

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUN 9 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

In the Matter of: VERITY HEALTH
SYSTEM OF CALIFORNIA, INC.,

Debtor,

No. 19-55997

D.C. No.

2:18-cv-10675-RGK

OFFICIAL COMMITTEE OF
UNSECURED CREDITORS OF VERITY
HEALTH SYSTEM OF CALIFORNIA,
INC.,

Appellant,

MEMORANDUM*

v.

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

Appellees.

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted June 2, 2020
Pasadena, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.



Before: FERNANDEZ and OWENS, Circuit Judges, and AMON,*** District Judge.

The Official Committee of Unsecured Creditors of Verity Health System of California, Inc. (the Committee) appeals from the district court’s dismissal of the Committee’s appeal from the bankruptcy court. The Committee argues the waivers under 11 U.S.C. § 506(c) and 11 U.S.C. § 552(b) in the bankruptcy court’s Final Debtor-in-Possession Order (Final DIP Order) prejudice unsecured creditors and unduly benefit secured creditors (Prepetition Secured Creditors). As the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 158(d)(1), and we affirm.

The district court properly dismissed the Committee’s appeal as statutorily moot under 11 U.S.C. § 364(e). Section 364(e) provides as follows:

The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

11 U.S.C. § 364(e). This court has held that § 364(e) “broadly protects any requirement or obligation that was part of a post-petition creditor’s agreement to

*** The Honorable Carol Bagley Amon, Senior United States District Judge for the Eastern District of New York, sitting by designation.

finance.” *Weinstein, Eisen & Weiss, LLP v. Gill (In re Cooper Commons, LLC)*, 430 F.3d 1215, 1219 (9th Cir. 2005), *cert. denied*, 546 U.S. 1174 (2006); *see id.* at 1219–20 (holding that “any provisions of the financing agreement that [a postpetition creditor] might have bargained for or that helped to motivate its extension of credit are protected by § 364(e)”; *Burchinal v. Cent. Wash. Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484, 1488 (9th Cir. 1987).

Here, the waivers are included in the Final DIP Order—a postpetition financing arrangement authorized under § 364.¹ The DIP Lender required the Prepetition Secured Creditors’ consent to the Final DIP Order as a precondition to its obligation to make the revolving loans. In turn, the Prepetition Secured Creditors conditioned their consent on, among other things, the inclusion of the waivers in the adequate protection package. Therefore, the waivers were “part of a post-petition creditor’s agreement to finance” and “helped to motivate [the DIP Lender’s] extension of credit.” *Cooper Commons*, 430 F.3d at 1219–20. As the Committee does not dispute that it did not obtain (or seek) a stay pending appeal and that the DIP Lender acted in good faith, the removal of the waivers from the

¹ The Committee’s contention that the Prepetition Secured Creditors are not entitled to § 364(e)’s protections because the adequate protection package was authorized under 11 U.S.C. § 361 is meritless. The adequate protection package, although not expressly included in § 364, is protected by § 364(e) because the package is part of Ally Financial, Inc.’s (the DIP Lender) agreement to finance. *See Adams Apple*, 829 F.2d at 1488.

Final DIP Order would constitute a modification of an authorization to obtain credit to which § 364(e) applies.

The Committee argues § 364(e) is irrelevant here because it stipulated with the DIP Lender that all rights and protections granted to the DIP Lender shall remain in full force and effect even if the Committee is successful in its appeal. Because we conclude the Prepetition Secured Creditors are also entitled to § 364(e)'s protections, this stipulation does not change the analysis.²

The Committee additionally relies on the bankruptcy court's order that authorized Verity Health System of California, Inc. and its subsidiaries (the Debtors) to use the proceeds from the sales of its hospitals to repay in full the amounts outstanding to the DIP Lender (the Supplemental Cash Collateral Order).³

² Further, the stipulation's force should be limited because only the Committee and the DIP Lender agreed to it and the bankruptcy court never approved it.

³ The Committee has filed a motion to supplement the record with the Supplemental Cash Collateral Order, which the Debtors and Prepetition Secured Creditors oppose. While this court generally does not allow parties to supplement the record on appeal with documents not before the district court, it has recognized that supplementing the record may be necessary when engaging in a mootness analysis. *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003). Therefore, we grant the motion as to the Supplemental Cash Collateral Order.

The Committee also asks this court to supplement the record with filings in two challenge actions against the Prepetition Secured Creditors. Because the challenge actions are not relevant to this court's mootness inquiry, we deny the motion to supplement as moot as to the challenge actions.

The Committee argues that because the DIP Lender has been fully repaid, § 364(e)'s protections are no longer relevant. However, the Supplemental Cash Collateral Order does not “terminate, restrict or modify the adequate protection granted to the Prepetition Secured Creditors pursuant to the Final DIP Order.” It indicates that “[n]othing herein shall alter any rights, claims, entitlements or defenses of the Debtors, the Prepetition Secured Creditors or the Committee.” Moreover, the Final DIP Order explicitly states that it will survive any subsequent orders issued by the bankruptcy court. Therefore, the Supplemental Cash Collateral Order does not affect the protections flowing to the Prepetition Secured Creditors through the Final DIP Order.

Thus, the district court properly dismissed the Committee's appeal as statutorily moot under § 364(e).⁴

AFFIRMED.

⁴ The Committee contends that the district court erred by not addressing equitable mootness. We disagree. A court may dismiss an appeal as statutorily moot under § 364(e) without addressing the separate doctrine of equitable mootness, as we do here. *See Adams Apple*, 829 F.2d at 1488–91.

United States Court of Appeals for the Ninth Circuit

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Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court’s decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel’s judgment, one or more of the situations described in the “purpose” section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel’s decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 10. Bill of Costs

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