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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 Foundation
☐ Affects St. Vincent Foundation
☐ Affects St. Vincent Dialysis Center, Inc.
☐ Affects Seton Medical Center Foundation
☐ Affects Verity Business Services

Lead Chapter 11 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

Adversary Case No. 2:20-ap-01001-ER

1820151200206000000000001

☐ Affects Verity Medical Foundation
☐ Affects Verity Holdings, LLC
☐ Affects De Paul Ventures, LLC
☐ Affects De Paul Ventures – San Jose ASC, LLC

Debtors and Debtors in Possession.

VERITY HEALTH SYSTEM OF CALIFORNIA, INC., a California nonprofit public benefit corporation, ST. VINCENT MEDICAL CENTER, a California nonprofit public benefit corporation, ST. VINCENT DIALYSIS CENTER, INC., a California nonprofit public benefit corporation, and ST. FRANCIS MEDICAL CENTER, a California nonprofit public benefit corporation, SETON MEDICAL CENTER, a California nonprofit public benefit corporation, and VERITY HOLDINGS, LLC, a California limited liability company;

Plaintiffs,

v.

KALI P. CHAUDHURI, M.D., an individual, STRATEGIC GLOBAL MANAGEMENT, INC., a California corporation, KPC HEALTHCARE HOLDINGS, INC. a California Corporation KPC HEALTH PLAN HOLDINGS, INC. a California Corporation, KPC HEALTHCARE, INC. a Nevada Corporation, KPC GLOBAL MANAGEMENT, LLC, a California Limited Liability Company, and DOES 1 through 500,

Defendants.

REPLY TO OPPOSITIONS TO "STRATEGIC GLOBAL MANAGEMENT, INC.'S . . . MOTION TO STAY ADVERSARY PROCEEDING"

Date: February 11, 2020
Time: 10:00 a.m.
Judge: Ernest Robles
Place: Courtroom 1568
255 E. Temple Street
Los Angeles, CA 90012

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Strategic Global Management, Inc. ("SGM") submits this reply (the "Reply") to the oppositions filed by Verity Health System of California, Inc., *et al.* (the "Debtors" or "Verity") [Adv. Doc. No. 24] (the "Opposition") and the Official Committee of Unsecured Creditors (the "Committee") [Adv. Doc. No. 25] (the "Committee Opposition") to SGM's "*Motion To Stay Adversary Proceeding*" [Adv. Doc. No. 19] (the "Motion"), and respectfully represents as follows:

I. INTRODUCTION

In their respective oppositions, the Debtors and the Committee[1] misstate the factual and procedural history of this matter to argue that this Court should deny the Motion to stay the Adversary Proceeding, as the law requires, on the ground that SGM breached the Asset Purchase Agreement ("APA") with the Debtors, and is responsible for the failure of the four hospitals which are the subject of the APA. This argument fails as a matter of law and equity.

SGM had a plan to save these facilities, and to continue providing needed care in their respective communities. It was the Debtors' improper attempt to force a premature sale closing that caused the sale transaction (the "Sale") to fall apart. SGM, for its part, tried valiantly to save the Sale transaction, even after the Debtors wrongfully terminated the APA, including by requesting that the Debtors participate in mediation and settlement meetings. The Debtors rejected these proposals. SGM also filed a motion with the District Court requesting an order directing the parties to comply with the District Court's mandatory ADR Program; both the Debtors and Committee opposed that motion. This motion remains pending.

As the Debtors would have it, SGM has no right to appeal Orders entered without due process, and no right to adjudicate the subject of those Orders in an adversary proceeding.

First, the Debtors argue that SGM's appeals (the "Appeals") from this Court's orders of November 14, November 18 and November 27, 2019 (collectively, the "Orders"), all of which

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[1] As described more fully in Section III.H, *infra*, the Committee Opposition should be stricken or simply ignored, because it is neither a party nor a permitted intervenor to the Adversary Proceeding.

relate to whether the Debtors satisfied the conditions to closing as of November 19, 2019, should be dismissed, thereby nullifying any appellate remedy to which SGM is entitled.

At the same time, the Debtors argue that these Orders, which form the basis for the breach of contract claims set forth in the Debtors' Complaint against SGM and others, will have a preclusive effect on the rights of SGM and the other defendants to defend the breach of contract claims on their merits.

If successful, the Debtors would achieve the Holy Grail of litigation: a judgment on its breach of contract claims without the defendants *ever* having had the opportunity to provide evidence, legal briefs, witnesses, documents or argument supporting their defense to the breach of contract claims or appeal from adverse orders.

This Court should prevent the Debtors from proceeding with their Complaint against SGM and the other defendants, in the face of the pending Appeals. The District Court's jurisdiction resulting from the Appeals (all of which were filed before the Debtors filed their Complaint) cannot be circumvented by any of the unsupportable and contradictory arguments raised by the Debtors.

First, the divestiture rule requires this Court to stay any action that involves the issues pending in the District Court, lest the courts reach divergent results. Here, the claims and causes of action for breach of contract set forth in the Complaint are expressly based on this Court's Orders. *See* (Compl. ¶¶ 83-90, 100.) The Debtors try to minimize the significance of the Orders (by creating innocuous sounding nicknames for them) but they cannot deny their unequivocal reliance on those Orders to establish, support, and enforce their claims against SGM and other defendants. Indeed, the Debtors' own Opposition demonstrates the degree to which the issues overlap. The Orders also affect SGM's counterclaims, which it will raise at the appropriate time.

To the extent that the Debtors contend that the Appeals should be dismissed on grounds of mootness, waiver, or because they are "interlocutory," these issues are properly before the District Court sitting as court of appeals.

As set forth in detail below, this Court was misled by Debtors' disingenuous contention that they had satisfied all conditions to closing as of November 19, 2019. Justice requires that SGM have its chance to demonstrate the falsity of the Debtors' position. Justice requires that SGM be

allowed to prove that Debtors: acted in bad faith; made false representations of fact and law to force a premature sale closing and manufacture a breach of the APA; hurriedly moved to close hospitals that they apparently always wanted to close; all while trying to keep $30 million of SGM's money.

In sum, this Court must not let the Debtors take advantage of Orders that were entered without due process by shielding them from appeal, while using them as a sword in the Adversary Proceeding.

II. FACTUAL AND PROCEDURAL BACKGROUND

SGM includes a recitation of the facts to respond to the Debtors' and the Committee's spurious allegations, and set the record straight regarding the events leading up to the present dispute.

A. Over Two Decades of Losses Leading to Bankruptcy.

After 25 years of substantial operating losses and any number of attempts to rescue the Debtors hospitals, the Debtors filed their bankruptcy petition on August 31, 2018 and instituted a process to sell its six hospitals. The Debtors, with Court approval, sold their two hospitals in Santa Clara County to the County.

Shortly thereafter, SGM generated a plan to resurrect four of the Debtors' hospitals and made a good faith offer to purchase the hospitals for $610 million, subject to adjustments set forth in the eventual APA. The Debtors ultimately selected SGM to purchase the hospitals after no other potential buyer made a fully qualified bid. In accordance with the terms of the parties' APA, SGM made its initial deposit of $30 million.

B. The Debtors' Failure to Comply with Their Contractual Obligations

The Debtors had numerous obligations under the APA, including many they were required to perform before SGM would be required to close the transaction. Notably, Section 8.7 of the APA obligated the Debtors to transfer their Medicare and Medi-Cal provider agreements to SGM pursuant to "settlement agreements" with the CMS (Medicare) and DHCS (Medi-Cal). Such transfers are critical because the purchasing entity cannot obtain payment for services to patients covered by Medicare and Medi-Cal without a provider agreement. Section 8.7 provides:

> Sellers shall transfer their Medicare provider agreements pursuant to a *settlement agreement* . . . with the California Department of Health Care Services ("DHCS"), which such settlement agreement[] shall result in: (i) resolution of all outstanding financial defaults under any of Sellers' . . . Medi-Cal provider agreements and (ii) full satisfaction, discharge and release of any claims under the . . . Medi-Cal provider agreements, whether known or unknown, that . . . DHCS . . . has against the Seller or Purchaser for monetary liability arising under the . . . Medi-Cal provider agreements before the Effective Time; provided, however, that Purchaser acknowledges that it will succeed to the quality history associated with the relevant . . . Medi-Cal provider agreements assigned and shall be treated, for purposed of survey and certification issues as if it is the relevant Seller and no change of ownership occurred.

(APA § 8.7) (emphasis added.)

The debtors failed to satisfy this condition, either as of November 19, the date they represented to SGM and to the Court that they had satisfied this condition, or thereafter.

For background, the Debtors had accumulated substantial liabilities to the California Department of Health Care Services ("DHCS"), which administers Medi-Cal in California, for unpaid Hospital Quality Assurance Fees ("HQAF"), and for Medi-Cal fee-for-service overpayments. During the course of the case, DHCS continued to find new and additional claims and eventually claimed that the Debtors owe it over $80 Million. DHCS contended that all of these claims had to be "cured" in order to allow SGM to assume the Debtors' Medi-Cal provider agreement.

On March 22, 2019, DHSC filed an objection to the proposed Sale to SGM, arguing that the Medi-Cal provider agreements between it and the Debtors were executory contracts that could not be transferred free and clear of claims, interests, and encumbrances unless all defaults were cured, as required by Bankruptcy Code § 365(b). Thus, according to DHCS, the provider agreements associated with each of the hospitals could not be transferred to SGM unless and until the Debtors cured the unpaid HQAF and fee-for-service overpayments. In response to DHCS' objection to the sale on April 10, 2019, the Debtors argued that they did not need do so because the Medi-Cal agreements are non-executory contracts.

On May 2, 2019, the Court entered its Sale Order authorizing the sale of the Debtors' assets to SGM free and clear of claims, liens, and encumbrances. However, the Sale Order expressly

carved out Medi-Cal Provider Agreements from the released claims, liens, and encumbrances. Specifically, the Sale Order states: "Nothing in this Sale Order shall apply to Medical Provider Agreements until and unless there is a court order approving a settlement between the Debtors and the DHCS or a court order resolving the DHCS's objection." (Doc. No. 2306.) Thus, as of the date of the Sale Order, Debtors' Medi-Cal obligation under § 8.7 had not been satisfied

On September 11, 2019, DHCS filed a Supplemental Brief regarding its unresolved objection to the Sale of the hospitals free and clear of Debtors' Medi-Cal Provider Agreements. (Doc. No. 3043.) The Debtors contested DHCS's characterization of the Medi-Cal Provider Agreements as executory contracts. The Debtors filed a Reply Brief in which they once again argued that the Provider Agreements could be transferred free and clear of any liens and claims without compliance with Bankruptcy Code § 365, while recognizing the need to provide SGM with such a transfer to satisfy its contractual obligations. (Doc. No. 3095, 13) ("SGM is willing to provide needed services to Medi-Cal beneficiaries and to accept a transfer of the Medi-Cal Provider Agreements, provided that SGM does not incur any exposure for liability under the Medi-Cal Provider Agreements, or otherwise for any Medi-Cal Claims, or HQAF Claims, for goods and services provided, and otherwise for events related to periods, prior to SGM taking possession and control of the Hospitals, or to otherwise assume any obligations or liabilities of the Debtors other than those expressly provided for in the Purchase Agreement related to the SGM Sale.").

On September 26, 2019, the Bankruptcy Court entered its Memorandum of Decision in which it agreed with the Debtors contention that the Medi-Cal Provider Agreements could be transferred without compliance with Bankruptcy Code § 365(b). At the same time, the Court expressly acknowledged that APA Section 8.7 obligated the Debtors to transfer the Provider Agreements free and clear of any DHCS claims of liability. (Doc. No. 3146, 3) ("Each of the Hospitals has executed a Provider Agreement with DHCS. The Asset Purchase Agreement (the "APA") [Doc. No. 2305-1] which governs the sale of the Hospitals to SGM provides that the sale cannot close unless issues regarding alleged financial defaults existing under each Provider Agreement have been resolved.").

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Despite the Court's clear statement in its Memorandum of Decision that it was not deciding the recoupment issue, on October 8, 2019, the Debtors lodged a proposed order seeking to prevent Medi-Cal from recouping payments owed to SGM in connection with the transfer of the Medi-Cal Provider Agreements. Unsurprisingly, the next day, DHCS objected to the Debtors' proposed order, noting that "the proposed order is not 'consistent' with the Memorandum [of Decision] and that "it overreaches by inserting gratuitous terms, to, for example, prohibit the Department's recoupment after the sale." (Doc. No. 3330.)

On October 11, 2019, the Court agreed with DHCS that the Debtors' proposed order was overreaching, stating that: "the Memorandum Decision did not determine whether DHCS' recoupment rights against SGM (if any) are extinguished by the transfer of the Provider Agreements free and clear of claims, interests, and encumbrances." (Doc. No. 3372, fn. 2). When entering the Order on October 11, 2019, the Court deleted the word "recoup" from the section providing for a transfer of the Medi-Cal Provider Agreements free and clear of claims, and expressly stated that it was reserving the issue of DHCS's recoupment rights for future adjudication. (Doc. No. 3372.) The Court thus left open the question of whether the Medi-Cal Provider Agreements can be transferred free of recoupment rights. That issue has never been resolved.

Thus, as of the entry of the Court's October 11 order, the (1) Debtors had no "settlement agreement" with DHCS to satisfy the closing condition of § 8.7, and (2) the only Court order permitting the Debtors to transfer their the Medi-Cal Provider Agreements to SGM expressly left open DHCS' right to recoup from SGM payment for liabilities of the Debtors. Therefore, even if a court order could have substituted for the "settlement agreement" required by §8.7, there was no such court order.

In November, the Debtors became anxious, knowing that the end of the year was fast approaching and that SGM would have the option to walk away from the deal if the sale did not close before December 31, 2019. Given that the purchase price in the agreement was no longer a fair price for the Debtors' assets, in light of the colossal plunge in the financial performance of the hospitals, the Debtors also knew that they would not be able to negotiate a new agreement for the same or greater amount from SGM or any other potential buyers.

The Debtors knew the transaction was not in a position to close before year's end. There were numerous transactional issues that still needed to be resolved by the parties, including the resolution of hundreds of cure claims. The Debtors themselves had not satisfied all of the conditions precedent to closure, including § 8.7 of the APA. Nor had the Debtors confronted the regulatory issues raised by Hooper Lundy. (*See* November 22, 2019 letter of Gary Klausner, with attachments, submitted by the Debtors on November 26, 2019.)

Nevertheless, in a misguided effort to force a pre-December 31 closing or to manufacture a false claim for breach against SGM, the Debtors improperly and knowingly misrepresented the status of their performance in a November 20, 2019 letter to SGM, demanding that it close by December 5, 2019, and representing that, as of November 19, "all conditions to closing are satisfied." Of course, as of the date they sent the demand to close, the Debtors had not entered into the requisite settlement agreement with DHCS. Indeed, they still had not entered into any such agreement as of December 5, the date the Debtors set for closing.

On November 25, 2019, in tacit recognition of their failure to reach an agreement with DHCS, the Debtors sent SGM an email in which they contended that no settlement agreement was necessary, notwithstanding the clear and unambiguous language of § 8.7. The Debtors argued that the Bankruptcy Court's May 2, 2019 Sale Order satisfied the requirements of § 8.7 because the sale generally provided for it to be free and clear. However, as explained above, DHCS had objected to the sale and, to accommodate that objection, the Debtors agreed, and the Sale Order provided, that DHCS would reserve all of its rights pertaining to the assumption of the Medi-Cal Provider Agreement, including its right of recoupment. Accordingly, the Debtors' last-minute attempt to satisfy § 8.7's requirement of a settlement agreement providing for a full release and discharge in favor of SGM was unavailing.

C. The Bankruptcy Court's Decision, Reached without Notice or Hearing from SGM.

To help its cause, the Debtors sought the assistance of a Bankruptcy Court that understandably did not want to see the patients and employees of the hospitals suffer if this transaction fell apart. The Debtors managed to mislead this Court into believing that they had satisfied all conditions to closing as of November 19, 2019 – a contention that was proven false in

a matter of days. As a result of the Debtors' tactics, the Court entered its November 27 Order and accompanying memorandum of decision concluding that: (1) the Debtors' November 20 notice of closing was valid; and (2) all conditions to closing had been satisfied by the Debtors as of November 19, 2019, such that SGM was "obligated" to close the Sale on December 5, 2019 or be in breach, without even providing notice to SGM that it intended to adjudicate issues relating to the APA, with nothing pending regarding the sale and without providing SGM any meaningful opportunity to be heard.

In addressing the Debtors' compliance with § 8.7 as it related to the Medi-Cal Provider Agreements, in a footnote at the conclusion of its Memorandum, the Court stated that the Debtors had satisfied that condition by obtaining the October, 11, 2019 Order (Doc. 3372). However, as demonstrated above, that order had expressly reserved DHCS' right of recoupment, which was not compatible with the "full release" and "discharge" to which SGM was entitled under § 8.7. DHCS' right of recoupment remained unresolved through the December 5, 2019 "closing date."

To help push SGM to close a transaction that it was not otherwise required to close, the Court went so far as to summarily adjudicate any future lawsuit that might be initiated by SGM by stating that, "[h]ad SGM presented its allegations by way of an adversary complaint, it would dismiss such a complaint under Civil Rule 12(b)(6) for failure to state a claim upon which relief could be granted." (Doc. No. 3723, 6 fn. 4).

Even without getting to the merits of the Court's decision regarding the satisfaction of conditions, the November 27 order should be vacated on appeal for due process reasons alone.[2]

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[2] It is black letter law that a court cannot make rulings that impair a party's rights without giving that party notice and an opportunity to be heard. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Tom Growney Equip., Inc. v. Shelley Irr. Dev., Inc.,* 834 F.2d 833, 835 (9th Cir. 1987) ("In the absence of extraordinary circumstances, procedural due process requires notice and an opportunity to be heard before any governmental deprivation of a property interest."). "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Fuentes*, 407 U.S. at 80 (citation omitted). An order made without notice

D. The Debtors' Continued Misconduct.

The Debtors continued breaching the APA after their improper notice of closing. On December 6, 2019, the Debtors attempted to "weaponize" the Court's November 27 Order by filing an "emergency" motion for an Order to Show Cause which, if granted, would have required SGM and certain of its officers and counsel to appear in court and explain why SGM should not be found in contempt of the Court's November 27 Order for not closing the sale on December 5. And, notwithstanding the Debtors' breach of the APA, *inter alia*, by misrepresenting that they had satisfied all conditions to closing as of November 19 and creating a false narrative resulting in erroneous court orders, but following their artificial December 5 closing date, they refused to return SGM's good faith deposit in breach of § 11.2 of the APA, and terminated the APA without justification.

Although this Court's orders regarding the Debtors satisfaction of its closing conditions are on appeal, on January 3, 2020, the Debtors also initiated an adversary proceeding against SGM (the "Adversary Proceeding") for breach of contract and other related claims; all of which are founded on SGM's failure to close the sale on December as "obligated" by the Court's November 27 Order.

In a transparent attempt to harass, embarrass, and needlessly increase SGM's litigation costs, the Debtors also added a number of other defendants, including Dr. Kali P. Chaudhuri personally, based on a frivolous and unfounded alter-ego claim. As the Debtors freely concede in their own Complaint, SGM fully disclosed the details of the relationship between all of these various entities before the Debtors agreed to contract with just SGM. *See, e.g.* (Compl. ¶41.) In direct contradiction to their alter-ego allegations, the Debtors actually allege that they relied on

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and opportunity to be heard is void. *In re Loloee*, 241 B.R. 655, 661 (B.A.P. 9th Cir. 1999); *see also In re Golden Plan of California, Inc.*, 829 F.2d 705, 712 (9th Cir. 1986) (holding district court's sua sponte consideration of a fraudulent conveyance issue rendered proceedings defective because investors were denied adequate notice); *In re Colortran, Inc.*, 218 B.R. 507, 511 (B.A.P. 9th Cir. 1997) (ruling that bankruptcy court's *sua sponte* order invalidating a creditor's lien without procedural safeguards afforded by the Bankruptcy Rules was void for lack of due process).

these representations regarding the relationship between these entities as the factual basis for their contrived fraud allegations. (Compl. ¶¶40-41.)[3]

After the appeals are resolved, SGM looks forward to fully and fairly litigating the Adversary Proceeding. Of course, SGM intends to assert its own claims, including for the Debtors' wrongful conversion of SGM's $30 million deposit.

III. ARGUMENT

A. Divestiture Is Mandatory in this Case, Regardless Whether the Rule Is Characterized as Jurisdictional Per Se or as Prudential.

The Debtors start off their Opposition by dramatically announcing that SGM has "ignore[d] recent Supreme Court precedent" in seeking a stay. *See* (Opp. at 1:12-2:9) (citing *Hamer v. Neighborhood Housing Servs. of Chicago*, 138 S.Ct. 13 (2017)). The Debtors' suggestion that SGM misstated the law to try to mislead this court is spurious. SGM did not cite *Hamer* because it has no bearing on this case.

Hamer discusses the nature of the rule concerning the deadline for filing a notice of appeal, and concludes the rule is a "mandatory claims-processing rule" rather than a jurisdictional rule. *Hamer*, 138 S.Ct. at 17. That is all. *Hamer* does not address the divestiture rule, nor does it say anything that would undermine the divestiture rule as stated in *Griggs* (which the Debtors dismiss as a "40 year old case"), namely that, "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and *divests the district court of its control over those aspects of the case involved in the appeal*." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (emphasis added). The divestiture rule serves to avoid problems that arise when two courts are reviewing the same issue at the same time. *See id.*

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[3] A party may not allege alter ego as a substitute for obtaining contractual guarantees from alleged alter-egos that it knew existed at the time of contracting. *E.g.*, *Lynch v. McDonald*, 155 Cal. 704, 704–05 (1909) (holding that a plaintiff cannot invoke the alter ego doctrine when it had knowledge of the existence of the defendant's principal but decided to contract solely with the entity defendant instead of or in addition to the principal).

In *Rodriguez v. County of Los Angeles*, 891 F.3d 776 (9th Cir. 2018), another case on which the Debtors rely (Opp. 2, 13, 15), the Court of Appeals *re-affirmed* the *Griggs* rule. *Rodriguez*, 891 F.3d at 790. The *Rodriguez* Court observed that the divestiture rule is not a *per se* jurisdictional rule but a prudential one – *i.e.*, a "mandatory claims-processing rule" like the rule at issue in *Hamer*. While the divestiture rule is not absolute, it *is mandatory* when (as here) a party asks the trial court to rule on issues that have been placed before a court of appeals. *Id.* at 790-91.

In *Ashker v. Cate*, 2019 WL 1558932 (N.D. Cal Apr. 2019), a third case on which the Debtors rely (Opp. 13, 14, 20), the district court granted a stay pending appeal on the ground that the issues the other party wanted it to decide were before the Ninth Circuit, which "divested [it] of jurisdiction." *Id*. at *4. The court explained that, as always, "district courts retain control of the aspects of the case that are not involved in the appeal," *e.g.*, attorney's fees decisions and the like. *Id*. at *3 (citations omitted). Otherwise, unless an appeal is "clearly defective or frivolous," the trial court must defer to the court of appeals when it comes to issues pending in that forum. *Id*.; *see Rodriguez*, 891 F.3d at 791.

In short, the Debtors' theatrics about the nature of the divestiture rule are a sideshow. They have no relevance, and were evidently included in the Opposition only to malign SGM.

B. The Appeals Divest this Court of Control Over the Issues in the Adversary Complaint, which Rests Its Allegations on the Orders on Appeal and Asks this Court to Decide Issues Pending in the District Court.

As discussed above, the divestiture rule applies when, as here, the issues in the lower court "involve aspects of the case that are the subject of the pending appeal." *Mercado-Guillen v. McAleenan*, 2019 WL 1995331, at *2 (N.D. Cal. May 6, 2019).

At base, the Debtors' Adversary Complaint seeks to hold SGM liable for "failing to consummate and close the Sale transaction in accordance with the APA[.]" (Compl. ¶ 100.) However, it is undisputed that SGM had no duty to close the Sale transaction until the Debtors had satisfied all conditions of the APA, including under Article 8. *See, e.g.*, *Atari Corp. v. Ernst & Whinney*, 981 F.2d 1025, 1029 (9th Cir. 1992) ("It is, of course, a basic principle of the common law of contracts that when a party's duty to perform under a contract is conditioned on the happening

of an event, the duty does not arise until the event occurs."). The Debtors' failure *vel non* to perform the conditions precedent set forth in the APA, including §§ 8.6 and 8.7, is exactly what the District Court must decide on appeal. The Bankruptcy Court cannot, therefore, adjudicate these issues without creating the risk of opposing outcomes. That is the very result the mandatory divestiture rule was designed to avoid. *Griggs*, 459 U.S. at 58.

The Debtors allege in their Complaint that they satisfied § 8.6 of the APA because they obtained an order from this Court stating that "the Debtors have complied with their obligation under the APA to obtain a final, nonappealable Supplemental Sale Order." (Compl. ¶ 83.) SGM has appealed both the November 14 and November 18 Orders concerning the alleged satisfaction of this condition, so the Orders cannot be used as grounds for relief in an Adversary Proceeding pending the outcome of the appeal.

The Debtors also allege in their Complaint that SGM breached the APA by "asserting entitlement to an "Evaluation Period when no such period existed after the entry of the Enforcement Order, Section 8.6 Order and the Closing Order [and] appealing the Enforcement Order to avoid its obligation to close and despite the APA's requirement that Defendants cooperate to render it a final, nonappealable order[.]" (Compl. ¶ 100.) The propriety of SGM's appeal is a question for the District Court, which has already denied all three of the Debtors' motions to dismiss the appeals, expressly rejecting the Debtors' waiver claim with respect to the November 14 Order. *See* (Klausner Decl. Ex. 1-3.)

The Debtors similarly attempt to rely on this Court's November 27 Order to support their allegations that SGM breached the APA: "Defendants also violated the Bankruptcy Court's orders requiring them to close the sale …." (Compl. 3:13); "The Court Orders SGM to Close By No Later Than December 5, 2019." (*Id*. at 30:26; Opp. at 12:4-7) (Order "finds that SGM is obligated to close the Sale pursuant to Section 1.3 of the APA because (i) the [VHS] had satisfied all conditions to closing, and (ii) SGM did not demonstrated that a Material Adverse Effect occurred under the Court's interpretation of the APA."). The Debtors also rely on the November 27 Order to allege that SGM "tortiously breached" [sic] the APA by "failing to consummate and close the Sale

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transaction in accordance with the APA," and by "making unfounded and untimely assertions of alleged Material Adverse Effects." (Compl. ¶ 107.)

Again, the merits and procedural propriety of this Court's November 27 Order are before the District Court; the Order cannot be used to bootstrap allegations in the Adversary Proceeding while the appeal is pending.

Any doubt as to the congruity of issues on appeal and issues to be resolved in the Adversary Proceeding is put to rest by the Debtors themselves, who repeatedly confirm it in their Opposition brief. *See, e.g.,* (Opp. 10) ("The Complaint asserts claims arising from SGM's conduct with respect to the APA and the SGM Sale, including breach of contract, promissory fraud, and tortious breach of contract based on SGM's and the other defendants' breaches of the implied covenant of good faith and fair dealing."); (Opp. 12) ("the facts giving rise to the Orders [on appeal] are indisputably pled in the Complaint independently of the Orders themselves").

C. SGM Had No Obligation (and No Reason) to Seek Stays of the Orders on Appeal.

The Debtors assert that the Court need not stay the Adversary Proceeding because SGM did not seek a stay of any of the appealed Orders. (Opp. 16:17-19.) This argument is a non-starter. The Orders from which SGM appealed are not enforceable orders; if they were, the Debtors would not be pressing ahead with their Adversary Proceeding in an attempt to obtain an enforceable damages order. Indeed, the Debtors themselves assert that the Court's orders were merely advisory in nature. (Opp. 19:3-5) ("[t]he [November 27] Order found that all other conditions to closing were satisfied and that SGM was obligated to close the Sale. The [November 27] Order *did not* compel SGM to close") (emphasis in original, internal citation omitted).

The Court's order denying VHS's Emergency Motion for an Order to show cause further confirms this when it states, "in the future, the Debtors will have an 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." (Doc. No. 3783, 2.) (Of course such litigation would be hampered, if not fatally impaired, by the Debtors' attempt to use the Orders preclusively.)

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In short, SGM had no need to seek a stay until the Debtors filed their post-appeal Adversary Proceeding, which creates the prospect of two courts ruling on the same issues at the same time. In such instances, as discussed above, the divestiture rule *mandates* that the appeals court be able to complete its work before the lower court proceeds.

The Debtors' argument that the appeal is or will become moot because the Orders on appeal were not stayed is baseless. An appellant in a bankruptcy proceeding needs to seek and obtain a stay to prevent her appeal from becoming moot or "equitably moot," where, for example the money in the estate will be transferred to creditors pending the outcome of the appeal, leaving the appeal court with no practical means to afford the appellant the relief she seeks. *E.g.*, *Cobb v. City of Stockton (In re City of Stockton)*, 909 F.3d 1256, 1260 (9th Cir. 2018) ("[T]he complex [Chapter 9] plan has been confirmed, affecting the rights of thousands of creditors and the public. The reorganization has left the station. [Appellant] did not pursue any bankruptcy stay remedies, much less pursue them with the requisite diligence. The plan has long been substantially consummated. He offers too little, too late. Thus, his appeal must be dismissed."); *cf. In re Baker & Drake, Inc.*, 35 F.3d 1348, 1352 (9th Cir. 1994) (appeal was not equitably moot because "we are not faced with a situation in which we have the impossible task of putting Humpty Dumpty together again.").

The appeals in this case, by contrast, do not present such a scenario. The issues raised on appeal, which are mirrored in the Adversary Complaint (and which will be addressed in SGM's cross-complaint), involve nothing more than a contract dispute over who breached the APA and the appropriate remedy.

D. This Court Should Disregard the Debtors' Collateral Attacks on the Appeals and Their Efforts to Undermine the District Court's Jurisdiction.

Through their arguments regarding the appellate jurisdictional concepts of final/interlocutory orders, mootness, and waiver (the "Appellate Jurisdiction Issues"), the Debtors ask the Court to ignore the pendency of the Appeals and the "mandatory" nature of the divestiture rule so that the Adversary Proceeding can go forward and continue to conclusion.

First and foremost, issues regarding the District Court's jurisdiction to decide the Appeals should be decided by the District Court. *See, e.g.*, *In re Air Vermont, Inc.*, 47 B.R. 536, 537 (Bankr.

D. Vt. 1985) ("The determination as to whether the summary judgment ordered by this Court is an interlocutory order . . . is respectfully left for determination by the United States District Court."); *Tridyn Indus., Inc. v. American Mut. Ins. Co.*, 296 N.C. 486, 491 (1979) (state supreme court interpreting Rule 54(b), and opining "That the trial court declared it to be a final, declaratory judgment does not make it so . . . . Neither can a trial judge by denominating his decree a 'final judgment' make it immediately appealable under Rule 54(b) . . . if it is not such a judgment.").

The Appellate Jurisdiction Issues have either already been decided by the District Court or will be decided by the District Court in due course in the Appeals—whether *sua sponte*,[4] or in response to issues raised by the parties.

Specifically, with regards to the appeal of this Court's order of November 14, the District Court has already entered an order dated December 20, 2019 denying the Debtors' "emergency" motion to dismiss that appeal (based on *inter alia* waiver and standing grounds) on its merits (the "November 14 Appeal Dismissal Order"). In that Order, the District Court ruled that SGM "did not waive its right to appeal the order entered by the Bankruptcy Court by virtue of its joinder in the original motion for relief," and "has a pecuniary interest" in and thus standing to challenge the November 14 Order. A true and correct copy of the November 14 Appeal Dismissal Order is attached as **Exhibit "1"** to the Klausner Declaration.

With regard to SGM's appeal of this Court's orders of November 18 and 27, the District Court also entered orders denying the Debtors' "emergency" motions to dismiss those appeals (the "November 18 and 27 Appeal Dismissal Orders"). These motions were not filed until December 19, 2019 (requiring SGM to respond by December 26). Both motions sought dismissals of the

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[4] *See id; Symantec Corp. v. Glob. Impact, Inc.*, 559 F.3d 922, 923 (9th Cir. 2009) (observing in the context of deciding whether an appealed order was final that "[a]lthough neither party raised the issue of our jurisdiction to entertain this appeal, we have a duty to consider it sua sponte."); *In re Burrell*, 415 F.3d 994, 997 (9th Cir. 2005) ("However, the [appellate] court has an independent obligation to consider mootness *sua sponte*.").

appeals of this Court's orders of November 18 and 27 on the grounds of judicial estoppel, the alleged interlocutory nature of the orders, and the alleged waiver of SGM's right to appeal. True and correct copies of the November 18 and 27 Appeal Dismissal Orders are attached as **Exhibits "2" and "3"** respectively to the Klausner Declaration.

Although it is uncertain whether the District Court will entertain and consider any further dismissal motions filed by the Debtors, given its denial of the three previous dismissal motions, the Debtors have made clear that they will ask the District Court again to dismiss the Appeals "as interlocutory and moot." (Opp. 17, n. 6) ([T]he *Debtors are preparing motions to dismiss the Appeals* as interlocutory and moot.") (emphasis added). *See also* (Committee Opp. 6:5-7) ("Committee may file a motion seeking to dismiss that appeal or otherwise present such an argument to the relevant time."). The Debtors rely on *Ruby v. Sec'y of the U.S. Navy*, 365 F.2d 385, 389 (9th Cir. 1996) to persuade this Court to disregard the Appeals, alleging that they are defective in some manner. *See* (Opp. 18.) The court in *Ruby*, while confirming the divestiture rule, determined that the lower court's jurisdiction had not been ousted from the appeal of an order dismissing a complaint against the "Secretary of the United states Navy to . . . legal, lawful and proper discharge or separation and or retirement . . . from the United States Navy," where the District Court subsequently entered an order "dismissing the action," which was not also appealed. *Id*. at 387. *Ruby* is factually distinguishable to this case in many ways — for example, SGM did, in fact, appeal the November 27 Order which determined the Closing Issue (defined below). "Moreover, the District Court not only has a *sua sponte* duty to determine its jurisdiction to decide the Appeals before it, but the Debtors have already conceded that these same Appellate Jurisdiction Issues in the Opposition will be raised again before the District Court in dismissal motions that will be filed in the near future. There is thus no need for this Court to determine the District Court's jurisdiction over the Appeals (even if such a determination were appropriate; it is not). Such a determination raises the prospect of conflicting and inconsistent findings and rulings by this Court and the District Court, resulting in confusion and an unnecessary waste of judicial and party resources. *U.S. v. Hickey*, 580 F.3d 922, 928 (9th Cir. 2009) ("Although the error was harmless in this case, we want to impress upon district courts that acting before the mandate has issued or after

the mandate has been recalled risks acting without jurisdiction and wasting judicial resources"); *see also id*. (citing *United States v. DeFries*, 129 F.3d 1293, 1301-03 (D.C. Cir. 1996) ("invalidating a trial which 'took several months, consuming thousands of hours of court and lawyer time' because the mandate had not issued before the trial began.").

Given the foregoing, it is unnecessary and improper for this Court to decide the issues related to the District Court's appellate jurisdiction over the Appeals. To avoid usurping the authority of the District Court, and the potential for conflicting rulings, this Court should defer any consideration of the "frivolous appeals" argument and await the outcome of the District Court's adjudication of these issues. These are all issues that have already been decided by the District Court, or will be decided by the District Court in due course. The most sensible and pragmatic approach – to avoid the waste of time, resources, inconsistency of findings/rulings – would be for this Court to stay the Adversary Proceeding.

E. The Orders Are Not Interlocutory.

Although questions about the District Court's jurisdiction over the Appeals should be left for that Court to decide, we address the Debtors' substantive contentions to show they are wrong.

The Debtors assert that a "final order is one that ends the litigation or disposes of a complete claim for relief, leaving nothing for the court to do but execute the judgment." (Opp. 18.) This assertion brazenly ignores the "pragmatic approach" applied in bankruptcy. As the United States Supreme Court has explained, "The ordinary understanding of 'final decision' *is not attuned to the distinctive character of bankruptcy litigation*. A bankruptcy case encompasses numerous "individual controversies, many of which would exist as stand-alone lawsuits but for the bankrupt status of the debtor." *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, No. 18-938, 2020 WL 201023, at *2 (U.S. Jan. 14, 2020) (citing *Bullard*, 575 U.S. at 501). "It is thus common for bankruptcy courts to resolve discrete controversies definitively while the umbrella bankruptcy case remains pending." *Id*. In this context, "[d]elaying appeals from discrete, controversy-resolving decisions in bankruptcy cases would long postpone appellate review of fully adjudicated disputes," and "could require the bankruptcy court to unravel later adjudications rendered in reliance on an earlier

decision." *Id.*; *see also id.* at *3 ("*[T]he usual judicial unit for analyzing finality in ordinary civil litigation is the case, [but] in bankruptcy[,] it is [often] the proceeding."*) (emphasis added).

Unlike in an ordinary civil case where "a complete act of adjudication ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," a bankruptcy court order is final if it "end[s] any interim disputes from which appeal would lie." *Slimick v. Silva (In re Slimick)*, 928 F.2d 304, 307 n.1 (9th Cir. 2007) (internal quotation marks and citations omitted). Therefore, a bankruptcy order is "final and thus appealable 'where it 1) resolves and seriously affects substantive rights and 2) finally determines the discreet issue to which it is addressed.'" *In re Bonham*, 229 F.3d 750, 761 (9th Cir. 2000).

The November 27 Order and accompanying memorandum decision unambiguously, and finally decided that "all conditions precedent to closing have been satisfied," and that "SGM is obligated to close the sale by no later than December 5, 2019." (Nov. 27 Memorandum Decision, Doc. 3723, 7). With respect to the Sale, after entry of the November 27 Order, there were no other Sale conditions left for the Court to interpret or rule on to obligate SGM to close the Sale. Nor was any matter or proceeding pending at the time of the Court's November 27 Order pertaining to the sale and, therefore, the November 27 Order was final.

The Debtors improperly conflate two distinct issues: (1) the matters pertaining to the closing of the Sale on December 5, 2019 (the "Closing Issue"), on the one hand; and (2) the matters pertaining to the breach of contract and other related claims by and between the Debtors, SGM, and other related parties (the "Breach Issue") on the other. The Debtors claim that the Orders regarding the "Closing Issue" are interlocutory, and that only after the "Breach Issue" is adjudicated will there be a "final order." That is wrong. The Closing Orders are final orders because they finally adjudicated the issue of the Debtors' satisfaction of all closing conditions and SGM's "obligation" to close on December 5. Furthermore, these orders were made outside the context of any pending matter so there was nothing to wait for before filing the notices of appeal.

Any argument by the Debtors that the Orders do not "seriously affect[] the substantive rights" of the parties should be rejected. *See Bonham*, 229 F.3d at 761. Although the Debtors conveniently define one of the Orders entered on 18, 2019 as the "Scheduling Order" in the

Opposition, the Debtors have themselves relied on each of the Orders to argue that SGM was obligated to close the Sale on December 5, 2019, and rely on them now to argue that SGM has breached the APA. These are not matters pertaining to "procedural convenience," or "disputes about how a bankruptcy case will unfold." *Ritzen*, 2020 WL 201023, at *5; *see Bonham*, 229 F.3d at 762 (concluding that a substantive consolidation order was final, and opining that "substantive consolidation is no mere instrument or procedural convenience . . . but a measure vitally affecting substantive rights."). Not only did the Orders "materially advance" the disputes related to the Closing Issue, they finally decided them on November 27, 2019.

In addition, the Debtors cite to a number of cases for the proposition that an order is not "final" for purposes of appeal unless it disposes of a pending matter in its entirety. *See* (Opp. 18) (" . . . final order is one that ends the litigation or disposes of a complete claim for relief, leaving nothing for the court to do but execute the judgment.") (citing *In re Kashani*, 190 B.R. 875, 882 (B.A.P. 9th Cir. 1995); *In re Travers*, 202 B.R. 624, 625 (B.A.P. 9th Cir. 1996)).

The fallacy of the Debtors' argument is that here, unlike in the cases the Debtors cite, there was no pending matter at the time the Court entered its November 18 Order (mischaracterized as a "Scheduling Order") or its November 27 Order (mischaracterized as the MAE Order). Indeed, the absence of any such pending proceeding, or fair notice and opportunity to be heard before the Court's entry of those two orders *sua sponte* is one of the primary reasons the Court's orders should be reversed. SGM could not have been required to await the outcome of the Adversary Proceeding in order to appeal, since the Adversary Proceeding had not yet been filed (and would not be filed until January 3, 2020), well after the time for filing appeals expired. Indeed, the Debtors makes this very point when they state:

> As such, although the Scheduling Order and MAE Order interpreted the APA with respect to the conditions to closing, the Orders did not 'finally determine a cause of action' raised in the Adversary Proceeding particularly given that the APA did not provide for specific performance as a remedy.

(Opp. 19: 16-20.)

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The absence of specific performance as a remedy for the Debtors is irrelevant. The Debtors are suing for money damages for breach of contract; and the Court's Orders purported to determine that SGM would be in breach, and, therefore liable for money damages, if it did not close on December 5.

Lastly, the Debtors' statement "that SGM failed to seek leave to appeal the interlocutory order and cannot satisfy standards for leave to appeal" is not properly before this Court. The District Court, if necessary and in its discretion, can "consider the notice of appeal as a motion for leave to appeal." *In re Stewart*, 157 B.R. 893, 895–96 (B.A.P. 9th Cir. 1993) ("Interlocutory orders are not appealable as of right . . . . Nevertheless, the Panel may consider the notice of appeal as a motion for leave to appeal. Fed.R.Bankr.P. 8003(c)[.]").

If SGM is not permitted to appeal those rulings, then SGM will be subject to the Debtors' arguments that these Orders are preclusive on those very issues, *i.e.* the Debtors will claim that SGM would not have the right to litigate those issues in defending the Debtors' Complaint. Simply stated, the Debtors cannot have it both ways; it cannot obtain definitive rulings on issues relating to its satisfaction of conditions and SGM's obligation to close the APA before filing suit, and then, when a suit has been filed, argue that SGM's timely appeals from those Orders must be dismissed because they were filed prematurely.

F. The Appeals Are Not Moot.

In another attempt to curtail SGM's rights, the Debtors argue that the Appeals are moot because the APA has been terminated and a Sale is no longer possible. (Opp. 20); *see also* (Opp. 22-23) ("obtained orders . . . authorizing . . . alternative transactions . . . approving the disposition milestones in connection with continued use of cash collateral . . . . authorizing the closure of SVMC[.]").

This argument is both contradictory and illogical. The Debtors argue on the one hand that this "Court is entitled to rely upon the narrow findings of the unstayed Orders in the Adversary Proceeding to the extent they have any collateral value to those claims asserted in the Complaint," (Opp. 17:9-11) and on the other that these "Orders are no longer of any practical force or effect."

(Opp. 23:3-4.) Just as with the Debtors' attempt to argue that the Orders are interlocutory, the Debtors again mistakenly conflate two distinct issues: (1) the ability of the Sale to close under the APA; and (2) the dispute over which party breached the APA.

The termination of the APA, and the start of the alternative disposition mechanism have nothing to do with whether the Debtors had satisfied their closing conditions as of November 19, 2019, or whether SGM was obligated to close the sale on December 5, 2019.[5]

A "party asserting mootness 'has the heavy burden of establishing that there is no effective relief remaining for a court to provide.'" *In re Nelson*, 391 B.R. 437, 444-45 (B.A.P. 9th Cir. 2008). "The classic example of mootness in the bankruptcy context is a case in which the debtor has failed to seek a stay of foreclosure and the debtor's property has been sold" or where "a party opposing a reorganization plan has failed to obtain a stay pending appeal, and the plan has been carried out to 'substantial culmination.'" *In re Baker & Drake, Inc*, 35 F.3d 1348, 1351 (9th Cir. 1994). Even under these circumstances, "failure to obtain a stay, standing alone, is often fatal but not necessarily so; nor is the 'substantial culmination' of a relatively simple reorganization plan." *Id*.

Here, there are no disputed sale or confirmation orders that would generally necessitate stays of such orders to avoid collateral effects. Moreover, as described above, there was no obligation or reason for SGM to seek stays of the Orders until the Adversary Proceeding was filed.

As described in the Motion and above, even a cursory perusal of the Complaint demonstrates the degree to which the Adversary Proceeding overlaps with the challenged rulings. For example, Plaintiffs allege that SGM breached the APA by, *inter alia*: (1) "asserting entitlement to an 'Evaluation Period' when no such period existed after the entry of the Enforcement Order [the November 14 Order], the Section 8.6 Order [the November 18 Order] and the Closing Order [the November 27 Order]"; "appealing the Enforcement Order [the November 14 Order] to avoid

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[5] SGM does not concede that the Debtors' termination of the APA on December 27, 2019 was lawful, which is an issue that will be resolved in the litigation.

its' obligation to close and despite the APA's requirement that Defendants cooperate to render it a final, nonappealable order"; and "filing meritless and frivolous Notices of Appeal." (Compl. ¶ 100). A plain and fair reading of the Complaint compels the conclusion that all of these claims rely heavily on the Court's findings in the Orders. As a result, the Debtors' representation that the "Orders are no longer of any practical force or effect" is, at best, mistaken and, at worse, a contradictory and disingenuous statement intended to create confusion. *See* (Opp. 23).

The Debtors' attempt to use them as a sword against SGM and non-SGM defendants in the Adversary Proceeding shows that these Orders have continuing legal effect, and the Appeals are not moot.

G. SGM Did Not Waive Its Right to Appeal.

The Debtors' next argument that SGM "waived its appellate rights with respect to the Scheduling Order and MAE Order" should likewise be rejected.[6] Waiver is the "*intentional* relinquishment or abandonment of a known right." *Hamer*, 138 S. Ct. at 17 (internal citations and quotations omitted, emphasis added); *see also Point Center*, 890 F.3d at 1193. The Debtors have failed to provide any evidence to show that SGM intentionally waived, or gave up its right to appeal any of the Orders. *See, e.g.*, *U.S. v. Gomez*, 757 F.3d 885, 893 (9th Cir. 2014) (in the appeal arising from a removal proceeding, opining that "[t]he government bears the burden of proving valid waiver in a collateral attack of the underlying removal proceedings.'").

Nor can the Debtors show there was any "express" waiver of SGM's right to appeal the November 18 and 24 Orders. SGM's execution of the APA and agreement to be bound by Sections 9.1(c) and 12.3 of the APA do not constitute waiver. Neither Section addresses the right to appeal.

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[6] Presumably, the Debtors do not argue in the Opposition that SGM waived its right to appeal the November 14 order because the District Court has already rejected this argument in the November 14 Appeal Dismissal Order.

In addressing "express" waiver issues in the context of appeal rights, courts routinely and consistently require that the document relied upon by the party claiming waiver contain specific and clear language addressing the waiver of one party's right to appeal. *See e.g.*, *Project B.A.S.I.C. v. O'Rourke*, 907 F.2d 1242, 1244 (1st Cir. 1990) ("BASIC suggests that appellants expressly *waived* any objection to the 'time schedule' order in a brief submitted to the district court . . . [by] *not only* fail[ing] to complain . . . *but also* said they would comply with that order. To be specific, PHA, in its opposition to BASIC's motion for reconsideration, stated that, the [district] Court has ordered the replacement housing to be constructed within twenty-three (23) months, *which PHA fully intends to do . . . . This statement, however, was merely a single, isolated sentence appearing in an opposition brief that made no reference whatsoever to the possibility of appellate review.* Consequently, we cannot treat it as a waiver of the PHA's right to appeal.") (emphasis added); *In re Deepwater Horizon*, 785 F.3d 986, 997 (5th Cir. 2015) (declining to find waiver of right to appeal, and opining that "where a settlement agreement does not resolve claims itself but instead establishes a mechanism pursuant to which the district court will resolve claims, parties must *expressly waive what is otherwise a right to appeal from claim determination decisions by a district court*. Given that there has been no such express waiver in the instant case, the parties have preserved their right to appeal from the district court to this court.") (emphasis added); *DeLoach v. Lorillard Tobacco Co.*, 391 F.3d 551, 559 (4th Cir. 2004) (denying motion to dismiss appeal on waiver grounds, and opining that "Indeed, § 12.4(c) *does not include any 'non-appealability' language. Accordingly, we deny the Class's motion to dismiss the appeal based on the contractual language of . . . the First Settlement Agreement*.") (emphasis added); *U.S. v. International Broth. Of Teamsters*, 905 F.2d 610, 615 (2d Cir. 1990) (declining to find waiver of right to appeal, because "[s]uch a clear and unmistakable intent is not present here, since the phrase 'exclusive jurisdiction,' read in the context of the Consent Decree, does not unambiguously exclude appellate review . . . . *Nothing in the Consent Decree indicates that the parties intended to waive their right to invoke the jurisdiction of this court*. Moreover, the government conceded at oral argument that the availability of appellate review was never discussed in the course of negotiations.") (emphasis added).

Here, the Debtors have failed to point to any clear and specific language in the APA that even mentions SGM's appeal rights. All but one of the cases cited by the Debtors in Section III.C.4 of the Opposition involve contractual waivers that explicitly addressed and provided for the waiver appellate rights. *See e.g.*, *U.S. Consol. Seeded Raisin Co. v. Chaddock & Co.*, 173 F. 577, 578 (9th Cir. 1909) (agreement provided that " . . . judgment . . . shall be final, and shall not be appealed"); *The Minesen Co. v. McHugh*, 671 F.3d 1332, 1339 (Fed. Cir. 2012) (agreement stating "no rights of appeal to any forum"); *Slattery v. Ancient Order of Hibernians in America, Inc.*, 1998 WL 135601, *1 (D.C. Cir. 1998) (stipulation stated that "parties agree not to appeal any decision"); *In re Lybarger*, 793 F.2d 136, 138 (6th Cir. 1986) (consent decree stated that "parties waive all rights of appeal and further review"); *Brown v. Gillette Co.*, 723 F.2d 192, 192 (1st Cir. 1983) (agreement stipulated that "waive any and all rights of appeal").

The remaining case, *In re Odyssey Contracting Corp*., No. 19-1150, 2019 WL 6766985 (3d Cir. Dec. 12 2010), is also distinguishable. There, the parties stipulated that "all of the Parties' pending claims will be withdrawn and disposed of in their entirety with prejudice" and "[i]n the event the Court determines after trial that Odyssey was the breaching party . . . *and this proceeding shall be deemed to be finally concluded in all respects*." *Id*. at 488 (emphasis in original). Unlike in *Odyssey* where it was the clear intent of the parties "to resolve and end the litigation based on the Court's determination of a contested issue," *id*. at 489, the language at issue here was drafted at the time the APA was executed, before there was any litigation. *Id*. The "exclusively settled" and "sole judicial forum" language in Sections 9.3(c) and 12.3 of the APA simply provides the forum in which disputes arising under the APA would take place. Nothing in either section can reasonably be interpreted to mean that the parties were waiving their right to appellate review, let alone due process.[7]

[7] SGM's due process rights were violated when, without any advance notice to SGM that it intended to adjudicate any issue pertaining to the Sale, and without providing SGM with any opportunity to

The APA does not address waiver of any of the parties' rights to appeal, nor does it evince SGM's intent to have this Court finally determine all disputes related to the APA without appellate review. The right to appeal the Orders was not waived, and they are now properly on appeal before the District Court. Because the District Court has jurisdiction over the Appeals, the Adversary Proceeding (concerning the same or related issues addressed in the Appeals) should be stayed.

H. The Committee's Opposition Should Be Stricken or Ignored.

SGM need not address the Committee Opposition because the Committee: (1) is not a party to the Adversary Proceeding, (2) has not sought or obtained Court permission to intervene in the Proceeding, and (3) has no standing to participate in the Proceeding or related disputes. *In re Latimer*, 918 F.2d 136, 137 (10th Cir. 1990) (holding that "debtor had no standing, due to his failure to move to intervene in this adversary action."); *In re Altman*, 265 B.R. 652, 655 (Bankr. D. Conn. 2001) ("creditors do not have an automatic right to intervene in adversary proceedings").

Any argument by the Committee that it has an automatic right to be heard in the Adversary Proceeding (as opposed to the Debtors' main bankruptcy case) pursuant to Section 1109(b) of the Bankruptcy Code should be rejected as misinformed. That Section states that "[a] party in interest . . . may raise and may appear and be heard on any issue in a *case* under this chapter." 11 U.S.C. § 1109(b) (emphasis added). An adversary proceeding is not a "case" in bankruptcy: "Congress has consistently drawn a distinction between bankruptcy 'cases' and 'adversary proceedings' . . . . [and] intended to differentiate between them in the context of intervention . . . . [We] conclude that

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be heard through the filing of briefs or otherwise, this Court entered the: (1) November 18 Order (granting the Debtors' motion for a continuance of the disclosure statement hearing) which nullified the Evaluation Period, and determined that the Debtors had satisfied the conditions set forth in Section 8.6 of the APA; and (2) November 27 Order (following the status conference, and hearing to continue the disclosure statement hearing) finding, among other things, that all conditions to closing had been satisfied by the Debtors, such that SGM was "obligated" to close the sale on December 5, 2019.

§ 1109(b) does not grant an unconditional right to intervene in adversary proceedings under Rule 24(a)(1)." *In re Catholic Bishop of N. Alaska*, No. ADV F08-90019-DMD, 2009 WL 8446700, at *2 (Bankr. D. Alaska Mar. 25, 2009) (emphasis added). The Committee Opposition should thus be stricken or simply ignored.

IV. CONCLUSION

For all of the foregoing reasons, and the reasons stated in the Motion, the Adversary Proceeding and all matters relating to the Adversary Proceeding, including the filing of any responsive pleading or compliance with this Court's Scheduling Order of January 6, 2020, should be stayed pending final resolution of the consolidated Appeals.

Dated: February 5, 2020

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

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 the foregoing Reply. Unless otherwise indicated, all capitalized but undefined terms herein shall have the same meanings ascribed to them in the Motion.

4. On December 20, 2019, the District Court entered an order denying the Debtors' "emergency" motion to dismiss the appeal of the November 14 Order on its merits (the "November 14 Appeal Dismissal Order"). A true and correct copy of the November 14 Appeal Dismissal Order is attached as **Exhibit "1"** hereto.

5. In addition, the District Court subsequently entered orders denying the Debtors' "emergency" motions to dismiss the appeals of the November 18 and 27 Orders (the "November 18 and 27 Appeal Dismissal Orders"). True and correct copies of the November 18 and 27 Appeal Dismissal Orders are attached as **Exhibits "2" and "3"** respectively hereto.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed February 5, 2020, at Los Angeles, California.

/s/ Gary E. Klausner
GARY E. KLAUSNER

EXHIBIT 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re VERITY HEALTH SYSTEM OF CALIFORNIA, INC., et al. Debtors.	CV 19-10352 DSF Order DENYING Emergency Motion to Dismiss Appeal (Dkt. No. 2); Order GRANTING Motion to be Named as Appellee (Dkt. No. 11)

Appellant Strategic Global Management, Inc. has appealed an order of the Bankruptcy Court acknowledging that a certain sale of hospital assets is free and clear from certain requirements that the Attorney General of California wished to impose. Debtors have moved to dismiss the appeal due to waiver and lack of standing.[1]

It is questionable whether any exigency exists that could be meaningfully resolved by dismissal of this appeal. Appellant may or may not close the relevant transaction in a timely fashion. If it doesn't, Debtors may or may not run out of operating cash. The existence of a pending appeal at the time the deal falls through may be relevant to

[1] Because it is a party in interest that actively took part in the proceedings below, the Creditors' Committee's motion to be named as an appellee is GRANTED. But regardless of its right to intervene, the Court declines to consider any additional arguments raised by the Creditors' Committee in its joinder filed on December 17. December 17 was the deadline for Appellant to respond to the emergency motion to dismiss. The Court will not consider substantive arguments to which the Appellant had no opportunity to respond.

sorting out the legal responsibilities of the various parties somewhere in the future, but dismissal of the appeal would not force Appellant to close or cause cash to appear in the Debtors' accounts. Nonetheless, the Court will decide the motion now given that the matter has been briefed and the Court is ruling in favor of the party that opposes the emergency treatment of the motion.

Appellant did not waive its right to appeal the order entered by the Bankruptcy Court by virtue of its joinder in the original motion for relief. Waiver is the "intentional relinquishment or abandonment of a known right." Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S.Ct. 13, 17 n.1 (2017). Appellant (presumably) agreed with the arguments made in Debtors' original motion and the Bankruptcy Court issued an extensive opinion agreeing with the arguments made in that motion. Appellants do not appeal that. Instead, they appeal the final order later entered by the Bankruptcy Court that was a product of an explicit compromise between Debtors and the Attorney General and that did not necessarily provide the entirety of relief requested in the motion. That compromise and order also resulted in the original opinion being vacated. There is no question that Appellants vigorously opposed the entry of the order and claimed that it did not provide them with the protection sought in the motion and to which they are entitled. While Appellants' arguments may ultimately turn out to be meritless, they did not waive the right to appeal an order that allegedly does not provide the result they had joined in seeking.

A party "aggrieved" by an order of a bankruptcy court generally has standing to appeal that order. "An appellant is aggrieved if directly and adversely affected pecuniarily by an order of the bankruptcy court; in other words, the order must diminish the appellant's property, increase its burdens, or detrimentally affect its rights." In re P.R.T.C., Inc., 177 F.3d 774, 777 (9th Cir. 1999) (internal quotation marks omitted). The premise of the appeal is that the order entered by the Bankruptcy Court does not provide the relief Appellant is entitled to as the prospective purchaser of assets from the Debtors. Appellants claim that the deficiencies in the order could expose them either to liability from an action by the Attorney General or to a reduced value of the

assets if the Attorney General asserts the existence of certain obligations on the holder of the assets in the future. Again, these arguments may ultimately be found to be substantively meritless, but Appellant has a pecuniary interest in that determination.

Debtors' assertion that generally a prevailing party has no standing to challenge the language of the lower court decree is incorrect. First, it is clear if a party that receives only some of what it sought, it is entitled to appeal. Forney v. Apfel, 524 U.S. 266, 271 (1998). In its view, Appellant only received part of what it sought or, alternatively, the ambiguity of the Bankruptcy Court's order rendered its purported victory illusory. Debtors' assertions to the contrary are its position on the substance of the appeal – that the order entered by the Bankruptcy Court was sufficient and everything Appellant wanted. In that sense, Debtors' standing argument begs the entire question posed by the appeal. In addition, language contained in an appealable decree – usually the judgment – has long been held to be subject to reformation on appeal by the prevailing party. See Envtl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co., 257 F.3d 1071, 1075 (9th Cir. 2001) (citing Elec. Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241, 242 (1939)). The relevant limitation is that "[a] party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree." Elec. Fittings Corp., 307 U.S. at 242. This is an appeal of the direct applicable language of the appealable decree, not an appeal for a review of unnecessary findings.

The motion to dismiss is DENIED.

IT IS SO ORDERED.

Date: December 20, 2019

Dale S. Fischer

Dale S. Fischer
United States District Judge

EXHIBIT 2

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re VERITY HEALTH SYSTEM OF CALIFORNIA, INC., et al. Debtors.	CV 19-10354 DSF CV 19-10356 DSF Order DENYING Emergency Motions to Dismiss

The emergency motions to dismiss are DENIED. The Court will not consider on an emergency basis two motions filed after hours on December 19, almost two weeks after the filing of the notices of appeal. The motion to dismiss in the related appeal, CV 19-10352, was filed on December 10. A further nine-day delay in filing the other two motions to dismiss is unreasonable, especially when filing on December 19 puts the deadline for opposition on December 26.

IT IS SO ORDERED.

Date: December 20, 2019

Dale S. Fischer

Dale S. Fischer
United States District Judge

EXHIBIT 3

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re VERITY HEALTH SYSTEM OF CALIFORNIA, INC., et al. Debtors.	CV 19-10354 DSF CV 19-10356 DSF Order DENYING Emergency Motions to Dismiss

The emergency motions to dismiss are DENIED. The Court will not consider on an emergency basis two motions filed after hours on December 19, almost two weeks after the filing of the notices of appeal. The motion to dismiss in the related appeal, CV 19-10352, was filed on December 10. A further nine-day delay in filing the other two motions to dismiss is unreasonable, especially when filing on December 19 puts the deadline for opposition on December 26.

IT IS SO ORDERED.

Date: December 20, 2019

Dale S. Fischer
United States District Judge

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is 10250 Constellation Boulevard, Suite 1700, Los Angeles, CA 90067.

A true and correct copy of the foregoing document entitled **REPLY TO OPPOSITIONS TO "STRATEGIC GLOBAL MANAGEMENT, INC.'S . . . MOTION TO STAY ADVERSARY PROCEEDING"** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On **February 5, 2020**, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

- James Cornell Behrens jbehrens@milbank.com, gbray@milbank.com;mshinderman@milbank.com;dodonnell@milbank.com;jbrewster@milbank.com;JWeber@milbank.com
- Gary E Klausner gek@lnbyb.com
- Jeffrey S Kwong jsk@lnbyb.com, jsk@ecf.inforuptcy.com
- Samuel R Maizel samuel.maizel@dentons.com, alicia.aguilar@dentons.com;docket.general.lit.LOS@dentons.com;tania.moyron@dentons.com;kathryn.howard@dentons.com;joan.mack@dentons.com;derry.kalve@dentons.com
- Tania M Moyron tania.moyron@dentons.com, chris.omeara@dentons.com;nick.koffroth@dentons.com;Sonia.martin@dentons.com;Isabella.hsu@dentons.com;lee.whidden@dentons.com;Jacqueline.whipple@dentons.com
- United States Trustee (LA) ustpregion16.la.ecf@usdoj.gov

2. SERVED BY UNITED STATES MAIL: On **February 5, 2020**, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on **February 5, 2020**, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Served via Attorney Service
The Honorable Ernest M. Robles
United States Bankruptcy Court
Edward R. Roybal Federal Building
255 E. Temple Street, Suite 1560
Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

February 5, 2020	Lisa Masse	*/s/ Lisa Masse*
Date	*Type Name*	*Signature*