

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
CIVIL MINUTES**

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**Adversary Title :** Official Unsecured Creditors Committee of City of v. City of Vallejo, California      **Case No :** 08-26813 - A - 9  
**Adv No :** 10-02136 - A  
**Date :** 8/9/10  
**Time :** 09:00

**Matter :** [16] - Motion/Application to Dismiss Case/Proceeding [OHS-1] Filed by Defendant City of Vallejo, California (pdes)      **OPPOSED**

**Judge :** Michael S. McManus  
**Courtroom Deputy :** Sarah Head  
**Reporter :** Diamond Reporters  
**Department :** A

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**APPEARANCES for :**

**Movant(s) :** Defendant's Attorney - Marc Levinson, John Killeen

**Respondent(s) :** Plaintiff's Attorney - Dale Ginter, James Paul  
Creditor's Attorney - Thomas Phinney, Aron Oliner, Richard Lapping, Steven Felderstein, Robert Kaplan (by phone), Mike Buckley (by phone), Lawrence Larose (by phone)

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**MOTION was :**  
Granted  
See final ruling below.

The court will issue a minute order.

Final Ruling: The motion will be granted.

The defendant in this proceeding, the City of Vallejo, the chapter 9 debtor in the underlying bankruptcy case, moves for dismissal pursuant Fed. R. Civ. P. 12(b)(6). In addition to arguing that each of the claims asserted in the complaint fails as a matter of law, the debtor contends that the plaintiff has no standing to prosecute those claims.

The plaintiff, the Official Unsecured Creditors Committee of City of Vallejo Retirees, opposes the motion.

Rule 12(b)(6), as made applicable by Fed. R. Bankr. P. 7012(b), permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Saldate v. Wilshire Credit Corp.*, 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

Although a court must take all factual allegations in the complaint as true, the court is not bound to accept as true legal conclusions couched as factual allegations. *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590

F.3d 806, 812 (9th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009)). Conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss under Rule 12(b)(6). *Caviness* at 812 (quoting *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996)).

Dismissal for lack of standing is appropriate under Rule 12(b)(6). *Harris v. Amgen, Inc.*, 573 F.3d 728, 732 n.3 (9th Cir. 2009).

The central and threshold issue here is whether the plaintiff has standing to prosecute the claims held by retirees on behalf of those retirees.

The plaintiff has cited no authority indicating that a committee has standing to prosecute the claims of committee members against a debtor.

Even though there is nothing in the Bankruptcy Code prohibiting a committee from prosecuting an adversary proceeding on behalf of its members, the court concludes that the absence of such a provision tends to show that Congress did not intend committees to have such powers.

11 U.S.C. § 1102 provides for the formation of committees and the appointment of its members. 11 U.S.C. § 1103 defines the powers and duties of committees, and 11 U.S.C. § 1109(b) provides that committees "may raise and may appear and be heard on any issue in a case under this chapter." Sections 1102, 1103 and 1109 are incorporated into chapter 9 cases by 11 U.S.C. § 901. None of these sections authorize a committee to prosecute causes of action on behalf of their members, or anyone else, against the debtor.

Further, courts have held that committees cannot bind their members. *In re Refco, Inc.*, 336 B.R. 187, 197 (Bankr. S.D.N.Y. 2006) (stating that "a committee's assent to a plan or a transaction does not bind its members") (citing *In re Armstrong World Indus., Inc.*, 432 F.3d 507 (3rd Cir. 2005)); *Philips Lighting Co. v. Schneider*, No. 05-CV-4820 (SLT)(MDG), 2008 WL 4527713, at \*5 (E.D.N.Y. Sept. 30, 2008) (holding that "a creditor's committee may not bind its constituents or its members"); see *Armstrong World* at 517.

The plaintiff has provided no evidence that all of its members consent to the prosecution of the instant adversary proceeding and agree to be bound by any judgment, including an adverse one. As pointed out by the debtor, the plaintiff is unlikely to obtain the consent of all of its members because the plaintiff has "insurmountable" conflicts of interest in representing all retiree members. That is why the plaintiff abandoned idea of filing a class action. See Attachment A to Debtor's Reply, 18:16–19:10. Thus, this action cannot be binding on the plaintiff's members.

Also, while case law has recognized some an implied power of committees to prosecute adversary proceedings on behalf of others, such power is narrow and qualified. It is based on sections 1103(c)(5) and 1109(b). *Liberty Mutual Ins. Co. v. Official Unsecured Creditors' Comm. of Spaulding Composites Co.* (In re *Spaulding Composites Co., Inc.*), 207 B.R. 899, 903 n.4 (B.A.P. 9th Cir. 1997); *In re Valley Park, Inc.*, 217 B.R. 864, 865 (Bankr. D. Mont. 1998); *In re First Capital Holdings Corp.*, 146 B.R. 7, 11 (Bankr. C.D. Cal. 1992); *Official Comm. of Unsecured Creditors of AppliedTheory Corp. v. Halifax Fund, L.P.* (In re *AppliedTheory Corp.*), 493 F.3d 82, 85–86 (2nd Cir. 2007) (defining only two limited instances where a committee may initiate an adversary proceeding in the context of a bankruptcy case); *Unsecured Creditors Comm. of Debtor STN Enter., Inc. v. Noyes* (In re *STN Enter.*), 779 F.2d 901, 904 (2nd Cir. 1985); *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery* (In re *Cybergenics Corp.*), 330 F.3d 548, 560–63 (3rd Cir. 2003) (holding that neither section 1109(b), nor section 1103(c)(5) allows for independent or blanket authority for committees to initiate an adversary proceeding).

11 U.S.C. § 1103(c) provides that:

"A committee appointed under section 1102 of this title may

- (1) consult with the trustee or debtor in possession concerning the administration of the case;
- (2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
- (3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;
- (4) request the appointment of a trustee or examiner under section 1104 of this title; and
- (5) perform such other services as are in the interest of those represented."

11 U.S.C. § 1109(b) provides that:

"A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter."

In order for a committee to prosecute an adversary proceeding on behalf of someone else, (1) the committee must have made a demand on the statutorily authorized party to take action, (2) the demand must have been declined, (3) a colorable claim that would benefit the estate exists, based on a cost-benefit analysis performed by the court, and (4) the inaction in not prosecuting the claim is an abuse of discretion or is unjustified. In re Yellowstone Mountain Club, LLC, Nos. 08-61570-11, 08-61571-11, 08-61572-11, 08-61573-11, 2009 WL 982207, at \*6 (Bankr. D. Mont. Jan. 16, 2009) (citing Valley Park at 866); First Capital Holdings at 11; see also Spaulding Composites at 903-04 (discussing a situation where the party on whose behalf the committee wanted to initiate an adversary proceeding had agreed to the committee prosecuting the action).

In addition, some courts have required a committee, and creditors in general, to obtain permission from the bankruptcy court prior to instituting an adversary proceeding. Spaulding Composites at 903-05; In re Curry and Sorensen, Inc., 57 B.R. 824, 828 n.3, 829 (B.A.P. 9th Cir. 1986); First Capital Holdings at 11; STN Enter. at 904.

The plaintiff has made no effort to discuss the foregoing authority. Nor has it argued that it has satisfied these requirements. Instead, the opposition cites *Argeras v. GF Corp.*, 140 B.R. 884 (N.D. Ohio 1992), a case holding that, pursuant to 11 U.S.C. § 1114, individual retirees lack standing and only the committee for the retirees, as their representative, has standing. The *Argeras* court reasoned that the committee for retirees not covered by a collective bargaining agreement is the only party with standing to represent the interests of those retirees because section 1114 has no provision for another authorized representative or for individual participation of persons receiving retiree benefits. *Argeras* at 886.

Hence, the plaintiff asserts, unless this court applies section 1114, as the court did in *Argeras*, or exercises broad authority to apply the principles applied in *Argeras*, the retirees are left without representation. In short, the plaintiff says that it is the only party with standing to represent the retirees under section 1114.

However, the fallacy of the argument is that it relies solely on section 1114, which is not incorporated into chapter 9 by section 901. This court does not have to agree or disagree with the conclusion reached in *Argeras*, because it is based on section 1114, which is not applicable here. The U.S. Trustee appointed the plaintiff pursuant to sections 1102(a) and 1102(b)(1), and not pursuant to section 1114. Case No. 08-26813, Docket Nos. 286, 292, 302. The standing of the committee in this adversary proceeding does not implicate section 1114. It implicates sections 1102, 1103, and 1109, which are discussed above.

The court also refuses to read section 1114 into chapter 9. This court's job is not to create new law by incorporating a provision into chapter 9 that has been left out of chapter 9 by Congress.

Additionally, even if the inapplicability of section 1114 was not at issue, *Argeras* is different than this case. Section 1114 provides that the court may appoint or order the appointment of a committee of retirees. 11 U.S.C. § 1114(c)(2), (d). And, the U.S. Trustee may appoint a committee of retirees only after the court has ordered the appointment of a committee already. 11 U.S.C. § 1114(d). In other words, in the appointment of committees under section 1114, the U.S. Trustee does not have the same discretion to appoint committees as she does under section 1102(a)(1), which permits appointment of creditor committees "as the United States trustee deems appropriate."

But, unlike in *Argeras*, where the court authorized the appointment of a committee of retirees, the committee here was appointed by the U.S. Trustee, without a prior order of appointment by the court. The U.S. Trustee appointed the committee on October 7, 2008 pursuant to sections 1102(a) and 1102(b)(1). Case No. 08-26813, Docket Nos. 286, 292, 302. Also, the plaintiff has not obtained an order from this court, recognizing it as an "authorized representative" pursuant to section 1114, as that section requires and as the committee for retirees not covered by a CBA in *Argeras* did. 11 U.S.C. § 1114(d); *Argeras* at 885.

Next, the plaintiff urges the court to create new law, giving the plaintiff standing under the circumstances of this case.

Any party invoking federal jurisdiction has the burden of establishing its standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To establish standing, a plaintiff must meet both the constitutional and prudential requirements of standing. *Bennett v. Spear*, 520 U.S. 154, 162 (1997). To establish standing under the case or controversy requirement of Article III of the United States Constitution, a plaintiff (1) must have suffered some actual or threatened injury due to alleged illegal conduct, known as the "injury in fact"

element; (2) the injury must be fairly traceable to the challenged action, known as the "causation element"; and (3) there must be a substantial likelihood that the relief requested will redress or prevent plaintiff's injury, known as the "redressability element." U.S.C.A. Const. Art. 3, § 1 et seq.; *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Dunmore v. United States*, 358 F.3d 1107, 1111–12 (9th Cir. 2004) (citing *Lujan*, 504 U.S. at 560–61).

The prudential requirements of standing require that: (1) the litigant must assert his own legal interests and not those of third parties; (2) the litigant "must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one shared in substantially equal measure by all or a large class of citizens;" and (3) the interest of the litigant must be within the "zone of interests" to be protected by the statute under which his claim arises. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100, 100 n.6 (1979) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)); *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004).

Unlike the constitutional limitations on standing, though, the prudential limitations may be modified or abrogated by Congress. *Bennett* at 162 (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

While the plaintiff acknowledges that it does not satisfy the "injury in fact" constitutional requirement and that it is asserting the interests of third parties, namely the individual retirees, the plaintiff claims that it has "associational" or "representational" standing.

The plaintiff would have "associational" standing if (a) at least one of its members has standing to assert the claims in his own right, (b) the interests it is seeking to protect are germane to the plaintiff's purpose or, in other words, the plaintiff is organized for a purpose germane to the subject of its members' claims, and (c) neither the claims asserted nor the relief requested requires the participation of individual members in the lawsuit. *New York State Club Ass'n., Inc. v. City of New York*, 487 U.S. 1, 9 (1988); *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 555–56 (1996). Only the first two prongs of this test are constitutionally mandated. The third prong is a prudential limitation, as a matter of "administrative convenience and efficiency." *Brown Group* at 553–57.

The court has difficulty concluding that associational standing exists here because of its analysis of sections 1102, 1103, 1109, and 1114. Generally, the rights of persons receiving retiree benefits are not determined under section 1109(b), as is the case with all other creditors. Rather, the rights of persons receiving retiree benefits are determined by section 1114. Under section 1114, only a committee for the retirees can be an authorized representative of individual retirees not covered by a collective bargaining agreement. Section 1114 has no provision for another authorized representative or for individual participation of persons receiving retiree benefits. 11 U.S.C. § 1114(d); see, e.g., *Argeras* at 886.

By specifically excluding section 1114 from the applicable chapter 9 provisions, Congress has stated, in effect, that it does not want section 1114 committees to represent individual retirees in chapter 9 cases. 11 U.S.C. § 901(a).

That is why the plaintiff was appointed as a committee pursuant to section 1102, and not section 1114, and that is why the rights of persons receiving retiree benefits in chapter 9 are by default determined by sections 1103 and 1109, which are applicable in chapter 9 cases. 11 U.S.C. § 901(a). As a result, the plaintiff is limited to the standing available to committees appointed under section 1102, 1103, and 1109, which, as discussed above, does not include standing to initiate an adversary proceeding on behalf of its members. Neither sections 1102, 1103 and 1109, nor the cases interpreting those provisions, provide for the standing requested by the plaintiff.

Further, in its complaint, the plaintiff is seeking injunctive and declaratory relief against the debtor, requesting the court to undo the retiree benefit-reducing measures taken by the debtor in connection with the implementation of its bankruptcy pendency plan and pursuant to the new collective bargaining agreements negotiated with the labor organizations representing active employees. In other words, the plaintiff argues that it has standing to ask the court to inject itself into the political governance of the City by compelling the City to undo certain resolutions and budget decisions.

But, Congress could not have intended for a committee like plaintiff to have standing to seek such relief, given Congress' express prohibition against this court's interference with the chapter 9 debtor's political or governmental powers. 11 U.S.C. § 904(1), (2). See, e.g., *In re County of Orange*, 179 B.R. 195, 199 (Bankr. C.D. Cal. 1995) (holding that section 904(2) precludes the bankruptcy court even from requiring a chapter 9 debtor to compensate professionals retained by a committee).

The plaintiff committee was not organized for a purpose that directly contradicts Congress' directive that this court not meddle in the debtor's governmental powers.

The court also concludes that the relief requested by the plaintiff requires the participation of each retiree. As discussed earlier, the plaintiff itself has admitted to "insurmountable" conflicts of interest in representing all retiree members. It is no answer to such conflicts to prosecute the action in its own name for the benefit of retirees with conflicting interests.

The plaintiff has no associational standing.

Lastly, the court rejects the plaintiff's argument that this is not a core proceeding.

Bankruptcy jurisdiction extends to four types of title 11 matters, any or all cases "under title 11," any or all proceedings "arising under title 11," any or all proceedings "arising in a case under title 11," and any or all proceedings "related to a case under title 11." See *Stoe v. Flaherty*, 436 F.3d 209, 216 (3rd Cir. 2006). The first three types of title 11 matters are termed as core proceedings by 28 U.S.C. § 157(b)(1), which provides that "[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 . . . and may enter appropriate orders and judgments." 28 U.S.C. § 157(b)(2) states that "[c]ore proceedings include, but are not limited to (O) other proceedings affecting . . . the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims."

On the other hand, "related to a case under title 11" proceedings are noncore. The bankruptcy court may not enter final orders or judgments in them. See 28 U.S.C. § 157(c)(1); see also 28 U.S.C. § 157(b)(3). This court is authorized only to submit proposed findings of fact and conclusions of law to the district court. It may enter appropriate orders and judgments only with the consent of all parties to the proceeding. 28 U.S.C. § 157(c)(1).

Cases "under title 11" are the only cases over which the district court has original and exclusive jurisdiction. As to proceedings "arising under," "arising in," or "related to a case under title 11," district courts have original but nonexclusive jurisdiction, meaning that such cases may be initially brought in state court and then removed to federal court. See 28 U.S.C. § 1334(a) and (b).

A proceeding "arising under title 11" is one that "invokes a substantive right provided by title 11." *Gruntz v. County of Los Angeles (In re Gruntz)*, 202 F.3d 1074, 1081 (9th Cir. 2000) (quoting *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987)). A proceeding "arising in a case under title 11" is one that "by its nature, could arise only in the context of bankruptcy case." *Id.* Finally, a proceeding is "related to a case under title 11" if its outcome could conceivably affect the administration of the estate. *Lorence v. Does 1 through 50 (In re Diversified Contract Servs., Inc.)*, 167 B.R. 591, 595 (Bankr. N.D. Cal. 1994) (citing *Fietz v. Great Western Savings (In Fietz)*, 852 F.2d 455, 457 (9th Cir. 1988)).

As noted earlier, the plaintiff is seeking injunctive and declaratory relief against the debtor, requesting the court undo the retiree benefit-reducing measures taken by the debtor in connection with its bankruptcy pendency plan and pursuant to the new collective bargaining agreements negotiated with the labor organizations representing active employees. Hence, while the plaintiff's claims do not invoke substantive rights provided by title 11, the claims by their nature directly impacting the adjustment of the debtor-creditor relationship and the administration of the bankruptcy case, could arise only in the context of a bankruptcy case. Namely, the claims are seeking to undo post-petition retiree benefit-reducing measures that resulted from the debtor rejecting collective bargaining agreements, negotiating new collective bargaining agreements, and implementing a pendency bankruptcy plan. The debtor could not have rejected the pre-petition collective bargaining agreements, negotiated new ones and implemented a pendency plan outside of the bankruptcy case. The claims directly affect the adjustment of the debtor-creditor relationship in the bankruptcy case and are core.

The motion will be granted without leave to amend the complaint.