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	

REPLY IN SUPPORT 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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The Debtors hereby submit this reply (the "Reply") in support of the Debtors' emergency motion [Docket No. 2] (the "Motion")[2] to dismiss this Appeal and in response to the opposition [Docket No. 10] (the "Opposition") filed by SGM.[3]

I. INTRODUCTION

The Opposition does not demonstrate that SGM is a "person aggrieved" for purposes of standing. Rather, SGM avoids analysis of its three flippant claims of "pecuniary interest," doubles-down on its concerns of imagined future litigation without addressing controlling precedent holding that the vague potential of future litigation is not sufficient to provide standing to appeal, and impermissibly invokes issues raised in its other appeals to justify this appeal.

Even assuming standing *arguendo*, SGM expressly waived its right to appeal the Enforcement Order. The most striking example of this waiver is that the APA requires SGM to "reasonably cooperate in any efforts to render the Supplemental Sale Order a final, non-appealable order." Only in the most Orwellian world could SGM file an appeal from the order it is contractually obligated to help render "final" and "non-appealable." Moreover, SGM pointedly downplays its participation in

[2] Unless otherwise defined herein, capitalized terms have the definitions set forth in the Motion.

[3] The approximately 6,589-word Opposition exceeds the 5,200 word-limit and omits a word-count certification. *See* Bankruptcy Rules 8013(f)(3)(A), 8015(h).

urging the Bankruptcy Court to grant the Enforcement Motion, both by filing papers in support of the Motion and in open court. The foregoing sharply contradicts SGM's contentions that it was not afforded due process. The Bankruptcy Court also set a hearing for SGM when it demanded different "words" in the Enforcement Order—even though SGM did not have the right to control the form and language in the Enforcement Order. For all these reasons the Opposition should be overruled, and the Motion to Dismiss should be granted.

II. ARGUMENT

A. SGM Is Not A "Person Aggrieved."

SGM fails to demonstrate standing for three reasons. ***First***, SGM ignores the Debtors' argument that either outcome of this Appeal—granting SGM's proposed Enforcement Order revisions or denying them—will result in an Enforcement Order obligating SGM to close the Sale at the $610 million purchase price under the APA. *See* Opp'n at 21 (citing *P.R.T.C., Inc.*, 177 F.3d 774, 777 (9th Cir. 1999)). Only the Debtors are authorized to seek entry of an order concerning the transfer of estate assets, and, accordingly, SGM's rights with respect to the terms of the Enforcement Order derive solely from the terms of the APA. *See In re Canyon P'ship*, 55 B.R. 520, 524 (S.D. Cal. 1985) (§ 363 "clearly indicates that the manner of sale is within the discretion of the Trustee"). The APA does not grant SGM any right to approve the terms of the Enforcement Order. *See* Debtors' App. at 247-249.

Contrary to SGM's baseless hypotheticals, *see* Opp'n at 17, this Appeal will not resolve SGM's rights under the APA or whether the conditions to closing are satisfied, which are issues subject to ***separate*** appeals brought by SGM. *See id.* Further, none of the appeals concern whether SGM is liable for damages—a determination that has been expressly reserved for later litigation and remains undecided by the Bankruptcy Court.

Second, SGM does not address the cases cited by the Debtors confirming that a simple Enforcement Order is not capable of reformation on appeal, and that SGM's ***mere desire*** to prevent future litigation does not confer standing. *See* Mot. at 18-20 9 (*citing, e.g.*, *Envtl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1075 (9th Cir. 2001); *Fondiller v. Robertson (In re Fondiller)*, 707 F.2d 441, 443 (9th Cir. 1983); *In re Hantges*, No. 2:08-cv-00990-KJD-GWF, 2009 WL 10678773, at *2 (D. Nev. Sept. 9, 2009)). Instead, SGM argues that it has standing because "the Order creates ambiguities and equivocations that are fertile grounds for ***future disputes and litigation***" because of the potential "***res judicata*** effect of an ***adverse*** judicial determination." Opp'n at 18-19 (quoting *Nat'l Presto Indus., Inc. v. Dazey Corp.*, 107 F.3d 1576, 1579 (Fed. Cir. 1997)) (emphases added). In *Dazey*, the court deprived the appellant "of the benefit of its victory" by dismissing a declaratory relief action and vacating dispositive findings favorable to the appellant. *Id.* at 1579. By contrast, here, the Bankruptcy Court granted substantive relief undeniably

favoring SGM and expressly waived the Attorney General's appeal rights. *See* Debtors' App. at 1319. SGM does not—and cannot—contend that the vacated Memorandum Decision limits the enforceability of the Enforcement Order.

Third, SGM claims that it has standing to appeal the Enforcement Order "when considered in light of" two other orders entered after the Enforcement Order and subject to separate appeals by SGM. Opp'n at 19. Here, SGM ignores that "***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 (emphasis added). SGM cannot combine the separate appeals in an attempt to bootstrap standing where it has none with respect to the Enforcement Order subject to this Appeal.[4]

B. The Statement of Support and APA Language Are an Express Waiver.

1. There is No Settlement or Compromise.

SGM claims that its express waiver in the Statement of Support is immaterial by mischaracterizing the record to suggest that the Enforcement Order is the product of ***both*** the Enforcement Motion and a separate "AG Compromise and Settlement." *See* Opp'n at 11. Specifically, SGM claims that the Stipulation was a compromise under Bankruptcy Rule 9019. *See id.* at 12 n.16.

[4] The Debtors object to SGM's legal and factual characterizations of its other appeals, which are not properly before the Court on this Motion.

The object of this manipulation is clear: in treating the Stipulation as a compromise under Bankruptcy Rule 9019(a), SGM hopes to manufacture a Bankruptcy Rule 9014 contested matter affording an opportunity to object that is separate and apart from the Enforcement Motion. Yet, SGM made no such contention in its objection to the Proposed Order (*see* Debtors' App. at 1208) nor at the hearing on the Stipulation (*see id.* at 1252). Rather, SGM's objection, and the statements of counsel at the hearing, were aimed solely at urging the Bankruptcy Court to accept SGM's editorial changes to the Proposed Order. *See id.* Accordingly, SGM forfeited its novel and incorrect theory that the Stipulation afforded SGM a separate opportunity to object to the Proposed Order. *See Hamer v. Neighborhood Housing Servs. of Chi.*, — U.S. —, 138 S. Ct. 13, 17 n.1 (2017) ("[f]orfeiture is the failure to make the timely assertion of a right"); *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 n. 1 (9th Cir. 2002) ("a party who fails to raise an issue in the [trial] court, cannot raise it on appeal").[5]

[5] Later the Debtors will discuss SGM's waiver of its right to appeal, and although the terms "waiver" and "forfeiture" are sometimes used "interchangeably", that is not the situation here. See *Wood v. Milyard*, 566 U.S. 463, 470 n.4 (2012) ("A waived claim or defense is one that a party has knowingly and intelligently relinquished; a forfeited plea is one that a party has merely failed to preserve." (citation omitted)); *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004) ("Although jurists often use the words interchangeably, forfeiture is the failure to make the timely assertion of a right[;] waiver is the intentional relinquishment or abandonment of a known right." (citations omitted) (internal quotation marks omitted)).

Further, the Stipulation is not a compromise under Bankruptcy Rule 9019(a). A debtor is required to seek court approval of any compromise that resolves a controversy affecting the Debtors' estate and its creditors. *See* FED. R. BANKR. P. 9019(a). However, a settlement that does not affect the Debtors' estate or its creditors is not subject to Bankruptcy Rule 9019(a). *See In re McKay*, 443 B.R. 511, 523 (Bankr. E.D. Ark. 2010) (Bankruptcy Rule 9019 does not apply to "controversies [that] do not affect other creditors or the estate and therefore [such controversies] do not need the sort of notice and approval that the settlement of other controversies affecting the estate require."); *accord In re Hass*, 273 B.R. 45, 50 (Bankr. S.D.N.Y. 2002). Here, the Stipulation resolves the language of the Proposed Order documenting the foregone conclusion that the Enforcement Motion was granted. Accordingly, the Stipulation did not offer another opportunity to object because it did not affect the outcome of the Enforcement Motion and only resolved a controversy with a non-creditor, i.e., the Attorney General.[6] Further, language in orders is routinely negotiated among parties without a settlement and releases.

2. The Express Waiver Was Repeated, Intentional, and Unqualified.

SGM misconstrues the applicable standard for express waiver and ignores language in the APA requiring SGM to "reasonably cooperate in any efforts to

[6] SGM—neither a creditor nor a claimant—also would not have been entitled to object to a compromise. *See In re Engram*, 348 Fed. Appx. 305, 306 (9th Cir. 2009).

render the Supplemental Sale Order a final, non-appealable order." Debtors' App. at 248. SGM incorrectly argues that express waiver requires "clear and specific language" that "references SGM's appeal rights, or SGM's intent to waive its right to appeal the Order." Opp'n at 14, 15. However, the Third Circuit held that a stipulation indicated "an intent to waive" the right to appeal even though it did "not specifically refer to [appellant's] right to appeal the Bankruptcy Court's determination." *In re Odyssey Contracting Corp.*, — F.3d —, 2019 WL 6766985, at *3 (3d Cir. Dec. 12, 2019). The Court of Appeals reasoned that the prospective agreement "to resolve and end the litigation based on the Court's determination of a contested issue" was sufficient to demonstrate an enforceable appeal waiver where the "party seeking to appeal [did not] make its intent to do so clear at the time" of the agreement. *Id.* at *4. "[A] party that agrees to resolve and end a case—and thus gives up its right to press its claims or defenses in exchange for finality—should not be left guessing whether the opposing party can appeal." *Id*.

The Debtors cited two instances in which SGM waived its right to appeal the Enforcement Order. ***First***, SGM agreed in the APA that it would "reasonably cooperate in any efforts to render the Supplemental Sale Order a final, non-appealable order." Debtors' App. at 248. Consistent with SGM's overly strict express waiver standard, the APA language is "clear and specific" and "references SGM's appeal rights, or SGM's intent to waive its right to appeal the Order." *See*

Opp'n at 14, 15 (citing cases). The Debtors contended that the APA language was an express waiver (*see* Mot. at 16), but SGM failed to offer any analysis or counterargument in its Opposition. ***Second***, SGM requested in the Statement of Support and on the record at the hearing, that the Court grant the Enforcement Motion. *See* Debtors' App. at 1159, 1449. Although SGM finds meaning in its agreement to "rest on the Court's tentative," the statement did not "make clear" SGM's intent to appeal an undesirable Enforcement Order "at the time." *See Odyssey*, 2019 WL 6766985, at *4. For the same reason, SGM's reservation of rights in the Statement of Support does not override SGM's express waiver. *See id.*

3. SGM Conflates the Debtors' Waiver and Standing Arguments.

SGM disingenuously suggests, without analysis, that the Debtors ignored the Ninth Circuit's *Point Center Financial, Inc.* and *Wrightwood Guest Ranch LLC* cases. *See* Opp'n at 11. The claim is mere obfuscation. Both cases hold that waiver of an argument does not preclude standing under the "person aggrieved" standard. *See In re Wrightwood Guest Ranch, LLC*, 896 F.3d 1109, 1113 (9th Cir. 2018) ("attendance and objection are not prudential standing requirements in bankruptcy cases, but rather relate to whether a party has waived or forfeited its right to appeal a given order of the bankruptcy court"). But, the Debtors' standing argument is not dependent on SGM's express waiver. As set forth in the Motion, SGM's express waiver and lack of standing are two independent bases to dismiss this Appeal.

C. Emergency Relief Is Necessary and Does Not Prejudice SGM.

SGM urges the Court to delay consideration of the Motion by incorrectly suggesting that the outcome of this Appeal will have no bearing on the Sale or the Debtors' Bankruptcy Cases. As set forth in the Adcock Declaration, the Debtors' daily operational losses of $450,000 while the Sale remains in limbo is an increasingly dire threat to the Bankruptcy Cases and Hospitals. *See* Adcock Decl. ¶ 7. SGM is using this Appeal to cast doubt on its breaches of the APA and as a basis not to close the Sale. The suspense of SGM's equivocation has an immediate and irreparable impact on the Debtors four Hospitals yesterday, today, and every day it continues.[7] In addition to economic losses from operations, SGM's behavior has forced thousands of patients and employees to grapple with uncertain futures and has obligated the Debtors' management to vacillate between alternative operating plans. Dismissal of this Appeal will resolve SGM's allegations that a termination would violate the APA and present a clearer path forward that each of the Debtors' constituents could move toward with the singular focus and effort needed to bring these Bankruptcy Cases to conclusion.

The impact of SGM's delay tactics on the Debtors' fragile Bankruptcy Cases is sufficient to grant emergency relief. *See In re Finley*, 135 B.R. 456, 458 (S.D.N.Y.

[7] The harm suffered by the Debtors and their constituents is immediate and ongoing, regardless whether the APA terminates on December 31 or earlier.

1992) (granting expedited appellate review to avoid "disruption" to "fragile" bankruptcy plan). The impending December 31 Termination Date is further ground to find irreparable harm, as SGM will doubtless claim that the APA terminated under its terms notwithstanding the Bankruptcy Court's orders establishing SGM's pre-Termination Date breaches. *See In re Dairy Mart Convenience Stores, Inc.*, 272 B.R. 66, 70 (S.D.N.Y. 2002) (granting expedited appellate review where movant demonstrated a likelihood of success on the merits and impending need for prejudgment relief). Accordingly, it is immaterial that specific performance is not a remedy under the APA—SGM's efforts to forestall accountability for breaching the APA has an immediate and irreparable impact on the Debtors' estates.

Further, SGM is not harmed by emergency relief. SGM had the same seven-day period to respond as it would for a non-emergency motion. *See* Bankruptcy Rule 8013(a)(3)(A). The Debtors solely requested that (i) their seven-day reply deadline be shortened to two days (Bankruptcy Rule 8013(a)(3)(B)) and (ii) that the Court rule on an emergency basis thereafter. Accordingly, granting the Motion on an emergency basis is necessary, appropriate, and does not prejudice SGM.

III. CONCLUSION

The Debtors respectfully request that the Court enter an order (i) dismissing the Appeal not later than December 31, 2019, (ii) overruling the Opposition, and (iii) granting such other relief as is just and necessary under the circumstances.

Dated: December 19, 2019

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CERTIFICATE OF COMPLIANCE

1. This Reply 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 Reply contains 2,479 words.

2. This Reply 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 19, 2019

/s/ Tania M. Moyron
Tania M. Moyron

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 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.

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