UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

February 11, 2021 at 10:30 a.m.

1.	**20-90525-E-7** **SDM-1**	**CARLOS PELAEZ** **Scott Mitchell**	**MOTION TO SET ASIDE DISCHARGE** **1-15-21 [25]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 15, 2021. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

The Motion to Vacate Chapter 7 Discharge was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Vacate Chapter 7 Discharge is granted, and the order discharging Debtor (Dckt. 19) is vacated.

Carlos Mario Pelaez ("Debtor") filed the instant case on July 31, 2020. Dckt. 1. On November 9, 2020, a discharge was granted to Debtor. Dckt. 19.

On January 15, 2021, Debtor filed this instant Motion to Set Aside the Discharge, on the basis that Debtor would like to file a reaffirmation agreement with Ford Motor Creditor Company, LLC creditor with a secured claim over Debtor's 2020 Ford Ranger.

Debtor does not provide the court with the applicable Federal Rule of Civil Procedure, or the rule as incorporated into the Federal Rules of Bankruptcy Procedure for the relief requested.

APPLICABLE LAW

Federal Rule of Civil Procedure Rule60(b), as made applicable by Federal Rule of Bankruptcy Procedure 9024, governs the reconsideration of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

FED. R. CIV. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1203 (5th Cir. 1993). The court uses equitable principles when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2857 (3d ed. 1998). The so-called catch-all provision, Federal Rule of Civil Procedure 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Uni-Rty Corp. V. Guangdong Bldg., Inc.*, 571 F. App'x 62, 65 (2d Cir. 2014) (citation omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, relief under Rule 60(b)(6) may be granted in extraordinary circumstances. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 & n.11 (1988).

A condition of granting relief under Rule 60(b) is that the requesting party show that there is a meritorious claim or defense. This does not require a showing that the moving party will or is likely to prevail in the underlying action. Rather, the party seeking the relief must allege enough facts that, if taken as true, allow the court to determine if it appears that such defense or claim could be meritorious. 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 60.24[1]–[2] (3d ed. 2010); *see also Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

Additionally, when reviewing a motion under Rule 60(b), courts consider three factors: "(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3)

whether culpable conduct of the defendant led to the default." *Falk*, 739 F.2d at 463 (citations omitted).

DISCUSSION

As an initial policy matter, the finality of judgments is an important legal and social interest. The standard for determining whether a Rule 60(b)(1) motion is filed within a reasonable time is a case-by-case analysis. The analysis considers "the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Gravatt v. Paul Revere Life Ins. Co.*, 101 F. App'x 194, 196 (9th Cir. 2004) (citations omitted); *Sallie Mae Servicing, LP v. Williams (In re Williams)*, 287 B.R. 787, 793 (B.A.P. 9th Cir. 2002) (citation omitted).

In this case, the court finds there is cause to vacating the discharge so that Debtor is able to file the Reaffirmation Agreement and retain the Vehicle. Debtor testifies that Creditor will allow them to retain the Vehicle only if Debtor files Reaffirmation Agreement. Debtor explains that although the Reaffirmation Agreement was not executed prior to the discharge, Debtor had continued making the ongoing payments on the account. Debtor further testifies that there is some equity in the Vehicle, the Reaffirmation Agreement includes an interest rate of 0% and the Vehicle has approximately 1,000 miles.

Therefore, in light of the foregoing, the Motion is granted, and the order discharging Debtor (Dckt. 19) is vacated for 60 days so that Debtor may file the Reaffirmation Agreement.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Vacate the Discharge filed by Carlos Mario Pelaez ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the order discharging Debtor (Dckt. 19) is vacated.
>
> **IT IS FURTHER ORDERED** that upon filing the executed reaffirmation agreement, Debtor may file an *ex parte* motion for the court to re-enter the discharge, and lodge a proposed order with the court when the *ex parte* motion is filed.

2. **20-90435-E-11** **CHARLES MACAWILE**
RDW-1 **David Johnston**

CONTINUED MOTION TO DISMISS CASE AND/OR MOTION TO CONVERT CASE FROM CHAPTER 11 TO CHAPTER 7
11-18-20 [48]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 18, 2020. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Case and/or Motion to Convert has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Dismiss Case and/or Motion to Convert is xxxxx.

This Motion to Dismiss or Convert the Chapter 11 bankruptcy case of Charles Collantes Macawile, Jr. ("Debtor") has been filed by creditors Scott R. Williams and Anastasie C. Martin, Trustees of The Williams Trust Dated August 19, 2014, its successors and/or assignees ("Movant"). Movant is the current payee of a Promissory Note dated September 6, 2018 in the principal amount of $1,000,000.00 secured by a First Deed of Trust, executed and recorded in Stanislaus County and which encumbers the real property located at 5412 Kieman Avenue, Salida, California 95368 ("Property"). The total amount of Movant's claim as of the Petition Date is $1,190,684.75.

Movant asserts that the case should be dismissed or converted based on the following grounds:

A. This is Debtor's second pending bankruptcy case in the last eight (8) months.

B. In the previous case (Case No. 20-90139), filed as a Chapter 13 case, Debtor proposed paying off the loan via a refinance in nine (9) months. Movant objected to this treatment and the objection was sustained.

C. Six days after the previous case was dismissed, Debtor filed the instant case under Chapter 11 as a Small Business Subchapter V.

D. Pursuant to Schedule I, neither the Debtor nor his non-filing spouse earn any income. Additionally, according to Schedule J, Debtor is running a deficit of $2,267 each month.

E. Debtor has again proposed to refinance to pay off Movant and in the Status Report filed on July 23, 2020, Debtor asserts having obtained a loan commitment from a lender in Mexico and is negotiating an agreement to lease the Property. Moreover, Debtor received an $1.8 Million offer to purchase the subject Property but turned it down.

F. At the meeting of creditors, Debtor testified that he intended to sell the Property to his wife, who qualified for a loan in April 2020 and was waiting for the finance to come through.

G. Debtor has not filed a plan and his motion to extend the deadline to file a plan was denied.

H. At the October 1, 2020 status conference, Debtor's Counsel informed the court that Debtor's plans of financing had not materialized.

I. Debtor has not provided evidence that there is a reasonable likelihood that a plan will be confirmed within a reasonable time.

APPLICABLE LAW

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).

DISCUSSION

Creditor's concerns are well taken. Debtor has failed to confirm a plan. Additionally, the Debtor has no income and is acting to the detriment of creditors by, namely, having turned down an offer to sell the Property which would have allowed for his creditors to be paid.

The instant motion was filed prior to the November 18, 2020 Status Conference. At the status conference, the court addressed the same concerns Movant raises now. After reviewing the facts of the case, it was determined that Debtor in Possession be removed and Subchapter V Trustee will now market and sell the property. Civil Minutes, Dckt. 53.

The hearing has been continued at the request of Movant.

February 11, 2021 Hearing

Since the last hearing, the Subchapter V Trustee has filed a Motion to Employ a Real Estate Broker (RAC-1) and a Motion to Employ Counsel for the Subchapter V Trustee (RAC-2) on January 22, 2020. Dckts. 66, 61. Both motions were granted and the Orders were entered on January 25, 2021. *See* Dckts. 71, 72.

The Subchapter V also filed a Motion to Sell real property free and clear of liens (RAC-3) on January 29, 2021 and set for hearing at 10:30 a.m. on March 11, 2021. Dckt. 73.

At the hearing, xxxxxxxx

3.	**12-91442-E-11** **TMO-3**	**ALEXANDRINO/DURVALINA VASCONCELOS** **Mark O'Toole**	**CONTINUED MOTION FOR SANCTIONS FOR VIOLATION OF THE AUTOMATIC STAY AND/OR MOTION FOR SANCTIONS FOR VIOLATION OF THE DISCHARGE INJUNCTION** **11-26-20 [248]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditors, and Office of the United States Trustee on November 26, 2020. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion for Sanctions for Violation of the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 11 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The hearing on the Motion for Sanctions for Violation of the Automatic Stay is continued to xx:xx a.m. on Xxxxxx xx, 2021.

December 10, 2020 Hearing

The hearing on this Motion has been set pursuant to an order of the court (Dckt. 257). On December 8, 2020, debtors Alexandrino and Durvalina Vasconcelos filed an Amended Notice, unilaterally changing the date and time of the hearing from that ordered by the court to January 14, 2021.

Continuing hearings once set to the court's calendar are addressed in Local Bankruptcy Rule 9014-1(j), which states:

> (j) Continuances. Continuances of hearings must be approved by the Court. A request for a continuance may be made orally at the scheduled hearing or in

advance of it if made by written application. A written application shall disclose whether all other parties in interest oppose or support the request for a continuance. Failure to comply with this provision may be grounds for denial of the motion without prejudice.

The court has not approved the continuance of the hearing on this Motion that has been set for December 10, 2020, at the express request of the two Debtors. The court not having continued the hearing, it was addressed at the scheduled December 10, 2020 hearing.

REVIEW OF MOTION

Alexandrino and Durvalian Vasoncelos, the Debtors, commenced this voluntary Chapter 11 case on May 18, 2012. They confirmed their Chapter 11 Plan (December 19, 2013 Order, Dckt. 198) and the Debtors obtained their discharge on April 22, 2019 (Dckt. 236, 237).

On November 23, 2020, the Debtor had this case reopened and filed a Motion seeking relief for alleged violations of the automatic stay and the discharge injunction. Motion, Dckt. 248. This relates to the claim secured by real property commonly known as 745 W. Olive Avenue, Turlock, California (the "Property"). Debtor asserts that attempts have been made to pay the secured claim in full, but that the creditor has refused, and demanded payment of a discharged unsecured claim as well as a condition of accepting a final payment and removing its encumbrance from the Property.

The Motion identifies various persons concerning the relief requested, but Debtor is unable to identify the person(s) identified as "Respondents" who are asserted to be engaging in the alleged improper conduct.

Overview of the Plan and Claim Treatment

The claim secured by the Property is provided for in Class 2.2 of the confirmed Chapter 11 Plan, and identifies Wells Fargo Bank, N.A. as the creditor with the secured claim. Confirmation Order, with Plan attached as an exhibit, Plan, p. 2:20-25; Dckt. 198. The treatment of this secured claim is provided in the confirmed Chapter 11 Plan, which states:

A. Value of the Secured Claim is $170,000, as stipulated by the creditor and Debtor. Plan, p. 7:11; *Id*. The Plan references to Docket Entry 178 for the Stipulation. *Id*. The Stipulation as to value of the secured claim found at Docket Entry 178 provides:

1. It is between Wells Fargo Bank, N.A., as the creditor with the secured claim, and Debtor.

2. Wells Fargo Bank, N.A. and Debtor stipulate to the following treatment of the Wells Fargo Bank Claim, which is set forth in Proof of Claim No. 3, as follows:

a. The secured claim is in the amount of $170,000.00, which is to be paid in monthly installments over 30 years, with 5.25% interest. Stipulation, ¶ 2; Dckt. 178.

b. Debtor shall also provide as part of the regular monthly payment an escrow amount for property taxes, insurance, and any post-petition shortage created by Debtor's failure to pay such amounts. *Id*., ¶3.

c. The balance of the Wells Fargo Bank, N.A. claim is a general unsecured claim. *Id*., ¶ 4.

d. The "avoidance of the unsecured portion" of the Wells Fargo Bank, N.A. claim is contingent upon the completion of Debtor's plan and the entry of Debtor's Chapter 11 discharge. *Id*., ¶ 5. This "avoidance" appears to be referencing the lien to the extent it secures any amount in excess of the $170,000 secured claim.

The Chapter 11 Plan incorporates by copying the terms of the Stipulation into the Plan. Plan, p. 5:12-28, 6:1-28, 7:1-28, 8:1-3; Dckt. 198.

3. For the general unsecured claim of Wells Fargo Bank, N.A., the Plan provides:

> Class 2.2 Wells Fargo Bank
> Wells Fargo Account #4826
> Unsecured, $149,500; of the $238 total payment to unsecured, 55% goes to Wells Fargo Bank. Their payment is $131 per month for 25 years.

Plan, p. 12:11-14; *Id*. For the unsecured claim, it appears that the payments are to total $39,300.00 ($131 x 12 months x 25 years).

The Motion asserts that Debtor began making the Plan payments after confirmation. The servicing of this secured claim and unsecured claim were turned over to Rushmore Loan Management (from Wells Fargo Home Mortgage) in 2014.

In July of 2018, Thomas Gillis, then Debtor's attorney, contacted Rushmore Loan Management to obtain a payoff balance for the secured claim. From the information provided to Mr. Gillis, a $157,042.04 cashier's check was sent to Rushmore Loan Management to pay off the secured claim. That check was returned, with no explanation other than "pay-off short." [Fn.1.]

FN. 1. The court notes that in July of 2018, Debtor had not completed the confirmed Plan and had not yet been granted a discharge, which are stated to be conditions of "avoidance of the unsecured portion" of the Wells Fargo Bank, N.A. claim.

In September 2018, Mr. Gillis was mailed a pay-off statement showing two principal balances: a $304,176.79 "principle balance" and a $147,293 "2nd principal balance." A copy of the Payoff Statement communicating these balances is filed as Exhibit G in support of the Motions. Dckt.

254 at 11. The Payoff Statement states that the Principal Balance of $301,998.79 includes the 2nd Principal Balance of $147,193.03.

Debtor asserts that the actual full payoff balance under the confirmed plan was $156,983.95 in August 2018 and that the tender of the $157,042.04 cashier's check was a tender of payment in full.

In May 2019, after Debtor obtained the bankruptcy discharge, Mr. Gillis again requested a payoff balance for the secured claim and provided Rushmore Loan Management with a copy of the discharge order issued by this court. It is asserted that Rushmore Loan Management failed to respond to the payment balance request.

In September of 2019, Rushmore Loan Management issued a Payoff Statement, stating that the unpaid Principal Balance was $299,603.92, which included a 2nd Principal Balance of $147,193.03. Exhibit N, Dckt. 254.

Filed as Exhibit O is a letter sent by Mr. Gillis to Rushmore Loan Management making demand that Rushmore Loan Management and its creditor client cease demanding payment of the discharged portion of the unsecured claim. *Id*. Rushmore Loan Management informed Mr. Gillis that Fay Servicing, LLC had taken over the servicing of the obligation and they were awaiting a response from the new servicer.

By a Notice dated January 7, 2020, Fay Servicing issued a Notice of Default for the claim, asserting that there was an $111,851.56 arrearage. Exhibit T, *Id*. Fay Servicing then sent a Mortgage Statement dated September 10, 2020 to Debtor stating that the total amount due was $318,016.31. Exhibit V, *Id*.

Then by letter dated September 21, 2020, Mr. Gillis (now acting as a paralegal for Mark J. Hannon, Esq.) communicated to Fay Servicing, transmitting a payoff check of $172,315.85 for the secured claim under the Plan. Exhibit W; *Id*. Fay Servicing rejected and returned the check, stating "The amount tendered is less than the amount required to pay off the loan." Exhibit Y; *Id*.

Mr. Gillis, as a paralegal working for Mark Hannon, Esq., communicated with ZBS Law, LLP, which identified itself as the foreclosure trustee and not counsel for Fay Servicing (Exhibit AA, *Id*.), in which Mr. Gillis explained the Chapter 11 Plan and the "cram down" of the secured claim to $170,000.00, with the $147,193.10 "deferred balance" identified by Fay Servicing being a general unsecured claim.

Fay Servicing and ZBS Law, LLP responded by setting a nonjudicial foreclosure sale to be conducted on December 14, 2020. Exhibit CC; *Id*.

Relief Requested

Debtor first requests that the court issue an injunction prohibiting Fay Servicing and ZBS Law, LLP, and other non-specified "Respondents" from conducting the nonjudicial foreclosure sale. Motion, p. 9:26-27; Dckt. 248.

Second, the court make a finding that the balance owning on the secured claim is $156,983.95.

Then issue an order that the present owner (unidentified) of the note and deed of trust issue and record a reconveyance of the deed of trust upon receipt of the $156,983.95. (This sounds in the nature of a mandatory injunction.) *Id*., p. 10:3.5-5.5.

Fourth, determine that pursuant to California Civil Code § 150 any interest, penalties, or other amounts asserted after August 2, 2018, are void, Debtor having tendered the full payoff amount at that time.

Fifth, find that the following persons have violated either the automatic stay or discharge injunction:

1. Rushmore Loan Management Services, LLC;
2. Fay Servicing, LLC;
3. WFG National-Default Services;
4. ZBS Law, LLP;
5. Wilmington Savings Fund Society dba Chirstianna Trust, as Trustee for NYMT Loan Trust; and
6. "Other offending parties."

Sixth, award Debtor attorney's fees and costs.

Seventh, award Debtor punitive damages against the persons found to violate either the automatic stay or discharge injunction.

Eight, award Debtor actual damages.

Debtor's Points and Authorities

Debtor's points and authorities cite the court to California Civil Code § 1504 and § 1512, and California Code of Civil Procedure § 2076 and § 1515. Debtor also cites several cases for the legal assertion that if a creditor fails to negotiate a payment that is tendered, this is deemed to be refusing a valid tender of such payment.

Debtor's points and authorities do not address the application of the automatic stay to these post-confirmation events or the exercise of the court's contempt power when a creditor violates the terms of a plan or demands payment of a discharged debt.

General Overview of Enforcement of Plan Terms

Though not addressed by Debtor, Congress provides in 11 U.S.C. § 1142 the statutory basis for the bankruptcy court addressing issues concerning performance under the confirmed Chapter 11 plan:

> § 1142. Implementation of plan
>
> (a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

> (b) The court may 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.

This section focuses on the debtor or other party performing the plan. Collier on Bankruptcy provides an discussion of this provision.

> ¶ 1142.03 Authority of Court to Direct Compliance with a Confirmed Plan; § 1142(b)
>
> Section 1142(b) empowers the court to direct any necessary party, including the debtor, to perform acts necessary for consummation of the plan. The statute effectively streamlines the substantive and procedural requirements that might otherwise constrain a plan proponent from obtaining affirmative injunctions, as may be necessary to cause plan implementation. For example, courts can order specific performance of plan provisions under section 1142 without having to weigh the adequacy of monetary damages.
>
> [1] Broad Scope of Section 1142(b); Authority of Court to Issue Orders Necessary for Plan Implementation
>
> Section 1142(b) grants courts authority to compel parties to take actions considerably broader than merely ministerial acts. Pursuant to section 1142(b), the court may issue any order necessary for the implementation of the plan.
>
> Compliance orders that may be issued under section 1142(b) include those compelling:
>
> > (1) lenders to execute and deliver loan documents required under the plan, clarify provisions of loan documents in accordance with the terms of the plan and supply commercially reasonable terms and conditions to loan documents where such terms were not otherwise addressed;
> >
> > (2) execution of documents extinguishing a lien that is released by the plan;
> >
> > (3) an investor to advance committed funds necessary to consummate the plan;
> >
> > (4) a change in corporate control or governance;
> >
> > (5) distributions on claims as required by the plan;
> >
> > (6) principals of the debtor to submit to examinations under Bankruptcy Rule 2004 to determine the extent to which they have acted in conformance with the plan; and

(7) execution of instruments enabling asset transfers, enforcement mechanics or other agreements contemplated by the plan.

In addition to directing parties to take actions, the court may order parties to refrain from taking actions if those actions interfere with implementation of the plan.

[2] Limitations on Court's Authority to Issue Orders under Section 1142(b)

While phrased broadly, section 1142(b) has limits. Courts should not use section 1142(b) to authorize the debtor to avoid a law or regulatory requirement regarding public health and safety. Courts also should refrain from issuing orders directing or authorizing third parties to take action unless the action specifically is called for by the terms of the plan or is necessary to implement the plan. For example, the U.S. Bankruptcy Court for the Southern District of New York recognized that section 1142(b) does not operate on a stand-alone basis or confer any substantive rights beyond what is provided for in a plan. Accordingly, the court ruled that section 1142(b) did not permit a plan administrator to retroactively issue preferred stock where the plan did not expressly authorize it and the terms of the debtor's amended charter and amended bylaws, which prohibited the issuance of securities, were incorporated into the plan. Additionally, section 1142(b) does not authorize a court to order parties to execute an agreement where there is no agreement on the terms or if the terms are uncertain.

The authority of the court to act under 1142(b) also is constrained by limitations periods. Although section 1142(b) does not specify a limitations period, the Supreme Court has recognized that, "courts do not ordinarily assume that Congress intended that there be no time limit on actions at all" and so must borrow "the most suitable statute or other rule of timeliness from some other source." In considering the correct limitations period for an action under section 1142, the Bankruptcy Court for the Southern District of Florida concluded that while a confirmed chapter 11 plan often is compared to a state law contract, it is "a creature of the Bankruptcy Code, a comprehensive federal statute" and so obligations arising under a confirmed plan "are necessarily federal in nature."

8 Collier on Bankruptcy P 1142.03 (16th 2020). The term "judgment" as used in the Bankruptcy Rules is defined to mean "any appealable order." Fed. R. Bankr. P. 9001. See also Federal Rule of Bankruptcy Procedure 7054, which incorporates Federal Rule of Civil Procedure 54(a) that defines the word "judgment" to include "[a] decree and any order from which an appeal lies" for adversary proceeding.

The Supreme Court provides in Federal Rule of Bankruptcy Procedure 3020(d) that notwithstanding the entry of the order of confirmation, the bankruptcy court may issue any order necessary to administer the estate.

In Federal Rule of Bankruptcy Procedure 7001, the Supreme Court specifies the types of relief that must be requested through an adversary proceeding, which include (identified by paragraph

number used in Rule 7001):

> (2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, but not a proceeding under Rule 3012 or Rule 4003(d);
> . . .
> (7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;
> . . .
> (9) a proceeding to obtain a declaratory judgment relating to any of the foregoing;
> . . .

Confirmation of the Chapter 11 plans works as a modification of the pre-petition obligations of the parties, binding the debtor and creditors to such modified terms. 11 U.S.C. § 1141(a).

Supplemental Points and Authorities Filed by Debtor

On December 6, 2020, Debtor filed a Supplemental Points and Authorities addressing issues raised by the court in the order shortening time. Dckt. 258.

Alleged Post-Confirmation Violation of the Automatic Stay

One issue identified by the court was the basis for asserting that the automatic stay was violated post-confirmation. In the Supplemental Pleading Debtor cites to 11 U.S.C. § 362(c)(2)(c) which provides that the automatic stay, other than as it exists for property that is property of the bankruptcy estate, continues in a Chapter 11 case until the time a discharge is granted.

It is asserted that the demands for payment from the Debtor and inaccurate billings pre-discharge constitute violations of the automatic stay. Thus, though the confirmed Plan revested the property back into the Debtor upon confirmation, thereby making it no longer property of the bankruptcy estate for purposes of 11 U.S.C. § 362(c)(1), it is not the attempt to foreclose that appears to be the asserted violative conduct.

Why Has the Debtor Not Sued For Specific Performance and Damages

Debtor responds that bankruptcy core jurisdiction exists to enforce the terms of the plan and violations of the automatic stay and discharge injunction. Debtor appears to believe the issue the court identified related to a judicial belief that the Debtor should have commenced an action in state court.

While "clear" in the court's mind, the issue identified was not clearly presented to Debtor. The issue is not the want of post-confirmation federal court jurisdiction, but as discussed above, the correct procedural method by which injunctive relief and a determination of the extent, validity, and priority of a lien, and to recover money or property. The Supreme Court provides that such relief shall be sought through an adversary proceeding, not a contested matter. Fed. R. Bankr. P. 7001.

DISCUSSION

It appears that the Chapter 11 Plan and prior order of the court, as stipulated to by the then creditor on the secured claim and Debtor, has fixed the amount of the secured claim. Pursuant to 11

U.S.C. § 506(a) the claim has been bifurcated into two parts - the secured claim for $170,000 and the general unsecured claim to be paid $39,300.00 over 25 years. Plan, Class 2.2 Claim, p. 12:11-14; Dckt. 198.

In obtaining the order for entry of discharge, Debtor testified "2. We have completed all of our plan payments." Declaration, ¶ 1; Dckt. 232. It is not clear whether that includes the $39,300 to be paid over 25 years, or whether the remaining balance of that amount is being paid as part of paying off the balance of the secured claim.

At the hearing, Counsel for the Debtor stated the parties stated that the hearing should be continued to allow the parties to address these issues. The court continues this matter to 10:30 a.m. on February 11, 2021, for a Status and Scheduling (if necessary) Conference. The parties shall file (jointly or severally) a Status Conference report on or before February 4, 2021.

STATUS CONFERENCE STATEMENT

The parties filed a Joint Status Conference Statement on February 3, 2021. Dckt. 272. The parties report that they actively engaged in settlement discussions and request that the status conference be continued out 30-45 days so that they may continue working on completing the settlement and avoid filing an adversary proceeding.

February 11, 2021 Hearing

At the hearing, xxxxxxxx

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Sanctions for Violation of the Automatic Stay by Alexandrino Vasconcelos and Durvalina Vasconcelos, Debtor in Possession, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion is continued to xx:xx x.m. on Xxxxxx xx, 2021.

4. **19-90382-E-7** **TRACY SMITH**
19-9013 **MWH-5** **Pro Se**

MOTION FOR EXAMINATION OF TRACY EMERY SMITH AND FOR PRODUCTION OF DOCUMENTS
12-2-20 [41]

KALRA V. SMITH

ADVERSARY PROCEEDING CLOSED:
03/06/2020

Pursuant to the prior Order issued on December 3, 2020, Dckt. 43, the Motion for Examination of Tracy Smith has been granted. **The matter is set for the examination to be conducted at 10:30 a.m. on February 27, 2020, at this court.**

FINAL RULINGS

5.	**20-90613-E-7** **UST-1**	**OVIDIO/ANGELICA BARAHONA** **Brian Haddix**	**MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR AND/OR MOTION TO EXTEND TIME TO FILE A MOTION TO DISMISS CASE UNDER SEC. 707(B)** **12-28-20 [17]**

Final Ruling: No appearance at the February 11, 2021 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and parties requesting special notice on December 28, 2020. By the court's calculation, 45 days' notice was provided. 28 days' notice is required.

The Motion to Extend Deadline to File a Complaint Objecting to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Extend Deadline to File a Complaint Objecting to Discharge is granted.

Tracy Hope Davis, the United States Trustee for Region 17 ("Movant"), moves to extend the deadline to file a complaint objecting to Ovidio Barahona and Angelica Cassandra Barahona's ("Debtor") discharge because Movant requires additional time to conduct an investigation on Debtor's financial reality as it pertains to child support arrearage and payments; banks statements on four of debtor's bank accounts; expenses claimed on Schedule J; SDI payments received; and pay statements for September 1, 2020 through present for which Debtor has failed to provide documentation.

The deadline for filing a complaint objecting to discharge was December 28, 2020. Dckt. 10. The Motion requests that the deadline to object to Debtor's discharge be extended to March 29, 2021.

The court may, on motion and after a noticed hearing, extend the time for objecting to the entry of discharge for cause. FED. R. BANKR. P. 4004(b)(1). The court may extend that deadline where the request for the extension of time was filed prior to the expiration of time for objection. *Id.*

The instant Motion was filed on December 28, 2020, before the deadline to object to the discharge of Debtor.

The court finds that in the interest of Movant to complete investigation, namely continuing to gather all necessary financial information about Debtor's assets, there is sufficient cause to justify an extension of the deadline. Therefore, the Motion is granted, and the deadline for Movant to object to Debtor's discharge is extended to March 29, 2021.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Extend Deadline to File a Complaint Objecting to Discharge filed by Tracy Hope Davis, the United States Trustee for Region 17, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the deadline for Movant to object to Ovidio Barahona and Angelica Cassandra Barahona's ("Debtor") discharge is extended to March 29, 2021.

6. **18-90029-E-11** **JEFFERY ARAMBEL** **CONTINUED MOTION TO DISMISS**
20-9008 **MRP-2 Pro Se** **CAUSE(S) OF ACTION FROM AMENDED COMPLAINT**

ARAMBEL V. LBA RV-COMPANY XX.VII, LP

11-20-20 [47]

Final Ruling: No appearance at the February 11, 2021 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor's Attorney on November 20, 2020. By the court's calculation, 80 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

Pursuant to the prior Order from the court (Dckt. 60), the hearing on the Motion to Dismiss Cause(s) of Action Amended Complaint has been continued to 10:30 a.m. on February 25, 2021.

LBA RV-Company XX.VII, LP ("Defendant") moves for the court to dismiss all claims against it in Jeffery Edward Arambel's ("Plaintiff-Debtor") Complaint according to Federal Rule of Civil Procedure 12(b)(6).

On February 1, 2021, Debtor filed an *Ex Parte* Application to Continue and Specially Set Hearing on Motion to Dismiss on the basis that counsel erroneously believed that the Motion to Dismiss had been continued to March 2021 and as such did not file a timely opposition which was due January 28, 2021. Dckt. 59. Plaintiff has received consent from Defendant to continue the hearing and suggests either February 25, 2021 or March 11, 2021. *Id.*

The court granted the *ex parte* request and entered the Order on February 2, 2021 and the hearing was continued to February 25, 2021 at 10:30 a.m. Dckt. 60.

7. **20-90479-E-12 DCJ-4** **JOE MACHADO** **David Johnston** **MOTION TO EMPLOY SEGERSTROM REAL ESTATE, INC. AS BROKER(S) 1-14-21 [70]**

Final Ruling: No appearance at the February 11, 2021 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 12 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 14, 2021. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Employ has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Employ is granted.

Joe Anthony Machado (the "Debtor in Possession") seeks to employ Segerstrom Real Estate, Inc., doing business as Coldwell Banker Segerstrom (the "Broker"), pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 327(a) and 330. Debtor in Possession seeks the employment of Broker to sell the real property commonly known as 620 Denton Road, Hickman, California ("the Farm").

Debtor in Possession argues that Broker's appointment and retention is necessary to sell the Farm for $2,100,000 from December 3, 2020 through June 30, 2021. Broker, through its agent, will assist Debtor in Possession in the sale of the Farm by listing the Farm for $2,100,000 from December 3, 2020 through June 30, 2021, and the parties have agreed on a commission of 5% of the sales price.

William Clark Segerstrom, the president of Segerstrom Real Estate, Inc., doing business as Coldwell Banker Segerstrom, and Veronica Hemphill, as Agent employed by Segerstrom Real Estate, Inc., doing business as Coldwell Banker Segerstrom testify as to the facts of the representation. William Clark Segerstrom testifies that he is the qualifying individual for the Broker and have been licensed as California real estate broker since April 13, 1984. Veronica Hemphill as the Agent, on behalf of the

Broker, has arranged to list the Farm and the parties have agreed to a commission of 5% of the sales price but if another broker procures the buyer, then the commission will be divided as is customary in the real estate business.

William Clark Segerstrom testifies he and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Taking into account all of the relevant factors in connection with the employment and compensation of Broker, considering the declaration demonstrating that Broker does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Segerstrom Real Estate, Inc., doing business as Coldwell Banker Segerstrom as Broker for the Chapter 12 Estate on the terms and conditions set forth in the Commercial and Residential Income Listing Agreement filed as Exhibit A, Dckt. 74. Approval of the commission is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by Joe Anthony Machado (the "Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted, and Debtor in Possession is authorized to employ Segerstrom Real Estate, Inc., doing business as Coldwell Banker Segerstrom as Broker for Debtor in Possession on the terms and conditions as set forth in the Commercial and Residential Income Listing Agreement filed as Exhibit A, Dckt. 74.
>
> **IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by broker in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.