IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

	)	Chapter 11
In re:	)	
	)	Case No. 14-12103 (KG)
TRUMP ENTERTAINMENT	)	
RESORTS, INC., *et al.*,	)	Jointly Administered
	)	
Debtors.	)	**Hearing Date: October 14, 2014 at 1:00 pm (ET)**
	)	**Objection Deadline: October 7, 2014 at 4:00 pm (ET)**

OBJECTION OF UNITE HERE LOCAL 54
TO DEBTORS' MOTION FOR ENTRY OF ORDER REJECTING
COLLECTIVE BARGAINING AGREEMENT PURSUANT TO 11 U.S.C. § 1113(c)
AND IMPLEMENTING TERMS OF DEBTORS' PROPOSAL
UNDER 11 U.S.C. § 1113(b)

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INTRODUCTION AND SUMMARY OF ARGUMENT

UNITE HERE Local 54 (**Local 54** or **Union**) objects to the Debtors' September 26, 2014, motion to reject the most recent Collective Bargaining Agreement between Trump Taj Mahal Associates, LLC (**Trump Taj** or **Taj Mahal**) and Local 54 (**CBA**) pursuant to 11 U.S.C. § 1113(c) (**1113(c) Motion**) [ECF No. 134]. The 1113(c) Motion should be denied for at least four key reasons.

First, Section 1113(c) does not authorize "rejection" of terms and conditions of employment that are imposed by statute—namely, the National Labor Relations Act (**NLRA**)—rather than as a matter of contract. Because the CBA that established the employment terms at issue in this Motion expired on September 14, 2014, before the Debtors made their Section 1113 proposal, and there is no contract in effect that can be assumed or rejected under 11 U.S.C. § 1113, the Court lacks jurisdiction to grant the relief Debtors request.

Second, by making a non-negotiable demand to eliminate the defined benefit pension plan and by failing to bring the relevant decision-makers to the bargaining table, the Debtors failed to satisfy 11 U.S.C. § 1113(b)(2)'s requirement that they bargain in good faith over their proposed CBA modifications between the time they made their Section 1113 proposal and the hearing on their 1113(c) Motion.

Third, the Debtors' proposal fails to treat all relevant stakeholders fairly and equitably, as mandated by 11 U.S.C. § 1113(b)(1)(A), because it requires permanent, irreversible concessions from the Union-represented employees while seeking only contingent, reversible concessions from others. Indeed, the Debtors seek an order that imposes immediate, substantial economic loss on these already struggling workers even if no other stakeholder concessions are achieved.

Fourth, the Union had "good cause" to reject the Debtors' proposed modifications under 11 U.S.C. § 1113(c)(2). Among other things, the Union made a counteroffer that could have

provided a less onerous path to the relief Debtors sought (including by reducing contributions to the defined benefit plan rather than eliminating it entirely), but the Debtors failed to engage on the issue. In addition, the Union had good cause, as a matter of law, to reject a proposal that failed to comply with the specific requirements of Section 1113(b).

Finally, even assuming these critical defects could be ignored, the Debtors nonetheless cannot obtain the relief they request here—that is, judicial approval of the specific terms of their Section 1113 proposal. As demonstrated below, Section 1113(c) provides only for rejection of a collective bargaining agreement in its entirety, not court-ordered modification of particular contract terms or implementation of a new concessionary CBA. And longstanding federal labor law clearly precludes courts from compelling a union and an employer to reach a collective-bargaining agreement.

Accordingly, this Court must deny the Debtors' 1113(c) Motion as currently constituted and, at the very least, must deny the unconditional, unauthorized order sought by the Debtors.

STATEMENT OF FACTS

I. Local 54, its Members and their 2011 CBA

1. Local 54 is an Atlantic City-based affiliate of UNITE HERE, a labor union that represents workers in the hotel, gaming, food service, airport, textile, manufacturing, distribution, laundry, and transportation industries. Declaration of Craig Keyser (**Keyser Decl.**), ECF No. 136, ¶ 4. UNITE HERE is one of the nation's largest unions of gaming workers. *Id.* The Union represents approximately 1,140 Taj Mahal workers. Declaration of Robert Griffin (**Griffin Decl.**), ECF No. 2, ¶ 18.

2. The most recent CBA between Local 54 and Trump Taj was negotiated in 2011 for a three-year term. Keyser Decl., ¶¶ 5, 6. As part of those negotiations, Local 54 gave the Debtors $4 million in annual concessions. *Id.* Those concessions took the form of a wage freeze

and reductions in vacation time, personal days, and holiday pay. *Id.* The 2011 CBA provided a wage scale that ranged from $3.80 per hour at the low end to $21.63 per hour at the high end. CBA, attached as Exhibit 1, at Schedule A. On average, according to the Debtors' representations at the bargaining table, Local 54 members earn $11.75 per hour under the CBA for their work at the Taj Mahal, and employees at the top of the wage scale—currently approximately 65% of all Union employees—have received only one $0.25 per hour increase since 2008 (which they got in 2013). Employees below the top step of the wage scale have been frozen in their steps in 2009 and 2011–13 (with step advancement only in 2010 and 2014).

II. Debtors' Corporate and Capital Structure

3. Trump Taj is one of several wholly-owned subsidiaries of Trump Entertainment Resorts Holdings, LP (**TER Holdings**). Griffin Decl., ¶ 8. TER Holdings, in turn, is owned by Trump Entertainment Resorts, Inc. (**TER**), which holds a 99% equity stake in TER Holdings, and by TERH LP Inc., which holds the remaining 1% equity stake. *Id.*

4. The Debtors' current capital structure is a result of their previous Chapter 11 reorganization, which began with their 2009 filing and yielded a confirmed plan of reorganization in 2010. Griffin Decl., ¶¶ 21–23. Under the 2010 reorganization plan, the Debtors entered into a credit agreement with Icahn Partners LP, Icahn Partners Master Fund LP, Icahn Partners Master Fund II LP, and Icahn Partners Master Fund III LP (collectively, **First Lien Lenders** or **Icahn Lenders**) and their collateral agent. *Id.*, ¶ 24. After a September 2010 settlement, the Debtors issued $346.5 million in first lien debt, with 12% annual interest payable on the outstanding principal. *Id.*, ¶¶ 24–25. The credit agreement also calls for quarterly, amortized principal payments of $866,000. *Id.*, ¶ 25.

5. As of September 9, 2014—the petition date in this Chapter 11 case—the Debtors owed the First Lien Lenders approximately $285.6 million in outstanding principal, plus another

$6.6 million in unpaid interest. *Id.* Together, the principal payments and interest impose on the Debtors an annual debt service expense of approximately $38 million. *Id.*, ¶ 37.

6. The cost of that debt service alone is more than ten times the largest claim—as estimated by the Debtors—of any unsecured creditor identified by the Debtors. Voluntary Petition, ECF No. 1 at 7 (listing Terham Energy Limited 1 as the largest unsecured creditor, with a claim of $2,955,275.24). Indeed, as of the filing of the petition, the Debtors owed only $13.5 million altogether in trade debt. Griffin Decl., ¶ 26.

III. The Debtors' Termination Notice Effecting Expiration of the CBA as of September 14, 2014

7. By letter dated March 7, 2014, the Debtors' lead negotiator for the Taj Mahal gave the Union notice of their "intention to terminate, modify or amend" the 2011 CBA. Exhibit B to Keyser Decl. Because that March 7, 2014 written notice of intent to "terminate, modify, or amend" the CBA forestalled any subsequent one-year renewal of the contract, the 2011 CBA expired by its terms at 11:59 p.m. on September 14, 2014. Exhibit 1, at § 22.4.[1]

8. Following the March 7, 2014 letter, the parties exchanged correspondence regarding bargaining over a period of several months. Exhibits C–G to Keyser Decl.

9. In April 2014, the Debtors decided to explore strategic and restructuring alternatives. *Id.*, ¶ 59. In May 2014, the Debtors retained Houlihan Lokey Capital Inc. (**Houlihan Lokey**) to assist them in identifying alternatives. *Id.* Although Houlihan Lokey reached out to the Debtors' key stakeholders and others to gauge interest in an investment in or a strategic transaction with the Debtors, no one expressed any such interest at that time. *Id.*

[1] The Debtors so stipulated during the October 2, 2014, preliminary hearing on this motion.

IV. The Debtors' Chapter 11 Filing, Section 1113 Proposal, Section 1113(c) Motion, and Request for Expedited Withdrawal from the Fund

10. The Debtors filed their voluntary petition on September 9, 2014. ECF No. 1. As noted above, the CBA expired five days later, on September 14, 2014. *Supra* at 5.

11. On September 17, 2014, the Debtors gave the Union a proposal (**1113 Proposal**) containing what the Debtors claim are "proposed changes to the CBA that are necessary to avoid the closing of the Taj Mahal and permit the reorganization of the Company." September 17, 2014, Letter from K. Hansen to W. Josem (**Hansen Sept. 17 Ltr.**), Exhibit F to 1113(c) Motion.

12. The 1113 Proposal would modify the terms of the most recent, expired, CBA as follows:

- **Pension:** Debtors would stop making contributions to, and permanently withdraw from, the employees' current defined-benefit pension fund (**National Retirement Fund** or **Fund**), and would replace it with an employer-sponsored 401(k) plan with employer contributions matching employee contributions up to 1% of each employee's compensation.
- **Health and Welfare:** Debtors would withdraw from the health and welfare fund entirely. Instead, they would require their employees to secure their own healthcare through the Affordable Care Act. Debtors would provide "full-time employees" a stipend of $2,000 to defray some of the associated costs.
- **Successorship:** Debtors would eliminate the successorship clause in the CBA, thereby permitting any would-be buyer to take over the Taj Mahal without assuming the CBA.
- **Other Proposals:** Debtors would also seek a three-year agreement, eliminate future contributions to the severance fund, reduce notice required for vacations, reduce holiday pay, reduce guaranteed hours, consolidate jobs, eliminate paid meal times, eliminate limits on certain workers' right not to sweep, expand subcontracting, reduce guaranteed hours for

banquet employees, and eliminate the employer-provided gratuity guarantee for certain servers and bartenders.

1113(c) Motion, ¶ 56; Hansen Sept. 17 Ltr.

13. According to the Debtors' own estimates, these modifications, if effected, would generate $14.6 million in annual savings for the Taj Mahal, with $3.7 million from the termination of the defined-benefit pension plan, $5.0 million from the elimination of health benefits, no savings from the elimination of the successorship clause, and $5.8 million coming from the remaining proposals. Houlihan Lokey September 2014 Presentation to Unite HERE Local 14 (**Houlihan Presentation**), Exhibit B to 1113(c) Motion, at 8.[2]

14. Debtors based this 1113 Proposal on a three-part business plan (Hansen Sept. 17 Ltr. at 1–2):

1. The Icahn Lenders would (a) convert their outstanding first-lien secured debt—now, approximately $286 million—into 100% equity of the reorganized Debtors and (b) provide the reorganized Debtors with a $100 million cash or equity investment. *See* Sept. 19, 2014, Letter from K. Hansen to A. Brilliant, V. Intrieri, Exhibit F to Declaration of William H. Hardie III (**Hardie Decl.**), ECF. No. 135 at 2.
2. Atlantic City, Atlantic County, and the State of New Jersey would (a) reduce the property level assessments of the Taj Mahal from $1 billion to $300 million, (b) freeze for five years the tax rates applicable to the Debtors, and (c) provide the Debtors with approximately $25 million in tax credits, incentives, or similar consideration from the New Jersey Casino Reinvestment Development Authority. Sept. 19, 2014, Letter from K.

[2] By contrast, the non-operating carrying costs associated with the now-closed Trump Plaza casino, even on a pro forma basis, are approximately $9.2 million per year. *Id.* at 14.

Hansen to J. Hanson, Mayor D. Guardian, Exhibit H to Hardie Decl., at 2.[3] Altogether, the Debtors estimate the three components of relief from these governmental authorities to be $175 million over five years. *See* Debtors' Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (**POR**), ECF No. 165, § 11.1(a)(v).

3. Local 54 would provide the concessions sought by the 1113 Proposal.

15. The Union responded on September 19, 2014, asking for a bargaining session to be held on September 24, 2014. Sept. 19, 2014, Letter from W. Josem to K. Hansen, Exhibit G to Keyser Decl. The Union also asked the Debtors, in advance of the bargaining session, to "advise us as to the status of Trump's requests to its senior secured lenders and to Atlantic City, Atlantic County and the State of New Jersey." *Id.* In a letter also dated September 19, 2014, the Debtors answered that their requests to the Icahn Lenders and the governmental authorities had been formally made but they had not yet received a response. Sept. 19, 2014, Letter from K. Hansen to W. Josem, Exhibit H to Keyser Decl.

16. The Union and Debtors met on September 24, 2014, to bargain. Keyser Decl., ¶ 18. No one on behalf of the Icahn Lenders attended that bargaining session. *Cf.*, *id.*at ¶ 16. During the session, the Union made several requests for information, which the Debtors asked be put in writing. *Id.* The Union did so by letter dated September 26, 2014, which enclosed the Union's counterproposal (**Union Counterproposal**). Sept. 26, 2014, Letter from D. DeCaprio to C. Keyser, Exhibit I to Keyser Decl.

17. Among other things, the Union Counterproposal included the following elements:

[3] The Debtors also sought a reduction in the assessment of Trump Plaza from $248 million to $40 million. *Id.* As discussed further below, these concessions would require legislative and regulatory action by the relevant state, county and municipal bodies.

- **Pension**: The Union offered to reduce the contribution rate to the Fund, subject to the Fund's approval. Absent such approval, the Union offered to consider another defined-benefit plan with a benefit accrual rate comparable to the Fund's. *Id.* In addition to that counteroffer, the Union also sought clarification on how the employer match under the 401(k) would work and when benefits under that plan would vest. *Id.*
- **Health and Welfare**: The Union sought clarification on how the Company defined "full-time employees" for the purpose of the $2,000 stipend. *Id.* It also sought analysis of the impact of the proposal on the out-of-pocket health care costs for affected employees. *Id.*
- **Successorship**: The Union took the Debtors up on their offer during the September 24, 2014, bargaining session that if the Union wished to retain the successorship language, the Debtors would take the proposal back to the senior secured lenders—*i.e.*, the Icahn Lenders—to see if it would be acceptable to them. *Id.* The Union further proposed that any agreement with the Debtors be conditioned on the Icahn Lenders agreeing to be bound by the new CBA in the event that they (or their affiliates) became the employer or equity owner of the Taj Mahal. *Id.*
- **Other Proposals:** The Union made various other counteroffers and requests for information in response to the remaining modifications proposed by the Debtors. *Id.* The Union conditioned its counteroffer on the other stakeholders providing the relief that the Debtors stated was necessary for the Taj Mahal to reorganize and avoid closing.

18. The same day—September 26—the Debtors filed their 1113(c) Motion. ECF No. 134. That motion sought authorization under Section 1113(c) to reject the expired CBA. 1113(c) Motion at 1. It also sought an order "implementing the terms of" the Debtors' Section 1113(c) Proposal. *Id.*; Proposed Order, ECF No. 134-2, ¶ 3. Finally, the motion sought expedited relief permitting the Debtors to withdraw from the Fund immediately. 1113(c) Motion at 1–2 & 2 n. 2.

19. Meanwhile, counsel for the Icahn Lenders responded to the Debtors' proposal by letter dated September 23, 2014. Sept. 23, 2014, Letter from A. Brilliant to K. Hansen, Exhibit G to Hardie Decl. The Icahn Lenders took the position that "we would be willing to comply with your request, if and only if the Union, City, State and County also comply with your requests." *Id.* at 1–2. But they noted that "anything less than the Union, City, State and County meeting your demands in full would make it impossible to operate a viable company at this time." *Id.* at 2. And even with that condition, the Icahn Lenders emphasized that their September 23, 2014, letter did not constitute a binding offer of financing; any such financing offer would instead be contingent on agreement over "all of the terms and conditions of a plan of reorganization and all other documentation related to the plan and the financing all of which must be acceptable to the [Icahn] Lenders in their sole and absolute discretion." *Id.*

20. Atlantic City Mayor Don Guardian responded on September 29, 2014, by telling the Associated Press, "[g]iven the difficult economic situation in Atlantic City, we are not in a position to accept these requests" by the Debtors. Associated Press, *Mayor nixes tax break to save Taj Mahal casino* (Sept. 29, 2014), available online at http://www.philly.com/philly/business/20140929_ap_122ce4ce46aa40919d803b033a0bfee0.html#jqxT8sBZYY2YCKKi.99 and attached as Exhibit 2.

21. On September 30, 2014, the Debtors convened a telephonic status conference and asked the Court for an expedited hearing and ruling on that portion of their 1113(c) Motion seeking immediate and permanent withdrawal from the Fund. On October 1, 2014, the Debtors filed a letter brief in support of that request for expedited withdrawal from the Fund. Debtors' Letter Brief in Further Support of 1113(c) Motion (**Debtors' 1113(c) Ltr. Br.**), ECF No. 167. In

that brief, Debtors took the position that "withdrawal from the NRF will happen; the only question is when … ." Debtors' 1113(c) Ltr. Br. at 2.

22. The Union and the Fund both opposed the Debtors' request for expedited withdrawal from the Fund. Local 54's Letter Brief Opposing Expedited Withdrawal from the Fund, ECF No. 190; Fund's Letter Brief Opposing Expedited Withdrawal from the Fund, ECF No. 196. Following an October 2, 2014 hearing, the Court denied the Debtors' request in an oral telephonic ruling onOctober 3, 2014. Minute Entry, ECF No. 212.

V. The Debtors' Plan of Reorganization

23. On October 1, 2014, the Debtors submitted their POR. ECF No. 165. As contemplated by the POR, "[o]n the Effective Date, the Reorganized Debtors' sole obligations regarding the Local 54 Taj Collective Bargaining Agreement shall be as provided by the CBA Order." POR, § 10.5(b).[4] The POR defines the "CBA Order" as "an order of the Bankruptcy Court, in form and substance acceptable to the Debtors and the Consenting First Lien Lenders, approving the CBA Motion and granting the relief requested in the CBA Motion." POR, I(A).[5] In turn, it defines "Consenting First Lien Lenders" as "those First Lien Lenders holding, in the aggregate, in excess of a majority of the principal amount of the First Lien Credit Agreement Claims outstanding as of the applicable reference date." *Id.* And it defines the "First Lien Lenders" as "Icahn Partners LP, Icahn Partners Master Fund LP and IEH Investments I LLC, the lenders under the First Lien Credit Agreement." *Id.*

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[4] Under the POR, all other CBAs will be assumed by the Reorganized Debtors. POR, § 10.5(a).

[5] Similarly, the POR defines "CBA Motion" as the 1113(c) Motion "or any supplement, modification or amendment to such motion, on terms and conditions acceptable to the Consenting First Lien Lenders." *Id.*

24. The POR also erects several conditions precedent to confirmation, including (1) the execution of the New Equity Investment Agreement—*i.e.*, a commitment to purchase $100 million in New Equity Investment Stock, on terms and conditions acceptable to the Consenting First Lien Lenders; (2) the Debtors' withdrawal from the Fund and termination of any obligations to contribute to it; (3) approval of the CBA Order, defined above; (4) approval of the Cash Collateral Order; and (4) receipt of at least $175 million in tax relief or other financial support from governmental entities like Atlantic City, Atlantic County, or New Jersey, with at least $55 million of that support received on consummation of the Plan—in both instances on terms acceptable to the Consenting First Lien Lenders. POR, § 11.1; I(A). The POR calls for similar conditions precedent to the POR becoming effective. POR, § 11.2. Moreover, for the POR to become effective, any administrative expense claim—either as estimated by the Bankruptcy Court or by the Consenting First Lien Lenders—must be less than a certain (but as yet unspecified) amount. POR, § 11.2(f).

25. By its terms, the POR will be funded from any cash the Debtors have on hand as of the Effective Date as well as the proceeds from the New Equity Investment—*i.e.*, the $100 million expected to be provided by the Icahn Lenders. POR, § 7.2.

26. Because nothing in the POR contemplates a sale of the now closed Trump Plaza, the Debtors project $9.2 million in annual non-operating, carrying expenses just for holding onto that property. *Supra* at 7 n.2.

ARGUMENT

I. This Court Lacks Jurisdiction Under Section 1113(c) to Approve Rejection of the Expired CBA or of Debtors' Post-Expiration Status Quo Obligations Under the NLRA

27. Debtors' request to reject the obligations they face following expiration of their CBA must fail, first and foremost, because this Court lacks jurisdiction under Section 1113(c) to grant that relief.[6]

28. Debtors admit, and it is undisputed here, that their CBA expired by its agreed-upon terms on September 14, 2014. Whatever current obligations now exist after the CBA's expiration are not contractual in nature, but, rather, statutory—they are created and imposed by the NLRA. Specifically, the NLRA imposes on employers the obligation to refrain from making unilateral changes (i.e., without bargaining in good faith to an agreed resolution or impasse) in the status quo with respect to certain employment terms and conditions after a CBA expires. 29 U.S.C. § 158(a)(5); *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991).

29. Section 1113(c) grants bankruptcy courts the authority to reject only existing collective bargaining agreements (when certain conditions are met), and does not purport to give bankruptcy courts authority to reject statutory obligations that bind parties independently of their agreements. Accordingly, this Court has no authority under Section 1113(c) to relieve Debtors

[6] As the Court noted in its October 3, 2014 oral ruling on the Debtors' expedited request for immediate withdrawal from the National Retirement Fund, the parties have already submitted initial letter briefs addressing the applicability of Section 1113 to the expired collective bargaining agreement that is the Subject of Debtors' 1113(c) Motion. Local 54 maintains and continues to rely on the legal position and arguments set forth in the Union's Letter Brief dated October 2, 2014, ECF No. 190, and presented at the October 3, 2014 hearing. In addition, for the Court's convenience, Local 54 has incorporated in this comprehensive Objection filing the relevant substance of its earlier briefing so that all Union objections to the 1113(c) Motion are encompassed in a single document and may be read together.

of their post-expiration status quo obligations under the NLRA, including their obligations to contribute to the Fund, and must decline to do so here.

A. An Employer's Obligations Under An Expired CBA Are Imposed by the NLRA, Not by Contract

30. During the term of a CBA, an employer is bound by the contractual obligations to which it has agreed—including terms and conditions of employment. An employer who violates these obligations during the term of the agreement is in breach of contract.

31. An employer whose employees are represented by a labor organization also has independent statutory obligations under the NLRA. In particular, Section 8(a)(5) of the NLRA makes it an unfair labor practice "to refuse to bargain collectively with the representatives of [the employer's] employees." 29 U.S.C. § 158(a)(5). Section 8(d) of the NLRA defines the obligation to bargain collectively, including the obligation to "confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). It is a per se violation of NLRA Section 8(a)(5) for the employer to make unilateral changes in the status quo with respect to such employment terms and conditions (referred to as mandatory subjects of bargaining), whether during negotiations for a first contract or after the expiration of a CBA. *Litton Financial*, 501 U.S. at 198; *NLRB v. Katz*, 369 U.S. 736 (1962); *Saunders House v. NLRB*, 719 F.2d 683 (3d Cir. 1983).

32. The Supreme Court has made clear that the status quo obligations imposed on employers following expiration of a CBA are created by NLRA Section 8(a)(5), not by contract. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544, 548-49 (1988). This is so even where some or all of the post-expiration "status quo" is defined by the expired agreement. *Id.* As the Second Circuit emphasized in *Derrico v. Sheehan Emergency Hosp.*, 844 F.2d 22, 26-27 (2d Cir. 1988), even though certain terms of an expired

agreement may "retain legal significance because they define the *status quo*" for purposes of a federal labor statute, the "[r]ights and duties under a collective bargaining agreement do not otherwise survive the contract's termination at an agreed expiration date," and courts must "respect the expiration date chosen by the parties." In all circumstances where legal consequences depend on a currently effective agreement, the courts must honor the difference between contractual and statutory obligations. *See Litton Financial,* 501 U.S. at 206–07 (citing and discussing authorities); *Derrico,* 844 F.2d at 27 ("[A]fter expiration of the CBA there is no contract subject to [29 U.S.C. § 185]," and thus "there can be no removal jurisdiction nor preemption" under that statutory provision.).

33. Put another way, the continuing economic terms of expired CBAs are no longer agreed-upon **contractual** terms, but rather terms imposed by law. *Litton Financial*, 501 U.S. at 206. This fundamental distinction has been recognized since the Supreme Court's decision in *Katz*, more than twenty years prior to Congress' enactment of § 1113.[7] Had Congress intended

[7] In *Litton Financial*, the Supreme Court specifically rejected an interpretation of its prior decisions that "assume[d] that postexpiration terms and conditions of employment which coincide with the contractual terms can be said to arise under an expired contract, merely because the contract would have applied to those matters had it not expired." *Litton Financial*, 501 U.S. at 206. Rather, the Supreme Court explained:

> [T]hat interpretation fails to recognize that an expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied. Although after expiration most terms and conditions of employment are not subject to unilateral change, in order to protect the statutory right to bargain, those terms and conditions no longer have force by virtue of the contract. See *Office and Professional Employees Ins. Trust Fund v. Laborers Funds Administrative Office of Northern California, Inc.*, 783 F.2d 919, 922 (CA9 1986) ("An expired [collective-bargaining agreement] ... is no longer a 'legally enforceable document' " (citation omitted)); cf. *Derrico v. Sheehan Emergency Hosp.,* 844 F.2d 22, 25–27 (CA2 1988) (Section 301 of the LMRA, 29 U.S.C. § 185, does not provide for federal court jurisdiction where a

to alter this well-established legal distinction between unexpired contracts and post-expiration obligations imposed by the NLRA for purposes of rejection under § 1113, it was required to do so explicitly. As shown below, it did not do so.

> bargaining agreement has expired, although rights and duties under the expired agreement "retain legal significance because they define the *status quo"* for purposes of the prohibition on unilateral changes).
>
> The difference is as elemental as that between *Nolde Brothers* and *Katz.* Under *Katz,* terms and conditions continue in effect by operation of the NLRA. They are no longer agreed-upon terms; they are terms imposed by law, at least so far as there is no unilateral right to change them. As the Union acknowledges, the obligation not to make unilateral changes is "rooted not in the contract but in preservation of existing terms and conditions of employment and applies before any contract has been negotiated." … *Katz* illustrates this point with utter clarity, for in *Katz* the employer was barred from imposing unilateral changes even though the parties had yet to execute their first collective-bargaining agreement.
>
> Our decision in *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.,* 484 U.S. 539, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988), further demonstrates the distinction between contractual obligations and postexpiration terms imposed by the NLRA. There, a bargaining agreement required employer contributions to a pension fund. We assumed that under *Katz* the employer's failure to continue contributions after expiration of the agreement could constitute an unfair labor practice, and if so the Board could enforce the obligation. We rejected, however, the contention that such a failure amounted to a violation of the ERISA obligation to make contributions "under the terms of a collectively bargained agreement ... in accordance with the terms and conditions of ... such agreement." 29 U.S.C. § 1145. Any postexpiration obligation to contribute was imposed by the NLRA, not by the bargaining agreement, and so the District Court lacked jurisdiction under § 502(g)(2) of ERISA, 29 U.S.C. § 1132(g)(2), to enforce the obligation.

Id. at 206–07.

B. Section 1113(c) Does Not Authorize Bankruptcy Courts to Approve Rejection of Expired CBAs or Attendant Post-Expiration NLRA Status Quo Obligations

34. The plain language of Section 1113(c) precludes bankruptcy courts from authorizing rejection of the independent statutory obligations imposed by the NLRA after expiration of a CBA.[8] Section 1113(c) authorizes a bankruptcy court only to "approve an application for rejection of a **collective bargaining agreement**," and only if the court finds that all the conditions specified in that subsection have been satisfied. 11 U.S.C. § 1113(c) (emphasis added).[9]

35. The term "collective bargaining agreement" refers to an existing contract, voluntarily entered into by the parties, governing agreed-upon terms and conditions of employment for a specified duration. As *Advanced Lightweight, Litton Financial* and the other authorities cited above confirm, the contractual obligations of a "collective bargaining agreement" are legally distinct from the status quo obligations imposed by the NLRA after a CBA expires. Thus, by limiting its application to the rejection of "collective bargaining agreements," and their associated **contractual** obligations, Section 1113(c) on its face provides

[8] Fundamental principles of statutory interpretation dictate that the words of a statute should be given their plain meaning. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (internal citations omitted).

[9] Likewise, Section 1113(a) of the Bankruptcy Code explicitly gives a debtor-in-possession only the ability to "assume or reject a **collective bargaining agreement** in accordance with the provisions of this section." 11 U.S.C. § 1113(a) (emphasis added). Section 1113(f) further states that "[n]o provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a **collective bargaining agreement** prior to compliance with the provisions of this section." 11 U.S.C. § 1113(f) (emphasis added).

bankruptcy courts no statutory authority to grant relief from the independent **statutory** obligations imposed by Section 8(a)(5) of the NLRA. *See supra* at 14–16. [10]

36. Consistent with this distinction and Section 1113's plain language, "[t]he majority of courts to address the issue have ruled that section 1113 does not apply if the collective bargaining agreement has expired by its terms." 3 Alan N. Resnick and Henry J. Sommer, COLLIER ON BANKRUPTCY ¶ 1113.02[1][d] (4th ed. 2014). *See, e.g., San Rafael Baking Co. v. Northern Cal. Bakery Drivers Sec. Fund*, 219 B.R. 860 (B.A.P. 9th Cir. 1998) (since CBA expired, there is no basis for an administrative expense award; "§ 1113 does not allow the bankruptcy court to impose non-contractual obligations on a chapter 11 debtor"); *In re Hostess Brands, Inc.,* 477 B.R. 378 (Bankr. S.D.N.Y. 2012) (dismissing § 1113(c) motion for lack of subject-matter jurisdiction where CBA had expired by its terms); *In re Chas. P. Young Company*, 111 B.R. 410, 413 (Bankr. S.D.N.Y. 1990) ("Rejection of a collective bargaining agreement pursuant to § 1113(b) and (c) is a moot issue if the agreement expires by its own terms [ ] before the bankruptcy court has a hearing on rejection."); *In re Sullivan Motor Delivery, Inc.,* 56 B.R. 28 (Bankr. E.D. Wisc. 1985) (§ 1113 applies only "where there is an unexpired collective bargaining agreement in existence"); *In re Leslie Fay Co., Inc.*, 168 B.R. 294, 300 (Bankr. S.D.N.Y. 1994) ("Collective bargaining agreements are simply executory contracts with a

[10] To the same effect, "assume" and "reject" as used in the Bankruptcy Code are technical legal terms that plainly apply only to contracts, not to statutory obligations. The meanings of "assume" and "reject" were judicially settled under Section 365 of the Code prior to the enactment of Section 1113. Congress used the same two verbs, "assume" and "reject," when it adopted Section 1113 in response to *NLRB v. Bildisco and Bildisco,* 465 U.S. 513 (1984). The text of Section 1113 provides no indication that "assume" and "reject" as used therein were intended to have a meaning different from that in Section 365, from which these terms were obviously taken; and courts addressing this issue have properly given those terms the same meaning. *See In re Family Snacks, Inc.*, 257 B.R. 884, 900 (8th Cir. 2001) ("[I]n light of *Bildisco's* direction, not disturbed by the enactment of § 1113, that CBAs are executory contracts, the better reading is that § 365 covers assumption and rejection of CBAs, except as specifically modified with regard to rejection in § 1113.").

special provision governing their assumption or rejection by the debtor or the trustee in a Chapter 11 case," and nothing in the statute's legislative history or the statute itself indicates that Section 1113 applies to agreements entered into after the filing of a Chapter 11 petition.) (citation omitted).[11]

37. In arguing for a contrary result, *see* Debtors' 1113(c) Ltr. Br. at 9–12, Debtors rely on case law that is inapposite, unpersuasive, or both.

38. In particular, several of the cases on which Debtors rely consider the authority conferred by the language of Section 1113(e)—which differs in critical ways from that found in Sections 1113(a), (c) and (f). Specifically, while Sections 1113(a), (c) and (f) expressly apply to the treatment of "a collective bargaining agreement," Section 1113(e)—which addresses the scope of the interim, emergency relief available to a debtor—applies "during a period **when the collective bargaining agreement continues in effect**." 11 U.S.C. § 1113(a), (c), (e) and (f) (emphasis added). That difference has led some courts to conclude that Section 1113(e) may confer authority to reject obligations associated with an expired CBA. *See, e.g.*, *Hostess*, 477 B.R. at 382 (determining that the language of § 1113(e) created an exception to § 1113's general inapplicability to expired CBAs); *In re Karykeion, Inc.*, 435 B.R. 663 (Bankr. C.D. Cal. 2010) (considering the applicability of § 1113 to an expired CBA in the context of a motion under § 1113(c), but analyzing that question using the language found in § 1113(e)). Regardless of whether that interpretation of Section 1113(e) is correct—and Local 54 contends strongly that it

[11] *See also Gloria Manufacturing Corp. v. International Ladies' Garment Workers' Union*, 734 F.2d 1020, 1022 (4th Cir. 1984) (holding, prior to effective date of § 1113, that 11 U.S.C. § 365(a) did not authorize rejection of an expired CBA, explaining that § 365(a) explicitly permits the assumption or rejection only of "executory contracts," an expired contract is not executory because nonperformance would not constitute a material breach, and "[o]nce a contract has expired on its own terms, there is nothing left for the trustee to reject or assume"); *In re Pesce Baking Co., Inc.*, 43 B.R. 949, 957 (Bankr. N.D. Ohio 1984).

is not[12]—it is not relevant here, because Debtors have expressly disclaimed recourse to whatever mechanisms for interim, temporary relief may be available through Section 1113(e), and seek relief exclusively under Section 1113(c). Thus, even if the "continues in effect" language of Section 1113(e) somehow expanded the authority of bankruptcy courts to enact interim modifications to NLRA status quo obligations – though it does not (*supra* at 14–16)—the plain language of Section 1113(c) demonstrates that Congress eschewed that approach when prescribing the scope of bankruptcy courts' authority to afford **permanent** relief.

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[12] Both *Karykeion* and *Hostess* erroneously attend to only some of the language of Section 1113(e)—the phrase, "a period when the collective bargaining agreement continues in effect"—while overlooking the statutory language that actually confers authority: "the court, after notice and a hearing, **may authorize the trustee to implement interim changes** in the terms, conditions, wages, benefits, or work rules **provided by [a] collective bargaining agreement**." 11 U.S.C. § 1113(e) (emphasis added). Under the Supreme Court's decision in *Litton Financial*, a post-expiration term is "provided by" a CBA "only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement." 501 U.S. at 206. Thus, the "provided by" language of Section 1113(e) likewise addresses bankruptcy courts' authority to address the interim modification of **contractual**, rather than **statutory** obligations.

The *Karykeion* and *Hostess* courts also erred in their construction of the period when a CBA "continues in effect." Those courts wrongly assumed that the only way for a CBA to "continue in effect" after expiration is by operation of law. *See Karykeion*, 435 B.R. at 676; *Hostess*, 477 B.R. at 383. Again, this seriously misreads *Litton Financial*, which explained that "a collective-bargaining agreement might be drafted so as to eliminate any hiatus between expiration of the old and execution of the new agreement, or to remain in effect until the parties bargain to impasse." 501 U.S. at 201 & n.2 (citing cases involving agreements that automatically renewed until a new agreement was reached or for a reasonable time to negotiate a new agreement). Thus, parties can and do fashion collective-bargaining agreements that, unlike the CBAs here, continue in effect beyond their expiration dates by their own terms, whether through "evergreen" clauses or through more limited renewal clauses like those at issue in *Litton Financial*. In short, nothing about Section 1113(e)'s use of the phrase "continues in effect" broadens the authority of bankruptcy courts to relieve a debtor of its statutory status quo obligations under the NLRA.

We add that the *Karykeion* decision should also be discounted because it is inconsistent with now-governing Circuit authority, *San Rafael Baking*, and does not suggest a *ratio decidendi* that is consistent with the persuasive body of law finding no authority to assume or reject non-executory contracts.

39. The Debtors' remaining citations are likewise unpersuasive. *In re Hoffman Bros. Packing Co.*,173 B.R. 177 (B.A.P. 9th Cir. 1994) involved the rejection of an "executory, as opposed to an expired, collective bargaining agreement," and the Ninth Circuit Bankruptcy Appeals Panel has specifically dismissed *Hoffman Brothers'* discussion of the applicability of Section 1113 to expired agreements as dicta. *San Rafael Baking Co.*, 219 B.R. at 865–66. And the pronouncement on Section 1113 in *Accurate Die Casting Co*., 292 NLRB 982 (1989), was dicta of an Administrative Law Judge without authority to interpret the Bankruptcy Code.

40. The Debtors' reliance on *In re Ormet Corp.*, 316 B.R. 662 (Bankr. S.D. Ohio 2004), is similarly misplaced. In *Ormet*, the debtors filed their Chapter 11 petitions and made their Section 1113(b) proposal before the CBA expired. *Id*. at 665. Thus, in considering the applicability of Section 1113(c), the *Ormet* bankruptcy court reasoned—without the benefit of any briefing containing controlling authority, *see id*.—that "debtors should not be penalized for their diligent efforts over the course of several months to make a proposal based on the most complete and reliable information available and to provide the USWA with all necessary information to evaluate that proposal." *Id*.[13] Here, unlike in *Ormet*, the Debtors made their Section 1113(b) proposal **after** the CBA had expired. The Debtors at all times controlled the timing of their Chapter 11 filing and 1113(c) Motion and could have filed earlier had they wished. *Ormet*'s facts and reasoning are thus inapplicable. Moreover, the majority of bankruptcy courts to have considered the issue have now properly followed the distinction drawn by the Supreme Court's controlling decisions in *Litton* and *Advanced Lightweight*, as should this Court.

[13] On appeal, the district court did not reach the merits of the issue because the Chapter 11 plan had already been confirmed and the question of contract rejection was therefore equitably moot. *See In re Ormet Corp.*, 2005 WL 2000704, *4 (S.D. Ohio Aug. 19, 2005).

41. Finally, Debtors seek refuge in *In re 710 Long Ridge Rd. Operating Co., II, LLC*, 13-13653 (DHS), 2014 WL 407528 (Bankr. D.N.J. Feb. 3, 2014), appeal docketed, *N.L.R.B. v. 710 Long Ridge Rd. Operating Co. II, LLC*, CIV.A. 14-832 CCC, (D. N.J. Feb. 10, 2014). The court in *Long Ridge* concluded that Section 1113(c) did apply to expired CBAs, based primarily on the rationale that to prevent a debtor from obtaining relief from the obligations of an expired CBA would frustrate the purposes of Section 1113.[14] This conclusion reasons from an erroneous premise. As the *Long Ridge* Court and the Debtors themselves acknowledge, *see* 2014 WL 407528 at *13; Debtors' 1113(c) Ltr. Br. at 10, Section 1113 was intended to be a "reasonable compromise between the goals Congress articulated in the National Labor Relations Act and the bankruptcy proceedings under chapter 11, which allow companies to lower costs, when necessary, in order to reorganize." 130 Cong. Rec. S8899-900 at 20094 (daily ed. June 29, 1984) (statement of Sen. Moynihan). It was the purview of Congress, and not the courts, to determine the proper way to balance those goals, and Congress plainly did so through the specific statutory language it enacted. The balance struck by Congress in Section 1113(c)—with full knowledge of the legal difference between unexpired collective bargaining agreements and post-expiration statutory obligations imposed by the NLRA—gave bankruptcy courts authority to approve rejection only of existing "collective bargaining agreements" and their attendant **contractual** obligations, but did not relieve debtors of statutory bargaining obligations. Bankruptcy courts are compelled to honor the deliberate and limited "compromise" embodied in the Code's plain language. *See supra* at __.

[14] *Long Ridge* relies heavily on *Karykeion*, *see* 2014 WL 407528, at *12-14, which, as discussed above, analyzes the language of Section 1113(e), not 1113(c), and was inconsistent with its' own governing Circuit authority. *See supra* 20 n. 12.

42. In light of the above, this Court should reject Debtors' attempts to enlarge the scope of Section 1113(c) beyond its plain language.

C. Bankruptcy Courts Lack Jurisdiction to Relieve Debtors of Obligations Imposed by the NLRA and Must Defer to the Exclusive Jurisdiction of the NLRB.

43. As shown above, Section 1113(c) affords no mechanism by which Debtors can evade their post-expiration NLRA status quo obligation to refrain from unilaterally altering existing terms and conditions of employment—including the Debtors' pension obligations. Those statutory obligations therefore remain in force.[15] The enforcement of those obligations, however, is the exclusive province of the National Labor Relations Board (**NLRB** or **Board**).

44. Federal courts are courts of limited jurisdiction, with only those powers "authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The Constitution erects a presumption against the exercise of federal judicial authority, "and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id*. Because bankruptcy judges lack the protections of Article III of the Constitution, bankruptcy courts' jurisdiction is even more severely cabined than that of district courts. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co*., 458 U.S. 50 (1982) (plurality opinion); *id*. at 89-90 (Rehnquist, J., concurring). Consequently, "[t]he jurisdiction of

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[15] It is black letter law that a debtor remains subject to the same legal obligations it would have outside bankruptcy. *See, e.g., Midlantic Nat. Bank. v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 502 (1986) ("Congress has repeatedly expressed its legislative determination that the trustee is not to have *carte blanche* to ignore nonbankruptcy law."); *Butner v. United States*, 440 U.S. 48, 55 (1979) (explaining that bankruptcy does not grant debtors rights greater than those they would receive outside bankruptcy); *In re St. Mary Hosp.*, 86 B.R. 393, 398 (Bankr. E.D. Pa. 1988) (the Bankruptcy Code "requires a debtor to conform with applicable federal, state, and local law in conducting its business"); *In re Wengert Transp., Inc.*, 59 B.R. 226, 231 (Bankr. N.D. Iowa 1986) ("Although the purpose of the automatic stay is to promote the debtor's rehabilitation, that rehabilitation must be undertaken in full compliance with all other valid state and federal laws.").

the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute." *Celotex Corp. v. Edward*s, 514 U.S. 300, 307 (1995).

45. Moreover, it is well-settled that the NLRB has exclusive jurisdiction over matters within the Board's special expertise. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) ("When an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the [NLRB] if the danger of state interference with national policy is to be averted."); *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982) ("The Board is vested with primary jurisdiction to determine what is or is not an unfair labor practice," and federal courts generally lack jurisdiction over alleged violations of § 8 of the NLRA.). Under longstanding Supreme Court doctrine, bankruptcy courts must defer to administrative agencies invested with such jurisdiction over specialized matters. *See, e.g., Nathanson v. NLRB*, 344 U.S. 25, 29–30 (1952) (because NLRA granted NLRB exclusive jurisdiction to adjudicate unfair labor practices, bankruptcy court was required to defer to NLRB's determination of back pay as remedy for commission of unfair labor practice); *Smith v. Hoboken R.R., Warehouse & S.S. Connecting Co.*, 328 U.S. 123, 130-33 (1946) (because Interstate Commerce Act granted Interstate Commerce Commission exclusive jurisdiction to determine when railroad could abandon operations, bankruptcy court was required to defer to resolution of such matter by ICC).

46. As shown above, *supra* at 14–16, if Debtors were to unilaterally change the terms and conditions of employment that were set by the expired CBA, they would not be breaching a contract—the subject matter of Sections 365(a) and 1113 of the Bankruptcy Code. Rather, they would be violating their statutory obligations under Section 8(a)(5) of the NLRA to negotiate in good faith and refrain from unilateral changes after expiration of a CBA. Enforcing these duties

in the event of an alleged violation is a matter squarely within the NLRB's special expertise and jurisdiction—a jurisdiction that excludes not only bankruptcy courts but also federal district courts. *Sullivan Motor*, 56 B.R. at 30; *San Rafael*, 219 B.R. at 866-67. Under the statutory scheme, such administrative enforcement occurs, if at all, only retrospectively, if and when an unfair labor practice charge is filed. The actual ongoing conduct of negotiations following expiration of a CBA—including timing, procedures and substance—is controlled by the parties themselves, and is not directed, supervised or mediated by the NLRB. The NLRA does not authorize the Board to "declare impasse" or determine when the parties are "released" from further negotiations, nor does the statute provide for issuance of advisory or declaratory judgments regarding such private party bargaining. Consequently, bankruptcy courts may not intrude in that Congressionally-determined scheme to rule, at the behest of one of the bargaining parties, that they are relieved of their NLRA obligations with respect to a particular employment term under negotiation.

47. Congress may, of course, create express exceptions to the Board's exclusive jurisdiction, and occasionally does so. In *NLRB v. Bildisco and Bildisco*, the Supreme Court found that Section 365(a) of the Bankruptcy Code created such an exception for unexpired collective-bargaining agreements, which are "executory contracts" and thus could be assumed or rejected by the terms of Section 365(a). 465 U.S. 513, 521–522 (1984). Likewise, the subsequently-enacted Section 1113 supplanted *Bildisco* and created a specially-tailored exception to enable a bankruptcy court to authorize a trustee or debtor-in-possession to "assume or reject a collective bargaining agreement" only in compliance with the specific requirements of

Section 1113(c). These statutory exceptions to the Board's exclusive jurisdiction are, however, narrowly confined to their terms.[16]

48. Bankruptcy courts have honored these fundamental principles, emphasizing that "§ 1113 [did not] intend[ ] a bankruptcy court to intrude into an area of labor law reserved exclusively for the expertise of the [NLRB] under circumstances where a collective bargaining agreement by its own terms expired before the Chapter 11 case was filed." *Sullivan Motor*, 56 B.R. at 30. *Accord San Rafael*, 219 B.R. at 866-67 ("No authority vests in the bankruptcy court, and the bankruptcy court lacks subject matter jurisdiction, to award benefit payments under an expired collective bargaining agreement. Only the [NLRB] has subject matter jurisdiction to make such an award for violations of an unfair labor practice under the Labor Management Relations Act. Section 1113 of the bankruptcy code does not apply to expired collective bargaining agreements.").

49. For all the reasons shown above, the Court here should likewise conclude that it lacks jurisdiction to consider Debtors' request for relief from their post-expiration status quo obligations under the NLRA, including their request to permanently withdraw from the Fund.

II. Even if this Court had Jurisdiction to Reject the Terms and Conditions Currently Imposed by Statute Now that the CBA Has Expired, the Debtors Fail to Satisfy the 1113 Requirements for Relief

A. The Controlling Statutory Requirements

50. Section 1113(c) imposes nine statutory requirements that must be satisfied before a court may approve the rejection of a collective bargaining agreement. *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., AFL-CIO-CLC*, 791 F.2d 1074, 1080-81 (3d Cir.

[16] This is true both because of the NLRA's broadly preemptive force, and because Section 1113(f) of the Code makes clear that only § 1113, and no other provision of the Bankruptcy Code, addresses the unilateral termination or modification of a collective bargaining agreements. *See supra* at 17 n.9.

1986); *In re Jefley, Inc.*, 219 B.R. 88, 92-93 (Bankr. E.D. Pa. 1998). The Debtors bear the burden of proving each required element by a preponderance of the evidence. *In re Liberty Cab & Limousine Co., Inc.*, 194 B.R. 770, 776 (Bankr. E.D. Pa. 1996) (citing *In re Garofalo's Finer Foods, Inc.*, 117 B.R. 363, 370 (Bankr. N.D. Ill. 1990)); *Jefley*, 219 B.R. at 93; *In re National Forge Co*., 279 B.R. 493, 500 (Bankr. W.D. Pa. 2002).

51. The first five statutory requirements must have been satisfied before the filing of the Debtors' 1113(c) Motion on September 26, 2014:

First, the Debtors had to make a valid "proposal" to the Union before filing their application to reject. 11 U.S.C. § 1113(b)(1)(A). Thus, in this case it is the Debtors' 1113 Proposal dated September 17, 2014, that must be evaluated for strict compliance with 1113's requirements.

Second, the Debtors must prove that their September 17 pre-application Proposal was "based on *the most complete and reliable information available* at the time of such proposal." 11 U.S.C. § 1113(b)(1)(A) (emphasis added).

Third, the Debtors must prove that the September 17 Proposal seeks only "those *necessary* modifications in the employees' benefits and protections that are *necessary* to permit the reorganization" of the Company. 11 U.S.C. § 1113(b)(1)(A) (emphasis added).

Fourth, the Debtors must prove that their 1113 Proposal to Local 54 "assures that *all creditors, the debtor and all of the affected parties are treated fairly and equitably*." 11 U.S.C. § 1113(b)(1)(A) (emphasis added). This means that unionized employees, non-union employees, management, non-labor creditors, and Company owners must all bear proportionate sacrifices.

Fifth, the Debtors must prove that before filing their Application, they gave the Unions "such relevant information as is necessary to evaluate the [pre-application] proposal." 11 U.S.C. § 1113(b)(1)(B).

52. The sixth and seventh statutory requirements specify what is required of the Debtors after the 1113 Proposal and before the commencement of the hearing on October 14:

Sixth, the Debtors must prove that they met with Local 54 at reasonable times. 11 U.S.C. § 1113(b)(2).

Seventh, the Debtors must prove that they conferred in "good faith" with Local 54 "in attempting to reach mutually satisfactory modifications" of the CBA. 11 U.S.C. § 1113(b)(2). As detailed below, the Debtors' take-it-or-leave-it approach that treats particular demands as non-negotiable does not satisfy this statutory requirement. Likewise, good faith bargaining aimed at mutual agreement cannot take place where, as here, the Debtors lack ultimate decision-making power and the relevant decision-maker(s) are not in the negotiations.

53. The last two statutory requirements take into account the entirety of the record. As with the other Section 1113 criteria, however, the Debtors must separately meet each of these final statutory tests:

Eighth, the Debtors must prove that the Local refused to accept the 1113 Proposal "without good cause." 11 U.S.C. § 1113(c)(2). Notably, there is no fixed rule limiting what qualifies as "good cause," because a union may have any number of legitimate reasons for refusing to accept a particular Section 1113 proposal, depending on the circumstances presented.

Ninth, and finally, the Debtors must prove by clear and convincing evidence that "the balance of the equities clearly favors rejection" of the CBA. 11 U.S.C. § 1113(c)(3).

B. By Making a Non-Negotiable Demand to Eliminate the Defined Benefit Plan, and Failing to Bring the Relevant Decision-Makers to the Table, the Debtors Failed to Confer in Good Faith with the Union Between the Making of their Proposal and the Hearing

54. A debtor may not obtain approval to reject a labor contract unless, "[d]uring the period beginning on the date of the making of a [1113] proposal [Sept. 17, 2014] . . . and ending on the date of the hearing [Oct 14, 2014]," the debtor has "confer[red] in good faith in attempting to reach mutually satisfactory modifications" of the collective bargaining agreement. 11 U.S.C. § 1113(b)(2). *See Wheeling-Pittsburgh*, 791 F.2d at 1093 ("[T]he debtor must meet its negotiating obligation before the court may approve its rejection of the labor contract."). Here, the Debtors failed confer in good faith by: (1) refusing to negotiate over withdrawal from the NRF or the elimination of the CBA's successorship clause and attempting to short-circuit the bargaining process by seeking immediate withdrawal from the NRF; and (2) failing to bring the relevant decision-makers—namely the Icahn Lenders—to the bargaining table. Each of these defects, standing alone, suffices to compel denial of the Debtors' 1113(c) Motion.

1. Debtors Failed to Bargain in Good Faith By Refusing to Negotiate Over Pensions or Successorship and By Seeking Immediate, Permanent Withdrawal from the National Retirement Fund.

55. In the context of Section 1113, good faith bargaining means that the debtor must not adopt a take-it-or-leave-it approach, whether on its total "ask" or particular terms. *See In re Northwest Airlines Corp.*, 346 B.R. 307, 327 (Bankr. S.D.N.Y. 2006) ("The 'good cause' and good faith requirements have been held to preclude a debtor from simply offering a 'take it or leave it' proposal."). Such a take-it-or-leave-it approach is incompatible with the goal of Section 1113 to facilitate consensual agreements. *See Liberty Cab*, 194 B.R. at 777 (holding that the debtor failed to negotiate in good faith due to its "take it or leave it" attitude); *In re Delta Airlines, Inc.*, 342 B.R. 685, 697 (Bankr. S.D.N.Y. 2006) (denying an application under §

1113(c) because the debtor made a non-negotiable demand for $8.9 million in concessions).[17] Similarly, where the debtor refuses to engage in a genuine back-and-forth over the particular terms in its proposal, the debtor has failed to satisfy its statutory obligation, and its application must be denied. *Ass'n of Flight Attendants v. Mesaba Aviation, Inc.*, 350 B.R. 435, 459 (D. Minn. 2006) (denying an application under § 1113(c) where debtor made a non-negotiable demand that no snapback be included in the modified agreement) (citing cases). Such intransigence is likewise a violation of an employers' comparable NLRA statutory obligation to bargain in good faith.[18]

56. Here, despite this well-established rule, the Debtors have made clear that at least two terms of their 1113 Proposal are absolutely non-negotiable: (1) permanent withdrawal from

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[17] *See also* 130 Cong. Rec. S8898 (daily ed. June 29, 1984) (quoting Senator Packwood, the sponsor of the language later enacted as Section 111, as stating, "this provision encourages the collective bargaining process, so basic to federal labor policy").

[18] Cases are legion under the NLRA in which an employer's refusal to budge on key issues in a labor negotiation has been considered nearly incontrovertible evidence of bad faith bargaining. The First Circuit explained that rule in upholding a finding of bad faith issued by the National Labor Relations Board:

> [I]f the employer makes not a single serious proposal meeting the union at least part way, then certainly the Board must be able to conclude that this is at least some evidence of bad faith. . . . In other words, while the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position, **the employer is obliged to make some reasonable effort in some direction to compose his differences with the union**. . . .

NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 135 (1st Cir. 1953) (emphasis added). *Accord Sparks Nugget, Inc. v. NLRB.*, 968 F.2d 991, 995 (9th Cir. 1992); *NLRB v. Columbia Tribune Pub. Co*., 495 F.2d 1384, 1391 (8th Cir. 1974); *NLRB. v. Tower Hosiery Mills, Inc.*, 180 F.2d 701, 705 (4th Cir. 1950). In one recently decided example, the federal district judge upheld a finding of bad faith bargaining by the employer where "nearly all of the provisions of [the employer's] final offer were identical to [the employer's] first offer." *Paulsen v. Renaissance Equity Holdings*, 849 F. Supp. 2d 335, 354 (E.D.N.Y. 2012). Indeed, even intransigence on one major term is sufficient as a matter of law to show bad-faith bargaining. *See supra* at __ (discussing *Delta* and *Mesaba*).

the National Retirement Fund; and (2) elimination of the CBA's successorship clause. *See supra* at 6–12. The Debtors are so adamant and unyielding on these conditions that they have incorporated them into their POR. *See supra* at 11–12 (discussing POR, § 11.1, which makes withdrawal from the NRF an independent "condition precedent" to Plan confirmation). *Accord* 1113(c) Motion at ¶ 84 (describing "elimination of the successors and assigns clause and the elimination of the Debtors' obligation to contribute to the National Retirement Fund" as a precondition to reorganization); Debtors'1113(c) Ltr. Br. at 2 ("[W]ithdraw from the NRF will happen; the only question is when …."). The Debtors' non-negotiable demands with respect to the Fund and the successorship clause are inconsistent with the good-faith bargaining required by Section 1113(b)(2). *See Delta*, 342 B.R. at 697; *AFA v. Mesaba* 350 B.R. at 459; *Liberty Cab*, 194 B.R. at 777.

57. As a rare exception to the rule against non-negotiable demands, a debtor may insist on a non-negotiable total "ask" or particular set of terms where the debtor has **proven** that its proposal is **absolutely essential** for reorganization—or, in the words of one court, the "*sine qua non* of the debtor's reorganization." *Delta*, 342 B.R. at 697. *See also AFA v. Mesaba*, 350 B.R. at 458 (holding that a debtor may refuse to negotiate over one of its proposal only when that proposal is "essential" to reorganization); *In re AMR Corp.* ("*AMR I*"), 477 B.R. 384, 444 (Bankr. S.D.N.Y. 2012) (same). That bar, higher than the ordinary necessity test under Section 1113, has not been met or even approached by the Debtors in this case. Although the Debtors assert that they would be unable to "obtain[ ] the financing necessary … to reorganize," in the absence of these concessions, *see* 1113(c) Motion at ¶ 84, they have proffered no direct evidence to that effect from either the First Lien Lenders or other potential financers. Nor have the Debtors presented any evidence of attempts to obtain alternative financing without these

concessions, including on the terms proposed in the Union Counterproposal—or even any evidence of any attempts whatsoever to explore financing or restructuring alternatives after their initial, cursory efforts in May 2014. *See supra* at 5.

58. Indeed, the Debtors' assertion that they can secure financing only upon complete withdrawal from the Fund strains credulity. By the Debtors' own calculation, termination of the defined benefit plan would yield only $3.7 million in cost savings. *See supra* at 7. Comparable cost savings could be achieved through a reduction in Debtors' pension contribution (as contemplated by the Union Counterproposal) in combination with other measures. Thus, even if an additional $3.7 million in savings could be deemed "essential" for the Debtors' reorganization—a doubtful prospect given that the Debtors' other liabilities, including the non-operating carrying costs of the Plaza, dwarf that amount (*supra* at 7 n.2)—the Debtors would still not be justified in making a non-negotiable demand that such savings come only from complete withdrawal from the Fund. *Cf.*, *AMR I*, 477 B.R. at 446 (finding the "good faith" requirement satisfied where AMR had "shown flexibility in the allocation of concession" and "almost without exception, … [wa]s willing to consider any reasonable alternative suggestions the Union might have to the Company's cost reduction proposals so long as the total cost reduction total is met").[19]

59. In short, the Debtors here have proffered no more than their own say-so that elimination of the pension plan and the successorship language are absolutely essential to reorganization. That "evidentiary record" is wholly insufficient to carry their burden here.

[19] Likewise, Section 1113(b)(2) does not excuse the Debtors' non-negotiable demand for withdrawal from the Fund based on the Debtors' unsubstantiated and untenable assertion that they will be absolutely precluded from reorganizing as long as there is even a de minimis risk ——no matter how speculative and legally unfounded the concern—that an undetermined fraction of an unasserted but possible future withdrawal liability claim might be classified as an administrative expense.

60. The Debtors' attempt to secure a preemptive order from this Court approving their immediate, permanent withdrawal from the Fund only exacerbates the obvious § 1113(b)(2) deficiencies in this case. *See supra* at 10–11; 1113(c) Motion at 1–2 & n.2; ¶ 68; Debtors' 1113(c) Ltr. Br. at 1. Under Section 1113(b)(2), the Debtors were required to bargain with the Union in good faith until at least October 14, 2014, with respect to **all modifications** in their 1113 Proposal. By attempting to expedite disposition of the pension component of their 1113(c) Motion, the Debtors sought to exclude that proposal entirely from the bargaining process and thereby also foreclosed any good faith bargaining with an open mind on the totality of their proposed modifications. The Court correctly rejected that request. *See supra* at 11. Even so, the Debtors' persistent, aggressive steps to remove their continued participation in the Fund entirely from the bargaining table preclude them from satisfying their obligation to bargain in good faith for the full statutory period prescribed by Section 1113(b)(2). Accordingly, the Debtors' 1113(c) Motion must fail.

2. Debtors Failed to Confer in Good Faith Because Those With Authority to Bargain—*i.e.*, the Icahn Lenders—Were Not At the Table.

61. The Debtors have also failed to bargain in good faith because the negotiations between the Debtors and the Union have not included the Icahn Lenders. As the Debtors' filings make clear, the magnitude of the Icahn Lenders' secured claims make them the de facto owners of the Company. *See supra* at 4–5. Indeed, the 1113(c) Motion indicates that all of Debtors' modification proposals are aimed at satisfying what Debtors assert to be the demands of the Icahn Lenders. *See* 1113(c) Motion. Moreover, by its very terms, the Debtors' POR is made contingent on various conditions precedent that require terms acceptable to the Icahn Lenders. *See supra* at 11–12. On these facts, it is clear that—absent the Icahn Lenders' approval—the Debtors themselves have no authority to modify their proposals or negotiate with Local 54.

62. Accordingly, by not having the Icahn Lenders represented at the bargaining table, while persisting in bargaining through negotiators lacking sufficient authority, the Debtors indisputably failed to satisfy their statutory obligation to confer in good faith. *See, e.g., Leader Commc'ns, Inc.*, 361 NLRB No. 28, *1 n.1 (2014); *Penntech Papers, Inc.*, 263 NLRB 264, 276 (1982) (finding failure of good faith bargaining where employers "failed to cloak their negotiator … with sufficient authority … and adopted a take-it-or-leave-it attitude"); *American Needle & Novelty Co.*, 206 NLRB 534, 543 (1973) (no "meaningful bargaining" occurred where negotiator was "not invested with 'authority'"); *Holmes Tuttle Broadway Ford., Inc.*, 186 NLRB 73, 83 (1970) (finding bad faith where employer "failed to provide its negotiators with sufficient authority to conclude an agreement with the Union").

C. The Debtors' Proposal Fails to Treat All Affected Parties Fairly and Equitably, Because it Seeks Permanent, Irreversible Concessions from the Union While the Concessions it Seeks from Other Creditors are Contingent and Reversible

63. An application under Section 1113 must be denied if the debtor's proposal does not "assure[] that all creditors, the debtor and all of the affected parties are treated equitably and fairly." 11 U.S.C. § 1113(b)(1)(A). As the Third Circuit has explained, the "fair and equitable" requirement was intended to ensure that employees "do not bear either the entire financial burden of making the reorganization work or a disproportionate share of that burden," so that, instead, "the burden of sacrifices in the reorganization process will be spread among all affected parties." *Wheeling-Pittsburgh*, 791 F.2d at 1091 (quoting 130 Cong.Rec. H7496 (daily ed. June 29, 1984) (remarks of Rep. Morrison); 130 Cong.Rec. S8898 (daily ed. June 29, 1984) (remarks of Sen. Packwood)).[20]

[20] *See also In re Century Brass Prods., Inc.*, 795 F.2d 265, 273 (2d Cir. 1986) ("fair and equitable" requirement is intended to "spread the burdens of saving the company to every constituency *while ensuring that all sacrifice to a similar degree*" (emphasis added)).

64. Thus, the Court must deny the Debtor's 1113(c) Motion if the contributions demanded from Local 54 are disproportionate to those borne by other stakeholders. In determining whether the debtor's proposal asks for commensurate sacrifices from all stakeholders, the Court must compare the contributions of each unionized labor group,[21] management,[22] creditors[23] and shareholders.[24] Here, the Debtors' 1113 Proposal is not fair or equitable because it demands immediate, permanent concessions from Local 54 employees, while imposing only contingent and reversible concessions on other stakeholders.[25]

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[21] *See, e.g., Delta,* 342 B.R. at 698-99 (denying § 1113(c) application in part because debtor asked flight attendants to bear disproportionate share of burden in comparison to other employee groups); *National Forge,* 279 B.R. at 503 (denying § 1113(c) application in part because insufficient information about amount of retiree concessions prevented the court from determining if all parties were treated fairly and equitably). In fact, here, the Debtors' seek no concession from other unionized labor groups. *See supra* at 11 n. 4.

[22] *See, e.g., Jefley,* 219 B.R. at 94 (denying § 1113(c) application where debtor's proposal left "the potential for more sacrifice on the part of management"); *In re William P. Brogna & Co.,* 64 B.R. 390, 392 (Bankr. E.D. Pa. 1986) (expressing concern about management's share of compensation reductions and denying § 1113(c) application).

[23] *See, e.g., Wheeling-Pittsburgh*, 791 F.2d at 1092-93 (reversing grant of § 1113(c) application because absence of snapback provision meant that workers would bear disproportionate share of burden in comparison to creditors if debtor did better than expected post-bankruptcy).

[24] *See, e.g., AFA v. Mesaba* , 350 B.R. at 460-61 (reversing grant of § 1113(c) application and remanding to determine whether holding company – debtor's sole shareholder – had been asked to make its share of sacrifices).

[25] In evaluating whether a proposal satisfies the "fair and equitable" standard, Courts also consider the magnitude of each constituency's pre-petition sacrifices. *See Truck Drivers Local 807, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Carey Transp. Inc*., 816 F.2d 82, 91 (2d Cir. 1987) (considering pre-petition sacrifices by a union and two creditors in assessing fairness). If a group has sacrificed prior to bankruptcy in excess of other stakeholders, fairness dictates that the group be asked for less within bankruptcy. Here, Local 54 employees have already given the Debtors $ 4 million dollars in pre-petition concessions, which took the form of a wage freeze and reductions in vacation time, personal days, and holiday pay. *See supra* at 3–4. The Debtors' 1113(c) Motion fails to demonstrate that the pre-petition sacrifices, if any, by other stakeholders are comparable to those made by Local 54's members.

1. The Debtors' 1113 Proposal Seeks to Impose Absolute, Permanent Concessions on Union-Represented Employees While Seeking Contingent Concessions From Other Stakeholders.

65. Debtors' 1113 Proposal derives from a business plan predicated on three elements: (1) conversion of outstanding first-lien secured debt into 100% equity of the reorganized Debtors, plus an additional $100 million investment, by the Icahn Lenders; (2) reduced property tax assessments, tax rate freezes and approximately $175 million in tax credits from Atlantic City, Atlantic County, and the State of New Jersey; and (3) concessions from Local 54. *See supra* at 7–8. A cursory inspection of this proposal belies the Debtors' claim that the permanent, non-contingent concessions it seeks from the Union are comparable to those sought from other creditors.

66. First, as the 1113(c) Motion and POR confirm, the concessions contemplated by the Icahn Lenders are made entirely contingent on the Union-represented employees (as well as the City, State, and County) meeting the demands of the 1113 Proposal in full. *See supra* at 6–8, 11–12. But these workers are not given reciprocal Icahn-equivalent protection. Instead, the Debtors' 1113(c) Motion as currently constituted imposes absolute, unconditional losses on the poorest and most vulnerable of the three groups targeted for major economic concessions.

67. Moreover, the City, State and County are public authorities that are not parties to the Bankruptcy case and not subject to the Bankruptcy Court's powers. Rather, all of the concessions Debtors seek from those stakeholders are purely voluntary measures that require regulatory and legislative approvals. Thus, any participation by these non-party "stakeholders" is speculative at best and entirely dependent on the Debtors' ability to lobby and negotiate outside of the procedures and protections afforded by the Bankruptcy Code. Indeed, public statements by the Mayor of Atlantic City indicate that the City will refuse to grant the Debtors'

requests—as is its right. *See supra* at 10. And, given the absence of any proof that the Debtors will ever be able to secure the non-party political concessions they seek, concessions from the Icahn Lenders are likewise beyond the Debtors' reach.

68. As a result, the factual record on the Debtors' 1113(c) Motion is one where the Union's concessions would be immediate and certain, while other stakeholders' concessions are merely contingent and speculative. That arrangement is neither fair nor equitable.[26]

69. The Court should therefore deny the present 1113(c) Motion, without prejudice to the Debtors' ability to refile if and when they have remedied this deficiency by securing the non-party concessions and the commitment of the Icahn Lenders that are essential to viability of the Debtors' proposed business plan. *See AMR I*, 477 B.R. at 394 (denying 1113(c) motion "on the present record," but noting that "[s]uch a denial is without prejudice to American seeking relief in the future with a new proposal … that remedies these deficiencies"); *In re AMR Corp.* ("*AMR II*"), 11-15463 SHL, 2012 WL 3834798 (Bankr. S.D.N.Y. Sept. 5, 2012) (granting renewed 1113(c) motion where debtors demonstrated, by their renewed motion and at a related hearing, that identified defects had been remedied); *In re Mesaba Aviation, Inc.*, 341 B.R. 693, 763 (Bankr. D. Minn. 2006) (denying 1113(c) motion without prejudice and inviting debtor to make a renewed motion that remedies identified defects) *aff'd in part, rev'd in part sub nom., on other grounds by AFA v. Mesaba*, 350 B.R. 435.

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[26] *See also Delta*, 342 B.R. at 697 (explaining that the question of what is "fair and equitable" for a particular stakeholder is a "statutory issue … to be judged by the Bankruptcy Court" and other stakeholders "may not dictate what is fair and equitable for [another group] by signing contingency clauses purporting to bind [the debtor] and the Court"); *National Forge*, 279 B.R. at 503 (denying § 1113(c) application where insufficient information about amount of retiree concessions prevented the court from determining if all parties were treated fairly and equitably).

2. The Debtors' 1113 Proposal Seeks to Impose Irreversible Concessions on Union-Represented Employees

70. In addition, the Debtors' modifications are not "fair and equitable" because the lack of a "snap back" provision in Debtors' 1113 Proposal "mean[s] that any improvement in the Company's position over this long period would not be shared by the employees." *Wheeling-Pittsburgh*, 791 F.2d at 1091.

71. In *Wheeling-Pittsburgh*, the Third Circuit specifically held that an 1113 proposal in which "labor costs would remain frozen" could not satisfy the "fair and equitable" standard where "the workers would suffer disproportionately to the creditors if the Company in fact fared better than its forecast." *Id*. at 1092. Likewise, the Debtors here insist that Union-represented employees permanently give up their pension and healthcare benefits, and effectively take wage cuts by receiving 2.5 hours per week less in compensation, and there is no provision for reversal of those concessions in the event that the Debtors' fortunes outstrip current projections. By contrast, the Debtors' 1113 Proposal provides for the Icahn Lenders to convert their outstanding secured debt into a 100% equity share in the reorganized Debtor, *see supra* at 7, 12. Thus, should the Company's position improve over time, the Icahn Lenders stand to benefit substantially. In short, the Debtors' 1113 Proposal places a disproportionate burden on employees represented by Local 54 and thus does not treat "all of the affected parties are treated equitably and fairly" as required by 11 U.S.C. § 1113(b)(1)(A). *Wheeling-Pittsburgh*, 791 F.2d at 1092; *Liberty Cab*, 194 B.R. at 777 (expressing concern about the absence of "snapback" in denying § 1113 application without prejudice); *In re William P. Brogna & Co.*, 64 B.R. 390, 392 (Bankr. E.D. Pa. 1986) (referencing absence of a "snapback" as a strong consideration in denial

of § 1113 application). Accordingly, this defect, too, requires denial of the Debtors' present 1113(c) Motion.[27]

D. The Union Had Good Cause to Reject the Debtors' Proposal

72. The court must deny an application for rejection if the union has "good cause" for refusing to accept the debtor's proposed terms. 11 U.S.C. § 1113(c)(2). Notably, the statute does not articulate or limit the circumstances that may constitute "good cause"; a union can have any number of legitimate reasons for refusing to accept a particular Section 1113 proposal. *Id.* Bankruptcy Courts have acknowledged that a union has "good cause" if it has offered "alternatives that would permit the debtor to reorganize." *Northwest*, 346 B.R. at 328. As part of the Debtors' burden of persuasion, then, they must prove that the alternatives offered by the Union would doom a successful reorganization. *Id.*; *In re Maxwell Newspapers, Inc.*, 146 B.R. 920, 932 (Bankr. S.D.N.Y. 1992) (holding that, once the union has produced evidence of its reasons for declining to accept the debtor's proposal, the debtor has the burden to prove that these reasons are inadequate), *aff'd in substantial part by In re Maxwell Newspapers, Inc.*, 981 F.2d 85 (2d Cir. 1992). Here, Debtors never responded to the Union Counterproposal, let alone met their burden to prove the terms it contained would absolutely preclude a successful reorganization. *See supra* at 8–9.

73. Moreover, the Debtors' bad faith in seeking expedited, immediate withdrawal from the pension—and precluding good faith negotiation on the other terms of the 1113

[27] The Debtors' 1113 Proposal also manifestly fails to meet the "necessity" requirement of 11 U.S.C. § 1113(b)(1)(A). Indeed, on this factual record, it is impossible to determine what modifications, if any, to the CBA would be necessary to the Debtors' successful reorganization: now that one of the three essential components of the Debtors' business plan has failed to materialize (*supra* at 10), the Court has no yardstick by which it could reasonably determine the nature or magnitude of labor concessions needed for the Debtors to reorganize. Indeed, on the present record the Court cannot conclude that any amount of concessions from Union-represented workers would make reorganization possible.

Proposal—gave the Union good cause to reject the proposal, regardless of its content. *See supra* at 26–33. Likewise, Debtors' failure to come to the table with actual authority to bargain, *see supra* at 33–34, ensured that the Union never had an opportunity to engage in meaningful negotiation over the terms of the 1113 Proposal. As a matter of law, the Union has "good cause" to reject a proposal that fails to satisfy each and all of Section 1113's requirements.

E. The Balance of the Equities Does Not Clearly Favor Rejection

74. The Court must deny a Section 1113 application if the debtor has not proven that "the balance of the equities clearly favors rejection" of the collective bargaining agreement. 11 U.S.C. § 1113(c)(3). Because the plain text of Section 1113(c)(3) requires that the equities "clearly" favor rejection, Debtors have a heightened burden of proof on this element and must demonstrate by "clear and convincing evidence" that the equities tip in their favor. *Matter of Walway Co.*, 69 B.R. 967, 974 (Bankr. E.D. Mich. 1987); *Matter of K & B Mounting, Inc.*, 50 B.R. 460, 467 (Bankr. N.D. Ind. 1985) (indicating that on this element "a preponderance of the evidence will not be sufficient."). The Debtors cannot satisfy this test because the equities in this case strongly favor the Union's position.

75. First, the Debtors sought concessions from the Union based on a three-part plan, one part of which has already been rejected. *See supra* at 7–8, 10. The Debtors themselves emphasized that the "Union concessions, standing alone, would be insufficient for the Debtors to avoid liquidation, *even with* the $100 million capital injection that the First Lien Lenders would agree to provide." 1113(c) Motion, ¶ 6. But the First Lien Lenders' $100 million capital injection was contingent on the governmental authorities providing the tax relief and incentives the Debtors sought, and Atlantic City refuses to do so. *Supra* at 19. By the Debtors' own analysis, then, the $14.6 million in Union concessions will be completely wasted, for those drastic cuts

alone fall far short of what is required to stave off liquidation in the current circumstances. Rejecting the former CBA at this point would therefore serve only to punish and further prejudice the Taj Mahal employees. On the other hand, if the Debtors were to secure the other essential relief they seek from the government and the Icahn Lenders, they could always refile this motion. *See supra* at 37 (citing *AMR I*, 477 B.R. at 394; *AMR II*, 2012 WL 3834798; *Mesaba*, 341 B.R. at 763).

76. Second, many of Local 54's members already earn near-minimum wages and qualify for governmental assistance of various forms based on the wages they earn. *See, e.g.*, Department of Labor, Workforce Investment Act of 1998 (WIA); Lower Living Standard Income Level (LLSIL) 79 Fed. Reg. 11784 (Mar. 27, 2014) (2014 LLSIL for a family of four in metro areas in the northeast is $41,787, and the 70% LLSIL is $29,251); New Jersey Dept. of Human Services, 2012 Annual Report on Access to Employer-Based Health Insurance, available online at http://www.state.nj.us/humanservices/news/reports/2012%20EBHI%20Report.pdf (Trump Taj Mahal accounted for over 440 participants in New Jersey Family Care/Medicaid during relevant portion of calendar year 2012). In this circumstance, the Debtors want to offload even more costs to the public fisc by requiring taxpayers to pick up the tab on the employees' health benefits—and they want to do this at the very same time that they are asking for millions in tax relief and credits from those same taxpayers. *See supra* at 7–8. That is not equitable.

77. Third, the $9.2 million non-operating carrying costs associated with upkeep on the now-shuttered Trump Plaza are more than double the savings the Debtors could reap from eliminating the Taj Mahal employees' pension plan—$3.7 million according to the Debtors' estimates . *See supra* at 7 & 7 n.2. Surely, it is not equitable to require near-minimum wage workers to give up retirement security and health benefits they achieved solely through collective

bargaining so that a non-operational neighboring building can remain dormant, without any foreseeable prospect of generating revenue. Moreover, the Plaza operated through a separate corporation from the Taj Mahal, with its own employees who were covered by their own CBA. Forcing the Taj Mahal workers to subsidize the non-operating costs of that separate (non-revenue-generating) corporation has absolutely no basis in equity.

III. If the Court Grants the Debtors' Motion, it Should Not Approve Specific Post-Rejection Terms of Employment

78. The Debtors have asked the Court for an order implementing or authorizing implementation of the specific terms of their 1113 Proposal. *See supra* at 9. In addition to the jurisdictional and merits-based hurdles to that relief, *supra* at 13–42, the requested order must be denied because this Court lacks statutory authority to enter it. Even where the grounds for Section 1113(c) are met, the statute authorizes bankruptcy courts only to "approve an application for rejection of a collective bargaining agreement …." 11 U.S.C. § 1113(c). Unlike Section 1113(e), which grants bankruptcy courts the power to "authorize the trustee [or debtor in possession] to implement interim changes in the terms, conditions, wages, benefits or work rules" under a CBA, Section 1113(c) directs courts either to grant or deny debtors permission to reject collective-bargaining agreements, but not to approve specific terms. 11 U.S.C. § 1113(e); *In re Northwest Airlines Corp.*, 483 F.3d 160, 171 n.5 (2d Cir. 2007) (reserving judgment on bankruptcy court's ability to authorize specific terms, but noting that because "the text of § 1113 is not explicit on this score," any such authority must be found elsewhere in the Bankruptcy Code).

79. Here, the Debtors' 1113 Proposal seeks a concessionary collective bargaining agreement for a three-year term. *See* 1113 Proposal (Article 22). Having failed to obtain the Union's voluntary agreement to those modified employment conditions, the Debtors are now

asking the Court to "implement" their Proposal and, in effect, impose a new CBA on the parties. But courts do not have the power to dictate terms of collective-bargaining agreements to parties; judicial power is limited to requiring good-faith negotiations. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102–08 (1970). The Debtors' POR nonetheless proposes that their obligations to Local 54-represented employees upon emergence from bankruptcy will be solely defined by the order on this motion. *See supra* at 11–12. But if the Debtors want to emerge from bankruptcy with the predictability of a labor contract, they must bargain for one.[28]

80. Moreover, to the extent that the Court would rely on its equitable powers under Section 105 as authority to approve specific (non-contractual) employment terms, *Northwest Airlines*, 483 F.3d at 171 n.5 (citing *Garofalo*, 117 B.R. at 370), that authority could be exercised fairly and equitably only by strictly conditioning implementation of the Debtors' proposed modifications on implementation of the two other forms of relief contemplated by their business plan—namely, tax relief from governmental authorities and debt relief and new capital from the Icahn Lenders. *See supra* at 7–8. In particular, any order purporting to authorize "rejection" of the former CBA and implementation of changed employment conditions should be conditioned so that it does not take effect unless and until the Debtors establish to the Court's satisfaction that they have obtained and implemented all the other "necessary" stakeholder concessions and

[28] Of course, if authorized to reject the terms previously established by the CBA, the Debtors must continue to comply with their obligations under the NLRA to bargain in good faith—obligations that preclude them from imposing terms more onerous than they had offered as part of their 1113 Proposal. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 238–39 (1996) ("[A]fter impasse, labor law permits employers unilaterally to implement changes in pre-existing conditions, but only insofar as the new terms meet carefully circumscribed conditions. For example, the new terms must be 'reasonably comprehended' within the employer's pre-impasse proposals (typically the last rejected proposals), lest by imposing more or less favorable terms, the employer unfairly undermined the union's status," and the "collective bargaining proceeding itself must be free of any unfair labor practice, such as an employer's failure to have bargained in good faith.").

contributions described in their 1113(c) Motion. Alternatively, any such order should be made contingent on proof of those stakeholders' fully binding, immediately enforceable obligations to provide and implement the relief sought from them by the Debtors.

CONCLUSION

This Court has no jurisdiction under Section 1113(c) to authorize "rejection" of the Debtors' non-contractual, statutorily-imposed terms of employment. And, even if Section 1113(c) did apply in this case, the Debtors have failed to satisfy the requirements that Section 1113 imposes as statutory preconditions for contract rejection, especially including the requirement to confer in good faith and treat Union employees fairly and equitably. The Court should therefore deny the Debtors' present 1113(c) Motion in its entirety.

Respectfully submitted,

/s/ William T. Josem
William T. Josem
Cleary, Josem & Trigiani LLP
Constitution Place
325 Chestnut Street, Suite 200
Philadelphia, PA 19106
(215) 735-9099
(215) 640-3201 (facsimile)
wtjosem@cjtlaw.org

Kathy L. Krieger
Darin M. Dalmat
Evin F. Isaacson
James & Hoffman, P.C.
1130 Connecticut Avenue, N.W., Suite 950
Washington, D.C. 20036-3975
(202) 496-0500
(202) 496-0555 (facsimile)
klkrieger@jamhoff.com
dmdalmat@jamhoff.com
efisaacson@jamhoff.com

Joseph J. Rhoades
Stephen T. Morrow
Law Offices of Joseph J. Rhoades
1225 King Street, 12th Floor
P.O. Box 874
Wilmington, DE 19899-0874
(302) 427-9500
(302) 427-9509 (facsimile)

Counsel for UNITE HERE Local 54