UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

TAYLOR BEAN & WHITAKER MORTGAGE CORP., *et al.*,

Debtor.
_____/

Case No.: 3:09-bk-07047-JAF

Chapter 11

NICHOLAS A. CALLAHAN, JULIE WHITEAKER, ERIC E. ANDERSON, CHRIS ESCANDON, CHARLES VAN HARTSELL III, DEBRA ORLANDO, DEZI TEIANN JESSOP, WILLIAM P. HICKEY III and TANJANIKA CARTER, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

TAYLOR BEAN & WHITAKER MORTGAGE CORP.,

Defendant[1].
_____/

Adv. Pro. No. 09-ap-00439-JAF

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This proceeding came before the Court on (1) the Motion to Dismiss Adversary Class Action Complaint (the "Motion to Dismiss"), filed on January 20, 2010 (Doc. No. 28), by defendant Taylor Bean & Whitaker Mortgage Corp. ("TBW"); and (2) the Motion for Class Certification and Related Relief (the "Class Certification Motion"), filed on March 25, 2010 (Doc. No. 47), by adversary plaintiffs NICHOLAS A. CALLAHAN, JULIE WHITEAKER, ERIC E. ANDERSON, CHRIS ESCANDON, CHARLES VAN HARTSELL III, DEBRA

[1] "Defendant" is defined in Plaintiffs' Adversary Class Action Complaint as "Taylor Bean & Whitaker Mortgage Corp., d/b/a Maslow Insurance Agency, LLC, d/b/a Security One Valuation Services, LLC, d/b/a Platinum Community Bank and other related entities."

ORLANDO, DEZI TEIANN JESSOP, WILLIAM P. HICKEY III and TANJANIKA CARTER, on behalf of themselves and all others similarly situated ("Plaintiffs").

In their Adversary Class Action Complaint (the "Complaint") (Doc. No. 1), Plaintiffs seek relief under the Federal Worker Adjustment and Retraining Notification Act (the "WARN Act"), 29 U.S.C. § 2101 et. seq. In the Motion to Dismiss, TBW argues the adversary proceeding should be dismissed and Plaintiffs' claims should be handled through the claims administration process. In the Class Certification Motion, Plaintiffs request (1) certification of a class, pursuant to the Federal Rules of Civil Procedure Rule 23 and Bankruptcy Rule 7023, comprised of former employees of TBW and its subsidiaries, (2) appointment of Outten & Golden LLP and GrayRobinson, P.A. as class counsel, (3) appointment of Plaintiffs as class representatives, and (4) approval of the form and manner of a proposed notice to the class.

Plaintiffs answered the Motion to Dismiss by filing a Memorandum in Opposition on February 23, 2010 (Doc. No. 35). On March 12, 2010, TBW filed its Reply Memorandum in Support of its Motion to Dismiss (Doc. No. 45), which was supported by the Reply Memorandum in Support of TBW's Motion to Dismiss (Doc. No. 46), filed on March 12, 2010 by the Official Committee of Unsecured Creditors (the "Committee"). On March 25, 2010, Plaintiffs filed a Sur-Reply (Doc. No. 48).

TBW answered the Class Certification Motion by filing a Response on April 26, 2010 (Doc. No. 53), which was supported by the Committee's Memorandum in Support of TBW's Memorandum Opposing the Class Certification Motion (Doc. No. 54), filed on April 27, 2010. On May 17, 2010, Plaintiffs filed a Reply to TBW and the Committee (Doc. No. 59).

For the reasons set forth herein, the Court finds that TBW's Motion to Dismiss is due to be denied. As more fully discussed below, the Court will grant the Plaintiffs' Class Certification Motion, appoint Outten & Golden LLP and GrayRobinson, P.A. as class counsel, appoint

Plaintiffs as class representatives, and approve the form and manner of the proposed notice to the class. The Court will enter separate orders on the Motion to Dismiss and Class Certification Motion consistent with these Findings of Fact and Conclusions of Law.

Background

Prior to filing bankruptcy, TBW operated one of the largest wholesale mortgage lending companies in the nation, employing more than 3,000 employees throughout the United States. TBW's headquarters were located in Ocala, Florida. TBW also operated facilities throughout the United States, including Colorado, Florida, Georgia, Illinois, Massachusetts, Ohio, South Carolina and Utah (the "Facilities"). On August 5, 2009, TBW ceased substantial operations.

On August 10, 2009, Plaintiffs filed a lawsuit against TBW in the United States District Court for the Middle District of Florida, captioned Callahan, et al. v. Taylor Bean & Whitaker Mortgage Corp., Case No. 09-00346 (GRJ) (the "District Court Action"). On August 24, 2009, TBW filed a petition for relief under Chapter 11 of Title 11 of the United States Bankruptcy Code. Plaintiffs then withdrew the District Court Action and, on August 24, 2009, filed the Complaint (Doc. No. 1). On January 11, 2010, the Court appointed Outten & Golden LLP and GrayRobinson, P.A. as interim class counsel (Doc. No. 26).

Relief Sought

The adversary proceeding seeks relief under the WARN Act and alleges that TBW violated the WARN Act by failing to provide employees with 60 days advanced written notice of their termination prior to ceasing operations. Plaintiffs seek to recover 60 days' wages and benefits, pursuant to 29 U.S.C. § 2104. Plaintiffs argue that their WARN Act claims, as well as the claims of all similarly situated employees, are entitled to (1) administrative expense status pursuant to 11 U.S.C. § 503(b)(1)(A)(ii); or in the alternative, (2) priority status pursuant to 11 U.S.C. § 507(a)(4), (5), wherein the first $10,950 of each putative class member's WARN Act

claim would be entitled to § 507(a)(4) priority, and the remaining balance, if any, would be a general unsecured claim.

TBW argues that the adversary proceeding should be dismissed and the WARN Act claims handled through the claims administration process. TBW asserts Plaintiffs' claims can just as easily be submitted and determined by filing proofs of claims, and the adversary proceeding is therefore unnecessary and duplicative of the claims process.

Motion to Dismiss Standard

Courts reviewing motions to dismiss must accept the allegations in the complaint as true and construe them in the light most favorable to the plaintiff. Financial Security Assur., Inc. v. Stephens, Inc., 450 F.3d 1257, 1262 (11th Cir. 2006) (citing Roberts v. Fla. Power & Light Co., 146 F.3d 1305, 1307 (11th Cir. 1998). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Financial Security, 450 F.3d at 1262 (citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 (1957)). "The threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is, as we have stated previously, 'exceedingly low.'" Financial Security, 450 F.3d at 1262 (citing Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 703 (11th Cir. 1985) (citing Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev., 711 F.2d 989, 995 (11th Cir. 1983))). "That said, 'while notice pleading may not require that the pleader allege a 'specific fact' to cover every element or allege 'with precision' each element of a claim, it is still necessary that a complaint 'contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.'" Financial Security, 450 F.3d at 1262 (citing Roe v. Aware Woman Ctr. for Choice, Inc., 253 F.3d 678, 683 (11th Cir. 2001) (quoting In re Plywood Antitrust Litig., 655 F.2d 627, 641 (5th Cir. Unit A, 1981))).

Motion to Dismiss Discussion

Construing the factual allegations of the Complaint in the light most favorable to Plaintiffs, the Court assumes the following facts to be true: On or around August, 5, 2009, Plaintiffs and between 1,000 and 3,000 other employees of TBW and its subsidiaries were terminated without cause and without advanced written notice. These employees were previously employed at TBW's headquarters in Ocala, Florida or at other Facilities owned and operated by TBW throughout the country. According to the Complaint, as of August 24, 2009, over 600 former employees of TBW and its subsidiaries had retained Outten & Golden LLP as counsel with respect to WARN Act claims.

In support of its Motion to Dismiss, TBW argues Plaintiffs have failed to satisfy the pleading requirements to certify a class and Plaintiffs' claims for damages are pre-petition claims against TBW that should be addressed in the claims administration process rather than by way of an adversary. The Court disagrees with TBW and finds that Plaintiffs have satisfied the pleading requirements to certify a class (as more fully discussed below).

Moreover, the Court finds that a class action adversary proceeding to resolve these claims is appropriate and preferable to the claims procedure. Even if the Court dismissed the adversary proceeding, Plaintiffs filed a class proof of claim in this case on June 15, 2010, which the Court would have to address, as recognized by the Eleventh Circuit in In re Charter Co., 876 F.2d 866, 873 (11th Cir. 1989). TBW has expressed opposition to the WARN Act claims and likely will defend against them whether in the claims process or through this adversary proceeding. Given the size of the class involved, the Court finds that resolving the WARN Act claims collectively through a class action adversary proceeding will be more efficient than handling them in a piece-meal fashion through the claims process.

In its Motion to Dismiss, TBW relies on two cases which concluded the claims process was more efficient than adversary proceedings. In In re First Magnus Financial Corp., 403 B.R. 659, 664 (Bankr. D. Ariz. 2009), a bankruptcy court determined it would be a waste of judicial resources to move forward with an adversary complaint when the claims process was moving the same issues down a parallel track. First Magnus is easily distinguishable, however, because it involved a class of eight plaintiffs, each of whom had already filed a proof of claim. In the other case cited by TBW, In re Circuit City Stores, Inc., 2010 WL 120014, *5 (Bankr. E.D. Va. Jan. 7, 2010), a bankruptcy court followed First Magnus and dismissed an adversary proceeding involving approximately 700 employees. Nonetheless, the Circuit City Stores holding seems contrary to the weight of authority on this issue. Numerous other courts have provided a more thoroughly reasoned basis for allowing WARN Act claims to proceed as adversary proceedings. See, e.g., In re Bill Heard Enterprises, Inc., 400 B.R. 795, 801 (Bankr. N.D. Ala. 2009) (certifying class of 2,300 WARN Act claimants); In re Protected Vehicles, Inc., 397 B.R. 339 (Bankr. S.C. 2008) (certifying class of 300 WARN Act claimants); In re First NLC Fin. Servs., LLC, 2008 WL 3471673 *3 (Bankr. S.D. Fla. August 11, 2008) (finding adversary proceeding preferable for resolution of complaint involving 200 WARN claimants rather than claims process).

The Court also believes that an adversary proceeding is necessary to protect the employees' rights, given the relatively small nature of their individual claims and the concern as expressed by the Eleventh Circuit in In re Charter Co., 876 F.2d at 877, that persons holding small claims may not prosecute their claims absent class procedures. Finally, the Court notes that the putative class members are spread out in several states and would likely suffer geographical hardship if required to defend their claims individually.

Class Certification Standard

To maintain a class action, Plaintiffs first must satisfy all the requirements of Federal Rule of Civil Procedure 23(a). The requirements of Rule 23(a) are:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These requirements are commonly referred to as numerosity, commonality, typicality, and adequacy of representation. These four requirements "are designed to limit class claims to those 'fairly encompassed' by the named plaintiffs' individual claims." Piazza v. Ebsco Indus., Inc., 237 F.3d 1341, 1346 (11th Cir. 2001).

In addition to meeting the prerequisites for class certification under Rule 23(a), a class must satisfy at least one of the three alternative requirements for treatment as a class action under Federal Rule of Civil Procedure 23(b). In this case, Plaintiffs seek to use Rule 23(b)(3), which requires "the questions of law or fact common to the members of the class to predominate over any questions affecting only individual members, and ... a class action to be superior to other available methods for the fair and efficient adjudication of the controversy." Silva-Arriaga v. Tex. Express, Inc., 222 F.R.D. 684, 690 (M.D. Fla. 2004).

The initial burden of proof to establish the propriety of class certification rests with the advocate of the class. Rutstein v. Avis Rent-A-Car Sys. Inc., 211 F.3d 1228, 1233 (11th Cir. 2000). Trial courts may not properly reach the merits of a claim when determining whether class certification is warranted. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974). However, "this principle should not be talismanically invoked to artificially limit a trial court's

examination of the factors necessary to a reasoned determination of whether a plaintiff has met her burden of establishing each of the Rule 23 class action requirements." Love v. Turlington, 733 F.2d 1562, 1564 (11th Cir. 1984). "Evaluation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims." Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, n. 12 (1978) (citing 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3911, p. 485 n. 45 (1976)).

Class Certification Discussion

The Court finds that each of the four requirements of Federal Rule of Civil Procedure 23(a) is satisfied in the pending adversary proceeding. The Court further finds that treatment as a class action is appropriate under Federal Rule of Civil Procedure 23(b)(3).

1. Numerosity.

Federal Rule of Civil Procedure 23(a)(1) requires that the class sought to be certified be "so numerous that joinder of all members is impracticable." This prerequisite, however, does not require that joinder be impossible. In re Kaiser Group Int'l., 278 B.R. 58, 64 (Bankr. D. Del. 2002). Practicability of joinder depends on many factors, such as the size of the class, ease of identifying its numbers and determining their addresses, the facility of making service on them if joined, and their geographic dispersion. Silva-Arriaga, 222 F.R.D. at 688.

Courts have not specified a specific number of plaintiffs that is required to maintain a class action. In re Protected Vehicles, Inc., 397 B.R. 339, 344 (Bankr. S.C. 2008). The Protected Vehicles court found the numerosity requirement to be satisfied where the proposed class was composed of approximately 300 claimants. Id. at 344-45. In this case, the putative class consists of 1,000 to 3,000 claimants.

TBW argues the Complaint's estimate of 1,000 to 3,000 claimants is unreasonable, speculative and unsupported by anything other than mere assertion. According to the Complaint,

though, over 600 former employees of TBW and its subsidiaries had already retained Outten & Golden LLP with respect to WARN Act claims. Joinder of 600 WARN Act claimants would be sufficiently impracticable to satisfy the numerosity requirement. The number of plaintiffs likely has increased in the 13 months since the adversary proceeding was first filed.

TBW also objects to Plaintiffs' allegation that it is responsible for its subsidiaries' employees with respect to their WARN Act claims. However, whether TBW and its subsidiaries qualify as a "single employer" under the WARN Act is a specific, merit-based issue that requires an opportunity for discovery by the parties before a determination can be made. See Bledsoe v. Emery Worldwide Airlines, Inc., 258 F.Supp.2d 780, 787 (S.D. Ohio 2003) ("the question of whether [a parent company] exercised a degree of control over [its subsidiary] justifying [a] Court's holding it accountable as the Plaintiffs' de facto employer is a fact-sensitive question which . . . should not be answered until the Plaintiffs have had some opportunity to conduct discovery on this matter."). The Court will not summarily deny class certification based on specific, merit-based WARN Act requirements before the parties have had some opportunity to conduct discovery.

2. Commonality.

To satisfy the commonality requirement under Federal Rule of Civil Procedure 23(a)(2), at least one factual or legal question must be shared by all class members. Bill Heard Enterprises, 400 B.R. at 802 (citing Protected Vehicles, 397 B.R. at 344). In this case, Plaintiffs allege that they and the putative class claimants were all terminated when TBW ceased operations prior to filing bankruptcy. As the court noted in Bill Heard Enterprises:

> There will be several common questions to be addressed for each plaintiff including: (a) whether plaintiffs and the putative class members were "affected employees" within the meaning of 29 U.S.C. § 2101(a)(5); (b) whether [the employer] was required by the WARN Act to give the plaintiffs and the other similarly situated former employees at least 60 days advanced written notice of

> their respective terminations; (c) whether [the employer] terminated the proposed class members without cause; and (d) whether [the employer] paid the proposed class members 60 days wages and benefits.

Id. at 802. In their responses to the Class Certification Motion, neither TBW nor the Committee objected to the commonality requirement. As such, the Court finds the commonality requirement satisfied.

3. Typicality.

Federal Rule of Civil Procedure 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Typicality requires that a class representative "possess the same interest and suffer the same injury as the class members." Santiago v. Wm. G. Roe & Sons, Inc., 2008 WL 2953003, *3 (M.D. Fla. May 15, 2008) (citing Cooper v. Southern Co., 390 F.3d 695, 713 (11th Cir. 2004)). The typicality requirement tends to merge with the commonality requirement of Rule 23(a)(2). Santiago v. Wm. G. Roe & Sons, Inc., 2008 WL 2953003 at *3 (citing Washington v. Brown & Williamson Tobacco Corp., 959 F.2d 1566, 1569 n. 8 (11th Cir. 1992)). Typicality is satisfied when the putative class's claims "arise from the same 'event or course of conduct' and are 'based on the same legal theory' as the plaintiff's." Bill Heard Enterprises, 400 B.R. at 802 (citing Protected Vehicles, 397 B.R. at 344).

In this case, each Plaintiff suffered the same type of injury as the rest of the class and TBW's alleged failure to comply with the requirements of the WARN Act represents a single course of conduct with regard to each potential class member. Plaintiffs allege that none of the class members received 60 days' advanced notice and were all terminated on or about the same day; thus, the facts surrounding Plaintiffs' claims and the legal theories upon which Plaintiffs' actions are grounded are typical of the entire class.

With respect to the typicality requirement, TBW again objects to Plaintiffs' allegation that it is responsible for its subsidiaries' employees. Plaintiffs were employed by TBW, not one of its subsidiaries, and yet Plaintiffs wish to represent a potentially nationwide class of former employees, including former employees of TBW subsidiaries. TBW argues this disparity in employers demonstrates that Plaintiffs' claims are not typical of all the employees they seek to represent. However, as was the case with the numerosity requirement, TBW's argument concerns a merit-based issue that requires discovery by the parties before a determination can be made. See Emery Worldwide Airlines, 258 F.Supp.2d at 787.

4. Adequacy of Representation.

Federal Rule of Civil Procedure 23(a)(4) requires the class representatives to "fairly and adequately protect the interests" of those the representatives purport to represent. The Eleventh Circuit has stated that the "'adequacy of representation' analysis 'encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action.'" Valley Drug Co. v. Geneva Pharmaceuticals, Inc., 350 F.3d 1181, 1189 (11th Cir. 2003) (citing In re HealthSouth Corp. Securities Litigation, 213 F.R.D. 447, 460-461 (N.D. Ala. 2003)). The Eleventh Circuit noted that "the existence of minor conflicts alone will not defeat a party's claim to class certification: the conflict must be a 'fundamental' one going to the specific issues in controversy." Valley Drug, 350 F.3d at 1189. "A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class." Id.

In this case, the Court finds that no substantial or fundamental conflicts of interest exist between Plaintiffs and the interests of the class as a whole. No Plaintiffs have any claims that conflict with the claims common to the rest of the class. The Court is satisfied that Plaintiffs will

adequately prosecute the action and are represented by class counsel who has already aggressively prosecuted this action by briefing and defending the issues before the Court.

5. Federal Rule of Civil Procedure 23(b)(3).

In addition to meeting the prerequisites for class certification under Rule 23(a), a class must meet at least one of the three alternative requirements for treatment as a class action under Federal Rule of Civil Procedure 23(b). In this case, the class meets the requirements of Rule 23(b)(3), which requires the Court to find that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The predominance inquiry focuses on "the legal or factual questions that qualify each class member's case as a genuine controversy," and is "far more demanding" than Rule 23(a)'s commonality requirement. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623-24 (1997). Four factors are set forth in Rule 23(b)(3) to guide the Court's determination:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Santiago v. Wm. G. Roe & Sons, Inc., 2008 WL 2953003 at *4.

As previously discussed, Plaintiffs estimate there are approximately 1,000 to 3,000 putative class members. The class members are spread out over many states. Each class member was employed by TBW or one of TBW's subsidiaries at the time TBW ceased operations. There are common or similar issues of law and fact (related to whether TBW's actions violated the WARN Act, whether the putative class members sustained damages and the

appropriate measure of those damages) which predominate over any questions affecting only individual members. As the Bill Heard Enterprises court ultimately concluded, "[i]f the Court refused to allow the adversaries to proceed and required these claimants to proceed alone through the claims procedure, it is evident that [the debtor] would defend against these claims leaving the claimants to defend their proofs of claims on their own, which would be impracticable given the small nature of the claims." Bill Heard Enterprises, 400 B.R. at 803. The Court finds that it is in the best interests of the putative class members and judicial economy to adjudicate these matters in one single action.

The Committee asserts that some TBW employees engaged in fraudulent conduct in loan processing which ultimately contributed to TBW's demise. The Committee argues these individual fraud issues predominate over the questions of law or fact common to class members, thus disqualifying the class action under Rule 23(b)(3). According to the Committee, the fraud allegations present fact-specific issues of proof and require a case-by-case inquiry into each employee's state of mind, which prevents class treatment in this case. However, the Court finds that the predominant issue in this case clearly is whether TBW's actions violated the WARN Act. A review of class action case law demonstrates that "courts are traditionally reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members":

> As the Court of Appeals for [the First Circuit] has stated: "where common issues otherwise predominated, courts have usually certified Rule 23(b)(3) classes even though individual issues were present in one or more affirmative defenses. After all, Rule 23(b)(3) requires merely that common issues predominate, not that all issues be common to the class." Smilow v. Southwestern Bell Mobile Systems, Inc., 323 F.3d 32, 39 (1st Cir. 2003) (internal citations omitted).

In re Sepracor Inc., 233 F.R.D. 52, 54 (D. Mass. 2005). In this case, the Committee's merit-based, unspecified fraud allegations against some unnamed employees will not prevent the Court

from certifying the class, especially before the parties have had an opportunity to conduct discovery. Also, the Court notes there has been no allegation that any of the Plaintiffs engaged in fraud, so this issue does not affect their adequacy to represent the class.

Class Counsel

The Court finds it appropriate to appoint Outten & Golden LLP and GrayRobinson, P.A. as class counsel. As provided in Federal Rule of Civil Procedure 23(g)(1)(A), the Court is required to consider the following:

(i) the work counsel has done in identifying or investigating potential claims in the action;
(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
(iii) counsel's knowledge of the applicable law; and
(iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. Proc. 23(g)(1)(A). Plaintiffs' counsel is qualified and has been actively and diligently prosecuting this action. By appointing Outten & Golden LLP and GrayRobinson, P.A. as interim class counsel (Doc. No. 26), the Court already made a preliminary determination that Plaintiffs' counsel is well-qualified to represent the putative class. Plaintiffs are being represented by attorneys who are highly experienced in class action litigation, specifically in prosecuting claims under the WARN Act.

Class Representatives

The Court finds it appropriate to appoint Plaintiffs as class representatives. Plaintiffs have been diligent in pursuing the class claim and have worked with counsel in initiating and prosecuting the action. Plaintiffs do not have interests which conflict with other putative class members. The Court is satisfied that they will fairly and adequately represent the interests of the other class members.

Form and Manner of Service of Notice

The Court finds it appropriate to approve the form and manner of the proposed notice to the class. Federal Rule of Civil Procedure 23(c)(2)(B) mandates that for any class certified under Rule 23(b)(3), the Court must determine the best notice practicable under the circumstances, including individual notice to potential class members, and that the notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues or defenses,
- that a class member may enter an appearance through counsel if the member so desired,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B). The notice required by Rule 23(c)(2) must contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt-out or remain a member of the class and be bound by the final judgment. In re Domestic Air Transp. Antitrust Litigation, 141 F.R.D. 534, 553 (N.D. Ga. 1992) (quoting In re Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088, 1105 (5th Cir. 1977)).

Plaintiffs' proposed notice (attached to the Class Certification Motion as Exhibit C) summarizes nature of the pending WARN Act litigation and apprises the proposed class, among other things: of the class definition; of the claims, issues and defenses; that complete information regarding the action is available upon request from class counsel; that any class member may opt-out of the class; that, if they do not opt-out, they will be bound by any judgment or settlement in the litigation; and that, if they do not opt-out, they may appear by their own counsel. The proposed notice contains all the information required by Rule 23(c)(2)(B).

TBW and the Committee object to the proposed notice, arguing that its definition of the class is misleading and overly broad, both in geographic scope and its inclusion of non-employees. TBW and the Committee contend Plaintiffs' class definition needs a geographic scope reasonably tailored to the WARN Act's requirements, and also that it must specifically exclude temporary employees, independent contractors and employees who were employed at single sites with fewer than 50 employees, as per the WARN Act. As was noted with respect to numerosity and typicality, however, the Court will not consider arguments which solely address the merits of the case at this point in the proceedings. Merit-based determinations, especially those involving interpretation of specific WARN Act requirements, necessitate discovery by the parties before a conclusion can be reached. See Emery Worldwide Airlines, 258 F.Supp.2d at 787.

Furthermore, the proposed notice actually references the WARN Act's requirements by defining the class as:

> the Plaintiffs and the other former employees of Defendant, (i) who worked at or reported to one of Defendant's facilities and who were terminated as part of, or as the foreseeable result of mass layoffs or plant closings ordered by Defendant on or about August 5, 2009, within thirty (30) days of that date, and thereafter, *and who are affected employees, within the meaning of 29 U.S.C. § 2101(a)(5)*, and (ii) who have not filed a timely request to opt-out of the class.

See Exhibit C to the Class Certification Motion (Doc. No. 47) (emphasis added). The proposed class definition includes the term "affected employees" and clarifies it by citing to the WARN Act. To the extent temporary employees, independent contractors and employees who were employed at single sites with fewer than 50 employees do not qualify as "affected employees" under the WARN Act, they are not included in Plaintiffs' proposed class definition.

Finally, Plaintiffs intend to send the proposed notice by First Class Mail, postage prepaid, to each member of the class at the member's last known address as shown on TBW's records.

Each class member will have at least 30 days from the date of the mailing to exercise his or her right to opt-out of the class. The Court finds this method of service to be the most practicable under the circumstances.

Conclusion

For the reasons set forth herein, the Court finds that TBW's Motion to Dismiss is due to be denied. The Court finds that Plaintiffs have satisfied the requirements of Federal Rules of Civil Procedure 23(a) and (b), and accordingly the Court will grant the Plaintiffs' Class Certification Motion. The Court also will appoint Outten & Golden LLP and GrayRobinson, P.A. as class counsel, appoint Plaintiffs as class representatives, and approve the form and manner of the proposed notice to the class. The Court will enter separate orders on the Motion to Dismiss and Class Certification Motion consistent with these Findings of Fact and Conclusions of Law.