2:19-cv-10352-DSF

UNITED STATES DISTRICT COURT
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 Bankruptcy Court Lead Case Number: 2:18−bk−20151−ER
STRATEGIC GLOBAL MANAGEMENT, INC. APPELLANT(S) v. STATE OF CALIFORNIA, VERITY HEALTH SYSTEM OF CALIFORNIA, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS, *et al.* APPELLEE(S).	Date: [TBD] Time: [TBD] Courtroom: 7D Location: 350 W. First Street Los Angeles, CA 90012

OFFICIAL COMMITTEE OF UNSECURED CREDITORS' JOINDER IN MOTION OF APPELLEES VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *ET AL.* TO DISMISS APPEAL

The Official Committee of Unsecured Creditors of Verity Health System of California, Inc., *et al*. (the "Committee") appointed in the chapter 11 cases (the "Chapter 11 Cases") of the above-captioned debtors and debtors-in-possession (the "Debtors"), hereby files this joinder (the "Committee Joinder") in *Debtors'*

Emergency Motion to Dismiss Appeal (the "Dismissal Motion" [District Court Docket No. 6]), and in support thereof represents as follows:

JOINDER

1. The breach by Strategic Global Management, Inc. ("SGM") of its asset purchase agreement with the Debtors (the "APA") may end up costing the Debtors' estates tens of millions of dollars and may result in the loss of hundreds, if not thousands, of jobs. The breach will also adversely affect medical care on a state-wide basis. The Court must not permit SGM to abuse the judicial process in this way. The Committee thus and hereby joins in the Dismissal Motion.

2. The Committee, like the Debtors, believes that the appeal of the Enforcement Order[1] (the "Enforcement Order Appeal" or the "Appeal"), which was filed by SGM and relates to the sale to SGM (the "Sale") of four of the Debtors' hospitals (the "Hospitals"), is a frivolous effort by SGM to appeal where no appeal lies, solely to forestall the closing on the Sale and ultimately escape the obligations SGM undertook in the APA—a heavily negotiated purchase agreement that was fully executed by the Debtors and SGM and approved by the Bankruptcy Court. Stated differently, the Appeal is nothing more than a thinly-disguised attempt by SGM to avoid a finding of breach by commencing an appellate process that purportedly gives

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Dismissal Motion.

rise to an "Evaluation Period" for SGM, during which, at SGM's sole election, SGM may walk away from the APA, *i.e.*, not be in breach.

3. The Committee believes that the Appeal should be dismissed because SGM (i) waived its appeal rights with respect to the Enforcement Order; and (ii) does not otherwise have standing to pursue the Enforcement Order Appeal. Indeed, 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, which the Court did; (ii) requested at the hearing on the Enforcement Motion that the Court grant the relief requested therein; and (iii) bound itself in the APA to the exact language used in the Enforcement Order—all as found by the Bankruptcy Court.

4. Even if SGM's waiver of appellate rights were not so clear-cut, moreover, dismissal would still be warranted because SGM is without standing to pursue the Appeal because it lacks a pecuniary interest in its outcome sufficient to confer such standing. This is so because (i) the Enforcement Order does not impose any costs on SGM not already imposed or contemplated by the APA; (ii) none of the parties that opposed entry of the Enforcement Order have appealed therefrom, with the result that the Appeal cannot be considered a cross-appeal intended solely to protect threatened contractual rights; and (iii) the Attorney General has consented to the requirements of the APA, which mandate that the Attorney General not impose any conditions on the Sale beyond those to which SGM had expressly agreed and

which had already been factored into the purchase price under the APA. Indeed, other than SGM's proposed "editorial changes" to the Enforcement Order—the rejection of which by the Bankruptcy Court did not in any way alter SGM's obligations under the APA—the only possible interest furthered by SGM's Enforcement Order Appeal would be delay.[2]

5. In the end, SGM's current gambit is both transparent and insupportable. By virtue of the Enforcement Order, SGM was presented with a choice—to close or not to close. By filing the Appeal, SGM made that choice, and made it in a way that appears to have been calculated exclusively to manufacture for its own benefit an "Evaluation Period," which would afford it either more time to extract additional concessions from the Debtors or, if the demanded concessions cannot be obtained, the right to walk away from the APA. The right to an Evaluation Period was granted to SGM by Section 8.6 of the APA, to address what it told the

[2] SGM's "editorial changes," moreover, cannot—as the Debtors cogently argue—either undo the waiver of its appellate rights or grant it standing to appeal. *See Abbs v. Sullivan*, 963 F.2d 918, 924 (7th Cir. 1992) (citing *California v. Rooney*, 483 U.S. 307 (1987) (per curiam) ("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.") *see also Elec. Fittings Corp. v. Thomas & Betts Co*., 307 U.S. 241, 242 (1939) ("A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree."); *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); *In re Hantges*, 2009 WL 10678773, at *2 (D. Nev. Sept. 9, 2009) (*citing P.R.T.C., Inc.*, 177 F.3d 774, 778 (9th Cir. 1992)) ("A mere desire to prevent future litigation does not detrimentally affect a debtor creating standing to appeal an order of the bankruptcy court.").

Court, when the APA was before the Court for approval, was the "appeal risk" associated with its closing on the Sale without a final, non-appealable Sale Order.[3]

6. Indeed, at the February 6, 2019 hearing that resulted in entry of the Sale Order, SGM made clear that the purpose of the Evaluation Period was to prevent it from being required to close the Sale if there was a risk that the Supplemental Sale Order could be overturned on appeal:

> If the Debtor is successful in obtaining [the Supplemental Sale Order], then we have to deal with the appeal risk, which is, again, very difficult to quantify. So what we've agreed on is that the Debtor is going to have a period of time to get us . . . a final non-appealable order. If the Debtor can get us a final, non-appealable order, meaning that if there's an appeal, it gets resolved in the Debtor's favor or maybe gets dismissed, at that point we will be obligated to close the transaction, as long as all the other conditions to closing have been satisfied.

(Transcript of February 6, 2019 Hearing at 20:7–21:6 (emphasis added).)

7. However, the "appeal risk" at which Section 8.6 was targeted—as SGM's own representations to the Court make clear—was the possibility that the

[3] The APA provides that once the Supplemental Sale Order becomes final and non-appealable, SGM "shall consummate the Sale provided that all other conditions to closing have been satisfied." (APA ¶ 8.6.) In its Memorandum of Decision dated November 18, 2019 (the "Enforcement Order Memorandum"), the Court found, among other things, that (i) all parties with standing to appeal had waived their rights to do so, and the Supplemental Sale Order was thus final and non-appealable; and (ii) all other conditions to closing had been satisfied, so SGM was obligated to promptly close the sale. (Memorandum Of Decision (1) Finding that SGM Is Obligated to Promptly Close the SGM Sale Under § 8.6 of the APA, Provided that All Other Conditions to Closing Have Been Satisfied and (2) Granting Debtors' Motion For A Continuance Of The Hearing To Approve The Disclosure Statement, dated November 18, 2019 [Docket No. 3632].)

Attorney General would appeal as to any relief granted to the Debtors and SGM in the Supplemental Sale Order. (*Id.* at 10:8-10:12 ("Paragraph 8.6 came into the asset purchase agreement fairly late in the process because of . . . concerns [about additional conditions precedent] . . . as certainly exemplified by the Attorney General's continuing efforts through its appeal of the Court's order with regard to the Santa Clara sale.") Never was it contemplated that the appellant as to such an "evaluation period" appeal would be SGM itself. (*Id.* ("If the Debtor *can get us* [*i.e.*, SGM, with respect to an Attorney General appeal] a final, non-appealable order, meaning that if there's an appeal, it gets resolved in the Debtor's favor or maybe gets dismissed." (emphasis added).)

8. Indeed, how can it be that, where SGM has obtained a Sale Order in a form that is otherwise consistent with the APA, it can appeal from the Enforcement Order for the sole purpose of fabricating an Evaluation Period to which it is no longer (and never was) entitled.

9. Either the Debtors have satisfied all Conditions Precedent to Closing, and SGM must close, or the Debtors have not, and SGM need not. If SGM believes that the Conditions Precedent remain unsatisfied, and thus elects not to close, SGM may do so at its own peril and must bear the consequences of this election.

10. However, SGM cannot disingenuously misconstrue Section 8.6 and improperly manipulate the judicial process to grant to itself optionality that was removed when the Attorney General agreed not to enforce Conditions Precedent

beyond those set forth in Section 8.6 and the Unions withdrew their objections—such that there were no pending objections to the entry of the Enforcement Order, and thus no one to appeal.

11. For all the foregoing reasons, the Dismissal Motion should be granted. The Chapter 11 Cases were filed because the Debtors are not financially capable of continuing to fund the losses generated by the operations of the Hospitals. If SGM is not expeditiously brought back to the table and compelled to comply with its obligations under the APA, so that the Sale can be consummated in a timely manner, the likely outcome will be that the Hospitals will be shut down and the Debtors' estates liquidated. Such an outcome would not be in the best interest of anyone—not the Debtors, not the creditors, and not the larger Hospital communities, including, among others, the Hospitals' many patients, physicians, nurses, and other employees.

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CONCLUSION

WHEREFORE, the Committee respectfully requests that the Court (i) grant the Dismissal Motion in its entirety; and (ii) grant such other and further relief as may be just and proper.

DATED: December 17, 2019

MILBANK LLP

/s/ Mark Shinderman
GREGORY A. BRAY
MARK SHINDERMAN
JAMES C. BEHRENS

Counsel for the Official Committee of Unsecured Creditors of Verity Health System of California, Inc., et al.