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**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

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| In re:<br>VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al.*,[1]<br><br>Debtors and Debtors in Possession. | **Case No. 2:19−cv−10352−DSF**<br><br>**STRATEGIC GLOBAL MANAGEMENT, INC.'S OPPOSITION TO "DEBTORS' EMERGENCY MOTION TO DISMISS APPEAL"**<br><br>Date: [TBD]<br>Time: [TBD]<br>Judge: Hon. Dale S. Fischer<br>Place: Courtroom 7D, 350 W. First Street, Los Angeles, CA 90012 |
| STRATEGIC GLOBAL MANAGEMENT, INC.,<br><br>Appellant,<br><br>v.<br><br>STATE OF CALIFORNIA; VERITY | |

[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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| HEALTH SYSTEM OF CALIFORNIA, INC., *et al*.<br><br>Appellees. | [Declaration Of Gary E. Klausner Filed Concurrently Herewith] |

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Appellant Strategic Global Management, Inc. ("SGM") hereby files its opposition to the "Emergency Motion" (the "Motion") filed by Verity Health Systems of California, Inc. ("VHS"), and the above-referenced affiliated debtors and debtors-in-possession (collectively, the "Debtors" or "Verity"), to dismiss SGM's appeal from the Bankruptcy Court's "*Order Granting "Debtors' Emergency Motion for the Entry of an Order: (I) Enforcing the Order Authorizing the Sale to Strategic Global Management, Inc.; (II) Finding that the Sale Is Free and Clear of Conditions Materially Different than Those Approved by the Court . . . "* [Doc. No. 3611] entered on November 14, 2019 (the "Order"),[2] and respectfully represents as follows:

## INTRODUCTION

This Court should deny Debtors' "emergency" motion. There is no emergency, and SGM's appeal is procedurally sound. Moreover, the Order on appeal is merely the first in a series of erroneous orders that SGM has appealed that should be considered together. These orders arise out of Debtors' improper requests that the Bankruptcy Court ignore SGM's due process and contractual rights and make substantive rulings affording SGM no notice or opportunity to be heard.

The Debtors assert that prompt dismissal of SGM's appeal of the Bankruptcy Court's Order is necessary to avert an "emergency" threatening the sale of the Debtors' assets to SGM under the January 8, 2019 Asset Purchase Agreement [Doc. No. 2305] (the "APA").[3] Debtors cite two reasons for emergency relief: (1) they are facing significant operating losses, and (2) the APA terminates by its own terms if a closing does not occur by December 31, 2019. (Mot. 11-12). Neither reason supports an emergency Motion. The resolution of this appeal, which should be

[2] The Debtors have attached a copy of the Order as "Attachment 18" to the Declaration of Richard D. Adcock [District Ct. Docket 3-1] (the "Adcock Declaration").

[3] The Debtors have attached a copy of the APA as "Attachment 4" to the Adcock Declaration.

decided on the merits in conjunction with the other appeals, will not compel or promote the closing of the sale before December 31, 2019, nor will it solve Debtors' liquidity problems. Indeed, on December 17, 2019, while this Motion was pending, the Debtors delivered to SGM a notice that they were terminating the APA effective December 27, 2019. Obviously, this Motion need not be expedited to preserve the sale.

Debtors do not acknowledge that they have failed to satisfy material conditions of the APA, and fail to disclose the Bankruptcy Court's recent order denying their improper "emergency" request for orders to show cause, which expressly allows Debtors to proceed with an alternative transaction(s) for disposition of the four hospitals that are the subject of the APA. Dismissal of SGM's appeal is, thus, unnecessary to enable the Debtors to pursue an alternative sale strategy.

Contrary to the Debtors' assertion, the Bankruptcy Court did *not* order SGM to close the sale on December 5, 2019, or on any other date. Indeed, the APA expressly precludes specific performance as a remedy available to the Debtors for breach of the APA. Debtors' sole remedy for breach is money damages (subject to the limitations in the APA).

SGM's appeal, along with the two related appeals pending in this Court (which may and should be consolidated), involve important issues of bankruptcy law and procedure, which cannot be adjudicated on an emergency basis.

In any event, as will be demonstrated below, Debtors' contention that SGM has no standing, or waived its right, to appeal is wrong as a matter of law.

## STATEMENT OF FACTS

While the Motion pertains only to the appeal pending from the Bankruptcy Court's Order of November 14, 2019, the appeal is one of three appeals from the

Bankruptcy Court's orders[4] pending before this Court – all of which relate to the APA between the Debtors and SGM, and disputes as to whether the conditions for SGM's closing of the sale have been satisfied pursuant to the APA. As a result, SGM believes this Court should understand the overall context in which the current Motion is being presented, including the relationship between the Order at issue in this appeal and the appeals pending from the November 18 and November 27 Orders.

**1. APA SECTION 8.6**

A critical component of the Sale negotiations between the Debtors and SGM was the need to anticipate and address, in the APA, the prospect that the California Attorney General ("AG"), in evaluating the proposed sale to SGM, might attach conditions that would impose costs on the purchaser that would effectively be "deal killers." Both SGM and the Debtors, and their professionals, had encountered such obstacles previously. To address these concerns, the parties negotiated Section 8.6 of the APA ("Section 8.6") to deal with what was termed "Additional Conditions." The relevant portion of Section 8.6 is below. *This language includes an important portion of Section 8.6 omitted by the Debtors in their Motion, that provided for SGM to have a 21 business day period (the "Evaluation Period") to evaluate any order (the "Supplemental Sale Order") that the Bankruptcy Court might enter in connection with the procedure provided for in Section 8.6.*

> 8.6 Attorney General Provisions . . . . 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

[4] SGM has also appealed the Bankruptcy Court's: (A) order entered on November 18, 2019 [Doc. No. 3633] (the "November 18 Order"); and (B) order entered on November 27, 2019 [Doc. No. 3724] (the "November 27 Order"). (Adcock Decl. Exs. 22 & 25).

> 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 . . . *If Sellers timely obtain such Supplemental Sale Order from the Bankruptcy Court or another court, Purchaser shall have a period of 21 business days from the entry of such order (the "Evaluation Period") to determine, in the exercise of the Purchaser's reasonable business judgment and in consultation with Purchaser's financing sources, whether to proceed to consummate the transactions contemplated by this Agreement* . . . .

(Adcock Decl. Ex. 4) (APA 32-33, § 8.6, emphasis added).

Fundamental to SGM's agreement to the language of Section 8.6 was the creation of an "Evaluation Period" of 21 business days, which would start from the entry of the "Supplemental Sale Order." Because, at the time the parties entered into the APA, no one knew whether the Bankruptcy Court would enter a Supplemental Sale Order or what it would say, SGM required an "Evaluation Period" to ensure that it would not be obligated to close the transaction if, in the exercise of its reasonable business judgment, and after consultation with its funding sources, the Supplemental Sale Order was not satisfactory.

Until early November 2019, when a disagreement arose between the Debtors and SGM concerning the resolution of the Debtors' Enforcement Motion (defined in the Motion, and below), SGM and the Debtors worked constructively towards a closing of the Sale under the APA. To that end, both the Debtors and SGM devoted substantial financial resources to hire consultants, attorneys, and other experts and in-house personnel to address these and a myriad of other issues.

**2. THE ENFORCEMENT MOTION, THE SETTLEMENT BETWEEN THE DEBTORS AND THE AG, AND THE NOVEMBER 14 ORDER**

On September 25, 2019, the AG rendered his decision regarding the

proposed transfer of the Debtors' four hospitals to SGM (the "AG Decision"), in which he imposed "Additional Conditions," as defined in Section 8.6, on the Sale (the "Additional Conditions") that would have resulted in hundreds of millions of dollars of *additional* costs to SGM.

After the AG Decision was issued, on September 30, 2019, the Debtors filed the "Enforcement Motion" contemplated by Section 8.6 [Doc. No. 3188] (the "Enforcement Motion"). SGM supported the Debtors' Enforcement Motion, by filing its "*Statement . . . in Support*" of the Enforcement Motion [Doc. No. 3356] (the "SGM Statement").[5] The AG opposed the Enforcement Motion.[6]

The Bankruptcy Court: (1) posted its tentative ruling and findings to grant the Enforcement Motion on October 15, 2019 (the "Tentative Ruling"); (2) held a hearing on the Enforcement Motion the same day (the "October 15 Hearing"); and (3) entered its "Memorandum of Decision" granting the Enforcement Motion [Doc. No. 3446] on October 23, 2019 (the "Memorandum of Decision").[7] [8]

As noted by the Debtors in their Motion, the AG decided he would waive his right to appeal from the Bankruptcy Court's ruling if the Debtors would agree that: (1) the Memorandum of Decision would be vacated, and (2) the parties would submit a "simple" order granting the Enforcement Motion. Doing so would benefit the AG, *inter alia*, by minimizing the use of the Bankruptcy Court's decision as precedent in future cases.

Negotiations took place among the Debtors, the AG, and SGM regarding the form of order granting the Enforcement Motion to be submitted to the Bankruptcy

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[5] Copies of the Enforcement Motion and SGM Statement are attached as Attachments 7 and 8 respectively to the Adcock Declaration.

[6] A true and correct copy of the AG's opposition to the Enforcement Motion [Doc. No. 3333] is attached as **Exhibit "2"** to the Klausner Declaration.

[7] A copy of the Memorandum of Decision is attached as Attachment 9 to the Adcock Declaration.

[8] A true and correct copy of the Tentative Ruling is attached as **Exhibit "1"** to the concurrently filed Declaration of Gary E. Klausner (the "Klausner Declaration")

Court in connection with the AG's proposed settlement. During this process, the AG took a "take it or leave it" position in the negotiations, although the form of order was unacceptable to SGM.

Nevertheless, the Debtors proceeded to enter into the "*Stipulation Resolving 'Debtors' Emergency [Enforcement] Motion . . . "* [Doc. No. 3572] (the "AG Compromise and Settlement"), to which SGM was not a party, lodge the form of order negotiated by the AG and the Debtors [Doc. No. 3574] (the "Proposed Order"), and request immediate entry of the Proposed Order in its "*Notice Regarding Proposed Order Resolving Debtors' Emergency [Enforcement] Motion*" [Doc. No. 3573] (the "Notice of Proposed Order").[9]

On November 11, 2019, SGM promptly objected to the AG Compromise and Settlement and Proposed Order [Doc. No. 3582] (the "SGM Objection"), arguing that the language that the Debtors and the AG had agreed on was ambiguous and incapable of providing SGM the protection to which it was entitled under Section 8.6. *See* (Adcock Decl. Ex. 13).[10]

The Bankruptcy Court entered its "*Order Setting Emergency Hearing On [the SGM Objection]*" [Doc. No. 3591] ("Order re SGM Objection Hearing"), and conducted a hearing on November 13, 2019 to consider the SGM Objection.[11]

During the course of the hearing, the AG's counsel reiterated his inability (or unwillingness) to negotiate any changes to the Proposed Order, with the exception of two grammatical edits, which counsel for the AG offered from the podium. At the conclusion of the hearing, the Bankruptcy Court approved the Proposed Order,

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[9] Copies of the AG Compromise and Settlement, notice of lodgment for the Proposed Order, and Notice of Proposed Order are attached as Attachments 10, 11, and 12 respectively to the Adcock Declaration.

[10] A copy of the SGM Objection is attached as Attachment 13 to the Adcock Declaration.

[11] A true and correct copy of the Order re SGM Objection Hearing is attached as **Exhibit "3"** to the Klausner Declaration.

and promptly entered the Order.[12] The entry of the Order on November 14, 2019 should have triggered SGM's 21-business day Evaluation Period, which would have given SGM until December 16, 2019 to complete its evaluation, but, as discussed below, the Bankruptcy Court nullified the Evaluation Period.

**3. THE NOVEMBER 18, 2019 ORDER**

Although nothing related to the APA or the Sale was pending, the Bankruptcy Court, *sua sponte*, entered the November 18 Order and accompanying memorandum decision concluding that SGM did not have standing to appeal from the November 14 Order because of its support of the Enforcement Motion, and finding that "Debtors have complied with their obligation under the APA to obtain a final, *nonappealable* Supplemental Sale Order. Consequently, SGM is now obligated to promptly close the SGM Sale, provided that all other conditions to closing have been satisfied." *See* (Adcock Decl. Ex. 22) (emphasis added).

The Bankruptcy Court entered this order without having provided SGM, or any other party, advance notice that it intended to adjudicate the issue of whether SGM, or any other party, had standing to appeal from the November 14 Order, or that the 14 day period for filing a notice of appeal under Federal Rule of Bankruptcy Procedure 8002(a)(1) would be nullified.

Thus, the Bankruptcy Court, unilaterally, and without affording any due process to SGM, concluded that the November 14 Order became "final and non-appealable" upon its entry, thus terminating the Evaluation Period before it had begun. The Bankruptcy Court also found, *without any advance notice or opportunity to be heard*, that the Debtors satisfied the conditions of Section 8.6, and that SGM would be obligated to close the transaction if all other conditions were satisfied.

The Bankruptcy Court's November 18 Order, which "came out of the blue,"

[12] A copy of the Order entered on November 14, 2019 is attached as Attachment 18 to the Adcock Declaration.

grievously injured SGM by nullifying the Evaluation Period for which it had bargained, and purported to preclude SGM from litigating the issue of whether the Debtors had satisfied the condition set forth in APA section 8.6. SGM timely appealed the November 18 Order.

**4. THE NOVEMBER 27, 2019 ORDER**

Emboldened by the November 18 Order, the Debtors launched a campaign to force SGM to close the Sale (or be in breach) before December 31, 2019, at which time the APA would automatically terminate. *See* (Mot. 12). The Debtors deployed this strategy by: (1) sending SGM, on November 20, 2019, a demand that it close the sale on December 5, 2019 (the "Closing Notice"), claiming that all conditions to closing had been satisfied, notwithstanding that critical closing conditions had not yet been satisfied by the Debtors, and, (2) through a series of (a) emergency motions; (b) improper "messaging" to the Bankruptcy Court that the sale was in doubt, *e.g.*, through statements made in motions to continue hearings on its Disclosure Statement, a proceeding in which SGM was not involved and had never participated; (c) submission to the Bankruptcy Court, without SGM's consent and over its filed objection, of correspondence between counsel for the Debtors and SGM regarding their respecting contentions relating to unsatisfied conditions; (d) multiple "set-up letters" threatening multi-million dollar damage claims against SGM and certain other parties, and threatening sanctions against SGM's counsel; and (e) the submission of documents to the court "under seal," in effect, *ex parte*, which SGM was not allowed to review.

Influenced by the Debtors' strategy and apparently accepting the Debtors' legal and factual contentions in one of its self-serving letters, the Bankruptcy Court, acting without the pendency of any proceeding relating to the Sale, without any advance notice to SGM that it intended to adjudicate any issues pertaining to the Sale, and without providing SGM with any opportunity to be heard, entered its November 27 Order and accompanying memorandum decision. The Bankruptcy

Court found that: (1) the Debtors' "Closing Notice," which was delivered to SGM on November 20, 2019, in which the Debtors demanded that the Sale close within 10 business days of such notice (*i.e.* by or on December 5, 2019) was valid; (2) all conditions to closing had been satisfied by the Debtors, such that SGM was "obligated" to close the sale on December 5, 2019; and (3) if SGM did not close on December 5, SGM would be in breach.

The Bankruptcy Court went on to find that, because SGM had agreed to the "exclusive jurisdiction" of the Bankruptcy Court to resolve disputes in connection with the termination of the agreement for Material Adverse Effects (an event that had not occurred as neither the Debtors nor SGM had given any notice of termination), SGM had effectively *waived any right to appeal* the November 27 Order. The Bankruptcy Court went so far as to summarily adjudicate any future lawsuit that might be initiated by SGM by stating that, "[h]ad SGM presented its allegations by way of an adversary complaint, it would dismiss such a complaint under Civil Rule 12(b)(6) for failure to state a claim upon which relief could be granted." (Adcock Decl. Ex. 24) (Doc. No. 3723, 6 fn. 4).[13]

Debtors continued their effort to coerce SGM into a premature closing, or to eliminate any meritorious litigation over the APA by "weaponizing" the Bankruptcy Court's November 27 Order. On Friday, December 6, 2019, Debtors filed an "emergency" contempt motion for an OSC regarding SGM's failure to close by December 5 [Doc. No. 3733] (the "Emergency Contempt Motion"), which SGM objected to.

On December 9, 2019, the Bankruptcy Court issued its memorandum decision [Doc. No. 3783] (the "Memorandum Denying OSC") and order [Doc. No. 3784] (the "Order Denying OSC") denying the Emergency Contempt Motion, and providing that Debtors could proceed with an alternative plan for the disposition of

[13] A copy of the November 27 memorandum of decision is attached as Attachment 24 to the Adcock Declaration.

the hospitals that are the subject to the APA, without itself breaching the APA.[14]

## ARGUMENT

### 1. THERE IS NO EMERGENCY.

The Debtors rely entirely on the Adcock Declaration to support the granting of the Motion on an emergency basis. However, the Adcock Declaration does nothing more than establish that the Debtors started their Chapter 11 cases with a history of substantial operating losses, and that those losses have continued during their Chapter 11 cases. Mr. Adcock states that the Debtors are unable to continue to incur operating losses "*ad infinitum*." However, there is nothing in the Adcock Declaration to "connect the dots," *i.e.*, to demonstrate that dismissing the appeal on an emergency basis will stop the Debtors from incurring operating losses. In fact, the dismissal of the appeal will do nothing to stem the Debtors' operating losses, or provide the Debtors with liquidity to continue to operate their businesses beyond December 31, 2019, when its current cash collateral stipulation with its secured lenders terminates.

The dismissal of this appeal will also not result in the closing of the Sale, nor will it eliminate what is likely to be litigation between SGM and the Debtors over the APA. Nor will it provide a basis for the Bankruptcy Court, or any other court, to compel SGM to close the Sale because the APA *expressly precludes specific performance* as an available remedy in the event of SGM's breach. *See* (Adcock Decl. Ex. 4) (APA 39, § 11.1, "If Purchaser commits any material default under this Agreement, Sellers shall have the right to sue for damages . . . . *Sellers shall have no right to sue for specific performance under this Agreement.")* (emphasis added). And, as noted above, the Debtors have delivered notice to SGM that they are terminating the APA effective December 27, 2019. There is, thus, no urgency that requires this Court to rule on the Motion on or before December 20, 2019, as

[14] True and correct copies of the Memorandum Denying OSC and Order Denying OSC are attached as **Exhibits "4" and "5"** to the Klausner Declaration.

the Debtors have requested.

**2. SGM DID NOT WAIVE ITS RIGHT TO APPEAL THE ORDER.**

The Debtors' argument that SGM waived its right to appeal the Order by filing the SGM Statement in support of the Enforcement Motion ignores the fact that SGM expressly preserved its right to appeal the (eventual) Order by: (1) "*reserv[ing] any and all arguments and rights that it may have pertaining to the Sale, APA, and ability to terminate the APA*" in the SGM Statement;[15] and (2) promptly objected to the AG Compromise and Settlement and the Order by filing the SGM Objection. (Adcock Decl. Ex. 8) (SGM Statement 4, ¶ 8); (Adcock Decl. Ex. 13) (SGM Objection filed by SGM on November 11, 2019). Where a claim of a waiver of a right is inconsistent with the plain language of a document relied upon, courts have generally declined to apply the concept of waiver. *See In re Kmart Corp.*, No. 02 B 02474, 2006 WL 952042, at *26 (Bankr. N.D. Ill. Apr. 11, 2006).

Moreover, the Debtors ignore controlling Ninth Circuit precedent which holds that the failure of a party to object to a proceeding in a bankruptcy case does not deprive that party of standing to appeal. *See, e.g., In re Point Center Financial, Inc.*, 890 F.3d 1188, 1192-93 (9th Cir. 2018) (following *In re Urban Broad Corp.*, 401 F.3d 236, 244 (4th Cir. 2005); *see also In re Wrightwood Guest Ranch LLC,* 896 F.3d 1109, 1113 (9th Cir. 2018) (following *Point Center* to hold that appellant had standing). Any argument based on waiver must fail in any event, because there is no waiver here.

Fundamentally, the Debtors conflate the proceedings involving (1) their Enforcement *Motion*, which SGM supported and (2) the AG Compromise and Settlement between the Debtors and the AG resulting in the Bankruptcy Court's

[15] The broad nature of SGM's reservation of rights in the SGM Statement (*i.e.*, pertaining to all arguments and rights pertaining to the Sale, APA, and ability to terminate the APA) necessarily preserves, and encompasses SGM's right to appeal the Order – which SGM has subsequently determined to be inadequate, objectionable, and unacceptable.

enforcement *Order*, to which SGM was not a party and which SGM opposed.[16] Once this confusion is clarified, the Debtors' argument boils down to this fallacy: SGM waived its right to object to the Order approving the AG Compromise and Settlement because it supported Debtors' Enforcement Motion. Nonsense. Parties in bankruptcy frequently object to an order of the bankruptcy court, whether or not they have objected to the motion triggering the order.

The following example demonstrates that there is no contradiction between SGM's support of the Enforcement Motion, and its opposition to the AG Compromise and Settlement and the Order approving that settlement. Suppose that, instead of the Order submitted to the Bankruptcy Court in this case, the Debtors and the AG had agreed on an order that granted the Motion, provided that the sale was free and clear of all of the Additional Conditions, but added the caveat that: "in the event the AG determines, in its discretion, that the enforcement of one or more of the Additional Conditions was essential to protect public health and safety, the AG may petition the state court to enforce those particular Additional Conditions." Under this scenario SGM, while having supported the Enforcement Motion would have every right to: (1) object to the form of order negotiated between the Debtors and the AG that left SGM vulnerable to the future imposition of Additional Conditions; and (2) appeal the entry of the order that overruled SGM's objections thereto.

The same rationale applies here. The Debtors should not be allowed to use the SGM Statement and the concept of waiver as a "sword" to preclude SGM from

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[16] In fact, the Debtors concede that the Order was a product of a settlement with the AG. *See* (Mot. 9) ("F. Settlement with the Attorney General and the Enforcement Order"). In presenting the AG Compromise and Settlement, and proposed Order to the Bankruptcy Court for consideration and approval, the Debtors failed to adhere to the requirements that compromises or settlements be presented in accordance with Federal Rule of Bankruptcy Procedure 9019 and *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986).

objecting to the unacceptable AG Compromise and Settlement, and the Order approving it.[17]

Applying the facts to the law, no wavier of the right to appeal the Order can be found. Waiver is the "***intentional*** relinquishment or abandonment of a known right." *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 n.1 (2017) (internal citations and quotations omitted, emphasis added); *see also Point Center*, 890 F.3d at 1193. Although the Debtors argue that this Court should find that SGM waived its right to appeal the Order, they have failed to provide any evidence to show that SGM intentionally waived, or gave up its right to appeal the Order, which is fatal to their argument. *See e.g.*, *U.S. v. Gomez*, 757 F.3d 885, 893 (9th Cir. 2014) (in the appeal arising from a removal proceeding, opining that "[t]he government bears the burden of proving valid waiver in a collateral attack of the underlying removal proceedings.'").

In addition, there was no "express" waiver of SGM's right to appeal the Order by SGM's filing of the SGM Statement. This is because the SGM Statement (1) contained a broad reservation of all of SGM's rights, and (2) did not say anything that could be construed as a waiver of SGM's right to appeal the future Order, or the future AG Compromise and Settlement. In addressing "express" waiver issues in the context of appeal rights, courts routinely and consistently require that the document relied upon by the party claiming waiver contain specific and clear language addressing the waiver of one party's right to appeal. *See e.g.*, *Project B.A.S.I.C. v. O'Rourke*, 907 F.2d 1242, 1244 (1st Cir. 1990) ("Third, BASIC suggests that appellants expressly *waived* any objection to the 'time schedule' order

[17] Indeed, as the Debtors note, SGM's counsel "requested entry of an order consistent with" that tentative. (Mot. 15). But the Tentative was nullified. After the Bankruptcy Court issued the Tentative and after it issued its Memorandum of Decision, the AG reached a settlement with Debtors, whereby the AG gave up its right to appeal the Memorandum of Decision and order based on the tentative, in exchange for Debtors' agreement to ask the Bankruptcy Court to vacate that opinion and order and grant the motion summarily.

in a brief submitted to the district court . . . [by] *not only* fail[ing] to complain . . . *but also* said they would comply with that order. To be specific, PHA, in its opposition to BASIC's motion for reconsideration, stated that, the [district] Court has ordered the replacement housing to be constructed within twenty-three (23) months, *which PHA fully intends to do . . . . This statement, however, was merely a single, isolated sentence appearing in an opposition brief that made no reference whatsoever to the possibility of appellate review.* Consequently, we cannot treat it as a waiver of the PHA's right to appeal.") (emphasis added); *In re Deepwater Horizon*, 785 F.3d 986, 997 (5th Cir. 2015) (declining to find waiver of right to appeal, and opining that " . . . where a settlement agreement does not resolve claims itself but instead establishes a mechanism pursuant to which the district court will resolve claims, parties must *expressly waive what is otherwise a right to appeal from claim determination decisions by a district court.* Given that there has been no such express waiver in the instant case, the parties have preserved their right to appeal from the district court to this court.") (emphasis added); *DeLoach v. Lorillard Tobacco Co.*, 391 F.3d 551, 559 (4th Cir. 2004) (denying motion to dismiss appeal on waiver grounds, and opining that "Indeed, § 12.4(c) *does not include any 'non-appealability' language. Accordingly, we deny the Class's motion to dismiss the appeal based on the contractual language of . . . the First Settlement Agreement.*") (emphasis added); *U.S. v. International Broth. Of Teamsters*, 905 F.2d 610, 615 (2d Cir. 1990) (declining to find waiver of right to appeal, because "[s]uch a clear and unmistakable intent is not present here, since the phrase 'exclusive jurisdiction,' read in the context of the Consent Decree, does not unambiguously exclude appellate review . . . . *Nothing in the Consent Decree indicates that the parties intended to waive their right to invoke the jurisdiction of this court.* Moreover, the government conceded at oral argument that the availability of appellate review was never discussed in the course of negotiations.") (emphasis added). Here, the Debtors have failed to point to any clear and specific language in the SGM Statement (or any other

document or pleading) that even references SGM's appeal rights, or SGM's intent to waive its right to appeal the Order.

Equally unavailing is the Debtors' argument that SGM "implicitly" waived its right to appeal the Order. None of the cases cited by Debtors, *see* (Mot. 14-15), supports the Debtors' argument that SGM had no right to object to the Enforcement Order, or that SGM somehow waived that right; indeed, the Evaluation Period contemplated that SGM might object to the form of the Order. Instead, the waiver cases cited by the Debtors all stand for the unexceptional proposition that a party cannot raise on appeal an argument that he or she failed to raise in the trial court. The cases do not apply here, because SGM is not trying to raise new arguments on appeal. To the contrary, SGM undisputedly filed and argued its objections to the summary enforcement Order, thereby preserving those objections for appeal. *See* (Adcock Decl. Ex. 13) (SGM Objection filed by SGM on November 11, 2019).

In fact, there is no dispute that the primary issue of this Appeal was not only expressly and formally raised by SGM in the SGM Objection, but also heard, considered, and rejected by the Bankruptcy Court. In this regard, the *Point Center* decision is instructive. There, in considering the issue of waiver and finding that the appellants did not waive their right to appeal the "Assumption Order," the Ninth Circuit stated that:

> " [Although] Appellants did not attend the hearing on the Assumption Motion, they filed a motion to reconsider with the bankruptcy court *before* it had issued a written order on the motion. . . . *Appellants laid out their objections to the Assumption Motion and the anticipated order in great detail in that motion to reconsider*. Significantly, the *bankruptcy court did not deny the motion to reconsider based on Appellants' failure to appear; rather it addressed their arguments for reconsideration on the merits*. Under these circumstances, we find that Appellants have not waived their challenge to the propriety of the underlying Assumption Order[.]"

*Point Center*, 890 F.3d at 1193; *see also Cadillac Fairview/Ca., Inc. v. United States*, 41 F.3d 562, 565 n.3 (9th Cir. 1994) (issue not raised in opposition to motion for summary judgment was nonetheless properly before the court of appeals where it had been raised in a motion to vacate the grant of summary judgment and the district court rejected it on the merits in an order supplementing its ruling on the summary judgment motion).

Similarly, although there was no reason for SGM to file an opposition to the Enforcement Motion, SGM subsequently objected to the AG Compromise and Settlement and Order by filing the SGM Objection, and its objections were considered and overruled by the Bankruptcy Court by its entry of the Order. *See* (Adcock Decl. Exs. 11, 12, 13 & 18); (Klausner Decl. Ex. 6).

Finally, the APA, itself, requires rejection of the "implied waiver" argument. Section 12.15 entitled "No Waiver" states that a waiver of any term or condition of the APA must be in writing and signed by the party expressly waiving such term or condition. There is nothing in SGM's Statement in support of the Enforcement Motion which could conceivably be interpreted as an express waiver of SGM's right to oppose any order regarding the Enforcement Motion, any compromise and settlement between the AG and the Debtors relating to the Enforcement Motion or SGM's Evaluation Period.[18]

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[18] The Debtors' reliance on Local Bankruptcy Rule ("LBR") 9021-1(b)(3), for the proposition that "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" is completely at odds with its plain language. *See* (Mot. 17). LBR 9021-1(b)(3) addresses the *process* for the submission of orders, and the filing of objections to proposed orders. LBR 9021-1(b)(3) ("(A) . . . the attorney who has the duty to prepare any order required by this rule *must serve a copy* of the proposed order on counsel . . . who filed an opposition or other objection to the relief requested . . . . (B) If an objection to the form of a lodged order is to be filed, the opposing party must immediately . . . upon receipt of the form of the proposed order contact the judge's clerk in chambers . . . [and] must, within 7 days after service of a copy of a proposed order prepared under this rule, file and serve a

**3. SGM IS A "PERSON AGGRIEVED" WITH STANDING TO APPEAL FROM THE ORDER.**

To have standing to appeal from an order entered by a bankruptcy court, the appellant must show that he is "aggrieved," *i.e.*, "the order must diminish the appellant's property, increase its burdens, or detrimentally affect its rights." *In re P.R.T.C., Inc.*, 177 F.3d 774, 777–79 (9th Cir.1999) (citing *In Matter of Fondiller*, 707 F.2d 441, 442 (9th Cir. 1983); *see also In re Patriot Co.*, 311 B.R. 71, 74 (B.A.P. 8th Cir. 2004) (appellant must show "that the challenged action caused him cognizable injury.").

Here, it is plain that the Bankruptcy Court's Order adversely affected SGM's rights and interests. First, SGM has a "financial stake in the . . . [O]rder" because: (1) SGM is the purchaser of the hospitals under the APA; (2) the Order purports to interpret SGM's rights under the APA; and (3) the Order purports to decide (without a hearing or any other due process) whether and when one of the conditions for closing, Section 8.6, was satisfied. If SGM is subsequently determined to be in breach of the APA, *i.e.*, if the District Court affirms the Orders (including this Order) on appeal, SGM could be liable for damages in an amount up to $60 million. (Adcock Decl. Ex. 4; APA 39, § 11.1). The Order thus, at the very least "increase[s] [SGM's] burdens, [and] detrimentally affect[s] its rights." *P.R.T.C., Inc.*, 177 F.3d at 777. Any of these injuries confers standing on SGM. *Id.*

Moreover, in approving the AG Settlement and Compromise, the Bankruptcy Court agreed to nullify its thorough and comprehensive twenty-four (24) page Memorandum of Decision, which determined that the Additional Conditions the AG sought to impose could not under any circumstances be

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written objection to the form of the order, setting forth the grounds therefor."). SGM thus complied with this rule.

imposed on SGM. The Bankruptcy Court's Memorandum of Decision provided a thorough analysis of Bankruptcy Code Section 363(f) and subsections (f)(1), (f)(4), and (f)(5), which formed the statutory predicate for the Bankruptcy Court's finding that the Additional Conditions constituted "interests" for purposes of § 363(f), and that the hospitals could be sold free and clear of those interests. The Bankruptcy Court's Memorandum of Decision also dealt at length with the state law issues involving the AG's authority to impose conditions. Indeed, the Bankruptcy Court went so far as to find that the AG had abused his discretion in attempting to impose the "Additional Conditions."

The November 14 Order nullifies all of the significant and compelling findings and conclusions that would have made it virtually impossible for the AG to impose any of the Additional Conditions on SGM. Replacing the twenty-four (24) page Memorandum of Decision with two sentences stating that the motion is granted, and the assets are transferred free and clear of the Additional Conditions leaves SGM without the powerful protection it was entitled to under the APA.

Moreover, the Order creates ambiguities and equivocations that are fertile grounds for future disputes and litigation. For example, immediately after the statement in paragraph 4 of the Order: "This Court shall retain exclusive jurisdiction to adjudicate any disputes or controversies regarding the interpretation or enforcement of this Order", it make the contradictory statement: "nothing in this Order prohibit[s] or limit[s] the authority of the [AG] to enforce, in the state courts and pursuant to section 5926 of the California Corporations Code, the Purchaser Approved Conditions set forth in Schedule 8.6 to the SGM APA." *See* (Adcock Decl. Ex. 18).

"A party shows standing to appeal by demonstrating, among other things, that it suffered some actual *or threatened* injury as a result of the appealed action. *The threat of an unfavorable determination in future litigation due to the res judicata effect of an adverse judicial determination may be such an injury*."

*National Presto Industries, Inc. v. Dazey Corp.*, 107 F.3d 1576, 1579 (Fed. Cir. 1997) (emphasis added).

In addition, the AG Compromise and Settlement between the AG and the Debtors (on which the Order is based) is, itself, full of ambiguities. For example, the AG Compromise and Settlement contains the following statement: the AG "does not agree or concede that the Additional Conditions . . . are an 'interest in property' for purposes of 11 U.S.C. § 363(f), but acknowledges that the Court so held . . . and that, *solely and exclusively for purposes of the APA (as defined in the Order) and the Motion, the Order so states*." *See* (Adcock Decl. Ex. 10) (¶ 2, emphasis added). The AG's attempt to reject all of the Bankruptcy Court's findings and conclusions in the Memorandum of Decision and pay "lip service" to the words "free and clear" was a cynical attempt to avoid the collateral damage of an unfavorable ruling, and left SGM vulnerable to litigation. Further, the words "solely and exclusively for purposes of the APA" creates even more uncertainty. Could the AG attempt to impose the Additional Conditions on a subsequent purchaser from SGM?

Finally, when considered in light of the Bankruptcy Court's *sua sponte* November 18 Order, the November 14 Order effectively terminates SGM's carefully negotiated right to an Evaluation Period, a material component of section 8.6. *See Matter of Andreuccetti*, 975 F.2d 413, 417 (7th Cir. 1992) (appellant was an aggrieved person with standing to appeal, in the context of bankruptcy, settlement of compensatory and punitive damages claims, because he might have benefited from litigation of these claims).

Contrary to Debtors' assertion, SGM did not get what it was entitled to under Section 8.6. A bare-bones "motion is granted" and the transfer is "free and clear," in the unusual and novel context of a sale free and clear of regulatory conditions, deserves more than three (3) words regarding Section 363(f) of the Bankruptcy Code. This is especially true given the importance of Section 8.6, the

magnitude of the transaction, the removal of the Bankruptcy Court's Memorandum of Decision, and the ambiguity of the AG Settlement and Compromise. The Debtors argue that because the "free and clear" verbiage is a direct quote from Section 8.6, an appropriate order need only include those three (3) words. Why then did the parties agree that SGM would have an Evaluation Period?

The brief alternative order submitted by SGM would have protected SGM, and not impaired the goal of the AG – assuming his goal was not to use ambiguity to his advantage at a later date.

## CONCLUSION

For all of the foregoing reasons, the Motion should be denied and the appeal adjudicated on the merits.

Dated: December 17, 2019

LEVENE, NEALE, BENDER, YOO & BRILL L.L.P.
By: */s/ Gary E. Klausner*
Gary E. Klausner
Counsel for Strategic Global Management, Inc.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 8012 of the Federal Rules of Bankruptcy Procedure, Appellant Strategic Global Management, Inc. hereby discloses that it is a nongovernmental corporate party, and that no parent corporation or publicly held corporation owns 10% or more of its stock.

**CERTIFICATE OF COMPLIANCE**

1. This Motion complies with the page limitation requirements of Fed. R. Bankr. P. 8013(f)(3) and District Court Local Rule 11-6 because, excluding the parts of the Motion excepted by Fed. R. Bankr. P. 8013(a)(2)(C), this Motion contains 20 pages.

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 the document was prepared in the proportionally spaced 14-point Times New Roman font.

Dated: December 17, 2019

*/s/ Gary E. Klausner*
GARY E. KLAUSNER

**CERTIFICATE OF SERVICE**

1. I hereby certify that on December 17, 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 using the CM/ECF system.

2. 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.

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

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Dated: December 17, 2019

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