Dated: October 15, 2021
The following is ORDERED:

M. Ruthie Hagan
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
James Banks and
Elaine Howell-Banks
Debtors

Case No. 19-27543
Chapter 13

James Banks and
Elaine Howell-Banks for the
Bankruptcy Estate,
Plaintiffs,
v.

Adv. Proc. No. 20-00058

Freedom Debt Relief, LLC,
National Litigation Law Group, LLP, and
National Litigation Law Group, PLLC,

Defendants.

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR TURNOVER

This matter is before the Court on Plaintiffs' Motion for Turnover [DE 124] ("Motion"), Defendant Freedom Debt Relief, LLC's Response in Opposition to Plaintiffs' Motion [DE 127], and the Plaintiffs' Reply to Defendant's Response [DE 129]. A hearing was held on September 29, 2021, at which time the Court took this contested matter under advisement.

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A). This Court has both the statutory and constitutional authority to hear and determine this matter subject to the statutory appellate provisions of 28 U.S.C. § 158(a)(1) and Part VIII ("Bankruptcy Appeals") of the Federal Rules of Bankruptcy Procedure. This order of decision constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. CIV. P. 52, made applicable to this contested matter by FED. R. BANKR. P. 9104 and 7052. Regardless of whether or not specifically referred to in this decision, the Court has examined the docket, the submitted materials, considered statements of counsel, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the following reasons, the Court finds that Plaintiffs' Motion for Turnover is hereby denied.

DISCUSSION OF BACKGROUND FACTS AND INFORMATION AND PROCEDURAL POSTURE OF THE CASE

Based on the statements of counsel for the parties, Defendant Freedom Debt Relief, LLC, obtained a study or survey conducted by Mr. Freddie Huynh regarding credit scores, presumably based on credit scores or data collected on individuals in the general population. Defendant asserts that the study was provided to Defendant in 2014, but was not published on Defendant's blog posts until 2020. Plaintiffs are now seeking turnover of the credit score study or survey pursuant to 11 U.S.C. § 542(e) because "[t]he credit score study/survey conducted by Freedom will allow the [Debtors] to prove at trial that Freedom uses credit scores information as a tool to attract consumers into its program. Freedom considers credit improvement to be a benefit of the program. This is

important because the [Debtors] believed they were paying Freedom for debt relief and credit repair services. By obtaining the credit score study/survey, the [Debtors] can show the Court that Freedom uses credit score information and credit repair promises to attract consumers like the [Debtors] into their[sic] program." Motion, at ¶4. The Motion also asserts that the information contained in the study/survey will support Plaintiffs' claim that "[Debtors] did not get what was promised, or what they paid for, and . . . did not receive reasonably equivalent value for the funds transferred into Freedom's program" in support of Count II of the Third Amended Complaint [DE 97] which alleges fraudulent transfers under 11 U.S.C. § § 544 and 548. Motion, at ¶5. Bankruptcy Code § 542(e), Plaintiffs allege, provides a means of turnover of the credit score study because it is "related to" the money the Debtors paid into the Defendant's program.

Defendant contends that the study/survey is irrelevant to this case, as the contract between the parties was executed in 2018 and the Debtors filed their bankruptcy petition in 2019 – well before the study/survey was ever published on Defendant's blog post in 2020. In fact, Defendant asserts, the Plaintiffs commenced this adversary proceeding prior to the study's dissemination. Therefore, Defendant argues, the study/survey is the property of Defendant, cannot be property of the bankruptcy estate and was not relied upon by the Debtors when they entered into their contract with Defendant; thus, the information requested is not a proper subject of turnover under Bankruptcy Code § 542(e).

Defendant also argues that the turnover request is moot because the Plaintiffs were already provided the material published by Defendant, as Plaintiffs' counsel was provided the URLs with which to download the information. [DE 127, p. 2].

LAW AND ANALYSIS

The Court agrees with Defendant. 11 U.S.C. § 542(e) provides, in pertinent part, that "the

court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, *relating to the debtor's property or financial affairs*, to turn over or disclose such recorded information to the trustee."[1] (emphasis added). The purpose of the statute is set forth in its legislative history, which explains:

> Subsection (e) requires an attorney, accountant, or other professional that holds recorded information relating to the debtor's property or financial affairs, to surrender it to the trustee. This duty is subject to any applicable claim of privilege, such as attorney-client privilege. It is a new provision that deprives accountants and attorneys of the leverage that they have today, under State law lien provisions, to receive payment in full ahead of other creditors when the information they hold is necessary to the administration of the estate.

S. REP. NO. 95-989 (1978). "Congress specifically designed this subsection 'to restrict . . . the ability of accountants and attorneys to withhold information from the trustee.'" *McKinstry v. Gesner (In re Black Diamond Mining Co., LLC),* 507 B.R. 209 (E.D. Ky. 2014) (citation omitted). Neither the plain language of the statute, nor its intended purpose, contemplate turnover under the circumstances presented here. Turnover of recorded information is required only in circumstances when the information relates to "the debtor's property or financial affairs," and Plaintiffs' request for Defendant's study/survey, which contains no information related to the Debtors (as the study/survey pre-dates Debtors being a customer of Defendant) and was first disseminated to the public after the filing of this adversary proceeding, simply does not meet that criteria. Citing to

[1] As the Court has previously noted, the Debtors allege derivative standing to bring this action on behalf of the estate pursuant to the terms of the Order Confirming Chapter 13 Plan entered on December 23, 2019. The Order provides, in pertinent part: "All property shall remain property of the Chapter 13 estate under 11 U.S.C. §§ 541(a) and 1306(a) and shall revest in the Debtor(s) only upon discharge pursuant to § 1328(a), conversion of the case, or specific order of the Court which states otherwise. The debtor(s) shall remain in possession of and in control of all property of the estate not transferred to the Trustee, and shall be responsible for the protection and preservation of all such property, pending further orders of the Court." [*In re Banks*, Case No. 19-27543, DE 31].

Rupp v. Auld (In re Auld), 561 B.R. 512 (B.A.P. 10th Cir. 2017), Plaintiffs assert that "anyone who has recorded information about estate property or debtor's financial affairs can be ordered to turn it over." Reply, at ¶12. The *Auld* Court, however, is no help to the Plaintiffs, as the study/survey requested in this case is neither "about estate property" nor related to the Debtors' financial affairs. There is no evidence that the Debtors participated in the survey or provided any financial information for the study.

The Plaintiffs also cite to *Henderson v. Legal Helpers Debt Resolution, LLC (In re Huffman),* 505 B.R. 726 (Bankr. S.D. Miss. 2014) in support of their position, where the court found that the case trustee's turnover claim under § 542 should be denied as moot, as the requested records were produced pursuant to the court's discovery order. *Id.* at 753.

While the Plaintiffs may request relevant information through the discovery process,[2] they may not obtain the Defendant's study/survey information through § 542(e). As the *Huffman* Court noted, Plaintiffs bear the burden of showing that the requested documents relate to the Debtors' property or financial affairs. *Id.* Under the facts and circumstances presented here, the Plaintiffs have failed to meet that burden.

The Court also acknowledges Defendant's objection to the procedural propriety of Plaintiffs' Motion for Turnover, and agrees that the Motion was procedurally improper. "The [Plaintiffs'] initial decision to bring [their] § 542(e) action as a motion rather than as a *claim* in a separate adversary proceeding was procedurally improper." *In re Black Mining Co.,* 507 B.R. at 213, n.3. However, "that requirement is not jurisdictional but is merely a procedural rule that the parties may waive." *Id.* (citations omitted). The Court has determined in the interest of judicial economy that this dispute should nevertheless be resolved on the Plaintiffs' Motion to Compel.

[2] The Court herein makes no determination regarding the propriety of a discovery request regarding the Defendant's study/survey at issue.

CONCLUSION

Based on the foregoing, the Court finds that Plaintiffs' Motion for Turnover [DE 124] is hereby DENIED. The Bankruptcy Court Clerk shall serve a copy of this Memorandum Opinion and Order to the parties listed below.

cc:

Debtors
Debtors' Counsel
Plaintiffs
Plaintiffs' Counsel
Defendants
Defendants' Counsel
Chapter 13 trustee
United States Trustee