

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re

SOUND SHORE MEDICAL CENTER OF
WESTCHESTER, et al.,

Debtors.

Case No. 13-22840 (RDD)

**REQUEST FOR PAYMENT OF ADMINISTRATIVE EXPENSE
PURSUANT TO 11 U.S.C. § 503(b)**

1. The undersigned represents the Industry and Local 338 Pension Fund (“Claimant”), a creditor in the above-captioned Chapter 11 bankruptcy proceeding, and is duly authorized to execute and file this request for payment of administrative expense pursuant to 11 U.S.C. §§ 503(b)(1)(A) and 507(a)(2) (the “Administrative Claim”).

Basis of Claim

2. Claimant is a jointly-administered employee pension benefit plan within the meaning of Sections 3(2) and (3) of ERISA, 29 U.S.C. §§ 1002(2) and (3), and a defined benefit plan within the meaning of Section 3(35) of ERISA, 29 U.S.C. § 1002(35). Claimant is established and maintained for the purpose of providing retirement and related benefits to eligible participants and beneficiaries.

3. Claimant is managed by a Board of Trustees equally represented by labor organizations and employers that contribute to Claimant and maintains a principal place of business at 911 Ridgebrook Road, Sparks, MD 21152.

4. The Administrative Claim is evidenced by various documents and instruments (collectively, the “Operative Documents”), including, without limitation,

the Agreement and Declaration of Trust of the Industry and Local 338 Pension Fund and the collective bargaining agreement between the Teamsters Local 445 and Sound Shore Medical Center of Westchester (the “Debtor”) (the “Collective Bargaining Agreement”). Pursuant to the Collective Bargaining Agreement, Debtor agreed to make contributions on behalf of all of its covered employees to Claimant.

5. As of May 29, 2013 (the “Petition Date”), the Collective Bargaining Agreement was in full force and effect.

6. On May 29, 2013, simultaneously with its Chapter 11 bankruptcy petition, the Debtor moved the Court for an order approving the sale of substantially all of its assets pursuant to an Amended and Restated Purchase Agreement (the “Purchase Agreement”) (Docket No. 123).

7. Section 9.1 of the Purchase Agreement specifically provides that the Buyer will not be assuming any of the Seller’s collective bargaining agreements. Section 9.3 further provides that the Buyer shall have no liability for any claim resulting from “the termination of Sellers’ obligations under any CBA or any trust agreement, including termination of Sellers’ obligations to contribute to any Multiemployer Plan,” such as Claimant.

8. On August 8, 2013, the Court entered an order (the “Sale Order”) approving the sale of substantially all of the Debtor’s assets pursuant to the Purchase Agreement, subject to the continued rights of certain creditors to object to the terms of the sale.

9. On October 15, 2013, the Court entered a Supplemental Order overruling the subsequent objections and affirming the Sale Order.

10. The Sale is expected to close shortly. Upon the Closing Date of the Sale, the Debtor will cease to have an obligation to contribute to Claimant and will therefore incur a complete withdrawal from Claimant pursuant to Section 4203(a) of ERISA, 29 U.S.C. §1383(a).

11. The Court set September 16, 2013 as the last day to file a proof of claim against the Debtor in respect of a pre-petition claim (the “General Bar Date”).

12. On or about September 14, 2013, prior to the General Bar Date, Claimant properly filed a proof of claim for withdrawal liability in the estimated amount of \$2,253,186. (See Claim No. 678.)

Claimant’s Administrative Expense Claim

13. Claimant asserts that a portion of its proof of claim for withdrawal liability, (Claim No. 678), is entitled to administrative expense priority pursuant to Sections 503(b)(1)(A) and 507(a)(2) of the Bankruptcy Code.

14. Withdrawal liability may have a pre- and a post-petition component. If employees work post-petition, contractual and statutory rights like withdrawal liability are properly characterized as post-petition obligations entitled to administrative expense status to the extent that they accrue after a bankruptcy filing. *See In re Marcal Paper Mills, Inc.*, 650 F.3d 311, 317 (3d Cir. 2011) (holding that “the portion of the withdrawal liability attributable to the post-petition period is entitled to administrative priority”). *See also In re Hostess Brand, Inc.*, --- B.R. ---, 2013 WL 5425782, at *4 (S.D.N.Y. Sept. 27, 2013) (noting that “withdrawal liability may be considered any administrative expense” in certain circumstances); *In re Great Northeastern Lumber & Millwork Corp.*, 64 B.R. 426 (Bankr. E.D. Pa. 1986) (to the extent that the withdrawal liability is attributable to post-petition employment, the

claim would be entitled to administrative status); *In re Pulaski Highway Express, Inc.*, 57 B.R. 502 (Bankr. M.D. Tenn. 1986) (to the extent withdrawal liability arises from post-petition labor and the post-petition vesting of rights, it is a post-petition obligation which may be entitled to administrative expense treatment, in whole or in part, pursuant to 11 U.S.C. § 503(b)); *In re Cott Corp.*, 47 B.R. 487 (Bankr. D.Conn. 1984) (dividing withdrawal liability into pre- and post- petition components based upon the period covered by the claim and affording the post-petition portion priority as an administrative claim).

15. The post-petition component of an employer's withdrawal liability is based on the amount of unfunded vested benefits attributable to the employer which was created after the Petition Date. In the plan year in which the bankruptcy occurs, there should be a pro-ration of the unfunded vested benefits.

16. Claimant's plan year runs from July 1 to June 30.

17. The Closing Date of the Sale will occur during the plan year running from July 1, 2013 to June 30, 2014.

18. Pursuant to ERISA, withdrawal liability is calculated based on the unfunded vested benefits on the last day of the plan year immediately preceding the year of withdrawal. Therefore, the Debtor's withdrawal liability will be calculated based on Claimant's unfunded vested liabilities as of June 30, 2013.

19. Accordingly, the post-petition period in this case covers the month of June 2013 (the time from the Petition Date to the last day of the plan year preceding the year in which the withdrawal occurred). Claimant's actuaries have calculated the estimated withdrawal liability attributable to June 2013 at approximately \$43,169.00.

20. As of the Closing Date of the Sale, the amount due and owing by the Debtor to Claimant on account of its withdrawal liability that is entitled to administrative expense priority is estimated to be \$43,169.00.

21. The Operative Documents are too voluminous to attach hereto and copies will be made available upon written request to Claimant's attorneys.

22. The consideration for the indebtedness described above consists of work provided to or for the benefit of the Debtor by union members.

23. All notices and distributions in respect of this Administrative Claim should be forwarded to:

Anne-Marie Sims
Associated Administrators, LLC
911 Ridgebrook Road
Sparks, MD 21152

With a copy to:

Elizabeth O'Leary, Esq.
Kauff McGuire & Margolis LLP
950 Third Avenue, 14 th Fl.
New York, NY 10022

24. Filing of this Administrative Claim is not and should not be construed to be: (a) a waiver or release of the Claimant's rights against any other entity or person liable for all or part of any claim described herein; (b) a waiver of the right to seek to have the reference withdrawn with respect to the subject matter of these claims, any objection or other proceedings commenced with respect thereto, or any other proceedings commenced in this case against or otherwise involving Claimant; (c) a waiver of any right to the subordination, in favor of Claimant, of indebtedness or liens

held by creditors of the Debtor or affiliated debtors; or (d) an election of remedy which waives or otherwise affects any other remedy of Claimant.

25. Claimant reserves the right to amend, modify, or supplement this Administrative Claim, including without limitation, its right: (a) to specify (and quantify) costs, expenses, and other charges or claims incurred by or owed to the Claimant, (b) to file any separate or additional proof(s) of claim with respect to the claim set forth herein or otherwise (which proof(s) of claim, if so filed, shall not be deemed to supersede this proof of claim); (c) to amend, modify or supplement this Administrative Claim in any respect, including with respect to the filing of an additional or amended proof of claim for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein; (d) to file additional proofs of claim in respect of additional claims or for any other reason; and (e) against third parties including without limitation any affiliates of the Debtor.

Dated: New York, New York
November 12, 2013

Respectfully submitted,

KAUFF MCGUIRE & MARGOLIS LLP

By: /s/ Elizabeth O'Leary
Elizabeth O'Leary

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*Attorneys for Creditor Industry and Local
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