UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
MF GLOBAL HOLDINGS, LTD.; MF GLOBAL FINANCE USA, INC., *et al*.,	:	Case No. 11-15059 (MG) Case No. 11-15058 (MG)
	:	(Jointly Administered)
Debtors.	:	
TODD THIELMANN, PIERRE-YVAN DESPAROIS, NATALIA SIVOVA, SANDY GLOVER-BOWLES, ARTON SINA, and SCOTT L. KISCH, Individually, and on behalf of All Other Similarly Situated Former Employees,	:	
Plaintiffs,	:	
	:	Adv. Pro. No. 11-02880 (MG)
v.	:	
MF GLOBAL HOLDINGS, LTD, MF GLOBAL HOLDINGS USA, INC., MF GLOBAL FINANCE USA, INC.; *et al.*,	:	
Defendants.	:	

NOTICE OF FILING OF PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW

PLEASE TAKE NOTICE that, in accordance with the Court's *Order Establishing Procedures for Trial* [Adv. Docket No. 133], the undersigned hereby files the attached *Proposed Findings of Fact and Conclusions of Law in Support of Class Certification and Related Relief* filed by plaintiffs, Todd Thielmann, Pierre-Yvan Desparois, Natalia Sivova, Sandy Glover-Bowles, Arton Sina, and Scott L. Kisch.

Dated: August 17, 2015

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FINDINGS OF FACT

1. Defendants MF Global Holdings Ltd. ("Holdings Ltd."), and MF Global Holdings USA, Inc. ("Holdings USA"), and MF Global Finance USA, Inc. ("Finance USA"), were among affiliates comprising the company generally known as MF Global.

2. The MF Global affiliates, including Defendants and affiliate MF Global Holdings Inc. ("MFGI"), functioned as an integrated business conducting worldwide financial and brokerage services.

3. Defendants maintained four facilities that are relevant to this litigation, two in New York and two in Chicago (collectively, the "Facilities").

4. Plaintiffs Todd Thielmann ("Thielmann"), Pierre-Yvan Desparois ("Desparois"), Natalia Sivova ("Sivova"), Sandy Glover-Bowles ("Glover-Bowles"), Arton Sina ("Sina") and Scott Kisch ("Kisch") and approximately 1,300 putative class members were hired by Defendants Holdings USA as employees of Defendants Holdings USA. They worked at one of Defendants' Facilities until they were terminated on or about November 11, 2011, or within thirty days of that date, without cause on their part.

5. Plaintiffs received employment offer letters from Holdings USA or its predecessor, Man Group USA, Inc. ("Man Group USA").

6. Plaintiffs' employment offer letters ("Letter Agreements" or "Agreements") specifically stated that Plaintiffs would be employed by Holdings USA, or its predecessor.

7. In the Agreements, Holdings USA was defined as "MF Global" or the "Company."[1] Plaintiffs' Letter Agreements contained specific terms of employment that Plaintiffs could expect from Holdings USA. In addition, Plaintiffs were paid by Holdings USA,

[1] In Mr. Thielmann's Employment Letter, he was invited to be employed by Man Group USA and thereby to become part of the Man Group.

Holdings USA appeared on their pay stubs, and Holdings USA represented to the IRS and to the Plaintiffs that it was Plaintiffs' employer when it issued to PlaintiffsW-2 forms with its name on them as the employer. Holdings USA provided health benefits plans and life insurance benefits to Plaintiffs.

8. Holdings USA provided to all 1,300 class members their wages and benefits from Holdings USA's account using funds provided by the facilities with Holdings Ltd. and Finance USA.

9. Plaintiffs were given the opportunity to receive (and some did receive) long term incentives from MF Global Holdings Ltd., which awards were signed by Thomas Connolly, as "Senior Vice President of Human Resources of MF Global Holdings, Ltd."

10. Plaintiffs' experiences were indicative of those of the class.

11. Further, Holdings USA (or its predecessor in Thielmann's case) issued its personnel policies and an "MF Global Employee Handbook" with which Plaintiffs were expected to comply and which applied to the MF Global workforce.

12. MF Global had a customized Oracle enterprise software system to maintain its books and records for accounting, tax, human resources ("HR"), and other purposes.

13. After Holdings USA hired its employees (Plaintiffs and the class members included), it entered cost center and legal entity (corporate subsidiary) codes for them in MF Global's general ledger kept on the Oracle software. Specifically, MF Global had several MF Global entities on its general ledger and Holdings USA linked its employees to these cost-center entities for accounting, tax and regulatory purposes. The last iteration of the spreadsheet listing all MF Global employees from the Facilities before October 31, 2011, was apparently created on October 27, 2011, and came to be known as the "10/27 spreadsheet."

14. At the time of their terminations, approximately 1,100 employees were coded in Oracle as assigned to MFGI and approximately 200 were coded as assigned to other MF Global entities. The allocations in Oracle were done after Holdings USA hired its employees as "a matter of convenience for the finance department," such as by using the number 202 for MFGI. MF Global used the same allocation form for the vast majority of the employees to determine which entity would be paying for each employee. The entity codes, however, did not necessarily correspond to the reporting structure of employees or to which entity employees provided services. Lower level broker dealers were coded as MFGI even though the executives to whom they ultimately reported were coded as Holdings USA. These broker dealer executives were integral to "front office" operations. Some staffers coded for accounting purposes as MFGI, such as Plaintiff Natalia Sivova and Darya Geetter, performed non-broker dealer services across the entire enterprise in the "corporate" (as opposed to "front office") category. The broker dealer supervisors who ran and controlled the broker dealer and were coded as Holdings USA, included the head of all broker dealer operations in Chicago, the heads of the Equities, Fixed Income, Foreign Exchange, Client Management and Treasury bond trading.

15. Holdings USA functioned as the ultimate parent of the MFGI subsidiaries. Executives who headed MF Global's operations, including those in charge of its broker dealer operations, were considered to have "sat" in Holdings USA. The chain of command ultimately flowed to Holdings USA, and that the ultimate officer in the chain of command at Holdings USA was Chief Executive Officer Jon Corzine. The leadership team would supervise the businesses conducted in MFGI while their employment would have been by Holdings USA and higher level executives made the determinations about entity designations. The leadership of the company

sat on Holdings USA. The officers of the company were USA employees and Connolly never reported to an MFGI employee.

16. Holdings USA approved the budgets of the subsidiaries such that the budget for a low-level analyst in the broker dealer area would ultimately have to be approved by the executives at the Holdings USA level. Business leaders at Holdings USA would decide, for budgetary and regulatory purposes, into which entity an employee would be designated in the company's records and the ultimate budgets had to be approved by Holdings USA.

17. The Oracle system was not readily shared with the employees absent special request and some Human Resources officers who input the legal entity codes did not know what these codes meant. There were hundreds of cost center codes and department numbers. If MF Global changed an employee's code in Oracle, it did not constitute any acceptance by the employee of a change in employment.

18. Employees worked in departments or groups within the organization without reference to any corporate entity. Plaintiffs did not encounter distinctions between the MF Global entities in the course of their work; they neither understood MF Global's corporate structure nor whether the name MF Global referred to a specific entity within it. At least some Human Resources officers believed their employer to be "MF Global" and did not consider it part of their job to recognize or understand the difference between the legal entities at MF Global.

19. After Plaintiffs entered into the Agreement with Holdings USA, they did not think their employment relationship was altered while they were employed. Plaintiffs never were so informed, nor told by MF Global that their employer was other than the MF Global entity named in their Agreements – which was Holdings USA. There is no other document

confirming to an employee that the employee was employed by MFGI or any other entity (other than the Letter Agreements).

20. In October of 2011, MF Global improperly used hundreds of millions of dollars in client funds to cover liquidity shortfalls. When MF Global's sale fell through and it went into Bankruptcy Court, it caused large scale layoffs, as Holdings USA had only $8 million in its account. In late October to November of 2011, all employees faced termination because the MF Global business collapsed and liquidity was gone.

21. On October 31, 2011, Holdings Ltd. and Finance USA filed chapter 11 petitions in this Court.

22. On March 2, 2012, Holdings USA filed a chapter 11 petition in this Court. (*Id.*)

23. In the first weeks of November, the Defendants and the SIPA Trustee focused on identifying which employees they would hire going forward. They discussed the language to be used in communications to employees. Executives at the Holdings USA level shared with the SIPA Trustee their Oracle 10/27 spreadsheet ("Oracle Spreadsheet") that showed the accounting code for each employee. The decisions of which employees would be kept to work after the layoff were made by Holdings USA and the SIPA Trustee using the Oracle Spreadsheet. But, the SIPA Trustee understood that he had no authority to interfere with or terminate an employment relationship between an employee and Holdings USA. Relying on the Oracle Spreadsheet that contained the ledger coding for each employee, the SIPA Trustee and Defendants selected those individuals they needed and discussed how to share the cost of employees they both would utilize Neither estate had the funds or a reason to employ the non-selected employees.

24. Starting on November 7 and continuing into November 2011, Defendants terminated the employment of Plaintiffs and the proposed class and Connolly and the Holdings USA-based Human Resources team conducted the terminations of approximately 1,300 employees, regardless of whether they were coded as Holdings USA or MFGI or any other MF Global entity.

25. Prior to their November 2011 terminations, Plaintiffs' and proposed class members' were never told that their written employment agreements with Holdings USA been terminated.

26. The SIPA Trustee indicated that his objective in November 2011 was not to terminate employment agreements between employees and non-MFGI entities, nor did it have authority over the affiliates of MFGI.

27. Termination letters were sent on the letterhead of Holdings USA (with the exception of some in Chicago) and Holdings USA stopped paying the employees.

28.

29. The Plaintiffs did not receive 60 days' advance written notice pursuant to the WARN Act, nor, did any of the other putative class members who were terminated on or about the same dates.

30. Following their terminations, they retained proposed Class Counsel as their counsel to assert WARN Act claims on their behalf as well as a class claim on behalf of the other MF Global employees who, like themselves, were terminated as part of the collapse of MF Global in or about November 2011. The SIPA Trustee indicated that his objective in November 2011 was not to terminate employment agreements between employees and non-MFGI entities, nor did it have authority over the affiliates of MFGI. Following their terminations, they retained

proposed Class Counsel as their counsel to assert WARN Act claims on their behalf as well as a class claim on behalf of the other MF Global employees who, like themselves, were terminated as part of the collapse of MF Global in or about November 2011.

31. The proposed Class is defined as: persons who worked at or reported to Defendants' New York and Chicago Facilities and were terminated without cause on or about November 11, 2011 or within 30 days of that date, as the reasonably foreseeable consequence of the mass layoffs and/or plant closings ordered by Defendants on or about November 11, 2011, and who are affected employees, within the meaning of 29 U.S.C. § 2101(a)(5) and/or the New York Labor Law § 860 et seq. (the "WARN Acts"), and (ii) who have not filed a timely request to opt-out of the class.

32. Plaintiff propose the Class be certified with two management convenience subclasses defined as: (i) a subclass comprising all employees who were listed with the name MFGI in the Oracle system spreadsheet of October 27, 2011 ("Subgroup 1"), and (ii) a subclass comprising all employees who were listed with the name of one of the non-MFGI MF Global entities in the Oracle system spreadsheet of October 27, 2011 ("Subgroup 2").

33. Plaintiffs and the proposed Class members, including any sub-classes, should any be determined to be necessary or appropriate, are so numerous that joinder of all members is impracticable, since approximately 1,300 employees were terminated.

34. The identity of the members of the Class and the last known residential address of each is contained on the Oracle enterprise software system of Defendants.

35. The rate of pay and benefits that were being paid by Defendants to each Class Member at the time of his/her termination is contained on the Oracle enterprise software system of Defendants.

36. There are questions of law or fact common to the Class, as set forth in these Contentions of Fact.

37. The class is united by the common legal question of whether the employer complied with the statutory notice requirements of WARN.

38. All the Plaintiffs and class members share as a common issue whether the Defendants were their "employer" which the WARN Act defines as a "business enterprise" 29 U.S.C. § 2101(a)(1). Holdings USA was the operating entity that directly hired, compensated, and managed labor relations all the class members. Holdings USA represented itself to the government as the holder of the class members' employer identification number and was in privity of contract with the class members by entering into similar employment agreements with them. The Plaintiffs and class members share as a common issue whether MF Global, Ltd., the ultimate parent, is subject to WARN Act liability for directing the enterprise.

39. The evidence necessary to determine Defendants' liability to the class is overwhelmingly common to the class, as set forth in thee Contentions of Fact.

40. Each Class member's claim arises from the same course of events, and each Class member makes similar legal arguments in order to prove the Defendants liability, as set forth in these Contentions of Fact.

41. Plaintiffs suffered the same type of injury as the rest of the Class, as set forth herein. The Chapter 11 and SIPA Trustees cherry-picked the Oracle Spreadsheet for employees they wanted going forward, but the Plaintiffs, like the entire putative class, were the employees left behind.

42. Defendants' failure to comply with the requirements of the WARN Act represents a single course of conduct resulting in injury to all Class Members, including

Plaintiffs. Neither Plaintiffs nor other Class Members received at least 60 days' notice or 60 days' wages and benefits, pursuant to the requirements of the WARN Acts. The same holds true with respect to the potential subclasses vis a vis the representatives of those subclasses.

43. The class of former employees of Defendants have precisely the same legal claims as Plaintiffs. To the extent that the employees who were coded as MFGI employees may need to defeat certain defenses and prove that they were employed in the legal sense by one or more of the Defendants, those issues are common to that subclass and common as between the representatives and the Class members.

44. Plaintiffs have no conflict of interest amongst themselves or with any former employee terminated as part of the MF Global terminations that occurred in or about November 2011.

45. Here as in all WARN cases, a common issue joins all 1,300 former MF Global employees together – they were terminated by MF Global in a "mass layoff" (as that term is defined under the WARN Act) without 60 days' WARN notice due to the collapse of MF Global in or about November 2011.

46. The six Plaintiffs who are the proposed Class Representatives are adequate and typical representatives of the Class.

47. No divergence exists between the interests of the proposed Class Representatives and the interests of the Class as a whole.

48. To the extent any conflicts exist between the interests of the subclasses, which they don't, the representatives of each respective subclass have interests that are fully aligned with those of their respective proposed subclass members.

49. Plaintiffs' counsel are qualified, experienced and generally able to conduct the proposed litigation. Putative Class Counsel, Jack A. Raisner and René S. Roupinian of Outten & Golden LLP, Charles A. Ercole and Lee D. Moylan of Klehr Harrison Harvey Branzburg. LLP, Stuart Miller of Lankenau & Miller, LLP and Mary Olsen of The Gardner Firm, P.C., have substantial experience in prosecuting large scale class and collective actions on behalf of employees and, specifically, WARN Act class actions such as this one.

50. The questions of law or fact common to the members of the Class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

51. The determination of the common, predominant issues shared by the Class Members will dispose of the matter.

52. A class action is the superior method of resolving this dispute because many of the claims are small, making individual lawsuits impracticable.

53. Neither Plaintiffs nor any of the other class members are expressing a desire to prosecute and control separate actions.

54. Plaintiffs are unaware of any other pending litigation concerning this controversy.

55. Concentrating the WARN litigation in a class action will avoid multiple suits and assist in efficient administration of the estate.

56. The difficulties in managing this litigation as a class action are few: the Class Members can be easily identified; the potential liability of Defendants can be readily calculated; and there is only one combined course of conduct – that of Defendants – to examine and adjudicate.

57. Plaintiffs have been diligent in pursuing the class claim and have worked with counsel in initiating and prosecuting the action.

58. As noted herein, Plaintiffs have no conflict of interest with other Class Members; and have and will fairly and adequately represent the interests of the Class.

59. Plaintiffs should be appointed Class Representatives.

60. Plaintiffs further submit that service of the proposed Notice of Class Action by First Class Mail, postage prepaid, to each member of the Class at their last known address as shown in the Defendants' records, is the best notice practicable under all the circumstances.

61. Plaintiffs have proposed a Class notice that clearly and concisely states the nature of the action; the definition of the class certified; the class claims, issues or defenses;

62. The proposed Class notice fairly apprises the prospective members of the Class of the proceedings and of the options that are open to them in connection with the proceedings.

63. Individual mailings to each Class Member's last known address is appropriate.

64. The names and addresses of all the putative Class Members are contained in Defendants' records. Once that information is provided to Plaintiffs, Plaintiffs' counsel will mail the Notice of Class Action by first class mail, postage prepaid to the last known address of each of the putative Class Members allowing at least 30 days from the date of the mailing for each Class Member to object to Class certification or to opt-out of the Class

65. The facts and circumstances concerning Plaintiffs' terminations support class certification.

CONCLUSIONS OF LAW

Having considered the stipulated facts and evidence presented at trial, I conclude the following

66. **The Proposed Class Satisfies the Requirements of Rule 23.** The proposed Class is as defined:

> Persons (i) who worked at or reported to Defendants' New York and Chicago Facilities and were terminated without cause on or about November 11, 2011 or within 30 days of that date, as the reasonably foreseeable consequence of the mass layoffs and/or plant closings ordered by Defendants on or about November 11, 2011, and who are affected employees, within the meaning of 29 U.S.C. § 2101(a)(5) and/or the New York Labor Law § 860 *et seq.* (the "WARN Acts"), and (ii) who have not filed a timely request to opt-out of the class.

67. Plaintiff propose the Class be certified with two management convenience subclasses defined as

(i) A subclass comprising all employees who were listed with the name MFGI in the Oracle system spreadsheet of October 27, 2011 ("Subgroup 1"), and

(ii) A subclass comprising all employees who were listed with the name of one of the non-MFGI MF Global entities in the Oracle system spreadsheet of October 27, 2011.("Subgroup 2")[2]

68. Plaintiffs bear the burden of proof as to the elements of class certification. Class certification requires that each of the four prerequisites set forth in Federal Rule of Civil Procedure 23(a) be met, which are that: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the Plaintiffs as representative parties are typical of the claims or defenses of the

[2] If the Court determines that formal certification of subclasses is necessary, Scott L. Kisch can serve as a representative of subclass (ii) and the other Plaintiffs can serve as representatives of subclass (i).

class, and (4) the Plaintiffs as representative parties will fairly and adequately protect the interest of the class.

69. **The Numerosity Requirement is Satisfied.** The Federal Rule of Civil Procedure 23(a)(1), requires that the class sought to be certified be "so numerous that joinder of all members is impracticable." *Cashman v. Dolce Int'l/Hartford*, 225 F.R.D. 73, 91 (D. Conn. 2004) (finding numerosity for class of 117 former employees). No specific number is needed to maintain a class action, but Courts in the Second Circuit presume that joinder is impracticable where the prospective class consists of 40 members or more. *Robidoux v. Celani*, 987 F.2d 931, 935-36 (2d Cir. 1993); *In re Partsearch Technologies, Inc.*, 453 B.R. 84, 93-94 (Bankr. S.D.N.Y. 2011) (holding 192 WARN class members sufficiently large to make joinder impracticable.). The whole class of approximately 1,300 former employees satisfy numerosity. When subdivided, Subclass 1 of approximately 1,100 employees, and Subclass 2, of about 200, employees each satisfy numerosity.

70. **Questions of Law and Fact Are Common to All Members of the Proposed Class.** The commonality requirement is satisfied because there is "at least one issue common to the class" *Cashman*, 225 F.R.D. at 91. The class is "united by the common legal question of whether the employer complied with the statutory notice requirements of WARN." *Guippone v. BH S&B Holdings LLC*, 09 CIV. 1029 CM, 2011 WL 1345041 at *5 (S.D.N.Y. Mar. 30, 2011). All the Plaintiffs and class members share as a common issue whether the Defendants were their "employer" which the WARN Act defines as a "business enterprise" 29 U.S.C. § 2101(a)(1) The Plaintiffs and class members share as a common issue whether the Defendants were their "employer" which the WARN Act defines as a "business enterprise" 29 U.S.C. § 2101(a)(1) Defendant Holdings USA was the operating entity that directly hired, compensated, and

managed the labor relations of all the class members. The Plaintiffs and class members also share a common issue as to whether Holdings USA represented itself to the government as the holder of the class members' employer identification number and was in privity of contract with them by entering into similar employment agreements with each of them. Whether MF Global Holdings, Ltd., the ultimate parent, is subject to WARN Act liability for directing the enterprise is also a common issue to all class members. 20 C.F.R. § 639(a). So too is whether Defendants (i) terminated their employment as a consequence of a mass layoff or shutdown without 60-days' notice; and (ii) failed to pay Plaintiffs and each of the Class Members their WARN Act wages and benefits amount.

71. **The Claims of the Plaintiff Class Representatives are Typical of the Class.** Plaintiffs need only show that the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(2), (3). The claims of the Plaintiffs are identical to those of the class members. The Plaintiffs make the same claims which are at issue in the commonality inquiry, *i.e.*, the Defendants were their WARN Act employer, and violated the WARN Act in conducting a layoff or shut down that caused them job loss without providing advance notice or backpay in lieu of notice

72. In terms of typicality, it is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability. *Cashman*, 225 F.R.D. at 91, *citing Presser v. Key Food Stores Co-op., Inc.*, 218 F.R.D. 53, 58 (E.D.N.Y. 2003) (finding that a WARN Act plaintiff met the commonality and typicality requirements). The proposed Class Representatives' claims are typical of the class as a whole and the Subclasses they seek to represent. The claims of both Subclass 1 and Subclass Representatives are typical in that they are common to each other, and

to their respective Subclasses in seeking to hold Defendants liable as their employer for the WARN Act layoff or shutdown they suffered.

73. **Plaintiffs Will Fairly and Adequately Protect the Interests of the Class.** Federal Rule of Civil Procedure 23(a)(4) provides that a class action is maintainable only if "the Representative parties will fairly and adequately protect the interests of the class." This element requires a two-step analysis. First, the court must determine whether the named class representatives have interests that "are free from conflicts of interest with the class they seek to represent. *Amchem Prods v. Windsor*, 521 U.S. 591, 625 (1997). Second, the court must find that the class would be represented by qualified counsel. *Bourlas v. Davis Law Associates,* 237 F.R.D. 345, 352 (E.D.N.Y. 2006); *Marisol A. ex.rel. v. Guliani,* 126 F.3d 372, 378 (2d Cir. 1997); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968), *cert. denied*, 417 U.S. 156 (1974).

74. The first element of Rule 23(a)(4) is met in this case because, as set forth above, no divergence exists between the interests of the proposed Class Representatives and the interests of the Class as a whole. To the extent any conflicts exist between the interests of the subclasses, which they do not, the representatives of each respective subclass have interests that are fully aligned with those of their respective proposed subclass members.

75. To the extent the Defendants raise a defense against the member of Subclass 1 that they were not their employees, Subclass 1 Class is well-represented by five of the six Plaintiff-proposed Class Representatives who are aligned with that Subclass. Mr Kisch is aligned with Subclass 2 and thus adequate to represent that Subclass's claims. Mr. Kisch and Subclass 2 have no conflicts with Subclass 1 and the Subclass 1 proposed representatives and class members do not have a conflict with Subclass 2.

76. The second element of Rule 23(a)(4) is met because Plaintiffs' counsel are qualified, experienced and generally able to conduct the proposed litigation. Putative Class Counsel, Jack A. Raisner and René S. Roupinian of Outten & Golden LLP, Charles A. Ercole and Lee D. Moylan of Klehr Harrison Harvey Branzburg. LLP, and Mary Olsen of The Gardner Firm, P.C., have substantial experience in prosecuting large scale class and collective actions on behalf of employees and, specifically, WARN Act class actions such as this one.

77. **The Proposed Class Meets the Requirements of Rule 23(b)(3).** Class Certification is proper under Rule 23(b)(3) where "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and … a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Ramos v. SimplexGrinnell LP,* 796 F.Supp.2d 346, 359 (E.D.N.Y. 2011). The "Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Wal-Mart Stores, Inc., v. Visa USA Inc. (In re Visa Check/MasterMoney Antitrust Litig.),* 280 F.3d 124, 136 (2d Cir. 2001). A question is said to predominate when "resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Moore v. PaineWebber, Inc.,* 306 F.3d 1247, 1252 (2d Cir.2002). There is generalized proof as to who was employed by Holdings USA as of November 1, 2011, and who were involuntarily terminated for reasons other than cause over the next 30 days. Any individualized issues among the 1,300 employees do not overwhelm the issues subject to common proof.

78. The answer to the question of whether Defendants were the WARN Act employer responsible for a violation of the WARN Act will be common to the entire class or

generate two answers: one common to Subclass 1 and the other common to Subclass 2. *Ramirez v. Riverbay Corp.*, 39 F. Supp. 3d 354, 363 (S.D.N.Y. 2014). The answer to the question of whether Defendants were the WARN Act employer responsible for a violation of the WARN Act will be common to the entire class or generate two answers: one common to Subclass 1 and the other common to Subclass 2.

79. **Superiorty is Met**. A class action is the superior method of resolving this dispute because the claims are small, which makes individual lawsuits impracticable. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); *In re Partsearch Technologies, Inc.*, 453 B.R. 84, 96 (Bankr. S.D.N.Y. 2011) (recognizing a class action is superior to other methods of resolving the WARN Act controversy to individual actions.") Here, similar to other WARN Act suits, concentrating the WARN litigation in a class action will avoid multiple suits and assist in efficient administration of the estate.

80. **The Form and Manner of Service of Notice is Appropriate.** The names and addresses of all the putative Class Members are contained in Defendants' records. Once that information is provided to Plaintiffs, Plaintiffs' counsel will mail the Notice of Class Action by first class mail, postage prepaid to the last known address of each of the putative Class Members allowing at least 30 days from the date of the mailing for each Class Member to object to Class certification or to opt-out of the Class. Service of the proposed Notice of Class Action by First Class Mail, postage prepaid, to each member of the Class at their last known address as shown in the Defendants' records, is the best notice practicable under all the circumstances.

81. Fed. R. P. 23(c)(2)(B) mandates that for any class certified under Rule 23(b)(3), the Court must determine the best notice practicable under the circumstances, including individual notice to potential class members and that the notice must be concise, clear, and stated

in plain, easily understood language. Here, the contents of the proposed Notice are sufficient. The Notice summarizes the nature of the pending WARN Act litigation and apprises the proposed Class, among other things, of the Class definition, of the claims, issues and defenses, that complete information regarding the action is available upon request from Class Counsel, that any Class Member may opt-out of the Class, that if they do not opt-out, they will be bound by any judgment or settlement in the litigation and that if they do not opt-out, they may appear by their own counsel. In short, the proposed Notice satisfies all the requirements of Rule 23(c)(2)(B). *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1983); *Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 750 F.2d 86, 90 (3d Cir. 1985).

82. **The Court Has the Discretion to Create Two Informal Subclasses.** The Court is empowered to divide the class into subclasses under Rule 23(c)(5)("When appropriate, a class may be divided into subclasses that are each treated as a class under this rule."); *Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp.*, 993 F.2d 11, 14 (2d Cir.1993); *In re Pfizer Inc. Sec. Litig.*, 282 F.R.D. 38, 54 (S.D.N.Y. 2012). This form of subclass is appropriate when there is conflict between the classes and each must then satisfy Rule 23 on its own. *Casale v. Kelly*, 257 F.R.D. 396, 408-09, 415 (S.D.N.Y. 2009) citing Newberg § 7:33 (4th ed.). Here there is no conflict between the two classes despite a potential defense to which Subclass 1 may be subject but Subclass 2 is not. The interests of the subclasses do no diverge based on this potential defense. When "there is no actual conflict, a case-management subclass may be created as a convenience subclass to expedite resolution of the case by segregating a distinct legal issue that is common to some members of the existing class. *Id.* at 408-09. Here the defense Defendants raise that they did not employ Subclass 1 would be a distinct legal issue to that Subclass which may warrant the creation of case management Subclasses 1 and 2. However, no such case management

subclasses are necessary at this time, and the Court will reconsider whether their creation is necessary at a later date.

CONCLUSION

The Class Certification motion is GRANTED. The Plaintiffs are APPOINTED Class Representatives and Notice is APPROVED.