Docket #0065 Date Filed: 8/29/2018

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: WESTINGHOUSE ELECTRIC COMPANY LLC, *et al.*,[1] Debtors.	Chapter 11 Bankr. Case No. 17-10751-MEW (Jointly Administered)
KENT GLADDEN, ANDREW FLEETWOOD, and RODNEY CAVALIERI, on behalf of themselves and all others similarly situated, Plaintiff, v. WECTEC LLC, WESTINGHOUSE ELECTRIC COMPANY LLC, WECTEC STAFFING SERVICES LLC, WECTEC GLOBAL PROJECT SERVICES INC., WEC CAROLINA ENERGY SOLUTIONS INC., WEC CAROLINA ENERGY SOLUTIONS, LLC and STONE & WEBSTER SERVICES LLC, Defendants.	**Adv. Pro. No. 17-1109**

MEMORANDUM OF LAW IN OPPOSITION TO MASSEY PLAINTIFFS' MOTION FOR TRANSFER

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if any, are: Westinghouse Electric Company LLC (0933), CE Nuclear Power International, Inc. (8833), Fauske and Associates LLC (8538), Field Services, LLC (2550), Nuclear Technology Solutions LLC (1921), PaR Nuclear Holding Co., Inc. (7944), PaR Nuclear, Inc. (6586), PCI Energy Services LLC (9100), Shaw Global Services, LLC (0436), Shaw Nuclear Services, Inc. (6250), Stone & Webster Asia Inc. (1348), Stone & Webster Construction Inc. (1673), Stone & Webster International Inc. (1586), Stone & Webster Services LLC (5448), Toshiba Nuclear Energy Holdings (UK) Limited (N/A), TSB Nuclear Energy Services Inc. (2348), WEC Carolina Energy Solutions, Inc. (8735), WEC Carolina Energy Solutions, LLC (2002), WEC Engineering Services Inc. (6759), WEC Equipment & Machining Solutions, LLC (3135), WEC Specialty LLC (N/A), WEC Welding and Machining, LLC (8771), WECTEC Contractors Inc. (4168), WECTEC Global Project Services Inc. (8572), WECTEC LLC (6222), WECTEC Staffing Services LLC (4135), Westinghouse Energy Systems LLC (0328), Westinghouse Industry Products International Company LLC (3909), Westinghouse International Technology LLC (N/A), and Westinghouse Technology Licensing Company LLC (5961). The Debtors' principal offices are located at 1000 Westinghouse Drive, Cranberry Township, Pennsylvania 16066.

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INTRODUCTION

This Court has sought the parties' views on whether to transfer the WARN Act adversary proceedings against Westinghouse,[2] which are core proceedings, to the District of South Carolina ("D.S.C.").

Since March, the Court has noted several reasons to transfer the WARN adversaries but reserved its decision until the D.S.C. Court had ruled on motions there. The Court's concerns are well-taken, and certainly would be compelling if the D.S.C. cases were about Westinghouse's WARN liability, but they are not.

A summary of the issues being litigated in this Court makes this clear. Here, the litigation will center on the effectiveness of Westinghouse's post-shutdown notice to its employees. This determination may reduce the $17.5 maximum damages amount that Gladden counsel estimates it owes them. This has nothing to do with the D.S.C. litigation. The next determination will be whether this amount can be further reduced, because Westinghouse could not foresee the SCANA announcement of July 31, 2018. This issue will turn primarily on Westinghouse's own witnesses and documents. This evidence will not necessarily be salient to the D.S.C. litigation. Litigating this issue in this forum should be efficient with some expected pretrial coordination with the D.S.C. parties. Lastly, there is the claim that SCANA was a single employer with Westinghouse. The determination of this issue may further reduce Westinghouse's liability. The employees' litigation of this issue in D.S.C. should not complicate the resolution of the discrete Westinghouse liability issues here. Gladden counsel have succeeded before in litigating on a single-employer defendant's home turf while the estate stays in its bankruptcy forum. Maintaining this posture here would maximize economy and efficiency.

[2] "Westinghouse" refers herein to the Debtors, whose Chapter 11 Plan went effective on August 1, 2018. (D.I. 3705)

A transfer to D.S.C., however, will tax the estate. The D.S.C. Court has chosen to certify a broad class of all plaintiffs and counsel to carry on that litigation. In doing so, the Court made no distinction as to whether employees worked for Westinghouse or Fluor. The Court effectively certified one big class action. The Westinghouse case would presumably be merged into it if the adversaries are transferred. The main WARN issues will be those pertaining to the thousands of non-Westinghouse employees. The stakes of the Fluor group's claims against Fluor and SCANA dwarf the claim against Westinghouse posed here. In South Carolina, Westinghouse will be beholden to, and overshadowed by, those other claimants and defendants.

The Massey Plaintiffs are the only proponents of a transfer. Their request is understandable. Massey Plaintiffs have strenuously tried to insinuate themselves into this litigation, first by filing a duplicative WARN complaint three months after Gladden. Then, faced with a motion to dismiss their action as duplicative, Massey Plaintiffs changed course. They now seek to charge Westinghouse with the entire $100+ million in damages being sought by the Fluor employees in their D.S.C. actions against Fluor and SCANA. Massey Plaintiffs may think this approach will bring them to a venue willing to overlook their otherwise duplicative, unnecessary filing. But the late-added allegations suggest an "afterthought," in the words of this Court. Assuming it is asked, this Court should determine whether the proposed Massey allegations on their face can withstand scrutiny, no less serve as paving stones for the road to South Carolina.

BACKGROUND

I. The Complaints

In the D.S.C., one of Gladden Counsel's (Outten & Golden LLP) Pennington complaint alleges three WARN claims: (1) a WARN single employer claim against SCANA for Fluor

employees (2) a WARN single employer claim against SCANA for Westinghouse employees, and (3) a direct WARN claim against Fluor for Fluor employees.[3]

In the D.S.C., the three Massey Counsel firms' Butler Complaint alleges a WARN claim "against just Fluor Defendants" on behalf of Fluor employees. (Case No.: 0-17-02201-JMC (D.S.C.), hereinafter "Butler Docket" ECF No. 86 (Order Denying Fluor Defendants' Motion to Dismiss the [Butler] action pursuant to the first-to-file rule) at 2, citing Butler Docket ECF No. 1).[4]

Here, the Gladden Complaint filed in August 2017 alleges a direct WARN Act claim against Westinghouse. The Massey Complaint, filed three months after the original Gladden complaint, alleges a direct WARN Act claim against Westinghouse. Massey Counsel moved in March 2018 for leave to amend their complaint with allegations that Westinghouse was the single-employer of the thousands of Fluor employees. (D.I. No. 45).

II. The Class Certification Hearing Regarding Transfer

In considering the pending class certification motions here, the Court questioned whether keeping the WARN adversaries in the Southern District of New York would lead to mischief, lack of coordination, excess legal expense, inconsistent rulings, and confusion among class members.

> THE COURT: I don't see anything efficient about it. I see nothing but an open invitation to mischief and lack of coordination and excess legal expense and potential inconsistent rulings and confusion among class members, who would be getting notices from different courts, who would never be able to keep track of which claim is subject to what or

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[3] The original Complaint (Case No.: 17-cv-02094-JMC (D.S.C), hereinafter "Pennington Docket", ECF. No. 1) and Amended Complaint (Pennington Docket, ECF No. 41).

[4] Butler Plaintiffs sought in their Complaint to represent "all other similarly situated former employees, pursuant to 29 U.S.C. § 2104(a)(5) and Rule 23(a), who worked for Fluor within 90 days of July 31, 2017, and were terminated without cause on or about July 31, 2017, and within 30 days of that date, or were terminated without cause as the reasonably foreseeable consequence of the mass layoffs ordered by Fluor on or about July 31, 2017.Order Order, Denying Fluor Defendants' Motion to Dismiss the [Butler] action pursuant to the first-to-file rule. (Butler Docket ECF No. 86 at 2)

> whether they have or have opted out or not. I don't still see the slightest bit of efficiency in this at all.

(Class Certification Hearing Transcript, March 29, 2018. 26: 19-25).

The Court asked for briefing on transfer. Although it was suggested that transfer might be warranted because Massey Plaintiffs moved to expand their claims against Westinghouse to include single employer allegations on behalf of Fluor employees, the Court registered some skepticism, likening the allegations to an "afterthought."

> THE COURT: Is it true that your current set of proposed class representatives did not include any Fleur employees?
> MR. ERCOLE: That is true, Your Honor, except as the Court may be aware, we filed a motion to amend the complaint on Monday, which was the last day of pleading.
> THE COURT: I saw that, but you know your contentions that your existing complaint supposedly includes the Fleur employees, when I looked at your actual class allegations and your class representatives, that did not exactly seem like a supportable proposition. It seemed more like an afterthought than something you had already done.

(Class Cert. Hr'g. Tr. 29:11-22).

The Court asked whether it was possible for Westinghouse plaintiffs to bring a claim on behalf of Fluor employees without a Fluor employee class representative.[5] When told it was possible under a single employer theory, the Court called it "Nonsense. That a bunch of Westinghouse employees can be adequate representatives of Fleur employees?" (Class Cert. Hr'g. Tr. 30:4-6).

When the Court was told that Fluor and Westinghouse employees worked together and were terminated on the same date, the Court responded: "Except that the Westinghouse employees couldn't care less whether Fluor is or is not found to be a single employer with

[5] THE COURT: Is it true that your current set of proposed class representatives did not include any Fleur employees? (Class Cert. Hr'g. Tr. 29:11-13)

Westinghouse. So how on earth could they possibly be adequate representatives?" (Class Cert. Hr'g. Tr. 30:11-13)

Turning to the issue of typicality, the Court continued: "But the Fluor employees would have an additional thing to prove, that none of the Westinghouse employees would have to prove. So how on earth could their claims by typical, and how on earth could the Westinghouse representatives adequately have an incentive and being trusted to litigate those claims to the fullest? It's nonsense." (Class Cert. Hr'g. Tr. 30:14-25 – 31:1-5).

The Court then stated the role of class representatives in Rule 23 class actions:

> THE COURT: You know, but in a -- at least the theory of class actions is that class counsel is not running everything.
>
> MR. ERCOLE: Right.
>
> THE COURT: And class counsel is not making all the decisions. If that were the fact, we wouldn't bother having adequate representatives and typicality of claims. The theory of class actions is that the case is under the direction of a Plaintiff, who has claims that are typical of the other class members. And the Plaintiff is an adequate fiduciary to make sure that the class is protected. So I know there are decisions where Courts say "Oh, well you know, you can count on Counsel." Nonsense.

(Class Cert. Hr'g. Tr. 31:13-25).

The Court continued:

> That's not what the rule anticipates. You can count on Counsel to some degree, but you've got to have typical claims. You've got to have a Plaintiff who has a legitimate incentive to protect all the members of the class. And as to Fleur employees, you don't have those things.

(Class Cert. Hr'g. Tr. 32:1-5).

Turning to the class counsel selection under Rule 23, the Court asked Massey

> THE COURT: Okay. So if I were to certify a class, why should it be you and not the other group?

(Class Cert. Hr'g. Tr. 32:15-16).

Massey Counsel answered by arguing that all counsel should be named class counsel: brushing aside Gladden counsel's concerns that doing so would be overkill and cause inefficiency.

> MR. ERCOLE: Mr. Raisner paints this dire and drastic situation, where he says, "Consolidation would be costly, burdensome, potentially crippling. It would double the number of Class Counsel and triple the number of Plaintiffs that would need to be consulted on every significant decision, potentially deadlocking the case over management issues. And having dropped the ball in this lap -- or having dropped this job in the Court's lap without making the slightest effort to describe how it could possibly work, much less benefit the Class, Massey's plan does not merit consideration."
>
> It's all nonsense. We worked together in many other cases. He knows the efforts and the way we worked together in MF Global, in (indiscernible) and other cases. So it's -- he knows exactly how it will be. We'd be professional. We would communicate with the Court as one voice.

(Class Cert. Hr'g. Tr. 33:12-25 – 34:1-3).

Massey counsel allowed that disagreements occur, but denied that Rule 23(g)(2) requires the Court to select the best able counsel, and that too many lawyers is inefficient and expensive.

> MR. ERCOLE: Certainly, there are times when you're working with multiple firms, that we have a disagreement over some strategy or --
>
> THE COURT: Doesn't Rule 23 contemplate that I make a choice here?
>
> MR. ERCOLE: No.
>
> THE COURT: Not that I force you to work together?
>
> MR. ERCOLE: I think you can force us to work together because factually, the standard is, what's in the best interests of the class? And so, this Court could determine that having the four top WARN Act firms in the country work together is the best interests of the class.
>
> THE COURT: Except that, you know, I was a litigator for 35 years. And I know that no matter how well Counsel can work together, if you have six different law firms involved, you will inevitably have an absurd amount of duplication because you will have people researching the same issues, you will have people taking different views of different things.

> The more lawyers you have involved, the more room for that disagreement you will have. And instead of an efficient prosecution on behalf of the class, you will have an overly expensive fund.

(Class Cert. Hr'g. Tr. 34:4-25 – 35:1).

Massey Counsel stood on its proposed Amended Complaint to justify its role in the Westinghouse litigation.

> MR. ERCOLE: Well, again, I -- since that's the way the motions were filed, we said that. I said, "If you're choosing to pick one, you should pick Massey Counsel because we protect the Westinghouse employees as well as the absent Fluor class." We have a broader class. We have a broader complaint.
>
> THE COURT: But why does protecting the Fluor people make you a better representative of the Westinghouse people?

(Class Cert. Hr'g. Tr. 37:4-12).

As the Court pressed Massey Counsel to explain why its claim on behalf of Fluor employees made it a better representative of Westinghouse employees, Massey counsel answered first that he could not "believe that Mr. Raisner has -- and the Gladden Counsel made the decision that they're not going to pursue Westinghouse on a single employer theory this early in the litigation" and "it's -- then you're just back to the issue of how many people signed up with us and, you know, our theories in general". Tr.37:13-25, 38:1-4).

Massey Counsel has never proffered evidence showing the number of employees it allegedly "signed up" for the WARN litigation.

III. The District Court of South Carolina Class Certification Order

In its Order granting class certification, as in other Orders, the D.S.C. Court recognized that the Pennington plaintiffs are an ex-Fluor and ex-Westinghouse employee.[6] It noted that

[6] *See*, Order, Denying the Motion for Judgment on the Pleadings under Rule 12(c) of the Federal Rules of Fluor Defendants, Pennington Docket, ECF No. 128 at 2 ("Until their respective terminations, Plaintiffs further allege that Pennington worked directly for Fluor Daniel at VC Summer as a Heavy Equipment Operator and Lorentz was

Plaintiffs Pennington and Lorentz alleged they worked for Fluor and Westinghouse, respectively. Pennington Docket, ECF No. 133 at 1-2 citing (*Id.* at 4 ¶¶ 14, 15.). The Court also noted that Pennington and Lorentz both alleged they were employees of SCANA (as a single employer with their direct employers). *Id.*

The Court found the Pennington Plaintiffs satisfied the Rule 23(a) factors of typicality, commonality, and adequacy with respect to the Defendants. (Pennington Docket, ECF No. 133 at 9-10). It certified the Pennington class definition of all employees of Defendants at VC Summer as follows:

> A class (the "Class") is certified comprising:
>
> > Plaintiffs and all persons (i) who were former employees of Defendants and worked at, reported to, or received assignments from the VC Summer Nuclear Station (the "Facility"), located at Highway 215 & Bradham Blvd, Jenkinsville, South Carolina 29065, (ii) who were terminated without cause on or about July 31, 2017 or within 30 days of that date, or were terminated without cause as the reasonably foreseeable consequence of the mass layoffs and/or plant closings ordered by Defendants on or about July 31, 2017, (iii) who are "affected employees" within the meaning of 29 U.S.C. § 2101(a)(5), and (iv) who have not filed a timely request to opt-out of the Class.

Pennington Docket, ECF No. 133 at 11.

While it might be natural to read the Order as certifying a class with two groups of employees: (1) the ex-Fluor employees such as Mr. Pennington insofar as they have claims against both Defendant SCANA and Fluor, and (2) the ex-Westinghouse employees such as Mr. Lorentz, insofar as they have claims against SCANA, the Court did not make such distinctions in making appointments.

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employed by Westinghouse Electric Company LLC ('WEC') as a Project Manager", *citing* Pennington Docket, ECF No. 41 at 4 ¶¶ 14, 15; *also* Order and Opinion, Denying Motion to Dismiss of Defendants SCANA Corporation and South Carolina Electric & Gas Company., Pennington Docket, ECF No. 109 at 2 (same).

IV. The District of South Carolina Order on Class Appointments and Consolidation

In contrast to its earlier consolidation Order consolidating the *Pennington* and *Butler* actions for discovery and pretrial motions,[7] in its Order of July 18, 2018, (the "Consolidation Order") the Court consolidated the cases "for all purposes pursuant to Rule 42(a)*."*

> In reviewing the instant Motions and the Motions for Class Certification (*see* ECF Nos. 21, 115 (*Pennington*); ECF No. 62 (*Butler*)), the court was reminded that each case presents virtually identical factual and legal issues. Given the similarities of the cases and the lack of any apparent inconvenience, delay, or expense that would result from bringing the cases together, the court consolidates these cases for all purposes pursuant to Rule 42(a).

(Pennington Docket, ECF No. 134 at 9; Butler Docket, ECF No. 78 at 9).

Further, the Consolidation Order appointed Class Representatives. It appointed as Class Representatives the Pennington Plaintiffs and the Butler Plaintiffs.[8] The Order of July 18th, did not designate specific responsibilities to Class Representatives, although the Order notes the Butler Action was filed on behalf of Fluor employees against Fluor. Pennington Docket, ECF No. 134 at 2; Butler Docket, ECF No. 78 at 2.

Finally, the Consolidation Order also appointed class counsel. Regarding counsel, the Order designates specific responsibilities. It designated certain counsel as co-lead counsel:

> For this reason, the court appoints as co-lead class counsel Jack Raisner and Rene Roupinian of Outten & Golden LLP and Lee Moylan and Charles Ercole of Klehr Harrison Harvey Branzburg LLP in accordance with Rule 23(g)(1). *See Wright v. Krispy Kreme Doughnuts, Inc.*, 232 F.R.D. 528, 530 (M.D.N.C. 2005) ("The court . . . may appoint one or more attorneys as . . . [L]ead [C]ounsel . . . for the consolidated cases and accordingly assign the designated lawyers specific responsibilities.") (quoting 9 Charles

[7] Pennington Docket, ECF No. 86 at 8; Butler Docket, ECF No. 43 at 8,

[8] Pennington Docket, ECF No. 134 at 8; Butler Docket, ECF No. 78 at 8 ("the court finds that the interests of both Pennington Plaintiffs and Butler Plaintiffs are aligned with those of the other class members. Accordingly, the court appoints Harry Pennington III, Timothy Lorentz, Lawrence Butler, Lakeisha Darwish, Darron Eigner, Jr., Bernard A. Johnson and Jimi Che Sutton as class representatives.)

> Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*: Civil 2d § 2385, at 463 (2d ed. 1994 & Supp. 2005) (footnote omitted)).

(Pennington Docket, ECF No. 134 at 7-8; Butler Docket, ECF No. 78 at 7-8).

The Order also appointed co-lead counsels' local counsel to serve in that capacity:

> As for local counsel, the court appoints Amy Gaffney, Regina Lewis and Susan Edwards of Gaffney Lewis & Edwards, LLC, Nancy Bloodgood and Lucy Sanders of Bloodgood and Sanders, and David Yarborough, Jr. and William Applegate, IV of Yarborough Applegate.

(Pennington Docket, ECF No. 134 at 8; Butler Docket, ECF No. 78 at 8).

Lastly, the Oirder designated all counsel as "class counsel in both lawsuits going forward":

> As a result of the foregoing, the court appoints Jack Raisner and Rene Roupinian of Outten & Golden LLP; Lee Moylan and Charles Ercole of Klehr Harrison Harvey Branzburg LLP; Amy Gaffney, Regina Lewis and Susan Edwards of Gaffney Lewis & Edwards, LLC; Nancy Bloodgood and Lucy Sanders of Bloodgood and Sanders; and David Yarborough, Jr. and William Applegate, IV of Yarborough Applegate as class counsel *in both lawsuits going forward*.

(Pennington Docket, ECF No. 134 at 10; Butler Docket, ECF No. 78 at 10).

ARGUMENT

In determining whether to transfer this case the most important factor is the economic and efficient administration of the estate. *In re Dunmore Homes*, Inc., 380 B.R. 663, 671–72 (Bankr.S.D.N.Y.2008).

Under 28 U.S.C. § 1412, "a district court may transfer a case or proceeding under title 11 to a district court in another district 'in the interest of justice or for the convenience of the parties.'" *In re: Suntech Power Holdings Co., Ltd*., 520 B.R. 399, 420 (Bankr. S.D.N.Y. 2014). As the *Suntech* Court noted, "Bankruptcy Courts in this district are authorized to transfer a case under § 1412 by virtue of 28 U.S.C. §§ 157(a) and 1334(b) and the District Court's order of reference." *Id*. (citation omitted). The *Suntech* Court further noted that while the "decision to transfer venue lies within the sound discretion of the court" the "party seeking to change venue

bears the burden of proof by a preponderance of the evidence." *Id*. Indeed, this is "a heavy burden of proof," because a debtor's choice of forum is "presumed to be the appropriate district for hearing and determination of a proceeding in bankruptcy." *Id*. Thus, courts must cautiously exercise the power to transfer a case as a debtor's selection of a proper venue is entitled to great weight. *Id*. If "transfer of venue would merely shift the inconvenience from one party to another, the debtor'' choice of forum should not be disturbed." *Id*.

A. The Transfer Factors

When evaluating the interest of justice and convenience of the parties Courts often look to the criteria established in the circuit court decisions in *Gulf States Exploration Co. v. Manville Forest Prods. Corp. (In re Manville Forest Prods. Corp.),* 896 F.2d 1384, 1391 (2d Cir.1990).

Citing *Manville*, the *Suntech* Court noted: "The interests of justice and the convenience of the parties are written in the disjunctive, and considered separately." 520 B.R. at 421. The "interest of justice" component of § 1412 is a broad and flexible standard which must be applied on a case-by-case basis. It contemplates a consideration of whether transferring venue would promote the efficient administration of the bankruptcy estate, judicial economy, timeliness, and fairness"). *Manville*, 896 F.2d at 1391. In determining whether the interest of justice would be best served, courts may consider factors that include whether:

1. transfer would promote the economic and efficient administration of the bankruptcy estate;
2. the interests of judicial economy would be served by the transfer;
3. the parties would be able to receive a fair trial in each of the possible venues;
4. either forum has an interest in having the controversy decided within its borders;
5. the enforceability of any judgment would be affected by the transfer; and
6. the plaintiff's original choice of forum should be disturbed.

Suntech, 520 B.R. at 422 (citing *In re Dunmore Homes*, 380 B.R. 663, 671–72 (Bankr. S.D.N.Y. 2008)).

Courts also consider the impact of the learning curve if the case is transferred. *Dunmore*, 380 B.R. at 672 (citation omitted). *In re Enron Corp.*, 284 B.R. 376, 404 (Bankr.S.D.N.Y.2002) ("The learning curve analysis involves consideration of the time and effort spent by the current judge and the corresponding effect on the bankruptcy case in transferring venue.") *(citation omitted).* In addition, courts consider the "ability of interested parties to participate in the proceedings and the additional costs that might be incurred to do so." *Dunmore*, 380 B.R. at 672 *(citation omitted).*

As to the "convenience of the parties" prong, courts consider the following factors:

1. the location of the plaintiff and the defendant;
2. the ease of access to the necessary proof;
3. the convenience of the witnesses and the parties and their relative physical and financial condition;
4. the availability of the subpoena power for unwilling witnesses; and
5. the expense of obtaining unwilling witnesses.

In re Enron Corp., 317 B.R. 629, 639 (Bankr. S.D.N.Y. 2004).

B. Transfer Does Not Satisfy the Interest of Justice Test

1. The economic and efficient administration of the estate militates against transfer

The Courts hold that the "most important factor is the first one: the economic and efficient administration of the estate." *Suntech*, 520 B.R. at 422.

Transfer of this case to the District Court of South Carolina would mire the estate in a multi-party litigation having little to nothing to do with it. The Westinghouse employees' WARN Act claim against Westinghouse is a discrete claim, for a discrete sum –estimated at

approximately $17.5 million. It is based primarily on what Westinghouse did to its own employees in the days and weeks following July 31, 2017. Upon a finding that Westinghouse provided a valid WARN notice (which Gladden Plaintiffs contend it did not), Westinghouse might show it did not reasonably foresee the shutdown, to negate its liability. These issues have little or nothing to do with the D.S.C. litigation. In D.S.C., the Westinghouse employees seek to prove that SCANA shares all or part of the Westinghouse WARN liability – a claim that this Court need not take up, just as the D.S.C. Court need not take up the claims against Westinghouse.

The South Carolina litigation is the Fluor/SCANA litigation. Fluor's and SCANA's liability for the termination of the Fluor employees (which number an estimated four to five thousand) is a potential $100+ million-dollar issue. The litigation over Westinghouse's post-shutdown communications to its employees, at best, is a side show if not a distraction.

The concern that Westinghouse's claims may be overwhelmed in the D.S.C. is borne out in the appointment of seven class representatives there, only one of whom worked for Westinghouse. Without making differentiations, the Court put the control of the Westinghouse litigation in the hands of the six Fluor class representatives who have no interest in Westinghouse, and their three law firms, who currently represent no Westinghouse employees in the South Carolina litigation. (See, pp. 9-10, above). Mr. Lorentz and his counsel are therefore outnumbered by those with no interest in the Westinghouse employees or estate's administration. While it may be true that if this case is transferred, and all the current Gladden and Massey plaintiffs and counsel are added to the class leadership that has been certified (making 19 or 20 class representatives), that imbalance would change. The dominant claims, however, will be the

$100+ million Fluor/SCANA claims, as opposed to the SCANA/Westinghouse claim. Westinghouse's liability will be the proverbial tail of the dog.

If the bulging D.S.C. litigation was not reason enough to decline a transfer, the Massey Plaintiffs now seek to make Westinghouse pay the entire $100+ million claim as a single employer. Transferring that claim to South Carolina may delight the defendants there who would be exonerated, but it should give this Court pause. Before exposing the estate to the consequences of this "afterthought" claim, the Court might determine whether allegations are facially sufficient to see the light of day in any court. (See, pp.4-7, above).

Upon a transfer, Westinghouse will lose a forum in which its economic and efficient case administration will be a significant concern over the course of the litigation. The well-being of the estate can be promoted and preserved only by denying transfer.

2. This Court's venue is most consistent with judicial economy

Judiciary economy insists that unnecessary, duplicative and conflicting litigation be avoided. There will be little to no threat to judicial economy if the Westinghouse claims remain in the Southern District of New York.

As mentioned, there is a limited nexus between the Westinghouse claims and the South Carolina claims. Although the announcement of SCANA to shut down the VC Summer Site set in motion the WARN Act claims against all the defendants, the claims against Westinghouse will turn on what Westinghouse knew prior to the announcement, and what Westinghouse did to its employees afterwards. Similarly, the claims against Fluor will turn on what it knew about SCANA's decision beforehand, and what it did to its employees afterwards. Those paths do not meet or cross, thus there cannot be duplicate litigation if the Westinghouse case stays in New York, and the Fluor litigation continues in D.S.C. Nor can there be inconsistent rulings with

respect to Fluor and Westinghouse because their knowledge of SCANA's decision to shut down the VC Summer Site will turn on different facts. Whether SCANA's decision subjects it to liability as a single employer to Fluor or Westinghouse is a separate issue from Westinghouse's own liability. It will be litigated by the employees in the South Carolina Court, and should impose no burden on the estate, this Court or judicial economy.

To the extent there are overlapping material facts, economies in the litigation can be achieved by the parties doubling up discovery requests and depositions to be efficient whether the Westinghouse case is in New York or South Carolina. A protocol for promoting such economies would be feasible and greeted by all. A transfer of the cases is not required for that reason. *See Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman*, 306 B.R. 746, 751 (S.D.N.Y. 2004).

Likewise, it would be efficient for this Court to keep the Westinghouse WARN case because this Court is familiar with Westinghouse's operations, including and especially at the VC Summer Site. The D.S.C. Court, by contrast, has not been steeped in this history yet.

"The learning curve analysis involves consideration of the time and effort spent by the current judge and the corresponding effect on the bankruptcy case in transferring venue." *In re Enron Corp.*, 284 B.R. 376, 404 (Bankr. S.D.N.Y. 2002).

That two Courts will have to know something about the events at the VC Summer Site will be true whether or not the Westinghouse cases are transferred. The New York Bankruptcy Court is arguably the Court most familiar with those events. At present, it has presided over the Westinghouse Debtors activities at VC Summer Site since March 2017, including the period in question. It may be more familiar with the claims flowing from the termination of the construction project because of the ongoing Westinghouse litigation relating to Fluor's contested

proof of claim. The District Court Judge, Hon. J. Michelle Childs, does not appear to have VC Summer Site litigation in her docket as does this Court. (The stock drop litigation against SCANA based on the VC Summer Site is assigned to Hon. Judge Margaret B. Seymour). In any event, Judge Childs' eventual examination of the issues relating to what Fluor knew or did not know ahead of the July 31 shutdown and did relative to its employees will likely involve a different record than the one concerning what Westinghouse knew and did. The "learning curve" of one case does not aid or replicate the learning curve of the other. *Dunmore*, 380 B.R. at 672 (citation omitted); *In re Enron Corp.*, 317 B.R. at 640.

Regarding the single employer relationship with SCANA, the actions of SCANA *vis a vis* the two contractors is squarely and discretely before Judge Childs. This Court does not have to be privy to or involved in that decision. Potential evidence such as a conversation between executives of Westinghouse and SCANA is relevant to both this Court and the South Carolina Court. It might bear on Westinghouse's defense before this Court that the shutdown was "unforeseeable". It might bear on SCANA's defense before the D.S.C that it was not a single employer. But the two Courts' resulting decisions could not be inconsistent because they relate to different claims and legal standards.

Regarding the "costs that might be incurred" the estate will need to retain local counsel. *Dunmore,* 380 B.R. at 672. In *In re B.L. of Miami,* the court identified the need for creditors to obtain local counsel to participate in the case as an additional difficulty and expense that would be incurred by parties. Avoiding that expense weighs in favor denying a transfer here. *In re B.L. of Miami*, 294 B.R. 325, 334 (Bankr. D. Nev. 2003).

3. This Court's venue is most consistent with a fair trial because multiple trials, potentially by juries may engulf the Westinghouse case in D.S.C.

The parties certainly would expect a fair trial in this Court and D.S.C. In South Carolina, however, the complexity of the WARN defenses and single employer evidence will differ between the defendants. It may require more than one factfinding jury to keep the subtly different claims and fact patterns straight. If the trial is consolidated, it may threaten fairness. Thus, multiple trials in all events, may undo any synergistic economy.

The issue of whether Westinghouse must face a jury trial at all in D.S.C. as opposed to a bench trial in this Court makes venue a significant issue for Westinghouse. Massey Plaintiffs make a jury demand in their Butler action against Fluor in D.S.C. Now, as co-lead class counsel for all purposes, Massey Plaintiffs presumably would seek to have Westinghouse face a jury trial as well. Gladden counsel have not sought a jury trial in a WARN claim in bankruptcy or district court, given the weight of authority holds that WARN seeks equitable relief for which jury trials are not warranted, but this issue is unsettled in the Fourth Circuit. If Westinghouse seeks to avoid a jury trial, it may well be enmeshed in years of motion practice and appeals over that issue alone. This prospect will not enhance fairness or increase judicial economy and efficiency.

4. Local interest in litigation against Westinghouse does not weigh in favor of transfer

Local interest in the D.S.C. is high but will not be heightened by adding the estate to the heap. South Carolinians are rivetted by the controversy involving SCANA, the local power utility. Fluor is also local, having a regional office near VC Summer. The maximum $100+ millions of damages at stake in the current D.S.C. litigation will be a focus of local attention, as well as whether SCANA may be on the hook to ex-Westinghouse employees. But that interest may eclipse the question of what part Westinghouse may ultimately have to pay of its potential

$17.5 million maximum damages. Such an administrative expense amount, however, would be important to creditors of Westinghouse. The resolution of WARN claims against prominent debtors is noteworthy to many in the bankruptcy community in New York and elsewhere. The Court has produced a body of authority and practice regarding WARN Act claims, which can be utilized here, and which this case may further develop.

5. Interest of Justice factors 5 and 6 are not relevant or are neutral

Although Courts consider whether the enforceability of any judgment would be affected by the transfer (factor 5) and whether the plaintiff's original choice of forum should be disturbed (factor 6), these are not relevant. Clearly the Plaintiffs did not choose this forum, it was dictated by the automatic stay**.**

C. Transfer Does Not Satisfy the Convenience of Parties Factors

Convenience of the parties generally involves consideration of the location of the parties and their counsel, the location of the proof, and the ability to compel otherwise unwilling witnesses to testify. *Official Committee of Unsecured Creditors v. McConnell (In re Grumman Olson Indus., Inc.)*, 329 B.R. 411, 435 (Bankr. S.D.N.Y. 2005). Unlike section 1404(a), the convenience of the witnesses does not have to be taken into account under section 1412, although it is part of any discussion to change venue. *Suntech*, 520 B.R. at 423.

1. The location of the Plaintiff and the Defendant does not favor transfer

The majority of the Westinghouse plaintiffs in the Gladden Action live outside of South Carolina. Andrew Fleetwood and Rodney Cavalieri live and work outside of South Carolina (Fleetwood and Cavalieri live in Tennessee, Mr. Cavalieri currently works in Minnesota). Only Mr. Gladden is a South Carolina resident. The sole Westinghouse plaintiff in the current D.S.C.

litigation, Mr. Lorentz – the class representative in the Pennington/Lorentz action – also lives outside of South Carolina.

The Westinghouse Defendant, on information and belief, does not have offices or a presence in South Carolina. Its counsel are New York-based. Gladden Counsel are New York and Alabama based. Transferring the case will inconvenience the Debtor and its counsel and require Gladden co-counsel firm Lankenau & Miller, also New York-based, to have to travel to South Carolina where they have no other business than the claim against Debtor Westinghouse.

2. Ease of access to the necessary proof is not a reason to transfer

The documentation proof in this case, as in any litigation against a corporate defendant is likely to be electronically stored. Westinghouse, having pulled up stakes from the VC Summer site is likely to have left no physical proof or personnel in South Carolina that calls for a transfer of the case. Access to proof, therefore, is not grounds for transfer.

3. Convenience factors 3, 4, and 5 are largely irrelevant

The convenience of the witnesses is of nominal importance, given the key witnesses are likely to be party witnesses. They are party witnesses who are likely to be willing to be produced without subpoena power, making factor 4 irrelevant. The fifth factor - expense of obtaining unwilling witnesses, is, therefore, not germane.

In sum, the Westinghouse Debtors have elected to have claims against them heard in this forum as part of their bankruptcy case. By transferring the case, the WARN Act claims against Westinghouse will become enmeshed and overwhelmed by the Fluor/SCANA WARN Act litigation. While that litigation was also kicked off by SCANA's decision to shut down the VC Summer project, the material facts differ from those here. This Court already knows the relevant

background. Were it to determine what Westinghouse owes under the WARN Act, it would increase judicial economy and enhance the economic and efficient administration of the estate.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that this Court decline to transfer the WARN adversary proceedings seeking the allowance and payment of administrative expense damages.

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Respectfully submitted,

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