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 CO., 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 UNOPPOSED EMERGENCY MOTION TO CONTINUE PRELIMINARY INJUNCTION ORAL ARGUMENT, AND FOR EXPEDITED DISCOVERY AND BRIEFING SCHEDULE, WHILE TRO REMAINS IN EFFECT

Receiver Daniel S. Newman, not individually, but solely in his capacity as receiver (the "Receiver") for Founding Partners Capital Management, Co. and relief 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 (collectively, "Founding Partners"), by his attorneys, Broad and Cassel, respectfully files this Unopposed Emergency Motion to Continue the Preliminary Injunction Oral Argument, and for Expedited Discovery and a Briefing Schedule, While the TRO Remains in Effect.

As discussed further below, Sun Capital Healthcare, Inc. ("SCHI") and Sun Capital, Inc. ("SCI") (collectively, "Sun") largely agree with the requested relief, with certain slight

differences and reservations, which are explained below. Due to the emergency nature of this Motion, Sun was not made privy to the arguments and positions in this Motion.

PRELIMINARY STATEMENT

The basis for this Motion is to ensure that a preliminary injunction is not entered solely based on the untested testimony of a Sun principal. The Receiver has had no deposition and formal document discovery from Sun to test and disprove Sun's allegations. Sun previously fended off these efforts, even though it sought "extraordinary and drastic"[1] relief from this Court on the basis of its own self-serving testimony. Moreover, the legal issues involved in the parties' competing claims of breach and default are factually and legally complex, contrary to the impression created in Sun's papers. The consequences of the Motion for Preliminary Injunction are severe. An injunction would prevent the Receiver from obtaining access to his collateral until the conclusion of the trial of the claims recently asserted by the Receiver; by then, the collateral would assuredly be dissipated.

Sun's emergency is over. Basic fairness and principles of due process require that, before Sun can obtain a ruling on its motion for preliminary injunction, it should be required to submit to expedited discovery for a period of 45 days on the merits of its motion, and that the Court should set an expedited briefing schedule to permit the parties to brief the factual and legal issues raised by Sun's motion.

Sun can claim *no prejudice* because the Receiver would consent to an extension of the TRO, pending the resolution of Sun's Motion for Preliminary Injunction (following expedited discovery and briefing).

[1] *See McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir.1998) (noting that a preliminary injunction is "an extraordinary and drastic remedy").

Had Sun's Motion not included a request for the immediate entry of a TRO, the Receiver would have responded by seeking the right to obtain discovery and a briefing schedule. Due to the emergency nature of Sun's request, the Receiver opposed that request based on the then undeveloped record. However, now that Sun's Emergency Motion for a TRO was resolved in Sun's favor, Sun should be required to provide discovery to permit the Receiver to present a fully developed record, on an expedited basis, prior to the entry of a preliminary injunction.

RELEVANT BACKGROUND

On July 22, 2009, Sun moved, on an emergency basis, for the immediate entry of a Temporary Restraining Order to remove the lockboxes (the Receiver's security in the event of Sun's default) from the Receiver's possession and return them to Sun's possession. [D.E. 122]. Sun's Motion for a TRO also included a Motion for Preliminary Injunction, which, if granted, would preclude the Receiver from taking possession of Founding Partners' security interests, until after the conclusion of the trial of the Receiver's claims against Sun. In support of its Motion for both a TRO and Preliminary Injunction, Sun filed the affidavit of Mr. Howard Koslow, dated July 22, 2009 ("Koslow July 22 Aff.") [D.E. 122-3]. Previously, Sun filed another affidavit of Mr. Koslow, dated May 4, 2009 ("Kolsow May 4 Aff.") [D.E. 40-2].

In view of the Sun's Emergency Motion for the TRO, on July 24, 2009, the Receiver submitted its Opposition Memorandum focused solely on the request for emergency relief, that is, the immediate entry of a TRO. [D.E. 124].

On July 24, the Court granted Sun's Motion for TRO. In its Order, the Court acknowledged that the record before it was "undeveloped." [D.E. 130 at 8].

Nevertheless, in view of the emergency motion for a TRO, and the allegations of irreparable harm, the Court granted the TRO, concluding among other things that:

> The Court also concludes, *based on the record submitted to the Court as to the current motion*, that Sun Capital has satisfied its burden of establishing the likelihood of success on the proposition that it was not in default under the Agreement. The most serious of the alleged defaults, from the Receiver's point of view, relate to the use of loan proceeds for purposes other than those allowed by the loan Agreements. These new uses of the loan proceeds are alleged to have increased the risks to Stable-Value investors. The difficulty is that it appears probable that the new uses were permitted until the Receiver revoked the verbal agreement two weeks ago. For example, the SEC Complaint states that beginning in 2004, the lender "permitted" or "allowed" Sun Capital to take the steps that the Receiver now claims constitute defaults.
>
> It is undisputed, however, that Sun Capital has not made any interest payments in 2009. Sun Capital contends that this was due to the breach of the Agreement by Stable-Value when it refused to fund a $5 million funding request in January, in violation of the Agreement. Sun Capital also asserts that after this default, Stable-Value's principal told it to stop making interest payments. It appears that this dispute will be litigated in connection with the Receiver's Complaint. *Based on what admittedly is an undeveloped record*, the Court concludes that Sun Capital has satisfied its burden of proof to establish the likelihood of success as to the parties' competing claims of default.

D.E. 130 at 7-8 (emphases added).

THE ONE-SIDED AND LIMITED FACTUAL RECORD

I. IN GENERAL

As the Court correctly noted, the record before it is "undeveloped."

Currently, the Court has before it only two affidavits from Mr. Koslow, dated May 4, 2009 and July 22, 2009. Mr. Koslow's testimony on the two competing claims of default (and the other elements for a preliminary injunction) is conclusory, one-sided, and untested.

Mr. Koslow has not submitted himself for deposition. No one from Sun submitted themselves for deposition.

Further, when the Receiver issued subpoenas to Sun and its affiliates, they moved to quash them, successfully deferring the depositions and related document requests.

Finally, Mr. Gunlicks, who might be expected to counter testimony offered by Sun has so far not agreed to cooperate. Apparently, he is still in Chicago because funds for travel still have not been released to him.

In total, the state of the record before the Court is conclusory, one-sided, and untested, and the Receiver is without means to challenge Sun's evidence or develop contrary evidence from Sun, unless the Court grants this Motion.

II. SPECIFIC FACTUAL ISSUES ON THE MOTION FOR PRELIMINARY INJUNCTION REQUIRING DEVELOPMENT

A. SUN'S DEFAULTS *PRIOR* TO THE RECEIVER'S JULY 7, 2009 REVOCATION OF WAIVERS AND CONSENTS

Mr. Koslow summarily asserts that every one of Sun's breaches of loan covenants were waived by Mr. Gunlicks, but cites only two examples. Koslow May 4 ¶ 7.

Mr. Gunlicks may, in fact, have waived certain loan covenants. However, before a preliminary injunction is issued, the Receiver should be permitted an opportunity to test Mr. Koslow's conclusory testimony in order to establish the existence of an event of default, even prior to the July 7, 2009 revocation of waiver.

Notably, on July 7, 2009, the Receiver's counsel sent a letter to Sun's counsel asking Sun's counsel to identify all waivers and consents purportedly given by Mr. Gunlicks. *See* Exhibit A. This information is critical for the Receiver to establish the existence of defaults (at least prior to July 7, 2009). Sun did not respond to this request. As noted, the Receiver subpoenaed Sun, but Sun had successfully resisted the subpoenas.

B. SUN'S NUMEROUS CURRENT DEFAULTS, *AS OF JULY 7, 2009*

Mr. Koslow side-steps the effect of the Receiver's July 7, 2009 revocation of consents and waivers, falsely describing it as an attempt to re-write history. To the contrary, the

revocation ends the effect of Mr. Gunlicks' waivers and consents. On a going forward basis, Sun must comply with all loan covenants.

The Receiver is confident he can prove numerous defaults as of July 7, 2009 and continuing on a daily basis, once Sun submits itself to discovery on its Motion for Preliminary Injunction. To date, however, there have been *no depositions* and *no document production*, due to Sun's success in resisting compulsory process, even while it sought a preliminary injunction, on the basis of Mr. Koslow's unchallenged testimony.

With respect to the limited voluntary disclosure by Sun, the latest financial data provided to the Receiver is as of May 31, 2009. Insofar as Sun is successful in convincing the Court that the only defaults that the Receiver may prove are for defaults on or after July 7, 2009, Sun had effectively blocked the Receiver from proving such defaults from relevant financial information.

C. FOUNDING PARTNERS' PURPORTED BREACH

In connection with Sun's claim that Founding Partners breached the Agreements, Mr. Koslow testified that "On January 27, 2009, Sun Capital made a funding request pursuant to the CSA. Founding Partners failed to fund that request despite the availability on the line of credit under the CSA." Koslow May 4 Aff. ¶ 3.

That is the entirety of the record, at this stage, on the claimed breach. This is plainly an insufficient basis for a preliminary injunction, now that the emergency is over.

The Receiver believes he can prove that the funding request was improper under the Credit and Security Agreements because Sun had a "Borrowing Base Deficiency," as defined in the SCHI Credit and Security Agreement, which permitted Founding Partners to reject the request (as the deficiency was an event of default). The limited financial data voluntarily provided by Sun for January 2009, indicates that, no matter what covenants were waived by Mr.

Gunlicks, Sun still had a Borrowing Base Deficiency, which precludes the possibility of a breach by Founding Partners.

The Receiver should also be given an opportunity to challenge Mr. Koslow's assertions that the Founding Partners' failure to fund the requested $5 million had an effect on Sun's ability to pay interest (or to comply with other covenants). From Mr. Koslow's testimony, it appears that the requested funds were for acquisitions or capital improvements, neither of which would be expected to provide immediate revenue generation to pay interest. *See* Koslow May 4 Aff. ¶ 12. The Receiver should be able to develop the record on whether the alleged breach had any effect on Sun's ability to pay interest or otherwise comply with the relevant Credit and Security Agreement.

Further, Mr. Koslow's affidavit does not clarify which of the two Credit and Security Agreements were purportedly breached by Founding Partners in January 2009. From the way Mr. Koslow describes the purported negative consequences of no funding, the request for funding was only under the SCHI Credit and Security Agreement, not the SCI Credit and Security Agreement. *See* Koslow May 4 Aff. ¶ 12. If that is the case, then Sun has successfully obtained its TRO in connection with the SCI lockbox, by alleging a breach by Founding Partners arising *only under the SCHI Credit and Security Agreement*. Plainly, the Receiver should be given a reasonable opportunity to test, challenge, and clarify Mr. Koslow's affidavit, before a preliminary injunction on all lockboxes is entered on such a limited record, with one-sided testimony that is vague on all critical issues.[2]

[2] The Receiver also seeks to challenge Mr. Koslow's testimony on "irreparable harm." Mr. Koslow testified that he status quo should be maintained by allowing Sun to continue to recycle receivables. Koslow July 22 Aff. ¶ 36. Mr. Koslow claims that the Receiver will not be harmed because he has "no legitimate ground for insecurity concerning the loan proceeds or the

NEED FOR EXPEDITED BRIEFING SCHEDULE

The Receiver seeks a briefing schedule to permit the Receiver to properly present the evidence it expects to obtain from Sun, if permitted to take discovery from Sun.

Some of the loan provisions involve complex formulas, with dozens of defined terms. This is particularly true, for example, for the Borrowing Base Deficiency issue, which is a key Sun default. The concept is simple enough, and the Receiver is confident he can provide indisputable evidence of such deficiencies (if given discovery). However, tracking the language, formulas, and defined terms is an involved process that, the Receiver submits, can most effectively be presented in written submissions.

In addition, Sun has raised numerous legal issues that require briefing.

As an example, the most important legal contention of Sun is that Founding Partners' purported breach in January 2009 – the details of which are not provided by Sun – can form a legal defense to the Receiver's claim that Sun has defaulted, and thus the Receiver has a right to the lockboxes Yet, Sun contractually waived the right to make the very argument that is at the core of its Motion for TRO and Preliminary Injunction, as follows:

> Waivers. To the extent that such waiver is not prohibited by the provisions of applicable law that cannot be waived, the ***Borrrower [Sun], hereby waives . . . any defense (other than payment in full) which it may now or hereafter have with respect to its liability under this Agreement or any other Program Document [defined to include the Master Lockbox Agreement]*** or with respect to the Credit Obligations.

SCHI Credit and Security Agreement ¶ 8.4(d); SCI Credit and Security Agreement ¶ 8.4(d) (emphases added).

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collateral" precisely because Sun simply recycling receivables. *Id.* ¶¶ 13 & 29. However, the Receiver has information that between January 1, 2009, and May 31, 2009, Sun made unsecured transfers of over $21 million to its affiliated hospitals and was not simply recycling receivables. The Receiver cannot test Sun's latest claims that the collateral will not be impaired because he has not been provided any information for the period after May 31, 2009.

The Receiver believes that it should be entitled to properly brief this absolute defense to Sun's core argument here, and the Receiver's immediate right to the lockboxes. If Sun wishes to challenge the effect of its contractual waiver – although this provision was cited in the Receiver's Complaint, Sun did not address it in its Motion – the parties each should have the ability to brief the important matter.

In short, the Court should have full briefing on the effects of the loan provisions under New York law in conjunction with an evidentiary hearing. As it stands, the parties have only made limited arguments on the effect of these loan provisions, due to the immediate and emergency nature of Sun's Motion for TRO.

LEGAL ANALYSIS

The Eleventh Circuit has recognized that where, as here, the material facts underlying the complaint and the injunction are disputed, the district court is required to hold a hearing which affords both parties "an adequate opportunity" to present their arguments and educate the court about the complex issues involved. *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1211 (11th Cir. 2003) (*citing Marshall Durbin Farms, Inc. v. Nat'l Farmers Org., Inc.*, 446 F.2d 353, 356 (5th Cir. 1971) (holding that evidence should not come from only one side of a controversy); *Sims v. Greene*, 161 F.2d 87, 88-89 (3d Cir. 1947) ("Trial of an issue of fact necessitates opportunity to present evidence and not by only one side to the controversy.")); *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70*, 415 U.S. 423, 434 n. 7 (1974) ("The notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the [opposing party] is given *a fair opportunity* to oppose the application and to prepare for such opposition.") (emphasis added).

The Receiver will not have a fair opportunity to oppose Sun's application at this point, particularly one involving only oral argument. The opportunity for a fair hearing is all the more important here, where the Receiver is a newcomer to the nine-year relationship between Sun and Founding Partners. Sun, of course, knows all the details of what transpired during that time and is further advantaged by knowing that Mr. Gunlicks will not be available to contradict Sun's testimony. The Court granted the TRO on the basis of an "undeveloped record," but it should not grant a preliminary injunction on the same undeveloped record. The Receiver should be provided a fair opportunity to rebut Sun's unsupported allegations.

The Receiver therefore requests that the Court postpone the hearing on the preliminary injunction for 45 days to allow the parties to engage in expedited discovery to be followed by an expedited briefing schedule. *See Nationwide Equipment Co. v. Allen*, No. 3:05-CV-236J32HTS, 2005 WL 1228360 (M.D. Fla. May 24, 2005) (granting TRO but postponing hearing on preliminary injunction until after parties had engaged in discovery); *Tefel v. Reno*, 972 F. Supp. 608, 620 (S.D. Fla. 1997) (granting TRO but postponing date for preliminary injunction hearing until after parties had opportunity to complete essential discovery in an orderly fashion); *Educational Comm'n, Foreign School Medical Graduates v. Repik*, No. CIV.A. 99-1381, 1999 WL 317052 (E.D. Pa. May 17, 1999) (permitting expedited discovery relevant to the motion for preliminary injunction, after which the court would schedule a preliminary injunction hearing).

As noted, the Receiver will consent to a continuation of the existing TRO until the Court rules on the motion for the preliminary injunction. This short delay will not prejudice Sun pending the requested expedited discovery and briefing schedule.

SUN'S POSITION ON THE RECEIVER'S MOTION

Pursuant to Local Rule 3.01(g), my colleague has conferred with counsel for Sun.

Sun's position is that it does not object to adjourning the hearing on its Motion for Preliminary Injunction to permit the parties to conduct discovery relating to its Motion and to thereafter submit briefs on the Motion.

Sun requests that the expedited discovery period on the Preliminary Injunction be 60 days from the date of the order granting this adjournment, rather than the 45 days sought by the Receiver.

In agreeing to the Motion, since the Receiver has not yet proposed any specific discovery, Sun reserves its right to object to the scope of the Receiver's requested discovery during the proposed expedited discovery period as being beyond the scope of the issues relevant to the Preliminary Injunction Motion.

Finally, Sun has requested that the Receiver agree that the Receiver not take discovery pursuant to the Receiver's outstanding Subpoenas addressed to Sun, Promise, and Success, or to seek any discovery beyond the issues relevant to the Preliminary Injunction Motion from those entities or their principals in either of the two actions pending before this Court until after the conclusion of the expedited Preliminary Injunction discovery period. The Receiver consents to this.

CONCLUSION

For the foregoing reasons, the Receiver, with the consent of Sun, respectfully requests that the Court (a) adjourn the argument on the Motion for Preliminary Injunction to a date to be set following the expedited discovery and briefing, (b) extend the Temporary Restraining Order issued by the Court on July 24, 2009 until such time as the Court issues a decision on the Motion for Preliminary Injunction; (c) order expedited discovery on the Motion for Preliminary Injunction to be completed within the 45-day period sought by the Receiver or the 60-day

period requested by Sun, and (d) order expedited briefing on the Motion for Preliminary Injunction, upon the conclusion of the expedited discovery.

Dated: July 28, 2009

Respectfully submitted,

s/Michael D. Magidson____
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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2009, 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.

/s/ Michael D. Magidson
Michael D. Magidson, Esq.

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July 7, 2009

VIA CERTIFIED MAIL

Howard Koslow
Sun Capital Healthcare, Inc.
999 Yamato Road, Third Floor
Boca Raton, Florida 33431

Re: *SEC v. Founding Partners Capital Management, et al.*
Case No. 2:09-cv-229 (M.D. Fla.)

Dear Mr. Koslow:

This letter refers to that certain Credit and Security Agreement entered into by and between Founding Partners Stable-Value Fund, L.P. ("Stable-Value") as "Lender" and Sun Capital Healthcare, Inc. ("SCHI"), as "Borrower" dated as of June 6, 2000 (the "Agreement). (All capitalized terms used but not defined herein shall have the meanings assigned to them in the Agreement.)

To the extent that Borrower has relied and continues to rely on any and all purported oral and written consents and waivers granted by Lender to Borrower, in my capacity as Receiver for Lender, under Section 14 of the Agreement, I hereby revoke, rescind, and withdraw any and all such purported waivers and/or consents, including but not limited to, any such purported consents and waivers that are (1) invalid under the provisions of Section 14 of the Agreement and (2) all purported waivers and/or consents that purport to permit SCHI to purchase accounts receivable that are not "Eligible Accounts" as defined in Section 1.37 of the Agreement, that purport to permit Borrower to engage in activities not contemplated by the Agreement, or (3) that are inconsistent with or in direct violation of the terms of the Agreement as properly amended pursuant to Section 14 of the Agreement.

In my capacity as receiver for Stable-Value, as well as for Founding Partners Capital Management Company; Founding Partners Stable-Value Fund, II, L.P.; Founding Partners Global Fund, Ltd.; Founding Partners Hybrid-Value Fund, L.P., and all other related entities (collectively, the "Founding Partners Entities"), I intend to enforce the terms of the Agreement as

set forth in the Agreement as executed and properly amended pursuant to Section 14 of the Agreement.

Sincerely,

BROAD AND CASSEL

Susan Barnes de Resendes
for

Daniel Newman, Esq.
Receiver for Founding Partners Capital Management Co.; 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.

DN:mm

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July 7, 2009

VIA CERTIFIED MAIL

Howard Koslow
Sun Capital, Inc.
999 Yamato Road, Third Floor
Boca Raton, Florida 33431

Re: *SEC v. Founding Partners Capital Management, et al.*
Case No. 2:09-cv-229 (M.D. Fla.)

Dear Mr. Koslow:

This letter refers to that certain Credit and Security Agreement entered into by and between Stable-Value as "Lender" and Sun Capital, Inc., as "Borrower" dated as of January 24, 2002 (the "Agreement"). (All capitalized terms used but not defined herein shall have the meanings assigned to them in the Agreement.)

To the extent that Borrower has relied and continues to rely on any and all purported oral and written consents and waivers granted by Lender to Borrower, in my capacity as Receiver for Lender, under Section 14 of the Agreement, I hereby revoke, rescind, and withdraw any and all such purported waivers and/or consents, including but not limited to, any such purported consents and waivers that are (1) invalid under the provisions of Section 14 of the Agreement and (2) all purported waivers and/or consents that purport to permit SCI to purchase accounts receivable that are not "Eligible Accounts" as defined in Section 1.39 of the Agreement, that purport to permit Borrower to engage in activities not contemplated by the Agreement, or (3) that are inconsistent with or in direct violation of the terms of the Agreement as properly amended pursuant to Section 14 of the Agreement.

In my capacity as receiver for Stable-Value, as well as for Founding Partners Capital Management Company; Founding Partners Stable-Value Fund, II, L.P.; Founding Partners Global Fund, Ltd.; Founding Partners Hybrid-Value Fund, L.P., and all other related entities (collectively, the "Founding Partners Entities"), I intend to enforce the terms of the Agreement as

set forth in the Agreement as executed and properly amended pursuant to Section 14 of the Agreement.

Sincerely,

BROAD AND CASSEL

Susan Barnes de Resendes
for

Daniel Newman, Esq.
Receiver for Founding Partners Capital Management Co.; 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.

DN:mm