IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION

In re: **UNITED FURNITURE INDUSTIRES, INC., aka United Furniture, *aka* Lane Furniture,** **Debtor**	**Chapter 11** **Bankr. Case No. 22-13422-SDM**
TORIA NEAL; JAMES PUGH; and KALVIN HOGAN, on behalf of themselves and all others similarly situated **Plaintiffs,** **v.** **UNITED FURNITURE INDUSTRIES, INC.; DAVID BELFORD individually and as Trustee for SEPARATE PROPERTY TRUST CREATED BY DAVID BELFORD and DAVID A. BELFORD IRREVOCABLE TRUST; and STAGE CAPITAL, LLC** **Defendants.**	**Adv. Proc. No. 23-01005-SDM**

PLAINTIFFS' PRE-TRIAL BRIEF ON APPLICABLE LEGAL STANDARDS FOR TRIAL

COME NOW, Plaintiffs, Toria Neal, James Pugh, and Kalvin Hogan (collectively referred to as "the Class Representatives" or "Class Representatives"), individually and on behalf of the certified classes and subclasses, and files this Pre-Trial Brief on Applicable Legal Standards for Trial. In support thereof, Plaintiffs would show as follows:

LEGAL STANDARDS

1. Fifth Circuit precedent on "single employer" liability.

The federal Workers Adjustment and Retraining Notification Act ("WARN Act") imposes liability on the "employer who orders a plant closing or mass layoff" without giving the required notice. 29 U.S.C. § 2104(a)(1). "To be liable, Defendants must have been Plaintiffs' employer, and they must have ordered the closing or layoff." *Fleming*, 88 F.4th at 294. Although the WARN Act does not directly address when a related entity may be held liable under a single employer theory, the Department of Labor (DOL) has done so via regulation. "The DOL regulations specify 'factors to be considered' in determining whether a related entity is so intertwined with the employer that the two may be considered a single employer, such that the related entity may be liable for the actual employer's WARN Act violation." *Fleming*, 83 F.4th at 295; *see* 20 C.F.R. § 639.3(a)(2). The five factors are: "(1) common ownership; (2) common directors and/or officers; (3) de facto exercise of control; (4) unity of personnel policies emanating from a common source; and (5) the dependency of operations." 20 C.F.R. § 639.3(a)(2).

i. <u>De Facto Control</u>

"This factor considers whether the defendant has specifically directed the allegedly illegal employment practice that forms the basis for the litigation." *Fleming*, 84 F.4th at 297; *Administaff Companies, Inc. v. New York Joint Bd., Shirt & Leisureware Div.*, 337 F.3d 454, 457-58 (5th Cir. 2003). The question of de facto control is of such importance that "liability might be warranted even in absence of the other factors." *Fleming*, 83 F.4th at 299; *Pearson Component Tech. Corp.*, 247 F.3d 471, 504 (3rd 2001). If a Defendant "specifically directed the [mass layoff or plant closing] without proper notice, the [Defendant] may be liable for the [direct employer's] WARN Act violation even absent other factors." *Id.* (internal citations omitted).

ii. <u>Common directors and officers.</u>

"This factor . . . looks to whether the two nominally separate corporations: (1) actually have the same people occupying officer or director positions with both companies; (2) repeatedly

transfer management-level personnel between the companies; or (3) have officers and directors of one company occupying some sort of formal management position with respect to the second company." *Fleming*, 83 F.4th at 297; quoting *Pearson*, 247 F.4th at 498. This factor simply "look[s] only to whether some of the same individuals comprise (or, at some point did comprise) the formal management team of each company." *Id.* In *Fleming*, the presence of independent directors resulted in the alleged single employer never having a majority of the board. *Id.*

iii. Common ownership.

This factor is obviously established where the same person or entity owns the alleged single employers. However, the common ownership factor does not require direct ownership. As the Fifth Circuit explained, "there may be circumstances where a significant financial relationship short of direct ownership nonetheless amounts to common ownership." *Fleming*, 83 F.4th at 296.

iv. Dependency of Operations.

In assessing this factor, courts consider "the existence of arrangements such as the sharing of administrative or purchasing services, interchanges of employees or equipment, and commingled finances." *Administaff Companies, Inc. v. New York Joint Bd., Shirt & Leisurewear Div.*, 337 F.3d 454, 458 (5th Cir. 2003). Some courts consider whether the alleged joint employer "had the right to direct and control the manner in which [the employer's officers] undertook their duties." *Pearson*, 247 F.4th at 501.

2. Cal/WARN Legal Standard

i. The plain language of the statute.

Under Cal/WARN, the phrase "employer" is defined as "any person, as defined by Section 18, who directly or indirectly owns and operates a covered establishment. A parent corporation is an employer as to any covered establishment directly owned and operated by its corporate

subsidiary." Cal. Lab. Code § 1400.5(b). "Employer" is defined by Section 18 as "any ***person***, association, organization, partnership, ***business trust***, limited liability company, or corporation." Cal. Lab. Code § 18 (emphasis added). Thus, under Cal/WARN, an individual or a trust can be deemed an "employer" if it "directly or indirectly owns and operates a covered establishment."

In *Su v. Capital Mailing Services, Inc.*, the California Court of Appeals held that the alleged employer also "qualified as an 'employer' under the Act because the evidence showed that [the alleged employer] was the 'person' who owned and operated CMS during the relevant time period." 2024 WL 4902513, at *5 (Cal. Ct App. Nov. 27, 2024). In reaching this conclusion, the Court did not apply either the five-factor test promulgated by the DOL or the "separate employer" test used in *In re HMR Foods Holding, LP*. Rather, the Court applied the plain language of the definition of "employer" found in Cal/WARN.

ii. "Single employer" test under the Federal WARN Act.

Some courts apply the same test under the Federal WARN Act when analyzing whether a third party can be held liable for Cal/WARN Act violations. *In re AFA Inv., Inc.*, 2012 WL 6544945 at *2; *Austen v. Catterton Partners V, LP*, 709 F. Supp. 2d 168, 170 n.3 (D. Conn. 2010).

iii. The *HMR Foods* Test.

One case has suggested, in dicta, that the WARN Act's "single employer" test does not apply to Cal/WARN claims. *See In re HMR Foods Holding, LP*, 602 B.R. 855, 877 (Bankr. D. Del. 2019). Rather, "single employer" liability under Cal/WARN can only be found if the alleged "single employer" "order[ed] a shut down in violation of the Act." *Id.* (emphasis omitted). In *HMR Foods*, because the subsidiary, rather than the parent company, ordered the shutdown, the court granted the parent company's motion to dismiss. *Id.* at 877–78.

3. Individual liability under the Federal WARN Act.

There is no outright prohibition of individual liability under the WARN Act in the Fifth Circuit. In *Plastisource Workers Committee v. Coburn*, the Fifth Circuit held, "we must reject Coburn's contention that, as a matter of law, an individual can never be held liable for WARN Act violations." 283 Fed.Appx. 181, 186 (5th Cir. 2008). The word "employer" is defined as "any business enterprise that employs (A) 100 or more employees, excluding part-time employees; or (B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime)." 29 U.S.C. § 2101(a)(1). The regulations promulgated by the Department of Labor contain the exact same definition. 29 C.F.R. § 639.3(a)(1). Thus, there is no language in either the statute of the implementing regulations that excludes individuals from the definition of "employer."

While a few courts have held that individuals cannot be held liable for WARN Act violations, most have relied on the faulty assumption that the above Conference Report exhibits Congress's intention to limit "employer" to only corporate entities. However, this is not unanimous. In *Mowat v. DJSP Enterprises, Inc.*, the District Court for the Southern District of Florida held that Stern, an individual, may be held liable as a "single employer" for the alleged WARN Act violation. 2011 WL 13214330, at *3-4 (S.D. Fla. Apr. 28, 2011).

Similarly, in *Marques v. Telles Ranch, Inc.*, the District Court for the Northern District of California held "a sole proprietorship is subject to liability under WARN if it is a 'business enterprise.'" 1994 WL 392232, at *2 (N.D. Cal. June 29, 1994). Notably, the Court rejected *Cruz*'s assumption that Congress intended "business enterprise" to mean "corporate entity." *Id.* n. 1. Rather, the Court stated, "[h]ad Congress intended to exclude all non-corporate business entities, it would have explicitly stated its intention in the statute." *Id.*

Further, a fiduciary, such as a trustee, who "continue[s] to operate the business for the benefit of creditors" succeeds to the WARN obligations of the employer, and therefore, would be liable for any WARN violations. *See* 54 Fed. Reg. 16,045 (1989).

In sum, at least one court has held that an individual can be liable as a "single employer" under the WARN Act. Other courts have held that sole proprietors and "fiduciaries" can be held liable for WARN violations despite their status as individuals.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on March 31, 2025, I filed a true and correct copy of the foregoing through the Court's ECF system which sent notice to all attorneys of record.

DATED: March 31, 2025

/s/ William "Jack" Simpson
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