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UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re:

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

Debtors and Debtors in Possession.

☒ Affects All Debtors

☐ Affects O'Connor Hospital
☐ Affects Saint Louise Regional Hospital
☐ Affects St. Francis Medical Center
☐ Affects St. Vincent Medical Center
☐ Affects Seton Medical Center
☐ Affects O'Connor Hospital Foundation
☐ Affects Saint Louise Regional Hospital Foundation
☐ Affects St. Francis Medical Center of Lynwood Foundation
☐ Affects St. Vincent Foundation
☐ Affects St. Vincent Dialysis Center, Inc.
☐ Affects Seton Medical Center Foundation
☐ Affects Verity Business Services
☐ Affects Verity Medical Foundation
☐ Affects Verity Holdings, LLC
☐ Affects De Paul Ventures, LLC
☐ Affects De Paul Ventures - San Jose Dialysis, LLC

Debtors and Debtors in Possession.

Lead Case No.: 2:18-bk-20151-ER
Jointly administered with:
CASE NO.: 2:18-bk-20162-ER
CASE NO.: 2:18-bk-20163-ER
CASE NO.: 2:18-bk-20164-ER
CASE NO.: 2:18-bk-20165-ER
CASE NO.: 2:18-bk-20167-ER
CASE NO.: 2:18-bk-20168-ER
CASE NO.: 2:18-bk-20169-ER
CASE NO.: 2:18-bk-20171-ER
CASE NO.: 2:18-bk-20172-ER
CASE NO.: 2:18-bk-20173-ER
CASE NO.: 2:18-bk-20175-ER
CASE NO.: 2:18-bk-20176-ER
CASE NO.: 2:18-bk-20178-ER
CASE NO.: 2:18-bk-20179-ER
CASE NO.: 2:18-bk-20180-ER
CASE NO.: 2:18-bk-20181-ER

Chapter 11 Cases

Hon. Judge Ernest Robles

RETIREMENT PLAN FOR HOSPITAL EMPLOYEES' NOTICE OF MOTION AND MOTION TO ALTER OR AMEND FINAL ORDER (I) AUTHORIZING POST PETITION FINANCING, ETC. (DKT. 409) (FRBP 9023)

Hearing:
Date: TO BE SET BY COURT
Time:
Place: Courtroom 1568
United States Bankruptcy Court
255 East Temple Street
Los Angeles, California 90012

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San Francisco, CA 94133

1820151181017000000000035

TO THE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at the above referenced date, time and location, Retirement Plan for Hospital Employees ("RPHE") will move the Court to alter or amend the *Final Order (I) Authorizing Postpetition Financing, (II) Authorizing Use of Cash Collateral, (III) Granting Liens And Providing Superpriority Administrative Expense Status, (IV) Granting Adequate Protection, (V) Modifying Automatic Stay, And (VI) Granting Related Relief* [Docket No. 409] (the "Financing Order") pursuant to Federal Rule of Bankruptcy Procedure 9023 and Federal Rule of Civil Procedure 59(e), to require Verity Health System of California, Inc. ("VHS") and the above-referenced affiliated debtors (collectively, the "Debtors"), to reserve or fund commencing as of September 1, 2018 for post-petition contributions to RPHE accruing weekly in the amount of $250,100, or such other amount as determined by the Court, as part of the DIP Budget, as defined in the Financing Order.

PLEASE TAKE FURTHER NOTICE that this Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points And Authorities, the Objection of Retirement Plan for Hospital Employees to Motion of Debtors for Final Orders (A) Authorizing the Debtors to Obtain Post petition Financing etc. [Docket 218] (the "RPHE Objection"), the Declaration of Michael Holdsworth in support of the RPHE Objection [Docket 218-1] (the "Holdsworth Declaration"), supporting statements, arguments and representations of a counsel who will appear at the hearing on the Motion, the record in this case, and any other evidence properly brought before the Court in all other matters of which this Court may properly take judicial notice.

PLEASE TAKE FURTHER NOTICE that any party opposing or responding to the Motion must file and serve the response ("Response") on the moving party and the United States Trustee not later than 14 days before the date designated for the hearing. A Response must be a complete written statement of all reasons in opposition thereto or in support, 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, pursuant to LBR 9013-1(h), the failure to

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file and serve a timely objection to the Motion may be deemed by the Court to be consent to the relief requested herein.

Dated: October 17, 2018

TRODELLA & LAPPING LLP

By: /s/ Richard A. Lapping
Richard A. Lapping
Attorneys for
Retirement Plan for Hospital Employees

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to the Court's tentative ruling [Docket 392], the RPHE Objection to the Debtors' motion to obtain the Financing Order ("Financing Motion") was apparently overruled by the following statement: "For the reasons set forth in the tentative ruling issued in connection with the Prepetition Wages Motion, the objections asserted by the unions representing the Debtors' employees are overruled." However, the Prepetition Wages Motion [Docket 22] concerned only prepetition wages and benefits, and the Court's ruling, which remains under submission, applied case law that in the main only pertained to prepetition claims and Bankruptcy Code section 1113. The RPHE Objection and now this Motion seek recognition of the Debtor's ongoing obligations with respect to post-petition administrative claims. To the extent that the authorities cited in the tentative ruling on the Prepetition Wages Motion apply to RPHE's post-petition claims, then the ruling falls into the category of clear error of law under the standards applicable to Federal Rule of Civil Procedure 59(e).

II. FACTS

RPHE is a multiemployer qualified defined benefit retirement plan under Section 401(a) of the Internal Revenue Code. VHS and certain of its affiliates, O'Connor Hospital, Saint Louise Regional Hospital, and Seton Medical Center, including Seton Medical Center Coastside, are participants in RPHE and pursuant to collective bargaining agreements ("CBAs") with the California Nurses Association ("CNA"), are obligated to make contributions to RPHE on behalf

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of members of CNA currently working at the above facilities. (Holdsworth Declaration, para. 2.)

Under the terms of the RPHE Trust Agreement and the Plan Document and Summary Plan Description applicable to VHS and its affiliates, IRS rules, and actuarial determinations, RPHE issues an annual Invoice to VHS requiring payment of the previous year's accrued contributions in three installments, due on February 15, May 15 and August 15 of the following calendar year.[1] Thus, for 2017 contributions, RPHE issued Invoices to VHS for February 15, 2018 in the amount of $4,791,218, for May 15, 2018 in the amount of $4,791,218, and for August 15, 2018 in the amount of $4,791,217. VHS paid the February 15 and May 15 Invoices, but did not pay the Invoice for August 15. (Holdsworth Declaration, para. 3.)

Although RPHE has not issued VHS any Invoices for 2018, the contribution obligations continue to accrue, and have accrued for 8 months through August 31, 2018, the petition date. Thus, RPHE will have an unsecured prepetition claim for the August 15, 2018 Invoice (related to 2017 accruals) plus the accrued contributions for January through August, 2018, which is two-thirds of a year. From and after September 1, 2018, VHS's contribution obligations will accrue continuously post-petition as part of the benefits earned by CNA members who staff the VHS facilities, even though in the ordinary course RPHE would not bill for any 2018 accrued contributions until the three scheduled dates in 2019.

The contributions that Debtors are required to make to RPHE for any period fall into two categories. The first is based on the normal cost of benefits, the expected administrative expenses and a component of interest, all determined by IRS rules and actuarial determinations ("normal costs"). The second category is Debtor's share of the Unfunded Actuarial Accrued Liability of the RPHE plan under ERISA, which is paid over a ten-year amortization ("non-normal costs"). RPHE's actuarial estimate for these VHS contributions for Plan Year 2018 is attached as Exhibit A to the Holdsworth Declaration. As indicated on Exhibit A, the first category is $1,756,757 for

[1] In reply to the RPHE Objection, Debtor submitted the RPHE Plan Funding Policy for the Plan Year Beginning January 3, 2017 as Exhibit 3, at Docket 310-3. That document simply confirms the timing of payments, but it should be noted that the final paragraph of Exhibit 3 states: "The Board reserves the right to amend this Funding Policy at a future date." To characterize the timing of when invoices are issued as an immutable obstacle, as the Debtor does, is not a sound principle in or out of bankruptcy.

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September 1 through December 31, 2018. Over 17 weeks for that period in the budget, this equals $103,339 per week. The second category, non-normal costs, this equates to $146,761 per week, or $2,494,941 over the 17-week period to the end of 2018.

In reply to the RPHE Objection (and to CNA), Debtors offered the Declaration of Carlos De la Parra [Docket 310-1] (the "Parra Declaration").[2] The Parra Declaration and its exhibit illustrate that Debtors propose to pay only normal costs and then only one-third of the normal costs on the 2019 invoices, in recognition that all 2019 invoices relate to 2018 accruals, and only one-third of the year remains after September 1. But Mr. Parra is incorrect when he states in Paragraph 10 that his amount, $1,704,170 for the entire year "corresponds very closely to the amount of $1,756,757 asserted by RPHE in its objection to the Final Order for DIP financing." As indicated above, $1,756,757 measures only the normal cost for the last 17 weeks of 2018.

Although discussing and comparing numbers in actuary charts can become complex, the issue presented by this Motion and the RPHE Objection is not: Are the contribution obligations for non-normal costs administrative expenses under 11 U.S.C. sections 503(b) and 507(a)(2). RPHE contends that the matter is settled by *In re Pacific Far East Line, Inc.*, 713 F.2d 476 (9th Cir. 1983) (construing the predecessor provision for administrative expenses under the Bankruptcy Act). As such, these necessary expenses should be included in the DIP Budget authorized by the Financing Motion.

III. ARGUMENT

A. Motions Under Rule 59(e)

The Ninth Circuit summarized the function of a Rule 59(e) motion to alter or amend a judgment thusly:

> Rule 59(e) provides a mechanism by which a trial judge may alter, amend, or vacate a judgment. *See Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). Rule 59(e) provides an efficient mechanism by which a trial court judge can correct an otherwise

[2] Debtor's submitted two replies that addressed the issues in this Motion, one with respect to the Financing Motion [Docket 309] and one as to the Prepetition Wages Motion [Docket 310]. We will cite throughout to the Docket numbers to avoid confusion.

> erroneous judgment without implicating the appellate process. As noted by this court in *United States v. Walker*, 601 F.2d 1051, 1058 (9th Cir. 1979): "Errors in the trial court may be most speedily corrected by the trial judge. Frequently a trial judge has had to rule on difficult questions under time pressures and without thorough briefing by the parties. A motion for reconsideration may, in some instances, avoid the necessity of an appeal."

Clipper Exxpress v. Rocky Mt. Motor Tariff Bureau, 674 F.2d 1252, 1260 (9th Cir. 1982). The motion can be granted in the discretion of the trial judge to correct clear error. *399 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1998).

Here, the Motion addresses an additional problem. At the hearing of the Financing Motion, counsel for RPHE's argument was stopped by the Court and deferred to the hearing on the Prepetition Wages Motion. [Transcript, 46:12-15.] Counsel requested that the Financing Motion be reopened if the Court ruled in RPHE's favor, which the Court agreed: "I think I understand the request, and that's without prejudice, yes." [Transcript 46:24 – 47:5.] However, the Finance Order was entered on October 4, 2018, with a looming appeal deadline of October 18, whereas, at the date of this Motion, the Prepetition Wage Motion remains under submission. Under a Rule 59(e) motion, the Court remains able to reopen the Financing Motion if appropriate.

B. Non-Normal Costs Accruing Post-Petition Are Administrative Expenses

In the RPHE Objection, RPHE cited *Columbia Packing Co. v Pension Ben. Guaranty Corp.*, 81 B.R. 205, 208-09, 18 CBC2d 1005 (D. Mass. 1988), for the proposition that a current postpetition pension fund contribution obligation based on reference to prepetition events should be an administrative expense. *Columbia Packing* cited and followed the reasoning in *In re Pacific Far East Line, Inc.*, 713 F.2d 476 (9th Cir. 1983).

Here, as in *Columbia Packing* and *Pacific Far East Line*, the RPHE has Unfunded Actuarial Accrued Liability, which is the difference between Actuarial Accrued Liability (for expected benefits owed to plan participants) and the Actuarial Value of Assets in the plan, which can result from a number of causes, including shortfalls in contributions or, more likely,

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fluctuations in the value of investments or legally required changes in actuarial assumptions (e.g., mortality). Debtors speculate that the underfunding is past earnings not paid, and attempt to categorize them as prepetition claims. But their actuary concedes that "The Target Normal Cost is an estimate based on assumptions about future events that cannot be predicted with any certainty." (Parra Declaration, Para. 6, Docket 310-1.) When the estimates need to be revised, as they were due to the Great Recession, then subsequent contributions must increase as required by ERISA.

RPHE does not contend that prepetition obligations such as the failure by Debtors to make the August 15, 2018 payment should be elevated to administrative claim status. Nonetheless, Debtors argue extensively in opposition to the RPHE Objection citing efforts by various parties to use Bankruptcy Code Section 1113 as a device to gain administrative recognition for prepetition pension claims. The RPHE Objection does not rely on Section 1113.

Undeterred, Debtors cite to numerous cases that reject Section 1113 arguments, as if they apply to the RPHE Objection. Even further, they rely heavily on an unpublished opinion, *In re Steiny and Company, Inc.*, 2017 WL 1788414 (Bankr. C.D. Cal. 2017). *Steiny* is a case where pension trustees argued that prepetition benefits were administrative expenses because the debtor had not rejected the collective bargaining agreements under Section 1113, citing, *inter alia*, *In re Unimet Corp.*, 842 F.2d 879 (6th Cir. 1988), an outlier case whose reasoning was rejected by *In re World Sales, Inc.*, 183 B.R. 872 (B.A.P. 9th Cir. 1995) and *In re Certified Air Techs, Inc.*, 300 B.R. 355 (Bankr. C.D. Cal. 2003).[3]

Debtors also contend, based solely on a passing statement in *Steiny*, that *Pacific Far East Line*, a Ninth Circuit case, is no longer good law, and that *Steiny* "rejected the argument advanced by the RPHE and the principal case on which it relies . . . ." This argument illustrates why unpublished opinions provide unstable footing. True, out of context, *Steiny* says: "The Trustees argue that [*Pacific Far East Line*] is controlling Ninth Circuit authority that this court is bound to follow. This Court disagrees." (Passage cited by Debtor at p. 9, Docket 310.) What is left unstated is what proposition the Trustees cited it for. In the Steiny Brief, it becomes clear. The Trustees argue: "Contributions payable post-petition for hours worked pre-petition are properly

[3] See brief filed by the pension trustees in the Steiny Case, Docket 117-1, filed in Case No. 2:16-bk-25619-WB, copy attached hereto as Exhibit A, at p. 6 ("Steiny Brief").

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considered administrative expenses." And for this widely rejected point they cite *Pacific Far East Line*, which does not support the contention. Again, RPHE is not arguing that prepetition claims should be accorded administrative status, not under Section 1113, or under any other authority.

RPHE relies on *Pacific Far East Line* and *Columbia Packing* for the narrow proposition applicable here, that where a benefit earned by post-petition work is calculated based on prepetition events, then such calculation is "an actuarial unit of measure for determining the employer's current periodic contribution than as compensation for work performed" prepetition. *Columbia Packing*, 81 B.R. at 208-09. And under these cases, the contribution thus calculated is an administrative expense. The rationale is best explained in *In re Sunarhauserman, Inc.*, 126 F.3d 811 (6th Cir. 1997). *Sunarhauserman* involved the issue here, whether non-normal cost accrued post-petition was eligible for administrative priority. The majority in *Sunarhauserman* held contrary to the Ninth Circuit in a complex case. In a dissent that does line up with the Ninth Circuit, Circuit Judge Kennedy made the basic case.

> Here, the debtor and its employees continued to participate in the pension plan. The cost of continuing in the plan was determined by the plan and ERISA. . . . If compliance with a given statute or regulation is necessary to operate as a business, then the costs of such compliance necessarily should be an administrative expense.

126 F.3d at 822. Here, federal law mandates the actuarial calculation and that the contributions be made so long as the employees work under the collective bargaining agreement that provides for the pension fund. When that work occurs postpetition, it is the measure of their wages and the administrative cost of doing business.

C. Debtors' Contributions to RPHE Are Operating Expenses That Under the Financing Order Must Be Included in the DIP Budget

Debtors also argue that nothing requires them to pay or reserve for administrative expenses that will, under the unique circumstances here, not be invoiced for up to a year or more in ordinary circumstances. Debtors aver there is no authority for RPHE's proposal to reserve funds to pay the accruing liabilities. That argument ignores reality. The whole point of the Financing Motion and

the Financing Order is to enable Debtors to pay operating expenses in order to continue operations and preserve going concern value. Not some operating expenses; all of them. Expenses are something a Debtor has to pay. Debtors concede as much as they agree to pay when invoiced, i.e., when outside of bankruptcy, they have to pay, assuming they have the funds.

Consistent with the foregoing, the Financing Order mandates that the proceeds of the DIP Facility be used in accordance with the DIP Budget, which is entirely based on necessary operating expenses. (Financing Order, Para. L; Para. 2(e).) It is impossible to view the entire financing process as an exercise to omit paying employees who work post-petition their agreed salary and benefits.

Here, Debtors expect the RPHE and the nurses to take it on faith that the Debtors will have the ability to pay all administrative expenses after the assets have been sold. If there is a shortfall, the employees lose. Moreover, Debtors run the risk that they will not be able to confirm a plan if they cannot pay administrative expenses because the secured creditors receive all the proceeds. It is imperative for all constituencies that they take this opportunity to reserve funds for these expenses and preserve their ability to confirm a plan.

IV. CONCLUSION

For the reasons stated above, the Court should order the Debtors to reserve or fund commencing as of September 1, 2018 for post-petition contributions to RPHE accruing weekly in the amount of $250,100, or such other amount as determined by the Court, as part of the DIP Budget, as defined in the Financing Order.

Dated: October 17, 2018

TRODELLA & LAPPING LLP

By: /s/ Richard A. Lapping
Richard A. Lapping
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EXHIBIT A

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UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: STEINY AND COMPANY, INC., Debtor.	CASE NO.: 2:16-bk-25619-WB Chapter 11 ASSIGNED TO THE HONORABLE JULIA W. BRAND **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ADMINISTRATIVE EXPENSES** HEARING DATE Date: February 2, 2017 Time: 10:00 a.m. Ctrm: 1375 Edward R. Roybal Federal Building 255 E. Temple Street Los Angeles, California 90012

I. PRELIMINARY STATEMENT

Pursuant to 11 U.S.C. §503(b) and 11 U.S.C. §1113, creditors Trustees ("Trustees") of the Southern California IBEW-NECA Pension Plan, Southern California IBEW-NECA Defined Contribution Trust Fund, Southern California IBEW-NECA Health Trust Fund ("Health Fund"), Southern California IBEW-NECA Supplemental Unemployment Benefit Trust Fund, Los Angeles County Electrical Educational and Training Trust Fund, National Electrical Benefit Fund, Southern California IBEW-NECA Labor-Management Cooperation Committee, National NECA-IBEW Labor-Management Cooperation Committee Trust Fund, Contract Compliance Fund, and Los Angeles Electrical Workers Credit Union (collectively "Trusts"), hereby move this Court for an order requiring the debtor, Steiny and Company, Inc. ("Steiny") to immediately fund post-petition fringe benefit contribution reports and pay damages accruing post-petition.

II. STATEMENT OF FACTS RELEVANT TO THIS MOTION

The Trusts are express trusts created pursuant to written declarations of trust ("Trust Agreements") between various local unions of the International Brotherhood of Electrical Workers ("IBEW"), and various chapters of the National Electrical Contractors Association ("NECA"). (Declaration of Raul Rodriguez ("Decl. Rodriguez"), ¶ 6.) The Trusts are now, and were at all times material to this motion, labor-management multiemployer trusts created and maintained pursuant to §302(c)(5) of the Labor Management Relations Act of 1947, as amended ("LMRA"), 29 U.S.C. §186(c)(5). (Decl. Rodriguez, ¶ 6.) Steiny is bound to various collective bargaining agreements ("Master Agreements") between various local unions of the IBEW and various chapters of NECA that require Steiny to make contributions on a timely basis to the Trusts for each hour of covered work performed by its employees. (Decl. Rodriguez, ¶ 8.) At all times material herein, Steiny has been obligated to the terms and provisions of the Master Agreements and the related Trust Agreements. (Decl. Rodriguez, ¶¶ 8 and 10.)

Steiny has not rejected the Master Agreements pursuant to 11 U.S.C. §1113. (Decl. Rodriguez, ¶ 9; Declaration of Matthew Bechtel ("Decl. Bechtel"), ¶ 3.) Because Steiny relies on labor provided by the local unions of the IBEW to run its business, the Trustees do not anticipate that Steiny will seek to reject the Master Agreements. (Decl. Rodriguez, ¶ 9.)

Steiny is an "employer" as defined and used in §3(5) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §1002(5). (Decl. Rodriguez, ¶ 9.) Therefore, Steiny is "obligated to make contributions to a multiemployer plan" within the meaning of §515 of ERISA, 29 U.S.C. §1145. Steiny is also an "employer" engaged in "commerce" in an "industry affecting commerce," as those terms are defined and used in §501(1) and §501(3) of the LMRA, 29 U.S.C. §142(1) and §142(3), and within the meaning and use of §301(a) of the LMRA, 29 U.S.C. §185(a). Section 515 of ERISA, 29 U.S.C. §1145, provides that every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Steiny filed its Chapter 11 bankruptcy petition on November 28, 2016. After filing bankruptcy, Steiny submitted to the Trusts fringe benefit contribution reports ("Monthly Reports") wherein Steiny admits owing the Trusts at least $169,337.88 for fringe benefit contributions which became due on December 10, 2016 (post-petition). (Decl. Rodriguez, ¶ 13; Exhibit G). The Trustees only seek to collect $139,911.40 of the $169,337.88 total amount owed based on Steiny's Monthly Reports for November 2016, as the Trustees only collect defined benefit contributions under Steiny's collective bargaining agreements with Local 441 and Local 477. (Decl. Rodriguez, ¶ 13.) As of the date of this motion, Steiny has failed to submit payment of any of the

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contributions owed to the Trustees that became due on December 10, 2016, and delinquent on December 15, 2016. (Decl. Rodriguez, ¶ 15.)

There is no legal excuse for Steiny's breach or violation of the Master Agreements, related Trust Agreements or §515 of ERISA, 29 U.S.C. §1145. (Decl. Rodriguez, ¶ 14.) Due to Steiny's non-performance, unpaid post-petition fringe benefit contributions are now due, owing and unpaid to the Trust Funds as evidenced by the reports submitted by Steiny and the declaration of Raul Rodriguez. (Decl. Rodriguez, ¶ 13.)

Pursuant to Section 502 of ERISA, 29 U.S.C. §1132(g)(2)(B), Steiny is obligated to pay to the Trustees interest on the fringe benefit contributions not paid in a timely manner at the rate prescribed under § 6621 of the Internal Revenue Code of 1986. An award of interest was made mandatory by the addition of § 502 (g)(2)(B) of ERISA [29 U.S.C. § 1132(g)(2)(B)]. In actions under ERISA to collect fringe benefit contributions, interest must be awarded. Operating Engineers Pension Trust v. Reed, s*upra*, 726 F.2d at 513, 514. Prejudgment interest is "determined by using the rate provided under the plan, or, if not provided, the rate prescribed under [26 U.S.C. § 6621]." 29 U.S.C. § 1132(g)(2). Here, the Master Agreements and related Trust Agreements provide for the recovery of interest. (Decl. Rodriguez, ¶ 16.) However, three of the four applicable collective bargaining agreements are silent as to the interest rate, while fourth agreement provide for an interest rate of 8% per annum. (Decl. Rodriguez, ¶ 16.) Therefore, for simplicity, interest has been calculated pursuant to the rate prescribed under § 6621, which states "[t]he underpayment rate established under this section shall be the sum of – (A) the Federal short-term rate determined under subsection (b), plus (B) 3 percentage points." 26 U.S.C. § 6621(a)(2). (Decl. Rodriguez, ¶ 16.) Under § 6621, interest is compounded on a daily basis. (Decl. Rodriguez, ¶ 16.) Therefore, in addition to the other amounts requested relating to the amounts due pursuant to the Monthly Reports for November 2016, the Trustees are seeking prejudgment interest in the total amount of $829.49, calculated

from the date the contributions became due until February 2, 2017 (the hearing date on this motion). (Decl. Rodriguez, ¶ 16; Exhibit H.) There is no legal excuse for Steiny's failure to pay the accrued interest.

Like prejudgment interest, liquidated damages are also mandatory under § 502 of ERISA [29 U.S.C. § 1132(g)], which requires an award of liquidated damages on unpaid contributions in an amount equal to the greater of: (a) the amount of prejudgment interest, or (b) liquidated damages provided for under the plan in an amount not in excess of 20%. 29 U.S.C. § 1132(g)(2)(C). Various federal courts, in recognition of the administrative costs involved in processing and pursuing delinquencies, have upheld and enforced liquidated damages provisions where, as here, the amount of liquidated damages are reasonable. U.S. for the use of Sherman v. Carter, 353 U.S. 210, 220 (1957); United O.A.B. & S.M.U. 21 v. Thorlief Larson & Son, Inc., 519 F.2d 331, 337 (9th Cir. 1975).

The Master Agreements and related Trust Agreements provide for liquidated damages ranging from 1.5% to 18% depending on the length of time an employer remains delinquent. (Decl. Rodriguez, ¶ 17.) Liquidated damages for the unpaid contributions based on Steiny's Monthly Reports November 2016 calculated from the date the contributions became due through February 2, 2017 (the hearing date on this motion)), at the rate provided in the Master Agreements and related Trust Agreements, amounts to $4,197.34. (Decl. Rodriguez, ¶ 17; Exhibit H.) Since this amount is greater than the amount of prejudgment interest $829.49) the Trustees seek liquidated damages for unpaid and untimely paid contributions in the amount of $4,197.34. Decl. Rodriguez, ¶ 17; Exhibit H).

Pursuant to the Master Agreement, Trust Agreements and Section 502 of ERISA, 29 U.S.C. § 1132(g)(2)(D), Steiny is obligated to pay to the Trustees' attorneys' fees and costs incurred to effect collection of delinquent contributions. The amount of attorneys' fees incurred to bring this motion, and anticipated fees to argue

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the motion, total $5,847.00. (Decl. Rodriguez, ¶¶ 18-19 and Declaration of Michael Y. Jung ("Decl. Jung") ¶¶ 4-8.)

III. ARGUMENT

A. Steiny Has a Duty to Abide by the Master Agreements.

A debtor operating an ongoing business has a duty to abide by contracts that it has not sought to abrogate and is thereby subject to the terms of a collective bargaining agreement until it is rejected. Matter of Canton Castings, Inc., 103 B.R. 874, 876 (Bankr. N.D. Ohio 1989). An unexpired collective bargaining agreement is an executory contract under the bankruptcy code. N.L.R.B. v. Bildisco and Bildisco, 465 U.S. 513, 516 (1984); In re Unimet Corp., 842 F.2d 879, 881 (6th Cir. 1988), cert. denied 488 U.S. 828 (1988). A trustee or debtor-in-possession may assume or reject a collective bargaining agreement only in accordance with the provisions of 11 U.S.C. §1113. This statute applies to all provisions of a collective bargaining agreement. In re Unimet Corp., *supra*, 842 F.2d 879 at 885. Furthermore, the debtor-in-possession is required to comply with all provisions of the collective bargaining agreement "unless and until rejection was permitted by the court." In re Unimet Corp., *supra*, 842 F.2d at p. 882; Matter of Canton Castings, Inc., *supra*, 103 B.R. at p. 876; and In re St. Louis Globe-Dispatch. Inc., 86 B.R. 606, 609 (Bankr. E.D. Mo. 1988). "No provision of this title [Title 11 U.S.C. §§101 et seq.] shall be construed to permit a trustee to unilaterally terminate or alter any provision of a collective bargaining agreement prior to compliance with the provisions of this section" (11 U.S.C. §1113(f)) and 11 U.S.C. §1113 "unequivocally prohibits the employer from unilaterally modifying any provision of the collective bargaining agreement." In re Unimet Corp., *supra*, 842 F.2d at p. 884.

In the instant case, Steiny has not filed a petition to reject the Master Agreements or related Trust Agreements pursuant to the procedures mandated by 11 U.S.C. §1113. (Declaration of Matthew Bechtel ("Decl. Bechtel"), ¶ 3; Decl. Rodriguez, ¶ 9.) In fact, Steiny has taken advantage of the benefits of its union status

while failing to submit agreed to, and federally protected, fringe benefit contributions to the Trusts pursuant to the Master Agreements. (Decl. Rodriguez, ¶ 9.)

B. The Trustees Have the Right to Obtain Payment of Fringe Benefit Contributions and Related Liquidated Damages and Interest Owed as Administrative Expenses, As Well As Attorneys' Fees Incurred in Bringing this Motion

11 U.S.C. § 503(b)(1)(A) provides: "¶ (b) After notice and a hearing, there shall be allowed as administrative expenses. . . ¶(1)(A) the actual necessary costs and expenses of preserving the estate, including wages, salaries or commissions for services rendered after the commencement of the case."

Contributions due pursuant to a collective bargaining agreement are actual and necessary costs or expenses of preserving the estate if the obligation to contribute arose post-petition. Columbia Packing Co. v. Pension Benefit Guaranty Corp., 81 B.R. 205. Contributions payable post-petition for hours worked pre-petition are properly considered administrative expenses. Pacific Far East Line, Inc. v. Pacific Maritime Association, 713 F.2d 476 (9th Cir. 1983); see also In Re World Sales, 183 B.R. 872. Damages are likewise treated as administrative expenses, as are expenses and liabilities incurred. Reading Company v. Brown, 391 U.S. 471, 476-79 (1968); N.L.R.B. v. Bildisco and Bildisco, supra, 465 U.S. at p. 532; In re Unimet Corp., supra, 842 F.2d at p. 881.

In the instant case, pursuant to the provisions of the Master Agreements and related Trust Agreements, Steiny voluntarily submitted to the Trustees its Monthly Reports for the work month of November 2016, which became due December 10, 2016, wherein Steiny admits owing the Trusts fringe benefit contributions totaling $169,337.88, of which the Trustees seek to recover the amount of $139,911.40 by way of this motion. (Decl. Rodriguez, ¶ 13.) This amount remains unpaid and is now considered *delinquent* pursuant to the Master Agreements and Trust Agreements. (Decl. Rodriguez, ¶ 15.) Steiny's own Monthly Reports are admissible against the

Steiny as admissions of contributions due. Fed. R. Civ. P. 801(d)(2); Gaspard & Co. v. Government of Guam, 427 F.2d 276 (9th Cir. 1970); Brick Masons Pension Trust v. Industrial Fence & Supply, Inc., 839 F.2d 1333 (9th Cir. 1988); Trs. of the S. Cal. IBEW-NECA Pension Trust Fund v. Flores, 519 F.3d 1045 (9th Cir. 2008); Cent. States v. Cent. Transport, Inc., 472 U.S. 559, 105 S.Ct. 2833, 86 L. Ed. 2d 447 (1985). In addition, due and payable from the Steiny is $829.49 for accrued interest, $4,197.34 for liquidated damages, and $5,847.00 for attorneys' fees. (Decl. Rodriguez, ¶¶ 16-19, Decl. Jung, ¶¶ 4-5.)

IV. CONCLUSION

The Trustees request, and justice demands, that the Court order the following:

1. Within ten (10) calendar days following entry of the order, Steiny shall pay to the Trustees $150,785.23, which consists of $139,911.40 for fringe benefit contributions, $829.49 for accrued interest, $4,197.34 for liquidated damages, and $5,847.00 for attorneys' fees.

DATED: January 9, 2017

LAQUER, URBAN, CLIFFORD & HODGE LLP

By: */S/ Michael Y. Jung*
Counsel for Creditors, Trustees of the Southern California IBEW-NECA Pension Plan. et al.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

540 Pacific Avenue, San Francisco, CA 94133

A true and correct copy of the foregoing document entitled (*specify*): RETIREMENT PLAN FOR HOSPITAL EMPLOYEES' NOTICE OF MOTION AND MOTION TO ALTER OR AMEND FINAL ORDER (I) AUTHORIZING POST PETITION FINANCING, ETC. (DKT. 409) (FRBP 9023)

will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) 10/17/2018, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☑ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On (*date*) 10/17/2018, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Hon. Ernest Robles
U.S. Bankruptcy Court
255 E. Temple Street
Los Angeles, CA 90012

☑ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

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

10/17/2018	Richard A. Lapping	/s/ Richard A. Lapping
Date	*Printed Name*	*Signature*

Attachment to Proof of Service of Document

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