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UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA – FORT MYERS DIVISION

Case No. 2:09-cv-445-FtM-29SPC

DANIEL S. NEWMAN, as 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.,

Plaintiff,

vs.

SUN CAPITAL, INC., a Florida corporation, SUN CAPITAL HEALTHCARE, INC., a Florida corporation, and HLP PROPERTIES OF PORT ARTHUR, LLC, a Texas limited liability company,

Defendants.

FILED  
2010 DEC -6 PM 3:33  
U.S. DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS, FLORIDA

FILED  
2010 DEC 22 PM 3:45  
U.S. DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS, FLORIDA

PARTIES' SEALED JOINT NOTICE CONCERNING SETTLEMENT STATUS

Plaintiff the Receiver (the "Receiver") for Founding Partners Capital Management Co., Founding Partners Global Fund, Ltd., Founding Partners Stable-Value Fund, LP, Founding Partners Stable-Value Fund II, LP, and Founding Partners Hybrid-Value Fund, LP (collectively, the "Receivership Entities") and Defendants Sun Capital Healthcare, Inc., Sun Capital, Inc., and HLP Properties of Port Arthur, LLC (collectively, "Sun Capital") hereby submit their Sealed Joint Notice to the Court in accordance with the Court's Orders.

THE PARTIES' POSITION

The Parties jointly seek a further 75-day extension of the stay to permit the Parties to work together toward a potential settlement of this case. The Parties seek a longer extension due to the holidays that will invariably results in lost days. During the period of

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the stay, the Parties and the Investor Group would seek to accomplish four specific milestones discussed below.

**BACKGROUND**

1. On June 12, 2010, Defendants moved for a stay of litigation proceedings for 120 days to allow Defendants, their affiliates, Promise Healthcare, Inc. and Success Healthcare, LLC, and their principals, Peter Baronoff, Howard Koslow, and Lawrence Leder (collectively, “the Sun-related Parties”), to pursue negotiation of a comprehensive settlement transaction with a group of large Stable-Value investors (“the Investor Group”), who had retained both a business advisor and legal counsel. (D.E. 196).

2. On June 28, 2010, the Receiver filed his opposition to the Defendants’ Motion to Stay, arguing that although he was not averse to the notion of possibly reaching a commercial resolution to the present dispute, he did not, at that time, have even the most minimal information relating to the settlement discussions to permit him to make an informed judgment concerning the requested stay. (D.E. 200).

3. On July 8, 2010, this Court entered an order granting in part and denying in part the motion for stay (“Stay Order”). (D.E. 202). The Court stayed the filing of an answer or other response to the First Amended Complaint in this action until further order of the Court. *Id.* at ¶1. The Court also stayed the responses to the outstanding subpoenas referred to in Defendants’ motion for stay in this case and in Case No. 2-09-cv-229 until further order of the Court. *Id.* at ¶2. Additionally, certain pending motions (D.E. 11, 67, 68, 176, 182) were deferred during the stay. *Id.* at ¶3. The Court further ordered the parties in this action to file a joint notice setting forth the progress of settlement discussions within

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sixty (60) days of the date of the Stay Order (*i.e.*, September 6, 2010). *Id.* at ¶4.

4. During the first 60 days of the stay, the parties and the legal and business advisors representing the Investor Group worked diligently toward the proposed comprehensive resolution, which would essentially transfer ownership of assets for the benefit of the investors, consisting principally of the hospitals and associated real estate that had been purchased by the Principals of the Sun-related Parties with loan proceeds from Founding Partners.

5. Specifically, during the first 60 days of the stay:

- a. The Receiver and the Sun-related Parties negotiated a uniform confidentiality agreement for the Receiver and his advisors and for any investors and their representatives who seek access to confidential information of the Sun-related Parties in connection with the proposed settlement transaction.<sup>1</sup>
- b. The Sun-related Parties populated an on-line data room with certain financial information, to which the Receiver was given access. In addition, as investors and their representative executed confidentiality agreements, they were also given access to the online data room.
- c. The Receiver and his counsel discussed the proposed settlement transaction and process in an all-day meeting with the Investor Group's legal counsel and business advisor (respectively, James Chadwick of Patton Boggs LLP and Dean Graham of Specialty Finance Advisors), and in several additional conversations with them.
- d. The Sun-related Parties and the Investor Group's professionals negotiated certain preliminary agreements concerning the use of the Sun-related Parties' financial consultant and access to its work product and compensation of the Investor Group's professionals.

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<sup>1</sup> Also, to eliminate any need for the Receiver to assert in a separate action the claims he had previously sought but was not permitted to assert *via* an amended complaint in this action, the Sun-related Parties and the Receiver have negotiated a tolling agreement suspending the limitations periods for those claims while settlement efforts are pursued.

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- e. The Receiver was advised that the Investor Group's professionals began engaging in various financial due diligence activities. The Receiver was advised that the Sun-related Parties' principals made financial and business presentations to the Investor Group's professionals; there were site visits to certain hospital facilities and projects on the West Coast and in the Southwest; and the Investor Group's professionals began analyzing the financial and business information prepared by the Sun-related Parties' financial consultant, among other things.
- f. Toward the conclusion of the first 60 days of the Stay, the Investor Group's professionals updated the Receiver and his counsel on the status of financial due diligence, on upcoming milestones, and on the time it would take to complete a transaction.

6. On September 7, 2010, the Parties filed their Joint Notice Concerning Settlement (D.E. 205). The Parties reported on the work that had been undertaken and noted that there was still much more work to be done. *Id.* ¶ 9.

7. Specifically, the Parties reported that the Investor Group's professionals represented the following to the Receiver:

- a. The due diligence activities and analyses were expected to be ongoing, and it was expected to take the Investor Group's professionals approximately 30-45 additional days to finalize the "financial" due diligence phase of a multi-phase process. At the end of the financial due diligence period, the Investor Group should have the necessary information -- as it relates to the finances and value of the assets involved in the proposed transaction -- to begin the further steps needed to move forward with the proposed transaction. The Receiver and his professionals (according to the Investor Group's professionals) would then be in a position to determine whether they agree that the proposed transaction should be consummated. (D.E. 205 ¶ 11).
- b. Upon completion of the financial due diligence period, there would be additional phases needed to complete diligence for the proposed transaction. The parties need to undertake a legal and regulatory due diligence, which would include operational testing at hospital facilities and taking all actions necessary to comply with regulatory

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requirements. (*Id.* ¶ 12).

c. The parties would need to prepare drafts of transaction documents (which are expected to be fairly complex) and negotiate such documents into final and mutually acceptable form. It was hoped that these subsequent phases (*i.e.*, legal, regulatory and documentation of the transaction itself) will be able to proceed concurrently. (*Id.* ¶ 13).

d. All told, it was expected to take about another 120 days, or roughly until the end of this calendar year, to complete all the due diligence and legal steps necessary prior to the completion of the proposed settlement transaction. (*Id.* ¶ 14).

8. The Receiver indicated that he believed the Investor Group's estimates to be reasonable, although more time might be needed. (D.E. 205 ¶ 14).

9. In view of the work undertaken in the first 60 days, and the estimates provided by the Investor Group's professionals, the Parties jointly recommended that the stay be extended and the Parties report again to the Court after another 60 days. (D.E. 205 ¶ 16). In seeking an additional 60 days for the stay and the next joint report, the Parties specifically noted that the "[t]he completion of the 'financial' due diligence is an important milestone and . . . that is estimated by the Investor Group's professionals to take 30-45 days." *Id.*

10. On September 10, 2010, the Court issued an Order extending the stay to and through November 8, 2010 and requiring the Parties to file a Status Report upon the expiration of the Stay. (D.E. 206).

11. On November 5, 2010, the Receiver filed his Unopposed Emergency Motion For Two-Week Extension of the Stay and Deadline to File Joint Report. (D.E. 207). The Receiver explained that, just one week earlier, he had been provided a substantial amount of

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interim financial due diligence materials and analyses from the Investor Group's professionals, and that the Receiver's advisors needed additional time to review and analyze the materials in order to provide the Court with a meaningful report and recommendation. As a result, the Receiver requested an extension of the stay and the deadline to file the next joint report to and through November 22, 2010.

12. On November 5, 2010, the Court granted the Receiver's Unopposed Emergency Motion and extended the stay and the deadline to file the next joint report to and through November 22, 2010. (D.E. 208).

13. On November 22, 2010, the Parties jointly moved to file this Notice under seal and to extend stay and filing deadline to and through November 29, 2010. (D.E. 209). The Court granted both requests. (D.E. 210).

14. Thereafter, the Parties filed additional motions to extend the stay and the reporting deadline, which were granted. (D.E. 211-214). The report is due today. (D.E. 214).

**THE PARTIES' REPORT**

15. Following the Court's November 5<sup>th</sup> Order, the Receiver, his counsel, and his financial advisors continued to review the financial due diligence that had been provided a week earlier, as well as additional information provided after the filing of the Emergency Motion.

16. In addition, the Investor Group arranged for a conference call between the Investor Group's professionals and the Receiver and certain of his professionals. The conference call took place on November 16, 2010. The Receiver is pleased to report that

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the November 16<sup>th</sup> conference call was highly constructive and informative. Although there is still some financial due diligence that has not been performed that the Receiver still seeks, overall, the Investor Group's professionals appear to have done a commendable job.

17. In addition, during the conference call, the Investor Group's professionals were helpful in identifying the work that they will perform in the next 75 days, if given the opportunity, to include the following:

- a. Beginning and completing "clinical" due diligence. This involves determining whether there are any significant regulatory or legal violations or problems that can result in the cessation of services or significant fines.
- b. Beginning and completing "regulatory" due diligence. This involves an analysis of the future regulatory landscape, including likely trends in reimbursement policies and other changes that can affect the viability of any one or more facilities.
- c. Beginning and completing "legal" due diligence. This involves ensuring that legal ownership and title of the business and real estate is as represented by the Sun-related Parties; and
- d. Beginning negotiating the final agreement. Given the complexity of the transaction – essentially the acquisition of over a dozen regulated and licensed health care businesses as well as numerous asset realty companies – this is likely to be a lengthy process. The Investor Group and the Parties nevertheless expect to make substantial progress over the next 75 days.

18. The Investor Group's professionals and the Receiver agree that these four projects should be worked on concurrently to help ensure that a settlement transaction, if advisable, can be closed – and the assets transferred -- as soon as possible.

19. The Parties agree that the due diligence and contract negotiations must proceed and be completed expeditiously to facilitate a potential transfer of assets in an

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orderly and appropriate fashion.

20. For these reasons, the Receiver supports a 75-day extension of the stay, in which the Parties will begin and complete clinical, regulatory, and legal due diligence, and in which the Parties will begin and make substantial progress on negotiating a final agreement.

21. Finally, although the Receiver supports the requested extension of the stay under these terms, information obtained by the Receiver from the due diligence process has raised certain concerns for the Receiver which, pursuant to the Court's Order appointing the Receiver and Order concerning the stay, the Receiver feels duty-bound to report to the Court. However, in the course of working with counsel for the Sun-related Parties in preparing this joint notice, the Sun-related Parties and counsel for the Investor Group objected to the manner in which the Receiver described certain due diligence information. This was the principal reason for the requested extensions, which were granted. The Receiver will continue working with the Sun-related Parties and counsel for the Investor Group to see if they can reach agreement on a further report to the Court. The Parties did not want to further delay the filing of this joint notice, but will continue to work together to provide a supplemental report.



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**CONCLUSION**

The Parties jointly request that the stay be continued for an additional 75 days, at which point the Parties will submit a new joint report. Further, the Parties expect that, if the Court extends the stay for an additional 75 days, the Parties will use that time to begin and complete clinical, regulatory, and legal due diligence, and to make substantial progress on a final agreement.

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Dated: December 3, 2010

Respectfully submitted,

By: /s/ Jonathan Etra

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