Docket #0310 Date Filed: 9/26/2018

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

In re

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

Debtors and Debtors In Possession.

☒ Affects All Debtors

☐ Affects Verity Health System of California, Inc.
☐ Affects O'Connor Hospital
☐ Affects Saint Louise Regional Hospital
☐ Affects St. Francis Medical Center
☐ Affects St. Vincent Medical Center
☐ Affects Seton Medical Center
☐ 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 Dialysis, LLC

Debtors and Debtors In Possession.

Lead Case No. 18-20151

Jointly Administered With:
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

Chapter 11 Cases

Hon. Ernest M. Robles

OMNIBUS RESPONSE TO OBJECTIONS TO 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 [RELATED PLEADINGS NO. 22, 75, 213, 214, 215, 223, 229, 296]

Hearing:
Date: October 3, 2018
Time: 10:00 am Pacific
Location: Courtroom 1568

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The above-captioned debtors and debtors in possession (the "Debtors"), by and through their undersigned counsel, file this Omnibus Response to the Objections filed by Service Employees International Union, United Healthcare Workers West ("SEIU-UHW"), the Retirement Plan for Hospital Employees ("RPHE"), the California Nurses Association ("CNA"), and the United Nurses Associations of California/Union of Health Care Professionals ("UNAC," and referred to collectively with SEIU-UHW, RPHE, CNA, UNAC "Objectors" and individually an "Objector")[1] to the *Motion of the Debtors for Final Order (I) Authorizing the Debtors o (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; Memorandum of Points and Authorities in Support Thereof* (the "Wage Motion") [Dkt. 22] and respectfully state the following:

I. Preliminary Statement

The Motion requests authority for the Debtors to pay prepetition employee wages and benefits earned within 180 days of the August 31, 2018 petition date, up to the benefit cap of $12,850 under Bankruptcy Code section[2] 507(a)(4), with excess available to pay contributions to employee benefit plans earned within that same period in accordance with § 507(a)(5). Although not required, in an effort to provide additional comfort to employees, the Motion stated the

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[1] The filed Objections are: 1) *SEIU-UHW'S Objection to Emergency Motion for Oder: (I) Authorizing the Debtors to (a) Pay Prepetition Employee Wages and Salaries and (B) Pay and Honor Employee Benefits and Other Workforce Obligations* [Dkt. 213], along with Declarations filed in support at Dkt. 214 and 215] (the "SEIU-UHW Objection"; 2) *Limited Objection of Retirement Plan for Hospital Employees to Emergency Motion of Debtors for Order (A) Authorizing the Debtors to Pay Prepetition Employee Wages and Benefits, Etc.* [Dkt. 229] (the "RPHE Objection,") which in turn incorporates RPHE's *Objection to the Debtors' Motion to Obtain Postpetition Financing* at Dkt. 218 (the "RPHE DIP Objection"); 3) *Objection by Creditor California Nurses Association to Motion for Entry of Final Order (I) Authorizing Debtors to (A) Pay Prepetition Employee Wages and Salaries and (B) To 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* [Dkt. 223] (the "CNA Objection"); 4) *Limited Objection of UNAC to Debtors' Motion for Entry of Final Order to Pay Prepetition Employee Wages, Etc.* [Dkt. 296] (the "UNAC Objection"). Certain Objectors have raised arguments to this Wage Motion similarly in objections to the DIP Motion. For the avoidance of doubt, the Debtors incorporate all arguments contained in its Response to the DIP Motion in this Response to the Wage Motion.

[2] All references to "§" or "section" herein are to the Bankruptcy Code, 11 U.S.C. §§ 101, et seq., as amended.

Debtors' intention to pay postpetition wages and benefits that arise in the ordinary course of business as administrative expenses. Such postpetition amounts include contributions for actively accruing benefits, such as employer matching defined contributions and amount attributable to accruing benefits under unfrozen defined pension plans. On September 5, 2018, the Court entered an interim order ("Interim Order") [Dkt. 75] granting the Debtors authority to pay millions of dollars in unpaid wages and benefits earned either 180 days before bankruptcy or postpetition that would be administrative claims).[3] Before the Court now is the request for entry of a final order.

On their face, the Objectors do not oppose payment to employees of prepetition wages and benefits. Rather, the Objectors seek to elevate treatment of prepetition claims to "superpriority" or an administrative expense status for tens of millions of dollars of claims that indisputably accrued years before the 180-day priority period (when the plans were sponsored by the Daughters of Charity). *See* SEIU Objection, p. 4, ll. 9-13; RPHE DIP Objection, p. 4, ll. 6-21, UNAC Objection, p. 3-5.[4] This request is improper in the context of the actual relief sought by the Wage Motion. Moreover, Objectors rely on widely criticized and/or otherwise inapplicable case authority that has been expressly rejected by several Circuit Courts of Appeal as well as this Court in *In in re Certified Air Technologies, Inc.*, 300 B.R. 355 (Bankr. C.D. Cal. 2003) and *In re Steiny*, 2017 WL 1788414 (Bankr. C.D. Cal. May 3, 2017) which reject the contention that collective bargaining agreements ("CBAs") and § 1113 trump the priority scheme of the Bankruptcy Code, elevates a prepetition claim into a superpriority claim or otherwise alters the nature of a prepetition claim.

Similarly without merit is any contention that anticipated postpetition pension obligations should receive special treatment and be paid out of the ordinary course. Such special treatment is

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[3] The Interim Order incorporated changes sought by SEIU-UHW. The Interim Order also included changes requested by Local 39, a union that represents the engineers who operate the boilers at Verity's Northern California hospitals.

[4] In addition, CNA seeks inclusion of language in the final order that would recognize the rights and claim of their union members. As Debtors believe it will be able to resolve those concerns for equivalent recognition in a final form of order, these proposed changes will not be addressed in this pleading.

unwarranted, unnecessary and impractical. The Debtors have committed to pay administrative expenses as they come due, including future wages and postpetition accruing benefits for open plans. As such, accruing benefits will be paid as they come due postpetition (such as for active CNA employees), but such amounts will not be paid on an expedited schedule as requested by Objectors. This approach is particularly appropriate given that it is unclear whether any buyer(s) will seek to assume liability under such pension plans or when that decision may be made. To require more would provide unwarranted special treatment at the expense of the interests of the estate and other creditors and therefore should be denied.

II. Statement of Facts

1. The Debtors incorporate the facts and Background as set forth in the Motion and the Declaration of Richard Adcock [Dkt. 8]. Although those papers provide significant factual background, the pension plans at issue, their prepetition underfunding and what contributions are expected to arise postpetition deserve attention here.

2. VHS maintains two single employer defined benefit pension plans (Verity Plan A and Verity Plan B) and participates in two multi-employer defined benefit pension plans (RPHE and Local 39 Plan). It is without dispute that the defined benefit pension plans have been frozen for all employees, except members of CNA at certain facilities and members of Local 39 under the Local 39 Plan. [5]

3. The defined benefit pension plan benefits are generally based on age, years of service, and employee compensation. In addition to these defined benefit plans, VHS (and VMF) maintain several defined contribution retirement plans for employees, which (like the Local 39 Plan obligations) are not at issue in the Objections.

4. The RPHE is a multiemployer defined benefits plan in which certain Debtors and unrelated non-Debtor employers participate. The VHS entities that participate in the RPHE are Seton Medical Center, Seton Medical Center Coastside, O'Connor Hospital, Saint Louise

[5] There are no unpaid prepetition contributions due under the Local 39 Plan. All amounts arising postpetition in connection with Local 39 are with respect to active members under an open plan. Such amounts will be paid in the ordinary course as they come due.

Regional Hospital, and Caritas Business Services. The RPHE is frozen as to these facilities, other than with respect to CNA members at O'Connor Hospital, Saint Louise and Seton Medical Center. Benefits under the RPHE are generally based on years of service and employee compensation. Contributions to the RPHE are based on actuarially determined amounts established by the RPHE Board of Trustees to meet benefits to be paid to plan participants and satisfy IRS funding requirements. VHS recorded benefit expenses of approximately $20.46 million and $17.22 million in cash contributions to the RPHE for the fiscal years ended June 30, 2017 and 2016, respectively. The VHS contributions accounted for approximately 43% and 40% of total contributions made to the RPHE for the fiscal years ending June 30, 2017 and 2016, respectively. Of the estimated remaining $4.79 million for 2018 and expected $12.68 million for 2019 VHS contributions to RPHE, approximately $3.15 million and $7.63 million, respectively, is for make-up of underfunded amounts that arose prior to VHS' acquisition of plan obligations from the Daughters of Charity. As of July 31, 2018, there were no unpaid contribution installment obligations owed by VHS to the RPHE, although the Debtors did not make payment of $4,791,216 that came due on August 15, 2018. There are no other contributions due on the RPHE for calendar year 2018 and the next contribution is contractually scheduled for February 15, 2019.

5. The two single-employer defined benefit plans are Verity Plan A and Verity Plan B (collectively, the "Verity A & B Plans"). VHS personnel at St. Francis Medical Center, St. Vincent Medical Center, O'Connor Hospital, Saint Louise Regional Hospital, and the VHS system office are eligible to participate in these plans. However, only CNA members continue to earn new benefits under the Verity Plan A. The Verity Plan B is completely frozen with no ongoing benefit accruals. VHS contributed approximately $41.68 million and $9.92 million during the fiscal years ended June 30, 2017 and 2016, respectively. Of the estimated remaining $10.12 million for 2018 and expected $35.53 million for 2019 VHS contributions to Verity Plan A, approximately $8.10 million and $28.05 million, respectively, is for make-up of underfunded amounts that arose prior to VHS' acquisition of plan obligations from the Daughters of Charity. As of July 31, 2018 there were no unpaid contribution installment obligations owed by VHS to

the Verity A & B Plans. The next scheduled contractual payment date for the Verity A Plan is October 15, 2018.[6]

6. Attached hereto as **Exhibit 1** is the Declaration of Carlos De la Parra (the "Declaration"), a Director at WillisTowersWatson ("WTW"), which has been actuary to the Debtors for the Verity A and B Plans, and is supporting the Debtors' efforts broadly in this case, including affirming contribution amounts allocations with respect to the RPHE. Attached to the Declaration are schedules that demonstrate the anticipated contributions for the Verity A Plan and RPHE, as well as those portions that relates to unpaid prepetition obligations (all of which accrued beyond 180 days of bankruptcy) and the portion anticipated to arise for CNA postpetition accruals, which the Debtors avers is $1,704,170 for the RPHE plan, an amount that corresponds to the $1,756,757 asserted by RPHE in its Objection, p. 4, ll. 13-14. *See also* Declaration at ¶ 10 (summarizing attached schedules). As acknowledged by RPHE, the 2018-19 amount is payable in three installments of $585,586 due on February 15, May 15 and August 15, 2019, the dates of which were set by the RPHE itself.[7]

7. With respect to Verity Health System Retirement Plan A, the portion of the contributions that are associated with obligations anticipated to arise for CNA accruals and

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[6] There are no contributions due under the small Verity Plan B for calendar years 2018 and 2019. VHS and VMF also maintain several active defined contribution retirement plans for eligible employees; eligibility for and benefits under the defined contribution retirement plans vary according to facility, union status, and employee classification/hire date. These defined contribution plans are funded from employee and/or employer contributions generally on a payroll by payroll basis. In addition to the above active defined contribution plans, there are several small, frozen ancillary retirement plans. During the fiscal years ended June 30, 2017 and 2016, the employer's contribution expense for defined contribution plans was approximately $18.48 million and $21.75 million respectively. As of July 31, 2018, there were no unpaid employer contributions owed on any of these defined contribution plans other than unpaid contributions for current and recent payroll cycles consistent with ordinary administrative practices.

[7] These due dates are acknowledged by RPHE in the RPHE DIP Objection, p. 2, ll., 18-25. Under the terms of the RPHE Trust Agreement and the Plan Document and Summary Plan Description applicable to VHS and its affiliates, IRS rules, and actuarial determinations, RPHE issues an annual Invoice to VHS requiring payment of the previous year's accrued contributions in three installments, due on February 15, May 15 and August 15 of the following calendar year. Thus, for 2017 contributions, RPHE issued Invoices to VHS for February 15, 2018 in the amount of $4,791,218, for May 15, 2018 in the amount of $4,791,218, and for August 15, 2018 in the amount of $4,791,217. VHS paid the February 15 and May 15 Invoices, but did not pay the Invoice for August 15. (Declaration of Michael Holdsworth, para. 3).

administrative expenses allocated for CNA members that are due after August 30, 2018 and before the end of 2019 total $2,699,124. There are no contributions due in the 2018-2019 period related to the Verity Health System Retirement Plan B. [8]

III. Argument

The Objectors do not oppose the actual relief requested by the Wage Motion; rather, they want more than what the Debtors have requested. In support, Objectors contend that § 1113 and certain case law requires payment of all pre-petition claims and the accelerated payment contingent postpetition benefits. The Objectors request for enhanced treatment is not warranted for several reasons.

A. Objection to the Wage Motion is not the Proper Vehicle for the Relief Sought by Objectors

As an initial matter, the Objectors' requested treatment is procedurally improper because it is beyond the bounds of what is sought by the moving parties (the Debtors). The Debtors seek authority to pay prepetition wages and related benefits up to and in accordance with requirements of § 507. Debtors' reference to expected postpetition payments was simply in recognition of the law: that is, postpetition accruing wages and benefits are entitled to administrative treatment. As such, the Court may deny the Objectors' requested relief on procedural grounds and require Objectors to file an adversary proceeding under Bankruptcy Rule 7001 or at least their own motions.

B. Substantively, Objectors Request for Superpriority Treatment of Prepetition Claims Based upon the Existence of CBAs and Section 1113 is without Merit.

The Objectors' request for elevated treatment of prepetition claims to superpriority and/or administrative status is unsupported by the plain language of the Bankruptcy Code and applicable case law. It is well established that the scope of claim priority is strictly construed because

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[8] VHS also maintains an early retiree health insurance program (the Postretirement Healthcare Plan), which provides medical benefits to eligible retirees from early retirement to age 65 only. The postretirement health care benefits are determined based on age and years of service. Certain employees at O'Connor Hospital, St. Louise Regional Hospital, Seton Medical Center, and Seton Medical Center Coastside are eligible to participate in this plan. The Postretirement Healthcare Plan is an unfunded plan. VHS contributed $50,000 and $58,000 to the Postretirement Healthcare Plan during the fiscal years ended June 30, 2017 and 2016, respectively.

"preferential treatment of a class of creditors is in order only when clearly authorized by Congress." *In re Consol. Freightways Corp. of Del.*, 564 F.3d 1161, 1167 n. 14 (9th Cir. 2009).

The Objectors assert, however, that § 1113 and/or ERISA provide authorization to elevate unsecure prepetition claims to superpriority status and to compel the debtor to pre-pay contingent postpetition expenses. Objectors contend that because pension obligations are referenced under a CBA, they must continue to be paid, regardless of their nature and priority, unless and until the CBA is rejected or modified under § 1113. To do otherwise, they assert, would violate § 1113(f). In support, the Objectors rely on a handful of inapplicable and distinguishable cases, including the 1988 decision of *In re Unimet Corp.*, 842 F.2d 879 (6th Cir. 1988), which found that section 1113 gives CBA claimants superpriority rights. A scattered amount of lower courts followed *Unimet* (and are cited in the SEIU-UHW Objection) in the 1980s and 1990s - forming the "[t]he minority approach." *Peters v. Pikes Peak Musicians Ass'n.*, 462 F.3d 1265, 1269 (10th Cir. 2006) (rejecting approach). RPHE also relies on even more antiquated authority - citing the 1983 decision (interpreting the former Bankruptcy Act) in *Matter of Pacific Far East*, 713 F.2d 476 (9th Cir. 1983) and a 1988 Massachusetts decision that followed it in *Columbia Packing Co. v. Pension Ben. Guaranty Corp.*, 81 B.R. 205 (D. Mass. 1988). RPHE DIP Objection, at 4-5. RPHE argues that pension liability is different than other employee liability because of actuarial treatment. *Id.*

These arguments are not well founded, and the authorities cited by Objectors have been rejected by the vast majority of courts that have addressed these issues, including this court on at least two occasions, first in 2003 and more recently in 2017. In this Court's 2003 decision of *In re Certified Air*, claimants made the same argument that Objectors make here - "that § 1113, which controls the assumption or rejection of collective bargaining agreements in chapter 11 cases, establishes a 'superpriority' status for wage and benefit claims arising out of collective bargaining agreements." *Cf. In in re Certified Air Technologies, Inc.*, 300 B.R. at 360-61. The Court performed a thorough review of the statutes and precedent and rejected the union's assertion. In doing so, it held:

> Had Congress intended for § 1113 to create a super-priority for pre-petition wage and benefit claims arising under a collective bargaining agreement, it would have either included [explicit] language in § 1113 . . . or amended § 507 to reflect the change it intended. Because Congress neither included explicit language in § 1113 to supersede § 507 nor amended § 507 to specifically create a super-priority status for such claims, the court concludes that pre-petition claims for wages and benefits due under a collective bargaining agreement are not entitled to treatment as administrative expenses but are to be accorded priority consistent with § 507.

Id. at 364-365 (emphasis added). In reaching this decision, this Court relied on several Circuit Court decisions. *Id.* at 363 ("The Second, Third and Fourth Circuits have declined to follow *Unimet*, holding instead that § 1113 does not affect the priorities accorded claims under § 507.") (*citing Adventure Res. Inc.*, 137 F.3d 786 (4th Cir. 1998); *In re Ionosphere Clubs, Inc.*, 22 F.3d 403, 406 (2d Cir. 1994); *In re Roth Am., Inc.*, 975 F.2d 949, 955 (3d Cir. 1992)); *see also Peters*, 462 F.3d 1265, 1270 ("section 1113 does not trump the priority scheme set forth in section 503 and section 507.").[9]

More recently this Court denied similarly requested special claim treatment in *In re Steiny*, 2017 WL 1788414 at *3 (Bankr. C.D. Cal. 2017) (attached hereto as **Exhibit 2**). In *Steiny*, Judge Brand followed and re-affirmed *Certified Air* and allowed priority status to pre-petition employee claims up to § 507(a)(5) cap, but found claims arising for pre-petition work are otherwise unsecured. In doing so, the Court ruled:

> Section 1113 was enacted to protect the existence of collective bargaining agreements in chapter 11 cases, not to re-order the priority scheme set by Congress in § 507. Had Congress intended for § 1113 to create a super-priority for pre-petition wage and benefit claims arising under a collective bargaining agreement, it would have either included language in § 1113. . .or amended section 507 to reflect [that] change.

2017 WL 1788414 at *3 (quoting *Certified Air*, 300 B.R. at 368-69).

In reaching this result, Judge Brand followed the long list of cases that hold that § 1113(f) does not re-structure the priority of claims - instead "section 1113(f) merely ensures that a pre-

[9] Also of note, although *Certified Air* denied super priority treatment, it allowed the debtor to pay such claims up to the § 507(a) employee caps, with the balance treated as general unsecured claim. *Id.* This is exactly the treatment being provided in this case.

petition CBA will not be rejected without the employer-debtor having first followed the procedures provided in § 1113." *Steiny*, 2017 WL 1788414, at *4.

Steiny also rejected the argument advanced by the RPHE and the principal case on which it relies: *Matter of Pacific Far East Line, Inc.*, 713 F.2d 476 (9th Cir. 1983). The *Steiny* court stated:

> The Trustees argue that *Matter of Pacific Far East Line, Inc.*, 713 F.2d 476 (9th Cir. 1983), is controlling Ninth Circuit authority that this Court is bound to follow. This Court disagrees. *In Pacific Far East Line*, a case decided under the old Bankruptcy Act, the court held that a trustee's payments to a maritime association for employee benefits were properly classified as administrative expenses even though the payments were determined based on employee hours worked pre-petition. 713 F.2d at 478–80. **This Court believes that *Pacific Far East Line* has limited persuasive authority because it was decided under the old Act and before the enactment of both § 1113, which addresses the assumption and rejection of collective bargaining agreements, and § 507(a)(5), which assigns fifth priority unsecured status to contributions to employee benefit plans**.

2017 WL 1788414, at *2 (emphasis added).

In applying the Bankruptcy Code, and not the old Bankruptcy Act, Judge Brand elected to follow the *Certified Air* (and majority) approach that obligations that arise by virtue of prepetition labor are prepetition expenses and obligation that arise from postpetition labor are post-petition expenses. *Id.* at *3. Section 1113 acts to give the estate and unionized employees security and due process - but it does not re-calibrate claims.

Similarly without merit is SEIU-UHW's assertion that prepetition pension payments must be paid because the applicable CBA has not been rejected. SEIU-UHW Objection at p. 8, ll. 9-11 (because less than thirty days after filing, the "Debtors have not followed the section 1113 procedures to reject the collective bargaining agreement . . . the collective bargaining agreement has been assumed."). In support, the Objection cites *In re Adventure Resources, Inc.*, 137 F.3d at 797, a case which is both legally and factually inapposite to the majority case law and rationale. *Adventure* entailed an adversary proceeding brought 43 months after the bankruptcy case was filed - and after the Debtors had not moved to assume or reject a CBA and had also stopped making any *postpetition* payments due under it. *Id.* at 796. The Fourth Circuit affirmed the

Bankruptcy Court's decision - which considered the union's adversary arguments and evidence under § 365 - that the Debtors had assumed the CBA. *Id.*

Adventure's facts are readily distinguishable to the situation at bar. In contrast to *Adventure*'s that was approximately three and a half years old, the cases here are a month old. Further, there can be no suggestion that the Debtors here are dawdling. Rather, they are actively seeking purchasers, pursuing an rapid exit strategy and have arranged to pay postpetition obligations as they are actually accrued and come due. In fact, the present case is more akin to the decision in *In re Family Snacks*, 257 B.R. 884, 904-905 (B.A.P. 8th Cir. 2001), where the Court distinguished its facts from *Adventure* and held that the debtor acted properly, did not unduly delay reorganization/liquidation process and paid post-petition administrative CBA claims as they came due in ordinary course. *Id.*

SEIU-UH and UNAC also seek to rely upon *Teamsters Indus. Sec. Fund v. World Sales* (*In re World Sales*), where in the court found that a "debtor's unperformed post-petition obligations under an unmodified or unrejected CBA are beyond the scope of §365(g), and claims based on such post-petition breaches must be given administrative status." 183 B.R. 872, 878 (B.A.P. 9th Cir. 1995). The *World Sales* case, however, is inapposite as it deals with facts that are plainly distinguishable from the facts here. Unlike in *World Sales*, each of the items these Objectors seek to require payment accrued prepetition (if fact, well beyond the 180 day priority period) and, therefore, are not post-petition claims under their CBAs. This critical factual distinction is recognized by Objectors themselves, including in *Exhibit A to the Declaration of David Miller in Support of the SEIU-UHW Objection* [Dkt. 215] ("Miller Decl."), where he admits (a) "for participants at the O'Connor and St. Louise division, there will be no more credited service granted after December 31, 2000;" (b) "Benefits were from for non-contractual participants effective February 28, 2011," (c) "Benefits were frozen for members of UNAC effective December 31, 2011," and (d) "Benefits were frozen for member of SEIU effective December 21, 2012." Miller Decl. Exhibit A at 30, Docket No 215 at 15 of 42; see also UNAC Objection, p. 2, ll. 23-26 ("Articles 1901 through 1913 of the CBA establishes the rights of UNAC-represented employees in a defined benefit plan generally knows as the Verity Health

System Retirement Plan A . . . which is characterized as having been 'frozen' since January 1, 2012." Indeed the Debtors were obligated to make those contributions even if every employee had been terminated prior to the filing. Therefore, the obligations are prepetition and do not qualify for administrative expense priority status.

The refusal to alter the priority rules of the Bankruptcy Code also comports to sound Bankruptcy policy. As stated by this Court in *Certified Air*, the majority "approach [to § 507 and § 1113] fosters the Code's policy to promote equality of distribution," and the "overriding policy reasons cutting to the essence of bankruptcy philosophy" militate against construing § 1113(f) as modifying the priorities set forth in § 507." 300 B.R. at 369 (*citing In re Murray Indus., Inc.*, 110 B.R. 585, 587 (Bankr. M.D. Fla. 1990), *vacated on other grounds*, 140 B.R. 298 (M.D. Fla. 1992); *see also In re Adventure Resources, Inc*, 137 F.3d at 797 (criticizing *Unimet* and efforts to "engender[] disharmony between § 1113 and the carefully ordered hierarchy of priorities embodied in § 507."). For these reasons, the Court should not alter the status of prepetition claims to superpriority treatment and overrule the Objections.

C. Section 1113 does not Create a Requirement for the Debtors to Immediately Pay or Pre-Pay Any Amounts of Claims that Might Arise Postpetition and Constitute an Administrative Expense; Rather Such Expenses will be Paid in the Ordinary Course

In addition to special treatment for prepetition claims, Objectors request the expedited payment of postpetition benefits before they come due, which is contrast to law (which only requires payment of administrative claims as a condition of plan confirmation under § 1129(a)(9)(A)) as well as the treatment in this case (when they actually arise). *See In re Villalobos*, 2014 WL 930495, at *10 (B.A.P. 9th Cir. Mar. 10, 2014) ("Section 1129(a)(9)(A) requires that a plan provide that administrative claims will be paid in full, in cash on the effective date of the plan."). Objectors demand not only runs counter to law, but also to the practicalities of this case.

In support, Objectors again seeks to rely on § 1113. And again the argument is misplaced. Nothing in § 1113 requires payment of administrative claims out of the ordinary course. In fact, the argument is particularly misplaced as raised by SEIU-UHW and UNAC because none of their respective members are accruing benefits and the pension plans are frozen as its members. Stated

somewhat differently, any claim these Objectors assert is based solely on underfunding that occurred before Verity took over the plans.[10] Therefore, while other employees may be accruing benefits under Verity defined benefit plans that will be paid in the ordinary course as they arise (namely CNA, and Local 39 as to a separate Local 39 Plan), SEIU-UHW and UNAC are not among them.

Denial of such special treatment is supported by the requirements of § 507 and case law, including *Certified Air*. The Court in *Certified Air* explained that whether an employee's claim is entitled to priority (without regard to the employee priority caps) is whether it is a "claim [for] payments . . . for postpetition work." *Certified Air*, 300 B.R. at 365 (citing *In re World Sales, Inc.*, 183 B.R. 872, 877 (B.A.P. 9th Cir. 1995)). *Steiny* also addressed this issue - holding that claims that arose from "hours worked pre-petition" meant the "debt arose pre-petition." 2017 WL 1788414, at *4.

The only case cited in support of Objectors' position - *In re Moline* - expressly rejected the argument that § 1113 requires the "immediate" payment of obligations that arise or might arise postpetition, and found that found that the debtor ***did not have to make any immediate payment or pre-payment*** because there was no statutory basis. 144 B.R. 75, 78-79 (Bankr. N.D. Ill. 1992). Instead, the claims would be treated like any other claims in a bankruptcy - where parties could apply for payments of administrative expenses as they came due and/or move for the rejection or assumption of contracts. *Id.; see also Murray*, 110 B.R. at 587 ("[If a party argues that] a Chapter 11 debtor must pay [benefits] immediately [under § 1113], this Section is in direct conflict with the treatment of claims established by the Bankruptcy Code, especially with the priority scheme established by § 507 and § 1129(9)(B)."). Thus, § 1113 does not entitle CBA claimants to immediate or pre-payment of administrative claims that may come due in the ordinary course.

Similarly baseless is the request by RPHE to pay future accruing benefits on a monthly basis, rather than as they accrue and come due under "the terms of the RPHE Trust Agreement

[10] The Debtors do not, at this time, challenge the standing of any Objector at this time but reserves the right to so in the future.

and the Plan Document and Summary Plan Description applicable to VHS and its affiliates, IRS rules, and actuarial determinations" "on February 15, May 15 and August 15 of 2019." RPHE DIP Objections, p. 2, ll. 18-25.[11] Here, the Debtors seek to pay contributions on those dates to the extent they are based on accruing benefits for postpetition work. In fact, the Debtors' efforts to make payments in the ordinary course as actual postpetition accruals arise and become due is more than is required of the Debtors - which could have elected to "preserve" the CBA claims and have them paid periodically throughout the case like other administrative claims. *See e.g.*, *In re Moline*, 144 B.R. at 78. Again, the Court should overrule the Objections.

D. Other Relief

The relief sought by Debtors seeks authority to make payments up to the prepetition caps set forth under §§ 507(a)(4) and (a)(5) and administrative expenses as they arise in the ordinary course. It should not, however, be interpreted to mandate payments. Similarly, it should be noted that to the extent that any payments mistakenly received priority treatment, the Debtors reserve the right to seek return of such funds by separate motion.

IV. Prayer

WHEREFORE, for the reasons set forth in the Motion and this pleading, the Debtors respectfully request that the Court (i) grant the Motion on a final basis, (ii) overrule the Objections and (iii) grant to the Debtors such other and further relief as the Court may deem proper.

[11] Attached as **Exhibit 3** is a copy of the RPHE Funding Policy. Section 3 sets forth dates for contributions.

Dated: September 26, 2018

DENTONS US LLP
SAMUEL R. MAIZEL
TANIA M. MOYRON

By */s/ Tania M. Moyron*
Tania M. Moyron

Proposed Attorneys for the Chapter 11 Debtors and Debtors In Possession

EXHIBIT 1

EXHIBIT 1

Exhibit 1

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UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION

In re VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al.*, Debtors and Debtors In Possession.	Lead Case No. 18-20151 Jointly Administered With: 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-20171-ER Chapter 11 Cases **DECLARATION OF CARLOS DE LA PARRA IN SUPPORT OF DEBTORS' OMNIBUS RESPONSE TO OBJECTIONS TO MOTION TO PAY EMPLOYEE WAGES AND SALARIES [RELATED PLEADINGS NO. 22, 75, 213, 214, 215, 223, 296, 297]**
☒ Affects All Debtors ☐ Affects Verity Health System of California, Inc. ☐ Affects O'Connor Hospital ☐ Affects Saint Louise Regional Hospital ☐ Affects St. Francis Medical Center ☐ Affects St. Vincent Medical Center ☐ Affects Seton Medical Center ☐ 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 Dialysis, LLC Debtors and Debtors In Possession.	

DECLARATION OF CARLOS DE LA PARRA

I, Carlos De la Parra, declare, that if called as a witness, I would and could competently testify thereto based on my own personal knowledge, as follows:

1. "I am a Director for Willis Towers Watson ("WTW"), actuary to the Debtors for the Verity Health System Plan A and Verity Health System Plan B (the "Plans").[1]

2. I obtained a B.S. in Actuarial Sciences from Instituto Tecnologico Autonomo de Mexico. Before joining WTW, I was a compensation analyst at Hewitt Associates from 2004 to 2005.

3. WTW has provided actuarial services for the Verity Health System (formerly Daughters of Charity Health System) since 1995.

4. I have worked on WTW's file for the Debtors since 2011, and I have been an Enrolled Actuary for the Verity pension plans since their conversion to ERISA status in 2015.

5. Under ERISA, the minimum required contribution for a single employer plan (such as the Verity Health System Retirement Plans A and B) includes a contribution to cover the benefits expected to accrue in the coming year (in this case, CNA is the only group still accruing benefits under the Plans, other plan participants have their benefits frozen) plus any expenses expected to be paid from the trust in the coming year (the total of these two components is called the target normal cost), as well as a 7-year amortization of any funding shortfall (associated with past service accrued obligations, the vast majority of which were accrued by the Daughters of Charity Health System before its transaction with BlueMountain). I use the term 'vast majority' because although the amortization shortfall is related entirely to past service obligations, the benefits for CNA members that have accrued since the Blue Mountain transaction between 2015 and January 1, 2018 are included in the amortization.

6. The Target Normal Cost is an estimate based on assumptions about future events that cannot be predicted with any certainty. For example, if participants' turnover is higher than expected under the valuation assumptions, the actual value of benefits accrued during the year could be less than anticipated in the calculation of the Target Normal Cost.

7. The RPHE plan is a multiemployer plan and subject to different rules than single employer plans. The contributions for this plan are set based on the funding policy established by the plan's trustees, which similar to the ERISA minimum required contribution for single employer plans include: the benefits expected to accrue in the coming year plus any expenses expected to be paid from the trust in the coming year, as well as an amortization of prior accrued obligations, but also include an amortization of surplus assets from Withdrawn Employers.

8. I attach hereto schedules demonstrating the anticipated contributions for the Plans, as well as the portion associated with obligations accrued on or before August 30,

[1] All capitalized terms not defined herein shall have the same meaning as those in the Debtors' Omnibus Response to Objections to Motion to Pay Employee Wages and Salaries.

2018 and the portion anticipated to arise for CNA accruals after that date and up to the end of 2019.

9. With respect to Verity Health System Retirement Plan A, the portion of the contributions that are associated with obligations anticipated to arise for CNA accruals and administrative expenses that are due after August 30, 2018 and before the end of 2019 total $2,699,124. There are no contributions due in the 2018-2019 period related to the Verity Health System Retirement Plan B.

10. I have performed a similar allocation for the components of the estimated contributions determined by the RPHE actuary. For the RPHE plan, the portion of the contributions that are anticipated to arise for CNA accruals and administrative expenses after August 30, 2018 and up to the end of 2019 amounts to $1,704,170, which corresponds very closely to the amount of $1,756,757 asserted by RPHE in its objection to the Final Order for DIP financing.

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

Executed on: 9/26/2018

CARLOS DE LA PARRA

Allocation of Contributions for 2018 and 2019

		Number of days	
		Pre-petition	Post-petition
Assumed petition date:	8/30/2018	242	123
		66.30%	33.70%

Verity Retirement Plan A

September 15, 2018 Contribution [1]			
CNA Benefit Accrual	$ 116,026	$ 116,026	$ -
CNA St. Vincent PBGC Premium	$ 25,349	$ 25,349	$ -
Other PBGC Premium	$ 477,466	$ 477,466	$ -
Plan Expenses (other than PBGC premiums)	$ 166,372	$ 166,372	$ -
Make-up Contribution	$ 3,358,145	$ 3,358,145	$ -
Total	**$ 4,143,358**	**$ 4,143,358**	**$ -**
October 15, 2018 Contribution			
CNA Benefit Accrual	$ 234,404	$ 155,413	$ 78,991
CNA St. Vincent PBGC Premium	$ 35,755	$ 23,706	$ 12,049
Other PBGC Premium	$ 673,474	$ 673,474	$ -
Plan Expenses (other than PBGC premiums)	$ 284,617	$ 188,705	$ 95,912
Make-up Contribution	$ 4,745,833	$ 4,745,833	$ -
Total	**$ 5,974,082**	**$ 5,787,131**	**$ 186,952**
2019 Contributions			
January 15, 2019 Contribution			
CNA Benefit Accrual	$ 307,791	$ 204,070	$ 103,721
CNA St. Vincent PBGC Premium	$ 46,949	$ 31,128	$ 15,821
Other PBGC Premium	$ 884,326	$ 586,320	$ -
Plan Expenses (other than PBGC premiums)	$ 373,725	$ 247,785	$ 125,940
Make-up Contribution	$ 6,231,668	$ 6,231,668	$ -
Total	**$ 7,844,459**	**$ 7,300,971**	**$ 245,483**
April 15, 2019 Contribution			
CNA Benefit Accrual	$ 271,953	$ -	$ 271,953
CNA St. Vincent PBGC Premium	$ 48,148	$ -	$ 48,148
Other PBGC Premium	$ 906,913	$ 906,913	$ -
Plan Expenses (other than PBGC premiums)	$ 382,500	$ -	$ 382,500
Make-up Contribution	$ 5,927,319	$ 5,927,319	$ -
Total	**$ 7,536,833**	**$ 6,834,232**	**$ 702,601**
July 15, 2019 Contribution			
CNA Benefit Accrual	$ 271,953	$ -	$ 271,953
CNA St. Vincent PBGC Premium	$ 48,148	$ -	$ 48,148
Other PBGC Premium	$ 906,913	$ 906,913	$ -
Plan Expenses (other than PBGC premiums)	$ 382,500	$ -	$ 382,500
Make-up Contribution	$ 5,927,319	$ 5,927,319	$ -
Total	**$ 7,536,833**	**$ 6,834,232**	**$ 702,601**
September 15, 2019 Contribution			
CNA Benefit Accrual	$ 199,215	$ 132,082	$ 67,133
CNA St. Vincent PBGC Premium	$ 30,387	$ 20,147	$ 10,240
Other PBGC Premium	$ 572,373	$ 379,491	$ 192,882
Plan Expenses (other than PBGC premiums)	$ 241,890	$ 160,376	$ 81,514
Make-up Contribution	$ 4,033,397	$ 4,033,397	$ -
Total	**$ 5,077,263**	**$ 4,725,494**	**$ 351,768**
October 15, 2019 Contribution			
CNA Benefit Accrual	$ 271,953	$ -	$ 271,953
CNA St. Vincent PBGC Premium	$ 48,148	$ -	$ 48,148
Other PBGC Premium	$ 906,913	$ 906,913	$ -
Plan Expenses (other than PBGC premiums)	$ 382,500	$ -	$ 382,500
Make-up Contribution	$ 5,927,319	$ 5,927,319	$ -
Total	**$ 7,536,833**	**$ 6,834,232**	**$ 702,601**
Total remaining 2018 and 2019 Contributions			
CNA Benefit Accrual	$ 1,673,295	$ 607,591	$ 1,065,704
CNA St. Vincent PBGC Premium	$ 282,884	$ 100,330	$ 182,554
Other PBGC Premium	$ 5,328,378	$ 5,328,378	$ -
Plan Expenses (other than PBGC premiums)	$ 2,214,104	$ 763,238	$ 1,450,866
Make-up Contribution	$ 36,151,000	$ 36,151,000	$ -
Total	**$ 45,649,661**	**$ 42,950,537**	**$ 2,699,124**

[1] This contribution would have been needed to satisfy the conditions of the agreement between Verity Health System and the Attorney General with respect to a charity care shortfall. However it is not needed to meet minimum funding requirements, as the contributions previoulsy made for Plan Year 2017 already satisfied minimum funding requirements under IRC Section 430.

Allocation of Contributions for 2018 and 2019

			Number of days	
			Pre-petition	Post-petition
Assumed petition date:		8/30/2018	242	123
			66.30%	33.70%
RPHE Plan (Verity's share)				
August 15, 2018 Contribution				
CNA Benefit Accrual	$	1,437,685	$ 1,437,685	$ -
Plan Expenses	$	199,838	$ 199,838	$ -
Make-up Contribution	$	3,153,695	$ 3,153,695	$ -
Total	**$**	**4,791,218**	**$ 4,791,218**	**$ -**
2019 Contributions				
February 15, 2019 Contribution				
CNA Benefit Accrual	$	1,483,639	$ 983,673	$ 499,966
Plan Expenses	$	202,058	$ 133,967	$ 68,091
Make-up Contribution	$	2,543,861	$ 2,543,861	$ -
Total	**$**	**4,229,558**	**$ 3,661,501**	**$ 568,057**
May 15, 2019 Contribution	$	1,483,639	$ 983,673	$ 499,966
CNA Benefit Accrual	$	202,058	$ 133,967	$ 68,091
Plan Expenses	$	2,543,861	$ 2,543,861	$ -
Make-up Contribution	**$**	**4,229,558**	**$ 3,661,501**	**$ 568,057**
Total				
August 15, 2019 Contribution				
CNA Benefit Accrual	$	1,483,639	$ 983,673	$ 499,966
Plan Expenses	$	202,058	$ 133,967	$ 68,091
Make-up Contribution	$	2,543,861	$ 2,543,861	$ -
Total	**$**	**4,229,558**	**$ 3,661,501**	**$ 568,057**
Total remaining 2018 and 2019 Contributions				
CNA Benefit Accrual	$	5,888,602	$ 4,388,704	$ 1,499,898
Plan Expenses	$	806,012	$ 601,740	$ 204,273
Make-up Contribution	$	10,785,278	$ 10,785,278	$ -
Total	**$**	**17,479,892**	**$ 15,775,721**	**$ 1,704,170**

EXHIBIT 2

EXHIBIT 2

2017 WL 1788414
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States Bankruptcy Court,
C.D. California,
Los Angeles Division.

IN RE: STEINY AND COMPANY, INC., Debtor(s).

Case No.: 2:16–bk–25619–WB
|
Date: February 2, 2017, Time: 10:00 AM,
Courtroom: 1375
|
Signed 05/03/2017

Attorneys and Law Firms

Ron Bender, Jacqueline L. James, Lindsey L. Smith, Levene, Neale, Bender, Yoo & Brill L.L.P., Los Angeles, CA, for Debtor.

MEMORANDUM OF DECISION

Julia W. Brand, United States Bankruptcy Judge

***1** Before the Court is a motion for administrative expenses ("Motion") filed by the trustees ("Trustees") of the following trusts: the Southern California IBEW–NECA Defined Contribution Trust Fund, the Southern California IBEW–NECA Health Trust Fund, the Southern California IBEW–NECA Supplemental Unemployment Benefit Trust Fund, the Los Angeles County Electrical Educational and Training Trust Fund, National Electrical Benefit Fund, the Southern California IBEW–NECA Labor–Management Cooperation Committee Trust Fund, Contract Compliance Trust Fund, and Los Angeles Electrical Workers Credit Union (collectively, "the IBEW–NECA Trusts"). Debtor Steiny and Company, Inc. ("Debtor") pays monthly contributions to these labor-management multiemployer trusts, which then provide certain fringe benefits to Debtor's union employees. In their Motion, the Trustees assert that the contribution for November 2016[1] is delinquent, and they request that the Court treat such contribution as an administrative expense pursuant to 11 U.S.C. §§ 503(b) and 507(a)(2). The Trustees also request that the Court require Debtor to pay interest, liquidated damages, and attorneys' fees incurred as a result of the delinquency[2] and that such amounts also be treated as administrative expenses. Finally, the Trustees request that the Court order immediate payment of their claim, if the claim is accorded administrative expense priority. Debtor and the Official Committee of Unsecured Creditors oppose all of the Trustees' requests.

A hearing on the Motion was held on February 2, 2017 at 10:00 a.m. The Court heard oral argument and took the matter under submission. Based on the pleadings, record, and oral argument of counsel, and for the reasons that follow, the Court denies the Motion. The Trustees' claim for the November 2016 contribution is entitled to fifth priority status under § 507(a)(5), up to the statutory cap provided therein. Any amount of the November 2016 contribution that exceeds the maximum payment allowed under § 507(a)(5) will be treated as a general unsecured claim. The Trustees' claim for interest, liquidated damages, and attorneys' fees, totaling $10,873.83, will be treated as a general unsecured claim.

I. STATEMENT OF FACTS

Debtor filed a voluntary Chapter 11 bankruptcy petition on November 28, 2016. Debtor is a privately held electrical contracting and engineering company with commercial, mass transit, industrial, traffic signal, control, and lighting divisions. Debtor continues to operate its business.

Debtor is a party to various collective bargaining agreements ("CBAs") that require Debtor to make monthly contributions to the IBEW–NECA Trusts for each hour of covered work that Debtor's union employees perform. Pursuant to these CBAs, monthly contributions are due on the tenth day of the month, for work performed the previous month, and are considered delinquent if not paid by the fifteenth day of the month. If a contribution is delinquent, Debtor is required to pay the Trustees of the IBEW–NECA Trusts interest, liquidated damages, and any attorneys' fees and costs the Trustees have incurred as a result of their collection efforts. Debtor has not yet rejected the CBAs.

***2** Debtor's payroll period for November 2016 ended on

November 27, 2016. The November 2016 contribution to the IBEW–NECA Trusts then came due post-petition, on December 10, 2016. Such contribution became delinquent on December 15, 2016. To date, Debtor still has not paid the November 2016 contribution.

In their Motion, the Trustees acknowledge that the November 2016 contribution is based on hours worked pre-petition between November 1, 2016 and November 27, 2016. However, because the contribution came due post-petition and became delinquent post-petition, the Trustees argue that the Court should treat the contribution, along with any interest, liquidated damages, and attorneys' fees, as an administrative expense.

II. DISCUSSION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(b) and 1334(b). This matter is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (B), and (K). Venue is proper in this Court. 28 U.S.C. § 1409(a) (2017).

A. Legal Standard for Administrative Expense Priority

In bankruptcy, certain unsecured claims are given priority treatment under § 507. 11 U.S.C. § 507(a)(1)–(10) (2017). Among these are administrative expense claims allowed pursuant to § 503(b), which are given second priority status and are generally limited to post-petition expenses. 11 U.S.C. § 507(a)(2); *In re* Kadjevich, 220 F.3d 1016, 1019–20 (9th Cir. 2000). Such claims include those for "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, and commissions for services rendered *after the commencement of the case*." 11 U.S.C. § 503(b)(1)(A)(i) (emphasis added). A creditor requesting administrative expense treatment under § 503(b)(1)(A) has the burden of proof and must show that the claim (1) arose post-petition (2) from a transaction with the trustee or debtor-in-possession and (3) directly and substantially benefited the estate. *In re* DAK Indus., Inc., 66 F.3d 1091, 1094 (9th Cir. 1995).

Section 507 also gives priority status to claims for wages and contributions to employee benefit plans that were earned within a certain amount of time before the bankruptcy petition was filed. See 11 U.S.C. §§ 507(a)(4)–(5). With regard to employer contributions to employee benefit plans, § 507 accords fifth priority status to such contributions if they arose from services rendered within 180 days before the bankruptcy petition date or the date the debtor-employer ceased doing business, whichever is earlier. 11 U.S.C. § 507(a)(5).

The Trustees argue that Matter of Pacific Far East Line, Inc., 713 F.2d 476 (9th Cir. 1983), is controlling Ninth Circuit authority that this Court is bound to follow. This Court disagrees. In Pacific Far East Line, a case decided under the old Bankruptcy Act, the court held that a trustee's payments to a maritime association for employee benefits were properly classified as administrative expenses even though the payments were determined based on employee hours worked pre-petition. 713 F.2d at 478–80. This Court believes that Pacific Far East Line has limited persuasive authority because it was decided under the old Act and before the enactment of both § 1113, which addresses the assumption and rejection of collective bargaining agreements, and § 507(a)(5), which assigns fifth priority unsecured status to contributions to employee benefit plans. The issue here is the interplay between § 1113 and § 507(a)(5) in determining whether an employee benefit plan contribution should be given administrative priority status. There is no controlling Ninth Circuit authority on this issue. However, this issue was addressed in *In re* Certified Air Techs., Inc., 300 B.R. 355 (Bankr. C.D. Cal. 2003). This Court finds the reasoning of the Certified Air court persuasive.

***3** In Certified Air, the court considered whether several pre-petition claims for employee benefit plan contributions, along with requests for liquidated damages and attorneys' fees incurred as a result of the delinquent contributions, should be given administrative priority status. 300 B.R. at 357–60. The debtor was a party to CBAs that required payment of such contributions. Id. After deciding that the priority scheme of § 507 applied to employees covered by a CBA, the court examined the relationship between § 507 and § 1113. Id. at 369. In light of the legislative history of § 1113 and the approach taken by a majority of the circuits that had considered the issue, the Certified Air court determined that the priority scheme of § 507 trumped any purported "super-priority" status that could be assigned to pre-petition wage and benefit claims as a result of § 1113. Id. at 366–69.

Section 1113 provides a detailed scheme that a debtor-in-possession must follow in order to reject a pre-petition CBA. See 11 U.S.C. § 1113. The relevant subsection that has been asserted as giving a "super-priority" status to wage and benefit claims arising out of a pre-petition CBA states that "[n]o provision of

this title shall be construed to permit a trustee [or debtor-in-possession] to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section." 11 U.S.C. § 1113(f). However, the Certified Air court determined that assigning such meaning to § 1113(f) causes that section to conflict with § 507, which cannot have been the result intended by Congress:

> Construing § 1113(f) as mandating super-priority status for pre-petition wage and benefit claims under a collective bargaining agreement in chapter 11, but not in chapter 7, leads to anomalous results. ... Section 1113 was enacted to protect the existence of collective bargaining agreements in chapter 11 cases, not to re-order the priority scheme set by Congress in § 507. Had Congress intended for § 1113 to create a super-priority for pre-petition wage and benefit claims arising under a collective bargaining agreement, it would have either included language in § 1113 similar to that incorporated into § 1114 or amended § 507 to reflect the change it intended. *Because Congress neither included explicit language in § 1113 to supercede § 507 nor amended § 507 to specifically create a super-priority status for such claims, the court concludes that pre-petition claims for wages and benefits due under a collective bargaining agreement are not entitled to treatment as administrative expenses but are to be accorded priority consistent with § 507.*

Certified Air, 300 B.R. at 368–69 (emphasis added). This analysis aligns with the Ninth Circuit's observation that "the scope of priorities should be strictly construed because 'preferential treatment of a class of creditors is in order only when clearly authorized by Congress.' " *In re* Consol. Freightways Corp. of Del., 564 F.3d 1161, 1167 n.14 (9th Cir. 2009) (quoting Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co., 547 U.S. 651, 655 (2006)).

Accordingly, the Certified Air court declined to assign administrative expense priority to the pre-petition benefit claims and related damages based on § 1113. See 300 B.R. at 363–65 (characterizing *In re* World Sales, 183 B.R. 872 (B.A.P. 9th Cir. 1995), as inapplicable, since the claim at issue there was based on payments due under a CBA for post-petition work). Instead, the court assigned the employee benefit plan contributions, which accrued within 180 days before the filing of the debtor's bankruptcy petition, fourth priority status[3] in accordance with the relevant subsection of § 507. Id. at 372. The court then allowed the related liquidated damages and attorneys' fees as general unsecured claims, since § 507 does not classify such amounts as priority unsecured claims, even when associated with priority wage and benefit claims. See id. at 369, 372.

B. The Trustees' Claim for the November 2016 Contribution, Based on Pre–Petition Hours Worked, is Not Entitled to Administrative Expense Priority.

***4** The Trustees concede that the November 2016 contribution is based on hours worked between November 1, 2016 and November 27, 2016. Debtor filed its bankruptcy petition on November 28, 2016. Therefore, this debt arose pre-petition and consequently is not entitled to administrative expense priority under § 507(a)(2), since this subsection only accords such priority to services rendered post-petition.

Further, § 507(a)(5) specifically covers the circumstances here. The Trustees' claim arises out of Debtor's November 2016 contribution to various employee benefit plans. Debtor has not yet ceased doing business; therefore, the operative date for purposes of § 507(a)(5) is the petition date. The work that gave rise to the November 2016 contribution was performed in the month before the petition was filed. Thus, such services were rendered within 180 days before the petition date. Therefore, under § 507(a)(5), the Trustees' claim is entitled to fifth priority status. The language of § 1113(f) does not change this circumstance, especially since that subsection does not accord any special priority status to pre-petition claims arising out of CBAs. Rather, § 1113(f) merely ensures that a pre-petition CBA will not be rejected without the employer-debtor having first followed the procedures provided in § 1113.

Accordingly, the Court assigns fifth priority status to the Trustees' claim for the November 2016 employee benefit plan contribution, up to the statutory cap provided in § 507(a)(5). Any amount of the November 2016 contribution that exceeds the maximum payment allowed under § 507(a)(5) will be treated as a general unsecured

claim.

C. The Trustees' Claim for Interest, Liquidated Damages, and Attorneys' Fees Will Be Treated as a General Unsecured Claim.

As in Certified Air, the Court determines that § 507 does not grant priority status to interest, liquidated damages, and attorneys' fees incurred as a result of delinquent, pre-petition employee benefit plan contributions. This notion holds true even when such amounts are related to employee benefit claims allowed under § 507(a)(5).

Therefore, although the Trustees' claim for the November 2016 contribution is entitled to priority under § 507(a)(5), the Trustees' claim for the associated interest, liquidated damages, and attorneys' fees will be treated as a general unsecured claim.

D. Since Neither Portion of the Trustees' Claim is Entitled to Administrative Expense Priority, the Court Will Not Order Immediate Payment of the Trustees' Claim.

The decision about when administrative expenses will be paid lies within the discretion of the bankruptcy court. *In re* Verco Indus., 20 B.R. 664, 665 (B.A.P. 9th Cir. 1982) (citing *In re* Standard Furniture Co., 3 B.R. 527, 532 (Bankr. S.D. Cal. 1980)). In determining whether an administrative expense should be paid immediately, courts often consider the following factors: (1) the likelihood that all administrative claimants will be paid in full; (2) whether the administrative claimant could repay any payment that later proves to be excessive; (3) if the case is a Chapter 13 or 11 case, how close the case is to confirmation; and (4) whether the expense was incurred in the ordinary course of the debtor's business. Kathleen P. March et al., Cal. Practice Guide: Bankruptcy § 17:730 (The Rutter Group 2016) (citing *In re* Cardinal Indus., Inc., 109 B.R. 738, 742–43 (Bankr. S.D. Ohio 1989); *In re* W. Farmers Ass'n, 13 B.R. 132, 135 (Bankr. W.D. Wash. 1981)). If it appears that there are insufficient assets to pay all administrative claims in full, immediate payment is disfavored. *In re* Conchise College Park, Inc., 703 F.2d 1339, 1356 n.22 (9th Cir. 1983).

***5** Here, as discussed previously, the Court has determined that no portion of the Trustees' claim will be treated as an administrative expense. Consequently, immediate payment of the Trustees' claim is neither necessary nor appropriate.

III. CONCLUSION

In summary, the Court holds that the Trustees' claim, comprised of the November 2016 employee benefit plan contribution and related interest, liquidated damages, and attorneys' fees, is not entitled to administrative expense priority and, therefore, need not be paid immediately. Rather, the November 2016 contribution is entitled to fifth priority status, since it is based on work performed within 180 days before Debtor filed its bankruptcy petition. Further, the interest, liquidated damages, and attorneys' fees incurred by the Trustees as a result of the delinquent contribution do not constitute a priority unsecured claim. Accordingly, the Trustees' Motion is denied. The Trustees may file a claim comprised of the following amounts: (1) the November 2016 contribution, which will be treated as a priority unsecured claim under § 507(a)(5), up to the statutory cap provided therein; (2) any amount of the November 2016 contribution that exceeds the maximum payment allowed under § 507(a)(5), which will be treated as a general unsecured claim; and (3) interest, liquidated damages, and attorneys' fees in the total amount of $10,873.83, which will be treated as a general unsecured claim.

A separate order consistent with this memorandum of decision will be entered.

All Citations

Not Reported in B.R., 2017 WL 1788414

Footnotes

1 According to the Trustees, the November 2016 contribution amounts to $169,337.88. However, the Trustees only seek to collect $139,911.40 of that amount, based on the report that Debtor submitted for November 2016.

2 The Trustees request $829.49 in interest; $4,197.34 in liquidated damages; and $5,847.00 in attorneys' fees.

3 When Certified Air was decided, § 507 only included nine categories of unsecured priority claims, with administrative expense claims receiving first priority, pre-petition wage claims receiving third priority, and pre-petition employee benefit plan contributions receiving fourth priority. 300 B.R. at 360. Each of these categories moved one level lower in priority when the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 added a new first priority for domestic support obligations. See 11 U.S.C. § 507(a)(1); Kathleen P. March et al., Cal. Practice Guide: Bankruptcy § 17:441 (The Rutter Group 2016).

End of Document

EXHIBIT 3

EXHIBIT 3

Retirement Plan for Hospital Employees

Plan Funding Policy effective for the Plan Year Beginning January 1, 2017

1. Definitions

1.1. Actuarial Accrued Liability

The Actuarial Accrued Liability as of the beginning of a plan year as determined by the Plan's actuary, employing the assumptions and actuarial cost methods selected by the actuary and approved by the Board. Individual liabilities are allocated to the employer with whom the individual participant last accrued a benefit under the Plan.

1.2. Actuarial Value of Assets

The Actuarial Value of Assets as of the beginning of the plan year determined using an adjusted market value method, determined by adjusting the Market Value of Assets to reflect the investment gains and losses (the difference between the actual investment return and the expected investment return) during each of the last five years at the rate of 20% per year. The aggregated Actuarial Value of Assets for all Ongoing and Withdrawn Employers is subject to a restriction that it not be less than 80% or more than 120% of Market Value of Assets.

1.3. Board

Refers to the Board of Trustees of the Retirement Plan for Hospital Employees.

1.4. Extraordinary Administrative Expenses

Extraordinary Administrative Expenses include administrative expenses paid by the Plan that are a result of a certain action, plan change or other request made by a specific Ongoing Employer, which primarily impacts that Ongoing Employer or its obligations under the Plan. This may include, but is not limited, to the cost of implementing plan changes initiated by one of the Ongoing Employers, fees associated with services requested to the Plan's advisors by an Individual Employer or costs and fees associated with correcting errors arising from the action of a specific Ongoing Employer.

1.5. Market Value of Assets

The Market Value of Assets as of the beginning of the plan year, including contributions receivable for the prior plan year not deposited by the beginning of the plan year, allocated to individual Ongoing Employers and Withdrawn Employers. Assets are tracked for each individual group and are rolled forward every year by adding any contributions or Employer Withdrawal Liability payments made by a specific Employer, subtracting any benefits paid to participants who last accrued a benefit while employed by such Employer and an allocation of the Plan's administrative expenses generally allocated based on the participant headcount for such Employer. The assets are then adjusted using the same rate of return for all Employers such that the aggregated individual Market Value of assets equals the market value of the assets held by the Plan.

1.6. Normal Cost

The Normal Cost equals the actuarial value of benefits accrued during the plan year employing the assumptions and actuarial cost methods selected by the actuary and approved by the Board plus an allocation of the expected administrative expenses to be paid during the plan year. Generally, such expected administrative expenses are allocated based on participant headcounts for all Ongoing Employers.

1.7. Ongoing Employers

Ongoing Employers refers to employers currently participating in the Plan and making contributions to the Plan. As of the effective date of this policy, Ongoing Employers Include:

- California Pacific Medical Center
- Dignity Health
- Verity Health System
- Institute on Aging
- St. Luke's Healthcare Center
- Sutter Pacific Medical Foundation

1.8. Plan

Refers to the Retirement Plan for Hospital Employees.

1.9. Unfunded Liabilities

An amount equal to the Actuarial Accrued Liabilities reduced by the Actuarial Value of Assets for each individual Ongoing Employer.

1.10. Valuation Interest Rate

The assumed interest rate used to determine the Actuarial Accrued Liability and Normal Cost, which is deemed to be a best estimate of the anticipated long term rate of return on the Plan's assets.

1.11. Withdrawn Employer
Refers to any employer who was previously an Ongoing Employer in the Plan, but has since withdrawn from the Plan.

1.12. Withdrawn Employer Surplus / Deficit
An amount equal to the Actuarial Value of Assets for all Withdrawn Employers reduced by 150% of the Actuarial Accrued Liability for all Withdrawn Employers. If this amount is positive (the Actuarial Value of Assets for Withdrawn Employers exceeds 150% of the Actuarial Accrued Liability for all Withdrawn Employers), the amount shall be referred to as the Withdrawn Employer Surplus. Conversely, if the amount is negative, it shall be referred to as the Withdrawn Employer Deficit.

2. Amount of contributions
The contributions due to the Plan for a certain plan year equals the regular annual contribution amount described in Section 2.1. The Board may opt to adjust contributions as described in section 2.3.

2.1. Regular annual contribution amount: The regular annual contribution amount due to the Plan by the Ongoing Employers for a certain plan year is calculated as follows

2.1.1. Amortization of Unfunded Liabilities: An amount equal to each Ongoing Employer's Unfunded Liability amortized over ten years at the Valuation Interest Rate, plus

2.1.2. End of year Normal Cost: An amount equal to each Ongoing Employer's Normal Cost plus interest, measured at the Valuation Interest Rate, through the end of the year, minus

2.1.3. Allocation of the Withdrawn Employer Surplus credit (if Surplus exists): An amount equal to the Withdrawn Employer Surplus amortized over ten years at the Valuation Interest Rate. This amount is then allocated to Ongoing Employers based on each Ongoing Employer's portion of the Actuarial Value of Assets aggregated for all ongoing Employers, plus

2.1.4. Allocation of the Withdrawn Employer Deficit charge (if Deficit exists): An amount equal to the Withdrawn Employer Deficit amortized over ten years at the Valuation Interest Rate. This amount is then allocated to Ongoing Employers based on each Ongoing Employer's portion of the Actuarial Value of Assets aggregated for all Ongoing Employers.

2.2. Adjustments to the regular contribution amount to meet minimum funding requirements prescribed under the Internal Revenue Code
In no case shall the regular annual contribution amount be less than the minimum required contribution due under Section 412 of the Internal Revenue Code, adjusted for any credit balance carried by the Plan. If the minimum required contribution adjusted by credit balance exceeds the regular annual contribution amount, the required contribution to the Plan will be equal to the adjusted minimum required contribution allocated proportionally to the regular contribution amount calculated under section 2.1.

2.3. Adjustments to the regular annual contribution amount: The Board may authorize certain adjustments to the required contributions under this funding policy. Any adjustment to the regular contribution amount cannot reduce the contribution to an amount that is less than the minimum required contribution due under Section 412 of the Internal Revenue Code.

2.4. Assessment of Extraordinary Administrative Expenses: At the Board's request, an Ongoing Employer will be required to make an additional contribution to cover any Extraordinary Administrative Expenses incurred on their behalf. The Plan Administrator will send an invoice in an amount equal to the Extraordinary Administrative Expenses payable within 30 days for any contributions related to Extraordinary Administrative Expenses.

3. Payment of contributions

Except for any Assessment of Extraordinary Administrative Expenses as described above in Section 2.4., contributions are payable in three installments as follows:

a) First installment: Equal to one third of the annual contribution amount determined based on the provisions of Section 2 rounded to the nearest dollar. The contribution is due February 15 of the calendar year beginning after the end of the plan year.
b) Second installment: An amount equal to the First Installment. The contribution is due May 15 of the calendar year beginning after the end of the plan year.
c) Third installment: An amount equal to the annual contribution amount determined based in the provisions of Section 2. Reduced by the First and Second Installments. The contribution is due August 15 of the calendar year beginning after the end of the plan year.

An Assessment of Extraordinary Administrative Expenses is payable within 30 days of the Ongoing Employer receiving an invoice detailing such expenses.

The Board may authorize an Ongoing Employer to accelerate the timing of the payment of its contributions. The Board reserves the right to assess an additional contribution should an Ongoing Employer fail to make an installment when due. Such additional contribution shall take into account the foregone investment return on the late paid contribution (or the return based on the Valuation Interest Rate, if greater), plus administrative and other costs associated with the collection of the late paid contribution.

4. Right to amend

The Board reserves the right to amend this Funding Policy at a future date.