No. _____

In The Supreme Court of the United States

UNITE HERE LOCAL 54,

Petitioner,

v.

TRUMP ENTERTAINMENT RESORTS, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves a crucial intersection between bankruptcy law and federal labor law. The Court held in *Bildisco and Bildisco*, 465 U.S. 513 (1984), that collective bargaining agreements are "executory contracts" that debtors could reject under § 365 of the Bankruptcy Code, with Bankruptcy Court approval. Congress was concerned that this would kick off a wave of rejections of labor contracts and within a matter of months added § 1113 to the Bankruptcy Code to make it more difficult for debtors to reject "collective bargaining agreements." Some debtors have attempted to expand § 1113 to authorize "rejection" not of collective bargaining agreements but of their employees' terms and conditions of employment when there is no contract in effect. Under this theory, a bankruptcy court may relieve an employer of its bargaining duties under the National Labor Relations Act at any time during a Chapter 11 case and permit it to change employees' terms and conditions without complying with its bargaining obligations under the NLRA – even though there is no agreement in effect. The bankruptcy courts are split on the question of whether they have this singular power to reject a debtor's *statutory* obligations, not just its *contractual* ones. The Bankruptcy Court in this case decided it had this extraordinary power and allowed the debtor to take away its employees' pensions, health coverage and other benefits. The Third Circuit Court of Appeals agreed. It considered that confining the meaning of "collective bargaining agreement" in § 1113

QUESTION PRESENTED – Continued

to collective bargaining agreements was "hyper-technical" and turned instead to its views on bankruptcy policy and pieces of legislative history to reach the conclusion that this key term means any of the wages, hours, terms and conditions established by a collective bargaining agreement even when the agreement has expired. The Fourth Circuit held the opposite in *Gloria Manufacturing Corp. v. International Ladies' Garment Workers' Union*, 734 F.2d 1020 (4th Cir. 1984) under precursor § 365. The question presented is:

Whether under § 1113 of the Bankruptcy Code a bankruptcy court may authorize a unionized debtor employer to abolish its employees' pensions, health coverage and other benefits without complying with its bargaining obligations under the National Labor Relations Act, when no collective bargaining agreement exists.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Third Circuit were Petitioner UNITE HERE Local 54 (the "Union") and Respondents Trump Entertainment Resorts, Inc.; TER Development Co. LLC; TERH LLP Inc.; Trump Entertainment Resorts Development Company LLC; Trump Entertainment Resorts Holdings LP; Trump Marina Associates; Trump Plaza Associates LLC and Trump Taj Mahal Associates, LLC (this last hereinafter "Trump"). Additional parties to the proceedings below are Official Committee of Unsecured Creditors of Trump Entertainment Resorts, National Retirement Fund, and First Lien Lenders. The National Labor Relations Board; 710 Long Ridge Road Operating Company II, LLC; 240 Church Street Operating Company II, LLC; 1 Burr Road Operating Company II, LLC; 245 Orange Avenue Operating Company II, LLC and 107 Osbourne Street Operating Company II, LLC appeared as *amici curiae* in the Court of Appeals.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner UNITE HERE Local 54 has no parent corporation, nor does it issue any stock (and so has no stock that is owned by any publicly held corporation).

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PETITION FOR WRIT OF CERTIORARI

Petitioner UNITE HERE Local 54 respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit from which this petition for writ of certiorari is taken, reported as *In re Trump Entertainment Resorts, UNITE HERE Local 54*, 810 F.3d 161 (3d Cir. 2016), is reprinted in the Appendix (App.) at 1-30. The opinion of the bankruptcy court, reported as *In re Trump Entertainment Resorts, Inc.*, 519 B.R. 76 (Bankr. D.Del. 2014), is reprinted at App. 31-68.

JURISDICTION

The Court of Appeals entered its judgment on January 15, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1113 of the Bankruptcy Code, 11 U.S.C. § 1113, provides:

> (a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.
>
> (b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall –
>
> > (A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and
> >
> > (B) provide, subject to subsection (d)(3), the representative of the employees with

such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that –

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case,

and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, 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. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No 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.

STATEMENT OF THE CASE

The court below held that a bankruptcy court may not only approve rejection of a Chapter 11 debtor's collective bargaining agreement but may also substitute its authority for that of the NLRB over bargaining for a new contract while the debtor remains under its protection. The Court in *NLRB v. Bildisco and Bildisco*, 465 U.S. 513 (1984), held that collective bargaining agreements are executory contracts and like all such contracts may be rejected or assumed by a debtor in bankruptcy pursuant to § 365(a) of the Bankruptcy Code. Shortly thereafter, the Fourth Circuit followed *Bildisco* and held that a debtor may not reject terms and conditions of employment it has a statutory obligation under the National Labor Relations Act ("NLRA") to keep in

effect until it bargains to change them. *Gloria Manufacturing Corp. v. International Ladies' Garment Workers' Union*, 734 F.2d 1020 (4th Cir. 1984). Congress then passed an amendment to the Bankruptcy Code allowing rejection of a "collective bargaining agreement" but modifying the standard and procedures in *Bildisco* to make rejection more difficult. 11 U.S.C. § 1113. In the ensuing years, there have been several attempts by debtors to expand the rejection powers of § 1113 beyond "collective bargaining agreements" to include debtors' statutory bargaining obligations. These attempts have met a mixed reaction. The bankruptcy courts are badly split on the issue.[1] The Third Circuit decided in this case that the bankruptcy court had the power to reject statutorily-imposed employment conditions – the opposite of the conclusion reached by the Fourth Circuit in *Gloria Manufacturing*, and contrary to the fundamental difference between collective bargaining agreements

[1] Compare *In re Hostess Brands, Inc.*, 477 B.R. 378, 382-83 (Bankr. S.D.N.Y. 2012); *In re San Rafael Baking Co.*, 219 B.R. 860, 866 (9th Cir. BAP 1998); *In re Charles P. Young Co.*, 111 B.R. 410, 413 (Bankr. S.D.N.Y. 1990); *In re Sullivan Motor Delivery, Inc.*, 56 B.R. 28, 29, 31 (Bankr. E.D. Wis. 1985) (all finding that § 1113 does not apply to expired collective bargaining agreements); with *In re 710 Long Ridge Rd. Operating Co., II*, 518 B.R. 810, 830 (Bankr. D.N.J. 2014); *In re Karykeion, Inc.*, 435 B.R. 663, 675 (Bankr. C.D. Cal. 2010); *In re Ormet Corp.*, 316 B.R. 662 (Bankr. S.D. Ohio 2004); *United Food & Commercial Workers Union, Local 770 v. Official Unsecured Creditors Comm. (In re Hoffman Bros. Packing Co.)*, 173 B.R. 177, 184 (9th Cir. BAP 1994) (all applying § 1113 to expired collective bargaining agreements).

and the statutory bargaining obligation drawn by the Court in *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 548-49 (1988), and again in *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 206-07 (1991).

The Union represents over 1,000 workers at the Trump Taj Mahal in Atlantic City. App. 35. The most recent collective bargaining agreement between the Union and Trump Taj Mahal Associates, LLC ("Trump") was negotiated in 2011 for a three-year term. The agreement contained a duration provision stating that it would remain in effect through September 14, 2014, and then continue in effect thereafter unless either party gave sixty days' written notice that it sought to terminate, modify, or amend the agreement. App. 6. Trump gave notice to the Union by letter dated March 7, 2014, which caused the agreement to expire by its own terms on September 14, 2014. App. 7-8.

On September 9, 2014, Trump Entertainment Resorts, Inc., and its affiliated debtors including Trump filed a voluntary petition under Chapter 11 of the Bankruptcy Code. App. 7. On September 26, 2014, Trump filed a motion in the Bankruptcy Court under 11 U.S.C. § 1113 seeking to reject the collective bargaining agreement and implement different terms proposed by Trump. App. 8.

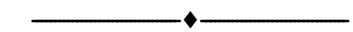
Trump met with the Union just once in the period between filing for bankruptcy and filing the § 1113 petition to reject the collective-bargaining agreement.

App. 8. After Trump filed the § 1113 motion, the Union and Trump met twice more for bargaining. App. 37-38. The bankruptcy court entered an order granting Trump's § 1113 motion on October 17, 2014. App. 8. Trump immediately implemented the changes in terms and conditions of employment that the Union had rejected. It ceased making contributions to the pension, health and welfare, and severance funds that provided benefits to Trump's employees. It expanded its own authority to consolidate positions, assign work, and subcontract, which resulted in layoffs and loss of pay. It eliminated paid meal times and the guarantee of a full day's shift. It reduced holiday pay. Revised Request for Payment of Administrative Expenses Contingent Upon NLRB Proceeding and, in the Alternative, Proof of Claim ¶ 8, *In re Trump Entertainment Resorts, Inc.* (Bankr. D.Del. Case 14-12103) (Doc. 1950, March 25, 2016).

The parties stipulated to an expedited appeal of the Bankruptcy Court order, which was heard on March 4, 2015. App. 1. The Court of Appeals affirmed the Bankruptcy Court decision. It held that "§ 1113 does not distinguish between the terms of an unexpired collective bargaining agreement and the terms and conditions that continue to govern after the collective bargaining agreement expires." App. 6. It based its conclusion not on a careful parsing of the words of the statute, calling this "hyper-technical," but on its "holistic" conceptions of bankruptcy policy. App. 16 and 14 n.23. It concluded that the congressional purpose behind § 1113 was to subordinate all

"labor obligations" under the NLRA to the needs of debtors to reorganize successfully. App. 26-27. The court found sparse legislative history to support this view, which contradicts the universally-accepted reality that § 1113 was intended to give union-represented workers *greater* protection from bankrupt employers. *See Wheeling-Pittsburgh Steel Corp. of America v. United Steelworkers Corp. of America*, 791 F.2d 1074, 1082-88 (3d Cir. 1986). The court held that the authority of the NLRB to enforce the NLRA should be disregarded, despite previously uniform law under 11 U.S.C. § 362(b)(4) that the NLRB's authority continues after an employer files for bankruptcy. "[I]t is the expertise of Bankruptcy court which is needed rather than that of the NLRB." App. 27.

The NLRB filed an *amicus* brief in the Third Circuit proceedings, urging reversal. It argued that "[t]he NLRB has a significant interest in the Court's disposition of this case because the decision below – which set aside NLRA-imposed terms and conditions of employment applicable, absent impasse, during post-contract periods – displaces the Board's primary authority to decide and enforce these statutory rights." Brief for the National Labor Relations Board as *Amicus Curiae* Urging Reversal in Support of Appellant UNITE HERE Local 54 at 2, *In re Trump Entertainment Resorts, UNITE HERE Local 54*, 810 F.3d 161 (3d Cir. 2016) (No. 3111862012).



REASONS FOR GRANTING THE WRIT

I. AN EMPLOYER'S CONTRACTUAL DUTIES UNDER A COLLECTIVE BARGAINING AGREEMENT ARE ENTIRELY DISTINCT FROM ITS STATUTORY DUTY NOT TO UNILATERALLY CHANGE EMPLOYMENT TERMS.

During the term of a collective bargaining agreement, an employer is bound by the contractual obligations it has agreed to, as set forth in the agreement. These obligations include the employer's obligations with respect to terms and conditions of employment and other matters affecting the employees in the bargaining unit. If an employer violates any of these obligations, it is in breach of contract. The union may seek appropriate remedies for breach.[2]

An employer also has statutory obligations with respect to collective bargaining. These obligations are set forth in the National Labor Relations Act. Section 8(a)(5) of the NLRA provides that it is 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

[2] Breach of a collective bargaining agreement is very often dealt with via an arbitration procedure that has been agreed to as part of the collective bargaining agreement. When arbitration is not available, § 301 of the National Labor Relations Act grants federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization." 29 U.S.C. § 185.

obligation to "confer in good faith with respect to wages, hours, and other terms and conditions of employment." It is a *per se* violation of the § 8(a)(5) duty to bargain for the employer to make unilateral changes concerning mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962). An employer may not unilaterally change the terms and conditions of employment – mandatory subjects of bargaining – in the time period after the certification of a union as the collective bargaining representative and before reaching a first contract. *Katz*, 369 U.S. at 739. However, if bargaining over a new collective bargaining agreement arrives at a genuine impasse, an employer may unilaterally implement its final offer. Unilateral changes are more than just a way to meet operational needs but are an economic weapon during a bargaining conflict. *See American Shipbuilding Company v. NLRB*, 380 U.S. 300, 313 (1965); *HiWay Billboards, Inc.*, 206 NLRB 22, 23 (1973), *enf. denied* 500 F.2d 181 (5th Cir. 1974).

CBAs expire just like other contracts. Important things happen when they do. Union security must end when the collective bargaining agreement expires. 29 U.S.C. § 158(a)(3); *Bethlehem Steel*, 136 NLRB 1500, 1502 (1962). Arbitration is no longer available to settle disputes. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 200-01 (1991). No-strike clauses terminate with the contract because of the union's statutory right to strike. 29 U.S.C. §§ 158(d)(4), 163; *NLRB v. Lion Oil Co.*, 352 U.S. 282, 293 (1957). For most other terms and conditions of

employment, however, an employer must perform its bargaining obligations under the NLRA before making unilateral changes after the expiration of the collective bargaining agreement. *Litton Financial Printing*, 501 U.S. at 198. The duties which survive the expiration of the collective bargaining agreement are created by § 8(a)(5), not by the contract. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 548-49 (1988).

In contrast to violations of an unexpired collective bargaining agreement, the remedy for a violation of the employer's § 8(a)(5) duty to refrain from unilateral changes unless negotiations reach impasse is to file an unfair labor practice charge with the National Labor Relations Board ("NLRB" or "Board"). The Board has exclusive jurisdiction over allegations of violations of the duty to bargain. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). As discussed below, *infra* at 27, the Board retains its ability to act on such allegations despite the automatic stay provision of the Bankruptcy Code.

II. BANKRUPTCY CODE § 1113 WAS ADOPTED IN RESPONSE TO THIS COURT'S *BILDISCO* DECISION AND PERMITS ONLY THE REJECTION OF COLLECTIVE BARGAINING AGREEMENTS, NOT NLRA BARGAINING DUTIES.

The history leading to the enactment of § 1113 demonstrates that Congress conspicuously chose the term "collective bargaining agreement" instead of a

broader reference to collective bargaining, and in light of existing law understood the term to mean an agreement still in effect by its own terms. Congress' purpose was to give greater protection to collective bargaining agreements during bankruptcy proceedings and to reduce the power of the bankruptcy courts to change employees' terms and conditions of employment.

Congress enacted § 1113 in direct response to the Court's decision in *NLRB v. Bildisco and Bildisco*, 465 U.S. 513 (1984). Thus, an analysis of whether § 1113 was intended by Congress to permit the "rejection" of continuing terms and conditions of an expired collective bargaining agreement must consider the effect of *Bildisco* on the ability of a debtor-in-possession ("employer") to "reject" such terms under the Bankruptcy Code as it stood prior to the enactment of § 1113.

In *Bildisco*, the employer was party to an existing collective bargaining agreement. After filing its bankruptcy petition, the employer refused to pay for health and pension benefits, remit union dues, and to pay wage increases as provided in the agreement. After unilaterally implementing these changes, the employer requested permission from the bankruptcy court to reject the collective bargaining agreement pursuant to § 365(a). The Court addressed two issues: (1) under what conditions could a bankruptcy court permit an employer to reject a collective bargaining agreement during its term, and (2) whether the NLRB could find an employer guilty of an unfair

labor practice for making a unilateral modification to an existing collective bargaining agreement prior to receiving the bankruptcy court's approval to reject the agreement.

There was no dispute that a collective bargaining agreement was an "executory contract" not falling within any of the exceptions of § 365(a), so the debtor could reject it with the bankruptcy court's approval. "Congress intended that § 365(a) apply to all collective-bargaining agreements covered by the NLRA." *Bildisco* at 522-23. The issue was whether the standard for rejection should be higher than for commercial contracts. All of the lower courts had concluded that the standard should be higher but disagreed on its formulation. The Court held unanimously that rejection should be allowed if the "debtor can show that the collective-bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract." *Id.* at 525-26. The Court did not absolve the debtor of its duty to bargain under § 8(a)(5) of the NLRA, however. It held that the Bankruptcy Court should not act on a petition to reject a collective bargaining agreement unless it is "persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution." *Id.* at 527.

Addressing the second question, the Court reconciled § 365(a) of the Bankruptcy Code with § 8(d) of the NLRA, which prohibits unilateral modification of a collective bargaining agreement during its term and

imposes a series of procedures for opening an agreement for renegotiation. The Court pointed out that rejection of a contract under § 365(a) relates back to the date of the filing of the petition. It concluded that this was as true of collective bargaining agreements as any other contract. *Bildisco*, 465 U.S. at 529-30. Because of this relation-back doctrine, Section 8(d) did not apply to a rejected agreement, since there was no in-force agreement to modify. *Id*. at 531. "[W]hile a debtor-in-possession remains obligated to bargain in good faith under NLRA § 8(a)(5) over the terms and conditions of a possible new contract, it is not guilty of an unfair labor practice by unilaterally breaching a collective-bargaining agreement before formal Bankruptcy Court action." *Id*. at 534. Upon rejection of the CBA, the union and its members would be entitled to damages, but recovery must be through administration of the claim in the bankruptcy action, *id*. at 530, and not through NLRB proceedings, *id*. at 532. But once again, the Court stated that the debtor still had the obligation to bargain "with the employees' certified representative over the terms of a new contract pending rejection of the existing contract or following formal approval of rejection by the Bankruptcy Court." *Id*. at 534. Four Justices dissented to this part of the Court's decision. They would have held that the requirements of § 8(d) continue in effect until the collective bargaining agreement is actually rejected. *Id*. at 554 (Brennan, J., dissenting).

The state of the law in the wake of *Bildisco*, then, was that CBAs could be rejected under § 365(a) of the

Bankruptcy Code, albeit under a somewhat heightened standard than applied to other executory contracts; a debtor-in-possession would not commit an unfair labor practice by unilaterally breaching an existing collective bargaining agreement prior to formal rejection pursuant to § 365(a); and a debtor-in-possession retained its duty under the NLRA to bargain collectively.

Efforts began immediately to amend the Bankruptcy Code to override *Bildisco*. *See In re Century Brass Products, Inc.*, 795 F.2d 265, 272 (2d Cir. 1986); *Wheeling-Pittsburgh Steel Corp. of America v. United Steelworkers Corp. of America*, 791 F.2d 1074, 1082-88 (3d Cir. 1986).

When legislation responsive to *Bildisco* was initially passed by the House, it provided that "[n]o provision of this title shall be construed to permit the trustee unilaterally to terminate or alter any of the *wages, hours, terms and conditions established by a collective bargaining agreement*." 130 Cong.Rec. H1842 (daily ed. March 21, 1984) (emphasis added). This version was passed by the House on March 21, 1984. 130 Cong.Rec. H1853. If this version had been enacted by the whole Congress as § 1113, then there might have been real textual support for the decision below. But just the opposite happened.

Four days after the House passed the language above, the Fourth Circuit addressed the question of whether the *Bildisco* holding applied to the terms and conditions of employment from an expired collective bargaining agreement. In *Gloria Manufacturing*

Corp. v. International Ladies' Garment Workers' Union, 734 F.2d 1020 (4th Cir. 1984), the court considered *Bildisco* and held that § 365(a) was inapplicable to a collective bargaining agreement which had expired. The court reasoned that § 365(a) explicitly permits the assumption or rejection only of "executory contracts," that is, contracts "under which the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other." *Gloria Manufacturing*, 734 F.2d at 1022 (quoting Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L.Rev. 439, 460 (1973)). An expired contract is not executory, because nonperformance would not constitute a material breach. In fact, "[o]nce a contract has expired on its own terms, there is nothing left for the trustee to reject or assume." *Gloria Manufacturing*, 734 F.2d at 1022. Thus, § 365(a) does not apply to an expired collective bargaining agreement.

No one in Congress took any exception to *Gloria Manufacturing* or tried to counter it legislatively. Senator Thurmond introduced a bill on May 21 that would have codified *Bildisco*. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1083. He made no comment about changing the result in *Gloria Manufacturing*, issued less than a month before his bill was submitted, by the Fourth Circuit which of course includes Sen. Thurmond's own South Carolina.

The Senate adopted a bill that did not address rejection, in order to permit the Conference Committee to address the issue. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1083. Section 1113 was enacted in final form on July 10, 1984. Pub.L.No. 98-353, 98 Stat. 390. The language in the House bill (corresponding to what is now § 1113(f)) permitting unilateral change of "wages, hours, terms and conditions established by a collective bargaining agreement" was dropped and replaced with just "collective bargaining agreement." The conference report adopting the Senate's version had previously passed the House on June 29, 1984. 130 Cong.Rec. H7499 (daily ed. June 29, 1984).

Section 1113 addresses both of the Supreme Court's holdings in *Bildisco*. On the method by which a court may permit the rejection of a collective bargaining agreement in bankruptcy, Congress essentially adopted the framework of *Bildisco*, but it elaborated with more detail the negotiations which must take place before the court considers rejection and tightened the standard by providing that the balance of equities must "clearly" favor rejection. § 1113(b) through (d). The only proposals a debtor may make and a union must consider are "those necessary modifications . . . necessary to permit the reorganization of the debtor" § 1113(b)(1)(A). In addition, "Section 1113 reversed the second part of *Bildisco*." *In re Century Brass Products, Inc.*, 795 F.2d 265, 272 (2d Cir. 1986). Section 1113(f) prohibited unilateral termination or alteration of a "collective bargaining agreement" by a debtor prior to the

negotiations and rejection provided in subsections (b) through (d). These procedures are an expanded version of NLRA § 8(d), even quoting the core phrase from NLRA § 8(d) requiring the bargaining parties to "meet, at reasonable times, . . . to confer in good faith." § 1113(b)(2); *cf.* 29 U.S.C. § 158(d).

Like all the Justices in *Bildisco*, both the majority and the dissenters, Congress recognized that there are exigencies in reorganization cases which call for quicker action than the negotiation procedures under either § 8(d) or under § 1113(b) through (d). For such circumstances, § 1113(e) creates a separate procedure and standard for the court to grant *interim changes* in the collective bargaining agreement's provisions. *See, e.g.*, *In re Landmark Hotel & Casino*, 872 F.2d 857, 860 (9th Cir. 1989).

What remains unchanged from the *Bildisco* decision after the adoption of § 1113 are two important principles. First, that "CBAs are executory contracts" is "not disturbed by the enactment of § 1113." *In re Family Snacks, Inc.*, 257 BR 884, 900 (BAP 8th Cir. 2001). Second, § 1113 did not modify *Bildisco*'s conclusion that, because they are employers under the NLRA, debtors-in-possession remain subject to the NLRA's duty to bargain with their employees' certified representatives.

III. "COLLECTIVE BARGAINING AGREEMENT" IS A TERM OF ART WITH SETTLED MEANING AND WAS SO WHEN § 1113 WAS ENACTED; IT MEANS A LABOR *CONTRACT*, NOT POST-CONTRACT OBLIGATIONS.

This case turns on the proper construction of § 1113. That inquiry begins with the statutory text, construed according to its ordinary meaning. *See, e.g.*, *United States v. Quality Stores, Inc.*, 134 S.Ct. 1395, 1399-1400 (2014); *Sebelius v. Cloer*, 133 S.Ct. 1886, 1893 (2013). If "'the statutory language is unambiguous and the statutory scheme is coherent and consistent,'" the inquiry comes to an end. *Sebelius*, 133 S.Ct. at 1895 (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)); *accord Patterson v. Shumate*, 504 U.S. 753, 757, 759 (1992) (Because "the plain language of the Bankruptcy Code" is the determinant, the Court "must enforce the statute according to its terms.") "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result *demonstrably at odds* with the intentions of its drafters.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)) (emphasis added). "Requiring a demonstration that the plain meaning of a statute is at odds with the intentions of its drafters is a more stringent mandate than requiring a showing that the statute's literal application is unreasonable in light of bankruptcy

policy." *In re Sunterra Corporation*, 361 F.3d 257, 269 (4th Cir. 2004).

The term "collective bargaining agreement" is central to the field of labor law and carries a well-established meaning. It denotes a contract between an employer and a labor union as the authorized representative of a group of workers; the subject matter of the contract is the terms and conditions of employment of the workers it covers. There is no dispute that a collective bargaining agreement is a contract – the terms "collective bargaining contract" and "labor contract" are synonymous. *See, e.g.*, *Textile Workers Union of America v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957) at 449 ("collective bargaining agreement"), 453 ("collective bargaining contract[ ]"), 466 ("labor contract[ ]"). Section 8(d) of the NLRA uses the term "collective-bargaining contract," and the duties of unions and employers spelled out in that subsection are all keyed to the existence and expiration of these contracts. NLRA § 301 was enacted as part of the Taft-Hartley amendments for the purpose of ensuring the enforceability of collective bargaining agreements. *Lincoln Mills*, 353 U.S. at 453-55. The Court has used the term in literally every case it has decided under Section 301, and in other contexts like *Bildisco*, and has never expressed any uncertainty about its meaning. *See, e.g.*, *Granite Rock, Inc. v. Intern. Bro. of Teamsters*, 561 U.S. 287, 311 (2010); *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235, 252-53 (1970); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 513 (1962). The meaning of the term was

thoroughly settled at the time Congress adopted § 1113 and must have been what it intended. When interpreting a statute, courts "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

The Court has been clear that a collective bargaining agreement and the statutory duty to keep some terms and conditions in effect pending negotiations are entirely distinct. The difference is "elemental." *Litton Financial Printing*, 501 U.S. at 206. "Under [*NLRB v.*] *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." *Id*. "*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." *Id*. at 207.

In *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 546-49 (1988), § 515 of the Employee Income Retirement Security Act, 29 U.S.C. § 1145, was at issue. This provision gives an employee benefit plan the right to sue in federal court to collect delinquent contributions due "under the terms of the plan or under the terms of a collectively bargained agreement." The Court rejected a plan's contention that it could use this statute to collect contributions an employer was obligated to continue making after the

expiration of a collective bargaining agreement by virtue of its statutory bargaining duty. "The text of § 515 plainly describes the employer's contractual obligation to make contributions but omits any reference to a noncontractual obligation imposed by the NLRA." *Advanced Lightweight Concrete*, 484 U.S. at 546. Moreover, the legislative "history contains no mention of the employer's statutory duty to make postcontract contributions while negotiations for a new contract are being conducted." *Id.* at 548. Both statements are as true of § 1113 as they are of ERISA § 515. Section 515 was enacted in 1980, just four years before § 1113, which further supports the conclusion that Congress used "collective bargaining agreement" in § 1113 in the precise, accepted meaning the Court gave it in *Advanced Lightweight Concrete*.

In the opinion below, the Court of Appeals dismissed the plain, accepted meaning of "collective bargaining agreement" as "hyper-technical." App. 16. Instead of applying the plain language of § 1113, the Court of Appeals searched for the meaning of "collective bargaining agreement" by taking a "broader, contextual view" that takes into account the provisions of the whole law and its object and policy. App. 14. The Court of Appeals licensed an excursion into judicial policymaking by calling statutory construction "a holistic endeavor." App. 14 n.23 (quoting *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 559 (3d Cir. 2003)). But contrary to the decision

below, in this case the statutory context shows that Congress used "collective bargaining agreement" to mean a contract in force by its own terms. The Court of Appeals ignored the proper interpretive context provided by the Bankruptcy Code and instead used small bits in the legislative record to fashion a philosophy about the statute untethered to its words and history.

Certainly, words in a statute may not be viewed in isolation. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (citations omitted). Reading "collective bargaining agreement" in § 1113 to mean an agreement in force by its own terms is supported by its context and its relation to other parts of the Bankruptcy Code.

It is abundantly clear from the legislative record that § 1113 was intended to address *Bildisco*. *See In re Royal Composing Room, Inc.*, 848 F.2d 345, 352-54 (2d Cir. 1988) (discussing legislative history of § 1113); *Wheeling-Pittsburgh Steel Corp. of America v. United Steelworkers Corp. of America*, 791 F.2d 1074,

1081-84 (3d Cir. 1986). *Bildisco* allowed rejection because a collective bargaining agreement is an executory contract, not because of any statutory obligations, and § 1113 accordingly refers only to a collective bargaining agreement. Section 1113 still allows rejection but subject to a tighter standard and with more elaborate procedure. Even though § 1113 provides specifically for the rejection of a "collective bargaining agreement," and does not mention the continuing obligations imposed by the NLRA, the Third Circuit asserted that "neither does it restrict its prescription to 'executory' or 'unexpired' CBAs." App. 16. The court contrasted this to § 365, which refers to "executory contracts or unexpired leases," App. 16 n.30, turning a blind eye to the reality that § 1113 was a direct outgrowth of § 365 as it was interpreted in *Bildisco*. The Court in *Bildisco* held that the collective bargaining agreement *is* an "executory contract." Congress would hardly have understood its reference to "collective bargaining agreement" to mean anything else but a contract that the Court had authoritatively declared to be executory in nature. Calling collective bargaining agreements "executory" would have been redundant. The Third Circuit did not explain how it (or Congress) could conceive of a collective bargaining agreement that was *not* executory. Until a collective bargaining agreement expires, the employer and the union each have performance to render to the other.

Section 1113(a) makes clear that the section addresses the same kinds of actions a bankruptcy court might take under § 365 by using the words

"assume or reject," the same as in § 365. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-98 (1979) (in interpreting a newly enacted statute using the same words as an existing statute, Congress is presumed to have intended the same construction to apply to the new statute as applied to the existing statute). Under § 365(a), expired contracts may not be rejected, as the Third Circuit itself has held. *Counties Contracting and Construction Co. v. Constitution Life Ins. Co.*, 855 F.2d 1054, 1061 (3d Cir. 1988) ("Once the contract is no longer in existence, the right to assume it is extinguished. A contract may not be assumed under § 365 if it has already expired according to its terms.") (citing 2 Collier on Bankruptcy ¶ 365.04; *In re Anne Cara Oil Co.*, 32 B.R. 643 (Bankr. D.Mass. 1983)); *accord In re Dant & Russell, Inc.*, 853 F.2d 700, 706 (9th Cir. 1988); *In the Matter of Triangle Laboratories, Inc. v. Halvajian*, 663 F.2d 463, 467 (3d Cir. 1981). We have found no applications of § 365(a) to obligations other than those founded in contract, let alone to statutory obligations. None was cited by either of the courts below.

IV. THE THIRD CIRCUIT'S DECISION GIVES CONTROL OVER LABOR LAW TO THE BANKRUPTCY COURTS, DISPLACING THE NLRB'S LONG-RECOGNIZED ENFORCEMENT AUTHORITY UNDER § 362(B)(4) OF THE BANKRUPTCY CODE.

As the Court held in *Advanced Lightweight Concrete*, an employer's statutory bargaining obligations,

as opposed to its contractual promises, can be enforced only by the NLRB. This remains true when an employer enters bankruptcy protection. Appellate courts have uniformly found NLRB enforcement proceedings to prevent, adjudicate, and remedy unfair labor practices to be exempt under Bankruptcy Code § 362(b)(4) from the automatic bankruptcy stay. *See, e.g.*, *NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992); *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 832-35 (9th Cir. 1991); *NLRB v. P*I*E Nationwide, Inc.*, 923 F.2d 506, 511-12 (7th Cir. 1991); *NLRB v. Edward Cooper Painting Inc.*, 804 F.2d 934, 939-41 (6th Cir. 1986); *Ahrens Aircraft, Inc. v. NLRB*, 703 F.2d 23, 24 (1st Cir. 1983); *NLRB v. Evans Plumbing Co.*, 639 F.2d 291, 292-93 (5th Cir. 1981).

The NLRB's enforcement authority during bankruptcy includes unfair labor practice charges alleging illegal unilateral changes by a bankrupt employer. *Edward Cooper Painting*, 804 F.2d at 936-37. The NLRB may even seek an injunction in district court under § 10(j) of the NLRA, notwithstanding the automatic stay, to force an employer to rescind unilateral changes, and may pursue civil contempt enforcement of that injunction, including the imposition of monetary penalties by the court. *Asseo for & on Behalf of NLRB v. Bultman Enterprises, Inc.*, 951 F. Supp. 307, 310 (D.P.R. 1996).

The decision below obliterates the role of the NLRB which § 362(b)(4) preserves. Control over the bargaining process for the entire time a case is in

Chapter 11 passes from the NLRB to the Bankruptcy Court. According to the Third Circuit, "it is the expertise of Bankruptcy court which is needed rather than that of the NLRB." App. 27. *See infra* at 38.

The Court of Appeals regarded this change in the law as necessary because otherwise an employer's statutory obligations will "undermine" the reorganization process. App. 27. The doctrine against unilateral changes is derived from the statutory requirement to "bargain in good faith." Sometimes unilateral changes may be in good faith. The NLRB allows an employer to make unilateral changes under "exigent circumstances" so a debtor does not need § 1113 to avoid bargaining over the elimination of onerous terms of employment. Some types of economic exigencies relieve the employer of its duty to bargain entirely. These are "extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action." *RBE Electronics of S.D., Inc.*, 320 NLRB 80 (1995). The NLRB also recognizes a second type of situation, where the duty to bargain is not entirely excused but where nonetheless the bargaining must take place quickly for economic reasons. *Id.* at 81-82. Moreover, "the amount of time and discussion required to satisfy the statutory obligation 'to meet at reasonable times and confer in good faith' may vary" with the circumstances, including "the exigencies of the particular business situation involved." *Shell Oil Company*, 149 NLRB 305, 307 (1964). Taken together, these doctrines "attempt[ ] to maintain the delicate balance

between a union's right to bargain and an employer's need to run its business." *RBE Electronics*, 320 NLRB at 82. So the "balance" the court below thought was necessary between bankruptcy law and labor law already exists in labor law.

V. THE LEGISLATIVE HISTORY OF § 1113 IS MEAGER, BUT IT SHOWS THAT CONGRESS UNDERSTOOD § 365 TO APPLY ONLY TO COLLECTIVE BARGAINING AGREEMENTS AND NOT NLRA BARGAINING DUTIES, AND THAT IT MODIFIED THE WORDING OF THE FINAL VERSION OF § 1113 ACCORDINGLY.

The existing law when Congress passed § 1113 was that the provision out of which it grew, 365(a), did not apply to post-expiration obligations. *Gloria Manufacturing* was decided in between the House approving the "terms and conditions" version of § 1113 and the full Congress adopting the "collective bargaining agreement" version, right in the middle of intense congressional work on the issue of rejection. *See supra* at 16. What effect *Gloria Manufacturing* may have had can only be inferred, however, because of the absence of any committee reports about the legislation. There is "only a meager legislative history," as the courts of appeals have recognized. *In re Century Brass Products, Inc.*, 795 F. 2d 265, 273 (2d Cir. 1986); *Wheeling-Pittsburgh Steel Corp. of America v. United Steelworkers Corp. of America*, 791 F.2d 1074, 1186 (3d Cir. 1986) (recognizing that "the most

authoritative source of legislative intent lies in committee reports") (citing *Garcia v. United States*, 469 U.S. 70, 76 (1984)). Nevertheless, given its timing, *Gloria Manufacturing* could not have escaped notice and must be presumed to have informed congressional thinking. *Goodyear Atomic Corp. supra*.

After *Gloria Manufacturing*, the wording of the law took a sharp turn that should settle the question in this case. When the bill emerged from conference, the House adopted the Senate version of the bill, which replaced the words "wages, hours, terms and conditions established by a collective bargaining agreement" in § 1113(f) with the familiar "collective bargaining agreement." *See supra* at 18. "'Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.'" *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) (adoption of Senate version rather than conflicting House version indicated that Congress settled the question found in the difference between the versions).

The Third Circuit engaged in no analysis of the text or context of § 1113 and gave the most superficial lip service to the legislative history, picking out only four comments by individual representatives which the court felt gave some incidental support for its views.

Unlike the decision below, the court in *Wheeling-Pittsburgh Steel* conducted an extensive review of the legislative history. 791 F.2d at 1082-84. All statements about what would be protected were about labor contracts. None was about conditions existing after the expiration of a collective bargaining agreement. No one even hinted that a bankruptcy court could use the section to authorize a debtor to make changes in terms and conditions of employment when there was no collective bargaining agreement in place. The same is true of the statements picked out of the legislative record by the court in this case. App. 17-18 n.33, App. 20 n.40, App. 21 n.42, App. 22 n.44, App. 28 n.56, App. 29 n.59. All statements were about "labor contracts" or "collective bargaining agreements" and none was about post-expiration obligations. The court below itself summarized the legislative history in terms of what would be done with "CBAs" and "labor contracts." App. 20. But the court finally rested its views about the meaning of the legislative history on the statements of two representatives, Lungren and Hall. App. 28 n.56, App. 29 n.59. Hall only asked questions of Lungren in the course of a floor debate. App. 29 n.59. None of the statements made by these two representatives referred to post-expiration obligations. In any event, this material is next to worthless. "We have eschewed reliance on the passing comments of one Member, and casual statements from the floor debates." *Garcia*, 469 U.S. at 76 (citations omitted).

VI. THE THIRD CIRCUIT'S DECISION RESTS ON ITS OWN ERRONEOUS POLICY PREFERENCES, PARTICULARLY THE BELIEF THAT THE NEED FOR BANKRUPTCY REORGANIZATION SHOULD SUPERSEDE THE NLRA.

Rather than applying the plain meaning of the statute, the Third Circuit first decided upon a policy goal in light of its views about the importance of Chapter 11 reorganization, and then imposed this policy in this case to greatly expand the reach of § 1113. Moreover, the Third Circuit's policy analysis was heavily influenced by a mistaken view of labor-management relations as regulated by federal labor law.

The main thrust of the Third Circuit opinion was to formulate what the appellate judges, not Congress, considered good policy. It construed § 1113 to go beyond the problem of bankruptcy courts rejecting collective bargaining agreements. The court divined a much larger purpose behind § 1113: "Congress sought to ensure that, *when the NLRA yields to the Bankruptcy Code* it does so only for reasons that will permit the debtor to stay in business." App. 22 (emphasis added). The court's opinion smuggles in the unwarranted assumption that the NLRA yields to the Bankruptcy Code when the two statutes appear to conflict.

The Third Circuit distinguished *Advanced Lightweight Concrete*. It stated that the Court found that Congress clearly intended to confine § 515 of ERISA

to contractual obligations arising from collective bargaining agreements, not to statutory obligations of employers to maintain terms and conditions after the expiration of collective bargaining agreements. App. 24-26. It claimed that that Congress' intent in enacting § 1113 was equally clear, but to the opposite effect. "Conversely, we find the intent of Congress here also to be clear but that intent was to incorporate expired CBAs in the language of § 1113." App. 26. The court had nothing in the way of textual support within § 1113 or legislative history to back up this assertion of clarity, so it turned back to its own notions of how employees' rights should be treated when they pose a risk to successful reorganization. Using its extremely broad reading of § 1113 as effecting the subordination of all NLRA rights, not just collective bargaining agreements, to the needs of debtors for reorganization, the court stated, "§ 1113 meets a gap in the schemes to permit reorganizations when *labor obligations* will prevent the success of a reorganization." App. 27 (emphasis added). According to the court, because § 1113 was designed to "counter . . . the precedent in *Bildisco* which permitted modification of collective bargaining agreement without close scrutiny by the Bankruptcy Court," now with the § 1113 sword in hand, "when the employer's *statutory obligations* to maintain the status quo under the terms of an expired collective bargaining agreement will undermine the debtor's ability to reorganize and remain in business, it is the expertise of the Bankruptcy Court which is needed rather than that of the NLRB." App. 27.

But there is no reason based in statutory text or history to presume that in this alleged clash between two specialized statutory schemes, each adjudicated by specialized tribunals (bankruptcy courts and the NLRB), it is the bankruptcy scheme that trumps. It is clearly a question of *policy* whether the purported interests of a business engaged in Chapter 11 reorganization permit the abrogation of the business's statutory obligations under the NLRA. It is a related question of *policy* whether an employer in Chapter 11 is permitted to apply to a bankruptcy court for permission to breach its duty to bargain, or whether such a breach should be adjudicated by the NLRB. Yet the Third Circuit arrived at its decision, elevating bankruptcy law and bankruptcy courts above the NLRA and the NLRB, by taking upon itself a policymaking role that should be reserved for Congress.

The Court of Appeals decision shows the danger inherent in such judicial policymaking. The appellate panel was offended by the union's bargaining tactics. It complained, "Instead of negotiating with the Debtors, the Union stalled the bargaining sessions, engaged in picketing, and attempted to harm the debtors' business." App. 24. The court failed to understand that economic pressure is exactly what Congress intended to be the motive force in collective bargaining. *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 133-44 (1976). "[T]he use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining." *Id*. at

144 (quoting *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 495 (1960)).

It was apparently the Union's exercise of these rights under the NLRA that contributed to the Third Circuit's conclusion that the Bankruptcy Court's action was appropriate. The court did not explain how its umbrage at the Union's resistance to Trump's demands helped the court discern the meaning of the statute. Rather, the court appears to have used its notion that NLRA rights must give way to the goals of the Bankruptcy Code to reach the conclusion that where a union is uncooperative with the debtor's demands, the bankruptcy court must be able to step in to enable the debtor to effectuate the changes it believes it needs.

In an even more extraordinary – and far-reaching – explanation for its holding, the Court recited that Trump's first lien secured creditor (Carl Icahn) would give the business a $100 million cash infusion only if *the collective bargaining agreement* were rejected (and certain tax relief were obtained), so "successful reorganization, therefore, depends on the rejection of the terms that the Debtors are required to maintain under the NLRA." App. 24. This statement is troubling for two reasons. First, it contains an obvious non-sequitur that already assumes the Court's conclusion, by equating "the collective bargaining agreement" with the debtor's statutory duty to bargain – and assuming that because a creditor desired relief from this statutory duty, the relief was within the bankruptcy court's power to deliver. Second, the

court's reasoning here turns the test for rejection into only a question of what would satisfy the dictates of a potential provider of new financing. An ultimatum from a financier – or for that matter, from the debtor or other creditors – has no bearing on the meaning of the statute.

Even if the Third Circuit had been right that the term "collective bargaining agreement" in § 1113 could mean something other than a collective bargaining agreement, and that there was a tension between the bargaining obligations of a debtor without a collective bargaining agreement and the rehabilitative purposes of the Bankruptcy Code, it was obligated to search for an accommodation that would reconcile the two statutes and their policies as well as possible. "[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The court below did not do this. Instead, it held simply that the purposes of the Bankruptcy Code are more important than those of the NLRA and that the latter must give way, whenever it conflicts with the debtor's needs. Trump "should not be bound by the expired agreement's burdensome terms until the parties negotiate to impasse. That interpretation of the statute would undercut the rehabilitative function of Chapter 11." App. 29-30. For this proposition the court cited authorities about the need to interpret *one* statute in order to accomplish its objectives, seemingly oblivious – or uncaring –

that there are *two* statutes in effect. App. 30 n.60. The Third Circuit opined, notably without reference to labor law, "[u]nder the policies of bankruptcy law, it is preferable to preserve jobs through a rejection of a collective bargaining agreement, as opposed to losing the positions permanently by requiring the debtor to comply with the continuing obligations set out by the collective bargaining agreement." App. 30. The court said it is "essential" that the Bankruptcy Court be able to remove "conditions that can detrimentally affect the life of a debtor, whether such encumbrances attached by operation of contract or a complex statutory framework." App. 30. This exercise in judicial policymaking ignores the policies established by Congress and the NLRB in the collective-bargaining context: permitting the use of economic pressure as an aspect of collective bargaining, holding the parties to a duty to bargain in the expectation that the employer and union should create their own compromises rather than have concessions imposed by a court, and modifying the duty to bargain in exigent circumstances.

Because the statutory bargaining duty continues, unlike a rejected contract, the power the Court of Appeals vested in the Bankruptcy Court knows no limit other than the end of the Chapter 11 case. Because the collective bargaining agreement in this case was expired, the Bankruptcy Court did not actually order its rejection *in toto*. Instead, it authorized Trump to change particular items which had been provided in the collective bargaining agreement,

not touching the other terms and conditions which had been set forth in the collective bargaining agreement, of which there were many. *See* App. 64-68. Both courts below left the door open for further judicial interference with the collective bargaining process between the Union and Trump. Trump might come back to the Bankruptcy Court again – perhaps several times – for permission to make other changes without going to the NLRA bargaining process. The Third Circuit offered no principle that would foreclose this, nor did it address this obvious problem with its analysis. Once a collective bargaining agreement expires, an employer and a Union may remain without an agreement for a while – sometimes a very long time. Because the Third Circuit did not put any endpoint on the time following expiration of the collective bargaining agreement during which an employer may use § 1113 to avoid its NLRA responsibilities, or limit the employer to one bite at this apple, the Bankruptcy Court can supplant the NLRB as the regulator of the bargaining process for the entire duration of the Chapter 11 proceeding, which can also go on for quite some time. Trump filed its petition in September 2014, and the bankruptcy case is still going on.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 14, 2016

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-4807

IN RE: TRUMP ENTERTAINMENT
RESORTS, UNITE HERE Local 54,

Appellant

On Appeal from the United States Bankruptcy Court
for the District of Delaware
(D. Del. Bankruptcy No. 14-12103)
Bankruptcy Judge: Honorable Kevin Gross

Argued March 4, 2015

Before: SHWARTZ, SCIRICA
and ROTH, Circuit Judges

(Opinion filed: January 15, 2016)

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OPINION

ROTH, *Circuit Judge*:

This appeal requires us to resolve the effect of two potentially conflicting provisions of federal law. Section 1113 of the Bankruptcy Code allows a Chapter 11 debtor to "reject" its collective bargaining agreements (CBAs) under certain circumstances.[1] The National Labor Relations Act (NLRA) prohibits an employer from unilaterally changing the terms and

[1] 11 U.S.C. § 1113.

conditions of a CBA even after its expiration.[2] Thus, under the NLRA, the key terms and conditions of an expired CBA continue to govern the relationship between a debtor-employer and its unionized employees until the parties reach a new agreement or bargain to impasse. This case presents a question of first impression among the courts of appeals: is a Chapter 11 debtor-employer able to reject the continuing terms and conditions of a CBA under § 1113 after the CBA has expired?

UNITE HERE Local 54 (Union) appeals the Bankruptcy Court's order granting the Debtors' motion to reject their CBA with the Union pursuant to § 1113(c). The Union contends that the Bankruptcy Court lacked subject matter jurisdiction to approve the Debtors' motion because the CBA had expired. The Debtors, Trump Entertainment Resorts, Inc., and its affiliated debtors,[3] contend that § 1113(c) governs all CBAs, expired and unexpired, and that the Bankruptcy Court's interpretation of § 1113 is consistent with the policies underlying the Bankruptcy Code.

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[2] *See* 29 U.S.C. § 158(a)(5); *NLRB v. Katz*, 369 U.S. 736, 743 (1962) (holding that an employer commits an unfair labor practice if, without bargaining to impasse, it unilaterally changes existing terms or conditions of employment); *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *Laborers Health & Welfare Trust Fund for N. Cal. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988) (applying the *Katz* doctrine to expired CBAs)).

[3] The affiliated debtors include Trump Taj Mahal Associates, LLC, the Union's counter-party to the CBA.

We conclude that § 1113 does not distinguish between the terms of an unexpired CBA and the terms and conditions that continue to govern after the CBA expires. Thus, we will affirm the order of the Bankruptcy Court.

I.

A.

The facts giving rise to this appeal are undisputed. The Debtors own and operate the Trump Taj Mahal casino in Atlantic City, New Jersey. The casino employs 2,953 employees, 1,467 of whom are unionized. UNITE HERE Local 54 is the largest of the employee unions, representing 1,136 employees. The most recent CBA between the Union and Taj Mahal was negotiated in 2011 for a three-year term. It contained a duration provision – titled "term of contract" – that provided:

The collective bargaining agreement shall remain in effect until 11:59 p.m. on September 14, 2014 and shall continue in full force and effect from year to year thereafter, unless either party serves sixty (60) days written notice of its intention to terminate, modify, or amend the Collective Bargaining Agreement.

In early 2014, due to the casino's deteriorating financial health,[4] the Debtors attempted to negotiate

[4] In 2011, Taj Mahal's earnings before interest, taxes, depreciation, and amortization (EBITDA) were approximately $32

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a new agreement. Specifically, on March 7, the Debtors gave the Union notice of their "intention to terminate, modify or amend" the CBA and asked the Union to begin negotiations for a new agreement. The Union did not respond. On April 10, the Debtors followed up on their request. On April 30, the Union responded that "while [it is] also anxious to commence bargaining, the Union is simply not ready, some five months out [from expiration of the CBA], to commence negotiations" but it would "contact [the Debtors] within the next several months."

On August 20, at the Debtors' request, the Union met with the Debtors to discuss terms for a new agreement. Although the Debtors emphasized their critical financial situation, the Union was not receptive to negotiations. On August 28, the Debtors proposed modifications to the CBA, including replacing the pension contributions with a 401(k) program, and replacing the health and welfare program with subsidized coverage under the Affordable Care Act. The Union responded that it was prepared to work with the Debtors on workers' pensions, but not on the health and welfare proposal. No agreement was reached.

On September 9, 2014, the Debtors filed for Chapter 11 bankruptcy protection. On September 11,

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million. The casino's earnings plummeted to a loss of $6.1 million in 2013. As of June 30, 2014, Taj Mahal's twelve-month EBITDA was a loss of $25.7 million.

the Debtors asked the Union to extend the term of the CBA, but the Union refused, unless the Debtors agreed to terminate the extension upon the filing of a § 1113 motion. It is undisputed that, with no new agreement in place and with the Debtors having served notice to modify the agreement, the CBA expired on September 14, 2014.

On September 17, the Debtors sent the Union a proposal with supporting documentation to demonstrate the Debtors' "dire" financial condition, and requested to meet "on any day and at any place" within the next seven days. The Union proposed to meet on September 24, for the first bargaining session. After the meeting on September 24, the Union requested additional information, which the Debtors promptly provided. Two days later, the Union sent a "counter-proposal" to the Debtors, which consisted largely of more information requests. Also on September 26, the Debtors filed a motion pursuant to 11 U.S.C. § 1113 seeking to reject the CBA and implement the terms of the Debtors' last proposal to the Union. The Debtors asserted that rejection of the CBA was necessary to their reorganization based on a three-part business plan, which anticipated concessions from the first lien lenders, local and state authorities, and the Union.

On October 17, 2014, following evidentiary hearings, the Bankruptcy Court granted the Debtors' motion to reject the expired CBA and authorized the Debtors to implement their last proposal.

B.

In granting the Debtors' motion, the Bankruptcy Court addressed three issues. First, the court considered whether it had the authority to grant the motion to reject the CBA, given that the CBA had expired after the Debtors filed for bankruptcy but before the Debtors filed the rejection motion. The court concluded that § 1113 permits rejection of expired CBAs, reasoning that § 1113 is not limited to "unexpired" or "executory" CBAs. The court observed that, in passing § 1113 as a whole, Congress "recognized the need for an expedited process by which debtors could restructure labor obligations" and "provided several checks" to protect union employees.[5] The court could not discern a reason for distinguishing between expired and unexpired CBAs because granting the union the power to delay the bankruptcy process would subvert the "policy and bargaining power balances Congress struck in Section 1113."[6]

Having decided that § 1113 encompasses expired CBAs, the Bankruptcy Court determined that the Debtors satisfied the requirements of § 1113. Specifically, the court found that the Debtors' proposal provided "for those necessary modifications . . . that are necessary to permit the reorganization of the debtor;" that the Union rejected the proposal without good

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[5] *In re Trump Entm't Resorts, Inc.*, 519 B.R. 76, 86 (Bankr. D. Del. 2014).

[6] *Id.* at 87.

cause; and that the balance of the equities clearly favored rejection of the CBA.[7] The Bankruptcy Court noted that, based on "uncontroverted evidence" at the hearing, the Debtors would be forced to close the casino and liquidate if the requested relief were not granted.[8] The Bankruptcy Court also expressed concern that "while [the] Debtors were imploring the Union to engage with them in discussions, offering to meet '24/7,' . . . the Union was engaging in picketing, a program of misinformation . . . and, most egregiously, communicating with customers who had scheduled conferences at the Casino to urge them to take their business elsewhere."[9] It was "clear" to the Bankruptcy Court that "the Union was not focusing its efforts on negotiating to reach agreement with Debtors."[10]

Finally, the Bankruptcy Court determined that, under § 1113, it could authorize the Debtors to modify the expired CBA and implement the terms of Debtor's proposal. The court observed that the text of § 1113 did not explicitly grant the court authority to implement the proposed terms, but the "reasoned view" is that a debtor in possession is authorized "to

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[7] *See id.* at 88-92; *see generally* 11 U.S.C. § 1113(b)(1).

[8] *Id.* at 87.

[9] *Id.* at 82.

[10] *Id.*; *see id.* at 81 ("The correspondence admitted into evidence is alarming in showing the Debtors were literally begging the Union to meet while the Union was stiff-arming the Debtors.").

implement changes to the terms and conditions of employment that were included in the section 1113 proposals approved by the bankruptcy court."[11]

The parties petitioned this Court for direct appeal,[12] which we granted on December 15, 2014. The Union challenges only the first issue addressed by the Bankruptcy Court, whether a Bankruptcy Court may grant a motion to reject an expired CBA under § 1113.[13]

II.

The Bankruptcy Court had jurisdiction under 28 U.S.C. §§ 157(b) and 1334(a).[14] We have jurisdiction

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[11] *Id.* at 92 (citing *7 Collier on Bankruptcy* ¶ 1113.06[1][b] (16th ed. 2014)).

[12] *See* 28 U.S.C. § 158(d)(2).

[13] The Union raises the issue of whether the Bankruptcy Court had the authority to "implement changes in the post-expiration terms and conditions of employment" in its Statement of Issue Presented for Review and in a single footnote in the Argument section of its brief, but does not articulate any arguments in support of review. Because the Union does not pursue this argument in its briefing, we assume, without deciding, that the Bankruptcy Court had the authority to implement the terms of the § 1113 proposal.

[14] Although the Union contends that the Bankruptcy Court erred in finding that it has jurisdiction under 11 U.S.C. § 1113, this case concerns the scope of a non-jurisdictional statute. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006). The Bankruptcy Court's interpretation of § 1113 did not violate the statute vesting the NLRB with exclusive jurisdiction to administer the NLRA. *See* 29 U.S.C. § 160. As the Bankruptcy Court recognized,

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under 28 U.S.C. § 158(d)(2)(A). We review the Bankruptcy Court's legal determinations *de novo.*[15]

III.

The question before us is whether § 1113 authorizes a Chapter 11 debtor to reject the continuing terms and conditions of a CBA after its expiration. Two statutory schemes are at issue: the NLRA and Chapter 11 of the Bankruptcy Code. We read these two statutory frameworks *seriatim*, and assume that Congress passed each subsequent law with full knowledge of the existing legal landscape.[16]

Our role in interpreting a statute is to give effect to Congress's intent.[17] Because we presume that Congress expresses its intent through the ordinary meaning of its language, we begin our analysis by examining the plain language of the statute.[18] When statutory "language is plain, the sole function of the

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§ 1113 allows the debtor only to terminate or modify its ongoing obligations to its employees; it does not give a bankruptcy court the authority to interpret or administer the NLRA. *See Trump Entm't Resorts, Inc.*, 519 B.R. at 87 ("This is a no greater intrusion on the NLRB's jurisdiction than if the Court were to apply Section 1113 to a [CBA] which has not expired by its terms.").

[15] *In re Makowka*, 754 F.3d 143, 147 (3d Cir. 2014).

[16] *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

[17] *See Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (3d Cir. 1998) (citing *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993)).

[18] *See id.* (citations omitted).

courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms."[19]

Bankruptcy courts are divided on whether § 1113 permits debtors to reject expired CBAs.[20] But a mere divergence in statutory construction does not render § 1113 ambiguous.[21] Instead, we must determine whether § 1113 is ambiguous by examining "the language itself, the specific context in which that language is used, and the broader context of the statute as a

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[19] *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted); *see Parker v. NutriSystem, Inc.*, 620 F.3d 274, 277 (3d Cir. 2010).

[20] *Compare In re 710 Long Ridge Rd. Operating Co., II*, 518 B.R. 810, 830 (Bankr. D. N.J. 2014) (holding that § 1113(c) applies to CBAs that had expired prepetition), *In re Karykeion, Inc.*, 435 B.R. 663, 675 (Bankr. C.D. Cal. 2010) (same), *In re Ormet Corp.*, No. 2:04-CV-1151, 2005 WL 2000704, at *2 (S.D. Ohio 2005) (same), *In re Hoffman Bros. Packing Co.*, 173 B.R. 177, 184 (9th Cir. BAP 1994) (holding that the CBA "continues 'in effect,' as recognized by § 1113(e) and as was implicit in § 1113(c)"), *Accurate Die Casting Co.*, 292 N.L.R.B. 982, 987-88 (1989) (dicta), *with In re Hostess Brands, Inc.*, 477 B.R. 378, 382-83 (Bankr. S.D. N.Y. 2012) (holding that § 1113(c) is only applicable to current CBAs), *In re San Rafael Baking Co.*, 219 B.R. 860, 866 (9th Cir. BAP 1998) (same), *In re Sullivan Motor Delivery, Inc.*, 56 B.R. 28, 29, 31 (Bankr. E.D. Wis. 1985) (same), *In re Charles P. Young Co.*, 111 B.R. 410, 413 (Bankr. S.D. N.Y. 1990) (noting that rejection of a CBA pursuant to § 1113(c) is a moot issue if the agreement expired by its own terms and before the bankruptcy court holds a hearing on rejection).

[21] *See In re Price*, 370 F.3d 362, 369 (3d Cir. 2004).

whole."[22] "Specifically, in interpreting the Bankruptcy Code, the Supreme Court has been reluctant to declare its provisions ambiguous, preferring instead to take a broader, contextual view, and urging courts to 'not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'"[23] A provision is ambiguous, "when, despite a studied examination of the statutory context, the natural reading of a provision remains elusive."[24] In that case, and as a last resort, we turn to pre-Code practice and legislative history to find meaning.[25]

A.

Section 1113 of the Bankruptcy Code governs the means by which a debtor may assume, reject, or modify a CBA. It establishes an expedited negotiation

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[22] *Marshak v. Treadwell*, 240 F.3d 184, 192 (3d Cir. 2001) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)); *see King v. Burwell*, 576 U.S. ___, 135 S. Ct. 2480, 2489 (2015) ("But oftentimes the meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." (quotation marks omitted)).

[23] *Price*, 370 F.3d at 369; *see Official Comm. of Unsecured Creditors of Cybergenics Corp., ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 559 (3d Cir. 2003) ("Statutory construction is a holistic endeavor, and this is especially true of the Bankruptcy Code." (quotation marks, alterations and citations omitted)).

[24] *Price*, 370 F.3d at 369.

[25] *See id.*

process for modifying a CBA and allows for judicial evaluation of a petition to reject a CBA if negotiations are unsuccessful. Specifically, § 1113 provides that a debtor may "reject a collective bargaining agreement" if the bankruptcy court determines that (1) the debtor has "ma[de] a proposal" to its employees "which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization," (2) "the authorized representative of the employees has refused to accept such proposal without good cause," and (3) "the balance of the equities clearly favors rejection of such agreement."[26] Section 1113 explicitly forbids debtors from "terminat[ing] or alter[ing] any provisions of a collective bargaining agreement prior to compliance with the provisions" of § 1113.[27]

The Union argues that the plain meaning of a "collective bargaining agreement" is a "contract between an employer and a labor union." Therefore, because the CBA has expired, there is no "contract" to be rejected under § 1113. The Union further contends that Debtors are required to bargain to impasse before making any changes to the key terms and conditions of the expired CBA. The Union's position is based on the NLRA's requirement that "[o]nce a collective bargaining relationship has been established, an employer may not make a change affecting [the]

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[26] 11 U.S.C. § 1113(a), (b)(1), (c).

[27] *Id.* § 1113(f).

mandatory bargaining subjects without affording the Union the opportunity to bargain over the change."[28] Even when a CBA expires, the employer must maintain the status quo with respect to mandatory subjects of bargaining until it either enters into a new contract or bargains to impasse.[29]

While § 1113 prescribes a process for rejection of a "collective bargaining agreement," it does not mention the continuing obligations imposed by the NLRA. However, neither does it restrict its prescription to "executory" or "unexpired" CBAs.[30] Following the lead of the Supreme Court to take a broad, contextual view of the Bankruptcy Code, we will not embark, as the parties do, on a hyper-technical parsing of the words and phrases that comprise § 1113,[31] or focus on

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[28] *Champion Parts Rebuilders, Inc. v. NLRB*, 717 F.2d 845, 852 (3d Cir. 1983) (citing *Katz*, 369 U.S. at 743); *see* 29 U.S.C. § 158(a)(5) (providing that it "shall be an unfair labor practice for an employer" to "refuse to bargain collectively with the representatives of [its] employees"); *id.* § 158(d) (defining the employer's duty to bargain as part of a mutual duty between the employer and the union to "meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment").

[29] *See Litton*, 501 U.S. at 199; *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 233 (3d Cir. 2001).

[30] *Cf.* 11 U.S.C. § 365. Section 365 permits unilateral rejection of any executory contracts or unexpired leases burdensome to the estate. *See Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39 (3d Cir. 1989).

[31] The Union argues that we should attach significance to the textual contrast between § 1113(e), which allows for emergency interim relief "when the collective bargaining agreement

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a meaning that may seem plain when considered in isolation. We will turn instead to the situation in which § 1113 was enacted and examine the provision in the context of the Bankruptcy Code as a whole.[32]

B.

Section 1113 was a product of the organized labor movement's push to overturn the Supreme Court's decision in *National Labor Relations Board v. Bildisco & Bildisco*.[33] There, the Supreme Court addressed

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continues in effect," and § 1113(c). The Union also contends that the word "terminate" within the context of § 1113(d)(2) suggests that there must be an unexpired CBA that can be "terminated."

[32] *In re Price*, 370 F.3d at 369 ("Statutory context can suggest the natural reading of a provision that in isolation might yield contestable interpretations."); *see King*, 135 S. Ct. at 2495 ("But while the meaning of the phrase . . . may seem plain 'when viewed in isolation,' such a reading turns out to be 'untenable in light of [the statute] as a whole.' . . . In this instance, the context and structure of the [statute] compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase." (citation omitted)); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" (quotation marks omitted)).

[33] 465 U.S. 513 (1984); *see* 130 Cong. Rec. 20,092 (1984) (statement of Sen. Kennedy) (stating that the intent of the new law is "to overturn the *Bildisco* decision which had given the trustee all but unlimited discretionary power to repudiate labor contracts and to substitute a rule of law that encourages the parties to solve their mutual problems through the collective bargaining process"); *id.* at 20,091 (statement of Sen. Packwood) (stating that "the agreement reached by the Conferees on the

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what standard governed rejection of CBAs in bankruptcy. The Court first held that CBAs were "executory contracts" under § 365 of the Bankruptcy Code, and could therefore be rejected under § 365 if the debtor showed that they "burden[ed] the estate, and . . . the equities balance[d] in favor of rejecting the labor contract[s]."[34] In recognizing national labor policy, the Court included a bargaining component in the process of rejection, requiring an employer to make reasonable efforts to negotiate a voluntary modification of the CBA before acting on a petition to modify or reject a CBA.[35] This first holding of *Bildisco* – establishing the standard for rejecting a CBA – was unanimous.

The Court then addressed whether the debtor's noncompliance with the CBA after filing for bankruptcy but before contract rejection constituted an unfair labor practice. Justice Rehnquist, writing for the majority, found that "from the filing of a petition in bankruptcy until formal acceptance, the [CBA] is

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labor provisions in the bill brings to an end the effort to assure that labor contracts, which are negotiated in good faith, are properly protected"); *see also Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., AFL-CIO-CLC*, 791 F.2d 1074, 1086 (3d Cir. 1986) ("[While we] are aware . . . that the most authoritative source of legislative intent lies in committee reports . . . [, here] there was no committee report, and we must seek guidance from the sequence of events leading to adoption of the final version of the bill, and the statements on the House and Senate floor of the legislators most involved in its drafting." (citation omitted)).

[34] *Bildisco*, 465 U.S. at 526.

[35] *Id.*

not an enforceable contract within the meaning of NLRA § 8(d)." Thus, it was not an unfair labor practice for an employer to unilaterally change the terms of a CBA after filing for bankruptcy but before the court approved rejection.[36] Justice Rehnquist reasoned that the trustee was "empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent a bankruptcy filing."[37] A rule, requiring trustees to adhere to a CBA's terms after filing, "would run directly counter to the express provisions of the Bankruptcy Code and to the Code's overall effort to give the debtor-in-possession some flexibility and breathing space."[38] He noted:

> The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources. . . . [A] beneficial recapitalization could be jeopardized if the debtor-in-possession were saddled automatically with the debtor's prior collective-bargaining agreement. Thus, the

[36] *Id.* 529-33 ("Since the filing of a petition in bankruptcy under Chapter 11 makes the contract unenforceable, § 8(d) procedures have no application to the employer's unilateral rejection of an already unenforceable contract. . . . Our rejection of the need for full compliance with § 8(d) procedures of necessity means that any corresponding duty to bargain to impasse under § 8(a)(5) and § 8(d) before seeking rejection must also be subordinated to the exigencies of bankruptcy.").

[37] *Id.* at 528.

[38] *Id.* at 532.

> authority to reject an executory contract is vital to the basic purpose to a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization.[39]

In response to *Bildisco*, Congress swiftly[40] passed § 1113 to overturn the second part of *Bildisco*'s holding and prohibit unilateral changes in debtors' CBAs without bankruptcy court approval.[41] In crafting the stringent requirements of § 1113, Congress was focused on preventing employers from terminating negotiated labor contracts and avoiding burdensome

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[39] *Id.* at 528.

[40] *See* Rosalind Rosenberg, *Bankruptcy and the Collective Bargaining Agreement – A Brief Lesson in the Use of the Constitutional System of Checks and Balances*, 58 Am. Bankr. L.J. 293, 313 (1984) ("On the same day *Bildisco* was decided, Congressman Rodino introduced H.R. 4908 to clarify the circumstances under which collective bargaining agreements may be rejected." (footnotes and quotation marks omitted)); 130 Cong. Rec. 6191 (statement of Rep. Hyde) (describing the House as taking action with "mind boggling speed"); 130 Cong. Rec. 13,205 (statement of Sen. Denton) (stating that "[i]t is notable that the *Bildisco* provision was introduced only 2 days before it was taken up on the floor, was never considered by the House Judiciary Committee in hearings or committee markups, and was brought to the House floor under a rule that did not permit the House to vote on it separately from the bankruptcy bill.").

[41] *See* 11 U.S.C. § 1113(f).

obligations to employees merely by entering bankruptcy.[42]

As enacted, § 1113 balances the concerns of economically-stressed debtors in avoiding liquidation and the unions' goals of preserving labor agreements and maintaining influence in the reorganization process. Unlike § 365, which does not constrain a debtor's rejection of burdensome executory contracts, § 1113 prescribes strict procedural and substantive requirements before a CBA can be rejected. Specifically, before the bankruptcy court will consider an application to reject, the debtor must make a proposal, provide relevant information, meet at reasonable times, and confer in good faith. The debtor's modifications must be "necessary" to permit reorganization and must treat all creditors, the debtor, and all affected parties

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[42] *In re Roth Am., Inc.*, 975 F.2d 949, 956 (3d Cir. 1992); *see In re Maxwell Newspapers, Inc.*, 981 F.2d 85, 89 (2d Cir. 1992) ("[Section] 1113 also imposes requirements on the debtor to prevent it from using bankruptcy as a judicial hammer to break the union."); *In re Century Brass Prods., Inc.*, 795 F.2d 265, 272 (2d Cir. 1986) ("[Section 1113] created an expedited form of collective bargaining with several safeguards designed to insure that employers did not use Chapter 11 as medicine to rid themselves of corporate indigestion."); *Sullivan Motor Delivery, Inc.*, 56 B.R. at 30 ("The elaborate procedure established under § 1113 is a conscious effort by Congress to slow down the potential for an avalanche of attempted rejections of [CBAs] by debtor employers."); 130 Cong. Rec. 20,092 (1984) (statement of Sen. Packwood) (noting that "the debtor will not be able to exploit the bankruptcy procedure to rid itself of unwanted features of the labor agreement that have no relation to its financial condition and its reorganization and which earlier were agreed to by the debtor").

"fairly and equitably." The balance of equities must "clearly favor" rejection of the CBA. The language of § 1113 was designed to foreclose all but the essential modifications of the working conditions integral to a successful reorganization.[43] In other words, by requiring compliance with the stringent provisions of § 1113, Congress sought to ensure that, when the NLRA yields to the Bankruptcy Code, it does so only for reasons that will permit the debtor to stay in business.[44]

This case exemplifies the process that Congress intended. Rejection of the Debtors' continuing labor obligations, as defined by the expired CBA, is necessary to permit the Debtors' reorganization – indeed it is essential to the Debtors' survival. As the Bankruptcy Court repeatedly emphasized, the Debtors' "financial situation is desperate. Not only are their losses large, but they have been unable to obtain debtor in possession financing for their bankruptcy cases and are operating with cash collateral. Debtors'

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[43] *See Wheeling-Pittsburgh Steel Corp.*, 791 F.2d at 1088.

[44] *See* 130 Cong. Rec. 20,231 (1984) (statement of Rep. Morrison) ("[T]he conference report strikes the necessary balance between the threat to companies in risk of being liquidated because of financial problems and the possibility of abuse of chapter 11 bankruptcy proceedings merely to vitiate union contracts"); *id.* at 20,232 (statement of Rep. Morrison) ("[A] chapter 11 reorganization case that is brought for the sole purpose or [sic] repudiating or modifying a [CBA] is a case brought in 'bad faith.' ").

cash will run out in less than two months."[45] The Debtors' expert, whom the Bankruptcy Court found "highly credible," testified that the

> Debtors must have relief from the CBA without which they can not avoid closing the Casino and liquidating their businesses. . . . [T]he situation is so grim that without the Court granting the Motion and Debtors obtaining other concessions, Debtors would have to give notice to the New Jersey Department of Gaming Enforcement not later than October 20, 2014, that Taj Mahal will close the Casino.[46]

The Debtors sold assets and closed one of their casinos, the Trump Plaza Hotel and Casino, to raise cash and reduce their obligations. As of September 5, 2014, the Debtors' working capital cash was approximately $12 million, and its secured debt was approximately $286 million. Under the relevant terms of the CBA, however, the Debtors were required to make more than $3.5 million per year in pension contributions, and $10 to $12 million per year in health and welfare contributions. After the CBA expired, the Debtors were required to sustain those payments at the same levels. To avoid liquidation, the Debtors moved to reject the CBA. Their § 1113 proposal to the Union included annual savings of approximately $3.7 million per year in pension contributions, $5.1 million

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[45] *Trump Entm't Resorts, Inc.*, 519 B.R. at 80.

[46] *Id.*

in health and welfare contributions, and $5.8 million in work rule changes, including elimination of paid meal times. Instead of negotiating with the Debtors, the Union stalled the bargaining sessions, engaged in picketing, and attempted to harm the Debtors' business.[47]

Notably, the Debtors' plan of reorganization is contingent on rejection of the CBA, the obtaining of tax relief, the conversion of the first lien secured creditor's debt to equity, and a capital infusion of $100 million from the first lien secured creditor. The first lien secured creditor "has made it clear that it will perform only if the CBA and tax relief contingencies are achieved because the business will not succeed without the relief."[48] A successful reorganization, therefore, depends on the rejection of the terms that the Debtors are required to maintain under the NLRA.

The Union recognizes that the Debtors are bound by the terms and conditions of the expired CBA by virtue of their obligation to maintain the status quo. Nevertheless, the Union argues that those obligations are "entirely distinct from the parties' voluntarily assumed contractual obligation to honor their CBA prior to its expiration." The Union relies on *Laborers Health & Welfare Trust Fund for Northern California*

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[47] *Id.* at 81-82.

[48] *Id.* at 83.

v. Advanced Lightweight Concrete Company.[49] This case involved the withdrawal of an employer from a multiemployer pension fund and the employer's subsequent failure to make payments to the fund as required by the expired CBA. The trustee of the fund brought suit in federal court to enforce the terms of the expired CBA. The Supreme Court distinguished an employer's obligation to make contributions to such a pension fund pursuant to the terms of a CBA from an employer's continuing obligation under the NLRA to make post-expiration contributions. The Court held that, because an employer's contractual duty to make multiemployer pension fund contributions does not survive the CBA's expiration, the employer's failure to make post-expiration contributions does not constitute a violation of § 515 of ERISA.[50] The Court concluded that § 515 was intended to cover only obligations arising under the CBA. To seek contributions from an employer after the expiration of the CBA, the trustee would have to go before the NLRB to obtain a remedy in a proceeding before that body; the district court did not have jurisdiction to hear the claim.

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[49] 484 U.S. 539 (1988).

[50] Section 515 was enacted to protect multiemployer funds and the other employers participating in them from the withdrawal of an employer from the fund. It obligates employers, even after withdrawal, to make contributions under the terms of a plan or of a CBA. 29 U.S.C. § 1145.

The Court in *Laborers Health* found Congress's intent in enacting § 515 was clear.[51] The Court added that there were three countervailing policy arguments to support its decision that the reach of § 515 was deliberate rather than inadvertent. First, if there is a gap in the enforcement scheme to enforce contributions to multiemployer funds, its incidence is unknown and, since it has not been called to the attention of Congress, "it may not be a problem of serious magnitude."[52] Second, the issues to be decided in a dispute over an employer's failure to make fund contributions are more complex when the refusal is post-CBA rather than a simple collection action during the life of the CBA.[53] Third, a violation of the duty to bargain in good faith is a labor law matter and is better decided by the NLRB than by a district court.[54]

Conversely, we find the intent of Congress here also to be clear but that intent was to incorporate expired CBAs in the language of § 1113. Our review of the decision in *Laborers Health* demonstrates to us that the three countervailing policy arguments in *Laborers Health* support our decision here. As we noted above, § 1113 was enacted to balance the needs of economically-stressed debtors in avoiding liquidation and the unions' needs in preserving labor agreements

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[51] *Laborers Health*, 484 U.S. at 551.

[52] *Id.*

[53] *Id.* at 551-52.

[54] *Id.* at 552.

and safeguarding employment for their members. Section 1113 meets a gap in the schemes to permit reorganizations when labor obligations will prevent the success of a reorganization. The number of cases cited in footnote 20 *supra* demonstrate this gap. Section 1113 was enacted to ensure that relief from a CBA was granted only in situations where relief was necessary to permit the reorganization. It is a counter to the precedent in *Bildisco* which permitted modification of a CBA without close scrutiny by the Bankruptcy Court. Under § 1113, approval will be granted only if the debtor's modifications are necessary to permit reorganization. In this context, when the employer's statutory obligations to maintain the status quo under the terms of an expired CBA will undermine the debtor's ability to reorganize and remain in business, it is the expertise of the Bankruptcy Court which is needed rather than that of the NLRB. For that reason, whether the CBA is in effect or is expired, it is the Bankruptcy Court which should make the review and decide on the necessity of the modification. We conclude, therefore, that § 1113 applies to a CBA after it has expired.

The Union contends, however, that because a debtor may not assume or reject an expired executory contract under § 365, it may not reject an expired CBA under § 1113. This argument ignores an important distinction between a CBA and any other executory contract: the key terms and conditions of a CBA continue to burden the debtor after the agreement's expiration. Rejection of those terms, therefore,

is not a moot issue as would be in the case of other contracts or leases.

C.

To hold that a debtor may reject an expired CBA or its continuing obligations as defined by the expired CBA is also consistent with the purpose of the Bankruptcy Code, which gives debtors latitude to restructure their affairs.[55] A Chapter 11 reorganization provides a debtor with an opportunity to reduce or extend its debts so its business can achieve long-term viability, for instance, by generating profits which will compensate creditors for some or all of any losses resulting from the bankruptcy. Congress has recognized that "[i]t is more economically efficient to reorganize rather than to liquidate, because it preserves jobs and assets."[56] Similarly, we have held that "[t]he policy

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[55] *See Perez v. Campbell*, 402 U.S. 637, 648 (1971) ("This Court on numerous occasions has stated that '(o)ne of the primary purposes of the Bankruptcy Act' is to give debtors 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.'" (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934))).

[56] H.R. Rep. No. 95-595, at 220 (1977) (stating that the premise of business reorganization is that a company's assets are worth more as a going concern than if sold for scrap); *see* 130 Cong. Rec. 20,230 (1984) (statement of Rep. Lungren, discussing § 1113) ("This is an important provision in the compromise because it underscores the primary purpose of chapter 11; that is, to maintain the debtor's business so that both the debtor and his employees can keep their jobs. . . . [T]his chapter 11 allows a company to reorganize rather than going belly-up. In essence, it

(Continued on following page)

behind Chapter 11 of the Bankruptcy Code is the 'ultimate rehabilitation of the debtor.'"[57] As the Bankruptcy Court recognized, "[i]n many cases, time is the enemy of a successful restructuring" and the § 1113 rejection process is a "much quicker process than the relatively protracted process contemplated by the NLRA."[58]

Section 1113 furthers the Code's rehabilitative policies by permitting debtors to restructure their labor obligations. A contrary holding, *i.e.*, that § 1113 does not allow a debtor to reject expired CBAs or its ongoing obligations, would impede that overriding goal.[59] Whether by force of contract or by operation of the NLRA, the Debtors here were bound by the key terms of the expired CBA. But those terms burdened the estate so as to preclude a successful reorganization. Just because the Debtors filed the § 1113 motion one week after the CBA expired, they should not be bound by the expired agreement's burdensome terms

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is the best way to protect the jobs of the workers of the company as then constituted.").

[57] *In re Exide Techs.*, 607 F.3d 957, 962 (3d Cir. 2010) (quoting *Nicholas v. United States*, 384 U.S. 678, 687 (1966)).

[58] *Trump Entm't Resorts*, 519 B.R. at 86.

[59] *See* 130 Cong. Rec. 20,230 (1984) (statement of Rep. Lungren) (noting that "[a]ny labor provision which would subordinate the debtor's reorganization to a union contract . . . would impinge on the goals of the 1978 Bankruptcy Reform Act and indeed on the principal reasons for a bankruptcy procedure"); *id.* at 20,231 (statement of Rep. Hall) (asking whether "the court in balancing equities would include the union contract – *and any other matters that might make it detrimental to the debtor* for the contract to remain in force" (emphasis added)).

until the parties negotiate to impasse. That interpretation of the statute would undercut the rehabilitative function of Chapter 11.[60]

Under the policies of bankruptcy law, it is preferable to preserve jobs through a rejection of a CBA, as opposed to losing the positions permanently by requiring the debtor to comply with the continuing obligations set out by the CBA. Moreover, it is essential that the Bankruptcy Court be afforded the opportunity to evaluate those conditions that can detrimentally affect the life of a debtor, whether such encumbrances attach by operation of contract or a complex statutory framework. In light of Chapter 11's overarching purposes and the exigencies that the Debtors faced, we conclude that the Bankruptcy Court did not err in granting the Debtors' motion.

IV.

For the reasons set forth above, we will affirm the judgment of the Bankruptcy Court.

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[60] *See King*, 135 S. Ct. at 2492-93 (citing *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 419-20 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.")); *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943) ("[C]ourts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permit so as to carry out in particular cases the generally expressed legislative policy.").

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In re	)	Chapter 11
TRUMP ENTERTAINMENT RESORTS, INC., *et al.*,	)	Case No. 14-12103(KG)
Debtors.	)	(Jointly Administered)
	)	**Re Dkt No. 134**

OPINION

INTRODUCTION

On September 9, 2014 (the "Petition Date"), Trump Entertainment Resorts, Inc., and its affiliated Debtors, including Trump Taj Mahal Associates, LLC (the "Debtors") filed for bankruptcy pursuant to Chapter 11 of the Bankruptcy Code. The Debtors have now filed Debtors' Motion for Entry of an Order (I) Rejecting Collective Bargaining Agreement Between, Trump Taj Mahal Associates, LLC and UNITE HERE Local 54, Pursuant to 11 U.S.C. § 1113(c) and (II) Implementing Terms of the Debtors' Proposal under 11 U.S.C. § 1113(b) (the "Motion"), filed on September 26, 2014. D.I. 134. Hereafter, the Court will refer to the November 11, 2011, collective bargaining agreement as "the CBA," Trump Taj Mahal Associates, LLC as "Taj Mahal," UNITE HERE Local 54 as the "Union," and the Proposal by Taj Mahal to the Union, dated September 17, 2014, as amended on October 10, 2014, as the "Proposal." The Motion reflects the Debtors' claim that Taj Mahal cannot maintain its labor costs given its financial extremis

and that Debtors will be forced to liquidate if the Court does not grant the request to reject the CBA.

The Court conducted an evidentiary hearing on October 2, 2014 and October 14, 2014, at which Debtors presented witnesses and introduced numerous exhibits in support of the Motion[1]. The Union cross examined the Debtors' witnesses and introduced a few exhibits into evidence, but did not call any witnesses on its behalf.

JURISDICTION AND VENUE

The Court's jurisdiction to consider the Motion is premised upon 28 U.S.C. §§ 157 and 1334; this is a core matter pursuant to 28 U.S.C. § 157(b)(2); and venue lies in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

FACTS

The Court makes the following factual findings, which are uncontroverted except as noted.

Debtors operated two casinos, now one casino in Atlantic City, New Jersey. While for many years the Atlantic City casinos enjoyed little competition for gambling and related recreational activities on the East Coast of the United States, times have changed

[1] The Court will reference the transcript of the October 2, 2014 hearing as "10/2 Tr.," and the October 14, 2014 continued hearing as the "10/14 Tr."

dramatically. Surrounding states now permit casino gambling and there is an online gambling industry. The Atlantic City casinos have seen their revenues fall by approximately half since 2006, and three casinos out of twelve are now closed. Ex. 1. One of the three closed is Trump Plaza Hotel and Casino, which the Debtors operated through Debtor Trump Plaza Associates, LLC. Since 2011, Debtors' EBITDA has fallen from $32 million to negative $6.1 million in 2013, with last twelve months EBITDA of negative $25.7 million as of June 30, 2014. The Debtors' financial situation is desperate. Not only are their losses large, but they have been unable to obtain debtor in possession financing for their bankruptcy cases and are operating with cash collateral. Debtors' cash will run out in less than two months. The Debtors have taken steps to reduce their severe losses. They have sold significant assets to raise much needed cash and to reduce their obligations, and they have closed the Trump Plaza Hotel and Casino. 10/2 Tr. 22-24.

The Motion at issue pertains solely to Taj Mahal, which operates the Taj Mahal Casino Hotel, which the Court will refer to as the "Casino." The Casino is at the North End of the famous boardwalk. The Casino is situated on 35.9 acres of beachfront property. It has over 2,000 hotel rooms, five cocktail lounges, approximately 162,0000 [sic] square feet of space for gaming, a large entertainment complex, a gentlemen's club, an exhibition hall, other recreational facilities, several restaurants and parking for almost

7,000 cars, plus a bus terminal and roof-top helipad. Ex. 1.

William H. Hardie of Houlihan Lokey Capital, Inc. ("Houlihan Lokey"), Debtors' investment banker, testified in support of the Motion. The Court qualified Mr. Hardie as an expert witness and he also testified as a fact witness. The Debtors, through Mr. Hardie, provided the Court with extensive financial data on the Debtors, including Taj Mahal. Ex. 1, Ex. 5, 10/2 Tr. 22-24. The evidence confirmed the Debtors' serious losses. From 2012 to 2013, gaming revenues declined 16.4%; hotel room revenues declined 8.3%; and food and beverage sale revenues declined 22.5%. Ex. 1, Attachment E. The trend continued into the first six months of 2014. Additionally, Debtors' casinos performed worse than other casinos. For Taj Mahal individually, EBITDA declined from a positive $37.3 million for fiscal year 2011 to a negative $5.3 million for the last twelve months. *Id.* As of September 5, 2014, Debtors' available working capital cash for its operations was limited to approximately $12 million, which will permit Debtors to operate less than two months – and then, only without paying interest on its secured debt of approximately $286 million. 10/2 Tr. 22. The pension costs alone are $75,000 per week. 10/2 Tr. 24. Mr. Hardie, whose testimony the Court finds was highly credible and was based upon his expertise and specific knowledge of the details of Debtors' finances and operations, testified without qualification that Debtors must have relief from the CBA without which they can not avoid closing the

Casino and liquidating their businesses. 10/14 Tr. 142. Mr. Hardie further testified that the situation is so grim that without the Court granting the Motion and Debtors obtaining other concessions, Debtors would have to give notice to the New Jersey Department of Gaming Enforcement not later than October 20, 2014, that Taj Mahal will close the Casino. 10/14 Tr. 149. These concessions include: savings from the payments to employees under the CBA of $14.6 million per year; assistance from the first lien secured creditor in the form of converting $286 million of outstanding secured debt and making an equity investment of $100 million; property tax relief from Atlantic City and the State of New Jersey; and $25 million of tax credits[2]. Mr. Hardie also testified that all of these concessions are necessary to avoid liquidation. 10/14 Tr. 139-40, 148-50.

Taj Mahal has 2,953 employees working at the Casino, 2,041 of whom are full time and the remainder are part-time, seasonal or temporary employees. 1,486 of the employees are non-unionized and 1,467 are unionized. The Union is the largest of the employee unions, and is a party to the CBA, with 1,136 Taj Mahal employees under its umbrella. Ex. 2.

The evidence, which again is uncontroverted, is that Taj Mahal is on the brink of running out of cash

[2] The tax concessions are a work-in-progress with Debtors seeking alternatives to the original requests of Atlantic City and the State of New Jersey.

to fund its operations and its financial health is poor and deteriorating. 10/14 Tr. 136. Mr. Hardie's testimony is unequivocal – the onerous terms of the CBA must be changed to avoid liquidation. Such closure would mean all employees will lose their jobs and, of course, salary and benefits. Under the terms of the CBA, Debtors are required to make pension contributions of more than $4 million every year, and $12 million to $15 million per year in health and welfare contributions. The payments applicable to Taj Mahal are $3.5 million for pension contributions and $10 to $12 million for the health and welfare contributions. The Debtors have also incurred potential liabilities to the pension fund of nearly $197 million for withdrawal because the fund is underfunded. Exs. 2, Attachment A, 3.

Faced with the financial pressures of the CBA, Debtors made a determined effort to engage the Union in discussions. The testimony of Mr. Hardie and Craig Keyser, Debtors' lead negotiator for the collective bargaining agreements, and the documents admitted into evidence reveal the following attempts and the Unions's [sic] response. The correspondence admitted into evidence is alarming in showing the Debtors were literally begging the Union to meet while the Union was stiff-arming the Debtors.

- By letter, dated March 7, 2014, Debtors asked the Union to begin negotiations for a new CBA which was due to expire in September 2014. The Union responded that it was not ready and would "contact you within

the next several months." Ex. 2, Attachments B, C & D.

- In June 2014, Debtors through Mr. Keyser, again asked to and did meet with the Union. The Union told Debtors that it would instead negotiate with two other casino operators. 10/2 Tr. 63.

- On August 20, 2014, at Debtors' request, the Debtors and Mr. Hardie met with the Union to discuss terms for a new CBA. Although Debtors described the worsening financial situation for Taj Mahal, the Union was not receptive to negotiations.

- The Debtors again requested a meeting with the Union and a meeting was held on August 28, 2014, between the Debtors, including Mr. Hardie, and the Union. At the meeting, Debtors proposed modifications to the CBA. The Debtors' proposal included elimination of the pension contributions to be replaced by a 401k program; and substituting the health and welfare program with (Affordable Care Act) Obamacare coverage which Debtors would subsidize. On September 3, 2014, the Union responded that it was prepared to work with Debtors on the pension but not on the health and welfare proposal.

- Debtors and the Union met again on September 24 and 30, 2014. The Union requested additional information from Debtors which Debtors promptly provided. 10/14 Tr. 23, Ex. 22, Ex. 25, Ex. 29. Debtors had created a data room for the Union, which the Union

utilized only briefly. Indeed, the Union stipulated at the hearing that Debtors fully and promptly responded to all requests for information.

- On October 3, 2014, the Debtors again requested another bargaining session with the Union. The Union advised Debtors that it was not available to meet until October 10, 2014, and then only for four hours, this despite the hearing on the Motion scheduled for October 14, 2014. Ex. 24. At this meeting, the Union raised for the first time the possibility of a new pension program but without documents or more information. The Union also made counterproposals concerning several of Debtors' work related proposals, and asked Debtors for additional information.

It is significant that while Debtors were imploring the Union to engage with them in discussions, offering to meet "24/7" (10/14 Tr. 28), the Union was engaging in picketing, a program of misinformation (Exs. 38-43) and, most egregiously, communicating with customers who had scheduled conferences at the Casino to urge them to take their business elsewhere (Ex. 44-47). It is thus clear that the Union was not focusing its efforts on negotiating to reach agreement with Debtors.

The Proposal (which contains some work-related concession by the Debtors, 10/14 Tr. 136) for a new or modified CBA is as follows (Exs. 10, 11, 12, 35, see Attachment A hereto):

Proposals	Annual Savings
Pension Termination (*replaced by 401k with some matching*)	$3.7 million
Amended Health and Welfare Benefit (*utilizing Obamacare coverage, Debtors providing $2,000 subsidy*)	$5.1 million
Work Rule Changes	$5.8 million
Total Savings	**$14.6 million**

It was not until the October 10 meeting that the Union provided Debtors with a partial counter proposal for further discussion, and a series of questions and requests for information. 10/14 Tr. 47, 137-138. They did so knowing that the hearing on the Motion was scheduled to take place in four days and that Debtors were obligated to advise the New Jersey Division of Gaming Enforcement immediately thereafter if they intended to close. The Casino would close unless agreement could be reached on the terms of the CBA or, in the absence of a negotiated agreement, the Court approved rejection.

Debtors have filed a Chapter 11 Plan of Reorganization with the Court (D.I. 165) and Disclosure Statement (D.I. 166). The Plan is contingent on the rejection of the CBA, property tax relief, the conversion of the secured creditor's debt to equity and a capital infusion from the secured creditor of $100 Million. The secured creditor has made it clear that it will perform only if the CBA and tax relief contingencies

are achieved because the business will not succeed without the relief. Debtors' reorganization is therefore dependent on rejection of the CBA and the other required relief.

DISCUSSION

A debtor's assumption or rejection of a collective bargaining agreement is governed entirely by Section 1113 of the Bankruptcy Code. Such action is permissible "only in accordance with the provisions of [Section 1113]." The first question the Court must address in this case is whether Debtors have the authority to reject an expired collective bargaining agreement. Here, the CBA expired on September 14, 2014, after the Petition Date but before Debtors filed the Motion. If the Court determines that the Debtors have such authority, the Court's analysis will turn to whether the Debtors have satisfied the requirements delineated in Sections 1113(b), and (c) of the Bankruptcy Code.

A. The Court's Authority Post-Expiration of the CBA

As an initial matter, the Court must determine whether it has jurisdiction to decide the Debtors' Motion. It is undisputed that the CBA expired by its own terms on September 14, 2015, just five days after the Petition Date. The Debtors filed the Motion on September 26, 2014.

Under the National Labor Relations Act ("NLRA"), employers are required to maintain the *status quo* after the expiration of a collective bargaining agreement while the employer and the union negotiate the terms of a new collective bargaining agreement. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing 29 U.S.C. §§ 158(a)(5), (d)). In most instances, the *status quo* is defined by the terms of the expired collective bargaining agreement. "[A]n employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Id.* Here, the Debtors do not assert that they have bargained to an impasse with the Union over a new agreement. So, the parties' relationship continues to be governed by most, if not all, of the terms of the recently expired CBA. For example, the Debtors are still required to make pension fund contributions on behalf of union employees and provide health insurance to union employees, both obligations defined by the CBA.

The Union argues that the Debtors' obligations under the expired CBA which remain in effect are statutory, as opposed to contractual, in nature because they arise only by virtue of the Debtors' *status quo* obligations under the NLRA. Since Section 1113 only provides for rejection of a collective bargaining agreement, i.e. an executory contract, the Union argues that this Court has no authority to approve an application to reject the Debtors' statutory *status quo* obligations. The Union concludes that since the

Bankruptcy Code provides no mechanism to alter the Debtors' statutory *status quo* obligations, the Court must defer to the National Labor Relations Board's ("NLRB") exclusive jurisdiction on these matters.

Courts are divided on the question of whether Section 1113 applies in a situation where a collective bargaining agreement has expired but the terms of the agreement remain in effect by virtue of the employer's *status quo* obligations under the NLRA. Compare *San Rafael Baking Co. v. N. California Bakery Drivers Sec. Fund* (*In re San Rafael Baking, Co.*), 219 B.R. 860 (B.A.P. 9th Cir. 1998), *In re Hostess Brands, Inc.*, 477 B.R. 378 (Bankr. S.D.N.Y. 2012), *In re Sullivan Motor Delivery, Inc.*, 56 B.R. 28 (Bankr. E.D. Wis. 1985), and *In re Chas. P. Young Co.*, 111 B.R. 410 (Bankr. S.D.N.Y. 1990) (all finding that Section 1113 does not apply to expired collective bargaining agreements), with *In re 710 Long Ridge Road Operating Company, II, LLC*, 2014 WL 407528 (Bankr. D.N.J. 2014), *In re Karykeion*, 435 B.R. 663 (Bankr. C.D. Cal. 2010), *United Food & Commercial Workers Union, Local 770 v. Official Unsecured Creditors Comm.* (*In re Hoffman Brothers Packing Co.*), 173 B.R. 177 (B.A.P. 9th Cir. 1994), and *In re Ormet Corp.*, 316 B.R. 662 (Bankr. S.D. Ohio 2004) (all finding that Section 1113 does apply to expired collective bargaining agreements).

In *Hostess*, a case on which the Union relies, the court found that Section 1113 does not apply to an expired collective bargaining agreement. The court reasoned in a bench ruling as follows:

> I believe if I were to extend the language of "collective bargaining agreement" to "collective bargaining agreement in effect" or "collective bargaining agreement as it covers the relations between the parties," I would be basing that conclusion on, first, a policy that is not well-articulated or found in the statute itself. Secondly, I'm of a view that as a factual matter I do not believe it has been established that the post-expiration regime would so interfere with whatever the congressional policy is behind Section 1113 as to the negate, Congress's policy. . . . And, finally, I believe it would stretch the statute's language too far.

477 B.R. at 383. The court noted that the reference in Section 1113(e) to a collective bargaining agreement which "continues in effect" merely creates an exception to the general rule that Section 1113 does not apply to expired collective bargaining agreements. *Id.* at 382. The court further noted that in his view a debtor in possession could not assume an expired collective bargaining agreement under Section 1113 and so it would logically follow that a debtor in possession could not reject an expired collective bargain agreement pursuant to Section 1113. *Id.* at 383.

The Court, though, is more persuaded by the reasoning found in the cases the Debtors cite. For the reasons that follow, the Court finds that the language and legislative purpose of Section 1113 establishes that the Court has jurisdiction to enter an order approving the rejection of obligations that continue in

effect under the NLRA in the wake of an expired collective bargaining agreement.

First, Section 1113(e) allows for the modification, on an interim basis, of a collective bargaining agreement "during a period when [it] continues in effect" so long as the debtor shows that the modification is essential to the continuation of the debtor's business or to avoid irreparable damage to the estate. The *Karykeion* court noted that "continues in effect" is a term of art regularly used in labor law to refer to the employer's post-expiration *status quo* obligations. 435 B.R. at 674 (citing *Litton*, 501 U.S. at 200). The *Karykeion* court further observed that Congress enacted Section 1113 in response to the Supreme Court's *Bildisco* decision, at a time when "the intersection of the Bankruptcy Code and the NLRA was under heated discussion." *Id.* Congress did not use the word "executory" anywhere in Section 1113 but instead selected the phrase "continues in effect" in Section 1113(e). There is a good reason why Congress made this selection as it could have very easily used the word "executory" to mirror Section 365 of the Bankruptcy Code.

The Court is persuaded that Congress selected the phrase "continues in effect" in Section 1113(e) with the intention of giving debtors the authority to modify the continuing effects of an expired collective bargaining agreement. It follows that the concept that a post-expiration collective bargaining agreement which "continues in effect" may be rejected is implicit in Section 1113(c) since there is "no logic to

support Congressional intent allowing interim modifications to an expired CBA if essential to a Debtor's business or to avoid irreparable harm to the estate as permitted by [Section] 1113(e) but not allowing the rejection of the expired CBA terms if necessary to further the purpose of reorganization provided the conditions of Section 1113(c) are satisfied." *710 Long Ridge*, 2014 WL 407528, at *13. It is incumbent upon the Court to read the statute so as to avoid such an absurd result. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *In re Kaiser Aluminum Corp.*, 456 F.3d 328, 330 (3d Cir. 2006).

Interpreting Section 1113(c) to allow for the rejection of a post-expiration collective bargaining agreement also comports with the legislative policies underlying Section 1113 and the Bankruptcy Code generally. While the legislative history of Section 1113 has been described to consist of "little more than self-serving statements by opposing partisans," *In re Mile Hi Metal Sys., Inc.*, 899 F.2d 887, 890 (10th Cir. 1990), the words of the statute and the context in which Congress enacted it are instructive as to its purpose.

As referenced above, Congress enacted Section 1113 in response to the Supreme Court's *Bildisco* decision. In *Bildisco*, the Supreme Court held that a collective bargaining agreement was subject to rejection by a debtor in possession pursuant to Section

365(a) of the Bankruptcy Code, so long as the debtor could "show that the collective-bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 525-26 (1984). The *Bildisco* court also found that a debtor in possession is not required to bargain to an impasse prior to rejection and "while a debtor-in-possession remains obligated to bargain in good faith under NLRA § 8(a)(5) over the terms and conditions of a possible new contract, it is not guilty of an unfair labor practice by unilaterally breaching a collective-bargaining agreement before formal Bankruptcy Court action." *Id.* at 533-34 (emphasis added). Section 1113 codifies certain parts *Bildisco* and rejects others. *Karykeion*, 435 B.R. at 675.

In Section 1113, Congress struck a balance between affording debtors the flexibility to restructure their labor costs on a comparatively expedited basis, *see Bildisco*, 465 U.S. at 532 (referencing the Bankruptcy Code's "overall effort to give a debtor-in-possession some flexibility and breathing space"), while interposing a certain level of court oversight and requirements for good faith bargaining, see Section 1113(f) ("No 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"). But, Section 1113 does not require debtors to bargain to an impasse, as is required under the NLRA. It is clear that Congress intended for

rejection under § 1113 to be a far more expedited process than collective bargaining under the NLRA. Section 1113(d)(1) requires that the Court hold a hearing on a debtor's application for rejection within 14 days of its filing. Section 1113(d)(2) further requires that the Court render a ruling on the application for rejection within thirty days of the hearing. While a debtor would likely need to commence bargaining with the union prior to filing its application for rejection in order to satisfy the requirements of Section 1113, the statute clearly contemplates a much quicker process than the relatively more protracted process contemplated by the NLRA[3].

Further, the Bankruptcy Code gives debtors broad powers to restructure their affairs and preserve value as a going concern. *Karykeion*, 435 B.R. at 675; *710 Long Ridge*, 2014 WL 407528, at *13. Subjecting

[3] In their letter brief of October 1, 2014 (D.I. 167), the Debtors assert that if they were to invoke the procedures contemplated by the NLRA, the process could take "years" to resolve. In support of this proposition the Debtors cite the NLRB fiscal year 2013 Performance and Accountability Report, which states that it is the NLRB's "goal" to resolve unfair labor practices cases within 365 days, which does not take into account the time it would take to bargain to an impasse. (D.I. 167-1, pp. 18-19). The Union did not refute the Debtors' assertion as to the length of the process under the NLRA or the Debtors' interpretation of the NLRB Report. The Court is convinced that the process contemplated the by NLRA would most likely take significantly longer than the weeks-long process contemplated by Section 1113 and certainly too long for the relief the Debtors require.

the Debtors to a complex and time consuming process overseen by another administrative body in the midst of their restructuring efforts would surely thwart this overriding policy. Which is not to say that the Union is not afforded any of the protections it would otherwise have in a traditional collective bargaining process under the NLRA. Congress provided several checks in Section 1113 to ensure that a debtor is not proceeding too expeditiously with the restructuring of its labor costs. Among these protections, discussed in more detail below, are the requirements that the debtor bargain in good faith, that any changes be necessary to allow reorganization, that the union be treated fairly and equitably in comparison to other stakeholders, and that the balance of the equities clearly favor rejection.

Although they ultimately adopted different standards, both Congress and the Supreme Court in *Bildisco* recognized the need for an expedited process by which debtors could restructure labor obligations in bankruptcy. In many cases, time is the enemy of a successful restructuring. This concern applies with equal force in a situation where the debtor is bound by the terms of a recently expired collective bargaining agreement pursuant to its *status quo* obligations under the NLRA. The concern applies with special force here, where the uncontroverted evidence demonstrates that the Debtors have months, perhaps weeks, to strike a deal in order to avoid liquidation. If the CBA were set to expire the day after the issuance this opinion, there is no doubt that the Court

would have jurisdiction to enter an order approving rejection. But, if the Union is correct, because the CBA expired only a few weeks ago, the Court has no such authority, even though the terms of the expired CBA continue to impose the exact burden on the Debtors' restructuring efforts that Section 1113 is meant to relieve. This result makes little sense. *See Karykeion*, 435 B.R. at 675-76; *710 Long Ridge*, 2014 WL 407528, at *13-14. Again, the Court must read the statute, when possible, to avoid such an illogical result. *Griffin*, 458 U.S. at 575; *Kaiser*, 456 F.3d at 330.

If the Court were to adopt the Union's view, it is certain, based on the uncontroverted evidence before the Court, that the Debtors would be forced to close the Casino and liquidate, resulting in the loss of approximately 3,000 jobs, including those of the Union employees. In contrast to the facts before the court in *Hostess*, the evidence here demonstrates that there is simply no way that the Debtors could complete the collective bargaining process contemplated by the NLRA and avoid liquidation. The CBA is of no force or effect if the Casino closes and the Union employees lose their jobs. This, too, would be an absurd result. Reading Section 1113 to grant the Court jurisdiction to approve rejection of the terms of an expired collective bargaining agreement "avoids an absurd result and promotes consistency with the legislative purpose of the statute and the Bankruptcy Code as a whole." *Long Ridge*, 2014 WL 417528, at *14. *See also Karykeion*, 435 B.R. at 676.

Further, this result does not intrude on the exclusive jurisdiction of the NLRB to enforce and interpret the provisions of the NLRA, as the Union suggests. The Court merely reads Section 1113 to apply with equal force in a situation where the terms of an expired collective bargaining agreement remain in effect due to the employer's *status quo* obligations under the NLRA. In applying Section 1113 to the facts of this case, the Court will interpret and enforce only Section 1113, and not any provision of the NLRA. This is a no greater intrusion on the NLRB's jurisdiction than if the Court were to apply Section 1113 to a collective bargaining agreement which has not expired by its terms. *See Karykeion*, 435 B.R. at 675.

The practical impact of the Court's finding that Section 1113 applies to expired collective bargaining agreements is slight, especially when compared to the violence adopting the Union's position would do to the legislative purpose of Section 1113 and the Bankruptcy Code generally, which is to facilitate and promote reorganization. *See Bildisco*, 465 U.S. 513, 528 ("The fundamental purpose of [chapter 11] reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources."). Labor unions are on notice that in the event of a bankruptcy, their collective bargaining agreements are subject to rejection pursuant to Section 1113. Reading Section 1113 to apply to the narrow class of expired collective bargaining agreements which remain in effect post-petition due to the employer's *status quo* obligations under the NLRA

does not alter and in fact preserves the pre-existing union-employer power dynamic.

The Union's position, if given credence, would effectively give labor unions the power to hold up a debtor's bankruptcy case until the union's demands were met, but only in cases where there is an expired but still controlling collective bargaining agreement. The Court cannot think of nor has the Union offered a good reason for such a distinction between an expired and unexpired collective bargaining agreement. While allowing the Union that sort of hold-up power may be appropriate or even necessary outside of bankruptcy, in a bankruptcy case it wholly ignores the policy and bargaining power balances Congress struck in Section 1113 and exalts form over substance.

Accordingly, the Court finds that it has jurisdiction pursuant to Section 1113(c) to approve an application for rejection of a collective bargaining agreement where the agreement has expired by its terms but the provisions of the agreement remain in effect due to the employer's *status quo* obligations under the NLRA.

B. Section 1113 Requirements

The Court will now focus on whether the Debtors have met their burden of establishing that it is necessary to reject the CBA and that they have satisfied a debtor's requirements under Section 1113, which provides that:

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

Section 1113(c). The reference in subsection (c) to subsection 1113(b)(1) incorporates the Debtors' burden to:

> (A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and
>
> (B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

Therefore, preliminary to rejection of a collective bargaining agreement, a debtor must (1) make a proposal "based on the most complete and reliable information available," (2) have provided a union with relevant information which is necessary for the union to evaluate the proposal, and (3) make certain the proposal treats all parties "fairly and equitably." Section 1113(b)(1)(A). The proposal must also be "necessary to permit the reorganization of the debtor." *Id.* The inquiry then turns to whether the union "refused to accept such proposal without good cause," Section 1113(c)(2), and whether the "balance of the equities clearly favors rejection of the collective bargaining agreement," Section 1113(c)(3). Finally, between the proposal having been made and the hearing on the rejection motion, a debtor must meet "at reasonable times, with the [union] to confer in good faith" in attempting to arrive at "mutually satisfactory modifications" of the collective bargaining agreement. Section 1113(b)(2). The Court is required to schedule a hearing on the Motion "not later than fourteen days after the date of the filing" of the motion. Section 1113(d)(1).

1. Necessary to Reorganization

The source of the law in the Third Circuit on rejection of a collective bargaining agreement is found in *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am. AFL-CIO-CLC*, 791 F.2d 1074 (3d Cir. 1986). *Wheeling* instructs the Court that the "necessary" standard requires a showing that the

modifications are not merely "desirable" but essential to reorganization. *Wheeling*, 791 F.2d at 1088-89. The emphasis is on promoting reorganization and avoiding liquidation. *Id.* at 1089.

Here, the Debtors have established that they are suffering losses at the Casino which are prohibitive to continuing the business and the Union has presented no evidence challenging such evidence. It is absolutely clear to the Court that the Debtors have sufficient cash to fend off the losses for less than two months. Mr. Hardie, Debtors' investment advisor, provided uncontroverted testimony that without relief from the CBA, Debtors will be forced to liquidate in which event all of the Casino employees, both union and non-union, will lose their jobs and all of the benefits which are at issue. 10/2 Tr. 38. The only alternative before the Court to liquidation is the Proposal and therefore the modifications are indeed essential to the Debtors' short-term survival. In *Bowen Enters., Inc. v. United Food & Commercial Workers Int'l Union* (*In re Bowen Enters., Inc.*), 196 B.R. 734 (Bankr. W.D. Pa. 1996), the court approved the Section 1113 rejection because the debtor's dire financial situation clearly meant that the debtor would be forced to liquidate otherwise.

The Union questioned Debtors' maintaining the Trump Plaza Hotel and Casino at a cost of $9.2 million per year, money which the Union argues could be used to honor the terms of the CBA. The Union does not take into account that the Debtors do not own the Trump Plaza Hotel and Casino free and clear. It is

encumbered by the secured creditor's lien and the Debtors can not dispose of the Trump Plaza Hotel and Casino without the secured creditor's cooperation and not quickly enough in any event to avoid the present cash emergency. The minimal spending on the Trump Plaza Hotel and Casino is only for such essentials as heat and air conditioning, some electric and security. 10/14 Tr. 147.

2. Most Complete and Reliable Information

As discussed above, Section 1113(b)(1)(A) requires the debtor to make a proposal "based on the most complete and reliable information available at the time of the proposal." The requirement contemplates the debtor will provide comprehensive information and make an honest effort to compile all relevant data. It need not be a perfect compilation but a good faith, best efforts one. *Karykeion, Inc.*, 435 B.R. at 667; and *Ass'n of Flight Attendants-CWA, AFL-CIO v. Mesaba Aviation, Inc.*, 350 B.R. 435, 454 (D. Minn. 2006).

Debtors have fully satisfied this requirement. On September 17, 2014, the Debtors provided the Union with the Proposal accompanied by a presentation prepared by Houlihan Lokey which contained the proposed modifications, the estimated economic impact of each of the proposed modifications, a cash flow forecast through November 13, 2014, and forecasts showing the financial conditions incorporating the proposed modifications and the need to obtain

relief. Ex. 5. Such information was the most complete and reliable information available. *In re 710 Long Ridge*, 2014 WL 407528 (Bankr. D.N.J. Feb. 3, 2014). The Union does not claim otherwise.

3. Relevant Information Necessary to Evaluate the Proposal

A debtor must provide "such relevant information as is necessary to evaluate the proposal." Section 1113(b)(1)(B). There is no question that Debtors satisfied this requirement. Debtors provided the Union with numerous documents, established a data room and responded promptly to every request for information. Having met its burden of establishing Debtors provided the relevant and necessary information, the burden shifted to the Union to rebut such compliance. The Union presented no evidence and voiced no complaint that Debtors had not provided all relevant information necessary for the Union's evaluation.

4. *All Parties Treated Fairly and Equitably*

The question posed for this requirement is "whether the . . . proposal would impose a disproportionate burden on the employees." *Wheeling*, 791 F.2d at 1091. In other words, the employees should not "bear either the entire financial burden of making the reorganization work or a disproportionate share of that burden, but only their fair and equitable share of the necessary sacrifices." *Id.*

Here, it is clear from the evidence presented that all constituencies will suffer greatly, not just the Union. The secured creditor is being asked to forego $286 million in debt and unpaid interest of $6 million, and to invest $100 million for the reorganization. Trade creditors will receive nothing. Atlantic City and the State of New Jersey are being asked for substantial financial concessions. Non-union employees will receive the same health and welfare benefits. Management's compensation is tied to pre-petition equity which will be worthless. Debtors have asked tenants of the Casino to make concessions. 10/14 Tr. 111-13. Every constituency will suffer significant losses.

The Union argues that there is no "snap-back" provision in the Proposal and that such a provision is required by *Wheeling*. A "snap back" provision increases employees' wages or benefits in the event its employer has greater financial success than expected. *Wheeling* did, indeed, discuss and find that the absence of a snap back provision in that case precluded rejection. The Court concludes that the absence of the snap back is not fatal to rejection in this case.

First, Section 1113 does not include such a requirement. Second, other cases have not denied rejection because of the absence of a snap back provision. *Bowen*, 196 B.R. at 742 (court not aware of a binding precedent requiring snap back); *United Food & Commercial Workers Local Union v. Appletree Mkts., Inc.* (*In re Appletree Mkts., Inc.*), 155 B.R. 431, 440 (S.D. Tex. 1993); *In re Sierra Steel Corp.*, 88 B.R. 337, 342 (Bankr. D. Colo. 1988). Third, as in *Bowen*

where the court rejected the concept that a snap back is required in every case, the Union never requested in negotiations that the Debtors provide a snap back clause. In *Wheeling*, the union made the request. The Third Circuit found that the debtor did not provide a credible explanation for the failure to include such a provision. But ultimately, the overriding answer to the Union's belated suggestion that the snap back had to be offered in the Proposal is the fact that the Proposal is not imposing a disproportionate burden on the Union. The suffering is spread across all parties associated with Debtors.

5. Union Rejection Without Good Cause

A court will not approve the rejection of a collective bargaining agreement unless the Union has rejected a proposal without good cause. Section 1113(c)(2); and *Bowen*, 197 B.R. at 745. When the debtor establishes that the union has refused to accept its proposal, the union then bears the shifted burden to prove that its refusal was not without good cause. *In re Am. Provision Co.*, 44 B.R. 907, 910 (Bankr. D. Minn. 1984).

The Debtors have established that the Union refused to negotiate, delayed negotiations or did not negotiate earnestly, and presented only a partial counterproposal at the last minute. The Union was in essence intransigent in its position. Instead, the Union took a "fight rather than switch" stance even in the face of Debtors' submission of information that

they were facing liquidation and would close the Casino unless negotiations led to a new collective bargaining agreement. The Union's refusal to negotiate qualifies for the finding that it rejected the Proposal without good cause. *See, e.g.*, *In re Garofalo's Finer Foods*, 117 B.R. 363, 371 (Bankr. N.D. Ill. 1990).

6. Balance of the Equities

Section 1113(c)(3) provides that rejection of a collective bargaining agreement is appropriate if "the balance of the equities clearly favor rejection of such agreement." In making the determination, courts will consider the following factors:

> (1) the likelihood and consequences of liquidation if rejection is not permitted; (2) the likely reduction in the value of creditors' claims if the bargaining agreement remains in force; (3) the likelihood and consequences of a strike if the bargaining agreement is voided; (4) the possibility and likely effect of any employees claims for breach of contract if rejection is approved; (5) the cost-spreading abilities of the various parties, taking into account the number of employees covered by the bargaining agreement and how various employees' wages and benefits compare to those of others in the industry; and (6) the good or bad faith of the parties in dealing with the debtors' financial dilemma.

Truck Drivers Local 807 v. Carey Transp., Inc., 816 F.2d 82, 93 (2d Cir. 1987). These factors clearly militate in favor of rejection. Most importantly, liquidation will result if the Court denies the Motion. *Bowen*, 196 B.R. at 745 (the fact that the debtor would be forced to liquidate unless relieved of onerous labor costs advised that the equities favored rejection). The Court also cannot ignore the Union campaign of misinformation, refusal to negotiate in earnest and effort to drive business away, all of which show bad faith.

7. Meetings at Reasonable Times to Confer in Good Faith

Section 1113(b)(2) requires the debtor to "confer in good faith in attempting to reach mutually satisfactory modifications" of the collective bargaining agreement. Once the debtor shows it has complied, the union must produce evidence that the debtor did not confer in good faith. *Am. Provision*, 44 B.R. at 909.

Debtors provided evidence through Mr. Keyser and Mr. Hardie that they went to great lengths and were relentless in their efforts to bring the Union to the bargaining table. They managed eventually to draw the Union into negotiations but the Union did not make a comprehensive counterproposal and continued to raise rather than discuss issues. By then, the Debtors had run out of time after more than seven months of trying to engage the Union in discussions. The Court finds that the Debtors "stood on

their head" to negotiate and were rebuffed time and time again. The Union presented no evidence that the Debtors did not confer in good faith. Thus, Debtors have satisfied their burden.

C. Effect of Rejection

In addition to disagreeing over whether rejection of the CBA is appropriate at all, the parties disagree as to the effect of rejection. In the Debtors' view, the Court can and should enter an order which modifies the CBA and implements the terms of its proposal. *See, e.g.*, *Garofalo's Finer Foods*, 117 B.R. at 369-70 ("the Court concludes that not only may such agreements be rejected under section 1113(c), but that if all the requirements are met, such agreements can be alternatively modified in the exercise of the Court's discretion in balancing the equities under section 1113(c) and rendering its judgment as deemed necessary and appropriate under section 105(a)"). The Union, on the other hand, argues that nothing in Section 1113 grants the Court the authority to specifically implement the terms of the Proposal. *See, e.g.*, *Northwest Airlines Corp. v. Ass'n of Flight Attendants-CWA* (*In re Northwest Airlines Corp.*), 483 F.3d 160, 171 n.5 (2nd Cir. 2007) (reserving judgment but noting that "the text of § 1113 is not explicit on this score, cf. 11 U.S.C. § 1113(e) (explicitly permitting the bankruptcy court to impose 'interim changes'), and that the bankruptcy court must look elsewhere in the Bankruptcy Code to find such authority").

Nothing in the text of Section 1113 gives the Court the authority to implement the terms of the Debtors' proposal and there is little judicial guidance on the issue. The more reasoned view, and the view which best harmonizes the goals of both bankruptcy law and labor law is that:

> [F]ollowing rejection, a [debtor in possession] remains subject to its labor law duty to bargain in good faith, but is permitted to implement changes to the terms and conditions of employment that were included in the section 1113 proposals approved by the bankruptcy court. Such implementation, without further bargaining, will not constitute a violation of the duty to bargain under the NLRA, because this result is a necessary accommodation of the NLRA to section 1113.

7 *Collier on Bankruptcy* ¶ 1113.06[1][b] (16th ed. 2014) (citing Memorandum from the General Counsel of the NLRB regarding *Mile-Hi Metal Systems, Inc.*, 1997 WL 731480 (N.L.R.B.G.C. July 30, 1986)). *See also In re Alabama Symphony Ass'n*, 155 B.R. 556, 573 (Bankr. N.D. Ala. 1993), *aff'd in part, rev'd in part on other grounds*, 211 B.R. 65 (N.D. Ala. 1996) ("The Court is here merely to decide whether they shall be divorced, subject to further out-of-court negotiations, and not to decide the terms under which they shall live together."). Accordingly, and to be clear, the Court approves the terms of the Proposal only in the sense that the Court finds that the Proposal and terms therein satisfy the requirements of Section

1113 and is authorizing the Debtors to implement the Proposal.

CONCLUSION

The Court will not speculate why the Union failed to negotiate in good faith with the Debtors and did not present witnesses at the evidentiary hearing.[4] The Union had ample opportunity to do both. The Court continues to be concerned that whatever the Union's reasons, the Union did not take action to advance the interests of Taj Mahal employees despite the protections which Section 1113 provides. Nor did the Union present a single witness in rebuttal.

The Court finds that it has jurisdiction to approve rejection of an expired collective bargaining agreement under Section 1113(c). Further, based on the extensive evidence, the Court finds that the Debtors have satisfied their responsibilities under Section 1113(b) and Section 1113(c). Accordingly, the

[4] Debtors and the Union discussed at the hearing, at some length, the existence of "most favored nation" or "most favored employer" provisions in collective bargaining agreements at other casinos in Atlantic City. The Court has not reached any conclusion whether such provisions – which give an employer the benefit of employer beneficial amendments in another casino's collective bargaining agreement – played a role in the Union's failure to negotiate.

Court will grant the Motion. The Court has entered an Order.

Dated: October 20, 2014 /s/ Kevin Gross
KEVIN GROSS, U.S.B.J.

ATTACHMENT A

CONFIDENTIAL
10-10-14

PROPOSAL THE FOLLOWING PROPOSAL IS MADE ON BEHALF OF TRUMP ENTERTAINMENT RESORTS, INC. AND TRUMP TAJ MAHAL ASSOCIATES, LLC (THE "DEBTOR") WITH RESPECT TO MODIFIED TERMS TO BE INCLUDED IN A NEW COLLECTIVE BARGAINING AGREEMENT ("CBA") FOR A FOUR-YEAR TERM BETWEEN TRUMP TAJ MAHAL ASSOCIATES, LLC AND UNITE HERE LOCAL 54. THE DEBTOR RESERVES THE RIGHT TO MODIFY, DELETE FROM OR ADD PROPOSALS AT ANY TIME.

ARTICLE 3 – CONTROL, DISCHARGE AND SENIORITY

The Debtor proposes to expand its right to direct and control employees, such as by consolidating jobs, by determining and re-determining job content and determining the assignment of work, in order to allow

for a more flexible use of staff and generate cost-savings.

Article 3.7(a): House seniority is an employee's length of continuous service in years, months and days from his/her first day paid in the bargaining unit by the Debtor."

Article 3.7(b): Classification seniority is an employee's length of continuous service within the department (as defined by the Debtor), in years, months and days from his/her first day paid in his/her present classification within his/her respective department/outlet.

ARTICLE 6 – MEAL AND LOCKER FACILITY

The Debtor proposes to eliminate paid meal times. Rather than a paid meal time, the Debtor proposes that all employees working on a shift of six (6) hours or more will be provided with an unpaid, uninterrupted thirty (30) minute meal period. Accordingly, the Debtor would also require that employees clock out prior to the commencement of their assigned unpaid break and clock in upon the conclusion of their break and return to work. This modification would ensure that amounts paid will match actual work performed.

ARTICLE 11 – HOLIDAYS

The Debtor proposes to reduce the amount of pay employees receive for working on a holiday. Rather than receiving straight pay (or in some cases, 1.5

times regular pay) for hours actually worked plus holiday pay, the employee would only receive a more market-standard time-and-a-half for hours actually worked on the holiday, thereby matching the amount paid to work actually performed. Employees would still receive holiday pay, at straight time, for the portion of the employee's usual shift which the employee does not work due to the holiday.

ARTICLE 12 – HOURS OF WORK

The Debtor proposes to eliminate the guarantee that employees will be paid for a full shift if they are sent home at the direction of the employer after the completion of more than half their shift. Instead, the Debtor proposes that employees who are sent home at the direction of the employer prior to the completion of their full shift shall be guaranteed pay for half of their scheduled shift or the hours actually worked, whichever is greater. This would more closely link the amount paid to the time worked.

ARTICLE 15 – H&W AND PENSION & SEVERANCE

The Debtor proposes to withdraw from the Health and Welfare Fund and, instead, substitute with health care coverage under the 2010 Patient Protection and Affordable Care Act (commonly referred to as "Obamacare"). Full-time employees, however, would receive additional compensation of $2,000 per year which will enable them to offset and, in some cases,

completely defray the cost of obtaining health insurance now available to them and their families under Obamacare. Notably, it is intended that non-union employees (including management) would receive identical treatment in this regard.

The Debtor further proposes to cease making contributions to, and permanently withdraw from, the Pension Fund (National Retirement Fund) and, instead institute an employer sponsored 401(k) plan with the employer matching employee contributions up to 1% of each employee's compensation per year. This modification would result in substantial cost-savings to the Debtor and enable the Debtor to attract new capital.

Also, in line with market standards, the Debtor also proposes to eliminate future contributions to the Severance Fund, which in turn will result in cost-savings to the Debtor.

ARTICLE 20 – MISCELLANEOUS PROVISIONS

The Debtor further proposes to expand the exception for utilizing subcontractors, as set forth in set forth in Article 20.8, to include restaurants owned, operated by and/or affiliated with national restaurateurs. This modification will enable the Debtor to contract with national restaurateurs to open destination restaurants and attract new customers.

The Debtor also proposes to increase the minimum number of rooms a housekeeper will clean in a day

from fourteen (14) to sixteen (16). This modification, which is in line with market standards, will enable internal efficiencies and result in cost-savings to the Debtor.

ARTICLE 22 – TERM OF CONTRACT

The Debtor proposes to enter into a Four (4) year agreement such that the benefits of the proposed modifications are realized over a necessary period of time.

Miscellaneous:

Conforming changes to the dates contained in the Survival of Article provisions of Attachment 5 and the Wage Progression Examples of Attachment 11 upon entering into a new Collective Bargaining Agreement.

Any Union proposal not specifically addressed by the Debtor in this Proposal is hereby rejected.