

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

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In re:

Chapter 11

YELLOW CORPORATION, *et al.*,

Case No. 23-11069 CTG

(Jointly Administered)

Debtors.

Ref. D.I. Nos. 3728, 3794, 4036,  
4286, 4312, 4452, 4491

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**INTERNATIONAL BROTHERHOOD OF TEAMSTERS AND TEAMSTERS  
NATIONAL FREIGHT NEGOTIATING COMMITTEE and INTERNATIONAL  
ASSOCIATION OF MACHINISTS' REPLY BRIEF IN SUPPORT OF THEIR  
MOTION FOR SUMMARY JUDGMENT**

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**I. Introduction.**

Debtors have completely missed the mark by focusing on when Yellow should have foreseen its closing and issued WARN notices to its employees. Pursuant to 29 U.S.C. §2102(a)(1) an employer must provide its employees, through their representative, 60 days' notice of any plant closing or mass layoff. An employer does not have to be at fault before violating this statutory requirement because:

In effect, the WARN Act establishes "strict liability": an employer must give notice 60 days prior to a plant closing, unless it can demonstrate that it falls within one of three specific enumerated exceptions: (1) the "faltering company" defense, (2) the "unforeseeable business circumstances" exception, or the (3) "natural disaster" defense.

*In re APA Transport Corp. Consol. Litig.*, 541 F. 3d 233, 248 (3d Cir. 2008). Whether the Debtors have liability under WARN depends on whether they can establish all of the required elements for any of the defenses to WARN liability they have asserted, not when Yellow should have foreseen its closing. Debtors are liable when each of their defenses to WARN liability fail:

First, because Yellow filed for bankruptcy after it both decided to, and discharged its employees, whether Debtors are subject to WARN is governed by the business enterprise test for employers, rather than the liquidating fiduciary test for fiduciaries. Under the business enterprise test, which analyzes the employer's business operations immediately before it discharged its employees, Yellow clearly was a business enterprise because it both picked up and delivered shipments immediately before it decided to discharge its employees. Even if the liquidating fiduciary test did apply, Yellow was not a liquidating fiduciary, because a company that continued normal business operations as a part of its liquidation is not a liquidating fiduciary.

Second, Yellow cannot rely on the faltering company defense because it cannot demonstrate, as a historical fact, that it believed giving WARN notice would have foreclosed it from obtaining financing or business. Moreover, at the time WARN notice was required on May 31, 2023, only Yellow's proposal to PIK interest was even arguably a proposal to seek new capital or business. Since PIK interest, just like new financing, would add to the principal amount of its debt, and Yellow admits that as of May 31, 2023 its circumstances prevented it from obtaining new financing, Yellow did not have a realistic opportunity to convince its lenders to agree to PIK interest by the time WARN notice would have been required.

Third, Debtors cannot rely on Yellow's asserted reason for closing, TNFINC's strike notice, as an unforeseeable business circumstance ("UBC") because its WARN notices never mentioned the strike notice. Even if the employees were aware of TNFINC's strike notice, they cannot know whether Yellow claimed the strike notice caused it to shorten the notice period, so that by failing to either mention the strike notice or explain its consequences in the WARN notice, Yellow deprived the employees of an opportunity to evaluate whether Yellow could rely on the strike notice as the reason to shorten the notice period. Debtors additionally cannot assert the UBC

defense because they caused the issuance of the strike notice by failing to pay contributions they owed, because it was foreseeable the Teamsters would issue a strike notice once Yellow's failure to pay contributions jeopardized health and pension benefits for its employees, and because Yellow should have realized its doom shortly after the strike notice was issued, so that by waiting until July 30 to issue WARN notices Yellow failed to provide as much notice of its closing as possible.

Fourth, Debtors cannot rely on the good faith defense to reduce their WARN liability. The good faith defense is only considered after a violation of WARN is determined to have occurred. Analyzing whether the employer acted with subjective good faith therefore turns on whether an employer should have considered issuing WARN notice to its employees, rather than whether an employer should have issued WARN notice to its employees. By the end of May of 2023, Yellow was aware of its possible closing by August 1, 2023, and therefore should have considered whether to issue WARN notices to its employees. By failing to even consider issuing timely WARN notices to its employees, Yellow cannot demonstrate the subjective good faith needed to sustain the good faith defense.

For these reasons, Debtors have liability under WARN to the Teamsters and the IAM as a matter of law. The Debtors' objections to the Unions' proofs of claim should be disallowed.

## **II. Response Statement of Facts.**

By July 18 or 19, 2023, a day or two after TNFINC issued its strike notice, Yellow CEO Hawkins thought that the company's corporate business equal to 40% was not coming back, and that starting with the remaining 60% some of the non-corporate business could be earned back. (D.I. #4268-1, *Second Supp. Ho Decl.*, Ex. 35, pg. 154:4-23) Since Yellow was picking up a little over 40,000 shipments before TNFINC issued the strike notice, at best, Hawkins believed Yellow could continue to operate as a company that picked up 20,000 to 25,000 shipments per day after

TNFINC issued its strike notice. (D.I. #3794-1, *Ho Decl.*, Ex. 17, pg. 2). Operating Yellow that picked up a lower volume of shipments required considering several financial matters, including how to find enough cash to burn during the transition period to a smaller operation, and how to reduce Yellow's debt level to match the reduced number of shipments it was picking up. (D.I. #4268-1, *Second Supp. Ho Decl.*, Ex. 35, pg. 124:1-16; 127:10-17). Yellow CFO Olivier would have been consulted if Yellow was considering a change to how it operated, and a question came up about how the proposal would work financially. (*Id.*, Ex. 36, Pg. 69:10 – 70:7). Olivier, however, does not recall having any discussions with Hawkins about whether Yellow could survive if it was picking up 20,000 or 25,000 shipments per day. (*Id.*, Ex. 36, pg. 70:20 – 71:2). Indeed, Hawkins himself referred to the scenario of a 6-8 week transition period to a Yellow that was picking up fewer shipments per day as a hypothetical "I just threw out sitting here", rather than something Yellow actually considered in July of 2023. (*Id.*, Ex. 35, Pg. 129:3-6).

Nor did Ducera ever report to Yellow that either of Yellow's potential lenders, Apollo or Ducera, were willing to provide financing to Yellow if it was picking up 25,000 shipments or less per day. (*Id.*, Ex. 36: Pg. 71:8 -24). [REDACTED]

[REDACTED] To the extent there were any discussions between Ducera and Atlas after July 18, 2023, those discussions do not show Atlas, or any other lenders, would have interest in providing credit to Yellow once the decline in shipments it experienced became known. Indeed, by July 24, 2023, due diligence requests that Atlas sent to Ducera were limited to the non-union logistics business. (D.I. #4316-3, *Kaldenberg Decl.*, ¶18)

### III. Argument.

1. Yellow was not a Liquidating Fiduciary<sup>1</sup>.

The Court should reject the Debtors' argument that the liquidating fiduciary test is used to determine whether a pre-bankruptcy employer is a business enterprise, because the debtors have conflated the business enterprise test applied to employers with the liquidating fiduciary test applied to fiduciaries. In *United Healthcare*, the Third Circuit first applied the business enterprise test, and found the answer to be inconclusive because after United Healthcare stopped caring for patients and entered bankruptcy to liquidate its assets, it continued to employ many employees for 16 days (after it filed for bankruptcy and before it decided to discharge the employees without 60 day notice) to assist with the shutting down of its business. *In re United Healthcare Systems, Inc.*, 200 F. 3d 170, 176-177 (3d Cir. 1999). Second, the Third Circuit applied the liquidating fiduciary test to conclude that United Healthcare did not succeed to its WARN obligations as an employer, because it, as the debtor-in-possession, was not operating as an ongoing enterprise. 200 F. 3d at 177-179.<sup>2</sup> The liquidating fiduciary test determines whether a fiduciary succeeded to the WARN obligations of an employer, not whether an employer is a business enterprise. The Court does not need to rewrite the WARN Act to recognize the existence of both a statutory test of whether an employer is a business enterprise and a non-statutory Department of Labor test for whether a fiduciary succeeded to the WARN obligations of an employer.

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<sup>1</sup> Because the Debtors were not a liquidating fiduciary both when it decided to, and when it discharged its employees, they can be liable under the New Jersey and California WARN Acts. The Unions agree with the Debtors that a determination of whether the UBC defense applies under California law should be made by the California administrative agency, not by the Court.

<sup>2</sup> The Department of Labor regulations similarly provide that a fiduciary whose sole function in the bankruptcy process is to liquidate a failed business for the benefit of creditors does not succeed to the notice obligations of the former employer because the fiduciary is not operating a "business enterprise" in the normal commercial sense. See 200 F. 3d at 177. The Department of Labor's test clearly does not apply to an employer who is not a fiduciary.

A debtor cannot secure for itself the applicability of the more generous liquidating fiduciary test by filing for bankruptcy after it decided to discharge its employees. *In re Jamesway Corp.*, 235 B.R. 329, 335, 343-344 (Bankr. S.D.N.Y. 1999) (Debtor was subject to WARN because employer decided whom to fire and formulated a plan to fire them on October 12<sup>th</sup> and filed for bankruptcy on October 18<sup>th</sup>, even though it did not discharge its last employee until November 11<sup>th</sup>). The Debtors' attempt to distinguish *Jamesway* is not persuasive because October 12<sup>th</sup> was the date when the pre-bankruptcy employer selected employees for discharge and formulated its plan for discharging the employees, while the employees were discharged between October 12<sup>th</sup> and November 11<sup>th</sup>, rather than all on October 12<sup>th</sup>. *See* 235 B.R. at 335, 343. The Court in *Jamesway* thus held the liquidating fiduciary test does not apply to determine whether a debtor is subject to WARN if the decision to discharge the employees was made pre-bankruptcy, even if some of the employees were discharged after the bankruptcy was filed. The other cases cited by the Debtors similarly applied the liquidating fiduciary test to fiduciaries, trustees, and secured creditors operating an employer's business, not to employers. *In re MF Global Holdings, Ltd.*, 481 B.R. at 272-273 (Plaintiff was terminated 12 days after a trustee was appointed whose sole responsibility was to liquidate the business); *Weslock Corp.*, 66 F. 3d at 244 (Drawing analogy between when a fiduciary and a secured creditor becomes an employer under WARN); *In re Century City Doctor Hosp., LLC*, 2010 WL 6452903 \* 9 (Holding that a Chapter 7 trustee is not an employer under WARN). In this case, Yellow filed for bankruptcy on August 7, 2023, after it decided to discharge its union represented employees on July 26, 2023, and after it discharged its union represented employees on July 30, 2023. Whether Yellow is subject to WARN therefore is governed by the business enterprise test rather than the liquidating fiduciary test.

Debtors' example of an employer filing for bankruptcy five minutes before, and five minutes after it discharges its employees is not illustrative, because under *United Healthcare* the timing of the bankruptcy filing determines whether the business enterprise or liquidating fiduciary test should apply, rather than determine whether an employer is subject to WARN. Moreover, pursuant to both the business enterprise test and the liquidating fiduciary test, the analysis focuses on the employer's operations before it decided to discharge the employees, and the fiduciary's operations before it discharged the employees. *United Healthcare*, 200 F. 3d at 176 (United Healthcare may be a business enterprise because it continued to employ hundreds of employees to assist with its winddown between February 19<sup>th</sup> and March 7<sup>th</sup>); *In re Start Man Furniture, LLC*, 647 B.R. 116, 123-124 (D. Del. 2022) (Fiduciary was subject to WARN because it continued to sell furniture as a part of liquidating its business between March 5 and when it discharged its employees between March 20<sup>th</sup> and 22<sup>nd</sup>). An entity who continued to operate its normal business up until the point it discharged its employees is subject to WARN, regardless of whether it was an employer or a fiduciary when it discharged its employees.

Applying the applicable business enterprise test, at the time it decided to discharge its unionized employees, Yellow clearly was a business enterprise within the meaning of the WARN Act. Analyzing whether an employer was a business enterprise focuses on its business activities performed immediately before it decides to lay off its employees without giving them 60 days' notice. *See In re United Healthcare*, 200 F. 3d at 176. (Employer may remain business enterprise under WARN, though it stopped engaging in its core business of providing care to patients, because for 16 days after it filed for bankruptcy and before it decided to immediately discharge its employees, it continued to employ hundreds of employees to assist with its winddown). Before Yellow decided to discharge its union represented employees on July 26, 2023, it continued to pick

up tens of thousands of shipments per day, so that it continued its normal business operations, and was covered by WARN, even if the court adopts the Debtors' absurd argument that Yellow's normal business operations were picking up rather than delivering shipments. (D.I. #3794-1, *Ho Decl.*, Ex. 17, pg. 2-3; D.I. #4440-1, *Ho Decl.*, Ex. 41, pg. 9:7-25).

If the Court applies the liquidating fiduciary test to the Debtors, though Yellow was not a fiduciary when it decided to discharge its employees, Debtors nonetheless are subject to WARN, because a fiduciary is not a liquidating fiduciary if it continued its normal business operations as a part of its liquidation. *In re Start Man Furniture*, 647 B.R. at 130. *See also Law v. American Enterprise Strategies, Ltd.*, 2007 WL 221671 \*16 (M.D. Tenn. 2007) (Employer was not a liquidating fiduciary because immediately after it decided to shut down and to discharge its employees, it continued to operate a trucking business by delivering items already in the pipeline). Debtors are wrong to argue that they must be liquidating fiduciaries because they were liquidating.

To analyze whether a fiduciary is a liquidating fiduciary, the Court should focus on the fiduciary's business activities before it discharged its employees. For example, in *Start Man Furniture*, the Court focused on the fiduciary's going out of business sales that were conducted between March 5<sup>th</sup> and at least March 15<sup>th</sup>, and before it discharged its employees between March 20<sup>th</sup> and March 22<sup>nd</sup>. *See* 647 B.R. at 123-124, 131-132. Debtors therefore are wrong to focus on its activities to prepare the business for liquidation after the union employees were terminated; and ignore the tens of thousands of shipments that it was delivering per day immediately before its union employees were terminated. In this case, there is no dispute that immediately before Yellow discharged its union employees, it continued to deliver tens of thousands of shipments per day. Yellow cannot be a liquidating fiduciary because immediately before terminating its employees it was continuing to operate its normal business, even if the operation of the normal business was a

part of its liquidation process. *Start Man Furniture*, 647 B.R. at 131-132. For the Debtors to argue that Yellow continuing to deliver tens of thousands of shipments per day is analogous to *United Healthcare*, in which the fiduciary surrendered its certificate of need and stopped its core business of providing patient care 17 days before it terminated its employees, is absurd.

Despite the Debtors' best efforts to distinguish them, *Start Man Furniture* and *Law* present facts very similar to this case. *Start Man Furniture* found a fiduciary was not a liquidating fiduciary because it continued to sell furniture as a part of winding down its operation, without making any findings on whether the fiduciary also continued to acquire inventory for sale. *See* 647 B.R. at 130-131. Similarly, the court found the employer in *Law* continued its normal business operations by, after it decided to shut down and lay off its employees, continuing to deliver the shipments that were in its network; without making any findings on whether the employer was also picking up new shipments after it decided to lay off its employees. *See* 2007 WL 221671 \* 16.<sup>3</sup> By analogy, Yellow continued its normal business operations by delivering shipments that remained in its network, regardless of how many new shipments it was picking up. After all, what Yellow is paid for and its main business operation is delivering, not picking up shipments.

2. The Faltering Company Defense Does not Apply.

The Court should reject the Debtors' attempts to rewrite the statutory faltering company defense. First, the requirement that to establish the faltering company defense, an employer must show that as of the time that notice would have been required it was actively seeking capital or business can be found in the plain language of 29 U.S.C. §2102(b)(1). As the Debtors explain, the Court must follow rather than rewrite statutory language drafted by Congress. *Wis. Cent. Ltd. v.*

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<sup>3</sup> Nor can the Debtors distinguish *Law* by arguing that in that case the employer had not yet begun its liquidation, since by liquidation the Court was narrowly referring to the liquidation of the employer's assets. *See* 2007 WL 221671 \*17. Similarly, in this case there is no evidence Yellow was liquidating any of its assets, aside from selling the Compton terminal at an earlier time, by the time it discharged its union employees on July 30, 2023.

*U.S.*, 585 U.S. 274, 282 (2018). The Court should reject the Debtors' attempt to pretend the requirement that an employer must be actively seeking capital at the time notice would have been required was created by the Third Circuit's decision in *In re APA Transport*, and to then distinguish *In re APA Transport* on the ground that it did not consider the applicability of the UBC exception.

Second, the Court should not permit the Debtors to conflate the faltering company and UBC defenses, by arguing that they can establish the faltering company defense by showing that its closing was not foreseeable. The WARN Act imposes strict liability upon employers unless they can show all of the elements for a defense to liability have been satisfied. *In re APA Transport Corp. Consol. Litig.*, 541 F. 3d 233, 248. To establish the faltering company defense, the Debtors must satisfy each of the four elements required by 20 C.F.R. §639.9(a). Whether the company's closing is foreseeable is not an element of, and is therefore irrelevant to, the faltering company defense outlined in §639.9(a). For example, an employer who was not actively seeking capital or business at the time WARN notice would have been required cannot rely on the faltering company defense, regardless of whether its closing was foreseeable at the time. *In re APA Transport*, 541 F. 3d 233, 237-238, 249-250 (Employer that learned one week before its closing that its lender would terminate the loan agreement rather than extend the loan agreement to provide additional financing cannot rely on the faltering company defense because it did not adequately seek financing at the time that the 60 days WARN notice would have been required).

Applying the governing criteria for the faltering company defense established in §639.9(a) to the facts of this case show the Debtors cannot establish the defense as a matter of law.

- a. Debtors Cannot Show, as a Matter of Historical Fact, That Yellow Believed giving WARN Notice Would have Precluded it from Obtaining Financing.

To satisfy the fourth requirement for the faltering company defense, an employer *must have believed* that giving the WARN notice would have precluded it from obtaining the needed capital or business. 20 C.F.R. §639.9(a)(4).<sup>4</sup> In *Childress v. Darby Lumber, Inc.*, 357 F. 3d 1000, 1009 (9<sup>th</sup> Cir. 2004), the Ninth Circuit concluded the employer’s faltering company defense failed because: Appellants provided no evidence that they reasonably and in good faith believed that giving the sixty-day notice to their employees during the negotiations with U.S. Bank would have precluded them from obtaining the credit from the bank. The employer therefore must present *evidence* to prove it believed giving WARN notice would preclude it from obtaining credit; and cannot satisfy the requirement of §639.9(a)(4) by claiming that had it considered the issue, it would have concluded that giving WARN notice would preclude it from obtaining credit. Indeed, if the latter showing were sufficient to satisfy §639.9(a)(4), an employer can satisfy the regulation by only showing that giving the WARN notice would have precluded it from obtaining the needed capital or business, thereby writing the phrase “must have believed that” out of the regulation. A Court may not in the guise of interpretation rewrite a regulation, anymore than it can rewrite a statute. *Wis. Central Ltd.*, 585 U.S. at 282; *Burns v. Barnhart*, 312 F. 3d 113, 125 (3d Cir. 2002) (Basic tenants of statutory interpretation apply to the interpretation of regulations). *In re Old Electralloy Corp.* is not persuasive because it only found giving 60 days’ notice would have precluded the employer from remaining open, so that it made no findings on whether the employer believed that

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<sup>4</sup> Remarkably, the Debtors’ citation to this provision omit the phrase “must have”, because they fully understand that including that phrase makes it clear that the employer’s belief that giving WARN notice would preclude it from obtaining the needed capital must be a historical fact. See D.I. 4452, pg. 34.

giving notice would have precluded it from obtaining advances from the Bank as required by §639.9(a)(4).<sup>5</sup>

At best, Debtors have presented evidence to attempt to show that giving the WARN notice would have precluded it from obtaining the needed capital or business. (D.I. #4291-2, Hawkins Decl., ¶36) (Issuing WARN notice in May or early June would have precluded the company from obtaining financing); (D.I. #4291-3, Kaldenberg Decl., ¶20) (Issuing WARN notice would have negatively impacted lenders and likely resulted in new avenues for liquidity to dissipate). Debtors have not presented a shred of evidence to make the required showing that Yellow believed, on or before July 30, 2023, that giving WARN notice would have precluded it from obtaining the needed capital or business. Debtors explain that Yellow did not issue WARN notices to its employees because it notices were not necessary in that it would not close within 60 days, rather than because it feared giving notice would have precluded it from obtaining financing. (D.I. #4452, pg. 34-35).

As *Darby* held, an employer's historical belief that giving WARN notice would preclude financing must be established by evidence, so that unsupported assertions in a brief cannot create material factual disputes. *See* 357 F. 3d at 1009; *Kang v. Attorney General of the U.S.*, 2024 WL 863352 \* 4 (3d Cir. 2024) (Unsupported statements in a brief are not evidence). Because the Debtors have the burden of proof on the faltering company defense, the Unions can obtain summary judgment by pointing out to the Court, as they have, that no evidence in the record supports the Court finding that Yellow believed, on or before July 30, 2023, that giving WARN notice would foreclose it from obtaining any sought capital or business. *Celotax Corp. v. Catrett*,

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<sup>5</sup> *In re Old Electralloy Corp.* is additionally unpersuasive because the Court's analysis was colored by its belief that WARN claims should not be asserted in bankruptcy at all, since WARN claims in bankruptcy are paid by other creditors rather than the employer. *See* 162 B.R. at 126.

477 U.S. 317, 325 (1986); *In re APA Transp. Corp.*, 541 F. 3d at 246 (Faltering company exception is affirmative defense, meaning employer has burden of establishing its elements).<sup>6</sup>

b. With the Possible Exception of PIK Interest, Debtors Have not Shown They Actively Sought Financing on or Before May 31, 2023.

To actively seek financing, an employer must be seeking financing or refinancing through the 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. 29 C.F.R. §639.9(a)(1). The regulation’s use of the phrase “any other” demonstrates that for a method of internally generated financing to qualify under §639.9(a)(1), it must be a commercially reasonable method of seeking additional money or credit. Indeed, actively seeking capital or business means obtaining a loan, issuing bond or stock, or securing new business; all of which are steps that would bring new cash or credit into a company. *Electrical Workers Local 397 v. Midwest Fasteners, Inc.*, 763 F. Supp. 78, 82 (D.N.J. 1990), *citing* 134 Cong. Rec. S8686, 58693. Implementing One Yellow does not constitute seeking financing or refinancing because it would not bring a single dollar of additional money or credit into Yellow; but would instead only allow Yellow to spend less of the monies it already had to sustain its operations. By the exact same reasoning, reducing Yellow’s interest payments by using the proceeds of sale to pay down its debt would only allow Yellow to spend less of the money it already has, and would not bring a single dollar of new money or credit into the company; and therefore, cannot constitute actively seeking financing either. Indeed, while an employer can equally spend less of the monies that it has by cutting its employees’ wages; and though implementing wage cuts

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<sup>6</sup> The Court, therefore, does not need to decide whether, as the Unions earlier argued, an employer’s belief that issuing WARN notice would preclude financing must be held at the time WARN notice would have been required.

can improve the employer's EBITDA, no reasonable person would argue an employer was actively seeking financing by implementing wage cuts for its employees.

Turning to external financing, the Court should reject the Debtors' argument that they can satisfy the faltering company defense by pointing to Yellow's attempts to seek financing made after May 31, 2023. To establish the faltering company defense, an employer must show it actively sought capital at the time WARN notice would have been required. 29 U.S.C. §2102(b)(1). The 14-day period that the Debtors refer to is the 14 days during which layoffs are expected occur; and not the 14 days during which notice should be given. *Elsinore Shores*, 173 F. 3d at 185. Rather, even if the employer decides to discharge its employees over a period of 14 days rather than on a single day, notice must still be given at least 60 days in advance of the first day of the 14 days period during which the discharges are expected to occur. 29 C.F.R. §639.7(b). The time when WARN notice would have been required was May 31, 2023, even had Yellow planned to discharge its employees during the 14 day period between July 30, 2023 and August 12, 2023.

As for the sole financing related proposal that Yellow made before May 31, 2023, Ducera's proposal to Apollo and the United States Treasury ("UST") on May 26, 2023, the Court should reject the debtors' argument that this proposal must constitute actively seeking capital because its lenders' acceptance of the proposal would have increased a company's incremental liquidity. Actively seeking money or capital means making a proposal that would bring new money or capital into the company, rather than, for example, improving a company's incremental liquidity by exchanging a company terminal for cash. 20 C.F.R. §639.9(a)(1); *Midwest Fasteners, Inc.*, 763 F. Supp. at 82. Nor can Debtors distinguish *Midwest Fasteners* by arguing that Yellow was selling one of hundreds of terminals, since Congress did not intend to permit an employer to assert the faltering company defense by selling a plant whether said plant is the employer's only plant or one

of hundreds. *Midwest Fasteners, Inc.*, 763 F. Supp. at 82. Moreover, since a prospective buyer's knowledge that a seller was closing would not preclude the buyer from purchasing the seller's plant, it would make no sense to ask, as required by §639.9(a)(4), whether the seller believed giving WARN notice would preclude it from selling the plant.

Next, Debtors mischaracterized Yellow's ABL proposal. Yellow's proposal was one made to Apollo and the United States Treasury to free up \$100 million of collateral to be added to the ABL borrowing base, rather than a proposal to its ABL lenders to increase the borrowing base for its ABL facility. (D.I. #4316-3, ¶10). Even had Apollo and the UST allowed Yellow to free up its collateral, its ABL lenders must then separately approve increasing the borrowing base for Yellow's ABL facility. (D.I. #4420-1, *Third Supplemental Ho Decl.*, Ex. 40, Pg. 43:10-13). Yellow's proposal to free up collateral, therefore, was a preparatory step towards increased borrowing for its ABL facility, rather than a proposal to increase borrowing for its ABL facility. Undertaking preparatory steps that by themselves would not bring any new capital or business into the company does not constitute actively seeking capital or business. *In re APA Transport*, 541 F. 3d at 250 (Employer did not actively seek financing by meeting with lender and by telling lender at end of meeting that it would seek additional financing); *United Paperworkers v. Aiden Corrugated Container Corp.*, 901 F. Supp. 426, 442 (D. Mass. 1995) (Developing new customers without making proposals to obtain new business is not actively seeking new business).

Nor did Debtors actively seek capital by asking Apollo and the UST to remove EBITDA covenants on its existing loans. Securing the waiver of a loan covenant may make it easier for an employer to retain credit that its lenders already extended but would not bring a single penny of new credit into the company. Nor can the Debtors successfully distinguish *In re APA Transport*, a case in which the Third Circuit found an employer did not actively seek capital, though its lender

*agreed* to a waiver and a loan modification to cure a default of the loan agreement. *See* 541 F. 3d at 236-237, 250. That the lender *agreed* to a waiver and a loan modification to cure a default presupposes the employer asked for these remedies, just like for earlier defaults the lender and the employer *negotiated* agreements whereby the breaches were waived and/or the applicable covenants were amended. *See* 541 F.3 d at 236. Because the employer in *APA* did request the waiver of a loan covenant, the Third Circuit found the employer did not actively seek financing because requesting the wavier of a loan covenant would not bring any new credit to the company, and therefore does not constitute actively seeking financing.

Finally, there is nothing inconsistent between the Unions' acknowledgement that the Debtors' proposal to PIK interest arguable constitutes actively seeking capital and their argument that no other aspect of Ducera's May 26, 2023 proposal to Apollo and the UST constituted actively seeking capital. Debtors did not, by including in the May 26, 2023 proposal a single aspect that may constitute actively seek financing, magically transform every other aspect of the same proposal into a request to actively seek financing. Since Debtors' proposal to PIK interest was its only proposal made on or before May 31, 2023 that arguably constituted a proposal to actively seek capital, Debtors cannot rely on any other proposals Yellow made to establish the faltering company defense.

c. Yellow Did Not Have a Realistic Opportunity to Convince Its Lenders to Agree to PIK Interest by May 31, 2023.

Under §639.9(a)(2), to establish the faltering company defense an employer must show it had a realistic opportunity to obtain the financing sought. Whether an employer had a realistic opportunity to obtain the financing sought is measured at the time when WARN notice would have been required. *In re Organogenesis Inc.*, 316 B.R. 574, 586 (Bankr. D. Mass. 2004) (Faltering company defense failed because as of the date 60-day notice was due the Claimants, July 25, 2002,

there was no realistic chance of the Debtor obtaining the sought after financing). Indeed, the faltering company defense allows an employer to justify why it did not issue timely WARN notice to its employees by claiming issuing notice would preclude it from obtaining capital needed to keep the business alive. An employer cannot rely on its fear of losing capital to justify its failure to issue timely WARN notice to its employees if it only had a realistic opportunity to obtain the capital after, rather than at time that WARN notice would have been required. In this case, to satisfy §639.9(a)(2), Debtors must show Yellow had a realistic opportunity to convince its lenders to agree to PIK interest as of May 31, 2023.

Debtors have made no response to the Unions' argument that from a lenders' perspective, Yellow's proposal to PIK interest is analogous to a proposal to seek new financing; in that both would increase the principal amount of the loan that Yellow must repay. Yellow's then current condition, however, precluded it from obtaining new financing as of May 31, 2023. (D.I. #2778-1, Murphy Decl., Ex. 11). Yellow similarly did not have a realistic opportunity to convince its lenders to agree to PIK interest as of May 31, 2023.

Moreover, Debtors have only shown Yellow presented a proposal to PIK interest to two of its lenders on May 26, 2023, which does not prove Yellow had a realistic opportunity to convince either lender to agree to the proposal to PIK interest. Debtors have not presented to the Court a shred of evidence showing either Apollo or the UST ever seriously discussed with Yellow, or ever had any inclination to agree, to allow Yellow to PIK interest. An employer's faltering company defense fails if it cannot show it had a realistic opportunity to obtain the financing sought. *Chaney v. Vermont Bread Company*, 2023 WL 5589113 \* 12 (D. Vt. 2023). At the very least, the Unions are entitled to summary judgment by pointing out to the Court that Debtors, who have the burden of proof on the faltering company defense, have failed to present any evidence to the Court

showing Yellow had a realistic opportunity to ever convince either Apollo or the UST to agree to permit it to PIK interest. *Celotax Corp.*, 477 U.S. at 325; *In re APA Transp. Corp.*, 541 F. 3d at 246.

3. Debtors' UBC Defense Fails as a Matter of Law.

a. Debtors Can Only Rely on TNFINC's Strike Notice as the Business Circumstance to Support Their UBC Defense.

An employer can only rely on business circumstances that caused the layoff of its employees to establish the UBC defense. *In re AE Liquidation*, 866 F. 3d 515, 523 (3d Cir. 2024). *See also Snider v. Commercial Financial Services, Inc.*, 288 B.R. 890, 895 (N.D. Okla. 2002) (UBC defense cannot apply if asserted business circumstance did not cause the layoff); *In re Organogenesis*, 316 B.R. at 587. Moreover, the unforeseeable business circumstance must be the cause of the layoff, i.e. the last straw that broke the camel's back. *In re Art Van Furniture, LLC*, 638 B.R. 523, 538 (Bankr. D. Del. 2022). Debtors testified at their deposition that it was TNFINC's strike notice that killed Yellow. (D.I. #4268-1, *Second Supplemental Ho Decl.*, Ex. 35: Pg. 118:19-22). Debtors cannot cover up their failure to mention the strike notice in their WARN notice to the Unions by conveniently arguing the strike notice was only one of the reasons for Yellow's closing.

Debtors' argument is fatally flawed because it conflates a business circumstance with the impact that the business circumstance had on the employer. As the Ninth Circuit explained in *Alarcon v. Keller Industries*, 27 F. 3d 386, 389 (9<sup>th</sup> Cir. 1994), an explanation of the employer's reason for shortening the notice period is inadequate if it only explained the result of the unforeseeable event (the lack of work capital) but not the unforeseeable event itself (the bank's unexpected decision to stop providing adequate capital), so that it failed to explain how the business circumstance caused the notice period to be shortened. 27 F. 3d at 391. *See also Chaney*, 2023 WL 5589113 \* 4, 10-11 (Employer cannot rely on seller's fraud as unforeseeable business

circumstance because WARN notice failed to mention the seller's failure to disclose the company's real financial condition, though it told employees about the company's unsuccessful exploration of avenues to allow it to survive after it discovered the seller's fraud); *Fleming v. Bayou Steel BD Holdings II, LLC*, 2022 WL 266942 \* 3 (E.D. La. 2022) (Employer cannot rely on UBC defense because its notice was inadequate, though notice told employees the company closed because of its inability to secure necessary capital). *Contrast In re Art Van Furniture, LLC*, 638 B.R. at 540. (Notice adequate because it told employees the unforeseen effects of COVID-19 prevented Debtors from completing the planned winddown of the company's retail operations).

In this case, Yellow blamed TNFINC's strike notice for both its loss of customers and its inability to obtain financing. Its script for communicating with non-union employees provided:

When IBT leaders were finally ready to meet this week, it was too late. By then, the IBT's strike threat already had a devastating effect on our business, rattling investors and causing customers to quickly depart.

D.I. 3794-1. Ho Decl., Ex. 15. Yellow's brief in opposition to the Unions' motion for summary judgment similarly contends that it was TNFINC's strike notice that caused Yellow's customers to depart and destroyed Yellow's prospects of obtaining financing. D.I. 4452, pg. 43-44. As the above cited cases demonstrate, an adequate brief statement that cites to an unforeseeable business circumstance as the reason for the employer to shorten the notice period must identify both the alleged unforeseeable business circumstance (in this case TNFINC's strike notice) and the effects of the business circumstance (in this case the loss of customers and the loss opportunity to obtain financing) so that the reader can understand how the allegedly unforeseeable business circumstance caused the employer to shorten the notice period. According to the Debtors' own narrative, Yellow's inability to obtain financing was a result of TNFINC's strike notice, not an independent business circumstance that caused Yellow to shorten the notice period.

- b. Debtors are Foreclosed From Relying on the Strike Notice as an Unforeseeable Business Circumstance, Because Yellow's WARN Notices Did not Identify the Strike Notice as the Unforeseeable Circumstance Causing Shortened Notice.

Just like in *Alarcon*, Yellow's WARN notices to the Unions only mentioned one of the effects of TNFINC's strike notice (the failure of efforts to obtain financing), but not the business circumstance itself, so that they failed to explain how the business circumstance of the strike notice caused it to shorten the notice period.

Debtors argue their error was harmless, because they presume (while pointing to the deposition testimony of a single employee, Coughlen) the union represented employees were aware of TNFINC's strike notice. Debtors' argument is meritless. An employer should provide to its employees a brief explanation of its reason for shortening the notice period, so that employees have information that would help them to determine whether the notice period was properly shortened. *In re Art Van Furniture*, 638 B.R. at 540. Yellow's inability to obtain financing was foreseeable once its customer base was eroded after TNFINC issued its strike notice. Whether Yellow's inability to obtain financing was unforeseeable therefore depends on whether TNFINC's strike notice was unforeseeable. Yellow's inadequate WARN notice was material and prejudicial to the Unions and their memberships because it deprived the employees of any notice that Yellow contended TNFINC's strike notice caused it to give shortened WARN notice to its employees; and therefore, deprived the employees of any opportunity to evaluate whether the strike notice was unforeseeable, and could be used to justify shortening the notice period.

To avoid this result, Debtors argue that because union members were aware of the strike notice, they must also know that Yellow was blaming the strike notice as the reason for it issuing shortened notice to its employees. The Debtors' argument is nonsense. Employees would not have access to information that they need to evaluate the impact of the strike notice, including the

number of shipments that Yellow picked up as a company before and after the strike notice, and the tenor of Yellow's negotiations with its lenders before and after the lenders became aware of the strike notice and its effects. Moreover, even if the employees somehow learned facts that suggested the strike notice could be blamed for Yellow's closing, they are not mind readers, and therefore must rely on Yellow to tell them what business circumstance Yellow blamed for its closing that caused it to issue shortened notice to its employees.

Nor can Debtors obtain a different result by misrepresenting to the Court the ruling of *Alarcon*. Debtors rely on a sentence in the opinion stating: "If an adequate explanation of the circumstances of one cause of the shortened notice period is given, the employer is not required to continue on with other explanations." Debtors deliberately did not mention to the Court, however, that by this statement the Ninth Circuit meant: "Here, because Keller's notice adequately stated the basis of its shortened notice as a faltering company, we need not also decide whether the statement was adequate with respect to the other cause of the shortened notice period. The statement, as a whole, adequately stated a basis for the shortened notice." See 27 F. 3d at 391. The Ninth Circuit is saying that if an employer provides its employees with adequate notice of its faltering company defense, and if that defense is meritorious, the employer can avoid liability though it did not provide its employees with adequate notice of its UBC defense. The *Alarcon* court is not saying, as the Debtors are insinuating, that a WARN notice's reference to one business circumstance means an employer can sandbag its employees by relying on other business circumstances, which they failed to mention in the WARN notice, to support its UBC defense.

Similarly, the Court should recognize and reject the Debtors' sleight of hand when, while discussing whether Yellow's other communications to its employees can supplement its inadequate WARN notices, they claim it was the Debtors' inability to reach agreement on One Yellow rather

than TNFINC's strike notice that caused Yellow's closure. (D.I. #4452, pg. 46) The Court only needs to look at Yellow's own words to reject this argument, including Yellow CEO Hawkins' statement that it was TNFINC's strike notice that killed Yellow, and Yellow's own communication to its non-union employees that: "When IBT leaders were finally ready to meet this week, it was too late"; so that by July 26, 2023 Yellow had run out of liquidity runway, and financing no longer appeared possible, though Yellow management believed the Teamsters would support the changes in operations that were necessary to implement One Yellow. (D.I. #3794-1, Ho Decl., Ex. 15; D.I. #4016-1, Ho Supp. Dec. Ex. 26, pg. 1-2; D.I. #4286, Ho 2<sup>nd</sup> Supp. Dec. Ex. 35, pg. 118:19-22) A business circumstance can only support the UBC defense if it caused the employees' layoffs; and is the last straw that broke the camel's back. *In re AE Liquidation*, 866 F. 3d at 523; *In re Art Van Furniture, LLC*, 638 B.R. at 538. Because Yellow claims it was killed by TNFINC's strike notice rather than its failure to reach agreement on One Yellow, Yellow cannot rely on its communications to its employees that referenced the One Yellow negotiations to cover up its failure to reference the strike notice as the business circumstance that caused its closing in its WARN notice.

Nor do either of the cases cited by the Debtors support their argument. In *Kalwaytis* the employer did not invoke either the faltering company or UBC defenses so that adequacy of the employer's explanation for shortening the notice period was not at issue; while in *AE Liquidation* a single email explained to the employees that the buyer's unexpected failure to obtain funding before Eclipse's debtor-in-possession reserves were depleted, the dire financial conditions in the global marketplace, the unavailability of additional funds, and the noteholders' resulting decision to convert Eclipse's case to a Chapter 7 liquidation; and therefore both identified the unforeseeable business circumstance (the failure to obtain funding), and how that circumstance led to the employer shortening the notice period. *See Kalwaytis*, 78 F. 3d at 121-122; *In re AE Liquidation*,

866 F. 3d at 525. Neither case permits an employer to assert a UBC defense when none of its communications to its employees identified the business circumstance that caused it to close without issuing the full 60 days WARN notice to its employees. The Debtors' argument about whether direct communications to employees can constitute adequate WARN notice for employees who have a representative is similarly a red herring because Yellow never mentioned the strike notice in any of its communications to its union represented employees.

Finally, Debtors cannot rely on 20 C.F.R. §639.7(a)(4) to excuse its failure to mention the strike notice in its WARN notices. The relevant portion of §639.7(a)(4) provides:

It is not the intent of the regulations that errors in the information provided in a notice that occur because events subsequently change or that are minor, inadvertent errors *are to be the basis for finding a violation of WARN.*

(Emphasis added). If a WARN notice failed to adequately explain how an unforeseeable business circumstance caused the company's closure, the employer is prohibited from relying on the business circumstance to establish its UBC defense; but is not prohibited from asserting other defenses against WARN liability. *Alarcon*, 27 F. 3d at 391. A failure to adequately explain the basis for reducing the notice period therefore potentially negates a defense to WARN liability, but is not a basis for finding a violation of WARN. By specifically limiting §639.7(a)(4) to prohibit relying on minor, inadvertent errors as a basis for finding a violation of WARN, the Department of Labor made clear that the provision does not apply to violations of §639.9 and §2102(b)(3), which could only negate a defense against WARN liability but cannot furnish a basis for finding a violation of WARN. Moreover, a WARN notice's failure altogether to mention the business circumstance that caused the employer to shorten the notice period is not the type of minor, in-advertent error that can be excused. *Grimmer v. Lord Day & Lord*, 937 F. Supp. 255, 257-258 (S.D.N.Y. 1996).

Nor can Debtors rescue their UBC defense by arguing that they believed in good faith that Kirkland and Ellis (“Kirkland”) drafted a WARN notice that complied with the law. Whether an employer acted in good faith is a valid consideration after a statutory violation has been established, so that the employer’s purported good faith cannot be relied upon to establish a UBC defense against a statutory violation. *Grimmer*, 937 F. Supp. at 258; 29 U.S.C. §2104(a)(4) (Good faith defense only applies if employer has violated this Chapter). Yellow’s error by relying on Kirkland to advise it on how to comply with WARN does not furnish the Debtors with a defense against WARN liability.

c. TNFINC’s Strike Notice was Caused by Yellow’s Own Failure to Pay Contributions, Not By Any Events Outside Yellow’s Control.

To establish the UBC defense, an employer must show that the business circumstances that caused the layoff were not reasonably foreseeable. *In re AE Liquidation*, 866 F. 3d at 523. An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. 20 C.F.R. §639.9(b)(1). In this case, TNFINC’s strike notice was caused by Yellow’s own failure to remit contributions for July of 2023. Whether to pay the owed contributions was within Yellow’s control because by mid-July of 2023 Yellow had more than \$70 million in unrestricted U.S. cash, more than enough to pay approximately \$33 million of contributions that it owed. (D.I. #3794-1, Ho Decl., Ex. 17, pg. 2; D.I. #4286-1, *Second Supplemental Ho Decl.*, Ex. 36: Pg. 10:2-7). Debtors’ arguments about whether paying the contributions was in Yellow’s best interest are irrelevant, since whether paying the contributions was within Yellow’s control depends on whether it had the necessary cash to pay the contributions, and not upon the Debtors’ *post hoc* analysis of what Yellow’s best interest was. Nor can Debtors rely on Citizens’ imposition of liquidity reserves to argue paying the contributions wasn’t in

Yellow's best interest. Citizens imposed the liquidity reserves because of TNFINC's strike notice that was caused by Yellow's own failure to make contributions. (D.I. #4286-1, Ex. 35, pg. 115:24 – 116:18). The risk that Citizens would impose liquidity reserves increases the risks to Yellow from failing to make contributions, and a further reason why Yellow should have paid the contributions to avoid Citizens imposing restrictions on its cash reserves.

Debtors' attempt to distinguish *Dillard Department Stores* misses the forest for the trees. The Unions cited *Dillard* for the proposition that to be unforeseeable, the business circumstance (TNFINC's strike notice) must be caused by some action or condition outside Yellow's control. The key holding in *Dillard* is that if the alleged business circumstance (uncertainty over when the SEC would approve a merger and when the employees would need to be discharged) was caused by the employer's own decision, the business circumstance was not unforeseeable. *See* 15 F. 3d at 1282. *Dillard* therefore analyzed whether the business circumstance was caused by an action or condition within the employer's control. Yellow's argument that the strike notice was unforeseeable is non-responsive when the relevant question is whether the cause of the business circumstance is foreseeable, rather than whether the business circumstance itself is foreseeable. TNFINC's strike notice cannot be an unforeseeable business circumstance when its cause, Yellow's own failure to remit contributions to the Funds, was within Yellow's control.

Nor can Debtors weaken the link of causation between its failure to remit contributions and TNFINC's strike notice by arguing that Central States' termination of Yellow's participation in the funds was a surprise. In 2020, Central States continued to provide coverage to Yellow employees as it discussed with Yellow its request to defer contributions. (D.I. #2778-1, Murphy Dec., Ex. 2). Indeed, in 2020, Central States placed Yellow on suspended status so that continued coverage would ordinarily stop after May 9, but on May 9 agreed to extend coverage for eight weeks. (D.I.

#2778-1, Murphy Dec., Ex. 2). That YRC was technically placed on suspended status therefore did not jeopardize continued coverage for its employees, which was granted on the same day. In 2023, on the other hand, Central States rejected Yellow's request to continue to provide coverage to Yellow employees as Yellow deferred contributions. (D.I. #4268-1, *Ho 2<sup>nd</sup> Supp. Decl.*, Ex. 35, pg. 83:1-13). Once Yellow failed to make its contributions for July, Central States did exactly what it said it would: It declined to continue to provide coverage that Yellow failed to pay for by preventing Yellow employees from accruing further pension benefits, and by requiring Yellow employees to make self-pays to continue their health benefits.

Nor do the Debtors dispute, as held by *Chaney*, that the UBC defense is unavailable if it was within the employer's control to avoid the harm caused by the asserted business circumstance. In that case, the court found the purchaser's own violation of its promise to invest \$2.5 million in the company, which could have mitigated the purchaser's surprise that the business was in worse than expected condition, was not the sort of external event that could constitute an unforeseeable business circumstance. *See* 2023 WL 5589113 \* 13. In this case, once TNFINC responded to the possible loss of health and pension benefits for its membership by issuing a strike notice, it was within Yellow's control to secure its labor force, and avoid customer flight, by paying the \$33 million of contributions that it owed. The possibility that Citizens may impose a liquidity reserve supports Yellow making the contributions so that it can demonstrate to Citizens that its business has not been harmed, so that the liquidity reserve need not be imposed. Yellow chose an immediate death, as the loss of customers made it impossible for it to obtain financing, over securing several additional weeks of runway to reach an agreement with TNFINC by paying the contributions that it owed so that it could hold on to its customers. Yellow's issuance of shortened notice to its employees was caused by its own decision making, not by any unforeseeable circumstances.

d. In Any Event, the Strike Notice Was Foreseeable.

As explained by the Unions' previous briefing, it was always foreseeable that if Yellow's failure to remit contributions jeopardized continued health and pension coverage for its employees, TNFINC would respond with a strike notice. Any union worth its salt would undertake specific actions authorized by its labor agreement, such as the issuance of a strike notice, to protect its membership from having to work without the health and pension benefits promised by their labor agreement. Yellow had no reasonable basis to draw any comfort from its previous dealings with the Teamsters and the Funds because those previous dealings never jeopardized continued health and pension coverage for Yellow's employees.

Even if the Court were to reject the above argument as a basis for granting summary judgment to the Unions, the Unions are entitled to WARN damages as a matter of law starting on the date Teamsters chief negotiator Murphy told Yellow chief negotiator Reifsnyder that if Yellow failed to make the contributions, the Teamsters will strike; because TNFINC's strike notice clearly became foreseeable once Murphy made this statement to Reifsnyder.

Debtors cannot successfully dispute Murphy's account of his conversation with Reifsnyder by relying on the sham affidavit rule. First, there is no contradiction between Murphy's affidavit and his deposition testimony. During his deposition, Murphy testified that he did not intend to organize a strike while negotiating with Yellow. (D.I. #4440-1, 3<sup>rd</sup> Supp. Ho Decl., Ex. 39, pg. 322-323) However, neither Yellow's failure to remit contributions nor TNFINC's response by issuing a strike notice was a part of negotiations between the Teamsters and Yellow. There is nothing inconsistent between the Teamsters recognizing that the NMFA did not authorize a strike during mid-term contract negotiations; and that the Teamsters would issue a strike notice, as authorized by the NMFA, once Yellow's failure to remit contributions jeopardized continued health and

pension coverage for Teamsters' members. Second, in support of their argument for expanding the sham affidavit rule, the Debtors cite to a single unpublished case, *Coit v. Garman*, 812 Fed Appx. 83, (3d Cir. 2020) (Unpublished). *Coit*, however, is not an opinion of the full court that can be treated as binding precedent. See 812 Fed. Appx. 83 n. \*, Third Circuit Internal Operating Procedures 5.3 and 5.7. Nor did *Coit* expand the sham affidavit rule when it instead only held a plaintiff cannot rely on unsupported allegations in his complaint to avoid summary judgment. See 812 Fed Appx. at 87. *Coit* therefore involved the straight forward application of the long standing rule that a party cannot rely on allegations of his complaint to resist a properly supported motion for summary judgment; and has nothing to do with the sham affidavit rule, which only permits a court to disregard later testimony if it both contradicts the witness' *deposition* testimony; and the discrepancy between the two statements is neither supported by record evidence nor otherwise satisfactorily explained. *Orsatti v. New Jersey State Police*, 71 F. 3d 480, 484 (3d Cir. 1995); *Sodeomagic, LLC v. Drexel U.*, 24 F. 4<sup>th</sup> 183, 209 (3d Cir. 2022). Since Murphy's declaration does not contradict any prior sworn testimony, the evidence that it presents including Murphy's strike threat made to Reifsnyder is properly before the Court on summary judgment.

Nor have the Debtors properly disputed Murphy's account of his conversation with Reifsnyder. A party opposing a motion for summary judgment must present affirmative evidence; and cannot rely on the prayer that the finder of fact would discredit its opponent's undisputed evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Debtors' complaints about whether Murphy's account of his conversation with Reifsnyder appear in his previous affidavits go to the weight to be assigned to the evidence; but in this case are irrelevant when the Debtors have not presented any evidence to dispute Murphy's account to create a material factual dispute. Nor can Debtors rely on Hawkins' protestations of surprise at TNFINC strike notice to create a

material factual dispute over Murphy's strike threat to Reifsnyder, since Hawkins' surprise only shows Reifsnyder did not relay Murphy's strike threat to Hawkins, rather than that Murphy never made the strike threat to Reifsnyder. Whether Hawkins was aware of Murphy's strike threat is immaterial to whether Yellow was aware of the strike threat, since the principal (Yellow) is charged with knowledge acquired by the agent (Reifsnyder) in the course of the principal's business. *Curtis, Collins & Holbrook Co. v. U.S.*, 262 U.S. 215, 222 (1923). Tellingly, Debtors have failed to dispute Murphy's account of his strike threat by either presenting a sworn statement from Reifsnyder, or by explaining why they need more discovery to dispute Murphy's account of his strike threat.

Once Murphy made his strike threat to Reifsnyder, it was foreseeable that TNFINC would issue a strike notice in response to threatened loss of health and pension benefits for its members. Yellow cannot draw comfort from its previous dealings with the Teamsters and Funds, because in those previous dealings continued health and pension coverage for Yellow employees was never threatened. For example, in 2020 the Funds agreed to extend coverage as soon as they issued a suspension of benefits notice, thus ensuring Yellow employees would continue to receive benefits without interruption. (D.I. #2778-1, Murphy Decl., Ex. 2; D.I. #4453, pg. 53). Nor can the Debtors create confusion by conflating how TNFINC responded to the threatened loss of health and pension coverage for its membership with collective bargaining negotiations, since Yellow's failure to remit contributions in violation of an existing collective bargaining agreement has nothing to do with negotiations of a new agreement. Nor would any reasonable employer construe Murphy's strike threat as a negotiating tactic since the strike threat was aimed at encouraging Yellow to pay contributions it owed under an existing agreement; and had nothing to do with collective bargaining over One Yellow.

e. Yellow Forfeited the UBC Defense Because Its WARN Notices Were not Issued As Soon as Practicable.

In their most recent summary judgment brief, the Unions argued that Yellow's WARN notice to the Unions were late because Yellow knew by July 18, 2023 that 40% of its shipments were not coming back anytime soon; never had internal discussions about continuing to operate as a smaller company, yet waited 12 days before issuing WARN notices to the Unions on July 30, 2023. (D.I. #4268-1, *Second Supplemental Ho Decl.*, Ex. 35, Pg. 126:18-22; Pg. 124:1-16; 127:10-17; Ex. 36, Pg. 69:10 – 70:7). Since Hawkins never included in his declaration (D.I. #2581) any statements about the prospect of recovering shipments, the Unions had to take the Debtors' deposition to discover that Hawkins immediately realized after TNFINC issued its strike notice that Yellow would become a smaller company for the foreseeable future, and that Yellow never discussed continuing to operate as a smaller company, so that Yellow was doomed as soon as TNFINC issued its strike notice. Debtors cannot dispute the Unions' argument by relying on arguments that the Unions made earlier, before they had the benefit of taking the Debtors' deposition.

The Court should easily reject the Debtors' argument that after TNFINC issued the strike notice, Yellow could have continued to pick up more than 25,000 shipments per day. As Hawkins explained in his deposition testimony:

But you talk to even more people and you see the foundational customers, they've already went through the exercise. They moved their business and they're not coming back, and they have complex supply chains, and right now all they're wanting is to get the freight out of our system that still belongs to them.

(D.I. #4268-1, *Ho Decl.*, Ex. 35, pg. 151:7-13). When asked as of July 18 or 19, 2023 how many shipments he thought Yellow could earn back, Hawkins similarly testified that the company's corporate business equal to 40% was not coming back, and that starting with the remaining 60%

some of the non-corporate business could be earned back. *Id.*, pg. 154:4-23) Hawkins' testimony convincingly demonstrates that by July 18 or 19, 2023, he understood that Yellow was in the process of losing its entire book of corporate business; and given that the company cannot expect to earn back every piece of non-corporate business it was losing, at best Yellow was looking at operating a company that would pick up 20,000 to 25,000 shipments per day.<sup>7</sup> Nor have the Debtors, despite submitting two declarations from Hawkins, identified a single piece of corporate business that was going to stay had Yellow continued to operate after July 30, 2023.

Yellow never seriously considered operating a smaller company that was picking up 20,000 or 25,000 shipments per day. Even though the feasibility of operating a smaller Yellow required considering a number of financial issues, including securing funding for the transition period to a smaller company, and how to reduce Yellow's debt load so that it was commensurate with a smaller company, Yellow's CEO Hawkins never discussed operating Yellow as a smaller company with its CFO Olivier. (D.I. #4268-1, *Second Supplemental Ho Decl.*, Ex. 35, Pg. 124:1-16; 127:10-17; Ex. 36, Pg. 69:10 – 70:7). Nor have the Debtors produced a shred of evidence showing anyone was ever interested in providing financing to a Yellow that was picking up 25,000 or fewer shipments per day. Once the strike notice was issued, and Hawkins realized Yellow's entire book of corporate business was not coming back, Yellow should have issued WARN notices to its employees.

Debtors cannot defeat this analysis by pointing to Hawkins' testimony about the 6-8 week transition period because Hawkins admitted that the 6-8 week number was a hypothetical he threw out during the deposition, rather than something that the Debtors considered in July of 2023. (D.I. #4268-1, Ex. 35, pg. 129:3-6). WARN notice should be issued once a similarly situated employer, exercising its commercially reasonable judgment, should have realized that a mass layoff was more

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<sup>7</sup> Contrary to Yellow's representation to the Court, the Unions' further amended summary judgment brief does not contain any reference to Article 29, Section 1 of the NMFA.

likely than not. *In re AE Liquidation*, 866 F. 3d at 530-531. Regardless of whether Hawkins may subjectively believe Yellow could be saved, a reasonable employer should have realized that its closing was likely when it was losing at least 40% of its business, and it had no serious discussions about how to continue to operate after losing at least 40% of its business. Nor can the Debtors rely on Ducera's discussions with Atlas after July 18<sup>th</sup> to avoid summary judgment when those discussions only concerned the non-union Logistics business; and would not have saved the unionized operations at issue in these WARN Cases. (D.I. #4316-3, *Kaldenberg Decl.*, ¶10). Similarly, even if a union's perspective could be relevant to when a similarly situated employer should have realized a layoff was probable, that the Teamsters discussed with the federal government how to help Teamsters' families could equally mean providing some sort of job loss benefits for displaced Yellow employees and their families, rather than trying to save Yellow; so that any discussions between the Teamsters and the United States government does not suggest Yellow was savable after July 18 or 19, 2023.

Because Yellow should have realized by July 19<sup>th</sup> that a mass layoff of its union employees was probable and admits that it can prepare WARN notices in 4 days, by issuing the notices on July 30<sup>th</sup> Yellow did not give the Teamsters and IAM as much notice as is practicable, as required by §639.9. Failure to give proper shortened notice forecloses the employer from relying on the UBC defense to defend against WARN liability. *Carroll v. World Marketing Holdings, LLC*, 418 F. Supp. 3d 299, 313 (E.D. Wis. 2019). No language in *Carroll* suggests the outcome would be any different depending on how tardy the shortened notice was; so that the Debtors cannot distinguish *Carroll* by arguing its WARN notices were only 7 days late.

4. Debtors' Good Faith Defense to Liability Fails as a Matter of Law.

Under 29 U.S.C. §2102, an employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves WARN notices to its employees. If an employer realizes that it may need to order a plant closing or mass layoff in 60 days, to demonstrate its subjective good faith it must make a reasonably diligent effort to determine whether it must issue notice under WARN. *Castro v. Chicago Housing Authority*, 361 F. 3d 721, 730 (7<sup>th</sup> Cir. 2004) (Once a public employer decided to close its police department, it must make a diligent effort to investigate whether the WARN Act applied to it.)

Similarly, by May of 2023 Yellow understood that it may not be around by August of 2023, so that its obligation to consider whether to issue WARN notices to its employees was triggered. (D.I. #2781-1, Murphy Decl., Ex. 11). Such an evaluation would have included considering how likely its closing must be for WARN notice to be required, whether its closing was sufficiently likely to warrant issuing WARN notices, and whether any affirmative defenses to WARN liability were available. Because the good faith defense focuses on whether an employer in good faith analyzed whether to issue WARN notices to its employees, Yellow's arguments about why it should not have issued WARN notices in May of 2023 are irrelevant to the good faith defense. After all, the good faith defense only applies after an employer is found to have violated the WARN Act, so that an employer cannot demonstrate that it violated the WARN Act in good faith by arguing that it did not violate the WARN Act. 29 U.S.C. §2104(a)(4).

By fixating on when WARN notice should have been issued rather than when it should have considered issuing WARN notices to its employees, Debtors have failed to dispute that (a) by May 2023 Yellow's closing was possible by August 1, 2023; (b) Yellow's obligation to consider whether to issue WARN notices to its employees therefore was triggered by May of 2023; and (c)

Yellow never considered whether to issue WARN notices to its employees in May of 2023. These undisputed facts and conclusions of law establish Yellow cannot demonstrate it acted with subjective good faith to comply with WARN, so that its good faith defense fails.

5. Conclusion.

For the above stated reasons, none of the Debtors' arguments change the appropriate conclusion that each of their defenses to WARN liability fail as a matter of law.

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