Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	SIPA Liquidation
	)	
Continental Capital Investment Services, Inc. and Continental Capital Securities, Inc.	)	Related Adv. Pro. No. 03-3370
	)	Adv. Pro. No. 05-3322
Debtors.	)	
	)	Hon. Mary Ann Whipple
Thomas S. Zaremba, SIPA Trustee,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Merle E. Pheasant, Jr.,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER GRANTING MOTION TO DISMISS COUNTERCLAIMS AND TO STRIKE JURY DEMAND

This adversary proceeding is before the court on the Motion to Dismiss and/or Strike Counterclaims and to Strike Jury Demand ("Motion") [Doc. #61] filed by Plaintiff Thomas S. Zaremba, Trustee under the Securities Investor Protection Act, Defendant's opposition [Doc. # 76], and the Trustee's reply [Doc. # 89]. The Trustee's Motion is brought under Federal Rule of Civil Procedure 12(b)(1), (b)(6) and 12(f), applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012(b).

The court has jurisdiction over this adversary proceeding under 15 U.S.C. §§ 78eee(b)(4) and 78fff(b). The court held a hearing on the motion at which attorneys for the Trustee, the Securities Investor Protection Corporation ("SIPC"), and Defendant all appeared in person. Having considered the motion and briefs in support thereof, the memorandum in opposition, and the arguments of counsel, the court will grant the Trustee's motion to dismiss Defendant's counterclaims and to strike his jury demand.

BACKGROUND

This adversary proceeding was commenced by Plaintiff as the Trustee in the underlying liquidation of Debtors Continental Capital Investment Services, Inc. and Continental Capital Securities, Inc. under the provisions of the Securities Investor Protection Act ("SIPA"), 15 U.S.C. § 78aaa, *et seq.* In his amended complaint, the Trustee alleged that Defendant aided and participated in various fraudulent activities of Debtors' principal, William Davis, and that Defendant received various transfers of funds from Debtors during the months before commencement of the SIPA liquidation proceeding. Based on these allegations, the Trustee alleged claims for turnover and accounting under 11 U.S.C. § 542, avoidance of preferential transfers under § 547 and fraudulent transfers under § 548 and § 544, as well as a claim for violations of the Ohio Securities Act. [*See* Doc. # 28]. Because Defendant made a jury demand, Plaintiff did not contest in this court Defendant's right to a jury trial on at least some of the issues raised in the complaint and not all parties consented to this court conducting a jury trial, the case was referred back to the District Court. [*See* Doc. # 40].

In the District Court, the Trustee filed a motion to strike Defendant's jury demand and remand the case to this court. Chief Judge Carr granted the Trustee's motion and remanded the case. [*See* Doc. # 44].

After remand, the Trustee filed a Second Amended Complaint. In addition to the claims alleged in the Amended Complaint, the Trustee alleges two fraud claims and several additional fraudulent conveyance claims. He also seeks a determination that the claim submitted by Defendant in the SIPA liquidation proceeding should not be allowed either as a customer claim or as a general unsecured claim. [*See* Doc. # 59].

Defendant filed an answer to the Second Amended Complaint in which he generally denies the allegations and makes a demand for a jury trial. He also asserts two counterclaims. In his first counterclaim, he asserts that the Second Amended Complaint "is not warranted under existing law" and was filed "only to harass or maliciously injure him." [Doc. # 60, p. 17]. Defendant seeks damages as well as attorney fees "as set forth in [Ohio Revised Code] § 2323.51." [*Id.*]. In his second counterclaim, Defendant

alleges that the Trustee "improperly, unfairly, and in bad faith" denied his claim. [*Id.* at 18]. At the hearing on the Trustee's Motion, Defendant's counsel made clear that his counterclaims are asserted against the Trustee in his official capacity as representative of the Debtors' estate, and not in his individual capacity seeking recovery from his individual assets.

LAW AND ANALYSIS

I. Motion to Dismiss Counterclaims

In support of his motion to dismiss Defendant's counterclaims, the Trustee first argues that Defendant's failure to obtain leave of this court before asserting the counterclaims deprives the court of subject matter jurisdiction and that the counterclaims should be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The Trustee also argues that the counterclaims should be dismissed pursuant to Rule 12(b)(6) because the Trustee has quasi-judicial immunity with respect to both counterclaims and because they otherwise fail to state a cause of action. Although the court concludes that it does have subject matter jurisdiction over the counterclaims and that quasi-judicial immunity is not applicable to claims brought against a trustee in his official capacity, it nevertheless finds that Defendant has failed to state a claim upon which relief can be granted and will, therefore, grant the Trustee's motion to dismiss.

A. The *Barton* Doctrine

In arguing that the court does not have subject matter jurisdiction over the counterclaims asserted by Defendant, the Trustee relies on what is referred to as the *Barton* doctrine. In *Barton v. Barbour*, 104 U.S. 126 (1881), the Supreme Court held that a District of Columbia court lacked jurisdiction to entertain a suit against a receiver that was appointed by a Virginia court without leave of the Virginia court. *Id.* at 133. The Court noted the "general rule that before suit is brought against a receiver leave of the court by which he was appointed must be obtained" and explained that if there is a right, "in a distinct suit," to prosecute a claim to judgment without leave of the court appointing the receiver, there would be a right to enforce satisfaction of the judgment outside the jurisdiction of the appointing court and the court that appointed the receiver and was administering the trust assets "would be impotent to restrain [such recovery]." *Id.* at 128. The Court further explained:

> A suit therefore, brought without leave to recover judgment against a receiver for a money demand, is virtually a suit the purpose of which is, and effect of which may be, to take the property of the trust from his hands and apply it to the payment of the plaintiff's claim, without regard to the rights of other creditors or the orders of the court which is

> administering the trust property. We think, therefore, that it is immaterial whether the suit is brought against him to recover specific property or to obtain judgment for a money demand. In either case leave should be first obtained.

Id. at 129.

Although conceived in the context of railroad receivership proceedings, the *Barton* doctrine has been extended to apply to bankruptcy trustees and it is now "well settled that leave of the appointing forum must be obtained by any party wishing to institute an action in a non-appointing forum against a trustee, for acts done in the trustee's official capacity and within the trustee's authority as an officer of the court." *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993). The Sixth Circuit explained that "[t]his requirement enables the Bankruptcy Court to maintain better control over the administration of the estate."[1] *Id.*

Since the concern in *Barton* was the ability of the appointing court to exercise control over property in the receivership and to ensure that the appointing court is not rendered impotent to enforce its orders concerning administration of that property, not surprisingly, all of the reported cases and all but one of the unreported cases cited by the Trustee have applied the *Barton* doctrine only where an action has been brought against a trustee in a non-appointing forum. Nevertheless, citing *Fisher v. Berney (In re Messina)*, Adv. No. 02A01041, 2003 WL 22271522 (Bankr. N.D. Ill. Sept. 29, 2003), the Trustee urges the court to extend the doctrine to actions brought against a trustee in the appointing court, as was done in this case. In *Messina*, the bankruptcy court dismissed the debtor's counterclaims against the Chapter 7 trustee, finding, without discussion, that the debtor's failure to seek leave of court was a "blatant violation" of the *Barton* doctrine. The court finds *Messina* unpersuasive as it does not even address the jurisdictional basis of the *Barton* decision and the lack of any jurisdictional concern where the counterclaim is filed in the appointing forum.

The court also finds unpersuasive the only reported case of which it is aware that applies the *Barton* doctrine where claims against a trustee are brought in the appointing forum. *See CIT Commc'ns Fin. Corp. v. Maxwell (In re marchFIRST, Inc.)*, 378 B.R. 563 (Bankr. N.D. Ill. 2007). As the basis for its holding that the doctrine applies, the court in *marchFIRST, Inc.*, found that the concerns of the Seventh Circuit, as

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[1] The Sixth Circuit noted that 28 U.S.C. § 959 serves as a limited exception to the common law rule set forth in *Barton* by allowing suits against a trustee for actions taken while "carrying on business" of the debtor. *In re DeLorean Motor Co.*, 991 F.2d at 1240-41.

discussed in *In re Linton*, 136 F.3d 544 (7th Cir. 1998), are present regardless of the forum in which the claims are brought. Those concerns include "the burden of defense," "the threat of distraction," and "that serving as a trustee will become a more irksome and expensive proposition." *In re marchFIRST, Inc.*, 378 B.R. at 566-567. However, in deciding that the *Barton* doctrine applied to an action brought against a trustee in state court after the bankruptcy case was concluded, the court in *Linton* explained that those concerns discussed by it "alone might not be sufficient to warrant extension . . . of the leave-to-file-requirement to suits filed after the winding up of the bankruptcy." *In re Linton*, 136 F.3d at 546. But the court found that a "concern with the integrity of the bankruptcy jurisdiction" did warrant such an extension. *Id.* Where, as in this proceeding, there is no issue regarding the integrity of this court's jurisdiction, the court declines to extend the *Barton* doctrine to situations where the claim is brought against a trustee in the appointing court. *Cf. In re Mailman Steam Carpet Cleaning Corp.*, 196 F.3d 1, 4-5 (1st Cir. 1999) (finding the *Barton* doctrine applicable only in cases brought in courts other than the bankruptcy court); *Kashani v. Fulton (In re Kashani)*, 190 B.R. 875, 885 (B.A.P. 9th Cir. 1995); *In re Continental Coin Corp.,* 380 B.R. 1, 3, n.1 (Bankr. C.D. Cal. 2007); *Golladay v. Brady (In re Coburn)*, Adv. No. 06-4072, 2006 Bankr. LEXIS 1458, *6, 2006 WL 2010852, *2 (Bankr. N.D. Cal. July 6, 2006) (same).

B. Defendant's Counterclaims

Federal Rule of Civil Procedure 8(a)(2) provides that a claim for relief must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." A motion to dismiss under Rule 12(b)(6) tests whether a cognizable claim has been asserted. *Kirk v. Hendon (In re Heinsohn)*, 231 B.R. 48, 61 (Bankr. E.D. Tenn. 1999). In order to withstand an attack by a Rule 12(b)(6) motion, Defendant's "factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all of the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (internal citations omitted).

1. First Counterclaim

Defendant's first counterclaim is captioned "(Frivolous Conduct)." It is nine paragraphs long, with the substance of it that the Trustee's filing of the Complaint, Amended Complaint and Second Amended Complaint were "done persistently and only to harass or maliciously injure [Defendant]," [Doc. # 60, p. 17, ¶ 7], and were "not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law," [Doc. #60, p. 17, ¶ 8]. The concluding paragraph of Defendant's first counterclaim states in full that "Mr. Pheasant is entitled to his attorney fees and other

damages as set forth in O.R.C. §2323.51." [Doc. #60, p.17, ¶ 9]. The statute set forth as the basis for the claim asserted is Section 2323.51 of the Ohio Revised Code Annotated. The parties argue about whether under Ohio law this statute can be the basis for an affirmative cause of action for damages set forth in a pleading or whether violations of its provisions are properly raised only by motion or application within otherwise properly commenced litigation.

Yet more fundamentally than that procedural dispute, the Sixth Circuit determined in *First Bank of Marietta v. Hartford Underwriters Insurance Co.*, 307 F.3d 501, 528-30 (6th Cir. 2002), that Ohio Revised Code § 2323.51 does not apply in federal court cases where the conduct in issue is, as Defendant asserts here, the actions of parties and attorneys in filing and litigating a claim, rather than a request for attorney's fees based on success on the merits of that claim. The Sixth Circuit held that the Ohio statute was procedural and not substantive in nature and conflicted with Rule 11 of the Federal Rules of Civil Procedure. In *First Bank of Marietta*, state law claims were asserted on the basis of diversity jurisdiction. Here, the Trustee is asserting both state and federal claims against Defendant under bankruptcy and SIPA jurisdiction. The court does not find the difference in jurisdictional grants a meaningful distinction and believes that the Sixth Circuit's holding in *First Bank of Marietta* applies equally in this adversary proceeding. Defendant's first counterclaim will therefore be dismissed because there is no cause of action under Ohio Revised Code § 2323.51 available in a federal court action such as this one.

Defendant tries to recharacterize his first counterclaim as a common law abuse of process action. The Ohio Supreme recognized the common law tort of abuse of process as distinct from the common law tort of malicious prosecution, whether civil or criminal, in *Yaklevich v. Kemp, Schaeffer & Rowe Co.*, 68 Ohio St. 3d 294, 298 (1994). Quoting the preeminent torts hornbook, the Ohio Supreme Court described the niche for an abuse of process claim as those "'cases in which legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed.'" *Yaklevich*, 68 Ohio St. 3d at 297 (quoting Prosser & Keeton, *The Law of Torts* (5 Ed. 1984) 897, Section 121). It held that the three elements of the tort of abuse of process under Ohio common law are "(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process." *Id.* at 298 (footnote omitted). The tort may be a permissive counterclaim but is not a compulsory counterclaim. *Id.* at 299.

Not even the most relaxed application of the concept of notice pleading permissible could fairly be invoked to characterize Defendant's first counterclaim as an Ohio common law abuse of process claim. Mirroring the caption Defendant affixed to his first counterclaim, the title of the cited state statute is "[f]rivolous conduct in civil actions." Beyond just the title, Defendant's statement of his claim precisely parrots the language defining frivolous conduct in the cited statute. The only fair reading of Defendant's counterclaim is that it is premised upon Ohio Revised Code § 2323.51.

The counterclaim does not meet the elemental pleading standards for an abuse of process claim as established by the Ohio Supreme Court in *Yaklevich*, which is grounds for dismissal, *In re DeLorean Motor Co.*, 991 F.2d at 1240. Taking as true all of the averments purporting to assert facts, Defendant's entire factual premise is that the Trustee is litigating against Defendant without probable cause to do so. Pleading in the alternative is permitted. But there is no reasonable construction of the averments of the first counterclaim by which it can be construed as a challenge to the continued pursuit of litigation commenced by the Trustee "with probable cause," an element that must not only be proven but properly pleaded in the first instance, *Gunaris v. Holiday Lakes Property Owners Assoc.*, Case No. H-98-032, 1999 Ohio App. LEXIS 404, *8-*10 (Ohio Ct. App. Feb. 12, 1999)(affirms Ohio Civil Rule 12(B)(6) dismissal where "appellants only alleged that the initiation of the initial complaint against them was 'without probable cause.' Nothing in the complaint alleges, in the alternative, that the acts complained of were instituted *with* probable cause as required to establish a claim for abuse of process."[emphasis in original]). Nor is there any ulterior motive pleaded. *See Sullivan v. Tuschman*, Case No. L-06-1373, 2007 Ohio App. LEXIS 3272, 2007 WL 2013531 (Ohio Ct. App. Jul. 13, 2007)(in affirming Ohio Civil Rule 12(B)(6) dismissal, "even if such a purpose is motivated by ill-will or bad faith, or is entirely frivolous, it is not legally sufficient to support a claim of abuse of legal process.").

Defendant's first counterclaim fails to state a claim upon which relief could be granted under Ohio Revised Code § 2323.51 or the Ohio common law tort of abuse of process. *See* Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012(b).

2. Second Counterclaim

Defendant's second counterclaim is captioned "Claim." The factual averments of the second counterclaim are twofold: (1) "Mr. Pheasant properly submitted a claim to the trustee for reimbursement of his losses. On information and belief, the Trustee apparently assigned it as his Claim No. 325 ('Claim')"; and (2) "[t]he Trustee improperly, unfairly, and in bad faith, denied that Claim." [Doc. # 60, pp. 17-18, ¶¶

11, 12]. As a result of these factual averments, Defendant seek as relief a court order to pay his claim and compensatory damages, punitive damages and attorney's fees. [*Id.*, p18].

The parties argue vociferously about whether the counterclaim is just the flip side of count one of the Trustee's Second Amended Complaint. [Doc. # 59, pp. 13-14, ¶¶ 63-67]. Count one objects to the claim submitted by Defendant in the liquidation proceeding and asks that it be disallowed as both a customer claim under SIPA and an unsecured claim against Debtor's general estate. Defendant asserts that the second counterclaim is different from count one of the Second Amended Complaint because it forms the basis for his demand for attorney's fees and punitive damages. The court again finds, however, a more fundamental defect with the counterclaim, specifically whether there is any such cause of action extant for bad faith denial of a claim that would entitle Defendant to an award of compensatory and punitive damages and attorney's fees. A complaint must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory. *In re DeLorean Motor Co.*, 991 F.2d at 1240 (quoting *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988)(quoting *Car Carriers, Inc v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). Assuming the factual averments are true, Defendant identifies no viable legal theory, state or federal, common law or statutory or constitutional, for any cause of action in tort for bad faith denial of a claim in a specialized statutory liquidation proceeding. *Cf.* 15 U.S.C. § 78kkk(c).

To the extent that Plaintiff's actions in litigation might be sanctionable under Federal Rule of Bankruptcy Procedure 9011 or under the inherent powers of the court, *see First Bank of Marietta*, 307 F.3d at 510-19, and that counsel's actions might also be sanctionable under 28 U.S.C. § 1927, the proper procedure for seeking such sanctions is by motion. *Wielgos v. Commonwealth Edison Co.*, 688 F. Supp. 331, 345 (N.D. Ill. 1988), *aff'd on other grounds* 892 F.2d 509 (7th Cir. 1989). Nor would the range of sanctions available include punitive damages in any event.

The court presumes that Defendant is extrapolating from Ohio state law under which there is a cause of action in tort against an insurer for a breach of the duty of good faith in paying a claim of its insured. *See Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 275-76 (1983). As that cause of action flows specifically from the relationship of an insurer and its insured under Ohio law, *id.*, there is no identified legal basis upon which that cause of action can be extended to apply to the actions of a liquidating trustee appointed by a federal court under a federal statute. Such an analogy breaks down further because, despite loose language in some court opinions, *e.g. Touche Ross & Co. v. Redington*, 442 U.S. 560, 574 (1979); *Ahammed v. Secs.*

Investor Prot. Corp. (In re Primeline Secs. Corp.), 295 F.3d 1100, 1103 (10th Cir. 2002), SIPC is not an insurer collecting premiums and issuing insurance policies, *Sec. & Exchange Comm'n v. Albert & Maguire Securities Co.*, 560 F.2d 569, 572, n.2 (3d Cir. 1977); *Sec. Investor Prot. Corp., v. Assoc. Underwriters, Inc.*, 423 F. Supp. 168, 171 (D. Utah 1975); *Miller v. DeQuine Revocable Trust (In re Stratton Oakmont, Inc.)*, Case No. 01-CV-2812 (RCC), 2003 U.S. Dist. LEXIS 20459, *14, 2003 WL 22698876, *5 (S.D.N.Y. Nov. 14, 2003).

Defendant's second counterclaim also fails to state a claim upon which relief can be granted and will be dismissed. *See* Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012(b).

C. Immunity

The Trustee asserts that he is entitled to some form of derived judicial immunity against the counterclaims even if they are cognizable. The application of immunity to bankruptcy trustees is a confused and confusing area of law, *In re Heinsohn*, 231 B.R. at 64, often intertwined with equally confused and confusing application of general principles of trustee liability, *see* Daniel B. Bogart, *Finding the Still Small Voice: The Liability of Bankruptcy Trustees and the Work of the National Bankruptcy Review Commission*, 102 Dick. L. Rev. 703, 717-23 (1998). That confusion seems to be present here.

The trustee in a case under Title 11 is the representative of the estate and, as the representative of the estate, has the capacity to sue or be sued. 11 U.S.C. § 323. As such, he acts in his "official capacity." *Schechter v. Ill. Dept. of Revenue (In re Markos Gurnee P'ship)*, 182 B.R. 211, 215-16 (Bankr. N.D. Ill. 1995). When he brings suits in his official capacity, he does so only on behalf of the estate he is charged with administering. When a trustee is sued as the representative of the estate, he is liable only "in an official capacity," so that any judgment is payable only out of estate assets and not out of the trustee's personal assets as it would be if he had personal liability. *Robinson v. Mich. Consol. Gas Co.,* 918 F.2d 579, 584 (6th Cir. 1990); *In re Markos Gurnee P'ship*, 182 B.R. at 215.

In this adversary proceeding, the Trustee brings the claims in the Second Amended Complaint only in his official capacity as the representative of the Debtors' estate. Zaremba is not personally asserting any claims against Defendant upon which he seeks to recover for his own benefit. Counterclaims are asserted only against an opposing party. Fed. R. Civ. P. 13(a), (b); Fed. R. Bankr. P. 7013. It necessarily follows that any counterclaims asserted by Defendant must likewise be against the estate and the Trustee in his official capacity as the representative of the estate, not against the Trustee personally seeking to establish his individual liability for damages to Defendant. Zaremba is not a party to this adversary proceeding other

than as the representative of the Debtors' estate and cannot be countersued in this adversary proceeding other than in his official capacity as the representative of the estate. At oral argument, Defendant's counsel thus confirmed that the counterclaims are asserted against Zaremba only in his official capacity as representative of the estate and that damages are sought only from the estate, not from Zaremba's personal assets on the basis of individual liability.

There are circumstances in which trustees have personal liability from their individual assets for acts or omissions occurring during service as trustee, *e.g., Mosser v. Darrow*, 341 U.S. 267 (1951), although the contours of those circumstances are subject to contradictory and unclear case law, *see In re Markos Gurnee P'ship*, 182 B.R. at 219; *In re Heinsohn,* 231 B.R. at 65, n.10. Immunity protects trustees against personal liability for certain of their actions or omissions. *In re Continental Coin Corp.*, 380 B.R. at 4. So although the Trustee argues that he has quasi-judicial immunity for his actions and, therefore, has no personal liability with respect to any allegations in Defendant's counterclaims, immunity is not an issue here because personal liability cannot be and is not being asserted by Defendant in the first instance.

That immunity is not relevant because the personal liability of the trustee is not at issue does not prevent dismissal of the counterclaims even if they are otherwise cognizable. As the counterclaims are against the Trustee in his official capacity, they are claims against Debtors' estate. *Robinson,* 918 F.2d at 584; *In re Elac Food Corp.*, 226 B.R. 320, 323(D.P.R. 1998); *see In re Markos Gurnee P'ship*, 182 B.R. at 215 (citing *Barton*, 104 U.S. at 129). The estate, however, is not liable for an ultra vires action. *In re Markos Gurnee P'ship*, 182 B.R. at 218, 224; *cf. Ford Motor Credit Co. v. Weaver*, 680 F.2d 451, 461-62 (6th Cir. 1982) (explaining that a bankruptcy trustee can be found liable in his official capacity "only if he was negligent and personally liable only if he willfully and deliberately violated his fiduciary duties"). As one court explained, "trustees act on behalf of the estate, and obligate only the estate, insofar as they are carrying out the duties required of their office. When they take action not within the scope of those duties, they are acting on their own." *In re Markos Gurnee P'ship*, 182 B.R. at 217; *In re Walton*, 158 B.R. 943, 947 (Bankr. N.D. Ohio 1993) ("The trustee in bankruptcy bears personal liability for acts willfully and deliberately in violation of his fiduciary duties."); *Reich v. Burke (In re Reich)*, 54 B.R. 995, 1002 (Bankr. E.D. Mich 1985) (same).

In this case, Defendant's counterclaims are based on the Trustee's alleged intentional misconduct in the improper use of legal process and bad faith. If true, these are ultra vires acts. And because the counterclaims are brought against the Trustee in his official capacity, even if the allegations are true,

Debtors' estate cannot be held liable for any intentional wrongful conduct alleged by Defendant. *See Weaver*, 680 F.2d at 462. As such, Defendant has failed to state a claim upon which relief can be granted against the Trustee in his official capacity, and the Trustee's motion to dismiss will be granted. *See* Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012(b).

II. Motion to Strike Jury Demand

The Trustee argues that the District Court's order granting his motion to strike jury demand constitutes the law of the case and, therefore, that the jury demand in Defendant's answer to the Trustee's Second Amended Complaint should be stricken.[2] However, in this case, after Defendant's jury demand was stricken by Chief Judge Carr in District Court, the Trustee filed a Second Amended Complaint. In addition to the claims alleged in the Amended Complaint, the Trustee alleges two fraud claims and several additional fraudulent conveyance claims. He also seeks a determination that the claim submitted by Defendant should not be allowed as a customer claim or as a general unsecured claim.

In granting the motion to strike jury demand filed in District Court, Chief Judge Carr found the following rationale set forth in *Langenkamp v. Culp*, 498 U.S. 42 (1990), equally applicable in a SIPA proceeding:

> [B]y filing a claim against a bankruptcy estate the creditor triggers the process of "allowance and disallowance of claims," thereby subjecting himself to the bankruptcy court's equitable power. If the creditor is met, in turn, with a preference action from the trustee, that action becomes part of the claims-allowance process which is triable only in equity. In other words, the creditor's claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's equity jurisdiction. As such, there is no Seventh Amendment right to a jury trial. If a party does not submit a claim against the bankruptcy estate, however, the trustee can recover allegedly preferential transfers only by filing what amounts to a legal action to recover a monetary transfer. In those circumstances the preference defendant is entitled to a jury trial.

Langenkamp, 498 U.S. at 44-45. Noting that Defendant has filed a claim with the Trustee in the liquidation proceeding, and citing *In re Glen Eagle Square, Inc.*, 132 B.R. 106 (E.D. Pa. 1991), Chief Judge Carr further found that he has waived his right to a jury trial for all claims that might arise in the case. He rejected Defendant's argument that he retained the right to a jury trial due to the Trustee's allegation of the Ohio

[2] Although Defendant suggests that the law-of-the-case doctrine is applicable only to final judgments, the Sixth Circuit has expressly held otherwise. *See Patterson v. Haskins*, 470 F.3d 645, 661 (6th Cir. 2006) (explaining that the "law-of-the-case rules . . .do not involve preclusion by final judgment, instead, they regulate judicial affairs *before final judgment*").

Securities Act claim, which is unrelated to the administration of the Debtors' estate, since the claim was ancillary to a proceeding that, as a whole, is an equitable, core proceeding. Accordingly, Chief Judge Carr granted the Trustee's motion to strike the jury demand and remanded the case to this court. [*See* Doc. # 44].

This court does not find the Trustee's inclusion of the additional claims alleged in the Second Amended Complaint to change the analysis set forth in Chief Judge Carr's order. The court will grant the Trustee's motion to strike Defendant's jury demand.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that the Trustee's motion to dismiss Defendant's counterclaims and to strike Defendant's jury demand [Doc. # 61] be, and hereby is, **GRANTED**.