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Case No. 2:19−cv−10352−DSF

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re: VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al.*,[1] 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 MANAGEMENT, INC., Appellant,	**DECLARATION OF GARY E. KLAUSNER IN SUPPORT OF STRATEGIC GLOBAL MANAGEMENT, INC.'S MOTION TO CONSOLIDATE APPEALS**

[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.

18201511912230000000000005

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

I, Gary E. Klausner, declare as follows:

1. I am over 18 years of age. I have personal knowledge of the facts set forth below and, if called to testify, would and could competently testify thereto.

2. I am a partner of Levene, Neale, Bender, Yoo & Brill L.L.P. ("LNBYB"), bankruptcy counsel for Strategic Global Management, Inc. ("SGM"). I am licensed to practice law in the State of California and before this court.

3. I submit this Declaration in support of SGM's "*Motion To Consolidate Appeals*" (the "Motion"). Unless otherwise indicated, all capitalized but undefined terms herein shall have the same meanings ascribed to them in the Motion.

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

4. 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.)

5. 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.

6. 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.

7. The Debtors and SGM entered into the "*Asset Purchase Agreement*" dated January 8, 2019 [Bankr. Doc. No. 2305] (the "APA") 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").

The November 14 Order

8. 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.

9. 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.)

10. 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.

11. 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.

12. 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"** hereto.

13. 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.

14. 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.

15. 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.

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

17. 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. True and correct copies of the November 14 Order [Bankr. Doc. No. 3611], is attached as **Exhibit "3"** hereto.

18. 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).

The November 18, 2019 order

19. 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." 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"** hereto.

20. 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.

21. 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.

The November 27, 2019 order

22. 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.

23. 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.

24. 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"** hereto.

25. 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.

26. 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.

27. On Friday, December 5, 2019, at the close of business, the Debtors 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").

28. 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"** hereto. The December 9 order is not on appeal.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed December 20, 2019, at Los Angeles, California.

/s/ Gary E. Klausner
GARY E. KLAUSNER

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Tuesday, October 15, 2019 **Hearing Room 1568**

11:00 AM
2:18-20151 Verity Health System of California, Inc. **Chapter 11**
Adv#: 2:18-01433 Xue v. Verity Health System of California Inc et al

#142.00 Pre-Trial Conference
RE: [1] Adversary case 2:18-ap-01433. Complaint by Baoru Xue against Verity Health System of California Inc , St. Francis Medical Center . (12 (Recovery of money/property - 547 preference)) ,(66 (Dischargeability - 523(a)(1),(14),(14A) priority tax claims)) ,(02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy))) (Collins, Kim S.)

Docket 1
***** VACATED *** REASON: DISMISSED 1-25-19**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Verity Health System of California,	Represented By Samuel R Maizel John A Moe II Tania M Moyron Claude D Montgomery Sam J Alberts Shirley Cho

Defendant(s):

Verity Health System of California	Pro Se
St. Francis Medical Center	Pro Se

Plaintiff(s):

Baoru Xue	Represented By Monica A Blut

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Tuesday, October 15, 2019 **Hearing Room 1568**

11:00 AM
2:18-20151 Verity Health System of California, Inc. **Chapter 11**
Adv#: 2:19-01002 ST. VINCENT MEDICAL CENTER, a California nonprofit v. LOCAL

#143.00 Pre-Trial Conference
RE: [1] Adversary case 2:19-ap-01002. Complaint by ST. VINCENT MEDICAL CENTER, a California nonprofit public benefit corporation, ST. FRANCIS MEDICAL CENTER, a California nonprofit public benefit corporation against LOCAL INITIATIVE HEALTH AUTHORITY FOR LOS ANGELES COUNTY DBA L.A. CARE HEALTH PLAN, an independent local public agency. (Charge To Estate). /COMPLAINT FOR BREACH OF WRITTEN CONTRACTS, TURNOVER, UNJUST ENRICHMENT, DAMAGES FOR VIOLATION OF THE AUTOMATIC STAY, AND INJUNCTIVE RELIEF (Attachments: # 1 Exhibit Exhibit A # 2 Exhibit Exhibit B # 3 Exhibit Exhibit C # 4 Exhibit Exhibit D # 5 Exhibit Exhibit E # 6 Adversary Proceeding Cover Sheet # 7 Notice of Required Compliance Bk Rule 7026) Nature of Suit: (11 (Recovery of money/property - 542 turnover of property)),(14 (Recovery of money/property - other)),(71 (Injunctive relief - reinstatement of stay)) (Kahn, Steven)

Docket 1
***** VACATED *** REASON: STATUS CONFERENCE 11-12-19 AT 10:00 A.M.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Verity Health System of California, — Represented By
Samuel R Maizel
John A Moe II
Tania M Moyron
Claude D Montgomery
Sam J Alberts
Shirley Cho

Defendant(s):

LOCAL INITIATIVE HEALTH — Pro Se

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Tuesday, October 15, 2019 **Hearing Room 1568**

11:00 AM

CONT... Verity Health System of California, Inc. **Chapter 11**

Plaintiff(s):

ST. VINCENT MEDICAL	Represented By Steven J Kahn
ST. FRANCIS MEDICAL	Represented By Steven J Kahn

FILED & ENTERED

OCT 23 2019

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY gonzalez DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: Verity Health System of California, Inc., *et al.*,

Debtors and Debtors in Possession.

☒Affects All Debtors

☐ Affects Verity Health System of California, Inc.
☐ Affects O'Connor Hospital
☐ Affects Saint Louise Regional Hospital
☐ Affects St. Francis Medical Center
☐ Affects St. Vincent Medical Center
☐ Affects Seton Medical Center
☐ Affects O'Connor Hospital Foundation
☐ Affects Saint Louise Regional Hospital Foundation
☐ Affects St. Francis Medical Center of Lynwood Medical Foundation
☐ Affects St. Vincent Foundation
☐ Affects St. Vincent Dialysis Center, Inc.
☐ Affects Seton Medical Center Foundation
☐ Affects Verity Business Services
☐ Affects Verity Medical Foundation
☐ Affects Verity Holdings, LLC
☐ Affects De Paul Ventures, LLC
☐ Affects De Paul Ventures - San Jose Dialysis, LLC

Debtors and Debtors in Possession.,

Lead Case No.: 2:18-bk-20151-ER
Chapter: 11

Jointly Administered With:
Case No. 2:18-bk-20162-ER;
Case No. 2:18-bk-20163-ER;
Case No. 2:18-bk-20164-ER;
Case No. 2:18-bk-20165-ER;
Case No. 2:18-bk-20167-ER;
Case No. 2:18-bk-20168-ER;
Case No. 2:18-bk-20169-ER;
Case No. 2:18-bk-20171-ER;
Case No. 2:18-bk-20172-ER;
Case No. 2:18-bk-20173-ER;
Case No. 2:18-bk-20175-ER;
Case No. 2:18-bk-20176-ER;
Case No. 2:18-bk-20178-ER;
Case No. 2:18-bk-20179-ER;
Case No. 2:18-bk-20180-ER;
Case No. 2:18-bk-20181-ER;

Chapter 11 Cases.

MEMORANDUM OF DECISION GRANTING DEBTORS' EMERGENCY MOTION TO ENFORCE THE SALE ORDER [DOC. NO. 3188]

Date: October 15, 2019

Time: 10:00 a.m.

Location: Ctrm. 1568
Roybal Federal Building
255 East Temple Street
Los Angeles, CA 90012

Before the Court is the Debtors' motion to sell four not-for-profit hospitals free and clear of regulatory conditions which the California Attorney General claims authority to impose under Cal. Corp. Code § 5914. For the reasons set forth below, the Court finds that § 363 of the Bankruptcy Code authorizes a sale free and clear of the conditions which the Attorney General contends he is authorized to impose.

I. Facts

On August 31, 2018 (the "Petition Date"), Verity Health Systems of California ("VHS") and certain of its subsidiaries (collectively, the "Debtors") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors' cases are being jointly administered.

As of the Petition Date, the Debtors operated six acute care hospitals in the state of California. On December 27, 2018, the Court authorized the Debtors to sell two of their hospitals—O'Connor Hospital and Saint Louise Regional Hospital—to Santa Clara County (the "Santa Clara Sale").[1] The Santa Clara Sale closed on February 28, 2019.

On February 19, 2019, the Court entered an order establishing bidding procedures (the "Bidding Procedures Order") for the auction of the Debtors' four remaining hospitals—St. Francis Medical Center ("St. Francis"), St. Vincent Medical Center (including St. Vincent Dialysis Center) ("St. Vincent"), Seton Medical Center ("Seton"), and Seton Medical Center Coastside ("Seton Coastside") (collectively, the "Hospitals"). Under the Bidding Procedures Order, Strategic Global Management ("SGM") was designated as the stalking horse bidder. SGM's bid for all four of the Hospitals was $610 million.

The Hospitals were extensively marketed by the Debtors' investment banker, Cain Brothers, a division of KeyBank Capital Markets, Inc. ("Cain Brothers"). Cain Brothers notified ninety parties of the auction process. Sixteen of these parties requested continued access to a data room containing information about the Hospitals.

Notwithstanding Cain Brothers' thorough marketing efforts, the Debtors did not receive any qualified bids for all of the Hospitals. The Debtors received one bid to purchase only St. Vincent and one bid to purchase only St. Francis. After consulting with the Official Committee of Unsecured Creditors (the "Committee") and the largest secured creditors, the Debtors determined not to conduct an auction. On May 2, 2019, the Court entered an order finding that SGM was the winning bidder and approving the sale to SGM (the "SGM Sale").

In 2015, prior to the commencement of these cases, the Debtors' predecessor sought authorization from the California Attorney General (the "Attorney General"), pursuant to Cal. Corp. Code § 5914, to implement a *System Restructuring and Support Agreement* (the "Restructuring Agreement"). The Attorney General approved the Restructuring Agreement, subject to various conditions (the "2015 Conditions"). Among other things, the 2015 Conditions required capital expenditures to make the Hospitals seismically compliant, and required the Hospitals to maintain specified levels of emergency services, intensive care services, cardiac services, and various other services.

Cal. Corp. Code § 5914 requires a non-profit entity operating a health facility to obtain approval from the Attorney General when selling a material amount of its assets to a for-profit entity. Pursuant to Cal. Corp. Code § 5914, the Debtors submitted the SGM Sale to the Attorney General for review.

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[1] For a description of the Santa Clara Sale, see *In re Verity Health Sys. of California, Inc.*, 598 B.R. 283 (Bankr. C.D. Cal. 2018) ("*Verity I*").

The Asset Purchase Agreement under which SGM agreed to purchase the Hospitals (the "APA") provided that SGM would close the sale so long as any conditions imposed by the Attorney General under the review process set forth in Cal. Corp. Code § 5914 were substantially consistent with conditions that SGM had agreed to accept (the "Approved Conditions").[2] In the event that the Attorney General sought to impose conditions materially different from the Approved Conditions (the "Additional Conditions"), the APA provided that the Debtors would have an opportunity to seek a determination from the Court that the Hospitals could be sold free and clear of the Additional Conditions under § 363(f) of the Bankruptcy Code. Under the APA, Additional Conditions imposing upon SGM costs of $5 million or more are conclusively deemed to be materially different from the Approved Conditions. Further, if the Debtors fail to obtain a final, non-appealable order authorizing the sale free and clear of the Additional Conditions, SGM is not obligated to close on the sale and is entitled to a refund of its good faith deposit.

On September 25, 2019, the Attorney General consented to the SGM Sale, subject to various conditions (the "2019 Conditions"). The 2019 Conditions are materially different from the Approved Conditions that SGM had agreed to accept. In particular, two of the 2019 Conditions impose an additional financial burden upon SGM of approximately $305 million. First, the 2019 Conditions require that SGM continue to operate St. Vincent as a licensed general acute care hospital through December 2024. SGM had agreed to maintain St. Vincent's general acute care license only through December 2020. SGM estimates that continuing to operate St. Vincent as a general acute care hospital for an additional four years would cost approximately $285 million. Second, the 2019 Conditions require St. Francis to provide annual charity care in an amount of $12,793,435 for six fiscal years. The required charity care amount is approximately $6.4 million more than the charity care that St. Francis provided in fiscal year 2019. The charity care requirement imposes an additional incremental cost of approximately $20 million.

SGM will not close the sale absent an order finding that the Hospitals can be sold free and clear of the Additional Conditions pursuant to § 363(f). If the SGM Sale does not close, the most likely outcome will be the closure of St. Vincent, Seton, and Seton Coastside. The Debtors would be required to close these three Hospitals to conserve resources to continue to operate St. Francis, the most solvent of the Hospitals, during the time it would take to obtain approval of a sale of St. Francis. The Debtors cannot continue to sustain operational losses of approximately $450,000 per day without the prospect of a prompt sale. There is no back-up bidder to purchase the Hospitals if the SGM Sale does not close.

The Debtors are facing very significant liquidity constraints. Recently, the California Department of Health Care Services (the "DHCS") began withholding certain Medi-Cal fee-for-service payments owed to the Debtors, for the purposing of recovering alleged Medi-Cal overpayments. As of the beginning of October 2019, DHCS had withheld approximately $4.5 million. The Debtors do not have the ability to borrow under any debtor-in-possession financing facility. At this time, the Debtors' cases are being financed by a consensual cash collateral stipulation executed between the Debtors and the principal secured creditors (the "Cash Collateral Stipulation"). Termination of the APA constitutes an event of default under the Cash Collateral Stipulation. It is unclear whether the Debtors would be able to obtain alternative financing. Further, the Debtors must begin the expensive process of closing the Hospitals while

[2] The Approved Conditions are set forth in Schedule 8.6 of the APA.

they still possess a significant cash buffer.[3] In short, the Debtors' prediction that failure of the SGM Sale would necessitate the closure of St. Vincent, Seton, and Seton Coastside is not a bluff.

The Attorney General asserts that imposition of the 2019 Conditions will not result in the closure of St. Vincent, Seton, or Seton Coastside. The Attorney General points to a declaration from Kenneth Sim, M.D. (the "Sim Decl."), the Chairman of Allied Physicians of California, A Professional Medical Corporation ("Allied"). According to the Attorney General, the Sim Decl. shows that Allied is prepared to acquire Seton and Seton Coastside and operate both Hospitals in accordance with the 2019 Conditions.

Contrary to the Attorney General's characterization, the Sim Decl. provides no certainty that a sale of Seton and Seton Coastside will occur. The Sim Decl. states only that "Allied remains interested in purchasing Seton …." Sim Decl. at ¶ 5. The Court further notes that Allied did not timely submit a qualified bid for Seton. At this late stage in the proceedings, Allied's vague statement that it is "interested" in purchasing Seton and Seton Coastside does nothing to dissuade the Court from its conclusion that absent consummation of the SGM Sale, Seton and Seton Coastside will most likely close.

The Attorney General also points to a bid for the Hospitals submitted by Prime Healthcare ("Prime"). The Attorney General overlooks the Prime did not submit a qualified bid. Among other things, Prime failed to submit the mandatory good faith deposit. In fact, Prime itself recognized that its "bid will not be formally considered at auction" and was submitted only "for reference."[4] Further, Prime stated that it did not want to serve as a back-up bidder.[5] In short, Prime's offer to purchase the Hospitals is just as illusory as Allied's.

Finally, the Attorney General points to an offer by AHMC Healthcare, Inc. ("AHMC Healthcare") to purchase St. Francis. The Attorney General is correct that AHMC submitted a qualified bid to purchase St. Francis. However, even assuming that AHMC would follow through on its prior bid to purchase St. Francis, that still would not prevent the closure of St. Vincent, Seton, and Seton Coastside. As discussed above, the Debtors lack sufficient cash to continue operating all four Hospitals during the time it would take for a sale of St. Francis to close. The Debtors would be required to close St. Vincent, Seton, and Seton Coastside to conserve the cash necessary to operate St. Francis during the sale process.

It is against this backdrop that the Debtors move for authorization to sell the Hospitals free and clear of the Additional Conditions, pursuant to § 363(f). The Debtors argue that the Additional Conditions constitute an "interest in property" within the meaning of § 363(f), and that a sale free and clear of the 2019 Conditions may be authorized under § 363(f)(1), (4), or (5), for the following reasons:

- Pursuant to § 363(f)(1), the Hospitals may be sold under applicable nonbankruptcy law, because under California law, the purchaser of assets does not assume successor liability.
- Pursuant to § 363(f)(4), the validity of the Additional Conditions is subject to a *bona fide* dispute, because the Attorney General abused his discretion in imposing the Additional Conditions.

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[3] For a description of the difficulties associated with closing a much smaller hospital, see *In re Gardens Reg'l Hosp. & Med. Ctr., Inc.*, 567 B.R. 820, 829 (Bankr. C.D. Cal. 2017), *appeal dismissed,* No. 2:16-BK-17463-ER, 2018 WL 1229989 (C.D. Cal. Jan. 19, 2018).

[4] April 3, 2019 E-mail from Prime to the Debtors [Doc. No. 3333, Ex. 6].

[5] *Id.*

- Pursuant to § 363(f)(5), the Attorney General could be compelled to accept a money satisfaction of certain of the Additional Conditions, such as the condition that SGM provide specified levels of charitable care.

The Debtors assert that imposition of the Additional Conditions violates § 525, which prohibits government entities from discriminating against debtors who have failed to pay dischargeable debts when issuing licenses. According to the Debtors, the Additional Conditions constitute an attempt by the Attorney General to collect a dischargeable debt. The Debtors' theory is that Attorney General's refusal to approve the SGM Sale absent imposition of the Additional Conditions amounts to the discriminatory denial of licensure in contravention of § 525.

Finally, the Debtors request that the Court issue a writ of mandate compelling the Attorney General to approve the SGM Sale without imposition of the Additional Conditions, pursuant to Cal. Civ. Proc. Code § 1085 or § 1094.5. The Debtors assert that a writ of mandate is justified because the Attorney General abused his discretion by imposing the Additional Conditions.

The Committee supports the Motion. The Committee argues that prompt closing of the SGM Sale is the best means of insuring a distribution to unsecured creditors.

The Attorney General opposes the Motion. He disputes the Debtors' contention that the Hospitals may be sold under applicable nonbankruptcy law, or that a bona fide dispute exists as to the Attorney General's authority to impose the Additional Conditions. The Attorney General denies that he abused his discretion in imposing the Additional Conditions. He notes that he considered an extensive record in arriving at the Additional Conditions, and states that the Debtors' dislike of the Additional Conditions does not mean that imposing the conditions was an abuse of discretion.

Service Employees International Union, United Healthcare Workers-West ("SEIU-UHW"), which represents approximately 1,303 employees at St. Vincent and St. Francis, opposes the Motion. SEIU-UHW contends that the Additional Conditions are economically feasible for SGM.

The United Nurses Association of California/Union of Health Care Professional ("UNAC"), which represents approximately 900 registered nurses at St. Francis, urges SGM, the Attorney General, and the Debtors to explore prospects for a consensual resolution with respect to the Additional Conditions.

II. Discussion

Section 363(d)(1) authorizes non-profit entities, such as the Debtors, to sell estate assets only if the sale is "in accordance with nonbankruptcy law applicable to the transfer of property by" a non-profit entity. Section 541(f) similarly provides that property held by debtors that are § 501(c)(3) corporations under the Internal Revenue Code may be transferred, but "only under the same conditions as would apply if the debtor had not filed a case under this title." Section 363(b) authorizes the Debtors to sell estate property out of the ordinary course of business, subject to court approval. The Debtors must articulate a business justification for the sale. *In re Walter*, 83 B.R. 14, 19–20 (9th Cir. BAP 1988). Whether the articulated business justification is sufficient "depends on the case," in view of "all salient factors pertaining to the proceeding." *Id.* at 19–20. Section 363(f) provides that a sale of estate property may be "free and clear of any interest in such property of an entity other than the estate," provided that certain conditions are satisfied.

A. The Additional Conditions are an "Interest in Property" Within the Meaning of § 363(f)

As this Court has previously explained:

> The Bankruptcy Code does not define the phrase "interest in ... property" for purposes of § 363(f). The Third Circuit has held that the phrase "interest in ... property" is "intended to refer to obligations that are connected to, or arise from, the property being sold." *Folger Adam Sec., Inc. v. DeMatteis/MacGregor JV*, 209 F.3d 252, 259 (3d Cir. 2000). That conclusion is echoed by *Collier on Bankruptcy*, which observes a trend in caselaw "in favor of a broader definition [of the phrase] that encompasses other obligations that may flow from ownership of the property." 3 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 363.06[1] (16th ed. 2017).
>
> Courts have held that interests in property include monetary obligations arising from the ownership of property, even when those obligations are imposed by statute. For example, in *Mass. Dep't of Unemployment Assistance v. OPK Biotech, LLC (In re PBBPC, Inc.)*, 484 B.R. 860 (1st Cir. BAP 2013), the court held that taxes assessed by Massachusetts under its unemployment insurance statutes constituted an "interest in ... property." The taxes were computed based on the Debtor's "experience rating," which was determined by the number of employees it had terminated in the past. *Id.* at 862. Because the Debtor had terminated most of its employees prior to selling its assets, its experiencing rating, and corresponding unemployment insurance tax liabilities, were very high. *Id.* The *PBBPC* court held that the experience rating was an interest in property that could be cut off under § 363(f). *Id.* at 869–70. Similarly, in *United Mine Workers of Am. Combined Benefit Fund v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573, 581, the court held that monetary obligations imposed by the Coal Industry Retiree Health Benefit Act of 1992 constituted an "interest in ... property" within the meaning of § 363(f).

In re Gardens Reg'l Hosp. & Med. Ctr., Inc., 567 B.R. 820, 825–26 (Bankr. C.D. Cal. 2017), *appeal dismissed,* No. 2:16-BK-17463-ER, 2018 WL 1229989 (C.D. Cal. Jan. 19, 2018) ("*Gardens I*").

The Additional Conditions are an "interest in property" within the meaning of § 363(f). First, the Additional Conditions are monetary obligations arising from the ownership of property. Similar to the "experience rating" at issue in *PBBPC, Inc.*, the Additional Conditions were calculated based upon the Hospitals' prior operating history. Among other things, the Additional Conditions require that SGM cause the Hospitals to provide specified levels of healthcare services. The required service levels have been set based upon the Hospitals' historical operations. For example, the Additional Conditions require that St. Francis "maintain and provide 24-hour emergency and trauma medical services at no less than current licensure and designation with the same types and/or levels of services …."[6] St. Francis is required to maintain cardiac services, critical care services, neonatal intensive services, women's health services, cancer services, pediatric services, orthopedic and rehabilitation services, wound care services, behavioral health services, and perinatal services, all at "current licensures, types, and/or levels

[6] St. Francis Conditions at § IV [Doc. No. 3188, Ex. B].

of services."[7] St. Vincent, Seton, and Seton Coastside are also required to maintain various healthcare services at current levels.[8]

Second, the Attorney General's statutory authority to impose the Additional Conditions arises from the Debtors' operation of the Hospitals as non-profit entities. Had the Debtors not operated the Hospitals in this manner, there could be no contention that the SGM Sale is subject to the Attorney General's review pursuant to Cal. Corp. Code § 5914. In this sense as well, the Additional Conditions "arise from the property being sold," *In re Trans World Airlines, Inc.*, 322 F.3d 283, 290 (3d Cir. 2003), and therefore qualify as an "interest in … property" within the meaning of § 363(f).

Third, the Attorney General is barred by the law of the case doctrine from asserting that the Additional Conditions are not an "interest in … property." "Under the 'law of the case' doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case." *Richardson v. United States*, 841 F.2d 993, 996 (9th Cir.), *amended,* 860 F.2d 357 (9th Cir. 1988). "For the doctrine to apply, the issue in question must have been 'decided explicitly or by necessary implication in [the] previous disposition.'" *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000).

In connection with the Santa Clara Sale, the Court addressed the exact issue presented here—whether conditions that the Attorney General sought to impose upon the sale constituted an "interest in … property" for purposes of § 363(f).[9] The Attorney General litigated the issue, and the Court overruled the Attorney General's arguments.[10] The Attorney General voluntarily dismissed his appeal of the order finding that the conditions he sought to impose were an "interest in … property." The law of the case doctrine bars relitigation of the issue.

The doctrine of issue preclusion is a further bar to any attempt by the Attorney General to contest the Additional Conditions' status as an "interest in … property." As explained by the Supreme Court, issue preclusion forecloses "'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892, 128 S. Ct. 2161, 2171, 171 L. Ed. 2d 155 (2008) (internal citations omitted). The doctrine protects "against 'the expense and vexation attending multiple lawsuits, conserve[s] judicial resources, and foster[s] reliance on judicial action by minimizing the possibility of inconsistent decisions.'" *Id.* Issue preclusion applies if "(1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits." *Howard v. City of Coos Bay*, 871 F.3d 1032, 1041 (9th Cir. 2017).

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[7] *Id.* at § VI.

[8] *See* St. Vincent Conditions at § VI (setting forth a list of healthcare services that St. Vincent must maintain at current levels); *see also* Seton and Seton Coastside Conditions at § VI (same).

[9] *See Verity I*, 598 B.R. at 293 ("The Conditions [imposed by the Attorney General] are an 'interest in property' within the meaning of § 363(f). The Conditions provide that any owner of the Hospitals must furnish specified levels of emergency services, intensive care services, cardiac services, and various other services. The required service levels were derived based upon the historical experience of the prior operator. As such, the Conditions are monetary obligations arising from the ownership of property.").

[10] *See generally Verity I.*

The Attorney General has litigated the issue presented here, both in connection with the Santa Clara Sale and in connection with a sale in *Gardens I* (the "Gardens Sale"). Just as he did in the Santa Clara Sale, the Attorney General claimed in the Gardens Sale the regulatory authority to impose conditions. The Court found that the Attorney General's claim to regulatory authority was an "interest in … property" for purposes of § 363(f). *Gardens I*, 567 B.R. at 826. The Attorney General is precluded from relitigating the issue of whether his claimed authority to impose conditions on the SGM Sale is an "interest in … property."

B. The Debtors May Sell the Hospitals Free and Clear of the Additional Conditions Pursuant to § 363(f)(1)

Sale of the Hospitals may be free and clear of the Additional Conditions only upon satisfaction of one or more of the five disjunctive sub-factors set forth in § 363(f). Under § 363(f)(1), a sale free and clear may be approved if permitted by applicable nonbankruptcy law.

Applicable nonbankruptcy law permits a sale free and clear for two reasons. First, the Attorney General's attempt to impose the Additional Conditions upon SGM is equivalent to an attempt to impose successor liability upon SGM. California law does not authorize the imposition of successor liability upon SGM. Second, even if the Attorney General were authorized to impose successor liability under California law, the Attorney General abused his discretion in imposing the Additional Conditions, meaning that the Additional Conditions must be set aside.

1. California Law Does Not Authorize the Attorney General to Impose Successor Liability Upon SGM

i. The Additional Conditions Qualify as Successor Liability

The Attorney General's attempt to impose the Additional Conditions upon SGM qualifies as an attempt to impose successor liability upon SGM. The reason is that the Additional Conditions impose upon SGM many of the same obligations imposed upon the Debtors by the 2015 Conditions. By attempting to enforce the Additional Conditions, the Attorney General is attempting to enforce the obligations imposed by the 2015 Conditions against SGM.

It is true that the 2015 Conditions are not identical to the Additional Conditions. Some medical services required under the 2015 Conditions are no longer required under the Additional Conditions. And unlike the 2015 Conditions, the Additional Conditions do not impose obligations to fund pension plans. But for the most part the Additional Conditions reinstate obligations imposed by the 2015 Conditions. For example, both the 2015 Conditions and the Additional Conditions require that St. Francis maintain cardiac services, including designation as a STEMI Receiving Center; critical care services, including a minimum of 36 intensive care unit beds; neonatal intensive care services, including a minimum of 29 neonatal intensive care beds; women's health services, including women's imaging services; cancer services, including radiation oncology; orthopedic and rehabilitation services; and wound care services. The Additional Conditions do not reinstate St. Francis' obligation to maintain advanced certification as a Primary Stroke Center, and the Additional Conditions reduce St. Francis' pediatric services obligation from 14 beds to 5 beds.

The 2015 Conditions required St. Francis to maintain the specified healthcare services for ten years from the date of the closing of the Restructuring Agreement. The Additional Conditions

require that the specified services be maintained for ten years from the date of the closing of the APA. That is, the Additional Conditions extend the term of the 2015 Conditions by approximately six years.

Considered within the overall scope of the obligations imposed, the differences between the 2015 Conditions and the Additional Conditions are comparatively inconsequential. The Attorney General relies upon these minor differences in support of his argument that the Additional Conditions do not impose successor liability. Such reliance is misplaced. The Additional Conditions still qualify as successor liability even though they are not exactly identical to the 2015 Conditions. Nor does the extension in the term of the reinstituted obligations remove the Additional Conditions from the category of successor liability.

The Attorney General argues that the Additional Conditions do not impose successor liability because they are SGM's own obligations, going forward from the date of the sale. According to the Attorney General, the Additional Conditions are based upon healthcare impact reports prepared for each Hospital. The Attorney General asserts that it is not surprising that the Additional Conditions resemble the 2015 Conditions, which are only four years old and relate to the same Hospitals and communities. Citing *In re General Motors Corp.*, 407 B.R. 463, 508 (Bankr. S.D.N.Y. 2009), the Attorney General analogizes the Additional Conditions to the environmental remediation liabilities that would remain the obligation of a purchaser of contaminated real estate.

These arguments are not persuasive. In *General Motors*, the environmental remediation obligations were not successor liability because any entity purchasing contaminated property would have an obligation to comply with environmental law:

> Under section 363(f), there could be no successor liability imposed on the purchaser for the [seller's] … monetary obligations related to cleanup costs, or any other obligations that were obligations of the seller. But the purchaser would have to comply with its environmental responsibilities starting with the day it got the property, and if the property required remediation as of that time, any such remediation would be the buyer's responsibility …. Those same principles will be applied here. Any Old GM properties to be transferred will be transferred free and clear of successor liability, but New GM will be liable from the day it gets any such properties for its environmental responsibilities going forward.

In re Gen. Motors Corp., 407 B.R. 463, 508 (Bankr. S.D.N.Y. 2009).

There is a key difference between the contaminated property at issue in *General Motors* and the Hospitals at issue here. Any entity that purchased the contaminated property at issue in *General Motors* would have been required to comply with environmental regulations going forward. A purchaser's duty to comply with environmental regulations would not vary based upon the identity of the purchaser or the identity of the seller. Here, by contrast, whether a purchaser is obligated to comply with Attorney General conditions can vary, depending upon either the identity of the purchaser or the identity of the seller. There is no general obligation imposed upon an entity that purchases a hospital in the State of California to operate that hospital in accordance with conditions asserted by the Attorney General. The Attorney General's regulatory authority applies only to non-profit hospitals, and only to certain types of sale transactions. Had the Hospitals been sold to a public entity, such as the County of Los Angeles, the Attorney General could not have reviewed the sale. *See Verity I*, 598 B.R. at 294 (holding

that Cal. Corp. Code § 5914 did not apply where non-profit hospitals were sold to a public entity). Had the Hospitals been operated by a for-profit entity, the Attorney General could not have reviewed the sale. *See* Cal. Corp. Code § 5914(a) (requiring only nonprofit corporations to submit the sale of assets to Attorney General review).

Because the obligation to comply with the Additional Conditions is contingent upon the identity of the purchaser and the identity of the seller, the conditions cannot fairly be characterized as the purchaser's obligation to comply with applicable law on a going-forward basis. The Attorney General can claim authority to impose the Additional Conditions upon purchaser SGM only because the Debtors operated the Hospitals as non-profit entities. Since the Attorney General's alleged authority to impose the Additional Conditions derives from the manner in which the sellers operated the Hospitals, the Additional Conditions are appropriately characterized as successor liability.

ii. Successor Liability Cannot Be Imposed Under California Law

Under California law, the general rule is "that where a corporation purchases, or otherwise acquires by transfer, the assets of another corporation, the acquiring corporation does not assume the selling corporation's debts and liabilities." *Fisher v. Allis-Chalmers Corp. Prod. Liab. Tr.*, 95 Cal. App. 4th 1182, 1188, 116 Cal. Rptr. 2d 310, 315 (2002). The general rule does not apply if "(1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts." *Id.*

None of the exceptions to the general rule are present here. First, SGM has not agreed to assume the Additional Conditions, either expressly or by implication. Second, the SGM Sale is not a consolidation or merger of the Debtors and SGM. A sale transaction is a consolidation or merger of two corporations "where one corporation takes all of another's assets without providing any consideration that could be made available to meet claims of the other's creditors or where the consideration consists wholly of shares of the purchaser's stock which are promptly distributed to the seller's shareholders in conjunction with the seller's liquidation." *Ray v. Alad Corp.*, 19 Cal. 3d 22, 28, 560 P.2d 3 (1977) (internal citations omitted). Neither factor applies. SGM is paying for the Hospitals in cash (not stock),[11] and that cash will be distributed to the Debtors' creditors through a plan of liquidation. Third, SGM is not a mere continuation of the Debtors. A purchaser is a mere continuation of a seller if there is inadequate consideration for the purchaser or if one or more persons are officers, directors, or stockholders or both corporations. *Id.* Consideration for the SGM Sale is adequate and no officers or directors of the Debtors are officers or directors of SGM.[12] Fourth, the Debtors are not selling the Hospitals for the purpose of escaping liabilities for their debts. In fact, the opposite is true—the objective of the SGM Sale is to generate proceeds to pay the Debtors' debts, to the extent possible. In sum, successor liability cannot be imposed on SGM under California common law.

Successor liability cannot be imposed under Cal. Corp. Code §§ 5914–5919. Cal. Corp. Code § 5914 authorizes the Attorney General to review transactions in which a non-profit healthcare

[11] *See* APA at § 1.1(a)(i) [Doc. No. 2305, Part 1].

[12] As nonprofit public benefit corporations, the Debtors do not have stockholders.

facility seeks to transfer a material amount of its assets to a for-profit entity, and provides in relevant part:

> Any nonprofit corporation that is defined in Section 5046 and operates or controls a health facility, as defined in Section 1250 of the Health and Safety Code, or operates or controls a facility that provides similar health care, regardless of whether it is currently operating or providing health care services or has a suspended license, shall be required to provide written notice to, and to obtain the written consent of, the Attorney General prior to entering into any agreement or transaction to do either of the following:
>
> (A) Sell, transfer, lease, exchange, option, convey, or otherwise dispose of, its assets to a for-profit corporation or entity or to a mutual benefit corporation or entity when a material amount of the assets of the nonprofit corporation are involved in the agreement or transaction.

Cal. Corp. Code § 5914(a)(1) (West).

The "Attorney General shall have discretion to consent to, give conditional consent to, or not consent to" the transaction. Cal. Corp. Code § 5917.

Nothing within the statute authorizes the Attorney General to impose successor liability upon SGM, the for-profit entity that purchased the healthcare assets from the non-profit Debtors. Under the statute, the Attorney General is authorized to review transactions entered into by a "nonprofit corporation that … operates or controls a health facility," Cal. Corp. Code § 5914(a)(1), and to "consent to, give conditional consent to, or not consent to" any such transactions, Cal. Corp. Code § 5917. These provisions do not grant the Attorney General authority to impose going-forward obligations on the assets that are the subject of the transaction. That is, the statute does not provide that the healthcare assets themselves are subject to regulation by the Attorney General. Rather, it is the non-profit status of the entity operating the healthcare assets that triggers the Attorney General's regulatory authority. Upon transfer of the healthcare assets from the non-profit entity to the for-profit entity, the Attorney General's regulatory authority over the assets terminates.

The issue of the Attorney General's authority to impose successor liability arose in the case of *La Paloma Generating Co.*, No. 16-12700, 2017 WL 5197116 (Bankr. D. Del. Nov. 9, 2017). In *La Paloma*, the debtor operated a power plant subject to a cap-and-trade emissions regulation. The regulation required "Covered Entities"—defined as entities engaging in operations that generated emissions—to surrender "Compliance Instruments" equal to the amount of emissions generated at specified times. At issue was whether a power plant could be sold "free and clear of, and without the purchaser assuming, any obligation to surrender compliance instruments under the California Cap-and-Trade Program for emissions generated by the Debtors and/or their facility during the period before the transfer of the assets." *Id.* at *2. The court found that "[u]nder the Regulation, only entities—and not assets—are Covered Entities" subject to the obligation to surrender Compliance Instruments. *Id.* at *5. As a result, the court found, the debtors could sell the power plant free and clear of the surrender obligations, pursuant to § 363(f)(1). *Id.* at *8. The court reasoned that the regulation did not impose successor liability on the purchaser, because it imposed liability only on "Covered Entities," and the purchaser would not become a Covered Entity until after it acquired the power plant. *Id.* at *7–*8. The regulation, the court held, was limited to Covered Entities, and could not be used to "impugn liability on the purchaser of … the Covered Entity's assets." *Id.* at *8.

With respect to the imposition of successor liability, the statute at issue here operates in the same manner as the regulation examined in *La Paloma*. Similar to the regulation in *La Paloma*, Cal. Corp. Code § 5914–5919 permits the imposition of liability upon the Hospitals only because they are operated by a non-profit corporation. That is, independent of the fact that they are operated by a non-profit entity, nothing within Cal. Corp. Code § 5914–5919 authorizes the Attorney General to impose liabilities upon the Hospitals. Further, the Attorney General's regulatory authority under the statute does not extend to for-profit entities. As was the case in *La Paloma*, Cal. Corp. Code §5914–5919 does not authorized the Attorney General to impose liability upon the for-profit purchaser of the Hospitals.

The Attorney General argues that the statute's implementing regulations authorize the imposition of successor liability. Specifically, the Attorney General points to Cal. Code Regs. Tit. 11, § 999.5, which provides in relevant part:

> It is the policy of the Attorney General, in consenting to an agreement or transaction involving a general acute care hospital, to require for a period of at least five years the continuation at the hospital of existing levels of essential healthcare services, including but not limited to emergency room services. The Attorney General shall retain complete discretion to determine whether this policy shall be applied in any specific transaction under review.

Cal. Code Regs. tit. 11, § 999.5.

Significantly, the statute's implementing regulations do not differentiate between Cal. Corp. Code §§ 5914–5919, which codifies the Attorney General's authority to review transfers between a non-profit and a for-profit entity, and Cal. Corp. Code §§ 5920–5925, which codifies the Attorney General's authority to review transfers between a non-profit entity and a different non-profit entity. Where assets are transferred between two different non-profit entities, the structure of the statute clearly provides the Attorney General the authority to impose successor liability.

The Court construes Cal. Code Regs. Tit. 11, § 999.5 as implementing Cal. Corp. Code §§ 5920–5925, not as implementing Cal. Corp. Code §§ 5914–5919. Cal. Corp. Code §§ 5920–5925 does authorize the imposition of successor liability, whereas Cal. Corp. Code §§ 5914–5919 does not. This construction is appropriate because it harmonizes the language of the regulation with the language of the statute, while still giving full effect to every part of the regulation. *See Butts v. Bd. of Trustees of California State Univ.*, 225 Cal. App. 4th 825, 835, 170 Cal. Rptr. 3d 604, 612 (2014) ("The rules of statutory construction also govern our interpretation of regulations promulgated by administrative agencies. We give the regulatory language its plain, commonsense meaning. If possible, we must accord meaning to every word and phrase in the regulation, and we must read regulations as a whole so that all of the parts are given effect.").

Because the Attorney General's authority to review the sale arises under Cal. Corp. Code §§ 5914–5919, the Attorney General cannot rely upon Cal. Code Regs. tit. 11, § 999.5, which implements Cal. Corp. Code §§ 5920–5925, as the basis for imposing successor liability upon SGM.

2. Even if California Law Allowed the Attorney General to Impose Successor Liability Upon SGM, the Attorney General Abused his Discretion in Imposing the Additional Conditions

As set forth below, the Court finds that the Attorney General's decision to impose the Additional Conditions is subject to judicial review by administrative mandate under California law. This Court is empowered to conduct such judicial review pursuant to § 1221(e) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), which provides:

> Nothing in this section shall be construed to require the court in which a case under chapter 11 of title 11, United States Code, is pending to remand or refer any proceeding, issue, or controversy to any other court or to require the approval of any other court for the transfer of property.

Pub. L. No. 109-8, § 1221(e) (2005).[13] *See also In re HHH Choices Health Plan, LLC*, 554 B.R. 697, 700 (Bankr. S.D.N.Y. 2016) (construing New York state law to determine the appropriate disposition of a non-profit debtor's assets).

Upon review of the Attorney General's decision, the Court finds that the imposition of the Additional Conditions constituted an abuse of discretion, for the reasons explained below. Therefore, the Additional Conditions must be set aside, which means that the Debtors are authorized to sell the Hospitals free and clear of the Additional Conditions under applicable nonbankruptcy law.

i. The Attorney General's Imposition of the Additional Conditions is Subject to Judicial Review by Administrative Mandate

Cal. Civ. Proc. Code § 1094.5 provides for judicial review by administrative mandate of decisions made by agencies or officers of the State of California. A writ of mandate may be issued if the agency or officer making the decision engaged in a "prejudicial abuse of discretion." Cal. Civ. Proc. Code § 1094.5(b). An "abuse of discretion is established if … the order or decision is not supported by the findings, or the findings are not supported by the evidence." *Id.*

The Attorney General contends that administrative mandamus review is not available because the Additional Conditions were not issued subsequent to "a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal." Cal. Civ. Proc. Code § 1094.5(a). The Attorney General acknowledges that he conducted "public meetings … to hear comments from interested parties" as required by Cal. Corp. Code § 5922. However, the Attorney General asserts that such public meetings were not "hearings" within the meaning of Cal. Civ. Proc. Code § 1094.5(a), because public comments were not presented under oath and no effort was made to determine the accuracy of the information offered by members of the public. The Attorney General's position is that the Debtors are entitled only to traditional mandamus review under Cal. Civ. Proc. Code § 1085.

"Quasi-legislative acts are ordinarily reviewed by traditional mandate, and quasi-judicial acts are reviewed by administrative mandate. 'Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts.'" *Friends of the Old Trees v. Dep't of Forestry & Fire Prot.*, 52 Cal. App. 4th 1383, 1389, 61 Cal. Rptr. 2d 297, 303 (1997) (internal citation omitted).

[13] This provision of BAPCPA does not appear in the Bankruptcy Code itself.

The Court is not persuaded by the Attorney General's contention that administrative mandamus review is unavailable to the Debtors. In reviewing the SGM Sale, the Attorney General hired JD Healthcare, Inc. to prepare expert reports containing information on how the SGM Sale would affect the availability of healthcare services in the regions served by the Hospitals. The JD Healthcare expert reports contained recommendations regarding the conditions that the Attorney General should impose on the SGM Sale. Upon receiving the expert reports, the Attorney General asked the Debtors to respond to the conditions recommended by JD Healthcare. The Attorney General conducted public meetings, all of which were transcribed, at which members of the public commented on the SGM Sale. "[P]urely documentary proceedings can satisfy the hearing requirement of Code of Civil Procedure § 1094.5, so long as the agency is required by law to accept and consider evidence from interested parties before making its decision." *Friends of the Old Trees*, 52 Cal. App. 4th at 1391–92. A "trial-type hearing" is not necessary. *Id.* at 1392.

The Attorney General's review involved "the actual application of … a rule to a specific set of existing facts." *Friends*, 52 Cal. App. 4th at 1389. The Attorney General received evidence from JD Healthcare, heard comments from members of the public, and elected to impose the Additional Conditions after considering all the evidence collected during the review process. The Attorney General's review of the SGM Sale was a quasi-judicial act subject to review by administrative mandate.

The Attorney General next asserts that administrative mandamus review is unavailable because the Debtors have failed to produce the complete administrative record supporting the Attorney General's decision. This contention is without merit. For purposes of administrative mandamus review, a partial record is sufficient if it "accurately represent[s] the administrative proceedings, provide[s] the reviewing court with an understanding of what occurred below, and enable[s] that court to undertake an independent judicial review of the administrative decision." *Elizabeth D. v. Zolin*, 21 Cal. App. 4th 347, 349, 25 Cal. Rptr. 2d 852 (1993). The record before the Court consists of the expert reports prepared by JD Healthcare, partial transcripts of public meetings conducted by the Attorney General, and various letters submitted by stakeholders. The record on file provides the Court with an understanding of reasons for the Attorney General's decision.

There are two tests for judicial review by administrative mandate. "The 'independent judgment' rule applies when the decision of an administrative agency will substantially affect a fundamental vested right." *Mann v. Dep't of Motor Vehicles*, 76 Cal. App. 4th 312, 320, 90 Cal. Rptr. 2d 277, 283 (1999). Under the "independent judgment" rule, the Court must "begin its review with a presumption of the correctness of administrative findings, and then, after affording the respect due to these findings, exercise independent judgment in making its own findings." *Fukuda v. City of Angels*, 20 Cal. 4th 805, 819, 977 P.2d 693, 701 (1999). "[T]he presumption provides the trial court with a starting point for review but it is only a presumption, and may be overcome. Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings." *Id.*

"The 'substantial evidence' rule applies when the administrative decision neither involves nor substantially affects a vested right. The trial court must then review the entire administrative record to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law …." *Mann*, 76 Cal. App. 4th 312, 320, 90 Cal. Rptr. 2d 277, 283 (1999).

To determine whether an administrative decision affects a fundamental vested right, the Court examines "whether the affected right is deemed to be of sufficient significance to preclude its extinction or abridgement by a body lacking *judicial* power." *Interstate Brands v. Unemployment Ins. Appeals Bd.*, 26 Cal. 3d 770, 779, 608 P.2d 707, 713 (1980) (emphasis in original). An administrative decision that would have the effect of shutting down a business affects a fundamental vested right. *See, e.g.*, *The Termo Co. v. Luther*, 169 Cal. App. 4th 394, 407–08, 86 Cal. Rptr. 3d 687, 697 (2008) ("The implementation of the Order and Decision would have the effect not only of shutting down a business that has been in existence for 20 years or more, but also of terminating the right to produce oil—an extraordinarily valuable resource, especially in the current economic era…. Certainly, a fundamental vested right is at issue."); *Goat Hill Tavern v. City of Costa Mesa*, 6 Cal. App. 4th 1519, 1529, 8 Cal. Rptr. 2d 385, 391 (1992) (holding that "the right to continue operating an established business in which [the owner] has made a substantial investment" is a fundamental vested right).

Imposition of the Additional Conditions will precipitate the collapse of the SGM Sale and require the Debtors to close three of the four Hospitals. The Debtors' rights to preserve the Hospitals' operations, by means of a sale to SGM, is a fundamental vested right that is abrogated by the Attorney General's attempt to impose the Additional Conditions. Consequently, the Court reviews the Attorney General's decision under the independent judgment test.

ii. In Imposing the Additional Conditions, the Attorney General Abused His Discretion

Under certain circumstances, the sale of a not-for-profit healthcare facility is subject to review by the Attorney General. Cal. Corp. Code § 5914. The Legislature enacted Cal. Corp. Code § 5914 to ensure that the public was not deprived of the benefits of charitable health facilities as a result of the transfer of those facilities' assets to for-profit entities. In enacting § 5914, the Legislature found:

> Charitable, nonprofit health facilities have a substantial and beneficial effect on the provision of health care to the people of California, providing as part of their charitable mission uncompensated care to uninsured low-income families and under-compensated care to the poor, elderly, and disabled.
>
> Transfers of the assets of nonprofit, charitable health facilities to the for-profit sector, such as by sale, joint venture, or other sharing of assets, directly affect the charitable use of those assets and may affect the availability of community health care services….
>
> It is in the best interests of the public to ensure that the public interest is fully protected whenever the assets of a charitable nonprofit health facility are transferred out of the charitable trust and to a for-profit or mutual benefit entity.

1996 Cal. Legis. Serv. Ch. 1105 (A.B. 3101) (West).

The Attorney General has "discretion to consent to, give conditional consent to, or not consent to" the sale of a healthcare facility. Cal. Corp. Code § 5917. In exercising that discretion, the Attorney General "shall consider any factors that the Attorney General deems relevant," including but not limited to whether any of the following apply:

a) The terms and conditions of the agreement or transaction are fair and reasonable to the nonprofit corporation.
b) The agreement or transaction will result in inurement to any private person or entity.

c) Any agreement or transaction that is subject to this article is at fair market value. In this regard, "fair market value" means the most likely price that the assets being sold would bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and in their own best interest, and a reasonable time being allowed for exposure in the open market.
d) The market value has been manipulated by the actions of the parties in a manner that causes the value of the assets to decrease.
e) The proposed use of the proceeds from the agreement or transaction is consistent with the charitable trust on which the assets are held by the health facility or by the affiliated nonprofit health system.
f) The agreement or transaction involves or constitutes any breach of trust.
g) The Attorney General has been provided, pursuant to Section 5250, with sufficient information and data by the nonprofit corporation to evaluate adequately the agreement or transaction or the effects thereof on the public.
h) The agreement or transaction may create a significant effect on the availability or accessibility of health care services to the affected community.
i) The proposed agreement or transaction is in the public interest.
j) The agreement or transaction may create a significant effect on the availability and accessibility of cultural interests provided by the facility in the affected community.

Cal. Corp. Code § 5917 (West).

Nothing in the record indicates that SGM's bid was other than for fair market value (factor (c)). The Hospitals were thoroughly marketed by Cain Brothers. SGM was the only bidder interested in purchasing the Hospitals. The Court must presume that a bid submitted after extensive marketing reflects the Hospital's fair market value. *See Bank of Am. Nat. Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 457, 119 S. Ct. 1411, 1423, 143 L. Ed. 2d 607 (1999) (stating that "the best way to determine value is exposure to a market").

There is no indication that SGM, or any other party, took any actions to decrease the value of the Hospitals (factor (d)). In view of the extensive marketing, the terms of the sale are fair and reasonable to the Debtors (factor (a)). There is no evidence that any of the parties involved in the SGM sale have engaged in any conduct that would amount to a breach of trust (factor (f)), or that the SGM Sale will inure to the benefit of any private person or entity (factor (b)). Nor has there been any suggestion that the Debtors failed to provide the Attorney General with sufficient information to evaluate the SGM Sale (factor (g)). Factor (e) does not apply, because the proceeds of the SGM Sale are fully encumbered by the claims of creditors, leaving no remaining equity that could be devoted to charitable purposes.

The remaining factors are (1) the effect of the SGM Sale on the accessibility of healthcare services (factor (h)) and cultural interests (factor (j)) in the affected communities and (2) whether the SGM Sale is in the public interest (factor (i)). Applying the independent judgment standard of review, the Court finds that in electing to impose the Additional Conditions, the Attorney General abused his discretion with respect to these factors.

By letter dated August 23, 2019 (the "August Letter"), the Debtors advised the Attorney General that if the Additional Conditions were imposed, SGM would not complete the sale and the most likely outcome would be the closure of St. Vincent, Seton, and Seton Coastside. The August Letter advised the Attorney General that SGM had submitted the only offer for the Hospitals, and that the "Debtors cannot sustain incurring ongoing operational losses to maintain

the going-concern value of St. Vincent and Seton without the realistic prospect of a purchaser."[14] The Debtors stated that upon the failure of the SGM Sale, they would be required to begin the process of closing St. Vincent, Seton, and Seton Coastside "almost immediately."[15]

Having overseen the Debtors' bankruptcy cases since their inception, the Court has become intimately familiar with the Debtors' operational and cash flow situation. As discussed above, the Debtors' statements regarding the necessity of closing certain of the Hospitals upon the failure of the SGM Sale are not an idle threat.

Imposition of the Additional Conditions will dramatically reduce the availability of healthcare services by causing the closure of three of the four Hospitals. In addition to the loss of healthcare services, closure of the Hospitals will destroy approximately 2900 jobs. Closure of the Hospitals will require the relocation of many patients suffering from critical conditions. None of this is in the public interest.[16]

The Court understands that the Additional Conditions were imposed with the laudable objective of increasing the amount of healthcare services provided by the Hospitals. The Court can only assume that the Attorney General does not believe the representation that imposition of the Additional Conditions will result in a collapse of the SGM Sale. Unfortunately, the dire economic circumstances in which the Debtors now find themselves leaves the Court with no doubt that if the SGM Sale is not completed, three of the Hospitals will almost certainly close.

Because the Additional Conditions will reduce health care services by resulting in the closure of three of the Hospitals, imposition of the Additional Conditions was an abuse of the Attorney General's discretion.

Outside of bankruptcy, the finding that the Attorney General abused his discretion would result in the entry of a judgment commanding the issuance of a peremptory writ of mandate, followed by the issuance of the writ. The writ would command the Attorney General to set aside the 2019 Conditions, and would further command the Attorney General to exercise his discretion with respect to the review of the SGM Sale in a lawful manner. *See, e.g.*, *California Hosp. Assn. v. Maxwell-Jolly*, 188 Cal. App. 4th 559, 570, 115 Cal. Rptr. 3d 572, 581 (2010), *as modified on denial of reh'g* (Sept. 16, 2010).

BAPCPA § 1221(e) compels a different result inside bankruptcy. Section 1221(e) provides that the Court is not required "to remand or refer any proceeding, issue, or controversy to any other court or to require the approval of any other court for the transfer of property." In *In re HHH Choices Health Plan*, the Bankruptcy Court relied upon BAPCPA § 1221(e) to conclude that it had the authority to interpret a New York law governing the transfer of the assets of a non-profit entity. The court observed that "[i]n the case of an insolvent not-for-profit corporation, section 511 of the New York Not-For-Profit Corporation Law ordinarily, would require the approval of the New York State Supreme Court for a transfer of assets." *HHH Choices Health Plan*, 554 B.R. at 700. The court rejected arguments advanced by certain of the parties "that the

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[14] August Letter at 14.

[15] *Id.*

[16] SEIU-UHW contends that it is economically feasible for SGM to operate the Hospitals while complying with the Additional Conditions. The record does not support SEIU-UHW's contention. SGM was the only bidder willing to purchase the Hospitals and has stated unequivocally that it will not complete its purchase if the Additional Conditions are imposed. These facts show that the Additional Conditions render operation of the Hospitals economically infeasible.

ordinary state court procedures must still be followed" with respect to the transfer of the assets. *Id.* Instead, the court held that substantive state law requirements remained applicable, but that it was the Bankruptcy Court that had authority to apply those requirements. *Id.*

Pursuant to BAPCPA § 1221(e), and consistent with the ruling in *HHH Choices Health Plan*, the Court is not required to issue a judgment and writ commanding the Attorney General to set aside the 2019 Conditions, and is not required to remand these proceedings to allow the Attorney General to conduct a further review of the SGM Sale in light of the Court's finding that the Attorney General abused his discretion. Instead, the Court is empowered to apply Cal. Corp. Code § 5914, and to determine the conditions under which the Debtors may sell the Hospitals to SGM.

Under the circumstances presented here, the only way that closure of three of the four Hospitals can be avoided is if a sale not subject to the Additional Conditions is approved. A decision by the Attorney General to not consent to the sale, or a decision to consent to the sale subject to conditions other than the Approved Conditions, would constitute an abuse of discretion. That is because SGM, the only entity willing to purchase and continue to operate the Hospitals, will do so only if it is permitted to operate the Hospitals in a manner consistent with the Approved Conditions.

In reaching this conclusion, the Court is not limiting or controlling the discretion vested in the Attorney General, in contravention of Cal. Code Civ. Proc. § 1094.5(f). The Hospitals have been financially distressed for years. A $100 million capital infusion made in connection with the 2015 Restructuring Agreement failed to stabilize the Hospitals' operations. A further capital infusion of $148 million in 2017 failed to restore the Hospitals to financial health. This demonstrates that it was not possible to successfully operate the Hospitals subject to the 2015 Conditions. It should come as no surprise that no buyer exists that is willing to purchase and operate the Hospitals if operations are constrained by Additional Conditions that are substantially similar to the 2015 Conditions. The Attorney General's continued attempts to impose conditions rendering sustainable operation of the Hospitals impossible amounts to an abuse of discretion.

The Attorney General contends that SGM, by refusing to purchase and operate the Hospitals subject to conditions other than the Approved Conditions, is attempting to divest the Attorney General of his regulatory authority by forcing him to accede to a transaction on SGM's terms. This argument ignores the financial and operational realities facing the Hospitals. SGM's refusal to accept the Additional Conditions is not an attempt to blackmail the Attorney General into approving the sale. Such refusal is instead dictated by economic reality.

iii. Even if the Attorney General's Decision is Subject to Traditional Mandamus Review Under Cal. Civ. Proc. Code § 1085, Imposition of the Additional Conditions Was an Abuse of Discretion

Even if the Attorney General's review of the sale transaction is a quasi-legislative decision, subject to traditional mandamus review under Cal. Civ. Proc. Code § 1085, the decision to impose the Additional Conditions was an abuse of discretion.

Under Cal. Civ. Proc. Code § 1085, a traditional mandate "may issue to correct the exercise of discretionary legislative power, *but only* if the action taken is so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law." *Carrancho v. California Air Res. Bd.*, 111 Cal. App. 4th 1255, 1265, 4 Cal. Rptr. 3d 536, 545 (2003) (emphasis in original). In reviewing quasi-legislative decisions, the "authority of the court is limited to determining

whether the decision of the agency was arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair." *Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ.*, 32 Cal. 3d 779, 786, 654 P.2d 168, 172 (1982). The Court must ensure that the agency or officer making the decision "has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." *W. States Petroleum Assn. v. Superior Court*, 9 Cal. 4th 559, 577, 888 P.2d 1268, 1277 (1995). Traditional mandamus review of a quasi-legislative decision is therefore more deferential than administrative mandamus review of a quasi-judicial decision under the independent judgment standard.

Even applying this more deferential standard of review, the Court finds that the decision to impose the Additional Conditions was an abuse of discretion, and that a proper exercise of discretion required the Attorney General to consent to the sale subject only to the Approved Conditions. Preservation of access to healthcare is one of the factors the Attorney General must consider in reviewing the transaction. *See* Cal. Corp. Code § 5917(h) (requiring the Attorney General to consider whether the "agreement or transaction may create a significant effect on the availability or accessibility of health care services to the affected community"). At the hearing, the Attorney General stated that he imposed the Additional Conditions in furtherance of § 5917(h)'s objective of preserving healthcare access.[17] The effect of the Additional Conditions will be the closure of three of the four Hospitals, which will significantly reduce access to healthcare. There is no "rational connection" between the purpose of the Additional Conditions (preserving healthcare access) and the actual results of the conditions (a severe reduction in healthcare access). *See W. States Petroleum Ass'n*, 888 P.2d at 1277. With respect to three of the four Hospitals, the Attorney General's decision will destroy the very charitable assets that he is charged with protecting.

In sum, regardless of whether the Debtors are entitled to review of the Attorney General's decision under traditional mandamus or administrative mandamus, the Attorney General's decision to impose the Additional Conditions was an abuse of discretion. In the unique circumstances of this case, the Attorney General was required to consent to the SGM Sale without imposing the Additional Conditions. As a result, sale of the Hospitals to SGM free and clear of the Additional Conditions is authorized under applicable nonbankruptcy law. The Court approves the SGM Sale, free and clear of the Additional Conditions, pursuant to § 363(f)(1).

C. The Debtors May Sell the Hospitals Free and Clear of the Additional Conditions Pursuant to § 363(f)(4)

Under § 363(f)(4), the Hospitals may be sold free and clear of the Additional Conditions provided the Additional Conditions are "in bona fide dispute …" A bona fide dispute exists if "there is an objective basis for either a factual or legal dispute as to the validity" of the interest at

[17] Specifically, counsel for the Attorney General explained that in imposing the conditions, the Attorney General "is weighing the impact on the affected community, and making a determination as to what would be the best outcome for this community in order to ensure that it is not being adversely impacted, and not inappropriately losing access to these nonprofit hospitals …." Hearing Transcript [Doc. No. 3416] at 24. Counsel further stated that the Attorney General's "obligation is … to do what's needed to preserve access to healthcare, in particular for disadvantaged populations, which is clearly what we're dealing with here." *Id.* at 12.

issue. *In re Octagon Roofing*, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1991). The court "court need not determine the probable outcome of the dispute, but merely whether one exists." *Id.*

The Debtors dispute the Attorney General's authority to impose the Additional Conditions, on the grounds that the (1) Additional Conditions attempt to impose successor liability in a manner not authorized under California law and that (2) the Attorney General abused his discretion in issuing the Additional Conditions. As discussed above, the Debtors have shown that the Attorney General cannot impose the Additional Conditions for both of these reasons. The Debtors have easily satisfied §363(f)(4), which does not require the Debtors to show that they will prevail upon the dispute—only that a dispute exists.

A bona fide dispute exists for yet another reason. The Debtors have shown that by imposing the Additional Conditions, the Attorney General violated § 525.

Section 525 provides in relevant part:

> [A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title … or another person with whom such … debtor has been associated, solely because such … debtor is or has been a debtor under this title … or has not paid a debt that is dischargeable in the case under this title ….

In *In re Aurora Gas, LLC*, the court held that the State of Alaska violated § 525 by refusing to approve the debtor's sale of oil and gas leases unless the purchaser posted a bond of $6 million to pay for the cost of plugging abandoned wells that the purchaser was not acquiring. *In re Aurora Gas, LLC*, No. A16-00130-GS, 2017 WL 4325560 (Bankr. D. Alaska Sept. 26, 2017). The court held that by conditioning approval of the sale upon the posting of a bond, the State was attempting to collect upon the debtor's obligation to pay for the costs of plugging the abandoned wells. Imposition of such a condition, the court found, constituted impermissible discrimination against the debtor and its affiliate, the purchaser of the gas leases, in violation of § 525.

The facts of this case are strikingly similar. Here, the Attorney General has conditioned approval of the SGM Sale upon SGM assuming the obligation to operate the Hospitals in accordance with conditions similar to the 2015 Conditions that are an obligation of the Debtors. As discussed, the Additional Conditions require that SGM maintain and operate the Hospitals at current licensure and service levels. The Additional Conditions amount to an attempt by the Attorney General to enforce the obligations imposed by the 2015 Conditions. The 2015 Conditions are liabilities that are dischargeable in bankruptcy. By conditioning the transfer of the Hospitals upon the assumption of the Additional Conditions, which impose obligations equal to or in excess of the 2015 Conditions, the Attorney General is impermissibly discriminating against the Debtors in violation of § 525.

The fact that the Additional Conditions can be characterized as a regulatory obligation does not change the analysis. Regulatory obligations such as the Additional Conditions qualify as a "debt" under the Bankruptcy Code's broad definition of the term:

> Under the Bankruptcy Code, "debt" means "liability on a claim," 11 U.S.C. § 101(12), and "claim," in turn, includes any "right to payment," § 101(5)(A). We have said that "[c]laim" has "the broadest available definition," *Johnson v. Home State Bank,* 501 U.S.

> 78, 83, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991), and have held that the "plain meaning of a 'right to payment' is nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation," *Pennsylvania Dept. of Public Welfare v. Davenport,* 495 U.S. 552, 559, 110 S.Ct. 2126 (1990). See also *Ohio v. Kovacs,* 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985). In short, a debt is a debt, even when the obligation to pay it is also a regulatory condition.

F.C.C. v. NextWave Pers. Commc'ns Inc., 537 U.S. 293, 302–03, 123 S. Ct. 832, 839, 154 L. Ed. 2d 863 (2003).

D. The Debtors May Sell the Hospitals Free and Clear of Certain of the Additional Conditions Pursuant to § 363(f)(5)

Under § 363(f)(5), property may be sold free and clear of an interest, if the entity holding the interest "could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."

An interest "that can be reduced to a specific monetary value" falls within the scope of § 363(f)(5). *In re Trans World Airlines, Inc.*, 322 F.3d 283, 291 (3d Cir. 2003); *see also In re Vista Marketing Grp. Ltd.*, 557 B.R. 630, 635 (Bankr. N.D. Ill. 2016) ("[O]ne would be hard-pressed to present a clearer example of a situation where the interest-holder could be compelled to accept a money satisfaction of its interest under subsection (f)(5) than the calculable monetary obligation asserted by the District in its surcharge bill and disconnection notice.").

Among the Additional Conditions are requirements that each of the Hospitals provide specified levels of charity care and community benefit services. The Additional Conditions allow any shortfalls in charity care or community benefit services to be satisfied through deficiency payments to tax-exempt entities within the Hospitals' service area. The charity care and community benefit obligations can easily be reduced to a specific monetary value. The Debtors may sell the Hospitals free and clear of these obligations pursuant to § 363(f)(5).

E. Section 363(d)(1) Does Not Bar the Sale

As noted, § 363(d)(1) provides that non-profit entities, such as the Debtors, may sell estate assets only if the sale is "in accordance with nonbankruptcy law applicable to the transfer of property by" a non-profit entity.

For the reasons discussed in Section II.B., above, the Debtors are authorized to sell the Hospitals, free and clear of the Additional Conditions, under applicable nonbankruptcy law.

Even if the Debtors were not authorized to sell the Hospitals free and clear under applicable nonbankruptcy law, § 363(d)(1) does not limit the Debtors' ability to sell the Hospitals free and clear of the Additional Conditions under § 363(f)(4) or (5).[18] Basic principles of statutory construction dictate this result. "Statutory construction … is a holistic endeavor." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S. Ct. 626, 630, 98 L. Ed. 2d 740 (1988). The Court must look "to the provisions of the whole law, and to its object and policy." *John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 94–

[18] Under § 363(f)(4), the Debtors are authorized to sell the Hospitals free and clear of all of the Additional Conditions. *See* Section II.C., above. Under § 363(f)(5), the Debtors are authorized to sell the Hospitals free and clear of the charity care and community benefit obligations. *See* Section II.D., above.

95, 114 S. Ct. 517, 523, 126 L. Ed. 2d 524 (1993). Absent a "clear intention otherwise," specific provisions addressing an issue apply instead of more generalized provisions covering the same issue. *Morton v. Mancari*, 417 U.S. 535, 550–51, 94 S. Ct. 2474, 2483, 41 L. Ed. 2d 290 (1974). This rule applies "regardless of the priority of enactment" of the provisions. *Id.*

Section 363(f) sets forth specific circumstances under which assets may be sold free and clear. Section 363(f) is not limited by a non-profit debtor's general obligation under § 363(d)(1) to comply with nonbankruptcy law. The general requirement set forth in § 363(d)(1) makes no reference to § 363(f), which more specifically delineates the circumstances in which assets may be sold free and clear. Without a "clear intention otherwise," *Morton*, 417 U.S. at 550–51, the general requirement of § 363(d)(1) does not repeal the specifics of free and clear sales under § 363(f), even though § 363(d)(1) was enacted subsequent to § 363(f).

F. Section 541(f) Does Not Bar the Sale

Section 541(f) provides:

> Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

The Attorney General asserts that § 541(f)'s initial clause, "[n]otwithstanding any other provision of this title," is broad enough to trump § 363(f). According to the Attorney General, § 541(f) requires that the SGM Sale comply with applicable California law. As a result, the Attorney General argues, the SGM Sale can occur only if SGM agrees to accept all of the 2019 Conditions, including the Additional Conditions.

The language of § 541(f) is similar, but not identical to, the language of § 363(d)(1). Section 363(d)(1) requires that non-profit entities transfer property "in accordance with nonbankruptcy law applicable to the transfer of property by" the non-profit entity; § 541(f) requires that such transfers occur "only under the same conditions as would apply if the debtor had not filed a case under this title."

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300, 78 L. Ed. 2d 17 (1983). Therefore, the Court cannot assume that § 541(f) has the same meaning as § 363(f). That is, § 541(f) cannot mean that the Debtors are required to transfer property "in accordance with nonbankruptcy law applicable to the transfer of [such] property," since that is the language used in § 363(d)(1).

There is no legislative history to guide the Court in construing the phrase "under the same conditions" in § 541(f). Nor has the Court been able to locate any cases interpreting this section. In the absence of legislative history, phrases are construed in accordance with their "ordinary or natural meaning." *F.D.I.C. v. Meyer*, 510 U.S. 471, 476, 114 S. Ct. 996, 1001, 127 L. Ed. 2d 308 (1994). According to *Roget's 21st Century Thesaurus* (3d ed. 2013), a synonymous phrase for "under the same conditions" is "in these circumstances."

Here, the Debtors have complied with § 541(f)'s mandate. That is, "[n]otwithstanding any other provisions" of the Bankruptcy Code, they have sought to transfer the Hospitals in the same

manner as the transfer would have occurred under applicable nonbankruptcy law. The Debtors submitted the transfer to the review of the Attorney General, paid for the expert healthcare impact statements required under the statute, and waited for 135 days for the Attorney General to review the transaction. The transfer has been subject to the same conditions that would have applied had the Debtors not sought bankruptcy protection.

Even if the Attorney General were correct that § 541(f) had the same meaning as § 363(d)(1), the Debtors would still be able to sell the Hospitals free and clear of the Additional Conditions, pursuant to § 363(f)(1), (4), and (5). Contrary to the Attorney General's contention, the "notwithstanding" clause does not mean that § 541(f) trumps § 363(f). The Ninth Circuit has held:

> In examining specific statutes, we have not, however, always accorded universal effect to the "notwithstanding" language, standing alone. *See Or. Natural Res. Council v. Thomas,* 92 F.3d 792, 796 (9th Cir.1996) ("We have repeatedly held that the phrase 'notwithstanding any other law' is not always construed literally." (citing *E.P. Paup Co. v. Dir., Office of Workers Comp. Programs,* 999 F.2d 1341, 1348 (9th Cir.1993); *Kee Leasing Co. v. McGahan (In re The Glacier Bay*), 944 F.2d 577, 582 (9th Cir.1991); *Golden Nugget, Inc. v. Am. Stock Exch., Inc.,* 828 F.2d 586, 588–89 (9th Cir.1987) (per curium))). Instead, we have determined the reach of each such "notwithstanding" clause by taking into account the whole of the statutory context in which it appears.

United States v. Novak, 476 F.3d 1041, 1046 (9th Cir. 2007).

Relying upon the "common-sense principle of statutory construction that sections of a statute generally should be read to give effect, if possible, to every clause," the Ninth Circuit has held that a "notwithstanding" provision should not be given its broadest possible interpretation if doing so would render other statutory provisions ineffectual. *Oregon Nat. Res. Council v. Thomas*, 92 F.3d 792, 797 (9th Cir. 1996).

According the "notwithstanding" clause the broad construction advocated by the Attorney General would render § 363(f) of the Bankruptcy Code ineffectual with respect to non-profit debtors. Section 541(f) was added to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1221(e) ("BAPCPA"). BAPCPA made no changes to § 363(f). The Court cannot find that Congress intended § 541(f) to trump § 363(f) with respect to non-profit debtors.

G. The Court Certifies a Direct Appeal of its Decision to the Ninth Circuit Court of Appeals

Title 28 U.S.C. § 158(d)(2) provides that the Bankruptcy Court, acting on its motion, may certify a direct appeal of an order to the Court of Appeals if the order "involves a matter of public importance" or if an immediate appeal of the order will "materially advance the progress of the case or proceeding."

Certification is warranted here. The interplay between the sale provisions of the Bankruptcy Code and the authority of the Attorney General to regulate the sale of assets subject to a charitable trust is a matter of public importance. The issue has previously arisen in *Gardens I* and *Verity I*, and will continue to arise in future cases.

A direct appeal will materially advance the progress of the case. Closing of the SGM Sale is the lynchpin of the Debtors' plan of reorganization. However, under the APA, SGM is not

obligated to close the sale unless the Debtors obtain a final, non-appealable order authorizing a sale free and clear. The Debtors are facing severe liquidity constraints and cannot afford to continue to operate the Hospitals for much longer. A direct appeal will facilitate resolution of this case by providing certainty regarding the permissibility of a sale free and clear far sooner than would otherwise be possible. If the Court's order is upheld, SGM can proceed to close the sale. If not, the Debtors can commence shutting down St. Vincent, Seton, and Seton Coastside.

III. Conclusion

Based upon the foregoing, the Court finds that the Debtors may sell the Hospitals to SGM, free and clear of the Additional Conditions. The sale may proceed under applicable nonbankruptcy law pursuant to § 363(f)(1) because (1) the Additional Conditions qualify as successor liability that may not be imposed against SGM under California law and because (2) the Attorney General abused his discretion in attempting to impose the Additional Conditions, which therefore must be set aside. A bona dispute as to the Attorney General's authority to impose the Additional Conditions exists under § 363(f)(4), because the Debtors (1) have shown that the Additional Conditions are not authorized under California law and that (2) the attempted imposition of the Additional Conditions violates § 525. Pursuant to §363(f)(5), the sale is free and clear of the charity care and community benefit obligations, which can be reduced to a monetary valuation.

The Court will prepare and enter an order certifying this matter for a direct appeal to the Ninth Circuit. The Debtors shall submit an order granting the Motion within seven days of the issuance of this Memorandum of Decision.

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Date: October 23, 2019

Ernest M. Robles
United States Bankruptcy Judge

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FILED & ENTERED

NOV 14 2019

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY gonzalez DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION

In re

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

Debtor and Debtor In Possession.

☒ Affects All Debtors

☐ Affects Verity Health System of California, Inc.
☐ Affects O'Connor Hospital
☐ Affects Saint Louise Regional Hospital
☐ Affects St. Francis Medical Center
☐ Affects St. Vincent Medical Center
☐ Affects Seton Medical Center
☐ Affects O'Connor Hospital Foundation
☐ Affects Saint Louise Regional Hospital Foundation
☐ Affects St. Francis Medical Center of Lynwood Foundation
☐ Affects St. Vincent Foundation
☐ Affects St. Vincent Dialysis Center, Inc.
☐ Affects Seton Medical Center Foundation
☐ Affects Verity Business Services
☐ Affects Verity Medical Foundation
☐ Affects Verity Holdings, LLC
☐ Affects De Paul Ventures, LLC
☐ Affects De Paul Ventures - San Jose Dialysis, LLC

Debtors and Debtors In Possession.

Lead Case No. 2:18-bk-20151-ER

Jointly Administered With:
Case No. 2:18-bk-20162-ER
Case No. 2:18-bk-20163-ER
Case No. 2:18-bk-20164-ER
Case No. 2:18-bk-20165-ER
Case No. 2:18-bk-20167-ER
Case No. 2:18-bk-20168-ER
Case No. 2:18-bk-20169-ER
Case No. 2:18-bk-20171-ER
Case No. 2:18-bk-20172-ER
Case No. 2:18-bk-20173-ER
Case No. 2:18-bk-20175-ER
Case No. 2:18-bk-20176-ER
Case No. 2:18-bk-20178-ER
Case No. 2:18-bk-20179-ER
Case No. 2:18-bk-20180-ER
Case No. 2:18-bk-20181-ER

Chapter 11 Cases
Hon. Judge Ernest M. Robles

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; (III) FINDING THAT THE ATTORNEY GENERAL ABUSED HIS DISCRETION IN IMPOSING CONDITIONS ON THAT SALE; AND (IV) GRANTING RELATED RELIEF" [DOC. 3188]

Hearing Date and Time:
Date: October 15, 2019
Time: 10:00 a.m. (Pacific Time)
Location: Courtroom 1568
255 E. Temple Street
Los Angeles, CA

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The Court, having considered the motion [Docket No. 3188] (the "Motion")[1] filed by Verity Health System of California, Inc. and the above-referenced affiliated debtors and debtors in possession in the above captioned chapter 11 bankruptcy cases (collectively, the "Debtors"), the response [Docket No. 3333] of the California Attorney General (the "Attorney General"), the statement [Docket No. 3356] filed by Strategic Global Management, Inc. (collectively with its affiliates, "SGM"), the reply [Docket No. 3382] filed by the Debtors, the stipulation [Docket No. 3572] by and among the Debtors and the Attorney General, and good cause appearing,

HEREBY ORDERS AS FOLLOWS:

1. The Motion is GRANTED.

2. The Court's memorandum decision [Docket No. 3446] is hereby vacated and withdrawn.

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

4. This Court shall retain exclusive jurisdiction to adjudicate any disputes or controversies regarding the interpretation or enforcement of this Order. Notwithstanding the preceding sentence, nothing contained in this Order shall prohibit or limit the authority of the Attorney General to enforce, in the California state courts and pursuant to section 5926 of the California Corporations Code, the Purchaser Approved Conditions set forth on Schedule 8.6 to the APA.

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

5. The Attorney General waives any right to appeal this Order.

IT IS SO ORDERED.

###

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

Date: November 14, 2019

Ernest M. Robles
United States Bankruptcy Judge

FILED & ENTERED

NOV 18 2019

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY llewis DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: Verity Health System of California, Inc., *et al.*,

Debtors and Debtors in Possession.

☒Affects All Debtors

☐ Affects Verity Health System of California, Inc.
☐ Affects O'Connor Hospital
☐ Affects Saint Louise Regional Hospital
☐ Affects St. Francis Medical Center
☐ Affects St. Vincent Medical Center
☐ Affects Seton Medical Center
☐ Affects O'Connor Hospital Foundation
☐ Affects Saint Louise Regional Hospital Foundation
☐ Affects St. Francis Medical Center of Lynwood Medical Foundation
☐ Affects St. Vincent Foundation
☐ Affects St. Vincent Dialysis Center, Inc.
☐ Affects Seton Medical Center Foundation
☐ Affects Verity Business Services
☐ Affects Verity Medical Foundation
☐ Affects Verity Holdings, LLC
☐ Affects De Paul Ventures, LLC
☐ Affects De Paul Ventures - San Jose Dialysis, LLC

Debtors and Debtors in Possession.,

Lead Case No.: 2:18-bk-20151-ER
Chapter: 11

Jointly Administered With:
Case No. 2:18-bk-20162-ER;
Case No. 2:18-bk-20163-ER;
Case No. 2:18-bk-20164-ER;
Case No. 2:18-bk-20165-ER;
Case No. 2:18-bk-20167-ER;
Case No. 2:18-bk-20168-ER;
Case No. 2:18-bk-20169-ER;
Case No. 2:18-bk-20171-ER;
Case No. 2:18-bk-20172-ER;
Case No. 2:18-bk-20173-ER;
Case No. 2:18-bk-20175-ER;
Case No. 2:18-bk-20176-ER;
Case No. 2:18-bk-20178-ER;
Case No. 2:18-bk-20179-ER;
Case No. 2:18-bk-20180-ER;
Case No. 2:18-bk-20181-ER;

Chapter 11 Cases.

ORDER (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

CONTINUED HEARING TO APPROVE DISCLOSURE STATEMENT:

Date: November 26, 2019

Time: 10:00 a.m.

Location: Ctrm. 1568
Roybal Federal Building
255 East Temple Street
Los Angeles, CA 90012

For the reasons set forth in the concurrently-issued *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* (the "Memorandum of Decision"), the Court **HEREBY FINDS AND ORDERS AS FOLLOWS:**

1) The Debtors have complied with their obligation under the APA[1] to obtain a final, non-appealable Supplemental Sale Order. Consequently, SGM is now obligated to promptly close the SGM Sale, provided that all other conditions to closing have been satisfied.
2) The hearing on the Disclosure Statement Motion is **CONTINUED** from November 20, 2019, at 10:00 a.m. to **November 26, 2019, at 10:00 a.m.** The Debtors' Reply in support of the Disclosure Statement Motion shall be filed by no later than **November 21, 2019**.

IT IS SO ORDERED.

###

Date: November 18, 2019

Ernest M. Robles
United States Bankruptcy Judge

[1] Capitalized terms not defined herein have the meaning set forth in the Memorandum of Decision.

FILED & ENTERED

NOV 18 2019

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY llewis DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: Verity Health System of California, Inc., *et al.*,

Debtors and Debtors in Possession.

☒Affects All Debtors

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☐ Affects De Paul Ventures, LLC
☐ Affects De Paul Ventures - San Jose Dialysis, LLC

Debtors and Debtors in Possession.,

Lead Case No.: 2:18-bk-20151-ER
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Case No. 2:18-bk-20178-ER;
Case No. 2:18-bk-20179-ER;
Case No. 2:18-bk-20180-ER;
Case No. 2:18-bk-20181-ER;

Chapter 11 Cases.

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

CONTINUED HEARING TO APPROVE DISCLOSURE STATEMENT:

Date: November 26, 2019

Time: 10:00 a.m.

Location: Ctrm. 1568
Roybal Federal Building
255 East Temple Street
Los Angeles, CA 90012

I. Introduction

The Debtors have filed a motion seeking (a) to continue the November 20, 2019 hearing on the Disclosure Statement and (b) to use the November 20 hearing as a Status Conference (the "Continuance Motion").[1] The Debtors filed the Continuance Motion after being advised, on November 15, 2019, that Strategic Global Management, Inc. ("SGM") would be sending the Debtors formal correspondence material to SGM's agreement to purchase the Debtors' four remaining hospitals (the "Hospitals," and the sale transaction, the "SGM Sale"). As of the filing of the Continuance Motion, the Debtors had not received the SGM correspondence. The Continuance Motion did not specify the anticipated contents of the correspondence.

The Court will grant the Continuance Motion for the reasons set forth below. To facilitate an expeditious and successful resolution of these cases, the Court makes the findings and conclusions contained herein. The Court's primary finding is that the Debtors have complied with their obligation under the APA[2] to obtain a final, non-appealable Supplemental Sale Order, and that accordingly SGM is now obligated to promptly close the SGM Sale, provided that all other conditions to closing have been satisfied.

II. Findings and Conclusions

A. SGM is Obligated to Promptly Close the Sale Under § 8.6 of the APA, Provided that All Other Conditions to Closing Have Been Satisfied

Prompt closing of the SGM Sale is indispensable to the successful resolution of these bankruptcy cases. The Debtors are sustaining operational losses of approximately $450,000 per day. Operation of the Hospitals is being financed by a consensual cash stipulation executed between the Debtors and the principal secured creditors (the "Cash Collateral Stipulation"), which expires on December 31, 2019. The Debtors do not have the ability to borrow under any debtor-in-possession financing facility, and it is unclear whether the Debtors will be able to obtain alternative financing once the Cash Collateral Stipulation expires. In addition, the Debtors are facing very significant liquidity constraints. In late September 2019, the California Department of Health Care Services (the "DHCS") began withholding certain Medi-Cal fee-for-service payments owed to the Debtors, for the purposing of recovering alleged Medi-Cal overpayments. The DHCS withholdings have deprived the Debtors of a major source of funding that had previously been used to sustain operations.

On February 6, 2019, the Court conducted a hearing to determine whether to approve the Asset Purchase Agreement (the "APA") entered into between the Debtors and SGM, under which SGM had agreed to serve as the stalking-horse bidder for the auction of the Hospitals. The Court found that the termination rights granted to SGM in the APA were unduly broad. In response to the Court's concerns, the Debtors renegotiated the APA to limit SGM's termination rights. On February 19, 2019, the Court approved the renegotiated APA.[3]

The renegotiated provisions pertain to SGM's ability to terminate the transaction in the event that the California Attorney General (the "Attorney General") sought to impose conditions on the sale that were not substantially consistent with those conditions that SGM had agreed to accept (the "Purchaser Approved Conditions"). In the event that the Attorney General sought to impose conditions materially different from the Purchaser Approved Conditions (the "Additional

[1] Doc. No. 3621.
[2] Capitalized terms not defined in this section are defined below.
[3] Doc. No. 1572.

Conditions"), the APA provides the Debtors an opportunity to obtain a determination from the Court that the Hospitals can be sold free and clear of the Additional Conditions under § 363(f) of the Bankruptcy Code (an order granting such relief, the "Supplemental Sale Order").

The Court entered the Supplemental Sale Order on November 14, 2019.[4] The Attorney General has waived his right to appeal the Supplemental Sale Order.[5] All other parties with standing to appeal the Supplemental Sale Order have waived their right to appeal.

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 at ¶ 8.6. Because all parties with standing to appeal have waived their rights to do so, the Supplemental Sale Order is now final and non-appealable. Provided that all other conditions to closing have been satisfied, SGM is obligated to promptly close the sale.

The Court conducted a hearing to resolve SGM's objections to the form of the Supplemental Sale Order on November 13, 2019.[6] At the hearing, SGM argued that entry of the Supplemental Sale Order did not obligate it to close the sale. SGM asserted that under § 8.6 of the APA, it had 21 business days to evaluate, in the exercise of its reasonable business judgment, whether the Supplemental Sale Order was acceptable (the "Evaluation Period").

SGM's argument that it is entitled to the Evaluation Period is not well taken. Under the plain language of the APA, SGM is entitled to the Evaluation Period only if the Supplemental Sale Order is the subject of a pending appeal:

> 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; provided, however, (i) Purchaser shall not terminate or provide notice of termination of the Stalking Horse APA based on the Seller's failure to satisfy the condition set forth under this Section 8.6 until the expiration of the Evaluation Period as may be extended herein, and (ii) the Evaluation Period may be extended by the Debtors, in consultation with the Consultation Parties, by up to 90 days for any appeal properly perfected with respect to the Supplemental Sale Order (the "Extended Evaluation Periods"). For the avoidance of doubt, if the Debtors or any of the Consultation Parties dispute the reasonableness of the exercise of the Purchaser's business judgment, such dispute shall be determined by the Bankruptcy Court only in the context of an adversary proceeding. If, at the conclusion of the Extended Evaluation Periods, such Supplemental Sale Order has not become a final, non-appealable order and Purchaser determines not to proceed, Purchaser shall have the right within ten (10) business days after the conclusion of the Extended Evaluation Periods to terminate this Agreement and receive the return of its Good Faith Deposit. Sellers shall provide Purchaser with prompt written notice of the conclusion of the Extended Evaluation Periods and whether the Supplemental Sale Order has become a final, non-appealable order. For purposes of this Section 8.6, "a final, non-appealable order" shall include a Supplemental Sale Order (i) which has been affirmed or

[4] Doc. No. 3611.
[5] Doc. No. 3572.
[6] For a transcript of the hearing, see Doc. No. 3620.

> the appeal of which has been dismissed by any appellate court and for which the relevant appeal period has expired (other than any right of appeal to the U.S. Supreme Court), or (ii) which has been withdrawn by the appellant. *If the Supplemental Sale Order becomes a final, non-appealable order prior to the expiration of the Evaluation Period or, if applicable, the Extended Evaluation Periods, Purchaser shall consummate the Sale provided that all other conditions to closing have been satisfied.*

APA at ¶ 8.6 (emphasis added).

At the February 6, 2019 hearing on approval of the APA, 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. SGM further stated that it would be required to close the sale if the Supplemental Sale Order became final and non-appealable:

> So, what we have done now is negotiate something less in our discretion. And the way this will work is the following. In the event that the AG comes out with what we call, "Additional Conditions," meaning those that are not set forth on the schedule, and assuming that they are material, and we've defined what we mean by "material."
>
> The Debtor has an opportunity to come to court and attempt to get the Court to determine that those conditions don't have to be satisfied because they're "interests" and the sale can be free and clear.
>
> If the Court—if the Debtor decides not to seek that relief, or if the [Debtor] seeks it and doesn't get it, we have a right to terminate. We don't have to, but we at least would have a right at that point to terminate based upon the imposition of these Additional Conditions.
>
> If the Debtor is successful in obtaining that 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]

SGM is judicially estopped from contending that it is entitled to the Evaluation Period and is not obligated to promptly close the sale.[8] As the Supreme Court has held:

> "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." This rule, known as judicial estoppel, "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."

[7] Doc. No. 1570.

[8] The Court's discussion assumes that all other conditions to closing have been satisfied.

New Hampshire v. Maine, 532 U.S. 742, 749, 121 S. Ct. 1808, 1814, 149 L. Ed. 2d 968 (2001) (internal citations omitted).

The Court declined to approve the original form of the APA because it found that SGM's termination rights were too expansive. The Court approved the APA only after the inclusion of the provision requiring SGM to close the sale if the Debtors obtained a final, non-appealable Supplemental Sale Order. SGM received a number of benefits under the APA, including a breakup fee and consultation rights in the event an auction was conducted. Having received benefits under the APA, SGM is judicially estopped from contradicting its prior representations regarding its obligation to close the sale.

B. The Continuance Motion is Granted

To the extent that the Continuance Motion was motivated by the dispute regarding SGM's obligations under § 8.6 of the APA, that dispute has been rendered moot by the findings set forth above. However, several objections to the Disclosure Statement Motion have been filed, and the Debtors have not yet had an opportunity to file a Reply to these objections. For that reason—and that reason alone—the Continuance Motion is granted.

The hearing on the Disclosure Statement Motion is **CONTINUED** from November 20, 2019, at 10:00 a.m. to **November 26, 2019, at 10:00 a.m.** The Debtors' Reply in support of the Disclosure Statement Motion shall be filed by no later than **November 21, 2019**.

The Court will enter an order consistent with this Memorandum of Decision.

###

Date: November 18, 2019

Ernest M. Robles
United States Bankruptcy Judge

FILED & ENTERED

NOV 27 2019

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY llewis DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: Verity Health System of California, Inc., *et al.*, Debtors and Debtors in Possession. ☒Affects All Debtors ☐ Affects Verity Health System of California, Inc. ☐ Affects O'Connor Hospital ☐ Affects Saint Louise Regional Hospital ☐ Affects St. Francis Medical Center ☐ Affects St. Vincent Medical Center ☐ Affects Seton Medical Center ☐ Affects O'Connor Hospital Foundation ☐ Affects Saint Louise Regional Hospital Foundation ☐ Affects St. Francis Medical Center of Lynwood Medical Foundation ☐ Affects St. Vincent Foundation ☐ Affects St. Vincent Dialysis Center, Inc. ☐ Affects Seton Medical Center Foundation ☐ Affects Verity Business Services ☐ Affects Verity Medical Foundation ☐ Affects Verity Holdings, LLC ☐ Affects De Paul Ventures, LLC ☐ Affects De Paul Ventures - San Jose Dialysis, LLC Debtors and Debtors in Possession.,	Lead Case No.: 2:18-bk-20151-ER Chapter: 11 Jointly Administered With: Case No. 2:18-bk-20162-ER; Case No. 2:18-bk-20163-ER; Case No. 2:18-bk-20164-ER; Case No. 2:18-bk-20165-ER; Case No. 2:18-bk-20167-ER; Case No. 2:18-bk-20168-ER; Case No. 2:18-bk-20169-ER; Case No. 2:18-bk-20171-ER; Case No. 2:18-bk-20172-ER; Case No. 2:18-bk-20173-ER; Case No. 2:18-bk-20175-ER; Case No. 2:18-bk-20176-ER; Case No. 2:18-bk-20178-ER; Case No. 2:18-bk-20179-ER; Case No. 2:18-bk-20180-ER; Case No. 2:18-bk-20181-ER; Chapter 11 Cases. **ORDER (1) FINDING THAT SGM IS OBLIGATED TO CLOSE THE SGM SALE BY NO LATER THAN DECEMBER 5, 2019 AND (2) SETTING CONTINUED HEARING ON DEBTORS' MOTION FOR APPROVAL OF DISCLOSURE STATEMENT** Date: November 26, 2019 Time: 10:00 a.m. Location: Ctrm. 1568 Roybal Federal Building 255 East Temple Street Los Angeles, CA 90012

For the reasons set forth in the concurrently-issued *Memorandum of Decision Finding that SGM is Obligated to Close the SGM Sale By No Later than December 5, 2019* (the "Memorandum of Decision"), the Court **HEREBY FINDS AND ORDERS AS FOLLOWS:**

1) Pursuant to § 1.3 of the APA,[1] SGM is obligated to close the SGM Sale by no later than December 5, 2019.
2) A continued hearing on the Debtors' motion to approve the adequacy of the Debtors' proposed Disclosure Statement (the "Disclosure Statement Motion") shall take place on **December 12, 2019, at 10:00 a.m.** The Debtors shall file a reply in support of the Disclosure Statement Motion by no later than **December 9, 2019**.

IT IS SO ORDERED.

###

Date: November 27, 2019

Ernest M. Robles
United States Bankruptcy Judge

[1] Capitalized terms not defined herein have the meaning set forth in the Memorandum of Decision.

FILED & ENTERED

NOV 27 2019

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY llewis DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: Verity Health System of California, Inc., *et al.*, Debtors and Debtors in Possession. ☒Affects All Debtors ☐ Affects Verity Health System of California, Inc. ☐ Affects O'Connor Hospital ☐ Affects Saint Louise Regional Hospital ☐ Affects St. Francis Medical Center ☐ Affects St. Vincent Medical Center ☐ Affects Seton Medical Center ☐ Affects O'Connor Hospital Foundation ☐ Affects Saint Louise Regional Hospital Foundation ☐ Affects St. Francis Medical Center of Lynwood Medical Foundation ☐ Affects St. Vincent Foundation ☐ Affects St. Vincent Dialysis Center, Inc. ☐ Affects Seton Medical Center Foundation ☐ Affects Verity Business Services ☐ Affects Verity Medical Foundation ☐ Affects Verity Holdings, LLC ☐ Affects De Paul Ventures, LLC ☐ Affects De Paul Ventures - San Jose Dialysis, LLC Debtors and Debtors in Possession.,	Lead Case No.: 2:18-bk-20151-ER Chapter: 11 Jointly Administered With: Case No. 2:18-bk-20162-ER; Case No. 2:18-bk-20163-ER; Case No. 2:18-bk-20164-ER; Case No. 2:18-bk-20165-ER; Case No. 2:18-bk-20167-ER; Case No. 2:18-bk-20168-ER; Case No. 2:18-bk-20169-ER; Case No. 2:18-bk-20171-ER; Case No. 2:18-bk-20172-ER; Case No. 2:18-bk-20173-ER; Case No. 2:18-bk-20175-ER; Case No. 2:18-bk-20176-ER; Case No. 2:18-bk-20178-ER; Case No. 2:18-bk-20179-ER; Case No. 2:18-bk-20180-ER; Case No. 2:18-bk-20181-ER; Chapter 11 Cases. **MEMORANDUM OF DECISION FINDING THAT SGM IS OBLIGATED TO CLOSE THE SGM SALE BY NO LATER THAN DECEMBER 5, 2019** Date: November 26, 2019 Time: 10:00 a.m. Location: Ctrm. 1568 Roybal Federal Building 255 East Temple Street Los Angeles, CA 90012

I. Introduction

At the above-captioned date and time, the Court conducted a Status Conference regarding the Asset Purchase Agreement (the "APA") under which Strategic Global Management ("SGM") agreed to purchase the Debtors' four remaining hospitals (the "Hospitals," and the sale transaction, the "SGM Sale"). For the reasons set forth below, the Court finds that as of November 19, 2019, all conditions precedent to SGM's obligation to close had been satisfied.

Accordingly, pursuant to § 1.3 of the APA, SGM is obligated to close the SGM Sale by no later than December 5, 2019.

II. Findings and Conclusions

A. Adjudication of SGM's Obligations Under the APA Does Not Require an Adversary Proceeding

At the outset, the Court rejects SGM's contention that the Court is required adjudicate issues pertaining to SGM's obligations under the APA within the context of an adversary proceeding. SGM asserts that not all conditions precedent to closing have been satisfied. Specifically, SGM maintains that the Debtors have failed to comply with certain of the conditions and obligations imposed upon them by the APA, and that these alleged failures to perform have resulted in a Material Adverse Effect under the APA, relieving SGM of its obligation to close.

SGM is not obligated to close unless all the conditions precedent set forth in Article 8 have been satisfied. Among the conditions precedent is Article 8.4, which provides:

> Sellers [the Debtors] shall have in all material respects performed or complied with each and all of the obligations, covenants, agreements and conditions required to be performed or complied with by Sellers on or prior to the Closing Date; provided, however, this condition will be deemed to be satisfied unless (a) Sellers were given written notice of such failure to perform or comply and did not or could not cure such failure to perform or comply within fifteen (15) business days after receipt of such notice and (b) the respects in which such obligations, covenants, agreements and conditions have not been performed have had or would have a Material Adverse Effect.

The APA provides that "any dispute between Purchaser [SGM] and Sellers [the Debtors] as to whether a Material Adverse Effect has occurred for any purpose under this Agreement shall be exclusively settled by a determination made by the Bankruptcy Court." APA at Art. 9.1(c). Nothing within Article 9.1(c) requires that the determination contemplated therein occur through an adversary proceeding. In contrast, Article 8.6 provides that any dispute pertaining to certain aspects of that article "shall be determined by the Bankruptcy Court only in the context of an adversary proceeding." The absence of comparable language in Article 9.1(c) undercuts SGM's contention that disputes under that article must be determined through an adversary proceeding.

Bankruptcy Rule 7001[1] provides that the following matters are adversary proceedings:

1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under §554(b) or §725 of the Code, Rule 2017, or Rule 6002;
2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, but not a proceeding under Rule 3012 or Rule 4003(d);

[1] Unless otherwise indicated, all "Civil Rule" references are to the Federal Rules of Civil Procedure, Rules 1–86; all "Bankruptcy Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037; all "Evidence Rule" references are to the Federal Rules of Evidence, Rules 101–1103; all "LBR" references are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California, Rules 1001-1–9075-1; and all statutory references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532.

3) a proceeding to obtain approval under §363(h) for the sale of both the interest of the estate and of a co-owner in property;
4) a proceeding to object to or revoke a discharge, other than an objection to discharge under §§727(a)(8), 1 (a)(9), or 1328(f);
5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan;
6) a proceeding to determine the dischargeability of a debt;
7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;
8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination;
9) a proceeding to obtain a declaratory judgment relating to any of the foregoing; or
10) a proceeding to determine a claim or cause of action removed under 28 U.S.C. §1452.

SGM contends that a determination of whether a Material Adverse Effect has occurred is "a proceeding to recovery money or property," "a proceeding to obtain an injunction or other equitable relief," and/or "a proceeding to obtain a declaratory judgment relating" to any of the types of proceedings set forth in Bankruptcy Rule 7001(1)–(8). SGM is mistaken.

First, adjudication of whether a "Material Adverse Effect" has occurred is not "a proceeding to recover money or property." Instead, such adjudication involves interpretation of a contract (the APA). It is true that a determination that there has been no Material Adverse Effect and that SGM is obligated to close the sale would require SGM to perform under its agreement to purchase the Hospitals. The fact that performance would require SGM to transfer money to the Debtors (the purchase price for the Hospitals) does not transform the "Material Adverse Effect" issue into a "proceeding to recovery money or property" within the meaning of Bankruptcy Rule 7001(1). SGM voluntarily chose to execute the APA and serve as the stalking horse bidder for the Hospitals for a purchase price of $610 million, subject to various adjustments. A determination requiring SGM to follow through on its commitments is very different from the typical actions brought under Bankruptcy Rule 7001(1)—such as proceedings to avoid preferences under § 547, proceedings to avoid fraudulent transfers under § 548, or proceedings to set aside post-petition transfers under § 549.

Second, adjudication of the "Material Adverse Effect" issue is not "a proceeding to obtain an injunction or other equitable relief." A determination setting forth SGM's obligations under a contract which it executed (the APA) is not an injunction or a form of equitable relief.

Third, adjudication of the "Material Adverse Effect" issue is not "a proceeding to obtain a declaratory judgment" relating to any of the types of proceedings set forth in Bankruptcy Rule 7001(1)–(8). Interpretation of the APA does not fall within the scope of any of the types of proceedings set forth in Bankruptcy Rule 7001(1)–(8). Therefore, a declaration of SGM's obligations under the APA does not fall within the ambit of Bankruptcy Rule 7001(9).

B. Adjudication of SGM's Obligations Under the APA Is Not Premature

SGM asserts that the issue of whether it has performed its obligations under the APA is not yet properly before the Court, and that the Debtors' request for a determination as to this issue is premature. SGM states that it has not yet decided whether it will close the SGM Sale. According to SGM, a case or controversy will arise only after SGM makes a final determination that it will not close the SGM Sale.

SGM is incorrect. SGM has made representations to the Debtors that provide reasonable grounds for the Debtors to doubt that SGM will fulfill its obligations under the APA. (The contents of those representations are not discussed herein because they have been presented to the Court under seal.) In response to the Debtors' demand for written assurance that SGM would fulfill its obligations, SGM sent the Debtors two letters casting further doubt upon whether it would perform under the APA (the "Nov. 22 Letters").[2] SGM's actions have given rise to a case or controversy.

The Court further notes that although SGM presented its ripeness argument in a document captioned as a reservation of rights,[3] SGM's submission was in reality an opposition to the Debtor's assertion that all conditions precedent to SGM's obligation to close have been satisfied. The Nov. 22 Letters also qualify as an opposition to the Debtors' assertions regarding SGM's obligation to close. The Nov. 22 Letters contain 19 single-spaced pages of legal argument and 38 pages of supporting exhibits. SGM's arguments regarding its obligations under the APA have been fully presented to the Court.

Finally, and as further discussed in Section II.D., below, the Court finds that SGM's contention that it is not obligated to close is a cynical attempt to extract a better purchase price. A key component of SGM's negotiation strategy is its attempt to delay as long as possible the adjudication of its obligations under the APA. The Court will not facilitate SGM's dubious tactics.

C. SGM Is Not Entitled to Appeal the Bankruptcy Court's Determination Regarding a Material Adverse Effect

SGM received substantial benefits under the APA, including the right to receive a breakup fee in the event that it was outbid and consultation rights in the event that an auction of the Hospitals occurred. In exchange for receiving those benefits, SGM waived certain rights, including its right to appeal any determination made by the Bankruptcy Court with respect to the occurrence of a Material Adverse Effect.

As noted, the APA provides that "any dispute between Purchaser [SGM] and Sellers [the Debtors] as to whether a Material Adverse Effect has occurred for any purpose under this Agreement *shall be exclusively settled* by a determination made by the Bankruptcy Court." APA at Art. 9.1(c). This provision means that only the Bankruptcy Court, and no other court (including any appellate court), is entitled to determine Material Adverse Effect issues.

D. No Material Adverse Effect Has Occurred

As set forth above, SGM alleges that the Debtors have failed to comply with certain of the conditions and obligations imposed upon them by the APA, and that these alleged failures to perform have resulted in a Material Adverse Effect, relieving SGM of its obligation to close. This Memorandum of Decision does not discuss SGM's allegations in detail, as doing so would damage the estates by adversely affecting (1) the Debtors' efforts to close the SGM Sale and (2) the Debtors' ability to maximize the value of the Hospitals in the event the SGM Sale does not close.

[2] The Nov. 22 Letters have also been filed under seal.

[3] Doc. No. 3701.

Under Section 8.4 of the APA, SGM is excused from its obligation to close only if (1) the Debtors have failed to perform their obligations under the APA and if (2) such failure to perform has resulted in a Material Adverse Effect.

The APA's definition of "Material Adverse Effect" is very brief. Under the APA, a "Material Adverse Effect" is "a material adverse effect upon the Hospitals, taken as a whole …." APA at Art. 2, Preamble.

"Material Adverse Effect" is a term of art routinely used in asset purchase agreements of the type at issue here. The parties' use of a term of art, combined with their decision to define the term with only minimal detail, shows that the parties intended to rely upon the definition of the term contained in applicable caselaw.

The APA is governed by California law, except to the extent that California law is superseded by the Bankruptcy Code or other applicable federal law. APA at Art. 12.3. California law on the meaning of a material adverse effect clause—sometimes known as a material adverse change clause—is not well developed. The few cases which do address material adverse effect clauses view their enforcement with disfavor. For example, in *1601 McCarthy Blvd., LLC v. GMAC Comm'l Mortg. Corp.*, 2005 WL 4859147 (Cal. Super. Ct. June 1, 2005), the court held that a loan servicer's invocation of a material adverse effect clause to avoid its obligation to disburse funds to a borrower was an "unfair business practice or act," because the servicer "used the material adverse change clause as a lever against [the borrower] to retain control over the borrower's … funds." *McCarthy Blvd.*, 2005 WL 4859147 at *¶ 59. The court found:

> [L]enders rarely employ—and even less frequently invoke and enforce—this type of broad-based material adverse change clause in commercial real estate transactions…. And even when they are invoked, … lenders only use the clause as a tool to "bring the borrower to the table, use it as lever against the borrower, or ... a club against the borrower to modify the loan or change the loan." There is no evidence in the record that the material adverse change clause in the Deed of Trust benefits any side but the lender, or serves any other purpose than to threaten the borrower with dire consequences….
>
> The record supports Mr. Greenwald's opinion that broad-based material adverse change clauses are rarely used, and in those rare instances when they are, they are placed in deeds of trust purely for their in terrorem effect and not with any genuine intention to invoke them.

Id. at ¶¶ 59 and 68.

Although the APA is governed by California law, Delaware cases interpreting material adverse effect clauses are helpful persuasive authority. A significant amount of the litigation over the enforcement of asset purchase agreements occurs before Delaware courts, and the Delaware caselaw interpreting material adverse effect clauses is well developed.

In *In re IBP, Inc. Shareholders Litigation*, the court rejected purchaser Tyson Foods' claim that it was not required to consummate a merger because of a material adverse effect. The court held:

> [A] buyer ought to have to make a strong showing to invoke a Material Adverse Effect exception to its obligation to close. Merger contracts are heavily negotiated and cover a large number of specific risks explicitly. As a result, even where a Material Adverse Effect condition is as broadly written as the one in the Merger Agreement, that provision

> is best read as a backstop protecting the acquiror from the occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally-significant manner. A short-term hiccup in earnings should not suffice; rather the Material Adverse Effect should be material when viewed from the longer-term perspective of a reasonable acquiror.

In re IBP, Inc. Shareholders Litig. (IBP, Inc. v. Tyson Foods, Inc.), 789 A.2d 14, 68 (Del. Ch. 2001).

In *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, 965 A.2d 715, 738 (Del. Ch. 2008), the court reiterated that a "buyer faces a heavy burden when it attempts to invoke a material adverse effect clause in order to avoid its obligation to close."

Assessment of the occurrence of a Material Adverse Effect must take into account the $610 million purchase price for the Hospitals. To prevail upon its assertion of a Material Adverse Effect, SGM would be required to show the occurrence of unexpected events which have substantially reduced the value of the Hospitals. Here, representative examples of a "Material Adverse Effect" under Article 8.4 of the APA would include the Debtors' failure to maintain the Hospitals' licensure, or the Debtors' operation of the Hospitals in a manner that caused regulatory authorities to close key departments within the Hospitals, such as the emergency department or pharmacy.

None of SGM's allegations come even close to showing a Material Adverse Effect. Even if all the allegations are true (a finding the Court does not make), SGM would not be excused from closing the sale under Article 8.4 of the APA.[4]

SGM's invocation of the APA's Material Adverse Effect provision is not well taken. The Court has previously made clear that the closing of the SGM Sale is the lynchpin of the Debtors' plan of liquidation; that if the SGM Sale does not promptly close, the most likely outcome will be the closure of three of the four Hospitals; and that the prompt closing of the sale is critical to the estates' liquidity position.[5] SGM is well aware that it was the only bidder for the Hospitals. By presenting non-meritorious arguments as to why it is not obligated to close, SGM is holding the estates, creditors, and patients of the Hospitals hostage in an attempt to extort a better purchase price. SGM's cynical tactics are especially offensive given the significant harm that closure of the Hospitals would impose upon patients. For example, two of the Hospitals that

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[4] Had SGM presented its allegations by way of an adversary complaint, the Court would dismiss such a complaint under Civil Rule 12(b)(6) for failure to state a claim upon which relief could be granted.

[5] *See* Memorandum of Decision Granting Debtors' Emergency Motion to Enforce the Sale Order (the "Sale Enforcement Memorandum") [Doc. No. 3446] at 3–4 and 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 [Doc. No. 3632]. The Sale Enforcement Memorandum was subsequently vacated pursuant to a stipulation between the Debtors and the California Attorney General (the "Attorney General"), under which the Attorney General agreed not to pursue an appeal in exchange for vacatur of the Sale Enforcement Memorandum. Doc. No. 3599. Notwithstanding such vacatur, the Sale Enforcement Memorandum's findings regarding the importance of consummation of the SGM Sale remain valid.

would likely close upon failure of the SGM Sale contain large populations of long-term patients suffering from severe illnesses, all of whom would have to be relocated to other facilities.

E. All Conditions Precedent to Closing Have Been Satisfied

The Court has previously found that the condition precedent to closing set forth in Article 8.6 of the APA has been satisfied.[6] All other conditions precedent to closing were satisfied as of November 19, 2019. On that date, the Debtors obtained a settlement with the Centers for Medicare and Medicaid Services providing for the transfer of their Medicare Provider Agreements to SGM, thereby satisfying their remaining obligations under Article 8.7 of the APA.[7]

Article 1.3 obligates SGM to close the sale "promptly but no later than ten (10) business days following the satisfaction" of all conditions precedent. As all conditions precedent were satisfied on November 19, 2019, SGM is obligated to close the sale by no later than December 5, 2019.

III. Conclusion

Based upon the foregoing, the Court finds that all conditions precedent to SGM's obligation to close the SGM Sale have been satisfied. Pursuant to Article 1.3 of the APA, SGM is obligated to close by no later than December 5, 2019. The Court will enter an order consistent with this Memorandum of Decision.

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[6] 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 [Doc. No. 3632].

[7] Article 8.7 also obligates the Debtors to transfer their Medi-Cal Provider Agreements to SGM pursuant to a settlement agreement with the California Department of Health Care Services (the "DHCS"). The Debtors materially complied with Article 8.7 by obtaining an order authorizing the transfer of the Medi-Cal Provider Agreements free and clear of any interest asserted by the DHCS. *See* Order Authorizing Debtors to Sell Medi-Cal Provider Agreements, Free and Clear of Interest Asserted by the California Department of Health Care Services, Pursuant to §§ 363(b) and (f)(5) [Doc. No. 3372].

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Date: November 27, 2019

Ernest M. Robles
United States Bankruptcy Judge

FILED & ENTERED

DEC 09 2019

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY gonzalez DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: Verity Health System of California, Inc., *et al.*, Debtors and Debtors in Possession.	Lead Case No.: 2:18-bk-20151-ER Chapter: 11
☒Affects All Debtors ☐ Affects Verity Health System of California, Inc. ☐ Affects O'Connor Hospital ☐ Affects Saint Louise Regional Hospital ☐ Affects St. Francis Medical Center ☐ Affects St. Vincent Medical Center ☐ Affects Seton Medical Center ☐ Affects O'Connor Hospital Foundation ☐ Affects Saint Louise Regional Hospital Foundation ☐ Affects St. Francis Medical Center of Lynwood Medical Foundation ☐ Affects St. Vincent Foundation ☐ Affects St. Vincent Dialysis Center, Inc. ☐ Affects Seton Medical Center Foundation ☐ Affects Verity Business Services ☐ Affects Verity Medical Foundation ☐ Affects Verity Holdings, LLC ☐ Affects De Paul Ventures, LLC ☐ Affects De Paul Ventures - San Jose Dialysis, LLC Debtors and Debtors in Possession.	Jointly Administered With: Case No. 2:18-bk-20162-ER; Case No. 2:18-bk-20163-ER; Case No. 2:18-bk-20164-ER; Case No. 2:18-bk-20165-ER; Case No. 2:18-bk-20167-ER; Case No. 2:18-bk-20168-ER; Case No. 2:18-bk-20169-ER; Case No. 2:18-bk-20171-ER; Case No. 2:18-bk-20172-ER; Case No. 2:18-bk-20173-ER; Case No. 2:18-bk-20175-ER; Case No. 2:18-bk-20176-ER; Case No. 2:18-bk-20178-ER; Case No. 2:18-bk-20179-ER; Case No. 2:18-bk-20180-ER; Case No. 2:18-bk-20181-ER; Chapter 11 Cases. **ORDER DENYING DEBTORS' EMERGENCY MOTION FOR ISSUANCE OF AN ORDER TO SHOW CAUSE RE: CLOSING OF THE SGM SALE** [No hearing required pursuant to Federal Rule of Civil Procedure 78(b) and Local Bankruptcy Rule 9013-1(j)(3)]

For the reasons set forth in the concurrently-issued *Memorandum of Decision Denying Debtors' Emergency Motion for Issuance of an Order to Show Cause Re: Closing of the SGM Sale* (the "Memorandum of Decision"), the Court **HEREBY FINDS AND ORDERS AS FOLLOWS:**

1) The *Debtors' Emergency Motion for (I) Issuance of an Order to Show Cause Why Strategic Global Management, Inc. Failed to Close the Sale Transaction by December 5, 2019; and (II) Entry of an Order Enforcing Prior Court Orders Requiring Strategic Global Management, Inc. to Close the Sale Transaction by December 5, 2019* [Doc. No. 3373] is **DENIED**.
2) Any efforts undertaken by the Debtors with respect to the alternative disposition of the Hospitals[1] will not violate the Debtors' obligation under Article 12.1 of the APA to cooperate with SGM to consummate the SGM Sale; nor shall any such efforts constitute a material default by the Debtors under any other provision of the APA.

IT IS SO ORDERED.

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Date: December 9, 2019

Ernest M. Robles
United States Bankruptcy Judge

[1] Capitalized terms not defined herein have the meaning set forth in the Memorandum of Decision.

FILED & ENTERED

DEC 09 2019

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY gonzalez DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: Verity Health System of California, Inc., *et al.*, Debtors and Debtors in Possession.	Lead Case No.: 2:18-bk-20151-ER Chapter: 11
☒Affects All Debtors ☐ Affects Verity Health System of California, Inc. ☐ Affects O'Connor Hospital ☐ Affects Saint Louise Regional Hospital ☐ Affects St. Francis Medical Center ☐ Affects St. Vincent Medical Center ☐ Affects Seton Medical Center ☐ Affects O'Connor Hospital Foundation ☐ Affects Saint Louise Regional Hospital Foundation ☐ Affects St. Francis Medical Center of Lynwood Medical Foundation ☐ Affects St. Vincent Foundation ☐ Affects St. Vincent Dialysis Center, Inc. ☐ Affects Seton Medical Center Foundation ☐ Affects Verity Business Services ☐ Affects Verity Medical Foundation ☐ Affects Verity Holdings, LLC ☐ Affects De Paul Ventures, LLC ☐ Affects De Paul Ventures - San Jose Dialysis, LLC Debtors and Debtors in Possession.	Jointly Administered With: Case No. 2:18-bk-20162-ER; Case No. 2:18-bk-20163-ER; Case No. 2:18-bk-20164-ER; Case No. 2:18-bk-20165-ER; Case No. 2:18-bk-20167-ER; Case No. 2:18-bk-20168-ER; Case No. 2:18-bk-20169-ER; Case No. 2:18-bk-20171-ER; Case No. 2:18-bk-20172-ER; Case No. 2:18-bk-20173-ER; Case No. 2:18-bk-20175-ER; Case No. 2:18-bk-20176-ER; Case No. 2:18-bk-20178-ER; Case No. 2:18-bk-20179-ER; Case No. 2:18-bk-20180-ER; Case No. 2:18-bk-20181-ER; Chapter 11 Cases. **MEMORANDUM OF DECISION DENYING DEBTORS' EMERGENCY MOTION FOR ISSUANCE OF AN ORDER TO SHOW CAUSE RE: CLOSING OF THE SGM SALE** [No hearing required pursuant to Federal Rule of Civil Procedure 78(b) and Local Bankruptcy Rule 9013-1(j)(3)]

The Court has reviewed the *Debtors' Emergency Motion for (I) Issuance of an Order to Show Cause Why Strategic Global Management, Inc. Failed to Close the Sale Transaction by December 5, 2019; and (II) Entry of an Order Enforcing Prior Court Orders Requiring Strategic Global Management, Inc. to Close the Sale Transaction by December 5, 2019* (the "Application for OSC") [Doc. No. 3373]. Pursuant to Federal Rule of Civil Procedure 78(b) and Local Bankruptcy Rule 9013-1(j), this matter is suitable for disposition without oral argument. For the reasons set forth below, the Application for OSC is **DENIED**.

I. Background

On November 27, 2019, the Court issued a *Memorandum of Decision Finding that SGM is Obligated to Close the SGM Sale By No Later than December 5, 2019* (the "Closing Memorandum") [Doc. No. 3723] and an accompanying *Order (1) Finding that SGM is Obligated to Close the SGM Sale By No Later than December 5, 2019 and (2) Setting Continued Hearing on Debtors' Motion for Approval of Disclosure Statement* (the "Closing Order") [Doc. No. 3724]. The Closing Order provided in relevant part: "Pursuant to § 1.3 of the APA, SGM is obligated to close the SGM Sale by no later than December 5, 2019." Closing Order at ¶ 1.

SGM[1] did not close the SGM Sale by December 5, 2019. The Debtors move for issuance of an order requiring SGM's principals, Chairman Kali Pradip Chaudhuri, MD, Chief Executive Officer Peter Baranoff, and General Counsel William Thomas, to appear and testify as to (1) why SGM did not close the SGM Sale by December 5, 2019 and (2) whether SGM has the financial ability to close the SGM Sale. The Debtors further request issuance of an order finding that: (1) SGM is in material breach of the APA by failing to close the SGM Sale on December 5, 2019, (2) the Debtors may retain SGM's $30 million good-faith deposit, and (3) the Debtors may proceed with alternative plans to dispose of the Hospitals.

II. Findings and Conclusions

Requiring SGM's representatives to testify as to SGM's reasons for not closing the SGM Sale would not increase the likelihood of the sale actually closing. By failing to close, SGM risks the loss of its $30 million good-faith deposit as well as the possibility of damages for breach of contract in an amount of up to $60 million.[2] Being compelled to offer testimony will not motivate SGM to close where the threat of the loss of up to $90 million has failed to accomplish that end. 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. In the meantime, the Debtors' efforts would be better spent ensuring the health and safety of the patients at the affected Hospitals.

The prompt closing of the SGM Sale would be in the best interests of all constituents in these cases, and the Court remains hopeful that SGM will fulfill its obligation to close. However, the estates' precarious cash position requires that the Debtors have the ability to immediately explore options for the alternative disposition of the Hospitals. The Court finds that any efforts undertaken by the Debtors with respect to the alternative disposition of the Hospitals will not violate the Debtors' obligation under Article 12.1 of the APA to cooperate with SGM to

[1] Capitalized terms not defined herein have the meaning set forth in the Closing Memorandum.
[2] *See* APA at Art. 11.1 ("If Purchaser commits any material default under this Agreement, Sellers shall have the right to sue for damages; provided, however that the amount of such damages shall never exceed $60,000,000.00.").

consummate the SGM Sale; nor shall any such efforts constitute a material default by the Debtors under any other provision of the APA.

The Court will enter an order consistent with this Memorandum of Decision.

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Date: December 9, 2019

Ernest M. Robles
United States Bankruptcy Judge

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 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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