Dated: February 03, 2015
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**
	)	
Debtor	)	**Chapter 11**
	)	
WISPER II, LLC,	)	
	)	
Plaintiff,	)	
v.	)	**Adv. Pro. No. 14-05043**
	)	
GEORGE MATTHEW ABERNATHY and ADRIA ABERNATHY,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION RE: DEFENDANTS' FIRST AMENDED MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

At issue in this adversary proceeding is whether the language in a confirmed plan's disclosure statement is sufficient under 11 U.S.C. § 1123(b)(3) to retain avoidance actions against insiders for purposes of surviving a motion to dismiss. Plaintiff, Wisper II, LLC ("Wisper II") is the successor-in-interest of Wisper, LLC ("Wisper I"). Defendant George Matthew Abernathy ("Matt Abernathy") was the sole owner and operator of Wisper I prior to its bankruptcy. Matt Abernathy and his wife Adria Abernathy (together, the "Defendants"),

operated the business as debtor-in-possession during the nine months prior to confirmation. After taking control of Wisper I's business, Wisper II discovered previously undisclosed facts that allegedly indicate Matt Abernathy mismanaged Wisper I. Wisper II alleges that Matt Abernathy's actions give rise to the turnover, preference, and fraudulent transfer claims at issue in this adversary proceeding. The Defendants assert that the *res judicata* effect of the confirmed plan precludes Wisper II's claims and that the Court lacks subject matter jurisdiction over some of the claims at issue.

For the reasons that follow, the Court concludes that *res judicata* does not bar Wisper II's actions against the Defendants. The causes of action pled by Wisper II were either specifically reserved for later litigation pursuant to 11 U.S.C. §1123(b)(3) or are exempt from the application of *res judicata* because the Defendants allegedly wrongfully concealed material facts giving rise to the claim. Further, the Court holds that it retains subject matter jurisdiction over these claims even postconfirmation. As such, the Court will deny the Defendants' motion to dismiss.

STATUTORY AUTHORITY AND JURISDICTION

This adversary proceeding is related to 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. In this proceeding, the Court is called upon to evaluate the propriety of Matt Abernathy's actions while in control of the debtor-in-possession during the pendency of the bankruptcy and to review and interpret the Court's final confirmation order and its effect on property and causes of action that were once property of the estate. The complaint is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (F), (H), (L), and (O). This Court has jurisdiction over core proceedings pursuant to 28 U.S.C. §§ 157(b)(1) and 1334 and thus may enter a final order in this matter. This memorandum opinion shall serve as the Court's findings of facts and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

FACTS

Prior to filing for Chapter 11 bankruptcy relief, Wisper I provided wireless internet services to its subscribers in the largely rural areas of West Tennessee. Wisper I filed its bankruptcy petition on March 27, 2013. At all times prior to confirmation, Matt Abernathy maintained control of Wisper I's business as a debtor-in-possession. Wisper I filed its Chapter 11 plan and disclosure statement on August 21, 2013. On October 15, 2013, creditors and investors representing over 90% of Wisper I's capital (collectively, the "Investor Plan Proponents")[1] filed a competing plan ("Investor Plan") and disclosure statement ("Investor Disclosure Statement") pursuant to 11 U.S.C. §1121(c).[2]

Although Wisper I indicated on its bankruptcy petition that Matt Abernathy was its sole equity holder, Abernathy had in fact entered into a number of revenue-sharing "Investment Agreements" that entitled investors to share in the profits from cellular or transmission towers in a contractually-defined location. The Investor Plan identified these investors as "Outside Equity Holders." The Investor Plan gave Outside Equity Holders the option of converting their revenue-sharing quasi-equity interest into a full membership interest in the reorganized debtor Wisper II and further proposed to oust Matt Abernathy as both manager and equity holder. The Investor Plan provided that Matt Abernathy "shall not receive or retain any interest in [Wisper I] or [Wisper II] under the Plan and shall be deemed to have withdrawn from [Wisper I] as of the Effective Date of the Plan and shall forfeit, waive and release the member interest in [Wisper I]." (Investor Plan, ECF No. 142 at 10-11.)[3] On November 27, 2013, the Court

[1]Specifically, the Investor Plan Proponents consist of 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.

[2] Both Wisper I 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 Wisper I'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.

[3] References to the docket of the underlying chapter 11 case appear in the following format: "(ECF. No. ----.)" References to the docket of this adversary proceeding appear in

approved the Investor Plan Proponents' disclosure statement and Wisper I's amended disclosure statement. Both proposed plans were submitted to Wisper I's creditors for voting in mid-December 2013.

The Investor Disclosure Statement addressed the causes of action at issue in this proceeding in three ways. First, the Investor Disclosure Statement identified the Defendants as "insiders:"

> **B. Insiders of the Debtor [Wisper I]**
>
> As defined in §101(31) of the United States Bankruptcy Code (the "Code") the following are insiders to the Debtor [Wisper I]:
>
> | | |
> |---|---|
> | 1. George Matthew Abernathy- | Person in Control of the Debtor §101(31)(B)(iii). It is asserted by George Matthew Abernathy that he is the sole member of the Debtor [Wisper I]. |
> | 2. Adria Abernathy- | Wife of George Matthew Abernathy §101(31)(B)(vi) |
> | 3. George T. Abernathy- | Father of George Matthew Abernathy §101(31)(B)(vi) |
> | 4. Joyce Abernathy- | Mother of George Matthew Abernathy §101(31)(B)(vi) |

(Investor Disclosure Statement, ECF No. 141 at 3.) Second, the Investor Disclosure Statement explicitly contemplated postconfirmation avoidance actions against the Defendants. Paragraph II (F), entitled "Projected Recovery of Avoidable Transfers," provides that "the creditor/investor plan proponents do not contemplate that [Wisper II] will pursue preference, fraudulent conveyance, or other avoidance actions *unless such action arises out of the actions or conduct of an insider.*" (*Id.* at 5) (emphasis added). Finally, Paragraph II (G) explains that financial information on which eligible parties must rely in determining how to vote may be inaccurate or incomplete:

> The identity and fair market value of [Wisper I]'s assets are taken from Exhibit A of [Wisper I]'s Amended Disclosure Statement filed on October 2, 2013, and are attached hereto as EXHIBIT C. The Creditor/Investor Plan Proponents

the following format: "(A.P. ECF No. ----.)"

> cannot verify the accuracy of the attached exhibit and must rely on the truth and veracity of [Wisper I] in submitting the exhibit. Where possible, confirmation of an amount with [Wisper I] has been done and the amount submitted by [Wisper I] has been updated.

(*Id.*) In order to address this deficiency, the Investor Disclosure Statement also outlined the scope of an ongoing independent audit of Wisper I's finances.

During the balloting process, the majority of Wisper I's creditors voted in favor of the Investor Plan. On January 15, 2014, in response to certain creditors expressing concern that Matt Abernathy would act to damage or curtail the business before confirmation, this Court entered an Interim Pre-Trial Order which provided:

> [Wisper I] shall identify any furniture, equipment or machinery that it claims is owned by a third party including George Matthew Abernathy (Matt Abernathy) and shall not permit the removal of any such property from [Wisper I]'s offices or tower locations without the approval of the Creditor/Investor representatives or the Court or unless the third party can verify by receipts or business records that the property is not owned by or contributed to [Wisper I].

(Interim Pre-Trial Order, ECF No. 225 at 5-6.)

At the January 24, 2014 confirmation hearing, the Court confirmed the Investor Plan. The Court entered an order confirming the plan on January 29, 2014 ("Confirmation Order"). The Confirmation Order, in relevant part, provides:

> That on or before the Effective Date, [Wisper I], its manager, George Matthew Abernathy, and its employees are directed to turn over all Property of [Wisper I] including but not limited to all business records and documents; all furniture, fixtures and equipment; keys to [Wisper I]'s principal business location and tower sites; all access codes and passwords to all Property, all bank deposit account records (including debit cards and credit cards of [Wisper I]) such that [Wisper II] can assume the right to continue the business operations of [Wisper I] without interruption to the customers and subscribers of the business.
>
> That upon the request of the Creditor/Investor Plan Proponents, the Court shall retain jurisdiction of the case in all matters pending further orders of the Court.

(Confirmation Order, ECF No. 245 at 5-6.)

After taking control of the business, Wisper II asserts it discovered that Matt Abernathy allegedly mismanaged Wisper I's estate while serving as the debtor-in-possession. Wisper II alleges that Matt Abernathy obscured this information in order to conceal his alleged

wrongdoing. Wisper II now seeks recovery against the Defendants on a number of grounds. First, Wisper II alleges the Defendants are in possession of a substantial amount of property of the estate (including $11,965.00 from the cash drawer, $36,000.00 in office furniture, and $10,300.00 in missing inventory) which properly vested in Wisper II after the merger of Wisper I into Wisper II pursuant to the Confirmation Order. Second, Wisper II alleges that the Defendants defrauded Wisper II out of approximately $210,771.45 by making unauthorized postpetition withdrawals from Wisper I's accounts, increasing rent on property leased to Wisper I without bankruptcy court approval,[4] and diverting investors' money earmarked for Wisper I into other entities the Defendants owned. Finally, due to the extended look-back period to which insiders are subject, Wisper II estimates a potential recovery of approximately $295,935.00 from previously undisclosed avoidable preferences and fraudulent transfers made by the Defendants.

For their part, the Defendants move to dismiss this adversary proceeding on two grounds.[5] First the Defendants argue that Wisper II does not have standing to pursue these claims because "[n]either the plan of reorganization, nor the order confirming the plan entered by this Court contemplate that any prepetition causes of action previously held by [Wisper I] would be preserved, retained, or otherwise vest in Wisper II." (Def.'s Mem. In Support of Mot. To Dismiss, A.P. ECF No. 39 at 4.) Given the fact that 11 U.S.C. § 1141(a) provides that a confirmed plan binds the debtor and the creditors, the Defendants argue that the Confirmed plan is *res judicata* as to all actions that were not reserved or retained in favor of the reorganized debtor.

The Defendants' second basis for dismissal is their allegation that the Court does not have subject matter jurisdiction over many of Wisper II's claims. The Defendants assert that

[4]The lease at issue seemingly provided for the increase in monthly rent; however, Wisper II asserts that the Defendants needed court approval to begin making the increased payments.

[5]The Defendants also argued that dismissal of the adversary proceeding was proper under Federal Rule of Civil Procedure 12(b)(6) because the complaint failed to state a claim upon which relief could be granted against George T. Abernathy, Matt Abernathy's father. However, Wisper II submitted an order granting a non-suit against George T. Abernathy on January 28, 2015. As such, the Defendants' Rule 12(b)(6) argument is moot.

many of the claims arise out of prepetition state law contract disputes that are not core proceedings within the meaning of 28 U.S.C. § 157(b)(1). The Defendants also assert that these claims are not "related to" any core claims and, as such, the Court does not have any jurisdiction to hear and resolve them. For this reason, the Defendants argue that dismissal is proper pursuant to Federal Rule of Civil Procedure 12(b)(1), made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7012(b).

ANALYSIS

I. *Res Judicata* and 11 U.S.C. § 1123(b)(3)

The key inquiry in this case is whether the language in Paragraph II (F) of the Investor Disclosure Statement is sufficient to preserve the avoidance actions for postconfirmation prosecution by Wisper II. Defendants argue that the actions were not preserved in the Confirmed Plan. Not surprisingly, Wisper II asserts that they were.

Preliminarily, the Court finds it important to discuss how the Defendants framed their argument as to the *res judicata* effect of the Confirmed Plan. In moving for dismissal on this basis, the Defendants argued that Wisper II lacks standing to pursue the turnover, preference, and fraudulent transfer claims because the Confirmed Plan did not preserve those causes of action. Traditionally, standing and *res judicata* are two separate concepts under the law. "A plaintiff's standing is a jurisdictional matter for [Article] III courts, and thus a 'threshold question' to be resolved before turning attention to more 'substantive' issues." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 490, 102 S. Ct. 752, 768 (1982). "A plaintiff has Article III standing when he or she can show: (1) an injury-in-fact that (2) was 'fairly traceable to the defendant's allegedly unlawful conduct' and (3) is '"likely to be redressed' via a favorable decision." *Schultz v. United States*, 529 F.3d 343, 349 (6th Cir. 2008) (quoting *Prime Media, Inc., v. City of Brentwood*, 485 F.3d 343, 349 (6th Cir. 2007)). Standing also involves prudential concerns which require that "the plaintiff must be a proper proponent . . . ." *Coal Operators & Assocs., Inc., v. Babbitt*, 291 F.3d 912, 916 (6th Cir. 2002) (citing *Valley Forge*, 454 U.S. at 472). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 2205 (1975) (citation omitted).

"Standing is not an affirmative defense . . . Instead, it is a qualifying hurdle that the plaintiffs must satisfy" before they can proceed with an action. *Cmty. First Bank v. Nat'l Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1995). "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99, 88 S. Ct. 1942, 1952 (1968).

Res judicata works to preclude an action based not on whether the party is entitled to bring suit, but whether something has occurred to prevent relitigation of an issue by parties who would otherwise be jurisdictionally able to pursue relief. "The doctrine of *res judicata* is that a judgment on the merits in a prior suit involving the same parties or their privies bars a subsequent suit based on the same cause of action." *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358, 361-62 (6th Cir. 1967) (citing *Lawlor v. Nat'l Screen Serv.*, 349 U.S. 322, 75 S. Ct. 865 (1955)). "The purpose of *res judicata* is to promote the finality of judgments and thereby increase certainty, discourage multiple litigation, and conserve judicial resources." *Westwood Chem. Co. v. Kulick*, 656 F.2d 1224, 1227 (6th Cir. 1981). *Res judicata* is an affirmative defense typically raised under Federal Rule of Civil Procedure 8(c). *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 582 (6th Cir. 2009). Consequently, *res judicata* "can be waived and . . . it does not go to subject-matter jurisdiction." *Id.*

In the case at bar, the Defendants have not argued that Wisper II lacks constitutional or prudential standing to pursue its causes of action in this proceeding. This would be a difficult argument given the fact that 11 U.S.C. § 1107(a) grants a Chapter 11 debtor-in-possession standing to bring turnover, preference, and fraudulent transfer actions pursuant to 11 U.S.C. §§ 542, 547, and 548. *Canadian Pacific Forest Prods., Ltd., v. J.D. Irving, Ltd.* (*In re Gibson Group, Inc.*), 66 F.3d 1436, 1440-41 (6th Cir. 1995). Instead, the Defendants argue that the *res judicata* effect of the Confirmed Plan bars these claims at this point in the proceedings. For this reason, the Court will address the Defendants' arguments under the *res judicata* doctrine as opposed to the traditional concept of standing.

Generally speaking, a bankruptcy court's confirmation order "has the effect of a judgment by the district court and *res judicata* principles bar relitigation of any issues raised or that could have been raised in the confirmation proceedings." *Still v. Rossville Bank* (*In re*

Chattanooga Wholesale Antiques, Inc.), 930 F.2d 458, 463 (6th Cir. 1991). A claim is barred by *res judicata* when the following elements are present:

> (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their "privies"; (3) an issue in the subsequent action was litigated or should have been litigated in the prior action; and (4) the causes of action are identical.

Id.

It is undisputed that the elements of *res judicata* are present in this case. First, the Investor Plan was confirmed on January 29, 2014. "Confirmation of a plan of reorganization constitutes a final judgment in bankruptcy proceedings." *Browning* , 283 F.3d at 772 (citation omitted). Second, both the Defendants and Wisper II were parties to Wisper I's bankruptcy proceeding:

> *Res judicata* bars not only the actual parties to an earlier bankruptcy proceeding from later bringing suits which should have been brought in the context of the proceeding, but also those in privity with the parties. "Privity in this sense means a successor in interest to the party...."

Browning, 283 F.3d at 772 (quoting *Sanders Confectionery Prods., Inc., v. Heller Fin., Inc.*, 973 F.2d 474, 480 (6th Cir. 1992)). Since preferences, fraudulent transfers, and other avoidance actions are actions which "could have been raised" before confirmation, these claims could potentially be barred by *res judicata* if the trustee or debtor-in-possession fails to prosecute them prior to confirmation. *In re James River Coal Co.*, 355 B.R. 45, 52 (Bankr. M.D. Tenn. 2006). Finally, confirmation of a chapter 11 plan has a *res judicata* effect with respect to all claims that became assets of the bankruptcy estate. *Reg'l Diagnostics*, 372 B.R. at 10. Accordingly, *res judicata* will bar the Plantiff's preconfirmation claims unless those claims were reserved under 11 U.S.C. § 1123(b)(3).

Section 1123(b) of the Bankruptcy Code states that a Chapter 11 plan may provide for:

> (A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

> (B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purposes, of any such claim or interest[.]

11 U.S.C. § 1123(b)(3)(B). The success or failure of reservation language under 11 U.S.C. § 1123(b)(3) determines the application of *res judicata* to the claim:

> Because it is often not practical or even possible to litigate all preference actions before confirmation of a plan, it has long been recognized that the Chapter 11 plan can reserve the right of the reorganized debtor to bring preference actions after confirmation, thereby overcoming the *res judicata* effect of confirmation.

Elk Horn Coal Co., LLC, v. Conveyor Mfg. & Supply, Inc. (*In re Pen Holdings, Inc.*), 316 B.R. 495, 498-99 (Bankr. M.D. Tenn. 2004); *see also Browning v. Levy*, 283 F.3d 761, 774 (6th Cir. 2002) ("*Res judicata* does not apply where a claim is expressly reserved by the litigant in the earlier bankruptcy proceeding. . . . But a general reservation of rights does not suffice to avoid *res judicata*."); *Morris v. Zelch* (*In re Reg'l Diagnostics, LLC*), 372 B.R. 3, 14 (Bankr. N.D. Ohio 2007) (denying party's request for dismissal based on *res judicata* when reservation language satisfied 11 U.S.C. § 1123(b)(3)).

Section 1123(b)(3) does not identify whether any particular language is necessary to preserve causes of actions following confirmation of a Chapter 11 plan. *See Pen Holdings,* 316 B.R. at 498-99. The Sixth Circuit, however, has addressed the issue in *Browning v. Levy*, 283 F.3d 761, 774 (6th Cir. 2002). In that case, the debtor's successor-in-interest relied on an "omnibus reservation of rights" provision in the approved disclosure statement in order to maintain causes of action for legal malpractice and breach of duty against the law firm that represented the debtor's majority shareholder prepetition. This "omnibus reservation" provided:

> In accordance with section 1123(b) of the Bankruptcy Code, the Company shall retain and may enforce any claims, rights, and causes of action that the Debtor or its bankruptcy estate may hold against any person or entity, including, without limitation, claims and causes of action arising under sections 542, 543, 544, 547, 548, 550 or 553 of the Bankruptcy Code.

Browning, 283 F.3d at 769. The Sixth Circuit rejected the successor-in-interest's argument and concluded that the language of the "omnibus reservation" was too broad to preserve the asserted causes of actions:

> [This] blanket reservation was of little value to the bankruptcy court and the other parties to the bankruptcy proceeding *because it did not enable the value of [the] claims to be taken into account in the disposition of the debtor's estate.* Significantly, it neither names [defendant law firm] nor states the factual basis for the reserved claims.... [The] blanket reservation does not defeat application of *res judicata* to its claims against [defendant law firm].

Browning, 283 F.3d at 775 (emphasis added).

In *Pen Holdings*,the Bankruptcy Court for the Middle District of Tennessee clarified the *Browning* analysis by placing the decision within the context of § 1123(b)(3)'s legislative history:

> Browning does not establish a general rule that naming each defendant or stating the factual basis for each cause of action are the only ways to preserve a cause of action at confirmation of a Chapter 11 plan. Read in the context of its history, § 1123(b)(3) protects the estate from loss of potential assets. It is not designed to protect defendants from unexpected lawsuits. The words sufficient to satisfy § 1123(b)(3) must be measured in the context of each case and the particular claims at issue: *Did the reservation allow creditors to identify and evaluate the assets potentially available for distribution?*

Pen Holdings, 316 B.R. at 504 (emphasis added). As recognized by the court in *Regional Diagnostics*, the legislative history also demonstrates that a court should engage in this case-by-case analysis with the purpose of § 1123(b)(3) firmly in mind.

> [W]hen a statute serves to give notice, such as the one here, it is important to identify who is intended to benefit from that notice. . . . "[T]he notice at issue in § 1123(b)(3) is not notice to potential defendants, it is notice to creditors generally that there are assets yet to be liquidated that are being preserved for prosecution by the reorganized debtor or its designee." Congress drafted the 1978 statute with the intent of preserving the goal of the 1938 provision (section 216(13) of the Bankruptcy Act) that preserved the debtor's causes of action for the benefit of creditors. "The legislative history of § 216(13) 'made clear that its aim was to make possible the formulation and consummation of a plan before completion of the investigation and prosecution of causes of action such as those for previous insider misconduct and mismanagement of the debtor....' "

Reg'l Diagnostics, 372 B.R. at 14 (internal citations omitted) (citing Pen Holdings, 316 B.R. at 499-501).

Generally, "[i]n interpreting a confirmed plan, courts use contract principles, since the plan is effectively a new contract between the debtor and its creditors." *Official Comm. of*

Unsecured Creditors v. Dow Corning Corp. (*In re Dow Corning Corp.*), 456 F.3d 668, 676 (6th Cir. 2006). State law governs contract interpretation. *Dow Corning Corp. v. Claimants' Advisory Comm.* (*In re Settlement Facility Dow Corning Trust*), 628 F.3d 769, 775 (6th Cir. 2010). Tennessee law provides that:

> [A] court's task when interpreting a contract is "to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contractual language." *Teter v. Republic Parking Sys.*, 181 S.W.3d 330, 342 (Tenn. 2005). The Tennessee Supreme Court explained in *Teter* that if a contract's language is unambiguous, the literal meaning of the language controls. *Id.* Additionally, under Tennessee law, a writing may be incorporated by reference into a written contract. If a writing is incorporated by reference, both writings must be construed together. *Oman Constr. Co. v. Tennessee Cent. Ry. Co.*, 212 Tenn. 556, 370 S.W.2d 563, 570 (1963)[.]

Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC, 477 F.3d 383, 392 (6th Cir. 2007) (some citations omitted). Tennessee law further provides that instruments "executed contemporaneously with commonality of parties, purpose and transaction should be construed together as one contract." *Carrier v. Speedway Motorsports, Inc*. 151 S.W.3d 920, 928 (Tenn. Ct. App. 2004). Here, the Investor Plan and Investor Disclosure Statement repeatedly reference the other, and both documents were executed as a single transaction in the confirmation process. Accordingly, the Investor Plan and Investor Disclosure Statement will be construed together as a single contract. *See Reg'l Diagnostics*, 372 B.R. at 15 (finding a plan's general reservation of litigation rights similar to that rejected in *Browning* nevertheless satisfied *Browning* when read in conjunction with its disclosure statement and a claim letter sent to potential defendants).

Here, the Investor Disclosure Statement provides: "the creditor/investor plan proponents do not contemplate that [Wisper II] will pursue preference, fraudulent conveyance, or other avoidance actions *unless such action arises out of the actions or conduct of an insider*." (Investor Disclosure Statement, ECF No 141 at 5) (emphasis added). Contrary to the Defendants assertion, these words are not meaningless. Rather, this clause functions to expressly waive all other causes of action while specifically retaining avoidance claims against a defined set of "insiders." The limited reservation of "preferences, fraudulent conveyance, or other avoidance actions" arising out of the conduct of insiders is fundamentally unlike the

"omnibus reservation of rights" rejected by the Sixth Circuit in *Browning.* Here, the Defendants are singled out as insiders against whom the general waiver is not meant to apply. *See Reg'l Diagnostics,* 372 B.R. at 15 (finding claim letter served on "the current and former directors and officers of the Debtors" and incorporated by reference into plan provided creditors with "information about the class of people the estate might have claims against" pursuant to *Browning*). Furthermore, although the retention clause in the Investor Disclosure Statement is not as specific as that of a formal complaint,

> [N]othing in § 1123(b)(3) suggests such specificity is required. The history of § 1123(b)(3) suggests just the opposite—that preserving the value of preferences for distribution to creditors after confirmation should be easily accomplished in the plan without magic words or typographical traps.

Pen Holdings, 316 B.R. at 505. In the present case, the categorical reservation of "preference, fraudulent conveyance, or other avoidance actions" is sufficient to provide notice of the preserved claims' factual basis to a voting creditor. *Reg'l Diagnostics,* 372 B.R. at 16.

It is also significant that the reservation language is presented in the Investor Disclosure Statement under the heading "Projected Recovery of Avoidable Transfers." This format indicates that the purpose of the reservation language is to "enable the value of" Wisper I's "claims to be taken into account in the disposition of" Wisper I's estate. *Browning,* 283 F.3d at 775. A creditor reading the Investor Disclosure Statement would at the very least know that there might possibly be claims against insiders that could be considered potential assets. Comparatively, the competing plan proposed by Wisper I (under the control of Matt Abernathy) provides: "[Wisper I] does not intend to pursue preference, fraudulent conveyance, or other avoidance actions." (Wisper I Disclosure Statement, ECF No. 103 at 3.) A creditor comparing these analogous provisions would have sufficient information to determine that potential avoidance assets might be available under the Investor Plan, but not under Wisper I's Plan. Although the monetary value of the avoidance actions was unknown during the confirmation process, notice of their potential recovery nevertheless allowed creditors to take into account their value as it pertains to the distribution of Wisper I's estate.

The reservation language in the present case is remarkably similar to that at issue in *P.A. Bergner & Co. v. Bank One Milwaukee* (*In re P.A. Bergner & Co.*), 140 F.3d 1111, 1117

(7th Cir. 1998). In *Bergner*, the Seventh Circuit found that certain language was sufficient to preserve the plaintiff's postconfirmation claim when the confirmed plan provided:

> 13.3. Avoidance and Recovery Actions.
>
> Effective as of the date of the approval of the Disclosure Statement by the Bankruptcy Court, the Debtors waive the right to prosecute and release any avoidance or recovery actions under sections 544, 545, 547, 548, 549, 550, 551, and 553 of the Bankruptcy Code or any other causes of action, or rights to payments of claims, that belong to the Debtors or the Debtors in Possession, *other than any such actions that may be pending on such date*.

Bergner, 140 F.3d at 1117 (emphasis added). Just as in *Bergner*, the reservation language in the present case reserves a specific category of claims by excepting them from a general waiver. *See Pen Holdings*, 316 B.R. at 504 (discussing *Bergner* with approval to demonstrate that Browning does not require specifically listing each defendants' name and the factual basis for the cause of action under § 1123(b)(3)); *see also Kmart Corp. v. Intercraft Company* (*In re Kmart Corp.*), 310 B.R. 107, 124 (Bankr. N.D. Ill. 2004) ("*Bergner* stands for the proposition that plan provisions identifying causes of action by type or category are not mere blanket reservations. Therefore, categorical reservation can effectively avoid the *res judicata* bar. . . . [S]ection 1123(b)(3) does not require 'specific and unequivocal' identification.").

Finally, the Investor Disclosure Statement explicitly states that its proponents have not completed their investigation into the financial affairs of Wisper I. In *James River Coal Co.* the court found that language reserving "actions under chapter 5 of the Bankruptcy Code" was sufficient to preserve preference and fraudulent conveyance under § 1123(b)(3) when "creditors were informed in the Disclosure Statement that it was not possible at that time to predict the outcome or value of those causes of action." *James River Coal Co.*, 355 B.R. at 53. Before the independent audit was completed in this case, the only financial information available for Wisper I came directly from Matt Abernathy. It is therefore unsurprising that the avoidance actions were not included as assets in the Investor Disclosure Statement's liquidation analysis since the basis for these claims had not been disclosed by Matt Abernathy. Although the court in *Pen Holdings* cautioned that "an estimate of what the Debtors might reasonably recover as preferences should have been included in the liquidation analysis," to have done so in the present case, based solely on the information provided by Matt Abernathy

would have done nothing to help creditors evaluate the potential assets. 316 B.R. at 504.

Having considered the claims at issue and the context of the present case, the Court concludes that the Investor Disclosure Statement's language reserving "preference, fraudulent conveyance, or other avoidance actions" arising "out of the actions or conduct of an insider" provides sufficient information to allow creditors to identify and evaluate the assets potentially available for distribution. The language therefore satisfies the requirements of 11 U.S.C. § 1123(b)(3). Accordingly, *res judicata* does not bar Wisper II's claims in the present action.

II. Wrongful Concealment

As a matter of federal common law, *res judicata* will not preclude an action when "a plaintiff's failure to raise or reserve its cause of action in an earlier case between the parties was caused by the defendant's 'wrongful concealment' of facts giving rise to the claim." *Browning*, 283 F.3d at 770 (quoting *McCarty v. First of Georgia Ins. Co.*, 713 F.2d 609, 612 (10th Cir. 1983) (claim preclusion "does not shield a blameworthy defendant from the consequences of his own misconduct"). Wrongful concealment has two prongs: "(1) wrongful concealment of material facts that (2) prevented the plaintiff from asserting their claims in the first action." *Venture Global Eng'g, LLC v. Satyam Computer Servs., Ltd.*, 730 F.3d 580, 586 (6th Cir. 2013) (quoting *Browning*, 283 F.3d at 770).

Although "concealment by mere silence" or an "unwillingness to divulge wrongful activities" will typically not qualify as "wrongful concealment" for purposes of *res judicata*, Matt Abernathy's position as manager of Wisper I gave him an affirmative fiduciary duty to disclose all material information to the Court and creditors. 11 U.S.C. § 1107; *see Tenn-Fla Partners v. First Union Nat. Bank of Fla.*, 229 B.R. 720, 734 (W.D. Tenn. 1999). In its complaint, Wisper II alleges that Matt Abernathy repeatedly misrepresented Wisper I's finances by (1) repeatedly making unauthorized cash withdrawals during the pendency of the case, (2) on at least one occasion reporting an unauthorized cash withdrawal as an "automobile expense" on the monthly operating report, using Wisper I's operating account for reporting personal expenses and reporting such expenses as business expenses, (3) failing to account for the removal of inventory of Wisper I, (4) failing to disclose EAM Properties was an unregistered Tennessee Partnership owned by the Defendants and therefore an insider, (5) unilaterally

approving increased rent payments due to EAM Properties during the pendency of the case, (6) failing to disclose on the statement of financial affairs preferential payments made by Wisper I to insiders within one year of the filing of the bankruptcy petition, and (7) failing to disclose on the statement of financial affairs Wisper I's transactions with insiders avoidable under 11 U.S.C. § 548(a)(1).

The Defendants were solely responsible for providing the statement of financial affairs and monthly operating reports of Wisper I. Therefore the first prong of wrongful concealment is satisfied. *Venture Global Eng'g*,730 F.3d at 587 ("Where the claims sound in fraud, as plaintiffs' do here, the wrongful concealment prong is satisfied by showing the fraud was self-concealing.") Furthermore, it is also clear from the pleadings that the Defendants' alleged fraud did not come to light until Wisper II took control of Wisper I and finished its independent audit of Wisper I's finances postconfirmation. Given the pace of the confirmation proceedings, there was no practical way for Wisper II to discover its possible claims during the preconfirmation period. Accordingly, the allegations regarding the Defendants' wrongful concealment are sufficient to prevent the application of *res judicata* to Wisper II's claims in this case.

III. Subject Matter Jurisdiction

Rule 12(b)(1) of the Federal Rules of Civil Procedure, made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7012, provides that a claim may be dismissed for lack of subject-matter jurisdiction.

> A facial attack on the subject matter jurisdiction alleged by the complaint merely questions the sufficiency of the pleading. In reviewing such a facial attack, a trial court takes the allegations in the complaint as true, which is a similar safeguard employed under 12(b)(6) motions to dismiss. On the other hand, when a court reviews a complaint under a factual attack, as here, no presumptive truthfulness applies to the factual allegations. . . . When facts presented to the district court give rise to a factual controversy, the district court must therefore weigh the conflicting evidence to arrive at the factual predicate that subject matter jurisdiction exists or does not exist.

Ohio Nat. Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990). In this proceeding, the Defendants maintain that Wisper II's claims regarding Wisper I's lease with EAM Properties are non-core claims otherwise unrelated to the bankruptcy proceeding: "These

claims made by the Plaintiff are state law claims and the resolution of these claims does not involve the interpretation, implementation, consummation, execution, or administration of the plan of reorganization that was approved by this Court." (Def. Memo, A.P. ECF No. 39 at 11.) This is an attack on the face of the pleadings, and thus the Court will accept Wisper II's allegations as true.

The Defendants attempt to characterize Wisper II's lease claim as a prepetition contract claim. However, this characterization fails to take into account that Wisper II's complaint only alleges misconduct regarding the lease that occurred when the Defendants were operating Wisper I postpetition as a debtor-in-possession:

> Pre-petition, [Wisper I] was paying the sum of Three Thousand and No/100 Dollars ($3,000) per month for rent to Matt Abernathy and Adria Abernathy, d/b/a EAM Properties, believed to be an unregistered Tennessee partnership owned by Matt and Adria Abernathy. This rent was for the business premises of [Wisper I] commonly known as 1378 North Cavalier Drive, Alamo, Tennessee. Immediately after the filing of the Petition, Matt Abernathy or Adria Abernathy, acting as the bookkeeper of [Wisper I], caused [Wisper I] to begin paying rent to "EAM Properties", an insider, an increased amount of Four Thousand and No/100 Dollars ($4,000) per month, without Court approval resulting in an overpayment of rent to the Abernathy's for the period of April, 2013 through December, 2013, of no less than Nine Thousand and No/100 Dollars ($9,000), for which they are jointly and severable liable to the Plaintiff.

(Pl.'s Am. Compl., A.P. ECF No. 35 at ¶ 24.) This claim does not assert a right based on the prepetition conduct of the Defendants. As such, Wisper II's claim regarding the lease is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (E), (L), and (O).

Moreover, the fact that this proceeding is brought postconfirmation does not change this conclusion. A bankruptcy court retains postconfirmation subject matter jurisdiction over claims when "there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter." *Thickstun Bros. Equip. Co., Inc. v. Encompass Servs. Corp.* (*In re Thickstun Bros. Equip. Co., Inc.*), 344 B.R. 515, 521 (B.A.P. 6th Cir. 2006) (citation omitted)). This "close nexus" is satisfied when a bankruptcy court is called upon to interpret its own orders. *Lefkowitz v. Mich. Trucking, LLC* (*In re Gainey Corp.*), 447 B.R. 807, 813-14 (Bankr. W.D. Mich. 2011); *see Resorts Int'l*, 372 F.3d at 167 ("Matters that affect the interpretation, implementation, consummation, execution, or administration of the confirmed

plan will typically have the requisite close nexus."); *Thickstun Bros.*, 344 B.R. at 522 ("It is difficult to imagine a closer nexus to [a debtor's] bankruptcy case and [a] confirmed [p]lan than [a] direct request for interpretation and clarification of the [p]lan's terms."). When, as here, the Court had jurisdiction over the claim preconfirmation and the plan and disclosure statement preserve that claim in favor of Wisper II, then the adjudication of the claim requires the Court to interpret, consummate, and execute the Confirmed Plan and Confirmation Order. *Reg'l Diagnostics*, 372 B.R. at 24-35. Thus, Wisper II's claim regarding the lease has a sufficiently close nexus to Wisper I's bankruptcy. Accordingly, the Court retains postconfirmation subject matter jurisdiction over the lease claim.

CONCLUSION

The Court concludes that the Defendants have not demonstrated that dismissal of Wisper II's adversary complaint against Matt and Adria Abernathy is warranted at this time. The Defendants' Motion to Dismiss is denied. The Court will enter a separate order in accordance herewith.

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