UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

In re: MOTORWERKS, INC., *Debtor*	Case No. 05-32116 Adv. No. 05-3201
FIFTH THIRD BANK, *Plaintiff* v. WRIGHT-PATT CREDIT UNION, ET AL., *Defendants*	Judge L. S. Walter Chapter 7

DECISION OF THE COURT GRANTING IN PART AND DENYING IN PART DEFENDANT WRIGHT-PATT CREDIT UNION'S MOTION TO DISMISS

On May 11, 2005, Plaintiff Fifth Third Bank ("Fifth Third") filed a complaint in this adversary proceeding against several defendants including Defendant Wright-Patt Credit Union ("WPCU"). [Adv. Doc. 1.] Fifth Third seeks to recover funds from WPCU that WPCU

withdrew and/or administratively froze from a WPCU deposit account of Debtor Motorwerks, Inc. ("Debtor") prior to the involuntary bankruptcy filing. Fifth Third alleges that WPCU withdrew and/or froze the funds from the Debtor's deposit account at WPCU in order to setoff against an alleged debt that the Debtor owes to WPCU. Fifth Third asserts that it can recover the funds (termed the "setoff funds") from WPCU because the setoff funds were not owned by the Debtor and, consequently, are not subject to setoff against a debt owed by the Debtor to WPCU. Instead, Fifth Third argues that it owns the funds, that the funds were intended as loans to Debtor's customers, and that the Debtor held the funds in trust for the beneficiaries of the loans.

On June 15, 2005, WPCU filed a motion to dismiss Fifth Third Bank's complaint alleging that the complaint fails to state any claim upon which relief may be granted. [Adv. Doc. 34.] Specifically, WPCU asserts that Fifth Third Bank has failed to allege facts supporting its assertion that the setoff funds were held in trust by the Debtor or that the setoff funds were held in a designated trust account. Furthermore, WPCU asserts that Fifth Third Bank lacks standing to challenge WPCU's setoff rights or to assert a request for turnover of the funds on this basis.

The court has reviewed the relevant documents referenced above as well as Fifth Third Bank's responsive memoranda and WPCU's reply. [Adv. Docs. 35 and 37.] The court is now prepared to render its decision.

FACTUAL ALLEGATIONS FROM THE COMPLAINT

The following are factual allegations from Plaintiff Fifth Third Bank's complaint that the court construes as true for purposes of WPCU's motion to dismiss:

On March 11, 2005, three creditors of Debtor Motorwerks, Inc. filed an involuntary petition against the Debtor. [Adv. Doc. 1, ¶ 5.] On April 8, 2005, the court entered the Order for Relief on Involuntary Petition and Requiring Filing of Schedules. [*Id.*, ¶ 6.]

Prior to the involuntary petition filing date, Fifth Third had a business relationship with the Debtor memorialized in the Fifth Third Motor Vehicle Dealer Agreement, a copy of which is attached to the Complaint. [*Id.*, ¶ 19 and Ex. A.] The purpose of the agreement was to set up procedures for the Debtor to offer its customers leasing and financing services through Fifth Third for the purchase or lease of vehicles. [*Id.*, Ex. A, Part I and II.] Pursuant to the agreement's terms, Debtor's customers submitted consumer loan applications to Fifth Third which would then make a determination as to whether to extend credit and offer a loan to the Debtor's customers for the purchase of a particular vehicle at a given price. [*Id*, ¶ 19 and Ex. A.] The agreement contemplates that Fifth Third would provide loans directly to the Debtor's customers who would repay the loans directly back to Fifth Third. [*Id.*, Ex. A, Part II (B) and Part III (A)(1).]

Between the dates of January 18, 2005 and January 27, 2005, Fifth Third made four consumer loans to Debtor's customers. [*Id.*, ¶ 21.] The loans totaled $164,569.45. [*Id.*] All four loans were wire transferred by Fifth Third Bank into a bank account in the Debtor's name at WPCU. [*Id.*, ¶¶ 20 and 21.] Documentation of each wire transfer, attached as exhibits to the complaint, indicates exactly which customer was to receive the loaned funds. [*Id.*, Exs. B-F.] The specifics of each loan are as follows:

On January 18, 2005, Fifth Third loaned $46,119.80 to James Labor (also a defendant) pursuant to a loan application signed on January 10, 2005. [*Id.*, ¶ 21(a).] The funds were wire transferred into Debtor's account at WPCU. [*Id.*] The wire transfer documentation specifically identified that it was for a loan in the name of James Labor and stated the specific loan number. [*Id.*] Debtor should have forwarded the funds to Causeway Ford (also a defendant). [*Id.*] Fifth Third attaches to the complaint copies of the wire transfer document, promissory note, the purchase agreement with the Debtor, and the application for title. [*Id.* and Ex. B.]

On January 25, 2005, Fifth Third loaned $40,272.75 to Maugueritte Rydlewski (also a defendant) pursuant to a loan application signed on January 13, 2005. [*Id.*, ¶ 21(b).] The funds were wire transferred into Debtor's account at WPCU. [*Id.*] The wire transfer specifically identified that it was for a loan in the name of Maugueritte Rydlewski and stated the specific loan number. [*Id.*] Debtor should have forwarded the funds to Freedom Motors (also a defendant). [*Id.*] Fifth Third attaches to the complaint copies of the wire transfer document, promissory note, the purchase agreement with the Debtor, and the application for title. [*Id.* and Ex. C.]

On January 27, 2005, Fifth Third loaned $50,054.15 to Carmelle Hanson (also a defendant) pursuant to a loan application signed on January 19, 2005. [*Id.*, ¶ 21(c).] The funds were wire transferred into Debtor's account at WPCU. [*Id.*] The wire transfer documentation specifically identified that it was for a loan in the name of Carmelle Hanson and stated the specific loan number. [*Id.*] Debtor should have forwarded the funds to Rollx Vans (also a defendant). [*Id.*] Fifth Third attaches to the complaint copies of the wire transfer document, promissory note, the purchase agreement with the Debtor, and the application for title. [*Id.* and Ex. D.]

On January 26, 2005, Fifth Third loaned $28,119.75 to Lindsey Hennessee (also a defendant) pursuant to a loan application signed on January 20, 2005. [*Id.*, ¶ 21(d).] The funds were wire transferred into Debtor's account at WPCU. [*Id.*] The wire transfer documentation specifically identified that it was for a loan in the name of Carmelle Hanson and stated the specific loan number. [*Id.*] Debtor should have forwarded the funds to AMS Vans (also a defendant). [*Id.*] Fifth Third attaches to the complaint copies of the wire transfer document, promissory note, the purchase agreement with the Debtor, and the application for title. [*Id.* and Ex. E.]

On February 9, 2005, Fifth Third sent a request to WPCU for the return of the wire transfers. [*Id.*, ¶ 22.] Fifth Third requested the return of the funds due to the Debtor's failure to make the payments to Defendants Rollx Vans, Freedom Motors, Causeway Ford and AMS Vans which are the dealership/manufacturers of the vehicles purchased by the individuals who applied for the loans. [*Id.*] WPCU refused to turnover the wire transferred funds to Fifth Third. [*Id.*]

Fifth Third believes that on or about January 27, 2005, WPCU placed an administrative freeze on the Debtor's account. [*Id.*, ¶ 23.] Fifth Third further believes that this administrative freeze caused the Debtor's failure to forward the respective loan proceeds to the dealer/manufacturers. [*Id.*, ¶ 24.] Fifth Third asserts that the administrative freeze caused damage to Fifth Third by the fact that the vehicle purchases and subsequent liens on the vehicle titles in favor of Fifth Third were not completed. [*Id.*] Fifth Third asserts causes of action against WPCU for turnover of the funds under trust theories as well as a claim to invalidate or disallow WPCU's setoff. [Adv. Doc. 1, ¶¶ 25-51.]

LEGAL ANALYSIS

A. Legal Standard

Defendant WPCU requests dismissal of Plaintiff Fifth Third's complaint under Fed. R. Civ. P. 12(b)(6), incorporated in bankruptcy adversary proceedings by Fed. R. Bankr. P. 7012. WPCU argues that Fifth Third has failed to state any claim upon which relief can be granted. To survive WPCU's motion, Fifth Third's complaint "must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Varljen v. Cleveland Gear Co., Inc.*, 250 F.3d 426, 429 (6th Cir. 2001) (noting that for a dismissal to be proper, "it must appear beyond a doubt that the plaintiff would not be able to recover under any set of facts that could be presented consistent with the allegations of the complaint"). *See also In re Cadillac by DeLorean*, 262 B.R. 711, 714 n.3 (Bankr. N.D. Ohio

2001). In considering the bank's motion to dismiss, the court "must consider true the well-pleaded allegations of the complaint and construe them in the light most favorable to the plaintiff." *Varljen*, 250 F.3d at 429. However, the court "need not accept as true legal conclusions or unwarranted factual inferences" in the complaint. *Id.*

B. Claims for Recovery under Trust Theories

Fifth Third Bank's complaint alleges several claims for recovery of the funds administratively frozen and/or setoff by WPCU under theories of an express, constructive and resulting trust. Fifth Third Bank alleges that the setoff funds in the Debtor's account with WPCU were held in trust by the Debtor and its fiduciary duties toward the funds included forwarding the funds to the appropriate dealership for the benefit of the consumers who applied for loans. Fifth Third argues that because the Debtor was not the equitable owner of the funds but only held them in trust, WPCU had no right to freeze the WPCU deposit account for purposes of using the funds to setoff against the Debtor's debt to WPCU. Instead, Fifth Third alleges that the setoff funds are legally owned by Fifth Third. The court will address each of Fifth Third's trust theories separately to determine whether they state a claim sufficient to withstand WPCU's motion to dismiss.

1. Express Trust

In its motion to dismiss, WPCU takes issue with the sufficiency of Fifth Third's claim that the setoff funds were held in an express trust. Pursuant to Ohio law, the creation of an express trust requires: 1) a manifestation of intent to create a trust; 2) the establishment of a trust corpus; and 3) a fiduciary relationship between the trustee and the beneficiary. *Indiana Lumbermens Mutual Ins. Co., Inc. v. Construction Alternatives, Inc. (In re Construction Alternatives, Inc.),* 2 F.3d 670, 677 (6th Cir. 1993) (citing *Brown v. Concerned Citizens for Sickle Cell Anemia, Inc.*, 382 N.E.2d 1155, 1158 (Ohio 1978)).

As long as these elements are present, no other formalities are required to create an express trust. *In re Ward*, 300 B.R. 692, 696-97 (Bankr. S.D. Ohio 2003); *Dayton Title Agency, Inc. v. White Family Companies (In re Dayton Title Agency, Inc.)*, 292 B.R. 857, 869 (Bankr. S.D. Ohio 2003). For example, an express trust may be created when a person accepts possession of funds for another with the express or implied understanding that he is not to hold it as his own absolute property, but is to hold and apply it for specific purposes. *Dayton Title*, 292 B.R. at 869 (citing *Norris v. Norris*, 57 N.E.2d 254, 258-59 (Ohio Ct. App. 1943)). *See also Stevenson v. J.C. Bradford & Co. (In re Cannon)*, 277 F.3d 838, 850 (6th Cir. 2001) (noting that under similar Tennessee law, a person who has accepted possession of personal property with the express or implied understanding that he is not to hold it as his own property but is to hold and apply it for the benefit of certain specific persons creates an enforceable express trust).

Taking the allegations in Fifth Third's complaint as true, Fifth Third establishes that it wire transferred consumer loans totaling $164,569.45 into the Debtor's account at WPCU. [Adv. Doc. 1, ¶ 21.] However, those funds were not loans to the Debtor itself but to four consumers who had applied for the loans to purchase vehicles. [*Id.*, ¶ 21(a)-(d).] This is substantiated by Fifth Third's documentation of each wire transfer indicating which specific customer is to receive the loaned funds. [*Id.*, Exs. B-F.] Following the deposits, the Debtor was to forward the funds to the dealerships that were selling the vehicles to these consumers. [*Id.*, ¶21(a)-(d).]

The agreement attached to Fifth Third's complaint further demonstrates an understanding between the Debtor and Fifth Third that the Debtor was not the owner nor intended beneficiary of the loaned funds. Fifth Third and the Debtor entered into a Fifth Third Motor Vehicle Dealer Agreement so that the Debtor could offer its customers leasing and financing services through Fifth Third. [Doc. 1, Ex. A, Part I and II.] Although the agreement does not mention any trust agreement between Fifth Third and the Debtor, it contemplates that Fifth Third's loans would be

made directly to the customers who repay the loans directly back to Fifth Third. [*Id.*, Ex. A, Part II (B) and Part III (A)(1).]

Fifth Third has provided no evidence that the account into which Fifth Third's funds were deposited was a trust or escrow account, but an express trust can be created without such formalities. The court concludes that Fifth Third has stated a claim for the existence of an express trust sufficient to overcome WPCU's motion to dismiss.

2. Constructive Trust

WPCU further argues that Fifth Third has failed to state an alternative claim for imposition of a constructive trust on the setoff funds. In Ohio, a constructive trust is defined as:

> A trust by operation of law which arises contrary to intention and in invitum, against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy. It is raised by equity to satisfy the demands of justice.

Poss v. Morris (In re Morris), 260 F.3d 654, 667 (6th Cir. 2001) (quoting *Ferguson v. Owens*, 459 N.E.2d 1293, 1295 (Ohio 1984)). Generally, a constructive trust is a remedy "used by courts for the prevention of fraud, unjust enrichment or other inequitable conduct." *Id.* However, fraudulent conduct is not a prerequisite. A constructive trust may also be imposed, "where it is against the principles of equity that the property be retained by a certain person even though the property was acquired without fraud." *Id.*

Although Fifth Third's claim may appear to meet the prerequisites for a constructive trust under Ohio law, the use of such a theory is severely limited within a bankruptcy case. The Sixth Circuit has held that the distribution of assets within a bankruptcy case is based on the identification of the debtor's assets and liabilities "as of the commencement of the case." *XL/Datacomp, Inc. v. Wilson (In re Omegas Group, Inc.)*, 16 F.3d 1443, 1449 (6th Cir. 1994). Consequently, for a creditor to assert a constructive trust with regard to an asset, the constructive

trust must have been impressed upon the asset, by operation of a court judgment or by operation of statutory law, prior to commencement of the bankruptcy case. *Id.* If the creditor was not the beneficiary of a constructive trust imposed pre-petition, the creditor has only a claim against the estate and nothing more. *Id.*

In this case, Fifth Third cites no prior court judgment nor statutory law impressing a constructive trust on the setoff funds prior to the Debtor's bankruptcy filing. Consequently, the holding of *Omegas Group* prevents this court from imposing a constructive trust post-petition.

Fifth Third correctly notes that the *Omegas Group* holding has been relaxed to a limited extent. Following *Omegas Group*, the Sixth Circuit concluded that a constructive trust may be imposed on property in a bankruptcy proceeding if the property would not otherwise be subject to ratable distribution among creditors. *McCafferty v. McCafferty (In re McCafferty)*, 96 F.3d 192, 196 (6th Cir. 1996). In *McCafferty*, the court concluded that a constructive trust should be impressed upon a portion of a debtor's STRS pension benefits that had been awarded to his former spouse because the debtor's STRS benefits would not have been subject to the reach of creditors under Ohio statutory law even without the imposition of the constructive trust. *Id.* at 196-97 (citing Ohio Rev. Code § 3307.71 protecting STRS benefits from the reach of execution, garnishment, attachment, the operation of bankruptcy or insolvency laws, or any other process of law). For this reason, the bankruptcy court's recognition of a constructive trust in that case would not diminish the ratable distribution to other creditors of the debtor. *Id.* at 197.[1]

[1] Another limited exception to the *Omegas Group* holding has been found when a state court action seeking the imposition of a constructive trust had been initiated prepetition. *See Poss v. Morris (In re Morris)*, 260 F.3d 654, 667 (6th Cir. 2001). In such circumstances, a bankruptcy court may lift the automatic stay to allow the state court litigation to continue and, later, may enforce a judgment imposing the constructive trust even though the state court judgment was not entered until after the bankruptcy filing. *Id.* In this case, however, Fifth Third has alleged no facts supporting that it initiated any state court proceeding for the imposition of a constructive trust prior to the bankruptcy filing. Consequently, the court determines that this limited exception has no application to the case at hand.

Contrasting this case to *McCafferty*, Fifth Third has alleged no facts or basis in state law supporting the conclusion that the setoff funds would remain outside the reach of creditors in bankruptcy unless the court impresses a constructive trust upon the assets. Without a separate legal basis keeping the funds out of the reach of the debtor's creditors, the imposition of a constructive trust in this case would diminish funds otherwise available to unsecured creditors.[2] The *McCafferty* exception does not apply and the court is without the power to impose a constructive trust post-petition.[3]

Fifth Third has failed to state a claim for imposition of a constructive trust on the setoff funds. The court concludes that this claim must be dismissed.

3. Resulting Trust

Fifth Third's complaint includes a third alternative claim based on a trust theory. Fifth Third requests a determination that the setoff funds in the hands of WPCU be impressed with a resulting trust in favor of Fifth Third. In Ohio:

> A resulting trust arises where property is transferred under circumstances that raise an inference that the transferor, or person who caused the transfer, did not intend the transferee to take a beneficial interest in the property. . . . By employing its equitable powers in creating a resulting trust, a court seeks to enforce the parties' intentions.

Belfance v. Bushey (In re Bushey), 210 B.R. 95, 104 (B.A.P. 6th Cir. 1997) (quoting *Union Sav. & Loan Ass'n v. McDonough*, 655 N.E.2d 426, 428 (Ohio Ct. App. 1995)). *See also First Nat'l Bank of Cincinnati v. Tenney*, 138 N.E.2d 15, 17 (Ohio 1956). Resulting trusts have been imposed in three general situations: 1) where an express trust fails in whole or in part; 2) where

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[2] Of course, if Fifth Third is successful with respect to one of its other trust theories, the funds will remain outside the hands of creditors. However, if successful on one of its alternative theories, Fifth Third's claim for a constructive trust is moot.

[3] Fifth Third relies on *First Federal of Michigan v. Barrow* in which the Sixth Circuit described when it is appropriate for a bankruptcy court to impose a constructive trust on funds commingled in a debtor's general account. 878 F.2d 912 (6th Cir. 1989). However, this case was decided prior to *Omegas Group* in which the Sixth Circuit curtailed the ability of a bankruptcy court to impress a constructive trust on property unless the property was subject to a statutory or court imposed constructive trust prior to the bankruptcy filing.

an express trust is performed without exhausting the trust estate; and 3) purchase money trusts. *NPF IV, Inc. v. Transitional Health Servs.*, 922 F.Supp. 77, 84 (S.D. Ohio 1996).

A resulting trust is based on the intent of the parties when property is transferred or acquired by one party under facts and circumstances that indicate that the beneficial interest is not to be enjoyed by the holder of the legal title. *Amedisys, Inc. v. JP Morgan Chase Manhattan Bank (In re National Century Financial Enterprises, Inc.)*, 310 B.R. 580, 601 (Bankr. S.D. Ohio 2004). Consequently, unlike an express trust, that arises from the transferor's manifestation of an intention to create it, a resulting trust arises from "an intention that is legally attributed to a transferor based on the nature of the transaction rather than from manifested intent." *In re Ward*, 300 B.R. 692, 697 (Bankr. S.D. Ohio 2003) (quoting Restatement (Third) of Trusts § 7 cmt. a). In addition, a resulting trust differs from a constructive trust in that a resulting trust "seeks to carry out a donative intent rather than to thwart an unjust scheme." *National Century Financial Enterprises, Inc.*, 310 B.R. at 600. Thus, it is the intent of the parties at the time of the transfer that determines whether a resulting trust arises. *Id.* at 601.

Like constructive trusts, resulting trusts are disfavored in bankruptcy because they represent a creditor's attempt to exclude or allocate assets in a manner inconsistent with bankruptcy principles leading to the diminishment of estate assets for other creditors. *Ward*, 300 B.R. at 699. However, unlike constructive trusts, the Sixth Circuit's holding in *Omegas Group* has not been extended to actually prevent a bankruptcy court from determining that a resulting trust arises.

In this case, Fifth Third has alleged sufficient facts to withstand WPCU's motion to dismiss its resulting trust claim. Many of the same factual allegations supporting the existence of an express trust also support the determination that neither the Debtor nor Fifth Third intended

the Debtor to receive the beneficial enjoyment of the setoff funds.[4] Instead, the complaint allegations, if taken as true, support that the setoff funds were intended by Fifth Third and the Debtor as loans to individual vehicle purchasers. [Doc. 1, ¶¶ 19-21; Exs. A-F.] The court concludes that complaint's allegations are sufficient to give rise to an inference of intent necessary for a resulting trust.

C. Fifth Third's Claim Challenging WPCU's Setoff Rights

WPCU asserts that Fifth Third lacks standing to assert its final claim, a challenge to WPCU's right to use the deposited funds to initiate a setoff against the Debtor's debt to WPCU. The right of setoff, although created under state law, is preserved in bankruptcy to the extent permitted by 11 U.S.C. § 553. This section states:

> **(a)** Except as otherwise provided in this section and in sections 362 and 363 of this title, 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, except to the extent that--
>
> > **(1)** the claim of such creditor against the debtor is disallowed;
> > **(2)** such claim was transferred, by an entity other than the debtor, to such creditor-
> > > **(A)** after the commencement of the case; or
> > > **(B) (i)** after 90 days before the date of the filing of the petition; and
> > > **(ii)** while the debtor was insolvent; or
> > **(3)** the debt owed to the debtor by such creditor was incurred by such creditor--
> > > **(A)** after 90 days before the date of the filing of the petition;
> > > **(B)** while the debtor was insolvent; and
> > > **(C)** for the purpose of obtaining a right of setoff against the debtor.
>
> **(b)(1)** Except with respect to a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(14), 365(h), 546(h), or 365(i)(2) of this title, if a creditor offsets a mutual debt owing to the debtor against a claim against the debtor on or within 90 days before the date of the filing of the petition, then the trustee may recover

[4] WPCU argues that the mere lending of funds to a borrower does not create a trust relationship allowing for the imposition of a resulting trust, but, instead, creates a debtor-creditor relationship between the borrower and lender. However, taking the facts alleged in Fifth Third's complaint as true, the Debtor is not the borrower in this case, but is holding the funds for the vehicle purchasers who are the ultimate borrowers. Consequently, the Debtor may well have fiduciary obligations with respect to the funds and WPCU's argument is without merit.

> from such creditor the amount so offset to the extent that any insufficiency on the date of such setoff is less than the insufficiency on the later of--
>
> > **(A)** 90 days before the date of the filing of the petition; and
> > **(B)** the first date during the 90 days immediately preceding the date of the filing of the petition on which there is an insufficiency.
>
> **(2)** In this subsection, "insufficiency" means amount, if any, by which a claim against the debtor exceeds a mutual debt owing to the debtor by the holder of such claim.
>
> **(c)** For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

11 U.S.C. § 553. This statute does not create a federal right of setoff, but, instead, preserves setoff rights that otherwise exist under non-bankruptcy federal or state law. *See Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995); *In re Kleather*, 208 B.R. 406, 413 (Bankr. S.D. Ohio 1997).

WPCU argues that Fifth Third lacks standing to challenge WPCU's setoff under § 553 because such a turnover action is a claim of the trustee on behalf of the estate. WPCU argues that the clear language of § 553(b) permits only the trustee to recover under this provision. 11 U.S.C. § 553(b).

The court agrees with WPCU that, in most circumstances, it is the trustee as representative of the estate who brings actions for avoidance and recovery on behalf of the estate. 11 U.S.C. §§ 542, 549 and 550. *See also Society Bank, N.A. v. Sinder (In re Sinder)*, 102 B.R. 978, 982 (Bankr. S.D. Ohio 1989) (noting that courts have unwaveringly foreclosed attempts by other parties to share or appropriate for themselves the statutory avoidance and turnover powers of the trustee). In the same vein, a trustee is prohibited from asserting claims belonging to individual creditors and not the bankruptcy estate. *AgriBioTech Creditors' Trust v. Thomas (In re AgriBioTech, Inc.)*, 319 B.R. 216, 219-21 (D. Nev. 2004); *Fisher, Hecht & Fisher v. D.H.*

Overmyer Telecasting Co., Inc. (In re D.H. Overmyer Telecasting Co., Inc.), 56 B.R. 657, 660-61 (Bankr. N.D. Ohio 1986).

In this case, it will not be clear whether a challenge to the validity of WPCU's setoff is a claim of the estate properly brought by the trustee or an individual claim of Fifth Third until the trial in this matter settles the property interests in the setoff funds. To the extent that the funds are found to be subject to a valid trust in Fifth Third's favor, Fifth Third may challenge WPCU's setoff in order to recover the trust funds in its own right. However, it cannot pursue any action under § 553(b) because this action is reserved to a trustee by the clear language of the Code. 11 U.S.C. § 553(b). Instead, Fifth Third may challenge the underlying validity of the setoff under applicable state law. *See Federal Ins. Co. v. Fifth Third Bank*, 867 F.2d 330, 335 (6th Cir. 1989) (describing how Ohio law limits a bank's ability to exercise a setoff against funds held in trust); *Kopp v. Bank One, N.A.*, 2003 WL 102609, at *3 (Ohio Ct. App. Jan. 10, 2003) (describing the requirements of mutuality for a bank to setoff a bank account of a depositor against a debt of the depositor including that the depositor must be the owner of the funds).

On the other hand, if the court concludes that the funds are not subject to a valid trust, any action for turnover of the funds from WPCU, pursuant to a setoff challenge or other theory of recovery, is properly brought by the trustee on behalf of the estate.[5]

At this time, the court determines that Fifth Third has stated a claim, in its own right, challenging WPCU's setoff rights respecting the funds at issue. The claim withstands WPCU's motion to dismiss to the extent described within this decision.[6]

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[5] The Chapter 7 Trustee in this case has filed a cross-claim against Defendant WPCU challenging WPCU's right of setoff under § 553(a) and § 553(b) among other theories of recovery. [Doc. 30.]

[6] As a final matter, WPCU challenges Fifth Third's fifth cause of action for turnover. Specifically, WPCU argues that Fifth Third has no standing to assert a turnover action for recovery of property of the estate under 11 U.S.C. § 542. While that may be true, WPCU misconstrues Fifth Third's claim. Fifth Third is not attempting to recover property of the estate under § 542, but is, instead, attempting to recover its own property to the extent it establishes its property rights in the setoff funds under the other causes of action pleaded in the complaint. The court concludes

CONCLUSION

WPCU's motion to dismiss is granted, in part and denied in part. The court holds that Fifth Third's cause of action asserting a constructive trust fails to state a claim and is hereby dismissed. Fifth Third has stated claims for an express and a resulting trust sufficient to withstand the dismissal motion. With respect to Fifth Third's claim challenging WPCU's setoff rights, the court concludes that Fifth Third has standing to pursue such a claim in its own right, but may not pursue a claim specifically reserved to the trustee under 11 U.S.C. § 553(b).

SO ORDERED.

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that this fifth cause of action is not an independent claim, but is instead, only a request for relief pursuant to the other claims pleaded in the complaint. It withstands WPCU's motion to dismiss.

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