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Case No. 2:19−cv−10352−DSF[1]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re: VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al.*,[2] Debtors and Debtors in Possession.	On Appeal from the United States Bankruptcy Court for the Central District of California (Bankr. Lead Case No.: 2:18-bk-20151-ER)
STRATEGIC GLOBAL	**STRATEGIC GLOBAL MANAGEMENT, INC.'S NOTICE OF MOTION AND MOTION TO CONSOLIDATE APPEALS**

[1] SGM seeks to consolidate this appeal (2:19-cv-10352-DSF) with the following related appeals: 2:19-cv-10354-DSF and 2:19-cv-10356-DSF.

[2] 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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MANAGEMENT, INC.,

Appellant,

v.

STATE OF CALIFORNIA; VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al*.

Appellees.

Date: [TBD]
Time: [TBD]
Judge: Hon. Dale S. Fischer
Place: Courtroom 7D, 350 W. First Street, Los Angeles, CA 90012

[Declaration Of Gary E. Klausner Filed Concurrently Herewith]

PLEASE TAKE NOTICE that Appellant Strategic Global Management, Inc. ("SGM") hereby submit the attached motion (the "Motion") to consolidate its appeals from the Bankruptcy Court's orders of November 14, November 18, and November 27, 2019 (the "Orders") in the bankruptcy matter captioned *In re Verity Health System of California*, Bankr. C.D. Cal. Case No. 2:18-bk-20151-ER. All three appeals involve the same parties, the same operative facts, the same record, and the same issues, namely disputes between SGM and Verity Health Systems of California, Inc., and the above-referenced affiliated debtors and debtors-in-possession ("Debtors") regarding their Asset Purchase Agreement ("APA") and issues pertaining to alleged breaches and failures to comply with conditions set forth in the APA. Consolidation for the purposes of briefing, oral argument, and decision will serve the interests of the Court and parties in economy and efficiency.

PLEASE TAKE FURTHER NOTICE that SGM brings the Motion pursuant to pursuant to Rule 8013(a) of the Federal Rules of Bankruptcy Procedure, Rule 7-4 of Chapter I of the Local Rules of the United States District Court for the Central District of California, and Federal Rule of Bankruptcy Procedure 8003(b)(2).

PLEASE TAKE FURTHER NOTICE that the Motion is based on this Notice of Motion, the concurrently filed Declaration of Gary E. Klausner in support of the Motion (the "Klausner Declaration"), the arguments of counsel, and any other admissible evidence brought before the Court at or before a hearing on the Motion.

PLEASE TAKE FURTHER NOTICE that SGM will serve this Notice of Motion, the Motion, and the Klausner Declaration on the parties set forth in the Proof of Service attached hereto. Pursuant to Federal Rule of Bankruptcy Procedure 8013(a)(3): (1) a response to the Motion must be filed within 7 days after service of the Motion; and (2) a reply to a response to the Motion must be

filed within 7 days after service of the response.

PLEASE TAKE FURTHER NOTICE that, in the event that the Court sets a hearing on the Motion, SGM shall provide notice of entry of the order setting the hearing as directed by the Court.

Dated: December 20, 2019

LEVENE, NEALE, BENDER, YOO & BRILL L.L.P.

By: */s/ Gary E. Klausner*

Gary E. Klausner
Counsel for Strategic Global Management

MEMORANDUM OF POINTS AND AUTHORITIES

Appellant Strategic Global Management, Inc. ("SGM") moves this Court to consolidate its appeals from the Bankruptcy Court's orders of November 14, November 18, and November 27, 2019 (the "Orders") in the bankruptcy matter captioned *In re Verity Health System of California*, Bankr. C.D. Cal. Case No. 2:18-bk-20151-ER. As we explain below, all three appeals involve the same parties, the same operative facts, the same record, and the same issues, namely disputes between SGM and Verity Health Systems of California, Inc., and the above-referenced affiliated debtors and debtors-in-possession ("Debtors") regarding their Asset Purchase Agreement ("APA") and issues pertaining to alleged breaches and failures to comply with conditions set forth in the APA.

Consolidation for the purposes of briefing, oral argument, and decision will serve the interests of the Court and parties in economy and efficiency.

STATEMENT OF FACTS

1. Bankruptcy Case Background, and the Sale of the Debtors' Hospitals.

The Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on August 31, 2018 (the "Petition Date"). As of the Petition Date, the Debtors operated as a nonprofit health care system, and owned and operated six (6) acute care hospitals in the State of California. According to the Debtors, the Debtors, filed their bankruptcy cases due to, among other reasons, their historical losses that "continued to amount to approximately $175 million annually on a cash flow basis," and "the legacy burden of more than a billion dollars of bond debt and unfunded pension liabilities." (Bankr. Doc. No. 28, 15:11-19.)

Despite a failed attempt to sell their hospitals pre-petition, the Debtors made a decision to continue marketing and selling their hospitals post-petition. On

December 27, 2018, the Bankruptcy Court authorized the Debtors to sell two (2) of their hospitals – O'Conner Hospital and Saint Louise Regional Hospital – to the County of Santa Clara, and that sale closed on or around February 28, 2019.

With regard to the Debtors' four (4) remaining hospitals – St. Francis Medical Center, St. Vincent Medical Center, Seton Medical Center, and Seton Medical Center (collectively, the "Hospitals") – the Debtors, along with their investment banker, marketed the Hospitals for sale.

The Debtors and SGM entered into the "*Asset Purchase Agreement*" dated January 8, 2019 [Bankr. Doc. No. 2305] for the sale of the Hospitals to SGM and, on February 19, 2019, the Bankruptcy Court entered its order establishing certain bidding procedures for an auction for the Hospitals, with SGM designated as the "stalking horse" bidder in the initial bid amount of $610,000 [Bankr. Doc. No. 1572]. There were no overbidders at the auction, and the Bankruptcy Court entered its order approving the Sale of the Hospitals to SGM on May 2, 2019 [Bankr. Doc. No. 2306] (the "Sale Order").

2. The November 14 Order.

Until early November 2019, SGM and the Debtors worked constructively towards a closing of the Sale under the APA. These efforts included, among others, the negotiation and ultimate agreements with six labor unions to modify their respective collective bargaining agreements; analysis of hundreds of executory contracts to be assumed and assigned to SGM upon closing; interaction with state and federal regulators concerning the eventual assumption and assignment of Medicare and Medi-Cal provider agreements; and the drafting of numerous separate agreements to be completed and put in place at the time of closing. 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.

Anticipating that the California Attorney General ("AG"), in evaluating the

proposed Sale, might attach onerous conditions that could derail the deal, as the parties and their counsel had previously experienced, the parties negotiated section 8.6 of the APA ("Section 8.6") to deal with what they termed "Additional Conditions" – *i.e.*, conditions in addition to those appearing on a list of "Approved Conditions" attached to the APA. (APA 32-33, § 8.6.)

If the AG were to impose such Additional Conditions, Debtors would "have the opportunity to file a motion with the Bankruptcy Court seeking the entry of an order ("Supplemental Sale Order") finding that the Assets could be transferred free and clear of the Additional Conditions." (*Id*.) Should the Bankruptcy Court grant the requested order, SGM would "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[.]" (*Id*.) Because SGM was going to be investing hundreds of millions of dollars into the purchase, and would likely be spending substantial additional funds in addressing the historical enormous operating losses of the hospitals, it was critical that SGM obtain a complete, unambiguous and unequivocal elimination of the Additional Conditions.

On September 25, 2019, the AG rendered his decision approving the transaction, but imposing the anticipated "Additional Conditions," which would have resulted in hundreds of millions of dollars of additional costs to SGM. Debtors filed the enforcement motion contemplated by Section 8.6 (the "Enforcement Motion"), with SGM's written support.

The Bankruptcy Court posted its tentative ruling and findings to grant the Enforcement Motion on October 15, 2019 (the "Tentative Ruling"), and entered a detailed "Memorandum of Decision" (the "Memorandum Decision") providing legal grounds for its decision on October 23, 2019. The Memorandum Decision included a finding that the AG had abused its discretion under state and bankruptcy

law in conditioning his approval on the Additional Conditions. True and correct copies of the October 15, 2019 Tentative Ruling and Memorandum Decision [Bankr. Doc. No. 3446] are attached respectively as **Exhibits "1" and "2"** to the concurrently filed Declaration of Gary E. Klausner (the "Klausner Declaration").

The AG then advised the Debtors that he would waive his right to appeal from the Bankruptcy Court's ruling (no order had yet been entered) if Debtors would agree that: (1) the Memorandum Decision would be vacated, and (2) the parties would submit a "simple" order granting the Enforcement Motion.

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 Court in connection with the AG's proposed settlement. SGM advised Debtors that the form of order was unacceptable, but the AG took a "take it or leave it" position. Debtors ultimately entered into a stipulation with the AG for a settlement and order worded as the AG wished.

SGM promptly objected, 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. SGM was also concerned that, unless the "Supplemental Sale Order" was satisfactory to its funding source, it could have funding problems.

The Bankruptcy Court conducted a hearing on November 13, 2019 to consider SGM's objections.

At the conclusion of the hearing, on November 14, 2019, the Bankruptcy Court approved the settlement, and entered the proposed Supplemental Sale Order (*i.e.*, the November 14 Order). Entry of the November 14 Order should have triggered SGM's 21-business day Evaluation Period, which would have given SGM until December 16, 2019 to evaluate the November 14 Order, but, as discussed below, the Bankruptcy Court effectively nullified the Evaluation Period provision. SGM timely appealed the November 14 Order. SGM contends that the

November 14 Order was entered in error because, *inter alia*, (1) the Debtors failed to comply with Bankruptcy Rule 9019 and the standards set for in the Ninth Circuit's decision in *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986), which govern compromises and settlements; and (2) the November 14 Order did not provide SGM with the protection against the AG's enforcement of the Additional Conditions to which SGM was entitled pursuant to APA Section 8.6. True and correct copies of the November 14 Order [Bankr. Doc. No. 3611], is attached as **Exhibit "3"** to the Klausner Declaration.

There is currently pending in this Court the Debtors' Emergency Motion to dismiss SGM's appeal from the November 14 Order (Doc. No. 2). SGM has filed its Opposition (Doc. No. 10).

3. The November 18, 2019 order

On November 18, 2019, although nothing related to the APA or the Sale was pending, the Bankruptcy Court, *sua sponte*, entered an order ruling that (1) SGM lacked standing to appeal the November 14 Order because it had supported the Enforcement Motion, and (2) "Debtors [had] complied with their obligation under the APA to obtain a final, *nonappealable* Supplemental Sale Order [the November 14 Order]. Consequently, SGM [was] now obligated to promptly close the SGM Sale, provided that all other conditions to closing have been satisfied." *See* (Klausner Decl. Ex. 4, ¶ 1) (emphasis added). True and correct copies of the November 18 Order [Bankr. Doc. No. 3633], and November 18 memorandum decision [Bankr. Doc. No. 3632] are attached respectively as **Exhibits "4" and "5"** to the Klausner Declaration.

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 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 taken away. The Bankruptcy Court gave SGM no

opportunity to be heard on the "final and nonappealable" status of the November 14 Order or the implicit elision of the Evaluation Period. Nor did it give SGM an opportunity to be heard on whether the Debtors had satisfied the conditions of Section 8.6 (as it turns out, they had not), or SGM's obligation to close the transaction assuming all other conditions were satisfied.

SGM timely appealed the November 18 Order. This appeal overlaps with SGM's appeal from the November 14 Order because they both involve the Bankruptcy Court's rulings regarding APA Section 8.6, the Supplemental Sale Order, and the rights of the parties thereunder.

4. The November 27, 2019 order

Emboldened by the November 18 Order, 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 by its own terms.

First, Debtors sent SGM, on November 20, 2019, a demand that it close the sale on December 5, 2019, claiming that all conditions to closing had been satisfied. Next, they filed *sealed* papers in the Bankruptcy court along with private correspondence between counsel for the Debtors and SGM, over SGM's objection. SGM has never received a copy of the sealed papers, so it still does not know what they contain.

On November 27, based on this one-sided presentation, the Bankruptcy Court *sua sponte* entered an order and decision finding that all conditions to closing had been satisfied by Debtors, such that SGM was "obligated" to close the sale on December 5, 2019 or be in breach. True and correct copies of the November 27 Order [Bankr. Doc. No. 3724], and November 27 memorandum decision [Bankr. Doc. No. 3723] are attached respectively as **Exhibits "6" and "7"** to the Klausner Declaration.

The Bankruptcy Court also found 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.

Finally, the Bankruptcy Court informed SGM that it would dismiss any adversary complaint that SGM might file in the future. (Klausner Decl. Ex. 7) (Doc. No. 3723, 6 fn. 4).

SGM timely appealed the November 27 Order. It did not close the Sale on December 5, 2019, because, contrary to the Bankruptcy Court's unadjudicated "findings," all of the conditions had *not* been met by Debtors.

Debtors, for their part, were determined to capitalize on their "winning streak." On Friday, December 5, 2019, at the close of business, they filed an "emergency" contempt motion asking the Bankruptcy Court to issue an OSC regarding SGM's failure to close by that date (the "OSC Motion").

On December 9, 2019, the Bankruptcy Court denied the emergency motion, and advised Debtors they could proceed with an alternative plan for the disposition of the hospitals without itself breaching the APA. True and correct copies of the Bankruptcy Court's order [Bankr. Doc. No. 3784] and memorandum of decision [Bankr. Doc. No. 3783] denying the OSC Motion are attached as **Exhibits "8" and "9"** to the Klausner Declaration.

In apparent contradiction of its November 27 Order, the Bankruptcy Court added: "In the future, the Debtors will have the opportunity to litigate the issues of whether SGM has breached the APA and whether the Debtors are entitled to retain SGM's good-faith deposit." (Klausner Decl. Ex. 9, 2.) The December 9 order is not on appeal.

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ARGUMENT

THIS COURT SHOULD EXERCISE ITS AUTHORITY TO CONSOLIDATE SGM'S THREE APPEALS, WHICH ARE CLOSELY RELATED AND SHARE THE SAME RECORD.

The Federal Rules of Appellate Procedure "encourage consolidation of appeals whenever feasible." Fed. R. App. P. 3 Advisory Committee's Notes. Consolidation of cases is favored when it serves judicial economy and the interests of justice. *Malcolm v. Nat'l Gypsum Co*., 995 F.2d 346, 350 (2d Cir. 1993); *see also* 20 Daniel R. Coquillette, et al., Moore's Federal Practice –Civil § 303.41[1] (2015); *Allison v. Bank One-Denver*, 289 F.3d 1223, 1230 n.1 (10th Cir. 2002) (appeals consolidated when sharing "identical facts and a common record").

This Court has discretion to consolidate the appeals. *See, e.g.*, *In re Be–Mac Transport, Inc*., 83 F.3d 1020, 1027 (8th Cir. 1996) (noting district court's broad discretion to consolidate appeals from multiple Bankruptcy Court Orders in one civil action based on whether the facts and parties underlying the appeals are the same); *Southern Pacific Transport Co. v. Voluntary Purchasing Groups, Inc*., 252 B.R. 373, 380 (E.D. Tex. 2000) (noting that railroad filed a separate appeal to district court from each of three Bankruptcy Court orders, and that district court had granted the railroad's motion to consolidate because appeals concerned the same issue); Fed. R. Bankr. Proc. 8003(b)(2).

As set forth in the Facts, *supra*, the three Orders pending appeal in this Court involve the same parties, the same operative facts, and the same record. All three stem from a dispute over the terms of the APA, and the parties' disagreement regarding the other party's satisfaction of conditions precedent to closing the Sale and claimed breaches of the APA.

As further discussed above, the Sale was proceeding smoothly until the AG reached a settlement with Debtors over SGM's objection, which settlement was

approved by the Bankruptcy Court in its November 14 Order, without any of the usual procedures pertaining to settlements under Fed. R. Bankr. Rule 9019.

The November 14 Order was followed by the November 18 Order, which effectively eliminated SGM's bargained-for right to an Evaluation Period under Section 8.6, and which purported to eliminate SGM's right to appeal the November 14 Order. After Debtors filed documents "under seal", which SGM has never been shown (effectively communicating with the Bankruptcy Court ex parte), the Bankruptcy Court perfunctorily adjudicated the parties' contract dispute on November 27, 2019, without affording any party notice or an opportunity to be heard, and denied SGM the right to bring an adversary complaint by effectively dismissing it before it was filed. In sum, all three appeals concern SGM's loss of contractual rights in violation of the APA, and the Due Process Clause of the U.S. Constitution.

None of the three appeals, together or separately, will have any effect on Debtors' disposition of their assets, because the Bankruptcy Court's December 9, 2019 order (not on appeal) gives Debtors the opportunity to dispose of their assets as they choose, notwithstanding the APA.

In the interest of fairness, economy, and judicial efficiency, this Court should consolidate the three appeals for purposes of briefing, decision, and oral argument.

CONCLUSION

For the foregoing reasons, SGM respectfully requests that its three appeals be consolidated for purposes of briefing, argument, and decision.

Dated: December 20, 2019

LEVENE, NEALE, BENDER, YOO & BRILL L.L.P.

By: */s/ Gary E. Klausner*
Gary E. Klausner
Counsel for Strategic Global Management, Inc.

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 9 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 20, 2019

/s/ Gary E. Klausner
GARY E. KLAUSNER

CERTIFICATE OF SERVICE

1. I hereby certify that on December 20, 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 may not have not consented to electronic service. I have served the foregoing documents by the means set forth below:

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Dated: December 20, 2019 */s/ Gary E. Klausner*
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