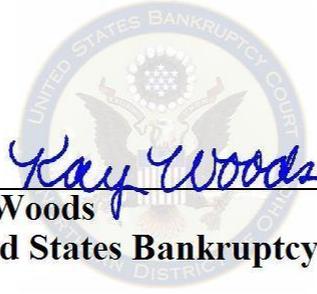


IT IS SO ORDERED.



**Dated: November 08, 2010
09:21:55 AM**

**Kay Woods
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:	*	
	*	
	*	CASE NUMBER 10-42916
	*	
VEC SYSTEMS, INC.,	*	CHAPTER 7
	*	
Debtor.	*	HONORABLE KAY WOODS
	*	

**MEMORANDUM OPINION REGARDING FIRST PLACE BANK'S
MOTION FOR RELIEF FROM STAY AND ABANDONMENT
WITH RESPECT TO MONIES ON DEPOSIT AT THE BANK**

This cause is before the Court on Motion of First Place Bank for Relief from Stay and Abandonment (Monies on Deposit at Movant's Bank and Debtor's Accounts Receivable) ("Motion for Relief") (Doc. # 11) filed by First Place Bank ("Bank") on August 24, 2010. Three objections were filed in response to the Motion for Relief, as follows: (i) Objections to Motion of First Place Bank for Relief from Stay and Abandonment ("Tatar/Shanabarger Objection") (Doc. # 19) filed by Jeffrey A. Tatar and Stephen Shanabarger ("Tatar and Shanabarger") on September 23, 2010; (ii) Objections to

Motion of First Place Bank for Relief from Stay and Abandonment ("Agency Objection") (Doc. # 20) filed by Mahoning Trumbull and Shenango Valley Central Administrative Agency ("Agency") on September 23, 2010; and (iii) Joint Objection of C.T. Taylor Company, Inc., Panzica Construction Company and Jance & Company, Inc. to Motion of First Place Bank for Relief from Stay and Abandonment (Monies on Deposit at Movant's Bank and Debtor's Accounts Receivable) (Doc. # 22) filed by C.T. Taylor Company, Inc., Panzica Construction Company and Jance & Company, Inc. (collectively, the "Contractors") on September 23, 2010.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. FACTUAL AND PROCEDURAL BACKGROUND

Debtor VEC Systems, Inc. ("Debtor") filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code on August 2, 2010. On Schedule D, the Debtor listed the Bank as a secured creditor in the amount of \$2,000,000.00, "secured by accounts receivable and other business assets." (Pet. at 11.)

In the Motion for Relief, the Bank alleges that: (i) the Bank provided the Debtor with a line of credit in the amount of

\$2 million as of April 3, 2007; (ii) the Debtor owes the Bank \$1,831,796.62 plus interest at the rate of 5.25% (less \$4,513.32 being held by the Bank in a suspense account) (the "Debt"); and (iii) pursuant to a UCC-1 Financing Statement filed with the Ohio Secretary of State on April 18, 2007, the Bank holds the first and best secured lien on the Debtor's accounts receivable and other rights to payment owned by the Debtor.

Tatar and Shanabarger are each former employees of the Debtor. They allege that the Debtor was obligated to make "contributions to the pension plan on their behalf." (Tatar/Shanabarger Obj. at 3.) They further allege that the Debtor "did not make any employer contributions to the pension plan" despite entries on their pay stubs reflecting the Debtor was making such contributions. (*Id.*) Tatar alleges that the Debtor failed to make \$11,606.91¹ in contributions to the pension plan on his behalf during the period November 2008 through April 2010, whereas Shanabarger alleges that the Debtor failed to contribute \$13,357.08² on his behalf during this same period of time. (*Id.*) Tatar and Shanabarger assert that the monies in the Debtor's bank accounts³ are being held in trust

¹The Debtor scheduled this amount as a "wage claim" on behalf of Tatar on Schedule E (Pet. at 32).

²The Debtor scheduled \$11,992.37 as a "wage claim" and \$213.36 as an "expense claim" on behalf of Shanabarger on Schedule E (*Id.* at 30).

³The Bank asserts that, as of the Petition Date, the Debtor had \$3,996.13 on deposit with the Bank; however the Bank does not (i) state whether these monies were in one or two accounts, or (ii) identify the account number(s) for these monies. (Bank Reply at 3.) Schedule B lists two accounts with the Bank, with total deposits of \$13,612.67 (Pet. at 7). The Agency, as well as Tatar and Shanabarger, allege the Debtor had two accounts with the Bank, which contained, as of April 12, 2010, \$5,862.85 and \$100,872.69, respectively. (Agency Obj. at

for each of them for such amounts that the Debtor should have contributed to the pension plan.

The Agency alleges the Debtor was obligated to make fringe benefit contributions to the Agency, as the collection agency established under certain collective bargaining agreements ("CBAs"), on behalf of the Debtor's employees.⁴ (Agency Obj. at 3.) The Agency further alleges that the Debtor has not paid the benefit obligations required by the CBAs for the months of March and April 2010, in the amount of \$20,144.73 ("Agency Obligations"); and such Agency Obligations include \$3,177.77 withheld by the Debtor from its employees' wages. (Agency Obj. at 4; Myers Aff. at ¶ 4.) Without identifying the account from which either of the drafts were drawn, the Agency states the Debtor issued two drafts in payment for the Agency Obligations, but the Bank dishonored those drafts. The Agency argues the Agency Obligations "never belonged to [the Debtor], but were instead held in trust" (Agency Obj. at 6.) As a consequence, the Agency argues that, to the extent the Debtor has monies in its bank accounts up to the amount of the Agency Obligations, the Bank's security interest does not attach thereto.

No party argued that it has an interest in the Debtor's accounts receivable superior to the Bank's security interest. There

4; Tatar/Shanabarger Obj. at 4.) It is not clear whether the Debtor had monies in two bank accounts or one account (and, if one, which one) as of the Petition Date.

⁴In support of its allegations, the Agency attached the Affidavit of Timothy B. Myers, Administrator for the Agency ("Myers Aff.").

also is no dispute that the bank accounts at issue are the Debtor's unrestricted general bank accounts.

The Court held a hearing on the Motion for Relief on September 30, 2010 ("Hearing"), at which time the Court granted the Bank relief from stay and abandonment to collect the accounts receivable, up to the amount of the Debt. Accordingly, on October 28, 2010, the Court entered Order Granting Motion of First Place Bank for Limited Relief from Stay and Abandonment (Monies on Deposit at Movant's Bank and Debtor's Accounts Receivable) (Doc. # 33), which resolved the Motion for Relief regarding the accounts receivable only.⁵

At the Hearing, the Court asked the parties to further brief whether the Bank had right to relief from stay regarding the Debtor's bank accounts. In accordance with the Court's direction, on October 14, 2010, the Bank filed Response of First Place Bank to Objections Filed by Jeffrey A. Tatar, Stephen Shanabarger, and the Mahoning Trumbull and Shenango Valley Central Administrative Agency to its Motion for Relief from Stay and Abandonment (Monies on Deposit at Movant's Bank and Debtor's Accounts Receivable) ("Bank Response") (Doc. # 27). In reply, on October 21, 2010, there were filed: (i) Ojectors [sic], Tatar's and Shanabarger's, Reply to First Place Bank's Response ("Tatar/Shanabarger Reply") (Doc. # 29); and (ii) Objector Mahoning Trumbull and Shenango Valley Central Administrative Agency's Reply to First Place Bank's Response

⁵ This order resolved the Objection filed by the Contractors.

("Agency Reply") (Doc. # 30).

II. ANALYSIS

If the monies in the Debtor's bank accounts constitute property of the bankruptcy estate, as defined in 11 U.S.C. § 541, the Bank is entitled to relief from stay to apply such monies in partial satisfaction of the Debt. If the monies in the bank accounts are not estate property, then the Bank's motion must be denied.

Section 541 of the Bankruptcy Code defines property of the estate as follows:

(a) The commencement of a case under section 301 . . . of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * *

(b) Property of the estate does not include

* * *

(7) any amount -

(A) withheld by an employer from the wages of employees for payment as contributions -

(i) to -

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d)

of the Internal
Revenue Code of 1986;

* * *

(ii) to a health insurance
plan regulated by State
law whether or not subject
to such title[.]

11 U.S.C. § 541 (West 2010).

In general, funds in a debtor's bank account constitute property of the estate because the debtor has a legal interest in such funds. However, as set forth above, certain property is excepted from property of the bankruptcy estate. Specifically, as set forth in section 541(b)(7)(A), amounts withheld by an employer from the wages of its employees as contributions to an ERISA benefit plan are excepted from the definition of estate property. Accordingly, if the Debtor's bank accounts contain or are comprised of monies the Debtor withheld from its employees' wages, such monies are not property of the estate to which the Bank has any rights.

Section 541(a)(1) provides that the 'property of the estate' includes 'all legal or equitable interests of the debtor in property as of the commencement of the case.'
. . . Because the debtor does not own an equitable interest in property he holds in trust for another, that interest is not 'property of the estate.'

Begier v. Internal Revenue Service, 496 U.S. 53, 59 (1990).

Although the objections by Tatar and Shanabarger are similar to the objections asserted by the Agency, the objections are not factually identical. As a consequence, the Court will deal with each objection separately.

A. The Agency Objection

1. Employee Withholdings. The Agency Objection has two parts. One of the Agency's arguments concerns \$3,177.77, which the Debtor allegedly withheld from its employees' wages in March and April 2010, but did not remit to the Agency. (Agency Obj. at 4; Myers Aff. ¶ 4; Agency Reply at 3.) Accordingly, the Agency contends a trust exists to the extent of \$3,177.77 because, under any scenario,⁶ the balance in the Debtor's bank account exceeds the amount withheld by the Debtor from its employees' wages.

This Court agrees that, to the extent the Debtor's bank account(s) contain monies withheld by the Debtor from its employees' wages, such monies are held in trust and do not constitute property of the bankruptcy estate. Imposition of a trust on employee withholdings is beyond question. "A trust is necessary (and every Circuit Court to consider the issue has imposed one) when the employer withholds the contributions but fails to remit them to the plan." *Chao v. Lexington Healthcare Group, Inc. (In re Lexington Healthcare Group, Inc.)*, 335 B.R. 570, 576 (Bankr. D. Del. 2005). See also, *In re College Bound*, 172 B.R. 399, 403 (Bankr. S.D. Fla. 1994), ("[O]nce the employees are paid and the employee contributions withheld, the withheld monies are deemed to be held in trust for the Plan, even if the funds remain in the Debtor's general checking account. . . . As long as the Debtor had funds in excess of the employee withholdings, the amounts withheld from

⁶ See n. 3, *infra*.

employee wages are deemed trust funds.”)

Despite recognizing that a trust is imposed upon amounts withheld from employee wages, it is not at all clear how the Agency calculated that \$3,177.77 was withheld by the Debtor. The attachment to the Myers Affidavit sets forth gross wages of the employees covered by the CBAs for March and April 2010, but there is no indication what, if any, amount(s) the Debtor withheld from these gross wages. Indeed, based upon the Agency’s documentation, there is no indication that the Debtor withheld any amount from its employees’ wages. As a consequence, there is no basis for the Court to find that the Debtor actually withheld \$3,177.77 from its employees’ wages.

The Agency asserts the Debtor had two bank accounts as of April 2010, but the Bank references one bank balance - without identifying whether the monies are in one or two accounts or how much is on deposit in either or each account. The Agency provides no information to identify the payroll account from which the Debtor allegedly withheld sums from its employees’ wages. As a consequence, the Court cannot find, based on the record before it, that a nexus exists between the alleged amounts withheld by the Debtor from its employees’ wages and the monies in the Debtor’s bank account(s) as of the Petition Date. Accordingly, this Court cannot find that the monies in the Debtor’s bank account(s) are held in trust as monies withheld from the Debtor’s employees’ wages.

2. Employer Contributions. The Agency’s objection also deals

with two drafts the Debtor issued to the Agency in the amount of \$20,144.73 as and for the Agency Obligations, which were dishonored by the Bank. As a result of the issuance and dishonoring of the two drafts, the Agency contends the Court should impose a trust on the entire amount in the bank accounts. The court in *College Bound* specifically held:

This Court agrees with *Denison's* [*Professional Helicopter Pilots Association v. Denison*, 804 F.Supp. 1447 (M.D. Ala. 1992)] distinction between employee monies withheld from wages and unpaid employer contributions. Absent express statutory or regulatory provisions creating a trust for employer contributions, a 401(k) Plan has no rights to the contributions until they are actually paid. Thus, the Court finds that the unpaid employer contributions for both 1991 and 1992 are assets of the bankruptcy estate.

In re College Bound, 172 B.R. at 403. The instant case deals with contributions to a pension plan and other unidentified fringe benefits rather than contributions to a 401(k) plan, but the reasoning remains the same.

The Agency cites Ohio Revised Code 4113.15(C) as the requisite statutory authority for imposition of a trust for the Agency Obligations. The Agency argues a trust was imposed upon \$20,144.73 in the Debtor's possession from the time the Debtor issued March and April paychecks to its employees. (Agency Obj. at 6; Agency Reply at 3.) The Bank counters that no trust can be imposed because, as of the Petition Date, the Debtor had only \$3,996.13 on deposit with the Bank, which is less than the amount for which the Agency seeks a trust. The Agency argues for a trust on whatever amount is in the

Debtor's bank account because "[r]egardless of which amount⁷ is correct, this money was held in trust and does not belong to [the Debtor], is not subject to the Bank's security interest, and is not part of the bankruptcy estate." (Agency Reply at 2.)

Although the plain language of O.R.C. 4113.15(c) requires imposition of a trust on certain employer contributions, such statutory language does not end this Court's inquiry into whether a trust has been imposed on the Debtor's bank account(s) for the Agency Obligations. There still has to be some nexus between the monies in the Debtor's bank account(s) and the drafts issued by the Debtor for the Agency Obligations. The Agency argues, "[T]here is a direct nexus between [the Debtor's] total fringe benefit obligation and the funds in the [Bank] accounts. [The Debtor] submitted fringe benefit reports and payment drafts to the Agency for the Months of March and April 2010. The drafts were *drawn on one of the accounts in question.*" (Agency Reply at 3, (*emphasis added*)).) The Agency asserts the Debtor had two bank accounts as of April 2010, but offers no information concerning from which of the Debtor's bank accounts the drafts were drawn. The Agency's assertion that the drafts were from one of the Debtor's accounts is insufficient to supply the requisite nexus. See *Lexington Healthcare*, 335 B.R. at 576 ("However, it is one thing to conclude that withheld employee contributions become trust funds at the time they are withheld; it is quite another to conclude that the trust

⁷ See n. 3, *infra*.

is imposed on all the assets of the employer.").

As a consequence, the Court cannot find, based on the record before it, that a nexus exists between the dishonored drafts and the monies in the Debtor's bank account(s) as of the Petition Date.

B. Tatar and Shanabarger Objection

Tatar and Shanabarger's Objection is based on the Debtor's failure to make certain pension contributions on their behalf for the period November 2008 through April 2010, despite indication on their payroll stubs that such contributions had been made. (See *generally* Affidavit of Jeffrey A. Tatar and Affidavit of Stephen Shanabarger, attached as exhibits to the Tatar/Shanabarger Obj.) Although Tatar and Shanabarger identify themselves as employees of the Debtor, they do not indicate whether they are union employees (covered by the CBAs referenced by the Agency) or non-union employees. If, and to the extent, Tatar and/or Shanabarger are covered by the CBAs, it is difficult, if not impossible, to reconcile their objections with the objection raised by the Agency. The Agency argues that the Debtor failed to make contributions for certain fringe benefits, including pension plan payments, only for the months of March and April 2010. Since Tatar and Shanabarger allege the Debtor failed to make pension contributions for the period November 2008 through April 2010, such pension contributions must be outside the scope of the CBAs. As a consequence, although it is not articulated, the Court must assume that neither Tatar nor Shanabarger is covered by the CBAs.

Tatar and Shanabarger allege that the Debtor "was to provide me with a retirement plan as a benefit of employment and, as part of my wage and compensation plan, to make contributions to the pension plan on my behalf." (Tatar Aff. ¶ 2; Shanabarger Aff. ¶ 2.) However, neither Tatar nor Shanabarger point to any document or other evidence that demonstrates the Debtor had a contractual or other legal obligation to make pension contributions on their behalf. Assuming, *arguendo*, that the pay stubs contained information concerning the Debtor's contributions to a pension plan on their behalf, Tatar and Shanabarger fail to demonstrate that (i) Debtor had an obligation to make pension plan contributions on their behalf; and (ii) even if such obligation existed, that the Debtor failed to make such contributions. As a consequence, this Court finds that Tatar and Shanabarger have presented insufficient evidence to require imposition of a trust upon the Debtor's bank account(s) for their benefit. Because Tatar and Shanabarger's objection does not defeat the Bank's right to use the monies in the bank account(s) to partially satisfy the Debt, the Court will overrule the Tatar/Shanabarger Objection.

III. CONCLUSION

The Court overrules the Tatar/Shanabarger Objection because Tatar and Shanabarger failed to demonstrate the monies in the Debtor's bank account(s) were impressed with a trust for their benefit. The Agency's Objection is neither overruled nor sustained at this time because there are factual issues that need to be

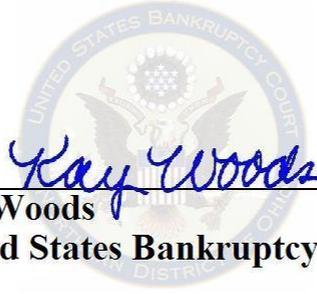
resolved. To the extent the Agency can show a nexus between the monies in the Debtor's bank account(s) as of the Petition Date and amounts actually withheld by the Debtor from its employees' wages, the Court finds that a trust is imposed upon such monies and, accordingly, such monies do not constitute property of the bankruptcy estate. The same is true for the Agency Obligations – any trust is subject to there being a nexus between the dishonored drafts and the monies in the Debtor's bank account(s) as of the Petition Date.

Because the Court cannot determine from the present record whether the monies in the Debtor's bank account(s) constitute property of the bankruptcy estate or are imposed with a trust, a ruling on the remainder of the Motion for Relief is held in abeyance pending further hearing.

An appropriate order will follow.

#

IT IS SO ORDERED.



**Dated: November 08, 2010
04:41:38 PM**

**Kay Woods
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:	*	
	*	
	*	CASE NUMBER 10-42916
	*	
VEC SYSTEMS, INC.,	*	CHAPTER 7
	*	
Debtor.	*	HONORABLE KAY WOODS
	*	

ORDER (i) OVERRULING OBJECTION FILED BY TATAR AND SHANABARGER AND (ii) SETTING MOTION FOR RELIEF FROM STAY FOR TELEPHONIC STATUS CONFERENCE

This cause is before the Court on Motion of First Place Bank for Relief from Stay and Abandonment (Monies on Deposit at Movant's Bank and Debtor's Accounts Receivable) ("Motion for Relief") (Doc. # 11) filed by First Place Bank ("Bank") on August 24, 2010. Three objections were filed in response to the Motion for Relief. Following a hearing on September 30, 2010, and the Court's entry of Order Granting Motion of First Place Bank for Limited Relief from Stay and Abandonment (Doc. # 33) on October 29, 2010, only two objections remained unresolved, as follows: (i) Objections to Motion

of First Place Bank for Relief from Stay and Abandonment ("Tatar/Shanabarger Objection") (Doc. # 19) filed by Jeffrey A. Tatar and Stephen Shanabarger on September 23, 2010; and (ii) Objections to Motion of First Place Bank for Relief from Stay and Abandonment ("Agency Objection") (Doc. # 20) filed by Mahoning Trumbull and Shenango Valley Central Administrative Agency on September 23, 2010.

For the reasons set forth in this Court's Memorandum Opinion Regarding First Place Bank's Motion for Relief from Stay and Abandonment with Respect to Monies on Deposit at the Bank entered on this date, this Court hereby (i) overrules the Tatar/Shanabarger Objection; and (ii) holds in abeyance a ruling on the Agency Objection pending further hearing.

The Court sets the remaining issues concerning the Motion for Relief and the Agency Objection for a telephonic status conference on November 15, 2010, at 1:30 p.m.

#