

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

FILED

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U.S. DISTRICT COURT
HARTFORD, CT

JEFFREY AUSTEN and DAVID A. ICARDI on
behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

CATTERTON PARTNERS V, LP, CATTERTON
PARTNERS V OFFSHORE, LP, CATTERTON
COINVEST I, LLC, INSIGHT HOLDINGS and
INSIGHT GROUP HOLDINGS, INC.,

Defendants.

CASE NO.:

309CV1257 MRK

**CLASS ACTION COMPLAINT FOR
(1) VIOLATION OF WARN ACT 29 U.S.C. § 2101, ET SEQ.
AND (2) VIOLATION OF CALIFORNIA LABOR CODE § 1400 ET. SEQ.**

Plaintiffs Jeffrey Austen and David A. Icardi ("Plaintiffs") allege on behalf of themselves and a class of similarly situated former employees of defendants, by way of their Class Action Complaint against Catterton Partners V, L.P., Catterton Partners V Offshore, L.P., Catterton Coinvest I, LLC, Insight Holdings, and Insight Group Holdings, Inc., (collectively, the "Defendants") by and through their counsel as follows:

NATURE OF THE ACTION

1. On October 6, 2008, Defendants shut down the 72-year-old national cookie baker and distributor it had acquired, terminating without notice the employment its 673 or so full-time employees and their health insurance coverage when it filed for bankruptcy protection for its operating units that day.

2. Plaintiffs Jeffrey Austen and David A. Icardi were employees of Archway & Mother's Cookie Co., Inc. and Defendants until their termination on or about October 6, 2008.

3. The Plaintiffs bring this action on behalf of themselves, and other similarly situated former employees who worked for Defendants and who were terminated without cause, as part of, or as the foreseeable result of, plant closings or mass layoffs ordered by Defendants and who were not provided 60 days advance written notice of their terminations by Defendants, as required by the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. § 2101 *et. seq.* and the California Labor Code § 1400 *et. seq.* ("CAL-WARN Act").

4. Plaintiffs and all similarly situated employees seek to recover 60 days wages and benefits, pursuant to the WARN Act, from Defendants.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1334 and 1367 and 29 U.S.C. § 2104(a)(5).

6. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B) and (O).

7. Venue is proper in this District pursuant to 29 U.S.C. § 2104(a)(5).

THE PARTIES

Plaintiffs

8. Plaintiff Jeffrey Austen was an employee of Archway & Mother's Cookie Co., Inc. and Defendants and worked as a baker at the Defendants' facility located in Ashland, Ohio (the "Ashland Facility") until his termination on or about October 6, 2008.

9. Plaintiff David A. Icardi was an employee of Archway & Mother's Cookie Co., Inc. and Defendants, serving as the Western Region Operations Manager, and worked at the Defendants' facility located in San Ramon, California until his termination on or about October 6, 2008.

Defendants

10. Defendant Catterton Partners V, LP, is a Delaware limited partnership with its principal place of business located at 599 West Putnam Avenue, Greenwich, Connecticut and conducted business in this district.

11. Upon information and belief, Defendant Catterton Partner V, LP is an approximately 75% shareholder of Archway & Mother's Cookie Co., Inc.

12. Defendant Catterton Partners V Offshore, L.P. is a Cayman Islands Corporation with its principal place of business located at 599 West Putnam Avenue, Greenwich, Connecticut and conducted business in this district.

13. Upon information and belief, Defendant Catterton Partners V Offshore LP is an approximately 25% shareholder of Archway & Mother's Cookie Co., Inc.

14. Defendant Catterton Coinvest I, LLC is a Delaware limited liability company with its principal place of business located at 599 West Putnam Avenue, Greenwich, Connecticut and conducted business in this district.

15. Upon information and belief, Defendant Catterton Coinvest I, LLC is a shareholder of Archway & Mother's Cookie Co., Inc.¹

16. Mother's Cake & Cookie Company, a California corporation, is the direct parent of Archway Cookie's LLC, a Delaware limited liability company.

¹ Defendants Catterton Partners V, LP, Catterton Partners V Offshore, LP and Catterton Coinvest I, LLC shall hereinafter be referred to as "Catterton."

17. Archway & Mother's Cookie Co., Inc., is a Delaware corporation with its headquarters located in Battle Creek, Michigan.

18. Archway & Mother's Cookie Co., Inc., is the ultimate parent of Mother's Cake and Cookie Company.

19. Dough Co. is a Delaware corporation with its headquarters located in Battle Creek, Michigan.

20. Upon information and belief, Dough Co. is the current or former name of Archway & Mother's Cookie Co., Inc.²

21. Upon information and belief and at all relevant times, Defendant Insight Holdings (hereinafter "Insight"), a California corporation, was the operating management firm of the Archway Entities.

22. Upon information and belief, Defendant Insight is comprised of Donald Stanners, Keith R. Lively and Mark Berwick.

23. Defendant Catterton was the Archway Entities' owner, junior lender and equity sponsor.

24. Defendant Catterton oversaw and directed the operations of the Archway Entities both directly and through its affiliate, Insight Holdings.

² Archway Cookies LLC, Mother's Cake & Cookie Company, Archway & Mother's Cookie Co., Inc. and Dough Co. shall hereinafter be referred to as the "Archway Entities."

25. Defendants maintained and operated the Archway Entities' corporate headquarters located at 67 West Michigan Avenue, Suite 200, Battle Creek, Michigan (the "Battle Creek Facility" or "Establishment"), and operated additional facilities and establishments, as those terms are defined by the CAL-WARN Act and the federal WARN Act (together the "WARN Acts"), throughout the United States, including California, Ohio and Michigan (collectively the "Facilities").

26. Upon information and belief and at all relevant times, Insight directly managed, and provided operational and financial services to the Archway Entities and ran the day-to-day operations of the Archway Entities.

27. Upon information and belief, and at all relevant times, Defendant Insight Group Holdings, Inc., is a Nevada corporation with its principal place of business located in San Francisco, California.

28. Upon information and belief and at all relevant times, there was an overlap of officers and directors among the Defendants.

29. Upon information and belief and at all relevant times, the members of the board of directors of the Archway Cookies, LLC were partners or principals of Defendant Catterton, including J. Michael Chu, Scott A. Dahnke, Craig H. Sakin and David Heidecorn.

30. Upon information and belief and at all relevant times, at least two directors of Mother's Cake & Cookie Company, Craig H. Sakin and William J. Lynch, were also officers or principals of Defendant Catterton.

31. Upon information and belief and at all relevant times, at least one officer of Archway & Mother's Cookie Company, Inc., Nikhil K. Thukral, was also a principal of Defendant Catterton.

32. Upon information and belief and at all relevant times, officers and principals of Defendant Insight were directors and officers of Archway & Mother's Cake & Cookie Company, Inc., including Mark Berwick, Keith R. Lively, Laurence X. Odher and Donald Stanners.

33. Until on or about October 6, 2008, the Plaintiffs and all similarly situated employees were employed by Defendants and worked at or reported to one of their Facilities.

34. On October 6, 2008, the Archway Entities filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Bankruptcy Code in the United States Bankruptcy Court, District of Delaware, and moved to have the estates jointly administered.

35. On January 9, 2009, the Archway Entities' Chapter 11 bankruptcy cases were converted to Chapter 7 cases, and on January 21, 2009, Jeffrey L. Burtch was appointed the Chapter 7 Trustee.

36. Upon information and belief, the Defendants made the decision that the Archway Entities would file for bankruptcy.

37. Upon information and belief, the Defendants made the decision to terminate the Plaintiffs and other similarly situated former employees.

WARN CLASS ALLEGATIONS, 29 U.S.C. § 2104

38. Plaintiffs bring the First Claim for Relief for violation of 29 U.S.C. § 2101 *et seq.*, on behalf of themselves and on behalf of all other similarly situated former employees, pursuant to 29 U.S.C. § 2104(a)(5) and Fed. R. Civ P. 23(a), who worked at or reported to one of Defendants' Facilities and were terminated without cause on or about October 6, 2008, and 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 October 6, 2008, and who are affected employees, within the meaning of 29 U.S.C. § 2101(a)(5) (the "WARN Class").

39. The persons in the WARN Class identified above ("WARN Class Members") are so numerous that joinder of all members is impracticable. Although the precise number of such persons is unknown, the facts on which the calculation of that number can be based are presently within the sole control of Defendants.

40. On information and belief, the identity of the members of the class and the recent residence address of each of the WARN Class Members is contained in the books and records of Defendants.

41. On information and belief, the rate of pay and benefits that were being paid by Defendants to each WARN Class Member at the time of his/her termination is contained in the books and records of the Defendants.

42. Common questions of law and fact exist as to members of the WARN Class, including, but not limited to, the following:

- (a) whether the members of the WARN Class were employees of the Defendants who worked at or reported to Defendants' Facilities;
- (b) whether Defendants unlawfully terminated the employment of the members of the WARN Class without cause on their part and without giving them 60 days advance written notice in violation of the WARN Act; and
- (c) whether Defendants unlawfully failed to pay the WARN Class members 60 days wages and benefits as required by the WARN Act.

43. The Plaintiffs' claims are typical of those of the WARN Class. The Plaintiffs, like other WARN Class members, worked at or reported to one of Defendants' Facilities and were terminated without cause on or about October 6, 2008, due to the mass layoffs and/or plant closings ordered by Defendants.

44. The Plaintiffs will fairly and adequately protect the interests of the WARN Class. The Plaintiffs have retained counsel competent and experienced in complex class actions, including the WARN Act and employment litigation.

45. On or about October 6, 2008, Defendants terminated the Plaintiffs' employment as part of a mass layoff or a plant closing as defined by 29 U.S.C. § 2101(a)(2), (3), for which they were entitled to receive 60 days advance written notice under the WARN Act.

46. Class certification of these claims is appropriate under Fed. R. Civ. P. 23(b)(3) because questions of law and fact common to the WARN Class predominate over any questions affecting only individual members of the WARN Class, and because a class action superior to other available methods for the fair and efficient adjudication of this litigation – particularly in the context of WARN Act litigation, where individual plaintiffs may lack the financial resources to vigorously prosecute a lawsuit in federal court against a corporate defendant, and damages suffered by individual WARN Class members are small compared to the expense and burden of individual prosecution of this litigation.

47. Concentrating all the potential litigation concerning the WARN Act rights of the members of the Class in this Court will obviate the need for unduly duplicative litigation that might result in inconsistent judgments, will conserve the judicial resources and the resources of the parties and is the most efficient means of resolving the WARN Act rights of all the members of the Class.

48. The Plaintiffs intend to send notice to all members of the WARN Class to the extent required by Rule 23.

CALIFORNIA WARN CLASS ALLEGATIONS, Cal. Labor Code § 1401

49. Plaintiff David A. Icardi (the “California Class Plaintiff”) brings the Second Claim for Relief for violation of Labor Code § 1401 on behalf of himself and a class of similarly situated persons pursuant to Labor Code § 1404 and Federal Rules of Civil Procedure, Rule 23(a) and (b), who worked at or reported to one of Defendants’ Facilities and were terminated without cause on or about October 6, 2008 (the “CAL WARN Class”)

50. The persons in the CAL WARN Class identified above (“CAL WARN Class Members”) are so numerous that joinder of all members is impracticable. Although the precise number of such persons is unknown, the facts on which the calculation of that number can be based are presently within the sole control of Defendants.

51. On information and belief, the identity of the members of the class and the recent residence address of each of the CAL WARN Class Members is contained in the books and records of Defendants.

52. On information and belief, the rate of pay and benefits that were being paid by Defendants to each CAL WARN Class Member at the time of his/her termination is contained in the books and records of the Defendants.

53. Common questions of law and fact exist as to members of the CAL WARN Class, including, but not limited to, the following:

(a) whether the members of the CAL WARN Class were employees of the Defendants;

(b) whether Defendants unlawfully terminated the employment of the members of the CAL WARN Class without cause on their part and without giving them 60 days advance written notice in violation of the CAL WARN Act; and

(c) whether Defendants unlawfully failed to pay the CAL WARN Class members 60 days wages and benefits as required by the CAL WARN Act.

54. The California Class Plaintiff’s claims are typical of those of the CAL WARN Class. The California Class Plaintiff, like other WARN Class members, worked at or reported to one of Defendants’ Facilities and were terminated on or about October 6, 2008, due to the termination of the Facilities ordered by Defendants.

55. The California Class Plaintiff will fairly and adequately protect the interests of the CAL WARN Class. The California Class Plaintiff has retained counsel competent and experienced in complex class actions on behalf of employees, including the CAL WARN Act, the federal WARN Act, other similar state laws, and employment litigation.

56. Class certification of these Claims is appropriate under Fed. R. Civ. P. 23(b)(3) because questions of law and fact common to the CAL WARN Class predominate over any questions affecting only individual members of the CAL WARN Class, and because a class action superior to other available methods for the fair and efficient adjudication of this litigation – particularly in the context of CAL WARN Class Act litigation, where individual plaintiffs may lack the financial resources to vigorously prosecute a lawsuit in federal court against a corporate defendant, and damages suffered by individual CAL WARN Class members are small compared to the expense and burden of individual prosecution of this litigation.

57. Concentrating all the potential litigation concerning the CAL WARN Act rights of the members of the Class in this Court will obviate the need for unduly duplicative litigation that might result in inconsistent judgments, will conserve the judicial resources and the resources of the parties and is the most efficient means of resolving the CAL WARN Act rights of all the members of the Class.

58. The California Class Plaintiff intends to send notice to all members of the CAL WARN Class to the extent required by Rule 23.

CLAIMS FOR RELIEF

Violation of the WARN Act, 29 U.S.C. § 2104

59. Plaintiffs reallege and incorporate by reference all allegations in all preceding paragraphs.

60. At all relevant times, Defendants employed more than 100 employees who in the aggregate worked at least 4,000 hours per week, exclusive of hours of overtime, within the United States.

61. At all relevant times, Defendants were an “employer,” as that term is defined in 29 U.S.C. § 2101 (a)(1) and 20 C.F.R. § 639(a), and continued to operate as a business until they decided to order mass layoffs or plant closings at the Facilities.

62. The Defendants constituted a “single employer” of the Plaintiffs and the Class Members under the WARN Act in that, among other things:

- (a) The Defendants shared common ownership;
- (b) The Defendants shared common officers and directors;
- (c) All of the Defendants exercised *de facto* control over the labor practices governing the Plaintiffs and Class Members, including the decision to order the mass layoff or plant closing at the Facilities;
- (d) There was a unity of personnel policies emanating from a common source between Defendants; and
- (e) There was a dependency of operations between Defendants.

63. Upon information and belief, in 2005, Catterton purchased Archway & Mother’s Cookie Co., Inc. from Parmalat.

64. Upon information and belief, Archway Entities are co-borrowers under a Loan and Security Agreement, dated January 28, 2005, with Congress Financial Corporation, a predecessor to Wachovia Capital Finance Corporation (“Wachovia”). Dough Co. is a guarantor under the loan agreement. The credit facility with Wachovia is comprised of first lien term loans in the original principal amount of \$20 million and a \$48.5 million revolving line of credit. The credit facility with Wachovia has subsequently been amended.

65. Upon information and belief, the Archway Entities are co-borrowers under a second lien Term Loan and Security Agreement, dated January 28, 2005, with Catterton. Dough Co. is a guarantor under the loan agreement. The credit facility is comprised of second lien term loans in the original principal amount of \$20 million. The loan facility has subsequently been amended. The Archway Entities are also co-borrowers under a Subordinated Term Loan and Security Agreement, dated January 28, 2005, with Catterton. Dough Co. is a guarantor under the subordinated loan facility. The credit facility is comprised of subordinated loan terms in the original principal amount of \$35 million. The subordinated facility was subsequently amended.

66. Upon information and belief, shortly after acquiring the Archway Entities from Parmalat, Catterton set up Insight to act as Catterton’s agent and management firm for Archway’s daily operations. Insight’s only corporate purpose is to manage companies owned by Catterton.

67. Upon information and belief, Defendants Catterton and Insight were each paid management fees by Archway Entities, which during the course of Catterton’s ownership of Archway amounted to more than \$6 million.

68. Upon information and belief, the board of Archway & Mother's Cookie Co. Inc. is or was composed of Stanners, Lively, Berwick, Thurkral, Lynch, Chu and Sakin. These same individuals are or were also the members of the board of directors of each of the Archway Entities.

69. Upon information and belief, Stanners, Lively and Berwick served as officers of each of the Archway Entities. Every director and officer of Archway Entities was also a senior manager of Defendant Catterton, or a principal of Defendant Insight, acting as an agent of Catterton.

70. Upon information and belief, Archway Entities did not have any outside directors. All decisions involving the management of Archway Entities were made by Defendants Catterton and/or Insight.

71. Upon information and belief, Defendants Catterton and Insight did not observe any corporate formalities in their management of Archway Entities. All financial accounting was prepared on a consolidated basis for Archway & Mother's Cookie Co., Inc., without any separate balance sheets or financial information for the other Archway Entities.

72. Upon information and belief, Archway & Mother's Cookie Co., Inc. entered directly into a number of collective bargaining agreements with unions on behalf of all the Archway Entities.

73. Upon information and belief, Archway & Mother's Cookie Co., Inc. entered directly into contractual agreements, including agreements for the manufacture, production and transportation of Archway products for all the Archway Entities.

74. Upon information and belief, Archway & Mother's Cookie Co. was never compensated for services it provided to the other Archway Entities.

75. Upon information and belief, Archway & Mother's Cookie Co., under the direction of Catterton, utilized the services and employees of the other Archway Entities, such as accounting, sales, information technology, payroll and office support, without paying any compensation for those services.

76. Upon information and belief, Keith Roberts, a Certified Public Accountant hired by the Archway Entities in 2007 to assist in preparing financial statements for Archway Entities, reported to Insight.

77. Upon information and belief, in August 2008, the Archway Entities and Catterton, along with Wachovia, discussed a potential sale of some of Archway's assets.

78. On or about October 6, 2008, Defendants ordered mass layoffs and/or plant closings at the Facilities, as those terms are defined by 29 U.S.C. § 2101(a)(2).

79. The mass layoffs or plant closings at the Facilities resulted in "employment losses," as that term is defined by 29 U.S.C. §2101(a)(2) for at least fifty of Defendants' employees as well as thirty-three percent (33%) of Defendants' workforce at the Facilities, excluding "part-time employees," as that term is defined by 29 U.S.C. § 2101(a)(8).

80. The Plaintiffs and the Class Members were terminated by Defendants without cause on their part, as part of or as the reasonably foreseeable consequence of the mass layoffs or plant closings ordered by Defendants at the Facilities.

81. The Plaintiffs and the Class Members are "affected employees" of Defendants, within the meaning of 29 U.S.C. § 2101(a)(5).

82. Defendants were required by the WARN Act to give the Plaintiffs and the Class Members at least 60 days advance written notice of their terminations.

83. Defendants failed to give the Plaintiffs and the Class members written notice that complied with the requirements of the WARN Act.

84. The Plaintiffs and each of the Class Members, are “aggrieved employees” of the Defendant as that term is defined in 29 U.S.C. § 2104 (a)(7).

85. Defendants failed to pay the Plaintiffs and each of the Class Members their respective wages, salary, commissions, bonuses, accrued holiday pay and accrued vacation for 60 days following their respective terminations, and failed to make the pension and 401(k) contributions and provide employee benefits under COBRA for 60 days from and after the dates of their respective terminations.

86. The relief sought in this proceeding is equitable in nature.

Violation of California Labor Code - § 1400 et. seq.

87. Plaintiffs realleges and incorporates by reference all allegations in all proceeding paragraphs.

88. The California Class Plaintiff and similarly situated employees who worked at or reported to Defendants’ facilities in California (the California Facilities”), and other “covered establishments,” are former “employees,” of Defendants as defined in Labor Code § 1400(h).

89. Defendants terminated the employment of California Class Plaintiff and other similarly situated employees, pursuant to a “mass layoff,” “relocation” or “termination” as defined in Labor Code § 1400(d-f) on or about March 10, 2009 or thereafter.

90. At all relevant times, Defendants were an “employer” as defined in Labor Code § 1400(b).

91. Defendants violated Labor Code § 1401 by ordering a “mass layoff,” “relocation” or “termination” in California without giving written notice at least 60 days before the order took effect to (1) the employees affected by the order and (2) the Employment Development Department, the local workforce investment board, and the chief elected official of each city and county government within which the mass layoff, relocation or termination occurred. The “mass layoff,” “relocation” or “termination” was not necessitated by a physical calamity or act of war.

92. As a result of Defendants’ violation of Labor Code § 1401, the other similarly situated California employees are entitled to damages under c(a) in an amount to be determined.

93. As a result of Defendants’ violation of Labor Code § 1401, Defendants are subject to a civil penalty of not more than five hundred dollars (\$500) for each day of the violation, under Labor Code § 1403.

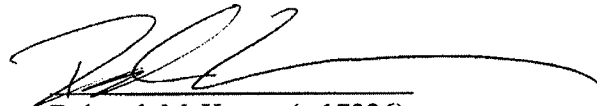
94. The California Class Plaintiff has incurred and the other similarly situated employees will incur attorneys’ fees in prosecuting this claim and are entitled to an award of attorneys’ fees under Labor Code § 1404.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs, individually and on behalf of all other similarly situated persons, pray for the following relief as against Defendants, jointly and severally:

- A. Certification of this action as a class action;
- B. Designation of the Plaintiffs as the Class Representatives;
- C. Appointment of the undersigned attorneys as Class Counsel;
- D. A judgment in favor of the Plaintiffs and the other similarly situated former employees equal to the sum of: their unpaid wages, salary, commissions, bonuses, accrued holiday pay, accrued vacation pay, pension and 401(k) contributions and other COBRA benefits, for 60 days, that would have been covered and paid under the then-applicable employee benefit plans had that coverage continued for that period, all determined in accordance with the WARN Act, 29 U.S.C. § 2104 (a)(1)(A) and the California Labor Code § 1402(a); and
- E. Such other and further relief as this Court may deem just and proper.

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Deborah McKenna (ct17326)
OUTTEN & GOLDEN LLP
Four Landmark Square, Suite 201
Stamford, CT 06901
Telephone: (203) 363-7888
Facsimile: (203) 363-0333
d1m@outtnegolden.com

Jack A. Raisner, Esq. (pro hac vice pending)
René S. Roupinian, Esq. (pro hac vice pending)
OUTTEN & GOLDEN LLP
3 Park Avenue, 29th Floor
New York, NY 10016
Telephone: (212) 245-1000
Facsimile: (212) 977-4005
jar@outtengolden.com
rroupinian@outtengolden.com

Attorneys for Plaintiffs and the putative Class