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, L.P., FOUNDING PARTNERS STABLE-VALUE FUND II, L.P., FOUNDING PARTNERS GLOBAL FUND, LTD., and FOUNDING PARTNERS HYBRID-VALUE FUND, L.P.,

Relief Defendants.
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RECEIVER'S OPPOSITION TO SUN CAPITAL, INC. AND SUN CAPITAL HEALTHCARE, INC.'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND MEMORANDUM OF LAW

Daniel S. Newman, not individually, but solely in his capacity as receiver (the "Receiver") for defendant Founding Partners Capital Management, Co. and 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"), by his attorneys, Broad and Cassel, respectfully files his Opposition to Sun Capital, Inc. and Sun Capital Healthcare, Inc.'s (collectively "Sun") Motion for Temporary Restraining Order and Preliminary Injunction [D.E. 122] (the "Motion").

PRELIMINARY STATEMENT

Sun's Motion is without merit and misrepresents the facts to the Court. Put simply, Sun is presently holding over $550,000,000 of investor collateral and has enjoyed and seeks to continue unfettered use of these funds without providing information to justify why the Receivership Entities and the investors are best served by allowing such use. Sun caused the financial situation in which it now finds itself and the fact that it claims that its hospital clients – most of which are owned by Sun's principals – are in such a precarious situation, speaks volumes concerning the continued viability of these entities.

Sun has been playing cat and mouse with the Receiver since his appointment. After weeks of repeated promises of cooperation and offering very little of substance to demonstrate to the Receiver that investor collateral was not being dissipated by Sun's continued use of these funds to allegedly support the operations of its hospitals, which for the most part are owned by Sun's principals – Peter Baronoff, Howard Koslow, and Lawrence Leder (the "Sun Principals") – the Receiver was left with no choice but to exercise the Receivership Entities' contractual rights under the Master Wholesale Lockbox Deposit and Blocked Account Service Agreement (the "Master Lockbox Agreement")[1] – which rights no one has disputed – in order to fulfill his Court-ordered duties. Ironically, Sun, which argued to this Court that its contractual relationship with the Receivership Entities shielded it from being a relief defendant, now requests that this Court ignore the contracts Sun previously relied upon and enjoin the Receiver from exercising the Receivership Entities' contractual rights to secure the investors' collateral. Sun's position is not supported under the facts or law.

[1] The Master Lockbox Agreement is attached as Exhibit 2 to the Affidavit of Howard Koslow dated July 22, 2009, which is Exhibit B to Sun's Motion, D.E. 122 ("July 22 Koslow Aff.").

The Receiver has been working, and continues to work, with Sun to craft a solution to its hospitals' cash flow needs, while providing Sun the opportunity to demonstrate continued funding is in the best interests of the Receivership Entities and investors. As Sun is well aware, no irreparable injury will result because the Receiver has never "shut off" funding for the hospitals. The Receiver and professionals working with him met for nine hours with the Sun Principals and their attorneys this past Sunday, with the Receiver agreeing to release $14,000,000 to Sun to allow the parties to continue to explore a resolution if Sun could demonstrate through specific and detailed information – not rhetoric – that such a resolution protected the collateral belonging to the Receivership Entities and the investors. The Receiver also required, and Sun agreed, to provide a mortgage on real property as part of this agreement. Sun apparently has second thoughts about this agreement and now seeks relief from the Court to leverage its bargaining position and protect entities owned by the Sun Principals from the terms of the agreement reached on Sunday. These entities were established and/or acquired by the Sun Principals using investor monies, loaned by the Receivership Entities, without the knowledge or consent of such investors. The Receiver has no direct contractual relationship or duties to these hospital entities, or the ability to control how they utilize investor funds, which facts in and of themselves demonstrate why Sun's Motion should be denied.

Sun has received and continues to receive funds as a result of the Receiver's agreement with Sun reached this past Sunday (the "July 19 Agreement").[2] Although there have been some logistical difficulties with SunTrust Bank's release of funds to Sun under the July 19 Agreement, the Receiver, upon learning of these issues, immediately contacted SunTrust to set up a separate Receivership account into which the contents of the Sun Lockboxes will be swept, so that the

[2] The July 19 Agreement is attached as Exhibit 1 to the Affidavit of Howard Koslow dated July 22, 2009, which is Exhibit B to Sun's Motion, D.E. 122 ("July 22 Koslow Aff.").

Receiver can advance the balance of the $14,000,000 that he agreed to advance under the July 19 Agreement, without a cumbersome manual process being necessary by SunTrust. Sun omits these facts from its Motion. Consistent with the July 19 Agreement, the Receiver still intends to meet with Sun today, to discuss funding moving forward.

Sun's protestations that it has been cooperating with the Receiver are simply untrue. While it has provided some information, it refused or delayed providing critical financial data related to the very entities that it wants to keep afloat – the hospitals owned by Promise Healthcare, Inc. ("Promise") and Success Healthcare, LLC ("Success"). The Receiver could not blindly accept Sun's word that it was merely "recycling receivables" (July 22 Koslow Aff. ¶ 29) in the face of the massive and unexplained transfers to the Promise and Success hospitals that appear on Sun's balance sheet.

The combined balance sheet for Sun for the period ended May 31, 2009, shows an amount due from related entities (including Promise and Success hospitals) of $77,151,027. In contrast, the balance sheet for Sun as of December 31, 2008, includes an amount due from related entities of $55,595,220. This indicates that $21,555,807 was transferred to related entities, including entities owned by the Sun Principals, during the five months ended May 31, 2009. Obviously, Sun is utilizing the cash collateral of Founding Partners Stable-Value Fund, L.P., one of the Receivership Entities ("Stable-Value"), to fund entities owned by the Sun Principals to keep their real estate and other ventures afloat. These transactions appear to be entirely unsecured, appear to be depleting Stable-Value's cash collateral, and potentially put the Receivership Entities in jeopardy as each day passes. Such action is hardly "recycling receivables," and severely undermines Sun's unsupported claim that it is not "misusing, embezzling, or dissipating any of the funds." July 22 Koslow Aff. ¶ 13. Sun has not provided

one document evidencing what this money was used for, despite repeated requests from the Receiver and his accountants.

To protect the property from Sun's potential unlawful diversion to related entities, the Receiver obtained control of the Lockboxes pursuant to his unequivocal authority under the Master Lockbox Agreement entered into by Sun, SunTrust Bank and Stable-Value. The unambiguous language of the Master Lockbox Agreement entitles the Receiver to take control of the Lockboxes for any reason or no reason at all. Indeed, Sun admits the Receiver possesses the contractual right to exercise control over the Lockboxes. Sun Motion at 8. But now Sun asks the Court to rewrite the parties' contracts to strip away the contractual rights of the Receivership Entities. The Receiver took control of the Lockboxes so he could, at the very least, monitor Sun's use of the proceeds of the accounts receivable Sun purchased with funding from Stable-Value. The Receiver respectfully submits that his responsibilities under the Order Appointing Replacement Receiver (the "Receivership Order") require nothing less.

Sun's rhetorical Motion and the argumentative and misleading affidavit submitted by Howard Koslow do not show that Sun is entitled to a temporary restraining order. If anything, it evidences the arrogance with which Sun interacts with the Receiver and his professionals. Apparently emboldened by this Court's prior rulings denying expansion of the Receivership and dismissing it from this case, Sun now believes it can simply use the loan proceeds any way it sees fit – the actual Loan Agreements notwithstanding.

It is ironic that Sun relies on the contracts when doing so suits it, but objects bitterly when it actually has to comply with them. In essence, Sun's position is that although it owes the Receivership Entities more than five hundred million dollars ($500,000,000), with no current plan or ability to repay these funds, it should continue to have unfettered use of these funds

because to do otherwise might cause further harm. Sun's arguments are without merit and its argument of patient danger is admittedly untrue as it admits that patients in hospitals owned by the Sun Principals can be transferred to other facilities, if necessary.

Despite the overwrought rhetoric employed by Sun in its Motion, there is no emergency and no legal or factual basis for this Court to enter a temporary restraining order or preliminary injunction.

FACTS

I. The Loan and Lockbox Agreements

As set forth more fully in the complaint filed by the Receiver against Sun in case number 2:09-cv-445, pending in this Court (the "Complaint"), and in the other papers filed by the Receiver in this action, Stable-Value loaned money to Sun pursuant to two virtually identical credit and security agreements (the "Loan Agreements").[3] Under the Loan Agreements, Stable-Value advanced money to Sun to purchase accounts receivables of certain healthcare providers and other commercial entities, such as hospitals, clinics, and nursing homes ("Providers"), by purchasing their accounts receivable for less than their face value. Loan Agreements § 2.2. In exchange for selling their receivables at a discount, the Providers could be paid for services they render sooner than if they had to wait to collect from third-party payers and insurers, like Medicare or Blue Cross.

Sun purchases accounts receivable from the Providers pursuant to Master Purchase and Sale Agreements. *See* Exhibit A.[4] These agreements require Sun to pay the Providers up to 80%

[3] The Loan Agreements have been previously filed with the Court as Exhibits A and B of Receiver's Emergency Motion to Expand Powers of Receiver, D.E. 29.

[4] Exhibit A is just one of many Master Purchase and Sale Agreements entered into by Sun with various Providers. Pursuant to § 6.20 of the Loan Agreements, Sun is not permitted to vary the terms of its Master Purchase and Sale Agreements. Therefore, it is the Receiver's understanding that all of the Master Purchase and Sale Agreements are substantially similar to the one attached hereto as Exhibit A.

of the expected net collectible amount of the accounts receivable. *Id.* § 2(a). The net collectible amount is the amount Sun and the Providers anticipate that the third-party payers will pay after deductions for allowances, discounts, and credits. *Id.* § 2(d). Upon Sun's purchase of the accounts from the Providers, all right, title, and interest in the accounts vests with Sun, including the right to receive payments from the third-party payers. *Id.* § 3.1.

Sun and the Providers entered into a Wholesale Lockbox Deposit and Blocked Account Service Agreement (the "Provider Lockbox Agreement") with SunTrust Bank. *See* Exhibit B.[5] SunTrust set up two post office boxes (the "Lockboxes") for each Provider to receive payment on the accounts receivable.[6] *Id.* § 1.A. Each day SunTrust deposits the proceeds for the Lockboxes into a dedicated Lockbox Bank Account. *Id.* § 3.A. The Providers are required to notify all third-party payers to make payments into the SunTrust Lockboxes or electronically transfer funds into the SunTrust Lockbox Bank Account. *Id.* § 3.B.2. The Provider Lockbox Agreement specifies that the Providers are not to change or cancel any funds transfer instructions to the third-party payers without the prior written consent of Sun. *Id.* To secure the amounts Sun advanced to the Providers, the Providers granted to Sun a first-priority security interest in all their accounts receivable. Exhibit A § 9(b).

Separate and apart from the Loan Agreements, Sun, Stable-Value and SunTrust entered into the Master Lockbox Agreement. Sun agreed in the Loan Agreements and the Master Lockbox Agreement to grant Stable-Value a security interest in all of Sun's right, title, and interest in the Master Purchase and Sale Agreements with the Providers, the Lockbox Agreement

[5] Exhibit B is just one of many Provider Lockbox Agreements entered into by Sun with various Providers. Pursuant to § 6.21 of the Loan Agreements, Sun is not permitted to vary the terms of its Provider Lockbox Agreements. Therefore, it is the Receiver's understanding that all of the Provider Lockbox Agreements are substantially similar to the one attached hereto as Exhibit B.

[6] Two accounts were set up, one to receive payments from non-governmental payers, and one to receive payments from governmental payers, for Sun Capital Healthcare, Inc.'s healthcare clients. Exhibit B § 1.A.

and the Lockboxes, the Lockbox Bank Accounts, the Purchaser Collection Account, and the Holding Account (all as defined in the Master Lockbox Agreement) along with all items and funds on deposit in the Lockboxes and accounts. Loan Agreements § 10. Sun also irrevocably directed and authorized SunTrust to transfer all collected and available funds in the Lockbox Bank Accounts and in the Holding Account to Stable-Value on two days' notice from Stable-Value, and cease transferring funds to the Purchaser Collection Account. *Id.* § 1. Sun also directed SunTrust to follow all directions of Stable-Value with respect to all the accounts upon receipt of written notice to that effect. *Id.*

The Loan Agreements provide that all collections received by Sun on the accounts that had not been transferred to the Lockbox are to be held by Sun in trust for Stable-Value. Loan Agreements § 6.32(b). For example, if a third-party payer makes payments to a Provider, who sends the money on to Sun, those payments are to be held in trust for Stable-Value's benefit. *Id.* The Loan Agreements require that all funds held in trust by Sun are to be sent to the Lockbox or Lockbox Bank Account the next business day. *Id.* Sun also agreed not to commingle any of the collected funds with any of its other property. *Id.* Most important, in the Loan Agreements, Sun agreed not to change the method of collection or the instructions to Providers that they ensure all third-party payers make all payments into the Lockbox or Lockbox Bank Accounts. *Id.* § 6.32(b) and (c). As a further safeguard of Stable-Value's interest in the third-party payments, Sun granted a power of attorney to Stable-Value allowing it to take whatever steps it deems necessary to change or rescind the instructions to the third-party payers. *Id.* § 6.32(d). Sun also covenanted "to take no action which, nor omit to take any action the omission of which, could impair the rights" of Stable-Value in the accounts receivable or the investors' collateral. *Id.* § 6.35.

II. Sun's Default Under the Loan Agreements

After all of the preconditions related to the purchase of the accounts receivable and the Lockboxes were met, Stable-Value funded Sun's purchase of the Providers' accounts receivable. Loan Agreements § 2.1. Sun could draw on the loans from Stable-Value to purchase the accounts receivable and then repay principal and make interest payments after collecting the accounts receivable from the payers. Loan Agreements § 2.2. The Loan Agreements, however, contained restrictions on the types of accounts receivable that Sun could purchase. Sun is required to only purchase accounts receivable that are defined in the Loan Agreements as "Eligible Accounts." An Eligible Account under the Loan Agreements consists of the following:

a. The Account must be payable in U.S. dollars by a "Third Party Obligor" (i.e., a health insurer like Medicare, Blue Cross, etc.) satisfactory to Stable-Value for health care services rendered or health care goods provided by a health care provider in the United States;

b. It cannot be a "Defaulted Account." (A Defaulted Account is one as to which 120 days had passed since the health care or other service was rendered and the Third Party Obligor had not paid into the Lockbox an amount equal to the sum of the amount paid for the account plus the discount fee);

c. It has to have been purchased less than 61 days after the date the health care service was rendered;

d. It has to have been billed to the Third Party Obligor prior to purchase;

e. Sun has to have good and marketable title to the Account; and

f. Stable-Value has to have a fully perfected, first priority security interest in the Account.

Loan Agreements §§ 1.37 and 2.2.

In violation of the Loan Agreements, Sun used the loan advances to purchase accounts receivable that were not due to be collected – if at all – until well after the 120 day limit. Sun also used loan advances to invest in real estate and other expenditures, and to engage in improper related-party transactions.[7] Sun purchased accounts receivable of entities under common control with Sun and accounts receivable of bankrupt and insolvent healthcare entities; used loan proceeds directly or indirectly to purchase businesses owned by entities under common control with Sun or owned directly by Sun Principals; advanced loan proceeds directly or indirectly to businesses controlled by the Sun Principals; made real estate loans directly or indirectly to entities under common control with Sun, most of which loans were not secured by mortgages; and made large payments to the Sun Principals.

Sun has consistently taken the position that its multiple violations of the Loan Agreements were verbally authorized by Gunlicks. Indeed, Mr. Koslow, Sun's Chief Operating Officer, repeatedly testified before the SEC that the Loan Agreements were never amended in writing to reflect the purchase of the ineligible accounts receivable. Furthermore, the Loan Agreements contain a provision prohibiting oral modifications to the Agreements, and further prohibit modifications through "course of dealing."[8] Loan Agreements § 14.

[7] The statements in this paragraph are supported by the Affidavit of David Siegel, as discussed in section III below.

[8] Under New York law, which governs the Loan Agreements, these provisions will likely defeat any claim that these purported oral modifications are enforceable. *Gerard v. Cahill*, 20 Misc.3d 1133(A), 872 N.Y.S.2d 690 (N.Y. Sup., July 16, 2008).

Moreover, even if Mr. Gunlicks had orally agreed to loan funds to Sun while it was in default under the written agreements, Mr. Gunlicks' oral agreement at that time could not operate as a waiver of the default under the Loan Agreements. The parties specifically agreed in section 8.3 of the Loan Agreements that the "making of any Loan during the existence of any Default or Event of Default shall not constitute a waiver of such Default or Event of Default." In other words, the plain language of the Loan Agreements bars Sun from prevailing on any claim that a waiver of the defaults occurred.

Even assuming *arguendo* that the previous defaults could have been successfully waived by Mr. Gunlicks, such waivers, by their nature, would not apply to future defaults. The parties understood that defaults would arise from time-to-time during the course of the relationship and they included language in the Loan Agreements governing the handling of those defaults. The parties agreed in Section 14 of the Loan Agreements that a "waiver on any one occasion shall not be construed as a bar to or waiver of any right or remedy on any future occasion." Therefore, even if the previous waivers were enforceable, Mr. Gunlicks was not required to continue to agree to waive the continuing defaults to provide future funding. Furthermore, in an abundance of caution, on July 7, 2009, the Receiver notified Sun that, to the extent that Sun had relied and was continuing to rely on purported consents and waivers of the terms and conditions of the Loan Agreements, the Receiver, on behalf of Stable-Value, revoked, withdrew, and rescinded all such purported waivers and consents. *See* Exhibit C. As a result of these defaults, which are ongoing, Sun owes the Receiver approximately $550,000,000, none of which has been repaid.

III. The Tenuous State of the Investors' Collateral

Based on the information received to date from Sun, which is not complete due to the inability to obtain, at this juncture, complete information and cooperation from Sun and others,

the Receiver's accountants report that as of July 31, 2009, Sun Capital Healthcare, Inc. ("SCHI") owes Stable-Value $587,288,910, which is comprised of unpaid principal and interest. *See* Exhibit D, Affidavit of David Siegel ("Siegel Aff.") ¶ 4. Sun Capital, Inc. ("SCI") owes Stable-Value $20,617,299, which is also comprised of unpaid principal and interest. *Id.* ¶ 5. Thus, Sun collectively now owes Stable-Value $607,906,209.

Sun has provided to the Receiver's accountants a "receivables aging report" (the "SCHI Aging Report") as of May 31, 2009, that contains various categories of SCHI accounts receivable that are aged based on how long invoices have remained unpaid. *Id.* ¶ 8. The total amount of accounts receivable included on the SCHI Aging Report is $375,174,948. *Id.* ¶ 23. Sun has represented that the first category of accounts receivable on the SCHI Aging Report, designated as "Regular Accounts Receivable," include accounts receivable for medical services that were provided and billed to third-party payors, such as private insurance companies and governmental agencies, purchased by SCHI. The total of Regular Accounts Receivable per the SCHI Aging Report is $176,964,112. *Id.* ¶ 10. In truth, however, the Receiver has learned that $120,146,000 of this amount is actually comprised of what Sun calls "Working Capital Advances" that were made to Promise-affiliated healthcare entities. *Id.* ¶ 11. There is no evidence of actual loan documents evidencing any security interest obtained by Sun in exchange for these "advances" to entities owned by the Sun Principals. Furthermore, there is no evidence of any interest being paid on these related-party loans and advances. In short, the Sun Principals have simply given away to themselves investor money that was supposed to be used to purchase true third-party receivables.

Thus, only $56,818,112 of the Regular Accounts Receivable constitute factored accounts receivable purchased from healthcare entities – the types of receivables contemplated by the

Loan Agreements. *Id.* ¶ 12. However, this figure includes accounts receivable purchased by Sun from healthcare facilities owned by the Sun Principals. *Id.* ¶ 14. Indeed, the amount of accounts receivable purchased from healthcare facilities that are *not* related to Sun represent only approximately 1.7 percent of the outstanding Stable-Value loan balance from SCHI as of May 31, 2009. *Id.* ¶ 15.

The SCHI Aging Report also includes $146,031,981 of Medicare/Medicaid Disproportionate Share accounts receivable (hereinafter "DSH Receivables"). *Id.* ¶ 16. DSH Receivables are determined by government agencies that reimburse healthcare entities for providing a disproportionate share of healthcare services to Medicaid uninsured and underinsured patients. *Id.* ¶ 17. DSH Receivables payments are cost-reimbursement payments and are not based on specific healthcare services provided. *Id.* ¶ 18. Based on the 2009 rate of collections, DSH Receivables will not be fully collected for approximately 3 years. *Id.* ¶ 19.

The SCHI Aging Report also shows workers' compensation accounts receivable which total $52,178,855. *Id.* ¶ 20-21. Based on 2009 rates of collection, these accounts receivable will not fully be collected for 26 years. *Id.* ¶ 22.

SCHI has also not collected all factoring fees for factoring accounts receivable of healthcare entities. *Id.* ¶ 24. Uncollected factoring fees of $77,258,353 are included as SCHI accounts receivable on the Sun combined balance sheet as of May 31, 2009. *Id.* ¶ 25.

As to Sun Capital, Inc. ("SCI"), which factors commercial accounts receivable of non-healthcare businesses, an aging report (the "SCI Aging Report") shows that $10,090,228 of total factored accounts receivable equal approximately 50 percent of the Stable-Value outstanding loan balance due from SCI as of May 31, 2009. *Id.* ¶ 27. The Sun Combined Balance Sheet as

of May 31, 2009, shows a total amount of accounts receivable for SCI of $40,625,196, of which only 25% are factored accounts receivable. *Id.* ¶ 28.

The Sun Combined Balance Sheet dated May 31, 2009, list an asset "Due from Related Parties" of $77,151,027. *Id.* ¶ 32. "Due from Related Parties" increased $21,555,807 during the five months ended May 31, 2009. *Id.* ¶ 33. This figure represents amounts paid to related parties, including Promise and Success, and to purchase real estate for limited partnerships owned by the Sun Principals. *Id.* ¶ 35.

Sun now asks this Court for a temporary restraining order requiring the Receiver to reverse his quite lawful and reasonable action under the Master Lockbox Agreement. Sun wants an order allowing it and its related entities to continue to potentially waste what is left of the investors' collateral in violation of the Loan Agreements and the Master Lockbox Agreement. Sun wants to continue to make unsecured transfers of the investors' collateral to Sun's related entities. Once the investors' collateral is transferred to these related entities, it is questionable given the facts whether the Receiver will ever be able to recover it for the benefit of investors. In short, Sun asks this Court for a judicial imprimatur altering a contract and authorizing it and its affiliates to continue converting the investors' collateral without any legal justification whatsoever. Sun has utterly failed to carry its high burden of showing entitlement to this extraordinary relief, and its Motion should be denied. Thus, the Receiver has evidence that significant portions of the investors' collateral has been and continues to be used for improper and unsecured self-dealings.

IV. The Receiver's Attempts to Obtain Information and Negotiate in Good Faith with Sun and Sun's Refusal to Cooperate or Negotiate in Good Faith

The Receiver and the prior receiver have doggedly attempted to obtain information as to the location and state of the investors' collateral since the first day of the Receivership. Sun has

not been completely forthcoming. Although some limited information has been provided, Sun has insisted on withholding key data relating to loans made to related parties and the present existence of the investors' collateral securing the advances made by Stable-Value. The Receiver's preliminary and limited information to date is that the bulk of the investor funds were used to fund unsecured loans and outright transfers made by Sun to related entities owned by the Sun Principals. Third-party eligible accounts receivable amount to a comparatively miniscule portion of the investors' total collateral: about $67,000,000 on a $550,000,000 loan.

The Receiver has attempted to work with Sun to obtain critical financial information regarding the state of the investors' collateral. In its Motion, Sun mischaracterizes the back-and-forth between the parties. At every turn, Sun's obfuscation, delay and refusal to provide current financial information has hindered the Receiver's ability to do his job.

Soon after the Receiver's appointment, he was contacted by Sun's counsel, who requested a meeting. *See* Exhibit E, Affidavit of Daniel Newman ("Receiver Aff.") ¶ 4. On May 27, 2009, the Receiver and his counsel met with Sun's counsel and the Sun Principals. At the outset of that meeting, Sun's counsel requested that the meeting be deemed privileged settlement discussions. The Receiver indicated that he would not agree to keep the meeting confidential due, in part, to his reporting duties to the Court. Sun's counsel indicated that they understood the Receiver's position that they would continue the meeting without any anticipation that discussions would be treated as confidential or privileged. *Id.* ¶ 5. During the meeting, Sun's counsel and the Sun Principals did not provide any documents to support of the representations Sun made. *Id.* ¶ 6. In addition, (i) Sun expressed gratitude that the Receiver was willing to listen to Sun's side of the story and give Sun a chance to explain itself; (ii) Sun stated that the prior receiver and the SEC purportedly refused Sun that opportunity, and Sun claimed much

unnecessary litigation was caused as a result; and (iii) Sun insisted that it had done nothing wrong, that the Promise and Success hospitals were not operating at losses, and that there was no need for the Receiver to take any action against Sun or the Promise and Success facilities. *Id.* ¶ 7.

To substantiate all of Sun's assertions, Sun insisted it would provide immediate, full, and complete voluntary disclosure so that the Receiver could see that Sun was telling the truth. On Sun's assurance that it was dealing in good faith and with the hope of obtaining critical information quickly and without the necessity and expense of subpoenas and motion practice, the Receiver attempted to work with Sun to allow it the opportunity to demonstrate that allowing it to continue to utilize the investors' collateral was in the best interests of the Receivership Estate and investors. *Id.* ¶ 8. Despite the assurances and promises by Sun's counsel and the Sun Principals, no information was provided for weeks, despite the requests made by the Receiver's counsel that Sun live up to its assurances and promises of cooperation. In addition, despite what the Receiver stated at the May 27 meeting and what they agreed to, Sun insisted on pre-conditions, including that any provision of information be subject to privilege and confidentiality. *Id.* ¶ 9.

On June 4, 2009, the Receiver's counsel told Sun's counsel that the Receiver had engaged an accounting firm and sought to have them meet the Sun Principals and review their records as soon as possible. *Id.* ¶ 10. On June 8, 2009, the Receiver's counsel again asked Sun's counsel for status on the document production. Sun's counsel responded that he was speaking with his clients that afternoon and would get "right back" to the Receiver. *Id.* ¶ 11. On June 10, 2009, Sun's counsel indicated he needed to draft an e-mail concerning how Sun would go forward with producing information. *Id.* ¶ 12. On June 11, 2009, Sun's counsel wrote to say

that Sun would begin to produce financial information, without any pre-conditions. However, Sun still provided no information, except that Sun offered to provide some level of access to the lockbox accounts. *Id.* ¶ 13.

On June 16, 2009, the Receiver participated in a telephone call with counsel for Sun and the accountants that retained by the Receiver. During that call, the parties discussed the documentation that the Receiver's accountants wanted to review. Sun's counsel stated that Sun needed a written list of the requested materials, at which point Sun would finally comply with its initial promise of full disclosure. *Id.* ¶ 14. Such a list was provided to Sun's counsel the next day. Sun, however, still provided no documents in response to the requests. *Id.* ¶ 15.

On June 26, 2009, although Sun had provided virtually no information, contrary to its promises, Sun filed a Renewed Motion to Modify the Order Appointing Receiver in order to permit Sun to sue the Receiver. In Sun's Renewed Motion, Sun argued, among other things, that the Receiver had learned enough about Sun to enable to the Receiver to address Sun's Renewed Motion. *Id.* ¶ 16.

No documents were produced on July 1, and as a result, the Receiver's counsel wrote a letter to counsel for Sun conveying the Receiver's disappointment with Sun's failure to live up to its promises. *Id.* ¶ 17. The Receiver was advised by his accountants that, on July 2, 2009, Sun finally produced a handful of materials, and Sun told the Receiver's accountants that the rest of the materials would be provided on July 6. No explanation for this newest delay was given. *Id.* ¶ 18.

Because informal methods of seeking the information from Sun had proved inadequate, on July 2, 2009, the Receiver's counsel issued subpoenas *duces tecum* and for depositions to Sun, pursuant to Fed. R. Civ. P. 30(b)(6). The depositions were scheduled for July 13, 2009.

The Receiver's counsel e-mailed a copy of the subpoenas to Sun's counsel and asked Sun's counsel if he would accept service of the subpoenas. Sun's counsel never responded. The Receiver therefore arranged for Sun to be personally served with the subpoenas. *Id.* ¶ 19. The letter to Sun's counsel accompanying the subpoenas expressed why it was necessary to issue subpoenas, and also urged Sun to voluntarily provide information, as previously promised. *Id.* ¶ 20.

By July 7, 2009, Sun had still provided only a small fraction of the previously promised materials, contrary to the representations of Sun at the May 27 meeting and on the June 16 call, among others. *Id.* ¶ 21. Sun's counsel indicated that they could not be ready for the depositions by the July 13 return date. The Receiver's counsel agreed to accommodate Sun's concerns and extend the return date by one week, on the condition that Sun did not seek further extensions thereafter. In response to the concerns of Sun's counsel on the scope of the Rule 30(b)(6) depositions, which included historical information, the Receiver's counsel agreed to focus solely on the present location of the funds and the existing status of the investors' collateral. *Id.* ¶ 22.

Notwithstanding the Receiver's offer to move the depositions and limit the areas of inquiry, on July 10, 2009, Sun moved to quash the subpoenas. Sun's Motion to Quash was filed on a Friday evening. On Monday morning, before the Receiver's counsel was able to provide a written response, Magistrate Judge Chappell issued an Order on the Motion. The Order essentially granted Sun until August to comply with the Subpoenas. *Id.* ¶ 23.

In the meantime, the Receiver's counsel continued efforts to persuade Sun to voluntarily provide the complete disclosure promised on May 27 and June 16. *Id.* ¶ 24. To that end, on July 7, 2009, the Receiver's counsel wrote to Sun's counsel requesting the voluntary provision of information, including the status of the investors' collateral and Sun's plans to repay its debt.

Id. ¶ 25. That same day, in an abundance of caution, the Receiver also wrote to Sun formally revoking any waivers or consents that may have been provided to Sun by the Receivership Entities prior to his appointment. *Id*. ¶ 26. Later that same day, Sun's counsel stated that they would finally provide complete information and present a proposal for repayment of the debt, but insisted that the parties first enter into a formal "standstill agreement." *Id.* ¶ 27. The Receiver's counsel stated that it would consider entering into such a standstill agreement for a limited time, provided that Sun first withdraw its Renewed Motion to Modify the Order Appointing Receiver so Sun could sue the Receiver. *Id.* ¶ 28.

On July 8, 2009, Sun's counsel provided a proposed standstill agreement. Among other things, Sun's proposed "standstill agreement" required the Receiver to forebear from taking any action against Sun for a period of 90 days, terminable on 15 days notice. Therefore, if the Receiver had entered into the standstill agreement, he would have suffered severe restrictions on his ability to sue Sun or to exercise his rights to seize the Lockboxes under the Master Lockbox Agreements. *Id.* ¶ 29.

From July 9, 2009 to July 10, 2009, the Receiver's counsel attempted to negotiate a far shorter standstill period and to obtain Sun's agreement that Sun would withdraw its Renewed Motion to Modify the Order Appointing Receiver. Sun refused. The Receiver's counsel and accountants were still unable to obtain the full, complete, and unhindered disclosure promised on May 27 and June 16. *Id.* ¶ 30.

On July 14, 2009, the Receiver filed a lawsuit against Sun, and submitted his Limited Opposition to Sun's Renewed Motion to Modify the Order Appointing Receiver. *Id.* ¶ 31. On July 15, 2009, the Receiver's counsel wrote to Sun's counsel again requesting that Sun provide the information it had promised and to provide a proposed plan for repayment of the debt. The

Receiver's counsel assured Sun's counsel that any proposed payment plan would be afforded the protections of the settlement privilege. *Id.* ¶ 32.

V. The Receiver's Exercise of his Rights under the Master Lockbox Agreement and Subsequent Events

On the evening of July 15, 2009 – over six weeks since Sun's false May 27 promises of cooperation and disclosure – the Receiver exercised his right under the Master Lockbox Agreement to require SunTrust to transfer to the Receiver's control all collected and available funds in the Lockbox Bank Accounts and in the Holding Account, and to cease transferring funds to the Purchaser Collection Account. The Receiver also directed SunTrust to follow his instructions with respect to all of the accounts. *Id.* ¶ 33. The Receiver did this not to shut off funding to the hospitals but simply to maintain control of his cash collateral in accordance with his duties. The next morning, on July 16, 2009, the Receiver's counsel wrote to Sun's counsel reviewing the history of Sun's broken promises, delayed and incomplete provision of information, and refusal to provide a plan for repayment. *Id.* ¶ 34. Also in that letter, the Receiver's counsel made it very clear that the Receiver would consider funding Sun to permit the hospitals to remain in operation, provided that Sun finally provide information needed to justify the use of the investors' collateral, in order for the Receiver to comply with his duties:

> It cannot come as a surprise to you that, after 90 days of Receivership, wherein you have failed to provide any current information about the hospitals that the Founding Partners Entities' loan proceeds are funding, that the Receiver, in fulfilling his obligations to the Court, would begin to take action to recover assets for the investors. Without current information from Sun that supports Sun's contention that Sun's operations are truly going concerns and that the hospitals receiving funds that are the Receiver's Collateral are viable entities, the Receiver has no choice but to begin collecting assets of the receivership estate for repayment to investors.
>
> Nonetheless, as I reiterated in our call and my e-mail last night, the Receiver wants a written proposal with supporting documentation to justify
>
> (a) any continuing funding of Sun operations,

(b) Sun's use of the cash proceeds of the Collateral to fund related entities, and

(c) the continued nonpayment of interest or principal.

If, for example, Sun can provide specific current information showing the Sun hospitals are viable, going concerns and that continued funding of those hospitals with the Receiver's cash collateral will not diminish the collateral available to repay investors, the Receiver will consider such funding if sufficient current financial information supports such a decision on a hospital by hospital basis. This is not possible, however, without a written proposal to do so and without any current reporting or accounting to the Receiver of Sun's continued use of the Receiver's cash collateral.

To the extent there is a critical need for financing today in order to fund the operations of any particular hospital, please provide us immediately with a request and supporting information so that the Receiver can understand the critical nature of the request and why the funding is in the best interests of the Receivership Estate. The Receiver will give immediate and serious consideration to any such request. I am available to you 24 hours a day to receive information and to counsel the Receiver.

We are also available to meet with you immediately to discuss your funding requests and supporting information. If you wish to meet with us this afternoon, Friday, or over the weekend we will be available.

If your clients take unilateral action without first availing themselves of these options, they will be responsible for any further impairment of the Collateral, including the precipitous closure of any Sun-related entity or facility.

Id. ¶ 35. On the morning of July 16, 2009, Sun's local counsel, Mr. Lawrence Heller, Esq., came to the Receiver's offices. He stated that the Sun Principals had elected to immediately shut down all hospitals. *Id.* ¶ 36. The Receiver explained to Mr. Heller the reasons for the seizure and the Receiver's willingness to provide funding, if justified by information to be provided by Sun, and as consistent with his Court-appointed duties. *Id.* ¶ 37.

In response to communications from Sun concerning threats that Sun would immediately shut down the hospitals and attempting to lay blame for this on the Receiver's exercise of contractual rights, the Receiver's counsel sent further correspondence to Sun's counsel detailing Sun's failures and broken promises, but reiterating the Receiver's willingness to meet with Sun and to consider justified funding requests. *Id.* ¶ 38. Later that day, Sun asked for a meeting to

take place on Sunday, July 19, 2009. The Receiver agreed to meet with Sun and its counsel in Miami on Sunday morning. The day before, Sun insisted the meeting take place in Sun's Boca Raton office. The Receiver agreed to this as well. The July 19 meeting lasted approximately none hours. At Sun's insistence, the Receiver agreed the discussions would be covered by the settlement privilege. *Id.* ¶¶ 39-40.

At the July 19 meeting, among things, the Receiver was given certain information from Sun and discussed events for the following week, including the receipt of additional information that Sun claimed would allow the Receiver to determine whether continuing to allow Sun to use the investors' collateral was prudent, in view of his Court-appointed duties. Sun also demanded that the Receiver release the Lockboxes to again give them unfettered use of the investors' collateral. The Receiver did not agree to that. *Id.* ¶¶ 41-42.

As a result of the July 19 meeting, an agreement was reached to provide a framework for going forward. The Receiver agreed to instruct SunTrust Bank (which holds the Lockboxes) to permit Sun access to up to $14,000,000 (the amount of money Sun claimed it needed for the week), in exchange for Sun providing the Receivership Estate with equivalent collateral in the form of a mortgage of one of its hospital properties. Sun and the Receiver entered into a written funding agreement that day (the "July 19 Agreement"). Sun had to arrange for the mortgage within five days, *i.e.*, by July 24. In addition, the parties agreed to meet on July 24, 2009 (today) to negotiate funding for the following week, and to meet a week later at which point Sun agreed to present a comprehensive 13 week budget as a basis for funding for those 13 weeks. *Id.* ¶¶ 43-44. At no time did Sun state the terms of the July 19 agreement were unfair or onerous. *Id.* ¶ 45.

As soon as the July 19 meeting ended, the Receiver's counsel sent a copy of the July 19 Agreement to counsel for SunTrust Bank and instructed SunTrust Bank to release up to

$14,000,000 to Sun, as promised under the July 19 Agreement. *Id*. ¶ 46. SunTrust Bank experienced difficulties in complying with the July 19 Agreements. The Receiver's counsel spent the better part of July 20 and July 21 working with SunTrust Bank to ensure that Sun had access to the $14,000,000. To address these problems, on July 21, 2009, the Receiver contacted SunTrust's outside counsel and in-house counsel to discuss a more effective method to release funds to Sun.[9] On July 22, 2009, the Receiver again spoke with outside and in-house counsel for SunTrust about setting up an account in the Receivership's name to receive Lockbox funds that could then be wired to Sun's operating account. *Id.* ¶ 47.

On July 22, 2009, the Receiver's counsel attempted to contact Sun's counsel, at the request of SunTrust, to see if they would agree to this alternative procedure. Sun's counsel did not respond to the Receiver's counsel concerning this proposal. Despite this, the Receiver moved forward with setting up the alternative procedure. *Id.* ¶ 48.

Finally, on July 22, 2009, Mr. Heller visited the Receiver's office again, this time at approximately 6:00 p.m. He stated that Sun intended to file this Motion in an attempt to eliminate the Receiver's right to the Lockboxes. When asked why Sun would file this Motion, Mr. Heller focused exclusively on the logistical difficulties experienced with SunTrust Bank on July 20 and July 21. The Receiver explained to Mr. Heller the alternative procedure agreed upon by SunTrust and the Receiver and further explained to Mr. Heller that he would continue to work in good faith with Sun. The Receiver expressed his strong feeling that filing this Motion would be in bad faith, given the Receiver's efforts to work with Sun to evaluate future funding. Mr.

[9] In the meantime, on the morning of July 21, 2009, Mr. Heller, Sun's local Miami counsel, visited the Receiver's office in a panic over a motion for temporary restraining order that was filed in a lawsuit brought by investors against Sun in Texas, which sought, among other things, immediate control of the Lockboxes that the Receiver had already seized and from which he was permitting funding to Sun. The Receiver contacted the Texas attorney, informing him that he had just seized the lockboxes and that the motion therefore should be withdrawn, which the Texas attorney agreed to do. Receiver Aff. ¶ 49.

Heller insisted that the Lockboxes needed to be released. The Receiver would not agree to that, and told him the alternative procedure being established with SunTrust would eliminate any logistical difficulties in effectuating the July 19 Agreement. *Id.* ¶ 50. Approximately an hour after this meeting, Sun filed its Motion. *Id.* ¶ 51.

On July 23, 2009, the Receiver's counsel wrote to Sun's counsel to confirm the meeting for July 24 (today), as required under the July 19 Agreement. Sun's counsel agreed to meet via teleconference, at 12:30 p.m. The purpose of the conference is to discuss Sun's funding needs for the week, in accordance with the July 19 Agreement. *Id.* ¶ 52.

VI. Evidence that Sun and the Sun Principals Participated in the Alleged Founding Partners Fraud

Sun's position in this litigation seems to be that Sun did not make or participate in making any misrepresentations, commit any violations of law, or improperly procure the loan proceeds. D.E. 65, pp. 4-5. Sun asserts that Mr. Gunlicks approved of all changes to the Loan Agreements, suggesting that it had no role in, nor has any responsibility for, Mr. Gunlicks' alleged misrepresentations to investors. July 22 Koslow Aff. at ¶ 21. To that end, Sun's Motion and Mr. Koslow's July 22 affidavit repeatedly suggest that this Court rendered judicial findings of fact that Sun and the Sun Principals are innocent of any wrongdoing and were unaware of Mr. Gunlicks' representations to investors. That is not the case. The Court concluded only that the SEC's allegations against Sun failed to meet the pleading requirements for relief defendants, and indicated that the SEC was free to seek to amend the complaint with sufficient allegations against Sun. D.E. 89 at p. 9.

Contrary to the unsullied portrait it paints of itself, certain evidence indicates that Sun and the Sun Principals were fully aware of, and participated in, Mr. Gunlicks' alleged false representations to investors. In particular, the Receiver has become aware of a lawsuit filed in

Texas state court on behalf of several major investors in the Receivership Entities against Sun, Promise and the Sun Principals.[10] The investors' counsel in that case has provided the Receiver with certain affidavits of investors which have been filed in that case. The Receiver and his counsel have reviewed the investor affidavits and they indicate that, contrary to Sun's and Mr. Koslow's unsubstantiated protestations of innocence, Sun and the Sun Principals were aware of, and personally participated in, the fraudulent misrepresentations to the investors concerning the use of investor funds.

For example, one prospective investor met with Mr. Baronoff and Mr. Koslow in May or June 2008 in connection with the investor due diligence. *See* Exhibit F. By that time, Sun had already diverted millions of investor funds away from investment grade receivables and towards speculative and illiquid receivables (such as worker's compensation and DSH receivables) and also towards the purchase of hospitals owned by the Sun Principals on their own behalf (which provided no return to the investors and whose equity was not provided as collateral to the investors). Yet, according to this investor, Mr. Baronoff and Mr. Koslow falsely represented that investor funds were fully collateralized and all funds were used to purchase investment grade receivables – the same false representations made by Mr. Gunlicks. According to this investor, Mr. Baronoff and Mr. Koslow did not disclose that hundreds of millions of dollars of investor funds had already been diverted and wasted on illiquid receivables and hospital acquisitions in which the investors were not given any equity or security interests. In reliance on Sun's misrepresentations and omissions, this investor invested approximately $30,000,000 into Sun (via the Receivership Entities), which were subsequently used by the Sun Principals, in the late 2008, to purchase additional hospitals for themselves, not for the investors, contrary to the false

[10] The case is Annandale Partners, LP et al. v. Sun Capital, Inc. et al., case number 09-03561, currently pending in the District Court for Dallas County, Texas, 134th Judicial District.

and fraudulent representations of Mr. Baronoff and Mr. Koslow. This account of Sun's direct and personal involvement in the fraud is corroborated by other investors. *See* Exhibit G.

Further, according to another investor, when in January 2009, the Sun Principals finally disclosed the truth – that Sun had diverted hundreds of millions of dollars of investor funds in a manner contrary to the representations made to investors – Mr. Koslow and Mr. Leder evinced a lack of responsibility for the damage caused by their fraudulent conduct, stating that Sun would put its interest above the interests of investors, expressing frustration that Sun was not able to move forward with a recapitalization of Promise (using other people's money), and showing no remorse for Sun's role in the swindling of hundreds of millions of dollars. *See* Exhibit H.

There is also evidence that the Sun Principals, not Mr. Gunlicks, were the architects of the entire fraudulent scheme. One investor was present in meetings when the initial Founding Partners fund was first established. According to this investor, the Sun Principals were present and involved at the very beginning. The strong inference is that the Sun Principals helped set up the Receivership Entities as the sales arm to Sun. *See* Exhibit I.

LEGAL ARGUMENT

I. Sun's Motion Is An Improper Request For Reconsideration of the Court's Prior Order Denying its Motion for a Temporary Restraining Order

As the Court will recall, Sun previously sought a temporary restraining order from this Court on May 4, 2009 to "enjoin[] the Receiver from seizing their assets (including the funds in the lockboxes created pursuant to the Credit and Security Agreements) and from taking any other action against or making any demands of the Sun Companies based upon its purported Notices of Default." D.E. #42, p. 6. The Court considered that request and denied it, ruling that "Sun Capital has not satisfied any of the elements that would be necessary for a temporary restraining

order." D.E. #70, p.6. Substantively, this latest Motion adds nothing that was not considered and rejected by the Court previously.

"A motion for reconsideration does not provide an opportunity to simply reargue-or argue for the first time-an issue the Court has once determined." *Bankers Life Ins. Co. v. Credit Suisse First Boston Corp.*, 2008 WL 4372847 at *1 (M.D. Fla. September 24, 2008). "Court opinions are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *Id.* "When issues have been carefully considered and decisions rendered, the only reason which should commend reconsideration of that decision is a change in the factual or legal underpinning upon which the decision was based." *Id.* Reconsideration is justified only in the following circumstances: "(1) an intervening change in controlling law; (2) the availability of new evidence; (3) the need to correct clear error or prevent manifest injustice." *Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689, 694 (M.D. Fla. 1994).

Sun's Motion does not argue an intervening change in the controlling law and it cites no clear error the Court may have previously made. Although of course new events have transpired since the Court denied Sun's previous motion for a temporary restraining order, none of those events affect the substance of Sun's Motion. The Receiver has been and continues to be willing and committed to funding the operations of the hospitals with sufficient support and security.

On this ground alone, the Court should deny the Motion.

II. Sun's Motion Fails to Establish Entitlement to a Temporary Restraining Order

In addition to the foregoing, Sun's Motion fails to establish any of the required elements for entry of a temporary restraining order. In order to obtain a temporary restraining order, a movant must show "(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant

outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *ACLU, Inc. v. Miami-Dade County School Board*, 557 F.3d 1177, 1198 (11th Cir. 2009); *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000). As the Eleventh Circuit has stated, "[f]ailure to show any of the four factors is fatal" to the motion for temporary restraining order. *ACLU,* 557 F.3d at 1198. Because Sun has failed to establish the existence of any of the four factors, the Motion should be denied.

A. No Irreparable Injury to Sun Will Result if the Motion is Denied

Sun argues that without a temporary restraining order, hospitals owned by Promise and Success will be shut down. As an initial matter, Sun cites only consequential damages to third parties, the hospitals owned by Promise and Success, which are not in privity with Stable-Value. Sun does not have standing to make these arguments. "Injunctions may not be issued to provide relief for non-parties." *Goldstein v. Home Depot U.S.A., Inc.*, 609 F. Supp. 2d 1340, 1349 (N.D. Ga. 2009); *Mack v. HH Gregg, Inc.*, 2008 WL 4082269 at *1 (S.D. Ind. Aug. 21, 2008) ("Plaintiffs' equitable arguments to the effect that such an injunction is needed to protect the safety of persons who fall within the definition of the proposed class do not overcome this basic restriction on the power of courts to make the world a better place."); *cf. Church v. City of Huntsville*, 30 F.3d 1332, 1340 (11th Cir. 1994) ("Thus, unless the plaintiffs have alleged that one of the named plaintiffs is in real and immediate danger of being personally injured by the city's enforcement of its building code and zoning ordinance, the plaintiff class lacks standing to challenge the alleged city practice, even if the persons described in the class definition would have standing themselves to sue.") (citations and internal quotations omitted). Sun has not pointed to any "irreparable injury" that it will suffer as a result of the Receiver exercising his

undisputed contractual right to take control of the Lockboxes and, therefore, its Motion should be denied.

Furthermore, even if Sun had the right to ask for relief on behalf of non-parties, as set forth in Section 21(i) of the Loan Agreements, Stable-Value does not have liability for consequential damages. Stable-Value cannot and should not be responsible for the inability of related entities – owned by the Sun Principals – to pay their own bills. Stable-Value has no contractual relationship with those hospitals. In fact, this lack of privity goes to the heart of the dilemma facing the Receiver. Sun is diverting money to related entities, with whom Stable-Value has no relationship, and is not acquiring a security interest in those funds. Now that the Receiver has control of the lockbox, however, he can ensure that all funds are transferred to entities owned by the Sun Principals for proper purposes and only if the transfer is protected with a security interest.

Sun also argues in its Motion that if the Motion is not granted, the hospitals will be shuttered, jeopardizing patients' health and well-being. This doomsday scenario is sheer speculation. In fact, the Receiver has already agreed to extend financing to preserve the receivables (or, it should go without saying, preserve someone's life), on the condition that the advances are appropriately collateralized. These types of arrangements are entered into every day, and Sun has presented no evidence as to why further advances cannot be secured. The Receiver respectfully suggests this approach strikes the proper balance of all the interests involved.

Thus, Sun's "parade of horribles" cited in its Motion will not come to pass if the Motion is denied. The Receiver has been, and continues to be, open to working with Sun to restructure Sun's debt to the Receivership Entities. In his efforts to maximize value for the investors in the

Receivership Entities, the Receiver has a strong interest in the economic viability and profitability of the hospitals. The Receiver can continue to work with Sun to ensure the feasibility of the hospitals while simultaneously protecting the Collateral for the benefit of investors. Thus, Sun's Motion fails to show any irreparable injury that would result from a denial of the Motion.

A showing of irreparable injury is "the sine qua non of injunctive relief." *Northeastern Fla. Chapter of the Ass'n. of Gen. Contractors v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (internal citations omitted); *see also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931, (1975) ("The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury."); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (to be granted a preliminary injunction plaintiffs must show "a substantial likelihood that they would suffer irreparable injury"). As the United States Supreme Court has said, "[o]ur frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. Natural Resources Defense Council*, 129 S.Ct. 365, 376 (2008) (emphasis in original). Likewise, the Eleventh Circuit has stressed on many occasions that the asserted irreparable injury "must be neither remote nor speculative, but actual and imminent." *City of Jacksonville*, 896 F.2d at 1285; *accord Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975) ("An injunction is appropriate only if the anticipated injury is imminent and irreparable"). The failure of Sun's Motion to establish the irreparable injury factor alone is sufficient grounds for denial of the Motion. As set forth below, however, Sun's Motion fails to establish the other three factors as well.

B. Sun Is Not Likely to Succeed on the Merits of Its Purported Claim

The Receiver's action in taking control of the lockboxes was entirely lawful and consistent with the unambiguous language of the Master Lockbox Agreement. Sun's argument that Stable-Value defaulted under the Loan Agreements is not only wrong, but entirely beside the point. Sun did not need to be in default of the Loan Agreements for the Receiver to take control of the Lockboxes. The Receiver could have done so for any reason or no reason whatsoever. Sun cannot establish any possibility of succeeding on the merits of any claim based upon the Master Lockbox Agreement.

Finally, as the Court well knows, a motion for a temporary restraining order is a request for immediate relief, prior to final judgment, on pending claims. Here, there is no pending claim for a permanent injunction to prevent the Receiver from exercising of his rights under the Master Lockbox Agreement. If such a claim was properly pled and before this Court, the Court could review it when it determines there is a likelihood of success on the merits. Without such a pending claim, however, there is nothing for the Court to look to when determining whether Sun is likely to succeed on the merits. Furthermore, a temporary restraining order is used to maintain the status quo in an action pending final judgment on the claim. Again, because Sun has no pending claim, it is difficult to see when or how the temporary restraining order would end.

Accordingly, Sun cannot show that it is likely to succeed on the merits. At the very least, however, there is a factual dispute between the parties which makes a temporary restraining order inappropriate at this time. *Int'l. Molders and Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547, 551 (9th Cir. 1986) (denying preliminary injunction, and holding that "[i]n deciding a motion for a preliminary injunction, the district court is not bound to decide doubtful and difficult questions of law or disputed questions of fact") (internal citations omitted).

For these reasons, Sun's Motion should be denied.

C. The Receiver and the Investors Will Suffer Irreparable Harm if the Motion is Granted

As set forth in the preceding section, and in much greater detail in the Complaint, the Receiver believes, based on information available to him, that much of the cash collateral is at risk, either because it is inadequately secured or has been advanced to entities under common control with Sun without a mechanism for the Receiver to retrieve it. To grant the Motion and prevent the Receiver from marshaling these assets of the Receivership Estate would cause tremendous and irrevocable damage to the Receivership Estate and the investors. Rather, an injunction in the Receiver's favor would actually be warranted under these circumstances, if he were not otherwise entitled under the Master Lockbox Agreement to take control of the accounts. "Where secured creditors (under the UCC or otherwise) seek court intervention to maintain their position, the prospective loss of their *status quo* security interest has been held sufficient to constitute irreparable harm need to justify an injunction." *Plainfield Specialty Holdings II, Inc. v. Children's Legal Services PLLC*, 2009 WL 1209465, *11 (E.D. Mich. 2009). The harm that would be caused to the Receiver and the investors by the loss of the *status quo* security interest if the Motion were granted would be irreparable and vastly outweighs any vague and speculative harm alleged by Sun in its Motion. For this reason, the Motion should be denied.

D. The Public Interest Weighs Strongly in Favor of Denying the Motion

There is a strong public interest in upholding the rights of secured lenders to their collateral. "Because the UCC system is designed to ensure that secured creditors do not have to fight with their debtors in litigation in order to obtain satisfaction of monies lent on security, allowing a debtor … to avoid its financial commitments and contractual obligations would not be in the public interest." *Plainfield*, 2009 WL 1209465 at *14. This strong public interest weighs heavily in the Receiver's favor.

Apart from the vital importance of enforcing secured creditors' rights, the public has an important interest in the basic enforcement of contracts. Failure to enforce the terms of these contracts entered into by sophisticated parties, with the advice and assistance of major law firms, will undermine the legitimate business expectations not only of the parties here, but of all contracting parties. It is the knowledge that valid and enforceable contractual agreements will be enforced in courts of competent jurisdiction which allows this country's competitive marketplace to thrive. Without such a rule of law, parties could not rely on contracts to conduct their affairs. *Merrill Lynch v. Ran*, 67 F. Supp. 2d 764, 781 (E.D. Mich. 1999).

On the other hand, the only "public interest" argument Sun can muster is that some speculative harm may come from having to shut down the hospitals. But, as noted above, even assuming Sun has standing to make it, that argument presupposes a fact that will not occur. The Receiver has agreed to advance funds to Sun to keep the hospitals running, so long as Sun can provide sufficient collateral for the advances. That should not be a problem for Sun, as it can pledge the remaining stock in Promise (the Receiver already owns the majority of the stock) and can offer other assets, including future accounts receivable and mortgages on real estate purchased by the Sun Principals using Stable-Value loan proceeds. Therefore, the Motion should be denied.

III. Required Security under Federal Rule of Civil Procedure 65(c)

In the event that Sun's Motion is granted, the Receiver strongly urges the Court to require Sun to post a bond as required by the plain language of Federal Rule of Civil Procedure 65(c): "The court may issue a preliminary injunction or temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." "The purpose of

requiring the party obtaining an injunction to post security is to compensate the enjoined party, if it prevails on the merits, for the pecuniary harm caused by a preliminary injunction. Because the damages caused by an erroneous preliminary injunction cannot exceed the amount of the bond posted as security, and because an error in setting the bond too high is not serious, district courts should err on the high side when setting bond." *Builder's World, Inc. v. Marvin Lumber & Cedar, Inc.*, 482 F.Supp.2d 1065, 1078 (E.D. Wis. 2007). "This bond requirement … assures the enjoined party that it may readily collect damages from the funds posted or the surety provided in the event that it was wrongfully enjoined, without further litigation and without regard to the possible insolvency of the assured." *Continuum Co, Inc. v. Incepts, Inc.*, 873 F.2d 801, 803 (5th Cir. 1989). Here, the Receiver's cash collateral, to which he has rights under the Loan and the Master Lockbox Agreements, will be totally removed from his control and supervision if the Motion is granted, raising the specter of massive losses for the Receivership Estate and the investors. For this reason, in the event that Sun's Motion is granted, the Court should require posting of a security adequate to cover such significant losses.

The cases Sun cites for the proposition that the Court may waive the requirement of a security under Rule 65(c) can easily be distinguished from the instant case. Both involve situations where the chance of harm to the restrained or enjoined party was so remote as to obviate the need for a security. As set forth above, the chance of harm to the Receiver – and the investors – if the Motion is granted is immediate, real and grave. In *Gay-Straight Alliance of Yulee High School v. School Board of Nassau County*, 602 F.Supp.2d 1233 (M.D. Fla. 2009), cited by Sun, the Court only waived the bond requirement because it specifically found "there is little risk of monetary loss" to the enjoined party. *Id*. at 1238. Likewise, in *Bellsouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC*, 425 F.3d 964 (11th

Cir. 2005), the other case cited by Sun, the Court's waiver of the bond requirement was based on prior case law which supported the waiver of the bond requirement due to the "short duration of the restraining order [which] minimized the harm" to the restrained party." *City of Atlanta v. Metropolitan Atlanta Rapid Transit Authority*, 636 F.2d 1084, 1094 (5th Cir. 1981) (cited in *Bellsouth*, 425 F.3d at 971). Thus, it is clear that, where serious harm will result to the restrained party, Rule 65(c)'s security requirement must be observed and a bond in an amount sufficient to compensate the restrained party for an improvidently-granted temporary restraining order must be posted.

IV. Sun's Proposed Temporary Restraining Order Improperly Contains Findings of Fact

Finally, in the event that Sun's Motion is granted, the Receiver asks this Court not to enter the order proposed by Sun because it contains multiple findings of fact, which are disputed by the Receiver, as set forth above. Entry of such an order would be improper in the absence of an evidentiary hearing. Although there has never been any evidentiary hearing or trial on the conduct of Sun and the Sun Principals – and no discovery on those issues – Sun's proposed order contains numerous proposed findings of fact concerning Sun's conduct. This is improper and would violate the rights, not just of the Receiver, but of the numerous investors who seek judicial redress from Sun. "Where the injunction turns on the resolution of bitterly disputed facts, however, an evidentiary hearing is normally required to decide credibility issues." *All Care Nursing Service, Inc. v. Bethesda Memorial Hosp., Inc.*, 887 F.2d 1535, 1538 (11th Cir. 1989).

CONCLUSION

As set forth above, there is absolutely no legitimate reason for a temporary restraining order to be entered by this Court against the Receiver. Sun has failed to satisfy any of the four requirements for granting a temporary restraining order, and its Motion should be denied.

Dated July 24, 2009.

Respectfully submitted,

BROAD AND CASSEL
Attorneys for Receiver
100 N. Tampa Street
Suite 3500
Tampa, FL 33602
Tel: (813) 225-3011
Fax: (813) 204-2137
mmagidson@broadandcassel.com

By: /s/ Michael D. Magidson
Michael D. Magidson, Esq.
Florida Bar No. 36191

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 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.

SERVICE LIST

Christopher Ian Anderson, Esq. U.S. Securities and Exchange Commission 801 Brickell Avenue Suite 1800 Miami, FL 33131 305-982-6317 305-536-4154 (fax) andersonci@sec.gov *Counsel for U.S. Securities and Exchange Commission* ***Service via CM/ECF***	**Paul A. Calli, Esq.** **Walter J. Tache, Esq.** **Marissel Descalzo, Esq.** Carlton Fields, P.A. 4000 International Place 100 SE 2nd Street Miami, FL 33131 305-358-5000 305-579-9749 (fax) pcalli@carltonfields.com wtache@carltonfields.com mdescalzo@carltonfields.com *Counsel for Defendant William L. Gunlicks* ***Service via CM/ECF***
Sarah S. Gold, Esq. **Vincenzo Paparo, Esq.** Proskauer Rose, LLP 1585 Broadway New York, NY 10036 212-969-3000 212-969-2900 (fax) sgold@proskauer.com vpaparo@proskauer.com *Counsel for Sun Capital, Inc. and Sun Capital Healthcare, Inc.* ***Service via CM/ECF***	