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

In re

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

Debtors and Debtors In Possession.

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

District Court Case No. 2:20-cv-02623-SVW

Lead Bankruptcy Case No. 2:18-bk-20151-ER
Chapter 11 Cases
Hon. Judge Ernest M. Robles

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

OPPOSITION TO PLAINTIFF'S MOTION TO WITHDRAW THE REFERENCE

[RELATED TO DOCKET NO. 1]

Hearing Date and Time:
Date: June 1, 2020
Time: 1:30 p.m.
Place: Courtroom 10A
310 W. 1st Street, 10th Floor
Los Angeles, California 90012
Judge: Hon. Steven V. Wilson

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I. INTRODUCTION

CNA's Motion for Withdrawal of the Reference (the "Motion") should be denied because (a) it would be highly inefficient, and a waste of judicial resources, to require this Court to acquire the intimate familiarity with the facts that are at the heart of the pending Motion to Dismiss (defined below) and the underlying causes of action and that are necessary to adjudicate the Adversary Proceeding,[1] (b) CNA has affirmatively submitted itself to the jurisdiction of the Bankruptcy Court, thereby waiving any right to a jury trial that CNA asserts as a rationale for withdrawal, and (c) the claims are neither complex nor beyond the jurisdiction of the Bankruptcy Court.

By way of background, on August 31, 2018, 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"), along with nine other affiliated companies (collectively, the "Debtors"), commenced the bankruptcy cases (the "Bankruptcy Cases"), in the United States Bankruptcy Court for the Central District of California (the "Bankruptcy Court"). Since that time, the Bankruptcy Court has considered more than 4,600 docket entries, adjudicated hundreds of disputes and is considering a dozen separate adversary proceedings. Moreover, the record developed in the Bankruptcy Case includes all facts central to

[1] The "Adversary Proceeding" is Adversary Proceeding No. 2:20-ap-1051 commenced by the California Nurses Association ("CNA") by filing its complaint (the "Complaint") in the Bankruptcy Court seeking damages under the Federal Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101 et seq. (the "WARN Act") (Count I) and the California WARN Act, California Labor Code §§ 1400-1408 ("Cal-WARN Act", and collectively with the WARN Act, the "WARN Acts") (Counts II) filed against the Institutional Defendants respectively, and damages under theories of Intentional Misrepresentation by Concealment (Count III) and Negligent Misrepresentation (Count IV) against the Institutional Defendants and individual defendants, Richard G. Adcock (VHS Chief Executive Officer) and Steven Sharrer (VHS Chief Human Resources Officer) and Does 1-500 (the "Individual Defendants" and referred to collectively with the Institutional Defendants as the "Defendants," and each individually as a "Defendant").

resolving this Adversary Proceeding, including the Motion to Dismiss under Rule 12(b) of the Federal Rules of Civil Procedure that is filed in and pending before the Bankruptcy Court (the "Motion to Dismiss," a copy of which is attached hereto as **Exhibit "1"**; *see also* Request for Judicial Notice ("RJN"), Exs, 1, 2).

The Adversary Proceeding arises out of the emergency closure of SVMC and its dialysis center (collectively, "St. Vincent") in January 2020. The Debtors were forced to shut down St. Vincent after the Bankruptcy Court approved purchaser (Strategic Global Management, Inc. ("SGM")) refused to close the sale of St. Vincent and other hospitals, despite several orders obligating SGM to close. St. Vincent lost approximately $65 million in 2019 alone, and without another purchaser, the Debtors had to close St. Vincent as responsible stewards of patient safety.[2] CNA alleges that the Debtors (i) failed to provide proper notice of the closure pursuant to the WARN Acts, and (ii) failed to disclose that the SGM transaction was not going to close. However, CNA's allegations are completely inconsistent with the extensive record in the Bankruptcy Cases, which include filings by the Debtors and rulings by the Bankruptcy Court making clear in detail on a regular basis, the status of the SGM transaction, the failure by SGM to fulfill its obligation to close, and that closure of St. Vincent was a likely outcome of SGM's failure to close. Throughout that period, CNA received notice of all pleadings,[3] actively participated in hearings, filed numerous proofs of claim and was at all times aware of the potential closure of St. Vincent. Accordingly, and as set forth in the Defendants' Motion to Dismiss, CNA cannot establish any failure to disclose or other elements of their WARN Act and tort claims.

[2] CNA vigorously opposed the closure of St. Vincent. See *Opposition to Debtors' Emergency Motion for Authorization to Close St. Vincent Medical Center*, filed Jan. 7, 2020. *See* RJN, Ex. 3 [Bankruptcy Docket No. 3914] ("CNA Closure Objection").

[3] 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* RJN, Ex. 4, *Notice of Appearance and Request for Special Notice and Inclusion on Mailing List* [Bankruptcy Docket No. 200.] CNA has also filed multiple proofs of claim in the Bankruptcy Cases against the Debtors. [Proofs of Claim Nos: 6233; 6247; 6249; 6250; 6251; 6336; 6340; 6342; 6350; 6359; 7847].

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Additionally, CNA has consented to the Bankruptcy Court's jurisdiction by making a formal appearance, filing proofs of claim, becoming a member of the Official Committee of Unsecured Creditors, and actively participating in numerous hearings throughout the Bankruptcy Cases.[4] Further, CNA waived its jury trial right by invoking the equitable jurisdiction of the Bankruptcy Court when it commenced the Adversary Proceeding that seeks a postpetition administrative expense on account of alleged postpetition conduct. The foregoing constitutes waiver of any right to a jury (or, even if one is permissible, consent to the Bankruptcy Court conducting a jury trial), which CNA asserts as a rationale for withdrawal.

Denial of the Motion is also warranted because the claims are neither complex nor beyond the jurisdiction of the Bankruptcy Court. The first two counts are asserted under the WARN Acts against the Institutional Defendants. The remaining counts seek claims of "Intentional Misrepresentation by Concealment" and "Negligent Misrepresentation" (Count III and Count IV, respectively) against the Institutional Defendants and the Individual Defendants. The WARN Act claims should be decided based on the well-established "liquidating fiduciary" exception and in light of the detailed factual record with which the Bankruptcy Court is intimately familiar. Likewise, the Bankruptcy Court is particularly well-positioned to adjudicate the tort claims, which also arose in the Bankruptcy Case in the context of Bankruptcy Court authorized activities. Moreover, because all facts arise out of actions taken in and in connection with the Bankruptcy Case, the Adversary Proceeding is a "core proceeding" under 28 U.S.C. § 157(b). Based on the foregoing, and the reasons more fully set forth below, the Motion should be denied.

II. STATEMENT OF FACTS

A. The Bankruptcy Proceeding

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

[4] *See* RJN, Ex. 5, *Notice of Appointment of Committee of Creditors Holding Unsecured Claims* [Bankruptcy Docket No. 197, Exhibit A].

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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. 6, *Declaration of Richard G. Adcock in Support of Emergency First-Day Motions* [Bankruptcy Docket No. 8] (the "First-Day Decl."), ¶ 11.

3. From the outset of the Bankruptcy 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. CNA represents former employees at St. Vincent under a collective bargaining agreement. *See* RJN, Ex. 7, [Bankruptcy Docket No. 3604].[5] In addition to St. Vincent, CNA represents employees at SMC and previously represented employees at Saint Louise Regional Hospital and O'Connor Hospital. Additionally, Defendants Holdings and DePaul have no employees and CNA has not at any relevant time represented employees at Defendant St. Francis Medical Center. *See* RJN, Ex. 7, [Bankruptcy Docket No. 3604] (referencing Debtor facilities where CNA has represented employees).

B. The Failed SGM Sale

5. Postpetition, the Debtors sold certain of their assets, including two hospitals, to Santa Clara County; this sale was approved by the Bankruptcy Court on December 27, 2018. *See* RJN, Ex. 8, [Bankruptcy Docket No. 1153]. Thereafter, SGM emerged as a leading potential candidate to be selected as the stalking horse bidder for the Debtors' remaining assets.

6. The Debtors selected SGM as the stalking horse bidder (the "Stalking Horse Bidder") to purchase substantially all of the Debtors' remaining assets, including SVMC, and requested approval of the same (the "Sale and Bidding Procedures Motion"). *See* RJN, Ex. 9,

[5] 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.*

[Bankruptcy Docket No. 1279] at ¶ 22. On February 19, 2019, the Bankruptcy 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. 10, [Bankruptcy Docket No. 1572]. The Bidding Procedures Order, among other things approved, (i) SGM as the Stalking Horse Bidder, and (ii) that certain asset purchase agreement [Bankruptcy Docket No. 2305-1] (the "APA"), as modified therein. *See* RJN, Ex. 11.

7. On May 2, 2019, after briefing and a hearing, the Bankruptcy Court entered an order [Bankruptcy Docket No. 2306] (the "Sale Order"), approving the sale to SGM pursuant to the APA (the "SGM Sale"). *See* RJN, Ex. 12.

8. One of the conditions to closing under the APA was (i) the approval by the California Attorney General (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" that those set forth in Schedule 8.6 to the APA. 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." *See* RJN, Ex. 11.

9. 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"), stating in relevant part:

> The closing of the Sale is subject to certain regulatory and other approvals and the satisfaction of certain other conditions agreed to between the Debtors and the Purchaser. While the Debtors are optimistic that the Sale will close, there is a possibility that the Sale will be unsuccessful. In that event, St. Vincent may close and none of its employees may be hired by the Purchaser. Even if the Sale closes and St. Vincent remains open, employees at St. Vincent may 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.
>
> Based on the best information available to date, we believe the Sale and separations of employment will occur between October 18, 2019 and October 31, 2019.

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See Motion, Ex. 1.

10. On September 25, 2019, the Attorney General approved the SGM Sale, subject to certain conditions that included additional conditions that were materially different than those SGM contractually agreed to in Schedule 8.6 of the APA (the "2019 Conditions"). Accordingly, the Debtors filed a motion that sought entry of an order enforcing the Sale Order, finding that the SGM Sale was free and clear of the 2019 Conditions, and limiting the SGM Sale to only those conditions that SGM developed and then contractually agreed to in Schedule 8.6 of the APA (the "Enforcement Motion"). *See* RJN, Ex. 13, [Bankruptcy Docket No. 3188.] In support of the Enforcement Motion, the Debtors filed a Declaration of CEO Richard Adcock, stating that the likely outcome of SGM not closing the sale was that SVMC would likely close. *See* RJN, Ex. 13, [Bankruptcy Docket No. 3188, at 33] ("If the SGM Sale does not close, *the most likely outcome is that at least three of the Hospitals will have to close*.") (emphasis added).[6]

11. On October 15, 2019, the Bankruptcy Court held a hearing on the Debtors' Emergency Motion to Enforce the Sale Order. *See* RJN, Ex. 13, [Bankruptcy Docket No. 3188, filed Sept. 30, 2019]. Counsel for CNA appeared at the hearing, during which the Bankruptcy Court underscored the significance of the SGM Sale and the consequences to employees if the SGM Sale fell through:

> Ms. Skogstad: Good Morning, your Honor. Kyrsten Skogstad, in-house counsel, on behalf of the California Nurses Association.
>
> * * *
>
> The Bankruptcy Court: . . . This is the culmination of this case. We have at some point a plan and disclosure statement hearing, but all of that posits that we have a sale of the assets of this case. If we don't, it makes no sense to have a plan and disclosure statement. So this is the day and this is the hour. The sale is the linchpin of the plan. So, without a sale, there's no point to going forward, and I reiterate that because I'm not sure if all of the participants at this morning's hearing fully appreciate what that means. If we don't have a plan and disclosure statement that can be approved by the

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

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> Court, then, on the Court's own motion, or on a motion of an interested party, the Court may dismiss the case, in which case I think that that would spell a disaster for every party that is represented here this morning.
>
> * * *
>
> More importantly, throughout another set of hearings with respect to a sale to some other entity, with all of the time that would be occasioned by that, *there is no money to fund the continued operations of the Debtor, which would inure to the detriment of thousands of patients, thousands of employees*, and not to mention the creditors in the case.

See RJN, Ex. 14 (Oct. 15, 2019 Hr'g Tr. at 1:23-25, 4:15-5: 4, 6:15-21) (emphasis added).

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

> 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.

See Motion, Ex. 2.

13. On October 23, 2019, the Bankruptcy Court issued a *Memorandum of Decision Granting the Debtors' Emergency Motion to Enforce the Sale Order*. *See* RJN, Ex. 15, [Bankruptcy Docket No. 3446] and thereafter, following negotiations, the Debtors and the Attorney General agreed to a stipulation resolving the Enforcement Motion [Bankruptcy Docket No. 3572] and lodged a related order [Bankruptcy Docket No. 3574]. *See* RJN, Exs. 16 & 17.

14. On November 11, 2019, SGM filed an objection to the proposed order disputing the Attorney General's position. *See* RJN, Ex. 18, [Bankruptcy Docket No. 3582 at pp. 3-4] (emphasis added).

15. On November 14, 2019, following a hearing, the Bankruptcy Court issued an order enforcing the Sale order (the "Enforcement Order"). *See* RJN, Ex. 19, [Bankruptcy Docket No. 3611].

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16. Section 1.3 of the APA obligated SGM to close the sale "promptly but no later than ten (10) business days following the satisfaction" of all conditions precedent. APA, § 1.3. On November 18, 2019, the Bankruptcy Court entered an order [Bankruptcy Docket No. 3633] and related memorandum [Bankruptcy Docket No. 3632] finding that: "The Debtors have complied with their obligation under the APA to obtain a final, nonappealable Supplemental Sale Order. Consequently, SGM is now obligated to promptly close the SGM Sale, provided that all other conditions to closing have been satisfied." *See* RJN, Exs. 20 & 21.

17. The conditions to close under the APA had been satisfied, and the transaction should have promptly closed by December 5, 2019. *Id.* On November 18, 2019, however, SGM's CEO, Peter Baronoff, contacted one of the Debtors' financial advisors and stated that SGM could not obtain sufficient financing for the transaction, contrary to Section 3.9 of the APA. *See* RJN, Ex. 22 [Bankruptcy Docket No. 3644 at ¶ 12]. That telephone call immediately resulted in the Debtors' request for an order [entered at Bankruptcy Docket No. 3646] continuing the hearing on the Debtors' motion [Bankruptcy Docket No. 2995] for approval of its disclosure statement [Bankruptcy Docket No. 2994]. *See* RJN, Exs. 23 & 24.

18. Given 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"). *See* Motion, 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 "we anticipate the Sale and separations of employment will occur between December 6, 2019 and December 19, 2019." *Id.* (emphasis omitted).

19. Thereafter the Debtors endeavored tirelessly to close the SGM Sale. Such efforts played out publicly through numerous Bankruptcy Court filings, and in multiple hearings before the Bankruptcy Court. CNA received notice of all such pleadings and events, as it had with all the documents filed by the parties and orders entered by the Court. *See e.g.,* Bankruptcy Docket Nos. 3698; 3701; 3723; 3724; 3726; 3727; 3773; 3790; 3906; 3914; 3934; 3982; 4053; 4126; 4265; and 4410.

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20. SGM failed to close the SGM Sale by December 5, 2019, despite several orders holding that the Debtors satisfied the conditions under the APA and SGM was obligated to close. Accordingly, on December 6, 2019, the Debtors filed an *Emergency Motion for (I) Issuance of an Order to Show Cause Why Strategic Global Management, Inc. Failed to Close the Sale Transaction by December 5, 2019; and (II) Entry of an Order Enforcing Prior Court Orders Requiring Strategic Global Management, Inc. to Close the Sale Transaction by December 5, 2019.* See RJN, Ex. 25 [Docket No. 3773] (the "Emergency Motion"). The Emergency Motion explained that SGM had failed to close the SGM Sale.

21. Because of the failure of SGM to close the SGM Sale, and the ongoing losses from the operation of SVMC, 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. 26, [Docket No. 3906]. On January 7, 2020, CNA filed the CNA Closure Objection. *See* RJN, Ex. 3, [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 without any evidence in support of the same. *Id.*

22. On January 9, 2020, the Bankruptcy Court granted the Closure Motion, overruled the CNA Closure Objection, and authorized the Closure Plan. *See* RJN, Ex. 27, [Docket No. 3934]. The Bankruptcy Court explained this order through a memorandum decision (the "Closure Decision"), where the Court found, in relevant part:

> "*Upon initiation of the Closure Plan, St. Vincent will enter the process of liquidation and will no longer be an operating business*."

RJN, Ex. 28, at 5. (Emphasis added).

23. Immediately after the Bankruptcy Court's entry of this order, the Debtors provided yet another WARN Notice, dated January 10, 2020, to CNA and its members (the "January 10, 2020 Notice"). *See* Motion, Ex. 5. The notice informed Plaintiff's "of the permanent closure of St. Vincent Medical Center . . . and St. Vincent Dialysis Center" and explained that "the closure

and separations of employment will occur between January 14, 2020 and January 27, 2020. *See* January 10, 2020 Notice (emphasis omitted).

III. ARGUMENT

A request that a district court withdraw a proceeding may be predicated on (i) mandatory and/or (ii) permissive, withdrawal. 28 U.S.C. §157(d); *see also Sec. Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1008 (9th Cir. 1997). CNA seeks relief under both mandatory and permissive withdrawal. *See* Mot. at 9:13-15. Withdrawal of the reference should not be granted on either ground.

A. Mandatory Withdrawal Is Not Warranted

Pursuant to 28 U.S.C. § 157(d), the Court shall withdraw the proceeding if such proceeding requires a "consideration" of both bankruptcy law and other federal law regulating organizations or activities affecting interstate commerce. Courts interpret this mandatory provision narrowly to prevent the very type of forum shopping being pursued here by CNA. *See Lucore v. Guild Mortg. Co.*, No. 12-CV-1411-IEG WVG, 2012 WL 2921354, at *2 (S.D. Cal. July 16, 2012) ("Congress intended for this language to be construed narrowly."); *In re Roman Catholic Bishop of San Diego*, No. 07-1355, 2007 WL 2406899 (S.D. Cal. Aug. 20, 2007) ("Congress intended the mandatory withdrawal provision to be construed narrowly so as not to create an 'escape hatch' by which most bankruptcy matters could easily be removed to the district court."); *see also Shurgrue v. Air Line Pilots Ass'n Intel (In re Ionosphere Clubs, Inc.)*, 922 F.2d 984, 995 (2d Cir. 1990).

The majority of courts base their withdrawal decision on whether resolution of the dispute will require a "substantial and material consideration of" nonbankruptcy federal law. *See e.g.*, *In re Vicars Ins. Agency, Inc.*, 96 F.3d 949 (7th Cir. 1996); *Ionosphere Clubs*, 922 F.2d at 995; *Smails v. City of Pittsburgh Sch. Dist.,* No. 15-1489, 2016 WL 110029, at *2 (M.D. Pa. Jan. 11, 2016); *In re Nortel Networks, Inc.,* 539 B.R. 704, 709 (D. Del. 2015); *In re IndyMacBancorp Inc.,* No. CV 11-03969-RGK, 2011 WL 2883012, at *2 (C.D. Cal. July 15, 2011); *In re White Motor Corp.,* 42 B.R. 693, 700 (N.D. Ohio 1984). Indeed, courts will generally require "interpretation, as opposed to mere application," of the nonbankruptcy law. *Vicars Ins. Agency,* 96 F.3d at 954;

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see also Ionosphere Clubs, 922 F.2d at 995; *United States v. Delfasco, Inc.*, 409 B.R. 704, 707 (D. Del. 2009); *In re G-I Holdings, Inc.*, 295 B.R. 222, 224 (D. N.J. 2003). Judges in the Central District of California have required that the consideration of nonbankruptcy federal law entail more than "routine application" to warrant mandatory withdrawal. *One Longhorn Land I, L.P. v. Presley*, 529 B.R. 755, 759-60 (C.D. Cal. 2015); *see also In re Tamalpais Bancorp.*, 451 B.R. 6, 8-9 (N.D. Cal. 2011) (finding courts within the Ninth Circuit have largely adopted the approach of requiring the interpretation, as opposed to mere application, of the non-title 11 statute).

1. Bankruptcy Courts Routinely Adjudicate WARN Claims

CNA incorrectly asserts that bankruptcy courts only "occasionally adjudicate WARN Act cases" (Motion at 17:2-3). Bankruptcy courts, in fact, regularly adjudicate WARN Act actions. *In re Century City Doctors Hosp*., LLC, 417 B.R. 801 (Bankr. C.D. Cal. 2009) (bankruptcy court considered and granted motion to dismiss WARN Act claims by trustee because the trustee was a liquidating fiduciary); *Gisinger v. Patriarch Partners, LLC*, Nos. 16 Civ. 1654 (ER), 16 Civ. 1596 (ER), 16 Civ. 2831 (ER), 2016 WL 6083981, at *4 (S.D.N.Y. Oct. 18, 2016) (no mandatory withdrawal because WARN claims "will require only simple application of the WARN Act."); *In re MF Global Holdings Ltd.*, 481 B.R. 268, 282 (Bankr. S.D.N.Y. 2012) (bankruptcy court decided "whether the Debtors were liquidating or attempting to reorganize when the layoffs occurred" in connection with WARN Act claims). The United States District Court for the Southern District of New York explained:

> Though Plaintiffs are correct in noting that this proceeding does not include any claims under the Bankruptcy Code, Plaintiffs' WARN Act claims are not particularly complex and will require only simple application of the WARN Act by the Bankruptcy Court. Indeed, a review of cases in this district suggests that *bankruptcy courts routinely assess WARN Act liability*.

Gisinger, 2016 WL 6083981, at *4 (emphasis added). Given that bankruptcy courts routinely decide WARN actions, CNA's contention that "federal labor laws of which the WARN Act is included are precisely the type of laws governing interstate commerce that Congress envisioned when it enacted Section 1157(d)" is not well taken and should be rejected. (Motion p. 16:12-14).

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2. Mandatory Withdrawal Is Not Appropriate Because The WARN Act Claims Only Require A Routine Application Of The WARN Acts

Withdrawal of the reference is not appropriate in this case because application of the WARN Acts does not require any significant interpretation of those Acts. *See One Longhorn Land I,* 529 B.R. at 759; *see also Tamalpais Bancorp.*, 451 B.R. at 8-9. Principally at issue is the application of the liquidating fiduciary exception, which is a *judicially created exception* based on the Department of Labor's comments on the final WARN Act regulations. *See* 54 Fed. Reg. 16,045 (1989); *In re United Healthcare Sys., Inc.*, 200 F.3d 170, 176-79 (3d Cir. 1999); *In re LMCHH PCP LLC*, No. 17-10353, 2017 WL 4408162, at *6 (Bankr. E.D. La. Oct. 2, 2017) (referring to the "the judicially-created liquidating fiduciary exception."). In fact, the liquidating fiduciary exception is the basis upon which the Institutional Defendants seek dismissal of the WARN Act claims in their pending Motion to Dismiss. (Motion to Dismiss pp. 23-25).

The facts supporting the liquidating fiduciary exception have been developed within and otherwise in connection with the Bankruptcy Cases. Of particular importance, the Debtors filed their Closure Motion on January 6, 2020, seeking authorization to close St. Vincent on an emergency basis to protect patients. The Bankruptcy Court granted the Closure Motion on January 9, 2020, finding: "*Upon initiation of the Closure Plan, St. Vincent will enter the process of liquidation and will no longer be an operating business*." RJN, Ex. 28, Closure Decision, at 5. (emphasis added). The Debtors provided a WARN Notice, dated January 10, 2020, to CNA and its members shortly thereafter, advising them of the permanent closure of St. Vincent and the members' separations of employment.[7] *See* Motion, Ex. 5.

The facts developed in the Bankruptcy Cases establish that the Debtors were liquidating fiduciaries as to St. Vincent at the time of the terminations and were, thus, not "employers" subject to the WARN Acts. The liquidating fiduciary exception "reflects a limitation on the

[7] In anticipation of the SGM Sale, the Debtors provided WARN Notice to CNA on August 12, 2019. Motion, Ex. 1. In light of the status of the SGM Sale transaction at the time, on October 23, 2019, the Debtors issued a WARN extension notice. Motion, Ex. 2. When the SGM Sale did not close as anticipated Debtors issued a WARN extension notice on November 25, 2019. Motion, Ex. 3.

statutory definition of employer." *Century City Doctors Hosp*., 2010 WL 6452903, at *8. The WARN Act defines "employer" as "any business enterprise that employs" the requisite number of employees. 29 U.S.C. § 2101(a)(1) (emphasis added). An entity does not qualify as a business enterprise and, thus, is not an employer, if it operates for the purpose of preserving or liquidating assets for creditors. *See* 54 Fed. Reg. 16045 (1989) ("[A] fiduciary whose sole function in the bankruptcy process is to liquidate a failed business for the benefit of creditors does not succeed to the notice obligations of the former employer because the fiduciary is not operating a "business enterprise" in the normal commercial sense."); *Chauffeurs, Sales Drivers, Warehousemen & Helpers Union Local 572 v. Weslock Corp*., 66 F.3d 241, 244 (9th Cir. 1995).

Application of this exception involves neither an issue of first impression nor a novel interpretation of the WARN Act. *In re Century City Doctors Hosp*., LLC, 417 B.R. 801 (Bankr. C.D. Cal. 2009) (bankruptcy court considered and granted motion to dismiss WARN Act claims by trustee because the trustee was a liquidating fiduciary); *Estrada v. Salyer Am.,* No. C 09-05618 JW, 2010 WL 11580074, at *5 (N.D. Cal. Mar. 31, 2010) (holding "absent any conflicting state law, the Court applies the *Chauffers* standard to determine whether a secured creditor is an employer for purposes of liability" and finding defendants could not be held liable as employers under the California WARN Act); *United Healthcare Sys.,* 200 F.3d at 176-79 (hospital in Chapter 11 bankruptcy did not qualify as employer because it "was operating not as a 'business operating as a going concern,' but rather as a business liquidating its affairs"); *MF Global Holdings,* 481 B.R. at 282 (bankruptcy court decided "whether the Debtors were liquidating or attempting to reorganize when the layoffs occurred" in connection with WARN Act claims). *In re St. Mary Hosp.*, 115 B.R. 495, 498 (E.D. Pa. 1990), cited by CNA, is inapposite as it involved an issue of first impression relating to application of the Medicare statute. *Id.* ("When the bankruptcy court must engage in a complex search for the appropriate interpretation of a non-bankruptcy federal statute involving an issue of first impression….") (Motion 17:12-20).

Of critical importance, the cases cited by CNA do not involve the WARN Acts. *See Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 454 B.R. 307, *9 (S.D.N.Y. 2011) (involving application of the Securities Litigation Uniform Standards Act of 1998); *Cty. of L.A.*

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Tax Collector v. Bank of Am., No. 2:10-CV-3536-SVW, 2010 WL 11545071, at *1 (C.D. Cal. Sep. 21, 2010) (involving substantial issues regarding National Bank Act, as a result of which withdrawal had been granted); *In re Dana Corp,* 379 B.R. 449, 458 (S.D.N.Y. 2000) (involving substantial interpretation of CERCLA); *In re St. Mary Hosp.,* 115 B.R. 495, 498 (E.D. Pa. 1990) (involving issue of first impression under Medicare statute); *In re White Motor Corp.*, 42 B.R. 693, 700 (N.D. Ohio 1984) (involving ERISA and IRC issues).

If this action were to continue beyond the Motion to Dismiss, the Institutional Defendants will also rely upon the separate good faith defense under the WARN Acts (29 U.S.C. §2104(a)(4); Cal. Lab. Code §1405), which, like the liquidating fiduciary defense, does not require any more than routine application of the law by the Bankruptcy Court and is not a matter of first impression. *Roeder v. United Steelworkers (In re Old Electralloy Corp.)*, 162 B.R. 121, 126 (Bankr. W.D. Pa. 1993) (analyzing good faith exception to WARN Act). In addition, the Bankruptcy Court, which is intimately familiar with the voluminous factual record in this case, including the history of WARN notices provided by Debtors to CNA, is in the best position to determine "good faith" in this case.

Because CNA's WARN Act claims do not require interpretation of the WARN Acts, and involve only routine application of these Acts, CNA's motion for mandatory withdrawal of the reference should be denied.

3. CNA's State Law Claims Cannot Be The Basis For Mandatory Withdrawal Of The Reference

Mandatory withdrawal of the reference is required "only where 'substantial and material' questions of non-bankruptcy *federal law* are present." *Lucore,* 2012 WL 2921354, at *2 (emphasis added). "Courts within this circuit have consistently held that [c]onsideration of state laws does not give rise to mandatory withdrawal." *One Longhorn Land I,* 529 B.R. at 760 (internal citations omitted); *Bradford v. Bank of E. Or.*, No. 1:18-cv-00397-BLW, 2019 WL 96221, at *3 (D. Idaho Jan. 3, 2019) ("Congress has not mandated withdrawal of the reference in cases where the bankruptcy courts must consider *state* law to resolve an adversary proceeding") (emphasis in original); *Budsberg v. Spice*, No. 17-5681 RJB, 2017 WL 3895701, at *2 (W.D.

Wash. Sep. 6, 2017) (denying mandatory withdrawal of the reference because "the claims raised here are state law claims or are claims under title 11" and "[t]here is no showing that resolution of the proceeding will require consideration of federal laws aside from the bankruptcy provisions."); *Don's Making Money, LLP v. Estate of Deihl*, No. CV 07-319-PHX-MHM, 2007 WL 1302748, at *7 (D. Ariz. May 1, 2007) (finding Plaintiff's state law claims could not give rise to mandatory withdrawal of the reference); *Lucore,* 2012 WL 2921354, at *3 ("Plaintiffs' state law claims do not require the determination of a federal issue, and, therefore, cannot be the basis for mandatory withdrawal of the reference.").

Because CNA's state law claims do not require the determination of federal law, they cannot form the basis for mandatory withdrawal of the reference.

B. Plaintiff's Cannot Overcome The Heavy Burden To Justify Permissive Withdrawal And, Thus, The Motion Should Be Denied

The burden on the Plaintiff to justify permissive withdrawal is similarly heavy. *In re KSL Media, Inc.*, No. 15-01212, 2016 WL 74385, at *2 (C.D. Cal. Jan. 6, 2016) (citations omitted) (providing that the standard for demonstrating cause for permissive withdrawal is high and must be demonstrated by the party seeking withdrawal). A district court should only exercise its discretion to withdraw the reference for "cause" shown. *Canter v. Canter*, 299 F.3d 1150, 1154 (9th Cir. 2002). To determine whether cause exists for permissive withdrawal, "a district court should consider the efficient use of judicial resources, delay and costs to the parties, uniformity of bankruptcy administration, the prevention of forum shopping, and other related factors." *Sec. Farms v. Int'l Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers*, 124 F.3d 999, 1008 (9th Cir. 1997) (citing *In re Orion Pictures Corp.*, 4 F.3d 1095, 1101 (2d Cir. 1993)); *see also Canter*, 299 F.3d at 1154 (finding the district court's withdrawal of reference to be "an inefficient allocation of judicial resources"); *In re Woodside Group*, No. CV 10-222-VBF(x), 2010 WL 11596179, at *4 (C.D. Cal. May 21, 2010) (denying motion to withdraw reference based on, among other things, forum-shopping concerns, that it "would not conserve judicial resources," and that it would "hinder bankruptcy administration").

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While not dispositive, a district court considering whether to withdraw the reference "should first evaluate whether the claim is core or non-core, since it is upon this issue that questions of efficiency and uniformity will turn." *One Longhorn Land I,* 529 B.R. at 762 (C.D. Cal. 2015) (quoting *Orion,* 4 F.3d at 1101); *In re Temecula Valley Bancorp, Inc.*, 523 B.R. 210, 214-15 (C.D. Cal. 2014) (quoting *Orion,* 4 F.3d at 1101*); see also In re Daewoo Motor Am.*, 302 B.R. 308, 310-11 (C.D. Cal. 2003).

Here, Plaintiff has not adequately addressed the above requirements or otherwise provided a compelling case that justifies permissive withdrawal. Indeed, each factor weighs in favor of denying the Motion. The Bankruptcy Court has jurisdiction to adjudicate the Adversary Proceeding because (i) the Adversary Proceeding is a "core proceeding" under 28 U.S.C. § 157(b) as it is predicated on actions that arose in the Bankruptcy Case itself, and (ii) there is requisite consent to Bankruptcy Court jurisdiction concerning the matters raised in the Adversary Proceeding. In addition, denial of the Motion will serve judicial economy and uniformity and prevent forum shopping.

1. The Complaint Raises "Core" Claims Arising Under the Bankruptcy Code.

Bankruptcy courts may hear and issue final rulings regarding core proceedings (i) arising under the Bankruptcy Code, or (ii) arising in a case under the Bankruptcy Code. 28 U.S.C. § 157(b)(1). Indeed, a matter is "core" not only when it is created or determined by the Bankruptcy Code, but also when it would have no existence outside of a bankruptcy case. *In re Harris*, 590 F.3d 730, 737 (9th Cir. 2009) (citing *In re Harris Pine Mills*, 44 F.3d 1431, 1435 (9th Cir. 1995)).

The Ninth Circuit has held that a trustee's postpetition conduct in a sale of assets was pursuant to a trustee's duty to administer the estate and, therefore, a state law claim for breach of contract was a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) ("matters concerning the administration of the estate"). *Harris,* 590 F.3d at 737. Similarly here, the Debtors' conduct in obtaining Bankruptcy Court approval to close St. Vincent, and then closing St. Vincent and laying off the employees in preparation for the eventual sale of the hospital, involves claims analogous to selling assets in *Harris.* In both cases the Debtor or Trustee is effectuating a disposal of assets

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of the estate, and therefore within the literal wording of "matters concerning the administration of the estate." *Id.*; *see also One Longhorn Land I,* 529 B.R. at 763 ("Longhorn's arguments that its claims should nevertheless be considered non-core because one references state law is unavailing: 'A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by state law.' 28 U.S.C. § 157(b)(3)."); *Don's Making Money,* 2007 WL 1302748, at *16-17 (D. Ariz. May 1, 2007) (Even though "each of Plaintiff's claims is based on state law" finding "Plaintiff has submitted evidence to show that at least one count [for fraudulent transfer] is a core claim, with a strong assertion that other claims may be as well."). The same is true here.

Critically, the events set forth in the Adversary Proceeding exist only because of the Bankruptcy Cases and the Bankruptcy Court approved closure of St. Vincent. Thus, the claims are directly and "inextricably intertwined with the sale of estate assets—the literal administration of the bankruptcy estate." *Harris*, 590 F.3d at 737. Moreover, the Bankruptcy Court approved the St. Vincent Closure, pursuant to §§ 105, 363 and 1108 and, as a result, the claims "arose in" the Bankruptcy Cases under 28 U.S.C. § 157(b)(1). Any dispute concerning the interpretation of that event, and the events leading up to the Closure Motion are, therefore, core and subject to the Bankruptcy Court adjudication. *See* 28 U.S.C. § 157(b)(1); *see also Hawaiian Airlines, Inc. v. Mesa Air Group*, Inc., 355 B.R. 214, 224-226 (D. Hawaii 2006) (denying permissive withdrawal where the underlying adversary proceeding regarded a post-petition confidentiality agreement entered into pursuant to a Bankruptcy Court-issued plan procedures order). As such, a withdrawal of the reference to this Court would be improper.

2. Plaintiff Consented to Bankruptcy Court Jurisdiction And Waived Any Right To A Jury Trial

a. CNA Waived Its Right To A Jury Trial By Filing An Adversary Proceeding That Triggered the Claims Allowance Process.

The U.S. Supreme Court has consistently held that a creditor submits to the bankruptcy court's equity jurisdiction over disposition of estate assets, and thereby waives the right to a jury trial, by submitting a proof of claim in a debtor's bankruptcy case. *See Langenkamp v. Culp*, 498

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U.S. 42, 44 (1990) (if creditor files proof of claim then preference action "becomes part of the claims-allowance process which is triable only in equity" and any jury right is waived); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 58-59 (1989) ("Because petitioners here . . . have not filed claims against the estate, respondent's fraudulent conveyance action does not arise 'as part of the process of allowance and disallowance of claims.' Nor is that action integral to the restructuring of debtor-creditor relations. Congress therefore cannot divest petitioners of their Seventh Amendment right to a trial by jury."); *Katchen v. Landy*, 382 U.S. 323, 336 (1966) ("although petitioner might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the trustee, when the same issue arises as part of the process of allowance and disallowance of claims, it is triable in equity") (citation omitted). Under these precedents, claims can lose their legal nature, and be converted into claims in equity, if the action in which claims are brought is "integrally related" to the claims allowance process. *In re CBI Holding Co.,* 311 B.R. 350, 365 (S.D.N.Y. 2004). "This is so because the filing of the claim 'converts the creditor's legal claim into an equitable claim to a pro rata share of the *res*.'" *In re Advanced Rods, Inc*., 2005 WL 6960214, at *2 (B.A.P. 9th Cir. June 27, 2005) (quoting *Katchen*, 382 U.S. at 336).

This principle extends to requests for payment of "administrative expense claims" from a debtor's estate that arise postpetition. *See* 11 U.S.C. § 503(a). As with proofs of claim filed on account of prepetition claims against a debtor's estate, the bankruptcy court's determination of administrative expense claims is "vital to the bankruptcy process" and, additionally, involves "disputes that are part of the claims-allowance process and the hierarchical reordering of . . . creditors' claims." *Dunmore v. United States*, 358 F.3d 1107, 1116 (9th Cir. 2004); *see also In re Adelphia Commc'ns Corp*., 307 B.R. 404, 421 (Bankr. S.D.N.Y. 2004) ("efforts to assert post-petition claims against the Adelphia Entities, and thereby establish claims to the Adelphia estate res (and with priority over claims of other Adelphia creditors), at least under the facts here, would likewise present a core matter"). As such, the assertion of a postpetition, administrative expense claim against a debtor's estate assets likewise results in a waiver of any jury trial right. *See O'Neill v. New England Road, Inc.,* No. 3:99 MC 309 SRU, 2000 WL 435507, at *7 (D. Conn.

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Feb. 28, 2000) (holding that an administrative expense claim qualifies as an equitable claim to a pro rata share of the bankruptcy *res*, the assertion of which extinguishes otherwise available seventh amendment rights to a jury trial).

As with the Plaintiff, here, an alleged administrative claimant may submit to the bankruptcy court's jurisdiction and waive its right to a jury trial by submitting a request for payment of a postpetition administrative claim in the context of an adversary proceeding. *See In re Davis,* No. 09-3096, 2012 WL 2871662, at *5 (Bankr. S.D. Tex. Jul. 10, 2012) (in the context of a counterclaim, providing that the implication of the claims allowance process results in a jury trial right waiver); *Roberds, Inc. v. Palliser Furniture,* 291 B.R. 102, 107 (S.D. Ohio 2003) (defendant waived jury trial right by filing amended answer and counterclaim to preference complaint asserting right to be reimbursed based on postposition sales) (citing *O'Neill v. New England Road, Inc*., No. 3:99 MC 309 SRU, 2000 WL 435507 (D. Conn Feb. 28, 2000)); *In re Winimo Realty Corp.,* 270 B.R. 108, 122 (S.D.N.Y. 2001) (citing and following *O'Neill); In re Warmus,* 276 B.R. 688, 693 (S.D. Fla. 2002) (defendant lost right to jury trial by filing a counterclaim, which was directed at the bankruptcy trustee and based on post-petition conduct); *Segal v. California Energy Development Corp.,* 167 B.R. 667, 672 (D. Utah 1994) (filing of counterclaim relating to post-petition contract with the bankruptcy trustee waived jury trial rights); *In re Sunshine Trading & Transportation Co.,* 193 B .R. 752, 756 (Bankr. E.D. Va. 1995) (holding that a "claim" is not limited to the filing of a "proof of claim"; "when the claims-allowance process is triggered, the bankruptcy court's equitable jurisdiction is also triggered, thereby rendering the right to a trial by jury waived.").

The Adversary Proceeding, at its core, seeks payment from the Debtors' estates on account of an alleged postpetition administrative expense. Plaintiff seeks recovery from the Debtors' estates on account of alleged postpetition conduct. *See, e.g.*, Compl. ¶¶ 90, 97, 101-105, 110-114. Further, Plaintiff's prayer for relief specifically requests administrative expense treatment for ***all*** damages claims, attorney's fees, and costs asserted in the Complaint. *See id.* at ¶ 125 ("Treatment of all damage claims as first priority administrative expense pursuant to 11 U.S.C. § 503(b)(l)(A)(i)-(ii)"), ¶ 127 ("An allowed administrative-expense priority claim under

11 U.S.C. § 503 for the reasonable attorneys' fees and the costs and disbursements that the Plaintiff incurs in prosecuting this action, as authorized by the WARN Act, 29 U.S.C. § 2104(a)(6)"). Accordingly, the entirety of the relief requested by Plaintiff constitutes both a request for payment of a postpetition claim from the Debtors' estates and a request for a finding that such claim is entitled to administrative expense priority under § 503.

The bankruptcy court's ruling in *In re Comm. Fin. Servs., Inc.,* 252 B.R. 516 (Bankr. N.D. OK. 2000) is instructive. In that case, the plaintiff moved for withdrawal of the reference to district court, in part, on the grounds that alleged post-petition WARN Act violations did not constitute submission to bankruptcy court jurisdiction because the alleged postpetition violations were not "claims" against the bankruptcy estate. The court opined that:

> Plaintiffs argue that they have not asserted a "claim" against the estate; they insist that a complaint seeking recovery for alleged wrongs that accrued postpetition is not a "claim" under the Bankruptcy Code, but rather is a request for payment of an administrative expense . . . . Plaintiffs' WARN Act claims against CFS, regardless of the procedural vehicle with which they are asserted, fall unambiguously within the Bankruptcy Code's definition of "claim," however . . . Plaintiffs have asserted a "right to payment" from the estate and thus a "claim" against the estate. "The broad definition of claim . . . includes of necessity postpetition obligations incurred by the trustee or debtor in possession." *In re MacDonald*,128 B.R. 161, 164 (Bankr. W.D. Tex. 1991). Regardless of the semantics involved, Plaintiffs have indeed asserted claims for distribution from the estate.

Id. at 525. The filing of such a claim for postpetition WARN violations, thus, "invoked the equitable jurisdiction of the bankruptcy courts in [the U.S. Supreme Court case of] *Katchen* and *Langenkamp*." *Id.* at 524. Additionally, the court concluded that, by requesting payment of an alleged administrative expense claim, "Plaintiffs invoke the Court's core equitable jurisdiction to hierarchically prioritize their claims against other claims for the purpose of receiving a distribution from the estate, an essential and exclusive obligation of the Bankruptcy Court." *Id*. at 525. The *Comm. Fin. Servs.* court issued a report and recommendation to the district court recommending that the court deny withdrawal of the reference. As with *Comm. Fin. Servs.*, this Court should decline to exercise permissive withdrawal of the reference because Plaintiff has submitted to the Bankruptcy Court's core jurisdiction and waived jury trial rights with respect to the postpetition claims raised in the Complaint.

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b. CNA Consented To Jurisdiction By Actively Participating In The Chapter 11 Cases And Filing Proofs of Claim.

Plaintiff has also consented to Bankruptcy Court jurisdiction over the claims raised in the Adversary Proceeding through the Plaintiff's conduct and participation in the Bankruptcy Cases and the relevant sale and closure proceedings. Consent to bankruptcy court jurisdiction may occur expressly or by conduct. *See Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 135 S. Ct. 1932, 1948 (2015) (consent to bankruptcy court adjudication of non-core claims may be express or implied). A party's knowing and voluntary consent to final adjudication of issues by a bankruptcy court is enforceable even if the claims raised are non-core. *See, e.g., Wellness Int'l Network*, Ltd., 135 S. Ct. at 1949 ("The Court holds that Article III permits bankruptcy courts to decide *Stern* claims submitted to them by consent."). Further, a litigant need not expressly consent to bankruptcy court jurisdiction to demonstrate consent for purposes of 28 U.S.C. § 157. *See id.* at 1947 ("Nothing in the Constitution requires that consent to adjudication by a bankruptcy court be express.").

Here, Plaintiff expressly consented to the Bankruptcy Court's jurisdiction as evidenced by (i) its formal appearances filed as early as September 17, 2018, (ii) its participation as a member of the Official Committee of Unsecured Creditors, which was formed shortly after the August 30, 2018 Petition Date, and (iii) filing multiple proofs of claim in the Bankruptcy Cases, including against SVMC. [Proofs of Claim Nos. 6233; 6247; 6249; 6250; 6251; 6336; 6340; 6342; 6350; 6359; 7847]. As such, permissive withdrawal of the reference is not warranted because CNA has directly implicated itself in core claims raised in the litigation and in the Bankruptcy Case more generally. *See Schmidt v. AAF Players LLC (In re Legendary Field Exhibitions LLC),* No. 19-05053-cag, 2020 WL 211409 (Bankr. W.D. Tex. Jan. 13, 2020) (relying on *Langenkamp*, 498 U.S. 42, and providing that the filing of a proof of claim equates to consent to bankruptcy court jurisdiction and waiver of a right to a jury trial); *see also In re Jensen*, 946 F.2d 369, 374 (5th Cir. 1991), abrogated on other grounds in *In re El Paso Elec. Co*., 77 F.3d 793, 794 (5th Cir. 1996) (providing that both debtor and creditor lose jury trial right when creditor files proof of claim). As a result, Plaintiff consented to the Bankruptcy Court's exclusive jurisdiction, and either

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waived its right to a jury or consented to the Bankruptcy Court conducting a jury trial (assuming one is permissible).[8]

c. Even Assuming *Arguendo* that Plaintiff is Entitled to a Jury Trial, the Reference Should Not be Withdrawn At This Time

Furthermore, even assuming, *arguendo*, that Plaintiff is entitled to a jury trial, reference to the Adversary Proceeding should not be withdrawn immediately, as the Bankruptcy Court is the most appropriate forum to oversee all pre-trial proceedings. Where the underlying factual and background is extensive, as is the case here, it is prudent to allow pre-trial proceedings to progress in the Bankruptcy Court. *Dom's Making Money,* 2007 WL 1302748, at *7 ("Even where the presence of non-core claims and a jury demand dictate that the reference to the bankruptcy court ultimately may have to be withdrawn, a district court may exercise its discretion not to withdraw the reference immediately where, for example, *the bankruptcy court already is familiar with the relevant facts and issues*, and the issues triable by a jury are not yet ripe for trial.") (emphasis added); *see also In re Empire Land, LLC,* No. CV 12-00193 DDP, 2016 WL 5890062, at *3 (C.D. Cal. Oct. 7, 2016) (declining to immediately withdraw reference because, among other factors, doing so would not support judicial economy). Indeed, this Circuit and District have recognized that such proceedings are more appropriately conducted before a bankruptcy court. *See In re Healthcentral.com*, 504 F.3d 775, 787 (9th Cir. 2007) ("[A] Seventh Amendment jury trial right does not mean the bankruptcy court must instantly give up jurisdiction and that the case must be transferred to the district court . . . . Instead, the bankruptcy court is permitted to retain jurisdiction over the action for pre-trial matters.") (citations omitted); *In re City of San Bernardino*, No. 5:15-CV- 00815-ODW, 2015 WL 6957998, at *7 (C.D. Cal. Nov. 10, 2015) ("The bankruptcy court shall fully control all pre-trial proceedings" and the district court "shall conduct the Pre-Trial Conference, hear and determine all Motions in Limine, and

[8] Additionally, Plaintiff proceeds against the Individual Defendants on the same theories as the Institutional Defendants, thereby triggering indemnity claims of those persons against the Debtors. As such, any jury trial right regarding claims against the Individual Defendants is similarly waived. A copy of the operative bylaws will be provided at the request of this Court.

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conduct trial.”); *In re New Meatco Provisions, LLC*, No. LA CV13-06637 JAK, 2013 WL 12185777, at *7 (C.D. Cal. Dec. 13, 2013) (“A balancing of the applicable factors shows that the more efficient means of proceeding is to have the underlying claims addressed initially by the bankruptcy court.”). The Court should deny permissive withdrawal of the reference in light of the foregoing, or, at minimum, all pretrial matters to proceed in the Bankruptcy Court.

3. Judicial Economy And Uniformity Are Served By Denying Permissive Withdrawal.

Judicial economy and uniformity would be undermined by removing this adversary proceeding. “If a bankruptcy court is already familiar with the facts of the underlying action, then allowing that court to adjudicate the proceeding will promote uniformity in the bankruptcy administration.” *Veldekens v. GE HFS Holdings, Inc. (In re Doctors Hosp.)*, 351 B.R. 813, 867 (Bankr. S.D. Tex. 2006); *Bell v. Lehr*, No. 2:13-cv-02483-MCE-KJN, 2014 WL 526406, at *2 (E.D. Cal. Feb. 6, 2014) (“[T]o ensure uniformity in this matter and to expedite proceedings, until this matter is completely ready for trial, this Court finds that efficiency and judicial economy demand that the Bankruptcy Court continue to handle all pretrial matters”); *Kenai Corp. v. Nat’l Union Fire Ins. Co.*, 136 B.R. 59, 61 (S.D.N.Y. 1992) (finding that “[g]iven [the bankruptcy judge’s] familiarity with the bankruptcy case involving [the debtor], [the bankruptcy judge] is in the best position to monitor all the proceedings related to that bankruptcy, including this adversary proceeding.”).

Moreover, withdrawal of the Adversary Proceeding would cause substantial delay as the Bankruptcy Court, which is familiar with the lengthy history relevant to the claims at issue here, would be able to adjudicate the Adversary Proceeding much more quickly and efficiently. *See Doctors Hosp. 1997, L.P.,* 351 B.R. at 869 (“When a bankruptcy court is intimately familiar with the underlying facts, parties, and issues, a withdrawal of reference would only further delay final resolution of the suit”) (internal citations omitted). Additional costs would also be incurred in providing this Court with the background information related to this matter. While this adversary proceeding was filed on March 5, 2020, the history leading up to this proceeding and the claims at issue dates back to over a year prior to that date, when SGM emerged as the leading stalking

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horse candidate to acquire the remaining assets of the Debtors. *See supra* ¶¶ 5-6. At bottom, the Bankruptcy Court is intimately familiar with the relevant record in the Bankruptcy Cases, including the Debtors' operations, history, the SGM sale, and the background related to the separations of employment of CNA's members, which form the basis of Plaintiff's claims.

Denial is also warranted given this District Court's heavy docket and the number of other pending cases. Thus, it is unnecessary for this Court to expend judicial resources on these matters when the Bankruptcy Court is particularly well suited to preside over the adversary proceeding. Where, as here, the Bankruptcy Court is already well versed in the complexities and the nuances of the Bankruptcy Case, Plaintiff's motion for permissive withdrawal of the reference should be denied.

4. CNA's Motion For Withdrawal Of The Reference Is A Transparent Attempt At Forum Shopping

In determining whether to grant permissive withdrawal, "a district court should consider the efficient use of judicial resources, delay and costs to the parties, uniformity of bankruptcy administration, ***the prevention of forum shopping***, and other related factors." *In re Solano*, No. CV 17-2158 FMO, 2017 WL 8180597, at *3 (C.D. Cal. June 19, 2017) (emphasis added). "The discretion to withdraw a reference to the bankruptcy court should be 'employ[ed] [ ] judiciously in order to prevent [withdrawal] from becoming just another litigation tactic for parties eager to find a way out of bankruptcy court.'" *GTS 900 F, Ltd. Liab. Co. v. Corus Constr. Venture, Ltd. Liab. Co.*, No. CV 10-06693 SJO, 2010 WL 4878839, at *5 (C.D. Cal. Nov. 23, 2010) (citing *In re Kenai Corp.*, 136 B.R. 59, 61 (S.D.N.Y. 1992)).

Plaintiff's motion to withdraw the reference is a transparent attempt at forum shopping. *See Solano*, 2017 WL 8180597, at *3 (denying motion to withdraw the reference in part because "the court is concerned that Solano's Motion is simply an attempt at forum-shopping."); *Facebook v. Vachani*, 577 B.R. 838, 850 (N.D. Cal. 2017) (denying withdrawal of the reference premised on "belief that [. . .] this Court would respond more favorably to Facebook's argument than the Bankruptcy Court.") Plaintiff has repeatedly, and unsuccessfully, opposed myriad relief sought by the debtors in this bankruptcy case, including rejection of collective bargaining

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agreements and, of particularly relevance, closure of St. Vincent. *See* RJN, Exs. 29 & 3 [Bankruptcy Docket Nos. 1269; 3914]. Thus, Plaintiff's attempt to withdraw the reference is a transparent attempt to obtain a more favorable forum by removing this Adversary Proceeding from the Bankruptcy Court, which is intimately familiar with the failed SGM Sale, the related WARN Notices that were provided to CNA, the subsequent approved emergency closure and liquidation of St. Vincent. As a result, permissive withdrawal should not be permitted.

IV. CONCLUSION

For the foregoing reasons, the Debtors respectfully request that this Court enter an order (i) denying the Motion and (ii) granting such other relief as the Court deems just and proper under law or equity.

Dated: May 4, 2020

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EXHIBIT 1

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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.

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

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

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

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

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

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

Dated: April 6, 2020

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Statutes

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Rules

Other Authorities

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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.

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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].

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

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

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

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

II.

RELIEF REQUESTED

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

III.

JURISDICTION AND VENUE

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

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

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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

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

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

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

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

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

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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 Motion[9] and authorized the payment of priority and administrative wage and benefit claims, including for union-represented employees.[10]

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[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.].

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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. I n 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.

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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" that 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

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> approvals and the satisfaction of certain other conditions agreed to between the Debtors and the Purchaser. While the Debtors are optimistic that the Sale will close, there is a possibility that the Sale will be unsuccessful. In that event, St. Vincent may close and none of its employees may be hired by the Purchaser. Even if the Sale closes and St. Vincent remains open, employees at St. Vincent may 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.

(Compl., Ex. 1).

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

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

20. On October 15, 2019, the Court held a hearing on the *Debtors' Emergency Motion for the Entry of an Order: (I) Enforcing the 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*

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

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

> Ms. Skogstad: Good Morning, your Honor. Kyrsten Skogstad, in-house counsel, on behalf of the California Nurses Association.
>
> * * *
>
> The Court: . . . This is the culmination of this case. We have at some point a plan and disclosure statement hearing, but all of that posits that we have a sale of the assets of this case. If we don't, it makes no sense to have a plan and disclosure statement. So this is the day and this is the hour. The sale is the linchpin of the plan. So, without a sale, there's no point to going forward, and I reiterate that because I'm not sure if all of the participants at this morning's hearing fully appreciate what that means. If we don't have a plan and disclosure statement that can be approved by the Court, then, on the Court's own motion, or on a motion of an interested party, the Court may dismiss the case, in which case I think that that would spell a disaster for every party that is represented here this morning.
>
> * * *
>
> More importantly, throughout another set of hearings with respect to a sale to some other entity, with all of the time that would be occasioned by that, *there is no money to fund the continued operations of the Debtor, which would inure to the detriment of thousands of patients, thousands of employees,* and not to mention the creditors in the case.

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

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

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

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> 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

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

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

25. On November 14, 2019, following a hearing, the Court issued an *Order Granting "Debtors Emergency Motion for the Entry of an Order: (I) Enforcing the 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"* (the "Enforcement Order"). *See* RJN, Ex. 20, [Docket No. 3611]. The Enforcement Order provided, in relevant part, that "the Additional Conditions (as defined in Section 8.6 of that certain asset purchase agreement [Docket No. 2305-1] (the 'APA')) were an 'interest in property' for purposes of 11 U.S.C. § 363(f). The Assets (as defined in the APA) were being sold free and clear of the Additional Conditions without the imposition of any other conditions which would adversely affect the Purchaser (as defined in the APA)." [Docket No. 3611 at ¶ 3]. The findings in the Enforcement Order mirrored the findings required under the APA.

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

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

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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].

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> 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

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

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

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

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

> SGM's contention that it is not obligated to close is a cynical attempt to extract a better purchase price. A key component of SGM's negotiation strategy is its attempt to delay as long as possible the adjudication of its obligations under the APA. The Court will not facilitate SGM's dubious tactics.
>
> * * *
>
> By presenting non-meritorious arguments as to why it is not obligated to close, *SGM is holding the estates, creditors, and patients of the Hospitals hostage in an attempt to extort a better 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*

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

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

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

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

> Despite the clear requirements of the APA and in direct contravention of this Court's prior Orders, SGM announced that it would not close the SGM Sale—and, then, did not close the SGM Sale—by December 5, 2019. In a transparent attempt to delay this 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 . . . .
>
> * * *
>
> *SGM has intentionally frustrated the closing process by refusing to participate*. In addition to announcing that it would not close the SGM Sale on December 5, as ordered by the Court, throughout the 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*.

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* * *

> *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*

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> *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).

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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*.

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

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

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

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

> We know that you were aware of the separations of employment at St. Vincent based on the prior WARN notice you received. We had hoped there would be an opportunity for continued employment with SGM when the sale closed. In light of the unforeseen 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.

(Compl., Ex. 5).

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

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

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

V.

ARGUMENT

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

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

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

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

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

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

[13] CNA has named DePaul and Holdings as Defendants in its Complaint. Neither of these Defendants have any employees and therefore are not subject to the WARN Acts. 29 U.S.C. § 2102(a); Cal. Labor Code §1401; *see also* RJN, Ex. 5 at ¶¶ 58-59; Compl. ¶ 120. Likewise SFMC, which CNA seeks to include as a Defendant, cannot be subject to liability for alleged WARN damages under the Complaint because CNA does not represent employees at SFMC and SFMC is not otherwise a party to a CBA that covers employees at SVMC. First Day Decl., ¶ 60 ("The Debtors' Employees are represented by the following unions with the respective contractual obligation . . . (v) 'C[NA] (Nurses) St. Vincent, O'Connor, St. Louise, Seton, Seton 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).

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

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

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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]

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[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. CNA Lacks Associational Standing to Assert the Intentional and Negligent Misrepresentation Claims

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

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

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

The Supreme Court has held that the third requirement means that an association may not seek damages for its members when "damages claims are not common to the entire membership, nor shared by all in equal degree." *Warth*, 422 U.S. at 515. "The courts that have addressed this issue have consistently held that claims for monetary relief necessarily involve individualized proof and thus the individual participation of association members, thereby running afoul of the third prong of the *Hunt* test." *United Union of Roofers, Waterproofers, & Allied Trades No. 40 v. Ins. Corp. of Am.*, 919 F.2d 1398, 1400-01 (9th Cir. 1990) ("[T]he requirements for associational standing under California and federal law are nearly identical."). Indeed, courts have routinely held that unions do not have associational standing to pursue claims for monetary relief on behalf 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

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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,

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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

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

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

Accordingly, CNA fails to allege any intentional misrepresentation.

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

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

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

Second, CNA asserts that Defendants failed to disclose that they "anticipated permanently shutting down St. Vincent entirely and expeditiously in the increasingly likely event that the sale did not close." (Compl., ¶¶ 101-02, 110-11). But the record confirms CNA was aware, as of at least August 12, 2019, 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."

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(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

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

c. CNA Fails To Allege Reasonable Reliance

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

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

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

- The August 12 Notice specifically advised Plaintiffs:

  [T]here is a possibility that the Sale will be unsuccessful. In that event, St. Vincent may close and none of its employees may be hired by the Purchaser. Even if the Sale closes and St. Vincent remains open, employees at St. Vincent may 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.* (Compl. Ex. 1) (emphasis added).

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

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

- The October 23, 2019 Notice advised Plaintiffs that "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* . . ." (Compl. Ex. 2) (emphasis added).
- The Closing Order stated "two of the Hospitals that would likely close upon failure of the SGM Sale contain large populations of long-term patients[.]" [Docket No. 3723 at pp. 6-7].
- The November 30, 2019 Notice further advised Plaintiffs that "the *separations of employment will be further postponed*" and that the "*separations of employment will occur* between **December 6, 2019 and December 19, 2019**" . (Compl. Ex. 3) (emphasis added)..

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

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

3. CNA's Claim for Negligent Misrepresentation Fails

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

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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

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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

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