SO ORDERED.
SIGNED this 15th day of August, 2023

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

K&L TRAILER LEASING, INC.

Debtor

GREENEVILLE FEDERAL BANK, FSB,

Plaintiff

v.

FIRST MIDWEST EQUIPMENT FINANCE CO.

Defendant.

Case No. 3:20-BK-31620-SHB
Chapter 11

Adv. Proc. No. 3:23-ap-03004-SHB

MEMORANDUM AND ORDER ON MOTION TO DISMISS ADVERSARY COMPLAINT

Pending before the Court is a motion to dismiss this adversary proceeding filed by Greeneville Federal Bank ("Plaintiff"), which was commenced through the filing of its Complaint on January 9, 2023 [Doc. 1], as amended on March 9, 2023 [Doc. 19] (collectively "Complaint"). Plaintiff seeks a judgment declaring that it holds a priority security interest that primes the purported security interest of First Midwest Equipment Finance Co. ("Defendant") in

proceeds received by the Chapter 11 Trustee, Gary M. Murphey (the "Trustee") that were paid to Defendant from the sale of five "big rig" trailers in the underlying bankruptcy case[1] (the "Disputed Trailers"[2]).

Defendant filed its Motion to Dismiss on February 17, 2023, along with a Supporting Brief/Memorandum (the "Motion") [Docs. 9, 12], seeking dismissal under Federal Rule of Civil Procedure 12(b)(6), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012(b). Defendant attached to its Motion a Settlement and Release Agreement between First Midwest Equipment Finance Co. and Greenville Federal Bank dated March 2021 (the "Settlement Agreement").[3] [Doc. 9-3.] Defendant argues that the Complaint fails to state a claim and should be dismissed under Rule 12(b)(6) because Plaintiff is estopped by its failure to object to approval of the Trustee's sale and closing statement in the Bankruptcy Case as well as by Plaintiff's settlement of disputes relating to other trailers, which constituted a waiver or forfeiture of its right to object, and because the proceeds were disbursed by the Trustee. Defendant also argues that Plaintiff lacks standing to pursue avoidance of a post-petition transfer under 11 U.S.C. § 549.

Plaintiff timely responded to the Motion [Doc. 21], asserting that the Settlement Agreement did not pertain to the Disputed Trailers, which were not identified in the adversary

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[1] *In re K&L Trailer Leasing, Inc.*, No. 3:20-bk-31620-SHB (the "Bankruptcy Case"). Debtor in the Bankruptcy Case will be referred to herein as "Leasing."

[2] The vehicle identification numbers of the Disputed Trailers are 1TTE482C1G3940661, 1TTF532C5G3932650, 1TTF532C9G3932652, 1TTE482C8G3956159, and 1TTF532C7G3932651. [Doc. 19-2.] Defendant's brief in support of the Motion misstates that Plaintiff's Complaint concerns four trailers. [See Doc. 12 at ¶ 4.]

[3] Notwithstanding the potential application of Rule 12(d), because the Court will deny Defendant's Motion as explained below, the Court need not convert the Motion to one seeking summary judgment for purposes of allowing the parties to present any additional response or material. *See* Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or (c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.").

proceeding that was settled, and that it resolved the parties' claims only as to the collateral expressly identified in the Settlement Agreement as "Disputed Collateral." Concerning Defendant's estoppel/waiver/forfeiture argument, Plaintiff relies on the reservation of rights in the Court's Amended Order Approving Sale of Debtor's Assets Free and Clear of All Liens and Authorizing Assumption of Executory Contracts (the "Sale Order") [Bankruptcy Case, Doc. 288]. Finally, Plaintiff argues that it has standing to exercise the rights reserved in the Sale Order and is not pursuing any action under 11 U.S.C. § 549.

I. DISCUSSION

A. Failure to State a Claim Under Rule 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure requires dismissal for "failure to state a claim upon which relief can be granted." Rule 8(a) requires a pleading to contain the following: "(1) a short and plain statement of the grounds for the court's jurisdiction . . . ; (2) a short and plain statement of the claim showing . . . entitle[ment] to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief." Fed. R. Civ. P. 8(a) (applicable to adversary proceedings under Fed. R. Bankr. P. 7008). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

> While a complaint attacked by Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

Twombly, 550 U.S. at 555 (citations omitted) (internal quotation marks omitted).

> While a complaint will survive a motion to dismiss if it contains "either direct or inferential allegations respecting all material elements" necessary for recovery under a viable legal theory, th[e] court "need not accept as true legal conclusions or

> unwarranted factual inferences, and conclusory allegations or legal conclusions masquerading as factual allegations will not suffice."

Philadelphia Indem. Ins. Co. v. Youth Alive, Inc., 732 F.3d 645, 649 (6th Cir. 2013) (quoting *Terry v. Tyson Farms, Inc*., 604 F.3d 272, 275-76 (6th Cir. 2010)).

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Iqbal, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556, 557).

When deciding whether to dismiss under Rule 12(b)(6), a court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008) (quoting *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)). The Court must also "'consider[] the complaint in its entirety, as well as . . . documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.'" *Solo v. United Parcel Serv. Co*., 819 F.3d 788, 794 (6th Cir. 2016) (alteration in original) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 322 (2007)); *see also Spier v. Coloplast Corp.*, 121 F. Supp. 3d 809, 813 (E.D. Tenn. 2015) ("[M]atters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint also may be taken into account [when reviewing a Rule 12(b)(6) motion]." (citations omitted)).

Through its Motion, Defendant argues that Plaintiff's failure to object to the Trustee's proposed disbursement of sale proceeds[4] resulted in Plaintiff's waiver and forfeiture of its right

[4] The Trustee filed his Notice of Proposed Closing Statement Regarding Sale of Trailers ("Notice of Proposed Closing Statement") on November 23, 2020 [Bankruptcy Case Doc. 257].

to claim priority over the sale proceeds. [Doc. 12 at ¶¶ 1-2.] Defendant asserts that Plaintiff's failure to object to the proposed disbursement of sale proceeds in a timely manner induced a detrimental reliance by Defendant and the Trustee so that the doctrine of estoppel should bar Plaintiff's claims for priority over and a judgment against Defendant in the amount of Disbursed Proceeds. [*Id*. at pp. 7-9]. Defendant also argues that Plaintiff's Complaint "comes long after a settlement was reached between Plaintiff and Defendant concerning other title disputes which arose as a result of the Trustee's sale of the assets and disbursement of proceeds with the Court's approval." [*Id.* at ¶¶ 7, 44.] Finally, Defendant argues that Plaintiff lacks standing to pursue an avoidance action under 11 U.S.C. § 549, which Defendant argues is Plaintiff's authority for "seek[ing] a declaration . . . which would result in the avoidance of a portion of the payment issued by Trustee to Defendant." [*Id.* at ¶ 48.]

B. Plaintiff's Allegations

The Complaint alleges that on October 1, 2010, Plaintiff made a loan to K & L Sales and Leasing, Inc. ("Sales"), for $2,500,000.00. Sales allegedly gave Plaintiff a security interest in "virtually all assets of [Sales]," including its inventory of new and used trailers, which Plaintiff properly perfected. [Doc. 19 at ¶¶ 9-10.] Plaintiff avers that because Sales was continuously engaged in the sale of "big rig" trailers that constituted its inventory, Plaintiff held a blanket inventory lien on all new and used trailers owned by Sales. [*Id.* at ¶ 11.]

Plaintiff further avers that Sales transferred the Disputed Trailers to Leasing and that Leasing gave a security interest in the Disputed Trailers to Defendant. [*Id.* at ¶¶ 12, 19.] Plaintiff alleges that its properly perfected blanket inventory lien, as a matter of Tennessee law, survived the prepetition transfer of trailers from Sales to Leasing because Plaintiff was not paid for the trailers, it did not consent or release its security interest in the trailers, and the trailers were not transferred by Sales to Leasing in the ordinary course of business. [*Id.* at ¶¶ 8, 13, 18.] Plaintiff's

Complaint then alleges that its security interest in the Disputed Trailers retained priority over Defendant's security interest in the Disputed Trailers. [*Id.* at ¶¶ 19, 21.] Specifically, Plaintiff alleges that Defendant "knew or should have known that [Leasing] was not a 'buyer in the ordinary course of business,' and it then had a duty" to obtain a release of Plaintiff's security interest. [*Id.* at ¶ 21.] Plaintiff maintains that Defendant's failure to obtain such a release means that Defendant's security interest in the trailer in the hands of Leasing as a transferee was junior and subordinate to Plaintiff's blanket inventory lien under Tennessee law. [*Id.* at ¶¶ 14, 15, 18, 21.]

In the Bankruptcy Case, the Trustee sold the Disputed Trailers and distributed $72,900.00 of the net proceeds to Defendant (the "Disbursed Proceeds"). Plaintiff asserts that it is authorized to initiate this adversary proceeding by the Sale Order, which provided: "The Court reserves the right of any creditor that discovers that sales proceeds were disbursed in contravention of the creditor's priority lien to assert such right by initiating a contested matter or adversary proceeding, as appropriate." [*Id.* at ¶ 7 (quoting the Sale Order).] Plaintiff now asserts that documents obtained from the Tennessee Department of Revenue and attached as Exhibit H to the Complaint show that the Disputed Trailers were transferred from Sales to Leasing so that the transfers were in contravention of Plaintiff's security interest. [*Id.* at ¶ 22; Ex. H to Doc. 19.] As a result, Plaintiff alleges that the Trustee's disbursement to Defendant from the sale of the Disputed Trailers was also in contravention of Plaintiff's security interest and that a judgment should be entered in favor of Defendant for the amount of the Disbursed Proceeds. [*Id.* at ¶ 23.]

C. Standing

Because standing is the "threshold question in every federal case," *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999); *Consol Energy, Inc. v. Murray Energy Holdings Co. (In re Murray Energy Holdings Co.)*, 624 B.R. 606 (B.A.P. 6th Cir. 2021), the Court will address first the last argument raised by Defendant in its Motion. Defendant claims that Plaintiff lacks standing because Plaintiff's claim is an indirect attempt to avoid a postpetition distribution of the Trustee and only a trustee has authority (or standing) to avoid postpetition transfers of estate property.[5] [Doc. 12 at ¶¶ 47-49.]

The Supreme Court has established that standing, at an "irreducible constitutional minimum," consists of three elements. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, (1992)). For a plaintiff to have standing, it "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 578 U.S. at 338 (citing *Lujan*, 504 U.S. at 560-61).

Plaintiff, as the party invoking this Court's jurisdiction, bears the burden of establishing each element. *Spokeo*, 578 U.S. at 338 (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990)). Defendant is correct that only a trustee may pursue an avoidance action under § 549; however, Plaintiff has not pleaded any action under § 549. Nor does Plaintiff rely on any

[5] Defendant also states, without citation to any authority, that Plaintiff's claim is moot because the Trustee has disbursed and no escrow remains, and because the Court approved the sale and disbursement, thereby removing the proceeds from the bankruptcy estate. [Doc. 12 at ¶ 33.] Failure to address an argument in more than a perfunctory fashion constitutes a waiver of such undeveloped argument. *See Benanti v. United States*, No. 3:20-CV-194-TAV-DCP, 3:15-CR-177-TAV-DCP-1, 2022 WL 68383 (E.D. Tenn. Jan. 6, 2022). In any event, "[t]he burden of demonstrating mootness rests on the party claiming mootness," and mootness results only when the court is unable to grant the requested relief. *Mueller Brass Co. v. Crompton*, No. 2:20-cv-02496-SHL-atc, 2022 WL 19403616, at *10 (W.D. Tenn. Feb. 10, 2022). Here, as discussed below, the Sale Order expressly reserved Plaintiff's right to challenge priority, and if Plaintiff proves priority of its security interest over Defendant's, the Court may grant the requested relief by entering a judgment requiring Defendant to pay the Disbursed Proceeds to Plaintiff.

bankruptcy statute for its request for a declaratory judgment that Defendant's security interest is subordinate to Plaintiff's as to the Disputed Trailers so that the Disbursed Proceeds were improperly paid to Defendant over Plaintiff's priority interest in those Disbursed Proceeds.

Plaintiff, instead, asserts that under Tennessee law, (1) it suffered an injury in fact (the prepetition transfer of the Disputed Trailers by Sales to Leasing in contravention of Plaintiff's properly perfected security interest and the Trustee's payment of the Disbursed Proceeds to Defendant in contravention of that continuing priority security interest); (2) that is fairly traceable to Defendant's failure to ensure that Plaintiff's security interest was released when Defendant took a security interest in Plaintiff's collateral and Defendant's receipt of the Disbursed Proceeds in contravention of Plaintiff's priority interest; and (3) that is likely to be addressed by a favorable judicial decision that declares Plaintiff's lien to have priority over the Disputed Trailers and the Disbursed Proceeds with entry of a money judgment to reverse the improper payment of the Disbursed Proceeds. *See Spokeo*, 578 U.S. at 338.

In short, Plaintiff has alleged sufficient facts that, when taken as true, establish Plaintiff's standing to pursue its claims against Defendant.

D. <u>Equitable Estoppel by Waiver and/or Forfeiture</u>

The doctrine of equitable estoppel "precludes a party to a lawsuit from raising a certain defense, regardless of the merits of the defense, because of some improper conduct on that party's part." *Chattanooga Agric. Credit Ass'n v. Davis (In re Davis)*, 330 B.R. 606, 611 (Bankr. E.D. Tenn. 2005) (quoting *State Bank of Coloma v. Nat'l Flood Ins. Program*, 851 F.2d 817, 819 (6th Cir. 1998)). Traditionally, the required elements of equitable estoppel are: "(1) misrepresentation by the party against whom the estoppel is asserted; (2) reasonable reliance on the misrepresentation by the party asserting estoppel; and (3) detriment to the party asserting estoppel." *In re Davis*, 330 B.R. at 611 (quoting *Mich. Express, Inc. v. United States*, 374 F.3d

424, 427 (6th Cir. 2004)). Equitable estoppel requires one party's reasonable reliance "on its adversary's conduct in such a manner as to change his position for the worse." *K-Com Micrographics, Inc. v. Neighborhood Econ. Dev. Corp. (In re K-Com Micrographics, Inc.)*, 159 B.R. 61, 67 (Bankr. D. Dist. Colo. 1993) (quoting *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 59 (1984)).

Forfeiture and waiver are distinct from each other and also different than equitable estoppel. The consequence of a party's failure to raise an objection in a timely manner is a forfeiture of the right to make the objection. *In re Murray Metallurgical Coal Holdings, LLC*, 618 B.R. 825, 830 (Bankr. S.D. Ohio 2020) (citing *Stern v. Marshall*, 564 U.S. 462, 482 (2011)). Waiver, however, is the "intentional relinquishment or abandonment of a known right." *Id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1993)); *see also Hasse v. Rainsdon (In re Pringle)*, 495 B.R. 447, 460-61 (B.A.P. 9th Cir. 2013) (discussing the difference between waiver and forfeiture).

As between estoppel and waiver, estoppel focuses on one party's conduct and its effect on another party, and waiver focuses on the intent of the party that purportedly waived its rights. *In re K-Com Micrographics, Inc.* 159 B.R. at 67 (citing *Saverslak v. Davis-Cleaver Produce Co.*, 606 F.2d 208, 213 (7th Cir. 1979)). The party's intention to waive a known right need not be expressly stated; rather, the intention may be inferred from conduct exhibited by the waiving party that is inconsistent with an intent to enforce that right. *Id.*; *see Molten, Allen & Williams, Inc. v. Harris*, 613 F.2d 1176, 1179 (D.C. Cir. 1980) ("The common law concept of waiver . . . includes inferences from the words and actions of the parties."). Further, because waiver is a unilateral action taken by one party, the party asserting waiver as a defense need not have changed its position detrimentally or taken any additional action in reliance on the opposing party's waiver of rights. *In re K-Com Micrographics, Inc.* 159 B.R. at 67 (citing *Pitts v. Am. Sec.*

Life Ins. Co., 931 F.2d 351, 357 (5th Cir. 1991); *Saverslak*, 606 F.2d at 214; *Gonyea v. John Hancock Mut. Life Ins. Co.*, 812 F. Supp. 445, 450 (D. Vt. 1993); *United States Fid. & Guar. Co. v. Bimco Iron & Metal Corp.*, 464 S.W.2d 353, 358 (Tex. 1971)). If, however, one party does alter its position in detrimental reliance on the representation of the opposing party, a claim for equitable estoppel may lie against the other party even absent the intentional waiver of a known right. *Id.* (citing *Saverslak*, 606 F.2d at 213).

Defendant argues that Plaintiff seeks to contest priority "more than 19 months after the Court set a deadline to object to the Trustee's Revised Proposed Closing Statement which included payment to Defendant in part for the Disputed Trailers." [Doc. 12 at ¶ 6.] Indeed, the Trustee filed an initial Notice of Proposed Closing Statement on November 23, 2020 [Bankruptcy Case Doc. 257] (the "Proposed Closing Statement"). The exhibit relating to trailers on which Defendant claimed liens was attached to the Proposed Closing Statement as Doc. 257-8, and it included the Disputed Trailers. After a December 17, 2020 hearing on numerous objections to the Proposed Closing Statement [*see* Bankruptcy Case Doc. 284], the Court entered the Sale Order, which amended the original order authorizing the sale and, among other things, added paragraph 31 to reserve the rights of creditors to seek adjudication of priority over disbursed sale proceeds.[6] [*Compare* Bankruptcy Case Doc. 288 *with* Bankruptcy Case Doc. 210.] Also as a result of the December 17, 2020 hearing, the Court ordered the Trustee to file a notice of revised closing statement and set a deadline for objection by creditors. [Bankruptcy Case Doc. 287 (the "December 18, 2020 Order").]

[6] The Sale Order states: "This Order amends the Order (A) Approving Sale of Debtor's Assets Free and Clear of all Liens, (B) Authorizing Assumption of Executory Contracts entered on October 23, 2020 [Doc. 210], *to include additional creditor reservation of rights* and to continue the reserved matters to a different hearing date." [Sale Order at ¶ 33 (emphasis added).]

The Trustee complied with the December 18, 2020 Order and filed his Notice of Proposed Closing Statement, which was amended as directed by the Court through its Order entered January 8, 2021 [Bankruptcy Case Doc. 309], by notices filed at Bankruptcy Case docket entries 292, 293, 348, and 372. Although the Court set objection deadlines for the revised closing statements, those orders did not abrogate or supersede the reservation of rights in the Sale Order.

Because Plaintiff did not knowingly waive a known right to contest the priority over the Disbursed Proceeds, waiver does not apply. Similarly, because the Sale Order expressly authorized Plaintiff to do exactly what it is doing here – to seek a judicial determination of priority of the Disbursed Proceeds – neither forfeiture nor equitable estoppel apply to bar Plaintiff's claim. Plaintiff is exercising a right expressly afforded it by this Court through the Sale Order.

Defendant also argues that the Settlement Agreement, which resulted in a $12,500.00 payment to Defendant in settlement of Adversary Proceeding No. 3:20-ap-03052-SHB, constituted a waiver and release of all future claims between Plaintiff and Defendant. [Doc. 12 at ¶ 44.] Defendant argues that "[b]y express agreement, [Plaintiff] waived and released, all claims, counterclaims or offsets against each other which could be asserted." [*Id.*]

Plaintiff responds that the adversary complaint that was the subject of the Settlement Agreement "did not seek an adjudication of the priority of any security interests of [Plaintiff] and [Defendant] in the same trailers which are the subject of the present adversary" proceeding.[7]

[7] Although Plaintiff is incorrect in this assertion (*see* the 3052 Complaint as defined below), that inaccuracy has no bearing on the Motion.

[Doc. 22 at ¶ 6.] The Court takes judicial notice of the pleadings in the Bankruptcy Case as well as the three related adversary proceedings to which Defendant is or was a party as follows:

- *Murphey v. First Peoples Bank*, No. 3:20-ap-3051-SHB.[8]
    - Amended and Restated Complaint to Determine Priority Interests in Escrowed Funds (Jan. 18, 2021), ECF No. 18 (the "3051 Complaint"). Count IV of the 3051 Complaint raises the priority dispute between Plaintiff and Defendant over one trailer with a vehicle identification number ending in 6545 that was titled in the name of Sales as identified at Exhibit D to the 3051 Complaint. The trailer at issue in Count IV of the 3051 Complaint is not one of the Disputed Trailers in the instant adversary proceeding.
    - Agreed Order Resolving Count IV (Apr. 19, 2021), ECF No. 36 (the "3051 Agreed Order"). The 3051 Agreed Order provided that Defendant would withdraw its claim of interest in the trailer that was the subject of the 3051 Complaint. The 3051 Agreed Order was approved by the Trustee, Plaintiff's counsel, and Defendant's counsel, and the motion seeking entry of the 3051 Agreed Order recited that the Trustee had reached an agreement with Defendant and Plaintiff "to resolve a portion of their interests in the trailer identified in Exhibit D in Count IV in the Amended Complaint." [Motion for Approval of Resolution of Count IV (Mar. 26, 2021), ECF No. 27.] It also recited that the agreement between the Trustee, Plaintiff, and Defendant included resolution of some of the trailers at issue in the 3052 Amended Complaint (as defined below).
- *Murphey v. First Peoples Bank*, No. 3:20-ap-3052-SHB:
    - Amended and Restated Complaint to Determine Priority Interests in Escrowed Funds (Jan. 18, 2021), ECF No. 18 (the "3052 Complaint"). Count XIV of the 3052 Complaint raises the priority dispute between Plaintiff and Defendant over 19 trailers titled in the name of Leasing as identified at Exhibit N to the 3052 Complaint, which is a copy of Defendant's attachment to its Proof of Claim Number 17 in the Bankruptcy Case. [List of Secured Equipment (Jan. 18, 2021), ECF No. 18-17.] The Disputed Trailers are included in the nineteen trailers identified in Exhibit N to the 3052 Complaint.
    - Agreed Order Resolving Count XIV (Apr. 19, 2021), ECF No. 44 (the "3052 Agreed Order"). The 3052 Agreed Order authorized the Trustee to pay Defendant $12,500.00 "in full satisfaction of the remaining claims that [Defendant] has against the estate and [Defendant] shall be dismissed as a [d]efendant in this Adversary Proceeding." The 3052 Agreed Order also indicated that the remaining proceeds held by the Trustee in escrow relating to

[8] This adversary proceeding is associated with the bankruptcy case of Sales, *In re K & L Trailer Sales And Leasing, Inc.*, No. 3:20-bk-31619-SHB.

the trailers described in Exhibit N in the Amended Complaint shall be held pending further order of the Court." The 3052 Agreed Order was approved by the Trustee, Plaintiff's counsel, and Defendant's counsel, and the motion seeking entry of the 3052 Agreed Order recited that the Trustee had reached an agreement with Defendant and Plaintiff "to resolve a portion of their interests in trailers identified in Exhibit N in Count XIV in the Amended Complaint." [Motion for Approval of Resolution of Count XIV (Mar. 26, 2021), ECF No. 42.]

- *Greeneville Federal Bank, FSB v. Fellhoelter*, 3:20-ap-3054-SHB.[9]

  - Amended Complaint (Dec. 23, 2020), ECF No. 17 (the "3054 Complaint"). Paragraph 27 of the 3054 Complaint identifies trailers to which Defendant claimed a priority security interest in the Bankruptcy Case. None of six trailers identified at paragraph 27 of the 3054 Complaint are included in the Disputed Trailers here.

  - Motion of Greeneville Federal Bank, FSB, to Dismiss Without Prejudice First Midwest Equipment Finance Co. In This Case (Jan. 9, 2023), ECF No. 188. Plaintiff moved to dismiss Defendant without prejudice from the 3054 Complaint because the six[10] trailers identified at paragraph 27 of the 3054 Complaint[11] because the priority dispute over those trailers had been resolved by the parties in connection with the 3052 Complaint. On February 1, 2023, the Court entered the Order Granting Greeneville Federal's Motion to Dismiss First Midwest Equipment Finance Co. (the "3054 Dismissal Order"), ECF No. 192. The order expressly dismissed Defendant without prejudice.

The Settlement Agreement, thus, resulted in the dismissal of allegations against Defendant in the 3051 Complaint, the 3052 Complaint, and the 3054 Complaint. The Settlement

[9] Adversary proceeding number 3:20-ap-3054 is associated with the Bankruptcy Case.

[10] Plaintiff's motion inaccurately states that there were only five trailers included in the 3054 Complaint; however, there were six trailers, all of which were included in the 3052 Complaint and resolved by the Settlement Agreement. [*Compare* 3054 Complaint ¶ 27 *with* Ex. N to the 3052 Complaint *and* the Settlement Agreement.]

[11] Although Plaintiff twice more amended the complaint between filing the 3054 Complaint and moving to dismiss Defendant with prejudice on January 9, 2023, the 3054 Complaint is the last iteration of Plaintiff's claim that raised any allegation against Defendant. [*Compare* 3054 Complaint *with* Second Amended Complaint for Adjudication of the Priority of the Security Interest of Greeneville Federal Bank in Certain Trailers and Lease and Sales Proceeds Therefrom, *Greeneville Federal Bank v. Fellhoelter*, No. 3:20-ap-3054-SHB (Jan. 5, 2022), ECF No. 99; Third Amended Complaint for Adjudication of the Priority of the Security Interest of Greeneville Federal Bank in Certain Trailers and Lease and Sales Proceeds Therefrom, *Greeneville Federal Bank v. Fellhoelter*, No. 3:20-ap-3054-SHB (Sept. 14, 2022), ECF No. 168.]

Agreement provided, in relevant part, the following (emphases added):[12]

> THIS SETTLEMENT AND RELEASE AGREEMENT ("Agreement") is entered into as of March __, 2021 (the "Effective Date") by and between First Midwest Equipment Finance Co. (the "FMEF") and Greeneville Federal Bank, (collectively, the "Greeneville"). FMEF and Greeneville are referred to collectively herein as the "Parties."
>
> WHEREAS, on or about, FMEF Borrower entered into Equipment Financing Agreement(s) whereby FMEF agreed to extend financing to K&L Trailer Leasing ("Borrower")'s for the acquisition of the six (6) 2016 Wabash Trailers, with VINs ending in 6044; 6045; 6380; 6379; 6381; and 6043 (collectively Disputed Collateral).
>
> . . . .
>
> WHEREAS, Trustee has filed an Complaint to resolve the disputes between certain creditors as to assets of the Bankruptcy, including FMEF and Greeneville's claims over the Disputed Collateral.
>
> WHEREAS, Greeneville has filed an Amended Complaint for Adjudication of Priority as to certain creditors as to assets of the Bankruptcy, including FMEF and Greeneville's claims over the Disputed Collateral ("Adjudication Complaint").
>
> WHEREAS, the Parties agree to resolve any and all disputes between them in good faith and wish to enter into this binding Agreement that resolves all current and potential claims that the Parties have or may have against one another *related to the Disputed Collateral* (collectively, the "Dispute").
>
> NOW THEREFORE, in consideration of the mutual covenants and agreements set forth herein, and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agrees as follows:
>
> . . . .
>
> 2. Allocation of Sales Proceeds. The Parties agree that as a result of this Agreement, the Parties will request and authorize the Trustee to issue payment of the proceeds of the Disputed Collateral as follows (1) Payment of $12,500.00 to FMEF and (2) the balance of the proceeds from the sale of the Disputed Collateral to Greeneville to be held by Trustee in escrow until resolution of other disputes concerning other collateral, including the priority asserted by the Trustee pursuant to 11 U.S.C. § 5449(a).
>
> 3. Dismissal of FMEF. Within seven (7) days after full execution of this Agreement, Greeneville shall file a motion, stipulation or other documents

[12] The quotation of the Settlement Agreement is verbatim with typographical and syntax errors from the original.

> necessary to cause the FMEF to be dismissed form Greeneville's Adjudication Complaint.[13]
>
> . . . .
>
> 5. Validity of Agreement and Waiver of Claims. FMEF and GREENEVILLE acknowledge and agree that this Agreement to which they are a party is a legal, valid and binding obligation, enforceable against them in accordance with their respective terms. FMEF and GREENEVILLE waive and release, all claims, counterclaims or offsets against each other which could be asserted, nor shall this Agreement give rise to any such defenses, claims, counterclaims or offsets. The consents, releases, waivers and acknowledgments of FMEF and GREENEVILLE in this Agreement shall survive any default of this Agreement.
>
> 6. Mutual Release. Upon the receipt of the Payment as provided for in paragraph 2 herein and compliance with all other terms herein, the FMEF and GREENEVILLE on behalf of itself, its shareholders, officers, employees, successors, and assigns, fully releases and discharges, and holds harmless each other from any and all claims, lawsuits, demands, causes of action, damages, costs, contracts, actions, expenses, attorney's fees, and any other liabilities or obligations or claims of whatever kind or nature in law or in equity *related to the Dispute*.

Although the Settlement Agreement reflects that Plaintiff and Defendant agreed to "waive and release, all claims, counterclaims or offsets against each other which could be asserted," the plain text expressly limits the settlement to the Disputed Trailers. At least at this juncture under Rule 12(b)(6), it would be impermissible for the Court to interpret the Settlement Agreement as a resolution of all possible disputes between Plaintiff and Defendant. *See Nashville Underground, LLC v. AMCO Ins. Co.*, 523 F. Supp. 3d 1006, 1011 (M.D. Tenn. 2021) ("When a contract is unambiguous, a court may determine the interpretation on a motion to dismiss as a matter of law, but when a contract is ambiguous, a court should not interpret the contract at the motion to dismiss stage." (citing *McKee Foods Corp. v. Pitney Bowes, Inc.*, No. 1:06-CV-80, 2007 WL 896153, at *3 (E.D. Tenn. Mar. 22, 2007))).

[13] Although not accomplished until January 9, 2023, Plaintiff ultimately filed the motion that resulted in the 3054 Dismissal Order.

Notably, Plaintiff was a party-plaintiff only in the 3054 Complaint. That is, Plaintiff and Defendant were co-defendants in the 3051 Complaint and the 3052 Complaint. Although Rule 13(g), made applicable here by Federal Rule of Bankruptcy Procedure 7013, authorizes crossclaims between co-defendants, the provision is permissive, not mandatory.[14] Indeed under Rule 7013, counterclaims against a trustee who is a plaintiff are not mandatory.

Because the Settlement Agreement resolved only the claims as to the Disputed Trailers and because Plaintiff dismissed the 3054 Complaint without prejudice, neither the Settlement Agreement nor the other adversary proceedings constitute waiver, forfeiture, or equitable estoppel that would require (or even authorize) this Court to grant the Motion.

II. ORDER

For these reasons, taking Plaintiff's allegations as true and considering the Complaint in a light most favorable to the Plaintiff as required by Rule 12(b)(6), the Court finds that Plaintiff has sufficiently pleaded facts that would allow the Court to find that Defendant's security interest may be inferior to Plaintiff's preexisting security interest in the Disputed Trailers so that the Court could enter judgment against Defendant for payment to Plaintiff of any Disbursed Proceeds in which Plaintiff possessed a priority security interest. Accordingly, Defendant's Motion to Dismiss [Doc. 9] is DENIED.

# # #

[14] "A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim or if the claim relates to any property that is the subject matter of the original action...." Fed. R. Civ. P. 13(g); *see also Pruco Life Ins. Co. v. Cal. Energy Dev. Inc.*, No. 318CV02280DMSAHG, 2021 WL 5043289, at *12 (S.D. Cal. Oct. 29, 2021) ("'Such cross-claims are permissive rather than mandatory.' In other words, crossclaims are not waived if a party fails to assert them and they can be pursued in a separate action." (quoting *Peterson v. Watt*, 666 F.2d 361, 363 (9th Cir. 1982))).