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Case No. 2:19−cv−10352−DSF[1]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re: VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al.*,[2] Debtors and Debtors in	On Appeal from the United States Bankruptcy Court for the Central District of California (Bankr. Lead Case No.: 2:18-bk-20151-ER)

[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.

Possession.

STRATEGIC GLOBAL MANAGEMENT, INC.,

Appellant,

v.

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

Appellees.

APPELLANT'S REPLY TO "APPELLEES' JOINT RESPONSE TO COURT'S TENTATIVE DECISION TO VACATE ORDERS"

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

INTRODUCTION

As SGM has demonstrated, the three orders on appeal (the "Orders") were entered improperly, including without due process. This Court's proposed vacatur is acceptable to SGM, because it will allow the pending litigation to proceed on a level playing field. If the Orders are not vacated, Debtors have made clear that they will attempt to use them to bolster their arguments that they satisfied the conditions to closing the sale, triggering SGM's "obligation" to close, and/or defensively to shield themselves from liability for their breaches. These issues are key to Debtors' breach of contract claim—and to SGM's potential counter-claims. The Orders, which Debtors and the bankruptcy court have characterized as moot and ineffectual, should not be used to SGM's prejudice in the pending litigation.

I. Vacatur Is the Proper Remedy for Constitutional Mootness.

The case cited by this Court, *Camreta v. Greene*, 563 U.S. 692 (2011), is one of a long and consistent line of U.S. Supreme Court cases[3] applying the equitable remedy of vacatur to protect parties from "***any legal consequences***" of moot orders or judgments, and to ensure that "***no party is harmed by . . . 'preliminary' adjudication***," such as that performed by the bankruptcy court in this case. *Id*. at 713 (emphasis added). Vacatur is appropriate because it will effectively wipe the record clean and "clear[] the path for future relitigation." *Id*.

When the party favoring vacatur is not itself responsible for an order's mootness, circuit courts – including the Ninth Circuit – apply vacatur "***automatic[ally]***" to avoid "any adverse legal consequences" of a moot civil judgment or order. *Public Utilities Com'n of State of Cal. V. F.E.R.C.*, 100 F.3d 1451, 1461 (9th Cir. 1996) ("*CPUC*") (emphasis added); *see id.* ("[M]ootness resulting from happenstance or from the 'unilateral action of the party who prevailed below' … require[s] vacatur" to avoid any adverse legal consequences

[3] *See, e.g., Azar v. Garza*, 138 S.Ct. 1790, 1792 (2018); *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950).

that would be caused by preservation of the orders.) *See also Lightner ex rel. N.L.R.B. v. 1621 Route 22 West Operating Co., LLC*, 729 F.3d 235, 238 (3d Cir. 2013); *GATX/Airlog Co. v. U.S. Dist. Court, for Northern Dist. Of Cal.*, 182 F.3d 1304, 1307 (9th Cir. 1999); *Dilley v. Gunn*, 64 F.3d 1365, 1371 (9th Cir. 1995).

Vacatur is particularly appropriate here, where such mootness is the result of Debtors' unilateral and improper termination of the APA (*i.e.*, the very heart of the litigation). *CPUC*, 100 F.3d at 1461.

Debtors spend most of their brief arguing that the vacatur remedy is limited to cases that would otherwise have *res judicata* or collateral estoppel effect. (Joint. Response ("JR"), 1-3.)[4] But none of authorities cited above limits the doctrine in this way, nor do the cases cited by Debtors in support of their theory. *U.S. v. Arpaio*, 951 F.3d 1001 (9th Cir. 2018), on which Debtors principally rely, was a criminal case in which a former sheriff sought to expunge his criminal conduct from the public record after he was pardoned by the President. Not only would such a result be inequitable, the Court ruled, it would controvert the vacatur doctrine, because (1) Arpaio's own conduct (accepting the pardon) mooted the appeal; and (2) Arpaio could not be adversely harmed by the mooted order because the criminal case against him was dismissed with prejudice. *Id*. at 1003. Debtors also cite *Bonner Mall*, but that case involved a settlement, which is a classic exception to the vacatur doctrine which recognizes that following a settlement, neither party is at risk. *See Bonner Mall*, 513 U.S. at 25.

Vacatur was unnecessary in the cases cited by Debtors because the pardon and the settlement respectively resolved their disputes once and for all; there was no opportunity for either of the mooted orders to cause harm in the future. Here, by

[4] Debtors argue that collateral estoppel and res judicata do not apply here because the Orders are "interlocutory" and only final orders are entitled to such preclusive effect. But there has been no adjudication by any court that the Orders are interlocutory. SGM addressed this issue in its opening and reply briefs on appeal. (See, e.g., Reply Brief, 14-16.)

contrast, there is pending litigation in which Debtors frankly acknowledge they wish to use the Orders to their advantage and SGM's detriment. This is exactly the type of situation that calls for vacatur in the context of constitutional mootness.

Debtors also argue that vacatur is somehow inappropriate in bankruptcy cases, citing *In re Verity Health Sys. Of Cal., Inc.*, 2019 WL 7997371 (C.D. Cal. Aug 2, 2019) and *In re Gardens Reg'l Hosp. & Med. Center, Inc.*, 2018 WL 1229989 (C.D. Cal. Jan 19, 2018). (Jt. Response, 4.) But these cases were dismissed on grounds of statutory (not constitutional) mootness, resulting from protections afforded to post-petition lenders under Bankruptcy Code §364(e) and to purchasers under Bankruptcy Code § 363(m), which limits an appellate court's ability to modify or vacate sale or financing orders. They have no bearing on this case.

II. Preservation of Any of the Appealed Orders Would Prejudice SGM and Impair Its Right to A Fair Trial

Debtors cryptically assert that they "prefer" this Court not vacate the Orders because they remain "critical factual bases on which the Debtors relied in making decisions in their Bankruptcy Cases." (JR 5:19-25.) Simply put, Debtors want it both ways: they want to avoid appeal of the Orders on the ground they are moot, and at the same time, use the Orders to persuade a trier of fact that their material breaches, including their false notice to close and improper termination of the APA, were justified. The Court should preclude such gamesmanship.

Whether or not the Orders have preclusive effect, Debtors will undoubtedly seek to use them to SGM's detriment in connection with the pending litigation. Why else would they oppose vacatur? Debtors' extensive reliance on the Orders in their First Amended Complaint makes plain that they intend to use them, even if they are acknowledged to have no "preclusive" effect. (As this Court may recall, Debtors' counsel represented to the bankruptcy court that they would not use the Orders in litigation with SGM, but then went on to feature them in their FAC.)

Debtors do not specify how they will use the Orders, but it is not hard to imagine. For example, they could seek to use Orders offensively as evidence to establish, or possibly shift the burden of proof, on the issue of whether Debtors have satisfied conditions to closing and whether SGM was obligated to close the sale on December 5 as stated in the November 27 Order. Debtors could also try to use the findings in that Order defensively, to evade a finding that they breached the APA themselves in demanding a closing on December 5 and improperly terminating the APA on December 27, 2019.

Debtors' use of the Orders in the pending litigation would not only impair SGM's ability to obtain a fair trial, it would invariably create distraction and confusion as to whether, and to what extent, the Orders may be used as evidence or otherwise in this litigation or in any subsequent appeals.

In short, it would be manifestly unfair to deprive SGM of its right to have its appeals resolved on the merits while permitting the Debtors to use the Orders as swords and/or shields in the pending litigation

III. Vacating the Orders Will Not Prejudice Appellees.

Appellees have not demonstrated any harm to the bankruptcy estate if the Orders are vacated. The AG argues that it will be adversely affected by vacatur of the November 14 Order because that could result in the reinstatement of the bankruptcy court's Memorandum of Decision of October 23, 2019, which the Debtors and the AG asked the bankruptcy court to vacate as part of their settlement. This argument fails for at least three reasons.

First, vacatur of the November 14 Order will not automatically result in reinstatement of the Memorandum of Decision; that will be up to the bankruptcy court. ***Second***, because the AG and the Debtors agree that the Memorandum of Decision should not be reinstated, nothing prevents them from mutually requesting that the bankruptcy court not to reinstate it. ***Third***, this Court can vacate the

November 14 Order with instructions to the bankruptcy court not to reinstate the Memorandum Decision. Thus, the AG's concern is meritless.[5]

IV. The Court May Address the Merits Even if the Appeals Are Moot.

This Court has cited the termination of the APA and the subsequent sales of the hospitals as bases for mootness. But while the bankruptcy court has approved sales of the four hospitals, three of the sales have not closed because conditions to closing, including regulatory approvals, have not been satisfied. Thus, these sales are still pending and the hospitals may be back on the market.

Further, despite the purported termination of the APA, there is still a "case or controversy" regarding SGM's and the Debtors' respective rights and obligations under the APA, including whether the APA was properly terminated and whether SGM or Debtors breached, and, if so, the extent to which the SGM or Debtors are entitled to damages. The Orders purport to adjudicate those very issues; the November 27 Order found that the Debtors satisfied all conditions to closing the sale and that SGM was obligated to close on December 5, 2019. Debtors' improper termination of the APA should not deprive SGM of its right to appeal these Orders.

Finally, even if the appeals are constitutionally moot, an exception to the mootness doctrine allows this Court to rule on the merits. In *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), the U.S. Supreme Court held that a moot case may be adjudicated if a litigant could be subject to civil or criminal liability if the case were not addressed on the merits. The exception applies here because Debtors plainly wish to rely on the Orders to establish SGM's liability for breach of the APA and to protect themselves from SGM's counterclaims.

Based on the foregoing, SGM respectfully urges the Court either to vacate the Orders or consider the merits of SGM's appeals.

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[5] If the Memorandum of Decision is revived, SGM retains its right to argue that Debtors did not satisfy the conditions of APA § 8.6.

Respectfully submitted,

Dated: June 8, 2020

LEVENE, NEALE, BENDER, YOO & BRILL L.L.P.

By: */s/ Gary E. Klausner*
Gary E. Klausner
Jeffrey S. Kwong

Dated: June 8, 2020

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By: /s/ *Kevin D. Rising*

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CERTIFICATE OF COMPLIANCE

1. This Reply complies with the page limit requirement pursuant to the Court's order appearing as docket entry 62 because, excluding the parts of the Reply that are exempted, this Reply is 5 pages.

2. This Reply 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 the document was prepared in the proportionally spaced 14-point Times New Roman font.

Dated: June 8, 2020

/s/ Gary E. Klausner
GARY E. KLAUSNER

CERTIFICATE OF SERVICE

1. I hereby certify that on June 8, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court for the Central District of California using the CM/ECF system.

2. 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.

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

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Dated: June 8, 2020

/s/ Gary E. Klausner
GARY E. KLAUSNER