

EXHIBIT A

Before the Court is the motion, pursuant to Fed. R. Civ. P. 56, filed by defendant, David L. Babson & Company, Inc. ("Babson") seeking that summary judgment be entered in its favor in this adversary proceeding and that the claims that plaintiff, Enron Corp. ("Enron"), has alleged against Babson be dismissed.

The adversary proceeding was commenced by Enron against various defendants, including Babson, seeking to avoid, pursuant to sections 544, 547 and 548 of the Bankruptcy Code, certain transactions involving the transfer of commercial paper and to recover from the defendants, pursuant to section 550(a) of the Bankruptcy Code, certain payments made in connection with those transactions. In addition, disallowance of defendants' claims is sought pursuant to section 502(d) of the Bankruptcy Code, against any defendant who is the transferee of an avoidable transfer.

As section 550(a) of the Bankruptcy Code permits the recovery of avoided transfers only from certain transferees of such transfers, Babson argues that, as a matter of law, recovery cannot be had from Babson because, according to Babson, it does not qualify as a section 550 transferee.

Babson contends that to qualify as a transferee, a party must not only receive the transferred funds but also have exercised dominion and control over them or, alternatively, have benefitted from any such transfer. Babson asserts that it did not even receive any of the transferred funds. Babson further asserts that it did not benefit from any of the transfers. In support of its position, Babson has submitted the affidavit of its Managing Director who is responsible for the management of Babson's Corporate Bond Management, Public Bond Trading

and Institutional Fixed Income units. In addition Babson has submitted the affidavit of its Director of Investment Management who is responsible for trade operations for fixed income securities. Both affiants attest that Babson did not receive any of the funds related to the relevant transfers nor did it benefit from any such transfers.

In opposition to Babson's motion for summary judgment, Enron has submitted an affidavit seeking further discovery pursuant to Fed. R. Civ. P. 56(f). Enron asserts that it needs discovery to determine if Babson was a transferee or beneficiary of the transferred funds and whether Babson is a proper defendant in this adversary proceeding.

Fed. R. Civ. P. 56(f) provides

Should it appear from the affidavits of a party opposing [the motion for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

An affidavit in opposition to motion for summary judgement which seeks further discovery should explain

- (1) what facts are sought and how they are to be obtained,
- (2) how those facts are reasonably expected to create a genuine issue of material fact,
- (3) what effort affiant has made to obtain them, and
- (4) why the affiant was unsuccessful in those efforts.

Gurary v. Winehouse, 190 F.3d 37, 43 (2d Cir. 1999); *Meloff v. New York Life Ins. Co.*, 51 F.3d 372, 375 (2d Cir. 1995).

A decision on whether to afford more time for discovery pursuant to Fed. R. Civ. P. 56(f) is within a court's discretion. *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir. 1994). Summary judgment may be granted where plaintiff gives "no basis to conclude that

further discovery would yield proof” of the evidence it requires. *Meloff*, 51 F.3d at 375.

A party must already have a claim for which it seeks additional discovery as discovery is not meant to allow a party “to find out if it has a claim.” *Paddington*, 34 F.3d at 1138. The mere expectation of potentially developing further evidence is not sufficient. *Id.* Rather, the evidence sought must be to fill in evidentiary gaps. *Paddington*, 34 F.3d at 1138 (citations omitted).

A party may not defeat a motion for summary judgment by merely restating conclusory allegations and amplifying them only with speculation about what discovery might uncover. *Contemporary Mission, Inc. v. U.S. Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981). An opposing party’s mere hope that further evidence may develop prior to trial is an insufficient basis upon which to justify the denial of the motion. *Contemporary*, 648 F.2d at 107.

Thus, a properly and timely made Rule 56(f) request for discovery may nevertheless be denied if a court determines that the request is based on “speculation as to what potentially could be discovered.” *Paddington*, 34 F.3d at 1138. A party seeking Rule 56(f) relief must show that the material sought is related to the defense, and that it is not cumulative or speculative. *Id.* A bare assertion that the evidence supporting a plaintiff’s allegation is in the hands of the defendant is not sufficient to justify a denial of a motion for summary judgment under Rule 56(f). *Id.*

If a plaintiff does not produce any specific facts at all to support its claim, discovery may be denied and summary judgment granted. *Contemporary*, 648 F.2d at 107. Merely asserting the allegations is insufficient to warrant denial of a motion for summary judgment when the moving party has met its burden of showing the absence of any genuine issue of material fact. *Id.* Indeed, where the motion for summary judgment is thus supported, a bare assertion that the moving party exclusively controls the evidence is not sufficient to defeat the motion where the

outcome of a continuance to allow discovery is wholly speculative. *Contemporary*, 648 F.2d at 107.

Babson's motion for summary judgment was properly supported by the affidavits of the two corporate managers whose positions overseeing credit-type investments and trading operations supply them with the requisite knowledge of the facts concerning whether Babson was a party to any of the relevant transactions, whether it received the transferred funds or benefitted by their transfer.

In response Enron argues that Babson is in exclusive control of evidence including the documents referenced in Babson's opposition and that Enron had no opportunity for discovery.

Enron has not submitted anything that it claims led it to conclude that Babson was a transferee or intended beneficiary of the transferred funds. Rather, Enron asserts that discovery will allow it to determine if Babson is a proper defendant. Thus, without any sort of evidence to point to Babson as a potential transferee or beneficiary of the transferred funds, Enron speculates that discovery might lead to such evidence. As previously noted, speculation is not sufficient for further discovery. At the hearing Enron indicated that it had included Babson as a defendant in the adversary proceeding "because of documents and information that Enron had in its possession before [it] brought the lawsuit." However, neither prior to nor at the hearing did Enron submit any such documents or specifically provide any detail as to the purported information that led it to include Babson as a defendant. Without that evidence, Enron is left with the bare assertion that further discovery will allow it to establish whether Babson is a proper defendant. This is not sufficient to defeat Babson's properly supported motion for summary judgment.

In addition, for the reasons set forth in Babson's pleadings Enron had previous

opportunity to pursue discovery which it failed to accomplish.

Based upon the foregoing, Enron's request for a continuance to seek discovery pursuant to Fed. R. Civ. P. 56(f) is denied. As Babson's properly supported factual allegations on its motion for summary judgment are not contested, its summary judgment motion is granted.

The Court will enter a "minutes of proceedings" order reflecting its ruling.