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Attorneys for the Chapter 11 Debtors and Debtors In Possession

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION

In re

VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al.*,

Debtors and Debtors In Possession.

☒ Affects All Debtors

☐ Affects Verity Health System of California, Inc.
☐ Affects O'Connor Hospital
☐ Affects Saint Louise Regional Hospital
☐ Affects St. Francis Medical Center
☒ Affects St. Vincent Medical Center
☐ Affects Seton Medical Center
☐ Affects O'Connor Hospital Foundation
☐ Affects Saint Louise Regional Hospital Foundation
☐ Affects St. Francis Medical Center of Lynwood Foundation
☐ Affects St. Vincent Foundation
☐ Affects St. Vincent Dialysis Center, Inc.
☐ Affects Seton Medical Center Foundation
☐ Affects Verity Business Services
☐ Affects Verity Medical Foundation
☐ Affects Verity Holdings, LLC
☐ Affects De Paul Ventures, LLC
☐ Affects De Paul Ventures - San Jose ASC, LLC

Debtors and Debtors In Possession.

Lead Case No. 2:18-bk-20151-ER

Jointly Administered With:

Case No. 2:18-bk-20162-ER
Case No. 2:18-bk-20163-ER
Case No. 2:18-bk-20164-ER
Case No. 2:18-bk-20165-ER
Case No. 2:18-bk-20167-ER
Case No. 2:18-bk-20168-ER
Case No. 2:18-bk-20169-ER
Case No. 2:18-bk-20171-ER
Case No. 2:18-bk-20172-ER
Case No. 2:18-bk-20173-ER
Case No. 2:18-bk-20175-ER
Case No. 2:18-bk-20176-ER
Case No. 2:18-bk-20178-ER
Case No. 2:18-bk-20179-ER
Case No. 2:18-bk-20180-ER
Case No. 2:18-bk-20181-ER

Hon. Judge Ernest M. Robles

DEBTORS' MEMORANDUM IN SUPPORT OF ENTRY OF AN ORDER, PURSUANT TO 11 U.S.C. § 363(b), (f), AND (m), (A) AUTHORIZING THE SALE OF CERTAIN ASSETS OF ST. VINCENT MEDICAL CENTER, VERITY HOLDINGS, LLC, AND VERITY HEALTH SYSTEM OF CALIFORNIA, INC., FREE AND CLEAR OF ALL CLAIMS, LIENS AND ENCUMBRANCES; (B) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF DESIGNATED EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (C) GRANTING RELATED RELIEF

Hearings:
Date: April 10, 2020
Time: 1:30 p.m.
Location: Courtroom 1568
255 E. Temple St., Los Angeles, CA

1820151200410000000000002

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MEMORANDUM

Verity Health System of California, Inc. ("VHS") and the above-referenced affiliated debtors, the debtors and debtors in possession in the above-captioned chapter 11 bankruptcy cases (collectively, the "Debtors"), hereby file this Memorandum in support of the entry of an order of, pursuant to section 363(b), (f), and (m) of title 11 of the United States Code, §§ 101 *et seq*. (the "Bankruptcy Code"),[1] approving the sale of Debtors' hospital St. Vincent Medical Center, a California nonprofit public benefit corporation ("St. Vincent"), and related assets (collectively with the hospital, the "Assets"), to the Chan Soon-Shiong Family Foundation or its permitted assignee (the "Purchaser"), in accordance with the terms of the Asset Purchase Agreement ("APA"), attached as Exhibit "A" to the Motion (as defined below). Pursuant to the Bidding Procedures Order (defined below), on April 29, 2020, at 10:00 a.m., the Debtors will seek the Court's approval of the Debtors' assumption and assignment to the Purchaser of those unexpired leases and executory contracts that the Purchaser wishes to assume and have assigned to it (defined in the APA as the "Assumed Contracts") on the terms set forth in the APA. For all of the reasons set forth herein and those in the Motion, and with the support of the Official Committee of Unsecured Creditors (the "Committee") and the Debtors' prepetition secured creditors (the "Prepetition Secured Creditors"), and the attached declarations of Richard G. Adcock (the "Adcock Declaration") and James M. Moloney (the "Moloney Declaration"), and a declaration from the Purchaser that will be filed in support of the Sale, the Debtors respectfully request that the Court enter the Sale Order.

I.
INTRODUCTION

The sale of St. Vincent to the Purchaser will conclude a harrowing chapter in the Debtors' cases, will generate significant value to the estates, and ensure that the St. Vincent facilities continue their essential role of providing critical access to health care in this time of need in our Los Angeles communities. St. Vincent was the oldest hospital in Los Angeles with a longstanding

[1] All references to § herein are to sections of the Bankruptcy Code; all references to "Bankruptcy Rules" are to provisions of the Federal Rules of Bankruptcy Procedure.

charitable mission to provide healthcare to Los Angeles's underserved communities. However, after the collapse of the sale to Strategic Global Management, Inc. and the ongoing operational losses, the Debtors, as responsible stewards of patient care, were required to make the difficult decision to close St. Vincent. Immediately thereafter, the Debtors reinstituted their marketing efforts and, just months later, the global COVID-19 pandemic saw renewed need for the St. Vincent facilities. The Debtors entered into an agreement to lease the former hospital building at the St. Vincent campus to the State of California in its efforts to address COVID-19. Further, following an intensive marketing process, the Debtors received an offer to purchase St. Vincent from the Purchaser for approximately $135 million. The Purchaser will assume the lease with the State and use the other buildings on the St. Vincent campus to conduct critical COVID-19 research. In just three months, the St. Vincent facilities are on the verge of rededication to their original charitable mission of service to their communities.

The Debtors' Prepetition Secured Creditors, the Committee, and the majority of other stakeholders in these Cases support the Sale to the Purchaser. Yet, the California Attorney General opposes the Sale despite the clear benefits to St. Vincent's communities and the Debtors' constituents. In the objection, the Attorney General presents a self-serving analysis of Section 5920 of the California Corporations Code to conclude that the Attorney General retains authority to review the Sale even though St. Vincent is closed, no longer operates or provides health care services at the closed facility, and will surrender its license. As set forth more fully below, the Attorney General's reading of the statute ignores its narrow scope and, perhaps worse, threatens public health and attempts to derail the Sale in contravention of the Attorney General's mandate to preserve and protect charitable assets for the benefit of Californians.

The Debtors have exercised their reasonable business judgment to conclude that the Sale to the Purchaser is in the best interests of their estates and stakeholders. In light of the foregoing, and as set forth more fully below, the Debtors respectfully request that the Court overrule any objections and approve the Sale.

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II.

STATEMENT OF FACTS

A. General Background

1. On August 31, 2018 (the "Petition Date"), the Debtors each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Since the commencement of their cases, the Debtors have been operating their businesses as debtors in possession pursuant to §§ 1107 and 1108.

2. Debtor VHS, a California nonprofit public benefit corporation, is the sole corporate member of five Debtor California nonprofit public benefit corporations that operated six acute care hospitals, including St. Vincent and other facilities in the state of California, on the Petition Date. *See Declaration of Richard G. Adcock in Support of Emergency First-Day Motions* [Docket No. 8] (the "First-Day Declaration").

3. St. Vincent was founded as the first hospital in Los Angeles in 1856. *Id.* at ¶ 34. On January 9, 2020, the Court entered an order and memorandum of decision authorizing the Debtors to close the hospital [Docket Nos. 3933-34] (the "Closure Order"). The Purchased Assets related to St. Vincent include the hospital facilities formerly known as St. Vincent Medical Center, located at 2131 W. 3rd Street, Los Angeles, CA 90057, including the hospital pharmacy, laboratory, and emergency department, as well as the medical office buildings and clinics owned and formerly operated by St. Vincent, and are defined as the "Assets" under the APA. In connection with the sale to the Purchaser, the Debtors have agreed to surrender their general acute care license in connection with the sale to the Purchaser. *See* Adcock Declaration, at ¶ 11.

4. St. Vincent is a jointly "obligated" party with its affiliates on approximately $461.4 million of outstanding secured debt consisting of: (a) $259.4 million outstanding tax exempt revenue bonds, Series 2005 A, G and H issued by the California Statewide Communities Development Authority (the "2005 Bonds"), which loaned the bond proceeds to certain Debtors to provide funds for capital improvements and to refinance certain tax exempt bonds previously issued in 2001 by the Daughters of Charity Health System, and (b) $202.0 million outstanding tax exempt

revenue notes, Series 2015 A, B, C, and D and Series 2017 issued by the California Public Finance Authority. First-Day Declaration, at ¶ 121.

5. In addition, Holdings was created in 2016 to hold and finance Verity's interests in six medical office buildings whose tenants are primarily physician and other practicing medical groups and certain of the Verity Hospitals. *Id.* at ¶ 123. Holdings is the borrower of approximately $66 million on two series of nonrecourse financing secured by separate deeds of trust, revenue and accounts pledges, including lease rents on each medical buildings (collectively "MOB Financing"), certain of which are among the Purchased Assets. *Id.* The secured lenders for the MOB Financings are affiliates of NantWorks, LLC. *Id.*

B. Initial Marketing Efforts and First Sale Process

6. Prior to the Petition Date, the Debtors engaged in substantial efforts to market and sell substantially all of their assets, including St. Vincent and any other Purchased Assets. In June 2018, the Debtors engaged Cain Brothers, a division of KeyBanc Capital Markets ("Cain"), to identify potential buyers for some or all of the Verity hospitals and related assets, and commenced discussions with potential buyers.

7. Cain (a) prepared a Confidential Investment Memorandum (the "CIM"), (b) organized an online data site to share information with potential buyers, and (c) contacted over 110 strategic and financial buyers beginning in July 2018 to solicit their interest in exploring a transaction regarding the Debtors.

8. By August 2018, as a result of its ongoing and broad marketing process, Cain had received 11 Indications of Interest ("IOI") for some or all of the Debtors' assets and, postpetition, Cain continued to develop potential sales leads.

9. On January 17, 2019, the Debtors filed a motion [Docket No. 1279] to approve the form of an asset purchase agreement and related "stalking horse" bidding procedures for the sale of its four remaining hospitals, including St. Vincent, to Strategic Global Management ("SGM"), which the Bankruptcy Court approved on February 19, 2019 [Docket No. 1572]. No other qualified, competing bid was received by the Debtors in compliance with the approved bidding procedures; accordingly, the Debtors filed a notice cancelling the auction and declaring SGM as

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the "winning bidder" [Docket No. 2053]. On May 2, 2019, the Bankruptcy Court entered an order approving the sale to SGM [Docket No. 2306].

10. Despite several notices and orders, SGM failed to close. *See* Docket No. 3899. On December 9, 2019, the Court entered an order authorizing the Debtors to implement a "Plan B" for the disposition of the hospitals [Docket No. 3784] (the "Plan B Order"). On January 3, 2020, the Debtors filed a notice regarding their termination of the asset purchase agreement with SGM, effective as of December 27, 2019. *See id*.

C. Renewed Marketing Efforts and the Bidding Procedures Order

11. As set forth in the Motion, following entry of the Plan B Order, Cain commenced a new marketing process to identify parties potentially interested in acquiring the Purchased Assets. *See* Moloney Declaration, at ¶ 4. Among other things, Cain began by making telephone calls to parties that had previously expressed interest in acquiring the Purchased Assets. *Id.* On January 3, 2020, Cain emailed all parties that had executed a nondisclosure agreement (an "NDA") in connection with the Debtors' previous efforts to market St. Vincent and explained that the Debtors were initiating another marketing process. *Id.*

12. After the Court entered the Closure Order, Cain continued to vigilantly monitor interest and continued to communicate with potential bidders and parties that had expressed interest in the Purchased Assets. *Id.* at ¶ 5. Cain also notified additional parties that had executed NDAs. *Id.* Ultimately, Cain notified 61 parties that executed NDAs of the Sale process and represented Cain's availability to assist in the bidding process. *Id.* Each of the 61 parties received access to the data room related to the Sale, which Cain continued to populate with new and relevant information as it became available. *Id.*

13. On January 15, 2020, Cain sent a letter to all potential purchasers, which highlighted the proposed sale timeline and requested that potential purchasers submit indications of interest ("IOIs") on or before February 7, 2020. *Id.* at ¶ 6. On February 7, 2020, the Debtors received twelve IOIs from parties that had experience in similar investments and a wherewithal to close. *Id.* Cain contacted the twelve potential purchasers that submitted IOIs, and continued to work with the

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potential purchasers on issues related to diligence, asset purchase agreements, inquiries, and other matters. *Id.*

14. On February 26, 2020, Cain requested that parties submit proposed asset purchase agreements on or before March 6, 2020. *Id.* at ¶ 7. The Debtors received ten proposed asset purchase agreements from interested bidders. *Id.*

15. On March 16, 2020, an amended asset purchase agreement (the "APA") was submitted by the Purchaser. *Id.* at ¶ 8. The Purchaser asserted it sought to purchase St. Vincent on an expedited timeline to use the St. Vincent facilities to coordinate with the State of California and the local government to ensure that the facilities are being put to the best use in this critical time and to facilitate critical research related to the COVID-19 pandemic. *Id.* After reviewing all of the submitted proposals and the APA, the Debtors and their advisors began negotiating terms of the APA with the Purchaser to become the Stalking Horse Bidder. *Id.* Simultaneously, Cain had ongoing discussions with other potential purchasers, including a bidder who also sought to be selected as the Stalking Horse Bidder. *Id.*

16. On March 23, 2020, the Debtors in consultation with Cain and their advisors, agreed to accelerate the sale of the Purchased Assets due to the all-cash offer from the Purchaser, its intended use for St. Vincent, and the heightened uncertainty in the capital markets related to the COVID-19 pandemic. *Id.* at ¶ 9; *see also* Adcock Declaration, at ¶ 7. Cain communicated the accelerated timeline and revised bid deadline to the interested parties that had submitted marked up asset purchase agreements. *Id.* During the foregoing discussions, one interested bidder sought to become the stalking horse bidder and made a revised bid for $135 million. *Id.* Subsequently, after additional discussions with Cain, the Purchaser increased its bid by $10 million to $135 million. *Id.* After consultation with Cain and their other advisors, the Debtors selected the Purchaser as the Stalking Horse Bidder because, in the judgment of the Debtors, the Purchaser had the highest and best bid (the "Stalking Horse Bid"), had completed their due diligence, had no financing contingency, and offered the most certain path to close. *Id.*

17. On March 30, 2020, the Debtors filed the *Debtors' Emergency Motion for the Entry of: (I) an Order (1) Approving Form of Asset Purchase Agreement; (2) Approving Auction Sale*

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Format and Bidding Procedures, (3) Approving Stalking Horse Bidder and Bid Protections; (4) Approving Form of Notice to Be Provided to Interested Parties; (5) Scheduling a Court Hearing to Consider Approval of the Sale to the Highest and Best Bidder; and (6) Approving Procedures Related to the Assumption of Certain Executory Contracts and Unexpired Leases; and (II) an Order Authorizing the Sale of Property Free and Clear of All Claims, Liens And Encumbrances [Docket No. 4365], followed by a corrected exhibit [Docket No. 4379] and supplement [Docket No. 4397] on April 1, 2020 (collectively, the "Motion"). Among other things, the Motion sought emergency relief to approve the proposed $135 million APA as the Stalking Horse APA with a proposed bid deadline of April 3, 2020, an auction date of April 6, 2020, if needed, and a scheduled approval hearing for April 10, 2020. Cain immediately communicated the accelerated bid, auction and sale hearing timeline to potential bidders. *See* Moloney Declaration, at ¶ 10.

18. On April 1, 2020, the Court held a hearing on the Motion and thereafter entered an order approving the Motion (the "Bidding Procedures Order")[2] [Docket No. 4398]. The Bidding Procedures Order approved: (a) the bidding procedures set forth in the Motion, as modified by the Bidding Procedures Order (the "Bidding Procedures"); (b) the Purchaser as the Stalking Horse Bidder; and (c) the form of APA. The Bidding Procedures Order further set a bid deadline of April 3, 2020 (the "Bid Deadline"). An Auction, if necessary, was scheduled to take place on April 6, 2020, at 10:00 a.m. (prevailing Pacific Time). Thereafter, Cain again reached out to its list of potential bidders, including bidders who had submitted proposed asset purchase agreements prior to the Debtors seeking emergency approval of the Stalking Horse APA. *See* Moloney Declaration, at ¶ 11.

19. On the Bid Deadline, Cain did not receive any bids. *Id*. at ¶ 12; Adcock Declaration, ¶ 9. Multiple parties indicated to Cain that they did not submit a bid given the strength of the Stalking Horse Bid and/or because of the capital market uncertainties arising from the COVID-19 pandemic. Moloney Declaration, at ¶ 12. Consequently, no auction was held and the Purchaser

[2] Unless otherwise defined, all capitalized terms used herein shall have the meaning ascribed to them in the Bidding Procedures Order.

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became the Winning Bidder, pursuant to the terms of the Bidding Procedures Order. *Id*.; Adcock Declaration, at ¶ 9.

D. The Lease with the State of California

20. On, March 20, 2020, the Court entered an order [Docket No. 4315] authorizing the Debtors to enter into a net lease (the "Lease") with the State of California (the "State") for the former St. Vincent hospital premises located at 2131 W. 3rd Street, Los Angeles, California, 90057. Generally, the Lease provides that the State will lease St. Vincent, as a closed facility, for a monthly payment of $2.6 million. The State will utilize the leased premises to provide services related to the SARS-CoV-2 virus and related infectious disease ("COVID-19") pandemic. As noted in the Motion, the Purchaser is willing to take assignment of the Lease. Further, the Bidding Procedures Order provides that the Purchaser will acquire the Assets subject to the Lease, as fully set forth therein. *See* Bidding Procedures Order at 9.

E. The APA

21. The primary terms of the APA are set forth in the Motion. *See* Mot. at 9-14. On March 31, 2020, the Debtors filed a copy of the APA with the Court. *See* Docket No 4379. The Debtors intend to file a fully executed version of the APA, after Court approval, with attached schedules.

F. The Assumption Objection Hearing

22. The Debtors intend to file and serve a notice to counterparties of potentially assumed and assigned executory contracts and unexpired leases. The Bidding Procedures Order provides that any objection (an "Assumption Objection") to the assumption and assignment of such executory contracts and unexpired leases must be filed by April 16, 2020, at 5:00 p.m. (Pacific Time). *See* Bidding Procedures Order at 9. The Court will hold a hearing on Assumption Objections, if any, on April 29, 2020, at 10:00 a.m. (Pacific Time). *See id.*

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III.

ARGUMENT

A. The Court Should Authorize The Debtors To Sell The Assets To the Purchaser In Accordance With The Terms Of The APA.

Section 363(b) provides that a debtor "after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the state." 11 U.S.C. § 363(b). To approve a use, sale or lease of property other than in the ordinary course of business, the Court must find "some articulated business justification." *See, e.g., In re Gardens Reg'l Hosp. & Med. Ctr., Inc.*, 567 B.R. 802, 825 (Bankr. C.D. Cal. 2017); *see also In re Martin (Myers v. Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (*citing In re Schipper (Fulton State Bank v. Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991)); *Comm. of Equity SEC Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983); *In re Abbotts Dairies of Pa., Inc*., 788 F.2d 143 (3d Cir. 1986) (implicitly adopting the "sound business judgment" test of *Lionel Corp.* and requiring good faith); *In re Del. & Hudson Ry. Co*., 124 B.R. 169 (D. Del. 1991) (concluding that the Third Circuit adopted the "sound business judgment" test in the *Abbotts Dairies* decision). Similarly, in the Ninth Circuit, "cause" exists for authorizing a sale of estate assets if it is in the best interest of the estate, and a business justification exists for authorizing the sale. *In re Huntington, Ltd*., 654 F.2d 578 (9th Cir. 1981); *In re Walter*, 83 B.R. 14, 19-20 (B.A.P. 9th Cir. 1988).

In determining whether a sale satisfies the business judgment standard, courts have held that: (1) there be a sound business reason for the sale; (2) accurate and reasonable notice of the sale be given to interested persons; (3) the sale yield an adequate price (*i.e*., one that is fair and reasonable); and (4) the parties to the sale have acted in good faith. *Titusville Country Club v. Pennbank (In re Titusville Country Club)*, 128 B.R. 396, 399 (Bankr. W.D. Pa. 1991); *see also Walter*, 83 B.R. at 19-20.

The Debtors submit that their proposed sale of the Assets to the Purchaser clearly satisfies each of these four criteria, is consistent with the terms of the APA, and demonstrates that the Debtors' business judgment to proceed with the proposed sale of the Assets to the Purchaser in

accordance with the terms of the APA is sound. Furthermore, both the Committee and the Debtors' Prepetition Secured Creditors have indicated their support for the Sale.

1. Sound Business Purpose

There must be some articulated business justification, other than appeasement of major creditors, for using, selling or leasing property out of the ordinary course of business before the bankruptcy court may order such disposition under § 363(b). *Gardens*, 567 B.R. at 825; *Lionel*, 722 F.2d at 1070. The Ninth Circuit Bankruptcy Appellate Panel established a flexible case-by-case test in *Walter* to determine whether the business purpose for a proposed sale justifies disposition of property of the estate under § 363(b):

> Whether the proffered business justification is sufficient depends on the case. As the Second Circuit held in *Lionel*, the bankruptcy judge should consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the Debtor, creditors and equity holders, alike. He might, for example, look to such relevant facts as the proportionate value of the asset to the estate as a whole, the amount of elapsed time since the filing, the likelihood that a plan of reorganization will be proposed and confirmed in the near future, the effect of the proposed disposition on future plans of reorganization, the proceeds to be obtained from the disposition vis-a-vis any appraisals of the property, which of the alternatives of use, sale or lease the proposal envisions and, most importantly perhaps, whether the asset is increasing or decreasing in value. This list is not intended to be exclusive, but merely to provide guidance to the bankruptcy judge.

Walter, 83 B.R. at 19-20 (*quoting In re Cont'l Air Lines, Inc*., 780 F.2d 1223, 1226 (5th Cir. 1986) (*citing Lionel*, 722 F.2d at 1071)).

The facts underlying the Debtors' proposed sale of the Assets to the Purchaser demonstrate that such sale serves the best interests of the Debtors' estates, their creditors and shareholders and merits the approval of the Court. The Sale will inject approximately $135 million of cash into the estates, which will maximize value to creditors. As importantly, the Purchaser desires to use the St. Vincent facilities for critical research related to the COVID-19 pandemic. Specifically, the Purchaser intends to cooperate with the State and use the additional buildings that comprise the St. Vincent campus, including three medical office buildings and Seton Hall, to address COVID-19. Thus, the Debtors appropriately concluded that the Purchaser's desired use of the St. Vincent

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facilities after the Sale will serve the charitable mission of the Debtors and the original legacy of the Daughters of Charity to provide critical access to underserved communities. *See* Adcock Decl. at ¶ 10.

2. Accurate and Reasonable Notice

In connection with a proposed sale under § 363, "four pieces of information must be presented to the creditors. The notice should: place all parties on notice that the debtor is selling its business; disclose accurately the full terms of the sale; explain the effect of the sale as terminating the debtor's ability to continue in business; and explain why the proposed price is reasonable and why the sale is in the best interest of the estate." *Del. & Hudson Ry.*, 124 B.R. at 180. A notice is sufficient if it includes the terms and conditions of the sale and if it states the time for filing objections. *In re Karpe*, 84 B.R. 926, 930 (Bankr. M.D. Pa. 1988). The purpose of the notice is to provide an opportunity for objections and hearing before the court if there are objections. *Id*.

On February 26, 2020, the Debtors served a *Notice of Sale Procedures, Auction Date, and Sale Hearing* [Docket. No. 4167] on the following parties: (i) the Office of the United States Trustee; (ii) the Consultation Parties; (iii) any parties requesting notices in this case pursuant to Bankruptcy Rule 2002; (iv) all Potential Bidders; (v) all parties known by the Debtors to assert a lien on any of the Assets; (vi) all persons known or reasonably believed to have asserted an interest in any of the Assets; (vii) all non-Debtor parties to any contracts and leases to be assumed; (viii) all unions representing employees of St. Vincent; (ix) the Office of the United States Attorney for the Central District of California; (x) the Office of the California Attorney General (the "Attorney General"); (x) the Office of the California Secretary of State; (xii) all taxing authorities having jurisdiction over any of the Assets, including the IRS; and (xiii) all environmental authorities having jurisdiction over any of the Assets. (*See* Declaration of Service [Docket No. 4208]). Also, as explained above, the Bidding Procedures Order was entered by the Court and has been provided to all known prospective bidders by Cain. The Debtors will also serve this Memorandum on the same parties in advance of the Sale Hearing.

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The Debtors submit that the foregoing satisfies the requirements of Bankruptcy Rules 6004(a) and (c), which provide as follows:

> (a) . . . Notice of a proposed . . . sale . . . of property . . . not in the ordinary course of business shall be given pursuant to Rule 2002(a)(2),(c)(1),(i) and (k) . . . .
>
> (c) . . . A motion for authority to sell property free and clear of liens or other interests shall be made in accordance with Rule 9014 and shall be served on the parties who have liens or other interests in the property to be sold. The notice required by subdivision (a) of this rule shall include the date of the hearing on the motion and the time within which objections may be filed and served on the debtor in possession . . . .

Fed. R. Bankr. P. 6004(a), (c).

3. Fair and Reasonable Price

In order to be approved under § 363(b), the purchase price must be fair and reasonable. *Coastal Indus., Inc. v. I.R.S. (In re Coastal Indus., Inc.)*, 63 B.R. 361, 368 (Bankr. N.D. Ohio 1986). The Debtors' "main responsibility, and the primary concern of the bankruptcy court, is the maximization of the value of the asset sold." *In re Integrated Res., Inc*., 135 B.R. 746, 750 (Bankr. S.D.N.Y. 1992), *aff'd*, 147 B.R. 650 (S.D.N.Y. 1992). "It is a well-established principle of bankruptcy law that the objective of bankruptcy rules and the [debtor's] duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate." *In re Atlanta Packaging Prods.*, *Inc*., 99 B.R. 124, 131 (Bankr. N.D. Ga. 1988); *see also In re Wilde Horse Enters.*, 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991) ("In any sale of estate assets, the ultimate purpose is to obtain the highest price for the property sold.").

The Debtors can demonstrate a that the Sale is for a fair and reasonable price if the Sale is for fair market value. "'[F]air market value' means the most likely price that the assets being sold would bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and in their own best interest, and a reasonable time being allowed for exposure in the open market." *In re Verity Health Sys. of California, Inc*., No. 2:18-BK-20151-ER, 2019 WL 5585007, at *14 (Bankr. C.D. Cal. Oct. 23, 2019), *vacated*, No. 2:18-BK-20151-ER, 2019 WL 6519342 (Bankr. C.D. Cal. Nov. 13, 2019); *see also In re Hayden*,

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No. 1:14-AP-01182-MT, 2015 WL 9491310, at *6 (Bankr. C.D. Cal. Dec. 28, 2015) (Fair market value is "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction.") (quoting Black's Law Dictionary 1691 (9th ed.2009)); *In re Cinema City Car Wash, Inc*., 935 F.2d 273 (9th Cir. 1991) (noting a sale price the bankruptcy court found to be "the best price obtainable under the circumstances" "represents the property's fair market value").

The marketing and sale process undertaken by Cain and the Debtors was designed to ensure that the highest price and greatest benefit possible was obtained for the Assets. Cain robustly marketed the assets since January 2020, and these same assets had been fully marketed from July 2018 until the approved sale to SGM, and before that in 2014-2015 while under control of the Daughters of Charity. The Purchaser's offer to purchase the Assets for the purchase price represents the fair market value for the Assets because it is the result of a competitive, open, and lengthy marketing process. *See Verity Health Sys. of California, Inc*., No. 2:18-BK-20151-ER, 2019 WL 5585007, at *14. Further, the $135 million purchase price is the highest and best price the Debtors were able to obtain for the Assets through the renewed marketing process and will provide a substantial benefit to the Debtors' estates. *See Wilde Horse Enters.*, 136 B.R. at 841. Accordingly, the Court should find that the sale price to the Purchaser is fair and reasonable.

4. Good Faith

When a bankruptcy court authorizes a sale of assets pursuant to § 363(b)(1), it is required to make a finding with respect to the "good faith" of the purchaser under § 363(m). *Abbotts Dairies*, 788 F.2d at 149. Such a procedure ensures that § 363(b)(1) will not be employed to circumvent the creditor protections of chapter 11, and as such, it mirrors the requirement of § 1129 that the Court independently scrutinizes the debtor's chapter 11 plan and makes a finding that it has been proposed in good faith. *Id*. at 150.

"Good faith" encompasses fair value, and further speaks to the integrity of the transaction. *Wilde Horse Enters.*, 136 B.R. at 842. With respect to the Debtors' conduct in conjunction with the sale, the good faith requirement "focuses principally on the element of special treatment of the Debtors' insiders in the sale transaction." *See In re Indus. Valley Refrig. & Air Cond. Supplies,*

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Inc., 77 B.R. 15, 17 (Bankr. E.D. Pa. 1987). With respect to the buyer's conduct, this Court should consider whether there is any evidence of "fraud, collusion between the purchaser and other bidders or the [debtor], or an attempt to take grossly unfair advantage of other bidders." *Abbotts Dairies*, 788 F.2d at 147; *see also In re Rock Indus. Mach. Corp*., 572 F.2d 1195, 1198 (7th Cir. 1978); *Wilde Horse Enters.*, 136 B.R. at 842; *In re Alpha Indus., Inc*., 84 B.R. 703, 706 (Bankr. D. Mont. 1988). In short, "[l]ack of good faith is generally determined by fraudulent conduct during the sale proceedings." *In re Apex Oil Co*., 92 B.R. 847, 869 (Bankr. E.D. Mo. 1988) (*citing In re Exennium, Inc*., 715 F.2d 1401, 1404-05 (9th Cir. 1983)); *see also In re M Capital Corp*., 290 B.R. 743 (B.A.P. 9th Cir. 2003).

In *In re Filtercorp, Inc*., 163 F.3d 570 (9th Cir. 1998), the Ninth Circuit set forth the following test for determining whether a buyer is a good faith purchaser:

> A good faith buyer "is one who buys 'in good faith' and 'for value.'" . . . [L]ack of good faith is [typically] shown by "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders."

Filtercorp, 163 F.3d at 577 (citations omitted).

The Ninth Circuit made clear in *Filtercorp* that this standard for determining good faith is applicable even when the buyer is an insider. Here, the Purchaser is neither an "insider" (e.g., director, officer, person in control, partnership, general partner, or relative), manager, nor creditor of the Debtors. *See* Adcock Declaration, at ¶ 12.

Additionally, the APA was intensively negotiated at arm's length between the Debtors and the Purchaser, and all parties involved acting in good faith. *See id.*; *see also* Moloney Declaration, at ¶ 13. The Debtors and their professionals are not aware of any fraud or collusion between the Purchaser and any other bidders, or any attempt to take unfair advantage of other bidders. *Id.* Based on the foregoing, the Debtors submit that the Court should find that the Purchaser constitutes a good faith purchaser entitled to all of the protections afforded by § 363(m).

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B. Section 363(f) Permits the Debtors' Sale of the Assets to the Purchaser to Be Free and Clear of Any and All Interests and Liens.

The Debtors have requested that, under § 363(f), the proposed sale be effected "free and clear" of encumbrances, interests or liens in the Assets. 11 U.S.C. § 363(f); *see also In re Grumman Indus., Inc*., 467 B.R. 694, 702 (S.D.N.Y. 2012) (discussing generally "free and clear" provision in § 363(f)). Section 363(f) "empowers the trustee to sell the debtor's assets 'free and clear of any interest in such property of an entity other than the estate.'" While "[t]he Bankruptcy Code does not define the phrase 'interest in . . . property' for purposes of § 363(f) . . . [the] trend in caselaw '[favors] a broader definition [of the phrase] that encompasses other obligations that may flow from ownership of the property.'" *In re Gardens*, 567 B.R. at 825-26 (citing 3 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 363.06[1] (16th ed. 2017)). Therefore, courts interpret the term "any interest" expansively to effectuate liquidations and reorganizations "to include not only in rem interests in property, but also other obligations that are "connected to or arise from the property being sold" or that could "potentially travel with the property being sold." *See, e.g., In re La Paloma Generating, Co.*, No. 16-12700 (CSS), 2017 WL 5197116, *4 (Bankr. D. Del. Nov. 9, 2017) (quoting *In re Trans World Airlines, Inc.*, 322 F.3d 283, 285, 288 (3d Cir. 2001)); *see also Mass. Dep't of Unemployment Assistance v. OPK Biotech, LLC (In re PBBPC, Inc.)*, 484 B.R. 860 (B.A.P. 1st Cir. 2013) (interests in property include monetary obligations arising from the ownership of property, even when those obligations are imposed by statute).

The alternative five conditions spelled out in § 363(f) under which a sale free and clear may be authorized are the following:

> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
> (2) such entity [the holder of the interest] consents;
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
> (4) such interest is in bona fide dispute; or
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f)(1)-(5) (2012); *see In re Shary*, 152 B.R. 724, 725 (Bankr. N.D. Ohio 1993) (stating the five conditions in § 363(f) are disjunctive and sale is proper where trustee can prove

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existence of any of the five conditions). The Debtors submit that one or more of the tests of § 363(f) are satisfied here, including, but not limited to, the tests below.

1. The Debtors' Proposed Sale is Permissible Pursuant to § 363(f)(1).

This Sale is not subject to review by the Attorney General under the applicable state law. The Attorney General claims that Section 5920 of the California Corporations Code authorizes the Attorney General review to review the Sale. However, as discussed below in Section IV, the statute does not apply to the Sale because St. Vincent (i) is not a health care facility under because it is closed, (ii) is not "currently operating or providing health care services," and (iii) has agreed to surrender its license. Accordingly, applicable nonbankruptcy law permits the Sale without Attorney General review.

2. The Debtors' Proposed Sale is Permissible Pursuant to § 363(f)(2).

Section 363(f)(2) authorizes a sale to be free and clear of an interest if the interest holder consents to the sale. Here, all secured claimants that hold liens secured by the Assets have consented to the proposed sale to the Purchaser. Thus, the sale is authorized pursuant to § 363(f)(2).

C. <u>The Court Should Authorize the Debtors to Assume and Assign to the Purchaser All of the Assumed Contracts that the Purchaser Designates at the Assumption Objection Hearing.</u>

Barring exceptions not herein relevant, §§ 365(a) and 1107(a) authorize a debtor in possession, "subject to the Court's approval, . . . [to] assume or reject any executory contract or unexpired lease of the debtor." A debtor in possession may assume or reject executory contracts for the benefit of the estate. *In re Klein Sleep Prods, Inc*., 78 F.3d 18, 25 (2d. Cir. 1996); *In re Central Fla. Metal Fabrication, Inc*., 190 B.R. 119, 124 (Bankr. N.D. Fla. 1995); *In re Gucci*, 193 B.R. 411, 415 (S.D.N.Y. 1996). In reviewing a debtor's decision to assume or reject an executory contract, a bankruptcy court should apply the "business judgment test" to determine whether it would be beneficial to the estate to assume it. *In re Cont'l Country Club, Inc*., 114 B.R. 763, 767 (Bankr. M.D. Fla. 1990); *see also In re Gucci*, 193 B.R. at 415. The business judgment standard requires that the court follow the business judgment of the debtor unless that judgment is the product of bad faith, whim, or caprice. *In re Prime Motors Inns*, 124 B.R. 378, 381 (Bankr. S.D.

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Fla. 1991) (*citing Lubrizol Enters. v. Richmond Metal Finishers*, 756 F.2d 1043, 1047 (4th Cir. 1985), *cert. denied*, 475 U.S. 1057 (1986)).

Pursuant to § 365(f)(2), a debtor may assign its executory contracts and unexpired leases, provided the debtor first assumes such executory contracts and unexpired leases in accordance with §365(b)(1), and provides adequate assurance of future performance by the assignee. Pursuant to § 365(b)(1), assumption of executory contracts and unexpired leases requires a debtor to: (a) cure any existing defaults under such agreements; (b) compensate all non-debtor parties to such agreements for any actual pecuniary loss resulting from the defaults; and (c) provide adequate assurance of future performance under the contract or lease. 11 U.S.C. § 365(b)(1); *see also In re Bowman*, 194 B.R. 227, 230 (Bankr. D. Ariz. 1995*); In re AEG Acquisition Corp*., 127 B.R. 34, 44 (Bankr. C.D. Cal. 1991), *aff'd* 161 B.R. 50 (B.A.P. 9th Cir. 1993). Pursuant to § 365(f)(1), a debtor may assign an executory contract or unexpired lease pursuant to § 365(f)(2) notwithstanding any provision in such executory contract or unexpired lease that prohibits, restricts or conditions the assignment of such executory contract or unexpired lease.

The assumption and assignment of executory contracts furthers the goals of chapter 11 of promoting reorganization by balancing the debtor's interest in maximizing the value of its estate against the contracting party's interest in receiving the benefit of its bargain and being protected against default by the debtor after assumption has occurred. *In re Embers 86th St. Inc*., 184 B.R. 892, 896 (Bankr. S.D.N.Y. 1995).

Here, the Debtors will seek to assume and assign to the Purchaser all of the Debtors' executory contracts and unexpired leases that the Purchaser designates as executory contracts and unexpired leases subject to assumption and assignment. The Debtors will file a notice listing all of the known executory contracts and unexpired leases and related cure amounts and will work with counterparties to resolve any issues regarding outstanding cure amounts. Any objections to the proposed cure amounts, or other objections related to the proposed assumption and assignment of such leases and contracts, (collectively "Assumption Objections") will be considered at a hearing before this Court on April 29, 2020, at 10:00 a.m. (the "Assumption Objection Hearing"). As a result of the foregoing, and in connection with the sale, the Debtors will seek the Court's authority

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to assume and assign to the Purchaser the Assumed Contracts and to fix the required Cure Amounts that would need to be paid to the other parties to the executory contracts and unexpired leases to enable compliance with the provisions of § 365(b)(1)(A) at the Assumption Objection Hearing.

D. The Court Should Waive the Fourteen-Day Waiting Periods Set Forth in Bankruptcy Rules 6004(h) and 6006(d).

Bankruptcy Rule 6004(h) provides, among other things, that an order authorizing the use, sale or lease of property is stayed until the expiration of fourteen days after entry of the Court order, unless the Court orders otherwise. Bankruptcy Rule 6006(d) has a similar provision with respect to an order approving of a debtor's assumption and assignment of unexpired leases and executory contracts.

For all of the reasons set forth above, the Debtors believe that selling the Assets to the Purchaser in accordance with the timeline provided in the APA and the Bidding Procedures Order is in the best interests of the Debtors' estates, their creditors and shareholders. In order to facilitate the most expeditious Closing possible, the Debtors request that the Sale Order be effective immediately upon entry by providing that the fourteen-day waiting periods of Bankruptcy Rule 6004(h) and 6006(d) are waived.

IV.

DEBTORS' REPLY TO THE ATTORNEY GENERAL'S OBJECTION

This Court has previously ruled that the Attorney General is not entitled to review a nonprofit's sale of its closed general acute care hospital building. *In re Gardens Regional Hospital and Medical Center, Inc.*, 567 B.R. 820 (Bankr. C.D. Cal. 2017). Despite that ruling, the Attorney General argues that the sale of the now closed St. Vincent Medical Center (the "Former Hospital") is subject to his review. He does so in reliance on a 2017 amendment to Section 5920 of the California Corporations Code ("Section 5920"), which he claims was passed to reverse the decision in *Gardens* and gives him virtually unlimited authority over the sale by a nonprofit of any building which once was, or could be again, a health facility. The Attorney General's self-serving read of the statute is particularly offensive since he uses it as a sword in an attempt to block the sale to the Purchaser, which plans to use the Former Hospital to in order to coordinate with the State and the

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local government to ensure that the facilities are being put to the best use in this critical time and to facilitate critical research related to the COVID-19 pandemic.

The Attorney General is simply wrong. First, his analysis ignores that the plain language of the statute limits the Attorney General's review to sales by a nonprofit of facilities the nonprofit "operates or controls." The Debtors no longer operate or control the Former Hospital; it has been leased to, and is exclusively operated and controlled by the State of California. Second, he does not have authority to review the Sale under Section 5920 because the Former Hospital (i) is not a health care facility under Section 1250 of the California Health and Safety Code ("Section 1250"), (ii) is not "currently operating or providing health care services," and (iii) has agreed to surrender its license. Consequently, for these reasons and as discussed in detail below, the Court should overrule the Court's objection.

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A. Section 5920 of the California Corporations Code Does Not Apply Where The Debtors Do Not Operate or Control the Facility Being Sold.

The Attorney General relies on a recent amendment to Section 5920 of the California Corporations Code ("Section 5920") in support of its argument that the Attorney General has authority to review the Sale of St. Vincent. Section 5920 provides, in pertinent part:

> (a)(1) Any nonprofit corporation that is defined in Section 5046 and operates or controls a health facility, as defined in Section 1250 of the Health and Safety Code , or operates or controls a facility that provides similar health care, ***regardless of whether it is currently operating or providing health care services or has a suspended license***, shall be required to provide written notice to, and to obtain the written consent of, the Attorney General prior to entering into any agreement or transaction to do either of the following: …

CAL. CORP. CODE § 5920(a)(1) (emphasis added).

Here, the Attorney General does not have authority to review the Sale under Section 5920 because St. Vincent (i) is not a health care facility under Section 1250 of the California Health and Safety Code ("Section 1250") because it is closed, (ii) is not "currently operating or providing health care services," and (iii) has agreed to surrender its license. In response to *Gardens*, the Attorney General argues that the California legislature expanded the scope of Section 5920 to sweep within its ambit closed facilities, such as St. Vincent, with the addition of "regardless of whether it

is currently operating or providing health care services or has a suspended license." *Id.* The Debtors do not dispute that the legislature amended Section 5920. However, the fundamental problem is that the amendment does not change the result: the Attorney General does not have authority to review the Sale, for the reasons discussed below.

The plain language of Section 5920 makes it clear that the statute only applies where the nonprofit **"operates or controls"** the health facility. Section 5920 provides, in pertinent part (with the language added in the 2017 amendments in bold italics, the "2017 Amendment" [3]):

> (a)(1) Any nonprofit corporation that is defined in Section 5046 and operates or controls a health facility, as defined in Section 1250 of the Health and Safety Code , or operates or controls a facility that provides similar health care, ***regardless of whether it is currently operating or providing health care services or has a suspended license***, shall be required to provide written notice to, and to obtain the written consent of, the Attorney General prior to entering into any agreement or transaction to do either of the following […]

CAL. CORP. CODE § 5920(a)(1) (emphasis added).

The Debtors are no longer operating nor are they in control of the Former Hospital because it is leased to the State to address the COVID-19 pandemic. Paragraph 5.2 of the Lease expressly states that the State, as tenant, has exclusive control over the Former Hospital and its operations:

> Tenant shall have exclusive control, possession, occupancy, use, and management of the Premises. Tenant shall have full and complete charge, authority and control of the administration, management and operation of the Medical Business at the Premises. Tenant shall have the right and authority to determine all business, technical and professional policies relating to the operation of the Medical

[3] The prior version of Section 5920 provided as follows:

> (a)(1) Any nonprofit corporation that is defined in Section 5046 and operates or controls a health care facility, as defined in Section 1250 of the Health and Safety Code, or operates or controls a facility that provides similar health care, shall be required to provide written notice to, and to obtain the written consent of, the Attorney General prior to entering into any agreement or transaction to do either of the following […]

Cal. Corp. Code § 5920(a)(1) (West 2017). The 2017 Amendment became effective on January 1, 2018.

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> Business, with no restrictions, qualifications or supervision by Landlord. Tenant shall determine the financial policy of the Medical Business and shall have complete power to fix, control and regulate the charges and collections made for services therein. Accordingly, Tenant shall be responsible for all operational and medical services provided at the Premises and the security of all persons and property at the Premises in compliance with applicable Laws, and Tenant acknowledges and agrees that Landlord is providing no services whatsoever and shall not responsible or otherwise liable for the same.

Lease, ¶ 5.2.

In interpreting the requirements of the statute, the Court should give the words "operate" and "control" their ordinary meaning. *See Animal Legal Defense Fund v. United States Dept. of Agriculture*, 933 F.3d 1088, 1093 (9th Cir. 2019) ("When a statute does not define a term, we typically 'give the phrase its ordinary meaning.'" (internal quotation marks omitted)) (*quoting FCC v. AT & T Inc*., 562 U.S. 397, 403 (2011)). The Cambridge English Dictionary defines "control" as "to order, limit or rule something, or someone's actions or behavior," and to "operate" as to "cause to work, be in action or have an effect." *See* www.dictionary.cambridge.com.org (last visited on Apr. 9, 2020). As the Lease makes clear, now only the State has the right and power to direct "actions or behavior" at the facility, and, therefore, the Debtors are not operating nor controlling the facility, and Section 5920 simply does not apply. *ASARCO, LLC v. Celanese Chemical Co*., 792 F.3d 1203, 1210 (9th Cir. 2015) ("A primary canon of statutory interpretation is that the plain language of a statute should be enforced according to its terms, in light of its context."); *see also Lamie v. United States Tr*., 540 U.S. 526, 542 (2004) ("It is beyond our province to rescue [the legislature] from its drafting errors, and to provide for what we might think ... is the preferred result.") (*quoting United States v. Granderson*, 511 U.S. 39, 68 (1994) (Scalia, J., concurring)).

The Attorney General argues that the 2017 Amendment modifies the requirement that the statute applies only where the nonprofit "operates or controls" the facility. However, the 2017 Amendment clearly only modifies the term "facility" in both prior clauses of the sentence and not the requirement that the nonprofit "operate or control" the facility. Under the rule of statutory construction commonly referred to as the "punctuation canon," a modifying phrase that is set off

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from a series of antecedents by a comma applies to each of those antecedents. *Davis v. Devanlay Retail Grp*., Inc., 785 F.3d 359, 364 n.2 (9th Cir. 2015) ("a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one [where the phrase] is separated from the antecedents by a comma.") (applying California law). Here, the 2017 Amendment, applied in a manner consistent with the punctuation canon, results in a the statute being read as: (1) a health facility, as defined in Section 1250 of the Health and Safety Code , regardless of whether it is currently operating or providing health care services or has a suspended license and (2) a facility that provides similar health care, regardless of whether it is currently operating or providing health care services or has a suspended license. *Stepnowski v. C.I.R.,* 456 F.3d 320, 324 n.7 (3d Cir. 2006) ("under the [punctuation canon] the series 'A or B, with respect to C' contains these two items: (1) 'A with respect to C' and (2) 'B with respect to C.'").

B. <u>Section 5920 of the California Corporations Code Does Not Apply to A Closed Facility with a Surrendered License.</u>

1. The St. Vincent License Will Be Surrendered and Canceled Rather Than "Suspended."

The Attorney General argues that the legislative history shows that the statute was amended because the California legislature wanted to make sure that the Attorney General had the authority to review the sale of a closed facility. However, the legislative history reveals that the legislature was concerned about the sale of a closed hospital only if it included a *suspended* (as opposed to surrendered and cancelled) license. **Here, the Debtors have agreed to surrender the license.** *See* Adcock Decl. at ¶ 11. The legislative history attached as Exhibit 3 to the Eldan Decl. concludes, that "***[t]his bill would not apply to closed hospitals that have surrendered their license***." California Bill Analysis, A.B. 651 Sen., 8/21/2017 (Staff Comments) (attached as Ex. 3 to Eldan Decl.) (emphasis added). If legislative history is considered to the degree that the Attorney General urges, there is no other conclusion to reach except that Section 5920 does not apply.

Further, as Justice Kennedy described, the Attorney General's opposition and cherry-picking invites "investigation of legislative history [to fulfill the] tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking out your

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friends.'" *Exxon Mobil Corp. v. Allapattah Services, Inc*., 545 U.S. 546, 568, 125 S. Ct. 2611, 2626, 162 L. Ed. 2d 502 (2005) (*citing* Wald*, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983)). In fact, the only clarity the legislative history provides here is that the closure of a hospital or the surrender of its license is outside of the bounds of the statute.

The Attorney General carefully avoided providing the Court with the full legislative history which makes clear that the Assembly and Senate votes on the 2017 Amendment, referred to as AB 651, focused almost exclusively on the issue of whether there was a facility with a suspended license, as opposed to any issue of continued operations or of providing healthcare or of a surrendered license. The 2017 Amendments focused only on precluding hospitals from suspending their licenses, without regard to surrender, because surrendering a license to avoid Attorney General review would be self-defeating.[4] Specifically, the legislative history cited by the Attorney General includes a letter from the California Hospital Association, which represents 400 hospitals in the State, where they recognize that "it is not operationally or economically feasible for a health facility to close or give up its license merely for the sake of avoiding conditions placed by the AG on the sale of that facility . . . ***if a license has been cancelled, it is no longer a health facility at all***, and any entity wishing to reopen a health facility would have to start a new license application." California Bill Analysis, A.B. 651 Sen., 7/5/2017 (Comments 10-11) (attached as Ex. 1 to Eldan Decl.) (emphasis added).

For instance, attached as Exhibit "5" to the Eldan Declaration is the Assembly analysis used for the vote on amendments proposed to AB 651 based on the Senate vote. It provides the following discussion for the Assembly members:

> The Senate amendments clarify that the AG has the authority to consent to proposed transactions regardless of whether the facility has a suspended license; require the AG to hold a public hearing

[4] *See also* Eldan Decl. Ex. 4 (same); California Bill Analysis, A.B. 651 Sen., 7/11/2017 (attached as Ex. 2 to Eldan Decl.) ("It is not operationally and economically feasible for a health facility to close or give up its license to operate merely for the sake of avoiding conditions placed by the Attorney General on the sale of that facility. Health facilities are not easily and frivolously opened and closed …").

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> before granting a waiver to consent; and, clarify the AG's authority to enforce the conditions of the transaction. … **The most significant change, in terms of workload for the DOJ, is to extend the requirement for review to health facilities that have a suspended license.** In theory, this will make additional facilities subject to review. Senate Appropriations Committee staff is only aware of one instance in recent years in which a health facility with a suspended license was proposed for sale. Therefore, the Committee staff does not anticipate very large increase in the number of reviews that will occur under this bill.

AB 651 Assembly analysis, Sept. 6, 2017 (emphasis added).

The parties who supported the 2017 Amendments also believed that the legislation was intended to apply to entities with suspended licenses. For example, Health Access California's letter in support of AB 651 included this language:

> **We strongly support AB 651, as proposed to be amended in the Senate Judiciary Committee, which would clarify that the AG's review of nonprofit health facilities includes those facilities that have suspended their license**. A hospital or nursing facility with a suspended license still possesses substantial assets that are held in public trust, including its tangible assets (building, land, equipment) and intangible assets (trademark, reputation, contracts). … **Finally, clarifying that the sale of facilities with suspended licenses is subject to AG review** ensures that nonprofit hospitals and their for-profit buyers do not exploit the lack of clarity in the law to avoid the AG's oversight."

Exhibit 2 to Eldan Decl., Senate Judiciary Report on AB 651 (Muratshchi), Doc. No. 4474, page 41 of 86 (emphasis added).

Finally, and most forcefully, the legislative history attached as Exhibit 3 to the Eldan Decl. concludes, under a "Staff Comment," that ***"[t]his bill would not apply to closed hospitals that have surrendered their license***." California Bill Analysis, A.B. 651 Sen., 8/21/2017 (Staff Comments) (attached as Ex. 3 to Eldan Decl.) (emphasis added).

Thus, the legislative history actually reveals that the focus of AB 651 was to ensure that the Attorney General would be able to review the sale of hospitals with suspended licenses, not closed ones with cancelled or surrendered licenses. Of course, the purpose of legislative history is to parse through motivations, and the legislative history demonstrates that the Attorney General lobbied to prevent healthcare facilities from purposefully suspending a license to evade Attorney General review. The Attorney General's concerns are not implicated here, because the Debtors are willing,

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and will, surrender their license. Accordingly, the Sale is not subject to review by the Attorney General.

2. The Attorney General Does Not Have the Statutory Right to Review the Proposed Sale of a Closed Hospital.

As this Court has previously held in the *Gardens* decision, in reviewing the plain language of Section 5914 (the virtually identical sister statute to Section 5920 which applies to sales to for profit entities), the sales of closed hospitals is not covered by these statutes, because they incorporate the definition of a health facility under Section 1250:

> As used in this chapter, "health facility" means a facility, place, or building that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness, physical or mental, including convalescence and rehabilitation and including care during and after pregnancy, or for any one or more of these purposes, for one or more persons, to which the persons are admitted for a 24-hour stay or longer, and includes the following types:
>
> (a) "General acute care hospital" means a health facility having a duly constituted governing body with overall administrative and professional responsibility and an organized medical staff that provides 24-hour inpatient care, including the following basic services: medical, nursing, surgical, anesthesia, laboratory, radiology, pharmacy, and dietary services.

CAL. HEALTH & SAFETY CODE § 1250.

To be a health facility as defined in section 1250, that facility must (1) be "operated for the diagnosis, care prevention and treatment of human illness", (2) admit patients for 24 hour stays or longer, and (3) have an organized medical staff that provides 24-hour inpatient care. The Former Hospital has none of these attributes. Since the Former Hospital doesn't currently provide any health care, it also cannot be a "facility that provides similar health care."

This Court has already ruled that the statutes do not apply to closed hospitals in *Gardens* because a closed hospital possess none of the required characteristics of a health facility required by the statute. That decision was consistent with normal usage, as courts have frequently looked to the legislature's choice of verb tense to ascertain a statute's temporal reach. *See, e.g.*, *United States* v. *Wilson*, 503 U. S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes"); *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U. S.

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49, 57 (1987) ("Congress could have phrased its requirement in language that looked to the past …, but it did not choose this readily available option").

To avoid the limits of its statutory powers as articulated by the Court in *Gardens* (which the AG contemptuously refers to as a "loophole" effectively created by the Court, Obj at 5), the AG argues he has the right to review the sale of a closed hospital relying on the 2017 Amendment: *regardless of whether it is currently operating or providing health care services or has a suspended license*. However, such an interpretation violates a canon of statutory construction that a court should read a statute in a manner that renders words a nullity.

Section 5920 as interpreted by the Attorney General with the 2017 Amendment and, again, applied in a manner consistent with the punctuation canon, results in Section 5920 apparently applying to "the sale of a health facility that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness, for one or more persons, to which the persons are admitted for a 24-hour stay or longer, regardless of whether it is currently operating or providing health care services." Thus, the addition of the words "regardless of whether the facility is operating or providing healthcare" renders the limitations of the statute to facilities as defined in Section 1250 a nullity. Similarly, reading the second phrase "a facility that provides similar health care," with the additional words "regardless of whether it is currently operating or providing health care services," renders the requirement that the facility provide similar healthcare a nullity. Courts should not accept statutory interpretations which render parts of the statute a nullity. *City of Huntington Beach v. Board of Administration*, 4 Cal. 4th 462, 468 (1992) ("[L]egislation must be construed as a whole while avoiding an interpretation which renders any of its language surplusage.").

The Court should apply the Absurdity Doctrine of statutory construction to reject the Attorney General's interpretation of the statute: a provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve. *See Dodd v. United States*, 125 S. Ct. 2478, 2483 (2005) ("[W]hen the statute's language is plain, the sole function of the courts—**at least where the disposition required by the text is not absurd**—is to enforce it according to its terms.")

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(quotation marks omitted). *Cf AM Int'l, Inc. v. Graphic Mgmt. Assocs.,Inc*., 44 F.3d 572, 577 (7th Cir. 1995) (Posner, C.J.) ("An absurdity in the application of the plain-meaning rule usually results from a comparison of the apparently plain meaning to the real-world setting in which the contract or statute is to be applied. It is the same point that a clear document can be rendered unclear--even have its apparent meaning reversed-by the way in which it connects, or fails to connect, with the activities that it regulates.").

Perhaps the most illustrative statement made in the Attorney General's Objection as to the impossible breadth of his Section 5920 argument is that: "The point of the 2017 amendment to section 5920 is that the statute applies regardless of whether Verity currently operates or controls such facilities." Obj. at 9, lns. 15-17. If that statement is correct, then the nonprofit would be compelled to submit an application for Attorney General review if it sold the hospital to a for-profit and the for-profit subsequently sold the hospital to a third party years later. The notion that the statute imposes obligations on a nonprofit in a subsequent transaction to which it is not a party is patently absurd and finds no support in the legislative history.

The AG appears to recognize the absurdity of his argument, but buries it in footnote 10 in his Objection. In that footnote, he concedes that the statutes in question should not "be read in every case to include the past and future tenses," but rather in only a "limited set of cases" which he cannot describe with any particularity, presumably because it will be a set of cases in which the AG alone can know how he chooses to interpret the statute. However, the Debtors urge the Court to find that this case falls within the "limited set of cases" where the AG concedes that the present tense is the only reading of the statute which makes sense and the Court should reject the AG's contrary interpretation.

The Attorney General argues that his interpretation is consistent with the purpose of Section 5920, Objection at 13, lines 3-4, and that legislation's purpose is to make sure that he has the authority to review the sales of buildings which were, at some time in the past, operated or controlled by a nonprofit entity, and, sometime in the past, provided healthcare, had an organized medical staff and had patients stay for 24-hour care. However, that is clearly not the overriding purpose of the legislation he purports to rely on. As this Court noted in *Gardens*, in reviewing the

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sister statute dealing with the transfer of nonprofit facilities to for-profit facilities, "[t]he Legislature enacted Cal. Corp. Code § 5914 to ensure that the public was not deprived of the benefits of charitable health facilities as a result of the transfer of those facilities' assets...." Those "benefits" sought to be preserved were "the provision of health care to the people of California, providing as part of their charitable mission uncompensated care to uninsured low-income families and under-compensated care to the poor, elderly, and disabled." *In re Gardens Regional Hospital and Medical Center, Inc*., 567 B.R. 820, 828 (Bankr. C.D. Cal. 2018) (quoting 1996 Cal. Legis. Serv. Ch. 1105 (A.B. 3101) (West)). Obviously, applying the statute to a facility that doesn't provide any health care to families, the poor, elderly or disabled, or anyone else, cannot be considered consistent with the purpose of the original legislation. *Id.*

The Attorney General also argues that section 11 of the California Corporations Code, which reads, in its entirety: *The present tense includes the past and future tenses, and the future tense includes the present*, shows that the language of Section 1250 and Section 5920 should be read to include formerly operating hospitals, which otherwise clearly cannot satisfy the limits of Section 5920. This argument should also be rejected for three reasons. First, that language offers nothing that the Court did not and could not consider in its decision in *Gardens*. Courts have long noted that the use of the present tense is not dispositive. "The present tense is commonly used to refer to past, present, and future all at the same time." *Coalition for Clean Air; et al. v. Southern Cal. Edison Co.*, 971 F.2d 219, 225 (9th Cir. 1992). Second, interpreting the statute as if written in the past tense renders it incomprehensible as shown above. Third, Section 5 of the California Corporations Code qualifies section 11 and the other default provisions as follows: ***Unless the provision or the context otherwise requires***, these general provisions, rules of construction, and definitions govern the construction of this code. CAL. CORP. CODE § 5 (emphasis added).

The context of the AG's argument, seeking power over all buildings that ever have been or ever could be a hospital, "otherwise requires" a more limited, common-sense reading of the Code under section 5 that trumps section 11. CAL. CORP. CODE §§ 5; 11. The case of *MCI Communications Services, Inc. v. California Dept. of Tax & Fee Admin.*, 28 Cal. App. 5th 635, 640, 239 Cal. Rptr. 3d 241, 244 (Ct. App. 2018), *reh'g denied* (Oct. 12, 2018) ("*MCI*") is instructive. In

MCI, MCI purchased telephone cables, conduit, and telephone poles which did not require further assembly or construction and were assembled and ready for installation at the time of purchase. After purchase, MCI used the items to install the telephone cables for MCI's network.

A dispute arose over taxation, with California successfully invoking an identical "context otherwise requires" argument against MCI's sweeping invocation of an identical default provision regarding verb tense. At issue in *MCI*, section 6016.5 of the California Sales and Use Tax Law (Rev. & Tax. Code § 6016.5) excludes "telephone and telegraph lines, electrical transmission and distribution lines, and the poles, towers, or conduit by which they are supported or in which they are contained" from the definition of tangible personal property that is otherwise taxed. MCI argued that under the statute, a "line" (i.e., cable) exists regardless of whether that line has been installed into an integrated system. [The state] on the other hand, argue[d] that a 'line' denotes a complete telephone or telegraph system, such that section 6016.5 does not apply to the pre-installation component parts of any such system."

MCI, presaging the AG, invoked an identical "default" (as described by the Court) provision in the Revenue and Taxation Code that "t]he present tense includes the past and future tenses; and the future, the present" to argue that because the raw cables and parties could become a "line" under the statutes (that is installed and connected to other cables so as to create a communication system) they should be considered exempt "lines."

This argument was flatly rejected by the court, which invoked the "context otherwise requires" default provision to snuff out MCI's extreme position that a statute exempting telephone lines also installed inchoate, hypothetical and fragments of the same:

> … the Legislature's use of present tense verbs in this clause ("are supported" and "are contained") confirms that a telephone or telegraph line must already be "supported" or "contained"—i.e., completed and installed—to fall within the scope of section 6016.5. (See Hughes v. Bd. of Architectural Examiners (1998) 17 Cal.4th 763, 776, 72 Cal.Rptr.2d 624, 952 P.2d 641 ["In construing statutes, the use of verb tense by the Legislature is considered significant."].) …MCI's [argument] that section 6016.5—although it uses present tense verbs ("are supported" and "are contained")—should be construed as though it employs the future tense, and therefore encompasses "telephone and telegraph lines ... and the poles, towers, or conduit by which they are [or will be] supported or in which they are [or will be] contained." (§ 6016.5.) [relying on] on section 11, a

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> default provision of the Revenue and Taxation Code stating that "[t]he present tense includes the past and future tenses; and the future, the present." [is undercut by s]ection 5, [which] clarifies that the Revenue and Taxation Code's default provisions, including section 11, do not apply if "the context otherwise requires ...." (§ 5.)

MCI, 28 Cal. App. 5th at 646, 650. Likewise, here the default provision of section 11 of the Corporations Code does not give the AG fiat powers to oversee and impose conditions on a sale of nearly any commercial property in the state. *See also see also Satey v. JPMorgan Chase & Co*., 521 F.3d 1087, 1092–93 (9th Cir. 2008) (A credit card holder sued JPMorgan Chase under California's Identity Theft law. Applying California statutory interpretation, the Court ruled that the term "claimant" as defined reflected a present tense interest and that there was no inclusion of someone who had an interest at some point in the past); *Riojas v. United States Dep't of Agric.*, 2016 WL 3566941, at *5–7 (N.D. Cal. June 30, 2016) (rejecting the USDAs argument that the present tense in a statute applied to something that had once occurred in the past but had then stopped) ("The fact that the statute specifically requires this assessment to be made on a month-to-month basis supports Plaintiff's argument that the present tense use of the verb "receives" means just what it says").

C. The Attorney Generals' Good Faith Purchaser Argument Lacks Merit.

In a flawed attempt to attack the Purchaser as a good faith purchaser under § 363(m), the Attorney General asks this Court to ignore the well-established definition of a "good faith purchaser" and instead adopt an entirely new definition based on § 5523 of the California Corporations Code ("Section 5523"). Obj. at 12-14 (citing CAL. CORP. CODE § 5523). The novelty of the Attorney General's theory is confirmed by the absence of case citations in support of his proposition. Lacking judicial opinions, or supporting scholarship, the Attorney General asks this Court to abandon the *Filtercorp* standard uniformly adopted by bankruptcy courts and appears to urge this Court to ignore controlling precedent in this Circuit. *See In re Filtercorp, Inc.*, 163 F.3d 570, 577 (9th Cir. 1998) (citations omitted). Under this precedent, established over twenty years ago, the focus of a good faith inquiry under § 363(m) with respect to the purchaser is whether the proposed buyer colluded with other bidders in an effort to suppress the price or value receive by the selling bankruptcy estate. *See id.* ("[L]ack of good faith is [typically] shown by "fraud,

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collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders."). The Attorney General compounds the novelty and unsupported premise of his argument by misconstruing the California statute on which he purports to rely, Section 5523.

Section 5523 prohibits a non-profit from improperly self-dealing with one of its directors or its affiliates. However, the AG does *not* allege that the Debtors are engaged in self-dealing. Instead, he alleges that one of the Purchaser's directors (Dr. Soon-Shiong) is allegedly self-dealing because one of the Debtors' creditor—NantWorks LLC ("NantWorks") that Dr. Soon-Shiong allegedly has an interest in—will receive payment of a secured claim from the proceeds of the Sale. The Attorney General points to no aspect of the Sale that unduly benefits NantWorks vis-à-vis other creditors, such as a "grossly unfair" allocation of funds. *In re Filtercorp, Inc.*, 163 F.3d at 577. Instead, the Attorney General implies that the Purchaser is not acting in good faith under § 363(m) because the estates and their creditors might be receiving *too much cash*, some of which will pay off an allowed secured claim pursuant to the absolute priority rule, including those allowed secured claims held by NantWorks.[5] The objection is unfounded for at least two reasons discussed below.

1. The Attorney General Concedes There Is No Collusion, Fraud, Or Unfair Advantage.

Congress passed § 363(m) to encourage higher, not lower, bids. *See In re Rare Earth Minerals*, 445 F.3d 359, 363 (4th Cir. 2006) (lack of § 363(m)'s protections would chill bidding and "substantially reduce the value [received by] the estate" in sales). For this reason, the Ninth Circuit and all other Circuits still interpret § 363(m) from the lens of *the estates*, that is, whether the winning bidder imperiled *the sale* through underhanded conduct. *See, supra Filtercorp*, 163 F.3d at 577 (cited by *In re Berkeley Delaware Court, LLC*, 834 F.3d 1036, 1040–41 (9th Cir. 2016)); *In re USA Commercial Mortg. Co.*, 2007 WL 2571947, at *6 (D. Nev. Aug. 29, 2007) ("In analyzing the good faith provision of Section 363(m), the Ninth Circuit has . . . only found bad faith when there is clear evidence of [the *Filtercorp.* factors]").

[5] Nothing in the proposed Sale or APA determines the allocation of values to the collateral subject to the various liens of Prepetition Secured Creditors, including NantWorks LLC.

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As set forth above, the Sale does not present issues of collusion, fraud, or unfair advantage, nor does the Attorney General identify any such facts. Indeed, the Attorney General does not and cannot because the Debtors and the Purchaser engaged in arms-length bargaining, represented by independent and qualified counsel and other advisers, supported in the process by the Consultation Parties, none of whom are alleged to have ties to the Purchaser. The Parties reached the APA in good faith and without collusion, fraud or unfair advantage. *In re Berkeley Delaware Court, LLC*, 834 F.3d at 1040-41 (affirming finding that the agreement "was the product of an arms-length negotiation between the Trustee and First-Citizens and entered into by the parties without collusion and in good faith.").

Further, it is unremarkable that a buyer in a § 363 sale may be affiliated with a secured creditor holding a claim that will be satisfied as a result of the sale. Putting aside credit bidding, the seminal case from the Ninth Circuit on statutory mootness, *In re Onouli-Kona Land Co.*, concerned mooting the appeal of a secured creditor's foreclosure of its collateral. 846 F.2d 1170, 1172 (9th Cir. 1988). The balance of § 363, requiring full transparency from marketing to close of the sale, ensures that secured creditors do not take undue advantage of the system. *Id.* at 1173 ("The terms of the auction came from the bankruptcy court, not from Purchaser: the bankruptcy court supervised the auction's timing, advertising, and down payment requirement."); *see also Matter of Youngstown Steel Tank Co.*, 27 B.R. 596, 599 (W.D. Pa. 1983) ("the cases are clear that a creditor can also be a good faith purchaser.").

Because of the propriety of this Sale, the Attorney General does not actually assert a § 363(m) challenge, but advances a state statute that has never been applied in the context of a bankruptcy sale.

2. The Attorney General Erroneously Applies Section 5523.

The remedies available under Section 5523 apply *only between the director (Dr. Soon-Shiong) and the non-profit he serves (the Purchaser)*. CAL. CORP. CODE § 5523(h); *See also* Ob. at 13 (the Sale "could subject the Foundation to litigation …"). The Attorney General cites no authority that the Court should consider some remote possibility of litigation between the buyer and a third party relating to the transactions could survive the free and clear nature of the Sale under

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§ 363(f) and the Court's anticipated good faith finding under § 363(m), because this authority does not exist.

Regardless, subsection (d)(1) of Section 5523 makes the objection academic. CAL. CORP. CODE § 5523(d)(1). It provides that the Attorney General may not seek any remedies for any alleged self-dealing transaction if

> … the court in an action in which the Attorney General is an indispensable party,[6] has approved the transaction before or after it was consummated.

Id. This is exactly what the Debtors seek in their Motion—approval of a deal that they negotiated to bring cash into their estates.[7] In these circumstances, seeking to re-open a closed hospital facility and provide consideration for the new operation to be sustainable to address the COVID-19 pandemic, the parties are acting in good-faith. Here, the Attorney General should not attempt to supplant the well-established understanding of "good faith" under § 363(m) with self-serving reference to inapplicable state law.

V.

DEBTORS' REPLY TO BELFOR'S OBJECTION

On April 7, 2020, Belfor Management filed a limited objection to the SVMC Sale [Docket 4442] asserting the Debtors had not carried their burdens under § 363(f)(1-5) to show that the sale could be free and clear of their mechanics lien. With respect to the unchallenged Belfor Mechanic' lien (the "Belfor Lien"), the Debtors rely entirely upon § 363 (f)(1) and (5). The Belfor lien affects

[6] The term "indispensable party" is a broad California term of art. "Where the plaintiff seeks some type of affirmative relief which, if granted, would injure or affect the interest of a third person not joined, that third person is an indispensable party." *County of Imperial v. Superior Court*, 152 Cal. App. 4th 13, 36, 61 Cal. Rptr. 3d 145, 162–63 (2007), as modified on denial of reh'g (July 13, 2007). Here, with the Debtors seeking rulings which would affect the alleged interests of the AG (who asserts authority over the Sale), the AG is an indispensable party.

[7] The Court has jurisdiction to so approve. *See In re HHH Choices Health Plan, LLC*, 554 B.R. 697, 700 (Bankr. S.D.N.Y. 2016) (bankruptcy court is proper venue for applying state law regarding non-profit sales) (citing Pub. L. No. 109-8, § 1221(e) (2005)) ("Nothing in this section shall be construed to require the court in which a case under chapter 11 of title 11, United States Code, is pending to remand or refer any proceeding, issue, or controversy to any other court or to require the approval of any other court for the transfer of property.").

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only SVMC and not the Holdings properties subject to the MOB Financing liens, and was filed after the Master Deed of Trust securing the Obligations to the 2005 Bonds and the Working Capital Notes (each as defined in the Final DIP Order). Under the Motion and proposed sale order, the Belfor Lien attaches to the proceeds of the SVMC sale and will be paid in order of priority based solely upon further orders of the court issued under § 363 or § 1129 pursuant to the Debtors' plan of liquidation.

Where state law permits a free and clear sale as part of a foreclosure sale, the Bankruptcy Code permits a sale free and clear of such interests under 363(f)(1). *Big Sky, LLC v. CH SP Acquisitions, LLC (In re Spanish Peaks Holdings II, LLC),* 892 F.3d 892 (9th Cir. 2017)(holding a debtor's real property sale could be free and clear of a leasehold interest, if permitted under Montana's state foreclosure law). In addition, § 363(f)(5) does not require full payment to the lien or interest holder if the debtor can demonstrate the existence of another legal or equitable proceeding by which the holder may be compelled to accept less than full satisfaction of the secured debt. *In re Grand Slam U.S.A., Inc.,* 178 B.R. 460, 461-62 (E.D. Mich. 1995) (holding that the "money satisfaction" language in § 363(f)(5) does not require full payment to the lien holder); *In re Healthco Int'l Inc.,* 174 B.R. 174, 176-78 (Bankr. D. Mass. 1994) (construing "money satisfaction of such interest" to mean a payment constituting less than full payment of the underlying debt because any lien can always be discharged by full payment of the underlying debt pursuant to §363(f)(3)); *Scherer v. Fed. Nat'l Mortgage Ass'n (In re Terrace Chalet Apartments, Ltd.),* 159 B.R. 821, 829 (Bankr. N.D. Ill. 1993). A foreclosure sale is a clear example of such a legal proceeding.

There should be little controversy that in a foreclosure proceeding, a junior mechanics lien can be cleared from the title. It is well understood in California, that:

> Title to real property which is conveyed after foreclosure by a trustee's deed relates back to the date the trust deed was executed. The title passed is that held by the trustor at the time of execution. Liens which attached after the foreclosed trust deed was executed are extinguished and the purchaser takes title free of those junior or subordinate liens.

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Principal Mut. Life Ins. Co. v. Vars, 65 Cal. App. 4th 1469, 1478, 77 Cal. Rptr. 2d 479, (Cal. App. 2d Dist. 1998), citing *Dover Mobile Estates v. Fiber Form Products Inc.,* 220 Cal. App. 3d 1494, 1498, 270 Cal. Rptr.183 (1990). More specifically, this concept applies to mechanics liens in California that are junior by agreement or timing of a recorded deed of trust. *See Rheem Mfg. Co. v. United States* (1962) 57 Cal.2d 621, 625, 21 Cal. Rptr. 802, 371 P.2d 578 ("It is established in California . . . that a recorded deed of trust given as security for the purchase price of property or for other purposes, such as a construction loan, has priority over subsequent mechanics' liens and that a trustee's sale of the property covered by the deed of trust extinguishes such liens.") See also, *Kohan v. Pacifica L39*, LLC, 2015 Cal. App. Unpub. LEXIS 4418 (Cal. App. 4th Dist. 2015); and *Magnum Builders v. Preferred Bank*, 2014 Cal. App. Unpub. LEXIS 5054 (Cal. App. 2d Dist. 2014)

Belfor's citation to *Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC),* 391 B.R. 25 (9th Cir. B.A.P. 2008) does not suggest a contrary result. First, the *Clear Channel* decision predates the 2017 decision of the Ninth Circuit in *In re Spanish Peaks Holdings II, LLC,* 892 F.3d at 900, which clearly holds a foreclosure proceeding is a relevant proceeding for purposes of §363(f)(1). Second, there is no ambiguity, as there was in *Clear Channel*, that Belfor could be compelled to accept money in satisfaction of its mechanic's lien as part of a foreclosure proceeding or that a foreclosure proceeding would yield the same result as this Court has been asked to approve through the Debtors' Motion. Unlike *Clear Channel*, here there are no carve out or lien stripping issues arising in the context of a negotiated credit bid. As a result, this Court should find the Sale can be approved and that Belfor's interests are adequately protected by attaching is mechanics lien to the proceeds of the Sale as provided in the Motion and the proposed Sale Order.

In addition, other courts also have held that a chapter 11 cramdown also is a typical "legal proceeding" by which an entity may be compelled to accept less than full money satisfaction and which will permit the sale of creditor's collateral free and clear of interest under § 363(f)(5). *In re Gulf States Steel, Inc. of Ala*., 285 B.R. 497, 508 (Bankr. N.D. Ala. 2002) (holding that the liens or interests identified in the sale motion could be compelled to accept a money satisfaction in a cramdown plan of reorganization in a chapter 11 case); *Terrace Chalet Apartments*, 159 B.R. at 829 (finding that § 1129(b)(2) cramdown is such a provision); *In re Perroncello,* 170 B.R. 189

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(Bankr. D. Mass. 1994); Collier, ¶ 363.06[6][a]; but see In re PW, LLC, 391 B.R. 25, 46 (B.A.P. 9th Cir. 2008). Thus, in addition to the reasoning *Spanish Peaks*, the Debtors can sell property free and clear of a creditor's lien if they demonstrate they can cram down the creditor's interest pursuant to § 1129(b)(2).

The ability of a debtor to "cram down" a secured creditor's interest in a mechanics lien under § 1129(b)(1) and (2) also constitutes a "legal proceeding," pursuant to which a secured creditor could be compelled to accept a money satisfaction. *See Grand Slam*, 178 B.R. at 462. Section 1129(b)(2)(A) allows cramdown of a secured creditor, provided that it receives "the indubitable equivalent" of its claim. A debtor can cram down a secured creditor if it demonstrates (1) the debtor is not unfairly discriminating against the secured creditor, § 1129(b)(1); (2) it is acting in good faith, § 1129(a)(3)-(b)(1); and (3) the secured creditor is receiving the actual value of its claim. § 1129(b)(2)(A)(i)(II), § 1129(b)(2)(A)(iii); *see also In re Sandy Ridge Dev. Corp*., 881 F.2d 1346, 1350 (5th Cir. 1989) (holding that "indubitable equivalent" of a secured creditor's interest is the actual value of the claim). In *In re Hunt Energy Co., Inc.,* 48 B.R. 472, 485 (Bankr. N.D. Ohio 1985), the court found that a lien which attaches to the proceeds of a sale would necessarily be reduced by subsequent valuation at a hearing under § 506(a) to meet the "indubitable equivalence" requirements of section 1129(b)(2)(A). Once § 1129(b)(2)(A) is satisfied, the lienholder would be compelled through the cramdown process to accept such money satisfaction as dictated by the cramdown provisions. *Id.*

Consequently, the Debtors' request the Court overrule the objection.

VI.

CONCLUSION

For all these reasons, the Court should enter the Sale Order, overrule any objections[8] to the Sale, and grant all of the other relief requested in this Memorandum.

[8] Service Employees International Union, United Healthcare Workers-West ("SEIU-UHW") filed a reservation of rights [Docket No. 4456] (the "Reservation of Rights") to the Sale. In the Reservation of Rights, SEIU-UHW "is not objecting to the sale" and reserves its rights. The Debtors reserve all rights with respect to SEIU-UHW.

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DECLARATION OF RICHARD G. ADCOCK

1. I, Richard G. Adcock, submit this Declaration in support of the *Debtors' Memorandum in Support of Entry of an Order, Pursuant to 11 U.S.C. § 363(b), (f), and (m), (A) Authorizing the Sale of Certain Assets of St. Vincent Medical Center, Verity Holdings, LLC, and Verity Health System of California, Inc., Free and Clear of All Claims, Liens and Encumbrances; (B) Authorizing the Assumption and Assignment of Designated Executory Contracts and Unexpired Leases; and (C) Granting Related Relief* (the "Memorandum")[9] filed by Verity Health System of California, Inc. ("VHS") and the affiliated debtors, the debtors and debtors in possession (collectively, the "Debtors") in the above-captioned chapter 11 bankruptcy cases (the "Cases"), and hereby state as follows:

2. I am, and have been since January 2018, the Chief Executive Officer ("CEO") of VHS. Prior thereto, I served as VHS's Chief Operating Officer ("COO") since August 2017. In my roles as COO and CEO at VHS, I have become intimately familiar with all aspects of VHS and its above-captioned affiliates who have also filed for bankruptcy protection, including St. Vincent Medical Center ("St. Vincent").

3. I have extensive senior-level experience in the nonprofit healthcare arena, especially in the areas of healthcare delivery, hospital acute care services, health plan management, budgeting, disease management, and medical devices. I have meaningful experience in both the technology and healthcare industries in the areas of product development, business development, mergers and acquisitions, marketing, financing, strategic and tactical planning, human resources, and engineering.

4. My background and familiarity with the Debtors' day-to-day operations, business and financial affairs, and the circumstances leading to the commencement of these chapter 11 bankruptcy cases are set forth more fully in my *Declaration filed in Support of Emergency First-Day Motions* [Docket No. 8] filed on the Petition Date, and are incorporated by reference into this Declaration.

[9] Unless otherwise defined herein, all capitalized terms have the definitions set forth in the Memorandum.

5. My background and familiarity with the Sale process is set forth more fully in my declarations filed in support of the Closure Motion [Docket No. 3906] and the Motion [Docket No. 4365], both of which are also fully incorporated herein by this reference.

6. I have been intimately involved in the sale of the Assets related to St. Vincent and have worked closely with the Debtors' advisors in connection therewith. As set forth more fully in the Moloney Declaration filed concurrently herewith, the Assets have now been fully marketed within these Cases for more than one year. After the Court entered an order [Docket No. 3784] authorizing the Debtors to implement an alternative sale process, Cain robustly marketed the Purchased Assets. As a result of the marketing process, the Debtors received bids, updated bids, and ancillary documents as set forth in the Moloney Declaration. The Debtors carefully analyzed all bids, including draft purchase agreements and ancillary documents, submitted by potential purchasers in connection with the Sale.

7. On March 23, 2020, the Debtors in consultation with Cain and their advisors, agreed to accelerate the sale of St. Vincent due to the all-cash offer from the Purchaser, its intended use for St. Vincent, and the heightened uncertainty in the capital markets related to the COVID-19 pandemic. After consultation with Cain and their other advisors, the Debtors selected the Purchaser as the Stalking Horse Bidder because, in the judgment of the Debtors, the Purchaser had the highest and best bid, had completed their due diligence, had no financing contingency, and offered the most certain path to close.

8. On March 30, 2020, the Debtors filed the Motion, seeking, among other things, emergency relief to approve the proposed $135 million APA as the Stalking Horse APA with a proposed bid deadline of April 3, 2020 (the "Bid Deadline"), an auction date of April 6, 2020, if needed, and a scheduled approval hearing for April 10, 2020. On April 1, 2020, the Court entered the Bidding Procedures Order.

9. The Debtors received no further bids on the Bid Deadline. Consequently, no auction was held and the Stalking Horse Bidder became the Winning Bidder, pursuant to the terms of the Bidding Procedures Order.

10. The Debtors believe that selling the Purchased Assets to the Purchaser in accordance

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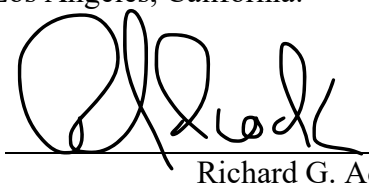
with the APA is in the best interests of the Debtors' estates, their creditors, and stakeholders. Importantly, the Purchase Price of $135 million represents the fair market value for the Purchased Assets, will inject funds into these estates, and will provide a substantial benefit to the Debtors' estates and their creditors. Additionally, and significantly, the sale to the Purchaser furthers the charitable mission of the Debtors and the original legacy of the Daughters of Charity. The Purchaser will use St. Vincent to coordinate with the State of California and the local government to ensure that the facilities are being put to the best use in this critical time and to facilitate critical research related to the COVID-19 pandemic.

11. In connection with the sale to the Purchaser, the Debtors have agreed to surrender their general acute care license in connection with the sale to the Purchaser.

12. The APA was intensively negotiated at arm's length between the Debtors and the Stalking Horse Bidder and their respective advisors and professionals, and all parties involved acted in good faith. Throughout the negotiations, the Debtors sought and obtained active input from the Consultation Parties and professionals. The Debtors are not aware of any fraud or collusion between the Stalking Horse Bidder and any other active or potential bidders, nor any attempt by the Stalking Horse Bidder to take unfair advantage of other bidders. Furthermore, the Stalking Horse Bidder is neither an "insider" (e.g., director, officer, person in control, partnership, general partner, or relative), manager, nor creditor of the Debtors.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed this 9th day of April, 2020, in Los Angeles, California.



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DECLARATION OF JAMES M. MOLONEY

I, James M. Moloney, submit this Declaration in support of the *Debtors' Memorandum in Support of Entry of an Order, Pursuant to 11 U.S.C. § 363(b), (f), and (m), (A) Authorizing the Sale of Certain Assets of St. Vincent Medical Center, Verity Holdings, LLC, and Verity Health System of California, Inc., Free and Clear of All Claims, Liens and Encumbrances; (B) Authorizing the Assumption and Assignment of Designated Executory Contracts and Unexpired Leases; and (C) Granting Related Relief* (the "Memorandum")[10] filed by Verity Health System of California, Inc. ("VHS") and the affiliated debtors, the debtors and debtors in possession (collectively, the "Debtors") in the above-captioned chapter 11 bankruptcy cases (the "Cases"), and hereby state as follows:

1. I am a managing director of Cain Brothers ("Cain"), which is a division of KeyBanc Capital Markets Inc., a wholly-owned broker/dealer subsidiary of KeyCorp and an affiliate of KeyBank National Association. Mr. Carsten Beith and I are the co-heads of Cain Brothers' Health Systems M&A group and Mr. Beith is also actively involved in this engagement with the Debtors. I am over the age of 18 and competent to testify as to the facts set forth herein and will do so if called upon.

2. I have personal knowledge of the facts stated in this declaration, except as to those stated on information and belief, and, as to those, I am informed and believe them to be true. If called as a witness, I could and would competently testify to the matters stated herein.

3. My background and familiarity with the Sale process is set forth more fully in my declarations filed in support of the Closure Motion [Docket No. 3906] and the Motion [Docket No. 4365], both of which are fully incorporated herein by this reference.

4. After the Court entered an order [Docket No. 3784] authorizing the Debtors to implement an alternative sale process, Cain commenced a new marketing process to identify parties potentially interested in acquiring the Purchased Assets. Among other things, Cain began by making telephone calls to parties that had previously expressed interest in acquiring the Purchased

[10] Unless otherwise defined herein, all capitalized terms have the definitions set forth in the Memorandum.

Assets. On January 3, 2020, Cain emailed all parties that had executed a nondisclosure agreement (an "NDA") in connection with the Debtors' previous efforts to market St. Vincent and explained that the Debtors were initiating another marketing process.

5. After the Court entered the Closure Order, Cain continued to vigilantly monitor interest and continued to communicate with potential bidders and parties that had expressed interest in the Purchased Assets. Cain also notified additional parties that had executed NDAs. Ultimately, Cain notified 61 parties that executed NDAs of the Sale process and represented Cain's availability to assist in the bidding process. Each of the 61 parties received access to the data room related to the Sale, which Cain continued to populate with new and relevant information as it became available.

6. On January 15, 2020, Cain sent a letter to all potential purchasers, which highlighted the proposed sale timeline and requested that potential purchasers submit indications of interest ("IOIs") on or before February 7, 2020. On February 7, 2020, the Debtors received twelve IOIs from parties that had experience in similar investments and a wherewithal to close. Cain contacted the twelve potential purchasers that submitted IOIs, and continued to work with the potential purchasers on issues related to diligence, asset purchase agreements, inquiries, and other matters.

7. On February 26, 2020, Cain requested that parties submit proposed asset purchase agreements on or before March 6, 2020. The Debtors received ten proposed asset purchase agreements from interested bidders.

8. On March 16, 2020, an amended asset purchase agreement (the "APA") was submitted by the Foundation. The Foundation asserted it sought to purchase St. Vincent on an expedited timeline to use the St. Vincent facilities to coordinate with the State of California and the local government to ensure that the facilities are being put to the best use in this critical time and to facilitate critical research related to the COVID-19 pandemic. After reviewing all of the submitted proposals and the Foundation APA, the Debtors and its advisors began negotiating terms of the APA with the Foundation to become the Stalking-Horse Bidder. Simultaneously, Cain had ongoing discussions with other potential purchasers, including a bidder who also sought to be selected as the Stalking-Horse Bidder.

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9. On March 23, 2020, the Debtors in consultation with Cain and their advisors, agreed to accelerate the sale of St. Vincent due to the all-cash offer from the Foundation, its intended use for St. Vincent, and the heightened uncertainty in the capital markets related to the COVID-19 pandemic. Cain communicated the accelerated timeline and revised bid deadline to the interested parties that had submitted marked up asset purchase agreements. During the foregoing discussions, one interested bidder sought to become the stalking horse bidder and made a revised bid for $135 million. Subsequently, after additional discussions with Cain, the Foundation increased its bid by $10 million to $135 million. After consultation with Cain and their other advisors, the Debtors selected the Foundation as the Stalking Horse Bidder because, in the judgment of the Debtors, the Foundation had the highest and best bid, had completed their due diligence, had no financing contingency, and offered the most certain path to close.

10. On March 30, 2020, the Debtors filed the Motion, which sought emergency relief to approve the proposed $135 million Asset Purchase Agreement as the Stalking Horse APA with a proposed bid deadline of April 3, 2020, an auction date of April 6, 2020, if needed, and a scheduled approval hearing for April 10, 2020. Cain immediately communicated the accelerated bid, auction and sale hearing timeline to potential bidders.

11. In the Bidding Procedure Order, the Bankruptcy Court, among other things, approved The Chan Soon-Shiong Family Foundation as the Stalking Horse Bidder and set a bid deadline of April 3, 2020 (the "Bid Deadline"). Thereafter, Cain again reached out to its list of potential bidders, including bidders who had submitted proposed asset purchase agreements prior to the Debtors seeking emergency approval of the Stalking Horse APA.

12. On the Bid Deadline, Cain did not receive any bids. Multiple parties indicated to Cain that they did not submit a bid given the strength of the Stalking Horse Bid and/or because of the capital market uncertainties arising from the COVID-19 pandemic. Consequently, the Stalking Horse Bidder became the Winning Bidder, pursuant to the terms of the Bidding Procedures Order.

13. The APA was intensively negotiated at arm's length between the Debtors and the Stalking Horse Bidder and their respective advisors and professionals. Throughout the negotiations, the Debtors sought and obtained active input from the Consultation Parties and

professionals. Cain is not aware of any fraud or collusion between the Stalking Horse Bidder and any other active or potential bidders, nor is Cain aware of any attempt by the Stalking Horse Bidder to take unfair advantage of other bidders.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed this 9th day of April, 2020, in Los Angeles, California.

James M. Moloney

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