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

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| In re: | ) | Chapter 7 |
| | ) | |
| ENTERTAINMENT PUBLICATIONS, LLC, | ) | Case No. 13-10496 (CSS) |
| | ) | |
| Debtor. | ) | |
| | ) | |
| LISA M. CZARNIAK, on behalf of herself and all others similarly situated, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Adv. Pro. No. 13-50912 (CSS) |
| | ) | |
| ENTERTAINMENT PUBLICATIONS, LLC, a/k/a ENTERTAINMENT PROMOTIONS, a/k/a ENTERTAINMENT.COM, MH INVESTORS UNITED, LLC, MH PRIVATE EQUITY FUND, LLC, MH-EPI HOLDINGS LLC, and MH INVESTORS ENTERTAINMENT, LLC, | ) | |
| | ) | |
| Defendants. | ) | |

**OPINION**


CROSS & SIMON, LLC
Michael J. Joyce
913 N. Market Street, 11th Floor
Wilmington, DE, 19899-1380
-and-
FREEBORN & PETERS, LLP
James J. Boland
Matthew R. Campobasso
311 South Wacher Drive, Suite 3000
Chicago, IL 60606

Counsel for Defendants

LOIZIDES, P.A.
Christopher D. Loizides
1225 King Street, Suite 800
Wilmington, DE 19801
-and-
OUTTEN & GOLDEN LLP
Jack A. Raisner
René S. Roupinian
3 Park Avenue, 29th Floor
New York, NY 10016

Counsel for Plaintiff and Putative Class


Date: March 12, 2014

Sontchi, J.

## INTRODUCTION[1]

The question before the Court is whether the putative class action plaintiff has alleged plausible facts in support of her assertion that the debtor and certain affiliated non-debtors are a "single employer" under the Worker Adjustment Retraining Notification Act (the "WARN Act"). Prior to the bankruptcy, plaintiff and the similarly-situated class members were employees of the debtor, Entertainment Publications, LLC ("EPI" or the "Debtor"). The non-debtor defendants (collectively, the "MH Entities") allegedly hold direct and indirect interests in EPI. Plaintiff brought this action for a WARN Act violation following EPI's factory shutdown and filing for bankruptcy protection based upon EPI's failure to give 60 days' notice prior to the shutdown. In response, the MH Entities have moved to dismiss the complaint arguing that EPI and the MH Entities are not a single employer under the WARN Act.

As set forth below, the Court finds that plaintiff has not pled facts with enough specificity to show that EPI and the MH Entities are plausibly a "single employer" for WARN Act purposes. Nonetheless, "[t]he Third Circuit has instructed that 'if a complaint is vulnerable to 12(b)(6) dismissal, a district court must permit a curative amendment, unless an amendment would be inequitable or futile.'"[2] Thus, the Court will grant the MH Entities' motion to dismiss without prejudice and provide Plaintiff

[1] "The court is not required to state findings or conclusions when ruling on a motion under Rule 12 . . . ." Fed. R. Bankr. P. 7052(a)(3). Accordingly, the Court herein makes no findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

[2] *Phillips v. Cnty. Of Allegheny*, 515 F.3d 224, 236 (3d Cir. 2008)(citing *Grayson v. Mayview State Hoso.,* 293 F.3d 103, 108 (3d Cir. 2002)).

with leave to file an amended complaint by no later than 28 days from entry of the dismissal order.

## STATEMENT OF FACTS

### I. The Parties

Plaintiff, Lisa M. Czarniak, is a former employee of EPI. She has brought this action against EPI and the MH Entities on behalf of herself and a class of 370 similarly-situation former employees of EPI. The MH Entities are MH Investors United, LLC, MH Private Equity Fund, LLC, MH EPI Holdings LLC, and MH Investors Entertainment LLC. The MH Entities have moved to dismiss the complaint (the "Complaint") based on the contention that they and the debtor are not a "single employer" under the WARN Act.

### II. Factual History

Plaintiff seeks recovery, pursuant to 29 U.S.C. § 2104, of 60 days' wages and benefits from the defendants. In support of its claim that the Debtor and the MH Entities are a single employer and, thus, the MH Entitites are liable for the WARN Act violation, plaintiff has alleged that the MH Entities made the decision that triggered the mass termination of EPI's employees and shut down the plant. Plaintiff has also alleged that the MH Entities withheld information that a proposed acquisition of Debtor had failed until EPI had no option except to file for bankruptcy protection.

Plaintiff has sought an administrative expense claim against "Defendants" pursuant to 11 U.S.C. § 503(b)(1)(A), for unpaid wages, salary, commissions, bonuses, accrued holiday pay, accrued vacation pay, pension and 401(k) contributions and other

COBRA benefits for 60 days.[3] Plaintiff has also sought, pursuant to 29 U.S.C. § 2104(a)(6), an administrative expense claim under section 503 for reasonable attorney's fees and costs and disbursements that plaintiff has incurred in prosecuting this action.[4]

Plaintiff's factual assertions that EPI and the MH entities constitute a single employer are contained in paragraph 13 of the Complaint:

> 13. Debtor subsidiary Entertainment Publications, LLC is a single employer with its non-debtor ultimate parent MHP Equity Fund, LLC and its other Defendant subsidiaries, in that, *inter alia*, it
>
> a) maintained centralized control over payroll and other personnel policies including manner and rates of pay and incentive and benefits programs as described in its motions to this Court;
>
> b) was their majority or sole shareholder and owner;
>
> c) made the decision that triggered the mass layoffs and termination of the Plaintiff and the similarly situated employees without notice, in that principals of MH Private Equity Fund, LLC withheld information from others, including the Debtor, that the proposed acquisition had failed until such a point that it would ensure Debtor's closure and filing for bankruptcy protection; and
>
> d) provided the Defendants subsidiaries with managerial, financial, operational and administrative support which they substantially depended.[5]

The Complaint contains no further allegations relating to the purportedly failed "proposed acquisition" referenced in subparagraph (c) above.

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[3] Compl. ¶ D (Prayer for Relief).

[4] Compl. ¶ E (Prayer for Relief). As the MH Entities are not debtors the Court cannot award plaintiff with an administrative claim against the MH Entities. The Court can enter judgment against the MH Entities and award damages. The Court assumes the latter is what plaintiff seeks. As the Court is dismissing the complaint with leave to amend, in any subsequent complaint plaintiff must accurately specify the relief sought against the MH Entities that does not include an award of an administrative claim against non-debtors.

[5] Compl. ¶ 13.

EPI and the MH Entities dispute plaintiff's claims, stating they are not a "single employer" for WARN Act purposes. They argue that plaintiff has failed to allege any particular facts to support her claims that defendants are a "single employer." Therefore, pursuant to Federal Rule of Civil Procedure 12(b)(6), made applicable to this adversary proceeding by Federal Rules of Bankruptcy Procedure 7012, the MH Entities have moved to dismiss the Complaint. This is the Court's opinion thereon.

## JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). This Court has the judicial power to enter a final order.

## STANDARD OF REVIEW

In weighing a motion to dismiss under Federal Rule 12(b)(6),[6] the Third Circuit has instructed this Court to conduct a two-part analysis. "First the factual and legal elements of a claim should be separated. The [court] must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions."[7] The court "must

[6] Federal Rules of Civil Procedure 8(a) and 12(b)(6) are made applicable to this adversary proceeding pursuant to Federal Rules of Bankruptcy Procedure 7008 and 7012(b), respectively.

[7] *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009). *See also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (holding that a court *must* take the complaint's allegations as true, no matter how incredulous the court may be); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-80 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . When there are well-plead factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."); *Winer Family Trust v. Queen*, 503 F.3d 319, 327 (3d Cir. 2007); and *Carino v. Stefan*, 376 F.3d 156, 159 (3d Cir. 2004). The Court may also consider documents attached as exhibits to the Complaint and any documents incorporated into the Complaint by reference. *In re Fruehauf Trail Corp.*, 250 B.R. 168, 183 (Bankr. D. Del. 2000) (*citing PBGC v. White*, 998 F.2d 1192, 1196 (3d Cir. 1993)). "[I]f the allegations of [the] complaint are contradicted by documents made a part thereof,

then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief."[8] The Third Circuit has further instructed that "[s]ome claims will demand relatively more factual detail to satisfy this standard, while others require less."[9]

## DISCUSSION

### I. The WARN Act

The WARN Act provides that "[a]n employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order" to each affected employee.[10] "The purpose of the WARN Act is to protect workers and their families by providing them with advanced notice of a layoff."[11] An employer, as defined by the WARN Act, is any business entity that employees 100 or more employees.[12] Although the WARN Act does not define "business entity," the Department of Labor provides that "independent contractors and

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the document controls and the Court need not accept as true the allegations of the complaint." *Sierra Invs., LLC v. SHC, Inc. (In re SHC, Inc.)*, 329 B.R. 438, 442 (Bankr. D. Del. 2005). *See also Sunquest Info. Sys., Inc. v. Dean Whitter Reynolds, Inc.*, 40 F. Supp. 2d 644, 649 (W.D.Pa. 1999) ("In the event of a factual discrepancy between the pleadings and the attached exhibit, the exhibit controls." (citations omitted)).

[8] *Fowler*, 578 F.3d at 211 (internal quotations omitted) ("[A] complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts." (citations omitted)). See also *Buckley v. Merrill Lynch & Co., Inc. (In re DVI, Inc.)*, Adv. No. 08-50248, 2008 WL 4239120, *4 (Bankr. D. Del. Sept. 16, 2008) ("The plaintiff must put some 'meat on the bones' by presenting sufficient factual allegations to explain the basis for its claim.").

[9] *In re Ins. Brokerage Antitrust Litig.*, 618 F. 3d 300, 320 n. 18 (3d Cir. 2010) (citations omitted). *See also Arista Records LLC v. Doe*, 604 F.3d 110, 120-21 (2d Cir. 2010) (stating that *Twombly* and *Iqbal* require factual amplification where needed to render a claim plausible, not pleadings of specific evidence or extra facts beyond what is needed to make a claims plausible).

[10] 29 U.S.C. § 2102(a)(1).

[11] *In re Jevic Holding Corp.*, 492 B.R. 416, 424 (Del. Bankr. 2013) (citing 20 C.F.R. § 639.1(a)).

[12] 29 U.S.C. § 2101(a)(1).

subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as part of the parent or contracting company depending upon the degree of their independence from the parent."[13] The single employer doctrine is an exception to the doctrine of limited liability. This regulation allows an employee to seek redress for WARN violations against their employers and the employers' parent companies, which may provide the employee with a larger recovery.

## II. The Single Employer Test

The Third Circuit has adopted the Department of Labor's five factor test to determine whether affiliated corporations can be considered a single employer for WARN Act purposes.[14] The factors to be considered are (i) common ownership, (ii) common directors and/or officers, (iii) *de facto* exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations.[15] These factors guide the Court's fact specific inquiry into whether related entities are a single employer under the statute.[16] These factors, however, "are a nonexhaustive list" and the Court may "consider other evidence, if any, of a functional

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[13] 20 CFR § 639.3(a)(1)(2).

[14] *Pearson v. Component Tech. Corp*., 247 F.3d 471, 478 (3d Cir. 2001). Several other Circuit courts have adopted the five-factor test set forth in *Pearson*. *See, e.g.*, *Administaff Cos., Inc. v. New York Joint Bd., Shirt & Leisurewear Div*., 337 F.3d 454 (5th Cir. 2003); *Childress v. Darby Lumber, Inc*., 357 F.3d 1000 (9th Cir. 2004); and *Coppola v. Bear Stearns & Co., Inc*., 499 F.3d 144, 150 (2d Cir. 2007) ("Of course, the DOL factors may be relevant to the question of whether the entities' relationship is in fact that of parent and subsidiary rather than debtor and creditor...."). *See also Vogt v. Greenmarine Holding, LLC,* 318 F. Supp. 2d 136, 142 (S.D.N.Y. 2004).

[15] *Pearson*, 247 F.3d at 483.

[16] *Id*. at 498 ("In deciding that the [five] DOL factors are appropriate . . . we also hold that the application of these factors is a 'factual' question rather than a 'legal' one.").

integration between the two nominally separate entities."[17] Finally, no one factor is controlling and all factors need not be present for liability to attach.[18]

**a) Common Ownership**

Plaintiff's allegations of common ownership contained within the Complaint are sparse at best. The Complaint identifies each of the "MH Entities" (MH Investors United, LLC, MH Private Equity Fund, LLC, MH EPI Holdings LLC, and MH Investors Entertainment LLC ) by name, state of incorporation and address.[19] The Complaint further alleges that MH Private Equity Fund, LLC ("MH Private Equity") is the non-debtor ultimate parent of the Debtor.[20] Although it is not clear, it appears that the Complaint alleges that MH Private Equity is the "majority or sole shareholder and owner" of the Debtor.[21] Finally, the Complaint alleges that the other MH Entities are subsidiaries of MH Private Equity but does not allege that the entities are direct or indirect parents of the Debtor.[22]

Courts have held that common ownership can be established by an allegation that a defendant owns 100% of the stock of a company, which, in turn, owns the stock of the debtor for which the fired employees worked.[23] However, other courts have found

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[17] *Id.* at 495.

[18] *Id.* at 491.

[19] Compl. ¶¶ 7-11.

[20] *Id.* at ¶ 13.

[21] *Id.*

[22] *Id.*

[23] *See, e.g., Austen v. Catterton Partners V, LP,* 709 F. Supp.2d 168, 175 (D. Conn. 2010).

that common ownership factor only applies to the direct owners of the debtor, not any indirect owners.[24]

Judge Shannon recently addressed the single employer test under the WARN Act on cross motions for summary judgment in the case of *In re Jevic Holding Corp.*[25] In that case, plaintiff met its burden on summary judgment as to the common ownership factor by providing the Court with specific evidence, including a flow chart the Court found very helpful. The record in that case established that the main target in the litigation - non-debtor defendant Sun Capital Partners, Inc. ("Sun Cap") - owned 100% of the equity in non-debtor Sun Transportation, LLC, which wholly owned debtor Jevic Holding Corp. (both Sun Transportation and Jevic Holding were holding companies created for Sun Cap's acquisition of the debtors). Moreover, the record showed that Jevic Holding Corp. wholly owned the operating company and co-debtor, Jevic Transportation, Inc. Based upon this evidence, the court found that "as a direct parent corporation of the Debtor there is no dispute that common ownership exists."[26]

As is readily apparent from a review of the *Jevic* decision, plaintiff's allegations in this case, even under a motion to dismiss standard, are woefully deficient. The sole

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[24] *See, e.g.*, *Vogt,* 318 F. Supp. 2d at 142 ("The corporate family tree described by plaintiffs, once the branches are untangled, reveals that only three defendants are alleged actually to own shares in OMC directly. Plaintiffs assert that defendant investment companies Greenmarine, Greenlake II, and QIP own 62.5%, 7.9%, and 25.3% respectively, of the shares in OMC. None of the six other defendants are alleged to directly own any stock in OMC. Rather, they are investment vehicles that own interests in Greenmarine, Greenlake II, and QIP. Reading the facts in the light most favorable to the plaintiffs, because Greenmarine, Greenlake, and QIP together own a majority of shares in OMC, common ownership is established as to those companies. **Because the other defendant companies are at best grandparents of OMC, plaintiffs have not alleged "common ownership" as to those companies**.") (emphasis added).

[25] 492 B.R. 425 (Bankr. D. Del. 2013).

[26] *Id.* at 425.

factual assertions are that MH Private Equity is the "non-debtor ultimate parent" and/or the "majority or sole shareholder and owner" of the Debtor. While the Complaint alleges that the other MH Entities are subsidiaries of MH Private Equity it does not allege that the entities are direct or indirect parents of the Debtor. Thus, plaintiff has failed to assert a plausible claim that the Debtor and the MH Entitites, including, MH Private Equity, share common ownership.

**b) Common Directors and/or Officers**

Plaintiff's allegations relating to whether the Debtor and the MH Entities share common directors and/or officers is even sparser than those related to common ownership. The Complaint states that the defendants "shared common officers and directors."[27] In addition, it is alleged that MH Private Equity "provided the Defendants subsidiaries with managerial, financial, operational and administrative support on which they substantially depended."[28]

"This factor [of the single employer test] examines whether two 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.'"[29] Importantly,

[27] Compl. ¶ 29(b).

[28] *Id.* at ¶ 13(d). It is not entirely clear from the grammatical structure of the sentence but it appears that Plaintiff alleges that MH Private Equity provided the other MH Entities and the Debtor with managerial, etc. support upon which the other MH Entities and the Debtor relied.

[29] *Id.* at 425 (quoting *Pearson*, 247 F.3d at 498).

"common ownership coupled with common management, without more, is an insufficient basis for liability under the WARN Act."[30]

The insufficiency of Plaintiff's allegations are readily apparent upon comparison with the detailed allegations in a complaint in another case that, nonetheless, did not satisfy this factor. In *Woolery v. Matlin Patterson Global Advisers, LLC*, the plaintiff brought a class action WARN Act asserting single employer liability against various associated entities in the private equity business (the "Matlin Enitities") that were the majority owners of the debtor ("Premium") through its holding company ("PPP Holdings" and, collectiviely with Premium, the "PPP Entities").[31] The complaint in *Woolery* "names names" and contains detailed allegations as to the identity and role of the various individuals that were involved with both the PPP Entities and the Matlin Entities. For example, the complaint (as described in the court's opinion) alleged that:

> The PPP Operating Agreement designated complete control of the PPP Holdings Board of Directors to [the Matlin Entities, which] appointed the following individuals to the Board: Peter Schoels, Michael Watzky, Raphael Posner, and Doug Yakola. These individuals occupied "positions on the management team" of [the MH Entities] while maintaining their respective roles with the PPP Entities. Mark Chodock, a Matlin partner, was primarily responsible for making decisions concerning the PPP Entities for [the MH Entities]. When [the MH Entities] purchased the [PPP] Entities, Steve Sands was the President of Premium and Chairman of the Board. Chodock demoted Sands to Secretary, installed Scott Vuchetich as the new President and Treasurer, and required Sands to act at Chodock's specific direction. Chodock also installed Kevin Yost as CEO, terminated Mike Gager, the manager of the Hastings facility, hired Ronald

[30] *Id.* 426 n. 27.

[31] *Woolery v. Matlin Patterson Global Advisers, LLC*, C.A. 12-726-RGA, 2013 WL 1750429 (D. Del. Apr. 23, 2013). Plaintiff also brought a state law claim under Nebraska's equivalent to the WARN Act. The state law claim was dismissed because Nebraska law does not contemplate single employer liability. *Id.* at *6-7.

> Gould to replace Gager as both the Plant and Regional Manager, and also made Gould COO of Premium.[32]

Despite these detailed allegations, however, the plaintiff in *Woolery* did not sufficiently allege "the presence of common *directors* or *officers*."[33]

> Plaintiffs allege that Schoels and Yakola occupied positions on the "management team" of one or more of the Matlin Entities while also members of PPP Holdings and directors of Premium, but the allegations as to those two individuals do not specify their exact roles with Defendants and are thus not sufficiently alleged. . . They also allege that Raphael Posner was a "Senior Advisor" and "Inside Legal Counsel" at Defendants MP Advisers while also serving as a member of PPP Holdings and on the board of Premium . . . [but] inside counsel or senior advisor positions is not the type of "high level management position" sufficient to satisfy the common director or officer factor.[34]

This left "Watzky as the only sufficiently identified individual common to the formal management of the companies."[35] There were, however, issues of law as to whether Watsky's could qualify as a common director or officer as he was a partner in one or more of the Matlin Entities and Premium was an LLC and, thus, did not have a board of directors.[36] The court did not resolve those legal issues as it found that "the presence of only a single overlapping individual with overlapping management roles between the companies is not sufficient" to satisfy the common director and officer factor of the single employer test.[37]

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[32] *Id.* at *1 (internal citations omitted).

[33] *Pearson*, 247 F.3d at 498 (emphasis in original).

[34] *Woolery* at *5.

[35] *Id.*

[36] *Id.*

[37] *Id.*

The contrast between the detailed allegations in *Woolery* and the conclusory allegations here are striking. While the plaintiff in *Woolery* was unable to satisfy the common directors or officers factor it was not for a lack of specificity in the pleading. Rather, it was a question of substance – the detailed allegations simply did not meet the legal criteria. In this case, the allegations are so lacking in sufficiency that the Court cannot even begin to address the issue of whether there are common directors or officers on the merits. Therefore, Plaintiff has failed to assert a plausible claim that any of the defendants share one or more common directors or officer.

**c) *De Facto* Exercise of Control**

Plaintiff alleges in the Complaint that "[a]ll of the Defendants exercised *de facto* control over the labor practices governing the Plaintiff and Class Members, including the decision to order the mass layoff closing at the Facilities."[38] The Complaint also contains three additional allegations as to MH Private Equity's exercise of *de facto* control over the Debtor. More specifically, plaintiff alleges that MH Private Equity:

> a) maintained centralized control over payroll and other personnel policies including manner and rates of pay and incentive and benefits programs as described in its motions to this Court;
>
> . . .
>
> c) made the decision that triggered the mass layoffs and termination of the Plaintiff and the similarly situated employees without notice, in that principals of MH Private Equity Fund, LLC withheld information from others, including the Debtor, that the proposed acquisition had failed until such a point that it would ensure Debtor's closure and filing for bankruptcy protection; and

[38] Compl. ¶ 29(c).

d) provided the Defendants subsidiaries with managerial, financial, operational and administrative support which they substantially depended.[39]

The question under this factor of the single employer test is whether "the parent or lender was the decisionmaker [sic] responsible for the employment practice giving rise to the litigation."[40] Put another way, "the '*de facto* exercise of control' prong allows the factfinder [sic] to consider whether the parent has specifically directed the allegedly illegal employment practice that forms the basis for the litigation."[41] It is "not intended to support liability based on a parent's exercise of control pursuant to the ordinary incidents of stock ownership. Nor may this factor be used to create liability for a lender's general oversight of its collateral."[42] Importantly, however, "because the balancing of the factors is not a mechanical exercise, if the *de facto* exercise of control was particularly striking - for instance, were it effectuated by 'disregard[ing] the separate legal personality of its subsidiary,' - then liability might be warranted even in the absence of the other factors."[43]

This is a factually based inquiry that must rest on particularized allegations, which are lacking here. As with the question of common directors or officers, it is particularly striking to compare the vague allegations in the Complaint with the facts in

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[39] Compl. ¶ 13.

[40] *Pearson*, 247 F.3d at 503-04.

[41] *Id.* at 491.

[42] *Id.* at 503.

[43] *Id.* at 504. *See also, Woolery* at *3 ("[T]he *de facto* exercise of control factor is a special factor . . . [that] best encapsulates the Third Circuit's view that courts should 'take a more functional approach ... by focusing on the nature and degree of control possessed by one corporation over another' when undertaking the single employer analysis.") (internal citations omitted).

those cases where the court found that a defendant *did not* have *de facto* control over the debtor. For example, in *Pearson*, the debtor, CompTech, was alleged to be under the *de facto* control of its lender, GECC. After CompuTech defaulted on its loan, GECC (i) exercised its right to install a new board of directors for CompTech; (ii) hired a consultant who served as CEO of CompTech; (iii) obtained (through amendments to the loan agreement) control over whether CompTech could borrow additional money, reorganize its stock, conduct any mergers or acquisitions, or hire employees with salaries in excess of $100,000; and (iv) "exercised continuing oversight of [CompTech's] finances pursuant to the loan agreement, occasionally agreeing to waive penalties and extend further loans to the cash-strapped company."[44] Moreover, CompTech sought GECC's approval of many decisions, including executive compensation and sale of equipment, while providing GECC with updates of its financial condition.[45] Finally, CompTech's CEO who was installed by GECC stated that he was "prepared to do whatever G.E. wants relative to CompTech."[46] Nonetheless, the Third Circuit did not find the foregoing to establish GECC's *de facto* control over CompTech but was only "given pause by the extent of GECC's involvement in the decision to close the plant."[47]

The Third Circuit reviewed the detailed allegations relating to the shutdown.

> CompTech was kept operational for three years solely as a result of GECC's own decision to hold on to CompTech and ensure the company's return to profitability. During this time, CompTech was almost always

[44] *Id.* at 479-80.

[45] *Id.* at 480.

[46] *Id.*

[47] *Id.* at 504.

> behind in its payments to GECC, and was only able to survive by GECC's extension of due dates and additional financing. Therefore, for three years, GECC was aware that its funding was the only thing keeping a troubled company afloat. It continued to invest, but when it finally concluded that CompTech could not be saved, it immediately made the decision ... [not to refuse to loan additional capital], but instead to "liquidate the company"—thus forcing CompTech to close its doors two weeks later. The decision is thus arguably less like a subsidiary's independent choice to terminate its business in the face of severe cash constraints than like the decision of a WARN Act employer to close a single site of its operations."[48]

Nonetheless, the Third Circuit concluded that CompTech was "an independent entity seeking further capital rather than as a branch of GECC operating under GECC's direction" and while the distinction between calling a loan (or refusing further advances) and shutting down a company is a fine one, the facts weighed in favor of finding no *de facto* control by GECC.[49]

Similarly, in *Jevic*, the court granted summary judgment on behalf of the debtors' ultimate parent, Sun Cap, finding that Sun Cap did not exercise *de facto* control over the debtor. The *Jevic* court found the facts in *Pearson* to be analogous to those before it, although, as a practical matter GECC exerted even more control in *Pearson* than Sun Cap was alleged to have done in *Jevic*.[50] The court found that the debtors "could not operate without funding from their parent, Sun Cap, and were in fact considering filing for bankruptcy before Sun Cap's acquisition of [Jevic Transportation]. Just as in *Pearson,* Sun Cap installed two of its officers on the board of directors of Jevic Holding Corp.

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[48] *Id.*

[49] *Id.* at 504-05.

[50] *Jevic*, 492 B.R. at 427.

Similarly, Sun Cap brought in Brian Cassady to provide financial, operational, and restructuring consulting services for the Debtors."[51]

The court found that Sun Cap did not exercise *de facto* control over the debtors for numerous reasons.[52] For present purposes, however, the holding can be succinctly stated.

> Although the Debtors were under some oversight by Sun Cap, the Court finds the level of oversight to be significantly lower than in *Pearson* where GECC required approval of many CompTech decisions. More importantly, however, Sun Cap was not involved in the decision to terminate employees or shutdown facilities. The only reason that the court in *Pearson* was "given pause" was because GECC made the decision to liquidate the company, "thus forcing CompTech to close its doors two weeks later." Even still, the Third Circuit found no "*de facto* exercise of control" of the debtor by GECC.
>
> Here, no Sun Cap personnel were involved in the day-to-day operations of the Debtors, including the hiring and firing of employees. It is undisputed that no one affiliated with Sun Cap requested or directed that employees of Jevic be terminated. Jevic had senior management discussions about whether to issue WARN Act notices where no Sun Cap employees were present, and Jevic management relied on its [own consultant] for legal and bankruptcy advice.[53]

Finally, in those instances where courts have found that a parent or lender has exercised de fact control over a debtor the allegations have been detailed. For example, in *Woolery*[54] and *Vogt,*[55] the plaintiffs named dual directors, their specific roles, the actions they took that lead to complaints.

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[51] *Id.* at 427-28.

[52] *Id.* at 427-29.

[53] *Id.* 428 (internal citations omitted).

[54] 2013 WL 1750429 at *1, *2, *6.

[55] 318 F. Supp. 2d at 138-39.

Here, Defendants alleged that Plaintiff did not provide any information pertaining to the names of directors, their roles in each organization, or specific actions they took that lead to the complaint. Indeed, plaintiff has failed to support her allegations with any specific actions taken by any of the MH Entities or any affiliated individuals. There are no detailed allegations as to how the MH Entities were responsible for making the decision to terminate employees or shutdown the business and file for bankruptcy. Also, no MH Entities personnel are alleged to have been involved in the day-to-day operations of the debtors.

Therefore, plaintiff failed to allege plausible facts that would lead to a conclusion that any of the MH Entities exercised *de facto* control over the Debtor.

**d) Unity of Personnel Policies Emanating from a Common Source**

Plaintiff has alleged that MH Private Equity Fund, along with the other MH Entities, "maintained centralized control over payroll and other personnel policies including manner and rates of pay and incentive and benefits programs as described in its motions to this Court."[56] When considering this factor the test is "whether the companies actually functioned as a single entity with regard to its relationships with employees."[57] When answering this question, "courts consider, 'whether the two companies in question engaged in centralized hiring and firing, payment of wages, and personnel and benefits recordkeeping.'"[58]

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[56] Compl. ¶ 13.

[57] *Pearson,* 247 F.3d at 499.

[58] *In re Jevic*, 492 B.R. at 430 (citing *In re APA Transp. Corp.,* 541 F.3d at 245 (3d Cir. 2008)).

In *Jevic*, the plaintiff alleged that Sun Cap shared incentive programs with the debtors. The court found that "this allegation, taken as true, is not enough to show that Sun Cap was a 'single employer' under the WARN Act" because the Third Circuit has previously held that "evidence of sharing certain benefit plans and some employee monitoring functions is not enough to find that the two companies functioned as a single entity."[59] Here, Plaintiff has failed to allege any specific facts that would support her conclusory statement that the MH Entities and EPI shared personnel policies emanating from a common source.

**e) Dependency of Operations**

Plaintiff has alleged that MH Private Equity "provided the Defendants subsidiaries with managerial, financial, operational and administrative support which they substantially depended." When considering whether a debtor's operations depend upon a parent or lender, the Court must consider "the existence of arrangements such as the sharing of administrative or purchasing services, interchanges of employees or equipment, and commingled finances" [60] "Dependency of operations cannot be established by the parent corporation's exercise of its ordinary powers of ownership."[61] Even loans from a parent to a subsidiary "cannot be sufficient to satisfy this prong."[62] The Third Circuit has decided they, "surely do not want to discourage companies from attempting to keep their subsidiary operations afloat with temporary loans by holding

[59] 492 B.R. at 431-32 (citing *In re APA Transp. Corp.*, 541 F.3d at 245).

[60] *Pearson*, at 500.

[61] *Id.* at 501.

[62] *In re Jevic*, 492 B.R. at 432 (citing *Pearson*, at 503).

that the mere fact that loans were even necessary establishes a 'dependency of operations' giving rise to liability."[63]

Again, plaintiff has accurately referenced the rule, but has not alleged plausible facts to show that the MH Entities have centralized control over the debtor. Nor has plaintiff alleged the MH Entities were involved in the day-to-day operations of the debtor's business.

**f) Conclusion**

Plaintiff failed to sufficiently plead facts to satisfy any of the five elements to the "single employer" test. While not all factors need be met for the Court to make a finding that defendants are a "single employer" the failure to establish any of the elements certainly spells doom for the claim. Therefore, none of the MH Entities are a "single employer" with EPI for WARN Act purposes.

**CONCLUSION**

As stated above, the Court finds that plaintiff has failed to allege facts that support a plausible claim that any of the MH Entities are a "single employer" with EPI for WARN Act purposes. Thus, plaintiff's claims against the MH Entities must be dismissed under Rule 7012(b)(6) for failure to state a claim upon which relief may be granted. Nonetheless, the Third Circuit has instructed that if a complaint is vulnerable to 12(b)(6) dismissal, a district court must permit a curative amendment, unless an amendment would be inequitable or futile.[64] Thus, the Court will grant the MH

[63] *Pearson*, 247 F.3d at 503.

[64] *Phillips*, 515 F.3d at 236.

Entities' motion to dismiss without prejudice and provide Plaintiff with leave to file an amended complaint by no later than 28 days from entry of the dismissal order.

An order will be issued.