Dated: August 17, 2017
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re EARL BENARD BLASINGAME and MARGARET GOOCH BLASINGAME, Debtors.	Case No. 08-28289-L Chapter 7
Church Joint Venture, a Limited Partnership, on behalf of Edward L. Montedonico, Chapter 7 Trustee of the Bankruptcy Estate of Earl Benard Blasingame and Margaret Gooch Blasingame, Plaintiff, v.	Adv. Proc. No. 17-00048
Earl Benard Blasingame, Margaret Gooch Blasingame, and The Blasingame Family Residence Generation Skipping Trust, Defendants.	

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

BEFORE THE COURT is the motion of Defendants to dismiss the complaint pursuant to Federal Rule of Bankruptcy Procedure 7012(b)(1) for lack of subject matter jurisdiction. The

Defendants assert that the Trustee sold his claim that the assets of the defendant trust are assets of the bankruptcy estate to Church Joint Venture, L.P. ("Church JV"), pursuant to a consent order entered October 19, 2011, in the related bankruptcy case of Defendants Earl Benard Blasingame and Margaret Gooch Blasingame. The Defendants assert that, as a result of this sale, the estate no longer has any interest in those assets, and Church JV may not pursue the pending action derivatively for the benefit of the bankruptcy estate. In response, the Plaintiff acknowledges the sale of certain causes of action by the Trustee, but claims that the causes of action that it asserts in the present action were not sold and remain property of the bankruptcy estate. In this adversary proceeding, the Plaintiff seeks a declaration that the Blasingame Family Residence Generation Skipping Trust (the "BRT") is a self-settled trust and/or that the Debtors' Residence[1] was never effectively transferred to the BRT, and thus that the residence is property of the bankruptcy estate pursuant to section 541(a) of the Bankruptcy Code. Original Complaint, Adv. Proc. 17-00048, Dkt. No. 1. The Plaintiff also seeks a turnover of the property or the value of property held by the BRT to the trustee in bankruptcy. For the reasons set forth below, the motion to dismiss will be granted in part and denied in part.

FACTS

This dispute relates to the voluntary Chapter 7 bankruptcy petition filed jointly by the Blasingames on August 15, 2008. Edward L. Montedonico was appointed trustee on August 15, 2008, and, following the meeting of creditors and extended examinations of the Debtors and related parties, joined Church JV in filing a "Complaint to Recover Property of the Bankruptcy Estate for Declaratory and Injunctive Relief, to Object to and Avoid Discharge, and to Object to

[1] Debtors' residence at 337 South Maple Street, Adamsville, Tennessee 38310, and surrounding 27 acres.

Claimed Exemptions," on September 29, 2009, Adv. Proc. 09-00482 (the "2009 Complaint"). The First Cause of Action in the 2009 Complaint sought declaratory relief using the following language:

> 51. The Plaintiffs assert that the three (3) Trusts and five (5) Corporations have been used for an improper purpose and are but the alter egos of the Debtors, shams to thwart, deceive and conceal assets from the claims of creditors and have been so misused and repeatedly commingled that the assets of same should be considered the assets of Debtors and made available to satisfy the claims of Debtors' creditors. The three (3) Trusts and the five (5) Corporations are, in fact, alter egos and instrumentalities of the Debtors who have and exert unrestricted control and access and engage in a consistent pattern of transfer between and commingling of each entity's assets *in a manner such that their assets are the commingled assets of the Debtors and property of the estate*.
>
> 52. The three (3) Trusts and five (5) Corporations are, separately or collectively, the alter egos and/or reverse alter egos of Debtors and serve only as the instrumentality and as agents of the Debtors *such that their assets should be considered the assets of Debtors and made available to satisfy the claims of Debtors' creditors.*
>
> 53. Plaintiffs seek a declaration from this Court that the three (3) Trusts and five (5) Corporations effectively have over the years lost their independent status as may have been originally designed and are now used exclusively to hinder, delay and defraud Debtors' creditors as *clearly indicated by the transfer of Debtors' property into the Trusts secure from creditors and rendering the Trusts self settled in whole or part*.
>
> 54. Although Plaintiffs seek a declaration from this Court that the three (3) Trusts and all five (5) Corporations are the alter egos, reverse alter egos, instrumentalities and/or agents of Debtors, these Plaintiffs acknowledge that one of the Corporations (Flozone) has some class B shareholders and that each of the other four (4) Corporations and the three (3) Trusts have certain mortgage and other indebtednesses that equitably need to be recognized and accommodated so as not to impair legitimate interests of innocent banks and third parties, as the case law directs, but Plaintiffs assert that those interests are easily accommodated and that *the Trustee's sale of the assets will produce substantial net income to the estate* without impairing the interest of innocent stakeholders. For example, Blasingame Farms, Inc. holds title to substantial acreage which is subject to mortgage indebtedness, but the value of the acreage is substantially more that the mortgage and hundreds of thousands of dollars are available to the Trustee as is the case with the residential compound and the assets of all the Trusts and Corporations.

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PREMISES CONSIDERED, Plaintiffs pray that this Honorable Court:

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3. Upon final hearing, declare that the assets of the Blasingame Family Residence Trust, the Blasingame Business Investment Trust and the Blasingame Trust, along with the assets of Flozone Services, Inc., Fiberzone Technologies, Inc., Blasingame Farms, Inc., GF Corporation and Aqua Dynamics Group Corporation *to be property of the estate and subject to the claims of creditors.*

2009 Complaint, ¶¶ 51-54, and p. 34 (emphasis added).

On September 1, 2011, the Trustee filed a Motion for Order Authorizing Sale of Estate Claims and Causes of Action (the "Sale Motion"). Bankr. Dkt. No. 331. The Trustee sought permission to sell to Church JV causes of action raised in the 2009 Complaint, including a cause of action:

> for declaratory judgment that each of the three (3) trust and five (5) corporate defendants have been used for an improper purpose and are, in fact, the alter egos or reverse alter egos of the Debtor Defendants, are shams to thwart, deceive, hinder and delay their creditors and to conceal assets from the claims of their creditors and/or have been so misused and their assets so repeatedly commingled *that the assets of each of them should be considered one and the same and made available to their creditors*.

Sale Motion, ¶ 5.b (emphasis added).

After notice, no objection was filed, and the court approved the sale by an order prepared by David Blaylock, the attorney for the Trustee, which was entered October 19, 2011 ("the Sale Order"). Bankr. Dkt. No. 356. That order provides in pertinent part:

> 2. Church Joint Venture ("Church JV") shall, upon this Order's becoming final, pay the Trustee $100,000 as consideration for the transfer, conveyance and assignment of the claims and cause of action of the Trustee which have been asserted in that certain Adversary Action No. 09-00482 ….
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> 4. A. Claims that Blasingame Family Investment Trust, Blasingame Family Residence Generation Skipping Trust, the Blasingame Trust, Flozone Services, Inc., Fiberzone Technologies, Inc., Blasingame Farms, Inc., GF Corporation, and

> Aqua Dynamics Group Corporation have all been used for an improper purpose and are, in fact, the alter egos or reverse alter egos of the Debtors, are shams to thwart, deceive, hinder and delay their creditors and to conceal assets from the claims of their creditors and/*or have been so used in their assets repeatedly co-mingled with the assets of each of them should be one of the same [sic] and made available to their creditors*.

Sale Order, ¶¶ 2, 4 (emphasis added).

Subsequent to a change in counsel for the Non-Debtor Defendants, the parties to Adversary Proceeding 09-00482 consented to the dismissal of Counts I, II, VI, VII and VIII of the 2009 Complaint for lack of subject matter jurisdiction. Adv. Proc. No. 09-00482 (Nov. 16, 2012), Dkt. No. 336. This order resulted from a motion filed on behalf of the Non-Debtor Defendants that asserted that as a result of the Sale Order, the Trustee lacked standing "to assert the alter ego/ corporate veil piercing claims against the Non-Debtor Defendants because the Chapter 7 Trustee lacked standing to assert such claims." Non-Debtor Defendants' Motion to Dismiss Counts I, II, VI, VII & VIII of Complaint for Lack of Subject Matter Jurisdiction and to Dismiss Count I of Complaint for Lack of Standing Based On Rights of Chapter 7 Trustee, Adv. Proc. No. 09-00482 (April 6, 2012), Dkt. No. 252. Count I of the complaint was the First Cause of Action described above.

Church JV, on its own behalf, then filed a complaint in the United States District Court for the Western District of Tennessee, Civil Action No. 12-cv-02999-SHM-tmp ("2012 USDC Complaint"). The First Amended Original Complaint, filed June 14, 2013, alleged as its First Cause of Action-To Set Aside and Avoid Transfers that:

> 95. The three (3) Trusts and the five (5) Corporations named in this action are, in fact, alter egos and instrumentalities of the Debtors who have and exert unrestricted control and access and engage in a consistent pattern of transfer between and commingling of each entity's assets *in a manner such that their assets are the commingling of assets of the Debtors.*

> 96. The three (3) Trusts and five (5) Corporations named in this action are, separately or collectively, the alter egos and/or reverse alter egos of Debtors and serve only as the instrumentality and as agents of the Debtors *such that their assets should be considered the assets of Debtors and made available to satisfy the claims of Debtors' creditors.*
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> 97. Accordingly, Church JV seeks a declaration from this Court that the three (3) Trusts and five (5) Corporations named in this action have effectively lost their independent status as may have been originally designed and have been and are now being used as devices and artifices exclusively to hinder, delay and defraud Church JV, a creditor of Debtors, all as clearly indicated by the transfers and transactions noted above, without limitation. 28 U.S.C. § 2201(a).
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> 98. Church JV is aware that FSI may have some class B shareholders and that each of the other four (4) Corporations and the three (3) Trusts involved in this action may have certain mortgage and other indebtedness that equitably may need to be recognized and accommodated so as not to impair legitimate interests of innocent banks and third parties, as the case law directs; however, Church JV asserts that those interests are easily accommodated and *the turnover and/or subsequent sale of the assets at issue will produce substantial net income to [sic] without impairing the interest of innocent stakeholders.*

2012 USDC Complaint, ¶¶ 95-98 (emphasis added).

The 2012 USDC Complaint is still pending, but the District Court dismissed the alter ego claims against the BRT and other defendants by order entered January 13, 2016. *Church Joint Venture v. Blasingame*, 2016 WL 3248044 (W.D. Tenn. January 13, 2016). The District Court specifically held that the Tennessee courts have not and would not recognize the doctrine of "reverse piercing" outside of parent-subsidiary contexts. 2016 WL 3248044, slip op. at *8-9. Only one claim against the BRT remains to be tried in the District Court, a claim that in January 2005, Mrs. Blasingame transferred a piece of property having a value of $10,000 to the BRT. *See Church Joint Venture v. Blasingame*, 2017 WL 943961 (W.D. Tenn. March 9, 2017). In its motion to dismiss the present adversary proceeding, the Defendants assert that the District Court found that the BRT was settled by Mavoureen Blasingame, not the Debtors, thus precluding further consideration of that issue by the bankruptcy court.

The present complaint seeks relief related to the BRT. In pertinent part, the complaint provides:

> 44. Accordingly, as to the property transfers referenced, and any other transfers which may be discovered, the Trust is invalid as to Debtors' creditors. Plaintiff seeks a declaration as to the rights of the parties as follows:
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> ****
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> i. *The Residence constitutes and is property of Debtors' bankruptcy estates pursuant to section 541(a) of the Bankruptcy Code*; and
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> j. *The Trustee may access and take possession of and sell the property for the benefit of the creditors of Debtors' bankruptcy estates.*

Original Complaint, *Church Joint Venture v. Blasingame (In re Blasingame),* Adv. Proc. No. 17-00048 (March 20, 2017), ¶ 44.

The Plaintiff disagrees with a number of the statements made in the Defendants' Motion to Dismiss. Specifically, the Plaintiff asserts (1) that neither the 2009 Complaint nor the 2012 USDC Complaint asserts that the BRT is a self-settled trust; (2) that the claim for a declaration that the BRT was self-settled was not sold to the Trustee; (3) that the District Court has not made any determination of the issue of whether or not the BRT is a self-settled trust.

The Plaintiff also points out that in Adversary Proceeding, No. 15-00339, Church JV, on behalf of the Trustee, sought a declaration that the Debtors held a life estate in their residence when their bankruptcy case was filed (the "Life Estate Action"). It was in connection with that adversary proceeding that the court became aware of certain facts concerning the formation of the BRT which caused it to ask for additional briefing on two issues:

1. Whether the attempted transfer of the Debtors' residence and surrounding 27 acres to "The Blasingame Family Residence Trust" was effective to pass title

to Benard Blasingame and Margaret Blasingame, Trustees for "The Blasingame Family Residence Generation Skipping Trust"?

2. If so, may the transfer from the Debtors individually to themselves as Trustees be treated as a transfer from Mavoureen Blasingame for the purpose of establishing a spendthrift trust under Tennessee law?

Specifically, it was only in connection with the Life Estate Action that the court was made aware that Mavoureen Blasingame never held title to the Debtors' residence and that the Warranty Deed given by the Debtors with respect to their residence names "The Blasingame Family Residence Trust" as the grantee rather than "The Blasingame Family Residence Generation Skipping Trust." On the basis of the court's questions, Church JV commenced the present adversary proceeding.

THE MOTION TO DISMISS

At the heart of the Defendants' Motion to Dismiss is the claim that the cause of action raised by the Plaintiff in this adversary proceeding was sold to Church JV in the Sale Order and thus no longer belongs to the bankruptcy estate. This bankruptcy court previously found that the sale by the Trustee of the causes of action raised in the 2009 Complaint against the Non-Debtor Defendants, including the BRT, left the bankruptcy court without jurisdiction over those causes of action because the outcome of those disputes could have no economic effect upon the bankruptcy estate. Corrected Order Denying Defendants' Motion to Dismiss Counts I, II, VI, VII & VIII of Complaint for Lack of Subject Matter Jurisdiction, and to Dismiss Count I of Complaint for Lack Of Standing Based on Rights of Chapter 7 Trustee, Adv. Proc. No. 09-00482 (June 7, 2012), Dkt. No. 286, pp. 6-8. The court nevertheless did not dismiss the 2009 Complaint because Church JV was an original plaintiff in its own right. With respect to the Trustee's causes of actions that had

been sold to Church JV, the court reserved decision or recommendation because although federal bankruptcy jurisdiction was no longer present as the result of the sale, federal jurisdiction might be retained in the event that substantial prejudice would result from dismissal. The parties were directed to file briefs and/or affidavits concerning the issue of prejudice. They subsequently agreed that the Non-Discharge Causes of Action might be dismissed without prejudice for lack of subject matter jurisdiction, which resulted in the entry of the Consent Order of November 14, 2012, Adv. Proc. No. 09-00482, Dkt. No. 336.

There is now a dispute about whether the causes of action sold to Church JV included the causes of action raised by it now on behalf of the bankruptcy estate. The Sale Order, which was not prepared by the court but by counsel for the Trustee, is limited to "the claims and cause of action of the Trustee which have been asserted in that certain Adversary Action No. 09-00482." Bankr. Dkt. No. 356, ¶ 2. The Defendants advocate a broad reading of the Sale Order, in essence asserting that the sale included claims raised against the Non-Debtor Defendants, including the claim that the assets of the BRT are assets of the bankruptcy estate, under any theory. The Plaintiff advocates a narrow reading of the Sale Order, saying that it included only those specific requests for relief specified in the 2009 Complaint.

In the 2009 Complaint, the Plaintiff sought, *inter alia*, a declaration that

> [T]he three (3) Trusts [including the BRT] and five (5) Corporations effectively have over the years lost this independent status as may have been originally designed and are now used exclusively to hinder, delay and defraud Debtors' creditors as clearly indicated by the transfer of Debtors' property into the Trusts secure from creditors and *rendering the Trust self-settled in whole or part.*

2009 Complaint, ¶ 53 (emphasis added). The First Cause of Action in the 2009 Complaint goes on to ask that as the result of the activities of the Debtors with regard to the trusts and corporations, they should be declared to be the alter egos, reverse alter egos, instrumentalities and/or agents of

the Debtors. The 2009 Complaint assumes that the BRT was properly formed and that at its formation, the Residence was transferred to it in such a manner as would shield it from the claims of the Debtors' creditors under Tennessee law, thus excluding the Debtors' beneficiary interests in the BRT from their bankruptcy estate. As the result of discovery and related litigation, the Plaintiff and the court have learned that there were irregularities in the formation of the BRT.

Unlike the claims raised in the 2009 Complaint, the present Complaint seeks relief related to the formation of the BRT. The Plaintiff asks for a declaration that the BRT *was* self-settled rather than a declaration that the BRT should be treated *as if it were* self-settled. In the alternative, the Plaintiff asks for a declaration that the Residence was never effectively transferred to the BRT. The 2009 Complaint asked that the assets of the BRT be treated as the assets of the Debtors as a remedy for their fraudulent activities. The present complaint asks for a declaration that the assets of the BRT never were protected from the claims of the creditors of its beneficiaries or that the primary asset that was intended to be transferred in trust never actually was transferred in trust. These clearly are different theories of recovery from those asserted in the 2009 Complaint. Are they distinct enough to be treated as separate causes of action to escape the effect of the Sale Order and dismissal of the alter ego/reverse piercing theories of the 2012 Complaint?

The Defendants point to a series of cases in support of the conclusion that the sale of assets by the Trustee included the claim that the assets of the BRT are assets of the bankruptcy estate under any theory. Each of these cases addresses the requirement of issue identity in the context of a request to dismiss a subsequent lawsuit on the basis of *res judicata.* The first of these is *Sanders Confectionary Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474 (6th Cir. 1992). That case addressed the question of whether certain claims based on theories of lender liability, RICO, and securities fraud were properly dismissed on the basis of *res judicata* as the result of a prior

bankruptcy court ruling. In that context, the court of appeals addressed the identity of causes of action, which it said means an "identity of the facts creating the right of action and of the evidence necessary to sustain each action." 973 F.2d at 484, quoting *Westwood Chemical Co. v. Kulick,* 656 F.2d 1224, 1227 (6th Cir. 1981). The court noted that all of the claims raised in the pending actions were based upon facts considered by the bankruptcy court in the previous action, resulting in an identity of claims. The second case relied upon by the Defendants is *Winget v. JPMorgan Chase Bank, N.A.*, 537 F.3d 565 (6th Cir. 2008). That case also concerned the application of *res judicata* principles in the context of a motion to dismiss. With respect to the requirement that there be identity of claims for *res judicata* to apply, the court said, "The final element of res judicata requires that there be an 'identity of claims,' which is satisfied if 'the claims arose out of the same transaction or series of transactions,' or if 'the claims arose out of the same core of operative facts.'" 537 F.3d at 580, citing *Browning v. Levy,* 283 F.3d 761 (6th Cir. 2002). The court of appeals specifically rejected a more narrow test urged by the appellant, which would have required identity of the *theory of the case* as well as identity of underlying facts. *Id.* The Defendants also rely upon *Heike v. Central Michigan Univ. Bd. of Trustees,* 573 Fed. Appx. 476 (6th Cir. 2014), which relies upon *United States v. Tohono O'odham Nation,* 563 U.S. 307, 317, 131 S. Ct. 1723, 1731, 179 L. Ed. 2d 723 (2011), in which the Supreme Court stated, "Two lawsuits are 'for or in respect to' the same claim … if they are based on substantially the same operative facts, regardless of the relief sought in each suit." Finally, the Defendants rely upon *Hapgood v. City of Warren,* 127 F.3d 490, 494 (6th Cir. 1997), which is based upon Ohio law substantially similar to federal law. In that case the court of appeals said, "Claim preclusion 'requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.'" *Id.*, quoting *National Amusements, Inc. v. City of Springdale,* 53 Ohio St. 3d 60, 558 N.E.2d 1178, 1180 (1990).

These cases make clear that when faced with a motion to dismiss based on claim or issue preclusion, the court must look to the "operative facts" rather than the relief sought. The present motion, however, presents slightly different issues. It asks that the Complaint be dismissed under Federal Rule of Bankruptcy Procedure 7012(b)(1) based on a lack of subject matter jurisdiction. The Defendants' theory is that as a result of the Sale Order, the causes of action raised in the pending complaint can have no economic effect upon the bankruptcy estate and thus, that bankruptcy jurisdiction is lacking. It also asks that the Complaint be dismissed pursuant to Federal Rule of Bankruptcy Procedure 7017 because as the result of the Sale Order, the Trustee is no longer the real party in interest. The focus of the motion under either theory is the Sale Order, and the question is whether the causes of action raised in the pending complaint were sold to Church JV pursuant to the Sale Order. It is in that context that the court must determine whether the causes of action raised in the pending Complaint are identical to those pled in the 2009 Complaint because those causes of action clearly were sold.

While the issue before the court is not strictly one of issue preclusion, the cases offered by the Defendants help the court in recognizing the scope of the claims sold by the Trustee. Based upon well-settled law, the causes of action sold by the Trustee included the right to assert that the assets of the BRT are property of the bankruptcy estate based on any theory of recovery arising out of the underlying facts described in the 2009 Complaint. Because that cause of action was sold to Church JV in its institutional capacity, it cannot now be pursued by it on behalf of the bankruptcy estate. Any recovery based upon that cause of action belongs to Church JV.

The Plaintiff correctly asserts that with respect to the question of whether it may recover the assets of the BRT on an alternative theory, "[t]he analysis of the issue raised by the Court begins and ends with the Sale Order." Plaintiff's Post-Hearing Brief (July 7, 2017), Dkt. No. 26,

¶ 3. The language of the Sale Order is instructive. In its "Corrected" Order Reserving Decision on Defendant's Motion to Dismiss, etc., this court noted that the 2009 Complaint sought two types of relief: "(1) a declaration that the Debtors are not entitled to discharge of their debts, and (2) an augmentation of the bankruptcy estate by recovering assets from the Non-Debtor Defendants." Adv. Proc. No. 09-00482 (June 7, 2012), Dkt. No. 286, p. 5. Similarly, the Sale Order divides the causes of action in the 2009 Complaint into two groups: those relating to the Debtors' discharge, and all other claims. The Sale Order, which was prepared by counsel, not the court, specifically provides:

> 4. Upon payment of the sum of money set forth in paragraph 2 of this Order, all claims and/or causes of action asserted by the Trustee in the Adversary Action, *except those relating to the Debtors' discharge*, shall be and are hereby transferred, conveyed, and assigned to Church JV, *including but not limited* to the following:
>
> A. Claims that Blasingame Family Investment Trust, Blasingame Family Residence Generation Skipping Trust, Flozone Services, Inc., Fiberzone Technologies, Inc., Blasingame Farms, Inc., GF Corporation, and Aqua Dynamics Group Corporation have all been used for an improper purpose and are, in fact, the alter egos or reverse alter egos of the Debtors, are shams to thwart, deceive, hinder and/or delay their creditors and to conceal assets from the claims of their creditors and/or have so used in [sic] their assets repeatedly co-mingled with the assets of each of them should be one of the same and made available to their creditors.
>
> B. Pursuant to 11 U.S.C. §544(d), to avoid and recover transfers by, between, to and among the Defendants, which should be set aside and avoided under applicable non-bankruptcy law; and
>
> C. For injunctive relief, accounting, recovery of attorneys [sic] fees, expenses and cost of court.

Sale Order, Bankr. Dkt. No. 356, ¶ 4 (emphasis added). The Sale Order divides the causes of action in the 2009 Complaint into those dealing with the Debtors' discharge and those seeking to augment the estate. The Sale Order provides for the sale of the second group to Church JV. It

describes those causes of action not in terms exclusive to the universe of possible claims, as Church JV now asserts, but exclusive to claims related to discharge. That this is true is indicated by use of the language "including but not limited to" at the end of the first section of paragraph 4 of the Sale Order. In general, and specifically in the context of the Bankruptcy Code, the words "include" and "including" are not words of limitation. *See* 11 U.S.C. § 102(3). The description of claims that follows is given as an illustration of the claims transferred. As the order says, the sale is intended to include all claims raised in the complaint *except* those related to the Debtors' discharge. Nowhere does the Sale Order say that it is limited only to certain theories of recovery. Rather, it is concerned with the Trustee's claim to augment the bankruptcy estate with the assets of the named Defendants, including the BRT, under any theory such as the ones given in subparagraph 4.A. by way of illustration.

Thus the inquiry shifts to whether the non-discharge causes of action sold to Church JV include the causes of action raised derivatively by Church JV in the pending Complaint. The Plaintiff asserts that they do not on the basis that "self-settled trust" and "ineffective transfer of the Residence" were not causes of action raised in the 2009 Complaint. The Defendants say that they do for the reason that "self-settled" trust was mentioned in the 2009 Complaint and both complaints seek recovery of assets from the BRT for the benefit of the bankruptcy estate.

The causes of action may be distinguished. The prior lawsuit focused on recovery of assets from the BRT as a remedy for fraud. It asked the court to treat the assets of the BRT *as if* they were property of the estate. The present lawsuit asserts (1) that the beneficial interests of the Debtors in the BRT are not shielded from the claims of their creditors and thus were not excluded from the bankruptcy estate by section 541(c)(2); and/or (2) that the Debtors never effectively transferred their Residence in trust and for that reason it became property of their estate when their

bankruptcy petition was filed. The first complaint asked for recovery of the assets of the BRT, *whatever they are.* That cause of action was sold to Church JV. While it is a close question, the claim that the assets of the BRT should be included in the bankruptcy estate because the trust was self-settled is another iteration of the claims made in the 2009 Complaint: the assets of the BRT should be recovered for the benefit of the creditors of the bankruptcy estate.

The pending Complaint also asks for recovery of assets for the reason that they never became assets of a trust, however. This claim is substantially different from the other claims. Under the Sale Order, Church JV obtained the right to pursue recovery of the assets of the BRT for its own benefit. It did not obtain the right to argue that certain assets never were transferred in trust.

The pending Complaint asserts that the Residence was never successfully transferred to the BRT. In the Life Estate Action, filed some three years after the entry of the Sale Order, the Plaintiff asked whether the Debtors were granted a life estate in the Residence held by the BRT, and whether that life estate constituted property of the bankruptcy estate. In other words, the question was not whether assets of the BRT were property of the bankruptcy estate, but whether an estate was reserved to the Debtors when the BRT was created. The question in the Life Estate Action was: What are the assets of the BRT? That was not the question raised in the 2009 Complaint which was: Are the assets of the BRT assets of the bankruptcy estate? These are separate questions and arose out of separate facts. It was in connection with that proceeding that irregularieies in the transfer of the Residence came to light.

A similar question is raised in the pending proceeding. In addition to asking whether assets of the BRT are assets of the bankruptcy estate, the complaint asks for a declaration that the Residence never became an asset of the BRT. If that assertion is supported by the facts and law,

the result would be that the Residence remained the property of the Debtors until they filed their bankruptcy petition. Upon the filing of the petition, the Residence would have become property of their bankruptcy estate not because it was property of the BRT but because it was property of the Debtors. This is a new claim, not simply a new theory of recovery. It relies upon facts concerning the formation of the trust, not upon subsequent facts concerning the Debtors' conduct with respect to the trust. It does not seek recovery of trust assets but recovery of the Debtors' assets for the benefit of the estate.

In summary, the claim that the BRT was self-settled and thus not a valid spendthrift trust under Tennessee law is more like the alter ego and reverse piercing theories. The self-settled trust claim is in essence a claim that the assets of the BRT should be brought into the bankruptcy estate. That cause of action was sold to Church JV. The claim that the Residence was never effectively transferred to the BRT is different. For the reasons stated, it seeks a declaration concerning assets of the Debtors, not assets of the trust. That cause of action was not sold.

CONCLUSION

For the foregoing reasons, the court concludes that the Motion to Dismiss should be granted in part and denied in part. The bankruptcy court lacks subject matter jurisdiction to entertain the question of whether the assets of the BRT are property of the bankruptcy estate because the Trustee lacks standing to pursue it. That cause of action, under any theory, was sold to Church JV pursuant to the Sale Order in 2012. The motion to dismiss is **GRANTED** with respect to that issue.

The question of whether the Residence was ever effectively transferred to the BRT was not raised in the 2009 Complaint and was not sold to Church JV in the Sale Order. The Motion to Dismiss is **DENIED** with respect to that claim.

cc: Debtors/Defendants
Attorney for Debtors/Defendants
Plaintiff
Attorney for Plaintiff
Chapter 7 Trustee
Attorney for Chapter 7 Trustee (if any)