Dated: May 05, 2014
The following is SO ORDERED:

Jimmy L. Croom
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re: WISPER , LLC	)	**Case No. 13-10770**
	)	
Debtor.	)	**Chapter 11**
	)	
	)	
WISPER II, LLC	)	
fka WISPER, LLC,	)	
	)	
Plaintiff,	)	
	)	**Adv. Pro. No. 14-5036**
v.	)	
	)	
THOMAS H. STRAWN,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION RE: WISPER II, LLC'S MOTION FOR SUMMARY JUDGMENT and DEFENDANT'S RESPONSE THERETO

At issue in this adversary proceeding is whether the plaintiff, Wisper II, LLC, fka Wisper, LLC, is entitled to summary judgment on its complaint to compel turnover of certain documents under § 542(e) of the Bankruptcy Code. The plaintiff contends that there are no genuine issues as to any material fact in this case and that it is entitled to judgment as a matter of law.

The defendant, Thomas H. Strawn, argues that turning over the requested documents may constitute a breach of the attorney-client privilege and other ethical rules.

For the reasons that follow, the Court concludes that Wisper II, LLC's motion for summary judgment should be granted and that Strawn is obligated to turn over Wisper, LLC's complete bankruptcy file to Wisper II, LLC, pursuant to 11 U.S.C. § 542(e).

I. Jurisdiction

This proceeding arises in a case referred to this Court by the Standing Order of Reference, Misc. Order No. 84-30 in the United States District Court for the Western District of Tennessee, Western and Eastern Divisions, and is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E). This Court has jurisdiction over core proceedings pursuant to 28 U.S.C. §§ 157(b)(1) and 1334 and, thus, may hear and enter a final order in this matter. This memorandum opinion shall serve as the Court's findings of facts and conclusions of law. Fed. R. Bankr. P. 7052.

II. FACTS

At the time of filing for bankruptcy relief, Wisper, LLC ("Wisper I"), provided wireless high speed internet service to rural communities in West Tennessee. George Matthew Abernathy ("Abernathy") was the sole owner and managing member of Wisper I.

Wisper I filed a voluntary Chapter 11 petition for bankruptcy relief on March 27, 2013. No Chapter 11 trustee was appointed in this case. Therefore, pursuant to 11 U.S.C. §§ 1101 and 1107(a), Wisper I was a debtor in possession. Abernathy continued to operate the debtor in possession's business post-petition as the managing member. Wisper I filed an application to employ attorney Thomas H. Strawn ("Strawn") as counsel for the debtor on March 27, 2013. The Court approved Strawn's employment on April 19, 2013.

Wisper I filed its Chapter 11 plan of reorganization on August 21, 2013. Several of Wisper I's creditors filed a competing plan of reorganization on October 15, 2013 ("Investor

Plan").[1] The proponents for the Investor Plan were Ally Finance Corporation, NTCH-West Tenn, Inc., Carter Edwards, Crockett Gin Company, Robbie Russell, Rance Barnes, Educational Broadband Corp., Halls Investment Group, Will Wade, Donnie Bearden, Barbara Woods, and Jerry Hughes (collectively referred to as "Investor Plan Proponents").

Wisper I submitted copies of both plans to its creditors in mid-December 2013. During the balloting process, a majority of Wisper I's creditors voted to accept the Investor Plan. At the January 23, 2014 confirmation hearing, the Court confirmed the Investor Plan ("Confirmed Plan"). The Court entered an order confirming the plan on January 29, 2014 ("Confirmation Order").

In relevant part, the Confirmed Plan provided for the merger of Wisper I into a new legal entity named Wisper II, LLC ("Wisper II"):

> After the Effective Date of the Order confirming the Plan, the Reorganized Debtor is to be a Board-Managed Tennessee Limited Liability Company and will be governed by a board of not less than five (5) or more than seven (7) directors who shall, from time to time designate one or more officers to operate the business in which the Debtor is currently engaged (the "Reorganized Debtor"). The Reorganized Debtor will be named "Wisper II, LLC" and shall be the survivor entity by merger as contemplated by this Plan immediately following Confirmation of the Plan proposed by the Creditor/Investor Plan Proponents. . . . .
>
> The Reorganized Debtor will continue to exist after the Effective Date as a separate business entity, with all the powers of a Tennessee limited liability company under applicable law and without prejudice to any right to alter or terminate such existence (whether by merger, dissolution or otherwise) under applicable state law. Except as otherwise provided herein, as of the Effective Date, all property of the Debtor, and any property acquired by a [sic] Debtor or Reorganized Debtor under the Plan, will vest in the applicable Reorganized Debtor, free and clear of all Claims, liens, charges, other encumbrances and interests[.] . . . On and after the Effective Date, the Reorganized Debtor may

[1]Both the debtor and the Investor Plan Proponents subsequently filed amended plans. Wisper I amended its plan on November 1, 2013, and December 2, 2013. The Investor Plan Proponents amended their plan on January 15, 2014; however, the competing plans were submitted to the debtor's creditors in mid-December. As a result, the creditors were asked to vote on Wisper I's second amended plan or the Investor Plan Proponent's original plan. Due to issues with wording in the Investor Plan Proponents' amended plan, the Investor Plan Proponents agreed to pursue confirmation of their original plan.

> operate its business and may use, acquire and dispose of property and compromise or settle any Claims or Equity Interests without supervision or approval by the Bankruptcy Court and free of any restrictions of the Bankruptcy Code or Bankruptcy Rules, other than those restrictions expressly imposed by the Plan or the Confirmation Order.

(Ch. 11 Plan at 12, Bankr. Case No. 13-10770, ECF No. 142).

The Confirmation Order included similar language concerning Wisper I's merger into Wisper II. The relevant portion of the Confirmation Order states that

> [o]n the Effective Date of the Plan the Debtor, Wisper, LLC shall be deemed as merged into Wisper II, LLC, a Tennessee Limited Liability Company duly formed on January 2, 2014 (the "Reorganized Debtor") and Wisper II, LLC, as the Reorganized Debtor shall be the surviving entity of the merger and this Order and the Plan shall constitute the "Plan of Merger" to be filed with the Tennessee Secretary of State in accordance with Tennessee law.
>
> . . . .
>
> That on or before the Effective Date, the Debtor, its manager, George Matthew Abernathy, and its employees are directed to turn over all Property of the Debtor including but not limited to all business records and documents; all furniture, fixtures and equipment; keys to the Debtor's principal business location and tower sites; all access codes and passwords to all Property, all bank deposit records (including debit cards and credit cards of the Debtor) such that the Reorganized Debtor can assume the right to continue the business operations of the Debtor without interruption to the customers and subscribers of the business.

(Confirmation Order at 5-6, Bankr. Case No. 13-10770, ECF. No. 245).

On February 12, 2014, Wisper II filed a Certificate of Merger with the Tennessee Secretary of State. The Certificate of Merger states that, effective January 23, 2014, Wisper I is merged with and into Wisper II and that Wisper II is the surviving entity. The Certificate of Merger also indicates that the Confirmed Plan and Confirmation Order set forth all of the terms for the merger.

Following entry of the Confirmation Order, Strawn filed a motion to withdraw as counsel for Wisper I. The Court granted Strawn's motion on March 6, 2014.

On March 18, 2014, Stephen L. Hughes ("Hughes") filed a Notice of Appearance as counsel for Wisper II. That same day, Wisper II filed a complaint to compel turnover of Strawn's complete bankruptcy file for Wisper I pursuant to 11 U.S.C. § 542(e). Wisper II's turnover request included "all pleadings, documents, notes, emails, and electronically stored documents and communications" relating to Strawn's representation of Wisper I throughout the course of these bankruptcy proceedings. (Compl. at 2, Bankr. Case No. 13-10770, Adv. Proc. No. 14-5036, ECF. No. 1.) Wisper II alleged that it acquired all of Wisper I's rights, privileges and assets, including Wisper I's complete bankruptcy file, when the entities merged on January 23, 2014. Strawn filed an answer to the complaint on March 25, 2013, in which he asked the Court to dismiss the complaint.

On March 27, 2014, Wisper II filed a motion for summary judgment, a statement of material facts, and a memorandum of law and facts in support of the motion. In its memorandum, Wisper II asserted that "the complete bankruptcy file of Wisper [I] . . . vested in Wisper II" at the time of the merger. Consequently, Wisper II argued it had the authority to "waive any attorney-client privilege that the former entity may have held." (Memo. in Supp. of Mot. for Summ. J. at 3, Bankr. Case No. 13-10770, Adv. Proc. No. 14-5036, ECF No. 7.)

Strawn filed a response to the motion, a statement of material facts, and a memorandum of law in support of his response on April 9, 2014. In his response, Strawn stated:

> George Matthew Abernathy has raised with Defendant and called for the lawyer/client privilege with respect to all notes, emails, and electronically stored documents. . . .[C]ompelling Defendant to turn over possession of the complete bankruptcy file for Wisper, LLC . . . would violate the privilege of communication that has been established between Defendant and Wisper, LLC's Chief Executive Officer, George Matthew Abernathy.

(Defs. Resp. at 1, Bankr. Case No. 13-10770, Adv. Proc. No. 14-05036, ECF No. 14). Strawn asserted that Rule 1.6 of the Tennessee Rules of Professional Conduct prohibits him from turning over Wisper I's complete bankruptcy file to Wisper II.

At the April 10, 2014 hearing on the motion for summary judgment, Strawn stated that he did not dispute any of the facts contained in Wisper II's statement of material facts. He merely filed his own statement in order to supplement the facts provided by Wisper II. In

defense of Wisper II's complaint and motion, Strawn repeated his assertion that Abernathy had invoked the attorney-client privilege to him in writing and expressed opposition to turning over Wisper I's complete bankruptcy file. Strawn also repeated his concern that turning over any documents to Wisper II may conflict with the attorney-client privilege and Rule 1.6 of the Tennessee Rules of Professional Conduct.

II. ANALYSIS

Federal Rule of Civil Procedure 56, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056, provides that summary judgment is appropriate "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." Fed. R. Civ. P. 56(a). When considering a motion for summary judgment, a court must view all the facts and make all reasonable inferences in favor of the non-moving party. *Flagg v. City of Detroit*, 715 F.3d 165, 178 (6th Cir. 2013).

The party moving for summary judgment has the initial "burden of proving that no genuine issue as to any material fact exists and that it is entitled to a judgment as a matter of law." *R.S.W.W., Inc., v. City of Keego Harbor*, 397 F.3d 427, 433 (6th Cir. 2005). "The nonmoving party must then respond by setting forth specific facts showing that there is a genuine issue for trial." *Kuns v. Ford Motor Co.*, 543 F. App'x 572, 575 (6th Cir. 2013) (internal quotation marks omitted) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). "Summary judgment is appropriate where; even construing the facts most strongly in favor of the non-movant, the proper resolution of issues of law requires that judgment be entered on behalf of the moving party." *United Food and Commercial Workers Union Local No. 17A v. Hudson Ins. Co.*, 2012 WL 2343905, *1 (N.D. Ohio 2012) (citing Fed. R. Civ. P. 56 and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)); *Vogel v. Kalita* (*In re Kalita*), 202 B.R. 889, 893 (Bankr. W.D. Mich. 1996).

In the current adversary proceeding, there is no genuine dispute as to any material fact. Both parties agree that Wisper I merged into Wisper II on January 23, 2014, pursuant to the terms of the confirmation order and the certificate of merger. The only issue in this matter is whether 11 U.S.C. § 542(e) requires Strawn to turnover Wisper I's complete bankruptcy file to Wisper II. This issue is one of law and, as such, is appropriate for resolution on a motion

for summary judgment. In resolving this issue, the Court must determine (1) whether Strawn's bankruptcy file for Wisper I falls under the ambit of 11 U.S.C. § 542(e) and is thus subject to turnover and (2) whether Abernathy may raise or assert the attorney-client privilege in this proceeding.

A. 11 U.S.C. § 542(e)

Section 542(e) of the Bankruptcy Code provides that

> [s]ubject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs to turn over or disclose such recorded information to the trustee.[2]

11 U.S.C. § 542(e). Whereas subsection (a) of § 542 only authorizes turnover of "property of the estate," subsection (e) requires the turnover of any documents that "relate to the debtor's property or financial affairs." *In re Crescent Res., LLC*, 457 B.R. 506, 513 (Bankr. W.D. Tex. 2011); *see also McKinstry v. Genser* (*In re Black Diamond Mining Co., LLC*), 507 B.R. 209, 214 (E.D. Ky. 2014); *Faulkner v. Kornman* (*In re The Heritage Organization, L.L.C.*), 350 B.R. 733, 739 (Bankr. N.D. Tex. 2006). "Therefore, whether [property] constitutes property of the estate is irrelevant to the Court's determination of whether turnover is proper under § 542(e)."[3] *Am. Metrocomm Corp. v. Duane Morris & Heckscher, LLP* (*In re Metrocomm Corp.*), 274 B.R. 641, 652 (Bankr. D. Del. 2002). The party seeking turnover of documents has the initial burden of demonstrating "that the documents relate to the debtor's property or financial affairs." *Crescent Res.,* 457 B.R. at 514.

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[2]Section 1107(a) of the Bankruptcy Code provides a debtor in possession shall have all the rights, powers and duties of a trustee in a case in which the court does not appoint a trustee. Federal Rule of Bankruptcy Procedure 9001(11) defines a "Trustee" to "include[ ] a debtor in possession in a chapter 11 case."

[3]In order to qualify as "property of the estate" for purposes of § 542(a), the attorney's documents must be prepared in the course of the attorney's representation of the debtor. *In re Heritage Org., L.L.C.*, 350 B.R. at 739. Such a requirement does not apply in a turnover proceeding brought pursuant to § 542(e). *Id.*

An attorney's file "regarding its representation of [a debtor] plainly falls within § 542[(e)]'s scope." *Black Diamond Mining*, 507 B.R. at 214 (citing *In re McKenzie*, 716 F.3d 404, 419 (6th Cir. 2013)); *In re Hotels Nevada, LLC*, 458 B.R. 560, 564 (Bankr. D. Nev. 2011). Therefore, it is unnecessary for a court to determine who actually owns the attorney file in a § 542(e) turnover action. This is especially true when the documents relate solely to an attorney's representation of a debtor during a bankruptcy case. *Black Diamond Mining*, 507 B.R. at 214; *In re Highland Park Assocs. Ltd. P'ship I*, 132 B.R. 358 (Bankr. N.D. Ill. 1991).

Although § 542 is broad, the court's authority to order turnover is not unfettered. Section 542(e) specifically provides that the obligation to turnover information related to the debtor's property or financial affairs is "[s]ubject to any applicable privilege." 11 U.S.C. § 542(e). The protective nature of this privilege, however, is limited. Congress specifically designed this subsection "to restrict ... the ability of accountants and attorneys to withhold information from the trustee." *Black Diamond*, 507 B.R. at 214 (citing *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 351 (1985)). The legislative history of § 542(e) indicates that this section "deprives accountants and attorneys of the leverage that they ha[d], . . . under State law lien provisions, to receive payment in full ahead of other creditors when the information they hold is necessary to the administration of the estate." *Weintraub*, 471 U.S. at 351 (citing S. Rep. No. 95-989, p. 84 (1978); H.R. Rep. No. 95-595, pp. 369-370 (1977)); *see also In re Beef N'Burgundy, Inc.*, 21 B.R. 69, 70 (Bankr. N.D. Ga. 1982).

In the current adversary proceeding, the complete file Strawn kept during his representation of Wisper I clearly relates to Wisper I's "property or financial affairs" within the meaning of § 542(e). *Black Diamond Mining*, 507 B.R. at 214. Strawn did not dispute this fact in his pleadings or at the hearing on the motion for summary judgment. As a result, the file Strawn kept during his representation of Wisper I in this bankruptcy case is subject to turnover under § 542(e). This conclusion, however, does not end the Court's inquiry. Section 542(e) specifically states that the duty to turnover documents is "[s]ubject to any applicable privilege." Therefore, the Court must now determine whether the attorney-client privilege prevents turnover of Strawn's file to Wisper II. Resolution of this issue will require the Court to decide if the privilege applies and, if so, who has the right to assert or waive the privilege.

B. Attorney-Client Privilege

The Supreme Court has long recognized that "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citation omitted); *Hunt v. Blackburn*, 128 U.S. 464 (1888). The purpose of the privilege

> is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Upjohn Co., 449 U.S. at 389. "The privilege was intended for the ultimate benefit of the client and to protect the client against disclosures constituting a breach of the client's trust." *Am. Metrcomm Corp.*, 274 B.R. at 653 (citations omitted). "A party claiming the attorney-client privilege must prove its applicability" by a preponderance of the evidence. *Foster v. Hill* (*In re Foster*), 188 F.3d 1259, 1264 (10th Cir. 1999); *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011); *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 (5th Cir. 2001); *Guy v. United Healthcare Corp.*, 154 F.R.D. 172, 177 (6th Cir. 1993); *Crescent Res.*, 457 B.R. at 516. "Because it impedes the full and free discovery of the truth, the attorney-client privilege is strictly construed and applies only where necessary to achieve its purpose." *Montgomery v. eTreppid Techs., LLC*, 548 F.Supp.2d 1175, 1177-78 (D. Nev. 2008) (internal quotation marks omitted) (citing *United States v. Talao*, 222 F.3d 1133, 1140 (9th Cir.2000)); *Foster*, 188 F.3d at 1264. The party asserting the privilege cannot make "a blanket claim" of protection from disclosure under the attorney-client privilege. *Foster*, 188 F.3d at 1264. Rather, he "must bear the burden as to specific questions or documents . . . ." *Id.*

In § 542(e) turnover proceedings, Federal Rule of Evidence 501, made applicable here by virtue of Federal Rule of Bankruptcy Procedure 9017 and Federal Rule of Evidence 1101(a), provides that "[t]he common law–as interpreted by United States courts in the light of reason and experience–governs a claim of privilege."[4] *See also Am. Metrocomm Corp.*, 274

[4]Although Rule 501 is subject to certain exceptions, none of the exceptions are applicable in this case.

B.R. at 653 (citations omitted). As a result, the issue of whether the attorney-client privilege prevents Strawn from turning over the Wisper I file to Wisper II depends upon federal common law. *Black Diamond*, 507 B.R. at 215.

"Only the holder of the attorney-client privilege may waive it." *Montgomery*, 548 F.Supp.2d at 1177 (citing *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340–41 (9th Cir.1996)). In the case of an individual represented by an attorney, clearly the individual client may assert the attorney-client privilege. *Weintraub*, 471 U.S. at 356. When the client is a limited liability company ("LLC"), however, resolution of whether the privilege applies is more difficult. There is little case law concerning the attorney-client privilege as it relates to LLCs, and even less law regarding LLCs and § 542(e). Additionally, determining whether the privilege may be asserted after an entity files for bankruptcy relief can be complicated regardless of whether the debtor is an individual, a partnership, an LLC, or a corporation.

"An LLC is a relatively new hybrid business entity that has the characteristics of both a corporation and a partnership, but is not characterized as either." *Montgomery*, 548 F.Supp.2d at 1179. State law governs the creation and definition of an LLC. *In re ICLNDS Notes Acquisition, LLC*, 259 B.R. 289, 292 (Bankr. N.D. Ohio 2001). Pursuant to the Tennessee Revised Limited Liability Company Act, "[a]n LLC is a legal entity distinct from its members." Tenn. Code Ann. § 48-249-116. "Generally, an LLC offers all of its members, including any member- manager, limited liability as if they were shareholders of a corporation but treats the entity and its members as a partnership for tax purposes." *ICLNDS Notes Acquisition*, 259 B.R. at 292-93 (citations omitted). Insofar as the attorney-client privilege is concerned, "federal courts have also treated partnerships and limited partnerships as corporations for purposes of determining the attorney-client privilege." *Montgomery*, 548 F.Supp.2d at 1183 (collecting cases). Consequently, regardless of whether an LLC is more akin to a partnership or corporation, courts treat the LLC like a corporation for purposes of the attorney-client privilege. Given this propensity, the Court will look to privilege law as it relates to corporations.

When a client is a corporation, as opposed to an individual, the attorney-client privilege still applies. *United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318, 336 (1915). However, "complications in the application of the privilege arise when the client is a

corporation, which in theory is an artificial creature of the law . . . ." *Upjohn*, 449 U.S. at 389-40. In such a situation, a court must determine who the client is and who may assert and/or waive the privilege on behalf of the corporation. "As an inanimate entity, a corporation must act through agents." *Weintraub*, 471 U.S. at 348.

"[F]or solvent corporations, the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors." *Id.*

> [W]hen control of a corporation passes to new management, [however] the authority to assert and waive the corporation's attorney-client privilege passes as well. New managers installed as a result of a takeover, merger, loss of confidence by shareholders, or simply normal succession, may waive the attorney-client privilege with respect to communications made by former officers and directors. Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties.

Id. at 349. Once a corporation files for bankruptcy relief, "the actor whose duties most closely resemble those of management should control the privilege in bankruptcy, unless such a result interferes with policies underlying the bankruptcy laws." *Id.* at 351-52. A trustee appointed under Chapter 7 or Chapter 11 of the Bankruptcy Code " plays the role most closely analogous to that of a solvent corporation's management" and he succeeds to the corporation's attorney-client privilege. *Black Diamond*, 507 B.R. at 214; *Hotels Nevada,* 458 B.R. at 566. Thus, it is the trustee and not the corporate debtor's directors who may control the attorney-client privilege after a bankruptcy case is filed. *Weintraub*, 471 U.S. at 353.

In a Chapter 11 case in which the Court does not find cause to appoint a trustee, the debtor-in-possession controls, "and can thus waive, the attorney-client privilege as to postpetition communications." *Ramette v. Bame* (*In re Bame*), 251 B.R. 367, 373 (Bankr. D. Minn. 2000); *see also* 11 U.S.C. § 1107(a). It is important to note, however, that a debtor in possession "represent[s] the interests of the estate," and so,"as to communications regarding administration of the estate, the estate, as the true client, is the only party that can waive the privilege." *Rame*, 251 B.R. at 374.

Regardless of whether an entity is in bankruptcy or not, the right to assert or waive the attorney-client privilege changes if control of the business changes either through a sale or merger. *MacKenzie-Childs LLC v. MacKenzie-Childs*, 262 F.R.D. 241, 247-48 (W.D.N.Y. 2009). The Tennessee Limited Liability Company Act dictates the effects of a merger:

> (g) Effect on nonsurviving domestic LLC. A certificate of merger, as filed with the secretary of state, shall act as notice of dissolution and articles of termination for a domestic LLC that is not the surviving entity in the merger. A merger of a domestic LLC, including a domestic LLC that is not the surviving entity in the merger, shall not require the domestic LLC to wind up its affairs under § 48-249-610, or to pay its liabilities and distribute its assets under § 48-249-620.
>
> . . . .
>
> (j) Effect of merger. When any merger has become effective under this section, for all purposes of the laws of this state:
>
> > (1) All of the rights, privileges and powers of each constituent party to the merger and all property, real, personal and mixed, of, and all debts due to, any constituent party to the merger, as well as all other things and causes of action belonging to each constituent party to the merger, shall be vested in the surviving constituent party, and thereafter shall be the property of the surviving constituent party as they were of each constituent party to the merger prior to the merger.

Tenn. Code. Ann. § 48-249-702(j). This code section makes clear that, as of the effective date of a merger, (1) the nonsurviving LLC is dissolved by operation of law; and (2) all of the rights, privileges, powers, and property of the nonsurviving LLC vest in the surviving LLC.

Applying this case law to the adversary proceeding currently before the Court, the Court concludes that Wisper II is entitled to summary judgment on its complaint to compel turnover of Wisper I's bankruptcy file from Strawn under § 542(e). Although Abernathy, as the managing member of Wisper I, clearly had the authority to assert and/or waive the attorney-client privilege with respect to Strawn's bankruptcy file prior to the effective date of the merger, Abernathy lost this authority once the merger became effective. The Confirmation Order, the Confirmed Plan, the Certificate of Merger and Tennessee law make clear that all of Wisper I's rights, privileges, and assets became Wisper II's property and that Wisper I was dissolved by operation of law as of January 23, 2014. Wisper I's bankruptcy file and the authority to

control the attorney-client privilege were among the assets and privileges that passed to Wisper II as of the effective date of the merger. As the sole privilege holder, Wisper II acquired the right to compel turnover of Wisper I's complete bankruptcy file from Strawn and to waive the attorney-client privilege that existed between Wisper I and Strawn.

Because the Court has concluded that ownership of Wisper I's bankruptcy file passed to Wisper II as of the effective date of the merger, it is unnecessary for this Court to address the concerns raised by Strawn under Rule 1.6 of the Tennessee Rules of Professional Conduct.

IV. Conclusion

For the reasons stated above, Wisper II's motion for summary judgement on its complaint to compel turnover of documents held by Strawn under 11 U.S.C. § 542(e) is granted.

The Court will enter a separate order in accordance herewith.

Mailing list
Thomas H. Strawn, Defendant
Stephen L. Hughes, Attorney for Plaintiff
United States Trustee

Dated: May 05, 2014
The following is SO ORDERED:

Jimmy L. Croom
Jimmy L. Croom
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re: WISPER , LLC	)	**Case No. 13-10770**
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Debtor.	)	**Chapter 11**
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fka WISPER, LLC,	)	
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Plaintiff,	)	**Adv. Pro. No. 14-5036**
v.	)	
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THOMAS H. STRAWN,	)	
	)	
Defendant.	)	

ORDER RE: WISPER II, LLC'S MOTION FOR SUMMARY JUDGMENT and DEFENDANT'S RESPONSE THERETO

For the reasons set forth in the Court's Memorandum Opinion re: Wisper II, LLC's Motion for Summary Judgment and Defendant's Response Thereto, the Plaintiff's Motion for Summary Judgment is **GRANTED.** Thomas H. Strawn is **HEREBY ORDERED** to turnover his entire bankruptcy file to counsel for Wisper II, LLC, fka Wisper, LLC.

IT IS SO ORDERED.

Mailing list
Thomas H. Strawn, Defendant
Stephen L. Hughes, Attorney for Plaintiff
United States Trustee