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Daniel S. Bleck (*pro hac vice*)
Paul J. Ricotta (*pro hac vice*)
Ian A. Hammel (*pro hac vice*)
MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO, P.C.
One Financial Center; Boston, MA 02111
Tel: 617-542-6000 | Fax: 617-542-2241
Emails: dsbleck@mintz.com; pjricotta@mintz.com;
iahammel@mintz.com

Abigail V. O'Brient (SBN 265704)
MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO, P.C.
2029 Century Park East, Suite 3100; Los Angeles, CA 90067
Tel: 310-586-3200 | Fax: 310-586-3200
Email: avobrient@mintz.com

Attorneys for UMB Bank, N.A., as master indenture trustee and
Wells Fargo Bank, National Association, as indenture trustee

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION

In re VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al.*, Debtor and Debtor 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 Lynwood Medical 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 DePaul Ventures, LLC ☐ Affects DePaul 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-20167-ER; Case No. 2:18-bk-20168-ER; Case No. 2:18-bk-20169-ER; Case No. 2:18-bk-20171-ER; Case No. 2:18-bk-20172-ER; Case No. 2:18-bk-20173-ER; Case No. 2:18-bk-20175-ER; Case No. 2:18-bk-20176-ER; Case No. 2:18-bk-20178-ER; Case No. 2:18-bk-20179-ER; Case No. 2:18-bk-20180-ER; Case No. 2:18-bk-20181-ER Chapter 11 Cases Hon. Ernest M. Robles **OBJECTION TO MOTION OF DEBTORS FOR FINAL ORDER (A) AUTHORIZING THE DEBTORS TO OBTAIN POST PETITION FINANCING (B) AUTHORIZING THE DEBTORS TO USE CASH COLLATERAL AND (C) GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED CREDITORS PURSUANT TO 11 U.S.C. §§ 105, 363, 364, 1107 AND 1108** HEARING: Date: October 3, 2018 Time: 10:00 a.m. Ctrm: 1568

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Secured creditors UMB Bank, N.A., as successor master indenture trustee for the master indenture obligations described more fully below (the "Master Trustee"), and Wells Fargo Bank, National Association, as indenture trustee for the series 2005 revenue bonds also described more fully below (the "Series 2005 Trustee", and, collectively with the Master Trustee, the "Secured Parties") hereby make the following objection to the Debtors' request for a final order (a "Final Order") allowing their "*Emergency Motion of Debtors for Interim and Final Orders (A) Authorizing the Debtors to Obtain Post Petition Financing (B) Authorizing the Debtors to Use Cash Collateral and (C) Granting Adequate Protection to Prepetition Secured Creditors Pursuant to 11 U.S.C. §§ 105, 363, 364, 1107 and 1108*" [Docket No. 31] (the "Financing Motion"). In support of this objection, the Secured Parties state as follows:

PRELIMINARY STATEMENT

1. The Debtors seek authority through the Financing Motion to, among other things, (i) incur up to $185 million of post-petition indebtedness, and (ii) secure such indebtedness by first priority, perfected liens on substantially all of the Debtors' assets (the "DIP Facility"), which liens would involuntarily prime the Secured Parties' liens, and similarly prime the liens of all other secured creditors in these cases.

2. At the September 5, 2018 initial hearing on the Financing Motion, the Secured Parties consented to interim relief in connection with the Financing Motion and the Court thereafter entered an interim order, which will expire on October 6, 2018, authorizing the Debtors to incur up to $30 million of post-petition borrowing [Docket No. 86] (the "Interim Order"). Prior to such initial hearing, the Secured Parties were not meaningfully consulted, and were not involved in any way in the selection of the DIP Lender[1] or the negotiation of the terms of the DIP Facility, particularly the involuntary priming of their liens. The decision by the Secured Parties to consent to the Interim Order was based solely on the fact that the Secured Parties did not want to immediately imperil the viability of the Debtors at the very beginning of

[1] Capitalized terms not defined in this objection have the meanings specified in the Financing Motion.

these cases, for a short, 30-day period, while the Secured Parties had a more reasonable opportunity to begin to assess the Financing Motion.

3. The Secured Parties are willing to consent to a Final Order approving the Financing Motion, but only if the terms of that order are consistent with the provisions described in this objection below, and, for the convenience of the Court and all parties, as set forth in the attached black-line of certain sections of the draft order that the Debtors circulated to the Secured Parties for discussion purposes on September 22, 2018 (the "Draft Order"). The Debtors have not established that they can provide adequate protection to the Secured Parties as required under section 364 of the Bankruptcy Code. Therefore, if the Final Order does not contain the provisions described in this objection, the Secured Parties do not consent to the relief in the Financing Motion, including, in particular, the request to prime the liens of the Secured Parties. Among other critical terms, a Final Order must include:

(a) An accurate description of the identity and prepetition rights of the Prepetition Secured Creditors and their respective secured claims;

(b) The incorporation of customary and basic protections for the Secured Parties on account of the fact that their liens are being primed; and

(c) Terms separating out, distinguishing and accurately describing the adequate protection granted to each individual Prepetition Secured Creditor on account of the fact that the Prepetition Secured Creditors are not one, homogeneous group with identical rights and collateral, and are not even parties to the same prepetition debt obligations.

4. If the Final Order does not include the provisions described in this objection, the Secured Parties demand strict proof that the prepetition liens of the Secured Parties are being adequately protected under the Bankruptcy Code, including proof of the sufficiency of adequate protection notwithstanding the imposition of the DIP Facility, use of the cash collateral of the Secured Parties, and the requested priming of the liens of the Secured Parties up to the amount of $185 million. Under those circumstances, the Secured Parties expressly reserve all rights to supplement this objection and otherwise oppose the Financing Motion at an evidentiary hearing

to be scheduled by this Court.

5. Finally, no Final Order or other relief on the Financing Motion should provide adequate protection liens to any stakeholder in these cases on terms that prime any of the Secured Parties' prepetition liens. The Draft Order, as presented by the Debtors before the Secured Parties provided comments, described adequate protection liens that would prime the Secured Parties' existing prepetition liens, and similarly prime the existing prepetition liens of almost every other secured creditor in these cases. *Id.* Section 5(a). This suggested treatment would make each Prepetition Secured Creditor the unwilling guarantor of each other Prepetition Secured Creditor and completely rearrange the Prepetition Secured Creditors' existing relative rights and bargained-for lending terms. There is no basis to provide adequate protection liens that displace the Secured Parties' existing liens, or displace the existing liens of other secured creditors in this manner over the Secured Parties' objection. Any effort to impose that relief should be denied.

BACKGROUND

6. The Secured Parties are the largest lender-side creditors in these cases. UMB Bank, N.A. serves as master trustee for MTI Obligations issued by Verity Health Systems of California, Inc. and its predecessor organizations ("VHS") in an aggregate outstanding amount exceeding $461 million. *See Financing Motion* ¶ 20. Those MTI Obligations secure nine series of securities that include revenue bonds, working capital bonds, and working capital notes issued for the benefit of Debtors VHS, O'Connor Hospital, Saint Louise Regional Hospital, St. Francis Medical Center, St. Vincent Medical Center and Seton Medical Center (collectively, the "Obligated Group"). *Id.* Wells Fargo Bank, National Association, serves as indenture trustee for three of those series of debt instruments in an aggregate outstanding amount exceeding $259 million (the "Series 2005 Bonds").[2] *Id.*

7. The MTI Obligations and Series 2005 Bonds are secured by Gross Receipts as

[2] U.S. Bank, National Association, serves as indenture trustee for the remaining six of those series of debt instruments in an aggregate outstanding amount exceeding $202 million.

well as the real property and personal property associated with the Debtors' six acute care hospital facilities. *See, e.g., Financing Motion* ¶ 26, *Financing Motion, Exhibit A* (Proposed Order) ¶ H.

8. The Debtors commenced these cases on August 31, 2018. The Debtors continue to manage their affairs as "debtors in possession."

9. The Debtors' "first day pleadings" in these cases include the Financing Motion and the "*Declaration of Anita Chou, Chief Financial Officer, in Support of Motion for Interim Order Authorizing (A) Use of Cash Collateral; (B) Debtor in Possession Credit Agreement; (C) Grant of Superpriority Priming Liens to DIP Lender and; (D) Grant of Junior Liens on Post Petition Accounts and Inventory as Adequate Protection to Prepetition Secured Parties Pursuance to 11 U.S.C. §§ 105(A), 363(C)(2), and 364(C) and (D)*" [Docket No. 32] (the "Chou Declaration").

10. Among other relief sought by the Debtors through the Financing Motion, the Debtors seek authority to incur up to $185 million of secured, post-petition financing on a final basis. *See Financing Motion* ¶ 31. The proposed DIP Facility would be secured by first priority, perfected liens on substantially all of the Debtors' assets in favor of the DIP Lender, which would involuntarily prime the liens and security interests securing the MTI Obligations.

11. The Debtors have offered the following adequate protection to the Secured Parties in an attempt to compensate them for the priming liens securing the DIP Facility which the Debtors seek to impose on the collateral of the Secured Parties and for the Debtors' continued use of the Secured Parties' cash collateral and other assets of the Debtors that are pledged as security for the Debtors' MTI Obligations: (a) adequate protection payments equal to post-petition non-default interest on the MTI Obligations; (b) payment of limited professional fees for the Secured Parties' attorneys and financial advisors; (c) new ("replacement") security interests on all of the Debtors' prepetition and post-petition assets, limited to the extent of any diminution in value of the Prepetition Secured Creditors' prepetition collateral, and subject to the priming DIP Liens, a carve out for professional fees of the Debtors and the Committee, and

certain other matters; (d) a promise to maintain pre-petition real property securing the MTI Obligations; and (e) a superpriority administrative claim, essentially covering the same assets and on the same terms and conditions as the replacement liens. *See Financing Motion at page 25; Chou Declaration* ¶¶ 19-23. The terms of the adequate protection do not, however, include a number of provisions that are customarily provided to prepetition secured creditors that are being primed, and which are necessary to adequately protect such creditors.

12. Neither of the Secured Parties was contacted in any capacity about the Debtors' deteriorating financial condition or potential need for additional financing as described in the Financing Motion until less than a month before the Debtors' chapter 11 filing. Critical documents concerning the DIP Facility, including the proposed "*Debtor in Possession Revolving Credit Agreement*" (the "Credit Agreement") and proposed order on the Financing Motion were only "shared" with those parties when they appeared on the docket in these cases.

ARGUMENT

(i) The Debtors are required to obtain the Secured Parties' consent to the Financing Motion or otherwise provide the Secured Parties with sufficient adequate protection.

13. It is fundamental, and indisputable, that the Debtors may only incur the DIP Facility, and otherwise use, sell or lease the Secured Parties' collateral, including cash collateral, if they obtain the Secured Parties' consent to the Financing Motion or provide "adequate protection" to the Secured Parties that safeguards the Secured Parties' property interests. *See Hari Ram, Inc. v. Magnolia Portfolio, LLC (In re Hari Ram, Inc.),* 507 B.R. 114, 120 (Bankr. M.D.Pa. 2014) (noting these basic alternatives); *Scottsdale Medical Pavilion v. Mutual Benefit Life Ins. Co. (In re Scottsdale Medical Pavilion),* 159 B.R. 295, 302 (B.A.P. 9th Cir. 1993) (same).

14. The Debtors' obligations to obtain consent or provide "adequate protection" are a function of the Debtors' requested priming liens and planned continued use of the Secured Parties' collateral, including cash collateral, all of which would diminish the Secured Parties' existing secured property interests.

15. The Secured Parties are entitled to adequate protection (absent the Secured Parties' consent on the Financing Motion) as a matter of right, not merely as a matter of discretion. *See In re Frank*, 103 B.R. 771, 774 (W.D. Va. 1989). Bankruptcy Code section 363(e) provides that the Court shall prohibit or condition the Debtors' use, sale, or lease of the Secured Parties' collateral, including cash collateral, as necessary to provide adequate protection of the Secured Parties' interests. *See* 11 U.S.C. § 363(e). Section 364(d)(1)(B) of the Bankruptcy Code is even more direct: there can be no 'superpriority' lien unless "there is adequate protection of the interest of the holder of the [prior] lien …." *See* 11 U.S.C. § 363(d)*; In re T.M. Sweeney & Sons LTL Servs., Inc.*, 131 B.R. 984, 990 (Bankr. N.D. Ill. 1991); *Metromedia Fiber Network Servs. v. Lexent, Inc. (In re Metromedia Fiber Network Servs., Inc.)*, 290 B.R. 487, 491 (Bankr. S.D.N.Y. 2003) (adequate protection is not permissive or discretionary).

16. The Debtors bear the burden of showing that adequate protection has been provided. *See* 11 U.S.C. §§ 363(p), 364(d)(2) (providing that the debtor "has the burden of proof on the issue of adequate protection"); *Wells Fargo Bank, N.A. v. Sonora Desert Dairy, L.L.C. (In re Sonora Desert Dairy, L.L.C.)*, 2015 Bankr. LEXIS 18, at *30-31 (B.A.P. 9th Cir. Jan. 5, 2015)[3]; *see also In re Plabell Rubber Prods., Inc.*, 137 B.R. 897, 899 (Bankr. N.D. Ohio 1992) ("Section 36[4](d)(1)(B) requires the movant to prove that the lender who is subject to being primed will be adequately protected in the face of the loan transaction").

17. Absent the Secured Parties' consent, adequate protection must ensure that the Secured Parties receive the value for which they bargained prepetition. *See Resolution Tr. Corp. v. Swedeland Dev. Group, Inc. (In re Swedeland Dev. Group, Inc.)*, 16 F.3d 552, 564 (3d Cir. 1994); *see also In re Martin*, 761 F.2d 472, 476 (8th Cir. 1985) (proposal of adequate protection "should as nearly as possible . . . provide the creditor with the value of his bargained for rights").

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[3] Pursuant to Local Bankruptcy Rule 9013-2(c)(3)(D), cited case law not available in approved reporters is attached hereto as **Schedule A**.

(ii) The Secured Parties are willing to consent to the Financing Motion if the Final Order reflects sufficient protections, including sufficient adequate protections for the Secured Parties.

18. The Secured Parties are willing to consent to a Final Order in connection with the Financing Motion if the Final Order contains terms as described in this objection and as set forth in ***Exhibit A.*** Proceeding on the Financing Motion with the Secured Parties' consent will obviate the need that will otherwise exist to address the Debtors' ability to provide adequate protection for the Secured Parties.

19. The primary required terms and provisions to convert the Draft Order to an acceptable Final Order can be generally grouped as follows:[4]

(a) Accuracy. Any Final Order must contain an accurate description of the identity and prepetition rights of the Prepetition Secured Creditors and their respective secured claims. Revised terms necessary to properly describe the Prepetition Secured Creditors and their respective claims are reflected in, among other places, Sections G and I of ***Exhibit A.*** For convenience, as reflected in ***Exhibit A***, the necessary language of the Final Order specifying these terms is also reproduced below:

> **"G. Prepetition Secured Credit Facilities**. As of the Petition Date, the Debtors were indebted and liable to the Prepetition Secured Creditors as follows:
>
> i. UMB Bank, N.A., ("***UMB Bank***") is the successor master trustee (in such capacity, the "***Master Trustee***") under the Master Indenture of Trust dated as of December 1, 2001, as amended and supplemented (the "***Master Indenture***") with respect to the MTI Obligations (defined below) securing the repayment by the Obligated Group (defined below) of its loan obligations with respect to (1) the California Statewide Communities Development Authority Revenue Bonds (Daughters of Charity Health System) Series 2005 A, G and H (the "***2005 Bonds***"), (2) the California Public Finance Authority Revenue Notes (Verity Health System) Series 2015 A, B, C and D (the "***2015 Working Capital Notes***"), and (3) the California Public Finance Authority Revenue Notes (Verity Health System) Series 2017 A and B (the "***2017 Working Capital Notes***" and, collectively with the 2015 Working Capital Notes, the "***Working Capital Notes***"). The joint and several obligations issued under the Master Indenture by

[4] ***Exhibit A*** also reflects certain other comments. The comments reflected in ***Exhibit A*** control to the extent of any discrepancy with this summary.

Verity Health System of California, Inc., O'Connor Hospital, Saint Louise Regional Hospital, St. Francis Medical Center, St. Vincent Medical Center and Seton Medical Center (collectively, the "***Obligated Group***") securing the Obligated Group's repayment of the loans to the Obligated Group of the proceeds of the 2005 Bonds and the Working Capital Notes are collectively referred to as the "***MTI Obligations***". Wells Fargo Bank National Association ("***Wells Fargo***") serves as bond indenture trustee under the bond indentures relating to the 2005 Bonds. U.S. Bank National Association ("***U.S. Bank***") serves as the note indenture trustee and as the collateral agent under the note indentures relating to the Working Capital Notes. UMB Bank, as Master Trustee, serves as the collateral agent for the MTI Obligations (UMB Bank, in such capacity, and Wells Fargo, as bond trustee under the bond indentures for the 2005 Bonds, and U.S. Bank, as note trustee under the note indentures for the Working Capital Notes, all secured on a parity basis by the MTI Obligations, the "***MTI Agents***"). As of the Petition Date, the amount of the MTI Obligations was as follows: (x) the principal and interest owing under the MTI Obligations securing the 2005 Bonds was $_____, not including fees, costs, costs of collection and any other amounts due and owing under the Obligated Group's loan agreements relating to the 2005 Bonds; (y) the principal and interest owing under the MTI Obligations securing the 2015 Working Capital Notes was $_____, not including fees, costs, costs of collection and any other amounts due and owing under the Obligated Group's loan agreements relating to the 2015 Working Capital Notes; and (z) the principal and interest owing under the MTI Obligations securing the 2017 Working Capital Notes was $_____, not including fees, costs, costs of collection and any other amounts due and owing under the Obligated Group's loan agreements relating to the 2017 Working Capital Notes. The MTI Obligations are secured by, inter alia, security interests in the prepetition accounts of, and mortgages on the principal real estate assets of, the members of the Obligated Group. In addition to the security provided under the MTI Obligations, U.S. Bank, as note trustee for the Working Capital Notes, is secured by security interests in the prepetition accounts of the Obligated Group, and mortgages on the principal real estate assets of Saint Louise Regional Hospital and St. Francis Medical Center (collectively, the "***Intercreditor Collateral***"). Pursuant to the terms of the Intercreditor Agreement among, inter alia, UMB Bank and U.S. Bank, the lien of the Master Indenture and the MTI Obligations on the Intercreditor Collateral is junior to the lien on the Intercreditor Collateral of U.S. Bank., as note

trustee for the Working Capital Notes, except with respect to up to $68,000,000 of the proceeds of any foreclosure or sale of St. Francis Medical Center and up to $5,500,000 of the proceeds of any foreclosure or sale of Saint Louise Regional Hospital, which, to the extent required to be applied to the payment of the 2005 Bonds in order to preserve their tax exemption, are required to be so applied (the "***Tax Savings Provisions***"); and

ii. Verity MOB Financing, LLC and Verity MOB Financing II, LLC (together, the "***MOB Lenders***") hold security interests in Verity Holdings' accounts, including rents arising from the prepetition MOB Financing, and mortgages on medical office buildings owned by Verity Holdings (the "***MOB Financing***").

The Master Trustee, Wells Fargo as bond indenture trustee for the 2005 Notes, U.S. Bank as Note Trustee for the Working Capital Notes, and the MOB Lenders are collectively hereafter referred to as the "***Prepetition Secured Creditors***;" the MTI Obligations, the Obligated Group's loan obligations with respect to the Working Capital Notes and the MOB Financing are hereinafter referred to as the "***Prepetition Secured Obligations***;" the prepetition interests (including the liens and security interests) of each Prepetition Secured Creditor in the property and assets of the Debtors are hereinafter referred to as the "***Prepetition Liens***;" and the documents, writings and agreements evidencing the Prepetition Secured Obligations are hereinafter referred to as the "***Prepetition Secured Documents***")."

"I. <u>Prepetition Collateral</u>. In order to secure that portion of the Prepetition Secured Obligations owing to an individual Prepetition Secured Creditor and the Prepetition Secured Trade Vendor Arrangement (as described in paragraph H above), the Debtors, excluding the Philanthropic Foundations, granted a Prepetition Lien to such Prepetition Secured Creditor and McKesson as provided in the Prepetition Secured Documents and the documents pertaining to the VMF Collateral. The assets subject to the Prepetition Lien of each Prepetition Secured Creditor are hereafter referred to as the "***Prepetition Collateral***" of such Prepetition Secured Creditor. Collectively, the assets subject to all of the Prepetition Liens of all of the Prepetition Secured Creditors and the VMF Collateral constitute substantially all of the assets of the Debtors."

(b) <u>Basic Protections for Primed Secured Parties</u>. Any Final Order must contain customary and basic protections for the Secured Parties on account of the fact that

their liens are being primed. Such protections should include giving the Secured Parties rights to real-time information relating to the Debtors' sale process and, because the Secured Parties (unlike the DIP Lender) are the real parties at risk of non-payment in these cases, providing the Secured Parties, along with the DIP Lender, reasonable input into that process and potential transaction terms. The Final Order should contain language set forth in, among other places, Sections 5(f) and 7 of ***Exhibit A.*** For convenience, the primary language set forth in ***Exhibit A*** specifying these terms is reproduced below:

> "5(f). Pursuant to Section 6.5 of the DIP Credit Agreement, the Debtors have agreed that they will not engage in any Asset Sale (as defined in the DIP Credit Agreement) except in form and substance satisfactory to the DIP Lender in its reasonable discretion. In light of the fact that the DIP Obligations are secured by priming, first priority liens on all of the Debtors' assets, in addition to the approval rights of the DIP Lender under such Section 6.5, the Debtors also shall not engage in any such Asset Sales which involve the disposition of the Prepetition Collateral of a Prepetition Secured Creditor unless in form and substance satisfactory to such Prepetition Secured Creditor in its reasonable discretion."
>
> "7. **Budget Compliance and Reporting**. The proceeds of the DIP Facility and the use of Cash Collateral shall be subject to, and used in accordance with, the terms and conditions of the DIP Financing Agreement and the DIP Budget (subject to the variances set forth therein). Debtors acknowledge and confirm that the DIP Budget includes the payment of CSCDA Special Assessments. The Debtors shall provide all reports and other information as required in the DIP Credit Agreement (subject to the grace periods provided therein), with copies delivered substantially contemporaneously to counsel for the Prepetition Secured Creditors and counsel to the Committee such information to include reasonably complete details on the payments contemplated by the Critical Vendors Motion and the Utilities Motion, as defined in the Adcock Declaration and such information to be timely provided, sufficient for the Prepetition Secured Creditors to file an objection with this Court on two business days' notice. The Debtors' failure to comply with the DIP Budget (including the variances set forth in the DIP Credit Agreement) or to provide the reports and other information required in the DIP Credit Agreement shall constitute an Event of Default (as defined herein), following the expiration of any applicable grace period set forth in the DIP Credit Agreement. Subject to the execution and continuation of valid and binding confidentiality agreements, the Debtors shall, on an ongoing

basis and otherwise upon reasonable request, provide to the Prepetition Secured Creditors information concerning the Debtors' ongoing efforts to market their assets, including all marketing materials used by the Debtors in this process, information identifying the parties the Debtors have contacted, copies of any proposals or expressions of interest, drafts and final versions of all pleadings and documentation (including purchase and sale agreements) to be used in connection with any sales of assets, and other information concerning these matters the Prepetition Secured Creditors may reasonably request."

(c) Accurately Granting Adequate Protection to Each Prepetition Secured Creditor. Any Final Order must accurately separate out, distinguish and accurately describe the adequate protection granted to each individual Prepetition Secured Creditor. The Prepetition Secured Creditors are not one, homogeneous group with identical rights, liens and collateral, and are not even parties to the same prepetition debt obligations. For example, some Prepetition Secured Creditors have overlapping collateral but have different priorities in such overlapping collateral, and some do not have overlapping collateral at all. In addition, it should be clear, as required by law, that any post-petition "replacement" lien of any creditor must be subject to any unavoidable prepetition lien of any other creditor and that such replacement lien does not constitute a priming lien among such creditors ranking prior to any prepetition lien. Revised terms on this subject are reflected in, among other places, Section M, Section N, Section 5(a) and Section 5(c) of ***Exhibit A***. For convenience, the primary revised terms contained in ***Exhibit A*** specifying the adequate protection replacement liens and adequate protection superiority administrative claims are reproduced below:

"**M. Application of Sale Proceeds of DIP Collateral.** The DIP Liens shall attach as first priority liens and security interests, pursuant to section 364(d) of the Bankruptcy Code and the DIP Financing Agreements, to all proceeds of any sale or other disposition of the Debtors' assets, including, without limitation, the Facilities and any other DIP Collateral (as defined below) (the "***Sale Proceeds***"). Any individual sale of assets of the Debtors which generates in excess [$50,000] of net Sale Proceeds shall be held in escrow in a separate interest bearing deposit account subject to a deposit account control agreement in favor of the DIP Lender (an "***Escrow Deposit Account***"). Any funds held in an Escrow Deposit Account shall not be commingled with any other Sale Proceeds, or any other funds of the Debtors or otherwise. The DIP Lender is granted a first priority lien on the Escrow Deposit Account and all Sale Proceeds, including any deposit provided by any buyer in connection with any asset sale, and such proceeds, deposits, and the Escrow Deposit Account shall constitute Collateral under the DIP Credit Agreement and DIP Collateral under this Final Order. On the Revolving Loan

Termination Date (as defined in the DIP Credit Agreement), the DIP Lender shall apply any and all amounts remaining on deposit in the Escrow Deposit Account to the outstanding amount due under the DIP Loan, with any remaining balance to be delivered to the Debtors subject to any Prepetition Liens, VMF Liens, Prepetition Replacement Liens and VMF Replacement Liens; *provided, however*, that upon further order of the Court as requested by any of the Prepetition Secured Creditors, McKesson or the Debtors, and with the consent of the DIP Lender (which consent may, for the avoidance of doubt, be withheld in its sole discretion), any Sale Proceeds and deposits provided in connection with any asset sale may be disbursed to the Prepetition Secured Creditors or McKesson on terms and conditions that are acceptable to the DIP Lender and to each of the Prepetition Secured Creditors which has a Prepetition Lien in such Sale Proceeds (on in the case of VMF Collateral, McKesson), or a Prepetition Lien in the type or category of assets sold. Nothing contained herein shall constitute an amendment, modification or waiver of any terms or provisions of the Intercreditor Agreement or the rights of the MTI Agents thereunder, and any distribution of any Sale Proceeds to the MTI Agents for application to the MTI Obligations shall be consistent with all of the terms of the Intercreditor Agreement, including the Tax Savings Provisions."

"**N. <u>Adequate Protection for Prepetition Secured Creditors and McKesson</u>.** The priming of each Prepetition Secured Creditor's Prepetition Liens to the extent set forth below pursuant to section 364(d) of the Bankruptcy Code is necessary to obtain the DIP Financing. In exchange for the priming of the Prepetition Liens set forth below, each Prepetition Secured Creditor and McKesson shall be entitled to receive adequate protection, as set forth in this Final Order, pursuant to sections 361, 363 and 364 of the Bankruptcy Code, for any diminution in the value of such Prepetition Secured Creditor's interest in its Prepetition Collateral or VMF Collateral resulting from, among other things, the subordination of such interest to the Carve Out (as defined herein) and to the DIP Liens (as defined herein), the Debtors' use, sale or lease of such Prepetition Collateral or VMF Collateral, including Cash Collateral, and the imposition of the automatic stay from and after the Petition Date (collectively, and solely to the extent of such diminution in value, a "***Diminution in Value***"). Each Prepetition Secured Creditor has negotiated in good faith regarding the Debtors' use of their respective Prepetition Collateral to help fund the administration of the Debtors' estates along with the proceeds of the DIP Financing. Based on the DIP

Motion and the record presented to the Court at the Interim Hearing and the Final Hearing, the terms of the proposed adequate protection arrangements are fair and reasonable, reflect the Debtors' prudent exercise of business judgment and constitute reasonably equivalent value and fair consideration for the consent of the Prepetition Secured Creditors and McKesson; *provided, however*, that nothing herein shall limit the rights of any of the Prepetition Secured Creditors or McKesson to hereafter seek new, additional, or different adequate protection."

"5(a) **Adequate Protection Replacement Liens**. To the extent that a Prepetition Secured Creditor suffers a Diminution in Value from and after the Petition Date with respect to its Prepetition Liens in any of its Prepetition Collateral, such Prepetition Secured Creditor shall be granted, pursuant to sections 361, 363(e), and 364(d) of the Bankruptcy Code, in addition to its Prepetition Liens, valid, perfected and enforceable security interests and Liens in the DIP Collateral, excluding the prepetition collateral held by WTNA with respect to the Clean Fund Bonds and the NR2 Petros Bonds, indenture held funds held by any of the MTI Agents, donor restricted funds held at Philanthropic Foundations and Avoidance Actions and any proceeds thereof (such Prepetition Secured Creditor's "***Prepetition Replacement Liens***"), which shall be junior only to (1) the Carve Out, (2) the DIP Liens securing the DIP Obligations, and (3) any perfected, unavoidable, prepetition liens on the DIP Collateral (including any unavoidable Prepetition Liens of such Prepetition Secured Creditor and any other Prepetition Secured Creditor). The priority of two or more Prepetition Replacement Liens, solely as among and between the holders of such Prepetition Replacement Liens, shall be as follows:

i. in the event that Prepetition Replacement Liens are granted hereunder to two or more of the MTI Agents, to the extent that such Prepetition Replacement Liens cover DIP Collateral that is a type or category of asset that constituted Prepetition Collateral of such MTI Agents, the priority of such Prepetition Replacement Liens solely as among and between such MTI Agents shall be governed by the Intercreditor Agreement as if such DIP Collateral subject to such Prepetition Replacement Liens were Prepetition Collateral of such MTI Agents immediately prior to the Petition Date;

ii. in the event that Prepetition Replacement Liens are granted hereunder to one or more MTI Agents and to the MOB Lenders,

to the extent that such Prepetition Replacement Liens cover DIP Collateral which is a type or category of asset that constituted Prepetition Collateral of such MTI Agents or the MOB Lenders, (x) the Prepetition Replacement Lien of the MTI Agents shall have priority over the Prepetition Replacement Lien of the MOB Lenders to the extent that such covered DIP Collateral is a type or category of asset that constituted Prepetition Collateral of the MTI Agents, and (y) the Prepetition Replacement Lien of the MOB Lenders shall have priority over the Prepetition Replacement Lien of the MTI Agents to the extent that such covered DIP Collateral is a type or category of asset that constituted Prepetition Collateral of the MOB Lenders; and

iii. in the event that Prepetition Replacement Liens are granted hereunder to any Prepetition Secured Creditor covering DIP Collateral which does not constitute Prepetition Collateral of any Prepetition Secured Creditor nor is a type or category of asset that constituted Prepetition Collateral of any Prepetition Secured Creditor, such Prepetition Replacement Liens shall rank *pari passu* and have equal priority with all Prepetition Replacement Liens granted in such DIP Collateral, and the holders of such Prepetition Replacement Liens shall be entitled to a *pro rata* distribution of the proceeds of any such Prepetition Replacement Liens.

With respect to the VMF Collateral, McKesson shall be entitled to a replacement lien on the postpetition assets of VMF, excluding Avoidance Actions ("***VMF Replacement Lien***"), to the extent of any Diminution in Value in such VMF Collateral, and shall be *pari passu* with any the Prepetition Replacement Liens thereon, but junior to (m) Carve Out, and (n) the DIP Liens."

"5(c) **Prepetition Superpriority Claim**. To the extent that a Prepetition Secured Creditor suffers a Diminution in Value from and after the Petition Date with respect to its Prepetition Liens in any of its Prepetition Collateral, in addition to the Prepetition Replacement Lien granted to such Prepetition Secured Creditor pursuant to paragraph 5(a) of this Final Order on account of such Diminution in Value (a "***Related Prepetition Replacement Lien***"), such Prepetition Secured Creditor shall be granted, pursuant to sections 363(c)(1), 503(b) and 507(b) of the Bankruptcy Code, an allowed, superpriority administrative expense claim (a "***Prepetition Superpriority Claim***") which shall have priority over all administrative expense claims and unsecured claims against the Debtors and their estates, now existing or hereafter arising, of any kind or nature whatsoever,

> including, without limitation, administrative expenses of the kind specified or ordered pursuant to sections 105, 326, 328, 330, 331, 503(a), 503(b), 506(c), 507(a), 507(b), 546(c), 546(d) 552, 726, 1113 and 1114 of the Bankruptcy Code; *provided*, *however*, any such Prepetition Superpriority Claim shall be junior and subordinate to (i) the Carve Out, and (ii) the DIP Superpriority Claim; *provided further*, if Prepetition Superpriority Claims are granted to more than one Prepetition Secured Creditor, then solely for the purpose of determining the relative rank and priority among and between such Prepetition Superpriority Claims, such rank and priority shall be the same as the relative rank and priority of the Related Prepetition Replacement Liens of such Prepetition Secured Creditors as determined by paragraph 5(a) of this Final Order."

20. Any Final Order should also reflect that it is based on the Secured Parties' consent, and is not based on any finding of the Court or admission by the Secured Parties that the Debtors have established sufficient adequate protection to impose the relief the Debtors are seeking. *See* ***Exhibit A*** Section K. Last, any Final Order should also reflect a number of technical modifications reflected in ***Exhibit A.***

21. A Final Order on the foregoing terms will result in a consensual order on the Financing Motion and therefore satisfy the requirements of the Bankruptcy Code. *Scottsdale Medical Pavilion v. Mutual Benefit Life Ins. Co. (In re Scottsdale Medical Pavilion),* 159 B.R. at 297.

(iii) The Secured Parties reserve all rights to challenge the Financing Motion if the requested provisions are not included in the Final Order.

22. Pending confirmation that the Debtors support, and that the Court will enter, a Final Order consistent with this objection, including ***Exhibit A***, the Secured Parties reserve all rights to require sufficient adequate protection as a condition to any further relief on the Financing Motion.

23. If the Debtors seek to impose the DIP Facility and a Final Order or other order granting relief in connection with the DIP Facility without the Secured Parties' consent, the Debtors must provide adequate protection that is crafted so as to preserve the *status quo* for affected secured creditors. *See In re 354 E. 66th St. Realty Corp.*, 177 B.R. 776, 781-782

(Bankr. E.D.N.Y. 1995) (noting that the purpose of adequate protection payments is to preserve the *status quo* for secured creditors); *see also Associates Commercial Corp. v. Rash (In re Rash)*, 90 F.3d 1036, 1050 n. 17 (5th Cir. 1996), *rev'd on other grounds*, 520 U.S. 953 (1997) ("The adequate protection provisions . . . were included in the Bankruptcy Code in 1978, reflecting a few prior decisions in the case law that sought to protect secured creditors from a decline in the value of the collateral during the pendency of the stay").

24. Because the Debtors' requested priming liens and planned continued use of the Secured Parties' collateral, including cash collateral, would, by definition and simple math, diminish the Secured Parties' existing secured property interests, the Debtors could only meet the adequate protection burden they would shoulder (absent consent) by showing on a "firm evidentiary basis" that the Secured Parties' liens will be adequately protected from the decrease in value that will be caused if the Debtors impose the requested priming liens and use the Secured Parties' collateral. *See In re Windsor Hotel, L.L.C.*, 295 B.R. 307, 314 (Bankr. C.D. Ill. 2003); *see also In re Mosello*, 195 B.R. 277, 292 (Bankr. S.D.N.Y. 1996) ("[A]dequate protection should be premised on facts, or on projections grounded in a firm evidentiary basis"); *In re First South Sav. Ass'n*, 820 F.2d 700, 710 (5th Cir. 1987) ("Given the fact that super priority financing displaces liens on which creditors have relied in extending credit, a court that is asked to authorize such financing must be particularly cautious when assessing whether the creditors so displaced are adequately protected").

25. Absent the entry of a Final Order on terms consistent with those set forth herein, the Secured Parties are unwilling to agree that the adequate protection reflected in the Financing Motion and in the Draft Order satisfies the requirements of sections 361, 363 and 364 of the Bankruptcy Code.

26. If the Debtors choose to proceed with non-consensual relief on or in connection with the Financing Motion, the Secured Parties insist on verifiable compensation to offset the decline in the Secured Parties' collateral position that would be caused by the relief sought in the Financing Motion, including without limitation, the involuntary imposition of a priming lien

and the use of the Secured Parties' collateral. *See In re Swedeland*, 16 F.3d at 567.

(iv) No Final Order or other relief on the Financing Motion should provide adequate protection liens to any stakeholder on terms that prime any of the Secured Parties' prepetition liens.

27. Finally, the Court must ensure that no Final Order or other relief on the Financing Motion provides adequate protection liens to any stakeholder in these cases on terms that prime any of the Secured Parties' prepetition liens. The Draft Order, as presented by the Debtors before the Secured Parties provided the comments that appear in ***Exhibit A***, described adequate protection liens that would prime the Secured Parties' existing prepetition liens, and similarly prime the existing prepetition liens of almost every other secured creditor in these cases. *Id.* Section 5(a). There is no basis to provide adequate protection liens that displace the Secured Parties' existing liens, or displace the existing liens of other secured creditors in these cases. Any effort to impose that relief should be denied.

28. The Draft Order, as presented, included proposed adequate protection liens for the benefit of all Prepetition Secured Creditors. *See* ***Exhibit A*** Section 5. Without conceding the Debtors' assertions that the Secured Parties are receiving adequate protection in the first place, it is not surprising that the Debtors proposed adequate protection liens when the Debtors are seeking authority in the Financing Motion to incur the DIP Facility, are seeking to burden substantially all of the Debtors' assets with priming liens in favor of the DIP Lender, and are otherwise planning to continue to use assets and property that constitute the Prepetition Secured Creditors' respective collateral, including Cash Collateral.

29. The Debtors' proposed adequate protection liens are, however, surprising because they include an extraordinary feature that is not supported by legal authority, runs counter to fundamental policies, and must not be approved. The Draft Order specifically proposed that the adequate protection liens in these cases would be subject only to: (1) the Carve Out; (2) the DIP Liens securing the DIP Obligations; (3) any perfected, unavoidable, prepetition VMF Liens in VMF Collateral; and (4) certain perfected, unavoidable, prepetition liens granted by Holdings to U.S. Bank as security for the Series 2017 Working Capital Notes. *Id.* The Secured Parties are

informed that these terms are intended to produce adequate protection liens that would prime existing prepetition liens associated with the MTI Obligations and prime most other prepetition secured obligations in these cases.

30. The Debtors' suggested "priming" would completely upend the Debtors' prepetition capital structure. Among other wholesale changes this structure would cause, this structure would force the Secured Parties to serve as unwilling guarantors of each other Prepetition Secured Creditor in these cases at the expense of the Secured Parties' own interests, in effect imposing an intercreditor arrangement on non-debtor third parties. This scheme would also force the Secured Parties to provide adequate protection to other Prepetition Secured Creditors at the expense of their own interests in the Debtors' assets and property, and otherwise completely rearrange the Prepetition Secured Creditors' existing relative rights and bargained-for lending terms. If, for example, U.S. Bank suffers a Diminution in Value under this structure in its role as note indenture trustee and collateral agent for the Working Capital Notes, U.S. Bank would suddenly have adequate protection liens in the Secured Parties' collateral ahead of the Secured Parties' interests. As noted in the Financing Motion, the Prepetition Secured Creditors have carefully drawn relative rights. The Secured Parties did not agree, either before these cases commenced or after, to assume any role that resembles the Debtors' suggested adequate protection structure.

31. The Secured Parties have in ***Exhibit A*** struck the terms of the Draft Order that purported to provide adequate protection liens on priming terms, and oppose any effort to impose them or similar relief, since there is no authority under the Bankruptcy Code for adequate protection liens on a priming basis. *See* 11 U.S.C. §§ 363, 364. The only provision in the Bankruptcy Code that contemplates priming liens at all – section 364(d) – does not apply to adequate protection liens. Section 364(d) only contemplates priming liens for the benefit of lenders advancing post petition loans.[5] *See* 11 U.S.C. § 364(d); *Shapiro v. Saybrook Mfg. Co.*

[5] Even under these conditions, section 364(d) conditions any priming lien on a showing that other requirements, including sufficient adequate protection for existing lienholders, are met. 11 U.S.C. § 364(d).

(In re Saybrook Mfg. Co.), 963 F.2d 1490, 1494 (11th Cir. 1992) ("By their express terms, sections 364(c) & (d) apply only to future -- i.e., post-petition -- extensions of credit. They do not authorize the granting of liens to secure pre-petition loans"). Currently, only the DIP Lender is providing new funds to the Debtors.

32. Courts that have considered exactly this issue have rejected the notion that adequate protection liens can be approved on terms that prime existing liens. *Desert Fire Prot. v. Fountainebleau Las Vegas Holdings, LLC (In re Fountainebleu Las Vegas Holdings, LLC),* 434 B.R. 716, 758 (S.D. Fla. 2010) ("Nothing in the Bankruptcy Code . . . appears to authorize a bankruptcy court to prime a secured creditor as a kind of adequate protection for the use of cash collateral"). The Court should similarly reject any invitation by the Debtors or other stakeholders in these cases to impose an adequate protection scheme with these attributes given this lack of authority.

33. The Court should otherwise reject adequate protection liens with priming features since a Final Order on those terms would impose a wholesale change in the Secured Parties' bargained-for rights, and go well beyond the intended purpose of adequate protection.

34. The Debtors cannot, in the name of adequate protection, impose what amounts to an intercreditor arrangement upon the Prepetition Secured Creditors. Importantly, " [n]either the legislative history nor the [Bankruptcy] Code indicate that Congress intended the concept of adequate protection to go beyond the scope of protecting the secured claim holder from a diminution in the value of the collateral securing the debt." *In re Pine Lake Vill. Apartment Co.*, 19 B.R. 819, 824 (Bankr. S.D.N.Y. 1982). The Court should reject any invitation to provide wide-ranging relief of this sort for these additional reasons.

RESERVATION OF RIGHTS

35. The Secured Parties will necessarily evaluate any other objections or other responses to the Financing Motion, whether in opposition to or in further support of the Financing Motion. The relief sought in other objections or submissions could require further response. For the avoidance of doubt, and for the foregoing reasons, the Secured Parties reserve

all rights to file further objections to the Financing Motion, make related arguments, and introduce testimony and other evidence at any hearing in connection with the Financing Motion on any matters that may be relevant to the requested relief, whether or not those issues are described herein.

WHEREFORE, the Secured Parties respectfully request that the Court: (i) deny any aspect of the Financing Motion that forms the basis for the objections stated herein; (ii) condition further relief on the Financing Motion on terms consistent with the foregoing terms; (iii) modify any Final Order in accordance with the objections stated herein; and (iv) grant such further relief as the Court deems appropriate.

Dated: September 25, 2018

MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO, P.C.

/s/ Abigail V. O'Brient
Abigail V. O'Brient

and

Daniel S. Bleck (*pro hac vice*)
Paul J. Ricotta (*pro hac vice*)
Ian A. Hammel (*pro hac vice*)

Attorneys for

UMB Bank, N.A. as master indenture trustee and Wells Fargo Bank, National Association, as indenture trustee

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: 2029 Century Park East, Suite 3100, Los Angeles, CA 90067

A true and correct copy of the foregoing document entitled (*specify*): **OBJECTION TO MOTION OF DEBTORS FOR FINAL ORDER (A) AUTHORIZING THE DEBTORS TO OBTAIN POST PETITION FINANCING (B) AUTHORIZING THE DEBTORS TO USE CASH COLLATERAL AND (C) GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED CREDITORS PURSUANT TO 11 U.S.C. §§ 105, 363, 364, 1107 AND 1108** 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 25, 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 25, 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 25, 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.

VIA PERSONAL SERVICE: 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.

9/25/18	Diane Hashimoto		/s/ Diane Hashimoto
Date	*Printed Name*		*Signature*

NEF SERVICE LIST

Damarr M Butler
butler.damarr@pbgc.gov, efile@pbgc.com

Samuel R Maizel
samuel.maizel@dentons.com,
alicia.aguilar@dentons.com;
docket.general.lit.LOS@dentons.com;
tania.moyron@dentons.com;
kathryn.howard@dentons.com

Emily P Rich
erich@unioncounsel.net, bankruptcycourtnotices@unioncounsel.net

Simon Aron
saron@wrslawyers.com

Hatty K Kip
hatty.yip@usdoj.gov

Scott E Blakeley
seb@blakeleyllp.com, ecf@blakeleyllp.com

Hutchison B Meltzer
hutchison.meltzer@doj.ca.gov, Alicia.Berry@doj.ca.gov

Jeffrey Garfinkle
jgarfinkle@buchalter.com, docket@buchalter.com,
dcyrankowski@buchalter.com

Jason D Strabo
jstrabo@mwe.com ahoneycutt@mwe.com
jmariani@mwe.com

Alvin Mar
alvin.mar@usdoj.gov

Jason Wallach
jwallack@ghplaw.com, g33404@notifycincompass.com

United States Trustee (LA)
ustpregion16.la.ecf@usdoj.com

John A Moe
john.moe@dentons.com,
glenda.spratt@dentons.com,derry.kalve@dentons.com,
jennifer.wall@dentons.com, andy.jinnah@dentons.com,
bryan.bates@dentons.com

Tania M Moyron
tania.moyron@dentons.com,
chris.omeara@dentons.com

Lawrence B. Gill
lgill@nelsonhardiman.com, rrange@nelsonhardiman.com

Gary F Torrell
gtf@vrmlaw.com

Marianne S Mortimer
mmortimer@sycr.com

Rosa A Shirley
rshirley@nelsonhardiman.com;
rrange@nelsonhardiman.com;
lgill@nelsonhardiman.com

Mark A Neubauer
mneubauer@carltonfields.com,
mlrodriguez@carltonfields.com;smcloughlin@carltonfields.com

Abigail V. O'Brient
avobrient@mintz.com; docketing@mintz.com;
DEHashimoto@mintz.com; nleali@mintz.com

NEF SERVICE LIST

Lori A Butler
butler.lori@pbgc.gov; efile@pbgc.gov

Lawrence B Gill
lgill@nelsonhardiman.com, rrange@nelsonhardiman.com

Elan S Levey
elan.levey@usdoj.gov; louisa.lin@usdoj.gov

Jennifer L Nassiri
jennifernassiri@quinnemanuel.com

Aram Ordubegian
ordubegian.aram@arentfox.com

Mary H Rose
mrose@buchalter.com, salarcon@buthalter.com

Matthew S Walker
matthew.walker@pillsburylaw.com,
candy.kleiner@pillsburylaw.com

Darryl S. Laddin
bkrfilings@agg.com

Latonia Williams
lwilliams@goodwin.com
bankruptcy@goodwin.com

Alicia K Berry
Alicia.Berry@doj.ca.gov

M Douglas Flahaut
flahaut.douglas@arentfox.com

Richard A Lapping
richard@lappinglegal.com

Kevin H Morse
kevin.morse@saul.com,
rmarcus@AttorneyMM.com,
sean.williams@saul.com

Melissa T Ngo
ngo.mellisa@pbcg.gov, efile@pbcg.gov

Michael B. Reynolds
mreynolds@swlaw.com, kcollins@swlaw.com

Mark Serlin
ms@swllplaw.com, mor@swllplaw.com

Kenneth K Wang
kenneth.wang@doj.ca.gov,
Jennifere.Kim@doj.ca.gov,
susan.lincoln@doj.ca.gov,
Yesenia.caro@doj.ca.gov

Craig G. Marguiles
Craig@MarguilesFaithlaw.com,
Victoria@MarguilesFaithlaw.com,
Helen@MarguilesFaithlaw.com

James Cornell Behrens
jbehrens@milbank.com,
gbray@milbank.com;
mshinderman@milbank.com
hmaghakian@milbank.com;
odonnell@milbank.com;
jbrewster@milbank.com

Aaron Davis
aaron.davis@bryancave.com,
kat.flaherty@bryancave.com

NEF SERVICE LIST

Steven T Gubner
sgubner@bg.law, ecf@bg.law

Lori L Purkey
bareham@purkeyandassociates.com

Julie H Rome-Banks
julie@bindermalter.com

Kyrsten Skogstad
kskogstad@calnurses.org, rcraven@calnurses.org

Ralph J Swanson
ralph.swanson@berliner.com, sabina.hall@berliner.com

Peter J Benvenutti
pbenvenutti@kellerbenvenutti.com,
pjbenven74@yahoo.com

Dustin P Branch
branchd@ballardspahr.com, carolod@ballardspahr.com;
hubenb@ballardspahr.com; Pollack@ballardspahr.com

Michael D Breslauer
mbreslauer@swsslaw.com;
wyones@swsslaw.com;
mbreslauer@ecf.courtdrive.com;
wyones@ecf.courtdrive.com

Mary H Haas
maryhaas@dwt.com, melissastrobel@dwt.com;
laxdocket@dwt.com; rosabeltran@dwt.com

Nathan A. Schultz
nschultz@foxrothschild.com

U.S. MAIL SERVICE LIST

Nicola T. Hanna
United States Attorney's Office
312 N Spring St., Ste 1200
Los Angeles, CA 90012-2551

United States Attorney for the Central District of California

Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Attorney General of the United States

EMAIL SERVICE LIST

Sam J Alberts
DENTONS US LLP
1900 K Street NW
Washington, DC 20006
Email: Sam.alberts@dentons.com

On behalf Debtors Verity Health System of California, Inc., et al.

Claude D Montgomery
DENTONS US LLP
1221 Avenue of the Americas
New York, NY 10020
Email: claude.montgomery@dentons.com

On behalf of Debtors Verity Health System of California, Inc., et al.

Donald R Kirk
John Ryan Yant
Carlton Fields Jorden Burt, P.A.
4221 W. Boy Scout Boulevard, Suite 1000
Tampa, FL 33607-5780
Email: dkirk@carltonfields.com
ryant@carltonfields.com

On behalf of Creditor St. Vincent IPA Medical Corporation

Nathan F. Coco
Megan Preusker
McDermott Will & Emery
444 West Lake Street
Chicago, IL 60606-0029
Email: ncoco@mwe.com
mpreusker@mwe.com

On behalf of Creditor Creditor U.S. Bank National Association, not individually, but as Indenture Trustee

Ryan Schultz
Fox Swibel Levin & Carroll LLP
200 W. Madison Street
Suite 3000
Chicago, IL 60606
Email: rschultz@foxswibel.com

On behalf of Creditor Old Republic Insurance Company, et al

David M. Lemke
Wallter Lansden Dortch & Davis, LLP
511 Union Street, Suite 2700
Nashville, TN 37219
Email: david.lemke@wallerlaw.com

Counsel for DIP Lender

Bruce Bennett
Jones Day
555 South Flower Street, Fiftieth Floor
Los Angeles, CA 90071
Email: bbennett@jonesday.com

Counsel for Verity MOB

Jason Reed
Clark Whitmore
MASLON LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Email: Jason.reed@maslon.com
Clark.whitmore@maslon.com

Counsel for U.S. Bank as 2017 Notes Trustee

Jill Sturtevant
Office of the United States Trustee
915 Wilshire Boulevard, Suite 1850
Los Angeles, CA 90017
Email: Jill.Sturtevant@usdoj.com

United States Trustee (LA)

SCHEDULE A

Wells Fargo Bank, N.A. v. Sonora Desert Dairy, L.L.C. (In re Sonora Desert Dairy, L.L.C.)

United States Bankruptcy Appellate Panel for the Ninth Circuit

November 20, 2014, Argued and Submitted at Phoenix, Arizona; January 5, 2015, Filed

BAP Nos. AZ-13-1471-KiDJu, AZ-13-1555-KiDJu (Consolidated Appeals)

Reporter
2015 Bankr. LEXIS 18 *

In re: SONORA DESERT DAIRY, L.L.C., et al., Debtors.WELLS FARGO BANK, N.A., Appellant, v. SONORA DESERT DAIRY, L.L.C.; SONORA DESERT DAIRY II, L.L.C.; SONORA DESERT DAIRY III, L.L.C.; LUECK CATTLE COMPANY, L.L.C.; BOB LUECK FARMS, L.L.C.; AGSTAR FINANCIAL SERVICES, FLCA; OFFICIAL JOINT COMMITTEE OF UNSECURED CREDITORS, Appellees.

Notice: THIS DISPOSITION IS NOT APPROPRIATE FOR PUBLICATION. ALTHOUGH IT MAY BE CITED FOR WHATEVER PERSUASIVE VALUE IT MAY HAVE (SEE *FED. R. APP. P. 32.1*), IT HAS NO PRECEDENTIAL VALUE. SEE 9TH CIR. BAP RULE 8013-1.

Prior History: [*1] Appeal from the United States Bankruptcy Court for the District of Arizona. Bk. Nos. 12-00262, 12-00263, 12-00264, 12-00265, 12;00266 (Jointly Administered). Honorable Randolph J. Haines, Bankruptcy Judge, Presiding.

Case Summary

Overview

HOLDINGS: [1]-The appeals were not moot. The Panel had jurisdiction under *28 U.S.C.S. § 158*; [2]-The bankruptcy court erred when it ordered the bank to apply the $516,000 payment to its debtor-in-possession (DIP) Loan and deemed the bank's lien satisfied; [3]-Citing *11 U.S.C.S. § 364(d)* as governing law, the Panel distinguished the bank's role as a prepetition secured creditor from its role as a DIP lender and the corresponding differences between the collateral used to secure both debts. Thus, the collateral securing each debt required specific identification and the ban's distinguishing roles associated with the two debts warranted a different calculus; [4]-The bankruptcy court did not violate the bank's due process rights when it entered the Supplemental DIP Order.

Outcome

The court vacated the DIP Order and remanded it to the bankruptcy court for further proceedings. As to the Supplemental DIP Order, the court affirmed.

LexisNexis® Headnotes

Bankruptcy Law > Administrative Powers > Adequate Protection

Bankruptcy Law > ... > Judicial Review > Standards of Review > Clear Error Review

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

HN1[] **Administrative Powers, Adequate Protection**

An appellate panel reviews a bankruptcy court's conclusions of law de novo and its factual findings for clear error. An adequate protection determination and an authorization to use cash collateral are factual issues reviewed for clear error. Factual findings are clearly erroneous if illogical, implausible or without support in the record.

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

HN2[] **Standards of Review, De Novo Standard of Review**

Whether the bankruptcy court's procedures comport with due process is a question of law reviewed de novo.

Civil Procedure > ... > Justiciability > Mootness > General Overview

Evidence > Burdens of Proof > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

HN3[] **Justiciability, Mootness**

A party bears a heavy burden to demonstrate appeals are moot.

Bankruptcy Law > Procedural Matters > Judicial Review > Jurisdiction

Civil Procedure > ... > Justiciability > Mootness > General Overview

HN4[] **Judicial Review, Jurisdiction**

A bankruptcy appellate panel has an independent duty to determine whether appellate jurisdiction exists. It lacks jurisdiction to decide moot appeals. If an appeal becomes moot while it is pending before the Panel, the Panel must dismiss it.

Civil Procedure > ... > Justiciability > Mootness > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

HN5[] **Justiciability, Mootness**

Failure to seek a stay can render an appeal equitably moot. For an appeal to be equitably moot, the question is whether the case presents transactions that are so complex or difficult to unwind that the doctrine of equitable mootness would apply. Ultimately, the decision whether or not to unscramble the eggs turns on what is practical and equitable.

Civil Procedure > ... > Justiciability > Mootness > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

HN6[] **Justiciability, Mootness**

In the context of an appeal, failure to seek a stay may, by itself, render a party's claim equitably moot.

Bankruptcy Law > ... > Bankruptcy > Administrative Powers > Postpetition Credit

HN7[] **Administrative Powers, Postpetition Credit**

Under *11 U.S.C.S. § 364(e)*, if the bankruptcy court found that the lender acted in good faith in extending the postpetition loan, a reversal or modification of the unstayed financing order on appeal does not affect the validity of the creditor's loan or any liens or priorities securing the loan. *11 U.S.C.S. § 364(e)*.

Bankruptcy Law > ... > Bankruptcy > Administrative Powers > Postpetition Credit

HN8[] **Administrative Powers, Postpetition Credit**

See *11 U.S.C.S. § 364(e)*.

Bankruptcy Law > Administrative Powers > Adequate Protection

Bankruptcy Law > ... > Bankruptcy > Administrative Powers > Postpetition Credit

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

HN9[] **Administrative Powers, Adequate Protection**

11 U.S.C.S. § 364(e) does not restrict an appellate panel from reviewing whether the bankruptcy court provided the creditor with adequate protection and whether the court violated the creditor's due process rights.

Bankruptcy Law > Administrative Powers > Adequate Protection

Evidence > Burdens of Proof > Allocation

Bankruptcy Law > ... > Bankruptcy > Administrative Powers > Postpetition Credit

HN10[] **Administrative Powers, Adequate Protection**

To obtain debtor-in-possession (DIP) financing that involves a senior or "priming" lien on encumbered property, the debtor-in-possession must show that (1) it was unable to obtain credit without granting such liens and (2) the value of the prepetition lender's lien that will be primed by the DIP lender's lien is adequately protected. *11 U.S.C.S. § 364(d)(1)*. The debtor bears the burden of proof on the issue of adequate protection. *11 U.S.C.S. § 364(d)(2)*. The purpose of the adequate protection requirement under *§ 364(d)* is to protect an existing lienholder from any decrease in the value of its security interest resulting from the priming lien. In other words, adequate protection is provided to ensure that the prepetition creditor receives the value for which the creditor bargained prebankruptcy.

Bankruptcy Law > Administrative Powers > Adequate Protection

Bankruptcy Law > ... > Bankruptcy > Administrative Powers > Postpetition Credit

HN11[] **Administrative Powers, Adequate Protection**

See *11 U.S.C.S. § 362(d)*.

Bankruptcy Law > Administrative Powers > Adequate Protection

HN12[] **Administrative Powers, Adequate Protection**

Adequate protection may be provided by (1) periodic cash payments, (2) additional or replacement liens or (3) other relief resulting in the "indubitable equivalent" of the secured creditor's interest; refer to *11 U.S.C.S. § 361*). In addition, the requirement to provide adequate protection can be met by showing the existing lienholder is oversecured with a substantial equity cushion. What constitutes adequate protection is to be decided flexibly on a case-by-case basis.

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > General Overview

HN13[] **Types of Claims, Secured Claims & Liens**

See *11 U.S.C.S. § 552(b)(1)*.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN14[] Preclusion of Judgments, Law of the Case

This discretionary, judicially-imposed doctrine ("law of the case" doctrine) precludes a court from reconsidering an issue explicitly or impliedly decided by a prior disposition from the same court or a higher court.

Bankruptcy Law > ... > Bankruptcy > Administrative Powers > Postpetition Credit

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN15[] Administrative Powers, Postpetition Credit

An integral part of *11 U.S.C.S. § 364* is the requirement that notice and a hearing be granted before a court order is issued. The phrase "notice and a hearing," as defined in *11 U.S.C.S. § 102(1)*, is a term of art. It does not mean that a hearing must be granted. The bankruptcy court may act without a hearing if notice has been properly given and (1) a hearing has not been requested or (2) there is insufficient time for one. *11 U.S.C.S. § 102(1)(B)*. Notice means "such notice as is appropriate in the particular circumstances." *11 U.S.C.S. § 102(1)(A)*. Nowhere is there any provision for an action to be taken without notice where "notice and a hearing" are required." This is true even in emergency situations.

Counsel: For appellant: Robert J. Miller, Esq., of Bryan Cave LLP.

For AgStar Financial Services, FCLA., appellee: Michael S. Dove, Esq., of Gislason & Hunter LLP.

Judges: Before: KIRSCHER, DUNN and JURY, Bankruptcy Judges.

Opinion

MEMORANDUM[1]

Creditor Wells Fargo Bank, N.A. ("Wells Fargo") appeals: (1) an order authorizing a postpetition financing loan from creditor AgStar Financial Services, FLCA, as loan servicer and attorney-in-fact for First National Bank of Altus ("AgStar"); and (2) a supplemental order authorizing the debtors to receive additional postpetition advances from AgStar. We VACATE and REMAND the first order; we AFFIRM the second order.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see ***Fed. R. App. P. 32.1***), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

A. The parties

The debtors ("Debtors") consist of five entities[2] owned and operated by Robert Lueck ("Lueck"), a dairy farmer with 37 years of experience **[*2]** in the dairy business. Debtors filed their chapter 11[3] bankruptcy cases on January 6, 2012, in response to Wells Fargo's assertion that it was going to seek the appointment of a receiver.

On the petition date, Debtors' assets consisted primarily of: (1) a 518 acre property on which Debtors conducted their dairy operations (the "Dairy Property"); (2) a 1,373 acre farm known as the Arlington Farm; and (3) a dairy herd of approximately 8,000 animals, related feed inventory and milk production. In September 2010, an appraisal by AgStar valued the Arlington Farm at $13.7 million and the Dairy Property at $23 million (the "Debtors' Appraisal") for a total of $36.7 million.

AgStar and Wells **[*3]** Fargo comprise Debtors' two largest secured creditors. Debtors owed AgStar, their real estate lender, approximately $14.7 million as of the petition date (the "AgStar Prepetition Loan"). Debtors secured this loan by first liens on the Dairy Property and the Arlington Farm. Debtors owed Wells Fargo approximately $11.5 million on an operational revolving line of credit (the "Wells Fargo Prepetition Loan"). Debtors secured the Wells Fargo Prepetition Loan by Debtors' personal property, including the dairy herd, feed inventory and milk proceeds.

The United States Trustee appointed a creditors' committee ("Committee") consisting primarily of Debtors' feed suppliers, who asserted approximately $3.3 million in unsecured nonpriority claims.

Early in the cases, Debtors contended that the value of their assets exceeded $50 million and that all their prepetition secured and unsecured obligations totaled less than $27 million. Debtors expected to pay all creditors in full; Lueck expected to retain at least $20 million in equity.

B. The cash collateral orders

In their first-day cash collateral motion, Debtors contended that as of the petition date the Dairy Property and Arlington Farm had a value no **[*4]** less than $36.7 million, based on Debtors' Appraisal and Lueck's opinion. Wells Fargo did not dispute these values. Debtors scheduled the Arlington Farm at a value of $15 million, but Debtors expected to sell it for $13-$14 million. Debtors further contended that the value of the dairy herd and feed inventory exceeded Wells Fargo's debt by $1 million. Lueck testified days later in response to Wells Fargo's motion to appoint an examiner[4] that the value of the dairy herd and feed inventory approximated $14.5 million, which exceeded Wells Fargo's debt. Debtors agreed to make monthly interest payments of $30,000 to Wells Fargo at the default contract rate.

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[2] The five debtors are: Sonora Desert Dairy, L.L.C.; Sonora Desert Dairy II, L.L.C.; Sonora Desert Dairy III, L.L.C.; Lueck Cattle Company, L.L.C.; and Bob Lueck Farms, L.L.C. The bankruptcy court ordered on January 12, 2012, that Debtors' cases be jointly administered. Debtors' cases were substantively consolidated on May 7, 2012. Debtors' chapter 11 cases were converted to chapter 7 on December 4, 2013.

[3] Unless specified otherwise, all chapter, code and rule references are to the Bankruptcy Code, ***11 U.S.C. §§ 101-1532***, and the *Federal Rules of Bankruptcy Procedure, Rules 1001-9037*.

[4] Eleven days into the bankruptcy cases, Wells Fargo filed a motion to appoint an examiner, which eventually became an alternative motion to appoint a trustee. Debtors and the Committee opposed it. After a three-day evidentiary hearing on March 22, 28 and 29, 2012, the bankruptcy court denied Wells Fargo's motion on May 8, 2012.

The bankruptcy court entered a stipulated order on Debtors' first interim cash collateral motion on January 24, 2012. In exchange for use of its cash collateral, Debtors provided Wells Fargo a replacement lien for **[*5]** its prepetition collateral. A series of interim cash collateral motions followed; Wells Fargo objected to them. Given concerns with monthly losses in the value of Debtors' dairy herd and feed inventory during the pendency of the case, Wells Fargo contended that its collateral suffered diminution in value since the petition date.[5]

The bankruptcy court issued at least sixteen interim cash collateral orders. Beginning with the second interim order and in subsequent interim orders, the bankruptcy court imposed a replacement lien for its prepetition collateral and junior liens on Debtors' real property for the benefit of Wells Fargo, which served as adequate protection for the Wells Fargo Prepetition Loan. Despite any losses in the prepetition collateral, Debtors asserted that the junior liens on Debtors' real property adequately protected Wells Fargo. The orders entered after the bankruptcy court approved the Wells Fargo DIP loan, discussed **[*6]** more thoroughly below, also allowed for the priming of AgStar's senior lien on Debtors' real property, giving Wells Fargo a $500,000 superpriority lien.

C. Debtors' proposed chapter 11 plans

Meanwhile, Debtors filed their initial chapter 11 plan and disclosure statement on March 21, 2012. Debtors' plan proposed to implement the orderly sales of the Arlington Farm, the Dairy Property and other assets Debtors used in their business operations, including the dairy herd, feed inventory and various equipment. Debtors opposed Wells Fargo's alleged desire to "fire sale" the dairy herd, contending it would result in significantly less funds for the estate. Debtors intended to continue operating the dairy farm until a suitable buyer could be found and a sale of the Dairy Property could be completed as a going concern. A working dairy farm may be more valuable than a nonoperational or "dark" one. Debtors asserted that the proceeds realized from the sale of the Arlington Farm, the Dairy Property and other operating assets would be sufficient to pay off the AgStar Prepetition Loan, the Wells Fargo Prepetition Loan and other secured creditors; the remaining proceeds would pay all of the allowed unsecured **[*7]** claims. In March 2012, Debtors expected over a six-to-nine month period to sell the Arlington Farm for between $10-$12 million (as opposed to the original $13-$14 million figure) and to sell the Dairy Property for between $20-$25 million.[6]

Ultimately, the Arlington Farm sold at auction for $8.425 million on August 9, 2012. From these proceeds, AgStar received $7.8 million and credited it to its debt of approximately $14.9 million; Wells Fargo received nothing. Wells Fargo now would have to look to the Dairy Property for adequate protection should the Wells Fargo Prepetition Loan not be satisfied by the prepetition collateral plus the replacements liens.

Debtors filed their first amended chapter 11 plan and disclosure statement on June 4, 2012. Debtors contended for the first time that the Wells Fargo Prepetition **[*8]** Loan was undersecured by between $1.4

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[5] Wells Fargo also initially accused Lueck of conducting "cull" sales of cattle and failing to tender all of the sale proceeds to Wells Fargo, a claim that was later determined to be unfounded. A "cull" sale is a routine sale of ill, aged or nonproductive cows.

[6] Debtors' real estate broker Charles Havranek ("Broker") confirmed these numbers at the March 29, 2012 evidentiary hearing on Wells Fargo's motion to appoint an examiner or trustee. Larry Clayton, the Wells Fargo employee in charge of the Wells Fargo Prepetition Loan, testified that he agreed with the Broker's figures, which totaled $30 million for the two properties on the low end.

and $5.95 million as of the petition date.[7] Debtors' Broker estimated that if operations ceased and the Dairy Property went "dark," its value would decline by at least 20% or a minimum of $5,000,000, based on a sale price between $20-$25 million. Thus, Debtors' projected losses of $875,000 during the summer months were far less than the $5,000,000 reduction that would be realized if the Dairy Property were sold "dark." Debtors ultimately withdrew their first amended plan.

D. Wells Fargo's first motion for relief from stay

qWells Fargo moved for relief from stay with respect to the dairy herd on June 28, 2012. After several postpetition sales of portions of the dairy herd, Debtors still owed Wells Fargo approximately $10.3 million. Wells Fargo argued that since the petition date, the dairy herd and feed inventory had declined in value by approximately $2.0 million, from $11.2 million to $9.2 **[*9]** million and it expected more losses. Wells Fargo disputed the Broker's opinion that the Dairy Property would be devalued by as much as $5 million if the dairy were shut down and the herd sold, leaving the real property and improvements to be sold alone. The Broker had admitted at deposition that he did no analysis to support this opinion and had no meaningful experience in this factual situation. Further, argued Wells Fargo, Debtors' position that the Dairy Property and Arlington Farm had sufficient value to cover all secured claims was disingenuous. Wells Fargo's recent appraisal of the two properties valued them at only $27.5 million. Thus, if foreclosure of the properties occurred, Wells Fargo's interest possibly would be wiped out. Wells Fargo disputed Debtors' position that it was undersecured by as much as $5.95 million on the petition date.

Debtors and the Committee opposed Wells Fargo's stay relief motion, contending that Wells Fargo was adequately protected with the replacement lien and junior liens on Debtors' real properties, and that the loss of the dairy herd would unnecessarily result in a reduction of the value of Debtors' assets.

The bankruptcy court denied Wells Fargo's **[*10]** request for stay relief on November 9, 2012, on the basis that it was adequately protected. At the hearing on November 5, 2012, the bankruptcy court pointed to Wells Fargo's appraisal valuing the Dairy Property at $21 million, which was consistent with Debtors' Appraisal. Based on the parties' estimates on the sale of the dairy herd and feed inventory at between $4.9 and $7.3 million and Wells Fargo's debt of $10 million, the court calculated that a sale of the collateral would leave Wells Fargo with a deficit of between $2.7 and $5.1 million. Subtracting out AgStar's remaining senior debt of $8 million, a sale of the Dairy Property for $21 million would leave approximately $13 million in equity for Wells Fargo and other creditors. So, worst case scenario, Wells Fargo had an equity cushion of 39%.

However, to protect Wells Fargo's interest in its collateral, the court ordered that: (1) Wells Fargo be given a valid and perfected junior lien in the Dairy Property; (2) the Dairy Property be sold by March 31, 2013, and if no sale was completed by that date, then (i) Debtors had to begin selling the dairy herd on April 1, 2013, to be completed by May 15, 2013, and pay all proceeds to Wells **[*11]** Fargo, who had the right to object and credit bid, and (ii) Wells Fargo would have stay relief as to the dairy herd effective May 15, 2013.

[7] Debtors clarified in their ninth interim cash collateral motion that Wells Fargo was undersecured by at least $1,491,000 or as much as $5,684,367, based on Wells Fargo's own internal inspection conducted on January 4, 2012, just two days prior to the petition date.

E. AgStar's first DIP motion; Wells Fargo's DIP loan and the Final DIP order

Meanwhile, on July 18, 2012, Debtors filed their motion for an order: (1) authorizing postpetition financing from AgStar on a secured basis; (2) compromising and restructuring AgStar's debt under *Rule 9019*; and (3) granting AgStar relief from stay ("First AgStar DIP Motion"). In short, Debtors sought a $1 million postpetition line of credit from AgStar, secured by a priming lien on the Arlington Farm and Dairy Property. The terms of the proposed DIP loan included an interest rate of 7% and a $10,000 origination fee. Debtors argued that even with a $1 million priming lien to AgStar, both AgStar and Wells Fargo were adequately protected by a substantial equity cushion, based on an approximate value of the Arlington Farm and Dairy Property at $33.5 million.

Wells Fargo opposed the First AgStar DIP Motion. Although concerned with the increasing decline in the value of the dairy herd and feed inventory since the petition date, Wells Fargo offered to provide Debtors with a $1 million DIP **[*12]** loan, secured by a superpriority priming lien on the Dairy Property. Wells Fargo offered 6% interest and no origination fee. The initial July 30 hearing on the First AgStar DIP Motion was continued to August 16, 2012, then continued again to November 5 and November 8 for an evidentiary hearing.

Prior to the August 16 hearing, Wells Fargo filed a supplemental brief, which included the detailed terms for Wells Fargo's proposed DIP loan. Wells Fargo explained that it had been forced to negotiate its DIP loan with the Committee rather than Debtors, because it was Debtors' and AgStar's position that Wells Fargo was not entitled to have private negotiations with Debtors. Wells Fargo believed the economic terms of its proposed DIP loan were better than AgStar's.

Debtors filed a supplemental declaration from Lueck. Despite Wells Fargo's offer, Lueck continued to believe that AgStar's proposed financing was in the best interest of creditors. Wells Fargo's conditional requirement to sell the dairy herd by December 31, 2012, whether or not the Dairy Property had been sold, concerned Lueck. Lueck believed a forced liquidation of the herd would impair the value of the Dairy Property and would only **[*13]** benefit Wells Fargo. Lueck further declared that he did not trust Wells Fargo to actually provide the funds.

At the November 5 evidentiary hearing on the First AgStar DIP Motion, the bankruptcy court expressed its concern that although Wells Fargo had proposed a DIP loan, no motion had been filed. Further, circumstances had changed — i.e., the Arlington Farm had been sold — so AgStar's proposed DIP loan terms were outdated. The court was also concerned with Debtors' failure to negotiate in good faith with Wells Fargo. If competing DIP loans were put before it, the court stated it would choose which one benefitted Debtors; the constant fighting between the parties would no longer be tolerated.

The court and parties further discussed the details of AgStar's revised DIP loan terms and Wells Fargo's proposed DIP loan terms at a continued hearing on November 8, 2012. Ultimately, the bankruptcy court approved the DIP loan proposed by Wells Fargo (the "DIP Loan") and denied approval of the First AgStar DIP Motion. Although the court expressed its reluctance to authorize the priming of AgStar's senior lien, it concluded the "very sufficient adequate protection" supported priming. The bankruptcy **[*14]** court overruled AgStar's due process and notice objections regarding the priming of its lien.

The bankruptcy court entered an interim order approving Debtors' continued use of cash collateral and approving the DIP Loan for $500,000 on November 9, 2012. Wells Fargo received, in addition to the

junior lien on the Dairy Property for its prepetition debt, a priming lien senior to that of AgStar's lien on the Dairy Property and of any administrative expenses — i.e., a superpriority lien — in exchange for the DIP funds. Wells Fargo's priming lien could not be made subordinate to, or made pari passu with, any other lien under *§ 364(d)*. In addition, so long as the DIP Loan remained outstanding, the interim order prohibited Debtors: from granting any liens on all postpetition collateral (the Dairy Property, insurance proceeds, cash proceeds, products, rents, etc.) senior or equal to the DIP lien of Wells Fargo; and from using any cash collateral of Wells Fargo or any proceeds from the DIP Loan for purposes other than those set forth in the budget agreed to by the parties. The bankruptcy court held a hearing for a final DIP order on November 26, 2012, overruled AgStar's and Debtors objections and entered **[*15]** a final order on November 29, 2012 ("Final DIP Order"). Debtors ultimately drew the entire $500,000 in available funds from the DIP Loan.

F. Debtors' multiple cattle sales

Over the course of the next few months and pursuant to the conditional stay relief granted to Wells Fargo with respect to the dairy herd, Debtors filed multiple motions to sell portions of the dairy herd under *§ 363(f)*. The sale motions were either granted over Wells Fargo's objection or stipulated to by Wells Fargo. Wells Fargo received all sale proceeds.

G. AgStar's motion for relief from stay

On May 9, 2013, AgStar moved for relief from stay under *§ 362(d)(1)* and *(d)(2)* to foreclose on the Dairy Property. By that time, Debtors owed approximately $7.4 million on the AgStar Prepetition Loan, which was junior to Wells Fargo's DIP lien and senior to Wells Fargo's junior lien on the Dairy Property. The Dairy Property had initially been listed for $27 million, then reduced to $20 million, then reduced again to $16 million. The total liens on the property approximated $15.4 million. Because the remaining dairy herd would soon be liquidated pursuant to the stay relief granted to Wells Fargo, AgStar contended the Dairy Property would decline another **[*16]** 10%-20% in value once it went dark. Broker costs amounted to $240,000 based on a sale price of $16 million. Thus, argued AgStar, relief from stay was warranted as little, if any, equity was available in the Dairy Property.

AgStar also revealed for the first time that it had conducted an appraisal of the Dairy Property in June 2012; it was valued at $15.5 million. Debtors' water rights were valued at $750,000.

H. Wells Fargo's second motion for relief from stay

Wells Fargo moved for relief from stay again on May 31, 2013. By this time, Debtors had sold the entire dairy herd and paid all proceeds to Wells Fargo. Wells Fargo contended that Debtors had incurred losses of more than $4.8 million in their dairy operations since the petition date, severely diminishing the bank's cash, herd, feed and other collateral. Wells Fargo contended that based on Debtors' figures in their April operating reports, the Wells Fargo Prepetition Loan exceeded the value of Debtors' remaining personal property (equipment, etc.) by $210,000. Thus, argued Wells Fargo, it was entitled to stay relief as to the personal property under *§ 362(d)(1)* and *(d)(2)*.

AgStar opposed Wells Fargo's second stay relief motion. In short, AgStar argued **[*17]** that because the purpose of the DIP Loan was to provide monies for Debtors' ongoing operations and the monies at issue were generated from Debtors' dairy operations, then those monies should be used to pay back the DIP Loan. AgStar argued that Wells Fargo's attempt to apply all existing monies to its prepetition debt severely prejudiced AgStar and provided a windfall to Wells Fargo by allowing its $500,000 priming lien to remain intact.

I. AgStar's second DIP motion and related DIP order - the basis of Wells Fargo's first appeal

As of May 30, 2013, Debtors owed Wells Fargo approximately $6 million, including the $500,000 DIP Loan. On June 6, 2013, Debtors tendered a payment of $516,826.97 to Wells Fargo to satisfy the DIP Loan and a payment of $239,006.34 to be applied to the Wells Fargo Prepetition Loan.

Just days later on June 12, 2013, Debtors filed a motion to: (1) authorize a DIP loan from AgStar for $315,000 for winding down purposes (the "AgStar DIP Loan"); (2) grant AgStar and Wells Fargo conditional relief from stay; (3) authorize the sale of the Dairy Property under *§ 363(f)*; (4) approve the bidding procedures for the Dairy Property; (5) set the date for the auction; and (6) grant other **[*18]** related relief (the "Second AgStar DIP Motion"). As for the proposed AgStar DIP Loan, AgStar agreed to fund Debtors' operation through November 8, 2013, pursuant to an agreed wind down budget. In exchange, AgStar would be given a priming lien on the Dairy Property (including all insurance proceeds, cash proceeds, products, rents, etc.) senior to that of Wells Fargo's DIP lien. To obtain the DIP financing from AgStar, Debtors were required to first pay off Wells Fargo's DIP Loan and satisfy the priming lien. AgStar's DIP lien could not be subordinate to, or made pari passu with, any other lien under *§ 364(d)*. Debtors argued that giving AgStar a priming lien over Wells Fargo was warranted because both AgStar and Wells Fargo were adequately protected based on the equity cushion in the Dairy Property.

As for the sale of the Dairy Property, Debtors sought authorization to auction it on October 4, 2013. Should the Dairy Property not sell at auction, AgStar and Wells Fargo would be granted stay relief to foreclose on the property after December 2, 2013.

Wells Fargo opposed the Second AgStar DIP Motion.[8] It argued that under the Final DIP Order, which was never appealed, Debtors were not allowed to use **[*19]** any of its cash collateral or proceeds from the DIP Loan for any other purpose than what was agreed to in Debtors' budget, unless they had prior written consent from Wells Fargo; repaying its DIP Loan was not an allowed use and Wells Fargo did not consent. In Wells Fargo's opinion, Debtors were attempting to use collateral for a loan for which a significant repayment risk existed (the Wells Fargo Prepetition Loan) to repay a loan for which minimal repayment risk existed (the DIP Loan). Wells Fargo argued that no adequate protection could exist under those circumstances.

Wells Fargo further argued that the Final DIP Order prohibited Debtors from obtaining DIP financing and granting any liens on the prepetition collateral or the postpetition collateral (including the Dairy Property) senior to, or on parity with, Wells Fargo's DIP lien. Despite Debtors' intent to pay off the DIP Loan with its tender of $516,000, Wells Fargo refused to apply it as such and placed the money into escrow pending resolution of the dispute. Thus, because the DIP lien was still outstanding, **[*20]** argued Wells Fargo,

[8] Wells Fargo also agreed to provide Debtors with additional DIP financing, but Debtors contended the terms were less favorable.

Debtors could not grant AgStar a senior lien. Wells Fargo did not oppose, generally, the sale of the Dairy Property.

A hearing on the Second AgStar DIP Motion was held on June 26, 2013. Wells Fargo reiterated its objection to Debtors using the milk proceeds, which secured the Wells Fargo Prepetition Loan, to pay off the DIP Loan. In response, the bankruptcy court inquired why the pay off of the DIP Loan was not, dollar for dollar, adequate protection for Wells Fargo; it eliminated a priority lien that was a lien against all of Wells Fargo's prepetition collateral. Counsel replied that the $500,000 in milk proceeds was cash collateral and the security for Wells Fargo's prepetition debt; the priming DIP lien was secured by the Dairy Property only, not all of Wells Fargo's prepetition collateral. When the court asked counsel why Debtors could not pay off the DIP Loan with the milk proceeds, counsel stated that Debtors could pay off the DIP Loan with the sale proceeds from the Dairy Property; Debtors could not use the cash collateral that secured Wells Fargo's prepetition debt to pay the postpetition debt obligation or they were not adequately protected. The court disagreed **[*21]** and countered that all Debtors had to show was that Wells Fargo was adequately protected for this particular use of cash collateral, not that Wells Fargo would never incur a loss on its prepetition debt. In other words, Debtors had to demonstrate that this use of cash collateral — to pay off the DIP Loan — would not cause greater loss to Wells Fargo. Since the cash was being used to pay down a lien that otherwise was senior to the Wells Fargo Prepetition Loan, the court could not see how that use of cash collateral created a greater loss to Wells Fargo. Counsel then referred back to the Final DIP Order, which expressly set forth the uses for the cash collateral; paying off the DIP Loan was not an approved use.

After further discussion, and in absence of any contrary authority cited by counsel for Wells Fargo, the bankruptcy court ruled:

> The debtor may use cash collateral to pay Wells Fargo and since the general common law rule is a voluntary payor has the right and power to designate how any payment shall be applied, debtor also has the right and power to designate that upon turning this cash collateral over to Wells Fargo it shall be applied to the DIP [L]oan.

Hr'g Tr. 19:18-23, June 26, 2013. **[*22]** The bankruptcy court further found "as a matter of law" that Debtors' use of the $516,000 in cash collateral to pay off the DIP Loan was adequate protection for the Wells Fargo Prepetition Loan. Accordingly, the Second AgStar DIP Motion was granted. Based on the court's ruling, Wells Fargo's objection as to the priming of its DIP lien by the AgStar DIP lien was overruled.

The bankruptcy court entered an order granting the Second AgStar DIP Motion on July 12, 2013 (the "AgStar DIP Order"). The court: ordered Wells Fargo to apply the funds received to the DIP Loan and to release its priming lien on the Dairy Property; gave AgStar a priming lien in the amount of $315,000 over its own senior lien on the Dairy Property; and declared that AgStar's DIP lien could not be made subordinate to, or made pari passu with, any other lien under *§ 364(d)*. The court found AgStar to be a good faith lender entitled to the protections of *§ 364(e)*. An auction to sell the Dairy Property was to occur on October 4, 2013, but in the event it did not sell, AgStar and Wells Fargo were granted stay relief to foreclose on the property after December 2, 2013. The AgStar DIP Order contemplated that other issues raised in the Second **[*23]** AgStar DIP Motion would be decided at a later hearing.

Wells Fargo timely moved to amend the AgStar DIP Order on July 19, 2013. In short, Wells Fargo contended that the AgStar DIP Order, in its form lodged unilaterally by Debtors and signed by the

bankruptcy court, contained language contrary to the court's oral ruling with respect to the proposed sale terms of the Dairy Property and to what matters were reserved for further hearing.

The bankruptcy court entered a minute entry on September 10, 2013, granting Wells Fargo's motion to amend. The minute entry also noted that a status hearing on further DIP financing was to be held on November 7, 2013, unless the parties notified the court that no hearing would be necessary. Now that the AgStar DIP Order was final, Wells Fargo timely filed its notice of appeal on September 24, 2013. The October 4 auction for the Dairy Property never took place.

J. The supplemental AgStar DIP order - the basis for Wells Fargo's second appeal

On November 6, 2013, Debtors filed a Notice of Lodging Proposed Stipulated Order Regarding Postpetition Financing. In the attached stipulated order entered into by Debtors and AgStar, Debtors stated that they had drawn approximately **[*24]** $144,000 of the $315,000 authorized in the AgStar DIP Order entered on July 12, 2013. Debtors were in immediate need of additional funds to maintain the Dairy Property until the foreclosure sale scheduled for December 6, 2013, which required an additional draw on the remaining funds in the AgStar DIP Loan but no additional loan beyond the $315,000 previously authorized. In addition to the existing priming DIP lien authorized on July 12, the bankruptcy court granted AgStar a replacement lien for the AgStar Prepetition Loan on the Dairy Property, which was to be senior to any other liens on the property (excluding the taxing authority's lien).

In light of the stipulation filed, the bankruptcy court vacated the status hearing for further DIP financing scheduled for November 7, 2013, and entered Debtors' and AgStar's stipulated financing order as proposed on November 7, 2013 (the "Supplemental AgStar DIP Order"). Wells Fargo timely filed its notice of appeal on November 14, 2013.

The Panel issued an order consolidating Wells Fargo's appeals of the AgStar DIP Order and the Supplemental AgStar DIP Order on January 21, 2014.

K. Debtors' cases get converted to chapter 7 and Dairy Property is [*25] foreclosed

The Committee moved to convert Debtors' cases to chapter 7 on November 19, 2013. In short, the foreclosure sale of the Dairy Property set for December 6, 2013, was expected to yield only enough funds to pay AgStar; no proceeds would be available for any junior lienholders, administrative claimants or the unsecured creditors. Therefore, because no possibility existed for rehabilitation, the Committee argued that conversion was in the best interest of creditors.

AgStar filed a limited objection to the Committee's conversion motion, requesting only that the cases not be converted until after the foreclosure sale of the Dairy Property. AgStar believed that insufficient funds would be available from the foreclosure sale to pay the AgStar Prepetition Loan, the AgStar DIP Loan and the additional funds authorized in the Supplemental AgStar DIP Order, much less for anyone else's claims.

After a hearing on December 2, 2013, the bankruptcy court ordered that Debtors' cases be converted to chapter 7, effective December 10, 2013, after the foreclosure sale of the Dairy Property on December 6.

A third-party bidder purchased the Dairy Property for $6,936,264.02; one dollar more than AgStar's **[*26]** opening credit bid. AgStar purchased Debtors' water rights through its credit bid for $999,999.00. Wells Fargo's junior lien on the Dairy Property was extinguished, leaving approximately $5 million of the Wells Fargo Prepetition Loan left unpaid.

II. JURISDICTION

The bankruptcy court had jurisdiction under *28 U.S.C. §§ 1334* and *157(b)(2)(D)* and *(M)*. We discuss our jurisdiction below.

III. ISSUES

1. Are the appeals moot?

2. Did the bankruptcy court err when it ordered Wells Fargo to apply its cash collateral to the DIP Loan and that its DIP lien was deemed satisfied?

3. Did the bankruptcy court violate Wells Fargo's due process rights when it entered the Supplemental AgStar DIP Order?

IV. STANDARDS OF REVIEW

HN1[] We review a bankruptcy court's conclusions of law de novo and its factual findings for clear error. *Zurich Am. Ins. Co. v. Int'l Fibercom, Inc. (In re Int'l Fibercom, Inc.), 503 F.3d 933, 940 (9th Cir. 2007)*. An adequate protection determination and an authorization to use cash collateral are factual issues reviewed for clear error. See *Martin v. United States (In re Martin), 761 F.2d 472, 478 (8th Cir. 1985)*. Factual findings are clearly erroneous if illogical, implausible or without support in the record. *Retz v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010)*.

HN2[] Whether the bankruptcy court's procedures comport with due process is a question of law reviewed de novo. *Price v. Lehtinen (In re Lehtinen), 564 F.3d 1052, 1058 (9th Cir. 2009)*; *Garner v. Shier (In re Garner), 246 B.R. 617, 619 (9th Cir. BAP 2000)*.

V. DISCUSSION[9]

A. The appeals are not moot.

On April 23, 2014, a motions panel denied AgStar's motion to dismiss the appeals as moot, determining that effective relief remained available. AgStar asks the merits panel to reconsider that decision, contending that it has met its ***HN3***[] heavy burden to demonstrate the appeals are moot. See *Motor*

[9] On November 13, 2014, appellant filed a statement of additional authorities **[*27]** and asked this Panel to consider such authorities. We conclude further consideration of such authorities is unnecessary given the analysis in this memorandum.

Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.), 677 F.3d 869, 880 (9th Cir. 2012). Despite the motions panel ruling, ***HN4***[] we have an independent duty to determine whether appellate jurisdiction exists. *Dannenberg v. Software Toolworks, Inc., 16 F.3d 1073, 1074 n.1 (9th Cir. 2004)*. We lack jurisdiction to decide moot appeals. *United States v. Pattullo (In re Pattullo), 271 F.3d 898, 900 (9th Cir. 2001)*. If an appeal becomes moot while it is pending before the Panel, we must dismiss it. Id. Therefore, we will consider AgStar's request.

AgStar merely rehashes the same arguments raised before the motions panel and offers no new grounds for reconsideration. Nonetheless, AgStar contends the appeals are equitably moot because: (1) Wells Fargo failed to obtain a stay pending appeal; (2) the Dairy Property has been sold to a third party; and (3) we cannot fashion effective relief. ***HN5***[] Failure to seek a stay can render an appeal equitably moot. *In re Thorpe Insulation Co., 677 F.3d at 881* ("We will first look at **[*28]** whether a stay was sought, for absent that a party has not fully pursued its rights.")(citing *In re Roberts Farms, 652 F.2d 793, 797-98 (9th Cir. 1981))*. For an appeal to be equitably moot, "[t]he question is whether the case 'presents transactions that are so complex or difficult to unwind that the doctrine of equitable mootness would apply.'" *Id. at 880* (quoting *Lowenschuss v. Selnick (In re Lowenschuss), 170 F.3d 923, 933 (9th Cir. 1999))*. "Ultimately, the decision whether or not to unscramble the eggs turns on what is practical and equitable." *Baker & Drake, Inc. v. Pub. Serv. Comm'n of Nev. (In re Baker & Drake, Inc.), 35 F.3d 1348, 1352 (9th Cir. 1994)* (citations omitted).

Wells Fargo failed to seek a stay of the AgStar DIP Order or the Supplemental AgStar DIP Order. Under *Thorpe*, that alone may be enough to render these appeals equitably moot. See also *Stokes v. Gardner, 483 Fed. Appx. 345, 2012 WL 1944552 (9th Cir. May 30, 2012)*(citing Thorpe and stating that ***HN6***[] failure to seek a stay may, "by itself," render a party's claim equitably moot). Nevertheless, the sale of the Dairy Property to a third party does not preclude us from fashioning effective relief for Wells Fargo. AgStar can be ordered to pay an appropriate portion of the sale proceeds to Wells Fargo, should we determine Wells Fargo is entitled to any. Further, such relief would not require the unwinding of the Dairy Property sale or have any effect on the third party not before us. Thus, the third party's absence in these appeals is of no moment. See **[*29]** *In re Thorpe Insulation Co., 677 F.3d at 881*.

We further conclude, although not raised by AgStar, the appeal of the AgStar DIP Order is not statutorily moot under *§ 364(e)*.[10] ***HN7***[] Under that provision, if the bankruptcy court found that the lender acted in good faith in extending the postpetition loan, a reversal or modification of the unstayed financing order on appeal does not affect the validity of the creditor's loan or any liens or priorities securing the loan. *§ 364(e)*; *Credit Alliance Corp. v. Dunning-Ray Ins. Agency, Inc. (In re Blumer), 66 B.R. 109, 113 (9th Cir. BAP 1986)*.

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[10] *Section 364(e)* provides:

> ***HN8***[] The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

The AgStar DIP Order does contain a boilerplate "good faith" finding; Wells Fargo has not made any allegations of bad faith.[11] However, it does not follow that we must dismiss that appeal as statutorily moot. ***HN9***[] *Section 364(e)* does not restrict us from reviewing central questions to the AgStar **[*30]** DIP Order: whether the bankruptcy court provided Wells Fargo with adequate protection and whether the court violated Wells Fargo's due process rights. See *Desert Fire Prot. v. Fontainebleau Las Vegas Holdings, LLC (In re Fontainebleau Las Vegas Holdings, LLC), 434 B.R. 716, 746 (S.D. Fla. 2010)*(if existing lienholder did not receive adequate protection for the priming lien, the court is not forbidden from granting the lienholder effective relief)(citing 3 COLLIER ON BANKRUPTCY ¶ 364.06[2] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2010)); *In re Blumer, 66 B.R. at 113* (although lenders satisfied good faith requirement of *§ 364(e)*, the appeal was not moot because the court's order violated appellant's due process rights).

Accordingly, we see no impediment to providing Wells Fargo with effective relief. Thus, the appeals are not moot; we have jurisdiction under *28 U.S.C. § 158*.

B. The bankruptcy court erred when it ordered Wells Fargo to apply the $516,000 payment to its DIP Loan and deemed Wells Fargo's DIP lien satisfied.

1. Governing law

HN10[] To obtain DIP financing that involves a senior or "priming" lien on encumbered property, the debtor-in-possession must show that (1) it was unable to obtain credit without granting such liens and (2) **[*31]** the value of the prepetition lender's lien that will be primed by the DIP lender's lien is adequately protected. See *§ 364(d)(1)*. The debtor bears the burden of proof on the issue of adequate protection. See *§ 364(d)(2)*.[12] The purpose of the adequate protection requirement under *§ 364(d)* is to protect an existing lienholder from any decrease in the value of its security interest resulting from the priming lien. In other words, adequate protection is provided to ensure that the prepetition creditor receives the value for which the creditor bargained prebankruptcy. *MBank Dallas, N.A. v. O'Connor (In re O'Connor), 808 F.2d 1393, 1396 (10th Cir. 1987)*; *In re Mosello, 195 B.R. 277, 288 (Bankr. S.D.N.Y. 1996)*.

HN12[] Adequate protection may be provided by (1) periodic cash payments, (2) additional or replacement liens **[*32]** or (3) other relief resulting in the "indubitable equivalent" of the secured creditor's interest. *In re Stoney Creek Techs., LLC, 364 B.R. 882, 890 (Bankr. E.D. Pa. 2007)*(citing *§*

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[11] No "good faith" finding was made in the Supplemental AgStar DIP Order, so it does not appear to be subject to the protections of *§ 364(e)*.

[12] *Section 364(d)(1)* and *(2)* provides:

> ***HN11***[] (1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if—
>
> (A) the trustee is unable to obtain such credit otherwise; and
>
> (B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.
>
> (2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

361). In addition, the requirement to provide adequate protection can be met by showing the existing lienholder is oversecured with a substantial equity cushion. See *Pistole v. Mellor (In re Mellor), 734 F.2d 1396, 1400 (9th Cir. 1984)*. What constitutes adequate protection is to be decided flexibly on a case-by-case basis. *In re O'Connor, 808 F.2d at 1396-97*.

2. Analysis

In analyzing the issues in this appeal, the Panel distinguishes Wells Fargo's role as a prepetition secured creditor from its role as a DIP lender and the corresponding differences between the collateral used to secure both debts. Thus, the collateral securing each debt requires specific identification and Wells Fargo's distinguishing roles associated with the two debts warrant a different calculus.

Wells Fargo contends the bankruptcy court erred when it forced Wells Fargo to apply the milk proceeds, which provided security for the Wells Fargo Prepetition Loan, to satisfy the DIP Loan, and it further erred in determining "as a matter of law" that using the milk proceeds to pay off the DIP Loan constituted adequate protection on a dollar-for-dollar basis. Wells Fargo also contends the bankruptcy court violated the "law **[*33]** of the case doctrine" by allowing Debtors to use cash collateral in a manner that was expressly prohibited in the Final DIP Order.

Paragraph 5 of the Final DIP Order provides that Wells Fargo will receive, in addition to the junior lien it already had on the Dairy Property, a lien on "any and all assets acquired by the Debtors after the Petition Date of the same type as the assets on which Wells Fargo held a lien on the Petition Date." In re Sonora Desert Dairy, LLC, No. 2:12-00262, slip order at 7 (Bankr. D. Ariz. Nov. 29, 2013). Thus, Debtors extended Wells Fargo's security interest in all personal property they acquired postpetition that was of the same type on which Wells Fargo held a security interest prepetition — i.e., the dairy herd, feed inventory and milk proceeds — to secure the Wells Fargo Prepetition Loan. Paragraph 6 of the Final DIP Order provides that the Dairy Property was the collateral securing the DIP Loan, and that Wells Fargo's DIP lien would be senior to or "prime" AgStar's senior lien on the Dairy Property. Id. In addition, Paragraph 1 provides that Debtors could only use any cash collateral of Wells Fargo in the manner set forth in the parties' agreed budget **[*34]** attached to the Final DIP Order. Id. at 5-6. Neither the budget nor the Final DIP Order contemplate that Debtors could use milk proceeds securing the Wells Fargo Prepetition Loan to pay off the DIP Loan secured by the Dairy Property.

In reviewing the transcript from the hearing on the Second AgStar DIP Motion, we conclude that Wells Fargo and the bankruptcy court misunderstood each other's positions. The court mistakenly assumed that Wells Fargo's DIP Loan was secured by all of Wells Fargo's prepetition collateral (the dairy herd, feed inventory and milk proceeds) in addition to the Dairy Property, despite counsel's statements to the contrary and his citation to Paragraph 6 of the Final DIP Order. In other words, the court believed all of Wells Fargo's collateral, pre- and postpetition, provided security for the DIP Loan.[13] On that assumption, it would follow that whether Wells Fargo applied the $516,000 cash payment to its DIP Loan or the Wells Fargo Prepetition Loan would make no difference; Wells Fargo was receiving its money either way. It would also follow under those facts that because the DIP Loan was being paid in full, Wells Fargo was

[13] The judge making the decision on the AgStar DIP Loan was not the same judge who heard the earlier matters and issued the Final DIP Order on November 29, 2012. Immediately after issuing the Final DIP Order, Judge Case reassigned Debtors' cases to Judge Haines, who subsequently issued the AgStar DIP Order on July 12, 2013.

receiving dollar-for-dollar adequate protection, and **[*35]** thus the AgStar DIP Loan and priming lien could be authorized under *§ 364(d)*.

However, applying the $516,000 payment to the DIP Loan did make a difference; it caused Wells Fargo to lose $516,000 it would have otherwise been able to recover from the sale of the Dairy Property. Put simply, had Wells Fargo's priming lien remained intact, it would have been paid its $500,000 DIP Loan (plus interest) from the Dairy Property sale proceeds and it would have recovered all of the milk proceeds, which consisted of approximately $800,000 to apply to the Wells Fargo Prepetition Loan. Accordingly, the bankruptcy court's decision transferred $516,000 of postpetition collateral protected by the *§ 552(b)(1)*[14] security interest extension provided in Paragraph 5 of the Final DIP Order to the payment of the DIP Loan, which prevented an equivalent payment to the Wells Fargo Prepetition Loan. Thus, the mechanism **[*36]** provided in the Final DIP Order to adequately protect Wells Fargo was thwarted.

Wells Fargo's argument that the "law of the case" doctrine precluded the bankruptcy court from reexamining issues already decided in the Final DIP Order lacks merit. ***HN14***[] This discretionary, judicially-imposed doctrine precludes a court from reconsidering an issue explicitly or impliedly decided by a prior disposition from the same court or a higher court. *Hall v. City of L.A., 697 F.3d 1059, 1067 (9th Cir. 2012)*. The bankruptcy court did not appear to be **[*37]** reconsidering or reexamining the terms of the Final DIP Order when it made its decision as to the Second AgStar DIP Motion; it simply misunderstood the facts of the case, which led to its error. The Final DIP Order governed the obligations of the parties, particularly Paragraphs 5 and 6 that created the hierarchy of liens and collateral and how Wells Fargo would be paid. Because the bankruptcy court did not expressly overrule any part of that order when it made its ruling, it was required to enforce the order's terms.

Because the bankruptcy court erred when it ordered Wells Fargo to apply the $516,000 payment to the DIP Loan and deemed Wells Fargo's DIP lien satisfied, we must VACATE the AgStar DIP Order and REMAND for further proceedings.[15] The question becomes then, what sort of relief can be granted to Wells Fargo in light of the bankruptcy court's good faith finding under *§ 364(e)*. Even if AgStar's priming DIP lien created under *§ 364(d)* must be left in place despite our vacation, allowing Wells Fargo's DIP lien to have priority over the lien securing the AgStar Prepetition Loan would be permissible under *§ 364(e)*, because it will not affect the validity or priority of AgStar's DIP lien.

C. The bankruptcy court did not violate Wells Fargo's due process rights when it entered the Supplemental AgStar DIP Order.

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[14] *Section 552(b)(1)* provides:

> ***HN13***[] Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, products, offspring, or profits of such property, then such security interest extends to such proceeds, products, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

[15] Although Wells Fargo **[*38]** contends the Supplemental AgStar DIP Order must also be reversed, that order did not detrimentally affect Wells Fargo. Its loss was created by the AgStar DIP Order, where Wells Fargo lost $516,000.

Wells Fargo challenges the Supplemental AgStar DIP Order on an additional ground — that it violated Wells Fargo's due process rights. It contends that Debtors never filed a motion to approve the additional DIP financing authorized in the Supplemental AgStar DIP Order or sought a hearing, but rather simply lodged a proposed form of order the day prior to the previously-scheduled status hearing on November 7, 2013. The bankruptcy court then improperly vacated the status hearing sua sponte and entered the Supplemental AgStar DIP Order as proposed on November 8, 2013. As a result, Wells Fargo argues that it was never given a reasonable opportunity to object or be heard and was thereby deprived of its due process rights.

HN15[] "An integral part of *Section 364* is the requirement that notice and a hearing be granted before a court order is issued." *In re Blumer, 66 B.R. at 113*. The phrase "notice and a hearing," as defined **[*39]** in *§ 102(1)*, is a term of art. It does not mean that a hearing must be granted. Id. The bankruptcy court may act without a hearing if notice has been properly given and (1) a hearing has not been requested or (2) there is insufficient time for one. Id. (citing *§ 102(1)(B)*. Notice means "such notice as is appropriate in the particular circumstances[.]" *§ 102(1)(A)*). "Nowhere is there any provision for an action to be taken without notice where 'notice and a hearing' are required." *In re Blumer, 66 B.R. at 113* (citing *In re Monach Circuit Indus., Inc., 41 B.R. 859, 861 (Bankr. E.D. Pa. 1984))*. "This is true even in emergency situations." Id.

Wells Fargo's arguments lack merit. Although it argues that Debtors never filed a motion to approve additional DIP financing, Debtors had filed the Second AgStar DIP Motion, which covered the proposed $315,000 DIP loan from AgStar that was ultimately authorized by the bankruptcy court. Wells Fargo was given the opportunity to, and did, oppose that motion. Thus, Wells Fargo's claim that the first notice it received of this additional DIP financing request was from the proposed form of order lodged by Debtors is not credible. Further, the bankruptcy court was not required to hold a hearing on the matter since all Debtors were requesting was an additional draw from the $315,000 AgStar **[*40]** DIP Loan already authorized by the court at a prior hearing, where Wells Fargo's objections had already been overruled.

Accordingly, we conclude that Wells Fargo's due process rights were not violated by entry of the Supplemental AgStar DIP Order.

VI. CONCLUSION

Based on the foregoing reasons, we VACATE the AgStar DIP Order and REMAND it to the bankruptcy court for further proceedings consistent with this memorandum. As to the Supplemental AgStar DIP Order, we AFFIRM.

End of Document

EXHIBIT A

SAMUEL R. MAIZEL (Bar No. 189301)
samuel.maizel@dentons.com
JOHN A. MOE, II (Bar No. 066893)
john.moe@dentons.com
TANIA M. MOYRON (Bar No. 235736)
tania.moyron@dentons.com
DENTONS US LLP
601 South Figueroa Street, Suite 2500
Los Angeles, California 90017-5704
Tel: (213) 623-9300/Fax: (213) 623-9924

Proposed Attorneys for the Chapter 11 Debtors and

Debtors In Possession

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

In re VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al.*, Debtors and Debtors In Possession.	Lead Case No. 18-20151 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
☒ 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 Lynwood 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.	**FINAL ORDER (I) AUTHORIZING POSTPETITION FINANCING, (II) AUTHORIZING USE OF CASH COLLATERAL, (III) GRANTING LIENS AND PROVIDING SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS, (IV) GRANTING ADEQUATE PROTECTION, (V) MODIFYING AUTOMATIC STAY, AND (VI) GRANTING RELATED RELIEF**

DENTONS US LLP
601 SOUTH FIGUEROA ~~STREET~~ STREET, SUITE 2500
LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

DENTONS US LLP
601 SOUTH FIGUEROA ~~STREET~~ STREET, SUITE 2500
LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

Upon the emergency motion (the "***DIP Motion***")[1], dated August 31, 2018, filed by Verity Health System of California, Inc., O'Connor Hospital, Saint Louise Regional Hospital, St. Francis Medical Center, St. Vincent Medical Center, Seton Medical Center, Verity Holdings, LLC, Verity Medical Foundation, O'Connor Hospital Foundation, Saint Louise Regional Hospital Foundation, St. Francis Medical Center of Lynwood Medical Foundation, St. Vincent Foundation, St. Vincent Dialysis Center, Inc., Seton Medical Center Foundation, Verity Business Services, DePaul Ventures, LLC, and DePaul Ventures - San Jose Dialysis, LLC (collectively, the "***Debtors***"), as debtors and debtors in possession in the above captioned chapter 11 cases (collectively, the "***Chapter 11 Cases***"), pursuant to sections 105, 361, 362, 363, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1), 364(e) and 507 of title 11 of the United States Code (the "***Bankruptcy Code***"), Rules 2002, 4001, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure (the "***Bankruptcy Rules***") and Rule 4001-2 of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Central District of California (the "***Local Rules***" or "***LBR***"), for entry of an emergency order (the "***Interim Order***") authorizing the Debtors to, among other things~~:~~ , *inter alia*:

(i) Obtain senior secured post-petition financing (the "***DIP Financing***" or "***DIP Facility***") pursuant to the terms and conditions of the DIP Financing Agreements (as defined below), and this Final Order~~, and the Final Order (as defined below)~~, pursuant to sections 364(c)(1), 364(d), and 364(e) of the Bankruptcy Code and Rule 4001(c) of the Bankruptcy Rules;

(ii) Enter into a Debtor-in-Possession Credit Agreement (the "***DIP Credit Agreement***"), substantially in the form attached hereto as **Exhibit 1**, and other related financing documents (together with the DIP Credit Agreement and DIP Security Agreement, the "***DIP Financing Agreements***"), by and among each of the Debtors and Ally Bank ("***Ally***"), in its capacity as agent ("***DIP Agent***") and in its capacity as lender ("***DIP Lender***,") under the DIP Credit Agreement;

(iii) Borrow, on an interim basis, pursuant to the DIP Financing Agreements, postpetition financing of up to $30,000,000 on a revolving basis (the "***Interim DIP Loan***") and

[1] Capitalized terms used herein and not otherwise defined shall have the meaning ascribed in the DIP Motion.

DENTONS US LLP
601 SOUTH FIGUEROA ~~STREET~~ STREET, SUITE 2500
LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

seek other financial accommodations from the DIP Lender pursuant to the DIP Credit Agreement, the other DIP Financing Agreements, and this Final Order;

(iv) Borrow, on a final basis, pursuant to the DIP Financing Agreements, post-petition financing of up to an additional $155,000,000, for a total of up to $185,000,000, on a revolving basis, which includes the Interim DIP Loan (the "***Final DIP Loan***," and together with the Interim DIP Loan, the "***DIP Loan***") and seek other financial accommodations from the DIP Lender pursuant to the DIP Credit Agreement, the other DIP Financing Agreements, and the Final Order (as defined below);

(v) Execute and deliver the DIP Credit Agreement and the other DIP Financing Agreements;

(vi) Grant the DIP Lender allowed super-priority administrative expense claims, pursuant to section 364(c)(1) of the Bankruptcy Code, in each of the Chapter 11 Cases and any Successor Cases (as defined below) for the DIP Financing and all obligations of the Debtors owing under the DIP Financing Agreements (collectively, and including all "***Obligations***" of the Debtors as defined and described in the DIP Credit Agreement, the "***DIP Obligations***") subject only to the Carve Out (defined below) as set forth below;

(vii) Grant the DIP Lender automatically perfected first priority senior security interests in and liens on all of the DIP Collateral (as defined below) pursuant to section 364(d)(1) of the Bankruptcy Code, which liens shall not be subordinate to any other liens, charges, security interests or surcharges under section 506(c) or any other section of the Bankruptcy Code, with the exception of the Carve Out (defined below) as set forth below;

(viii) Obtain authorization to use the proceeds of the DIP Financing in all cases in accordance with the proposed initial agreed budget covering the initial 13 week period (the "***Initial Agreed Budget***") a copy of which is attached to the Chou Decl. [Docket No. 32] as **Exhibit 2**, as updated from time to time in accordance with the terms of this Final Order, and attached hereto as **Exhibit 2** (the "***DIP Budget***") and as otherwise provided in the DIP Financing Agreements, the Interim Order and this Final Order;

(ix) Provide adequate protection separately to certaineach of the Prepetition Secured Creditors (defined herein) and McKesson (defined herein) pursuant to the terms of this Final Order foron account of any diminution in value of their respective interests in thethe interest of such Prepetition Secured Creditor or McKesson in the specific Prepetition Collateral or VMF Collateral (each as defined herein) resulting fromwhich is pledged to such Prepetition Secured Creditor or McKesson, including, without limitation, as a result of the priming of the interest of such Prepetition Secured Creditor or McKesson in its Prepetition Collateral or VMF Collateral by the DIP Liens (as defined herein) on the Prepetition Collateral or VMF Collateral,, the subordination of the interest of such Prepetition Secured Creditor or McKesson in its Prepetition Collateral or VMF Collateral to the Carve Out (as defined herein), or Debtors' use, sale, or leasethe use by any of the Debtors of the Cash Collateral of such Prepetition Secured Creditor or McKesson, and any other decline in value of the interest of such Prepetition Secured Creditor or McKesson in its Prepetition Collateral or VMF Collateral whether arising out of the automatic stay, the Debtors' use, sale, or disposition of the Prepetition Collateral or VMF Collateral, including cash collateralor otherwise (such cash collateral that is Prepetition Collateral or VMF Collateral hereafter definedis referred to as "***Cash Collateral***");

(x) Grant authorization based upon the consent of the Prepetition Secured Creditors and McKesson to use of Cash Collateral in accordance with the DIP Budget upon the terms and conditions set forth herein;

(xi) Vacate and modify the automatic stay imposed by section 362 of the Bankruptcy Code solely to the extent necessary to implement and effectuate the terms of the DIP Financing Agreements, the Interim Order, and this Final Order;

(xii) Following the conclusion of a final hearing (the "***Final Hearing***") to consider entry of an order (the "***Final Order***") granting the relief requested in the DIP Motion on a final basis; and

(xiii) Waive any applicable stay as provided in the Bankruptcy Rules (expressly including Rule 6004) and provide for immediate effectiveness of this Final Order.

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

DENTONS US LLP
601 SOUTH FIGUEROA ~~STREET~~ STREET, SUITE 2500
LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

The Court, having considered the DIP Motion, the Declarations of Anita M. Chou, Chief Financial Officer filed in support of the DIP Motion and Rich Adcock, CEO filed in support of the First Day Motions each as Officers of the Debtors, in Support of Chapter 11 Petitions and First Day Pleadings, the DIP Motion, the proposed DIP Credit Agreement, and any the exhibits attached thereto, and the evidence submitted or adduced and the arguments of counsel made at the hearing on the Interim Order (the "***Interim Hearing***") and on the request for entry of the Final Order (the "***Final Hearing***"); and due and proper notice of the DIP Motion, an Interim Hearing, entry of the Interim Order, and Final Hearing having been provided in accordance with Bankruptcy Rules 2002, 4001(b) and (d), and 9014 and LBR 4001-2 and no other or further notice being required under the circumstances; and the Interim Hearing and Final Hearing having been held and concluded; and it appearing that approval of the and final relief requested in the DIP Motion is necessary to avoid immediate and irreparable harm to the Debtors and is otherwise fair and reasonable and in the best interests of the Debtors, their estates and their creditors, and is essential for the preservation of the value of the Debtors' assets; and all objections, if any, to the entry of this Final Order having been withdrawn, resolved or overruled by the Court; and after due deliberation and consideration, and for good and sufficient cause appearing therefor:

BASED UPON THE RECORD ESTABLISHED AT THE INTERIM AND FINAL HEARINGS, THE COURT MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:[2]

A. **Petition Date**. On August 31, 2018 (the "***Petition Date***"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the Central District of California (the "***Court***"). The Debtors have continued in the management and operation of their businesses and properties as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

[2] The findings and conclusions set forth herein constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

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B. **Jurisdiction and Venue**. This Court has jurisdiction over the Cases, the DIP Motion and the parties and property affected hereby pursuant to 28 U.S.C. §§ 157(b) and 1334(b), and over the persons and property affected hereby. Consideration of the DIP Motion constitutes a core proceeding as defined in 28 U.S.C. § 157(b)(2). Venue for these Chapter 11 Cases and proceedings on the DIP Motion is proper before this district pursuant to 28 U.S.C. §§ 1408 and 1409.

C. **Committee Formation.** The Office of the United States Trustee (the "***U.S. Trustee***") has noticed the appointment of an official committee of unsecured creditors in these Cases pursuant to section 1102 of the Bankruptcy Code, the members of which are identified by the Office of the United States Trustee in that Notice of Appointment and Appointment of Committee of Creditors Holding Unsecured Claims dated September 17, 2018 [Docket No. 197] (the "***Committee***").

D. **Notice**. Notice of the Court's entry of Interim Order on September 6, 2018 [Docket No. 86] and Notice of the Final Hearing and on the DIP Motion [Docket No. 201] has been provided by the Debtors to: (i) the Office of the United States Trustee for the Central District of California (the "***U.S. Trustee***"); (ii) the United States Securities and Exchange Commission; (iii) the Office of the United States Attorney for the Central District of California; (iv) the Internal Revenue Service; (v) the Debtors' fifty (50) largest unsecured creditors on a consolidated basis; (vi) counsel to each of the Prepetition Secured Creditors (as defined below); (vii) counsel to the DIP Agent and the DIP Lender; (viii) the Office of the Attorney General for the State of California, Charities Division; and (ix) all other parties known to assert a lien on any of the Debtors' assets. Under the circumstances, such notice of the Final Hearing and the DIP Motion constitute due, sufficient and appropriate notice and complies with sections 102(1) and 363 of the Bankruptcy Code, Bankruptcy Rules 2002 and 4001(b), and the Local Rules, and no other or further notice is required under the circumstances.

E. **Findings Regarding Corporate Authority**. As set forth in the resolutions accompanying the Petitions and the Adcock Declaration, each Debtor has all requisite corporate

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(213) 623-9300

power and authority to execute and deliver the DIP Financing Agreements to which it is a party and to perform its obligations thereunder.

F. **Intercreditor Agreement**. Pursuant to section 510(a) of the Bankruptcy Code, the Second Amended and Restated Intercreditor Agreement dated December 1, 2017 (the "***Intercreditor Agreement***") and any other applicable intercreditor or subordination provisions contained in any of the Prepetition Secured Documents (i) shall remain in full force and effect, with respect to prepetition and post-petition assets of the Debtors as provided thereunder, (ii) shall continue to govern the relative priorities, rights and remedies of the Prepetition Secured Creditors (including the relative priorities, rights and remedies of such parties with respect to the Prepetition Replacement Liens and Adequate Protection Superpriority Claims granted, or amounts payable, by the Debtors under the Interim Order, this Final Order or otherwise and the modification of the automatic stay), and (iii) shall not be deemed to be amended, altered or modified by the terms of this Final Order or the DIP Financing Agreements, unless expressly set forth herein.

G. **Prepetition Secured Credit Facilities**. As of the Petition Date, the Debtors were indebted and liable to the Prepetition Secured Creditors as follows:

(i) UMB Bank, N.A., (~~"~~"***UMB Bank***~~"~~") ~~as~~is the successor ~~Master Trustee~~master trustee (in such capacity, the "***Master Trustee***") under the Master ~~Trust~~Indenture of Trust dated as of December 1, 2001, as amended and supplemented (the "***Master Indenture***") with respect to the MTI Obligations (defined below) securing the repayment by the Obligated Group (defined below) of its loan obligations with respect to (1) the California Statewide Communities Development Authority Revenue Bonds (Daughters of Charity Health System) Series 2005 A, G and H (the ~~"~~"***2005 Bonds***~~"~~"), (2) the California Public Finance Authority Revenue Notes (Verity Health System) Series 2015 A, B, C and D (the "***2015 Working Capital Notes***"), and (3) the California Public Finance Authority Revenue Notes (Verity Health System) Series 2017 A and B (the "***2017 Working Capital Notes***" and, collectively with the 2015 Working Capital Notes, the ~~"~~"***Working Capital Notes***~~"~~"). The joint and several obligations issued under the Master Indenture by Verity Health System of California, Inc., O'Connor Hospital, Saint Louise Regional Hospital, St. Francis Medical Center, St. Vincent Medical Center and Seton

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Medical Center (collectively, the "***Obligated Group***") in respectsecuring the Obligated Group's repayment of the loans to the Obligated Group of the proceeds of the 2005 Bonds and the Working Capital Notes are collectively referred to as the "***MTI Obligations***". Wells Fargo Bank National Association ("***Wells Fargo***") serves as bond indenture trustee under the bond indentures relating to the 2005 Bonds. U.S. Bank National Association ("***U.S. Bank***") serves as the note indenture trustee and as the collateral agent under each of the note indentures relating to the 2015 Working Capital Notes and the 2017 Working Capital Notes, respectivelyWorking Capital Notes. UMB Bank, as Master Trustee, serves as the collateral agent for the MTI Obligations (UMB Bank, in such capacity, and Wells Fargo, as bond trustee under the bond indentures for the 2005 Bonds, and U.S. Bank, as note trustee under the note indentures for the Working Capital Notes, all secured on a parity basis by the MTI Obligations, the "***MTI Agents***"). As of the Petition Date, the amount of the MTI Obligations was as follows: (x) the principal and interest owing under the MTI Obligations securing the 2005 Bonds was $_____, not including fees, costs, costs of collection and any other amounts due and owing under the Obligated Group's loan agreements relating to the 2005 Bonds; (y) the principal and interest owing under the MTI Obligations securing the 2015 Working Capital Notes was $_____, not including fees, costs, costs of collection and any other amounts due and owing under the Obligated Group's loan agreements relating to the 2015 Working Capital Notes; and (z) the principal and interest owing under the MTI Obligations securing the 2017 Working Capital Notes was $_____, not including fees, costs, costs of collection and any other amounts due and owing under the Obligated Group's loan agreements relating to the 2017 Working Capital Notes. The MTI Obligations are secured by, inter alia, security interests granted to the Master Trustee in the prepetition accounts of, and mortgagesdeeds of trust on the principal real estate assets of, the members of the Obligated Group. In addition to the security provided to the Master Trustee to secureunder the MTI Obligations, U.S. Bank, as Note Trusteenote trustee for the 2015 Working Capital Notes and the 2017 Working Capital Notes, is secured by first priority liens upon and security interests in the prepetition accounts of the Obligated Group's accounts, and deeds of trust on the principal real estate assets of Saint Louise Regional Hospital and St. Francis Medical Center (collectively, the

"***~~Priority~~Intercreditor Collateral***"). U.S. Bank, as ~~Notes Trustee~~note trustee for the 2017 Working Capital Notes, has also been granted a deed of trust, dated as of December ~~1,~~21, 2017, by Verity Holdings in certain real property located in San Mateo, California~~ (the "***Moss Deed of Trust***") to further secure the 2017 Working Capital Notes~~. Pursuant to the terms of the Intercreditor Agreement among, inter alia, UMB Bank and U.S. Bank, the lien of the Master Indenture and the MTI Obligations on the Intercreditor Collateral is junior to the lien on the Intercreditor Collateral of U.S. Bank, as note trustee for the Working Capital Notes.

(ii) Verity MOB Financing, LLC and Verity MOB Financing II, LLC (together, the "***MOB Lenders***") hold security interests in Verity Holdings' accounts, including rents arising from the prepetition MOB Financing, and ~~mortgages~~deeds of trust on medical office buildings owned by Verity Holdings (the "***MOB Financing***").

The Master Trustee, Wells Fargo as bond indenture trustee for the 2005 Notes, U.S. Bank as Note Trustee for the Working Capital Notes, and the MOB Lenders are collectively hereafter referred to as the "***Prepetition Secured Creditors***;" the MTI Obligations, the Obligated Group's loan obligations with respect to the Working Capital Notes and the MOB Financing are hereinafter referred to as the "***Prepetition Secured Obligations***;" the prepetition interests (including the liens and security interests) of each Prepetition Secured Creditor in the property and assets of the Debtors are hereinafter referred to as the "***Prepetition Liens***;" and the documents, writings and agreements evidencing the Prepetition Secured Obligations are hereinafter referred to as the "***Prepetition Secured Documents***"). The Debtors acknowledge that funds which are being held by the MTI Agents or any of them are not property of the Debtors' estates

H. **Prepetition Secured Trade Vendor Arrangement**. As of the Petition Date, the VMF had entered into agreements for the sole source purchasing of certain critical chemotherapy and other drugs with a McKesson Corporation and certain affiliates ("***McKesson***"), and on or about March 27, 2018 granted to McKesson a prepetition perfected security interest ("***VMF Liens***") in VMF tangible and intangible personal property, including accounts (the "***VMF***

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Collateral"), but such perfected security interest excluded VMF cash, personal property requiring possession for perfection and real property interests.

I. **Prepetition Collateral**. In order to secure that portion of the Prepetition Secured Obligations owing to an individual Prepetition Secured Creditor and the Prepetition Secured Trade Vendor Arrangement (as described in paragraph H above), the Debtors, excluding the Philanthropic Foundations, granted ~~the~~a Prepetition ~~Liens and the VMF Liens~~Lien to ~~the~~such Prepetition Secured ~~Creditors~~Creditor and McKesson~~, respectively~~ as provided ~~and described~~ in the Prepetition Secured Documents and the documents pertaining to the VMF Collateral. The assets subject to the Prepetition ~~Liens (~~Lien of each Prepetition Secured Creditor are hereafter referred to as the "***Prepetition Collateral***"~~)~~ of such Prepetition Secured Creditor. Collectively, the assets subject to all of the Prepetition Liens of all of the Prepetition Secured Creditors and the VMF Collateral constitute substantially all of the assets of the Debtors~~, excluding cash and assets of the Philanthropic Foundations.~~ .

J. **Prepetition Agreements to Pay Special Assessments.** Seton Medical Center, a Debtor, ("***SMC***") and California Statewide Communities Development Authority ("***CSCDA***") entered into an (i) Agreement to Pay Assessment and Finance Improvements dated May 11, 2017 under the CSCDA CaliforniaFirst Program ("***Clean Fund Agreement to Pay Assessment***"), and (ii) Agreement to Pay Assessment and Finance Improvements dated May 18, 2017 under the CSCDA CaliforniaFirst Program ("***Petros Agreement to Pay Assessment***", collectively, with Clean Fund Agreement to Pay Assessment, the "***Assessment Agreements*** "), each for the limited purpose of providing financing for certain renewable energy, energy efficiency, water efficiency and seismic improvements permanently affixed to real property owned by SMC located in Daly City, California under the CSCDA CaliforniaFirst Program in the aggregate amount of $40,000,000. As of the Petition Date, after payment of tax exempt bond issuance fees for the Clean Fund Bonds and the NR2 Petros Bonds (each as defined in the DIP Motion) and retention of capitalized interest reserves approximately $34,379,450 is being held for authorized improvements (the "***Program Funds***") by Wilmington Trust N.A. ("***WTNA***") as indenture trustee, pursuant to, *inter alia*, the terms of two Indentures between CSCDA and WTNA dated as

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of May 11, 2017 and May 18, 2017 and the Assessment Agreements. Notwithstanding SMC's status as a tax exempt California not for profit corporation, SMC agreed and consented to the CSCDA special tax assessments imposed pursuant to and under the Assessment Agreements (the "***CSCDA Special Assessments***"). The Debtors acknowledge that the CSCDA Special Assessments have the same lien priority and methods of collection as general municipal taxes on real property. Notices of Assessment and Payment of the Special Assessments were recorded in the official records of the County of San Mateo against the real property owned by SMC and consented to by the Prepetition Secured Lenders. The Debtors acknowledge that the Program Funds and other proceeds of the issuance of the Clean Fund Bonds or NR2 Petros Bond which are being held by WTNA are not property of the Debtors' estates, and are not subject to the Prepetition Liens, the DIP Liens, or the Prepetition Replacement Liens.

K. **Findings Regarding the Postpetition Financing**.

(i) **Consensual Priming of the Prepetition Liens**. ~~The priming of the Prepetition Liens of the Prepetition Secured Creditors on the Prepetition Collateral, and the VMF Liens on the VMF Collateral under section 364(d) of the Bankruptcy Code, as contemplated by the DIP Financing Agreements, as authorized by this Final Order, and as further described below, is consented to by the Prepetition Secured Creditors and McKesson, and will enable the Debtors to continue borrowing under the DIP Facility and to continue operating their businesses for the benefit of their estates and creditors.~~ The Prepetition Secured Creditors and McKesson are each entitled to receive adequate protection as set forth in this Final Order pursuant to sections 361, ~~363,~~363 and 364 of the Bankruptcy Code~~,~~ for any Diminution in Value (as defined herein) of each of their respective interests in the Prepetition Collateral and VMF Collateral (including Cash Collateral)~~ or VMF Collateral.~~. Each of the Prepetition Secured Creditors and McKesson has consented to permit the DIP Liens to prime the Prepetition Lien of such Prepetition Secured Creditor and McKesson under section 364(d) of the Bankruptcy Code, to the extent contemplated by the DIP Financing Agreements and as authorized by this Final Order. Absent the consent of the Prepetition Secured Creditors and McKesson, nothing contained in this Final Order shall constitute an agreement or acknowledgement by the Prepetition Secured Creditors or McKesson

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that the adequate protection provided to the Prepetition Secured Creditors and McKesson by this Final Order satisfies the requirements of sections 361, 363 and 364 of the Bankruptcy Code.

(ii) **Good Cause; Need for Postpetition Financing**. Good cause has been shown for the entry of this Final Order. An immediate and continuing need exists for the Debtors to obtain funds from the DIP Loan in order to continue operations, continue to serve the Debtors mission to provide vital, lifesaving patient care for vulnerable populations and to administer and preserve the value of their estates. The ability of the Debtors to finance their operations, to preserve and maintain the value of the Debtors' assets and to maximize a return for all creditors requires the availability of working capital from the DIP Loan, the absence of which would immediately and irreparably harm the Debtors, their estates and their creditors and the possibility for a successful reorganization or sale of the Debtors' assets as a going concern or otherwise. The proposed DIP Loan is in the best interests of the Debtors, their estates, and their creditors.

(iii) **No Credit Available on More Favorable Terms**. The Debtors have been unable to obtain (a) unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense, (b) credit for money borrowed secured solely by a lien on property of the estate that it not otherwise subject to a lien, (c) credit for money borrowed secured by a junior lien on property of the estate which is subject to a lien, (d) or credit otherwise on more favorable terms and conditions than those provided in the DIP Credit Agreement and this Final Order. The Debtors are unable to obtain credit for borrowed money without granting to the DIP Lender the DIP Protections (as defined below).

L. **Use of Proceeds of the DIP Facility.** Proceeds of the DIP Facility (net of any amounts used to pay fees, costs and expenses under the DIP Financing Agreements) are to be utilized by the Debtors until the DIP Facility Termination Date in accordance with the DIP Budget and in a manner consistent with the terms and conditions of the DIP Credit Agreement, this Final Order, and the Final Order.

M. **Application of Sale Proceeds of DIP Collateral**. The Debtors have agree with the DIP Lender that, subject to the terms of this Final Order and the DIP Credit Agreement, The DIP Liens shall attach as first priority liens and security interests, pursuant to section 364(d) of the

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601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

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LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

Bankruptcy Code and the DIP Financing Agreements, to all proceeds of any sale or other disposition of the Debtors' ~~property~~assets, including, without limitation, the Facilities and any other DIP Collateral (as defined below) (the "***Sale Proceeds***"). The net Sale Proceeds of any individual sale of assets of the Debtors shall be held in escrow in ~~one or more~~a separate interest bearing deposit ~~accounts~~account, each of which shall be subject to a deposit account control agreement in favor of the DIP Lender (~~the~~each such account, an "***Escrow Deposit Account***"). Any funds held in ~~the~~an Escrow Deposit Account shall not be commingled with any other Sale Proceeds, or any other funds of the Debtors or otherwise. Without limitation of the rights of the DIP Lender upon the occurrence of an Event of Default, the Debtors shall not be permitted to use Cash Collateral of any Prepetition Secured Creditor held in an Escrow Deposit Account for any purpose without first obtaining the consent of the applicable Prepetition Secured Creditor or obtaining an order of the Court after notice and a hearing. The DIP Lender is granted a first priority lien on ~~the~~each Escrow Deposit Account and all Sale Proceeds, including any deposit provided by any buyer in connection with any asset sale, and such proceeds, deposits~~,~~ and each the Escrow Deposit Account shall constitute Collateral under the DIP Credit Agreement and DIP Collateral under this Final Order. On the Revolving Loan Termination Date (as defined in the DIP Credit Agreement), the DIP Lender shall apply any and all amounts remaining on deposit in the Escrow Deposit Account to the outstanding ~~principal~~ amount ~~of~~due under the DIP Loan, ~~together with accrued and unpaid DIP Obligations,~~ with any remaining balance to be delivered to the Debtors subject to any Prepetition Liens~~, VMF Liens,~~ and Prepetition ~~Replacement Liens and VMF~~ Replacement Liens; *provided, however*, that upon ~~any Debtor's request~~further order of the Court as requested by any of the Prepetition Secured Creditors or the Debtors, and with the consent of the DIP Lender (which consent may, for the avoidance of doubt, be withheld in its sole discretion), any Sale Proceeds and deposits provided in connection with any asset sale may be disbursed to the Prepetition Secured Creditors ~~or McKesson~~ on terms and conditions that are acceptable to the DIP Lender ~~in its sole discretion and upon further order of this Court.~~ and to each of the Prepetition Secured Creditors which has a Prepetition Lien in such Sale Proceeds, or a Prepetition Lien in the type or category of assets sold. Nothing contained herein shall constitute

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an amendment, modification or waiver of any terms or provisions of the Intercreditor Agreement or the rights of the MTI Agents thereunder, and any distribution of any Sale Proceeds to the MTI Agents for application to the MTI Obligations shall be consistent with all of the terms of the Intercreditor Agreement. Subject to the DIP Lender's first priority lien, each Prepetition Secured Creditor's Prepetition Liens shall be deemed to attach to the Escrow Deposit Account with the same relative priority, validity force, extent and effect as the Prepetition Liens attached to the Prepetition Collateral giving rise to such proceeds. Each Prepetition Secured Creditor reserves the right to seek a declaration of their respective rights in and to any of the funds held in a Deposit Escrow Account, consistent with and subject to the terms and conditions of this Final Order and the Intercreditor Agreement.

N. **Adequate Protection for Prepetition Secured Creditors and McKesson.** The priming of ~~the~~each Prepetition Secured ~~Creditors'~~Creditor's Prepetition Liens to the extent set forth below pursuant to section 364(d) of the Bankruptcy Code is necessary to obtain the DIP Financing. In exchange for the priming of the Prepetition Liens set forth below, ~~the~~each Prepetition Secured ~~Creditors~~Creditor and McKesson shall be entitled to receive adequate protection, as set forth in this Final Order, pursuant to sections 361, 363 and 364 of the Bankruptcy Code, for any diminution in the value of ~~their respective interests in the~~such Prepetition Secured Creditor's interest in its Prepetition Collateral or VMF Collateral resulting from, among other things, the subordination of such interest to the Carve Out (as defined herein) and to the DIP Liens (as defined herein), the Debtors' use, sale or lease of such Prepetition Collateral or VMF Collateral, including Cash Collateral, and the imposition of the automatic stay from and after the Petition Date (collectively, and solely to the extent of such diminution in value, ~~the~~a "***Diminution in Value***"). ~~The~~ Each Prepetition Secured ~~Creditors have~~Creditor has negotiated in good faith regarding the Debtors' use of ~~the~~their respective Prepetition Collateral to help fund the administration of the Debtors' estates along with the proceeds of the DIP Financing. Based on the DIP Motion and the record presented to the Court at the Interim Hearing and the Final Hearing, the terms of the proposed adequate protection arrangements are fair and reasonable, reflect the Debtors' prudent exercise of business judgment and constitute reasonably

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equivalent value and fair consideration for the consent of the Prepetition Secured Creditors and McKesson; *provided, however*, that nothing herein shall limit the rights of any of the Prepetition Secured Creditors or McKesson to hereafter seek new, additional, or different adequate protection.

O. **Extension of Financing**. The DIP Lender has indicated a willingness to provide financing to the Debtors in accordance with the DIP Credit Agreement. The DIP Lender is acting in good faith with respect to the DIP Facility and the terms and conditions of the DIP Credit Agreement and the other DIP Financing Agreements. The DIP Lender's claims, superpriority claims, security interests and liens and other protections granted pursuant to this Final Order and the DIP Financing Agreements will not be affected by any subsequent reversal or modification of this Final Order or the Final Order, as provided in section 364(e) of the Bankruptcy Code.

P. **Business Judgment and Good Faith Pursuant to Section 364(e).**

(i) The DIP Lender has indicated a willingness to provide DIP Financing to the Debtors in accordance with the DIP Financing Agreements. The terms and conditions of the DIP Facility and the DIP Financing Agreements, and the fees paid and to be paid thereunder are fair, reasonable, and the best available under the circumstances, reflect the Debtors' exercise of prudent business judgment consistent with their fiduciary duties, and are supported by reasonably equivalent value and consideration;

(ii) The DIP Financing Agreements were negotiated in good faith and at arms' length between the Debtors and the DIP Lender;

(iii) The proceeds to be extended under the DIP Facility will be so extended in good faith, and for valid business purposes and uses; and

(iv) The DIP Lender is acting in good faith with respect to the DIP Facility and the terms and conditions of the DIP Financing Agreements, and the DIP Lender's claims, superpriority claims, security interests and liens and other protections granted pursuant to this Final Order and the DIP Financing Agreements will not be affected or avoided by any subsequent reversal or modification of this Final Order or the Final Order, as provided in section 364(e) of the Bankruptcy Code.

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Q. **Relief Essential; Best Interest; Good Cause**. The relief requested in the DIP Motion (and as provided in this Final Order) is necessary, essential, and appropriate for the preservation of the Debtors' assets, business and property. It is in the best interest of the Debtors' estates to be allowed to establish the DIP Facility contemplated by the DIP Credit Agreement. Good cause has been shown for the relief requested in the DIP Motion (and as provided in this Final Order) solely on an interim basis.

R. **Consent to Use of Cash Collateral**. Each of the ~~Prepetiton~~Prepetition Secured Creditors and McKesson have consented to the use of their respective interests in Cash Collateral, subject to the terms and conditions set forth in this Order.

NOW, THEREFORE, on the DIP Motion and the record before this Court with respect to the DIP Motion, including the record created during the Interim Hearing, and with the consent of the Debtors, the Prepetition Secured Creditors and the DIP Lender to the form and entry of this Final Order, and good and sufficient cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. **Motion Granted**. The DIP Motion is granted on an interim basis in accordance with the terms and conditions set forth in this Final Order and the DIP Credit Agreement. Any objections to the DIP Motion with respect to entry of this Final Order to the extent not withdrawn, waived or otherwise resolved, and all reservations of rights included therein, are hereby denied and overruled.

2. **DIP Financing Agreements.**

(a) **Approval of Entry Into DIP Financing Agreements**. The Debtors are authorized, empowered and directed to execute and deliver the DIP Financing Agreements and to incur and to perform the DIP Obligations in accordance with, and subject to, the terms of this Final Order and the DIP Financing Agreements, and to execute and deliver all instruments and documents which may be required or necessary for the performance by the Debtors under the DIP Financing Agreements and the creation and perfection of the DIP Liens described in and provided for by this Final Order and the DIP Financing Agreements. The Debtors are hereby authorized and directed to do and perform all acts, pay the principal, interest, fees, expenses, indemnities and

other amounts described in the DIP Credit Agreement as such amounts become due and payable without need to obtain further Court approval, including closing fees, unused line fees, administrative agent's fees, collateral agent's fees, and the reasonable fees and disbursements of the DIP Agent's and the DIP Lenders' respective attorneys, advisors, accountants, and other consultants, whether or not such fees arose before or after the Petition Date, and whether or not the transactions contemplated hereby are consummated, to implement all applicable reserves and to take any other actions that may be necessary or appropriate, all to the extent provided in this Final Order or the DIP Financing Agreements. All collections and proceeds, whether from ordinary course collections, asset sales, debt or equity issuances, insurance recoveries, condemnations or otherwise, will be deposited and applied as required by this Final Order and the DIP Financing Agreements. The DIP Financing Agreements represent valid and binding obligations of the Debtors, enforceable against each of the Debtors and their estates in accordance with their terms, including, without limitation, commitment fees and reasonable attorneys' fees and disbursements as provided for in the DIP Credit Agreement, which amounts shall not otherwise be subject to approval of this Court, *provided however,* that notwithstanding section 2.9(a) of the DIP Credit Agreement, following entry of this Final Order, the Debtors shall pay only $1,600,000 on account of the commitment fee. The Debtors shall pay the deferred balance of the commitment fee required by section 2.9(a) of the DIP Credit Agreement only upon entry of a Final Order approving the DIP Credit Agreement.

(b) **Authorization to Borrow/and or Guarantee**. To enable them to continue to preserve the value of their estates and dispose of their assets in an orderly fashion, during the period prior to termination of the DIP Credit Agreement and subject to the terms and conditions of this Final Order, upon the execution of the DIP Credit Agreement and the other Financing Documents the Debtors are hereby authorized to borrow the DIP Loan up to a total committed amount of $185,000,000 under the DIP Financing Agreements.

(c) **Conditions Precedent.** The DIP Lender shall have no obligation to make the DIP Loan or any loan or advance under the DIP Credit Agreement unless the conditions

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601 SOUTH FIGUEROA ~~STREET~~ STREET, SUITE 2500
LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

DENTONS US LLP
601 SOUTH FIGUEROA ~~STREET~~ STREET, SUITE 2500
LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

precedent to making such loan under the DIP Credit Agreement have been satisfied in full or waived by the DIP Lender in its sole discretion.

(d) **DIP Collateral; DIP Liens**. Effective immediately upon the entry of this Final Order, on account of the DIP Loan, the DIP Lender shall be and is hereby granted first-priority security interests and liens (which shall immediately be valid, binding, permanent, continuing, enforceable, perfected and non-avoidable) on all of the Debtors' property, including, without limitation, the Sale Proceeds and the Escrow Deposit Account, whether arising before or after the Petition Date (collectively, the "***DIP Collateral***," and all such liens and security interests granted on or in the DIP Collateral pursuant to this Final Order and the DIP Financing Agreements, the "***DIP Liens***"), but shall exclude the Program Funds, and proceeds of the Clean Fund Bonds and NR2 Petros Bonds held by WTNA, donor restricted funds held at Philanthropic Foundations, Avoidance Actions (defined below) and any proceeds thereof and any funds held by the Prepetition Secured Creditors (including amounts set forth on **Exhibit 1** to the Chou Decl.). The DIP Collateral shall not be subject to any surcharge under section 506(c) or any other provision of the Bankruptcy Code or other applicable law, nor by order of this Court.

(e) **DIP Lien Priority**. Subject only to the Carve Out (as defined below) and the prepetition tax lien arising in connection with the CSCDA Special Assessments, the DIP Liens shall, pursuant to section 364(d)(1) of the Bankruptcy Code, be perfected, continuing, enforceable, non-avoidable first priority senior priming liens and security interests on the DIP Collateral, and shall prime all other liens and security interests on the DIP Collateral, including any liens and security interests in existence on the Petition Date against the Prepetition Collateral and VMF Collateral, and any other current or future liens granted on the DIP Collateral, including any adequate protection or replacement liens granted on the DIP Collateral ~~(collectively, the "***Primed Liens***")~~ (other than the Debtors' claims and causes of action under sections 502(d), 544, 545, 547, 548, 549, 550 and 553 of the Bankruptcy Code, and any other avoidance or similar actions under the Bankruptcy Code or similar state law (the "***Avoidance Actions***"), whether received by judgment, settlement or otherwise. Without limiting the foregoing, the DIP Liens shall not be made subject to, subordinate to, or pari passu with any lien or security interest by any

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LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

court order heretofore or hereafter granted in the Chapter 11 Cases. The DIP Liens shall be valid and enforceable against any trustee appointed in the Chapter 11 Cases, upon the conversion of any of the Chapter 11 Cases to a case under Chapter 7 of the Bankruptcy Code or in any other proceedings related to any of the foregoing (any "***Successor Cases***"), and/or upon the dismissal of any of the Chapter 11 Cases or Successor Cases. Other than the Carve Out, no costs, expenses, claims, or liabilities that have been or may be incurred by Debtors during these Chapter 11 Case, or in any Successor Cases, will be senior to, prior to, or on parity with the DIP Liens.

(f) **Enforceable Obligations**. The DIP Financing Agreements shall constitute and evidence the valid and binding obligations of the Debtors, which obligations shall be enforceable against the Debtors, their estates and any successors thereto and their creditors or representatives thereof, in accordance with their terms.

(g) **Protection of DIP Lender and Other Rights**. From and after the Petition Date, the Debtors shall use the proceeds of the extensions of credit under the DIP Facility only for the purposes specifically set forth in the DIP Credit Agreement and this Final Order and in strict compliance with the DIP Budget (subject to any variances thereto permitted by the DIP Credit Agreement).

(h) **Additional Protections of DIP Lender: Superpriority Administrative Claim Status**. Subject to the Carve Out (as defined below), all DIP Obligations shall constitute an allowed superpriority administrative expense claim (the "***DIP Superpriority Claim***" and, together with the DIP Liens, the "***DIP Protections***") with priority in all of the Chapter 11 Cases and Successor Cases over all other administrative expense claims under sections 364(c)(1), 503(b) and 507(b) of the Bankruptcy Code and otherwise over all administrative expense claims and unsecured claims against the Debtors or their estates, now existing or hereafter arising, of any kind or nature whatsoever, including, without limitation, administrative expenses of the kinds specified in or ordered pursuant to sections 105, 326, 328, 330, 331, 365, 503(a), 503(b), 506(c), 507(a), 507(b), 546(c), 546(d), 1113 and 1114 and any other provision of the Bankruptcy Code except as otherwise set forth herein, whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment. The DIP Superpriority

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(213) 623-9300

Claim shall be payable from and have recourse to all prepetition and post-petition property of the Debtors and all proceeds thereof. Without limiting the foregoing, the Superpriority Claim shall not be made subject to, subordinate to, or *pari passu* with any other administrative claim in the Chapter 11 Cases or Successor Cases, except for the Carve Out (as defined below). Other than the Carve Out, no costs, expenses, claims, or liabilities that have been or may be incurred by Debtors during these Chapter 11 Case, or in any Successor Cases, will be senior to, prior to, or on parity with the DIP Superpriority Claim.

3. **Authorization to Use Proceeds of DIP Facility**. Pursuant to the terms and conditions of this Final Order, the DIP Credit Agreement and the other DIP Financing Agreements, and in accordance with the DIP Budget and the variances thereto set forth in the DIP Credit Agreement, the Debtors are authorized to use the advances under the DIP Credit Agreement during the period commencing immediately after the entry of this Final Order and terminating upon the occurrence of an Event of Default (as defined below) and the termination of the DIP Credit Agreement in accordance with its terms and subject to the provisions hereof.

4. **Application of Sale Proceeds of DIP and Prepetition Secured Creditor Collateral.** The DIP Liens shall attach as first priority liens and security interests, pursuant to section 364(d) of the Bankruptcy Code and the DIP Financing Agreements, to the Sale Proceeds. The Sale Proceeds shall be ~~allocated by Debtor and~~ held in escrow in the Escrow Deposit Accounts. Funds held in any Escrow Deposit Account shall not be commingled with any other funds of the applicable Debtor or any of the other Debtors and, without limitation of the rights of the DIP Lender upon the occurrence of an Event of Default under the DIP Financing Documents or pursuant to this Final Order, the Debtors shall not be permitted to use Cash Collateral of any of the Prepetition Secured Creditors held in any Escrow Deposit Account for any purpose without first obtaining the consent of the ~~applicable~~ Prepetition Secured Creditor having an interest in such Sale Proceeds, or obtaining an order of the Court pursuant to Section 363 of the Bankruptcy Code after notice and a hearing. The DIP Lender is granted a first priority lien on the Escrow Deposit Accounts and all Sale Proceeds, including any deposit provided by any buyer in connection with any asset sale, and such proceeds, deposits, and the Escrow Deposit Account

shall constitute Collateral under the DIP Credit Agreement and DIP Collateral under this Final Order. On the Revolving Loan Termination Date (as defined in the DIP Credit Agreement), the DIP Lender may apply amounts held in Escrow Deposit Accounts to the outstanding principal amount of the DIP Loan. Each of the Prepetition Secured Creditors shall have the right to seek a declaration of their respective rights in and to any of the Sale Proceeds and funds held in a Deposit Escrow Account, consistent with and subject to the terms and conditions of this Final Order, and the Court shall determine all such disputes in accordance with this Final Order, the Prepetition Secured Documents, and applicable law~~.~~; *provided, that*, nothing contained herein constitutes consent by any Prepetition Secured Creditor authorizing the Court to amend, modify or terminate any rights contained in, or provisions of the Prepetition Secured Documents, including the Intercreditor Agreement, impose any additional obligations not currently existing in the Prepetition Secured Documents, or to subordinate or re-order any rights or liens of the Prepetition Secured Creditors as set forth in the Prepetition Secured Documents.

5. **Adequate Protection for Prepetition Secured Creditors**. As adequate protection for ~~the interests of the Prepetition Secured Creditors in~~ any Diminution in Value in the interest of each Prepetition Secured Creditor in that portion of the Prepetition Collateral ~~and McKesson in the VMF Collateral, but subject to the rights of the Prepetition Secured Creditors in the Sale Proceeds and Deposit Escrow Accounts set forth above, on account of the granting of the DIP Liens, subordination to the Carve Out (as defined below), any Diminution in Value arising out of the Debtors' use, sale, or disposition or other depreciation of the Prepetition Collateral, including Cash Collateral or the VMF Collateral, resulting from the automatic stay, the Prepetition Secured Creditors and McKesson~~which is subject to such Prepetition Secured Creditor's Liens, each Prepetition Secured Creditor shall receive the adequate protection set forth herein in Sections 5(a) – (g), inclusive, as follows:

(a) **Adequate Protection Replacement Liens**. To the extent ~~of the~~that a Prepetition Secured Creditor suffers a Diminution in Value ~~of the interest of the respective~~from and after the Petition Date with respect to its Prepetition ~~Secured Creditors in~~Liens in any of its Prepetition Collateral, ~~each of the affected~~such Prepetition Secured ~~Creditors~~Creditor shall be

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LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

granted, subject to the terms and conditions set forth below, pursuant to sections 361, 363(e), and 364(d) of the Bankruptcy Code additional, in addition to its Prepetition Liens, valid, perfected and enforceable replacement security interests and Liens in the DIP Collateral, (theexcluding the prepetition collateral held by WTNA with respect to the Clean Fund Bonds and the NR2 Petros Bonds, indenture held funds held by any of the MTI Agents, donor restricted funds held at Philanthropic Foundations and Avoidance Actions and any proceeds thereof (such Prepetition Secured Creditor's "***Prepetition Replacement Liens***"), which Prepetition Replacement Liens shall have the same relative priority, validity, force, extent and effect as the liens that they replace and which shall be junior only to (1) the Carve Out, (2) to the DIP Liens securing the DIP Obligations, and (3) any perfected, unavoidable, prepetition VMF Liens in VMFliens on the DIP Collateral and (4)(including any perfected, unavoidable, prepetition liens granted by Holdings pursuant to those certain deeds of trust issued in connection with the MOB Financing and that certain Deed of Trust with Fixture Filing and Security Agreement and Assignment of Leases and Rents by Holdings in favor of U.S. Bank as 2017 Note Trustee and Deed of Trust Beneficiary, dated as of September 15, 2017, as further amended or modified (the "***Moss Deed of Trust***") to secure the Series 2017 Working Capital Notes; *provided, however*, that anyunavoidable Prepetition Liens of such Prepetition Secured Creditor and any other Prepetition Secured Creditor). The priority of two or more Prepetition Replacement Liens, solely as among and between the holders of such Prepetition Replacement Liens, shall be as follows:

i. in the event that Prepetition Replacement Liens granted to the 2015 Note Trustee and/or 2017 Note Trustee on account of the Diminution in Value of the Priority Assets as defined inare granted hereunder to two or more of the MTI Agents, to the extent that such Prepetition Replacement Liens cover DIP Collateral that is a type or category of asset that constituted Prepetition Collateral of such MTI Agents, the priority of such Prepetition Replacement Liens solely as among and between such MTI Agents shall be governed by the Intercreditor Agreement shall be senior to the Prepetition Replacement Liens granted to any other

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601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

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(213) 623-9300

~~Prepetition Secured Creditors and junior to (i) the Carve Out, (ii) the DIP Liens securing the DIP Obligations, and (iii) perfected, unavoidable, prepetition liens granted by Holdings pursuant to those certain deeds of trust issued in connection with the MOB Financing and the Moss Deed of Trust, and *further provided* that any Prepetition Replacement Liens granted to the holders of deeds of trust issued in connection with the MOB Financing and the Moss Deed of Trust, on account of the Diminution in Value of such Prepetition Collateral shall be senior to the Prepetition Replacement Liens granted to any other Prepetition Secured Creditors and junior to (x) the Carve Out, (y) the DIP Liens securing the DIP Obligations, and (z) perfected, unavoidable, prepetition liens of the Master Trustee, the 2015 Note Trustee and/or the 2017 Note Trustee on property other than the property subject to the Moss Deed of Trust. With respect to~~as if such DIP Collateral subject to such Prepetition Replacement Liens were Prepetition Collateral of such MTI Agents immediately prior to the Petition Date;

ii. in the event that Prepetition Replacement Liens are granted hereunder to one or more MTI Agents and to the MOB Lenders, to the extent that such Prepetition Replacement Liens cover DIP Collateral which is a type or category of asset that constituted Prepetition Collateral of such MTI Agents or the MOB Lenders, (x) the Prepetition Replacement Lien of the MTI Agents shall have priority over the Prepetition Replacement Lien of the MOB Lenders to the extent that such covered DIP Collateral is a type or category of asset that constituted Prepetition Collateral of the MTI Agents, and (y) the Prepetition Replacement Lien of the MOB Lenders shall have priority over the Prepetition Replacement Lien of the MTI Agents to the extent that such covered DIP Collateral ~~that is subject to the Intercreditor Agreement, any proceeds of such Prepetition~~

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~~Collateral or Prepetition Replacement Liens related thereto shall be allocated among the Prepetition Secured Creditors in accordance with the terms of the Second Amended and Restated Intercreditor Agreement.~~ , is a type or category of asset that constituted Prepetition Collateral of the MOB Lenders;

iii. in the event that Prepetition Replacement Liens are granted hereunder to any Prepetition Secured Creditor covering DIP Collateral which does not constitute Prepetition Collateral of any Prepetition Secured Creditor nor is a type or category of asset that constituted Prepetition Collateral of any Prepetition Secured Creditor, such Prepetition Replacement Liens shall rank *pari passu* and have equal priority with all Prepetition Replacement Liens granted in such DIP Collateral, and the holders of such Prepetition Replacement Liens shall be entitled to a *pro rata* distribution of the proceeds of any such Prepetition Replacement Liens.

With respect to the VMF Collateral, McKesson shall be entitled to a replacement lien on the postpetition assets of VMF, excluding Avoidance Actions ("***VMF Replacement Lien***"), to the extent of any Diminution in Value in such VMF Collateral, and shall be ~~senior to~~*pari passu* with any the Prepetition Replacement Liens thereon, but junior to ~~the~~ (m) Carve Out, and (n) the DIP Liens.

(b) **Adequate Protection Payments and Protections**. So long as there is no Default or Event of Default under the Interim Order, this Final Order, or the DIP Financing Agreements, the Debtors are also authorized and directed to provide (I) to the Prepetition Secured Creditors monthly adequate protection payments equal to the amount of postpetition, non-default contractual interest on the outstanding balances of the Prepetition Secured Obligations, provided that reference to the non-default contractual rate of interest shall not include any Penalty Rate, Default Rate or the Tax Rate as defined in the Prepetition Secured Documents, plus monthly payment of reasonable trustee fees for each of (1) Wells Fargo, (2) UMB Bank as Master Trustee, (3) U.S. Bank as 2015 Note Trustee, and (4) U.S. Bank as 2017 Note Trustee, respectively, and

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reimbursement of reasonable attorney's fees for one set of attorneys for (1) Wells Fargo as the successor indenture trustee for the 2005 Bonds, (2) UMB Bank as Master Trustee, (3) U.S. Bank as 2015 Note Trustee, (4) U.S. Bank as 2017 Note Trustee, and (5) MOB Financing and reimbursement of reasonable financial advisor fees for one set of financial advisors for (1) Wells Fargo as the successor indenture trustee for the 2005 Bonds and UMB Bank as Master Trustee, (2) U.S. Bank as 2015 Note Trustee and 2017 Note Trustee and (3) MOB Financing; and (II) payments by the Debtors to McKesson under and pursuant to the terms of the interim and final orders authorizing the Critical Vendor Program (as defined in the Debtors First Day Motions) in an amount not to exceed $[3,055,000] (collectively I and II are the "***Prepetition Adequate Protection Payments***"). Notwithstanding the foregoing, to the extent the Court enters a final and non-appealable order that determines, pursuant to sections 506(a) or (b) of the Bankruptcy Code, that the Prepetition Adequate Protection Payments under (I) above are not properly allocable to interest on one or more of the respective Prepetition Secured Obligations to which they were made, the Prepetition Adequate Protection Payments may be re-characterized as payment(s) applied to the principal amount of the respective Prepetition Secured Obligations.

(c) **Prepetition Superpriority Claim**. To the extent ~~of the Diminution in Value of the interest of the respective~~that a Prepetition Secured ~~Creditors in~~Creditor suffers a Diminution in Value from and after the Petition Date with respect to its Prepetition Liens in any of its Prepetition Collateral, ~~each of the affected Prepetition Secured Creditors shall be granted, subject to the terms and conditions set forth below~~in addition to the Prepetition Replacement Lien granted to such Prepetition Secured Creditor pursuant to paragraph 5(a) of this Final Order on account of such Diminution in Value (a "***Related Prepetition Replacement Lien***"), such Prepetition Secured Creditor shall be granted, pursuant to sections 363(c)(1), 503(b) and 507(b) of the Bankruptcy Code, an allowed, superpriority administrative expense claim (~~the~~a "***Prepetition Superpriority ~~Claims~~Claim***")~~,~~ which shall have priority ~~(except with respect to (i) the DIP Liens, (ii) the DIP Superpriority Claim, (iii) the Carve Out, and (iv) any claims granted by Holdings pursuant to those certain deeds of trust issued in connection with the MOB Financing and the Moss Deed of Trust) in the Chapter 11 Cases under sections 363(c)(1), 503(b) and 507(b) of the~~

~~Bankruptcy Code and otherwise~~ over all administrative expense claims and unsecured claims against the Debtors and their estates, now existing or hereafter arising, of any kind or nature whatsoever, including, without limitation, administrative expenses of the kind specified or ordered pursuant to sections 105, 326, 328, 330, 331, 503(a), 503(b), 506(c), 507(a), 507(b), 546(c), 546(d) 552, 726, 1113 and 1114 of the Bankruptcy Code~~, and upon entry of the Final Order, section 506(c) of the Bankruptcy Code, whether or not such expenses or claims may become secured by a judgment Lien or other non-consensual Lien, levy or attachment~~; *provided*, *however*, ~~that~~ any such Prepetition Superpriority Claim ~~granted to the 2015 Note Trustee and/or 2017 Note Trustee on account of the Diminution in Value of the Priority Assets as defined in the Intercreditor Agreement shall have priority over the Prepetition Superpriority Claims granted to any other Prepetition Secured Creditors (except with respect to (i) the DIP Liens,~~shall be junior and subordinate to (i) the Carve Out, and (ii) the DIP Superpriority Claim~~, (iii) the Carve Out, and (iv) claims associated with the MOB Financing and the Moss Deed of Trust) and *further provided* that any Prepetition Superpriority Claim granted to the holders of those certain deeds of trust issued in connection with the MOB Financing and the Moss Deed of Trust, on account of the Diminution in Value of such Prepetition Collateral shall be senior to the~~; *provided further*, if Prepetition Superpriority Claims are granted to ~~any other Prepetition Secured Creditors (except with respect to (i) the DIP Liens, (ii) the DIP Superpriority Claim, (iii) the Carve Out, and (iv) the claims of the Master Trustee, the 2015 Note Trustee and/or the 2017 Note Trustee on property other than the property subject to the Moss Deed of Trust). With respect to the Prepetition Collateral that is subject to the Second Amended and Restated Intercreditor Agreement, any proceeds of such Prepetition Collateral or Prepetition Superpriority Claim related thereto shall be allocated among~~more than one Prepetition Secured Creditor, then solely for the purpose of determining the relative rank and priority among and between such Prepetition Superpriority Claims, such rank and priority shall be the same as the relative rank and priority of the Related Prepetition Replacement Liens of such Prepetition Secured Creditors ~~in accordance with the terms of the Second Amended and Restated Intercreditor Agreement~~as determined by paragraph 5(a) of this Final Order.

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601 SOUTH FIGUEROA ~~STREET~~, SUITE 2500
LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

DENTONS US LLP
601 SOUTH FIGUEROA ~~STREET~~, SUITE 2500
LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

(d) **Validity, Perfection and Amount of Prepetition Liens**. Any adequate protection provided to a Prepetition Secured Creditor hereunder, including any Prepetition Replacement Lien, shall be in addition to, and not in substitution for the Prepetition Lien of each Prepetition Secured Creditor, which Prepetition Lien shall continue in the Prepetition Collateral after the Petition Date (including to the extent that the Prepetition Collateral constitutes DIP Collateral) with the same validity, perfection, enforceability and priority as such Prepetition Lien had in the Prepetition Collateral as of the Petition Date, subject only to the superior priority of the DIP Liens and the Carve Out as provided in this Final Order. Any Prepetition Replacement Lien which attaches to any Prepetition Collateral shall be subject and subordinate to all non-avoidable Prepetition Liens on such Prepetition Collateral. The Debtors further acknowledge and agree that, as of the Petition Date, (a) the Prepetition Liens ~~securing the~~of each Prepetition Secured ~~Obligations on the Prepetition Collateral and the VMF Liens on the VMF Collateral~~Creditor were valid, binding, enforceable, non-avoidable, and properly perfected and were granted to, or for the benefit of, ~~the~~each such Prepetition Secured ~~Creditors~~Creditor, and ~~McKesson,~~ (b) the Prepetition Liens were senior in priority over any and all other Liens on the Prepetition Collateral except the prepetition tax lien arising in connection with the CSCDA Special Assessments~~, and and (c) the VMF Liens were senior in priority over any and all other Liens on VMF Collateral~~. The findings and stipulations set forth in this Final Order with respect to the validity, enforceability and amount of the Prepetition Secured ~~Obligation~~Obligations and the Prepetition Liens, including the amount of the MTI Obligations, shall be binding on any subsequent trustee, responsible person, examiner with expanded powers, any other estate representative, and all creditors and parties in interest and all of their successors in interest and assigns, including the Committee, unless, and solely to the extent that, a party in interest with requisite standing and authority (other than the Debtors, as to which any Challenge (as defined below) is irrevocably waived and relinquished) has timely filed the appropriate pleadings, and timely commenced the appropriate proceeding required under the Bankruptcy Code and Bankruptcy Rules, including as required pursuant to Part VII of the Bankruptcy Rules (in each case subject to the limitations set forth in this paragraph 4(d)) challenging the Prepetition Liens (each such proceeding or appropriate pleading commencing a

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(213) 623-9300

proceeding or other contested matter, a "***Challenge***") within ninety (90) days from the formation of the Committee (the "***Challenge Deadline***"); *provided however* that the filing by the Committee of a motion for standing to prosecute a Challenge shall automatically toll the Challenge Deadline until three (3) business days after a decision by the Court with respect to such motion; and *provided further*, that the "Challenge Deadline" for matters solely relating to the value of the Prepetition Collateral may be further extended to such time as may be agreed by the parties or further ordered by the Court. The foregoing limitation on use of Prepetition Collateral or its proceeds shall only be amended upon further order of this Court and the consent of both the Prepetition Secured Creditors and the DIP Lender. The Debtors shall not use the Prepetition Collateral~~, VMF Collateral~~ or ~~their~~its proceeds to investigate or prosecute claims against the Prepetition Secured Creditors~~ or McKesson~~, including Avoidance Actions, *provided however* that the Committee may investigate the existence of such claims and have allowed fees paid from the Prepetition~~ Collateral or VMF~~ Collateral and the proceeds of the DIP Facility up to the amount of $~~100,000,~~[50,000], *provided further however* that no Prepetition~~ Collateral or VMF~~ Collateral, the proceeds thereof or the proceeds of the DIP Facility may be used to prosecute claims against Prepetition Secured Creditors~~ or McKesson~~. For the avoidance of doubt, the Debtors, on behalf of their estates, do not release or indemnify the Prepetition Secured Creditors~~ or McKesson~~ from any Challenge raised by third parties, including the Committee, to the validity, amount or enforceability of the Prepetition Secured Obligations and the Prepetition Liens~~ or the VMF Liens~~. Without limitation of any rights subject to or under the Intercreditor Agreement, any Prepetition Lien which is avoided or subordinated pursuant to a Challenge shall be subject and subordinate to the adequate protection granted to the Prepetition Secured Creditors hereunder, including any Prepetition Replacement Lien.

(e) **Sections 506(c) and 552(b)**. In light of the Prepetition Secured Creditors'~~ and McKessons~~' agreements that their Prepetition Liens ~~and VMF Liens, respectively,~~ shall be subject to the Carve Out and subordinate to the DIP Liens, the Prepetition Secured Creditors~~ and McKesson~~ are each entitled to a waiver of any "equities of the case" exception under section

552(b) of the Bankruptcy Code, and a waiver of the provisions of section 506(c) of the Bankruptcy Code.

(f) Pursuant to Section 6.5 of the DIP Credit Agreement, the Debtors have agreed that they will not engage in any Asset Sale (as defined in the DIP Credit Agreement) except in form and substance satisfactory to the DIP Lender in its reasonable discretion. In light of the fact that the DIP Obligations are secured by priming, first priority liens on all of the Debtors' assets, in addition to the approval rights of the DIP Lender under such Section 6.5, the Debtors also shall not engage in any such Asset Sales which involve the disposition of the Prepetition Collateral of a Prepetition Secured Creditor unless in form and substance satisfactory to such Prepetition Secured Creditor in its reasonable discretion.

(g) ~~(f)~~ Nothing contained in this Final Order shall prevent the Prepetition Secured Creditors from application or use of the funds held ~~thereby~~by them in accordance with the Prepetition Secured Documents. Each of the Prepetition Secured Creditors reserves the right to seek additional or further adequate protection from the Court.

6. **Budget Maintenance**. The proceeds of the DIP Loan under the DIP Facility and the use of Cash Collateral shall be subject to, and in accordance with, the terms and conditions of the DIP Financing Agreements and the DIP Budget. The Initial Agreed Budget delivered to the DIP Agent shall be accompanied by such supporting documentation as reasonably requested by the DIP Agent. The DIP Budget shall be prepared in good faith based upon assumptions that the Debtors believe to be reasonable. A copy of any DIP Budget shall be delivered to counsel for the Committee and the U.S. Trustee and counsel for the Prepetition Secured Creditors after it has been approved in accordance with the DIP Financing Agreements. The DIP Budget may not be amended without the prior consent of the Prepetition Secured Creditors, which consent shall not be unreasonably withheld or delayed. The Debtors shall provide at least two (2) business days' notice to counsel for the Committee and the Prepetition Secured Creditors prior to the effective date of any requested change in the DIP Budget.

7. **Budget Compliance and Reporting**. The proceeds of the DIP Facility and the use of Cash Collateral shall be subject to, and used in accordance with, the terms and conditions of

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LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

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LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

the DIP Financing Agreement and the DIP Budget (subject to the variances set forth therein). Debtors acknowledge and confirm that the DIP Budget includes the payment of CSCDA Special Assessments. The Debtors shall provide all reports and other information as required in the DIP Credit Agreement (subject to the grace periods provided therein), with copies delivered substantially contemporaneously to counsel for the Prepetition Secured Creditors and counsel to the Committee~~,~~ such information to include reasonably complete details on the payments contemplated by the Critical Vendors Motion and the Utilities Motion, as defined in the Adcock Declaration~~,~~ and such information to be timely provided, sufficient for the Prepetition Secured Creditors to file an objection with this Court on two business days' notice. The Debtors' failure to comply with the DIP Budget (including the variances set forth in the DIP Credit Agreement) or to provide the reports and other information required in the DIP Credit Agreement shall constitute an Event of Default (as defined herein), following the expiration of any applicable grace period set forth in the DIP Credit Agreement. Subject to the execution and continuation of valid and binding confidentiality agreements, ~~prior to any hearing to consider entry of a Final Order related to this DIP Motion,~~ the Debtors shall, on an ongoing basis and otherwise upon reasonable request, provide to the Prepetition Secured Creditors information concerning ~~(i) the Debtors' efforts to obtain debtor in possession financing proposals, including any proposals the Debtors received, and (ii)~~ the Debtors' ongoing efforts to market their assets, including all marketing materials used by the Debtors in this process, information identifying the parties the Debtors have contacted, copies of any proposals or expressions of interest, drafts and final versions of all pleadings and documentation (including purchase and sale agreements) to be used in connection with any sales of assets, and other information concerning these matters the Prepetition Secured Creditors may reasonably request.

8. **Postpetition Lien Perfection.** This Final Order shall be sufficient and conclusive evidence of the validity, perfection, and priority of the DIP Liens, all rights granted in the Sale Proceeds and the Escrow Deposit Account, the Prepetition Replacement Liens and the McKesson Replacement Lien, without the necessity of filing or recording any financing statement, deeds of trust, mortgages, or other instruments or documents which may otherwise be required under the

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law of any jurisdiction or the taking of any other action (including, for the avoidance of doubt, entering into any deposit account control agreement or obtaining possession of any possessory collateral) to validate or perfect the DIP Liens, Prepetition Replacement Liens or McKesson Replacement Lien, or to entitle the DIP Liens, Prepetition Replacement Liens and McKesson Replacement Lien the respective priorities granted herein. Notwithstanding and without limiting the foregoing, the DIP Lender may file such financing statements, mortgages, deeds of trust, notices of liens and other similar documents as it deems appropriate, and it is hereby granted relief from the automatic stay of section 362 of the Bankruptcy Code in order to do so, and all such financing statements, mortgages, deeds of trust, notices and other documents shall be deemed to have been filed or recorded at the time and on the date of the commencement of the Chapter 11 Cases. Notwithstanding and without limiting the foregoing provisions regarding the validity, perfection, and priority of the DIP Liens, the Debtors shall execute and deliver to the DIP Lender all such financing statements, mortgages, deeds of trust, deposit account control agreements, notices and other documents as the DIP Lender may reasonably request to evidence, confirm, validate or perfect, or to insure the contemplated priority of, the DIP Liens granted pursuant hereto and the DIP Financing Agreements. Any such financing statements, mortgages, deeds of trust, deposit account control agreements, notices and other documents shall be considered DIP Financing Agreements for all intents and purposes. The DIP Lender, in its discretion, may file a certified copy of this Final Order as a financing statement with any recording officer designated to file financing statements or with any registry of deeds or similar office in any jurisdiction in which any Debtor has real or personal property, and in such event, the recording officer shall be authorized to file or record such copy of this Final Order. To the extent that any Prepetition Secured Creditor is the secured party under any security agreement, mortgage, leasehold mortgage, landlord waiver, credit card processor notices or agreements, bailee letters, custom broker agreements, financing statement, account control agreements, or any other Prepetition Secured Documents or is listed as loss payee or additional insured under any of the Debtors' insurance policies, the DIP Agent shall also be deemed to be the secured party under such documents or to be the loss payee or additional insured, as applicable.

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9. **Application of Proceeds of Collateral**. As a condition to the continued extension of credit under the DIP Facility and the continued authorization to use Cash Collateral, the Debtors have agreed that as of and commencing on the Closing Date the Debtors shall apply all advances under the DIP Facility, as follows: (i) *first*, to fund the day to day operations and general corporate purposes of the Debtors' estates; (ii) *second*, to pay the administrative expenses of the Chapter 11 Cases; and (iii) *third*, to make the Prepetition Adequate Protection Payments all in accordance with the DIP Budget.

10. **Proceeds of Subsequent Financing**. If the Debtors, any trustee, any examiner with expanded powers, or any responsible officer subsequently appointed in these Chapter 11 Cases or any Successor Cases, shall obtain credit or incur debt pursuant to Bankruptcy Code sections 364(b), 364(c), or 364(d) or in violation of the DIP Financing Agreements at any time prior to the indefeasible repayment in full of all DIP Obligations and Prepetition Secured Obligations (to the extent such remain outstanding), and the termination of the DIP Agent's and the DIP Lenders' obligation to extend credit under the DIP Facility, including subsequent to the confirmation of any chapter 11 plan of reorganization with respect to any or all of the Debtors and the Debtors' estates, and such facility is secured by any DIP Collateral, then all the cash proceeds derived from such credit or debit shall immediately be turned over to the DIP Agent to be applied in accordance with this Final Order and the DIP Financing Agreements.

11. **Cash Collection**.

(a) From and after the date of the entry of this Final Order, all collections and proceeds of any DIP Collateral or Prepetition Collateral and all Cash Collateral that shall at any time come into the possession, custody, or control of any Debtor, or to which any Debtor is now or shall become entitled at any time, shall be promptly deposited in accounts as specified in the DIP Credit Agreement (or in such other accounts as are designated by the DIP Agent from time to time) (collectively, the "***Cash Collection Accounts***"), which accounts shall be subject to the sole dominion and control of the DIP Agent. It is understood and agreed by the Debtors and the DIP Agent that, unless a "Default" or an "Event of Default" under the DIP Credit Agreement has occurred and is continuing, for so long as there are no amounts outstanding under the DIP

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Facility, proceeds in the Cash Collection Accounts shall be returned to the Debtors and the Debtors shall be authorized to use such Cash Collateral in accordance with this Final Order. All proceeds and other amounts in the Cash Collection Accounts shall be remitted to the DIP Agent for application in accordance with the DIP Financing Agreements. Unless otherwise agreed to in writing by the DIP Agent and the Prepetition Secured Creditors or as set forth in this Final Order, the Debtors shall maintain no accounts except those identified in the interim cash management order entered by the Court with respect thereto (the "***Cash Management Order***"), whether now existing or hereafter established. The Debtors and the financial institutions where the Debtors' Cash Collection Accounts are maintained (including those accounts identified in the Cash Management Order), are authorized and directed to remit, without offset or deduction, funds in such Cash Collection Accounts upon receipt of any direction to that effect from the DIP Agent. To the extent that a Prepetition Secured Creditor's perfection in or control over bank accounts or investment accounts, including any funds or investments therein, may be affected by reason of the transfer of control to the DIP Agent or any agent of the DIP Agent in accordance with this Final Order, the perfection and control rights of the applicable Prepetition Secured Creditor therein shall be deemed to continue, subject to the prior rights of the DIP Lender, for so long as the DIP Obligations remain outstanding, and thereafter shall revert back to the applicable Prepetition Secured Lender.

(b) Notwithstanding anything in this Final Order or any of the DIP Financing Agreements, from and after the date of the entry of this Final Order, all collections and proceeds of any DIP Collateral or Prepetition Collateral that shall at any time come into the possession, custody, or control of any Debtor, or to which any Debtor is now or shall become entitled at any time, shall promptly be deposited into a depository account furnished by a depository bank acceptable to the DIP Agent and such account shall be in the name of the DIP Agent and subject to the sole dominion and control of the DIP Agent (such account, the "***DIP Collateral Account***"). The Debtors' use of the proceeds in the DIP Collateral Account shall be subject to this Final Order and the DIP Financing Agreements.

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12. **Maintenance of DIP Collateral**. Until the indefeasible payment in full of all DIP Obligations, all Prepetition Secured Obligations, and the termination of the DIP Agent's and the DIP Lenders' obligation to extend credit under the DIP Facility, the Debtors shall: (a) insure the DIP Collateral as required under the DIP Facility or the Prepetition Secured Documents, as applicable; and (b) maintain the cash management system in effect as of the Petition Date, as modified by the Cash Management Order, and maintain books and records sufficient to account for postpetition intercompany transfers in a manner required by the Cash Management Order at paragraph 6 and the DIP Credit Agreement at section 5.6 or as otherwise agreed to by the DIP Agent or otherwise required or permitted by the DIP Financing Agreements or this Final Order.

13. **DIP and Other Expenses**. The Debtors are authorized and directed to pay all reasonable and documented prepetition and postpetition fees and expenses of the (1) DIP Agent, (including the fees, expenses, and disbursements of Waller, Lansden, Dortch & Davis, LLP, as counsel to the DIP Agent), (2) the DIP Lenders in connection with the DIP Facility, as provided herein and in the DIP Financing Agreements, or, if requested by the Debtors, incurred with a proposed conversion of the DIP Facility into exit financing (including the preparation and negotiation of the documentation relating to the exit facility), and (3) the Prepetition Secured Creditors, whether or not the transactions contemplated hereby are consummated, including attorneys' fees, monitoring and appraisal fees, financial advisory fees, fees and expenses of other consultants, and indemnification and reimbursement of fees and expenses. Payment of all such fees and expenses shall not be subject to allowance by the Court. Professionals for the DIP Agent, the DIP Lenders and the Prepetition Secured Creditors shall not be required to comply with the U.S. Trustee fee guidelines; however, any time that such professionals seek payment of fees and expenses from the Debtors, each professional shall provide summary copies of its invoices to the U.S. Trustee contemporaneously with the delivery of such invoices to the Debtors. Any objections raised by the Debtors, the U.S. Trustee or the Committee, with respect to such invoices must be in writing and state with particularity the grounds therefor and must be submitted to the applicable professional within ten (10) days of the receipt of such invoice; if after ten (10) days such objection remains unresolved, it will be subject to resolution by the Court.

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Pending such resolution, the undisputed portion of any such invoice will be paid promptly by the Debtors. Notwithstanding the foregoing, the Debtors are authorized and directed to pay on the Closing Date all reasonable and documented fees, costs, and out-of-pocket expenses of the DIP Agent, the DIP Lenders and the Prepetition Secured Creditors incurred on or prior to such date without the need for any professional engaged by such parties to first deliver a copy of its invoice or other supporting documentation. No attorney or advisor to the DIP Agent, the DIP Lenders or any Prepetition Secured Creditor shall be required to file an application seeking compensation for services or reimbursement of expenses with the Court. Upon entry of this Final Order, any and all fees, costs, and expenses paid prior to the Petition Date by any of the Debtors to the (i) DIP Agent or the DIP Lenders in connection with or with respect to the DIP Facility, and (ii) Prepetition Secured Creditors in connection with or with respect to these matters, were approved in full and shall not be subject to avoidance, disgorgement or any similar form of recovery by the Debtors or any other person.

14. **Indemnification**. The Debtors shall indemnify and hold harmless the DIP Agent and the DIP Lenders in accordance with the terms and conditions of the DIP Credit Agreement.

15. **Right to Credit Bid**. The DIP Lender shall have the right, but not the obligation, to "credit bid" the DIP Obligations during any sale of the DIP Collateral, including without limitation, sales occurring pursuant to section 363 of the Bankruptcy Code or included as part of any reorganization plan subject to confirmation under section 1129(b)(2)(A)(iii) of the Bankruptcy Code. Subject to the indefeasible payment in full of the DIP Obligations, the Prepetition Secured Creditors shall have the right but not the obligation to credit bid the Prepetition Secured Obligations during any sale of the Prepetition Collateral, including without limitation, sales occurring pursuant to section 363 of the Bankruptcy Code.

16. **Carve Out**. The DIP Liens, DIP Superpriority Claim, and Replacement Liens are subordinate only to the following: (i) all fees required to be paid to the clerk of the Court and to the Office of the United States Trustee pursuant to 28 U.S.C. § 1930(a)(6) (the "***U.S. Trustee Fees***"), together with interest, if any, at the statutory rate; and (ii) all allowed claims for unpaid fees, costs and expenses incurred by persons or firms retained by the Debtors or the Committee, if

any, whose retention is approved by the Court pursuant to any one or more of sections 327, 328, 363, and 1103 of the Bankruptcy Code, to the extent such claims for fees, costs and expenses are both (a) allowed by the Court pursuant to the Final Order, and (b) in accordance with, and solely up to the total respective amounts set forth in the DIP Budget for the applicable time frame (the "***Carve Out Expenses***"); provided that the aggregate amount of such Carve Out Expenses shall not exceed (a) $2,000,000 with respect to persons or firms retained by the Debtors, and (b) $~~150,000~~[100,000] with respect to persons or firms retained by the Committee (collectively, the "***Carve Out Amount***"). Any payment or reimbursement made after the Carve Out Trigger Date in respect of any Carve Out expenses shall permanently reduce the Carve Out Amount on a dollar-for-dollar basis.

17. **Limitation of Use of Proceeds**. Notwithstanding anything set forth herein and except as provided in the following paragraph, the Carve Out shall exclude any fees and expenses incurred in connection with initiating or prosecuting any claims, causes of action, adversary proceedings, or other litigation against the DIP Lender or any of the Prepetition Secured Creditors, including, without limitation, the assertion or joinder in any claim, counterclaim, action, proceeding, application, motion, objection, defenses or other contested matter, the purpose of which is to seek any order, judgment, determination or similar relief (i) invalidating, setting aside, disallowing, avoiding, challenging or subordinating, in whole or in part, (a) the DIP Obligations, (b) the Prepetition Secured Obligations, (c) the Prepetition Liens, or (d) the DIP Liens, or (ii) preventing, hindering or delaying, whether directly or indirectly, the DIP Lender or Prepetition Secured Creditors' assertion or enforcement of their liens or security interests or realization upon any DIP Collateral or Prepetition Collateral, or (iii) prosecuting any Avoidance Actions against the DIP Lender or any Prepetition Secured Creditor, or (iv) challenging the amount, validity, extent, perfection, priority, or enforceability of, or asserting any defense, counterclaim, or offset to, the Prepetition Secured Obligations, or the adequate protection granted herein, *provided however*, that nothing in this Final Order shall limit the right of the Debtors to challenge the reasonableness of attorney and financial advisory fees paid or proposed to be paid to Prepetition Secured Creditors as adequate protection payments

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LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

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LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
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18. **Payment of Compensation.** Nothing herein shall be construed as consent to the allowance of any professional fees or expenses of any of the Debtors or the Committee or shall affect the right of the DIP Lender or the Prepetition Secured Creditors to object to the allowance and payment of such fees and expenses or to permit the Debtors to pay any such amounts not set forth in the DIP Budget.

19. **Section 506(c) Claims; Equities of the Case**. Nothing contained in this Final Order shall be deemed a consent by the DIP Lender or any Prepetition Secured Creditor to any charge, lien, assessment or claim against the DIP Collateral under Section 506(c) of the Bankruptcy Code or otherwise. The "equities of the case" exception under Section 552(b) of the Bankruptcy Code and surcharge powers under section 506(c) of the Bankruptcy Code are waived as to the Prepetition Creditors and all pre and postpetition collateral securing their claims.

20. **Collateral Rights.** Unless the DIP Lender has provided its prior written consent or all DIP Obligations have been paid in full in cash (or will be paid in full in cash upon entry of an order approving indebtedness described in subparagraph (a) below), and all commitments by the DIP Lender to lend have terminated:

(a) The Debtors shall not seek entry, in these proceedings, or in any Successor Case, of any order which authorizes the obtaining of credit or the incurring of indebtedness that is secured by a security, mortgage, or collateral interest or other lien on all or any portion of the DIP Collateral and/or entitled to priority administrative status which is senior or pari passu to the DIP Liens granted to the DIP Lender pursuant to this Final Order, the DIP Financing Agreements or otherwise;

(b) The Debtors shall not consent to relief from the automatic stay by any person other than the DIP Lender with respect to all or any portion of the DIP Collateral without the express written consent of the DIP Lender; and

(c) In the event that the Debtors seek entry of an order in violation of subsection (a) hereof, the DIP Lender shall be granted relief from the automatic stay with respect to the DIP Collateral pursuant to the notice procedures set forth in this Order.

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(d) The Parties to the DIP Credit Agreement agree that the Final Order does not impair the claims, rights, or ability, if any, to recoup, setoff or otherwise recover Medicare overpayments related to prepetition services by a Debtor ("Prepetition Medicare Overpayments") of the United States, its agencies, departments, agents or entities (collectively, "United States") from the payments made to such Debtor for services rendered after the Petition Date ("Postpetition Medicare Payments"), in accordance with the Medicare statutes, regulations, policies and procedures. The Parties to the DIP Credit Agreement further agree that the Final Order does not impair the United States' claims, rights or ability, if any, to recoup, setoff or otherwise recover any other prepetition debt a Debtor may owe to the United States from the Postpetition Medicare Payments due such Debtor in accordance with applicable law.

21. **Commitment Termination Date.** All DIP Obligations of the Debtors to the DIP Lender shall be immediately due and payable, and the Debtors' authority to use the proceeds of the DIP Facility shall cease, on the date that is the earliest to occur of: (i) September 5, 2019 (the "***Scheduled Termination Date***"); (ii) the earlier of: (a) the date that is thirty (30) days from entry of this Final Order unless a final, non-appealable order of the Court authorizing the DIP Facility in form and substance satisfactory to the DIP Lender in its sole and absolute discretion has been entered and has become effective prior to the expiration of such period (or such later date as the DIP Lender may approve in writing in its sole and absolute discretion), (b) the date the Court denies entry of the Final Order, or (c) the date of revocation of this Final Order, as applicable; (iii) the substantial consummation (as defined in Section 1101 of the Bankruptcy Code and which for purposes hereof shall be no later than the "*effective date*") of a plan of reorganization filed in the Chapter 11 Cases that is confirmed pursuant to an order entered by the Court; (iv) the consummation of a sale of all or substantially all of the DIP Collateral; (v) the date the Court orders the conversion of the Chapter 11 Cases to a Chapter 7 liquidation or the dismissal of the Chapter 11 Cases or the appointment of a trustee or examiner with expanded power in the Chapter 11 Cases; and (vi) the acceleration of the DIP Loan and the termination of the commitments with respect to the DIP Facility in accordance with the DIP Financing Agreements (the earliest of such dates, the "***Commitment Termination Date***"). The occurrence of the Commitment Termination

Date, shall also constitute, subject to further Court order, termination of the Prepetition Secured Creditors' and McKesson consent to the Debtors' use of their prepetition cash collateral.

22. **Disposition of Collateral**. The Debtors shall not sell, transfer, lease, encumber or otherwise dispose of any portion of the DIP Collateral, without the prior written consent of the DIP Lender (and no such consent shall be implied, from any other action, inaction or acquiescence by the DIP Lender or an order of this Court), except as provided in the DIP Financing Agreements and this Final Order and approved by the Court to the extent required under applicable bankruptcy law. Nothing herein shall prevent the Debtors from making sales in the ordinary course of business to the extent consistent with the DIP Budget and as permitted in the DIP Financing Agreements.

23. **Events of Default.** The occurrence of a "Default" or an "Event of Default" pursuant to Section 9.1 the DIP Credit Agreement, including, without limitation, the "Bankruptcy Defaults" enumerated in Section 9.1(q) of the DIP Credit Agreement, shall constitute an event of default under this Final Order, unless expressly waived in writing in accordance with the consents required in the DIP Financing Agreements.

24. **Rights and Remedies Upon Event of Default.**

(a) Any otherwise applicable automatic stay is hereby modified so that after the occurrence of any Event of Default and at any time thereafter during the continuance of such Event of Default, the DIP Lender shall be entitled to exercise its rights and remedies with respect to the Debtors and the DIP Collateral provided in the DIP Financing Agreements and by applicable law, including, without limitation, foreclosing on and selling the DIP Collateral, without the need for further court approval or the consent of any other party.

(b) Notwithstanding the preceding paragraph, immediately following the giving of notice by the DIP Lender of the occurrence and continuance of an Event of Default, the DIP Lender shall have the right in its sole discretion to take any or all of the following actions: (i) declare the commitment of the DIP Lender to make the DIP Loan to be terminated; (ii) declare the unpaid principal amount of all outstanding DIP Loans, all interest accrued and unpaid thereon, and all other amounts owing or payable hereunder or under any other DIP Financing Document to

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be immediately due and payable, without presentment, demand, protest or other notice of any kind, all of which are hereby expressly waived by any Debtor; (iii) reduce the advance rates in respect of Eligible Accounts (as defined in the DIP Credit Agreement) or take additional reserves against or otherwise modify the Borrowing Base; and (iv) exercise all rights and remedies available to the DIP Agent and the DIP Lenders under the DIP Financing Documents, including any right of set-off under Section 11.21 of the DIP Credit Agreement, or under the UCC or any other applicable law; *provided, however*, that upon the occurrence of an Event of Default under the DIP Credit Agreement, the obligation of the DIP Lenders to make the DIP Loan shall automatically terminate, the unpaid principal amount of all outstanding DIP Loans and other DIP Obligations and all interest and other amounts as aforesaid shall automatically become due and payable without further act of the DIP Agent or any DIP Lender.

(c) Nothing included herein shall prejudice, impair, or otherwise affect the DIP Lender's rights to seek any other or supplemental relief in respect of the DIP Lender's rights, as provided in the DIP Credit Agreement.

25. **Limitation on Lender Liability**. Nothing in this Final Order, any of the DIP Financing Agreements, or any other documents related thereto shall in any way be construed or interpreted to impose or allow the imposition upon the DIP Agent, the DIP Lenders or the Prepetition Secured Parties Creditors of any liability for any claims arising from any activities by the Debtors in the operation of their businesses or in connection with the administration of these Cases. The DIP Agent, the DIP Lenders and the Prepetition Secured Creditors shall not, solely by reason of having made loans under the DIP Facility, be deemed in control of the operations of the Debtors or to be acting as a "responsible person" or "owner or operator" with respect to the operation or management of the Debtors (as such terms, or any similar terms, are used in the United States Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 et seq., as amended, or any similar federal or state statute). Nothing in this Final Order or the DIP Financing Agreements shall in any way be construed or interpreted to impose or allow the imposition upon the DIP Agent, the DIP Lenders, or any of the Prepetition Secured

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Creditors of any liability for any claims arising from the prepetition or postpetition activities of any of the Debtors.

26. **Insurance Proceeds and Policies**. As of the entry of this Final Order and to the fullest extent provided by applicable law, the DIP Agent (on behalf of the DIP Lenders) and the Prepetition Secured Creditors, shall be, and shall be deemed to be, without any further action or notice, named as additional insured and as lender's loss payee with the priority as to all rights and remedies as set forth herein and in the DIP Credit Agreement.

27. **Proofs of Claim**. The DIP Lender will not be required to file proofs of claim in the Chapter 11 Cases. Any proof of claim so filed shall be deemed to be in addition and not in lieu of any other proof of claim that may be filed by any of the Prepetition Secured Creditors.

28. **Other Rights and Obligations**.

(a) **Good Faith ~~Under~~under Section 364(e) of the Bankruptcy Code. No Modification or Stay of this Final Order.** The Debtor, the DIP Lender and the Prepetition Secured Creditors have acted in good faith in connection with negotiating the DIP Financing Agreements, extending credit under the DIP Facility, and authorizing use of Cash Collateral and rely on this Final Order in good faith. Based on the findings set forth in this Final Order and the record made during the Interim Hearing and the Final Hearing, and in accordance with section 364(e) of the Bankruptcy Code, in the event any or all of the provisions of this Final Order are hereafter reversed, modified amended or vacated by a subsequent order of this or any other Court, the DIP Lender and Prepetition Secured Creditors are entitled to the protections provided in section 364(e) of the Bankruptcy Code. Any such reversal, modification, amendment or *vacatur* shall not affect the validity and enforceability of any advances made pursuant to , Order or the DIP Financing Agreements, nor shall it affect the validity, priority, enforceability, or perfection of the DIP Liens, the Prepetition Replacement Liens or the McKesson Replacement Lien. Any claims or DIP Protections granted to the DIP Lender hereunder, or adequate protection granted to the Prepetition Secured Creditors hereunder, arising prior to the effective date of such reversal, modification, amendment or *vacatur*, shall be governed in all respects by the original provisions of this Final Order, and the DIP Lender and Prepetition Secured Creditors shall be entitled to all

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of the rights, remedies, privileges and benefits, including the DIP Protections and adequate protection granted herein, with respect to any such claims. Since the loans made pursuant to the DIP Credit Agreement are made in reliance on this Final Order, the obligations owed to the DIP Lender or the Prepetition Secured Creditors prior to the effective date of any reversal or modification of this Final Order cannot, as a result of any subsequent order in the Chapter 11 Cases or in any Successor Cases, be subordinated, lose their lien priority or superpriority administrative expense claim status, or be deprived of the benefit of the status of the liens and claims granted to the DIP Lender or Prepetition Secured Creditors under this Final Order and/or the DIP Financing Agreements.

(b) **Binding Effect**. The provisions of this Final Order shall be binding upon and inure to the benefit of the DIP Lender, the Debtors, the Prepetition Secured Lenders, the Committee, all other Parties in Interest, and all creditors, and each of their respective successors and assigns (including any trustee or other fiduciary hereinafter appointed as a legal representative of the Debtors or with respect to the property of the estates of the Debtors) whether in the Chapter 11 Cases, in any Successor Cases, or upon dismissal of any such chapter 11 or chapter 7 case.

(c) **No Waiver**. The failure of the DIP Lender to seek relief or otherwise exercise its rights and remedies under the DIP Financing Agreements, the DIP Facility, this Final Order or otherwise, as applicable, shall not constitute a waiver of the DIP Lender's rights hereunder, thereunder, or otherwise. Notwithstanding anything herein, the entry of this Final Order is without prejudice to, and does not constitute a waiver of, expressly or implicitly, or otherwise impair the DIP Lender under the Bankruptcy Code or under non-bankruptcy law, including without limitation, the rights of the DIP Lender to (i) request conversion of the Chapter 11 Cases to cases under Chapter 7, dismissal of the Chapter 11 Cases, or the appointment of a trustee in the Chapter 11 Cases, (ii) propose, subject to the provisions of section 1121 of the Bankruptcy Code, a plan of reorganization, or (iii) exercise any of the rights, claims or privileges (whether legal, equitable or otherwise) the DIP Lender may have pursuant to this Final Order, the DIP Financing Agreements, or applicable law. Nothing in this Final Order shall interfere with the rights of any party with respect to any non-Debtors.

DENTONS US LLP
601 SOUTH FIGUEROA ~~STREET~~ STREET, SUITE 2500
LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

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(d) **No Third Party Rights**. Except as explicitly provided for herein, this Final Order does not create any rights for the benefit of any third party, creditor, equity holder or any direct, indirect, or incidental beneficiary.

(e) **No Marshaling**. The DIP Lender shall not be subject to the equitable doctrine of "marshaling" or any other similar doctrine with respect to any of the DIP Collateral.

(f) **Amendment.** The Debtors and the DIP Lender may amend or waive any provision of the DIP Financing Agreements, on notice to the Office of the U.S. Trustee, the Committee, and the Prepetition Secured Creditors. The Debtors shall give each Pre-Petition Secured Creditor notice concurrent with giving such notice or request to the DIP Agent for any amendment or waiver of the DIP Financing Agreements and, without prejudice to the effectiveness of any such amendment or waiver, each Pre-Petition Secured Creditor shall have the right to file a motion objecting to such amendment. Nothing in this DIP Order shall authorize the DIP Agent or DIP Lenders to increase the commitments in excess of the commitments set forth in this Final Order, increase the contract interest rate, defined in the DIP Credit Agreement as the Applicable LIBOR Margin, or Default Rate or extend the maturity date, defined in the DIP Credit Agreement as the "Scheduled Termination Date". Except as otherwise provided herein, no waiver, modification, or amendment of any of the provisions of the DIP Financing Agreements shall be effective unless set forth in writing, signed on behalf of all the Debtors and the DIP Lender, and, if material, approved by the Court. Nothing herein shall preclude the Debtors and the DIP Lender from implementing any amendment or waiver of any provision of the DIP Financing Agreements.

(g) **Estate Subrogation**. After satisfaction of the DIP Liens and the Prepetition Replacement Liens against the Debtor Verity Holdings, Verity Holdings shall have an allowed unsecured superpriority administrative expense claim granted to it pursuant to section 364(c)(1), to the extent of any postpetition net intercompany advances by Verity Holdings to any other Debtor; *provided that* such claims shall be subordinated to the Prepetition Superiority Claims granted hereunder to the Prepetition Secured Creditors.

DENTONS US LLP
601 SOUTH FIGUEROA ~~STREET~~ STREET, SUITE 2500
LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

DENTONS US LLP
601 SOUTH FIGUEROA ~~STREET~~ STREET, SUITE 2500
LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

29. **Survival of Interim Order and Other Matters.** The provisions of this Final Order and any actions taken pursuant hereto shall survive entry of any order which may be entered (i) confirming any Plan in the Chapter 11 Cases, (ii) converting any of the Chapter 11 Cases to a case under chapter 7 of the Bankruptcy Code or any Successor Cases, (iii) to the extent authorized by applicable law, dismissing any of the Chapter 11 Cases, (iv) withdrawing of the reference of any of the Chapter 11 Cases from this Court, or (v) providing for abstention from handling or retaining of jurisdiction of any of the Chapter 11 Cases in this Court. The terms and provisions of this Final Order including the DIP Protections granted pursuant to this Final Order and the DIP Financing Agreements, shall continue in full force and effect notwithstanding the entry of such order, and such DIP Protections shall maintain their priority as provided by this Final Order until all the obligations of the Debtors to the DIP Lender pursuant to the DIP Financing Agreements have been indefeasibly paid in full and in cash and discharged (such payment being without prejudice to any terms or provisions contained in the DIP Financing Agreements which survive such discharge by their terms). The terms and provisions of this Final Order including any protections granted to the Prepetition Secured Creditors, shall continue in full force and effect notwithstanding the entry of such order, and such protections for the Prepetition Secured Creditors shall maintain their priority as provided by this Final Order until all the obligations of the Debtors to the Prepetition Secured Creditors pursuant to applicable documentation have been discharged. The DIP Obligations shall not be discharged by the entry of an order confirming a plan of reorganization, the Debtors having waived such discharge pursuant to section 1141(d)(4) of the Bankruptcy Code.

(a) **Inconsistency**. In the event of any inconsistency between the terms and conditions of the DIP Financing Agreements and of this Final Order, the provisions of this Final Order shall govern and control.

(b) **Enforceability**. This Final Order shall constitute findings of fact and conclusions of law pursuant to the Bankruptcy Rule 7052 and shall take effect and be fully enforceable *nunc pro tunc* to the Petition Date immediately upon entry of this Final Order. Notwithstanding Bankruptcy Rules 4001(a)(3), 6004(h), 6006(d), 7062, 9024, or any other

Bankruptcy Rule, or Rule 62(a) of the Federal Rules of Civil Procedure, this Final Order shall be immediately effective and enforceable upon its entry and there shall be no stay of execution or effectiveness of this Final Order.

(c) **Objections Overruled**. All objections to the DIP Motion to the extent not withdrawn or resolved, are hereby overruled on an interim basis.

(d) **No Waivers or Modification of Interim Order**. The Debtors irrevocably waive any right to seek any modification or extension of this Final Order without the prior written consent of the DIP Lender and no such consent shall be implied by any other action, inaction or acquiescence of the DIP Lender. No Effect on Non-Debtor Collateral. Notwithstanding anything set forth herein, neither the liens nor claims granted in respect of the Carve Out shall be senior to any liens or claims of the DIP Lender with respect to any other non-Debtor or any of their assets.

Dated: _____
Los Angeles, California

/s/_____
HONORABLE JUDGE ROBLES
UNITED STATES BANKRUPTCY JUDGE

DENTONS US LLP
601 SOUTH FIGUEROA ~~STREET~~ STREET, SUITE 2500
LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

Exhibit 1

DIP CREDIT AGREEMENT

DENTONS US LLP
601 SOUTH FIGUEROA ~~STREET~~ STREET, SUITE 2500
LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

Exhibit 2

DIP BUDGET

/s/_____
HONORABLE JUDGE ROBLES
UNITED STATES BANKRUPTCY JUDGE

DENTONS US LLP
601 SOUTH FIGUEROA ~~STREET~~ STREET, SUITE 2500
LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
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601 SOUTH FIGUEROA ~~STREET~~ STREET, SUITE 2500
LOS ~~ANGELES~~ ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

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