

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED

MAR 06 2002

BC

Michael N. Milby, Clerk

MARK NEWBY, ET AL.,)

Plaintiffs)

VS.)

ENRON CORPORATION, ET AL.,)

Defendants)

PIRELLI ARMSTRONG TIRE)
CORPORATION RETIREE MEDICAL)
BENEFITS TRUST, Derivatively On Behalf)
of ENRON CORPORATION, ET AL.,)

Plaintiffs)

VS.)

KENNETH LAY, ET AL.,)

Defendants)

PAMELA M. TITTLE, on behalf of herself)
and a class of persons similarly situated, et al.)

Plaintiffs)

VS.)

ENRON CORP., an Oregon Corporation,)
ET AL.)

Defendants)

CIVIL ACTION NO. H-01-3624
AND CONSOLIDATED CASES

CIVIL ACTION NO. H-01-3645
AND CONSOLIDATED CASES

CIVIL ACTION NO. H-01-3913
AND CONSOLIDATED CASES

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**OPPOSITION OF DEFENDANTS RICHARD A. CAUSEY,
RICHARD B. BUY, AND CINDY K. OLSON TO THE TITTLE, RINARD, AND
KEMPER PLAINTIFFS' MOTION FOR A PRELIMINARY ORDER FREEZING
AND IMPOSING A CONSTRUCTIVE TRUST OVER INDIVIDUAL DEFENDANTS'
ASSETS AND LIMITED EXPEDITED DISCOVERY INTO THOSE ASSETS**

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Respondents Richard B. Buy, Richard A. Causey, and Cindy K. Olson (“Respondents”)¹ oppose the motion of Plaintiffs in the *Tittle, Rinard and Kemper* ERISA cases (“ERISA Plaintiffs”) for an order freezing and imposing a constructive trust over their assets and for expedited discovery into those assets (“Motion”) on the grounds that Judge Rosenthal has already held that discovery and an asset freeze are not justified on the record before the Court, and the ERISA Plaintiffs have added nothing to that record.

I.
Factual And Procedural Background

On December 5, 2001, Plaintiffs in the securities cases filed a motion seeking a temporary restraining order freezing certain assets, an accounting of insider trading proceeds, and limited expedited discovery. On January 8, 2002, Judge Rosenthal issued a Memorandum Opinion and Order (“Order”) denying that motion.² While Judge Rosenthal asserted that the Court had the authority to freeze the profits resulting from any defendant’s sale of Enron stock in the Class Period, she found that the record before the Court did not justify the imposition of an asset freeze. The Court found that (1) because securities plaintiffs had made no showing that any of the individual securities defendants were likely to hide or dissipate assets, plaintiffs were not entitled to injunctive relief; (2) securities plaintiffs had not shown an entitlement to expedited discovery; and (3) she gave them until January 23, 2002, to file a brief justifying expedited discovery “as to the individual

¹The ERISA Plaintiffs also seek discovery and an asset freeze against Paula Rieker. Ms. Rieker has never been served or appeared in this action and, therefore, is not properly before the Court. The ERISA Plaintiffs’ request for a freeze of her assets should be denied for that reason alone, and also for the reasons set out below relating to Ms. Olson.

²Movants refer to the January 8, 2002, Memorandum Opinion and Order as “the Freeze Order” despite the Court’s explicit finding that the record before the Court did not warrant the freezing of any assets.

defendants, particularly as to the officers allegedly liable as control persons, Kenneth Lay, Jeffrey Skilling, and Andrew Fastow.” (Order at 42-44). The brief that the securities plaintiffs’ filed in response to the Order offered the Court no new justification for expedited discovery. The brief made no further attempt to show that any particular securities defendant intended to hide assets. Indeed, the securities plaintiffs simply reasserted the unsupported allegations that the Court had already found to be insufficient. Respondents Causey, Buy, and Olson are members of the group named in the securities plaintiffs’ motion and in their supplemental brief in response to the Court’s Order. That motion is pending before this Court.

The ERISA Plaintiffs have now joined in the securities plaintiffs’ motion for expedited discovery and have added requests to freeze assets and obtain discovery from several other people, including Paula Rieker. Without offering either additional evidence or additional authority for the relief requested, the ERISA Plaintiffs ask this Court to authorize not limited, but sweeping expedited discovery, followed by a freeze on Respondents’ assets. Neither the record nor the law supports the ERISA Plaintiffs’ request.

II. **Legal Standard**

In denying the securities plaintiffs’ request, Judge Rosenthal held that entitlement to discovery and an asset freeze requires that the Plaintiffs show (1) “a sufficient nexus between the assets sought to be frozen and the equitable relief plaintiffs request” and (2) that an asset freeze “is a reasonable measure to preserve the status quo in aid of the ultimate equitable relief claimed.” (Order at 14-15 (citing *United States ex rel. Rahman v. Oncology Associates, P.C.*, 198 F.3d 489 (4th Cir. 1999); *DeBeers Consol. Mines, Ltd. V. United States*, 325 U.S. 212 (1945))). The second

requirement cannot be met, held the Court, simply by asserting that the individual defendants' assets are the only viable avenue of recovery or by allegations that defendants "know how to conduct international financing transactions." (Order at 39-41).³ Plaintiffs are required to present evidence that particular defendants are attempting to dissipate or conceal the profits gained from trading Enron stock. (Order at 39). In the absence of evidence distinguishing "among the individual defendants on the basis of their current activities or future risk of asset concealment or dissipation," the Court found that Plaintiffs had failed to make "the necessary showing that the individual defendants will remove the assets from the reach of the plaintiffs, so as to cause irreparable injury absent an asset freeze." (Order at 40).

Purporting to paraphrase the Court's Order, the ERISA Plaintiffs argue that, under the Court's reasoning, (1) a sufficient nexus exists between the equitable relief sought and the assets they seek to freeze, and (2) ERISA Plaintiffs are therefore entitled to an order freezing Respondents' assets "upon a proper showing that the transient assets *may* disappear if they are not frozen." (Memorandum of Law in Support of the Motion of the Tittle, Rinard and Kemper Plaintiffs for a Preliminary Order Freezing and Imposing a Constructive Trust over Individual Defendants' Assets and Limited Expedited Discovery into those Assets ("ERISA Motion") at 3-4 (emphasis added)).

³Plaintiffs have only alleged that one of the defendants knows how to conduct international financial transactions. Judge Rosenthal noted:

Andrew S. Fastow is the only defendant against whom Amalgamated made a specific suggestion of a risk of concealment of assets. . . . Amalgamated alleges that Fastow's involvement with these offshore entities shows that Fastow knows how to conduct international financial transactions. So do many individuals and entities; that alone is not a sufficient basis for the relief sought.

(Order at 39-41).

In fact, the Court held no such thing. First, the Court was not presented with, and therefore did not decide, the existence of a nexus between the ERISA claims and the assets that the ERISA Plaintiffs seek to freeze. And second, the Court found that plaintiffs were required to show, and had not shown “that *each* defendant *is likely to* dissipate the assets that may satisfy the equitable remedies [plaintiff] has asserted, absent intervention by this court.” (Order at 39 (emphasis added)). ERISA Plaintiffs’ Memorandum offers nothing that would satisfy either of the Court’s requirements.

III.
Argument and Authorities

A. The ERISA Plaintiffs’ Motion Suffers From The Same Defects As The Securities Plaintiffs’ Motion.

1. Buy, Causey, And Olson Are Already Addressed In The Securities Plaintiffs’ Motion.

The securities plaintiffs’ motion for expedited discovery seeks discovery from Mr. Buy and Mr. Causey and Ms. Olson. The deficiencies in the securities plaintiffs’ motion are set out in the opposition to that motion and are hereby incorporated by reference. (Response Of Certain Officer Defendants In Opposition To Amalgamated Bank’s Supplemental Brief In Support Of Expedited Discovery, filed February 8, 2002 (“Opposition To Securities Plaintiffs’ Motion”). The ERISA Plaintiffs’ joinder in the securities plaintiffs’ motion adds nothing to the securities plaintiffs’ motion and should be denied for the reasons set out in the response to that motion and for the additional reasons set out below.

2. Like The Securities Plaintiffs, The ERISA Plaintiffs Have Failed To State Any Basis For Believing That The Respondents Are Likely To Dissipate Or Conceal Assets.

In her Order denying securities plaintiffs' request for an asset freeze, Judge Rosenthal addressed and found deficient the argument that Enron's bankruptcy rendered the individual defendants' assets the plaintiffs only viable avenue of recovery. After analyzing the case law addressing the requisite showing of risk that assets will be concealed or dissipated, Judge Rosenthal held:

This argument does not show a substantial threat that the proceeds or profits of the individual defendants' Enron trades will be unavailable to satisfy Amalgamated's equitable claims if this temporary restraining order is not granted. This argument does not provide a basis for concluding that each or any defendant is attempting to dissipate or conceal the profits gained from trading Enron stock in the Class Period, so as [to] make them uncollectible in the event of an award of the equitable relief Amalgamated seeks. A prejudgment asset freeze is not available in a case simply because the potential equitable award is likely to exceed available assets.

(Order at 39-40). ERISA Plaintiffs now ask this Court to freeze Respondents' assets on the very basis that Judge Rosenthal found wanting. They argue that they are entitled to an asset freeze because "it has become apparent that the available corporate assets and insurance policies can not even begin to make the Savings Plan and its participants whole . . . the wrongfully obtained assets of the named individuals will form an essential portion of any meaningful recovery on behalf of the Savings Plan and the ESOP." (ERISA Motion at 3). For the reasons stated in Judge Rosenthal's Order, this argument does not constitute a showing of risk that Respondents will conceal or dissipate their assets.

Plaintiffs' claim to have an unfounded blanket suspicion that defendants "may" conceal or dissipate assets cannot justify a "freeze" or the lifting of the stay that plaintiffs seek. If such unfounded suspicions were sufficient, every plaintiff who stated a claim for equitable relief could obtain expedited discovery and an asset freeze. Judge Rosenthal correctly recognized that plaintiffs "must distinguish among the individual defendants on the basis of their current activities or future risk of asset concealment or dissipation." (Order at 40). As set out more fully in the Opposition to Securities Plaintiffs' Motion, the plaintiffs have failed to make any particularized showing that any of the Respondents are likely to dissipate or conceal any assets. The closest the ERISA Plaintiffs come to any particularized showing is their statement that "[Mr.] Lay's wife has publicly announced a plan to sell various properties in order to achieve 'liquidity.'" (ERISA Plaintiffs' Motion at 8).⁴ That showing is not even sufficient to justify relief against Mr. Lay. It is certainly not a

⁴ERISA Plaintiffs cite newspaper reports of Congressional testimony regarding sales of Enron stock by Ms. Olson in early 2001 and before. (ERISA Motion at 7). Even the ERISA Plaintiffs' own "evidence" undercuts their position. ERISA Plaintiffs conveniently ignore the same newspaper article's report that "[s]he said she decided to sell the shares after having a falling out with former Enron President Jeffrey Skilling over their different management styles. Thinking about leaving the company, she said, she went to a financial adviser who advised her to diversify her portfolio; at his suggestion, she said, she put the proceeds from selling her Enron shares into government bonds." (Exhibit 1 to Memorandum Of Law In Support Of The Motion Of The Tittle, Rinard, And Kemper Plaintiffs For Appointment Of An Independent Fiduciary For The Enron 401(k) Plan). Those reports of sales are not evidence of insider trading and purchase of government bonds is certainly not evidence of dissipation or concealment of assets.

particularized showing that Buy, Causey, and Olson⁵ pose any danger of dissipating or concealing any assets.⁶

B. The ERISA Plaintiffs' Allegations Cannot Support The Asset Freeze They Seek.

1. The ERISA Plaintiffs' Derivative Complaint Does Not Assert ERISA Claims Against Causey and Buy.

As noted above, the ERISA Plaintiffs' allegations against Mr. Causey and Mr. Buy add nothing to the allegations already asserted by the securities plaintiffs. The ERISA Plaintiffs' First Amended Derivative Complaint prays for the following equitable relief against Respondents Causey and Buy:

D. That this Court impose a constructive trust on the profits made by . . . Causey and Buy from the sales of Enron stock made while in possession of materially adverse insider information in breach of fiduciary duties owed to the Savings Plan and its participants as shareholders.

E. That this Court order an equitable accounting for all profits made by Defendants . . . Buy and Causey from trading Enron stock while in possession of material insider information, in breach of fiduciary duties owed to the Savings Plan and its participants as shareholders.

⁵Ms. Rieker is not named in the securities plaintiffs' motion to freeze and for particularized discovery. The ERISA Plaintiffs "refer the Court to the Appointment Motion [requesting removal of the Plan trustees]" as the place where the ERISA Plaintiffs "describe in detail their ERISA claims, and demonstrate their likelihood of success on the merits of the claims such as to satisfy the prerequisites for preliminary relief pursuant to Fed. R. Civ. P. 65(a)." That motion could not apply to Rieker since she had ceased to be a trustee before the ERISA Plaintiffs filed their motion.

⁶The ERISA Plaintiffs also point to the fact that some defendants have asserted their Fifth Amendment right not to testify. Asserting that right is not evidence of guilt, concealment of assets, or anything else. To the extent it could be relevant to this Court's inquiry at all, it suggests that those defendants who have asserted their Fifth Amendment right should not be required to respond to any discovery in this case.

(First Amended Derivative Complaint for the Enron Corp. Savings Plan and Complaint for the Enron Corp. Stock Ownership Plan for Violation of Federal Securities Law, the Employment Retirement Income Security Act of 1974, the Racketeer Influence and Corrupt Organizations Act, and Texas Common Law (the “Complaint”) at 79-80).⁷

Despite ERISA Plaintiffs’ attempt to blur the line between their ERISA claims and securities claims, the distinction is dispositive of the effort to freeze the assets of Respondents Causey and Buy. Any attempt to freeze those assets pursuant to securities claims was foreclosed by Judge Rosenthal’s finding that the record did not justify lifting the PSLRA stay and by ERISA Plaintiffs’ failure to add to that record. Any attempt to freeze Causey’s and Buy’s assets pursuant to ERISA claims is foreclosed, not only by the same absence of evidence that doomed the effort to freeze assets in the securities cases, but also by the complete absence of a nexus between those claims and any profits that Causey and Buy may have realized from the sale of Enron stock.

The ERISA Plaintiffs’ Complaint asserts no ERISA claims against Causey or Buy. Neither Causey nor Buy is included among the parties designated as “Enron ERISA Defendants,” and none of the ERISA counts names either Causey or Buy as a defendant. (See Complaint at 9-10, 13, 55, 58, 60, 62). Furthermore, ERISA Plaintiffs cannot assert ERISA claims against Causey or Buy, because neither of them was a plan fiduciary. *Geller v. County Line Auto Sales, Inc.*, 86 F.3d 18 (2d Cir. 1996) (corporate officers who exercise no discretionary authority over plan are not plan fiduciaries); *Amato v. Western Union International, Inc.*, 773 F.2d 1402 (2d Cir 1985), *cert. dismd.*,

⁷Judge Rosenthal’s determination that plaintiffs had asserted equitable claims is currently the subject of motions for reconsideration. (See The Outside Directors’ Motion for Limited Reconsideration of the Court’s Order of January 8, 2002 Regarding the Court’s Authority to Order a Prejudgment Restraint of Defendants’ Assets and Response to Amalgamated Bank’s Supplemental Brief in Response to the Court’s January 8, 2002 Order, filed February 8, 2002).

474 U.S. 1113, 106 S.Ct. 67, 89 L.Ed.2d 288 (1986) (corporate officers assume no ERISA fiduciary status unless they are acting as plan administrators); *Flake v. Hoskins*, 55 F.Supp.2d 1196 (D.Ka. 1999) (defendants cannot owe a fiduciary duty over ERISA activities for which they have no responsibility). Even if a non-fiduciary knowingly participates (which Causey and Buy did not) in a breach of fiduciary duty to the plan, he may not be sued under ERISA. *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993). Only plan fiduciaries are subject to liability under ERISA. *Id.*

Because neither Causey nor Buy is, or can be, an ERISA defendant, there is no nexus between the ERISA claims and their assets. ERISA Plaintiffs have not, therefore, met the first prong of the requirement for a prejudgment asset freeze as to these two defendants.

2. The ERISA Plaintiffs' Complaint Asserts No Insider Trading Claims Against Olson.

Judge Rosenthal found that there could be a nexus for the securities plaintiffs' request for an accounting for insider trading claims. But the ERISA Plaintiffs' Complaint does not allege insider trading against Ms. Olson. The ERISA Plaintiffs have only named Olson under the ERISA counts of the Complaint. *See* Complaint at 69, 73, 74. Nowhere in their Complaint do the ERISA Plaintiffs claim that Olson has engaged in insider trading, and the Complaint does not seek from Olson either a constructive trust or an equitable accounting for any stock sale profits. *Id.* at 79-80. Nonetheless, ERISA Plaintiffs have asked this Court to freeze Olson's assets.⁸

ERISA Plaintiffs concede that they must establish a sufficient nexus between the equitable relief asserted and the ill-gotten assets that they seek to freeze. (*See* Memorandum of Law in

⁸The ERISA Plaintiffs' Complaint also does not assert any insider trading claims against Rieker, but as with Olson, the Plaintiffs' seek discovery and an asset freeze against Rieker.

Support of the Motion (“Memorandum”) at 4). However, because the ERISA Plaintiffs seek no relief for insider trading against Olson, there can be no nexus between the ERISA Plaintiffs’ claims and any profits from any unalleged insider trading by Olson. Similarly, because ERISA Plaintiffs have not even alleged that Olson profited personally from the alleged ERISA violations, there is no nexus between those claims and Olson’s assets. Like their attempt to freeze the assets of Causey and Buy, their attempt against Olson fails for lack of the requisite nexus between the equitable relief sought and the assets to be frozen.

3. The ERISA Plaintiffs Do Not Seek Any Equitable Relief Against Olson.

While the ERISA Plaintiffs admit that they must show a nexus between some equitable relief sought and the assets they seek to freeze, there can be no such nexus here because, while the Plaintiffs assert ERISA claims against Olson, their derivative Complaint does not seek any equitable relief against Olson. The only relief requested against Olson and the other “Enron ERISA Defendants” (which includes Rieker) is the recovery of the Savings Plan’s alleged “losses.” The recovery of such plan losses, which is an available remedy for breach of fiduciary duty under ERISA §409, has been characterized by Justice Scalia as the ERISA equivalent of “compensatory” or “money damages.” *Mertens v. Hewitt Associates*, 508 U.S. 248, 252, 255. Such generalized “losses” do not constitute the “specific fund or *res* that resulted from the defendants’ breach” that this Court recognized as the essential prerequisite to a prejudgment freeze order (Order at 33).⁹

⁹A plaintiff “cannot reach a defendant’s assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment.” *DeBeers Consolidated Mines v. United States*, 325 U.S. 212, 65 S.Ct. 1130, 89 L.Ed.1566 (1945); *In re Fredeman Litigation*, 843 F.2d 821 (5th Cir. 1988). To permit such an order would open every defendant to the risk of having all assets, whether or not they were subject to final equitable relief, frozen “on a mere statement of belief that the defendant can easily make away with or transport his money or goods. . . .” *Id.* At 825. A freeze order “designed simply to aid the plaintiff in enforcing

C. The ERISA Plaintiffs Are Not Entitled To The Discovery They Seek.

Even if the ERISA Plaintiffs had made the necessary allegations and the necessary showings to lift the stay and obtain particularized discovery, they still would not be entitled to obtain the discovery they seek. ERISA Plaintiffs describe their discovery requests as “limited.” Yet the document requests themselves¹⁰ belie both that description and any pretense that ERISA Plaintiffs are not seeking premature discovery on the merits of the securities case and impermissible discovery into assets of Respondents that are unrelated to this litigation.

ERISA Plaintiffs request documents pertaining to formation, personnel, transactions, compensation and profits of limited partnerships; documents pertaining to accounting practices of Enron’s auditors; Enron Board of Director reports and minutes; and Enron’s document destruction or retention policy. See Memorandum at 8-9. These document requests reach far beyond ERISA Plaintiffs’ claims that Respondents intend to secrete or dissipate their assets, and delve instead into securities claims as to which discovery has been stayed.

IV. Conclusion

For the reasons stated in the foregoing Opposition, Respondents Richard B. Buy, Richard A. Causey, and Cindy K. Olson respectfully request that the Court enter an order denying the motion of Plaintiffs in the *Tittle, Rinard* and *Kemper* ERISA cases for an order freezing and imposing a constructive trust over their assets and for expedited discovery into those assets.

any judgment he might obtain” is impermissible. *Id.* At 826 (citing *ITT Community Development Corp v. Barton*, 569 F.2, 1351, 1359-61 (5th Cir. 1978)).

¹⁰The document requests are not found in ERISA Plaintiffs’ Motion or their proposed Order; they are included only in the Memorandum at pp. 8-9.

Respectfully submitted,



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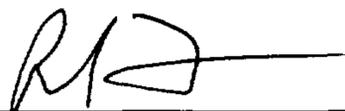
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was forwarded to all known counsel of record by facsimile on March 6, 2002.



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