

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
GS CONSULTING SERVICES, INC.,)	CASE NO. 05-33646 HCD
)	CHAPTER 7
)	
DEBTOR.)	
)	
)	
JOSEPH D. BRADLEY,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 07-3060
)	
TERRY GRANT, GORDON GOTZINGER, and)	
JEANNE SIMS,)	
)	
DEFENDANTS.)	

Appearances:

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

Michael Banik, Esq., counsel for defendants Grant and Gotzinger, 217 South Fourth Street, Elkhart, Indiana 46516; and

Brian L. Goins, Esq., counsel for defendant Sims, Hinshaw & Culbertson LLP, 222 Indianapolis Boulevard, Suite 202, Schererville, Indiana 46375.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 17, 2009.

Before the court is the Motion for Summary Judgment of the plaintiff Joseph D. Bradley, Trustee (“plaintiff” or “Trustee”) of chapter 7 debtor GS Consulting Services, Inc. (“GS”), filed against the defendants Terry Grant (“Grant”), Gordon Gotzinger (“Gotzinger”), and Jeanne Sims (“Sims”). Also before the court are a Cross-Motion for Summary Judgment and a Motion to Strike the affidavits of the Trustee, J. Richard Ransel (the Trustee’s counsel) (“Ransel”), and Frederick J. Slamin (the Trustee’s forensic accountant) (“Slamin”), filed by the defendant Sims. For the reasons that follow, the court denies all of the

motions now before it: the Trustee's Motion for Summary Judgment, Sims's Cross-Motion for Summary Judgment, and Sims's Motion to Strike.

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)(O) 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

The Trustee moves for summary judgment based upon the truth of the allegations in the Complaint and of the sworn statements in the supporting affidavits filed by the Trustee and by Slamin, the certified public accountant who conducted forensic accounting analysis of the debtor's books and records. Virtually all of the alleged facts are contested by the defendants. Therefore, the court has set out the allegations found in the summary judgment motion that are critical to the understanding of the issues herein and has added footnotes or further comments indicating some of the disagreements.

According to the Complaint, defendant Grant was President and sole shareholder of the debtor GS Consulting.¹ Defendant Gotzinger was the Treasurer of the debtor.² Defendant Sims was a director of

¹ In his Answer, defendant Grant admits that he was the President, a Director, and a Shareholder of the Debtor. *See* R. 14 at 1, ¶ 1. He denies all other allegations of the Complaint, based on insufficient knowledge. At the § 341 Meeting of Creditors held August 9, 2005, however, Grant testified that he was Chairman and CEO of GS Consulting, that Gotzinger was President, and that Sims was Secretary. *See* R.

(continued...)

the debtor, along with Grant and Gotzinger.³ During the months before filed for chapter 7 relief, the debtor contacted several money managers and financial advisors to attempt to obtain funds for continuing the operation of its business. One of the parties contacted was Andrew Armstrong (“Armstrong”). It appears that the debtor was unaware that Armstrong was, at that time, under a grand jury indictment in the United States District Court for the Southern District of Iowa for willful failure to pay taxes, embezzlement of employee 401(k) pension funds, and embezzlement of health care benefits. He was found guilty by a jury on October 11, 2005, and is presently incarcerated. The Complaint set forth the following alleged facts concerning the relationship that developed between Armstrong and the debtor:

Armstrong represented that if the debtor were to deposit its funds with Funds Administration Services (“FAS”) located in Houston, Texas, [] the debtor’s funds would be protected and [] he could arrange for a debenture from 4 to 5 million dollars from KDG Charitable Trust to finance the debtor’s operations. It is the trustee’s belief that this promise of funding was a part of the scam perpetrated to get the debtor’s ERISA deposits. Armstrong also represented that he would personally control and supervise the account established at FAS with the assistance of its officers, David Dombrowski (hereinafter “Dombrowski”) and David Strauss (hereinafter “Strauss”). In reliance on Armstrong’s representations, the debtor made a series of deposits totaling \$3,609,000 to FAS’s account at Bank of America, Houston, Texas (the “Account”).

Prior to making this deposit, the debtor advised all defendants and FAS of the ERISA nature of the funds to be deposited. The debtor was assured that due to the ERISA nature of the funds they would be segregated and could only be withdrawn by the debtor. The plaintiff believes that at least \$2,500,000 of the funds deposited in said account were ERISA funds from the debtor’s customers. After the debtor’s initial deposit, the debtor would instruct FAS to disburse funds from the account to pay various claims, premiums and operating expenses. At first these instructions were complied with by FAS. Thereafter, despite repeated requests and demands by the debtor to FAS, FAS refused to comply despite the fact that there was a balance

(...continued)

48, Tr. at 5-6. He also testified that each of them was a 1/3 shareholder of the corporation. *See id.*, Tr. at 7.

² Defendant Gotzinger states in his Answer that he “believes he was the Treasurer and a Director of the Debtor.” R. 16 at ¶ 2. In all other matters, he denies the allegations based on his insufficient knowledge. At the § 341 Meeting of Creditors, however, defendant Grant testified that Gotzinger was President, a Director, and a 1/3 shareholder in GS Consulting. *See* R. 48, Tr. at 6-7.

³ Defendant Sims denies that she was a director of the debtor. At the § 341 meeting of creditors, however, defendant Grant stated that Sims was Secretary, Director, and 1/3 shareholder of GS Consulting. *See* R. 48, Tr. at 6-7. Grant also testified that the company name, GS, stands for Grant Sims. *See id.*

of 1.3 million dollars in the account and despite the fact that FAS and the defendants were again advised repeatedly of the ERISA nature of the funds in the Account. Further, the debtor never received any funding from the debenture as Armstrong represented it would.

Unbeknownst to the debtor, FAS, Armstrong and FAS officers converted up to \$369,000 of the funds in the Account for their own personal use and to pay the debtor's directors' fees with ERISA funds. Only \$77,000 of said directors' fees have been repaid. FAS subsequently filed Chapter 11 in the United States Bankruptcy Court for the Southern District of Texas, Houston Division.⁴

See R.1 at 2-4, ¶¶ 4-13. According to the Complaint, the defendants, as the debtor's directors and/or officers, owed the debtor their fiduciary duty and best business judgment when conducting the debtor's business affairs. *See id.*, ¶ 15.

The Complaint alleged that the defendants failed to perform appropriate due diligence by investigating Armstrong's background, and thus they did not discover the federal criminal indictment which was pending at the time the defendants entrusted \$3,609,000 to FAS at Armstrong's recommendation. As a direct consequence of the defendants' failure to perform their duties to the debtor, FAS and Armstrong (and his co-conspirators Dombrowski and Strauss) "looted the debtor's ERISA trust funds deposited in the FAS account." *Id.*, ¶ 17. The debtor lost \$1,046,000 in ERISA trust funds deposited with FAS, an insolvent company which later filed chapter 11. *See id.*, ¶ 18.

The Complaint also alleged that the defendants, from the beginning of the debtor's business in December 2004 until the filing of this case on May 23, 2005, consistently paid the debtor's operating expenses with ERISA trust funds, which is prohibited by ERISA and general trust law. As a direct result of such use of ERISA funds, the defendants have damaged the debtor, its creditors and this bankruptcy estate. The Complaint charged the defendants with a duty to repay the Trustee all amounts of ERISA funds used to pay the debtor's operating expenses and sought judgment against each of the defendants. *See id.* at 5.

⁴ The Complaint stated that the Trustee herein received a partial distribution of \$48,000 in the FAS chapter 11 liquidating case. *See* R. 1 at 4, ¶ 13.

Each defendant, in the Answer to the Complaint, generally denied the matters alleged. Defendant Sims filed a Cross-Motion for Summary Judgment. In her Memorandum, she argued that the standard of care for directors is governed by Delaware law, since the debtor is a Delaware corporation.⁵ Under Delaware law, she asserted, she as a putative director could not be held liable for a failure in monitoring because she “did not review, approve, ratify or consent to the activities of Terry Grant that serve as the basis for the Plaintiff’s Complaint herein,” and because there was no evidence that she was involved in any of those transactions. R. 42 at 2-3. Defendant Sims noted that the Complaint did not list her as an officer of GS and that she should not be found vicariously liable for the actions of other officers, since she did not actively participate in the transactions at issue. She claimed she was entitled to judgment as a matter of law. *See id.* at 5.

Sims also argued that the affidavits of Mssrs. Bradley, Slamin and Ransel should be stricken and disregarded as wholly inadmissible. *See id.* at 4. She asserted that Bradley’s affidavit simply restated the testimony of defendant Grant and did not reflect Bradley’s personal knowledge. Slamin’s affidavit, she claimed, was hearsay and contained no foundation for the books and records he used. Ransel’s affidavit was hearsay, as well. Moreover, all three affidavits contained no evidence connecting Sims to the transactions at issue, she contended. The plaintiff “conflate[d] the acts of Terry Grant with Ms. Sims by lumping all directors together.” *Id.* Without evidence of her interaction, Sims insisted, the plaintiff could not demonstrate that she was negligent or otherwise failed to meet her standard of care to the company. In addition, Bradley did not show that her acts or omissions caused the losses at issue. Sims concluded that the plaintiff did not provide even a prima facie case against her. There were no genuine issues of material fact that would support a judgment against Sims, she argued. Therefore, the plaintiff’s motion for summary judgment against her must be denied and summary judgment in her favor must be granted. *See id.* at 5.

⁵ Sims attached to her cross-motion a certified copy of the Certificate of Incorporation of GS. *See* R. 41.

Discussion

A. Motions to Strike

The court begins with the defendant Sims's motion to strike the affidavits filed in support of the Trustee's Motion for Summary Judgment. If the affidavits are stricken, the Motion for Summary Judgment is without buttresses. "An affidavit is a statement reduced to writing and the truth of which is sworn to before someone who is authorized to administer the oath." *Chapman v. Charles Schwab & Co. (In re Chapman)*, 265 B.R. 796, 811 (Bankr. N.D. Ill. 2001) (quoting *Pfeil v. Rogers*, 757 F.2d 850, 859 (7th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986) (citations omitted)). Rule 56(e), made applicable in bankruptcy cases by Bankruptcy Rule 7056, governs the requirements for affidavits. The rule provides that affidavits must (a) "be made on personal knowledge," (b) "set out facts that would be admissible in evidence," and (c) "show that the affiant is competent to testify on the matters stated." Rule 56(e); *see Compania Administradora de Recuperacion v. Titan Int'l, Inc.*, 533 F.3d 555, 562 (7th Cir. 2008). A motion to strike an affidavit is appropriate if the affidavit contains hearsay or vague and conclusory statements, is incomplete, or is not properly authenticated. *See Spector v. Experian Info. Servs. Inc.*, 321 F. Supp. 2d 348, 352 (D. Conn. 2004) (citation omitted).

Defendant Sims claimed that the affidavit of the plaintiff Trustee "purports to restate the testimony of Terry Grant and is not based on Mr. Bradley's personal knowledge." R. 42 at 4. The testimony given by Grant was presented at the first meeting of creditors, held on August 9, 2005, in the office of the United States Trustee in South Bend, Indiana. Trustee Bradley, carrying out his duties as Trustee by conducting that first meeting of creditors, swore in Terry Grant and questioned him concerning his activities as Chairman and CEO of the debtor. *See* 11 U.S.C. § 341; 704(a)(4). The Trustee heard the witness's answers and explanations, which Grant gave under oath. Grant's sworn testimony at that § 341 meeting was transcribed by Richard L. Holle, a qualified court reporter who has served the federal courts with skill and excellence for many years. Mr. Holle's affidavit stated that his transcription of the testimony was true and

correct. *See* R. 48. He attached the § 341 meeting transcript to his filed affidavit. When the court compared the transcript to the Trustee's affidavit, the transcript verified the Trustee's Affidavit. The court finds, therefore, that the Trustee had personal knowledge of the sworn statements made by Grant. Sims's Motion to Strike the affidavit of Trustee Bradley is denied.

Turning to Slamin's affidavit, defendant Sims contended that it was composed of hearsay and relied on books and records for which he laid no foundation. The court finds, from a review of the record, that the employment of Slamin's firm Morris-Anderson & Associates, Ltd., was authorized by the Bankruptcy Court in the District of Delaware before the case was transferred to this court. *See In re GS Consulting, Inc.*, Case No. 05-33646, R. 41. The firm was employed as an independent, outside consulting firm to review the debtor's financial records, to analyze its schedules and Statement of Financial Affairs, and to assist in the efficient and successful administration of the case. When the case was transferred here, the court granted this Trustee's application for continued authorization of the firm for that purpose. *See id.*, Case No. 05-33646, R. 76. Slamin, a certified public accountant who is the managing director of the firm, has served the Trustee as forensic accountant throughout the GS bankruptcy proceeding. His affidavit presented the analysis he conducted of the debtor's books and records. Books and records are "regularly kept business records [that] are an exception to the hearsay rule, and therefore may be shown through an affidavit." *In re Chapman*, 265 B.R. at 812. In the affidavit, Slamin listed the documents and account records he reviewed and the analytical conclusions he drew as a forensic accountant. *See* R. 28. The court finds that Slamin satisfied the "personal knowledge" requirement of Rule 56(e) and was fully competent to testify on the financial business records of the debtor. It also determines that his affidavit set out facts that would be admissible in evidence. *See First Source Bank v. Bradley (In re GS Consulting, Inc.)*, B.R., 2009 WL 301917 at *3 (N.D. Ind. 2009) (affirming bankruptcy court, finding that the "factual basis of Slamin's analysis is apparent in the affidavit and demonstrates that Slamin had first-hand, personal knowledge"); *cf. Babitt v. Schwartz (In re Lollipop, Inc.)*, 205 B.R. 682, 687 (Bankr. E.D.N.Y. 1997)

(finding that accountant's affidavit, in support of trustee's motion for summary judgment, provided uncontroverted evidence of debtor's insolvency; granting summary judgment).

Slamin's affidavit analyzed the debtor's books and records concerning the transfer, by the debtor's officers and directors, of ERISA funds to First Global Holdings, Inc. ("FGH") (Section I) and to FAS (Section II). In Section I, Slamin stated that the debtor paid FGH \$500,000 and that those transferred funds were "entirely ERISA trust funds held in trust by the Debtor to pay medical claims." R. 28 at ¶¶ 4, 5. He also reported four telephone calls with Ron Kehrli, president of FGH. Kehrli's first call with Slamin explained the purpose of the loan to FGH. In the next three conversations, Kehrli advised Slamin that the note, with interest, would be paid – "by the end of 2005," "within 60 days," or as soon as the results of due diligence were provided. *See id.* at ¶¶ 7-10. Slamin then stated that "FGH has never paid the Trustee any principal or interest on the Note" and that FGH is no longer in business and has no assets. *Id.* at ¶¶ 11, 12.

Defendant Sims asserted that paragraphs 7 through 12 of Slamin's affidavit, reporting the statements made by Ron Kehrli to Slamin, were entirely hearsay. The court finds, however, that the Kehrli statements were not offered "to prove the truth of the matters asserted." *See* Fed. R. Evid. 801(c). The reported conversations were presented to prove the existence of the conversations themselves and Slamin's understanding of them. *See, e.g., Spector v. Experian*, 321 F.Supp.2d at 353-54 (finding that the statements were relied on only as evidence of what was said or reported to affiant, not as evidence of the truth of the statements); *R² Investments, LDC, v. World Access, Inc. (In re World Access, Inc.)*, 301 B.R. 217, 259 n.38 (Bankr. N.D. Ill. 2003) (finding that a conversation was offered as to the affiant's understanding only and not for the truth of the matter asserted). Slamin stated in his affidavit that GS, at the time Grant, Gotzinger and Sims were its officers, directors, and/or shareholders, transferred \$500,000 in ERISA trust funds to FGH and that, despite Kehrli's promises of repayment to Slamin, FGH never repaid the note to the debtor or to the Trustee. The court finds that Section I contained no hearsay and that the information therein was made

on personal knowledge about which Slamin was competent to testify and about facts that would be admissible at trial.

Section II, Sims contended in her Motion to Strike, “represented purported statement[s] of fact for regular matters [about] which Mr. Slamin had no personal knowledge.” R. 40 at 2. That section described the debtor’s account at FAS, known as the “730 Account,” and Slamin’s review and analysis of it. Sims did not explain what constituted “regular matters” or which matters were the ones about which the accountant had no personal knowledge. The court finds that Defendant Sims’s general, cursory objection to the statements in Slamin’s affidavit is insufficient to permit the striking of Section II of the affidavit. *See In re Custom Builders of Steamboat, Inc.*, 349 B.R. 39, 42 (Bankr. D. Idaho 2005) (because objector failed to show affidavit’s violation of rules of evidence, motion to strike was denied). In conclusion, the court finds that Sims’s Motion to Strike the accountant’s affidavit is unfounded. The Motion to Strike is denied as to the affidavit of Slamin.

Defendant Sims’s Motion objected to Ransel’s affidavit, as well. J. Richard Ransel, attorney for the Trustee in this case, declared that he performed a simple internet search of the federal court PACER system and learned that, on October 7, 2003, Andrew Armstrong was under federal criminal indictment for charges of willful failure to truthfully account for and pay over payroll taxes (in violation of 26 U.S.C. § 7202), embezzlement from an employee pension benefit plan (in violation of 18 U.S.C. § 664), and embezzlement in connection with a health care benefit program (in violation of 18 U.S.C. § 669). Ransel further learned that Armstrong later was convicted and presently is incarcerated.

Sims objected to the Ransel affidavit on grounds of hearsay and relevance “insofar as it fails to contain a scintilla of evidence tending to show how Jeanne Sims was involved with or otherwise legally responsible for the transactions of which the Plaintiff complains.” R. 40 at 2. The Trustee responded that the information concerning Armstrong’s indictment is relevant to Sims: According to defendant Grant’s sworn testimony, Sims put Grant in touch with Ed Dombrowski, and Dombrowski put Grant, Gotzinger and

Sims in touch with Armstrong.⁶ See R. 51 at 3-4; R. 43, Ex. 1, ¶¶ 11-13. In addition, Ransel stated that he had personal knowledge of the facts concerning Armstrong's criminal record, information which was available to him by internet and the PACER system. See *id.* at 4. Ransel filed a Response Affidavit and attached the PACER Case Summary, the criminal docket, the Clerk's Court Minutes on Sentencing, the Federal Bureau of Prisons Inmate Locator, and the Default Judgment entered in this court on November 15, 2007, against defendants Armstrong, Dombrowski, Strauss, and KDG Charitable Foundation Plans, Inc., in favor of the plaintiff Joseph D. Bradley, Trustee, in the amount of \$3,360,109.64. See R. 50, Exs. A, B, C, D; see also Fed. R. Civ. P. 56(e) (allowing affidavits to be supplemented by further affidavits).

The court finds that court records from the PACER system and business records made available on the internet by public agencies may be admissible evidence under the public records exception (Federal Rule of Evidence 803(8)) and/or the business records exception (Federal Rule of Evidence 803(6)) to the hearsay rule. See *United States v. McDonald*, 66 Fed. Appx. 411, 413-14, 2003 WL 21279427 (3d Cir. 2003) (admitting PACER records and business records on Department of Treasury forms). The records attached to Ransel's Response Affidavit were (a) court documents that were produced in the regular course of the court's business and made available on PACER (an acronym for "Public Access to Court Electronic Records," the electronic docket system run by the Administrative Office of the United States Courts) and (b) business records that were available on the websites of agencies like the Federal Bureau of Prisons. The court notes that the Bureau of Prison website, www.bop.gov, is cited and relied upon by courts in hundreds of cases. The court determines, therefore, that the documents were admissible under the business and public records exceptions to the hearsay rule. It concludes that the Ransel affidavit contains no hearsay, as

⁶ The affidavits of Grant and Gotzinger are attached to the Response to Motion for Summary Judgment. See R. 43. Although the defendants asserted that their statements were made under oath and that they each "affirm[ed] under the pains and penalties of perjury that the foregoing representations [were] true," neither defendant so swore before someone authorized to administer the oath. The veracity of those statements certainly is open to challenge at trial.

defendant Sims claimed. It was made on his personal knowledge; it sets out facts that would be admissible in evidence; and it shows that Ransel is competent to testify to the matters set forth in the affidavit.

One last contention should be addressed. Defendant Sims repeatedly argued that there was no evidence of her involvement in the transactions at issue in this proceeding. In her Motion to Strike, she specifically asserted that Ransel's affidavit was "irrelevant insofar as it fails to contain a scintilla of evidence tending to show how Jeanne Sims was involved" R. 40 at 2. The court finds, however, that Ransel's affidavit was narrowly focused; it demonstrated the "simple internet search" that revealed Armstrong's criminal history. No defendant has challenged the truth of Armstrong's indictment and conviction, Ransel's methods of discovering the information, or the simplicity of the internet search. In addition, the court notes that there is evidence of Sims's involvement in the transactions at issue, even though she denies the evidence. Bradley's affidavit named Sims as an officer, director and shareholder of the debtor, owning 1/3 interest in the debtor. Defendant Grant's affidavit named Sims as the person who introduced Grant and Gotzinger to Dombrowski, who then introduced the three defendants to Armstrong. The Complaint alleged that all of the defendants decided to entrust \$3.6 million, including ERISA trust funds, to Armstrong, who at that time was under indictment for (among other charges) embezzlement from an employee pension benefit plan and from a health care benefit program. The court finds that there is more than a scintilla of evidence of Sims's involvement with the transactions of the debtor corporation. However, with respect to the specific allegation concerning Ransel's affidavit, it determines that Ransel's purpose when presenting that sworn testimony was not to demonstrate Sims's involvement in the debtor corporation. The Ransel affidavit will not be stricken as irrelevant.

Having found that defendant Sims's contentions as to the affidavits of Bradley, Slamin and Ransel were unfounded, the court denies Sims's Motion to Strike in its entirety.

B. *Choice of Law*

In her memorandum of law objecting to the plaintiff's summary judgment motion and supporting her cross-motion, defendant Sims challenged the plaintiff's choice of Indiana law to establish the standard of care for directors of the debtor corporation. In her view, the debtor is a Delaware corporation and thus the proper standard of care is governed by Delaware law. *See* R. 42 at 1-2. She attached to her Cross-Motion a certified copy of the Certificate of Incorporation of GS. *See* R. 41, Ex. B. The plaintiff responded that the bankruptcy was transferred here because the debtor's principal offices were located in South Bend, Indiana. In addition, he noted (without attaching documentary proof) that "the State of Delaware had dissolved GS Consulting Services, Inc., because it had failed to comply with corporate reporting requirements." R. 53 at 1.

When choosing the applicable law to be followed in this case, the bankruptcy court, as a federal court sitting in diversity, is obligated to apply the law of the state in which it sits and in which the lawsuit is pending. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 73, 58 S. Ct. 817, 82 L.Ed. 1188 (1938). It therefore applies Indiana's choice of law rules to determine whether to follow Indiana or Delaware law in this case. The Complaint charges the defendants with a breach of their fiduciary duties. Such allegations sound in tort, and tort damages are an available remedy. *See Nichols v. Minnick*, 885 N.E.2d 1, 4 (Ind. 2008) (considering remedies in tort); *Mack v. American Fletcher Nat'l Bank & Trust Co.*, 510 N.E.2d 725, 738 (Ind. App. 1987) (declaring that a breach of fiduciary duty is a tort).

In *Baca v. New Prime, Inc.*, 810 N.E.2d 711 (Ind. 2004), the Supreme Court of Indiana reaffirmed the leading choice of law decision for tort cases in Indiana, *Hubbard Manufacturing Co. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987). *See id.* at 712. Two years later, the Indiana Court of Appeals succinctly set forth the steps to follow in a *Hubbard* choice of law analysis. *See Alli v. Eli Lilly and Co.*, 854 N.E.2d 372, 376 (Ind. App. 2006). A court first determines, as a preliminary matter, "whether the differences between the laws of the states are 'important enough to affect the outcome of the litigation.'"

Id. (quoting *Simon v. United States*, 805 N.E.2d 798, 805 (Ind. 2004) (which quoted *Hubbard*, 515 N.E.2d at 1073)). It then conducts the following analysis to determine which state’s laws apply:

If such a conflict exists, the presumption is that the traditional *lex loci delicti* rule – the place of the wrong – will apply. Under this rule, the trial court applies the substantive law of the state where the last event necessary to make an actor liable for the alleged wrong takes place. However, this presumption is not conclusive. It may be overcome if the trial court is persuaded that the place of the tort bears little connection to this legal action. If the location of the tort is insignificant to the action, the trial court should consider other contacts that may be more relevant, such as: 1) the place where the conduct causing the injury occurred; 2) the residence or place of business of the parties; and 3) the place where the relationship is centered. These factors are not an exclusive list, nor are they necessarily relevant in every case. All contacts should be evaluated according to their relative importance to the particular issues being litigated. This evaluation ought to focus on the essential elements of the whole cause of action rather than on the issues one party or the other forecasts will be the most hotly contested given the anticipated proofs.

Alli, 854 N.E.2d at 376 (citing *Simon* and *Hubbard*) (citations, quotations omitted). Following those guidelines, the court first considers whether the differences between the Indiana and Delaware laws are important enough to affect the outcome of this adversary proceeding.

The plaintiff charged the defendants with failure to perform their fiduciary duty and failure to use their best judgment when conducting the debtor’s business affairs. This court compared the “business judgment standard” under the laws of Delaware and of Indiana and found no difference important enough to affect the outcome of the litigation. *See, e.g., Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024 at *4 (Del. Ch. 2004) (unpub’d) (“Directors are protected by the deferential business judgment rule.”); *Murray v. Conseco, Inc.*, 795 N.E.2d 454, 461 (Ind. 2003) (“Indiana’s BCL [Business Corporation Law] is extremely deferential to directors’ judgment as to what is in the corporation’s interest.”⁷ A

⁷ Compare *Gantler v. Stephens*, ___A.2d___, 2009 WL 188828 at *7 (Del. Supr. 2009) (“[T]he business judgment standard . . . is ‘a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.’”) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. Supr. 1984)) with *G & N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 238 (Ind. 2001) (“Indiana has statutorily implemented a strongly pro-management version of the business judgment rule. A director is not to be held liable for informed actions taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. The rule includes ‘a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was

(continued...)

comparison of the states' laws concerning a director's fiduciary duties, including the duty of care, also demonstrated no difference significant enough to affect the outcome of this case. There is no doubt that in Delaware, the state to which corporations flock and in which much corporate law has been created and refined, there are more cases focusing on due diligence and the standard of care for directors. But the court's survey of the laws of Delaware and Indiana reflects that both states similarly require a director, "based on facts then known to the director, [to] discharge the duties as a director . . . in good faith; with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and in a manner the director reasonably believes to be in the best interests of the corporation." Ind. Code 23-1-35-1(a)(1)-(3); compare Del. Code 8 § 145 (Indemnification of Officers, Directors, Employees and Agents); compare also *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967-70 (Del. Ch. 1996) (describing directors' duties to exercise appropriate attention and care).⁸

When the two state's laws are the same, or when the difference between the laws is not important enough to affect the outcome of the litigation, the trial court shall apply the law of the forum. See *Allen v. Great American Reserve Ins. Co.*, 766 N.E.2d 1157, 1162 (Ind. 2002); *Rodriguez v. Rodriguez*, 818 N.E.2d 993, 996 (Ind. App. 2004). This court therefore applies the law of Indiana to the facts of this case. Sims's Cross-Motion for Summary Judgment is denied on this issue.

C. Motions for Summary Judgment

⁷(...continued)

in the best interests of the company." (quoting *Aronson*, 473 A.2d at 812)); and compare *In re Citigroup Inc. Shareholders Derivative Litig.*, 964 A.2d 106, __ (Del. Ch. 2009) ("The standard of director liability under the business judgment rule is predicated upon concepts of gross negligence.") with *G & N Aircraft*, 743 N.E.2d at 238 ("By statute, negligence is insufficient to overcome the presumption; reckless or willful misconduct is required.").

⁸ One could distinguish Indiana's measure of care – the "care an ordinarily prudent person in a like position would exercise under similar circumstances" – from Delaware's measure of care when reading *Caremark*, for that case criticized the use of a hypothetical "reasonable person" as a norm: "It is doubtful that we want business men and women to be encouraged to make decisions as hypothetical persons of ordinary judgment and prudence might." 698 A.2d at 967, n. 16. Such a difference does not change this court's view that the laws of the two states are similar enough that the outcome of the litigation will not be affected by the application of Indiana rather than Delaware law.

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).

When, as in this case, the parties have filed cross motions for summary judgment, the court must examine the evidence and “construe all facts and inferences therefrom in favor of the party against whom the motion under consideration is made.” *The First State Bank of Monticello v. Ohio Cas. Ins. Co.*, 555 F.3d 564, 567 (7th Cir. 2009) (citations omitted). Summary judgment must be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

The Trustee’s Complaint alleges that the three defendants, as the directors, officers, and/or shareholders of the debtor corporation, failed to perform due diligence in their fiduciary duty to the debtor. Construing the facts and inferences in favor of the defendants, the court finds that there are genuine issues of material fact as to the positions of each defendant in the debtor’s company. The Complaint reports that Grant is GS’s President, Gotzinger is Treasurer, and Sims is a director. Grant, in the 341 meeting of creditors, however, testified that he was Chairman and CEO, Gotzinger was President, and Sims was Secretary. Gotzinger, in his Answer, said he believed he was the Treasurer and a director. Another clash of facts occurred concerning who was a shareholder: The Complaint stated that Grant was the sole

shareholder, but Grant testified that he, Gotzinger and Sims were each 1/3 owners of the corporation. Before allegations of breach of fiduciary duty can attach, resolution of the roles each defendant played in the management of the debtor corporation must be ascertained. *See Galligan v. Galligan*, 741 N.E.2d 1217, 1228 (Ind. 2001) (concluding that the question whether a principal was an officer or director at the time of the transaction was a genuine issue of material fact precluding summary judgment).

Central to the Complaint's allegations is the specific charge that the defendants failed to perform appropriate due diligence: By failing to investigate Armstrong's background, it alleged, they did not discover Armstrong's criminal indictment, which was pending at the time they turned over to FAS \$3.6 million upon Armstrong's recommendation. In his statement attached to the Response to the Trustee's summary judgment motion, however, defendant Grant insisted that he "ran an internet search on Andrew Armstrong which turned up no negative information." R. 43, Ex. 1, ¶ 14. To demonstrate that he had obtained some results, he added: "The search even showed that Armstrong performed forensic accounting work." *Id.* Grant also claimed that he performed due diligence before entering into a written business relationship with FAS. *See id.* ¶ 18. The Trustee responded with sarcasm:

The creditors in this case can certainly be thankful that Mr. Grant and the other directors did their "due diligence." Can you imagine how badly things might have turned out if they had not done such "due diligence"?

R. 52 at 2. The Court finds that there are many genuine issues of material fact about pivotal issues, facts that must be clarified before the parties can turn to the specific transactions by the debtor involving the transfer of ERISA trust funds from the debtor's direct control. *See Lean v. Reed*, 876 N.E.2d 1104, 1113 (Ind. 2007) (stating that "summary judgment is rarely appropriate as to a director's reasonable care"). The Trustee's Motion for Summary Judgment must be denied.

The Cross-Motion for Summary Judgment filed by defendant Sims is also denied. The court found, *supra*, that Indiana law, not Delaware law, was appropriate in the adversary proceeding and that the proper standard of care for directors is governed by Indiana law. It therefore did not need to address Sims's

