NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-09-1235-MkJaD
CENTURY CITY DOCTORS HOSPITAL, LLC,	Bk. No. LA 08-23318-SB
Debtor.	Adv. No. LA 09-01101-SB
HEATHER WALSH, et al.,	
Appellants,	
v.	**MEMORANDUM**[*]
RICHARD K. DIAMOND, Chapter 7 Trustee; CENTURY CITY DOCTORS HOSPITAL, LLC,	
Appellees.	

Argued And Submitted On
May 20, 2010, at Pasadena, California

Filed: October 29, 2010

Appeal From The United States Bankruptcy Court
for the Central District of California

Honorable Samuel Bufford, Bankruptcy Judge, Presiding

Appearances: Blake Joseph Lindemann of Lindemann Law Group PLC for Appellants Heather Walsh, et al.
Walter K. Oetzell of Danning, Gill, Diamond & Kollitz, LLP for Appellee Richard K. Diamond, Chapter 7 Trustee.

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[*]This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

Before: MARKELL, JAROSLOVSKY[**] and DUNN, Bankruptcy Judges.

INTRODUCTION

Century City Doctor's Hospital, LLC ("CCDH") filed for chapter 7 bankruptcy[1] in August of 2008. Approximately five months later, Heather Walsh and others (the "Plaintiffs") sued CCDH under the Worker Adjustment and Retraining Notification Act, also known as the WARN Act, seeking back pay. The Plaintiffs also alleged that their back pay entitlement was an administrative expense priority in CCDH's bankruptcy case. CCDH's chapter 7 trustee moved to dismiss the complaint under Rule 7012, which incorporates Civil Rule 12(b)(6). In a reported opinion, the bankruptcy court granted the motion in its entirety, without leave to amend. Walsh v. Century City Doctors Hosp., LLC (In re Century City Doctors Hosp., LLC), 417 B.R. 801 (Bankr. C.D. Cal. 2009). Plaintiffs appealed. We AFFIRM.

FACTS

On August 22, 2008, at 12:06 p.m., CCDH filed its chapter 7 bankruptcy petition. CCDH operated a hospital in southern California. A trustee for CCDH's chapter 7 estate, Richard Diamond (the "Trustee"), was immediately appointed. Under § 704 of the Bankruptcy Code, a chapter 7 trustee is responsible for

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[**]Hon. Alan Jaroslovsky, United States Bankruptcy Judge for the Northern District of California, sitting by designation.

[1]Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, and all "Civil Rule" references are to the Federal Rules of Civil Procedure.

collecting and reducing to money all property of the estate in an expeditious manner. In furtherance of this duty, the Trustee sought and obtained from the bankruptcy court authorization to temporarily operate the hospital for a period of several days to facilitate its orderly closure. This authorization also included authority to supervise the discharge or transfer of CCDH's remaining patients and the termination of CCDH's remaining employees.

The Trustee initially requested 120 days to wind up CCDH's operations. The court, however, only authorized the Trustee to operate the hospital for a period of four days, until August 26, 2008. On August 26, 2008, the Trustee withdrew his request to operate the hospital for 120 days, and instead sought leave to wind up CCDH's operations by August 31, 2008.[2]

On January 31, 2009, after CCDH had ceased operations, the Plaintiffs, consisting of Walsh and other former employees of CCDH, sued CCDH and others for, among other things, violation of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101, et seq. (the "WARN Act"). The Plaintiffs claimed that they were each entitled to sixty days' back pay because they did not receive the statutorily-required, pre-termination notice prescribed by 29 U.S.C. § 2102.[3] According to the Plaintiffs'

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[2]According to the Trustee, if CCDH did not vacate the hospital property by August 31, 2008, CCDH would incur additional rent expenses, which the Trustee contended the estate had no funds to pay.

[3]"An 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 – (1) to each representative of

(continued...)

complaint, their back pay entitlement also qualified as an administrative expense of the bankruptcy estate because their back-pay accrued "after the filing of the Debtor's bankruptcy petition." Complaint (Jan. 31, 2009), at ¶ 52.

In support of their claim of postpetition accrual, Plaintiffs alleged that each of their terminations occurred between 2:30 p.m. on August 22, 2008, and August 30, 2008. The complaint also alleges that a "super-majority" of the Plaintiffs were not terminated until they received a termination memorandum drafted and mailed on August 26, 2008 by CCDH's interim chief executive officer Pat Wolfram. This was four days after CCDH's bankruptcy filing.

While the complaint contains specific allegations regarding the timing of the terminations, the complaint does not contain clear allegations regarding the party responsible for the terminations or for the connected violations of the WARN Act. Paragraph 19 of the Complaint is a good example: "[Neither] Defendant, nor the Trustee (to the extent the Trustee terminated certain employees) provided Plaintiffs the statutorily required sixty (60) days notice of the mass layoff or termination in violation of the WARN Act." Notably, the term "Defendant" is not defined in the Complaint, and there is more than one named defendant.

The Trustee moved to dismiss the complaint as against the

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[3](...continued)
the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee . . . ." 29 U.S.C. § 2102(a)(1).

bankruptcy estate for failure to state a claim. The Trustee argued that he was not an "employer" subject to the WARN Act, and thus neither he nor CCDH's estate could be liable for violation of the WARN Act. The Trustee similarly argued that he did not qualify as an employer under any of the other statutes relied upon by Plaintiffs, as alleged in the complaint's second and third claims for relief.

In support of his motion to dismiss, the Trustee filed a request for judicial notice. The judicial notice request referred to four court documents: (1) the Trustee's August 22, 2008 emergency motion seeking authorization to operate debtor's business; (2) the bankruptcy court's August 22, 2008 order on the Trustee's authorization motion; (3) the Trustee's August 26, 2008 supplement to his authorization motion; and (4) the bankruptcy court's August 28, 2008 further order on the Trustee' authorization motion. These four documents, together, establish that the Trustee only was authorized to operate the hospital for a period of ten days, and only for the purpose of effectuating an orderly closure of the hospital. According to the Trustee, the documents establish that he was not running a business enterprise within the meaning of the WARN Act, and therefore he did not qualify as an employer subject to the WARN Act's notice requirements.

In their opposition to the motion to dismiss, the Plaintiffs characterized the Trustee's not-an-employer argument as an affirmative defense, and hence an improper basis for a motion to dismiss. According to Plaintiffs, the "liquidating fiduciary exception" to WARN Act liability is a factual determination that

cannot be made on a motion to dismiss. The Plaintiffs also argued that the Trustee's motion to dismiss was not well taken because the Trustee, as an individual, was not a named party to the lawsuit and because the Trustee's role in the lawsuit, if any, was merely in his capacity as administrator of CCDH's bankruptcy estate.[4]

Plaintiffs' opposition reiterated that their terminations occurred postpetition. For instance, Plaintiffs stated:

> The key focus needs to be on the post-petition *acts* of the Debtor or Debtor in Possession, and the labor that benefits the estate can be pre-petition to qualify as an administrative claim. **Post-petition, representatives of the Debtor and/or the Trustee terminated Claimants** . . . . The rule enunciated in Metro Fulfillment is straightforward; Wages and penalties **based on termination during the post-petition period** are administrative claims.

Opposition to Motion to Dismiss (May 5, 2009), at 9:9-9:14 (emphasis added).

The bankruptcy court held a hearing on the motion to dismiss, at which the court effectively granted the Trustee's judicial notice request, and orally ruled that it would dismiss the complaint as against the Trustee because he could not have any liability under the WARN Act.

On June 16, 2009, the bankruptcy court entered its order dismissing the complaint in its entirety as against the Trustee and the estate,[5] and on June 26, 2009, the Plaintiffs filed this

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[4]That this series of arguments is inconsistent with any attempt to ascribe WARN Act liability to the trustee is not lost on the Panel.

[5]Plaintiffs have characterized the dismissal order as only dismissing the WARN Act claim, but this is patently incorrect. The dismissal order on its face granted the Trustee's motion to

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appeal. On August 18, 2009, the bankruptcy court issued an opinion explaining in detail its reasoning for dismissing Plaintiffs' WARN Act claim. Walsh v. Century City Doctors Hosp., LLC (In re Century City Doctors Hosp., LLC), 417 B.R. 801 (Bankr. C.D. Cal. 2009). This opinion, issued after the Plaintiffs commenced this appeal, did not in any way alter the bankruptcy court's prior judgment.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(B) and (O). We have jurisdiction under 28 U.S.C. § 158, subject to the resolution of the jurisdictional issue discussed immediately below.

We may hear an appeal from an interlocutory order only if we grant leave to appeal. See 28 U.S.C. § 158(a)(3); Rules 8001(b), 8003; Giesbrecht v. Fitzgerald (In re Giesbrecht), 429 B.R. 682, 687-88 (9th Cir. BAP 2010); Ransom v. MBNA Am. Bank, N.A. (In re Ransom), 380 B.R. 799, 802, 809 n.21 (9th Cir. BAP 2007), aff'd, 577 F.3d 1026 (9th Cir. 2009), cert. granted, 2010 WL 333672 (Apr. 19, 2010).

A judgment or order that does not dispose of all claims

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[5](...continued)
dismiss, and expressly dismissed the complaint in its entirety as against the Trustee and the estate.

There is a bit of confusion in the record as to the scope of the bankruptcy court's oral ruling of dismissal at the hearing. Whereas the court first indicated that it was going to grant in full the Trustee's motion to dismiss, the court later stated at the same hearing, upon inquiry by Plaintiff's counsel, that only the WARN Act claim would be dismissed. In spite of the ambiguity in the record, the written form of the court's entered dismissal order, which is not ambiguous, controls. Cashco Fin. Servs., Inc. v. McGee (In re McGee), 359 B.R. 764, 774 n.9 (9th Cir. BAP 2006).

stated and all parties named in the complaint is interlocutory, and not final. See Rule 7054 (incorporating Civil Rule 54(b)); American States Ins. Co. v. Dastar Corp., 318 F.3d 881, 884 (9th Cir. 2003) (citing Cheng v. Comm'r, 878 F.2d 306, 310 (9th Cir. 1989)). However, if prior to the appellate court addressing the finality issue, another order is entered fully and finally disposing of the matter, the finality defect associated with the prior interlocutory order can be deemed "cured." Cato v. Fresno City, 220 F.3d 1073, 1074-75 (9th Cir. 2000); Dannenberg v. Software Toolworks, Inc., 16 F.3d 1073, 1075 (9th Cir. 1994).

Here, even though the order on appeal only disposed of the complaint as against the estate, Plaintiffs subsequently entered into stipulations dismissing the remaining claims and defendants. Consequently, a motions panel deemed the finality defect cured, and concluded that the BAP had jurisdiction over this matter as an appeal from a final order. See BAP Order (Jan. 5, 2010).

The problem is, on further examination of one of Plaintiffs' dismissal stipulations, it appears that Plaintiffs only agreed to dismiss that defendant without prejudice, and only with the understanding that the action against that defendant might be reinstated at the conclusion of the appeals process. See Stipulation to Dismiss Without Prejudice (July 13, 2009). The contents of this stipulation arguably create the impression that the parties agreed to the dismissal at least in part for the purpose of manufacturing appellate jurisdiction. If that truly is the case, the July 13, 2009 dismissal stipulation would be ineffective to render the order on appeal final for appeal purposes. See American States, 318 F.3d at 885-92; Dannenberg,

16 F.3d at 1075-78.

However, we need not determine here whether the July 13, 2009 dismissal stipulation was ineffective for finality purposes. Plaintiffs also filed a motion for leave to appeal, which we now grant, pursuant to Rule 8003. The BAP routinely applies the factors enunciated in 28 U.S.C. § 1292(b) in deciding whether to grant leave to appeal an interlocutory bankruptcy court order. See, e.g., In re Travers, 202 B.R. 624, 626 (9th Cir. BAP 1996) (stating that "leave is appropriate if the order involves [1] a controlling question of law [2] where there is substantial ground for difference of opinion and [3] when the appeal is in the best interests of judicial economy because an immediate appeal may materially advance the ultimate termination of the litigation."). We conclude that the factors for granting leave to appeal are sufficiently present in this appeal.

ISSUES[6]

1. Did the bankruptcy court err when it determined that the Trustee was not an employer under the WARN Act?
2. Did the bankruptcy court improperly make a factual finding that the terminations occurred postpetition?
3. Did the bankruptcy court improperly make a factual finding

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[6]Plaintiffs have not specifically addressed on appeal the bankruptcy court's dismissal of their second and third claims for relief. Thus, they have waived any issues relating to the dismissal of their second and third claims for relief, to the extent those issues might have diverged from those presented in their challenge to the dismissal of their federal WARN Act claim. See Chappel v. Lab. Corp. of Am., 232 F.3d 719, 725 n.3 (9th Cir. 2000) (on appeal from dismissal under Civil Rule 12(b)(6), holding that arguments not raised on appeal are deemed waived).

that the Trustee was the only party responsible for the terminations?

4. Did the bankruptcy court properly take judicial notice of the fact that it authorized the Trustee to temporarily operate CCDH, and the limited scope of that authorization?

5. Did the bankruptcy court err when it granted the Trustee's dismissal motion with prejudice, without giving Plaintiffs an opportunity to amend their complaint?

6. Do any of the other arguments that Plaintiffs raise on appeal have any merit?

STANDARDS OF REVIEW

We review de novo a dismissal under Civil Rule 12(b)(6). See AlohaCare v. Hawaii Dept. of Human Services, 572 F.3d 740, 744 n.2 (9th Cir. 2009).

Generally speaking, denial of leave to amend is reviewed for abuse of discretion. See, e.g., Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990). It also has been said that appellate courts should "review strictly a . . . court's exercise of discretion denying leave to amend." Albrecht v. Lund, 845 F.2d 193, 195 (9th Cir. 1988). Even though the above-cited cases refer to the use of the abuse-of-discretion standard, the Ninth Circuit also has held that "'[d]ismissal without leave to amend is improper, unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.'" Intri-Plex Techs., Inc. v. Crest Group, Inc., 499 F.3d 1048, 1056 (9th Cir. 2007).

A decision whether to grant or deny a judicial notice request is reviewed for abuse of discretion. Madeja v. Olympic

Packers, LLC, 310 F.3d 628, 639 (9th Cir. 2002).

The bankruptcy court abuses its discretion if it bases its decision on an erroneous view of the law. See U.S. v. Gould (In re Gould), 401 B.R. 415, 421 (9th Cir. BAP 2009). The bankruptcy court also can abuse its discretion if its bases its decision on clearly erroneous factual findings, or misapplies the facts to the relevant law. See United States v. Hinkson, 585 F.3d 1247, 1261-63 (9th Cir. 2009) (en banc).

DISCUSSION

A. Standards governing Civil Rule 12(b)(6) dismissal motions.

A motion to dismiss under Civil Rule 12(b)(6) challenges the sufficiency of the allegations set forth in the complaint. "A Rule 12(b)(6) dismissal may be based on either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" Johnson v. Riverside Healthcare Sys., 534 F.3d 1116, 1121 (9th Cir. 2008) (quoting Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)).

In resolving a Civil Rule 12(b)(6) motion to dismiss, the court must construe the complaint in the light most favorable to the plaintiff, and accept all well-pleaded factual allegations as true. Johnson, 534 F.3d at 1122; Knox v. Davis, 260 F.3d 1009, 1012 (9th Cir. 2001). On the other hand, the court is not bound by conclusory statements, statements of law, and unwarranted inferences cast as factual allegations. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-57 (2007); Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994).

"While a complaint attacked by a Rule 12(b)(6) motion to

dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citations omitted). "In practice, a complaint . . . must contain either direct or inferential allegations respecting **all the material elements** necessary to sustain recovery under some viable legal theory." Id. at 562 (emphasis added) (quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984)).

In Ashcroft v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009), the Supreme Court elaborated on the Twombly standard:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.

Id. (citations and internal quotation marks omitted.)

Further, the allegations of the complaint, along with other materials properly before the court on a motion to dismiss, can establish an absolute bar to recovery. See Weisbuch v. County of Los Angeles, 119 F.3d 778, 783 n. 1 (9th Cir. 1997) ("If the pleadings establish facts compelling a decision one way, that is as good as if depositions and other expensively obtained evidence on summary judgment establishes the identical facts."). While the court generally must not consider materials outside the complaint, the court may consider exhibits submitted with the

complaint. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

In addition, facts properly subject to judicial notice may be used to establish that the complaint does not state a claim for relief. Intri-Plex Techs., Inc., 499 F.3d at 1052; Estate of Blue v. County of Los Angeles, 120 F.3d 982, 984 (9th Cir.1997); Mullis v. Bankruptcy Ct., 828 F.2d 1385, 1388 (9th Cir. 1987). In this regard, a court can properly take judicial notice of court papers filed in related litigation. Estate of Blue, 120 F.3d at 984. Further, court documents filed in an underlying bankruptcy case are subject to judicial notice in related adversary proceedings and district court lawsuits. O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989); Mullis, 828 F.2d at 1388.

B. The bankruptcy court did not err when it determined that the Trustee was not an employer under the WARN Act.

In determining that the Trustee was not an employer under the WARN Act, the bankruptcy court considered the allegations stated in Plaintiffs' complaint, and the limited scope of authority that the court itself granted to the Trustee to temporarily operate CCDH. According to the bankruptcy court:

> This is a case where from the very beginning it was a Chapter 7 case, and -- and from the outset it was a liquidation case. And it's matters that are properly subject to judicial notice in this case as outlined by Mr. Oetzell in his presentation, support the -- a conclusion of the Court that this has from the outset been a liquidation and that in this case that's sufficient basis for the Court to determine that the Trustee is not an employer for the purposes of the application of the [WARN] Act.

Hearing Transcript (May 19, 2009), at 23:17-23:25.

Plaintiffs challenge the bankruptcy court's determination

that the Trustee could not be an employer on two grounds, both of which are considered below.

1. The bankruptcy court did not err when it relied on the Department of Labor's commentary in construing the WARN Act's definition of employer.

Under the WARN Act, "employers" generally must give sixty-days' advance written notice to "affected employees" of a "plant closing" or a "mass layoff," as those terms are defined in the act. See 29 U.S.C. §§ 2101, 2102. The primary issue in this appeal is the meaning of "employer" under the WARN Act. In holding that the Trustee did not qualify as an employer within the meaning of the WARN Act, the bankruptcy court relied on published commentary accompanying the Department of Labor's regulations promulgated to facilitate enforcement of the WARN Act (the "DOL Commentary"). In relevant part, the DOL Commentary states:

> . . . DOL agrees that a fiduciary whose sole function in the bankruptcy process is to liquidate a failed business for the benefit of creditors does not succeed to the notice obligations of the former employer because the fiduciary is not operating a "business enterprise" in the normal commercial sense. In other situations, where the fiduciary may continue to operate the business for the benefit of creditors, the fiduciary would succeed to the WARN obligations of the employer precisely because the fiduciary continues the business in operation.

54 Fed. Reg. 16042, 16045 (1989).

Plaintiffs argue that the plain meaning of the word "employer" conclusively establishes that the WARN Act meant the word "employer" to cover any entity that has employees. According to Plaintiffs, the bankruptcy court erred by ignoring this plain meaning, and instead relying on the DOL Commentary.

Plaintiffs' plain meaning argument ignores the fact that the

WARN Act defines the term employer. Under the WARN Act:

> (1) . . . the term "employer" means any business enterprise that employs –
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> (A) 100 or more employees, excluding part-time employees; or
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> (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). Plaintiffs' so-called plain-meaning definition does not jibe with this statutory definition, in that the statutory definition places a floor on the minimum number of employees an employer must employ and, more importantly, refines the definition to only include business enterprises.

While the WARN Act does not define the term "business enterprise," the Ninth Circuit already has relied on the DOL Commentary in construing the meaning of this term. See Chauffeurs, Sales Drivers, Warehousemen & Helpers Union v. Weslock Corp., 66 F.3d 241, 244 (9th Cir. 1995). Relying on the statutory definition of employer and the DOL Commentary, the Weslock court held that the defendant therein would qualify as an employer under the WARN Act only if it operated "debtor's assets as a 'business enterprise' in the 'normal commercial sense.'" Id. (quoting DOL Commentary). According to Weslock, the "crucial question" is whether the WARN Act defendant at the time of the terminations "is responsible for operating the business as a going concern." Id.; see also Official Committee of Unsecured Creditors v. United Healthcare System (In re United Healthcare System), 200 F.3d 170, 176-77 (3d Cir. 1999) (holding that plain language of statute did not resolve who would qualify as an employer under WARN Act, and relying on DOL Commentary for guidance).

Plaintiffs have not articulated any plain meaning definition specifically with respect to the term "business enterprise" but even if they had, their plain meaning definition could not trump the Ninth Circuit's construction of that term; we are bound by the Ninth Circuit's interpretation. While the defendant in Weslock was a secured creditor, rather than a chapter 7 trustee, the Weslock court explained that, "[f]or the purpose of determining when a defendant becomes an employer under WARN, we see no reason for drawing a distinction between a 'fiduciary' in bankruptcy who takes control of debtor's assets and a creditor who exercises control over collateral securing a delinquent loan." Id.

Given that the Ninth Circuit already has used the DOL Commentary for the same purpose, the bankruptcy court did not err when it relied on the DOL Commentary to determine whether the Trustee qualified as an employer under the WARN Act.[7]

2. The bankruptcy court did not err by not giving Plaintiffs the opportunity to conduct discovery and present evidence regarding whether the Trustee qualified as an employer under the WARN Act.

Plaintiffs argue that the Trustee herein still might have qualified as an employer even under the construction of that term as refined by the DOL Commentary. Plaintiffs characterize the "liquidating fiduciary exception" as an affirmative defense,

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[7]Because Weslock effectively disposes of the Plaintiffs' argument regarding the DOL Commentary, we need not determine whether Plaintiffs' argument also runs afoul of Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), which requires courts to give significant deference to agency rulings interpreting statutes that the subject agency is responsible for administering. Id. at 842-43.

which Plaintiffs contend the Trustee was obliged to plead and prove. Thus, according to Plaintiffs, the liquidating fiduciary exception could not be properly considered in conjunction with a Civil Rule 12(b)(6) motion. We disagree with Plaintiffs' characterization of the liquidating fiduciary exception as an affirmative defense. Plaintiffs cite no authority to support their characterization nor are we aware of any. More importantly, the WARN Act's notice requirement, on its face, only applies to employers. The so-called "liquidating fiduciary exception" merely reflects a limitation on the statutory definition of employer. The bankruptcy court properly considered employer status as a required element that had to be properly alleged to state a viable claim for relief under the WARN Act.

More generally, Plaintiffs argue that, if they were given the opportunity to conduct discovery and present evidence, they might have been able to show that the Trustee was not a liquidating fiduciary, and therefore the bankruptcy court erred by not giving them this opportunity. But this argument does not comport with the standard governing Civil Rule 12(b)(6) motions enunciated by the Supreme Court in Twombly and Iqbal. The Twombly court rejected the old, no-set-of-facts standard, where a court could not properly dismiss a complaint under Civil Rule 12(b)(6) "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." Twombly, 550 U.S. at 561 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In place of the no-set-of-facts standard, the Twombly court articulated a new "plausability" standard. Twombly held that a complaint must

contain enough well-pled facts that, when taken as true, "state a claim for relief that is plausible on its face." Id. at 570. Twombly emphasized that mere conclusory allegations of illegal conduct were insufficient to state a claim for relief. According to Twombly, such conclusory allegations get "the complaint close to stating a claim, but without some further factual enhancement, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id. at 557.

Iqbal amplified and refined Twombly's plausibility standard. Iqbal held that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S.Ct. at 1949. Iqbal further stated that the plausibility determination is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 1950.

With this guidance in mind, we turn back to Plaintiffs' argument that they ultimately might have been able to prove that the Trustee was not a liquidating fiduciary. Under the plausibility standard, we must look at the allegations in Plaintiffs' complaint and determine what inferences the bankruptcy court reasonably could have drawn from their well-pled allegations. Here, Plaintiffs alleged that CCDH commenced a chapter 7 bankruptcy case, a chapter 7 trustee was appointed, and CCDH thereafter was liquidated. Plaintiffs further alleged that, after the bankruptcy was filed, they were terminated without receiving advance written notice. We hold that these alleged facts, when taken as true, do not plausibly suggest that the

Trustee was anything other than a liquidating fiduciary. Using Iqbal's phraseology, one could not reasonably infer from the alleged factual content that the Trustee operated CCDH as a business enterprise in the normal commercial sense.

Our holding is supported by the role played by chapter 7, and specifically chapter 7 trustees, in bankruptcy. According to the leading treatise on bankruptcy, "Chapter 7, colloquially known as 'straight bankruptcy,' is the 'operative' chapter of the Bankruptcy Code that normally governs liquidation of a debtor." 6 COLLIER ON BANKRUPTCY, ¶ 700.01 (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. rev. 2010) (hereinafter "COLLIER"). Once appointed, a chapter 7 trustee must "perform the basic tasks necessary to liquidate the debtor's property – collecting the property of the estate and reducing it to money. These tasks are normally accomplished by the trustee's sale of the property, and are to be accomplished expeditiously." 6 COLLIER, supra, at ¶ 704.01. See also 11 U.S.C. § 704(a)(1). The bankruptcy court can enter an order authorizing a chapter 7 trustee to temporarily operate a debtor's business, but such authorization must be restricted to a limited period of time, and the scope of the authorized operation must be "consistent with the orderly liquidation of the estate." 11 U.S.C. § 721; see also 6 COLLIER, supra, at ¶ 721.01.

The Complaint does not allege that the Trustee temporarily operated CCDH, nor is any temporary operation implicit in any facts that Plaintiffs did allege. Rather, the bankruptcy court took judicial notice of the fact that it authorized temporary management of CCDH's business, but only for a period of roughly

ten days, and then only to enable the Trustee to close down CCDH's hospital operations in an orderly manner. As a matter of law, the bankruptcy court concluded that the limited authorization to operate CCDH granted to the Trustee did not transmute the Trustee from a liquidating fiduciary to an operator of a business enterprise in the normal commercial sense. We agree. As explicated in Weslock, the dispositive issue is whether, at the time terminations occurred, the defendant was "responsible for operating the business as a going concern." Weslock, 66 F.3d at 244. Here, the bankruptcy court's orders establish that the Trustee was authorized to operate CCDH only for a period of several days, and only for the purpose of permanently closing CCDH's business in an expeditious and orderly manner.

Moreover, in most instances, subjecting a chapter 7 estate to WARN Act liability based on the trustee's actions is simply bad policy, especially when the debtor is a health care business. The Bankruptcy Code requires chapter 7 trustees to:

> (12) use all reasonable and best efforts to transfer patients from a health care business that is in the process of being closed to an appropriate health care business that –
>
> (A) is in the vicinity of the health care business that is closing;
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> (B) provides the patient with services that are substantially similar to those provided by the health care business that is in the process of being closed; and
>
> (C) maintains a reasonable quality of care.

11 U.S.C. § 704(a)(12). A Chapter 7 trustee ought to be free to carry out these duties without fear of subjecting the bankruptcy

estate to additional administrative expenses not directly related to caring for patients, and the exercise of these duties should not result in his characterization as an employer in a business enterprise.

In sum, while we assume without deciding that it is conceivable that some set of facts might exist under which a chapter 7 trustee might operate a debtor as a going concern, mere conceivability does not satisfy the plausibility standard. See Iqbal, 129 S.Ct. at 1950-51. Here, in light of the alleged facts and the judicially-noticed facts properly before the bankruptcy court,[8] it would not have been reasonable for the bankruptcy court to infer that the Trustee operated CCDH as a business enterprise in the ordinary commercial sense. Thus, the bankruptcy court did not err by not giving Plaintiffs the opportunity to conduct discovery and offer evidence on the issue of whether the Trustee qualified as an employer under the WARN Act.

C. The bankruptcy court did not make a factual finding that the terminations occurred postpetition.

Plaintiffs claim that the bankruptcy court improperly found that their terminations all occurred postpetition, and that there was insufficient evidence for the court to make this finding.[9]

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[8]The propriety of the bankruptcy court's judicially-noticed facts is discussed in section E, below.

[9]This issue is significant because someone other than the Trustee necessarily would have been responsible for any termination that occurred prepetition, because the Trustee, as a matter of law, could not have assumed control and management responsibility over CCDH and its assets until CCDH's chapter 7 bankruptcy was commenced. If someone else was responsible for (continued...)

Plaintiffs' claim is meritless. The bankruptcy court did not find that the terminations occurred postpetition; a court does not make factual findings on a motion to dismiss. Rather, the court accepted as true Plaintiffs' allegations that all of the Plaintiffs were terminated postpetition. Plaintiffs' assertion that they did not allege this simply is false.

Further, Plaintiffs reiterated their allegations that the terminations all occurred postpetition in statements they made in their opposition to the motion to dismiss and at the hearing on the motion to dismiss. Such statements constitute a concession of the issue. See, e.g., Knox, 260 F.3d at 1013; Weisbuch, 119 F.3d at 781.

Thus, even if Plaintiffs had not alleged in their complaint that all of their terminations occurred postpetition (which they did), the bankruptcy court properly could have relied on Plaintiffs' statements in their opposition papers and at the hearing that all of their terminations occurred postpetition.

D. The bankruptcy court did not make a factual finding that the Trustee was the only party responsible for the terminations.

Plaintiffs argue that the bankruptcy court improperly found that the Trustee was the party responsible for all of their terminations. Plaintiffs point out that their complaint did not

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[9](...continued)
the terminations, that party presumably would not have been a liquidating fiduciary. For instance, if CCDH's pre-bankruptcy management was responsible for the terminations, then CCDH could qualify as an employer under the WARN Act, and its bankruptcy estate might have had administrative expense priority liability for any back pay that was due as a result of violation of the WARN Act and that was attributable to the postpetition period. See 11 U.S.C. § 503(b)(1)(A)(ii).

allege that the Trustee was responsible for all of their terminations. According to Plaintiffs, they should have been given the opportunity to conduct discovery and present evidence regarding who was responsible for their terminations.

However, the bankruptcy court did not make any such factual finding, again because that was not its role on a motion to dismiss. Rather, the Trustee's responsibility for Plaintiffs' terminations necessarily follows, as a matter of law, from the facts that Plaintiffs alleged. Specifically, because Plaintiffs all were terminated postpetition, as Plaintiffs alleged, and because only the Trustee had the authority postpetition to terminate the Plaintiffs, the sole person responsible for the Plaintiffs' terminations had to be the Trustee.

When CCDH filed its chapter 7 bankruptcy petition, its prebankruptcy management automatically lost their authority to manage CCDH; the only successor to that authority was the Trustee. See Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 352-53 (1985). As stated in Weintraub:

> . . . the Bankruptcy Code gives the trustee wide-ranging management authority over the debtor. In contrast, the powers of the debtor's directors are severely limited. Their role is to turn over the corporation's property to the trustee and to provide certain information to the trustee and to the creditors. Congress contemplated that when a trustee is appointed, he assumes control of the business, and the debtor's directors are completely ousted.

Id. (citations, footnotes and internal quotation marks omitted).

Plaintiffs point out that some of their terminations, as alleged, occurred within hours after CCDH's bankruptcy filing, before the Trustee had been appointed. They argue that the Trustee could not have been responsible for any postpetition

terminations that occurred before his appointment. We disagree. This argument might have had some legs if CCDH's bankruptcy case had been commenced under chapter 11, in which case prebankruptcy management can continue to control operations postpetition on behalf of a debtor-in-possession, unless and until a chapter 11 trustee is appointed. See Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n, 997 F.2d 581, 585 & n.6 (9th Cir. 1993). However, in chapter 7, no one other than the chapter 7 trustee has authority postpetition, on behalf of the bankruptcy estate, to manage and control the debtor's business and assets. See id. In chapter 7 cases, the trustee is the sole representative of the bankruptcy estate, and the debtor's prebankruptcy management has no authority over the bankruptcy estate. Id. (citing Weintraub, 471 U.S. at 353, 355).[10]

Here, any postpetition terminations that occurred before appointment of the Trustee became effective upon the Trustee's ratification, thereby making those terminations his own. See, e.g., Crevier v. Welfare & Pension Fund For Local 701 (In re Crevier), 820 F.2d 1553, 1557 (9th Cir. 1987)(acknowledging chapter 7 trustee's ratification of debtors' unauthorized postpetition transfer of estate property, and explaining that, by ratifying the transfer, the trustee effectively adopted the

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[10]The bankruptcy code also gives the trustee powers on behalf of the estate that prebankruptcy management never enjoyed, like the power to assume or reject executory contracts and unexpired leases. See 11 U.S.C. § 365(a). In relevant part, § 365 enables the trustee to reject executory contracts and unexpired leases entered into by prebankruptcy management if he concludes that such rejection would be beneficial to the estate. See 3 COLLIER, supra, at ¶ 365.03.

transfer as his own). Simply put, under the facts as alleged, only the Trustee legally could have been responsible for Plaintiffs' postpetition terminations. Thus, we reject Plaintiffs' claim that the bankruptcy court improperly found the Trustee responsible for Plaintiffs' terminations.

E. The bankruptcy court properly took judicial notice of the fact that it authorized the Trustee to temporarily operate CCDH, and the limited scope of that authorization.

Plaintiffs contend that, by granting the Trustee's judicial notice request, the bankruptcy court improperly took judicial notice of facts that are subject to reasonable dispute. Plaintiffs argue that they validly disputed "the purposes of which the Trustee were employed." Further, Plaintiffs characterize the facts that the bankruptcy court took judicial notice of as "hearsay allegations." We disagree with Plaintiffs' contention and each of its premises.

It is well-settled that court documents from the underlying bankruptcy case are subject to judicial notice in related adversary proceedings and related district court litigation. See In re E.R. Fegert, Inc., 887 F.2d at 957-58; Mullis, 828 F.2d at 1388. The record here establishes that the bankruptcy court took judicial notice of the filing of the Trustee's motion for authorization to temporarily operate CCDH, and the supplement thereto. The bankruptcy court also took judicial notice of the entry of its own orders on the Trustee's authorization motion. Finally, the bankruptcy court properly took judicial notice of the contents of its own orders. It had only permitted the Trustee to operate CCDH for a period of several days, and then only for the purpose of closing down the hospital as quickly as

practicable. Notwithstanding Plaintiffs' claims to the contrary, the terms and contents of the court's own authorization orders were not subject to reasonable dispute.

The court's authorization language was not inadmissible hearsay. It was not an utterance or assertion made outside of court offered to prove the truth of the matter asserted. Rather, the authorization language was not a statement of fact or evidence – as an operative order, it had independent legal effect. The specific content of this language – what the court ordered – was the subject of the court's judicial notice, and not some extrinsic factual matter.

Thus, the bankruptcy court did not err by taking judicial notice of the extent and scope of its authorization orders.

F. The bankruptcy court did not err by dismissing Plaintiffs' causes of action without leave to amend.

As indicated above, the Ninth Circuit has variously stated the standard of review applicable to a dismissal without leave to amend. Regardless of the standard articulated, these cases generally agree that a court should not dismiss a complaint without leave to amend unless amendment would be futile. Intri-plex, 449 F.3d at 1056 (citing Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989)); Reddy, 912 F.2d at 296; Albrecht v. Lund, 845 F.2d at 195. This is true even where, as here, Plaintiffs never made a formal motion for leave to amend. See Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 247 (9th Cir. 1990).

Some of these same cases have elaborated on the meaning of the futility standard, by holding that amendment is futile when

allegation of other facts consistent with the existing pleading could not cure the deficiency. See Reddy, 912 F.2d at 296-97; Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc., 806 F.2d 1393, 1401 (9th Cir. 1986). Here, we cannot conceive of any additional facts, consistent with the existing factual allegations and the judicially-noticed facts before the bankruptcy court, that would have cured the defects in Plaintiffs' complaint. Plaintiffs themselves have not articulated, either to us or to the bankruptcy court, any particular amendments that they would have liked to have made if they had been given the opportunity.

But Plaintiffs' complaint is beyond cure. As discussed previously, as a matter of law, only the Trustee could have been responsible for the Plaintiffs' postpetition terminations, and the Trustee was bound by statute and court order to close down CCDH and liquidate its assets in an orderly and expeditious manner. Further, Plaintiffs admitted in their complaint that the liquidation had, in fact, occurred. Under these circumstances, there are no allegations that Plaintiffs could have added to the complaint that would have made the Trustee anything other than a liquidating fiduciary, and thus amendment of Plaintiffs' complaint never could have made the Trustee an "employer" subject to the WARN Act.[11]

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[11]Even if Plaintiffs had expressed a desire to allege that the Trustee operated CCDH beyond the scope of his authority, as a going concern, then Plaintiffs' complaint would have been subject to a different fatal defect: an administrative expense priority claim against CCDH for violation of state or federal labor laws (continued...)

Plaintiffs' briefs on appeal arguably suggest that Plaintiffs would have liked to amend their complaint to allege that someone other than the Trustee was responsible for their terminations. However, we already have explained elsewhere in this memorandum why, as a matter of law, only the Trustee could have been responsible for these terminations.

Plaintiffs' appeal briefs also suggest that they would have liked to amend their complaint to allege that their terminations occurred prepetition. However, such an amendment would have been inconsistent with their numerous prior allegations and statements, referenced throughout this memorandum, that all of their terminations occurred postpetition. In dismissing without leave to amend, the bankruptcy court was not required to consider such an amendment because: (1) Plaintiffs neither proposed nor even hinted at such an amendment, and (2) such an amendment would

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[11](...continued)
only could arise from postpetition actions of the Trustee taken within the scope of his authority. See Reading Co. v. Brown, 391 U.S. 471, 485 (1968) (holding that claim arising from bankruptcy receiver's negligence was administrative expense priority claim where receiver was "acting within the scope of his authority"); In re Metro Fulfillment, Inc., 294 B.R. 306, 310-12 (9th Cir. BAP 2003) (applying Reading to penalty wages arising from violation of state labor laws). The rationale for requiring the Trustee to be acting within the scope of his authority for an administrative expense claim to arise is straightforward: "[T]rustees act on behalf of the estate, and obligate only the estate, insofar as they are carrying out the duties required of their office. When they take action not within the scope of those duties, they are acting on their own." In re Markos Gurnee Partnership, 182 B.R. 211, 217 (Bankr. N.D. Ill. 1995). As Plaintiffs themselves point out, they did not name the Trustee as a defendant in his personal capacity; the Trustee's only involvement herein is as the representative of CCDH's bankruptcy estate.

have been inconsistent with Plaintiffs' existing allegations and concessions. See Albrecht, 845 F.2d at 195; Reddy, 912 F.2d at 296-97; Schreiber, 806 F.2d at 1401; see also Knox, 260 F.3d at 1013 (in ruling on Civil Rule 12(b)(6) motion, court may rely on concessions made by plaintiff); Weisbuch, 119 F.3d at 781 (same).

PAE Government Services, Inc. v. MPRI, Inc., 514 F.3d 856 (9th Cir. 2007), does not require a different result. In MPRI, the court of appeals held that the district court erred when it struck an amended pleading solely because it stated facts that were inconsistent with prior versions of that pleading. The defendant on appeal had argued, among other things, that cases like Reddy prohibited a plaintiff from pleading inconsistent facts. The MPRI court disagreed. The MPRI court opined that nothing in federal procedure precludes a plaintiff from pleading inconsistent facts, and that Reddy stood for the "unremarkable proposition" that a district court can dismiss a complaint without leave to amend when amendment will not cure the defects in the complaint. Id. at 859-60.

MPRI is distinguishable from our case. Whereas the plaintiff in MPRI actually proposed an amended pleading containing the inconsistent allegations, Plaintiffs here never proposed in the bankruptcy court to amend their complaint to allege prepetition terminations. Indeed, nothing in the bankruptcy court record suggests in the slightest that Plaintiffs might have desired to amend their complaint to allege prepetition terminations. To the contrary, all of the allegations and statements made by Plaintiffs created the exact opposite impression – that Plaintiffs had conceded that all of the

terminations occurred postpetition.

Nothing in MPRI requires a court, when considering whether to dismiss without leave to amend based on futility, to consider hypothetical amended pleadings containing allegations inconsistent with those already alleged. To construe MPRI's holding more broadly would bring MPRI into direct conflict with Albrecht, Reddy and Schreiber. Further, common sense dictates that, if trial courts were required to consider the entire universe of hypothetical amendments, including amendments with allegations inconsistent with those already alleged, then trial courts effectively would be precluded from ever dismissing without leave to amend on the basis of futility, as the pool of hypothetical amendments subject to consideration would be untenably large.

In sum, because amendment of Plaintiffs' complaint would have been futile, the bankruptcy court did not err when it dismissed Plaintiffs' causes of action against the estate without leave to amend.

G. Plaintiffs' other arguments have no merit.

Plaintiffs have advanced several other arguments on appeal, each of which has no merit.

Initially, Plaintiffs argue that, because they did not name the Trustee as a defendant in their lawsuit, the court should not have granted any relief in favor of the Trustee or the bankruptcy estate. This argument ignores the fact that Plaintiffs named CCDH as a defendant, and that the principal relief that Plaintiffs sought in their complaint was an administrative expense priority claim against CCDH's bankruptcy estate. Because

the Trustee, by statute, is the legal representative of the bankruptcy estate (see 11 U.S.C. § 323; 3 COLLIER, supra, at ¶ 323.01), he properly could defend and seek dismissal of the complaint on behalf of the estate.

Plaintiffs also argue that the court should have adhered to the procedures governing objections to claims, as set forth in various statutes and rules, including but not limited to Rule 3007, and Local Rule 3007-1 of the local bankruptcy rules for the Central District of California. This argument ignores the fact that, by filing a complaint in the bankruptcy court, Plaintiffs commenced an adversary proceeding subject to the procedures set forth in Part VII of the Federal Rules of Bankruptcy Procedure. In other words, Plaintiffs themselves, through their own litigation activity, implicated the adversary proceeding rules, including Rule 7012(b), which makes Civil Rule 12(b)(6) motions to dismiss available in adversary proceedings. Simply put, Civil Rule 12(b)(6) governs here, and nothing Plaintiffs say justifies supplanting Civil Rule 12(b)(6) procedure with a different set of procedures.[12]

Plaintiffs also argue that their due process rights were violated. However, Plaintiffs' due process argument hinges on two contentions: (1) that the court should have adhered to claims objection procedure, and (2) that the court should have given the

[12]Each of the parties confirmed at oral argument that there has been no disallowance of any proofs of claim that Plaintiffs or other former employees of CCDH have filed or might file in the future. In addition, we note that the bankruptcy court's dismissal of the adversary proceeding necessarily is without prejudice to employee rights beyond the scope of the bankruptcy court's ruling.

Plaintiffs the opportunity to conduct discovery and present evidence at further hearing. We already have discussed and rejected these contentions above, and no purpose would be served if we were to rehash those discussions here.

Finally, Plaintiffs argue that their filing of an adversary proceeding was the appropriate procedure for the relief they sought against CCDH's bankruptcy estate. It is difficult to reconcile this argument with Plaintiffs' claims objection and due process arguments, as both of these arguments, in essence, attempt to negate the Trustee's entitlement to challenge the complaint under Civil Rule 12(b)(6) – a fundamental component of adversary proceeding procedure. In any event, we do not need to consider the propriety of the adversary proceeding any further. The Trustee never challenged the propriety of the Plaintiffs' use of an adversary proceeding to seek the relief requested, nor did the bankruptcy court rule that Plaintiffs' use of an adversary proceeding was inappropriate. Consequently, the propriety of Plaintiffs' filing of an adversary proceeding is not in dispute, and is beyond the scope of this appeal.

CONCLUSION

For all of the reasons set forth above, we AFFIRM the bankruptcy court's order dismissing Plaintiffs' complaint in its entirety as against the Trustee and CCDH's bankruptcy estate.