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In the Matter of:	:	UNITED STATES BANKRUPTCY COURT
	:	DISTRICT OF NEW JERSEY
	:	
	:	Chapter 11
	:	
PASCACK VALLEY HOSPITAL	:	Case No.: 07-23686/RG
ASSOCIATION, INC.	:	
	:	Judge: Hon. Rosemary Gambardella
Debtor.	:	
	:	OBJECTION TO APPROVAL OF THE SALE
	:	ON BEHALF OF HEALTH PROFESSIONALS
	:	AND ALLIED EMPLOYEES AFT/AFL-CIO
	:	
	:	

The objection of Health Professionals and Allied Employees AFT/AFL-CIO, (hereinafter “the Union”), to the approval of the sale of assets by and through their counsel, Mitchell Malzberg, Esq. of Mitnick & Malzberg, P. C. , respectfully states and alleges as follows:

BACKGROUND

1. On September 24, 2007 (the “Petition Date”), the Debtor filed its petition for relief under Chapter 11 of the Bankruptcy Code. Prior to the filing, the Debtor announced it would wind down its’ operations. In the context of the Bankruptcy, the Debtor, on or about October 30, 2007, retained Cushman & Wakefield to market itself for sale of the assets of the hospital.

2. As the Court is well aware, my office has been actively involved in this case as counsel for the Union. On behalf of the Union, I am filing this objection to the sale as the Debtor and Purchaser, HUMC/TOURO LLC (hereinafter “Touro”) and for that matter, the Asset Purchase Agreement (hereinafter “A.P.A.) fail to honor the Collective Bargaining Agreement (hereinafter “C.B.A.”) . As such, the Union must file this Objection to the approval of the sale.

3. The court entered an Order approving the bidding procedures for the Sale of the Assets on

December 20, 2007. This Bidding and Sales Procedures Order was amended by Orders dated February 4, 2008 and February 8, 2008 respectively. The amendments merely changed the date of the auction sale and the dates as to when the hearing and objections were to be held. The Notice and Bidding procedures contained a form A.P.A. The form A.P.A. failed to address in any respect a Purchaser's obligations under the Collective Bargaining Agreement and/or compliance with Section 1113 of the Bankruptcy Code.

4. The Debtor and the Union are parties to a C.B.A. The Debtor, pursuant to the Notice of Auction sale (Docket 408), announced that Touro was the highest and best bidder at the Auction sale scheduled on February 27, 2008. The bid by Touro was for \$45 million for the purchase of the Hospital's real property located at 250 Old Hook Road, Westwood, New Jersey. The Debtor and the Purchaser, Touro entered into an A.P.A. dated March 3, 2008. The A.P.A. of Touro fails to assume, assign and honor the C.B.A. as a condition of the sale.

5. The A.P.A. does not affirmatively assume and assign the C.B.A. and related employee obligations. In fact, the A.P.A. plainly states (under the excluded liability section 1.4(l) of the A.P.A.), that all liabilities relating to the seller's employees are excluded. The Union was not a party to any of the negotiations as they pertain to the A.P.A. The A.P.A. fails to address the Debtor's and for that matter, Touro's obligations as they relate to the C.B.A.

6. The A.P.A. proposed by the Debtor and the Purchaser is in violation of the Union's collective Bargaining Rights and Section 1113 of the Code. The Union was never approached by the Debtor or the Purchaser prior to the Debtor signing the A.P.A. to negotiate with the Union or seek to discuss the C.B.A. No formal negotiations or proposals whatsoever have taken place to date.

OBJECTION

7. Pursuant to Federal Labor Law, and additionally pursuant to Section 1113 of the Code, the Debtor has an obligation to bargain with the Union in good faith over any changes to the C.B.A. and over the effects of any decision to alter the scope of the business whether through sale or shutdown or otherwise. *See* 29 U.S.C. Section 158(d) (providing that mid-term modifications to a C.B.A. must be

mutually agreed upon, and that absent a mutual agreement, no party may terminate or modify such agreement during its term); 11 U.S.C. Section 1113(f) states “no provision of this Title shall be construed to permit a Trustee to unilaterally terminate or alter any provision of a C.B.A. prior to compliance with the provisions of this section.” 11 U.S.C. Section 1113. Of course, the Union does recognize that it, too, must bargain in good faith.

8. As the court is well aware, the Third Circuit has addressed the issue of Collective Bargaining Agreements in the context of asset sales. It is impermissible for a Debtor or a Buyer to misuse the Bankruptcy Code in an effort to avoid the collective bargaining process that Congress has put in place as a statutory requirement via the sales process. Am. Flint Glass Workers v. Anchor Resolution Corp., 197 F.3d 76, 81-82 (3rd Cir. 1999). Any unilateral change of the C.B.A. by the Debtor and/or Purchaser is a violation of Section 1113(f). Section 1113 is the exclusive means of Assumption and Rejection of Collective Bargaining Agreements. (See Section 1113). The goal behind Section 1113 is to preclude Debtors (or Trustees) from unilaterally terminating, altering or modifying the C.B.A. without strictly following Section 1113. Id.; See Continental Airlines, 125 F.3d at 137. Further, Section 1113 precludes the use of other code sections to the advantage of debtors to permit them to escape complying with Section 1113 of the Code. Id. A debtor cannot use the sale process to avoid its obligations pursuant to a C. B. A. (or for that matter reject a C.B.A.) and/or to avoid its’ obligations under Section 1113 of the Bankruptcy Code. Id.

9. The court in In Re Allegheny Health, Educ. and Research Found. interpreted the holding in American Flint as follows: “When a Trustee or a Debtor-in possession incompletely assigns a C.B.A. within the context of a sale of substantially all of the debtor’s assets such that the assignee of such agreement does not assume all of the obligations attached to said agreement, such incomplete assignment constitutes an attempt to effect an alteration of the C.B.A.. Such an attempt to alter a C.B.A., according the Third Circuit, requires the Debtor to comply with the procedures contained in 11 U.S.C. Section 1113, failing which the debtor shall be deemed to have violated Section 1113(f).” In Re Allegheny Health, Educ. And Research Found., 265 B.R. 88, 116-17 (W.D. Pa. 2001) *affd and reversed and*

remanded on other grounds 383 F.3d 169 (3rd Cir. 2004) The obligations pursuant to Section 1113 must be met before the sale. *See, Allegheny* 265 B.R. at 116-17. To be clear, Section 1113 obligations cannot occur after the sale or else it would be a clear violation of section 1113. *Id.*

10. At a minimum under federal labor law, if there is a genuine change of employer but the employing industry remains substantially the same, the successor employer must recognize and bargain with the representative Union of the predecessor's employees. *See Allegheny* 265 B.R. 88, 104-05 (W.D. Pa. 2001 *citing* Theodore Kheel, Labor Law Section 17.01(1) at 17-3 (Bender 2000) (*citing* NLRB v. Burns International Security Services, 406 U.S. 272, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972)). In the present matter, the Purchaser, Touro has not even agreed to recognize or negotiate with the Union as required under law.

11. As stated, the Union was not a party to any of the negotiations of the A.P.A. with the Debtor and Purchaser. The A.P.A. fails to both recognize the Union and assume and assign the C.B.A.. The Debtor has not required the Purchaser to assume the C.B.A. Not once has the Debtor reached out to the Union to bargain in good faith regarding the C.B.A. in the context of the asset sale. The Union has remained willing to bargain in good faith. The Debtor, by not requiring Touro to assume the C.B.A., obligated itself to unilateral changes of the C.B.A. in violation of Section 1113. The Debtor has an affirmative duty to not obligate itself to C.B.A. issues prior to negotiations with the Union. *See, In Re Lady H Coal Co., Inc.*, 193 B.R. 233, 242 (Bank S.D. W. VA. 1996) *affd* on other grounds, 199 B.R. 595. Since as in Lady Coal, the Debtor has locked itself into an agreement to in essence avoid the C.B.A. without first negotiating with the Union, the court cannot grant a motion for rejection of the C.B.A. pursuant to Section 1113 at the time of the sale or after the sale. *Id.* at 242-243. The Debtor has not complied with Section 1113 in any respect and is in clear violation of Section 1113.

12. It is apparent that in failing to address the C.B.A. in the A.P.A. that the Debtor and Touro are in actuality seeking to avoid honoring, assuming and assigning the C.B.A. All procedural and substantive protections governed by Section 1113 apply to an asset sale. American Flint, 197 F.3d at 81-82. Since the Purchaser's A.P.A. fails to recognize the Union or assume the C.B.A., this Court must

find as a matter of law that the Debtor and Purchaser have failed to comply with Section 1113 of the Code.

13. Accordingly, the court cannot approve the sale and the Union objects to any such approval of the sale. As a matter of law and as a condition precedent to approval of the sale, the Debtor and Touro must comply with Section 1113. Presently, they have violated the mandates of Section 1113 and absent assuming and assigning the C.B.A., the sale cannot be approved by this court. Otherwise, there is a violation of Section 1113(f) by the Debtor and Purchaser.

14. Since the Debtor failed to include the Union in the sales process and in essence, effectively unilaterally agreed to terminate the C.B.A., this Court cannot ever find that the Debtor has a basis to reject the C.B.A. as necessary. Furthermore, the Debtor will not be able to reject the C.B.A. as it will not meet the stringent standards authorizing rejection pursuant to Section 1113 and the Third circuit case law interpreting the “necessary” requirement as outlined in In Re Wheeling Pittsburgh Steel, 791 F.2d 1074. (3rd Cir. 1986). In Wheeling citing Section 1113(b)(1)(A), the Third Circuit held that “necessary” modifications mean modifications essential to prevent liquidation, and are not related to the general long term viability of a Debtor. Here, the Debtor clearly cannot say the entire C.B.A. had to be voided to avoid liquidation.

15. In the present matter, the sale is, in essence, a confirmation hearing so this Court should likewise deny approval of the sale due to the Debtors’ failure to comply with Section 1113. Inasmuch as the Code mandates compliance prior to approving the sale. Since the Debtor has effectively unilaterally agreed to have the contract rejected and failed to attempt in good faith to require negotiations with the Union and Touro, a rejection of the C. B. A. cannot occur. A ruling to the contrary would render Section 1113 useless. The Debtor cannot do after the fact what it is statutorily required to do prior to a sale. The whole purpose behind Section 1113 is to not allow the bankruptcy process to thwart organized labor and collective bargaining rights and allow the Debtor to misuse the Code to avoid Collective Bargaining Agreements. (See Wheeling Pittsburgh) The A.P.A. between the Debtor and Touro and the failure to negotiate and recognize the Union as a condition of the sale flies in the face

of Section 1113 and well settled Labor Law. Approving the sale would render Section 1113 a meaningless provision of the Code and is a clear attempt to avoid the bargaining rights of the Union and its members.

16. The court in In re Lionel, 722 F.2d 1063 (2nd Cir. 1983) listed factors the court should evaluate when a Debtor seeks a sale of assets outside of a plan. This analysis is commonly called the *Sub Rosa* plan analysis. These factors are as follows:

1. The proportionate value of the estate as a whole;
2. The amount of elapsed time since the filing;
3. The likelihood that a plan of reorganization will be proposed and confirmed in the near future;
4. The effect of the proposed disposition on future plans of reorganization;
5. The proceeds to be obtained from the disposition vis-a-vis any appraisals of the property; and
6. Most importantly, whether the asset is increasing or decreasing in value.

In re Lionel 722 F.2d at 1071. The list is not intended to be exhaustive. Id. The Court should not follow “the hue and cry of the most vocal special interest groups”. Id. The burden is on the Debtor and the Union recognizes that in opposing the sale it must present evidence that such sale is not justified. Id. This court must consider the Debtor’s failure to comply with Section 1113 as one of the *Sub Rosa* factors and not approve the sale as the Debtor would not be able to confirm a plan of reorganization which provided for a sale of assets in its plan without complying with Section 1113 of the Code. See, In re Stein Henry Co., Inc. 1992 Bankr. LEXIS 2574 (Bankr. E.D. Pa. 1991)

17. For example, the Bankruptcy Court in the Eastern District of Pennsylvania denied confirmation of a plan of reorganization that was selling assets as part of the plan and the asset sale did not comply with the C.B.A. In re Stein Henry Co., Inc., 1992 Bankr. LEXIS 2574 (Bankr. E.D. Pa 1991)¹ The Court in Stein Henry outright denied confirmation for failing to comply with Section 1113 of the Code. In failing to negotiate with the Union, the Debtor and Touro have not complied with Section 1113 of the Code. As such, the sale cannot and should not be approved.

¹ A copy of the reported decision in Stein Henry is attached hereto as Exhibit 1.

18. The Debtor, Touro and for that matter the counsel of the Master Trustee, the Bank of New York, cannot argue that Section 1113 does not apply because this is a liquidating Chapter 11. As stated, in Stein Henry, this is a Chapter 11 and Section 1113 applies whether or not there is a liquidation. Id at 7. Just like in a confirmation, the sale must satisfy all applicable Code Sections including Section 1113. Id. The Debtor has elected to voluntarily file and proceed under Chapter 11 and therefore it must comply with all Sections of the Bankruptcy Code. Again, approving the sale and ignoring Section 1113 of the Code would render Section 1113 meaningless. In enacting Section 1113, Congress has specifically recognized that Collective Bargaining rights play a significant role in a Bankruptcy proceeding. *See, Wheeling Pittsburgh Steel v. UN. Steelworkers*, 791 F.2d 1074, 1089 (3rd Cir. 1986).

19. Likewise, the Debtor cannot circumvent Section 1113 because it first wound down operations and closed. Again, the Debtor is in Chapter 11 and it must comply with all sections of the Code. To ignore section 1113 of the Code would send a message to any Debtor that it can avoid a C.B.A. by simply temporarily shutting down and sell its assets in order to successfully strip the estate from the obligations in the C.B.A and circumvent Section 1113. To permit this would allow Debtors to creatively circumvent Section 1113 of the Code and this legal maneuvering should not be tolerated.

20. The Court in In Re Lady Coal approved the sale of assets despite the violation of a C.B.A. and Section 1113. In Re Lady Coal, 193 B.R. 233. The case is distinguishable as the court found that the sale was emergent. *See In Re Lady Coal* 193 B.R. 233. The court In Re Lady Coal still precluded the rejection of the C.B.A. Id. In the case at bar, the sale is not in any way an emergent sale. The Pascack sale process has been underway since the filing. As such, an argument cannot be made by the Debtor that it is an emergency sale. The Debtor and Purchaser had ample time to include the Union in negotiations prior to execution of the A.P.A. If the court were to approve the sale over the objection of the Union, (and it is the position of the Union, that this can only be done if this court makes a finding as a matter of law that the sale is an emergency sale), then the Section 1113(f) rejection damage claims of the Union become administrative expense claims. *See, In Re Lady Coal* , 193 B.R. at 243. Therefore, all employee benefit and medical and pension benefit accruals automatically become administrative expense

claims.

21. The Union would agree to withdraw its objection to the sale if Touro agrees to recognize the Union and further agrees to negotiate a Collective Bargaining Agreement in good faith. If the Debtor and Touro agree to this proposal, then the Union would immediately withdraw its objection to the sale subject to the Sale Order and A.P.A. being modified to reflect that the Touro will recognize the Union and negotiate a C. B. A. in good faith. Absent an agreement memorializing these terms, the Court must not approve the sale.

WHEREFORE, this Court cannot approve the sale, since the Debtor and Touro did not assume and assign the C.B.A. as a condition of the sale nor have they complied with Section 1113 of the Code. Accordingly, the sale cannot and should not be approved as a matter of law.

I certify that the statements made by me are true and if they are made in a willfully false manner, I may be subject to punishment.

Respectfully submitted,

/s/ Mitchell Malzberg
MITCHELL MALZBERG, ESQ.
Counsel to Health Professionals and Allied
Employees AFT/AFL-CIO

Dated: March 10, 2008

Exhibit 1

LEXSEE 1992 BANKR. LEXIS 2574

In re: STEIN HENRY COMPANY, INC. Debtor

Bankruptcy No. 91-15491S, Chapter 11

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

1992 Bankr. LEXIS 2574

June 1, 1992, Decided

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Trustee).

JUDGES: SCHOLL

OPINION BY: DAVID A. SCHOLL

OPINION

MEMORANDUM

BY: DAVID A. SCHOLL, UNITED STATES
BANKRUPTCY JUDGE

In its Objection to the First Amended Plan of Liqui-
dation filed by the Debtor ("the Plan"), Teamsters Local
500 ("the Union") contends [*2] that the Plan cannot be
confirmed, presumably pursuant to 11 U.S.C. §
1129(a)(1), because it features a sale of all of the
Debtor's assets to West Point Meats, Inc. ("West Point")
under an agreement of sale which does not include terms
which preserve those provisions of the collective bar-
gaining agreement ("the Agreement") between the
Debtor and the Union stating that the Agreement "shall
be binding upon [the Debtor's] successors . . . and as-
signs," in violation of 11 U.S.C. § 1113(f). We agree.

In its most recent Memorandum, the Debtor attempts
to overcome our explicit skepticism that the Agreement
was terminated pre-petition by the Union. The Agree-
ment provides as follows:

ARTICLE 40 - TERM OF AGREEMENT

This Agreement shall be in full force
and effect from July 1, 1988 up to and in-
cluding June 30, 1991 and shall continue
in full force and effect from year to year
thereafter unless and until either of the
parties hereto shall give to the other three
(3) months' written notice prior to the end
of the original term, or three (3) months'
written notice prior to the end of any sub-
sequent year of an intention to terminate
[*3] at the end of the original term or of
the then current year, respectively.

The Debtor argues that the following letters of May
31, 1991, and June 18, 1991, from the Union to the
Debtor constituted the requisite "intention to terminate"
the Agreement:

[May 31, 1991]

This Local Union would like to begin negotiations for the new collective bargaining agreement covering your employees in the bargaining unit.

Please contact this Local union at your earliest convenience so that we may set up a day and time for negotiations.

Thank you for your prompt attention to this request.

[June 18, 1991]

Confirming telephone conversation of today, due to unforeseen circumstances, it will be necessary to extend the collective bargaining agreement for a thirty (30) day period.

We are in agreement that when a new contract is agreed to, everything will be retroactive back to June 30, 1991.

In support of this argument, the Debtor cites *Oakland Press Co.*, 229 NLRB 476 (1977), enforced, 606 F.2d 689 (6th Cir. 1979); and *South Texas Chapter, Associates General Contractors*, 190 NLRB 383 (1971). In both of these cases, letters [*4] of unions to the respective employers which indicated a desire to negotiate new terms were deemed to be sufficient to terminate the respective collective bargaining agreements.

However, in each of these cases, the notice provided was, within the terms of the respective agreement, timely. In each case, the unions argued that their letters expressed an obvious intention to terminate the agreements in issue. The respective regulatory bodies held that mere technical deficiencies in language should not frustrate the union's intentions, in both cases, to terminate the agreements.

However, the letters in issue here were not even close to timely under the terms of the Agreement. And the Union is of course arguing that it did not intend to terminate the Agreement through the letters. Both parties in fact adhered to the Agreement's terms at all times after July 1, 1991. We therefore conclude that *Oakland Press* and *South Texas* are distinguishable and in no way alter our observations, at the hearing, that the Debtor clearly had not proven that the Agreement was in fact terminated.

The issue about which the court expressed its principal concern at the hearing was whether [*5] we could adequately protect the Union's rights against West Point

by an Order confirming the Plan, yet expressly declaring that confirmation of the Plan did not affect the Union's rights against West Point.

We note that the Debtor has not argued that the court could do so in its post-hearing Memorandum. Perhaps it recognizes, as we do now, that it is improper for a court to try to modify a plan itself to make it confirmable, and that it is what such an Order would be doing.

We have little doubt that a plan which is contrary to the terms and effect of 11 U.S.C. § 1113 cannot be confirmed. The Debtor has clearly not complied with the demanding notice and negotiation requirements of 11 U.S.C. § 1113. See *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America*, 791 F.2d 1074, 1081-94 (3d Cir. 1986).

We are convinced that the Plan's failure to preserve a union's rights against a successor-purchaser of a Chapter 11 debtor's assets violates 11 U.S.C. § 1113. Only through the medium of 11 U.S.C. § 1113(f) can a collective bargaining agreement be terminated or [*6] modified in any way. See *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 988-90 (2d Cir. 1990). See also *In re Unimet Corp.*, 842 F.2d 879, 883-84 (6th Cir. 1988) (§ 1113 protects rights of retirees beyond the normal extent provided elsewhere in the Bankruptcy Code). But see *In re Armstrong Store Fixtures Corp.*, 135 Bankr. 18, 22 (Bankr. W.D. Pa. 1992). Rights provided in the agreement as to successor-entities must be preserved unless there is, unlike here, compliance with the procedures of 11 U.S.C. § 1113. See *Ionosphere Clubs*, 922 F.2d at 987 (issue was protection of union members upon a sale or merger of the debtor).

In a prior Memorandum, the Debtor argued that, apart from the Agreement, successor rights generally, and those of the Union in particular, are very fragile and may not be cognizable, citing, e.g., *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 96 L. Ed. 2d 22, 107 S. Ct. 2225 (1987); and *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272, 32 L. Ed. 2d 61, 92 S. Ct. 1571 (1972). If this is so, then that aspect of the Agreement which specifically provides that the rights [*7] created thereby survives a succession or assignment become even more crucial and their preservation is necessary.

The Plan purports to reject "all executory contracts. . ." This would clearly include the Agreement. We do not think that we can re-write the Plan to exclude the Agreement from it. In fact, the vigor with which West Point and the Debtor argue the rather hopeless termination issue convinces us that the extrication of West Point from the Agreement, per the rejection of the Agreement was, as the Union argues, a significant aspect of the sale

transaction. Therefore, the rejection of the Agreement is a significant provision of the Plan.

In the last analysis, we cannot be influenced by questions such as the following, raised expressly and by implication at the hearing: Couldn't the Debtor accomplish the same ends by converting to Chapter 7 and allowing a trustee to consummate the sale to West Point, apparently free from the constraints of Chapter 11 and *11 U.S.C. § 1113*? Why should the Union be allowed to take a position which not only squelches a plan endorsed by all other creditor entities but jeopardizes jobs of members of another Teamsters [*8] Local, with which West Point has a contract and with whose drivers it intends to replace those of the Debtor (especially since the Debtor's insurance expires on June 1, 1992, and it advises that it may have to close down immediately, thereby eliminating *all* of the driver jobs)?

The first question is answered by the observation that this case is presently in Chapter 11, and *11 U.S.C. § 1113* does apply, whether the plan proposed is a liquidating one or not. *But cf. In re GF Corp., 115 Bankr. 579, 585 (Bankr. N.D. Ohio 1990)* (Congress did not appear to contemplate liquidating plans in enacting *11 U.S.C. §§ 1113, 1114*).

The second question is answered by two observations. Firstly, the Bankruptcy Code does not authorize confirmation of *any* plan endorsed by even an overwhelming majority of creditors. To be confirmed, the plan must satisfy all applicable Code requirements. Secondly, workers' collective rights have traditionally been won by deference of immediate gratification to long-term collective ends, and the theory that, if push comes to shove, management will, at least in most instances and if compelled [*9] to do so, accommodate itself to labor's needs.

DAVID A. SCHOLL

UNITED STATES BANKRUPTCY JUDGE

3722 United States Court House

Philadelphia, PA 19106-1763

Dated at Philadelphia, PA, this 1st day of June, 1992.

ORDER

AND NOW, this 1st day of June, 1992, after a hearing to consider confirmation of the First Amended Plan of Liquidation filed by Debtor ("the Plan") and Objections thereto by Teamsters Local 500 ("the Union") on May 28, 1992, and careful consideration of the Memoranda submitted by the parties both before and after this hearing, it is ORDERED AND DECREED as follows:

1. The Objections of the Union are SUSTAINED.
2. Confirmation of the Plan is DENIED.
3. A status conference in this case is scheduled on

WEDNESDAY, JUNE 10, 1992, at 9:30 A.M. and shall be held in Courtroom No. 2 (Room 3718), United States Court House, 601 Market Street, Philadelphia, PA 19106.

DAVID A. SCHOLL

UNITED STATES BANKRUPTCY JUDGE

3722 United States Court House

Philadelphia, PA 19106-1763