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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.*,[3] Debtors and Debtors in Possession.	On Appeal from the United States Bankruptcy Court for the Central District of California (Bankr. Lead Case No.: 2:18-bk-20151-ER) **APPELLANT'S REPLY BRIEF**

[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.

[3] 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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STRATEGIC GLOBAL MANAGEMENT, INC., Appellant, v. STATE OF CALIFORNIA; VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al*. Appellees.	Judge: Hon. Dale S. Fischer Place: Courtroom 7D, 350 W. First Street, Los Angeles, CA 90012

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INTRODUCTION

Appellees (Debtors, the California Attorney General (the "AG") and the Committee of Unsecured Creditors (the "Committee")) try hard to convince this Court not to exercise its jurisdiction over these consolidated appeals. They spend the first half of their brief raising theory after theory in support of this argument, but (as we explain in section III, *infra*), all of their theories are meritless.

Appellees begin their brief with a serious mischaracterization of the record, stating that "SGM's appeals from the… AG and Scheduling Orders are, *in the words of the bankruptcy court*, 'defective and frivolous.'" (JAB 1-2, citing RJN, Ex. L. at 11, emphasis added.) The bankruptcy court made no such statement. The citation is to the bankruptcy court's summary of *Verity's position* with respect to SGM's motion to stay the adversary proceeding pending the resolution of its appeals. Appellees follow this misrepresentation with page after page of inflammatory and misleading statements of fact and law.

As to the three orders on appeal, Appellees argue on the one hand that they are moot and ineffectual, and on the other, that they are proper and should be affirmed on the merits. Because the bankruptcy court entered the orders erroneously, and because Appellees continue to rely on them in pursuing their damages claims against SGM and other defendants (seeking tens of millions of dollars), this Court should vacate or reverse them in this proceeding.

This Court can (and SGM respectfully submits, should) also conclude that SGM was not "obligated" to close the sale on December 5 because the undisputed facts show, as a matter of law, that Debtors failed at the very least to meet the obligations of APA §§ 8.6 and 8.7 as of November 19, 2019, the date by which the bankruptcy court ruled that all conditions to closing were satisfied.

TERMINOLOGY

Appellees refer to the November 27 Order concluding that Debtors had met all of the conditions precedent to sale of the hospitals, including §§ 8.6 and 8.7, such that SGM was "obligated" to close on December 5, as the "MAE Order." They refer to the November 18 Order, which held that the November 14 Order was "final and nonappealable" and that SGM was estopped from appealing it as the "Scheduling Order." They refer to the November 14 Order regarding the AG's "Additional Conditions" as the "AG Order."

Because Appellee's nomenclature misconstrues the contents and effect of each order, SGM continues to refer to the orders by date and content.

STANDARD OF REVIEW

Appellees' recital of the standard of review is incomplete and misleading. They address only findings of fact (JAB 19), while the lion's share of issues on appeal are legal issues reviewed de novo. (*See* Appellant's Opening Brief ("AOB") 19).

LEGAL DISCUSSION

I. Debtors fail to refute SGM's showing that the November 18 and 27 orders were issued without due process.

SGM demonstrated in its opening brief that it was denied due process as to the November 18 and 27 Orders because both were entered without notice to SGM or meaningful opportunity to be heard.[4]

A. Due Process applies with full force here.

Appellees start by suggesting that SGM was entitled to something less than constitutional due process because 11 U.S.C. § 102(1)(A) requires notice and hearing "as appropriate in the particular circumstances." (Joint Answering Brief ("JAB") 45.) But that section does not reduce the due process rights of

[4] SGM does not argue that the November 14 Order was issued without due process.

parties in bankruptcy. As set forth in SGM's opening brief, such parties are entitled to the same due process as parties appearing in Article III courts. (AOB 6-7, 24-25, citing cases.)

Appellees also suggest that SGM was not entitled to due process because the orders were interlocutory. (JAB 46.) As explained below, pages 17-20, they were final, not interlocutory. And the case cited by Appellees, *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950), cannot be understood to say that due process applies only (or even only fully) when decisions are final. *Mullane* does not even address the interlocutory issue, and the rule that Appellees infer is contrary to the very concept of due process.

B. There is nothing to support Appellees' argument that SGM received any, let alone adequate, due process with respect to the November 18 and 27 Orders.

1. The November 18 Order.

As a preliminary matter, Appellees do not dispute that: (1) no party asked the bankruptcy court to decide if: (a) SGM waived its right to appeal the November 14 Order or if that order was "final and non-appealable" upon entry, or (b) all conditions to closing had been satisfied as of November 19; (2) the bankruptcy court never advised the parties that it intended to make a ruling on either of those issues before doing so; (3) the bankruptcy court did not provide the parties with the opportunity to present evidence, file briefs, or participate in argument regarding these issues; (4) the bankruptcy court did not conduct a hearing before ruling on these issues and (5) the bankruptcy court accepted and relied upon an exchange of letters between counsel (filed over SGM's objection) in place of briefs.

Appellees nevertheless argue that the bankruptcy court's tentative ruling of November 12, 2019, regarding SGM's objection to language in the Supplemental Sale Order proposed by Debtors and the AG, gave SGM notice with respect to the

November 18 order (JAB 51-52). This argument is incomprehensible. The November 18 Order declared that SGM could not appeal the November 14 Order because it was "final and nonappealable," and that SGM was judicially estopped from challenging the order in any event. (AA1545-1546.).

Neither the November 12 tentative ruling or anything else put SGM on notice that the bankruptcy court was going to address or decide either of these issues on November 18, nor did SGM get a hearing or opportunity to brief these issues before the bankruptcy court made its ruling *sua sponte*.

2. The November 27 Order.

a. This Order is not properly characterized as a "MAE" order.

In the November 27 Order, the court ruled, *sua sponte*, that, as of November 19, 2019, Debtors had met all of the conditions precedent to closing the sale, including § 8.7 (which it addressed summarily in a footnote) and that SGM was therefore obligated to close by December 5, 2019. (AA1611-1612.).

Appellees refer to this Order as the "MAE [Material Adverse Effect] order," but this term is misleading. The term "Material Adverse Effect" is used throughout the APA to refer to regulatory matters, such as "licenses, permits and authorizations from governmental agencies or governmental bodies that are required for the purchase, sale and operation of the Hospitals." APA Article 2; *see also, e.g.,* § 4.6 [operation of the hospitals]. Section 8.4 precludes violations that would have a "material adverse effect upon the Hospitals, taken as a whole (a "Material Adverse Effect").

Such regulatory violations are distinct from the affirmative conditions set forth in §§ 8.6 and 8.7, which required the Sellers to obtain specific rulings or agreements from the AG, CMS, and the Department. Debtors' failure to meet such conditions cannot be eliminated on the ground they are not "material" to the

operation of the hospitals, because they have nothing to do with the hospitals; they directly affect the rights of SGM under the APA.

The bankruptcy court's November 27 Order thus cannot properly be termed a "MAE" order because it purports to resolve both types of condition—regulatory (subject to "MAE") and contractual (not subject to "MAE").

b. The bankruptcy court deprived SGM of due process.

Contrary to Appellees' assertion (JAB 51-52), the bankruptcy court's tentative ruling of November 12, inquiring about competing versions of the Supplemental Sale Order required by § 8.6, did not put SGM on notice that the court planned to resolve a broad-ranging contract dispute involving § 8.7 or the regulatory issues identified by health care firm Hooper Lundy, which had yet to be analyzed by counsel or submitted to the court.

No more effective were Debtors' request for a status conference on Debtors' Proposed Disclosure Statement (a proceeding in which SGM was not participating) or Debtors' statement, in their status report, that they intended to seek an expedited procedure for deciding "the Material Adverse Effects" dispute. This was a request for a procedure, not a request to decide the Hooper Lundy issues point blank, or to decide whether § 8.7 had been satisfied, without briefing or expert testimony. (AA01557-01561.)

Finally, contratry to Appellees' contention, Debtors' eleventh hour submission (over SGM's objection) of letters between counsel referring to Hooper Lundy's findings along with a secret document that SGM still has not seen, cannot substitute for notice by the court that it planned to decide all outstanding contract issues at a status conference.

Appellees ignore the bankruptcy court's statement in the November 27 Memorandum Decision that it would not entertain an adversary proceeding if SGM were to file one, but would dismiss it for failure to state a claim (AA01608,

fn 4), effectively granting the Debtors summary adjudication of a lawsuit that had yet to begin.

Next, Appellees argue that SGM cannot show "prejudice" (JAB 55-56), but the prejudice is self-evident: the bankruptcy court set SGM up for a breach of contract suit by Debtors after making sua sponte rulings purporting to adjudicate SGM's "obligation" to close on December 5.

Finally, Appellees cite the bankruptcy court's statement, in its December 9 order denying Debtors' requested OSC re Contempt, that SGM would have the right, in the future, to litigate whether its failure to close the sale was a breach of contract. (JAB 23-24.) This by no means nullifies the court's flagrant denial of SGM's due process rights. True, SGM would have had the "opportunity" to defend against Debtors' lawsuit for breach of contract, but that opportunity would have been crippled by the Court's November 18 and November 27 rulings. Indeed, were it not for these appeals, Debtors would be using these orders to support a motion for summary judgment.

In sum, Appellees fail to show that SGM received any (never mind adequate) notice or opportunity to be heard. The November 18 and 27 Orders must therefore be reversed or vacated as a procedural matter.

c. The bankruptcy court was not entitled to withhold due process based on its § 105(a) authority.

Appellees then argue that the bankruptcy court was not required to give SGM due process because the November 18 and 27 orders "were necessary and appropriate to enforce and implement the Sale Order[,]" and thus within the bankruptcy court's inherent authority to issue. (JAB 57-58, citing 11 U.S.C. § 105(a) .)

Section 105 gives the bankruptcy court authority to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. *Law v. Siegel*, 571 U.S. 415, 420–21 (2014) (citing

§ 105(a)). But § 105(a) is not an open-ended permit to do anything a bankruptcy court thinks "necessary or appropriate. *Id*. ("in exercising those statutory and inherent powers, a bankruptcy court may not contravene specific statutory provisions.") Appellees cite no authority for the proposition that the bankruptcy court may, pursuant to its § 105 authority, ignore due process and make substantive rulings purporting to adjudicate a contract dispute without proper notice or opportunity to be heard.

If the bankruptcy court were entitled to do what Appellees suggest, it could just skip all proceedings following issuance of the sale order and enter judgment. This Court should reject Appellees' "Hail Mary" due process argument.

II. This Court can and should determine as a matter of law that Debtors failed to meet all necessary preconditions to closing the sale by November 19.

SGM demonstrated in its opening brief that the bankruptcy court's November 27 order should be reversed because the court erred in concluding that Debtors had satisfied all conditions precedent to closing the APA as of November 19, 2019. (JAB 4.) As of that date there were at least two closing conditions that had not been satisfied: APA §§ 8.7 and 8.6. Appellees fail to show otherwise.

A. The undisputed facts demonstrate that Debtors failed to meet the requirements of APA § 8.7.

Appellees make two critical concessions in their appeal brief (JAB 39). First, they acknowledge that APA § 8.7 required, as a closing condition, that Verity obtain a "settlement agreement" with DHCS providing for a transfer of Verity's Medi-Cal Provider Agreements with DHCS granting as to SGM the "full satisfaction, discharge and release" of any claim DHCS could have asserted against Verity. Second, Appellees concede that Verity had not obtained any such settlement agreement as of November 19. (*See* JAB 39 [asserting that "a settlement agreement was not the only means of satisfying Section 8.7"], footnote

omitted.) These admissions should put to rest any claim that Debtors had satisfied APA § 8.7 as of November 19. (AA0147.)

Appellees' concession is not contradicted by footnote 15 of their brief, which misleadingly states that, "*on November 22, 2019*, Debtors reached a *Court-approved settlement agreement* with DHCS." (JAB 39, emphasis added) The bankruptcy court did not approve any settlement agreement until Verity and DHCS signed and filed one on *December 9, 2019* (the document cited at JAB 39) 20 days after the date by which the court found all conditions had been satisfied and five days after the date the court ruled SGM was "obligated" to close. (Appellant RJN Ex. 4 & 5.) As Verity's own counsel stated at a hearing on November 26, all that Verity had, as of that date, was a "settlement in principal," the terms of which were not and never have been disclosed. (AA 01591.).

Appellees unsuccessfully attempt to defend the bankruptcy court's erroneous conclusion that § 8.7 had been satisfied by November 19 in the absence of the requisite settlement agreement by cobbling together incomplete segments of two orders and a superseded memorandum decision: (1) the May 2, 2019 "Sale Order" (AA0739-0765); (2) the October 11, 2019 "Transfer Order" granting Debtor's motion to transfer the Medi-Cal Provider Agreements to SGM (AA1460-1465); and (3) a September 26, 2019 memorandum decision filed in connection with Verity's request for leave to transfer the Medi-Cal Provider Agreement to SGM "free and clear" (Augment Mot. Ex. 5). Appellees argue that these, along with Verity's discussions with DHCS, demonstrate "material" compliance with § 8.7 as of November 19, 2019. (JAB 37-39.)

The argument fails on several levels. First, § 8.7 does not provide that court orders and memoranda may serve in place of a settlement agreement executed by DHCS. (AA0147.) In interpreting a contract under California law, a court must first look to the plain meaning of the contract's language. I Cal. Civ. Code §§ 1638, 1644. "When a contract is reduced to writing, the intention of the parties is

to be ascertained from the writing alone, if possible[.]" *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 787–88 (9th Cir. 2008) (citation omitted).[5] SGM bargained for a settlement agreement committing DHCS to release any claim it could have asserted against SGM. SGM did not bargain for the opportunity to make arguments in future litigation with the AG based on language extracted from court orders and a memorandum.

Even if court orders could substitute for the required settlement agreement, contrary to the plain language of the APA, the orders on which Appellees rely fall fatally short. As Appellant explained in its opening brief (AOB 30-32), the May 2 Sale Order and October 11 Transfer Order, read alone or in conjunction with each other and/or the court's September 26 Memorandum Decision, fail to satisfy the critical condition that § 8.7 unequivocally requires: namely, the "full satisfaction, discharge and release of any claims … DHCS had against Verity or SGM for monetary liability[.]" (AA0147.)

The documents on which the court and Appellees rely expressly *reserve* the issue of DHCS' right to recoup from SGM any monies owed by Verity, which, as of November 19, 2019, exceeded $70 Million. (AA0782-0784.) As set forth below and in the opening brief, Appellees simply ignore the relevant language pointed out by SGM.

The May 2, 2019 Sale Order. Before the sale was approved in May 2019, DHCS filed an objection to Verity's motion for leave to transfer its Medi-Cal Provider Agreements to SGM without having to treat them as "executory contracts" under Bankruptcy Code § 365. (AA01-077.) That Code section would

[5] California law also "holds that 'even if the trial court personally finds the document not to be ambiguous, it should preliminarily consider all credible evidence to ascertain the intent of the parties.'" *Guidiville*, 531 F.3d at 788 (citations omitted). Here, there was no assertion or finding that the language was ambiguous, nor did the bankruptcy court receive or review any evidence. The bankruptcy court just decided in a footnote that "Debtors section 8.7 materially complied with Article 8.7." (AA1609, fn.7.)

have required Verity to "cure" all defaults to DHCS, which, at the time, totaled tens of millions of dollars. Instead, Verity proposed to transfer the provider agreements as non-executory contracts, which would have allowed Verity to transfer the provider agreements "free and clear" of all claims, liens, encumbrances and recoupment rights pursuant to Bankruptcy Code § 363(f). The bankruptcy court did not rule on this issue when it entered the Sale Order on May 2, 2019. (AA 0762-0763, ¶ 31.) Instead, it reserved that issue and all related issues for future determination:

> *Nothing in this Sale Order shall apply to Medi-Cal 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 objections*." (AA0763, ¶ 31) (emphasis added).

Appellees remarkably fail to acknowledge this language in their brief. The bankruptcy court's broadly stated reservation cannot be reconciled with Appellees' assertion that the Sale Order "resolved Medi-Cal's recoupment rights." (AJB 38.)

The October 11, 2019 Transfer Order. Appellees concede that the October 11, 2019 Transfer Order "did not address or resolve Medi-Cal's recoupment rights, if any, against SGM[.]" (JAB 38.) Indeed, the Transfer Order expressly reserved the issue of recoupment for later determination:

> [N]*othing in this paragraph shall be construed to limit whatever rights DHCS may or may not have to withhold, under principals of equitable recoupment*, *payments owed by DHCS* to the Debtors and/or to the SGM Buyers[.] (AA01464: 6-10, 16-20, emphasis added.)

Nevertheless, Appellees contend that "such resolution was unnecessary because those rights had previously been resolved in the Sale Order." (*Id.*) As shown above, however, this is simply not so.

In sum, neither the May 2, 2019 Sale Order nor the October 11, 2019 Transfer Order can be read, independently or together, to satisfy § 8.7's condition that Verity obtain a "settlement agreement" providing for a full discharge and release of any claims that could be asserted against SGM.

The bankruptcy court thus erred in relying on the Transfer Order to support its November 27 ruling that all closing conditions had been satisfied and that SGM was obligated to close the sale on December 5, 2019 (AA 01609, fn. 7.) Like Appellees, the bankruptcy court failed to acknowledge that its earlier orders left open the recoupment issue for future resolution.

The September 26 Memorandum Decision. This decision has no bearing on Verity's satisfaction of § 8.7. First of all, it was superseded by the October 11, 2019 Transfer Order (AA01460-01465), which, as Appellees acknowledge, expressly reserved for later resolution DHCS' recoupment rights against SGM. In any event, the court expressly stated that this decision did not determine DHCS' recoupment rights against SGM: "the [APA] … provides that the sale cannot close unless issues regarding alleged financial defaults existing under each Provider Agreement has been resolved." (AA0881; *see also* AA01464.) As stated in the Transfer Order, "The [September 26] 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." (AA1464, fn. 2.) The issue was never resolved.

Furthermore, Verity acknowledged in its September 2019 briefs, before the court issued its Memorandum Decision, that the Sale Order did not protect SGM from DHCS' potential claims. (AA0876 ["[E]ven if the Court were to find that recoupment survives the sale, the Court's Order should state that the DHCS's recoupment rights against SGM if any, could be exercised only after DHCS recouped from payments due to the Debtors from Medi-Cal."].) Verity was thus well aware that the court had not yet resolved the issue of whether Verity could

transfer the Provider Agreements "free and clear," and whether such a transfer would eliminate or satisfy DHCS' recoupment rights.

In sum, there was no "settlement agreement" and no basis for concluding that any or all of the documents on which Appellees rely satisfied the closing condition of § 8.7. Had SGM gone to a closing on December 5, as the bankruptcy court said SGM was obligated to do, SGM would have closed the sale with a $70 million recoupment risk.

B. There is nothing to support the conclusion that Debtors met the requirements of APA § 8.6.

APA § 8.6 required Verity to obtain a "final, non-appealable" Supplemental Sale Order finding that the transfer of Verity's assets to SGM free and clear of Additional Conditions, *i.e.* conditions imposed by the AG in addition to those that the parties had agreed upon, as listed in APA Schedule 8.6. (AA0146.) As of November 19, 2019 (the date the bankruptcy court concluded that all closing conditions had been satisfied), the Supplemental Sale Order entered on November 14, 2019 had not become "final and non-appealable." (AA1531-33.) Bankruptcy Rule 8002(a)(1) provides a 14-day time period to file an appeal from an order entered by the bankruptcy court. As of November 19, 2019, the time to appeal had not even run. Because SGM timely appealed the November 14 order, the order could not be "final" until this Court ruled (or until any and all further appeals were exhausted). Consequently, as of November 19, 2019, the condition set forth in APA § 8.6—that a Supplemental Sale Order be final and non-appealable—had not been satisfied. (AA0146.)

For the foregoing reasons, and those set forth in the opening brief, this Court should reverse the bankruptcy court's November 27 Order and conclude that Verity had not satisfied *all* of the closing conditions set forth in the APA as of November 19, 2019.

C. This Court may consider Bankruptcy Rule 9019.

While SGM did not cite Bankruptcy Rule 9019 specifically in objecting to the deal made between the AG and Debtors, courts in this Circuit "may consider an issue raised for the first time on appeal if "the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court." *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990). The issue raised here is purely one of law, and does not prejudice Debtors.

Appellees argue the agreement between the AG and Debtors was not a "settlement" because Debtors gave up nothing of value. (JAB 42-43.) Instead, they gave up something of value to *SGM*. But selling out a third party is not a means to evade the procedures for satisfying the standards governing settlements—namely, Rule 9019 and *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986) ("*A&C*"), which requires, *inter alia*, a motion asking the bankruptcy court to approve the settlement based on consideration of Rule 9019 factors. *Id.*

III. Appellees' attempts to foreclose this Court's review are all meritless.

Appellees concede this Court has jurisdiction over SGM's consolidated appeal (JAB 1), but urge it to "decline" to exercise that jurisdiction for a variety of reasons, which they frontload in their appeal brief (*see* JAB 6-7, 20-32). All of their arguments are meritless.

A. The appeals are final, not interlocutory.

Although Appellees concede up front that this Court has jurisdiction (JAB 1), they later argue that it lacks jurisdiction because, they claim, the three Orders are "interlocutory," because the bankruptcy court told the parties after the appeals were filed that the November 18 and 27 Orders (the ones issued without due process) were merely advisory and not intended to have collateral estoppel effect. (*See* JAB 23-24, quoting the bankruptcy court's assertion that "[t]he Orders do not adjudicate whether SGM breached the APA; nor do the Orders contain findings

that compel the [bankruptcy court] to rule in the Debtors' favor with respect to [the adversary complaint].") The bankruptcy court's retrospective reimagining of its own orders, made after jurisdiction had transferred to this Court, is ineffectual and irrelevant.

SGM agrees that the November 18 and 27 Orders should be jettisoned, not because of the bankruptcy court's remarks about the "meaning" of its rulings, but because the bankruptcy court failed to accord SGM due process when it issued them and because they are wrong as a matter of law. In any event, the court's remarks do not render the orders interlocutory.

All three Orders are final for purposes of bankruptcy. As the U.S. Supreme Court reiterated this year, "The ordinary understanding of 'final decision' is not attuned to the distinctive character of bankruptcy litigation." *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S.Ct. 582, 586 (2020). A bankruptcy case "encompasses numerous 'individual controversies, many of which would exist as stand-alone lawsuits but for the bankrupt status of the debtor.'" *Id*. (quoting *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501 (2015)). "It is thus common for bankruptcy courts to resolve discrete controversies definitively while the umbrella bankruptcy case remains pending." *Id*. at 586-87.

Accordingly, courts in this Circuit use a "flexible and pragmatic approach" to determine whether a bankruptcy court's order is final. *In re Perl*, 811 F.3d 1120, 1125 (9th Cir. 2016). The *Perl* court explained that a bankruptcy order is final for purposes of intermediate appellate review when it "1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed." *Id*. at 1126 (citation omitted, cleaned up). Applying this test, the *Perl* court held the BAP had properly exercised jurisdiction over the bankruptcy court's determination that the appellant had violated the automatic stay, because the ruling could subject appellant to money damages: "Notwithstanding the fact that no financial penalty or sanction has yet been

assessed against [the appellant], the bankruptcy court's determination … is a substantive ruling with real effects, including money damages that could be sought by Perl indefinitely." *Id*. at 1126-27 (affirming the BAP).

Applying the test here, this Court should conclude that the orders are final. As in *In re Perl*, they dispose of discrete issues involving interpretation of the APA. They also affect SGM's substantive rights, because they purport to finally resolve issues regarding Verity and SGM's obligations under the APA and expose SGM to the prospect of money damages. The November 27 order states unequivocally that Debtors had satisfied all conditions precedent to closing as of November 19, 2019, and that SGM was therefore "obligated" to close the sale on December 5, 2019. (AA01611-01612; AA01609.) What subsequent court or party would not infer that SGM would be in breach of the APA if it did not close by December 5? The November 14 and 18 orders likewise dispose of discrete issues relating to the AG's approval of the sale, and expose SGM to potential money damages, because they conclude that Debtors met their obligations under APA § 8.6. Finally, the very concept of interlocutory means that there is a matter pending which has yet to be finally resolved. Here, there was nothing pending when the court entered its November 18 and November 27 Orders.

Although the bankruptcy court later advised the parties—in a tentative ruling issued in connection with its denial of SGM's motion to stay the adversary proceeding pending appeal—that it issued the orders just to get the sale closed, and did not mean to imply anything about breach (Appellee's RJN Ex. L.), that is not how the orders read, nor do these subsequent statements prevent them from being enforced. Furthermore, as the court acknowledged, it had no jurisdiction to vacate or modify orders on appeal when it made its remarks. *See* (*id*.)

Although Debtors orally assured the bankruptcy court that they would not rely on the orders and profess here that the orders do not harm SGM, they have been relying on the orders to support their breach claims ever since December 5,

2019—the day the bankruptcy court ruled (in its November 27 order) that SGM was obligated to close. Debtors immediately filed an emergency contempt motion asking the bankruptcy court to enforce its November orders. When that failed, they filed an adversary proceeding, which is now before this Court, seeking damages for breach based largely on the three orders at issue on appeal. And in their brief on appeal, they ask this Court to dismiss the appeals or affirm the bankruptcy court's orders (JAB 59), either one of which would preserve the orders for use in the pending litigation.

In sum, this Court should reject the argument that it lacks jurisdiction over the three final orders on appeal.

B. The consolidated appeal is not moot.

Appellees also argue that the appeal is moot, citing as authority the bankruptcy court's conclusion that "'[i]t is no longer possible for the Debtors to close the transaction contemplated by the APA.'" (JAB 21, quoting the court.)

But SGM is not seeking by these appeals to close the sale, and this Court *can* grant effective relief: it can reverse orders that Debtors are using as ammunition in their pursuit of tens of millions of dollars in damages from SGM. The appeal is thus not constitutionally moot.

Appellees also argue that the appeal is equitably moot because SGM did not seek to obtain a stay of any of the Orders. (JAB 21-23.) Seeking a stay makes sense when execution of a bankruptcy plan is likely to transpire and result in the distribution of an estate's assets, such that relief would entail retrieving funds already disbursed to its creditors, as in the cases cited by Appellees. (*See id*. at 23, citing *In re Thorpe Insulation Co*., 677 F.3d 869 (9th Cir. 2012) and *In re Roberts Farms, Inc*., 652 F.2d 793 (9th Cir. 1981).)

But this is not such a case, nor is seeking a stay invariably required to avoid equitable mootness. The relief sought by SGM does not require retrieving funds already dispensed; it affects only a yet-to-be determined claim for damages for

breach of contract. Furthermore, Appellees do not explain how staying one or more of the orders could have prevented Verity from unilaterally terminating the APA or looking for other buyers.

C. SGM did not waive any appellate rights.

1. SGM did not waive its right to appeal the November 27 order.

As discussed in the opening brief, the bankruptcy court decided *sua sponte* that SGM had waived its right to appeal the November 27 Order because APA § 9.1(c) provides for the bankruptcy court to "exclusively settle[]" disputes in connection with the termination of the agreement for Material Adverse Effects. (AA01606.) Without hearing from the parties, the court interpreted these words to mean, contrary to the plain language rule, "that only the Bankruptcy Court and no other court (*including any appellate court*) is entitled to determine Material Adverse Effect issues," and apparently, issues regarding the non-regulatory conditions set forth in APA §§ 8.6 and 8.7. (AA 01606, emphasis added).

On appeal, Appellees rely on the above-cited language and on the language of APA § 12.3, which provides that "*so long as Sellers are subject to the jurisdiction of the Bankruptcy Court*, the parties irrevocably elect, as the sole judicial forum for the adjudication of any matters, arising under or in connection with the [APA], and consent to the exclusive jurisdiction of the Bankruptcy Court." (JAB 25-26, emphasis added.) This argument can be rejected out of hand because the provision starts by stating it applies *only* "so long as Sellers are subject to the jurisdiction of the Bankruptcy Court." Once SGM noticed its appeal from the November 27 Order, the parties were no longer "subject to the jurisdiction of the Bankruptcy Court" with respect to the issues raised by that Order, because the bankruptcy court had been divested of juridiction. *See Rodriguez v. Cty. of Los Angeles*, 891 F.3d 776, 790 (9th Cir. 2018) ("'[t]he filing of a notice of appeal … confers jurisdiction on the court of appeals and

divests the [lower] court of its control over those aspects of the case involved in the appeal.'") (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982)); *see id.* at 790-91 (divestiture rule is "mandatory" as applied to issues that have been placed before a court of appeals).

Turning to the language of APA § 9.1(c), Appellees acknowledge that waiver entails the "intentional relinquishment" of a known right. (JAB 26; *see Hamer*, 138 S. Ct. at 17 n.1). The problem for Appellees is that the language of § 9.1 says nothing about relinquishing appellate rights. An agreement to have the bankruptcy court "exclusively settle[]" disputes in connection with certain claims has never been construed as a waiver of the right to appeal the court's decision. In this context, that provision simply serves as an election of forum—the bankruptcy court will decide the issue in the first instance, rather than a state court.[6]

Appellees cite numerous cases in which waiver of the right to appeal was found based on language expressly and unequivocally waiving that right. (*See* JAB 26-28, citing *Throne v. Citicorp Inv. Servs. Inc.*, 378 F. App'x 629, 631 (9th Cir. 2010) (parties agreed to "*waive their right to appeal* or seek other judicial review ...."); *U.S. Consol. Seeded Raisin Co. v. Chaddock & Co.*, 173 F. 577, 578 (9th Cir. 1909) (parties agreed that "the judgment ... *shall not be appealed* from") (emphasis added); *Minesen Co. v. McHugh*, 671 F.3d 1332, 1343 (Fed. Cir. 2012) ("[d]ecisions of the Armed Services Board of Contract Appeals are final and are *not subject to further appeal*.") (emphasis added); *Slattery v. Ancient Order of Hibernians in Am., Inc.*, No. 97-7173, 1998 WL 135601, at *1 (D.C. Cir. Feb. 9, 1998) (parties agreed "*not to appeal any*

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[6] Argumetns often arise as to whether a bankruptcy court has exclusive jurisdiction or whether it shares jurisdiction with the state court. *E.g.*, *Engelbrecht v. Wildman*, 268 F.2d 133, 134 (9th Cir. 1959). Parties thus agree among themselves that the bankruptcy court will have exclusive jurisdiction over certain aspects of litigation. They do not thereby waive their right to appeal, and Appellees fail to cite to any case concluding otherwise.

decision by the district court relating to … attorneys' fees and costs.") (emphasis added); *In re Lybarger*, 793 F.2d 136, 139 (6th Cir. 1986) (parties agreed to "*waive any and all rights of appeal* with respect to such determinations.") (emphasis added); *Goodsell v. Shea*, 651 F.2d 765, 766 (C.C.P.A. 1981) (parties agreed to "*waive[] any and all rights of appeal* from any such decision.") (emphasis added)). There is no such language here.

Appellees also cite *In re Odyssey Contracting Corp.*, 944 F.3d 483 (3d Cir. 2019) (JAB 28), a recent Third Circuit case deciding that the parties waived the right to appeal by stipulating to withdraw certain claims with prejudice and "conclude the matter in all respects" if the bankruptcy court were to decide the debtor was the breaching party. *Id.* at 483, 487-88. The Third Circuit rejected debtor Odyssey's arguments that a waiver of appeal must be clear and unequivocal, a proposition well-settled in this and most Circuits. Instead, it applied "the well-established principle that a party cannot appeal from a *consent judgment* if it did not expressly reserve its right to do so." *Id.* at 488-89 (citation omitted) (emphasis added). A petition for *certiorari* is pending.[7]

Although the Third Circuit found there was no significant distinction between a consent judgment and the bankruptcy litigation agreement in *Odyssey*, *id.* at 489, no Ninth Circuit court has ever applied consent judgment rules to other types of agreement. The Ninth Circuit has also *rejected* arguments that a party waives its right to appeal by agreeing that a bankruptcy court's decision will be "final and conclusive." *R.R. Credit Corp. v. Ecker*, 152 F.2d 418, 421 (9th Cir. 1945). This Court should decline the invitation to apply the Third Circuit's peculiar reasoning here.

Appellees argue that *Aerojet-General Corp. v. AAA*, 478 F.2d 248 (9th Cir. 1973), cited by SGM, is inapposite because it is an arbitration case and

[7] A petition for *certiorari* was docketed on March 30, 2020.

arbitration promotes different policies than bankruptcy. (JAB 27.) SGM cited the case because the issue of whether a party waived its appellate rights is rarely addressed in civil cases except in the arbitration context. Appellees do not say why the policy differences between arbitration and bankruptcy have any bearing on the right to appeal. If anything, the right to appeal a bankruptcy court order to an Article III court is entitled to more protection than in arbitration, where appellate rights are limited and frequently waived by the parties.[8]

This Court should reject Appellees' waiver argument because the APA contains no clear and unmistakable language waiving the right to appeal.

2. As this Court has already ruled, SGM did not waive its right to appeal the November 14 order.

In December 2019, this Court denied all of Verity's emergency motions to dismiss these appeals, and in doing so expressly rejected Debtors' argument that SGM waived its right to appeal the November 14 order regarding the fate of the AG's "Additional Conditions." (Distr. Ct. CV-10356 Dkt. # 14 ("There is no question that Appellants vigorously opposed the entry of the [November 14] 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 [on the merits] 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.").

Appellees nevertheless persist in pressing this meritless argument. (JAB 30-31.) As discussed in the opening brief (AOB 26-27), the bankruptcy court concluded that SGM had no right to appeal based on the court's *sua sponte* decision in its November 18 Order that the November 14 Order was a "final

[8] The case Appellees cite, *In re Wal-Mart Wage & Hour Employment Practices Litig.*, 737 F.3d 1262 (9th Cir. 2013), sheds no light on the matter—it discusses only arbitration.

nonappealable order." (AA01543-47; AA01548-49.) The time to appeal the November 14 order had not run, and there is nothing to support Appellees' argument that SGM intentionally and knowingly abandoned its right to an Evaluation Period under APA § 8.6, or to appeal an order compromising its rights under that section.

D. The bankruptcy court erroneously invoked the doctrine of judicial estoppel.

This argument applies to the November 18 Order and memorandum decision, in which the bankruptcy court ruled that SGM was "estopped" from challenging the November 14 order regarding the AG's attempt to impose additional conditions on the sale. (AA01546-01547.)

As a preliminary matter, Appellees misleadingly states that the decision to invoke estoppel is reviewed for an abuse of discretion. (JAB 19-20, citing *Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d 1024, 1044 (9th Cir. 2016). But *Kobold* says only this: "We review the district court's *application* of the doctrine of judicial estoppel *to the facts* of this case for an abuse of discretion." *Id*. (citation omitted) (emphasis added). Whether a court properly *invokes* the doctrine in the first place is reviewed *de novo*. *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 992-93 (9th Cir. 2012) ("*First, we determine de novo whether the trial court identified the correct legal rule* to apply to the relief requested. … "[If so,] we then evaluate whether the trial court's application of the correct legal standard was (1) 'illogical,' (2) 'implausible,' or (3) 'without support in inferences that may be drawn from the facts in the record.'") (citations omitted).

Here, the bankruptcy court erred as a matter of law in invoking judicial estoppel, which "'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *Id*. at 993 (quoting *New Hampshire v. Maine*, 532 U.S. 742,

749, (2001)). The Supreme Court has identified three factors to consider in reviewing the invocation of judicial estoppel:

> "First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position .... A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 994 (quoting *New Hampshire*, 532 U.S. at 750-51).

Applying these factors here, it is clear that judicial estoppel was not properly invoked. First, SGM did not take "clearly inconsistent positions in prior judicial proceedings." *Id.* at 996. At the February 2019 hearing cited by the court and Appellees, SGM's counsel addressed his understanding of what would transpire if the AG were to appeal an order rejecting its attempt to condition the sale on additional factors. (Appellees' Appendix 20; AA01546.) That was one of the reasons for adding § 8.6 to the APA in the first place, as explained in the opening brief (AOB 26-27).

SGM's counsel said nothing at the hearing about SGM's own right to appeal. Counsel could not have predicted that the AG, instead of appealing, would relinquish its right to appeal in exchange for Debtors' agreement to replace the bankruptcy court's memorandum decision (to which SGM would not have objected) with a cursory order (to which SGM *did* object).[9]

SGM thus did not change its position when it appealed from the November 18 Order; it simply responded to changed circumstances in a way that

[9] Suppose, for example, that Debtors and the AG stipulated to an order that nullified all Additional Conditions, but then said that the AG could, at a later date, seek a court order imposing such Additional Conditions. Is there any doubt that SGM would have the right to object to such an order and appeal from its entry?

was entirely consistent with its position all along—namely, that SGM should be protected from any attempt by the AG to impose additional conditions on a sale of the hospitals, presently or in the future. Based on the first factor alone, then, judicial estoppel does not apply.

Appellees cannot establish the other two factors, either: they do not show how the bankruptcy court "relied" on SGM's counsel's remarks in entering the May 2, 2019 Sale Order (JAB 29) three months after the February 2019 hearing. Nor do Appellees show how SGM's counsel's remarks had any effect on the bankruptcy court's decision to enter the Sale Order, or how SGM benefitted from the bankruptcy court's apparent misapprehension of its remarks.

Appellees try to show prejudice by asserting that SGM had some nefarious motive for objecting to the November 14 order and for appealing it (JAB 35). But SGM's concerns were serious and well-taken.

SGM's principal objection to the order proposed by the AG (and adopted by the court) was the proviso that the AG's agreement to withdraw its Additional Considerations was "[s]olely and exclusively for purposes of the APA." As SGM explained to Debtors, this could allow the AG to seek to enforce the Additional Conditions later on, *e.g.*, in connection with a subsequent sale or financing transaction involving the acquired assets. SGM also questioned the AG's outright refusal to include SGM's proposed language stating that the sale would be "free and clear of, and [would] not be subject to or conditioned upon SGM's performance of, compliance with, or adherence to, and all of the Additional Conditions[.]" (AA01512.) Had SGM's proposed language been accepted, SGM would have had no basis to object or appeal. If Verity was concerned that SGM's objection to the order was a pretense, Verity could have advocated for SGM's changes and eliminated any potential leverage. Instead, Verity joined forces with the AG to push through an order to which SGM could not agree.

In sum, the bankruptcy court's erroneous invocation of judicial estoppel should be rejected. Even if the bankruptcy court's invocation of judicial estoppel were appropriate (it was not), the foregoing discussion demonstrates that the court's application of the doctrine to the facts was nonetheless "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id*. at 992-93 (cleaned up).

E. SGM has standing to appeal the content of the bankruptcy court's "Additional Conditions" order.

Appellee Committee argues that SGM lacks standing to appeal the November 14 order because, it claims, SGM is "not a person aggrieved" by the order. (JAB 31-32.)[10] At the same time, the Committee joins Appellees in asserting that the same order was intended to benefit SGM. (*See id*., 31-32.) Appellees cannot have it both ways; if SGM was the intended beneficiary of the Order, it certainly has standing to challenge the Order for failing to protect it. *See, e.g*., *Karo v. San Diego Symphony Orchestra Ass'n*, 762 F.2d 819, 821–22 (9th Cir. 1985) (discussing beneficiary standing).

The Committee specifically objects to SGM's appealing the *content* of the November 14 order. (JAB 32.) This issue is partly but not entirely moot; the sale did not take place, but the content as well as the existence of the order affects the outcome of the parties' ongoing dispute as to whether Debtors met the conditions precedent to closing the sale. The Committee apparently concedes that SGM has standing to engage in *that* dispute (*id*.), so its objection is difficult to comprehend. In any event, it is meritless.

[10] The Committee starts by questioning the standing of SGM to appeal any of the orders (AAB 31), but then makes clear it is only talking about what it calls the "AG Order"—*i.e*., the November 14 order (JAB 32).

CONCLUSION

For the foregoing reasons, and those set forth in the opening brief, this Court should:

(1) reverse or vacate the bankruptcy court's rulings of November 18 and November 27, 2019, because they were issued without due process;

(2) determine that SGM was not obligated to close the sale by December because Debtors failed to meet one or more of their conditions precedent to closing under the APA.

Respectfully submitted,

Dated: May 4, 2020

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. Bankr. P. 8015(h), this brief complies with the type-volume limitations of Fed. R. Bankr. P. 8015(a)(7) and Ninth Circuit Rule 32-2(b) because, excluding the parts of the brief excepted by Fed. R. Bankr. P. 8015(g), this brief contains 7,799 words.

2. This brief 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: May 4, 2020

/s/ Gary E. Klausner
GARY E. KLAUSNER

CERTIFICATE OF SERVICE

1. I hereby certify that on May 4, 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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