

Not Reported in F.Supp.2d, 2005 WL 2465493 (S.D.N.Y.)  
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United States District Court,  
S.D. New York.

Jose MARTINEZ and Haywantie Singh, on Their  
Own Behalf and on Behalf of All Other Similarly  
Situated Persons, and George Miranda, as a Trustee of  
the Union Mutual Fund Pension Plan, the Allied  
Welfare Fund and the Vacation Fringe Benefit Fund,  
Plaintiffs,

v.

George BARASCH; Stephen Barasch; Linda Barasch  
Glazer; Richard Glazer; John Morro, Individually and  
as President of Allied Trades Council; Jack Siebel,  
Reginald Rosado and James Crowley, Individually  
and as Officers of ATC; Gerald Herskowitz, Louis  
Kaplan, Stephen Camadeco, Rudolph Pascucci, An-  
thony Guigliano, and Bruce Rogers, as Trustees of the  
Allied Welfare Fund; Gerald Herskowitz, Harvey  
Rosen, Bruce Rogers, Herman Wolfson, Stephen  
Camedeco, and James Crowley, as Trustees of the  
Vacation Fringe Benefit Fund; Irving Hans, Irving  
Kroop, Donald Marino, Harold Banner, Bertram  
Gelfand, as Trustees of Union Mutual Fund Pension  
Plan; Churchill Administrators, Inc.; Financial Ad-  
ministrators, Inc. Defendants.

**No. 01 Civ. 2289(MBM).**

Oct. 5, 2005.

Thomas M. Kennedy, Susan M. Jennik, Kennedy,  
Schwartz & Cure, P.C., New York, NY, for plaintiff.

John Fialcowitz, Robert J. Kipnees, Lowenstein  
Sandler PC, Roseland, NJ, for defendants, George  
Barasch, Linda Barasch Glazer, Richard Glazer, and  
Financial Administrators, Inc.

Peter L. Altieri, John Harris, J. William Cook, Epstein  
Becker & Green, P.C., New York, NY, for defendants  
Trustees of the Union Mutual Fund Pension Plan.

OPINION & ORDER

MUKASEY, J.

\*1 Plaintiffs Jose Martinez and Haywantie Singh are former members of the Allied Trades Council (ATC) and participants in several related employee benefit funds, including the Union Mutual Fund Pension Plan, the Allied Welfare Fund, and the Vacation Fringe Benefit Fund (the Employee Benefit Funds). In their Fourth Amended Complaint (FAC), plaintiffs rely on §§ 404, 405, and 406 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001-1461 (2000), to claim that defendants breached their fiduciary duties by mismanaging and manipulating the Employee Benefit Funds to defendants' own advantage.

Defendants George Barasch, Linda Barasch Glazer, Richard Glazer, and Financial (the Service Provider Defendants), and the Union Mutual Fund Pension Plan Trustees (UMF Trustees) move to dismiss the claims against them under Fed.R.Civ.P. 12(b)(1) and 12(b)(6). As noted below, plaintiff Martinez is about to withdraw from this case. Plaintiff Singh, who claims now for the first time to be suing derivatively on behalf of other Employee Benefit Fund participants, is utterly unsuited to represent those participants for reasons explained below and in a prior opinion. Indeed, she is acting as nothing but a stalking horse for a nonparty, as her lawyer all too freely admits. Therefore, plaintiffs are unable to prove any set of facts consistent with the complaint that would entitle them to relief. Sweet v. Sheahan, 235 F.3d 80, 83 (2d Cir.2000). Accordingly, defendants' motion is granted and all claims against the Service Provider Defendants and the UMF Trustees are dismissed.

I.

This court has issued four prior opinions in this action. See Bona v. Barasch, No. 01 Civ. 2289, 2003 U.S. Dist. LEXIS 4186 (S.D.N.Y. Mar. 20, 2003) (granting in part and denying in part defendants' motion to dismiss); Bona v. Barasch, No. 01 Civ. 2289, 2003 U.S. Dist. LEXIS 8760 (S.D.N.Y. May 22, 2003) (denying plaintiffs' motion for partial summary judgment); Martinez v. Barasch, No. 01 Civ. 2289, 2004 U.S. Dist. LEXIS 11019 (S.D.N.Y. June 11, 2004) (denying plaintiffs' motion for class certification); Martinez v. Barasch, No. 01 Civ. 2289, 2004

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U.S. Dist. LEXIS 12902 (S.D.N.Y. July 7, 2004)  
(granting ATC defendants' motion to dismiss).

At this point, familiarity with the facts of this case is assumed, and the court will not dwell on all the details of plaintiffs' allegations. However, it is important to note that George Barasch formed ATC in 1947, and "has dominated its affairs since then." *Bona*, 2003 U.S. Dist. LEXIS 4186, at \*10; *see also* FAC ¶ 1. Linda Barasch Glazer is George Barasch's daughter, and Richard Glazer is Linda Barasch Glazer's husband (FAC ¶ 7); for the purposes of this opinion, the court will refer to George Barasch, Linda Barasch Glazer, and Richard Glazer as the Barasch Family. Plaintiffs claim that the Barasch Family arranged for the ATC Employee Benefit Funds to pay inflated administrative fees to Financial, a company that the Barasch Family controlled; that the Employee Benefit Fund Trustees allowed this practice to continue although they knew that other companies had offered the Funds lower fees; and that defendant UMF Trustees accepted gifts from the Barasch Family that influenced their judgment with respect to management of the Funds.

\*2 This case began in March 2001 as a class action with five named plaintiffs: Lisa Bona, Elaine N. Cogdell, Martinez, Singh, and Jovan Agnes Thomas. (Dkt. No. 1) George Miranda, a trustee of the Employee Benefit Funds, was added as a plaintiff in June 2001. (Dkt. No. 9) The court then found that Bona and Thomas lacked standing to bring their ERISA claims. *Bona*, 2003 U.S. Dist. LEXIS 4186 at \*38-40. Cogdell dropped out of the action in August 2003 (Dkt.103), and the court denied class certification last year. *Martinez*, 2004 U.S. Dist. LEXIS 11019. In December 2004, Miranda entered court-approved settlement agreements with all remaining defendants. (Dkt. Nos.117-119) Finally, plaintiffs' counsel has informed the court that Martinez wishes to abandon his claims against all defendants, and that a stipulation withdrawing him from the case is being completed. (Pl. Br. at 2 n. 1) Therefore, at this stage of the case, only one individual plaintiff, Singh, is pursuing a claim against defendants.<sup>FN1</sup>

FN1. Because Martinez's withdrawal from the case appears to be all but a formality, for the duration of this opinion, the court refers to Singh as the only plaintiff in the action.

Singh alleges that defendants misappropriated union dues and breached their fiduciary duties, in violation of ERISA §§ 404, 405, and 406. To get around the court's previous ruling that individual plaintiffs do not have standing to seek damages on their own behalf under ERISA § 502(a)(2), 29 U.S.C. § 1132(a), *see Bona*, 2003 U.S. Dist. LEXIS 4186, at \*25-29, Singh claims now for the first time that she is suing derivatively on behalf of her fellow former Employee Benefit Fund participants. Singh admits that this litigation still is being funded by ATC's rival union, UNITE. (Pl. Br. at 21) Her abruptly retooled legal strategy does not help disguise what the court previously recognized as a "litigation [that] fairly brims with ulterior motives-to gain access to ATC's records, to induce ATC members to join UNITE, and perhaps even to destroy ATC through protracted litigation." *Martinez*, 2004 U.S. Dist. LEXIS at \*21. As explained below, plaintiff's claim for monetary damages is dismissed. Additionally, the Miranda settlement provides adequate injunctive relief against defendants, and plaintiff has made no showing that a permanent injunction is required.

## II.

### A. Plaintiff's Request for Monetary Damages

This court held previously that ERISA's civil enforcement provisions prevent individual plaintiffs from recovering monetary damages on their own behalf. *Bona*, 2003 U.S. Dist. LEXIS 4186, at \*27 ("Section 502(a)(2) authorizes relief for the benefit of a plan only."); *see also Lee v. Burkhardt*, 991 F.2d 1004, 1009 (2d Cir.1993) (same). Plaintiff claims now that she is suing derivatively on behalf of the Employee Benefit Funds, and therefore should be able to recover monetary damages on behalf of all Fund participants.

This is plaintiff's first mention of an ERISA derivative action during the four-and-a-half-year pendency of this litigation, and the problems with plaintiff's arguments are manifold. First, several courts have held that a plan beneficiary has no right to sue derivatively under ERISA unless and until the plan's trustees improperly refuse to sue. *See Moore v. Am. Fed'n of TV & Radio Artists*, 216 F.3d 1236, 1243-47 (11th Cir.2000); *McMahon v. McDowell*, 794 F.2d 100, 110 (3d Cir.1986); *Struble v. N.J. Brewery Employees'*

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*Welfare Trust Fund*, 732 F.2d 325, 337 (3d Cir.1984); see also Charles A. Wright, *The Law of Federal Courts* § 73, at 525 (5th ed. 1994) (“[T]rust beneficiaries may bring claims derivatively on behalf of the trust if the trustee refuses to bring them....”). Additionally, our Circuit has held that an individual beneficiary may not sue derivatively under ERISA unless he first establishes that the trustees breached their fiduciary duties. *Diduck v. Kaszycki & Sons Contractors, Inc.*, 874 F.2d 912, 916 (2d Cir.1989). Given that Miranda, one of the Fund's trustees, both sued and settled his claim in this action, Singh's right to proceed derivatively is in doubt.

\*3 Even assuming that Singh may proceed in spite of the Miranda settlement, it is unclear whether she may do so when suing under ERISA §§ 404, 405, and 406. In *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 287 (2d Cir.1991), our Circuit held that an individual beneficiary may sue derivatively for unpaid pension plan contributions under § 515, 29 U.S.C. § 1145, which is enforced under § 502(g)(2), 29 U.S.C. § 1132(g)(2). It is unclear whether the holding in *Diduck* applies to other types of ERISA actions, such as the instant case, which involves alleged breach of fiduciary duty, is brought under §§ 404, 405, and 406, and enforced under § 502(a)(2) and § 502(a)(3).

If it is possible for plaintiff to sue derivatively here, then the holding in *Diduck* would control such an action, because *Diduck* is to date our Circuit's only statement on the standards for ERISA derivative suits. In that case, the Court held that Fed.R.Civ.P. 23.1, which governs the standards for derivative actions brought by shareholders against corporations or unincorporated associations, is applicable to derivative actions brought under § 502(g)(2). *Diduck*, 974 F.2d at 287. To be sure, other courts have held otherwise. See *Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1463 (9th Cir.1995) (“Neither the text of Rule 23.1 nor the concerns that motivate its separate treatment for shareholder derivative actions apply here, for the plaintiffs are not ‘shareholders’ suing on behalf of a ‘corporation.’ ”); *In re AEP ERISA Litig.*, 327 F.Supp.2d 812, 821 (S.D. Ohio 2004) (holding that the provisions of Rule 23.1 are not controlling when a trust beneficiary brings a derivative suit on behalf of a trust). However, as one Court in this Circuit held recently,

the portion of *Diduck* addressing the applicability of Rule 23.1 to derivative actions under ERISA appears to remain good law ... [and] since the Second Circuit has never retreated from *Diduck*'s holding that a plaintiff seeking to pursue a derivative action ‘for or on behalf of a plan’ must comply with Rule 23.1 or be excused from doing so, this Court is obliged to follow *Diduck*, not *Kayes* or *AEP*, unless and until the Second Circuit says otherwise.

*Coan v. Kaufman*, 349 F.Supp.2d 271, 274-75 (D.Conn.2004).

Moreover, in one of its previous opinions in this case, this court cited *Diduck* in applying Rule 23.1 to dismiss plaintiffs' claims under § 501(b) of the Labor Management Reporting and Disclosure Act (LMRDA). The court found that because Rule 23.1 applied to ERISA actions, it also should apply plaintiffs' LMRDA § 501(b) suit, which was brought “‘for the benefit of the labor organization’ ... [by] members of and on behalf of ATC.” *Martinez*, 2004 U.S. Dist. LEXIS 12902, at \*20-\*21 (quoting 29 U.S.C. § 501(b)). Because plaintiffs were no longer members of ATC, and because “Rule 23.1 implicitly requires that a plaintiff maintain his status as a shareholder or member throughout the pendency of the action,” the court held that plaintiffs lacked standing to pursue a LMRDA derivative action against the ATC officer defendants. *Id.* at \*21.

\*4 Given the law of this Circuit and the court's previous holding in this case, if plaintiff has the right to proceed derivatively in this case, the requirements of Rule 23.1 govern. Like Fed.R.Civ.P. 23, which prescribes the standards for class actions, Rule 23.1 requires that the plaintiff must “fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.” The court ruled last year when it denied plaintiffs' motion for class certification that Singh does not adequately represent the interests of other participants in the Employee Benefit Funds. See *Martinez*, 2004 U.S. Dist. LEXIS 11019. As appears immediately below, that has not changed.

As of June 2004, Singh no longer was employed by Duane Reade (the store whose employees ATC and UNITE compete to represent), see *id.* at \*17, and it is unclear whether she currently is a member of any

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union or a participant in any Employee Benefit Fund, although she does allege in her brief and in the complaint that she remains a participant in the Union Mutual Fund Pension Plan (UMF). *See* Compl. ¶ 1; Pl. Br. at 3. As the court found last year, Singh was recruited as a plaintiff in this lawsuit by a representative of ATC's rival union UNITE, UNITE arranged for her to meet with plaintiff's counsel Thomas Kennedy, and when this litigation commenced, Singh was unfamiliar with all but one of the defendants, *see Martinez*, 2004 U.S. Dist. LEXIS 11019, at \*17; that person, John Morro, the former president of ATC, is no longer a party in the case, *see Martinez*, 2004 U.S. Dist. 12902.

As the court found when it denied plaintiffs' motion for class certification, "Singh [was] hand-picked by UNITE for this litigation, [was] effectively assigned counsel by UNITE for this litigation, and [has] been coached by UNITE via its representatives and its counsel at the Kennedy firm throughout this litigation." *Martinez*, 2004 U.S. Dist. LEXIS at \*20. Although plaintiff's own ignorance of her claims is not sufficient to make her an inadequate representative, it suggests that she is "little more than [a] pawn[ ] in a battle between rival unions, rather than [a plaintiff] seeking redress for injuries to an entire class of persons." *Id.*

Plaintiff's counsel virtually concedes in his brief that UNITE, and not Singh, is the true plaintiff in this action. Despite this acknowledgment, plaintiff attempts to argue that UNITE is an adequate representative of other Employee Benefit Fund participants. Plaintiff states that this litigation no longer can "be used as a vehicle by UNITE or anyone else to destroy ATC or to gain access to its records" because all of plaintiff's claims against the officers of ATC have been dismissed, *Martinez*, 2004 U.S. Dist. LEXIS 12902; because ATC has merged with another labor union, Local 338 (Pl. Br. at 21); and because the Barasch Family agreed in its settlement with Miranda that it would drop its role as administrator of the Employee Benefit Funds (*id.*). Because of these developments, plaintiff, who seems to believe that judicial credulousness has no limit, tells the court that UNITE continues to fund this litigation out of pure good will. This argument beggars description, and therefore must be quoted to be fully appreciated:

\*5 UNITE is still funding this litigation. But with

ATC out of the lawsuit, this is not an intra union conflict. UNITE cannot be said to have interests that are indisputably antagonistic to the interests of the plan participants since it is irrelevant whether those participants support UNITE, ATC or no union at all. The overwhelming majority of the participants are not active employees who are capable of supporting any union. Even assuming a long-standing UNITE desire to draw Duane Reade employees away from ATC, UNITE cannot use this litigation as a means to do so except by reaching a good resolution for the class and demonstrating that it is a diligent supporter of participant interests. The purse strings to this litigation only afford UNITE the ability to rectify an injustice and hopefully to burnish its reputation among working people. That "interest" is not hostile in any way to the interest of the participants in the Pension Fund.

*Id.* at 21-22. First, plaintiff's claim that ATC is "out of the lawsuit" is inaccurate. Plaintiff herself acknowledges that the Barasch Family founded ATC, and that its permanent removal from control over ATC's operations "likely would have some negative effect on ATC." *Id.* at 21. Second, in view of the history of this litigation, the court is not obligated to take at face value the claim that UNITE is spending substantial amounts of money on this protracted litigation simply to "rectify an injustice" and to "burnish its reputation among working people." *Id.* at 22. UNITE's obvious goal is to lure Duane Reade employees away from ATC/Local 338. A judgment that the founders and trustees of ATC breached their fiduciary duties to participants in Funds administered by ATC would help it achieve that goal.

It may be that UNITE's interests are not "indisputably antagonistic" (*id.* at 21) to those of the Fund Participants, although even that statement is debatable. But Rule 23.1 requires that a plaintiff fairly and adequately represent the interests of those similarly situated. In this case, despite plaintiff's counsel's protestations to the contrary, Singh's (or UNITE's) primary aim likely is not to "remedy injustice," but to present UNITE as more attractive to potential members than ATC/Local 338. This goal lacks congruence with and does not adequately represent the interests of the Employee Benefit Fund participants. For instance, although UNITE likely is continuing this litigation in hopes of ultimately touting to potential members a hard-fought victory in federal court over the founders of ATC, the

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Fund participants might have been better served by a rapid settlement. Had the true interested parties been in control of this case, those Fund participants who were harmed by defendants' alleged improprieties might have received monetary damages long ago.

Moreover, not only has plaintiff been unable to recruit others to join her suit, but also, as detailed above, plaintiffs have dropped like flies, and Singh now remains the only individual willing to pursue her claims. See *Smith v. Ayres*, 977 F.2d 946, 948 (5th Cir.1992) ("The trial court may properly consider the degree of support a would-be shareholder plaintiff will receive from other shareholders in determining the adequacy of representation under Rule 23.1."); *Larson v. Dumke*, 900 F.2d 1363, 1367 (9th Cir.1990) (same); *Rothenberg v. Sec. Mgm't Co.*, 667 F.2d 958, 961 (11th Cir.1982) (same); *Davis v. Comed, Inc.*, 619 F.2d 588, 594 (6th Cir.1980) (same). Singh obviously is not a persuasive enough plaintiff to attract other Fund participants to her cause, or even to keep them involved in it, which further supports the conclusion that she is not an adequate representative in a derivative suit.

\*6 Neither the Miranda settlement, nor ATC's merger with Local 338, nor the dismissal of the ATC officers as defendants in this lawsuit alter the court's previous holding that Singh is not an adequate representative of those similarly situated. As long as this lawsuit remains a crusade by UNITE to harm ATC's founders and former trustees, Singh may not proceed derivatively on behalf of other Fund participants, nor may she recover any individual monetary relief.

Finally, it bears mention that UNITE's financing of and strong interest in this litigation smack of both maintenance and the related act of champerty.<sup>FN2</sup> See *Norman D.D.S., P.C. v. ARCS Equities Corp.*, 72 F.R.D. 502 (S.D.N.Y.1976) (refusing to certify class where a third party was paying the plaintiff's legal fees and expenses). As one court in this District explained:

<sup>FN2</sup>. "Put simply, maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty." *In re Primus*, 436 U.S. 412, 425 n. 15 (1978).

[t]he furnishing of money by a layman for the purpose of permitting a lawyer to provide, in part, costs and expenses in carrying on litigation for a third party ... constitute[s] maintenance. All the reasons which impelled the justices of the common law to punish the powerful barons and large landholders for maintaining actions against others by furnishing costs and expenses, are present here.

*Kane v. Sesac, Inc.*, 54 F.Supp. 853, 859 (S.D.N.Y.1943). Relatedly, "[t]he historical objection to [champerty] was grounded in the belief that this offense permitted intermeddlers to stir up strife by speculative litigation." *J.B.P. Holding Corp. v. United States*, 166 F.Supp. 324, 327 (S.D.N.Y.1958). UNITE's unabashed fueling and churning of this litigation despite not being a party to it borders on the unethical, and certainly does not bolster Singh's argument that she is an adequate representative in a derivative action against defendants.

Because the court finds that Singh is not an adequate representative, the court need not rule on whether she was required by Rule 23.1 to make a demand on the directors of the corporation before proceeding derivatively in this action.

#### B. Injunctive Relief

Plaintiff claims also that she is entitled under § 502(a)(3) to a permanent injunction against all remaining defendants, preventing them from serving in any fiduciary capacity in an employee benefit plan or as a party in interest to such a plan. (FAC § 26)

However, the Miranda settlement moots this claim because it provides relief that is more than adequate to address plaintiff's concerns. The settlement provides, inter alia, that: (1) Financial will terminate its contract with the Union Mutual Pension Plan and no longer operate as third-party administrator for that plan; (2) Financial will not at any time in the future serve as third-party administrator for the Union Mutual Pension Plan, the Allied Welfare Fund, or the Vacation Fringe Benefit Fund; (3) that defendants George Barasch, Linda Barasch Glazer, and Richard Glazer will not "at any time in the future operate or have any interest in any entity providing Administrator services to the Union Mutual Pension Plan, the Allied Welfare Fund and/or the Vacation Fringe Benefit Fund;" and

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(4) that the UMF trustees will resign upon the court's approval of the settlement agreement, and agree not to serve as trustees for the Union Mutual Pension Plan or any Local 815 or joint Local 815/ATC fund for 10 years. ( Fialcowitz Decl. Ex. A at 3; Cook Decl. Ex. A at § 4-5)

\*7 The Miranda settlement permanently ends Financial's involvement with the Employee Benefit Funds, permanently prevents the Barasch Family from committing acts similar to those alleged in the complaint, and removes the UMF trustees from involvement with the Employee Benefit Funds for at least 10 years. Plaintiff argues that the Miranda settlement is "far too narrowly circumscribed," because it does not prevent the Service Provider Defendants from assuming roles at ATC other than as administrators for the plans. (Pl. Br. at 11) Plaintiff wants to prevent defendants permanently from serving in any kind of fiduciary role with respect to the Employee Benefit Funds.

Permanent injunctions certainly are available when necessary in ERISA actions, *see Beck v. Levering*, 947 F.2d 639, 641 (2d Cir.1991), but plaintiff has not explained why such an extreme remedy is required here. The Miranda settlement provides injunctive relief as to each wrong alleged in the complaint. Plaintiff has alleged no set of facts tending to prove that wrongs have been committed requiring further injunctive relief. The Service Provider Defendants have controlled ATC for more than half a century, but plaintiff does not allege that they have committed any breaches of fiduciary duty other than those related to the administrator services provided by Financial. The Miranda settlement addresses that misconduct and moots any further request for injunctive relief.

For the reasons set forth above, both the Service Provider Defendants' and the UMF Trustees' motion to dismiss the complaint is granted.

SO ORDERED:

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