Docket #0372 Date Filed: 11/01/2024

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
	)	Case No. 24-90507 (CML)
VERTEX ENERGY, INC., *et al.*, [1]	)	(Jointly Administered)
	)	
Debtors	)	Hearing: Nov. 6, 2024, 10:00 AM
	)	Obj. deadline: Nov. 1, 2024, 4:00 PM

RESERVATION OF RIGHTS OF UNITED STEELWORKERS TO THE DEBTORS' MOTION FOR AN ORDER APPROVING THE DISCLOSURE STATEMENT

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, along with its Local 9-00265-01 (collectively, the "USW"), a creditor and party in interest in these cases, submits this reservation of rights in response to the Debtors' *Motion for Entry of an Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Debtors' Proposed Joint Chapter 11 Plan, (III) Approving the Forms of Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dates with Respect Thereto, and (V) Granting Related Relief* (the "Disclosure Statement Motion") [Docket No. 141].

Background

1. USW is a labor union representing a bargaining unit of approximately 100 mechanics, gaugers, operators, I&E technicians, and lab testers at Debtor Vertex Refining Alabama LLC's ("Vertex") refinery plant in Mobile, Alabama (the "Mobile Refinery").

[1] A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors' proposed claims and noticing agent at https://www.veritaglobal.net/vertex. The location of Debtor Vertex Energy, Inc.'s corporate headquarters and the Debtors' service address in these chapter 11 cases is 1331 Gemini Street Suite 250, Houston, Texas 77058.

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2. USW and Vertex are parties to a collective bargaining agreement ("CBA"), in effect through April 30, 2026.[2]

3. The CBA contains, in Article 1, an evergreen provision stating that, following the end of the CBA's term on April 30, 2026, the CBA will automatically renew from year to year thereafter. Either USW or Vertex may, on timely written notice, request changes to the CBA prior to its automatic renewal, which proposed changes the parties may then bargain.

4. In addition, the CBA includes strong successorship language imposing obligations on Vertex and requiring that in any "agreement to sell the Mobile [Refinery]… in its entirety to a third party… the Company will include in any sale, merger or joint venture agreement the requirement that the successor company shall recognize the [USW] as the exclusive representative of the bargaining unit and shall adopt the Collective Bargaining Agreement and all existing Memoranda of Agreement."

Reservation of Rights

5. USW appreciates that, in the case of a reorganization, the Reorganized Debtor has committed to assume the CBA and satisfy all cure obligations in the ordinary course. However, in the event of an asset sale, the Debtors propose to treat its obligations under the CBA in a way that contravenes both the explicit terms of the collectively bargained successorship clause and the requirements of the Bankruptcy Code.

6. The Disclosure Statement, at Section XI.8, describes two possible treatments for the CBA in these cases under the Debtors' proposed Plan of Reorganization. In the case of a reorganization, the "the Reorganized Debtors… shall be deemed to have assumed the Collective Bargaining Agreement and any agreements, documents, and instruments related

[2] The CBA is lengthy and is in the Debtors' possession. USW can provide a full copy of the CBA at the Court's request.

thereto." Disclosure Statement, p. 47. In the case of an asset sale, however, the Debtors propose that

> to the extent the Collective Bargaining Agreement has not already been assumed and assigned to the Purchaser, terminated, or otherwise expired, the Collective Bargaining Agreement *shall terminate in accordance with its terms* as of or after the Effective Date. *Such termination shall not constitute a rejection of the Collective Bargaining Agreement or implicate section 1113 of the Bankruptcy Code*. The Plan Administrator is authorized to take any action that it deems necessary or appropriate to terminate the Collective Bargaining Agreement. For the avoidance of doubt and notwithstanding the foregoing, *to the extent section 1113 is applicable, the termination of the Collective Bargaining Agreement shall be deemed to satisfy such provisions*.

Id. (emphasis added).

7. This language appears to provide for two potential treatments of the CBA, neither of which is permitted by the Bankruptcy Code. First, if the Debtors sell the Mobile Refinery they will neither assume nor reject the CBA pursuant to Section 365. Instead, the Disclosure Statement provides that the CBA will somehow 'terminate' in accordance with its terms. The Disclosure Statement further provides that this termination may occur on or after the Effective Date, presumably depending on the terms of the CBA, and termination will, without explanation, somehow not constitute a rejection of the CBA implicating the requirements of Section 1113. Second, if the Court determines that the Debtors' treatment of the CBA under a proposed asset sale *does* implicate Section 1113, then, again without explanation, the 'termination' will somehow satisfy the provisions of Section 1113.

8. Regarding the first issue, it is not clear to USW what the Disclosure Statement's use of the term 'termination' means in the context of the CBA. The Disclosure

Statement does not define 'termination,' and it is not a recognized term of art in either labor or bankruptcy law.[3]

9. In any event, because the CBA has an evergreen provision, it does not 'terminate in accordance with its terms,' as suggested by the Disclosure Statement, but instead renews year-to-year, potentially with changes negotiated by Vertex and USW.

10. Assuming, for the sake of argument, that the Debtors take the position that the CBA will expire/terminate of its own accord at some point, the Disclosure Statement appears to state that, though the CBA will still be in effect on the Effective Date, the Debtors need neither assume nor reject the CBA, perhaps suggesting that the CBA will 'pass through' the bankruptcy case unaffected.[4] In short, the Debtors contemplate a unilateral abrogation of their collectively-bargained obligations. The parties negotiated the successorship provision to apply in this very event, and the Debtors cannot be relieved of its obligations by a wave of its hand.

11. Such a 'pass through' is only permissible if the CBA is unaffected by the bankruptcy, *i.e.* only if the Debtors can continue to perform on the CBA post-bankruptcy. *See In re O'Connor*, 258 F.3d 392, 405 (5th Cir. 2001). In this case, the CBA cannot pass through the bankruptcy case unaffected if the Debtors sell the Mobile Refinery because in the case of an asset sale the Debtors will no longer own the Mobile Refinery or employ the bargaining unit members. If the Debtors pursue an asset sale, the CBA must either 1) be assumed and assigned to the purchaser, or 2) be rejected by the Debtors. *See Id.* As described further below, the Debtors

[3] In labor parlance, the parties to a collective bargaining agreement may 'terminate' that agreement through a bilateral agreement, while a collective bargaining agreement may 'expire' by its own terms upon its expiration date, with the employer obligated to maintain the status quo by operation of labor law.

[4] *See In re Nat'l Gypsum Co.*, 208 F.3d 498, 504 n.4 (5th Cir. 2000) ("If an executory contract is neither assumed nor rejected, it will 'ride through' the proceedings and be binding on the debtor even after a discharge is granted.").

may not reject the CBA without complying with the strict substantive and procedural requirements of Section 1113.

12. Regarding the second issue, contrary to the Debtors' assertion in the Disclosure Statement, the 'termination' of the CBA alone will not satisfy the substantive and procedural requirements of Section 1113.[5] Section 1113(f) provides 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). Section 1113 forbids the application of other Code provisions to permit a debtor to escape the requirements of section 1113: "[w]e construe subsection 1113(f) quite literally. We hold that it was meant to prohibit the application of *any* other provision of the Bankruptcy Code when such application would permit a debtor to achieve a unilateral termination or modification of a collective bargaining agreement without meeting the requirements of § 1113." *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 990-91 (2d Cir. 1990) (emphasis added).

13. Thus, a debtor cannot reject, or *de facto* reject, collectively bargained obligations, including relevant successorship protections, through the general provisions of a plan of reorganization without invoking and meeting the requirements of Section 1113. *See Chi. Dist. Council of Carpenters Pension Fund v. Cotter*, 914 F. Supp. 237, 242-43 (N.D. Ill. 1996) (holding that language in a confirmed plan of reorganization stating that all executory contracts

[5] Among Section 1113's procedural requirements, in order to reject a CBA the Debtors must first bargain with the union over proposed modifications to the CBA and provide the union with all information available to allow the union to assess the Debtors' proposal, and the union must reject the Debtors' proposed modifications without good cause. 11 U.S.C. § 1113. Among Section 1113's substantive requirements, in order to reject a CBA the Debtors must prove that the proposed modifications are necessary to allow reorganization and that the balance of the equities favors rejection. *Id.*

not assumed are deemed rejected did not effectuate the rejection of a collective bargaining agreement, which could only be rejected through Section 1113); *see also Am. Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 81-82 (3d Cir. 1999) (debtor could not, under Section 1113(f), contractually bind itself to obtain a change in a collective bargaining agreement as a condition precedent to asset sale closing; any such change required compliance with the Section 1113 procedures); *see also In re Nat'l Forge Co.*, 289 B.R. 803, 808 (Bankr. W.D. Pa. 2003) (debtor "compelled" prior to gaining approval of sale of assets to seek rejection of CBA "[b]ecause of the successor language").

14. As the bankruptcy court concluded in the *Journal Register* case, a debtor may not use Section 363 to bypass the requirements of Section 1113:

> The collective bargaining agreement continues to bind the debtor post-petition, and a debtor cannot reject a collective bargaining agreement except in accordance with Bankruptcy Code § 1113. Generally speaking, a rejection represents a decision not to perform a burdensome executory contract. A debtor cannot bypass § 1113 and obtain a *de facto* rejection of its collective bargaining agreement simply by refusing to perform it. Although the obligation to comply with the successor clause is only one duty among many under a collective bargaining agreement, a debtor' s intentional breach of a material provision of the collective bargaining agreement is tantamount to a rejection, or alternatively, a unilateral alteration of its provisions in violation of Bankruptcy Code § 1113(f). *Thus, as a general proposition, a sale under Bankruptcy Code § 363 cannot circumvent the condition imposed under a successor clause absent compliance with § 1113.*

In re Journal Register Co., 488 B.R. 835, 840 (Bankr. S.D.N.Y. 2013) (emphasis added).

15. The CBA contains an evergreen provision and a binding successorship provision. As a result, the CBA will not 'terminate' on its own, and the Debtors must either assume and assign or seek to reject the CBA in the context of an asset sale. USW alerts this Court to these concerns with the full expectation that the Debtors and all case constituents will

proceed entirely in the manner contemplated by the CBA's successorship clause, with USW and any asset buyer resolving all collective bargaining concerns prior to an asset sale.

16. Accordingly, USW reserves all rights regarding the treatment of the CBA under the proposed Plan of Reorganization.

Dated: November 1, 2024
New York, New York

Respectfully Submitted,

Cohen, Weiss and Simon LLP

/s/ Richard M. Seltzer

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CERTIFICATE OF SERVICE

I certify that on November 1, 2024, a true and correct copy of the foregoing document was served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas on those parties registered to receive electronic notices.

/s/ *Matthew E. Stolz*
Matthew Stolz