UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO. 2:09-CV-445-FtM-99SPC

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,

v.

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.

RECEIVER'S MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION FOR PRELIMINARY INJUNCTION

Broad and Cassel
One Biscayne Boulevard, 21st Floor
2 South Biscayne Boulevard
Miami, Florida 33131
Jonathan Etra, Esquire
Florida Bar No.: 0686905
Michael A. Shafir, Esquire
Florida Bar No.: 0660671

TABLE OF CONTENTS

Page

I. PRELIMINARY STATEMENT 1

II. PROCEDURAL HISTORY 5

III. LEGAL ARGUMENT 14

A. STANDARDS FOR MOTION FOR PRELIMINARY INJUNCTION 14

B. SUN CANNOT SUSTAIN ITS BURDEN OF PROVING A "SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS" 15

1. SUN IS OBLIGATED TO COMPLY WITH THE AGREEMENTS 16

a. THE SCHI AGREEMENT AND FOUNDING PARTNERS'S PERFORMANCE UNDER IT 16

b. THE SCI AGREEMENT AND FOUNDING PARTNERS'S PERFORMANCE UNDER IT 18

2. SUN BREACHED THE LOAN AGREEMENTS 18

a. SCHI AND SCI BREACHED THEIR CONTRACTUAL OBLIGATIONS TO PAY MONTHLY INTEREST 18

REDACTED

d. SCHI BREACHED THE CSA'S RESTRICTION ON USING FOUNDING PARTNERS FUNDS ONLY TO PURCHASE GENUINE HEALTHCARE ACCOUNTS RECEIVABLE 20

e. SCI BREACHED THE SCI AGREEMENT'S RESTRICTION ON USING FOUNDING PARTNERS' FUNDS ONLY TO PURCHASE GENUINE COMMERCIAL ACCOUNTS RECEIVABLE 22

REDACTED

g. SCHI AND SCI BREACHED THEIR REPORTING REQUIREMENTS 26

(1) "FAILURE TO PROVIDE "WEEKLY REPORTS" 26

(2) FAILURE TO PROVIDE COMPLETE "MONTHLY REPORTS" 26

(3) FAILURE TO PROVIDE QUARTERLY FINANCIAL REPORTS 27

(4) FAILURE TO PROVIDE SEMI- ANNUAL FINANCIAL REPORTS AUDITED BY "BIG 5" ACCOUNTING FIRM 27

(5) FAILURE TO PROVIDE ANNUAL FINANCIAL REPORTS AUDITED BY "BIG 5" ACCOUNTING FIRM 28

(6) FAILURE TO PROVIDE INFORMATION ON COLLATERAL 28

(7) FAILURE TO PROVIDE NOTICE OF DEFAULT 29

h. THE SCHI AND CSA AGREEMENTS WERE IN DEFAULT BY OPERATION OF THE CROSS-DEFAULT PROVISIONS 29

i. SCHI BREACHED THE CSA BY PROVIDING FALSE OFFICER'S CERTIFICATES, INCLUDING THE FALSE JANUARY 27, 2009 OFFICER'S CERTIFICATE 30

3. THE RECEIVER'S ENFORCEMENT OF HIS RIGHTS AND SUN'S RESPONSES TO THE RECEIVER'S ENFORCEMENT EFFORTS 31

4. SUN'S DEFENSE THAT ALL BREACHES WERE EFFECTIVELY WAIVED BY FOUNDING PARTNERS HAS BEEN PROVEN FALSE IN DISCOVERY 32

a. THE PURPORTED WAIVERS ARE A SHAM 32

b. SUN WITNESSES DO NOT CLAIM WAIVERS FOR *ALL* DEFAULTS 33

c. EXECUTED STANDSTILL AGREEMENTS PROVE THAT FOUNDING PARTNERS NEVER WAIVED SUN'S OBLIGATION TO PAY MONTHLY INTEREST 34

d. FOUNDING PARTNERS' PURPORTED WAIVERS WERE MOSTLY ORAL, AND THUS NOT EFFECTIVE UNDER THE TERMS OF THE AGREEMENTS 38

e. SUN WITNESSES' TESTIMONY, IF CREDITED, INDICATES THAT SUN IS RE-WRITING HISTORY IN RELYING ON ORAL WAIVERS AND COURSE OF DEALING 42

f. IN ANY EVENT, THE RECEIVER REVOKED WAIVERS ON JULY 7, 2009 AND SUN CONTINUED TO DEFAULT WITH NO EXCUSE 44

5. BECAUSE OF THE REVOCATION OF WAIVERS, SUN IS FORCED TO RELY ON THE UNTENABLE POSITION THAT FOUNDING PARTNERS' ALLEGED BREACH IN JANUARY 2009 PERMITS SUN TO IGNORE ALL CONTRACTUAL OBLIGATIONS AND KEEP ALL THE MONEY 45

a. SUN CANNOT SUSTAIN ITS BURDEN OF PROOF THAT FOUNDING PARTNERS BREACHED THE AGREEMENTS IN NOT HONORING THE PURPORTED JANUARY 27, 2009 FUNDING REQUEST 46

b. EVEN IF FOUNDING PARTNERS BREACHED THE AGREEMENTS, SUN CANNOT OBTAIN THE RADICAL RELIEF IT SEEKS 47

C. SUN CANNOT SUSTAIN ITS BURDEN OF PROVING IRREPARABLE HARM 51

1. MR. KOSLOW'S TESTIMONY ON IRREPARABLE HARM TO SUN WAS FALSE AND MISLEADING 52

2. MR. KOSLOW'S TESTIMONY ON IRREPARABLE HARM TO PROMISE AND SUCCESS WAS FALSE AND MISLEADING 55

a. MR. KOSLOW'S TESTIMONY THAT AN INJUNCTION WAS JUSTIFIED BECAUSE SUN WAS ONLY RECYCLING RECEIVABLES TO MAINTAIN HOSPITALS WAS FALSE AND MISLEADING 55

b. MR. KOSLOW'S TESTIMONY THAT PROMISE AND SUCCESS ARE VIABLE AND THAT A RECAPITALIZATION IS LIKELY WAS FALSE AND MISLEADING 58

c. MR. KOSLOW'S AFFIDAVIT FALSELY ARGUES THAT AN INJUNCTION WAS NECESSARY TO MAINTAIN VIABLE HOSPITALS 60

d. MR. KOSLOW'S TESTIMONY THAT AN INJUNCTION WAS NECESSARY TO "SAVE THE DSH" RECEIVABLES WAS FALSE AND MISLEADING 64

e. MR. KOSLOW'S TESTIMONY THAT INJUNCTION WAS NECESSARY TO ENSURE PATIENT SAFETY WAS FALSE AND MISLEADING AND IN ANY EVENT HAS BEEN MOOTED 66

f. MR. KOSLOW'S AFFIDAVIT TESTIMONY CONCEALED THE PROMISE STOCK PLEDGE, WHICH UNDERMINES ENTIRE MOTION 70

REDACTED

h. MR. KOSLOW'S TESTIMONY THAT AN INJUNCTION WAS NEEDED FOR THE SCI LOCKBOX WAS FALSE AND MISLEADING 73

D. DAMAGES TO THE RECEIVER RESULTING FROM A PRELIMINARY INJUNCTION OUTWEIGHS SUN'S CLAIMED IRREPARABLE HARM 74

REDACTED

2. SUN PRINCIPALS HAVE NOT MET THEIR BURDEN OF PROVING THEY ARE CAPABLE STEWARDS OF COLLATERAL 75

3. SUN HAS NOT DEMONSTRATED THAT THE RECEIVER IS NOT CAPABLE OF BEING A STEWARD OF THE COLLATERAL 76

E. SUN CANNOT DEMONSTRATE THAT PUBLIC INTERESTS FAVOR ENJOINING THE RECEIVER 76

F. SUN CANNOT DEMONSTRATE THAT IT HAS ACTED EQUITABLY 77

IV. IF THE COURT GRANTS THE MOTION FOR PRELIMINARY INJUNCTION, THE COURT SHOULD SET AN ADEQUATE BOND 79

V. REQUEST FOR ORAL ARGUMENT EVIDENTIARY HEARING 81

VI. CONCLUSION 81

CERTIFICATE OF SERVICE 82

TABLE OF AUTHORITIES

CASES

ABC Charters, Inc. v. Bronson, 591 F. Supp. 2d 1272 (S.D. Fla. 2008).. 53

All Care Nursing Service, Inc. v. Bethesda Memorial Hosp., Inc., 887 F.2d 1535 (11th Cir. 1989) 81

Arthur v. Allen, 574 F.Supp. 2d 1252 (S.D. Ala. 2008).. 77

Bellsouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC, 425 F.3d 964 (11th Cir. 2005).. 80

Builder's World, Inc. v. Marvin Lumber & Cedar, Inc., 482 F.Supp. 2d 1065 (E.D. Wis. 2007) 79

CAN Financial Corp. v. Brown, 162 F.3d 1334 (11th Cir. 1998) 77

Chacon v. Granata, 515 F.2d 922 (5th Cir. 1975).. 52

Citizens for Police Accountability Political Action Committee v. Browning, 572 F.3d 1213 (11th Cir. 2009) 15

City of Atlanta v. Metropolitan Atlanta Rapid Transit Authority, 636 F.2d 1084 (5th Cir. 1981) 80

Continuum Co, Inc. v. Incepts, Inc., 873 F.2d 801 (5th Cir. 1989) 79

Coral Springs Street Systems, Inc. v. City of Sunrise, 371 F.3d 1320 (11th Cir. 2004) 77, 78

Corp. v. Robert A. Makin, Inc., 653 F.Supp. 401 (W.D.N.Y. 1986) 49

Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328 (5th Cir. 1981) 52

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 52

Drennan v. Heard, 211 F. 335 (5th Cir. 1914) 78

First City National Bank & Trust Co. v. Heaton, 563 N.Y.S.2d 783 (N.Y. App. Div. 1990)...... 48

Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County, 483 F.Supp. 2d. 1224, (S.D.Fla. 2007) 76

Gay-Straight Alliance of Yulee High School v. School Board of Nassau County, 602 F.Supp. 2d 1233 (M.D. Fla. 2009) 80

Global Tel Link Corp. v. Scott 2009 WL 2242372, at *9 (M.D.Fla.).. 74

Gutter v. Wunker, 631 So. 2d 1117 (Fla. 4th DCA 1994) 3

Maguire v. Campagnoli & Co., 17 N.Y.S.2d 129 (N.Y. Sup. Ct. 1939).. 49

Marco Construction Corp. v. Aetna Casualty & Surety Co., 556 N.Y.S.2d 714 (N.Y. App. Div. 1990) 49

Merrill Lynch v. Ran, 67 F.Supp. 2d 764 (E.D. Mich. 1999) 77

New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F. 2d 471 (5th Cir. 1961) 78

Northeastern Fla. Chapter of the Ass'n. of Gen. Contractors v. City of Jacksonville, 896 F.2d 1283 (11th Cir. 1990) 51, 52

Oce North America, Inc. v. Caputo 416 F.Supp. 2d 1321 (S.D.Fla. 2006) 15

Plainfield Specialty Holdings II, Inc. v. Children's Legal Services PLLC, 2009 WL 209465, *11 (E.D. Mich. 2009) 75

Plainfield Specialty Holdings II, Inc. v. Children's Legal Services PLLC, 2009 WL 1209465, *11, *14 (E.D. Mich. 2009) 77

Precise Marketing Corp., v. Simpson, 1996 WL 285364 (S.D.N.Y.) 15

Ryan v. Volpone Stamp Co., 107 F.Supp. 2d 369 (S.D.N.Y. 2000) 50

Schuster v. Dragone Classic Motor Cars, Inc., 98 F.Supp. 2d 441, (S.D.N.Y. 2000) 48

SEC v. Lauer, 445 F. Supp. 2d 1362 (S.D. Fla. 2006) 78

Sirken v. The Fourteenth Street Store, 108 N.Y. 830 (N.Y. App. Div. 1908) 32

Stone v. Freeman, 82 N.E.2d 571 (N.Y. 1948) 32

U.S. v. Murray, 154 Fed. Appx. 740 (11th Cir. 2005) 4

U.S. v. Rivera, 944 F. 2d 1563 (11th Cir. 1991) 4

Wechsler v. Hunt Health Systems, Ltd., 330 F.Supp. 2d 383 (S.D.N.Y. 2004) 50

Wells Fargo Bank Minnesota, N.A. v. C.D. Video, Inc., 802 N.Y.S.2d 423 (N.Y. App. Div. 2005) 48

Westin v. McDaniel, 760 F. Supp. 1563 (M.D. Ga. 1991) 53

Williams v. Allen, 496 F.3d 1210 (11th Cir. 2007) 77

Winter v. Natural Resources Defense Council, 129 S.Ct. 365, 376 (2008) 52

TABLE OF AUTHORITIES

CASES

~~*ABC Charters, Inc. v. Bronson*, 591 F. Supp. 2d 1272 (S.D. Fla. 2008)~~ 53

All Care Nursing Service, Inc. v. Bethesda Memorial Hosp., Inc., 887 F.2d 1535 (11th Cir. 1989) 81

Arthur v. Allen, 574 F.Supp. 2d 1252 (S.D. Ala. 2008) 77

Bellsouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC, 425 F.3d 964 (11th Cir. 2005) 80

Builder's World, Inc. v. Marvin Lumber & Cedar, Inc., 482 F.Supp. 2d 1065 (E.D. Wis. 2007) 79

CAN Financial Corp. v. Brown, 162 F.3d 1334 (11th Cir. 1998) 77

Chacon v. Granata, 515 F.2d 922 (5th Cir. 1975) 52

Citizens for Police Accountability Political Action Committee v. Browning, 572 F.3d 1213 (11*th* Cir. 2009) 15

City of Atlanta v. Metropolitan Atlanta Rapid Transit Authority, 636 F.2d 1084 (5th Cir. 1981) 80

Continuum Co, Inc. v. Incepts, Inc., 873 F.2d 801 (5th Cir. 1989) 79

Coral Springs Street Systems, Inc. v. City of Sunrise, 371 F.3d 1320 (11th Cir. 2004) 77, 78

Corp. v. Robert A. Makin, Inc., 653 F.Supp. 401 (W.D.N.Y. 1986) 49

Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328 (5th Cir. 1981) 52

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 52

Drennan v. Heard, 211 F. 335 (5th Cir. 1914) 78

First City National Bank & Trust Co. v. Heaton, 563 N.Y.S.2d 783 (N.Y. App. Div. 1990) 48

Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County, 483 F.Supp. 2d. 1224, (S.D.Fla. 2007) 76

Gay-Straight Alliance of Yulee High School v. School Board of Nassau County, 602 F.Supp. 2d 1233 (M.D. Fla. 2009) 80

Global Tel Link Corp. v. Scott 2009 WL 2242372, at *9 (M.D.Fla.) 74

Gutter v. Wunker, 631 So. 2d 1117 (Fla. 4th DCA 1994) 3

Maguire v. Campagnoli & Co., 17 N.Y.S.2d 129 (N.Y. Sup. Ct. 1939) 49

Marco Construction Corp. v. Aetna Casualty & Surety Co., 556 N.Y.S.2d 714 (N.Y. App. Div. 1990) 49

Merrill Lynch v. Ran, 67 F.Supp. 2d 764 (E.D. Mich. 1999) 77

New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F. 2d 471 (5th Cir. 1961) 78

Northeastern Fla. Chapter of the Ass'n. of Gen. Contractors v. City of Jacksonville, 896 F.2d 1283 (11th Cir. 1990) 51, 52

Oce North America, Inc. v. Caputo 416 F.Supp. 2d 1321 (S.D.Fla. 2006) 15

Plainfield Specialty Holdings II, Inc. v. Children's Legal Services PLLC, 2009 WL 209465, *11 (E.D. Mich. 2009) 75

Plainfield Specialty Holdings II, Inc. v. Children's Legal Services PLLC, 2009 WL 1209465, *11, *14 (E.D. Mich. 2009) 77

Precise Marketing Corp., v. Simpson, 1996 WL 285364 (S.D.N.Y.) 15

Ryan v. Volpone Stamp Co., 107 F.Supp. 2d 369 (S.D.N.Y. 2000) 50

Schuster v. Dragone Classic Motor Cars, Inc., 98 F.Supp. 2d 441, (S.D.N.Y. 2000) 48

SEC v. Lauer, 445 F. Supp. 2d 1362 (S.D. Fla. 2006) 78

Sirken v. The Fourteenth Street Store, 108 N.Y. 830 (N.Y. App. Div. 1908) 32

Stone v. Freeman, 82 N.E.2d 571 (N.Y. 1948) 32

U.S. v. Murray, 154 Fed. Appx. 740 (11th Cir. 2005) 4

U.S. v. Rivera, 944 F. 2d 1563 (11th Cir. 1991) 4

Wechsler v. Hunt Health Systems, Ltd., 330 F.Supp. 2d 383 (S.D.N.Y. 2004) 50

Wells Fargo Bank Minnesota, N.A. v. C.D. Video, Inc., 802 N.Y.S.2d 423 (N.Y. App. Div. 2005) 48

Westin v. McDaniel, 760 F. Supp. 1563 (M.D. Ga. 1991) 53

Williams v. Allen, 496 F.3d 1210 (11th Cir. 2007) 77

Winter v. Natural Resources Defense Council, 129 S.Ct. 365, 376 (2008) 52

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
CASE NO. 2:09-CV-445-FtM-99SPC

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,

v.

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.
_______________________________________/

RECEIVER'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR PRELIMINARY INJUNCTION

DANIEL S. NEWMAN, solely in his capacity as duly appointed Receiver ("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. (collectively, the "Receivership Entities') hereby files this Memorandum in Opposition to the Motion of Defendants Sun Capital Healthcare, Inc. ("SCHI") and Sun Capital, Inc. ("SCI") (collectively, "Sun") for Preliminary Injunction. (D.E. 11).

I. PRELIMINARY STATEMENT

Sun moved for a temporary restraining order on the premise that it was not involved in Mr. Gunlicks' fraud on investors and that it merely enjoyed an arms-length contractual

relationship with Founding Partners.[1] (D.E. 11 at 4; Exhibit K at ¶ 2, 14, 16; Exhibit L at ¶ 21). In fact, Sun's purportedly legitimate arms-length debtor-creditor relationship with Founding Partners has been the foundation of its position throughout these proceedings. (D.E. 65 in the SEC Action at 2-6, 12; Exhibit K at ¶ 2, 16).

Prior to Sun's Motion for a Temporary Restraining Order and Preliminary Injunction ("Sun's Motion"), however, the Receiver learned that Sun had misled the Court about its supposed lack of involvement in the fraud. Specifically, certain Founding Partners investors claim to have been directly defrauded by the Sun Principals (Mr. Peter Baronoff, Mr. Howard Koslow, and Mr. Lawrence Leder).[2] Sun was not an innocent third party in Mr. Gunlicks' fraudulent scheme upon the investors. Rather, Sun was an integral and knowing part of the fraudulent enterprise that victimized the investors.

Accordingly, in responding to Sun's Motion, the Receiver included affidavits from these Founding Partners investors to rebut Sun's Motion (and the affidavits of Sun Principal Mr. Howard Koslow) with respect to Sun's supposed lack of involvement in the fraud, and to demonstrate that Sun was not entitled to the equitable relief of an injunction. (Exhibit S). Thereafter, representatives of another victim, the Archdiocese of New Orleans, came forward with their own independent account of Mr. Baronoff's, Mr. Koslow's, and Mr. Leder's roles in soliciting investors with false representations for the benefit of the Sun Principals. (Exhibit T).

---

[1] All references to "Founding Partners" throughout this Memorandum are meant to include all of the Receivership Entities.

[2] Sun witnesses testified that all three Sun Principals jointly own SCHI, Promise Healthcare, Success Healthcare and other entities, but that SCI and some other companies are owned by Mr. Baronoff and Mr. Koslow only, with Mr. Leder acting as a CFO at SCI. For purpose of simplicity, this brief will refer to all such entities as owned by the Sun Principals.

Despite Sun's representations to the Court, Sun refused to permit discovery on Sun's and Mr. Koslow's claims not to have been involved in the fraud on investors. (*See, e.g.*, Exhibit I at 133; Exhibit J at 430).[3]

It is not disputed, however, that Sun Principals met with investors, and that is a critical admission. (Exhibit F, at 281). To establish that they are entitled to injunctive relief, the Sun Principals must prove, at a minimum, that they disclosed the full extent of Sun's manifold deviations from the loan agreements[4] and diversions of hundreds of millions of dollars to their own businesses and their own pockets. *See, e.g.*, *Gutter v. Wunker*, 631 So. 2d 1117, 1118 (Fla. 4th DCA 1994) ("A defendant's knowing concealment or nondisclosure of a material fact may also support an action for fraud where there is a duty to disclose.") Sun cannot establish that they provided such disclosure.[5]

Even apart from meeting with investors, the Sun Principals' complicity in the securities fraud is established solely because Sun knew that Founding Partners obtained its funds from investors, who were not being told the whole truth by Mr. Gunlicks. Sun Principals knew that Founding Partners' funds came from private investors (Exhibit A at 120-121, 129; Exhibit E at

---

[3] There were six deposition sessions in the expedited discovery period. First, Mr. Koslow was deposed as the corporate representative of SCHI and SCI. Then, Mr. Leder was deposed as the corporate representative of SCHI, Promise, Success, and SCI. The transcripts of the depositions are attached hereto as Exhibits A through J.

[4] The loan agreements are referred to as "Loan Agreements," "Agreements," "Credit and Security Agreements," and "CSAs." The SCHI Loan Agreement is attached as Exhibit U (*see, e.g.*, Exhibit A at 6) and the SCI Loan Agreement is attached as Exhibit X (*see, e.g.*, Exhibit C at 19-20).

[5] Had Sun provided full disclosure, no reasonable investor would have invested funds to be utilized for the benefit of Sun and its Principals, and Sun would have been thwarted in its fraudulent scheme.

82-83; Exhibit F at 198-199) and Mr. Koslow admitted that he saw Founding Partners Private Placement Memoranda (D.E. 36-2 in the SEC Action[6] at 46). Sun Principals also knew that Sun was violating the Loan Agreements at every turn (as discussed herein in detail). Even assuming *arguendo* that the Sun Principals simply chose to ignore the fact that their dealings with Mr. Gunlicks required daily new disclosures to his investors on the continuous and expanding non-compliance with the CSAs, even that deliberate ignorance subjects the Sun Principals to liability for fraud. *See U.S. v. Murray*, 154 Fed. Appx. 740, 743-44 (11th Cir. 2005) ("The deliberate ignorance instruction provides that 'if a [defendant] has his suspicions aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge.'"), *quoting U.S. v. Rivera*, 944 F. 2d 1563, 1570 (11th Cir. 1991).[7] Moreover, any deliberate ignorance became actual participation in the fraud when the Sun Principals attended investor meetings and furthered Mr. Gunlicks' representations or failed to disclose the truth to investors.

The Sun Principals' knowing participation in Mr. Gunlicks' scheme to violate the federal securities laws vitiates their claim for injunctive relief because of their unclean hands. In addition, insofar as the Sun Principals rely on purported contractual waivers and consents by Mr. Gunlicks, such waivers or consents are not enforceable as a matter of public policy because they were knowingly done to further the fraudulent enterprise.

---

[6] "SEC Action" refers to *SEC v. Founding Partners, et al.,* Case No. 2:09-CV-229-Ftm-99SPC.

[7] Sun was also on notice by virtue the fact that, according to Mr. Leder, Mr. Gunlicks generally did not want to put his consents to Sun's breaches of the Agreements in writing. (Exhibit J at 297-299).

In any event, even putting aside the unchallenged evidence of Sun's knowing involvement in the fraud, Sun's Motion still fails. As a result of the expedited discovery ordered by the Court, it is now clear that Mr. Koslow's affidavits and Sun's Motion are false and misleading. Sun cannot sustain its burden of proof to obtain the drastic and extraordinary relief of the continuation of the temporary restraining order and conversion into a preliminary injunction.

This Court should reject Sun's request for a preliminary injunction because, notwithstanding that Sun has the burden to prove its entitlement to injunctive relief, as described in greater detail below, the evidence establishes:

* Sun has breached the Loan Agreements in almost every respect, and continues to do so today, even after the Receiver revoked prior waivers of Mr. Gunlicks;
* Sun's true legal position is that it can retain all funds previously advanced by Founding Partners, virtually free and clear;
*

REDACTED

*

* The issue of patient safety was manipulated by Sun, and in any event, the issue has been mooted even by the admission of counsel for Sun.

II. PROCEDURAL HISTORY

On April 20, 2009, the Court appointed Leyza F. Blanco as the Receiver ("Initial Receiver") over the Receivership Entities. (D.E 9 in the SEC Action). On May 13, 2009, the Court removed the Initial Receiver due to potential conflicts of interest. (D.E. 70 in the SEC Action at 6-9).

On May 20, 2009, the Court appointed Daniel S. Newman as replacement Receiver and ordered, among other things, that the Receiver investigate the manner in which the affairs of Founding Partners were conducted and institute such actions and legal proceedings that the Receiver deems necessary against any individuals or entities which have misappropriated or transferred money or other proceeds. (D.E. 73 in the SEC Action at 3-4).

The Receiver learned that Sun owed over a half a billion dollars to Founding Partners, and had not paid monthly interest since December 2008, in violation of the terms of the CSAs. (Exhibit K at ¶ 2; Exhibit O at ¶ 36). The Receiver also learned that, on or about April 29, 2009, the Initial Receiver notified Sun that, under the Agreements' acceleration clauses in the event of a breach, all principal and interest (totaling over $600 million, with accrued interest included) was immediately due and owing and remained unpaid and outstanding. (D.E. 98-6 in the SEC Action).

On May 27, 2009, the Sun Principals and Sun's counsel met with the Receiver and his counsel. (Exhibit M at ¶ 5). At this meeting, the Sun Principals indicated that Sun hoped to attract an investor who would pump hundreds of millions of dollars into the Promise and Success Hospitals, as a means to provide some form of recovery for the investors. Sun indicated that it needed continued access to the lockboxes to maintain the hospitals until the anticipated infusion of cash. Sun further indicated that a seizure of the lockboxes would jeopardize the hospitals, and, if the hospitals closed, over a hundred million dollars of "DSH" receivables would be lost. In response to the Receiver's request, Sun and its counsel promised that Sun would provide full and voluntary disclosure to the Receiver's professionals, so that the Receiver's professionals could evaluate Sun's claims and ensure no further dissipation of the Receiver's collateral. (Exhibit M at ¶ 8).

From May 27, 2009 through July 14, 2009, the Receiver attempted to gain full disclosure from the Sun Principals, as had been promised on May 27th. (Exhibit M at ¶¶ 8-30). Initially, Sun and its counsel promised full disclosure. (Exhibit M at ¶¶ 8-9). However, Sun and its counsel engaged in evasion and delay tactics. (Exhibit M at ¶¶ 9-25). The Sun Principals denied certain requests for information, including any information on the viability of the Promise and Success Hospitals, on the advice of Sun's counsel. (Exhibit O at ¶ 42-43; Exhibit G at 144.) The Sun Principals eventually stopped returning the calls placed by the Receiver's accountants.[8] (Exhibit O at ¶ 47).

The limited information that was received from Sun raised red flags.

First, the Receiver's accountant discovered that Sun had earlier provided financial reports to Founding Partners which **concealed** $120 million of historical non-factoring transfers of cash from Sun to Promise, which are not permitted under the Agreements.[9] These transfers were referred to by Sun as "working capital advances" but were hidden among purported regular accounts receivable financing.[10]

Second, in the first five months of 2009 (while Sun refused to pay Founding Partners monthly interest due under the CSAs), the Receiver's accountant learned that Sun had apparently

---

[8] When Receiver's counsel attempted to re-start the flow of information, Sun's counsel insisted on a Standstill Agreement that would have tied the Receiver's hands for three months, giving Sun free rein to use the Receiver's cash collateral, without any recourse by the Receiver. (Exhibit M at ¶¶ 27-30).

[9] *See* Declaration of David Siegel dated January 13, 2010, attached as Exhibit P, at ¶ 7.

[10] *Id.*, at ¶¶ 3-9.

diverted approximately $21.5 million in transfers to Promise and Success listed on Sun's financial statements as "due from related party" transfers. (Exhibit O ¶¶ 32-34).

As a result, on or about July 2, 2009, the Receiver issued subpoenas for Sun documents and for the depositions of Sun's corporate representatives. (*See* D.E. 106 and 107 in the SEC Action). However, the subpoenas were successfully challenged by Sun. (*See* D.E. 114 and 115 in the SEC Action).

Sun's actions posed a Hobson's choice for the Receiver: either 1) permit Sun to continue to have unfettered access to the lockboxes to sustain the hospitals, while Sun was in breach, and at the risk of what appeared to be past and ongoing dissipation of the collateral in non-factoring cash transfers to Promise and Success, or 2) seize the lockboxes and secure the remaining collateral, at the risk of losing the value of the DSH receivables or the potential for the infusion of cash by a health care investor.[11]

The Receiver elected to choose a middle ground. The Receiver sued Sun and seized the lockboxes, but still sought to work with the Sun on funding based on full disclosure by Sun and ensuring that good money was not thrown after bad.

On July 7, 2009, the Receiver revoked all prior waivers and consents. (Exhibit M at ¶ 26 (and Exhibit 10 thereto)). On July 14, 2009, the Receiver filed the instant lawsuit. (D.E. 1). Thereafter, on July 15, 2009, the Receiver exercised Founding Partners' rights under the

---

11 REDACTED

Agreements to send transfer notices to SunTrust Bank, effectively seizing the lockboxes, which are referred to as "Holding Accounts" in the CSAs. (Exhibit M at ¶ 33).[12]

As a result of the seizure of the lockboxes, the Sun Principals finally consented to a meeting with the Receiver, without the precondition of an onerous Standstill Agreement that would handcuff the Receiver from taking appropriate actions to protect the collateral. (Exhibit M at ¶ 39). The meeting took place on July 19th. (Exhibit M at ¶¶ 39-40). At the meeting, Sun Principals requested that the Receiver return the lockboxes to ensure continued funding of Promise and Success to "save the DSH" and attract an investor. (Exhibit M at ¶ 42).

Sun presented the Receiver with another Hobson's choice – immediately give up control of the lockboxes to "save the DSH" and the Hospitals (which could lead to total dissipation of collateral), or hold on to the lockbox to prevent dissipation (which Sun had warned would lead to the loss of DSH receivables and the infusion of cash from an investor).

Again, the Receiver chose a middle ground. The Receiver agreed to provide funding conditioned on full disclosure and the prudent use of collateral based on value. (Exhibit M at ¶¶ 43-44). The Sun Principals consented. *Id.*

---

[12] Sun, Founding Partners and SunTrust entered into the Master Lockbox Agreement. Sun agreed in the Loan Agreements and the Master Lockbox Agreement to grant Founding Partners 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 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. (Exhibits U & X § 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 Founding Partners on two days' notice from Founding Partners, and cease transferring funds to the Purchaser Collection Account. *Id.* § 1. Sun also directed SunTrust to follow all directions of Founding Partners with respect to all the accounts upon receipt of written notice to that effect. *Id.*

In the resulting July 19th Agreement (Exhibit PP; Exhibit A at 192), the Receiver agreed to instruct SunTrust Bank to release up to $14 million for the upcoming week, which was the amount of money Sun claimed to need to keep the hospitals open, in exchange for Sun contractually agreeing to provide full disclosure and providing new collateral. (Exhibit M at ¶¶ 43-44; Exhibit PP at ¶¶ 1-3, 5, 8). The parties agreed to meet on July 26th to review the collection and funding of the week, and discuss the following week's funding. (Exhibit M at ¶ 44; Exhibit PP at ¶ 6). The parties also agreed to meet within two weeks, which is when Sun claimed it would have a 13-week operating budget prepared, at which time a longer-term funding schedule could be established. (Exhibit M ¶ 44; Exhibit PP at ¶ 7).[13]

The Receiver observed the letter and spirit of the July 19th Agreement by instructing SunTrust to release up to $14 million for the first week and then working around the clock to help SunTrust resolve the operational challenges experienced by SunTrust, and the Receiver successfully resolved those problems. (Exhibit M at ¶¶ 46-48).

Sun, on the other hand, Sun did not provide the promised full disclosure, the promised 13-week operating budget for the hospitals, or the promised collateral. In fact, subsequent discovery confirmed the collateral promised by the Sun Principals in the July 19th Agreement did not actually exist, and was offered to fraudulently induce the Receiver to release funds from the lockbox.[14]

---

[13] Thus, the July 19th Agreement provided funding for one week at a time for two weeks *only because* that is how long Sun claimed it would take to formulate a 13-week budget. Had Sun prepared a 13-week budget at the July 19th meeting, the funding could have been for an initial 13-week period.

[14] Specifically, the Sun Principals agreed in the July 19th Agreement to have a real estate company owned by the Sun Principals, LH Acquisition, LLC, provide a mortgage on property relating to Promise Hospital of Louisiana ("the Property") to the Receiver, and they

Instead, on July 22, 2009, three days after agreeing to a funding system with the Receiver (Exhibit PP), Sun filed its Motion. (D.E. 11). Sun's Motion contained numerous assertions and representations, in reliance on a prior affidavit of Mr. Koslow (Exhibit K), dated May 5, 2009, and attached a new affidavit of Mr. Koslow (Exhibit L), dated July 23, 2009.

The Receiver was not in a position to challenge the bulk of Mr. Koslow's affidavit testimony because Sun had refused to provide information voluntarily and the Receiver's prior efforts for compulsory process did not succeed.

Based on the limited information provided to it, and facing an emergency motion in which the lives of patients were represented to be at stake, on July 24, 2009, the Court granted the temporary restraining order, in apparent reliance on the affidavit testimony of Mr. Koslow. (D.E. 19 and D.E. 20).

Based on the record before it, the Court referenced its prior finding that Founding Partners and Sun were in an arms-length, lender-borrower contractual relationship governed by the CSAs. (D.E. 19 at 2-3). Sun had earlier argued that its purportedly arms-length relationship

---

represented that the Property was unencumbered and was worth at least $14 million. (Exhibit PP at ¶¶ 1-2). On July 23, 2009, counsel for Sun provided the Receiver with a draft mortgage that purported to convey from LH Acquisition to the Receiver a security interest in the Property, in accordance with the July 19th Agreement. (Exhibit N at ¶ 12). However, the Receiver discovered when he tried to obtain title insurance on the Property, and Mr. Leder admitted in deposition, that Promise Hospital of Louisiana, not LH Acquisition, owned the Property, contrary to the July 19th Agreement and the representations of Sun's counsel. (*See* Exhibit G at 177-178; Exhibit N at ¶ 14). Thus, Sun made fraudulent representations to the Receiver regarding the Property and, incredibly, Sun's counsel forwarded a false mortgage document to the Receiver's counsel. (Exhibit N at ¶ 14). Sun's counsel later claimed that Sun was not required to provide a mortgage in the first place because (relying on their now familiar theme) the Receiver allegedly breached the July 19th Agreement first. (Exhibit N at ¶ 16). Notwithstanding the false argument concerning the Receiver's alleged breach, Sun and its counsel have never addressed their misrepresentation and conduct in pledging collateral they knew did not exist.

with Founding Partners supported its opposition to the Initial Receiver's motion to expand of the receivership over it and dismissal of the SEC's relief defendants claims against it. (D.E. 65 in the SEC Action at 2-6; 12; Exhibit K at ¶ 2, 16).

The Court found, based on the record before it at the time, that it was probable that all breaches by Sun, including Sun's improper uses of Founding Partners's loan proceeds and collateral, were waived by Founding Partners. (D.E. 19 at 7-8).

With respect to Sun's interest payment defaults, the Court made note of Sun's dual claims. (D.E. 19 at 8). First, Sun claimed that its failure to pay interest was "due to the breach by Founding Partners when it refused a $5 million funding request in January 2009, in violation of the Agreement." (*Id.*). Second, Sun claimed that, in the wake of Founding Partners' purported breach in January 2009, Mr. Gunlicks purportedly waived Sun's obligation to pay monthly interest. Therefore, the Court stated:

> Based on what admittedly is an undeveloped record, the Court concludes that Sun Capital has satisfied its burden of proof to establish its likelihood of success as to the parties' competing claims of default. (D.E. 19 at 8).

On the issue of irreparable harm, the Court credited Mr. Koslow's testimony that failure to enjoin the Receiver would cause the closure of Sun's factoring business and also of "twenty-one (21) hospitals with approximately one thousand (1,000) critically ill patients and approximately three thousand five hundred (3,500) employees." (D.E. 19 at 8-9).

The Court also found, as of that time, that the balance of private equities favored Sun's Motion. (D.E. 19 at 9). The Court stated that "Sun Capital will suffer great harm absent issuance of a restraining order, in the form of loss of receivables owed by government agencies and potential closure of hospitals, while the Receiver will be subject to little, if any discernable harm if a temporary restraining order is issued." (*Id.*)

The Court found that public interest favored enjoining the Receiver from control of the lockboxes:

> The Receiver asserts, and the Court does not disagree, that there is a strong public interest in "upholding the rights of secured lenders to their collateral" and in "the basic enforcement of contract rights." [citing to the Receiver's opposition brief]. The Court notes, however, that the nature of Sun Capital's business operations – namely, the provision of financing to acute-care hospitals – raises issues of greater relative concern pertaining to patient safety, provision of medical care and supplies, closure of hospitals, emergency evacuation of patients [citing to Sun's Motion and Mr. Koslow's affidavit] and more strongly establishes the public interest requirement. (D.E. 19 at 9)

Finally, the Court rejected the Receiver's request for imposition of a bond. (D.E. 19 at 10).

The Court ordered that oral argument on the Motion for Preliminary Injunction take place on July 30, 2009. (D.E. 19 at 10).

On July 28, 2009, the Receiver moved to adjourn the preliminary injunction hearing, so that the Receiver could take discovery on Mr. Koslow's affidavit testimony, upon which the Court relied in granting the TRO, but which the Receiver believed to be false and misleading. (D.E. 22).

On July 28, 2009, the Court granted the Receiver's Motion, stating that it made "good sense." (D.E. 9 at 2).

In the expedited discovery period, SCHI and SCI (noticed pursuant to Rule 30(b)(6)) refused to show up for properly noticed depositions, insisted on a delayed date for a deposition, and then refused to show up on that date. (*See* D.E. 46.) Promise and Success (affiliates of Sun and represented by Sun's counsel) refused to provide any deposition or document discovery, claiming that the evidence on the Hospitals was not relevant to the Motion for Preliminary Injunction. *Id.* Upon the Receiver's Motion (D.E. 46), the Court compelled Sun, Promise, and Success to appear for depositions. (D.E. 57).

Sun eventually produced Mr. Koslow as the designated representative of both SCHI and SCI. Mr. Koslow is the affiant upon whose testimony Sun obtained the temporary restraining order and hope to secure a preliminary injunction. Mr. Koslow is also the President of SCHI and SCI, and should have been prepared to answer questions on the subjects identified in the notices. Yet, Mr. Koslow failed to answer questions on Sun and his affidavit testimony, in many cases testifying that he could not explain the bases for his testimony. A chart detailing Mr. Koslow's repeated inability and/or refusal to answer questions in deposition is attached as Exhibit YY.[15]

Sun was forced to produce another corporate representative, its CFO and accountant, Mr. Leder.[16] Mr. Leder testified as the corporate representative of SCHI, SCI, Promise, and Success. Mr. Leder's deposition testimony confirmed that Mr. Koslow's affidavit testimony was false and misleading in all material respects, as discussed below.

III. LEGAL ARGUMENT

A. STANDARDS FOR MOTION FOR PRELIMINARY INJUNCTION

To obtain a preliminary injunction, a party must prove four elements:

---

[15] Although Mr. Koslow could not answer many basic questions because he claimed the questions sought legal information, he readily testified that Founding Partners had legally defaulted upon and breached the CSAs in January 2009. (Exhibit D at 221-30).

[16] The Sun Entities should be held liable for the costs of Mr. Leder's depositions for SCHI and SCI. *See, e.g., FCC v. Mizuho Medy Co.*, 257 F.R.D. 679 (S.D.Cal. 2009) (party who created necessity for second deposition by refusing, through corporate representative, to properly respond to questions held responsible for costs associated with second deposition). This also provided Defendants with tactical advantages, including (a) obtaining an extension of the discovery period from September 30 to October 30, (b) dragging out the conclusion of the depositions until November 4, (c) and enabling Mr. Leder and the Sun Entities to have a full "preview" of the Receiver's questions from Mr. Koslow's depositions, so that Mr. Leder would be prepared to try to give answers more favorable to the companies he (along with Mr. Koslow and Mr. Baronoff) owns.

> (1) substantial likelihood of success on the merits; (2) irreparable injury absent an injunction; (3) the injury outweighs whatever damage an injunction may cause the opposing party; and (4) an injunction is not adverse to the public interest.

Citizens for Police Accountability Political Action Committee v. Browning, 572 F.3d 1213, 1217 (11*th* Cir. 2009). The Eleventh Circuit has recently emphasized that "[a] preliminary injunction is an extraordinary and drastic remedy." *Id.* (internal quotations omitted).

B. <u>SUN CANNOT SUSTAIN ITS BURDEN OF PROVING A "SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS"</u>

Here, Sun alleged that it is likely to succeed in proving that it did not breach the Loan Agreements, (D.E. 11 at 19-24). As a result, according to Sun, Founding Partners cannot declare a default and exercise the contractual remedy of seizing the lockboxes. *Id.* at 24.

"The elements for a breach of contract action are (1) a contract; (2) performance of the contract by one party; (3) breach of the contract by one party; and (4) damages." *Precise Marketing Corp., v. Simpson* 1996 WL 285364 (S.D.N.Y.).[17]

"In determining whether to enter a preliminary injunction, the first element, the likelihood of success on the merits, is generally considered the most important." *Oce North America, Inc. v. Caputo* 416 F.Supp. 2d 1321, 1325 (S.D.Fla. 2006). "A failure to meet this first element can defeat the party's request for a preliminary injunction regardless of its ability to establish any of the other elements." *Id.*

Based on admissions by Sun witnesses, Sun cannot sustain its burden of proof.

---

[17] The Loan Agreements provide that they are governed by New York law. Exhibits U and X, § 16.

1. SUN IS OBLIGATED TO COMPLY WITH THE AGREEMENTS

SCHI and SCI are obligated to comply with their respective Loan Agreements with Founding Partners.

a. THE SCHI AGREEMENT AND FOUNDING PARTNERS'S PERFORMANCE UNDER IT

SCHI and Founding Partners entered into the SCHI Agreement as of June 6, 2000. (*See* Exhibit U). The SCHI Agreement is highly detailed, with dozens of provisions that spell out the parties' duties and the allocation of risk. *Id.* Together with its four exhibits, the SCHI Agreementis over 100 pages long. *Id.*

The Agreements represent that "[t]he parties have participated jointly in the negotiation and drafting of this Agreement and other Program Documents with counsel sophisticated in financing transactions." (Exhibit U § 20). Mr. Koslow, who signed the Agreement on behalf of SCHI, read and understood it before he signed it. (Exhibit A at 6-9).

While the SCHI Agreement provides for a "Final Maturity Date" upon which all outstanding principal must be repaid, SCHI's ability to hold and use funds loaned by Founding Partners is dependent upon SCHI's daily compliance with numerous contractual requirements. (Exhibit Q at 24-29). With any one SCHI default (be it a borrowing base default, an interest payment default, or any other default), the CSA expressly authorized Founding Partners to seize the lockbox and accelerate the payment of principal, regardless of the Final Maturity Date. (Exhibit U, § 8.2.3).[18]

---

[18] Therefore, Sun was never in a position to assume it could hold onto the principal until February 2013 regardless of its defaults, contrary to Sun's litigation position. (Exhibit E at 10.)

The SCHI CSA was amended in two respects, in accordance with the contractual requirement in Section 14 that amendments be in writing and signed by both parties. (Exhibit U, §14). First, the CSA was amended to extend the Final Maturity Date three times. (Exhibit W; Exhibit B at 14-15). The last amendment to the CSA's definition of the Final Maturity Date extended it to February 1, 2013. *Id.* Second, the CSA was amended to change the definition of "Maximum Allowable Credit." (Exhibit V; Exhibit B at 17-18). This was done approximately 26 times, in writings signed by both parties, in accordance with the CSA's requirement that amendments be in writing, and signed by both parties. *Id.* The last amendment to the definition of "Maximum Allowable Credit" extended the Maximum Allowable Credit from $525 million to $550 million, and that amendment was executed on January 9, 2009. *Id.* Each of the 29 times the parties formally amended the SCHI Agreement, in signed writings, they reinforced their agreements to the numerous other terms that remained untouched.

SCHI actively utilized the CSA for its benefit. As required by the CSA, SCHI provided Founding Partners with "Officer's Certificate's" to request funding from SCHI approximately 198 times. Pursuant to the first 197 Officer's Certificates, SCHI requested, and Founding Partners lent, under the CSA, approximately $524 million, all of which remains outstanding. (Exhibit A at 7, 74). The 198th Officer's Certificate purportedly sought an additional $5 million, and was apparently not honored. (Exhibit K at ¶3). According to Sun, the 198th Officer's Certificate was submitted to Founding Partners on January 27th (just over two weeks from the last increase in the Maximum Allowable Credit, which was needed to create room under the credit limit for the January 27th funding request). *Id.*

b. THE SCI AGREEMENT AND FOUNDING PARTNERS'S PERFORMANCE UNDER IT

The SCI CSA was executed as of January 24, 2002. (*See* Exhibit X). It is, in most respects, identical to the SCHI Agreement. It represents an additional validation of numerous provisions from the SCHI Agreement that were included in the SCHI Agreement, mostly verbatim. The SCI CSA had similar amendments, and the Final Maturity Date was also extended until February 1, 2013. (Exhibit Z; Exhibit D at 236-239). The Maximum Amount of Credit was extended by amendment to $20 million. (*See* Exhibit Y; Exhibit D at 239). The total funds drawn by SCI were approximately $18.5 million. (Exhibit D at 240).

2. SUN BREACHED THE LOAN AGREEMENTS

Sun cannot sustain its burden of proof that it did not breach the Agreements, in at least the following ways:

a. SCHI AND SCI BREACHED THEIR CONTRACTUAL OBLIGATIONS TO PAY MONTHLY INTEREST

The Agreements unconditionally require SCHI and SCI to "pay accrued and unpaid interest on the Loans to the Lender on the first day of each calendar month (or on the first business day thereafter)." (Exhibits U and X, §§ 3.1, 3.2, 4.1). The failure to pay interest when due is an event of default. (Exhibits U and X, § 8.11).

SCHI and SCI failed to make any monthly interest payments since their January payment of interest for December 2008. (Exhibit O ¶ 36; Exhibit K at ¶ 2; Exhibit A at 10-11, 40-46, 49-50, 192-196, 231; Exhibit D at 230-232, 240-245; Exhibit E at 15; Exhibit N at ¶¶ 5, 9). They missed the interest payment for each of the 12 months of 2009. *Id.* REDACTED

REDACTED

REDACTED

d. SCHI BREACHED THE CSA'S RESTRICTION ON USING FOUNDING PARTNERS FUNDS ONLY TO PURCHASE GENUINE HEALTHCARE ACCOUNTS RECEIVABLE

The SCHI CSA provides that the Borrower may withdraw Founding Partners' funds from the Holding Account[19] only "to purchase Accounts[20] directly from Sellers[21] pursuant to a Purchase and Sale Agreement[22]." (Exhibit U, § 2.1.3). This means that the funds must be used to purchase third-party accounts receivable of a sum certain due and owing to the provider (or seller) that arise from the provider's (or seller's) provision of healthcare services. (*See, e.g.*, Exhibit U, § 1 and Exhibit B thereto). SCHI specifically warrants in the CSA that it will use the borrowed funds and collateral only for purposes permitted in the CSA. (Exhibit U, § 7.11). The violation of this warranty is an event of default. (Exhibit U, §§ 7.11, 8.14).[23]

Discovery revealed that SCHI breached the SCHI CSA's restrictions on the use of funds in the following ways:

---

[19] The "Holding Account" is the lockbox. The Holding Account contains both (a) fresh Founding Partners' funds advanced under the CSA, since the CSAs require the advances be made into the Holding Account, and (b) Founding Partners collateral in the form of payments by third-party payers, pursuant to the Purchase and Sale Agreement.

[20] The term "Accounts " is defined in §1.1 as having the meaning given in the Purchase and Sale Agreement.

[21] The term "Seller" is defined in §1.111.

[22] Pursuant to §§ 6.20 and 7.29, any purchase and sale agreement entered into between SCHI and Sellers of Accounts must conform to the Form Purchase and Sale Agreement which is attached to the CSA as Exhibit B.

[23] Relatedly, the CSA specifically prohibits the use of funds for other purposes, including for capital expenditures (other than office equipment and the like). Exhibit U, § 6.10. Failure to comply with this restriction on the use of funds is event of default for SCHI. *Id.*, § 8.1.2.

First, from 2003 to approximately 2008, SCHI diverted approximately $120 million in so-called "working capital advances" of Founding Partners funds or collateral to pay for (a) the costs of acquiring the Promise Hospitals and certain associated real estate (approximately $55 million), (b) the costs of ramping up operations at the Promise Hospitals (approximately $25 million), and (c) operating losses at the Promise Hospitals (approximately $40 million). (*See* Exhibit A at 189-191, 230; Exhibit G at 79-80; Exhibit RR; Exhibit F at 228; Exhibit Q at 4-5; *see also*, Exhibit VV).

Second, from approximately 2008 to the present, SCHI diverted so-called "due from related party" transfers of Founding Partners funds or collateral to pay for (a) operating losses at Promise and Success Hospitals, (b) construction of new hospital facilities and

(*See* Exhibit Q at 6-7; Exhibit D at 132-161; Exhibit J at 347-356, 362-363; Exhibit RR).

REDACTED

Third, SCHI's purchase of DSH receivables violates the Agreement. DSH receivables are not true "Accounts" within the meaning of the SCHI CSA and Purchase and Sale Agreement because they are not a form of indebtedness due and payable and arising from the provision of a specific service. (*See* Exhibit U (Exhibit B thereto); Exhibit Q at 10-11)).

REDACTED

Finally, the Sun Principals caused SCHI to divert millions of dollars to themselves (when the company was insolvent and unable to pay its debt). This includes approximately $7.5 million

in distributions from SCHI and additional sums in salaries from SCHI. (Exhibit F at 249-250). This also includes unknown sums in salaries and distributions from affiliated ventures capitalized with Founding Partners funds. For example, after swearing that the Sun Principals obtained no distributions or salary from Promise or Success, Mr. Leder admitted that the Sun Principals take approximately $300,000 per year in distributions from the companies that own the real estate associated with the hospitals (all of which are owned by Sun Principals, but acquired with Founding Partners funds) (*See* Exhibit F at 251). These distributions are "profits" from the Sun Principal owned real estate companies (after paying taxes and other carrying costs), which are derived from excessive rent payments made by the Sun Principal owned Hospitals. In this fashion, the Sun Principals take distributions from the Hospitals, at the expense of the Receiver's collateral and patient care. As August 2009, after the TRO was entered, the Sun Principals took at least $100,000 from Promise in this fashion. (Exhibit G at 163-164; *see also* Exhibit VV.)

e. SCI BREACHED THE SCI AGREEMENT'S RESTRICTION ON USING FOUNDING PARTNERS' FUNDS ONLY TO PURCHASE GENUINE COMMERCIAL ACCOUNTS RECEIVABLE

The SCI Agreement provides that the Borrower may withdraw Founding Partners' funds from the Holding Account only "to purchase Accounts[24] directly from Sellers[25] pursuant to a Purchase and Sale Agreement[26]." (Exhibit X § 2.1.3). This means that the funds must be used

---

[24] The term "Accounts" is defined in §1.1 as having the meaning given in the Purchase and Sale Agreement.

[25] The term "Seller" is defined in §1.111.

[26] Pursuant to §§ 6.20 and 7.29, any purchase and sale agreement entered into between SCI and Sellers of Accounts must conform to the Form Purchase and Sale Agreement, which is attached to the CSA as Exhibit B.

to purchase third-party accounts receivable of sums certain due and owing to Sellers that arise from the Seller's provision of commercial products or services. (Exhibit X, § 2.1 and Exhibit B thereto).

Discovery has revealed that SCI breached the Agreement's restrictions on the use of funds in at least the following ways:

First, SCI transferred, in the form of "over-advances," REDACTED to a Sun Principal owned company called Symbio. (*See* Exhibit C at 29-34; Exhibit D at 68-80; Exhibit Q at 7-8). Mr. Leder testified that the REDACTED was used to cover operating losses at Symbio. (*See* Exhibit J at 385). In approximately "July or August" 2009, SCI caused Symbio to convert this debt to SCI into a note (*See* Exhibit J at 313). This was done without consulting with the Receiver, which is another breach of the Agreement. (Exhibit X, § 6.31 (lender's consent required to modify debt).

Notably, the Receiver has recently learned that, on **January 4, 2010**, the Sun Principals caused Symbio to file for bankruptcy. (Exhibit WW). The bankruptcy filings list the $24 million owed to SCI, which represents Founding Partners collateral squandered by the Sun Principals on their own failed business. (*Id.*).

Second, SCI transferred over $3 million to an entity called "Kanterman & Associates," an SCI client, in the form of "over-advances." (*See* Exhibit D at 121-127). Mr. Kanterman was a close friend of Mr. Koslow, and sat on the board of Promise. (Exhibit D at 122-123; Exhibit J at 315). Eventually, SCI realized that Mr. Kanterman's firm had presented false and fraudulent invoices to SCI and that Mr. Kanterman caused the third-party payors to pay Mr. Kanterman's firm, thus bypassing the SCI lockbox, in violation of the Purchase and Sale Agreement between SCI and Kanterman, causing SCI to lose millions of dollars. (Exhibit J at 316). The Sun Principals then removed Mr. Kanterman from the Promise board of directors. *Id.* at 315-16. As

with Symbio, SCI converted the Kanterman debt into a note without consulting with the Receiver, which is also a violation of Section 6.31.

Third, SCI transferred millions of Founding Partners' funds and collateral to various real estate and other investments and business ventures of the Sun Principals. (*See* Exhibit D at 132-161).

REDACTED

These investments do not qualify as the purchase of Accounts under the SCI CSA and Purchase and Sale Agreement.[27]

REDACTED

---

27 The Receiver recognizes that some or all of this money transferred for these investments might be included in the "due from related party" balance sheet accounting entry discussed above. These transfers are noted as breaches of the SCI Agreement because they appear on the SCI (not SCHI) general ledger. The "due from related party" balance sheet accounting entry is discussed as an SCHI breach because a great proportion of the recent "due from related party" transfers are for Promise and Success from SCHI.

28

REDACTED

REDACTED

REDACTED

REDACTED

g. **SCHI AND SCI BREACHED THEIR REPORTING REQUIREMENTS**

The CSAs impose numerous reporting requirements upon Sun, the violation of which are events of default. **Sun has violated every one of these requirements for years, continuing through today.**

(1) **"FAILURE TO PROVIDE "WEEKLY REPORTS"**

Sun is also required to provide Founding Partners with "Weekly Reports" to the satisfaction of the Lender. (Exhibits U and X, §§ 6.5(e), 1.1240. The Weekly Report must contain the Borrowing Base Calculation. *Id.* § 1.12.[29] Sun admits it has never provided any weekly reports. (Exhibit A at 31-32, 81; Exhibit C at 24-25).

(2) **FAILURE TO PROVIDE COMPLETE "MONTHLY REPORTS"**

---

[29] The CSA further provides that "the Borrowing Base shall be reduced to zero dollars ($0) at any time the Borrower has failed to furnish the computation of the Borrowing Base in the Weekly Report within one day after such Weekly Report was originally due pursuant to Section 6.5. *Id.* When that happens, as noted, there is no availability for funding under the Agreement (§ 5.2.1) and any request for funding that does not accurately state this constitutes a further event of default (§ 8.12).

Sun is obligated to provide Founding Partners with *monthly* financial statements for Sun that must contain, *inter alia*, balance sheet, income statements, and cash flow reports for SCHI, together with an attestation by the Sun CFO – i.e., Mr. Leder – that the reports present the true condition of Sun in accordance with Generally Accepted Accounting Principles ("GAAP"). (Exhibits U and X, § 6.5(d)(iii). Sun has provided certain monthly reports, but none of them comply with the contractual requirements, for example, of including required cash flow statements,[30] and the monthly reports did not provide the attestation that the reports were in compliance with GAAP (they were not). In addition, the last monthly report of any kind provided by Sun was for October 2009.[31]

REDACTED

(3) FAILURE TO PROVIDE QUARTERLY FINANCIAL REPORTS

Sun was obligated to provide Founding Partners with *quarterly* financial statements containing similar information (*i.e.*, including cash flow reports) and a similar attestation on GAAP. (Exhibits U and X, § 6.5(d)(ii)). Sun provided no such reports. (Exhibit A at 31-32).

(4) FAILURE TO PROVIDE SEMI-ANNUAL FINANCIAL REPORTS AUDITED BY "BIG 5" ACCOUNTING FIRM

---

30 In responding to a pending motion to compel, Sun asserted that it maintains no cash flow records, despite the contractual obligations to provide cash flow reports at least monthly to the Founding Partners. (D.E. 96 at 8) ("The Receiver seeks monthly cash flow reports prepared by Sun Capital, Promise, and Success. Sun Capital does not prepare such documents.").

31 Sun argued in response to a pending motion to compel that it should not be required to produce monthly reports past October 2009, oblivious to its ongoing contractual obligations to provide its lender with comprehensive monthly reports, which include cash flow reports and a GAAP attestation. (D.E. 96 at 6-8)

Sun is obligated to provide Founding Partners with ***audited*** *semi-annual financial statements* prepared by a "big 5" accounting firm, in accordance with GAAP. (Exhibits U and X, § 6.33). The failure by Sun to provide any of these contractually-required financial reports when due is an event of default under the CSAs. (Exhibits U and X, § 8.1.2). Sun never claims to have provided semi-annual audited reports. (Exhibit A at 31-32).

(5) FAILURE TO PROVIDE ANNUAL FINANCIAL REPORTS AUDITED BY "BIG 5" ACCOUNTING FIRM

Sun is obligated to provide Founding Partners with ***audited*** *annual financial statements* prepared by a 'big 5" accounting firm, in accordance with GAAP. (Exhibits U and X, § 6.5(d)(ii)). The failure of Sun to provide any of these contractually required financial reports when due is an event of default under the CSAs. (Exhibits U and X § 8.1.2). Sun admits it last provided an audited financial statement for 2004. (Exhibit A, at 32).

(6) FAILURE TO PROVIDE INFORMATION ON COLLATERAL

The CSAs also require Sun to "promptly" provide Founding Partners with information about Sun or Sellers (of accounts receivables) or of the receivables or other collateral, as requested by Founding Partners, provided Sun has access to such information. (Exhibits U and X, § 6.5(g)). Thus, because Promise and Success are "Sellers of Accounts" with respect to the regular accounts receivables financing, Sun has a contractual duty to provide all available information about Promise and Success, upon the request of Founding Partners (which Sun concededly refuses to do). The failures to promptly comply with such requests for information constitute events of default under the CSA. § 8.1.2.

Sun cannot sustain its burden of proof in view of the affidavit testimony of Phil Fues[32] and the documentary evidence.[33] Sun likewise cannot sustain its burden of proof that it has not violated this requirement since the appointment of the Receiver.[34]

(7) **FAILURE TO PROVIDE NOTICE OF DEFAULT**

Sun is required to notify Founding Partners if Sun was in default under the CSA. (Exhibits U and X, § 6.5(a)). The failure to provide this notice is, in and of itself, an event of default. *Id.*, § 8.12. Thus, if an event of default occurs and neither Founding Partners nor Sun react to it, the resulting inaction is not a waiver by Founding Partners (*see* §§ 8.3, 14), but rather a second default by Sun. *See id.* Sun violated this affirmative requirement by failing to affirmatively disclose its numerous defaults described in this brief.

h. THE SCHI AND CSA AGREEMENTS WERE IN DEFAULT BY OPERATION OF THE CROSS-DEFAULT PROVISIONS

Each loan agreement provides that the borrower is in default if the other loan agreement is default. (Exhibits U and X §§ 5.2.10, 8.13). Thus, for example, when SCI defaulted under its

---

32 *See* Exhibit R. Sun chose not to depose Mr. Fues, despite its awareness of Mr. Fues' involvement in these matters.

33 *See, e.g.,* Exhibit GG; Exhibit B at 82; (December 2007 Founding Partners request for detailed financial information on Promise, which appears not to have been provided until the end of the expedited discovery period).

34 For example, Sun refused to provide available and requested collateral information (a) when it turned down the Receiver's request for information on collateral prior to the seizure of the lockboxes (Exhibit G at 144; Exhibit M at ¶¶ 5-35; Exhibit O at ¶ ¶ 39-47), (b) when it did not provide the disclosure promised in the July 19th Agreement, (c) when it resisted the Receiver's formal discovery requests for the discovery, including even depositions of Promise and Success, forcing the Receiver to obtain an compulsion order (*See* D.E. 46 and 57), and (d) when the Receiver, on October 30, 2009, specifically requested real time transparency on collateral and was turned down by Sun (*See* Exhibit N at ¶¶ 15-16).

Loan Agreement for being insolvent, as admitted by Mr. Leder, SCHI was immediately in default of its Loan Agreement as a result of the cross-default provisions.

i. SCHI BREACHED THE CSA BY PROVIDING FALSE OFFICER'S CERTIFICATES, INCLUDING THE FALSE JANUARY 27, 2009 OFFICER'S CERTIFICATE

Sun provided false officer's certificates to Founding Partners to obtain financing. In each Officer's Certificate submitted by Mr. Koslow, he swore, *inter alia*, that (a) no defaults existed at the time of the request, (b) there was a positive borrowing base, and (c) funds would be used only as permitted under the CSAs. (Exhibit U § 5.2.1 (and Exhibit D thereto)). In addition, the Certificates, in each case, stated the purported borrowing base, which was always represented to be positive. *Id.*

Each one of Mr. Koslow's representations and warranties in the Officer's Certificate, particularly the most recent one on January 27, 2009, was false because they each represented that SCHI was not in default under the SCHI CSA, **REDACTED** **REDACTED** and that the funds would be used for proper purposes only.[35] (*See* Exhibit II; Exhibit A at 218; *see also* Exhibit U, § 5.2.1). **REDACTED** **REDACTED** (*See* Exhibit II).

---

[35] Sun witnesses testified that the January 27, 2009 funding request was needed for impermissible uses, including paying for operating losses at Promise and Success and for new construction (Exhibit A at 48-49; Exhibit E at 77, 80). Although not admitted by Sun, the funds were apparently also needed to continue to subsidize Symbio and Kanterman Associates before those debts were converted into notes.

The result is twofold. First, the false representations and warranties in the January 27, 2009 Officer's Certificate (and in the prior Officer's Certificates) represent additional events of default. (Exhibit U § 8.2). Second, the January 27, 2009, Officer's Certificate did not create a contractual duty for Founding Partners to honor the funding request because SCHI failed to meet all conditions precedent to obtaining funding. (*Id.* § 5.2; *see also* Exhibit Q at 27).

3. THE RECEIVER'S ENFORCEMENT OF HIS RIGHTS AND SUN'S RESPONSES TO THE RECEIVER'S ENFORCEMENT EFFORTS

Although active enforcement is not necessary to maintain Founding Partners' rights (*see* Exhibit U and X §§ 8.3 and 14), the Receiver has asserted Founding Partners' rights under the Agreements.

As noted, the Receiver revoked prior waivers and consents (Exhibit M at ¶ 26 and Exhibit 10 thereto) (consistent with §§ 8.3 and 14, which provide, *inter alia*, that a waiver at one time does not extend to future breaches), filed this lawsuit (D.E. 1), and seized the lockboxes (Exhibit M at ¶ 33), as permitted under the Agreements.

In addition, subsequent to the revocation of waivers, the Receiver wrote numerous notices of default to Sun on its defaults. (Exhibit N at ¶¶ 4, 8). The notices of defaults concerned, among other things, Sun's continuous failures to pay interest when due and and to comply with Sun's reporting requirements. (Exhibit N @ ¶¶ 3-10).

As the Court knows, on April 29, 2009, the Initial Receiver accelerated the payment of outstanding principal and interest, due to then-existing defaults. (D.E. 98-6 in the SEC Action). In addition, on August 10, 2009, the Receiver also took the same step, accelerating the payment of outstanding principal and interest for then-existing defaults. (Exhibit N ¶¶ 4, 8).

Further, as set forth in greater in the Receiver's Declaration, the Receiver formally requested full transparency on the activities in the lockbox account, and Sun refused, citing the temporary restraining order. (*See* Exhibit N at ¶¶ 15-16)

4. SUN'S DEFENSE THAT ALL BREACHES WERE EFFECTIVELY WAIVED BY FOUNDING PARTNERS HAS BEEN PROVEN FALSE IN DISCOVERY

Founding Partners (through Mr. Gunlicks) did not effectively waive all defaults. According to Mr. Koslow's affidavits, Sun's principal defense to the Receiver's breach of contract claim is that Founding Partners allegedly waived all of the defaults of Sun. (D.E. 11 at 20-23). Discovery has confirmed that argument fails for a variety of independent reasons.

a. THE PURPORTED WAIVERS ARE A SHAM

Sun's waiver argument is a sham to cover up Sun's fraudulent conduct.

First, the purported contractual **waivers** are not enforceable because they were requested by Sun and given by Mr. Gunlicks, with each party's knowledge that the waivers were in furtherance of a fraudulent scheme, as discussed in the Preliminary Statement. *See Sirken v. The Fourteenth Street Store,* 108 N.Y. 830 (N.Y. App. Div. 1908); *Stone v. Freeman*, 82 N.E.2d 571, 572 (N.Y. 1948).

REDACTED

[36]

b. <u>SUN WITNESSES DO NOT CLAIM WAIVERS FOR *ALL* DEFAULTS</u>

Assuming *arguendo* the entire subject of waivers is not a sham, Sun's waiver argument is still easily disposed of. Simply put, Sun does not and cannot claim a waiver for each default for the simple reason that Sun concealed them from Founding Partners, including:

i.

ii.

REDACTED

iii.

---

36 *See Brook-Lea Country Club, Inc. v. Hanover Ins. Co.*, 306 N.Y.S.2d 780, 784 (NY Sup Ct. 1969). *Accord Harper v. City of Newburgh*, 145 N.Y.S. 59, 696-97 (N.Y. App. Div. 1913) ("in rescission no contract remains, for there was in the eye of the law no meeting of the minds at all."). Further, New York courts recognize that equity can intervene to prevent enforcement of a contract where the party seeking enforcement failed to disclose a material fact that it had a duty to disclose. *See Verschel v. Pike*, 445 N.Y.S. 2d 489, 49-92 (N.Y. App. Div. 1981).

37

REDACTED

iv. **REDACTED**

v. Sun's defaults for presenting false Officer's Certificates, including on January 27, 2009, which contain numerous misrepresentations and violations of Loan covenants (*supra*, Section III.B.2.i.);

vi. Each of SCHI's and SCI's defaults by operation of the cross-default provisions (*supra*, Section III.B.2.h.);

vii. Sun's default for not notifying Founding Partners of its defaults (supra, Section III.B.2.g.7).

Sun witnesses do not claim that Sun obtained waivers on any of these hidden defaults. On this basis alone, Sun cannot sustain its burden of proving that all defaults were waived.

c. EXECUTED STANDSTILL AGREEMENTS PROVE THAT FOUNDING PARTNERS NEVER WAIVED SUN'S OBLIGATION TO PAY MONTHLY INTEREST

Sun cannot sustain its burden of proving that Founding Partners waived the payment of monthly interest. Mr. Koslow testified in his affidavits that, when Founding Partners did not honor SCHI's request for $5 million in funds on January 27, 2009, Mr. Gunlicks thereby waived the payment of interest to Founding Partners under both Agreements for all time thereafter. (Exhibit K at ¶ 3). The Court credited this testimony in ruling for Sun on the TRO. (Exhibit K at 8).[38]

Discovery has proven, however, that Mr. Koslow's affidavit testimony on Mr. Gunlicks purported waiver of the payment of interest (Exhibit K at ¶ 3) was false and misleading.

---

[38] In depositions, Mr. Koslow and Mr. Leder slightly altered Sun's position on this, testifying that Founding Partners had waived the payment of interest *until a recapitalization*. (Exhibit A at 40-42, 231; *See* Exhibit E 15-18.) **REDACTED**

REDACTED

First, Mr. Phil Fues, who attended the meeting in which Sun claims to have obtained Mr. Gunlicks' oral waiver of monthly interest payments, has confirmed that the request was made by Sun, but there was no resolution of the request at the meeting. (*See* Exhibit R at ¶ 9).

Second, discovery revealed that, on February 1, 2009, Founding Partners issued letters to Sun demanding payment of interest for January 2009 (Exhibit JJ and KK; Exhibit A at 43-46, 49-50; Exhibit D at 240-241), which undermines Mr. Koslow's testimony that Founding Partners had acknowledged only days earlier that it had no right to interest once it did not honor a funding request. (Exhibit A, at 192-196). These written demands for interest were concealed by Mr. Koslow in his affidavits, and confirm Mr. Fues' affidavit testimony. (*See* Exhibit R at ¶ 9).

Third, on February 3, 2009, Mr. Koslow sent a memorandum to Founding Partners purporting to summarize their meeting on January 29, 2009. (Exhibit NN, Exhibit A thereto; Exhibit A at 222; Exhibit B at 21-23). In his memo, Mr. Koslow stated, *inter alia*, that:

> We have provided Founding Partners with a forecasted cash flow for the period January 26, 2009 through July 3, 2009. This shows a projected net cash deficit of ($53.8 million). You have also indicated to that you do not have any additional cash to provide us. **In order for Sun's hospital client base, including Promise and Success, to meet their current operating obligations we have mutually agreed to the following:**
>
> a. **Interest for the month of January would continue to accrue at the current rate. However, payment would not be made and would be deferred until the refinancing took place.**
>
> b. **Effective February 1, 2009, the interest rate would be reduced to 8% per annum and would accrue. However, payment and would not be made would be deferred until the refinancing took place.**
>
> c. **In addition, however, Founding Partners would require a monthly fee of approximately $150,000 to cover its operating costs.**

(Exhibit NN; (Exhibit A thereto, § 3 of the attachment (emphases added))). Sun does not claim Founding Partners signed this memorandum prepared by Mr. Koslow (*See* Exhibit A at 232-233), which was inconsistent with its demand for the January interest payment two days earlier.

Fourth, in February, March, and April 2009, Sun and Founding Partners executed a series of Standstill Agreements. (Exhibit NN; Exhibit A at 222; Exhibit B at 21-23). By their terms, the Standstill Agreements were each for limited durations covering short, specific periods of time in February, March, and April, 2009. The Standstill Agreements each attached and incorporated Mr. Koslow's unilateral February 3rd memo and provided that its terms would govern **only** during the limited "Standstill Periods," as a temporary accommodation during settlement discussions, but otherwise would have no effect.

Specifically, each of the jointly executed Standstill Agreements, attached Sun's February 3, 2009 memo as Exhibit A, and provided that:

> 1. The parties shall take no action against each other whatsoever, under any circumstances, until the close of business on March 3, 2009 [or other dates in other iterations] (the "Standstill Period"). During the Standstill Period, "no action" shall include but not be limited to litigation, self-help remedies [i.e., seizure of the lockboxes due to Sun's defaults], setting off accounts, bankruptcy filings and any other legal or equitable remedies.
>
> 2. **During the Standstill Period, SCH [i.e., Sun Capital Healthcare, Inc.] and SCI [i.e., Sun Capital, Inc.] (collectively, the "Borrowers") agree to be in compliance with the Credit Agreements, as modified by the 2/3/09 letter attached hereto as Exhibit "A,"** other than for any alleged existing defaults or events of default under the Credit Agreements by the Borrowers ("the Historical Defaults").
>
> 3. By their execution below, the parties agree to not waive any and all claims with respect to the alleged Historical Defaults by the Borrowers or allegedly existing breaches by the Lender, under the Credit Agreements.
>
> 4. The Borrowers agree not to request, and the Lender agrees not to make, any fundings under the Credit Agreements during the Standstill Period.
>
> The purpose of the Standstill Period is for the parties to continue good faith discussions to amend the Credit Agreements. . . .

Exhibit NN (underline in originals; bold added).

The Standstill Agreements memorialized the parties' agreements that Sun was permitted to accrue but not pay interest (as per Mr. Koslow's unilateral February 3, 2009 memorandum, which is attached to the Standstill Agreements) and still be deemed in compliance with the CSAs, **but that accommodation was in effect only during the limited terms of various Standstill Agreements for purposes of settlement, the last of which ended in April 2009** (and also was dependent on Sun's payment to Founding Partners for monthly operating costs). Mr. Koslow's affidavit testimony that Founding Partners authorized Sun to never pay interest ever again (Exhibit K at ¶ 3) is flatly rebutted by these executed Standstill Agreements (which were executed by Mr. Koslow on behalf of Sun, meaning that Mr. Koslow knew about them when he submitted his affidavits). The Standstill Agreements corroborate Mr. Fues' testimony.

Moreover, the deposition of Mr. Leder revealed that Mr. Koslow's affidavit testimony on the supposed waiver of interest payments (Exhibit K at ¶ 3), in addition to being in disregard of the executed Standstill Agreements, is also based on only a **partial** reading of Mr. Koslow's unilateral February 3, 2009 memorandum. Even according to Mr. Koslow's unilateral February 3rd memorandum, **Founding Partners' purported accommodation in not insisting on interest was expressly conditioned on Sun paying Founding Partners paying $150,000 per month for operating expenses.** But Sun never paid that amount. (Exhibit A at 232-233, 240-243; Exhibit E at 40.) In fact, Mr. Koslow explained that, in negotiations during the limited standstill periods, Founding Partners later raised its demand to approximately $400,000 a month for operating costs, but again, Sun never paid it – even while relying on their own February 3rd memorandum, which purported to absolve Sun paying interest only insofar as Sun paid Founding Partners' monthly operating costs. (Exhibit A at 232-233, 240-243). Of course, Mr. Koslow's

unilateral February 3, 2009 memorandum is not controlling. The subsequent jointly executed Standstill Agreements control over prior alleged oral waivers. [39]

d. FOUNDING PARTNERS' PURPORTED WAIVERS WERE MOSTLY ORAL, AND THUS NOT EFFECTIVE UNDER THE TERMS OF THE AGREEMENTS

Discovery has revealed that the vast majority of purported waivers relied upon by Sun, were oral or were based simply on Mr. Gunlicks' inaction or the parties' course of dealing, all of which are barred by the express terms of the Agreements.[40] Specifically, the corporate representatives testified as follows:

- the modification of the CSA provision regarding weekly reports was oral (Exhibit A, at 39, 81)

---

[39] The executed Standstill Agreements disprove Mr. Koslow's affidavit testimony in other respects. Mr. Koslow testified that Mr. Gunlicks never accused Sun of defaulting under the CSAs. (Exhibit L ¶¶ 8,12; Exhibit K ¶ 2). However, the text of the executed Standstill Agreements proves that Mr. Gunlicks defined a term, "Historical Breaches," to refer to Sun's many prior breaches. Also, notes of meetings occurring in or about February 2009, show Sun Principals urging Mr. Gunlicks not to accuse them of default and Mr. Gunlicks holding his ground. (Exhibit J at 417-421). Moreover, the executed Standstill Agreements specifically recognize that "self-help" in the form of seizing the lockboxes for defaults was being considered by Founding Partners. Yet, two months later, in April 2009, Mr. Koslow submitted his first affidavit **falsely representing** to the Court that, before the appointment of the Initial Receiver, Mr. Gunlicks never suggested that Sun was ever in default.

[40] Discovery revealed purported written, signed waivers for the acquisition of: (a) 8 hospitals (Exhibit EE); (b) $1.9 million in DSH in 2002 from a hospital that is no longer a factoring client (Exhibit DD; *see also* Exhibit B, at 5) – less than the $130 million-plus in DSH now outstanding (Exhibit Q, at 10-11)); and (c) a 2004 purchase of $11.5 million in worker's compensation receivables (Exhibit FF; *see also* Exhibit A, at 91) – less than the full $51.4 million now outstanding) (Exhibit Q, at 12).

- "Q: Did you think that if Mr. Gunlicks said something to you, that is a binding amendment that applies for the rest of the life of the agreement, that he said something to you orally? **A: Yes.**" (*Id.*, at 61-62) (emphasis added)

- "A: Mr. Gunlicks said a lot of things that were oral. Q: And you rely on that? A: Yes. Q: You rely on them in this litigation? A: Yes." (*Id.*, at 62)

- the modification of the method for calculating the borrowing base was oral (*Id.*, at 78-80, 82)

- there was no need to check with Founding Partners every time Sun purchased DSH receivables, because Mr. Gunlicks once said it was okay (*Id.*, at 117)

- written modification to allow for purchase of workers' compensation receivables was never executed, but Mr. Gunlicks "orally committed" to it (*Id.*, at 126-29)

- Mr. Gunlicks' consent to Sun continued purchase of hospitals after 2003 was oral (*Id.*, at 144)

- waiver of requirement that Sun obtain E&O insurance was made in "a discussion" with Mr. Gunlicks (*Id.*, at 150)

- the notion that Sun had to pay interest only provided that it continued to receive funding came only from "discussions with Mr. Gunlicks." (*Id.*, at 193)

- Founding Partners' commitment to fund the multimillion-dollar Villages project was oral (*Id.*, at 225)

- agreement to defer interest in early 2009 was agreed to orally by Mr. Gunlicks (*Id.*, at 231-32, 238-39)

- Sun did not make any payments under the agreement regarding interest because Mr. Gunlicks "said don't make any payments." (*Id.*, at 241)

- Mr. Gunlicks waived the distinction between "Tier One" and "Tier Two" accounts because "He said go ahead and do the transactions."; "He said fine, don't worry about it." (Exhibit D, at 61-65)

- Mr. Gunlicks allowed Sun to overadvance on Symbio (an SCI client owned by the Sun Principals) – "We had discussions. We did it. We discussed it with him. He agreed to it." (*Id.*, at 77)
- Mr. Leder confirms that although the CSA requires amendments to be in writing and signed by both parties, no writing from Mr. Gunlicks exists telling Sun to stop paying interest (Exhibit E, at 17)
- no writing exists allowing Sun to use Founding Partners' funds for acquisition of Florida hospitals, because Sun did not feel one was needed (*Id.*, at 74)
- no signed document from Mr. Gunlicks approving the use of the loan balance as a borrowing base; instead, this approval came in a conversation with Mr. Gunlicks (*Id.*, at 247)
- Mr. Gunlicks' consent to overadvances came in conversations with Mr. Gunlicks (Exhibit J, at 311)
- Mr. Gunlicks' consent to transfers of funds between Sun Capital HealthCare and Sun Capital, Inc. came in conversations with Mr. Gunlicks (*Id.*, at 338)

Section 14 of each Agreement (Exhibit U and X), provides that only waivers that are in writing and signed by Founding Partners are "effective." Section 14 also provides that the CSAs may be amended only by a writing signed by both parties:

> Course of Dealing: Amendments and Waivers. No course of dealing between the Lender, on the one hand, and the Borrower, on the other hand, shall operate as a waiver of the Lender's rights under this Agreement or under any other Program Document [defined to include the lockbox agreement] or with respect to the Credit Obligations. The Borrower acknowledges that if the Lender gives notice or information to, or obtains a consent from any other person, the Lender shall not by implication have amended, waived, or modified this Agreement or any other Program Document, or created a duty to give such notice or information or to obtain any such consent on any future occasion. No delay or omission on the part of the Lender in exercising any right under this Agreement or any other Program Document or with respect to the Credit Obligations shall operate as a waiver of such right or any other right hereunder or thereunder. A waiver on one occasion shall not be construed as a bar or waiver of any right or remedy on any future occasion. **This agreement may be amended only by a writing signed by both of the parties hereto. No waiver or consent with respect to this Agreement shall be effective unless it is in writing and signed by the waiving or consenting party as the case may be.**

Exhibit U and X § 14 (emphasis added).

Similarly, Sections 6.5(a) and 8.3 together provide that no default is waived by Founding Partners' inaction in the face of defaults or continued funding in the face of defaults:

> Unless otherwise consented to in writing, the Borrower shall furnish the Lender . . . within two Business Days after any officer of the Borrower has knowledge of the occurrence of any Event of Default or other Default, a written statement describing the Event of Default or other Default that the action the Borrower proposes to take with respect thereto, in each case in reasonable detail.
>
> Annulment of Defaults. Once a default or an Event of Default has occurred, such Default and Event of Default shall be deemed to exist and be continuing until cured by the Borrower to the reasonable satisfaction of the Lender (or until Lender has waived such default or event of default in writing, has stated in writing that the same has been cured to the Lender's satisfaction or has entered into an amendment to this Agreement, which by its express terms cures such Default, or Event of Default), at which time such Default or Event of Default shall no longer be deemed to exist or to have continued. The Lender shall not be obligated to make any such waiver, make any such statement or enter into any such amendment. No such action by the Lender shall extend to or affect any subsequent Default or Event of Default or impair the rights of the Lender upon the occurrence thereof. 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.

Exhibit U and X, § 6.5(a), 8.3.

Sun witnesses testified that they were aware that the CSAs precluded the very waivers they claim to rely upon (*see* Exhibit A at 59-64; Exhibit E at 17, 263), which disproves their claim that they relied in good faith upon oral waivers or waivers based on course of dealing. (*see, e.g.*, Exhibit A at 41, 52, 55-56, 68-70, 76-81, 85-86, 115-117, 128-129, 141-143, 150; Exhibit C at 21-28; Exhibit D at 58-65, 68-71, 230-232, 240-244). Moreover, these provisions were reaffirmed by the parties with every amendment to the Agreements.[41]

---

[41] As Sun is certain to point out, New York law recognizes two situations in which an oral or course of dealing waiver can be effective, even when there is a provision precluding

e. SUN WITNESSES' TESTIMONY, IF CREDITED, INDICATES THAT SUN IS RE-WRITING HISTORY IN RELYING ON ORAL WAIVERS AND COURSE OF DEALING

As noted, the entire business of waivers is a sham because Sun Principals were part of the fraud and dominated and misled Mr. Gunlicks, who was subordinate to them in the joint fraudulent enterprise. By ignoring this, Sun is radically re-writing history.

Putting that aside, however, Sun witness testimony indicates that Sun always knew that the oral waivers were ineffective and did not rely on them in good faith. Mr. Koslow testified that the parties were working toward a new amended agreement (Exhibit A at 41-43, 55-57, 84, 104, 110-112, 122, 124, 178; Exhibit B at 30-34; Exhibit D at 89-91, 120, 174-176, 231-232, 252-254). A review of some of the draft agreements makes clear that Sun hoped a new agreement would nullify Sun's breaches against the SEC, the victims, and the Courts. (*See* also Exhibits MM and OO; Exhibit B at 30-33) (draft agreements intended to supersede the CSAs, but never executed)).

Indeed, when asked to explain how Mr. Gunlicks could waive the breach of so many provisions of the CSAs and permit his collateral to dissipate through massive transfers of wealth to Promise and Success, Mr. Leder testified the intent was that Sun and Founding Partners would execute an amended agreement that would provide value to Founding Partners (and excuse the

---

any waivers that are not in writing or signed. As an initial matter, **the Court need not delve into this area of the law** because the Receiver has shown breaches in which Sun does not and cannot contend there were any waivers, before – and certainly after – the July 7, 2009 revocation of waivers. In any event, as the Receiver has previously argued to this Court, Sun cannot sustain its very high burden of proving substantial likelihood of success that either of the two narrow New York exceptions – partial performance and equitable estoppel – would apply here. *See, e.g.*, D.E. 67, at 14-15; D.E. 118, at 4-5.

defaults of Sun) through a recapitalization. (Exhibit F at 267-268.) Mr. Leder was candid in expressing his frustration over the fact that the parties were working so hard toward a new amended agreement to supersede the Credit and Security Agreements (at the same time as the alleged oral waivers), but that Mr. Gunlicks never pulled the trigger, apparently trying to get some leverage over the Sun Principals. If credited, Mr. Leder's testimony shows that the purported oral waivers - which are barred by the CSAs – were understood not to excuse prior defaults, but were pursuant to an ongoing negotiation for a new agreement. They were not the bankable, enforceable, definitive waivers claimed by Mr. Koslow in his affidavits. *See, e.g.*, *Anostario v. Vicinanzo*, 463 N.Y.S.2d 409, 410 (1983) (if "the performance undertaken by plaintiff is also explainable as preparatory steps taken with a view toward consummation of an agreement in the future," then that performance is not "unequivocally referable" to the new contract and the purported oral waivers are not effective).

This is consistent with the fact that Mr. Leder had trouble defining the terms of the purported oral waivers. (Exhibit F at 276-277.) For example, Mr. Leder acknowledged that the date when DSH and worker's compensation age out for purposes of the borrowing base was never agreed to, and would have been resolved if the parties had entered into a comprehensive new agreement, which never took place.[42]

[42] One of Mr. Koslow' affidavits attached a 2005 draft amendment that would have amended the SCHI Agreement to permit the purchases of worker's compensation receivables with extended maturity dates (needed to include the receivables in the borrowing base, as discussed below). (Exhibit K ¶ 7 and Exhibit 2 thereto). Founding Partners never executed that amendment, however.

f. **IN ANY EVENT, THE RECEIVER REVOKED WAIVERS ON JULY 7, 2009 AND SUN CONTINUED TO DEFAULT WITH NO EXCUSE**

In any event, whatever written or oral waivers may ultimately be proven to have been given by Mr. Gunlicks on behalf of Founding Partners, the waivers were properly *revoked* on July 7, 2009 by the Receiver on behalf of Founding Partners. (D.E. 13-5). The revocation of waivers by the Receiver is consistent with provisions of the CSA, which contemplate that waivers are limited by the waiving party and can be revoked. §§ 8.3 and 14. Yet, Sun continued to breach the CSAs, without the cover of any potential waiver.

Thus, for example, following the July 7th revocation of waivers, Sun continued to breach the Agreements by:

-- not paying monthly interest (Section III.B.2.a.);

-- diverting Founding Partners funds and collateral to cover operating losses and ramp up costs at Sun Principal owned Promise, Success, and Symbio (Section III.B.2.d.);

-- unilaterally converting the existing debt into a note, without approval by the Receiver (Section III.B.2.e.);

-- diverting Founding Partners funds and collateral to acquire new businesses and fund new construction (Section III.B.2.d.);

-- diverting Founding Partners collateral to purchase additional DSH receivables (Section III.B.2.d.);

--

REDACTED

-- not complying with its reporting obligations – not disclosing defaults, not providing weekly reports, not providing complete monthly reports, not providing quarterly reports, and not providing audited semi-annual and annual reports (Section III.B.2.g.); and

-- not answering Founding Partners questions on collateral (*See* III.B.2.g.).

Sun also continues to be in breach of the CSAs in ways that were never waived in the first place, as noted above.

REDACTED

Mr. Koslow complained in his affidavit testimony that the Receiver is trying to retroactively change history. (Exhibit L at ¶¶ 4, 12, 13). That is false. The revocation of waivers goes forward, not backward. The revocation of waivers removes any excuse for continued non-compliance on a going forward basis only.

When asked about the revocation of waivers in deposition, both Mr. Koslow and Mr. Leder refused to answer the questions posed -- even Mr. Koslow, who had testified about the revocation in his affidavit. (Exhibit A at 13; Exhibit D at 243-245). The conceded only that they did not change their behavior, despite this action by their lender revoking alleged waivers. (Exhibit J at 429-430.)

5. BECAUSE OF THE REVOCATION OF WAIVERS, SUN IS FORCED TO RELY ON THE UNTENABLE POSITION THAT FOUNDING PARTNERS' ALLEGED BREACH IN JANUARY 2009 PERMITS SUN TO IGNORE ALL CONTRACTUAL OBLIGATIONS AND KEEP ALL THE MONEY

Because Sun cannot use waivers as an excuse since the July 7th revocation of waivers (and newly discovered concealed breaches that go back further in time), Sun witnesses acknowledged that **Sun's true legal position is that the Agreements are without any force and effect – with the single exception that the Final Maturity Date provision alone is still enforceable to prevent the Receiver from collecting outstanding principal and accrued interest.**

Mr. Koslow testified in his affidavits that Founding Partners purportedly breached the SCHI Agreement on January 27, 2009, when Founding Partners did not honor Sun's request for an additional $5 million under the SCHI Agreement. (Exhibit L D.. 11-3 at ¶ 5; Exhibit M at ¶¶ 2-4, 21). On this basis, Sun claims that it may continue to retain the outstanding over $600 million in principal and accrued interest on money previously lent, and to pay no more interest on money previously lent (or comply with any other CSA provisions). (Exhibit E at 14-15). Sun need not do anything at all, under its legal theory, until the Final Maturity Date, when there will likely be nothing left to collect.

a. <u>SUN CANNOT SUSTAIN ITS BURDEN OF PROOF THAT FOUNDING PARTNERS BREACHED THE AGREEMENTS IN NOT HONORING THE PURPORTED JANUARY 27, 2009 FUNDING REQUEST</u>

Discovery has confirmed that Sun cannot meet its burden of proof that Founding Partners breached the Agreement on January 27, 2009. As noted above, the Officer's Certificate was false because Sun was in default, the borrowing base was negative and even Sun admits that it sought to use the funds impermissibly to cover losses at Promise and Success and new construction. (Exhibit A at 48-49; *See* Exhibits U and X § 5.2). As such, Founding Partners had no obligation to provide the requested funding. (Exhibits U and X § 5.2.1).[43]

---

[43] Mr. Koslow's affidavit testimony that the rejection of the funding request caused Sun to renege on obligations (Exhibit K at ¶¶ 3, 21) is proven false by admission of Sun witnesses that Sun had no contractual obligations to fund any projects, to pay for Promise and Success losses, or to pay for Symbio losses. (Exhibit E at 40-46, Exhibit F at 236-237; Exhibit I at 107). Even with respect to regular accounts receivable financing, Sun was not obligated to purchase any genuine receivables under the terms of the Purchase and Sale Agreement. (Exhibit E at 67-68).

In any event, the purported funding request was no more than a sham designed to manufacture a purported breach on the part of Founding Partners, in order for Sun to avoid the consequences of its undeniable multiple defaults and dissipation of collateral. As explained by Mr.. Phil Fues in his affidavit, in the days leading up to the funding request, Founding Partners was pressing Sun for detailed information on the Promise and Success hospitals. (Exhibit R, at ¶ 6) In response, the Sun Principals acknowledged, for the first time, that the Promise and Success hospitals were not profitable. (Exhibit R, at ¶ 7). Founding Partners had also determined that Sun had violated the Agreements. (Exhibit R, at ¶ 8).

Moreover, the Receiver does not agree with Sun's view that the right thing for Mr. Gunlicks to have done to avoid breaching was to dupe yet another victim/investor into giving him an extra $5 million for the Sun Principals to squander on their personal investments. Mr. Gunlicks did many things wrong, but resisting the Sun Principals' demand that Mr. Gunlicks find a new victim in their common fraudulent enterprise in late January 2009 was one of the few things he did right (even if it was motivated by the looming presence of the SEC and the rising voices of concerned investors).

b. EVEN IF FOUNDING PARTNERS BREACHED THE AGREEMENTS, SUN CANNOT OBTAIN THE RADICAL RELIEF IT SEEKS

Even if Sun can sustain its burden that it is substantially likely to prove that Founding Partners not honoring the January 27th funding request was a breach of the SCHI CSA, Sun still cannot obtain the radical remedy it seeks for two reasons.

First, in entering into the Agreements, in which Sun obtained substantial financing and benefits, Sun knowingly and voluntarily waived significant rights to both challenge Sun's

enforcement action and to assert lender liability claims to offset the Receiver's action. For example, Sun waived defenses to Founding Partners' collection efforts:

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

Exhibits U and X, § 8.4(d).

In addition, insofar as Sun may have lender liability claims against Founding Partners, Sun waived its ability to pursue them in certain respects. (*See* Exhibits U and X, §21 (i)). Sun can seek only "actual damages" (not the negation of the Agreements), and Sun can seek damages only on pleading and proving that Founding Partners engaged in "willful misconduct" in breaching the Agreement (which they did not plead and cannot prove).[44]

These types of waiver provisions are routinely enforced. *See, e.g., Schuster v. Dragone Classic Motor Cars, Inc.*, 98 F.Supp. 2d 441, 447 (S.D.N.Y. 2000); *Wells Fargo Bank Minnesota, N.A. v. C.D. Video, Inc.*, 802 N.Y.S.2d 423, 424 (N.Y. App. Div. 2005) (upholding express contractual waiver of defenses); *First City National Bank & Trust Co. v. Heaton*, 563 N.Y.S.2d 783, 784 (N.Y. App. Div. 1990) (specific acknowledgements in bank notes operated as an effective contractual waiver of affirmative defenses); *San Marco Construction Corp. v. Aetna*

[44] Whatever Sun's feeling about the Receiver, Sun has never maintained that Mr. Gunlicks acted with "willful misconduct" to Sun in not acceding to Sun's purported funding request on January 27, 2009.

Casualty & Surety Co., 556 N.Y.S.2d 714, 717 (N.Y. App. Div. 1990) (confession of liability in liquidation agreement operated as a contractual waiver of defenses).[45]

Second, even if the Agreements did not have these provisions, the argument is, in any event, contrary to the fundamental principles of contract law and basic notions of fairness. In support of its radical legal theory, Sun cites to case law that stands for the general principle that, in an executory contract, the failure of the first party to perform frees up the second party from performing, when the second party's performance is conditioned upon the first party's performance. (D.E. 11 at 21-22).[46] That plainly has nothing do with this situation, where Sun is holding onto previously advanced loan proceeds, and ignores all obligations arising out of Sun's retention of those funds. "It is against the law as well as sound morals to permit a party to a contract to repudiate the contract **or his obligation under it, and at the same time retain the consideration he has received.**" *McDonald's Corp. v. Robert A. Makin, Inc.*, 653 F.Supp. 401, 403 (W.D.N.Y. 1986) (emphasis added) (*quoting Maguire v. Campagnoli & Co.*, 17 N.Y.S.2d 129, 131-32 (N.Y. Sup. Ct. 1939)).

---

45 In response to Founding Partners' motion to strike Sun's affirmative defenses, Sun argued for the first time that through his course of conduct, Mr. Gunlicks waived enforcement of these contractual waivers. (D.E. 88 at 4-5). This argument is not supported by the depositions and makes no sense (D.E. 116 at 2-4).

46 *See, e.g.*, *Legend Artists Management, Inc. v. Blackmore*, 709 N.Y.S.2d 85, 86 (N.Y. App. 2000) (breach entitled non-breaching party to "avoid payment of any future commissions" – i.e., commissions on **future services** performed by non-breaching party) (emphasis added); *Melodies, Inc. v. Mirabile*, 179 N.Y.S.2d 991, 993 (N.Y. App. 1958) (breach excused the non-breaching party "from the duty of **further** performance.") (emphasis added); *see also New Windsor Volunteer Ambulance Corps, Inc. v. Meyers*, 442 F.3d 101, 117 (2d Cir. 2006) (under New York law, a breach "may excuse the nonbreaching party from **further** performance[.]") (emphasis added).

If there is merit to Sun's purported lender liability claim (which is denied), then Sun can seek to pursue such claims in litigation (subject to the restrictions on pursuing such claims), but such claim would not provide a basis for Sun to avoid its performance and payment obligations under the CSAs for funds previously advanced. *See, e.g.*, *McDonald's*, 653 F.Supp. at 403 (while Sun may have counterclaims against Founding Partners, "the alleged wrongs of [Founding Partners] do not constitute affirmative defenses to [Sun's] non-payment[.]").

Under the law of New York, if Sun believes that Founding Partners has breached the CSAs, it has only two options:

> the non-breaching party may stop performance and sue for total breach, or continue to perform and sue for partial breach. **What the non-breaching party cannot do is avoid its obligations under the contract and yet continue to reap the benefits.**

Ryan v. Volpone Stamp Co., 107 F.Supp. 2d 369, 397-98 (S.D.N.Y. 2000) (emphasis added); *see also Wechsler v. Hunt Health Systems, Ltd.*, 330 F.Supp. 2d 383, 428 (S.D.N.Y. 2004) ("a party cannot at the same time treat a contract as broken and subsisting. One course of action excludes the other.") (internal citations omitted). Accordingly, Sun has two available courses of action: 1) continue to perform under the CSAs and repay the principal advanced pursuant to the terms of the CSAs (with interest), while pursuing a claim against Founding Partners for damages resulting from alleged breaches;[47] or 2) cease performance and seek rescission of the CSAs.[48] Neither

---

[47] Sun's obligations under the CSAs are numerous, and include the payment of interest, as well as requirements that Sun report regularly to Founding Partners regarding the status of the collateral purchased with funds advanced by Founding Partners. Sun has, in the past, failed to comply with these and other reporting obligations that are clearly set forth in the CSAs, and Sun must comply with them if they elect to continue to reap the benefits of the monies advanced to them. The Receiver has demanded compliance with these provisions. (Exhibit N, at ¶¶ 4, 8)

option permits Sun to do what they claim to be entitled to do – namely, to retain the monies advanced to them, cease making repayments of principal and interest until February 2013, reap a complete windfall in the meantime with no guarantee that any of the sums will ever be repaid, and thus ignore all contractual obligations except one.[49] The law does not allow for such an inequitable result.

C. SUN CANNOT SUSTAIN ITS BURDEN OF PROVING IRREPARABLE HARM

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,

---

[48] Since rescission requires that all parties be returned to their original positions as though the contracts had never been made, this option would require Sun to immediately repay all principal advanced, plus interest. *See, e.g., Jackson v. BellSouth Telecommunications*, 372 F.3d 1250, 1279 (11th Cir. 2004) ("the prerequisite to rescission is placing the other party in status quo.").

[49] The obligations that have already been incurred in this case include repayment of both principal and interest. Sun cannot argue that making payments on monies they have already received pursuant to the CSAs constitutes "future performance" just because the payments are to be made at some future time – rather, the obligation to repay principal and interest is a current obligation, directly referable to commitments already undertaken by Sun under the CSAs. *See, e.g., Jamaica Savings Bank v. Toomey*, 355 N.Y.S. 2d 268, 271 (N.Y. Sup. 1974) ("when one contracts to pay a principal sum at a certain future time with interest, the interest prior to the maturity of the contract is payable **by virtue of the contract**[.]") (emphasis added); *see also Gober v. Gober*, 772 N.Y.S. 2d 32, 33 (N.Y. App. 2004) (where plaintiff received distributive award, defendant was compelled to pay interest until distributive award was paid in full, as defendant would be availing himself of plaintiff's money; distributive award was "not a future award but a current one[.]"). This is consistent with the nature of interest, which is "simply the cost of having the use of another person's money for a specified period[.]" *Manufacturers & Traders Trust Co. v. Reliance Insurance Co.*, 838 N.Y.S. 2d 806, 809 (N.Y. 2007) (internal citations omitted). In the other case cited by Sun, the party failed to perform any of their obligations under the agreement in question. *See Pui Sang Lai v. Shuk Yim Lau*, 855 N.Y.S.2d 615, 617 (N.Y. App. 2008).

(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").

Sun, through Mr. Koslow' affidavits (Exhibits K and L), made arguments asserting immanent irreparable harm to Sun and its affiliates. Discovery has proven that all arguments had no merit.

1. MR. KOSLOW'S TESTIMONY ON IRREPARABLE HARM TO SUN WAS FALSE AND MISLEADING

Mr. Koslow swore that seizure of the lockboxes would cause Sun to go out of business, causing its employees to lose their jobs. (Exhibit L at ¶¶ 2, 14, 25, 32). This testimony was false and misleading. Mr. Koslow neglected to mention that since approximately November 2008, when Mr. Gunlicks told Sun Principals that Founding Partners funds were limited, Sun was slated for closure by the Sun Principals. (Exhibit A at 29-30, 206-207, 222-223; Exhibit B at 80-82; Exhibit D 83-91, 232-234). In Sun's financial statements for February 2009, Sun's CFO Mr. Leder stated that Sun was "no longer a going concern" and Mr. Leder analyzed Sun's financial condition on a "liquidated basis." (Exhibit A at 182-183, 222-223). All of this was done **before**

the Receiver seized the lockboxes.

REDACTED

REDACTED

As such, the cases cited by Sun in support of this proposition are inapposite and do not support Sun's irreparable harm claim. *See, e.g., ABC Charters, Inc. v. Bronson*, 591 F.Supp. 2d 1272, 1307 (S.D. Fla. 2008) (cited by Sun) (where plaintiffs sought injunction against a statute that would have imposed additional bonds, fines, regulatory requirements, and possible criminal liability upon business owners who were previously operating viable travel agencies, court held that compliance with the new regulatory requirements constituted an irreparable harm because, as a result, previously viable businesses would have to close); *see also Westin v. McDaniel*, 760 F.Supp. 1563, 1569 (M.D. Ga. 1991) (cited by Sun) (where attorney obtained injunction against his own prosecution hours before a grand jury was convened, in order to protect harm to his

viable, operating law practice, court determined that "the damage caused by a grand jury investigation initiated under these motives would certainly be irreparable.").[50]

In addition, Mr. Leder admitted Sun has not paid interest since December 2008 because it cannot afford to pay the cost of its capital, while it diverts millions to projects owned by Mr. Baronoff, Mr. Koslow, and Mr. Leder. (Exhibit E at 15.) If a finance company cannot afford to pay for the cost of its capital, then it is not a viable company. If a finance company can afford to pay for the cost of its capital, but refuses to do so and instead chooses to squander funds on pet projects of its owners, its continued existence should not be maintained solely by the Court's equitable and injunctive powers.

REDACTED

---

50 Sun's naked speculation that its "business reputations" and the "goodwill they have developed" (Sun's Motion at 15) will be destroyed is similarly insufficient, even under the authority they cite. For example, in *BellSouth Telecomms., Inc. v. MCIMetor Access Transmission Servs., LLC.*, 425 F. 3d 964, the Eleventh Circuit cited the District Court's finding that without the injunction, the defendants would be able to undertake anti-competitive conduct, as a result of which BellSouth had already been "losing about 3200 customers per week." 425 F. 3d at 970. That is not the case here, as Sun merely speculates regarding the loss of "good will" and "business reputations" if the Court permits the Receiver to exercise rights under a contract Sun executed. Further, to invoke loss of good will and customers to meet the irreparable harm requirement, Sun cannot merely "support that speculation with self-serving statements," as it has in this case. *See Mercedes-Benz U.S. Int'l., Inc. v. Cobasys, LLC*, 605 F. Supp. 2d 1189, 1207 (N.D. Ala. 2009) (denying injunctive relief); *Rubenstein v. Bauman*, No. 07CV798-MHT, 2007 WL 3120258, *2 (M.D. Al. Oct 23, 2007) ("Rubenstein's claims of irreparable harm are the paragon of speculative assertion").

2. MR. KOSLOW'S TESTIMONY ON IRREPARABLE HARM TO PROMISE AND SUCCESS WAS FALSE AND MISLEADING

a. MR. KOSLOW'S TESTIMONY THAT AN INJUNCTION WAS JUSTIFIED BECAUSE SUN WAS ONLY RECYCLING RECEIVABLES TO MAINTAIN HOSPITALS WAS FALSE AND MISLEADING

In his affidavits, Mr. Koslow testified that, since January 27, 2009, Sun had been merely "recycling receivables" to keep the hospitals afloat and keep the patients alive, while maintaining the collateral for the investors. (Exhibit L at ¶¶ 15, 24, 36; Exhibit Kat ¶¶ 21-22).

> Sun Capital has recently been receiving up to $14 million a week in receivable repayments from its hospital clients, which are deposited into two lockbox accounts. Sun Capital then uses the returned receivable proceeds to purchase like receivables from the hospitals. (Exhibit L at ¶ 6).
>
> The FP Receiver well knows that, despite the difficult financial circumstances engendered by the Lender's default in January, we are doing the best we can to collect and reloan receivables to keep the hospitals afloat and are not misusing, embezzling, or dissipating any of the funds. (Exhibit L at ¶ 13).
>
> Without steady and reliable access to funds, we cannot continue to recycle receivables from the hospitals that depend upon our financing program. (Exhibit L at ¶ 14).

Mr. Koslow also testified that, historically"[t]here was no self-dealing, Promise-owned hospitals always received the exact same financial terms and commitments as all other hospital clients." (Exhibit K at ¶ 9).

None of this was true.

First, discovery has proven that, far from treating Promise and Success as ordinary factoring clients, the Sun Principals have been "self-dealing" by giving Promise and Success REDACTED million in subsidies to cover operating losses and for other purposes, over and above ordinary receivables financing or recycling of receivables. The same is true for non-hospital

affiliates, such as Symbio. (Exhibit J at 385).

REDACTED

Second, contrary to Mr. Koslow's testimony that Sun has been "recycling receivables" since January 2009, discovery has demonstrated that, in fact, since January 2009, continuing during April and July (when Mr. Koslow submitted his affidavits), and through today, Sun has not simply been "recycling receivables" to keep operating hospitals afloat in a manner that preserves the collateral. Indeed, contrary to Mr. Koslow's testimony that Sun had to struggle to maintain regular accounts receivable financing at the hospitals (Exhibit K at ¶¶ 6, 13), the "self-dealing" continues unabated. Sun Principals have continued to provide Promise and Success millions more in subsidies

REDACTED

They have also spent millions more on developing and building new hospitals (Exhibit A at 226; Exhibit B at 42-44) and in continuing to subsidize Symbio (Exhibit C at 29-34; Exhibit D at 68-80), Exhibit J at 308-312), which funds could have been used to pay interest or at the very least maintain collateral.[51]

---

[51] Mr. Koslow's testimony that "[t]he FP Receiver well knows that . . . [Sun is] not misusing, embezzling, or dissipating any of the funds" (Exhibit L at ¶ 13) is false because, prior to the seizure of the lockboxes, (a) Mr. Leder admitted to the existence of historical "working capital advances" (Exhibit P) and (b) the Receiver's professionals noticed that "due from related party" amounts increased by $21.5 million and questioned Mr. Leder about it (Exhibit O at ¶¶ 32-34). Discovery has shown that $21.5 million in dissipation observed by the Receiver's staff prior to the seizure of the lockboxes (Exhibit O),

REDACTED

Third, in or about August 2009, with the benefit of the TRO in place, the Sun Principals gave themselves distributions of at least $100,000 from Promise, which was diverted from hospital operations to the Sun Principals through excessive rent payments from the Promise Hospitals (which the Sun Principals own, but which was capitalized purely through Founding Partners loan proceeds) (Exhibit G at 163-164) to the entities that own the real estate (which Sun Principals own, but which was capitalized purely with Founding Partners loan proceeds). (Exhibit G at 163-164.) When asked how he could justify diverting $100,000 from Promise after he and his partners assured the Court that every penny was needed to recycle receivables to keep the lights on Promise and Success, Mr. Leder responded that "The money was there. It was our money." (Exhibit G at 164).

REDACTED

REDACTED

b. MR. KOSLOW'S TESTIMONY THAT PROMISE AND SUCCESS ARE VIABLE AND THAT A RECAPITALIZATION IS LIKELY WAS FALSE AND MISLEADING

Mr. Koslow testified that a recapitalization – an infusion of hundreds of millions of dollars by an investor – is likely. (Exhibit L at ¶ 21; Exhibit K at ¶ 28). Mr. Koslow went on to state that his investment banking firm believes that "a recapitalization can be achieved before year-end [of 2009]." (Exhibit L at ¶ 21). His testimony thus strongly suggested that Promise and Success were viable businesses that would attract an investment and had the ability to remain in business until such an event. Mr. Leder echoed this testimony in his deposition, and went even further testifying that a recapitalization was "absolutely" going to take place. (Exhibit G at 148.)

First,

REDACTED

REDACTED

REDACTED

REDACTED

In view of the Sun Principals' general unreliability and poor business decisions using other

people's money, the investors should not be forced to rely upon the Sun Principals' judgment on funding decision on the limited lockbox funds.

c. MR. KOSLOW'S AFFIDAVIT FALSELY ARGUES THAT AN INJUNCTION WAS NECESSARY TO MAINTAIN VIABLE HOSPITALS

Mr. Koslow swore in his affidavits that only the Sun Principals can keep viable hospitals afloat, whereas the Receiver acts rashly to close down hospitals that should remain open. (*See* Exhibit L at ¶¶ 16, 19, 21-30, 34). The Court appears to have accepted this testimony, in finding that one reason to restrain the Receiver from seizing the lockboxes was to maintain the hospitals. Mr. Koslow's testimony, however, is demonstrably false.

The record evidence shows that the Receiver and his professionals have never ruled out the possibility that *one or more* of the Promise and Success hospitals may have value and may be worth preserving, provided the Receiver gets access to the relevant information and proper controls are in place to prevent diversion, but Sun has stymied that effort at every turn (as discussed above in the Procedural History). Sun Principals cannot prevent the Receiver from making proper funding decisions and then complain about it to enjoin the Receiver from acting on his security interests.

Mr. Koslow objects that "The FP Receiver and his representatives are lawyers, not hospital operators[.]" (Exhibit L, at ¶ 30). Even if this were a valid basis to object to the Receiver's exercise of his contractual rights (which is denied), the objection is no longer valid. The Receiver's testifying expert's firm, the Huron Consulting Group ("Huron"), can provide expertise on hospitals and distressed businesses, as needed. Huron is a nationally recognized

leader in turning around distressed companies, especially in healthcare.[52] Moreover, unlike Sun, Huron has extensive experience running distressed hospitals under court supervision, with positive results.[53] If the Hospitals are viable, Huron is more likely than the Sun Principals to keep them going, without dissipation of collateral and free of current management, which has engaged in reckless self-dealing and waste of collateral on themselves.

By contrast, Sun cannot sustain its burden of proof that it deserves continued unfettered access to the Receiver's limited collateral to maintain whichever hospitals may be viable. Symbio provides a perfect case study on what happens when the Sun Principals are permitted to make funding decisions with Founding Partners loan proceeds. (*See* Exhibit C at 29-34; Exhibit D at 68-80). Symbio's predecessor company, Command Software, was a factoring client of SCI. Although Sun claims to be expert on due diligence on its potential factoring clients, SCI nevertheless claims that Command Software defrauded SCI with fraudulent accounts receivable, resulting in the loss of approximately $4.5 million. Sun could have cut its losses and moved on, but instead the Sun Principals dug in further. A company that defrauds its lender might be suspected of having deep operational problems, but the Sun Principals nevertheless chose to acquire Symbio.

REDACTED

---

52 *See* Exhibit XX. For example, Huron has been named a "top 12 outstanding turnaround firm" by *Turnaround and Workouts Magazine* every year since its inception in 2002 and *Modern Healthcare* ranked Huron second on its 2009 list of the top 15 healthcare management consulting firms. *Id.*

53 *Id.*

REDACTED

In "July or August" 2009, the Sun Principals arranged for Symbio's debt to Sun to be converted to a note. (Exhibit J, at 313) Then, on January 4, 2010, the Sun Principals caused Symbio to file for bankruptcy, with virtually no assets, and the $24 million of Funding Partners investor funds lost, without any apparent negative consequences for the Sun Principals. (Exhibit WW) Founding Partners may have no contractual recourse under the Agreements (but has tort and fraudulent conveyance claims), because it had no security interests in Symbio once the funds were transferred. Founding Partners' contract claim is against Sun, which is insolvent and which has engineered a depletion of the collateral in the lockbox.

Promise and Success seem to be following in the footsteps of Symbio, although on a much larger scale. For the most part, these were troubled hospitals, as Mr. Koslow admits (Exhibit K at ¶ 10), and many had engaged in fraud. (*See, e.g.*, Exhibit A at 73)

REDACTED

---

[54] Mr. Leder came up with an excuse – the reimbursement regulations changed. (Exhibit G at 108). Discovery did not provide the means to test Mr. Leder's excuse, but the excuse itself proves the larger point. Mr. Leder is a health care reimbursement specialist, having worked for one of the top accounting firms in the world. (Exhibit G at 302.) If Mr. Leder and his partners cannot make projections based on potential changes in health care regulations, they

The Sun principals should have been cautioned by the losses at Promise. Instead, they forged ahead with Success. The origins of Success are the Envision Hospital chain, which began as an SCHI factoring client in early 2008. (*See* Exhibit A at 73, 142-143, 200-204). By late 2008, the Envision Hospitals were in severe financial distress and (according to Mr. Leder) had engaged in fraud. (Exhibit H at 7-9, 20-25). Instead of cutting off funding for these Hospitals, Sun acquired them and created the Success hospital chain, paying for their continuing losses with investor funds (following the same pattern in Promise). (*Id.*) Success involved the purchase of the City of Angels hospitals, which received nationwide media attention for having transported local indigents to the hospital for fake services to be billed to Medicare and Medicaid *before* the Sun Principals imprudently agreed to acquire it fully aware of the fraud. (Exhibit H at 12-14).

REDACTED

REDACTED

---

should not be in the healthcare business. More likely, they knew the risks and did not care because, as they knew all along, the losses would be borne by the investors, not by them.

[55] Discovery thus far has only begun to reveal the numerous instances of poor and reckless investment decisions encompassed within the collective Promise and Success enterprises. The following two examples are likely just the tip of the iceberg: First, Mr. Leder testified that Promise acquired a second hospital in a section of Mississippi purely to prevent a competitor from buying the hospital and competing with a pre-existing Promise hospital in the same area. (Exhibit H at 61). Evidently, the first Promise hospital in that location could not compete on its own, so instead of shutting it down, Sun elected to waste additional investor funds

d. -MR. KOSLOW'S TESTIMONY THAT AN INJUNCTION WAS NECESSARY TO "SAVE THE DSH" RECEIVABLES WAS FALSE AND MISLEADING

Mr. Koslow testified that it was self-defeating for the Receiver and harmful to the investors for the Receiver to take any action that might shut down the hospitals since some of them have DSH Receivables, which will not be paid if the hospitals close. (Exhibit L at ¶¶ 17, 20, 25, 46; Exhibit K at ¶ 25). By contrast, Mr. Koslow claims that if the Receiver is restrained, the hospitals will remain open and the DSH receivables will be paid, for the benefit of the investors. (*Id.*) The Court relied on this testimony in granting the temporary restraining order. (D.E. 19 at 9).

Discovery has confirmed that Mr. Koslow's affidavit testimony on DSH was false and misleading.

REDACTED

---

to secure profits at the first hospital. Second, Mr. Leder explained Sun's recent or current construction in Vidalia, Mississippi as necessary because an existing Promise Hospital in that area was no longer operable due to a change in regulations. (Exhibit G at 24). The investment in the now-obsolete Promise Hospital was evidently a waste and Sun either did not have adequate knowledge of the regulations or simply did not care that it was acquiring a hospital that would soon be obsolete.

REDACTED

REDACTED

Third, Mr. Koslow's testimony is also misleading in that it fails to disclose another risk of Sun's heavy investments in DSH receivables. As an element of cost reimbursement, the DSH receivables are subject to the policies and budget constraints of state regulatory agencies. (Exhibit A at 72-73; Exhibit Q at 10-11; Exhibit F at 143, 191). Here, much of the DSH is concentrated in California, which is experiencing a budget crisis, and the funding of DSH is in doubt. (Exhibit A at 203; Exhibit F. at 149-150, 174).

REDACTED

REDACTED

For all these reasons, discovery has proven that Mr. Koslow's affidavit testimony on DSH receivables (Exhibit L at ¶¶ 17, 20, 25, 36; Exhibit K at ¶ 25) was false and misleading.[56]

e. **MR. KOSLOW'S TESTIMONY THAT INJUNCTION WAS NECESSARY TO ENSURE PATIENT SAFETY WAS FALSE AND MISLEADING AND IN ANY EVENT HAS BEEN MOOTED**

Mr. Koslow testified in his second affidavits that patients lives were endangered by the Receiver's exercise of his contractual rights (Exhibit L at ¶¶ 2-3, 14, 16, 18-20, 29, 34), and that it was never expected that Founding Partners could have any role in the funding or management of the hospitals. (Exhibit L at ¶¶ 26, 30, 32). The Court relied on Mr. Koslow's affidavit testimony about patient safety. (D.E. 19 at 8-9).

---

56 Discovery has also proven the recklessness and shortsightedness of Sun's investment in DSH receivables. Mr. Koslow swore in his affidavit that Sun only factored hospitals that were on the brink of closure. (D.E. 11-4 at ¶ 10). Sun should not have begun factoring DSH receivables for hospitals about to close, if the DSH would be lost. However, the Sun Principals had no downside from investing in DSH in failing hospitals because they were risking other people's money. If Sun was short on cash to pay interest, Sun could just borrow more money from Founding Partners and increase the total debt that that it never intended to repay. While the principal of the loan would continue to grow, as Mr. Leder admitted, Sun had long ago concluded it could not repay the principal anyway and Sun continued to keep borrowing more money. (Exhibit I at 71.) The upside for the Sun Principals was that they could get a hook into failing hospitals and then use more Founding Partners funds to buy the hospitals (to be owned by Sun Principals) because of the need to "save the DSH" that never should have been purchased in the first place.

Discovery has confirmed that Mr. Koslow's affidavit testimony on patient safety and control of the hospitals was false and misleading in all respects.

First, Sun has acknowledged that patient safety is an economic issue, not a health and safety issue. (*See* Exhibit A at 208-217; Exhibit B at 38-39; Exhibit G at 197.) If Sun believed it lacked the funds to safely evacuate patients, the Principals could have provided the funds from their millions of ill-gotten gains. Alternatively, Sun could have asked the Receiver for the funds needed to transfer hospitals, but did not do so. Sun could have alerted the state regulators, who would ensure patients are safely transferred to another facility. (Exhibit G at 196). Sun did not avail themselves of these means to ensure patient safety, and instead obtained the temporary restraining order on the basis of a dubious claim that patient lives were endangered.[57]

Second, discovery also indicates that Sun views the issue of patient safety as an issue to manipulate in litigation. In response to a different line of questions, Mr. Leder testified he knows from his experience that judges are loath to close hospitals because judges are sympathetic to arguments focusing on the need to protect patients. (Exhibit F at 173). The second Koslow affidavit, which falsely raises alarms over patient safety (Exhibit L; D.E 2-3, 14, 16, 18-20, 29, 34), was evidently the product of Mr. Leder's cynical views.[58]

---

[57] Discovery has confirmed that each hospital has adequate evacuation plans, as required by state regulation. (Exhibit A at 160). None of the hospitals ever advised the relevant state regulators that their plans are inadequate, and none advised state regulators that they were concerned for patient safety in the event the TRO was denied. (*See* Exhibit A at 161-162; Exhibit G at 195-196.)

[58] Mr. Leder testified that, in 2006, Founding Partners reneged on a commitment and proved to be an unreliable source of funds. (Exhibit E at 25-27). Sun therefore sought alternative financing. (*Id.* at 27). A major investment bank was willing to fund the hospitals, but only if the Sun Principals gave up the factoring business. (*Id.* at 28; Exhibit G at 147). If the Sun Principals were truly concerned about patient safety, they would have changed funders,

Third, Sun cannot complain about patient safety when it has acted with the risk that Founding Partners would take over the hospitals, due to its breaches,[59] fraudulent conveyances to the hospitals, and the pledge of Promise stock discussed below. Despite this, Sun claims to have put in place no plans (other than disaster plans), or set aside any funds, to address the lives of patients, or contact state regulators (Exhibit A at 161-162; Exhibit G at 204-205), which means they know there is no real concern and want to use this issue to keep control of the Hospitals titled in their name, but in all respects rightfully belonging to Founding Partners.[60]

---

but they chose to stay with Founding Partners because, as Mr. Leder explained, the Sun Principals were making too much money factoring. (Exhibit E at 29).

[59] Sun's reliance on oral waivers or waivers from course of conduct proves this point. Sun had to know that it was at least questionable whether a court would credit such purported waivers given that Section 14 of the Agreement requires waivers to be in a signed writing. Given the uncertainty on how a court would rule, Sun's claim that it never imagined Founding Partners could assert its rights to the lockbox rings hollow.

Sun's awareness of this risk (falsely denied by Mr. Koslow in his affidavits) is manifest in the Standstill Agreements executed in February, March, and April 2009, discussed above. (Exhibit D at 169-172, 247-249). As noted, the Standstill Agreements specifically note that Founding Partners believed Sun had committed "Historical Defaults" (Exhibit D 249-252) and specifically precluded Founding Partners from exercising "self-help remedies," *i.e.*, seizing the lockboxes. Although Sun denied being in default, it is clear that Sun has long been aware that the lockboxes could have been seized due to their historical non-compliance with the written terms of the CSAs, for which there were very few written and signed waivers that could pass muster under the written terms of the CSA. Once the Standstill Agreements expired, in April 2009, they had to expect that the lockboxes would be seized.

[60] In his second affidavit, Mr. Koslow expressed indignation that Founding Partners might one day make funding and management decisions at the hospitals acquired by the Sun Principals with funds they diverted from Founding Partners. (Exhibit L at ¶¶ 26, 30, 32). Mr. Koslow's affidavit testimony is proven false, not just because the hospitals should never have been titled to the Sun Principals in the first place (since they were capitalized and subsidized purely with Founding Partners' funds), but also because Sun Principals have long acted with full knowledge that Founding Partners could seize the lockboxes (Exhibit A at 53-55) (and thus control funding for the hospitals and patient care) and conducted themselves in a manner that virtually guaranteed that Founding Partners would take this action.

Finally, the issue has been firmly resolved and mooted, as Sun now concedes. In depositions, the Receiver's counsel asked Mr. Leder to confirm that Sun, Promise, and Success would ensure that, in the event the Court ultimately denies Sun's Motion for Preliminary Injunction, they will by then have in place a plan that they are confident can ensure patient safety. Mr. Leder responded that the Sun and hospitals would be ready for this. (Exhibit G at 195-196). In a deposition on another day, Mr. Leder changed his mind because, as he explained, "I don't think we're going to lose." (Exhibit I at 132).

The Receiver affirmatively resolved the issue and once and for all. In early December 2009, the Receiver's counsel wrote to counsel for Sun, Promise, and Success asking for a meeting to discuss future funding, including the negotiation of a protocol, to be submitted jointly to the Court for approval and to obtain the force of a Court Order, which would ensure that the Receiver would provide sufficient funds to ensure patient safety at each hospital, in the event the pending Motion for Preliminary Injunction was denied and the Receiver sought to cease funding any of the hospitals. (Exhibit N at ¶ 17). The Receiver specifically assured Sun, Promise, and Success that, regardless of whatever differences may exist, the Receiver would provide funding to ensure patient safety and would consent to a Court Order to that effect. *Id.* In its response, counsel for Sun, Promise, and Success refused to meet with the Receiver, but acknowledged that, if the Court denies the Motion for Preliminary Injunction, the Court would order the Receiver to provide funds necessary to ensure the safe transfer of patients. (Exhibit N at ¶ 18).

By all accounts, therefore, this issue is no longer a basis for injunctive relief.

REDACTED

f. MR. KOSLOW'S AFFIDAVIT TESTIMONY CONCEALED THE PROMISE STOCK PLEDGE, WHICH UNDERMINES ENTIRE MOTION

Mr. Koslow fraudulently concealed the fact that Sun Principals long ago bargained away control of Promise to Founding Partners because it suited their needs. The existence of a pledge agreement calls into doubt the entire basis for the relief sought in Sun's Motion. Founding Partners, not Sun, is the real party in interest. Founding Partners is the only party with a legitimate claim to both (a) the lockboxes, from which funds are being diverted, and (b) the Promise Hospitals, the destination of most diverted funds, which causes Sun's argument that it is entitled to unfettered control of both the lockboxes and the hospitals to fall flat.

Specifically, according to the documents and the deposition testimony of Sun, in 2003, Sun convinced Founding Partners to permit Sun to acquire eight hospitals from a hospital chain called Camelot, using Founding Partners' funds and collateral. (Exhibit A at 91-99). In exchange, however, Sun Principals promised to pledge their shares in Promise to Founding Partners as collateral, since the diversion of funds to acquire these 8 hospitals would have caused a dissipation in collateral. (Exhibit A at 93, 101-102, Exhibit 13).

The parties entered into a Pledge Agreement and then an Amended Pledge Agreement. (Exhibits AA and BB; Exhibit A at 144, 150). In the Amended Pledge Agreement, the Sun Principals pledged their shares in Promise stock to Founding Partners to secure (a) the obligations of SCI to Founding Partners, and (b) the obligations of HLP Properties,[61] a realty company owned by the Sun Principals, to Founding Partners.

---

[61] HLP stands for Howard, Larry, and Peter – the first names of the Sun Principals.

HLP Properties was the owner of realty of one of the original eight Promise Hospitals. Founding Partners advanced funds to HLP Properties which was memorialized in the HLP Agreement. (*See* Exhibit G at 186-191). HLP breached the HLP Agreement by not paying principal and interest when due. [62]

The Receiver's position in this litigation is that the Promise stock now belongs to Founding Partners under the Amended Pledge Agreement due to breaches of the HLP Agreement and the SCI CSA (which covers breaches of the SCHI CSA, through the cross-default provision).

Founding Partners is the rightful owner of Promise, not just because Founding Partners funded the Sun Principals' acquisition of the hospital and involuntarily subsidized their operations as the hospitals lost millions of dollars, but also because the Amended Pledge Agreement acts to transfer ownership to Founding Partners.

The Sun Principals evidently disagree. However, they cannot deny that the Sun Principals voluntarily put their ownership and control of the Promise Hospitals in jeopardy and

---

[62] The HLP Note expired, and principal was due, but was not paid. (Exhibit G at 186-187, 190-191). HLP stopped paying required monthly interest in 2009. (Exhibit G at 191). Sun has never provided any explanation as to how Founding Partners' purported breach of the SCHI CSA on January 27, 2009 can be leveraged by the Sun Principals into an excuse by HLP not to comply with any of its obligations. Indeed, even assuming *arguendo* the Sun Principals can argue that the HLP has a legal excuse not to pay interest due to Founding Partners purported breach of the SCHI CSA on January 27, 2009, that would not explain HLP's refusal to pay principal and accrued interest on the expired HLP Agreement. Sun Principals do not deny that SCHI is required to repay all principal and accrued interest upon the Final Maturity Date of the SCHI CSA. Even by their reckoning, therefore, HLP is obligated to do at least the same, now that the HLP Agreement has expired by its own terms. HLP's failure to pay principal and interest is indisputably a breach of the HLP Agreement, entitling Founding Partners to foreclose on its security interests – the Sun Principals' Promise Stock.

Founding Partners' claims concerning the pledge agreement and HLP Properties' breaches are in Counts III and VI of its Complaint

therefore cannot be heard to complain that their lender, Founding Partners, might one day make take control of the hospitals, contrary to Mr. Koslow's misleading affidavit testimony. (Exhibit L at ¶¶ 26, 30, 32).

REDACTED

REDACTED

ɜs

ɩt

REDACTED

h. **MR. KOSLOW'S TESTIMONY THAT AN INJUNCTION WAS NEEDED FOR THE SCI LOCKBOX WAS FALSE AND MISLEADING**

Mr. Koslow's affidavits obscured the difference between SCHI and SCI and the fact that SCI did not factor health care receivables. This was accomplished by defining "Sun Capital" as the combination of SCHI and SCI (Exhibit L at ¶ 1) and then referring only to Sun Capital when discussing the funding of hospitals and the alleged need for Sun to keep control of both lockboxes to keep the hospitals afloat and "save the DSH." (Exhibit L at ¶¶ 2-3, 14-20, 25, 29, 34, 36).

In his deposition, Mr. Koslow struggled to defend his treatment of SCI in his affidavits, which resulted in affidavit testimony that the SCI lockbox was needed to "save the DSH" (Exhibit L at ¶¶ 17, 20, 25, 36; Exhibit K at ¶ 25) and ensure patient safety at SCI's (non-existent) hospital clients. (Exhibit L at ¶¶ 2-3, 14, 16, 18-20, 29, 34). Initially, Mr. Koslow refused to answer questions about his affidavit testimony on SCI, until he ultimately admitted that SCI has no role in healthcare financing. (Exhibit D at 164-168, 177-185, 202-211, 218, 267-271).

Mr. Leder contradicted Mr. Koslow. Mr. Leder testified that Sun Principals have no regard for the origin of funds in their control, and are concerned only with taking available cash from whatever source and applying it wherever it is needed to advance the interests of the Sun Principals, which would include losses at a Promise or Success hospital (or other affiliated company, such as Symbio), or for building or developing new ventures for the Sun Principals, or paying the Sun Principals through excessive Promise rent payments. (Exhibit G at 120-122;

Exhibit J at 337-338.) Thus, according to Mr. Leder, Sun does need access to the SCI lockbox because Sun Principals use the funds in any way they want, including subsidizing the failing Promise and Success hospitals.

None of these diversions justify the injunction on the SCI lockbox. Even assuming *arguendo* that SCI funds were diverted only to keep the hospitals afloat only through legitimate receivable financing and that the hospitals were all viable and a recapitalization was likely – none of which is true -- that still would not justify the injunction on SCI's lockbox. Even if it is for a legitimate purpose, a party obviously cannot misuse funds entrusted to it for a different purpose and then obtain an injunction against the return of those funds, on the argument that the ends (keeping hospitals afloat) justify the means (stealing from the SCI lockbox).

D. DAMAGES TO THE RECEIVER RESULTING FROM A PRELIMINARY INJUNCTION OUTWEIGHS SUN'S CLAIMED IRREPARABLE HARM

> In deciding whether injunctive relief is appropriate, the third task a trial court must undertake is to balance the hardships to the respective parties. Plaintiff must establish that the threatened injury to it outweighs the harm the requested preliminary injunctive relief may cause to the defendant.

Global Tel Link Corp. v. Scott 2009 WL 2242372, at *9 (M.D.Fla.).

REDACTED

REDACTED

REDACTED

2. SUN PRINCIPALS HAVE NOT MET THEIR BURDEN OF PROVING THEY ARE CAPABLE STEWARDS OF COLLATERAL

As discussed above, the Sun Principals cannot sustain their burden of proof that they are capable stewards of the Receiver's collateral or that they can be trusted to make responsible funding decisions.

3. SUN HAS NOT DEMONSTRATED THAT THE RECEIVER IS NOT CAPABLE OF BEING A STEWARD OF THE COLLATERAL

As noted, Sun has not explained why Founding Partners would be unable to properly manage the collateral and make proper funding decisions for the hospitals, as needed, in the exercise of Founding Partners' security interests and rights under the pledge agreement. They certainly cannot meet this burden in view of the expert assistance of Huron.

E. SUN CANNOT DEMONSTRATE THAT PUBLIC INTERESTS FAVOR ENJOINING THE RECEIVER

Sun cannot sustain the proof that an injunction would serve the public's interest. *See Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County* 483 F.Supp. 2d. 1224, 1231 (S.D.Fla. 2007).

In granting the TRO, the Court found that the public interest was served because of the need to fund hospitals and protect patients. (D.E. 19 at 9).

As noted, the Receiver has committed to providing funding that may be necessary to protect patients (Exhibit M at ¶¶ 35-38, 43-48), and Sun recognizes that the Court would take patient safety into account in fashioning an order.[63]

The Receiver is also duty bound to protect the value of the collateral, which includes ensuring that viable hospitals remain funded and that hospitals that are not viable or not transferrable for value will be shut down in an orderly fashion that protects patient lives.

---

[63] In the event Sun's Motion is denied, in the event that a hospital is determined not to be viable, the Receiver's staff will investigate the most cost-effective way to close the hospitals while protecting patients, in consultation with appropriate regulatory agencies.

Thus, Sun cannot demonstrate that the public interest is served by a preliminary injunction.

By contrast, a preliminary injunction would hurt the public interest. A preliminary injunction would undermine the sanctity of contracts and security interests. *See Plainfield Specialty Holdings II, Inc. v. Children's Legal Services PLLC*, 2009 WL 1209465, *11, *14 (E.D. Mich. 2009); *Merrill Lynch v. Ran*, 67 F.Supp. 2d 764, 781 (E.D. Mich. 1999).

REDACTED

F. SUN CANNOT DEMONSTRATE THAT IT HAS ACTED EQUITABLY

A movant must prove that it acted equitably in order to obtain a preliminary injunction.

> It is a bedrock principle of courts of equity that they may impose the substantive remedy of injunctive relief *only* when fundamental fairness and justice demand it...The court [of equity] will grant relief only when fairness and good conscience demand it...While a court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness, and conscientiousness on the part of the parties who occupy a defensive position in judicial controversies, it no less stringently demands the same from litigant parties who come before it as plaintiffs or actors in such controversies.

Coral Springs Street Systems, Inc. v. City of Sunrise, 371 F.3d 1320, 1340-41 (11th Cir. 2004). "Injunctive relief is an equitable remedy that is not available as a matter of right." *Williams v. Allen*, 496 F.3d 1210, 1212 (11th Cir. 2007) *see also Arthur v. Allen* 574 F.Supp. 2d 1252 (S.D. Ala. 2008). 'The grant of equitable relief, such as an injunction, is a matter of judicial discretion." *CAN Financial Corp. v. Brown*, 162 F.3d 1334, 1337 (11th Cir. 1998).

A movant must have clean hands and not act fraudulently or deceitfully.

> One of the most elementary and fundamental concepts of equity jurisprudence and a universal rule which affects the entire system of equity jurisprudence is the

> maxim that 'He who comes into equity must come with clean hands.' This principle is founded upon conscience and good faith.
>
> * * *
>
> The equitable powers of this court can never be exerted on behalf of one who has acted fraudulently or who by deceit or any unfair means gains an advantage. To aid a party in such a case would make this court the abetter of iniquity."

Coral Springs Street Systems, Inc. v. City of Sunrise, 371 F.3d at 1341; *see also New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc.*, 291 F. 2d 471, 472 (5th Cir. 1961); *SEC v. Lauer*, 445 F. Supp. 2d 1362, 1366 (S.D. Fla. 2006) ("a cardinal rule of equity is he who comes into equity must come with clean hands."). *Drennan v. Heard*, 211 F. 335, 336 (5th Cir. 1914) (in deciding whether to apply a forfeiture provision in a will to the plaintiff's benefit, holding that "the plaintiff cannot be permitted in equity to profit by such contest, when it appears that she sanctioned, approved, or advised it.").

Sun cannot demonstrate that it acted equitably. The evidence from investors, including the Archdiocese of New Orleans, is overwhelming that Sun knowingly furthered Mr. Gunlicks' fraud on the investors. (Exhibits S and T). In refusing to answer questions on meetings with investors, Sun waived its right to challenge this evidence and thus cannot sustain its burden of proof that it acted with clean hands.

Sun has acted inequitably in numerous other ways, including **REDACTED** **REDACTED** defrauding the Court-appointed Receiver with offers of a mortgage from LH Acquisition to obtain funding from the Receiver, and committing fraud on the Court through the submission of two false and misleading affidavits which they used to obtain significant relief.

Sun also cannot justify its numerous, serial, and continuing breaches of the Agreement, and ignoring the Receiver's revocation of prior waivers, not paying monthly interest as it

continues to waste the Receiver's collateral, and acting as if it has no duties to its lender.

REDACTED

IV. IF THE COURT GRANTS THE MOTION FOR PRELIMINARY INJUNCTION, THE COURT SHOULD SET AN ADEQUATE BOND

In the event that Sun's Motion is granted, the Receiver urges the Court to require Sun to post a bond as contemplated by 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).

REDACTED

REDACTED

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 should be observed and a bond in an amount sufficient to compensate the restrained party should be ordered as a condition of the bond.

V. REQUEST FOR ORAL ARGUMENT EVIDENTIARY HEARING

The Receiver respectfully requests an oral argument on the Motion for both parties the address any legal or factual issues that may be of concern to the Court.

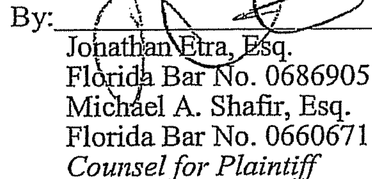
In addition, insofar as the Court may grant the Motion based on findings of fact, the Receiver requests an evidentiary hearing on those findings of fact. *See All Care Nursing Service, Inc. v. Bethesda Memorial Hosp., Inc.*, 887 F.2d 1535, 1538 (11th Cir. 1989) ("Where the injunction turns on the resolution of bitterly disputed facts, however, an evidentiary hearing is normally required to decide credibility issues.").

VI. CONCLUSION

For all the foregoing reasons, the Motions by Sun Capital Healthcare, Inc. and Sun Capital, Inc. for Preliminary Injunction should be denied and the original transfer notices from the Receiver to SunTrust Bank should be reinstated and given full force and effect.

Respectfully submitted,

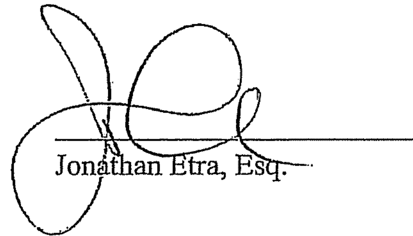
BROAD AND CASSEL
One Biscayne Tower, 21st Floor
2 S. Biscayne Boulevard
Miami, FL 33131
Telephone: (305) 373-9400
Facsimile: (305) 995-9443



By:____________________
Jonathan Etra, Esq.
Florida Bar No. 0686905
Michael A. Shafir, Esq.
Florida Bar No. 0660671
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this 19 day of January, 2010 on all counsel of record identified on the attached Service List in the manner specified.



Jonathan Etra, Esq.

SERVICE LIST

Daniel S. Newman, as Receiver v. Sun Capital, Inc., et al
Case No. 2:09-cv-445-FtM-99-SPC
United States District Court, Middle District of Florida

Jonathan Galler, Esq.
Proskauer Rose, LLP
2255 Glades Rd
Suite 340 West
Boca Raton, FL 33431
561.995.4733
561.241.7145 (fax)
jgaller@proskauer.com

Counsel for Defendants Sun Capital, Inc., Sun Capital Healthcare, Inc. and HLP Properties of Port Arthur, LLC
Service via Federal Express

Sarah S. Gold, Esq.
Karen E. Clarke, Esq.
Proskauer Rose, LLP
1585 Broadway
New York, NY 10036
212.969.3000
212.969.2900 (fax)
sgold@proskauer.com
kclarke@proskauer.com

Counsel for Defendants Sun Capital, Inc., Sun Capital Healthcare, Inc. and HLP Properties of Port Arthur, LLC
Service via Federal Express