UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CASE NO. 2:09-CV-445-FtM-99SPC
Proceeding Ancillary to 2:09-cv-229-FtM-29SPC

DANIEL S. NEWMAN, as Receiver for Founding Partners Capital Management Company; Founding Partners Stable-Value Fund, L.P.; Founding Partners Stable-Value Fund II, L.P.; Founding Partners Global Fund, Ltd., and Founding Partners Hybrid-Value Fund, L.P., Plaintiff, 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, LH Acquisition, LLC, a Texas limited liability company, Defendants. _____/	

RECEIVER'S MOTION FOR LEAVE TO FILE SUR-REPLY

Plaintiff, DANIEL S. NEWMAN ("Receiver"), solely in his capacity as duly appointed 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., hereby files his Motion for Leave to File a Sur-reply to the Reply Memorandum filed by Defendants in support of their Motion for Preliminary Injunction (D.E. 161) ("the Reply Memorandum"), and states as follows:

Sun Capital's 117-page Reply Memorandum is by no means a typical or proper reply brief. It does not seek to narrowly address certain points from the opposition papers. It seeks to overwhelm and negate all that came before it, and cloud and confuse the issues, without permitting the Receiver a response. It contains an avalanche of new cases, new work product, new arguments, and new positions. Under these circumstances, the Receiver respectfully seeks permission to file a sur-reply, no longer than 25 pages, to respond to new arguments, including:

1. Waviers/Oral Modifications/Estoppel. The Receiver seeks permission to demonstrate that Sun Capital did not – and cannot – sustain its burden of proving that each of the past and continuing breaches of the CSAs are covered by purported oral amendments (or estoppel) by Mr. Gunlicks. Insofar as New York law recognizes oral amendments or estoppel in such agreements, it is only in cases where the party seeking to prove the oral amendment or estoppel has already performed all or the vast bulk of the breaching activity sought to be excused. The scope of any purported oral amendments or estoppel is therefore necessarily (and sensibly) limited by the conduct that proves up the supposed oral amendment or estoppel. The cases relied upon by Sun Capital do not stand for the proposition that <u>any</u> evidence of a purportedly excused historical breach automatically bestows upon the breaching party an irrevocable license to engage in continuous or new breaches until the end of the contract term.

Yet, that is Sun Capital's apparent position, set forth for the first time in Reply Memorandum in the course of over 20 pages of work product and over a dozen cases. (D.E. 161 at 36-48, 74-80).

The Receiver consented to Sun Capital's request to file a lengthy Reply Memorandum because the Receiver understood that Sun Capital bore the burden of defining, demonstrating, and proving the precise terms of its claimed waivers, modifications or estoppel and proving that they gave legal cover to each of Sun Capital's many acts of breach. The Receiver seeks leave to demonstrate that, in 117 pages of Reply Memorandum (and 70 pages of Mr. Leder's argumentative Affidavit), Sun Capital has not even attempted to conduct the analysis necessary to meet its burden under New York law and the numerous new cases it purports to reply upon.

2. Effect of Stable-Value's Purported Breach. Sun Capital continues to stake out new and untenable positions on its claim that Stable-Value's purported January 27, 2009 breach of the SCHI CSA (by not honoring a funding request, despite Sun Capital admittedly being in financial distress at the time) acts to excuse Sun Capital from performing any obligation under the CSAs. In his opposition papers, the Receiver showed that Sun Capital's position is that the CSAs are nullified – except that the CSAs somehow continue to give Sun Capital license to keep all previously advanced funds until the Final Maturity Dates of the CSAs. (D.E. 161 at 45-51).[1] In the Reply Memorandum, Sun Capital collects dozens of new cases purportedly in defense of its position. (D.E. at 49-56). For the first time, Sun Capital acknowledges in its Reply Memorandum that, under New York law, it must elect remedies for this purported breach – either (a) terminate the CSAs and give up the benefits of the CSAs, and sue for total breach, or (b) continue to assert rights under the CSAs, and sue for partial breach. (D.E. 161 at 54-55). Sun Capital also acknowledges, for the first time, that its legal position is that Sun Capital

[1] Of course, this is a convenient position for Sun Capital, as it retains all of the benefits of the CSAs, with none of the liabilities or responsibilities.

elected to completely terminate the CSAs (*Id.*). The Receiver seeks leave to demonstrate that the cases cited by Sun Capital do not support Sun Capital's position. Sun Capital may not claim termination and at the same time invoke (and seek the protections of) the Final Maturity Date provision of the CSAs that are "terminated."

3. Other New Arguments On Reply. Sun Capital advances a series of new legal arguments that were not raised in the moving papers. These include Sun Capital's new contention that its contractual waiver of all defenses (except payment) to Stable-Value's enforcement efforts is ineffective. (D.E. 161 at 63-69). The Receiver seeks leave to show that none of Sun Capital's cited cases provide any basis to nullify the waiver provisions that Sun Capital unequivocally agreed to by contract, which, by itself, defeats the pending Motion.

MEMORANDUM OF LAW

Reply memoranda are only permitted in limited instances and upon leave of Court. *See* Local Rule 3.01(c). In those instances where a reply memorandum is allowed, it must be confined solely to rebuttal of matters raised in the response, and cannot introduce new argument in support of the underlying motion. *See*, *e.g.*, *In re Application of Operadora DB Mexico, S.A.*, 2009 WL 2435750, at *11 (M.D.Fla. May 28, 2009) ("Generally, the Court will not consider new arguments raised for the first time in a reply brief.") (overruled on other grounds). The 117-page Reply Memorandum is certainly not the kind of reply brief contemplated by Local Rules. Under these circumstances, the Receiver respectfully submits that a sur-reply is justified and warranted to permit the Receiver to respond to certain of the new cases, new arguments, new work product, and new positions set forth in the 117-page Reply Memorandum. *See Hammett v. American Bankers Insurance Co.*, 203 F.R.D. 690, 695 n.1 (S.D.Fla. 2001) (granting leave to file surreply specifically because of new arguments and new theory presented in reply brief).

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests leave of this Court to file sur-reply to Sun Capital's Reply Memorandum in Support of its Motion for Preliminary Injunction, not to exceed 25 pages, and requests any further relief this Court deems just and proper.

CERTIFICATE OF CONFERRAL

Counsel for the Receiver conferred with counsel for Sun Capital, which indicated that it opposed the Receiver's requested relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Jonathan Etra
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