

1 SAMUEL R. MAIZEL (Bar No. 189301)
samuel.maizel@dentons.com
2 TANIA M. MOYRON (Bar No. 235736)
tania.moyron@dentons.com
DENTONS US LLP
3 601 South Figueroa Street, Suite 2500
Los Angeles, California 90017-5704
4 Telephone: 213 623-9300
Facsimile: 213 623-9924
5

6 Proposed Attorneys for the Chapter 11 Debtor
and Debtor In Possession

7 **UNITED STATES BANKRUPTCY COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**

9 In re

10 **BORREGO COMMUNITY**
HEALTH FOUNDATION,
11 Debtor and Debtor In
12 Possession.

Case No. 22-02384-11

Chapter 11 Case

**DEBTOR'S EMERGENCY FIRST DAY
MOTION FOR ENTRY OF AN ORDER (I)
AUTHORIZING THE DEBTOR TO (A)
MAINTAIN INSURANCE PROGRAM, (B)
PAY INSURANCE PREMIUMS AND
BROKERAGE COMMISSIONS IN THE
ORDINARY COURSE, (C) CONTINUE
ITS PREMIUM FINANCING PROGRAM
AND (D) PAY ALL OBLIGATIONS
ASSOCIATED THEREWITH; AND (II)
PREVENTING INSURANCE
COMPANIES FROM ENFORCING IPSO
FACTO CLAUSES OR GIVING ANY
NOTICE OF TERMINATION OR
OTHERWISE MODIFYING ANY
INSURANCE POLICY WITHOUT
OBTAINING RELIEF FROM THE
AUTOMATIC STAY**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

**Declaration of Isaac Lee in Support of
Debtor's First Day Motions filed
concurrently herewith**

Judge: Honorable Laura S. Taylor

Date: TBD
Time: TBD
Place: TBD

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300



220238422091200000000005

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. JURISDICTION 2

III. STATEMENT OF FACTS 2

 A. General Background 2

 B. Relevant Background to the Motion 3

IV. DISCUSSION 5

 A. Ordinary Course Payments 5

 B. Payment of insurance Obligations under §§ 363(b) and 105,
 including prepetition amounts, is necessary to operate 6

 C. The Automatic Stay 11

 D. *Ipsso Facto* Provisions Unenforceable 13

V. CONCLUSION 13

DENTONS US LLP
 601 SOUTH FIGUEROA STREET, SUITE 2500
 LOS ANGELES, CALIFORNIA 90017-5704
 (213) 623-9300

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

Cases

In re Adana Mortg. Bankers, Inc.,
 12 B.R. 983 (Bankr. N.D. Ga. 1980)..... 11

In re B&W Enters.,
 713 F.2d 534 (9th Cir. 1983)..... 10

In re Bakalis,
 220 B.R. 525 (Bankr. E.D.N.Y. 1998) 7

Berg & Berg Enters. v. Boyle,
 178 Cal. App. 4th 1020 (Cal. 2009) 7

In re Braniff, Inc.,
 218 B.R. 628 (Bankr. M.D. Fla. 1998)..... 9

In re Castre,
 312 B.R. 426 (Bankr. D. Colo. 2004)..... 7

In re Columbia Gas Sys., Inc.,
 171 B.R. 189 (Bankr. D. Del. 1994)..... 9

In re First Wellington Canyon Assocs.,
 1989 WL 165028 (N.D. Ill Dec. 28, 1989) 7

In re Ionosphere Clubs, Inc.,
 98 B.R. 174 (Bankr. S.D.N.Y. 1989) 6, 9

In re Just for Feet, Inc.,
 242 B.R. 821 (D. Del. 1999) 9

Lamden v. La Jolla Shores Condo. Homeowners Assn.,
 21 Cal. 4th 249 (Cal. 1999) 7

In re Murphy,
 288 B.R. 1 (D. Me. 2002)..... 7

In re Pac. Forest Indus., Inc.,
 95 B.R. 740 (Bankr. C.D. Cal. 1989) 5

DENTONS US LLP
 601 SOUTH FIGUEROA STREET, SUITE 2500
 LOS ANGELES, CALIFORNIA 90017-5704
 (213) 623-9300

1 *In re Sharon Steel Corp.*,
 161 B.R. 934 (Bankr. W.D. Pa. 1994)..... 5

2

3 *Sternberg v. Johnston*,
 595 F.3d 937 (9th Cir. 2010) 11

4

5 *Summit Land Co. v. Allen (In re Summit Land Co.)*,
 13 B.R. 310 (Bankr. D. Utah 1981)..... 7

6 *In re U.S. Airways Group, Inc.*,
 287 B.R. 643 (Bankr. E.D. Va. 2002) 6

7

8 *United States v. Energy Res. Co.*,
 495 U.S. 545 (1990) 12

9

10 *In re Walter*,
 83 B.R. 14 (B.A.P. 9th Cir. 1988)..... 6

11

12 *In re Wireless Telecomms. Inc.*,
 449 B.R. 228 (Bankr. M.D. Pa. 2011)..... 5

13

14 **Statutes**

15 11 United States Code

16 § 101 *et seq.* 1, 2

17 § 105 9, 10, 11, 12

18 § 362 10, 11, 12, 13

19 § 363 6, 10

20 § 365 12

21 § 549 10

22 § 1107 3

23 § 1108 3

24

25 28 United States Code

26 § 157 1

27 § 1334 1

28 § 1408 1

§ 1409 1

Rules and Regulations

Federal Rules of Bankruptcy Procedure

Rule 1007(d) 3

1 Rule 2002..... 3

2 Rule 6003..... 1

3 Rule 6004..... 3

4 Local Bankruptcy Rules

5 Rule 9013-9(d)..... 1, 2, 3

DENTONS US LLP
 601 SOUTH FIGUEROA STREET, SUITE 2500
 LOS ANGELES, CALIFORNIA 90017-5704
 (213) 623-9300

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

EMERGENCY MOTION

Pursuant to Local Bankruptcy Rule 9013-9 and §§ 362, 363, 365 and 105 of title 11 of the United States Code (the “Bankruptcy Code”),¹ Borrego Community Health Foundation (the “Debtor”), the debtor and debtor in possession in the above-captioned chapter 11 bankruptcy case (the “Case”), hereby moves, on an emergency basis (the “Motion”), for entry of an order (substantially in the form attached as **Exhibit “A”**, the “Proposed Order”): (i) authorizing the Debtor to (a) maintain its insurance coverage levels, including authority to revise, extend, supplement, renew or change insurance coverage as needed, (b) pay insurance premiums, self-insured retentions, broker fees and deductibles in the ordinary course of business, (c) continue its insurance premium financing program, and (d) pay certain administrative obligations associated therewith (collectively, the “Insurance Obligations”); and (ii) preventing insurance companies from enforcing any *ipso facto* clauses or giving any notice of termination or otherwise modifying or cancelling any insurance policies without first obtaining relief from the automatic stay imposed by § 362.

BACKGROUND INFORMATION

On September 12, 2022, the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

The Debtor is a nonprofit federally qualified health center (“FQHC”) that provides healthcare services to low income and rural patients (collectively, “Patients”) in San Diego and Riverside Counties through a system of twelve clinics, two pharmacies, and six mobile units. In 2021, the Debtor provided approximately 386,000 patient care visits to over 94,000 patients. The Debtor’s services include comprehensive primary care, urgent care, behavioral health, dental services, specialty

¹ All references to “§” or “section” herein are to sections of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 care, transgender health, women’s health, prenatal care, veteran’s health, chiropractic
2 services, tele-health, and pharmacy.

3 As set forth in the annexed Memorandum of Points and Authorities, the
4 Debtor filed this Case to protect its patient population and explore all available
5 restructuring options, particularly since its patient population faces risks as a result
6 of recent steps taken by the California Department of Health Care Services.

7 **SUMMARY OF REQUESTED RELIEF**

8 By this Motion, the Debtor seeks entry of an order: (i) authorizing the Debtor
9 to (a) maintain, continue and pay the Insurance Obligations and (ii) preventing
10 insurance companies from enforcing any *ipso facto* clauses or giving any notice of
11 termination or otherwise modifying or cancelling any insurance policies without first
12 obtaining relief from the automatic stay imposed by § 362. The Debtor requests that
13 the relief sought herein be granted on an emergency basis because it will suffer
14 irreparable harm without the relief requested in this Motion.

15 By way of background, the maintenance of the Debtor’s insurance coverage
16 summarized in **Exhibit “B”** to this Motion is vital to the operation of the Debtor’s
17 business, the health care system operated by the Debtor, and to the health, welfare,
18 safety and security of the patients who seek medical care therein. Payment of the
19 Insurance Obligations is necessary to maintain the Debtor’s insurance coverage
20 postpetition and must be made to avoid immediate and irreparable harm.

21 In support of the Motion, the Debtor has separately filed the *Declaration of*
22 *Isaac Lee, Chief Restructuring Officer of Borrego Community Health Foundation, in*
23 *Support of Debtor’s Emergency First Day Motions* (the “Lee Declaration”).

24 Based on the foregoing, and the reasons set forth below, the Debtor
25 respectfully requests that (i) the Motion be heard on an emergency basis,² pursuant to

26

27 ² Pursuant to LBR 9013-9(b), a separate motion for an expedited hearing is not
28 required.

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 Rule 9013-9 of the Local Bankruptcy Rules and Administrative Procedures (the
2 “LBR”) of the United States Bankruptcy Court for the Southern District of California
3 (the “Court”) and (ii) the Court grant the relief sought in the Motion.

4 **ADDITIONAL INFORMATION**

5 The Motion is based on the Notice of Emergency Motions that will be filed and
6 served after obtaining a hearing date for the Debtor’s “First Day Motions,” the
7 attached Memorandum of Points and Authorities, the Lee Declaration, the arguments
8 of counsel and other admissible evidence properly brought before the Court at or
9 before the hearing on this Motion. In addition, the Debtor requests that the Court take
10 judicial notice of all documents filed with the Court in this Case.

11 The Debtor will serve this Motion, the attached Memorandum of Points and
12 Authorities, the Lee Declaration and the Notice of Emergency Motions in accordance
13 with LBR 9013-9(d) and Appendix D1 of the LBR on: (i) the Office of the United
14 States Trustee; (ii) any alleged secured lenders; (iii) the twenty largest general
15 unsecured creditors appearing on the consolidated list filed in accordance with Rule
16 1007(d) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”); (iv)
17 the United States of America, and the State of California; and (v) parties that file with
18 the Court and serve upon the Debtor requests for notice of all matters in accordance
19 with Bankruptcy Rule 2002(i). To the extent necessary, the Debtor requests that the
20 Court waive compliance with Bankruptcy Rules 2002 and 6004(a) and approve
21 service (in addition to the means of services set forth in such LBR) by overnight
22 delivery and telephonic notice.

23 Pursuant to Appendix D-1(8) of the LBR, any party who opposed this
24 Emergency First Day Motion must immediately notify the Bankruptcy Judge’s law
25 clerk of its position by telephone at (619) 557-6750. No opposition may be filed to
26 an Emergency First Day Motion unless authorized by the Court.

27
28

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

In the event that the Court grants the relief requested by the Motion, the Debtor shall provide notice of the entry of the order granting such relief upon each of the foregoing parties and any other parties in interest as the Court directs. The Debtor submits that such notice is sufficient and that no other or further notice be given.

CONCLUSION

WHEREFORE, for all the foregoing reasons and such additional reasons as may be advanced at or prior to the hearing regarding this Motion, the Debtor respectfully requests that the Court enter an order: (i) authorizing the Debtor to (a) maintain its insurance coverage levels, including authority to revise, extend, supplement, renew or change insurance coverage as needed, (b) pay insurance premiums, self-insured retentions, broker fees and deductibles in the ordinary course of business, (c) continue its insurance premium financing program, and (d) pay certain administrative obligations associated therewith; and (ii) preventing insurance companies from enforcing any *ipso facto* clauses or giving any notice of termination or otherwise modifying or cancelling any insurance policies without first obtaining relief from the automatic stay imposed by § 362; and (iii) granting the Debtor such other and further relief as the Court deems just and proper.

Dated: September 12, 2022

DENTONS US LLP
SAMUEL R. MAIZEL
TANIA M. MOYRON

By /s/ Tania M. Moyron
Tania M. Moyron

Proposed Attorneys for the Chapter 11
Debtor and Debtor In Possession

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Pursuant to Appendix D1-1 of the Local Bankruptcy Rules of the United States Bankruptcy Court for the Southern District of California (the “LBR”), Rule 6003 of the Federal Rules of Bankruptcy Procedures (the “Bankruptcy Rules”), and §§ 362, 363 365 and 105 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”),³ Borrego Community Health Foundation (the “Debtor”), the debtor and debtor in possession in the above-captioned Chapter 11 bankruptcy case (the “Case”) has moved, on an emergency basis, in the Motion (the “Motion”) for entry of an order (substantially in the form attached hereto as **Exhibit “A”**, the “Proposed Order”): (i) authorizing the Debtor to (a) maintain its insurance coverage levels, including authority to revise, extend, supplement, renew or change insurance coverage as needed, (b) pay insurance premiums, self-insured retentions, broker fees and deductibles in the ordinary course of business, (c) continue its insurance premium financing program, and (d) pay certain administrative obligations associated therewith (collectively, the “Insurance Obligations”);⁴ and (ii) preventing insurance companies from enforcing any *ipso facto* clauses or giving any notice of termination or otherwise modifying or cancelling any insurance policies without first obtaining relief from the automatic stay imposed by § 362.

³ All references to “§” or “section” herein are to sections of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

⁴ The insurance coverages and Insurance Obligations to which this Motion relate are coverages and obligations that relate to the insurance policies summarized in **Exhibit “B”** hereto (the “Insurance Policies”). For the avoidance of doubt, to the extent that the relief sought in this Motion overlaps with the relief sought in the Debtor’s motion to pay employee wages, salaries and benefits, the Debtor seeks authority to pay any obligation only once.

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 **II. JURISDICTION**

2 This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§
3 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The
4 venue of this Case is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

5 **III. STATEMENT OF FACTS**

6 **A. General Background**

7 1. On September 12, 2022 (“Petition Date”), the Debtor filed a voluntary
8 petition for relief under chapter 11 of title 11 of the United States Code (the
9 “Bankruptcy Code”).⁵

10 2. The Debtor is a non-profit 501(c)(3) public charity, a federally qualified
11 health center (“FQHC”), and a federal tort claims act deemed facility that, as of
12 September 12, 2022, had twenty-four (24) brick and mortar sites, including
13 administrative sites, two (2) pharmacies, and six (6) mobile units. The Debtor’s
14 service area covers a 250-mile corridor on the eastern side of San Diego and Riverside
15 Counties, California. In 2021, the Debtor provided approximately 386,000 patient
16 care visits.

17 3. FQHCs are federally designated entities that receive higher state
18 payments to provide health care services to low income and rural families. The
19 Debtor’s health services are targeted to families with incomes below 200% of the
20 poverty level. As an FQHC, the Debtor strives to deliver high quality, comprehensive,
21 compassionate primary health care to people in the surrounding area, regardless of
22 ability to pay.

23 4. The Debtor was organized in the early 1990s to operate a holistic health
24 clinic in Borrego Springs, a small, unincorporated community in the northeast corner
25 of San Diego County, California. In 2002, when the Debtor gained recognition as an
26

27 ⁵ All references to “§” or “section” herein are to sections of the Bankruptcy Code, 11
28 U.S.C. §§ 101 *et seq.*, as amended.

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 FQHC, it operated one clinic in Borrego Springs with seventeen (17) employees
2 providing 7,400 patient visits. The Debtor has since grown to approximately 700
3 employees serving over 94,000 patients in eighteen (18) clinics, and six (6) mobile
4 units throughout San Diego and Riverside counties excluding Riverside Community
5 Health Foundation (“RCHF”) affiliated clinics.

6 5. The Debtor strives to be the community leader in improving the health
7 of the populations in our service area. Its primary focus is the underserved, with an
8 empowered workforce providing measurable quality and compassionate care.

9 6. The Debtor’s services include comprehensive primary care, pediatric
10 care, urgent care, behavioral health, dental services, specialty care, transgender health,
11 women’s health, prenatal care, veteran’s health, chiropractic services, telehealth and
12 pharmacy.

13 7. The Debtor is an active partner in the training of medical residents,
14 medical students, nurse practitioner students, physician assistant students, nursing
15 students, and other healthcare professionals.

16 8. Since the commencement of the Case, the Debtor has been operating its
17 business as debtor in possession pursuant to §§ 1107 and 1108 of the Bankruptcy
18 Code.

19 9. To date, no official committee or examiner has been appointed by the
20 Office of the United States Trustee in this Case.

21 10. Additional background facts on the Debtor, including an overview of the
22 Debtor’s business, information on the Debtor’s capital structure and additional events
23 leading up to this Case, are contained in Lee Declaration.

24 **B. Relevant Background to the Motion**

25 1. The Debtor maintains various insurance policies issued by several
26 insurance carriers (collectively, the “Insurance Carriers”). Collectively, these policies
27 provide for coverage for, among other things: workers’ compensation and employee
28

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 liability, general liability, and professional liability, commercial property, commercial
2 automobile, management liability (directors and officers), employee benefits and
3 other coverage (collectively, the “Insurance Policies”). A schedule and summary of
4 the Insurance Policies is attached hereto as **Exhibit “B”**.

5 2. As set forth in **Exhibit “B”**, most of the Debtor’s Insurance Policies will
6 expire beginning on March 1, 2023 or later. It is critical that the Debtor continues to
7 carry the necessary insurance coverage to operate its business. The Debtor seeks the
8 authority to renew, modify, extend or enter into new Insurance Policies (collectively,
9 the “New Insurance Policies”) on a postpetition basis in the ordinary course of
10 business.

11 3. In certain instances, the Debtor pays premiums for its Insurance Policies
12 in full at the beginning of the policy and in other instances in monthly installments as
13 reflected in **Exhibit “B”**. Debtor also has premium financing in place for certain of
14 its policies through First Insurance Funding. To ensure continued insurance coverage
15 in the ordinary course of the Debtor’s business, the Debtor seeks the authority to pay
16 all premium payments or insurance financing payments that may come due on current
17 Insurance Policies during the course of this Case. *See* **Exhibit “B”**. The Debtor also
18 seeks authority to pay all premiums associated with the New Insurance Policies on a
19 postpetition basis in the ordinary course of business.

20 4. The Debtor also seeks authority to pay its deductibles and self-insured
21 retention amounts such amounts come due on a postpetition basis, including any
22 amounts accrued and not due as of the Petition Date, in the ordinary course of
23 business.

24 5. The Debtor’s insurance brokers are Marsh McLennan Agency and
25 Arthur J. Gallagher. Debtor seeks to pay brokerage commission and other amounts
26 due to its brokers in the ordinary course of business.

27
28

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 6. The Debtor also seeks to pay any claims administration costs in the
2 ordinary course of business.

3 7. The Debtor estimates that the total amount of pre-petition amounts owed
4 related to its Insurance Programs including commissions and fees set forth above are
5 up to \$275,000.

6 **IV. DISCUSSION**

7 The following is a discussion of the key caselaw and statutes relevant to the
8 Motion.

9 **A. Ordinary Course Payments**

10 “[A] debtor receiving necessary benefits from a prepetition executory insurance
11 contract must accord the nondebtor party an administrative expense priority for the
12 pro rata share of the premium, during the period in which the estate received benefits
13 from the contract.” *In re Sharon Steel Corp.*, 161 B.R. 934, 937 (Bankr. W.D. Pa.
14 1994) (*quoting In re Gamma Fishing Co., Inc.*, 70 B.R. 949 (Bankr. S.D. Cal. 1987)).
15 Administrative expenses incurred in the ordinary course of business are payable in
16 the ordinary course of business. *In re Wireless Telecomms. Inc.*, 449 B.R. 228, 235
17 n. 5 (Bankr. M.D. Pa. 2011) (*quoting* 4 *Collier on Bankruptcy*, 16th ed., ¶ 503.03[4],
18 503–17) (“‘ordinary course of business’ administrative expenses (such as current
19 postpetition wages and trade debt) generally are paid when due. . . . Additionally,
20 section 363(c) allows a trustee to use property of the estate in the ordinary course of
21 business without providing for notice or an opportunity for a hearing.”); *In re Pac.*
22 *Forest Indus., Inc.*, 95 B.R. 740, 743 (Bankr. C.D. Cal. 1989) (*quoting* 3 *Collier on*
23 *Bankruptcy*, 15th ed., ¶ 503.01) (“there is a virtually unstated assumption that
24 ‘ordinary course of business’ administrative expenses (such as current post petition
25 wages and trade debt) will be paid when due.”)).

26 The Debtor’s insurance premiums that come due postpetition must be paid to
27 maintain the Debtor’s postpetition insurance coverage. Also, the self-insured
28

1 retentions and deductibles incurred for postpetition occurrences must be paid to
2 maintain postpetition insurance coverage. The maintenance of the Debtor's
3 postpetition insurance coverage is essential to the operation of the Debtor's business.
4 Thus, the Debtor's expenses for postpetition insurance premiums, self-insured
5 retentions and deductibles are administrative in nature and are appropriately paid by
6 Debtor in the ordinary course of business.

7 **B. Payment of insurance Obligations under §§ 363(b) and 105,**
8 **including prepetition amounts, is necessary to operate**

9 In some limited circumstances, the insurance premiums, self-insured
10 retentions, and other Insurance Obligations owed by the Debtor relate to occurrences
11 prior to the Petition Date.

12 The Debtor submits that payment of these Insurance Obligations is appropriate
13 pursuant to §§ 105(a), 363(b), 364, 1107(a) and 1108, as well as the "necessity of
14 payment" doctrine.

15 i. *Payment of the Insurance Obligations is appropriate under*
16 *Section 363 of the Bankruptcy Code.*

17 This Court may authorize the Debtor's proposed payment of Insurance
18 Obligations under § 363(b)(1). Section 363(b)(1) authorizes a bankruptcy court, after
19 notice and a hearing, to authorize a debtor to "use, sell, or lease, other than in the
20 ordinary course of business, property of the estate." *See* 11 U.S.C. § 363(b)(1). In
21 order to obtain approval for the use of estate assets outside of the ordinary course of
22 business, a debtor must articulate a valid business justification for the requested use.
23 *See In re Walter*, 83 B.R. 14, 20 (B.A.P. 9th Cir. 1988) (*quoting In re Continental Air*
24 *Lines, Inc.*, 780 F.2d 1223 (5th Cir.1986)) ("for the debtor-in-possession or trustee to
25 satisfy its fiduciary duty to the debtor, creditors and equity holders, there must be
26 some articulated business justification for using, selling, or leasing the property
27 outside the ordinary course of business"); *In re U.S. Airways Group, Inc.*, 287 B.R.

1 643, 645 (Bankr. E.D. Va. 2002); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175
2 (Bankr. S.D.N.Y. 1989).

3 “The [business judgment] rule establishes a presumption that directors’
4 decisions are based on sound business judgment, and it prohibits courts from
5 interfering in business decisions made by the directors in good faith and in the absence
6 of a conflict of interest.” *Berg & Berg Enters. v. Boyle*, 178 Cal. App. 4th 1020, 1045
7 (Cal. 2009). “A hallmark of the business judgment rule is that, when the rule’s
8 requirements are met, a court will not substitute its own judgment for that of the
9 corporation’s board of directors.” *Lamden v. La Jolla Shores Condo. Homeowners*
10 *Assn.*, 21 Cal. 4th 249, 257 (Cal. 1999) (citing *Katz v. Chevron Corp.*, 22 Cal. App.
11 4th 1352, 1366 (Cal. 1994)).

12 When applying the “business judgment” rule, courts show great deference to
13 the debtor’s decision making. *See, e.g., In re Castre*, 312 B.R. 426, 430 (Bankr. D.
14 Colo. 2004); *In re Murphy*, 288 B.R. 1, 5 (D. Me. 2002); *In re Bakalis*, 220 B.R. 525,
15 532 (Bankr. E.D.N.Y. 1998); *In re First Wellington Canyon Assocs.*, 1989 WL
16 165028, *1 (N.D. Ill Dec. 28, 1989); *Summit Land Co. v. Allen (In re Summit Land*
17 *Co.)*, 13 B.R. 310, 315 (Bankr. D. Utah 1981). Because certain of the Insurance
18 Obligations are entitled to priority status, and because maintenance and renewal of
19 insurance coverage is vital to the Debtor’s ongoing operations, it is in the best interest
20 of the Debtor’s estate to pay such insurance obligations in the ordinary course of
21 business during this Case.

22 Additionally, it is critical that (i) the Debtor maintains its Insurance Policies
23 and renew or enter into the New Insurance Policies, as applicable, in order to provide
24 a comprehensive range of coverage that protects its business and property; and (ii) the
25 Debtor has no rupture in its relationship with carriers, from which it seeks renewals,
26 and its service providers that administer its workers compensation and professional
27 and general liability coverage. The insurance coverage provided under the Insurance
28

1 Policies is essential to the continued operations of the Debtor, and some of the
2 Insurance Policies are required by various state and federal regulations and by
3 contracts that govern the Debtor's business. Disruption of the Debtor's insurance
4 coverage would expose the Debtor to serious risks, including: (a) the incurrence of
5 direct liability for the payment of claims that otherwise would have been payable by
6 the Insurance Carriers; (b) the occurrence of material costs and other losses that would
7 have otherwise been reimbursed by the Insurance Carriers; (c) the loss of good-
8 standing certification to conduct business in California; (d) the inability to obtain
9 similar types of insurance coverage; and (e) the incurrence of higher costs for
10 obtaining new insurance coverage. Granting the relief requested herein would avoid
11 these consequences and would allow the Debtor's business operations to continue
12 without interruption during the chapter 11 process.

13 Further, if the Debtor is unable to pay the premiums and obligations necessary
14 to maintain the Insurance Policies, it may be unable to find alternative insurance
15 carriers willing to offer the Debtor similar insurance at a competitive price given the
16 magnitude of the insured's risk and the additional risk of non-payment. While the
17 Debtor questions the right of any insurer to terminate the Insurance Policies for non-
18 payment of premiums, any litigation associated with such alleged termination would
19 be contested, and thus, very costly to the Debtor's estate.

20 The Debtor represents that it has sufficient availability of funds to pay the
21 amounts described herein in the ordinary course of business by virtue of existing cash
22 on hand and expected cash flows from ongoing business operations and grants. Also,
23 under the Debtor's existing cash management system, the Debtor represents that
24 checks or wire transfer requests can be readily identified as relating to an authorized
25 payment of the Insurance Obligations. Accordingly, the Debtor believes that checks
26 or wire transfer requests, other than those relating to authorized payments, will not be
27 honored inadvertently and that all applicable financial institutions should be
28

1 authorized, when requested by the Debtor, to receive, process, honor and pay any and
2 all checks or wire transfer requests with respect to the Insurance Obligations.

3 ii. *Payment of the Insurance Obligations is appropriate under*
4 *Section 105 of the Bankruptcy Code.*

5 Section 105 of the Bankruptcy Code provides a separate, additional basis for
6 payment of the Insurance Obligations.

7 The Debtor's proposed payment of the Prepetition Obligations also should be
8 authorized under the "doctrine of necessity," which is grounded in § 105(a). Pursuant
9 to § 105, this Court "may issue any order . . . that is necessary or appropriate to carry
10 out the provisions" of the Bankruptcy Code. 11 U.S.C. § 105.

11 The doctrine of necessity permits a bankruptcy court to authorize payment of
12 certain prepetition claims prior to the completion of the chapter 11 case where the
13 payment of such claims is necessary to the chapter 11 efforts. *See In re Just for Feet,*
14 *Inc.*, 242 B.R. 821, 826 (D. Del. 1999) (stating that where the debtor "cannot survive"
15 absent payment of certain prepetition claims, the doctrine of necessity should be
16 invoked to permit payment); *In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 191-192
17 (Bankr. D. Del. 1994) (noting that debtors may pay prepetition claims that are
18 essential to continued operation of business) (*citing In re Lehigh & New England Ry.*
19 *Co.*, 657 F.2d 570, 581 (3d Cir. 1981)).

20 The doctrine of necessity is a widely accepted component of modern
21 bankruptcy jurisprudence. *See, e.g., In re Braniff, Inc.*, 218 B.R. 628, 633 (Bankr.
22 M.D. Fla. 1998) (noting that debtors may pay prepetition wages when necessary to
23 ensure employees remain on the job postpetition); *Just For Feet*, 242 B.R. at 826
24 (approving payment of key inventory suppliers' prepetition claims when such
25 suppliers could destroy debtor's business by refusing to deliver new inventory on eve
26 of debtor's key sales season); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr.
27 S.D.N.Y. 1989) (recognizing that the doctrine of necessity is derived from the court's
28 equitable powers and allows debtors to make payment on prepetition claims to

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 creditors who will refuse to supply services or material essential to the conduct of the
2 debtors’ business).⁶

3 The Debtor submits that the payment of the Insurance Obligations represents a
4 sound exercise of the Debtor’s business judgment, is necessary to avoid immediate
5 and irreparable harm to the Debtor’s estate, and is therefore justified under §§ 105(a)
6 and 363(b) of the Bankruptcy Code. Paying insurance premiums, self-insured
7 retentions, deductibles, and other Insurance Obligations will benefit the Debtor’s
8 estate and its creditors by allowing the Debtor’s business operations to continue
9 without interruption. Indeed, the Debtor believes that without the relief requested
10 herein, it will be unable maintain its current insurance coverage or find suitable
11 replacement or renewal insurance coverage. Without insurance coverage the Debtor
12 will be unable to maintain patient care, operate its business and successfully complete
13 its Case.

14 For the reasons discussed herein, payment of the Insurance Obligations is
15 necessary to ensure that the Debtor is able to continue to treat patients and maintain
16 operations postpetition. This Court should exercise its equitable powers to grant the
17 relief requested in this Motion.

18
19
20

21 ⁶ The Debtor is mindful that in *In re B&W Enters.*, 713 F.2d 534 (9th Cir. 1983), the
22 Ninth Circuit refused to extend the “necessity of payment” doctrine beyond the
23 railroad reorganization case where the debtor made unauthorized postpetition
24 payments to trade suppliers on prepetition debts. In *B&W*, after conversion to chapter
25 7, the trustee sought to recover the payments under section 549 of the Bankruptcy
26 Code. That case is factually distinguishable from the instant one in that *B&W* (a)
27 involved ordinary trade suppliers for which the claims were not entitled to priority,
28 (b) did not seek prior court approval for the payments, and (c) was liquidating, thereby
rendering the “necessity” of such payments moot. Further, the payment authority
requested by this Motion, as it relates to prepetition occurrences, is separately and
independently warranted under § 363(b)(1).

1 **C. The Automatic Stay**

2 The Debtor also requests that the Court prevent the Insurance Carriers from
3 giving any notice of termination or otherwise modifying or canceling any Insurance
4 Policies without obtaining relief from the automatic stay imposed by § 362. The
5 purpose of this relief is to aid in the administration of the Debtor's Case and to
6 preserve patient care and thereby the value of the business operations. The Debtor's
7 Insurance Carriers may be unfamiliar with the protections afforded chapter 11 debtors
8 under § 362, and thus, an order of this Court affirming these protections would help
9 avoid costly and unnecessary litigation.

10 As a result of the commencement of the Debtor's Case, and by operation of law
11 pursuant to § 362, the automatic stay prevents all persons from, *inter alia*, (a)
12 commencing or continuing any judicial, administrative or other proceeding against
13 the Debtor, (b) taking any action to exercise control over property of the estate, or (c)
14 taking any action to collect, assess or recover a claim against the Debtor that arose
15 before the commencement of such case. *See* 11 U.S.C. § 362(a).

16 The appropriate procedure for obtaining Court approval of termination under
17 an insurance policy is to seek relief from the automatic stay. *In re Adana Mortg.*
18 *Bankers, Inc.*, 12 B.R. 983, 988 (Bankr. N.D. Ga. 1980). The injunctions contained
19 in § 362 are self-executing and constitute fundamental debtor protections, which, in
20 combination with other provisions of the Bankruptcy Code, provide the Debtor with
21 the "breathing spell" that is essential to the Debtor's ability to reorganize. *See, e.g.*,
22 *Sternberg v. Johnston*, 595 F.3d 937, 948 (9th Cir. 2010), *overruled on other grounds*,
23 *In re Schwartz-Tallard*, 803 F.3d 1095 (9th Cir. 2015).

24 As fundamental as the foregoing protections may be, and notwithstanding that
25 they arise as a matter of law upon commencement of a chapter 11 case, not all parties
26 affected or potentially affected by the commencement of a chapter 11 case are aware
27 of the Bankruptcy Code provisions or cognizant of their significance and impact.
28

1 Experience has shown that it is often necessary to advise third parties of the existence
2 and effect of § 362 and, occasionally, it is necessary to commence proceedings in the
3 bankruptcy court to enforce the protections contained therein.

4 The Debtor submits that this Court has ample authority to grant the relief sought
5 herein. Under § 105(a), “the Court may issue any order, process, or judgment that is
6 necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a).
7 The purpose of § 105(a) is “to assure the bankruptcy courts power to take whatever
8 action is appropriate or necessary in aid of the exercise of their jurisdiction.” 2 Collier
9 on Bankruptcy, ¶ 105.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed). This is
10 consistent with the broad equitable authority of the bankruptcy courts. *See, e.g.,*
11 *United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990).

12 Accordingly, the Debtor believes that under the circumstances of this Case,
13 entry of the proposed order, which incorporates a restatement of the applicable
14 provisions of § 362, would help protect the Debtor from violations of these crucial
15 provisions by Insurance Carriers. It would also spare the Debtor from the burden and
16 expense of commencing proceedings to enforce the Bankruptcy Code. Accordingly,
17 an order entered by this Court enforcing the automatic stay may increase substantially
18 the efficiency of the administration of this case.

19 To the extent an Insurance Policy is deemed an executory contract within the
20 meaning of § 365, the Debtor does not at this time intend to assume such agreement.
21 Court authorization of payment shall not be deemed to constitute postpetition
22 assumption or adoption thereof as an executory contract pursuant to § 365 of the
23 Bankruptcy Code. The Debtor is in the process of reviewing the Insurance Policies
24 and reserve all of its rights under the Bankruptcy Code with respect thereto.

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

D. IpsO Facto Provisions Unenforceable.

Under § 365(e)(1), *ipso facto* provisions are not enforceable in bankruptcy. The Court should enter an order making clear that the above-referenced *ipso facto* clauses in any of the Insurance Policies are not enforceable.

V. CONCLUSION

WHEREFORE, for all the foregoing reasons and such additional reasons as may be advanced at or prior to the hearing on this Motion, the Debtor respectfully requests entry the Proposed Order (substantially in the form attached hereto as **Exhibit “A”**) (i) authorizing the Debtor to (a) maintain its insurance coverage levels, including authority to revise, extend, supplement, renew or change insurance coverage as needed, (b) pay insurance premiums, self-insured retentions, broker fees and deductibles in the ordinary course of business, (c) continue its insurance premium financing program, and (d) pay certain administrative obligations associated therewith; (ii) preventing insurance companies from enforcing any *ipso facto* clauses or giving any notice of termination or otherwise modifying or cancelling any insurance policies without first obtaining relief from the automatic stay imposed by § 362; and (iii) granting the Debtor such other and further relief as the Court deems just and proper.

Dated: September 12, 2022

DENTONS US LLP
SAMUEL R. MAIZEL
TANIA M. MOYRON

By /s/ Tania M. Moyron
Tania M. Moyron

Proposed Attorneys for the Chapter 11
Debtor and Debtor In Possession

Exhibit “A”
(Proposed Order)

CSD 1008 [08/21/00]
Name, Address, Telephone No. & I.D. No.
DENTONS US LLP
SAMUEL R. MAIZEL (Bar No. 189301)
TANIA M. MOYRON (Bar No. 235736)
601 South Figueroa Street, Suite 2500
Los Angeles, California 90017-5704
Tel: (213) 623-9300 | Fax: (213) 623-9924

Proposed Attorneys for the Chapter 11 Debtor and Debtor in Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West F Street, San Diego, California 92101-6991

In Re
BORREGO COMMUNITY HEALTH FOUNDATION

Debtor.

BANKRUPTCY NO. 22-02384
Date of Hearing:
Time of Hearing:
Name of Judge: Honorable Laura S. Taylor

ORDER ON

Emergency First Day Motion for Entry of an Order (I) Authorizing The Debtor To (A) Maintain Insurance Program, (B) Pay Insurance Premiums and Brokerage Commissions In The Ordinary Course, (C) Continue Insurance Premium Financing Program, And (D) Pay All Obligations Associated Therewith; And (II) Preventing Insurance Companies From Enforcing IPSO Facto Clauses Or Giving Any Notice Of Termination Or Otherwise Modifying Any Insurance Policy Without Obtaining Relief From The Automatic Stay

The court orders as set forth on the continuation pages attached and numbered 2 through 3 with exhibits, if any, for a total of pages 5. Motion/Application Docket Entry No. _____.

//

//

//

//

//

//

//

DATED:

Judge, United States Bankruptcy Court

CSD 1001A

CSD 1001A [07/01/18] (Page 2)

ORDER ON Emergency First Day Motion for Entry of an Order (I) Authorizing The Debtor To (A) Maintain Insurance Program, (B) Pay Insurance Premiums and Brokerage Commissions In The Ordinary Course, (C) Continue Insurance Premium Financing Program, And (D) Pay All Obligations Associated Therewith; And (II) Preventing Insurance Companies From Enforcing IPSO Facto Clauses Or Giving Any Notice Of Termination Or Otherwise Modifying Any Insurance Policy Without Obtaining Relief From The Automatic Stay

DEBTOR: BORREGO COMMUNITY HEALTH FOUNDATION

CASE NO: 22-02384

Having considered the Emergency Motion,¹ the accompanying Memorandum of Points and Authorities in support of the Emergency Motion, and the Declaration of Isaac Lee in support of the Emergency Motion, the arguments of counsel at the hearing, and good cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is granted in its entirety.
2. The Debtor is authorized to:
 - (a) maintain its insurance coverage levels, including authority to revise, extend, supplement, renew or change insurance coverage as needed,
 - (b) pay insurance premiums, self-insured retentions, broker fees and deductibles in the ordinary course of business,
 - (c) continue its existing insurance premium financing program or any extensions or renewals of that program, and
 - (d) pay certain administrative obligations associated therewith.
3. The Debtor's insurers are barred from enforcing any *ipso facto* clauses or giving any notice of termination or otherwise modifying or cancelling any insurance policies without first obtaining relief from the automatic stay imposed by section 362 of the Bankruptcy Code.
4. Notice of the Emergency Motion as provided therein shall be deemed good and sufficient notice, and the requirements of Bankruptcy Rules 2002 and 6004(a) and LBR 9013(9)(d) and Appendix D-1(2) the Local Bankruptcy Rules are waived and/or satisfied by such notice.
5. The Debtor is authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

¹ Defined terms in this Order shall have the same meaning as in the Emergency Motion unless otherwise defined herein.

CSD 1001A [07/01/18] (Page 3)

6. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

###

EXHIBIT “B”

(Schedule and summary of the Insurance Policies)

Borrego Community Health Foundation
Insurance Summary

Private & Confidential
Preliminary Draft - Subject to Material Change

Name	Type	Policy #	Term Start	Term End	Annual Premium ⁽¹⁾	Premium Financing
Allied World National Assurance Company	Cyber	0312-2597	3/1/2022	3/1/2023	\$121,319	Yes
Allied World Surplus Lines Insurance Company	Excess Liability Insurance	0312-7698	3/1/2022	3/1/2023	270,017	Yes
Evanston Insurance Company	Not for Profit Management Liability (D&O)	MKLV3MMN000062	3/1/2022	3/1/2023	345,886	Yes
Starr Indemnity & Liability Company	Excess Liability Insurance (Directors & Officers Liability/Employment Practices Liability)	100062322221	3/1/2022	3/1/2023	117,650	Yes
General Security Indemnity Company of Arizona	Flood, Including Earthquake Sprinkler Leakage	TR0001486-12619-22	3/1/2022	3/1/2023	23,640	Yes
Mercer Insurance Company	Flood, Including Earthquake Sprinkler Leakage	ARH00001402	3/1/2022	3/1/2023	78,068	Yes
Palomar Excess and Surplus Insurance Company	Flood, Including Earthquake Sprinkler Leakage	PE701503	3/1/2022	3/1/2023	132,520	Yes
Intact Insurance Management Liability (Atlantic Specialty Insurance Company)	Employed Lawyers Professional Liability ("ELPL")	MML-23089-22	3/1/2022	3/1/2023	6,000	Yes
Philadelphia Insurance Companies	Commercial Inland Marine Coverage Part UltimateCover Property Coverage Part	PHPK2385408	3/1/2022	3/1/2023	171,178	No
BETA Risk Management Authority / BETA Healthcare Group	Professional Liability Bodily Injury and Property Damage Personal Injury, Advertising Injury Employee Benefits Liability	HCL-22-1052	7/1/2022	7/1/2023	186,724	No
BETA Risk Management Authority / BETA Healthcare Group	Auto Liability Physical Damage	AL-22-1052	7/1/2022	7/1/2023	110,965	No
BETA Risk Management Authority / BETA Healthcare Group	Workers Compensation Employee Liability	WC-22-1052	7/1/2022	7/1/2023	1,179,361	No
Starr Indemnity & Liability Company	Aviation Insurance Policy	1000239641-01	9/1/2020	9/1/2023	6,750	No

(1) Includes related fees and taxes