Dated: December 02, 2015
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,	)	
	)	
Plaintiff,	)	
v.	)	**Adv. Pro. No. 14-5043**
	)	
George Matthew Abernathy and Adria Abernathy,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION RE: (1) PLAINTIFF'S FIRST AMENDED COMPLAINT TO RECOVER MONEY AND PROPERTY OF THE ESTATE, TO COMPEL TURNOVER, TO RECOVER PREFERENCES, AND TO RECOVER FRAUDULENT TRANSFERS; and (2) DEFENDANTS' COUNTER-COMPLAINT TO RECOVER MONEY AND PROPERTY WRONGFULLY TAKEN FROM DEFENDANTS

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I. SUMMARY OF OPINION

In this adversary proceeding, the Court is called upon to evaluate the propriety of the parties' actions both prior to and following confirmation of the Chapter 11 plan in the underlying bankruptcy case. The debtor, Wisper, LLC ("Wisper I"), filed its Chapter 11 Petition for bankruptcy relief on March 27, 2013. At the time of filing, defendant George Matthew Abernathy ("Matt Abernathy" or "Abernathy") served as Wisper I's managing member. Wisper I was a single member LLC. Matt's wife, Adria Abernathy, served as Wisper I's bookkeeper both before and after the filing of the Chapter 11 case. Wisper I filed its proposed Chapter 11 plan of reorganization on August 21, 2013. A group of Wisper I's creditors filed a competing Chapter 11 plan on October 15, 2013 ("Competing Plan"). On January 29, 2014, the Court confirmed the Competing Plan. The terms of the confirmed plan provided that the reorganized debtor would be a Board-Managed Tennessee Limited Liability Company known as Wisper II, LLC ("Wisper II"). Wisper I merged with and into Wisper II as of February 12, 2014, the effective date of the confirmed plan.

In this adversary proceeding, Wisper II alleges that Matt Abernathy and Adria Abernathy (together, the "Defendants") wrongfully removed property from the debtor's business premises both before and after the filing of Wisper I's Chapter 11 case. Wisper II also alleges that the Defendants made unauthorized withdrawals from the debtor's bank accounts during this same period of time. Wisper II asserts that these actions give rise to the turnover, conversion, preference, and fraudulent transfer claims at issue in this adversary proceeding. Lastly, Wisper II asserts that Matt Abernathy disobeyed orders of this Court and should, therefore, be held in contempt. Wisper II is seeking damages, the return of property, and sanctions against the Defendants.

In their Counter-Complaint, the Defendants allege that Wisper II is liable for approximately $82,000.00 in payroll taxes the IRS collected from Matt Abernathy following confirmation of the creditors' Chapter 11 plan. The Defendants are seeking reimbursement of this amount from Wisper II.[1]

[1]The Defendants' Counter-Complaint actually contained three claims for relief; however, on June 10, 2015, the Court issued an order dismissing the other two counterclaims based on a lack of subject matter jurisdiction. As such, the only remaining counterclaim is the

The Court conducted a three-day trial in this adversary proceeding from June 10, 2015, to June 12, 2015. At the Court's direction, the parties filed Post-Trial Briefs on July 14, 2015. Given the nature of the claims at issue, resolution of this adversary proceeding requires the Court to make factual findings regarding each parties' actions as well as legal conclusions as to whether those actions create liability.

Wisper II filed its Amended Complaint against three defendants: Matt Abernathy, Adria Abernathy, and Matt's father, George T. Abernathy. Pursuant to a January 30, 2015 Consent Order, the parties entered a non-suit as to George T. Abernathy. As such, he is no longer a defendant in this adversary proceeding.

For the reasons set forth herein, the Court concludes as follows:

1. The Court finds that the 2010 Ford F-250 Truck, the welder along with the 25 hp Kohler engine, the eight 290 amp hour deep cycle marine batteries, the two battery chargers, the gas generator, and the $11,965.00 in missing cash are property of Wisper II. As such it will order the Defendants to turn that property over to Wisper II;
2. The Court finds that the air compressor and the missing Laptop are property of the Defendants. The Court also finds that there was no proof that an impact drill was removed from Wisper I's offices. Accordingly, the Court will not order the Defendants to turn these three items over to Wisper II;
3. The Court finds that the office furniture and equipment currently being used at Wisper II's offices in Alamo, Tennessee, are property of Wisper II;
4. Based on the lack of evidence at the trial, the Court finds that Wisper II is not entitled to damages for the Defendants' failure to turn over property to Wisper II;
5. The Court finds that the Defendants wrongfully converted the two Pure Wave WiMax BTS Base Stations worth $20,600.00, $693.92 of the $2,804.02 Humana insurance premium for February 2014, and the $1,938.61 the Defendants used to make repairs to their personal vehicle. The Court will award Wisper II $23,232.53 for this conversion;

Defendants' claim for reimbursement of the payroll taxes.

6. The Court finds that the 2004 Ford Econoline Van was the Defendants' personal property. The Court therefore will not find that the Defendants converted Wisper I property when they sold the van post-petition;

7. The Court finds that the pre-petition transfers from Wisper I to the Defendants are not avoidable as preferential transfers pursuant to 11 U.S.C. § 547(b);

8. The Court finds that $209,345.00 in pre-petition transfers from Wisper I to the Defendants are avoidable as fraudulent transfers pursuant to 11 U.S.C. § 548(a)(1)(B). The Court also finds that Wisper II is entitled to recover this amount from the Defendants pursuant to 11 U.S.C. § 550(a)(1);

9. The Court finds that the $7,500.00 payments to Matt Abernathy in January 2012, April 2012, May 2012, June 2012, July 2012, August 2012, November 2012, and January 2013 are not avoidable as fraudulent transfers pursuant to 11 U.S.C. § 548(a). The Court also finds that the $7,500.00 monthly payments were not impermissible distributions under Tennessee Code Annotated § 48-236-105(a). The Court also finds that the $52,384.00 Matt Abernathy allegedly failed to deposit when Jerry Hughes and David Hughes invested in Wisper I is not avoidable as a fraudulent transfer pursuant to 11 U.S.C. § 548 or as an impermissible distribution under Tennessee Code Annotated § 48-236-105(a);

10. The Court finds that Wisper II is not entitled to recover rent payments for the period May 2013 through December 2013 pursuant to Tennessee Code Annotated § 48-249-404;

11. The Court concludes that 11 U.S.C. § 503(c) is not applicable to the instant matter and that Wisper II is not entitled to a refund of Matt Abernathy's owner's draw/salary or commissions from April 2013 to December 2013;

12. The Court concludes that the 11 U.S.C. § 362 automatic stay was not in effect following confirmation of the Chapter 11 plan in Wisper I's bankruptcy case. As such, the Defendants did not violate the automatic stay in failing to turn over property to Wisper II after confirmation;

13. The Court finds Matt Abernathy in contempt of this Court's prior orders and will sanction him by ordering him to pay reasonable attorney's fees and costs incurred by Wisper II in this adversary proceeding; and

14. The Court concludes that the Defendants are not entitled to a subrogation interest in the funds paid to the IRS for Wisper I's taxes in January 2014.

II. PROCEDURAL HISTORY

Pursuant to its Complaint and its Amended Complaint ("Amended Complaint"), Wisper II set forth the following causes of action:

1. a request for turnover of numerous pieces of property of the estate from the Defendants;
2. an allegation that the Defendants converted and/or fraudulently obtained property of the estate and money from the debtor-in-possession account and used these assets for their personal use;
3. an allegation that the Defendants withdrew funds from Wisper I's deposit account prior to filing for bankruptcy relief and that these transfers are subject to being set aside as preferential transfers and/or fraudulent conveyances pursuant to 11 U.S.C. §§ 547 and 548 and as impermissible distributions under Tennessee Code Annotated § 48-236-105(a);
4. an allegation that the Defendants improperly increased the amount of rent they were paying themselves for Wisper I's business offices in Alamo, Tennessee, without Court permission and that the rent payments should be avoided as a conflict of interest transaction under Tennessee Code Annotated § 48-249-404;
5. an allegation that certain withdrawals Matt Abernathy made from the debtor's bank accounts should not have been paid pursuant to 11 U.S.C. § 503(c);
6. an allegation that Matt Abernathy violated 11 U.S.C. § 362 when he removed property of the estate from Wisper I's business premises post-confirmation and a request for compensatory and punitive damages for Matt Abernathy's post-confirmation use of property of the estate in violation of the automatic stay; and
7. a request to find Matt Abernathy in civil contempt for failure to comply with this Court's prior orders and to assess compensatory and punitive damages for this contempt.[2]

[2]Wisper II's Complaint also contained two other claims for relief: (1) an allegation that a cell phone tower and the real property on which it was located were property of the estate and a request for a deed and access to the site; and (2) a request for the Court to determine the parties' rights under a lease/installment sales agreement for the company's business premises in Alamo, Tennessee. Both of these claims were resolved by the time this proceeding came to trial. At a hearing on January 8, 2015, the parties announced that the claim regarding the deed and access to the tower site was no longer in dispute because the parties had sold the property. In a February 13, 2015 Memorandum Opinion and Order

Wisper II asserted that the Court has jurisdiction over each of these claims and that each cause of action is a core proceeding. (Compl. at 2, ECF No. 1, and Am. Compl. at 2, ECF No. 35).[3]

Over the course of this adversary proceeding, the Defendants filed three motions to dismiss Wisper II's complaint. Although the Defendants challenged the Court's subject matter jurisdiction in each of these motions, they limited their jurisdictional objections to two claims that were resolved prior to the trial. (Mem. in Support of Mot. to Dismiss at 3, ECF No. 14; Mem. in Support of Mot. to Dismiss Am. Compl. at 9, ECF No. 39). Once those issues were resolved, the Defendants' limited objections to the Court's subject matter jurisdiction became moot.

The Defendants filed a Motion to Dismiss the original Complaint on May 15, 2014. (ECF No. 13). Wisper II filed an Objection to this motion on June 17, 2014. (ECF No. 23). In that objection, Wisper II stated that "[t]he Bankruptcy Court has both subject matter jurisdiction and constitutional authority to adjudicate the 'scope and affect' of its prior Bankruptcy Court Orders." (Obj. To Defs.' Mot. to Dismiss at 3, ECF No. 23). This is the only time in any of the numerous pleadings filed with the Court that a party made an allegation with respect to the Court's constitutional authority.

The Defendants filed an Amended Motion to Dismiss the original Complaint on August 21, 2014. (ECF No. 27).

Wisper II filed an Amended Complaint on November 12, 2014. (ECF No. 35). The Defendants filed an Amended Motion to Dismiss the Amended Complaint on November 17, 2014. (ECF No. 38). The Court denied this motion in a February 3, 2015 Memorandum Opinion and Order. (ECF Nos. 53 and 54). In doing so, the Court determined that it had

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in the debtor's bankruptcy case, the Court concluded it did not have subject matter jurisdiction over any of the post-confirmation issues related to the lease/installment sales agreement. (Bankr. Case No. 13-10770, ECF Nos. 345 and 346).

[3]Unless otherwise noted, all citations to the record are to the docket in Adversary Proceeding No. 14-5043.

subject matter jurisdiction over Wisper II's claims and that each of the claims were a core proceeding. The Defendants did not seek any relief from this determination.

The Court conducted a pre-trial scheduling conference in this matter on February 18, 2015. The attorney for Wisper II and the attorney for the Defendants participated in the pre-trial conference. The Court issued a Pre-Trial and Scheduling Order on February 20, 2015. (ECF No. 57). This order provided filing deadlines for discovery and various pre-trial motions. It also set the trial for June 10, 2015.

On March 3, 2015, Jason Rudd filed a Motion to Withdraw as Counsel for the Defendants in this adversary proceeding. The Court granted his motion on April 2, 2015. Thereafter, the Defendants employed Thomas Strawn ("Strawn") to serve as their attorney in this matter. Strawn filed a Notice of Appearance on April 13, 2015. Strawn was not a stranger to the Defendants or to this case. Strawn had served as debtor's counsel in Wisper I's Chapter 11 proceeding from the time the petition was filed in March 2013 until shortly after the Court confirmed the Competing Plan in January 2014. During Strawn's tenure as the debtor's attorney in the Chapter 11 case, Matt Abernathy operated Wisper I as the debtor-in-possession pursuant to 11 U.S.C. §§ 1101 and 1107.

The Defendants filed an Amended Answer to Wisper II's Amended Complaint on May 6, 2015. (ECF No. 67). In paragraph 4 of the Amended Answer, the Defendants denied that "jurisdiction in the United States Bankruptcy Court for the Western District of Tennessee, Eastern Division, is proper" and that "this is a core proceeding." (Am. Answer at 2, ECF No. 67). In doing so, the Defendants failed to acknowledge that the Court had already ruled on the issue of its subject matter jurisdiction over Wisper II's claims in its February 3, 2015 Memorandum Opinion. The Defendants did not offer any argument that the Court's prior ruling on jurisdiction was incorrect or should be set aside. They simply stated that the Court lacked subject matter jurisdiction. Because the Court has already determined that it had jurisdiction over the plaintiff's claims in its February 3, 2015 Memorandum Opinion and Order and because the Defendants did not offer any allegation that this decision was somehow incorrect, the Court will not revisit its determination that subject matter jurisdiction exists in these matters.

In addition to setting forth a general denial of all of Wisper II's claims, the Defendants asserted several affirmative defenses in their Amended Answer to the Amended Complaint:

1. the complaint fails to state a claim upon which relief can be granted and should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6);
2. the complaint is barred by the defenses of statute of frauds and laches;
3. Wisper II is not entitled to recovery under any of their claims under the doctrines of estoppel, waiver, accord and satisfaction, ratification, selective prosecution, settlement and release and acquiescence;
4. Wisper II is not entitled to any relief because the Defendants "did not violate any sections or provisions of the UNITED STATES BANKRUPTCY CODE, TENNESSEE CODE ANNOTATED, or any other applicable law;"
5. Wisper II is not entitled to any recovery against Adria Abernathy because it does not allege that Adria Abernathy violated any applicable law or did anything actionable against Wisper II; and
6. Wisper II's preferential and fraudulent transfer claims "do not violate any sections or provisions [of the] UNITED STATES BANKRUPTCY CODE, TENNESSEE CODE ANNOTATED, or any other applicable law."

(*Id.* at 6). With respect to their first affirmative defense, the Defendants failed to acknowledge that the Court had already denied their Rule 12(b)(6) Motion to Dismiss the Amended Complaint on February 3, 2015. (ECF Nos. 53 and 54).

The Defendants included a Counter-Complaint in their Amended Answer. The Defendants asserted that Wisper II was liable for approximately $82,000.00 that the IRS collected from the Defendants for unpaid payroll taxes.[4] The Defendants argued that Wisper II's assumption of Wisper I's assets and liabilities included the outstanding payroll taxes. As such, the Defendants asserted that Wisper II should be made to reimburse them for the taxes.

After filing their Amended Answer, the Defendants submitted a number of pleadings: (1) a Motion for a Jury Trial and a memorandum in support thereof (ECF Nos. 68 and 82); (2)

[4]The Defendants' Counter-Complaint actually contained 2 others forms of requested relief; however, as stated *supra*, the Court dismissed those counterclaims on June 10, 2015, for lack of subject matter jurisdiction. (*See* ECF No. 119).

a Motion to Extend Various Pre-trial Deadlines, including the trial date, and a memorandum in support thereof (ECF Nos. 69 and 81); (3) an Objection to Wisper II's Motion to Strike the Defendants' Amended Answer (ECF No. 83); (4) an Objection to Wisper II's Motion to Strike the Defendants' request for a jury trial (ECF No. 84); and (5) their Post-Trial Brief (ECF No. 129). The only jurisdictional issue the Defendants alluded to in any of these pleadings was a statement in the Memorandum in Support of the Motion for a Jury Trial. In that memorandum, the Defendants asserted that "[t]he subject matter in the amended complaint involves core and non-core proceedings as both equitable and legal issues are involved." (ECF No. 82). The Defendants did not offer this statement as a jurisdictional argument, but instead as the sole basis for their assertion that they were entitled to a jury trial under the Seventh Amendment.

Wisper II filed a Motion to Strike the Defendants' Amended Answer to the First Amended Complaint on May 11, 2015. (ECF No. 76). After a hearing on this motion, the Court issued a Memorandum Opinion and Order denying the motion. In so doing, the Court determined that the claims at issue in this matter are core proceedings over which the Court has subject matter jurisdiction. (ECF Nos. 98 and 99). None of the parties to this proceeding sought any reconsideration of this conclusion.

On May 29, 2015, the Defendants filed an Emergency Motion for Order of Reference to Federal District Court with this Court. (ECF No. 85). The sole basis for the Defendants' request was their asserted right to a jury trial. Because this Court has no statutory authority to refer a matter to district court, it denied the Defendants' motion. *See* 28 U.S.C. § 157(d) ("The *district court* may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown.") (emphasis added).

Wisper II filed an Answer to the Defendants Counter-Complaint on June 3, 2015. (ECF No. 101). Wisper II first asserted that the Counter-Complaint was barred by the applicable statute of limitations and the doctrines of estoppel and waiver. Turning to the Tax Counterclaim specifically, Wisper II made the following argument:

> The tax obligation of a single member LLC is the obligation of the single member as it flows through his personal return as a Schedule C Exhibit. As such, any obligation for pre-petition unpaid IRS taxes, is and was the personal obligation of Matt Abernathy. . . . To the extent that Matt Abernathy paid any IRS claim which he personally owed, he has no right to subrogration [sic] of such claim under the Bankruptcy Code, specifically considering that the aforedescribed consent [sic] Order reserved his personal liability.

(Ans. to Counter-Compl. at 3, ECF No. 101). Wisper II also asserted that the Court lacked subject matter jurisdiction over the Defendants' counterclaims.

Prior to commencement of the trial, the Court issued an order in which it determined that it had subject matter jurisdiction only as to the Defendants' Tax Counterclaim. (ECF No. 119). The Court dismissed the Defendants' other two counterclaims. None of the parties to this proceeding sought reconsideration of this conclusion.

III. CONSTITUTIONAL AUTHORITY AND JURISDICTION

The statutory basis for bankruptcy court jurisdiction is set forth in 28 U.S.C. § 1334. This statute provides that the United States District Courts have "original and exclusive jurisdiction of all cases under title 11" and "original, but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a) and (b). 28 U.S.C. § 157(a) allows a district court to refer "all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 . . . to the bankruptcy judges for the district." Pursuant to the Standing Order of Reference, Misc. Order No. 84-30, the District Court for the Western District of Tennessee has referred all bankruptcy cases and adversary proceedings to the bankruptcy court for this district.

Statutorily, a bankruptcy court's authority to issue a final order depends upon whether a matter is a core or non-core proceeding. In core proceedings, 28 U.S.C. § 157(b) provides that a bankruptcy judge "may enter appropriate orders and judgments subject to" appellate review by the district court or bankruptcy appellate panel. In non-core proceedings, 28 U.S.C. § 157(c) provides that "the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court" for *de novo* review unless all of the parties consent to entry of a final order by the bankruptcy court.

Under 28 U.S.C. § 157(b)(1), a "core proceeding" is generally defined as one that "either invokes a substantive right created by federal bankruptcy law or one which could not exist outside of the bankruptcy." *Lowenbraun v. Canary*, 453 F.3d 314, 320 (6th Cir. 2006). Section 157(b)(2)'s nonexhaustive list of "core proceedings" includes matters concerning the administration of the estate, orders to turn over property of the estate, and proceedings to determine, avoid, or recover preferences and fraudulent conveyances. 28 U.S.C. § 157(b)(2). A "non-core proceeding" is a matter that "is otherwise related to a case under title 11." 28 U.S.C. § 157(c)(1). Pursuant to 28 U.S.C. § 157(b)(3), bankruptcy courts have the power to determine whether a proceeding is core or non-core. Such a determination must be made "on a claim-by-claim basis." *Waldman v. Stone,* 698 F.3d 910, 921 (6th Cir. 2012) *overruled in part on other grounds by Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015).

Historically, bankruptcy judges were presumed to have authority to enter final orders in any matter designated by 28 U.S.C. § 157(b) as a core proceeding. This changed in 2011 with the issuance of the Supreme Court's watershed decision: *Stern v. Marshall*, 131 S. Ct. 2594 (2011). At issue in *Stern* was whether a bankruptcy judge had the constitutional authority to hear and finally resolve a counterclaim the debtor brought against a creditor who had filed a dischargeability proceeding and a proof of claim against the bankruptcy estate. Because 28 U.S.C. § 157(b)(2)(C) specifically identifies "counterclaims by the estate against persons filing claims against the estate" as a core proceeding, the bankruptcy court concluded that it had authority to issue a final order in the dispute. *Id.* at 2601. The Supreme Court disagreed. *Id.* at 2608.

In analyzing the case, the *Stern* court carefully reviewed the history of bankruptcy court jurisdiction and the constitutional parameters associated therewith and concluded that Article I bankruptcy judges lack the constitutional authority to issue final orders in matters designated as core proceedings in 28 U.S.C. § 157(b), but which exclusively encompass "matters 'of private right, that is, of the liability of one individual to another under the law as defined.' " *Id.* at 2612 (quoting *Crowell v. Benson*, 285 U.S. 22, 51, 52 S. Ct. 285 (1932)). As Article I courts, bankruptcy judges are limited to hearing matters involving "public rights," i.e.,"cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within

the agency's authority." *Id.* at 2613. The *Stern* court held that "a state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy" falls within the class of "private rights" bankruptcy judges are not constitutionally authorized to finally determine. *Id.* at 2610. Any matter that falls within this class of prohibited claims is now commonly referred to as a "*Stern* claim." *Exec Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014); *Meoli v. Cooper (In re Allen)*, 521 B.R. 613, 615 (Bankr. W.D. Mich. 2014).

A bankruptcy court may resolve a *Stern* claim in one of two ways. First, a bankruptcy judge may hear the matter and issue proposed findings of fact and conclusions of law to the district court for *de novo* review. *Arkison*, 134 S. Ct. at 2168. Second, a bankruptcy court may hear and finally determine *Stern* claims as long as "the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge." *Wellness*, 135 S. Ct. at 1939. This "knowing and voluntary consent" may be "express or implied." *Id.* at 1948.

"It is well-established that the federal courts are under an independent obligation to examine their own jurisdiction." *Kusens v. Pascal Co., Inc.*, 448 F.3d 349, 359 (6th Cir. 2006) (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990)). It is an analysis that must be made " 'whenever a doubt arises as to the existence of federal jurisdiction.' " *Sicherman v. Rivera (In re Rivera)*, 379 B.R. 728, 730 (Bankr. N.D. Ohio 2007) (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278, 97 S. Ct. 568 (1977)). If the parties fail to raise the issue of jurisdiction, a court must do so *sua sponte*. *Rivera*, 379 B.R. at 730. Since *Stern*, this investigative duty necessarily involves determining whether the claim at issue is, in fact, a *Stern* claim and, if it is, whether the parties have consented to entry of a final order by the bankruptcy court. *Waldman*, 698 F.3d at 918; *Northeast Indus. Dev. Corp. v. ParkStone Capital Partners, LLC (In re Northeast Indus. Dev. Corp.)*, 513 B.R. 825, 836 (Bankr. S.D.N.Y. 2014).

The determination of whether a court has subject matter jurisdiction to hear a particular proceeding "is entirely separate from the question of whether a bankruptcy judge has" the constitutional authority to issue a final order in the matter. *Liquidating Tr. of the MPC Liquidating Trust v. Granite Fin'l Solutions, Inc. (In re MPC Computers, LLC)*, 465 B.R. 384,

389 (Bankr. D. Del. 2012); *Binder v. Price Waterhouse & Co., LLP (In re Resorts Int'l., Inc.)*, 372 F.3d 154, 163 (3d Cir. 2004); *Exec. Sounding Bd. Assocs., Inc., v. Advanced Mach. & Eng'g Co. (In re Oldco M Corp.)*, 484 B.R. 598, 607 (Bankr. S.D.N.Y. 2012) ("Section 157 allocates the authority to enter final judgment between the Bankruptcy Court and the district court. . . . That allocation does not implicate questions of subject matter jurisdiction." (quotation omitted)); *Empire State Bldg., Co., LLC, v. N.Y. Skyline, Inc. (In re N.Y. Skyline, Inc.)*, 471 B.R. 69, 79 (Bankr. S.D.N.Y. 2012) ("The holding in *Stern* did not concern the subject matter jurisdiction of the bankruptcy court, but rather, the allocation of the authority as between the district court and the bankruptcy court to enter final judgments."). Consequently, a court must answer two questions in analyzing its authority to hear and finally determine a particular proceeding. First, the court must determine whether it has subject matter jurisdiction over the claim pursuant to 28 U.S.C. § 1334. Second, a court must determine if it has the constitutional authority to issue a final order in the matter or if it is instead limited to issuing proposed findings of fact and conclusions of law to the district court for *de novo* review. The core/non-core distinction is relevant to this second inquiry as is the issue of the parties' consent to a final adjudication by the bankruptcy judge.

At various times throughout this adversary proceeding, the parties asserted that certain claims were non-core proceedings over which this Court lacked subject matter jurisdiction. These arguments muddle the jurisdictional and constitutional concerns at issue in this matter. Bankruptcy courts have subject matter jurisdiction over "all cases under title 11" and "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a) and (b). This jurisdictional grant includes both core and non-core proceedings. 28 U.S.C. § 157. An assertion that a matter is non-core goes to the court's *ability* to enter a final order, not to the court's *jurisdiction* to determine the case.

As stated *supra*, the Court has already resolved the issue of subject matter jurisdiction in this matter. Therefore, the only determination this Court must now make is whether it has the constitutional authority to finally resolve the claims at issue. This decision necessarily requires the Court to determine whether the parties have consented to entry of a final order by this Court in each of the claims advanced by both Wisper II and the Defendants. If they have not so consented, the Court is limited to issuing proposed findings of fact and

conclusions of law as to any claims which may be classified as *Stern* claims or as non-core proceedings.

With the exception of one broad statement in Wisper II's Objection to a Motion to Dismiss, the parties wholly failed to address the Court's constitutional authority to issue a final decision in these matters. They also failed to state whether they consented to the Court's entry of a final order in any of these matters. Consequently, the Court must examine the pleadings in this proceeding, as well as the parties' actions, to determine the issue of consent.

The Supreme Court decisions in *Stern v. Marshall*, *Executive Benefits Insurance Agency v. Arkison,* and *Wellness International Network, Ltd., v. Sharif* reveal that parties can consent to a final judgment by the bankruptcy court in cases such as this. As the Supreme Court made clear in *Wellness*, express consent is not required. A party may impliedly consent to entry of a final decision by the bankruptcy court. *Wellness*, 135 S. Ct. at 1947. A party's consent may be implied from his conduct. *Sheridan v. Michels (In re Sheridan)*, 362 F.3d 96 (1st Cir. 2004); *DuVoisin v. Foster (In re S. Indus. Banking Corp.)*, 809 F.2d 329, 331 (6th Cir. 1987); *Northern v. MDC Innovations, LLC (In re C and M Invs. of High Point Inc.)*, Case No. 13-10661, Adv. Pro. No. 14-02005, 2015 WL 5120819, at *1 n.1 (Bankr. N.D.N.C. Aug. 26, 2015) (concluding that parties who "generally denied that this Court has constitutional authority to enter a final order" in their answer impliedly consented to entry of a final order by not "otherwise argu[ing] against this Court's constitutional authority in their numerous briefs").

In this proceeding, the Court finds that Wisper II consented to the Court's constitutional authority over its claims against the Defendants. The filing of an adversary complaint along with an allegation that all of the actions are core proceedings constitutes consent to entry of a final order in the matter. *Perkins v. LVNV Funding, Inc. (In re Perkins)*, 533 B.R. 242, 249 (Bankr. W.D. Mich. 2015).[5]

[5]Wisper II filed a Motion to Determine Whether Claims are Core Proceedings on May 29, 2015. (ECF No. 90). In that motion, Wisper II made the assertion that if certain claims were non-core proceedings, the Court should exercise its "related to" jurisdiction and submit proposed findings of fact and conclusions of law to the district court. Although this argument ignores Wisper II's ability to consent to entry of a final order pursuant to 28 U.S.C. § 157(c)(2), the Court need not consider any of the statements in this pleading

With respect to the Defendants' Tax Counterclaim, the Court finds that Wisper II impliedly consented to entry of a final order by this Court. Although Wisper II disputed that the claim was a core proceeding in its Answer to the Counter-Complaint, it never addressed the Court's authority to issue a final order. During the trial, Wisper II never asserted that the Tax Counterclaim was a non-core proceeding or that the Court lacked constitutional authority to issue a final order in the dispute. In addition, Wisper II began its Post-Trial Brief by stating that

> The issues *to be decided* are:
>
> . . .
>
> XV. Whether Matt Abernathy is entitled to judgment against Wisper on the Counter-Complaint regarding his voluntary post-confirmation payment of payroll taxes for which he served as the responsible person?

(Pl.'s Post-Trial Br. at 1-3, ECF No. 128) (emphasis added). In the Court's opinion, this statement indicates that Wisper II consents to this Court finally resolving the Tax Counterclaim. If Wisper II disputed the Court's authority to finally resolve the Tax Counterclaim, it would have chosen a different phrase than "to be decided." In addition, items I through XIV in the opening of Wisper II's Post-Trial Brief are Wisper II's claims against the Defendants – claims that they asserted were core proceedings and within this Court's constitutional authority to finally decide. Further, if Wisper II disputed the Court's ability to enter a final order in the Tax Counterclaim, it could have somehow separated the counterclaim from the claims set out in its Amended Complaint rather than group them all together as "issues to be decided." Based on these facts, the Court concludes that Wisper II's actions, when taken together, constitute consent to the Court's constitutional authority to finally resolve the Tax Counterclaim.

The Court also finds that the Defendants have consented to entry of a final order in their Tax Counterclaim. As with the filing of an adversary complaint, the filing of a counterclaim and the allegation that the claim is a core proceeding constitutes consent to final adjudication by this Court. *Perkins*, 533 B.R. at 249.

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because Wisper II withdrew the motion on June 4, 2015. (ECF NO. 105).

Turning to the claims set forth by Wisper II against the Defendants, the Court finds that the Defendants have impliedly consented to the Court's constitutional authority to issue a final order in those matters. In *Perkins v. LVNV Funding, LLC*, the Bankruptcy Court for the Western District of Michigan was asked to determine whether the defendant had consented to the court's entry of a final order on a motion to dismiss a non-core proceeding. The court examined the defendant's actions in the case and concluded that the defendant had impliedly consented to entry of a final order.

> In their Motion to Dismiss, the Defendants expressly request that this court enter an order dismissing the Complaint. (Mot. to Dismiss at p. 1.) This request is reiterated in the Reply (as defined below) filed by the Defendants. (Reply at p. 10.) Finally, the Defendants have not filed a motion to withdraw the reference or otherwise intimated, whether through pleadings or during hearings, that they do not consent to this court's entry of a final judgment or order. See 28 U.S.C. § 157(d).

Perkins, 533 B.R. at 249. Although the issue in *Perkins* was whether the court had the constitutional authority to issue a final order on the motion to dismiss, this Court concludes that the Defendants' actions in the current proceeding indicate that they have impliedly consented to entry of a final order by the Court on all of Wisper II's claims. The Defendants filed a number of pleadings with this Court in which they failed to challenge this Court's constitutional authority to issue a final order. Although they challenged the Court's subject matter jurisdiction in their various motions to dismiss, they limited their challenge to the two claims that were resolved prior to the trial. They never extended their subject matter jurisdiction argument beyond those claims until *after* the Court had determined that it had subject matter jurisdiction over all the claims. The Defendants failed to seek any type of relief from the Court's determination that it did in fact have subject matter jurisdiction over Wisper II's claims.

The Defendants filed eight pleadings after filing their Amended Answer to the Amended Complaint. Although they stated in one of these pleadings that "[t]he subject matter in the Amended Complaint involves core and non-core proceedings as both equitable and legal issues are involved," they made this assertion in arguing that they had a right to a jury trial in this proceeding. The Defendants never raised the issue of jurisdiction or constitutional authority in any of their subsequent pleadings. Even in filing their procedurally-defective

Motion for an Order of Reference, they failed to assert that this Court lacked the authority to issue a final order. Instead, they argued that Wisper II's failure to consent to a jury trial required this Court to refer the adversary proceeding to the District Court. Even in moving to extend the Pre-Trial and Scheduling Order deadlines, the Defendants failed to assert that the Court lacked the constitutional authority to finally resolve Wisper II's claims.

The Defendants also failed to raise the issues of jurisdiction or constitutional authority at the trial in this matter or in their Post-Trial Brief. (*See* ECF No. 129). Had they disputed the Court's authority to issue a final order, they could have asserted that position in either venue. They did neither. In fact, in their Post-Trial Brief, the Defendants argued that the Court should not grant Wisper II any recovery on its preference and fraudulent transfer claims for substantive reasons – not procedural or jurisdictional ones. "Where a party participates in extensive litigation without raising an argument of which it was aware, it would be unfair and inefficient to allow that party to escape the consequences of its knowing silence." *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 462 B.R. 457, 472 (S.D.N.Y. 2011); *Menotte v. United States (In re Custom Contractors, LLC)*, 462 B.R. 901, 909 (Bankr. S.D. Fla. 2011) (concluding that "actively litigating this proceeding for more than a year, demonstrates . . . implied consent to entry of final orders by this Court").

Based on all of these facts, the Court concludes that it has constitutional authority to render a final decision in these matters. For this reason, it is unnecessary for the Court to determine whether each individual claim is a *Stern* claim, a core proceeding, or a non-core proceeding.

IV. FACTS

The trial in this adversary proceeding came at the end of what can best be described as a long, and sometimes tortured, journey though the Chapter 11 process of reorganization for the business now known as Wisper II. Throughout the Chapter 11 case and this adversary proceeding, the Court has been called upon to render a number of decisions. The Court issued three pre-trial opinions in this adversary proceeding and one opinion in the main case. (Adv. Proc. No. 14-5043, ECF Nos. 53, 98, and 119; Bankr. Case No. 13-10770, ECF No. 345).

The Defendants are not strangers to the bankruptcy process. They have previously filed three bankruptcy cases—one as individuals and two for businesses they owned. Additionally, George T. Abernathy, Matt Abernathy's father and a previous defendant in this adversary proceeding, filed a prior individual bankruptcy case. Matt Abernathy and George T. Abernathy both testified about these cases at the trial in this matter. (June 10, 2015 Tr. of Hr'g at 27-28; June 12, 2015 Tr. of Hr'g at 62).

Matt and Adria Abernathy filed a joint Chapter 11 Petition for bankruptcy relief on October 30, 2008, case no. 08-14227. The Court confirmed their Chapter 11 plan on June 21, 2010. The Abernathys did not list any office furniture or equipment as assets on this petition.

Matt Abernathy's father, George T. Abernathy, filed an individual Chapter 11 Petition for bankruptcy relief on October 30, 2008, case no. 08-14230. The case converted to Chapter 7 on April 5, 2010. George T. Abernathy received a no-asset Chapter 7 discharge on July 13, 2010. George T. Abernathy did not list any office furniture or equipment as assets on either his Chapter 11 Petition or his Chapter 7 Petition.

On the Ball, Inc., a business owned and operated by the Defendants, filed a Chapter 11 Petition for bankruptcy relief on February 6, 2009, case no. 09-10499. Adria Abernathy signed the Chapter 11 Petition as secretary for On the Ball, Inc. The case converted to Chapter 7 on April 9, 2010. Matt Abernathy signed the Chapter 7 Petition as president of On the Ball, Inc. The only office equipment On the Ball, Inc., listed on its Chapter 11 Petition and its Chapter 7 Petition was $4,000.00 worth of "[c]omputers, copiers, printers, faxes, [and] shelving." (Sched. B to Petition, Bankr. Case No. 09-10499, ECF No. 1).

Another business owned and operated by the Defendants, Business Information Center, Inc., filed a Chapter 7 Petition for bankruptcy relief on February 10, 2009, case no. 09-10562. Matt Abernathy signed the petition as the company's vice-president. The only property Business Information Center, Inc., listed on its petition was $200.00 worth of "computers [and] office furniture" and a "Steel mold and aluminum mold" valued at $500.00. (Sched. B to Petition, Bankr. Case No. 09-10562, ECF No. 1).

Wisper I was a single-member limited liability company that provided wireless internet services to its subscribers in the largely rural areas of West Tennessee. Matt Abernathy was Wisper I's managing member. Wisper I filed its articles of organization with the Tennessee Secretary of State on September 21, 2009, and started selling its internet services to customers in May 2010. (June 10, 2015 Tr. of Hr'g at 29).

Because two of the Defendants' prior businesses had filed for bankruptcy protection, Matt Abernathy testified that he was unable to obtain traditional financing from banks for Wisper I's startup costs. As a result, he sought to raise capital from investors. (June 12, 2015 Tr. of Hr'g at 164). Wisper I had two investment models. Some investors would loan money to Wisper I under a promissory note and, at a certain specified date, have the option of converting the debt to ownership in the company. (June 10, 2015 Tr. of Hr'g at 146-47). Other investors would invest capital in Wisper I and, in return, would receive a 25% interest in the revenue stream from a particular cellular tower. (*Id.* at 148) (*see also* Tr. Ex. 49).

Wisper I conducted its business operations from offices at 1378 North Cavalier Drive in Alamo, Tennessee ("Alamo Property"). The Defendants entered into an eleven year Lease/Installment Sales Agreement for the Alamo Property with Dwyane and Barbara Dove on April 1, 2010. (Tr. Ex. 16). The monthly rental payment under this agreement was $1,977.67. (*Id.*).

On May 2, 2010, Matt Abernanthy leased the Alamo Property to Wisper I for a period of nine years. ("Alamo Lease") (Tr. Ex. 16). Pursuant to the lease, the rent terms were as follows:

> [Wisper I] agrees to pay to [Matt Abernathy] for the leased premises during the term hereof basic rent at the rate of thirty six thousand ($36,000) Dollars per annum, payable in 12 installments of three thousand dollars ($3,000.00) for years one through three, four thousand dollars ($4,000.00) for years four through six, and five thousand dollars ($5,000) for years seven through nine.[6]

[6]Although the Alamo Lease calls for increased monthly payments in years four through nine, the Court notes that the lease did not call for an increase in the amount of the annual rent due. None of the parties to this proceeding challenged the rent on this basis. For that reason, the Court will not address this inconsistency.

(*Id*.). In addition to the rent, the lease provisions also obligated Wisper I to pay all the property taxes and utilities for the Alamo Property, as well as all repairs and improvements. Wisper I also paid the liability insurance on the Alamo Property. (*Id*.).

Although page one of the Alamo Lease identifies the "Landlord" simply as "George Matthew Abernathy," the signature page lists the "Landlord" as "EAM Properties." (*Id*.). Matt Abernathy signed the lease on behalf of EAM Properties and on behalf of the "Tenant," Wisper I. (*Id.*) EAM Properties was a "self proprietorship" that the Defendants used to handle their real property rental business. (June 10, 2015 Tr. of Hr'g at 98-99).

Wisper I filed its Chapter 11 Petition for bankruptcy relief on March 27, 2013. Its Summary of Schedules indicate that, as of the day of filing, Wisper I had assets of $2,138,910.45 and liabilities of $6,418,127.25. (Sched. B to Petition, Bankr. Case No. 13-10770, ECF No. 16). Matt Abernathy signed Wisper I's Chapter 11 Petition under penalty of perjury. After Wisper I's filing, Matt Abernathy maintained control of Wisper I's business as a debtor-in-possession under 11 U.S.C. §§ 1101 and 1107.

According to Wisper I's schedules, $3,172,423.00 of its liabilities were owed to secured creditors. Wisper I's amended Schedule D indicates that $522,423.00 of the secured debt was owed to Ally Finance Corporation for "Tower Equipment." (Am. Sched. D, Bankr Case no. 13-10770, ECF No. 27). Another $100,000.00 of the secured debt was owed to Carter Edwards ("Edwards") for "various monthly subscriber amounts." (*Id.*) The remaining $2,550,000.00 of the secured debt was owed to NTCH-West Tenn, Inc. (*Id.*).[7] NTCH-West Tenn, Inc., leased Wisper I space on cellular communication towers for its wireless internet business.

Shortly after filing the case, Abernathy had an initial meeting with representatives from the United States Trustee's Office to discuss the debtor-in-possession's fiduciary duties and the establishment of a debtor-in-possession bank account ("DIP Account"). (June 10, 2015

[7]On August 31, 2012, and December 21, 2012, NTCH-West Tenn, Inc., assigned its interests in lease agreements with Wisper I to GTP Structures I, LLC. (*See* Motion of GTP Structures I, LLC, for Payment of Post-Petition Rent at 2, Bankr Case No. 13-10770, ECF No. 68).

Tr. of Hr'g at 111). Abernathy testified that he understood that the purpose of the DIP Account was to allow the Court, the United States Trustee's office, and other interested parties to monitor the debtor-in-possession's post-petition financial transactions. (*Id.*). Abernathy set up Wisper I's DIP Account at First State Bank in Jackson, Tennessee. He also testified that he was familiar with these fiduciary duties since he had previously filed other Chapter 11 cases.

Abernathy admitted that Wisper I had difficulty paying business expenses at various times: "There were different times, ebbs and flows in business where cash flow would be tight and other times, it wasn't." (June 10, 2015 Tr. of Hr'g at 124). On at least one occasion when Wisper I was unable to make its payroll, Abernathy testified that he pawned the title for Adria Abernathy's personal vehicle, a 2009 Chevrolet Suburban, at a car dealership in Brownsville, Tennessee. Wisper I paid the car title loan off once it acquired the funds to do so. (*Id.*) Two of Wisper I's employees, Sarah Moyers and Charlie Karnes, testified that their paychecks were returned for insufficient funds on at least one occasion. (*Id.* at 202; June 11, 2015 Tr. of Hr'g at 93). Moyers also testified that the Defendants asked her to wait a few days before cashing another one of her payroll checks. (June 10, 2015 Tr. of Hr'g at 203).

Shortly after filing its Chapter 11 Petition, Wisper I increased its monthly rental payment for the Alamo Property from $3,000.00 to $4,000.00 in accordance with the Lease provisions. Neither Wisper I nor the Defendants sought permission from the Court to increase the monthly rental payment. Wisper I made this increased payment from May 2013 through December 2013. (Tr. Ex. 16). Wisper I never sought to assume the Alamo Lease in the Chapter 11 case. Wisper I listed the $4,000.00 monthly rental payment on its Monthly Operating Reports and identified the landlord as "EAM Properties."

Wisper I filed Monthly Operating Reports throughout the pendency of its Chapter 11 case. With the exception of the reports for March and April 2013, all of the Monthly Operating Reports indicate that Matt Abernathy took an "Owner's Draw" in the amount of $7,500.00 each month. (*See* Bankr. Case No. 13-10770, ECF Nos. 84, 85, 86, 227, 131, 228, 223, 224, and 292). At the trial in this matter, Matt Abernathy testified that he began taking his monthly $7,500.00 owner's draw when Wisper I moved into the Alamo Property in May 2010. (June

11, 2015 Tr. of Hr'g at 33). To the best of Abernathy's knowledge, Wisper I's investors were aware of this monthly draw. (*Id.*) Carter Edwards, one of Wisper I's investors, corroborated this claim. When asked by Wisper II's attorney whether he was aware that Matt Abernathy was paying himself a monthly salary or draw of $7,500.00, Edwards replied "Yes." (June 12, 2015 Tr. of Hr'g at 126). He further opined that, to the best of his knowledge, several of Wisper I's investors were aware of Abernathy's $7,500.00 monthly draw. (*Id.*)

Wisper I filed its Chapter 11 plan and disclosure statement on August 21, 2013. In section III(D) of its disclosure statement, Wisper I indicated that Matt Abernathy would serve as the reorganized debtor's post-confirmation manager and would receive monthly compensation of $7,500.00. (Disclosure Statement at 10, Bankr. Case No. 13-10770, ECF No. 103). Wisper I filed an amended disclosure statement on October 2, 2013. (Bankr. Case No. 13-10770, ECF No. 132). The amended statement also proposed retaining Abernathy as the manager at the monthly rate of $7,500.00. (*Id.* at 9). Several creditors filed objections to Wisper I's disclosure statements. (*See* Bankr. Case No. 13-10770, ECF Nos. 137, 138, 163).

On October 15, 2013, creditors and investors representing over 90% of Wisper I's capital (collectively, the "Competing Plan Proponents") filed a Competing Plan and Disclosure Statement ("Competing Disclosure Statement") pursuant to 11 U.S.C. § 1121(c). The Competing Plan gave its proponents the option of converting their revenue-sharing quasi-equity interest into a full membership interest in the reorganized debtor and further proposed to oust Matt Abernathy as the company's manager and equity holder. The Competing Plan provided that 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]." (Competing Plan at 10-11, Bankr. Case No. 13-10770, ECF No. 142).

The Competing Plan Proponents identified two priority tax claims in section three of their disclosure statement. One was a claim in favor of the Tennessee Department of Labor in the estimated amount of $17,626.60. The second was a claim in favor of the Internal Revenue Service ("IRS") in the estimated amount of $91,602.64. (Competing Disclosure Statement at 8, Bankr. Case No. 13-10770, ECF No. 141). The Competing Plan placed the

priority tax claims in Class 2 and provided that the claims would be repaid "not later than 5 years after the date of the order for relief." (Competing Plan at 7, Bankr. Case No. 13-10770, ECF No. 142). The Competing Plan Proponents proposed a monthly payment of $1,526.71 on the IRS's priority debt.

The IRS's final claim after amendment consisted of a priority claim in the amount of $91,062.74 and an unsecured claim in the amount of $37,800.40. (Bankr. Case No. 13-10770, Claim 1-4). No party filed an Objection to the IRS's Proof of Claim.

Pursuant to the terms of the Competing Disclosure Statement, unsecured creditors who chose not to be members of the Reorganized Debtor would receive 4% of their claim through the plan. (Competing Disclosure Statement at 11, Bankr. Case No. 13-10770, ECF No. 141). Accordingly, the IRS was scheduled to receive $1,515.54 towards its general unsecured claim of $37,800.40.

On December 4, 2013, the IRS objected to the Competing Plan's proposed monthly repayment amount of $1,526.71. (Bankr. Case No. 13-10770, ECF No. 181). The IRS alleged that the monthly payment would need to be increased in order to pay the claim out as required by 11 U.S.C. § 1129(a)(9)(C).

The IRS and the Competing Plan Proponents entered into a Consent Order on January 29, 2014, which increased the monthly payment to the IRS to $1,951.23. (Consent Order, Bankr. Case No. 13-10770, ECF No. 244). The order also provided that the IRS would have an allowed priority claim of $91,602.64. The parties also agreed to amend the Confirmed Plan as follows:

> C) If full payment is not made within 15 days of such demand, then the Internal Revenue Service may collect any unpaid liabilities through the administrative collection provisions of the Internal Revenue Code including the right to collect the full amount of the pre-petition claim amount of $128,951.14 from George Matthew Abernathy as the "Responsible Person" as defined under the Internal Revenue Code.

(Consent Order Withdrawing USA's Obj. to Confirmation, Bankr. Case No. 13-10770, ECF No. 244). Matt Abernathy was not a party to this Consent Order.

During the balloting process, a majority of Wisper I's creditors voted to accept the Competing Plan. (*See* Tally of Ballots, Bankr. Case No. 13-10770, ECF No. 214).

On January 9, 2014, the Court conducted a pre-trial conference on confirmation in Wisper I's Chapter 11 case. Matt Abernathy appeared at that hearing and testified under oath. Abernathy acknowledged he had fiduciary duties to the debtor, the estate, and the creditors, and that this responsibility would continue until such time as he was relieved from his position at the company. (Jan. 9, 2014 Audio Recording of Hr'g). He also stated that he knew that he could be individually liable for any breach of those duties. (*Id.*).

Despite assurances from Matt Abernathy that he understood his fiduciary duties as the debtor-in-possession, certain creditors expressed concern that Abernathy would act to damage or curtail the business before confirmation. In response, the Court entered an Interim Pre-Trial Order ("Interim Order") on January 15, 2014. (Bankr. Case No. 13-10770, ECF No. 225). This order 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].

(*Id.* at 4-5).

At the January 23, 2014 confirmation hearing, the Court confirmed the Competing Plan ("Confirmed Plan"). The Court entered an order confirming the Competing Plan on January 29, 2014 ("Confirmation Order"). The Confirmation Order, in relevant part, provided:

> 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.

(Confirmation Order at 5-6, ECF No. 245). The Confirmed Plan provided that all property of Wisper I would vest in Wisper II on the plan's effective date. (*Id.* at 11.) The Confirmed Plan's effective date was "the first business day following the date that is fourteen days after the entry of the Confirmation Order." (Competing Plan at 3, ECF No. 142). The plan's effective date was February 12, 2014 ("Effective Date").

On January 29, 2014, Matt Abernathy sent a letter to Wisper II's acting CEO Tom Farrell in which he asserted that he personally owned property being used in Wisper I's business operations. (June 11, 2015 Tr. of Hr'g at 20). This property consisted of "two bucket trucks" and "office equipment." (Tr. Ex. 10). The "office equipment" Matt Abernathy identified in this letter consisted of 199 pieces of office furniture and equipment used in Wisper I's offices at the Alamo Property. (Exhibit D to Am. Compl., ECF No. 35-4). Matt Abernathy attached a list of the office furniture and equipment to the letter. (Tr. Exs. 3 and 10). Matt Abernathy asserted that he and his father, George T. Abernathy, owned the trucks, office equipment and office furniture individually and that it did not belong to the business. Matt Abernathy requested that Wisper II either rent, purchase, or return these assets. From the time of Wisper I's inception until now, the equipment and furniture have remained at the Alamo Property.

Two of the Competing Plan Proponents, NTCH West Tenn, Inc., and Ally Finance Corporation, sent the Defendants a letter on January 29, 2014, in which they informed them that Matt Abernathy was "duty bound to hold and protect the property and assets of the Debtor pending further orders of the United States Bankruptcy Court." (Ex. E to Am. Compl., ECF No. 35-5). The Competing Plan Proponents specifically stated that they believed that the bucket trucks and the office equipment identified in Matt Abernathy's January 29, 2014 letter were "property of the estate" and that there was obviously a "dispute as to ownership" of the property. The Proponents also stated that the January 15, 2014 "Interim Order [on confirmation] contemplates that the Court will decide any disputes related to the ownership of property." The Plan Proponents further stated that they had no intention of renting the property from Matt Abernathy at that time.

Wisper II filed the instant adversary proceeding against the Defendants on April 4, 2014. Wisper II filed an Amended Complaint on November 12, 2014. Pursuant to these complaints, Wisper II seeks recovery against the Defendants on a number of grounds.

A. 11 U.S.C. §§ 541

Wisper II alleges that the Defendants are in possession of a substantial amount of property of the estate which vested in Wisper II as of the Confirmed Plan's Effective Date. Wisper II is seeking turnover of this property from the Defendants. The property consists of motor vehicles, office furniture, equipment, and $11,965.00 allegedly missing from the cash drawer at the Alamo Property.

1. 2010 Ford F-250

The first piece of property at issue in this proceeding is a 2010 Ford F-250 ("2010 Ford") that Matt Abernathy has had in his possession since the filing of Wisper I's Chapter 11 Petition. The Bill of Sale shows that Abernathy purchased the vehicle from Golden Circle Ford in Jackson, Tennessee, on April 16, 2012. (Tr. Ex. 1). The entire $43,470.00 purchase price was paid by a check written on Wisper I's account. (*Id.* at 5). At the trial in this proceeding, Matt Abernathy admitted that Wisper I paid "100% of the purchase price" for the vehicle and paid the insurance for the vehicle at all times prior to confirmation of the Competing Plan. (June 10, 2015 Tr. of Hr'g at 42-43). Despite this fact, Abernathy titled the 2010 Ford in his name. Matt Abernathy is the primary driver for the vehicle and has kept the vehicle in his possession since confirmation despite demands from Wisper II that he surrender the vehicle. (*Id.* at 41).

On cross examination, the Defendants' attorney asked Matt Abernathy to explain how he acquired the 2010 Ford. Abernathy first stated that Wisper I "wrote a check for" the vehicle. (June 11, 2015 Tr. of Hr'g at 10). Abernathy then stated that before writing the check, he consulted with Carter Edwards. According to Abernathy's testimony,

> Carter Edwards is a creditor and was appointed by the other creditors to be my accountability person, if you would, or be the liaison between the creditors and me. And so any major purchases whatsoever, I was to get permission from Carter before I did that.

(*Id.* at 10-11). Abernathy testified that Carter Edwards eventually gave him permission to use Wisper I funds to purchase the 2010 Ford. (*Id.* at 12). Abernathy further testified that he used the 2010 Ford for Wisper I's business. (*Id.*). When asked why he titled the 2010 Ford in his name, Matt Abernathy replied "Well, I had permission from Carter [Edwards] for one. And secondly, it was my truck." (*Id.* at 13).

During their case in chief, the Defendants' attorney called Carter Edwards as a witness. Edwards testified that he "thought that the company was buying the truck . . .." (June 12, 2015 Tr. of Hr'g at 128). He further testified that other businesses he has been involved with had purchased vehicles in this manner. Such an arrangement allows the business manager to use the vehicle for both personal and business reasons. (*Id.*). Edwards testified that he was unaware that Abernathy titled the 2010 Ford in his individual name rather than that of Wisper I. (*Id.* at 130).

The Defendants depreciated the 2010 Ford as a business expense for Wisper I on Schedule C of their individual tax returns for 2012 and 2013.[8] (Tr. Exs. 68 and 69).

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[8]The Treasury Regulations provide that entities with only one owner may decide whether to be treated as a corporation or as a sole proprietorship. 26 C.F.R. §§ 301.7701-2 and 301.7701-3. "[I]f an entity with one owner, including a single-member limited liability company ("LLC"), seeks to be treated as a corporation, it must check the appropriate box on its IRS Form 8832; if it does not check this box, the entity is treated and taxed as a sole proprietorship." *Seymour v. United States*, Case No. 4:06-CV-116, 2008 U.S. Dist. LEXIS 47674, at *8-9 n.1 (W.D. Ky. 2008) (citing 26 C.F.R. §§ 301.7701-3(b) and (c)). "[A]n unincorporated sole proprietorship that is treated as such is taxed only once: the owner simply lists his business income on his individual tax return and the proprietorship, as a 'disregarded entity,' is not directly taxed." *Id.* (quoting 26 C.F.R. § 301.7701-3(b)).

In this case, the Defendants filed joint Individual Income Tax Returns on Form 1040 in 2010, 2011, and 2012. (Tr. Exs. 66, 67, and 68). They claimed Profit or Loss from Business for Wisper I on Schedule C of each return. They also claimed Depreciation and Amortization for Wisper I on Schedule C and Form 4562. All references to tax returns in this Memorandum Opinion refer to the Defendants' joint Individual Tax Returns with the accompanying schedules.

Wisper II is seeking turnover of the 2010 Ford. Wisper II is also seeking to be compensated for the depreciation of the truck from the Effective Date of the Confirmed Plan through the date an order for turnover becomes final. Based on the depreciation rate of $13,910.00 on the Defendants' 2013 tax return, Wisper II is seeking $38.10 per day or $1,159.16 per month as compensation for the depreciation. Wisper II did not present any proof that the truck has actually depreciated to this extent.

2. 2004 Ford Econoline Van

The second piece of property at issue in this proceeding is a 2004 Ford Econoline van ("Ford Van") that Matt Abernathy purchased on May 16, 2013. Abernathy titled the van in Wisper I's name. (Tr. Ex. 2). Abernathy testified that he purchased the vehicle post-petition and paid the van's entire purchase price with his own money. The $3,000.00 check was written on May 16, 2013, to "Dustin Smith." (Tr. Ex. 70). The "memo" line on the check includes the notation "Van E-150." (*Id.*)

Despite the fact that he used personal funds to buy the van, Abernathy titled the Ford Van in Wisper I's name "for . . . liability purposes [because] employees would be driving the vehicle." (June 10, 2015 Tr. of Hr'g at 45; June 11 Tr. of Hr'g at 15). Abernathy admitted that Wisper I used the van on a regular basis and that the van was wrapped with Wisper's name. (June 10, 2015 Tr. of Hr'g at 49). Abernathy also testified that Wisper I paid the insurance premiums for the Ford Van. The Defendants did not depreciate the Ford Van as a business expense for Wisper I on Schedule C of their individual tax return for 2013. (*See* Tr. Ex. 69).

When asked about the location of the Ford Van, Abernathy testified that he had sold it in the fall of 2014 "to a painter." (June 10, 2015 Tr. of Hr'g at 45). Abernathy could not recall the painter's name or the sales price, but testified that he gave the van's title to the painter at the time of the sale. (*Id.* at 46) Abernathy testified that "Wisper [I] did not negotiate or execute the title to allow it to be sold" and that he did not sign Wisper I's name to the title. (*Id.* at 46-47). Abernathy admitted that he sold the Ford Van even after he appeared in Court at the pre-trial confirmation hearing on January 9, 2014, and testified that he understood his fiduciary duties to the debtor and creditors. (June 10, 2015 Tr. of Hr'g at 50-51).

In its Post-Trial Brief, Wisper II asserted for the first time that Abernathy's sale of the vehicle amounted to conversion of property of the estate and sought $3,000.00 in damages.

3. Office Furniture and Equipment

The next class of property at issue is office furniture and equipment used by Wisper I and Wisper II at the Alamo Property ("Office Furnishings"). The Office Furnishings consist of 199 pieces of office furniture and equipment. (*See* Tr. Ex. 3). The property includes everything from a coat rack to desks to filing cabinets and makes up "essentially the biggest part of the furniture and furnishings located at the business premises at" the Alamo Property. (June 10, 2015 Tr. of Hr'g at 58).

Although the Office Furnishings were originally purchased in 2006 by On the Ball, Inc., Matt Abernathy testified that the company eventually transferred ownership of the property to himself and his father, George T. Abernathy. (*Id.* at 60-61). Matt Abernathy never provided a date for this alleged transfer; however, George T. Abernathy admitted on cross examination that he and Matt owned the furniture prior to the filing of their individual bankruptcy cases on October 30, 2008.

> Q: In October 2008, your son filed a petition for bankruptcy. Is that right? And so to the extent that y'all had any ownership in this furniture, it should show up either in your schedules or Matt's schedules. Is that right?
>
> A: I don't remember the details. It's been seven years ago.
>
> Q: Well, you claim you own it now, but you didn't own it then?
>
> A: I do own -- I did own it then.

(June 12, 2015 Tr. of Hr'g at 64-65).

During his testimony, George T. Abernathy admitted that the information contained in his bankruptcy schedules in case no. 08-14230 was true and accurate at the time of filing. (*Id.* at 62). When asked if the Office Furnishings should have shown up in his 2008 bankruptcy schedules, George T. Abernathy did not answer the question, but rather stated that his wife owned half of everything he owned. He elaborated by saying that he "[didn't] know if it would

be under [my bankruptcy assets], or it could have been my wife's." (*Id.* at 65). When asked if his wife had ever filed for bankruptcy protection, George T. Abernathy replied "no." (*Id.*).

Neither the purchase of the Office Furnishings nor the transfer of ownership of the property from On the Ball, Inc., to Matt Abernathy and George T. Abernathy was documented.[9] George T. Abernathy admitted at the trial in this matter that neither he nor his son formally documented the transfer of ownership of the Office Furnishings. (*Id.* at 53).

Following confirmation of the Competing Plan, Matt Abernathy and his father generated a list of the Office Furnishings and assigned a total estimated value of $36,600.00 to them. Abernathy then demanded that Wisper II pay him rent for use of the property. (*See* Tr. Ex. 10). At the trial, Abernathy admitted that each piece of property on the Office Furnishings list was in Wisper I's possession at the Alamo Property at the time Wisper I filed its Chapter 11 Petition and Schedules. (*Id.*). Wisper I did not list any of this furniture on Schedule B of its Petition. (Tr. Ex. 11). However, in response to item 14 on Wisper I's Statement of Financial Affairs ("SOFA") which instructs debtors to "List all property owned by another person that the debtor holds or controls," Wisper I indicated "None." (SOFA, ECF NO. 16).

In preparation for the trial in this proceeding, the Defendants generated a list of the financial loans they made to the company between January 2011 and April 19, 2013. (Tr. Ex. 37). The Defendants generated this list in support of their claim that withdrawals they took from the company were actually for repayment of loans they made to Wisper I or expenses they paid for Wisper I. One of the items they listed on this exhibit was $36,600.00 in "office furniture." (*Id.*).

In its Post-Trial Brief, Wisper II asserts that the doctrine of judicial estoppel prevents the Defendants and George T. Abernathy from claiming personal ownership of the Office Furnishings in this proceeding. Because neither the Defendants nor George T. Abernathy listed the Office Furnishings as assets in their 2008 individual bankruptcy proceedings and

[9]While it is true that the Defendants introduced a copy of an invoice from Miller's Installations, LLC, for the tear down and reassembly of Herman Miller workstations in support of their claim of ownership, the Court finds this exhibit to be of no probative value to the issue of who owned the property. (*See* Tr. Ex. 27).

because Wisper I indicated that they did not have any property in its possession that belonged to third parties on the SOFA in the present case, Wisper II asserts that the parties may not now claim individual ownership of the property.

4. 2007 Elite Gooseneck Trailer

On February 2, 2011, Wisper I purchased a 2007 Elite Gooseneck Trailer from Dynamic Machinery. (Tr. Ex. 6). Wisper I wrote a check in the amount of $3,800.00 for the trailer. (*Id.*). On direct examination, Abernathy admitted that the trailer belonged to Wisper II. (June 10, 2015 Tr. of Hr'g at 73).

When asked by Wisper II's attorney whether he had refused to turn over possession of the trailer to Wisper II, Matt Abernathy responded "No, sir, I haven't." (*Id.* at 72). He then stated that he thought his former attorney, Jason Rudd, had talked to Wisper II's representatives and told them they could come get the trailer at any time. (*Id.*; June 11, 2015 Tr. of Hr'g at 31). Wisper II's attorney stated that Wisper II was unaware of this offer of surrender. Shortly after the trial in this matter concluded, Matt Abernathy surrendered possession of the trailer to Wisper II. (*See* Pl.'s Post-Trial Br. at 12, ECF No. 128).

Wisper II is seeking sanctions against Matt Abernathy in the amount of $150,000.00 for his "intentional exercise" of control over the trailer and his "intentional[ ] disregard" of this Court's orders. (*Id.*).

5. Various Items of Property Matt Abernathy Allegedly Removed from Alamo Property

a) Equipment

Wisper II seeks turnover of the following equipment that it asserts became property of the reorganized debtor upon plan confirmation: an air compressor, a welder along with the 25 hp Kohler engine, eight 290 amp hour deep cycle marine batteries, two battery chargers, a gas generator, an impact drill, and a computer and monitor ("Laptop")[10] Matt Abernathy used while

[10]In its Amended Complaint and its Post-Trial Brief, Wisper II referred to the computer it alleges Matt Abernathy removed from the Alamo Property as "a computer and monitor;" however, at the trial, Wisper II referred to the computer as a "laptop." (June 10, 2015 Tr.

at Wisper I (collectively "Equipment"). Wisper II asserts that Matt Abernathy removed these items of Equipment from Wisper I's business premises once he learned that the Competing Plan was going to be confirmed in January 2014. (June 10, 2015 Tr. of Hr'g at 67-76). At the trial, Abernathy admitted that he removed the Equipment from Wisper I's premises "for security reasons" during the first week in January 2014. (*Id.* at 68). He claimed, however, that he either returned the Equipment to Wisper II or that it was his personal property and not part of Wisper I's inventory.

Wisper II did not present any detailed information about the missing Equipment in its pleadings or at the trial. Wisper II did not provide a brand name, model number, serial number, year of manufacture, or any other identifying information. It did not provide any evidence that described the equipment in a detailed fashion.

Matt Abernathy testified that once he learned that the January 29, 2014 Confirmation Order directed him to turn over Wisper I's property to Wisper II, he returned everything that belonged to the company to the Alamo Property. When asked specifically where he put the property, Abernathy stated "on top of the server room, which is right — right above the network engineer's work space." (June 11, 2015 Tr. of Hr'g at 25). Wisper II's network engineer Charlie Karnes[11] explained that the returned equipment was "hidden . . . in places that you would never look[.]" (*Id.* at 105).

At the trial, Abernathy asserted that the Laptop was his personal property and did not belong to Wisper I. As such, he admits that he did not return the Laptop to the Alamo Property. Abernathy testified that he owned the Laptop prior to Wisper I's formation and that he stored personal records, as well as records for his other businesses, on it. (*Id.* at 31). He also testified that Wisper I did not purchase the computer. (*Id.* at 31-32). Abernathy further testified that any Wisper I documents that were stored on the Laptop were also available on other computers at the Alamo Property. (*Id.*) Abernathy also stated that he took the Laptop home and on business trips on numerous occasions. (*Id.* at 32). Abernathy denied that the

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of Hr'g at 75). In light of this, the Court is referring to the missing computer as the "Laptop."

[11]Charlie Karnes also served as Wisper I's network engineer.

Laptop's hard drive contained any customer or proprietary information for Wisper I. (June 10, 2015 Tr. of Hr'g at 76). He also testified that neither Wisper I's financial software nor its company database was stored on the Laptop. (*Id.*). When asked if Wisper I consented to Matt Abernathy removing the Laptop, Matt Abernathy replied "I didn't know that it had to consent to something that I owned personally." (*Id.* at 76-77).

Wisper II did not put on any proof, testimonial or otherwise, that rebutted Matt Abernathy's claim that he owned the Laptop personally.

Matt Abernathy also testified that he did not return the air compressor because he owned that individually. (*Id.* at 69). At the trial, Matt Abernathy stated that "[t]he air compressor was my air compressor," and that he only "let [Wisper I] borrow it." (*Id.* at 69-70).

As with the Laptop, Wisper II failed to put on any proof that rebutted Matt Abernathy's claim that the air compressor was his personal property.

As for the allegedly missing batteries, the Court cannot discern whether the Defendants are claiming that Matt Abernathy returned the batteries to the Alamo Property or whether he owned them individually. During the first day of the trial, Matt Abernathy admitted that he removed "several batteries" from Wisper I's premises. (*Id.* at 71). The Defendants presented conflicting proof regarding the batteries. Matt Abernathy testified that two Wisper I employees, John Weaver and James Runyons,[12] helped him return the missing Equipment to the Alamo Property following entry of the Confirmation Order on January 29, 2014. Both Weaver and Runyons agreed that they helped return equipment; however, their accounts of what specific items were returned differs. Weaver testified that he helped Abernathy bring back "a few base stations, a few odds and ends things," as well as a generator, an impact wrench, a table, and "batteries." (June 12, 2015 Tr. of Hr'g at 21). Runyons testified that neither the batteries nor the gas generator was returned "as far as [he] knew." (June 11, 2012 Tr. of Hr'g at 112).

The Defendants also called one of Wisper I's investors, Linda Danneker, to testify about the allegedly missing batteries. Danneker testified that she gave Matt Abernathy "some

[12] James Runyons also works for Wisper II.

batteries that . . . Matt had use for in the business[.]" (June 12, 2015 Tr. of Hr'g at 95). When asked to describe the batteries in more detail, Danneker stated that "[t]hey were batteries for the tower. And it was set up on my solar to start with so we didn't have to hook up electricity." (*Id.* at 96). Danneker also testified that she gave the batteries to Matt Abernathy individually and not to Wisper I. (*Id.* at 108). When asked whether she had "a close approximation of the time frame of when [she] delivered the batteries to Mr. Abernathy," Danneker responded "No." (*Id.*). Wisper II did not present any evidence that rebutted Danneker's claim that she gave some batteries to Matt Abernathy individually; however, Danneker never identified the number of batteries she gave Abernathy nor did she identify the batteries as anything other than "batteries for the tower." There was no proof that the batteries were the ones set forth in the complaint: "eight 290 amp hour deep cycle marine batteries." (Am. Compl. at 3, ECF No. 35).

Although Charlie Karnes admitted that Matt Abernathy returned some equipment to the Alamo Property, he testified that Abernathy did not return "the air compressor, the welder, the batteries, battery charger, or the generator." (June 11, 2015 Tr. of Hr'g at 98-99). Karnes also stated that a drill press was not returned and that he was not sure if the impact drill was taken or returned "because I'm not sure what that is."[13] (*Id.* at 105).

Wisper II's acting CEO Tom Farrell also testified that the missing Equipment was not returned to the Alamo Property. (*Id.* at 85-86).

Wisper II is seeking return of the missing Equipment or a money judgment for the items Matt Abernathy allegedly did not return to the Alamo Property. Wisper II did not submit any evidence of the missing Equipment's value.

b) $11,965.00 in Cash

Wisper II alleges that the Defendants converted $11,965.00 in cash that was missing from Wisper I's cash drawer. The missing cash was discovered when Alexander Thompson Arnold, PLLC, prepared a post-petition "Independent Accountant's Report on Applying Agreed-

[13]Wisper II did not include the drill press in its Amended Complaint or in its Post-Trial Brief. As such, the Court concludes that Wisper II is not seeking turnover of the drill press.

Upon Procedures" ("Accountant's Report") in November 2013.[14] (June 10, 2015 Tr. of Hr'g at 90-96) (*see also* Tr. Ex. 13). At the trial, Matt Abernathy testified that the $11,965.00 deficit had accumulated over four years. (June 11, 2015 Tr. of Hr'g at 34).

According to Abernathy's testimony, Wisper I's business practice was to accept cash payments from customers at the Alamo Property. (June 10, 2015 Tr. of Hr'g at 91). Cash was routinely removed from the drawer to reimburse employees for various business expenses. (June 11, 2015 Tr. of Hr'g at 36). Matt Abernathy also withdrew cash from the drawer on various occasions. (June 10, 2015 Tr. of Hr'g at 92).

Shortly after starting to sell Wisper I's internet services to customers in May 2010, Matt Abernathy hired Sarah Moyers ("Moyers") as Wisper I's office manager. (*Id.* at 185). Moyers began working for Wisper I on July 5, 2010. (*Id.* at 184). Prior to her employment with Wisper I, Moyers had worked as a bookkeeper for several different businesses. (*Id.* at 185).

When Moyers started working for Wisper I, Matt Abernathy asked her "to take a week or so and observe everything that was going on" and to "tell him – where [she] thought there might be weaknesses and things that might need to be improved on based on [her] experience." (*Id.* at 186). After doing this, Moyers noticed that "not much paperwork documentation was done as far as the cash accounts, the vehicle maintenance." (*Id.*). Moyers testified that cash "was kept in a bank bag. And any cash expenses were paid out of the bank bag. And it seemed that any employee who needed to make a purchase had access to the bank bag." (*Id.* at 187). Matt Abernathy admitted that "the dispensing of cash to employees for things was pretty loose" prior to Moyers's time at the company. (June 11, 2015 Tr. of Hr'g at 37).

After her review of the company practices, one of the recommendations Moyers made to Matt Abernathy was "that a voucher system be put in place and that any money requested be signed for and that receipts be returned so we could verify where the cash expenses were

[14]The Court notes that the parties refer to this report as an "audit;" however, the copy of the report introduced into evidence was not labeled as an "audit." It was titled "Independent Accountant's Report on Applying Agreed-Upon Procedures." (*See* Tr. Ex. 13).

– where the cash was going." (June 10, 2015 Tr. of Hr'g at 187). Moyers's first step in instituting the cash voucher system was to purchase a "locking cash drawer." (*Id.*). She then created paper vouchers which required the person withdrawing cash from the drawer to date the voucher, list a reason for the withdrawal, and sign the voucher. (*Id.*). Once the intended purchase was made, Moyers required the employee to provide her with a copy of the receipt. (*Id.*). The receipt was then stapled to the voucher. (*Id.* at 195). Moyers testified that she was responsible for balancing the drawer every evening and every morning. (*Id.* at 188). Although Wisper I did not attempt to keep a particular amount of money in the cash drawer for petty cash or other expenses, Moyers testified that she attempted to "keep an amount that I thought would be sufficient to provide change for the customers that came in with large bills." (*Id.* at 192).

Matt Abernathy admitted that he frequently took cash out of the cash drawer. (*Id.* at 92). Moyers testified that sometimes Abernathy would leave her "sticky notes saying that he had taken such and such cash." (*Id.* at 191). At other times, Moyers testified that Matt Abernathy refused to fill out or sign a voucher when he took cash out of the drawer. (*Id.* at 191). When this happened, Moyers stated that she would write Abernathy's name on the voucher. (*Id.* at 190). At the trial, Abernathy stated that he didn't "remember refusing to sign" the vouchers; however, when he was asked "[y]ou don't recall ever" refusing to sign a voucher, Abernathy responded "I wouldn't say ever." (*Id.* at 93).

Moyers counted the cash drawer every evening and every morning. (*Id.* at 191). She testified there were a few times she had problems reconciling the cash drawer upon arriving at work in the morning. (*Id.* at 191). When this occurred, Moyers testified that she would ask Matt Abernathy "if he had taken any money overnight. And sometimes [he said] yes and sometimes [he said] no." (*Id.*).

At no point during the trial did Moyers testify that other Wisper I employees failed to turn in receipts or fill out vouchers when they used cash from the drawer.

Moyers testified that during her first year at the company she asked Wisper I's bookkeeper, Adria Abernathy, if the cash receipts were being entered into Wisper I's Quickbooks program. (*Id.* at 193). Moyers testified that Adria Abernathy said they were not,

but that Matt Abernathy said that the accountant would take care of that when he did the taxes. (*Id.* at 193). Moyers testified that she began giving Adria Abernathy the cash drawer information at some point after that first year, but that she did not know if Adria Abernathy ever entered the cash drawer information into Wisper I's financial records.

Moyers was primarily responsible for the cash drawer from July 2010 through February 2012 when she was moved to another position at Wisper I. (*Id.* at 190). After this time, Moyers testified that Christy Raab took over responsibility for the voucher system. (*Id.* at 194). Raab gave all the vouchers and the daily draw information to Moyers at the end of each month and then Moyers would reconcile the records. (*Id.* at 195). Moyers kept the cash vouchers, the receipts, and the monthly reconciliation records in a filing cabinet in her office. (*Id.* at 197).

Moyers became ill and was off work in January, February and most of March 2014. (*Id.* at 199). During this time, Moyers testified that Matt Abernathy called her at home and told her he had removed a file from her office that contained his personal information, such as driver's license number, social security number, etc. (*Id.* at 198-99). Moyers testified that Matt Abernathy also told her during this call that "if anything else is missing, don't look too hard." (*Id.* at 199). When Moyers returned to work in March 2014, she was unable to find the cash voucher records for July 2010 through the beginning of 2014. (*Id.* at 199-200).

When Wisper II took over control of the business, it was unable to find the vouchers for the cash drawer. At the trial in this proceeding, Matt Abernathy admitted that he had the vouchers in his possession. (*Id.* at 93). He testified that he knew that the vouchers belonged to Wisper II and that the Court had ordered him to turn them over; however, he claimed that he held on to the vouchers in an attempt to "have my day in court to actually tell my story[.]" (*Id.* at 93-96). Abernathy testified that he was afraid Wisper II would use the vouchers "to falsely accuse him of wrongdoing" because "the way it looked or appeared is that I had stolen that money, and I knew I had not done that." (*Id.* at 94-95; June 11, 2015 Tr. of Hr'g at 34). Abernathy admitted that although he could have preserved the cash voucher system records by photocopying them and then returning the originals to Wisper II, he did not do so. (June 10, 2015 Tr. of Hr'g at 96).

At the trial, the Defendants' attorney asked Matt Abernathy about the missing cash.

Q. And, in fact, does it look like there is a shortage of about $11,000 over a four-year period of time?"

A. Yes, sir.

Q. Do you have any explanation for that?

A. Lot of different explanations[.]

(June 11, 2015 Tr. of Hr'g at 35). Despite this claim that there were numerous reasons for the shortage, Matt Abernathy offered only two concrete explanations for the discrepancy. First, Matt Abernathy stated that "[t]here were times when the receipts didn't get – or there wasn't a count for receipts when we used cash that got lost or whatever." (June 10, 2015 Tr. of Hr'g at 92). Second, Abernathy stated that there were times when Wisper I's employees failed to turn in receipts for cash purchases prior to institution of the voucher system . (June 11, 2015 Tr. of Hr'g at 36-37). In explaining this, Abernathy stated "Sometimes [the receipts] flew out the window. Sometimes they got washed in their blue jeans." (*Id.* at 37).

Shortly before the trial began, Abernathy gave the missing vouchers to his attorney. The Defendants did not turn the cash voucher records over to Wisper II at any time prior to the trial in this matter. (June 11, 2015 Tr. of Hr'g at 38). Neither Matt Abernathy nor any other witness testified that the cash voucher records in Abernathy's possession account for the $11,965.00 in missing cash.

6. Damages Claim

In its Amended Complaint, Wisper II asserts that it is entitled to damages for Matt Abernathy's post-confirmation use and/or possession of the missing property of the estate. Wisper II asserts that these damages should consist of the depreciated value of the property and the fair market rental value of each item from confirmation of the Competing Plan until such time as the property is returned. Wisper II also asserts that it is entitled to damages for its inability to properly register and/or use company vehicles that are in its possession, but are improperly registered to Matt Abernathy. With the exception of the 2010 Ford, Wisper II failed to present the Court with any evidence of the depreciated value of the property or the fair market rental value of the property. Additionally, aside from its request for $150,000 in

punitive damages for Matt Abernathy's failure to turn over the 2007 Gooseneck Trailer, Wisper II failed to provide the Court with a dollar amount for damages.

B. Conversion and/or Fraud

Wisper II's second claim in this adversary proceeding is an assertion that Matt Abernathy removed property of the estate from Wisper I's business premises and made unauthorized withdrawals from Wisper I's DIP Account both prior to and after entry of the Interim Order on January 15, 2014. Wisper II also asserts that the Defendants used money from the account to make repairs to their personal vehicle. Wisper II asserts that the Defendants are liable for these actions under a theory of conversion and/or fraud.

At the trial in this matter, Wisper II's attorney asked Matt Abernathy about a series of checks written on Wisper I's DIP Account at First State Bank on January 27, 2014. Abernathy testified that he directed Adria Abernathy to write all of these checks. He further testified that he was told he would be in charge of the business through February 6, 2014, and that he thought paying these bills was part of his fiduciary duty to the company. (June 10, 2016 Tr. of Hr'g at 81).

The first check at issue was written to Matt Abernathy in the amount of $7,500.00. (Check No. 2189, Tr. Ex. 14). On direct examination, Abernathy stated, "That check was written as my final paycheck or my owner's draw. I was paid in the – in [arrears] . . . So that was the end of being paid for the month of January at the beginning of the next month." (June 10, 2015 Tr. of Hr'g at 79).

The second check at issue was written to Humana in the amount of $2,804.02. (Check No. 2209, Tr. Ex. 14). During the trial, Matt Abernathy admitted that this payment was for health insurance coverage for February 2014.[15] (June 10, 2015 Tr. of Hr'g at 80). Matt Abernathy stated that the Humana policy provided family insurance coverage for himself and

[15]The Humana invoice that Wisper II introduced into evidence at the trial in this matter was actually the invoice for insurance coverage in January 2014. (Tr. Ex. 44). However, upon questioning by Wisper II's attorney, Matt Abernathy admitted that the January 27, 2014 check made out to Humana for $2,804.02 actually paid the premium for insurance coverage in February 2014. (June 10, 2015 Tr. of Hr'g at 86-88).

Adria Abernathy and individual coverage for his father George T. Abernathy, his mother Joyce Abernathy, and Wisper I employee Deanna Casteel. (*Id.* at 82-83). Matt Abernathy admitted that as of February 1, 2014, Joyce Abernathy was no longer an employee of Wisper I. (*Id.* at 83). The monthly insurance premium for Joyce Abernathy's coverage was $693.92. (Tr. Ex. 44).

The third check at issue was written to Matt Abernathy in the amount of $400.00. (Check No. 2383, Tr. Ex. 14). Matt Abernathy testified that this payment represented his commission for the Crop Production Services account in Alamo.

The fourth check at issue in this proceeding was written to Verizon Wireless in the amount of $306.62. (Check No. 2206, Tr. Ex. 14). Matt Abernathy testified that this check was for payment of a cell phone bill for two company cell phones and his own cell phone. Matt Abernathy could not recall if this payment was for February 2014 cell phone service or not. (June 10, 2015 Tr. of Hr'g at 89-90). Wisper II did not introduce any documentary evidence of this bill at the trial.

Wisper II also asserts that on November 12, 2013, the Defendants used $1,938.61 from the DIP Account to make repairs to their 2009 Chevrolet Suburban. (Tr. Ex. 20). Abernathy testified that although the Suburban was Adria Abernathy's personal vehicle, she also used it to run errands for Wisper I. (June 10, 2015 Tr. of Hr'g at 121; June 11, 2015 Tr. of Hr'g at 27). Adria Abernathy confirmed that she occasionally used the Suburban to run errands for the company. (June 12, 2015 Tr. of Hr'g at 153-54).

When Carter Edwards discovered that Matt Abernathy had used Wisper I's funds to pay for the repairs, Edwards advised Matt that he should not have done that. (*Id.* at 130). Edwards also testified that after the case was filed, it came to his attention that Matt "had taken [the Suburban] and carried it and had a general going over of maintenance, fix anything, everything." (*Id.*). When asked by the Defendants' attorney whether he had "any personal knowledge of any moneys that Matt may have misappropriated," Edwards responded "No. Other than what [he] mentioned previously in [his] testimony about having his wife's car fixed." (*Id.* at 136).

In addition to a judgment for the $1,938.61 the Defendants allegedly misappropriated to pay for repairs to the Suburban, Wisper II also asserts that the Court should impose punitive damages against the Defendants for their "secretive and devious conduct" in using company funds to service their personal vehicle.

Wisper II also alleges that Matt Abernathy removed $2,000.00 from the company's cash drawer upon his exit from the company. Matt Abernathy denied taking this money. (June 10, 2015 Tr. of Hr'g at 90).

Wisper II also asserts that Matt Abernathy withdrew $3,000.00 from Wisper's DIP Account on August 15, 2013. (Tr. Ex. 17). This withdrawal was reflected on Wisper I's General Ledger for August 31, 2013, as an "Automobile Expense." (*Id.*). During the trial, Matt Abernathy stated that he used the funds to purchase a new bucket truck for Wisper I from a man named "Pinky" at "412 Motors." (June 10, 2015 Tr. of Hr'g at 112). Abernathy testified that he purchased the truck with cash because "Pinky knew we were in bankruptcy and wanted cash." (*Id.*).

Abernathy did not seek or receive approval from the Court to make this purchase. When asked about his failure to obtain prior court approval, Abernathy stated that he thought it "was a normal course of business to replace it." (*Id.* at 113). Abernathy testified that an engine in one of Wisper I's other bucket trucks blew up and it was imperative that Wisper I find a new truck as quickly as possible. Abernathy stated that the bucket truck served "a critical function in our day-to-day operations." (*Id.*). The parties to this adversary proceeding failed to present any allegations or proof to the Court as to whether Wisper II is in possession of this bucket truck.

Lastly, Wisper II asserts that Matt Abernathy removed two Pure Wave WiMAX BTS Base Stations ("Base Stations") from Wisper I's inventory in January 2014 and failed to return them to Wisper II's possession. Wisper II asserts that the fair market value of these Base Stations is $10,300.00 per unit. (*See* Tr. Ex. 18).

During the trial in this matter, Abernathy admitted that Wisper I kept a supply of base stations in its inventory in case a station needed to be replaced due to a lightning strike or

other problem. (June 10, 2015 Tr. of Hr'g at 114-15). He also admitted that he instructed two Wisper I employees, Charlie Karnes and Richard Duvall, to load the Base Stations into his truck shortly before the Court confirmed the Competing Plan.[16] (*Id.* at 116). Abernathy stated he did this because he was worried about theft.

> And so I made sure that those base stations, along with some other antennas and critical pieces that affected Wisper, came to my possession where I did not have to worry about people stealing them or anything like that.

(*Id.* at 116).

During the trial, Karnes testified that Matt Abernathy had told him that he was selling the Base Stations to a third party in St. Louis. (June 11, 2015 Tr. of Hr'g at 96). Abernathy denied he told Karnes this or that he sold the Base Stations to a third party. (June 10, 2015 Tr. of Hr'g at 117). He claimed instead that two Wisper I employees, John Weaver and James Runyons, helped him return the Base Stations to the Alamo Property sometime after entry of the Confirmation Order. (June 11, 2015 Tr. of Hr'g at 25). Abernathy asserted that he placed the Base Stations out of sight on top of the server room above the network engineer's work space. (*Id.*).

James Runyons admitted that he helped Abernathy remove the Base Stations. (*Id.* at 111). When asked if the Base Stations "made their way back" to the Alamo Property, Runyons responded "As far as I was aware[.]" (*Id.*). John Weaver also testified that he brought back "a few base stations" but did not specifically identify whether they were the ones at issue in this adversary proceeding. (June 12, 2015 Tr. of Hr'g at 20).

Wisper II's acting CEO Tom Farrell ("Farrell") testified that when he took over management of the company in early February 2014, he and some of Wisper II's employees "searched every square inch of" the Alamo Property for the Base Stations. (June 11, 2015 Tr. of Hr'g at 79). Neither Farrell nor the Wisper II employees were ever able to locate the stations. Farrell stated that they searched Wisper II's network for any signals from the missing

[16] During questioning about the Base Stations, Abernathy stated that he thought he removed three base stations from the Alamo Property. (June 10, 2015 Tr. of Hr'g at 126). In its complaint and at the trial, Wisper II only alleged that Abernathy removed two stations.

Base Stations to see if they were in use within Wisper II's system. They did not find any signals for the missing stations. (*Id.*).

C. 11 U.S.C. §§ 547 and 548

Prior to filing Wisper I's Chapter 11 petition, the Defendants made a number of withdrawals from Wisper I's deposit account at Commercial Bank and Trust Company ("Deposit Account"). Wisper II asserts that these withdrawals are recoverable as fraudulent and/or preferential transfers pursuant to 11 U.S.C. §§ 547, 548, and 550. A portion of this claim includes an allegation that Matt Abernathy diverted investor funds earmarked for Wisper I to other businesses he owned and/or controlled. Wisper II asserts that each of the transactions set forth in this claim also violates Tennessee Code Annotated § 48-236-105(a) which provides "Limitations on Distributions" for Limited Liability Companies.

1. Withdrawals from Wisper I's Deposit Account

Under its fraudulent and/or preferential transfer claim, Wisper II is seeking to recover a total of $41,100.00 for transfers made within ninety days of the filing of Wisper I's Chapter 11 Petition, $122,210.00 for transfers made within one year of the filing of Wisper I's Chapter 11 Petition, and $106,035.00 for transfers made within two years of the filing of Wisper I's Chapter 11 Petition.[17] (Tr. Ex. 21). On direct examination, Matt Abernathy admitted that he authorized all of these transfers and that he and Adria Abernathy received all of the transfers. (June 10, 2015 Tr. of Hr'g at 125, 127, and 136).

Matt Abernathy admitted that a Profit and Loss Statement for January through December 2012 shows that Wisper I had a net ordinary income of negative $400,342.46 and a net other income of negative $103,112.99. (Tr. Ex. 65) (June 10, 2015 Tr. of Hr'g at 234-35). When asked if he thought either number showed a significant loss, Matt Abernathy responded "Not for a startup company. Not at all." (June 10, 2015 Tr. of Hr'g at 235).

[17]For reasons the Court does not understand, Wisper II did not include all transfers that occurred within ninety days of the filing of Wisper I's Chapter 11 Petition in the first portion of its fraudulent and/or preferential transfers claim. For purposes of this opinion, the Court has grouped transactions according to when they occurred rather than how they are listed in Wisper II's complaint.

Schedule C from the Defendants' Individual Income Tax Return for 2010 shows a business loss of $263,645.00. (Tr. Ex. 66). Schedule C from the Defendants' Individual Income Tax Return for 2011 shows a business loss of $446,467.00. (Tr. Ex. 67). Schedule C from the Defendants' Individual Tax Return for 2012 shows a business loss of $1,173,617.00. (Tr. Ex. 68).

The first group of transfers Wisper II is seeking to avoid is a series of withdrawals the Defendants made from the Deposit Account within ninety days of the filing of Wisper I's Chapter 11 Petition. These withdrawals total $41,100.00 and consist of the following:

1. check no. 13407 on December 31, 2012, in the amount of $8,000.00 (made payable to Matt Abernathy and signed by Adria Abernathy);
2. check no. 13464 on January 20, 2013, in the amount of $5,000.00 (made payable to Matt Abernathy and signed by Adria Abernathy);
3. a cash debit withdrawal on January 22, 2013, in the amount of $7,500.00 (signed for by Adria Abernathy);
4. a cash debit withdrawal on January 28, 2013, in the amount of $200.00 (signed for by Matt Abernathy);
5. a cash debit withdrawal on January 29, 2013, in the amount of $400.00 (with note that says "[transfer] to farm account per Adria");
6. check no. 13641 on March 1, 2013, in the amount of $10,000.00 (made payable to Matt Abernathy and signed by Adria Abernathy); and
7. check no. 13686 on March 7, 2013, in the amount of $10,000.00 (made payable to Matt Abernathy and signed by Adria Abernathy).

(Tr. Ex. 21). In its Amended Complaint, Wisper II asserted that Wisper I did not disclose these transactions in its Chapter 11 schedules.

The second group of transfers Wisper II is seeking to avoid is a series of withdrawals the Defendants made from the Deposit Account within one year of the filing of Wisper I's Chapter 11 Petition. These withdrawals total $122,210.00 and consist of the following:

1. a cash debit withdrawal on March 30, 2012, in the amount of $600.00 (signed for by Adria Abernathy);
2. a cash debit withdrawal on April 13, 2012, in the amount of $1,800.00 (signed for by Adria Abernathy);

3. check no. 12226 on April 15, 2012, in the amount of $7,500.00 (made payable to Matt Abernathy and signed by Adria Abernathy);

4. a cash debit withdrawal on April 27, 2012, in the amount of $400.00 (signed for by Matt Abernathy);

5. check no. 12326 on May 1, 2012, in the amount of $7,500.00 (made payable to Matt Abernathy and signed by Adria Abernathy);

6. a cash debit withdrawal on May 15, 2012, in the amount of $1,000.00 (signed for by Matt Abernathy);

7. a cash transfer by phone on May 30, 2012, in the amount of $13,000.00 (requested by Adria Abernathy, with notation "To: Farm Acct");

8. check no. 12468 on June 1, 2012, in the amount of $7,500.00 (made payable to Matt Abernathy and signed by Adria Abernathy);

9. a cash debit withdrawal on June 12, 2012, in the amount of $1,000.00 (signed for by Adria Abernathy);

10. a cash transfer by phone on June 18, 2012, in the amount of $10,500.00 (requested by Adria Abernathy, with notation "To Farm Acct");

11. a cash debit withdrawal on June 21, 2012, in the amount of $1,000.00 (signed for by Adria Abernathy);

12. a cash transfer by phone on June 29, 2012, in the amount of $1,400.00 (requested by Matt Abernathy);[18]

13. check no. 12612 on July 10, 2012, in the amount of $7,500.00 (made payable to Matt Abernathy and signed by Adria Abernathy);

14. a cash debit withdrawal on July 13, 2012, in the amount of $1,200.00 (signed for by Matt Abernathy);

15. a cash debit withdrawal on August 9, 2012, in the amount of $250.00 (signed for by Matt Abernathy);

16. check no. 12748 on August 15, 2012, in the amount of $7,500.00;[19]

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[18]Wisper II set forth a cash transfer on June 29, 2012, in its Amended Complaint; however, the amount Wisper II listed for that transaction was $400.00. Immediately prior to the start of the trial in this matter, Wisper II's attorney stated that the correct amount for the June 29, 2012 transfer was $150.00. According to the exhibit Wisper II presented during the trial and the questions it asked Matt Abernathy, the June 29, 2012 transfer was $1,400.00.

[19]The parties did not submit a copy of this check. Instead, they submitted a page from the monthly statement for the Deposit Account. For this reason, the Court does not know who signed the check or who the payee was.

17. a cash transfer by phone on August 17, 2012, in the amount of $1,650.00 (requested by Adria Abernathy, with notation “To Farm Acct”);

18. a cash debit withdrawal on August 24, 2012, in the amount of $400.00 (signed for by Adria Abernathy);

19. a cash debit withdrawal on August 24, 2012, in the amount of $560.00 (signed for by Adria Abernathy);[20]

20. check no. 12852 on September 5, 2012, in the amount of $10,000.00 (made payable to Matt Abernathy and signed by Adria Abernathy);

21. check no. 12853 on September 5, 2012, in the amount of $5,000.00 (made payable to Matt Abernathy and signed by Adria Abernathy);

22. a cash transfer by phone on September 27, 2012, of $700.00 (requested by Matt Abernathy);[21]

23. a cash transfer by phone on October 1, 2012, in the amount of $100.00 (requested by Adria Abernathy, with notation “To: On the Ball TV”);

24. a cash transfer by phone on October 4, 2012, of $1,000.00 (requested by Matt Abernathy);[22]

25. a cash debit withdrawal on October 11, 2012, in the amount of $150.00 (with notation “per Adria”);[23]

26. check no. 13006 on October 11, 2012, in the amount of $10,000.00 (made payable to Matt Abernathy and signed by Adria Abernathy);

27. a cash debit withdrawal on October 15, 2012, in the amount of $1,500.00 (with notation “per Adria”);

28. a cash debit withdrawal on October 19, 2012, in the amount of $1,500.00 (signed for by Matt Abernathy);

29. check no. 13146 on November 15, 2012, in the amount of $7,500.00 (made payable to Matt Abernathy and signed by Adria Abernathy);

30. check no. 13196 on December 3, 2012, in the amount of $2,500.00 (made payable to Matt Abernathy and signed by Adria Abernathy); and

31. check no. 13250 on December 14, 2012, in the amount of $10,000.00 (made payable to Matt Abernathy and signed by Adria Abernathy).

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[20]Wisper II did not list this transaction in its Amended Complaint.

[21]*Ibid.*

[22]*Ibid.*

[23]*Ibid.*

(Tr. Ex. 21).

The third group of transfers Wisper II is seeking to avoid is a series of withdrawals the Defendants made from the Deposit Account within two years of the filing of Wisper I's Chapter 11 Petition. These withdrawals total $106,035.00 and consist of the following:

1. a cash debit withdrawal on January 3, 2012, in the amount of $2,350.00 (signed for by Adria Abernathy);
2. check no. 11815 on January 12, 2012, in the amount of $7,500.00 (made payable to Matt Abernathy and signed by Adria Abernathy);
3. check no. 11789 on January 13, 2012, in the amount of $25,000.00 (made payable to American Motors and signed by Adria Abernathy);
4. check no. 11818 on January 18, 2012, in the amount of $2,000.00 (made payable to American Motors and signed by Matt Abernathy; with notation ("Loan Interest");
5. a cash transfer by phone on January 19, 2012, in the amount of $850.00 (requested by Adria Abernathy);
6. a cash debit withdrawal on January 30, 2012, in the amount of $500.00 (signed for by Adria Abernathy);
7. a cash transfer by phone on February 22, 2012, in the amount of $4,400.00 (requested by Matt Abernathy; with notation "To: Farm Acct");
8. a cash debit withdrawal on February 22, 2012, in the amount of $1,975.00 (signed for by Matt Abernathy; with notation "transfer to Farm Acct");
9. a cash transfer by phone on March 9, 2012, in the amount of $1,950.00 (requested by Adria Abernathy);
10. a cash transfer by phone on March 14, 2012, in the amount of $9,510.00 (requested by Adria Abernathy; with notation "To: Matt's Farm Acct"); and
11. check no. 12135 on March 26, 2012, in the amount of $50,000.00 (made payable to Matt Abernathy and signed by Adria Abernathy).

(Tr. Ex. 22).

The transfers Wisper II is seeking to avoid under this count of their complaint are ones which Farrell discovered in reviewing Wisper I's business records. Wisper II's attorney asked Farrell about how he developed the list of the allegedly fraudulent/preferential transfers.

Q: And did you put together for me a spreadsheet that tried to track the financial undertakings of Wisper as far as draws that went to Matt Abernathy, Matt's farm account, his other businesses?

A: Yes, I did.

Q: And as far as you know, does the lawsuit, does it include a complete list for the applicable time period of the transactions that look to you to be outside the ordinary course of business?

A: In time, yes. There's a possibility that we missed some transactions. But we did attempt to make a complete list of anything that benefited [sic] the previous owners.

(June 11, 2015 Tr. of Hr'g at 80). When asked if there was anything suspicious about the transfers, Farrell replied that he found "[a] very strong correlation between the dates of deposits from investors to dates large amounts of moneys [sic] would be written to the previous owners." (*Id.* at 80-81).

During the trial, Wisper II's attorney asked Matt Abernathy about the $7,500.00 transfers listed in Wisper II's fraudulent and/or preferential transfer claims.

Q: You got paid, Mr. Abernathy, on a -- on a monthly basis through the business in the normal course. Is that right?

A: Most months.

Q: That was the normal course of business for Wisper [I], is that correct, to pay you once a month?

A: As far as my owner's draw. Yes, sir.

Q: And you've already told us that that was $7500?

A: Most of the time.

(June 10, 2015 Tr. of Hr'g at 97-98; *see also* June 11, 2015 Tr. of Hr'g at 132). Throughout the trial, Matt Abernathy's undisputed testimony was that his monthly owner's draw or salary was $7,500.00 beginning in May 2010. (June 11, 2015 Tr. of Hr'g at 33).

When asked about the March 26, 2012 check for $50,000.00, Matt Abernathy testified that it was repayment of a loan he and Adria Abernathy had made to Wisper I. (June 10, 2015 Tr. of Hr'g at 137). Farrell disputed this claim and instead asserted that the $50,000.00 was actually a withdrawal from Abernathy's "Capital Account." (June 11, 2015 Tr. of Hr'g at 81).

Wisper II introduced a copy of the ledger for Matt Abernathy's Capital Account into evidence at the trial. (Tr. Ex. 71). According to this ledger, Abernathy's $50,000.00 withdrawal brought his capital account to a negative $23,789.97 balance. (*Id.*). However, the account statement also indicates that Matt Abernathy deposited $10,000.00 into his Capital Account on April 19, 2013, and $22,560.00 on June 26, 2013. These deposits brought the Capital Account balance to a positive $3,970.03. (*Id.*).

During cross examination, Wisper II's attorney asked Abernathy about the $22,560.00 deposit on June 26, 2013. The account statement indicates this money was "Commissions." (*Id.*). However, Abernathy admitted that he did not actually deposit $22,560.00 on that date. (June 12, 2015 Tr. of Hr'g at 205). Instead, that entry was actually an "offsetting [of] money that Wisper owed to" Abernathy. (*Id.*).

Matt Abernathy testified that some of the payments made to him during his time at Wisper were actually commissions he earned selling Wisper I's wireless internet services. (*Id.* at 191-92). Abernathy stated that he earned a commission for a deal with the Memphis Grizzlies to provide wireless internet services at the FedEx Forum. Although Abernathy estimated that the total cost for this project was between $83,000.00 and $85,000.00, he did not indicate what his commission was or when this agreement was made. Abernathy also testified that he earned a commission for renewal of the Crop Production Services account "right before [he] left." (*Id.* at 192). Abernathy stated that this commission was around $400.00. (*Id.*). The only entry for "Commissions" listed on the ledger for Matt Abernathy's Capital Account was the June 26, 2013 entry for $22,560.00. (Tr. Ex. 71).

Matt Abernathy testified that he and Adria Abernathy made several loans and capital contributions to Wisper I during the time they managed the business. (June 12, 2015 Tr. of Hr'g at 194). In preparation for the trial in this proceeding, the Defendants generated a list of their "Deposits Made Into Wisper" between January 2011 and April 19, 2013. (Tr. Ex. 37). These deposits totaled $98,645.03.[24] (*Id.*). During cross examination, Matt Abernathy admitted that he did not execute any promissory notes for loans he and Adria Abernathy

[24]This figure includes $4,000.00 George T. Abernathy allegedly deposited into Wisper I's account on February 3, 2010. (Tr. Ex. 37).

allegedly made to Wisper I. (June 12, 2015 Tr. of Hr'g at 205-06). The Defendants never provided an estimate of the amount they allegedly loaned, as opposed to contributed, to Wisper I nor did they present any evidence of loans they made to Wisper I.

In further support of their alleged financial contributions to the company, the Defendants listed three deposits they made into Wisper I's account in 2009 and 2010: (1) $5,000.00 on November 12, 2009; (2) $5,000.00 on November 16, 2009; and (3) $600.00 on July 22, 2010. These contributions totaled $10,600.00. (Tr. Ex. 37).

The Defendants also included expenses they allegedly paid for Wisper I:

1. $18,000.00 paid to Strawn;
2. $3,000.00 for the purchase of a van;
3. $83,149.22 paid to the IRS;
4. $36,600.00 in "office furniture;" and
5. "$14,000.00 or $28,000.00" in "Rent to Dwayne Dove" for "March - Aug."

(*Id.* at 2). The Defendants did not provide dates for any of these five payments.

The total amount of money the Defendants allegedly loaned or contributed to Wisper I totaled $249,994.25. (*Id.*). The Defendants attached copies of checks, deposit slips, and bank statements in support of their claim that they loaned or contributed money to Wisper I. These copies only provide documentary evidence for $109,245.03 of the $249,994.25 the Defendants allegedly loaned or contributed to the company. The copies attached to Trial Exhibit 37 demonstrate that the Defendants loaned or contributed the following amounts to Wisper I:

November 12, 2009	$ 5,000.00
November 16, 2009	$ 5,000.00
July 22, 2010	$ 600.00
January 3, 2011	$10,000.00
May 20, 2011	$ 1,000.00
May 23, 2011	$ 1,000.00
May 31, 2011	$ 5,100.00

July 19, 2011	$ 3,500.00
July 28, 2011	$ 1,500.00
July 28, 2011	$11,000.00
August 3, 2011	$ 900.00
October 27, 2011	$ 8,000.00
November 3, 2011	$ 5,300.00
November 7, 2011	$ 7,000.00
November 18, 2011	$22,000.00
February 21, 2012	$12,345.03
April 19, 2013	$10,000.00

(*Id.*).

When asked why they invested this much money in Wisper I, Matt Abernathy testified that they loaned the company money any time the company needed money for bills, payroll, or equipment. (June 12, 2015 Tr. of Hr'g at 195-96). He also stated that "there was [never] any misunderstanding on anybody's part that whenever [he] did that, [he] would at some point in time when the business could do it, to repay [him]" and that he never misled anyone about this arrangement. (*Id.* at 196).

The Defendants' attorney asked Matt Abernathy about the various transfers at issue.

Q: Did you in any way convey assets of this company in a fraudulent manner to deceive – with an intent to deceive or in any way mislead any of these creditors?

A: Never

Q: Were the creditors all paid in accordance with the terms of their loans, slash, [sic] investment up until December of 2012?

A: Yes, sir, they were.

Q: Did anybody ever miss a payment?

A: No, sir.

. . .

Q. No one missed a payment. You've heard testimony that payroll checks at one point bounced.

Did you make certain that anybody who had a payroll check always had it covered? Did you personally make sure of that?

A: Yeah. I don't even recall that happening. And if it did, it would have been like one isolated situation out of four years. I mean, I don't even recall that.

It was certainly never a practice that – that we participated in. So...

Q: And the amounts that were kept up with, actual notes payment payable [sic], you didn't prepare those and cancel them out like you probably should have. And I think you've testified that business from a – from a documentary point of view, you were kind of running it fast and loose. Is that a good description?

A: I guess so. Yes, sir.

(*Id.* 197-98). When asked why he was less than diligent about properly documenting the financial transactions between himself and Wisper I, Matt Abernathy responded that they "were working as hard as [they] could" to secure a return to his investors and "to grow the business as fast as possible. Because that was the plan. That was the exit strategy. That was the – that's what everybody had agreed on was our goal." (*Id.* at 198-99).

The Defendants' attorney also asked Matt Abernathy about the type of investor he sought out in trying to capitalize Wisper I. Abernathy stated that he sought "sophisticated investors" and that he explained the investments could be "high risk." (*Id.* at 200). Abernathy admitted that Wisper I was "constantly undercapitalized." (*Id.*)

2. Investments from Jerry Hughes and David Hughes

Wisper II alleges that Matt Abernathy failed to deposit $52,384.00 of $136,384.00 in cash which represented investments from Jerry Hughes and David Hughes. Wisper I provided the Hughes with a receipt for each of these investments. (Tr. Exs. 51-55). Only those portions of the investments that were actually deposited into Wisper I's Deposit Account show up in the company's financial records.

Wisper II asserts that Jerry Hughes brought the following investments to Wisper I's offices in 2011. Those portions of the investments that Wisper II asserts were not deposited are listed in parentheses.

February 18, 2011	$50,000.00	($ 6,000.00)
April 15, 2011	$25,000.00	($12,000.00)
May 13, 2011	$ 4,692.00	($ 4,692.00)
September 21, 2011	$20,000.00	($ 5,000.00)

(*Id.*). Wisper II asserts that David Hughes brought the following investments to Wisper I's offices in 2011. Those portions of the investments that Wisper II asserts were not deposited are listed in parentheses.

May 13, 2011	$ 4,692.00	($ 4,692.00)
May 13, 2011	$15,000.00	($ 3,000.00)
June 30, 2011	$17,000.00	($17,000.00)

(Pl.'s Post-Trial Br. at 38, ECF No. 128) (*see also* Tr. Exs. 51-55). Wisper II has alleged that Matt Abernathy took the cash that was not deposited and kept it for his personal use.

When questioned about the discrepancies between the investments and the deposits, Matt Abernathy asserted that he "[d]eposited it, used it for the business. I maybe paid myself some money back. I don't know. I don't remember exactly what I did with [all] that money." (June 10, 2015 Tr. of Hr'g at 160, 179-82). Abernathy testified that at the time the investments were made, Wisper I "consistently operated . . . from cash" for fuel, supplies, and other daily expenses. (*Id.* at 164). He also stated that "instead of going to the bank and . . . and cashing [a check], . . . we just would operate off of that cash." (June 11, 2015 Tr. of Hr'g at 39). Abernathy stated that they routinely used cash to purchase equipment for the company, and that Wisper I was using cash "at a rate that would have absorbed that much money." (June 10, 2015 Tr. of Hr'g at 176; June 11, 2015 Tr. of Hr'g at 42).

Abernathy also offered two other possible explanations for the discrepancies. First, he suggested that some of the cash could have been deposited on later dates. (June 10, 2015 Tr. of Hr'g at 166). Second, Abernathy asserted that some of the money might have been used to purchase a cellular tower from a third party. Abernathy testified that he entered into an agreement with Jerry Hughes and David Hughes for the purchase of a cellular tower from a third party. Matt Abernathy stated that he entered into this transaction individually and not as a representative of Wisper I. For reasons he did not explain, Abernathy stated that Wisper

I acted as the middleman for this transaction. (*Id.* at 170-74). The Defendants did not submit any proof of this transaction.

Because he was not Wisper I's bookkeeper, Matt Abernathy stated that he did not know whether Wisper I routinely failed to deposit investments in its operating account or, at the very least, failed to enter the investments on its ledger. (*Id.* at 165). If, however, an error was made and those funds should have been reflected in the operating account or the ledger, Matt Abernathy stated that it had to have been merely a mistake and not an intentional failure. (*Id.* at 175).

3. Tennessee Code Annotated § 48-236-105(a)

In addition to asserting that the fraudulent and/or preferential transfers are avoidable under 11 U.S.C. § 547 and 548, Wisper II also asserts that the transfers violate Tennessee Code Annotated § 48-236-105(a), "Limitations on distributions" for Limited Liability Companies. Wisper II stated in its Post-Trial Brief that "Wisper [I] was habitually operating from a position where it was unable to pay its ordinary expenses and debts as they became due in the normal course of business[.]" (Pl.'s Post-Trial Br. at 33, ECF No. 128).

D. Overpayment of Rent

Wisper II's fourth claim against the Defendants is an allegation that they improperly increased the monthly rental payment for the Alamo Property from $3,000.00 to $4,000.00 in May 2013.[25] Although the Alamo Lease provided for the increase in monthly rent, Wisper II asserts that the Defendants needed court approval before making the increased payments. Wisper II argues that this unauthorized increase in rental payments resulted in a monthly $1,000.00 overpayment in rent from May 2013 through December 2013.

In a February 13, 2015 Memorandum Opinion, the Court determined that the Alamo Lease was deemed rejected under 11 U.S.C. § 365(d)(4) as of July 25, 2013, based on the

[25]In its Amended Complaint, Wisper II asserts that Wisper I increased its monthly rental payment in April 2013; however, the exhibit introduced at trial indicates that Wisper I did not increase the monthly rental payment until May 2013. (*See* Tr. Ex. 16).

parties' failure to timely seek permission to assume the lease. (*See* Mem. Op. and Order, Bankr. Case No. 13-10770, ECF Nos. 345 and 346).

In its Post-Trial Brief, Wisper II also asserts that the Alamo Lease was "conflict of interest" transaction under Tennessee Code Annotated § 48-249-404 which prohibits "Conflict of Interest Transactions" for Limited Liability Companies. Wisper II asserts that the lease was a conflict of interest transaction because it was not "fair to the LLC." (Pl.'s Post-Trial Br. at 25-26, ECF No. 128).

E. 11 U.S.C. § 503(c)

Wisper II's fifth claim against the Defendants is that Matt Abernathy improperly transferred certain funds to himself from Wisper I's Deposit Account and DIP Account between April 5, 2013, and December 4, 2013. Wisper II argues that these transfers were not allowed and should not have been paid under 11 U.S.C. § 503(c). Wisper II identified these transfers as either an "owner's draw" or a "commission." (Am. Compl. at 9, ECF No. 35).

1. $2,500.00 "owner's draw" on April 1, 2013, check no. 13778;
2. $7,500.00 "owner's draw" on May 8, 2013, check no. 1113;
3. $7,500.00 "owner's draw" on June 5, 2013, check no. 1247;
4. $7,500.00 "owner's draw" on July 1, 2013, check no. 1375;
5. $3,125.00 "commission" on July 31, 2013, check no. 1447;
6. $7,500.00 "owner's draw" on August 1, 2013, check no. 1467;
7. $7,500.00 "owner's draw" on September 5, 2013, check no. 1594;
8. $7,500.00 "owner's draw" on October 1, 2013, check no. 1775;
9. $7,500.00 "owner's draw" on November 1, 2013, check no. 1857;
10. $7,500.00 "owner's draw" on December 2, 2013, check no. 2011.

(Tr. Ex. 19). All of these transfers were accomplished by checks written on Wisper I's DIP Account except the check dated April 1, 2013, which was written on Wisper I's Deposit Account. The checks were made out to Matt Abernathy and were signed by Adria Abernathy.

Abernathy testified that he set his monthly salary at $7,500.00 when Wisper I began business operations. Abernathy testified that he did this "with the blessing of the creditors."

(June 10, 2015 Tr. of Hr'g at 118). In addition to his monthly draw, Abernathy also received health insurance coverage for his family and a company cell phone as compensation as Wisper I's managing member. (*Id.* at 120).

While acting as the debtor-in-possession, Matt Abernathy consistently paid himself his monthly owner's draw and the rent for the Alamo Property. (*Id.* at 118-19). Abernathy also testified that during his tenure as debtor-in-possession, Adria Abernathy never missed a paycheck. (*Id.* at 122). While these expenses were paid, approximately $500,000.00 in Wisper I's other administrative expenses went unpaid. (*Id.* at 119) (*see also* Consent Order for Assumption and Assignment of Unexpired Lease Agreements, Bankr. Case No. 13-10770, ECF No. 273). The unpaid expenses included monthly lease payments on the cellular towers.

Pursuant to 11 U.S.C. § 503(c), Wisper II asserts that Matt Abernathy should not have been allowed or paid a salary as a post-petition administrative expense without approval from this Court. Wisper II also asserts that Matt Abernathy should not have been paid without a finding that such payments "were essential to retain Matt Abernathy as an employee, . . . and that the services provided by Matt Abernathy to Wisper were essential to the survival of the business." (Pl.'s Post-Trial Br. at 30, ECF No. 128).

F. 11 U.S.C. § 362

Wisper II's sixth claim against the Defendants is an assertion that Matt Abernathy violated the 11 U.S.C. § 362 automatic stay by treating property of the estate as his personal property and withholding property from Wisper II after the Effective Date of the Confirmed Plan. Wisper II is seeking actual and punitive damages against Matt Abernathy for this violation of the automatic stay. Wisper II's request for damages includes a request for the attorney's fees incurred in prosecution of this adversary proceeding. Wisper II did not set forth a dollar amount for these damages in their complaint nor did it provide a dollar amount for the damages at the trial or in its Post-Trial Brief.

G. Contempt of Court

Wisper II's last claim against the Defendants is an allegation that Matt Abernathy violated numerous Court orders and should be held in civil contempt. Wisper II asks the Court

to "take action and assess punitive damages" for this alleged contempt. (Am. Compl. at 14, ECF No. 35). Wisper II asserts that Matt Abernathy's cash withdrawals from the DIP Account, his removal of property of the estate from the Alamo Property, and the payment of personal bills with company funds all constitute contempt. Wisper II also asserts that Matt Abernathy's sale of the Ford Van without Court permission and his subsequent failure to turn the proceeds over to the bankruptcy estate also constitute contempt. Although Wisper II admits that Matt Abernathy returned some of the property to the Alamo office and warehouse, it asserts that the fact that he hid some of the property supports its claim for contempt. Wisper II asks for "[s]anctions of no less than One Hundred Fifty Thousand and No/100 Dollars ($150,000) or more, plus Wisper [II]'s attorney fees and costs are warrantied [sic]." (Pl's Post-Trial Brief at 36, ECF No. 128).

H. Tax Counterclaim

During the Defendants' case in chief, Strawn asked Carter Edwards about Wisper I's unpaid payroll taxes. Edwards testified that [t]he first time that [he] felt terribly let down" by Matt Abernathy was when he "found out he was not paying payroll taxes." (June 12, 2015 Tr. of Hr'g at 119-20). Edwards stated that he expressed his disappointment to Abernathy and Abernathy assured him that he would pay the IRS debt off with an investment of cash Edwards made in the company. (*Id.* at 120).

Abernathy testified that after receiving the cash infusion from Carter Edwards, he went the IRS office in Jackson, Tennessee, to inquire about the unpaid taxes. According to Matt Abernathy's testimony, the IRS representative told him Wisper I owed "70 something thousand dollars." (*Id.* 180-81). Although Abernathy stated that he paid that amount in full, he did not present any proof of that payment.

Sometime in 2012 or 2013, Matt Abernathy received a notification from the IRS that payroll taxes for the first quarter of 2012 were due and owing. Abernathy stated that, unbeknownst to him, these taxes had not been included in the balance he had previously paid to the IRS. (*Id.* at 181). By the time he received this notification, Abernathy testified that he had spent Carter Edwards's infusion of capital on "towers and the equipment and whatever" and was unable to pay the outstanding taxes. (*Id.*).

The IRS filed a Notice of Federal Tax Lien in the amount of $82,559.72 against Matt Abernathy on October 30, 2014.[26] (Tr. Ex. 76). The lien included taxes due from 2010 through 2012. Abernathy testified that when he sold 204 acres of property in Alamo, Tennessee ("Acreage"), in December 2014, $83,149.22 was deducted from the $374,500.00 sales price and remitted to the IRS in full satisfaction of the federal tax lien. (June 12, 2015 Tr. of Hr'g at 182). The IRS filed a Certificate of Release of Federal Tax Lien on February 4, 2015. (Tr. Ex. 77).

Abernathy testified that aside from a state tax lien, there were no other tax liens against him or his property at the time of the December 2014 sale. (June 12, 2015 Tr. of Hr'g at 186-87). Abernathy also testified that the taxes that were collected under the IRS's tax lien were "the company's taxes." (*Id.* at 208). On cross examination, Abernathy agreed that he was a "Responsible Person" for the taxes within the meaning of the Internal Revenue Code. (*Id.*).

Wisper II's acting CEO Tom Farrell testified that as of January 5, 2015, Wisper II has paid a total of $19,815.40 towards the IRS's allowed priority and unsecured claims under the Confirmed Plan. (*Id.* at 220-21). According to account transcripts from the IRS, Wisper II only received credit for $66,619.98 of the $83,149.22 Matt Abernathy paid to the IRS upon the sale of the Acreage in December 2014. (Tr. Ex. 80; *see also* June 12, 2015 Tr. of Hr'g at 224).

In its Post-Trial Brief, Wisper II argues that Matt Abernathy is not entitled to reimbursement from Wisper II for his voluntary payment of the $83,149.22 to the IRS upon the sale of his Acreage. Wisper II asserts that Matt Abernathy is not entitled to reimbursement for the taxes because he was a "responsible person" and "subrogation does not exist for payment of your own debt." (June 12, 2015 Tr. of Hr'g at 240). Wisper II also asserted that

[26]Matt Abernathy did not present any evidence of when he received notification that the first quarter 2012 payroll taxes were past due. Although he asserted that the only taxes due under the IRS's Federal Tax Lien were for the first quarter of 2012, the notice itself indicates otherwise. The ending dates for the tax periods covered by the lien were listed as: 3/31/2010; 6/30/2010; 9/30/2010; 12/31/2010; 06/30/2011; 9/30/2011; 3/31/2012; 6/30/2012; 9/30/2012; 12/31/2012. The "Notices of lien on George [Matthew] Abernathy tax debt" attached to the HUD-1 Settlement Statement for the 204 acres also lists these periods as the ones covered by the lien. (*See* Tr. Ex. 73 at 3).

Matt Abernathy should not be entitled to subrogation because he "comes to this Court with unclean hands." (*Id.* at 241).

V. ANALYSIS

Given the complexity of this proceeding, the Court will set forth each claim separately.

A. 11 U.S.C. § 541

Pursuant to § 541 of the Bankruptcy Code, "property of the estate" includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). "This definition is unquestionably broad, its main purpose being 'to bring anything of value that the debtors have into the [bankruptcy] estate.' " *Lyon v. Eiseman (In re Forbes)*, 372 B.R. 321, 330-31 (B.A.P. 6th Cir. 2007) (quoting *Booth v. Vaughan (In re Booth)*, 260 B.R. 281, 284-85 (B.A.P. 6th Cir. 2001)). The determination of whether property is "property of the estate" is ordinarily determined by state law. *Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 918 (1979); *French v. Frey (In re Bergman)*, 467 F.3d 536, 538 (6th Cir. 2006) ("Unless a federal interest is at issue, property rights are defined by state law."). The party who is alleging that property is "property of the estate" pursuant to 11 U.S.C. § 541 carries the burden of proof. *United States v. Chalmers (In re Wheeler)*, 252 B.R. 420, 425 (W.D. Mich. 2000).

The Confirmed Plan in this case provides that "Except as otherwise provided herein, as of the Effective Date, all property of [Wisper I], and any property acquired by [Wisper I] or [Wisper II] under the Plan, will vest in the applicable Reorganized Debtor . . .." (Competing Plan, Bankr. Case No. 13-10770, ECF No. 142 at 11). As the reorganized debtor, Wisper II asserts that the 2010 Ford F-250, the Office Furnishings, the equipment missing from the Alamo Property, and the $11,965.00 in missing cash became its property under this plan provision as of the Confirmed Plan's February 12, 2014 Effective Date. Implicit in this allegation is the fact that the property at issue became § 541 "property of the estate" upon the filing of Wisper I's Chapter 11 Petition.

According to Wisper II's Amended Complaint, Wisper II brought their claims for turnover pursuant to 11 U.S.C. § 542(a). This section provides that

> an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. § 542(a). A reorganized debtor's standing to bring a § 542 turnover action after confirmation depends on whether the confirmed plan adequately reserved such cause of action in favor of the reorganized debtor. *Ice Cream Liquidation, Inc. v. Calip Dairies, Inc. (In re Ice Cream Liquidation, Inc.)*, 319 B.R. 324, 333 (Bankr. D. Conn. 2005). In order to sustain a post-confirmation turnover action, the confirmed plan must contain specific language reserving the § 542 cause of action. *Connolly v. City of Houston (In re W. Integrated Networks, LLC)*, 329 B.R. 334, 338 (Bankr. D. Col. 2005). A "blanket" reservation of rights will not satisfy this requirement. *Id.* A plan which specifically reserves avoidance actions under §§ 544, 547, 548, and 550, but which is silent as to § 542, is not sufficient to preserve turnover actions after confirmation. *Ice Cream Liquidation,* 319 B.R. at 333.

Although the Competing Disclosure Statement in the current case specifically reserved "preference, fraudulent conveyance, or other avoidance actions [that arose] out of the actions or conduct of an insider," it made no mention of turnover actions under § 542(a). (*See* Competing Disclosure Statement at 5, ECF No. 141). As a result, the Court concludes that Wisper II does not have standing to bring a § 542(a) turnover action against the Defendants. This conclusion, however, does not foreclose Wisper II's request for possession of the property at issue. As this Court recognized in its February 13, 2015 Memorandum Opinion regarding the Defendants' Motion to Compel Payment of Rent, a bankruptcy court retains post-confirmation jurisdiction "to ensure compliance with the provisions of title 11 and to ensure the proper execution and consummation of the debtor's plan." *Pioneer Inv. Servs. Co. v. The Cain P'ship, Ltd. (In re Pioneer Inv. Servs. Co.)*, 141 B.R. 635, 641 (Bankr. E.D. Tenn. 1992). This retention of jurisdiction necessarily includes the power to interpret the terms of a confirmed plan. *Gordon Sel-Way, Inc., v. United States (In re Gordon Sel-Way, Inc.)*, 270 F.3d 280, 289 (6th Cir. 2001); *Equip. Finders, Inc. of Tenn. v. Fireman's Fund Ins. Co.* (*In re Equip. Finders,*

Inc. of Tenn.), 473 B.R. 720, 730-31 (Bankr. M.D. Tenn. 2012). This retention of jurisdiction also includes the authority to

> direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

11 U.S.C. § 1142(b). Bankruptcy Rule 3020(d) also provides that "nothwithstanding the entry of the order of confirmation, the court may issue any other order necessary to administer the estate." *See Thickstun Bros. Equip. Co., Inc. v. Encompass Servs. Corp.* (*In re Thickstun Bros. Equip. Co., Inc.*), 344 B.R. 515, 521 n.2 (B.A.P. 6th Cir. 2006) (noting that "post-confirmation jurisdiction is assumed by [11 U.S.C. § 1142(b)] and rule [Fed. R. Bankr. P. 3020(d)]").

In this case, the Confirmed Plan provided that all of Wisper I's property would vest in Wisper II as of the plan's Effective Date. The Confirmation Order also provided "[t]hat 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 at 5-6, Bankr. Case No. 13-10770, ECF No. 245). The determination of whether Wisper II is entitled to possession of the property at issue necessarily requires this Court to interpret whether the property vested in Wisper II pursuant to the terms of the Confirmed Plan. Consequently, the Court concludes it has jurisdiction to determine the property rights at issue under Wisper II's first cause of action.

1. 2010 Ford F-250

Although registered to Matt Abernathy, the Court finds that the 2010 Ford F-250 ("2010 Ford") was Wisper I's property immediately prior to confirmation. Because the plan provided that all of Wisper I's property would vest in Wisper II as of the Effective Date of the Confirmed Plan, the 2010 Ford became Wisper II's property as of February 12, 2014.

Under Tennessee law, the "owner" of a vehicle is defined as the "person who holds the legal title" to the vehicle. Tenn. Code Ann. § 55-12-102(11). "[P]roof of the registration of the . . . vehicle in the name of any person shall be prima facie evidence of ownership of the . . .

vehicle by the person in whose name the vehicle is registered." Tenn. Code Ann. § 55-10-312. This presumption of ownership, however, is rebuttable. "[T]he intention of the parties, not the certificate of title, determines the ownership of an automobile." *Smith v. Smith*, 650 S.W.2d 54, 56 (Tenn. Ct. App. 1983) (recognizing that the motor vehicle title laws "were designed to deter trafficking in stolen cars," not to determine ownership); *In re Printup*, 264 B.R. 169, 173 (Bankr. E.D. Tenn. 2001) (recognizing the rebuttable presumption is valid in determining "property of the estate" under 11 U.S.C. § 541). "Ownership is a question of fact." *Gipson v. State Farm Fire and Cas. Co.*, No. W2013-02872-COA-R3-CV, 2014 WL 5591048, at *5 (Tenn. Ct. App. Nov. 4, 2014). As the Tennessee Court of Appeals held in *Rivkin v. Postal*,

> To determine ownership of a vehicle, a trier-of-fact may consider and weigh evidence relating to (1) the circumstances surrounding the vehicle's purchase, (2) the registration of the vehicle, (3) all aspects of insuring the vehicle, (4) all parties' financial stake in the vehicle, (5) the actual possession of the vehicle, (6) the responsibility for bearing the expense of operating, maintaining, and licensing the vehicle, and (7) the ultimate right to control the vehicle, including the right to make major decisions concerning the vehicle such as its use and restrictions on its use or the sale or other disposition of the vehicle.

No. M1999-01947-COA-R3-CV, 2001 WL 1077952, at *11 (Tenn. Ct. App. Sept. 14, 2001) (citation omitted).

In this proceeding, the uncontroverted proof established that Wisper I paid the entire purchase price and all of the insurance premiums for the 2010 Ford. Matt Abernathy confirmed these facts at the trial. He also testified that he used the truck in carrying out his duties as Wisper I's managing member. Abernathy did not include the purchase price of the truck as income on his 2012 tax return; however, he depreciated the 2010 Ford as a business expense in 2012 and 2013 on his individual tax returns. The only explanation Matt Abernathy provided for titling the 2010 Ford in his name rather than Wisper I's was Abernathy's claim that Carter Edwards gave him permission to do so. Edwards denied this assertion at the trial. Edwards testified that he gave Matt Abernathy permission to purchase the vehicle with Wisper I funds, but he was unaware that Abernathy planned to title the vehicle in his individual name. When weighing conflicting claims regarding ownership of a vehicle, the trial court must necessarily make a determination as to "the credibility of the witnesses." *Brewer v. Brewer*, No. M2010-00768-COA-R3CV, 2011 WL 532267, at *4 (Tenn. Ct. App. Feb. 14, 2011). On

this particular issue, the Court finds Carter Edwards's testimony to be more credible than that of Matt Abernathy.

Considering these facts under a totality of the circumstances, the Court concludes that the evidence weighs in favor of finding that the 2010 Ford was property of Wisper I and, as such, it vested in Wisper II pursuant to the terms of the Confirmed Plan as of February 12, 2014. The Court will enter a separate order directing the Defendants to turn over possession of the 2010 Ford to Wisper II.

2. Office Furniture and Equipment

Because of the sworn statements made by George Abernathy and Matt Abernathy in their 2008 individual bankruptcy petitions, the Court finds that Matt Abernathy and George T. Abernathy are judicially estopped from claiming ownership of the 199 pieces of office furniture and equipment ("Office Furnishings") at the Alamo Property.

Judicial estoppel is an equitable doctrine which "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich*, 530 U.S. 211, 227 n. 8, 120 S. Ct. 2143, 2154 n.8 (2000). Stated another way:

> [W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

New Hampshire v. Maine, 532 U.S. 742, 749, 121 S. Ct. 1808, 1814 (2001) (citing *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S. Ct. 555, 558 (1895)). One purpose of judicial estoppel is to prohibit " 'parties from deliberately changing positions according to the exigencies of the moment[.]' " *Id.* at 750 (citing *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993)). The doctrine prohibits a party from contradicting "sworn statements made during judicial proceedings." *FDIC v. Berry*, 659 F. Supp. 1475, 1486 (E.D. Tenn. 1987). Judicial estoppel "preserve[s] the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship . . . ." *Lorillard Tobacco Co. v. Chester, Wilcox & Saxbe*, 546 F.3d 752, 757 (6th Cir. 2008). The doctrine "should be applied with caution to avoid impinging

on the truth-seeking function of the court, because the doctrine precludes a contradictory position without examining the truth of either statement." *Eubanks v. CBSK Fin. Grp.*, *Inc*., 385 F.3d 894, 897 (6th Cir. 2004) (internal citation and quotation marks omitted). The issue of whether the doctrine of judicial estoppel should be invoked is within the discretion of the trial court. *Id*.

Although "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," there are three factors a court should consider in determining whether to apply the doctrine. *New Hampshire*, 532 U.S. at 750.

> First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled." Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750-51. In order for judicial estoppel to apply, the Sixth Circuit Court of Appeals has consistently held that "a party must show that the opponent took a contrary position under oath in a prior proceeding and that the prior position was accepted by the court." *Lorillard Tobacco*, 546 F.3d at 757; *Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620, 624 (6th Cir. 2005); *Valentine-Johnson v. Roche*, 386 F.3d 800, 811 (6th Cir. 2004).

"Evidence of an inadvertent omission of a claim in a previous bankruptcy proceeding is a reasonable and appropriate factor to consider when analyzing judicial estoppel's applicability." *Eubanks*, 385 F.3d at 899. There are two circumstances in which an omission may be deemed inadvertent. "One is where the debtor lacks knowledge of the factual basis of the undisclosed claims, and the other is where the debtor has no motive for concealment." *Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002) (citing *Browning Mfg., v. Mims* (*In re Coastal Plains, Inc.*), 179 F.3d 197, 210 (5th Cir. 1999)). Evidence that the debtor attempted to remedy the omission as soon as possible may also weigh against the application of judicial

estoppel. *Fairdale Area Cmty. Ministries, Inc., v. Hollingsworth* (*In re Hollingsworth*), 441 B.R. 833, 840 (Bankr. W.D. Ky. 2010).

Section 521(a)(1)(B) requires a debtor to file "a schedule of assets and liabilities" and "a statement of the debtor's financial affairs." Pursuant to Federal Rule of Bankruptcy Procedure 1008, bankruptcy "petitions, lists, schedules, statements and amendments thereto" are signed under penalty of perjury. Fed. R. Bankr. P. 1008. By signing these documents, the debtor swears that the information contained therein is true and correct to the best of the debtor's knowledge, information, and belief.

The failure to list an asset on a sworn schedule or a SOFA "qualifies as a 'prior position' " for purposes of judicial estoppel. *Johnson v. Lewis Cass Intermediate Sch. Dist.* (*In re Johnson*), 345 B.R. 816, 822 (Bankr. W.D. Mich. 2006); *Barger v. City of Catersville, Ga.,* 348 F.3d 1289, 1294 (11th Cir. 2003). If the debtor had a "motive for concealment," the omission of an asset from bankruptcy schedules or statements may foreclose a debtor's attempt to claim ownership of that asset at a later date. *Eubanks,* 385 F.3d at 898; *In re Sumerell*, 194 B.R. 818, 830 (Bankr. E.D. Tenn. 1996) (concluding that judicial estoppel prevented debtors from claiming, at a later date, that property they listed on Schedule B of their petition actually belonged to their son).

In confirming a repayment plan or granting a discharge, a bankruptcy court implicitly adopts the representations made by debtors in their sworn schedules and statements. *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1048 (8th Cir. 2006); *Auday v. Wet Seal Retail, Inc.*, No 1:10-CV-260, 2012 WL 124080, at *3 (E.D. Tenn. Jan. 17, 2012); *Johnson,* 345 B.R. at 822; *Tyler v. Fed. Express Corp.*, 420 F. Supp. 2d 849, 856 (W.D. Tenn. 2005). This adoption of the representations set forth in schedules and statements "is sufficient 'judicial acceptance' to estop the party from later advancing an inconsistent position." *Reynolds v. Comm'r*, 861 F.2d 469, 473 (6th Cir. 1988).

Although George T. Abernathy testified at the trial in this matter that he and Matt Abernathy owned the $36,600.00 worth of Office Furnishings prior to October 30, 2008, neither of them listed the property on their 2008 bankruptcy petitions, schedules, or statements. The Court clearly relied on Matt and Adria Abernathy's failure to disclose

ownership of the lien-free assets in confirming their Chapter 11 plan on June 21, 2010 (case no. 08-14227). The Court also clearly relied on George T. Abernathy's failure to disclose ownership of the property in granting him a no-asset Chapter 7 discharge on July 13, 2010 (case no. 08-14230). At no time during either case did Matt Abernathy or George T. Abernathy seek to amend their schedules to reflect ownership of the Office Furnishings. They have also failed to assert that their failure to list the Office Furnishings in their previous personal bankruptcy petitions, schedules, or statements was the result of mistake or inadvertence.

After considering the facts, the Court concludes that Matt Abernathy and George T. Abernathy are judicially estopped from claiming ownership of the Office Furnishings in this bankruptcy case. By not listing the Office Furnishings on their 2008 individual bankruptcy petitions, Matt Abernathy and George T. Abernathy asserted under oath that they did not own the Office Furnishings. The testimony at the trial in this matter clearly established that Matt Abernathy and George T. Abernathy owned the furniture at the time those cases were filed. Consequently, Matt Abernathy and George T. Abernathy are now barred from claiming personal ownership of the Office Furnishings. If the Court were to allow Matt Abernathy and George T. Abernathy to claim ownership of the property in this case, the $36,600.00 in Office Furnishings would once again be kept safe from the claims of their creditors and the parties would escape from yet another bankruptcy proceeding with their lien-free asset intact. This would obviously allow the parties to "deliberately chang[e] positions according to the exigencies of the moment" and to obtain a benefit at the expense of their creditors. *New Hampshire*, 532 U.S. at 750. This is precisely the situation judicial estoppel was intended to prevent.

Accordingly, based on the reasoning of the previously discussed cases and the views of the Sixth Circuit Court of Appeals, this Court concludes that Matt Abernathy and George T. Abernathy are judicially estopped from claiming ownership of the Office Furnishings at this point in the proceedings. The Court will enter a separate order declaring the Office Furnishings listed on Trial Exhibit 3 to be the property of Wisper II.

3. Missing Equipment

In this case, there is no dispute that Matt Abernathy removed various items of equipment from Wisper I's property in early January 2014. He admitted that he did this. What the parties cannot agree on is whether Matt Abernathy returned all of the property. Matt Abernathy claims he returned everything that was not his personal property. Although Wisper II agrees that Matt Abernathy returned some of the property he removed from Wisper I's business premises, Wisper II asserts that he failed to return the Equipment listed in the Amended Complaint. The Court finds that the uncontroverted evidence demonstrates that the air compressor and the missing Laptop belonged to the Defendants at the time of Confirmation and thus did not vest in Wisper II upon confirmation; however, the Court finds that the welder along with the 25 hp Kohler engine, the eight 290 amp hour deep cycle marine batteries, the two battery chargers, and the gas generator were property of Wisper I at the time of confirmation of the Competing Plan and thus became property of Wisper II upon confirmation. The Court will order turnover of those items to Wisper II. Finally, the Court finds that Wisper II failed to establish that an impact drill was removed or missing from Wisper I's business premises in Alamo, Tennessee. For that reason, the Court will not order turnover of the impact drill.

The only evidence introduced by the parties about the missing Equipment was testimony from several witnesses. Accordingly, the Court must review the testimony from the trial to determine whether Wisper II successfully demonstrated that Matt Abernathy failed to return any items belonging to Wisper I to Wisper I's business premises in Alamo, Tennessee. As the trier of fact, "the bankruptcy court . . . must weigh conflicting facts, determine the credibility of witnesses and draw inferences from the evidence presented." *Ohio Crime Victims Reparations Fund v. Harwell* (*In re Harwell*), 349 B.R. 502, 507-08 (Bankr. N.D. Ohio 2006) (citation omitted). In determining a witness's credibility, a court must

> apply the tests of truthfulness we apply in our daily lives. One such test which is particularly relevant here, is the reasonableness of testimony. The determination of credibility is especially important in [a] case where evidence at the trial was for the most part oral.

Diekman v. Czanik (*In re Czanik*), 51 B.R. 637, 638 (Bankr. S.D. Ohio 1985). When analyzing a witness's credibility, a court must also determine what weight to give the witness's testimony. *Spragin v. Nowak* (*In re Nowak*), 330 B.R. 880 (B.A.P. 6th Cir. 2005).

With respect to the air compressor and the Laptop Matt Abernathy used while managing Wisper I, the only evidence in the record is Matt Abernathy's testimony that these items were his personal property. Wisper II did not present any evidence, testimonial or otherwise, to contradict these claims.

With respect to the eight 290 amp hour deep cycle marine batteries, the Court finds that the weight of evidence demonstrates that those batteries were property of Wisper I at the time of confirmation and that Matt Abernathy did not return those batteries to Wisper I's business premises. Although Linda Danneker testified that she gave Matt Abernathy some batteries for his individual use, she did not identify the number or type of batteries she gave him. She also was unable to approximate a time frame for when she gave him the batteries. Although John Weaver, one of the Defendants' witnesses, testified that he helped return "batteries," he also failed to identify what type of battery was returned. Charlie Karnes and James Runyons both testified that the batteries at issue in this adversary proceeding were not returned to Wisper I's offices. The Court finds their testimony to be more credible than any other witness since they were the only witnesses who referred to the batteries with any specificity.

The Court must now determine whether the evidence presented at trial proved that Matt Abernathy returned the welder along with the 25 hp Kohler engine, the two battery chargers, or the gas generator. In this case, Matt Abernathy admitted taking the missing Equipment from Wisper I's offices in Alamo, Tennessee, but claimed that he returned anything that belonged to Wisper I to the business premises. By alleging that he returned the property, Matt Abernathy conceded that it was Wisper I's property. Wisper II does not dispute that Matt Abernathy returned some equipment to the Alamo Property, but it denies that he returned the welder and engine, the battery chargers or the gas generator.

With respect to any equipment Matt Abernathy did return to the Alamo Property, Abernathy testified that he purposely hid some of the returned property by placing it "on top of the server room, which is right — right above the network engineer's work space." (June

11, 2015 Tr. of Hr'g at 25). In light of this admission, the Court finds the testimony of Wisper II's witnesses to be more credible and entitled to more weight than that of Matt Abernathy on the issue of the missing welder, battery chargers, and the gas generator.

Wisper II's witnesses consistently testified that Matt Abernathy did not return the welder along with the 25 hp Kohler engine, two battery chargers, or the gas generator. Given their testimony and demeanor throughout the trial, the Court finds these witnesses to be more credible.

The January 15, 2014 Interim Order on Confirmation prohibited Matt Abernathy from removing any property from Wisper I's business premises. This prohibition included property that Wisper I owned and property Wisper I did not own. (*See* Interim Order at 4, Bankr. Case No. 13-10770, ECF No. 225). The order directed Matt Abernathy to obtain permission from either the Court or Wisper I's creditors before removing *any* property from Wisper I's business premises. Matt Abernathy did not do this. The Court finds that Abernathy's failure to comply with the terms of the Interim Order weighs against his claims that he returned any equipment belonging to Wisper I to the Alamo Property.

The Court finds that the weight of evidence at the trial established that Matt Abernathy did not return the welder along with the 25 hp Kohler engine, the two battery chargers, or the gas generator to Wisper I's possession following entry of the Confirmation Order on January 29, 2014. The Court will enter a separate order directing the Defendants to turn over the welder along with the 25 hp Kohler engine, the eight 290 amp hour deep cycle marine batteries, the two battery chargers, and the gas generator to Wisper II.

4. $11,965.00 in Missing Cash

The next item Wisper II asserts the Defendants should be directed to turn over is $11,965.00 in cash that a November 2013 Accountant's Report discovered was missing from Wisper I's cash drawer at the Alamo Property. The Court finds that the Defendants failed to account for the missing funds. The Court will enter a separate order directing the Defendants to turn over $11,965.00 to Wisper II.

The only evidence introduced at the trial about the $11,965.00 in missing cash was testimony from Matt Abernathy, Sarah Moyers, and Christy Raab, and a copy of the November 2013 Accountant's Report. Consequently, the Court must once again "weigh conflicting facts, determine the credibility of witnesses and draw inferences from the evidence presented." *Harwell*, 349 B.R. at 507-08. At no time during the trial did Matt Abernathy dispute the accuracy of the November 2013 Accountant's Report.

Matt Abernathy testified that Wisper I conducted much of its day-to-day business through cash transactions. Wisper I obtained this money through cash payments from customers. Wisper I kept these funds in a cash drawer at the Alamo Property. Abernathy testified that he frequently took cash out of the cash drawer. He also testified that Wisper I employees would use money from the cash drawer for business expenses such as gas for company vehicles and the purchase of equipment and parts for Wisper I.

Although Sarah Moyers established a cash voucher system for the cash drawer when she started working for Wisper I in July 2010, Abernathy testified that there was no formal system in place to track the cash withdrawals prior to that time. When asked to explain the shortage of $11,965.00 in cash, Abernathy simply testified that Wisper I employees sometimes failed to turn in receipts for their purchases and that receipts sometimes got "lost or whatever." (June 10, 2015 Tr. of Hr'g at 92; June 11, 2015 Tr. of Hr'g at 35).

Throughout the course of her testimony, Moyers never indicated that other Wisper I employees failed to turn in receipts. Instead, she claimed that Matt Abernathy would often remove money from the cash drawer without documenting the withdrawal. He would either refuse to sign a cash voucher or he would take the money when Moyers was not present.

When asked by Wisper II's attorney whether he ever recalled refusing to sign the vouchers, Matt Abernathy answered "I wouldn't say ever." (June 10, 2015 Tr. of Hr'g at 190).

Matt Abernathy admitted that he removed all of the cash voucher records from the Alamo Property around the time the Court confirmed the Competing Plan on January 29, 2014. Abernathy testified that he turned those vouchers over to his attorney shortly before the trial began; however, nothing in Abernathy's testimony indicated that those vouchers account

for the missing cash. The Defendants sought to introduce the missing vouchers at the outset of the trial and have them pre-admitted into evidence. Because the vouchers were not disclosed in compliance with the Pre-Trial and Scheduling Order deadlines and because Wisper II had not had an opportunity to review the vouchers prior to the trial, Wisper II objected to pre-admitting the vouchers into evidence. The Court denied the Defendants' motion to pre-admit the vouchers into evidence. The Defendants never sought to introduce and admit the vouchers individually during the course of the trial.

Generally, a party who is in possession of evidence has "an obligation to preserve the evidence" if it is on notice that it may be relevant to a potential claim. *Beaven v. U.S. Dep't of Justice*, 622 F.3d 540, 554 (6th Cir. 2010). As the Eighth Circuit Court of Appeals has recognized, "in certain circumstances, a negative inference arises from a defendant's failure to produce documents shown to have been in his possession. The inference is that the documents would have been damaging to the defendant." *Evans v. Robbins*, 897 F.2d 966, 970 (8th Cir. 1990); *see also Beaven*, 622 F.3d at 555 n.11 (noting that "t]he failure or refusal to produce a relevant document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to the possessor, provided the opponent, when the identity of the document is disputed, first introduces some evidence tending to show that the document actually destroyed or withheld is the one as to whose contents it is desired to draw an inference") (citing 2 John Henry Wigmore, Evidence in Trials at Common Law § 291, at 227-29 (Chadbourn rev. 1979)).

After reviewing the evidence, the Court finds that the Defendants did not account for the $11,965.00 cash missing from Wisper I's cash drawer. Matt Abernathy did not indicate that the cash vouchers account for the missing money. His only explanation was that employees failed to turn in receipts when they used Wisper I funds to pay for business expenses. During direct and cross examination, Matt Abernathy admitted that he occasionally took money from the cash drawer without documenting the withdrawal.

The Court also finds that Matt Abernathy has been in control of the cash voucher system records since early 2014. He admits removing the records from Wisper I's offices in Alamo, Tennessee, and admits that he never provided Wisper II with any access to the

vouchers. Wisper II filed this adversary proceeding on April 4, 2014. Wisper II asserted in the original complaint that the $11,965.00 missing from the cash drawer was Wisper I's property and, as such, should be turned over to Wisper II. (Compl. at 2, ECF No. 1). There is no doubt that Matt Abernathy knew that the $11,965.00 in missing cash was an issue in this adversary proceeding for fourteen months before the trial began. If the cash voucher records accounted for the missing cash, Abernathy should have provided proof of such to Wisper II and the Court. He did not do this. Given this fact, the Court infers one of two things. Either (1) the voucher records demonstrate that Matt Abernathy in fact removed the missing cash or (2) there are no receipts that account for the missing money.

For these reasons, the Court will enter a separate order directing the Defendants to turn over $11,965.00 to Wisper II.

5. Damages for Failure to Turn Over Property of the Estate

In addition to its turnover requests, Wisper II is also seeking damages based on the Defendants' failure to turn over the property at the time of plan confirmation. Wisper II asserts that it is entitled to damages for the Defendants' failure to turn over the 2010 Ford and missing Equipment as well as the Defendants' failure to turn over the 2007 Gooseneck Trailer until after the commencement of the trial. The Court finds that not only did Wisper II fail to provide the Court with proof of economic harm in seeking damages, but it also failed to provide the Court with allegations that it suffered any concrete damages as a result of the Defendants' failure to turn the property over to Wisper II. As such, the Court will deny Wisper II's request for damages.

Pursuant to 11 U.S.C. § 1141, a confirmed Chapter 11 plan of reorganization is binding on the debtor and each creditor and claimant dealt with under the plan. "In 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). Consequently, "general principles of contract law apply" to allegations that an entity has breached the terms of a confirmed plan. *Official Comm. of Unsecured Creditors v. Liberty Savs. Bank* (*In re Toy King Distrib., Inc.*), 256 B.R. 1, 156 (Bankr. M.D. Fla. 2000). A reorganized debtor is entitled to

damages from a party who fails to comply with the terms of the confirmed plan. *In re Castle Home Builders, Inc.*, 520 B.R. 98, 107 (Bankr. N.D. Ill. 2014).

"The person seeking an award of damages must prove actual damages with some degree of certainty." *Beair v. Polhamus* (*In re Beair*), 168 B.R. 633, 637 (Bankr. N.D. Ohio 1994) (citation omitted). "The law does not require impossibilities when it comes to proof of damages, but it does require whatever degree of certainty that the nature of the case admits. A damage award must not be based on mere speculation, guess, or conjecture." *John E. Green Plumbing & Heating Co. v. Turner Const. Co.*, 742 F.2d 965, 968 (6th Cir. 1984) (internal citations and quotation marks omitted). "Once the existence of damages has been shown, all that an award of damages requires is substantial evidence in the record to permit a factfinder to draw reasonable inferences and make a fair and reasonable assessment of the amount of damages." *Grantham & Mann, Inc. v. Am. Safety Prods., Inc.*, 831 F.2d 596, 601-02 (6th Cir. 1987). "The plaintiff bears the burden of proving damages" by a preponderance of the evidence. *Id.* at 601; *Bankers Healthcare Grp., Inc., v. Bilfield* (*In re Bilfield*), 494 B.R. 292, 302 (Bankr. N.D. Ohio 2013) (citation omitted). "[W]ithout adequate proof, there can be no award of damages in any amount." *Grantham*, 831 F.2d at 601; *MERV Props., LLC, v. Friedlander* (*In re MERV Props., LLC*), No. 11-52814, 2015 WL 2105884, at *17 (Bankr. E.D. Ky. May 4, 2015) (concluding that failure to "adequately identify any evidence of injury or damages" does not satisfy the requirement of "establish[ing] with certainty the existence of damages") (citation omitted).

In this adversary proceeding, there is no doubt that Matt Abernathy breached the terms of the Confirmed Plan in failing to turn over the 2010 Ford, the welder along with the 25 hp Kohler engine, the eight 290 amp hour deep cycle marine batteries, the two battery chargers, the gas generator, and the 2007 Gooseneck Trailer. What is not clear is whether Wisper II has proven any damages for Matt Abernathy's post-confirmation possession of the property. In its Amended Complaint, Wisper II asked for damages in the form of the fair market rental value of each item of personal property. Wisper II also asserted that it is entitled to the amount the 2010 Ford has depreciated since the effective date of the Confirmed Plan. In its Post-Trial Brief, Wisper II asserted that "under the circumstances some additional protection . . . is warranted to prevent Matt Abernathy from intentionally damaging the vehicle prior to its

surrender." Wisper II asserted that the proper measure of these damages would be the depreciation rate used by the Defendants on their 2013 tax return: $38.10 per day or $1,159.16 per month.

With respect to Wisper II's request for the fair market rental value of the personal property, Wisper II failed to present the Court with any testimony or evidence that it has actually suffered damages as a result of Matt Abernathy's failure to turn the property over. None of the witnesses testified that Wisper II has been forced to rent or purchase replacements for the 2010 Ford, the missing equipment, or the 2007 Gooseneck Trailer while in Matt Abernathy's possession. Wisper II did not present documentary evidence of any costs it has incurred in trying to either replace these missing items of property or to obtain possession of them from the Defendants.

With respect to Wisper II's request for the depreciated value of the 2010 Ford, the Court finds that the request is denied for lack of evidentiary support. The Court acknowledges that the Defendants' wrongful retention of the 2010 Ford has hampered Wisper II's ability to demonstrate whether and to what amount any damage has occurred to the vehicle; however, this Court cannot award damages based on "mere speculation, guess, or conjecture." *Green Plumbing*, 742 F.2d at 968. Wisper II did not present any information that would assist the Court in determining whether the depreciation as reflected on the Defendants' 2013 tax return is an appropriate measure of damages in this adversary proceeding.

Due to the absence of any proof regarding the appropriate amount of damages, the Court has no choice but to deny Wisper II's request for damages as they relate to the 2010 Ford Truck, the welder along with the 25 hp Kohler engine, the eight 290 amp hour deep cycle marine batteries, the two battery chargers, the gas generator, and the 2007 Gooseneck Trailer. This denial is without prejudice to Wisper II's right to bring an appropriate cause of action for any damages that are discovered when the Defendants return the property. The Court will enter a separate order denying Wisper II's request for damages.

B. Conversion and/or Fraud

In its Amended Complaint, Wisper II asserted that the Defendants wrongfully removed property from Wisper I's business premises in Alamo, Tennessee, and made unauthorized use of funds in Wisper I's DIP Account for personal expenses. Wisper II alleged that the Defendants are liable for these actions under a theory of conversion and/or fraud. The Court finds that the Defendants are liable for conversion of the two Pure Wave WiMax BTS Base Stations valued at $20,600.00, the $1,938.61 the Defendants used to make repairs to their personal vehicle , and a portion of the $2,804.02 insurance premium paid to Humana.

Under Tennessee law, the tort of conversion is defined as "the appropriation of another's property to one's own use and benefit, by the exercise of dominion over the property, in defiance of the owner's right to the property." *Ralston v. Hobbs*, 306 S.W.3d 213, 221 (Tenn. Ct. App. 2009) (citations omitted). "Conversion is an intentional tort, and a party seeking to make out a *prima facie* case of conversion must prove: (1) the appropriation of another's property to one's own use and benefit, (2) by the intentional exercise of dominion over it, (3) in defiance of the true owner's rights." *PNC Multifamily Capital Inst. Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp.*, 387 S.W.3d 525, 553 (Tenn. Ct. App. 2012) (citations omitted). The party bringing the conversion claim carries the burden of proof as to each element. *Nunley v. Nunley*, 925 S.W.2d 538, 541 (Tenn. Ct. App. 1996).

> A party may convert property in one of three ways.
>
> > First, a person may personally dispossess another of tangible personalty. Second, a person may dispossess another of tangible property through the active use of an agent. . . . Third, under certain circumstances, a person who played no direct part in dispossessing another of property may nevertheless be liable for conversion for "receiving a chattel."

PNC Multifamily Capital, 387 S.W.3d at 553 (citations omitted). "The defendant's intention need not be a matter of conscious wrongdoing, but can merely be an exercise of dominion or control over the property in such a way that would be inconsistent with the owner's rights and which results in injury to him." *Permobil, Inc. v. Am. Express Travel Related Servs. Co., Inc*., 571 F. Supp. 2d 825, 840-41 (M.D. Tenn. 2008) (internal citation and quotation marks omitted). Consequently, "[w]hether the defendant acts in good faith is generally immaterial"

to the inquiry. *Mammoth Cave Prod. Credit Ass'n v. Oldham*, 569 S.W.2d 833, 836 (Tenn. Ct. App. 1977).

> The tort of conversion may lie where a defendant may have rightfully obtained possession of the property of the owner but refuses to return it to the owner when legally required to do so. By making a rightful demand for the return of his property, a plaintiff establishes a *prima facie* case of conversion, and the defendant must then show facts that constitute a justification or excuse for his failure to deliver it.

Id. at 841 (internal citations and quotation marks omitted).

Although "the general rule is that money is an intangible and therefore not subject to a claim for conversion, . . . there is an exception where the money is specific and capable of identification or where there is a determinate sum that the defendant was entrusted to apply to a certain purpose." *PNC Multifamily Capital*, 387 S.W.3d at 553 (internal citations and quotation marks omitted); *see also Ralston*, 306 S.W.3d at 221.

"As a general rule, plaintiff's damages in an action for conversion are measured by the sum necessary to compensate him for all actual losses or injuries sustained as a natural and proximate result of the defendant's wrong." *Lance Prods., Inc. v. Commerce Union Bank*, 764 S.W.2d 207, 213 (Tenn. Ct. App. 1988). A court may award punitive damages for a conversion only "if it finds . . . that a defendant's wrongful actions were intentional, fraudulent, malicious, or reckless." *White v. Empire Express, Inc.*, 395 S.W.3d 696, 720 (Tenn. Ct. App. 2012) (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn.1992)). In order to satisfy their burden of proof as to punitive damages, movants must demonstrate the aggravated nature of the act by clear and convincing evidence. *Id.* "Clear and convincing evidence leaves 'no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.' " *Id.* (citing *Hodges*, 833 S.W.2d at 901 n. 3.). "[C]lear and convincing evidence should demonstrate that the truth of the facts asserted is 'highly probable' as opposed to merely 'more probable' than not." *Id.* (citing *In re M.A.R.*, 183 S.W.3d 652, 660 (Tenn. Ct. App. 2005)).

The first payment at issue in Wisper II's conversion claim against the Defendants is the January 27, 2014 check for $7,500.00 to Matt Abernathy. At the trial, Matt Abernathy testified

that this payment was his monthly owner's draw for January 2014. The Court finds this assertion to be credible. Nothing in Wisper II's proof demonstrated that Matt Abernathy had taken a monthly draw since December 2, 2013. (*See* Tr. Ex. 19). Consequently, the Court finds that the $7,500.00 was property of Matt Abernathy at the time it was paid to him. Because a party can only be liable for conversion when he exerts rights over property that does not belong to him, the Court finds that Matt Abernathy did not convert the $7,500.00.

The next payment at issue is the January 27, 2014 check for $2,804.02 to Humana. At the trial, the uncontroverted proof established that Joyce Abernathy was no longer an employee of Wisper I at the time this premium was paid. Although Matt Abernathy testified that he knew Wisper II would be assuming control of the business in February 2014, Matt Abernathy, Adria Abernathy, George T. Abernathy, and Deanna Casteel were Wisper I employees at the time the insurance premium was paid. Wisper II did not present any evidence about the insurance policy's terms with respect to coverage or the prorating of premiums. Accordingly, the Court finds that the proof presented at the trial did not establish that the Defendants converted Wisper I's property when using company funds to pay the insurance premiums for their family insurance coverage or the individual coverage for George T. Abernathy and Deanna Casteel. However, because Joyce Abernathy was not a Wisper I employee at the time the premium was paid, the Court finds that the Defendants converted company funds in an amount equal to the portion of the premium that provided for her coverage: $693.92. The Court will enter a separate order awarding Wisper II $693.92 for the Defendants' conversion of Wisper I's funds.

The next payment at issue is the January 27, 2014 check for $400.00 to Matt Abernathy. Matt Abernathy testified that this payment represented his commission for the Crop Production Services account. Wisper II did not present any evidence to rebut this assertion. Accordingly, the Court finds that the only proof in the record about the $400.00 payment establishes that Matt Abernathy had earned these funds at the time they were paid to him. The Court finds that these funds belonged to Matt Abernathy and he therefore did not exercise dominion or control over Wisper I's funds by paying the commission to himself.

The next payment at issue is the January 27, 2014 check for $306.62 to Verizon Wireless. Matt Abernathy testified that this payment was for two company cell phones and his own cell phone. Wisper II did not present any evidence to contradict this claim nor did it present any evidence that this payment was for pre-paid cellphone service. Accordingly, the Court finds that Wisper II did not satisfy its burden of proof on establishing that the Defendants converted the $306.62 Verizon payment to their own use.

The next payment at issue in Wisper II's conversion claim against the Defendants is the November 12, 2013 use of $1,938.61 in Wisper I's funds for repairs for the 2009 Chevrolet Suburban. Although Matt Abernathy asserted that Adria Abernathy used the vehicle to run errands for Wisper I, the Court finds that the uncontroverted proof established that the 2009 Suburban was the Defendants' personal vehicle. The Court finds support for this conclusion in Carter Edwards's statement that he told Matt Abernathy he should not have used Wisper I's funds to make the repairs. Because the Suburban was the Defendants' personal property, the Court finds that the Defendants converted Wisper I's property when they used $1,938.61 in company funds to repair the vehicle. The Court will enter a separate order awarding Wisper II $1,938.61 for the Defendants' conversion of Wisper I's funds.

Although the Court finds that the Defendants converted Wisper I funds to pay for repairs to the Suburban, the Court cannot find that Wisper II has proven that it is entitled to punitive damages for this act. Wisper II did not present any clear and convincing evidence that the Defendants' use of company funds to make the repairs was "intentional, fraudulent, malicious or reckless." *White*, 395 S.W.3d at 720. Matt Abernathy testified that he felt justified in using company funds to make the repairs because Adria Abernathy occasionally used the vehicle to run errands for Wisper I. Although this was an erroneous conclusion on Abernathy's part, it alone does not clearly and convincingly demonstrate that Matt Abernathy's actions rise to the type of intentional, bad-faith behavior required for the imposition of punitive damages.

The next alleged misuse of funds at issue in this conversion claim is the $2,000.00 in cash that Wisper II asserts Matt Abernathy removed from Wisper I's cash drawer upon his exit from the company. Wisper II did not submit any evidence of this withdrawal at the trial and Matt Abernathy denied taking the money. Although the Court recognizes that it is unlikely Matt

Abernathy would admit taking the cash, the Court cannot award a judgment without some type of evidence of the withdrawal. Based on this lack of evidence, the Court cannot find that Abernathy removed $2,000.00 from the cash drawer when he left the Alamo Property in January 2014.

The last alleged misuse of funds at issue in this conversion claim is the $3,000.00 cash Matt Abernathy withdrew from Wisper's DIP Account on August 15, 2013. (Tr. Ex. 17). Initially the Court notes that Wisper II's argument with respect to this cash withdrawal is inaccurate. In its Post-Trial Brief, Wisper II stated that "Matt Abernathy's explanation was that he purchased a 2004 white Ford Van with said proceeds, for cash." (Pl.'s Post-Trial Br. at 28, ECF No. 128). Wisper II cites Trial Exhibit 70 in support of this statement. (*Id.*). Wisper II asserts that Abernathy's explanation is implausible because the cash withdrawal was made three months *after* the 2004 white Ford van was purchased. Neither the summary of Matt Abernathy's explanation nor the reference to Trial Exhibit 70 is correct. At the trial, Abernathy testified that he used the $3,000.00 cash to purchase a bucket truck from a man named "Pinky" at 412 Motors. (June 10, 2015 Tr. of Hr'g at 112). He did *not* testify that he used the money to purchase a 2004 Ford van. Trial Exhibit 70 is a bill of sale and vehicle registration for the 2004 Ford van, the same one referenced in Trial Exhibit 2 that Matt Abernathy admits purchasing from Dustin Smith on May 16, 2013. Abernathy admits he sold the van to a painter post-petition and did not remit the proceeds to Wisper I.

Given these facts, the Court finds that the two vehicles discussed in relation to this claim for conversion are separate and distinct. The uncontroverted proof establishes that Matt Abernathy used funds from his personal bank account to purchase the 2004 Ford van from Dustin King on May 16, 2013. (Tr. Exs. 2 and 70). The uncontroverted proof also establishes that Matt Abernathy used $3,000.00 cash from Wisper I's DIP Account to purchase a bucket truck from 412 Motors on August 15, 2013. (June 10, 2015 Tr. of Hr'g at 112). Wisper II did not present any proof that it is not in possession of the bucket truck at this time. Accordingly, the Court finds that Matt Abernathy did not convert the $3,000.00 in cash from Wisper I's account on August 15, 2013.

In addition to the funds at issue in this conversion claim, Wisper II has also asserted that the Defendants converted the 2004 Econoline Van when Matt Abernathy sold the van post-petition. Using the factors set forth in *Rifkin v. Postal*, No. M1999-01947-COA-R3-CV, 2001 WL 1077952 (Tenn. Ct. App. Sept. 14, 2001), the Court finds that Matt Abernathy was the owner of the 2004 Econoline Van at the time he sold it to the unnamed third party in the fall of 2014. Matt Abernathy paid for the van with personal funds. Although he titled the van in Wisper I's name and allowed Wisper I employees to use the van for work purposes, the Court finds the fact that Matt Abernathy paid for the van with his personal funds weighs in favor of finding that it was his personal property. Accordingly, the Court finds that Wisper II's claim for the conversion of the van cannot be sustained. The Court will enter a separate order denying Wisper II's claim for the conversion of the van.

Lastly, Wisper II has asserted that the Defendants should be liable for the conversion of two Pure Wave WiMax BTS Base Stations. The Defendants did not dispute the fact that Wisper I owned the base stations at issue in this proceeding. During the trial, Matt Abernathy admitted that the base stations belonged to Wisper I. (June 11, 2015 Tr. of Hr'g at 25). He also admitted that he removed the base stations from the Alamo Property shortly before confirmation of the Competing Plan. (June 10, 2015 Tr. of Hr'g at 116). What the parties do not agree upon is what happened to the base stations after Matt Abernathy removed them from the Alamo Property. Matt Abernathy asserted that he returned the base stations to Wisper I's possession. (June 11, 2015 Tr. of Hr'g at 25). Conversely, Wisper II's acting CEO Tom Farrell testified that Wisper II has been unable to locate them. (*Id.* at 79).

In determining whether the Defendants converted the base stations to their own use, the Court must necessarily weigh the testimony of Matt Abernathy and Tom Farrell and determine who it finds to be the more credible witness. *See Harwell,* 349 B.R. at 507-08. Given Matt Abernathy's admission that he removed the base stations from the Alamo Property, his assertion that he returned the base stations lacks credibility. Matt Abernathy admitted that he removed numerous items of Wisper I's property from the Alamo Property. Although he returned some of that property, Abernathy admitted that he intentionally hid what he returned. These actions call his credibility on the issue of the missing base stations into doubt. Tom Farrell's credibility, on the other hand, has never been questioned. Accordingly, the Court

finds that the Defendants removed the two Pure Wave WiMax BTS Base Stations from the Alamo Property and failed to return them to Wisper I's possession. Wisper II submitted proof that the value of each station is $10,300.00. The Court will enter a separate order awarding Wisper II $20,600.00 for the Defendants' conversion of the base stations.

In bringing its conversion claim, Wisper II asserted that the Defendants may also be liable for the missing funds and property under a theory of fraud. Under Tennessee law,

> Actions for fraud contain four elements: (1) an intentional misrepresentation of a material fact, (2) knowledge of the representation's falsity, and (3) an injury caused by reasonable reliance on the representation. The fourth element requires that the misrepresentation involve a past or existing fact or, in the case of promissory fraud, that it involve a promise of future action with no present intent to perform.

Dobbs v. Guenther, 846 S.W.2d 270, 274 (Tenn. Ct. App. 1992) (citation omitted). "The party alleging fraud bears the burden of proving each element." *Diggs v. Lasalle Nat. Bank Ass'n*, 387 S.W.3d 559, 564 (Tenn. Ct. App. 2012). In this adversary proceeding, the Court finds that Wisper II did not meet its burden of proof in demonstrating that the Defendants committed fraud through possessing the funds and property. Wisper II failed to present any proof of a misrepresentation or the Defendants' intent in this case. As such, the Court finds that Wisper II is not entitled to recovery for fraud in this proceeding.

C. 11 U.S.C. §§ 547 and 548

Under its fraudulent and preferential transfer claims, Wisper II is seeking to recover a total of $41,100.00 for transfers made within ninety days of the filing of Wisper I's Chapter 11 Petition, $122,210.00 for transfers made within one year of the filing of Wisper I's Chapter 11 Petition, and $106,035.00 for transfers made within two years of the filing of Wisper I's Chapter 11 Petition. (Tr. Ex. 21). Wisper II is also seeking to recover $52,384.00 Matt Abernathy allegedly failed to deposit when Jerry Hughes and David Hughes made cash investments in Wisper I. The Court finds that $209,345.00 of the money the Defendants transferred to themselves from Wisper I's Deposit Account within two years of the filing Wisper I's Chapter 11 bankruptcy Petition is avoidable as a fraudulent conveyance pursuant to 11 U.S.C. § 548(a)(1).

Although both §§ 547 and 548 confer standing to bring avoidance actions on the "trustee," Federal Rule of Bankruptcy Procedure 9001(11) defines "Trustee" to include "a debtor in possession in a chapter 11 case." Fed. R. Bankr. P. 9001(11). Section 1107 of the Bankruptcy Code also provides that "a debtor in possession shall have all the rights, . . .and shall perform all the functions and duties . . . of a trustee serving in a case under this chapter." 11 U.S.C. § 1107. Clearly, a debtor-in-possession has standing to bring an avoidance action pre-confirmation.

When a Chapter 11 case is confirmed, a debtor-in-possession loses its standing to "pursue claims as though it were a trustee[.]" *Dynasty Oil & Gas, LLC, v. Citizens Bank* (*In re United Operating, LLC*), 540 F.3d 351, 355 (5th Cir. 2008). If, however, the confirmed plan expressly reserves the right to bring certain causes of action, a reorganized debtor will have standing "to bring a post-confirmation action on a 'claim or interest belonging to the debtor or to the estate.' " *Id.* (citing 11 U.S.C. § 1123(b)(3)); *see also Tenn. Wheel & Rubber Co., v. Captron Corp. Air Fleet* (*In re Tenn. Wheel & Rubber Co.*), 64 B.R. 721, 725 (Bankr. M.D. Tenn. 1986).

In this case, the Competing Disclosure Statement expressly reserved "preference, fraudulent conveyance, or other avoidance actions [that arose] out of the actions or conduct of an insider." (Competing Disclosure Statement at 5, ECF No. 141). As such, the Court concludes that Wisper II has standing to bring its preference and fraudulent transfer actions against the Defendants.

1. 11 U.S.C. § 547

Under § 547(b) of the Bankruptcy Code, a party may avoid certain pre-petition transfers of "an interest of the debtor in property." 11 U.S.C. § 547(b). The purpose of this statute is to reclaim property for the benefit of the bankruptcy estate so that there is more property available for distribution to creditors. " 'Property of the debtor' subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings." *Begier v. IRS*, 496 U.S. 53, 58 (1990). Essentially, anything that would qualify as "property of the estate" under § 541 had it not been transferred pre-petition may be subject to a preference

action. *Chase Manhattan Mortgage Corp. v. Shapiro* (*In re Lee*), 530 F.3d 458, 464 (6th Cir. 2008).

There are five elements to a § 547(b) claim. First, the transfer must have been made "to or for the benefit of a creditor." 11 U.S.C. § 547(b)(1). Second, the transfer must have been made "for or on account of an antecedent debt owed by the debtor before such transfer was made." 11 U.S.C. § 547(b)(2). Third, the transfer must have been "made while the debtor was insolvent." 11 U.S.C. § 547(b)(3). Fourth, the transfer must have been made "on or within 90 days before the date of the filing of the petition" or "between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider." 11 U.S.C. § 547(b)(4)(A) and (B). The last element of a preference action is that the transfer must have enabled the creditor to receive more than he would have received if the case were a chapter 7 case, the transfer had not been made, and the creditor received payment of the debt "to the extent provided by the provisions of this title." 11 U.S.C. § 547(b)(5)(A) and (B). The party bringing the preference action bears the burden of proof on each of these five elements and must establish each element by a preponderance of the evidence. 11 U.S.C. § 547(g); *Triad Int'l Maint. Transp., Inc. v. S. Air Transp.* (*In re S. Air Transp., Inc.*), 511 F.3d 526, 535 (6th Cir. 2007). Determination of each element of a preference action is a question of material fact. *Derryberry v. Albers* (*In re Albers*), 67 B.R. 530, 534 (Bankr. N.D. Ohio 1986).

In this adversary proceeding, the Court concludes that Wisper II failed to prove the first element of a preference action. Section 547(b)(1) requires that the transfer be "to or for the benefit of a creditor." 11 U.S.C. § 547(b)(1). Section 101 defines "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief" and "claim" as a "right to payment[.]" 11 U.S.C. § 101(5)(A) and (10)(A). This "right to payment" can be "liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]" 11 U.S.C. § 101(5)(A). If the party seeking relief is unable to prove that the transferee was a creditor of the debtor, the preference claim cannot be sustained. *Hendon v. Assocs. Commercial Corp.* (*In re Fastrans, Inc.*), 142 B.R. 241, 245 (Bankr. E.D. Tenn. 1992).

All of the transfers at issue in Wisper II's preference claim were transfers to the Defendants. Wisper II did not submit any proof that the Defendants held a claim against Wisper I at the time of the transfers. Although the Defendants asserted during the trial in this matter that they loaned various amounts to Wisper I during the pre-petition period, none of the parties submitted evidence of this debt to the Court. The Defendants did not file a proof of claim in Wisper I's Chapter 11 case. Accordingly, the Court finds that Wisper II did not carry its burden of proof under 11 U.S.C. § 547(b)(1). The Court will enter a separate order denying Wisper II's claim to avoid the subject transfers as preferences under 11 U.S.C. § 547.

2. 11 U.S.C. § 548

Section 548(a)(1) of the Bankruptcy Code provides that:

> (a)(1)The trustee may avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily-
>
> > (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
> >
> > (B)(I) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
> >
> > (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

11 U.S.C. § 548(a)(1).

Section 548(a)(1) provides for the avoidance of two types of fraud: (1) actual fraud pursuant to § 548(a)(1)(A); and (2) constructive fraud pursuant to §548(a)(1)(B). The party seeking to avoid a fraudulent transfer under either subsection of § 548(a)(1) bears the burden of proof as to each element by a preponderance of the evidence. *Baumgart v. Bedlyn, Inc*. (*In re Empire Interiors, Inc.*), 248 B.R. 305, 307 (Bankr. N.D. Ohio 2000). A party who satisfies this burden of proof may, subject to certain exceptions, "recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property from - (1) the

initial transferee of such transfer or the entity for whose benefit such transfer was made[.]" 11 U.S.C. § 550(a)(1).

"To prevail on a claim for fraudulent transfer under § 548(a)(1)(A), the Trustee must prove the following elements . . . : (1) a transfer was made of the Debtor's property; (2) the transfer was made within two years of the Petition Date; and (3) the transfer was made with actual intent to hinder, delay, or defraud the Debtor's creditors." *West v. Hsu (In re Advanced Modular Power Sys., Inc.),* 413 B.R. 643, 673 (Bankr. S.D. Tex. 2009) (citation omitted). The plaintiff in a § 548(a)(1)(A) claim carries the burden of proof and must satisfy this burden by a preponderance of the evidence. *Slone v. Lassiter* (*In re Grove-Merritt*), 406 B.R. 778, 793 (Bankr. S.D. Ohio 2009).

"A determination of whether a conveyance is fraudulent [under § 548(a)(1)(A)] is dependent upon the facts and circumstances of each case; such fraud is typically proven by circumstantial evidence." *Holcomb Health Care Servs., LLC v. Quart Ltd., LLC* (*In re Holcomb Health Care Servs., LLC*), 329 B.R. 622, 670 (Bankr. M.D. Tenn. 2004) (citing *Macon Bank & Trust Co. v. Holland*, 715 S.W.2d 347, 349 (Tenn. Ct. App. 1986)). Because "a court can hardly expect one who fraudulently transfers property to step up and admit it under oath," *5 Collier on Bankruptcy* ¶ 548.04 (16th ed. 2012), "[t]he issue of fraud is commonly determined by certain recognized indicia, denominated 'badges of fraud,' which are circumstances so frequently attending fraudulent transfers that an inference of fraud arises from them." *United States v. Leggett*, 292 F.2d 423, 426-27 (6th Cir. 1961) (citations omitted). Simply put, "courts routinely look to badges of fraud as circumstantial evidence of a debtor's subjective state of mind" in order to prove the debtor's actual intent to hinder, delay or defraud creditors. *5 Collier on Bankruptcy* ¶ 548.04 (16th ed. 2012).

Under Tennessee law, "badges of fraud" include:

(1) The transferor is in a precarious financial condition.

(2) The transferor knew there was or soon would be a large money judgment rendered against the transferor.

(3) Inadequate consideration was given for the transfer.

(4) Secrecy or haste existed in carrying out the transfer.

(5) A family or friendship relationship existed between the transferor and the transferee(s).

(6) The transfer included all or substantially all of the transferor's nonexempt property.

(7) The transferor retained a life estate or other interest in the property transferred.

(8) The transferor failed to produce available evidence explaining or rebutting a suspicious transaction.

(9) There is a lack of innocent purpose or use for the transfer.

Arvest Bank v. Byrd, 814 F.Supp.2d 775, 800-01 (W.D. Tenn. 2011) (citations omitted). "The presence of one or more of the badges of fraud gives rise to a presumption of fraud and [consequently] shifts the burden of disproving fraud to the defendant." *Id. at* 801 (citations omitted) "Although the presence of a single badge may only raise the suspicion of [a] debtor's fraudulent intent, the confluence of several badges can be conclusive evidence of fraudulent intent, absent significantly clear evidence of the debtor's legitimate supervening purpose." *Holcomb Health Care*, 329 B.R. at 671 (citations omitted)**.**

In order to avoid a transfer as constructively fraudulent under § 548(a)(1)(B), a party must prove that: (1) the debtor transferred an interest in property; (2) the transfer took place within two years before the bankruptcy case was filed; (3) the debtor received less than reasonably equivalent value, either voluntarily or involuntarily; and (4) the debtor was insolvent on the date the transfer was made or became insolvent as a result of the transfer, the debtor is undercapitalized, or the debtor is unable to pay its debts as they become due. *West v. Hsu (In re Advanced Modular Power Sys*.), 413 B.R.643, 673 (Bankr. S.D. Tex. 2009); *Scherer v. Quality Commc'ns, Inc. (In re Quality Commc'ns, Inc.)*, 347 B.R. 227, 233 (Bankr. W.D. Ky. 2006).

The Bankruptcy Code does not expressly define "reasonably equivalent value." While value given on account of an antecedent debt is usually considered reasonably equivalent value, whether reasonably equivalent value has been given for a transfer of property is a question of fact. *Suhar v. Bruno* (*In re Neal*), 541 Fed. App'x 609, 611 (6th Cir. 2013). Determining whether the debtor received reasonably equivalent value is a two step inquiry. *Gold v. Marquette Univ*. (*In re Leonard*), 454 B.R. 444, 457 (Bankr. E.D. Mich. 2011) (citing

Lisle v. John Wiley & Sons, Inc. (*In re Wilkinson*), 196 Fed. App'x 337, 342 (6th Cir. 2006)). The first step of the inquiry requires a court to determine whether the debtor received any value for the exchange. *Id.* In analyzing this issue, "a court must consider whether, 'based on the circumstances that existed at the time' of the transfer, it was 'legitimate and reasonable' to expect some value accruing to the debtor." *Pension Transfer Corp. v. Beneficiaries Under the Third Amendment to Fruehauf Trailer Corp. Retirement Plan No. 003* (*In re Fruehauf Trailer Corp*.), 444 F.3d 203, 212 (3rd Cir. 2006) (citing *Mellon Bank, N.A. v. Official Committee of Unsecured Creditors* (*In re R.M.L., Inc.*), 92 F.3d 139, 152 (3rd Cir. 1996)). Although "value can be in the form of either a direct economic benefit or an indirect economic benefit," the benefit received must be "economic." *Lisle*, 196 Fed. App'x at 342. An indirect economic benefit must be "concrete and quantifiable." *Id.* For purposes of fraudulent transfers, the Bankruptcy Code defines "value" as "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor." 11 U.S.C. § 548(d)(2)(A).

Once the court determines that value was received, it must determine if the value was reasonably equivalent to the value surrendered. *Corzin v. Fordu* (*In re Fordu*), 201 F.3d 693, 707 (6th Cir. 1999). "[T]he test used to determine whether a transfer was supported by reasonably equivalent value focuses on whether there is a reasonable equivalence between the value of property surrendered and that which was received in exchange." *Id.* at 708. This test necessarily "requires the court to compare what was given with what was received." *Coan v. Fleet Credit Card Servs., Inc.* (*In re Guerrera*), 225 B.R. 32, 36 (Bankr. D. Conn. 1998). In making this inquiry the "proper focus is on the net effect of the transfers on the debtor's estate, the funds available to the unsecured creditors." *Corzin*, 201 F.3d at 707 (quoting *Harman v. First Am. Bank* (*In re Jeffrey Bigelow Design Grp., Inc.*), 956 F.2d 479, 484 (4th Cir.1992)). "As long as the unsecured creditors are no worse off because the debtor, and consequently the estate, has received an amount reasonably equivalent to what it paid, no fraudulent transfer has occurred." *Harman*, 956 F.2d at 484. A debtor need not receive a dollar-for-dollar equivalent in order for a court to find he received reasonably equivalent value. *Congrove v. McDonald's Corp*. (*In re Congrove*), 222 Fed. App'x 450 (6th Cir. 2007). The debtor must, however, receive some type of consideration for the transfer. *Slone v. Lassiter* (*In re*

Grove-Merritt), 406 B.R. 778, 802 (Bankr. S.D. Ohio 2009) (finding that "[t]he absence of value is not reasonably equivalent value[.]"); *Harrison v. N.J. Cmty. Bank* (*In re Jesup & Lamont, Inc.*), 507 B.R. 452, 470 (Bankr. S.D.N.Y. 2014) (concluding "where . . . a debtor receives no value for an alleged conveyance, a court may find that the transfer was fraudulent, as a matter of law, as long as the other elements in § 548 are satisfied") (citation omitted). For purposes of the "reasonably equivalent value" inquiry, the relevant date is the date of the transfer. *Southeast Waffles, LLC v. U.S. Dep't of Treasury* (*In re Southeast Waffles, LLC*), 460 B.R. 132, 139 (B.A.P. 6th Cir. 2011).

Section 548(a)(1)(B)(ii)(I) requires the creditor to prove that the debtor was insolvent on the date the transfer was made or became insolvent as a result of the transfer. The Bankruptcy Code defines "insolvent" as a "financial condition such that the sum of such entity's debts is greater than all of such entity's property" "excluding the value of preferences, fraudulent conveyances and exemptions." 11 U.S.C. § 101(32)(A); *Webb Mtn, LLC, v. Exec. Realty P'ship, L.P.* (*In re Webb Mtn, LLC*), 414 B.R. 308, 355 (Bankr. E.D. Tenn. 2009). "Insolvency is essentially a balance-sheet test." *Rieser v. Hayslip (In re Canyon Sys. Corp.)*, 343 B.R. 615, 647 (Bankr. S.D. Ohio 2006). At least one court has determined that a "[d]ebtors' testimony that they were unable to pay all of their debts at the time of filing their petition" in and of itself "is insufficient evidence under §§ 548 and 101(32)(A) that they were insolvent on the date of the transfer." *Kovacs v. Berger (In re Berger*), No. 05-3214, 2007 WL 2462646, at *4 (Bankr. N.D. Ohio Aug. 27, 2007). "A trustee may utilize appropriate means to prove insolvency, including balance sheets, financial statements, appraisals, expert reports, and other affirmative evidence." *Manning v. Wallace (In re First Fin. Assocs., Inc.)*, 371 B.R. 877, 897 (Bankr. N.D. Ind. 2007). Profit and loss statements by themselves may demonstrate insolvency for purposes of § 548(a)(1)(B). *Flener v. Turner (In re Vencom, Inc.)*, 355 B.R. 3, 9 (Bankr. W.D. Ky. 2006).

If a transfer is avoided under 11 U.S.C. § 548(a), § 550(a)(1) of the Bankruptcy Code allows the party "to recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from . . . the initial transferee of such transfer." 11 U.S.C. § 550(a)(1). "As is plain from its text, section 550(a)(1) holds initial transferees strictly liable for any fraudulent transfers they receive." *Taunt v. Hurtado (In re Hurtado)*, 342 F.3d

528, 532 (6th Cir. 2003). "An 'initial transferee' is one who receives money from a person or entity later in bankruptcy, and has dominion over the funds." *First Nat'l Bank of Barnesville v. Rafoth (In re Baker & Getty Fin. Servs., Inc.)*, 974 F.2d 712, 722 (6th Cir. 1992). "The minimum requirement of status as a 'transferee' is dominion over the money or other asset, the right to put the money to one's own purposes." *Id.* (citation omitted). Generally, the party who receives the funds or property from the debtor is considered the "initial transferee" for purposes of § 550(a)(1). *Hurtado*, 342 F.3d at 533.

a) Withdrawals from Wisper I's Deposit Account

In this adversary proceeding, Wisper II asserts that 49 separate withdrawals the Defendants made from Wisper I's Deposit Account within two years of the filing of the Chapter 11 Petition were fraudulent and should be avoided under 11 U.S.C. § 548(a)(1). These withdrawals total $269,345.00. There is no dispute that these transfers were transfers of the debtor's property made within two years of the filing of Wisper I's Chapter 11 Petition. Thus, Wisper II has satisfied the first and second elements of a fraudulent transfer claim under 11 U.S.C. § 548(a)(1). The only issue the Court must now determine is whether the transfers were actually fraudulent or constructively fraudulent.

Under § 548(a)(1)(B), a transfer is avoidable as constructively fraudulent if the debtor did not receive reasonably equivalent value for the transfer and the debtor was insolvent at the time of the transfer. In this adversary proceeding, it is clear that $60,000.00 of the $269,345.00 was paid to Matt Abernathy as his monthly salary. This money was paid to Matt in $7,500.00 increments in January 2012, April 2012, May 2012, June 2012, July 2012, August 2012, November 2012, and January 2013. No one disputed that Matt Abernathy managed Wisper I during the time he received these monthly salary payments or that he took these payments in anything other than good faith. The proof also clearly established that Wisper I's investors were aware of Matt Abernathy's monthly salary both before and after the filing of the Chapter 11 Petition. Given these facts, the Court finds that Wisper I received reasonably equivalent value in exchange for Matt Abernathy's monthly salary payments of $7,500.00 in January 2012, April 2012, May 2012, June 2012, July 2012, August 2012, November 2012, and January 2013. The Court also finds that these transfers were not made with any actual

intent to hinder, delay, or defraud the Debtor's creditors nor did they carry any badges of fraud under Tennessee law. As such, the Court concludes that Wisper II may not avoid any of the $7,500.00 monthly transfers as actually or constructively fraudulent.

Turning to the remaining $209,345.00 in transfers from Wisper I's Deposit Account, the Court concludes that they are avoidable as constructively fraudulent pursuant to 11 U.S.C. § 548(a)(1)(B). The Defendants failed to present any proof that Wisper I received *anything* of value, let alone something that was reasonably equivalent, in exchange for the transfers. Although the Defendants asserted that they made various loans to Wisper I during the time they managed the business, they failed to present any evidence or even a dollar amount of these loans. Given the fact that Matt Abernathy testified he did not memorialize these loans with any documentation, this failure of proof is unsurprising. The Court cannot, however, determine that the transfers in question were in exchange for the loans because there was no proof that the Defendants actually made any loans to the company.

As for the Defendants' claim that some of the transfers in question were commission payments to Matt Abernathy, the Court also finds that proof is lacking. The Defendants did not present any evidence that any of the payments from Wisper I were commission payments that Matt Abernathy had earned. There were no notations that indicated any of the payments were for commissions. And, like the Defendants' claims about the loans, Matt Abernathy failed to indicate how much these commissions amounted to. Without this critical piece of information, the Court cannot determine whether Wisper I received anything of value in exchange for the transfers.

As for the other contributions the Defendants allegedly made to Wisper I, the Court finds the evidence of the various deposits unpersuasive. The deposits listed in the Defendants' "Deposits Made Into Wisper" (Tr. Ex. 37) were not made contemporaneously with the transfers from Wisper I. Most of the deposits the Defendants made occurred in 2011 while all of the transfers Wisper II is seeking to avoid were made in 2012 and 2013. For purposes of § 548(a)(1)(B), a Court must determine whether the debtor received reasonably equivalent value *at the time of the transfer*. *Southeast Waffles*, 460 B.R. at 139. Clearly, Wisper I did not receive anything of value, let alone something that was reasonably equivalent, at the time

the transfers in question were made.

The second prong of the § 548(a)(1)(B) inquiry requires the Court to determine whether Wisper I was insolvent on the date of the transfer. The Court concludes that the financial records in this case demonstrate that Wisper I was insolvent at the time the transfers were made to the Defendants. The Profit and Loss Statement for January through December 2012 shows that Wisper I had a net ordinary income of negative $400,342.46 and a net other income of negative $103,112.99. (Tr. Ex. 65). Although Matt Abernathy testified that he did not think either income number was significant for a start up company, he admitted that this profit and loss statement accurately reflected Wisper I's financial status. (June 10, 2015 Tr. of Hr'g at 234-35). The Defendants' tax return for 2012 also demonstrates that Wisper I was insolvent at the time of these transfers. Schedule C from the Defendants' Individual Tax Return for 2012 shows a business loss of $1,173,617.00. (Tr. Ex. 68). Matt Abernathy also testified that Wisper I was constantly undercapitalized. (June 12, 2015 Tr. of Hr'g at 200). He also admitted there were times Wisper I could not meet payroll expenses. (June 10, 2015 Tr. of Hr'g at 124). On at least one occasion when this occurred, Abernathy testified that he pawned the title for Adria Abernathy's personal vehicle in order to meet his payroll obligations. (*Id.*) Two of Wisper I's employees testified that their paychecks "bounced" at least once. (*Id.* at 202; June 11, 2015 Tr. of Hr'g at 93). All of these facts clearly demonstrate that Wisper I was insolvent at the time the transfers in question were made.

As a result of these findings and conclusions, the Court determines that Wisper II may avoid $209,345.00 in transfers Wisper I made to the Defendants between January 3, 2012, and March 7, 2013 pursuant to 11 U.S.C. § 548(a)(1)(B). Wisper I did not receive reasonably equivalent value in exchange for the transfers and Wisper I was insolvent at the time of making the transfers. The Court also finds that Wisper II may recover the $209,345.00 from the Defendants pursuant to 11 U.S.C. § 550(a)(1). The Defendants were the initial transferees of the transfers. The Court will enter a separate order avoiding the transfers and directing the Defendants to turn $209,345.00 over to Wisper II.

Wisper II has also asserted that the transfers violated Tennessee Code Annotated § 48-236-105(a). Because the Court has found that $209,345.00 of the $269,345.00 transfers

are avoidable as constructively fraudulent transfers pursuant to 11 U.S.C. § 548(a)(1)(B), it is unnecessary to determine whether the $209,345.00 in transfers also violated Tennessee Code Annotated § 48-236-105(a).

With respect to the $60,000.00 in "owner's draws" that Matt Abernathy took in January 2012, April 2012, May 2012, June 2012, July 2012, August 2012, November 2012, and January 2013, the Court finds that salary payments are not subject to the restrictions in Tennessee Code Annotated § 48-236-105(a).

Tennessee Code Annotated § 48-236-105(a) provides that

> (a) Rule. No *distribution* may be made by an LLC if, after giving effect to the distribution:
>
> > (1) The LLC would not be able to pay its debts as they became due in the normal course of business; or
> >
> > (2) The LLC's total assets would be less than the sum of its total liabilities . . . [.]

Tenn. Code Ann. § 48-236-105(a) (emphasis added). The Tennessee Limited Liability Company Act defines a "distribution" as:

> a direct or indirect transfer of money or other property (except its own membership interests) with or without consideration, or an incurrence or issuance of indebtedness, (whether directly or indirectly, including through a guaranty) by an LLC to or for the benefit of any of its members *in respect of membership interests*. A distribution may be in the form of an interim distribution or a liquidation distribution; a purchase, redemption, or other acquisition of its membership interests; a distribution of indebtedness (which includes the incurrence of indebtedness, whether directly or indirectly, including through a guaranty, for the benefit of the members) or otherwise[.]

Tenn. Code Ann. § 48-202-101(15) (emphasis added). Matt Abernathy testified that the $7,500.00 monthly payments represented his salary as Wisper I's managing member. Wisper II did not present any evidence that contradicted this testimony. Because those payments were not distributions in consideration of Matt Abernathy's membership interest in Wisper I, the Court finds that Tennessee Code Annotated § 48-236-105 is not applicable to Matt Abernathy's pre-petition salary payments in January 2012, April 2012, May 2012, June 2012, July 2012, August 2012, November 2012, and January 2013.

b) Investments from Jerry Hughes and David Hughes

In addition to the $269,345.00, Wisper II also asserts that the Defendants fraudulently transferred a portion of the $136,384.00 in cash investments from Jerry Hughes and David Hughes. Wisper II asserts that Matt Abernathy failed to deposit $52,384.00 of these funds when the Hughes made their investments in Wisper I. Wisper II did not submit any evidence that the $52,384.00 was fraudulently transferred either actually or constructively. Matt Abernathy's uncontroverted testimony established that at the time the investments were made, Wisper I consistently operated on a cash basis. He testified that Wisper I used cash to purchase supplies, equipment and gas. Wisper II did not present any evidence that contradicted this claim. For this reason, the Court finds Matt Abernathy's explanation that the money he failed to deposit in Wisper I's Deposit Account was used for business expenses to be credible. As such, the Court does not find that Wisper II carried its burden of proof in establishing that the $52,384.00 was fraudulently transferred under 11 U.S.C. § 548(a). The Court therefore concludes that Wisper II is not entitled to avoid the $52,384.00 as a fraudulent transfer.

For the same reasons as stated in the section above, the Court finds that the $52,384.00 is not recoverable under Tennessee Code Annotated § 48-236-105(a). There was no proof that the money Matt Abernathy did not deposit was a "distribution" within the meaning of the Limited Liability Company Act.

D. Overpayment of Rent

On April 1, 2010, Matt Abernathy and Adria Abernathy entered into an eleven year lease with Dwayne Dove and Barbara Dove for property located at 1378 North Cavalier Drive in Alamo, TN. (Tr. Ex. 16 at 30-37). Matt Abernathy, apparently doing business as EAM Properties, then sub-leased this property to Wisper I for a period of nine years by lease dated May 2, 2010. (*Id.* at 22-29). This agreement called for a scaled rental amount correlating to the year of occupancy (i.e. $3,000 per month for years one through three, $4,000 per month for years four through six, and $5,000 per month for years seven through nine). *Id.* The first increase in rent took effect with the May 2013 payment which increased rent to $4,000 per month for the next three years. *Id.*

Wisper II challenges the $1,000.00 monthly increase in rental payments Wisper I paid Matt Abernathy from May 2013 through December 2013. (Pl.'s Am. Compl. at 8, ECF No. 35; Pl.'s Post-Trial Br. at 24-27, ECF No. 128). In the Amended Complaint, Wisper II seeks to recover the $1,000 monthly increase in rent seeking damages for "overpayment of rent . . . of no less than Nine Thousand and No/100 Dollars ($9,000)." (Pl.'s Am. Compl. at 8, ECF No. 35). Yet, in the Post-Trial Brief, Wisper II contends that the $4,000 total monthly payment allowed the Defendants to profit $2,022.33 per month over the amount Matt Abernathy was paying Dwayne and Barbara Dove under the original lease agreement. (Pl.'s Post-Trial Br. at 24-27, ECF No. 128). Using this profit amount as a monthly basis, Wisper II seeks a $16,178.64 judgment against the Defendants for the May 2013 through December 2013 rent payments. *Id.*

Wisper II bases recovery for these rent payments on the allegation that the sub-lease between Matt Abernathy/EAM Properties and Wisper I was a conflict of interest transaction void or voidable under Tennessee Code Annotated § 48-249-404. This statute defines a conflict of interest transaction as "a transaction with the LLC in which a member, manager, director or officer, as applicable, of the LLC has a direct or indirect interest." Tenn. Code Ann. § 48-249-404. The statute then states that the interest of a member, manager, director, or officer in a business transaction does *not* make the transaction void or voidable if any one of the following four scenarios is true:

1. The material facts of the transaction and the interest of the member, manager, director or officer, as applicable, were disclosed or known to the managers or board of directors, as applicable, and the managers or board of directors, as applicable, authorized, approved or ratified the transaction;
2. The material facts of the transaction and the interest of the member, manager, director or officer, as applicable, were disclosed or known either to:
    A. The members entitled to vote and they authorized, approved or ratified the transaction; or
    B. All the members and all the members authorized, approved or ratified the transaction, even if one (1) or more, or all, the members have a conflict of interest;
3. The transaction was fair to the LLC; or

4. The transaction was of such a nature that the conflict of interest is waived by the LLC documents. Such waiver shall be upheld, unless manifestly unreasonable under the circumstances.

Id. Wisper II crafts its argument around the third scenario regarding fairness of the transaction. (Pl.'s Post-Trial Br. at 26, ECF No. 128). Wisper II argues that the transaction was not fair to Wisper I based on the "entire fairness" test laid out by the Tennessee Court of Appeals in *Rock Ivy Holding, LLC, v. RC Props., LLC*, 464 S.W.3d 623 (Tenn. Ct. App. 2014). *Id.* In doing so, Wisper II argues that the lease fails the two components of the test, fair dealing and fair price.

In arguing against the fairness of the transaction, Wisper II fails to consider the three remaining scenarios expressly listed in the statute. If any one of them is found to be true, the transaction at issue is not void or voidable by the LLC. This Court specifically points to the provisions of subsection § 48-249-404(a)(2)(B) noting that the transaction is not void or voidable if "the material facts of the transaction and the interest of the member, manager, director, or officer, as applicable, were disclosed or known" to "all the members and all the members authorized, approved, or ratified the transaction, even if one (1) or more, or all, the members have a conflict of interest." Tenn. Code Ann. 48-249-404. In addition, § 48-249-404(e) provides, "For purposes of subdivision (a)(2)(B), a conflict of interest transaction may be authorized, approved or ratified by the sole member of a single-member LLC." *Id.*

In the matter before this Court, Wisper I was a single-member LLC at the time the Alamo Lease at issue was executed. The lease was also signed by the sole member, Matt Abernathy. By affixing his signature to the lease, this Court concludes that Matt Abernathy "authorized, approved, or ratified" the transaction as required by subsection (a)(2)(B) and expressly authorized by subsection (e) of Tennessee Code Annotated § 48-249-404. Accordingly, this Court concludes that the lease agreement is not void or voidable as a conflict of interest transaction under the provisions of Tennessee Code Annotated § 48-249-404. Wisper II is therefore not entitled to recover rent payments for the period May 2013 through December 2013 pursuant to this statute.

E. 11 U.S.C. § 503(c)

Wisper II argues that 11 U.S.C. § 503(c) precludes Matt Abernathy from being paid a salary "as a post-petition administrative expense prior to a finding by this Court . . . that the transfers were essential to retain Matt Abernathy as an employee because he had a bona fide job offer from another business at the same or greater rate of compensation, and that the services provided by Matt Abernathy to Wisper were essential to the survival of the business." (Pl.'s Post-Trial Br. at 30-31, ECF No. 128). At issue here is the salary Matt Abernathy paid to himself on behalf of Wisper I prior to confirmation of the Competing Plan. Wisper II argues that it is entitled to a refund of those wages. Wisper II relies specifically on § 503(c)(1) in its assertion that post-petition "owner's draws" or "commissions" paid to Matt Abernathy should be reimbursed to Wisper II. (*Id.*). The Court finds that Wisper II is not entitled to relief under 11 U.S.C. § 503(c).

Section 503(c) prohibits three types of administrative expense payments in bankruptcy proceedings: (1) payments made to insiders to induce them to remain with the business; (2) severance payments to insiders; and (3) payments to anyone else outside the ordinary course of business and not justified by facts and circumstances of the case. *See generally* 11 U.S.C. § 503. Despite its restrictions, "section 503(c) was not intended to foreclose a chapter 11 debtor from reasonably compensating employees, including 'insiders,' for their contribution to the debtors' reorganization." *In re Dana Corp.*, 358 B.R. 567, 575 (Bankr. S.D.N.Y. 2006) (citation omitted). Instead, "[t]he effect of section 503(c) was to put in place 'a set of challenging standards' and 'high hurdles' for debtors to overcome before retention bonuses could be paid." *In re Velo Holdings, Inc.*, 472 B.R. 201, 209 (Bankr. S.D.N.Y. 2012).

In bringing its § 503(c) claim against the Defendants, Wisper II relies specifically on subsection (1). This section disallows payments made to insiders "for the purpose of inducing such person to remain with the debtor's business" without evidence of three factors. 11 U.S.C. § 503(c). First, evidence must establish that the payment is "essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation[.]" 11 U.S.C. § 503(c)(1)(A). Second, evidence must establish that "the services provided by the person are essential to the survival of the business[.]" 11

U.S.C. § 503(c)(1)(B). Third, evidence must establish that the amount of the transfer does not exceed certain statutory formulas. 11 U.S.C. § 503(c)(1)(C). "Section 503(c)(1) limits payments to insiders for the purpose of retention and applies to those employee retention provisions that are essentially 'pay to stay' key employee retention programs." *Velo Holdings*, 472 B.R. at 209.

A debtor can avoid the requirements of § 503(c)(1) entirely by showing "that the transfers are not being made for the purpose of retaining [an insider]." *In re Residential Capital, LLC*, 478 B.R. 154, 169 (Bankr. S.D.N.Y. 2012) (analyzing Key Employee Incentive Programs and their relation § 503(c)(1)). Although "[a]ny payment to an employee, including regular wages, has at least a partial purpose of retaining the employee," applying § 503(c)(1) to *every* payment to an insider would lead to "an absurd result." *In re Nellson Nutraceutical, Inc.*, 369 B.R. 787, 802 (Bankr. D. Del. 2007). The *Nellson* court held that § 503(c)(1) only applied to "a transfer made to . . . an insider of the debtor for the [*primary*] purpose of inducing such person to remain with the debtor's business." *Id.* (citing 11 U.S.C. § 503(c)) (emphasis in original).

In this adversary proceeding, the testimony is undisputed that Matt Abernathy's pre-petition salary draw was $7,500 per month. Abernathy testified that he began taking this monthly draw in May 2010. It is also undisputed that from April 2013 through December 2013 Abernathy's post-petition salary draw was $7,500 per month. There was no material change in Matt Abernathy's salary in preparation for, or resulting from, the filing of Wisper I's Chapter 11 Petition. As the debtor-in-possession, Wisper I continued to pay Matt Abernathy the same ongoing salary as it had since as early as May 2010. Matt Abernathy's salary draw was listed on the post-petition, pre-confirmation monthly operating reports and no party filed an objection to the salary payments prior to trial. (*See* Bankr. Case No. 13-10770, ECF Nos. 84, 85, 86, 227, 131, 228, 223, 224, and 292). All of this considered collectively indicates that the $7,500 monthly salary was not paid for the primary purpose of retention. Rather, it was an ongoing salary payment for Matt Abernathy's continued employment with the company. Therefore, the Court concludes that § 503(c)(1) is not applicable to the instant matter.

The remaining provisions of § 503(c) are likewise inapplicable. Matt Abernathy's salary was not a severance payment and, thus, § 503(c)(2) does not apply. Additionally, this Court finds that the monthly salary was within the ordinary course of business thereby resolving any issues under § 503(c)(3). *See generally In re QuVis, Inc*., 2009 WL 4262077, at *6 (Bankr. D. Kan. Nov. 23, 2009) (holding that a proposed salary is compensation for services to be performed, not a retention payment, and as a salary, it is not a transfer outside the ordinary course under § 503(c)(3)).

As such, this Court concludes that § 503(c) is not applicable to the instant matter before this Court and that Wisper II is not entitled to a refund of Matt Abernathy's owner's draw and/or salary from April 2013 to December 2013.

F. 11 U.S.C. § 362

In its Amended Complaint, Wisper II asserts that Matt Abernathy violated the 11 U.S.C. § 362 automatic stay by "removing and/or holding property" belonging to Wisper II after the Effective Date of the Confirmed Plan. Wisper II asks for damages for Matt Abernathy's alleged violation of the automatic stay. Because the automatic stay terminated upon entry of the Confirmation Order, the Court finds this claim to be without merit.

Pursuant to § 362(c)(1), "the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate." Section 1141(b) also provides that "except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." Consequently, the automatic stay terminates as to property of the estate upon entry of the confirmation order unless the parties provide otherwise. *In re Globakar*, 375 B.R. 383, 386 (Bankr. N.D. Ohio 2007). Once the automatic stay ceases to exist, a court is unable to grant parties any relief under § 362. *Id.*

The Confirmation Order in Wisper I's Chapter 11 proceeding provided that all property belonging to Wisper I vested in Wisper II as of confirmation. Accordingly, there was no automatic stay in effect after entry of the Confirmation Order. The Court will enter a separate order denying Wisper II's § 362 claim.

G. Contempt of Court

Wisper II's last claim against the Defendants is an allegation that Matt Abernathy violated numerous Court orders and should be held in civil contempt.[27] Wisper II asks the Court to "take action and assess punitive damages" for this alleged contempt. (Am. Compl. at 14, ECF No. 35). Wisper II asserts that Matt Abernathy's cash withdrawals from the DIP Account, his removal of property of the estate from the Alamo Property, and the payment of personal bills with company funds all constitute contempt. Wisper II also asserts that Matt Abernathy's sale of the Ford Van without Court permission and his subsequent failure to turn the proceeds over to the bankruptcy estate also constitute contempt. Although Wisper II admits that Matt Abernathy returned some property to Wisper I's business premises, it argues that the fact that he hid some of the property also supports its claim for contempt. Wisper II asks for "[s]anctions of no less than One Hundred Fifty Thousand and No/100 Dollars ($150,000) or more, plus Wisper's attorney fees and costs are warrantied [sic]." (Pl's Post-Trial Brief at 36, ECF No. 128).

In *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46, 111 S. Ct. 2123, 2133 (1991), the Supreme Court held that federal courts have the inherent authority to sanction parties for contempt of court.

> . . . Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates. These powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

Id. (internal citations omitted). In addition,

[27]Wisper II brought its contempt claim against the Defendants as a claim in its adversary proceeding complaint. As the bankruptcy court in *French v. Am. Gen. Fin. Servs. (In re French)* noted, Federal Rule of Bankruptcy Procedure 9020 requires that claims for contempt should be brought by motion under Federal Rule of Bankruptcy Procedure 9014. 401 B.R. 295, 315 n.9 (Bankr. E.D. Tenn. 2009). However, like the *French* court, "the court will, for the sake of judicial economy, allow this contempt action to proceed within this adversary proceeding." *Id.*

> [I]t is firmly established that [t]he power to punish for contempts is inherent in all courts. This power reaches both conduct before the court and that beyond the court's confines, for [t]he underlying concern that gave rise to the contempt power was not ... merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial.

Id. (internal citations omitted).

A bankruptcy court may also hold parties in contempt pursuant to 11 U.S.C. § 105(a) which provides that

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

"In a civil contempt proceeding, the petitioner must prove by clear and convincing evidence that the respondent violated the court's prior order." *Glover v. Johnson*, 138 F.3d 229, 244 (6th Cir. 1998). "A litigant may be held in contempt if his adversary shows by clear and convincing evidence that 'he violate[d] a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order.' " *Id.* (quoting *Glover v. Johnson*, 934 F.2d 703, 707 (6th Cir. 1991)).

> The court must strictly construe the order alleged to have been violated, and the facts must constitute a plain violation of the order. The provisions alleged to have been violated must be clear and definite. A finding of contempt should not be made unless the order violated is clear and explicit and the act complained of is clearly proscribed. The judge must find a clear and undoubted disobedience of a clear and unequivocal command. In this connection, the party alleged to have disobeyed the order must be able to ascertain from the four corners of the order what acts are required or forbidden.... Any ambiguities or omissions in the order must be construed in favor of the defendant.

In re Parker, 368 B.R. 86, 9 (B.A.P. 6th Cir. 2007) (citation omitted) (unpub.). This analysis necessarily requires the court to determine whether the party allegedly in contempt acted "with knowledge of the Order." *Rolex Watch U.S.A., Inc., v. Crowley*, 74 F.3d 716, 720 (6th Cir. 1996). "Willfulness is not an element of civil contempt, so the intent of a party to disobey a

court order is irrelevant to the validity of a contempt finding." *Id.* (internal citation and punctuation omitted).

To defend against a charge of contempt, a defendant must produce evidence which shows "categorically and in detail why he or she is unable to comply with the court's order." *Id.* (citation omitted). "The test is not whether defendants made a good faith effort at compliance but whether the defendants took all reasonable steps within their power to comply with the court's order. Good faith is not a defense to civil contempt." *Glover*, 138 F.3d at 244 (internal citations and quotation marks omitted).

"Generally, civil contempt may be either intended to coerce future compliance with a court's order or to compensate for the injuries resulting from the noncompliance." *In re Jaques*, 761 F.2d 302, 305-06 (6th Cir. 1985) (citations omitted). "Appropriate fines for civil contempt generally include the parties' actual damages incurred and reasonable attorney's fees." *French v. Am. Gen. Fin. Servs. (In re French)*, 401 B.R. 295, 314 (Bankr. E.D. Tenn. 2009) (citing *Braun v. Champion Credit Union (In re Braun)*, 152 B.R. 466, 474 (N.D. Ohio 1993)). "Nevertheless, remedies are within the discretion of the court, and the party seeking contempt 'must put on credible evidence showing the amount of the loss sustained.' " *French*, 401 B.R. at 314 (quoting *Distad v. United States (In re Distad)*, 392 B.R. 482, 487 (Bankr. D. Utah 2008)). "An award of damages based upon civil contempt should not be speculative or conjectural." *In re Seal*, 192 B.R. 442, 456 (Bankr. W.D. Mich. 1996) (citing *Archer v. Macomb Cnty. Bank*, 853 F.2d 497, 499 (6th Cir.1988)).

At least one court has held that "sanctions, not an award of damages, is the appropriate remedy" for contempt of court. *Chambers v. Greenpoint Credit* (*In re Chambers*), 324 B.R. 326, 329 (Bankr. N.D. Ohio 2005). The reason for this distinction is that in "knowingly violating a court order, the contemptor's actions transgressed the court's authority–any damage to an individual party, no matter the seriousness of the transgression is merely incidental." *Id.* A court has broad discretion "in selecting an appropriate sanction" for contempt of its orders. *Id.* A court may elect to impose a "variety of sanctions," including an award of actual damages related to injuries stemming from the contempt. *Id.* In addition, "[f]ederal courts, including bankruptcy courts, have the discretion to award attorney fees and expenses as a sanction for

misconduct[.]" *In re Mehlhose*, 469 B.R. 694, 709 (Bankr. E.D. Mich. 2012). The party alleging contempt bears the burden of proof on the issue of sanctions. *Chambers*, 324 B.R. at 330.

If there is "some sort of nefarious or otherwise malevolent conduct," a court may also impose punitive damages for a party's failure to abide by court orders. *In re Perviz*, 302 B.R. 357, 372 (Bankr. N.D. Ohio 2003) (citing *Memphis Cmty. School District v. Stachura*, 477 U.S. 299, 306 n.9, 106 S. Ct. 2537, 2542 n.9 (1986)). A court should only impose punitive damages "where there exists a complete and utter disrespect for the bankruptcy laws." *Pervis*, 302 B.R. at 372 (citing *In re Arnold*, 206 B.R. 560, 568 (Bankr. N.D. Ala. 1997)). Although "§ 105(a) grants bankruptcy courts the authority to award mild noncompensatory punitive damages, it does not provide a basis for awarding serious noncompensatory punitive damages." *Adell v. John Richards Home Bldg. Co., LLC (In re John Richards Home Bldg. Co., LLC)*, 552 Fed. App'x 401, 415 (6th Cir. 2013). A bankruptcy court's power to award punitive damages is "most often . . . limited to compensatory punitive awards of attorney's fees after findings of bad faith or contempt." *Id*. at 414 (citations omitted). The Sixth Circuit held that the ability to impose punitive damages under § 105(a) "is limited to sanctions that are necessary or appropriate to enforce the Bankruptcy Code." *Id.* at 415 (citation omitted).

In Wisper I's Chapter 11 bankruptcy case, the Court issued an Interim Order on January 15, 2014, which directed Wisper I to "identify any furniture, equipment or machinery that it claims is owned by a third party[.]" (Interim Order at 4, Bankr. Case No. 13-10770, ECF No. 225). The order also provided that Wisper I "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]." (*Id.* at 4-5). The Confirmation Order entered on January 29, 2014, also directed Matt Abernathy and all Wisper I employees 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.

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

The provisions of the Interim Order and the Confirmation Order were clear and definite. The Interim Order directed Matt Abernathy and Wisper I to identify any property it claimed was owned by third parties. It also required Matt Abernathy and Wisper I to obtain approval before removing any of that property from Wisper I's offices in Alamo, Tennessee. The Confirmation Order required Matt Abernathy and Wisper I to turn over all of Wisper I's property to Wisper II. The Confirmation Order specified that this property included business records and documents, bank account records, furniture, fixtures, and equipment. Despite the clear instructions, Matt Abernathy did not identify any property he owned personally. He failed to seek approval from the Court or the Competing Plan Proponents before he removed any of this property. He also failed to turn over all of Wisper I's property to Wisper II. Matt Abernathy attended the hearing on the Interim Order and was questioned extensively about whether he understood his fiduciary duties to Wisper I. He consistently replied that he did.

Clearly, Matt Abernathy had knowledge of what was contained in both the Interim Order and the Confirmation Order. He knew that he was required to turn over all of Wisper I's property to Wisper II. He also knew that the had to identify any property that did not belong to Wisper I and that he had to seek permission before removing any of that property from Wisper I's business offices. Although he alleged that he thought some of the property belonged to him personally rather than to Wisper I, this good faith defense is no excuse for purposes of contempt. He also testified in court that he understood his fiduciary duties to Wisper I and the bankruptcy estate. Accordingly, the Court finds that Matt Abernathy was in contempt of this Court's orders when he refused to comply with the terms of the Interim Order and the Confirmation Order.

Additional support for this conclusion can be found in statements the Defendants' attorney made at the trial in this proceeding. During closing arguments, the Defendants' attorney admitted that the Defendants' failure to turn over the cash voucher records to Wisper II rises to the level of contempt. (June 12, 2015 Tr. of Hr'g at 248).

The Court takes contempt of its orders very seriously. The Court is especially concerned with the contempt of parties who come to this Court seeking affirmative relief under the Bankruptcy Code. Matt Abernathy or businesses under his control have petitioned this Court for bankruptcy relief four times over the last seven years. He has obtained the benefits of bankruptcy protections in those cases, as well as the opportunity to reorganize his personal and business affairs. If a party desires to seek the protections and benefits the Bankruptcy Code offers, then he must be willing to abide by the requirements of the Code and to recognize the authority of the Court.

Given Matt Abernathy's actions in violating this Court's orders, the Court concludes that sanctions are appropriate in this adversary proceeding. As stated *supra*, this Court has broad discretion in fashioning the appropriate sanction for Matt Abernathy's contempt. It may award Wisper II its actual damages and its reasonable attorney's fees and expenses as a sanction for Matt Abernathy's contempt.

With respect to its actual damages, Wisper II failed to present any evidence that it suffered quantifiable injuries as a result of Matt Abernathy's contempt. It did not present proof that it had to rent or replace any of the missing assets. It also failed to present proof that any of the assets it has since recovered were returned damaged or incomplete. Wisper II did not provide the Court with a dollar amount for the actual damages it suffered as a result of Matt Abernathy's contempt. Were the Court to award damages without any evidence of actual injury to Wisper II, the award would most definitely be set aside as being "speculative [and] conjectural." *Seal*, 192 B.R. at 456. As such, the Court cannot award actual damages as a sanction for Matt Abernathy's contempt. This, however, does not end the sanctions inquiry.

As stated *supra,* a court may award reasonable attorney's fees as a sanction for a party's contempt of court. In this adversary proceeding, the Court concludes that this relief is appropriate in this adversary proceeding. Had Matt Abernathy complied with the terms of the January 15, 2014 Interim Order and the January 29, 2014 Confirmation Order, Wisper II would not have had to seek recovery of the property in this protracted adversary proceeding. The Court will give Wisper II's attorney until January 15, 2016, to file a fee application for reasonable attorney's fees and expenses incurred in prosecution of this adversary proceeding.

An invoice detailing the attorney's fees and expenses must be submitted to the Court with the fee application. Once filed, the Court will set the application for a hearing.

As for Wisper II's request for punitive damages, the Court finds that they are not justified in this case. Wisper II did not demonstrate that Matt Abernathy's failure to abide by court orders was nefarious or malevolent. Additionally, the Court has already ordered Matt Abernathy to reimburse Wisper II for it's reasonable attorney's fees and expenses related to this matter. The Court finds that this imposition of sanctions adequately compensates Wisper II for any injuries sustained by virtue of Matt Abernathy's contempt of court. The Court will enter a separate order finding Matt Abernathy in contempt and directing Wisper II's attorney to file a fee application by January 15, 2016.

H. Tax Counterclaim

There are two avenues by which a party may seek subrogation in bankruptcy. There is a statutory right to subrogation under 11 U.S.C. § 509, but there is also equitable subrogation separate and apart from statutory subrogation. Section 509 of the Bankruptcy Code governs claims of codebtors and provides the applicable law for subrogation interests arising statutorily. Moving outside of statutory law, courts have held that equitable subrogation arises separately from § 509 and is not governed by statute. *See, e.g.*, *Wetzler v Cantor*, 202 B.R. 573 (D. Md. 1996) (holding that the requirements of § 509 are irrelevant to a case based on equitable subrogation, since equitable subrogation is a creature of equity, not statute).

In distilling down § 509(a)'s subrogation provisions, the statute reads ". . . an entity that is liable with the debtor . . . on claim of a creditor . . . and that pays such claim, is subrogated to the rights of such creditor to the extent of such payment." *In re Southwest Equip. Rental*, 193 B.R. 276, 283 (E.D. Tenn. 1996) (quoting 11 U.S.C. § 509(a)). The *Southwest* court examined this language in conjunction with § 509(c)'s language that a creditor's claim be "paid in full" before subrogation rights attach. *Id.* In doing so, the District Court found that statutory subrogation under § 509 requires payment of the full underlying debt. *Id.*

The Southwest court next recognized that equitable subrogation "is separate and distinct from subrogation rights afforded by § 509." *Id.* The court explained that under equitable subrogation, the following requirements must be met: (1) payment must have been

made by subrogee to protect own interest; (2) subrogee must not have acted voluntarily; (3) debt paid must be one for which subrogee was not primarily liable; (4) entire debt must have been paid; and (5) subrogation must not work any injustice to rights of others. *Id.* (citing *In re Flick*, 75 B.R. 204 (Bankr. S.D. Cal. 1987)). Accordingly, the Southwest court held that even under equitable subrogation, there is a requirement that the debt be paid in full. *Sw. Equip. Rental*, 193 B.R. at 283. Bankruptcy courts in this Court's own district have also upheld the same requirements. *See, e.g.*, *In re Meridian Corp.*, Bankr. Case No. 99-28923-L, 2004 Bankr. LEXIS 2637, at *49 (Bankr. W.D. Tenn. Dec. 13, 2004) (acknowledging that full payment of the debt is required by § 509 before a subrogee can receive any reimbursement for payments made and further noting that equitable subrogation also requires that the entire debt must have been paid).

Matt Abernathy did not pay the full debt owed to the IRS for Wisper's payroll taxes and therefore does not satisfy the subrogation requirement that the underlying debt be paid in full. Pursuant to the terms of the Confirmed Plan, the IRS will receive $91,062.74 for its secured claim and $1,515.54 for its general unsecured claim for a total of $92,578.28 in payments. (See Competing Disclosure Statement at 8 and 11, Bankr. Case No. 13-10770, ECF No. 141). Matt Abernathy alleges he paid $83,149.22 of the proceeds from the December 2014 sale of 204 acres of real estate in Alamo, TN, but account transcripts from the IRS indicate that Wisper II only received credit for $66,619.98. (Tr. Ex. 80; see also June 12, 2015 Tr. of Hr'g at 224). Wisper II has paid $19,815.40 towards the total tax obligation under the Confirmed Plan. These payments by Matt Abernathy and Wisper II leaves a balance on the IRS's claim of $6,142.90. (June 12, 2015 Tr. of Hr'g at 220-21).

Accordingly, this Court concludes Matt Abernathy did not pay the underlying debt in full and thus does not satisfy the requirements giving rise to a subrogation interest. This Court concludes that Matt Abernathy is not entitled to a subrogation interest in the funds paid to the IRS for Wisper's taxes.

Because the Court has determined that the Defendants are not entitled to subrogation for the $83,149.22 they paid from the proceeds of the December 2014 sale, it is unnecessary to address Wisper II's defense to the Tax Counterclaim.

I. Affirmative Defenses

In their Amended Answer, the Defendants asserted several affirmative defenses: (1) failure to state a claim under Federal Rule of Civil Procedure 12(b)(6); (2) the statute of frauds and doctrine of laches; and (3) doctrines of estoppel, waiver, accord and satisfaction, ratification, selective prosecution, settlement and release and acquiescence. They also asserted, as affirmative defenses, that the Defendants did not violate any applicable laws and that Wisper II failed to allege Adria Abernathy violated any applicable law or did anything actionable against Wisper II. Of these asserted defenses, only the defenses set forth in groups 2 and 3 are relevant as affirmative defenses at this point in the proceedings. The Court has already denied the Defendants' Federal Rule of Civil Procedure 12(b)(6) Motion to Dismiss the Amended Complaint in its February 3, 2015 Memorandum Opinion and Order. In addition, general denials of liability are not considered "affirmative defenses." *Cumberland Trust & Inv. Co. v. Genesis Learning Ctrs.*, No. 3:07-0799, 2010 WL 2265696, at *3 (M.D. Tenn. June 3, 2010) (recognizing that "[g]enerally, affirmative defenses are distinguished from general denials because they require the pleading of facts which are extrinsic to plaintiff's cause of action") (citations omitted).

Federal Rule of Civil Procedure 8(c), made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7008, requires a party to plead affirmative defenses in responding to a pleading. The party asserting an affirmative defense "bears the burden of proving" the defense by a preponderance of the evidence. *Westlake Vinyls, Inc., v. Goodrich Corp.*, 518 F. Supp. 2d 918, 941 (W.D. Ky. 2007) (citing *Dixon v. United States*, 548 U.S. 1, 8, 126 S. Ct. 2437, 2443 (2006)); *In re Delicruz*, 300 B.R. 669, 681 (Bankr. E.D. Mich. 2003); *Cappella v. Little (In re Little)*, 163 B.R. 497, 503 (Bankr. E.D. Mich. 1994).

> In addition, affirmative defenses must comply with the general pleading requirements of [Federal Rule of Civil Procedure] 8(a), which requires "a short and plain statement" of the asserted defense. Fed. R. Civ. P. 8(a). The rule does not obligate a defendant to set forth detailed and particular facts, but requires only that the defendant give "fair notice" of the defense and "the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957). On the other hand, the party raising the affirmative defense "must do more than make conclusory allegations." *Microsoft Corp. v. Jesse's Computers & Repair, Inc*., 211 F.R.D. 681, 684 (M.D. Fla.2002).

Morrison v. Exec. Aircraft Refinishing, Inc., 434 F. Supp. 2d 1314, 1318 (S.D. Fla. 2005). Failure to argue or to present any evidence of an affirmative defense is grounds for denying the defense. *Westlake Vinyls, Inc.*, 518 F. Supp. 2d at 946; *Spradlin v. Baker (In re Foley)*, Bankr. No. 09-52536, Adv. No. 10-05029, 2010 WL 3905987, at *2 (Bankr. E.D. Ky. Sept. 30, 2010).

In this adversary proceeding, the Defendants did nothing more than provide a cursory listing of their asserted affirmative defenses in their Amended Answer. The Defendants' did not provide any factual basis for their defenses in their Amended Answer that would put Wisper II, or the Court for that matter, on notice of what particular facts supported their alleged defenses. Additionally, the Defendants did not offer any legal argument in support of their affirmative defenses in either the Amended Answer to the Amended Complaint or during the trial in this proceeding. The Court cannot sustain an affirmative defense when a party fails to provide even a scintilla of information or support for the defense. Accordingly, the Court finds that there is no basis for the Defendants' affirmative defenses and they are denied.

VI. CONCLUSION

The Court finds and concludes as follows:

1. The Court finds that the 2010 Ford F-250 Truck, the welder along with the 25 hp Kohler engine, the eight 290 amp hour deep cycle marine batteries, the two battery chargers, the gas generator, and the $11,965.00 in missing cash are property of Wisper II. As such it will order the Defendants to turn that property over to Wisper II;
2. The Court finds that the air compressor and the missing Laptop are property of the Defendants. The Court also finds that there was no proof that an impact drill was removed from Wisper I's offices. Accordingly, the Court will not order the Defendants to turn these three items over to Wisper II;
3. The Court finds that the office furniture and equipment currently being used at Wisper II's offices in Alamo, Tennessee, are property of Wisper II;
4. Based on the lack of evidence at the trial, the Court finds that Wisper II is not entitled to damages for the Defendants' failure to turn over property to Wisper II;

5. The Court finds that the Defendants wrongfully converted the two Pure Wave WiMax BTS Base Stations worth $20,600.00, $693.92 of the $2,804.02 Humana insurance premium for February 2014, and the $1,938.61 the Defendants used to make repairs to their personal vehicle. The Court will award Wisper II $23,232.53 for this conversion;

6. The Court finds that the 2004 Ford Econoline Van was the Defendants' personal property. The Court therefore will not find that the Defendants converted Wisper I property when they sold the van post-petition;

7. The Court finds that the pre-petition transfers from Wisper I to the Defendants are not avoidable as preferential transfers pursuant to 11 U.S.C. § 547(b);

8. The Court finds that $209,345.00 in pre-petition transfers from Wisper I to the Defendants are avoidable as fraudulent transfers pursuant to 11 U.S.C. § 548(a)(1)(B). The Court also finds that Wisper II is entitled to recover this amount from the Defendants pursuant to 11 U.S.C. § 550(a)(1);

9. The Court finds that the $7,500.00 payments to Matt Abernathy in January 2012, April 2012, May 2012, June 2012, July 2012, August 2012, November 2012, and January 2013 are not avoidable as fraudulent transfers pursuant to 11 U.S.C. § 548(a). The Court also finds that the $7,500.00 monthly payments were not impermissible distributions under Tennessee Code Annotated § 48-236-105(a). The Court also finds that the $52,384.00 Matt Abernathy allegedly failed to deposit when Jerry Hughes and David Hughes invested in Wisper I is not avoidable as a fraudulent transfer pursuant to 11 U.S.C. § 548 or as an impermissible distribution under Tennessee Code Annotated § 48-236-105(a);

10. The Court finds that Wisper II is not entitled to recover rent payments for the period May 2013 through December 2013 pursuant to Tennessee Code Annotated § 48-249-404;

11. The Court concludes that 11 U.S.C. § 503(c) is not applicable to the instant matter and that Wisper II is not entitled to a refund of Matt Abernathy's owner's draw/salary or commissions from April 2013 to December 2013;

12. The Court concludes that the 11 U.S.C. § 362 automatic stay was not in effect following confirmation of the Chapter 11 plan in the Wisper I's bankruptcy case. As such, the Defendants did not violate the automatic stay in failing to turn over property to Wisper II after confirmation;

13. The Court finds Matt Abernathy in contempt of this Court's prior orders and will sanction him by ordering him to pay reasonable attorney's fees and costs incurred by Wisper II in this adversary proceeding; and

14. The Court concludes that the Defendants are not entitled to a subrogation interest in the funds paid to the IRS for Wisper I's taxes in January 2014.

The Court will enter a separate order in accordance herewith.

Mailing list
Wisper II, LLC, Plaintiff
George Matthew Abernathy and Adria Abernathy, Defendants
Stephen L. Hughes, Attorney for Plaintiff
Thomas H. Strawn, Attorney for Defendants
Samuel K. Crocker, United States Trustee, Region 8

the two battery chargers, the gas generator, the impact drill, the Laptop, and the $11,965.00 in missing cash is **GRANTED IN PART**. Wisper II's request for turnover of the 2010 Ford F-250 Truck, the welder with 25 hp Kohler engine, the eight 290 amp hour deep cycle marine batteries, the two battery chargers, the gas generator, and the $11,965.00 in missing cash is **GRANTED**. The Defendants are **ORDERED** to turn over possession of the 2010 Ford F-250 Truck, the welder with 25 hp Kohler engine, the eight 290 amp hour deep cycle marine batteries, the two battery chargers, the gas generator, and the $11,965.00 in missing cash to Wisper II by December 31, 2015;

2. Wipser II, LLC's request for damages for the Defendants' failure to turn over property to Wisper II, LLC, is **DENIED** without prejudice to Wisper II bringing an action for any damage that is discovered when the Defendants return the 2010 Ford F-250 Truck, the welder with 25 hp Kohler engine, the eight 290 amp hour deep cycle marine batteries, the two battery chargers, the gas generator, and the $11,965.00 in missing cash;

3. Wisper II, LLC's request for an order declaring the office furniture and equipment currently being used at Wisper II's offices in Alamo, Tennessee, to be property of Wisper II is **GRANTED**. The Court hereby declares the office furniture and equipment to be property of Wisper II, LLC;

4. Wisper II, LLC's request for reimbursement of money and property the Defendants converted to their own use is **GRANTED IN PART**. The Defendants are **ORDERED** to remit $23,232.53 to Wisper II, LLC, for the conversion by December 31, 2015;

5. Wisper II, LLC's request to avoid certain pre-petition transfers as preferences pursuant to 11 U.S.C. § 547(b) is **DENIED**;

6. Wisper II, LLC's request to avoid certain transfers pursuant to 11 U.S.C. § 548(a) is **GRANTED IN PART**. The transfer of $209,345.00 in funds from Wisper I to the Defendants is **AVOIDED** pursuant to 11 U.S.C. § 548(a)(1)(B). The Defendants are **ORDERED** to turn over funds in the amount of $209,345.00 to Wisper II, LLC, pursuant to 11 U.S.C. § 550(a)(1) by December 31, 2015;

7. Wisper II, LLC's request to avoid certain transfers under Tennessee Code Annotated § 48-236-105(a) is **DENIED**;

8. Wisper II, LLC's request to recover the increase in rent for the Alamo Property from May 2013 through December 2013 is **DENIED**;

9. Wisper II, LLC's request to recover Matt Abernathy's owner's draw/salary or commissions from April 2013 to December 2013 pursuant to 11 U.S.C. § 503 is **DENIED**;

10. Wisper II, LLC's request for damages for the Defendants' violation of the 11 U.S.C. § 362 automatic stay is **DENIED**;

11. Wisper II, LLC's request to find Matt Abernathy in contempt of court is **GRANTED**. The Court hereby finds Matt Abernathy to be in contempt of its January 15, 2014 Interim Pre-Trial Order and its January 29, 2014 Confirmation Order. Wisper II, LLC's request for damages is **GRANTED IN PART**. Matt Abernathy is **ORDERED** to pay all reasonable attorney's fees and expenses incurred by Wisper II, LLC, in prosecution of this adversary proceeding. Wisper II's attorney, Stephen Hughes, is directed to file an application for reasonable attorney's fees and expenses incurred in prosecution of this adversary proceeding, along with a detailed invoice documenting these fees and expenses, by January 15, 2016; and

12. The Defendants' request for reimbursement of $83,149.22 they paid to the Internal Revenue Service for Wisper, LLC's past-due payroll taxes is **DENIED**.

IT IS SO ORDERED.

Mailing list
Wisper II, LLC, plaintiff
George Matthew Abernathy and Adria Abernathy, defendants
Stephen L. Hughes, attorney for plaintiff
Thomas H. Strawn, attorney for defendants
Samuel K. Crocker, United States Trustee, Region 8