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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re Verity Health System of California, Inc. Debtors	DISTRICT COURT CASE NUMBER: 2:19-cv-133-DMG BANKRUPTCY COURT CASE NUMBER: 2:18-bk-20151-ER
XAVIER BECERRA, California Attorney General, Appellant, **v.** **County of Santa Clara,** Appellee.	**CALIFORNIA ATTORNEY GENERAL'S NOTICE OF EMERGENCY MOTION AND EMERGENCY MOTION TO STAY PENDING APPEAL OF THE BANKRUPTCY COURT'S ORDER AUTHORIZING THE SALE OF CERTAIN OF THE DEBTORS' ASSETS TO SANTA CLARA COUNTY FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND OTHER INTERESTS, AND MEMORANDUM OF DECISION OVERRULING OBJECTIONS OF THE CALIFORNIA ATTORNEY GENERAL; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF ALICIA BERRY, WENDI HORWITZ AND PHIL DALTON IN SUPPORT THEREOF;** **[Appendix filed concurrently]** Date: [TBD] Time: [TBD] Courtroom: 8C Judge: Dolly M. Gee

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COURT RULES

Xavier Becerra, Attorney General of California (Attorney General)[1] moves the Court for an order to stay the Bankruptcy's Court's "Order (A) Authorizing the Sale of Certain of the Debtors' Assets to Santa Clara County Free and Clear of Liens, Claims, Encumbrances, and Other Interests; (B) Approving the Assumption and Assignment of an Unexpired Lease Related Thereto; and (C) Granting Related Relief" entered on December 27, 2018 (Sale Order) pending the Attorney General's appeal to this Court filed on January 7, 2019. This motion is being made on an emergency basis because the Bankruptcy Court waived the automatic 14-day stay of the Sale Order allowed under Bankruptcy Rule 6004(h) and denied the Attorney General's request for a stay.

Thus, the Sale Order became immediately effective and allows the parties to close the transaction before this Court can rule on the instant motion for a stay pending appeal. Without a stay, the Attorney General's appeal regarding an important state law issue affecting public health, safety, and welfare will likely be rendered moot by operation of 11 U.S.C. § 363(m).

PLEASE TAKE NOTICE that the Attorney General brings this motion under Federal Rules of Bankruptcy Procedure Rule 8007(b) and Local Rule 7-19, seeking a stay pending appeal on an emergency basis. Granting this motion on an emergency basis will assure that the Attorney General's right to appeal is preserved. The Attorney General's interest in preserving his right to appeal is particularly significant here, where important issues of state law regarding health, safety, and

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[1] Xavier Becerra is the Attorney General of the State of California and is the State's chief law officer. Cal. Const., art. V, § 13. The California Attorney General has broad constitutional, common law and statutory powers to protect the public. California Constitution, art. V, §13; *D 'Amico v. Board of Medical Examiners,* 11 Cal.3d 1, 14-15 (1974); 112 Cal.Rptr. 786. He is charged with the supervision and regulation of nonprofit corporations and other charitable trusts, including hospital transactions. Cal. Govt. Code § 12598; Cal. Corp. Code § 5914, et seq.

welfare are at issue, and are most likely to arise again in bankruptcy sales where appellate rights are frequently mooted by operation of section 363(m).

PLEASE TAKE FURTHER NOTICE that this Motion is based on this Notice and Motion, the attached Memorandum of Points and Authorities, the Declarations of Alicia Berry, Wendi Horwitz and Phil Dalton, Appendix, the arguments of counsel, and other admissible evidence brought before the Court at or before the hearing on this Motion.

PLEASE TAKE FURTHER NOTICE that the Attorney General is serving this Notice and Motion, the Memorandum of Points and Authorities, the Declarations of Alicia Berry, Wendi Horwitz and Phil Dalton, and Appendix on Debtor, the County of Santa Clara, the Official Creditors Committee, the Office of the United States Trustee, and the United States Attorney as set forth in the attached proof of service. To the extent necessary, the Attorney General requests that this Court waive compliance with Local Rule 7-19 and approve service, in addition to the means of service set forth in such rule, by regular mail. In the event that the Court sets a hearing on the Motion, the Attorney General shall provide notice of the entry of the order setting the hearing on each of the foregoing parties and such other parties as the Court directs, including by telephonic notice.

WHEREFORE, for the foregoing reasons, and as may further be set forth at or before the hearing on this Motion, the Attorney General respectfully requests that this Court enter an order staying the Sale Order until the conclusion of an appeal therefrom.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

On December 3, 2015, after careful deliberation, public meetings, and consultation with a healthcare expert pursuant to state law (Cal. Corp. Code, § 5914, et seq.), the California Attorney General issued a decision to consent with conditions to the change in governance and control of Daughters of Charity Health System (now known as Verity Health Systems of California, Inc.). The decision contained five sets of required health and safety protections ("AG Conditions"), one for each of the hospitals. (Appendix, Docs. 1 [AG Conditions] and 5 [health care impact reports].)

Following Verity's acceptance of the AG Conditions, the transaction closed on December 14, 2015. The health and safety protections within the AG Conditions specifically contemplated a future sale of the hospitals, and required that O'Connor Hospital and Saint Louise Regional Hospital retain specific healthcare services for at least ten years from the closing date of the transaction, including: 24-hour emergency medical service; intensive care services; coronary care services; obstetric services; sub-acute care services; women's health services; reproductive health services; and stroke services and designation as a primary stroke center; as well as additional services including cancer and cardiac services, for a period of five years. (Appendix, Doc. 1 [AG Conditions] at 178-179, 263-264.)

These hospitals provide essential services to the uninsured, under-served populations, and the elderly. (Appendix, Doc 5 [health care impact reports] at p. 715 and 811.) Now, Verity proposes to sell O'Connor and Saint Louise hospitals to Santa Clara County without the AG Conditions required by state law. Without these health and safety protections, the County will not be required to continue to operate O'Connor or Saint Louise as general acute care hospitals, or provide the healthcare services required by the AG Conditions.

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The County's Asset Purchase Agreement does not set forth the specific clinical services that will be provided. Nowhere has the County committed in any legally enforceable document to provide these essential healthcare services. The Asset Purchase Agreement only states that it will provide services "consistent with the objectives of the current conditions of approval from the California Attorney General." (Appendix, Doc. 2 [Stalking Horse Motion], p. 557.) Of course, this statement of intent does not bind the County to actually provide the clinical services required by the AG Conditions.

The County has never stated which, if any, of the healthcare services the AG Conditions require are a problem for it to maintain. Without these vital health and safety protections, the County will not be required to maintain the properties as acute care hospitals providing important healthcare services, and can later use the properties for any other purpose. The County's refusal to commit to these essential healthcare services compels the California Attorney General to seek a stay of the Sale Order.

PROCEDURAL BACKGROUND

1. In July 2015, Daughters of Charity Health System and Daughters of Charity Ministry Services Corporation (collectively, "Daughters") entered into the System Restructuring and Support Agreement with BlueMountain Capital Management, LLC ("BlueMountain"), pertaining to the change in governance and control of Daughters, its affiliated entities, five acute care hospitals and skilled nursing facility; those facilities include but are not limited to: St. Vincent Medical Center in Los Angeles, St. Francis Medical Center in Lynwood, O'Connor Hospital in San Jose, Saint Louise Regional Hospital in Gilroy, Seton Medical Center in Daly City, and Seton Coastside in Moss Beach.

2. On July 31, 2015, Daughters submitted written notice of the transaction to the CALIFORNIA ATTORNEY GENERAL for review and approval pursuant to California Corporations Code sections 5914 and 5920. During the review of the

transaction, a healthcare expert was retained to evaluate the potential impact of the transaction on the availability and accessibility of healthcare services to each of the communities served by the hospitals involved, as required by the California Code of Regulations, Title 11, section 999.5, subd. (e)(5) and (e)(6). The regulations require the health care expert to assess the effect of the agreement on emergency services, reproductive health services, and any other health care services that the hospital is providing, the provision of services to Medi-Cal patients and county indigent patients, staffing and the availability of care, the likely retention of employees as it may affect continuity of care, and any mitigation measures proposed by the hospital to reduce any potential adverse effect on health care services. Cal. Code Regs. Tit. 11, § 999.5, subd. (e)(6) (2018). The regulations require that the Attorney General evaluate the effect of the transaction on the public, including the availability and accessibility of health care services to the affected community. Cal. Code Regs. Tit. 11, § 999.5, subd. (f). The expert prepared five health care impact statements. These healthcare impact statements included interviews with medical staff, management, and employees, board members, and community representatives. These health care impact statements contained the expert's analysis of financial, utilization, and health care services, demographic characteristics, payer mix, hospital utilization records and trends, health status indicators, and hospital market share information in formulating an opinion regarding the potential impact of the transaction on the community. (Declaration of Phil Dalton, ¶ 2.)

3. On December 3, 2015, the California Attorney General issued a decision to consent with conditions, to the change in governance and control of Daughters of Charity Health System (now known as Verity Health Systems of California, Inc.). The decision contained five sets of conditions ("AG Conditions"), one for each of the hospitals, as well as a copy of the healthcare impact reports for each of the hospitals. (Appendix, Doc. 1 [AG Conditions].)

4. The December 3, 2015 decision incorporated the recommendations of the healthcare expert. Several conditions were already contained within the System Restructuring and Support Agreement, but were further formalized in the California Attorney General's decision (i.e., the hospital would continue to operate as general acute care hospitals with emergency services, continuation of participation in the Medi-Cal and Medicare programs, continuation of staff privileges.) Moreover, the vast majority of the AG Conditions relate to the health, safety, and welfare of the People of the State of California: continued operation as licensed general acute care hospitals, continued provision of 24-hour emergency and trauma medical services, continued provision of certain essential health care services including reproductive health services, continued participation in the Medi-Cal and Medicare programs for low income, disabled and elderly patients, and the continuation of governmental contracts that provide access to care for indigent patients.

5. The transaction between Daughters and BlueMountain specifically contemplated a future sale of the hospitals through the Purchase Option Agreements listed in Condition II. (Appendix, Doc. 1.) Condition I of the AG Conditions provides that the conditions shall be legally binding on the parties to the transaction, including the hospital facilities, and any other subsidiary, parent, general partner, limited partner, member, affiliate, successor, successor in interest, assignee, or person or entity serving in a similar capacity, and any entity succeeding thereto as a result of consolidation, affiliation, merger, or acquisition of all of substantially all of the real property or operating assets of the hospitals, or the real property on which the hospital is located, any and all current and future owners, lessees, licensees, or operators of the hospital, and any and all current and future lessees and owners of the real property on which the hospital is located. (Appendix, Doc. 1.)

6. The conditions imposed by the California Attorney General's decision for each of the five hospitals and one skilled nursing facility remain in effect for

fifteen years from the closing date of the transaction. The conditions also make clear that they apply to all future owners, managers, lessees, licensees, or operators of the hospitals and skilled nursing facility. (Appendix, Doc. 1 [AG Conditions].)

7. As part of the transaction, Daughters was renamed Verity Health System of California, Inc. ("Verity"). Verity has since complied with the AG Conditions and has not sought the California Attorney General's approval to modify any conditions.

8. On August 31, 2018, Verity and its nonprofit subsidiaries (collectively, the "Debtors") each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

9. On October 1, 2018, Verity filed Debtors' Notice Of Motion And Motion For The Entry Of (I) An Order (1) Approving Form Of Asset Purchase Agreement For Stalking Horse Bidder And For Prospective Overbidders To Use, (2) Approving Auction Sale Format, Bidding Procedures And Stalking Horse Bid Protections, (3) Approving Form Of Notice To Be Provided To Interested Parties, (4) Scheduling A Court Hearing To Consider Approval Of The Sale To The Highest Bidder And (5) Approving Procedures Related To The Assumption Of Certain Executory Contracts And Unexpired Leases; And (II) An Order (A) Authorizing The Sale Of Property Free And Clear Of All Claims, Liens And Encumbrances; Memorandum Of Points And Authorities In Support Thereof (Bid Procedures Motion) (Appendix, Doc. 2.) related to two of the hospitals in Santa Clara County: O'Connor Hospital in San Jose, and Saint Louise Regional Hospital in Gilroy. Section 5.6 of the Asset Purchase Agreement indicates that "Purchaser agrees that promptly after the Signing Date, and in any event prior to the date of the Auction, it will use its commercially reasonable efforts to negotiate any issues with the California Attorney General over approval of the transactions contemplated by this Agreement. Sellers agree to cooperate in good faith as permitted under the

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Bankruptcy Code to assist in this endeavor." (Appendix, Doc. 2 [Stalking Horse Motion] p. 536.)

10. On October 10, 2018 the California Attorney General filed his Response to Debtors' Motion for Entry of (I) an Order (1) Approving Form of Asset Purchase Agreement for Stalking Horse Bidder, and (II) an Order (A) Authorizing the Sale of Property Free and Clear of all Claims, Liens and Encumbrances; Memorandum of Points and Authorities in Support Thereof (AG Bid Procedure Response) wherein the California Attorney General objected to a sale free and clear of the AG Conditions. (Appendix, Doc. 3.)

11. On October 17, 2018 Verity filed its Debtors' Reply to Response of California Attorney General to Debtors' Bid Procedures Motion. (Appendix, Doc. 4.)

12. On October 22, 2018, the California Attorney General filed his Sur-Reply to Debtors' Reply to the Response by the California Attorney General to Debtors' Bid Procedures Motion; Declaration of Alicia Berry (AG Bid Procedure Sur-Reply wherein the California Attorney General objected to a sale free and clear of the AG Conditions. (Appendix, Doc. 5.)

13. In the Court's Order dated October 30, 2018, the court did not rule on the objections asserted by the California Attorney General, finding such objections premature. However, the objections were preserved for the Sale Hearing. (Appendix, Doc. 6.)

14. Beginning in late October 2018, staff from the California Attorney General's Office began discussions with counsel for the County of Santa Clara ("County") regarding the applicability of the AG Conditions.

15. On November 2, 2018, the County submitted a request for clarification of certain of the AG Conditions for O'Connor Hospital and Saint Louise Regional Hospital. (Appendix, Doc. 8 [County Request for Clarification], p. 858-901.)

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16. On November 9, 2018, the California Attorney General issued a response clarifying that the AG Conditions identified in the November 2 letter would not be enforced against the County. (Appendix, Doc. 8 [AG Letter of Clarification], p. 903-905.)

17. On December 12, 2018, Debtors' filed their Debtors' Notice of Motion and Motion for the Entry Of (I) an Order (1) Approving Form of Asset Purchase Agreement for Stalking Horse Bidder and for Prospective Overbidders to Use, (2) Approving Auction Sale Format, Bidding Procedures and Stalking Horse Bid Protections, (3) Approving Form of Notice to be Provided to Interested Parties, (4) Scheduling a Court Hearing to Consider Approval of the Sale to the Highest Bidder and (5) Approving Procedures Related to the Assumption of Certain Executory Contracts and Unexpired Leases; and (II) an Order (A) Authorizing the Sale of Property Free and Clear of All Claims, Liens and Encumbrances; Memorandum of Points and Authorities In Support ("Motion for Sale"). (Appendix, Doc. 7.)

18. On December 14, 2018, the California Attorney General filed its Response to the Motion for Sale. (Appendix, Doc. 8.)

19. On December 21, 2018, the Court issued its Preliminary Findings and Conclusions, and requested the Debtors, the California Attorney General, the Official Committee of Unsecured Creditors, and the County of Santa Clara submit further briefing by December 24, 2018. (Appendix, Doc. 9.)

20. The California Attorney General submitted his Response on December 24, 2018, and his errata dated December 26, 2018. (Appendix, Docs. 11 and 13.)

21. Debtor submitted a Response on December 24, 2018, and on that date also submitted the Declaration of Douglas Press. (Appendix, Docs. 10 and 12.)

22. On December 26, 2018, the bankruptcy court issued its Memorandum of Decision Overruling the Objections of the California Attorney General to the Debtors' Sale Motion, and its Sale Order on December 27, 2018. (Appendix, Docs. 14 and 15.)

23. The Attorney General filed a notice of appeal. (Appendix, Doc. 16), and moved for a stay of the bankruptcy court's sale order pending appeal. (Appendix, Doc. 17.) Debtors opposed the motion for stay, as did the Official Committee of Unsecured Creditors and the County of Santa Clara. (Appendix, Docs. 19-21.)

24. The Attorney General filed a Reply to the oppositions to the motion for stay. (Appendix, Doc. 22.) However, the bankruptcy court denied the motion for stay. (Appendix, Doc. 23.)

25. The transaction is scheduled to closed by February 28, 2019.

ARGUMENT

Federal Rules of Bankruptcy Procedure, rule 8007(b) allows a bankruptcy court to suspend an order pending appeal.

The standard for determining whether to grant a stay pending appeal is similar to the standard for issuing a preliminary injunction. *Hilton v. Braunskill* (*Braunskill*), 481 U.S. 770, 776 (1987); *Tribal Vill. of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988); *see also Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20, (2008) (laying out four-pronged test for preliminary injunctive relief). For both the appellate court and the district court, "the factors regulating the issuance of a stay are generally the same: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits on the appeal; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties in the proceeding; and (4) where the public interest lies." *Braunskill*, 481 U.S. at 776; see *also Humane Soc'y of U.S. v. Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009).

Courts need not give equal weight to each of the four factors. *Standard Havens Prods v. Gencor Indus.* (*Standard Havens*), 897 F.2d 511, 512 (Fed. Cir. 1990); *see also Providence Journal Co. v. Federal Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979). Courts have used the sliding scale approach to decide motions for stay. *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011);

Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134-35 (9th Cir. 2011). Likelihood of success in the appeal is not a rigid concept. *Standard Havens*, 897 F.2d at 512; *see also Washington Metro Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 844 (D.C. Cir. 1977) (A court may grant a stay when "[t]here is substantial equity, and a need for judicial protection, whether or not movant has shown a mathematic probability of success.").

I. THE CALIFORNIA ATTORNEY GENERAL IS LIKELY TO SUCCEED ON THE MERITS OF THE APPEAL

The Bankruptcy Court held 1.) that the sale of a nonprofit healthcare facility to a public entity is not subject to California Attorney General review under Corporations Code sections 5914 and 5920, 2.) that the California Attorney General had waived his right to object to the sale of the hospitals free and clear of the AG Conditions, and 3.) that the California Attorney General is equitably estopped from contesting the Debtors' ability to sell the hospitals free and clear of the health and safety protections within the AG Conditions. The three grounds for the Court's ruling are discussed separately below:

A. The California Attorney General Exercised His Police and Regulatory Powers by Imposing Conditions on the 2015 Transaction

Xavier Becerra is the elected Attorney General of the State of California and is the chief law officer of the State, as was Attorney General Kamala Harris before him. Cal. Const., art. V, § 13. The California Attorney General has broad constitutional, common law and statutory powers under the state constitution to protect the public. Cal. Const., art. V, §13; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14-15. The California Attorney General is charged with the supervision and regulation of nonprofit corporations and other charitable trusts in this state. Cal. Govt. Code, § 12598.

California Attorney General Harris exercised her police and regulatory powers pursuant to California state law in December 2015 when she issued a decision to consent with conditions to the change in governance and control of Daughters, its affiliated entities, five acute care hospitals and skilled nursing facility; including St. Vincent Medical Center in Los Angeles, St. Francis Medical Center in Lynwood, O'Connor Hospital in San Jose, Saint Louise Regional Hospital in Gilroy, Seton Medical Center in Daly City, and Seton Coastside in Moss Beach. The terms of the AG Conditions were to remain in place for 15 years, though certain conditions expire sooner. (Appendix, Doc. 1, [AG Conditions] p. 181 and 266.) As such, the continued operation of the AG Conditions is a continuation of the California Attorney General's police and regulatory powers under Corporations Code section 5914 et seq. The Bankruptcy Court was required to apply non-bankruptcy law under Bankruptcy Code sections 959(b) and the amendments to the Bankruptcy Code in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 of sections 363(d)(1), 541(f), 1129(a)(16), and 1221(d) that specifically provide that applicable non-bankruptcy law applies to sales of assets by a nonprofit debtor.

The Supreme Court held in *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 507 (1986), in a Chapter 11 case that converted to a liquidation proceeding in a Chapter 7, that the Bankruptcy Code does not preempt "a state statute or regulation that is reasonably designed to protect the public health or safety…." The Court noted Congress' intentions that the trustee's efforts "to marshal and distribute the assets of the estate" give way to the governmental interest in public health and safety. *Id.* at 502. In addition, other courts have applied section 959(b) where the state was exercising its inherent regulatory and police powers in a Chapter 7 or other liquidation situation. *H.L.S. Energy Co., Inc.* 151 F.3d 434 (5th Cir. 1998) and *In re Stevens*, 68 B.R. 774 (D. Me. 1987).

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The legislative history regarding sections 363(d)(1)[2], 1129(a)(16)[3], and 1221(d)[4] clearly shows Congress's intent to give greater influence to state regulators and attorneys general, and limit the ability of trustees or debtors-in-possession to use, sell or lease property of a nonprofit corporation in derogation of laws regarding important state interests. This is especially true when government entities are enforcing their police and regulatory powers, such as Corporations Code section 5914 and 5920 *et seq.*

Here, the California Attorney General protected the health, safety, and welfare of the communities served by the six health facilities owned and controlled by the Debtors by issuing conditions requiring essential health care services to be provided by the facilities including emergency services, minimum levels of charity care (free or discounted care), participation in the Medi-Cal and Medicare programs, and seismic safety. (Appendix, Doc. 1 [AG Conditions]; Cal. Const., art. V, § 13.)

Under both California law and the express terms of the conditions, the County as the purchaser takes the assets subject to the conditions. The California Attorney General's decision is binding on any successor, successor in interest, assignee or other transferee of the healthcare facilities.

Condition I of the decision related to O'Connor Hospital states:

> These Conditions shall be legally binding on [the parties], any other subsidiary, parent, general partner, limited partner, member, affiliate, successor, successor in interest, assignee, or person or entity serving in a similar capacity of any of the above-listed entities [omitted]…, <u>any entity succeeding thereto as a result of consolidation, affiliation, merger, or acquisition of all or substantially all of the real property or operating assets of O'Connor Hospital, or the real property on which O'Connor Hospital is located, any and all current and future owners,</u>

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[2] Section 363(d)(1) provides that the trustee may use, sell, or lease property of the estate only in accordance with non-bankruptcy law applicable to the transfer of the debtor's property.

[3] Section 1129(a)(16) provides that all transfers of property of the plan shall be made in accordance with any applicable provisions of non-bankruptcy law that govern the transfer of property by a nonprofit corporation.

[4] The Attorney General is a party in interest to these Chapter 11 proceedings pursuant to Section 1221(d) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 as "the attorney general of the State in which the debtor is incorporated, was formed or does business."

> lessees, licensees, or operators of O'Connor Hospital, and any and all current and future lessees and owners of the real property on which O'Connor Hospital is located.
>
> These Conditions shall be legally binding on the following entities, as defined in Operating Asset Purchase Option Agreement, Operating Asset Purchase Agreement, Real Estate Purchase Option. Agreement, and the Real Estate Purchase Agreement, when the closing occurs on the Operating Asset Purchase Agreement and the Real Estate Purchase Agreement: the Option Holders, Purchaser and its Affiliates, "OpCo" a Delaware limited liability company, owned directly or indirectly by funds managed by BlueMountain Capital Management LLC, and "PropCo" a Delaware limited liability company that will elect to be treated for tax purposes as a real estate investment trust, owned directly or indirectly by funds managed by BlueMountain Capital Management LLC, Integrity Healthcare, LLC, a Delaware limited liability company, Integrity Healthcare Blocker, LLC, a Delaware limited liability company, any other subsidiary, parent, general partner, limited partner, member, affiliate, successor, successor in interest, managing member, assignee, or person or entity serving in a similar capacity of any of the above-listed entities, any entity succeeding thereto as a result of consolidation, affiliation, merger, or acquisition of all or substantially all of the real property or operating assets of O'Connor Hospital, or the real property on which O'Connor Hospital is located, any and all current and future owners, lessees, licensees, or operators of O'Connor Hospital, and any and all current and future lessees and owners of the real property on which O'Connor Hospital is located. (Appendix, Doc. 1 [AG Conditions], p. 179-180 and 264-265, emphasis added.)

Also, construction of a statute by officials charged with its administration, including their interpretation of authority vested in them to implement and carry out its provisions, is entitled to great weight and courts should defer to the agency. *Morris v. Williams* 67 Cal.2d 733 (1967); *Aguilar v. Association for Retarded Citizens* 234 Cal.App.3d 21(1991); and *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 844 (1984). Thus, the California Attorney General should be given deference to interpret California laws concerning his authority and regulations promulgated by his office.

B. There Was No Waiver of the California Attorney General's Conditions

Under California law, waiver is a question of fact. Waiver is an affirmative defense, for which the party asserting it bears the burden of proof. *Intel Corp. v. Hartford Acc. & Indem. Co.* 952 F.2d 1551,1559 (9th Cir. 1991). Here, neither

Debtor nor the County has met the burden of proof.

Shortly before the California Attorney General filed his Response on December 14, the County was advised that the California Attorney General did not object to the sale *as long as the conditions as currently or subsequently clarified remained in place*. (Appendix, Doc. 11 [AG Response to Court's Preliminary Findings], p. 967.) The County provided no evidence that the California Attorney General intended to, or had, withdrawn his previous objections. In fact, the County further corroborates the arguments and declarations submitted by the California Attorney General. (Appendix, Doc. 12 [Declaration of Douglas Press].) The County acknowledges that "we also agreed to discuss, *post-sale*, how to address the other conditions under a variety of approaches" and that "ongoing discussions with the County about the other conditions were contemplated outside the Court process." (*Id.* at 946.) As such, it is clear that the County understood that the health and safety provisions within the AG Conditions would survive the sale order, or there would have been no need to continue discussing the AG Conditions post-sale. Thus, as evidenced by Press' declaration, the County did not have a reasonable belief that the California Attorney General had intentionally relinquished his police and regulatory rights.

C. The Doctrine of Equitable Estoppel Does Not Apply

The doctrine of equitable estoppel requires: 1.) the party to be estopped must know the facts, 2.) he must intend that his conduct shall be acted on, 3.) the party asserting the right to estoppel must be ignorant of the true facts, and 4.) the party asserting estoppel must act in reliance and to his injury. *Gabriel v. Alaska Elec. Pension Fund* 773 F.3d 945, 955 (9th Cir. 2014).

Here, the County has failed to prove three factors of the four-prong test in *Gabriel*. First, there has been no showing that the California Attorney General intended the December 14, 2018 filing to be treated as a waiver. In fact, moments before the filing took place, the Chief Assistant Attorney General explained to the

Assistant County Counsel that the language meant that the California Attorney General did not object to the sale *as long as the conditions, as clarified, remained in place*. (Appendix, Doc 11 [Declaration of Angela Sierra] p. 939.) Thus, the California Attorney General did not intend the filing to waive all objections to the sale of the hospital, and no evidence has been introduced that negates this fact. Rather, the County was apprised of the California Attorney General's position moments before the December 14, 2018 filing. (*Ibid.*)

Second, the County "agreed to discuss, post-sale, how to address the other conditions under a variety of approaches" and that "ongoing discussions with the County about the other conditions were contemplated outside the Court process." (Appendix, Doc. 12 [Declaration of Assistant County Counsel Douglas Press], p. 946.) As such, not only was the County apprised of the California Attorney General's position, the County agreed that the parties would continue discussions about the AG Conditions post-sale – which requires that the AG Conditions survive the sale order.

Lastly, there is no evidence that the County or Debtors were injured as required by the fourth prong. The County and Debtors argued that they would have argued more strenuously, but this is not a cognizable injury. Moreover, because the County was aware that the California Attorney General did not intend to waive his AG Conditions, there was no reliance and no injury to support the application of the equitable estoppel doctrine.

II. The Families and Patients Served by O'Connor Hospital and Saint Louise Regional Will Suffer Irreparable Injury Absent a Stay

The California Attorney General represents the People of the State of California and has broad constitutional, common law and statutory powers to protect the public. California Constitution, art. V, § 13; *D'Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974). The California Attorney General is statutorily obligated to conduct an assessment of the effect of the agreement on emergency services, reproductive health services, and any other health care services that the hospital is providing when reviewing hospital transactions. (Cal. Code Regs. tit 11, § 999.5, subd. (e)(6) (2018). Moreover, "[i]t is the policy of the Attorney General in consenting to an agreement of transaction involving a general acute care hospital, to require for a period of at least five years the continuation at the hospital of existing levels of essential healthcare services." *Id.* at subd. (f)(8)(C).

Absent a stay, the proposed sale transaction will close prior to a ruling on the California Attorney General's appeal. If that should occur, the appeal may well be mooted because any reversal or modification of the Sale Order on appeal will not affect the validity of a sale under 11 U.S.C. section 363(m). Paragraph E of the Sale Order seeks to give the parties protection under section 363(m). Section 363(m) effectively moots any challenge to a section 363 sale that affects the validity of the sale so long as the purchaser acted in good faith and the appellant failed to obtain a stay of the sale. Thus, without the stay, any reversal or modification of the Sale Order on appeal will not affect the validity of a sale, and the essential healthcare services and protections in the AG Conditions will be lost even if the bankruptcy court's ruling is incorrect. The essential services that may be lost include emergency services, obstetric and neonatal intensive care services, pediatric services, cardiac services, sub-acute care services, diagnostic imaging services, stroke and surgical services, women's and breast care services, and orthopedic services. (Declaration of Phil Dalton, ¶ 4.)

The Legislature entrusted the California Attorney General with the specific responsibility to protect the public interest in reviewing the transfer of hospitals through the statutory scheme laid out in California Corporations Code section 5914, et seq. The families and patients who depend on the essential healthcare services guaranteed by the AG Conditions will suffer irreparable injury if the Attorney General is denied his power to protect the public health, safety, and welfare.

III. THERE WILL BE LESS HARM TO OTHER INTERESTED PARTIES IF A STAY IS GRANTED

The third factor is whether there will be any harm to other interested parties if a stay is granted. The Debtors have not demonstrated any harm to the parties if the County were required to provide these healthcare services. The County has never stated that any specific AG Condition at issue in this appeal would prevent the sale from closing.[5] The County has never stated that it would not or could not provide any of the healthcare services at O'Connor and St. Louise. Were that situation ever to arise, state law already provides a mechanism to modify the AG Conditions and release the County from any particular obligations. Cal. Code Regs. tit. 11, § 999.5, subd. (h). Rather, the California Attorney General's healthcare impact reports demonstrate that harm will occur if this transfer of assets is allowed without the continued application of the health and safety protections of the AG Conditions. (Declaration of Phil Dalton, ¶ 4; Appendix, Doc 5 [health care impact reports] p. 715 and 820.)

IV. A STAY WOULD PROMOTE THE PUBLIC INTEREST

As stated above, a stay will promote the public's interest in allowing the District Court to determine on appeal whether the important health, safety, and welfare protections in the AG Conditions are preserved to protect the patients and families served by O'Connor Hospital and Saint Louise Regional Hospital. The AG Conditions address the continued operation as licensed general acute care hospitals; provision of 24-hour emergency and trauma medical services; reproductive health services; participation in the Medi-Cal and Medicare programs for low income, disabled and elderly patients; and the continuation of governmental contracts that provide access to care for indigent patients. The continued application of these important health and safety protections is in the public interest.

[5] The five conditions referenced in the November 9 letter, which the Attorney General previously addressed with the County, are not at issue in the present appeal. (Appendix, Doc. 8 [AG letter of clarification] p. 903-905.)

Without them, the County is free to close the hospitals or eliminate vital healthcare services in those communities.

CONCLUSION

For the reasons stated above, the California Attorney General respectfully requests that this Court enter an order staying the Sale Order until the conclusion of an appeal therefrom.

Dated: February 1, 2019

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
TANIA M. IBANEZ
Senior Assistant Attorney General

/s/ ALICIA BERRY

ALICIA BERRY
Deputy Attorney General
Attorneys for Xavier Becerra, Attorney General of California

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DECLARATION OF ALICIA BERRY

I, Alicia Berry, hereby declare:

1. I am a Deputy Attorney General at the California Attorney General's office. I make this declaration of my own personal knowledge and belief, and, if called as a witness, I could competently testify to the matters set forth herein.

2. The Appendix contains true and correct copies of the documents attached therein.

3. Based upon a concern that the Bankruptcy Court's waiver of Bankruptcy Rule 6004(h) in the filed and entered Sale Order and the fact that the transaction is scheduled to close at the end of February, the sale transaction could close before the Attorney General's request for a stay pending appeal is ruled on by this Court.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 1, 2019 at Los Angeles, California.

/s/ Alicia Berry
Alicia Berry, Deputy Attorney General
For Xavier Becerra, California Attorney General

DECLARATION OF WENDI HORWITZ

I, WENDI HORWITZ, hereby declare:

1. I am a Deputy Attorney General at the Office of the California Attorney General. For the last 15 years, I have reviewed written notices submitted by nonprofit corporations seeking the California Attorney General's written consent under Corporations Code sections 5914 *et seq*. I make this declaration of my own personal knowledge and belief, and, if called as a witness, I could competently testify to the matters set forth herein.

2. On or around July 31, 2015, Daughters of Charity Health System submitted a written notice seeking the California Attorney General's written consent pursuant to California Corporations Code sections 5914 *et seq*. During the Attorney General's review of the transaction, the Attorney General's Office retained a healthcare expert, Phil Dalton, Senior Vice President of VHA-UHC Alliance NewCo, Inc., to prepare health care impact statements that evaluate the effects of the transaction on the availability and accessibility of health care services to each of the communities served by the hospitals, as required by the California Code of Regulations, Title 11, section 999.5, subdivisions (e)(5) and (e)(6).

3. A true and correct copy of the expert's health care impact statements for O'Connor Hospital and Saint Louise Regional Hospital were filed with the bankruptcy court on October 22, 2018. (Appendix, Doc. 5.)

4. On or about December 3, 2015, the California Attorney General issued a decision conditionally consenting to the change in governance and control of Daughters of Charity Health System (now known as Verity Health Systems of California, Inc.). The Attorney General's decision contained five sets of conditions, one for O'Connor Hospital, Saint Louise Regional Hospital, St. Vincent Medical Center, St. Francis Medical Center, and Seton Medical Center and Seton Coastside combined. (Appendix, Doc 1.) Many of the Attorney General's conditions were recommended by the healthcare expert in the "Conclusions"

section of each health care impact statement.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 1, 2019 at Los Angeles, California.

/s/ Wendi Horwitz
Wendi Horwitz, Deputy Attorney General
For Xavier Becerra, California Attorney General

DECLARATION OF PHIL DALTON

I, PHIL DALTON, hereby declare:

1. I am a Professor of Practice of Health Management and Policy at the University of Southern California Sol Price School of Public Policy where I teach courses in the Master of Health Administration program. I hold a Master of Public Health from the University of Minnesota and a Master of Science in Health Policy and Management from Harvard University. In my career, I have worked for hospitals and health systems for over 12 years with responsibilities that included planning new services and evaluating community needs. I have also provided strategic and business advisory services as a healthcare consultant for over 20 years (including for my own firm, MDS Consulting that later became a VHA business), and recently as an employee of the consulting division of Vizient Inc. (formerly VHA-UHC Alliance NewCo, Inc.). In my consulting work, I have advised hospitals and health systems regarding market assessments, community needs, and healthcare services. I also have over 15 years of experience assisting in the review of hospital transactions for the California Attorney General that included preparation of health care impact statements, and I have reviewed over 20 transactions involving more than 50 hospitals.

2. VHA-UHC Alliance NewCo, Inc. was retained by the California Attorney General in or around July 2015 to prepare health care impact statements that evaluate the effects of the Daughters of Charity Health System, Inc.'s transaction on the availability and accessibility of health care services to each of the communities served by their hospitals. As an employee and Senior Vice President of VHA-UHC Alliance NewCo, Inc., I helped prepare the five health care impact statements

3. These five health care impact statements contained analyses of health care services, demographic characteristics, payer mix, hospital utilization trends, and hospital market share that were used in formulating an opinion regarding the

effect of the transaction on the communities served and proposed conditions to minimize any potential negative healthcare impact that might result from the transaction if the Attorney General approves the transaction. As set forth in the health care impact statement for O'Connor Hospital, we proposed conditions requiring the maintenance of several healthcare services: emergency medical services, obstetric and neonatal intensive care services, pediatric services, critical care services, stroke and cardiac services, sub-acute care services, and orthopedic services. (Appendix, Doc. 5.) As set forth in the health care impact statement for Saint Louise Regional Hospital, we proposed conditions requiring the maintenance of several healthcare services: concluded that emergency medical services, obstetric services, cancer services, critical care services, stroke services, and women's services. (Appendix, Doc. 5.).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 1, 2019 at Rancho Palos Verdes, California.

/s/ Phil Dalton
Phil Dalton

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