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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re: HUDSON HEALTHCARE, INC., Debtor.	Chapter 11 Case No. 11-33014 (DHS)

OBJECTION OF JNESO, DISTRICT COUNCIL 1, IUOE, AFL-CIO TO (A) THE DEBTOR'S FIRST OMNIBUS MOTION FOR (I) AUTHORIZATION TO SELL SUBSTANTIALLY ALL OF ITS ASSETS OUTSIDE THE ORDINARY COURSE OF BUSINESS, FREE AND CLEAR OF ALL LIENS, CLAIMS, INTERESTS, AND ENCUMBRANCES, PURSUANT TO PRIVATE SALE; (II) APPROVAL OF FORM AND CONTENT OF ASSET PURCHASE AGREEMENT BETWEEN DEBTOR AND HUMC HOLDCO, LLC AND HUMC OPCO, LLC; (III) AUTHORIZATION TO ASSUME AND ASSIGN CERTAIN OF ITS EXECUTORY CONTRACTS AND UNEXPIRED LEASES; (IV) AUTHORIZATION TO SELL "DESIGNATION RIGHTS" IN CONNECTION WITH CERTAIN OF ITS EXECUTORY CONTRACTS AND UNEXPIRED LEASES; (V) AUTHORIZATION TO REJECT ALL EXECUTORY CONTRACTS AND UNEXPIRED LEASES THAT ARE NOT ASSUMED OR DESIGNATED; (VI) AUTHORIZATION TO REJECT COLLECTIVE BARGAINING AGREEMENTS; AND (VII) GRANTING OTHER RELATED RELIEF AND (B) MOTION OF DEBTOR, HOBOKEN MUNICIPAL HOSPITAL AUTHORITY, THE CITY OF HOBOKEN AND THE HOBOKEN PARKING UTILITY FOR ENTRY OF AN ORDER APPROVING SETTLEMENT AND COMPROMISE PURSUANT TO FED. R. BANKR. P. 9019

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JNESO, District Council 1, IUOE, AFL-CIO ("JNESO"), by and through its undersigned counsel, hereby submits this Objection to the following two (2) Motions filed by the Debtor, Hudson Healthcare, Inc. (the "Hudson"):

- First Omnibus Motion for (i) Authorization to Sell Substantially All of its Assets Outside the Ordinary Course of Business, Free and Clear of All Liens, Claims, Interests, and Encumbrances, Pursuant to Private Sale; (ii) Approval of Form and Content of Asset Purchase Agreement Between Hudson and HUMC Holdco, LLC and HUMC Opco, LLC (together, the "Purchaser"); (iii) Authorization to Assume and Assign Certain of its Executory Contracts and Unexpired Leases; (iv) Authorization to Sell "Designation Rights" in Connection With Certain Of its Executory Contracts and Unexpired Leases; (v) Authorization to Reject All Executory Contracts and Unexpired Leases That Are Not Assumed or Designated; (vi) Authorization to Reject Collective Bargaining Agreements; and (vii) Granting Other Related Relief (the "Sale Motion"); and

- Motion of Hudson, Hoboken Municipal Hospital Authority (the "Authority"), The City Of Hoboken (the "City") and the Hoboken Parking Utility (the "Parking Utility") for Entry of an Order Approving Settlement and Compromise Pursuant to Fed. R. Bankr. P. 9019 (the "Settlement Motion," and, collectively with the Sale Motion, the "Motions").

In support of its Objection, JNESO respectfully states as follows:

PRELIMINARY STATEMENT

Hudson's bankruptcy filing, and the Motions, seek to allow for a sale of the assets of "Hoboken University Medical Center" (the "Hospital"), which is the trade name by which the Authority operates the Hospital, with all of the protections and benefits of 11 U.S.C. § 363, but also seek to allow, among other things, the issuance of shockingly broad releases in favor of numerous third parties, including the City on its guaranty of the Authority's bond obligations, the Authority, and the Authority and Hudson's many former and present board members and directors. Against this backdrop, the Motions, if successful, would result in: (i) JNESO, its members, and many other creditors likely receiving very small, if any, recoveries on their claims and (ii) many of JNESO's members not being offered employment by the Purchaser and/or being offered employment at substantially-reduced salaries, with reduced benefits, if any.

Specifically, as part of these Motions, Hudson requests, among other things, that the Court: (i) authorize Hudson's rejection of JNESO's collective bargaining agreement with the Hospital,[1] (ii) authorize Hudson's settlement of its claims against the Authority, based upon the Authority's withholding of approximately $36 million from Hudson that resulted in Hudson's inability to pay the Hospital's obligations, primarily obligations that accrued over the past few months, (iii) *approve the sale of the Authority's assets*, which Hudson does not own, and (iv) approve releases in favor of the Authority and others from claims of *their* creditors, and to insulate the Purchaser from all claims.

In support of the Motions, Hudson asserts that the proposed sale and the proposed settlement are purportedly fair and equitable and are the best interests of the estate and creditors. However, at least with respect to JNESO, Hudson has not acted in good faith, and has utterly failed to comply with the provisions of section 1113 of the Bankruptcy Code, thereby prohibiting any rejection of JNESO's collective bargaining agreement.

Hudson's only attempt at a rationalization is that unless the sale of the non-debtor assets is approved, along with the proposed settlement, and the broad releases are not granted, the assets of the Hospital will not be sold, and the Authority will not contribute a portion of the sale proceeds to Hudson, which will result in prejudice to Creditors. In particular, Hudson asserts this is true because without this contribution, Hudson will be unable to confirm a future plan, thereby harming Hudson's creditors.

Hudson's desire to propose a future liquidating plan is far too tenuous a reason to justify the astonishing scope of the requested relief. Additionally, whether or not creditors will receive less if the Motions are not granted does not justify Hudson and the Authority's violation of

[1] As is set forth herein, JNESO's collective bargaining agreement is not with Hudson, the within debtor, but instead is with the Authority, which is not a debtor in this or any other bankruptcy case.

numerous provisions of the Bankruptcy Code. Further, nothing in the Motions provides any basis for Hudson's claims that the relief sought is actually in the best interests of Hudson's creditors. Rather, it appears that the proposed sale and the proposed settlement are solely in the best interests of the Authority, the City, the Parking Utility and the Purchaser. However, these entities are not debtors under the Bankruptcy Code, and are not entitled to obtain the benefits and protections afforded by the Bankruptcy Code, no matter how much Hudson would like to serve as a conduit to provide such relief.

JNESO does not oppose the sale of the Hospital. Indeed, in light of the interests of the community the Hospital serves, the preservation of employment for numerous individuals, and the Hospital's financial condition as disclosed in the Motions, a sale to a third party appears to make sense. JNESO does, however, oppose the requested relief, which is unjustified and contrary to the Bankruptcy Code in numerous respects.

For these reasons, and as is set forth in more detail herein, the Court should not grant the Motions in their current form.

BACKGROUND

A. Hudson's Bankruptcy Petition.

1. "Hoboken University Medical Center" is a registered trade name for the Authority, which owns and operates the Hospital. (See New Jersey Business Gateway Report attached as **Exhibit "A."**)

2. Between late 2010 and early 2011, the Authority, its professionals and others spent many months negotiating a sale of the Hospital to the Purchaser. During this time, the Authority began to withhold substantial amounts of money that the Authority was required to pay to Hudson, causing Hudson to substantially fall behind in paying various of the Hospital's creditors. As is set forth herein, Hudson's failure to pay the Hospital's normal obligations

included Hudson's failure during 2011 to pay certain wages and benefits to JNESO's members and to make certain contributions to JNESO's members' pension plan.

3. After the Authority negotiated a sale of substantially all the Hospital's assets to the Purchaser, and entered in an Asset Purchase Agreement with the Purchaser (the "Authority APA") on or about April 20, 2011,[2] a true copy of which is attached as **Exhibit "B,"** upon information and belief, the Authority was instrumental both in causing certain members of Hudson's board of directors to resign, and in replacing them with the Authority's designees.

4. Thereafter, on August 1, 2011 (the "Petition Date"), the Authority, which chose not to or was unable to file a petition under Chapter 9 of the Bankruptcy Code itself, caused Hudson to file a voluntary Chapter 11 petition with the Court.

5. On August 12, 2011, the United States Trustee appointed an Official Committee of Unsecured Creditors for Hudson (the "Committee"), which includes JNESO.

B. Relationship Between Hudson, the Authority and the Hospital.

6. The Authority and Hudson came into existence in 2006. At that time, the New Jersey State Legislature adopted a newly-codified New Jersey Municipal Hospital Authority Law, N.J.S.A. 30:9-23.15, et seq., (the "MHAL"), pursuant to which the City formed the Authority for the purpose of acquiring the Hospital, thereby, placing the Hospital into public ownership.

7. Thereafter, the Authority registered the trade name "Hoboken University Medical Center" as a trade name for the Authority in connection with its operation of the Hospital. (See Exhibit A.)

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[2] The Authority APA specifically included the Authority's sale to the Purchaser of the Hospital and the Authority's trade name, "Hoboken University Medical Center." See Exhibit B, Section 2.1(n).

8. The MHAL mandates that "[t]he authority shall exercise its powers and duties to manage and operate a hospital owned by it through a contract or contracts with a manager," provided that "the primary responsibility of operating the hospital shall remain that of the authority." See N.J.S.A. § 30:9-23.20(a).

9. In accordance with the MHAL, the Authority caused Hudson to be formed as a not-for-profit corporation and a support organization, as defined in Sections 501(c)(3) and 509(a)(3) of the Internal Revenue Code of 1986, to act as manager and operate the Hospital on the Authority's behalf pursuant to a Manager and Operator Agreement between Hudson and the Authority, dated February 1, 2007 (the "Manager Agreement"). (See Settlement Motion, Exhibit C.)

10. From that date until the present, Hudson has acted as the Authority's agent in operating the Hospital.

(i) The Authority's Obligations Under the Manager Agreement.

11. The Manager Agreement obligates Hudson to act as agent for the Authority and perform all necessary duties and enter into contracts for goods and services necessary for the operation and management of the Hospital. Understandably then, the Manager Agreement also makes it abundantly clear that the Authority, as the disclosed principal, is responsible for funding all costs and expenses incurred by Hudson in operating the Hospital on behalf of the Authority as its principal. Among the key provisions requiring funding by the Authority are:

- On a monthly basis, the Authority is required to transfer to Hudson 1/12 of the amount set forth in the annual budget agreed to between the parties. (see Manager Agreement, § 2.1.3).
- The Authority is required to reimburse Hudson for all costs incurred by Hudson in carrying out its duties and obligations as set forth in the Manager Agreement. (see id., § 2.2.28).

- The Authority is required to approve of and concur in any payments made by Hudson on account of any budgeted reimbursable expenses incurred to operate the Hospital, unless those expenses were incurred due to the gross negligence or criminal misconduct of Hudson. Absent evidence of gross negligence or criminal misconduct, all such reimbursable expenses incurred by Hudson in operating the Hospital must be reimbursed by the Authority. (see id., § 7.4).

- The Authority explicitly agrees to fund Hudson's reimbursable expenses. (see id., § 8.2.10).

- The Authority is ultimately and directly responsible to indemnify Hudson and to fully satisfy all of the liabilities and obligations of Hudson:

> To the extent permitted by law, the Authority hereby agrees to indemnify, defend and hold harmless the manager, its directors, officers, employees and agents for, from and against any cost, loss damage or expense (including, but not limited to, reasonable attorneys' fees and all court costs and other expenses of litigation, whether or not recoverable under local law) resulting from (i) a breach of this Agreement by the Authority, including any breach of any representation, warranty or covenant in this Agreement or failure to pay any amount, when due, owing to the Manager under this Agreement, (ii) the fraud, gross negligence or willful misconduct of the Authority, (iii) any act (or failure to act) undertaken and performed (or refused to be undertaken) by the Manager or its officers, employees or agents, in good faith within the scope of authority conferred by this Agreement, or (iv) the performance or failure to perform any acts by the Manager or its officers, employees or agents, in good faith reliance on the advice of accountants or legal counsel or in good faith reliance on the advice, instruction or approval from the Authority. Without limitation of the foregoing, the Authority's indemnification obligation includes the obligations to pay Manager pursuant to Section 7 of this Agreement.

(Id., § 11.1).

12. These and other provisions of the Manager Agreement make it apparent that, to the extent Hudson incurs expenses in connection with operating the Hospital, the Authority has the unconditional obligation to ensure that the expenses of its agent are funded, thereby making the Authority ultimately responsible to Hudson's creditors.

(ii) The Authority's Control and Supervision of Hudson as its Agent.

13. The Authority's complete control over Hudson is readily apparent from a review of the Manager Agreement and Hudson's By-Laws.

14. In particular, Hudson's By-Laws expressly reserve to the Authority, pursuant to the requirements of the MHAL, extensive control over every significant aspect of Hudson's corporate existence, including:

- To approve the individuals that the Manager proposes to designate as the Chief Executive Officer and the Chief Financial Officer of the municipal hospital managed by the Manager; to remove such individuals from office, and to approve contracts or other arrangements setting forth terms and conditions of employment for those positions.
- To approve the management plan for the municipal hospital to be operated by the Authority, including monitoring and review methods of financial activities.
- To approve the minimum provisions that shall be set forth in the Manager's management contract with the Authority.
- To approve and monitor the annual budgets of the municipal hospital operated by the Authority and of the Manager and any amendments thereto.
- To authorize the Manager to engage in or enter into any transaction providing for the acquisition or disposition of the assets of the municipal hospital operated by the Authority, unless authorized in the municipal hospital's annual budget.
- To approve the incurrence of debt or expenses by the municipal hospital operated by the Authority, unless authorized in the municipal hospital's annual budget.

(See Hudson's By-Laws, Article III.)[3]

15. Upon information and belief, the Authority also controls most, if not all, of the members of Hudson's board of directors. "The Directors who serve by virtue of their service as President and Treasurer/Chief Financial Officer of the Corporation shall be approved by the

[3] A true copy of Hudson's By-Laws were previously filed with the Court [see Docket No. 96-2].

Authority and shall serve until they resign or are removed by the Authority." (See Hudson's By-Laws, Article IV, Section 3.)

16. Further, "[n]o officer shall have the authority to enter into any contracts, obligations or undertakings on behalf of [Hudson] in any matter unless the same are within the expenditure limits for various budget categories approved by the Authority in the annual budget." (See Hudson's By-Laws, Article VI, Section 10.)

17. The Authority's control over Hudson is also clear from the Manager Agreement, including (i) approval of the appointment of the Chief Executive Officer and Chief Financial Officer and their respective compensation (see id., Section 2.2.8); (ii) approval of the Proposed Annual Business Plan and Budget (see id., Sections 4.1 and 4.2); access to and inspection of all books and records and financial data (see id., Section 4.5); monthly, quarterly and annual reporting from Hudson to the Authority reflecting financial results of the hospital's operations (see id., Section 4.6); and control of the acquisition and disposition of assets, the incurring of debts and expenses and the taking on of liabilities not normally associated with the day-to-day operation of a hospital (see id., Section 2.1.2).

C. The Authority's Bond Obligations.

18. To finance renovations and other the capital improvements to the Hospital and to provide the Hospital with working capital, the Authority issued $51.6 million in revenue bonds in 2007 and $9.72 million of revenue bonds in 2009 (collectively, the "Bonds").

19. Hudson is not an obligor on the Bonds. Further, the City unconditionally guaranteed payment of the Bonds.

20. The terms and conditions of the Bonds are set forth in an Indenture of Trust between the Authority and TD Bank, N.A. (as successor-in-interest to Commerce Bank, N.A.),

as trustee (in such capacity, the "Bond Trustee"), dated February 1, 2007 (as supplemented, the "Indenture").

21. Pursuant to the Indenture, the Bonds are primarily secured by "Revenues," which is defined in the Indenture to include:

> (a) *all revenues, fees, charges, rents, rates, receipts and other charges and other income derived or to be derived by the Authority from or for the ownership, operation, use or services of the Hospital*, including all Government Grants, including, without limitation, contributions, donations and pledges whether in the form of cash, securities or other personal property, and all rights to receive the same, whether in the form of accounts receivable, contract rights, chattel paper instruments or other rights, and the proceeds thereof, (b) any income derived from the investment of funds (other than the Rebate Fund) which are held pursuant to the Indenture (subject to the provisions governing the application of such investment income), and (c) the proceeds of any insurance coverages on and condemnation awards in respect of any assets of the Authority and allocable to losses of operating revenues, income or receipts of the types hereinbefore in this definition mentioned or referred to (including, without limitation, the proceeds of any business interruption or use and occupancy insurance and any business interruption or use and occupancy insurance and any portions of any net condemnation awards made in respect of lost revenues or disruptions in the receipt thereof) . . .

Indenture at pp. 17-18 (emphasis added).

22. The term "Hospital" is defined in relevant part as: "the Hoboken University Medical Center . . . including such real and personal property utilized for its operations . . . " Indenture at p.10.

23. Upon information and belief, the Bonds are not secured by a lien on any real property owned by the Authority and a search of mortgage records in Hudson County did not reveal any mortgages encumbering the Authority or the Hospital's real property.

D. JNESO.

24. JNESO is a professional health union serving many of the nurses at the Hospital. JNESO began in 1958 as the Jersey Nurses Economic Security Organization, a euphemism for the Union Division of the State Nurses Association. In 1985, the JNESO membership voted to leave the State Association as an independent union, and officially changed its name to JNESO. In 1992, the membership voted to affiliate with the International Union of Operating Engineers, AFL-CIO.

25. JNESO is a labor organization within the meaning of section 2(5) of the National Labor Relations Act, see 29 U.S.C. § 152(5), and section 301 of the Labor-Management Relations Act. See 29 U.S.C. § 185(a).

E. The Collective Bargaining Agreement.

26. On or about October 1, 2009, JNESO and the Hospital entered into that certain collective bargaining agreement entitled "Agreement Between Hoboken University Medical Center and JNESO, District Council 1, IUOE, October 1, 2009 through September 30, 2011" (the "CBA"). A true copy of the CBA is attached to the accompanying Certification of Virginia Treacy, R.N. (the "Treacy Certification") as Exhibit "1"). Importantly, Hudson is not a party to the CBA.

27. Pursuant to the CBA, among other things, the Hospital recognized JNESO as the sole and exclusive collective bargaining representative for all employees of the Hospital holding the nursing positions identified in Article 1 of the CBA (the "Nurses").

(i) The Interim Agreements.

28. After discussions and negotiations, in or about January 2010, JNESO agreed to certain interim modifications to the CBA (the "Concession Agreement"), which modifications were further amended on August 13, 2010 (the "Interim Agreement on Incentives," and

collectively with the Concession Agreement, the "Interim Agreements," true copies of the Interim Agreements are attached to the Treacy Certification as Exhibits "2" and "3," respectively). The Interim Agreements were integrated into and became a part of the CBA. Hudson executed the Interim Agreement as agent on behalf of the Hospital.

29. Through the Interim Agreements, which became effective the second pay period in January 2010 and were to be in effect for a duration of twenty-six (26) pay periods (approximately one (1) year), JNESO, on behalf of the Nurses, agreed to significant financial concessions for a limited time period to accommodate the Hospital's financial issues. Specifically, the Interim Agreements provided that, among other things, during a limited interim period: (i) the Nurses would receive a seven (7%) percent wage reduction to their base rate; (ii) compensation for daily overtime was eliminated; (iii) compensation for holiday and vacation as time worked for purposes of computing overtime was eliminated and (iv) on-call pay was reduced from $15.00 to $8.00.[4] (See Treacy Certification, Exhibit 2 at Sections 2-8.)

30. Under the Interim Agreements, the Hospital was required to restore all of the foregoing concessions in January 2011. (See id. at Section 1.)[5]

[4] Certain Nurses receive alternative treatment for their on-call pay based upon prior agreements with the Hospital. Instead of a set dollar amount, these Nurses are entitled to receive seventy five (75%) percent of their actual rate of pay. Therefore, prior to the Interim Agreement, certain of these Nurses received up to $35/hour for on-call pay; thus, these Nurses bear an even greater financial burden as a result of the Interim Agreements. (See Treacy Certification at ¶ 8 n.1.)

[5] The Concession Agreement also provided that, as of January 2011, all Nurses "shall have their rates restored by an additional one (1%) percent for every one million dollars surplus of Revenue over Case, as established by audited financial, up to a maximum of five and a quarter percent. (5.25%)." (Treacy Certification, Exhibit 2 at Section 10.)

(ii) The Hospital's Failure to Comply with the Interim Agreements/the Arbitration.

31. In January 2011, in disregard of the Interim Agreements, the Hospital failed to restore the concessions made by the Nurses under the Interim Agreements. (See Treacy Certification at ¶ 10.)

32. As a result of the Hospital's failure in January 2011 to restore the concessions, pursuant to Article 10 of the CBA, JNESO initiated an arbitration against the Hospital with the New Jersey State Board of Mediation.

33. On April 7, 2011, an arbitration was conducted by Arbitrator Wellington Davis ("Arbitrator Davis"). On July 15, 2011, Arbitrator Davis issued a consent award in favor of JNESO and against the Hospital, effective as of June 20, 2011, modifying the Interim Agreements and requiring the Hospital to comply with the CBA by, *inter alia*, (i) restoring daily overtime; (ii) restoring holiday pay and vacation as time worked for purposes of computing overtime; (iii) restoring on-call pay from $8.00 to $15.00 and (iv) implementing the July 15, 2011 wage increase required by the CBA (the "Consent Award"). (A true copy of the Consent Award is attached to the Treacy Certification as Exhibit "4.")

34. Despite the entry of the Consent Award, the Hospital failed to comply with the Consent Award. (See Treacy Certification at ¶ 13).

35. As a result, on or about August 1, 2011, JNESO initiated a second arbitration[6] with the New Jersey State Board of Mediation, based upon the Hospital's failure to, among other

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[6] Under controlling law, the automatic stay does not apply to the arbitration provision in the CBA. See In re Ionosphere Clubs, Inc., 922 F.2d 984, 993 (2d Cir. 1990) ("[A]n arbitration brought pursuant to a provision in a collective bargaining agreement is not subject to the automatic stay since its application would allow a debtor unilaterally to avoid its obligation to arbitrate."). See also In re Continental Airlines, 125 F.3d 120, 137 (3d Cir. 1997).

things, properly implement the terms of the CBA, as required by the Consent Award.[7]

F. JNESO's Claims Against the Hospital.

36. On or about September 28, 2011, JNESO filed a proof of claim [Claim No. 14] in Hudson's bankruptcy case, reflecting claims of at least $3.7 million, including at least $1.2 million in unsecured priority claims pursuant to 11 U.S.C. § 507(a)(4) (the "JNESO Claim").

37. The JNESO Claim consists of claims against the Hospital arising from, among other things, (i) the Hospital's failure to restore the concessions that had been agreed to under the Interim Agreements, (ii) the Hospital's failure to implement pre-petition salary increases, other benefits and other economic provisions to JNESO Nurses, as required by the CBA and the Consent Award, (iii) the Hospital's failure to engage in good faith "effects bargaining" with JNESO prior to the Petition Date (as detailed below), (iv) JNESO's claims against the Hospital for violation of the National Labor Relations Act, and (v) damages under the WARN Act. (See Treacy Certification at ¶ 18).

38. JNESO's claims are conservatively estimated given the fact that JNESO is unable to calculate the actual amount of its claims without being provided access to the Hospital's records. In particular, to calculate the actual amount of JNESO's Claim, JNESO would need additional information from the Hospital, including information concerning hours worked by

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[7] As is set forth in detail herein, the CBA is with the Hospital, which is the Authority, and not with Hudson, the Authority's agent. Nonetheless, Hudson seeks to reject the CBA. Further, Schedule 5.8(d) to the Hudson APA (defined below), attached as part of Exhibit "1" to Hudson's Amended Exhibits to the Sale Motion [Docket No. 150], represents that Hudson has no delinquencies in payments to employees under to any collective bargaining agreement. Assuming that Hudson is even a party to the CBA, which it is not, JNESO's Consent Award and the recently-filed arbitration demonstrates that Hudson's representations are false. Additionally, Hudson has failed to fulfill its pension payment obligations to JNESO members for June, July and August 2011, which are in arrears by $186,000 to date. (See Treacy Certification at ¶ 15.)

JNESO Nurses, overtime worked by JNESO Nurses, and whether holiday or vacation time was used by JNESO Nurses. (See Treacy Certification at ¶ 19.)

G. The Proposed Sale of the Hospital.

39. On April 20, 2011, the Authority entered into the Authority APA with the Purchaser, pursuant to which the Authority agreed to sell to the Purchaser substantially all of the Hospital's assets, including the Hospital building and the Authority's trade name, "Hoboken University Medical Center." See Exhibit B, Section 2.1(n).

40. By letter dated June 27, 2011, a true copy of which is attached to the Treacy Certification as Exhibit "5," JNESO made a demand on the Hospital for "effects bargaining,"[8] and requested certain information from the Hospital.

41. The Hospital failed to respond to JNESO's requests, prompting JNESO to file an unfair labor charge with the National Labor Relations Board on July 15, 2011, identified as Case No. 22-CA-061377 (the "NLRB Proceeding"). (See Treacy Certification at ¶ 22.)

42. By letter dated July 29, 2011, a true copy of which is attached to the Treacy Certification as Exhibit "6," counsel to Hudson sent formal notice to JNESO of the Authority's proposed sale of the Hospital and all of its assets to the Purchaser, representing that the

[8] "Effects bargaining" is bargaining between a union and employer regarding a decision to close operations where union members are employed. See First National Maintenance Corp v. N.L.R.B., 452 U.S. 666, 681-82 (1981). See also 29 U.S.C. § 158(a)(5). It is well established that a union is entitled to notice that an employer is closing its facility and is entitled to negotiate meaningfully about the effects of the decision on the employees whose employment status will be altered. First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981); N.L.R.B. v. Royal Plating and Polishing Co., 350 F.2d 191 (3rd Cir. 1965); Kadouri International Foods, 356 NLRB No. 148 (2011); Willamette Tug & Barge Co., 300 NLRB 282 (1990); see also N.L.R.B. v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961); N.L.R.B. v. Winn-Dixie Stores, Inc., 361 F.2d 512 (5th Cir. 1966). Such bargaining over the "effects" of the decision on the displaced employees may cover such subjects as severance pay, vacation pay, seniority and pensions, among others, which are necessarily of particular importance and relevance to the employees. Royal Plating and Polishing Co., 350 F.2d at 196. The fact that the Hospital is seeking to transfer it operations to another entity does not relieve the Hospital of its obligation to engage in effects bargaining. TNT Logistics North America, 346 NLRB 1301, 1303 (2006), enf. 246 Fed. Appx. 220 (4th Cir. 2007).

anticipated closing date for the sale would occur between September 15, 2011 and September 29, 2011.

43. Shortly after the Petition Date, representatives of the Hospital and JNESO met, at which time JNESO made a formal written proposal to the Hospital. (See Treacy Certification at ¶ 24.)

44. On or about September 15, 2011, well after the filing of the Motions, Hudson's counsel expressly informed JNESO and an attorney for the National Labor Relations Board ("NLRB") that Hudson intended to reject JNESO's effects bargaining demands. (See September 15, 2011 email from Joseph Maddaloni, Jr., Esq. to Margo Greenfield and Virginia Treacy (the "September 15, 2011 Hudson Email," a true copy of which is attached to the Treacy Certification as Exhibit "7").) Hudson's counsel also informed JNESO that it intended to "propose certain givebacks and modifications to the CBA under section 1113," despite the fact that the Sale Motion, which seeks to reject the CBA, had already been filed. (Id.)

45. Importantly, through the September 15, 2011 Hudson Email, Hudson demonstrated the bad faith nature of its negotiation tactics, clarifying that any proposals it would make to JNESO would be mere formalities, and pretended to feign compliance with section 1113:

> [I]n light of [Hudson's] bankruptcy filing there is really nothing for the parties to discuss unless the Union is prepared to make concessions to the employer as per Section 1113 of the bankruptcy code. Given the fact that [Hudson] be [sic] liquidating and going out of business, I thought it prudent to save us all the time and cost of having to negotiate give-backs that I know JNESO is not going to agree to, and which in the end, would be meaningless because [Hudson] is not going to come out of bankruptcy.

(Id.)

46. This statement was made to JNESO after Hudson's counsel previously acknowledged to an attorney for the NLRB that it did not intend to comply with section 1113 of the Bankruptcy Code and that Hudson would not engage JNESO in any negotiations:

> [Hudson] could be seeking concessions and demands from the Union in preparation for rejecting the CBA pursuant to Section 1113 of the Bankruptcy Code. We, however, are not seeking to negotiate concessions . . . .

(Id. at August 15, 2011 email from Joseph Maddaloni, Jr., Esq. to Margo Greenfield.)

47. On September 19, 2011, Hudson's counsel formally rejected JNESO's effects bargaining demands.[9] (See September 19, 2011 email form Joseph Maddaloni, Jr. to Virginia Treacy, a true copy of which is attached to the Treacy Certification as Exhibit "8").

48. Hudson also requested that, pursuant to section 1113 of the Bankruptcy Code, JNESO make certain concessions under the CBA including that JNESO forego the wage increase provisions of the CBA blessed by the Consent Award.[10] (Id.)

H. The Motions.

49. On August 23, 2011, the Debtor filed the Sale Motion, which seeks, among other things, (i) the approval of the sale of substantially all of Hudson's limited assets, free and clear of the liens and claims of Hudson's creditors, (ii) authorization to assume certain executory

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[9] Where an employer refuses to engage in good faith bargaining over the effects of a closing, the traditional remedy is an order to pay employees back pay at the rate of their normal wages for no less than the employees would have earned for a 2-week period when last in the employer's employ. Transmarine Navigation Corp., 170 NLRB 389 (1968). Under the assumption that further bargaining would be futile, the Transmarine remedy provides a formula for calculation of liquidated damages in order to make an effort to redress the refusal to bargain in a manner that is not entirely devoid of economic consequences for the employer. NLRB v. Emsing's Supermarket, Inc., 872 F.2d 1279, 1289-91 (7th Cir. 1989). As described by the NLRB, "under the circumstances of [the] case, including the lapse of time and changes in the corporate nature of [Transmarine], it is impossible to reestablish a situation equivalent to that which would have prevailed had [Transmarine] more timely fulfilled its statutory bargaining obligation." Transmarine Navigation Corp., 170 NLRB at 389. Similarly, in the instant case, the Hospital's failure to timely engage in effects bargaining has rendered bargaining on the eve of the closing futile, and subjects the Hospital to claims by JNESO under Transmarine.

[10] As explained above, Hudson is presently in default as to these and other obligations owed to JNESO.

contracts and assign those contracts to the Purchaser and (iii) authorization to reject various other executory contracts, including the CBA and certain other collective bargaining agreements.

50. The Asset Purchase Agreement by and between Hudson and the Purchaser (the "Hudson APA," a copy of which is attached to Hudson's Amended Exhibits to the Sale Motion [Docket No. 150] (the "Amended Sale Exhibits") as Exhibit "1") states that the "Purchaser agrees to negotiate in good faith with existing unions at the Hospital as required by law in an attempt to reach mutually satisfactory CBAs . . . ." (See Hudson APA at Section 8.23.)

51. However, the Hudson APA makes clear that the CBA is to be excluded from the assets that the Purchaser is to purchase. (See Hudson APA at Sections 2.2(a), 2.6; see also Amended Sale Exhibits at Exhibit "3" (listing all Assigned Contracts) and Exhibit "5" (listing CBA on list of "Rejected Contracts"); Sale Motion at ¶ 5 (specifically stating that "the Rejected Contracts include all collective bargaining agreement to which Debtor is a party"). Further, Hudson's rejection of the CBA[11] is a condition precedent to the consummation of Hudson's sale of assets to the Purchaser. (See Hudson APA at Section 10.3(c).)

52. Additionally, under the Hudson APA, "Excluded Liabilities" include: (i) liabilities associated with "Excluded Assets," such as the CBA (id. at Section 2.4(c)); (ii) Hudson's obligations and liabilities to "Employees" (id. at Section 2.4(o)); (iii) all of Hudson's liabilities and obligations arising out of any collective bargaining agreement (id. at Section 2.4(t)); (iv) all of Hudson's liabilities and obligations to employees related to "wages, benefits and paid time off" (id. at Section 2.4(u)); and (v) all of Hudson's liabilities or obligation related to, among other things, "multiemployer" benefit plans (id. at Section 2.4(v)).

[11] How Hudson can reject an agreement to which it is not a party is not explained in the Motion.

53. Further, under the Hudson APA,[12] the Purchaser has agreed to "employ no less than seventy-five percent (75%) of the Employees of HHI," (see id. at Section 8.20); however, Purchaser is granted "sole and exclusive discretion" to make such offers. (Id. at Section 9.1(a).) Section 9.1(a) of the Hudson APA goes on to provide that the "Purchaser *shall not* be obligated to *continue* salaries, wages, benefits or other terms and conditions of employment applicable to employees of HHI. (Id. (emphasis added).)

54. Despite the Purchaser's agreements and obligation under the Hudson APA to negotiate in good faith with JNESO, and notwithstanding JNESO's repeated requests for the Purchaser to negotiate with JNESO, the only "negotiations" that have occurred between JNESO and the Purchaser have been the Purchaser's demand that JNESO's Nurses agree to take on increased hours at the Hospital and receive substantially lower pay and benefits than the Nurses were entitled to under the CBA. (See Treacy Certification at ¶ 30.)

55. Furthermore, despite the representations in the Motions, neither Hudson nor the Authority has negotiated in good faith with JNESO, (see Treacy Certification at ¶ 16), and, as made clear by the September 15, 2011 Hudson Email and September 19, 2011 Hudson Email, Hudson has no intention of doing so. Upon information and belief, the National Labor Relations Board is contemplating filing a complaint against Hudson and/or the Authority for violations of the National Labor Relations Act, specifically related to their failure to collectively bargain with JNESO in good faith. (See Treacy Certification at ¶ 22.)

56. In view of the foregoing, despite the representations by Hudson, the Authority, the Purchaser and others that the sale of the Hospital will benefit the City and its residents and is necessary to avoid a pending healthcare emergency in the City, the Purchaser's actions, at least

[12] The Authority APA contains identical provisions with respect to the treatment of collective bargaining agreements.

with respect to the JNESO Nurses, reflects that the Purchaser is primarily concerned with maximizing its profits, and not necessarily with patient care.

I. The Continued Hearings/The JNESO Subpoena.

57. Following the filing of the Motions, during the weeks of September 12 and 19, with the assistance of the Court, various parties in interest engaged in discussions and/or negotiations, at the courthouse, which caused the hearing on the Motions to be adjourned on several occasions. Unfortunately, during those discussions, Hudson and the Purchaser refused to engaged in any substantive discussions or negotiations with JNESO.

58. On or about September 23, 2011, JNESO was advised that Hudson was supposedly going to substantially amend the relief sought in the Motions to modify the impact of Motions on the rights of, *inter alia*, JNESO.

59. Thereafter, on Saturday, September 24, 2011, Hudson filed a Notice of Continued Hearing with Respect to the Motions [Docket No. 235] (the "Continuation Notice"). In the Continuation Notice, Hudson stated that it would file a new proposed form of order with the Court on September 26, 2011.

60. Given the fact that, among other things, JNESO was advised on September 23 that Hudson would seek to modify the relief sought in the Motions with respect to JNESO, on September 24, JNESO served a subpoena, pursuant to Fed. R. Bankr. P. 9016, upon Sills Cummis & Gross, P.C., counsel to the Committee, in an effort to obtain certain specific, discoverable documents to use at the hearing on the Motions, as amended with respect to the treatment of JNESO (the "JNESO Subpoena").

61. In response to the JNESO Subpoena, on Sunday, September 25, 2011, the Authority moved to quash the JNESO Subpoena [Docket No. 237]. Similarly, on September 26, 2011, Hudson moved to quash the JNESO Subpoena [Docket No. 238]. Both of these motions to

quash the JNESO Subpoena state that the hearings on these motions will occur on October 18, 2011 at 10:00 a.m., after the hearing on the Motions. The motions to quash the JNESO Subpoenas seek to prevent JNESO from obtaining documents, including deposition transcripts that JNESO believes demonstrates the bad faith conduct of Hudson, the Authority, the City and the Purchaser in connection with Hudson's bankruptcy and the Motions.[13]

62. Despite the fact that neither Hudson nor the Purchaser has not had any substantive discussions with JNESO to date, on September 26, 2011, Hudson filed another Notice of Continued Hearing with Respect to the Motions [Docket No. 239], rescheduling the hearings on the Motions for September 28, 2011 at 10:00 a.m., and stating that a proposed form of order setting forth the modified relief that would be sought through the Motions would be filed with the Court on September 27, 2011.

63. Thereafter, on September 27, 2011, Hudson filed yet another Notice of Continued Hearing with Respect to the Motions [Docket No. 241], again rescheduling the hearing on the Motions for October 4, 2011, which provided, among other things, that a proposed form of order setting forth the modified relief that would be sought through the Motions would be filed with the Court on October 3, 2011, less than twenty-four hours prior to the hearing on the Motions.

64. Following a status conference with the Court on October 3, 2011, on October 4, 2011, Hudson filed another Notice of Continued Hearing with Respect to the Motions [Docket No. 255], again rescheduling the hearing on the Motions for October 6, 2011, which again provided, among other things, that a proposed form of order setting forth the modified relief that

[13] JNESO has advised both the Authority and Hudson that JNESO would enter into a confidentiality agreement to gain access to the documents and resolve the motions to quash. However, the Authority and Hudson have completely ignored JNESO.

would be sought through the Motions would be filed with the Court on October 5, 2011, less than twenty-four hours prior to the hearing on the Motions.

65. Despite the repeated assurances in Hudson's continuation notices, as of the objection deadline with respect to the Motions, no proposed form of order has been filed with the Court and no notice has been given to JNESO -- or other creditors -- as to the scope of the actual relief being sought by Hudson through the Motions.

OBJECTION

I. APPROVAL OF THE AMENDED MOTIONS WILL VIOLATE JNESO'S DUE PROCESS RIGHTS.

66. By substantially modifying the Motions as they pertain to JNESO without giving JNESO notice, both the Authority and Hudson have improperly sought to disenfranchise JNESO. JNESO must be provided with a full opportunity to respond to the Motions, as modified, and prepare for the hearing on the Motions, as modified, including an opportunity to conduct discovery with respect to the issues raised in the Motions, as modified.

67. Due process of law is engrained in our judicial system, and requires, at a minimum, that a person be given notice and an opportunity to be heard before being deprived of a property interest. See Fuentes v. Shevin, 407 U.S. 67, 81–82 (1972). The standard of notice required to comply with the concept of due process is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Thus, the "purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14 (1978); Landon v. Plasencia, 459 U.S. 21, 39 (1982) (Generally, notice must be sufficiently adequate so as to apprise the

individual of the issues so that he has the opportunity to present his defense in a full and fair hearing.); see also Pascarella v. Swift Transp. Co., Inc., 643 F. Supp. 2d 639, 650 (D.N.J. 2009) (citing Kahn v. United States, 753 F.2d 1208, 1218 (3d Cir. 1985)) ("The most important requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.")

68. Here, JNESO has been deprived of its constitutionally-guaranteed right to due process. Hudson is seeking this Court's approval of the Motions, as modified, on an expedited basis, after indicating that it would file a proposed form of order with the Court setting forth the modified relief sought only hours before the hearing on the Motions, without providing JNESO with proper notice.[14]

69. The lack of due process afforded JNESO is amplified by the recently-filed motions to quash the JNESO Subpoena, which seek to deprive JNESO from receiving the documentary discovery to which JNESO is entitled.

70. Hudson and the Authority's attempts to prevent JNESO from obtaining discovery prior to a hearing on the Motions, as modified, is, in itself, a further violation of JNESO's due process rights. See, e.g., In re Blast Energy Servs., Inc., 296 B.R. 676, 690 (Bankr. S.D. Tex. 2008) (court denied debtor's request for expedited hearing and granted continuance to allow sufficient time for opposing party to conduct discovery "to ensure that due process was afforded"); In re La Sierra Fin. Servs., Inc., 290 B.R. 718, 732-33 (9th Cir. B.A.P. 2002) (internal citations omitted) (recognizing that due process "requires more than simply that the parties be aware of the litigation, but also they have the opportunity to prepare adequately for an

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[14] Pursuant to Fed. R. Bankr. P. 2002, the Motions, as modified, require 21-days notice prior to a hearing. By advising that it would materially alter the relief sought through the Motions as it relates to JNESO, Hudson has violated of Fed. R. Bankr. P. 2002, and has deprived JNESO of due process.

impending hearing"). Cf. Anderson v. Davila, 125 F.3d 148, 158 (3d Cir. 1997) ("A court cannot expedite a hearing, deny a continuance and the opportunity to conduct discovery, and then, after the parties have finished presenting testimony, suddenly decide that the hearing was really a trial on the merits after all. This course of action violates well-established notions of due process and cannot be sanctioned by this Court.").

71. For these reasons, the Motions, as modified, violate JNESO's due process rights.

II. HUDSON'S REJECTION OF THE CBA IS VIOLATIVE OF LAW.

A. HUDSON CANNOT REJECT THE CBA BECAUSE HUDSON IS NOT A PARTY TO THE CBA.

72. "Hoboken University Medical Center," which is JNESO's counter-party to the CBA, is the Authority's trade name.[15] Hudson is not a party to the CBA, but simply executed the Interim Agreements on behalf of the Authority as Hudson's disclosed principal.

73. Importantly, the purpose of a trade name is to permit the controlling entity to do business under a different name without having to create an entirely new business entity to do so. See N.J.S.A. § 14A:2-2.1 (permitting for-profit corporation to conduct business under alternate name); N.J.S.A. § 15A:2-3 (permitting not-for-profit corporation to conduct business under alternate name). The use of a trade name does not, however, relieve the controlling entity from liability for the acts engaged in under its trade name, since the entity and its trade name are one and the same. See, e.g., Trs. of the Constr. Indus. & Laborers Health & Welfare Trust v. C&W Enters., 298 Fed. Appx. 566, 567 (9th Cir. Nev. 2008) ("The designation "d/b/a" is merely

[15] See Exhibits "A" and "B." The trade name "Hoboken University Medical Center" is not an asset being sold by Hudson to the Purchaser pursuant to the Sale Motion. Instead, the name "Hoboken University Medical Center" is expressly listed as an asset that the Authority seeks to sell to the Purchaser pursuant to the Authority APA.

descriptive of a corporation that does business under some other name and does not create a distinct corporate entity.").

74. Given the fact that the Authority -- not Hudson -- is the true party to the CBA, Hudson cannot reject the CBA as a matter of law.

B. HUDSON'S REQUEST TO REJECT THE CBA SHOULD BE DENIED BECAUSE HUDSON HAS NOT SATISFIED THE REQUIREMENTS OF SECTION 1113 OF THE BANKRUPTCY CODE.

75. Assuming, *arguendo*, that Hudson, as the Authority's agent, has the ability to make use of the Bankruptcy Code with respect to the CBA, Hudson cannot reject the CBA because it has failed to comply with section 1113 of the Bankruptcy Code.

(i) General Legal Standards Under Section 1113.

76. In response to the Supreme Court's decision in National Labor Relations Board v. Bildisco & Bildisco, 465 U.S. 513 (1984), Congress enacted section 1113 of the Bankruptcy Code ("Section 1113"), which provides the sole means by which a debtor can reject or modify a collective bargaining agreement. See 11 U.S.C. § 1113. Section 1113 permits a debtor to reject a collective bargaining agreement provided that the debtor has satisfied the statute's numerous procedural and substantive prerequisites. See id.

77. As explained by the Third Circuit in Continental Airlines:

> The intent behind section 1113 is to preclude debtors or trustees in bankruptcy from unilaterally terminating, altering, or modifying the terms of a collective bargaining agreement without following its strict mandate. Moreover, the provision operates to preclude the application of other bankruptcy code provisions to the advantage of debtors and trustees to permit them to escape the terms of a collective bargaining agreement without complying with the requirements of section 1113.

Continental Airlines, 125 F.3d at 137 (citing In re Ionosphere Clubs, Inc., 922 F.2d 984, 989-90 (2d Cir. 1990) (internal citations omitted).

78. Courts hold that a debtor must fulfill the following nine (9) requirements, derived from sections 1113(b) and (c) of the Bankruptcy Code, prior to rejection of a collective bargaining agreement:

i. after the petition date and prior to filing an application to reject the collective bargaining agreement, the debtor must make a proposal to the union to modify the collective bargaining agreement;

ii. the proposal must be based on the most complete and reliable information available at the time of the proposal;

iii. the proposed modifications must be necessary to permit the debtor's reorganization;

iv. the proposed modifications must assure that all creditors, the debtor and all the affected parties are treated fairly and equitably;

v. the debtor must provide the union such relevant information as is necessary to evaluate the proposal;

vi. the debtor must meet at all reasonable times with the union between the time the proposal is made and the hearing on approval of the rejection of the existing collective bargaining agreement;

vii. at the meetings with the union, the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement;

viii. the union must have refused to accept the proposal without good cause; and

ix. the balance of the equities must clearly favor rejection of the collective bargaining agreement.

See, e.g., In re Bowen Enters., Inc. (Bowen Enters., Inc. v. United Food and Commercial Workers Int'l Union, Local 23, (Bankr. W.D. Pa. 1996); In re Am. Provision Co., 44 B.R. 907, 909 (Bankr. D. Minn. 1984).

79. The debtor must prove its compliance with each of these elements by a preponderance of the evidence. See, e.g., In re Jefley, Inc., 219 B.R. 88. 93 (Bankr. E.D. Pa. 1998); In re Liberty Cab & Limousine Co., 194 B.R. 770, 776 (Bankr. E.D. Pa. 1996).

80. It is well settled that Section 1113 applies to all cases filed under chapter 11 of the Bankruptcy Code, regardless of whether the debtor intends to reorganize, in the traditional sense, or liquidate its assets. See, e.g., N.Y. Typographical Union No. 6 v. Maxwell Newspapers, Inc. (In re Maxwell Newspapers, Inc.), 981 F.2d 85, 91 (2d Cir. 1992); In re Horizon Natural Res. Co., 316 B.R. 268 (Bankr. E.D. Ky. 2004); In re The Lady H Coal Co., 193 B.R. 233, 240-43 (Bankr. S.D.W. Va. 1996); Hoffman Bros. Packing Co., 173 B.R. 177, 186-87 (B.A.P. 9th 1994).

81. If a debtor seeks to sell its assets free and clear of liens to a purchaser, the debtor must first reject its collective bargaining agreements by complying with Section 1113. See N.Y. Typographical Union No. 6 v. Maxwell Newspapers, Inc. (In re Maxwell Newspapers, Inc.), 981 F.2d 85, 89 (2d Cir. 1992) ("A debtor may sell the assets of the business unencumbered by a collective bargaining agreement if that agreement has been rejected pursuant to § 1113. . . . Rejection of a collective bargaining agreement is permitted only if the debtor fulfills the requirements of § 1113(b)(1) . . . ."). See also In re Lady H Coal Co., Inc., 193 B.R. 233, 240 (Bankr. S.D. W. Va. 1996).

82. Hudson has failed to comply with the strict requirements under Section 1113. As a result, Hudson's purported rejection of the CBA cannot be permitted.

(ii) Hudson has Ignored the Procedural Requirements of Section 1113(b).

a. Hudson Has Not Satisfied the Threshold Requirements of Section 1113(b)(1).

83. Section 1113(b) provides that "subsequent to the filing of a [chapter 11] petition and prior to filing an application seeking rejection of a collective bargaining agreement," a debtor must (1) submit a proposal to the union outlining those modifications to the collective bargaining agreement that the debtor believes are necessary to the reorganization and (2) provide

the union with information necessary to evaluate the proposal. 11 U.S.C. § 1113(b)(1) (emphasis added). See also 7 Collier on Bankruptcy ¶ 1113.03 (16th ed. 2010).

84. Section 1113(b) explicitly requires that these threshold conditions be satisfied prior to a debtor moving to reject a collective bargaining agreement. See Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., AFL-CIO-CLC, 791 F.2d 1074, 1085. See also Century Brass Prods., Inc. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am (In re Century Brass Prods., Inc.), 795 F.2d 265, 273 (2d Cir. 1986) (explaining that "[o]nly after having demonstrated compliance with [Sections 1113(b)(1) and (2)], without success, may a debtor seek court approval for rejection").

85. Here, in disregard of Section 1113, Hudson never took any of the required steps mandated by Section 1113(b) prior to filing the Sale Motion, such as providing JNESO with a proposal regarding modifications to the CBA.[16]

86. As a result of the Hudson's failure to comply with these threshold requirements, Hudson's request for approval to reject the CBA must be denied. See In re Karykeion, Inc., 435 B.R. 663, 677 (Bankr. C.D. Cal. 2010) ("In order to reject a CBA, the debtor must strictly comply with all of § 1113's requirements."). Cf. In re Stein Henry Co., Inc., Case No. 91-15491, 1992 Bankr. LEXIS 2574 (Bankr. E.D. Pa. June 1, 1992) (denying confirmation of plan, which attempted to reject collective bargaining agreement, because debtor failed to comply with requirements of Section 1113).

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[16] Any last ditch efforts by Hudson to feign compliance with this requirement after the filing of the Sale Motion does not remedy Hudson's failure to present JNESO with a proposal prior to filing the Sale Motion.

b. Hudson Cannot Satisfy the Good Faith Requirement of Section 1113(b)(2) of the Bankruptcy Code.

87. Section 1113(b)(2) mandates that after a debtor makes a proposal to modify a collective bargaining agreement, and prior to a hearing on the debtor's motion for approval to reject that collective bargaining agreement, the debtor must "meet, at reasonable times, with the authorized representative to confer *in good faith* in attempting to reach mutually satisfactory modifications of such agreement." 11 U.S.C. § 1113(b)(2) (emphasis added).

88. The requirement to negotiate in good faith is vital to the Section 1113 process. See N.Y. Typographical Union No. 6 v. Maxwell Newspapers, Inc. (In re Maxwell Newspapers, Inc.), 981 F.2d 85, 89 (2d Cir. 1992) (identifying obligation to negotiate in good faith as most important part of Section 1113 mandate). Such good faith negotiations further the statute's goal of "giv[ing] special consideration to a collective bargaining agreement and encourag[ing] the debtor and the union to reach a mutually acceptable agreement . . . ." In re Roth Am., Inc., 975 F.2d 949, 957 (3d Cir. 1992); see also In re The Leslie Fay Cos., Inc., 168 B.R. 294, 303 (Bankr. S.D.N.Y. 1994) (noting that "[t]he focus of [Section 1113] is to force the parties to negotiate").

89. Hudson cannot meet the requirements of Section 1113(b)(2) because, among other things, Hudson never made JNESO a proposal, as required by Section 1113(b)(1).[17]

90. Hudson's exclusion of the CBA from the proposed sale further mandates that Hudson cannot satisfy the "good faith" requirement of Section 1113(b)(2). See, e.g., Hudson APA at Sections 2.2(a), 2.4, 9.1(a), 10.3(c) with Amended Sale Exhibits at Exhibit 3 and Exhibit 5. See also Sale Motion at ¶ 5.

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[17] In fact, Hudson's counsel has made clear that Hudson has no intentions to negotiate with JNESO at all. (See September 15, 2011 Hudson Email.)

91. In In re The Lady H Coal Co., Inc., 193 B.R. 233 (Bankr. S.D. W. Va. 1996), the court considered the debtors' motion to reject a collective bargaining agreement that was filed by the debtors in connection with their attempt to sell substantially all of their assets prior to confirmation. In denying the debtors' motion, the court found that, among other things, the debtor had not negotiated in good faith. Id. at 241. The court explained:

> This Court has found that the Debtors' motion to sell substantially all assets is essentially the Debtors' plan of reorganization. This form of reorganization does not mean a debtor can shortcut its duties or take unfair advantage of any particular group, as in this case, the employees. *The Court finds that a debtor has a duty under § 1113 to not obligate itself prior to negotiations with its union employees, which would likely preclude reaching a compromise.* Good faith bargaining is conduct indicating an honest purpose to arrive at an agreement as the result of the bargaining process. In this case, the Debtors could not have bargained in good faith as the Debtors were, prior to any negotiations with the union locked into an agreement where the purchase was not assuming the [union's collective bargaining agreement].

Id. at 242 (emphasis added) (internal citations omitted). See also In re Karykeion, Inc., 435 B.R. 663, 682 (Bankr. C.D. Cal. 2010) ("[B]eginning negotiations when one party is already locked into a position does not constitute good faith."); In re Delta Air Lines, 342 B.R. 685, (Bankr. S.D.N.Y. 2006) (finding that debtor failed to comply with its obligation under 11 U.S.C. § 1113(b)(2) to confer in good faith because it steadfastly maintained that its initial proposal under § 1113(b)(1)(A) was nonnegotiable).

92. Furthermore, upon information and belief, the National Labor Relations Board is contemplating filing a complaint against Hudson and/or the Hospital for violations of the National Labor Relations Act, specifically related to their failure to collectively bargain with JNESO in good faith. (See Treacy Certification at ¶ 22.)

93. As a result, Hudson has not satisfied the requirements of Section 1113(b)(2) of the Bankruptcy Code.

(iii) Hudson Cannot Demonstrate that it Has Complied with Section 1113(c) of the Bankruptcy Code.

94. Section 1113(c) of the Bankruptcy Code requires that :

> The court shall approve an application for rejection of a collective bargaining agreement *only* if the court finds that –
>
> (1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);
>
> (2) the authorized representative of the employees has refused to accept such proposal without good cause; and
>
> (3) the balance of the equities clearly favors rejection of the agreement.

11 U.S.C. § 1113(c) (emphasis added).

95. Hudson's failure to make the requisite proposal to JNESO prior to filing the Sale Motion also violates Section 1113(c)(1), further causing Hudson's attempt to reject the CBA to be contrary to law.[18]

C. HUDSON'S UNILATERAL MODIFICATIONS OF THE CBA VIOLATE SECTION 1113(f) AND BAR HUDSON FROM REJECTING THE CBA.

96. Section 1113(f) of the Bankruptcy Code prohibits a debtor from "unilaterally terminat[ing] or alter[ing] any provisions of a collective bargaining agreement *prior to compliance* with the provisions of [Section 1113]." 11 U.S.C. § 1113(f). A debtor is barred from modifying a collective bargaining agreement unless and until the collective bargaining agreement is rejected, see Northwest Airlines Corp. v. Ass'n of Flight Attendants-CWA (In re Northwest Airlines Corp.), 349 B.R. 338, 357 (S.D.N.Y. 2006) ("Section 1113(f) . . . requires that collective bargaining agreements may not be altered until the Bankruptcy Court approves their rejection."), or interim modifications are permitted pursuant to section 1113(e). See In re

[18] The violation of Section 1113(c)(1) obviates the need for further analysis regarding whether Section 1113(c)(2) and (3) have been satisfied. However, Hudson also fails to satisfy these subsections.

Roth Am., Inc., 975 F.2d 949, 957-58 (3d Cir. 1992). As a result, a debtor remains obligated to pay post-petition wages and benefits as they become due in accordance with the collective bargaining agreement.

97. Notwithstanding this clear mandate, since the Petition Date, the Hospital has unilaterally modified the CBA by failing to abide by the terms of the CBA and the Consent Award, which required the Hospital to reverse the concessions that had previously been implemented, as well as to implement certain salary and pensions plan contribution increases. (See CBA at Sections 34.B and 43.A.2.) Additionally, the Hospital has failed to fund post-petition pension obligations.

98. The modifications to the CBA that Hudson has unilaterally implemented since the Petition Date violate section 1113(f) of the Bankruptcy Code. See In re Roth Am., Inc., 975 F.2d at 957-58; Northwest Airlines Corp., 349 B.R. at 357 (S.D.N.Y. 2006).

99. As a result of Hudson's section 1113(f) violation, JNESO has, among other things, a post-petition claim on behalf of the Nurses for all post-petition amounts due. Under Third Circuit law, these post-petition claims have administrative priority status. See In re Roth Am., Inc., 975 F.2d 949, 957-58 (3d Cir. 1992).

100. Hudson is also in violation of Section 1113(f) by virtue of the fact that it contractually bound itself, as part of the Hudson APA, to exclude the CBA from the proposed sale to the Purchaser. See, e.g., Hudson APA at Sections 2.2(a), 2.4, 9.1(a), 10.3(c) with Amended Sale Exhibits at Exhibit 3 and Exhibit 5; see also Sale Motion at ¶ 5. In Am. Flint Glass Workers Union v. Anchor Resolution Corp., 197 F.3d 76 (3d Cir. 1999), the Third Circuit stated:

> We hold when as here a debtor in possession . . . binds itself contractually to obtain a change in legal relations created by a CBA as a condition precedent to

> closing a sale of substantially all of the debtor's assets, that constitutes an attempt to effect an alteration of the CBA.

Id. at 81.

101. Moreover, Hudson's willful violation of Section 1113(f) bars it from now seeking to reject the CBA. As the District Court for the Northern District of Alabama explained, a violation of Section 1113(f) bars a debtor from later rejecting a collective bargaining agreement:

> If a debtor is free to breach the CBA without impairing its ability to reject the contract later, then § 1113 provides no incentive to abide by the terms of the CBA in the interim. . . . Congressional intent to prevent the unilateral rejection of CBAs . . . is accomplished only if a breach of contract is viewed as a violation of § 1113(f) preventing rejection of the contract.

Birmingham Musicians' Protective Assoc. v. Ala. Symphony Assoc. (In re Ala. Symphony Assoc., 211 B.R. 65, 70-71 (N.D. Ala. 1996).[19]

102. For these additional reasons, Hudson should not be permitted to reject the CBA.

D. ALTERNATIVELY, THE SALE PROCEEDS SHOULD BE ESCROWED PENDING RESOLUTION OF JNESO'S ARBITRATION.

103. One of the fundamental principles of labor law is that labor disputes be settled peacefully through voluntary arbitration. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957). Although the Norris-LaGuardia Act limits a court's ability to interfere with labor disputes, the Supreme Court in Boys Markets v. Retail Clerks Union, 398 U.S. 235 (1970), paved the way for

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[19] In addition, courts have held that a debtor's failure to comply with the requirements of a collective bargaining agreement, without first obtaining approval for rejection of the agreement, is a violation of Section 1113(f) and results in a constructive assumption of the collective bargaining agreement, which bars future rejection. See In re Adventure Resources, Inc., 137 F.3d 786, 796, 798 (4th Cir. 1998) (finding debtor's violations of Section 1113(f) and failure to reject in accordance with Section 1113 caused, by operation of law, a constructive assumption of the collective bargaining agreement); In re Roth Am., Inc., 975 F.2d 949, 957 (3d Cir. 1992) (finding collective bargaining agreement was assumed, by operation of law, as a result of debtor's failure to seek to reject collective bargaining agreement under Section 1113). See also In re Moline Corp., 144 B.R. 75, 78 (Bankr. N.D. Ill. 1992) ("[B]ecause of the more rigorous standard [of §1113], most collective bargaining agreements would be assumed either by inaction or denials of motions to reject.").

an injunction against a union strike that centered around an issue that was subject to a contractual grievance procedure. Numerous courts have permitted unions to obtain a "reverse" Boys Markets injunction to prevent the employers from taking action over which arbitrable grievances have been filed. In general, courts will enjoin an employer from taking such action pending arbitration if the arbitrator would otherwise be powerless to grant an effective remedy. Teamsters Local Union 299 v. U.S. Truck Co. Holdings, Inc. 87 F. Supp. 2d 726, 733 (E.D. Mich. 2000) (citing Aluminum Workers v. Consolidated Aluminum Corp., 696 F.2d 437, 441-442 (6th Cir. 1982)).

104. When an employer breaches a collective bargaining agreement, a union may seek injunctive relief under § 301 of the Labor Management Relations Act in order to preserve the *status quo ante* prior to arbitration of the dispute. 29 U.S.C. §185; Gateway Coal v. United Mine Workers, 414 U.S. 368 (1974); Nursing Home & Hospital Union No. 434 v. Sky Vue Terrace, Inc., 759 F.2d 1094 (3d Cir. 1985) (upholding an injunction enjoining an employer from distributing funds derived from the sale of its business pending arbitration). To obtain an injunction in such circumstances, the union must demonstrate that an injunction is necessary to prevent conduct that threatens or frustrates the arbitral process agreed to in the collective bargaining agreement. See Sky Vue Terrace, 759 F.2d at 1098.

105. The Third Circuit has stated a three-part test for determining whether an injunction should issue in a labor dispute: 1) whether the underlying dispute is subject to mandatory arbitration; 2) whether the employer's actions are interfering with and frustrating the arbitral process; and 3) whether the ordinary principles of equity favor an injunction. United Steelworkers of America, AFL-CIO v. Fort Pitt Steel Casting, 598 F.2d 1273, 1278-79 (3d Cir. 1979).

106. JNESO can satisfy the foregoing three-part test, and is therefore, entitled to injunctive relief preventing any distribution or dissipation of the Hospital's sale proceeds. First, the CBA provides for mandatory arbitration of the disputes between the Debtor and the Hospital. Second, by the Hospital's ignoring the requirements of the CBA and the Consent Award, and by Hudson's filing of its bankruptcy petition, the Hospital has clearly interfered with and has frustrated the arbitration process. Finally, JNESO and its members will suffer irreparable harm if the Hospital's assets are sold and the proceeds distributed, which would result in JNESO's members not being compensated, which is inequitable.

107. As a result, to the extent the Court is inclined to approve the Sale Motion and the Settlement Motion, the sale proceeds should be escrowed pending resolution of JNESO's arbitrable claims, because to do otherwise would leave an arbitrator powerless to provide a sufficient remedy to JNESO. See Teamsters Local Union 299 v. U.S. Truck Co. Holdings, Inc. 87 F. Supp. 2d 726, 733 (E.D. Mich. 2000) (citing Aluminum Workers v. Consolidated Aluminum Corp., 696 F.2d 437, 441-442 (6th Cir. 1982)).

III. THE SETTLEMENT MOTION SHOULD NOT BE APPROVED.

A. HUDSON CANNOT CARRY ITS HEIGHTENED BURDEN OF ESTABLISHING THAT THE PROPOSED GLOBAL SETTLEMENT IS FAIR AND EQUITABLE AND IN THE BEST INTEREST OF HUDSON'S ESTATE.

108. Bankruptcy settlements are governed by Fed. R. Bankr. P. 9019, which provides:

> On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Fed. R. Bankr. P. 9019(a).

109. Although settlements are favored by courts, “the unique nature of the bankruptcy process means that judges must carefully examine settlements before approving them.” Will v. Northwestern Univ. (In re Nutraquest, Inc.), 434 F.3d 639, 644 (3d Cir. 2006).

110. In most contexts, the Third Circuit requires courts to consider four (4) criteria when determining whether to approve a settlement:

> (1) the probability of success in litigation;
>
> (2) the likely difficulties in collection;
>
> (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and
>
> (4) the paramount interest of the creditors.

Myers v. Martin (In re Martin), 91 F.3d 389, 393 (3d Cir. 1996).

111. Consideration of these factors is not the end of the inquiry, as the Court may approve a settlement only if the Court concludes that the settlement is “fair and equitable.” U.S. v. AWECO, Inc. (In re AWECO, Inc.), 725 F.2d 293, 297 (5th Cir.), cert. denied, 469 U.S. 880 (1984).

112. When considering whether a settlement is “fair and equitable,” the Court should not only consider the fairness among and between the settling parties, but should also consider the effects of the settlement upon other parties to the bankruptcy case to ensure that no one is being set apart for unfair treatment:

> The fairness to the settling parties of a proposed settlement agreement may not warrant its approval if the rights of others who are not parties to the settlement agreement are unduly prejudiced. We must further determine that “no one has been set apart for unfair treatment.” Ignoring the effect of a proposed upon the rights of third parties “contravenes a basic notion of fairness.”

Eddy v. Nat’l Union Fire Insu. Co. (In re Medical Asset Management, Inc.), 249 B.R. 659, 663 (Bankr. W.D. Pa. 2000) (quoting Cullen v. Riley (In re Masters Mates & Pilots Pension Plan),

957 F.2d 1020, 1026, 1031 (2d Cir. 1992)). See also In re Zales Corp., 62 F.3d 746, 754 (5th Cir. 1995) (quoting In re AWECO, 725 F.2d at 298) ("While it is true that the bankruptcy court has jurisdiction to determine whether a settlement between the debtor and other parties is fair and equitable, 'looking only to the fairness of the settlement as between the debtor and the settling claimant [and ignoring third party rights] contravenes a basic notion of fairness.").

113. For example, in Medical Asset Management, Inc., the reorganized debtor's disbursing agent and a creditor, Heller Healthcare Financial ("HHF"), sought approval of a settlement between the disbursing agent, HHF and an insurer of the debtor, which included a sweeping injunction that would prevent certain objecting creditors, who were not parties to the settlement, from pursuing bringing future causes of actions against the non-debtor insurer. Medical Asset Management, Inc., 249 B.R. at 661. As a result of the far reaching injunction, the Bankruptcy Court for the Western District of Pennsylvania refused to approve the settlement agreement finding it was not fair and equitable and contrary to bankruptcy law. Id. at 665.

114. Importantly, where a proposed settlement includes insiders, and does not appear to be an arm's length transaction, each of the elements above must be reviewed by the Court with heightened scrutiny. See, e.g., Connecticut Gen. Life Ins. Co. v. United Cos. Fin. Corp.(In re Foster Mortgage Corp.), 68 F.3d 914, 919 (5th Cir. 1995) ("The court's scrutiny must be great when the settlement is between insiders and an overwhelming majority of creditors in interest oppose such settlement of claims."); In re Drexel Burnham Lambert Group, Inc., 134 B.R. 493, 498 (Bankr. S.D.N.Y. 1991) (finding that a bankruptcy court should subject insider agreements

to closer scrutiny than agreements between debtor and unrelated entities). The Authority indisputably is an "insider" of the Debtor.[20]

115. Finally, the burden of persuasion with respect to all of the foregoing falls on the proponents of the settlement, who must "provide the court with sufficient information to conclude that the compromise falls within the reasonable range of litigation possibilities." Key3Media Group, Inc. v. Pulver.com, Inc. (In re Key3Media Group, Inc.), 336 B.R. 87, 93 (Bankr. D. Del. 2005).

116. Here, given the control by the Authority over Hudson, and considering that Hudson was expressly acting on behalf of the Authority under both the MHAL and the Manager Agreement, there is a clear lack of arm's length negotiations in arriving at the proposed settlement. As a result, the proposed settlement must be closely scrutinized. See In re North Plaza, LLC, Case No. 04-00769, 2006 Bankr. LEXIS 4696, at *9 (Bankr. S.D. Cal. Apr. 17, 2006) (denying approval of debtor's proposed settlement with secured creditors and explaining

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[20] The term "insider" is defined in the Bankruptcy Code to include, among other things, an "affiliate," 11 U.S.C. § 101(31)(E) and a "person in control of the debtor." 11 U.S.C. § 101(31)(B)(iii). As noted above:

- The MHAL requires that the Authority operate the Hospital, its only asset, through the Debtor. Section 101(2)(C) of the Bankruptcy Code defines an affiliate to include a "person substantially all of whose property is operated under an operating agreement with the debtor." The Authority, therefore, is an affiliate of the Debtor and is an insider.
- Also, the Authority has at least two seats on Hudson's Board of Trustees. And, as discussed at length above, the MHAL makes clear that the Authority is in control of the Hospital *and* Hudson. See N.J.S.A. § 30:9-23.20(a). Thus, the Authority is unquestionably an insider of Hudson. The Authority's status as an insider is, alone, grounds for the Court to apply heightened scrutiny in evaluating the transaction. See S. Rep. No. 989, 95th Cong., 2d Sess. 25 (1978) ("An insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor."); see also In re HyLoft, Inc., 451 B.R. 104, 113 (Bankr. D. Nev. 2011) ("While insider status alone is not fatal to dealings between a debtor and an insider, the court must scrutinize these dealings more carefully."); Spradlin v. Williams (In re Alma Energy, LLC), 2010 U.S. Dist. LEXIS 121696, at *10,*12-13 (E.D. Ky. Nov. 16, 2010) ("Being an insider likely has its advantages, but it also means one's dealings with the bankrupt entity must be viewed in a different, more critical light. . . . The bankruptcy court must subject the dealings between an insider and a debtor to closer scrutiny.").

that heightened scrutiny was required to evaluate proposed settlement where negotiations between debtor and creditors were clearly not at arm's length); Foster Mortgage Corp., 68 F.3d at 919 (holding that bankruptcy court abused discretion in approving settlement by failing to consider overwhelming opposition to settlement by creditors and insider status of parties involved in settlement); Aks v. Southgate Trust Co., 844 F. Supp. 650, 661 (D. Kan. 1994) (noting that in absence of arm's length negotiations, court may be reluctant to approve a settlement "without some degree of scrutiny").

117. Although Hudson mentions the Martin factors in the Settlement Motion, Hudson barely attempts to demonstrate that the Martin factors have been satisfied. Instead, Hudson simply asserts that the standards are met, without any real discussion that provides either the Court or creditors with a credible basis to conclude that the proposed settlement produces the best economic result for Hudson and creditors. Given the economic stakes at issue, the Court should insist that Hudson make a clear showing that the required factors for approval of a settlement under Fed. R. Bankr. P. 9019(a) have been met.

118. For example, with respect to the first and second Martin factors, the Settlement Motion simply concludes that the settlement will "avoid a protracted litigation . . . with a completely unpredictable outcome," and that "likelihood of collection, particularly from the Authority, is speculative at best." See Settlement Motion, ¶ 30. Not only are these statements conclusory, but they are belied by the facts. The Authority has no credible claims against Hudson (or at least none that are revealed in the Motions), while Hudson's claims against the Authority for nonpayment of reimbursable expenses, such as vendor claims incurred in the ordinary course of business, are abundantly apparent, and grounded in the statute that authorized the relationship between Hudson and the Authority, as well as in the Manager Agreement.

119. Moreover, it is far from clear that the paramount interests of creditors will be served by the approval of the proposed settlement. The only thing that is clear is that proposed settlement is intended to facilitate the Authority's sale of the Hospital, which is not property of this bankruptcy estate. However, based upon the positions taken by Hudson and the Authority in the Motions with respect to liability for creditor claims against the Hospital (positions which are contested by JNESO and belied by the facts, as discussed above), it is unclear how the proposed settlement will provide any benefit to creditors of this estate.

120. For these reasons, the proposed settlement should not be approved.

B. THE PROPOSED RELEASES AND INJUNCTIONS SHOULD NOT BE APPROVED.

121. The broad releases to numerous non-debtors, for which Hudson seeks approval, are not only startling in their scope, but are clearly contrary to law.

122. Specifically, in connection with the Settlement Motion, Hudson seeks approval of a proposed "Settlement Injunction," "Plan Injunction" and "Plan Releases"[21] (collectively, the "Third-Party Releases") in favor of numerous non-debtor third parties, including, but not limited to, the Authority, the City, the Parking Utility, the Purchaser, the Bond Trustee, the Bondholders and most or all of their respective current and former directors and officers, which are referred to in the Settlement Motion as the "Covered Parties." The releases and injunctions include a third party release and injunction against any successor liability claims against the Purchaser.

123. The Third-Party Releases violate In Gillman v. Continental Airlines (In re Continental Airlines), 203 F.3d 203 (3d Cir. 2000). In Continental Airlines, the Third Circuit Court of Appeals declared that "Section 524(e) of the Bankruptcy Code makes clear that the bankruptcy discharge of a debtor, by itself, does not operate to relieve non-debtors of their

[21] Although called "Plan Releases" in the Settlement Motion, there is no proposed chapter 11 plan on file with the Court.

liabilities" and "does not explicitly authorize the release and permanent injunction of claims against non-debtors." Id. at 211. Non-consensual releases of claims against third parties must be fair and necessary to the reorganization, and the court approving the releases must make specific factual findings to support those conclusions, including that they were "given in exchange for fair consideration.". Id. at 213-14, 215, 217; See also Walton v. Houlihan, Lokey, Howard & Zukin (In re UA Theatre Co.), 315 F.3d 217, 227 (3d Cir. 2003).

124. Guided by Continental Airlines, other courts in this district have articulated the "most flexible test for non-debtor releases" as follows:

> (1) whether the third party who will be protected by the injunction or release has made an important contribution to the reorganization;
>
> (2) whether the requested injunctive relief or releases is "essential" to the confirmation of the plan;
>
> (3) whether a large majority of creditors in the case have approved the plan;
>
> (4) whether there is a close connection between the case against the third party and the case against the debtor; and
>
> (5) whether the plan provides for payment of substantially all of the claims affected by the injunction or release.

Medford Crossings N. LLC, 2011 Bankr. LEXIS 185, at *61-62 (quoting In re Saxby's Worldwide Coffee, 436 B.R. 331, 331 (Bankr. E.D. Pa. 2010)).

125. Here, the proposed Third-Party Releases fail all of these tests. Most notably, the releases are not sought under a plan, meaning that they have not been subjected to the scrutiny and review of a disclosure statement process, and creditors have not had the opportunity to vote on the overall package. Further, none of the Covered Parties, apart from perhaps the Purchaser,

are providing any contribution,[22] let alone the substantial contribution that could possibly support a nonconsensual release.

126. Not only are the Third-Party Releases contrary to well-established Third Circuit law, it is unclear whether the Court even has jurisdiction to grant the requested releases to non-debtor parties. In re Johns–Manville, 600 F.3d 135 (2d Cir. 2010); W.R. Grace & Co. v. Chakarian (In re W.R. Grace & Co.), 591 F. 3d 164 (3d Cir. 2009). In Johns–Manville, the Second Circuit Court of Appeals confirmed that courts do not have the subject matter jurisdiction in bankruptcy cases to enjoin non-derivative claims against third parties. Id. at 153. For a claim to be deemed derivative, the outcome of the third-party claim must have an affect upon the *res* of the bankruptcy estate. See In re Johns–Manville, 517 F.3d 52, 66 (2d Cir. 2008) ("[A] bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate."). Further, recently in In re Medford Crossings N. LLC, Case No. 07-25115, 2011 Bankr. LEXIS 185 (Bankr. D.N.J. Jan. 20, 2011), the Honorable Gloria M. Burns reviewed the breadth of a bankruptcy court's jurisdiction with respect to the granting of third-party releases and determined, consistent with the holding in Johns-Manville, that "[i]n the absence of any direct effect on the debtor's estate, a bankruptcy court in this Circuit is without authority to enjoin actions against non-debtors." Id. at *45-46.

127. The party seeking to obtain the releases has the burden of establishing this Court's jurisdiction to grant the proposed third-party releases. See In re Digital Impact, Inc., 223 B.R. 1, 11 (Bankr. N.D. Okla. 1998) (holding that court did not have jurisdiction to releases non-debtors under plan and stating that "[t]he presumption is *against* federal subject matter jurisdiction, and a

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[22] The contribution offered by the Authority, in the form of a potential 10% - 15% distribution, is illusory in that Hudson's administrative and priority creditors will share in the distribution, which will likely result in little, if any, remaining funds for general unsecured creditors.

person desiring to invoke jurisdiction of a federal court has the burden of demonstrating statutory authority for such jurisdiction”).

128. Here, Hudson seeks approval of extremely broad, non-consensual, third-party releases in connection with a sale by a non-debtor of assets which Hudson does not own, and most of which do not concern property of or affect the estate, other than potentially prejudicing the estate’s ability to collect on judgments against those parties or collect on D&O insurance. Further these releases, even if permissible in bankruptcy, cannot be approved outside the context of a plan. As a result, the releases certainly should not be granted through this contested matter.

129. Specifically, and without limitation, the releases sought in favor of the Authority will severely prejudice the rights of JNESO and its members. Not only, as discussed above, is the Authority the counterparty to the CBA, and thereby directly liable to JNESO for the obligations under the CBA, but the Authority APA specifically and tellingly provides that the Authority -- not Hudson -- will be responsible for any WARN Act liability resulting from the termination of the Hospital’s employees. See Exhibit B, Section 9.1(d) (“Seller [the Authority] will retain all liability for any failure of Seller, Manger [Hudson] or their Affiliates to comply with any of the requirements of WARN”). Thus, notwithstanding the Authority’s explicit acknowledgement of its WARN Act liabilities in the Authority APA, if the Court approves the Third-Party Releases sought through the Settlement Motion, JNESO’s Nurses -- and all of the Hospital’s employees -- will be forever barred from seeking recoveries from the Authority for any WARN Act violations. Additionally such releases would also relieve the Authority from its obligations under the CBA.

130. For these reasons, the Third-Party Releases should not be approved.

C. THE SETTLEMENT CANNOT SEEK PRE-APPROVAL OF TERMS OF A PLAN.

131. Through the Motions, Hudson and the Authority essentially seek approval for a *sub rosa* plan, because the relief requested through the Motions would mandate the inclusion of certain provisions in any plan that could be confirmed in this bankruptcy case.

132. The approval of portions of a debtor's plan of reorganization in advance of the plan confirmation process is expressly prohibited by the Bankruptcy Code. See In re Decora Indus., Inc., No. 00-4459, 2002 WL 32332749, at *8 (D. Del. May 20, 2002) (providing that a debtor cannot "short circuit" the requirements for confirmation of a reorganization plan by establishing terms of a plan in advance through 11 U.S.C. § 363); In re Humboldt Creamery, LLC, No. 09-11078, 2009 Bankr. LEXIS 2470, at *3 (Bankr. N.D. Cal. Aug. 14, 2009) (finding that a court may not approve a financial restructuring stripped of procedural safeguards built into Chapter 11 of the Bankruptcy Code); In re Crutcher Res. Corp., 72 B.R. 628, 631 (Bankr. N.D. Tex. 1987) ("[W]here a transaction specifies terms for adopting a reorganization plan, Hudson may not bypass 11 U.S.C. § 1125, disclosure requirements; § 1126, voting requirements; § 1129(a)(7) "best interest of the creditors test"; or § 1129(b)(2)(B) absolute priority requirements."); see also In re TCI 2 Holdings, LLC, No. 09-13654, 2010 Bankr. LEXIS 1169, at *30 (Bankr. D.N.J. Apr. 12, 2010) ("Utilizing the Rule 9019 procedure, which entitles the debtors to some deference to their business judgment, does not immunize the settlement provisions from meeting confirmation requirements, and cannot serve as an end run around the Bankruptcy Code."); In re Congoleum Corp., No. 03-51524, 2009 Bankr. LEXIS 900, at *26 (Bankr. D.N.J. Feb. 26, 2009), aff'd in part, rev'd in part, 414 B.R. 44 (D.N.J. 2009) ("No matter how eminently reasonable a settlement may be, affecting outcomes through settlement that could not be accomplished directly through provisions of the Bankruptcy Code is unacceptable. Parties may not do an end run around the Bankruptcy Code by calling something a settlement.").

133. Here, through the Motions, which among other things, seek pre-approval for sweepingly broad injunctions and releases, Hudson and the Authority seek to bind parties in interest to terms that can only be accomplished under a plan, with the protections afforded parties in interest by the plan and disclosure statement process. This is patently improper and should not be approved.

CONCLUSION

WHEREFORE, for the reasons set forth above, JNESO respectfully requests that the Court (i) deny the Motions, with prejudice and (ii) grant JNESO such other and further relief as the Court deems just and equitable.

Dated: Morristown, NJ
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