

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 PARTERS 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 FIFTH 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 Fifth Status Report (the "Fifth Report").

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

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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 supersedes 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...

This Report summarizes recent events relevant to the settlement in the action styled *Daniel S. Newman, as Receiver for Founding Partners Capital Management Company; et al v. Sun Capital, Inc., et al.*, U.S. District Court, Middle District of Florida – Fort Myers, Case No. 2:09-cv-445-FtM-29SPC, and the Claims Process being undertaken by the Receiver on which he will shortly file a Recommendation to the Court.

II. BACKGROUND AND RECENT EVENTS

A. The Settlement Agreement

On August 28, 2012, the Court entered its Amended Order and Opinion fully approving the revised Settlement Agreement in the action styled *Daniel S. Newman, as Receiver for Founding Partners Capital Management Company; et al v. Sun Capital, Inc., et al.*, U.S. District Court, Middle District of Florida – Fort Myers, Case No. 2:09-cv-445-FtM-29SPC (the “Sun Litigation”), and the Claims Process being undertaken by the Receiver. [Sun Litigation, D.E. 308].

Based on the investor records kept by the Receivership Entities, approximately 91% of Investors, representing over approximately 95% of the net invested capital in the Receivership Entities, provided releases, indicating that they had chosen to participate in the Settlement Agreement. The Settlement Agreement was fully executed by the parties on January 9, 2013.

The Receiver continues to work with the Defendants on the Settlement Agreement to

ensure compliance with all other closing conditions and to take actions related to closing.

As described in previous filings, these tasks include: (1) establishing a line of credit for the subsidiary company created by the Settlement Transaction (the “FP Designee”); (2) filing governmental applications and notices related to the change of ownership of the Promise and Success hospitals over to the FP Designee; and (3) establishing the FP Designee Board. [*See Sun Litigation*, D.E. 322, 324].

1. The Line of Credit

As discussed in prior filings and above, one of the conditions to closing the Settlement Transaction is the establishment of the line of credit for Promise Healthcare, Inc. (“Promise”) and Success Healthcare LLC (“Success”). Discussions took place with many lenders over the course of the past six to eight months. In May 2013, term sheets (“Term Sheets”) were executed with two of those prospective lenders. The Term Sheets contemplate a \$45 Million revolving line of credit for Promise and \$15 Million revolving line of credit for Success under terms described in the Term Sheets. Both lenders are currently performing their due diligence. At the completion of the due diligence which is anticipated to conclude shortly, and providing each lender remains prepared to move forward, one lender will be selected and final loan documents will be negotiated and executed. Based on current information, the Receiver and Defendants reasonably believe a closing will take place in August 2013.

2. Change of Ownership Process

The Receiver, working with the principals and management of Promise and Success, have filed governmental applications and notices related to the change of ownership of the Promise and Success hospitals over to the FP Designee. All applications required prior to closing have been filed at this time. No governmental agencies have indicated there are any

material deficiencies in such applications. Therefore, the Receiver and the Defendants do not believe that the change in ownership process will pose a delay to the estimated closing timetable.

3. FP Designee Board

On February 11, 2013, pursuant to the Limited Liability Company Agreement (the “LLC Agreement”) of the FP Designee, approved by the Court on August 28, 2012 [Sun Litigation, D.E. 308], the Receiver filed a Motion for Court Approval of the FP Designee Board Member Designations. (“Board Approval Motion”) [Sun Litigation, D.E. 322]. The LLC Agreement provides the Court with the right, if it so chooses, to review and approve the initial designation of board members for the FP Designee. Under the LLC Agreement, which was approved by the Court in connection with the Motion to Approve the Settlement Agreement, the Court has the authority, but may decline, to review or approve the Receiver’s initial designations.

The Receiver requested that the Court either: (1) enter an order approving the designation of Mr. Ian Stokoe, Mr. James Brown, Mr. Keith Kennedy, and Mr. Edmund Woodbury as the initial four investor representative board members of the FP Designee, to serve until their successors are appointed in accordance with the provisions of the LLC Agreement, or until their earlier death, resignation, or removal;¹ or (2) enter an order declining to review and approve the Receiver’s initial designations of FP Designee board members, in which case the designations take effect in accordance with the provisions of the LLC Agreement, which was approved by the Court in August 2012 at [Sun Litigation, D.E. 308]. One investor in Global Fund, Inc. filed an objection to the Board Approval Motion, requesting that he be placed on the board of the FP Designee. [Sun Litigation, D.E. 317].

¹ In accordance with the LLC Agreement, which was approved by the Court, no approval is required for the Receiver’s appointment to the Board of FP Designee. [See LLC Agreement section 8.2(a)(ii), D.E. 248-3 at 9].

The Board Approval Motion remains pending. Unless the Court rejects the Receiver's proposed slate, the Receiver will hold an official first meeting of the Board, utilizing his proposed slate. The Receiver seeks to hold such a meeting shortly before closing of the Settlement Transaction.

B. The HLP Loan Transaction

On April 26, 2013, HLP Properties at The Villages, LLC ("HLP"), an entity that is a party to the Settlement Agreement and which owns assets that will be indirectly transferred to the FP Designee upon closing, entered into a Loan transaction ("Loan Transaction") with Lion Financial, LLC ("Lion"). Pursuant to the loan transaction, Lion loaned HLP \$12 million. The fee for the Loan was two percent (2%) of the loan or \$140,000.00.

The purpose of the Loan Transaction was to secure funds for the purpose of construction of the two facilities currently being constructed by Promise in Fort Myers and Miami, Florida, under Certificates of Need ("CONs"). These CONs are valuable to Promise and will become indirect assets of the FP Designee upon closing. However, in the interim period before closing, funds were needed to finance construction to ensure compliance with applicable state requirements. The Loan Transaction also allowed HLP to retire a previously existing approximately \$5.8 million mortgage on the same property.

The Settlement Agreement requires the Receiver's consent to certain transactions engaged in by the settling Defendants, including those that may be deemed outside the ordinary course of business. Management believed that the above transaction was prudent, necessary and in the best interests of all settling parties. Management provided information to the Receiver in support of that position. After meetings and review of the relevant information, the Receiver agreed and approved the Loan Transaction by Lion to HLP because the business purpose was

consistent with the terms of the Settlement Agreement and the desire to maximize value for the ultimate investor stakeholders in the FP Designee.

The Receiver required as part of the Loan Transaction that Promise enter into a Reserve Account Agreement with the Receiver that put restrictions on how the borrowed funds could be disbursed and used. The sole purposes, pursuant to the Reserve Account Agreement, for which the borrowed funds can be utilized is to pay “CON Costs” as that term is defined in the Reserve Account Agreement, and to loan up to \$2 million in the aggregate to Promise, Success and/or their affiliates for them to pay certain approved working capital costs. Furthermore, the Reserve Account Agreement put in place contains monthly reporting requirements to be complied with by Promise so the use of such funds could be monitored. Moreover, the FP Designee and Receiver have the right, at their own expense, to audit the manner in which the Reserve Account and/or loan funds are being utilized. The Receiver believes that his consent to the Loan Transaction was in the best interest of the Receivership Estate.

C. The Claims Process

The Receiver and his professionals have been working diligently to finalize a recommendation to the Court in connection with the claims process. The process was complex, as described in previous filings to the Court. The Receiver had to obtain follow-up information from many investors to verify that his recommendation is based on complete information. At this juncture, the Receiver is still waiting for final information from one of the large investors, but has provided a deadline, by which if the information is not received, the claims recommendation will go forward based on available information and the understanding that full information was not forthcoming. The Receiver has also held meetings and telephone conferences with the Joint Official Liquidator (“JOL”) for the Global Fund, Inc., which is one of

the largest investors in the Receivership Entities, in an effort to negotiate an agreement of the Global Fund, Inc. claim. The Receiver believed that the size and complexity of the issues surrounding the Global Fund, Inc. claim warranted pre-filing negotiations to try to avoid potential objections and motion practice with regard to this claim. Once those matters are concluded, the Receiver will then file his claims recommendation, which is almost completed, with the Court.

CONCLUSION

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

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2013, 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.

Dated: June 13, 2013.

Respectfully submitted,

BROAD AND CASSEL

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By: /s/ Jonathan Etra
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