2:19-cv-10354-DSF

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al.*, Debtors and Debtors In Possession	On Appeal from the United States Bankruptcy Court for the Central District of California
STRATEGIC GLOBAL MANAGEMENT, INC.[1] Appellant	Bankruptcy Court Lead Case No.: 2:18-bk-20151-ER Chapter 11
v.	Date: [TBD] Time: [TBD] Courtroom: 7D Location: 350 W. First Street Los Angeles, CA 90012
VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al.* Appellees	

NOTICE OF DEBTORS' EMERGENCY MOTION TO DISMISS APPEALS

[1] The other Debtors in the chapter 11 cases, being jointly administered under Lead Case No. 2:18-bk-20151-ER, are O'Connor Hospital 2:18-bk-20168-ER, Saint Louise Regional Hospital 2:18-bk-20162-ER, St. Francis Medical Center 2:18-cv-20165-ER, St. Vincent Medical Center 2:18-bk-20164-ER, Seton Medical Center 2:18-cv-20167-ER, O'Connor Hospital Foundation 2:18-bk-20179-ER, Saint Louise Regional Hospital Foundation 2:18-cv-20172-ER, St. Francis Medical Center of Lynwood Foundation 2:18-cv-20178-ER, St. Vincent Foundation 2:18-cv-20180-ER, St. Vincent Dialysis Center, Inc. 2:18-cv-20171- ER Seton Medical Center Foundation 12:8-cv-20175-ER, Verity Business Services 2:18-cv-20173-ER, Verity Medical Foundation 2:18-cv-20169-ER, Verity Holdings, LLC 2:18-cv-20163-ER, DePaul Ventures, LLC 2:18-cv-20176-ER, and DePaul Ventures - San Jose Dialysis, LLC 2:18-cv-20181-ER.

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PLEASE TAKE NOTICE that Verity Health System of California, Inc. ("VHS"), and the above-referenced affiliated debtors and debtors-in-possession (the "Debtors") in the above-captioned chapter 11 cases (the "Bankruptcy Cases") pending in the United States Bankruptcy Court for the Central District of California (the "Bankruptcy Court") and the appellees herein, hereby submit the attached emergency motion (the "Motion") to dismiss the above-captioned appeal from two orders of the Bankruptcy Court entered November 18, 2019 and November 27, 2019 respectively, filed by Appellant, Strategic Global Management, Inc. ("SGM"). The bases for the emergency relief sought in the Motion are as follows: (i) the Debtors face mounting operational losses of approximately $450,000, per day, which threaten their ability to continue operating their hospitals as going concerns into 2020; and (ii) the asset purchase agreement underlying the sale transaction between the Debtors and SGM terminates by its terms if a closing does not occur by December 31, 2019.

PLEASE TAKE FURTHER NOTICE that the Debtors bring the Motion on an emergency basis pursuant to Rule 8013(d) of the Federal Rules of Bankruptcy Procedure, Rule 5.1 of Chapter IV of the Local Rules of the United States District Court for the Central District of California, and Rule 7-19 of Chapter I of the Local Rules of the United States District Court for the Central District of California. **As**

set forth in the Motion, the Debtors request that the Court rule on the Motion not later than December 31, 2019.

PLEASE TAKE FURTHER NOTICE that the Motion is based on this Notice of Motion, the *Declaration of Richard G. Adcock* (the "Adcock Declaration") and *Declaration of Tania M. Moyron* (the "Moyron Declaration") attached to the Motion, the *Appendix in Support of the Debtors' Motion to Dismiss the Appeal* (the "Debtors' Appendix") filed concurrently herewith, the arguments of counsel, and any other admissible evidence brought before the Court at or before a hearing on the Motion, if any.

PLEASE TAKE FURTHER NOTICE that the Debtors will serve this Notice of Motion, the Motion, the Adcock Declaration, the Moyron Declaration, and the Debtors' Appendix on counsel to Strategic Global Management, Inc., the appellant herein, and the State of California, the appellee herein, as set forth in the Proof of Service attached hereto. **Further, as set forth in the Moyron Declaration, on December 19, 2019, counsel to the Debtors informed counsel to SGM of the filing of this Motion and further informed counsel to SGM that SGM should submit a response or opposition to the Motion, if any, not later than December 26, 2019, unless the Court otherwise directs pursuant to Rule 8013(a)(3)(A) of the Federal Rules of Bankruptcy Procedure.** To the extent necessary, the Debtors request that the Court waive any further compliance with Rule 7-19 of Chapter I of

the Local Rules of the United States District Court for the Central District of California, and approve service, in addition to the means of service set forth in such Local Rule, by CM/ECF notification, email, and regular mail. In the event the Court sets a hearing on the Motion, the Debtors shall provide notice of entry of the order setting the hearing on each of the foregoing parties and such other parties as the Court directs, including by telephonic notice.

PLEASE TAKE FURTHER NOTICE that, in light of the emergency basis of the relief requested, the Debtors request authority to file a reply in support of the Motion not later than December 29, 2019, which is less than the seven days provided pursuant to Rule 8013(a)(3)(B) of the Federal Rules of Bankruptcy Procedure.

Dated: December 19, 2019

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By: */s/ Tania M. Moyron*
Tania M. Moyron

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UNITED STATES DISTRICT COURT
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In re: VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al.*, Debtors and Debtors In Possession	On Appeal from the United States Bankruptcy Court for the Central District of California
STRATEGIC GLOBAL MANAGEMENT, INC.[1] Appellant v. VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al.* Appellees	Bankruptcy Court Lead Case No.: 2:18-bk-20151-ER Chapter 11 Date: [TBD] Time: [TBD] Courtroom: 7D Location: 350 W. First Street Los Angeles, CA 90012

DEBTORS' EMERGENCY MOTION TO DISMISS APPEALS

[1] The other Debtors in the chapter 11 cases, being jointly administered under Lead Case No. 2:18-bk-20151-ER, are O'Connor Hospital 2:18-bk-20168-ER, Saint Louise Regional Hospital 2:18-bk-20162-ER, St. Francis Medical Center 2:18-cv-20165-ER, St. Vincent Medical Center 2:18-bk-20164-ER, Seton Medical Center 2:18-cv-20167-ER, O'Connor Hospital Foundation 2:18-bk-20179-ER, Saint Louise Regional Hospital Foundation 2:18-cv-20172-ER, St. Francis Medical Center of Lynwood Foundation 2:18-cv-20178-ER, St. Vincent Foundation 2:18-cv-20180-ER, St. Vincent Dialysis Center, Inc. 2:18-cv-20171- ER Seton Medical Center Foundation 12:8-cv-20175-ER, Verity Business Services 2:18-cv-20173-ER, Verity Medical Foundation 2:18-cv-20169-ER, Verity Holdings, LLC 2:18-cv-20163-ER, DePaul Ventures, LLC 2:18-cv-20176-ER, and DePaul Ventures - San Jose Dialysis, LLC 2:18-cv-20181-ER.

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Verity Health System of California, Inc., *et al*.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 8012 of the Federal Rules of Bankruptcy Procedure, Appellee Verity Health System of California, Inc., as debtor and debtor in possession in the above captioned jointly administered chapter 11 cases, hereby discloses that it is a nonprofit public benefit corporation organized under the laws of the State of California and that it has no parent corporation and has no shareholders, and therefore no entity owns or controls ten percent or more of its shares.

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Verity Health System of California, Inc. ("VHS"), and the above-referenced affiliated debtors and debtors-in-possession (the "Debtors") in the above-captioned chapter 11 cases (the "Bankruptcy Cases") pending in the United States Bankruptcy Court for the Central District of California (the "Bankruptcy Court") and the appellees herein, hereby submit this emergency motion[2] (the "Motion") to dismiss the above-captioned appeals from (a) the 8.6 Order (defined below) entered by the Bankruptcy Court on November 18, 2019 (the "8.6 Appeal"), and (b) the Closing Order (defined below) entered by the Bankruptcy Court on November 27, 2019 (the "Closing Appeal", and collectively with the 8.6 Appeal, the "Appeals"), filed by appellant, Strategic Global Management, Inc. ("SGM").

I. INTRODUCTION[3]

SGM willfully violated the Bankruptcy Court's Orders requiring SGM to close a $610 million sale of four acute care hospitals (the "Sale"), without ever filing a motion to stay the Orders. The Bankruptcy Court held: "By presenting non-meritorious arguments as to why it is not obligated to close, SGM is holding the estates, creditors, and patients of the Hospitals hostage in an attempt to extort a better

[2] In support of the Motion, the Debtors submit the attached *Declaration of Richard G. Adcock* (the "Adcock Declaration"), the *Declaration of Tania M. Moyron* (the "Moyron Declaration"), and reference the concurrently-filed *Appendix in Support of the Debtors' Motion to Dismiss Appeals* (the "Debtors' App.")

[3] Capitalized terms in this Introduction have the definitions set forth in this Motion.

purchase price. SGM's cynical tactics are especially offensive given the significant harm that closure of the Hospitals would impose upon patients. For example, two of the Hospitals that would likely close upon failure of the SGM Sale contain large populations of long-term patients suffering from severe illnesses." Debtors App. at 1175-1176.

The Appeals are merely SGM's latest attempt to manufacture reasons as to why SGM is not required to close the Sale and to run out the clock under the APA which terminates by its terms if the Sale does not close by December 31, 2019.

The Appeals must be dismissed for three reasons. First, the 8.6 Order is not a "final" order because it does not make a determination as to whether all of the conditions to closing the Sale had been satisfied. The interlocutory nature of the 8.6 Order is demonstrated by the Closing Order and related Closing Memo Decision, which did find all conditions to close had been satisfied. Where an order is not "final," it is considered interlocutory and non-appealable unless the District Court or Bankruptcy Appellate Panel grants leave to appeal. Since SGM did not request leave to appeal the 8.6 Order—and no grounds exist to grant leave—the 8.6 Appeal should be dismissed.

Second, even if not dismissed as interlocutory, the doctrine of equitable estoppel should be invoked to dismiss the 8.6 Appeal. During the Sale hearing, SGM represented that it would be obligated close the Sale if the Debtors obtained a final,

non-appealable order consistent with Section 8.6. *See id.* . at 1156. The Bankruptcy Court approved the APA on this representation, among other things. *Id.* at 1157. Faced with SGM's objections to the Enforcement Order (which constituted a final, non-appealable order consistent with Section 8.6), the Bankruptcy Court found that "SGM is judicially estopped from contradicting its own prior representations [at the Sale hearing] regarding its obligation to close the sale." *Id*. Thus, these Appeals also should be dismissed under the doctrine of equitable estoppel.

Third, SGM has expressly waived its right to appeal the Closing Order. Closing Memo Decision at 6. The parties agreed in the APA that any determination regarding the occurrence of a material adverse effect (an "MAE") would be made "exclusively" by the Bankruptcy Court. After a hearing that afforded SGM the right to be heard, the e Bankruptcy Court found that: "[n]one of SGM's allegations come even close to showing a Material Adverse Effect" and, thus, SGM was obligated to close the Sale by no later than December 5, 2019. While SGM may have desired a different ruling, SGM agreed that the Bankruptcy Court was the sole arbiter of any disagreement relating to a Material Adverse Effect—the only issues raised in the Closing Order. SGM should be bound by that agreement.

Accordingly, as set forth below, the Debtors respectfully request that the Appeals be dismissed on an emergency basis not later than December 31, 2019.

II. BACKGROUND

A. Factual Background

1. On August 31, 2018 (the "Petition Date"), the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").[4] *See* Debtors' App. at 3.

2. On the Petition Date, Debtor VHS, a California nonprofit public benefit corporation, was the sole corporate member of five Debtor California nonprofit public benefit corporations that operated O'Connor Hospital ("OCH") and Saint Louise Regional Hospital ("SLRH"), and currently operates St. Francis Medical Center ("SFMC"), St. Vincent Medical Center ("SVMC"), and Seton Medical Center, including Seton Medical Center Coastside Campus (collectively, "Seton" and, together with OCH, SLRH, SFMC, and SVMC, the "Verity Hospitals" and together with VHS, the "Verity Health System"). *Id.* at 4.

B. The Sale

3. On May 2, 2019, the Bankruptcy Court entered an order approving the sale (the "Sale") of four of the Debtors' hospitals (the "Hospitals") to SGM pursuant to the terms of the APA. *Id.* at 698. The Sale is one of the central objectives of the Debtors' Bankruptcy Cases, as it will preserve patient care in the Hospital's

[4] All references to "§"are to sections of the Bankruptcy Code, 11 U.S.C. §§101, *et seq.* and "Rules" refers to the Federal Rules of Bankruptcy Procedure.

communities, protect over 4,000 jobs, allow physician and trade creditors to maintain going-forward business relationships, and presents the most likely source of recovery to unsecured creditors.

C. AG Review and APA Section 8.6

4. California state law authorizes the California Attorney General (the "AG") to review the sale of a non-profit health care facility to a for-profit entity. CAL. CORP. CODE §§ 5914(a)(1), 5917. Prepetition, the AG imposed conditions on a transaction that recapitalized and restructured Verity Health System (the "2015 Conditions"). *Id.* at 24. The 2015 Conditions broadly impacted the Debtors' operations, and locked the Verity Health System into financial and operational obligations that made success impossible and, in large part, precipitated these Bankruptcy Cases. *Id.* at 28. Accordingly, the Debtors and SGM heavily negotiated provisions of the APA addressing the AG's review and imposition of conditions in connection with the Sale. *Id.* at 791-792.

5. Section 8.6 of the APA provides in relevant part:.

> Purchaser recognizes that the transactions contemplated by this Agreement may be subject to review and approval of the CA AG. Purchaser agrees to close the transactions contemplated by this Agreement so long as any conditions imposed by the CA AG are substantially consistent with the conditions set forth, as Purchaser Approved Conditions, in Schedule 8.6. In the event the CA AG imposes conditions on the transactions contemplated by this Agreement, or on Purchaser in connection therewith, which are materially different than the Purchaser

> Approved Conditions set forth on Schedule 8.6 (the "Additional Conditions"), Sellers shall have the opportunity to file a motion with the Bankruptcy Court seeking the entry of an order ("Supplemental Sale Order") finding that the Additional Conditions are an "interest in property" for purposes of 11 U.S.C. §363(f), and that the Assets can be sold free and clear of the Additional Conditions without the imposition of any other conditions, which would adversely affect the Purchaser.

Id. at 94-96.

D. The AG Conditions and Enforcement Order

6. On September 25, 2019, the AG consented to the Sale subject to certain conditions, some of which were materially different than those SGM contractually agreed to in Schedule 8.6 (the "Additional Conditions"). *Id.* at 836-875. SGM's CEO confirmed that, SGM would not close the Sale if the Additional Conditions remained extant. *Id.* at 793.

7. On September 30, 2019, the Debtors filed a motion (the "Enforcement Motion"), which sought (i) entry of an order enforcing the Sale Order, (ii) a finding that the Sale was free and clear of the Additional Conditions, and (iii) a finding limiting the Sale to only those conditions to which SGM contractually agreed to assume in Schedule 8.6 of the APA. *Id.* at 95.

8. On October 10, 2019, SGM filed a statement (the "Statement of Support") in support of the Enforcement Motion expressly requesting that the

Bankruptcy Court enter an order granting the Enforcement Motion. *Id.* at 1004 ("***SGM respectfully requests that the Court grant the Motion***.") (emphasis added).

9. In the Statement of Support, SGM represented that "SGM will not close the Sale unless the Debtors timely obtain an order from the Court finding that the Additional Conditions are 'interests in property' that can be sold free and clear pursuant to Section 363(f) of the Bankruptcy Code." *Id.* at 1002.

10. On October 23, 2019, the Court entered a memorandum of decision (the "Enforcement Memo Decision") granting the Enforcement Motion. *Id.* at 1010. After entry thereof, the AG, the Debtors, and SGM engaged in discussions concerning a proposed form of order. *Id.* at 1044. While the Debtors and the AG agreed to specific language (the "Proposed Order"), despite best efforts, the Debtors were unable to obtain SGM's agreement. On November 8, 2019, the Debtors and the AG filed a stipulation (the "Stipulation") and lodged the Proposed Order. *Id.* at 1034, 1042, 1049. Pursuant to the Stipulation, (i) the AG agreed to the Proposed Order authorizing the Sale free and clear of "Additional Conditions," (ii) the Debtors agreed to obtain a withdrawal of the Enforcement Memo Decision, and (iii) the AG agreed not to appeal the Proposed Order. *Id.* at 1036.

11. On November 11, 2019, SGM filed an objection to the Proposed Order (the "SGM Objection") and lodged a competing order. *Id.* at 1053, 1261. SGM offered a detailed, yet flawed analysis, as to why additional language was necessary

in the Proposed Order to satisfy Section 8.6. *Id.* at 1056. On November 13, 2019, the Bankruptcy Court overruled the SGM Objection. *Id.* at 1073, 1134-1135.

12. On November 14, 2019, the Bankruptcy Court entered the Enforcement Order granting the Enforcement Motion. *Id.* at 1139. The Enforcement Order found that the "Assets (as defined in the APA) are being sold free and clear of the Additional Conditions without the imposition of any other conditions which would adversely affect the Purchaser (as defined in the APA)." *Id.* at 166. On November 29, 2019, SGM appealed the Enforcement Order. *Id.* at 1142. That appeal is currently pending before the District Court and under Case No. 19-10352-DSF.

13. On November 18, 2019, the Bankruptcy Court entered an Order finding that SGM was obligated to promptly close the sale under §8.6 of the (the "8.6 Order"). *See id.* at 1158. The 8.6 Order provides, in relevant part, that:

> The Debtors have complied with their obligation under the APA to obtain a final, non-appealable Supplemental Sale Order. Consequently, SGM is now obligated to promptly close the SGM Sale, provided that all other conditions to closing have been satisfied.

Id. at 1159.

14. In conjunction with the 8.6 Order, the Bankruptcy Court issued a memorandum of decision (the "8.6 Memo Decision"), wherein the Court found that "SGM is judicially estopped from contending that it is entitled to the Evaluation Period and is not obligated to promptly close the sale." *Id.* at 1156. The 8.6 Order

expressly provides that it is based on the findings set forth in the 8.6 Memo Decision. On November 29, 2019, SGM appealed the 8.6 Order. *Id.* at 1160.

F. The Status Conference, the Closing Memo Decision and Closing Order

15. On November 26, 2019, the Bankruptcy Court held a status conference (the "Status Conference") regarding the APA and the Sale. SGM appeared and made arguments at the Status Conference. *Id.* at 1269-1289.

16. On November 27, 2019, the Bankruptcy Court entered an Order finding SGM was obligated to close the Sale by no later than December 5, 2019 (the "Closing Order" and together with the 8.6 Order, the "Orders"). *Id.* at 1179.

17. The Bankruptcy Court issued a memorandum of decision supporting the Closing Order (the "Closing Memo Decision") wherein the Court found that "[the Court has previously found that the conditions precedent to closing set forth in [Section] 8.6 of the APA has been satisfied. All other conditions precedent to closing were satisfied as of November 19, 2019." *Id.* at 1176. The Closing Order expressly provided that its findings were based on the reasons set forth in the Closing Memo Decision. Pursuant to the APA, SGM was required to close the Sale within 10 business days of the Debtors' satisfaction of all conditions to closing. *Id.* On December 3, 2019, SGM appealed the Closing Order. *Id.* at 1180.

18. On December 17, the Debtors sent SGM a letter declaring them in material breach of the APA and providing notice that the them that the APA will terminate effective December 27, 2019. *Id.* at 1290.

G. The Basis for Emergency Relief

19. Emergency relief is necessary to curtail SGM's exploitation of artificial obstacles to its obligations to close the Sale. The Debtors also want to ensure that SGM does not argue that the Debtors' termination of the APA is not a breach based on its interpretation that the Bankruptcy Court's orders were incorrect. Further delay of resolution of the foregoing issues threatens the continued operation of one or more of the Hospitals and the Bankruptcy Cases, and, therefore, dismissal of these Appeals constitutes a true emergency. The Debtors sustain daily operational losses of $450,000 approximately per day, which continue to mount as SGM casts doubt on its obligations and the Orders. *See* Adcock Decl. ¶7.

III. ARGUMENT

A. SGM is Judicially Estopped from Challenging the Orders.

The doctrine of judicial estoppel prevents a party from changing its position over the course of judicial proceedings when such positional changes adversely impact the judicial process. *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990) (citations omitted); *accord Arizona. v. Shamrock Foods Co.,* 729 F.2d 1208, 1215 (9th Cir.1984). Judicial estoppel precludes a litigant from playing "fast and loose

with the courts." *Russell*, 893 F.2d at 1037 (citing *Rockwell Int'l Corp. v. Hanford Atomic Metal Trades Council,* 851 F.2d 1208, 1210 (9th Cir.1988)). "Because it is intended to protect the integrity of the judicial process, it is an equitable doctrine invoked by a court *at its discretion*." *Id.* (emphasis added); *see also Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 993 (9th Cir. 2012) (judicial estoppel protects "the dignity of judicial proceedings").

Judicial estoppel also may be used to bar an appeal. *See Smith v. United Parcel Serv.*, 578 Fed. Appx. 755 (10th Cir. 2014) (court exercised its discretion to consider judicial estoppel and dismissed appeal on such basis); *UNR Indus., Inc., v. Bloomington Factory Workers*, No. 92-C-6396, 1993 WL 181453, at *2 (N.D. Ill. May 27, 1993) (granting motion to dismiss on the grounds of judicial estoppel).

The *Russell* Court found that the doctrine of judicial estoppel barred the State from advancing a procedural argument in one court contrary to the arguments it previously advanced in another. *Russell*, 893 F.2d at 1038 ("Each court, state and federal, is entitled to have whatever rules of judicial estoppel it considers necessary to protect its dignity and its system of justice.").

Here, in open court, SGM represented to the Bankruptcy Court that it would be required to close the Sale if the Supplemental Sale Order became final and non-appealable:

> If the Debtor can get us a final, non-appealable order, meaning that if there's an appeal, it gets resolved in the

> Debtor's favor or maybe gets dismissed, at that point we will be obligated to close the transaction, as long as all the other conditions to closing have been satisfied.

Debtors' App. at 1156; *see also id.* at 1218-1219.

There is also no question the Bankruptcy Court relied on and accepted SGM's representation. *Id.* The Bankruptcy Court found that it "approved the APA only after the inclusion of the provision requiring SGM to close the sale if the Debtors obtained a final, non-appealable Supplemental Sale Order." *Id.* at 1157. Lastly, the record is clear that the Debtor will suffer a significant and unfair detriment if SGM is not estopped from asserting arguments inconsistent with its prior representations.

The Bankruptcy Court found that the Supplemental Sale Order is a final order since the objecting parties withdrew their objections to the Enforcement Motion. *See id.* at 1155. As a result, the Bankruptcy Court invoked the doctrine of judicial estoppel and found SGM to be "judicially estopped from contradicting its prior representations regarding its obligation to close the sale" as required by Section 8.6 of the APA, *id.* at 1155. The Bankruptcy Court's findings regarding judicial estoppel apply to both Orders.[5] *See Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1114 (9th Cir. 2000) (noting that prior interlocutory orders are "merged into final judgment"). Based on the Bankruptcy Court's findings, this

[5] The Closing Memo Decision expressly acknowledges the findings and conclusions set forth in its 8.6 Memo Decision. *See* Closing Decision at nt. 5 and 6.

Court should exercise its discretion to invoke the doctrine of judicial estoppel and dismiss these Appeals.

B. <u>The 8.6 Order is Interlocutory and SGM Did Not Seek Leave</u>.

A federal court must determine *sua sponte* its proper jurisdiction. *In re Martinez*, 721 F.2d 262, 264 (9th Cir. 1984). Section158(a) gives the district court jurisdiction to hear appeals: "(1) from final judgments, orders, and decrees [...] (3) ...and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title." 28 U.S.C. §158(a)(1) and (3).

Accordingly, interlocutory orders are not appealable as of right. The court must grant leave for an appeals court to have jurisdiction over an interlocutory order.

A final order is one that ends the litigation or disposes of a complete claim for relief, leaving nothing for the court to do but execute the judgment. *In re Kashani*, 190 B.R. 875, 882 (B.A.P. 9th Cir. 1995); *see also In re Travers*, 202 B.R. 624, 625 (B.A.P. 9th Cir. 1996). In contrast, an interlocutory order is "one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken to enable the court to adjudicate the cause on the merits." *In re Kashani*, 190 B.R. at 882.

The Ninth Circuit has adopted a "pragmatic approach" to finality because

> "certain proceedings in a bankruptcy case are so distinctive and conclusive either to the rights of individual

> parties or the ultimate outcome of the case that final decisions as to them should be appealable as of right." ... Under our pragmatic approach, a bankruptcy court order is considered to be final and thus appealable "where it 1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed."

In re Bonham, 229 F.3d 750, 761 (9th Cir. 2000) (citations omitted).

Here, the 8.6 Order is clearly interlocutory because it does not make a determination as to whether the conditions to closing other than those arising under §8.6 of the APA have been satisfied. Since additional steps must be taken (*i.e.* a finding that the remaining conditions have been satisfied), underlying issues on the merits remain unadjudicated. The Bankruptcy Court made that additional finding in the Closing Order and Closing Memo Decision finding "SGM is obligated to close the SGM Sale by no later than December 5, 2019" and "that as of November 19, 2019, all conditions precedent to SGM's obligation to close has been satisfied."[6] Debtors' App. at 1179 and 1176. As noted in *Bonham*, it would be impractical for this Court to undertake, piecemeal, the appeal process for a portion of the 8.6 Order.

SGM did not file a motion for leave to appeal as required by Rules 8001(b) and 8003. *In re Kashani*, 190 B.R. at 882. The Court is authorized to dismiss the 8.6 Appeal on that ground, alone, for lack of jurisdiction. *See* 28 U.S.C. § 1292(b).

[6] The Debtors have consolidated into this Motion a request to dismiss both the Appeals because the Closing Order highlights that the 8.6 Order is interlocutory.

SGM cannot meet the standard for leave to appeal in any event because the 8.6 Order does not involve "a controlling question of law where there is substantial ground for difference of opinion." *In re Sperna*, 173 B.R. 654, 658 (B.A.P. 9th Cir. 1994). Rather, it involves the Bankruptcy Court's interpretation of the APA—a factual determination. As evidenced by the subsequent Closing Order, the immediate appeal of the 8.6 Order was insufficient to "materially advance" the dispute concerning SGM's obligation to close the Sale. *See id.* Further, as set forth below, the merger of the 8.6 Order into the Closing Order cannot salvage the 8.6 Appeal because the APA vested the determinations in the Closing Order exclusively in the Bankruptcy Court without the right of appeal.

C. SGM Expressly Waived Its Right to Appeal Orders in the APA.

"Waiver is the intentional relinquishment or abandonment of a known right." *See Hamer v. Neighborhood Hous. Servs. of Chicago*, — U.S. —, 138 S. Ct. 13, 17 n.1 (2017). Contractual appeal waivers are enforced by appellate courts in the Ninth Circuit. *See, e.g., U.S. Consol. Seeded Raisin Co. v. Chaddock & Co.*, 173 F. 577, 579 (9th Cir. 1909) (it is "universally held that, where such an agreement [to waive appeal rights] is made upon a valid and legal consideration, either before or after trial, it will be enforced in an appellate court, and the appeal, if taken will be dismissed") (citations omitted); *Throne v. Citicorp Inv. Servs. Inc.*, 378 Fed. Appx. 629 (9th Cir. 2010) (upholding express waiver of right to appeal and affirming).

Circuit courts enforce contractual appellate waivers intended to bind the parties to a determination of a specific court. *See Goodsell v. Shea*, 651 F.2d 765, 767 (C.C.P.A. 1981) ("It is common practice for parties in litigation to agree among themselves to be bound by the determination of a specific tribunal and not to prosecute an appeal . . . . [Such] agreements not to appeal should not be simply ignored."); *Brown v. Gillette Co.*, 723 F.2d 192, 192-93 (1st Cir. 1983) ("[t]hose who give up the advantage of a lawsuit in return for obligations contained in a negotiated decree, rely upon and have a right to expect a fairly literal interpretation of the bargain that was struck and approved by the court"); *Slattery v. Ancient Order of Hibernians in Am.*, No. 97-7173, 1998 WL 135601, at *1 (D.C. Cir. Feb. 9, 1998) (dismissing appeal where parties "agree[d] not to appeal any decision by the district court relating to defendants' motion for attorneys' fees"); *In re Lybarger*, 793 F.2d 136, 139 (6th Cir. 1986) (dismissing appeal based on appellate waiver and finding that plaintiff had "assumed the risk of an unreviewable decision").

SGM's agreement that "*any dispute between [SGM] and [the Debtors] as to whether an MAE has occurred for any purpose under this Agreement shall be exclusively settled by a determination made by the Bankruptcy Court*" constitutes an enforceable appeal waiver. Debtors' App. at 96-97. The provision is sufficiently express because it authorized the Bankruptcy Court to make an "exclusive" determination as to the existence of any MAE. *See, e.g.*, *In re Odyssey Contracting*

Corp., — F.3d —, 2019 WL 6766985, at *2-*3 (3d Cir. Dec. 12, 2019) (finding waiver sufficiently express where stipulation "indicate[s] an intent to waive" the appeal right by authorizing bankruptcy court to determine issue of breach "in all respects" and "with prejudice"). Further, the parties' agreement embodied in the APA constitutes "valid and legal consideration" in exchange for the express waiver. *Chaddock & Co.*, 173 F. at 579. Specifically, in interpreting Section 9.1(c), the Bankruptcy Court found that "SGM received substantial benefits under the APA […]. In exchange for receiving those benefits, SGM waived certain rights, including its right to appeal any determination made by the Bankruptcy Court with respect to the occurrence of a Material Adverse Effect." *Id.* at 1173. Accordingly, the Bankruptcy Court correctly determined that only it, "and no other court (including any appellate court), is entitled to determine Material Adverse Effect issues." *Id.*

After considering the Section 9.1(c) waiver language, the Bankruptcy Court found, among other things, that (i) all conditions precedent to SGM's obligation to close had been satisfied by November 19, 2019, (ii) no MAE has occurred, and (iii) any dispute between SGM and the Debtors as to whether an MAE has occurred shall be exclusively settled by the Bankruptcy Court. *Id.* at 1171-1176. Accordingly, the Bankruptcy Court held that, "[p]ursuant to §1.3 of the APA, SGM is obligated to close the SGM Sale by no later than December 5, 2019." *Id.* at 1171.

SGM agreed, in the APA, that the Bankruptcy Court is the sole arbiter of any disagreement relating to an MAE—the only issues raised in the Closing Order. SGM should be bound by that agreement, which is a waiver of its right to appeal. Therefore, the Court should dismiss the appeal of the Closing Order.

Further, in Section 8.6 of the APA, SGM agreed that "During any Evaluation Period [...] Purchaser shall reasonably cooperate in any efforts to render the Supplemental Sale Order a final, non-appealable order, including timely taking reasonable steps in preparation for closing of the transactions described in this Agreement." *Id.* at 94-96. As the Bankruptcy Court found, SGM is not entitled to an Evaluation Period here, despite their arguments to the contrary. But even if they were entitled to an Evaluation Period, such period, by SGM's counsel's own calculation, has already expired. *Id.* at 1191-1192.[7] SGM waived any basis to not close the Sale because (i) SGM failed to terminate the APA even after expiration of the Evaluation Period, to which they were not entitled, and (ii) SGM is required to cooperate with steps to close the transactions. Accordingly, SGM has expressly waived its right to appeal the 8.6 Order and the 8.6 Appeal must be dismissed.

[7] On December 2, 2019, counsel for SGM emailed counsel to the Debtor claiming an entitlement to an "Evaluation Period" "under section 8.6 [that] will not expire until December 16, 2019." *See* Debtors' App. at 1191. SGM did not terminate the APA on December 16, 2019. Any argument that SGM is entitled to an Evaluation Period, when they are not, is nonetheless moot.

D. Cause Exists to Grant the Motion on an Emergency Basis.

SGM is using these Appeals to cast doubt on its breaches of the APA and to manufacture barriers to its contractual basis to close. SGM's tactics are particularly egregious given the detrimental impact on the operating Hospitals and the losses the Hospitals bear while waiting for the Sale to close.. The Debtors' daily operational losses of $450,000 while the Sale remains in limbo is an increasingly dire threat to the Bankruptcy Cases and Hospitals. In addition to economic losses from operations, SGM's behavior has forced thousands of patients and employees to grapple with uncertain futures and has obligated the Debtors' management to vacillate between alternative operating plans. *See* Adcock Decl. ¶9. Dismissal of this appeal will resolve SGM's lingering allegations that such termination would violate the APA and present a clear path prior to the termination of the APA.

The impact of SGM's delay tactics on the Debtors' fragile Bankruptcy Cases is sufficient to grant emergency relief. *See In re Finley*, 135 B.R. 456, 458 (S.D.N.Y. 1992) (granting expedited appellate review to avoid "disruption" to "fragile" bankruptcy plan). SGM will doubtless claim that the Debtors' breached the APA by providing a notice of termination as of December 27, 2019, and by resolution of these Appeals, the Debtor is looking to foreclose any such argument. *See In re Dairy Mart Convenience Stores, Inc.*, 272 B.R. 66, 70 (S.D.N.Y. 2002) (granting expedited appellate review where movant demonstrated a likelihood of success on the merits

and impending need for prejudgment relief). The harm suffered by the Debtors and their constituents as a result of SGM's actions is immediate and ongoing, regardless whether the APA terminates on December 31 or earlier. Accordingly, SGM should not be able to forestall accountability for breaching the APA and causing the Debtors' estates and the Hospitals' communities immediate and irreparable harm.

SGM is not harmed by emergency relief. SGM will have the same seven-day period to respond as it would for a non-emergency motion. *See* Bankruptcy Rule 8013(a)(3)(A). The Debtors solely requested that (i) their seven-day reply deadline be shortened to accommodate the expedited schedule (Bankruptcy Rule 8013(a)(3)(B)) and (ii) that the Court rule on an emergency basis thereafter, no later than December 31, 2019. Accordingly, granting the Motion on an emergency basis is necessary, appropriate, and does not prejudice SGM.

IV. CONCLUSION

The Debtors respectfully request that the Court enter an order (i) dismissing the Appeals on an emergency basis not later than December 31, 2019 and (ii) granting such other relief as is just and necessary under the circumstances.

Dated: December 19, 2019

DENTONS US LLP
SAMUEL R. MAIZEL
TANIA M. MOYRON
NICHOLAS A. KOFFROTH

By: */s/ Tania M. Moyron*
Tania M. Moyron

Attorneys for Appellees
Verity Health Systems of California, Inc., *et al.*

DECLARATION OF RICHARD G. ADCOCK

I, Richard G. Adcock, submit this Declaration in support of the *Debtors' Motion to Dismiss Appeal* (the "Motion"),[8] and hereby state as follows:

1. I have personal knowledge of the facts stated in this Declaration, except as to those stated on information and belief, and, as to those, I am informed and believe them to be true. If called as a witness, I could and would competently testify to the matters stated herein.

2. I am, and have been since January 2018, the Chief Executive Officer of Verity Health System of California, Inc. ("VHS"). Prior thereto, I served as VHS's Chief Operating Officer since August 2017.

3. I have extensive senior-level experience in the nonprofit healthcare arena, especially in the areas of healthcare delivery, hospital acute care services, health plan management, product management, acquisitions, integrations, population health management, budgeting, disease management and medical devices. I have meaningful experience in both the technology and healthcare industries in the areas of product development, business development, mergers and acquisitions, marketing, financing, strategic and tactical planning, human resources, and engineering.

[8] Capitalized terms not otherwise defined herein have the definitions set forth in the Motion.

4. Prior to VHS, from 2014 until 2017, I served as Executive Vice President and Chief Innovation Officer of Sanford Health, a large integrated health system headquartered in the Dakotas dedicated to health and healing. In this role, I was responsible for leading Sanford Health's growth and innovation, in addition to direct operational oversight of the following related entities: Sanford Research, Sanford Health Plan; Sanford Foundation (a philanthropic fundraising foundation); Sanford Frontiers (a commercial and real estate company); Profile by Sanford (a scientific weight loss program); and Sanford World Clinic (which operates clinics in multiple countries).

5. From 2012 to 2017, I served as the President of Sanford Frontiers and had the responsibility of starting a new entity within Sanford Health focused on innovative ventures. From 2008 to 2012, I served as Executive Vice President of Sanford Clinic. I was responsible both for (i) working directly with the President of the Clinic to the lead team of Vice Presidents in all aspects of management, and (ii) Sanford World Clinics operations, including the design, opening and operation of several global clinics. From 2006 to 2008, I served as the Vice President of Sanford Clinic and was responsible for leading strategic, operational and financial aspects within Sanford Clinic. From 2004 to 2006, I served as Director of Clinical Operations at Sanford Children's Specialty Clinic and led the Pediatric Subspecialty Physician program and the clinical practice through all facets of the operation.

6. Prior to Sanford Health, I served as the Director of Engineering and Six Sigma Master Black Belt at GE Medical Systems, and before that served as the Vice President of Research and Development and the Co-Owner/Founder of Micro Medical Systems. I have a bachelor of science in business administration and a masters of business administration in healthcare management.

7. The Debtors incur operational losses of $450,000, per day. The Debtors cannot sustain these operational losses *ad infinitum*, particularly since the costs of delay are escalating beyond that anticipated by the Debtors. The Debtors obtained a consensual cash collateral agreement to fund operations; however, the agreement terminates if the Debtors do not close the Sale or confirm a plan by December 31, 2019, after which the Debtors will have no other likely source of funding or financing operations. The Debtors hold $25.4 million cash-on-hand in their operating accounts and an additional $70.8 million of escrowed proceeds from the Debtors' sale of SLRH and OCH to the County of Santa Clara. However, as responsible stewards of patient safety, the Debtors must maintain or have access to sufficient cash-on-hand to close the Hospitals safely in the event the Sale does not close.

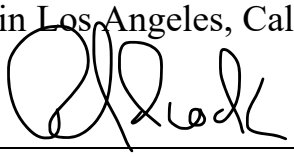
8. The Debtors anticipate the incremental costs of operations will continue to increase as the Bankruptcy Cases continue. By way of example, the Debtors continue to confront employee attrition due to the bankruptcy process, which means

the Debtors must increasingly turn to more expensive temporary staffing alternatives (e.g., *locum tenens* physicians and registry nurses). Additionally, the Debtors are required to maintain workers' compensation insurance while they maintain operations. The Debtors current workers' compensation insurance policy expires on January 1, 2020 and the sole alternative provider is a California state program with significantly more expensive annual premiums (more than $16 million per year).

9. In addition to economic losses from operations, SGM's delay in closing the Sale pursuant to the APA has caused widespread uncertainty among the Debtors' thousands of patients and employees. Further, given the uncertainty of a closing with SGM, the Debtors' management have been forced to consider alternative operating plans, which has further complicated the operations of the Debtors.

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

Executed this 19th day of December, 2019, in Los Angeles, California.



Richard G. Adcock

DECLARATION OF TANIA M. MOYRON

I, Tania M. Moyron, submit this Declaration in support of the *Debtors' Motion to Dismiss Appeal* (the "Motion"),[9] and hereby state as follows:

1. I have personal knowledge of the facts stated in this Declaration, except as to those stated on information and belief, and, as to those, I am informed and believe them to be true. If called as a witness, I could and would competently testify to the matters stated herein.

2. I am a Partner at Dentons US LLP, at 601 South Figueroa Street, Suite 2500, Los Angeles, California 90017-5704, and am one of the attorneys primarily responsible for representing Verity Health System of California, Inc., a California nonprofit benefit corporation and the Debtor herein, and the above-referenced affiliated debtors, the debtors and debtors in possession in the above-captioned chapter 11 bankruptcy cases (collectively, the "Debtors").

3. On November 15, 2019, SGM advised the Debtors that SGM would be sending formal correspondence material to the Sale. That same day, the Debtors were required to file a reply brief in support of the Disclosure Statement describing the Debtors' Plan. The Plan is contingent on the closing of the Sale. In good faith, the Debtors could not seek approval of the Disclosure Statement and proceed with

[9] Capitalized terms not otherwise defined herein have the definitions set forth in the Motion.

the Plan with the uncertainty surrounding the Sale. Consequently, that same day, the Debtors filed the motion to continue the hearing on the Disclosure Statement.

4. On December 3, 2019, I received an email from Gary Klausner, counsel to appellant SGM. In his email, Mr. Klausner informed me that SGM did not intend to close the Sale on December 5, 2019.

5. On December 19, 2019, I emailed Mr. Klausner and informed Mr. Klausner that the Debtors would file the Motion today, December 19, 2019. In the email I further informed Mr. Klausner that (i) SGM must file a response to the Motion not later than December 26, 2019, unless the Court otherwise directs, pursuant to Rule 8013(a)(3)(A), and (ii) that the Motion would seek entry of an order on an emergency basis not later than December 31, 2019.

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

Executed this 19th day of December, 2019, in Los Angeles, California.

/s/ Tania M. Moyron
Tania M. Moyron

CERTIFICATE OF COMPLIANCE

1. This Motion complies with the word limit of FED. R. BANKR. P. 8013(f) because, excluding the parts of the Motion exempted by FED. R. BANKR. P.8013(a)(2)(C) and FED. R. BANKR. P. 8015(g), this Motion contains 4,882 words.

2. This Motion complies with the typeface requirements of FED. R. BANKR. P. 8015(a)(5) and the type-style requirements of FED. R. BANKR. P. 8015(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: December 19, 2019

/s/ Tania M. Moyron
Tania M. Moyron

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court for the Central District of California by using the CM/ECF system.

I further certify that parties of record to this appeal who either are registered CM/ECF users, or who have registered for electronic notice, or who have consented in writing to electronic service, will be served through the CM/ECF system.

I further certify that some of the parties of record to this appeal have not consented to electronic service. I have served the foregoing document by the means set forth below:

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/s/ Tania M. Moyron
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