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15 UNITED STATES BANKRUPTCY COURT
16 CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION

17 In Re

Case No. 2:18-bk-20151-ER

18 VERITY HEALTH SYSTEM OF
19 CALIFORNIA, INC., et al.,

CHAPTER 11

20 Debtor and Debtors in Possession.

Jointly Administered With:

- 21 Affects All Debtors
- 22 Affects Verity Health System of California, Inc.
- 23 Affects O'Connor Hospital
- 24 Affects Saint Louise Regional Hospital
- 25 Affects St. Francis Medical Center
- 26 Affects St. Vincent Medical Center
- 27 Affects Seton Medical Center
- 28 Affects O'Connor Hospital Foundation
- Affects Saint Louise Regional Hospital Foundation
- Affects St. Francis Medical Center of Lynwood Foundation
- Affects St. Vincent Foundation
- Affects St. Vincent Dialysis Center, Inc.
- Affects Seton Medical Center Foundation
- Affects Verity Business Services
- Affects Verity Medical Foundation
- Affects Verity Holdings, LLC
- Affects De Paul Ventures, LLC
- Affects De Paul Ventures — San Jose ASC, LLC

- Case No.: 2:18-bk-20162-ER;
- Case No.: 2:18-bk-20163-ER;
- Case No.: 2:18-bk-20164-ER;
- Case No.: 2:18-bk-20165-ER;
- Case No.: 2:18-bk-20167-ER;
- Case No.: 2:18-bk-20168-ER;
- Case No.: 2:18-bk-20169-ER;
- Case No.: 2:18-bk-20171-ER;
- Case No.: 2:18-bk-20172-ER;
- Case No.: 2:18-bk-20173-ER;
- Case No.: 2:18-bk-20175-ER;
- Case No.: 2:18-bk-20176-ER;
- Case No.: 2:18-bk-20178-ER;
- Case No.: 2:18-bk-20179-ER;
- Case No.: 2:18-bk-20180-ER;
- Case No.: 2:18-bk-20181-ER

29 Debtors and Debtors In Possession.

SEIU-UHW'S OBJECTION TO EMERGENCY MOTION FOR ORDER: (I) AUTHORIZING THE DEBTORS to (A) PAY PREPETITION EMPLOYEE WAGES AND SALARIES, AND (B) PAY AND HONOR EMPLOYEE BENEFITS AND OTHER WORKFORCE OBLIGATIONS [DOC. 22]

and

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I. INTRODUCTION

Service Employees International Union, United Healthcare Workers-West (“SEIU-UHW”) hereby objects to the Emergency Motion of Debtors for Entry of Order: (I) Authorizing the Debtors to (A) Pay Prepetition Employee Wages and Salaries, and (B) Pay and Honor Employee Benefits and Other Workforce Obligations; and (II) Authorizing and Directing the Applicable Bank to Pay All Checks and Electronic Payment Requests Made by the Debtors Relating to the Foregoing (“First Day Wage Oder”). (Doc. 22.)

The motion should be denied to the extent it unilaterally changes the material terms and conditions of the collective bargaining agreement between SEIU-UHW and certain Debtors without bargaining over those terms with SEIU-UHW and without a showing that such changes are essential to the continuation of the Debtors’ business, in violation of 11 U.S.C. § 1113. Debtors have asserted that the decision to stop paying SEIU-UHW’s members’ pension contributions is justified because their benefits are “frozen,” but minimum funding contributions to the frozen plans are nonetheless required by the current collective bargaining agreement to ensure that the plans are able to satisfy their obligations to participants. Because the Debtors have not rejected or modified the collective bargaining agreement, they are not free to unilaterally alter the pension contribution requirement in the agreement.

SEIU-UHW also objects to the Emergency Motion of Debtors For Interim and Final Orders (A) Authorizing The Debtors To Obtain Post Petition Financing (B) Authorizing The Debtors To Use Cash Collateral And (C) Granting Adequate Protection To Prepetition Secured Creditors Pursuant To 11 U.S.C. §§ 105, 363, 364, 1107 and 1108 (Doc. 31) to the extent the minimum funding contributions to the pension plans are not reflected in the Initial Agreed Budget.¹ These amounts should be incorporated into the budget and paid in the ordinary course of business.

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¹ The Initial Agreed Budget (Doc. 32-2 [Chou Decl., Ex. 2]) includes only a general line for “Operating Expenses” and does not include a detailed breakdown.

1 II. FACTUAL BACKGROUND

2 A. **The Debtors have an obligation to make ongoing minimum funding contributions to**
3 **pension plans under the collective bargaining agreement with SEIU-UHW**

4 SEIU-UHW is a labor organization representing over 140,000 workers in California.
5 Debtors estimate that SEIU-UHW represents approximately 39% of Debtors' employees.
6 (Doc. 20, ¶ 8.) The terms and conditions of employment for SEIU-UHW members employed at
7 hospitals operated by Debtors are governed by a collective bargaining agreement. (Miller Decl.,
8 Ex. C.)

9 SEIU-UHW members and retirees are participants in two defined-benefit pension plans –
10 Verity Health System Retirement Plan A and the Retirement Plan for Hospital Employees.
11 (Miller Decl., ¶ 3, *see also* Miller Decl., Ex. C, Ex. D.) Those plans were frozen at the end of
12 2012, and after December 31, 2012, no more credited service has be granted to any of the
13 members of SEIU-UHW who participate in those plans. (Miller Decl., ¶¶ 4-5, Ex. A., Ex. B.)

14 Both Verity Health System Retirement Plan A and the Retirement Plan for Hospital
15 Employees are currently underfunded, and the plans do not have sufficient assets to cover all of
16 the benefits that have accrued. (Gray Decl. ¶¶ 2-3, Ex. A, Ex. B.) Accordingly, Debtors are
17 subject to minimum funding standards under ERISA and the Internal Revenue Code. Where a
18 plan is underfunded, the employer is bound to make certain actuarially determined contributions
19 in order to satisfy statutory funding requirements to meet its pension obligations. 29 U.S.C. §
20 1082; 26 U.S.C. § 412; *see Pension Benefit Guar. Corp. v. Sunarhauserman, Inc.*, 126 F.3d 811,
21 815 (6th Cir. 1997) (“[t]he minimum funding standard requires every employer maintaining a tax-
22 qualified plan to fund the plan until it is terminated, in amounts determined by the plan's enrolled
23 actuary in accordance with ERISA and the Internal Revenue Code”).

24 Moreover, Debtors are bound by the collective bargaining agreement with SEIU-UHW to
25 continue to make these minimum funding contributions to the pension plans to ensure that the
26 plans remain adequately funded and able to satisfy their obligations to participants. (Miller Decl.,
27 ¶¶ 6-7, Ex. C, Ex. D.) Specifically, the collective bargaining agreement provides that, as one of
28 the terms of employment of bargaining unit members, “Verity Health System will take all

1 necessary steps to comply with all laws and regulations applicable to the Plan, including ...
2 administering and funding such Plan in accordance with ERISA ... and ... making all
3 contributions necessary to satisfy the funding and PBGC premium requirements of ERISA and
4 the [Internal Revenue] Code.” (Miller Decl., Ex. C, p. 61; Ex. D., p. 61.)

5 The collective bargaining agreement remains in effect, and Debtors have not sought to
6 modify or reject the collective bargaining agreement pursuant to 11 U.S.C. § 1113.

7 **B. The Debtors failed to seek authority to pay these required minimum funding**
8 **contributions to the pension plans**

9 The Debtors filed their petition for relief under Chapter 11 of the Bankruptcy Code on
10 Friday, August 31, 2018. On the same day, the Debtors filed First Day Motions, including an
11 emergency motion seeking the entry of an order authorizing the Debtors to pay prepetition
12 employee wages and salaries, and pay and honor employee benefits and other workforce
13 obligations. (Doc. 22.)

14 In that motion, Debtors seek authority to pay both pre-petition and post-petition employee
15 wages and benefits. Debtors generally seek authority “to (a) pay prepetition employee wages and
16 salaries, and (b) pay and honor employee benefits and other workforce obligations (including
17 remitting withholding obligations, maintaining workers’ compensation and benefits programs,
18 paying related administration obligations, *making contributions to retirement plans*, and paying
19 reimbursable employee expenses).” (Doc. 22, p. 1:7-11 [emphasis added].)

20 As far as post-petition payments, Debtors ask “to continue to pay Wages to Employees of
21 the Verity Debtors incurred postpetition in the ordinary course of the Debtors’ business” (Doc.
22 22, p. 13:5-6), “to continue to pay Withholding Obligations incurred postpetition in the ordinary
23 course of the Debtors’ business” (Doc. 22, p.14:13-14), “to continue to pay Union Obligations
24 incurred postpetition in the ordinary course of the Debtors’ business” (Doc. 22, 14:24-25), “to
25 continue to pay Reimbursement Obligations incurred postpetition in the ordinary course of the
26 Debtors’ business” (Doc. 22, p. 15:13-14), “to continue to pay, *in their discretion* and in the
27 ordinary course of their business, the administration fees, premiums for and claims under the
28 Health Plans incurred postpetition” (Doc. 22, p. 19:13-14 [emphasis added]), and to continue to

1 honor miscellaneous Employee Benefit Plans “and to continue distributing to third-parties the
2 payments for these programs” (Doc. 22, p. 22:25-26-23:1).

3 *With regard to post-petition retirement plan payments*, however, Debtors ask authority
4 only “to continue to pay, in their discretion and in the ordinary course of their business, *matching*
5 *contributions* for the Retirement Plans incurred postpetition.” (Doc. 22, 22:11-12 [emphasis
6 added].) Verity claims to “offer” three defined benefit plans including Verity Health System
7 Retirement Plan A and the Retirement Plan for Hospital Employees. (Doc. 22, 21:2-5).²
8 Employer contributions into these defined benefit plans are not *matching contributions*. Matching
9 contributions are a creature of 401(k) type retirement plans. Thus, Debtors seek authority to
10 continue benefits only for certain employees who participate in defined contribution plans, but do
11 not seek authority to continue to pay the employer contributions to defined benefit plans that are
12 required pursuant to various collective bargaining agreements, including that between SEIU-
13 UHW and various Debtors. (Doc. 22, ¶¶ 60-63.) Debtors have claimed that with regard to the
14 RPHE and the Verity Retirement Plan A, this is because the pension benefits for SEIU-UHW
15 members are “frozen.”

16 III. ARGUMENT

17 A. **Debtors’ failure to request authorization to pay pension contributions required by 18 the collective bargaining agreement is a violation of 11 U.S.C. § 1113**

19 A debtor in possession cannot modify or terminate a collective bargaining agreement
20 without following the detailed procedure set forth in 11 U.S.C. § 1113. This is the exclusive
21 method of rejecting a collective bargaining agreement. Section 1113 provides that a Chapter 11
22 debtor may reject a collective bargaining agreement “only in accordance with the provisions of
23 this section.” 11 U.S.C. § 1113(a). The whole of the agreement is protected, as are its
24 components: “No provisions of this title shall be construed to permit a trustee to unilaterally
25

26 ² Debtors actually contribute to at least four defined benefit retirement plans. Those employees
27 represented by IUOE Stationary Engineers Local 39 are covered by the IUOE Stationary
28 Engineers Local 39 Pension Trust Fund. At Objector’s request, Debtors agreed include making
continuing contributions the IUOE Stationary Engineers Local 39 Pension Trust Fund in the
proposed Interim Order, which was issued by the Court.

1 terminate or alter any provisions of a collective bargaining agreement prior to compliance with
2 the provisions of this section.” 11 U.S.C. § 1113(f).

3 “[T]he language employed by Congress in § 1113 is unequivocal.” *Adventure Resources,*
4 *Inc. v. Holland*, 137 F.3d 786, 796 (4th Cir. 1998). “It plainly imposes a legal duty on the debtor
5 to honor the terms of a collective bargaining agreement ... until that agreement is properly
6 rejected.” *Id.*

7 Given the Debtors’ legal duty to honor the terms of a collective bargaining agreement
8 until it is modified or rejected under § 1113, the Sixth Circuit has held that all benefit claims
9 under a collective bargaining agreement are entitled to superpriority, and must be immediately
10 paid in full regardless of whether they were incurred before or after the petition date. *In re*
11 *Unimet Corp.*, 842 F.2d 879, 885 (6th Cir. 1988); *Eagle, Inc. v. Local No. 537 of United Ass’n of*
12 *Journeyman*, 198 B.R. 637, 639 (D. Mass.1996) (stating that section 1113(f) creates a super-
13 priority for all pre-petition and post-petition payments due under a collective bargaining
14 agreement).

15 Even courts that have rejected this superpriority status have found that a debtor is
16 obligated to pay its obligations under an ongoing collective bargaining agreement as an
17 administrative expense. For instance, in *Adventure Resources, Inc. v. Holland*, 137 F.3d 786, 797
18 (4th Cir. 1998), the Fourth Circuit held that § 1113 did not “supersede the general priority scheme
19 set forth in § 507.” Consequently, the pension funds’ claim in that case could be afforded priority
20 status “only insofar as it fits into one of the categories singled out for preferential treatment in
21 § 507.” *Id.* The court ultimately concluded that the pension obligations were entitled to priority
22 as an administrative expense under § 507, *even though the arrears to the pension funds originally*
23 *arose pre-petition*. The court explained that the collective bargaining agreement was an
24 executory contract, and that, “as a result of the [debtor’s] failure to reject it in accordance with
25 § 1113,” it assumed the contract “*cum onere*.” *Id.* at 798. “Upon assumption of the contract, the
26 expenses and liabilities incurred may be treated as administrative expenses, which are afforded
27 the highest priority on the debtor’s estate.” *Id.* Thus, once the debtor assumed the collective
28 bargaining agreement by failing to reject it, it undertook a legal obligation to cure its existing

1 defaults under that agreement, including arrears to the pension funds. *Id.* “In effect, [the
2 debtor’s] postpetition assumption of its executory labor contract ... transformed the prepetition
3 claims of the Pension Trusts, once not cured, into new claims arising postpetition.” *Id.* The court
4 made it clear that a debtor “may not” “continue to reap the benefits of its bargain without concern
5 that the non-debtor party will be made whole for the debtor’s unfulfilled prepetition obligations.”
6 *Id.* at 790. Thus, when the debtor continued to use the labor of employees under the collective
7 bargaining agreement, it was obligated to fulfill its end of the bargain, including its contractual
8 obligation to pay the pension funds.

9 Here, as in *Adventure Resources*, the Debtors have not followed the § 1113 procedures to
10 reject the collective bargaining agreement. Consequently, the collective bargaining agreement
11 has been assumed. *Id.* at 798 (even in the absence of a commitment to assume a collective
12 bargaining agreement, a collective bargaining agreement is automatically assumed in the absence
13 of a § 1113 rejection); *In re Moline*, 144 B.R. 75, 78 (Bankr. N.D. Ill. 1992) (“If the debtor never
14 rejects the collective bargaining agreement [it] thus assumes the agreement by inaction”); *In re St.*
15 *Louis Globe Democrat*, 86 B.R. 606 (Bakr. E.D. Mo. 1988) (holding that § 1113(f) effects the
16 automatic assumption of any labor agreement not rejected). Because the collective bargaining
17 agreement has not been assumed and the Debtors are obligated to honor its terms and conditions
18 until the agreement is modified or rejected pursuant to the requirements of § 1113, the Debtors
19 are bound to make the minimum funding contributions to the frozen pension funds as required by
20 the collective bargaining agreement. Debtors are not free to continue to use bargaining unit labor
21 and reap benefits under the collective bargaining agreement while unilaterally modifying the
22 CBA’s requirement to make minimum funding contributions to the frozen pension funds to
23 ensure that these funds remain able to satisfy their existing obligations to participants. In
24 exchange for the postpetition labor the Debtors are using under the collective bargaining
25 agreement, they are bound to make the pension contributions required by the collective
26 bargaining agreement. These contributions are entitled to administrative expense priority.

27 As the Bankruptcy Appellate Panel of the Ninth Circuit has explained, “Section 1113 was
28 enacted to protect employees during the interim between the filing of the bankruptcy petition and

1 court-supervised modification or ultimate rejection of the CBA. During this period, working
2 employees benefit the estate. Their rights accrue as services are rendered *on the basis provided*
3 *for by the CBA.*” *Teamsters Indus. Sec. Fund v. World Sales (In re World Sales)*, 183 B.R. 872,
4 878 (B.A.P. 9th Cir. 1995) (emphasis added). The debtor’s “employees continued employment
5 post-petition in the ‘reasonable belief’” that the terms of their employment as laid out in the CBA
6 would remain unchanged. *Id.* “We therefore hold that a debtor's unperformed post-petition
7 obligations under an unmodified or unrejected CBA are beyond the scope of § 365(g), and claims
8 based on such post-petition breaches must be given administrative status.” *Id.* (holding that post-
9 petition obligations to provide healthcare coverage beyond the scope of work performed pursuant
10 to terms of a CBA that had not yet been rejected were entitled to administrative claim status, even
11 though they might not otherwise meet the standards for an administrative claim); *see also In re*
12 *Colorado Springs Symphony Orchestra Assn.*, 308 B.R. 508 (Bankr. D. Colorado 2004) (finding
13 that pursuant to debtor’s obligation under CBA to pay musicians for minimum number of
14 performances, whether or not musician played at all such performances, such payments entitled to
15 administrative status for post-petition period prior to rejection of CBA).

16 The Debtors’ failure to request authorization to continue to honor the pension obligations
17 under the collective bargaining agreement is an attempt to unilaterally alter the minimum funding
18 contribution requirements of the collective bargaining agreement in violation of § 1113(f). This
19 should not be permitted. Instead, the Debtors should be required to continue to pay the required
20 pension contributions until the provisions of the collective bargaining agreement or modified or
21 rejected in accordance with § 1113(f).

22 Accordingly, the employer contributions required by the collective bargaining agreement
23 must be paid, and the Debtors’ motion should be denied to the extent it seeks to avoid these
24 payments. *See, e.g., In re Cutler Industries*, Case No. 91-21886T (Bankr. E.D. Pa. Oct. 10, 1991)
25 (refusing to approve cash collateral order because it fails to require debtor to pay pre-petition
26 health benefit contributions); *In re Coast to Coast Construction Co.*, (Bankr. D. R.I., June 1,
27 1993) (requiring debtor and secured party to amend cash collateral order to afford payment of
28 pension fund claims).

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IV. CONCLUSION

For the reasons stated herein, SEIU-UHW respectfully requests that the Court deny the Debtors’ Motion for Entry of Order Authorizing Payment of Employee Benefits and Workforce Obligations (Doc. 22) to the extent it does not seek authority to pay post-petition contributions to their employees’ defined-benefit retirement plans as required under the collective bargaining agreement. SEIU-UHW also requests that the Court deny the Debtors’ Motion for a Final Order Authorizing the Debtors to Use Cash Collateral (Doc. 31) to the extent the contractually required post-petition contributions to the defined-benefit retirement plans are not reflected in the Initial Agreed Budget, and asks for an order requiring Debtors to pay these amounts in the ordinary course of business.

Dated: September 19, 2018

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CERTIFICATE OF SERVICE

1
2
3 I am a citizen of the United States and an employee in the County of Alameda, State of
4 California. I am over the age of eighteen years and not a party to the within action; my business
5 address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

6 I hereby certify that on September 19, 2018, I electronically filed the forgoing
7 **DECLARATION OF CAITLIN GRAY IN SUPPORT OF SEIU-UHW'S OPPOSITION**
8 **TO EMERGENCY MOTION OF DEBTORS FOR ENTRY OF ORDER AUTHORIZING**
9 **PAYMENT OF EMPLOYEE BENEFITS AND OTHER WORKFORCE OBLIGATIONS**

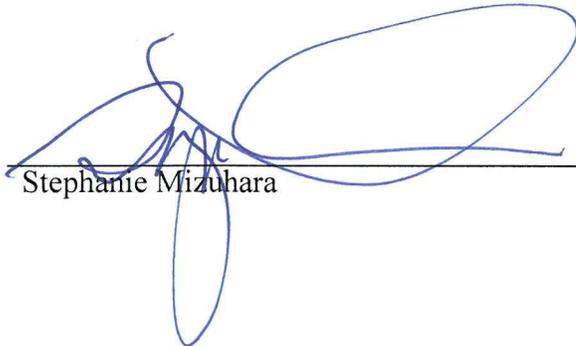
10 with the U.S. Bankruptcy Court, Central District California, by using the Court's CM/ECF
11 system, and served on the persons listed below

12 SEE ATTACHED SERVICE LIST.

13 I further certify that on on this same date, I electronically served the same by
14 electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic
15 mail system from smizuhara@unioncounsel.net to the email addresses set forth below.

16 SEE ATTACHED SERVICE LIST

17 I certify under penalty of perjury that the above is true and correct. Executed at Alameda,
18 California, on September 19, 2018.

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22 Stephanie Mizuhara
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SERVICE LIST

Via CM/ECF

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