UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
GS CONSULTING SERVICES, INC.	)	CASE NO. 05-33646 HCD
DEBTOR	)	CHAPTER 7
	)	
JOSEPH D. BRADLEY	)	
PLAINTIFF	)	
vs.	)	PROC. NO. 05-3069
	)	
1ST SOURCE BANK, HEALTHCARE ECONOMICS GROUP, LLC, FACILITIES MANAGEMENT & INVESTMENTS, INC., BENEFIT RESOURCE ADMINISTRATORS, INC., THE CALENDS GROUP, INC., HORIZON MANAGEMENT GROUP, LLC, HEALTHCARE RESOURCES GROUP, LLC, MEDGUARD, LLC, MEDRECOVER, LLC, PYRAMID BENEFIT SERVICES, INC., PCT OPERATIONS, INC., ROCKPORT ADMINISTRATIVE SERVICES, LLC, STOPLOSS COMMISSION SERVICES, LLC NATIONAL HEALTH & CLAIMS ADMINISTRATORS, TEXAS HEALTHCARE RESOURCES GROUP ADMINISTRATORS - SAN ANTONIO, HEALTHCARE RESOURCES GROUP SOUTH EAST, LLC, PARTNERCARE TPA, INC., CANTEEN SERVICE COMPANY OF OWENSBORO, INC., and THE UNITED STATES DEPARTMENT OF LABOR	)	
DEFENDANTS	)	
_____	)	
CANTEEN SERVICE COMPANY OF OWENSBORO, INC.	)	
CROSS-CLAIMANT	)	
vs.	)	
1ST SOURCE BANK	)	
CROSS-DEFENDANT	)	
_____	)	
1ST SOURCE BANK	)	
CROSS-CLAIMANT	)	
vs.	)	
HEALTHCARE RESOURCES GROUP, LLC	)	
CROSS-DEFENDANT	)	
_____	)	
CANTEEN SERVICE COMPANY OF OWENSBORO, INC.	)	
COUNTER-CLAIMANT	)	
vs.	)	
JOSEPH D. BRADLEY	)	
COUNTER-DEFENDANT	)	

Appearances:

J. Richard Ransel, Esq., counsel for plaintiff, Thorne, Grodnik LLP, 228 West High Street, Elkhart, Indiana 46516;

Mark D. Boveri, Esq., and R. John Kuehn, Esq., counsel for defendant 1st Source Bank, Boveri, Murphy, Rice & LaDue, LLP, 400 Plaza Building, 210 South Michigan Street, South Bend, Indiana 46601;

Robin W. Morlock, Esq., and Wayne T. Ault, Esq., counsel for defendant The United States Department of Labor, Office of United States Attorney, 5400 Federal Plaza, Suite 1500, Hammond, Indiana 46320; and

Peter A. Velde, Esq., counsel for defendant Canteen Service Company of Owensboro, Inc., Kightlinger & Gray, LLP, 151 North Delaware Street, Suite 660, Indianapolis, Indiana 46204.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 28, 2007.

Before the court are the Motion for Summary Judgment filed by Canteen Service Company of Owensboro, Inc. ("Canteen"), cross-claimant and counter-claimant in this matter (R. 60); Trustee's Motion for Summary Judgment filed by plaintiff Joseph D. Bradley, Trustee ("Trustee") of the debtor GS Consulting Services, Inc. ("Debtor") (R. 77); and Motion for Partial Summary Judgment filed by 1st Source Bank ("1st Source"), defendant and cross-claimant (R. 80). The parties have filed responses and memoranda of law. In addition, 1st Source has filed two Motions to Strike Affidavits (R. 100, 107, 111) and the plaintiff Trustee has responded (R. 105, 109). Following the briefing periods, the court took the matter under advisement.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(E) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any

conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

On May 23, 2005, GS Consulting Services, Inc. ("Debtor"), filed its voluntary chapter 7 petition. Venue was transferred to this bankruptcy court on June 28, 2005, and Joseph D. Bradley was appointed Trustee in the case. The adversary proceeding now before the court was filed on August 22, 2005, and was amended on September 15, 2005. *See* R. 1, 5. The Trustee stated that the Debtor had entered into an Asset Purchase Agreement to purchase the assets of certain entities and that the bank accounts located at 1st Source Bank held those assets. The Trustee asked the court to determine that the various accounts named and listed, others named which might exist, and any accounts under the tax identification numbers of the Debtor, be declared to be property of the bankruptcy estate. The Trustee also sought an order that the accounts held in 1st Source be turned over to the Trustee.

The defendant 1st Source answered the Complaint. *See* R. 11. Canteen filed a motion to intervene, and the court granted the motion on October 31, 2005. *See* R. 18. The United States Department of Labor ("DOL") and the Trustee filed a stipulation that the two parties had resolved all the disputes between them. *See* R. 20. It was clear that, before it had filed bankruptcy, the Debtor had provided services to entities as a third party administrator for various employer sponsored employee health insurance plans created under the Employee Retirement and Income Security Act of 1974 ("ERISA"). The Trustee and DOL stated that the Debtor's clients included both those with ERISA qualified plans and those with non-ERISA qualified plans. They found that it was in the best interests of all creditors and all ERISA plans for the Trustee to continue to recover funds held by the Debtor in conjunction with DOL. *See id.* at 3. The court approved the Stipulation on November 9, 2005. *See* R. 25.

On November 29, 2005, the court granted the Trustee's motion for Judgment by Default. *See* R. 31. The 37 defendants who failed to appear or defend in this adversary proceeding were found to have no interest in the accounts of the Debtor held in 1st Source.[1]

On June 1, 2006, the Trustee filed a Motion for Partial Summary Judgment. Attached were the affidavits of the Trustee and Frederick J. Slamin, the certified public accountant and forensic accountant hired by the Trustee in this case. *See* R. 53, 54, 55. On July 17, 2006, the present parties in this adversary proceeding – the Trustee, 1st Source, DOL, and Canteen – filed a Stipulation to Entry of Order Granting Trustee's Motion for Partial Summary Judgment. *See* R. 63. On July 20, 2006, the court accepted the Stipulation and granted summary judgment on the following determinations: (1) 1st Source holds a claim of $131,070.00 against the Debtor for unremitted health claims and stop loss premiums; (2) Canteen holds a claim of $112,412.00 for mistakenly deposited funds in the Debtor's bank accounts, and (3) the Debtor's accounts total about $718,710.65. The court then ordered 1st Source and Canteen to turn over to the Trustee the excess amounts over the $131,070.00 claimed by 1st Source and the $112,412.00 claimed by Canteen. It was agreed that the turnover of those funds shall have no effect on any of the parties' rights to recover those funds or on any legal theories or arguments to be presented to the court. *See* R. 65.

On June 14, 2006, the Trustee, 1st Source Bank, Canteen, and the DOL filed the following Stipulation of Facts:

> 1. That on August 22, 2005, this adversary proceeding was filed. On September 15, 2005, an amended complaint was filed.
>
> 2. That thereafter 1st Source filed its answers, defenses and counterclaim on October 13, 2005.
>
> 3. That on October 24, 2005, Canteen filed its motion to intervene which the court subsequently granted. Canteen answered the complaint and filed a crossclaim and counterclaim.
>
> 4. That Health Care Resources Group, Inc., a Tennessee corporation, filed a disclaimer by Agreed Order signed by the court on November 3, 2005.

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[1] In addition, Health Care Resources Group filed a disclaimer, stating that it had no interest or claim in the accounts of the Debtor at 1st Source. The court approved an Agreed Order stating that all potential claims against that defendant were dismissed with prejudice. *See* R. 22, Order of November 3, 2005.

5. That no other parties' defendants appeared. On November 29, 2005, the court entered its order granting the plaintiff's motion for default judgment and determining that they had no interest in any of the bank accounts at 1st Source which are the subject of this adversary proceeding.

6. The parties to this stipulation are the only remaining parties in this adversary proceeding and thus, the only parties claiming an interest in the bank accounts described in this adversary proceeding.

7. That the trustee and DOL have filed a stipulation in this adversary proceeding agreeing that the trustee is to collect ERISA and non-ERISA funds in conjunction with the DOL and subject to the DOL's oversight.

8. That the debtor executed an Asset Purchase Agreement on December 15, 2004, to purchase the assets of certain third party health care administration companies (hereafter the "TPA Providers").

9. That the accounts at 1st Source which are owned solely by the debtor, subject to Bank's and Canteen's and DOL's ERISA claims, have a total balance of $718,710.65.

10. That the debtor executed an Agreement for Deposit Accounts with respect to each account at 1st Source.

11. 1st Source has established and maintained a self-funded employee benefit plan (the "Plan") through which its eligible employees may obtain health care benefits for themselves and their eligible dependents (collectively, the "Plan Participants").

12. On or about December 24, 2005, 1st Source and debtor's predecessor "Healthcare Resource Group" ("HRG") entered into a Third Party Administrative Services Agreement (the "Contract"), pursuant to which it undertook to provide administrative services to 1st Source in connection with the Plan. The Contract was amended on or about January 17, 2005, by the execution of Appendix A.

13. Pursuant to the Contract, debtor periodically requested monies from 1st Source to fund the payment of valid health expenses incurred by Plan Participants. In response to these requests, 1st Source entrusted monies to debtor specifically earmarked for the sole purpose of enabling debtor to timely remit payments to health care providers for such expenses.

14. Since entering into the Contract, 1st Source has entrusted millions of dollars to debtor earmarked solely for payment of the Plan Participants' health care expenses.

15. On or about May 6, 2005, debtor informed 1st Source (a) that there were "funds missing" from the monies theretofore entrusted to it by 1st Source and other employers, (b) that debtor could not then account for all monies theretofore entrusted to it by 1st Source and other employers, and (c) that debtor was suspending payments to health care providers owed funds for health care previously rendered.

16. 1st Source entrusted monies to debtor specifically earmarked for payment of health care expenses incurred by the Plan Participants. Debtor has not remitted such monies to the providers owed payment for such health care and [has] not been able to account for all funds of 1st Source entrusted to it.

17. In addition to the monies 1st Source remitted to debtor for payment of Plan Participants' healthcare expenses, 1st Source also remitted premiums to the debtor for relay by the debtor to the insurers providing stop loss coverage for catastrophic claims under the Plan. Debtor also failed to remit the stop loss premiums it received from 1st Source to the stop loss insurer.

18. The total amount 1st Source claims against the debtor is $131,070.00.

19. Prior to March 29, 2005, Canteen contracted with the debtor to act as Canteen's Third Party Administrator.

20. On or about March 29, 2005, Canteen terminated the services of debtor as Canteen's Third Party Administrator.

21. Notwithstanding Canteen's termination of its relationship with the debtor, Canteen in May, 2005, inadvertently deposited funds that were intended to be directed to Canteen's new Third Party Administrator in satisfaction of Canteen's ERISA obligations, in debtor's account located at the Bank.

22. Upon discovery of its inadvertent deposit, Canteen requested the then-acting Bankruptcy Trustee to have the funds released bank [*sic*] to Canteen or to Canteen's new Third Party Administrator.

23. Notwithstanding its request, the funds have not been returned to Canteen.

24. As a result of the non-return of its money, Canteen, in accordance with its obligations, has forwarded additional funds to its current Third Party Administrator.

25. The dates and amounts of Canteen's transfers to the debtor's accounts are as follows:

Date of Transfer	**AmountTransferred To**
05/06/05	$21,000.00 Account No. 1319474
05/13/05	$70,412.70 Account No. 1319474
05/20/05	$ 2,551.16 Account No. 1319474
05/20/05	$18,448.84 Account No. 1319475

The transfers total $112,412.70.

26. This stipulation is not intended to preclude any party from filing other affidavits or exhibits.

R. 58 (references to attached exhibits deleted).

One month later, on July 14, 2006, Canteen filed a Motion for Summary Judgment. *See* R. 60. It asserted that the $112,412.70 that was deposited mistakenly by Canteen in the Debtor's 1st Source Bank account was excluded from the bankruptcy estate, was owned by Canteen free and clear of any claims of 1st Source Bank, and was to be disbursed back to Canteen. Canteen explained that the Debtor had provided services to Canteen as a third party administrator for its employer sponsored employee health insurance plan created under ERISA.

On March 29, 2005, Canteen terminated the Debtor as its third party administrator. Later, however, it erroneously deposited $112,412.70 in the Debtor's 1st Source account. Although it requested that the funds be returned to Canteen or to its new third party administrator, the funds were not returned.

According to Canteen, the Debtor holds $112,412.70 in trust in the 1st Source bank accounts for the benefit of Canteen, and it must disburse those funds back to Canteen. It also argues that 1st Source has no right of setoff against those funds held by the Debtor: Because the funds are ERISA plan funds, they are not the equitable property of the Debtor and, as a matter of law, cannot be used to satisfy the Debtor's individual obligations to any other creditor.

On August 14, 2006, the Trustee filed Trustee's Response to Canteen's Motion for Summary Judgment. *See* R. 70. He explained that the Debtor executed an Asset Purchase Agreement to purchase the assets of certain third party health care administration companies. The Debtor acted as a third party administrator for various employer sponsored employee health insurance plans. It was a third party administrator under ERISA for 1st Source, Canteen, and other employers. The Debtor's Trustee is working in conjunction with the Department of Labor to collect the Debtor's funds, ERISA and non-ERISA. Once collected, the ERISA funds will be distributed in an equitable manner to the ERISA plan beneficiaries who entrusted their funds to the Debtor.

The Trustee argued that Canteen is not entitled to summary judgment because there is a genuine issue between the parties concerning the amount of ERISA funds each employer will receive, once the funds are collected. The Trustee disputed Canteen's claim that it is entitled to a full recovery of the ERISA funds it deposited into the 1st Source accounts. He explained that Canteen is one of many ERISA fund contributors who made payments to the Debtor. Canteen did not assert any reason that it should receive 100 per cent of the funds entrusted to the Debtors while other similarly situated plan beneficiaries will likely not receive back 100 percent of their plan contributions. Concluding that such a result would be unfair and contrary to applicable law, the Trustee urged the court to allow the Trustee to determine the pro rata distribution of the recovered ERISA funds with all the parties who entrusted their ERISA funds to the Debtor and to deny full recovery to Canteen.

On August 30, 2006, the Trustee filed Trustee's Motion for Summary Judgment and Memorandum in Support of the motion. *See* R. 77, 78. He noted that the Debtor's funds, held in trust for the various health insurance plans at 1st Source, are almost all (all but $8,859.88) ERISA funds. The Trustee raised two arguments in his Motion. First, he asserted that Canteen is not entitled to the disbursement of ERISA funds for several reasons: (1) It would be inequitable to pay Canteen's claim in full at the expense of other ERISA claimants; (2) refunding the amount to Canteen would result in a further reduction of already insufficient funds to all ERISA claimants; and (3) the erroneous payments, solely the mistake of Canteen, could have been avoided. He asks that summary judgment be entered against Canteen on its claim for disbursement of the funds it erroneously deposited with the Debtor.

The Trustee also argued that 1st Source is not entitled to a setoff of ERISA funds. It pointed out, first, that the Debtor does not owe any money to 1st Source, and therefore 1st Source is not a "creditor" of the Debtor and cannot qualify under the setoff section of the Bankruptcy Code, § 553, which preserves the "right of <u>a creditor</u> to offset a mutual debt owing by such creditor to the debtor . . . ." It asserted, secondly, that the funds in the 1st Source bank accounts are ERISA trust funds held only for the benefit of the plan participants. Those funds are not property of the Debtor and cannot be used by 1st Source to pay the Debtor's debts to it.

Canteen submitted "Canteen's Joinder in Trustee's Response to Canteen's Motion for Summary Judgment." R. 93. It stated: "Canteen accepts the position of the bankruptcy trustee, and therefore requests that the Court find as a matter of law that Canteen is an ERISA plan creditor, entitled to recovery on the same basis as all other ERISA plan creditors."

On August 30, 2006, 1st Source filed its Motion for Partial Summary Judgment, seeking a declaration of its right of setoff against the Debtor's deposit accounts at 1st Source. *See* R. 80, 81. It argued that its right of setoff derives from Indiana common law and from its written Agreement for Deposit Accounts. It also contended that the Debtor, as a claims processing agent with purely ministerial responsibilities, was not an ERISA fiduciary. The Administrative Services Agreement between the Debtor and Canteen states that the plan sponsor, Canteen, retains full and final authority and responsibility for the plan and its operation. In addition, the Debtor was not

an ERISA fiduciary when it received the funds that Canteen inadvertently transferred to the Debtor's 1st Source accounts. Canteen had discharged the Debtor as its third party administrator, thereby divesting the Debtor of any responsibility to Canteen, its plan or plan participants. 1st Source concluded that it was entitled to exercise its setoff rights with respect to Canteen's funds.

Responsive memoranda were filed by the Trustee, *see* R. 94, Canteen, *see* R. 95, 113; and 1st Source, *see* R. 98, 106. The DOL also filed a memorandum in support of the Trustee's motion and in opposition to 1st Source's motion. *See* R. 103.

On October 30, 2006, 1st Source filed a Motion to Strike portions of the affidavit of the forensic accountant Frederick J. Slamin. *See* R. 100. It focused on ¶ 6(e) of the affidavit, which stated: "I conclude that $8,859.88 of the balance of funds in this [i.e., Canteen's] account are non-ERISA funds. The balance are all ERISA funds." R. 76, ¶ 6(e). 1st Source asserted that Slamin's determination that Canteen's monies on deposit are ERISA funds "requires an 'expression of legal opinion,' which is beyond the scope of Mr. Slamin's personal knowledge." R. 100 at 2. It noted, as well, that Mr. Slamin is not qualified to express a legal opinion; he is a CPA, not a lawyer. The Trustee filed his opposition to the Motion to Strike. He asked the court to deny the motion because ¶ 6(e) of the affidavit "contains [Mr. Slamin's] factual testimony as to how he, acting in his capacity as Certified Public Accountant and forensic account[ant] hired by the trustee to analyze the Debtor's operations and assets." R. 105 at 3. 1st Source filed a reply brief.

On November 17, 1st Source also filed a Motion to Strike portions of the affidavit of Queenie Evans. *See* R. 107. It asked that paragraphs 5 through 13 of her Affidavit be stricken because she maintained that the Debtor had "the discretion and authority" to perform certain tasks, and those are terms of legal opinion, beyond the scope of her personal knowledge. The Trustee responded that Ms. Evans stated from her personal knowledge, as an employee of the Debtor, what the Debtor actually did and how it exercised its discretion and authority. *See* R. 108. He asked the court to deny the motion to strike. 1st Source filed a reply brief. Once the briefing schedule had passed, the court took the matter under advisement.

DISCUSSION

Three parties have filed motions for summary judgment in this adversary proceeding. This court renders summary judgment only if the record shows that "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *See Celotex*, 477 U.S. at 323. If the moving party satisfies its initial burden, then the nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The court neither weighs the evidence nor assesses the credibility of witnesses. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

It is undisputed that, before it filed bankruptcy, the Debtor held funds as a third party administrator for various employer sponsored health benefit plans created under ERISA.[2] The Debtor deposited and held the ERISA funds in bank accounts at 1st Source Bank. It has asserted that it held those funds in trust for the various ERISA plans. 1st Source argued that the Debtor was never an ERISA fiduciary with respect to Canteen's funds.

ERISA presents a statutory definition of a "fiduciary":

> [A] person is a fiduciary with respect to a plan to the extent (I) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, ...

29 U.S.C. § 1002(21)(A). The Supreme Court noted that the ERISA provisions concerning a fiduciary's authority "do not characterize a fiduciary as one who exercises *entirely* discretionary authority or control. Rather, one is a fiduciary to the extent he exercises *any* discretionary authority or control." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113, 109 S. Ct. 948, 955-56, 103 L.Ed.2d 80 (1989). "The statute provides that not only

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[2] The DOL explained that amounts withheld from the wages of the employees of the Debtor's employer-clients for contribution to each employer's welfare plans were segregated by the employer and then transferred to the Debtor as third party administrator. Those employee contributions were ERISA plan assets. *See* R. 103 at 7-8.

the persons named as fiduciaries by a benefit plan, *see* 29 U.S.C. § 1102(a), but also anyone else who exercises discretionary control or authority over the plan's management, administration, or assets, *see* § 1002(21)(A), is an ERISA 'fiduciary.'" *Mertens v. Hewitt Associates*, 508 U.S. 248, 251, 113 S. Ct. 2063, 2066, 124 L.Ed.2d 161 (1993).

The duties carried out by the Debtor when administering Canteen's ERISA plan assets included: (a) maintaining the accounts for the benefit of the plan, (b) issuing checks to plan participants for benefits under the plan, (c) issuing checks to pay plan expenses such as stop loss insurance premiums, and (d) withdrawing its contractual administration fees. The Debtor's Claims Manager, Queenie Evans, in her Affidavit described the authority of the Debtor and of HRG, the Debtor's predecessor, during her time of employment with the company:

> 5. HRG had the discretion and authority to accept or reject claims filed by individuals covered by the healthcare plans of HRG's clients as being within or outside the scope of coverage of the plans of HRG's clients.
>
> 6. HRG maintained an internal appeal process for rejected claims . . . . HRG utilized this internal appeals procedure with the employees of HRG's clients, including 1st Source Bank's employees.
>
> 7. HRG had the discretion and authority to negotiate claims filed by individuals covered by the healthcare plans of HRG's clients, including negotiations with service providers to reduce the cost of claims.
>
> 8. HRG had the discretion and authority to negotiate terms with PPOs. . . .
>
> 9. HRG had the discretion and authority to negotiate discounts with out of network, out of plan healthcare providers.
>
> 10. HRG had the discretion and authority to review medical records and determine the medical necessity of procedures proposed for plan participants of HRG's clients.
>
> 11. HRG had the discretion and authority to make recommendations to doctors regarding procedures, such as informing doctors of which procedures were covered and which were not.
>
> 12. HRG had the discretion and authority to answer questions from the employees of HRG's clients regarding EOB's (Explanation of Benefits), and HRG did so, including doing so for 1st Source Bank's employees.
>
> 13. HRG exercised the discretion and authority which it had, as described in paragraphs 5 through 12 above, with regard to all of its clients, including both 1st Source Bank and Canteen Services.

R. 96.

The court considers, first, 1st Source's motion to strike this affidavit on the ground that Ms. Evans's use of the terms "discretion and authority" were expressions of legal opinion beyond the scope of her personal knowledge. It is well established that the threshold criterion for any witness to testify, by affidavit or at trial, is that she have personal knowledge. *See* Fed. R. Evid. 602; *Unterreiner v. Volkswagen of America, Inc.*, 8 F.3d 1206, 1211 (7th Cir. 1993). The court has no doubt that this Claims Manager and long-term employee of the Debtor would have personal knowledge of the services provided and responsibilities held by those who handle claims for the Debtor and its predecessor. In describing the "authority and discretion" that she and other administrators used when handling claims, the court finds that Ms. Evans was using those words as ordinary-language terms, not as legal ones. It is completely satisfied that Ms. Queenie Evans was speaking with personal knowledge. The court also finds that Mr. Slamin described the Debtor's assets as ERISA or non-ERISA funds based upon his review of the Debtor's books and records. It does not consider Mr. Slamin's distinction to be a legal one, but rather one reflected by the information before him as he analyzed the Debtor's assets. The court finds his testimony to be within the scope of his knowledge. It therefore denies 1st Source's Motions to Strike the Affidavits of Queenie Evans and Frederick Slamin.

Having reviewed the Affidavit of Queenie Evans and the uncontradicted description by the Trustee concerning the authority and control exercised by the Debtor as third party administrator, the court determines that the Debtor's responsibilities were not ministerial functions. Negotiating and making recommendations are not ministerial functions, for example. The Debtor determined which claims would be paid, for which client, and when payments would be made. *See* R. 103 at 13. Discretion was used in the handling of claims. *See American Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Society*, 841 F.2d 658, 662 (5th Cir. 1988) (finding that "authority to grant or deny claims, to manage and disburse fund assets and to maintain claims files clearly qualifies as discretionary control respecting management of a plan or its assets within the meaning of § 1002(21)(A)"). In fact, Canteen notes that the Debtor continues to exercise its discretion by retaining possession of the funds Canteen mistakenly paid to the Debtor after it had terminated its contract with the Debtor. In addition, the court finds that the Debtor had authority and control over the plan assets and thus was

a "fiduciary" within the meaning of the ERISA statute, 29 U.S.C. § 1102(21)(A)(I). *See Chao v. Day*, 436 F.3d 234, 236 (D.C. Cir. 2006) ("[I]n order to qualify as a 'fiduciary' with respect to a plan's 'assets,' a person must simply exercise '*any* authority or control' over their management or disposition."). Even under the Administrative Services Agreement between the Debtor and Canteen, the Debtor is responsible for the payment of claims and may adopt its own policies and procedures to administer the Agreement. It specifically states: "It is understood and agreed that the services to be performed or arranged for by BRA [Benefits Resources, Inc., an entity of the Debtor] under this agreement necessarily require the exercise of judgment." *See* Agreement, p.4, ¶ G.3, cited in R. 94 at 7. It determines, therefore, that the Debtor is an ERISA fiduciary.

The court logically also finds that the Debtor held the assets in trust to provide benefits to plan participants and their beneficiaries and to pay expenses. ERISA provides that trust funds must be held for the participants:

> [T]he assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

29 U.S.C.§ 1103(c)(1). Even the funds deposited mistakenly by Canteen with the Debtor are ERISA trust funds, because they were intended for the payment of ERISA claims under Canteen's plan, even though Canteen had moved to a different third party administrator. *See In re Contractor Technology, Ltd.*, 345 B.R. 800, 806 (Bankr. S.D Tex. 2006) ("General principles of trust law dictate that trust assets remain in trust, regardless of how the asset is distributed."). Moreover, 1st Source's service agreement, signed by the Chief Operating Officer of the Debtor, does not change the character of the Debtor as a fiduciary or the Debtor's assets as trust funds. The terms in the service contract do not control the nature of the trust funds, which are held in the accounts for a third party. In this case, of course, 1st Source had selected the Debtor as its third party administrator; it knew, therefore, that the funds deposited in accounts by the Debtor were trust funds, and cannot be heard to assert otherwise now. As § 1103(c)(1) states, plan assets are to be used exclusively for the benefit of plan participants.

There is an exception to the "exclusive benefit" rule of § 1103(c)(1), however. It is found in the following subsection:

> In the case of a contribution . . . if [a] contribution or payment is made by an employer to a plan . . . by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer.

29 U.S.C. § 1103(c)(2). It is undisputed that Canteen erroneously deposited funds with the Debtor, and that the funds were ERISA trust funds. (Stip. Facts ¶¶ 20, 21.) Some courts have found that the return of erroneously deposited funds is neither mandatory nor automatic, just because the funds are ERISA trust funds. *See Frank L. Ciminelli Constr. Co., Inc., v. Buffalo Laborers Supplemental Unemployment Benefit Fund*, 976 F.2d 834, 835-36 (2d Cir. 1992); *Plucinski v. I.A.M. Nat'l Pension Fund*, 875 F.2d 1052, 1056-68 (3d Cir. 1989). Those courts have considered such factors as whether the return of the ERISA funds would be equitable and whether such a return would result in an underfunding of a plan.

This court applied the equitable balancing test when considering whether to return the ERISA funds and found that, in this case, the repayment of Canteen's funds would result in a smaller payment to the other ERISA claimants. *See Ciminelli*, 976 F.2d at 836 (denying repayment because, when "employers are allowed to recover overpayments and thereby reduce a fund's total assets, those who have already retired will have received too much . . . [and] [f]uture retirees will then receive too little"); *Plucinski*, 875 F.2d at 1053 (refusing to order return of mistaken ERISA fund payments when restitution would result in the underfunding of a plan). The court determines that it would be inequitable to disburse Canteen's erroneous payments back to Canteen in full when other ERISA claimants will not be receiving refunds in full. In light of the fact that the erroneous payments by Canteen to the Debtor were solely the mistake of Canteen, it would be inequitable to reward Canteen for its mistake by disbursing the erroneous payments back to it while other ERISA claimants will not receive a full disbursement. Accordingly, to ensure a more equitable distribution among the claimants, an equal pro rata distribution is favored, so that similarly situated parties may share equally. *See In re Lemons & Assocs., Inc.*, 67 B.R. 198, 213-14 (Bankr. D. Nev. 1986). Even if the court were inclined to consider allowing Canteen's recovery of its erroneous payments, it still would find that Canteen failed to show that the equities favor restitution to

Canteen. *See Alaska Trowel Trades Pension Fund v. Lopshire*, 103 F.3d 881, 885 (9th Cir. 1996). The court therefore finds that Canteen, as a single ERISA claimant, should not be able to benefit at the expense of the other ERISA claimants. *See Lemons*, 67 B.R. at 213-14. Accordingly, Canteen's Motion for Summary Judgment is denied.[3]

The final issue is whether 1st Source is entitled to a setoff of the ERISA funds held in the bank accounts at 1st Source. The Bankruptcy Code's statute for setoff states:

> (a) . . . this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case . . . .

11 U.S.C. § 553(a). It has long been held that there is "no right of setoff unless the demands are responsive, one to the other; that is, there cannot be a setoff of a trustee's funds against a personal debt." *Newhouse v. First National Bank*, 13 F.2d 887, 890 (N.D. Ill. 1926), *aff'd.*, 17 F.2d 228 (7th Cir. 1927). It is the character of the funds as trust funds that defeats a bank's right to setoff.

> Normally, funds deposited with a bank are general deposits which create a debtor-creditor relationship between the bank and its depositor. Setoff is not permitted, however, if the funds involved are trust funds or if the depositor can show that the bank agreed to maintain the deposit as a trust fund.

In re Texas Mortgage Servs. Corp., 761 F.2d 1068, 1075 n.11 (5th Cir. 1985) (citations omitted). It is clear under ERISA that employee benefit plan assets "shall be held in trust," 29 U.S.C. § 1102, and the "federal common law of rights and obligations under ERISA-regulated plans" confirms the statutory mandate. *See Firestone Tire & Rubber Co.*, 489 U.S. at 110, 109 S. Ct. at 954 (stating that federal common law fills out the ERISA statute); *United States v. McConnell*, 258 B.R. 869, 873-74 (Bankr. N.D. Tex. 2001) (finding that, under federal common law, a constructive trust is created). The court finds that 1st Source has no right of setoff of the Debtor's funds.

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[3] Canteen changed its position during the course of this adversary proceeding. It filed a Joinder, accepting the position of the Trustee. *See* R. 93. Nevertheless, it did not withdraw or correct its original motion for summary judgment. *See Holgate v. Baldwin*, 425 F.3d 671, 678-79 (9th Cir. 2005). For that reason, the court is compelled to rule on the summary judgment motion remaining before the court.

Conclusion

For the reasons set forth in the Memorandum of Decision, the Motion for Summary Judgment filed by Canteen Service Company of Owensboro, Inc., is denied. The Motion for Partial Summary Judgment filed by 1st Source Bank is denied. The Motions to Strike the Affidavits of Frederick Slamin and Queenie Evans are denied. The Trustee's Motion for Summary Judgment filed by plaintiff Joseph D. Bradley, Trustee, is granted.

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT