Hearing Date and Time: April 9, 2013 at 10:00 a.m. Eastern

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
Hostess Brands, Inc., *et al.*,[1]	:	Case No. 12-22052 (RDD)
Debtors.	:	(Jointly Administered)

[1] The Debtors are the following six entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Hostess Brands, Inc. (0322), IBC Sales Corporation (3634), IBC Services, LLC (3639), IBC Trucking, LLC (8328), Interstate Brands Corporation (6705) and MCF Legacy, Inc. (0599).

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 other similarly situated, Plaintiffs,	:	Master Docket Adversary No. 12-08314 (RDD)
v.	:	
Hostess Brands, Inc., IBC Sales Corporation, IBC Services, LLC, IBC Trucking, LLC, Interstate Brands Corporation, and MCF Legacy, Inc. Defendants.	:	

MOTION OF DEBTORS AND DEBTORS IN POSSESSION
TO DISMISS CONSOLIDATED CLASS ACTION ADVERSARY COMPLAINT

TO THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE:

Hostess Brands, Inc. and its five domestic direct and indirect subsidiaries, as debtors and debtors in possession (collectively, "Hostess" or the "Debtors"), respectfully submit this Motion to Dismiss (the "Motion") the Consolidated Class Action Adversary Proceeding Complaint (Adversary No. 12-08314) (the "Complaint"), pursuant to Federal Rule of Civil Procedure 12(b)(6), made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7012.

The Complaint was filed on January 22, 2013 by Mark Popovich, William Dean, Robert Gregory, Henry Dini, Fred Shourds and Michael Jablonowski (together with members of the putative class of others similarly situated, the "Plaintiffs"). As detailed below, the Complaint should be dismissed because it fails to state a claim against the Debtors upon which relief can be granted. A proposed Order is attached hereto as Exhibit A.

PRELIMINARY STATEMENT

1. In their Complaint, the Plaintiffs seek back pay because, in their view, Hostess provided insufficient notice of the Plaintiffs' employment termination under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 et seq. (the "WARN Act"). Although a complete review of the material facts would show that Hostess did in fact comply with the WARN Act's notice requirements before terminating the Plaintiffs' employment, there is no need for the Court to undertake this factual inquiry. The Complaint should be dismissed now because it alleges that Hostess terminated each Plaintiff on November 21, 2012, Complaint ¶¶ 39-46 and 53, at which time Hostess had ceased operating its businesses and begun liquidating its assets pursuant to an order by this Court. The Plaintiffs' claim for violation of the WARN Act's notice requirements thus fails as a matter of law because, as a "liquidating fiduciary" in bankruptcy, Hostess was not an "employer" subject to liability under the WARN Act or to the Act's notice requirements at the time it terminated the Plaintiffs' employment. Accordingly, the Complaint should be dismissed.

BACKGROUND

2. On January 11, 2012, the Debtors commenced their bankruptcy cases by filing voluntary petitions for relief under chapter 11 of title 11 of the United States Code. Complaint at ¶ 21. On May 4, 2012, the Plaintiffs received a letter enclosing a WARN notification. Complaint at ¶ 27. On July 20, September 5, October 5, and November 13, 2012, some of the Plaintiffs received extensions of the WARN notification. Complaint at ¶¶ 31-35.

3. On November 9, 2012, members of the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union (the "BCTGM") began picketing certain of the Debtors' facilities and initiating strikes at Hostess bakeries. Complaint at ¶ 36.

4. One week later, as a result of the debilitating effects on the Debtors' businesses brought about by the nationwide strike instituted by the BCTGM, Hostess filed an emergency motion (the "Winddown Motion") to obtain authorization from this Court to shut down its business operations on a permanent basis and begin the process of liquidating all its assets for the benefit of its creditors.[2] See Complaint at ¶ 51. The Court held an interim evidentiary hearing on the Winddown Motion on November 21, 2012.

5. At the end of the November 21, 2012 hearing, the Court ruled from the bench that the Debtors were authorized to immediately implement the relief sought in the Winddown Motion on an interim basis. See November 21, 2012 Hearing Transcript [Docket No. 2339] at 143 ("the [D]ebtors knowing the need for speed can operate [in] reliance on [its] bench decision"). As result of its ruling, the Court recognized in its bench decision that, "the debtors [were]… in a liquidation process." Id. On November 27, 2012, the Court entered on the docket its interim order granting the relief sought in the Winddown Motion, *nunc pro tunc* as of November 21, 2012 [Bankr. Docket No. 1816] (the "Interim Winddown Order"). Accordingly, on the same day that the Interim Winddown Order was entered, Hostess notified over 15,000 employees via letter that they were terminated as of November 21, 2012. Complaint at ¶ 39 and Exhibit F thereto.[3]

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[2] Emergency Motion of Debtors and Debtors in Possession For Interim and Final Orders, Pursuant to Sections 105, 363, 365 and 503(c) of the Bankruptcy Code: (A) Approving (I) A Plan to Wind Down the Debtors' Businesses, (II) the Sale of Certain Assets, (III) Going-Out-of-Business Sales at the Debtors' Retail Stores, (IV) The Debtors' Non-Consensual Use of Cash Collateral and Modifications to the Final DIP Order, (V) An Employee Retention Plan, (VI) A Management Incentive Plan, (VII) Protections for Certain Employees Implementing the Winddown of the Debtors' Businesses, (VIII) The Use of Certain Third Party Contractors and (IX) Procedures for the Expedited Rejection of Other Contracts and Leases; and (B) Authorizing the Debtors to Take Any and All Actions Necessary to Implement the Winddown [Bankr. Docket No. 1710].

[3] The Interim Winddown Order authorized the Debtors "to take any and all actions that are necessary or appropriate in the exercise of their business judgment to implement the liquidation of their businesses pending the Final Hearing." See Interim Winddown Order at 4-5. On November 30, 2012, the Court entered the final order authorizing the Debtors to implement the relief sought in the Winddown Motion [Bankr. Docket No. 1871].

ARGUMENT

I. The Complaint Fails to State a Claim Against the Debtors

6. Federal Rule of Civil Procedure 12(b)(6), made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7012, provides for the dismissal of a complaint that "fail[s] to state a claim upon which relief can be granted." Fed. R. Bankr. Pro. 7012(b). In considering a motion to dismiss for failure to state a claim, courts should accept the material facts alleged in the complaint as true and construe them in the plaintiff's favor. See, e.g., Sec. Investor Prot. Corp. v. Stratton Oakmont, Inc., 234 B.R. 293, 309 (Bankr. S.D.N.Y. 1999). However, courts must "disregard legal conclusions, deductions or opinions couched as factual allegations." Dow Jones & Co. v. Int'l Sec. Exch., Inc., 451 F.3d 295, 307-08 (2d Cir. 2006) ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.") (citations omitted). In addition, to avoid dismissal, a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 667-68 (2009) ("a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'") (quoting Bell Atl. Corp. v. Twombly, 550 U.S. at 570).

7. When considering a motion to dismiss an adversary proceeding complaint, a court may take judicial notice of motions filed and orders entered in the underlying bankruptcy case. See In re Century City Doctors Hosp., LLC, 2010 WL 6452903, at *6 (B.A.P. 9th Cir. 2010); In re Calpine Corp., 2007 WL 4565223, at *4 (Bankr. S.D.N.Y. 2007) (taking judicial notice of entire docket of chapter 11 case, including all pleadings, previous orders and hearing transcripts).

A. Plaintiffs' WARN Act Claim Should Be Dismissed

8. Under the WARN Act, "employers" must provide sixty days notice to certain employees prior to a plant closing or mass layoff. 29 U.S.C. § 2102(a).[4] The WARN Act defines an "employer" as a "business enterprise" that employs: (a) 100 or more employees, excluding part time employees; or (b) 100 or more employees who in the aggregate work at least 4,000 hours per week. 29 U.S.C. § 2101(a)(1)(A)-(B). The Department of Labor, which has express statutory authority to prescribe regulations and interpretive statements regarding the WARN Act (see 29 U.S.C. § 2107(a)) has explained in its commentary that a fiduciary whose duty is to liquidate a failed business (i.e., a "liquidating fiduciary") is not an "employer" subject to the Act because that entity "is not operating a 'business enterprise.'" 54 Fed. Reg. 16,042, 16,045 (Apr. 20, 1989) (codified at 20 C.F.R. § 639.3(a)). As a result, the Department of Labor's commentary states that a liquidating fiduciary does not succeed to the WARN Act obligations of the former employer:

> 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.

54 Fed. Reg. 16,045 (1989) (discussing 20 C.F.R. § 639.1 et seq.).

9. Based in part on the Department of Labor's commentary, several courts have found that liquidating fiduciaries in bankruptcy are not subject to the WARN Act's notification requirements and do not succeed to the WARN Act notice obligations of the former employer, including when the liquidating fiduciary is itself the former employer. For example,

[4] A "plant closing" is a shutdown of a single site of employment that causes an "employment loss" for fifty or more employees during a 30-day period. 29 U.S.C. § 2101(a)(2). A "mass layoff" is any other work force reduction that results in an "employment loss" for either (1) fifty to 499 full-time employees, if the number laid off equals 33 percent of the work force, or (2) 500 full-time employees. 29 U.S.C. § 2101(a)(3).

in Official Comm. of Unsecured Creditors of United Healthcare Sys., Inc. v. United Healthcare Sys., Inc. (In re United Healthcare Sys., Inc.), 200 F.3d 170 (3d Cir. 1999), the debtor filed a chapter 11 bankruptcy petition and simultaneously gave 60 days' notice of termination to its employees pursuant to the WARN Act. Approximately fourteen days later, the official committee of unsecured creditors filed a motion for an order directing the debtor to immediately terminate all employees, other than those necessary to protect the Debtors' estates. In its motion, the creditors committee sought a finding that the WARN Act did not apply to the debtor because, among other things, the debtor was a liquidating fiduciary. Id. at 173. Two days later, the debtor terminated over 92% of its employees. Id.

10. In response to the creditors committee's motion, the debtor in that case argued that the WARN Act mandated that the debtor provide "back pay" to the terminated employees. The bankruptcy court agreed. Id. at 173-75. Relying on the Department of Labor's commentary, however, the Third Circuit overturned the bankruptcy court's decision. It held that the debtor was not operating as a "business enterprise" when it terminated its employees because "the nature and extent of the entity's business activities . . . clearly demonstrate[d] its intent to liquidate." Id. at 178. The court found that the debtor had ceased operating as a going concern and that the remaining employees were no longer engaged in their regular duties, but were instead performing tasks designed to prepare for the liquidation of the business. Id. at 178. Thus, the debtor was not subject to the WARN Act because the WARN Act notice obligations of the "former employer" (i.e., the debtor) were extinguished when the debtor became a liquidating fiduciary. Id. (citing 54 Fed. Reg. 16,045 (1989) ("a fiduciary whose sole function in the bankruptcy process is to liquidate . . . does not succeed to the notice obligations of the former employer").

11. Other courts have also found that liquidating fiduciaries are not subject to the WARN Act's notice requirements. See In re Century City Doctors Hospital, LLC, 2010 WL 6452903, at *6-7 (B.A.P. 9th Cir. Oct. 29, 2010) (affirming motion to dismiss WARN Act complaint and holding that WARN Act notice requirements did not apply to liquidating chapter 7 debtor that did not operate the business of the debtor in the "normal commercial sense"); Chauffeurs, Sales Drivers, Warehousemen & Helpers Union Local 572 v. Weslock Corp., 66 F.3d 241, 244 (9th Cir. 1995) (WARN Act does not apply to secured creditor operating debtor's assets where creditor "does no more than exercise that degree of control over the debtor's collateral necessary to protect the security interest, and acts only to preserve the business asset for liquidation or sale . . ."); see also In re MF Global Holdings, Ltd., 481 B.R. 268, 280 (Bankr. S.D.N.Y. 2012) (adopting the "liquidating fiduciary" doctrine and citing Department of Labor commentary stating that a liquidating fiduciary does not succeed to the WARN Act obligations of the former employer).

12. Application of the WARN Act's notice requirement to liquidating fiduciaries would result in a class of terminated employees receiving a preference at the expense of all other creditors in a liquidation. Such a result would be inconsistent with one of the primary goals of the Bankruptcy Code, which is to maximize the value of the estate for the benefit of all creditors. See, e.g., In re Big Rivers Elec. Corp., 233 B.R. 739, 751-52 (Bankr. W.D. Ky. 1998) ("A debtor in possession owes a fiduciary duty to maximize the value of the estate to all its creditors. In fact, . . . its main responsibility, and the primary concern of the bankruptcy court, is the maximization of value of the asset sold. This duty to maximize the estate often trumps other duties the debtor may owe to individual creditors or third parties.") (internal quotations and citations omitted); see also Hannaford Bros., Co. v. Ames Dept. Stores,

Inc. (In re Ames Dep't Stores, Inc.), 316 B.R. 772, 796 (Bankr. S.D.N.Y. 2004) (noting bankruptcy's "fundamental policy of maximizing estate assets for the benefit of all creditors").

13. Here, on Wednesday, November 21, 2012, the Court issued its bench decision on the Winddown Motion, which authorized Hostess to take ***immediate*** action to cease operating as a business enterprise and begin liquidating its assets, before Hostess terminated the Plaintiffs' employment. Indeed, the Interim Winddown Order, which was entered on the Docket the following Tuesday, expressly authorized the Debtors "to take any and all actions that are necessary or appropriate in the exercise of their business judgment to implement the liquidation of their businesses," at 4-5, and it was entered by this Court *nunc pro tunc* as of November 21, 2012. Hostess relied on the Court's prior bench decision and the *nunc pro tunc* effective date of the Interim Winddown Order when it notified the Plaintiffs, by letter sent after the entry of the Interim Winddown Order, that their employment was terminated "as of November 21, 2012." Complaint ¶ 39 and Exhibit F thereto; see also id. at ¶ 53.

14. Thus, the Complaint's allegations and the motions and orders entered in Hostess' underlying bankruptcy case establish that Hostess terminated each Plaintiff ***after*** Hostess had ceased operating as a business enterprise and begun liquidating its assets for the benefit of its creditors pursuant to court order. As a matter of law, Hostess' notice obligations under the WARN Act were extinguished once it became a liquidating fiduciary by order of this Court. Accordingly, the Plaintiffs' first cause of action should be dismissed because Hostess was a liquidating fiduciary, not an "employer" operating a "business enterprise," at the time it terminated the Plaintiffs. See United Healthcare, 200 F.3d at 178; Chauffeurs, Sales Drivers, Warehousemen & Helpers Union Local 572, 66 F.3d at 244.

B. Plaintiffs' Claims For Allowance and Payment Of Administrative Expense Claims Should be Dismissed

15. As their second cause of action, the Plaintiffs seek allowance of administrative claims for amounts owed under the Debtors' purported failure to comply with the WARN Act. Even if the Court finds that Plaintiffs have a valid claim under the WARN Act (which, as described above, they do not), the Court should dismiss Plaintiffs' second cause of action because the classification of claims must be made through the claims process. An adversary proceeding is not the proper forum in which to resolve such claims. Conn v. Dewey & LeBoeuf, Case No. 12-01672, slip op. at 18 (Bankr. S.D.N.Y. Feb. 13, 2013) ("[A]n administrative expense or priority claim is not properly asserted in an adversary proceeding.") (citing Colandrea v. Union Home Loan Corp. (In re Colandrea), 17 B.R. 568, 583 (Bankr. D. Md. 1982); Pillar Capital Hldgs., LLC v. Williams (In re Living Hope Southwest Med. Servs., LLC), Nos. 4:06-BK-71484, 4:11-CV-04043, 2012 WL 1078345, at *5 (W.D. Ark. Mar. 30, 2012); W.A. Lang Co. v. Anderberg-Lund Printing Co. (In re Anderberg-Lund Printing Co.), 109 F.3d 1343, 1346 (8th Cir. 1997)). Accordingly, Plaintiffs' cause of action seeking to allow administrative expense claims should be dismissed. See Living Hope Southwest Med. Servs., LLC, 2012 WL 1078345, at *5; Colandrea, 17 B.R. at 583.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court (a) grant the Motion and dismiss the Complaint with prejudice; and (b) grant such other and further relief to the Debtors as the Court deems proper.

Dated: March 1, 2013
New York, New York

Respectfully submitted,

/s/ Corinne Ball

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ATTORNEYS FOR DEBTORS AND
DEBTORS IN POSSESSION

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
Hostess Brands, Inc., *et al.*,[1]	:	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 other similarly situated,	:	Master Docket
Plaintiffs,	:	Adversary No. 12-08314 (RDD)
v.	:	
Hostess Brands, Inc., IBC Sales Corporation, IBC Services, LLC, IBC Trucking, LLC, Interstate Brands Corporation, and MCF Legacy, Inc.	:	
Defendants.	:	

ORDER DISMISSING CONSOLIDATED
CLASS ACTION ADVERSARY COMPLAINT

This matter coming before the Court on the Motion of Debtors and Debtors in Possession to Dismiss Consolidated Class Action Adversary Complaint (the "Motion"),[2] filed by the debtors and debtors in possession in the above-captioned cases (collectively, the "Debtors"); the Court having reviewed the Motion, the Complaint, and having considered the statements of counsel at a hearing before the Court (the "Hearing"); the Court finding that (a) the Court has

[1] The Debtors are the following six entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Hostess Brands, Inc. (0322), IBC Sales Corporation (3634), IBC Services, LLC (3639), IBC Trucking, LLC (8328), Interstate Brands Corporation (6705) and MCF Legacy, Inc. (0599).

[2] Capitalized terms not otherwise defined herein have the meanings given to them in the Motion.

jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), (c) notice of the Motion and the Hearing was sufficient under the circumstances, and (d) the Court having determined that the legal bases set forth in the Motion and at the Hearing and proceedings made to and before the Court establish just cause for the relief granted herein;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.

2. The Complaint is dismissed with prejudice.

3. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation of this Order.

Dated: _____, 2013
White Plains, New York

HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE