IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
YELLOW CORPORATION, *et al.*,[1]	Case No. 23-11069 (CTG)
Debtors.	(Jointly Administered)

BRIEF IN SUPPORT OF COUGHLEN CLAIMANTS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

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[1] A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors' claims and noticing agent at https://dm.epiq11.com/YellowCorporation. The location of the Debtors' principal place of business and the Debtors' service address in these chapter 11 cases is: 11500 Outlook Street, Suite 400, Overland Park, Kansas 66211.

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WILLIAM G. COUGHLEN, IAN A. JIMENEZ, BRIAN DODDERER, ERIC LARSON, and ROBERT KROLCZYK, on behalf of themselves and the proposed class of opt-out, former union employees (collectively, the "Coughlen Claimants" or "Opt-out Claimants"),[2] hereby submit this brief in support of their motion for partial summary judgment [Docket No. 4030] (the "Motion"), pursuant to Federal Rule of Civil Procedure 56, made applicable by Federal Rule of Bankruptcy Procedure 7056 and 9014, regarding liability of the above-captioned debtors and debtors-in-possession (collectively, the "Debtors" or "Yellow") under Federal and state Workers Adjustment and Retraining Notification Acts and the inapplicability of their liquidating fiduciary, faltering company, unforeseeable business circumstance, and good faith defenses as set forth in WARN Claim Objections (as defined below).[3] In support of their Motion, Coughlen Claimants rely on the *Declaration of Tara C. Pakrouh in Support of Coughlen Claimants' Motion for Partial Summary Judgment* (the "Pakrouh Declaration"), which is being filed contemporaneously herewith, and respectfully state as follows:

I. INTRODUCTION

This action stems from the Debtors' termination of 492 employees—the Coughlen Claimants—without the required notice pursuant to the Workers Adjustment and Retraining Notification ("WARN") Act.

By violating the Federal WARN Act, Yellow also failed to comply with certain states' WARN Act equivalents, in particular California New York, and New Jersey, where Coughlen

[2] Coughlen Claimants' class is currently comprised of 492 former employees including 466 former employees who have opted out of union-provided representation and 26 non-union employees who have opted out of class representation. *See* Pakrouh Decl. at **Tab 1**. Unless otherwise noted, citations to "Docket No." shall refer to the above-captioned, main-case proceeding.

[3] Contemporaneously herewith, Coughlen Claimants filed a partial summary judgment motion in the adversary proceeding styled as *Coughlen et al. v. Yellow Corp. et al.*, Adv. Case No. 23-50761, addressing the issues raised in the *Defendants' Answer to Plaintiff's Class Action Adversary Proceeding Complaint* [Adv. 23-50761 Docket No. 4].

Claimants were employed prepetition. Moreover, Yellow breached certain state hour and wage laws, in particular North Carolina, by their failure to pay employees their final earned wages before termination. Because Yellow can neither prove a defense to these violations nor demonstrate that it falls within any exception, summary judgment is appropriate and should be entered in favor of the Coughlen Claimants.

Coughlen Claimants join and incorporate by reference the facts and arguments set forth in the *Memorandum of Law in Support of International Brotherhood of Teamsters and International Association of Machinists' Motion for Summary Judgment* [Docket No. 3794] (the "Teamsters Brief").[4] Coughlen Claimants write separately in the instant memorandum to elaborate on issues pertaining to the Coughlen Claimants, namely the Debtors' liability under California, North Carolina, New York, and New Jersey state laws.

II. FACTUAL BACKGROUND

The Coughlen Claimants consist of 466 Union employees and 26 non-union employees who were employed by Yellow prior to being laid off in July 2023. The Coughlen Claimants were employed in various locations across the United States including, as relevant here, California, North Carolina, New York, and New Jersey.[5]

The Coughlen Claimants hereby incorporate the fact section from the Teamsters Brief.

A. Procedural History.

On August 6, 2023 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. These chapter 11 cases have been consolidated

[4] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Teamsters Brief.

[5] Specifically, Claimant Coughlen is a citizen of Mississippi; Claimant Jimenez is a citizen of California; Claimant Dodderer is a citizen of North Carolina; Claimant Larson is a citizen of New Jersey; and Claimant Krolczyk is a citizen of New York. *See generally* 7.21.2023 All Employees List used for baseline RIFs (YELLOW_WARN_118171), attached to the Pakrouh Decl. at **Tab 2**.

for procedural purposes only and are being jointly administered pursuant to Bankruptcy Rule 1015(b). Docket No. 169. Debtors are managing their businesses and their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Prior to the bar date, each of the Coughlen Claimants filed individual proofs of claim.[6]

On September 13, 2023, the Court entered the *Order (I) Setting Bar Dates for Filing Proofs of Claim, Including Requests for Payment Under Section 503(b)(9), (II) Establishing Amended Schedules Bar Date and Rejection Damages Bar Date, (III) Approving the Form of and Manner For Filing Proofs of Claim, Including Section 503(B)(9) Requests, and (IV) Approving Form and Manner of Notice Thereof* [Docket No. 521] (the "Bar Date Order") establishing certain dates and deadlines for filing proofs of claim in these chapter 11 cases (the "Claims Bar Date").

1. The Coughlen Adversary Proceeding.

On November 13, 2023, William G. Coughlen, individually and on behalf of others similarly situated (collectively, the "Coughlen Plaintiffs"), filed a class action adversary complaint [Adv. 23-50761 Docket No. 1] ("Coughlen WARN Action") against Debtors Yellow Corporation, YRC Inc., USF Holland, LLC, New Penn Motor Express LLC, Yellow Logistics, Inc., and USF Reddaway, Inc. (collectively, the "Defendants") alleging violations of the Federal Workers Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.* ("WARN Act"); California Labor Code §§ 201 *et seq*. and 1401 *et seq.*; North Carolina Wage Law §§95-25.1 *et seq.*, the New Jersey WARN Act, PL. 2007, c.212, C.34:21-2 *et seq*.; and the New York WARN Act, NYLL § 860 *et seq. See* Adv. 23-50761 Docket No. 1.

Prior to the Claims Bar Date, Coughlen Claimants filed proofs of claim against Debtors for violation of the WARN Act and state ancillary WARN Acts and in connection with the filing of

[6] *See* Coughlen Claimants – Compiled Proofs of Claim from Epiq, attached to the Pakrouh Decl. at **Tab 3**.

the Coughlen WARN Action. The Coughlen Claimants filed a total of 492 proofs of claim, including class proofs of claim, for the Union opt-outs, against each of the Debtors.[7]

On February 7, 2024, Defendants in the Coughlen WARN Action filed *Defendants' Answer to Plaintiff's Class Action Adversary Proceeding Complaint* (the "Answer") asserting seventeen affirmative defenses. *See* Adv. 23-50761 Docket No. 4.

On April 26, 2024, the Court entered a *Scheduling Order* [Adv. 23-50761 Docket No. 22], setting forth discovery and dispositive-motion deadlines to resolve the merits of the underlying state and federal WARN claims.

2. The WARN Claim Objections.

On March 12, 2023, Debtors filed a *Third Omnibus (Substantive) Objection To Proofs Of Claim For WARN Liability* [Docket No. 2576], *Fourth Omnibus (Substantive) Objection To Proofs Of Claim For WARN Liability* [Docket No. 2577] and *Fifth Omnibus (Substantive) Objection To Proofs Of Claim For WARN Liability* [Docket No. 2578] (collectively, the "WARN Claim Objections").

As relevant to the Coughlen Claimants, Debtors sought to disallow all WARN-related proofs of claim, on the basis that Coughlen Claimants could not meet their burden to establish that Debtors were liable for violations of the WARN Act.

On March 29, 2023, the Coughlen Claimants responded to the WARN Claim Objections, arguing the parties should be permitted to take discovery and enter a scheduling order to encourage a uniform approach amongst all WARN claimants with respect to WARN-related issues.

After a hearing on the WARN Claim Objections (among other issues), on April 26, 2024, the Court entered a *Scheduling Order* [Docket No. 3186], setting forth discovery and dispositive-

[7] *See* Coughlen Claimants – Compiled Proofs of Claim from Epiq, attached to the Pakrouh Decl. at **Tab 3**.

motion deadlines to resolve the merits of the underlying state and federal WARN claims.

Following discovery, the Coughlen Claimants now move for partial summary judgment as to the Debtors' liability and as to the Debtors' WARN liquidating fiduciary, faltering company, unforeseeable business circumstance, and good faith defenses.[8]

III. DEBTORS ARE LIABLE FOR VIOLATIONS OF THE WARN ACT[9]

The Court shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is "material" if it could affect the outcome of the proceeding and a dispute about a material fact is considered "genuine" if there is sufficient evidence to permit a reasonable jury to return a verdict for the nonmoving party. *Evans v. Flowserve U.S. Inc.*, 239 F.Supp.3d 838, 841 (D. Del. 2017) (citing *Lamont v. New Jersey*, 637 F.3d 177, 181 (3d Cir. 2011)). The moving party bears the initial burden of proving the absence of a genuinely disputed material fact, and then the burden shifts to the non-movant to demonstrate a genuine issue for trial exists. *Id*. The Court must view the evidence in the light most favorable to the non-moving party. *Id.*

To demonstrate a genuine dispute of material fact, the non-movant "must support its contention by citing to particular documents in the record, by showing that the cited materials do not establish the absence or presence of a genuine dispute, or by showing that an adverse party cannot produce admissible evidence to support the fact." *Charlevoix v. Caterpillar, Inc.*, 239 F.Supp.3d 814, 818 (D. Del. 2017). The existence of some factual dispute may not be sufficient to deny a motion for summary judgment; instead, there must be sufficient evidence to enable a jury

[8] *See* WARN Claim Objections [D.I. 2576, 2577, and 2578].

[9] Twenty-one of the non-union employee Coughlen Claimants signed the Severance Agreement waiving any right to pursue state or federal WARN Claims. These 21 employees intend to file amended proofs of claim to clarify that they only seek payment of unpaid wages/salary and accrued PTO. As a result, these 21 individuals do not seek summary judgment as to any of the WARN claims but join with the other Coughlen Claimants as to the claims for unpaid wages/salary and accrued PTO.

to reasonably find for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986*); see also Clark v. Welch*, 167 F.Supp.3d 659, 662 (D. Del. 2016) ("If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.").

A. Yellow Cannot Dispute That the Requirements of the Federal WARN Act Have Been Satisfied.

With certain exceptions, the WARN Act requires an "employer" to provide its employees with sixty days' notice of a "plant closing" or "mass layoff." 29 U.S.C. § 2102. If the employer fails to do so, it may be liable to "each aggrieved employee" for up to sixty days' back pay and benefits. *Off'l Comm. of Unsecured Creditors v. United Healthcare System, Inc. (In re United Healthcare System, Inc.),* 200 F.3d 170, 176 (3d Cir. 1999). In effect, the WARN Act establishes strict liability: an employer must give 60 days' notice unless it can demonstrate that it falls within a specific exception. *In re APA Transp. Corp. Consol. Litig.*, 541 F.3d 233, 248 (3rd Cir. 2008).

Under the Act, an "employer" is defined as a business enterprise that employs 100 or more employees, excluding part-time employees. 29 U.S.C. § 2101(a)(1). A "plant closing" is the "permanent or temporary shutdown of a single site of employment, one or more facilities or operating units within a single site of employment" if the shutdown results in employment loss of 50 or more employees over a 30-day period." 29 U.S.C. § 2101(a)(2). "Mass layoff" is defined as:

> a reduction in force which (a) is not the result of a plant closing; and (b) results in an employment loss at the single site of employment during any 30-day period for (1)(i) at least 33% of the employees (excluding any part-time employees); and (1)(ii) at least 50 employees (excluding any part-time employees); or (2) at least 500 employees (excluding any part-time employees)

29 U.S.C. § 2101(a)(3).

"Aggrieved" and "affected" employees are individuals who worked for the employer and did not receive notice of termination or who may reasonably be expected to experience employment loss due to the plant closing. 29 U.S.C. §§ 2101(a)(5), 2104(7).

The employer may avoid WARN liability by proving as an affirmative defense that it qualifies for one of the Act's exceptions: the "faltering company" exception; the "unforeseen business circumstances" exception; or the "natural disaster" exception. *See* 29 U.S.C. § 2102. Numerous courts have held that the exceptions permitting a reduction of the notice period run counter to the Act's remedial purpose and thus, are to be "narrowly construed." *Stewart v. Giuliano (In re Start Man Furniture, LLC),* 647 B.R. 116, 127 (D. Del. Dec. 13, 2022) (citing cases).

There is no dispute that Yellow's termination of the Coughlen Claimants is a clear violation of the WARN Act. First, it is undisputed that Yellow qualifies as an "employer" under the WARN Act because it employed nearly 30,000 employees, well over the 100 employee threshold required by the statute. Docket No. 2576 at ¶ 6.[10] Second, as described in the notice sent to its employees, Yellow's shuttering of its facilities across the country constituted a permanent shutdown of employment sites.[11] Third, Yellow did not provide 60-day advance notice as required under the Act.[12] Rather, non-Union employees were terminated on July 28, 2023, and provided notice via the Severance Agreement that same day. Docket No. 2581 at ¶ 106. Similarly, the remaining 22,000 Union employees were terminated on July 30, 2023, and received a notice one day later on July 31. *See* Docket No. 2581 at ¶¶ 108–110.[13] Finally, the Coughlen Claimants were either

[10] *See also* William Coughlen WARN Notice (YELLOW_WARN_012351-354); Ian Jimenez WARN Notice (YELLOW_WARN_074079-082); Brian Dodderer WARN Notice (YELLOW_WARN_065343-346); Eric Larson WARN Notice (YELLOW_WARN_036043-046); Robert Krolczyk WARN Notice (YELLOW_WARN_002619-622); Yellow – WARN to Employees (YELLOW_WARN_118191), attached to the Pakrouh Decl., respectively, at **Tabs 6, 7, 8, 9, 10, and 4**.

[11] *See supra* note 10.

[12] The permanent shutdown of employment sites and mass layoff of Yellow employees occurred on July 30, 2023, by law the 60 day notice should have been provided on May 31, 2023. *See also* William Coughlen WARN Notice (YELLOW_WARN_012351-354); Ian Jimenez WARN Notice (YELLOW_WARN_074079-082); Brian Dodderer WARN Notice (YELLOW_WARN_065343-346); Eric Larson WARN Notice (YELLOW_WARN_036043-046); Robert Krolczyk WARN Notice (YELLOW_WARN_002619-622), attached to the Pakrouh Decl., respectively, at **Tabs 6, 7, 8, 9, and 10**.

[13] *See also* Yellow – WARN to Employees (YELLOW_WARN_118191), attached to the Pakrouh Decl. at **Tab 4**.

individuals employed by Yellow, or could have reasonably been expected to experience employment loss due to the plant closing.[14]

Thus, the Coughlen Claimants have easily met their burden to establish a *prima facie* WARN Act violation by the Defendants and summary judgment should be entered for the Coughlen Claimants. The only contested legal issues regarding the WARN Act in this proceeding are whether Yellow falls within one of the exceptions to the WARN Act, which it does not.

B. The Liquidating Fiduciary Defense Does Not Apply to Yellow Because It Was Not Acting in a Fiduciary Capacity.

The Department of Labor (the "DOL") has commented that a bankrupt entity might not be an "employer"—and thus, not subject to the WARN Act—in certain situations where it is a liquidating fiduciary whose "sole function in the bankruptcy process is to liquidate a failed business." *In re Start Man Furniture, LLC*, 647 B.R. 116, 128 (D. Del. 2022). In these situations, the Third Circuit has analyzed "whether [the defendant], as the debtor-in-possession, was operating as an ongoing business enterprise, or whether it was merely engaged in the liquidation of assets." *In re United Healthcare System, Inc.*, 200 F.3d 170, 177 (3d Cir. 1999). The closer an entity's activities resemble a business operating as a going concern, the more likely it is an "employer" instead of a liquidating fiduciary winding up its affairs. *Id.* at 178. Importantly, the entity must have been a "liquidating fiduciary" at the time notice would have been required. *Newman as Trustee of World Mktg. Trust v. Crane, Heyman, Simon, Welch, & Clar*, 435 F.Supp.3d 834, 839 (N.D. Ill. 2020); *Carroll v. World Mktg. Hldgs., LLC*, 418 F.Supp.3d 299, 308 (E.D. Wisc. 2019).

Yellow's defense is easily rebutted because it was not a debtor-in-possession or otherwise

[14] *See generally* 7.21.2023 All Employees List used for baseline RIFs (YELLOW_WARN_118171), attached to the Pakrouh Decl. at **Tab 2**.

a liquidating entity at the time it issued the WARN notices, and certainly not at the time it should have issued the WARN notices 60 days prior to the Plaintiffs' terminations. Yellow began terminating non-Union Plaintiffs on July 28, 2023, and union Plaintiffs on July 30, 2023. *See* Docket No. 2581 at ¶¶ 106-110.[15] Thus, in order to invoke the defense, Yellow must have qualified as a liquidating fiduciary no later than May 29, 2023. *See* 29 U.S.C. § 2102(a)(1)).

However, Yellow was not a "liquidating fiduciary" at any time before the layoffs began. Instead, Yellow was a pre-bankruptcy entity operating as a going concern. Yellow was still delivering shipments and receiving payment for those shipments even as late as July 30, 2023—the day the last layoff occurred. Docket No. 2581 at ¶¶ 107-108;[16] *See e.g. Law v. Am. Capital Strategies, Ltd.*, 2007 WL 221671, *17 (M.D. Tenn. Jan. 26, 2007) (holding that a company that informed drivers to make all the remaining shipments in the trucks and then consider the company closed still operated as an employer for one shift and was thus not a liquidating fiduciary). Even a few days before termination, Yellow was in contract negotiations with the Union, indicating Yellow expected its business to continue and was not in the process of liquidating. *See* Docket No. 2581 at ¶ 102.[17] Yellow did not file its petition seeking chapter 11 protection until August 6, 2023; nine days *after* it began terminating the Coughlen Claimants. *See* Docket No. 1.

Thus, Yellow was not a liquidating fiduciary because it had not yet declared bankruptcy, nor was it operating with the *sole* purpose of liquidating assets. *Pechulis v. Pipeline Health Systems LLC*, 2020 WL 4003519, at *4 (N.D. Ill. July 15, 2020) (relying on the liquidating fiduciary

[15] *See also* 7.21.2023 All Employees List used for baseline RIFs (YELLOW_WARN_118171), attached to the Pakrouh Decl. at **Tab 2**.

[16] *See also* July 31, 2023 Email from John Hymer, providing Yellow Daily Revenue, Quality and Labor Report – July 28th, 2023 (YELLOW_WARN_002233), attached to the Pakrouh Decl. at **Tab 11**.

[17] *See also* 2023 06 05 – Notice to Yellow Lus – Yellow Update (YELLOW_WARN_166163-172); July 12, 2023 Letter from Darren Hawkins to Sean O'Brien (YELLOW_WARN_138806-807); and Letter to John Murphy – 5-30-23 (YELLOW_WARN_114616-617), attached to the Pakrouh Decl., respectively, at **Tabs 12, 13, and 14**.

defense is unavailable when WARN Act notice trigger date was pre-bankruptcy); *In re Start Man Furniture*, 647 B.R. at 130. Thus, the liquidating fiduciary exception cannot apply and summary judgment must be entered in favor of the Coughlen Claimants.

C. The Faltering Company Defense Does Not Apply.

An employer can establish the "faltering company" defense if, *as of the time notice would have been required*, the employer was actively seeking capital or business which would have enabled the employer to avoid or postpone the shutdown, and the employer reasonably believed giving the notice would have precluded obtaining the business. 29 U.S.C. § 2102(b)(1). There must have been a realistic opportunity to obtain the financing or business sought. 20 C.F.R. § 639.9(b). To meet this exception, an employer must still "(i) give as much notice as is practicable and (ii) set forth specific facts in the notice that explain the reason for reducing the notice period." *In re Tweeter OPCO, LLC*, 453 B.R. 534, 546-47 (Bankr. D. Del. 2011). However, the "faltering company" exception should be "narrowly construed." *In re APA Transport Corp. Consol. Litig.*, 541 F.3d 233, 249 (3d Cir. 2008) (quoting 20 C.F.R. § 639.9(a)). An employer cannot invoke the defense by claiming they did not know a shutdown was 60 days away. *Id*.

Yellow's reliance on the "faltering company" defense fails for four reasons. First, Yellow never reasonably and in good faith believed that giving the notice required would have precluded it from obtaining the needed capital or business. Second, Yellow did not provide as much notice as practicable or set forth specific facts explaining the reason for reducing the notice period. Third, at the time notice was required, Yellow was not actively seeking capital or business that would have postponed or avoided the shutdown. Finally, Yellow never had a realistic opportunity to obtain financing. Thus, summary judgment should be entered in favor of the Coughlen Claimants.

1. Yellow cannot rely on the "faltering company" defense when it did not consider issuing WARN notices 60 days before the layoff.

By plain statutory language, the faltering company defense only applies if an employer reasonably and in good faith believed that giving the notice would have precluded it from obtaining the needed capital or business. 29 U.S.C. §2102(b)(1). The statutory requirement that the employer must have believed that giving notice would have precluded it from obtaining the needed capital demonstrates the employer's belief must be a historical fact; so that for an employer to claim "had we considered giving notice, we would not have done so because giving notice would preclude us from obtaining the needed capital or business" is insufficient. *Cullen v. Pinholster,* 563 U.S. 170, 182 (2011) (stating backward language in statute, phrased in the past tense, meant that court review was limited to the state court adjudication and the record that was before the state court).

In *Childress v. Darby Lumber, Inc*., the Ninth Circuit gave effect to the plain meaning of § 2102(b)(1), by holding that a faltering company defense failed where an employer provided no evidence it reasonably and in good faith believed giving 60-day notice to their employees during the negotiations with the bank would have precluded it from obtaining credit from the bank. 357 F. 3d 1000, 1009 (9th Cir. 2004). *Darby* is consistent with 29 C.F.R. §639.9(a)(4). An employer cannot have reasonably and in good faith believed that giving notice would have precluded it from obtaining the financing when it never even considered giving notice.

To invoke the "faltering company" defense, Yellow must provide evidence that at the time WARN notice was required, it reasonably and in good faith believed notice would have precluded it from obtaining the financing. To invoke the defense against the non-Union Coughlen Claimants, Yellow must provide evidence that it considered giving WARN notice on or before May 29, 2023—60 days prior to the non-Union layoffs on July 28, 2023. Likewise, to invoke the defense against the Union-affiliated Coughlen Plaintiff's, Yellow must provide evidence that it considered

giving WARN notice on or before May 31, 2023—60 days prior to the Union layoffs on July 30, 2023. The Coughlen Claimants submit that no such evidence exists in the record. Thus, summary judgment should be entered in favor of the Coughlen Claimants on the "faltering company" defense.

2. Yellow did not provide as much notice as practicable or set forth specific facts explaining the reason for reducing the notice period.

Courts have authority to rule at summary judgment that a defendant cannot raise the faltering company exception where they fail to explain the reason for the reduced notification period. *See e.g. In re Tweeter*, 453 B.R. at 547; *Organogenesis, Inc. v. Andrews*, 331 B.R. 500, 502 (D. Mass. 2005) ("An employer who wants to reduce the notification period [using the faltering company exception] must comply with the clear statutory requirement that the termination notice contain an explanation for the shortened notice time."); *Grimmer v. Lord Day & Lord*, 937 F.Supp. 255, 256 (S.D.N.Y. 1996) (same). By requiring an employer to give a brief statement of the basis for the shortened notice, Congress intended employers to provide "more than a citation to the statute or a conclusory statement summarizing the statutory provision." *In re Tweeter*, 453 B.R. at 547 (quoting *Grimmer v. Lord Day & Lord,* 937 F.Supp. 255, 257 (S.D.N.Y. 1996)); *see also Alarcon v. Keller Indus., Inc.,* 27 F.3d 386, 390 (9th Cir. 1994) (stating that it is not enough for an employer to simply say "the notice is short because we are a faltering company").

In *Tweeter*, the notices stated that "[u]nfortunately due to adverse business conditions outside our control, we are not able to give you advance notice" and "[a]s a result of our bankruptcy filing and the elimination of some services to our costumers, [sic] today we are conducting a significant reduction in our workforce and your position is directly affected by this reduction." 453 B.R. at 547. The Court ruled this was an insufficient explanation to meet the exception. *Id.*

Here, the Defendants' brief statement in the notice simply cites the statutory provision as

cautioned against in *Alarcon*: "The Company was not able to provide earlier notice of the Shut Down as it qualifies under the 'unforeseeable business circumstances,' 'faltering company,' and 'liquidating fiduciary' exceptions set forth in the WARN Act."[18] The only other statement that could relate to the faltering business exception is a sentence stating "[t]he Company had hoped to complete one or more transactions and secure funds and business to prevent the closing of these locations but was unable to do so."[19] This statement fares no better as it simply summarizes the statutory text rather than providing a discernible reason for the lack of adequate notice.

Because Defendants did not provide an adequate reference to underlying facts or explain why shortened notice period was necessary, they cannot rely on the faltering business exception. *In re Tweeter*, 453 B.R. at 547. Thus, summary judgment should be entered for Coughlen Claimants.

3. At the time notice was required, Yellow was not actively seeking capital or business.

Pursuant to 29 U.S.C. §2102(b)(1), to qualify for the faltering company defense, an employer must be actively seeking capital or business at the time WARN notice would have been required, *i.e.* on or before May 29, 2023, for the non-Union Coughlen Claimants and May 31, 2023, for the Union-affiliated Coughlen Claimants. *In re APA Transport Corp*., 541 F. 3d at 249.

When deciding what constitutes actively seeking financing, the Court must assume Congress included the word "actively" for a reason; with "actively" generally understood as action rather than contemplation or speculation. *In re APA Transport*, 541 F. 3d at 249. Governing DOL regulations state "actively seeking" means "seeking financing or refinancing through the

[18] *See* William Coughlen WARN Notice (YELLOW_WARN_012351-354); Ian Jimenez WARN Notice (YELLOW_WARN_074079-082); Brian Dodderer WARN Notice (YELLOW_WARN_065343-346); Eric Larson WARN Notice (YELLOW_WARN_036043-046); Robert Krolczyk WARN Notice (YELLOW_WARN_002619-622), attached to the Pakrouh Decl., respectively, at **Tabs 6, 7, 8, 9, and 10**.

[19] *See supra* note 18.

arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing; or the employer must have been seeking additional money, credit or business through any other commercially reasonable method." 20 C.F.R. §639.9(a)(1). Under this standard, an employer is not actively seeking capital when it informed the lender that it would seek additional financing; and then waited for the lender to offer financing. *In re APA Transport*, 541 F. 3d at 250.

To the extent Yellow may argue the implementation of One Yellow would have attracted new financing, actively seeking financing means undertaking specific steps to obtain a loan, to issue bonds or stock, or to secure new business. *Law v. Am. Capital Strategies, Ltd*., 2007 WL 221671, *10 (M.D. Tenn. Jan. 26, 2007), *see also* Conference Committee Report for WARN Act at 1988 U.S. Code Cong. & Adm. News 2078, at 2081–82. That the employer was preparing to seek new business by developing new customers does not constitute actively seeking business. *United Paperworkers Int'l Union v. Alden Corrugated Container Corp*., 901 F. Supp. 426, 441 (D. Mass. 1995). By the same reasoning, implementing One Yellow to allegedly make Yellow more attractive to investors does not by itself constitute actively seeking capital. If any doubt remains, the faltering business exception should be construed narrowly, so that implementing changes to allow a company to use its existing capital more efficiently or to make the company more attractive to outside investors is not actively seeking capital. *In re APA Transport Corp*., 541 F. 3d at 247.

Additionally, Yellow's efforts to obtain modifications of its existing loan obligations or to refinance do not qualify as actively seeking capital. *Id.* at 250 (noting employer did not undertake any steps to secure additional financing between October 24, 2001, and January 2, 2002, though it persuaded the lender to amend the loan agreement to waive a covenant on December 10, 2001). Regardless, Ducera did not reach out to potential asset-based lenders to refinance Yellow's

existing asset-based loans until June 5, 2023—outside the 60-day statutory window.

Because Defendants were not actively seeking capital at the time notice would have been required, they cannot rely on the faltering business exception. Thus, summary judgment should be entered in favor of the Coughlen Claimants.

4. Yellow did not have a realistic opportunity to obtain the financing or business sought.

Yellow must also demonstrate that it had a realistic opportunity to obtain the funding that would prevent it from terminating the Plaintiffs. The factual record, however, reflects otherwise.

Yellow knew it did not have a realistic opportunity to obtain financing as long as it was in negotiations with the Union regarding a path forward. In Yellow correspondence requesting a deferral of payments to the Funds, Yellow conceded that "the bankers have made it clear that their willingness to underwrite such a solution depends on Yellow reaching an immediate agreement with the Teamsters that will quickly enable it to complete implementation of One Yellow." Docket No. 2581-22 at p. 2. Yellow lamented that because it had been unable to reach a deal with the Union "the Company is unlikely to secure the financing it desperately needs to, among other things, pay the required contributions to the Funds." Docket No. 2581-22 at p. 2.

Additionally, in early July 2023 Yellow's President and COO shared an article with fellow Yellow executives that stated Yellow's "refinancing efforts stalled in the spring when the Teamsters blocked the company's operations overhaul."[20] As such, Yellow knew it had no realistic opportunity to obtain any necessary funding until it reached a deal with the Union.

Dan Olivier, Yellow's CFO, expressed as much to his colleagues when revising a media report. He explained, "I don't want to make it sound like a refinancing is a layup" and revised the

[20] *See* July 10, 2023 Email from Darrel Harris to Yellow Executives, attaching article (YELLOW_WARN_145220-221); and 07 10 2023 Wall Street Journal Article (YELLOW_WARN_145222-224), attached to the Pakrouh Decl., respectively, at **Tabs 15, and 16**.

report from "[a] comprehensive refinancing of the Company's debt is available when there is a clearer path forward with the IBT" to "[o]nce there is a clearer path forward with the IBT, the Company can focus on a comprehensive refinancing of its debt that matures in 2024."[21] Based on these revisions, Yellow did not even know for sure that a refinancing strategy would be available even if they did reach an agreement with the Union.

Finally, in minutes from a July 23, 2023 board of directors meeting, Yellow admits its goal to obtain financing is "no longer a viable option," and "despite the near impossibility of securing financing necessary . . . it may be advisable to speak with Mr. O'Brien."[22] These statements from Yellow's top executives leave no dispute that Yellow itself did not believe it had a realistic opportunity to obtain financing or business that would have avoided the terminations.

Because Defendants did not have a realistic opportunity to obtain the necessary capital they cannot rely on the faltering business exception.[23] Thus, summary judgment should be entered in favor of the Coughlen Claimants.[24]

D. The Unforeseeable Business Circumstances Defense Does Not Apply.

For the reasons stated in the Teamsters Brief [*see* Docket No. 3794 at pp. 24-34], Yellow

[21] *See* June 21, 2023 Email from Dan Olivier to Yellow Executives (YELLOW_WARN_094122-124), attached to the Pakrouh Decl. at **Tab 17**.

[22] *See* Minutes of Board of Directors Yellow Corporation July 23, 2023 (YELLOW_WARN_140398-399), attached to the Pakrouh Decl. at **Tab 18**.

[23] Moreover, the faltering company exception does not apply to a "mass layoff." A "mass layoff" is defined as a reduction in force that results in employment loss during any 30-day period for at least 33% of the employees and at least 50 employees, or at least 500 employees. 29 U.S.C. § 2101(a)(3). There can be no reasonable dispute that Debtors' elimination of their entire workforce of approximately 30,000 employees constituted a "mass layoff" and not a "plant closing" under the WARN Act. Therefore, if the Court finds this was a "mass layoff," Debtors are precluded from raising the "faltering company" defense since that defense only applies to a "plant closing." Thus, summary judgment should be entered in favor of the Coughlen Claimants on the "faltering company" defense.

[24] Because discovery is ongoing, Plaintiffs' reserve the right to brief whether there is a causal connection between Yellow's search for capital and the ultimate reduction in work force. Preliminarily, Plaintiffs contend Yellow has not demonstrated a causal connection between the search for capital and the ultimate reduction in work force. *Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dept. Stores, Inc.*, 15 F.3d 1275, 1281 (5th Cir. 1994), so summary judgment should be entered in favor of the Coughlen Claimants.

cannot satisfy this defense.

E. Yellow's Good Faith Defense Fails Because It Never Contemplated Giving Timely WARN Notice to Its Employees.

For the reasons stated in the Teamsters Brief [*see* Docket No. 3794 at pp. 34-36], Yellow cannot satisfy this defense.

IV. DEBTORS ARE ALSO LIABLE FOR VIOLATIONS OF STATE LABOR LAWS.

A. Yellow's Federal WARN Liability Necessarily Leads to Liability Under The New York WARN Act.

The Coughlen Claimants who are residents of New York are also entitled to summary judgment of their claims for violation of the New York state worker adjustment and retraining notification act. NY Labor § 860.[25]

Under the NY WARN Act, an "employer" means any business enterprise employing more than 50 full time employees. *Id.* §860-a(3). The NY WARN Act defines a "plant closing" as the shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss of more than 25 employees during any 30-day period. *Id.* at § 860a(6). Furthermore, the NY WARN Act requires a notice to be sent 90 days before the plant closing or mass layoff. "Given these stricter requirements, wherever there is liability under the federal WARN Act, there is necessarily liability under the N.Y. WARN Act." *1199 SEIU United Healthcare Workers East v. South Bronx Mental Health Council, Inc.*, 2013 WL 6003731, *2 (S.D.N.Y. Nov. 13, 2013).

As explained in section III.A, *supra,* the Coughlen Claimants have established that Defendants violated the Federal WARN Act. As a result, the requirements of the NY WARN Act are necessarily satisfied. Nonetheless, the New York Coughlen Claimants can show that they

[25] *See generally* 7.21.2023 All Employees List used for baseline RIFs (YELLOW_WARN_118171), attached to the Pakrouh Decl. at **Tab 2**.

independently satisfy the requirement of the NY WARN Act. Certain Coughlen Claimants, such as Antonio Isidoro, Craig Pistole, James Lumsden, Justin Quaranta, Sean Carey, and William Manas worked at New York sites of employment that employed 25 or more people. Because all the employees at these sites were terminated within a 30-day period, each site underwent a "plant closing" under the NY WARN Act.[26] The NY WARN Act requires even more notice than the Federal WARN Act before termination—90 days. This further requires the exceptions must have been applicable 90 days before termination as well. NY Labor § 860-c. For all the reasons mentioned regarding the WARN Act, there is necessarily liability under the NY WARN Act.

B. Yellow's Federal WARN Liability Necessarily Leads to Liability Under The New Jersey WARN Act.

The New Jersey WARN Act provides, in pertinent part, that:

> If an establishment is subject to a transfer of operations or a termination of operations which results, during any continuous period of not more than 30 days, in the termination of employment of 50 or more full-time employees, or if an employer conducts a mass layoff, the employer who operates the establishment or conducts the mass layoff shall: . . . [p]rovide, in the case of an employer who employs 100 or more full-time employees, not less than 60 days, or the period of time required pursuant to the federal "Worker Adjustment and Retraining Notification Act," 29 U.S.C. § 2101 *et seq*., or any amendments thereto, whichever is longer, before the first termination of employment occurs . . . .

N.J. Stat. Ann. § 34:21-2(a).

"[E]stablishment" means "a single place of employment which has been operated by an employer for a period longer than three years . . . . 'Establishment' may be a single location or a group of contiguous locations, including groups of facilities which form an office or industrial park or separate facilities just across the street from each other." *Id.* § 34:21-1. If an employer does not provide requisite notice of operations termination, its former full-time employees are entitled to severance pay equal to one week's pay for each full year of employment. *Id.* § 34:21-2(b).

[26] *See generally* 7.21.2023 All Employees List used for baseline RIFs (YELLOW_WARN_118171), attached to the Pakrouh Decl. at **Tab 2**.

"[T]he New Jersey Act was modeled after its federal counterpart, and the two statutes share the same purpose of protecting workers and communities by requiring employers to provide notice of plant closings and mass layoffs." *DeRosa v. Accredited Home Lenders, Inc*., 22 A.3d 27, 36 (N.J. Super. Ct. App. Div. 2011). Therefore, "for purposes of determining the applicability of the statutory notice requirement, the analysis is the same under both the WARN Act and the NJ WARN Act." *Platt v. Freedom Mortg. Corp*., 2013 WL 6499252, at *4 (D.N.J. Dec. 11, 2013).

Here, Defendants clearly meet the requirements of the New Jersey WARN Act. First, Defendants operated multiple "establishments" for over three years that employed at least 50 individuals. Second, as explained in Section III.A, *infra*, Defendants failed to give the requisite 60 days' notice before conducting the mass layoff. Therefore, summary judgment should be entered in favor of the Coughlen Claimants as to violations of the New Jersey WARN Act.

C. Yellow's Federal WARN Liability Necessarily Leads to Liability Under The California WARN Act.

The California WARN Act is similar to the WARN Act in most respects. It prohibits "[a]n employer [from ordering] a mass layoff . . . or termination at a covered establishment unless, 60 days before the order takes effect, the employer gives written notice of the order to . . . [t]he employees of the covered establishment affected by the order . . . ." Cal. Lab. Code § 1401. Defendants' California facilities were a "covered establishment" because Defendants employed 75 or more people.[27] *See* Cal. Lab. Code § 1400(a)-(b). And the July layoffs were both a "termination"—because Defendants stopped operations at a covered facility, *id.* § 1400(f)—and a "mass layoff," because fifty or more employees were fired within a 30-day period, *id.* § 1400(d).[28] And as stated before, it is not disputed that Defendants did not give 60 days' advance written notice

[27] *See generally* CA Data – 8-15-2023 (YELLOW_WARN_118190), attached to the Pakrouh Decl. at **Tab 19**.

[28] *See supra* note 28.

of the terminations. *See* Section III, *supra*.

The exceptions under the California WARN Act are more limited, and in any case do not apply here. There is no "unforeseeable business circumstances" exception under the California WARN Act. *See The Int'l. Brotherhood of Boilermakers, etc. v. NASSCO Holdings Inc*., 17 Cal. App. 5th 1105, 1127-28, 226 Cal. Rptr. 3d 206 (2017) (noting that the exception is limited to a "physical calamity or act of war") (citing Cal. Lab. Code § 1401(c)). And similar to the federal WARN Act, Defendants do not satisfy the "actively seeking capital or business" exception under the California WARN Act. There is no evidence to suggest that Defendant was "actively seeking capital or business," *see* III.C *supra*., or that it met the stricter provisions of the California WARN Act, such as providing written records to the California Department of Industrial Relations, to justify lesser notice. *See* Cal. Lab. Code § 1402.5(b); *see also* Cal. Lab. Code § 19.

Therefore, summary judgment should be entered in favor of the Coughlen Claimants.

D. Yellow's Termination of Plaintiffs Without Paying All Wages Due Violates North Carolina Wage and Hour Act

Coughlen Claimants from North Carolina are further entitled to summary judgment on their claims for violation of certain North Carolina Wage and Hour Act provisions. N.C. Gen. Stat. § 95-25.1 *et seq.* At a minimum, Yellow has violated provisions related to wage payment. Under the North Carolina Wage and Hour Act § 95-25.6, an employer must pay all wages accrued to an employee. After their termination, the North Carolina Coughlen Claimants, including Dodderer, were not paid their wages that were earned up to the time of their termination.[29] Any employer who violates § 95-25.12 is liable in the amount equal to their unpaid wages plus 8% interest per annum from the date the amount first came due. § 95-25.22; N.C. ST § 24-1. Consequently, the

[29] *See generally* Employee Pay Run Information 040123_080523 – to include Vacation in Lieu and ER Benefit data (YELLOW_WARN_118173), and 7.21.2023 All Employees List used for baseline RIFs (YELLOW_WARN_118171), attached to the Pakrouh Decl., respectively, at **Tabs 20 and 2**.

North Carolina Coughlen Claimants are entitled to summary judgment that Debtors violated North Carolina's Wage and Hour Act and are liable for their unpaid wages plus interest.

E. Yellow's Termination of Plaintiffs Without Paying All Wages Due Violates California Labor Code § 201

Pursuant to § 201 of the California Labor Code, if an employer discharges an employee, the wages earned and unpaid at the time of discharge are immediately due and payable. Cal. Lab. Code § 201(a). If an employer willfully fails to pay, the wages of the employee shall continue as a penalty from the due date thereof at the same rate for not longer than 30 days unless the employee is paid or an action is commenced in the meantime. Cal. Lab. Code § 203.

Here the California employees have yet to be paid their last wages before termination.[30] Therefore, Defendants owe not only the wages earned and unpaid at the time of discharge, but additional payments in the form of a penalty for 30 days of the California employees' wages at the same rate prior to discharge.

Therefore, the Coughlen Claimants from California, including Jimenez, are entitled to summary judgment on this claim.

F. Yellow Cannot Prove Its Affirmative Defenses.

For all the reasons mentioned above, Yellow cannot prove it falls within one of the exceptions for any of the state WARN claims. Additionally, Yellow cannot prove that any of the state law claims are preempted by the federal WARN Act. Indeed, the WARN Act expressly indicates it was not intended to completely preempt this particular area. *See e.g., Smith v. Genstar Capital LLC*, 2001 WL 1658315, at *1 (N.D. Cal. Dec. 20, 2001) (citing 29 U.S.C. § 2105

[30] *See generally* Employee Pay Run Information 040123_080523 – to include Vacation in Lieu and ER Benefit data (YELLOW_WARN_118173), attached to the Pakrouh Decl. at **Tab 20**.

(remedies available under the WARN Act "are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees…").

V. CONCLUSION

In Conclusion, the Coughlen Claimants respectfully request that their Motion be granted.

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