IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

KEITH REED, LISA DOLENCE,
ELIZABETH SCHENKEL,
EMILY WINES, MARK GARAN
CHRISTINA LUCAS, and **AUGUST ULLUM, II,**
individually and on behalf of others similarly situated,

Plaintiffs,

v.

CIVIL ACTION NO. 5:19-CV-263
Judge Bailey

ALECTO HEALTHCARE SERVICES, LLC, and
ALECTO HEALTHCARE SERVICES
WHEELING, LLC, d/b/a Ohio Valley Medical Group d/b/a OVMC Physicians,

Defendants.

ORDER RESOLVING MOTIONS

Pending before this Court are the following motions:

1. Plaintiffs' Motion for Summary Judgment [Doc. 163]; and

2. Defendants' Motion for Summary Judgment [Doc. 165].

All the above motions have been fully briefed and are ripe for decision.

I. BACKGROUND[1]

This case arises out of the closure of Ohio Valley Medical Center ("OVMC") in Wheeling, West Virginia. Plaintiffs bring this action pursuant to the Worker Adjustment and Retraining Notification Act ("the WARN Act"), 29 U.S.C. § 2101 *et seq.*, alleging violations thereof. Specifically, plaintiffs contend that Alecto Healthcare Services, LLC ("AHS") and Alecto Healthcare Services Wheeling, LLC ("AHSW") (hereinafter collectively "defendants") violated the notice provisions of the WARN Act. In doing so, plaintiffs allege that AHS and AHSW operated as an integrated enterprise. *See* [Doc. 37 at 2]. Plaintiffs further aver that whether defendants comprise a "single employer" or a "single enterprise" under applicable legal authority is an issue in this matter. *See* [Id. at 5]. Defendants deny plaintiffs' allegations and maintain that it complied with all applicable laws in the closing of OVMC.

AHS is a Delaware Limited Liability Company based in Irvine, California. *See* [Doc. 39]. AHS has a principal place of business of 101 N. Brand Boulevard, Suite 1780, Glendale, California, 91203.

AHSW is a Delaware Limited Liability Company. *See* [Id.]. AHSW has a principal place of business of 101 N. Brand Boulevard, Suite 1780, Glendale, California, 91203. Plaintiffs aver that AHSW has principal offices in Wheeling, West Virginia, and was formed in connection with AHS's acquisition of certain assets of Ohio Valley Health Services and Education Corporation ("OVHSE"). *See* [Doc. 37].

OVHSE previously owned and operated OVMC in Wheeling, West Virginia. *See* [Doc. 39]. Subsequently, AHSW became the owner of OVMC and continued

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[1]The Background Section is taken verbatim from this Court's Order Granting Motion to Certify Class. *See* [Doc. 175].

operating the same. *See* [Docs. 39 & 66]. AHS is 80% owner of Alecto Healthcare Services Ohio Valley ("AHSOV"); MPT of Wheeling – Alecto Hospital LLC is 20% owner of AHSOV.[2] *See* [Doc. 66 at 4]. AHSOV is the sole member of AHSW, which is the owner of the hospital formerly known as OVMC. *See* [Id.].

This action was commenced on September 9, 2019. *See* [Doc. 1]. Plaintiffs filed an Amended Complaint on August 24, 2020. *See* [Doc. 37]. In the Amended Complaint, plaintiffs assert one count against defendants: Violation of the WARN Act. *See* [Id. at 7]. Plaintiffs specifically allege that:

1. Plaintiffs and putative Class members are "affected employees" under 29 U.S.C. § 2101(a)(5);
2. Defendants are "employers" under 29 U.S.C. § 2101(a)(1)
3. Defendants ordered a "plant closing" under 29 U.S.C. § 2101(a)(3); and
4. Defendants failed to provide plaintiffs and the proposed Class with 60-days' written notice, as required by the WARN Act.

See [Id. at ¶¶ 37–40]. For relief, plaintiffs seek this Court to declare this action a class action under Federal Rule of Civil Procedure 23; appoint proposed Class counsel; approve proposed Class notice; find and declare that defendants violated the WARN Act; award plaintiffs and the proposed Class 60-days' back pay and benefits; award plaintiffs and the proposed Class pre- and post-judgment interest; award plaintiffs and the proposed Class reasonable attorneys' fees and costs; and award any other relief as this Court may deem just and proper. *See* [Id. at 7–8].

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[2] Neither AHSOV nor MPT of Wheeling – Alecto Hospital LLC are parties to this litigation.

On August 8, 2019, defendants filed a notice with the West Virginia Dislocated Worker Unit, announcing that OVMC would cease operations on October 7, 2019, affecting 736 employees. *See* [Doc.37-1]. In a press release dated August 7, 2019, defendants announced that OVMC had begun closing its operations

> after a thorough evaluation of all available options, losses or more than $37 Million over the past two years, and an exhaustive but unsuccessful search for a strategic partner or buyer. . . .

See [Doc. 37-2]. The press release further stated that the closure process for facilities like OVMC "typically takes 60 to 90 days and . . . OVMC . . . will share a definitive timeline with all interested parties in the coming days. *See* [Id.].

Less than a month later, defendants announced that "at 11:59pm on September 4, 2019," OVMC would "suspend Acute and Emergency Medical services." *See* [Doc. 37-3]. Plaintiffs allege that on September 3, 2019, defendants told OVMC employees not to report after September 5, 2019, except for a handful of employees needed for a few days to pack. *See* [Doc. 37 at ¶ 20]. Moreover, plaintiffs allege that defendants advised managers that most employees' work hours would be reduced to zero by September 6, 2019. *See* [Id.].

After multiple scheduling order amendments, plaintiffs filed a Motion to Certify Class on April 7, 2022. *See* [Doc. 123]. Thereafter, both parties filed Motions for Summary Judgment. *See* [Docs. 163 & 165]. This Court held a Class Certification Hearing on July 25, 2022. *See* [Doc. 147]. On July 27, 2022, this Court granted plaintiffs' Motion to Certify Class. *See* [Doc. 175].

II. MOTIONS FOR SUMMARY JUDGMENT

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The party seeking summary judgment bears the initial burden of showing the absence of any genuine issues of material fact. *See* ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322–23 (1986). If the moving party meets this burden, the nonmoving party "may not rest upon the mere allegations or denials of its pleading, but must set forth specific facts showing there is a genuine issue for trial." ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248 (1986). A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." ***Id.*** "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." ***Id.*** at 250.

In reviewing the supported underlying facts, all inferences must be viewed in the light most favorable to the party opposing the motion. *See* ***Matsushita Elec. Indus. Co. v. Zenith Radio Corp.***, 475 U.S. 574, 587 (1986). Additionally, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." ***Id.*** at 586. That is, once the movant has met its burden to show absence of material fact, the party opposing summary judgment must then come forward

with affidavits or other evidence demonstrating there is indeed a genuine issue for trial. Fed. R. Civ. P. 56©; ***Celotex Corp.***, 477 U.S. at 323–25; ***Anderson***, 477 U.S. at 248. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." ***Anderson***, 477 U.S. at 249 (citations omitted). Although all justifiable inferences are to be drawn in favor of the non-movant, the non-moving party "cannot create a genuine issue of material fact through mere speculation of the building of one inference upon another." ***Beale v. Hardy***, 769 F.2d 213, 214 (4th Cir. 1985). Further, "the plain language of Rule 56© mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." ***Celotex Corp.***, 477 U.S. at 322.

When faced with cross-motions for summary judgment, a district court is not required to grant judgment as a matter of law for one side or the other; rather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration. Wright, Miller, & Kane, *Federal Practice and Procedure:* Civil 2d § 2720.

B. The WARN Act

To prove a WARN Act violation, a plaintiff must show that: (1) the defendant was "an employer"; (2) the defendant ordered a "plant closing" or "mass layoff"; (3) the defendant failed to give employees 60-days notice before the closing or layoff; and (4) the plaintiff is an "aggrieved" or "affected" employee. 29 U.S.C. §§ 2102, 2104. If a plaintiff makes these showings, the employer may avoid liability by proving as an affirmative

defense that it qualifies for one of the Act's three exceptions: the "faltering company" exception; the "unforeseen business circumstances" exception; or the "natural disaster" exception. 29 U.S.C. § 2102; 20 C.F.R. § 639.9.

The WARN Act requires that an employer provide sixty (60) days notice to employees who would be affected before ordering a mass layoff or a plant closing. 29 U.S.C. § 2101(a). In the absence of such notice, the employees are entitled to

> (A) back pay for each day of violation at a rate of compensation not less than the higher of—
>
> (I) the average regular rate received by such employee during the last three years of the employee's employment; or
>
> (ii) the final regular rate received by such employee; and
>
> (B) benefits under an employee benefit plan described in section 1002(3) of this title [referring to the Employment Retirement Income Security Act] including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

"When a company fails to provide sufficient notice, the Act allows individual employees suffering an employment loss to bring suit to recover unpaid wages and other benefits for each day of a violation. *See* 29 U.S.C.A. § 2104(a). The Act calculates an employer's liability for violations on the basis of the number of days of the violation, reduced by 'any wages paid by the employer to the employee,' but not reduced by wages the employee may earn from a new employer." ***Long v. Dunlop Sports Group Americas,* Inc.** 506 F.3d 299, 201 (4th Cir. 2007); *see also* 29 U.S.C.A. § 2104(a)(2)(A).

C. Plaintiffs' Motion for Summary Judgment

Plaintiffs filed a Motion for Summary Judgment and accompanying memoranda [Docs. 163 & 164] on July 8, 2022. Therein, plaintiffs move for summary judgment on the sole count in the Amended Complaint: violation of the WARN Act. In support, plaintiffs assert that defendants' "2019 decision to close [OVMC] without providing Plaintiffs and hundreds of other affected employees with the 60-days advance notice violated the [WARN Act]. . . ." *See* [Doc. 163 at 1]. Plaintiffs assert five (5) arguments in support of their Motion for Summary Judgment.

First, plaintiffs assert that defendants are "employers" covered by the WARN Act. *See* [Doc. 164 at 11–13]. Plaintiffs state they can establish that defendants "together constitute a single employer subject to the WARN Act" because each of the five factors delineated in the WARN Act ("DOL Factors") support that finding. *See* [Id. at 12].

Second, plaintiffs argue that the OVMC shutdown was a plant closing that triggered class entitlement to notice. *See* [Id. at 13–14]. Plaintiffs assert that defendants ordered a plant closing on September 4, 2019, when OVMC was shut down. *See* [Id.].

Third, plaintiffs argue that they suffered an "employment loss." *See* [Id. at 14–17]. Plaintiffs assert that based on undisputed interrogatory answers, hospital census, and payroll records establish that "there were 726 OVMC employees as of August 2019 to whom Defendants sent the Aug. 8, 2019, letter informing them of OVMC's closure and their expected employment loss. . . . Of these, Defendants' pay records establish that only 29 continued to work past Oct. 8, 2019 . . . and only that small group could have had 60 or more days' notice of the hospital closure before separation." *See* [Id. at 14]. Moreover,

plaintiffs argue that "the fact that some employees left after Defendants prematurely ordered a plant closure, cut their hours, and laid them off does not establish a 'voluntary departure' outside the protection of the WARN Act." *See* [Id. at 15].

Fourth, plaintiffs argue they did not receive statutorily-sufficient notice. *See* [Id. at 17–18]. Plaintiffs assert that "the notice given was defective and insufficient." *See* [Id. at 17]. Plaintiffs state that the letters "do not specify a termination date or bumping rights and were not based on 'best information available.'" *See* [Id.].

Fifth, plaintiffs assert damages can be proved on a Class-wide basis from defendants' records. *See* [Id. at 18–19]. Plaintiffs argue defendants pay and timekeeping records reflect the last date each affected employee actual worked, as well as hours worked, wage rate, and paid time off in summer and fall 2019. *See* [Id. at 18]. Moreover, defendants also produced documents for each affected employee indicating the average weekly hours, full/part time status, formal date of separation and reason for separation. *See* [Id.]. Because of the information already produced by defendants, plaintiffs argue the Class members' identities can be ascertained, and their damages calculated, from defendants pay and timekeeping records.

a. Defendants' Response in Opposition

Defendants filed a Response in Opposition [Doc. 170] on July 22, 2022. Therein, defendants argue that plaintiffs' Motion is "predicated upon demonstrably incorrect facts regarding the acquisition, operation, and closure of [OVMC]." *See* [Doc. 170 at 1]. Defendants assert that by plaintiffs relying on these incorrect facts, their argument fails as a matter of law. *See* [Id.]. Moreover, defendants argue that plaintiffs do not satisfy their

burden of proving several key elements of their sole WARN Act claim, "including single employer status, noncompliant notice, or that Plaintiffs suffered 'employment loss' or a 'plant closing' prior to October 7, 2019." *See* [Id.].

b. Plaintiffs' Reply

Plaintiffs filed a Reply [Doc. 177] on July 29, 2022. Therein, plaintiffs re-assert the arguments made in their Motion for Summary Judgment. Plaintiffs again touch on four (4) arguments:

(1) There is no genuine issue of material fact that defendants constitute a "single employer" subject to the WARN Act. *See* [Doc. 177 at 4–5].

(2) There is no genuine issue of material fact that defendants' WARN Act Notice was deficient. *See* [Id. at 5–7].

(3) There is no genuine issue of material fact that plaintiffs suffered an employment loss when defendants closed OVMC. *See* [Id. at 7–9].

(4) Defendants failed to carry their burden to create an issue of fact that they are entitled to the "faltering business" defense or the good faith exception. *See* [Id. at 9–11].

D. Defendants' Motion for Summary Judgment

Defendants filed a Motion for Summary Judgment and accompanying memoranda [Doc. 165 & 166] on July 8, 2022. Therein, defendants argue there is no genuine issues of material fact and defendants are entitled to judgment as a matter of law. Defendants advance five (5) arguments in support of their Motion for Summary Judgment.

First, defendants argue AHS is not plaintiffs' employer, as the term is defined by the WARN Act. *See* [Doc. 166 at 8–16]. Defendants assert that all five Department of Labor ("DOL") Factors weigh against finding AHS to be a single employer with AHSW. *See* [Id. at 16]. Defendants argue that "AHS did not exercise control over AHSW beyond what is customary for a 'grandparent' entity. . . ." *See* [Id.].

Second, defendant AHSW argues, as the employer of plaintiffs, it sent compliant WARN notices to all required recipients, including all affected employees, the chief elected official of local government, and state dislocated worker unit. *See* [Id. at 17–19]. Defendants assert that the August 7, 2019, e-mail with a press release and Employee Q&A, the August 8, 2019, letter, and a September 3, 2019, email regarding the suspension of services can be combined to create valid notice. *See* [Id. at 17].

Third, defendants argue that the "plant closing" occurred on October 7, 2019, when plaintiffs suffered employment loss, even if hours were lower than normal in the few weeks prior. *See* [Id. at 19–23]. Defendants assert that OVMC did not experience a "plant closing" until October 7, 2019, because 50 or more full-time employees did not experience "employment loss" before that date. *See* [Id. at 19].

Fourth, in the alternative, defendant AHSW argues it qualifies for the "faltering company" exception. *See* [Id. at 23–29]. Defendants argue that in "the many months leading up to the closure of OVMC, AHS and AHSW (the employer) pursued every possible avenue of securing capital, investment, buyer, or strategic partner to keep all or

part of OVMC open."[3] *See* [Id. at 23–25]. Moreover, defendants assert they also sought additional money to serve as operational funds to keep OVMC open.[4] *See* [Id. at 25–26].

Fifth, in the alternative, defendants argue the good faith exception applies to reduce damages. *See* [Id. at 29–30]. Defendants argue that there is "ample evidence of " the fact defendants acted in good faith and had reasonable grounds for believing that the act or omission was not a violation. *See* [Id. at 29].

a. Plaintiffs' Response in Opposition

Plaintiffs filed a Response in Opposition [Doc. 172] on July 22, 2022. Therein, plaintiffs state:

1. Defendants are a single employer under the WARN Act [Doc. 172 at 3–7];
2. Defendants did not send "compliant WARN Notices" [Id. at 7–10];
3. Defendants violated the WARN Act by depriving employees of wages and benefits during the notice period [Id. at 10–16];
4. Defendants do not satisfy the requirements for the "faltering company" exception to the WARN Act [Id. at 16–21]; and
5. Defendants failed to meet their burden and establish the good faith exception [Id. at 21–23].

See [Doc. 172].

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[3] Defendants provide a non-exhaustive list of possible avenues it pursued to keep all or part of OVMC open at Doc. 166 at 23–25.

[4]Defendants provide a non-exhaustive list of possible avenues it pursued to receive additional money at Doc. 166 at 25–26.

b. Defendants' Reply

Defendants filed a Reply [Doc. 176] on July 29, 2022. Therein, defendants re-assert much of what is in its Motion for Summary Judgment and again argues:

(1) There is no "single employer" liability [Doc. 176 at 2–6];

(2) Plaintiffs received adequate notice of OVMC's closure under the WARN Act [Id. at 6–7];

(3) "Employment loss" occurred on October 7 and plaintiffs had adequate notice [Id. at 7–12];

(4) "Faltering business" exception applies because defendants were negotiating better terms with a new credit lender in July 2019 when plaintiffs claim notice was due [Id. at 12–14]; and

(5) Any acts or omissions in violation of the WARN Act were made in good faith [Id. at 14–15].

III. DISCUSSION

A. Defendants AHSW and AHS are an "employer" under the WARN Act.

An "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)(A)–(B).

It is undisputed by the parties that AHSW is an "employer" of plaintiffs as defined by 29 U.S.C. § 2101(a)(1). *See* [Doc. 124-44 at 1 (Defendants "[a]dmit that, as of September 2, 2019, AHSW employed over 100 full-time employees working at [OVMC]."

and "[a]dmit that, as of September 2, 2019, AHSW employed over 100 employees, including part-time employees, who in the aggregate worked at least 4,000 hours per week, exclusive of overtime, at [OVMC]")].

I. AHSW and AHS are considered a "single employer" under the WARN Act.

In ***Butler v. Fluor Corp.***, 511 F.Supp.3d 688, 697–98 (D. S.C. Jan. 6, 2021) (Childs, J.), Judge Childs reasoned:

> Determining whether two affiliated companies amount to a single WARN employer has been a disorganized, complex, and sometimes contradictory area of law, as various courts have applied numerous tests to determine whether two corporations comprise a single, liable entity. *See, e.g.*, ***Pearson v. Component Tech. Corp.***, 247 F.3d 471, 483 (3d Cir. 2001) (compiling cases). Given these difficulties, the Third Circuit in ***Pearson***–a seminal decision upon which all parties rely heavily–proclaimed that simply applying the five factors delineated in the WARN Act ("DOL Factors") is the best course when determining single employer liability under the WARN Act. ***Id***. at 495–96. This court observes the Fourth Circuit has not provided specific guidance regarding which standard a district court should use to evaluate single employer status under the WARN Act.[5] Nevertheless, this

[5] The Fourth Circuit in ***Pennington v. Fluor Corp.***, 19 F.4th 589, 597 (4th Cir. 2021) stated: "We agree . . . with the Third Circuit's decision in ***Pearson*** that 'the [Department of Labor] factors are the best method for determining WARN Act liability because they were created with WARN Act policies in mind.'" (quoting ***Pearson***, 247 F.3d at 489).

court agrees with the persuasive reasoning in ***Pearson*** and applies the DOL Factors in this case.

The DOL Factors outlined in the WARN Act's regulations examine subsidiary or independent contractor liability with its parent or contracting company by scrutinizing: "(I) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel polices emanating from a common source, and (v) the dependency of operations" 20 C.F.R. § 639.3(a)(ii)(2). The DOL Factors in essence seek to determine whether two (or perhaps more) affiliated corporations or entities acted as a "single employer" to invoke WARN liability.[6] ***Pearson***, 247 F.3d at 490–91 (noting the DOL Factors "are a non[-]exhaustive list"). "As in any balancing test, application of these factors requires a fact-specific inquiry, no one factor set out by the DOL is controlling, and all factors need not be present for liability to attach." ***Guippone v. BH S & B Holdings LLC***, 737 F.3d 221, 226 (2d Cir. 2013).

In this case, defendants argue plaintiffs fail to prove single employer status. *See* [Doc. 170 at 12–21]. Defendants assert that plaintiffs argument rests on the third "de facto exercise of control" factor and fails to "meaningfully analyze or engage with the DOL regulations that expressly govern single employer status. . . ." *See* [Id. at 12].

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[6] Although the term "single employer" does not appear in the text of the WARN Act or its regulations, the DOL Factors "were adopted from other [various] tests developed for intercorporate liability[.]" ***Pearson***, 247 F.3d at 491.

1. Common Ownership

The common ownership factor "inquires as to whether a parent or related entity owns a separate corporate entity." ***Guippone v. BH S & B Holdings LLC***, 2010 WL 2077189, at *4 (S.D. N.Y. May 18, 2010) (citing ***Vogt v. Greenmarine Holding, LLC***, 318 F.Supp.2d 136, 140 (S.D. N.Y. 2004)). "Common ownership is the least important factor . . . . Single employer status ultimately depends on all the circumstances of the case and is characterized as an absence of an arms length relationship found among unintegrated companies. . . ." *See* ***Childress v. Darby Lumber, Inc.***, 357 F.3d 1000, 1005–06 (9th Cir. 2004).

Upon review, AHSW is a manager-managed LLC. *See* [Doc. 172-7 at 5]. It has a principal place of business of 101 N. Brand Boulevard, Suite 1780, Glendale, California, 91203. AHSW lists only one officer, identified as a manager, Alecto Healthcare Services Ohio Valley LLC ("AHSOV"), with an address of 101 N. Brand Boulevard, Suite 1780, Glendale, California, 91203. *See* [Id. at 6].

AHSW is a wholly-owned subsidiary of AHSOV, a member-managed LLC. AHSOV had no employees or operations in 2019—it only owned a membership interest in AHSW and Alecto Healthcare Services Martins Ferry LLC. *See* [Doc. 124-4 at 3].

AHS is a member-managed LLC. It has a principal place of business of 101 N. Brand Boulevard, Suite 1780, Glendale, California, 91203. AHS lists itself as its only member.

It is undisputed that AHS and AHSW share a principal place of business. Moreover, it is undisputed that AHS and AHSW share common directors. AHS VP and General

Counsel, Michael Serrao, testified that AHSOV was a "holding corporation." Thus, seeing an absence of an arms length relationship found among unintegrated companies, this Court finds that this factor weighs in favor of plaintiffs.

2. Common Directors and/or Officers

The common directors and/or officers factor "ordinarily 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." ***Pearson***, 247 F.3d at 497.

Upon review, AHS and AHSW share common directors, Michael Sarrao and Lex Reddy. Thus, this Court finds that this factor favors plaintiffs.

3. De Facto Control

De facto exercise of control applies when one company is "the decisionmaker responsible for the employment practice giving rise to the litigation." ***Pearson***, 247 F.3d at 503–05. The factor thus incorporates a longstanding theory of affiliate liability that holds parents accountable where they are directly liable for the actions of a subsidiary. *See* ***id***. at 486–87, 490. *See also* ***Ray v. Mechel Bluestone, Inc.***, 2016 U.S. Dist. LEXIS 26314 (S.D. W.Va. March 2, 2016) (Berger, J.).

The direct liability test "developed as a basis for liability in the specialized context of parent-subsidiary relationships. It remains a narrow test, one that is designed to apply in the unusual case where a company commits a wrongful act through the legal form of a

distinct entity. *See* ***DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.***, 540 F.2d 681, 683 (4th Cir. 1976) ("'[I]n an appropriate case and in furtherance of the ends of justice,' the corporate veil will be pierced, and the corporation and its stockholders 'will be treated as identical.'" (quoting 18 Am. Juris 2d at 559)). The background of the direct liability test makes this clear. As the Supreme Court has put it, "[i]t is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation ... is not liable for the acts of its subsidiaries." ***United States v. Bestfoods***, 524 U.S. 51, 61 (1998) (quoting William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193, 193 (1929)). Liability may attach on a finding that the parent company acted through the subsidiary with respect to a discrete act or transaction. *See* ***Esmark, Inc. v. NLRB***, 887 F.2d 739, 756 (7th Cir. 1989); ***Johnson v. Flowers Indus., Inc.***, 814 F.2d 978, 981 (4th Cir. 1987) (stating that liability in the employment context may attach to a parent that "control[s] the employment practices and decisions of the subsidiary"). The theory of direct liability, however, does not translate easily outside of the parent-subsidiary context since '[a] third party,' unlike a parent corporation, confronts a corporation 'as an independent entity, with its own decisionmaking apparatus geared towards advancing [its] independent interests.' ***Esmark***, 887 F.2d at 756." ***Pennington v. Fluor Corp.***, 19 F.4th 589, 598 (4th Cir. 2021).

"In the WARN Act context, courts have found direct liability only in two circumstances. First, and surprisingly, courts have applied the test to parent-subsidiary relationships where the parent through its own management is responsible for a WARN Act violation. *See, e.g.*, ***Guippone***, 737 F.3d at 227–28; ***Garner v. Behrman Brothers***

IV, LLC, 260 F.Supp.3d at 369, 378–79 (S.D. N.Y. 2017). Second, the test may also apply to certain lender-borrower relationships where the lender's contractual rights give it an unusual degree of control over the borrower. *See* ***Pearson***, 247 F.3d at 492–94." ***Pennington***, 19 F.4th at 599.

Here, there is significant evidence that defendants were "the decisionmaker responsible for the employment practice giving rise to the litigation." ***Pearson***, 247 F.3d at 503–04. Defendants concede that they jointly decided to close OVMC, which is the exact issue being addressed in the above-styled action. Moreover, Mark Bradshaw, AHS director, was responsible for drafting the WARN notice. *See* [Doc. 124-14]. When a parent and a subsidiary jointly participate in a decision, the result is by its nature a decision of the parent.

More telling is a Management Services Agreement ("MSA") between AHS, called "Manager" in the MSA, and AHSW. *See* [Doc. 166-4 at 359–379]. In the MSA, 1.2 states:

> Authority and Responsibility of Manager. Hospital acknowledges that Manager has been engaged hereunder solely to perform the tasks described on **Exhibit "A"** hereto and that Manager is hereby authorized to implement the additional "*Major Decisions*" (as hereinafter defined) approved by the hospitals.

[Doc. 166-4 at 359]. Exhibit "A" provides a "Description of Management Services":

> During the term of this Agreement, Manager will perform and/or oversee the following tasks and services for the Facilities consistent with the terms and conditions of this Agreement:

- Performance and oversight of Managed Care/Employer Contract Development and Maintenance;
- Oversight of Materials and Supplies Cost Sourcing and Management;
- Perform Business Office Staff Orientation, Training and Support;
- Oversight of Accreditation;
- Oversight of Risk Management & Credentialing[;]
- Performance and oversight of Physician Relations;
- Oversight of Day-to-Day Management;
- Oversight of Cash Management Billing and Collections;
- Oversight of Continuing Education for Staff;
- Oversight of Utilization Review;
- Performance and oversight of Vendor Contracting;
- Oversight of Regulatory Compliance and Auditing;
- Oversight of preparation of Financial Statements; and
- Oversight of Legal Services.

[Id. at 372]. The MSA shows that AHS agreed to not only manage AHSW, but do a long list of services for AHSW. Thus, this factor weighs strongly in favor of a finding of a single employer.

4. Unity of Personnel Policies

The unity of personnel policies factor "is analogous to the aspect in the federal labor law test concerning 'centralized control of labor operations,'" and includes such elements

as "centralized hiring and firing, payment of wages, maintenance of personnel records, benefits and participation in collective bargaining." ***Vogt***, 318 F.Supp.2d at 142–43. In essence, this factor examines "whether the companies actually functioned as a single entity with regard to its relationship with employees." ***Pearson***, 247 F.3d at 499.

Upon review, this Court observes that defendants concede they jointly decided to close OVMC, at the very least. Because "[i]n the contest of the WARN Act, the decision to effect a mass layoff is the single most important personnel policy," ***Vogt***, 318 F.Supp.2d at 143, this factor weighs strongly in favor of a finding of a single employer.

5. Dependency of Operations

In some cases, the dependency of operations factor "addresses three areas of overlap between related corporations: (1) sharing of administrative or purchasing services, (2) interchanges of employees or equipment, or (3) commingled finances." ***Guippone***, 2010 WL 2077189, at *6 (citation omitted). But in other cases, courts look beyond an individual job site to see if two entities are otherwise dependent on their continued operations. *See* ***Martin-Smith v. Ramcor Services Group, Inc.***, 2012 WL 4472036, at *6 (observing two companies were not codependent because their respective operations went "well beyond" the contract at issue, and outside of that contract, the companies had no relationship, "much less a dependency relationship"); ***In re APA Transp. Consol. Litig.***, 541 F.3d 233, 245 (3d Cir. 2008), *as amended* (Oct. 27, 2008) (explaining "there is no stronger evidence for . . . [a lack of codependence] than that APA Truck Leasing continued to operate without incident after APA Transport folded.").

Upon review, it is clear that AHS controlled all AHSW funds. *See* [Doc. 124-11]. In an email from Jeremy Redin, Chief Financial Officer for AHS, he informed Jennifer A. Coello, Chief Operating Officer of East Ohio Regional Hospital and OVMC, of what "steps will be implemented to control A/P vendor payments." *See* [Id.]. Moreover, AHS had management rights over OVMC under a Management Services Agreement whereby AHSW and Alecto Healthcare Services Martins Ferry LLC engaged AHS to manage each of them. *See* [Doc. 124-12].

Most telling is an email from Daniel C. Dunmyer, President and CEO of OVMC and East Ohio Regional Hospital stating:

> This brings up the larger issue though. Why are Jennifer and I excluded from not only discussions but decisions on these types of things. Every day (MRI, drugs etc) we are hearing of decisions being made without even being part of the discussion let alone being the ones to make the decision.
>
> If it has been decided that you are making those decisions (and others) without our input that is fine but please let us know so we are not put in a position, yet again, of telling our staff we didn't know

[Doc. 124-45 at 2]. This email is proof that AHS exercised such a high degree of control over AHSW that even the CEO of AHSW complained to AHS executives about the lack of decisionmaking power he was being afforded. Thus, this Court is persuaded that this factor also weighs strongly in favor of plaintiffs.

ii. Outcome of DOL Factors Analysis

After a thorough review of the record, this Court concludes that all five DOL Factors weigh in favor of plaintiffs. Thus, this Court concludes that AHS and AHSW acted as a single employer for purposes of the WARN Act.

B. Defendants ordered a "plant closing" under the WARN Act.

A "plant closing" means "the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees." 29 U.S.C. § 2101(a)(2).

"The WARN Act requires 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.' 29 U.S.C. § 2102(a). The Act defines a 'plant closing' as a 'shutdown' that has certain undisputed characteristics and 'results in an employment loss . . . for 50 or more employees.' 29 U.S.C.A. § 2101(a)(2). As relevant here, the Act defines 'employment loss' as 'an employment termination, other than a discharge for cause, voluntary departure, or retirement.' 29 U.S.C.A. § 2101(a)(6)(A)." ***Long***, 506 F.3d at 201.

> The purpose of the WARN Act, as articulated by regulation, is to provide protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs . . . provid[ing] workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain

> alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market.

20 C.F.R. § 639.1(a). "Thus, while it is clear that the intent of the WARN Act would have all affected employees given 60 days' notice before their layoffs to permit them to arrange their employment affairs, the specific language of the Act is inartful, if not confusing." ***United Mine Workers of America v. Martinka Coal Co.***, 202 F.3d 717, 720 (4th Cir. 2000).

In this case, defendants ordered a plant closing of OVMC on September 4, 2019, for a permanent shut down. This plant closing resulted in "an employment loss . . . during any 30-day period for 50 or more employees excluding any part-time employees."

At the very least, plaintiffs experienced a "mass layoff." The term "mass layoff" means a reduction in force which—

> (A) is not the result of a plant closing; and
>
> (B) results in an employment loss at the single site of employment during any 30-day period for—
>
> > (I)
> >
> > > (I) at least 33 percent of the employees (excluding any part-time employees); and
> > >
> > > (II) at least 50 employees (excluding any part-time employees; or
> >
> > (ii) at least 500 employees (excluding any part-time employees).

29 U.S.C. § 2101(a)(3); 20 C.F.R. § 639.3(c)(1).

If this Court held OVMC was not a "plant closing" under the WARN Act, plaintiffs would still have experienced a "mass layoff" because there was employment loss of at least 33 percent of the employees and at least 50 employees during a 30-day period. In the August 8, 2019, letter, defendants stated that "approximately 739 positions (i.e. substantially the entire workforce) will be eliminated." *See* [Doc 124-24]. Thus, this Court finds that a mass layoff also occurred.

C. Plaintiffs experienced "employment loss" under the WARN Act.

An "employment loss" is defined as one of three specific events: (I) an employment termination, other than a discharge for cause, voluntary departure, or retirement; (ii) a layoff exceeding 6 months; or (iii) a reduction in hours of work of more than 50% during each month of any 6-month period. *See* 29 U.S.C. § 2101(a)(6); 20 C.F.R. § 639.3(f)(1). "Termination" has been construed as "the permanent cessation of the employment relationship." Worker Adjustment and Retraining Notification, 54 Fed.Reg. 16,042 (Apr. 20, 1989).

The WARN Act does not provide a definition of "voluntary departure," but the DOL offers guidance in the Federal Registrar. The DOL explained that resignations and retirements are typically considered voluntary departures, unless there is evidence that "the employer has created a hostile or intolerable work environment or has applied other forms of pressure or coercion which forced the employee to quit or resign." 54 Fed. Reg. 16,042, at 16048. The DOL has also explained that acceptance of incentive programs, particularly incentive retirement programs, "can be found to be involuntary where a worker was unduly pressured to accept the program." *See* id. However, and importantly to the case at hand,

the DOL "does not . . . agree that a worker who, after the announcement of a plant closing or mass layoff, decides to leave early has necessarily been constructively discharged or quit 'involuntarily'. (In the situation posted, where the plant closing or mass layoff has been announced, and, presumably, notice has been given, the worker already has received the notice that WARN requires and whether his later resignation or retirement is voluntary or not is no longer germane.)." *See* id.

However, this Court agrees with the Ninth Circuit in ***Collins v. Gee West Seattle LLC***, 631 F.3d 1001 (9th Cir. 2011). In ***Collins***, the Ninth Circuit held that employees who resigned after their employer gave notice that a plant shutdown was likely did *not voluntarily* depart their employment. As in this case, the defendant claimed "that all other employees voluntarily departed after notice was given." 631 F.3d at 1006. Ultimately, the Ninth Circuit held, and this Court agrees:

> This argument would allow an employer to escape responsibility for failing to give proper notice simply because its employees subsequently leave the business due to its imminent closure. The unexpected and urgent need to find new employment is precisely the type of pressure that this Court held that Congress was attempting to eliminate by creating the WARN Act. *See* ***Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas***, 244 F.3d 1152, 1158 (9th Cir. 2001) and discussion *infra*. Employees' departure because of a business closing, therefore, is generally not voluntary[7], but a consequence of the shutdown and must be considered

[7] Not all departures after a deficient notice will be considered an "employment loss" under the Act. Employees could certainly still "voluntarily depart" from a job even after a

a loss of employment when determining whether a plant closure has occurred.

. . .

Employers, such as Gee West, who are trying to keep a business afloat and whose futures are uncertain have other protections under the Act, and need not resort to a broad definition of voluntary departure to avoid liability. Struggling businesses face difficult issues such as whether to give notice at al, since closure is not certain, and whether giving notice will hasten the business decline or impair efforts for a sale. Recognizing these difficulties and the public policy interest in giving employees such notice as is practicable, Congress provided that an employer who is *actively* seeking capital or business in order to avoid or postpone a shutdown may give only such notice "as is practicable" if giving 60-days' notice would "preclude[ ] the employer from obtaining the needed capital or business." 29 U.S.C. § 2102(b)(1) & (3). This provision of the WARN Act, otherwise known as the "faltering business" exception, explicitly provides for the situation confronted by Gee West without resort to a broad interpretation of voluntary departure.

Adopting Gee West's interpretation of "voluntary departure" would eviscerate much of the relevance and purpose behind § 2102(b)(1) & (3).

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deficient notice. For example, an employee might depart because of pregnancy, health reasons, a better job opportunity, etc. [The Ninth Circuit] only hold that, where an employee's reason for departing is because the business is closing, such a departure cannot be termed "voluntary" under the Act. Determining an employee's reason for departing is a factual inquiry better suited for district courts.

> Instead of relying on § 2102(b)(1) & (3) to escape the strictness of the 60-day's notice requirement, faltering businesses could, in many cases, simply rely on a liberal definition of the term "voluntary departure" to avoid the Act's reach. Such a tactic is unnecessary under the Act and contrary to the language and purpose of the Act as discussed *supra*.

Collins, 631 F.3d at 1007–1008.

"[E]mployers are not permitted to actually close a plant yet technically prevent their employees from suffering an 'employment loss' under the Act until the 60-day clock has run by sending regular 'paychecks' in whatever amount they choose over 50%." ***Gray v. Walt Disney Co.***, 915 F.Supp.2d 725, 732 (D. Md. 2013) (Blake, C.J.). "***Long*** is unambiguous: only *full* pay–pay that replaces a 60-day continuation of employment following a plant closing–suffices in lieu of notice." ***Id***. (citing ***Long***, 506 F.3d at 303 ("[P]aying all benefits and wages for 60 days without requiring work in exchange entirely accords with the language, purpose, and structure of the WARN Act.")).

In sum, this Court holds that an employee departing a business because the business was closing has not "voluntary departed" within the meaning of the WARN Act. "To hold otherwise would be inconsistent with the Act's general structure and its overall purpose. It would also render the 'faltering business' exception superfluous." ***Collins***, 631 F.3d at 1007–1008.

Moreover, the employees suffered an "employment loss" under the WARN Act. In this case, an entire plant, OVMC, was permanently closing, and plaintiffs suffered "a total employment loss resulting from a permanent plant closing." ***Gray***, 915 F.Supp.2d at 731.

The WARN Act almost guarantees "notice before substantial employment changes." ***Id.*** Thus, plaintiffs are entitled to receive their full wages and benefits during "a congressionally guaranteed 'transition time to adjust to the prospective loss of employment.'" ***Gray***, 915 F.Supp.2d at 730–31.

Documents and exhibits provided show the "termination classification" for all employees. There is not a material issue of fact as to why the employee was terminated. Thus, this Court will grant plaintiffs' motion for summary judgment as it pertains to employment loss under the WARN Act.

D. Defendants failed to give employees 60-days' notice before the closing or layoff.

The WARN Act requires that an employer provide sixty (60) days notice to employees who would be affected before ordering a mass layoff or a plant closing. 29 U.S.C. § 2101(a); 20 C.F.R. § 639.2. Notice is requires to be given to affected employees "who may reasonably be expected to experience an employment loss. This includes employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such workers can be identified at the time notice is required to be given." 20 C.F.R. § 639.6. Delivery "is designed to ensure receipt of notice of at least 60 days before separation is acceptable (e.g., first class mail, personal delivery with optional signed receipt)." 20 C.F.R. § 639.8. Notice must be "specific" and must be "written in language understandable to the employees" and is to contain:

> (1) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(2) The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated;

(3) An indication whether or not bumping rights exist;

(4) The name and telephone number of a company official to contact for further information.

20 C.F.R. § 639.7(d)(1)–(4).

The United States Court of Appeals for the Fourth Circuit has explained the WARN Act "provide[s] notice of sudden, significant employment loss so that workers [can] seek alternative employment and their communities c[an] prepare for the economic disruption of a mass layoff." ***Meson v. GATX Tech. Servs. Corp.***, 507 F.3d 803, 808 (4th Cir. 2007) (citing ***Bader v. N. Line Layers, Inc.***, 503 F.3d 813 (9th Cir. 2007); 20 C.F.R. § 639.1(a) (1989)).

In this case, defendants first provided an e-mail to employees on August 7, 2019, with a press release and Employee Q&A attached. *See* [Doc. 166-2 at 1–2]. The press release stated that "after a thorough evaluation of all available options, losses of more than $37 Million over the past two years, and an exhaustive but unsuccessful search for a strategic partner or buyer, OVMC and EORH have decided to begin the process to close both OVMC and EORH." *See* [Id.].

On August 8, 2019, via first class mail, defendants provided "Notice of Permanent Closure of Ohio Valley Medical Center." *See* [Doc. 124-24]. The letter sufficiently states whether the closing is permanent or temporary, provides the expected date when OVMC was closing; and a name and telephone number of a company official to contact for further

information. The letter does not indicate whether or not bumping rights exist. However, failing to include mention of bumping rights is not fatal to the notice's effectiveness. *See* ***Nagel v. Sykes Enterprises, Inc.***, 383 F.Supp.2d 1180, 1198 (D. N.D. 2005).

On September 3, 2019, Daniel Dunmyer, President and CEO of OVMC, emailed all of the staff at OVMC stating:

> By now you may have heard we are suspending inpatient services at OVMC. As you are aware our census has dropped significantly since our announcement in August. We cannot continue to offer the services when we have dropped to so few numbers. We announced in August we would be closing on or before October 7. Obviously this is much sooner than we expected or planned but we just are not able to maintain an adequate number of patients or staff to continue. . . . We continue to work towards a solution for both hospitals but made the decision to suspend the services as of midnight Wednesday.

[Doc. 166-4 at 396]. *See also* [Doc. 124-46 at 2].

Even if the August 8, 2019 letter met all statutory requirements, the letter was not sent timely, and did not provide affected employees with 60 days' notice as required by law. *See* 29 U.S.C. § 2101(a); 20 C.F.R. § 639.2; 20 C.F.R. § 639.8.

The letter was sent on August 8, 2019, just 27 days before defendants shut down OVMC on September 4, 2019. Thus, defendants did not satisfy the 60-day notice required under the WARN Act. Thus, this Court will grant plaintiffs' motion for summary judgment as it pertains to the inadequacy of the notice provided by defendants.

E. Plaintiffs are "aggrieved" or "affected" employees.

The term "affected employees" as used in the WARN Act is defined to mean those "employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing . . . by their employer." 29 U.S.C. § 2101(a)(5).

When a company fails to provide sufficient written notice before a plant closure or mass layoff under the WARN Act, affected employees can sue to recover unpaid wages and other benefits for each day of violation. This Court holds that plaintiffs in this case are "affected employees" and are entitled to recover unpaid wages and other benefits for each day of violation.

F. Defendants do not qualify for the "faltering company" exception.

The "faltering company" exception provides

> An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

29 U.S.C. § 2102(b)(1). The DOL regulations clarify that there are four (4) requirements for invoking this defense. "The employer must demonstrate: (1) it was actively seeking capital at the time the 60-day notice would have been required, (2) it had a realistic opportunity to obtain the financing sought, (3) the financing would have been sufficient, if obtained, to enable the employer to avoid or postpone the shutdown, and (4) the employer

reasonably and in good faith believed that sending the 60-day notice would have precluded it from obtaining the financing." ***In re AE Liquidation, Inc.***, 522 B.R. 62, 67 (D. Del. 2014) (citing ***In re APA Transp. Corp. Consol. Litig.***, 541 F.3d 233, 246–74 (3d Cir. 2008) (summarizing 20 C.F.R. § 639.9(a)(1)–(4))).

The regulations describe "actively seeking capital" as pursuing "financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing," or "seeking additional money, credit, or business through any other commercially reasonable method." 20 C.F.R. § 639.9(a)(1). Case law makes clear that a sale of the business does not meet this definition. ***Law v. Am. Capital Strategies, Ltd.***, 2007 WL 221671 at *10 (M.D. Tenn. 2007) ("This Court concludes that [the faltering company] exception is inapplicable where, as here, the closings and/or layoffs occur as a result of a failed business sale."); ***Local 397, Int'l Union of Electronic, Electrical, Salaried, Mach. & Furniture Workers, AFL–CIO v. Midwest Fasteners, Inc.***, 763 F.Supp.78 (D. N.J. 1990) (negotiating the sale of a company does not qualify as "actively seeking capital"). *See also* ***In re AE Liquidation, Inc.***, 522 B.R. 62; ***Law v. Am. Capital Strategies, Ltd.***, 2007 WL 221671 (M.D. Tenn. Jan. 26, 2007).

In addition, "[t]he employer must, *at the time notice actually is given*, provide a brief statement of the reason for reducing the notice period, in addition to the other elements set out in § 639.7." 20 C.F.R. § 639.9(a).

Here, defendants first cannot satisfy the precondition to invoke the defense because they cannot show that "at the time notice actually is given" they provided "a brief statement of the reason for reducing the notice period. . . ." *See* ***Newman as Tr. of World Mktg.***

Tr. v. Crane, Heyman, Simon, Welch, & Clar, 435 F.Supp.3d 834, 8433–44 (N.D. Ill. 2020) ("Courts to consider the issue appear to have uniformly held that giving proper shortened notice is a prerequisite to invoking one of the statutory exceptions." (collecting cases); *see, e.g.*, ***Weekes-Walker v. Macon Cnty. Greyhound Park, Inc.***, 877 F.Supp.2d 1192, 1208 (M.D. Ala. 2012) ("The brief statement requirement is not satisfied when . . . there is no reference to WARN, to the defense, or to the reasons for reducing the notification period."). Having never admitted or notified employees and officials of the shortened notice period or reasons for it, defendants cannot assert the "faltering company" exception.

Moreover, defendants also fall short of meeting the requirements of the faltering company exception. This Court refuses to set the precedent that if a company, *at any point in the past*, attempts to receive additional capital, that is sufficient to qualify for the "faltering company" exception. In June 2019, AHSW specifically asked Medical Properties Trust Inc. ("MPT") for a $20 million loan to support operations. MPT denied that request. In AHS's VP And General Counsel Michael Sarrao's deposition, he noted that in the phone call, MPT's manager was "surprised we were asking him again. He emphatically said no to $20 million. Or any amount of money, he said no." *See* [Doc. 172-5 at 4]. Had defendants taken MPT's denial and started to send out notices any day[8] in June, defendants would have effectively given employees 60-days notice pursuant to the WARN Act. However, defendants waited an additional two months before sending out Notice that

[8] If defendants sent out notices on the last day of June, June 30, 2019, and taking into account the 60-day notice under the WARN Act and the 3-day mailbox rule, employees would have received notice on or before September 1, 2019, just in time for when OVMC suspended inpatient services.

OVMC was permanently closing. While defendants claim to have been actively seeking capital from other avenues, they provide no evidence that the avenues "had a realistic opportunity to obtain the financing," that the financing "would have been sufficient, if obtained, to enable the employer to avoid or postpone the shutdown," or that defendants reasonably believed that "sending the 60-day notice would have precluded it from obtaining the financing."

This Court will deny Defendants' Motion for Summary Judgment regarding the "faltering company" exception of the WARN Act.

G. Good faith

Section 2104(a)(4) of the WARN Act permits a court, in its discretion, to reduce liability if the employer "proves to the satisfaction of the court that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this chapter." As the employer, defendants bear the burden of proof as to this mitigation defense. Moreover, this defense must be narrowly construed. ***Olsen v. Lake Country, Inc.***, 955 F.2d 203, 206 (4th Cir. 1991) ("we recognize the rule of construction that exemptions from remedial statues are to be construed narrowly").

Accordingly, the WARN Act's good faith mitigation provision has been interpreted narrowly to require proof that the employer believed at the time of the plant closing that it was giving 60 days' notice or that it fit within one of the provisions allowing shortened or no notice. ***Dillard Dep't Stores, Inc.***, 15 F.3d at 1275; ***United Steelworkers of America***

v. North Star Steel, 817 F.Supp. 522 (M.D. Pa. 1992); ***Jones v. Kayser-Roth Hosiery, Inc.***, 748 F.Supp. 1292 (E.D. Tenn. 1990).

In this case, "the pertinent inquiry in deciding whether to exercise the court's discretion in favor of reducing the defendant[s'] liability is the defendant[s'] conduct prior to the notice; *i.e.*, whether the act or omission which violated [the Act] was in good faith and whether the employer reasonably believed that the act or omission was not a violation of this Act." ***Jones v. Kayser-Roth Hosiery, Inc.***,748 F.Supp. 1276, 1291 (E.D. Tenn. 1990). Defendants knew, at the latest, in June 2019 that the hospital was not going to get capital sufficient to keep OVMC open and running. Defendants waited until August to start informing the employees of the permanent closure. This Court will not afford weight to defendants' conduct *after* the WARN Act notice went out. Prior to the notice, defendants did nothing. After the notice, defendants "organized employee forums, daily huddles, drafted recommendations for new jobs, provided multiple employee Q&A, arranged for unemployment site visits, and otherwise supported its employees. . . ." *See* [Doc. 166 at 29]. This Court applauds defendants' efforts after the notice, but this Court will not allow defendants to receive a good faith exception and reduce the amount of liability or penalty owed to plaintiffs in this case. Thus, defendants' motion for summary judgment as it pertains to the good faith exception is denied.

IV. Damages

Plaintiffs are hereby **DIRECTED** to submit an itemized list of damages for each plaintiff on or before **August 15, 2022**. Defendants can file a response on or before

August 22, 2022. This Court will hold a damages hearing on **August 25, 2022, at 2:00 p.m.**

VII. CONCLUSION

For the reasons stated above:

1. Plaintiffs' Motion for Summary Judgment [**Doc. 163**] is **GRANTED**; and
2. Defendants' Motion for Summary Judgment [**Doc. 165**] is **DENIED**.
3. Plaintiffs are **DIRECTED** to submit an itemized damages report for each plaintiff on or before **August 15, 2022**.
4. Defendants can file a response to the damages report on or before **August 22, 2022**.
5. A hearing on damages is hereby **SCHEDULED** for **August 25, 2022, at 2:00 p.m.**
6. Plaintiffs' Motion in Limine to Prohibit Any Reliance Upon Advice of Counsel in Support of a Good Faith Defense or in Favor of the Adequacy of Notice [**Doc. 179**] and Motion in Limine to Prohibit Any Evidence or Argument That Plaintiff Mark Garan Voluntarily Departed His Employment at Ohio Valley Medical Center [**Doc. 180**] are **DENIED AS MOOT**.
7. Defendants' Motion to Strike Jury Demand [**Doc. 187**] and Motion in Limine [**Doc. 191**] are **DENIED AS MOOT**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: August 2, 2022.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE