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Objections Due: March 25, 2020.
Hearing Date: April 15, 2020.
Time: 11 a.m.
Location: U.S. Bankruptcy Court, 402 E. Yakima Avenue, Second Floor Courtroom, Yakima, WA
Telephonic Access
Phone Number: 1-877-402-9757
Conference Code: 7036041

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In re: ASTRIA HEALTH, *et al*., Debtors and Debtors in Possession.[1]	Chapter 11 Lead Case No. 19-01189-11 Jointly Administered **Adv. Proc. Case No. 20-80005-WLH**

[1] The Debtors, along with their case numbers, are as follows: Astria Health (19-01189-11), Glacier Canyon, LLC (19-01193-11), Kitchen and Bath Furnishings, LLC (19-01194-11), Oxbow Summit, LLC (19-01195-11), SHC Holdco, LLC (19-01196-11), SHC Medical Center - Toppenish (19-01190-11), SHC Medical Center - Yakima (19-01192-11), Sunnyside Community Hospital Association (19-01191-11), Sunnyside Community Hospital Home Medical Supply, LLC (19-01197-11), Sunnyside Home Health (19-01198-11), Sunnyside Professional Services, LLC (19-01199-11), Yakima Home Care Holdings, LLC (19-01201-11), and Yakima HMA Home Health, LLC (19-01200-11).

MOTION TO DISMISS ADVERSARY PROCEEDING

Washington State Nurses Association, Plaintiff, v. SHC Medical Center-Yakima, Astria Health, Defendants.	**NOTICE OF MOTION AND MOTION TO DISMISS THE ADVERSARY PROCEEDING; MEMORANDUM OF POINTS AND AUTHORITIES [RELATED ADV. DOCKET NO. 1]**

PLEASE TAKE NOTICE Astria Health and SHC Medical Center-Yakima ("Medical Center") (collectively, the "Defendants"), two of thirteen debtors and debtors-in-possession (collectively, the "Debtors") in the above-captioned Chapter 11 bankruptcy cases (the "Cases"), hereby move (the "Motion") for entry of an Order dismissing this adversary proceeding (the "Adversary Proceeding") filed by the Washington State Nurses Association ("WSNA").

PLEASE TAKE FURTHER NOTICE that Defendants file this Motion pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6), applicable to adversary proceedings in bankruptcy by operation of Bankruptcy Rule[2] 7012(b).

PLEASE TAKE FURTHER NOTICE that this Motion is based on this Notice and Motion, the attached Memorandum of Points and Authorities, and the concurrently filed Request for Judicial Notice, the arguments of counsel and other admissible evidence property brought before this United States Bankruptcy Court for the Eastern District of Washington (the "Bankruptcy Court") at or before the

[2] Unless specified otherwise, all chapter, "§" and section references are to the Bankruptcy Code, 11 U.S.C. § 101-1532, and all " Bankruptcy Rule" references are to the Federal Rules of Bankruptcy Procedure.`

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hearing on this Motion, if any.

PLEASE TAKE FURTHER NOTICE that any party opposing or responding to the Motion must file a response (the "Response") with the Bankruptcy Court and serve a copy of it upon the moving party and United States Trustee not later than 21 days after the filing of this Motion. The Response must be a complete written statement of all reasons in opposition to the Motion, declarations and copies of all evidence on which the responding party intends to rely, and any responding Memorandum of Points and Authorities.

PLEASE TAKE FURTHER NOTICE that failure to timely file and serve any opposition may be considered consent to the granting of the Motion without hearing.

PLEASE TAKE FURTHER NOTICE that if any objections are filed and a hearing is needed on the Motion, the hearing will be held on **April 15, 2020, at 11:00 a.m. (prevailing Pacific Time)**, at the U.S. Bankruptcy Court, 402 E. Yakima Avenue, Second Floor Courtroom, Yakima, WA.

PLEASE TAKE FURTHER NOTICE that counsel for any party that wishes to address the Court is strongly encouraged to appear in person. Telephonic appearances will, however, be permitted, including for parties that do not wish to address the Court. The telephone conference call-in number is (877) 402-9757, Access Code: 7036041.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

By its complaint [Adv. P. Docket No. 1] (the "Complaint"), Washington State Nurses Association ("WSNA") seeks to recover significant damages from Defendants arising out of the Bankruptcy Court-authorized emergency closure of SHC Medical Center-Yakima (the "Medical Center") on behalf of WSNA-represented employees who were terminated from the Medical Center. Specifically, although the Medical Center paid all employees (including WSNA-represented employees) the balance of their salaries and hourly wages in their final pay check, WSNA seeks damages, punitive damages, fees and costs under three counts. The first count seeks an unspecified amount of damages for all WSNA-represented employees under the Federal Worker Adjustment and Retraining Notification Act, title 29 of the United States Code, §§ 2100 *et. seq*. (the "WARN Act"). The second and third counts seek payment of all accrued and unused paid time off ("PTO"), regardless of when earned, plus double damages equal to the value of such PTO under the Washington Wage Payment and Collection Act, RCW § 49.48.010 *et seq*. (the "Washington Payment Act") and the Washington Rebate Act, RCW § 49.52.010 *et seq.*, based upon Defendants' alleged failure to pay all PTO on the nurses' last day of employment.

None of these counts have merit and, are so fundamentally defective that the Complaint should be dismissed, with prejudice. First, the WARN Act claim fails

because under the authorized emergency closure, Defendants were not operating the Medical Center as "a going concern" but as liquidating fiduciaries and therefore Defendants do not qualify as "employers" under the WARN Act. Because the WARN Act cannot apply to Defendants, the first count should be dismissed with prejudice.

The second and third counts seeking damages for nonpayment of PTO under the Washington Payment and Rebate Acts must also fail because: (1) WSNA lacks standing to pursue these claims on behalf of its members; and (2) both § 301 of the Labor Management Relations Act (the "LMRA") and applicable bankruptcy law and Bankruptcy Court orders preempt these claims. Among other things, the Washington Payment and Rebate Acts cannot be used to elevate the priority of all PTO claims to administrative expense status (particularly PTO that accrued pre-petition) or punish the Debtors for non-payment of such PTO in an employee's final check. Moreover, WSNA's demand for double damages, fees, and costs seeks to improperly punish the Defendants for the Debtors' compliance with operative bankruptcy law and existing case orders, including the Wage Order and Interim Cash Collateral Orders (as those terms are defined herein) that expressly limit the Debtors' authority to pay PTO.

For these and other reasons as noted below, the Court should dismiss the

Complaint, with prejudice.[3]

RELIEF REQUESTED

By this Motion, Defendants request entry of an Order dismissing the Adversary Proceeding filed by WSNA with prejudice, on the basis that the Complaint fails to state a claim upon which relief can be granted.

JURISDICTION AND VENUE

The Bankruptcy Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334.[4] This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

The statutory predicate for the relief requested herein is Federal Rule of Civil Procedure ("FRCP") 12(b)(6), applicable to adversary proceedings in Bankruptcy by operation of Rule 7012(b).

FACTUAL AND PROCEDURAL BACKGROUND

On May 6, 2019, Defendants filed voluntary petitions for relief under chapter

[3] Notwithstanding that dismissal of the Complaint should be with prejudice, the Debtors remain willing to work with WSNA to reach an agreed upon calculation of all PTO to be satisfied in accordance with the priority and distribution requirements of bankruptcy law.

[4] Unless specified otherwise, all chapter, "§" and section references are to the Bankruptcy Code, 11 U.S.C. § 101-1532, and all "Bankruptcy Rule" references are to the Federal Rules of Bankruptcy Procedure.

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11 of the Bankruptcy Code.[5] Compl. at ¶ 21. On May 8, 2019, the Bankruptcy Court issued an order authorizing Defendants to pay certain pre- and post-petition wages to their current workforce. [Bankr. Docket No. 83] (the "Wage Order").

Of note, the Wage Order authorized Defendants to take limited actions with respect to employees' accrued PTO benefits. Of particular relevance, it authorized the *use* of pre- and post-petition PTO in the ordinary course during the Bankruptcy Case. Wage Order at ¶ 8. The Wage Order also authorized (but did not mandate) the Debtors to *pay* employees for unused PTO "that accrued within 180 days prepetition" up to a certain dollar amount "in the Debtors' sole discretion." *Id.* at ¶ 9.

Of similar relevancy, on December 20, 2019, the Bankruptcy Court entered the *Interim Order (I) Authorizing the Debtors to Obtain Replacement Postpetition Financing; (II) Granting Security Interests and Superpriority Administrative Expense Status; (III) Granting Adequate Protection to Certain Prepetition Secured Credit Parties; (IV) Modifying the Automatic Stay; (V) Authorizing the Debtors to Enter into Agreements with Lapis Advisers, L.P., (VI) Authorizing Use of Cash Collateral; (VII) Scheduling a Final Hearing; and (VIII) Granting Related Relief* [Bankr. Docket No. 841] (the "Interim Cash Collateral Order"), providing the

[5] Defendants are separate entities and filed separate petitions; however, the Debtors' Cases are being jointly administered pursuant to this Bankruptcy Court's order [Bankr. Docket No. 10] (the "Joint Admin Order").

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Debtors with limited interim financing. Among other things, the Interim Cash Collateral Order provided a carve-out of $1,000,000 "for the Debtors' accrued and unpaid payroll obligations to employees (**excluding** management and consultants and not including **paid time off**, severance vacation **or any other claims based upon state or federal law**) . . . ." Interim Cash Collateral Order at 35-36 ¶ 15(a) (**emphasis added**). On February 5, 2020, a second interim order ("Second Interim Cash Collateral Order") was entered that contained the same carve out and limitations. Second Interim Cash Collateral Order at 36-38 ¶ 14(a). It should be noted that WSNA did not oppose the entry of either order or the limitations on the $1,000,000 carve-out concerning "paid time off" or payment of "any other claims under state or federal law." Second Interim Cash Collateral Order at 36-38 ¶ 14(a).

Also of particular relevance is the record concerning the sale and refinancing process which has been established in this Bankruptcy Case. It is without dispute that from the Petition Date through December 2019, the Debtors worked to obtain exit financing or a buyer interested in acquiring the Medical Center under acceptable terms. Compl. at ¶¶ 23-23; Ex. M, Tr. 1/14/20 Hr'g at 107:17-21; [6] "Debtors' Status Conference Report" at §§ A(1) and B [Bankr. Docket No. 831]; "Debtors' Second Status Conference Report" at §§ A(1) and B [Bankr. Docket No. 913]. Notwithstanding those efforts (including retention of an investment banker),

[6] A full list of exhibits is provided in the Defendants' Request for Judicial Notice in Support of Their Motion to Dismiss the Adversary Proceeding, filed contemporaneously herewith. All citations to exhibits are with reference thereto.

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the Debtors were not able to obtain such financing or buyer. Ex. M, Tr. 1/14/20 Hr'g at 107:17-21. In fact, the Medical Center's deteriorating financial condition coupled with a last-gasp failed effort to obtain refinancing or a purchaser led to the emergency closure of the Medical Center in order to prevent a risk to patient safety at the Medical Center. [Bankr. Docket No. 874 at 1-2].

More specifically, on January 3, 2020, Defendants moved on an emergency basis to close the Medical Center [Bankr. Docket No. 867] (the "Closure Motion"). As set forth in the Bankruptcy Court's order approving the Closure Motion [Bankr. Docket No. 874] (the "Closure Order"), Defendants filed the Closure Motion under seal because, if the relief sought became public, "maintaining adequate staff to provide quality patient care could have become problematic" and created "an immediate threat to both patient and public health and safety." *Id* at 2.

The Bankruptcy Court granted the Closure Motion on January 8, 2020, and authorized Defendants "to implement a plan (the "Closure Plan") … for the closure of the Medical Center." *Id*. at 3. The Bankruptcy Court-approved Closure Plan provided for a safe but quick closure of the Medical Center's operations. *Id*. at 5-9. The same day the Bankruptcy Court authorized the closure, the Medical Center sent notices *via* email to its employees and to WSNA for its represented employees notifying them of the closure. Compl. at ¶ 32. The Medical Center closed on or about January 13, 2020. Compl. at ¶ 35. In accordance with the Closure Plan, Medical Center employees were terminated, including the nurses represented by the

WSNA. Compl. at ¶¶ 12, 135.

On January 10, 2020, the WSNA filed an *Emergency Motion for Reconsideration of the Order Authorizing Closure of the Medical Center* [Bankr. Docket No. 876] (the "Reconsideration Motion"). The Debtors filed their response to the Reconsideration Motion on January 13, 2020 [Bankr. Docket No. 886]. On January 14, 2020, the Bankruptcy Court convened a hearing to consider the merits of the Reconsideration Motion, took evidence, heard the argument of counsel and at its conclusion, denied WSNA's request. *Order Denying WSNA's Emergency Motion for Reconsideration of the Order Authorizing Closure of the Medical Center* [Bankr. Docket No. 897].

On February 3, 2020, WSNA filed the instant Complaint. Notably missing from the Complaint is any allegation that the Defendants failed to pay WSNA-represented nurses their remaining earned salaries or hourly wages in their final pay check or that Defendants refused to honor usage of accrued and unused PTO earned postpetition or during the 180-day period prior to the Petition Date (up to the applicable § 507(a)(4) priority cap) in accordance with the authorization and limitations provided under the Wage Order or the Bankruptcy Code.[7] Moreover, as the case record demonstrates, WSNA has not filed an administrative claim (or priority claim) for unpaid PTO.

[7] Moreover, the Complaint also fails to acknowledge that certain WSNA constituents have been rehired by the Debtors' other facilities. Debtors' Third Status Conference Report [Bankr. Docket No. 1036 at § C].

On February 7, 2020, the Debtors authorized below legal counsel to accept service of the Complaint.

ARGUMENT

FRCP 12(b)(6), applicable to adversary proceedings in bankruptcy by operation of Bankruptcy Rule 7012(b), allows a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." The Bankruptcy Court may dismiss a complaint based on either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). In reviewing a motion to dismiss in an adversary proceeding, the Bankruptcy Court can take judicial notice of court documents from the underlying bankruptcy case and documents incorporated by reference into the Complaint. *E.g., United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (court may consider documents incorporated by reference in complaint, such as those that form the basis of the plaintiff's claims); *In re Century City Doctors Hosp., LLC*, BAP No. CC-09-1235-MkJaD, 2010 WL 6452903, at *6 (B.A.P. 9th Cir. Oct. 29, 2010) ("[C]ourt documents filed in an underlying bankruptcy case are subject to judicial notice in related adversary proceedings."). The Court should dismiss a complaint without leave to amend when amendment cannot cure the deficiencies in the complaint. *E.g., Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011).

Here, the law and facts as alleged in the Complaint and supported in the

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existing Bankruptcy Court record demonstrate that the Complaint fails to state a claim upon which relief can be granted and, the defect is so pronounced that dismissal should be granted with prejudice.

I. THE WARN ACT DOES NOT APPLY TO DEFENDANTS AS LIQUIDATING FIDUCIARIES

WSNA's WARN Act claim fails because Defendants were not "employers" within the meaning of the Act at the time of the closure and, thus, the WARN Act cannot apply. On January 8, 2020, the Bankruptcy Court issued an order authorizing Defendants to close the Medical Center. [Bankr. Docket No. 874]. It is without legitimate dispute that, at the time of the closure, Defendants were not operating the Medical Center as "a going concern" but for the sole purpose of safely discharging patients and preserving the remaining assets for the bankruptcy estate. As such, Defendants were exempt from the WARN Act under the "liquidating fiduciary" exception.

The liquidating fiduciary exception "reflects a limitation on the statutory definition of employer." *In re Century City Doctors Hosp.*, 2010 WL 6452903, at *8. The WARN Act requires only "employers" to give notice of plant closings and mass layoffs. 29 U.S.C. § 2102(a). The Act defines "employer" as "any *business enterprise* that employs" the requisite number of employees. *Id.* at § 2101(a)(1) (emphasis added). In turn, a "business enterprise" is a business that operates "in the normal commercial sense" "as a going concern." *Chauffeurs, Sales Drivers,*

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Warehousemen & Helpers Union Local 572 v. Weslock Corp., 66 F.3d 241, 244 (9th Cir. 1995) (discussing the Department of Labor's comments on the final WARN Act regulations at 54 Fed. Reg. 16,045 (1989)). An entity does *not* qualify as a business enterprise, and thus is not an employer, if it operates for the purpose of preserving or liquidating assets for creditors. *Id.*; *see also In re Century City Doctors Hosp.*, 2010 WL 6452903, at *9 (trustee was not an employer where the trustee was authorized to operate hospital temporarily and for sole purpose of closing the hospital's operations in a safe manner); *In re United Healthcare Sys., Inc.*, 200 F.3d 170, 176-79 (3d Cir. 1999) (hospital in Chapter 11 did not qualify as employer where it "was operating not as a 'business operating as a going concern,' but rather as a business liquidating its affairs").

Here, WSNA alleges that the closure occurred on or about January 13, 2020 (Compl. at ¶ 35)—after Defendants were no longer operating the Medical Center as a going concern. The week before the closure, on January 8, 2020, the Bankruptcy Court authorized both Defendants "to implement a plan (the "Closure Plan") … for the closure of the Medical Center." [Bankr. Docket No. 874 at 3]. The Bankruptcy Court-authorized Closure Plan permitted Defendants to safely transfer patients, dispose of controlled substances, and engage in other activities to "ce[ase] operations at the Medical Center." *Id.* Significantly, the Closure Plan did not give Defendants an option to continue to operate the Medical Center except as necessary to ensure a safe and orderly closure. Under the Closure Plan, "even if [Defendants]

had wanted to continue operating as a business concern," they could not have done so. *See In re MF Glob. Holdings Ltd.*, 481 B.R. 268, 283 (Bankr. S.D.N.Y. 2012) (trustee was liquidating fiduciary where trustee's sole job was to liquidate the business).

WSNA's Complaint seemingly seeks to ignore the Bankruptcy Court's findings related to the closure of the Medical Center, including the transition of the Medical Center from an operating business to a rapidly closing facility that was working solely to discharge patients. WSNA instead incorrectly attempts to suggest that Defendants intentionally hid the decision to close the Medical Center from WSNA for nefarious reasons. Compl. at ¶¶ 23-28, 33. That is not true. WSNA's own Complaint and the Bankruptcy Court's factual findings refute any assertion that the Defendants wrongfully tried to keep WSNA's nurses "in the dark." Compl. at ¶¶ 23-24, 26, 28; Ex. L, Tr. of 1/8/20 Hr'g at 5:6-12, 8:9-9:2Ex. M, Tr. of 1/14/20 Hr'g at 108:3-4, 112:12-13. In any event, it would not change the analysis because the relevant time period for analyzing whether the liquidating fiduciary exception applies is at the time of the closure.

Similarly, WSNA attempts to sidestep the evidentiary record concerning the failed efforts to refinance and sell this facility. WSNA alleges that in December 2019, Defendants found it "unlikely" that they would obtain financing or a buyer for the Medical Center, but not that it was a certainty. Compl. at ¶¶ 23-24, 26. WSNA further alleges that on December 3, 2019 the Medical Center's Board of

Trustees authorized the closure of the Medical Center, but WSNA's complaint is silent as to when that future closure would occur, or if Defendants even knew when it would occur. Compl. at ¶ 25. Indeed, WSNA alleges that as of December 13, 2019, Defendants were still seeking "authorization to obtain replacement postpetition financing" to keep the Medical Center open to continue to provide critical care for the Yakima Valley community. Compl. at ¶ 28. These factual allegations alone, taken as true, do not plausibly allege that Defendants improperly kept WSNA or the nurses in the dark. *E.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (a claim is plausible only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").

Moreover, the Bankruptcy Court found that the timing of the closure was reasonable and "appropriately" done "on an *emergency basis*," and that Defendants "did everything they could reasonably do to avoid" closing the Medical Center but "they had no other choice." Ex. M, Tr. of 1/14/20 Hr'g at 112:12-13; [Bankr. Docket No. 874 at 2]. The Bankruptcy Court also found closing the Medical Center was "the right decision" and "necessary to ensure the safety of patients." *Id.* at 1; *see also* Ex. M, Tr. of 1/14/20 Hr'g at 108:3-4 (Court noting that there was no alternative to closing the hospital and that it "would be negligent not to close it"). Further, the Bankruptcy Court found that the Debtors legitimately filed the closure request under seal to protect patient health because, if the request became public too

early, "maintaining adequate staff to provide quality patient care could have become problematic" and created "an immediate threat to both patient and public health and safety." Ex. L, Tr. of 1/8/20 Hr'g at 5:6-12, 8:9-9:2; [Bankr. Docket No. 874 at 2].

In any event, it is irrelevant what occurred in December 2019; the relevant time period for analyzing when the liquidating fiduciary exception applies is "*at the time of the plant closing or mass layoff*"—not a month before. *See, e.g.*, *Chauffeurs*, 66 F.3d at 244 ("the crucial question is … if *at the time of the plant closing or mass layoff* the defendant is responsible for operating the business as a going concern.") (emphasis added); *In re Century City Doctors Hosp.*, 2010 WL 6452903, at *7 (relevant time period is "at the time of the terminations"); *In re MF Glob. Holdings Ltd.*, 481 B.R. at 275 (key question was "whether the Debtors were liquidating or attempting to reorganize *when the layoffs occurred*") (emphasis added); *Estrada v. Salyer Am.*, No. C 09-05618 JW, 2010 WL 11580074, at *3 (N.D. Cal. Mar. 31, 2010) (same). For these reasons the WARN Act count should be dismissed, with prejudice.

II. WSNA'S STATE LAW CLAIMS FAIL

WSNA's claims under the Washington Payment and Rebate Acts (Counts 2 and 3) fail because: (a) WSNA does not have standing to pursue monetary damages on behalf of its members; (b) § 301 of the LMRA preempts the claims, and (c) the Bankruptcy Code preempts the claims. Similarly to the WARN Act

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count, dismissal should be granted with prejudice.

A. WSNA Lacks Associational Standing to Pursue State Law Wage Claims on Behalf of the Nurses.

A court should dismiss an action if it finds that the moving party lacks standing. *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d. 343 (1975) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."). WSNA cannot meet its burden to show that it has standing to pursue the state law wage claims. *See, e.g., Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing these elements."). For an association to have standing to sue on its members' behalf, it must meet three requirements:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977). The Supreme Court held that the third requirement means that an association may not seek damages for its members when "damages claims are not common to the entire membership, nor shared by all in equal degree." *Warth*, 422 U.S. at 515.

"The courts that have addressed this issue have consistently held that claims for monetary relief necessarily involve individualized proof and thus the individual

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participation of association members, thereby running afoul of the third prong of the *Hunt* test." *United Union of Roofers, Waterproofers, & Allied Trades No. 40 v. Ins. Corp. of Am.*, 919 F.2d 1398, 1400 (9th Cir. 1990). Indeed, courts have routinely held that unions do not have associational standing to pursue claims for monetary relief on behalf of their members, including claims under the Washington state wage laws. *E.g.*, *United Bhd. of Carpenters & Joiners of Am. v. Metal Trades Dep't*, No. 11-CV-5159-TOR, 2013 WL 173016, at *12 (E.D. Wash. Jan. 15, 2013) (union lacked standing to pursue monetary relief on behalf of members because such claims "require the participation of individual members"), *aff'd*, 770 F.3d 846 (9th Cir. 2014); *Gen. Teamsters Local No. 174 v. Safeway, Inc.*, No. C07-1383-JCC, 2007 WL 9778080, at *2 (W.D. Wash. Oct. 30, 2007) (union did not have standing in federal court to assert Washington state law wage claims on behalf of its members); *see also Serv. Employees Int'l Union, Local 721 v. Cty. of Riverside*, No. EDCV 09-00561-VAP, 2011 WL 1599610, at *11 (C.D. Cal. Apr. 27, 2011) (union lacked standing to pursue money damages on behalf of its members); *Stationary Engineers Local 39 Health & Welfare Tr. Fund v. Philip Morris, Inc.*, No. C-97-01519 DLJ, 1998 WL 476265, at *17 (N.D. Cal. Apr. 30, 1998) (same).

Here, WSNA's Washington state wage claims (Counts 2 and 3) seek monetary damages on behalf of its nurse-members that necessarily require the participation of individual nurses. Compl. at ¶¶ 4-5. WSNA alleges that its nurses are owed payment for PTO accrued at the time of their termination. Compl. at ¶¶ 5-

6, 38-39, 51-59. Each of WSNA's nurse-members will have accrued a different amount of PTO based on the number of hours the nurses worked and whether they were hired on or after January 1, 2014. Ex. G, Collective Bargaining Agreement between WSNA and the Medical Center (the "CBA") at § 10.3.[8] Additionally, WSNA's members will have different rates of PTO payment depending on their base rate of pay, whether they earned Bachelor of Science in Nursing ("BSN")/certification pay, and other factors. Compl. at ¶ 38 (quoting CBA § 10.4).

Thus, this case is like *Lake Mohave Boat Owners Ass'n v. Nat'l Park Serv.*, 78 F.3d 1360, 1367 (9th Cir. 1995), where the association's claims for restitution on behalf of its members "would require individualized proof" because "each member paid a per foot fee based on length of slip or length of boat, whichever was greater." *Id.* "Boat size, slip size, and amount of use will be different for each member," and therefore the association lacked standing to pursue the claim for monetary relief on behalf of its members. *Id.* Likewise, WSNA cannot establish that it has standing to pursue its Washington state law wage claims on behalf of the nurses.

B. Section 301 of the LMRA Preempts WSNA's State Law Claims.

The Complaint should also be dismissed because counts 2 and 3 anre

[8] This Bankruptcy Court may consider the text of the CBA on this Motion because WSNA incorporated the CBA by reference into its Complaint. *E.g.*, *Ritchie*, 342 F.3d at 908.

preempted by the LMRA. Specifically, § 301 of the LMRA preempts WSNA's state law claims because, as plead, those claims hinge on a purported breach of the CBA. WSNA does not allege that Washington state law, on its own, entitles the nurses to cash out PTO. Instead, WSNA alleges that Washington state law entitles the nurses to payment of all wages on termination, and that because the CBA provided for PTO, PTO qualifies as wages within the meaning of the Washington Payment and Rebate Acts. *E.g.*, Compl. at ¶ 51 ("[i]n light of [the] nurses' vested, contractual right to cash out PTO upon termination").

§ 301 of the LMRA preempts "any state cause of action for violation of contracts between an employer and a labor organization." *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1059 (9th Cir. 2007) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 23 (1983)). Courts apply a two-step test to determine whether § 301 preemption applies: First, the court asks if the claim "involves a right conferred upon on employee by virtue of state law, not by a CBA." *Id.* "If the right exists solely as a result of the CBA, then the claim is preempted, and our analysis ends there." *Id.* Second, if the right exists independently of the CBA, the claim is nevertheless preempted if it is "substantially dependent on analysis of a collective-bargaining agreement." *Id.* WSNA's claims fail under both prongs.

Under the first prong, WSNA's state law claims exist solely because of the CBA. WSNA sued under the Washington Payment Act, RCW § 49.48.010, and

Rebate Act, RCW § 49.52.050, which do not provide an independent right to PTO but merely require employers to pay all "wages" due at the end of employment. *See* Compl. at ¶ 52. The state laws, in turn, define "wages" as "compensation due to an employee by reason of employment." RCW § 49.48.082(10) (pointing to RCW § 49.46.010(7)). The only reason WSNA alleges that PTO qualifies as "compensation due … by reason of employment" is *because of the CBA*. Compl. ¶¶ 38, 51, 57. Therefore, without the CBA, WSNA could have, even in theory, no state law wage claim. *See, e.g.*, *Guardado v. Cascadian Bldg. Mgmt., Ltd*, No. C16-0303JLR, 2016 WL 3105041, at *3 (W.D. Wash. June 1, 2016) ("Plaintiffs' claim [under RCW § 49.48.010] is at its core a claim for breach of CBA provisions that is governed by the LMRA"); *Cornn v. United Parcel Serv., Inc.*, No. C03-2001 TEH, 2004 WL 2271585, at *1 (N.D. Cal. Oct. 5, 2004) ("Plaintiffs claim a nonnegotiable right, independent of the CBAs, to be paid for all work performed, but the code sections they rely on to establish that right only require an employer to pay an employee all wages as agreed upon.").

Under the second prong, WSNA's state law claims substantially depend on an analysis of the CBA. The Complaint alleges that WSNA's nurses were not paid PTO they were entitled under § 10.4 of the CBA. Compl. at ¶¶ 38-39. Whether WSNA's members were, in fact, owed PTO under § 10.4, how much they were

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owed, and when they were owed it,[9] requires interpretation of the CBA. Indeed, the only CBA section that WSNA cites to allege that its nurses were owed PTO after the closure is § 10.4, and Defendants disagree that § 10.4 of the CBA requires Defendants to pay PTO after a closure—a CBA interpretation issue the Bankruptcy Court would necessarily have to resolve.[10] Thus, WSNA's state law claims are preempted. *See, e.g., Bernardi v. Amtech/San Francisco Elevator Co.*, No. C 08-01922 WHA, 2008 WL 2345153, at *4 (N.D. Cal. June 5, 2008) ("The complaint alleges that plaintiffs were not paid the full amount of vacation pay to which they were entitled under Article XII of the CBA and § 222 of the California Labor Code. This requires interpretation of the CBA", and therefore the state law claim was preempted).

Significantly, WSNA cannot cure this defect through an amended Complaint. WSNA does not and cannot plead any facts to suggest that it exhausted the exclusive grievance and arbitration procedures in the CBA and the time limit for filing a grievance has expired under CBA § 19.4. *See, e.g., Clayton v. Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am.*, 451 U.S. 679, 681

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[9] WSNA does not allege that the CBA mandated PTO payment by a certain date.

[10] § 10.4 applies only to nurses "who leave[] their employment"—*i.e.*, resign—"after giving the required three (3) weeks' written notice, as identified in this Agreement." The three-week written notice "identified in this Agreement" refers to the notice required in § 5.1 for a "resignation." Ex. G. No other section in the CBA requires three weeks' notice. (*Cf. id.* at § 6.2 (requiring five days' notice of a layoff); *id.* at § 15.3 (no notice required for a discharge with just cause).

(1981) (exhaustion required before bringing a § 301 LMRA suit).

C. The Bankruptcy Code Preempts WSNA's State Law Claims.

WSNA's state law counts seek payment of all PTO, regardless of when actually earned, plus double damages equal to such PTO (and fees and costs) because the Debtors—in deference to the limitations and restrictions of Bankruptcy law, and the orders entered in this case—did not pay all accrued and unpaid PTO on WSNA-represented employees' last day of employment. WSNA's action must be dismissed because WSNA's requested relief is preempted and contradicted by the Bankruptcy Code's priority and distribution scheme, and the orders entered in this Bankruptcy Case.

The touchstone regarding whether a state law is preempted by the Bankruptcy Code must always be whether the state law in question impedes the accomplishment of the objective(s) of Congress. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992); *see also* Susan Raeker–Jordan, *The Pre–Emption Presumption that Never Was: Pre–Emption Doctrine Swallows the Rule*, 40 ARIZ. L.REV. 1379, 1396 (Winter 1998) (stating that even though the test for preemption is stated in various ways, the "obstruction of purposes is still the touchstone . . . to the pre-emption question.") The application of the Washington Payment Act and/or the Washington Rebate Act not only impedes, but runs directly in contravention to the priority scheme provided by Congress in the Bankruptcy Code.

Claim priority is determined in part by when the claim arises. *Boeing North*

Am., Inc. v. Ybarra (In re Ybarra), 424 F.3d 1018, 1026 (9th Cir. 2005) ("[O]nly claims arising from post-petition transactions may be granted [administrative] priority.") (citations omitted). That is, a claim that arises prepetition is deemed prepetition (unless it falls within a priority treatment provision of § 507(a)), and a claim that arises postpetition is generally entitled to administrative expense status if it provided benefit to the estate. *Kadjevich v. Decker (In re Kadjevich),* 220 F.3d 1016, 1019 (9th Cir. 2000). This priority determination formula applies with equal force to claims that accrue over time, such as PTO. *In re Ionosphere Clubs, Inc.*, 22 F.3d 403, 406 (2d Cir. 1994) (agreeing with the Third Circuit in *In re Roth Am., Inc.*, 975 F.2d 949, 954-58 (3d Cir. 1992), that vacation pay claims arising under a CBA are subject to the priorities in § 507 of the Bankruptcy Code); *In re Certified Air Techs., Inc.*, (300 B.R. 355, 367-68 (Bankr. C.D. Cal. 2003) (same); *In re Hudson Healthcare, Inc.*, 2012 WL 4088866, at *2 (Bankr. D. N.J. Sept. 17, 2012) ("[T]he prevailing view regarding vacation pay claims under a collectively bargaining agreement in bankruptcy is that such claims are accorded administrative priority only to the extent of the proportionate part of total vacation pay earned during the period from the beginning of the bankruptcy administration to the date of termination of employment.") (quoting *Roth*, 975 F.2d at 957.) Here, the Debtors have already recognized that PTO will be determined under this accrual method of claim priority determination. Wage Order at ¶ 9.

Further, under the Bankruptcy Code, allowed administrative expense and

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priority claims are entitled to payment at or shortly after plan confirmation (or the reservation of sufficient funds pending resolution of disputed claims). 11 U.S.C. §§ 503, 1129. In fact, if a creditor desires payment sooner than a plan effective date, it should file a motion for allowance of administrative expense under § 503 of the Bankruptcy Code. *See In re Verity Health System of Cal., Inc.*, Case No. 18-20151 [Docket No. 614] (Bankr. C.D. Cal. Oct. 22, 2018) ("[I]t is well established that the Court has broad discretion in determining when the Debtors are required to pay an administrative claim. Even if the Debtors' underfunding obligations do constitute an administrative claim (a finding the Court does not make), nothing in the Bankruptcy Code requires that the claim be immediately paid. Consequently, it is appropriate to require the Objectors to present their arguments regarding this issue by way of motion as contemplated by § 503, so that this important issue can be decided based upon a complete record."). If a proper administrative expense motion had been filed, the Debtors and Court would at least have before them a properly formed request, although one that could not mandate elevation of all claims to priority status or mandate when payment would be required. *Id.*; *see also In re LTV Steel Co.*, 288 B.R. 775, 779 (Bankr. N.D. Ohio 2002) (denying immediate payment of administrative expenses because the Bankruptcy Code does not require it and instead requires parity among administrative claims); *Spartan Plastics v. Verco Indus. (In re Verco Indus.)*, 20 B.R. 664, 664-65 (B.A.P. 9th Cir. 1982); *In re Garden Ridge Corp.*, 323 B.R. 136 (Bankr. D. Del. 2005); *In re*

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Colortex Indus., Inc., 19 F.3d 1371, 1348 (11th Cir. 1994); 4 COLLIER ON BANKRUPTCY ¶ 503.03[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) ("[The Bankruptcy Code] neither expressly prohibits nor expressly authorizes paying administrative expenses earlier than upon the effective date of a plan . . . . Generally, courts have held that the timing for payment of administrative claims is a matter to be determined within the discretion of the bankruptcy court.").[11]

Instead of filing a § 503 request, WSNA has sought to turn the Bankruptcy Code's priority and distribution scheme on its head by seeking full payment of all PTO as if each claim consisted entirely of an administrative expense and, for double damages, fees and costs, based upon the Debtors' nonpayment of unused PTO in the employees last check. Such payment, however, is not required by the Bankruptcy Code, the Wage Order, or the Debtors' interim DIP budgets but, in fact, runs contrary to them. *See* Interim Budget [Bankr. Docket No. 83 at ¶ 9] (authorizing Defendants "[t]o pay, **in the Debtors' sole discretion**, Employees for unused PTO [subject to certain conditions.]" (emphasis added)); Interim Cash Collateral Order at § 15(a) and Interim Budget, attached thereto (providing, in relevant part, a carve-out only for employee payroll wages); Second Interim Cash

[11] The Defendants do not, however, concede that WSNA possesses standing to bring such a motion for allowance of an administrative expense. The Defendants reserve all of their rights under the Bankruptcy Code, and any other applicable law, to, among other things, contest WSNA's standing to bring such a motion.

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Collateral Order at § 14(a) and Interim Budget attached thereto (same).[12]

In fact, allowing WSNA to proceed on claims for double damages, fees, and costs based upon the non-immediate payment of PTO, would allow inapplicable state law to improperly trump applicable federal Bankruptcy law. *See Teamsters, AFL-CIO v. Kitty Hawk Int'l, Inc. (In re Kitty Hawk, Inc.)*, 255 B.R. 428, 439 (Bankr. N.D. Tex. 2000) ("Although the nature of a creditor's claim is determined under state law, the [Bankruptcy] Code establishes the priorities of claims. . . . Where a state statute would alter the priority of claims in a bankruptcy case, the state statute is pre-empted by the [Bankruptcy Code]." (citations omitted); *see also Rosetta Stone Comm's, LLC v. Gordon (In re Chambers)*, 500 B.R. 221, 228-29 (Bankr. N.D. Ga. 2013) ("[P]rovisions granting priority in bankruptcy are narrowly construed. . . . [T]o the extent that a state statute purports to establish the priority of a claim over other claims, that statute is preempted by the Bankruptcy Code."); *In re Lull*, 162 B.R. 234, 240 (Bankr. D. Minn. 1993) ("A state statute cannot reset bankruptcy priorities."). This is particularly harmful in a bankruptcy case with

[12] In fact, even if the applicable CBA were to require immediate payment of PTO (which it does not), such a provision could not elevate prepetition PTO or otherwise interfere with the priority or distribution scheme of the Bankruptcy Code. *Certified Air*, 300 B.R. at 364-65 (agreeing with the Second, Third and Fourth Circuits that § 1113 does not affect the priorities accorded claims under § 507) (*citing Adventure Res. Inc.*, 137 F.3d 786 (4th Cir. 1998); *Ionosphere Clubs*, 22 F.3d at 406; *In re Roth Am. Inc.*, 975 F.2d 949, 955 (3d Cir. 1992)); *Verity*, Case No. 18-20151; *see also Peters v. Pikes Peak Musicians Ass'n*, 462 F.3d 1265, 1270 (10th Cir. 2006) ("[S]ection 1113 does not trump the priority scheme set forth in §§ 503 and 507."); *In re Steiny*, 2017 WL 1788414 at *3 (Bankr. C.D. Cal. May 3, 2017).

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limited resources, such as this one.

III. DISMISSAL SHOULD BE WITH PREJUDICE

This Court should dismiss WSNA's Complaint with prejudice and without leave to amend because amendment would be futile. *E.g.*, *Cervantes*, 656 F.3d at 1041 (a court "may dismiss without leave where a plaintiff's proposed amendments would fail to cure the pleading deficiencies and amendment would be futile"). As to the WARN Act claims, WSNA cannot amend to allege any facts to place Defendants within the scope of the WARN Act, since the Bankruptcy Court-authorized closure made Defendants liquidating fiduciaries—and not employers—as a matter of law. Similarly, amendment cannot cure the deficiencies with WSNA's state law claims. No set of facts will give WSNA associational standing to pursue money damages; WSNA cannot re-plead its state law claims under § 301 of the LMRA because it failed to timely exhaust the CBA's grievance procedure; and in any event, the Bankruptcy Code will continue to preempt the claims.

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CONCLUSION

The Bankruptcy Court should dismiss WSNA's Adversary Proceeding for failure to state a claim, with prejudice and without leave to amend and for all other relief that Court may find warranted by law or equity.

Dated: March 4, 2020

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