceed first, followed by the CPR Litigation, with the Broward Litigation occurring last.

### **H. Approval of EY Settlement**

The Receiver and EY agreed to a global settlement in principle in March 2023, as a result of mediation. The mediation took place two weeks before the final hearing was scheduled to begin in the AAA Arbitration. After months of negotiation and preparing the settlement documents, the parties executed a Settlement Agreement dated July 24, 2023. The Settlement Agreement resolved all claims the Receiver had against EY in the Arbitrations and the Broward Litigation. The Receiver filed his Motion for Approval of Settlement Agreement with EY on August 1, 2023 ("Motion for Approval"). [D.E. 597].

The Motion for Approval specifically addressed the 33 1/3% contingency fee that is to be paid to Special Counsel, pursuant to the Court-approved engagement letter. *See id.* at p. 6, n.3. Notices concerning the Motion for Approval were provided to hundreds of individuals and entities, and no timely objections were filed regarding either the settlement or any payments referenced in that Motion. The Court held a hearing on the Motion for Approval on October 25, 2023, and approved the Settlement Agreement.

On October 30, 2023, the Court entered its Amended Final Settlement Approval and Bar Order. [D.E. 613]. No timely notice of appeal has been filed regarding the Amended Final Settlement Approval and Bar Order. Pursuant to the Court-approved settlement, the Receiver has obtained \$200 million, plus interest in the amount of \$3,305,728.60, for a total of \$203,305,728.60.

On January 3, 2024, the Parties voluntarily dismissed, with prejudice, the Broward Litigation, the AAA Arbitration, and the CPR Arbitration.

## **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 claims against EY. The Receiver's recovery 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 Amended Final Settlement Approval and Bar Order discuss the Broward Litigation, the Arbitrations, the necessity of retaining Special Counsel, and the results obtained by the Receiver in detail. The Court has found the terms of the settlement are "adequate, fair,

reasonable and equitable, and are the product of serious, informal, good-faith, and arm's length negotiations." [D.E. 613, p. 3].

The Receiver respectfully requests leave to pay Special Counsel its fees for the recovery in the Broward Litigation and the Arbitrations in accordance with this Court's prior Order Authorizing Retention and Payment [D.E. 246]. This amount totals \$67,768,576.20 which constitutes one-third of the Receiver's total recovery from EY (\$203,305,728.60) (consisting of \$200 million from the settlement amount from EY, and \$203,305,728.60 in interest earned while the funds sat in escrow pending notice to interested parties, a reasonable objection period, court approval, and the dismissal of claims).<sup>1</sup>

### **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].

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<sup>1</sup> 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 ...." (Emphasis added). Thus, Special Counsel's fee is based on the total recovery -- including interest earned while settlement funds sat in escrow pending completion of the settlement process.



**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 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 in furtherance of the Receivership, the Court may award compensation for those fees. 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 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 EY and the corresponding recovery of \$203,305,728.60 million, including interest. The Receiver's Motion for Approval and the Court's Amended Final Settlement Approval and Bar Order discusses the Broward Litigation and Arbitrations. [D.E. 597, pp.3-6; D.E. 613, p.2]. Beus's records reflect that the firm began drafting the Complaint against EY in August 2010. Special Counsel were in litigation with EY for nearly thirteen years, with no promise of payment except from a successful resolution of the Receiver's claims.

The Arbitrations and the Broward Litigation were hard-fought and active. In summary, Special Counsel spent significant time:

- Handling motion practice and general case management in the Broward Litigation, which was extensive and included briefing regarding the motion to compel arbitration, described above;
- Addressing and responding to discovery in the Broward Litigation and the Arbitrations;
- Handling an appeal to the Fourth District Court of Appeal, and successfully challenging the appellate ruling via a motion for rehearing, described above;

- Handling production and review of numerous documents produced by parties and non-parties;
- Handling nineteen depositions in the AAA Arbitration, including the depositions of experts and non-party witnesses, including the multi-day preservation deposition of William L. Gunlicks, which was taken in front of the AAA and CPR Arbitration panels;
- Extensive motion practice before the AAA Arbitration panel regarding pre-hearing issues;
- Preparing for the nearly month-long final hearing in the AAA Arbitration, which included pre-hearing briefing, the exchange of exhibit and witness lists, meeting with and preparing witnesses, preparation of witness examination outlines, and the preparation of visual aids and PowerPoint materials;
- Assisting the Receiver in keeping investors apprised of the progress of the Broward Litigation and the Arbitrations, including hosting informational calls and Zoom sessions for investors regarding case progress; and
- Negotiating and finalizing the terms of the settlement between the Receiver and EY over a period of months.

It should be noted that the Receiver and EY reached a settlement in principle only two weeks before the AAA Arbitration hearing was scheduled to commence, after Special Counsel had spent significant time and resources preparing for said hearing.

Additional detailed descriptions of Special Counsel's time and work in the Broward Litigation and the Arbitrations can be found in the Receiver's various reports to the Court. [*See, e.g.*, D.E. 478, 493, 500, and 596].

## **2. The Second and Third Factors**

The Court has already considered these factors and found that the Arbitrations and the Broward Litigation were complex and time-consuming disputes. [D.E. 613, p. 3]. In support of its Amended Final Settlement Approval and Bar Order, the Court found, among

other things, “the record in this case establishes that the litigation being settled is very complex, was being pursued in three different forums, and was very expensive for all parties.” [*Id.*] For that reason, the Court approved the Settlement and entered the Approval and Bar Order and entered Partial Final Judgment. The Receiver submits that the claims against EY were unusually difficult and challenging, having been litigated for approximately thirteen years. The factual, legal, and accounting issues in dispute were complex. 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 Arbitrations and the Broward Litigation.

The Receiver and Special Counsel kept investors fully informed during the settlement process. This included the Receiver and Special Counsel hosting Zoom and telephone conferences to explain to investors the results to be obtained in the Settlement, if it were supported by investors and approved. More than 98% of the holders of Approved Claims—representing approximately 99.4% of the total Allowed Amount—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 thirteen-year pendency of the claims against EY, 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; D.E. 534]. When the Receiver obtained approval to hire Special Counsel, the Receivership Estate did not have the resources or means to pursue the claims against EY, except with a contingency fee arrangement. (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—a large settlement for this type of claim. (Factor 12).

**CONCLUSION**

For these reasons, the Receiver, Daniel S. Newman, respectfully requests that this Court enter an Order authorizing the payment of \$67,768,576.20 to Special Counsel.

Dated: January 12, 2024.

Respectfully submitted,

**NELSON MULLINS**  
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By: /s/ Christopher Cavallo  
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**CERTIFICATE OF SERVICE**

I hereby certify that on January 12, 2024, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

By: /s/ Christopher Cavallo  
Christopher Cavallo, Esq.