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Attorneys for Swinerton Builders

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:
VERITY HEALTH SYSTEM OF
CALIFORNIA, INC., *et al*,
Debtors and Debtors In Possession.

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

Debtors and Debtors In Possession.

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

Jointly administered with:

CASE NO.: 2:18-bk-20162-ER
CASE NO.: 2:18-bk-20163-ER
CASE NO.: 2:18-bk-20164-ER
CASE NO.: 2:18-bk-20165-ER
CASE NO.: 2:18-bk-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. Judge Ernest Robles

**NOTICE OF HEARING ON MOTION
FOR AMENDMENT OF FINDINGS IN
FINAL ORDER (I) AUTHORIZING
POSTPETITION FINANCING [...]; AND**

**REPLY OF SWINERTON BUILDER IN
SUPPORT OF MOTION
[RELATED TO DOCKET NOS. 732, 564,
409, 392, 355, 309 AND 269]**

Hearing:

Date: December 4, 2018

Tim

NOTICE OF HEARING

PLEASE TAKE NOTICE that pursuant to Local Rule 9013-1(o)(4), the *Motion Pursuant to Bankruptcy Rule 7052(b) For Amendment of Findings in 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* (Doc. No. 564) (the “Motion”) is hereby being set for hearing on **December 4, 2018 at 10:00 a.m. at the United States Bankruptcy Court, Courtroom 1568, 255 E. Temple Street, Los Angeles, California.**

Dated: November 13, 2018

Respectfully submitted,

FOX ROTHSCHILD LLP

By: /s/ Nathan A. Schultz
Robert N. Amkraut (Admitted Pro Hac Vice)
Nathan A. Schultz
Attorneys for Swinerton Builders

REPLY

Swinerton Builders (“Swinerton”), a creditor secured by a \$1.2 million mechanic’s lien on the Seton Medical Center real property, submits this Reply in support of the Motion.

As stated in the Motion, Swinerton requests two amendments to the Final Order (Doc. No. 409) clarifying the Final Order so that it conforms to the Court’s ruling. Specifically, Swinerton requests the Court clarify (1) that Swinerton’s lien is adequately protected by an equity cushion, something that even Debtors accept, and (2) that if the adequate protection ultimately proves inadequate, Swinerton is entitled to a superpriority claim consistent with other prepetition secured creditors. For the Court’s convenience, the two specific proposed amendments provided in Swinerton’s Motion are reprinted at the end of this Reply.

A. Bankruptcy Rule 7052(b) is Appropriate to Clarify the Court’s Order.

The Motion seeks to clarify the Final Order as it relates to Swinerton. As such, it is squarely within the scope and purpose of Bankruptcy Rule 7052(b), a rule that allows a court to clarify or amend findings or make additional findings. *In re King*, 2017 WL 1944123, at 2

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(Bankr. C.D. Cal 2017) (“A motion to amend under F.R.Civ.P 52(b) may be used ‘to clarify essential findings or conclusions, correct errors of law or fact, or to present newly discovered evidence.’”) (*quoting* Collier on Bankruptcy ¶ 7052.03 (16th ed. 2015) (further cites omitted); *In re Charron*, 541 B.R. 822, 825 (Bankr. W.D. Mich. 2015) (“The main purpose of Rule 52(b) is ‘to create a record upon which the appellate court may obtain the necessary understanding of the issues to be determined on appeal.’” (*citing In re St. Marie Development Corp. of Montana, Inc.*, 334 B.R. 663, 675 n. 3 (Bankr. D. Mont. 2005) and 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2582 (3d ed. 2015); *In re Smith Corona Corporation, SCM* 212 B.R. 59, 60 (Bankr. D. Del. 1997) (“The purpose of a motion pursuant to Rule 52(b) is to correct findings of fact and legal conclusions where the trial court deems it appropriate.” (*citing United States Gypsum Co. v. Schiavo Bros. Inc.*, 668 F.2d 172, 180 n. 9 (3d Cir. 1981))).

As shown in Swinerton’s Motion and as further explained below, Swinerton seeks clarification of the Final Order. A motion pursuant to Bankruptcy Rule 7052(b) is the appropriate vehicle for requesting clarifying additional findings.

B. The Court Should Clarify the Final Order to Conform with its Ruling Regarding Swinerton to State that Swinerton’s Lien is Adequately Protected by an Equity Cushion and that Swinerton is Entitled to a Superpriority Claim Similar to Other Secured Creditors.

On September 24, 2018, Swinerton filed the Limited Objection of Swinerton Builders to Motion of Debtors for Final Orders (A) Authorizing the Debtors to Obtain Post Petition Financing Etc. (Doc. 269). In the Limited Objection, Swinerton objected that the Debtors’ motion and proposed order failed to provide adequate protection of Swinerton’s mechanic’s lien as required by Bankruptcy Code 364(d)(1)(B). The Court overruled Swinerton’s objection. In reaching its decision, the Court found:

The approximate realizable value of the Debtors’ assets, in excess of prepetition secured liabilities, is between \$150 and \$225 million *Id.* That is, secured creditors are protected by an equity cushion of between 26% to 40%. It is well established that an equity cushion of 20% or more constitutes adequate protection. *See, e.g., In re James River Associates*, 148 B.R. 790, 796 (E.D. Va. 1992).

Tentative Ruling at 9 (Doc. No. 392), incorporated into the Final Order (Doc. No. 409) at 6. With regard to adequate protection of secured claims, the Court said:

1 In addition to adequate protection through the equity cushion, the
2 replacement liens and superpriority claims provide the secured
creditors additional adequate protection.

3 Tentative Ruling at 9 (Doc. 392).

4 With regard to Swinerton's lien, the Court ruled: "There is no reason why Swinerton's
5 lien should not be primed in the same manner as the liens of the other secured creditors."

6 Tentative Ruling at 12.

7 The Final Order, however, alters the Tentative Ruling, insofar as the Final Order does not
8 prime Swinerton's lien "in the same manner as the liens of the other secured creditors." The
9 Final Order provides the other secured creditors with adequate protection in the forms of: (1) an
10 equity cushion; (2) superpriority claims; and (3) replacement liens. The Final Order is silent with
11 regard to adequate protection of Swinerton's lien.

12 Swinerton requests that the Court remedy this omission by clarifying the Final Order to
13 provide Swinerton's lien with adequate protection similar to the adequate protection provided to
14 the liens of other secured creditors. Specifically, Swinerton requests that the Final Order be
15 amended by adding provisions stating that: (1) Swinerton's lien on the Seton Medical Center
16 property is adequately protected by an equity cushion; and (2) to the extent of the diminution in
17 value of Swinerton's interest in the Seton Medical Center property, Swinerton shall be granted an
18 allowed superpriority administrative expense claim (subject to the same limitations as the
19 superpriority administrative expense claims granted to the other Prepetition Secured Creditors in
20 the Final Order).¹

21 It should not be controversial to amend the Final Order to add a Finding that Swinerton's
22 lien on the Seton Medical Center property is protected by an equity cushion. Even the Debtors
23 acknowledge that:

24 Swinerton is adequately protected through the equity cushion that
25 the Debtors' described, and provided evidence of, in their Omnibus
26 Reply to the Objections to the DIP Motion [Docket No. 355] and in
the Declarations of Anita Chou and James Moloney in support
thereof [Docket Nos. 309-2 and 309-3].

27
28 ¹ Because Swinerton's collateral is real property--not inventory or accounts receivable which are
consumed and replaced--Swinerton is not seeking the replacement liens given to the other secured
creditors.

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1 Objection to Swinerton Builders' Motion (Doc. 732) at 5.

2 Although the Debtors' concede that Swinerton is adequately protected by an equity
3 cushion, the Debtors persist in their objection to amending the Final Order to provide adequate
4 protection similar to the adequate protection provided to the liens of other secured creditors.² If
5 the equity cushion should prove to be inadequate, the Debtors would deprive Swinerton of the
6 remedy that the Bankruptcy Code provides in section 507(b). The Debtors confidently assure the
7 Court that there is "ample value in the Debtors' estates to ensure payment of any properly
8 noticed, filed and recorded mechanics' lien, including if applicable, one filed by Swinerton."
9 Debtors' Objection to Swinerton Builders' Motion p. 6 (Doc. 732) (*quoting* Debtors' Omnibus
10 Reply to the Objections to the DIP Motion, at 3-4 (Doc. 355). If the Debtors' assurance is
11 correct, Swinerton will have no need for a section 507(b) superpriority claim.

12 But the Debtors might be wrong. If the equity cushion proves inadequate, then consistent
13 with the Final Order, Swinerton should be entitled to a superpriority claim. This also, of course,
14 follows Bankruptcy Code section 507(b) which provides a remedy when adequate protection is
15 insufficient. That remedy is a superpriority claim. The Court, having stated that Swinerton is
16 adequately protected, should not deprive Swinerton of the remedy provided by Congress in
17 section 507(b).

18 **C. Conclusion**

19 Amending the Final Order to add the two requested provisions would effectuate the
20 Tentative Ruling by priming Swinerton's lien "in the same manner as the liens of the other
21 secured creditors." The requested amendments would also bring the Final Order into compliance
22 with Bankruptcy Code section 364(d)(1)(B), which states that the court may authorize post-
23 petition borrowing secured by a priming lien "only if" there is adequate protection of the
24 subordinated lien.

25 For the Court's convenience, the two requested amendments from Swinerton's BR
26 7052(b) Motion are reprinted below:

27
28 ² Notably, no creditors, including the Secured Creditors (as defined in the Final Order) and the
Unsecured Creditors Committee, objected to the Motion.

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1 Swinerton's lien on the Seton Medical Center property should be
2 primed in a manner substantially similar to the priming of the liens
3 of the Prepetition Secured Creditors. Specifically, in exchange for
4 the priming of Swinerton's lien, Swinerton shall be entitled to
5 receive adequate protection, pursuant to Bankruptcy Code sections
6 361, 363 and 364, for any diminution in the value of its interest in
7 the Seton Medical Center property resulting from, among other
8 things, the subordination to the Carve Out (as defined herein) and to
9 the DIP Liens (as defined herein), the Debtors' use, sale or lease of
10 the Seton Medical Center property, and the imposition of the
11 automatic stay from and after the Petition Date (collectively, and
12 solely to the extent of such diminution in value, the "***Diminution in***
13 ***Value***).

14 To the extent of the Diminution in Value of Swinerton's interest in
15 the Seton Medical Center property, Swinerton shall be granted and
16 allowed a superpriority administrative expense claim (the
17 "Swinerton Superpriority Claim"), which shall have priority (except
18 with respect to (i) the DIP Liens, (ii) the DIP Superpriority Claim,
19 (iii) the Carve Out, and (iv) any claims granted by Holdings
20 pursuant to those certain deeds of trust issued in connection with
21 the MOB Financing and the Moss Deed of Trust) in the Chapter 11
22 Cases under section 363(c)(1), 503(b) and 507(b) of the Bankruptcy
23 Code and otherwise over all administrative expense claims and
24 unsecured claims against the Debtors and their estates, now existing
25 or hereafter arising of any kind or nature whatsoever, including,
26 without limitation, administrative expenses of the kind specified or
27 ordered pursuant to sections 105, 326, 328, 330, 331, 503(a),
28 503(b), 507(a), 507(b), 546(c), 546(d), 552, 726, 1113, and 1114 of
the Bankruptcy Code, and upon entry of this 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
nonconsensual Lien, levy or attachment.

19 WHEREFORE, Swinerton respectfully requests that the Court overrule the Debtors'
20 Objection and grant the Motion.

21 Dated: November 13, 2018

Respectfully submitted,

FOX ROTHSCHILD LLP

23 By: /s/ Nathan A. Schultz
24 Robert N. Amkraut (Admitted Pro Hac Vice)
25 Nathan A. Schultz
26 Attorneys for Swinerton Builders
27
28

PROOF OF SERVICE OF DOCUMENT

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

A true and correct copy of the foregoing document entitled (*specify*): _____
NOTICE OF HEARING ON MOTION FOR AMENDMENT OF FINDINGS IN FINAL ORDER (I)
AUTHORIZING POSTPETITION FINANCING [...]; AND
REPLY OF SWINERTON BUILDER IN SUPPORT OF MOTION

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*) November 13, 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*) November 13, 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.

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

☐ Service information continued on attached page

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*) _____, 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.

☐ 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.

11/13/2018
Date

Nathan A. Schultz
Printed Name

/s/ Nathan A. Schultz
Signature

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

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Samuel R Maizel on behalf of Debtor De Paul Ventures, LLC

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