

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

Case No. 2:09-cv-445-FtM-229SPC

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.

JOINT MOTION FOR EXPEDITED APPROVAL OF PROPOSED PROCEDURE TO OBTAIN COURT APPROVAL OF THE PROPOSED SETTLEMENT TRANSACTION

Plaintiff Daniel S. Newman, not individually but solely in his capacity as Receiver (the “Receiver”) for Founding Partners Capital Management Company (“FPCM”), Founding Partners Global Fund, Ltd. (“Global Fund”), Founding Partners Stable-Value Fund, L.P. (“Stable-Value”), Founding Partners Stable-Value Fund II, L.P. (“Stable-Value II”) and Founding Partners Hybrid-Value Fund, L.P. (“Hybrid-Value”) (FPCM, Global Fund, Stable-Value, Stable-Value II and Hybrid-Value are collectively referred to as the “Receivership Entities”; Global Fund, Stable-Value, Stable-Value II and Hybrid Value are collectively referred to as the “Receivership Funds”) and Defendants Sun Capital Healthcare, Inc. (“SCHH”), Sun Capital, Inc. (“SCI”), and HLP Properties of Port Arthur, LLC (“HLP,” and together with SCHH and SCI, the

“Sun Entities”) respectfully submit their Joint Motion for expedited approval of the proposed procedure to obtain Court approval of their proposed settlement transaction

A copy of this Motion with exhibits, and other materials as discussed below, will be sent to all investors in the Receivership Funds at their addresses known to the Receiver based on the books and records of the Receivership Entities, if the Court approves the process outlined herein to give notice of the settlement transaction to the investors.

INTRODUCTION

The parties are pleased to report that they have reached a comprehensive settlement agreement, subject to Court approval.

The purpose of this Motion is, first, to seek approval of the parties’ proposed procedure for court approval pursuant to which the investors in the Receivership Entities would be given notice of the proposed settlement transaction and an opportunity to object to the proposed Settlement Agreement, and second, to seek the Court’s approval of the Settlement Agreement, after the Court has a chance to consider any objections filed.

In essence, the proposed Settlement Agreement provides that, in exchange for the Sun-Related Parties¹ being released from the Receiver’s and the Releasing Investors’ claims and potential claims, the Sun Principals, Spouses and Dawson will transfer ownership of their factoring companies (SCHI and SCI) and their hospital companies and associated real estate holding companies (Promise, Success and related entities) (collectively, the “Settlement

¹ The Sun-Related Parties that would be parties to the Settlement Agreement are listed in the attached documents, and are composed of the following: (a) SCHI and SCI, which are Defendants in this case; (b) Messrs. Peter Baronoff, Howard Koslow, and Lawrence Leder (the “Sun Principals”); (c) Malinda Baronoff, Jane Koslow, and Carole Leder, the Sun Principals’ spouses (the “Spouses”); (d) Mark Dawson, an individual with an ownership interest in Promise (“Dawson”); (e) Promise Healthcare, Inc. (“Promise”); (f) Success Healthcare, LLC (“Success”); and (g) affiliates of SCHI, SCI, Promise and Success listed on Annex I to the Settlement Agreement. The affiliates listed on Annex I except for Trieste Land Ventures, LLC and F.C.G. Courtyard are collectively referred to as the “Other Acquired Companies”.

Entities”) to a newly formed entity wholly-owned by Stable-Value (the “FP Designee”), except that the Sun Principals, Spouses and Dawson will collectively retain a 4% ownership interest in Promise on the terms more fully described below.

To the extent approved by the Court, upon closing of the Settlement Agreement, for an interim period thereafter (until the Receiver can distribute membership interests described in the succeeding paragraph at the conclusion of a court-approved claims process), the FP Designee will remain a subsidiary of Stable-Value, operating under a governance structure that is described below.

Following the conclusion of a Court-approved claims process (which will be the subject of a future motion), the Receiver intends, upon Court approval, to distribute membership interests in the FP Designee to Releasing Investors (as hereafter defined) of the Receivership Entities, such that ownership of the FP Designee will be transferred from Stable-Value to such Releasing Investors whose interests are validated through the claims process. To distribute these membership interests as part of a future claims process, the Receiver will seek a fairness hearing under the securities laws, described below.

Under the terms of the Settlement Agreement, only those investors of the Receivership Funds who agree to release the Sun-Related Parties from all claims that those investors may have or have asserted against the Sun-Related Parties and who furnish a signed release (“Releasing Investor”) will be eligible for distribution of a membership interest in the FP Designee. Non-releasing investors shall retain any rights and claims they may have against the Sun-Related Parties, but will not be eligible for distribution of a membership interest in the FP Designee. A copy of the proposed release that will be required to be executed by Releasing Investors is attached as Exhibit 1 (the “Investor Release”). It is a condition of closing of the transaction that

a sufficient number of investors have executed such releases (to be held by the Receiver in escrow pending closing, when they will be delivered to the Sun-Related Parties' counsel).

To date, investors purporting to own investments in the Receivership Entities equal to approximately \$144 million have executed Consents to the Settlement Agreement, copies of which are attached hereto as Exhibit 2, whereby such investors have approved the settlement on the terms provided in the Settlement Agreement and have agreed to execute and deliver an Investor Release ("Consenting Investors").

The Receiver intends to distribute the form of Investor Release to all known investors as described in Section VI of this Motion. Through a separate motion seeking approval for the initiation of a claims process, the Receiver will seek an order that will provide, among other things, that investors shall be required to return to the Receiver an executed Investor Release (along with other materials typically required for submission of a claim in a receivership) by a deadline to be set by the Court, if they wish to be eligible for distribution of a membership interest in the FP Designee. Investors – such as the Consenting Investors – may execute the Investor Releases at any time prior to the deadline.² However, as described below, the Sun-Related Parties are not obligated to close the transaction until a sufficient number and dollar percentage of executed Investor Releases (based on the Investor List, defined below) have been received.

As explained below, the Receiver supports the Settlement Agreement and finds it to be in the best interests of the Receivership Entities. The parties jointly propose that the investors of the Receivership Funds be given notice of the proposed settlement through the mailing of a court-approved disclosure package by the Receiver to known investors, publication in at least

² As described below, in the claims process motion, the Receiver intends to request that the Court order that Investor Releases must be returned to the Receiver within 45 days after the entry of an order on the claims process motion, so long as the conditions of execution of Investor Releases have been met.

two newspapers with national circulation for two consecutive weeks and posting online of same on the official Founding Partners Receivership website set up by the Receiver, www.foundingpartners-receivership.com. The parties further jointly propose that an order be entered requiring that any objections by any investors be made in writing, served on the parties, and filed with the Court in accordance with a schedule to be set by the Court, which will set forth dates for mailing of the notice to all investors, filing of objections by investors, and responses to objections by the Receiver and/or the Sun Entities. The parties are working on a proposed form of order and, with the Court's permission, will submit it by e-mail in accordance with the Court's individual rules.

DISCUSSION

I. APPOINTMENT OF RECEIVER AND THE RECEIVERSHIP ORDER

On April 20, 2009, the United States Securities and Exchange Commission filed its complaint ("SEC Action") against Founding Partners Capital Management Company ("FPCM") and William L. Gunlicks ("Gunlicks"), alleging that FPCM and Gunlicks engaged, and were engaging, in a scheme to defraud investors and violate the federal securities laws (SEC Action, D.E. 1). In the SEC action, the SEC sought, among other relief, entry of a temporary restraining order and a preliminary injunction.

On April 20, 2009, the Court entered an Order Freezing Assets of FPCM and Gunlicks (the "Asset Freeze Order"). The Asset Freeze Order also applies to Stable-Value, Stable-Value II, Global Fund and Hybrid-Value. Also, on April 20, 2009, the Court entered an order (the "Initial Receivership Order") appointing a receiver (the "Initial Receiver") for the Receivership Entities. (SEC Action, D.E. 9).

On May 13, 2009, the Court removed the Initial Receiver. (SEC Action, D.E. 70). On May 20, 2009, the Court entered an order (the "Receivership Order") appointing Daniel S.

Newman, Esq. replacement receiver of the Receivership Entities. (SEC Action, D.E. 73). The Receivership Order provides that the Receiver shall, among other things:

- (a) Take immediate possession of all property, assets and estates of every kind of Founding Partners and each of the Founding Partners Relief Defendants, whatsoever and wheresoever located, including but not limited to all offices maintained by Founding Partners and the Founding Partners Relief Defendants, rights of action, books, papers, data processing records, evidences of debt, bank accounts, savings accounts, certificates of deposit, stocks, bonds, debentures and other securities, mortgages, furniture, fixtures, office supplies and equipment, and all real property of Founding Partners and the Founding Partners Relief Defendants wherever situated, and to administer such assets as is required in order to comply with the directions contained in this Order... ;
- (b) Investigate the manner in which the affairs of Founding Partners and the Founding Partners Relief Defendants were conducted and institute such actions and legal proceedings, for the benefit and on behalf of Founding Partners or the Founding Partners Relief Defendants and their investors and other creditors as the Receiver deems necessary against those individuals, corporations, partnerships, associations and/or unincorporated organizations which the Receiver may claim have wrongfully, illegally or otherwise improperly misappropriated or transferred money or other proceeds directly or indirectly traceable from investors in Founding Partners and the Founding Partners Relief Defendants...; and
- ...
- (f) Defend, compromise or settle legal actions, including the instant proceeding, in which Founding Partners, any of the Founding Partners Relief Defendants, or the Receiver are a party, commenced either prior to or subsequent to this Order, with authorization of this Court....

II. THE SUN LITIGATION

Pursuant to the Receivership Order, on July 14, 2009, the Receiver filed suit against the Sun Entities, seeking the recovery of over \$500 million (D.E. 1) (the "Sun Litigation"). The lawsuit asserted, among other things, claims arising from the loan agreements between Stable-Value and the Sun Entities.

On July 15, 2009, the Receiver seized lockbox bank accounts utilized by the Sun Entities. On July 22, 2009, the Sun Entities filed a Motion for a Temporary Restraining Order and

Preliminary Injunction to return control of the lockboxes to the Sun Entities, which was opposed by the Receiver on July 24, 2009. (D.E. 11 & 13). On July 24, 2009, the Court issued a restraining order, temporarily returning control of the lockboxes to the Sun Entities, pending resolution of the Sun Entities' pending Motion for Preliminary Injunction. (D.E. 19).

On July 28, 2009, the Court granted the Receiver's Motion, consented to by the Sun Entities, providing for expedited discovery to be followed by a briefing schedule in connection with the Sun Entities' pending Motion for Preliminary Injunction on the lockboxes. (D.E. 22). Thereupon, the parties engaged in expedited discovery.

On August 24, 2009, the Sun Entities answered the complaint, asserted defenses and asserted counterclaims. (D.E. 29).

On October 9, 2009, the Receiver moved to strike defenses and to dismiss the counterclaims. (D.E. 68). The Sun Entities opposed the Motion (D.E. 88), which is fully briefed.

On January 19, 2010, following the completion of the expedited discovery period, the Receiver filed his Memorandum in Opposition to the Sun Entities' Motion for Preliminary Injunction. (D.E. 125).

On March 3, 2010, the Sun Entities filed their Reply Brief in Further Support of their Motion for Preliminary Injunction. (D.E. 161).

On April 16, 2010, the Receiver filed his Motion to Strike the Sun Entities' Reply Brief and Supporting Declarations, which was opposed by the Sun Entities. (D.E. 182).

Meanwhile, on March 1, 2010, the Receiver filed his Motion to Amend the Complaint. (D.E. 159). The Receiver sought to add claims against the existing Defendants and to assert

claims against the Sun Principals and hospitals, real estate, and other companies that were owned by the Sun Principals.

On March 26, 2010, the Sun Entities opposed the Motion to Amend. (D.E. 180).

On April 12, 2010, Magistrate Judge Sheri Polster Chappell issued a Report and Recommendation, recommending that the Motion to Amend be granted in part and denied in part, to permit the Receiver to add certain claims against existing Defendants, but not to add new defendants in this litigation. (D.E. 181). Following objection by the Receiver (D.E. 190), opposed by the Sun Entities (D.E. 192), the Court adopted the Report and Recommendation (D.E. 193).

On or about June 1, 2010, the Receiver served numerous subpoenas duces tecum on the Sun Entities and related entities.

On June 12, 2010, the Sun Entities filed a Motion to Stay the litigation for 120 days for purposes of settlement discussions. (D.E. 196). In the Motion, the Sun Entities stated that they entered into a term sheet, providing for the terms of a proposed settlement, with a group of investors in one or more of the Receivership Entities (the "Investor Group"). The Motion further stated that the proposed term sheet provided for the settlement of the Receiver's claims against the Sun Entities (and against the Sun Principals and their other companies, which were not permitted to be added to the Sun Litigation), in exchange for the Sun Principals' transferring for the benefit of the investors in the Receivership Entities the Sun Principals' factoring companies (SCHI, SCI) and their hospitals and associated real estate holding companies (Promise, Success and certain related entities), while retaining certain interests in those assets. The Sun Entities attached affidavits from two members of the Investor Group that negotiated the term sheet with

the Sun Entities, stating that an overwhelming majority of the investors they had contacted supported the term sheet and the proposed stay.

On June 28, 2010, the Receiver opposed the Motion to Stay. (D.E. 200). The Receiver argued, among other things, that claims in the Sun Litigation belonged to the Receivership, and thus any settlement had to involve the Receiver. The Receiver also requested that any stay be for less than the requested 120 days.

On July 8, 2010, the Court issued an order staying the Sun Litigation for 60 days and requiring a joint status report at the end of the 60-day stay. (D.E. 202).

In its Order, the Court noted that it would grant the stay because, among other things:

“The Court clearly has the discretionary authority to grant a reasonable stay in a case, and pursuit of a settlement can be a reasonable basis for a stay. This particular case is not typical, and literally cries out for a good faith effort at resolution before the only people left standing are the lawyers and other litigation professionals. It would appear that a settlement may only be accomplished if the efforts include substantial involvement of an informed Receiver in the settlement process. The Receiver was appointed not only for his legal and business acumen, but to bring common sense to a process, which by its very nature can be complex.” (D.E. 202).

The following motions are among those that were fully briefed and remained pending at the time the litigation was stayed: (a) the Receiver’s Motion to Strike Sun’s Affirmative Defenses and Counterclaims, (b) the Sun Entities’ Motion for Preliminary Injunction, and (c) the Receiver’s Motion to Strike the Sun Entities’ reply papers.

Thereafter, the Receiver and the Sun Entities have requested several extensions of the stay to continue settlement negotiations. The Court granted those requests, and the stay continues through the present.

III. THE PROPOSED SETTLEMENT

This section discusses some of the material provisions of the draft Settlement Agreement, the exhibits thereto and any documents to be executed in connection with the transactions contemplated thereby (collectively, the "Transaction Documents"). Copies of the Transaction Documents, except for certain confidential materials which will be the subject of a motion to file under seal, are attached as Exhibit 3 to this Motion.³

In essence, the proposed Settlement Agreement provides that, in exchange for releasing the Sun-Related Parties from the Receiver's claims and potential claims, the Sun Principals will transfer their direct or indirect ownership interests in their factoring companies (SCHI and SCI) and their hospital companies and associated real estate holding companies (Promise, Success and Other Acquired Companies) to the FP Designee, a newly formed, wholly-owned subsidiary of Stable-Value.

A. COMPANIES TO BE TRANSFERRED

The Sun Principals, Spouses and Dawson will directly or indirectly convey to the FP Designee all of the ownership interest in SCHI, SCI, Success and the Other Acquired Companies. They will also cause stock of Promise to be issued, as a result of which the FP Designee will indirectly own all of the preferred stock of Promise and 96% of the common stock of Promise, with the remaining 4% to be retained by the Sun Principals, the Spouses and Dawson.

Collectively, the Settlement Entities own or lease and operate eighteen hospitals, two medical office buildings and a nursing school. Promise's facilities consist of fifteen long term

³ The confidential materials that the parties wish to file under seal are Mr. Baronoff's employment agreement, a redacted disclosure statement (and exhibits) to the Transaction Documents, and a chart reflecting the organizational structure of the entities following the closing ("Post-Closing Organizational Chart") (collectively "Confidential Materials").

acute care hospitals (“LTACHs”). Promise, the Sun Principals’ LTACH division, provides medical care to patients who suffer from conditions too complex to be effectively managed by skilled nursing or sub-acute facilities, and require inpatient care for longer durations than general acute care hospitals are organized or staffed to provide. Success, the Sun Principals’ community-based hospital division, operates two general acute care hospitals and one psychiatric facility as well as two medical office buildings and a nursing school. Success hospitals offer a variety of medical-surgical services such as primary care, emergency services, general surgery, bariatric surgery, internal medicine, cardiology, oncology, senior care and wound care. In addition, the hospitals provide inpatient and outpatient ancillary services including rehabilitation and diagnosis. Success’ psychiatric hospital offers acute and geriatric services as well as other behavioral care programs.

The Settlement Entities’ corporate headquarters are located in Boca Raton, Florida, with a satellite office in Shreveport, Louisiana.

As part of the settlement transaction, ownership of Other Acquired Companies that own the real estate which is utilized by Promise or Success will be conveyed to Promise, such that once the transactions contemplated by the Settlement Agreement are closed, the ownership of the Settlement Entities will be as set forth on the Post-Closing Organizational Chart, which will (together with the other Confidential Materials) be the subject of a joint motion to file under seal, and which will be distributed to investors who execute the required confidentiality agreement. Thus, after the closing, each of SCI, SCHI and Success will be wholly-owned by the FP Designee, and SCHI will own 96% of the issued and outstanding common stock of Promise, while the other 4% thereof will be retained by the Sun Principals, their Spouses and Dawson (the “Retained Equity”), as more fully discussed below.

In exchange for Promise's issuance of 96% of the common stock of Promise to SCHI, along with the preferred stock discussed below, SCHI will cancel approximately \$150 million in outstanding indebtedness due SCHI from Promise. In addition, the remaining existing loans made by SCHI to Promise (the "Existing Loans") will be amended and restated as follows:

1. Senior Term Facility: \$75 million loan, which shall accrue interest at LIBOR plus 7.5% annually, payable quarterly (the "Senior Term Facility"). The Senior Term Facility shall be deemed fully-funded as of the closing from the Existing Loans, and shall be repaid upon maturity, which shall not exceed 5 years after the closing. It shall be secured by a first-priority security interest in all assets of Promise and its operating and real estate subsidiaries, excepting (i) those assets in which the Sun Principals, Spouses and Dawson are being granted a security interest (and in which SCHI is obtaining a subordinated second-priority security interest) and (ii) certain accounts and books and records and other related assets, which are being pledged to secure a line of credit Promise intends to obtain as a condition precedent to the closing.

2. Subordinated Term Loan: \$125 million loan, accruing interest at 12% annually, payable quarterly in kind, which shall be subordinated to the Senior Term Facility (the "Subordinated Term Loan"). The Subordinated Term Loan shall be deemed fully-funded as of the closing from the Existing Loans and shall have a term of 5 years after closing. It shall be secured by a second-priority security interest in all assets of Promise and its subsidiaries, excepting (i) those assets in which the Sun Principals, Spouses and Dawson are being granted a security interest (and in which SCHI is obtaining a subordinated third-priority security interest) and (ii) certain accounts and books and records and other related assets, which are being pledged to secure a line of credit Promise intends to obtain as a condition precedent to the closing.

3. Preferred Stock in Promise will be issued, and will have a liquidation preference and mandatory redemption value of \$75 million (the "Preferred Stock"). *See* Article 4 of Exhibit F to the Settlement Agreement (part of Exhibit 3 hereto).

The Senior Term Facility, the Subordinated Term Loan (except for the interest payable thereunder) and the Preferred Stock shall each have priority over the Retained Equity. Therefore, it is anticipated that the FP Designee, as lender, will receive \$275 million plus interest in cash on the Senior Term Facility (to the extent of proceeds ultimately available) before the Sun Principals receive anything in respect of the Retained Equity.

B. CLAIMS TO BE RELEASED

Pursuant to the terms of the proposed Settlement Agreement, upon closing of the transaction, the Receiver and the Sun-Related Parties – which include the Defendants in this case as well as the Sun Principals and specified related individuals and entities – agree to mutual general releases (but do not release each other from claims arising from the Transaction Documents), as set forth in the attached releases. The claims to be released therefore include, without limitation, the parties' claims in the Sun Litigation and the Receiver's unasserted claims against individuals and entities other than the Defendants that the Receiver sought to add to the Sun Litigation by amendment.

In addition, pursuant to the terms of the proposed Settlement Agreement, all investors must agree to release the Sun-Related Parties and Receiver from any claims they may have against the Sun-Related Parties as a condition to being eligible to receive an equity interest in the FP Designee through a Court-ordered distribution. As noted, a copy of the required Investor Release is attached as Exhibit 1. Thus, for example, the Receiver is aware that certain investors in the Receivership Funds have filed suit directly against certain of the Sun-Related Parties. If those investors wish to be eligible for a share of the ownership of the FP Designee, they must

execute and deliver an Investor Release prior to the closing. The releases will be held in escrow by the Receiver's counsel to be delivered to the Sun-Related Parties at closing.

C. **CONSIDERATION TO BE RECEIVED BY THE SUN PRINCIPALS, SPOUSES AND DAWSON**

In exchange for entering into the Settlement Agreement and conveying to the FP Designee their ownership interests in the Settlement Entities, and releasing the Receivership Entities, the Receiver and Releasing Investors from any claims relating to the loans made by Stable-Value to SCHI or SCI, the Principals, their Spouses and Dawson will receive the following material benefits and consideration:

1. Collectively, \$5,884,000 of Secured Notes will be issued to the Sun Principals, their Spouses and Dawson in proportion to their ownership interests in Promise following the closing, which Secured Notes will be substantially in the form attached to the Settlement Agreement as Exhibit L, and which generally provide for payment of such amounts, without interest, in three annual payments. *See* ¶ 2 of Exhibit L to the Settlement Agreement (part of Exhibit 3 hereto).

2. Each of Howard Koslow and Lawrence Leder will enter into a Consulting Agreement with Promise substantially in the forms attached to the Settlement Agreement as Exhibits J and K thereto, which generally provide for payment to each of Messrs. Koslow and Leder of \$1,800,000, payable \$50,000 per month over three years in exchange for their consulting services. *See* § 2(a) of Exhibits J and K to the Settlement Agreement (part of Exhibit 3 hereto).

3. Peter Baronoff will enter into an Employment Agreement with Promise and Success, which will be the subject of a motion to file under seal, which provides for what is

believed to be market-rate compensation for his continuing services as CEO of Promise and Success.⁴

4. The Sun Principals will be granted a first-priority lien on certain real and personal property of certain of the Settlement Entities as security for any payments due to the Sun Principals, their Spouses, or Dawson under the Secured Notes and the Consulting Agreement and for certain continuing personal guaranty obligations of the Sun Principals (the "Performance Security"). *See* § 2.1(o) of the Settlement Agreement (part of Exhibit 3 hereto).

5. Loans made by certain of the Settlement Entities to one or more of the Sun Principals or their Spouses totaling approximately \$1.7 million in principal outstanding shall be forgiven. *See* § 2.1(p) of the Settlement Agreement (part of Exhibit 3 hereto).

6. The Sun-Related Parties will receive releases of claims from the Receiver, the Receivership Entities, and Releasing Investors. *See* § 2.1(m) of the Settlement Agreement (part of Exhibit 3 hereto).

7. The Sun Principals, the Spouses and Dawson (collectively, the "Indemnitees") shall be indemnified from and after the closing by each of Promise, Success, SCHI, SCI and FP Designee for any claims relating to their actions or omissions on behalf of any of the Settlement Entities, as more fully described in Article VI of the Settlement Agreement. The indemnification obligations include a duty by the indemnifying parties to defend the Indemnitees and to advance all necessary and reasonable expenses relating to any indemnified proceedings. However, certain types of claims are ultimately not covered by such indemnification. *See* § 6.2(b) of the Settlement Agreement (part of Exhibit 3 hereto).

⁴ This is based on information provided by advisors retained by the Investor Group, who consulted industry sources and a published compensation survey.

8. For a period of six years after the closing, each of Promise and Success agree to maintain directors and officers insurance for the benefit of any Indemnitee who was serving as a director, officer, employee, consultant or agent of any of the Settlement Entities. *See* § 6.4(a) of the Settlement Agreement (part of Exhibit 3 hereto).

9. The Sun Principals, their Spouses and Dawson will continue to own 4% of the issued and outstanding common stock of Promise, in approximate proportion to their current ownership interests in Promise (the "Retained Equity"). The Retained Equity will be subordinate to certain amounts payable under the Senior Term Facility, the Subordinated Term Loan and the Preferred Stock. *See* § 5(b) of the Stockholders Agreement (part of Exhibit 3 hereto). In addition, one-half of the Retained Equity may be subject to cancellation under certain circumstances. *See* § 5(d) of the Stockholders Agreement (part of Exhibit 3 hereto).

D. RIGHTS OF RECOURSE OF THE FP DESIGNEE AGAINST THE SUN-RELATED ENTITIES

The Sun Principals and Dawson make certain representations and warranties to the FP Designee which are set forth in Schedule 5.2(a) to the Settlement Agreement. In addition, in the Disclosure Statement substantially in the form attached to the Settlement Agreement as Exhibit N thereto (the "Disclosure Statement"), each of the Sun Principals and their Spouses make certain representations and warranties to the FP Designee. These representations and warranties shall survive for a period of 18 months after the closing of the transactions (or until certain earlier liquidity events). Any claim for breach of these representations and warranties must be brought by the FP Designee within that 18-month or shorter period.

E. **GOVERNANCE STRUCTURE OF FP DESIGNEE PRIOR TO DISTRIBUTION**

Upon Court approval, the FP Designee will be formed by the Receiver as a subsidiary of Stable-Value operating in accordance with the FP Designee organizational documents attached as Exhibit 4.

Prior to the distribution of the equity interests in the FP Designee to Releasing Investors whose interests are validated in the claims process, the FP Designee shall be managed by a board of managers (the "Board") consisting of five members. Under the Settlement Agreement, the Receiver (or his designee) may be one of the five members of the Board, and the remaining four members are to be reasonably qualified to serve in such positions. In addition, for so long as Baronoff is employed as CEO, he will be entitled to one seat on the board of Directors of Promise.

Under the FP Designee organizational documents, the Receiver (or his designee) shall be one of the five members of the Board of the FP Designee, and the remaining four members shall be persons associated with various investors in the Receivership Funds (or their designees); provided, however, that until the distribution of membership interests of the FP Designee to Releasing Investors is completed, the approval of the Receiver or his designee on the Board shall be required to approve certain major decisions specified in the FP Designee's organizational documents; provided, further that in the event that a majority of the other Board members oppose the vote of the Receiver or his designee on any such major decision, they may, if this Court authorizes such a procedure as part of its continuing jurisdiction over the supervision of the Receivership, petition this Court to potentially overrule the vote of the Receiver or his designee on such major decisions. *See* § 8.5 of the FP Designee's Limited Liability Company Agreement (attached hereto as Exhibit 4). The FP Designee anticipates that post-closing, following the

distribution of membership interests to Releasing Investors pursuant to the pre-closing claims process, new Board elections will be held, with the Board to be selected by vote of the members of FP Designee. *See* § 8.2(a)(iii) of the FP Designee's Limited Liability Company Agreement (attached hereto as Exhibit 4).

F. CONDITIONS TO CLOSING

The obligations of the parties to consummate the transactions contemplated by the Transaction Documents are contingent upon, among other things, (i) entry of an order of this Court approving the Settlement Agreement and granting related relief, (ii) the Receiver's receipt of advice as to the application of New York law to the applicable Transaction Documents by New York corporate counsel to be retained by the Receiver, upon Court authorization (which will be the subject of a future motion) and to be paid by the Settlement Entities or Sun Entities, and the Receiver being satisfied with such advice, (iii) receipt of all necessary governmental authorizations or third-party consents, (iv) accuracy of representations and warranties of each party and performance of the covenants applicable to such party, and (v) entry by Promise into a working capital line of credit, and (vi) the solicitation of releases from all Receivership Fund investors and receipt of a sufficient number of executed releases from the investors in the four Receivership Funds. *See* §§ 4.1-4.3 of the Settlement Agreement (part of Exhibit 3 hereto).

IV. SETTLEMENT HEARING, FAIRNESS HEARING, AND CLAIMS PROCESS

The parties anticipate, as set forth below, that the Court will conduct a settlement hearing to determine whether to approve the settlement transactions contemplated by the Settlement Agreement and other Transaction Documents as a means to resolve this lawsuit and other related claims or threatened claims. That settlement hearing would follow the dissemination of notice to

all investors in the four Receivership Funds, receipt of any objections by such investors, and responses thereto submitted by the parties.

The Receiver also anticipates that he will seek approval of a claims process leading to the distribution of membership interests of the FP Designee, which will effectuate the transfer of the ownership of the FP Designee from Stable-Value to the Releasing Investors. The Receiver expects to rely upon Section 3(a)(10) of the Securities Act of 1933 with respect to the issuance of membership interests in the FP Designee to Releasing Investors without registration. *See* 15 U.S.C. § 77c(a)(10). That provision requires that the Court hold a “fairness hearing,” *i.e.*, a hearing to determine whether the terms and conditions of the exchange of the investors’ claims for the membership interests are fair. *Id.* If the Court determines that the exchange of claims for securities is fair, the Receiver will be able to issue membership interests in the FP Designee to eligible Releasing Investors, which will result in ownership of the FP Designee being transferred from Stable-Value to Releasing Investors. The Receiver intends to file a motion for a fairness hearing, which will fully brief these issues.⁵

V. THE RECEIVER HAS CONCLUDED THAT THE PROPOSED SETTLEMENT IS IN THE BEST INTERESTS OF THE RECEIVERSHIP ESTATES

The Receiver respectfully submits that the Court should approve the proposed settlement because it is in the best interests of the Receivership Entities. The process of reaching the proposed settlement was fair, well-informed, and well-advised by legal and financial professionals.

⁵ The Receiver expects that he will recommend to the Court that an investor’s particular ownership interest be determined broadly based on the proportion of that investor’s total unreturned principal invested in the Receivership Entities compared against the total unreturned principal investments made by all investors. The exact formula for this calculation will be submitted by the Receiver for the Court’s consideration in connection with a motion to approve this claims process.

Since the Court's Order staying the Sun Litigation, the Receiver, the Sun Entities and the Investor Group have engaged in extensive settlement discussions, which resulted in the filing of this Motion. Pursuant to confidentiality agreements,⁶ the Sun Entities posted voluminous due diligence materials in an electronic data room, including financial records and restructuring information, for review by the Receiver, the Investor Group and individual investors who signed a confidentiality agreement.

Throughout this process, the Receiver and the Investor Group were advised by highly qualified professionals. The Receiver retained financial and legal advisors to assist in his review and analysis of the due diligence materials and to aid in his discussions with the Investor Group and the Sun Entities including accountants, Berkowitz Dick Pollack & Grant ("Berkowitz Dick"), and legal counsel, Broad and Cassel. The Investor Group was advised by their financial advisors, Specialty Finance Advisors LLC ("Specialty Finance"); legal counsel, Patton Boggs LLP; business valuation consultant, Focus Management Group USA, Inc. ("FMG"), investment banker, MTS Health Partners, L.P. ("MTS Health"); and healthcare consultant, Nightingale Consulting, LLC ("Nightingale"). The Receiver and his professionals regularly met with, communicated with, and received information from the Sun Entities, the Investor Group and their professionals while performing his analysis of the settlement transaction.

During the due diligence phase of this settlement process, the professionals engaged by the Receiver and the Investor Group reviewed voluminous financial information and the professionals engaged by the Investor Group conducted numerous site visits. The Sun Entities provided periodic company updates (with a focus on the Promise and Success business units), including recent financial performance, cash forecasts, competitive pressures, and updates to the

⁶ The Court-approved July 22, 2010 confidentiality and use restriction agreement with the Receiver is D.E. 203-1.

regulatory and reimbursement environments. The Sun Entities arranged facility site visits for virtually all of Promise's facilities and all of Success's facilities during the summer and fall of 2010. These site visits were completed by representatives of Specialty Finance. In addition, representatives of Specialty Finance and MTS Health attended the opening of the Villages facility in Florida. At each facility visited, Promise executives (*i.e.* the Chief Executive Officer and/or divisional presidents) and local facility management (*e.g.*, the hospital Chief Executive Officer and Chief Operating Officer) gave Specialty Finance (and as applicable, MTS Health) thorough tours of each facility, provided detailed management presentations and engaged in detailed question and answer sessions.

FMG performed a detailed financial and accounting due diligence review. FMG was on-site in the Sun Entities' corporate offices in Boca Raton, Florida from August to October 2010 to perform its due diligence review. FMG prepared a detailed financial and accounting due diligence report (plus an executive summary thereof) dated November 12, 2010 (the "FMG Report") which detailed its findings. The FMG due diligence report has been provided to the Receiver. The Receiver, Specialty Finance, FMG and the Receiver's advisor (Berkowitz Dick) engaged in an all-day discussion on November 16, 2010 to discuss the FMG report to address the Receiver's (and his advisors') questions. Subsequent to the completion of the FMG due diligence report and subsequent discussions, the parties agreed to continue to negotiate definitive documents for the transaction contemplated by the term sheet.

From December 15, 2010 through February 4, 2011, Nightingale performed a detailed clinical due diligence assessment of the Promise and Success facilities (the "Nightingale Report"). The assessment included a site visit to the Boca Raton corporate offices as well as site visits to the Success Hospitals and a representative sample of five Promise Hospitals. The

assessment included a comprehensive evaluation of clinical care, quality, risk and corporate compliance of the Promise and Success billing practices and compliance programs. The Nightingale Report, dated February 15, 2011 has been provided to the Receiver. All issues highlighted in the Nightingale Report have been communicated to Promise and Success management.

The Sun Entities' online data room has been updated on an ongoing basis to include a significant amount of updated information, including updated financial information as well as operational, reimbursement and regulatory information. The Receiver and investors who signed the confidentiality agreement have access to the online data room. Specialty Finance and the Receiver's advisor (Berkowitz Dick) have had numerous follow-up discussions regarding the updated financial information since the completion of the FMG Report. In addition, the Investor Group's counsel, Patton Boggs LLP, engaged in a legal due diligence review of the various contracts, licensing information, organizational and other non-financial information that was provided by the Sun Entities to the online data room, summaries of which were provided to the Receiver.

The Receiver's financial advisor, Berkowitz Dick, has conducted a calculation of value for Promise. See Exhibit 5. Based on their analysis, Berkowitz Dick's estimate of preliminary values ranges from \$115 million to \$203 million. In addition to its own analysis, Berkowitz Dick has reviewed the valuation report prepared by MTS Health dated December 15, 2010 ("MTS Health Report"), which derived a range of values in excess of those provided by Berkowitz Dick.

In addition, it is a condition of closing the settlement transaction that FMG update its work under the FMG Report to a more recent date and provide the Receiver and the FP Designee

with an updated report (the “FMG Update”), and that MTS Health provide the Receiver and the FP Designee with an updated valuation estimate of Promise and Success and their subsidiaries (the “MTS Updated Valuation”).

With respect to FMG, a copy of the engagement letter entered into by FMG and the Investor Group, which the Receiver signed, (FMG Agreement”) is attached as Exhibit 6. The FMG Agreement provides that the Receiver will be provided with the FMG Update and can rely upon it.

With respect to MTS Health, a copy of the engagement letter entered into by MTS Health and the Receiver (“MTS Health Agreement”) -- certain provisions of which are not effective unless and until the Agreement is approved by the Court -- is attached as Exhibit 7. The MTS Health Agreement enabled the Receiver to have access to an earlier valuation report prepared by MTS for the Investor Group (“Prior Valuation”) for use by the Receiver in this Joint Motion, and it will enable the Receiver to have access to the updated valuation that will be prepared by MTS Health as a condition of closing (“Updated Valuation”). The MTS Health Agreement further provides, among other things, that if the Receiver distributes either Valuation in a manner inconsistent with the Agreement, and without the consent of MTS Health, the Receivership Entities could be responsible for indemnification liability. However, the MTS Health Agreement provides that such indemnification provisions do not become effective unless and until the Court approves the MTS Health Agreement.⁷

The ultimate inquiry in assessing a proposed receivership settlement is whether “the proposed settlement is fair.” *Sterling v. Stewart*, 158 F. 3d 1199, 1203 (11th Cir. 1998); *see In re*

⁷ If the Court does not approve the MTS Health Agreement, and in the absence of a new agreement that the Court may approve, the Receiver may not get access to the Updated Valuation prior to closing and will not be able to distribute it to investors who sign confidentiality agreements.

Consol. Pinnacle West Sec. Litig./Resolution Trust Corp.-Merabank Litig., 51 F.3d 194, 196-97 (9th Cir. 1995) (“We see no reason to upset the court’s conclusion that the settlement process and result were fair.”).

Determining the fairness of [a] settlement is left to the sound discretion of the trial court.” *Sterling*, 158 F. 3d at 1202 (11th Cir. 1998). The Court should examine the following broad array of factors:

(1) the likelihood of success; (2) the range of possible discovery; (3) the point on or below the range of discovery at which settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved.

Sterling, 158 F. 3d at 1204. See also *SEC v. Princeton Economic Int’l*, 2002 WL 206990, *2 (S.D.N.Y. 2002) (receivership court should consider “various factors including, *inter alia*: (1) the probable validity of the claim; (2) the apparent difficulties attending its enforcement through the courts; (3) the collectability of the judgment thereafter; (4) the delay and expenses of the litigation to be incurred; and (5) the amount involved in the compromise”).

For example, the district court in *Gordon v. Dadante* “analyze[d] the settlement as a whole, under the totality of the circumstances.” 2008 U.S. Dist. LEXIS 32281, *39, 48 (N.D. Ohio April 18, 2008). The Sixth Circuit affirmed, finding that the district court had fulfilled its responsibilities by engaging in an “independent analysis of the settlement,” as “the district court had extensive knowledge of the claims involved in the case, the valuation of those claims, and the nature of the settlement,” and thus “had more than sufficient information to assess the fairness of the settlement proposed.” 2009 U.S. App. LEXIS 15517 at **16, 23. As the district court noted in a later approval proceeding, “the courts must recognize that plans relating to settlement of a receivership are inherently imperfect, “because no proposal can be [perfect],” and

the “task at hand, however, is to do justice to the extent possible.” *Gordon v. Dadante*, 2010 U.S. Dist. LEXIS 1979, *13-14 (N.D. Ohio Jan. 11, 2010).

Here, the Receiver respectfully submits that the proposed Settlement Agreement is a fair, adequate, and reasonable resolution of the Sun Litigation. As the Court knows, the Sun Litigation involves complex issues of law and facts, involving extensive, time-consuming, and costly litigation, discovery, and motion practice, with no certain results.⁸ Based on the due diligence conducted, the terms of the proposed settlement are fair and reasonable, representing a sensible means of assuring a beneficial outcome for the investors who contributed funds. The Receiver and Consenting Investors, considering the delays and high costs of litigation and the anticipated difficulty of collecting a judgment, believe that the outcome for the Receivership Entities and investors will be better under the settlement transaction than it would be if the Receivership Entities continued this litigation or were forced to file claims in a bankruptcy proceeding of the Settlement Entities.

VI. PROPOSED CONFIRMATION PROCEDURE

As discussed above, the parties seek approval of a process to provide investors in the Receivership Entities with notice of the settlement transaction that the Receiver has concluded is in the best interests of the Receivership Entities. The parties seek an order authorizing and directing the Receiver to disseminate the following package of information to all investors in the four Receivership Funds, within five days of the entry of such order: (a) a notice in the form attached hereto as Exhibit 8, (b) the form of Investor Release; (c) this entire submission, and (d)

⁸ .As the Eleventh Circuit has observed in a different context, “Complex litigation – like the instant case – can occupy a court’s docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive.” *In re U.S. Oil and Gas Litigation*, 967 F.2d 489, 493 (11th Cir. 1992).

a form of confidentiality agreement attached as Exhibit 9, to be executed by any investors who seek to review the Confidential Materials.

Confidential Materials will be provided, in a later mailing, to those investors who request the Confidential Materials and who submit an executed confidentiality agreement to the parties. Also in a later mailing, such Fund Investors who have executed the required confidentiality agreement will also be entitled to receive the following materials which have not yet been provided to the Receiver but are required to be delivered to the Receiver: (1) audited financial statements for Promise and Success for prior periods (“Audited Financial Statements”) (required prior to either party agreeing to execute the Settlement Agreement), and (2) the FMG Update (required prior to closing of the transaction).⁹ In the claims process motion, the Receiver intends to request that the Court order that executed Investor Releases must be returned to the Receiver within 45 days after the entry of an order on the claims process motion, so long as the conditions of execution of Investor Releases have been met. The parties agree that investor elections on whether to sign Investor Releases shall not be required from such investors until after they have received these additional materials. However, such releases must be received by the deadline set by the Court. Assuming a sufficient total number of Investor Releases have been received, the closing can occur.

The parties respectfully request that the Court enter an order providing for, among other things, a schedule for the requested confirmation procedure. (For the Court’s convenience, if the Court permits, the parties will provide a proposed form of order by e-mail to the Court.)

⁹ In addition, upon request of an investor and subject to the investor’s execution of an indemnification and confidentiality agreement acceptable to MTS Health and the above-noted confidentiality agreement acceptable to the parties, the Receiver intends to afford investors the opportunity to receive a copy of the MTS Health Updated Valuation.

The parties further request that the Court order that all investor objections be made in writing, and submitted to the Court and served upon counsel for the Receiver and counsel to the Sun-Related Parties, as follows, within the deadline to be set by the Court:

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Finally, the parties jointly request that the Court authorize and direct the Receiver to provide to counsel to the Sun-Related Parties a current list of all investors in the Receivership Funds with name and outstanding amount(s) in the Receivership Funds (as well as the total outstanding amounts) based upon the current books and records of the Receivership Entities available to the Receiver (the “Investor List”), subject to all such recipients entering into the form of confidentiality agreement attached as Exhibit 10.¹⁰ The Investor List is needed to enable the Sun-Related Parties to determine whether a sufficient percentage of investors, by number and dollar amount, have executed the Investor Releases that are required as a condition of closing.

V. THE NEED FOR EXPEDITED RELIEF

¹⁰ As the claims process has not yet taken place, the Investor List will not reflect any judicial determination of claims.

The parties jointly and respectfully request that the Court consider this Motion, issue a scheduling order, and provide for a hearing on the Motion on an expedited basis, due to the need to move forward expeditiously to complete the transaction to give stability and certainty to the hospitals operated by the Sun-Related Parties.

CONCLUSION

For the foregoing reasons, the Receiver and the Sun-Related Parties jointly and respectfully request that the Court enter an order approving, among other things, the confirmation procedure as jointly requested by the parties, the content of the materials to be sent by the Receiver to the investors in the Receivership Funds, the provision of the Investor List to the Sun-Related Parties' counsel pursuant to the confidentiality agreement attached hereto as Exhibit 10, the formation of the FP Designee by the Receiver in accordance with the organizational documents attached as Exhibit 4 and the filing of related documents in connection with the formation and maintenance of the FP Designee, and the taking of all other actions necessary and appropriate to implement the Court's order and the settlement transaction.

The parties further jointly request that the order provide that the parties to the Settlement Agreement shall be bound by the provisions of Section 7.1 and 7.4 of the Settlement Agreement from the date of such order until the earlier of: (i) the Court's disapproval of the proposed Settlement Agreement, or (ii) the execution and delivery of the Settlement Agreement by the parties thereto.

In addition, the Receiver and the Sun-Related Parties jointly and respectfully request that the Court approve the proposed Settlement Agreement, approve the exclusion of non-Releasing Investors from participating in any manner in the FP Designee or receiving any proceeds resulting from the Settlement Entities, and provide that, upon subsequent closing of the

transactions contemplated by the Settlement Agreement, all claims asserted in this litigation will be dismissed with prejudice.

The Receiver also requests that the Court approve the MTS Health Agreement attached as Exhibit 7.

Finally, the Receiver and the Sun-Related Parties jointly and respectfully request that the Court consider this Motion and provide for a hearing on the Motion on an expedited basis.

Dated: December 9, 2011

Respectfully submitted,

By: /s/ Jonathan Etra

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2011, 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/ Jonathan Etra
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EXHIBIT 1