KYRSTEN B. SKOGSTAD (SBN 281583)
CAROL A. IGOE (SBN 267673)
NICOLE J. DARO (SBN 2769480)
CALIFORNIA NURSES ASSOCIATION
155 Grand Ave.
Oakland, CA 94612
(510) 273-2200 (telephone)
(510) 663-4822 (facsimile)
cigoe@calnurses.org
kskogstad@calnurses.org
Attorneys for Plaintiff
CALIFORNIA NURSES ASSOCIATION

**UNITED STATES BANKRUPTCY DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| In Re<br><br>VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et. al.*,<br><br>Debtors and Debtors in Possession. | Lead Bk Case No. 2:18-bk-20151-ER<br><br>Chapter 11 Proceedings<br><br>Adv. Proc No. 2:20-ap-01051-ER<br><br>**CALIFORNIA NURSES ASSOCIATION'S OPPOSITION TO DEFENDANTS VERITY HEALTH SYSTEM OF CALIFORNIA, INC, *et al's*., MOTIONS TO DISMISS COMPLAINT**<br><br>**[RELATED TO DOCUMENTS 12, 13, 14]** |
| CALIFORNIA NURSES ASSOCIATION (CNA)<br><br>Plaintiff,<br><br>v.<br><br>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,<br><br>Defendants. | Hearing:<br><br>Date: TBD<br>Time: TBD<br>Courtroom: 1568<br>255 E. Temple St.<br>Los Angeles, CA 90012<br>Judge: Hon. Ernest E. Robles |

Page

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

CALIFORNIA CASES



FEDERAL STATUTES

FEDERAL WARN ACT



FEDERAL WARN ACT REGULATIONS



CALIFORNIA STATUTES



CALIFORNIA WARN ACT

CALIFORNIA REGULATIONS



OTHER AUTHORITIES

## I. INTRODUCTION

The California Nurses Association ("CNA") hereby responds to Institutional and Individual Defendants' Motions to Dismiss and Request for Judicial Notice. [Adv. Proc. Docket Nos. 12-14]. As CNA pled, while operating as a going concern, Institutional Defendants planned to shut down SVMC, researched WARN Act exceptions, and intentionally concealed this information from CNA and SVMC's nurses — all just to avoid the inconvenience of a potential staffing shortage. But this type of unscrupulous employer conduct is exactly what Congress sought to eradicate when it passed the WARN Act. Congress made no exception for bankrupt employers, and in doing so implicitly acknowledged that the rights of employees who loyally work during bankruptcy should not be subjugated to the interest of the estate.

Institutional Defendants' attempt to hide behind the so-called "liquidating fiduciary" concept falls flat. First, there is no such exception under the California WARN Act, nor should the federal courts graft one onto a state's remedial statute. Second, the DOL commentary that gave rise to the exception states that it is only available to entities whose sole purpose in bankruptcy is to liquidate. Third, the exception has no relevance where, as here, an integrated enterprise continues to operate two other hospitals while in bankruptcy. Fourth, the Ninth Circuit has never applied this exception to a Debtor-In-Possession ("DIP"), such as Institutional Defendants. And finally, the exception is wholly inappropriate for a group of Chapter 11 DIPs on a Motion to Dismiss given the numerous factual disputes. For all these reasons, the liquidating fiduciary exception provides no basis to dismiss CNA's WARN Act claims.

Defendants also cannot avoid state tort liability for their deception regarding the nurses' job losses. Under the Supreme Court's *UFCW* decision, CNA has associational standing because its members would individually have standing, the issues are germane to CNA's purpose, and California grants CNA the right to pursue these claims in a representative capacity. CNA pled all the elements of these state tort claims with sufficient specificity.

Accordingly, Defendants' motions to dismiss should be denied.

## II. BACKGROUND

### A. WARN Act Background

Widespread plant closures in the 1970s and 1980s caused many mass layoffs, for which most employees had little to no advance warning. *Hotel Employees, Int'l Union Local 54 v. Elsinore Shore Assocs*., 173 F.3d 175, 182 (3d Cir. 1999). Moreover, some companies deliberately concealed anticipated closures from employees to enjoy the benefits of a secure workforce, with complete disregard for the harsh impact a mass layoff with no notice has on employees and communities. *Id.* To address these serious social problems, Congress passed the WARN Act. *Id.* The Act's provisions were viewed as basic protections. Indeed, even "the country's premier business newspaper, the Wall Street Journal, has pointed out, the plant closing provision is a reasonable effort that fits 'squarely in the tradition of such social reforms as child labor and minimum wage laws.'" 134 Cong. Rec. H 5500 (July 13, 1988) (Rep. Miller, California). Additionally, research showed that workers of color and older workers had greater difficulty finding reemployment. *Id.* Thus, advance notice was especially necessary to mitigate the compounded effects of job loss and future hiring discrimination on these employees. *Id.*

Ultimately, the WARN Act's purpose is to ensure that employees have 60 days' notice to adjust to the fact that their income stream is ending and to search for alternative employment. *Collins v. Gee W. Seattle, LLC*, 631 F.3d 1001, 1007 (9th Cir. 2010). This notice affords workers time to find and negotiate comparable employment, without being forced to take the first job offered. *Local Joint Executive Bd. Of Culinary/Bartender Trust Fund v. Las Vegas*, 244 F.3d 1152, 1159 (9th Cir. 2001). This notice also reduces strain on unemployment insurance funds and allows local businesses time to prepare for corresponding reductions in customer-base. 134 Cong. Rec. S 8376 (June 22, 1988) (statements from Senators Byrd and Kennedy).

As discussed in detail below, in 2002, the California Legislature enacted Labor Code § 1400 et. seq., the California WARN ACT, to enhance the protection and expand the coverage afforded by the Federal WARN Act. *International Brotherhood of Boilermakers v. NASSCO Holdings, Inc.,* 17 Cal. App. 5th 1105, 1124 (Cal. Ct. App. 2017).

**B. Key Facts Related to Institutional Defendants' Operations While in Bankruptcy.**

**1. Institutional Defendants Are a Single Employer and Integrated Enterprise for WARN Act Purposes.**

Throughout its operation as Verity Health Systems, all the Institutional Defendants have shared management and directors, been under the ultimate control of Verity Health Systems of California, Inc., ("Verity") as the parent corporation for all significant matters including employment functions, and heavily shared income and borne losses with one another. Complaint ¶¶ 60-84.[1] Indeed, one of the main reasons Institutional Defendants cited for closing SVMC was that it created a drain on the other hospitals in the system. [*Emergency Motion*, Docket. No. 3906, p. 6 (filed January 6, 2020) ("VHS cannot continue to subsidize St. Vincent's operations without putting the continued existence of the entire Verity Health System at risk"); *Id.* at 10 ("However, St. Vincent has been operating at significant financial losses . . . which has become unsustainable for both St. Vincent, and for the other Debtors forced to subsidize its losses.").] Moreover, all the cash collateral motions provide financing for Institutional Defendants as a group and a consolidated budget is attached to each of these motions with no distinction between any of them. [*See, e.g.*, Docket No. 4187, pp. 2, 5, 26 (filed February 28, 2020).]

**2. Institutional Defendants Entered Bankruptcy to Reorganize, Continue to Operate Hospitals as Going Concerns, Operated SVMC For Over 16 Months Prior to Its Closure and Were Not Engaged in Liquidation at Any Point in the SVMC Nurses' Employment.**

Institutional Defendants' First Day Motion indisputably demonstrates that Debtors' intended to reorganize and operate the hospitals as going concerns while in bankruptcy. [Docket No. 8, *First Day Motion*, pp. 3-4, 38 (filed 08/31/18)]. Specifically, Mr. Richard Adcock, CEO of Verity asserted the following in support of Debtors' emergency motions:

- "The First-Day Motions seek relief intended to maintain the Debtors' business operations; to preserve value for the Debtors . . . and, most importantly, to protect the health and wellbeing of the patients who are being treated at the Hospitals [] operated by the Debtors and the employees of the Debtors." [*Id.* at pp. 3-4].

[1] Herein after, standalone citations to ¶'s in this brief are citations to the Complaint. This brief cites to documents filed in the Adversary Proceedings (2:20-ap-01051) as "Adv. Proc. Docket No. __" and documents filed in the related Chapter 11 bankruptcy case (2:18-bk-20151) as "Docket No. ___"). It cites to Institutional Defendants' Notice of Motion and Motion to Dismiss the Adversary Proceeding (Adv. Proc. Docket No. 12) as "Inst. Defs. MTD" or "MTD".

- "Absent entry of an interim order granting the requested relief, the very existence of the Hospitals will be threatened and the ability of the Hospitals to survive as **long-term going concerns**, whether or not owned by the Debtors, will be irreparably harmed." [*Id.* at p. 38]. [emphasis added].

- "Thus, in order to ensure the timely and proper care of the patients and maintain ongoing business operations, it is imperative that the Debtors are able to rely on a consistent, quality supply of various physicians, nurses, nurse practitioners . . ." [*Id.* at p. 47].

Moreover, the need for DIP financing was recognized at the outset of the case to preserve Institutional Defendants' ongoing operations.

> The interests of Prepetition Secured Creditors will be protected and enhanced by the Debtors' use of Cash Collateral and the DIP Facility because such relief will ensure the uninterrupted operation of the Debtors' hospitals and operations . . . , thus protecting the Debtors' revenue streams and protecting the **going concern value** of Debtors. [*Emergency Motion of Debtors for Interim and Final Orders (A) Authorizing the Debtors to Obtain Post-petition Financing*, *etc*., Docket No. 31, p. 38 (filed August 31, 2018)]. [emphasis added]

Additionally, during the bankruptcy, this Court approved an order to sell SVMC as a going concern to SGM, and the terms of the APA included provisions for employment of substantially all of the current staff. ¶¶ 24 -27. Furthermore, throughout the entire bankruptcy, including immediately before and after the closure of SVMC, Institutional Defendants have maintained an ongoing operational hospital system in bankruptcy. The First and Second Amended Cash Collateral Orders, filed on December 30, 2019 and January 31, 2020 (*i.e*., before and after SVMC's closure) respectively, both make explicit mention of the Debtors' need for financing to continue its ongoing operations.

> An immediate and continuing need exists for the Debtors to use Cash Collateral, including Escrowed Cash Collateral and Replacement Cash Collateral, in order to continue operations. . .

[Docket No. 3883, p. 9 (filed December 30, 2019); Docket No. 4028, p. 9 (filed January 31, 2020)]. As noted previously, the Orders quoted above also include operating budgets for Debtors' operations. [Docket No. 3883, p. 26, Docket No. 4028, p.24]. These budgets include anticipated millions of dollars of patient revenue expected each week and plans to pay millions of dollars in payroll and other expenses during the period of December 14, 2019 through February 1, 2020 and

January 25, 2020 through February 29, 2020, respectively. These are not the budgets of a liquidating enterprise.

Additionally, Debtors' activities after receiving authorization to close SVMC were not solely in the spirit of liquidation. Rather, they continued to operate it as a functioning hospital until closure. Debtors' motion to close the hospital stated that the "majority of patients will be discharged in the ordinary course." [Docket 3906, p. 20]. Nor were Debtors even going to cease *scheduling* elective procedures (let alone concluding them) until five days after the entry of an order authorizing the closure, and the clinic operations were not intended to be closed until 30 days after such an order. [Docket 3906, p. 19-20]. The nurses providing care during this period were obviously not performing liquidation activities such as taking inventory and cleaning equipment. Instead, they were providing ongoing patient care in the normal course for which Debtors would receive payment from insurers as part of their regular business.

Furthermore, Debtors did not move to cancel their license to provide acute hospital care at SVMC until April 10, 2020 and instead kept their license in suspense post-closure. [Docket No. 4526, p.6]. Debtors' failure to immediately move to cancel their license casts serious doubt as to whether their intent even at closure was solely to liquidate SVMC. Cancelling a license is very simple (see Docket No. 4526 for two paragraph letter Mr. Adcock had emailed to the Department of Public Health to cancel the license) and allows for the hospital to no longer be deemed a "health facility" subject to Attorney General review. Cal. Corp. Code § 5920(a)(1). A hospital with a suspended license must still pay renewal fees, which are not charged to holders of cancelled licenses. *See* 22 CCR § 70131(b); 22 CCR § 70133. Debtors' behavior is especially subject to further inquiry given that they received a call from an entity interested in SVMC as a going concern on the same day they filed their closure motion. [Docket No. 3906, p. 36]. This call may have led Debtors to believe that other parties were interested in SVMC as a hospital after the SGM sale fell through and encouraged them to keep all possibilities open.

To date, other than SVMC, all of Debtors' hospitals have been sold as going concerns. [Docket No. 1153 (order authorizing sale of O'Connor Regional Hospital and Saint Louise Regional Hospital to Santa Clara County as going concerns on Dec. 27, 2018); Docket No. 4511

(order authorizing sale of St. Francis Hospital as a going concern to Prime Healthcare on April 9, 2020 and Institutional Defendants will continue to operate it until the sale closes); Docket No. 4627 (order authorizing sale of Seton Hospital as a going concern to AHMC on April 22, 2020 and Institutional Defendants will also continue to operate it until the sale closes)].

**C. Key Facts Related to Defendants' Fraud.**

CNA pled that Richard Adcock is the CEO for Verity, and thus for the single employer and integrated enterprise (i.e., Institutional Defendants), and that he exercised control and influence over the key decisions at issue in this Complaint. ¶ 19. Steven Sharrer is the Chief Human Resources Officer of Verity, and thus for the single employer/Institutional Defendants, he too exercised control and influence over key decisions at issue in this Action. ¶ 20.

CNA also pled copious details, including dates, about what Messrs. Adcock and Sharrer disclosed to CNA and the nurses about the likelihood that Defendants would sell SVMC to a buyer who would continue to employ all but nine of the nurses (for whom severance would be provided). ¶¶ 28-29, 33, 36, 37, 40, 41, 50. CNA pled specifics, including dates, about numerous points at which, in order to avoid any nurses leaving before Verity wanted them to, Messrs. Adcock and Sharrer deliberately chose not to disclose that the sale was becoming increasingly unlikely or that Defendants were actively planning to permanently shutter SVMC if there was no sale; or later that the sale had fallen through and that the shutdown was imminent. ¶¶ 31, 37, 40, 43, 48, 49, 52, 54, 100, 103.

Finally, CNA pled that the nurses and CNA believed and relied on Defendants' misleading partial disclosures to their detriment. ¶¶ 30, 34, 36, 44, 51, 102, 103. As a result, nurses forewent the opportunity to look for work with reasonable notice. ¶¶ 44, 51, 105, 107. CNA likewise wasted resources on bargaining it would not otherwise have pursued and lost opportunities to pursue strategies it would have had if it had known all the material facts. ¶¶ 106, 108.

///

///

///

## III. ARGUMENT

### A. Motion to Dismiss Standard

To survive a motion to dismiss, a complaint need only "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Nayab v. Capital One Bank (USA), N.A.*, 942 F.3d 480, 495 (9th Cir. 2019) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Reviewing courts must "take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party." *Disability Rights Montana, Inc. v. Batista,* 930 F.3d 1090, 1097 (9th Cir. 2019) (internal quotations omitted). Plausibility does not demand probability, but seeks only more than a sheer possibility of unlawful conduct. *Nayab*, 942 F.3d at 495. Thus, a "well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of these facts is improbable, and 'that recovery is very remote and unlikely.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (*quoting Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). A plaintiff need not negate affirmative defenses in the complaint. *Id.* at 498.

The Institutional Defendants seek judicial notice of 59 documents outside of the pleadings [*Request for Judicial Notice* ("RJN"), Adv. Proc. Docket No. 14]. These documents may not be used to refute any of CNA's factual allegations on a motion to dismiss. *See CPI Advanced, Inc. v. Kong Byung Woo Comm. Ind., Co., Ltd.,* 135 Fed. Appx. 81, 83 (9th Cir. June 16, 2005) (Unpub. Disp.) ("Though records of litigation are subject to judicial notice for some purposes at the pleading stage, judicial notice is not a proper basis for rejecting factual allegations appearing in the plaintiff's complaint," citing *Sears, Roebuck & Co. v. Metropolitan Engravers, Ltd*., 245 F.2d 67, 70 (9th Cir. 1957)). Nor can these documents be used to resolve issues of disputed fact. *See Khoja v. Orexigen Therapeutics, Inc.*, 889 F.3d 988, 999 (9th Cir. 2018) *cert. denied sub nom. Hagan v. Khoja*, 139 S. Ct. 2515 (2019) ("[j]ust because the document itself is susceptible to judicial notice does not mean that every assertion of fact within the document is judicially noticeable for its truth."). Accordingly, CNA specifically objects to the Defendants' request for judicial notice ("RJN") of the facts asserted in the declaration of Richard Adcock (RJN, Exh. 5), Declaration of Peter Chadwick (RJN, Exh. 44), Declaration of James Maloney (RJN, Exh. 9) and of the facts asserted in *Debtors' Emergency Motion for*

*Authorization to Close St. Vincent Medical Center* and *Status Reports Re Closure of St. Vincent Medical Center* (RJN, Exhs. 44, 47, 48, 49, and 50), which present Defendants' unilateral accounts of the circumstances that led to the bankruptcy filing and certain events during the bankruptcy proceedings (such as the Institutional Defendants' reasons for closing SVMC and their plans for it post-closure). These allegations are clearly subject to dispute in this adversary proceeding and thus cannot be relied on to resolve a motion to dismiss.

CNA further objects to the RJN for the documents about the possibility of SVMC closing and difficulties with the SGM sale because Defendants attempt to rely on the existence of these documents as proof that CNA was both aware of them and understood them to mean that SVMC would not only close, but close in extremely short order. (RJN, Exhs. 14, 15, 19 27, 30, 36, 39, 41, 42, 57, 58). CNA disputes this inference, revealing yet another glaring dispute of fact. Likewise, CNA objects to documents (e.g., RJN, Exhs. 1, 2) showing its involvement in the bankruptcy because none of these documents establish that CNA somehow had advance knowledge of Defendants' abrupt closure of SVMC. CNA objects to the RJN with respect to Exhibits 3 and 51 because both of these pleadings relate to a settlement agreement Institutional Defendants reached with a union completely unaffiliated with CNA, which has no relevance in any context. CNA objects to RJN, Exh. 4, on the grounds that it relates to a settlement agreement CNA reached with Institutional Defendants that they admit is now null and void (MTD, p. 3, fn.6). The settlement agreement cannot demonstrate CNA's acquiesce of the priority of any claims presently before this Court because they were obviously not at issue in that settlement agreement. CNA also objects to RJN, Exhs. 6-8, 56 on the grounds that they relate to Institutional Defendants' first day wage motion, which is irrelevant to the claims or damages sought in this case.

**B. The California WARN Act Does Not Have a "Liquidating Fiduciary" Exception.**

California enacted its state WARN Act for the sole purpose of expanding the coverage of the Federal WARN Act and strengthening its protections. *Int'l Bhd. of Boilermakers v. NASSCO Holdings, Inc.,* 17 Cal. App. 5th 1105, 1124 (Cal. App. 2017) ("The entire thrust of the legislative effort in enacting the California WARN Act was to provide greater protection to

California workers."). Among other enhancements, California requires a significantly lower number of laid-off employees to trigger its protections, explicitly replaces the federal exception for layoffs caused by unforeseen business circumstances with a more restrictive physical calamity or act of war defense, and requires that employers provide notice to all represented employees, as opposed to merely their union. *NASSCO Holdings, Inc.*, 17 Cal. App. 5th at 1123.

Because California's goal was to expand WARN Act coverage and because there is no reference to a liquidating fiduciary anywhere in the California WARN Act or regulations, this Court should decline to read the federal liquidating fiduciary concept into to it. *See*, *e.g.*, *NASSCO Holdings, Inc.*, 17 Cal. App. 5th at 1126 (in California WARN Act case, refusing to import the federal requirement that advance notice is only required when temporary layoffs are for more than six months); *see also Troester v. Starbucks Corp.*, 5 Cal. 5th 829, 841 (Cal. 2018)[2] (declining to apply the *de minimis* exception developed in federal caselaw and federal regulations under the Federal Labor Standards Act to state law because no evidence existed of any intent to do so); *Morrillon v.Royal Packing*, 22 Cal. 4th 575, 592 (Cal. 2000) ("Absent convincing evidence of the [California Industrial Welfare Commission's] intent to adopt the federal standard . . . we decline to import any federal standard, which expressly eliminates substantial protections to employees."). *Accord*, *Ramos v. Baldor Specialty Foods, Inc.*, 687 F.3d 554, 558 (2d Cir. 2012) ("To extend an exemption to other than those plainly and unmistakably within [the statute's] terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people."); *Czyzewksi v. Jevic Transp. Inc. (In re Jevic Holding Corp.*), 496 B.R. 151, 165 (Bankr. D. Del. 2013) ("While the Court finds that the Debtors satisfy the Unforeseeable Business Circumstances exception under the Federal WARN Act, there is no such exception under the New Jersey WARN Act . . . Class Plaintiffs are entitled to recovery under the New Jersey WARN Act.").

This outcome is further supported by the fact that the federal and California WARN Acts define "employer" differently. *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 796-797 (Cal.

[2] In *Troester*, the Ninth Circuit certified these questions of state law interpretation to the California Supreme Court. 5 Cal. 5th at 836.

1999) ("By choosing not to track the language of the federal exemption and instead adopting its own distinct definition . . . the IWC evidently intended to depart from federal law and to provide, at least in some cases, greater protection for employees."). Specifically, the DOL based what is now recognized as the liquidating fiduciary exception on the premise that an entity that is only in bankruptcy for the purpose of liquidating is not an employer because it is not "engaged in a business enterprise" as required in the Federal WARN Act's definition of employer. 54 Fed. Reg. 16042 (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"); 29 U.S.C. § 2101(a)(1) (". . . the term 'employer' means any business enterprise that employs . . ."). But California WARN Act's definition of employer does not track the federal requirement that entity be "engaged in a business enterprise." Indeed, there is no reference to a "business enterprise" in the California WARN Act definition of employer at all. Instead, California merely requires that an employer "operate" a "covered establishment," which in turn is an "industrial or commercial facility or part thereof that employs, or has employed within the preceding 12 months, 75 or more persons." Cal. Lab. Code § 1400(a). California's definition of an employer as someone who merely operates an industrial or commercial facility is much less stringent and more inclusive because it carries no possible requirement that the industrial or commercial facility be an ongoing business. Accordingly, the differences in statutory definition of "employer" further militate against importing the federal liquidating fiduciary exception into the application of the California WARN Act. *See also MacIsaac v. Waste Mgmt. Collection & Recycling, Inc.*, 134 Cal. App. 4th 1076, 1089 (Cal. App. 2005) (similarly explaining that "differences between definitions used in Wisconsin WARN Act and Federal WARN Act made reference to the federal authority unhelpful").

The only case that Institutional Defendants cite in support of their claim that the liquidating fiduciary exception should be read into the state WARN Act, *Estrada v. Salyer Am.*, did not meaningfully consider the issue because plaintiffs in that case did not present any authority suggesting the liquidating fiduciary exception should not apply under the state law.

No. C 09-05618 JW, 2010 U.S. District Lexis 16054, at *8 (N.D. Cal. March 31, 2010) ("Plaintiffs do not cite any authority that would suggest a different standard under the California WARN Act or Cal. Labor Code § 203. Thus, absent any conflicting state law, the Court applies the *Chauffeurs* standard to determine whether a secured creditor is an employer . . ."). Because the *Estrada* court did not consider whether a different standard should apply under California law, it provides no authority on this question.

Furthermore, as discussed in Section C.3 below, *Estrada* is wholly inapposite to the instant situation. The question before that court was whether a *receiver* was a WARN Act employer when he: (1) had been appointed on behalf of a group of secured creditors to recoup loans, (2) was obligated to terminate the business under the receivership, and (3) did indeed shut down the business within two weeks of appointment. No. C 09-05618 JW, 2010 U.S. District Lexis 16054 at **4, 10. Under these circumstances the receiver would not have any state WARN Act liability even absent the liquidating fiduciary exception based on differences in how the two statutes construe the term employee.[3] Concluding that a liquidating fiduciary exception should not only be read into the state law based on dicta in *Estrada*, but also should be extended further to DIPs which operated SVMC for over sixteen months with plans to sell it to another operator as a going concern and continue to operate other hospitals, borders on nonsensical. Accordingly, this Court should reject Institutional Defendants' assertion that the federal liquidating fiduciary exception applies to the California WARN Act: a contrary finding would undermine the remedial purpose of the state law, is not supported by any language in the state law, and is not supported by any other legal authority.

[3] Under the California WARN Act, employers only have to give notice to employees whom they have employed "for at least 6 months of the 12 months preceding the date on which notice is required." Cal. Lab. Code §§ 1401(a)(1), 1400(h). Thus, a receiver or trustee appointed to liquidate a business would never be liable under the state law simply because they operate the business for too short a time to acquire any employees under this definition. The Federal WARN Act has no such temporal limitation in its definition of employee. These differences further militate against applying federal exceptions to the state law.

**C. The Federal "Liquidating Fiduciary" Exception Is Inapplicable to the Case at Bar.**

Even under federal law the liquidating fiduciary exception does not apply for several independent reasons.

**1. The Ninth Circuit Has Not Applied Liquidating Fiduciary Exception to Chapter 11 DIPs.**

As the DOL commentary explains, the entire premise of the liquidating fiduciary exception is that a liquidator should not succeed to the notice obligations of the former employer because the liquidator is not operating a business:

> [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. In other situations, where the fiduciary may continue to operate the business for the benefit of creditors, **the fiduciary would succeed to the WARN obligations of the employer** precisely because the fiduciary continues the business in operation. [emphasis added].

54 Fed. Reg. 16042, 16045 (Apr. 20, 1989). This is a successorship liability provision. Thus, for the exception to apply, a recognized distinction between the "former employer" and the new fiduciary must exist. However, the Ninth Circuit views the DIP "as the same entity which existed before the filing of the bankruptcy petition." *Biltmore Ass'ns, LLC v. Twin City Fire Ins Co.*, 572 F.3d 663, 672 (9th Cir. 2009). Thus, there is no successor when a DIP continues to manage its business in bankruptcy, and especially when the DIP maintains all of its normal obligations as an employer.

Accordingly, it is unsurprising that no Ninth Circuit decision has ever found that the exception applies to DIPs. In fact, in the *Weslock* case that Defendants rely so heavily on, the court only acknowledged that the DOL commentary applies to formal fiduciaries, "i.e., a trustee." *Chauffeurs, Sales Drivers v. Weslock*, 66 F.3d 241, 244 (9th Cir. 1995) ("[t]he comments acknowledge that the application of WARN to a 'fiduciary (**i.e., a trustee**) in a bankruptcy proceeding is dependent on whether the fiduciary has in fact operated the debtor's assets as a business enterprise. . . .") (emphasis added). The Ninth Circuit's use of "i.e." as opposed to "e.g." illustrates that in this context, fiduciary means trustee. *See Otter Products, LLC v. Treefrog Dev. Inc.*, No. 11-cv-02180-WJM-KMT, 2012 U.S. Dist. LEXIS 139253, *64,

n.12 (D. Colo. Sept. 27, 2012) (explaining that "e.g." stands for "exempli gratia" and means "for example," but "i.e." is the abbreviation for "id est" and means "in other words."). This choice of words by the Ninth Circuit demonstrates that the court did not intend its holding to apply to DIPs at all, but rather only separate entities brought in to manage the estate after a DIP has been divested of authority. This reading is also in line with basic canons of statutory construction. It is presumed that Congress passes each subsequent law "with full knowledge of the existing legal landscape." *Northwest Airlines Corp. v. Assn. of Flight Attendants-CWA, AFL-CIO*, 483 F.3d 160, 169 (2d Cir. 2007). Thus, as Congress was well aware at the time it passed the WARN Act that employers often terminate their businesses in bankruptcy, the fact that it chose not to exclude bankrupt employers demonstrates that it intended the Act to apply to them.

**2. Institutional Defendants Are A Single Employer with Ongoing Operations.**

The single employer and integrated enterprise doctrines treats all entities under common control and management as one employer for the purposes of the WARN Act. *Childress v. Darby Lumber Co.*, 357 F.3d 1000, 1006 (9th Cir. 2004); *Blair v. Infineon Tech AG,* 720 F. Supp. 2d 462, 467, 474 (D. Del. 2010) (denying motion to dismiss because parent companies and subsidiaries were a single enterprise for WARN Act purposes despite facts that subsidiaries had filed for bankruptcy on the same day they terminated their employees and subsidiaries were not named in complaint). In this circuit, courts determine single employer/integrated enterprise status by considering the following factors derived from the WARN Act regulations: common ownership, common directors and/or officers, de facto exercise of control, unity of personnel policies emanating from a common source and dependency of operations. *Id.* CNA has more than adequately alleged these factors as applied to all Institutional Defendants because CNA pled they are all under the control of Verity. ¶¶ 60-84. The WARN Act Notices in question were sent by Verity on its letterhead. ¶¶ 28, 33, 41, 57. CNA bargained terms and conditions of employment for the SVMC nurses through Verity's labor relations personnel. ¶¶ 32-36. And even the notice to cancel St. Vincent's hospital license was sent by Rich Adcock as Verity CEO, again on Verity letterhead. Docket No. 4526, p. 6. These facts all show that the Institutional Defendants are part of one integrated business operation. Furthermore, the decision to close St.

Vincent which led to the terminations at issue was made collectively by the Institutional Defendants. [Docket No. 3906, p.25 ("Here, the Debtors have determined in their business judgment that it is prudent to seeks permission to cease operations at St. Vincent.").] In this case there is simply no meaningful distinction between the Institutional Defendants; St. Vincent was just a part of that single, integrated enterprise's operation.

Thus, the liquidating fiduciary exception cannot apply to Institutional Defendants because as a single employer and integrated enterprise their "sole function in the bankruptcy process" is not liquidation. 54 Fed. Reg. 16042, 16045. In fact, their sole function has never been liquidation. Rather, to date they continue to operate two hospitals, Seton Medical Center and St. Francis Medical Center, in the normal course. Hence, this case is very close to *In re MF Glob. Holdings*, *Ltd.*, is which the district court reversed a bankruptcy court's dismissal of a WARN Act claim based on the liquidating fiduciary concept because plaintiffs had alleged that defendants were a single employer, and factual questions remained if parent companies continued in business even though the subsidiary did not). No. 13 CIV. 07218-LGW, 2014 U.S. Dist. Lexis 113853 at *14-18 (S.D.N.Y. August 14, 2014)

Moreover, the DOL regulations associated with the liquidating fiduciary commentary draw a distinction between an "employer" and a "site of employment". *See*, 20 C.F.R. § 639.3(i). Thus, a single employer may operate several sites of employment. *See, e.g.,* 20 C.F.R. § 693.3(i)(4) ("For example, assembly plants which are located on opposite sides of a town and which are managed by a single employer are separate sites if they employ different workers.") Additionally, as noted above, the DOL regulations specifically include provisions incorporating the single employer doctrine. 20 C.F.R. § 693.3(a)(2). Thus, given that all of these concepts were in play at the time the DOL drafted its commentary, it is significant that it did not phrase the liquidating fiduciary concept in terms of *liquidating sites of employment*, but, rather, *liquidating fiduciaries*. This choice further demonstrates that it did not intend the concept to exempt entities who continue to operate other sites as going concerns while shutting down one operation. *Lao v. Wickes Furniture Co.*, 455 F.Supp. 2d 1045 (C.D. Cal. 2006) (quoting 2A Norman J. Singer, *Sutherland Statutory Construction* § 46:6 (6th ed. 2005) ("[W]hen the

legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended. In like manner, where the legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded."). Even assuming arguendo that the exception can apply to DIPs, it would still only be available when the entire entity is in the process of liquidating its whole operation.[4] *See also* House Conf. Report. 100-576, 100th Cong. 2nd Sess. 1045, 1046 [reprinted in 5 U.S. Code Cong. & Admin. News [1988] 2078, 2079] ("General Motors has dozens of automobile plants through the country. Each plant would be considered a site of employment, but as provided in the bill, there is only one 'employer' – General Motors.").[5]

**3. Exempting DIPs that Shut Down After Operating a Business for More than a Year in Bankruptcy as a Going Concern Is Irreconcilable with the DOL Commentary and Purpose of the WARN Act.**

Institutional Defendants point to a thin line of cases in support of the proposition that Chapter 11 DIPs can avail themselves of the liquidating fiduciary exception if at the time of the terminations the DIP was shutting down the facility at issue, regardless of how long the DIP managed the company in bankruptcy as a going concern and regardless of their intent throughout most of the bankruptcy process. Inst. Defs. MTD, pp. 23-25. This argument is mistaken. The DOL commentary establishing the liquidating fiduciary exception plainly states that it is the activity of the fiduciary throughout the entire bankruptcy which is material, not the activities at termination of employment (reprinted again for convenience):

---

[4] Even if the California WARN Act had a liquidating fiduciary exception, the argument that it would nonetheless not apply to Institutional Defendants because they continue ongoing operations would be even more forceful under the California WARN Act because it expressly holds a parent corporation liable for the acts of the subsidiary (Cal. Labor Code §1400(b)) and Verity, the parent, is still operating hospitals to date.

[5] If ongoing bankrupt integrated enterprises could escape liability when they decide to close one of their subsidiaries, this would give them an unfair competitive advantage over solvent companies (i.e., the other ongoing hospitals in this bankruptcy would benefit from not having to absorb any part of the WARN Act liability at SVM, while non-bankrupt integrated enterprises would have to incur this cost if they closed a subsidiary). *In re Res. Tech. Corp.*, 662 F.3d 472, 476 (7th Cir. 2011) ("Businesses operating in bankruptcy that were excused from tort liability would have an inefficient competitive advantage over their solvent competitors.").

> [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. **In other situations, where the fiduciary may continue to operate the business for the benefit of creditors, the fiduciary would succeed to the WARN obligations of the employer precisely because the fiduciary continues the business in operation.** [emphasis added].

This language is explicit. Fiduciaries who continue regular business operations in bankruptcy, as Institutional Defendants did for 16 months prior to closing SVMC and as they continue to do with Seton and St. Francis, are not liquidating fiduciaries. 7 *Collier Bankr. Prac. Guide* P. 133.05[9][g] ("Further one point is clear from the case law: the fiduciary cannot operate the business in any sense for even a limited amount of time. Even one shift as a going concern could be enough to destroy any application of the defense.") (internal citations omitted). Not surprisingly, the only court that was confronted with a WARN Act case involving Chapter 11 DIPs which operated their business for any appreciable amount of time in bankruptcy found they could not take advantage of the exception. *See Oil, Chem. & Atomic Workers v. Hanlin Grp.* (*In re Hanlin)*, 176 B.R. 329, 332 (Bankr. N.J. 1995) ("In this case, the Debtor kept the plant in operation for at least one month after the petition was filed, and continued to operate the business as a whole for the benefit of all parties in interest. It is therefore subject to WARN.").

Reading the exception as broadly as Defendants advocate would create a major escape hatch from WARN Act duties for all "going-out-of-business" events that occur in bankruptcy. This interpretation cannot be reconciled with the express purpose of the WARN Act to provide notice of *plant closures,* especially considering that the Act makes no exception for bankrupt employers. 29 U.S.C. § 2101(a)(2). Furthermore, the same DOL commentary from which the exception is based explicitly states that fiduciaries in bankruptcy should not be categorically excluded from the definition of a WARN employer because "adequate protection for fiduciaries are available through the bankruptcy court . . . ." 54 Fed. Reg. 16042, 16045 (Apr. 20, 1989). Thus, it was neither Congress's nor the DOL's intent to exempt companies from WARN Act liability merely because they close during bankruptcy proceedings. Rather, by its plain terms, the exception applies only to fiduciaries whose sole purpose in bankruptcy is to liquidate.

Moreover, courts construe the liquidating fiduciary exception narrowly because the WARN Act is remedial legislation.

> First, this is an exception applied to liquidating fiduciaries, and as an exception, it should be applied sparingly . . . in this instance, anything other than a narrow interpretation runs the risk of allowing circumstances well beyond those intended by the Department of Labor to vitiate the protections afforded employees by the WARN Act.

*In re World Mktg. Chi., LLC,* 564 B.R. 587 (Bankr. N.D. Ill. 2017) (internal citations omitted); *see also Law v. American Capital Strategies,* 3:05-cv-0836, 2007 U.S. Dist. Lexis 5936, *49 (M.D. Tenn. January 26, 2007) (same). Indeed, as a matter of policy, courts apply remedial legislation broadly. *See, e.g.*, *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

For example, in *Walsh v. Diamond* (*In re Century City Doctors Hospital*), this Court found that even a Chapter 7 liquidating trustee would be subject to the WARN Act so long as it operated the business as a going concern for a significant period of time prior to its closure. 417 B.R. 801 (Bankr. C.D. Cal. 2009), aff'd, B.AP. No. CC-09-1235-MkJaD, 2010 Bankr. Lexis 5048 (B.A.P. 9th Cir. Oct. 29, 2010) (B.A.P. decision unpublished) ("The Department of Labor interpretation of the WARN Act supports this view."). The Court then went on to state that it need not decide how a long a trustee must operate a business for WARN Act liability because the trustee in question only operated the hospital for a week "**solely** for the limited purpose 'of shutting down the Debtor's operations and [disposing of medical and hazardous waste]." *Id.* at 805 [emphasis added]. Thus, consistent with the purpose of the DOL commentary, this Court interpreted the exception to only apply when the sole intent of the trustee in the entire bankruptcy process is to liquidate the estate. *Id.*

Other courts have followed similar analysis. In *In re United Healthcare System*, for example, the hospital DIP surrendered its certificate of need (i.e., state license to operate a hospital), gave employees a WARN notice and arranged for the sale of its goodwill to a buyer on the same day it filed for bankruptcy and transferred all of its patients within 48 hours. 200 F.3d 170, 173 (3d. Cir.1999). United Healthcare then kept its staff employed for 16 days for wind-down operations (e.g., cleaning equipment, taking inventory and preparing it for liquidation) before terminating them. *Id.* In ruling that United Healthcare could take advantage of the

liquidating fiduciary exception, the Third Circuit reasoned that its "actions from the time it filed its Chapter 11 petition throughout the proceedings clearly demonstrate its intent to liquidate." *Id.* at 178. "[H]ad [its] conduct and activities demonstrated a bona fide effort toward reorganization, [however] the evidence may have shown [it] was an 'employer' subject to WARN." *Id.* In reaching this decision, the Third Circuit, went to great lengths to distinguish its case from one in which an employer continues to operate in bankruptcy.

> An employer as fiduciary will succeed to its WARN Act obligations if an examination of the debtor's economic activities leading up to and during the bankruptcy proceedings reveals that the fiduciary has continued in an 'employer' capacity, operating the business as an ongoing concern.

*Id.* at 178.

As demonstrated by the cash collateral orders, first day motions, attempted sale of SVMC as a going concern, and Institutional Defendants' behavior, it is unclear they were ever liquidating while the SVMC nurses were employed, much less that they were in bankruptcy for the sole purpose of liquidation. Moreover, unlike, the employees in *United Healthcare*, the affected nurses were not engaged in "winddown" operations such as taking inventory or cleaning equipment for sale at the time of their terminations, but rather were providing regular bedside nursing care. [Docket No. 3906, pp. 19-20]. Accordingly, under the guidance of *In re Century City Doctors Group*, *In re Hanlin Group* and *United Healthcare*, Institutional Defendants cannot be liquidating fiduciaries because they made "bona fide attempts to reorganize" by operating SVMC and the other hospitals for sixteen months throughout the bankruptcy, and continuing to operate hospitals at present.

The notion that Institutional Defendants, who planned the terminations and shutdown while operating as a going concern, can take advantage of an exception for liquidation in lieu of operation defies both logic and the purpose of the Act. *See, e.g.*, ¶ 49. Courts interpreting similar fact patterns have reached the same conclusion:

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

*Law v. American Capital Strategies,* 2007 U.S. Dist. Lexis 5936, *49 (finding that even if employees were only engaged in distributing remaining packages and not taking new orders when the company closed, they were still engaged in the employer's regular business operations).

Nor does *Weslock*, the main case on which Institutional Defendants rely for their position that only a fiduciary's actions at the time of the terminations matter, support a contrary result. In that case the court considered the secured creditor's behavior during the entire six days it was in charge of the company.

> Indeed, there is no indication that [secured creditor] was responsible during the six days in question for operating the Weslock facility as a business enterprise in the normal commercial sense: [secured creditor] apparently did not participate in the decisions concerning the plant's production output, the marketing of the plant's product, or the plant's employment practices. Without some evidence showing [secured creditors] involvement in the functional operations of the Weslock facility, there can be no finding that [secured creditor] is an employer under WARN.

*Chauffeurs, Sales Drivers v. Weslock*, 66 F.3d 241, 245 (9th Cir. 1995).

Institutional Defendants make much of a stray sentence in the *Weslock* decision which suggests that a Debtor's activities at the moment of termination is dispositive. (Inst. Def. MTD at 24.) But this statement is at best dicta. As the above quotation demonstrates when the court actually analyzed whether the liquidating fiduciary exception applied, it considered all of the secured creditor's actions upon taking possession of the facility in question to determine if at any point it did anything more than exercise "financial control designed to preserve its security interest." *Id.* at 245. Thus, the court squarely determined whether the secured creditor actually succeeded to any of the employer functions. In the instant case, by contrast, Institutional Defendants have continued all employer functions throughout this bankruptcy.

Furthermore, the *Weslock* terminations were nearly simultaneous with the secured creditor's takeover, so it makes sense that the court could conversationally refer to the terminations as an operative moment. The same is true for all of the cases cited by Debtors. *In Re Century City Doctors Hospital, LLC*, 2010 Bankr. LEXIS 5048, *1 (B.A.P. 9th Cir. 2010) (unpublished) (liquidating trustee terminated employees within week of appointment); *Estrada v. Salyer America*, 2010 WL 11580074, at p. 6 (receiver terminated employees within two weeks of

appointment), and *Thielmann v. MF Global Holdings, Ltd. (In re MF Global Holdings)*, 481 B.R. 268, 272-273 (Bankr. S.D. N.Y. 2012) (liquidating trustee terminated employees within eleven days of appointment). Thus, the courts did not need to draw meaningful distinctions between the fiduciaries' activities throughout the bankruptcy process and the time of employee terminations because they were all one and the same. None of these courts actually grappled with the DOL commentary as it relates to the facts for the case at bar, namely, DIPs who continue to operate as a going concern for over a year with intent and attempts to reorganize but nonetheless now assert an exception applicable only to a fiduciary whose sole function is liquidation.

Ultimately, the amount of time the entity ran the business prior to liquidation is of crucial importance, because it goes to the issue of giving advanced notice to employees which lies at the heart of the WARN Act. Unlike the trustees and receivers in the above cases who were appointed after the decision to liquidate had been made, Institutional Defendants ran the hospitals with a reorganizing purpose for over a year after filing for bankruptcy. Institutional Defendants thus had the ability to give notice when they themselves made the decision to close SVMC and were still operating it as a going concern. They controlled the shutdown and planned it at least weeks before it occurred. ¶ 48. *Compare In Re United Healthcare*, 200 F.3d at 179 (applying liquidating fiduciary exception in part because "there is no evidence United Healthcare knew in advance that it would be forced to close but concealed that knowledge from employees.")

Thus, unlike trustees and receivers who have no meaningful opportunity to provide WARN notice and do not even make the decision to liquidate, Institutional Defendants did make the decision to close but chose not to notify the affected employees of that decision until the last possible moment in order to reduce staffing inconveniences. ¶ 54. Even more egregious and distinguishable from the cases involving appointed liquidating trustees and receivers, here Institutional Defendants' attorneys were researching whether they could hide behind the liquidating fiduciary exception as early as December 19, 2020, when it was operating as a going concern. ¶ 52; *see also* Docket No. 4250-7, p. 140 of 164 (related billing entry). Rather than

scheming to avoid liability by trying to shoehorn the closure into the liquidating fiduciary exception, Institutional Defendants should have simply provided notice to the employees that SVMC would be closing and terminating their employment in mid-to-late January. They should not be permitted to escape WARN Act liability by availing themselves of an exception that was never intended to apply to these circumstances.

**4. The Putative Employer's Activities at Termination of Employment Have Never Been Dispositive in Any Other WARN Act Exclusion or Exception.**

Institutional Defendants' fixation on the purported employer's activities at termination is not only without basis in the DOL commentary, but also without support in the WARN caselaw that has actually addressed the issue. When faced with the question of when the number of employees should be measured to determine if a company meets the threshold for liability, the Ninth Circuit held that whether an entity is an employer is determined at the time notice should have been given. *See Collins v. Gee W. Seattle LLC,* 631 F.3d 1001, 1005 (9th Cir. 2001) (rejecting argument that WARN obligations should be measured as of date of plant closing rather than when notice was due.) Accord *Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1005 (9th Cir. 2004) (employment loss triggering WARN notice is calculated "from the 'snap-shot' date of the last date upon which the notice would be required to be given . . . ."); *Caroll v. World Mktg. Holdings, LLC*, 418 F. Supp. 3d 299, 308 (E.D. Wis. 2019) (no liquidating fiduciary exception because no evidence the employer solely functioned to liquidate "at the time WARN Act notice was required"); *Newman as Tr. Of World Mktg Tr. v. Crane, Heyman, Simon, Welch, & Clar*., 17 C 6978, 2020 U.S. Dist. LEXIS 11685, at *11 (N.D. Ill. Jan 22, 2020) (same).

Furthermore, the statutory exceptions to the WARN Act require that the necessary conditions occur at the time that notices are required, or in some cases when the employees are hired. *See* 29 U.S.C. § 2102(b)(1) (faltering company exception based on events when notice required); 29 U.S.C. § 2102(b)(2)(A) (unforeseeable business circumstance exception based on state of affairs when notice required); 29 U.S.C. § 2103(1) (exception for short-term assignments based on employees' understanding when hired); *see also* 20 C.F.R. § 639.5 (WARN regulations measuring employer's obligations as of notice). None of the exceptions use the time of termination as the determinative period.

This is all consistent with the key fact that the WARN Act is primarily a notice statute. It does not prevent an employer from terminating its operations and firing employees. It only requires that the employer give notice. While the DOL commentary clearly states that it is the fiduciaries' entire intent and behavior in bankruptcy that controls, to the extent there is one time period that requires heightened focus by a court it must be when notice is required. In this case, the time when notice should have been provided was in November 2019 (or at the very latest, weeks prior to the Closure Order when Institutional Defendants planned the shutdown). Because Institutional Defendants admit they were operating as a going concern until January 9, 2020,[6] (Inst. Def. MTD, p. 24) well after notices were due, they are "employers" for purposes of WARN Act liability.

**5. DIPs in a Chapter 11 Case Cannot Prevail on their "Liquidating Fiduciary" Theory on a Motion to Dismiss.**

Courts have consistently denied motions to dismiss on the basis of the "liquidating fiduciary" exception against Chapter 11 DIPs because whether or not these debtors were in bankruptcy for the sole purpose of liquidating is a heavily fact-driven analysis. *Cain v. Inacom Corp*., Adv. No. 00-1724, 2001 Bank. Lexis 1299, at *3 (Bankr. Del. September 26, 2001) (denying Chapter 11 DIP's motion to dismiss even where they filed for bankruptcy, shut down plant and terminated employees on the same day because liquidating fiduciary principle is fact intensive); *In re Dewey & LeBoeuf LLP*, 487 B.R. 169, 174-176 (Bankr. S.D.N.Y. 2013) (same where Chapter 11 DIP terminated employees a few weeks prior to filing for bankruptcy); *In re Thielmann v. MF Global Holdings Ltd.*, 481 B.R. 268 (Bankr. S.D.N.Y. 2012) (denying motion to dismiss against Chapter 11 debtors since questions existed whether they were liquidating or reorganizing; but granting motion to dismiss against Securities Investment Protection Act (SIPA) trustee appointed to liquidate business when employees were terminated less than two weeks after Chapter 11 petition filed).

The only case to Plaintiff's knowledge in which a court found that a DIP was a liquidating fiduciary is *In re United Healthcare System, Inc.*, 200 F.3d 170 (3d Cir. 1999). However, that case was based on a motion for summary judgment and, as discussed in detail

[6] CNA disputes that Debtors were liquidating at any point in the SVMC nurses' employment.

above, was very factually distinct from the case at bar because all of the evidence showed that the DIP's sole purpose in bankruptcy was to liquidate the business. *Id*. Indeed, the only cases in which defendants have prevailed on a motion to dismiss based on this theory is when the defendant was appointed as a liquidating trustee and closed the facilities in very short order. *In re Century City Doctors Hosp.*, 417 B.R. at 804 (noting that Chapter 7 differs from Chapter 11 in that the "purpose of a chapter 7 case is the liquidation of a debtor's business, not its operation," and even then not ruling that a chapter 7 trustee could be a WARN Act employer if they operated the business in question for a period of time). This line of cases is very distinguishable from this case in that a liquidating trustee who takes steps to close and liquidate a hospital upon appointment can hardly be said to have a purpose in the bankruptcy other than liquidating.

**6. The WARN Act Claims are Entitled to Administrative Priority.**

Defendants inexplicably note several times that CNA's WARN Act Claims are not entitled to administrative priority. (Inst. Def. MTD, p. 3, p. 25, fn. 14). The priority status of CNA's claims has no bearing on whether this case can survive a motion to dismiss and is inappropriate to consider at this stage. In any event, Institutional Defendants' purported liquidating status (which CNA disputes) does not transform the priority of CNA's claims under 11 U.S.C. § 503(b)(1)(A)(ii). *See Matthews v. Truland Group (In re Truland Group, Inc.)*, 520 B.R. 197, 200-201 (Bankr. E.D. Va. 2014) (granting administrative priority to the potential WARN Act claims of a group of employees terminated two days prior to their employer's filing of a Chapter 7 bankruptcy petition under Section 503(b)(1)(A)(ii)); *In Re World Mtkg. Chicago*, 564 B.R. 587, 596-597 (Bankr. N.D. Ill. 2017) (granting administrative priority under Section 503(b)(1)(A) to WARN Act claims when employer terminated employees on day it filed for bankruptcy and closed down its operations); *In Re Hanlin Grp.*, 176 B.R. at 332 (granting administrative priority to WARN Act claims for employees of facility shut-down during bankruptcy); *In re Beverage Enter.*, 225 B.R. 111 (Bankr. E.D. Pa. 1998) (same).

Section 503(b)(1)(A)(ii) was enacted in 2005. It specifically refers to employment awards and makes no exception for liquidating entities. Rather, this section simply allows

administrative priority for "back pay[7] attributable to **any period of time occurring after commencement of the case under this title**, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered." 11 U.S.C. § 503(b)(1)(A)(ii). (emphasis added). Even prior to the 2005 amendment the Ninth Circuit B.A.P. affirmed the administrative priority of wage awards as applied to a liquidating debtor. *In re Metro Fulfillment*, 294 B.R. 306, 312 (9th Cir. B.A.P. 2003) (reversing bankruptcy court's denial of administrative expense priority to penalties imposed by wage statutes holding they are a "cost of doing business" although the estate was being liquidated and there was no longer an ongoing business). Furthermore, reading a liquidating debtor exception into the priority scheme in the employment context would turn an entire well-established body of caselaw that grants certain types of severance claims administrative priority in bankruptcy on its head given that most severance payments are due when companies shut down. *See, e.g., In Roth Amer. Inc.*, 975 F.2d 949, 957-958 (3d. Cir. 1993) (describing history of caselaw granting administrative priority to severance pay); *In Re World Marketing Chicago*, 564 B.R. at 597 (WARN Act damages are a statutory form of severance pay). In any case, as described at length above, Institutional Defendants were not liquidating at the time of the terminations, but running ongoing businesses.

**D. CNA Has Associational Standing to Pursue Its Members' State Law Claims.**

Defendants' strategic misrepresentations to nurses and CNA about the likelihood that SVMC would continue operating or shut down directly harmed them. Defendants argue that CNA lacks standing to pursue relief for its members from these injuries. These arguments are unfounded.

**1. Under *Hunt* and *UFCW*, Associational Standing Is Proper Where Two Constitutional Factors Are Met and There Is an Affirmative Grant of the Right to Sue in a Representative Capacity.**

In *Hunt*, the Supreme Court created a three-part test that, when satisfied, affords an organization the associational standing to pursue claims on behalf of its members. *Hunt v. Wash.*

[7] WARN Act damages are considered a form of backpay. *See United Food & Commercial Workers v. Brown Group*, 517 U.S. 544, 546 (1996).

*State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). In *United Food & Commercial Workers v. Brown Group*, the Court clarified that only the first two parts of the test are Article III standing requirements. 517 U.S. 544 (1996) (hereinafter "*UFCW*"). The third part, the Court explained, is a judicially created prudential consideration, and as such (discussed in detail below), must give way where substantive law affirmatively grants the organizational plaintiff the right to sue in a representative capacity. *UCFW*, 517 U.S. at 555-57.

The constitutional requirements are that (1) the association's members would otherwise have standing to sue, and that (2) the interests the association seeks to protect are germane to the association's purpose. *Hunt*, 432 U.S. at 343; *UFCW*, 517 U.S. at 555-57. These requirements ensure there is an actual case or controversy. *UCFW*, 517 U.S. at 555-57.

As set forth in *Hunt*, once the first two parts of the test are satisfied, associational standing is proper so long as significant participation of individual members is not necessary to resolution of the claims. *Hunt*, 432 U.S. at 343. This had the practical effect that while organizations could pursue injunctive or declaratory relief, they generally could not pursue damages. *UFCW*, 517 U.S. at 554. But, as the Court clarified in *UFCW*, this third part of the *Hunt* test is a judicially created prudential consideration, not a constitutional standing requirement. *Id.*

This prudential limit "is best seen as focusing on [] matters of administrative convenience." *Id.* at 557. While this prudential limit is not without value, it is a judicial construct, not a constitutional mandate. *Id.* at 556-57. For that reason, this prudential consideration is subordinate to an affirmative grant of the right to sue in a representative capacity. This is highlighted, the Court explained, by the fact that "[r]epresentative damages litigation is common -- from class actions under Fed. R. Civ. P. 23(b)(3) to suits by trustees representing hundreds of creditors in bankruptcy to *parens patriae* actions by state governments to litigation by and against executors of decedents' estates." *Id.* (internal quotation marks omitted).

Applying these standards in *UFCW*, the Supreme Court held that the union plaintiff in that case had associational standing to pursue WARN Act damages on behalf of its members.

517 U.S. at 557-58. ("Because Congress authorized the union to sue for its members' damages, and because the only impediment to that suit is a general limitation, judicially fashioned and prudentially imposed, there is no question that Congress may abrogate the impediment."). Because federal courts owe states special deference when applying state law, this same reasoning applies even more forcefully where a state, rather than Congress, is the authority for the law at issue. *E.g.*, *Sarausad v. Porter*, 503 F.3d 822, 825 (9th Cir. 2007) (explaining that federal courts owe special deference to state law); *DiGuglielmo v. Smith*, 366 F.3d 130, 137 (2d Cir. 2004) ("[F]ederal courts must of course defer to state-court interpretations of the state's laws, so long as those interpretations are themselves constitutional.").

Thus, harmonizing *Hunt* and *UFCW*, once the two constitutional requirements are established, associational standing is proper where either the *Hunt* prudential consideration is satisfied or where the underlying source of law (whether Congress or a state) affirmatively grants the organizational plaintiff the right to pursue its members' individual claims in a representative capacity. *Accord*, *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 732 (D.C. 2000) (similarly holding that the DC Human Rights Act grants standing coextensive to what Article III allows, and so cannot be further limited by prudential considerations); *Equal Rights Ctr. v. Ambercrombie & Fitch Co.*, 767 F. Supp. 2d 510, 525-529 (D. Md. 2010) (noting that the third part of *Hunt* test is prudential but was nonetheless applicable because there was "no indication" that the state intended a different standard to apply); *cf.* R. Givens, Manual of Federal Practice 5th § 3.114 ("The capacity of a person to sue or be sued as a representative, such as an executor or administrator, is determined by the law of the state in which the district court sits."); Fed. Rules Civ. Pro. R. 17 (The capacity to sue in representative capacity "for all other parties other than individuals or corporations" determined "by the law of the state where the court is located.").

**2. The *Hunt*/*UFCW* Requirements Are All Satisfied in This Case.**

CNA has associational standing to pursue its members' state law claims for intentional misrepresentation and negligent misrepresentation, just as the union in *UFCW* had associational standing to pursue its members' WARN Act claims.

*a. The Two Hunt Constitutional Requirements Are Met.*

Additionally, just as in *UFCW*, the two constitutional standing requirements are plainly met in this case. Nurses who were injured by Defendants' misrepresentations would have standing to sue on their own. And representing the nurses' interests with respect to the closure of their hospital is central to CNA's purpose, as demonstrated by the fact that CNA is also representing the nurses' interests with respect to these closures in their WARN Act claims.

*b. California Grants CNA a Right to Sue in a Representative Capacity.*

Additionally, just as Congress granted the union the right to sue in the representative capacity in *UFCW*, so too does California grant CNA a right to sue in the representative capacity in this case, as discussed in detail below.

*i. California's law on Associational Standing is deliberately broad.*

As a general matter, California takes a very broad view on representational standing. The purpose of this approach is to promote "considerations of necessity and paramount convenience." *Salton City etc. Owners Assn. v. Imperial Contracting Co.*, 75 Cal. App. 3d 184, 189 (1977). "The statutory authorization for representative and class suits (Cal. Code Civ. Pro. § 382), is an exception to the general rule of compulsory joinder of all interested parties and requires [only] an ascertainable class and a well-defined community of interest in the questions of law and fact involved." *Id.* (emphasis added).

> The presumption that one not a member of the represented class cannot adequately and fairly represent its interest cannot apply with full force to an association seeking to represent its members; it imports an artificial distinction between the association and its members. One presumes that an association is typically the embodiment of a community of interest, the form assumed by some conglomerative principle or goal.

*Id.* at 190. Under this liberal approach, it is "well settled that one particular kind of unincorporated association – labor unions – has the right to sue in a representative capacity." *Tenants Ass'n of Park Santa Anita v. Southers*, 222 Cal. App. 3d 1293, 1299 (Cal. App. 1990).

*ii. California allows organizations to pursue members' fraud claims where the members were commonly affected.*

The California Court of Appeal has specifically held that associations have the right to sue in a representative capacity where defendants' acts of fraud commonly impacted the

association's members. For example, as the court explained in *Salton City Owners Association*, a class that is made up of the members of an association is readily ascertainable and easily defined. 75 Cal. App 3d at 189-90. And "[t]he commonality of the critical questions of law and fact involved in the action, the community of interest, is adequately set forth in the complaint[,] which alleges the use of a fraudulent canned sales pitch which was designed to and did induce the members of the Association to purchase property in the Salton City area." *Id.* Therefore, the two factors required in order for an association to sue in a representative capacity were easily met based on the members' injury from the defendants' fraud. *Id.*

In *Tenants Ass'n of Park Santa Anita*, 222 Cal. App. 3d at 1303-1304, the court allowed an association to pursue claims on behalf of its members who were commonly impacted by defendants' fraudulent acts. The association pled a fraud claim on behalf of its members, and sought "compensatory and punitive damages as well as monetary damages for personal injuries, including mental suffering, physical distress." *Id.* at 1296-97. The court considered whether organizations pursuing their members' claims in a representative capacity can sue "not only [for] prospective relief, but also [for] damages for its individual members." *Id.* The answer is yes. Where "[o]nly the extent of injury would require individualized proof, [that] fact [is] insufficient in itself to bar [representative or] class treatment of the action." *Id.* (citing and quoting *Salton City Owners Assn.*, 75 Cal. App. 3d at 189). Having closely considered the issue, the court held that the association should be allowed to proceed, except with respect to the damages "for anxiety, emotional distress, or personal injuries," which were too intangible and too personal. With respect to those damages, the court held, the leave to amend should be granted to add individuals. *Id.*

Accordingly, under California law, compensatory and punitive damages can be recovered through a representational action for fraud. *See also, Raven's Cove Townhomes, Inc.* v. *Knuppe Development Co.*, 114 Cal. App. 3d 783 (1981) (association of townhouse owners had standing to sue the project developer in a representative capacity for damages to individual units); 1 *Matthew Bender Practice Guide: CA Pretrial Civil Procedure* 5.05[4] (2020) ( "[a]n association may also sue for some damages incurred by its members, even in the absence of injury to itself,

although not for personal injuries that vary from member to member.").

California recognizes both the state law claims that CNA brought in this case as forms of fraud. *E.g.*, *Continental Airlines, Inc. v. McDonnell Douglas Corp.*, 216 Cal. App. 3d 388, 403 (1989) (explaining that negligent misrepresentation and intentional misrepresentation are both forms of fraud). Accordingly, just as California law granted the association the right to pursue fraud claims for compensatory and punitive damages on behalf of its members in *Tenants Ass'n of Park Santa Anita*, so too does California law grant CNA the right to pursue its fraud claims against Defendants for compensatory and punitive damages on behalf of its members. Thus, as the two constitutional standing requirements are met, this Court ought to defer to California's grant of the right to pursue these claims in a representative capacity.

*iii. Recognizing CNA's right to sue in a representative capacity will advance judicial efficiency.*

Recognizing CNA's right to sue in a representative capacity is especially appropriate in this case because the prudential concerns identified in *Hunt* and *UFCW* are not even implicated. Far from being negatively impacted, judicial efficiency will be promoted. CNA is also pursuing a fraud claim on its own behalf. And all the key facts that will establish that Defendants committed fraud will be the same in CNA's direct claim as in its claim on behalf of its members. Accordingly, by allowing CNA to pursue its members' fraud claims, the Court will avoid the duplication of judicial resources if the same essential claims had to be litigated in two separate matters. Additionally, because CNA is pursuing its own claims, has a legal duty to fairly represent its members, and has a fiduciary duty to its members, the adversarial integrity necessary to ensure vigorous pursuit of claims and distribution of such damages to members is not implicated. *See Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848, 864 (9th Cir. 2016) (noting that "federal labor laws impose upon unions a 'responsibility and duty of fair representation' to their members"); 29 USCS § 501 (provision of the Labor Management Reporting and Disclosure Act which establishes that union officers, agents, shop stewards, and other agents owe fiduciary duties to the union's members.).

With respect to emotional distress, while California courts have generally excluded these damages from the scope of associational standing, here judicial efficiency strongly militates in

favor of allowing CNA to also pursue these claims in order to fully vindicate the harm Defendants caused to the nurses without creating duplicate litigation. Alternatively, CNA should be given the opportunity to amend to either add individual members who have emotional damages claims or to strike the emotional distress damages demands.

**E. CNA Properly Pled Its State Tort Claims.**

CNA properly pled intentional concealment and negligent misrepresentation claims.

**1. Concealment**

Under California law, intentional misrepresentation by concealment is an actionable tort. It can be established in several ways, including, as CNA pled in this case, by a showing that:

1. Defendants disclosed some facts to plaintiffs, but intentionally failed to disclose others, making the affirmative disclosures deceptive;
2. Plaintiffs did not know of the concealed facts;
3. Defendants intended to deceive plaintiffs by concealing the facts;
4. Had the omitted information been disclosed, plaintiff would have behaved differently;
5. Plaintiff was harmed; and
6. Defendants' concealment was a substantial factor in causing plaintiff's harm.

*See Marketing West, Inc. v. Sanyo Fisher (USA) Corp.*, 6 Cal. App. 4th 603, 613 (1992); Judicial Council of California, Civil Jury Instructions CACI 1901 (citing numerous supporting authorities). While Defendants are correct that in cases that include a corporate defendant, the plaintiff must "allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written," courts and litigants should not take overly rigid view of this requirement. *Pirelli Armstrong Tire Corp. v. Walgreen Co.*, 631 F.3d 436, 441–442 (7th Cir. 2011) ("courts and litigants often erroneously take an overly rigid view of the formulation"). Here, CNA pled all the intentional concealment elements with sufficient specificity.

*a. CNA pled that Defendants misleadingly disclosed only some facts to CNA and the nurses, and did so with the intent to deceive—the First and Third Elements.*

As set forth above, with respect to who committed the fraud, and with what authority, CNA properly pled that the Institutional Defendants are an integrated enterprise functioning as a single employer. CNA also pled that Richard Adcock (CEO) and Steven Sharrer (Chief Human Resources Officer) both exercised control over the key decisions at issue in this Complaint. ¶¶ 19-20. And CNA specifically identified many instances of what Messrs. Adcock and Sharrer said, to whom, and when; as well as what they failed to disclose.

For example, CNA pled that on August 12, 2019, Mr. Sharrer sent a notice to CNA and the SVMC nurses stating that Defendants were in the process of closing the sale of SVMC, and that the new owner would continue to employ "substantially all" the nurses. ¶¶ 28-30. While Mr. Sharrer shared that the sale was subject to "certain regulatory approval and the satisfaction of certain other conditions agreed to between the Debtors and the Purchaser," and stated that it was possible the sale would be unsuccessful, he also emphasized Defendants were optimistic that the sale would go through. ¶ 29. Thus, Mr. Sharrer gave CNA and the nurses the impression that the only obstacles to closure of the sale, and consequently to continuation of employment for substantially all the nurses, were formalities that Defendants believed would be sorted out. ¶ 30.

In October 2019, Mr. Sharrer sent CNA a notice that sale of SVMC would likely occur between November 17-30, 2019. ¶ 33; Ex. 2 to the Complaint. Nothing in this notice indicated uncertainty about whether the sale would occur, only when. *Id.* And in this notice, Mr. Sharrer promised to keep CNA "apprised of any new developments." *Id.*

In November 2019, in the course of four or five bargaining sessions, Defendants represented to CNA and the CNA nurse bargaining team that the new owner would employ all but about nine of the SVMC nurses, and Defendants agreed to severance for those nurses. ¶ 36. But Defendants did not disclose that in the middle of this bargaining, the potential buyer informed Defendants that it could not obtain financing for the purchase. ¶ 37. And during this same time, Defendants filed a motion, under seal, asking the Court for permission to also file a secret "Plan B" to avoid "an adverse impact on operations and employee morale." ¶ 40.

On November 25, 2019, Mr. Sharrer sent CNA a notice stating that Defendants anticipated the sale of SVMC would close in December. ¶ 41; Ex. 3. But by this point, as the Chief Human Resource Officer with control over key decisions about the closure, Mr. Sharrer knew, but did not disclose, that the potential buyer did not have financing to close the sale, that there were other additional indicators the sale would not go through, and that Defendants planned to permanently shut down SVMC if the sale fell through. ¶¶ 20, 41, 43; Ex. 3 to the Complaint. Thus, by this communication, Defendants further lulled CNA and the nurses into believing that the sale was likely (¶ 44), contrary to material facts known to Defendants.

In fact, by December 16, 2019, Defendants had actually begun meeting with consultants to develop plans to permanently shut SVMC (¶ 48). Obviously, this meeting with professional outside consultants was not the first time Defendants began planning the undisclosed shutdown. Then on December 17, 2019, Defendants advised the potential buyer that Defendants were terminating the sale agreement; but they still didn't advise CNA or the nurses of any negative developments. ¶ 49. As both Messrs. Adcock and Sharrer exercised control over the key decisions at issue in this Complaint, ¶¶ 19-20, they share direct responsibility for the ongoing decision not to disclose the increasing probability that the sale would fall through and that Defendants would permanently shut down SVMC.

On December 18, 2019, Mr. Adcock emailed the nurses informing them that the sale of SVMC had fallen through, and as a result, their employment would not end on December 19, 2019, as Defendants had previously anticipated. ¶ 50; Ex. 4 to the Complaint. This notice effectively amounted to telling the nurses that their employment would not switch to the new owner as previously anticipated because there would be no sale. Mr. Adcock completely failed to disclose that Defendants were actively planning to permanently shutter SVMC in short order, causing the nurses to all lose their jobs. ¶ 50; Ex. 4 to the Complaint. Defendants argue that CNA's Complaint somehow misconstrues Mr. Adcock's December 18 email. Since CNA actually attached the email to the Complaint, this contention is not credible. Moreover, the bottom-line is that, as pled, (1) Mr. Adcock clearly knew by this point that Defendants were planning to shut down SVMC because he was in control of those decisions (¶¶ 20, 48); and (2)

he nonetheless sent an email to the nurses saying that their employment would not end as previously planned, without disclosing Defendants were planning to permanently close SVMC (¶ 50); and (3) the decision, over which he had control (¶ 20), not to disclose the planned shutdown was deliberate and strategic (¶¶ 48, 41, 54).

On January 6, 2020, Defendants filed an emergency motion to shut down SVMC, in which they again expressed concern that once the impending shutdown was public, nurse turnover would be "likely to accelerate, making maintenance of high-quality patient care . . . significantly more expensive." ¶ 54. As executive officers with control over the decisions relevant to the shutdown (¶¶ 19, 20), Messrs. Adcock and Sharrer had full knowledge of these developments. Accordingly, CNA pled facts that if proven, will establish that Messrs. Adcock and Sharrer were (1) actively planning to close SVMC without disclosing that fact to CNA or the nurses; and (2) they concealed these plans after actively leading CNA and the nurses to believe that while closure was possible, in the immediate future, SVMC would continue to employ the nurses, and that Defendants would keep CNA and the nurses abreast of any developments. These facts also show that Messrs. Adcock and Sharrer decided not to disclose the impending shutdown because they did not want the nurses to leave until it was convenient for Verity.

The alleged facts outlined above show that CNA pled "the names of the persons who made the allegedly fraudulent representations [Messrs. Adcock and Sharrer], their authority to speak [CEO and Chief HR Officer with control over the key decisions at issue in this case], to whom they spoke [CNA and the nurses], what they said or wrote, and when [copious details provided above]." Accordingly, CNA adequately pled the first element (misleading partial disclosures) and third element (intent to mislead) of intentional concealment.

*b. CNA pled that CNA and the Nurses were misled, the Second Element.*

CNA likewise adequately pled that CNA and the nurses did not know of the facts that Defendants concealed. Specifically, CNA alleged that based on Defendants' deceptive combinations of disclosures and failures to disclose, until they got Mr. Adcock's email, CNA and the nurses reasonably believed that Defendants were in the process of closing the sale of SVMC to a buyer who would continue the nurses' employment. ¶¶ 44, 102. After Mr. Adcock's

email, again because of Defendants' deliberate concealment, CNA and the nurses reasonably believed that the nurses' employment would continue directly with Verity, and that Defendants would keep CNA and the nurses up-to-date as the situation continued to develop. ¶¶ 51, 103.

Defendants suggest that their public filings put CNA and the nurses on notice of the facts that Defendants strategically concealed. This argument is disingenuous because in Defendants' motion to close SVMC they explicitly state that the hospital must close rapidly because once the nursing staff becomes aware of the closure, they will leave to find other employment. This statement shows that the nurses were not yet aware of the closure, and that Defendants kept them in the dark until the last minute. ¶54. Defendants cannot have it both ways. Secondly, there have been over 4,600 filings in this case. *See Bankruptcy Court Docket*. Neither CNA nor the nurses were responsible for mastering their contents. Nor did they. Of course, CNA and the nurses knew that it was *possible* that the sale might fall through, and that the hospital might shutdown, but based on Defendants' representations they reasonably believed that outcome was unlikely. Even if CNA was aware of these documents, without actual notice from Defendants, CNA cannot be expected to know if these pleadings were merely litigation posturing or SGM bluffing in order to reduce the sale price. Nor can CNA be expected to read them to mean that SVMC would be shut down on extremely short notice. In summary, CNA adequately pled this element, and to the extent Defendants dispute whether CNA and the nurses were actually deceived by Defendants' deliberate concealment, resolution of that dispute is a question of fact. *E.g.*, *Irving v. Lennar Corp.,* No. 2:12-cv-0290-KJM-EFB, 2014 U.S. Dist. LEXIS 2184, *19-20 (E.D. Cal. Jan. 8, 2014) ("[T]he mere fact of publicity does not conclusively show that a plaintiff must be imputed with knowledge. * * * [Because] the determination of whether a reasonable person would have discovered the information depends on various factors, including the characteristics of the plaintiffs, the inquiry is best left to a proceeding where both sides can present evidence on the issue.").

*c. CNA pled that absent concealment, CNA and the nurses would have acted differently, and that they were harmed as a result, the remaining Elements.*

CNA also specifically pled the fourth, fifth, and sixth elements of concealment. Had Defendants disclosed what they concealed, CNA and the nurses would have behaved differently. Specifically, nurses would have looked for other work sooner and CNA would not have expended certain bargaining resources and bargained differently (e.g., it would instead have sought severance or coverage of COBRA payments when nurses' employment was still valuable to Defendants). ¶¶ 44, 51, 105, 107. CNA and the nurses were both harmed by Defendants' concealment because it caused them to lose money, time, and opportunities – as well as caused emotional distress. ¶¶ 106, 108.

In short, CNA adequately pled all the elements of its intentional concealment claim. Moreover, even if the Court were to find that CNA has not sufficiently pled any element of this cause of action, leave to amend should be liberally granted. *Wietschner v. Monterey Pasta Co*., 294 F. Supp. 2d 1102, 1118 (N.D.Cal. 2004) ("Dismissal with prejudice and without leave to amend is not appropriate unless it is clear that the complaint could not be saved by amendment.") (internal quotation marks and alterations omitted).

**2. Negligent Misrepresentation**

The same allegations that show that CNA adequately pled intentional concealment also support CNA's alternative claim for negligent misrepresentation. The key difference is that a jury could find negligent misrepresentation even if it found that Messrs. Adcock and Sharrer were merely negligent in their failure to disclose that the sale was increasingly unlikely and that Defendants were planning to shut down SVMC if the sale fell through; and then still later when they failed to disclose that Defendants were actively planning to shut down SVMC.

## IV. CONCLUSION

The SVMC nurses deserve the chance to hold Defendants accountable for shuttering the hospital after deliberately hiding the probability of shutdown and failing to provide nurses the advance notice they were entitled to under the law. The Court should deny Defendants' Motions to Dismiss.

Dated: May 12, 2020

Respectfully submitted,

CALIFORNIA NURSES ASSOCIATION
LEGAL DEPARTMENT

By: /s/ Kyrsten B. Skogstad
Kyrsten B. Skogstad
Carol A. Igoe
Counsel for Plaintiff
California Nurses Association

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF ALAMEDA**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is 155 Grand Ave., Oakland, CA 94612.

On May 12, 2020, I served true copies of the following document(s) described as **CALIFORNIA NURSES ASSOCIATION'S OPPOSITION TO DEFENDANTS VERITY HEALTH SYSTEM OF CALIFORNIA, INC, *et al's.,* MOTIONS TO DISMISS COMPLAINT** on the interested parties in this action as follows:

**TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):** Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On May 12, 2020, I checked the CMIECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice list to receive NEF transmission at the email addresses stated below:

| | |
|---|---|
| Interested Party: | James Behrens<br>jbehrens@milbank.com |
| Attorney for Defendants:<br>Verity Health Systems<br>of California, Inc. *et al.* | Tania M. Moyron<br>Tania.moyron@dentons.com; chris.omeara@dentons.com;<br>nick.koffroth@dentons.com;<br>kathryn.howard@dentons.com;<br>Sonia.martin@dentons.com; Isabella.hsu@dentons.com;<br>lee.whidden@dentons.com;<br>Jacqueline.whipple@dentons.com |
| Attorney for Defendants:<br>Richard Adcock<br>Steven Sharrer | Marco Quazzo<br>mquazzo@bzbm.com; bsage@bzbm.com |
| U.S. Trustee (LA): | ustpregion16.la.ecf@usdoj.gov |

**BY OVERNIGHT MAIL**: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed below and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the California Nurses Association's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the UPS, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Oakland, California.

**BY E-MAIL OR ELECTRONIC TRANSMISSION**: I caused a copy of the document(s) to be sent from e-mail address kskogstad@calnurses.org to the persons at the e-mail addresses listed in below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful:

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on May 12, 2020, at Oakland, California.

/s/Tym Tschneaux_____
Tym Tschneaux