

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

SAMUEL R. MAIZEL (Bar No. 189301)
samuel.maizel@dentons.com
SAM J. ALBERTS (admitted *pro hac vice*)
sam.alberts@dentons.com
SONIA R. MARTIN (Bar No. 191148)
sonia.martin@dentons.com
TANIA M. MOYRON (Bar No. 235736)
tania.moyron@dentons.com
DENTONS US LLP
601 South Figueroa Street, Suite 2500
Los Angeles, California 90017-5704
Tel: (213) 623-9300 / Fax: (213) 623-9924

Attorneys for the Chapter 11 Debtors and
Debtors In Possession

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

In re

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

Debtors and Debtors In Possession.

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

Debtors and Debtors In Possession.

Lead Bankruptcy 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 M. Robles

Adversary No. 2:20-ap-01051-ER

**NOTICE OF DEBTORS' MOTION AND
MOTION TO DISMISS COMPLAINT
UNDER RULE 12(b), WITH PREJUDICE**

Hearing Date and Time:

Date: May 6, 2020

Time: 10:00 a.m.

Place: Courtroom 1568

255 E. Temple St.

Los Angeles, CA 90012



1820151200407000000000003

CALIFORNIA NURSES ASSOCIATION (CNA)

Plaintiff,

v.

VERITY HEALTH SYSTEMS OF CALIFORNIA,
INC., a California Corporation; ST. FRANCIS
MEDICAL CENTER, an Affiliate; ST. VINCENT
MEDICAL CENTER, an Affiliate; SETON
MEDICAL CENTER, an Affiliate; ST. FRANCIS
MEDICAL CENTER OF LYNWOOD, an
Affiliate; ST. VINCENT DIALYSIS CENTER,
INC., an Affiliate; VERITY HOLDINGS, LLC, an
Affiliate; DEPAUL VENTURES, LLC, an
Affiliate; RICHARD ADCOCK, an Individual;
STEVEN SHARRER, an Individual, and DOES 1
through 500,

Defendants.

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

1 **PLEASE TAKE NOTICE** that Verity Health System of California, Inc., Seton Medical
2 Center, St. Vincent Medical Center, St. Vincent Dialysis Center, Inc., St. Francis Medical Center,
3 Verity Holdings, LLC and DePaul Ventures, LLC (collectively, the “Institutional Defendants”),
4 eight of seventeen debtors (collectively, the “Debtors”), in the above-captioned Chapter 11
5 bankruptcy cases (the “Cases”), hereby move (the “Motion”) for entry of an order, pursuant to
6 Federal Rule of Civil Procedure 12(b)(6) incorporated by Federal Rule of Bankruptcy Procedure
7 7012(b), dismissing the complaint in the above-captioned adversary proceeding (the “Adversary
8 Proceeding”) commenced by the California Nurses Association.

9 **PLEASE TAKE FURTHER NOTICE** that this Motion is based on this Notice and
10 Motion, the attached Memorandum of Points and Authorities, and the concurrently filed Request
11 for Judicial Notice, the arguments of counsel and other admissible evidence properly brought
12 before the United States Bankruptcy Court for the Central District of California (the “Bankruptcy
13 Court”) at or before the hearing on this Motion, if any.

14 **PLEASE TAKE FURTHER NOTICE** that, pursuant to Local Bankruptcy Rule 9013-
15 1(f), any party opposing or responding to the Motion must file a response (the “Response”) with
16 the Bankruptcy Court and serve a copy of it upon the moving party and the United States Trustee
17 not later than 14 days before the date designated for the hearing. A Response must be a complete
18 written statement of all reasons in opposition to the Motion or in support, declarations and copies
19 of all evidence on which the responding party intends to rely, and any responding memorandum
20 of points and authorities.

21 **PLEASE TAKE FURTHER NOTICE** that, pursuant to Local Bankruptcy Rule 9013-
22 1(h), the failure to file and serve a timely a Response to the Motion may be deemed by the Court
23 to be consent to the relief requested herein.

24 **PLEASE TAKE FURTHER NOTICE** that if any Responses are filed and a hearing is
25 needed on the Motion, the hearing will be held on **May 6, 2020 at 10:00 a.m. (prevailing Pacific**
26 **Time)**, at the U.S. Bankruptcy Court, 255 E. Temple Street, Los Angeles, CA 90012. Pursuant to
27 Amended General Order 20-02 issued by the Bankruptcy Court on April 1, 2020, all appearances
28 at hearings must be telephonic; the telephone conference call-in number is (866) 582-6878. The

1 telephone conference call-in number is (866) 582-6878.

2
3 Dated: April 6, 2020

DENTONS US LLP
SAMUEL R. MAIZEL
SAM J. ALBERTS
SONIA R. MARTIN
TANIA M. MOYRON

4
5
6
7 By /s/ Tania M. Moyron
Tania M. Moyron

8 Attorneys for Verity Health Systems of
9 California, Inc., *et al.*
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

TABLE OF CONTENTS

	<u>Page</u>
MEMORANDUM OF POINTS AND AUTHORITIES	1
INTRODUCTION	1
RELIEF REQUESTED.....	4
JURISDICTION AND VENUE	4
STATEMENT OF FACTS	5
A. General Background.....	5
B. St. Vincent.....	5
C. The CNA CBA And The Represented Employees	7
D. Marketing and Sale Efforts	8
E. The Failed SGM Sale	8
ARGUMENT	22
A. Neither the WARN Act nor the California WARN Act Applies to Defendants as Liquidating Fiduciaries.....	23
B. CNA Fails to State Claims for Intentional and Negligent Misrepresentation.....	25
1. CNA Lacks Associational Standing to Assert the Intentional and Negligent Misrepresentation Claims.....	26
2. CNA’s Claim for Intentional Misrepresentation Fails	27
a. CNA Fails To Allege An Intentional Misrepresentation	28
b. CNA Fails To Allege a Concealment of a Material Fact	29
c. CNA Fails To Allege Reasonable Reliance	31
3. CNA’s Claim for Negligent Misrepresentation Fails	32
C. Dismissal Should Be With Prejudice	33
D. CNA’s Motion for Withdrawal of the Reference Does Not Preempt Resolution of This Motion	33
RESERVATION OF RIGHTS	34
CONCLUSION	34

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

TABLE OF AUTHORITIES

Page(s)

Cases

<i>In re 800Ideas.com, Inc.</i> , 496 B.R. 165 (B.A.P. 9th Cir. 2013).....	15
<i>All. Mortg. Co. v. Rothwell</i> , 10 Cal. 4th 1226 (1995)	30
<i>Am. Diabetes Ass’n v. United States Dep’t of the Army</i> , 938 F.3d 1147 (9th Cir. 2019).....	26
<i>Balistreri v. Pacifica Police Dep’t</i> , 901 F.2d 696 (9th Cir. 1990).....	22
<i>Bhd. of Teamsters & Auto Truck Drivers v. Unemployment Ins. Appeals Bd.</i> , 190 Cal. App. 3d 1515 (1987).....	26
<i>In re Century City Doctors Hosp., LLC</i> , BAP No. CC-09-1235-MkJaD, 2010 WL 6452903 (B.A.P. 9th Cir. Oct. 29, 2010)	22, 23, 24
<i>Cervantes v. Countrywide Home Loans, Inc.</i> , 656 F.3d 1034 (9th Cir. 2011).....	22
<i>Chauffeurs, Sales Drivers, Warehousemen & Helpers Union Local 572 v. Weslock Corp.</i> , 66 F.3d 241 (9th Cir. 1995).....	23, 24
<i>Earlywine v. USAA Life Ins. Co.</i> , No. 3:17-CV-328-CAB-NLS, 2017 WL 2733939 (S.D. Cal. June 23, 2017)	32
<i>Estrada v. Salyer Am.</i> , No. C 09-05618 JW, 2010 WL 11580074 (N.D. Cal. Mar. 31, 2010).....	24, 25
<i>GemCap Lending I, LLC v. Quarles & Brady, LLP</i> , 787 F. App’x 369 (9th Cir. 2019)	27, 29
<i>GemCap Lending, LLC v. Quarles & Brady, LLP</i> , 269 F. Supp. 3d 1007 (C.D. Cal. 2017).....	27
<i>Guido v. Koopman</i> , 1 Cal. App. 4th 837 (1991).....	31
<i>Hadley v. Kellogg Sales Co.</i> , 243 F. Supp. 3d 1074 (N.D. Cal. 2017)	28

1	<i>Hunt v. Washington State Apple Advert. Comm’n</i> ,	
2	432 U.S. 333 (1977).....	26
3	<i>L.A. Mem’l Coliseum Com. v. Insomniac, Inc.</i> ,	
4	233 Cal. App. 4th 803 (2015).....	27
5	<i>Lake Mohave Boat Owners Ass’n v. Nat’l Park Serv.</i> ,	
6	78 F.3d 1360 (9th Cir. 1995).....	26
7	<i>Land v. Gonsalves</i> ,	
8	281 F.R.D. 444 (E.D. Cal. 2012)	27
9	<i>Livermore v. Wells Fargo Bank</i> ,	
10	Case No. 17-cv-03347-BLF, 2017 WL 6513649 (N.D. Cal. Dec. 20, 2017)	27
11	<i>Lopez v. Nissan N. Am., Inc.</i> ,	
12	201 Cal. App. 4th 572 (2011).....	32
13	<i>Lujan v. Defs. of Wildlife</i> ,	
14	504 U.S. 555 (1992).....	25
15	<i>In re MF Glob. Holdings Ltd.</i> ,	
16	481 B.R. 268 (Bankr. S.D.N.Y. 2012)	25
17	<i>Oushana v. Lowe’s Home Ctrs., LLC</i> ,	
18	No. 1:16-cv-01782-AWI-SAB, 2017 WL 2417198 (E.D. Cal. June 5, 2017).....	32
19	<i>Punian v. Gillette Co.</i> ,	
20	No. 14-CV-05028-LHK, 2016 WL 1029607 (N.D. Cal. Mar. 15, 2016)	28
21	<i>Reading v. Brown</i> ,	
22	391 U.S. 471 (1968).....	25
23	<i>In re Resource Tech. Corp.</i> ,	
24	662 F.3d 472 (7th Cir. 2011).....	25
25	<i>SEIU, Local 721 v. Cty. of Riverside</i> ,	
26	No. EDCV 09-00561-VAP, 2011 WL 1599610 (C.D. Cal. Apr. 27, 2011)	26
27	<i>United Bhd. of Carpenters & Joiners of Am. v. Metal Trades Dep’t</i> ,	
28	No. 11-CV-5159-TOR, 2012 WL 3817789 (E.D. Wash. Sep. 4, 2012).....	26
	<i>In re United Healthcare Sys., Inc.</i> ,	
	200 F.3d 170 (3d Cir. 1999).....	24
	<i>United States v. Ritchie</i> ,	
	342 F.3d 903 (9th Cir. 2003).....	22

1	<i>United Union of Roofers, Waterproofers, & Allied Trades No. 40 v. Ins. Corp. of</i>	
2	<i>Am.</i> ,	
	919 F.2d 1398 (9th Cir. 1990).....	26
3	<i>Vess v. Ciba–Geigy Corp. USA</i> ,	
4	317 F.3d 1097 (9th Cir. 2003).....	27
5	<i>Warth v. Seldin</i> ,	
6	422 U.S. 490 (1975).....	25
7	<i>Wilson v. Century 21 Great W. Realty</i> ,	
	15 Cal. App. 4th 298 (1993).....	33
8	<i>Yamauchi v. Cotterman</i> ,	
9	84 F. Supp. 3d 993 (N.D. Cal. 2015)	27
10	Statutes	
11	11 U.S.C.	
	§§ 101 -1532	1,4
12	§ 363(f).....	12, 13
13	§ 503(b)(1)(A)(i)-(ii).....	2
	§ 507(a)(4) and (5)	2
14	28 U.S.C.	
15	§§ 157 and 1334	4
	§ 157(b)(2)(B)	4
16	§§ 1408 and 1409	4
17	29 U.S.C.	
18	§ 158(a)(5).....	27
	§ 2101(a)(1).....	23
19	§ 2102(a)	22
20	California Corporations Code § 5914	8
21	California Labor Code §1401(a)	22
22	California Labor Code §1400, <i>et. seq.</i>	3, 22, 23, 24
23	Internal Revenue Code § 501(c)(3).....	5
24	National Labor Relations Act	
25	§ 8(a)(5).....	<i>passim</i>
26		
27		
28		

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

Rules

Federal Rule of Bankruptcy Procedures 5011(c)	36
Federal Rule of Bankruptcy Procedure 7012(b)	1, 4, 21
Federal Rules of Civil Procedure	
9(b)	30
12(b)(6)	1, 2, 4, 21

Other Authorities

11 California Code of Regulations § 999.5	8
20 CFR § 639.1	32
54 Fed. Reg. 16,045 (1989)	24

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

MEMORANDUM OF POINTS AND AUTHORITIES

Verity Health System of California, Inc. (“VHS”), Seton Medical Center (“SMC”), St. Vincent Medical Center (“SVMC”), St. Vincent Dialysis Center, Inc. (“SVDC”), St. Francis Medical Center (“SFMC”), Verity Holdings, LLC (“Holdings”) and DePaul Ventures, LLC (“DePaul,” and collectively with VHS, SMC, SVMC, SVDC, SFMC, and Holdings, the “Institutional Defendants”), eight of seventeen debtors (collectively, the “Debtors”) in the above-captioned cases (the “Chapter 11 Cases”) proceeding under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the “Bankruptcy Code”),¹ hereby move (the “Motion”) for entry of an order, pursuant to Federal Rule of Civil Procedure (“Civil Rules”) 12(b)(6) incorporated by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”), dismissing the complaint in the above-captioned adversary proceeding (the “Complaint” or “Adversary Proceeding”) commenced by the California Nurses Association (“Plaintiff” or “CNA”), and as more fully set forth in the below Memorandum of Points and Authorities, and further supported by a joinder to the Motion filed separately by the individual defendants, Richard G. Adcock, Steven Sharrer and Does 1-500 (the “Individual Defendants”), assert as follows:

I.

INTRODUCTION

After the public refusal of Strategic Global Management, Inc. (“SGM”) to close the acquisition of the Debtors’ remaining hospital facilities in December 2019, the Debtors were compelled to pursue and take alternative actions and transactions. Among the most immediate actions was the closure approved by this Court in early January 2020 of SVMC and its on-campus dialysis center, SVDC (collectively, “St. Vincent”), a facility that had lost approximately \$65 million in 2019 alone.

Throughout this process, CNA received notice of all pleadings,² actively participated in

¹ Unless specified otherwise, all chapter, “§” and section references are to the Bankruptcy Code, and all “Bankruptcy Rule” references are to the Federal Rules of Bankruptcy Procedure.

² CNA filed a Notice of Appearance in the Bankruptcy Court on September 17, 2018, and has been receiving ECF service of all filings since then. *See Request for Judicial Notice (“RJN”), Ex. 1, Notice of Appearance and Request for Special Notice and Inclusion on Mailing List* [Docket

both its individual capacity as representative of nurses at St. Vincent (and other existing and previously Debtor-owned facilities) and as a member of the Official Committee of Unsecured Creditors (the “Committee”)³ in the Chapter 11 Cases, and was at all times aware of the potential closure of St. Vincent. CNA received notice of St. Vincent’s potential closure through various pleadings filed during 2019 and notice of the motion to close St. Vincent in January 2020, which CNA actively opposed. *See* RJN, Ex. 29, *Opposition to Debtors’ Emergency Motion for Authorization to Close St. Vincent Medical Center*, filed January 7, 2020 [Docket No. 3914] (“CNA Closure Objection”). It is also indisputable that upon St. Vincent’s closure, CNA-represented nurses received payment of all remaining wages for the period worked and unused administrative and priority period allowable paid time off (“PTO”).⁴

After St. Vincent’s closure, the Debtors engaged in bargaining with CNA and another union (“SEIU-UHW”) in order to terminate or otherwise modify the operative collective bargaining agreements (“CBAs”) and to resolve claims associated with the closure of St. Vincent. Those discussions resulted in a settlement with SEIU-UHW that was approved by this Court on an expedited basis. *See* RJN, Ex. 3, [Docket No. 4340].⁵

In contrast to SEIU-UHW, CNA commenced this Adversary Proceeding, which seeks relief under four counts. The first two counts are asserted under the Federal Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101 et seq. (the “WARN Act”) and the California WARN Act, California Labor Code §§ 1400-1408 (“Cal-WARN Act”, and collectively with the WARN Act, the “WARN Acts”) (Count I and Count II, respectively) against the Institutional

No. 200.] CNA has also filed a proof of claim in the Bankruptcy Cases against the Debtors. *See* RJN 4, [Docket No. 3604].

³ *See* RJN, Ex. 2, *Notice of Appointment of Committee of Creditors Holding Unsecured Claims* [Docket No. 197, Exhibit A].

⁴ Allowed priority wage and benefits claims are subject to the statutory priority cap under § 507(a)(4) and (5).

⁵ A full list of exhibits is provided in the *Defendants’ Request for Judicial Notice in Support of Their Motion to Dismiss Complaint Under Rule 12(b)(6), with Prejudice*, filed contemporaneously herewith. All citations to exhibits are with reference thereto.

Defendants. The remaining counts seek claims of “Intentional Misrepresentation by Concealment” and “Negligent Misrepresentation” (Count III and Count IV, respectively) against the Institutional Defendants, as well as two corporate individuals—Richard G. Adcock (Chief Executive Officer for VHS) and Steven Sharrer, Chief Human Resources Officer for VHS—and unnamed individuals labeled DOES 1 - 500. For damages, CNA seeks “civil penalties” (under the WARN Act), as well as “compensatory damages, including lost wages and employment benefits,” “damages for mental pain and anguish and emotional distress,” “punitive damages,” “interest” and “[t]reatment of all damages as first priority administrative expenses pursuant to 11 U.S.C. § 503(b)(1)(A)(i)-(ii)” (Compl., ¶¶ 119-22, 124-25). Such damages, which CNA seeks to have treated as “administrative” while unspecified in amount, undoubtedly exceed any unpaid administrative and priority severance claims CNA had previously agreed should be treated under an accrual method of calculation, with administrative and priority amounts paid after plan confirmation. *See* RJN, Ex. 4, *Debtors’ Omnibus Motion for Approval of 1) Settlement Agreements with Labor Unions, 2) Assumption and Assignment of Modified Collective Bargaining Agreements to SGM, 3) Termination of Retiree Healthcare Benefits and 4) Related Relief* [Docket No. 3604, ¶ 39].⁶

Leaving aside CNA’s blatant attempt, yet again, to elevate and expand what constitutes an administrative claim, while simultaneously seeking to punish Defendants for taking necessary actions to mitigate SGM’s failure to close, none of the Counts have merit and each should be dismissed with prejudice.⁷ CNA’s WARN Act claims fail for several reasons; although for the

⁶ That settlement was reached in connection with the CBA modification and assignment to SGM. By its terms, that settlement was rendered null and void by SGM’s failure to close the sale transaction. *See* RJN, Ex. 4 [Docket No. 3604, Ex. 1, ¶ 12] (“Terms of this Agreement shall be null and void in the event that 1) the Sale does not close[.]”) Although the settlement was rendered void, no agreement has been reached to accelerate the payment of administrative or priority severance prior to any plan effective date.

⁷ CNA objected to the Wage Motion (defined herein)—notwithstanding the fact that the Debtors unilaterally agreed to pay more than a million dollars in post-petition accruing pension contributions for active and unfrozen CNA-represented employees in 2018-2019—because the Wage Motion did not also seek to pay pre-petition pension related contributions. *See* RJN, Ex. 56 [Docket No. 223].

1 purposes of this Motion, the Defendants focus on one: due to the emergency closure of St.
2 Vincent, the Institutional Defendants constitute a “liquidating fiduciary” and are not employers
3 for purposes of the WARN Acts. The record before this Court provides all evidence necessary to
4 support this defense and, as such, Counts I and II should be dismissed with prejudice.

5 Likewise, the claims against the Institutional and Individual Defendants for alleged
6 “intentional” and “negligent” misrepresentation (Counts III and IV) are devoid of color and
7 should be dismissed with prejudice for at least two reasons. First, CNA lacks associational
8 standing to assert the intentional and negligent misrepresentation claims. Second, CNA fails to
9 allege the requisite elements to support either intentional misrepresentation or negligent
10 misrepresentation.

11 Further, it should be noted that although CNA has filed a motion in the District Court
12 seeking to withdraw the reference of this Adversary Proceeding, no stay has been sought, let
13 alone granted, and accordingly nothing prohibits this Court from making a determination of this
14 Motion.

15 For these and other reasons, the Court should dismiss the Adversary Proceeding, with
16 prejudice.

17 II.

18 **RELIEF REQUESTED**

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

22 III.

23 **JURISDICTION AND VENUE**

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

27 The statutory predicate for the relief requested herein is Civil Rule 12(b)(6), as made
28 applicable to adversary proceedings in bankruptcy courts by operation of Bankruptcy Rule

7012(b).

IV.

STATEMENT OF FACTS

A. General Background

1. On August 31, 2018 (the “Petition Date”), the Debtors each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

2. Debtor VHS, a California nonprofit public benefit corporation, is the sole corporate member of the other Debtor California nonprofit public benefit corporations that operated acute care hospitals and other facilities in the state of California. *See* RJN, Ex. 5, *Declaration of Richard G. Adcock in Support of Emergency First-Day Motions* [Docket No. 8] (the “First-Day Decl.”), ¶ 11.

3. From the outset of the Chapter 11 Cases, the Debtors emphasized that their vulnerable condition, caused by years of inherited legacy liabilities and generous employee benefits, state law demands and reimbursement and operational difficulties, necessitated the bankruptcy filing and the objective to transfer the hospitals as operating entities. *Id.* at ¶¶ 96-110, 139.

4. The Debtors incorporate the First-Day Decl. for further general background.

B. St. Vincent

5. SVMC was founded as the first hospital in Los Angeles in 1856. *Id.* at ¶ 34. In 1971, a new facility was constructed at the Hospital’s current location at 2131 West Third Street, Los Angeles, CA 90057. *Id.* The Hospital expanded to a 366 licensed bed, regional acute care, tertiary referral facility, specializing in cardiac care, cancer care, total joint and spine care, and multi-organ transplant services. *Id.* The Hospital served both local residents and residents from Los Angeles, San Bernardino, Riverside, and Orange Counties. *Id.* SVMC provided medical care for both inpatients (*i.e.*, patients who remain in the hospital for more than 24 hours) and outpatients (*i.e.*, patients who receive outpatient services, such as MRIs). *Id.* SVMC owns real property commonly known as: (i) 2131 W 3rd Street, Los Angeles, CA 90057, including the

1 hospital and all of the facilities located thereon; and (ii) vacant land in Salton Sea, California. *Id.*
2 at ¶ 23.

3 6. SVMC's campus had a dialysis center, SVDC, where SVMC's kidney disease
4 patients received dialysis services, including hemodialysis and isolated ultrafiltration treatments
5 as part of SVMC's end-stage renal disease program. *Id.* at ¶ 36. SVMC and SVDC had separate
6 corporate identities, and SVMC was the sole corporate member of SVDC. *Id.* Both SVMC and
7 SVDC were exempt from federal income taxation as an organization described in § 501(c)(3) of
8 the Internal Revenue Code of 1986. *Id.* at ¶ 21.

9 7. As of the Petition Date, St. Vincent employed approximately 1,099 employees, of
10 which 897 were full time, 42 were part time, and 160 were *per diem*. *Id.* at ¶ 59(f).

11 8. St. Vincent had consistently lost money for many years due to, among other
12 things, unfavorable payor contracts, rising health care costs, high pension obligations and certain
13 requirements imposed on SVMC by the Attorney General for the State of California (the
14 "Attorney General"). *See id.* at ¶¶ 95, 99. SVMC was also dramatically under-invested in
15 structural improvements necessary to meet California's state-mandated seismic and clean energy
16 requirements. *Id.*

17 9. While the Debtors collectively have a poor financial history, St. Vincent was
18 particularly troubled. *See* RJN, Ex. 44, *Declaration of Peter C. Chadwick in Support of Debtors'*
19 *Emergency Motion to Authorization to Close St. Vincent Medical Center* [Docket No. 3906], ¶ 6.
20 On the Petition Date, although SVMC accounted for approximately only 23% of the patient
21 volume of the entire Verity Health System, the hospital accounted for approximately 60% of the
22 operating losses. *Id.* Before closing SVMC, the Debtors projected continuing operating losses by
23 SVMC. Relevant reported financial statements reflect that, in fiscal year 2019 (ended June 30,
24 2019), it lost approximately \$65 million, which was an 18% and 103% increase over the fiscal
25 years 2018 and 2017, respectively. *Id.* at ¶ 8.

C. The CNA CBA And The Represented Employees

9. CNA represents employees at St. Vincent under a collective bargaining agreement. *See* RJN, Ex. 4, [Docket No. 3604].⁸ In addition to St. Vincent, CNA represents employees at SMC and previously represented employees at Saint Louise Regional Hospital and O'Connor Hospital (the latter two having been sold to Santa Clara County). Additionally, Defendants Holdings and DePaul have no employees and CNA has not at any relevant time represented employees at Defendant SFMC. *See* RJN, Ex. 4, [Docket No. 3604] (referencing Debtor facilities where CNA has represented employees).

10. On the Petition Date, the Debtors filed their *Emergency Motion Of Debtors For Entry Of Order: (I) Authorizing The Debtors To (A) Pay Prepetition Employee Wages And Salaries, And (B) Pay And Honor Employee Benefits And Other Workforce Obligations; And (II) Authorizing And Directing The Applicable Bank To Pay All Checks And Electronic Payment Requests Made By The Debtors Relating To The Foregoing; Memorandum Of Points And Authorities In Support Thereof* [Docket No. 22] (the "Wage Motion"), which requested authority to pay priority employee claims and to pay employees in the ordinary course of business for post-petition work. *See* RJN, Ex. 6. On October 22, 2018, this Court granted the Wage Motion⁹ and authorized the payment of priority and administrative wage and benefit claims, including for union-represented employees.¹⁰

⁸ In addition, CNA is party to other collective bargaining agreements with the Debtors, including a collective bargaining agreement with SMC, and a "Master" collective bargaining agreement with SMC and St. Vincent. *Id.*

⁹ *See Final Order Granting the [Debtors'] Emergency Motion of Debtors for Entry of Order: (I) Authorizing the Debtors to (A) Pay Prepetition Employee Wages and Salaries, and (B) Pay and Honor Employee Benefits and Other Workforce Obligations; and (II) Authorizing and Directing the Applicable Bank to Pay All Checks and Electronic Payment Requests Made by the Debtors Relating to the Foregoing* [Docket No. 612]; and concurrently issued *Memorandum of Decision (1) Overruling Objections to the (A) Prepetition Wages Motion and (B) Financing Motions and (2) Denying Motion for Reconsideration of the Final Financing Order* [Docket No. 614] (together, the "Wage Order"). *See* RJN, Exs. 7 & 8.

¹⁰ Unlike other labor unions, whose benefit accruals under certain defined pension plans were frozen as a function of the Wage Order, CNA continued to accrue new benefits under a large multiemployer pension plan (the RPHE), into which the Debtors received authority to make payments under a specified budget. [Docket No. 614, § I. B.].

D. Marketing and Sale Efforts

11. Prior to the Petition Date, the Debtors engaged in substantial efforts to market and solicit interest in their assets (collectively, the “Assets”). See RJN, Ex. 9, *Declaration of James M. Moloney in Support of the Debtors’ Memorandum in Support of Entry of an Order: (A) Authorizing the Sale of Property Free and Clear of All Claims, Liens and Encumbrances; (B) Authorizing the Assumption and Assignment of Designated Executory Contracts and Unexpired Leases; and (C) Granting Related Relief* [Docket No. 2220] (the “Moloney Sale Decl.”), at ¶ 4.

12. As part of these prepetition efforts, the Debtors engaged Cain Brothers, a division of KeyBanc Capital Markets (“Cain”), to assist in identifying potential buyers of some or all of the Assets and commenced discussions with those potential buyers. *Id.* at ¶¶ 1, 4. In that initial marketing process, Cain contacted more than 100 potential partners to evaluate their interest in exploring a transaction involving some or all of the Assets. *Id.* at ¶ 4. By August 2018, as a result of its ongoing and broad marketing process, Cain received 11 “Indications of Interest” from potential buyers of some or all of the Assets. *Id.*

13. Post-petition, the Debtors effectuated a sale of certain Assets to Santa Clara County, which was approved by this Court on December 27, 2018. See RJN, Ex. 10, [Docket No. 1153]. Thereafter, SGM emerged as a leading potential candidate to be selected as the stalking horse bidder for the Debtors’ remaining Assets. *Moloney Sale Decl.* at ¶ 6.

E. The Failed SGM Sale

14. The Debtors selected SGM as the stalking horse bidder (the “Stalking Horse Bidder”) for substantially all of the Debtors’ remaining Assets, including SVMC, and requested approval of the same (the “Sale and Bidding Procedures Motion”). See RJN, Ex. 59, [Docket No. 1279] at ¶ 22. On February 19, 2019, the Court held a hearing on the Sale and Bidding Procedures Motion and thereafter entered an order approving the Sale and Bidding Procedures Motion (the “Bidding Procedures Order”). See RJN, Ex. 11, [Docket No. 1572]. SGM served as the Stalking Horse Bidder under the terms of the Bidding Procedures Order. The Bidding Procedures Order also approved that certain asset purchase agreement [Docket No. 2305-1] (the “APA”) as modified therein. See RJN, Ex. 12.

15. On May 2, 2019, after briefing and a hearing, the Court entered the *Order (A) Authorizing The Sale Of Certain Of The Debtors' Assets To Strategic Global Management, Inc. Free And Clear Of Liens, Claims, Encumbrances, And Other Interests; (B) Approving The Assumption And Assignment Of An Unexpired Lease Related Thereto; And (C) Granting Related Relief* [Docket No. 2306] (the "Sale Order"), approving the sale to SGM pursuant to the APA (the "SGM Sale"). See RJN, Ex. 13.

16. One of the conditions to closing under the APA was (i) the approval by the Attorney General, pursuant to California Corporations Code § 5914 and title 11 of the California Code of Regulations, § 999.5, and (ii) that the Attorney General did not impose any conditions that were "materially different" than those set forth in Schedule 8.6 to the APA. APA, § 8.6. Under Section 8.6 of the APA, the APA also provided that SGM "shall reasonably cooperate in any efforts to render the Supplemental Sale Order a final, non-appealable order." *Id.*

17. In anticipation of the SGM Sale, on August 12, 2019, the Debtors sent a notice under the WARN Act (generally, a "WARN Notice") to CNA and each of its members (the "August 12, 2019 Notice") (Compl., Ex. 1) stating in relevant part:

This notice is being issued to you under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§2101 et seq. (the "WARN Act") and the California WARN Act, California Labor Code §§1400-1408 ("Cal-WARN Act"). The purpose of this notice is to inform you of the sale of St. Vincent Medical Center, located at 2131 West Third Street, Los Angeles, CA 90057 and St. Vincent Dialysis Center, located at 201 S. Alvarado St., Los Angeles, CA 90057 (together, "St. Vincent"). . . .

On April 17, 2019, the Bankruptcy Court entered an order approving the Sale.

In connection with the Sale, the Debtors will be separating the employment of all of St. Vincent's employees, which may result in an "employment loss" within the meaning of the WARN Act and the Cal-WARN Act. Under the Asset Purchase Agreement between the Debtors and the Purchaser, the Purchaser has agreed to make offers of employment to substantially all of St. Vincent's employees, subject to the other terms and conditions contained in such Asset Purchase Agreement.

The closing of the Sale is subject to certain regulatory and other

1 approvals and the satisfaction of certain other conditions agreed to
2 between the Debtors and the Purchaser. While the Debtors are
3 optimistic that the Sale will close, there is a possibility that the Sale
4 will be unsuccessful. In that event, St. Vincent may close and none
5 of its employees may be hired by the Purchaser. Even if the Sale
6 closes and St. Vincent remains open, employees at St. Vincent may
7 suffer an “employment loss” within the meaning of the WARN Act
and Cal-WARN Act because the Debtors will separate the
employment of all of St. Vincent's employees upon the closing of
the Sale. For those employees, if any, who are not hired by the
Purchaser, the employment loss is expected to be permanent.

8 (Compl., Ex. 1).

9 18. The August 12, 2019 Notice explained that “[b]ased on the best information
10 available to date, we believe the Sale and separations of employment will occur between October
11 18, 2019 and October 31, 2019.” *Id.*

12 19. On September 25, 2019, the Attorney General approved the SGM Sale, subject to
13 certain conditions that included additional conditions that were materially different than those
14 SGM contractually agreed to in Schedule 8.6 of the APA (the “2019 Conditions”). Accordingly,
15 the Debtors filed a motion that sought the entry of an order enforcing the Sale Order, finding that
16 the SGM Sale was free and clear of the 2019 Conditions, and limiting the SGM Sale to only those
17 conditions that SGM developed and then contractually agreed to in Schedule 8.6 of the APA (the
18 “Enforcement Motion”). *See* RJN, Ex. 14, [Docket No. 3188.] In support of the Enforcement
19 Motion, the Debtors filed a Declaration of CEO Richard Adcock, stating that the likely outcome
20 of SGM not closing the sale was that SVMC would likely close. *See* RJN, Ex. 14, [Docket No.
21 3188, p. 33] (“If the SGM Sale does not close, the most likely outcome is that at least three of the
22 Hospitals will have to close.” (emphasis added)).¹¹

23 20. On October 15, 2019, the Court held a hearing on the *Debtors’ Emergency Motion*
24 *for the Entry of an Order: (I) Enforcing the Order Authorizing the Sale to Strategic Global*
25 *Management, Inc; (II) Finding That the Sale is Free and Clear of Conditions Materially Different*
26 *Than Those Approved by the Court; (III) Finding That the Attorney General Abused His*

27 ¹¹ CNA indisputably had actual knowledge of this filing and, indeed, specifically referenced it in
28 its CNA Closure Objection, filed January 7, 2020 [Docket No. 3914, p. 3]. *See* RJN, Ex. 29.

1 *Discretion in Imposing Conditions on That Sale; and (IV) Granting Related Relief. See* RJN, Ex.
2 14, [Docket No. 3188, filed September 30, 2019]. Counsel for CNA appeared at the hearing,
3 during which the Court underscored the significance of the SGM Sale and the consequences to
4 employees if the SGM Sale fell through:

5 Ms. Skogstad: Good Morning, your Honor. Kyrsten Skogstad, in-
6 house counsel, on behalf of the California Nurses Association.

7 * * *

8 The Court: . . . This is the culmination of this case. We have at
9 some point a plan and disclosure statement hearing, but all of that
10 posits that we have a sale of the assets of this case. If we don't, it
11 makes no sense to have a plan and disclosure statement. So this is
12 the day and this is the hour. The sale is the linchpin of the plan.
13 So, without a sale, there's no point to going forward, and I reiterate
14 that because I'm not sure if all of the participants at this morning's
15 hearing fully appreciate what that means. If we don't have a plan
16 and disclosure statement that can be approved by the Court, then,
17 on the Court's own motion, or on a motion of an interested party,
18 the Court may dismiss the case, in which case I think that that
19 would spell a disaster for every party that is represented here this
20 morning.

21 * * *

22 More importantly, throughout another set of hearings with respect
23 to a sale to some other entity, with all of the time that would be
24 occasioned by that, there is no money to fund the continued
25 operations of the Debtor, which would inure to the detriment of
26 thousands of patients, thousands of employees, and not to mention
27 the creditors in the case.

28 *See* RJN, Ex. 15 (Oct. 15, 2019 Hr'g Tr. at 1:23-25, 4:15-5: 4, 6:15-21) (emphasis added).

21 21. In light of the status of the SGM Sale transaction, on October 23, 2019, the
22 Debtors issued a WARN extension notice ("October 23, 2019 Notice") (Compl., Ex. 2) stating, in
23 relevant part:

24 This notice is being provided in follow up to the August 12, 2019
25 notice you received under the Worker Adjustment and Retraining
26 Notification Act and the California WARN Act *advising that*
27 separations of employment would occur between October 18, 2019
28 and October 31, 2019.

The October 23, 2019 Notice also provided an update regarding the SGM Sale, stating:

The Agreement requires satisfaction of certain milestones to
complete the Sale. Not all of the milestones have been met.

Consequently, the separations of employment must be postponed and will not occur at the time originally anticipated. At this time, we anticipate the Sale and separations of employment will occur between **November 17, 2019 and November 30, 2019.**

We will continue to keep you apprised of any new developments and will provide you with updated information should circumstances change with respect to the Sale and the separations of employment.

(Compl., Ex. 2) (emphasis added).

22. On October 23, 2019, the Court issued a *Memorandum of Decision Granting the Debtors' Emergency Motion to Enforce the Sale Order*. See RJN, Ex. 16, [Docket No. 3446]. In the memorandum, the Court ruled for the Debtors on all issues, holding, among other things, that the Attorney General's conditions that were materially different than the conditions in Schedule 8.6 were not enforceable under the Bankruptcy Code and state law.

23. Thereafter, following negotiations, the Debtors and the Attorney General reached a *Stipulation Resolving "Debtors Emergency Motion for the Entry of an Order: (I) Enforcing the Sale Order Authorizing the Sale to Strategic Global Management, Inc.; (II) Finding That the Sale Is Free and Clear of Conditions Materially Different Than Those Approved by the Court; (III) Finding That the Attorney General Abused His Discretion in Imposing Conditions on That Sale; and (IV) Granting Related Relief"* [Docket No. 3572] and lodged a related order [Docket No. 3574]. See RJN, Exs. 17 & 18.

24. On November 11, 2019, SGM filed an objection to the proposed order, stating in relevant part:

While SGM remains fully committed to the transaction, fundamental to SGM's rights as a purchaser is the protection to which it is entitled under APA section 8.6 in the form of a clearly and unambiguously written order which forecloses, to the extent possible, any disputes or controversies as to SGM's protection from such Additional Conditions, its right not to comply with, perform or adhere to any of the Additional Conditions, and SGM's ability to come to this court if there are future disputes or controversies over the interpretation or enforcement of such order

* * *

Unfortunately, the AG's effort to avoid the precedential effect of

1 this Court's ruling has created an unnecessarily ambiguous order
2 which may actually result in litigation between the AG and SGM.
3 The AG's verbatim extraction of specific language from § 8.6,
4 while superficially appealing, is grammatically unartful. Whether
5 by design to obscure the outcome of the Court's ruling or simply
6 poor draftsmanship, the end result is an order that does not do
7 justice to, or fairly reflects, this Court's ruling and leaves SGM
8 open to litigation.

9 See RJN, Ex. 19, [Docket No. 3582 at pp. 3-4] (emphasis added).

10 25. On November 14, 2019, following a hearing, the Court issued an *Order Granting*
11 *"Debtors Emergency Motion for the Entry of an Order: (I) Enforcing the Order Authorizing the*
12 *Sale to Strategic Global Management, Inc.; (II) Finding That the Sale Is Free and Clear of*
13 *Conditions Materially Different Than Those Approved by the Court; (III) Finding That the*
14 *Attorney General Abused His Discretion in Imposing Conditions on That Sale; and (IV) Granting*
15 *Related Relief"* (the "Enforcement Order"). See RJN, Ex. 20, [Docket No. 3611]. The
16 Enforcement Order provided, in relevant part, that "the Additional Conditions (as defined in
17 Section 8.6 of that certain asset purchase agreement [Docket No. 2305-1] (the 'APA')) were an
18 'interest in property' for purposes of 11 U.S.C. § 363(f). The Assets (as defined in the APA)
19 were being sold free and clear of the Additional Conditions without the imposition of any other
20 conditions which would adversely affect the Purchaser (as defined in the APA)." [Docket No.
21 3611 at ¶ 3]. The findings in the Enforcement Order mirrored the findings required under the
22 APA.

23 26. APA Section 1.3 obligated SGM to close the sale "promptly but no later than ten
24 (10) business days following the satisfaction" of all conditions precedent. APA, § 1.3. On
25 November 18, 2019, the Court entered an order [Docket No. 3633] and related memorandum
26 [Docket No. 3632] finding that: "The Debtors have complied with their obligation under the
27 APA to obtain a final, nonappealable Supplemental Sale Order. Consequently, SGM is now
28 obligated to promptly close the SGM Sale, provided that all other conditions to closing have been
satisfied." See RJN, Exs. 21 and 22.

29 27. The conditions to close under the APA had been satisfied, and the transaction
30 should have promptly closed by December 5, 2019. *Id.* On November 18, 2019, however,

SGM's CEO, Peter Baronoff, contacted a Cain representative and stated that SGM could not obtain sufficient financing for the transaction, contrary to Section 3.9 of the APA. *See* RJN, Ex. 27, [Docket No. 3644 at ¶ 12]. That telephone call immediately resulted in the Debtors' request for an order [entered at Docket No. 3646] continuing the hearing on the Debtors' motion [Docket No. 2995] for approval of its disclosure statement [Docket No. 2994]. *See* RJN, Exs. 57 & 58. Specifically, on November 19, 2019, the Debtors filed a *Motion to (A) Continue Hearing on Motion of the Debtors for an Order Approving: (I) Proposed Disclosure Statement; (II) Solicitation and Voting Procedures; (III) Notice and Objection Procedures for Confirmation of Debtors' Plan, and (IV) Granting Related Relief; (B) Continue the Reply Deadline with Respect to Disclosure Statement Objections, and (C) Use the November 26, 2019, 10:00 a.m. Hearing Date for a Status Conference on This Matter.* *See* RJN, Ex. 27, [Docket No. 3644]. The Debtors' motion explained:

The [November 18, 2019] Order also provided that Strategic Global Management, Inc. ("SGM") was obligated to promptly close the SGM sale (the "SGM Sale"), provided that all other conditions have been satisfied. Despite the foregoing, there remains a significant amount of uncertainty regarding the SGM sale transaction. As of the last motion [Docket No. 3621] to continue the hearing on the Disclosure Statement Motion, the Debtors anticipated receiving formal correspondence from SGM that would be material to the sale transaction. The Debtors have yet to receive the correspondence, but have been informed that it is forthcoming. Further, since the Orders, SGM orally communicated new information that undermines the Debtors' confidence in a prompt closing of the sale.¹²

Id. at p. 2 (emphasis added).

28. Given the Debtors' understanding that the SGM Sale would not close by November 30, 2019 as anticipated, the Debtors issued a WARN extension notice on November 25, 2019 (the "November 25, 2019 Notice") (Compl., Ex. 3). This notice informed CNA and its members that "*the separations of employment will be further postponed* due to the circumstances noted below" and explained:

¹² CNA received and was aware of these filings and, indeed, specifically referenced one of them in its CNA Closure Objection [Docket No. 3914, p. 3].

The Debtors continue to work expeditiously for a prompt close of the Sale with SGM. For example, the Debtors obtained an order from the court regarding the Attorney General conditions and reached a settlement with the U.S. Department of Health and Human Services. We are notifying you that we anticipate the Sale and *separations of employment will occur* between **December 6, 2019 and December 19, 2019**.

We will keep you apprised with respect to the Sale and the separations of employment.

Id. (emphasis added).

29. On November 25, SGM filed a Reservation of Rights, alleging (among other things) that “there are genuine disputes of material fact as to the [sic] whether there have been Material Adverse Effects under the terms of the APA.” *See* RJN, Ex. 30, [Docket No. 3701 at p. 6]. SGM’s Reservation of Rights further stated:

On November 22, 2019, SGM, through counsel, delivered two letters to Verity . . . In the SGM Letters, SGM notified Verity that Verity had breached a number of material covenants, representations, warranties and conditions, as a result of which there had occurred and would continue to occur “Material Adverse Effects” as that term is used throughout the APA.

* * *

[...] SGM is desirous of proceeding with the transaction reflected in the APA. However, the significant and material issues which have emerged and which are set forth in SGM’s Letter of November 22, 2019, must be addressed and resolved. SGM believes that the most effective mechanism to resolve these issues is not to rush to Court on an expedited and profoundly unfair process. Rather, it would be more productive for SGM to meet and confer with Verity and the other stakeholders, including the secured lenders and the Unsecured Creditors Committee, to see if the transaction can be salvaged and closed without the necessity of litigation.

Id. at pp. 2-3, 9-10.

30. In response, the Debtors submitted to the Court SGM’s November 22, 2019 Letters under seal. *See* RJN, Exs. 31 & 32, [Docket Nos. 3697 & 3699]. On the same date, SGM filed an *Objection to Debtor’s Ex Parte Motion for an Order Allowing the Debtors to File Correspondence Regarding the SGM Sale Under Seal*, stating:

[C]ertain disputes and controversies have arisen between SGM and the Debtors with regard to the APA and, as a result of the

1 emergence of those issues, the parties have exchanged letters; the
2 Debtor's letter to SGM dated November 19, 2019 and SGM's letter
to the Debtors dated November 22, 2019.

3 See RJN, Ex. 33, [Docket No. 3698 at p. 2].

4 31. On November 26, 2019, the Court held a Status Conference, at which the Court
5 rejected SGM's arguments, stating (among other things) that "[a]s far as the Court is concerned"
6 SGM is the "proud owner" of the Debtors' assets as set forth in the APA, and that SGM "has an
7 obligation to close" the transaction pursuant to the APA. See RJN, Ex. 34, [Nov. 26, 2019 Hr'g
8 Tr. at 12:22-24, 14:10-11]. Additionally, at the Status Conference, the Debtors announced that
9 they had reached a settlement agreement in principle with the California Department of Health
10 Care Services ("DHCS") on November 22, 2019 ("DHCS Settlement"), given SGM's objection
11 to the sufficiency of the Court's prior Orders regarding DHCS. [*Id.* at 10:17-24.]

12 32. On November 27, 2019, the Court issued an Order finding that, "[p]ursuant to §
13 1.3 of the APA, SGM is obligated to close the SGM Sale by no later than December 5, 2019"
14 ("Closing Order"). See RJN, Ex. 35, [Docket No. 3724]. The Memorandum Decision supporting
15 the Closing Order concluded, among other things, that (i) "Adjudication of SGM's Obligations
16 Under the APA Does Not Require an Adversary Proceeding," (ii) "Adjudication of SGM's
17 Obligations Under the APA Is Not Premature," (iii) "SGM Is Not Entitled to Appeal the Court's
18 Determination Regarding a Material Adverse Effect," (iv) "No Material Adverse Effect Has
19 Occurred," (v) "All Conditions Precedent to Closing Have Been Satisfied." See RJN, Ex. 36,
20 [Docket No. 3723]. The Court further concluded that:

21 SGM's contention that it is not obligated to close is a cynical
22 attempt to extract a better purchase price. A key component of
23 SGM's negotiation strategy is its attempt to delay as long as
the adjudication of its obligations under the APA. The
24 Court will not facilitate SGM's dubious tactics.

* * *

25 By presenting non-meritorious arguments as to why it is not
26 obligated to close, SGM is holding the estates, creditors, and
27 patients of the Hospitals hostage in an attempt to extort a better
28 purchase price. SGM's cynical tactics are especially offensive
given the significant harm that closure of the Hospitals would
impose upon patients. For example, two of the Hospitals that

1 would likely close upon failure of the SGM Sale contain large
2 populations of long-term patients suffering from severe illnesses,
all of whom would have to be relocated to other facilities.

3 *Id.*, pp. 4, 6-7 (emphasis added).

4 33. On November 29, 2019, SGM filed two notices of appeal [Docket Nos. 3726 &
5 3727] related to (i) the order granting the Enforcement Motion [Docket No. 3611], and (ii) the
6 order finding that SGM is obligated to promptly close the transaction under Section 8.6 of the
7 APA provided all other conditions to closing are satisfied [Docket No. 3633]. *See* RJN, Exs. 20
8 & 21.

9 34. SGM failed to close the SGM Sale by December 5, 2019, as ordered by the Court.
10 Accordingly, on December 6, the Debtors filed an *Emergency Motion for (I) Issuance of an Order*
11 *to Show Cause Why Strategic Global Management, Inc. Failed to Close the Sale Transaction by*
12 *December 5, 2019; and (II) Entry of an Order Enforcing Prior Court Orders Requiring Strategic*
13 *Global Management, Inc. to Close the Sale Transaction by December 5, 2019.* *See* RJN, Ex. 39,
14 [Docket No. 3773] (the “Emergency Motion”). The Emergency Motion explained that SGM had
15 failed to close the SGM Sale and SGM’s conduct suggested it lacked the financial wherewithal to
16 do so. Specifically, the motion stated that, “[o]n November 19, 2019, SGM’s CEO, Peter
17 Baronoff, telephoned the Debtors’ investment banker and stated that SGM could not obtain
18 sufficient financing for the transaction,” and explained:

19 Despite the clear requirements of the APA and in direct
20 contravention of this Court’s prior Orders, SGM announced that it
21 would not close the SGM Sale—and, then, did not close the SGM
22 Sale—by December 5, 2019. In a transparent attempt to delay this
23 proceeding, frustrate the Debtors’ ability to transfer the Hospitals
pursuant to the APA, and manufacture a context to renegotiate the
purchase price under the APA, SGM has filed three frivolous
appeals

24 * * *

25 SGM has intentionally frustrated the closing process by refusing to
26 participate. In addition to announcing that it would not close the
27 SGM Sale on December 5, as ordered by the Court, throughout the
28 week leading up to the filing of this Motion, SGM has refused to
participate in the regular, pre-scheduled joint closing calls and
operational transition calls, apparently based on the advice of its
counsel.

* * *

Given the actions and inactions of SGM over the past month, which suggest SGM lacks the financial ability to close the SGM Sale, the Debtors have made repeated and direct requests that SGM state whether it has the financial ability to close the SGM Sale, and whether it intends to do so. SGM has refused to respond, attempting to distract from its apparent financial inability to perform and seeking to preserve the ability to argue at some later date that the Debtors breached the APA by deciding prematurely to distribute their assets in a different manner, i.e. “Plan B” as it was referred to during the November 26, 2019, status conference.

Id. at pp. 2-3, 6 (emphasis added).

35. The Emergency Motion asked the Court to find SGM in material breach of the APA by failing to close the SGM Sale on December 5, 2019, and order SGM and its principals, to appear in this Court, on December 11, 2019, at 10:00 a.m., and show cause as to why SGM failed to comply with this Court’s Order and close the SGM Sale by December 5, 2019, including, but not limited to, stating whether SGM has the financial ability to proceed with this transaction in accordance with the APA, and whether it intends to close the transaction. [Docket No. 3773].

36. By Order dated December 9, 2019, the Court denied the Emergency Motion, explaining:

Requiring SGM’s representatives to testify as to SGM’s reasons for not closing the SGM Sale would not increase the likelihood of the sale actually closing. By failing to close, SGM risks the loss of its \$30 million good-faith deposit as well as the possibility of damages for breach of contract in an amount of up to \$60 million. Being compelled to offer testimony will not motivate SGM to close where the threat of the loss of up to \$90 million has failed to accomplish that end. In the future, the Debtors will have the opportunity to litigate the issues of whether SGM has breached the APA and whether the Debtors are entitled to retain SGM’s good-faith deposit. In the meantime, the Debtors’ efforts would be better spent ensuring the health and safety of the patients at the affected Hospitals.

The prompt closing of the SGM Sale would be in the best interests of all constituents in these cases, and the Court remains hopeful that SGM will fulfill its obligation to close. However, the estates’ precarious cash position requires that the Debtors have the ability to immediately explore options for the alternative disposition of the Hospitals. The Court finds that any efforts undertaken by the Debtors with respect to the alternative disposition of the Hospitals will not violate the Debtors’ obligation under Article 12.1 of the

APA to cooperate with SGM to consummate the SGM Sale; nor shall any such efforts constitute a material default by the Debtors under any other provision of the APA.

See RJN, Ex. 40, [Docket No. 3783 at pp. 2-3] (emphasis added).

37. The potential implications of SGM's actual and threatened conduct was clear to CNA and hospital employees. On December 10, 2019, the Medical Staff of Seton Medical Center filed an Expression of Concern, stating: "The Medical Staff of Seton Medical Center hereby expresses its profound concern over the delay in the closing of the sale." See RJN, Ex. 41, [Docket No. 3790]. The pleading was served on CNA [Docket No. 3790, Proof of Service], and attached a letter sent to the CEOs of SGM and Verity, stating:

On or about November 15th, 2019, VHS sent the attached letter to approximately 1,000 nurses and ancillary staff at Seton, terminating them and inviting them to retrieve their severance packages on December 2, 2019 (the "Severance Letter"). It was originally assumed that the Severance Letter would be coupled with an employment offer from SGM, but SGM has been very slow to make just a few offers, and so the only definitive statement that has been received by the vast majority of Seton's 1,000 nurses is VHS's Severance Letter, terminating them as of December 2, 2019.

* * *

The uncertainty about whether the Buyer will perform has caused 6 nurses to leave the Emergency Room, severely reducing its ability to function. The majority of the nurses in the Intensive Care Unit have accepted jobs elsewhere over the last three weeks [...]

See RJN, Ex. 41 (emphasis added).

38. The following day, the Committee, of which CNA is a member, filed its own Expression of Concern, stating that it "shares the concerns of the Medical Staff of Seton Medical Center and urges SGM to promptly close the sale[.]" See RJN, Ex. 42, [Docket No. 3803]. This pleading was also served on CNA. [Docket No. 3803, Proof of Service].

39. On December 18, 2019, in follow-up to the November 25, 2019 Notice advising that separations of employment would occur on December 19, 2019, the Debtors advised St. Vincent employees via email that "KPC Group . . . failed to close the sale transaction, as ordered by the Bankruptcy Court" and notified them that "your employment will NOT end on December 19, 2019, as we had anticipated." (Compl., Ex. 4).

40. As a result of SGM’s wrongful conduct regarding the SGM Sale, on January 3, 2020, certain of the Debtors filed a complaint for breach of contract, promissory fraud and tortious breach of contract, thereby commencing an adversary proceeding against SGM, among others. *See* RJN, Ex. 43, [Adv. P. No. 20-01001, Docket No. 1].

41. Left with no other choice, on January 6, 2020, the Debtors filed their *Emergency Motion for Authorization to Close St. Vincent Medical Center* (the “Closure Motion”), under which the Debtors sought authorization to close St. Vincent (the “Closure”), pursuant to a “Closure Plan” (as defined in the Closure Motion). *See* RJN, Ex. 44, [Docket No. 3906]. On January 7, 2020, CNA filed the CNA Closure Objection. *See* RJN, Ex. 29, [Docket No. 3914]. In the CNA Closure Objection and at the hearing held on the Closure Motion, CNA argued that improper notice had been given and that the Closure was not necessary because of a potential sale or recovery from SGM. *Id.*

42. On January 9, 2020, the Court granted the Closure Motion, overruled the CNA Closure Objection, and authorized the Closure Plan. *See* RJN, Ex. 45, [Docket No. 3934]. The Court explained this order through a memorandum decision (the “Closure Decision”), where the Court found:

- a. “Upon initiation of the Closure Plan, St. Vincent will enter the process of liquidation and will no longer be an operating business.” Closure Decision, at 5. (Emphasis added).
- b. “Premature publication of notice of closure would have harmed employee retention and morale, confused patients, and caused vendors to cease furnishing critical supplies. These serious harms would have undercut the central objective of the § 363 sale process—providing the Debtors the opportunity to realize the optimal value of their assets.” *Id.*
- c. “The Debtors have articulated a sufficient business justification for closing St. Vincent.” *Id.* at 7.
- d. “No buyer has presented a realistic bid to purchase St. Vincent as a stand-alone hospital.” *Id.*

1 e. “St. Vincent is generating substantial operating losses. As of the Petition Date, St.
2 Vincent accounted for approximately 23% of the patient volume of the entire
3 Verity Health System, but was responsible for 60% of the operating losses . . . [and
4 that the] Debtors lack sufficient funds to continue to subsidize St. Vincent’s
5 operating losses. Absent the closure of St. Vincent, the Debtors will be unable to
6 continue operating their other hospitals. Chadwick Decl. at ¶ 9.” *Id.*

7 f. “The speculative possibility of a future cash infusion based upon SGM’s alleged
8 breach is not a solution to St. Vincent’s current funding crisis. Nor is pursuing a
9 sale, another alternative suggested by CNA.” *Id.* at 8.

10 *See* RJN, Ex. 46, [Docket No. 3933].

11 43. Immediately after the Court’s order, entered on January 9, 2020, approving the
12 closure of St. Vincent, the Debtors provided yet another WARN Notice, dated January 10, 2020,
13 to CNA and its members (the “January 10, 2020 Notice”) (Compl., Ex. 5). This notice informed
14 Plaintiff’s “of the permanent closure of St. Vincent Medical Center . . . and St. Vincent Dialysis
15 Center” and explained:

16 We know that you were aware of the separations of employment at
17 St. Vincent based on the prior WARN notice you received. We had
18 hoped there would be an opportunity for continued employment
19 with SGM when the sale closed. In light of the unforeseen
20 circumstances relating to the sale and the unexpected need to close
St. Vincent as a last resort, this additional WARN notice is being
provided to you as soon as practicable after the Order.

21 (Compl., Ex. 5).

22 44. The Debtors have now substantially implemented the Closure Plan, as described
23 more fully in their status reports: *Status Report Re Closure Of St. Vincent Medical Center*, dated
24 January 23, 2020, *see* RJN, Ex. 47, [Docket No. 3982]; *Debtors’ Status Report Re Closure of St.*
25 *Vincent Medical Center*, dated February 6, 2020, *see* RJN, Ex. 48, [Docket No. 4053]; *Debtors’*
26 *Status Report Re Closure of St. Vincent Medical Center*, dated February 20, 2020, *see* RJN, Ex.
27 49, [Docket No. 4126]; *Debtors’ Status Report Re Closure of St. Vincent Medical Center*, dated
28 April 2, 2020, *see* RJN, Ex. 50, [Docket No. 4410]. *See* RJN, Ex. 51, [Docket No. 4265, ¶ 6]

1 *Declaration of Richard G. Adcock In Support of Debtors' Motion for Approval of Settlement*
2 *Agreement with SEIU-UHW Related to the Closure of St. Vincent Medical Center, Including*
3 *Allowance of Certain Claims and Consensual Modification of the Applicable Collective*
4 *Bargaining Agreement.*

5 45. The Debtors' management team, however, has worked to create opportunities for
6 the affected employees, including arranging for approximately 61 different healthcare
7 organizations to participate in on-site job fairs, where hundreds of employees received offers on
8 the spot or within days of the job fair. *Id.* at ¶ 7. In addition, affiliate and Defendant SFMC has
9 made employment offers to approximately 50 employees from St. Vincent. *Id.*

10 V.

11 ARGUMENT

12 Civil Rule 12(b)(6), as made applicable to adversary proceedings in bankruptcy cases by
13 Bankruptcy Rule 7012(b), allows a court to dismiss a complaint for "failure to state a claim upon
14 which relief can be granted." The Bankruptcy Court may dismiss a complaint based on either
15 "the lack of a cognizable theory or the absence of sufficient facts alleged under a cognizable legal
16 theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). In reviewing a
17 motion to dismiss in an adversary proceeding, the Bankruptcy Court can take judicial notice of
18 court documents from the underlying bankruptcy case and documents incorporated by reference
19 in the Complaint. *See e.g., United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (providing
20 that the court may consider documents incorporated by reference in complaint, such as those that
21 form the basis of the plaintiff's claims); *In re Century City Doctors Hosp., LLC*, BAP No. CC-09-
22 1235-MkJaD, 2010 WL 6452903, at *6 (B.A.P. 9th Cir. Oct. 29, 2010) ("[C]ourt documents filed
23 in an underlying bankruptcy case are subject to judicial notice in related adversary
24 proceedings[.]"). The Court should dismiss a complaint without leave to amend when
25 amendment cannot cure the deficiencies in the complaint. *See e.g., Cervantes v. Countrywide*
26 *Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011).

27 Here, the law and facts as alleged in the Complaint and supported in the existing
28 Bankruptcy Court record demonstrate that the Complaint fails to state a claim upon which relief

1 can be granted and the defect is so pronounced that dismissal should be granted with prejudice.

2 **A. Neither the WARN Act nor the California WARN Act Applies to Defendants as**
3 **Liquidating Fiduciaries**

4 The Complaint is predicated on CNA's assertion that notwithstanding service of multiple
5 WARN Notices prior to the motion seeking St. Vincent's closure, its represented employees
6 should be entitled to 60 days of additional wages plus other damages, even though they were
7 terminated after the Closure Motion was granted and the Debtors were liquidating St. Vincent at
8 that time. *See* RJN Ex. 46. While the Debtors are prepared to challenge CNA's narrow reading
9 of the WARN Act if ultimately necessary, CNA's position is irrelevant to the Motion and need
10 not be addressed now to dispose of the Complaint with prejudice. This is because the WARN Act
11 claims fail because the Debtors were liquidating fiduciaries as to St. Vincent at the time of the
12 terminations and were thus not "employers" subject to the WARN Acts.¹³

13 The liquidating fiduciary exception "reflects a limitation on the statutory definition of
14 employer." *Century City Doctors Hosp.*, 2010 WL 6452903, at *8. The WARN Acts only
15 require "employers" to give notice of plant closings and mass layoffs. 29 U.S.C. § 2102(a); Cal.
16 Labor Code. §1401(a). The WARN Act defines "employer" as "any *business enterprise* that
17 employs" the requisite number of employees. 29 U.S.C. § 2101(a)(1) (emphasis added). In turn,
18 a "business enterprise" is a business that operates "in the normal commercial sense" "as a going
19 concern." *Chauffeurs, Sales Drivers, Warehousemen & Helpers Union Local 572 v. Weslock*

20 ¹³ CNA has named DePaul and Holdings as Defendants in its Complaint. Neither of these
21 Defendants have any employees and therefore are not subject to the WARN Acts. 29 U.S.C. §
22 2102(a); Cal. Labor Code §1401; *see also* RJN, Ex. 5 at ¶¶ 58-59; Compl. ¶ 120. Likewise
23 SFMC, which CNA seeks to include as a Defendant, cannot be subject to liability for alleged
24 WARN damages under the Complaint because CNA does not represent employees at SFMC and
25 SFMC is not otherwise a party to a CBA that covers employees at SVMC. First Day Decl., ¶ 60
26 ("The Debtors' Employees are represented by the following unions with the respective
27 contractual obligation . . . (v) 'C[NA] (Nurses) St. Vincent, O'Connor, St. Louise, Seton, Seton
28 Coastside . . . [SFMC not included]; *see also* RJN, Ex. 4, Exhibit 1 to *Debtors' Omnibus Motion*
for Approval of 1) Settlement Agreements with Labor Unions, 2) Assumption and Assignment of
Modified Collective Bargaining Agreements to SGM, 3) Termination of Retiree Healthcare
Benefits and 4) Related Relief [Docket No. 3604] (notes CBAs to which CNA is a party and does
not include SFMC); *see also* 29 U.S.C. § 2102(a) (Written notice of plant closing by employer to
be provided "to each representative of the affected employees...." (Emphasis added).

1 *Corp.*, 66 F.3d 241, 244 (9th Cir. 1995) (discussing the Department of Labor’s comments on the
2 final WARN Act regulations at 54 Fed. Reg. 16,045 (1989)). An entity does not qualify as a
3 business enterprise, and thus is not an employer, if it operates for the purpose of preserving or
4 liquidating assets for creditors. Fed. Reg. 16045 (1989) (“[A] fiduciary whose sole function in
5 the bankruptcy process is to liquidate a failed business for the benefit of creditors does not
6 succeed to the notice obligations of the former employer because the fiduciary is not operating a
7 “business enterprise” in the normal commercial sense.”); *Weslock Corp.*, 66 F.3d at 244; *see also*
8 *Century City Doctors Hosp.*, 2010 WL 6452903, at *1, 6 (trustee was not an employer where the
9 trustee was authorized to operate hospital temporarily and for sole purpose of closing the
10 hospital’s operations in a safe manner); *In re United Healthcare Sys., Inc.*, 200 F.3d 170, 176-79
11 (3d Cir. 1999) (hospital in Chapter 11 bankruptcy did not qualify as employer because it “was
12 operating not as a ‘business operating as a going concern,’ but rather as a business liquidating its
13 affairs”). The same analysis has been applied to determine “employer” status under the
14 California WARN Act. *Estrada v. Salyer Am.*, No. C 09-05618 JW, 2010 WL 11580074, at *5
15 (N.D. Cal. Mar. 31, 2010) (holding “absent any conflicting state law, the Court applies the
16 *Chauffeurs* standard to determine whether a secured creditor is an employer for purposes of
17 liability” and finding defendants could not be held liable as employers under the California
18 WARN Act).

19 On January 9, 2020, the Court granted the Debtors’ emergency motion to close St.
20 Vincent. *See* RJN, Ex. 45, [Docket No. 3934]. From that moment on, St. Vincent was no longer
21 being operated as a “going concern” but rather for the sole purposes of safely discharging patients
22 and preserving the remaining hospital assets for the bankruptcy estate. (*See* RJN, Ex. 46 [Docket
23 No. 3933] Closure Decision at 5 (“Upon initiation of the Closure Plan, St. Vincent will enter the
24 process of liquidation and will no longer be an operating business.”)). Critically, the relevant
25 time period for analyzing when the liquidating fiduciary exception applies is “at the time of the
26 plant closing or mass layoff.” *See, e.g., Chauffeurs*, 66 F.3d at 244 (“[T]he crucial question is not
27 the status of the defendant’s legal relationship to the business, but instead, if *at the time of the*
28 *plant closing* or mass layoff the defendant is responsible for operating the business as a going

concern.”) (emphasis added); *Century City Doctors Hosp.*, 2010 WL 6452903, at *7 (relevant time period is “at the time of the terminations”); *In re MF Glob. Holdings Ltd.*, 481 B.R. 268, 283 (Bankr. S.D.N.Y. 2012) (key question was “whether the Debtors were liquidating or attempting to reorganize *when the layoffs occurred*”) (emphasis added); *see also Estrada v. Salyer Am.*, No. C 09-05618 JW, 2010 WL 11580074, at *3 (N.D. Cal. Mar. 31, 2010) (same).

Here, Defendants were liquidating St. Vincent at the time of the layoffs and were thus exempt from both the Federal and California WARN Acts. *See* RJN Ex. 46, Closure Order at 5 [Docket No. 3933]. For these reasons, the Federal and California WARN Act counts I and II should be dismissed with prejudice.¹⁴

B. CNA Fails to State Claims for Intentional and Negligent Misrepresentation

Counts III and IV, which seek damages for intentional and negligent misrepresentation, should also be summarily dismissed with prejudice. Dismissal is justified because CNA lacks associational standing and has failed and cannot otherwise allege adequate facts to support either theory of misrepresentation.¹⁵

¹⁴ Even assuming arguendo that Federal and California WARN Act claims were to survive this Motion (which they should not), such claims should only be afforded general unsecured, not administrative, status, as St. Vincent was liquidating at the time the claims accrued. *See Reading v. Brown*, 391 U.S. 471 (1968) (providing that tort claims arising from the *continued operation* of a business enterprise in a chapter 11 proceeding are entitled to administrative priority) (emphasis added); *In re 800Ideas.com, Inc.*, 496 B.R. 165, 178 (B.A.P. 9th Cir. 2013) (concluding that Reading did not apply when the “[t]rustee was not operating the business of debtor under the common meaning of the term”); *In re Res. Tech. Corp.*, 662 F.3d 472, 476-77 (7th Cir. 2011) (providing that when a debtor has ceased to operate as a business, and instead exists to liquidate, a tort claim is entitled to unsecured, not administrative status).

¹⁵ Notably, CNA has filed two unfair labor practice charges with the National Labor Relations Board (“NLRB”) over the same conduct it alleges in its complaint constituted misrepresentation under state law. On January 31, 2020, CNA filed Charge 31-CA-255580, which it amended on March 20, 2020, alleging that Defendants “failed to provide CNA with adequate advance notice of [the SVMC] closure to allow for meaningful effects bargaining” and “refused to engage in effects bargaining” in violation of Section 8(a)(5)” of the NLRA. *See* RJN, Ex. 52. On February 21, 2020, CNA filed Charge 31-CA-256890 alleging that Defendants “engaged in bad faith bargaining” regarding “the effects of the closure of St. Vincent Medical Center in violation of section 8(a)(5)” of the NLRA during “the last six months.” RJN, Ex. 54. Thus, CNA seeks two shots at recovery for the same conduct--state law tort remedies and federal labor law remedies.

1 **1. CNA Lacks Associational Standing to Assert the Intentional and Negligent**
2 **Misrepresentation Claims**

3 A court should dismiss an action if it finds that the moving party lacks standing. *Warth v.*
4 *Seldin*, 422 U.S. 490, 498 (1975) (“In essence the question of standing is whether the litigant is
5 entitled to have the court decide the merits of the dispute or of particular issues.”). CNA cannot
6 meet its burden to show that it has standing to pursue the state law tort claims. *See, e.g., Lujan v.*
7 *Def. of Wildlife*, 504 U.S. 555, 561 (1992) (“The party invoking federal jurisdiction bears the
8 burden of establishing these [standing] elements.”). For an association to have standing to sue on
9 its members’ behalf, it must meet three requirements:

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

15 *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977); *Am. Diabetes Ass’n v.*
16 *U.S. Dep’t of the Army*, 938 F.3d 1147, 1155 (9th Cir. 2019); *Bhd. of Teamsters & Auto Truck*
17 *Drivers v. Unemployment Ins. Appeals Bd.*, 190 Cal. App. 3d 1515, 1522 (1987) (applying *Hunt*
18 standing requirements under California law).

19 The Supreme Court has held that the third requirement means that an association may not
20 seek damages for its members when “damages claims are not common to the entire membership,
21 nor shared by all in equal degree.” *Warth*, 422 U.S. at 515. “The courts that have addressed this
22 issue have consistently held that claims for monetary relief necessarily involve individualized
23 proof and thus the individual participation of association members, thereby running afoul of the
24 third prong of the *Hunt* test.” *United Union of Roofers, Waterproofers, & Allied Trades No. 40 v.*
25 *Ins. Corp. of Am.*, 919 F.2d 1398, 1400-01 (9th Cir. 1990) (“[T]he requirements for associational
26 standing under California and federal law are nearly identical.”). Indeed, courts have routinely
27 held that unions do not have associational standing to pursue claims for monetary relief on behalf
28 of their members. *See e.g. Lake Mohave Boat Owners Ass’n v. Nat’l Park Serv.*, 78 F.3d 1360,
1367 (9th Cir. 1995) (“Awarding restitution to LMBOA on behalf of its members would require
individualized proof[]” and “[t]herefore, LMBOA lacks standing to bring a claim for this remedy

on behalf of its members.”); *SEIU, Local 721 v. Cty. of Riverside*, No. EDCV 09-00561-VAP (JTLx), *Carpenters* (C.D. Cal. Apr. 27, 2011) (union lacked standing to pursue money damages on behalf of its members); *United Bhd. of Carpenters & Joiners of Am. v. Metal Trades Dep’t*, No. 11-CV-5159-TOR, 2012 WL 3817789, at *2-3 (E.D. Wash. Sep. 4, 2012) (union lacked standing to pursue monetary relief on behalf of members because such claims “require the participation of individual members”).

Here, CNA’s state law claims for intentional and negligent misrepresentation seek monetary damages, including, among others, damages for mental pain and anguish and emotional distress, on behalf of its nurse-members. These damages claims necessarily require the participation of individual nurses to determine their mental pain and anguish and emotional distress, which are necessarily individualized. (Compl., ¶¶ 114-15). Likewise damages for lost wages will depend on the individual nurse members’ wage rates.

Because CNA seeks damages on behalf of the CNA nurse-members including damages for mental pain and anguish and emotional distress, which are highly individualized, CNA lacks associational standing to bring the state law intentional and negligent misrepresentation claims on behalf of its members.

2. CNA’s Claim for Intentional Misrepresentation Fails

Fraud must be alleged with particularity under Civil Rule 9(b), which requires a plaintiff to plead the “who, what, when, where, and how” of the alleged misconduct. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). “State law causes of action brought in federal court must comply with these heightened pleading requirements where applicable.” *Yamauchi v. Cotterman*, 84 F. Supp. 3d 993, 1018 (N.D. Cal. 2015) (citing Fed. R. Civ. P. 9(b)). The specificity requirement is even more stringent for fraud claims against a corporation: “When pleading fraud against a corporation, a plaintiff must allege the name (or names) of the person(s) who made the representations, along with ‘their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.’” *Livermore v. Wells Fargo Bank*, Case No. 17-cv-03347-BLF, 2017 WL 6513649, at *9 (N.D. Cal. Dec. 20, 2017) (citing *Tarmann v. State Farm Mut. Auto Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991)); *Land v. Gonsalves*, 281 F.R.D. 444,

451 (E.D. Cal. 2012).

“The elements of fraud, which give[] rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.” *L.A. Mem’l Coliseum Com. v. Insomniac, Inc.*, 233 Cal. App. 4th 803, 831 (2015); *see also GemCap Lending, LLC v. Quarles & Brady, LLP*, 269 F. Supp. 3d 1007, 1040 (C.D. Cal. 2017), *aff’d sub nom. GemCap Lending I, LLC v. Quarles & Brady, LLP*, 787 F. App’x 369 (9th Cir. 2019) (elements of a claim of concealment include: “(1) concealment of a material fact; (2) duty to disclose the fact; (3) intent to defraud; (4) the plaintiff was unaware of the fact and would have acted differently if the plaintiff knew; and (5) resulting damage.”); *Punian v. Gillette Co.*, No. 14-CV-05028-LHK, 2016 WL 1029607, at *10 (N.D. Cal. Mar. 15, 2016) (same). “To maintain a cause of action for fraud through nondisclosure or concealment of facts, there must be allegations demonstrating that the defendant was under a legal duty to disclose those facts.” *L.A. Mem’l Coliseum*, 233 Cal. App. 4th at 831.

Here, CNA’s intentional misrepresentation claim fails because they have not alleged (1) an intentional misrepresentation or concealment of fact, (2) a duty to disclose, and (3) detrimental reliance. The record in this case prevents them doing so.

a. CNA Fails To Allege An Intentional Misrepresentation

To state a claim for fraud, a plaintiff must identify a specific factual representation made by the defendant and “set forth what is false or misleading about [the] statement, and why it is false.” *Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1085 (N.D. Cal. 2017) (emphasis added). CNA fails to meet this standard.

Here, the only alleged misrepresentation is a misquoted email from Richard Adcock. Specifically, in Paragraph 103 of their Complaint, CNA alleges that Mr. Adcock sent an email stating that “the nurses’ employment would ‘NOT’ end.” (Compl., ¶ 103). CNA alleges that, as a result, the nurses believed their “employment at St. Vincent was likely to continue even though the sale to SGM had not occurred as ordered.” (Compl., ¶112). CNA has *materially misquoted* the document attached to their Complaint. Read in whole, the email makes clear that Mr. Adcock

1 was advising that the nurse-members’ “employment will NOT end on December 19, 2019, as we
2 had anticipated.” (Emphasis added) (Compl., Ex. 4). As the Complaint confirms, Mr. Adcock’s
3 statement was true—the nurses’ employment did not end on December 19, 2019.

4 Moreover, CNA does not allege any misrepresentations by De Paul and Holdings, neither
5 of which has any employees.

6 Accordingly, CNA fails to allege any intentional misrepresentation.

7 **b. CNA Fails To Allege a Concealment of a Material Fact**

8 Nor has CNA alleged any basis for a fraudulent concealment claim. CNA identifies four
9 alleged facts that they contend Defendants failed to disclose. Because the exhibits to the
10 Complaint and the Court record confirm that CNA, which received notice of and actively
11 participated in both its individual capacity as representative of nurses at St. Vincent and as a
12 member of the Committee, was on notice of those alleged facts, they cannot support fraud
13 liability. *See GemCap Lending*, 787 F. App’x at 369 (“A concealment cause of action requires
14 proof of the following elements: (1) *concealment of a material fact . . .*” (emphasis added)).

15 First, CNA asserts that Defendants failed to disclose that “[*n*]ew information had arisen
16 and then continued to arise that made it increasingly unlikely the sale would close” (Compl., ¶¶
17 101-02, 110-11) (emphasis added). But the Court record confirms CNA was well aware as of
18 November 2019, that (1) “SGM orally communicated new information that undermines the
19 Debtors’ confidence in a prompt closing of the sale,” *see* RJN, Ex. 27, [Docket No. 3644 at p. 2],
20 (2) “certain disputes and controversies have arisen between SGM and the Debtors with regard to
21 the APA,” *see* RJN, Ex. 33 [Docket No. 3698 at p. 2], and (3) “SGM [was] holding the estates,
22 creditors, and patients of the Hospitals hostage in an attempt to extort a better price.” *See* RJN,
23 Ex. 36, [Docket No. 3723 at p. 6].

24 Second, CNA asserts that Defendants failed to disclose that they “anticipated permanently
25 shutting down St. Vincent entirely and expeditiously in the increasingly likely event that the sale
26 did not close.” (Compl., ¶¶ 101-02, 110-11). But the record confirms CNA was aware, as of at
27 least August 12, 2019, that “there is a possibility that the Sale will be unsuccessful” and that “[i]n
28 that event, St. Vincent may close and none of its employees may be hired by the Purchaser.”

(Compl., Ex. 1). In addition, CNA was notified on September 30, 2019 that, “[i]f the SGM Sale does not close, the most likely outcome is that at least three of the Hospitals will have to close.” [Docket No. 3188]. CNA was again notified on November 27, 2019 that “two of the Hospitals [] would likely close upon failure of the SGM Sale” [Docket No. 3723].

Third, CNA asserts that Defendants failed to disclose that “[t]he sale fell through.” (Compl., ¶¶ 101-02, 110-11) (emphasis added). But CNA was well aware of SGM’s failure to close the SGM Sale. It was notified on December 6, 2019, that “SGM announced that it would not close the SGM Sale” and “did not close the SGM Sale-by December 5, 2019” [Docket No. 3773 at p. 2]. On December 9, 2019, CNA was served with the Debtors’ Emergency Motion for Contempt, seeking an Order “[r]equiring SGM’s representatives to testify as to SGM’s reasons for not closing the SGM Sale would not increase the likelihood of the sale actually closing.” [Docket No. 3783 at p. 2]. In addition, CNA received further notice on December 18, 2019, that “KPC Group . . . failed to close the sale transaction.” (Compl., Ex. 4).

Finally, CNA asserts that Defendants failed to disclose that “Defendants were planning to shut down St. Vincent entirely” (Compl., ¶¶ 101-102, 110-111) (emphasis added). But CNA cannot demonstrate that it was unaware of the likelihood that the hospital would close if the SGM Sale fell through. CNA was on notice since the August 12, 2019 Notice that “there is a possibility that the Sale will be unsuccessful” and that “[i]n that event, *St. Vincent may close* and none of its employees may be hired by the Purchaser.” (Compl., Ex. 1) (emphasis added). And again, on September 30, 2019, CNA was advised that “[i]f the SGM Sale does not close, *the most likely outcome is that at least three of the Hospitals will have to close.*” See RJN, Ex. 14, [Docket No. 3188 at ¶ 50]. Further, CNA was again notified on November 27, 2019 that “two of the Hospitals [] would likely close upon failure of the SGM Sale” See RJN, Ex. 36, [Docket No. 3723 at pp. 6-7].

Moreover, CNA does not allege any concealment by DePaul and Holdings, neither of which has any employees. Nor may CNA allege concealment by SFMC with whom CNA has no connection.

In short, CNA fails to specifically identify any alleged fact that was concealed from it. As

1 a result, CNA fails to allege a fraudulent concealment claim.

2 **c. CNA Fails To Allege Reasonable Reliance**

3 In addition, CNA's claim for intentional misrepresentation fails on the independent
4 ground that CNA fails to allege reasonable reliance. "Reliance exists when the misrepresentation
5 or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal
6 relations, and when without such misrepresentation or nondisclosure he or she would not, in all
7 reasonable probability, have entered into the contract or other transaction." *All. Mortg. Co. v.*
8 *Rothwell*, 10 Cal. 4th 1226, 1239 (1995). "[W]hether a party's reliance was justified may be
9 decided as a matter of law if reasonable minds can come to only one conclusion based on the
10 facts." *Id.* at 1239. "In determining whether one can reasonably or justifiably rely on an alleged
11 misrepresentation, the knowledge, education and experience of the person claiming reliance must
12 be considered." *Guido v. Koopman*, 1 Cal. App. 4th 837, 843 (1991).

13 Here, CNA fails to allege that each of its nurse-member Plaintiffs reasonably relied on any
14 alleged statements or omissions by Debtors. Instead, CNA only vaguely alleges that those "St.
15 Vincent nurses who would have looked for other work . . . did not do so because they were
16 intentionally kept ignorant of these facts." (Compl., ¶ 105).

17 Moreover, CNA cannot establish any basis for reasonable reliance because the record
18 confirms CNA was apprised of the status of the SGM Sale and the likelihood that the nurse-
19 members' employment would be terminated even if the SGM Sale did not close:

- 20 ■ The August 12 Notice specifically advised Plaintiffs:

21 *[T]here is a possibility that the Sale will be unsuccessful. In that*
22 *event, St. Vincent may close and none of its employees may be hired*
23 *by the Purchaser.* Even if the Sale closes and St. Vincent remains
24 open, employees at St. Vincent may suffer an "employment loss"
25 within the meaning of the WARN Act and Cal-WARN Act because
the Debtors *will separate the employment of all of St. Vincent's*
employees upon the closing of the Sale. (Compl. Ex. 1) (emphasis
added).

- 26 ■ The Declaration of Richard Adcock in support of the Debtors' Emergency Motion,
27 filed on September 30, 2019, explained, "If the SGM Sale does not close, *the most*
28

1 *likely outcome is that at least three of the Hospitals will have to close*” (emphasis
2 added). See RJN 14, [Docket No. 3188, Richard G. Adcock Declaration at ¶ 9].

- 3 ■ The October 23, 2019 Notice advised Plaintiffs that “the *separations of*
4 *employment must be postponed* and will not occur at the time originally
5 anticipated. At this time, we anticipate the Sale *and separations of employment*
6 *will occur between . . .*” (Compl. Ex. 2) (emphasis added).
- 7 ■ The Closing Order stated “two of the Hospitals that would likely close upon failure
8 of the SGM Sale contain large populations of long-term patients[.]” [Docket No.
9 3723 at pp. 6-7].
- 10 ■ The November 30, 2019 Notice further advised Plaintiffs that “the *separations of*
11 *employment will be further postponed*” and that the “*separations of employment*
12 *will occur between December 6, 2019 and December 19, 2019*”. (Compl. Ex. 3)
13 (emphasis added)..

14 In fact, the purpose of the WARN Act is to provide advance notice of mass layoffs. (20
15 CFR § 639.1). Any argument that the nurse-members were unaware of their impending
16 terminations and reasonably relied on Defendants’ numerous WARN communications, *issued for*
17 *the sole purpose to advise employees of impending separations of employment*, as a promise of
18 future employment, would strain credulity.

19 Because Plaintiffs have not alleged reasonable reliance on any alleged misrepresentation
20 or concealment by Defendants, their fraud claim fails.

21 **3. CNA’s Claim for Negligent Misrepresentation Fails**

22 “The elements of a cause of action for fraud and a cause of action for negligent
23 misrepresentation are very similar. . . . However, the state of mind requirements are different.
24 Negligent misrepresentation lacks the element of intent to deceive.” *Earlywine v. USAA Life Ins.*
25 *Co.*, No. 3:17-CV-328-CAB-NLS, 2017 WL 2733939, at *2 (S.D. Cal. June 23, 2017) (citations
26 omitted); *Oushana v. Lowe’s Home Ctrs., LLC*, No. 1:16-cv-01782-AWI-SAB, 2017 WL
27 2417198, at *3 (E.D. Cal. June 5, 2017) (“The tort of negligent misrepresentation requires the
28 same elements [as fraud] with the exception of intent to defraud.”).

Here, CNA’s claim for negligent misrepresentation is based on the same alleged statement(s) at issue in its intentional misrepresentation claim. Accordingly, the negligent misrepresentation claim fails on the same grounds as set forth in the arguments above.

In addition, because claims for negligent misrepresentation cannot be based on omissions, CNA’s negligent misrepresentation claim fails to the extent it is based on alleged omissions. *Oushana*, 2017 WL 2417198, at *6 (providing that claims for negligent misrepresentation, as opposed to intentional misrepresentation “require[] a positive assertion” and “nondisclosures cannot give rise to liability for negligent misrepresentation”) (internal citations omitted); *Lopez v. Nissan N. Am., Inc.*, 201 Cal. App. 4th 572, 596 (2011) (“A negligent misrepresentation claim ‘requires a positive assertion,’ not merely an omission.”); *Wilson v. Century 21 Great W. Realty*, 15 Cal. App. 4th 298, 306 (1993) (“Negligent misrepresentation is a species of fraud or deceit specifically requiring a ‘positive assertion’”).

C. Dismissal Should Be With Prejudice

This Court should dismiss CNA’s Complaint with prejudice and without leave to amend because amendment would be futile. *See e.g., Cervantes*, 656 F.3d at 1041 (providing that a court “may dismiss without leave where a plaintiff’s proposed amendments would fail to cure the pleading deficiencies and amendment would be futile”). Based on the detailed record in this case, it is without legitimate dispute that CNA cannot amend its Complaint to allege any specific factual allegations that could salvage its claims.

D. CNA’s Motion for Withdrawal of the Reference Does Not Preempt Resolution of This Motion

CNA filed a *Notice of Motion and Motion of Plaintiff for Withdrawal of Reference of Adversary Proceedings Pending in Bankruptcy Court* in the District Court on March 20, 2020. *See* RJN, Ex. 55. “The filing of a motion for withdrawal of a case or proceeding . . . shall not stay the administration of the case or any proceeding therein before the bankruptcy judge except that the bankruptcy judge may stay, on such terms and conditions as are proper, proceedings pending disposition of the motion.” Fed. R. Bankr. P. Rule 5011(c).

As of the date of this Motion, CNA has not filed an application for a stay of this

proceeding. As a result, nothing prohibits this Court, which is already intimately familiar with all the relevant facts, from ruling on this Motion.

VI.

RESERVATION OF RIGHTS

This Motion relates solely to the Defendants' request to dismiss the Complaint as set forth in this Motion. Nothing contained herein is intended or shall be construed as: (i) a waiver of the Defendants' or any appropriate party in interest's rights to dispute, object to or otherwise challenge the substantive relief sought by CNA as set forth in the Complaint; or (ii) a waiver of any claims, causes of action, defenses, objections or other rights to respond which may exist against CNA in any forum.

VII.

CONCLUSION

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

Dated: April 6, 2020

DENTONS US LLP
SAMUEL R. MAIZEL
SAM J. ALBERTS
SONIA R. MARTIN
TANIA M. MOYRON

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

Attorneys for Verity Health Systems of
California, Inc., *et al.*