Dated: November 26, 2012
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re JEFFREY T. CHANDLER, Debtor.	Case No. 11-23842-L Chapter 7

SYNOVUS BANK, successor by merger with TRUST ONE BANK, Plaintiff, v. JEFFERY T. CHANDLER, Defendant.	Adv. Proc. No. 11-00396

ORDER GRANTING PARTIAL SUMMARY JUDGMENT TO DEFENDANT, JEFFERY T. CHANDLER

BEFORE THE COURT is the motion of the Plaintiff, Synovus Bank, successor by merger with Trust One Bank ("Trust One Bank"), for summary judgment on Count I of its Complaint, alleging that the Defendant, Jeffrey T. Chandler, is indebted to it and that the debt results from fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. 11 U.S.C. § 523(a)(4). Although the Defendant did not file a cross motion for summary judgment, examination of the

pleadings, exhibits, and briefs filed by the parties in light of controlling law supports the conclusion that the Complaint fails to state a claim under section 523(a)(4). Summary judgment will be granted in favor of the Defendant.

JURISDICTION

Jurisdiction over a complaint arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). The determination of the dischargeability of a particular debt is a core proceeding arising under the Bankruptcy Code. *See* 28 U.S.C. § 157(b)(2)(I). Accordingly, the bankruptcy court has authority to hear and determine this adversary proceeding subject to appellate review under section 158 of title 11. 28 U.S.C. § 157(b)(1); *see BBC Holding v. Alexander (In re Alexander)*, Ch. 7 Case No.10-32756-L, Adv. No. 11-00062, slip op. at 2 (Bankr. W.D. Tenn. Oct. 13, 2011).

FACTS

The Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on April 14, 2011. Among his listed creditors is the Plaintiff, Trust One Bank, shown holding a claim in the amount of $202,000.00 based upon the guaranty of a business loan.

The Plaintiff filed its Complaint to Determine Dischargeability on September 9, 2011. Count I of the Complaint alleges that on April 24, 2009, Chandler, as president of Eclipse SCS, Inc. ("Eclipse"), executed a Revolving Credit Note payable to the order of Trust One Bank secured by

a Revolving Loan and Security Agreement and the personal guaranty of Chandler. On that same day, Eclipse and FTRANS Corp. entered into a Trade Credit Outsourcing Agreement; and Eclipse, FTRANS, and Trust One Bank entered into an Assignment of Credit Balances and Intercreditor Agreement. The Complaint further alleges that Eclipse is in default of the Revolving Credit Note in the unpaid accelerated balance of $121,838.19, together with additional interest and reasonable attorney fees. It alleges that Chandler, in violation of the various agreements, directed certain customers of Eclipse to pay its invoices directly to the company rather than to FTRANS. It alleges that the amount of these improperly withheld payments is $65,755.36. It alleges that this debt is the personal responsibility of Chandler and should be determined to be nondischargeable in his bankruptcy case pursuant to section 523(a)(4) of the Bankruptcy Code for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

Count II of the Complaint alleges no additional facts, but asserts that under these same facts, Chandler is indebted to Trust One Bank, and that the debt should be excepted from discharge pursuant to section 523(a)(6) of the Bankruptcy Code for willful and malicious injury to another entity or to property of another entity.

Chandler filed his Answer on October 20, 2011. He admits the agreements entered into between the various parties, and the genuineness of documents made exhibits to the Complaint, but denies the remaining allegations of the Complaint.

Trust One Bank filed its Motion for Summary Judgment on August 7, 2012. The Motion essentially restates the facts of Count I of the Complaint, except that it falls short of claiming that Chandler directed customers of Eclipse to divert payments from FTRANS. Instead, Trust One Bank now asserts that, "Chandler admits that Eclipse failed to properly remit or turn over ... funds in the

amount of $61,964.96, which were to be held in trust for the benefit of Trust One." Motion for Summary Judgment, Adv. Dkt. No. 17, ¶ 7. It asserts that Chandler, as president, sole shareholder, and guarantor of the obligations of Eclipse owed a fiduciary duty to Trust One Bank, which he breached. As a result, it asserts that a non-dischargeable judgment should be entered against Chandler in favor of Trust One Bank in the amount of $61,964.96. The Motion for Summary Judgment is supported by a Statement of Material Undisputed Facts and a Memorandum of Law, together with the various agreements between the parties and Chandler's Responses to Plaintiff's First Request for Admissions.

Chandler filed an Objection to the Motion for Summary Judgment, in which he asserts that there is no express or technical trust relationship between himself and Trust One Bank. As a result, he asks that the action under section 523(a)(4) be dismissed. Chandler asserts that the only agreement that creates a relevant trust relationship is one between Eclipse and FTRANS. He admits that this relationship is created by Section 9 of the Trade Credit Outsourcing Agreement, which provides in pertinent part:

> Any checks, case, notes or other document or instruments, proceeds or property you received with respect to the Accounts shall be held by you in trust for us, separated from your own property, and immediately turned over to us with proper endorsements.

Chandler further notes that pursuant to the Trade Credit Outsourcing Agreement, FTRANS agreed to *purchase* the accounts of Eclipse. Thus, he says, any fiduciary obligation of Eclipse was owed to FTRANS, as owner of the accounts, not to Trust One Bank, which held only a security interest.

Trust One Bank filed a Response to Chandler's Objection. It asserts that it is the beneficiary of the trust relationship between Eclipse and FTRANS, and therefore entitled to a remedy for Eclipse's breach of its duty of loyalty and its duty to administer the trust in the interest and benefit

of Trust One Bank. Trust One Bank further asserts that Eclipse's fiduciary duties should be imputed to Chandler consistent with Sixth Circuit precedent to the effect that a corporate officer can be considered a fiduciary under section 523(a)(4) where the officer had "full knowledge and responsibility for the handling of [the corporate fiduciary's] trust undertakings." *Stello v. Aikin (In re Aikin)*, 2008 WL 2856697, * 12 (Bankr. D. Dist. Col. 2008), quoting *Capitol Indemnity Corp. v. Interstate Agency, Inc. (In re Interstate Agency, Inc.)*, 760 F.2d 121, 125 (6th Cir. 1985). Trust One Bank finally asserts that title to the accounts is irrelevant to the existence of fiduciary duties on the part of Eclipse/Chandler because they knew that payments subject to the Trade Credit Outsourcing Agreement ultimately were to be paid to Trust One Bank. In support of this fact, Trust One Bank points to paragraph 6 of the Assignment of Credit Balances and Intercreditor Agreement, which provides:

> FTRANS is expressly authorized to remit to [Trust One] for the account of [Eclipse] all Outsourcing Payables under the [Trade Credit Outsourcing Agreement] and [Eclipse] hereby authorizes and directs FTRANS to remit all such Outsourcing Agreement Payables to [Trust One] for the account of [Eclipse].

Trust One Bank summarizes its position as follows: "This matter involves an express trust involving property held by Eclipse for which Eclipse/Chandler failed to properly account for [sic]." Adv. Dkt. No. 22, p. 5.

On September 28, 2012, I asked for additional briefing on the question of whether the Assignment of Credit Balances and Intercreditor Agreement specifically excludes the possibility that Trust One Bank is a third-party beneficiary of the Trade Credit Outsourcing Agreement. I was concerned because Section 7 of the Assignment of Credit Balances and Intercreditor Agreement appears to conflict with Section 18.3 of the Trade Credit Outsourcing Agreement. Section 18.3 of the Trade Credit Outsourcing Agreement provides:

> In the event we enter into with you an Assignment of Credit Balances and Intercreditor Agreement, or similar agreement, with a bank or other lender that is providing advances to you based on this Agreement, (i) you agree that we are permitted to deliver that bank or other lender, or their assignee, a copy of any information we deliver to you pursuant to this Agreement, and (ii) we agree that the bank or other lender, or their assignee, is a third party beneficiary of and under this Agreement.

This paragraph seems to anticipate that in the event of an assignment of accounts to FTRANS, the lender who advanced funds in reliance upon the services of FTRANS would be made a third party beneficiary of the Trade Credit Outsourcing Agreement. Section 7 of the Assignment of Credit Balances and Intercreditor Agreement, however, provides in pertinent part:

> Notwithstanding the obligations of this section, at no time shall ... [Trust One Bank] be considered an intended third party beneficiary under the Trade Credit Outsourcing Agreement or have any rights thereunder, except as specifically provided in this Agreement.

This paragraph also seems to anticipate that the lender would become a third party beneficiary of the Trade Credit Outsourcing Agreement upon assignment of accounts, but only if and insofar as expressly provided in the Assignment of Credit Balances and Intercreditor Agreement. I was not able to find any language in the Assignment of Credit Balances and Intercreditor Agreement providing the status of third party beneficiary to Trust One Bank.

The parties timely filed supplemental briefs. Chandler states that the quoted paragraph from the Assignment of Credit Balances and Intercreditor Agreement does conflict with paragraph 18.3 of the Trade Credit Outsourcing Agreement. Chandler asserts that paragraph 18.3 of the Trade Credit Outsourcing Agreement should be treated as surplusage and given no effect in light of section 7 of the Assignment of Credit Balances and Intercreditor Agreement.

Trust One Bank states that it is irrelevant whether Trust One Bank is a third party beneficiary of the Trade Credit Outsourcing Agreement because it is the beneficiary of an express trust. It says

that when the various agreements are read together, it is clear that an express trust was created for the sole benefit of Trust One Bank. Trust One Bank apparently concedes that it is not a third party beneficiary of the Trade Credit Outsourcing Agreement.

ISSUES

Chandler admits that Eclipse received payments on accounts that should have been paid to FTRANS and that those funds were not paid to FTRANS. He also concedes that failure to remit those funds to FTRANS violated the Trade Credit Outsourcing Agreement. He nevertheless denies that he is personally responsible for this breach, and denies that a fiduciary relationship existed between himself and Trust One Bank within the meaning of section 523(a)(4) of the Bankruptcy Code. It appears there are no unresolved issues of fact. What remains are three legal issues:

First, whether the various agreements by and among Eclipse, Trust One Bank, FTRANS, and Chandler created an express trust within the meaning of section 523(a)(4) of the Bankruptcy Code?

Second, whether Trust One Bank is a beneficiary of that trust, if any?

Third, whether Chandler undertook and should be deemed to have undertaken fiduciary responsibilities with respect to that trust, if any?

ANALYSIS

Summary Judgment Standards

In order to grant a motion for summary judgment, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. *Matsushita Elec. Indus. v. Zenith Radio Corp.*,

475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). When judgment is appropriate as a matter of law, whether or not a motion for summary judgment is opposed, this requirement is met. Fed. R. Bankr. Proc. 7056(c). On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986) ("the burden on the moving party may be discharged by 'showing' ... that there is an absence of evidence to support the non-moving party's case."). If that initial burden is not met, the opposing party is under no obligation to offer evidence in support of its opposition. See, *Investors Credit Corp. v. Batie (In re Batie)*, 995 F.2d 85, 90 (6th Cir. 1993), *In re Rogstad*, 126 F.3d 1224, 1227 (9th Cir. 1997), *Hibernia Nat. Bank v. Admin. Cent. Sociedad*, 776 F.2d 1277, 1279 (5th Cir. 1985). Indeed, the court may sua sponte grant summary judgment for the non-movant, "so long as the losing party [movant] was on notice that she had to come forward with all her evidence." *Celotex Corp. v. Catrett*, 477 U.S. at 326, 106 S. Ct. at 91. Accord, *Jones v. Union Pacif. R.R. Co.*, 302 F.3d 735, 740 (7th Cir. 2002); *Grand Rapids Plastics, Inc. v. Lakian*, 188 F.3d 401, 407 (6th Cir. 1999), *cert. den*., 529 U.S. 1037, 120 S. Ct. 1531 (2000).

Was There an Express Trust?

Section 523(a)(4) of the Bankruptcy Code excepts from discharge those debts owed by an individual debtor for "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4).[1] Exceptions to discharge are construed narrowly in favor of the debtor. *Cash America Financial Services, Inc. v. Fox (In re Fox)*, 370 B.R. 104, 114 (BAP 6th Cir.

[1] Trust One Bank bases Count I of its Complaint on the exception for debts for fraud or defalcation while acting in a fiduciary capacity, so no consideration will be given here to debts for embezzlement or larceny.

2007). Demonstration that a debt is non-dischargeable because it is one for fraud or defalcation while acting in a fiduciary capacity requires proof by a preponderance of the evidence of the following: (1) a pre-existing fiduciary relationship between the debtor and the objecting creditor; (2) breach of that fiduciary relationship; and (3) a resulting loss. *Commonwealth Land Title Co. v. Blaszak (In re Blaszak)*, 397 F.3d 386, 390 (6th Cir. 2005). *See also Carlisle Cashway, Inc. v. Johnson (In re Johnson)*, 691 F.2d 249, 251 (6th Cir. 1982) ("The question of who is a fiduciary for purposes of section 17(a)(4) [the predecessor section to § 523(a)(4)] is one of federal law, although state law is important in determining when a trust relationship exists.").

Thus, the first issue to be decided is whether Trust One Bank has demonstrated that there was a pre-existing fiduciary relationship between itself and Chandler. In order to satisfy this requirement, Trust One Bank relies upon two sections of the Trade Credit Outsourcing Agreement: Sections 9.1 and 18.8. Section 9.1 was quoted previously. It provides that, "**Any checks, cash, notes or other documents or instruments, proceeds or property you receive with respect to the Accounts shall be held by you in trust for us, separate from your own property, and immediately turned over to us with proper endorsements.**" (emphasis in the original). Section 18.8 provides,

> Our relationship shall be that of seller and purchaser of Accounts, and neither party is or shall be determined a fiduciary of or to the other **except to the extent that you will be deemed to owe us a fiduciary duty and serve as our trustee with respect to all payments you receive directly from customers the handling of which shall be governed by Section 9.1.**

The parties to the Trade Credit Outsourcing Agreement were Eclipse and FTRANS.

The first question to be answered with respect to these sections is whether they create an express or technical trust for purposes of section 523(a)(4). The exception to discharge for debts

resulting from fraud or defalcation while acting in a fiduciary capacity has been part of the bankruptcy laws of the United States since 1841. The provision applies to "technical trusts, and not those which the law implies from the contract." *Davis v. Aetna Acceptance Corp.*, 293 U.S. 328, 333, 11 S. Ct. 151, 153 (1934), quoting *Chapman v. Forsyth*, 2 How. 202, 11 L. Ed. 236 (1844); *see also In re Blaszak*, 397 F.3d at 391 ("It is well established that the defalcation provision of § 523(a)(4) applies to express or technical trusts, but not to constructive trusts that courts may impose as an equitable remedy" citing *Davis*, 293 U.S. at 333). In *Davis*, the Court further explained that:

> It is not enough that, by the very act of wrongdoing out of which the contested debt arose, the bankrupt has become chargeable as a trustee ex maleficio. He must have been a trustee before the wrong and without reference thereto. In the words of Blatchford, J: "The language would seem to apply only to a debt created by a person who was already a fiduciary when the debt was created."

Davis, 293 U.S. at 333, 11 S. Ct. at 154 (citation omitted). The Court held that a transaction pursuant to which an automobile dealer obtained a loan from a finance company for the acquisition of an automobile evidenced by a note, chattel mortgage, trust receipt, and bill of sale was in substance a chattel mortgage, and "was not turned into one arising from a trust because the parties to one of the documents have chosen to speak of it as a trust." *Id.*, 293 U.S. at 334, 55 S. Ct. at 154. The relation between the parties, the Court said, would have been no different had the duty been stated in terms of covenant alone.

The Sixth Circuit Court of appeals has issued a series of opinions concerning the proof required to establish the existence of defalcation while acting in a fiduciary capacity for purposes of section 523(a)(4). The first was *Carlisle Cashway, Inc. v. Johnson (In re Johnson)*, 691 F.2d 249 (6th Cir. 1982), decided under the old Bankruptcy Act and Michigan law, in which the court of

appeals held that the Michigan Building Contract Funds Act imposed a "trust" upon a building contract fund for purposes of section 17(a)(4), the predecessor to section 523(a)(4). The court noted that the Michigan statute satisfied the requirement that the trust exist separate from the act of wrongdoing, that it arise at the time monies were entrusted to the contractor, and that the fiduciary duties be independent of and in addition to the obligations arising under the contract between the parties. *Id.* at 253.

The second opinion by the court of appeals was *Capitol Indem. Corp. v. Interstate Agency, Inc. (In re Interstate Agency, Inc.)*, 760 F.2d 121 (6th Cir. 1985). In that case, also decided under the old Bankruptcy Act and Michigan law, the court held that premium payments received by an insurance agency have the status of trust funds for the benefit of the insurance principal. The court of appeals looked to state law to determine the nature of the property interest in question. The Michigan Insurance Code expressly provided that "[a]n agent shall be a fiduciary for all moneys received or held by him in his capacity as agent," quoted at *Capitol Indem. Corp.*, 760 F.2d at 124. Pursuant to this statute, funds coming in to the hands of an insurance agent were held in trust for his principal. This obligation, created by statute, satisfied the section 17(a)(4) requirement of an express or technical trust.

The third decision by the Sixth Circuit was *R.E. America v. Garver (In re Garver)*, 116 F.3d 176 (6th Cir. 1997), in which the court held that the attorney-client relationship, without more, is insufficient to establish the necessary fiduciary relationship for purposes of section 523(a)(4). Citing its prior decision in *Capitol Indem. Corp.*, the court of appeals defined defalcation as "encompassing embezzlement, the '*misappropriation of trust funds* held in any fiduciary capacity,' and the 'failure

to properly account for such funds."' *Id.* at 179. The court then adopted a narrow view of the term "fiduciary capacity," stating,

> We believe that this definition [of defalcation], which focuses upon the embezzlement, misappropriation, or failure to properly account for "trust funds", necessarily implies the existence of an express or technical trust relationship.... The attorney-client relationship, without more, is insufficient to establish the necessary fiduciary relationship for defalcation under § 523(a)(4). Instead, the debtor must hold funds in trust for a third party to satisfy the fiduciary relationship element of the defalcation provision of § 523(a)(4).

Garver, 116 F.3d at 179. The court went on to explain that the mere failure to meet an obligation while acting in a fiduciary capacity was not sufficient under the definition of defalcation provided by *Capitol Indem. Corp.* Rather, defalcation requires "an express or technical trust relationship arising from the placement of a specific res in the hands of the debtor" prior to the time of the alleged injury. *Id.* at 180.

The fourth and most recent decision by the court of appeals is *Commonwealth Land Title Co. v. Blaszak (In re Blaszak)*, 397 F.3d 386 (6th Cir. 2005), in which the court affirmed the decisions of the Bankruptcy Appellate Panel and bankruptcy court holding that an agency agreement that appointed the debtor the issuing agent for an insurance principal created a trust with respect to funds that came into the agent's hands for purposes of section 523(a)(4). Although the facts in *Blaszak* were similar to those in *Capitol Indem. Corp.*, *Blaszak* was decided under Ohio rather than Michigan law. In *Blaszcak* there was no provision of the state insurance code imposing fiduciary responsibilities upon the insurance agent. Rather, the court of appeals looked to the terms of the agency agreement to determine the presence of four requirements necessary to establish an express or technical trust: (1) an intent to create a trust; (2) a trustee; (3) a trust res; and (4) a definite beneficiary. *Id.* at 391, citing *Graffice v. Grim (In re Grim)*, 293 B.R. 156, 166 (Bankr. N.D. Ohio

2003) (decided based upon Ohio law). Reviewing the particular agency agreement at issue, the court of appeals found that the agreement provided that (1) funds being held by the agent for the principal were to be segregated from other funds; (2) such funds were to be remitted to the principal on a regular basis; (3) the agent was to serve as trustee; (4) the moneys collected by the agent on behalf of the principal were to provide the trust res; and (5) the principal was the named beneficiary. Under these facts, the court of appeals held that the agent was serving in a fiduciary capacity for the benefit of the insurance principal for purposes of section 523(a)(4).

These cases read together indicate that in order to find the requisite fiduciary capacity for purposes of section 523(a)(4), the bankruptcy court must find a pre-existing trust created by state statute or by the express terms of the parties' agreement. Without the presence of one or the other of these, the mere relation between the parties, such as attorney and client, is not sufficient.

In the present case, the parties have invoked no state statute creating a trust in the funds admittedly received directly by Eclipse from three of its account debtors. *See* Statement of Material Undisputed Facts, ¶¶ 17-23. Thus Trust One Bank must rely upon the terms of the various written agreements to establish the requisite express trust. Under Tennessee law, the existence of an express trust requires proof of three elements: (1) a trustee who holds trust property and who is subject to the equitable duties to deal with it for the benefit of another; (2) a beneficiary to whom the trustee owes the equitable duties to deal with the trust property for his benefit; and (3) identifiable trust property. *Kopsombut-Myint Buddhist Center v. State Bd. of Equalization*, 728 S.W.2d 327, 333 (Tenn. Ct. App. 1986), citing G.G. Bogert & G.T. Bogert, *The Law of Trusts and Trustees* § 1, at 6 (rev. 2d ed. 1984) and Restatement (Second) of Trusts § 2 comment h (1957). *See also Myers v. Myers*, 891 S.W.2d 216, 218 (Tenn. Ct. App. 1994) ("In determining whether or not a trust exists,

at minimum there must be a grantor or settlor who *intends* to create a trust; a corpus (the subject property); a trustee; and a beneficiary").

The facts in the present case more closely resemble those in *Blaszak* than any of the other decisions by the court of appeals. The Trade Credit Outsourcing Agreement imposes a specific duty upon Eclipse with respect to payments received directly from customers. Eclipse was to hold those payments as trustee for the benefit of FTRANS, to segregate those payments from its own funds, and to immediately turn over those funds to FTRANS. These undertakings were in addition to the contract between the parties for the purchase and sale of accounts. Given this specific undertaking, I hold that the Trade Credit Outsourcing Agreement created an express trust for the benefit of FTRANS for purposes of section 523(a)(4). Eclipse is the named trustee, FTRANS is the named beneficiary, and the trust res consists of payments received by Eclipse directly from customers. Trust One Bank has identified $61,964.96 in payments that fit this description and constitute the trust res.

Was Trust One Bank the Beneficiary of an Express Trust?

The second issue to be decided is whether the language of the Trade Credit Outsourcing Agreement (or any other agreement) creates an express trust for the benefit of Trust One Bank. The language of the Sections 9.1 and 18.8 create an express trust for the benefit of FTRANS. Trust One Bank is not a party to that agreement. Nevertheless, Trust One Bank argues that the Trade Credit Outsourcing Agreement and the Assignment of Credit Balances and Intercreditor Agreement read together create an express trust for its benefit because "all payments were to be remitted to Trust One [Bank]." Pltf's Supplemental Brief, Adv. Dkt. No. 26, p. 3. It points to various sections of the Revolving Loan and Security Agreement, which it says must be read together with the other loan

documents to understand the agreement of the parties. It notes that it agreed to make a revolving credit facility available to Eclipse to be funded in accordance with Advance Rates consisting of eighty-five percent (85%) of the face amount of the Borrower's F-Trans Receivables and fifty percent (50%) of Eligible Inventory (Revolving Loan and Security Agreement, § 2.1), and further that FTRANS agreed to remit to it, as Lender, for the account of Eclipse all Outsourcing Agreement Payables under the Trade Credit Outsourcing Agreement (Assignment of Credit Balances and Intercreditor Agreement, § 6). These are two very separate undertakings, however.

The Revolving Loan and Security Agreement gives very little information about the role of FTRANS in the bank's transactions with Eclipse. It defines "F-Trans Receivables" as "those invoices issued by Borrower to certain of its Account Debtors who have been approved to make payments using F-Trans, Inc.," which falls far short of an indication that FTRANS was to collect accounts or make payments for the benefit of Trust One Bank. (Revolving Loan and Security Agreement, § 1.1). The language of the Revolving Loan and Security Agreement at most emphasizes FTRANS' role in determining the creditworthiness of Eclipse's account debtors. Pursuant to the Trade Credit Outsourcing Agreement, FTRANS undertook the credit risk for accounts that it approved. (Trade Credit Outsourcing Agreement, § 2.2). Those are the accounts that are denominated "F-Trans Receivables" in the Revolving Loan and Security Agreement. They are the only accounts that are eligible to be part of the Borrowing Base for the credit facility extended to Eclipse. But, FTRANS is not a party to the Revolving Loan and Security Agreement, and thus undertook no responsibility with respect to Trust One Bank in that agreement.

The Assignment of Credit Balances and Intercreditor Agreement, on the other hand, indicates that FTRANS was to remit funds to Trust One Bank *for the benefit of Eclipse* (Assignment of Credit

Balances and Intercreditor Agreement, § 6). Pursuant to the Assignment of Credit Balances and Intercreditor Agreement, Eclipse assigned to Trust One Bank a security interest in monies and credit balances that it would become entitled to under the Trade Credit Outsourcing Agreement. In addition, Trust One Bank agreed to permit Eclipse to sell its accounts to FTRANS and to grant FTRANS a security interest in so-called "FTRANS Collateral." Trust One Bank further agreed that, notwithstanding other provisions in the "Lender Documents" (such as the Revolving Loan and Security Agreement), it would concede to FTRANS a senior priority security interest in the FTRANS Collateral. Conversely, FTRANS agreed that Trust One Bank would have a senior priority security interest in the "Lender Primary Collateral." *Eclipse*, not Trust One Bank, authorized and directed FTRANS to remit all "Outsourcing Agreement Payables" to the bank, payments that otherwise would be payable to Eclipse pursuant to the Trade Credit Outsourcing Agreement, presumably to create new availability under the Revolving Loan. These undertakings are not consistent with the creation of an express trust for the benefit of Trust One Bank. Rather, they indicate an intention to create an additional security interest for the benefit of the bank and a vehicle whereby payments would be promptly remitted to the bank for the benefit of Eclipse. A security agreement does not give rise to a fiduciary relationship for purposes of section 523(a)(4), especially where, as in this case, it contains no trust language. See *Automotive Fin. Corp. v. Leonard (In re Leonard)*, 2012 WL 1565120, *9 (Bankr. E.D. Tenn. May, 2, 2012), noting the majority rule that security agreements directing that proceeds be held "in trust" do not turn the parties' contractual obligations into a trust relationship without more.

Nothing in the language of the Revolving Loan and Security Agreement or the Assignment of Credit Balances and Intercreditor Agreement indicates the intention to create a trust for the

benefit of Trust One Bank. The only agreement that does create a trust relationship between any of the parties is the Trade Credit Outsourcing Agreement. It creates a trust relationship by and between Eclipse and FTRANS for the benefit of FTRANS. Trust One Bank is not a party to the Trade Credit Outsourcing Agreement and is contractually excluded from being a third party beneficiary of that agreement by section 7 of the Assignment of Credit Balances and Intercreditor Agreement, which specifically provides: "at no time shall Lender be considered an intended third party beneficiary under the Trade Credit Outsourcing Agreement or have any rights thereunder, except as specifically provided in this agreement." Nothing in the Assignment of Credit Balances and Intercreditor Agreement gives Trust One Bank rights to or an interest in the accounts purchased by FTRANS or the proceeds of those accounts. Rather, Trust One Bank is granted a security interest in amounts that Eclipse would be entitled to be paid under the Trade Credit Outsourcing Agreement. As stated previously, the agreement to provide a security interest, without more does not create an express trust.

Should Chandler be Deemed a Trustee of an Express Trust?

Having determined that no express trust existed for the benefit of Trust One Bank, it is not necessary to consider the third issue raised by Trust One Bank, i.e., whether Chandler may be held personally responsible for Eclipse's breach of trust. Nevertheless, I will briefly consider the arguments advanced by Trust One Bank.

Trust One Bank asserts that Chandler should be held personally responsible for the acts of Eclipse for the following reasons: (1) he was the president and sole shareholder of the corporation; (2) he signed the Trade Credit Outsourcing Agreement and the Assignment of Credit Balances and Intercreditor Agreement on behalf of the corporation; (3) he is the guarantor of the obligations of

the corporation to Trust One Bank; and (4) he had full knowledge and responsibility for the handling of Eclipse's trust undertakings pursuant to the Trade Credit Outsourcing Agreement. Pltf's Memorandum in Support of Motion for Summary Judgment, Adv. Dkt. No. 17, Attachment 1, p. 6. Trust One Bank relies upon the decision of the Sixth Circuit in *Capitol Indem. Corp.* in which an individual insurance agent was held personally responsible for the failure of his insurance agency to remit insurance premiums to the insurance principal. *Id.*, 760 F.2d at 125. The individual was the president of the insurance agency, he was himself an insurance agent with fiduciary responsibilities under the Michigan Insurance Code, and he personally signed the agency agreements. The court of appeals reversed the decision of the district court, holding that it was not necessary to find that the individual was the alter ego of the corporation in order to impose liability for the misappropriation of trust funds. Both the individual and the agency, it said, failed to properly account for trust funds. *Id.*

Capitol Indem. Corp. is distinguished from the present case by the fact that no state statute imposes fiduciary responsibilities upon either Eclipse or Chandler with respect to Trust One Bank. Indeed, in an unpublished decision the Sixth Circuit has recognized that *Capitol Indem. Corp*. turned upon the specific Michigan statute that imposed fiduciary responsibility upon the individual insurance agent. *See Commonwealth of Ky. v. Kinnard*, 1 F.3d 1240, 1993 WL 300425, *4 (6th Cir. 1993). That statute made the individual a fiduciary from the moment funds were turned over to his company in trust. The Kentucky statute at issue in *Kinnard* was instead a remedial statute, which conditioned a corporate officer's liability upon the failure to take action once he learned that his company had failed to act. Thus, the Kentucky statute imposed a trust ex maleficio, which was not sufficient to bring the responsibility of the corporate officer within the scope of section 523(a)(4).

The present case is not based upon any state statute. Instead, the fiduciary undertakings of Eclipse are imposed by contract and as such, should be limited to the parties to that contract. Nothing in the parties' agreements imposes fiduciary responsibilities upon Chandler. Because exceptions to discharge are to be strictly construed in favor of the debtor, I hold that the failure of the parties to specify that Chandler was undertaking fiduciary responsibilities for the benefit of FTRANS (or, for that matter, Trust One Bank) is fatal to Trust One Bank's argument.

CONCLUSION

For the foregoing reasons, summary judgment will be granted for the Defendant, Jeffrey T. Chandler, as to Count I of the Complaint.

cc: Debtor/Defendant
Attorney for Debtor/Defendant
Plaintiff
Attorney for Plaintiff
Chapter 7 Case Trustee