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Case No. 2:19−cv−10352−DSF[1]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re: VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al.*,[2] Debtors and Debtors in	On Appeal from the United States Bankruptcy Court for the Central District of California (Bankr. Lead Case No.: 2:18-bk-20151-ER)

[1] This appeal (2:19-cv-10352-DSF) has been consolidated with the following related appeals: 2:19-cv-10354-DSF and 2:19-cv-10356-DSF.

[2] The other Debtors in the chapter 11 cases, being jointly administered under Lead Case No. 2:18-bk-20151-ER, are O'Connor Hospital 2:18-bk-20168-ER, Saint Louise Regional Hospital 2:18-bk-20162-ER, St. Francis Medical Center 2:18-cv-20165-ER, St. Vincent Medical Center 2:18-bk-20164-ER, Seton Medical Center 2:18-cv-20167-ER, O'Connor Hospital Foundation 2:18-bk-20179-ER, Saint Louise Regional Hospital Foundation 2:18-cv-20172-ER, St. Francis Medical Center of Lynwood Foundation 2:18-cv-20178-ER, St. Vincent Foundation 2:18-cv- 20180-ER, St. Vincent Dialysis Center, Inc. 2:18-cv-20171- ER Seton Medical Center Foundation 12:8-cv-20175-ER, Verity Business Services 2:18-cv-20173-ER, Verity Medical Foundation 2:18-cv-20169-ER, Verity Holdings, LLC 2:18-cv-20163-ER, DePaul Ventures, LLC 2:18-cv-20176-ER, and DePaul Ventures – San Jose Dialysis, LLC 2:18-cv-20181-ER.

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Possession.	**STRATEGIC GLOBAL MANAGEMENT, INC.'S NOTICE OF MOTION AND MOTION FOR ORDER: (1) ALLOWING APPELLANT ACCESS TO THE DOCUMENT DESCRIBED AS "PLAN B", WHICH WAS FILED UNDER SEAL WITH THE BANKRUPTCY COURT, FOR USE IN CONNECTION WITH APPELLANT'S OPENING BRIEF, (2) EXTENDING THE DEADLINE FOR THE FILING OF APPELLANT'S OPENING BRIEF AND (3) CLARIFYING THE BRIEFING PROCESS**
STRATEGIC GLOBAL MANAGEMENT, INC., Appellant, v. STATE OF CALIFORNIA; VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al*. Appellees.	[No Hearing Required Pursuant to Federal Rule of Bankruptcy Procedure 8013(b)][3] Date: [TBD] Time: [TBD] Judge: Hon. Dale S. Fischer Place: Courtroom 7D, 350 W. First Street, Los Angeles, CA 90012 [Declaration of Gary E. Klausner Filed Concurrently Herewith]

[3] Because this Motion seeks a procedural order, a hearing is not necessary. *See* Fed. R. Bankr. P. 8013(b)("The district court . . . may rule on a motion for a procedural order . . . at any time without awaiting a response. A party adversely affected by the ruling may move to reconsider, vacate, or modify it within 7 days after the procedural order is served.")

PLEASE TAKE NOTICE that Appellant, Strategic Global Management, Inc. ("SGM") hereby submits the attached motion (the "Motion") requesting that the Court enter an order: (1) allowing SGM access to the document, described as "Plan B," which was filed under seal with the Bankruptcy Court, for use in connection with SGM's opening brief, (2) extending the deadline for the filing of the opening brief to provide Appellant time to review and analyze Plan B after receiving it and (3) clarifying the briefing process.

PLEASE TAKE FURTHER NOTICE that SGM brings the Motion pursuant to Rules 8009, 8013(a) & (b), and 9006 of the Federal Rules of Bankruptcy Procedure.

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

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

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

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Dated: January 23, 2020

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

By: */s/ Gary E. Klausner*

Gary E. Klausner

Dated: January 23, 2020

BARNES & THORNBURG LLP

By: */s/ L. Rachel Lerman*

Kevin D. Rising
L. Rachel Lerman
Joel R. Meyer

Counsel for Strategic Global Management, Inc.
Appellant

Strategic Global Management, Inc. ("SGM" or "Appellant) respectfully requests the following orders: (1) allowing Appellant access to the document described as "Plan B", which was filed under seal with the Bankruptcy Court, for use in connection with Appellant's Opening Brief, (2) extending the deadline for the filing of Appellant's Opening Brief and (3) clarifying the briefing process.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Just before the November 26 status conference that was to address issues related to the Debtors' chapter 11 plan, the Debtors rushed to file documents under seal with the Bankruptcy Court. These documents included confidential letters between the parties, which the Court accepted over SGM's objection, and a secret "Plan B" document, which was accepted two hours later, before SGM had a chance to object. To date, SGM has not been given access to the Plan B document.

At the status conference, the Bankruptcy Court referred obliquely to the content of Plan B, excoriated SGM's counsel for SGM's perceived attempt to renegotiate the sale agreement for the sale of the hospitals, and ruled – without giving SGM an opportunity to present argument or evidence – that the Debtors had met all of the conditions precedent to closing the sale, and that SGM must close by December 5, 2019. (As SGM will demonstrate on appeal, these conditions had not been met.)

Even though it had never (and still has not) seen Plan B, SGM designated it as part of the record on appeal. SGM has asked the Debtors to let it review Plan B on a confidential basis, but the Debtors point blank refused, even though SGM agreed to keep it sealed. There is no longer any legitimate basis for keeping the document confidential, and it is a critical to the appeal.

SGM therefore asks this Court to enter an order granting SGM access to

Plan B (which may remain sealed)[4], and granting SGM a reasonable amount of time to review and analyze the document. To that end, SGM proposes that the date for filing its opening brief be extended to the later of February 14, 2020 (the date that the Debtors' have agreed for SGM to file its opening brief) or 21 days after SGM has had a chance to review Plan B.

SGM also asks this Court to clarify the procedures for filing briefs in these consolidated appeals.

II. STATEMENT OF FACTS

A. The Appeals

SGM and the Debtors are parties to consolidated appeals currently pending in this Court. Specifically, SGM has appealed the following orders:

- (A) "*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 . . .* " [Bankr. Doc. No. 3611] entered on November 14, 2019;
- (B) "*Order (1) Finding that SGM Is Obligated to Promptly Close the SGM Sale Under Sec. 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*" [Bankr. Doc. No. 3633] entered on November 18, 2019; and
- (C) "*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"* [Bankr. Doc. No. 3724] entered on November 27, 2019.

[4] To the extent SGM refers to the contents of Plan B in its opening or reply briefs, it agrees to redact that portion of Plan B from its brief and submit the redacted portion in a sealed document.

The Orders all relate to disputes between the Debtors and SGM concerning the "Asset Purchase Agreement" dated January 8, 2019 [Bankr. Doc. No. 2305] (the "APA") for the sale of four hospitals. The Sale was approved by an order of the Bankruptcy Court entered on May 2, 2019 [Bankr. Doc. No. 2306].

On December 20, 2019, this Court entered three orders denying the Debtors motions to dismiss each of the Appeals.[5]

The Committee has intervened in all three of the Appeals pursuant to this Court's order of January 17, 2020.

On December 6, 2019, the Court entered the "*Notice[s] To Parties Of Court-Directed ADR Program.*"[6] SGM asked the Debtors and Committee to participate in a mediation or other form of dispute resolution process. When they refused, SGM filed motions to compel the Debtors and Committee to participate in the ADR Program ("ADR Motion"), which both parties have opposed. The ADR Motion is currently pending.

B. The Plan B Document Filed Under Seal with the Bankruptcy Court

On Friday November 22, 2019 at 3:12 p.m. – less two business days prior to the November 26, 2019 status conference scheduled to address the Debtors' Disclosure Statement regarding its Chapter 11 Plan – the Debtors filed an "*Ex Parte* Motion . . . To File 'Plan B' Of Their Status Report Under Seal".

The Plan B Motion alleged that the Plan B document [Bankr. Doc. No. 3678], which apparently sets forth an alternative disposition of the Hospitals if the Sale to SGM did not close, had to be sealed "[g]iven that there is a possibility that the SGM Sale still may close, public statements regarding the requested Plan B may have an adverse impact on operations and employee morale." (Plan B

[5] Docket numbers 19, 16, and 14 in case numbers 2:19-cv-10352-DSF, 2:19-cv-10354-DSF, and 2:19-cv-10356-DSF respectively.

[6] Docket numbers 7, 6, and 5 in case numbers 2:19-cv-10352-DSF, 2:19-cv-10354-DSF, and 2:19-cv-10356-DSF respectively.

Motion, 3). The Plan B Motion states that the Plan B Document was served on certain "Disclosure Parties," but SGM was not one of those parties. (Plan B. Motion, 5). A true and correct copy of the Plan B Motion is attached as **Exhibit "1"** to the Klausner Declaration.

Just two hours later, before SGM had a chance to respond to the filing or sealing of the Plan B Motion the Bankruptcy Court entered its order granting leave to file it under seal. A true and correct copy of the Plan B Order is attached as **Exhibit "2"** to the Klausner Declaration.

Plan B was reviewed by the Bankruptcy Court (along with other documents filed under seal and over SGM's objection) before the November 26 Status Conference.

At the Status Conference, the Bankruptcy Court announced that it had reviewed the materials that the Debtors had submitted and announced that SGM was obligated to close the sale on December 5, 2019. (No one, including the Debtors, had asked the Court make any such determination at the Status Conference). The Bankruptcy Court also made statements regarding closure of hospitals resulting from SGM's failure to close that had not been part of any publicly filed document in the Debtors' Chapter 11 cases, which suggests that they came from Plan B.

The next day, the Bankruptcy Court, *sua sponte*, filed a Memorandum Decision and Order declaring that the Debtors had satisfied all conditions precedent to closing and that SGM was "obligated" to close the sale on December 5, 2019. (No one, including the Debtor, had requested any such ruling from the Court.)

SGM timely appealed.

On December 13, 2020, SGM designated the Plan B Document in its Designation of Record on appeal from the November 27 Order [November 27 Appeal, Doc. No. 3812].

By correspondence dated December 30, 2019, counsel for SGM requested that the Debtors stipulate to allow SGM to have access to the Plan B Document for use in the appeal. SGM agreed that the document could remain sealed. The Debtors refused. A true and correct copy of this correspondence is attached as **Exhibit "3"** to the Klausner Declaration.

III. ARGUMENT

A. SGM Is Entitled to Review Plan B

The Plan B Document was filed shortly before the November 26 Status Conference, and was considered and reviewed by the Bankruptcy Court before its entry of the November 27 Order. Accordingly, Plan B is relevant and likely material to this appeal.

As matters now stand, SGM does not know what the Debtors told the Bankruptcy Court in Plan B about the consequences of SGM's potential failure to close the sale or other disputes between the parties. SGM does not know what the Debtors said about the closing of hospitals or the consequences of closure. SGM does not know whether the statements in Plan B are accurate. Nevertheless, the Bankruptcy Court's reference to hospitals being closed (which was not a matter of public record), and his highly charged admonition to SGM's counsel, suggests that Plan B was influential, and apparently inflammatory.[7] SGM is entitled, as a matter of fundamental fairness and due process, to know what the Debtors told the Court, which led the Court to decide on November 27 that SGM was "obligated" to close the sale on December 5.

[7] (November 26 Transcript, 14: 7-16) ("After reviewing the statement of strategic, I don't want to cast any negative aspersions at all. But I want to make clear that I believe that it is operating very closely within the satellite of bad faith. I think it has an obligation to close. I think it wants to negotiate a better deal. I think it believes that it will be unpalatable for the Court and for others here to see patients, young, old, infirmed, being wheeled or carted out of the hospitals. That's a cynical view and I don't adhere to it.").

This Court has authority to obtain the sealed document from the clerk of the Bankruptcy Court under Federal Rule of Bankruptcy Procedure 8009(f) which provides, in relevant part, that "a document placed under seal by the bankruptcy court may be designated as part of the record on appeal." Fed. R. Bankr. P. 8009(f). The party designating it "must identify it without revealing confidential or secret information, but the bankruptcy clerk must not transmit it to the clerk of the court where the appeal is pending as part of the record." *Id*. "Instead, a party must file a motion with the court *where the appeal is pending* to accept the document under seal. If the motion is granted, the movant must notify the bankruptcy court of the ruling, and the bankruptcy clerk must promptly transmit the sealed document to the clerk of the court where the appeal is pending." *Id*. (emphasis added.)[8]

SGM emphasizes that it is *not* seeking to "unseal" the Plan B Document so that its contents would be revealed to the public – only that SGM and the Court be granted access to it for purposes of the Appeals.

The Debtors' asserted bases for sealing Plan B are no longer extant. There is no longer any need to avoid disclosure of the possibility that the sale to SGM may or may not close, or to share with SGM the Debtors' alternatives. The Debtors publicly announced their termination of the APA and are now in the process of pursuing alternatives for the sale of the Hospitals.

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[8] *See* § 19:13. Designation of record and statement of issues on appeal – Sealed documents and pleadings, 3 Bankruptcy Practice Handbook § 19:13 (2d ed. Sept. 2019) ("The best way to streamline this procedure is to get the consent of the other parties to the appeal to transmit the sealed document. If the party who initiated the sealing process is not a party to the appeal, that party's consent should be obtained as well. These consents should be evidenced by each party's signature on the proposed order granting the motion.").

B. "Cause" Exists to Extend the Deadline For SGM to File its Opening Briefs

1. If The Court Orders SGM to Have Access to Plan B, SGM Requires an Extension of Time to File its Opening Brief

Rules 8013(b) and 9006(b) of the Federal Rules of Bankruptcy Procedure provide this Court with authority to extend the deadline for SGM to file its Opening Brief in the Appeals and other related documents, for cause shown.

SGM tried to work with the Debtors to accomplish this but was rebuffed time and time again.

A true and correct copy of the response from Debtors' counsel rejecting SGM's proposal (the "Debtors' Letter") is attached as **Exhibit "4"** to the Klausner Declaration. The Debtors did agree to give SGM a seven (7) day extension to file the Opening Brief, through February 14, 2020, and SGM has submitted a stipulation to counsel providing for such extension. That date may not be sufficient, depending on how and when the Court rules on SGM's request for access to Plan B, and how long it takes for the Debtors to provide it.

2. SGM Requests Clarification Regarding the Briefing Process.

All three Appeals have been consolidated, the Committee's requests to intervene in all three Appeals were approved, and SGM's ADR Motion is still pending before this Court. SGM requests clarification as to the number of briefs that each party will be allowed to file, the length of those briefs, and whether any ADR process should take place before, during, or after the briefs are filed.

The clarification and "Plan B Document" matters should be fully resolved, and clarified before briefs in the Appeals can properly be prepared.

Federal Rule of Bankruptcy Procedure 8013(e) contemplates the filing of joint briefs for appeals involving multiple appellees or appellants (which would make the most sense for the Appeals, given that most of the Committee's arguments would be duplicative of the Debtors', and would serve the interest of

judicial economy). *See* Fed. R. Bankr. P. 80014(e) ("In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.").

Until the Court grants or denies SGM's request to obtain access to, and accepts the Plan B Document, SGM will not have a meaningful opportunity to analyze or address it in its opening brief.

SGM respectfully requests that the deadline for SGM to file its Opening Brief in these Appeals be extended to a date that is the later of February 14, 2020 or 21 days after SGM is provided access to the Plan B Document.

CONCLUSION

For the foregoing reasons, SGM respectfully requests the Court enter an order (1) granting the Motion, (2) extending the deadline for SGM to file its Opening Brief, (3) allowing SGM and the Court access to, and the Court's acceptance of the Plan B Documents as part of the record of the Appeals; and (4) affording such other relief as is appropriate under the circumstances.

Dated: January 23, 2020

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

By: */s/ Gary E. Klausner*
Gary E. Klausner

Dated: January 23, 2020

BARNES & THORNBURG LLP

By: */s/ L. Rachel Lerman*

Kevin D. Rising
L. Rachel Lerman
Joel R. Meyer

Counsel for Strategic Global Management, Inc., Appellant

CERTIFICATE OF COMPLIANCE

1. This Motion complies with the page limitation requirements of Fed. R. Bankr. P. 8013(f)(3) and District Court Local Rule 11-6 because, excluding the parts of the Motion excepted by Fed. R. Bankr. P. 8013(a)(2)(C), this Motion contains 8 pages.

2. This Motion complies with the typeface requirements of Fed. R. Bankr. P. 8015(a)(5) and the type-style requirements of Fed R. Bankr. P. 8015(a)(6) because the document was prepared in the proportionally spaced 14-point Times New Roman font.

Dated: January 23, 2020

/s/ Gary E. Klausner
GARY E. KLAUSNER

CERTIFICATE OF SERVICE

1. I hereby certify that on January 23, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court for the Central District of California using the CM/ECF system.

2. I further certify that parties of record to this appeal who either are registered CM/ECF users, or who have registered for electronic notice, or who have consented in writing to electronic service, will be served through the CM/ECF system.

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

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Dated: January 23, 2020

/s/ Gary E. Klausner
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