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Debtors In Possession

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

9 In re

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

11 Debtors and Debtors In Possession.

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

Jointly Administered With:

- CASE NO.: 2:18-bk-20162-ER
- CASE NO.: 2:18-bk-20163-ER
- CASE NO.: 2:18-bk-20164-ER
- CASE NO.: 2:18-bk-20165-ER
- CASE NO.: 2:18-bk-20167-ER
- CASE NO.: 2:18-bk-20168-ER
- CASE NO.: 2:18-bk-20169-ER
- CASE NO.: 2:18-bk-20171-ER
- CASE NO.: 2:18-bk-20172-ER
- CASE NO.: 2:18-bk-20173-ER
- CASE NO.: 2:18-bk-20175-ER
- CASE NO.: 2:18-bk-20176-ER
- CASE NO.: 2:18-bk-20178-ER
- CASE NO.: 2:18-bk-20179-ER
- CASE NO.: 2:18-bk-20180-ER
- CASE NO.: 2:18-bk-20171-ER

Chapter 11 Cases

Hon. Judge Ernest M. Robles

**EMERGENCY MOTION FOR ENTRY OF AN ORDER
(I) AUTHORIZING THE DEBTORS TO (A)
MAINTAIN INSURANCE PROGRAM, (B) PAY
INSURANCE PREMIUMS IN THE ORDINARY
COURSE AND (C) PAY ALL OBLIGATIONS
ASSOCIATED THEREWITH; AND (II) PREVENTING
INSURANCE COMPANIES FROM ENFORCING IPSO
FACTO CLAUSES OR GIVING ANY NOTICE OF
TERMINATION OR OTHERWISE MODIFYING ANY
INSURANCE POLICY WITHOUT OBTAINING
RELIEF FROM THE AUTOMATIC STAY;
MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

[Filed Pursuant to LBR 2081-1(a)(12) and 9075-1(a)]

[Declaration of Richard Adcock in Support of Debtors' First
Day Motions filed concurrently herewith]

- 15 Affects All Debtors
- 16 Affects Verity Health System of California,
Inc.
- 17 Affects O'Connor Hospital
- 18 Affects Saint Louise Regional Hospital
- 19 Affects St. Francis Medical Center
- 20 Affects St. Vincent Medical Center
- 21 Affects Seton Medical Center
- 22 Affects O'Connor Hospital Foundation
- 23 Affects Saint Louise Regional Hospital
Foundation
- 24 Affects St. Francis Medical Center of
Lynwood Medical Foundation
- 25 Affects St. Vincent Foundation
- 26 Affects St. Vincent Dialysis Center, Inc.
- 27 Affects Seton Medical Center Foundation
- 28 Affects Verity Business Services
- Affects Verity Medical Foundation
- Affects Verity Holdings, LLC
- Affects DePaul Ventures, LLC
- Affects DePaul Ventures - San Jose Dialysis,
LLC

Debtors and Debtors In Possession.

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EMERGENCY HEARING:
Date: September 5, 2018
Time: 10:00 a.m.
Place: Courtroom 1568

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1 **EMERGENCY MOTION**

2 Verity Health System Of California, Inc. (“VHS”) and the above-referenced affiliated
3 debtors, the debtors and debtors in possession in the above-captioned chapter 11 bankruptcy cases
4 (the “Chapter 11 Cases”) (collectively, the “Debtors”) hereby move, on an emergency basis (the
5 “Motion”), pursuant to §§ 105, 361, 362, and 363 of title 11 of the United States Code, 11 U.S.C.
6 §§ 101, et seq. (the “Bankruptcy Code”)¹ for entry of an order: (i) authorizing the Debtors to (a)
7 maintain their insurance coverage levels, including authority to revise, extend, supplement, renew
8 or change insurance coverage as needed, (b) pay insurance premiums, self-insured retentions,
9 broker fees and deductibles in the ordinary course of business and (c) pay certain administrative
10 obligations associated therewith; (collectively, the “Insurance Obligations”); and (ii) preventing
11 insurance companies from enforcing any *ipso facto* clauses or giving any notice of termination or
12 otherwise modifying or cancelling any insurance policies without first obtaining relief from the
13 automatic stay imposed by § 362. In support of the Motion, the Debtors have separately filed the
14 Declaration of Richard Adcock in Support of First Day Motions (the “Adcock Declaration”).

15 **SUMMARY OF REQUESTED RELIEF**

16 The Debtors request that the relief sought herein be granted on an emergency basis because
17 they will suffer immediate and irreparable harm without the relief requested in this Motion. The
18 maintenance of the Debtors’ insurance coverage is vital to the operation of the Debtors’ business,
19 the hospitals operated by the Debtors, and to the health, welfare, safety and security of the patients
20 who seek medical care therein. Payment of the Insurance Obligations is necessary to maintain the
21 Debtors’ insurance coverage postpetition and must be made to avoid immediate and irreparable
22 harm. Thus, “exigent circumstances exist justifying an expedited hearing,” pursuant to Rule 2081-
23 1(a)(12) of the Local Bankruptcy Rules of the United States Bankruptcy Court of the Central
24 District of California (the “LBR”) to allow the Debtors to pay its Insurance Obligations and
25 continue to operate postpetition.

26
27
28 ¹ All references to “§” or “section” herein are to sections of the Bankruptcy Code unless otherwise noted.

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1 **ADDITIONAL INFORMATION**

2 The Motion is based on the Notice of Emergency Motions that will be filed and served
3 after obtaining a hearing date for the Debtors' "First Day Motions," the attached Memorandum of
4 Points and Authorities, the concurrently filed Adcock Declaration, the arguments of counsel and
5 other admissible evidence properly brought before the Court at or before the hearing on this
6 Motion. In addition, the Debtors request that the Court take judicial notice of all documents filed
7 with the Court in these Chapter 11 Cases.

8 Counsel to the Debtors will serve this Motion, the attached Memorandum of Points and
9 Authorities, the Adcock Declaration and the Notice of Emergency Motions on: (i) the Office of
10 the United States Trustee; (ii) all alleged secured lenders; (iii) the fifty (50) largest general
11 unsecured creditors appearing on the consolidated list filed in accordance with Rule 1007(d) of the
12 Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"); (iv) the United States of
13 America, and the State of California; and (v) parties that file with the Court and serve upon the
14 Debtors requests for notice of all matters in accordance with Bankruptcy Rule 2002(i). To the
15 extent necessary, the Debtors request that the Court waive compliance with LBR 9075-1(a)(6) and
16 approve service (in addition to the means of services set forth in such LBR) by overnight delivery.
17 Among other things, the Notice of Emergency Motions will provide that any opposition or
18 objection to the Motion may be presented at any time before or at the hearing regarding the
19 Motion, but that failure to timely object may be deemed by the Court to constitute consent to the
20 relief requested herein. In the event that the Court grants the relief requested by the Motion, the
21 Debtors shall provide notice of the entry of the order granting such relief upon each of the
22 foregoing parties and any other parties in interest as the Court directs. The Debtors submit that
23 such notice is sufficient and that no other or further notice be given.

24 **WHEREFORE**, for all the foregoing reasons and such additional reasons as may be
25 advanced at or prior to the hearing regarding this Motion, the Debtors respectfully request that the
26 Court enter an order: (i) granting the relief requested herein; and (ii) granting the Debtors such
27 other and further relief as the Court deems just and proper.

28

1 Dated: August 31, 2018

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Debtors request entry of an order on an emergency basis in these Cases pursuant to
4 LBR 2081-1(a)(12) and 9075-1(a) and §§ 105, 361, 362, and 363 of the Bankruptcy Code: (i)
5 authorizing the Debtors to (a) maintain their insurance coverage levels, including authority to
6 revise, extend, supplement, renew or change insurance coverage as needed, (b) pay insurance
7 premiums, self-insured retentions, broker fees and deductibles in the ordinary course of business
8 and (c) pay certain administrative obligations associated therewith; (collectively, the “Insurance
9 Obligations”);² and (ii) preventing insurance companies from enforcing any *ipso facto* clauses or
10 giving any notice of termination or otherwise modifying or cancelling any insurance policies
11 without first obtaining relief from the automatic stay imposed by § 362.³

12 The Debtors’ goals in these Cases are to facilitate an orderly administration of their Cases
13 and to maintain efficient and seamless operations for the benefit of the patients (the “Patients”)
14 who seek medical care in the Hospitals (defined below) operated by the Debtors in order to
15 maximize the value of their assets for the benefit of all stakeholders. Accordingly, it is imperative
16 to the accomplishment of the Debtors’ goals in these Cases that the Debtors minimize any adverse
17 impact of the chapter 11 filing on the Debtors’ workforce, on the Patients, on the operations of the
18 Hospitals, and on the orderly administration of these Cases. Any disruption to payment of the
19 Debtors’ Insurance Obligations would prevent the Debtors from achieving their goals in this case
20 because the Debtors may not be able to operate without maintaining their insurance coverage.
21 Failure to pay its Insurance Obligations will result in severe repercussions on the Debtors’ ability
22 to continue to provide patient care, to preserve their assets and to administer their estates, with
23 immediate and irreparable harm to the Debtors and severe detriment to patients, employees, the

24 ² The insurance coverages and Insurance Obligations to which this Motion relate are coverages and obligations that
25 relate to the Insurance Policies as defined in paragraph 21 *infra*. For the avoidance of doubt, to the extent that the
26 relief sought in this Motion overlaps with the relief sought in the Debtors’ motion to pay employee wages, salaries and
benefits, the Debtors seek authority to pay any obligation only once.

27 ³ As discussed herein, the Debtors’ obligations under their workers’ compensation policy are secured by a letter of
28 credit in favor of Old Republic Insurance Company. The Debtors are moving by separate motion to enjoin draws on
that letter of credit by Old Republic as long as the Debtor’s obligations under their workers’ compensation policy are
current.

1 public and other stakeholders. Accordingly, the Debtors respectfully request that the Court grant
2 the Motion.

3 **II. JURISDICTION AND VENUE**

4 This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§157 and 1334.
5 This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court
6 pursuant to 28 U.S.C. §§ 1408 and 1409.

7 **III. STATEMENT OF FACTS**

8 **A. General Background**

9
10 1. On August 31, 2018 (“Petition Date”), Verity Health System of California, Inc.
11 (“VHS”) and the above-referenced affiliated debtors, the debtors and debtors in possession in the
12 above-captioned chapter 11 bankruptcy cases (collectively, the “Debtors”), each filed a voluntary
13 petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”).
14 Since the commencement of their cases, the Debtors have been operating their businesses as
15 debtors in possession pursuant to §§⁴ 1107 and 1108 of the Bankruptcy Code.

16 2. Debtor VHS, a California nonprofit public benefit corporation, is the sole corporate
17 member of the following five Debtor California nonprofit public benefit corporations that operate
18 six acute care hospitals, O’Connor Hospital, Saint Louise Regional Hospital, St. Francis Medical
19 Center, St. Vincent Medical Center, Seton Medical Center, and Seton Medical Center Coastsides
20 (collectively, the “Hospitals”) and other facilities in the state of California. Seton Medical Center
21 and Seton Medical Center Coastsides operate under one consolidated acute care license. *See*
22 Declaration of Richard G. Adcock in Support of First Day Motion (the “Adcock Declaration”),
23 filed concurrently herewith, ¶ 11.

24 3. VHS, the Hospitals, and their affiliated entities (collectively, “Verity Health
25 System”) operate as a nonprofit health care system, with approximately 1,680 inpatient beds, six
26 active emergency rooms, a trauma center, eleven medical office buildings, and a host of medical
27 specialties, including tertiary and quaternary care. Adcock Declaration, ¶ 12.

28 ⁴ All references to “§” or “section” herein are to the Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.*, as amended.

1 4. The VHS affiliated entities, including the Debtors and non-debtor entities, are as
2 follows:

- 3 • O'Connor Hospital
- 4 • Saint Louise Regional Hospital
- 5 • St. Francis Medical Center
- 6 • St. Vincent Medical Center
- 7 • Seton Medical Center, including Seton Medical Center Coastside
- 8 • Verity Business Services
- 9 • Marillac Insurance Company, Ltd.
- 10 • O'Connor Hospital Foundation
- 11 • Saint Louise Regional Hospital Foundation
- 12 • St. Francis of Lynwood Medical Center Foundation
- 13 • St. Vincent Medical Center Foundation
- 14 • Seton Medical Center Foundation
- 15 • St. Vincent de Paul Ethics Corporation
- 16 • St. Vincent Dialysis Center
- 17 • De Paul Ventures, LLC
- 18 • De Paul Ventures - San Jose Dialysis, LLC
- 19 • De Paul Ventures - San Jose ASC, LLC
- 20 • Verity Medical Foundation
- 21 • Verity Holdings, LLC

22 Adcock Declaration, ¶ 13.

23 5. Verity Medical Foundation (“VMF”), incorporated in 2011, is a medical
24 foundation, exempt from licensure under California Health & Safety Code § 1206(I). Adcock
25 Declaration, ¶ 14. VMF contracts with physicians and other healthcare professionals to provide
26 high quality, compassionate, patient-centered care to individuals and families throughout
27 California. *Id.* With more than 100 primary care and specialty physicians, VMF offers medical,
28 surgical and related healthcare services for people of all ages at community-based, multi-specialty
clinics conveniently located in areas served by the Debtor Hospitals. *Id.* VMF holds long-term
professional services agreements with the following medical groups: (a) Verity Medical Group;
(b) All Care Medical Group, Inc.; (c) CFL Children’s Medical Associates, Inc.; (d) Hunt Spine
Institute, Inc.; (e) San Jose Medical Clinic, Inc., D/B/A San Jose Medical Group; and (f) Sports,
Orthopedic and Rehabilitation Associates. *Id.*

 6. Verity Holdings, LLC (“Holdings”) is a direct subsidiary of its sole member VHS
and was created in 2016 to hold and finance VHS’ interests in four medical office buildings whose

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1 tenants are primarily physicians, medical groups, healthcare providers, and certain of the VHS
2 Hospitals. Adcock Declaration, ¶ 15. Holdings’ real estate portfolio includes more than 15
3 properties. *Id.*

4 7. Saint Louise Regional Hospital Foundation, St. Francis of Lynwood Medical
5 Center Foundation, St. Vincent Medical Center Foundation, and Seton Medical Center Foundation
6 handle fundraising and grant-making programs for each of their respective Debtor Hospitals.
7 Adcock Declaration, ¶ 16.

8 8. As of August 31, 2018, the Debtors have approximately 7,385 employees, of whom
9 4,733 are full-time employees. Adcock Declaration, ¶ 18. Approximately 74% of these
10 employees are represented by collective bargaining units. *Id.* A majority of the employees are
11 represented by either the Service Employees International Union (approximately 39% of
12 employees) or California Nurses Associations (approximately 22% of employees). *Id.*

13 9. Each of the Debtors is exempt from federal income taxation as an organization
14 described in Section 501(c)(3) of the Internal Revenue Code of 1986, except for Verity Holdings,
15 LLC, DePaul Ventures, LLC, and DePaul Ventures - San Jose Dialysis, LLC. Adcock
16 Declaration, ¶ 21.

17 10. To date, no official committee or examiner has been appointed by the Office of the
18 United States Trustee in these Chapter 11 Cases.

19 **B. Historical Challenges**

20 11. The Hospitals and VMF were originally owned and operated by the Daughters of
21 Charity of St. Vincent de Paul, Province of the West (the “Daughters of Charity”), to support the
22 mission of the Catholic Church through a commitment to the sick and poor. Adcock Declaration,
23 ¶ 82. The Daughters of Charity began their healthcare mission in California in 1858 and they
24 ministered to ill, poverty-stricken individuals for more than 150 years. *Id.* In March 1995, the
25 Daughters of Charity merged with Catholic Healthcare West (“CHW”). Adcock Declaration, ¶
26 83. In June 2001, Daughters of Charity Health System (“DCHS”) was formed, and in October
27 2001, the Daughters of Charity withdrew from CHW. *Id.* In 2002, DCHS commenced operations
28

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1 and was the sole corporate member of the Hospitals, which at that time were California nonprofit
2 religious corporations. *Id.*

3 12. Between 1995 and 2015, the Daughters of Charity and DCHS struggled to find a
4 solution to continuing operating losses, either through a sale of some or all of the hospitals or a
5 merger with a more financially sound partner. *See* Adcock Declaration, ¶ 84. All these efforts
6 failed. *Id.* During these efforts, however, the health system’s losses continued to mount, and the
7 health system borrowed more than \$500 million – including through a 2008 bond issuance (the
8 “2008 Bonds”) – to fund operations, acquire assets, fund needed capital improvements and/or
9 refinance existing debt. *Id.*

10 13. Despite continuous efforts to improve operations, operating losses continued to
11 plague the health system due to, among other things, mounting labor costs, low reimbursement
12 rates and the ever-changing healthcare landscape. Adcock Declaration, ¶ 86. In 2013, DCHS
13 actively solicited offers for O’Connor Hospital, St. Louise Regional Hospital, Seton Medical
14 Center and Seton Medical Center Coastside. *Id.* In 2013, to avoid failing debt covenants, the
15 Daughters of Charity Foundation, an organization separate and distinct from DCHS, donated \$130
16 million to DCHS to allow it to retire the 2008 Bonds in the total amount of \$143.7 million. *Id.*

17 14. In early 2014, DCHS announced that they were beginning a process to evaluate
18 strategic alternatives for the health system. Adcock Declaration, ¶ 87. Throughout 2014, DCHS
19 explored offers to sell their health system and, in October of 2014, they entered into an agreement
20 with Prime Healthcare Services and Prime Healthcare Foundation (collectively, “Prime”) to sell
21 the health system. *Id.* However, to keep the hospitals open, DCHS needed to borrow another
22 \$125 million to mitigate immediate cash needs during the sales process; in other words, to allow
23 DCHS to continue to operate until the sale could be consummated. *Id.* In early 2015, the
24 California Attorney General consented to the sale to Prime, subject to conditions on that sale that
25 were so onerous that Prime terminated the transaction. *Id.*

26 15. In 2015, DCHS again marketed their health system for sale, and, again, focused on
27 offers that maintained the health system as a whole, and assumed all the obligations. Adcock
28

1 Declaration, ¶ 88. In July 2015, the DCHS Board of Directors selected BlueMountain Capital
2 Management LLC (“BlueMountain”), a private investment firm, to recapitalize its operations and
3 transition leadership of the health system to the new Verity Health System (the “BlueMountain
4 Transaction”). *Id.*

5 16. In connection with the BlueMountain Transaction, BlueMountain agreed to make a
6 capital infusion of \$100 million to the hospital system, arrange loans for another \$160 million to
7 the health system, and manage operations of the health system, with an option to buy the health
8 system at a future time. Adcock Declaration, ¶ 89. In addition, the parties entered into a System
9 Restructuring and Support Agreement (the “Restructuring Agreement”), DCHS’s name was
10 changed to Verity Health System, and Integrity Healthcare, LLC (“Integrity”) was formed to carry
11 out the management services under a new management agreement. *Id.*

12 17. On December 3, 2015, the California Attorney General approved the BlueMountain
13 Transaction, subject to conditions. Adcock Declaration, ¶ 91. Despite BlueMountain’s infusion
14 of cash and retention of various consultants and experts to assist in improving cash flow and
15 operations, the health system did not prosper. *Id.*, ¶ 93.

16 18. In July 2017, NantWorks, LLC (“NantWorks”) acquired a controlling stake in
17 Integrity. NantWorks brought in a new CEO, CFO, and COO. Adcock Declaration, ¶ 94.
18 NantWorks loaned another \$148 million to the Debtors. *Id.*

19 19. Despite the infusion of capital and new management, it became apparent that the
20 problems facing the Verity Health System were too large to solve without a formal court
21 supervised restructuring. Adcock Declaration, ¶ 95. Thus, despite VHS’ great efforts to revitalize
22 its Hospitals and improvements in performance and cash flow, the legacy burden of more than a
23 billion dollars of bond debt and unfunded pension liabilities, an inability to renegotiate collective
24 bargaining agreements or payor contracts, the continuing need for significant capital expenditures
25 for seismic obligations and aging infrastructure, and the general headwinds facing the hospital
26 industry, make success impossible. *Id.* Losses continue to amount to approximately \$175 million
27 annually on a cash flow basis. *Id.*

28

1 20. Additional background facts on the Debtors, including an overview of the Debtors’
2 business, information on the Debtors’ capital structure and additional events leading up to these
3 Chapter 11 Cases, are contained in the Declaration of Richard G. Adcock.

4 **C. Relevant Background to the Motion**

5 (i) *The Debtors’ Insurance Policies*

6 21. The Debtors maintain various insurance policies issued by several insurance
7 carriers (collectively, the “Insurance Carriers”). Collectively, these policies provide for coverage
8 for, among other things: workers’ compensation and employers liability, D&O liability, general
9 liability, and professional liability, sexual misconduct and molestation liability, storage tank
10 liability, commercial property, commercial automobile, helipad liability & non-owned aircraft
11 liability (collectively, the “Insurance Policies”).⁵ Adcock Declaration, ¶ 67. A schedule of the
12 Insurance Policies is attached hereto as **Exhibit A**.

13 22. Significant insurance is issued to the Debtors by its captive insurer Marillac
14 Insurance Company, Ltd. (“Marillac”) organized in the Cayman Islands. Adcock Declaration, ¶
15 68. VHS is the sole owner of Marillac. *Id.* The policies issued by Marillac cover professional
16 and general liability (both at the primary and excess level) and additional excess coverage as to
17 automobile liability, heliport and non-owned aircraft liability, employer’s liability and certain
18 other general liability. *Id.* Marillac also issued a Deductible Liability Protection Policy which
19 provides coverage for the deductible obligations on the Debtors’ workers’ compensation policy
20 issued by Old Republic Insurance Company (“Old Republic”). *Id.* A schedule of the Marillac
21 policies is included in the attached schedule of the Insurance Policies, **Exhibit A**.

22 23. Continuation of the Insurance Policies is essential to the operation and preservation
23 of the value of the Debtors’ hospitals, healthcare businesses, properties and assets. The Debtors,
24 as employers and operators of a nonprofit healthcare system in California, must maintain workers’
25 compensation insurance coverage. *See, e.g.*, Cal. Lab. Code § 3700 (requiring workers’
26 compensation coverage). Also, as a practical and legal matter, the Debtors cannot provide patient

27 _____
28 ⁵ The Insurance Policies include six (6) CA DHS Patient Trust Bonds, which have an annual premium in the aggregate
of \$1,100 that was paid in full in December 2017 and will not come due for renewal until December 2018.

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1 care and continue to operate a healthcare system without professional and general liability
2 insurance, among other coverages.

3 24. As set forth in Exhibit A, most of the Debtors' Insurance Policies will expire
4 between September 5, 2018 and July 1, 2019. It is critical that the Debtors continue to carry the
5 necessary insurance coverage to operate their business. As a result, the Debtors have begun
6 negotiating renewals, extensions and/or entries into new insurance policies with respect to the
7 expiring Insurance Policies. Adcock Declaration, ¶ 69. The Debtors seek the authority to renew,
8 modify, extend or enter into new Insurance Policies (collectively, the "New Insurance Policies")
9 on a postpetition basis in the ordinary course of business.

10 25. In certain instances, the Debtors pay premiums for their Insurance Policies in full at
11 the beginning of the policy and in other instances in quarterly installments. Adcock Declaration, ¶
12 70. The total annual premium due for Insurance Policies is approximately \$18,647,036. *Id.* Of
13 that amount, the Debtors pay \$2,637,071 at the time of inception, and the remaining \$16,009,965
14 is paid in quarterly installments. *Id.* As of the Petition Date, there are no outstanding unpaid
15 premiums due. *Id.* The total amount of annual insurance premiums which will come due
16 postpetition is \$10,043,085. *Id.*

17 26. To ensure continued insurance coverage in the ordinary course of the Debtors'
18 business, the Debtors seek the authority to pay all premium payments that may come due on
19 current Insurance Policies during the course of these Chapter 11 Cases. *See* Exhibit A, Schedule
20 of the Insurance Policies, Column J (listing premium payment due dates). The Debtors also seek
21 authority to pay all premiums associated with the New Insurance Policies on a postpetition basis in
22 the ordinary course of business.

23 (ii) *The Debtors' Self-Insured Retentions*

24 27. The Debtors maintain self-insured retentions of \$250,000 per claim under their
25 D&O liability coverage, \$350,000 per claim under their employment practices coverage, \$50,000
26 per claim under their fiduciary liability coverage, \$100,000 per claim under their crime coverage,
27 and \$50,000 per claim under their sexual misconduct and molestation liability coverage (the "Self-
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1 Insured Retentions” or “SIRs”). Adcock Declaration, ¶ 71. A SIR is a loss amount that the
2 insured is obligated to pay before the insurer’s coverage obligation is triggered.

3 28. The Debtors’ Self-Insured Retentions are administered so that the Debtors pay
4 directly for the losses under each policy as they are incurred up to the amounts of the Self-Insured
5 Retentions. Adcock Declaration, ¶ 72. Such SIRs due prepetition have been paid. *Id.* For the last
6 year, no SIR amounts have been due for (a) the D&O liability coverage, (b) the employment
7 practices coverage, (c) the fiduciary liability coverage, and (d) the crime coverage. There have
8 been no SIR amounts incurred under the sexual misconduct and molestation liability policy in the
9 last year. *Id.* The Debtors seek authority to pay all losses incurred up to the amounts of the Self-
10 Insured Retentions as such amounts come due on a postpetition basis in the ordinary course of
11 business.

12 (iii) *The Debtors’ Deductibles*

13 29. The Debtors maintain a workers’ compensation insurance policy with Old Republic
14 with a \$500,000 deductible for each claim. Adcock Declaration, ¶ 73. Old Republic provides
15 coverage under the policy up to \$1 million for each claim. *Id.* As discussed, pursuant to a
16 Deductible Liability Protection Policy, captive insurer Marillac insures payment of the Debtors’
17 deductible of \$500,000 per claim under the workers’ compensation policy.

18 30. The Debtors provide a \$34,087,296 letter of credit to Old Republic as security for
19 all of the Debtors’ obligations, as required under their workers’ compensation policy. Adcock
20 Declaration, ¶ 76. Marillac is the account party on the letter of credit, and the letter of credit is
21 fully secured by Marillac’s assets - \$34,087,296 of liquid securities. *Id.* Pursuant to the Program
22 Agreement Endorsement to the workers’ compensation policy, Old Republic may draw upon the
23 letter of credit to reimburse Old Republic for payment of the Debtors’ deductible obligations or for
24 payment of other obligations of the Debtors under the workers’ compensation policy, if not paid
25 by Marillac. *Id.* Old Republic may also draw down the \$34,087,296 letter of credit in full upon
26 the Debtors’ insolvency or filing of a bankruptcy petition. *Id.* The Debtors are filing a separate
27 motion and adversary proceeding to enjoin Old Republic from drawing down the letter of credit in
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1 full based on the Debtors' insolvency or bankruptcy filing. The Debtors expect that Marillac will
2 continue to honor its policy to insure the Debtors' obligations under the workers' compensation
3 policy, and that Old Republic will not be harmed by the Debtors' chapter 11 filing. Adcock
4 Declaration, ¶ 77.

5 31. On average, the monthly invoice amounts for deductibles (including Allocated Loss
6 Adjustment Expense) incurred under the workers' compensation policy is between \$400,000 and
7 \$650,000, which are timely paid by Marillac under the Deductible Liability Protection Policy.
8 Adcock Declaration, ¶ 73.

9 32. The deductibles included in the Debtors' other Insurance Policies are:

- 10 • Storage Tank Liability - ACE American Insurance Company (Chubb) - \$5,000
11 per Storage Tank Incident
- 12 • Storage Tank Liability - Tokio Marine Specialty Insurance Company
13 (Philadelphia) - \$25,000 per Confirmed Release
- 14 • Commercial Property - American Guarantee and Liability Insurance Company
15 (Zurich) - \$100,000 Basic Policy Deductible
- 16 • Commercial Automobile - National Union Fire Insurance Company of
17 Pittsburg, PA (AIG) - \$1,000 Comprehensive, \$1,000 Collision
- 18 • Helipad Liability & Non-Owned Aircraft Liability - StarNet Insurance
19 Company (Berkley Aviation) - \$1,000 Physical Damage per Occurrence
- 20 • General Liability - Chubb - \$10,000 per Occurrence

21 Adcock Declaration, ¶ 74.

22 33. The Debtors seek authority to pay their deductibles as such amounts come due on a
23 postpetition basis, including any amounts accrued and not due as of the Petition Date, in the
24 ordinary course of business.

25 (iv) *Claims Administration Agreements*

26 34. The Debtors have entered into administrative services contracts with Sedgwick
27 Claims Management Services, Inc. ("Sedgwick"), for administration of claims submitted under the
28

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1 Debtors' workers' compensation policy as well as their professional and general liability policy.
2 Adcock Declaration, ¶ 78.

3 35. The Debtors pay Sedgwick an annual estimated fee of \$702,000 which is paid in
4 quarterly installments of \$175,000 for services provided by Sedgwick under the Debtor's workers'
5 compensation policy.⁶ Adcock Declaration, ¶ 79. The actual fees owed to Sedgwick are based on
6 the staffing necessary for Sedgwick to provide claims services and are calculated by taking the
7 actual program salaries, bonuses and temporary expenses multiplied by the salary multiplier. *Id.*
8 Sedgwick will periodically provide an accounting to determine the actual fees incurred. *Id.* The
9 Debtors are entitled to a credit if the amount of actual fees owed to Sedgwick are less than the
10 estimated fees paid. *Id.* On the other hand, Sedgwick bills the Debtors for the additional actual
11 fee owed if the actual fee amount is higher than the estimated fees. *Id.*

12 36. With respect to administration of their professional and general liability policy, the
13 Debtors pay Sedgwick \$3,545 per claim and suit file, \$1,825 per Potentially Compensable Event
14 ("PCE") where an investigation has been requested, \$275 for a PCE where an investigation has
15 not been requested pursuant to this agreement. Adcock Declaration, ¶ 80. Fees are paid monthly
16 as files are assigned to Sedgwick by the Debtors. Debtors also pay Sedgwick a program
17 management fee of \$1,250 each month. *Id.*

18 37. The Debtors seek authority to continue paying the Sedgwick fees for administration
19 of claims incurred under their workers' compensation and professional and general liability
20 insurance policies, including any amounts accrued and unpaid as of the Petition Date, in the
21 ordinary course of business.

22 **IV. RELIEF REQUESTED**

23 By this Motion, pursuant to §§ 105, 361, 362, and 363, the Debtors respectfully request
24 entry of an order (i) authorizing the Debtors to (a) maintain their insurance coverage levels,
25 including authority to revise, extend, supplement, renew or change insurance coverage as needed,
26 (b) pay insurance premiums, self-insured retentions, broker fees and deductibles in the ordinary
27

28 ⁶ The next installment payment of \$175,000 is due postpetition on September 30, 2018.

1 course of business and (c) pay certain administrative obligations associated therewith; and (ii)
2 preventing insurance companies from enforcing any *ipso facto* clauses or giving any notice of
3 termination or otherwise modifying or cancelling any insurance policies without first obtaining
4 relief from the automatic stay imposed by § 362.

5 **V. DISCUSSION**

6 **A. Ordinary Course Payments**

7 “[A] debtor receiving necessary benefits from a prepetition executory insurance contract
8 must accord the nondebtor party an administrative expense priority for the pro rata share of the
9 premium, during the period in which the estate received benefits from the contract.” *In re Sharon*
10 *Steel Corp.*, 161 B.R. 934, 937 (Bankr. W.D. Pa. 1994) (*quoting In re Gamma Fishing Co., Inc.*,
11 70 B.R. 949 (Bankr. S.D. Cal. 1987)). Administrative expenses incurred in the ordinary course of
12 business are payable in the ordinary course of business. *In re Wireless Telecomms. Inc.*, 449 B.R.
13 228, 235 n. 5 (Bankr. M.D. Pa. 2011) (*quoting 4 Collier on Bankruptcy*, 16th ed., ¶ 503.03[4],
14 503–17) (“‘ordinary course of business’ administrative expenses (such as current postpetition
15 wages and trade debt) generally are paid when due. . . . Additionally, section 363(c) allows a
16 trustee to use property of the estate in the ordinary course of business without providing for notice
17 or an opportunity for a hearing.”); *In re Pac. Forest Indus., Inc.*, 95 B.R. 740, 743 (Bankr. C.D.
18 Cal. 1989) (*quoting 3 Collier on Bankruptcy*, 15th ed., ¶ 503.01) (“there is a virtually unstated
19 assumption that ‘ordinary course of business’ administrative expenses (such as current post
20 petition wages and trade debt) will be paid when due.”)).

21 The Debtors’ insurance premiums that come due postpetition must be paid to maintain the
22 Debtors’ postpetition insurance coverage. Also, the Self-Insured Retentions and deductibles
23 incurred for postpetition occurrences must be paid to maintain postpetition insurance coverage.
24 The maintenance of the Debtors’ postpetition insurance coverage is essential to the operation of
25 the Debtors’ business. Thus, the Debtors’ expenses for postpetition insurance premiums, Self-
26 Insured Retentions and deductibles are administrative in nature and are appropriately paid by
27 Debtors in the ordinary course of business.

1 **B. Payment of Insurance Obligations under §§ 363(b) and 105, including**
2 **prepetition amounts, is necessary to operate and confirm a plan.**

3 In some limited circumstances, the insurance premiums, Self-Insured Retentions, and other
4 Insurance Obligations owed by the Debtors relate to occurrences prior to the Petition Date. The
5 Debtors believe those obligations are minimal, since they are current on payment of their
6 Insurance Obligations.

7 The Debtors submit that payment of these Insurance Obligations is appropriate pursuant to
8 §§ 105(a), 363(b), 1107(a) and 1108, as well as the “necessity of payment” doctrine.

9 *i. Payment of the Insurance Obligations is appropriate under Section 363 of*
10 *the Bankruptcy Code.*

11 This Court may authorize the Debtors’ proposed payment of Insurance Obligations under §
12 363(b)(1). Section 363(b)(1) authorizes a bankruptcy court, after notice and a hearing, to authorize
13 a debtor to “use, sell, or lease, other than in the ordinary course of business, property of the
14 estate.” *See* 11 U.S.C. § 363(b)(1). In order to obtain approval for the use of estate assets outside
15 of the ordinary course of business, a debtor must articulate a valid business justification for the
16 requested use. *See In re Walter*, 83 B.R. 14, 20 (B.A.P. 9th Cir. 1988) (*quoting In re Continental*
17 *Air Lines, Inc.*, 780 F.2d 1223 (5th Cir.1986)) (“for the debtor-in-possession or trustee to satisfy
18 its fiduciary duty to the debtor, creditors and equity holders, there must be some articulated
19 business justification for using, selling, or leasing the property outside the ordinary course of
20 business”); *In re U.S. Airways Group, Inc.*, 287 B.R. 643, 645 (Bankr. E.D. Va. 2002); *In re*
21 *Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989).

22 “The [business judgment] rule establishes a presumption that directors’ decisions are based
23 on sound business judgment, and it prohibits courts from interfering in business decisions made by
24 the directors in good faith and in the absence of a conflict of interest.” *Berg & Berg Enters. v.*
25 *Boyle*, 178 Cal. App. 4th 1020, 1045 (Cal. 2009). “A hallmark of the business judgment rule is
26 that, when the rule’s requirements are met, a court will not substitute its own judgment for that of
27 the corporation’s board of directors.” *Lamden v. La Jolla Shores Condo. Homeowners Assn.*, 21
28

1 Cal. 4th 249, 257 (Cal. 1999) (*citing Katz v. Chevron Corp.*, 22 Cal. App. 4th 1352, 1366 (Cal.
2 1994)).

3 When applying the “business judgment” rule, courts show great deference to the debtor’s
4 decision making. *See, e.g., In re Castre*, 312 B.R. 426, 430 (Bankr. D. Colo. 2004); *In re Murphy*,
5 288 B.R. 1, 5 (D. Me. 2002); *In re Bakalis*, 220 B.R. 525, 532 (Bankr. E.D.N.Y. 1998); *In re First*
6 *Wellington Canyon Assocs.*, 1989 WL 165028, *1 (N.D. Ill Dec. 28, 1989); *Summit Land Co. v.*
7 *Allen (In re Summit Land Co.)*, 13 B.R. 310, 315 (Bankr. D. Utah 1981). Because certain of the
8 Insurance Obligations are entitled to priority status, and because maintenance and renewal of
9 insurance coverage is vital to the Debtors’ ongoing operations and their prospects for successfully
10 confirming a plan, it is in the best interest of the Debtors’ estates to pay such insurance obligations
11 in the ordinary course of business during these Chapter 11 Cases.

12 Additionally, it is critical that (i) the Debtors maintain their Insurance Policies and renew
13 or enter into the New Insurance Policies, as applicable, in order to provide a comprehensive range
14 of coverage that protects their business and property; and (ii) the Debtors have no rupture in their
15 relationship with carriers, from which they seek renewals, and their service providers that
16 administer its professional and general liability coverage. The insurance coverage provided under
17 the Insurance Policies is essential to the continued operations of the Debtors, and some of the
18 Insurance Policies are required by various state and federal regulations and by contracts that
19 govern the Debtors’ business. Disruption of the Debtors’ insurance coverage would expose the
20 Debtors to serious risks, including: (a) the incurrence of direct liability for the payment of claims
21 that otherwise would have been payable by the Insurance Carriers; (b) the occurrence of material
22 costs and other losses that would have otherwise been reimbursed by the Insurance Carriers; (c)
23 the loss of good-standing certification to conduct business in California; (d) the inability to obtain
24 similar types of insurance coverage; and (e) the incurrence of higher costs for obtaining new
25 insurance coverage. Granting the relief requested herein would avoid these consequences and
26 would allow the Debtors’ business operations to continue without interruption during the chapter
27 11 process.

28

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1 Further, if the Debtors are unable to pay the premiums and obligations necessary to
2 maintain the Insurance Policies, they may be unable to find alternative insurance carriers willing
3 to offer them similar insurance at a competitive price given the magnitude of the insured's risk and
4 the additional risk of non-payment. While the Debtors question the right of any insurer to
5 terminate the Insurance Policies for non-payment of premiums, any litigation associated with such
6 alleged termination would be contested, and thus, very costly to the Debtors' estates.

7 The Debtors represent that they have sufficient availability of funds to pay the amounts
8 described herein in the ordinary course of business by virtue of expected cash flows from ongoing
9 business operations and anticipated access to debtor in possession financing. Also, under the
10 Debtors' existing cash management system, the Debtors represent that checks or wire transfer
11 requests can be readily identified as relating to an authorized payment of the Insurance
12 Obligations. Accordingly, the Debtors believe that checks or wire transfer requests, other than
13 those relating to authorized payments, will not be honored inadvertently and that all applicable
14 financial institutions should be authorized, when requested by the Debtors, to receive, process,
15 honor and pay any and all checks or wire transfer requests with respect to the Insurance
16 Obligations.

17 *ii. Payment of the Insurance Obligations is authorized under §§ 1107(a) and*
18 *1108.*

19 The Debtors, operating their business as debtors in possession under §§ 1107(a) and 1108,
20 are fiduciaries "holding the bankruptcy estate and operating the business for the benefit of its
21 creditors and (if the value justifies) equity owners." *In re CoServ, L.L.C.*, 273 B.R. 487, 497
22 (Bankr. N.D. Tex. 2002). Implicit in the duties of a chapter 11 debtor in possession is the duty "to
23 protect and preserve the estate, including an operating business's going-concern value." *Id.*

24 According to the Court in *CoServ*, there are instances in which a debtor in possession can
25 fulfill its fiduciary duty "only . . . by the preplan satisfaction of a prepetition claim." *See id.* The
26 Court in *CoServ* specifically noted that preplan satisfaction of prepetition claims would be a valid
27 exercise of a debtor's fiduciary duty when the payment "is the only means to effect a substantial
28 enhancement of the estate." *Id.* The court provided a three-pronged test for determining whether

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1 a preplan payment on account of a prepetition claim was a valid exercise of a debtor's fiduciary
2 duty:

3 First, it must be critical that the debtor deal with the claimant. Second, unless it
4 deals with the claimant, the debtor risks the probability of harm, or, alternatively,
5 loss of economic advantage to the estate or the debtor's going concern value, which
6 is disproportionate to the amount of the claimant's prepetition claim. Third, there is
no practical or legal alternative by which the debtor can deal with the claimant
other than by payment of the claim.

7 *Id.* at 498.

8 Payment of the prepetition Insurance Obligations meets each element of this standard.⁷ As
9 discussed, the payment of the Insurance Obligations is necessary to maintain insurance coverage
10 postpetition and continue to operate. The Debtors, as employers and operators of a nonprofit
11 healthcare system in California, must maintain workers' compensation insurance coverage. *See*,
12 *e.g.*, Cal. Lab. Code § 3700 (requiring workers' compensation coverage). Also, as a practical and
13 legal matter, the Debtors cannot operate a healthcare system without professional and general
14 liability insurance, among other coverages. Further, if the Debtors are unable to pay the premiums
15 necessary to maintain the Insurance Policies, they may be unable to find alternative insurance
16 carriers willing to offer them similar insurance at a competitive price. The potential harm and
17 economic disadvantage that could stem from the failure to pay the Insurance Obligations is grossly
18 disproportionate to the amount of any prepetition claim that may be paid.

19 Accordingly, the Debtors can meet their fiduciary duties as debtors in possession under §§
20 1107(a) and 1108 only by payment of their Insurance Obligations.

21 *iii. Section 105 of the Bankruptcy Code provides a separate, additional basis*
22 *for payment of the Insurance Obligations.*

23 The Debtor's proposed payment of the Prepetition Obligations also should be authorized
24 under the "doctrine of necessity," which is grounded in § 105(a). Pursuant to § 105, this Court

25 _____
26 ⁷ These Prepetition Insurance Obligations are minimal. As of the Petition Date, no outstanding premium are due.
27 Adcock Declaration, ¶ 70. All SIRs due prepetition have also been paid. *Id.*, ¶ 72. There are only four open
28 employment practices claims which could generate a SIR. *Id.* The Debtors' principal deductible exposure is under
the workers' compensation policy issued by Old Republic, which is paid by Marillac, a captive insurer, under the
Deductible Liability Protection Policy. *Id.*, ¶ 68. Any other prepetition deductible exposure is believed to be
minimal. *Id.*, ¶ 75.

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1 “may issue any order . . . that is necessary or appropriate to carry out the provisions” of the
2 Bankruptcy Code. 11 U.S.C. § 105.

3 The doctrine of necessity permits a bankruptcy court to authorize payment of certain
4 prepetition claims prior to the completion of the chapter 11 case where the payment of such claims
5 is necessary to the chapter 11 efforts. *See In re Just for Feet, Inc.*, 242 B.R. 821, 826 (D. Del.
6 1999) (stating that where the debtor “cannot survive” absent payment of certain prepetition claims,
7 the doctrine of necessity should be invoked to permit payment); *In re Columbia Gas Sys., Inc.*,
8 171 B.R. 189, 191-192 (Bankr. D. Del. 1994) (noting that debtors may pay prepetition claims that
9 are essential to continued operation of business) (*citing In re Lehigh & New England Ry. Co.*, 657
10 F.2d 570, 581 (3d Cir. 1981)).

11 The doctrine of necessity is a widely accepted component of modern bankruptcy
12 jurisprudence. *See, e.g., In re Braniff, Inc.*, 218 B.R. 628, 633 (Bankr. M.D. Fla. 1998) (noting
13 that debtors may pay prepetition wages when necessary to ensure employees remain on the job
14 postpetition); *Just For Feet*, 242 B.R. at 826 (approving payment of key inventory suppliers’
15 prepetition claims when such suppliers could destroy debtor’s business by refusing to deliver new
16 inventory on eve of debtor’s key sales season); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175
17 (Bankr. S.D.N.Y. 1989) (recognizing that the doctrine of necessity is derived from the court’s
18 equitable powers and allows debtors to make payment on prepetition claims to creditors who will
19 refuse to supply services or material essential to the conduct of the debtors’ business).⁸

20 The Debtors submit that the payment of the Insurance Obligations represents a sound
21 exercise of the Debtors’ business judgment, is necessary to avoid immediate and irreparable harm
22 to the Debtors’ estates, and is therefore justified under §§ 105(a) and 363(b) of the Bankruptcy
23 Code. Paying insurance premiums, Self-Insured Retentions, deductibles, and other Insurance

24 _____
25 ⁸ The Debtors are mindful that in *In re B&W Enters.*, 713 F.2d 534 (9th Cir. 1983), the Ninth Circuit refused to extend
26 the “necessity of payment” doctrine beyond the railroad reorganization case where the debtor made unauthorized
27 postpetition payments to trade suppliers on prepetition debts. In *B&W*, after conversion to chapter 7, the trustee
28 sought to recover the payments under section 549 of the Bankruptcy Code. That case is factually distinguishable from
the instant one in that *B&W* (a) involved ordinary trade suppliers for which the claims were not entitled to priority, (b)
did not seek prior court approval for the payments, and (c) was liquidating, thereby rendering the “necessity” of such
payments moot. Further, the payment authority requested by this Motion, as it relates to prepetition occurrences, is
separately and independently warranted under § 363(b)(1), as noted at pages 13-16 *supra*.

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1 Obligations will benefit the Debtors' estates and their creditors by allowing the Debtors' business
2 operations to continue without interruption. Indeed, the Debtors believe that without the relief
3 requested herein, they will be unable maintain their current insurance coverage or find suitable
4 replacement or renewal insurance coverage. Without insurance coverage the Debtors will be
5 unable to maintain patient care, operate their business and successfully complete their bankruptcy
6 cases.

7 For the reasons discussed herein, payment of the Insurance Obligations is necessary to
8 ensure that the Debtors are able to continue to treat patients and maintain operations postpetition.
9 This Court should exercise its equitable powers to grant the relief requested in this Motion.

10 **C. The Automatic Stay**

11 The Debtors also request that the Court prevent the Insurance Carriers from giving any
12 notice of termination or otherwise modifying or canceling any Insurance Policies without
13 obtaining relief from the automatic stay imposed by § 362. The purpose of this relief is to aid in
14 the administration of the Debtors' bankruptcy cases and to preserve patient care and thereby the
15 value of the business operations. The Debtors' Insurance Carriers may be unfamiliar with the
16 protections afforded chapter 11 debtors under § 362, and thus, an order of this Court affirming
17 these protections would help avoid costly and unnecessary litigation.

18 As a result of the commencement of the Debtors' Chapter 11 Cases, and by operation of
19 law pursuant to § 362, the automatic stay prevents all persons from, *inter alia*, (a) commencing or
20 continuing any judicial, administrative or other proceeding against the Debtors, (b) taking any
21 action to exercise control over property of the estates, or (c) taking any action to collect, assess or
22 recover a claim against the Debtors that arose before the commencement of such cases. *See* 11
23 U.S.C. § 362(a).

24 The appropriate procedure for obtaining Court approval of termination under an insurance
25 policy is to seek relief from the automatic stay. *In re Adana Mortg. Bankers, Inc.*, 12 B.R. 983,
26 988 (Bankr. N.D. Ga. 1980). The injunctions contained in § 362 are self-executing and constitute
27 fundamental debtor protections, which, in combination with other provisions of the Bankruptcy
28

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1 Code, provide the Debtors with the “breathing spell” that is essential to the Debtors’ ability to
2 reorganize. *See, e.g., Sternberg v. Johnston*, 595 F.3d 937, 948 (9th Cir. 2010), *overruled on other*
3 *grounds, In re Schwartz-Tallard*, 803 F.3d 1095 (9th Cir. 2015).

4 As fundamental as the foregoing protections may be, and notwithstanding that they arise as
5 a matter of law upon commencement of a chapter 11 case, not all parties affected or potentially
6 affected by the commencement of a chapter 11 case are aware of the Bankruptcy Code provisions
7 or cognizant of their significance and impact. Experience has shown that it is often necessary to
8 advise third parties of the existence and effect of § 362 and, occasionally, it is necessary to
9 commence proceedings in the bankruptcy court to enforce the protections contained therein.

10 The Debtors submit that this Court has ample authority to grant the relief sought herein.
11 Under § 105(a), “the Court may issue any order, process, or judgment that is necessary or
12 appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). The purpose of § 105(a)
13 is “to assure the bankruptcy courts power to take whatever action is appropriate or necessary in aid
14 of the exercise of their jurisdiction.” 2 Collier on Bankruptcy, ¶ 105.01 (Alan N. Resnick & Henry
15 J. Sommer eds., 16th ed). This is consistent with the broad equitable authority of the bankruptcy
16 courts. *See, e.g., United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990).

17 Accordingly, the Debtors believe that under the circumstances of these Chapter 11 Cases,
18 entry of the proposed order, which incorporates a restatement of the applicable provisions of §
19 362, would help protect the Debtors from violations of these crucial provisions by Insurance
20 Carriers. It would also spare the Debtors from the burden and expense of commencing
21 proceedings to enforce the Bankruptcy Code. Accordingly, an order entered by this Court
22 enforcing the automatic stay may increase substantially the efficiency of the administration of this
23 case.

24 To the extent an Insurance Policy is deemed an executory contract within the meaning of §
25 365, the Debtors do not at this time intend to assume such agreement. Court authorization of
26 payment shall not be deemed to constitute postpetition assumption or adoption thereof as an
27 executory contract pursuant to § 365 of the Bankruptcy Code. The Debtors are in the process of
28

1 reviewing the Insurance Policies and reserve all of their rights under the Bankruptcy Code with
2 respect thereto.

3 **D. Ipsa Facto Provisions Unenforceable.**

4 The Debtors' professional and general liability policy, issued by Marillac (a Cayman
5 Islands entity) contains a provision which would modify and limit coverage to acts committed
6 before a "material event," which includes appointment for the Debtors of a receiver, trustee or
7 "similar administrator." Professional and General Liability Policy, Section J. The professional
8 and general liability policy is an executory contract; it has an inception date of March 31, 2018
9 and expiration date of March 31, 2019. The excess liability policy issued by Marillac provides
10 that it follows the form of the underlying insurance.

11 Under § 365(e)(1), *ipso facto* provisions are not enforceable in bankruptcy. The Court
12 should enter an order making clear that the above-referenced *ipso facto* clauses in the Marillac
13 policies, as well as any other *ipso facto* provisions in other Insurance Policies, are not enforceable.

14 **VI. EMERGENCY RELIEF AND WAIVER OF STAY**

15 Pursuant to Rule 6003 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy
16 Rules"), the Court may grant relief within 21 days after the filing of the petition regarding a
17 motion to use property of the estate only if such relief is necessary to avoid immediate and
18 irreparable harm. For the reasons set forth above, the relief requested herein is necessary to avoid
19 immediate and irreparable harm to the Debtors' estates. Accordingly, the relief requested herein
20 may be granted within the 21 days following the Petition Date.

21 The Debtors further request a waiver of any stay of the effectiveness of the order
22 approving this Motion to the extent such an order is entered. Pursuant to Bankruptcy Rule
23 6004(h), "[a]n order authorizing the use, sale, or lease of property other than cash collateral is
24 stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise."
25 Fed. R. Bankr. P. 6004(h). As set forth above, the relief requested herein is critically important to
26 prevent irreparable damage to the Debtors' operations. Accordingly, the Debtors submit that
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1 cause exists to justify a waiver of the fourteen-day stay imposed by Bankruptcy Rule 6004(h), to
2 the extent it applies.

3 **VII. CONCLUSION**

4 **WHEREFORE**, the Debtors respectfully request entry of an order (i) granting the relief
5 requested herein and (ii) granting the Debtors such other and further relief as the Court deems just
6 and proper.

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9 Dated: August 31, 2018

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12 By /s/ Tania M. Moyron
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