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13 UNITED STATES BANKRUPTCY COURT
14 CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION

15 In Re

16 VERITY HEALTH SYSTEM OF
17 CALIFORNIA, INC., et al.,

18 Debtor and Debtors In
19 Possession.

- 20 Affects All Debtors
- 21 Affects Verity Health System of California, Inc.
- 22 Affects O'Connor Hospital
- 23 Affects Saint Louise Regional Hospital
- 24 Affects St. Francis Medical Center
- 25 Affects St. Vincent Medical Center
- 26 Affects Seton Medical Center
- 27 Affects O'Connor Hospital Foundation
- 28 Affects Saint Louise Regional Hospital Foundation
- 29 Affects St. Francis Medical Center of Lynwood Foundation
- 30 Affects St. Vincent Foundation
- 31 Affects St. Vincent Dialysis Center, Inc.
- 32 Affects Seton Medical Center Foundation
- 33 Affects Verity Business Services
- 34 Affects Verity Medical Foundation
- 35 Affects Verity Holdings, LLC
- 36 Affects De Paul Ventures, LLC
- 37 Affects De Paul Ventures — San Jose ASC, LLC

38 Debtors and Debtors In
39 Possession.

40 Case No. 2:18-bk-20151-ER

41 CHAPTER 11

42 Jointly Administered With:

- 43 Case No.: 2:18-bk-20162-ER;
- 44 Case No.: 2:18-bk-20163-ER;
- 45 Case No.: 2:18-bk-20164-ER;
- 46 Case No.: 2:18-bk-20165-ER;
- 47 Case No.: 2:18-bk-20167-ER;
- 48 Case No.: 2:18-bk-20168-ER;
- 49 Case No.: 2:18-bk-20169-ER;
- 50 Case No.: 2:18-bk-20171-ER;
- 51 Case No.: 2:18-bk-20172-ER;
- 52 Case No.: 2:18-bk-20173-ER;
- 53 Case No.: 2:18-bk-20175-ER;
- 54 Case No.: 2:18-bk-20176-ER;
- 55 Case No.: 2:18-bk-20178-ER;
- 56 Case No.: 2:18-bk-20179-ER;
- 57 Case No.: 2:18-bk-20180-ER;
- 58 Case No.: 2:18-bk-20181-ER

59 **SEIU-UHW'S OPPOSITION TO DEBTORS'
60 MOTION TO REJECT COLLECTIVE
61 BARGAINING AGREEMENT (DOC. 4741)**

62 Date: June 3, 2020
63 Time: 10:00 a.m. (PST)
64 Location: Courtroom 1568
65 255 East Temple St., Los Angeles, CA



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1 I. INTRODUCTION

2 The Debtors' motion to reject its collective bargaining agreement with SEIU-UHW must
3 be denied because the Debtors failed to meet with SEIU-UHW at reasonable times to confer in
4 good faith on a proposal to the Union as required under Section 1113. The Debtors began
5 negotiations with SEIU-UHW over a proposal to modify the collective bargaining agreement only
6 after the Debtors had locked themselves into an Asset Purchase Agreement that predetermined the
7 outcome of negotiations. Because the Asset Purchase Agreement was finalized, signed by the
8 parties, and filed with the Court before any engagement with SEIU-UHW, SEIU-UHW could not
9 meaningfully participate in the process or engage potential buyers, configure any agreement with
10 Prime regarding the terms that would be offered the employees, or work with the Debtors to reach
11 a mutually agreed upon outcome. It was all already done prior to any negotiations with its union
12 employees. The negotiations were thus doomed from the beginning.

13 To make matters worse, SEIU-UHW was denied critical information that would enable it
14 to evaluate the proposals or form a response. SEIU-UHW was confronted with a proposal that
15 would slash wages, with some workers facing cuts as high as 63%. Even the respiratory
16 technicians responsible for putting COVID-19 patients on ventilators would face cuts as high as
17 28%. Yet SEIU-UHW was provided nothing that would justify such drastic cuts given the clear
18 profitability of the facility, especially in the midst of this pandemic in which healthcare workers
19 provide such a vital public service. SEIU-UHW was provided no justification or rationale for
20 Prime's other proposals that would enable it to understand what counter-proposals might be
21 acceptable. SEIU-UHW was not provided with any justification for Prime's subcontracting
22 proposal—a provision that does not appear in any agreement between Prime and SEIU-UHW—
23 which would grant Prime the unfettered right to eliminate any employees' job and subcontract
24 that job out to non-union employees. SEIU-UHW was given no information about how many of
25 the workers would be retained, which workers would be retained, or how these decisions would
26 be made. The lack of critical information prevented SEIU-UHW from meaningfully engaging
27 with Prime, but it also prevented SEIU-UHW from evaluating the Debtors' proposal to pay
28 severance only to workers not re-hired by Prime.

1 Despite the lack of information, SEIU-UHW made a meaningful counterproposal,
2 accepting the benefit proposal made by Prime. Prime refused to counter the Union’s proposal.
3 Instead, Prime simply re-proposed its original offer. Prime then chose to walk away from the
4 negotiations, insisting that in order for the negotiation process to continue, the Union would need
5 to make a new counterproposal and bargain against itself.

6 Finally, the Debtors cannot satisfy their burden to prove that elimination of all severance
7 obligations is necessary to reorganization. In fact, the Debtors’ indication that they might be
8 willing to pay severance to a limited subset of employees who were not re-hired by Prime proves
9 that these payments would not threaten reorganization. This aspect of the requested relief must
10 be denied.

11 **II. FACTUAL BACKGROUND**

12 SEIU-UHW and the Debtors are parties to a collective bargaining agreement covering the
13 terms and conditions of employment for approximately 941 employees at St. Francis Medical
14 Center.

15 **A. The language in the APA was reached without engaging SEIU-UHW**

16 After the planned sale of the facilities to SGM fell through, the Court approved bidding
17 procedures for the sale of St. Francis Medical Center on February 26, 2020. The Debtors did not
18 approach SEIU-UHW to provide information about the sale process, interested parties, or the
19 treatment of the collective bargaining obligations, so on March 5, 2020, SEIU-UHW reached out
20 and requested to be included in the sale process, asking to be put in touch with interested parties
21 so that the Union could have the opportunity to discuss assumption or modification of the
22 collective bargaining agreement before the bid deadline. Gray Dec., ¶ 2, Ex. A. SEIU-UHW did
23 not receive any response to its request, so it followed up with the Debtors on March 16, 2020, but
24 again received no response. Gray Dec., ¶ 2. SEIU-UHW was never afforded an opportunity to
25 discuss the treatment of the collective bargaining obligations by the purchaser before the terms of
26
27
28

1 the Asset Purchase Agreement were finalized, signed by the parties, and filed with the Court on
2 April 8, 2020. *Id.*¹

3 The APA language provides that if SEIU-UHW does not agree to modify the collective
4 bargaining agreement or enter a new collective bargaining agreement with terms “substantially
5 similar” to Prime’s existing agreements within 30 days from the date of the sale’s approval,
6 Verity will have the right to reject the collective bargaining agreement and will be obligated to
7 obtain rejection prior to the closing of the sale.

8 The Debtors were already locked into these terms before they began any discussions with
9 SEIU-UHW. SEIU-UHW does not know if Prime would have accepted different language, or a
10 different version of a modified collective bargaining agreement, or a different timeline for
11 rejection because it was barred from engaging with the parties or offering any information or
12 concessions that may have resulted in different terms.

13 **B. Prime sought drastic wage cuts and the absolute right to subcontract without any**
14 **reasonable justification for these proposals**

15 The Court approved the sale of St. Francis Medical Center to Prime on February 26, 2020.
16 Dkt. 4165. After the sale was approved, SEIU-UHW did not receive any communication from
17 Verity or Prime until April 22, 2020, and bargaining dates were set for May 1, 5, and 8. Gray
18 Dec., ¶ 4.

19 The night before the first bargaining session, SEIU-UHW received a proposal for Prime
20 for modification of the collective bargaining agreement or entry into a new collective bargaining
21 agreement. Gray Dec., ¶ 5.

22 Even though the APA calls for an agreement “substantially similar” to Prime’s existing
23 agreements, the proposal contained significant provisions that did not draw on any other
24 collective bargaining agreements. Critically, even though all Prime’s other agreements with

25 _____
26 ¹ Although SEIU-UHW is a member of the Unsecured Creditors’ Committee (“UCC”), it did not
27 obtain any information about the identity of the bidders or treatment of the collective bargaining
28 obligations through the UCC. SEIU-UHW was instead informed that the UCC was required to
keep such information UCC counsel’s eyes only. SEIU-UHW did not receive any information
about the identity of the bidders or terms of the asset purchase agreement until this information
was publicly filed. Gray Dec., ¶ 3.

1 SEIU-UHW have meaningful limitations on subcontracting—a critical provision of any collective
2 bargaining agreement because it is essential to protect the bargaining unit from being outsourced
3 out of existence—Prime’s proposed agreement afforded Prime the absolute right to subcontract
4 without limitation. *Id.* No such language exists in any of Prime’s other contracts with SEIU-
5 UHW. *Id.*

6 Similarly, Prime’s attached wage scale did not adopt any of Prime’s existing wage scales
7 with SEIU-UHW, but instead contained new rates for each classification of worker. *Id.* The
8 proposed wage scale sought wage cuts averaging 12% across the bargaining unit, with some
9 workers facing wage cuts as high as 63%. *Id.* Respiratory technicians, the workers responsible
10 for putting COVID-19 patients on ventilators, would face wage cuts ranging from 6% to as high
11 as 28%. *Id.* To justify this proposal, Prime claimed that St. Francis Medical Center was not
12 profitable, and lost \$9-20 million each year. Gray Dec., Ex. B.

13 **C. SEIU-UHW sought information critical to understand the § 1113 Proposal –**
14 **including the reasoning behind Prime’s offer that would enable SEIU-UHW to form**
15 **an acceptable counter-offer and information about how much of the workforce**
would be retained

16 SEIU-UHW sought information to understand the basis of the wage cuts. During the
17 bargaining process, it was revealed that the calculations behind Prime’s assertion that St. Francis
18 lost \$9-20 million each year relied on both improperly including one-time costs and bankruptcy
19 reorganization costs of \$22.9 million *and* improperly excluding \$31.1 million of QAF payments
20 that had been received under a nonstandard “normalization” that reduced QAF received in 2020
21 from \$119.3 million to \$88.2 million, even though no other expenses or revenues were
22 normalized. Gray Dec., ¶ 6. Without including bankruptcy reorganization costs and reducing
23 QAF revenues, Prime’s calculations would have shown an operating profit of \$41 million—not a
24 loss of \$20 million. *Id.* In fact, the analysis Cain shared with potential bidders shows operating
25 profits of \$87.8 million to \$152 million in the last 3 years. Gray Dec., Ex. C. Prime was unable
26 to offer any justification for the drastic wage cuts it proposed given the clear profitability of the
27 hospital, not to mention the obvious need to compensate healthcare workers who are risking their
28 health and the health of their families to serve the public during this deadly pandemic.

1 Prime was also unable to justify its other proposals. During bargaining, SEIU-UHW’s
2 bargaining team asked for the justification behind certain important provisions so that it could
3 understand what parts of Prime’s proposal were necessary for Prime and what counter-proposals
4 might be suitable. When asked about the justification for each provision, Prime either responded,
5 “It is our proposal—give us a counterproposal,” or “Prime has made the proposal because it is
6 substantially similar to provisions in other Prime agreements.” Gray Dec., ¶ 7. SEIU-UHW
7 explained that it could not tell what counter-proposals would meet the standard of being
8 “sufficiently similar” to Prime’s existing agreements and could not tell what parts of Prime’s
9 existing agreements were important to Prime, especially given that some of Prime’s most
10 important proposals like the subcontracting proposal represented a complete departure from
11 Prime’s existing agreements. *Id.* Prime stated that the absolute right to subcontract was proposed
12 to provide Prime “operational efficiency,” and SEIU-UHW asked how much “operational
13 efficiency” was necessary, whether this need could still be satisfied with some limitations on
14 subcontracting, and whether the existing limits Prime had in place at Garden Grove or Centinela
15 allowed sufficient “operational efficiency.” *Id.* Prime simply stated that “it was its proposal” and
16 “the Union was free to make a counter proposal.” *Id.* No explanation of what counter-proposal
17 would satisfy Prime as being “substantially similar” to its existing collective bargaining
18 agreements was ever provided.

19 SEIU-UHW’s bargaining team also asked for important information needed to assess the
20 Section 1113 Proposal, including critical information about the workforce transition. Prime could
21 not provide information about who would be hired and who would not be hired because it had not
22 prepared that plan yet and did not know what its staffing needs would be. Gray Dec., ¶ 8. It could
23 not share “even a soft number” about what percentage of the workforce would be hired because it
24 was still learning about all the services that are at St. Francis. *Id.* It could not say whether there
25 are services that will not be retained. *Id.* Prime could not provide a timeline for when it would
26 have this information. *Id.*

27 SEIU-UHW expressed that it was going to have a hard time assessing the proposal and
28 presenting a counter-proposal without the information it had requested. Gray Dec., ¶ 9. Verity

1 and Prime asked SEIU-UHW to memorialize a list of the information it had requested in writing,
2 but urged SEIU-UHW to make a counter-proposal to see if the terms the Union wanted would be
3 acceptable to Prime. *Id.* SEIU-UHW sent a letter summarizing the outstanding information
4 requests on May 8, 2020. Gray Dec., Ex. D.

5 To date, SEIU-UHW has not received the requested information about the justification for
6 the proposed wage scale, the reasoning behind each of Prime’s proposals including its creation of
7 a wholly new right to subcontract without limitation, and the requested information about the
8 workforce transition and how much of the workforce would be retained by Prime. Gray Dec.,
9 ¶ 10.

10 ///

11 **D. Prime refused to respond to SEIU-UHW’s counter-proposal and bargaining with**
12 **Prime broke down**

13 Although SEIU-UHW expressed a need for more information to form a counter-proposal
14 that might be acceptable to Prime, Prime and Verity urged SEIU-UHW to just make a counter-
15 proposal to see if the terms the Union wanted would be acceptable to Prime. Gray Dec., ¶ 9.

16 On May 8, 2020, SEIU-UHW presented a counter-offer to Prime’s proposal for an
17 agreement that accepted key parts of the economic package including the elimination of the
18 pension contribution requirement and acceptance of the retirement and healthcare benefits as
19 proposed by Prime, but maintained the existing wage scales and the existing subcontracting
20 language which limits subcontracting to certain situations (more similar to Prime’s existing
21 agreements). *Id.*

22 Prime rejected SEIU-UHW’s counter-proposal, but did not make a counter. Instead,
23 Prime’s counsel Rich Martwick stated that Prime was standing on its original proposal, and told
24 SEIU-UHW to come back with a counter-proposal that was more “similar to Prime’s existing
25 agreements.” *Id.* SEIU-UHW told Prime that the ball was in Prime’s court to respond to SEIU-
26 UHW’s counter offer. Gray Dec., ¶ 11. Prime indicated that it would not do so, and the May 8,
27 2020 bargaining session came to a close. *Id.*

28

1 SEIU-UHW indicated it is willing to continue negotiations if it receives a counter, but
2 Prime has stated it will not do so. Gray Dec., Ex. G, Ex. I.

3 **E. Verity made a proposal for rejection of the contract to SEIU-UHW, offering**
4 **severance only to a limited subset of workers**

5 On May 13, the Debtors sent SEIU-UHW a proposal to reject the collective bargaining
6 agreement in exchange for severance payments to bargaining unit members who are not re-hired
7 by Prime. On May 18, SEIU-UHW sent a response, saying that real negotiations still needed to
8 occur and that SEIU-UHW was still awaiting important information. Gray Dec., ¶ 12, Ex. E.

9 SEIU-UHW also requested information about the necessity of rejecting even limited
10 severance payments to workers who were not re-hired by Prime in the event SEIU-UHW did not
11 stipulate to rejection, and Verity’s response was simply that this was consistent with what it had
12 done before. Gray Dec., Ex. F.

13 To date, SEIU-UHW has still not received a counter from Prime and has still not received
14 the information requested during bargaining. Gray Dec., ¶ 15.

15 **III. ARGUMENT**

16 **A. Legal Standard**

17 Section 1113 was enacted “in order to buffer CBAs against uncontrolled inroads
18 whenever financial distress drives an employer into the bankruptcy courts in an effort to
19 reorganize.” *Am. Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 81-82 (3d
20 Cir. 1999) (citing *In re Continental Airlines*, 125 F.3d 120, 137 (3d Cir.1997); *In re Roth Am.*,
21 *Inc.*, 975 F.2d 949, 956 (3d Cir.1992); *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 989-90 (2d
22 Cir.1990)).

23 A debtor may “reject a collective bargaining agreement only in accordance with the
24 provisions of [Section 1113].” 11 U.S.C. §1113 (a). Subsection (b)(1) specifies that:

25 Subsequent to filing a petition and prior to filing an application
26 seeking rejection of a [CBA], the debtor . . . shall – (A) make a
27 proposal to the authorized representative of the employees covered
28 by such agreement, based on the most complete and reliable
information available at the time of such proposal, which provides
for those necessary modifications in the employees benefits and
protections that are necessary to permit the reorganization of the

1 debtor and assures that all creditors, the debtor and all of the
2 affected parties are treated fairly and equitably; and (B) provide . . .
3 the representative of the employees with such relevant information
4 as is necessary to evaluate the proposal.

5 Subsection (b)(2) further states:

6 During the period beginning on the date of the making of a proposal
7 provided for in paragraph (1) and ending on the date of the hearing
8 provided for in subsection (d)(1), the [debtor] shall meet, at
9 reasonable times, with the authorized representative to confer in
10 good faith in attempting to reach mutually satisfactory
11 modifications of such agreement.

12 Subsection (c) then provides:

13 The court shall approve an application for rejection of a collective
14 bargaining agreement only if the court finds that – (1) the [debtor]
15 has, prior to the hearing, made a proposal that fulfills the
16 requirements of subsection (b)(1); (2) the authorized representative
17 of the employees has refused to accept such proposal without good
18 cause; and (3) the balance of the equities clearly favors rejection of
19 such agreement.

20 The above requirements are cumulative.² “Rejection of a collective bargaining agreement
21 is prohibited absent strict compliance with the substantive and procedural requirements of the

22 ² In essence, the movant under Section 1113 must, prove by a preponderance of the evidence, the
23 nine elements that were set out in the leading case, *In re American Provision Co.*, 44 B.R. 907,
24 909 (Bankr. D.Minn. 1984), which is followed by virtually all courts:

- 25 1. The debtor must make a proposal to the union to modify the collective bargaining
26 agreement.
- 27 2. The proposal must be based on the most complete and reliable information available at
28 the time of the proposal.
1. The proposed modifications must be necessary to permit the reorganization of the
debtor.
2. The proposed modifications must assure that all creditors, the debtor and all affected
parties are treated fairly and equitably.
3. The debtor must provide to the union such relevant information as is necessary to
evaluate the proposal.
4. Between the time of making of the proposal and the time of the hearing on approval of
the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable
times with the union.
5. At the meetings the debtor must confer in good faith in attempting to reach mutually
satisfactory modifications of the collective bargaining agreement.
6. The union must have refused to accept the proposal without good cause.
7. The balance of the equities must clearly favor rejection of the collective bargaining
agreement.

American Provision, 44 B.R. at 909.

1 statute.” *In re Certified Air Techs., Inc.*, 300 B.R. 355, 361 (Bankr. C.D. Cal. 2003). The debtor
2 bears the burden of proving *all* of the above requirements by a preponderance of the evidence. *In*
3 *re Kentucky Truck Sales, Inc.*, 52 B.R. 797, 800-801 (Bankr. W.D. Ky. 1985). If the debtor does
4 not meet that burden on any one of the elements, the Court may not allow it to reject its collective
5 bargaining agreements. *In re American Provision Co.*, 44 B.R. 907, 909 (Bankr. D.Minn. 1984);
6 *In re The Lady H Coal Co., Inc.*, 193 B.R. 233, 241 (Bankr. S.D. W. Va. 1996) (“As the Court
7 finds that the Debtors have not met elements (4), (7) and (9) above for the reasons set forth
8 below, it is not necessary to address any of the other elements.”).

9 Accordingly, a debtor cannot prevail unless it meets *all* of the Section 1113 hurdles.

10 **B. The Court Must Deny the Debtors’ Motion Where, As Here, the Debtors Have Not**
11 **Met Their Burden of Proof on Each and Every One of the Nine Requirements for a**
12 **Section 1113 Order**

13 **1. The Debtors cannot prove that they “met at reasonable times” to “confer in**
14 **good faith” on a proposal to the union as required under Section 1113**

15 Only by some sort of perverse Orwellian logic could the Debtors’ conduct here possibly
16 be characterized as meeting the requirement to meet at reasonable times or the requirement to
17 confer in good faith. What the Debtors did was exactly the opposite. After shutting SEIU-UHW
18 out of the process of finding a buyer, the Debtors waited until the last possible moment to emerge
19 from the closet, confronting the Unions with a *fait accompli*. By the time the Debtors approached
20 SEIU-UHW to talk about the collective bargaining agreement, it was a foregone conclusion that
21 the hospitals would be sold to Prime and that Prime would not assume the existing collective
22 bargaining obligations. SEIU-UHW was offered no meaningful opportunity to engage potential
23 buyers, configure any agreement with Prime regarding the positions and terms that would be
24 offered its members, or work with the Debtors to reach a mutually agreed upon outcome. It was
25 already done. “Reasonable times” to meet had long passed. No “conferring” about the sale to
26 Prime took place. SEIU-UHW had no way to negotiate.

27 Common sense dictates, and the courts have held, that conduct of the type exhibited by the
28 Debtors here is the very antithesis of what is required by Section 1113. *See, e.g., In re The Lady*

1 *H Coal Co.*, 193 B.R. 233, 241 (Bankr. S.D. W. Va. 1996); *In re GCI, Inc.*, 131 B.R. 685, 690-91
2 (Bankr. N.D.Ind. 1991).

3 In *The Lady H Coal Co.*, the debtor’s “dire” financial status had left it struggling to pay its
4 electrical bills. Without telling the union, the debtor retained a broker, who procured a buyer,
5 albeit one that refused to assume the CBA, but did eventually stipulate to the court that it would
6 employ at least 25% of the existing employees. After that proposal was rejected by the union, the
7 debtor moved for relief under Section 1113 in order to “save itself from the consequences of a
8 potential breach of its existing contract with the [union]” – a contract that, like the CBA at issue
9 here, contained a successorship clause. *In re The Lady H Coal Co.*, 193 B.R.... at 240. After an
10 evidentiary hearing at which the broker testified that he unsuccessfully had sought to interest
11 other potential buyers, the court denied the Section 1113 motion, explaining that “**a debtor has a**
12 **duty under § 1113 to not obligate itself prior to negotiations with its union employees, which**
13 **would likely preclude reaching a compromise.”** *Id.* at 242 (emphasis added). Engaging the
14 union only after binding itself to a certain version of what the collective bargaining obligations
15 will be cannot be considered meeting at “reasonable times” in “good faith.” The *Lady H Coal*
16 court expressly found that the debtors “could not have bargained in good faith as the Debtors
17 were, prior to any negotiations with the union, locked into an agreement where the purchaser was
18 not assuming the [CBA].” *Id.* The court ruled that the debtor had failed the Section 1113
19 requirement to “confer in good faith,” and further concluded that “the balance of equities [did]
20 not favor the rejection of the CBA.” *Id.* at 242-243.

21 So too here, the Debtors were locked into the APA’s specific vision for the collective
22 bargaining obligations before any negotiations with SEIU-UHW began. Unlike the facts
23 previously presented to the Court regarding the sale to Santa Clara County, a public entity that
24 could not have assumed the CBA, the facts surrounding this sale are different: Prime could have
25 included assumption of some of the collective bargaining obligations. But despite repeated
26 efforts to reach out to the Debtors and request an opportunity to meaningfully engage prospective
27 buyers before the terms of the APA were finalized, SEIU-UHW was not given any information
28 about the sale of the hospital or treatment of the collective bargaining obligations and was not

1 afforded any opportunity to discuss possible concessions that would be acceptable to the buyer
2 before the terms were finalized, signed by the parties, and filed with the Court. By the time
3 SEIU-UHW had any information about the planned treatment of the collective bargaining
4 obligations, the Debtors had already committed themselves to the terms of the sale and locked
5 themselves into a provision requiring rejection unless a collective bargaining agreement
6 “substantially similar” to Prime’s existing agreements could be consensually reached. The
7 Debtors utterly failed to engage SEIU-UHW at a time that could have been meaningful.

8 The requirement that debtor confer in good faith in attempting to reach mutually
9 satisfactory modifications of the CBA cannot be met if a debtor asserts that its proposals are non-
10 negotiable. *In re Delta Air Lines*, 342 B.R. 685, 697 (Bankr. S.D.N.Y. 2006) (“I hold that as a
11 general rule a debtor cannot be said to comply with its obligation ... when it steadfastly maintains
12 that its initial proposal under [1113] ... is non-negotiable.”) But that is exactly what happened
13 here because, by the time negotiations started, the conclusion was foregone.

14 The negotiations between Prime and SEIU-UHW were farcical. Prime offered no
15 meaningful justification for its proposals. When asked why any given provision was necessary,
16 Prime would simply respond “Prime has made the proposal because it is substantially similar to
17 provisions in other Prime agreements” or “It is our proposal—give us a counterproposal.” Gray
18 Dec., ¶ 7. But SEIU-UHW was entirely deprived of any information that would allow it to form a
19 counter-proposal that would meet the standard of being “sufficiently similar” to Prime’s existing
20 agreements. Some of the most important parts of Prime’s proposal—like the right to outsource
21 bargaining unit work and the definition of the bargaining unit—were complete departures from
22 Prime’s existing agreements, and the wage proposal similarly does not already exist in any of
23 Prime’s existing contracts. *Id.* When asked about these provisions, Prime asserted that the
24 hospital lost money and there was a need for “operational efficiency.” *Id.* Bargaining revealed
25 that Prime’s assertion of operating losses were based on nonstandard accounting that improperly
26 included \$22.9 million in bankruptcy reorganization costs, improperly excluded over \$31 million
27 in QAF revenue, and flew in the face of the information Prime was given by Cain that showing
28 operating profits consistently above \$80 million over the last 3 years. Gray Dec., ¶ 6, Ex. C.

1 Given the clear profitability of the hospital, not to mention the obvious need to compensate
2 healthcare workers who are risking their health and the health of their families to serve the public
3 during this deadly pandemic, Prime’s proposed wage cuts—under which some workers would
4 face cuts as high as 63%--simply cannot be justified. Similarly, when asked whether any limits
5 would be acceptable or whether the limits in Prime’s existing contracts were unacceptable for
6 some reason, Prime just told SEIU-UHW to make a counter-offer. *Id.* When SEIU-UHW did as
7 instructed, and made a counter-proposal, Prime refused to respond with any counter at all, and
8 told SEIU-UHW that it would not participate in negotiations unless SEIU-UHW issued an
9 acceptable counter, essentially requiring SEIU-UHW to take it or leave it, taking stabs in the dark
10 guessing what parts of the contract were important and negotiating against itself.

11 It is clear from what happened at the bargaining table that Prime never intended to engage
12 SEIU-UHW in good faith but intended instead to assert its still undefined right to pursue a
13 contract “substantially similar” to its other contracts while also taking the liberty to introduce
14 important departures from its existing contracts without any justification.

15 This cannot serve as the basis for finding that the Debtors met “at reasonable times” “in
16 good faith.” By the time the Debtors engaged the Union, the time for meaningful negotiations
17 had already passed, as illustrated by Prime’s clear abuse of the process to assert proposals without
18 any justification.

19 **2. The Debtors cannot prove that the proposal was based on “the most reliable**
20 **information available” or that the Union was provided with relevant**
21 **information necessary to evaluate the proposal and form a counter-proposal**

22 Under Section 1113, the Debtors’ proposal must be soundly based upon “the most
23 complete and reliable information available,” and all information necessary to evaluate the
24 proposal must be provided to the collective bargaining agent. Significantly, the Debtors have an
25 affirmative obligation to provide such information even without a request by the union. *In re Salt*
26 *Creek Freightways*, 47 B.R. 835 (Bankr. D. Wyo. 1985).

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a. The Union was never provided relevant information about Prime’s proposal and the planned workforce transition

Here, the Union was never provided information that would justify Prime’s proposal or even enable it to determine what counter-proposal would be deemed “substantially similar” to Prime’s existing contracts. To date, SEIU-UHW has not received the requested information about the justification for the proposed wage scale, the reasoning behind each of Prime’s proposals including its creation of a wholly new right to subcontract without limitation, and the requested information about the workforce transition. Gray Dec., ¶ 10. SEIU-UHW has therefore been prevented from meaningfully engaging with Prime in any way that would allow it to form a counter-proposal.

The lack of this critical information not only prevents SEIU-UHW from understanding what might constitute an “substantially similar” agreement to Prime’s existing agreements and forming an acceptable counter-proposal in its negotiations regarding modification or a new collective bargaining agreement, it also prevents SEIU-UHW from assessing Verity’s proposal.

With respect to Verity’s proposal to pay severance only to those bargaining unit members that are not re-hired by Prime, the lack of information about how much of the workforce will be re-hired prevents SEIU-UHW from even beginning to assess what this proposal means. SEIU-UHW asked for information about who would be hired, what percentage of the workforce would be hired, whether service lines would be cut, whether workers would be impacted or staffing would be reduced as a result of the implementation of EPIC, and how hiring decisions would be made, but it received none of this information. Gray Dec., ¶ 8 and Ex. D. Prime said that it had not prepared a staffing plan yet, could not share “even a soft number” about what percentage of the workforce would be hired, could not say whether there would be services that would be cut, and could not provide a timeline for when it would have this information. Gray Dec., ¶ 8.

How can SEIU-UHW reasonably be expected to assess a proposal to pay severance only to workers who are not re-hired by Prime when it does not know how many workers will be rehired, who these workers will be, how they will be selected, or whether workers who are rehired initially will have any expectation of a job going forward?

1 The Debtors cannot show that SEIU-UHW was provided with all relevant information
2 necessary to assess the proposal, so its motion must be denied until the information is provided
3 and real, informed negotiations can occur.

4 **b. The Debtors have not provided adequate information supporting the**
5 **financial necessity of its request for the elimination of all severance**
6 **obligations**

7 Here, the Debtors have failed to provide enough information to SEIU-UHW or the Court
8 to assess the necessity of the proposed elimination of the severance obligations to the bargaining
9 unit members. They have not shown that elimination of the CBA’s severance obligations in their
10 entirety is necessary. To the contrary, they have admitted that they are able to pay severance to
11 workers who are not re-hired by Prime.

12 The Debtors have an obligation to base the proposal on complete and reliable information.
13 The explanations provided by the Debtors in their response to the Union’s information requests
14 are exactly the kind of bald assertions unsupported by financial analysis that are not permitted
15 under Section 1113. *In re Sun Glo Coal Co.*, 144 BR 58, 63 (Bankr. E.D. Ky. 1992) (denying
16 rejection where debtor relied on vague and unsubstantiated information that concessions would
17 lead to increased productivity and failed to perform a complete cost analysis of proposed
18 concessions); *In re Mesaba Aviation, Inc.* 341 BR 693, 712 (D. Minn. 2006) (“[A] debtor-
19 employer must make a proposal firmly grounded in the historical reality of operational
20 economics, an unvarnished evaluation of its current straits, and a thorough analysis of all the
21 incidents of income and expense.”). Without such substantiation, “neither the union nor the court
22 could assess the necessity of the proposed modifications.” *In re K & B Mounting, Inc.*, 50 B.R.
23 460, 467-68 (Bankr. N.D. Ind. 1985). “The union should be supplied with detailed projections
24 and recommendations, perhaps made by a management consultant, preferably one who is
25 independent of the interested parties. The debtor should present full and detailed disclosure of its
26 difficulties and its proposed short-run and long-run solutions.” *Id.* at 467.

27 The Debtors’ failure to provide this specific information about its financial objectives
28 stripped SEIU-UHW of its ability to evaluate the proposal or form a counter proposal. “Before
the union can be expected to respond or make a counter proposal to specific proposals by

1 management, it is entitled to know what the objectives of management are.” *Schaeur Mfg.*, 145
2 BR 32, 35 (Bankr. SD Ohio 1992) (modification denied where debtor requested concessions from
3 the union without informing the union as to the debtor’s savings objectives, reorganization
4 strategy, or financial goals necessary to implement that strategy).

5 The Debtors’ refusal to provide information necessary for SEIU-UHW to form a counter
6 proposal with respect to severance requires rejection of the Debtors’ motion. For the same
7 reason, the lack of information provided about the workforce transition and necessity of
8 eliminating severance gives the union “good cause” in not accepting the Debtors’ proposal.
9 Accordingly, the Debtors have not proved that they provided all information necessary and the
10 Union unreasonable rejected the proposal, and rejection should be denied.

11 **3. As a matter of law, the Debtors cannot establish that the proposal to eliminate**
12 **all severance obligations is necessary to permit the reorganization of the**
13 **Debtors**

14 In order for a debtor to satisfy the requirements of Section 1113, “it must propose
15 modifications to the existing labor contract without which the debtor cannot obtain confirmation.”
16 *In re Pierce Terminal Warehouse, Inc.*, 133 B.R. 639, 646-47 (Bankr. N.D.Iowa 1991). Even
17 where a debtor needs “some modifications to successfully reorganize,” if they overreach by
18 seeking changes that exceed these needs, rejection will be prohibited. *Id.*

19 Here, the Debtors have sought relief beyond what is truly necessary to enable
20 confirmation. Rejection of all severance obligations is not necessary to enable the Debtors’
21 reorganization. In fact, the Debtors’ May 13, 2020 letter even offers to pay severance to a limited
22 subset of workers – demonstrating that these payments would be possible and would not
23 jeopardize reorganization. Accordingly, the Debtors cannot carry their burden to prove that
24 payment of this portion of severance under the collective bargaining agreement is necessary.

25 Additionally, the Debtors have provided no analysis that would support a finding
26 of necessity in rejecting severance to other workers, who are being separated from their positions
27 with Verity and would be owed severance under the terms of the collective bargaining agreement.
28 These workers are losing their pension, losing their seniority and job security, facing severe wage
cuts as high as 63%, losing their preferred healthcare, and many other sacrifices. It would by no

1 means constitute a windfall to pay these workers the post-petition accrual of the severance they
2 are contractually owed for their long tenure with Verity. The Debtors have provided no analysis
3 that would support its position that elimination of these claims is necessary for its reorganization.

4 The Debtors' perceived need is an element of proof on which Debtors bear the burden by
5 a preponderance of evidence. The Debtors have not presented such evidence here that would
6 support the elimination of all severance. Insofar as the Debtor's proposal eliminates the existing
7 contractual requirement to pay modest severance payments, the Debtors have sought changes that
8 materially exceed their needs. Accordingly, the Court should deny this aspect of the requested
9 relief.³ *In re Pierce Terminal Warehouse, Inc.*, 133 B.R. 639, 646-47 (Bankr. N.D.Iowa 1991
10 ("The court must also consider whether the employer, although needing some modifications to
11 successfully reorganize, has sought changes to the contract which materially exceed such needs.
12 The result of such overreaching is that rejection will be prohibited."); *In re Sun Glo Coal Co.*, 144
13 B.R. 58, 63 (Bankr. E.D. Ky. 1992) (Even in a case where "[t]he evidence [was] indisputable that
14 if these debtors do not receive major economic concessions they cannot continue in business[,
15 t]he question before the court is whether the debtors have insisted on significant concessions that
16 go beyond what is necessary to allow them to reorganize").

17 IV. CONCLUSION

18 Because the Debtor has not established each of the nine *American Provision* elements by a
19 preponderance of the evidence, the 1113 Motion to reject the CBAs must be denied.

20 Dated: May 29, 2020

WEINBERG, ROGER & ROSENFELD
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27 ³ In the alternative, the Court could simply find that termination of the severance obligations is
28 not necessary for reorganization and refrain from granting the Debtors' motion at the present
time, continuing the hearing so that the Debtors may have a chance to negotiate with the Union in
good faith and reach a settlement or otherwise limit the proposal to necessary modifications.