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7 Debtors In Possession

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

9 In re

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

12 Debtors and Debtors In
13 Possession.

14 Affects All Debtors

- 15 Affects Verity Health System of California, Inc.
- 16 Affects O'Connor Hospital
- 17 Affects Saint Louise Regional Hospital
- 18 Affects St. Francis Medical Center
- 19 Affects St. Vincent Medical Center
- 20 Affects Seton Medical Center
- 21 Affects O'Connor Hospital Foundation
- 22 Affects Saint Louise Regional Hospital Foundation
- 23 Affects St. Francis Medical Center of Lynwood Foundation
- 24 Affects St. Vincent Foundation
- 25 Affects St. Vincent Dialysis Center, Inc.
- 26 Affects Seton Medical Center Foundation
- 27 Affects Verity Business Services
- 28 Affects Verity Medical Foundation
- Affects Verity Holdings, LLC
- Affects De Paul Ventures, LLC
- Affects De Paul Ventures - San Jose Dialysis, LLC

29 Debtors and Debtors In
30 Possession.

Lead Case No. 18-20151-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

Chapter 11 Cases
Hon. Ernest M. Robles

DEBTORS' REPLY IN SUPPORT OF *EX PARTE* MOTION FOR AN ORDER AUTHORIZING THE DEBTORS TO DISCLOSE TO THE CALIFORNIA ATTORNEY GENERAL BIDS FOR THE ACQUISITION OF ASSETS RELATED TO ST. FRANCIS MEDICAL CENTER SUBJECT TO CONFIDENTIALITY RESTRICTIONS. [Related Docket Nos. 4165, 4708, 4720, 4721, 4723, 4725]

Hearing:

Date: May 27, 2020
Time: 10:00 a.m.
Location: Courtroom 1568
255 E. Temple St., Los Angeles, CA

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1 Verity Health System of California, Inc., a California nonprofit benefit corporation and the
2 Debtor herein (“VHS”), and the above-referenced affiliated debtors, the debtors and debtors in
3 possession (collectively, the “Debtors”) in the above-captioned chapter 11 bankruptcy cases (the
4 “Cases”), hereby file this reply (“Reply”) in support of the *Debtors’ Ex Parte Motion for an Order*
5 *Authorizing the Debtors to Disclose to the California Attorney General Bids for the Acquisition of*
6 *Assets Related to St. Francis Medical Center Subject to Confidentiality Restrictions* [Docket No.
7 4708] (the “Motion”)¹ and in response to the Court’s *Order Setting Hearing on Debtors’ Ex Parte*
8 *Motion for an Order Authorizing the Debtors to Disclose Bids for the Acquisition of St. Francis*
9 *Medical Center Subject to Confidentiality Restrictions* [Docket. No. 4725] (the “Order”) entered
10 by the Court and the objection [Docket No. 4721] (the “Objection”) filed by the California Attorney
11 General (the “Attorney General”). In reply to the Objection, the questions raised by the Court in
12 the Order, and in further support for the relief sought by the Motion, the Debtors respectfully state
13 as follows:

14 **I.**

15 **INTRODUCTION**

16 The Debtors have expended and continue to expend enormous effort to satisfy requests and
17 demands made by the Attorney General that often have no regard for the chapter 11 process.
18 Constituents who underwrite the costs of the Attorney General’s extended review process of every
19 sale suffer severe economic impact. Unfortunately, one thing has been made clear in these cases:
20 the Attorney General sees no limits to his power. When the Attorney General insisted that he had
21 the authority to review the sale of O’Connor Hospital and Saint Louise Regional Hospital to the
22 County of Santa Clara, despite the clear language in the statute to the contrary, the Debtors were
23 forced to spend precious resources and costs successfully litigating the issue. When the Attorney
24 General insisted that he could issue any conditions on the sale of four hospitals, the Debtors were
25 forced to spend additional resources and costs successfully cutting off the conditions under § 363.
26 When the Debtors successfully sold St. Vincent to a philanthropic foundation that would use the
27

28 ¹ Capitalized terms not defined in this Reply shall have the meaning ascribed to them in the Motion.

1 facility to address COVID-19, the Debtors were forced to spend even more resources and costs
2 litigating with the Attorney General, even though he knew St. Vincent agreed to surrender its license
3 which put the sale beyond his purview. And these are only the public disputes that have unfolded
4 and shine a light on the difficulty the Debtors navigate as they overcome challenge after challenge
5 to bring these Cases to successful conclusion.

6 Until now, the Debtors have not asked the Court to involve itself in the review process
7 conducted by the Attorney General. However, this dispute concerns compliance with an order
8 entered by this Court—an order at the core of the Sale process upon which the Debtors, constituents,
9 and third parties relied. The Attorney General blatantly rejects the limitations in the Bidding
10 Procedures Order based on his self-serving reading without acknowledgement of an alternative
11 interpretation or the Debtors’ legitimate concern of running afoul of an order. *See* Docket No. 4773
12 at 3 (alleging that “*nothing* in the APA or Bidding Procedures states, or even implies, that a bid is
13 to [be] kept confidential if it is not picked as a Qualifying Bid”). To boot, the Attorney General has
14 resorted to unfounded, blanket suppositions about bidders’ expectations without any facts, which
15 are contrary to the bidders’ expectations, as discussed below.

16 The Debtors’ concern that they cannot unilaterally disclose the Bids has been met with
17 unnecessary attacks and treated as a challenge to the Attorney General’s independent review
18 without regard to the chapter 11 process. To the Debtors’ disappointment, the Attorney General
19 has now even intimated that the Debtors’ submission may not be complete because the Attorney
20 General did not receive the Bids notwithstanding the Bidding Procedures Order. Such a decision
21 would have a catastrophic economic impact on these Cases since the Debtors worked around the
22 clock to submit the application 5 weeks ago and all parties expended resources on the review. The
23 Attorney General has been served with every pleading, has actively participated in these Cases, and
24 could have objected to the Bidding Procedures, but waited until now to raise the issue. Based on
25 the foregoing, and for the reasons set forth below, the Debtors respectfully request that the Court
26 amend the Bidding Procedures Order to authorize the Debtors to disclose the Bids to the Attorney
27 General on a confidential basis. To publicly disclose the Bids, unwinds the finality of the sale
28

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1 process and erodes expectations in in these Cases, and future cases, that parties can rely on the sale
2 process created by a bidding procedures order.

3 **II.**

4 **RELEVANT FACTUAL BACKGROUND²**

5 **A. The Motion, Related Pleadings, and the Order**

6 1. On May 13, 2020, the Debtors filed the Motion for the entry of an order authorizing
7 the Debtors to provide certain Bids to the Attorney General for their “Eyes Only” in connection
8 with the Attorney General’s review of the sale (the “Sale”) of substantially all of the assets related
9 to St. Francis Medical Center pursuant to that certain asset purchase agreement (the “APA”). The
10 Motion seeks this relief to provide the Bids to the Attorney General while still ensuring compliance
11 with the terms of the Bidding Procedures Order. The Bidding Procedures Order approved detailed
12 procedures related to the conduct of the Sale, including, *inter alia*, the specific circumstances under
13 which the Debtors were authorized to disclose bids and the specific parties entitled to receive and
14 review bids.

15 2. On May 15, 2020, the Attorney General filed the Objection, which asserts two
16 arguments. First, the Attorney General claims that the *ex parte* request is procedurally improper
17 and requests that the Court “preemptively meddle in the internal deliberations of a Constitutional
18 officer of the State.” *See* Obj. at 2. The Attorney General suggests that the Debtors seek an order
19 determining which material the Attorney General must deem confidential under 11 C.C.R. § 999.5.
20 Second, the Attorney General claims that the Bidding Procedures Order “establish no . . . duty of
21 confidentiality.” *See id.*

22 3. On May 15, 2020, UMB Bank, N.A., as master trustee, and Wells Fargo Bank,
23 National Association, as 2005 bonds indenture trustee (collectively, the “Trustees”) and the Official
24 Committee of Unsecured Creditors (the “Committee”) filed responses [Docket Nos. 4720, 4723]
25 (each a “Response”) in support of the Motion. In the Responses, the Trustees and Committee both
26 contend that the Bidding Procedures Order precludes disclosure of the Bids to parties other than the
27 Bid Deadline Recipients. *See* Trustee Response at 1; Committee Response at 2. Further, the

28 _____
² The Debtors incorporate by this reference the factual background set forth in the Motion.

1 Trustees explained that submission of the Bids to the Attorney General on a confidential basis
2 would not impede the Attorney General's internal deliberations concerning his review of the Sale.
3 *See* Trustee Response at 1.

4 4. On May 18, 2020, the Court entered the Order. The Order set the Motion for hearing
5 and requested additional briefing concerning (i) any matters the parties deem relevant to the Motion
6 and (ii) requested specific responses to the following issues:

- 7 a. Did Potential Bidders submit Bids with an expectation that those Bids would
8 remain confidential if they were not deemed Qualifying Bids?
9 b. If the Non-Qualifying Bids were made public, what type of confidential
10 commercial information would be disclosed? Would disclosure of this
11 information disrupt the integrity of the auction process by chilling bidding at
12 future auctions?
13 c. Will maintaining the confidentiality of the Non-Qualifying Bids interfere
14 with the Attorney General's ability to discharge his obligations under CAL.
15 CORP. CODE § 5914 *et seq.* in connection with his review of the Sale?

16 *See* Order at 3.

17 **B. The Debtors Agreed to Produce the Bids Subject to this Court's Ruling.**

18 5. On May 20, 2020, the Debtors submitted a letter to the Attorney General agreeing
19 to produce the Bids subject to the Court's ruling on the Motion and the Debtors' request that the
20 Attorney General treat the Bids as confidential under 11 C.C.R. 999.5(c)(3). As noted in the
21 Motion, the Debtors submit that it is appropriate to provide the Bids to the Attorney General to
22 further his review process, as requested, but the submission must be consistent with the Bidding
23 Procedures Order on which the Debtors, prepetition secured creditors, Committee, bidders, and
24 other parties in interest relied.

25 6. On May 21, 2020, the Deputy Attorney General would not agree that the 90-day
26 review period had started without the submission of the Bids.
27
28

1 III.

2 DISCUSSION

3 A. The Debtors Appropriately Rejected the Attorney General’s Invitation to Ignore the
4 Bidding Procedures Order.

5 The Debtors and its constituents read the Bidding Procedures Order to authorize disclosure
6 of the Bids only to the Bid Deadline Recipients. The Debtors filed the Motion because they cannot
7 simply ignore the explicit limitations set forth in the Bidding Procedures Order, but at the same
8 time desired to comply with the Attorney General’s request.

9 The Debtors’ insistence on obtaining leave of this Court to submit the Bids is well-reasoned.
10 The Bidding Procedures are not, as the Attorney General suggests, a mere “private agreement”
11 between the Bid Deadline Recipients. *See* Docket No. 4473 at 3. The Bidding Procedures approved
12 by the Bidding Procedures Order identify express and definite parties entitled to receive copies of
13 the Bids under particular circumstances. The Debtors’ intentional failure to comply with these
14 provisions without leave of this Court would constitute a violation of the Bidding Procedures Order.
15 *See, e.g., In re Count Liberty, LLC*, 370 B.R. 259, 277 (Bankr. C.D. Cal. 2007) (principal’s
16 “admission that he failed to comply with the [sale] order is sufficient, of and by itself, to justify
17 sanctions for civil contempt under § 105(a)” even if principal was “confused as to the meaning” of
18 a term used in the sale order); *Reno Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1130 (9th
19 Cir. 2006) (“Civil contempt . . . consists of a party’s disobedience to a specific and definite court
20 order by failure to take all reasonable steps within the party's power to comply.”) (quoting *Go-*
21 *Video, Inc. v. The Motion Picture Ass’n of Am. (In re Dual-Deck Video Cassette Recorder Antitrust*
22 *Litig.)*, 10 F.3d 693, 695 (9th Cir.1993)); *Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461,
23 465 (9th Cir. 1989) (stating that civil contempt may be found when a party fails to comply with an
24 order that is both specific and definite)). Further, the Debtors’ good faith effort to comply with the
25 Attorney General’s request would not absolve the Debtors of any violation of the Bidding
26 Procedures Order. *See, e.g., Dual-Deck Video*, 10 F.3d at 695 (“[T]here is no good faith exception
27 to the requirement of obedience to a court order[.]”); *Crystal Palace Gambling Hall, Inc. v. Mark*
28 *Twain Indus., Inc. (In re Crystal Palace Gambling Hall, Inc.)*, 817 F.2d 1361, 1365 (9th Cir.1987)

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1 (“the contempt need not be willful” and a “‘good faith’ exception to the requirement of obedience
2 to a court order has no basis in law”).

3 The Attorney General incorrectly surmises that the Motion is motivated by the Debtors’
4 separate obligations under nondisclosure agreements. It is not. Rather, the Debtors filed the Motion
5 for precisely the stated reasons—the Debtors take seriously their obligations to respect orders of
6 this Court. The Debtors disagree with the Attorney General’s suggestion that the Bids can be
7 disclosed simply because the Bidding Procedures do not use the term “confidential,” as more fully
8 discussed below. The Attorney General’s attempt to parse the Bidding Procedures and Bidding
9 Procedures Order for an “out” should be rejected in favor of the Debtors’ procedurally proper efforts
10 to seek leave of this Court.

11 **B. The Bidding Procedures and Bidding Procedures Order Are Integral to the Sale and**
12 **Should Not Be Modified.**

13 The Sale is a direct result of the parties’ compliance with the detailed provisions of the
14 Bidding Procedures. The Bankruptcy Court approved comprehensive Bidding Procedures in
15 advance of the Sale to ensure that all parties clearly understood the requirements of participation
16 and to avoid *post facto* disputes among bidders concerning the conduct of the Sale. *See, e.g.*,
17 Bidding Procedures Order at 4 (finding that “[t]he Bidding Procedures . . . are fair, reasonable, and
18 appropriate and are designed to maximize the recovery from the Sale of the Purchased Assets”);
19 *see also In re Pursuit Capital Mgmt., LLC*, 874 F.3d 124, 129 (3d Cir. 2017) (recognizing that bid
20 procedures are intended “[t]o establish ground rules”). These provisions dictated (and often
21 predetermined) the Debtors’ subsequent decision-making in connection with every aspect of the
22 Sale process. By way of example, after careful review of the Bidding Procedures, the Debtors (in
23 consultation with the “Consultation Parties”) concluded that they were unable to hold an auction
24 because they received no Qualified Bids. *See* Docket No. 4465 at 2 (“On the Bid Deadline, the
25 Debtors received bids from potential purchasers, but, after consultation with their advisors and the
26 Consultation Parties, determined that the bids did not satisfy the requirements to be Qualified Bids.
27 Thereafter, the Debtors selected Prime as the Winning Bidder and did not conduct the Auction.”).
28 Further, the APA negotiated with Prime expressly provides for, and allocates risks as a result of,

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1 the terms of the Bidding Procedures Order. *See, e.g.*, APA § 6.1(a) (“Sellers and Purchaser shall
2 comply with the terms of the Bid Procedures Order.”); *id.* at § 9.2 (agreeing to “a break-up fee in
3 accordance with the Bidding Procedures” under certain circumstances); *id.* at § 1.11 (agreeing to
4 early designation concerning assumption or rejection of certain contracts “to enable Sellers to
5 comply with the terms of the Bidding Procedures Order”). In light of the foregoing, the Debtors
6 are skeptical of any effort to rewrite or alter wholesale provisions of the Bidding Procedures and
7 Bidding Procedures Order given their inextricable relationship with the Sale.

8 **C. The Debtors Presume That Bidders Submitted Bids in Reliance Upon the Bidding**
9 **Procedures, Which Set Clear Expectations Concerning Disclosure of the Bids.**

10 The Debtors respectfully submit that bidders provided the Bids with an expectation that
11 those Bids would remain confidential if they were not deemed Qualified Bids. Indeed, bidders had
12 an expectation of confidentiality throughout the process, which is consistent with any competitive
13 sale process. *See, e.g.*, email from counsel to a bidder attached hereto as **Exhibit “A.”** While the
14 Debtors do not stand in the shoes of any bidders, counsel for another bidder informed the Debtors
15 that the bidder relied on the bidding procedures set forth in the Bidding Procedures Order and that
16 all parties would be expected to comply with the procedures, including disclosure.

17 Further, the Debtors accept as true that bidders, the Bid Deadline Recipients, and other
18 parties in interest take final orders of this Court at face value, rely on their express terms, and
19 appropriately view such final orders as binding rather than noncompulsory. This presumption is
20 particularly true of the Bidding Procedures Order because it was intended to set bidders’
21 expectations concerning the Sale process. *See In re Golden Empire Air Rescue, Inc.*, Nos. 07-1086,
22 07-1087, 2007 WL 7540946, at *7 (B.A.P. 9th Cir. Oct. 25, 2007) (“Setting up formal bidding
23 procedures and allowing the bidding process to play out would have helped assure that the highest
24 and best price was received for the benefit of the silent creditors.”); *In re Innkeepers USA Tr.*, 448
25 B.R. 131, 148 (Bankr. S.D.N.Y. 2011) (finding that bidding procedures provide “the market and
26 the Debtors [with] the certainty and the ‘rules’ that they need to complete the auction process and
27 move on to plan confirmation”); *In re Texas Rangers Baseball Partners*, 431 B.R. 706, 717 (Bankr.
28 N.D. Tex. 2010) (“It is . . . in every party’s interest to make a success of the Approved [Bid]

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1 Procedures.”). Modifications should be balanced against the “policy of inspiring confidence in
2 sales under the supervision of the court.” *See, e.g., Munro Drydock, Inc. v. M/V Heron*, 585 F.2d
3 13, 14 (1st Cir. 1978); *In re Farmland Industries, Inc.*, 284 B.R. 111, 120 (Bankr. W.D. Mo. 2002)
4 (providing that an auction and bid process established by court order ensures the regularity of the
5 auction and encourages bidders to make their highest and best bids). Thus, the Bidding Procedures
6 were carefully crafted to detail the precise conduct of the Sale process in advance for the benefit of
7 all parties.

8 The plain meaning of the Bidding Procedures Order and Bidding Procedures are
9 determinative of bidder expectations given their unambiguous limitations on the disclosure of Bids.
10 In *In re Bigler*, a bidder submitted a “higher and better” bid following the close of the auction and
11 selection of the winning bidder, but before the hearing on the motion to approve the sale. *See In re*
12 *Bigler, LP*, 443 B.R. 101, 106 (Bankr. S.D. Tex. 2010). The court overruled the bidder’s argument
13 that the court should look beyond the express terms of the bidding procedures to consider evidence
14 of actual bidder expectations. *See id.* at 111. Applying contract interpretation principles, the court
15 specifically “reject[ed] the notion that it should take into account the expectations of the parties, for
16 the plain meaning of the Bid Procedures and the Bid Procedures Order unambiguously prohibits
17 bids after the auction has closed.” *See id.* (citing *Ghidoni v. Thomas (In re Ghidoni)*, 99 Fed. Appx.
18 517, 520 (5th Cir. 2004) (“Under the basic rules of contract interpretation, the four corners of the
19 contract control unless the contract is deemed ambiguous”) (internal footnotes and citations
20 omitted)).

21 The approved Bidding Procedures clearly delineate the parties entitled to review the Bids
22 and the circumstances under which the Bids could be reviewed. The Bidding Procedures required
23 potential bidders to submit their Bids to the Debtors, the prepetition secured creditors and the
24 Committee (collectively, the “Bid Deadline Recipients”). *See* Bidding Procedures Order, Ex. 1
25 (Bidding Procedures at ¶¶ 4, 8). Other than the Bid Deadline Recipients, the Bidding Procedures
26 only permitted the Debtors to disclose (i) the identities of bidders that submitted “Qualified Bids”
27 (as that term is defined in the Bidding Procedures) to potential bidders that submitted Bids, and
28 (ii) terms of the Qualified Bids with “Qualified Bidders” if an auction was held. *See id.* (Bidding

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1 Procedures at ¶¶ 11, 13(c)). The express inclusion of the Bid Deadline Recipients as the sole
2 recipients of the Bids presumptively excludes all other potential parties even if the term
3 confidentiality was not used; the list of parties to get the bids in the Bid Procedures Order was
4 exclusive and therefore any one not listed was excluded. This is consistent with the rule of
5 construction called “negative implication canon.” The expression of one thing implies the
6 exclusion of others (*expressio unius est exclusio alterius*). While it is generally applied to the
7 interpretation of statutes, it is equally applicable to the interpretation of orders. This rule creates a
8 presumption “that when a statute designates certain persons, things, or manners of operation, all
9 omissions should be understood as exclusions.” *Copeland v. Ryan*, 852 F.3d 900, 907 (9th Cir.
10 2017) (quoting *Boudette v. Barnette*, 923 F.2d 754, 756-57 (9th Cir. 1991) and citing Antonin Scalia
11 & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107-111 (2012)); *see, e.g.*,
12 *Harford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (concluding that
13 a statute that states a bankruptcy trustee has the right to recover but is silent regarding an
14 administrative claimant should be read as not giving such claimant the same right).

15 And although the presumption is most often applied in interpreting statutory language, it is
16 applicable to any other written documents, such as contracts or orders, as well. *See, e.g., Barnes v.*
17 *Indep. Auto. Dealers Ass’n Health & Benefit Plan*, 64 F.3d 1389, 1393 (9th Cir. 1995) (“Under the
18 doctrine of *expressio unius est exclusio alterius*, we must assume that by expressly providing for
19 subrogation in cases in which the Plan makes payment, the Plan document excludes subrogation
20 when no payment is made.”); *Hardware Mut. Ins. Co. v. Dunwoody*, 194 F.2d 666, 668 (9th
21 Cir.1952) (applying the doctrine to a subrogation clause in an insurance contract); *Bigler*, 443 B.R.
22 at 111 (applying rules of contract and statutory interpretation to interpret bid procedures and a bid
23 procedures order).

24 Further, as a policy matter, bidders are expected to rely on the Bidding Procedures approved
25 by the Bidding Procedures Order, including the express provisions concerning disclosure of
26 Qualified Bids. Congress recognized that parties’ reliance on the finality of a bankruptcy court
27 order is particularly important in the context of bankruptcy sales. *See, e.g.*, 11 U.S.C. § 363(m);
28 *In re Stadium Mgmt. Corp.*, 895 F.2d 845, 847 (1st Cir. 1990) (Section 363(m) offers “finality to

1 judgments by protecting good faith purchasers, the innocent third parties who rely on the finality
2 of the bankruptcy judgments in making their offers and their bids.”). Courts have extended this
3 important policy to orders that are “an integral element of the sale.” *In re WestPoint Stevens, Inc.*,
4 600 F.3d 231, 254 (2d Cir. 2010).

5 Here, the Court recognized that the Bidding Procedures Order—including the procedure to
6 determine Qualified Bids—was an integral component of the Sale. *See* Sale Order at ¶ M (finding
7 that “the Debtors received no other Qualified Bids by the Bid Deadline (as such terms are defined
8 by the Bidding Procedures Order”); *id.* at ¶ 3 (finding that the Sale “complied in all respects with
9 the Bidding Procedures”). The Attorney General waived any challenge to the Bid disclosure
10 limitations set forth in the Bidding Procedures by failing to object and only reserved rights with
11 respect to the Attorney General’s authority to review the Sale. *See* Sale Order at 22. The Bidding
12 Procedures Order and the Sale Order are now final orders and subject to the Court’s finding under
13 § 363(m). *See* FED. R. BANKR. P. 8002(a)(1) (providing for 14-day appeal period after entry of an
14 order); Sale Order at 5, 13. Thus, bidders and other parties in interest were entitled to rely on the
15 limited disclosure of Bids when evaluating whether to participate in the Sale process in accordance
16 with the Bidding Procedures, and the Attorney General has forfeited the right to now challenge its
17 exclusion from the list of parties entitled to see the bids. *See, e.g., Stewart v. U.S. Bancorp*, 297
18 F.3d 953, 956-957 n.1 (9th Cir. 2002) (“In general, a party who fails to raise an issue in the district
19 court, cannot raise it on appeal.”); *Freytag v. Commissioner*, 501 U.S. 868, 894 n.2 (1991) (Scalia,
20 J., concurring in part and concurring in judgment) (distinguishing between waiver and forfeiture
21 and finding that a party may forfeit a right if the party “failed to object in timely fashion”).

22 **D. The Bidding Procedures Required the Bidders to Publicly Disclose the Content of the**
23 **Bids Only If the Bidders Had an Opportunity to Participate in an Auction.**

24 The Court requests that the Debtors identify the type of confidential commercial information
25 that would be disclosed if the non-qualifying Bids were made public and whether disclosure of that
26 information would disrupt the integrity of the auction process. Before addressing these questions,
27 the Debtors emphasize that disclosure directly impacts the Debtors’ estates in these Cases—not just
28 other parties or future auctions. By way of example, disclosure of the Bids would inject uncertainty

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1 into the now final Sale process by allowing any party to reevaluate the decision-making that was
2 purposefully limited to the Debtors and the Consultation Parties. Endless questions, re-
3 negotiations, and other issues that would result from such a disclosure are present and real concerns
4 of the Debtors in these Cases.

5 Turning to the Court’s questions, the Bids contain commercial information, including, but
6 not limited to, financing sources, acquisition structure and strategy, proposed treatment of collective
7 bargaining agreements, purchase price, and Attorney General conditions the bidders were willing
8 to accept. The bidders were presumptively prepared to disclose the content of the Bids, even if they
9 contained information that would otherwise constitute confidential commercial information, *but*
10 *only if* the Bids were Qualified Bids and the bidders had an opportunity to participate in an auction.
11 The Debtors cannot substitute their judgment for the cost-benefit analysis bidders undertook in
12 reliance on the Bidding Procedures. Subsequent departure from the Bidding Procedures by public
13 disclosure of the Bids threatens to vitiate bidder’s independent decision-making. *See Bigler*, 443
14 B.R. at 111 (finding that post-auction alteration to “the bidding process would thoroughly
15 undermine [the bidder’s] expectations” after the bidder spent substantial time submitting bids and
16 being declared the winning bidder).

17 The Debtors submit that the Attorney General’s suggested *post facto* modification to the
18 Bidding Procedures undercuts their purpose and threatens to chill future bidding by undermining
19 the policy of inspiring confidence in bidding procedures. The Attorney General does not dispute
20 that Bidding Procedures are intended to provide a level playing field for potential bidders to
21 encourage bidding and enhance the value of a sale to the estate. *See Golden Empire Air Rescue,*
22 *Inc.*, Nos. 07-1086, 07-1087, 2007 WL 7540946, at *7; *Innkeepers USA Tr.*, 448 B.R. at 148; *Texas*
23 *Rangers Baseball Partners*, 431 B.R. at 717. The Court should consider the “policy of inspiring
24 confidence in sales under the supervision of the court” when making such modifications. *Munro*
25 *Drydock, Inc.*, 585 F.2d at 14. Although the Debtors were not privy to bidders’ internal
26 deliberations concerning the information bidders were willing to disclosure, the Bidding Procedures
27 were intended to offer a clearly defined metric for bidders to make their own assessments
28

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1 concerning their commercial information. Upending that calculus now would surely undermine
2 confidence in the intended certainties of the Court-supervised Sale process and chill bidding.

3 **E. Disclosure of the Bids on a Confidential Basis Does Not Preclude the Attorney General**
4 **from Reviewing the Sale or “Meddle” With the Attorney General’s Decision-Making**
5 **Authority Under 11 C.C.R. § 999.5(c)(3).**

6 The Attorney General incorrectly assumes that there is a conflict between the Court’s
7 authority to regulate the conduct of the Sale and the Attorney General’s authority to review the
8 Sale. However, maintaining the Bids confidential in accordance with the Bidding Procedures does
9 not conflict with the Attorney General’s review authority under state law.

10 The Attorney General implicitly concedes that the Bankruptcy Court has jurisdiction to
11 enter orders regulating the conduct of the Sale. The Attorney General did not object to the Bidding
12 Procedures Order or the provisions in the Bidding Procedures concerning treatment of bids or
13 limited disclosure to Bid Deadline Recipients. Nor does the Attorney General challenge the
14 Debtors’ assertion that the Court retains jurisdiction to enforce and implement the Bidding
15 Procedures Order. *See* Bidding Procedures Order at 10 (“The Court shall retain exclusive
16 jurisdiction over all matters arising from or related to the interpretation and implementation of this
17 Order.”); *see also* Mot. at 4-5 (citing *See* 11 U.S.C. § 105(a); *Travelers Indem. Co. v. Bailey*, 557
18 U.S. 137, 151 (2009); *In re Wilshire Courtyard*, 729 F.3d 1279, 1289 (9th Cir. 2013); *In re*
19 *Millennium Seacarriers, Inc.*, 419 F.3d 83, 96 (2d Cir. 2005)). Additionally, the Attorney General
20 does not (and cannot) suggest that it was improper to provide the Bids to a limited universe of
21 constituents, subject to confidentiality. *See, e.g., Pursuit Capital Mgmt., LLC*, 874 F.3d at 137 (“It
22 is clear that the Trustee had the authority to move to a sealed-bid procedure and did so precisely so
23 that he could comply with his fiduciary duties.”).

24 Rather, the Attorney General conflates enforcement of the Bidding Procedures Order with
25 an attempt to “meddle” with the Attorney General’s authority to make confidentiality
26 determinations under 11 C.C.R. § 999.5(c)(3). California law provides that

27 (3) All of the information provided to the Attorney General by the
28 applicant shall be treated as a public record unless such information
is a trade secret or unless the public interest in maintaining the

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1 confidentiality of that information clearly outweighs the public
2 interest in disclosure.

3 (A) The applicant shall have the sole burden of designating, at
4 the time of its submission, any specific information that it
5 believes should be treated as confidential and the reasons
6 therefor. The Attorney General shall determine the validity of the
7 confidentiality claim and communicate that determination to the
8 applicant prior to any public disclosure of the information.

9 Nothing in the regulation authorizes the Attorney General to ignore the limitations imposed by the
10 Bidding Procedures Order or supersedes the Court’s exclusive jurisdiction over the conduct of the
11 Sale. 28 U.S.C. § 1334(a) (granting bankruptcy courts, vis-à-vis district courts, “original and
12 exclusive jurisdiction of all cases under title 11”); 28 U.S.C. § 157(b)(2)(N) (conferring bankruptcy
13 courts with core jurisdiction over “orders approving the sale of property other than property”); *In*
14 *re East Orange General Hospital, Inc.*, 587 B.R. 53, 75 (D.N.J. 2018) (bankruptcy court had
15 jurisdiction to order dismissal of state court lawsuit did not constitute an exercise of jurisdiction
16 over state court action and was appropriate enforcement of sale order subject to the bankruptcy
17 court’s jurisdiction); *see also* Pub. L. 109-8, 119 Stat. 23 (2005) (“Nothing in this section [which is
18 now § 363(d)(1)] shall be construed to require the [bankruptcy] court in which a case under [the
19 Bankruptcy Code] is pending to remand or refer any proceeding, issue, or controversy to any other
20 court or to require the approval of any other court for the transfer of property.”). Further, California
21 law requires the disclosure of “each Proposal received by the applicant from any potential transferee
22 suggesting the terms of a potential transfer” only “if they are available.” 11 C.C.R. §
23 999.5(d)(11)(E). The open-ended, “available” exception to disclosure of the Bids coupled with the
24 Court’s authority to regulate the Sale process demonstrates that the Bidding Procedures Order and
25 California law do not conflict.

26 To the extent a conflict arises, the Attorney General cannot argue that he has the authority
27 under state law to determine whether the Bids are maintained as confidential without regard to this
28 Court’s exclusive jurisdiction over the Debtors’ assets and authority over the Sale process. State
law is preempted by the Bankruptcy Code if the state regulations conflict with the Court’s authority
to supervise the Sale process. *See* 28 U.S.C. § 1334(e); 11 U.S.C. § 541; *MSR Exploration, Ltd. v.*

1 *Meridian Oil, Inc.*, 74 F.3d 910, 914 (9th Cir. 1996) (“While it is true that bankruptcy law makes
2 reference to state law at many points, the adjustment of rights and duties within the bankruptcy
3 process itself is uniquely and exclusively federal. It is very unlikely that Congress intended to
4 permit the superimposition of state remedies on the many activities that might be undertaken in the
5 management of the bankruptcy process.”).

6 The Attorney General noticeably limits his claim of “meddling” to confidentiality
7 determinations and does not allege that confidential treatment will impair the Attorney General’s
8 review process. Indeed, as discussed above, the applicable regulations specifically contemplate
9 that an applicant may submit confidential information without impeding the review process. *See*
10 11 C.C.R. § 999.5(c)(3). Under California’s own regulations, the Attorney General can complete
11 the review even if the Bids are treated confidentially. The Court may grant the Motion to protect
12 bidder expectations without interfering with the Attorney General’s review.

13 **F. The Court Should Find That the Submission of the Bids Is Not Necessary to Submit**
14 **11 C.C.R. § 999.5(e)(1)(A).**

15 Since the filing of the Motion, the Attorney General has insinuated that he may treat the
16 Debtors application (submitted on April 16, 2020) as incomplete until the Debtors provide
17 unfettered access to the Bids. The California Corporations Code provides that the Attorney General
18 must complete his review of the Sale within 90 days of receipt of the Debtors’ application. *See*
19 CAL. CORP. CODE § 5915(a) (“Within 90 days of the receipt of the written notice required by Section
20 5914, the Attorney General shall notify the public benefit corporation in writing of the decision to
21 consent to, give conditional consent to, or not consent to the agreement or transaction.”). The
22 regulations provide that the application is deemed received “on the date when all of the information
23 required by section 999.5(d) of these regulations has been submitted to the Attorney General.” 11
24 C.C.R. § 999.5(e)(1)(A). As this Court is aware, any delay in the Attorney General review process
25 will have profound economic impact on the Debtors’ efforts to close the Sale and confirm a plan of
26 liquidation. Thus, the Attorney General’s unsupportable position poses a serious risk to the Debtors
27 and their estates.
28

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1 Although the Motion did not request that the Court rule on the issue, Debtors’ Attorney
2 General application was complete when submitted on April 16, 2020 and, for at least two reasons,
3 the Debtors are not obligated to submit the Bids to satisfy 11 C.C.R. § 999.5(e)(1)(A). **First**, as
4 noted above, California law limits the disclosure of unsuccessful bids and related proposals where
5 the proposals are “available” or provided elsewhere in the application. *See* 11 C.C.R. §
6 999.5(d)(11)(E). Specifically, the regulation provides

7 (11) The written notice of any proposed agreement or transaction
8 set forth in section 999.5(a)(1) of these regulations shall include the
9 following attachments ***if they are available and if they are not
included in another section of the written notice:***

10 ...

11 (E) Copies of each Proposal received by the applicant from any
12 potential transferee suggesting the terms of a potential transfer
13 of applicant's health facilities or facilities that provide similar
health care, and any analysis of each such Proposal.

14 *Id.* (emphasis added). Available is not defined in the regulations, but its common definitions
15 include “legally valid or colorable,” AVAILABLE, Black’s Law Dictionary (11th ed. 2019),
16 “present or ready for immediate use,” AVAILABLE, Merriam-Webster.com (2020 ed.),
17 <https://www.merriam-webster.com/dictionary/available> (accessed May 22, 2020), and “accessible
18 or obtainable,” *id.*³ In light of the restrictions on disclosure set forth in the Bidding Procedures, the
19 Bids cannot fit into any of these definitions of available. The disclosure limitations specifically
20 render the Bids unavailable for present or immediate use, inaccessible, and unobtainable by parties
21 other than the Bid Deadline Recipients. The Debtors’ willingness to further the Attorney General’s
22 review by seeking leave to provide the Bids confidentially should not be construed as an admission
23 that the Bids are generally available.

24 **Second**, the bidders that submitted unqualified Bids cannot be considered potential bidders
25 for purposes of 11 C.C.R. § 999.5(d)(11)(E). Unlike the term “available,” the California Code of

26 _____
27 ³ Because the word “available” is not defined in the regulation, is customary to give that word its
28 ordinary meaning, which is frequently derived from the dictionary. *See, e.g., FDIC v. Meyer*, 510
U.S. 471, 476 (1994) (Supreme Court relied on Black’s Law Dictionary for the meaning of an
otherwise undefined term in the Federal Torts Claim Act).

1 Regulations specifically defines “potential transferee.” Potential transferees are “any corporation
2 or entity with which an applicant has engaged in discussions, or from which an applicant has
3 received a written proposal, *concerning a possible agreement or transaction* for which written
4 notice is required by section 999.5(a)(1).” 11 C.C.R. § 999.5(b)(5) (emphasis added). The Debtors
5 were precluded from considering any of the Bids as a possible transaction under the terms of the
6 Bidding Procedures, because the Bids were not “Qualified Bids” under the Bidding Procedures
7 approved by the Court.⁴

8 The Attorney General’s effort to leverage the Debtors into submitting the Bids without
9 regard to the Bidding Procedures Order is unsupported by the regulations the Attorney General
10 purports to enforce. The Debtors are not required to submit the unqualified Bids under the plain
11 terms of applicable California law, and do so only to further the Attorney General’s review of the
12 Sale. Submission of the Bids is not necessary to satisfy 11 C.C.R. § 999.5(e)(1)(A) and any delay
13 in the Attorney General’s review—a process that is already indisputably underway following
14 Attorney General interviews and other facility reviews—is impermissible.

15 **IV.**

16 **CONCLUSION**

17 **WHEREFORE**, the Debtors respectfully request that the Court enter an order (i) granting
18 the Motion, (ii) overruling the Attorney General’s Objection, (iii) authorizing the Debtors to submit
19 the Bids to the Attorney General on a confidential basis, and (iv) granting the Debtors such other
20 and further relief as the Court may deem just and proper.

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22
23
24
25
26
27 ⁴ For this reason, the Bidding Procedures Order and Bidding Procedures are the only documents
28 necessary to establish the “the reasons why any potential transferee was excluded from further
consideration as a potential transferee.” 11 C.C.R. § 999.5(d)(11)(C).

1 Dated: May 22, 2020

DENTONS US LLP
SAMUEL R. MAIZEL
TANIA M. MOYRON
NICHOLAS A. KOFFROTH

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5 By: /s/ Tania M. Moyron
Tania M. Moyron

6 Attorneys for the Debtors
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Exhibit A

From: Eric Klein <EKlein@sheppardmullin.com>
Sent: Friday, May 22, 2020 9:01 AM
To: Maizel, Samuel R.; Moyron, Tania M.
Cc: James M. Moloney (jmoloney@cainbrothers.com); Chi Huynh
Subject: Objection to Disclosure of [REDACTED] Bid for St. Francis Medical Center

[External Sender]

Sam and Tania, I received a call yesterday from Cain Brothers advising me that Verity was requesting the ability to disclose [REDACTED]'s indication of interest to purchase the business of St. Francis Medical Center to the California Attorney General's office at their request. I understand further that this request was made informally and without subpoena, and that no confidentiality as to [REDACTED]'s documents or information has been granted or assured by the Attorney General's office. Given this, my client has asked that I notify you of our objection and to inform you that [REDACTED] does not consent to the disclosure of its documents or information (including but not limited to [REDACTED]'s indication or interest/bid) to the Attorney General's office or otherwise.

I am available should you wish to discuss or have any questions.

Thanks, Eric

Eric Klein
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310.228.3988 | **private fax**
310.503.1611 | **cell**
310.228.3700 | **office**
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