DARIN M. DALMAT (WSBA No. 51384)
KELLY ANN SKAHAN (WSBA No. 54210)
BARNARD IGLITZIN & LAVITT LLP
18 W Mercer St, Suite 400
Seattle, WA 98119
Tel: (206) 257-6028 / Fax: (206) 257-6048
dalmat@workerlaw.com
skahan@workerlaw.com

PETER D. DECHIARA (Admitted *Pro Hac Vice*)
COHEN WEISS AND SIMON, LLP
900 Third Avenue, Suite 2100
New Yok, NY 10022-4869
Tel: (212) 356-0256 / Fax: (646) 473-8216
pdechiara@cwsny.com

Attorneys for Washington State Nurses Association

HONORABLE WHITMAN L. HOLT

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

IN RE: ASTRIA HEALTH, *et al*. Debtors.	Lead Case No. 19-01189-11 Adv. Pro. Case No. 20-80005 – WLH
Washington State Nurses Association, Plaintiff, v. SHC Medical Center–Yakima, Astria Health, Defendants	**WSNA'S OBJECTION TO DEFENDANTS' MOTION TO DISMISS**

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INTRODUCTION

The Washington State Nurses Association (**WSNA**) brings this adversary proceeding on behalf of the scores of nurses Defendants threw out of work with virtually no notice and deprived of pay owed them under federal and state law. WSNA's complaint charges SHC Medical Center—Yakima (**Regional**, **Medical Center**, or **hospital**) and Astria Health with violations of the federal Worker Adjustment and Retraining Act (**WARN Act**), and the Washington Wage Payment and Collection Act (**Payment Act**) and Wage Rebate Act (**Rebate Act**). The Defendants unlawfully laid off the nurses employed by Regional with just a few days' notice, in violation of the WARN Act; failed to pay nurses their accrued paid time off (**PTO**) in violation of the Payment Act; and did so willfully in violation of the Rebate Act.

The Defendants seek dismissal of the WARN claims under the "liquidating fiduciary" doctrine. They contend that, even though nurses continued to care for patients up until the day Regional shuttered, the Court's order authorizing Regional's closure stripped them of their status as employers and made them so-called liquidating fiduciaries outside the ambit of the Act. That theory runs into three fatal problems.

First, it overlooks the unmistakable fact that the Defendants filed for bankruptcy to reorganize, not to liquidate, and Regional operated for months

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seeking to reorganize. The Defendants accordingly cannot establish as a matter of law that their sole purpose in this bankruptcy was to liquidate Regional's assets. Second, under governing Ninth Circuit law, an employer's WARN obligations must be assessed as of the date the WARN notice was required, not the date the business ultimately laid off its employees. Here, the WARN notice was required 60 days prior to Regional's closing or, in any event, weeks before the Court's order authorizing the hospital's closure. At the time the WARN notice was required, Regional was indisputably an "employer" for purposes of the WARN Act. To accept the Defendants' position—that a court should determine a defendant's status as an employer after the employer has already begun to close—would allow the narrow "liquidating fiduciary" exception to the WARN Act to swallow the rule, undermining Congress' determination that workers receive adequate advance notice of a closure. Third, the Defendants ignore WSNA's allegations that the two businesses—Regional and Astria Health—acted as a single employer. Because Astria Health remains a going concern, as a matter of logic and law, it cannot be a "liquidating" fiduciary and so neither can the single employer of which it is part. The Defendants will have ample time to plead and attempt to prove statutory defenses under the WARN Act. They are not entitled to a dismissal based on a nonstatutory theory that has no application to the facts alleged here.

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The Defendants also challenge WSNA's state-law claims on equally meritless grounds. WSNA indisputably has associational standing to assert its WARN claim. It follows, as a matter of judicial efficiency, that WSNA also has standing to assert ancillary state-law claims arising from the same facts and seeking damages of unpaid PTO based on common, objective evidence in the Defendants' possession. Because the Defendants challenge only the prudential, not the constitutional, element of WSNA's standing, efficiency should carry the day and avoid litigation of these claims in two forums or as a class action.

Federal labor law does not preempt WSNA's wage payment claim. The Supreme Court has squarely held that federal law does not preempt state statutes requiring timely payment of wages owed, because application of such statutes does not require interpretation of a collective bargaining agreement (**CBA**). Here, WSNA's claims under the Payment Act and Rebate Act do not require interpretation of the parties' CBA, and federal law does not preempt them.

Finally, the Bankruptcy Code does not preempt WSNA's state-law claims because WSNA does not seek administrative priority treatment for those claims under the Payment Act or the Rebate Act. Rather, WSNA seeks administrative status for those claims *under the Bankruptcy Code*, based on the post-petition services that the nurses provided the bankruptcy estate. WSNA does not seek to upend the Code's priority scheme through state law.

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For all these reasons, as more fully explained below, the Defendants' motion to dismiss should be denied.

STATEMENT OF FACTS[1]

I. At all relevant times, WSNA has been the nurses' bargaining representative and the Defendants have together been the nurses' single employer under the WARN Act.

WSNA is the collective bargaining representative of nurses currently and formerly employed by the Defendants; it advocates for the more than 17,000 nurses it represents statewide. Comp. ¶¶ 1, 12, ECF No. 1.[2] As the leading nurse advocate in Washington, WSNA has repeatedly been found to have standing to litigate in a representational capacity for fair pay on behalf of its member nurses. *See Pugh v. Evergreen Hosp. Med. Ctr.*, 177 Wn. App. 363, 365–69, 312 P.3d 665 (2013) (WSNA had associational standing to litigate rest breaks case on behalf of nurses); *Washington State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 826–35, 287 P.3d 516, 518 (2012) (WSNA represented nurses in missed breaks case). That is so because ensuring that its members are properly

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[1] This statement of facts is drawn from the facts alleged in the complaint, which must be deemed true on this motion. *See Disability Rights Montana, Inc. v. Batista*, 930 F.3d 1090, 1097 (9th Cir. 2019).

[2] This brief cites docket entries in this adversary proceeding (20-8005) as "ECF No. ___" and cites docket entries in the related Chapter 11 cases as "Ch. 11 ECF No. __." It cites Defendants Notice of Motion and Motion to Dismiss the Adversary Proceeding; Memorandum of Points and Authorities, ECF No. 1, as "Mot."

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compensated for the services they perform is germane to WSNA's purpose and goals. Comp. ¶ 13(c).

Regional is a Washington nonprofit corporation in Yakima. Comp. ¶ 14. While in operation, it was a hospital that served the residents of Yakima and the Yakima Valley region. Comp. ¶ 15. At relevant times, it employed more than 100 employees. Comp. ¶ 15.

Throughout its operation, Regional substantially depended on its parent company, Astria Health. Comp. ¶ 18. The two companies shared common ownership, common directors and officers, and personnel policies. *Id.* Regional depended substantially on Astria Health to subsidize the hospital's operations, including through funds from other Astria Health subsidiaries. Comp. ¶ 18. *See also* Order Granting Debtors' Emergency Mot. to Close Medical Center (**Closure Order**), Ch. 11 ECF No. 874 at 2–3 (recognizing same and authorizing Regional's closure, in part, to "maintain the financial viability of the Debtors' remaining two hospitals and related clinics"); ECF No. 831 at 4 (recounting the Debtors' longstanding practice of funding Regional's operations with cash generated from other hospitals and clinics in the Astria Health system).[3]

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[3] *Accord* Ch. 11 ECF No. 301, 409, 521, 768, 847, 955, 1075 (consolidated monthly statements showing subsidization by other hospitals).

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As a result of their tightly interconnected structure and finances, Regional and Astria Health have functioned as the nurses' single employer, within the meaning of 20 C.F.R. § 639.3(a)(2), at all relevant times. Comp. ¶ 18.

II. The Defendants filed their bankruptcy cases to reorganize, operated the hospital in Chapter 11 for more than seven months, and ceased Regional's operations without liquidating, while Astria Health continues as a going concern.

Together with their affiliates, both defendants filed for Chapter 11 protections in May 2019. Comp. ¶ 21. From the beginning of the Chapter 11 cases, both Defendants—along with the other affiliated Debtors—sought to reorganize. *See, e.g.*, Ch. 11 ECF No. 3. Well into December 2019—seven months after their petition—the Debtors continued to urge the Court of the necessity of maintaining Regional as a going concern. Comp. ¶ 28 (discussing Ch. 11 ECF No. 818).

On or about December 3, 2019, the Boards of Trustees of both Astria Health and of Regional authorized John Gallagher—the President and Chief Executive Officer of Astria Health—to cease Regional's operations at his discretion. Comp. ¶¶ 21-27.

On January 3, 2020, the Defendants (along with other Debtors) filed a motion under seal seeking the Court's approval to close Regional. Comp. ¶¶ 29-30. On January 8, 2020, the Court unsealed the motion and authorized the Defendants to close Regional. Comp. ¶ 31.

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The approved Closure Plan did not authorize Regional's liquidation—i.e., it did not authorize or provide for the sale of Regional's various assets. *Cf.*, 11 U.S.C. § 704(a)(1) (a bankruptcy trustee who liquidates an estate "collect[s] and reduce[s] to money the property of the estate" and closes the estate "as expeditiously as is compatible with the best interests of parties in interest"); Black's Law Dictionary (11th ed. 2019) (defining "liquidation" as the act of determining the exact amount of something that was previously uncertain, including by converting assets into cash to settle debts). Instead, it simply authorized the cessation of Regional's operations in accordance with the Closure Plan. Closure Order, Ex. A Closure Plan ¶ 11. That plan expressly called for "appropriate notices to be sent" to employees. *Id.*

Consistent with that plan, on January 8, 2020, the Defendants sent WSNA a Notice Pursuant to Worker Adjustment and Retraining Act (**WARN Notice**). Comp. ¶ 32. Their WARN Notice expressly acknowledged that the closure of Regional would "result in an 'employment loss' within the meaning of the WARN Act." Comp. ¶ 34.

The Defendants closed Regional within a week of the Closure Order and WARN Notice. Comp. ¶ 35. Had the Defendants given WSNA 60 days' notice of the closure and mass layoffs—as required by the WARN Act—they would have had to notify WSNA by no later than mid-November 2019. Comp. ¶ 36.

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At no point has either Regional or Astria Health asked the Court to convert its Chapter 11 case to a Chapter 7 liquidation.[4] As of February 5, 2020, the Debtors were only "starting the process of liquidating [Regional's] assets" and any liquidation of Regional was only "anticipated." Ch. 11, ECF No. 1020 at 7. Meanwhile, Astria Health remains a going concern, actively engaged in reorganization efforts for itself and its other subsidiaries that also remain going concerns. *See, e.g.*, Ch. 11 ECF No. 1102 (March 2020 status report).

III. The Defendants have not paid nurses the balance of their accrued and unused PTO.

The Defendants have not paid nurses wages or benefits since Regional's closure and, specifically, have not paid accrued and unused PTO Comp. ¶¶ 37–39. Doing so violated the Payment Act, which requires employees to be paid all wages owed them—including all compensation by reason of employment—by no later than the pay period following their termination. RCW 49.48.010. The Defendants' withholding of nurses' final compensation was also willful (i.e., volitional). Comp. ¶¶ 6, 59. The Rebate Act accordingly entitles the nurses to double damages. RCW 49.52.050(2).

The Court recently ordered the Defendants to produce "objective" evidence of the unpaid PTO balances. ECF No. 12.

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[4] As recently as March 17, 2020, the Debtors list Yakima Regional (SHC Medical Center Yakima) as a Chapter 11

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ARGUMENT

I. Legal standard on a motion to dismiss.

To survive a motion to dismiss, a complaint need only "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Nayab v. Capital One Bank (USA), N.A.*, 942 F.3d 480, 495 (9th Cir. 2019) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Reviewing courts must "take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party." *Disability Rights Montana, Inc. v. Batista*, 930 F.3d 1090, 1097 (9th Cir. 2019) (internal quotations omitted). Plausibility does not demand probability, but seeks only more than a sheer possibility of unlawful conduct. *Nayab*, 942 F.3d at 495. A plaintiff need not negate affirmative defenses in the complaint. *Id.* at 498.

The Defendants seek judicial notice of 13 documents outside the pleadings. ECF No. 7. Several of those documents do not qualify for judicial notice because the factual assertions contained within them are subject to reasonable dispute. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018), *cert. denied sub nom. Hagan v. Khoja*, 139 S. Ct. 2615 (2019) (discussing Fed. R. Evid. P. 201(b)). WSNA specifically objects to the Defendants' request for judicial notice of the facts asserted in the declaration of John Gallagher and of the facts

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debtor. Ch. 11 ECF No. 1107.

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asserted in the Debtors' status reports (ECF No. 7, Exhibits B, D, I, and K), which present the Defendants' unilateral accounts of the circumstances that led to the bankruptcy filing and of certain events during the bankruptcy proceedings (such as the Debtors' view of the causes of Regional's closure).[5] These allegations are well outside the pleadings in this adversary proceeding and, in any event, irrelevant to resolution of this motion.[6] *See Khoja*, 899 F.3d at 999 (court cannot take judicial notice "of disputed facts contained in public records"; "[j]ust because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth.")

II. The Defendants were WARN Act employers, not liquidating fiduciaries, when the Act required them to notify employees of the closure.

The WARN Act

> provides protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market.

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[5] To the extent the Defendants seek notice only of the fact that the Debtors filed these documents, rather than of the contents asserted by the documents, WSNA does not object.

[6] WSNA also interposes a limited objection to judicial notice of Exhibits L and M because those exhibits excerpt the Court's findings on prior motions without including all such findings, such as the Court's finding that it was not ruling on the legal consequences that may flow from the Closure Order.

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20 C.F.R. § 639.1. To secure these protections, the Act requires "employers" to provide advanced notice of plant closings, subject to certain statutory exceptions not relevant to this motion. 29 U.S.C. § 2101(a) (defining "employer"); 20 C.F.R. § 639.3(a) (same).[7]

WSNA alleges that both Defendants, separately and considered together, qualify as "employers" under the WARN Act subject to its notice requirements. Comp. ¶¶ 15–19. WSNA also alleges that the Defendants acknowledged their obligations by issuing the required WARN Notice, albeit after the statutory deadline for doing so. Comp. ¶¶ 32–36.

Those allegations that the Defendants were "employers" must be accepted as true for the purposes of this motion and thus defeat the Defendants' liquidating fiduciary argument. *See In re Dewey & LeBoeuf LLP*, 487 B.R. 169, 174–76 (Bankr. S.D.N.Y. 2013) (denying motion to dismiss because "liquidating fiduciary" doctrine, which contends that a liquidating fiduciary does not fit the definition of "employer" under the WARN Act, is a fact-intensive doctrine that should be subject to discovery).

The Defendants nonetheless seek dismissal of the WARN claims on the grounds that the Closure Order made them both "liquidating fiduciaries" outside

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[7] Those include the faltering company, unforeseeable business circumstances, and natural disaster exceptions, which

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the Act's definition of an "employer." Mot. 9–13. Their argument fails because it (1) attempts to expand the narrow liquidating fiduciary doctrine far beyond its regulatory mooring in successorship obligations to any Chapter 11 debtor authorized to cease operations; (2) improperly analyzes the Defendants' WARN obligations as of the layoffs rather than as of the timing of the required notice; and (3) ignores WSNA's single employer allegations, which render the doctrine inapplicable because Astria Health continues to operate its business as a going concern.

A. The liquidating fiduciary doctrine does not apply to Chapter 11 debtors, like the Defendants here, who have long sought to reorganize through bankruptcy.

The WARN Act does not expressly provide a "liquidating fiduciary" defense. Instead, the doctrine emerged as a judicial gloss on the statutory definition of an "employer" as a "business enterprise" that employs a specified number of people and, more specifically, from regulatory guidance on that definition. 29 U.S.C. § 2101(a); 20 C.F.R. § 639.3(a). In promulgating regulations that clarified the statutory definition, the Department of Labor (**DOL**) considered whether "fiduciaries in bankruptcy proceedings should be excluded from the definition of employer." DOL, Worker Adjustment and Retraining Notification, 54 Fed. Reg.

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the Defendants have not asserted here as a basis for dismissal. 29 U.S.C. § 2102(b); 20 C.F.R. § 639.9(a)–(c).

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16042, 16045 (Apr. 20, 1989). It concluded that fiduciaries in bankruptcy should not be categorically excluded from the definition of a WARN employer because "adequate protections for fiduciaries are available through the bankruptcy courts … ." *Id.* The Department went on to consider when a fiduciary might succeed to a former employer's WARN obligations. *Id.* It opined:

> DOL agrees that a fiduciary whose *sole function* in the bankruptcy process is to liquidate a failed business for the benefit of creditors does not *succeed to the notice obligations of the former employer* because the fiduciary is not operating a "business enterprise" in the normal sense.

Id. (emphasis added). It emphasized, however, that "where the fiduciary may continue to operate the business for the benefit of creditors, the fiduciary *would succeed* to the WARN obligations of the employer precisely because the fiduciary continues the business in operations." *Id.* (emphasis added).

This guidance makes clear that the "liquidating fiduciary" doctrine only applies to those limited circumstances where a business is managed by a separate fiduciary deemed—as the employer's successor—to have acquired the employer's duty to send a WARN notice. *See also* 20 C.F.R. § 639.4(c) (discussing successorship obligations in the context of a sale).

Analyzing that guidance, courts have repeatedly held that the liquidating fiduciary doctrine generally does *not* apply to a Chapter 11 debtor-in-possession because such debtors generally do not have the "sole purpose" of liquidating their

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assets. *See In re World Mktg. Chicago, LLC*, 564 B.R. 587, 559–600 (Bankr. N.D. Ill. 2017) (rejecting application of "liquidating fiduciary" doctrine because debtors in possession operate for the benefit of creditors, not solely to liquidate); *Carroll v. World Mktg. Holdings, LLC*, 418 F. Supp. 3d 299, 308 (E.D. Wis. 2019) (doctrine inapplicable because debtors were not in process of liquidating at the time WARN notice would be required); *Newman as Tr. of World Mktg. Tr. v. Crane, Heyman, Simon, Welch, & Clar*, 17 C 6978, 2020 WL 374693, at *3–4 (N.D. Ill. Jan. 22, 2020) (doctrine inapplicable where liquidation was not debtor's "sole function" in bankruptcy).

B. The Defendants' WARN obligations must be measured as of the timing of the required notice, not the closure.

The Defendants base their "liquidating fiduciary" argument on the assertion that they were no longer WARN "employers" after the Court's issuance of the Closure Order in January 2020. Accepting this argument

> would be to allow the liquidating fiduciary exception to swallow the rule. Such an interpretation of the exception would strip employees of the WARN Act's protection whenever an employer decides to terminate its employees and, before implementing that decision, starts to take preliminary steps towards liquidation, while otherwise continuing to carry on its business. Such an interpretation would eviscerate the WARN Act and be an expansion of an exception which is to be construed narrowly.

Law v. Am. Capital Strategies, Ltd., CIV. 3:05-0836, 2007 WL 221671, at *17 (M.D. Tenn. Jan. 26, 2007).

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Indeed, the Ninth Circuit has squarely held that, in determining whether a defendant had an obligation to issue a WARN notice, courts should focus on the period when the WARN notices were due, which in this case was in November 2019 (or, at the very least, weeks prior to the Closure Order). *See Collins v. Gee W. Seattle LLC*, 631 F.3d 1001, 1005 (9th Cir. 2011) (rejecting argument that WARN obligations should be measured as of date of plant closing rather than when notice was due). As the court explained, analyzing an employer's obligations as of the date of a plant closing or mass layoff

> flips the basic structure of the WARN Act on its head. Instead of placing the onus on the employer to give 60–days' notice before closing a plant, [the employer's] reading of the Act would measure an employer's liability based solely on the number of employees remaining at the plant at the time of its closure, even though employees departed because of the plant closure. Such an interpretation is inconsistent with the basic structure of the WARN Act and frustrates its purposes.

Id. at 1005. *Accord Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1005 (9th Cir. 2004) (determination of employment loss triggering WARN notice is calculated "from the 'snap-shot' date of the last date upon which the notice would be required to be given … ."); 20 C.F.R. § 639.5 (measuring employer's obligations as of notice, not closure, date); *Carroll v. World Mktg. Holdings, LLC*, 418 F. Supp. 3d 299, 308 (E.D. Wis. 2019) (rejecting liquidating fiduciary doctrine where there was no evidence that the employer solely functioned to liquidate "at the time WARN

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Act notice was required"); *Newman as Tr. of World Mktg. Tr. v. Crane, Heyman, Simon, Welch, & Clar*, 17 C 6978, 2020 WL 374693, at *4 (N.D. Ill. Jan. 22, 2020) (same).

There can be no question that WSNA pleaded facts sufficient to show that, when the notices were due, the Defendants were both operating as going concerns and thus qualified as WARN Act employers. *Supra* at 4–12.

The Defendants' cited authority avails them nothing because none of it addresses a circumstance in which a Chapter 11 debtor-in-possession was a going concern at the time the notices were required. For example, *In re Century City Doctors Hosp., LLC*, presented the question whether a Chapter 7 Trustee—who had never operated the debtor as a going concern—became a WARN employer even though the Chapter 7 case "was a liquidation case" from the outset and the Trustee had limited authority to operate the business. *In re Century City Doctors Hosp., LLC*, ADV.LA 09-01101-SB, 2010 WL 6452903, at *6–10 (B.A.P. 9th Cir. Oct. 29, 2010). Unlike *Century City*, this case is a Chapter 11 with no appointed trustee.

Similarly, *Chauffeurs, Sales Drivers, Warehousemen & Helpers Union Local 572, Int'l Bhd. of Teamsters, AFL-CIO v. Weslock Corp.* (***Weslock***), 66 F.3d 241, 243 (9th Cir. 1995), did not address the WARN obligations of a Chapter 11 debtor-in-possession. In *Weslock*, the question was whether a secured creditor

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succeeded to an employer's WARN obligations upon taking possession of the employer's assets. *Id.* at 242–43. The court held that a secured creditor can succeed to an employer's WARN obligations but "only where the creditor operates the debtor's asset as a 'business enterprise' in the 'normal commercial sense.'" *Id.* at 244. Applying that analysis, the court concluded that the secured creditor in that case did not become a WARN employer because its interaction with the employer was "limited to financial controls designed to preserve its security interest." *Id.* at 245. By contrast, here both Defendants operated Regional as a business enterprise for years before their bankruptcy filing and for months throughout the reorganization cases, including at the time when the WARN Act required them to provide notice. *Supra* at 6–8.

The Defendants point to the fact that in *Weslock*, the court analyzed whether the secured creditor had become a WARN employer in the days preceding the closing. Mot. 13. But in *Weslock*, the court focused on the six days preceding the closing because it was *only during those six days* that the secured lender took control of the employers' assets and thus even arguably stepped into their shoes as the employees' employer. *See* 66 F.3d at 242–43. Under those facts, there was no basis for the court to look at the secured creditors' status for any earlier period. *Weslock* does not stand for the proposition that a court should look at the putative employer's status at the time of or just before a shutdown. On the contrary,

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Weslock shows that a court looks at the defendant's status during the time when circumstances indicate that it was potentially acting as an employer. Here, Regional was acting as an employer during the entire time from November 2019 until the Closure Order. Accordingly, at all relevant times, it was an "employer" within the meaning of the WARN Act.

Indeed, in cases where the Ninth Circuit squarely addressed the point in time at which an employer's WARN obligations must be analyzed, it has ruled that the operative moment is when the notice would be required. *Collins*, *Childress*, *supra*.

This leaves *In re United Healthcare Sys., Inc.*, 200 F.3d 170 (3d Cir. 1999), as the Defendants' final refuge. The Third Circuit's analysis, which has never been adopted by the Ninth Circuit and has been repeatedly criticized or distinguished,[8] is so factually inapposite as to provide no guidance here. In that case, the Third Circuit acknowledged that a debtor-in-possession that engages in "business and commercial activities while in bankruptcy" may well be a WARN employer but ultimately found the hospital debtor in that case to have been a liquidating

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[8] *In re World Mktg. Chicago, LLC*, 564 B.R. 587, 601 (Bankr. N.D. Ill. 2017) (criticizing *United Healthcare*'s analysis as a "court-made liquidating fiduciary exception [that is] not in line with the more specific language of the Department of Labor commentary."); *Law v. Am. Capital Strategies, Ltd.*, CIV. 3:05-0836, 2007 WL 221671, at *16 (M.D. Tenn. Jan. 26, 2007) (declining to follow *United Healthcare* where the employer was providing its usual, albeit limited, services on the "morning of the shutdown and layoffs"); *Carroll v. World Mktg. Holdings, LLC*, 418 F. Supp. 3d 299, 308 (E.D. Wis. 2019) (distinguishing *United Healthcare* where there was no evidence that the employer solely functioned to liquidate "at the time WARN Act notice was required"); *Newman as Tr. of World Mktg. Tr. v. Crane, Heyman, Simon, Welch, & Clar*, 17 C 6978, 2020 WL 374693, at *4 (N.D. Ill. Jan. 22, 2020)

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fiduciary throughout the bankruptcy proceedings because it surrendered its certificates of need before filing for bankruptcy, filed a "voluntary bankruptcy plan under which it would liquidate its assets and cease to exist," stopped admitting patients, and engaged in tasks "solely designed to prepare … for liquidation." 200 F.3d at 178. The court emphasized that "United Healthcare's actions from the time it filed its Chapter 11 petition throughout the proceedings clearly demonstrate its intent to liquidate." *Id.* Had it instead "demonstrated a bona fide effort toward reorganization, the evidence may have shown that United Healthcare was an 'employer' subject to the WARN Act." *Id.*

The Defendants here have shown bona fide efforts toward reorganization: for Regional, those efforts lasted approximately seven months since its Chapter 11 petition, and for Astria Health, those efforts continue to date. *Supra* at 6–8. Indeed, as of today, neither Defendant has proposed a plan to liquidate Regional's assets. *Supra* at 8. Unlike the hospital in *United Healthcare*, then, the Defendants here did not evidence any intent solely to liquidate throughout the bankruptcy proceedings. As a result, the Ninth Circuit's analysis in *Collins* and *Childress* control here and the Defendants' status as WARN employers should be assessed as of November 2019, when they were obligated to provide WARN notice. *Supra* at 15.

(distinguishing *United Healthcare* because employer "did not qualify as a liquidating fiduciary at the time notice

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C. Because Astria Health and Regional operated as a single employer and Astria Health remains a going concern, dismissal is inappropriate.

Even if Regional, considered alone, were a "liquidating fiduciary," Defendants' argument fails for an independent reason: WSNA has alleged that the Defendants together constituted a single employer. Comp. ¶¶ 15–18. Because Astria Health remains a going concern, that single-employer entity cannot qualify for the "liquidating fiduciary" doctrine.

Where a parent company continues as a going concern and the parent is alleged to be a single employer along with its subsidiary, the liquidating fiduciary doctrine cannot apply as a matter of law. *See In re MF Glob. Holdings, Ltd.*, 13 CIV. 07218 LGS, 2014 WL 4054281, at *5–7 (S.D.N.Y. Aug. 14, 2014) (reversing dismissal based on liquidating fiduciary doctrine, where plaintiffs alleged single employer and the parent remained in business).

Defendants only response is that the Closure Order precluded them from operating *Regional* as a going concern. Mot. 10–11. Even so, nothing in the Closure Order precluded *Astria Health* from continuing to operate as a going concern and it has continued to do so. *Supra* at 8. In light of WSNA's single-

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should have been provided.").

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employer allegations, the nurses' employer remains a going concern today and their WARN claims cannot be dismissed.

Accepting those allegations as true, as the Court must on this motion, this case is far more like a shipbuilder that closes two of its four sites, leaving the remaining two in operation, than it is like a standalone hospital going completely out of business. *Davis v. Signal Int'l Texas GP, LLC*, 728 F.3d 482, 484 & 484 n.3 (5th Cir. 2013) (affirming WARN violation based on failure to give advanced notice of mass layoffs at two of four worksites). *Accord* House Conf. Report. 100-576, 100th Cong., 2nd Sess. 1045, 1046, [reprinted in 5 U.S. Code Cong. & Admin. News [1988] 2078, 2079] ("General Motors has dozens of automobile plants throughout the country. Each plant would be considered a site of employment, but as provided in the bill, there is only one "employer"—General Motors."). Regardless of whether WSNA will ultimately be able to establish its single employer allegations as a factual matter, at this stage of the proceedings, those allegations must be taken as true. They doom the Defendants' motion.

III. WSNA has stated valid state-law claims.

A. Because WSNA unequivocally has associational standing to pursue its WARN claims, prudence and judicial efficiency favor associational standing over WSNA's supplemental state-law claims.

The Supreme Court unanimously held that unions have associational standing to pursue WARN claims for damages on behalf of their members. *United*

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Food and Com. Workers Union Loc. 751 v. Brown Group, Inc. (***UFCW***), 517 U.S. 544, 551–58 (1996). The Defendants wisely do not contest WSNA's standing to bring WARN claims in its associational capacity. Without grappling with *UFCW*, the Defendants nonetheless contest WSNA's associational standing to bring ancillary state-law claims. Mot. 14–16. The Defendants' argument fails because the only standing element at issue here—the necessity of individualized participation for each associational member—presents a prudential question and, on this record, it is far more efficient to litigate the state-law claims together with the WARN claims which (1) arise from the same transaction or occurrence, namely, the closing of Regional; (2) as this Court has foreseen, can be proven on a common basis through objective evidence in Defendants' possession; and (3) will avoid splitting this case between bankruptcy court (where the WARN damages claims can indubitably proceed on an associational basis) and state court (where the state-law damages claims can also indubitably proceed on an associational basis). Litigating the WARN claim here and the PTO claims in state court would unnecessarily burden the estate with the inefficiencies of defending claims arising out of the same facts in two separate forums.

Unsurprisingly, Defendants cite *no* case in which a union pursuing a WARN claim on behalf of its members lacked associational standing to pursue ancillary state-law claim for damages arising from the same facts. *Cf.*, Mot. 15.

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An association, including a union, has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested makes the participation of individual members "indispensable to proper resolution of the cause." *UFCW*, 517 U.S. at 552 (quoting *Warth v. Seldin*, 522 U.S. 490, 511 (1975)).

WSNA alleged all three prongs here, Comp. ¶¶ 13(b)–(d), and the Defendants contest only the third. That element, the *UFCW* Court held, is not an "Article III necessity … .." *Id.* at 555. Instead, it is simply a "prudential" guideline that may, in appropriate cases, "promote adversarial intensity"; "guard against the hazard of litigating a case to the damages stage only to find the plaintiff lacking detailed records or the evidence necessary to show the harm with sufficient specificity"; and "hedge against any risk that the damages recovered by the association will fail to find their way into the pockets of the members on whose behalf injury is claimed." *Id.* at 556. Ultimately, this element focuses on "matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution." *Id.* at 557.

The Defendants do not suggest that there is or will be any lack of adversarial intensity over the state-law claims. *Cf.*, Mot. 14–16. On the contrary, their vigorous

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briefing here shows that the parties will zealously advocate their respective positions. Neither do they argue that the state-law claims present any greater risk of insufficient evidence than already presented by the WARN claims, which WSNA unequivocally has standing to pursue. *Cf.*, *id.* Indeed, the back pay and benefits that WSNA seeks on its WARN claim includes unpaid PTO. Comp., Request for Relief, ¶¶ 1–7. Similarly, the Defendants do not contend that there is any risk that WSNA will remit WARN Act back pay and benefits to its members but fail to do so for the ancillary unpaid PTO it seeks on its state-law claims.

Defendants' reliance on *Lake Mohave Boat Owners Ass'n v. Nat'l Park Serv.*, 78 F.3d 1360 (9th Cir. 1995), is unavailing. There, a boating association challenged the National Park Service's approval of a rate increase at a particular marina. *Id.* at 1363. The court found that the association had standing to challenge the rate increase prospectively but not to seek restitution for its members because the amount owed them could not be established from NPS's records (the rents were paid to a marina concessionaire, not the government) and, accordingly, the only way to establish the amount of restitution would be to have each boat owner individually prove the rate he or she paid based on "[b]oat size, slip size, and amount of use … ." *Id.* at 1367. In this case, however, the Court has already rightly recognized that the Defendants maintain objective records of the amount of PTO each nurse accrued as of his or her termination date as well as the applicable wage

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rates. *Supra* at 8. WSNA can therefore establish the extent of unpaid PTO without the need for each nurse to testify; it can simply inspect the objective data this Court has already ordered to be produced and perform simple multiplication to calculate the damages on that claim.[9]

Finally, consider the effect of dismissing these claims for want of associational standing. In that case, WSNA could seek relief from the automatic stay[10] and, if granted, pursue its state-law claims in state court, where associations are clearly entitled to pursue damages claims so long as the damages are "certain, easily ascertainable, and within the knowledge of the defendant." *Intl. Ass'n of Firefighters, Loc. 1789 v. Spokane Airports*, 45 P.3d 186, 190, 146 Wn.2d 207 (2002). Alternatively, WSNA could move to amend its complaint in this adversary proceeding to assert a class action instead of (or in addition to) an associational action. In either event, the only practical result of dismissing the state-law claims for lack of associational standing is more complex litigation either in separate

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[9] The *UFCW* Court reserved the question "whether, absent congressional action, the third prong would bar a 'simplified' claim for damages." *Id.* at 554 n.5. WSNA submits that where, as here, a claim is ancillary to a WARN Act claim, seeks damages subsumed by the WARN claim, and intends to prove damages through objective evidence within the possession of the defendant, all prudential requirements of the third prong are met and the associational should be permitted to proceed in its associational capacity.

[10] If WSNA moved to lift the automatic stay, there would arguably be cause for the Court to lift it, because a state suit would completely resolve the PTO claims and would do so without interfering in the bankruptcy proceedings or prejudicing any other creditors. *See In re Curtis*, 40 B.R. 795, 799 (Bankr. D. Utah 1984) (listing relevant factors for lifting stay); *In re Konemyer*, 405 B.R. 915, 921 (9th Cir. B.A.P. 2009) (adopting *Curtis* factors).

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forums or in this forum. Since WSNA intends to establish its claims through common evidence without individual participation of each nurse, administrative convenience and efficiency support maintaining both the lead claim and the supplemental state-law claims in WSNA's associational capacity.[11]

B. Section 301 of the LMRA does not preempt the state-law claims, which this Court can resolve without interpreting the collective bargaining agreement

The Supreme Court has squarely rejected the contention that a claim under a state wage-payment statute to recover untimely wages is preempted by Section 301 of the LMRA. *Livadas v. Bradshaw*, 512 U.S. 107, 121–26 (1994). *Livadas* defeats the Defendants' argument that Section 301 preempts WSNA's state-law claims under the Washington Payment Act and Rebate Act to recover untimely wages that were willfully withheld. Section 301, 29 U.S.C. § 185, creates federal jurisdiction over claims asserting a breach of a collective bargaining agreement and authorizes federal courts to develop a common law of CBA interpretation to ensure against hostility toward arbitral resolution of genuine interpretive disputes. *Id.* at 121–22. It does not, however, preempt "nonnegotiable rights" conferred under state law. *Id.*

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[11] *See Warth*, 422 U.S. at 515. *See also New York Psychiatric Ass'n, Inc. v. UnitedHealth Group*, 795 F.3d 125, 130–31 (2d Cir. 2015) (at pleadings stage, association plausibly alleged it could prove systematic ERISA violations without individualized proof); *Ass'n of Am. Physicians & Surgeons, Inc. v. Texas Medical Bd.*, 627 F.3d 547, 551–53 (5th Cir. 2010) (where claims can be proven "by evidence from representative injured members, without a fact-intensive-individual inquiry, the participation of those individual members will not thwart associational standing."); *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 601–02 (7th Cir. 1993) (where evidence from individual members of association is unnecessary, associational standing is proper).

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at 123. To police the distinction between a genuine dispute over CBA interpretation and enforcement of independent state-law rights, federal courts distinguish mere consultation of a labor contract—*e.g.*, to determine rates of pay—from genuine disputes over the "meaning of contractual terms." *Id.* at 123–24. This distinction allows courts to focus on the "legal character of a claim," rather than simply whether a contractual grievance arising from "precisely the same set of facts" as the state-law claim could be pursued. *Id.* (internal citations omitted). *See also Alaska Airlines Inc. v. Schurke*, 898 F.3d 904, 921 (9th Cir. 2018) (en banc) (state-law claims are not "CBA disputes by another name, and so are not preempted … if they just refer to a CBA-defined right …; rely in part on a CBA's terms of employment … ; run parallel to a CBA violation; … or invite use of the CBA as a defense) (internal citations omitted).

Contractual interpretation, in the sense that triggers Section 301 preemption, requires more than consideration of, reference to, or application of a contract term. *Id.* at 921. Instead, it requires "an active dispute over 'the meaning of contract terms.'" *Id.* (same). A mere hypothetical connection between state-law claim and CBA terms does not preempt the claim. *Id.*

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Applying these principles, the Supreme Court found a state timely wage-payment claim not 301-preempted because the "primary text for" finding a violation was not the CBA "but a calendar." *Livadas*, 512 U.S. at 124. The question of the employer's willful failure to pay prompt wages upon severance "was a question of state law, entirely independent of any understanding embodied in the collective-bargaining agreement between the union and the employer." *Id.* 125. Similarly, computation of the penalty did not require CBA interpretation but mere reference to the contract to discern the applicable wage rates. *Id.*

WSNA's Washington wage-payment claims require no more CBA interpretation than the wage payment claims at issue in *Livadas*. The Wage Payment Act requires employers to pay employees, following the termination of their employment, "the wages due him or her on account of his or her employment … at the end of the established pay period." RCW 49.48.010. This right to timely payment of wages is a creature of state statutory law, wholly independent of any parallel contractual right to timely wage payment. *See Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998) (Payment Act and Rebate Act, along with state Minimum Wage Act, provide "nonnegotiable, substantive [state-law] rights regarding minimum standards for working conditions, wages, and the payment of wages").

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The only remaining question on WSNA's state-law claims is whether the wages that must be timely paid include accrued PTO. Again, state-law provides the answer. "Wages" means "compensation due to an employee by reason of employment … ." RCW 49.46.010(7). Where a CBA unambiguously permits employees to cash out sick leave or paid time off, those forms of compensation count as "wages" under state law because they "constitute[] an entitlement to compensation for services performed." *Naches Valley School Dist. No. JT3 v. Cruzen*, 54 Wn. App. 388, 398–99, 775 P.2d 960 (1989).

Under *Naches*, Washington law requires reference to a CBA to determine whether the CBA unambiguously provides for a right to cash out PTO. In this case, the CBA unambiguously provides such a right. Comp. ¶ 38 (quoting CBA, § 10.4).[12] *See also* CBA, § 6.6 ("Cash Out of PTO. A nurse who is laid off shall receive all accumulated PTO as of the date of layoff."), Ch. 11 ECF No. 887, Ex. A. That mere reference to the CBA resolves the state law question without requiring *interpretation* of the CBA. Absent an active interpretive dispute, WSNA's state-law claims cannot be preempted. *Schurke*, *supra* at 27.

[12] By contrast, if the CBA had not provided for PTO cashout, PTO would not be considered wages under state law. *Sornsin v. Scout Media, Inc.*, 10 Wn. App.2d 739, 742– 450 P.3d 193 (2019). In light of the applicable CBA's unambiguous cash out provision here, *Naches Valley*'s analysis controls.

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The Defendants contend that the Bankruptcy Code provides them substantive defenses to the untimely payment of wages. Mot. 20–25. But they cannot dispute the plain terms of the CBA, which unambiguously provide for cashout of PTO upon termination. Because WSNA's state-law claims require no interpretation of the CBA, Section 301 does not preempt them.

C. The Bankruptcy Code does not preempt the state-law claims.

Finally, Defendants argue that the Bankruptcy Code preempts WSNA's state-law claims. Mot. 20–25. This argument fails. In support of their argument, Defendants cite case law for the unremarkable proposition that the Bankruptcy Code preempts state statutes that "would alter the priority of claims in a bankruptcy case." *In re Kitty Hawk, Inc.*, 255 B.R. 428, 439 (Bankr. N.D. Tex. 2000) (cited at Def. Mem. 24). Defendants' preemption argument fails because WSNA does not contend that state law provides the basis for the administrative priority status of its state-law claims. On the contrary, those state-law claims enjoy administrative status *under the Bankruptcy Code*, because they arose post-petition.

In its second and third causes of action, WSNA's complaint asserts that Defendants are liable under the two Washington state statutes for their willful failure to pay the terminated Regional nurses their accrued PTO by their last pay period. Comp. ¶¶ 50–59. In its "Request for Relief," the pleading asks the Court to "[t]reat all damages, fees, costs, and interest awarded in this action as

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administrative expenses in the Defendants' bankruptcy cases." *Id*. at 16 ("Request for Relief" ¶8). WSNA's complaint nowhere asserts that the state statutes themselves give the claims administrative status. Rather, WSNA's claims in this adversary proceeding—both the federal WARN claim and the state-law claims—enjoy administrative status under Bankruptcy Code §507(a)(2), because they arose post-petition, following Regional's closing. In particular, the Regional nurses performed actual and necessary post-petition services that kept the hospital operating for months after the bankruptcy filing. They performed those vital services under the terms of an unrejected collective bargaining agreement, which provided, as one of its essential terms, for payment of accrued PTO upon termination. *See* 11 U.S.C. §503(b)(1)(A) (providing administrative status to "actual, necessary costs and expenses of preserving the estate"); *cf. Kitty Hawk, Inc.*, 255 B.R. at 436 (cited at Def. Mem. 24) (denying administrative status to union's pay claims when debtor shut down and terminated the employees *before* filing for bankruptcy). Because WSNA's state-law claims enjoy administrative status by virtue of the Bankruptcy Code, not state law, the Bankruptcy Code does not preempt them. *See generally In Ritter Ranch Dev., LLC*, 255 B.R. 760, 767 (9th Cir. B.A.P. 2000) (no preemption of state law when no evidence of "evasion or conflict with the Bankruptcy Code").

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Defendants argue that WSNA seeks to "turn the Bankruptcy Code's priority and distribution scheme on its head" by asserting that all the PTO owed "consisted entirely of an administrative expense." Mot. 23. In effect, Defendants dispute whether under the Bankruptcy Code, the entirety of WSNA's state-law claims enjoy administrative status. However, the extent to which these claims enjoy administrative status (in whole, in part, or not at all) has nothing to do with, and provides no support for, Defendants' preemption argument. Because WSNA bases the priority status of its state-law claims on the Bankruptcy Code, and is not trying to use state law to advance in the priority line ahead of other creditors, Defendants' preemption argument fails.[13]

Defendants also argue that they cannot be liable for the damages and fees that WSNA seeks in its second and third causes of action because, they assert, paying the Regional nurses their accrued PTO following their termination would have run contrary to the Bankruptcy Code, the Court's May 8, 2019 wage order, and two DIP financing orders. Mot. 23. This contention does not support Defendants' preemption argument. By asserting that the Code, the wage order, and DIP orders deprived them of the authority or the ability to pay the terminated

[13] The Court, in resolving Defendants' motion to dismiss, need not determine the priority status of WSNA's state-law claims. That can await a later stage of the adversary proceeding, such as summary judgment, when all relevant facts can be considered.

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Regional nurses their accrued PTO, Defendants are raising a defense to WSNA's state-law claims *on the merits*. Defendants' preemption argument, however, has nothing to do with the merits of WSNA's state-law claims. Preemption would occur only if WSNA were trying to use state law, instead of the Bankruptcy Code, to establish the administrative status of those claims. As explained above, WSNA is doing no such thing.

Even though not necessary for defeating Defendants' preemption argument, WSNA notes that Defendants are wrong on the merits. They cite no provision of the Bankruptcy Code that would have precluded them from paying the Regional nurses their accrued PTO. Nor did the December 8, 2019 wage order preclude Defendants from paying the nurses' accrued PTO. That order granted Debtors' motion for authority to make certain payments, including the payment of post-petition employee obligations. Ch. 11 ECF No. 83 at 2–3, 7 (¶18). Such post-petition employee obligations would clearly include post-petition PTO. In any event, even if the order did not *authorize* Defendants to pay the nurses' accrued PTO, it did not *prohibit* them from doing so, and it certainly did not prohibit them from seeking Court permission to do so.

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The December 20, 2019, and February 5, 2020, DIP orders restricted Debtors' use of cash it received from DIP loan facilities. Ch. 11 ECF No. 841, 1020. However, the orders did not, and could not, provide Defendants immunity from liability under Washington State law for failing to pay accrued PTO. Even assuming that the orders precluded Defendants from using cash from the DIP loan to pay the nurses' PTO, and further assuming that the Defendants had no other funds to use to pay the PTO (a factual question not resolvable on a motion to dismiss), that would not relieve Defendants from liability for failing to pay. A debtor's lacking available funds to satisfy an obligation to a creditor does not defeat the creditor's claim. On the contrary, the debtors' refusal or inability to pay is precisely what gives rise to a creditor's claim against a bankrupt debtor.

Defendants next assert that nothing in the Bankruptcy Code requires immediate payment of the PTO owed. Mot. 21–22. That is true, but irrelevant. WSNA's adversary proceeding does not ask that Defendants make immediate payment of the administrative claims asserted in the second and third causes of action. Indeed, as Defendants note, WSNA has not moved under Bankruptcy Code § 503(a) for immediate payment of its administrative PTO claims. Mot. 21. WSNA's position on its second and third causes of action—which accords completely with the Bankruptcy Code—is that state law created an obligation on Defendants to pay the Regional nurses their accrued PTO by no later than their last

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 FAX 206.378.4132 LAVITT LLP

paycheck; that Defendants' violation of that obligation gave rise to *liability* under state law; that the Bankruptcy Code (not state law) provides administrative priority status to the claims because they arose post-petition; and that the *timing* of Defendants' payment of a judgment granting the second and third causes of action will be governed by the Bankruptcy Code (and the Court's administration of the case). Because nothing in this adversary proceeding runs afoul of the Bankruptcy Code, Defendants' preemption argument fails.[14]

In their last stab at showing preemption, Defendants assert that allowing WSNA's state-law claims to proceed would be "particularly harmful in a bankruptcy case with limited resources, such as this one." WSNA disputes that the estate would be harmed by complying with applicable state law and by paying the nurses what they earned. But even if Defendants' assertion were true, it would not advance their preemption argument. The Bankruptcy Code does not preempt an otherwise valid state-law claim simply because of the claim's possible impact on the reorganization. *See In re Baker & Drake*, 35 F.3d 1348, 1354 (9th Cir. 1994) (state law not preempted simply because it may make debtor's reorganization more difficult).

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[14] WSNA reserves the right at some future date to file a §503(a) motion for immediate payment of its administrative expense claims. It recognizes that, if it does, the Bankruptcy Code would not necessarily *require* immediate

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The Bankruptcy Code does not preempt WSNA's state-law claims.

CONCLUSION

For these reasons, WSNA respectfully asks the Court to deny the Defendants' motion to dismiss and to set a scheduling conference to develop the schedule for the remainder of this action.

RESPECTFULLY SUBMITTED this 25th day of March, 2020.

s/ Darin M. Dalmat
Darin M. Dalmat, WSBA No. 51384
Kelly Ann Skahan, WSBA No. 54210
BARNARD IGLITZIN & LAVITT LLP
18 W Mercer St, Suite 400
Seattle, WA 98119
Tel: (206) 257-6028
Tel: (206) 257-6009
Fax: (206) 378-4132
dalmat@workerlaw.com
skahan@workerlaw.com

s/ Peter D. DeChiara
Peter D. Dechiara *(*Admitted *Pro Hac Vice)*
Cohen Weiss and Simon, LLP
900 Third Avenue, Suite 2100
New Yok, NY 10022-4869
Tel: (212) 356-0256
Fax: (646) 473-8216
pdechiara@cwsny.com

Attorneys for WSNA

payment, but that the Court would have discretion, if it believed the circumstances appropriate, to require Debtors to pay immediately.

DECLARATION OF SERVICE

I hereby certify that on the date noted below, I served the foregoing document on the following individuals in the manner indicated below:

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
SAM J. ALBERTS (WSBA #22255) DENTONS US LLP 1900 K. Street, NW Washington, DC 20006 Tel: (202) 496-7500 Fax: (202) 496-7756 sam.alberts@dentons.com *On behalf of Defendant Astria Health and SHC Medical Center – Yakima*	☐ Hand Delivery ☐ Certified Mail ☐ Facsimile ☐ E-mail ☐ U.S. Mail ☐ E-Service ☒ CM/ECF

DATED this 25th day of March, 2020 at Seattle, Washington.

By: 

Esmeralda Valenzuela, Paralegal

18 WEST MERCER ST., STE. 400 BARNARD
SEATTLE, WASHINGTON 98119 IGLITZIN &
TEL 800.238.4231 | FAX 206.378.4132 LAVITT LLP