

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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R. ALEXANDER ACOSTA , Secretary of Labor,		:
United States Department of Labor,		:
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Plaintiff,		:
		:
v.		:
		:
AEU BENEFITS, LLC,		:
AEU HOLDINGS, LLC,		:
BLACK WOLF CONSULTING, INC.,		:
SD TRUST ADVISORS, LLC,		:
and the AEU HOLDINGS, LLC		:
EMPLOYEE BENEFIT PLAN,		:
		:
Defendants.		:
		:
		:
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CIVIL ACTION NO.
1:17-cv-07931-JHL-SMF

Hon. Joan H. Lefkow
District Judge

Hon. Sheila Finnegan
Magistrate Judge

**MEMORANDUM IN SUPPORT OF
SECRETARY OF LABOR’S UNOPPOSED MOTION FOR AN ORDER STAYING ALL
PROCEEDINGS AGAINST PARTICIPANTS, BENEFICIARIES, THE AEU
HOLDINGS, LLC EMPLOYEE BENEFIT PLAN (“AEU PLAN”), EMPLOYER PLANS
PARTICIPATING IN THE AEU PLAN, AND PLAN ASSETS**

R. Alexander Acosta, Secretary of the United States Department of Labor (“the Secretary”) submits this memorandum of law in support of his request that this Court stay all proceedings arising from unpaid benefit claims against the participants and beneficiaries of the ERISA-covered employer plans (“Participating Plans”) participating in the Multiple Employer Welfare Arrangement known as the AEU Holdings LLC Employee Benefit Plan (“AEU Plan”), and all proceedings against the plan assets of the AEU Plan and Participating Plans.

I. THE COURT SHOULD EXERCISE ITS BROAD EQUITABLE POWERS TO PROTECT THE PARTICIPATING PLANS' ASSETS AND PARTICIPANTS AND BENEFICIARIES

On November 3, 2017, this Court issued a temporary restraining order (“TRO”) in which the Court removed Defendants AEU Holdings, LLC, AEU Benefits, LLC (collectively, “AEU”), and Black Wolf Consulting, Inc. (“Black Wolf”) as fiduciaries and service providers to the Participating Plans, froze several bank accounts holding plan assets, and appointed an independent fiduciary with full and exclusive authority to control and manage the Participating Plans and the AEU Plan and all assets of the Participating Plans and the AEU Plan. The Court gave Receivership Management, Inc., the Independent Fiduciary, the authority to, *inter alia*, conduct an accounting of all medical claims, adjudicate and pay or deny any and all claims submitted, negotiate payments with medical service providers, identify and pursue claims on behalf of the Participating Plans and the AEU Plan, and terminate the Participating Plans and the AEU Plan, if in the best interest of the Participating Plans.

The Independent Fiduciary, after making an investigation of the assets, operations, and claims of the AEU Plan and Participating Plans has determined that there is a minimum of \$29.1 million in unpaid claims. (Declaration of Jeanne Bryant, attached hereto as Exhibit A, at ¶¶4, 6). In addition, the Independent Fiduciary has discovered another 6,472 claims that have not yet been processed. (Ex. A, ¶5). The TRO also permitted the Independent Fiduciary to freeze bank accounts believed to have plan assets. At present, the Independent Fiduciary has frozen approximately \$10.4 million in cash, although it is unknown if all of these funds consist of plan assets. (Ex. A, ¶9).

Further, the Independent Fiduciary has determined as a result of this non-payment of claims, creditors have initiated collection actions against multiple plan participants and

beneficiaries, posing severe personal and financial hardships as a result. (Ex. A, ¶7). Moreover, the Independent Fiduciary has learned of at least two independent lawsuits filed against the Defendant Black Wolf over the same non-payment of claims, putting at risk the AEU Plan and Participating Plans' remaining funds. (Ex. A, ¶10). The Independent Fiduciary has further learned that the Secretary has issued a Cease and Desist Order which prevents brokers working on behalf of the defendants from marketing the AEU Plan to prospective employers and collecting applications for enrollment of new employers in the AEU Plan. (Ex. A, ¶11).

The Independent Fiduciary believes that the individual participants and participating employers have lost confidence in the AEU Plan's ability to pay claims and provide health coverage to Participating Plans, leading many employers to withdraw from the AEU Plan entirely. (Ex. A, ¶12). This fact, along with the lack of incoming new employers, will result in a substantial reduction in the AEU Plan's cash flow. (Ex. A, ¶13). Under these circumstances, the AEU Plan will soon be left with significant unpaid claims and liabilities, a small and rapidly dwindling amount of cash on hand, and little or no cash flow.

Together these facts show current circumstances pose a serious threat to the AEU Plan and Participating Plans' limited assets, to the detriment of the participants and beneficiaries, and the creditor-providers. Equitable relief in the form of a stay, enjoining state and federal proceedings against the AEU Plan and Participating Plans' participants and beneficiaries, is therefore essential to protect these classes of interested persons and entities.

Accordingly, the Secretary respectfully requests prompt judicial intervention, pursuant to ERISA §§ 409 and 502(a)(2) and (5), 29 U.S.C. §§ 1109 and 1132(a)(2) and (5), in order to protect the Participating Plans and their participants and beneficiaries. The Secretary requests this Court enter an order staying all federal and state proceedings arising from unpaid benefit

claims against participants and beneficiaries. Additionally, the Secretary requests an order staying all federal and state proceedings against the AEU Plan, the Participating Plans, and any plan assets of the AEU Plan and Participating Plans.

II. THE ALL WRITS ACT AUTHORIZES THIS COURT TO STAY PROCEEDINGS TO PROTECT THE PLAN'S PARTICIPANTS AND BENEFICIARIES

The All Writs Act, 28 U.S.C. § 1651, provides that “all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” Such a writ is necessary here for this Court to effectuate its TRO dated November 3, 2017, giving the Independent Fiduciary full and exclusive authority to control and manage the Participating Plans and the AEU Plan and all assets of the Participating Plans and the AEU Plan.

There is no question that the All Writs Act authorizes the Court to stay proceedings against the Participating Plan's participants and beneficiaries. The Supreme Court “has repeatedly recognized the power of a Federal court to issue such commands under [the Act] as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained.” United States v. New York Tel. Co., 434 U.S. 159, 174, 98 S. Ct. 364, 373 (1977). Federal appeals courts have construed those equitable powers equally broadly. See Hamilton v. Nakai, 453 F.2d 152, 157 (9th Cir. 1972), cert. denied, 406 U.S. 945 (1972); SEC v. G.C George Securities, Inc., 637 F.2d 685, 688 (9th Cir. 1981). As the Supreme Court observed:

The power conferred by the Act extends, under appropriate circumstances, to person who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompass even those who have not taken any affirmation action to hinder justice.

New York Tel. Co., 434 U.S. at 174 (citations omitted).

The All Writs Act has accordingly been held to authorize stays of actions by non-parties in federal and state courts relating to ERISA-covered plans. Two cases where courts have dealt directly with this issue—Cutler v. The 65 Security Plan, 831 F. Supp. 1008 (E.D.N.Y. 1993), and In re Consolidated Welfare Fund ERISA Litigation, 798 F. Supp. 125 (S.D.N.Y. 1992)—each involved dangerously underfunded ERISA welfare benefit plans that, like the AEU Plan, faced mounting litigation over unpaid claims. *See, e.g., Cutler*, 831 F. Supp. at 1011 (describing “hundreds of lawsuits” the plan was settling and defending). In both cases, the courts issued stays pursuant to the All Writs Act, enjoining actions by parties and non-parties against those plans and, in Cutler, against the plans’ participants and beneficiaries as well. *Id.* at 1024; In re Consolidated, 798 F. Supp. at 128. Relying on In re Consolidated, the Cutler court explained a broader stay was necessary to forestall a “race to the courthouse” that would have “rendered meaningless” its “efforts to prevent further damage to [the plans’] members.” Cutler, 831 F. Supp. at 1014 (quoting In re Consolidated, 798 F. Supp. at 128). In such “exceptional” circumstances, where “the public interest and large numbers of people [were] involved,” the Cutler court concluded the Act authorized it to “go even farther to fashion broad remedies,” including staying actions by non-parties against the welfare benefit plans as well as their similarly distressed participants and beneficiaries. 831 F. Supp. at 1013 (citing Golden State Bottling Co. Inc. v. NLRB, 414 U.S. 168, 179 (1983)).

The Secretary submits that such a stay is equally necessary in this case. Here, as in Cutler, the Independent Fiduciary has determined that the AEU Plan has millions of dollars in unpaid and unprocessed claims still on its books, with more piling up every week. *Cf. Cutler*, 831 F. Supp. at 1011 (noting that the plan involved there owed more than \$30 million on some 160,000 unpaid claims). Further, these unpaid claims, like those in Cutler, have spawned

numerous collections and other actions against participants and beneficiaries, with more lawsuits likely as time goes on. See id.; Chao v. Sai Med Health Plan, LLC, No. 8:01-cv-00325-DKC, Docket No. 23 (D. Md. June 5, 2001) (staying collection actions against participants and beneficiaries), attached hereto as Exhibit B. These increasingly dire financial conditions have put the welfare of a significant number of the Plan's participants and beneficiaries in jeopardy, and the Independent Fiduciary's efforts to avert further damage will be "rendered meaningless" if these actions are allowed to further deplete the participants' assets or to extract payment from beneficiaries for claims that the Plan is responsible for satisfying. Cutler, 831 F. Supp. at 1014. A "race to the courthouse," as the In re Consolidated court noted, would only make this already difficult situation that much harder to manage. See 798 F. Supp. at 128.

III. THE ANTI-INJUNCTION ACT DOES NOT BAR A STAY OF PENDING STATE COURT PROCEEDINGS

The Anti-Injunction Act, 28 U.S.C. § 2283, generally prohibits federal courts from enjoining pending state court proceedings unless "expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The Anti-Injunction Act only applies to pending state court proceedings; it "does not affect a federal court's power to enjoin future state actions or any actions in other federal courts." In re Joint Eastern and Southern Dist. Asbestos Litig., 134 F.R.D. 32, 37 (E. & S.D.N.Y. 1990) (citing Dombrowski v. Pfister, 380 U.S. 479, 484 n.2 (1965); B & A Pipeline Co. v. Dorney, 904 F.2d 996, 1001 n.15 (5th Cir. 1990)). The Secretary is aware of at least two current pending state court proceedings. (Ex. A, ¶10).

In this case, the Anti-Injunction Act does not bar a stay of pending state court proceedings for two reasons. First, as a threshold matter, the Anti-Injunction Act does apply to requests by federal agencies for stays of state proceedings. See Cutler, 831 F. Supp. at 1014

(citing Securities and Exchange Commission v. Wencke, 622 F.2d 1363, 1368 (9th Cir.1980) (relying on Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957))); see also Arkansas v. Farm Credit Svcs., 520 U.S. 821, 829 (1997) (“Just as the Tax Injunction Act is inapplicable where the United States is a party, a parallel rule prevails under [the Anti-Injunction Act].”)

Second, even if the Anti-Injunction Act did apply, it would not bar the order sought in this case. That is because, as explained above, such a stay “is the only means by which this Court can ensure” the Independent Fiduciary’s management of the AEU Plan and Participating Plans “will not be undermined and [this Court’s] ability to provide some relief to [] creditors and members will not be destroyed.” In re Consolidated, 798 F. Supp. at 128. This makes a stay of state proceedings “necessary in aid of [this Court’s] jurisdiction” within the meaning of both the All Writs Act as well as the Anti-Injunction Act. As the Seventh Circuit recently explained, these necessary-in-aid-of-jurisdiction provisions in the “[t]he two laws are interpreted similarly,” Archer v. Chisholm, 870 F.3d 603, 621 (7th Cir. 2017), and both have been read “liberally ‘to prevent a state court from . . . interfering with a federal court’s flexibility and authority’ to decide the case before it.” In re Joint Eastern and Southern Dist. Asbestos Litig., 134 F.R.D. at 37 (quoting Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Eng’rs, 398 U.S. 281, 295 (1970)). Therefore, for the same reason a stay is appropriate under the All Writs Act, a stay of current state proceedings is not barred by the Anti-Injunction Act.

Applying the necessary-in-aid-of-jurisdiction exception also makes good sense in this context. As the In re Consolidated court noted, the court’s jurisdiction over a welfare benefit plan’s assets “is not unlike” a court’s “jurisdiction over property,” generally “preclud[ing] other courts from exercising control over that same property.” 798 F. Supp. at 127 n.3. Thus, the application of this exception here, to stay state court proceedings against the Plan’s participants,

beneficiaries, and plan assets while the Independent Fiduciary works to manage plan assets and unpaid claims, would fall naturally within that exception's usual limitation to in rem proceedings. See Zurich American Ins. Co. v. Superior Court for State of California, 326 F.3d 816, 825 (7th Cir. 2003) (noting that, "[h]istorically, this exception applied only to in rem rather than in personam proceedings"); see also Chao v. Graf, No. CV-N-01-0698-DWH-RAM, Docket No. 73 (D. Nev. Apr. 30, 2002) (under All Writs Act authority, imposing quasi-bankruptcy proceedings for in rem plan assets), attached hereto as Exhibit C. Such a stay would also help achieve a basic objective of the Anti-Injunction Act in this case, by eliminating any "needless friction" that might result between the "dual court systems" if state court litigation against the participants, beneficiaries, and plan assets were allowed to proceed, undermining the Independent Fiduciary's efforts to equitably resolve the long and growing list of claims that the AEU Plan is responsible for paying. Archer, 870 F.3d at 621 (quoting Atlantic Coast Line R.R., 398 U.S. at 286).

IV. CONCLUSION

The All Writs Act gives this Court the power to stay all federal and state actions against the AEU Plan and Participating Plans' participants, beneficiaries, the AEU Plan, Participating Plans, and plan assets, and the Anti-Injunction Act raises no bar to its use in this case. Exercising that power here would also allow the Court to more efficiently and equitably manage and coordinate these complex proceedings, just as it aided the Cutler and In re Consolidated courts in nearly identical circumstances. Accordingly, this Court should act pursuant to its broad remedial authority under the All Writs Act to prevent any further damage to the plans, participants, beneficiaries, and plan assets by staying all federal and state actions against them.

For the foregoing reasons, the Secretary urges the Court to issue the proposed Order submitted herewith.

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