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Attorneys for Swinerton Builders
In re:

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

Debtors and Debtors In Possession.

- ☐ Affects All Debtors
- ☐ Affects O'Connor Hospital
- ☐ Affects Saint Louise Regional Hospital
- ☐ Affects St. Francis Medical Center
- ☐ Affects St. Vincent Medical Center
- ☒ Affects Seton Medical Center
- ☐ Affects O'Connor Hospital Foundation
- ☐ Affects Saint Louise Regional Hospital Foundation
- ☐ Affects St. Francis Medical Center of Lynnwood Foundation
- ☐ Affects St. Vincent Foundation
- ☐ Affects St. Vincent Dialysis Center, Inc.
- ☐ Affects Seton Medical Center Foundation
- ☐ Affects Verity Business Services
- ☐ Affects Verity Medical Foundation
- ☐ Affects Verity Holdings, LLC
- ☐ Affects De Paul Ventures, LLC
- ☐ Affects De Paul Ventures – San Jose Dialysis, LLC

Debtors and Debtors In Possession.

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

Jointly administered with:

CASE NO.: 2:18-bk-20162-ER
CASE NO.: 2:18-bk-20163-ER
CASE NO.: 2:18-bk-20164-ER
CASE NO.: 2:18-bk-20165-ER
CASE NO.: 2:18-bk-20168-ER
CASE NO.: 2:18-bk-20169-ER
CASE NO.: 2:18-bk-20171-ER
CASE NO.: 2:18-bk-20172-ER
CASE NO.: 2:18-bk-20173-ER
CASE NO.: 2:18-bk-20175-ER
CASE NO.: 2:18-bk-20176-ER
CASE NO.: 2:18-bk-20178-ER
CASE NO.: 2:18-bk-20179-ER
CASE NO.: 2:18-bk-20180-ER
CASE NO.: 2:18-bk-20181-ER

Chapter 11 Cases

Hon. Judge Ernest Robles

LIMITED OBJECTION OF SWINERTON BUILDERS TO MOTION OF DEBTORS FOR FINAL ORDERS (A) AUTHORIZING THE DEBTORS TO OBTAIN POST PETITION FINANCING ETC.

Final Hearing:

Date: October 3, 2018

Time: 10:00 a.m. (PST)

Place: United States Bankruptcy Court
Courtroom 1568
255 East Temple Street
Los Angeles, California 90012



1 Swinerton Builders, a secured creditor in this bankruptcy (“Swinerton”), hereby makes
2 this Limited Objection (“Objection”) to Debtors’ Motion for a Final Order (A) Authoring the
3 Debtors to Obtain Post Petition Financing (B) Authorizing the Debtors to Use Cash Collateral and
4 (C) Granting Adequate Protection to Prepetition Secured Creditors Pursuant to 11 U.S.C. §§ 105,
5 363, 364, 1107 and 1108 (“Motion”).
6

7 **I. INTRODUCTION**

8 The Motion and the interim order (“Order”) attached to the Notice of Final Hearing filed
9 with this court on September 17, 2018 (Doc. 201) fail to address Swinerton’s mechanics lien and
10 do not provide adequate protection for Swinerton as required by 11 U.S.C. § 364 (d)(1)(B). The
11 Order must be revised to protect Swinerton’s lien. Swinerton does not object to the Motion
12 except for the priming of Swinerton’s lien.

13 Swinerton holds an inchoate mechanics lien on real property owned by one of the debtors,
14 Seton Medical Center. Pursuant to 11 U.S.C. §§ 546(b)(1)(A) and 362(b)(3), Swinerton intends
15 to record its lien against this property in the coming weeks as authorized by California law. Once
16 recorded, the lien will relate back and become a lien effective as of the date work first
17 commenced at Seton Medical Center.

18 The Motion and Order fail to account for Swinerton’s lien and would allow a new lien
19 senior to Swinerton. The priming of a lien is not allowed under the Bankruptcy Code unless the
20 lien is adequately protected. The Motion provides no adequate protection for Swinerton’s lien.

21 This Objection is supported by the declaration of Curtis Johnson filed concurrently
22 herewith (“Johnson Dec.”).
23

24 **II. BACKGROUND**

25 On May 15, 2017, Swinerton entered into a contract with Seton Medical Center under
26 which Swinerton was to provide, among other things, seismic improvements for the medical
27 center. Johnson Dec., ¶ 2. In accordance with California law, Swinerton delivered a California
28 Preliminary Notice advising of its right to record a claim of lien. Johnson Dec., ¶ 3. Swinerton

1 commenced installation work on or about October 16, 2017. Johnson Dec., ¶ 4. Swinerton
2 continued seismic improvement work until it received a Stop Work Order dated July 18, 2018
3 from Seton Medical Center. Johnson Dec., ¶ 5. Swinerton proceeded to stop work and
4 demobilize, a process that was completed on or about August 3, 2018. Johnson Dec., ¶ 6.
5 Swinerton has not received a request to resume work. Johnson Dec., ¶ 7. As of the petition date
6 in this bankruptcy, Swinerton was owed \$1,206,886.22. Johnson Dec., ¶ 8.

7 8 **III. ARGUMENT**

9 **A. Swinerton Holds a Lien on Property Owned by Debtor Seton Medical Center.**

10 Swinerton holds an inchoate lien on the Seton Medical Center property, with the right
11 under California law and under the Bankruptcy Code to perfect its lien post-petition by recording
12 a claim of lien. California's Mechanics Lien Statute provides that a lien attaches upon
13 commencing work to improve property and has priority over any lien unrecorded as of the
14 commencement of work. Cal. Civ. Code § 8450. To perfect a lien, a direct contractor such as
15 Swinerton must record a claim of lien in the county where the property is located up to ninety
16 days after completion of the work of improvement. Cal. Civ. Code § 8412. Where there is a
17 cessation of labor, completion occurs upon occupation by the owner, or when the cessation of
18 labor has continued for a sixty day period. Cal. Civ. Code § 8180. Thus, the ninety day time
19 period for Swinerton to file its claim of lien began on or about August 3, 2018 at the earliest, the
20 date Swinerton demobilized. This ninety day period has not yet expired.

21 A claim of lien relates back to the date work commenced on the real property. Cal. Civ.
22 Code § 8450. Therefore, when Swinerton records its claim of lien, it will have a lien effective as
23 of the date work commenced. Swinerton's lien will be senior to any liens recorded subsequent to
24 that date.

25 The Bankruptcy Code specifically allows Swinerton to record its claim of lien post-
26 petition. Bankruptcy Code Section 362(b)(3) provides that the automatic stay does not apply to
27 "any act to perfect, or to maintain or continue the perfection of, an interest in property to the
28

1 extent that the trustee's rights and powers are subject to perfection under section 546(b) of this
2 title" Bankruptcy Code Section 546 (b)(1)(A) states:

3 The rights and powers of a trustee under sections 544, 545, and 549
4 of this title are subject to any generally applicable law that—(A)
5 permits perfection of an interest in property to be effective against
an entity that acquires rights in such property before the date of
perfection.

6 Cases interpreting these statutes are clear. Where state law permits a mechanics lien to
7 relate back to a pre-petition date, a creditor asserting a mechanics lien may record a lien post-
8 petition and the lien will relate back to the pre-petition period as provided by state law. *See, e.g.,*
9 *Greenblatt v. Utley*, 240 F.2d 243, 247 (9th Cir. 1956) ("Under California law it is clear that the
10 mechanic's lien, having arisen before bankruptcy, is preserved notwithstanding the advent of
11 bankruptcy.") (*Citing* a prior version of the California statute.); *In re KDR Bldg. Specialties, Inc.*,
12 76 B.R. 778, 780 (Bankr. S.D. CA 1987) (*quoting* legislative history of Bankruptcy Code Section
13 546(b): "The purpose of the subsection is to protect, in spite of the surprise intervention of a
14 bankruptcy petition, those whom state law protects by allowing them to perfect their liens or
15 interest as of an effective date that is earlier than the date of perfection.") The leading bankruptcy
16 treatise is also clear and on point:

17 Thus, the filing of a bankruptcy petition does not prevent the holder
18 of an interest in property from perfecting its interest under
19 applicable law, if, absent the bankruptcy filing, the interest holder
could have perfected its interest against an entity acquiring rights in
the property before the date of perfection.

20 5 Collier on Bankruptcy, ¶ 546(b)(1)(A), (Richard Levin & Henry J. Sommer eds., 16th ed. Rev.
21 2018).

22 Under California law and under Bankruptcy Code §§ 546(b)(1)(A) and 362(b)(3),
23 Swinerton holds an inchoate lien, and will hold a perfected lien relating back to the date work
24 commenced, when Swinerton records its claim of lien in the coming days.

25
26 **B. The Motion and Proposed Order Violate 11 U.S.C. § 364(d)(1)(B).**

27 The Bankruptcy Code requires that lien holders in estate property receive adequate
28 protection before new liens are allowed that would be senior or equal in priority to the existing

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1 liens. 11 U.S.C. § 364(d)(1)(B). The trustee has the burden of proof to show the adequate
2 protection. 11 U.S.C. § 362(d)(2). A motion for authority to obtain credit must describe the
3 adequate protection that will be provided to pre-petition lien holders. Fed. R. Bankr. P. 4001.
4 Here, Swinerton holds a lien on the Seton Medical Center property. However, the Motion and the
5 Order fail to provide adequate protection to Swinerton. Therefore, the Motion cannot be granted
6 in its current form and the Order must be amended to preserve the priority of Swinerton's lien.

7 There should be no dispute that the Motion and Order fail to address Swinerton's lien and
8 fail to provide adequate protection. The Bankruptcy Rule 4001 Statement section of the Motion
9 identifies secured creditors, but does not name Swinerton. Motion, p. 16. The Order does not
10 name Swinerton as one of the prepetition secured lenders. Order, p. 6-7. The Motion and Order
11 are also clear that the priming liens proposed for the DIP Lender would be senior to Swinerton.
12 Among other things, the Order provides the DIP Lender with first-priority security interests and
13 liens "on all of the Debtors' property." Order, p. 13.

14 Because the Order does not provide adequate protection to Swinerton, the Motion must be
15 denied.¹

16 IV. REPLY DEADLINE

17 Pursuant to a Stipulation between Swinerton and the Debtors, any Reply to this Limited
18 Objection is due on or before October 2, 2018 at 12:00 p.m. (Pacific Daylight Time). *See* (Doc.
19 251).

20 V. CONCLUSION

21 The Motion and Order fail to provide adequate protection for Swinerton's lien. Therefore,
22 the Motion must be denied or the Order revised to preserve the priority of Swinerton's mechanics
23 lien on the Seton Medical Center real property. To preserve this priority, the following proviso
24 should be inserted in the Order: "Provided, however, that nothing in this Order shall subordinate
25 Swinerton's mechanics lien on the Seton Medical Center property to any lien(s) or

26
27 ¹ Swinerton recognizes that Debtors may have failed to address Swinerton's lien because the lien
28 has not yet been recorded even though Seton Medical Center was aware of Swinerton's inchoate
lien. In advance of the October 3, 2018 hearing on the Motion, Swinerton anticipates working
with the Debtors to address Swinerton's lien.

1 claim(s) granted herein, whether to the DIP Lenders, the Prepetition Secured Creditors or
2 otherwise.”

3 WHEREFORE, Swinerton respectfully requests that the Court (i) condition any final
4 approval of the Motion on insertion of the foregoing language into the Order and/or such other
5 adequate protection of Swinerton’s interest in the Seton Medical Center real property as is
6 warranted under the Bankruptcy Code, and (ii) grant such other and further relief as the Court
7 deems just and proper.

8
9 Respectfully submitted,

10 Dated: September 24, 2018

FOX ROTHSCHILD LLP

11
12 By: /s/ Nathan A. Schultz

Nathan A. Schultz

Robert N. Amkraut (Pro Hac Vice To Be Filed)

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14 Attorneys for Swinerton Builders
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PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:
345 California Street, Suite 2200, San Francisco, CA 94014-2734

A true and correct copy of the foregoing document entitled (*specify*): _____

LIMITED OBJECTION OF SWINERTON BUILDERS TO MOTION OF DEBTORS FOR FINAL ORDERS (A) AUTHORIZING THE DEBTORS TO OBTAIN POST PETITION FINANCING ETC.

will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) September 24, 2018, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☒ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On (*date*) September 24, 2018, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☒ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (*state method for each person or entity served*): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) September 24, 2018, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

The Honorable Ernest Robles
U.S. Bankruptcy Court
Roybal Federal Building
255 E. Temple Street, Suite 1560
Los Angeles, CA 90012

☐ Service information continued on attached page

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

09/24/2018

Date

Nathan A. Schultz

Printed Name

/s/ Nathan A. Schultz

Signature

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

1. Served By the Court via Notice of Electronic Filing (NEF):

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This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

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1. Served By U.S. Mail:

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