2:19-cv-10352-DSF

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al.*, Debtors and Debtors In Possession	On Appeal from the United States Bankruptcy Court for the Central District of California
STRATEGIC GLOBAL MANAGEMENT, INC.[1] Appellant	Bankruptcy Court Lead Case No.: 2:18-bk-20151-ER Chapter 11
v.	Date: [TBD] Time: [TBD] Courtroom: 7D Location: 350 W. First Street Los Angeles, CA 90012
STATE OF CALIFORNIA; VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al.* Appellees	

NOTICE OF DEBTORS' EMERGENCY MOTION TO DISMISS APPEAL

[1] The other Debtors in the chapter 11 cases, being jointly administered under Lead Case No. 2:18-bk-20151-ER, are O'Connor Hospital 2:18-bk-20168-ER, Saint Louise Regional Hospital 2:18-bk-20162-ER, St. Francis Medical Center 2:18-cv-20165-ER, St. Vincent Medical Center 2:18-bk-20164-ER, Seton Medical Center 2:18-cv-20167-ER, O'Connor Hospital Foundation 2:18-bk-20179-ER, Saint Louise Regional Hospital Foundation 2:18-cv-20172-ER, St. Francis Medical Center of Lynwood Foundation 2:18-cv-20178-ER, St. Vincent Foundation 2:18-cv-20180-ER, St. Vincent Dialysis Center, Inc. 2:18-cv-20171- ER Seton Medical Center Foundation 12:8-cv-20175-ER, Verity Business Services 2:18-cv-20173-ER, Verity Medical Foundation 2:18-cv-20169-ER, Verity Holdings, LLC 2:18-cv-20163-ER, DePaul Ventures, LLC 2:18-cv-20176-ER, and DePaul Ventures - San Jose Dialysis, LLC 2:18-cv-20181-ER.

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PLEASE TAKE NOTICE that Verity Health System of California, Inc. ("VHS"), and the above-referenced affiliated debtors and debtors-in-possession (the "Debtors") in the above-captioned chapter 11 cases (the "Bankruptcy Cases") pending in the United States Bankruptcy Court for the Central District of California (the "Bankruptcy Court") and the appellees herein, hereby submit the attached emergency motion (the "Motion") to dismiss the above-captioned appeal from an order of the Bankruptcy Court entered November 14, 2019 filed by Appellant, Strategic Global Management, Inc. ("SGM") based on waiver and lack of standing. The bases for the emergency relief sought in the Motion are as follows: (i) the Debtors face mounting operational losses of approximately $450,000, per day, which threaten their ability to continue operating their hospitals as going concerns into 2020; and (ii) the asset purchase agreement underlying the sale transaction between the Debtors and SGM terminates by its terms if a closing does not occur by December 31, 2019.

PLEASE TAKE FURTHER NOTICE that the Debtors bring the Motion on an emergency basis pursuant to Rule 8013(d) of the Federal Rules of Bankruptcy Procedure, Rule 5.1 of Chapter IV of the Local Rules of the United States District Court for the Central District of California, and Rule 7-19 of Chapter I of the Local Rules of the United States District Court for the Central District of California. **As**

set forth in the Motion, the Debtors request that the Court rule on the Motion not later than December 20, 2019.

PLEASE TAKE FURTHER NOTICE that the Motion is based on this Notice of Motion, the *Declaration of Richard G. Adcock* (the "Adcock Declaration") and *Declaration of Tania M. Moyron* (the "Moyron Declaration") attached to the Motion, the *Appendix in Support of the Debtors' Motion to Dismiss the Appeal* (the "Debtors' Appendix") filed concurrently herewith, the arguments of counsel, and any other admissible evidence brought before the Court at or before a hearing on the Motion, if any.

PLEASE TAKE FURTHER NOTICE that the Debtors will serve this Notice of Motion, the Motion, the Adcock Declaration, the Moyron Declaration, and the Debtors' Appendix on counsel to Strategic Global Management, Inc., the appellant herein, and the State of California, the appellee herein, as set forth in the Proof of Service attached hereto. **Further, as set forth in the Moyron Declaration, on December 10, 2019, counsel to the Debtors informed counsel to SGM of the filing of this Motion and further informed counsel to SGM that SGM should submit a response or opposition to the Motion, if any, not later than December 17, 2019, unless the Court otherwise directs pursuant to Rule 8013(a)(3)(A) of the Federal Rules of Bankruptcy Procedure.** To the extent necessary, the Debtors request that the Court waive any further compliance with Rule 7-19 of Chapter I of

the Local Rules of the United States District Court for the Central District of California, and approve service, in addition to the means of service set forth in such Local Rule, by CM/ECF notification, email, and regular mail. In the event the Court sets a hearing on the Motion, the Debtors shall provide notice of entry of the order setting the hearing on each of the foregoing parties and such other parties as the Court directs, including by telephonic notice.

PLEASE TAKE FURTHER NOTICE that, in light of the emergency basis of the relief requested, the Debtors request authority to file a reply in support of the Motion not later than December 19, 2019, which is less than the seven days provided pursuant to Rule 8013(a)(3)(B) of the Federal Rules of Bankruptcy Procedure.

Dated: December 10, 2019

DENTONS US LLP
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By: */s/ Tania M. Moyron*
Tania M. Moyron

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
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In re: VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al.*, Debtors and Debtors In Possession	On Appeal from the United States Bankruptcy Court for the Central District of California
STRATEGIC GLOBAL MANAGEMENT, INC.[1] Appellant v. STATE OF CALIFORNIA; VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al.* Appellees	Bankruptcy Court Lead Case No.: 2:18-bk-20151-ER Chapter 11 Date: [TBD] Time: [TBD] Courtroom: 7D Location: 350 W. First Street Los Angeles, CA 90012

DEBTORS' EMERGENCY MOTION TO DISMISS APPEAL

[1] The other Debtors in the chapter 11 cases, being jointly administered under Lead Case No. 2:18-bk-20151-ER, are O'Connor Hospital 2:18-bk-20168-ER, Saint Louise Regional Hospital 2:18-bk-20162-ER, St. Francis Medical Center 2:18-cv-20165-ER, St. Vincent Medical Center 2:18-bk-20164-ER, Seton Medical Center 2:18-cv-20167-ER, O'Connor Hospital Foundation 2:18-bk-20179-ER, Saint Louise Regional Hospital Foundation 2:18-cv-20172-ER, St. Francis Medical Center of Lynwood Foundation 2:18-cv-20178-ER, St. Vincent Foundation 2:18-cv-20180-ER, St. Vincent Dialysis Center, Inc. 2:18-cv-20171- ER Seton Medical Center Foundation 12:8-cv-20175-ER, Verity Business Services 2:18-cv-20173-ER, Verity Medical Foundation 2:18-cv-20169-ER, Verity Holdings, LLC 2:18-cv-20163-ER, DePaul Ventures, LLC 2:18-cv-20176-ER, and DePaul Ventures - San Jose Dialysis, LLC 2:18-cv-20181-ER.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 8012 of the Federal Rules of Bankruptcy Procedure, Appellee Verity Health System of California, Inc., as debtor and debtor in possession in the above captioned jointly administrated chapter 11 cases, hereby discloses that it is a nonprofit public benefit corporation organized under the laws of the State of California and that it has no parent corporation and has no shareholders, and therefore no entity owns or controls ten percent or more of its shares.

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Verity Health System of California, Inc. ("VHS"), and the above-referenced affiliated debtors and debtors-in-possession (the "Debtors") in the above-captioned chapter 11 cases (the "Bankruptcy Cases") pending in the United States Bankruptcy Court for the Central District of California (the "Bankruptcy Court") and the appellees herein, hereby submit this emergency motion[2] (the "Motion") to dismiss the above-captioned appeal (the "Appeal") from an order of the Bankruptcy Court entered November 14, 2019 (the "Enforcement Order") filed by Appellant, Strategic Global Management, Inc. ("SGM" or "Appellant").

I.

INTRODUCTION[3]

This is a frivolous appeal and SGM's latest tactic to forestall the closing of the Sale ordered by the Bankruptcy Court. It is not a garden-variety appeal by an aggrieved party, but rather an appeal by a party who has no standing and waived its right to appeal the Enforcement Order.

[2] In support of the Motion, the Debtors submit the attached *Declaration of Richard G. Adcock* (the "Adcock Declaration"), the *Declaration of Tania M. Moyron* (the "Moyron Declaration"), and reference the concurrently-filed *Appendix in Support of the Debtors' Motion to Dismiss Appeal* (the "Debtors' App.")

[3] Capitalized terms in this Introduction have the definitions set forth elsewhere in this Motion.

SGM is the court approved buyer following an extensive and competitive bidding process under a fully executed $610 million asset purchase agreement for the Sale of four of the Debtors' operating Hospitals. The purchase agreement terminates by its terms if the Sale does not close by December 31, 2019.

The Appeal stems from the Bankruptcy Court's Enforcement Order, which granted, in its entirety, the Debtors' motion to sell the Hospitals to SGM free and clear of certain "Additional Conditions" imposed on the Sale by the California Attorney General. SGM filed a Statement of Support in support of the Bankruptcy Court granting Enforcement Motion and benefitted from the entry of the Enforcement Order. SGM, however, now appeals the Enforcement Order allegedly based on its displeasure that the Bankruptcy Court rejected certain language it requested in the Enforcement Order.

SGM waived its appeal rights with respect to the Enforcement Order and does not have standing to pursue this Appeal. SGM expressly and impliedly waived its rights to appeal ***any*** order granting the Enforcement Motion when it (i) filed a Statement of Support requesting that the Court grant the Enforcement Motion without reservation, (ii) requested at the hearing that the Court grant the Enforcement Motion, and (iii) contracted in the APA for the ***exact*** language used in the Enforcement Order, as found by the Bankruptcy Court. Further, SGM lacks any pecuniary interest in the outcome of the Appeal sufficient to confer standing because

the Enforcement Order does not impose any costs SGM not contemplated by the APA, (ii) none of the parties that opposed entry of the Enforcement Order have appealed it such that the Appeal cannot be considered a cross appeal intended to protect threatened contractual rights, and (iii) the Attorney General has consented to the requirements of the APA, which require the Attorney General not to impose any conditions on the Sale beyond those to which SGM expressly agreed would be acceptable and anticipated as part of the purchase price under the APA. Indeed, other than editorial changes to the Enforcement Order, the rejection of which by the Bankruptcy Court does not alter SGM's obligations under the APA, the only possible interest furthered by the Appeal is delay.

Emergency relief is necessary because failure to close the Sale by December 31, 2019, will have a detrimental impact on the Hospitals, the Bankruptcy Cases, and the Debtors' patients and employees. Further, the Debtors face mounting operational losses of approximately $450,000, per day, which threaten the Debtors' ability to continue operating as going concerns into 2020. Based on the foregoing, and for the reasons set forth in greater detail below, the Debtors respectfully request that the Appeal be dismissed on an emergency basis but no later than December 20, 2019.

II.

BACKGROUND FACTS

A. Factual Background

1. On August 31, 2018 (the "Petition Date"), the Debtors in these jointly administered Bankruptcy Cases each filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").[4] *See* Debtors' App. at 3.

2. On the Petition Date, Debtor VHS, a California nonprofit public benefit corporation, was the sole corporate member of five Debtor California nonprofit public benefit corporations that operated O'Connor Hospital ("OCH") and Saint Louise Regional Hospital ("SLRH"), and currently operates St. Francis Medical Center ("SFMC"), St. Vincent Medical Center ("SVMC"), and Seton Medical Center, including Seton Medical Center Coastside Campus (collectively, "Seton" and, together with OCH, SLRH, SFMC, and SVMC, the "Verity Hospitals"). *See id.* at 4.

[4] All references to "§" herein are to sections of the Bankruptcy Code, 11 U.S.C. §§101, *et seq.* unless otherwise noted. All references to "Rules" are to the Federal Rules of Bankruptcy Procedure. All references to "Local Rules" refer to Chapter IV of the Rules of the United States District Court for the Central District of California. All references to the "Local Bankruptcy Rules" are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California.

3. The scope of the services provided by the VHS, the Verity Hospitals, and their affiliated entities (collectively, "Verity Health System") is exemplified by the fact that in 2017, the Verity Hospitals provided medical services to over 50,000 inpatients and approximately 480,000 outpatients. *See id.*

B. The Sale

4. The sale of SFMC, SVMC, and Seton (collectively, the "Hospitals") as going-concerns (the "Sale") is one of the central objectives of the Debtors' Bankruptcy Cases. The Sale will preserve patient care in the Hospital's communities, protect thousands of jobs for the Hospitals' employees, allow trade creditors to maintain going-forward business relationships with the Hospitals, and (with a $610 million purchase price) presents the most likely source of recovery to unsecured creditors in these Bankruptcy Cases.

5. On January 17, 2019, the Debtors filed a motion (the "Sale and Bidding Procedures Motion") to approve the form of an asset purchase agreement and related "stalking horse" bidding procedures for the sale of the Hospitals. *See* Debtor's App at 67, which the Court approved (the "Bidding Procedures Order"). *See id.* at 176. Appellant, SGM, served as the Stalking Horse Bidder under the terms of the Bidding Procedures Order. *See id.* at 179. The Bidding Procedures Order also approved that certain amended asset purchase agreement between certain of the Debtors and SGM ("APA"). *See id.*; *see also id.* at 212.

6. There was no "Qualified Full Bid" for all four Hospitals, accordingly no auction was held and the Debtors declared SGM as the "winning bidder" of the Hospitals. *See id.* at 842. On May 2, 2019, the Bankruptcy Court entered an order approving the Sale to SGM pursuant to the APA. *See id.* at 853.

C. Attorney General Review and Section 8.6 of the APA

7. The closing of the SGM Sale was subject to review and approval by the California Attorney General (the "Attorney General"). California state law authorizes the Attorney General to review the sale of a non-profit health care facility to a for-profit entity and either (i) consent to, (ii) give conditional consent to, or (iii) not consent to the transaction. *See* CAL. CORP. CODE §§ 5914(a)(1), 5917. Prepetition, the Attorney General imposed conditions on a transaction that recapitalized and restructured Verity Health System (the "2015 Conditions"). *See id.* at 24. The 2015 Conditions broadly impacted the Debtors operations, and locked the Verity Health System into financial and operational obligations that made success impossible and, in large part, precipitated these Bankruptcy Cases. *See id.* at 28. Accordingly, the Debtors and SGM heavily negotiated provisions of the APA addressing the Attorney General's review and imposition of conditions in connection with the Sale. *See id.* at 946-947.

8. Section 8.6 of the APA is the result of the negotiations between the Debtors and SGM with respect to Attorney General conditions the parties anticipate

could be imposed on the Sale. SGM agreed to continue to operate the Hospitals and abide by the vast majority of the 2015 Conditions, as set forth in Schedule 8.6 to the APA. Specifically, Section 8.6 of the APA is titled: "Attorney General Provisions" and provides, in part, as follows:

> Purchaser recognizes that the transactions contemplated by this Agreement may be subject to review and approval of the CA AG. Purchaser agrees to close the transactions contemplated by this Agreement so long as any conditions imposed by the CA AG are substantially consistent with the conditions set forth, as Purchaser Approved Conditions, in Schedule 8.6. In the event the CA AG imposes conditions on the transactions contemplated by this Agreement, or on Purchaser in connection therewith, which are materially different than the Purchaser Approved Conditions set forth on Schedule 8.6 (the "Additional Conditions"), Sellers shall have the opportunity to file a motion with the Bankruptcy Court seeking the entry of an order ("Supplemental Sale Order") finding that the Additional Conditions are an "interest in property" for purposes of 11 U.S.C. § 363(f), and that the Assets can be sold free and clear of the Additional Conditions without the imposition of any other conditions, which would adversely affect the Purchaser. For purposes of this Section 8.6, Additional Conditions which individually or collectively impose a direct or indirect cost to Purchaser of $5 million, or more, shall be conclusively deemed to be "materially different."

Id. at 247-249.

D. <u>The Attorney General Conditions and Enforcement Motion</u>

9. On September 25, 2019, the Attorney General consented to the Sale subject to certain conditions (the "<u>2019 Conditions</u>"). *See id.* at 991-1030. The 2019

Conditions included numerous Additional Conditions that were materially different than those SGM contractually agreed to in Schedule 8.6. SGM's Chief Executive Officer confirmed that, SGM would not close the Sale if the Additional Conditions remained extant. *See id.* at 948.

10. To avoid the impact of the Additional Conditions on the SGM Sale, the Debtors were required to seek an order enforcing the Sale Order, finding that the Sale was free and clear of the 2019 Conditions, and limiting the Sale to only those conditions to which SGM contractually agreed to assume in Schedule 8.6 of the APA. *See id.* at 248. On September 30, 2019, the Debtors filed a motion (the "Enforcement Motion") to (a) enforce the Sale Order, and (b) consistent with Section 8.6 of the APA, obtain an order finding that the Sale was "free and clear" of the Additional Conditions pursuant to § 363(f).. *See id.* at 870.

E. SGM Expressly Requested an Order Granting the Enforcement Motion

11. On October 10, 2019, SGM filed a statement (the "Statement of Support") in support of the Enforcement Motion. In the Statement of Support, SGM represented that

> SGM will not close the Sale unless the Debtors timely obtain an order from the Court finding that the Additional Conditions are "interests in property" that can be sold free and clear pursuant to Section 363(f) of the Bankruptcy Code, as described more fully in Section 8.6 of the APA.

Id. at 1157. The Statement of Support further represented that

> The AG's decision to impose the Additional Conditions (the "Decision") . . . now entitles SGM to "terminate the [APA] and receive the return of its Good Faith Deposit" if the Debtors determine not to seek, or cannot timely (i.e., within 60 days of the Decision) an order from this Court finding "that the Additional Conditions are an 'interest in property' for purposes of 11 U.S.C. § 363(f), and that the assets can be sold free and clear of the Additional Conditions without the imposition of any other conditions, which would adversely affect the Purchaser."

Id. at 1157-1158.

12. Based on the foregoing, SGM expressly requested that the Bankruptcy Court enter an order granting the Enforcement Motion. *See id.* at 1159 ("For the foregoing reasons, ***SGM respectfully requests that the Court grant the Motion***, and grant such other and further relief as is just and appropriate.") (emphasis added).

F. Settlement with the Attorney General and the Enforcement Order

13. On October 23, 2019, the Court entered a memorandum of decision (the "Memorandum Decision") granting the Enforcement Motion and requesting that the Debtors lodge an order consistent with the Memorandum Decision. *See id.* at 1165. After entry of the Memorandum Decision, the Attorney General, the Debtors, and SGM engaged in discussions concerning a proposed form of order. *See id.* at 1199. The Debtors and the Attorney General worked diligently for ten days to satisfy SGM's concerns with the wording of the Proposed Order. *See id.* Despite their efforts, the Debtors were unable to obtain SGM's joinder in the Stipulation; however, after careful consideration, the Debtors and their constituents determined

that entry of the Proposed Order was in the best interests of the Debtors' estates. *See id*.

14. On November 8, 2019, the Debtors and the Attorney General filed a stipulation (the "Stipulation") and lodged a proposed order granting the Enforcement Motion (the "Proposed Order"). *See id.* at 1189, 1197, 1204. Pursuant to the Stipulation, (i) the Attorney General agreed to the Proposed Order authorizing the Sale free and clear of "Additional Conditions," (ii) the Debtors agreed to obtain a withdrawal of the Memorandum Decision, and (iii) the Attorney General agreed not to appeal the Proposed Order. *See id.* at 1191.

15. On November 11, 2019, SGM filed an objection to the Proposed Order and lodged a competing order. *See id.* at 1208, 1228. The Debtors and the Official Committee of Unsecured Creditors (the "Committee") filed responses. *See id.* at 1236, 1241.

16. On November 13, 2019, the Bankruptcy Court held a hearing on the Stipulation, at which the Court overruled SGM's objection to the Proposed Order. *See id.* at 1252.

17. On November 14, 2019, the Bankruptcy Court entered the Enforcement Order granting the Enforcement Motion. *See id.* at 1318. The Enforcement Order provides, in part, that

> 1. The Motion is GRANTED.

> . . .
>
> 3. Solely and exclusively for purposes of the APA (as defined below) and the Motion, the Additional Conditions (as defined in section 8.6 of that certain asset purchase agreement [Docket No. 2305-1] (the "APA")) are an "interest in property" for purposes of 11 U.S.C. § 363(f). The Assets (as defined in the APA) are being sold free and clear of the Additional Conditions without the imposition of any other conditions which would adversely affect the Purchaser (as defined in the APA)

Id. at 1319. On November 29, 2019, SGM filed a notice of appeal related to the Enforcement Order. *See id.* at 1321.

G. The Status of the SGM Sale and Debtors' Economic Circumstances

18. The Debtors' Bankruptcy Cases and the SGM Sale will change dramatically after December 31, 2019. ***First***, since the Petition Date—more than one year ago—the Debtors have sustained daily operational losses that currently exceed $450,000 per day. *See* Adcock Decl. ¶ 7. The Debtors cannot sustain these losses *ad infinitum*. *See id.* The Debtors obtained a consensual cash collateral agreement to fund operations; however, the agreement terminates if the Debtors do not confirm a plan by December 31, 2019, after which the Debtors will have no other likely source of funding or financing operations. *See id.* The Debtors hold $28.4 million cash-on-hand in their operating accounts and an additional $75.7 million of escrowed proceeds from the Debtors' sale of SLRH and OCH to the County of Santa Clara. *See id.* However, as responsible stewards of patient safety, the Debtors must

maintain or have access to sufficient cash-on-hand to close the Hospitals safely in the event the Sale does not close. *See id.*

19. ***Second***, the anticipated costs of operations will escalate significantly after December 31, 2019. *See id.* ¶ 8. By way of example, the Debtors continue to confront employee attrition due to the bankruptcy process, which means the Debtors must increasingly turn to more expensive temporary staffing alternatives (e.g., *locum tenens* physicians and registry nurses). *See id.* Additionally, the Debtors are required to maintain workers' compensation insurance while they maintain operations. *See id.* The Debtors current workers' compensation insurance policy expires on January 1, 2020 and the sole alternative provider is a California state program with significantly more expensive annual premiums (more than $16 million per year). *See id.*

20. ***Third***, the APA terminates by its terms on December 31, 2019 (the "APA Termination Date"). *See* Debtors' App. at 250. The APA requires that SGM close within 10 business days of the Debtors' satisfaction of all conditions to closing. *See id.* at 219. Thus, December 16, 2019 is the outside date on which the Debtors can satisfy all conditions to closing and obligate SGM to close by the December 31, 2019 APA termination date. SGM has presented a litany of baseless objections to promptly closing the Sale. Among them, SGM asserts that the Sale cannot close because the alleged drafting errors in the Enforcement Order present a threat of

future litigation with the Attorney General giving rise to a "Material Adverse Effects" under the APA. *See id.* at 1210. On November 27, 2019, the Bankruptcy Court found that all conditions to closing were satisfied and that SGM is required to close under the terms of the APA not later than December 5, 2019. *See id.* at 1365.[5] Nevertheless, SGM did not close the Sale on December 5, 2019. *See* Moyron Decl. ¶ 3.

III.

ARGUMENT

SGM is attempting to delay the closing beyond the December 31, 2019 APA Termination Date as a means to extract a more favorable purchase price or renege on the entire transaction because of, as the Bankruptcy Judge put it, "buyers remorse." *See* Debtors' App. at 1398. The Debtors respectfully request that this Court dismiss the Appeal because SGM (i) waived the right to challenge the Enforcement Order in its Statement of Support, and (ii) lacks standing because the outcome of the Appeal will have no pecuniary effect on SGM. The Debtors submit that cause exists to grant this relief on an emergency basis in light of the Debtors'

[5] SGM separately appealed the Bankruptcy Court's orders (i) finding that Section 8.6. of the APA is satisfied and (ii) finding that SGM is obligated to close the Sale because the Debtors satisfied all conditions to closing. *See* Debtors' App. at 1353, 1355, 1373, 1375. As of the date of this Motion, SGM has not sought stays pending appeal of any of its three appeals.

circumstances, including the economic impact of the Sale on the Hospitals and the Bankruptcy Cases.

A. SGM Expressly and Implicitly Waived the Right to Challenge the Enforcement Order.

The SGM waived the right to appeal any order granting the Enforcement Motion—both explicitly and implicitly—when it filed the Statement of Support, failed to object on the record at the hearing on the Enforcement Motion, and contracted for the exact language contained in the Enforcement Order. Express waiver arises where a litigant intentionally abandons a known right. *See Hamer v. Neighborhood Housing Services of Chicago*, — U.S. —, 138 S. Ct. 13, 17 n.1 (2017) ("waiver is the intentional relinquishment or abandonment of a known right"). Further, a litigant may implicitly waive an issue for appellate purposes by failing to raise the issue in lower court proceedings. *See In re Bankr. Pet. Preparers Who Are Not Certified Pursuant to the Requirements of the Ariz. Sup. Ct.*, 307 B.R. 134, 140-141 (B.A.P. 9th Cir. 2004) ("[I]t is not evident from Brown's excerpts of record that he raised to the bankruptcy court the issue of the validity of the state rule, nor did he brief the question in this appeal. In such circumstances, we need not consider his argument.") (citing *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956-957 n.1 (9th Cir. 2002) ("In general, a party who fails to raise an issue in the district court, cannot raise it on appeal.")); *see also Simmons v. Citibank, NA*, 594 Fed. Appx. 383, 384

(9th Cir. 2015) ("Simmons has raised other arguments, but these were not asserted in the district court. Accordingly, these arguments are waived and need not be addressed.") (unpublished).

The Statement of Support constitutes an enforceable express waiver of the issues raised in this Appeal. The Statement of Support is the only pleading SGM filed in connection with the Bankruptcy Court's consideration of the Enforcement Motion. In the prayer for relief, SGM specifically requested that the Court grant the Enforcement Motion. *See* Debtors' App. at 1159 ("For the foregoing reasons, ***SGM respectfully requests that the Court grant the Motion***, and grant such other and further relief as is just and appropriate.") (emphasis added). The relief requested by SGM includes no qualification or limitation on the specific terms of the Enforcement Order, and the Enforcement Order provides the ***exact*** relief requested by SGM. *See id.* at 1319 (providing that the "Motion is GRANTED"). Further, consistent with the Statement of Support, SGM's counsel requested entry of an order consistent with the Bankruptcy Court's tentative ruling to grant the Enforcement Motion. Counsel's sole statement on the record at the hearing on the Enforcement Motion was that

> in connection with the Debtors' emergency motion, we have submitted the declaration of Peter Baronoff, which the Debtor filed along with its moving papers. We also submitted a statement in support of the sale—I'm sorry, in support of the motion. We are prepared to rest on the Court's tentative.

See id. at 1449. Such express waivers are enforced by appellate courts. *See, e.g.*, *In re Sagamore Partners, Ltd.*, 620 Fed. Appx. 864, 870-871 (11th Cir. 2015) (enforcing express waiver of right to payment of late fees set forth in amended proof of claim). Accordingly, the Appeal should be dismissed because SGM expressly waived its right to object the Enforcement Order.

Further, the Statement of Support, the statement of SGM's counsel at the hearing on the Enforcement Motion, and the terms of the APA constitute an implicit waiver of the right to appeal the Enforcement Order. As discussed above, SGM's sole pleading related to the Enforcement Motion requests that the Bankruptcy Court grant the Enforcement Motion without limitation. *See* Debtors' App. at 1159. SGM's representation at the hearing on the Enforcement Motion—requesting an order granting the Enforcement Motion without limitation—is likewise (and at minimum) an implicit waiver of the right to appeal an order granting the Enforcement Motion. Further, the Enforcement Order incorporated nearly *verbatim* the language set forth in Section 8.6 of the APA, which SGM agreed would satisfy the Debtors' obligation to obtain a "Supplemental Sale Order." *Compare id.* at 247-249 *with id.* at 1319. SGM cannot relitigate the issues it failed to raise during the Court's consideration of the Enforcement Motion.

Finally, the actual entry of the Enforcement Order created an express and freely negotiated duty on the part of SGM to "***reasonably cooperate in any efforts***

to render the Supplemental Sale Order a final, non-appealable order."[6] *See id.* at 248. In other words, SGM waived the right to appeal entry of the Enforcement Order because it was bound to support the Debtors' efforts to render the Enforcement Order a final non-appealable order. SGM did not cure its waiver of appeal rights by belatedly objecting to the Proposed Order. Pursuant to the Local Bankruptcy Rules, only those parties that filed objections to the underlying contested motion are entitled to object to the proposed form of order granting the contested motion. *See* Local Bankr. R. 9021-1(b)(3). SGM's belated objection to the Proposed Order was untimely and a nullity in respect of preserving issues for appeal. Accordingly, the Appeal should be dismissed based on SGM's express and implied waiver of any objection to the Enforcement Motion.

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[6] Section 8.6 contains the following sentence:

> During any Evaluation Period or Extended Evaluation Periods, Purchaser shall reasonably cooperate in any efforts to render the Supplemental Sale Order a final, non-appealable order, including timely taking reasonable steps in preparation for closing of the transactions described in this Agreement; provided, however, Purchaser shall not be obligated to expend more than $500,000.

See Debtors' App. at 248.

B. SGM Has No Standing to Appeal the Enforcement Order Because It Has No Pecuniary Interest in the Outcome of the Appeal.

SGM does not have standing to appeal the Enforcement Order because (i) the Appeal is not outcome-determinative of SGM's obligation to close on the Sale, and (ii) SGM's concerns of future litigation with the Attorney General are insufficient to confer standing. In the Ninth Circuit, appellate standing is limited to "person[s] aggrieved" by a bankruptcy court order. *Duckor Spradling & Metzger v. Baum Tr. (In re P.R.T.C., Inc.)*, 177 F.3d 774, 777 (9th Cir. 1999). Under this prudential standing doctrine, a "person aggrieved" is a party who is "directly and adversely affected pecuniarily" by the order. *Fondiller v. Robertson (In re Fondiller)*, 707 F.2d 441, 443 (9th Cir. 1983). Specifically, "the order must diminish the appellant's property, increase its burdens, or detrimentally affect its rights." *P.R.T.C., Inc.*, 177 F.3d at 777 (citing *Fondiller*, 707 F.2d at 442). Courts are less inclined to find prudential standing where "marginal parties in the bankruptcy proceedings . . . face potential harm incident to the bankruptcy court's orders." *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 642 n.3 (2d Cir. 1988) (citing *Fondiller*, 707 F.2d at 443).

SGM is the successful party at the Bankruptcy Court. SGM's Statement of Support requested entry of an order granting the Enforcement Motion, as did its counsel at the hearing. *See* Debtors' App. at 1159, 1449. SGM merely objects to the wording of the Enforcement Order. *See id.* at 1211-1213. "But a winner cannot

appeal a judgment merely because there are passages in the court's opinion that displease him—that may indeed come back to haunt him in a future case." *Abbs v. Sullivan*, 963 F.2d 918, 924 (7th Cir. 1992) (citing *California v. Rooney*, 483 U.S. 307 (1987) (per curiam); *Elec. Fittings Corp. v. Thomas & Betts Co.,* 307 U.S. 241, 242 (1939)). SGM cannot claim that the Enforcement Order provides less than the relief sought because it expressly grants the Enforcement Motion in its entirety and includes the language in the APA that it required. *See, e.g.*, *Envtl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1075 (9th Cir. 2001) (finding that "there is nothing for us to reform" where judgment merely states that a motion is granted or denied).

SGM incorrectly argued below that its objection to the Proposed Order was necessary because the Proposed Order was "unnecessarily ambiguous" and "may actually result in litigation between the AG and SGM." *See* Debtors' App. at 1211. The APA never required the Debtors to obtain an order that was unassailable on appeal. *See id.* at 247-249. Nevertheless, the Attorney General waived any right to appeal in the Stipulation and Enforcement Order. *See id.* at 1191, 1320. SGM's mere desire to avoid ***future*** litigation over issues not addressed in the APA is inadequate to confer standing. *See In re Hantges*, No. 2:08-cv-00990-KJD-GWF, 2009 WL 10678773, at *2 (D. Nev. Sept. 9, 2009) (citing *P.R.T.C.*, 177 F.3d at 778) ("A mere desire to prevent future litigation does not detrimentally affect a debtor

creating standing to appeal an order of the bankruptcy court."); *see also Fondiller*, 707 F.2d at 443 (finding that debtor's wife was not "aggrieved," because her "only demonstrable interest in the order is as a potential party defendant in an adversary proceeding"); *accord Envtl. Prot. Info. Ctr., Inc.*, 257 F.3d at 1076.

Further, SGM is (i) obligated to close the Sale at the purchase price of $610 million regardless the outcome of this Appeal, and (ii) required to close the Sale within 10 business days of the Debtors' satisfaction of all conditions to closing set forth in the APA. *See* Debtors' App. at 219. Under the APA, each condition to closing is deemed satisfied unless SGM provides the Debtors (i) notice of a failure to perform and (ii) alleged failure to perform has a "Material Adverse Effect." *See id.* at 247.

The Bankruptcy Court entered findings that all conditions to closing were satisfied and that was no "Material Adverse Effect." *See id.* at 1368. The Bankruptcy Court found that the term "Material Adverse Effect" is limited to "the occurrence of unexpected events which have substantially reduced the value of the Hospitals,[7]" which would include "the Debtors' failure to maintain the Hospitals' licensure, or the Debtors' operation of the Hospitals in a manner that caused

[7] The determination as to whether there has been a "Material Adverse Effect" is a decision that the APA vests exclusively in the Bankruptcy Court without the right to appeal. *See id.* at1368.

regulatory authorities to close key departments within the Hospitals, such as the emergency department or pharmacy." *See id.* at 1370. The Enforcement Order has no such impact. Indeed, the Enforcement Order adopts nearly *verbatim* the language to which SGM agreed in Section 8.6 of the APA. Accordingly, SGM's pecuniary interests are not implicated by this Appeal because SGM is obligated to close the Sale at the purchase price ***regardless*** whether SGM obtains its preferred editorial changes to the Enforcement Order.

SGM cannot claim to be an aggrieved party because the outcome of this Appeal will not diminish SGM's property, increase its burdens, or detrimentally affect its rights. *See P.R.T.C., Inc.*, 177 F.3d at 777. SGM is obligated to pay the $610 million purchase price under the APA because the Enforcement Order—in either its current form or with the revisions sought by SGM—provides SGM precisely the relief it sought in the Statement of Support and contracted for in Section 8.6 of the APA. The substantive relief SGM seeks in this Appeal does not meet the Ninth Circuit's fundamental requirements to confer standing. Accordingly, the Debtors respectfully request that the Court dismiss the Appeal.

C. Cause Exists to Grant the Motion on an Emergency Basis.

The Motion complies with Rule 8013 and Local Rule 5.1 governing emergency motions. The Motion is accompanied by the Adcock Declaration, which sets forth the facts showing the existence and nature of the immediate and irreparable

harm concerning the Sale and these Bankruptcy Cases. *See* Rule 8013(d)(2)(a). The Motion is also accompanied by the Debtors' Appendix, which includes, among other things, the notice of appeal and the Enforcement Order. *See* Local R. 5.1.1, 5.1.2. Further, the Debtors have made "every practicable effort to notify opposing counsel" of the response deadline. *See* Moyron Decl. ¶ 4; Rule 8013(d)(3). As set forth herein, the Debtors have demonstrated cause to grant the Motion on an emergency basis not later than December 20, 2019 in light of the impact to the Debtors' ability to operate as going concerns and the December 31, 2019 termination of the Sale under the APA.

IV.

CONCLUSION

The Debtors respectfully request that the Court enter an order (i) dismissing the Appeal on an emergency basis not later than December 20, 2019 and (ii) granting such other and further relief as is just and necessary under the circumstances.

Dated: December 10, 2019

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

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

Attorneys for Appellees
Verity Health Systems of California, Inc., *et al.*

DECLARATION OF RICHARD G. ADCOCK

I, Richard G. Adcock, submit this Declaration in support of the *Debtors' Motion to Dismiss Appeal* (the "Motion"),[8] and hereby state as follows:

1. 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.

2. I am, and have been since January 2018, the Chief Executive Officer of Verity Health System of California, Inc. ("VHS"). Prior thereto, I served as VHS's Chief Operating Officer since August 2017.

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, product management, acquisitions, integrations, population health 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.

[8] Capitalized terms not otherwise defined herein have the definitions set forth in the Motion.

4. Prior to VHS, from 2014 until 2017, I served as Executive Vice President and Chief Innovation Officer of Sanford Health, a large integrated health system headquartered in the Dakotas dedicated to health and healing. In this role, I was responsible for leading Sanford Health's growth and innovation, in addition to direct operational oversight of the following related entities: Sanford Research, Sanford Health Plan; Sanford Foundation (a philanthropic fundraising foundation); Sanford Frontiers (a commercial and real estate company); Profile by Sanford (a scientific weight loss program); and Sanford World Clinic (which operates clinics in multiple countries).

5. From 2012 to 2017, I served as the President of Sanford Frontiers and had the responsibility of starting a new entity within Sanford Health focused on innovative ventures. From 2008 to 2012, I served as Executive Vice President of Sanford Clinic. I was responsible both for (i) working directly with the President of the Clinic to the lead team of Vice Presidents in all aspects of management, and (ii) Sanford World Clinics operations, including the design, opening and operation of several global clinics. From 2006 to 2008, I served as the Vice President of Sanford Clinic and was responsible for leading strategic, operational and financial aspects within Sanford Clinic. From 2004 to 2006, I served as Director of Clinical Operations at Sanford Children's Specialty Clinic and led the Pediatric Subspecialty Physician program and the clinical practice through all facets of the operation.

6. Prior to Sanford Health, I served as the Director of Engineering and Six Sigma Master Black Belt at GE Medical Systems, and before that served as the Vice President of Research and Development and the Co-Owner/Founder of Micro Medical Systems. I have a bachelor of science in business administration and a masters of business administration in healthcare management.

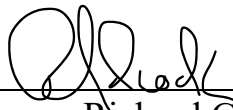
7. The Debtors incur operational losses of $450,000, per day. The Debtors cannot sustain these operational losses *ad infinitum*, particularly since the costs of delay are escalating beyond that anticipated by the Debtors. The Debtors obtained a consensual cash collateral agreement to fund operations; however, the agreement terminates if the Debtors do not confirm a plan by December 31, 2019, after which the Debtors will have no other likely source of funding or financing operations. The Debtors hold $28.4 million cash-on-hand in their operating accounts and an additional $75.7 million of escrowed proceeds from the Debtors' sale of SLRH and OCH to the County of Santa Clara. However, as responsible stewards of patient safety, the Debtors must maintain or have access to sufficient cash-on-hand to close the Hospitals safely in the event the Sale does not close.

8. The Debtors anticipate the incremental costs of operations will continue to increase as the Bankruptcy Cases continue. By way of example, the Debtors continue to confront employee attrition due to the bankruptcy process, which means the Debtors must increasingly turn to more expensive temporary staffing alternatives

(e.g., *locum tenens* physicians and registry nurses). Additionally, the Debtors are required to maintain workers' compensation insurance while they maintain operations. The Debtors current workers' compensation insurance policy expires on January 1, 2020 and the sole alternative provider is a California state program with significantly more expensive annual premiums (more than $16 million per year).

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

Executed this 9th day of December, 2019, in Los Angeles, California.



Richard G. Adcock

DECLARATION OF TANIA M. MOYRON

I, Tania M. Moyron, submit this Declaration in support of the *Debtors' Motion to Dismiss Appeal* (the "Motion"),[9] and hereby state as follows:

1. 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.

2. I am a Partner at Dentons US LLP, at 601 South Figueroa Street, Suite 2500, Los Angeles, California 90017-5704, and am one of the attorneys primarily responsible for representing Verity Health System of California, Inc., a California nonprofit benefit corporation and the Debtor herein, and the above-referenced affiliated debtors, the debtors and debtors in possession in the above-captioned chapter 11 bankruptcy cases (collectively, the "Debtors").

3. On December 3, 2019, I received an email from Gary Klausner, counsel to the Appellant, SGM. In his email, Mr. Klausner informed me that SGM did not intend to close the Sale on December 5, 2019. SGM did not close the Sale on December 5, 2019.

[9] Capitalized terms not otherwise defined herein have the definitions set forth in the Motion.

4. On December 9, 2019, I called Mr. Klausner at his office, and informed him that the Debtors intended to file the Motion. On December 10, 2019, I emailed Mr. Klausner and informed Mr. Klausner that the Debtors would file the Motion today, December 10, 2019. In the email I further informed Mr. Klausner that (i) SGM must file a response to the Motion not later than December 17, 2019, unless the Court otherwise directs, pursuant to Rule 8013(a)(3)(A), and (ii) that the Motion would seek entry of an order on an emergency basis not later than December 20, 2019.

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

Executed this 10th day of December, 2019, in Los Angeles, California.

/s/ Tania M. Moyron
Tania M. Moyron

CERTIFICATE OF COMPLIANCE

1. This Motion complies with the word limit of FED. R. BANKR. P. 8013(f) because, excluding the parts of the Motion exempted by FED. R. BANKR. P.8013(a)(2)(C) and FED. R. BANKR. P. 8015(g), this Motion contains 5,159 words.

2. This Motion complies with the typeface requirements of FED. R. BANKR. P. 8015(a)(5) and the type-style requirements of FED. R. BANKR. P. 8015(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: December 10, 2019

/s/ Tania M. Moyron
Tania M. Moyron

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court for the Central District of California by using the CM/ECF system.

I further certify that parties of record to this appeal who either are registered CM/ECF users, or who have registered for electronic notice, or who have consented in writing to electronic service, will be served through the CM/ECF system.

I further certify that some of the parties of record to this appeal have not consented to electronic service. I have served the foregoing document by the means set forth below:

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/s/ Tania M. Moyron
Tania M. Moyron