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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re MF GLOBAL HOLDINGS, LTD; MF GLOBAL FINANCE USA, INC., et al., Debtors.	Chapter 11 Case No. 11-15059 (MG) Case No. 11-15058 (MG) Case No. 11-02790 (MG) SIPA (Jointly Administered)
Todd Thielmann, Pierre-Yvan Desparois, Natalia Sivova, Sandy Glover-Bowles and Arton Sina, Individually, and on behalf of All Other Similarly Situated Former Employees, Plaintiffs, v. MF GLOBAL HOLDINGS, LTD, MF GLOBAL HOLDINGS USA, INC., MF GLOBAL FINANCE USA, INC., MF GLOBAL INC., et al., Defendants.	Adv. Pro. No. 11-02880 (MG)

REPLY MEMORANDUM OF LAW OF JAMES W. GIDDENS, SIPA TRUSTEE FOR THE LIQUIDATION OF MF GLOBAL INC., IN FURTHER SUPPORT OF TRUSTEE'S MOTION TO DISMISS THE AMENDED CLASS ACTION ADVERSARY PROCEEDING COMPLAINT

James W. Giddens (the "Trustee"), as Trustee for the liquidation of the business of MF Global Inc. ("MFGI") under the Securities Investor Protection Act of 1970, as amended ("SIPA"), 15 U.S.C. § 78aaa *et seq*., by and through his undersigned counsel, respectfully submits this Reply Memorandum of Law in further support of the Trustee's Motion to Dismiss the Amended Class Action Adversary Proceeding Complaint (the "Complaint") filed by Plaintiffs Todd Thielmann, Pierre-Yvan Desparois, Natalia Sivova, Sandy Glover-Bowles and Arton Sina, on behalf of themselves and all others similarly situated (collectively "Plaintiffs") on the grounds that the Complaint fails to state a claim against MFGI upon which relief can be granted.

PRELIMINARY STATEMENT

1. In an attempt to prevent the dismissal of their federal and state Worker Adjustment Retraining Notification ("WARN") Act claims against MFGI, the Plaintiffs argue, without any support, that the Trustee may not in fact be liquidating the business and that discovery is necessary to confirm that the Trustee is not operating the business in the normal commercial sense.[1] Such discovery would be unnecessary and inappropriate. As the Plaintiffs are well aware, on October 31, 2011, the United States District Court for the Southern District of New York mandated that MFGI be liquidated pursuant to the provisions of SIPA and appointed the Trustee to oversee this liquidation. The docket shows that the Trustee is in fact carrying out the liquidation that the District Court mandated. In this adversary proceeding, judicial notice of the docket by this Court in lieu of discovery would be appropriate for the purpose of confirming that the Trustee is liquidating the business.

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[1] Contrary to Plaintiffs' Objection papers, Plaintiffs' Complaint does not assert a claim under the Illinois WARN Act.

2. The Plaintiffs also argue that this Court should ignore the preamble to the final rule of the Department of Labor (the "DOL") that a liquidating fiduciary such as the Trustee is not operating a business enterprise in the normal commercial sense, and thus is not an employer within the meaning of the WARN Act. Applying the DOL's liquidating fiduciary exception would not, as Plaintiffs suggest, "violate the Administrative Procedures Act" or "prompt litigation…over fact-intensive issues." Courts have applied the DOL's liquidating fiduciary exception without running afoul of either the APA or prompting litigation.

ARGUMENT

I. THE FEDERAL WARN ACT CLAIMS SHOULD BE DISMISSED

A. The Trustee is Not Operating the Business of MFGI.

3. Plaintiffs assert that the Trustee "cannot claim to be excluded from being the WARN employer on a motion to dismiss" given that the Trustee must factually demonstrate that it was his sole function to liquidate the MFGI estate. (Plaintiffs' Objection to MFGI's Motion to Dismiss the Complaint, hereinafter "Pl. Mem.," 6.) Plaintiffs thus contend that discovery is necessary on the issue of whether the Trustee is in fact liquidating the business since the Trustee has proffered no evidence in this regard. (Pl. Mem. 7.) This simply is incorrect.

4. As the Trustee noted in his moving papers, the docket in the liquidation proceeding, Case No. 11-2790(MG) SIPA, is replete with evidence confirming that the Trustee is in fact liquidating the business of MFGI, as opposed to carrying on the business in the normal commercial sense. By way of example, the Trustee has: i) effectuated bulk transfers of customer property to other futures commission merchants (E.g., ECF Docs. 14, 316, 717); ii) sold, transferred and assigned securities accounts to various purchasers (E.g., ECF Doc. 718); iii) established and implemented a claims process (ECF Doc. 423); iv) made interim distributions

pursuant to that claims process (E.g., ECF Docs. 1450); v) made cash distributions to customers who requested full liquidation of their physical property (E.g., ECF Doc. 1281); and vi) rejected unexpired leases on MFGI office space (E.g., ECF Doc. 1285). The Court may take judicial notice of the docket in the liquidation proceeding for purposes of this Motion to Dismiss. In re Century City Doctors Hosp., LLC, 2010 WL 6452903, at *6 (B.A.P. 9th Cir. 2010).

5. Moreover, among the Trustee's actions in support of the liquidation of MFGI was the termination of MFGI's workforce. The termination letter distributed by the Trustee, on behalf of MFGI, on November 11, 2011, explicitly informed the Plaintiffs, and more than 1000 MFGI employees, that their employment was being terminated as a result of the liquidation. The letter stated, in relevant part: "As you know, on October 31, 2011, the Securities Investor Protection Corporation initiated proceedings for the liquidation of MF Global Inc. and a Trustee was appointed. Unfortunately, this will result in the termination of your employment, effective immediately." (Affirmation of Ned H. Bassen, sworn to on June 4, 2012, hereinafter "Bassen Aff.," ¶ 3, Ex. 1.) Judicial notice may be taken of this document since it is a document distributed to the plaintiffs, and thus was a document in the possession of the plaintiff. Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002).

6. Plaintiffs assert that the Trustee is not solely liquidating the business since the Liquidation Order issued by the District Court gave the Trustee the ability to operate the business of MFGI in the ordinary course. (Pl. Mem. 19.) This argument distorts the Liquidation Order, which gave the Trustee the ability to conduct business for just a few days in connection with winddown of business. (Liquidation Order ¶ 10.) Plaintiffs ignore the Liquidation Order's explicit reference to 11 U.S.C. § 721, which permits a trustee to operate an estate "for a limited period, if such operation is ….*consistent with the orderly liquidation of the estate*." Id., citing 11

U.S.C. § 721 (emphasis added). Thus, contrary to Plaintiffs' position, the Trustee has no statutory authority to operate the business in the ordinary course.

7. The Plaintiffs further contend that the Trustee does not have the 'sole function' of liquidating MFGI because SIPA also authorizes the Trustee to "'investigate the circumstances surrounding the failure of MFGI and report to the Court'…" (Pl. Mem. 7.) Plaintiffs have taken the words of DOL's preamble to its final rule out of context. The issue here is whether it is the function of the Trustee to liquidate business, as opposed to operating the business, which the Trustee clearly is not doing. The undisputed fact that the Trustee also is authorized by SIPA to investigate the circumstances surrounding the failure of MFGI and report to the Court on this failure has no bearing on whether or not the Trustee is operating the business. There is nothing inconsistent with the Trustee investigating the failure of MFGI while the Trustee oversees the liquidation of the business.

B. The Department of Labor's Interpretation Should Be Afforded Deference But In All Events is a Valid Construction of the WARN Act.

8. Plaintiffs take issue with this Court applying the liquidating fiduciary exception that the DOL has set forth in the preamble to its final WARN Act rule. Plaintiffs would have this Court believe that before it applies the DOL's liquidating fiduciary exemption, it is necessary for this Court to conclusively determine what level of deference should be afforded to the DOL. In fact, courts have considered and applied the DOL's liquidating fiduciary exception without engaging in any such analysis. See e.g., In re Century City Doctors Hosp., LLC, 417 B.R. 801 (Bankr. C.D. Cal. 2009), aff'd 2010 WL 6452903 (B.A.P. 9th Cir. 2010); In re United Health Care System, Inc., 200 F.3d 170 (3d Cir. 1999).

9. In the event that the Court may be inclined to determine what level of deference the DOL's interpretation should be afforded, Plaintiff's arguments that Chevron deference is unwarranted are unpersuasive. Plaintiffs rely on In re Zyprexa Products Liab. Litig. and Wyeth v. Levine to support the proposition that the DOL's preamble to its final WARN Act rule is not entitled to deference. However, these cases that Plaintiffs rely on do not categorically exclude preambles from deference. Rather, in each of these cases deference to the preamble at issue would have resulted in preemption of state law well outside of the authority of the federal statute at issue (the FDA in these cases and the WARN Act here). See Wyeth v. Levine, 555 U.S. 555, 576-577 (2009); In re Zyprexa Products Liability Litigation, 489 F. Supp.2d 230, 273 (E.D.N.Y. 2003). No such preemption issue exists here.

10. Further, contrary to Plaintiffs' argument, the DOL's preamble to its final WARN Act rule can be afforded deference even though it was not subject to public comment. In Kruse v. Wells Fargo Home Mortg., Inc., 383 F.3d 49, 59 (2d Cir. 2004), the Second Circuit found that although a HUD policy statement was not the "fruit of notice-and-comment rulemaking," it warranted deference because the of the general grant of authority given to the agency by Congress to make rules under the statute and because of factors such as the reliance by other courts on the policy statement. Id. at 59-61. Congress granted the DOL the same type of authority with respect to the WARN Act. 29 U.S.C. §2107 (granting the DOL authority to prescribe regulations "as necessary" to implement the WARN Act).

11. Moreover, even under the Skidmore standard that Plaintiffs contend should apply, the DOL's preamble to its final WARN Act rule is a valid construction of the WARN Act's definition of employer because there is no issue as to the validity of its reasoning under Skidmore. Plaintiffs' argument that the reasoning is not valid is pure speculation. There is

no basis to support Plaintiffs' contention that the DOL's liquidating fiduciary exemption would be difficult to administer here or in any other SIPA liquidation. Further, there is no basis to support Plaintiffs' contention about the mixed role of bankruptcy trustees because, as discussed *supra*, there is no basis for Plaintiffs' contending that the Trustee here is playing any role inconsistent with liquidation.

12. The WARN Act itself contains multiple exceptions to its 60-day notice requirement, including the "unforeseeable business circumstances exception," which excuses an employer from providing the 60-day WARN Act notice if its closing is not reasonably foreseeable and the "faltering business exception," which excuses an employer the Act's notice requirements if it is actively seeking capital or business that would allow it to postpone or avoid closing and reasonably believes that giving notice would prevent it from obtaining capital or business. 29 U.S.C. 2102(b)(1); 29 U.S.C. § 2102(b)(2)(A). Thus, contrary to Plaintiffs' contentions, the Plaintiffs here are in no different position from employees whose employer had to immediately terminate employment due to an unexpected economic downturn or the loss of a major client contract.

13. Furthermore, Plaintiffs have put forth no argument as to why this Court should not conduct a similar analysis and reach the same result as in In re United Health Care System, 200 F.3d 170 (3d Cir. 1999), where the Third Circuit looked to the DOL's commentary that a liquidating fiduciary is not an employer and found that the actions of the debtor demonstrated that it was not an employer within the meaning of the WARN Act. Moreover, Plaintiffs' argument as to why the In re Century City Doctors Hosp., LLC decision of the Ninth Circuit Bankruptcy Appellate Panel (the "BAP") is inapposite is not at all persuasive. Plaintiffs assert that the decision on which the BAP relied, the Ninth Circuit's decision in Chauffeurs,

Sales Drives, Warehousemen & Helpers Union v. Weslock Corp., 66 F.3d 241 (9th Cir. 1995) was erroneous in that the Ninth Circuit was confused when it decided that WARN Act obligations can apply to a secured creditor only where the creditor operates the debtor's asset as a "business enterprise" in the "normal commercial sense." (Pl. Mem. 20-21.) Plaintiffs go on to assert that the proper analysis is found in the Second Circuit's decision in Coppola v. Bear Sterns & Co., Inc., 499 F.3d 144, 150 (2d Cir. 2007) where the Second Circuit "set a high bar for secured creditors to become employers." (Pl. Mem. 21.) However, the Second Circuit itself took no issue with the Weslock Court's analysis, noting that where lender liability under the WARN Act is at issue, "the appropriate test is the one used by Weslock." 499 F.3d at 150. The Second Circuit considered the "dispositive question" at hand to be whether the secured creditor was "exercising control over the debtor beyond that necessary to recoup some or all of what is owed, and is operating the debtor as the *de facto* owner of an ongoing business." Id. This analysis is no different from the analysis at hand, *viz.*, whether the Trustee is operating the business in its ordinary course or liquidating the business.

II. THE NEW YORK WARN ACT CLAIMS SHOULD BE DISMISSED

14. Plaintiffs assert that the New York WARN Act does not recognize an exception for liquidating fiduciaries and that those who represent bankrupt entities themselves are intended to be encompassed within the statute's definition of an employer. (Pl. Mem. 24.) However, it is clear on the face of the very regulation that Plaintiffs refer to, § 921.1.1(e)(3), that the definition of employer under the NY WARN Act includes only those receiver trustees, debtors-in-possession, or other fiduciaries who are responsible for *continuing operations of the business entity*. As discussed above, and as in the Memorandum of Law in Support of the

Trustee's Motion to Dismiss the Complaint, the Trustee is not continuing the operations of MFGI. Accordingly, the NY WARN Act claims should be dismissed.

III. ANY PURPORTED CLAIMS FOR VIOLATION OF THE ILLINOIS WARN ACT SHOULD BE DISMISSED

15. Plaintiffs argue that the Illinois WARN Act, 20 Ill. Comp. Stat. 65 *et seq.*, does not exempt liquidating fiduciaries and that even if the Court finds that the liquidating fiduciary exception exists under federal law, it should not dismiss the Illinois WARN Act claim. (Pl. Mem. 25.) In fact, the Complaint does not assert any claim for violation of the Illinois WARN Act against MFGI. However, to the extent that any such claim might be read into the Complaint, it also should be dismissed.

16. The Illinois WARN Act provides that it "shall be interpreted in a manner consistent with the federal WARN Act and the federal regulations and court decisions interpreting that Act to the extent that the provisions of federal and State law are the same." 820 Ill. Comp. Stat. 65/55. Both the Illinois WARN Act and the federal WARN Act define employer as a "business enterprise." 820 Ill. Comp. Stat. 65/5(c); 29 U.S.C. § 2101(a). As discussed above, and in the Memorandum of Law in Support of the Trustee's Motion to Dismiss the Complaint, the DOL has opined, and a number of federal courts have found, that a liquidating fiduciary does not operate a business in the normal commercial sense and thus is not an employer within the federal WARN Act. Accordingly, the Trustee is not an employer within the meaning of the Illinois WARN Act, which defines employer in the very same way.

IV. PLAINTIFFS' REQUEST TO FURTHER AMEND THE COMPLAINT SHOULD BE DENIED

17. In the alternative, Plaintiffs request that the Court grant Plaintiffs leave to further amend the Amended Complaint. (Raisner Decl. ¶ 12.) The Complaint was previously

amended in December 2011. Plaintiffs have not specified the manner in which they would further amend the Complaint. In all events, the Court should deny Plaintiffs' request for leave to amend the Complaint against the Trustee given that, for the reasons set forth above, amending the Complaint against the Trustee would be futile.

18. Leave to amend may be denied when a proposed amendment "fails to state a claim or would be subject to a successful motion to dismiss on some other basis." Chan v. Reno, 916 F. Supp. 1289, 1302 (S.D.N.Y. 1996); see also In re Enron Corp., 367 B.R. 373, 382 (Bankr. S.D.N.Y 2007). Because the Trustee is not an employer within the meaning of the WARN Act, no re-articulation of the Plaintiffs' complaint would be able to state a claim that could withstand a motion to dismiss. Moreover, and perhaps tellingly, Plaintiffs have not put forth a proposed amendment. Wilson v. Merrill Lynch & Co., Inc., 671 F.3d 120, 140 (2d Cir. 2011) (upholding denial of motion to amend where plaintiff "never indicated to the district court how further amendment would permit him to cure the deficiencies in the complaint.")

V. THE CLAIMS FOR VACATION PAY SHOULD BE DISMISSED.

19. Plaintiffs' Complaint alleges violations of the New York Wage Payment Law and Illinois Wage Payment and Collection Act. (Compl. ¶¶ 102-119.) The Trustee has moved to dismiss these claims since, under the Bankruptcy Code, claims for unpaid vacation pay are subject to the claims process. 11 U.S.C. § 507(a)(4). Plaintiffs have failed to put forth any argument disputing the dismissal of these claims. Accordingly, the Court should dismiss the claims for unpaid vacation pay.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Memorandum of Law in Support of the Trustee's Motion to Dismiss the Complaint, the Trustee respectfully requests that the Court dismiss the Complaint.

Dated: New York, New York
June 4, 2012

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