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and STEVEN SHARRER

9 UNITED STATES BANKRUPTCY COURT

10 CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES DIVISION

11  
12 In re

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

15 Debtors and Debtors In Possession.

16 ☐ Affects All Debtors

17 ☒ Affects Verity Health System of California, Inc.

18 ☐ Affects O'Connor Hospital

19 ☐ Affects Saint Louise Regional Hospital

20 ☒ Affects St. Francis Medical Center

21 ☒ Affects St. Vincent Medical Center

22 ☒ Affects Seton Medical Center

23 ☐ Affects O'Connor Hospital Foundation

24 ☐ Affects Saint Louise Regional Hospital  
Foundation

25 ☐ Affects St. Francis Medical Center of Lynwood  
Foundation

26 ☐ Affects St. Vincent Foundation

27 ☒ Affects St. Vincent Dialysis Center, Inc.

28 ☐ 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

**DEFENDANTS RICHARD ADCOCK  
AND STEVEN SHARRER'S REPLY  
MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS COMPLAINT  
UNDER RULE 12(B)(6)**

**[RELATED TO DKT. NOS. 12, 13, 14, 24]**



1 CALIFORNIA NURSES ASSOCIATION  
2 (CNA),

3 Plaintiff,

4 v.

5 VERITY HEALTH SYSTEMS OF  
6 CALIFORNIA, INC., a California  
7 Corporation; ST. FRANCIS MEDICAL  
8 CENTER, an Affiliate; ST. VINCENT  
9 MEDICAL CENTER, an Affiliate; SETON  
10 MEDICAL CENTER, an Affiliate; ST.  
11 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,

12 Defendants.  
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Hearing Date and Time:

Date: TBD

Time: TBD

Place: Courtroom 1568  
255 E. Temple St.  
Los Angeles, CA 90012

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1 The Court should grant the Individual Defendants’ motion to dismiss the complaint,  
2 notwithstanding Plaintiff’s opposition, because (a) Plaintiff lacks associational standing to pursue  
3 claims for money damages against Messrs. Adcock and Sharrer on behalf of individual members,  
4 including damages for emotional distress; (b) Plaintiff has not and cannot allege that  
5 Messrs. Adcock and Sharrer misrepresented or concealed any material fact to support a claim for  
6 intentional misrepresentation; and (c) Plaintiff has not and cannot allege that Messrs. Adcock and  
7 Sharrer made any false positive assertion or affirmative representation to support its claim for  
8 negligent misrepresentation. For these reasons, all claims asserted against the Individual  
9 Defendants should be dismissed with prejudice.

10 **I. CNA LACKS ASSOCIATIONAL STANDING TO PURSUE ITS STATE LAW**  
11 **TORT CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS**

12 CNA seeks to invoke federal jurisdiction over its state law tort claims against the  
13 Individual Defendants. As such, CNA has the burden of showing that it has associational standing  
14 to assert tort claims on behalf of the individual nurses who were allegedly harmed by St. Vincent’s  
15 closure. *See Lujan v. Defense of Wildlife*, 504 U.S. 555, 561 (1992). CNA has not met its burden  
16 of establishing that it has associational standing under either federal or state law.

17 **A. CNA Does Not Have Associational Standing Under Federal Law**

18 An association may sue on its members’ behalf under federal law only if “neither the claim  
19 asserted nor the relief requested requires the participation of individual members in the lawsuit.”  
20 *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977). CNA’s  
21 Complaint expressly seeks compensatory damages for each individual nurse’s “lost wages and lost  
22 employee benefits,” and also “[d]amages for mental pain and anguish and emotional distress.”  
23 Complaint, ¶¶ 120-121. Numerous federal courts have held that unions such as CNA do not have  
24 associational standing to pursue claims for money damages on behalf of their members, because  
25 such claims necessarily require individualized proof and the active participation of individual  
26 members. *See United Union of Roofers, Waterproofers, & Allied Trades No. 40 v. Insurance*  
27 *Corp. of America*, 919 F.2d 1398, 1400-01 (9th Cir. 1990) (union lacked standing to pursue claim  
28 for payment of members’ wages); *Lake Mohave Boat Owners Ass’n v. Nat’l Park Service*, 78 F.3d

1 1360, 1367 (9th Cir. 1995) (union lacked standing to pursue claim for restitution); *SEIU*,  
2 *Local 21 v. City of Riverside*, No. EDCV 09-00561-VAP (JTLx) (C.D. Cal. Apr. 27, 2011) (union  
3 lacked standing to pursue money damages).

4 CNA relies on *United Food & Commercial Workers v. Brown Group*, 517 U.S. 544 (1996)  
5 (hereinafter, “*UFCW*”) to argue the contrary. But *UFCW* represents a narrow exception to the rule  
6 that unions cannot sue for money damages on behalf of their members. The plaintiff in *UFCW*  
7 sought money damages under the federal WARN Act, which expressly grants unions authority to  
8 sue for its members’ monetary damages. *Id.*, 517 U.S. at 548-549. *UFCW* held that Congress  
9 could abrogate the associational standing rule set forth in *Hunt v. Washington State Apple*  
10 *Advertising Comm’n* by granting unions authority in the WARN Act to sue on behalf of their  
11 members, because the rule “is a general limitation, judicially fashioned and prudentially imposed.”  
12 *Id.*, 517 U.S. at 558. Thus, *UFCW* held that the union had associational standing to sue for its  
13 members’ WARN Act damages only because Congress has expressly authorized such suits in the  
14 WARN Act itself. *Id.*

15 *UFCW* has no application to CNA’s claims against Messrs. Adcock and Sharrer. CNA  
16 does not assert any WARN Act claims against the Individual Defendants. Instead, CNA seeks tort  
17 damages under the California common law. Congress has ***not*** expressly authorized unions to sue  
18 for its members’ money damages under California tort law. Accordingly, pursuant to the rule set  
19 forth in *Hunt v. Washington State Apple Advertising Comm’n*, CNA lacks associational standing to  
20 sue under federal law. CNA cannot invoke federal court jurisdiction to pursue its tort law claims  
21 against Messrs. Adcock and Sharrer.

22 **B. CNA Does Not Have Associational Standing Under State Law**

23 Perhaps recognizing that it has no associational standing under federal law, CNA invites  
24 this Court to apply California state law rules for associational standing. Opp. Br., pp. 27-29.  
25 However, CNA fails to present any legal authority for its notion that state law overrides the federal  
26 rules for associational standing set forth by the U.S. Supreme Court in *Hunt v. Washington State*  
27 *Apple Advertising Comm’n*, *supra*, and *Warth v. Seldin*, 422 U.S. 490, 498 (1975). This Court  
28

1 should follow federal law and deny jurisdiction over claims for which CNA has no associational  
2 standing.

3 Even if this Court were to apply California state law on the issue of associational standing,  
4 CNA would not be permitted to recover damages for emotional distress on behalf of its members.  
5 None of the California cases on which CNA relies allowed a union or other association to sue for  
6 its members' emotional distress damages. The California rule governing associational standing is  
7 set forth in California Code of Civil Procedure section 382, which states in relevant part:

8 "...when the question is one of a common or general interest, of many persons, or  
9 when the parties are numerous, and it is impracticable to bring them all before the  
court, one or more may sue or defend for the benefit of all."

10 California courts have universally rejected the notion that claims for emotional distress damages  
11 present a question of "common or general interest." Rather, unions do not have associational  
12 standing to sue for its members' "damages/injuries for anxiety, emotional distress, or personal  
13 injuries" under California law because such injuries:

14 "are too intangible and too inherently personal to the individual to reasonably  
15 constitute a community of interest. For example, what may have caused emotional  
16 distress to one tenant may not have caused emotional distress to another tenant, or  
may have caused a different degree of distress, as the second tenant may have been  
less susceptible to emotional distress or may have been treated differently than the  
first tenant."

17 *Tenants Association of Park Santa Anita v. Southers*, 222 Cal.App.3d 1293, 1304 (1990). The  
18 same logic applies to CNA's damages claims for "lost wages and lost employee benefits" and  
19 "mental pain and anguish and emotional distress." Complaint, ¶¶ 120-121. Such damages claims  
20 are inherently personal to the individual member, will vary from member to member, and will  
21 require an individualized analysis. See *United Union of Roofers, Waterproofers, & Allied Trades*  
22 *No. 40, supra*, 919 F.2d at 1402 (union lacked associational standing to pursue wage claims under  
23 both federal and California law). There is no "common or general interest" when it comes to  
24 quantifying and allocating such damages among individual members.<sup>1</sup> CNA therefore does not  
25

26 <sup>1</sup> *Salton City Area Property Owners Ass'n v. M. Penn Phillips Co.*, 75 Cal.App.3d 184 (1977)  
27 does not alter this analysis. Although *Salton City* found the homeowners' association had standing  
28 to sue for fraud damages, in that case each homeowner was seeking rescission or restitution of  
their real estate purchase contracts. The claims thus had a general or common interest that is



1 have associational standing under California state law to pursue its claims against Messrs. Adcock  
2 and Sharrer.

3 **II. CNA FAILS TO STATE A CLAIM FOR INTENTIONAL MISREPRESENTATION**

4 To state a claim for fraud, CNA must identify at least one specific factual representation  
5 made by Messrs. Adcock or Sharrer and explain what is false or misleading about the statement,  
6 or why it is false. *Hadley v. Kellogg Sales Co.*, 243 F.Supp.3d 1074, 1085 (N.D. Cal. 2017).  
7 Plaintiff argues that Messrs. Adcock and Sharrer are liable for fraud because they made  
8 misleading statements that selectively disclosed some facts regarding the potential sale and/or  
9 closure of St. Vincent, while omitting other facts. When put to the test, however, none of  
10 Messrs. Adcock's and Sharrer's statements were misleading or false, as a matter of law.

11 CNA first argues that Mr. Sharrer's August 2019 notice of the potential sale of St. Vincent  
12 to SGM was misleading because he stated, in part, that "Debtors are optimistic that the Sale will  
13 close." *See* Opp. Br. p. 31, Complaint ¶ 29 and Ex. 1. However, in the same sentence of the same  
14 notice Mr. Sharrer stated "there is a possibility that the Sale will be unsuccessful." Complaint,  
15 Ex. 1. And in the immediate prior sentence of the same notice, Mr. Sharrer cautioned that the  
16 "closing of the Sale is subject to certain regulatory and other approvals and the satisfaction of  
17 certain other conditions...." Thus, no reasonable person could interpret Mr. Sharrer's statement as  
18 a guarantee that the sale of St. Vincent to SGM was certain to close. Mr. Sharrer's statement that  
19 Debtors were optimistic, as of August 2019, was merely a statement of opinion about what may  
20 happen in the future. The statement, when read in context, cannot be actionable as fraud.  
21 "[P]redictions as to future events, or statements as to future action by some third party, are  
22 deemed opinions, and not actionable fraud." *Nibbi Brothers, Inc. v. Home Federal Sav. & Loan*  
23 *Ass'n*, 205 Cal.App.3d 1415, 1423 (1988) (citation omitted).

24  
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26 \_\_\_\_\_  
27 absent from the individualized damages claims that CNA wants to pursue for its members.  
28 Moreover, *Salton City* discussed but declined to follow the U.S. Supreme Court decision in  
*Warth v. Seldin*, 422 U.S. 490 (1975), which governs this action. *Salton City*, 75 Cal.App.3d at  
188.

1 CNA next argues that Mr. Sharrer’s October 2019 notice was somehow misleading when it  
2 stated, “At this time, we anticipate the Sale and separations of employment will occur between  
3 **November 17, 2019 and November 30, 2019.**” *See* Opp. Br. p. 31, Complaint ¶ 33 and Ex. 2.  
4 Again, the context of the statement is important. Mr. Sharrer stated in the same paragraph that the  
5 purchase and sale agreement with SGM “requires satisfaction of certain milestones to complete  
6 the Sale [and] [n]ot all of the milestones have been met.” Complaint, Ex. 2. Mr. Sharrer further  
7 indicated, in the following sentence, that circumstances could “change with respect to the Sale and  
8 the separations of employment.” *Id.* Accordingly, no reasonable person could rely on  
9 Mr. Sharrer’s statement as a guarantee that the sale of St. Vincent to SGM, and separations of  
10 employment were certain to occur in late November 2019, or at any other time.

11 CNA next argues that Messrs. Adcock and Sharrer failed to disclose, during bargaining  
12 sessions with CNA in November 2019, that SGM had telephoned Debtors’ investment banker on  
13 November 18 to say that it could not obtain sufficient financing to close the sale. *See* Opp. Br.  
14 p. 31, Complaint ¶ 37. Messrs. Adcock and Sharrer had no legal duty to disclose to CNA every  
15 development in the complex, constantly evolving process of selling St. Vincent to SGM.  
16 Although an intentional misrepresentation claim may be based on an omission, it must be an  
17 omission of fact one has a duty to disclose. *Lopez v. Nissan North America, Inc.*, 201 Cal.App.4th  
18 572, 596 (2011) (holding that intentional misrepresentation claim failed as a matter of law). In  
19 particular, Messrs. Adcock and Sharrer had no duty to disclose to CNA the November 18 phone  
20 call from SGM because it was plainly a negotiating tactic; a week later, this Court found “that as  
21 of November 19, 2019, all conditions precedent to SGM’s obligations to close had been satisfied  
22 ... [and] SGM is obligated to close the SGM Sale by no later than December 5, 2019.” *See* RJN,  
23 Ex. 36 [Docket No. 3723] at pp. 1-2. This Court further determined that SGM was “holding the  
24 estates, creditors, and patients of the Hospitals hostage in an attempt to extort a better purchase  
25 price.” *Id.*, at p. 6. SGM’s phone call to Debtors’ investment banker was not material given that  
26 all interested parties knew, as stated by the Court on November 27, that SGM was “presenting  
27 non-meritorious arguments as to why it was not obligated to close.” *Id.*

1 CNA next argues that Mr. Sharrer's November 25, 2019 notice was somehow misleading  
2 when it stated that Debtors "anticipate the Sale and separations of employment will occur between  
3 **December 6, 2019 and December 19, 2019.**" *See* Opp. Br. p. 32, Complaint ¶ 41 and Ex. 3.  
4 Given the fact that two days later, this Court ordered SGM to close the sale by December 5,  
5 Mr. Sharrer's statement was not misleading. *See* RJN, Ex. 36 [Docket No. 3723] at pp. 1-2.

6 Finally, CNA argues that Messrs. Adcock and Sharrer failed to disclose that on  
7 December 17, 2019, Debtors informed SGM they were terminating the asset purchase agreement  
8 as a result of SGM's failure to close the sale on December 5. *See* Opp. Br. p. 32, Complaint ¶ 49.  
9 However, it is undisputed that *the next day*, on December 18, Mr. Adcock informed CNA's nurses  
10 by email that SGM "failed to close the sale transaction, as ordered by the Bankruptcy Court [and  
11 therefore] your employment will NOT end on December 19, 2019, as we had anticipated."  
12 Complaint, Ex. 4. CNA thus was informed in a timely manner of the termination of the sale to  
13 SGM. Moreover, CNA was well aware as of December 18, 2019 that Debtors might seek to close  
14 St. Vincent if the sale to SGM fell through. *See* RJN, Ex. 36 [Docket No. 3723] at p. 6 ("The  
15 Court has previously made clear that ... if the SGM Sale does not promptly close, the most likely  
16 outcome will be the closure of three of the four Hospitals"); *see also* Complaint, Ex. 1 (if the sale  
17 to SGM is unsuccessful, "St. Vincent may close and none of its employees may be hired by  
18 [SGM]"). CNA also certainly understood that any decision to close St. Vincent was subject to this  
19 Court's approval. Hence, CNA's claim that Mr. Adcock's email improperly omitted information  
20 regarding St. Vincent's possible closure fails as a matter of law.

21 To state a claim for intentional misrepresentation, CNA must allege facts showing  
22 "justifiable reliance" on the alleged false or misleading representations. *Alliance Mortgage Co. v.*  
23 *Rothwell* 10 Cal.4th 1226, 1239 (1995). CNA has not and cannot allege any such facts here. It is  
24 undisputed that Defendants expressly informed CNA, and that CNA knew as early as August  
25 2019, that there was "a possibility that the Sale [to SGM] will be unsuccessful" in which case  
26 "St. Vincent may close and none of its employees may be hired by [SGM]." Complaint, Ex. 1.  
27 Although the reasonableness of plaintiff's reliance is often a question of fact, "whether a party's  
28 reliance was justified may be decided as a matter of law if reasonable minds can come to only one

1 conclusion based on the facts.” *Alliance Mortgage Co.*, 10 Cal.4th at 1239 (citations omitted).  
2 Here, the only conclusion based on the undisputed facts is that CNA could not have concluded  
3 from the statements and warnings of Messrs. Adcock and Sharrer, between August 2019 and  
4 December 2019, that SGM would absolutely complete its purchase of St. Vincent and thereby  
5 save St. Vincent from closing.

6 CNA has failed to state a claim for intentional misrepresentation. The Court should  
7 dismiss it without leave to amend.

8 **III. CNA FAILS TO STATE A CLAIM FOR NEGLIGENT MISREPRESENTATION**

9 CNA argues that Messrs. Adcock and Sharrer were “negligent in their failure to disclose  
10 that the sale [to SGM] was increasingly unlikely and that Defendants were planning to shut down  
11 SVMC if the sale fell through.” Opp. Br., p. 35. However, ““nondisclosures[] cannot give rise to  
12 liability for negligent misrepresentation.” *Oushana v. Lowe’s Home Centers, LLC*, No. 1:16-cv-  
13 01782-AWI-SAB, 2017 WL 2417198 at \*6 (E.D. Cal. June 5, 2017) (citation omitted). Instead, a  
14 “negligent misrepresentation claim ‘requires a positive assertion,’ not merely an omission.”  
15 *Lopez v. Nissan North America, Inc.*, 201 Cal.App.4th 572, 596 (2011) (holding that negligent  
16 misrepresentation claim failed as a matter of law); *see also Wilson v. Century 21 Great Western*  
17 *Realty*, 15 Cal.App.4th 298, 306 (1993) (finding an implied assertion or representation does not  
18 state a claim). CNA’s opposition ignores this requirement even though the foregoing cases were  
19 cited in the Defendants’ moving papers for this motion.

20 CNA has not alleged, and cannot allege, that Messrs. Adcock or Sharrer made any  
21 “positive assertion” that was false. For this reason, and for all the same reasons that CNA’s  
22 intentional misrepresentation claim fails, the negligent misrepresentation claim must also be  
23 dismissed without leave to amend.

24 In addition to the foregoing arguments, the Individual Defendants hereby adopt and  
25 incorporate by reference the arguments set forth in the following sections of the Reply Brief filed  
26 by the Institutional Defendants: Section III.C. (CNA Lacks Associational Standing to Assert the  
27 Misrepresentation Claims); and Section III.D. (CNA Has Failed To Factually Allege State Law  
28 Fraud Claims).

1 **IV. CONCLUSION**

2 The arguments offered by CNA in opposition to the Individual Defendants' motion to  
3 dismiss are unavailing. Accordingly, Messrs. Adcock and Sharrer respectfully request that the  
4 Court dismiss CNA's claims for intentional and negligent misrepresentation without leave to  
5 amend under Federal Rule of Civil Procedure 12(b)(6).

6  
7 DATED: May 22, 2020

BARTKO ZANKEL BUNZEL & MILLER  
A Professional Law Corporation

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9  
10 By: /s/ Marco Quazzo  
11 Marco Quazzo  
12 Attorneys for Defendants RICHARD ADCOCK  
13 and STEVEN SHARRER  
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## PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:  
One Embarcadero Center, Suite 800, San Francisco, CA 94111

A true and correct copy of the foregoing document entitled (*specify*): DEFENDANTS RICHARD ADCOCK AND STEVEN SHARRER'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT UNDER RULE 12(b)(6)

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

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):** Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) 05/22/2020, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

ATTORNEYS FOR PLAINTIFF: Carol A. Igoe, [cigoe@calnurses.org](mailto:cigoe@calnurses.org); Kyrsten Skogstad, [kskogstad@calnurses.org](mailto:kskogstad@calnurses.org)  
UNITED STATES TRUSTEE (LA): [ustpreion16.la.ecf@usdoj.gov](mailto:ustpreion16.la.ecf@usdoj.gov)  
INTERESTED PARTY: James Behrens, [jbehrens@milbank.com](mailto:jbehrens@milbank.com)

☒ Service information continued on attached page

2. **SERVED BY UNITED STATES MAIL:**

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

☐ Service information continued on attached page

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

☐ Service information continued on attached page

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

05/22/2020  
Date

Barbara Sage  
Printed Name

/s/ Barbara Sage  
Signature

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

ATTACHMENT TO PROOF OF SERVICE

**Service via Electronic Notice of Electronic Filing (NEF):**

Attorney for Defendant De Paul Ventures, LLC  
tania.moyron@dentons.com

Attorney for Defendant St. Francis Medical Center  
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