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Counsel for NantHealth, Inc.

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA – LOS ANGELES DIVISION**

In re:

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

Debtors.

- ☒ Affects All Debtors
☐ Affects Verity Health System of California, Inc.
☐ 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.

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 M. Robles

**OBJECTION OF NANTHEALTH, INC. TO
PROPOSED ASSUMPTION AND
ASSIGNMENT OF EXECUTORY
CONTRACTS AND UNEXPIRED LEASES**

**[RELATED TO DOCKET NOS. 1279, 1572,
1704]**

Hearing

Date: April 17, 2019, at 10:00 a.m.
Place: U.S. Bankruptcy Court, Courtroom
1568, 255 East Temple Street
Los Angeles, California 90012



NantHealth, Inc. (“NantHealth”), submits this objection (the “Objection”) to the Debtors’ *Notice of Motion and Motion for the Entry of (I) an Order (1) Approving Form of Asset Purchase Agreement for Stalking Horse Bidder and for Prospective Overbidders, (2) Approving Auction Sale Format, Bidding Procedures and Stalking Horse Bid Protections, (3) Approving Form of Notice to be Provided to Interested Parties, (4) Scheduling a Court Hearing to Consider Approval of the Sale to the Highest Bidder, and (5) Approving Procedures Related to the Assumption of Certain Executory Contracts and Unexpired Leases; and (II) an Order (A) Authorizing the Sale of Property Free and Clear of All Claims, Liens and Encumbrances* [Docket No. 1279] (the “Motion”). NantHealth objects to the Debtors’ potential assumption and assignment of the Master Software & License Agreement dated September 6, 2011 (the “License Agreement”) between NantHealth and Debtor Verity Holdings, LLC (the “Debtor”). In support of this Objection, NantHealth respectfully states as follows:

BACKGROUND

1. On September 6, 2011, NantHealth (formerly iSirona, LLC “iSirona” and formerly Nant Health, LLC) entered into the License Agreement with the Debtor granting the Debtor a nonexclusive, nontransferable, non-assignable, perpetual license to use certain software products of iSirona while the License Agreement is in effect solely for the Debtor’s own internal data processing operations.

2. On July 7, 2015, Nant Health, LLC and the Debtor entered into Amendment No. 1 to the License Agreement. Among other things, the amendment stated that iSirona, a wholly owned subsidiary of NantHealth, assigned the License Agreement to NantHealth, and that NantHealth is substituted for iSirona in the License Agreement.

3. Thereafter, on October 20, 2015, the Debtor requested NantHealth’s consent to transfer the License Agreement. On October 30, 2015, NantHealth consented to the Transfer.

4. On August 31, 2018, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

5. On February 19, 2019, the Court entered the *Order (1) Approving Form of Asset Purchase Agreement for Stalking Horse Bidder and for Prospective Overbidders, (2) Approving*

1 *Auction Sale Format, Bidding Procedures and Stalking Horse Bid Protections, (3) Approving*
2 *Form of Notice to be Provided to Interested Parties, (4) Scheduling a Court Hearing to Consider*
3 *Approval of the Sale to the Highest Bidder, and (5) Approving Procedures Related to the*
4 *Assumption of Certain Executory Contracts and Unexpired Leases; and (II) an Order (A)*
5 *Authorizing the Sale of Property Free and Clear of All Claims, Liens and Encumbrances [1572].*
6 Pursuant to that Order, on March 5, 2019, the Debtors filed the *Notice To Counterparties To*
7 *Executory Contracts And Unexpired Leases Of The Debtors That May Be Assumed And Assigned*
8 [Docket No. 1704] (the “Assumption Notice”).

9 6. The Assumption Notice includes the License Agreement as a contract subject to
10 assumption on Exhibit A: Part 4 “Executory Contracts and Unexpired Leases Subject to
11 Assumption (System / Multi Facility),” reference number 328. The Assumption Notice lists a
12 cure amount of \$0.00 (the “Proposed Cure Amount”). NantHealth’s records reflect a required
13 cure amount of no less than \$86,366.94, as of March 31, 2019.

14 7. On April 11, 2019, the Debtors filed a *Notice of Executory Contracts and*
15 *Unexpired Leases Designated by Strategic Global Management, Inc. for Assumption and*
16 *Assignment* [Docket No. 2131] (the “Designation Notice”) listing the executory contracts and
17 unexpired leases that Strategic Global Management, Inc. (the “Proposed Licensee” or “SGM”)
18 designated for assumption and assignment to SGM. The Designation Notice lists the License
19 Agreement for assumption and assignment to SGM on Exhibit B “Executory Contracts and
20 Unexpired Leases Designated by Strategic Asset Management, Inc. (SGM) to be Assumed,”
21 reference number 328.

22 **JURISDICTION AND VENUE**

23 8. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and
24 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

25 9. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

OBJECTION

I. The Debtors May Not Assume Or Assign the License Agreement Without NantHealth's Consent.

8. NantHealth objects to the Debtors' potential assumption and assignment of the License Agreement because under applicable federal law, the Debtors may not assume or assign the License Agreement without NantHealth's Consent.

9. Section 365(c) of the Bankruptcy Code provides that a debtor in possession "may not assume *or* assign any executory contract" without the non-debtor party's consent if "applicable law" excuses the non-debtor party to such a contract from accepting performance from an entity other than the debtor. 11 U.S.C. § 365(c) (emphasis added).

10. The plain language of the statute "bars a debtor in possession from assuming an executory contract without the nondebtor's consent where applicable law precludes assignment of the contract to a third party." *In re Catapult Entm't*, 165 F.3d 747, 750 (9th Cir. 1999). In *Catapult*, the Ninth Circuit adopted the "hypothetical test" barring a debtor from assuming an executory contract over a non-debtor's objection "if applicable law would bar assignment to a hypothetical third party." *Id.* Assumption is barred even if "the debtor in possession has no intention of assigning the contract in question to any such third party." *Id.*

11. First, copyright and patent law—which constitute "applicable law" under the circumstances—render the License Agreement non-assumable without NantHealth's consent. *See, e.g., id.* at 750 (holding that under federal patent law the debtor was precluded from assuming a patent license over the licensor's objection); *In re Hernandez*, 285 B.R. 435, 440 (Bankr. D. Ariz. 2002) ("applicable federal patent law would require the consent of the Licensor to assign the License"); *In re CFLC, Inc.*, 89 F.3d 673, 680 (9th Cir. 1996) ("because federal law makes [] licenses personal and assignable only with the consent of the licensor, the [] license is not assumable and assignable in bankruptcy"); *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1334 (9th Cir. 1984) (copyright license cannot be transferred without consent from licensor); *In re Sunterra Corp.*, 361 F.3d 257, 271 (4th Cir. 2004) (debtor was precluded from assuming software license agreement); *In re Kazi Foods of Michigan, Inc.*, 473 B.R. 887, 889 (Bankr. E.D.

1 Mich. 2011) (federal trademark law prevented debtors from assuming franchise agreements
2 without licensor's consent).

3 12. Second, the License Agreement explicitly prohibits assignment of the agreement
4 absent NantHealth's consent. The License Agreement states: "[NantHealth] hereby grants to
5 [Debtor] a nonexclusive, nontransferable, non-assignable (subject to Section 7.10) perpetual
6 license...." License Agreement at 2.1. Pursuant to Section 7.10, the Debtor agreed that:

7 [Debtor] shall not grant any sublicense, security interest or any other interest in this
8 Agreement or the license granted hereunder to any third party, or sell, transfer or
9 assign any right or obligation hereunder, without the prior written consent of
10 [NantHealth] in each instance. A change in "control" of [Debtor] shall be deemed
11 to constitute an assignment of this Agreement requiring the prior written consent of
12 [NantHealth]. [NantHealth] may grant or withhold its consent as it determines in
13 its sole and absolute discretion Any attempted assignment in violation of this
14 provision shall be void and shall constitute a material breach of this Agreement.

15 License Agreement Section 7.10.

16 13. Because NantHealth has not and will not consent to the assumption of the License
17 Agreement, the Objection should be sustained.

18 **II. Alternatively, The Debtors May Not Assume The License Agreement Unless The**
19 **Proper Cure Amount Is Paid And Adequate Assurance of Future Performance Is**
20 **Given.**

21 14. Although the Extended Cure Objection Deadline for NantHealth to object to the
22 Proposed Cure Amount is May 22, 2019, NantHealth objects to the Proposed Cure Amount and
23 will file a separate objection to the Proposed Cure Amount prior to the Extended Cure Objection
24 Deadline.¹

25 15. Even if the Debtors could assume and assign the License Agreement, the Debtor is
26 in default under the License Agreement. As a result, the Debtors must comply with the
27 provisions of section 365 of the Bankruptcy Code in order to assume the License Agreement.
28 Pursuant to section 365(b)(1), a debtor in possession may not assume an executory contract unless

¹ On April 10, 2019, the Debtors filed a stipulation extending the cure amount objection
deadline to May 22, 2019, at 4:00 p.m. (PST) (the "Extended Cure Objection Deadline").
*See Stipulation Continuing Hearing and Extending Objection Deadline for NantWorks, LLC, Integrity
Healthcare, LLC, and Nant Health, LLC re Order (1) Approving Form of Asset Purchase Agreement
for Stalking Horse Bidder and for Prospective Overbidders, (2) Approving Auction Sale Format,
Bidding Procedures and Stalking Horse Bid Protections [Docket No. 2111].*

1 the debtor (1) “cures, or provides adequate assurance that [it] will promptly cure” the default; (2)
2 compensates, or provides adequate assurance that it will compensate any actual pecuniary loss
3 resulting from a default; and (3) provides adequate assurance of future performance under the
4 contract. 11 U.S.C. § 365(b)(1).

5 16. Such defaults include both prepetition and postpetition defaults. *See In re Circle K*
6 *Corp.*, 190 B.R. 370, 376 (B.A.P. 9th Cir. 1995), *aff’d*, 127 F.3d 904 (9th Cir. 1997); *South Street*
7 *Seaport Ltd. P’ship v. Burger Boys, Inc. (In re Burger Boys, Inc.)*, 94 F.3d 755, 763 (2d Cir.
8 1996) (noting that prior to assumption, debtor must cure its failure to make both pre-petition and
9 post-petition lease payments); *Matter of Superior Toy & Mfg. Co., Inc.*, 78 F.3d 1169, 1174 (7th
10 Cir. 1996) (“A party to an executory contract must be paid all amounts due him under the contract
11 before the contract may be assumed.”).

12 17. Further, to make NantHealth whole pursuant to section 365(b)(1), the Debtor, in
13 assuming the License Agreement, is required to pay interest at the contract rate on the prepetition
14 unpaid fees. *See In re Crummie*, 194 B.R. 230, 237 (Bankr. N.D. Cal. 1996); *In re Valley View*
15 *Shopping Ctr., L.P.*, 260 B.R. 10, 26 (Bankr. D. Kan. 2001). The Debtors owe NantHealth no
16 less than \$86,366.94, as of March 31, 2019.

17 18. In addition to curing any defaults, section 365 also requires the debtor to
18 “provide[] adequate assurance of future performance under such contract or lease.” 11 U.S.C.
19 § 365(b)(1)(C). The proposed assumption contains no information regarding adequate assurance
20 of future performance of the License Agreement, on which the Debtor has the burden of proof
21 under section 365(b)(1).

22 19. Courts require a specific factual showing through competent evidence to determine
23 whether adequate assurance of future performance has been provided, and a number of
24 bankruptcy courts have found that a debtor’s failure to provide such specific evidence precluded
25 the debtor’s ability to assume a lease. *See, e.g., Matter of Haute Cuisine, Inc.*, 58 B.R. 390, 393-
26 94 (Bankr. M.D. Fla. 1986) (even though experts presented cash flow projections, the court found
27 that insufficient documentary evidence had been presented); *In re CM Systems, Inc.*, 64 B.R. 363,
28 365 (Bankr. M.D. Fla. 1986) (finding “that [because] there is no convincing evidence in this

1 record that the Debtor is able to perform this contract pursuant to its terms, the Motion to Assume
2 cannot be granted.”); *In re Embers 86th St., Inc.*, 184 B.R. 892, 902 (Bankr. S.D.N.Y. 1995)
3 (courts look to “evidence of profitability such as demonstrated reductions in operating costs,
4 payroll, and inventory coupled with an increase in sales; a plan which would earmark money
5 exclusively for the landlord; or the willingness and ability of debtor or debtor’s assignee to fund
6 the cure payments” (internal citations omitted)). Without this type of information, NantHealth is
7 denied its statutory right to conduct a meaningful analysis of the Proposed Licensee.

8 20. Therefore, the Debtors’ Motion should also be denied for failure to provide (1)
9 either the full cure or adequate assurance of the full cure of all defaults under the License
10 Agreement and (2) adequate assurance of future performance by the Proposed Licensee.

11 **RESERVATION OF RIGHTS**

12 21. NantHealth reserves all of its rights, claims, defenses, and remedies with respect to
13 the License Agreement or other contracts with any of the Debtors or their non-Debtor affiliates,
14 including, without limitation, the right to amend, modify, or supplement this Objection, to request
15 adequate assurances of future performance, to seek discovery, or to raise any additional
16 objections. By filing this Objection, NantHealth further specifically reserves its right to seek
17 termination of the License Agreement.

18 **CONCLUSION**

19 22. WHEREFORE, NantHealth respectfully requests that this Court (a) sustain this
20 Objection, (b) deny the Debtors’ proposed assumption and subsequent assignment of the License
21 Agreement, and (c) grant such other and further relief to NantHealth as the Court may deem
22 proper.

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Dated: April 12, 2018

Respectfully Submitted,

JONES DAY

By: /s/ Bruce S. Bennett

Bruce S. Bennett
555 South Flower Street, 50th Floor
Los Angeles, California 90071

Counsel for NantHealth, Inc.

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:
555 South Flower St., Fiftieth Floor, Los Angeles, CA 90071

A true and correct copy of the foregoing document entitled (*specify*): Objection of NantHealth, Inc. to Proposed Assumption and Assignment of Executory Contracts and Unexpired Leases

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*) 04/12/2019, 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*) 04/12/2019, 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*) 04/15/2019, 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 Delivery:

Honorable Ernest Robles
United States Bankruptcy Court for the Central District of California
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.

04/12/19
Date

Chané Buck
Printed Name

/s/ Chané Buck
Signature

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