Dated: August 17, 2017
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re EARL BENARD BLASINGAME and MARGARET GOOCH BLASINGAME, Debtors.	Case No. 08-28289-L Chapter 7
Church Joint Venture, a Limited Partnership, on behalf of Edward L. Montedonico, Chapter 7 Trustee of the Bankruptcy Estate of Earl Benard Blasingame and Margaret Gooch Blasingame, Plaintiff, v. Earl Benard Blasingame, Margaret Gooch Blasingame, and The Blasingame Family Business Investment Trust, Defendants.	Adv. Proc. No. 17-00049

ORDER GRANTING MOTION TO DISMISS

BEFORE THE COURT is the motion of Defendants to dismiss the complaint pursuant to Federal Rule of Bankruptcy Procedure 7012(b)(1) for lack of subject matter jurisdiction. The Defendants assert that the Trustee sold his claim that the assets of the Defendant Trust are assets

of the bankruptcy estate to Church Joint Venture, L.P. ("Church JV"), pursuant to a consent order entered October 19, 2011, in the related bankruptcy case of Defendants Earl Benard Blasingame and Margaret Gooch Blasingame. The Defendants assert that, as a result of this sale, the estate no longer has any interest in those assets, and Church JV may not pursue the pending action derivatively for the benefit of the bankruptcy estate. In response, the Plaintiff acknowledges the sale of certain causes of action by the Trustee, but claims that the causes of action that it asserts in the present action were not sold and remain property of the bankruptcy estate. In this adversary proceeding, the Plaintiff seeks a declaration that the Blasingame Family Business Investment Trust (the "Investment Trust") is a self-settled trust, and thus that its assets are not excluded from property of the bankruptcy estate by section 541(c)(2) of the Bankruptcy Code. Original Complaint, Adv. Proc. 17-00049, Dkt. No. 1. The Plaintiff also seeks a turnover of the property or the value of property held by the Investment Trust to the trustee in bankruptcy. For the reasons set forth below, the motion to dismiss will be granted.

FACTS

This dispute relates to the voluntary Chapter 7 bankruptcy petition filed jointly by the Blasingames on August 15, 2008. Edward L. Montedonico was appointed trustee on August 15, 2008, and, following the meeting of creditors and extended examinations of the Debtors and related parties, joined Church JV in filing a "Complaint to Recover Property of the Bankruptcy Estate for Declaratory and Injunctive Relief, to Object to and Avoid Discharge, and to Object to Claimed Exemptions," on September 29, 2009, Adv. Proc. 09-00482 (the "2009 Complaint"). The First Cause of Action in the 2009 Complaint sought declaratory relief using the following language:

> 51. The Plaintiffs assert that the three (3) Trusts and five (5) Corporations have been used for an improper purpose and are but the alter egos of the Debtors, shams

to thwart, deceive and conceal assets from the claims of creditors and have been so misused and repeatedly commingled that the assets of same should be considered the assets of Debtors and made available to satisfy the claims of Debtors' creditors. The three (3) Trusts and the five (5) Corporations are, in fact, alter egos and instrumentalities of the Debtors who have and exert unrestricted control and access and engage in a consistent pattern of transfer between and commingling of each entity's assets *in a manner such that their assets are the commingled assets of the Debtors and property of the estate*.

52. The three (3) Trusts and five (5) Corporations are, separately or collectively, the alter egos and/or reverse alter egos of Debtors and serve only as the instrumentality and as agents of the Debtors *such that their assets should be considered the assets of Debtors and made available to satisfy the claims of Debtors' creditors.*

53. Plaintiffs seek a declaration from this Court that the three (3) Trusts and five (5) Corporations effectively have over the years lost their independent status as may have been originally designed and are now used exclusively to hinder, delay and defraud Debtors' creditors as *clearly indicated by the transfer of Debtors' property into the Trusts secure from creditors and rendering the Trusts self settled in whole or part*.

54. Although Plaintiffs seek a declaration from this Court that the three (3) Trusts and all five (5) Corporations are the alter egos, reverse alter egos, instrumentalities and/or agents of Debtors, these Plaintiffs acknowledge that one of the Corporations (Flozone) has some class B shareholders and that each of the other four (4) Corporations and the three (3) Trusts have certain mortgage and other indebtednesses that equitably need to be recognized and accommodated so as not to impair legitimate interests of innocent banks and third parties, as the case law directs, but Plaintiffs assert that those interests are easily accommodated and that the Trustee's sale of the assets will produce substantial net income to the estate without impairing the interest of innocent stakeholders. For example, Blasingame Farms, Inc. holds title to substantial acreage which is subject to mortgage indebtedness, but the value of the acreage is substantially more that the mortgage and hundreds of thousands of dollars are available to the Trustee as is the case with the residential compound and the assets of all the Trusts and Corporations.

*****

PREMISES CONSIDERED, Plaintiffs pray that this Honorable Court:

****

3. Upon final hearing, declare that the assets of the Blasingame Family Residence Trust, the Blasingame Business Investment Trust and the Blasingame

> Trust, along with the assets of Flozone Services, Inc., Fiberzone Technologies, Inc., Blasingame Farms, Inc., GF Corporation and Aqua Dynamics Group Corporation *to be property of the estate and subject to the claims of creditors.*

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

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

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

Sale Motion, ¶ 5.b (emphasis added).

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

> 2. Church Joint Venture ("Church JV") shall, upon this Order's becoming final, pay the Trustee $100,000 as consideration for the transfer, conveyance and assignment of the claims and cause of action of the Trustee which have been asserted in that certain Adversary Action No. 09-00482 ….
>
> 4. A. Claims that Blasingame Family Investment Trust, Blasingame Family Residence Generation Skipping Trust, the Blasingame Trust, Flozone Services, Inc., Fiberzone Technologies, Inc., Blasingame Farms, Inc., GF Corporation, and Aqua Dynamics Group Corporation have all been used for an improper purpose and are, in fact, the alter egos or reverse alter egos of the Debtors, are shams to thwart, deceive, hinder and delay their creditors and to conceal assets from the claims of their creditors and/*or have been so used in their assets repeatedly co-mingled with the assets of each of them should be one of the same [sic] and made available to their creditors*.

Sale Order, ¶¶ 2, 4 (emphasis added).

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

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

> 95. The three (3) Trusts and the five (5) Corporations named in this action are, in fact, alter egos and instrumentalities of the Debtors who have and exert unrestricted control and access and engage in a consistent pattern of transfer between and commingling of each entity's assets *in a manner such that their assets are the commingling of assets of the Debtors.*
>
> 96. The three (3) Trusts and five (5) Corporations named in this action are, separately or collectively, the alter egos and/or reverse alter egos of Debtors and serve only as the instrumentality and as agents of the Debtors *such that their assets should be considered the assets of Debtors and made available to satisfy the claims of Debtors' creditors.*
>
> 97. Accordingly, Church JV seeks a declaration from this Court that the three (3) Trusts and five (5) Corporations named in this action have effectively lost their independent status as may have been originally designed and have been and are now being used as devices and artifices exclusively to hinder, delay and defraud

> Church JV, a creditor of Debtors, all as clearly indicated by the transfers and transactions noted above, without limitation. 28 U.S.C. § 2201(a).
>
> 98. Church JV is aware that FSI may have some class B shareholders and that each of the other four (4) Corporations and the three (3) Trusts involved in this action may have certain mortgage and other indebtedness that equitably may need to be recognized and accommodated so as not to impair legitimate interests of innocent banks and third parties, as the case law directs; however, Church JV asserts that those interests are easily accommodated and *the turnover and/or subsequent sale of the assets at issue will produce substantial net income to [sic] without impairing the interest of innocent stakeholders.*

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

The 2012 USDC Complaint is still pending, but the District Court dismissed the alter ego claims against the Investment Trust and other defendants by order entered January 13, 2016. *Church Joint Venture v. Blasingame,* 2016 WL 3248044 (W.D. Tenn. January 13, 2016). The District Court specifically held that the Tennessee courts have not and would not recognize the doctrine of "reverse piercing" outside of parent-subsidiary contexts. 2016 WL 3248044, slip op. at *8-9. Only one claim remains to be tried in the District Court, a claim that in January 2005, Mrs. Blasingame transferred a piece of property having a value of $10,000 to the Blasingame Family Residence Generation Skipping Trust ("Residence Trust"). *See Church Joint Venture v. Blasingame,* 2017 WL 943961 (W.D. Tenn. March 9, 2017).

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

> 55. Accordingly, as to the property transfers referenced, and any other transfers which may be discovered, the Investment Trust is invalid as to Debtors' creditors. Plaintiff seeks a declaration as to the rights of the parties as follows:
>
> ****
>
> *c. The property transferred, as noted above, constitutes and is property of Debtors' bankruptcy estates pursuant to section 541(a) of the Bankruptcy Code*; and

d. *The Trustee may access and take possession of and sell the property for the benefit of the creditors of Debtors' bankruptcy estates.*

Original Complaint, *Church Joint Venture v. Blasingame (In re Blasingame),* Adv. Proc. No. 17-00049 (March 21, 2017), ¶ 55.

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

THE MOTION TO DISMISS

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

jurisdiction might be retained in the event that substantial prejudice would result from dismissal. The parties were directed to file briefs and/or affidavits concerning the issue of prejudice. They subsequently agreed that the Non-Discharge Causes of Action might be dismissed without prejudice for lack of subject matter jurisdiction, which resulted in the entry of the Consent Order of November 14, 2012, Adv. Proc. No. 09-00482, Dkt. No. 336.

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

Although the 2009 Complaint sought a declaration that the assets of the Investment Trust are property of the Blasingames' bankruptcy estate, it did so on the basis of alter ego, piercing the corporate veil, or reverse piercing theories. The issue raised by the present motion is whether the request for a declaration that the assets of the Investment Trust are assets of the bankruptcy estate includes every theory under which that might be true? The simple answer is *yes*, because assets of the Defendant Trust can only be recovered once. Church JV purchased the right to recover *on its own behalf* the assets of the Defendant Trust. The estate received compensation for the sale. The bankruptcy court dismissed the Defendant Trust from the 2009 Complaint because the estate had already received the value of any assets held by the Trust found to be assets of the bankruptcy

estate. Having sold the right to recover the value of those assets, the bankruptcy estate cannot now attempt to recover the value of the same assets on another theory.

The Defendants point to a series of cases in support of the conclusion that the sale of assets by the Trustee included the claim that the assets of the Investment Trust are assets of the bankruptcy estate under any theory. Each of these cases addresses the requirement of issue identity in the context of a request to dismiss a subsequent lawsuit on the basis of *res judicata.* The first of these is *Sanders Confectionary Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474 (6th Cir. 1992). That case addressed the question of whether certain claims based on theories of lender liability, RICO, and securities fraud were properly dismissed on the basis of *res judicata* as the result of a prior bankruptcy court ruling. In that context, the court of appeals addressed the identity of causes of action, which it said means an "identity of the facts creating the right of action and of the evidence necessary to sustain each action." 973 F.2d at 484, quoting *Westwood Chemical Co. v. Kulick*, 656 F.2d 1224, 1227 (6th Cir. 1981). The court noted that all of the claims raised in the pending actions were based upon facts considered by the bankruptcy court in the previous action, resulting in an identity of claims. The second case relied upon by the Defendants is *Winget v. JPMorgan Chase Bank, N.A.*, 537 F.3d 565 (6th Cir. 2008). That case also concerned the application of *res judicata* principles in the context of a motion to dismiss. With respect to the requirement that there be identity of claims for *res judicata* to apply, the court said, "The final element of res judicata requires that there be an 'identity of claims,' which is satisfied if 'the claims arose out of the same transaction or series of transactions,' or if 'the claims arose out of the same core of operative facts.'" 537 F.3d at 580, citing *Browning v. Levy*, 283 F.3d 761 (6th Cir. 2002). The court of appeals specifically rejected a more narrow test urged by the appellant, which would have required identity of the *theory of the case* as well as identity of underlying facts. *Id.* The

Defendants also rely upon *Heike v. Central Michigan Univ. Bd. of Trustees,* 573 Fed. Appx. 476 (6th Cir. 2014), which relies upon *United States v. Tohono O'odham Nation, 563* U.S. 307, 317, 131 S. Ct. 1723, 1731, 179 L. Ed. 2d 723 (2011), in which the Supreme Court stated, "Two lawsuits are 'for or in respect to' the same claim … if they are based on substantially the same operative facts, regardless of the relief sought in each suit." Finally, the Defendants rely upon *Hapgood v. City of Warren,* 127 F.3d 490, 494 (6th Cir. 1997), which is based upon Ohio law substantially similar to federal law. In that case the court of appeals said, "Claim preclusion 'requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.'" *Id.*, quoting *National Amusements, Inc. v. City of Springdale*, 53 Ohio St. 3d 60, 558 N.E.2d 1178, 1180 (1990).

While the issue before the court is not strictly one of issue preclusion, the cases offered by the Defendants help the court in recognizing the scope of the claims sold by the Trustee. Based upon well-settled law, the causes of action sold by the Trustee included the right to assert that the assets of the Investment Trust are property of the bankruptcy estate based on any theory of recovery arising out of the underlying facts described in the 2009 Complaint. Because that cause of action was sold to Church JV in its institutional capacity, it cannot now be pursued by it on behalf of the bankruptcy estate. Any recovery based upon that cause of action belongs to Church JV. Thus the present suit should be dismissed because it was brought on behalf of the bankruptcy trustee who no longer has standing to pursue it.

In its Post-Hearing Brief filed July 7, 2017 [Dkt. No. 33], the Plaintiff attempted to distinguish the cases relied upon by the Defendants. In each instance, however, the Plaintiff focused on form rather than substance. The assets of the Defendant Trust can only be recovered on the basis that they are assets of the bankruptcy estate one time. The assets of the Investment

Trust either are or they are not assets of the bankruptcy estate. Church JV purchased the right to pursue that claim from the Trustee. As the result of that sale, the estate has received all that it will ever receive on account of those assets.

The Plaintiff correctly asserts that "[t]he analysis of the issue raised by the Court begins and ends with the Sale Order." Plaintiff's Post-Hearing Brief (July 7, 2017), Dkt. No. 33, ¶ 3. The language of the Sale Order is instructive. In its "Corrected" Order Reserving Decision on Defendant's Motion to Dismiss, etc., this court noted that the 2009 Complaint sought two types of relief: "(1) a declaration that the Debtors are not entitled to discharge of their debts, and (2) an augmentation of the bankruptcy estate by recovering assets from the Non-Debtor Defendants [including the Defendant Trust]." Adv. Proc. No. 09-00482 (June 7, 2012), Dkt. No. 286, p. 5. Similarly, the Sale Order divides the causes of action in the 2009 Complaint into two groups: those relating to the Debtors' discharge, and all other claims. The Sale Order, which was prepared by counsel, not the court, specifically provides:

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

C. For injunctive relief, accounting, recovery of attorneys [sic] fees, expenses and cost of court.

Sale Order, Bankr. Dkt. No. 356, ¶ 4 (emphasis added). The Sale Order divides the causes of action in the 2009 Complaint into those dealing with the Debtors' discharge and those seeking to augment the estate with the assets of the defendant trusts and corporations. The Sale Order provides for the sale of the second group to Church JV. It describes those causes of action not in terms exclusive to the universe of possible claims, as Church JV now asserts, but exclusive to claims related to discharge. That this is true is indicated by using the language "including but not limited to" at the end of the first section of paragraph 4 of the Sale Order. In general, and specifically in the context of the Bankruptcy Code, the words "include" and "including" are not words of limitation. *See* 11 U.S.C. § 102(3). The description of claims that follows is given as an illustration of the claims transferred. As the order says, the sale is intended to include all claims raised in the complaint *except* those related to the Debtors' discharge. Nowhere does the Sale Order say that it is limited only to certain theories of recovery. Rather, it is concerned with the Trustee's claim to augment the bankruptcy estate with the assets of the named Defendants, including the Investment Trust, under any theory such as the ones given in subparagraph 4.A. by way of illustration.

This case is therefore distinguishable from related adversary proceeding 17-00048 which raises the question of what assets are in fact assets of the Residence Trust. It asks whether the Residence[1] failed to be transferred to the Residence Trust and thus remained property of the Debtors when their bankruptcy petition was filed. This adversary proceeding asks that the

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

bankruptcy estate be augmented by the assets of the Defendant Trust, whatever they are. That course of action was sold pursuant to the Sale Order.

CONCLUSION

For the foregoing reasons, the court concludes that the Defendants are correct. The bankruptcy court lacks subject matter jurisdiction to entertain the present dispute because the Trustee lacks standing to pursue it. The cause of action was sold to Church JV pursuant to the Sale Order in 2012. The motion to dismiss is **GRANTED**.

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