IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 7
	)	
DIGITAL NETWORKS NORTH AMERICA, INC.,	)	Case No. 15-11535 (KBO)
	)	
Debtor.	)	
	)	
GEORGE L. MILLER, solely in his capacity as the Chapter 7 Trustee of Digital Networks North America, Inc.,	)	
	)	
Plaintiff,	)	Adv. Proc. No. 17-50900 (KBO)
	)	
v.	)	
	)	
D&M HOLDINGS US INC.,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT D&M HOLDINGS US INC.'S MOTION FOR SUMMARY JUDGMENT

Before the Court is the motion for summary judgment (the "Motion")[1] filed by D&M Holdings US Inc. (the "Defendant") in the above-captioned adversary proceeding commenced by George L. Miller (the "Trustee"), solely in his capacity as the chapter 7 trustee for the estate of Digital Networks North America, Inc. (the "Debtor"). In support, the Defendant submits the declaration of Corey Weissman, director of financial planning and analysis of Sound United, LLC, the successor of the Defendant.[2] In support of his opposition, the Trustee submits the declaration of Matthew Tomlin, a certified public accountant and partner with the accounting firm employed by the Trustee.[3] The Motion has been fully briefed[4] and argued and is ripe for adjudication. For the reasons set forth herein, the Court grants and denies in part the Motion.

[1] Adv. D.I. 69.

[2] Adv. D.I. 71 (the "Weissman Decl." or the "Weissman Declaration").

[3] Adv. D.I. 83 (the "Tomlin Decl." or the "Tomlin Declaration").

[4] Adv. D.I. 70, 82, 86.

I. JURISDICTION

The Court has subject matter jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(a) and 1334(b). Venue is proper pursuant to 28 U.S.C. § 1409(a).

II. SUMMARY OF RELEVANT PROCEDURAL AND FACTUAL BACKGROUND

On July 20, 2015 (the "Petition Date"), the Debtor filed in this Court a voluntary petition for relief under chapter 7 of title 11 of the United States Code (the "Bankruptcy Code"). Subsequently, the Office of the United States Trustee appointed the Trustee as chapter 7 trustee for the Debtor's estate. On July 19, 2017, the Trustee commenced this adversary proceeding by filing a complaint (the "Complaint")[5] against the Defendant, the Debtor's parent corporation.[6]

As filed, the Trustee's Complaint includes six claims for relief. Count One seeks avoidance of certain transfers totaling $92,213.45 (the "SOFA Transfers") as preferential pursuant to section 547(b).[7] These transfers were disclosed by the Debtor in answer to question 3(c) of the Statement of Financial Affairs.[8] Count Two seeks the avoidance pursuant to section 547 of one or more transfers totaling $524,524.00 (the "Expense Transfer(s)") allegedly made to or for the benefit of the Defendant on account of the Debtor's share of its federal corporate tax expense. Count 3 seeks recovery of the SOFA Transfers and the Expense Transfer(s) pursuant to section 550. Counts Four, Five, and Six relate to an intercompany receivable in the amount of $271,103.00 (the "Receivable") allegedly owed from the Defendant to the Debtor. Counts Four and Five seek turnover of the Receivable pursuant to section 542(a) and 542(b), respectively. Count Six seeks a declaratory judgment that the Receivable is property of the Debtor's estate and is not subject to offset pursuant to section 553.

On August 13, 2018, the Court dismissed Count One except as it pertains to transfers aggregating $15,316.14 (the "Payroll Transfers").[9] It also dismissed Count Three except as it pertains to the Payroll Transfers and the Expense Transfer.[10] Finally, it dismissed Count Six.[11] Defendant now moves pursuant to Rule 56 of the Federal Rules of Civil Procedure (the "Federal Rules") for entry of an order granting summary judgment in its favor on all remaining counts.

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[5] Adv. D.I. 1.

[6] Compl. ¶ 18; Weissman Decl. ¶ 5.

[7] Unless otherwise indicated, all statutory references herein refer to the Bankruptcy Code.

[8] Adv. D.I. 4.

[9] Adv. D.I. 39 & 40.

[10] *Id.*

[11] *Id.*

III. LEGAL STANDARD

Federal Rule 56, made applicable to this proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides that a court may grant summary judgment in whole or in part of a claim or defense "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[12] Summary judgment serves to "isolate and dispose of factually unsupported claims or defenses" and avoid an unnecessary trial where the facts are settled.[13] Thus, at the summary judgment stage, the court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a *genuine* dispute of *material* fact.[14] Therefore, "*some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment;"[15] a material fact is one which "might affect the outcome of the suit under governing law"[16] and it "is genuine when . . . reasonable minds could disagree on the result."[17]

A party moving for summary judgment bears the initial burden of informing the court of the basis for its motion and identifying the particular parts of materials in the record "which it believes demonstrate the absence of a genuine issue of material fact."[18] Federal Rule 56(c)(1) provides that the cited record may include "depositions, documents, electronically stored information, affidavits or declarations, stipulations . . ., admissions, [and] interrogatory answers."[19] The burden then shifts to the nonmoving party to identify specific facts that show the presence of a genuine dispute for trial.[20] The nonmoving party must offer more than conclusory allegations and denials[21] and "do more than simply show that there is some metaphysical doubt as to the material facts."[22] When reviewing the facts, the court should view them and all permissible

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[12] FED. R. CIV. P. 56(a).

[13] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *see also Delta Mills, Inc. v. GMAC Com. Fin. LLC (In re Delta Mills, Inc.*), 404 B.R. 95, 104 (Bankr. D. Del. 2009) ("Summary judgment is designed 'to avoid trial or extensive discovery if facts are settled and dispute turns on issue of law.'" (quoting 11-56 MOORE'S FEDERAL PRACTICE § 56.02 (Matthew Bender 3d ed.)).

[14] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

[15] *Id.* at 247-48.

[16] *Id.* at 248.

[17] *Argus Mgmt. Group v. GAB Robins, Inc. (In re CVEO Corp.)*, 327 B.R. 210, 214 (Bankr. D. Del. 2005); *see also Anderson*, 477 U.S. at 248 ("summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

[18] *Celotex*, 477 U.S. at 324; *see also* Fed. R. Civ. P. 56(c)(1).

[19] FED. R. CIV. P. 56(c)(1).

[20] *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

[21] *Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990).

[22] *Matsushita*, 475 U.S. at 586; *accord Anderson*, 477 U.S. at 249.

inferences therefrom in the light most favorable to the non-moving party,[23] and any doubt must be construed in such party's favor.[24]

Ultimately, summary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the non-moving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and the moving party is entitled to judgment as a matter of law.

IV. DISCUSSION

A. Counts One and Three: Avoidance and Recovery of the Payroll Transfers

In Counts One and Three, the Trustee seeks the avoidance and recovery of the Payroll Transfers pursuant to sections 547(b) and 550. The Payroll Transfers are three transfers, each in the amount of $5,105.38, aggregating $15,316.14.[25] They were made on April 27, 2015, May 26, 2015, and June 23, 2015, respectively.[26] In support of its request for summary judgment in its favor on these counts, the Defendant argues and puts forth evidence that the Payroll Transfers are immune from avoidance either completely under the "ordinary course of business" exception of section 547(c)(2) or partially under the "subsequent new value" exception of section 547(c)(4).[27] The Trustee, in briefing and during argument on the motion, conceded that the defenses apply to shield the Payroll Transfers from avoidance.[28] Accordingly, the Court will enter summary judgment in favor of the Defendant on Counts One and Three as they pertain to the Payroll Transfers.

B. Counts Two and Three: Avoidance and Recovery of the Expense Transfer(s)

In Counts Two and Three, the Trustee seeks the avoidance and recovery of the Expense Transfer(s) in the amount of $524,524. Pursuant to section 547(b), a trustee may avoid a transfer of an interest of the debtor in property if the transfer was:

> (1) to or for the benefit of a creditor;
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> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;

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[23] *Matsushita*, 475 U.S. at 587-88.

[24] *Delta Mills*, 404 B.R. at 105

[25] Case No. 15-11535, D.I. 4 (Question 3(c)); Weissman Decl. ¶ 13.

[26] *Id.*

[27] Defendant contends that $10,210.76 of the Payroll Transfers is protected by the subsequent new value defense.

[28] *See* Adv. D.I. 82 at 12; Oct. 25, 2021 Hr'g Tr. 18:14-15, 21:20-22; 29:25-30:13.

(4) made –

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if –

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.[29]

The Defendant has moved for summary judgment on Counts Two and Three, arguing that there are no facts to suggest that the Expense Transfer(s) was made. The Trustee disagrees and bears the burden of proof on this issue.[30] In the context of a motion for summary judgment, this burden does not change.[31] Thus, to avoid summary judgment, the Trustee must provide evidence sufficient that a reasonable jury could find that the Expenses Transfer(s) was made.[32]

The sole evidence offered by the Trustee that the Debtor made the Expense Transfer(s) is the Debtor's pro forma federal income tax return for the tax year April 1, 2015 through March 31, 2016 (the "Pro Forma Tax Return") attached to the Tomlin Declaration.[33] Mr. Tomlin states that the Pro Forma Tax Return was prepared and produced by the Defendant's independent certified public accountants.[34] Section 3(b) of Form 8916-A of the Pro Forma Tax Return indicates an "intercompany interest expense" of $524,524 "***[p]aid*** to a tax affiliated group[.]"[35] Accordingly,

[29] 11 U.S.C. § 547(b).

[30] *Id.* § 547(g); *see, e.g.*, *Pirinate Consulting Grp., LLC v. Kadant Sols. Div. (In re NewPage Corp.)*, 569 B.R. 593, 599 (D. Del. 2017).

[31] *See, e.g.*, *Radnor Holdings Corp. v. PPT Consulting, LLC (In re Radnor Holdings Corp.)*, No. 08-51184, 2009 WL 2004226, at *4 (Bankr. D. Del. 2009).

[32] *Celotex*, 477 U.S. at 324; *see also Anderson*, 477 U.S. at 254 ("[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden.").

[33] Mr. Tomlin attests that the Pro Forma Tax Return attached to his declaration is a true and correct copy. Tomlin Decl. ¶ 3.

[34] *Id.*

[35] *Id.*, Ex. A at 26 (Form 8916-A, Supplemental Attachment to Schedule M-3, Part III.3b) (emphasis added).

on its face, the Pro Forma Tax Return indicates that the Debtor did, in fact, make the Expense Transfer(s). The Defendant argues that the Pro Forma Tax Return, however, is not reliable because Mr. Tomlin did not prepare the contents of the return and there is no evidence that the information therein was filed with the Internal Revenue Service. Both arguments are unpersuasive.

As an out-of-court statement offered to prove the truth of the facts described therein, the Pro Forma Tax Return is hearsay under Rule 801 of the Federal Rules of Evidence. Nonetheless, it is well-settled in this circuit that "hearsay statements can be considered on a motion for summary judgment if they are *capable of being admissible at trial*."[36] Thus, in deciding whether to consider hearsay statements on a motion for summary judgment, "the court need only determine if the nonmoving party can produce admissible evidence regarding a disputed issue of material fact at trial."[37] Even hearsay within hearsay can be considered in ruling on a motion for summary judgment, provided that both layers of hearsay are admissible at trial.[38]

The Trustee has argued that he is entitled and intends to call the preparer of the Pro Forma Tax Return to testify at any future trial, and nothing suggests that the witness will be unavailable. Accordingly, the Court will not exclude from its consideration on the Motion the Pro Forma Tax Return.[39] Moreover, although the Trustee has not yet provided relevant facts surrounding the genesis, purpose, preparation, accuracy, and use of the Pro Forma Tax Return and the Expense Transfer(s) disclosure, he will have the opportunity to do so at trial through witness testimony, documents, and the like, and the Defendant may test the sufficiency of such evidence (including whether the Expense Transfer(s) was included in a filed tax return).

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[36] *Fraternal Order of Police, Lodge 1 v. City of Camden*, 842 F.3d 231, 238 (3d Cir. 2016) (emphasis in original) (quoting *Stelwagon Mfg. Co. v. Tarmac Roofing Sys*., 63 F.3d 1267, 1275 n.17 (3d Cir. 1995)); *see also Celotex*, 477 U.S. at 324 ("We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment.").

[37] *Fraternal Order*, 842 F.3d at 238.

[38] *See Smith v. City of Allentown*, 589 F.3d 684, 693 (3d Cir. 2009) (providing that where a statement offered at summary judgment contains two lawyers of hearsay, the proponent "must demonstrate that both layers of hearsay would be admissible at trial."); FED. R. EVID. 805 ("Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.").

[39] *See, e.g., Fraternal Order*, 842 F.3d at 239 (reversing district court's exclusion of hearsay in considering a motion for summary judgment because plaintiffs identified third-party declarants and nothing suggested that those declarants would be unavailable to testify at trial); *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 223 n.2 (3d Cir. 2000) (finding that the district court did not err in considering a letter from a third party at the summary judgment stage because it was capable of admission at trial); *Williams v. Borough of West Chester, Pa.*, 891 F.2d 458, 465 n.12 (3d Cir. 1989) ("[H]earsay evidence produced in an affidavit opposing summary judgment may be considered if the out-of-court declarant could later present that evidence through direct testimony, i.e., in a form that would be admissible at trial." (internal quotations omitted)); *Chambers v. York Cty. Prison*, No. 18-2386, 2021 WL 1212532, *1 n.2 (M.D. Pa. Mar. 31, 2021) (considering a hearsay statement on a motion for summary judgment because plaintiffs pointed to multiple people who directly heard the statement and could testify to it at trial); *Tristar Prods., Inc. v. Ocean State Jobbers, Inc.*, No. 17-1767, 2021 WL 2981041, *7 (D.N.J. July 15, 2021) (considering hearsay evidence because such evidence could be presented in an admissible form at trial by calling the relevant witness to testify).

In an attempt to further diminish the reliability of the Pro Forma Tax Return, Mr. Weissman explains in his declaration that the Debtor maintained only five bank accounts for the year prior to the Petition Date, *i.e.* July 20, 2014 to July 19, 2015 (the "Preference Period").[40] Attached to the Weissman Declaration are the monthly statements for each account during the Preference Period. The accounts match those in existence on the Petition Date as disclosed in Schedule B of the Debtor's Schedules of Assets and Liabilities.[41] Relying on the statements, the Defendant argues that the Debtor did not make a single payment of $524,524 during the Preference Period. A review of the statements proves this argument correct. Nonetheless, they detail a variety of transfers that may aggregate to represent the Expense Transfer(s); and the Defendant has cited no other particular parts of materials in the record to establish the contrary. Accordingly, the account statements do not serve to make the Pro Forma Tax Return less persuasive or obviate the existence of a genuine issue of material fact established thereby.

Finally, in its reply briefing, the Defendant contends that it was never paid the Expense Transfer(s) by the Debtor during the Preference Period. This expanded argument tardily introduces two new issues that the Court need not consider because the Trustee did not have the opportunity to respond properly to them. Notwithstanding, the Pro Forma Tax Return is sufficient to create a genuine issue of material fact on both of them. More specifically, the reporting timeframe of the Pro Forma Tax Return partially overlaps with the Preference Period, thereby providing support for the Trustee's allegation that the Expense Transfer(s) was made during the Preference Period. Moreover, given the Defendant's status as the Debtor's parent, it is reasonable to infer that it is part of the tax affiliated group detailed on the Pro Forma Tax Return as the recipient of the Expense Transfer(s). Even if that proves incorrect, however, the Defendant has not argued that the record is devoid of any facts to support the Trustee's alternative argument that the Expense Transfer(s) was made for the benefit of the Defendant. Accordingly, viewing the foregoing facts and inferences drawn therefrom in a light most favorable to the Trustee, the Court finds that numerous genuine issues of material fact exist with respect to Counts Two and Three and therefore will deny summary judgment in favor of the Defendant on them.[42]

C. Counts Four and Five: Turnover of the Receivable

In Counts Four and Five, the Trustee seeks turnover pursuant to section 542 of the Receivable allegedly owed to the Debtor by the Defendant. The Defendant does not dispute the amount of the Receivable.[43] Rather, the Defendant argues that summary judgment in its favor is appropriate because the Trustee's claim to recover the Receivable is time-barred by applicable state law and because the Defendant has a complete setoff defense.

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[40] Weissman Decl. ¶ 6. The parties do not dispute that the Defendant, as the Debtor's parent corporation, is an "insider" within the meaning of section 101(31). Therefore, the applicable preference period is the one-year prior to the Petition Date.

[41] Case No. 15-11535, D.I. 2 (Sch. B, Question 2).

[42] The Defendant notes in its briefing that the Trustee may be unable to establish that the Debtor was insolvent at the time the Expense Transfer(s) was made. This issue was not presented to the Court by the Motion and is preserved for trial.

[43] Weissman Decl. ¶¶ 8-9.

1. The Statute of Limitations Defense

The parties agree that the Trustee may not pursue turnover of the Receivable if the claim underlying the turnover request is time-barred.[44] Defendant argues that the Receivable results from the Defendant's breach of contract and that Delaware law applies to the claim. Under Delaware law, a claim arising from a breach of contract must be brought within three years of the breach.[45] Defendant asserts that the underlying claim to recover the Receivable arose no later than March 2011 and thus, was time-barred prepetition in March 2014.

These allegations may prove to be true following a trial, but the Defendant has provided the Court with no evidence that supports them. For instance, as the Trustee highlights, there is nothing in the record provided to the Court showing that the Receivable springs from a contract, the nature and terms of the contract (including performance and repayment terms), and the date of the alleged breach.[46] In Delaware, statute of limitations is an affirmative defense on which the Defendant bears the burden of proof.[47] Defendant has failed to establish any facts that would give rise to its application. Accordingly, it has failed to carry its burden that summary judgment in its favor on Counts Four and Five is appropriate.

2. The Right to Setoff

For similar reasons, the Defendant's argument that it has a complete setoff defense fails. Setoff "allows entities that owe each other money to apply their mutual debts against each other,

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[44] *See, e.g.*, *Miller v. Jannetta (In re Irwin)*, 509 B.R. 808 (Bankr. E.D. Pa. 2014) (finding a turnover claim barred by the state statute of limitations applicable to breach of contract claims); *see also Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 356 (3d Cir. 2001) ("[I]f the debtor has a claim that is barred at the time of the commencement of the case by the statute of limitations, then the trustee would not be able to pursue that claim, because he too would be barred. He could take no greater rights than the debtor himself had." (quoting S. REP. NO. 95-989, at 82 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5868)).

[45] *See, e.g.*, *Donald M. Durkin Contracting, Inc. v. City of Newark*, No. 19C-09-206, 2020 WL 2991778, at *7 (Del. Super. Ct. June 4, 2020) ("In Delaware, the law is clear that settlement agreements are contracts. As such, 10 Del. C. § 8106 controls the statute of limitations of contracts. Under § 8106, the statute of limitations for breach of contract is three years from the date that the cause of action accrued. Furthermore, this Court has consistently held that the statute of limitations accrues at the time the contract is broken, not at the time when actual damage results or is ascertained." (internal quotations omitted)).

[46] The Weissman Declaration includes an intercompany ledger detailing six entries from 2011 representing amounts owed by the Defendant to the Debtor. Weissman Decl. ¶ 8. One or more of those apparently represents the Receivable. *Id.* The explanations provided for the entries are "CTO BS Accounts tr", "Asset Transfer", "IC Balance Settlem", and "FY10 Audit Adjustm". *Id.* This information alone is insufficient to allow the Court to ascertain the entry or entries representing the Receivable or any other relevant information regarding the entries.

[47] *See, e.g.*, *Winner Acceptance Corp. v. Return on Cap. Corp.*, No. 3088-VCP, 2008 WL 5352063, at *14 (Del. Ch. Dec. 23, 2008). Even if New Jersey law applies as the Trustee contends, the Defendant would still bear the burden of establishing the defense. *See, e.g.*, *Passaic Valley Water Comm'n v. Prismatic Dev. Corp.*, No. A-5125-11T3, 2013 WL 5508055, at *6 (N.J. Super. Ct. App. Div. Oct. 7, 2013).

thereby avoiding 'the absurdity of making A pay B when B owes A.'"[48] Section 553, which governs setoff in bankruptcy, does not create a right of setoff but rather "'preserves for the creditor's benefit any setoff right that it may have under applicable nonbankruptcy law,' and 'imposes additional restrictions on a creditor seeking setoff' that must be met to impose a setoff against a debtor in bankruptcy."[49] "Thus, setoff is appropriate in bankruptcy only when a creditor both enjoys an independent right of setoff under applicable non-bankruptcy law, and meets the further Code-imposed requirements and limitations set forth in section 553."[50] The party asserting a right to setoff has the burden of proof.[51]

In support of its right to set off the entirety of the Receivable, Defendant contends that the Debtor owes it approximately $108 million and points to Debtor's Schedule F for support. Schedule F lists the Defendant with a non-contingent, liquidated, and undisputed unsecured claim in the amount of $108,324,790.64.[52] The Trustee argues that a genuine triable issue of material fact exists because, among other things, the Weissman Declaration contradicts the Defendant's scheduled claim. Specifically, Mr. Weissman provides a screenshot of the Defendant's intercompany account ledger it kept for the Debtor.[53] This ledger covers the time period from April 1, 2010 to July 31, 2015 and does not reflect that the Debtor owes the Defendant $108

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[48] *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 18 (1995) (quoting *Studley v. Boylston Nat. Bank*, 229 U.S. 523, 528 (1913)).

[49] *In re SemCrude, L.P.*, 399 B.R. 388, 393 (Bankr. D. Del. 2009) (quoting *In re Sentinel Prod. Corp. Inc.*, 192 B.R. 41, 45 (N.D.N.Y. 1996)).

[50] *Id.* at 393; *see also In re Tarbuck*, 318 B.R. 78, 81 (Bankr. W.D. Pa. 2004) ("The threshold question in every case involving an asserted right of setoff is the source and validity of the underlying right."); *Brunswick Bank & Trust Co. v. Atanasov (In re Atanasov)*, 221 B.R. 113, 117 (D.N.J. 1998) (holding that courts must look to state law to determine whether a right to setoff exists, but that "the granting or denial of a right to setoff depends upon the terms of section 553, and not upon the terms of state statutes or laws.").

[51] *See, e.g.*, *In re Garden Ridge Corp.*, 338 B.R. 627, 632 (Bankr. D. Del. 2006).

[52] Case No. 15-11535, D.I. 2 (Schedule F). Courts have held that information contained in a debtor's schedules may be a considered an admission of the debtor and have evidentiary value. *See, e.g., In re Dispirito*, 371 B.R. 695, 698 (Bankr. D.N.J. 2007) ("It is generally accepted that information contained in a debtor's bankruptcy schedules may be considered as an admission."); *In re Garberg*, No. 05-19589, 2006 WL 1997415, at *6 (Bankr. E.D. Pa. 2006) (information contained in one's bankruptcy schedules may be considered as an admission and thus accorded probative weight); *In re Arcella-Coffman*, 318 B.R. 463, 475 (Bankr. N.D. Ind. 2004) (recognizing that statements in schedules constitute admissions under Rule 801(d)(2) of the Federal Rules of Evidence and are directly admissible); *In re Bohrer*, 266 B.R. 200, 201 (Bankr. N.D. Ca. 2001) ("Statements in bankruptcy schedules are executed under penalty of perjury and when offered against a debtor are eligible for treatment as judicial admissions."); *In re Wolcott*, 194 B.R. 477, 483 (Bankr. D. Mont. 1996) (holding that the court may consider a debtor's petition, schedules, and statement of affairs in the main chapter 7 case as evidentiary admissions made by the debtor when offered by a party opponent in an adversary proceeding). The weight the Court will ultimately give the Debtor's disclosures on Schedule F will be decided after trial. *Anderson,* 477 U.S. at 249, 255 ("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions . . . .").

[53] Weissman Decl. ¶ 8.

million.[54] Given that all reasonable inferences must be drawn in favor of the Trustee, the conflict between the Debtor's Schedule and the Defendant's ledger is sufficient to create a genuine issue as to whether the Defendant has a claim against the Debtor eligible for setoff.[55] Accordingly, the Court will deny the Defendant's request for summary judgment in its favor on Counts Four and Five.

V. CONCLUSION

For the foregoing reasons, the Court hereby grants in part and denies in part the relief requested in the Motion as set forth below.

1. Summary judgment in favor of the Defendant is granted on Counts One and Three with respect to the Payroll Transfers.

2. Summary judgment in favor of the Defendant is denied on Counts Two and Three with respect to the Expense Transfer(s).

3. Summary judgment in favor of the Defendant is denied on Counts Four and Five with respect to the Receivable.

Date: November 8, 2021

Karen B. Owens
United States Bankruptcy Judge

[54] *Id.*

[55] During argument, Defendant's counsel advised the Court that it produced to the Trustee documents supporting the Defendant's $108 million claim and right to setoff. Curiously, however, the Defendant has not provided those documents to the Court in connection with the Motion. Moreover, the Weissman Declaration lacks any support for or explanation of the Defendant's alleged $108 million claim.