IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PROFESSIONAL STAFF LEASING CORP.,	:	
	:	
Plaintiff	:	
	:	
v.	:	Civil Action No. 02-11-JJF
	:	
UNICARE LIFE & HEALTH INSURANCE COMPANY, UNICARE HEALTH PLANS OF THE MIDWEST, INC., and SENIOR LIVING PROPERTIES, I, INC.,	:	
	:	
Defendants	:	

R. Stokes Nolte, Esquire of NOLTE & BROADWAY, P.A., Wilmington, Delaware.

Attorney for Plaintiff.

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Attorneys for Defendants Unicare Life & Health Insurance Co. and Unicare Health Plans of the Midwest, Inc.

OPINION

March 31, 2003
Wilmington, Delaware

FARNAN, District Judge.

Presently before the Court is Defendant Unicare Life & Health Insurance ("Unicare Life"), and Unicare Health Plans of the Midwest, Inc.'s ("Unicare Midwest") (collectively "Unicare Defendants") Motion to Dismiss Counts I-IV of the Complaint (D.I. 7). For the reasons discussed below, the Unicare Defendants' Motion to Dismiss (D.I. 7) is denied.

I. Factual Background

This is an Employee Retirement Income Security Act ("ERISA") case. The Plaintiff, Professional Staff Leasing Corporation, ("ProLease"), is a Maryland corporation providing payroll, tax, employee benefit and human resources services for its clients. (D.I. at ¶ 1). Defendant, Unicare Life is a corporation formed under the laws of the State of Delaware, which issues life, health care and other types of insurance policies which provide insurance coverage to the general public. (D.I. 1 at ¶ 2). Defendant Unicare Midwest is a corporation formed under the laws of the state of Illinois which provides health benefits coverage to the general public. Senior Living Properties L.L.C. and Senior Living Properties I, Inc. (collectively "SLP") are a limited liability company and corporation formed under the laws of the state of Indiana and which own and operate a number of

nursing homes.[1] (D.I. 1 at ¶¶ 4, 5).

On or about October 24, 2000, ProLease entered into an Administrative Services Agreement with SLP (the "Agreement"), pursuant to which ProLease agreed to provide certain payroll processing, tax withholding, benefit administration and human resources services to SLP, in consideration for which SLP agreed to pay a periodic administrative service fee to ProLease. (D.I. 1 at ¶¶ 8, 10, the Agreement D.I. 1, Ex. A). As part of the service ProLease provided to SLP under the Agreement, ProLease remitted, on behalf of SLP, insurance premiums to insurers providing benefits to SLP's employees pursuant to SLP's benefit plan (the "SLP Plan") (D.I. 1 at ¶ 11).

On or about January 1, 2001, the Unicare Defendants issued policies providing insurance coverage for life, health, dental, long-term disability and short-term disability for SLP's active employees. (D.I. 1 at ¶ 12).

During the time period ProLease provided services to SLP under the Agreement (between approximately January 1, 2001 and September 30, 2001), the Unicare Defendants periodically transmitted invoices to ProLease itemizing premiums owed by SLP to the Unicare Defendants for insurance coverage. (D.I. 27 at 4). ProLease contends that upon receipt of these invoices, it

[1] Defendant Senior Living Properties, L.L.C. was dismissed from this action on July 12, 2002.

would typically collect premium payments from SLP (which payments were comprised of contributions from SLP itself, as well as its employees), and would then forward such payments to the Unicare Defendants to pay SLP's insurance premiums. (D.I. 27 at 4). On occasion, however, ProLease contends that it failed to receive payments from SLP at the time the Unicare Defendants' premiums became due. (D.I. 27 at 24). In these instances ProLease asserts that it paid the Unicare Defendants' insurance premiums directly from its own funds, as a short term advance on behalf of the SLP Plan, in order to ensure that SLP's employees continued to receive insurance benefits from the Unicare Defendants.

Pursuant to their Agreement, ProLease contends that SLP was supposed to provide them with the names of employees who were terminated or resigned so that there would be no overpayment of insurance premiums. ProLease asserts that SLP did not do so, and as a result, ProLease overpaid Unicare Defendants approximately one million dollars. After ProLease learned of the overpayment it requested reimbursement from the Unicare Defendants; Unicare Defendants refused and ProLease filed the instant lawsuit alleging the following counts against Unicare Defendants: 1) a federal common law right of action under ERISA for equitable restitution of overpayments made due to a mistake of fact or law; 2) breach of fiduciary duty under ERISA; 3) prohibited transactions under ERISA; and 4) a state law claim for unjust

enrichment.

II. Parties' Contentions

By their motion, the Unicare Defendants cite the following grounds for dismissal: 1) Counts II-III should be dismissed because Unicare Defendants are not fiduciaries under ERISA; 2) Counts II-III should be dismissed because ProLease does not have standing under ERISA to assert its claims; 3) Counts II-III should be dismissed because Unicare Defendants' alleged conduct does not subject them to ERISA liability; 4) ERISA does not authorize the relief that ProLease seeks; 5) Count I should be dismissed because a common law claim under ERISA for equitable restitution does not exist under the facts as alleged by ProLease; and 6) if the Court dismisses Counts I-III, the Court should decline to exercise supplemental jurisdiction over Count IV.

In response, ProLease contends that: 1) it has stated claims against the Unicare Defendants for breach of fiduciary duty and for participation in prohibited transactions (Counts II and III); 2) ProLease is in fact a fiduciary under the SLP Plan and has standing to sue under § 502 (a) of ERISA for breach of fiduciary duty; 3) Unicare Defendants are fiduciaries, and therefore, liable for breach of fiduciary duties; 4) the Unicare Defendants' retention of the premium overpayments made by ProLease

constitutes a breach of the Unicare Defendants' duties under ERISA as well as unlawful participation in a prohibited transaction; 5) the remedies available to ProLease are not limited to restoration of money to SLP's Plan; 6) Plaintiff has stated a claim against the Unicare Defendants for equitable restitution under the federal common law of ERISA; and 7) even if Counts I-III of the complaint are dismissed, ProLease may still maintain its state law claim pursuant to diversity jurisdiction.

III. Applicable Legal Standard

Unicare Defendants move the Court to dismiss Counts I-III pursuant to Federal Rules 12 (b)(1) and 12(b)(6) and Count IV pursuant to 12(b)(1). A motion to dismiss under Rule 12(b)(1) challenges the jurisdiction of the court to address the merits of the plaintiff's complaint. See Lieberman v. Delaware, No. CIV. A. 96-523, 2001 WL 1000936, at *1 (D. Del. Aug. 30, 2001). The motion should be granted where the asserted claim is "insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." Coxson v. Comm. of Pennsylvania, 935 F. Supp. 624, 626 (W.D. Pa. 1996) (citations omitted). Additionally, a motion to dismiss under 12(b)(1) may present either a facial or factual challenge to subject matter jurisdiction. See Mortensen v. First Federal Savings and Loan, 549 F.2d 884, 891 (3d Cir. 1977). The instant case presents a

facial challenge because Unicare Defendants do not dispute the existence of the jurisdictional facts alleged in the complaint. Therefore, the court must accept the facts alleged in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. See Zinermon v. Burch, 494 U.S. 113, 118, 110 S. Ct. 975, 108 L. Ed.2d 100 (1990); Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990).

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal sufficiency of a complaint. Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); Strum v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). In reviewing a motion to dismiss for failure to state a claim, "all allegations in the complaint and all reasonable inferences that can be drawn therefrom must be accepted as true and viewed in the light most favorable to the non-moving party." Strum, 835 F.2d at 1011; see also Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). A court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984); Jordan, 20 F.3d at 1261.

IV. Discussion

A. Whether Unicare Defendants are Fiduciaries

Unicare Defendants contend that they are not fiduciaries, and therefore, cannot be liable under ERISA. On the record before it, the Court cannot conclude as a matter of law that the Unicare Defendants are not fiduciaries for purposes of ERISA. ERISA, specifically, 29 U.S.C. §1002(21)(A) defines the term fiduciary as follows:

> Except as otherwise provided in subparagraph (B), 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, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

29 U.S.C. §1002(21)(A). The Third Circuit Court of Appeals has stated that there is a lower threshold to establish a fiduciary status under §1002(21)(A)(iii). Specifically, the court stated:

> Discretionary authority or responsibility is required to confer fiduciary status for plan administration under subsection (iii), and "discretionary" authority or "discretionary" control is required for plan management under subsection (i). As noted earlier, however, the adjective "discretionary," so carefully selected for plan administration and management, is omitted in subsection (i) when dealing with authority or control over the management or disposition of plan "assets." 'The statute treats control over the cash differently from control over administration. That Congress established a lower threshold for fiduciary status where control of assets is at stake is not surprising, given that '[a]t common law, fiduciary duties characteristically attach to decisions about managing assets and distributing property to beneficiaries.' 'By

> mandating the trust form and by transposing the duty of loyalty from trust to pension law, the drafters of ERISA were able to institute a familiar fiduciary regime to protect pension funds against internal defalcation.'

Board of Trustees of Bricklayers and Allied Craftsman Local 6 of New Jersey Welfare Fund v. Wettlin Associates, 237 F.3d, 274 (3d Cir. 2001) (citations omitted). Based on this analysis, the Third Circuit declined to state that a party was not a fiduciary as a matter of law where the defendant had the "day to day responsibility to control, manage, hold, safeguard, and account for the Fund's assets and income.'" Id. at 274 (citations omitted).

In this case, ProLease contends that Unicare determined the eligibility of SLP's employees for such benefits, determined the compensability of insurance claims submitted by SLP's employees and reserved the right to grant or deny claims submitted. (D.I. 27 at 4). Based on these facts, and the analysis outlined in Wettlin, the Court declines to dismiss the claim at this stage, because the record needs to be further developed as to this issue. Accordingly, the Court will deny Unicare's motion to dismiss.

B. Does ProLease Have Standing?

Unicare Defendants contend that ProLease lacks standing under § 502(a) of ERISA for breach of fiduciary duty. ProLease argues that it does have standing under ERISA because it is a

fiduciary under 29 U.S.C. §1002(21)(A). The civil enforcement provision of ERISA, 29 U.S.C. §1132(a), limits parties entitled to sue thereunder to: 1) participants; 2) beneficiaries; and 3) fiduciaries. The Court has previously defined fiduciary and will not restate the definition. Additionally, the Court has noted the Third Circuit's analysis of fiduciary status designation under 29 U.S.C.§1002(21)(A)(iii). ProLease contends that it remitted, on behalf of SLP, insurance premiums to insurers providing benefits to SLP's employees pursuant to SLP's benefit plan, and on occasion advanced sums for the payment of premiums. Applying the Wettlin standard to the facts pled in the Complaint, the Court cannot conclude as a matter of law that ProLease is not a fiduciary under 29 U.S.C. § 1002 (21)(A)(iii). Viewing the facts in the light most favorable to ProLease, the record on this issue needs to be further developed, and therefore, dismissal at this juncture is inappropriate.

Additionally, Unicare Defendants argue that even if ProLease was a fiduciary, the tasks at issue were performed outside of that fiduciary capacity, and therefore, ProLease lacks standing. The Court cannot determine as a matter of law, at this juncture, that the tasks were performed outside of ProLease's role as a fiduciary. The Court recognizes that some courts have found that in cases of directed trustees, even if the tasks were performed outside of the fiduciary capacity, if the directed trustee

intentionally or knowingly participates in a violation of ERISA than they can still be held liable. Firstier Bank, N.A. v. Zeller, 16 F.3d 907, 911 (8th Cir. 1994). Thus, the Court concludes that the factual record as to ProLease's fiduciary status, or whether the actions at issue fall within that status needs to be developed more thoroughly. As a result, the Court concludes that dismissal is not warranted.

C. Whether Unicare Defendants' Conduct Subject Them to Liability

Unicare Defendants' contend that their conduct is not a prohibited transaction under ERISA and also contend that they cannot breach a fiduciary duty to ProLease, since ProLease, is not the SLP Plan. Section 404 of ERISA states that:

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of participants and beneficiaries and...for the exclusive purpose of...providing benefits to participants and their beneficiaries ...with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use....

29 U.S.C. § 1104(a)(1)(B). Additionally, § 406 of ERISA, forbids fiduciaries and parties in interest from engaging in transactions that are not in the best interest of the plan, including "deal[ing] with the assets of the plan on his own interest or own account." 29 U.S.C. § 1106 (b)(1). In this case, as previously stated, the Court cannot conclude as a matter of law that Unicare is not a fiduciary to the SLP plan. If the Plaintiff's allegations are accepted as true, than Unicare as a fiduciary, by

not returning an overpayment, has dealt with the assets of the plan for its own interest– a prohibited transaction. Also, even if Unicare Defendants are not fiduciaries they could still be held liable for prohibited transactions as "parties in interest" which is defined as a "person providing services" to an employee benefit plan. See 29 U.S.C. § 1002(14); 29 U.S.C. § 1106.

Additionally, Unicare Defendants seem to be arguing that the insurance overpayments are not "plan assets", and therefore, they cannot be liable for breach of fiduciary duty or be considered a prohibited transaction within the context of ERISA. ERISA does not define the term "plan assets." The only Circuit Court to develop a test for determining whether a given asset is a "plan asset" is the Ninth Circuit. According to the Ninth Circuit, "[t]o determine whether a particular item constitutes [an] 'asset of the plan,' it is necessary to determine whether the item in question may be used to the benefit (financial or otherwise) of the fiduciary at the expense of plan participants or beneficiaries." Acosta v. Pacific Enters., 950 F.2d 611, 620 (9th Cir. 1992). Given the fact that ERISA does not define the term "plan asset" and the Third Circuit has not announced a test to determine if an asset is a plan asset, the Court cannot conclude as a matter of law that the overpayment by ProLease was not a plan asset. Although a Department of Labor Regulation provides a definition for "plan asset", the Court is reluctant to

adopt such a definition in the context of a motion to dismiss.

D. Whether the Remedies Available are Limited to Restoration of Money to SLP's Plan

Unicare Defendants argue that the remedies available in this action are limited to restoration of money to SLP's Plan. However, § 1132(a)(3) of ERISA states that a civil action may be brought "by a participant, beneficiary or fiduciary...to obtain other appropriate equitable relief." 29 U.S.C. § 1132 (a)(3). The scope of "other appropriate equitable relief" has been addressed by the Third Circuit, which has concluded that relief is available to parties other than the plans. See Ream v. Frey, 107 F.3d 147, 152-153 (3d Cir. 1997) (determining that a beneficiary of a benefit plan may assert a claim for individualized relief under § 1132(a)(3) because he suffered a "clear and distinct personal loss"). Given this possibility, the Court cannot conclude as a matter of law at this juncture, that ProLease's remedy is limited to restoration of money to the SLP plan.

E. Whether a Claim for Equitable Restitution Exists

In regard to Count I, Unicare Defendants contend that it should be dismissed because a common law claim under ERISA for equitable restitution does not exist under the facts alleged by ProLease. The Third Circuit first recognized an equitable restitution claim in Plucinski v. I.A.M. National Pension Fund,

875 F.2d 1052 (3d Cir. 1989). In Plucinski the court awarded equitable restitution to employers for a mistaken overpayment, stating:

> [w]e hold that there is an equitable cause of action by employers for the recovery of contributions erroneously paid to pension funds due to a mistake of fact or law. Of course, general equitable principles govern and when it would be inequitable to so order, for example, when restitution would result in the underfunding of the plan, the court should in its sound discretion deny recovery. We believe that creating such a cause of action will fill in the interstices of ERISA and further the purposes of ERISA... Indeed, we believe that if we did not recognize this cause of action it could lead to severely inequitable results that we do not believe were intended by Congress. A simple keypunch error could cost an employer tens of thousands of dollars or more. Perhaps more strikingly, a trustee could extort extra money from an employer by force or fraud, and the employer would have no definite means of recouping the 'contributions' from the fund.

Plucinski, 875 F.2d at 1058. Additionally, the Third Circuit recognized such a cause of action for restitution to a plan in Luby v. Teamsters Health, Welfare and Pension Trust Funds, 944 F.2d 1176 (3d Cir. 1991). Although the Court understands that ProLease is neither an employer or a plan, it also understands that Unicare Defendants have not presented any authority stating that such a claim does not exist under similar circumstances. As a result, the Court will not dismiss such a claim at this stage due to the factual considerations involved in the determination to award such relief, including the balancing of equities, and whether such an action would "fill in the interstices of ERISA and further the purposes of ERISA." Luby, 944 F.2d at 1186.

Accordingly, the Court will deny Unicare Defendants' Motion to Dismiss Count I.

F. Count IV- State Law Claims

Because the Court is not dismissing Counts I-III, consideration of whether the Court will exercise supplemental jurisdiction is moot.

V. Conclusion

In sum, the Court concludes that a further factual record needs to be developed with regard to the legal issues presented. Accordingly, the motion to dismiss will be denied.

An appropriate Order will be entered.

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	:	
Defendants.	:	

ORDER

NOW THEREFORE, for the reasons set forth in the Opinion issued this date, IT IS HEREBY ORDERED this 31st day of March 2003 that Unicare Defendants' Motion to Dismiss Counts I-IV. (D.I. 7) of the Complaint is **DENIED**.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE