2:19-cv-10352-DSF[1]

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.[2]

Appellant

v.

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

Appellees

Bankruptcy Court Lead Case No.: 2:18-bk-20151-ER
Chapter 11

Judge: Hon. Dale S. Fischer
Courtroom: 7D
Location: 350 W. First Street
Los Angeles, CA 90012

APPELLEES' JOINT BRIEF

[1] This appeal (2:19-cv-10352-DSF) has been consolidated with the following related appeals: 2:19-cv-10354-DSF and 2:19-cv-10356-DSF.

[2] 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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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 8012 of the Federal Rules of Bankruptcy Procedure, Appellee Verity Health System of California, Inc. 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.

The Official Committee of Unsecured Creditors is a statutory committee appointed by the Office of the United States Trustee in the chapter 11 cases of Verity Health System of California, Inc., *et al.*, pursuant to 11 U.S.C. § 1102; it is not a corporate entity subject to Rule 8012.

The Attorney General of the State of California is an officer of the State of California pursuant to the Constitution of California, Article V, Section 13; he is not subject to Rule 8012.

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Appellees: (i) Verity Health System of California, Inc. ("VHS"), and its affiliated debtors and debtors in possession (the "Debtors") in their chapter 11 cases (the "Bankruptcy Cases") pending in the United States Bankruptcy Court for the Central District of California (the "Bankruptcy Court"); (ii) the Official Committee of Unsecured Creditors (the "Committee") appointed by the Office of the United States Trustee (the "UST") in the Bankruptcy Cases; and (iii) Xavier Becerra, the Attorney General for the State of California (the "AG"), collectively the appellees herein (the "Appellees"), hereby submit this Appellees' Joint Opening Brief (the "Brief"), pursuant to Rule 8014(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), in response to the Appellant's Opening Brief ("AOB") filed by Appellant, Strategic Global Management, Inc. ("SGM").

JURISDICTIONAL STATEMENT

The Court has jurisdiction to hear appeals from the Bankruptcy Court pursuant to 28 U.S.C. § 158(a); however, as set forth below, the Court should decline jurisdiction over these Appeals.

INTRODUCTION

SGM's appeals (the "Appeals") of the Bankruptcy Court's orders entered on (i) November 14, 2019 (the "AG Order"), (ii) November 18, 2019 (the "Scheduling Order"), and (iii) November 27, 2019 (the "MAE Order," and collectively with the

AG and Scheduling Orders, the "Orders") are, in the words of the Bankruptcy Court, "defective and frivolous." RJN, Ex. L, at 11.[3]

The Debtors and SGM entered the Amended Asset Purchase Agreement (the "APA") for the sale of four acute care hospitals and related assets (the "Sale"), which the Bankruptcy Court approved (the "Sale Order"). AA0739-0765. The Debtors incurred significant expense performing under the APA and diligently preparing for a closing of the sale for nearly a year. Once all contingencies precedent to close under the APA were satisfied, waived or passed, Defendants refused to close the sale and sought to coerce Plaintiffs into a re-trade at a substantially lower purchase price. As the Bankruptcy Court recognized, SGM's efforts were designed to hold "the estates, creditors, and patients of the Hospitals hostage in an attempt to extort a better purchase price." AA01608.

The Appeals arise out of SGM's attempt to manufacture an excuse not to close the Sale as obligated under the APA. The Debtors obtained the AG Order, satisfying its obligations under Section 8.6. The AG did not appeal the AG Order; nor did any other party in interest. Only SGM did so; but SGM was the party for whose benefit the AG Order was intended—to permit closing on the Sale notwithstanding the AG's attempt to impose Additional Conditions (defined below). Because the only party

[3] All references to "DA" refer to the Debtor Appendix filed in Case No. 2:19-CV-10352.

that could have had a basis for appealing the AG Order (the AG) had agreed not to do so, the Bankruptcy Court properly concluded that the requirements of Section 8.6 had been satisfied in the Scheduling Order.

Missing from the Appellant's analysis is any mention that the Bankruptcy Court made clear the Scheduling and MAE Orders were entered for one purpose only—to facilitate the Sale—and, in the event of litigation between the parties, the matters addressed in those two interlocutory Orders would need to be tried to resolution. Ultimately, the Scheduling and MAE Orders had no impact on SGM, since SGM refused to close.

Under these circumstances, appellate review of the Orders is not proper. *First*, as the Bankruptcy Court properly recognized, "[t]he appeals of the Orders are constitutionally and equitably moot," both because there is no relief that can be fashioned to resurrect the Sale and the Appeals arise from SGM's own actions (or inaction). *Second*, the Scheduling and MAE Orders are interlocutory. SGM failed to obtain leave to appeal them, and SGM could not meet the standard for leave to appeal because such orders do not involve "a controlling question of law as to which there is a substantial ground for difference of opinion." *Third*, the Appeal of the MAE Order should be dismissed because SGM expressly waived its right to appeal that Order given the parties' agreement in Sections 9.1(c) and 12.3 of the APA that the Bankruptcy Court would have exclusive jurisdiction over and exclusive authority

to settle any disputes regarding any alleged "material adverse effect." SGM also waived its right to appeal the AG Order given its contractual agreement to cooperate with the Debtors to obtain a final, non-appealable order, which the AG Order satisfied. *Fourth*, for the same reasons stated by the Bankruptcy Court, SGM is judicially estopped from appealing the Scheduling Order. *Fifth*, having been afforded all the relief to which it was entitled under the APA, or, more precisely, not having been deprived of any rights it was granted under Section 8.6, SGM has no standing to prosecute the Appeals.

If the Court does review the merits of the Orders, the Court should find the Appeals lack merit because the Bankruptcy Court properly concluded that the conditions to closing under the APA had been satisfied. The record demonstrates that the Debtors satisfied both Sections 8.6 and 8.7 and placed SGM in the position to close the Sale as agreed. Furthermore, SGM received appropriate due process, and SGM's flawed due process argument to the contrary is nothing more than an attempt to obfuscate its own tactics. SGM has been a constant participant in the Bankruptcy Cases and received notice, filed pleadings and appeared at each of the hearings that led to the Orders, which reflect deliberate consideration of SGM's actions and perspectives.

Finally, SGM's argument that the AG Order should be reversed because it resulted from a stipulation that amounted to a settlement that did not comply with

Rule 9019 similarly lacks merit and is procedurally improper. *First*, SGM forfeited this argument by not raising it to the Bankruptcy Court. *Second*, there was no settlement subject to Rule 9019: the AG Order gave the Debtors the precise relief they had sought by motion, which motion SGM had supported.

For these reasons and the other reasons set forth below, the Debtors respectfully request that the Appeals be dismissed or, alternatively, that the Orders be affirmed in their entirety.

ISSUES ON APPEAL

1. Whether the Appeals are moot, thus divesting this Court of jurisdiction?

2. Whether this Court lacks jurisdiction as to the Scheduling Order and the MAE Order because those Orders are interlocutory and, thus, not subject to appeal as of right?

3. Whether SGM waived its right to appeal the MAE Order?

4. Whether SGM is judicially estopped from appealing the Scheduling Order?

5. Whether SGM waived its right to appeal the AG Order?

6. Whether SGM lacks the requisite standing to appeal the Orders?

7. Whether the Bankruptcy Court properly concluded that Sections 8.6 and 8.7 had been satisfied?

8. Whether SGM forfeited any right to challenge the AG Order on Rule 9019 grounds by failing to raise the issue below?

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Parties

On August 31, 2018 (the "Petition Date"), the Debtors each filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq*. (the "Bankruptcy Code").[4] DA003. On the Petition Date, VHS was the sole corporate member of five Debtor California nonprofit public benefit corporations that operated O'Connor Hospital, Saint Louise Regional Hospital, and St. Vincent Medical Center ("SVMC"), and continues to operate St. Francis Medical Center ("SFMC") and Seton Medical Center ("SMC," and collectively with SVMC and SFMC, the "Hospitals"). DA004.

On September 17, 2018, the UST appointed the Committee, one of the Appellees, comprising nine of the Debtors' significant creditors.

The AG has been an active party in the Bankruptcy Cases and is an Appellee solely with respect to the AG Order.

Appellant SGM is a California corporation headquartered in Corona, California.

[4] Unless otherwise indicated, all references to "§"are to sections of the Bankruptcy Code, and all references to "Section" are to the APA.

B. The SGM Sale

On January 8, 2019, SGM executed the APA and thereby committed itself to acquire the Hospitals in the amount of $610,000,000, plus assumption of certain liabilities, and payment of cure costs associated with any assumed leases, contracts and assumption of other obligations. AA0110-0116. The APA contains, among others, provisions requiring approval by the Bankruptcy Court, approval by the AG, and transfer of Medicare and Medi-Cal provider agreements to SGM. AA0110-0738. The APA provides that "any dispute between Purchaser and Sellers as to whether a Material Adverse Effect has occurred for any purpose under this Agreement shall be *exclusively settled* by a determination made by the Bankruptcy Court." AA0147-0148 (emphasis added). The APA also included a broad forum selection and jurisdictional waiver clause.

On January 17, 2019, the Debtors filed a motion (the "Sale and Bidding Procedures Motion") to approve the form of APA, SGM as the Stalking Horse Bidder and related "stalking horse" bidding procedures for the Sale, DA056-172, which the Bankruptcy Court approved with certain modifications (the "Bidding Procedures Order"), DA173-208. At the hearing, SGM's counsel represented that SGM would be required to close the Sale if an order consistent with Section 8.6 (defined therein as a "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.

AA01546.

On May 2, 2019, the Bankruptcy Court entered the Sale Order approving SGM as the purchaser of the Hospitals. AA0739-0765. Paragraph 27 of the Sale Order provided, in relevant part:

> This Court shall retain exclusive jurisdiction to interpret, construe, and enforce the provisions of the APA and this Sale Order ***in all respects***, and further, including, without limitation, ***to (i) hear and determine all disputes between the Debtors and/or SGM***, as the case may be . . . and any dispute between SGM and the Debtors as to their respective obligations with respect to any asset, liability, or claim arising hereunder; (ii) compel delivery of the Purchased Assets to SGM free and clear of Encumbrances[.][5]

AA0761 (emphasis added).

The foregoing paragraph is consistent with Section 12.3, which provides:

> For so long as Sellers are subject to the jurisdiction of the Bankruptcy Court, the parties irrevocably elect, ***as the sole judicial forum for the adjudication of any matters arising under or in connection with the Agreement, and consent to the exclusive jurisdiction of the Bankruptcy Court***. The parties hereby consent to the jurisdiction of such court and waive their right to challenge any proceeding involving or relating to this Agreement on the basis of lack of jurisdiction over the Person or forum non conveniens.

[5] "Sale order" is defined in Section 6.1(c) with the following qualification: "Consistent with this Agreement and in a form reasonably satisfactory to Purchaser." AA0143.

AA0154 (emphasis added).

C. AG Review and Section 8.6

California state law authorizes the AG to review the sale of a non-profit health care facility to a for-profit entity, and provide consent with or without conditions. CAL. CORP. CODE §§ 5914-5925; CAL. CODE REGS. TIT. 11, § 999.5. Accordingly, the Debtors, SGM, and the Committee negotiated heavily a revised version of Section 8.6 below, whose revised terms were incorporated into the Bidding Procedures Order. AA0966-0968.

Section 8.6 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. For purposes of this Section 8.6, Additional Conditions which individually or collectively impose a direct or indirect cost to Purchaser of $5 million, or more, shall be conclusively deemed to be "materially different."

AA0145-0146 (emphasis added). In short: if the AG imposed "Additional Conditions"—conditions materially different from SGM's Purchaser Approved Conditions—the Debtors could seek a "Supplemental Sale Order" finding that: (i) the Additional Conditions were an "interest in property" under § 363(f); and (ii) the Hospitals could "be sold free and clear of the Additional Conditions without the imposition of any other conditions, which would adversely affect" SGM. AA0146, ll. 3-10. In that event, SGM would be obligated to close the Sale.

D. The AG Conditions and AG Order

On September 25, 2019, the AG consented to the Sale subject to certain conditions, some of which were materially different than those to which SGM contractually agreed in Schedule 8.6 (the "Additional Conditions"). AA01011-01050.

On September 30, 2019, the Debtors filed an emergency motion (the "AG Motion," AA0890-1175), requesting that the Bankruptcy Court enter an order finding that the Sale was "free and clear of the Additional Conditions" (AA0950, ll. 12-14). The AG opposed the AG Motion.

On October 10, 2019, SGM filed a statement in support of the AG Motion (the "Statement of Support," AA01451-01459): "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) . . . , *as described more fully in Section 8.6 of the APA*." AA01452, ll. 20-23 (emphasis added); *see also* AA0966-0968.

On October 23, 2019, the Bankruptcy Court entered a memorandum (the "AG Memo Decision"), (1) holding that the Additional Conditions were interests in property under § 363(f) and that the Hospitals could be sold to SGM free and clear of them (AA01489); (2) granting the AG Motion; and (3) directing the Debtors to lodge an order consistent with the ruling. AA01466-01489. The Bankruptcy Court certified its ruling for direct appeal to the Ninth Circuit, noting that "the interplay between the sale provisions of the Bankruptcy Code and the authority of the [AG] to regulate the sale of assets subject to a charitable trust is a matter of public importance"; and that "[a] direct appeal w[ould] materially advance the progress of the case." AA01488-01489 (recognizing that "[t]he Debtors [we]re facing severe liquidity constraints and [could not] afford to continue to operate the Hospitals for much longer," and their sale to SGM was the "lynchpin of the Debtors' plan of reorganization," but SGM would not be "obligated to close the sale unless the Debtors obtain[ed] a final, non-appealable order authorizing a sale free and clear"—so "direct appeal [would] facilitate resolution of this case by providing certainty regarding the permissibility of a sale free and clear far sooner than would otherwise be possible").

The AG agreed not to appeal, but instead worked with all parties to create an order that (1) granted the AG Motion and the relief sought therein without compromise (*i.e.*, imposing no additional conditions), and (2) would not prejudice the AG in future bankruptcy cases. The Debtors and the AG worked diligently for ten days to satisfy SGM's concerns regarding the wording of the proposed order granting the AG Motion (the "Proposed Order"). AA01498-01504. The Debtors were unable to obtain SGM's agreement to the language at issue even though the Proposed Order contained the findings required in Section 8.6.

On November 8, 2019, the Debtors and the AG filed a stipulation (the "Stipulation"), pursuant to which: (i) the AG agreed the AG Motion would be granted and waived any appeal; (ii) the Debtors and the AG agreed that the AG Memo Decision would be vacated and withdrawn; and (iii) the Proposed Order would incorporate the language of Section 8.6 nearly verbatim.[6] AA01495-01497. The Stipulation was submitted along with a notice: (i) requesting that the Bankruptcy Court approve it on an expedited basis; and (ii) lodging the Proposed Order. AA01490-01508.

On November 11, 2019, SGM filed an objection to the Proposed Order (the "SGM Objection") and lodged a competing order. AA01509-01528. SGM's

[6] *See* section II.A.1, *infra*, for a side-by-side comparison of the language.

objection was *not* to the Proposed Order's substance, but rather to its language and, to that end, offered preferred wording. AA01522-01523. SGM's objection sought revisions to the Proposed Order to rectify purported ambiguities "that may actually result in litigation between the AG and SGM." AA01512. Specifically, SGM sought to add a phrase that does not appear in Section 8.6. *Compare* AA01509-01515; *with* AA0145-0146. The Debtors and the Committee filed responses. DA217-221, DA222-232.

On November 12, 2019, the Bankruptcy Court issued a tentative ruling (the "Tentative Ruling") in advance of its hearing on the AG Motion, which stated that SGM and the other parties "should be prepared to address the following questions and concerns of the Court," including, *inter alia*: (1) the meaning of the phrase "Solely and Exclusively for the purposes of the APA" (informing the parties that "[i]t is not clear to the Court what is ambiguous about this prefatory phrase"); (2) the difference between the phrases "can be sold" and "are being transferred" (informing the parties that, in the context of the Proposed Order, "the Court is unable to discern a meaningful difference between the two"); and (3) whether the Proposed Order satisfies Section 8.6. That same day, on November 12, 2019, the Bankruptcy Court entered an order setting an emergency hearing on the SGM Objection and the dueling forms of order, and attached the Tentative Ruling as "Exhibit A—Questions

and Concerns," addressing the merits of the form-of-order dispute over two-plus single-spaced pages. DA233-237.[7]

On November 13, 2019, the Bankruptcy Court held a hearing on the Stipulation, which lasted more than 90 minutes. DA490-555.[8] The Debtors, SGM, the Committee, the AG,[9] two unions representing Debtor employees, and other constituents appeared. *Id.* Only SGM objected to the form of order agreed to by the Debtors and AG. DA529, ll. 3-18. The Debtors and AG agreed to certain minor modifications to the Proposed Order at the Bankruptcy Court's suggestion, and the Bankruptcy Court overruled the SGM Objection. DA238-245.

On November 14, 2019, the Bankruptcy Court entered the AG Order, which made three contractually-required findings and provides, in part, that:

> ***Solely and exclusively for purposes of the APA*** (as defined below) ***and the Motion***, the Additional Conditions (as defined in section 8.6 of that certain asset purchase agreement [Docket No. 2305-1] (the "APA")) are an "interest in property" for purposes of 11 U.S.C. § 363(f). 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).

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[7] Included by SGM in its designation of the record, but neither mentioned in the AOB nor included in its AA.

[8] *See* note 7, *supra*.

[9] Messrs. Toma and Eldan, of the Department of Justice, appeared for the AG; the second page of the transcript erroneously states otherwise.

AA01531-01533 (emphasis added).

Neither the AG nor any other third party appealed the AG Order. SGM appealed the AG Order, despite its representations to the Bankruptcy Court and its obligations under the APA to cooperate with (and not impede) the Debtors' efforts to obtain a final non-appealable order. DA273-283; AA0146. SGM did not seek a stay of the AG Order.

E. Section 8.6 and the Scheduling Order

On November 15, 2019, the Debtors filed a motion to continue upcoming deadlines related to the Debtors' disclosure statement and hold the November 20, 2019 hearing as a status conference because SGM indicated it would send the Debtors correspondence material to the Sale. AA01535.

On November 18, 2019, the Bankruptcy Court entered the Scheduling Order that provided, 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*.

AA01549 (emphasis added).

The Bankruptcy Court also entered a memorandum decision (the "Scheduling Memo Decision") finding that: "SGM is judicially estopped from contending that it is entitled to the Evaluation Period [as defined in the APA] and is not obligated to

promptly close the sale. . . . Having received benefits under the APA, SGM is judicially estopped from contradicting its prior representations regarding its obligation to close the sale." AA01546-01547. On November 29, 2019, SGM appealed the Scheduling Order. DA284-293.

F. Section 8.7 and the MAE Order

On October 11, 2019, the Bankruptcy Court entered an Order (the "Transfer Order," AA01460-01465) authorizing the transfer of the Medi-Cal Provider Agreements free and clear of any interests asserted by California Department of Health Care Services ("DHCS"), which supplemented the terms of the Sale Order that had terminated any creditor's recoupment rights. AA0739-0765.

On November 19, 2019, the Debtors requested another extension of the disclosure statement-related dates, and to hold the rescheduled November 26, 2019 hearing date as another status conference because the Debtors had yet to receive SGM's correspondence concerning the Sale. DA253 ("As of the filing of this Motion, November 19, 2019, the Debtors have not received any such correspondence, but have been informed that it is forthcoming.").

On November 22, 2019, the Debtors received two letters from SGM (the "Nov. 22 Letters"), comprising "19 single-spaced pages of legal argument and 38 pages of supporting exhibits." AA01606. On November 24, 2019, the Debtors filed another status report. AA01557-01561. On November 25, 2019, the Debtors

requested to file their correspondence with SGM under seal for consideration at the status conference because it was "relevant to the Court's request that the Debtors provide 'the status of the closing of the SGM Sale.'" DA256.

On November 26, 2019, the Bankruptcy Court held a status conference (the "Status Conference") regarding the APA and the Sale, at which SGM appeared and made arguments. AA01582-01602.

On November 27, 2019, the Bankruptcy Court entered the MAE Order, finding that SGM was obligated to close the Sale by no later than December 5, 2019. AA01612. The Bankruptcy Court issued a memorandum decision (the "MAE Memo Decision"), stating that it had "previously found that the conditions precedent to closing set forth in [Section] 8.6 of the APA have been satisfied" and that "[a]ll other conditions precedent to closing were satisfied as of November 19, 2019." AA01609. The Bankruptcy Court specified that "[t]he Debtors materially complied with Article 8.7 by obtaining an order authorizing the transfer of the Medi-Cal Provider Agreements free and clear of any interest asserted by the DHCS." AA01609.

Pursuant to the APA, SGM was required to close the Sale within ten business days of the Debtors' satisfaction of all conditions to closing. AA01609.

On December 3, 2019, SGM appealed the MAE Order, but did not seek a stay pending appeal. DA294-304. SGM did not close the Sale on December 5, 2019, or thereafter.

On December 17, 2019, the Debtors sent SGM a letter stating that SGM was in material breach of the APA and that the APA would terminate effective December 27, 2019 (the "Termination Letter"). RJN, Ex. J.

G. Events After Termination of the APA

On December 9, 2019, the Bankruptcy Court entered an order which provided that any "efforts undertaken by the Debtors with respect to alternative disposition of the Hospitals will not violate the Debtors' obligations under Article 12.1 of the APA." DA309. On January 9, 2019, the Bankruptcy Court entered an order authorizing the Debtors to shut down SVMC. RJN, Ex. C.

On January 3, 2020, the Debtors commenced an adversary proceeding (the "Adversary Proceeding") against SGM and others, alleging, *inter alia*, breaches of the APA and promissory fraud. RJN, Ex. K. On February 11, 2020, the Bankruptcy Court entered an order denying SGM's motion to stay the Adversary Proceeding because, among other things, "the findings in the Orders were limited to the failed SGM Sale, those findings are not dispositive of the claims asserted in the Complaint." RJN, Ex. L. On March 4, 2020, this Court entered an order granting SGM's motion to withdraw the reference of the Adversary Proceeding. RJN, Ex. O.

On April 10, 2020, and April 11, 2020, the Bankruptcy Court entered two orders granting the Debtors' motions to sell SVMC and SFMC. RJN, Exs. M, N. A hearing for the sale of SMC is scheduled for April 22, 2020. RJN, Ex. G.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction over all three Appeals because they are moot. This Court also lacks jurisdiction over the Scheduling and MAE Orders because they are interlocutory and, thus, not subject to appeal as of right.

Alternatively, this Court should affirm the AG and MAE Orders because SGM expressly waived its right to appeal them in the APA as exchanged mutual consideration. Similarly, this Court should affirm the Scheduling Order because the Bankruptcy Court found that SGM's representations to the Bankruptcy Court regarding its obligation to close the Sale judicially estopped SGM from challenging that Order.

On the merits, the Bankruptcy Court properly concluded that the Debtors satisfied all conditions precedent to consummation of the Sale, and SGM was afforded appropriate due process protections in connection therewith. The AG Order is not a bankruptcy settlement under Rule 9019.

STANDARD OF REVIEW

The Bankruptcy Court's factual findings as to "what the parties said or did" relative to their obligations under the APA are reviewed for clear error. *L.K. Comstock & Co., Inc. v. United Eng'rs & Constructors Inc.*, 880 F.2d 219, 221 (9th Cir. 1989); *see also Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878 (9th Cir. 2009). The Bankruptcy Court's determination of its

authority to "exclusively settle" any Material Adverse Effect dispute is reviewed for clear error. *L.K. Comstock & Co., Inc.*, 880 F.2d at 221. Further, the Bankruptcy Court's decision whether to invoke judicial estoppel, and whether it properly applied the doctrine to the facts presented in this case, is reviewed for an abuse of discretion. *Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d 1024, 1044 (9th Cir. 2016); *Wagner v. Prof. Eng'rs in Cal. Govt.*, 354 F.3d 1036, 1040 (9th Cir. 2004).

ARGUMENT

I. APPELLATE REVIEW OF THE ORDERS WOULD BE IMPROPER.

This Court should decline review of the Appeals on grounds of mootness, lack of finality, waiver, judicial estoppel, and lack of standing.

A. This Court Should Decline Jurisdiction Over the Appeals Because They Are Moot, and No Adequate Relief May Be Fashioned.

The Appeals are now constitutionally and equitably moot because changed circumstances make it impractical for this Court to fashion adequate relief and, therefore, this Court should not consider the merits of the Appeals. *See In re Mortgages Ltd.*, 771 F.3d 1211, 1215, n.2 (9th Cir. 2014) ("We have at times referred to equitable mootness as a jurisdictional bar."); *In re Baker & Drake Inc.*, 35 F.3d 1348, 1351 (9th Cir. 1994); *see also Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 880-81 (9th Cir. 2012).

Expressly finding that "[t]he appeals of the Orders are constitutionally and equitably moot," the Bankruptcy Court offered the following explanation:

> The relief set forth in each of the Orders contemplates the effectiveness and closing of the SGM Sale pursuant to the APA. The Court cannot grant relief with respect to closing the SGM Sale given the dramatic change in circumstances after SGM's refusal to close. The APA was terminated on December 27, 2019. The Debtors obtained orders authorizing them to undertake alternative transactions and authorizing the closure of St. Vincent Medical Center. It is no longer possible for the Debtors to close the transaction contemplated by the APA. Consequently, the Orders—which each pertain to the closing of the SGM Sale—are moot.

RJN, Ex. L, at 11.

Bankruptcy appeals may be dismissed for mootness on constitutional (Article III) and equitable grounds. *Thorpe*, 677 F.3d at 880. An appeal from a bankruptcy court's order is deemed constitutionally moot when it is impossible for the appellate court to grant "any effective relief." *Id.*; *In re Burrell*, 415 F.3d 994, 998 (9th Cir. 2005). Where some type of relief may be possible or even legally warranted, "[c]ourts may also dismiss an appeal on the grounds of *equitable* mootness when the equities weigh in favor of dismissal." *In re Barbour*, No. CV 17-02857 SJO, 2017 WL 8791902, at *2 (C.D. Cal. Nov. 15, 2017) (emphasis in original); *see also Trone v. Robert Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793, 797 (9th Cir. 1981).

The Orders are moot because it is no longer possible for SGM to close the Sale under the terms of the Orders, whether affirmed, modified, or vacated; neither is it possible for a court to reverse the consequences of SGM's failure to close for the Debtors, the Committee's constituents, or the AG. *See, e.g. In re Mortgages*

Ltd., 771 F.3d at 1218 (9th Cir. 2014); *Fultz v. Rose*, 833 F.2d 1380, 1380 (9th Cir. 1987).

Following the collapse of the Sale, the Bankruptcy Court authorized the Debtors to shut down SVMC, which had an immediate material impact on the lives of patients, their families, employees and third parties. Reversal of the orderly closure plan for SVMC to belatedly consummate the APA is not remotely practicable, and certainly not possible without further impacting innocent third parties. Critically, SGM did not challenge the Debtors' motion to shut down SVMC, and did not seek a stay of that order. In addition, the Debtors have obtained Bankruptcy Court orders authorizing the sale of both SFMC and SVMC, as well as sought further procedures for the sale of SMC, making a return to the terms of the APA even more impracticable. *See* RJN, Exs. G, M, N.

Further, in response to the COVID-19 pandemic, the Debtors have entered into agreements with the State of California, whereby the State has leased SVMC for at least six months and reserved at least 177 beds at SMC for at least six months to care for patients impacted by the COVID-19 pandemic. *See* RJN, Ex. F.

SGM's own role in the process further renders the Appeals equitably moot, including SGM's failure to diligently pursue their available remedies to obtain a stay of the Orders, thereby "permit[ing] such a comprehensive change of circumstances to occur as to render it inequitable for this court to consider the merits of the appeal."

Roberts Farms, 652 F.2d at 798; *see also Thorpe*, 677 F.3d at 880-81 ("We will look first at whether a stay was sought, for absent that a party has not fully pursued its rights.").

B. This Court Lacks Jurisdiction Over the Scheduling and MAE Order Appeals Because the Underlying Orders Are Interlocutory.

The Scheduling and MAE Orders are interlocutory because they do not "finally determine a cause of action." *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). Further, SGM never filed a motion seeking leave to appeal. Absent such leave to appeal, a jurisdictional inquiry as to the nature of the order from which an appeal is taken is mandatory. *See* 28 U.S.C. § 158(a)(1), (3); *Ritzen Group Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582 (2020); *Butler v. Dexter*, 425 U.S. 262, 263 n.2 (1976); *In re Martinez*, 721 F.2d 262, 264 (9th Cir. 1984).

A final order is one that "end[s] the . . . adjudication and le[aves] nothing more for the Bankruptcy Court to do in that proceeding." *Ritzen*, 140 S. Ct. at 592. The Bankruptcy Court made clear that the Scheduling and MAE Orders were intended solely to facilitate the closing of the Sale by offering interpretive guidance, and, conversely, were in no way intended to have any collateral estoppel effect in later litigation concerning breach of the APA. *See, e.g.*, DA306; RJN, Ex.L, at 16. On December 9, 2019, the Bankruptcy Court reaffirmed the interlocutory nature of these Orders, finding that "[i]n the future, the Debtors will have an opportunity to litigate

the issues of whether SGM has breached the APA and whether the Debtors are entitled to retain SGM's good-faith deposit." DA306; *see also* RJN, Ex. L, at 16 (ruling that "[t]he Orders do not adjudicate whether SGM breached the APA; nor do the Orders contain findings that compel the Court to rule in the Debtors' favor with respect to the Complaint's breach of contract claim").

Neither the Scheduling nor MAE Order is "important enough" under *Bullard v. Blue Hills Bank*, 575 U.S. 496, 135 S. Ct. 1686, 1695 (2015), or a "discrete, controversy-resolving decision" under *Ritzen*, 140 S. Ct. at 587, so as to be considered final using a "pragmatic approach" under *In re Bonham*, 229 F.3d 750, 761 (9th Cir. 2000). The Scheduling Order provides that the remaining conditions are to be satisfied and the merits—issues involving questions of California law and contract interpretation—remain unadjudicated. *See Bonham*, 229 F.3d at 761; *see also In re Marino*, 949 F.3d 483, 487 (9th Cir. 2020). Similarly, the Bankruptcy Court's conclusions under the MAE Order and MAE Memo Decision that "SGM ***is*** obligated to close the SGM Sale by no later than December 5, 2019," AA01604, AA01609 (emphasis added), did not purport to compel SGM to close, resolve questions of breach of contract or fraud or impose liability or damages.

Even if this Court were inclined to treat SGM's notices of appeal as requests for leave under Bankruptcy Rule 8004(d), SGM could not meet the standard for leave to appeal, because the Scheduling and MAE Orders do not involve "a

controlling question of law as to which there is a substantial ground for difference of opinion." *See Shurance v. Planning Control Int'l, Inc.*, 839 F.2d 1347, 1347 (9th Cir. 1988) (quotation omitted); *Cal. Pub. Emps. Ret. Sys. v. City of San Bernardino (In re City of San Bernardino),* 260 F. Supp. 3d 1216, 1223-24 (C.D. Cal. 2013).

C. SGM Expressly Waived Its Right to Appeal the MAE Order in the APA and Sale Order.

SGM contractually agreed in Section 9.1(c) that issues relating to a Material Adverse Effect (an "MAE") would be "exclusively settled" by a determination of the Bankruptcy Court.[10] AA0147-0148 ("[A]ny dispute between the Purchaser and the Sellers as to whether a Materially Adverse Effect has occurred for purposes under this Agreement shall be *exclusively settled by a determination made by the Bankruptcy Court*.") (emphasis added). SGM further agreed in Section 12.3 as follows:

> For so long as Sellers are subject to the jurisdiction of the Bankruptcy Court, the parties irrevocably elect, as the sole judicial forum for the adjudication of any matters arising under or in connection with the Agreement, and consent to the exclusive jurisdiction of the Bankruptcy Court.

[10] The word "settled" is a synonym for "resolved," indicating the parties' enforceable intent to execute a unique means of dispute resolution. *See* SETTLE, Black's Law Dictionary (11th ed. 2019) ("2. To end or resolve (an argument or disagreement, etc.); to bring to a conclusion (what has been disputed or uncertain) <they settled their dispute>").

AA0154.[11] By agreeing to these two related provisions regarding MAEs, SGM (a) secured the coveted, court-approved exclusive status of winning bidder; and (b) contractually ceded sole power and jurisdiction over this issue to the Bankruptcy Court, waiving any right to appeal substantive determinations by the Bankruptcy Court regarding the MAEs to another forum.

The AOB does not contain any reference to Section 9.1(c) or 12.3. Nor does SGM support its position with any legal authority regarding contractual waiver of appellate rights. Instead, SGM cites inapposite cases predicated on the unremarkable proposition that waiver constitutes an intentional relinquishment of known rights. *See Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 n.1 (2017); *United States v. Depue*, 912 F.3d 1227, 1232 (9th Cir. 2019); *United States v. Amwest Sur. Ins. C*o., 54 F.3d 601, 602-03 (9th Cir. 1995).

The other two cases cited in the AOB, although proffering a more substantive discussion of waiver, are also distinguishable. In *In re Birting Fisheries, Inc*., 178 B.R. 849, 850 (W.D. Wash. 1995), the debtor and certain class claimants negotiated modifications to the debtor's plan of reorganization with respect to the class claims.

[11] Similarly, the exclusive review of APA issues was incorporated into the Sale Order retention of jurisdiction provisions: "This Court shall retain exclusive jurisdiction to interpret, construe, and enforce the provisions of the APA and this Sale Order . . . ." AA0761.

In contrast to the language of the APA and the Sale Order, however, the language at issue in *Birting* did not mention finality or jurisdictional exclusivity at all. *Id.*

Moreover, *Aerojet—General Corp. v. American Arbitration Ass'n*, 478 F.2d 248, 251 (9th Cir. 1973), involved an arbitration proceeding in which the court determined that "[o]rdinary language to the effect that the decisions of the arbitrator shall be 'final and binding' has been held not to preclude *some* judicial review." *Id.* (emphasis added). But arbitration, with its different policy objectives, presents a far different situation than the waiver of judicial review at issue in the Bankruptcy Cases. *See, e.g., In re Wal-Mart Wage & Hour Employment Practices Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013).

By contrast, settled precedent in the Ninth Circuit (and beyond) enforces appeal waivers. *See e.g.*, *Throne v. Citicorp Inv. Serv. Inc.*, 378 Fed. App'x. 629 (9th Cir. 2010) (upholding express waiver of right to appeal and affirming); *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); *see also Minesen Co. v. McHugh*, 671 F.3d 1332, 1343 (Fed. Cir. 2012); *Slattery v. Ancient Order of Hibernians in Am.*, No. 97-7173, 1998 WL 135601, at *1 (D.C.

Cir. Feb. 9, 1998); *In re Lybarger*, 793 F.2d 136, 139 (6th Cir. 1986); *Goodsell v. Shea*, 651 F.2d 765, 767 (C.C.P.A. 1981).

Section 9.1(c) is sufficiently express to constitute an enforceable appeal waiver 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.*, 944 F.3d 483, at 488 (3d Cir. 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").

The agreements of the parties reflected in the APA constitute "valid and legal consideration" in exchange for the express waiver. *Chaddock & Co.*, 173 F. at 579. 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." AA01606. The Bankruptcy Court correctly determined that only it, "and no other court (including any appellate court), is entitled to determine Material Adverse Effect issues." AA01606.

This Court should dismiss the MAE Order appeal because SGM agreed in the APA that the Bankruptcy Court is the sole arbiter of any disagreement relating to any alleged MAE—the only issues raised in the MAE Order.

D. SGM is Judicially Estopped from Challenging the Scheduling Order.

SGM is judicially estopped from challenging the Scheduling Order because allowing it to effectuate "such positional changes [would] have an adverse impact on the judicial process." *See Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990) (quotation and citations omitted); *see also Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996).

Although SGM asserts it "was not given any opportunity to be heard on the subject of judicial estoppel," judicial estoppel is not subject to notice and a hearing. Rather, "[b]ecause it is intended to protect the integrity of the judicial process, it is an equitable doctrine *invoked by a court at its discretion*." *Russell*, 893 F.2d at 1037 (emphasis added).

Judicial estoppel also may be used to bar an appeal. *See Smith v. United Parcel Serv.*, 578 Fed. App'x. 755 (10th Cir. 2014); *UNR Indus., Inc., v. Bloomington Factory Workers*, No. 92-C-6396, 1993 WL 181453, at *2 (N.D. Ill. May 27, 1993); *cf. Russell*, 893 F.2d at 1038.

The Bankruptcy Court entered the Sale Order in reliance on SGM's representation at the hearing:

> 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.

AA01546; *see also* DA360, ll. 2-6. Further, the Bankruptcy Court "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." AA01547.

The Debtors obtained the AG Order, which was a final, non-appealable order, because the only parties that objected to the AG Motion withdrew their objection. The Bankruptcy Court found that the AG Order was a final order and that SGM was "judicially estopped from contradicting its prior representations regarding its obligation to close the sale" as required by Section 8.6. AA01547. SGM's assertion that "it is clear from the context of counsel's comments that he was referring to an appeal by the AG, and the effect of that appeal being resolved favorably" is nothing more than after-the-fact spin. As the APA reflects, the AG was the only party in interest with the motive or potential intention to appeal.

E. SGM Waived Any Right to Challenge the AG Order.

In addition, SGM waived any right to appeal the AG Order. *See Hamer*, 138 S. Ct. at 17 n.1. SGM contractually agreed in the APA to "reasonably cooperate in any efforts to render the Supplemental Sale Order a final, non-appealable order." AA0146. By doing so, SGM waived any right to appeal the AG Order because it was bound to support the Debtors' efforts to render the AG Order a final non-appealable order. SGM did not cure its waiver of appeal rights by belatedly objecting to the Proposed Order.

In addition, SGM's sole pleading related to the AG Motion requested that the Bankruptcy Court grant that motion without limitation. *See* AA01454 ("For the foregoing reasons, ***SGM respectfully requests that the Court grant the Motion***, and grant such other and further relief as is just and appropriate.") (emphasis added). In addition, at the hearing on the AG Motion, SGM requested an order granting that motion without limitation. DA444. Such waivers are enforced by appellate courts. *See, e.g.*, *In re Sagamore Partners, Ltd.*, 620 Fed. Appx. 864, 870-71 (11th Cir. 2015). Accordingly, the Appeal should be dismissed because SGM waived its right to object the AG Order.

F. SGM Lacks Standing to Prosecute the Appeals.

The Committee, as Appellee, also argues that SGM lacks standing to pursue these Appeals because SGM is not a "person aggrieved" under the controlling Ninth Circuit standard.[12] *See In re P.R.T.C., Inc.*, 177 F.3d 774, 777 (9th Cir. 1999); *Fondiller v. Robertson (In re Fondiller)*, 707 F.2d 441, 442-43 (9th Cir. 1983). Specifically, there is no relief that SGM could obtain as a result of the Appeals that could (i) change its rights, as outlined herein, under Section 8.6; or (ii) provide it with the additional comfort that it contends it required to close the Sale. The Orders

[12] The Committee makes this argument in view of this Court's express indication that it has not yet considered the Committee's arguments on this issue. [Docket No. 19, at 1 n.1.] The Debtors renew their argument to ensure this issue is preserved for further review if necessary and appropriate.

could not have the requisite "detrimental" impact on any rights ever granted to SGM under the APA, so SGM is without standing to seek restoration of such rights on appeal.

In short, the Committee contends, SGM can argue that the Debtors did not sufficiently fulfill a condition precedent to closing in obtaining the AG Order pursuant to Section 8.6 in the Adversary Proceeding, but SGM does not have standing to appeal the contents of that order. By itself, the AG Order neither gave anything to nor took anything from SGM, and SGM was not a creditor of the estate and did not oppose the AG Motion seeking that very order.

II. THE BANKRUPTCY COURT PROPERLY CONCLUDED THE CONDITIONS TO CLOSE HAD BEEN SATISFIED TO PERMIT THE SALE TO PROCEED.

A. The Debtors satisfied APA § 8.6.

The Bankruptcy Court correctly concluded from the record that Section 8.6 was satisfied. SGM's Section 8.6 argument bears no relationship to the actual language of the APA. SGM "agree[d] to close the transactions contemplated [therein] 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." AA0145-0147. In accordance with the AG Order, the "conditions imposed by the CA AG are substantially consistent with the conditions set forth . . . in Schedule 8.6" because "[t]he 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)." AA01532.

Moreover, the Debtors' obligations under Section 8.6 are only triggered "[i]n the event the CA AG imposes conditions on the [Sale], or on [SGM] in connection therewith, which are materially different than the Purchaser Approved Conditions set forth on Schedule 8.6 (the 'Additional Conditions')." AA0146. Because the AG Order provided that "[t]he 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)," the Additional Conditions were no longer "impose[d]" on the Sale, thereby rendering the remainder of Section 8.6 moot. *Id.*

Even if the Debtors had some sort of affirmative obligation under Section 8.6, once the AG confirmed he would not enforce any inconsistent conditions, the Debtors plainly satisfied any such obligation by obtaining entry of the AG Order. The Debtors "file[d] a motion with the Bankruptcy Court seeking the entry of an order ('Supplemental Sale Order')," and the ultimate form of the AG Order satisfied Section 8.6's requirements as illustrated below:

AG Order	Section 8.6 Requirements
Solely and exclusively for purposes of the APA (as defined below) and the Motion, the Additional Conditions (as defined in section 8.6 of that certain asset purchase agreement [Docket No. 2305-1] (the "APA")) are an "interest in property" for purposes of 11 U.S.C. § 363(f). 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).	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.

Compare AA01532; *with* AA0147.[13]

[13] SGM objected to the submitted language, instead proposing the following competing language:

SGM's Proposed Language	Section 8.6 Requirements
The Debtors' transfer to SGM of the Debtors' assets (the "SGM Sale") pursuant to that certain asset purchase agreement [Docket No. 2305-1] (the "SGM APA") is free and clear of, ***and shall not be subject to or conditioned upon SGM's performance of, compliance with, or adherence to, any and all*** Additional Conditions (as defined in the SGM APA and in the Motion), pursuant to Bankruptcy Code §§ 363***(b)***, (f)***(1)***, (f)***(4)***, and (f)***(5) and otherwise provided in the Sale Order***.	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.

Compare DA211 (emphasis added); *with* AA0146. Had SGM wanted to control the precise form of "Supplemental Sale Order" that the Debtors obtained in order to satisfy Section 8.6, it could have prescribed such a form in the APA. As SGM's counsel noted, "I guess in hindsight I'll know from my next deal that we should actually draft the court order that we will condition our acceptance on. Didn't seem necessary at the time." DA548.

The APA was intended by the parties to permit the Debtors and SGM to close the Sale even if the AG Conditions sought to impose conditions beyond those which SGM was willing to accept ("Additional Conditions"). Specifically, in the event that the AG sought to impose Additional Conditions, the Debtors could seek relief from the Bankruptcy Court to permit the sale to proceed free and clear of those conditions. If the Debtors obtained such an order and that order became a final order, then SGM would be obligated to close if all other conditions precedent to closing were satisfied. If, however, the Debtors obtained such an order but it was not final because of an appeal, presumably by the AG, then SGM would have an evaluation period and the option to close or not. In all events, SGM was contractually obligated to "reasonably cooperate in any efforts to render the Supplemental Sale Order a final, non-appealable order." AA0146.

By filing the appeal, SGM was perversely seeking to manufacture for itself an excuse not to close. The AG did not appeal the AG Order; no other party in interest appealed the Order. Only SGM did so. And SGM was the party for whose benefit the AG Order was intended—to permit closing on the Sale notwithstanding the AG's attempt to impose Additional Conditions. Because the only party that could have had a basis for appealing the AG Order (the AG) had agreed not to do so, the Bankruptcy Court properly concluded that the requirements of Section 8.6 had been satisfied.

B. The Debtors satisfied APA § 8.7.

SGM argues that the Debtors did not meet the requirements of APA § 8.7 because (a) there was no "§ 8.7 settlement agreement" in place on November 19 or December 5, 2019; and (b) neither the Sale Order nor the Transfer Order satisfied Section 8.7. SGM is wrong for several reasons, including that the Transfer Order materially satisfied Section 8.7.

Section 8.7 provides, in relevant part, as follows:

> 8.7 . . . Medi-Cal Provider Agreements. Sellers shall transfer their . . . Medi-Cal provider agreements pursuant to a settlement agreement with the California Department of Health Care Services ("DHCS"), which such settlement agreements shall result in: (i) resolution of all outstanding financial defaults under any of Sellers' . . . Medi-Cal provider agreements and (ii) full satisfaction, discharge, and release of any claims under the . . . Medi-Cal provider agreements, whether known or unknown, that . . . DHCS . . . has against the Seller or Purchaser for monetary liability arising under the . . . Medi-Cal provider agreements before the Effective Time[.]

AA0147. Furthermore, a material companion provision, Section 8.4 provides:

> 8.4 Performance of Covenants. Sellers shall have in all *material respects* performed or complied with each and all of the obligations, covenants, agreements and conditions required to be performed or complied with by Sellers on or prior to the Closing Date; provided, however, *this condition will be deemed to be satisfied unless . . . the respects in which such obligations, covenants, agreements and conditions have not been performed have had or would have a Material Adverse Effect*.

AA0145 (Emphasis added.)

The Debtors complied, in all material respects, with their obligation to be in a position to transfer the Medi-Cal Provider Agreements to SGM with a "full satisfaction, discharge, and release of any claims under the . . . Medi-Cal provider agreements, whether known or unknown, that . . . DHCS . . . has against [SGM] for monetary liability arising under the . . . Medi-Cal provider agreements before the Effective Time"—in other words, without successor liability. AA0147.

First, on September 26, 2019, the Bankruptcy Court entered its Memorandum Opinion (the "Medi-Cal Memo Opinion," AA0879-0889), which expressly held that the Medi-Cal "Provider Agreements may be sold free and clear of the liabilities which DHCS contends attach to the Provider Agreements." AA0886. The relevant liabilities include "the alleged liabilities for approximately $30 million in unpaid HQA Fees and $25 million in Medi-Cal overpayments." *Id.* ***Second***, the Debtors secured the Transfer Order authorizing the transfer of the Medi-Cal Provider Agreements free and clear of any interests asserted by DHCS. *See* AA01460-01465. That order expressly provided:

> DHCS shall not adjust, offset or lien any payments owing to SGM and other SGM affiliates (collectively, "SGM Buyers") which are assigned any rights in connection with the transfer of the Medi-Cal Provider Agreements . . . and the SGM acquisition of the Hospitals and St. Vincent Dialysis Center (collectively, the "Assets") pursuant to the Sale Motion ("SGM Sale") after the transfer of the Assets (the "Transfer Effective Date"), or make any claims against any of the SGM Buyers or any of their assets, including, without limitation, any assets acquired by any of the SGM Buyers pursuant to the SGM Sale, for any obligations,

> liabilities, claims or other interests against the Debtors related to periods on or before the Transfer Effective Date ("Pre-Transfer Effective Date Liabilities") including without limitation for Pre-Transfer Effective Date Liabilities under or related to (a) the Medi-Cal Program, and (b) without prejudice to the rights of the Debtors or the SGM Buyers as provided for in the Asset Purchase Agreement [Docket No. 2305-1] by and among the Debtors and SGM, the Hospital Quality Assurance Fees Program, California Welfare & Institutions Code, § 14169.52(a) et. seq. or similar or successor statutes ("HQA Fee Program").

AA01463-01464.

Furthermore, although the Transfer Order did not address or resolve Medi-Cal's recoupment rights, if any, against SGM, such resolution was unnecessary because those rights had previously been resolved in the Sale Order. *See* AA0739-0765. In the Sale Order, which was a final order and was never appealed, "recoupment" rights by all creditors, including DHCS, were expressly extinguished as to SGM. Although the Sale Order was not binding on DHCS until the Transfer Order was entered, once the Transfer Order was entered, DHCS became bound by the Sale Order—including all provisions extinguishing recoupment rights thereunder.[14]

[14] After entry of the Transfer Order, the only issue preserved was whether the provider agreements constituted executory contracts or licenses, which was not relevant to any closing conditions.

The Sale Order, Medi-Cal Opinion, and Transfer Order together satisfied Section 8.7. Contrary to SGM's assertion, a settlement agreement was not the only means of satisfying Section 8.7.[15] Rather, pursuant to Section 8.4, the Debtors only had to perform or comply with Section 8.7 "in all material respects," which would be deemed to have occurred unless "the respects in which [Section 8.7] ha[d] not been performed have had or would have a Material Adverse Effect." AA0145.

Within the scope of its express and exclusive authority, as agreed to by the parties, the Bankruptcy Court agreed. Specifically, in the MAE Order, the Bankruptcy Court ruled that: "The Debtors materially complied with Article 8.7 by obtaining an order authorizing the transfer of the Medi-Cal Provider Agreements free and clear of any interest asserted by the DHCS . . . ." AA01609.[16] Thus, SGM's

[15] SGM disagreed. Regardless, on November 22, 2019, the Debtors reached a Court-approved settlement agreement with DHCS. *See* DA310-331, DA332-333. The DHCS settlement and order (the "DHCS Order") were secured *after* the underlying Orders at issue in the Appeals, and therefore the issue of whether SGM breached the APA by failing to close after the settlement agreement was obtained is not before the Court on these Appeals.

[16] Even if the Bankruptcy Court's prior Orders regarding the Medi-Cal Provider Agreements were somehow insufficient to satisfy Section 8.7 (which Appellees dispute), it would simply mean that the mandatory Closing Date for the transaction would have been a few days later, *i.e.*, ten days from the date a settlement was reached with DHCS. As noted above, the DHCS Order was issued after the underlying Orders at issue in the Appeals, so the issue of whether SGM breached the APA by failing to close after the settlement agreement was obtained is not before the Court or relevant to the Appeals.

contention that the Bankruptcy Court had "no evidence" on which to rely to determine material compliance with the APA is meritless. *See* AOB at 29-30.

Moreover, the Bankruptcy Court appropriately rejected SGM's request to require an adversary proceeding in order to address these issues; its exclusive authority over the parties' rights under the APA derived from the Sale Order mandated no additional procedural framework. *See, e.g.*, *In re WorldCorp, Inc.*, 252 B.R. 890, 895 (Bankr. D. Del. 2000) ("[A]n adversary proceeding is not necessary where the relief sought is the enforcement of an order previously obtained."). The process SGM received is precisely the bargain SGM struck under the APA—that disputes concerning whether an MAE had occurred would be exclusively settled by the Bankruptcy Court. *See* AA0148 (APA § 9.1(d)).

C. SGM's Rule 9019 Argument Was Not Raised Below and Lacks Merit.

SGM alleges that the Debtors and the AG stipulated to entry of the AG Order, and obtained such an order from the Bankruptcy Court, without (i) filing a motion required by Rule 9019 for approval of a settlement or (ii) offering evidence to satisfy the criteria for approval of a settlement. AOB at 34-36. Importantly, SGM never raised such an objection—or such an argument in any form—in the Bankruptcy Court. *See* DA349, DA393. Here, SGM filed the SGM Objection, and proposed an alternative form of order. AA01522-01523. SGM's counsel argued at length at the hearing on the "form of order" dispute. DA355-361. Nowhere in SGM's filings or

the hearing transcript was there even a hint that a "settlement or compromise" was at issue, let alone that a Rule 9019 motion had not been filed or a necessary evidentiary showing had not been made. Accordingly, SGM forfeited this argument by not raising it below. *See Hamer*, 138 S. Ct. at 17 n.1 (2017) ("[f]orfeiture is the failure to make the timely assertion of a right"); *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 n.1 (9th Cir. 2002) ("a party who fails to raise an issue in the [trial] court, cannot raise it on appeal").[17] Even had SGM raised such an argument below, however, SGM—neither a creditor nor a claimant—would not have been entitled to object. *See In re Engram*, 348 Fed. App'x. 305, 306 (9th Cir. 2009). This consideration alone should dispose of the matter.

On its merits, the AG Order did not stem from a "compromise" under well-established bankruptcy law, practice, and procedure. *See, e.g.*, Fed. R. Bankr. P. 9019(a).[18] A "compromise and settlement" in bankruptcy is "an agreement for the

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[17] Appellees already discussed SGM's waiver of its right to appeal, *supra*, and although the terms "waiver" and "forfeiture" are sometimes used "interchangeably", that is not the situation here. *See Wood v. Milyard*, 566 U.S. 463, 470 n.4 (2012) ("A waived claim or defense is one that a party has knowingly and intelligently relinquished; a forfeited plea is one that a party has merely failed to preserve." (citation omitted)); *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004) ("Although jurists often use the words interchangeably, forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right." (quotations omitted) (internal marks omitted)).

[18] While the reasoning of *In re A&C Prop.*, 784 F.2d 1377 (9th Cir. 1986), remains the Ninth Circuit standard for how to evaluate a settlement or compromise that falls

settlement of a real or supposed claim in which *each party surrenders something in concession to the other*." *In re Cresta Tech. Corp.*, Case No. 16-50808 MEH, 2018 WL 2422415, *7 (Bankr. N.D. Cal., May 29, 2018) (quotation omitted) (emphasis added); *see also In re Signet Indus., Inc.*, Case No. 96-2534, 1998 WL 639168, *2 (6th Cir., Sept. 10, 1998) ("[C]ompromise and settlement" is the "[s]ettlement of a disputed claim by *mutual concession* to avoid a lawsuit.") (citation omitted) (emphasis added).

The parties got *exactly what they bargained for* in the AG Order. AA01532, l. 10 ("The Motion is GRANTED"). The Debtors sought a "finding that the SGM Sale is free and clear of the Additional Conditions" (AA0950, ll. 13-15),[19] which was incorporated into the AG Order. AA01532, ll. 15-17 ("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)."). Otherwise, the AG Order provided that the AG waived any appeal and the AG Memo Decision was vacated and withdrawn. AA01532-01533. That is not a settlement under Rule 9019, because the Debtors gave up nothing by

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under Bankruptcy Rule 9019, it is not a standalone procedural requirement that exists apart therefrom, as it was decided under a provision of the Bankruptcy Act of 1898 that was repealed. *See, e.g., In re Telesphere Commc'ns, Inc.*, 179 B.R. 544, 551–52 (Bankr. N.D. Ill. 1994).

[19] SGM requested that the Bankruptcy Court "grant the Motion." AA01454, l. 14.

it. The AG Order granted the Debtors' motion and gave them all the relief they had requested. They agreed only to vacatur of the AG Memo Decision explaining its reasons for granting the AG Motion. But the Debtors had not sought a written decision in its motion (again, a movant asks for an order, not an explanation of the court's reasons for granting the order); nor were they entitled to a written decision. *See* Fed. R. Civ. P. 52(a)(3) (requirement that court "find the facts specially and state its conclusions of law" does *not* apply to decisions on motions); Fed. R. Bankr. P. 7052 (Federal Rule of Civil Procedure ("Civil Rule") 52 applies in adversary proceedings); Fed. R. Bankr. P. 9014 (Rule 7052 applies to contested matters). Nor did the Debtors, by agreeing to vacatur, give up anything of value: the AG Memo Decision could be of no use to them, precisely because, by the terms of the AG Order itself, the AG Motion was granted and the AG waived any appeal.

The cases cited by SGM support the proposition that procedural bankruptcy compromises are often used to settle "claims as to which there are substantial and reasonable doubts." *See Protective Committee for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968); *see also DeBilio v. Golden (In re DeBilio)*, 2014 WL 4476585, *6 (B.A.P. 9th Cir. 2014); *In re Mickey Thompson Entm't Group, Inc.*, 292 B.R. 415, 420-21 (B.A.P. 9th Cir. 2003). Finalizing the language of the AG Order to accurately conform to the Bankruptcy Court's ruling, *granted with appropriate due process*, and to reflect the terms and

bargain struck in Section 8.6 by the now-challenging party, involved neither claims by or against the estates. Indeed, language in orders is routinely negotiated among parties without creating a bankruptcy settlement or compromise triggering Rule 9019(a) procedural formalities. SGM's attempt to create a controversy through the filing and prosecution of these Appeals does not retroactively give rise to a "controversy" that did not exist at the time that the AG Order was entered.

D. Reversal of the Orders Would Not Result in a Finding that the Conditions to Close Were Not Satisfied.

Finally, SGM also asks this Court to make an independent determination "that, because Debtors failed to meet all of their obligations under the APA, SGM was not obligated to close the sale by December 5."[20] AOB at 36. Such a finding would be outside the scope of the Appeals. If the Court finds that the Bankruptcy Court committed error, then the Court can reverse the Order(s). *E.g.*, *In re D'Arco*, 587 B.R. 722, 726 (C.D. Cal. 2018), *aff'd sub nom. Misik v. D'Arco*, 777 F. App'x 258 (9th Cir. 2019). SGM's request that this Court go beyond such a finding and make affirmative findings on substantive questions as to the Debtors' own compliance with the APA is inappropriate.

[20] SGM's reference to *Miller v. American Exp. Co.*, 688 F.2d 1235, 1240 (9th Cir. 1982) is irrelevant as that case involved a summary judgment motion.

III. SGM RECEIVED DUE PROCESS WITH RESPECT TO THE ORDERS.

SGM argues that the Scheduling and MAE Orders were obtained in violation of its procedural due process rights.[21] Specifically, SGM claims that: (1) the Bankruptcy Court allegedly issued the Scheduling and MAE Orders *sua sponte*; (2) SGM allegedly received no advance notice that the Bankruptcy Court intended to adjudicate the issues it did in those two Orders; and (3) SGM allegedly had no meaningful opportunity to be heard before the these Orders were entered. AOB at 20. However, the record demonstrates that SGM received "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); *see also* 11 U.S.C. §102(1)(A) ("'after notice and a hearing', or a similar phrase—(A) means after such notice as is appropriate *in the particular circumstances*, and such opportunity for a hearing as is appropriate *in the particular circumstances*") (emphasis added). In addition to adequate notice, they had an opportunity to be heard, appeared and presented their arguments, and did so after receiving detailed tentative rulings setting

[21] SGM does not claim that the AG Order was entered without procedural due process. Rather, as discussed in Section II.A.3, *supra*, SGM claims that the Bankruptcy Court entered the AG Order without following procedures set forth in the Bankruptcy Rules and applicable case law.

forth the Bankruptcy Court's concerns. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (finding that "some form of hearing is required before an individual is finally deprived of a property interest").

Additionally, as explained in section I.A., *supra*, the Scheduling and MAE Orders were interlocutory. As such, they are not entitled to the same level of due process protections that are "elementary and fundamental . . . *in any proceeding which is to be accorded finality.*" *See Mullane*, 339 U.S. at 314 (emphasis added).

A. Notice of the Issues to Be Resolved by the Scheduling and MAE Orders Was Provided to SGM.

SGM received fair notice of impending action and an opportunity to be heard, the hallmarks of procedural due process. *See Mathews*, 424 U.S. at 333; *Mullane*, 339 U.S. at 314-15. Notice and a hearing are two distinct features of due process, and are thus governed by different standards. *See Dusenbery v. United States*, 534 U.S. 161, 168 (2002).

With respect to notice, SGM alleges that the Scheduling and MAE Orders were "abruptly and unexpectedly decided." AOB at 21. To the contrary, as set forth below, the record reflects that SGM had actual notice, "reasonably calculated, under all the circumstances," of the Bankruptcy Court's intent to consider and rule on the issues addressed in the Orders. *See Mullane*, 339 U.S. at 314; *In re Miller*, 124 F. App'x 490, 492 (9th Cir. 2005); *see also In re Lazy Days' RV Center, Inc*., 724 F.3d

418, 424-25 (3d Cir. 2013); *Presley v. City of Charlottesville*, 464 F.3d 480, 490 (4th Cir. 2006).

- Tentative Ruling. On November 12, 2019, the Bankruptcy Court issued the Tentative Ruling (which it also attached to an order directly on SGM's filed objection), which set forth, *inter alia*, the following two questions: (i) "Does the AG Order Satisfy § 8.6 of the SGM APA?"; and (ii) "Does SGM take the position that the AG Order does not qualify as a 'Supplemental Sale Order' that is final and non-appealable within the meaning of § 8.6 of the SGM APA?" DA237. Indeed, SGM's counsel acknowledged the Bankruptcy Court's concerns at the November 13, 2019 hearing. *See, e.g.,* DA496, DA501-503 ("So all of our negotiations really culminated in Section 8.6 of the APA with which I know the Court is familiar."), DA496, ll. 20-23 ("And in the tentative the Court expressed some concern about what might be the ability of our client not to go forward if the conditions that were imposed by the AG were unacceptable.").

The Tentative Ruling sufficiently provided "notice reasonably calculated, under all the circumstances, to apprise interested parties" of these issues before the Bankruptcy Court, including the Section 8.6 issue ultimately addressed in the Scheduling and MAE Orders. *See, e.g., Thomas C. Nelson, v. Deutsche Bank Nat'l Trust Co. (In re: Stage Coach Venture, LLC)*, No. BR 15-13471 VK, 2017 WL 3995516, at *4 (C.D. Cal. Sept. 8, 2017) ("[T]he tentative ruling posted before the .

. . status conference gave the parties notice that the Court was considering dismissing the case and explained the reasons in detail."); *In re Azam*, No. 13-BK-14339-TA, 2014 WL 12689267, at *6 (C.D. Cal. Apr. 1, 2014) (identifying the bankruptcy court's tentative order, which appellant addressed at the subsequent hearing, among the items providing notice), *aff'd*, 642 F. App'x 777 (9th Cir. 2016). Such notice was amplified by the Bankruptcy Court attaching the Tentative Ruling to an order directly addressing SGM's objection by setting it down for hearing. Thus, as addressed in the next section, SGM had meaningful opportunity to be heard on these issues as well.

- Status Report and Sealing Request. The Debtors' status report and related request to file their correspondence with SGM under seal unquestionably put SGM on notice that the Bankruptcy Court would address MAE issues at the November 26, 2019 status conference. *See* AA01557-01559 (advising the Bankruptcy Court of the Debtors' intention to "request an expedited briefing schedule for a determination of whether there have been 'Material Adverse Effects' . . . under the terms of the SGM APA, pursuant to § 9.1(c) of the SGM APA" and asserting that the "Debtors satisfied all conditions to closing."); DA256 (requesting that the Bankruptcy Court authorize the filing of the parties' correspondence under seal for consideration at the status conference because it was "relevant to the Court's request that the Debtors provide 'the status of the closing of the SGM Sale.'").

Indeed, in its pleadings SGM acknowledged and objected to the Bankruptcy Court's apparent intention to address MAEs at the status conference, thereby demonstrating its actual notice:

> At the same time, the Debtors are apparently going to request that the Court resolve certain of those claims on an expedited and truncated process, which completely ignores applicable rules of bankruptcy procedure and due process protections to which SGM is entitled. This issue will be addressed in SGM's forthcoming Reservation of Rights in connection with Debtor's Status Report, which will be filed later today.

DA265, at n.1; AA01565. The Reservation of Rights referred to by SGM became just another of many examples of SGM's numerous opportunities to be heard, as detailed in the next section.

Ultimately, the alleged MAEs addressed by the Bankruptcy Court were precisely those raised by SGM in the Nov. 22 Letters. *See* DA271-272; SGM MA, Ex. 9; *see also* AA01606 (MAE Memo Decision addressing MAEs raised by SGM). SGM knew, pursuant to the terms of the APA, that the Debtors were required to bring SGM's concerns regarding alleged breach before the Bankruptcy Court because it was a fundamental assumption that the Sale was a prerequisite of the viability of the Debtors' proposed plan of liquidation, *see* RJN, Ex. B, at 86 ("The Plan is conditioned on the SGM Sale closing in Section 12.2 of the Plan, and the Plan will not be feasible if the SGM Sale does not close because the sale proceeds are needed to fund the Plan."). Accordingly, SGM "knew or reasonably should have

known" that the MAE issues would be before the Bankruptcy Court at the November 26, 2019 hearing. *See In re Miller*, 124 F. App'x at 492.

Nor are the cases cited by SGM to support its due process argument persuasive. Indeed, the case on which SGM chiefly relies found no due process violation and held that the order entered by the bankruptcy court was not void. *See In re Levoy*, 182 B.R. 827, 835 (B.A.P. 9th Cir. 1995) (finding notice reasonably calculated to apprise creditor of pending action and opportunity to object). The other cases cited by SGM are factually distinguishable, including on the grounds that the parties received no notice or opportunity for hearing and, in certain cases, concerned an issue expressly requiring an adversary proceeding. *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (non-bankruptcy case noting due process exemptions for public interest and protecting the public health); *In re Sanders*, No. 15-1344, 2016 WL 3971324, at *2 (B.A.P. 9th Cir. July 15, 2016) (bankruptcy case summarily dismissed at the time of filing without notice or hearing); *In re Manning*, No. 12-1149, 2013 WL 4428761, at *7 (B.A.P. 9th Cir. Aug. 19, 2013) (finding where court's pre-status conference tentative ruling set forth continuance dates and expressly excused appearances, vacating an entry of default as to non-appearing judgment creditor violated due process); *In re Loloee*, 241 B.R. 655, 661 (B.A.P. 9th Cir. 1999) (involving lien priority subject to Bankruptcy Rule 7001, improper service, no hearing, and no findings of fact or conclusions of law); *In re Colortran,*

Inc., 218 B.R. 507, 511 (B.A.P. 9th Cir. 1997) (involving lien invalidation subject to Bankruptcy Rule 7001, no notice, no opportunity to be heard).

B. SGM Received Meaningful Opportunity to be Heard on the Issues Resolved by the Scheduling and MAE Orders.

SGM claims it was not afforded a meaningful opportunity to be heard on the issues decided by the Scheduling and MAE Orders, and that, in other words, it "had no opportunity to put on evidence." However, having an "opportunity to be heard" does not look the same in all situations, but rather "is flexible and depends on what is appropriate *in the particular circumstance*." *See, e.g.*, *Sanders*, 2016 WL 3971324, at *2. All of the foregoing criteria were satisfied here by the opportunity for a hearing afforded by the Debtors to SGM. The Bankruptcy Court heard and weighed both sides, including regular input from SGM.

With regard to the MAE Order, to which SGM devotes greater attention, SGM inaccurately claims it did not have a meaningful opportunity to be heard on the following issues:

- The Debtors' satisfaction of conditions to closing. SGM argues it lacked opportunity to be heard on this point in both the MAE and Scheduling Orders. In the Tentative Ruling, the Bankruptcy Court instructed that at the hearing on the AG Motion, "[t]he parties should be prepared to address [certain] questions and concerns of the Court," including: "Does the AG Order Satisfy § 8.6 of the SGM APA?" DA237. The Bankruptcy Court further asked: "Does SGM take the position

that the AG Order does not qualify as a 'Supplemental Sale Order' that is final and non-appealable within the meaning of § 8.6 of the SGM APA?" *Id*. SGM, through counsel and two executives, was present at the hearing, and SGM's counsel participated extensively. DA490-555. And yet, although the Bankruptcy Court expressly requested that SGM address these points at the hearing, SGM refused to address the issues. Specifically, SGM's counsel said:

> So today isn't the day to address the question of whether Section 8.6 has been satisfied . . . . Whether this Court's order ultimately satisfies Section 8.6 is not for today. . . . So the discussion whether 8.6 is satisfied or not isn't for today. It's for another day.

DA510-512.

Even after the hearing, on November 25, 2019, SGM filed a nine-page reservation of rights with respect to the Bankruptcy Court's consideration of Section 8.6, that still did not address the Bankruptcy Court's questions regarding Section 8.6. *See* AA01562-01577. The following day, as discussed above, SGM attended the status conference and argued that not all conditions were satisfied under the APA. *See* AA01596-01598.

Accordingly, the record evidences that SGM *declined* the opportunity to be heard on the Debtors' satisfaction of conditions to closing.

- SGM's obligations to close on December 5, 2019. SGM argues it was deprived of any opportunity to be heard on this ruling in both the MAE and Scheduling Orders. The Bankruptcy Court heard SGM on this point several times,

and gave meaningful consideration to it. *See* AA01603-01610. With regard to SGM's November 25, 2019 filing, AA01562-01577, the Bankruptcy Court "note[d] that although SGM presented its ripeness argument in a document captioned as a reservation of rights, SGM's submission was in reality an opposition to the Debtor's assertion that all conditions precedent to SGM's obligation to close have been satisfied." AA01606.

Although filed by the Debtors as required by the circumstances of the Bankruptcy Cases, the Bankruptcy Court also considered two letters provided by SGM's bankruptcy counsel and healthcare counsel to the Debtors, which outlined alleged longstanding defaults under the APA, included detailed statutory citation, and attached alleged evidentiary support. *See* DA271-272; SGM MA, Ex. 9. The Bankruptcy Court determined that these "Nov. 22 Letters also qualify as an opposition to the Debtors' assertions regarding SGM's obligation to close. The Nov. 22 Letters contain 19 single-spaced pages of legal argument and 38 pages of supporting exhibits." AA01606. In light of these two submissions, the Bankruptcy Court found that "SGM's arguments regarding its obligations under the APA have been fully presented to the Court." AA01606.

- SGM's breach if it failed to close. The Orders did not address the issue of breach, so due process could not have been violated. *See, e.g.*, DA306 ("In the future, the Debtors will have an opportunity to litigate the issues of whether SGM

has breached the APA and whether the Debtors are entitled to retain SGM's good-faith deposit."); RJN, Ex. L, at 16 ("The Orders do not adjudicate whether SGM breached the APA; nor do the Orders contain findings that compel the Court to rule in the Debtors' favor with respect to the Complaint's breach of contract claim").

- The definition of "Material Adverse Effect."[22] SGM's allegations that it was deprived of an opportunity to be heard on the issues underlying the MAE Order are materially at odds with SGM's months-long effort to preclude the Bankruptcy Court from considering MAEs under the APA ***first asserted by SGM in mid-October 2019***. SGM was well aware of the Bankruptcy Court's intention to consider SGM's lengthy correspondence detailing alleged MAEs—SGM objected to the Bankruptcy Court's review of the correspondence under seal, filed a reservation of rights disputing the Debtors' claim that all conditions to closing were satisfied, and appeared and made argument at the hearing that resulted in the MAE Order. Further, the Bankruptcy Court interpreted the Scheduling and MAE Orders to have no preclusive effect in subsequent litigation. *See* RJN, Ex. L, at 16.

- SGM's right to appeal the rulings. SGM fails to demonstrate how the Bankruptcy Court allegedly deprived it of any right to appeal the underlying Orders.

[22] The AOB alternates between "Material Adverse Effect" and "Material Adverse Event." The phrase in the APA and the MAE Memo Decision is "Material Adverse Effect."

On the contrary, SGM contractually agreed to waive its right to appeal any MAE ruling; and, by its own positions taken before the Bankruptcy Court, is judicially estopped from appealing the Scheduling Order.

C. SGM Cannot Show Prejudice from the Process Afforded It.

In addition, SGM cannot succeed on its procedural due process claim because it did not suffer prejudice. "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983). Thus, "even if the [B]ankruptcy [C]ourt failed to provide [SGM] with sufficient notice and opportunity to be heard," which Appellees maintain it did not, due process is not violated if SGM fails "to show that it was prejudiced by the court's deficient procedures." *See In re Kenny G Enters., LLC*, No. BAP CC-13-1527, 2014 WL 4100429, at *10 (B.A.P. 9th Cir. Aug. 20, 2014); *see also In re Rosson*, 545 F.3d 764, 776-77 (9th Cir. 2008) (finding that appellant "can show no prejudice arising from the defective process afforded him"); *In re Pryor*, No. 6:15-BK-19998-MH, 2016 WL 6835372, at *4 (B.A.P. 9th Cir. Nov. 18, 2016) ("Debtor must show prejudice from any procedural deficiencies.").

In neither the AOB nor in any submission to the Bankruptcy Court below has SGM sufficiently "identified evidence or argument that it would have presented to the bankruptcy court given more time." *See Kenny G*, 2014 WL 4100429, at *10;

see also Rosson 545 F.3d at 776-77 ("[E]ven when given an opportunity, he has never actually provided a satisfactory explanation. . . . Because there is no reason to think that, given appropriate notice and a hearing, [appellant] would have said anything that could have made a difference, [he] was not prejudiced by any procedural deficiency."). As noted in the previous sections, SGM fails to support its lack of notice or opportunity to be heard on issues it conceded were before the Bankruptcy Court for months. "Thus, any potential due process error committed by the bankruptcy court was harmless in light of [SGM's] inability to show prejudice." *See Kenny G*, 2014 WL 4100429, at *10; *cf.* AA01608 ("None of SGM's allegations come even close to showing a Material Adverse Effect.").

D. The Scheduling and MAE Orders Were Necessary and Appropriate to Enforce the Sale Order and Prevent an Abuse of Process.

Appellees dispute SGM's contention that the Scheduling and MAE Orders were issued *sua sponte*. *See, e.g.*, AOB at 2. To the contrary, the Scheduling Order was merely a subsequent order based on the briefing and hearing preceding entry of the AG Order; and the MAE Order was only entered after the parties were given the opportunity to brief the issues and appear at a hearing.

Furthermore, neither Order was issued on a *sua sponte* basis because the parties had expressly authorized the Bankruptcy Court to issue such orders by agreement, as reflected in both the APA and Sale Order. Specifically, SGM agreed

in the APA that the MAE disputes would be "exclusively settled by a determination made by the Bankruptcy Court." AA0148. Further, the Sale Order—which was approved as to form by SGM—provided that the Bankruptcy Court would retain "exclusive jurisdiction" to hear and determine "any dispute between SGM and the Debtors as to their respective obligations with respect to any asset, liability, or claim arising" under the Sale Order. AA0761.

In any event, even if the Scheduling and MAE Orders were entered *sua sponte* (which they were not), *sua sponte* orders are not a *per se* indicator of lack of due process. *See, e.g.*, *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311-12 (9th Cir. 1986); *Portsmouth Square, Inc. v. Shareholders Protective Comm.,* 770 F.2d 866, 869 (9th Cir. 1985); *S.E.C. v. Leslie*, No. 07-3444, 2010 WL 2991038, at *38 (N.D. Cal. July 29, 2010).

The Bankruptcy Court is expressly permitted to enter orders to enforce or implement its own prior orders. *See* 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title . . . shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent abuse of process.").

Consequently, both the Scheduling and MAE Orders were necessary and appropriate to enforce and implement the Sale Order, which expressly preserved the Bankruptcy Court's "exclusive jurisdiction to interpret, construe, and enforce the provisions of the APA and this Sale Order *in all respects*," including to "compel . . . performance of other obligations owed to the Debtors; [and] interpret, implement, and enforce the provisions of this Sale Order." AA0761, at ¶ 27 (emphasis added); *see HSBC Bank USA, Nat'l Ass'n v. Calpine Corp.*, No. 07-3088, 2010 WL 3835200, at *10 (S.D.N.Y. Sept. 15, 2010) (recognizing that "bankruptcy courts have the authority to modify creditors' contract rights [under § 105(a)] to further substantive provisions of the Bankruptcy Code, and § 363 serves to protect the interests of debtors.") (citation omitted).

SGM's reliance on *In re Golden Plan of Cal., Inc.*, 829 F.2d 705, 712 (9th Cir. 1986), is inapposite. There, it was the district court on appeal that issued the *sua sponte* decision without notice and without the knowledge of the entire history of the case, relationship of the parties, and record that was before the bankruptcy court. *Id*. Here, the Bankruptcy Court entered the Orders after notice to SGM and after the record concerning MAEs was thoroughly developed, and after nearly a year presiding over these parties and these issues. Pursuant to § 105(a) and the Sale Order, the Bankruptcy Court had authority to enter the Scheduling and MAE Orders, whether as requested by the parties in the APA or else *sua sponte*.

CONCLUSION

For the foregoing reasons, this Court should dismiss the Appeals; or, in the alternative, affirm the Orders.

Respectfully submitted,

Dated: April 13, 2020

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April 13, 2020

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