File an answer to a motion:

12-08314-rdd Popovich et al v. IBC Sales Corporation et al

U.S. Bankruptcy Court

Southern District of New York

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The following transaction was received from Charles A. Ercole entered on 4/15/2013 at 9:41 AM and filed on 4/15/2013
Case Name: Popovich et al v. IBC Sales Corporation et al
Case Number: 12-08314-rdd
Document Number: 18

Docket Text:
Opposition Brief *to Debtors' Motion to Dismiss Adversary Complaint* (related document(s)[11]) filed by Charles A. Ercole on behalf of William Dean, Henry Dini, Robert Gregory, Michael Jablonowski, Mark Popovich, Fred Shourds. with hearing to be held on 6/3/2013 (check with court for location) Reply due by 5/29/2013, (Attachments: # (1) Exhibit Certificate of Service) (Ercole, Charles)

The following document(s) are associated with this transaction:

Document description: Main Document
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[STAMP NYSBStamp_ID=842906028 [Date=4/15/2013] [FileNumber=12499138-0]
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12-08314-rdd Notice will not be electronically mailed to:

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Hearing Date and Time: June 3, 2013 at 10:00 a.m. Eastern

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	X	
	:	Chapter 11
HOSTESS BRANDS, INC., *et al.*	:	
	:	Case No. 12-22052 (RDD)
Debtors.	:	
	:	(Jointly Administered)
	X	
Mark Popovich, William Dean, Robert Gregory, Henry Dini, Fred Shourds, and Michael Jablonowski, Individually and as Class Representatives on behalf of a Putative Class of all others similarly situated,	:	Adversary No. 12-08314 (RDD)
Plaintiffs,	:	
v.	:	
Hostess Brands, Inc., IBC Sales Corporation; IBC Services, LLC, IBC Trucking, LLC, Interstate Brands Corporation, and MCF Legacy, Inc.,	:	
Defendants.	:	

MEMORANDUM IN SUPPORT OF OPPOSITION TO THE MOTION OF DEBTORS AND DEBTORS IN POSSESSION TO DISMISS CONSOLIDATED CLASS ACTION ADVERSARY COMPLAINT[1]

[1] Plaintiffs are willing to withdraw without prejudice -- and reserve the right to re-assert -- the second count of their complaint regarding whether their claims should be allowed as an administrative priority until such time as Plaintiffs can establish liability on the WARN Act claim.

Table of Contents

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

Hostess Brands, Inc., and its five domestic direct and indirect subsidiaries (collectively the "**Defendants**"), have moved to dismiss the underlying Consolidated Complaint[2] ("Compl.") on grounds that the Interim Winddown Order[3] authorizing the Plaintiffs termination transformed the Defendants from "employers" into "liquidating fiduciaries" thereby absolving the Defendants from liability under the Worker Adjustment and Retraining Notification Act ("WARN Act" or the "Act"), 29 USC §§2101 *et seq.*

However, the Defendants' motion fails for, *inter alia*, the following reasons:

1. The liquidating fiduciary exception to the definition of employer under the WARN Act is not found in the statute itself but, rather, appeared for the first time in the preamble to the Department of Labor's final rule. Based upon the rules of statutory construction and the fact that the preamble was not subject to a period of review and comment, the fiduciary exception should not be adopted or accorded judicial deference by this Court.

2. Assuming, *arguendo*, the liquidating fiduciary exception is entitled to recognition, Hostess was not a liquidating fiduciary as it represented to the Court and all of its employees that it was focused on "completing a restructuring of the Company and emerging from chapter 11 as a viable company" through mid-November 2012, and acted nothing like a liquidating company.

3. Again, assuming the Court chooses to recognize the liquidating fiduciary exception, the exception is an affirmative defense involving questions of fact that simply are not appropriate for resolution on a motion to dismiss.

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[2] Unless otherwise defined herein, and to alleviate confusion, the Plaintiffs have used the Defined Terms used in the Defendants' Motion.
[3] Bankr. Doc. No. 1816.

II. BACKGROUND

A. Statutory Background

The WARN Act provides protection to workers, their families, and communities by requiring employers to provide notification sixty calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market. The WARN Act also provides for notice to state dislocated worker units so that dislocated worker assistance can be promptly provided. 20 C.F.R. §639.1.

B. Procedural History

On January 11, 2012, (the "**Petition Date**") the Defendants filed voluntary petitions for relief under chapter 11 of Title 11 of the United States Bankruptcy Code. Compl. at ¶ 21. On November 21, 2012, the Court held a hearing regarding the Defendants' Winddown Motion. Subsequent to that hearing on November 27, 2012, the Court issued the Interim Winddown Order retroactively terminating the Plaintiffs effective as of November 21, 2012.

On November 21, 2012 and December 12, 2012, two adversary complaints seeking relief under state and federal WARN Acts were filed on behalf of employees terminated by Defendants. *See Popovich v. Hostess Brands, et al*, Adversary Proceeding No. 12-08314-rdd (Bankr. S.D.N.Y. Nov. 21, 2012) and *Dean, et al, v. Hostess Brands, Inc., et al*, Adversary Proceeding No. 12-08319-rdd (Bankr. S.D.N.Y. Dec. 12, 2012). On January 22, 2013, a Consolidated Complaint was filed on behalf of all plaintiffs. Doc. No. 8.

C. Factual Background

Plaintiffs allege that they were, in effect, terminated on November 16, 2012, *not*, November 21st as Defendants claim. Compl. at ¶ 37. In a letter dated November 27, 2012, Hostess claimed that it had terminated its employees as of November 21, 2012. *Id.* ¶ 39. Between the Petition Date and November 16, 2012, absolutely nothing material had changed for any of the Plaintiffs or the co-workers they observed as far as their job duties – the daily job duties of Hostess' front line employees remained the same or substantially the same during that entire time. *Id.* ¶ 38.

In its *Motion of Debtors and Debtors in Possession, Pursuant to Rule 1015(B) of the Federal Rules of Bankruptcy Procedure, for an Order Directing the Joint Administration of Their Chapter 11 Cases*, Hostess represented that "management has developed a business plan that it believes will allow the Debtors to regain long-term viability." Bankr. Docket No. 2 ¶ 8.[4] From the Petition Date through as late as November 13, 2012 – just three days before Hostess workers were suddenly terminated – Hostess continued to lead its employees to believe that it was business as usual. For example, in a May 4, 2012 letter to employees, Hostess informed them that Hostess' "goal remains fixed on emerging from bankruptcy as a stable company with a strong future," Compl. at ¶ 28, and that the "primary focus is to complete our restructuring of the Company and emerge from chapter 11 as a viable company." *Id.* ¶ 29. In every single letter Hostess sent to its employees up to and including a letter dated November 13, 2012, Hostess continued to assure its employees that its "primary focus continues to be on completing a restructuring of the Company and emerging from chapter 11 as a viable company." *Id.* ¶ 35.

[4] The Court can take judicial notice of the pleadings filed in the underlying bankruptcy case. *Walsh v. Diamond (In re Century City Doctors Hospital, LLC)*, BAP No. CC-09-1235-MkJaD, 2010 Bankr. LEXIS 5048, 2010 WL 6452903, at *6 (B.A.P. 9th Cir. Oct. 29, 2010) ("court documents filed in an underlying bankruptcy case are subject to judicial notice in related adversary proceedings and district court lawsuits"); *In re Calpine Corp. Secs. Litig.*, 288 F. Supp. 2d 1054, 1076 (N.D. Cal. 2003) (the court may take judicial notice of public filings).

Only in its November 16, 2012 Emergency Motion for an interim order of, *inter alia*, approval of a Wind Down Plan did Hostess retreat from its steadfast desire to emerge from chapter 11 as a viable company. "From the outset of these chapter 11 cases until only recently, the Debtors focused on, and pursued, the reorganization of their businesses as economically viable and competitive ongoing concerns." Bankr. Docket No. 1710 ¶ 8.

While representing to employees that the focus was on restructuring, Hostess knew that it would still close a number of sites. According to St. Louis Mayor Francis Slay, Hostess had told him months before the shut down that the company was "planning on closing the site in St. Louis." Compl. at ¶ 52. Similarly, in its negotiations with the BCTGM, Hostess told the union that "the company was planning to close at least nine bakeries, although the company refused to disclose which bakeries." *Id.* Over one month prior to the bakers' union strike, Hostess stated in bankruptcy filings that it already was planning on closing down at least five bakeries and numerous depots as part of its Revised Turnaround Plan although again, without identifying which bakeries, leaving employees in the dark. *Id.*

III. ARGUMENT

It is a "fundamental principle that, on a motion to dismiss, a complaint must be read most favorably to the plaintiffs." *Krys v. Sugrue (In re Refco Secs. Litig.)*, 779 F. Supp. 2d 372, 377 (S.D.N.Y. 2011). Thus, in evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court accepts as true the facts alleged in the complaint and draws all reasonable inferences in the plaintiffs' favor. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Global Network Commc'ns, Inc. v. City of N.Y.*, 458 F.3d 150, 154 (2d Cir. 2006). As the Supreme Court has reiterated, a complaint that contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" may not be dismissed. *Iqbal*, 129 S. Ct. at

1949 (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The "plausibility standard is not akin to a 'probability requirement.'" *Id.* Thus, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556 (*quoting Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

It is clear that under the Rule 12(b)(6) standard of review, Plaintiffs have set forth viable claims against the Defendants. Accordingly, the Motion should be denied in its entirety.

A. This Court Should Not Recognize The Liquidating Fiduciary Exception To The WARN Act.

1. The Liquidating Fiduciary Exception Is Inconsistent with the Rules of Statutory Construction and Should not be Followed.

When interpreting a statute, "[i]t is a fundamental principle of statutory construction that the starting point must be the language of the statute itself; absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Morenz v. Wilson-Coker*, 415 F.3d 230 (2d Cir. 2005), *see also United States v. Bishop*, 894 F.2d 981, 985 (8th Cir. 1990) (*quoting, United States v. Goodyear Tire and Rubber Co.*, 493 U.S. 132, 110 S. Ct. 462, 467, 107 L. Ed. 2d 449 (1989)) ("[the] starting point, as in all cases involving statutory interpretation, 'must be the language employed by Congress.'"). Moreover, "[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253–54 (1992), *see also Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 214 (2d Cir. 2013) (quoting *Conn. Nat'l Bank*, 503 U.S. at 253-54).

With respect to the WARN Act, Congress specifically included only two exemptions (*i.e.* where the closing or layoff is due to the completion of temporary projects or a strike or lockout that is not intended to evade the requirements of the Act, 29 U.S.C. § 2103) and only two exceptions which can reduce the notification period required under the Act (*i.e.* the "faltering company" and "unforeseeable business circumstances" exceptions, 29 U.S.C. § 2102(b)). This Court, therefore, should not read-in an additional exemption not explicitly set forth in the statute. *See, e.g., Ramos v. Baldor Specialty Foods, Inc.*, 687 F.3d 554, 558 (2d Cir. 2012) (quoting *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)) ("'To extend an exemption to other than those plainly and unmistakably within [the statute's] terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people.'") (quoting *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)).

A second canon of statutory construction also weighs against recognizing the fiduciary exception for employers: it is presumed that Congress passes each subsequent law "with full knowledge of the existing legal landscape." *Northwest Airlines Corp. v. Assn. of Flight Attendants--CWA, AFL--CIO (In re Northwest Airlines Corp.),* 483 F.3d 160, 169 (2d Cir. 2007) (citing *Miles v. Apex Marine Corp.,* 498 U.S. 19, 32 (1990)), *see also Prime Care of Northeast Kan., LLC v. Humana Ins. Co.,* 446 F.3d 1284, 1287 (10th Cir. 2006) ("Congress is presumed to enact legislation with knowledge of the law and a newly-enacted statute is presumed to be harmonious with existing law and judicial concepts."). Based on this canon, it can be presumed that when Congress enacted the WARN Act and crafted the definition of employer, it was aware of both the Bankruptcy Code and the fact that many employers who conducted mass layoffs were likely to be experiencing financial difficulties. Accordingly, if Congress wanted to exclude entities that had filed for bankruptcy from the scope of the term "employer" it could easily have

done so. Congress's silence, therefore, is audible and this Court should not act as a legislator by rewriting the definition of employer to insert an exception for employers that have filed for bankruptcy. *See Borgenicht v. Creditors' Committee,* 479 F.2d 150, 153 (2d Cir. 1973) (noting that when Congress chose not to draft a statute a certain way the "court cannot rewrite the statute by extending it beyond the thought conveyed by the unambiguous words"), *see also Artuz v. Bennett,* 531 U.S. 4, 10, 148 L. Ed. 2d 213, 121 S. Ct. 361 (2000) ("Whatever merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them.").

2. The Fiduciary Exception Is Not Entitled to Judicial Deference as It Only First Appeared in the Preamble to the Department of Labor's Final Rule.

The first reference to a liquidating fiduciary appeared in the preamble of the Final Rule regarding the WARN Act that the Department of Labor issued on April 20, 1989:

> [the] DOL agrees that a fiduciary whose sole function in the bankruptcy process is to liquidate a failed business for the benefit of creditors does not succeed to the notice obligations of the former employer because the fiduciary is not operating a "business enterprise" in the normal commercial sense. In other situations, where the fiduciary may continue to operate the business for the benefit of creditors, the fiduciary would succeed to the WARN obligations of the employer precisely because the fiduciary continues the business operation.

54 Fed. Reg. 16,042 (codified at 20 C.F.R. 639 (2011)). As this language appeared for the first time in the final version of the preamble to the final rule, it was not subject to review and comment. Although language in a preamble which has been the subject of review and comment may be entitled to judicial deference, where the language is not subject to public review and comment, no judicial deference should be accorded. *See Wyeth v. Levine,* 555 U.S. 555, 577 (2009).

Similar to this case, *Wyeth*, involved a defendant's reliance on language in a preamble to a regulation that had not been offered for comment by the interested parties, and the Supreme Court refused to accord deference to that language. In that case, the pharmaceutical drug manufacturer/ defendant appealed a jury verdict in a failure to warn case. Specifically, the defendant relied on the language of the preamble to a 2006 FDA regulation wherein the FDA declared that the Federal Food, Drug, and Cosmetic Act regulations on labeling established "both a 'floor' and a ceiling" so that "FDA approval of labeling . . . . preempts conflicting or contrary state law." 71 Fed. Reg. 3922 at 3934-3935 (2006)). In addressing whether the language in FDA's preamble was entitled to judicial deference, the Supreme Court held:

> [T]he FDA's 2006 preamble **does not merit deference**. . . In 2006, the agency finalized the rule and, **without offering States or other interested parties notice or opportunity for comment**, articulated a sweeping position on the FDCA's pre-emptive effect in the regulatory preamble. The agency's views on state law are inherently suspect in light of this procedural failure.

Wyeth v. Levine, 555 U.S. at 577 (emphasis added). This Court likewise should refuse to accord deference to statements made in a preamble which was not subject to review and comment.

B. Hostess Was Not A Liquidating Fiduciary.

Another canon of statutory construction that should be adhered to is that "remedial legislation should be construed broadly to effectuate its purposes." *Leshinsky v. Telvent GIT, S.A.*, 873 F. Supp. 2d 582, 597 (S.D.N.Y. 2012) (*quoting Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)). Because the WARN Act constitutes remedial legislation, the Court should broadly construe its provisions to protect the rights of employees. *See Guippone v. BH S & B Holdings, LLC,* 09-01029, 2011 WL 5148650, at *12 (S.D.N.Y. Oct. 28, 2011) (noting the WARN Act constitutes remedial legislation). At the same time, exceptions to remedial legislation such as the WARN Act should be "construed narrowly so as not to eviscerate the real purpose of the Act."

Beach v. JD Lumber, Inc., CV-08-416-N-JLQ, 2010 WL 3363921 at *2 (D. Idaho Aug. 24, 2010); *Local Union 7107, UMW v. Clinchfield Coal Co.*, 124 F.3d 639, 640-41 (4th Cir. 1997) ("Because WARN is remedial legislation, its exceptions are construed narrowly"), *see also Rai v. WB Imico Lexington Fee, LLC*, 851 F. Supp. 2d 615, 626 (S.D.N.Y. 2012) (explaining that remedial statute's "exemptions … should be narrowly construed").

Here, even if the Court applies the liquidating fiduciary exception, it will find that Hostess was simply not a liquidating fiduciary. A debtor may be a liquidating fiduciary if "throughout the proceedings [the debtor] clearly demonstrates its intent to liquidate." *Official Comm. Of Unsecured Creditors of United Healthcare Sys., Inc. v. United Healthcare Sys. Inc.*, 200 F.3d 170 (3d Cir. 1999) ("*United Healthcare*"). However, where an individual or entity is acting as an "employer" and "performing its normal business functions" in an attempt to reorganize, the fiduciary exception will not apply. *See e.g., Law v. American Capital Strategies, Ltd.*, No. 3:05-0836, 2007 WL 221671, at *17 (M.D. Tenn. Jan. 26, 2007) ("*American Capital*").

In this case, Plaintiffs have alleged that for over 11 months after it filed its chapter 11 petition and up to the day it told its employees to no longer report to work, Hostess acted like it was business as usual. Between the January 11, 2012 Petition Date and November 16, 2012, absolutely nothing material had changed for any of the Plaintiffs or any of the co-workers they observed as far as their job duties; indeed, the daily job duties of Hostess' front line employees remained the same or substantially the same during that entire time. Compl. ¶ 38. Further, Hostess repeatedly told its employees as well as this Court that its primary focus was on to completing the restructuring of the Company and emerging from chapter 11 as a viable company. *Id.* at ¶¶ 28, 29, 35 and Section I.C., *infra*. In other words, Hostess acted like anything *but* a liquidating fiduciary until the date of the Winddown Order.

Under very similar circumstances where an employer was "performing its normal business function," the court in *American Capital* rejected a defendant's attempt at summary judgment to be declared a liquidating fiduciary. The Court held that to accept the defendant's assertion that it was a liquidating fiduciary where it had taken no specific steps to begin the liquidation and was still operating as a business enterprise at the time of the shutdown decision:

> would be to allow the liquidating fiduciary exception to swallow the rule. Such an interpretation of the exception would strip employees of the WARN Act's protection whenever an employer decides to terminate its employees, and before implementing their decision, starts to take preliminary steps toward liquidation, while otherwise continuing to carry on its business. Such an interpretation would eviscerate the WARN Act and be an expansion of an exception which is to be construed narrowly.

American Capital, 2007 WL 221671, at *17. "On the morning of the shutdowns and layoffs, Service Transport was operating as a trucking business, even if it was only making the deliveries of those items which were already in the pipeline." *Id.* at 16. Similarly in this case, up to the day they were let go on November 16, 2012, the former Hostess employees were engaged in all their normal duties, preserving the assets of Hostess and allowing it to continue operating as an ongoing company.

The facts in this case are markedly different than the facts in the cases cited by Defendants, making their cases easily distinguishable. Defendants repeatedly cite *United Healthcare* but in that case, "United Healthcare's actions from the time it filed its Chapter 11 petition throughout the proceedings clearly demonstrate[d] its intent to liquidate." *United Healthcare,* 200 F.3d at 178. In fact, the *United Healthcare* court noted that "[s]ignificantly…its employees were no longer engaged in their regular duties but instead were performing tasks solely designed to prepare United Healthcare for liquidation." *Id.*

The exact opposite happened in this case. There is no question here that Hostess continued to operate its business enterprise between the Petition Date and November 16, 2012. During that period, absolutely nothing material had changed for any of the Plaintiffs or the co-workers they observed as far as their daily job duties. Compl. at ¶ 38. As the *United Healthcare* court specifically noted, "[t]he more closely the entity's activities resemble those of a business operating as a going concern, the more likely it is that the entity is an 'employer'," and "[a]n employer . . . will succeed to its WARN Act obligations if an examination of the debtor's economic activities leading up to and during the bankruptcy proceedings reveals that the fiduciary has continued in an 'employer' capacity, operating the business as an ongoing concern." *Id.* at 179. That is exactly what happened in this case – Hostess continued operating the business as an ongoing concern.

Similarly, in all of the other cases cited by Hostess, the actions of the defendants were clearly geared toward liquidation. In *Chauffeurs, Sales Drivers, Warehousemen & Helpers Union Local 572 v. Weslock Corp.,* ("*Chauffeurs*"), the court of appeals found that the WARN Act notice obligation did not apply to a secured creditor who had no involvement in the operations of the facility, and "whose interaction with the delinquent debtor primarily is limited to financial controls designed to preserve its security interest." 66 F.3d 241, 245 (9th Cir. 1995). Similarly, *In re Century City Doctors Hospital LLC*, involved a WARN Act action against a trustee in a chapter 7 bankruptcy who was statutorily obligated to liquidate the estate under 11 U.S.C. § 704(a)(12). No. 09-1235, 2010 WL 6452903 (Bankr. C.D. Cal. Oct. 29, 2010). In rejecting the claim, the court explained that "[t]his is a case where from the very beginning it was a Chapter 7 case, and – and from the outset it was a liquidation case." *Id.* at *6. These cases are completely inapposite to the situation at hand.

Finally, Defendants attempt to claim that *Thielmann v. MF Global Holdings Ltd. (In re MF Global Holdings Ltd.),*("*MF Holdings*") supports their position. 481 B.R. 268 (Bankr. S.D.N.Y. 2012). But is simply does not. In *MF Holdings*, the plaintiffs brought WARN Act claims against two trustees: one designated pursuant to the Securities Investor Protection Act ("SIPA Trustee") and one designated under Chapter 11 ("Chapter 11 Trustee"). Judge Glenn found that the liquidating fiduciary exception applied as a matter of law to the SIPA Trustee because [t]he only purpose of the SIPA proceeding is liquidation." *Id.* at 274. However, "the chapter 11 cases were filed at least initially with the hope of reorganization." *Id.* at 275. As a result, Judge Glenn noted that at the motion to dismiss stage, claims against a SIPA Trustee and a Chapter 11 Trustee "lead to different results," *id.* at 272, with the court actually declining to dismiss the complaint against the chapter 11 debtors based on the liquidating fiduciary principle. *Id.* at 283.

Dismissing a case based on the liquidating fiduciary principle "requires [a] court to conclude as a matter of law that a debtor was liquidating when the layoffs occurred." *MF Holdings*, 481 B.R. at 282. However, if the Court accepts as true the facts alleged in the Consolidated Complaint that Hostess continued to operate as an ongoing concern up through at least November 16, 2012 -- as it is supposed to do on a motion to dismiss, *Ashcroft*, 129 S. Ct. at 1949, then Hostess was still "engaged in business" and operating as a going concern, was not a liquidating fiduciary, and its motion to dismiss should be denied.

C. The Liquidating Fiduciary Exception Is An Affirmative Defense Involving Issues Of Fact That Cannot Be Resolved On A Motion To Dismiss.

The liquidating fiduciary principle raises "issues of fact [that] cannot be resolved on a motion to dismiss." *Conn v. Dewey & Leboeuf LLP (In re Dewey & Leboeuf LLP)* ("*Dewey*"), No. 12-12321, 2013 WL 494452, at *5, 487 B.R. 169, (S.D.N.Y. Feb. 11, 2013). In particular,

"[n]o case law supports granting a motion to dismiss based on the liquidating fiduciary principle where . . . there is a factual dispute whether the debtor was operating as a going concern at the time of the terminations." *Id.* at *6.

All three of the cases cited by Defendants support this proposition. Defendants rely heavily on *United Healthcare*, but as pointed out by several courts, that case was based on a fully developed factual record before an appellate court, not a ruling on a motion to dismiss. *Dewey,* 2013 WL 494452, at *6; *MF Holdings*, 481 B.R. at 281. Similarly, *Chauffeurs* was decided on a motion for summary judgment, not a motion to dismiss. 66 F.3d. at 242.

Defendants also rely on *MF Holdings*, but Judge Glenn in that case "decline[d] to dismiss the complaint against the chapter 11 Debtors based on the 'liquidating fiduciary' principle, finding that the complaint in that case was silent on whether the Debtors were seeking to reorganize or liquidate." 481 B.R. at 283. To the contrary in this case, Plaintiffs' Consolidated Complaint specifically alleges that Hostess was seeking to reorganize the company and, indeed, repeatedly assured its employees that it was reorganizing, not liquidating. Compl. at ¶¶ 28, 29, 35, 38. In addition, Hostess repeatedly represented in pleadings to this Court that it was focused on reorganizing, and not liquidating the company. *See supra* Section II.C. As the court in *Cain v. Inacom Corp.* confirmed, it is inappropriate to grant a motion to dismiss where there remains a triable issue of fact regarding whether the employer was "engaged in business":

> the Employees argue that there are sufficient disputed facts at this stage of the proceeding which preclude a definitive determination as to whether Inacom was a liquidating fiduciary. Citing *United Healthcare*, the Employees argue that in determining whether an entity is an "employer" the court must consider whether the entity was "engaged in business" during the time prior to the business close down and mass layoff. The Employees assert that Inacom was trying to sell the company rather than trying to obtain financing to continue running the company and that a company in that situation is not relieved of the WARN Act 60 day notice requirement.

> I agree with the Employees that at a minimum there is a material question of fact whether Inacom was a liquidating fiduciary at the time of the employee terminations and it is inappropriate to resolve such a fact question in the context of a Rule 12(b)(6) motion.

Cain v. Inacom Corp., ADV. 00-1724, 2001 WL 1819997 at *1 (Bankr. D. Del. Sept. 26, 2001); *accord American Capital Strategies, Ltd.*, 2007 WL 221671 at *15-17.

Further, there is a factual dispute as to when the former Hostess employees were terminated. Plaintiffs allege they were terminated on November 16, 2012, Compl. at ¶ 37, while Hostess attempts to manufacture a termination date by backdating a November 27, 2012 letter claiming employees were terminated on November 21, 2012 to match court proceedings that occurred after the fact. *See* Compl. at 39. If the Court finds there is a factual dispute over the termination date and whether Hostess was operating as an ongoing concern as of that date, then the Court must deny Hostess's motion. As Judge Glenn pointed out in *Dewey*, "[n]o caselaw supports granting a motion to dismiss based on the liquidating fiduciary principle where ... there is a factual dispute whether the debtor was operating as a going concern at the time of the terminations." 2013 WL 494452, at *6.

Finally, the liquidating fiduciary exception is inapplicable where the employer identifies employees for termination at a time significantly prior to their termination. *Barnett v. Jamesway Corp.* (*In re Jamesway Corp.*), 235 B.R. 329, 343-44 (Bankr. S.D.N.Y. 1999). In *Jamesway*, the company fired a group of its employees shortly before filing a liquidating Chapter 11 bankruptcy and then fired another group of employees shortly after it filed the Chapter 11 petition. 235 B.R. at 335. The employer claimed that it was exempt from providing the employees terminated post-petition with WARN Act notice because at that point it had become a liquidating fiduciary. *Id.* at 343. The court rejected this contention and held that the employer was liable to these employees for sixty days pay and benefits. *Id.* at 348. The *Jamesway* court noted that prior to its

bankruptcy filing the employer had already "identified all of the plaintiffs as employees that would lose their jobs in the ensuing liquidation." *Id.* at 343-44. The fact that the actual order terminating the employees did not take place until after the bankruptcy filing was held to be irrelevant since "[t]he subsequent filing of the bankruptcy petition did not divest it of the obligations under WARN to those employees." *Id.*

Applying the *Jamesway* analysis to the facts herein, the Plaintiffs have alleged sufficient facts to suggest that the terminated employees were identified long before the Interim Winddown Order was entered. Significantly, the Defendants began sending the Plaintiffs legally ineffective notices of their impending termination as early as May 4, 2012. *See* Compl. at ¶¶ 25-37, *see also* Compl. at ¶ 52 (plans Hostess had to terminate close bakeries and, therefore, terminate employees, prior to the Winddown Order). As such, because there are allegations before this Court that the decision to terminate the employees was made as early as May of 2012 which makes the Defendants ineligible for the liquidating fiduciary defense, this Court should deny the Motion.

IV. CONCLUSION

This Court should not further promulgate the judicially created liquidating fiduciary exception which is not supported by the language of the statute, or the traditional canons of statutory construction. However, even assuming the Court is willing to recognize the exception, the relief requested in the Motion should be denied for two reasons. First, Plaintiffs' allegations show that Hostess was not a liquidating fiduciary. Second, the issue of whether the liquidating fiduciary principle applies involves questions of fact that simply are not appropriate for resolution on a motion to dismiss. For all these reasons, Plaintiffs respectfully request the Court deny Defendants' motion to dismiss.

Respectfully submitted,

April 15, 2013

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
HOSTESS BRANDS, INC., *et al.*	:	Case No. 12-22052 (RDD)
Debtors.	:	(Jointly Administered)
Mark Popovich, William Dean, Robert Gregory, Henry Dini, Fred Shourds, and Michael Jablonowski, Individually and as Class Representatives on behalf of a Putative Class of all others similarly situated,	:	Adversary No. 12-08314 (RDD)
Plaintiffs,	:	
v.	:	
Hostess Brands, Inc., IBC Sales Corporation; IBC Services, LLC, IBC Trucking, LLC, Interstate Brands Corporation, and MCF Legacy, Inc.,	:	
Defendants.	:	

CERTIFICATE OF SERVICE

I, Kathryn Perkins, hereby certify that on April 15, 2013, I caused a true and correct copy of the foregoing *Memorandum in Support of Opposition to the Motion of Debtors and Debtors in Possession to Dismiss Consolidated Class Action Adversary Complaint* to be served on all parties registered with the Court's CM/ECF noticing system as well as on the following via First Class Mail:

Corinne Ball
Jones Day
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/s/ Kathryn Perkins
Kathryn Perkins