



Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
July 24, 2018

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

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In re: ) Case No.: 13-10499-MKN  
          ) Chapter 11  
CHARLESTON ASSOCIATES, LLC, )  
          ) Debtor. ) Date: July 18, 2018  
                                          ) Time: 9:30 a.m.  
                                          )

**ORDER ON MOTION TO ENFORCE PLAN BY REQUIRING PAYMENT OF PLAN  
PAYMENTS OR, IN THE ALTERNATIVE, CONVERSION OF CASE TO CHAPTER 7<sup>1</sup>**

On July 18, 2018, the court heard the Motion to Enforce Plan by Requiring Payment of Plan Payments, or in the Alternative, Conversion of Case to Chapter 7 (“Conversion Motion”), brought by First American Title Insurance Company (“FATCO”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

**BACKGROUND**

On June 17, 2010, a voluntary Chapter 11 petition was filed by Charleston Associates, LLC (“Debtor”), in the United States Bankruptcy Court for the District of Delaware (“Delaware Bankruptcy Court”). (ECF No. 1).

<sup>1</sup> In this Order, all references to “ECF No.” are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. Where appropriate, the reference will include a particular jurisdiction. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “NRS” are to provisions of the Nevada Revised Statutes. All references to “Bankruptcy Rule” are to the Federal Rules of Bankruptcy Procedure. All references to “Civil Rule” are to the Federal Rules of Civil Procedure.

1 On November 24, 2010, Debtor commenced an adversary proceeding against RA  
2 Southeast Land Company, LLC (“RAS”) and City National Bank (“CNB”) by filing a  
3 “Complaint for Declaratory Judgment” in the Delaware Bankruptcy Court. The focal point of  
4 the dispute between the Debtor, its previous lender (CNB), and the purchaser from the previous  
5 lender (RAS) is the rights with respect to the undeveloped portions of land in a shopping center  
6 located in Las Vegas, Nevada (“Undeveloped Land”).

7 On December 29, 2010, the Delaware Bankruptcy Court entered an order transferring  
8 venue of the Debtor’s adversary proceeding to Nevada, where it was assigned Adversary No. 10-  
9 01452-LBR (“RAS Adversary”).<sup>2</sup>

10 On February 25, 2011, Debtor filed an amended complaint (“Complaint”) in the RAS  
11 Adversary. (AECF No. 37).

12 On October 5, 2011, this bankruptcy court entered an order in the RAS Adversary  
13 granting partial summary judgment in favor of the Debtor and against CNB and RAS (“Prior PSJ  
14 Order”). (AECF No. 120). The order was appealed to the United States District Court for the  
15 District of Nevada (“USDC”), and assigned Case No. 2:11-cv-02023-MMD-PAL. (AECF Nos.  
16 151, 153 and 156).

17 On August 3, 2012, Debtor filed a proposed First Amended Plan of Reorganization under  
18 Chapter 11 of the Bankruptcy Code (“Plan”) in the Delaware Bankruptcy Court. (ECF No. 725).

19 On September 28, 2012, an order was entered by the Delaware Bankruptcy Court  
20 confirming the Plan (“Plan Confirmation Order”). (ECF No. 809). Pursuant to the confirmed  
21 plan, New Boca Syndications Group, LLC (“New Boca”) is defined to be the “Reorganized  
22 Entity.” See Plan, Art. II., A., 38 and 52. Under the confirmed plan, New Boca acquired “Boca  
23 Fashion Village” that is a portion of a shopping center located in Southern Nevada, as well as all  
24 existing assets of the Debtor. See Plan, Art. II., A., 8; Plan, Art. VII., C.; and Plan, Art. VIII.,  
25 (e). Under the confirmed Plan, all estate property is vested in New Boca on the effective date,  
26 see Plan, Art. IX., A. and Plan Confirmation Order at II, 6., and New Boca is required to timely  
27 make all payments required under the Plan. See Plan, Art. IX., I. Under the Plan, the “RAS  
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<sup>2</sup> All references to “AECF No.” are to the documents filed in the RAS Adversary.

Litigation” is defined as being the RAS Adversary. See Plan, Art. II., A., 50. In addition to acquiring the shopping center, New Boca also acquired all of the Debtor’s claims in the RAS Litigation, see Plan, Art. V., B., and also assumed liability for any claims asserted against the Debtor by CNB and RAS. See Plan, Art. VII., C.<sup>3</sup>

Under the confirmed Plan, the Debtor’s pre-confirmation debts were discharged upon confirmation of the Plan. See Plan, Art. X., A. Under the confirmed Plan, the claims of CNB were specifically excepted from discharge. See Plan, Art. III., B., 4. The Delaware Bankruptcy Court also specifically ordered that “Confirmation shall not operate as a discharge of the Debtor or the New Entity with respect to the CNB Claims...and nothing in the Plan, [or] the Confirmation Order...shall prevent CNB or RAS from obtaining of taking any steps necessary to obtain unencumbered title to the Declarant Rights or any other relief sought in the RAS/CNB Litigation should CNB or RAS be entitled to such relief based on a ruling after Confirmation in the RAS/CNB Litigation, by the Bankruptcy Court or otherwise.” Plan Confirmation Order at II., 21.

On January 15, 2013, the Delaware Bankruptcy Court entered an order transferring venue of the Chapter 11 proceeding to Nevada, where it was assigned Case No. 13-10499-LBR.<sup>4</sup>

On July 25, 2013, the USDC entered an order reversing the Prior PSJ Order that had been entered by the Nevada bankruptcy court in the RAS Adversary (“Reversal Order”). (2011 USECF No. 70;<sup>5</sup> AECF No. 207). On August 23, 2013, Debtor filed a notice appealing the

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<sup>3</sup> The specific treatment of CNB under the confirmed Plan is for New Boca to assume joint liability with the Debtor for any claims of CNB. See Plan, Art. III., B., 4.

<sup>4</sup> On December 29, 2014, both the Chapter 11 proceeding and the RAS Adversary were reassigned to this court upon the retirement of the previously assigned bankruptcy judge.

<sup>5</sup> All references to “2011 USECF No.” are to the documents filed in this USDC appeal. This court may take judicial notice under FRE 201 of the materials appearing on the docket of the USDC. See *U. S. v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980); *Conde v. Open Door Mktg., LLC*, 223 F.Supp.3d 949, 970 n.9 (N.D. Cal. 2017); *Gree v. Williams*, 2012 WL 3962458, at 1 n.1 (D. Nev. Sep. 7, 2012).

1 Reversal Order to the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”).<sup>6</sup>  
2 (2011 USECF No. 78).

3 On December 19, 2013, an order was entered in the RAS Adversary granting RAS’s  
4 motion for an award of \$376,078.35 in attorney’s fees and costs against the Debtor. (AECF No.  
5 240).

6 On September 29, 2014, the bankruptcy court entered judgment in the RAS Adversary in  
7 favor of RAS and against the Debtor and its successor, New Boca, awarding attorney’s fees and  
8 costs in the total amount of \$376,078.35 (“RAS Fee Judgment”). (AECF No. 370).

9 On October 24, 2014, the Debtor and New Boca appealed the RAS Judgment to the  
10 USDC, which was assigned Case No. 2:14-cv-01766-MMD. (AECF No. 402).

11 On January 25, 2016, the Ninth Circuit affirmed the USDC’s Reversal Order (“Circuit  
12 Order”). 632 Fed.Appx. 362 (9th Cir. 2016). (2011 USECF No. 106). On February 24, 2016,  
13 the Ninth Circuit entered a separate order directing to the USDC all requests by CNB and RAS  
14 for an award of legal fees and costs in connection with the appeals. (2011 USECF No. 110).

15 On April 19, 2017, the USDC entered an order against the Debtor awarding \$540,088.55  
16 in attorney’s fees and costs in favor of CNB in connection with the RAS Adversary appeal.  
17 (2011 USECF No. 138). The USDC denied without prejudice CNB’s request, under the Plan, to  
18 enforce against New Boca the Debtor’s liability for the amounts awarded.

19 On April 26, 2017, the USDC entered an order against the Debtor awarding \$370,330.99  
20 in attorney’s fees and costs in favor of RAS in connection with the RAS Adversary appeal.  
21 (2011 USECF No. 140). The USDC also denied without prejudice RAS’s request, under the  
22 Plan, to enforce against New Boca the Debtor’s liability for the amounts awarded.

23 On May 19, 2017, FATCO, as assignee of RAS, filed a motion in the Debtor’s  
24 bankruptcy case to enforce the Plan (“FATCO Enforcement Motion”) by requiring New Boca to  
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26 <sup>6</sup> On August 26, 2013, the bankruptcy court entered summary judgment in the RAS  
27 Adversary in favor of CNB and RAS pursuant to the Reversal Order. (AECF No. 210). On  
28 November 5, 2013, however, the USDC granted the Debtor’s motion for an order directing the  
bankruptcy court to vacate the summary judgment order because it had been entered  
prematurely. (USECF No. 99; AECF No. 226).

1 pay the \$370,330.99 in attorney's fees and costs that had been awarded by the USDC against the  
2 Debtor. (ECF No. 932). Opposition was filed by the Debtor. (ECF No. 943). A joinder in  
3 FATCO's Enforcement Motion was filed by CNB. (ECF No. 945). A reply to the Debtor's  
4 opposition was filed by FATCO. (ECF No. 946). A joinder in FATCO's reply was filed by  
5 CNB. (ECF No. 947).

6 On May 24, 2017, CNB filed a motion in the Chapter 11 case and in the RAS Adversary  
7 to join New Boca and to award judgment against New Boca on the attorney's fees and costs that  
8 had been awarded ("CNB Enforcement Motion"). (ECF No. 936; AECF No. 466).

9 On June 20, 2017, the FATCO Enforcement Motion was heard and granted by this court.  
10 On July 7, 2017, a written order was entered granting the FATCO Enforcement Motion. (ECF  
11 No. 954).

12 On June 21, 2017, the CNB Enforcement Motion was heard and granted by this court.  
13 On July 7, 2017, a written order was entered granting in part and denying in part the CNB  
14 Enforcement Motion. (ECF No. 953; AECF No. 494).<sup>7</sup>

15 On July 18, 2017, a judgment in favor of CNB and against New Boca was entered in the  
16 Debtor's bankruptcy case and in the RAS Adversary in the amount of \$540,088.55 in attorney's  
17 fees and costs, plus interest at the federal judgment rate from April 19, 2017 ("CNB Fee  
18 Judgment"). (ECF No. 958;<sup>8</sup> AECF No. 496).<sup>9</sup>

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21 <sup>7</sup> The order denied without prejudice CNB's request to join New Boca as a party to the  
22 RAS Adversary.

23 <sup>8</sup> The time to appeal the CNB Fee Judgment expired on or about August 1, 2017. See  
24 FED.R.BANKR.P. 8002(a)(1).

25 <sup>9</sup> Based on the CNB Fee Judgment, CNB garnished certain Rents that had been deposited  
26 into certain accounts maintained by New Boca at Wells Fargo Bank ("Wells Fargo").  
27 Thereafter, U.S. Bank, N.A. ("US Bank") filed a Petition for Return of Improperly Garnished  
28 Property that was opposed by CNB. (AECF No. 531). On December 12, 2017, this court  
entered an order denying the Petition ("Deposit Account Order"). (AECF No. 539). US Bank  
appealed that order to the USDC. (AECF No. 548).

1 On July 24, 2017, a judgment in favor of FATCO and against New Boca was entered in  
2 the Debtor's bankruptcy case in the amount of \$370,330.99 in attorney's fees and costs, plus  
3 interest at the federal judgment rate from April 27, 2017 ("FATCO Fee Judgment"). (ECF No.  
4 960<sup>10</sup>).

5 On September 27, 2017, CNB filed a satisfaction with respect to the CNB Fee Judgment.  
6 (AECF No. 510).

7 On or about November 20, 2017, FATCO served a Notice of Intent to Serve Writs of  
8 Garnishment on the tenants of the New Boca property. That Notice was served on the Debtor,  
9 New Boca, and US Bank. (ECF No. 970).

10 On or about December 22, 2017, US Bank served an Objection to Writs of Garnishment  
11 and Execution upon Rents. (ECF No. 971).

12 On or about January 4, 2018, FATCO served a Notice of Intent to Serve Writ of  
13 Garnishment in Aid of Execution on Wells Fargo. That Notice was served on the Debtor, New  
14 Boca, US Bank, and CNB. (ECF No. 972).

15 On January 16, 2018, US Bank filed a Verified Third-Party Claim to Improperly  
16 Garnished Property and Petition for Hearing ("US Bank Claim"). (ECF No. 973). Pursuant to  
17 NRS 31.070,<sup>11</sup> US Bank sought, *inter alia*, "an order declaring [US Bank] is the rightful and sole  
18 owner of the Rents or that it has a superior interest to that of [FATCO], and compelling the  
19 Constable to remit the entirety of any Rents taken to [US Bank]." US Bank Claim at 12:19-22.

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24 <sup>10</sup> The time to appeal the FATCO Fee Judgment expired on or about August 7, 2017.  
25 See FED.R.BANKR.P. 8002(a)(1).

26 <sup>11</sup> NRS 31.070 is described by the Nevada Supreme Court as "[t]he third-party claim  
27 statute [that] is designed to give a summary remedy to persons . . . who own property in which a  
28 judgment creditor can claim no interest." Elliott v. Denton & Denton, 860 P.2d 725, 726 n.1  
(Nev. 1993).

1 On January 17, 2018, US Bank filed an application seeking a temporary restraining order  
2 to prevent FATCO from garnishing the Rents payable to New Boca pending resolution of the US  
3 Bank Claim (“TRO Application”). (ECF No. 976).<sup>12</sup>

4 On January 25, 2018, orders were entered shortening time so that a hearing on the US  
5 Bank Claim and TRO Application could be held on February 6, 2018. (ECF Nos. 982 and 983).

6 On February 2, 2018, oppositions to both motions were filed by FATCO. (ECF Nos. 986  
7 and 987).

8 On February 5, 2018, replies were filed by US Bank. (ECF Nos. 988 and 989).

9 On February 6, 2018, both matters were heard. Counsel for the parties confirmed that  
10 two tenants of the shopping center had mailed January rent checks totaling approximately  
11 \$46,000 to the Constable, but that the checks had been sent by the Constable back to the tenants,  
12 in accordance with instructions from FATCO. As a result, no Rent checks claimed by US Bank  
13 had been garnished to satisfy the FATCO Fee Judgment.

14 On February 13, 2018, an order was entered denying the US Bank Claim. (ECF No.  
15 991). On the same date, a separate order was entered denying the TRO Application. (ECF No.  
16 992).

17 On March 1, 2018, the USDC entered an order affirming the RAS Fee Judgment with  
18 respect to the award against the Debtor, but reversing the RAS Fee Judgment with respect to  
19 New Boca (“USDC Order”). (2014 USECF No. 29).<sup>13</sup>

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22 <sup>12</sup> On January 18, 2018, an amended version of the TRO Application was filed. (ECF  
23 No. 977).

24 <sup>13</sup> All references to “2014 USECF No.” are to the documents filed in that USDC appeal.  
25 The USDC Order refers to the RAS Adversary as the “Real Property Proceeding.” In that order,  
26 District Judge Du observed: “The question here is not whether New Boca is liable for RAS’s  
27 attorney fees and costs – the Plan makes clear that it is – rather the question is whether the  
28 Bankruptcy Court had jurisdiction over New Boca in the Real Property Proceeding such that it  
could enter a judgment against New Boca.” USDC Order at 5:5-8 (emphasis added). Because  
New Boca is not a party to RAS Adversary, the USDC concluded that it was inappropriate to  
enter a judgment against New Boca in that proceeding.



1 On March 26, 2018, in the RAS Adversary, CNB filed a motion for partial summary  
2 judgment on the merits of various claims in light of the Reversal Order and Circuit Order (“CNB  
3 PSJ Motion”). (AECF No. 580).

4 On April 13, 2018, FATCO filed the instant Conversion Motion. (ECF No. 998 and  
5 1000). FATCO seeks a further order to enforce the provisions of the confirmed Plan requiring  
6 New Boca to satisfy the Debtor’s obligations to FATCO’s predecessor in interest, RAS. In the  
7 alternative, FATCO seeks to convert the Chapter 11 proceeding to Chapter 7.

8 On May 2, 2018 and May 7, 2018, an opposition to the Conversion Motion was filed by  
9 creditor The Black Mailbox, LLC (“TBM”), along with the supporting and corrected declaration  
10 of James W. Penguilly (“Penguilly Declaration”). (ECF Nos. 1007, 1008, and 1010).<sup>14</sup>

11 On May 14, 2018, Debtor filed its opposition to the CNB PSJ Motion. (AECF No. 593).

12 On May 24, 2018, CNB filed its reply in support of the CNB PSJ Motion. (AECF No.  
13 599).

14 On May 31, 2018, an opposition to the instant Conversion Motion was filed on behalf of  
15 the Debtor (“Opposition”). (ECF No. 1016).

16 On June 5, 2018, a hearing was conducted on the CNB PSJ Motion and the matter was  
17 taken under submission.

18 On June 7, 2018, a reply was filed by FATCO in support of its Conversion Motion  
19 (“FACTO Reply”). (ECF No. 1017).

20 On June 8, 2018, a joinder in the Conversion Motion was filed by American Contractors  
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23 <sup>14</sup> TBM apparently is a post-confirmation creditor of both the Debtor and New Boca. In  
24 December 2017, TBM entered into a stipulation with the Debtor and New Boca, for entry of a  
25 judgment against the Debtor and New Boca in the amount of \$429,058.91. A stipulated  
26 judgment in that amount was entered on or about December 22, 2017, by the Eighth Judicial  
27 District Court, Clark County, Nevada, in a civil action styled as The Black Mailbox, LLC v.  
28 Charleston Associates, LLC, et al., denominated Case No. A-16-732661-B. A further order was  
entered in that action on or about March 1, 2018, awarding attorney’s fees, costs and  
prejudgment interest to TBM in the total amount of \$167,096.14. See Exhibits “A” and “B” to  
Penguilly Declaration.



Indemnity Company (“ACIC”). (ECF No. 1019).<sup>15</sup>

On June 8, 2018, New Boca filed a joinder in the Opposition. (ECF No. 1023).

On June 13, 2018, an initial hearing was held on the Conversion Motion. The hearing was continued to July 19, 2018, however, on the suggestion from counsel representing both the Debtor and New Boca that funds to satisfy the judgments in favor of FATCO might be raised.

On July 19, 2018, oral arguments on the Conversion Motion were presented and the matter was taken under submission.

### DISCUSSION

As a result of the USDC Order, the RAS Fee Judgment awarding attorney’s fees and costs in the total amount of \$376,078.35 against the Debtor remains in effect and may be enforced against the Debtor. The rights under the RAS Fee Judgment were assigned to FATCO on May 19, 2017, see discussion at 3, supra, and were assigned by FATCO to ACIC on June 13, 2018. See note 8, supra.

In addition to the RAS Judgment, the FATCO Fee Judgment awarding attorney’s fees and costs in the total amount of \$370,330.99 against New Boca remains in effect and may be enforced against New Boca. The FATCO Fee Judgment was the result of the previous FATCO Enforcement Motion. See discussion at 5-6, supra. Unlike CNB, however, FATCO apparently has not been able to collect the RAS Fee Judgment from the Debtor, nor has it collected the FATCO Fee Judgment from New Boca. FATCO’s efforts to garnish the Rents generated by the shopping center were thwarted when US Bank objected to execution upon New Boca’s accounts at Wells Fargo. See discussion at 7, supra. See also Conversion Motion at 7:20 to 8:2.

Frustrated by its inability to collect the judgments, FATCO seeks to enforce Article V, Section C of the confirmed Plan, see Conversion Motion at 1:18-27 and 6:23 to 7:6, against both the Debtor and New Boca. The provision prohibits the payment of a “Disputed Claim” until the claim is allowed. Upon allowance of such a claim, the provision also provides that “the holder shall be paid the amount that such holder would have received had its Claim been an Allowed

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<sup>15</sup> On June 13, 2018, in the RA Southeast Adversary, FATCO filed a notice stating that its rights under the RAS Fee Judgment had been assigned to ACIC. (AECF No. 612).

Claim on the Effective Date.” Id. at 7:5-6, quoting Plan, Art. V., C. Because New Boca has assumed the liabilities of the Debtor under Article VII., C. of the confirmed Plan, FATCO seeks “an order that the Debtor and the Reorganized Debtor pay the fees,” see Conversion Motion at 3:25, awarded under the RAS Fee Judgment as well as the FATCO Fee Judgment. Id. at 4:5-15.

It appears, however, that Article V., C. of the confirmed Plan does not even apply to either of the judgments. Under the Plan, a “Disputed Claim” is defined to be “[a] filed Proof of Claim as to which an objection has been filed by any party in interest or a Claim that is listed in the Debtor’s schedules as disputed, unliquidated or contingent.” Plan, Art. II., A., 21. A review of the record reveals that RAS has never filed a proof of claim in the instant Chapter 11 proceeding, nor was RAS ever listed on the Debtor’s schedules. The obvious reason was alleged in the Complaint filed by the Debtor in the RAS Adversary: CNB did not sell the Undeveloped Land to RAS until September 24, 2010, well after the Debtor commenced the instant Chapter 11 proceeding. See Complaint at ¶ 23. As a result, RAS could not file a proof of claim, nor would it be scheduled as a prepetition creditor. Under these circumstances, RAS did not have a “Disputed Claim” that would be subject to Article V., Section C. of the confirmed Plan.

A confirmed Chapter 11 plan is a contract that binds all parties whose rights are addressed by the plan. See 11 U.S.C. § 1141(a) (“...the provisions of a confirmed plan bind the debtor,...any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.”). (Emphasis added.) See generally Hillis Motors, Inc. v. Haw. Auto. Dealers’ Ass’n, 997 F.2d 581, 588 (9th Cir. 1993)(“A reorganization plan resembles a consent decree and therefore, should be construed basically as a contract.”); U.S. v. Villalobos (In re Villalobos), 2014 WL 930495, at \*11 (B.A.P. 9th Cir. Mar. 10, 2014). Because the obligations under a confirmed plan supplant the prior debts of the Chapter 11 debtor, enforcement of the confirmed plan is not required: the unpaid creditor can sue to enforce the new obligation under non-bankruptcy law. See, e.g., In re Boise Gun Co., Inc., 2018 WL 400719, at \*5 (Bankr. D. Idaho Jan. 12, 2018) (denying unpaid creditor’s motion to

1 enforce Chapter 11 plan without prejudice to creditor seeking to enforce plan obligations through  
2 “appropriate non-bankruptcy law processes and remedies.”).

3 In the instant case, New Boca has a contractual obligation under the confirmed Plan to  
4 pay the amounts owed by the Debtor arising out of the RAS Adversary, including the RAS Fee  
5 Judgment and the FATCO Fee Judgment. See note 13, supra. New Boca conducts business in  
6 Nevada, maintains bank accounts in Nevada,<sup>16</sup> owns real property in Nevada, and already has  
7 consented to entry of judgments and orders entered by courts in Nevada. See discussion at note  
8 14, supra. Thus, while FATCO’s request to enforce Article V., C. of the confirmed Plan is  
9 without merit, nothing prevents FATCO or ACIC from commencing the appropriate civil action  
10 in state or federal court to enforce New Boca’s contractual obligations arising under Article IX.,  
11 I, and Article VII., C. of the confirmed Plan. As presented, FATCO’s present request to enforce  
12 Article V., C., of the confirmed Plan, however, must be denied without prejudice.<sup>17</sup>

13 As an “alternative” to an order compelling immediate payment by the Debtor and New  
14 Boca, FATCO seeks to convert the Chapter 11 to Chapter 7 liquidation under Section 1112(b).  
15 See Conversion Motion at 8:4-15. Section 1112(b)(1) provides that “on request of a party in  
16 interest...the court shall convert a case under this chapter to a case under chapter 7 or dismiss a  
17 case under this chapter, whichever is in the best interests of creditors and the estate, for cause  
18 unless the court determines that the appointment under section 1104(a) of a trustee or examiner  
19 is in the best interests of creditors and the estate.” 11 U.S.C. § 1112(b)(1). FATCO argues that  
20 the failure of the Debtor and New Boca to pay the fee judgments constitutes a “material

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22 <sup>16</sup> See Exhibits “1-A” and “1-B” to Exhibit “C” attached to TRO Application.

23 <sup>17</sup> Because the FATCO Fee Judgment was not appealed and not stayed, it is final for  
24 purposes of execution and enforcement. In view of the USDC Order, the attorney’s fees and  
25 costs awarded against New Boca by the RAS Fee Judgment may be sought by obtaining a new  
26 judgment in a separate civil action, or by obtaining a properly requested order under the  
27 confirmed Plan. A monetary judgment in a civil action may be enforced by a writ of execution  
28 under applicable law. Likewise, an order resulting from a contested matter in bankruptcy may be  
enforced through the execution procedure of the particular state. See Fed.R.Bankr.P. 9014(c)  
(Bankruptcy Rule 7069 applies in contested matters); Fed.R.Bankr.P. 7069 (Civil Rule 69  
applies in adversary proceedings); Fed.R.Civ.P. 69(a)(1) (a money judgment is enforced by  
execution under the execution procedure of the state where the court is located).

1 default...with respect to a confirmed plan” constituting “cause” under Section 1112(b)(4)(N).  
2 Upon conversion to Chapter 7, FATCO maintains that a Chapter 7 bankruptcy trustee could  
3 administer the property of New Boca for the benefit of unsecured creditors that have not been  
4 paid through the Plan. See Conversion Motion at 9:6-18. It therefore argues that conversion is  
5 in the best interests of creditors under Section 1112(b)(1). Id. at 9:19 to 10:2.

6 Debtor maintains that conversion would result in no assets “revesting” in the Debtor’s  
7 bankruptcy estate because they were sold to New Boca. See Opposition at 10:20 to 12:4. While  
8 New Boca is defined under the Plan to be the “Reorganized Entity,” the order confirming the  
9 Plan also provides that after the Reorganized Entity is formed, it “shall continue to exist after the  
10 Effective Date as a separate corporate entity.” Plan Confirmation Order at II, 6. Accordingly,  
11 Debtor maintains that New Boca has never been the Chapter 11 debtor. See Opposition at 2:1-5  
12 and 6:1-4. Because all of the Debtor’s assets were sold to New Boca under the confirmed Plan,  
13 Debtor argues that it has no assets that would be part of the bankruptcy estate upon conversion of  
14 the Chapter 11 proceeding to Chapter 7. As a result, Debtor maintains that there would be no  
15 property for a Chapter 7 trustee to administer and no resulting benefit to creditors. Id. at 12:4-12.

16 Under the confirmed Plan, the Debtor was obligated to distribute only limited estate  
17 assets to creditors. The Plan contained six classes of claims and interests. See Plan, Art., IV.,  
18 B., 1. to 6. For the secured lender Class 1, the Debtor was required on the Plan effective date to  
19 apply certain “Borrower Property Funds” to certain tenant improvement and leasing commission  
20 costs, to distributions to unsecured claims in Class 3, and to allowed professional fees and  
21 expenses incurred during the Chapter 11. See Plan, Art. IV., B., 1., (f). For the remaining  
22 Classes 2, 4, 5, and 6, the Plan contains no requirement that the Debtor apply or reserve any  
23 assets to satisfy any obligations in those Classes. As previously noted, all the Debtor’s other  
24 assets were sold to New Boca. Because all of the conditions to the effective date of the Plan  
25 have occurred, see Plan, Art. VIII., there is no apparent dispute that the Borrower Property Funds  
26 were distributed and the Plan became effective on October 17, 2012.<sup>18</sup> Unlike circumstances

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27 <sup>18</sup> After the Plan Confirmation Order was entered on September 28, 2012, monthly  
28 operating reports (“MOR”) continued to be filed as well quarterly post-confirmation reports  
 (“QR”). Even though the Plan does not refer to a “revested debtor,” the QRs are filed on behalf

1 where undistributed estate assets remain available post-confirmation, see In re Smith, 201 B.R.  
 2 267 (D. Nev. 1996), aff'd, 141 F.3d 1179 (9th Cir. 1998), cert. denied, 525 U.S. 1018 (1998),  
 3 conversion of the instant Chapter 11 case would not provide a Chapter 7 trustee with resources to  
 4 “better fulfill the plan goals.” See Conversion Motion at 9:26.<sup>19</sup>

5 At this juncture, conversion of the reopened Chapter 11 case will not result in any of the  
 6 assets of the prior Chapter 11 bankruptcy estate becoming property of a Chapter 7 estate because  
 7 the language of the Plan does not contain a specific provision for continued liquidation and  
 8 distribution of the Debtor’s assets.<sup>20</sup> Compare In re Consolidated Pioneer Mortg. Entities, 264  
 9 F.3d 803, 808 (9th Cir. 2001)(liquidating entity created to distribute proceeds to investors of the  
 10 Chapter 11 entities); Hillis Motors, Inc. v. Haw. Auto. Dealers’ Ass’n, 997 F.2d at 589-590 (plan  
 11 confirmation order delayed discharge of corporate entity and Chapter 11 trustee continued to  
 12 manage reorganized debtor’s affairs.). Because confirmation of the Plan vested all property of  
 13 the Chapter 11 estate in New Boca under Section 1141(b), and no exception was included in the  
 14

15 of “[t]he revested debtor.” (ECF Nos. 337, 880, and 881). The MORs for September 2012,  
 16 October 2012, and November 2012 (Delaware ECF Nos. 807, 845, and 849), as well as the  
 17 MORs for December 2012 and January 2013 (Nevada ECF Nos. 146 and 158), consist of two  
 18 parts: Part I for the Debtor, and Part II for New Boca. The MORs for December 2012 and  
 19 January 2013 state that the Plan became effective on October 17, 2012. The MORs and QRs  
 indicate that the Debtor apparently completed the distributions to the creditor Classes that it was  
 required to make under the confirmed Plan.

20 <sup>19</sup> FATCO argues that the Debtor remains the owner of the assets sold to New Boca under  
 21 Article VII, C., of the confirmed Plan. See FATCO Reply at 10:4-16. FATCO highlights the  
 22 last sentence of that provision, which states as follows: “In the event of any legal, equitable or  
 23 statutory prohibition or other impediment of any kind or nature whatsoever to the transfer of  
 24 assets and assumption of liabilities described above, the Debtor shall remain owner of any such  
 25 assets and oblige under any such liabilities and shall act as nominee of New Boca in connection  
 26 with the post-Effective Date exercise of rights, claims, defenses, counterclaims and other rights  
 of setoff and recoupment relating to any such assets or liabilities.” FATCO’s argument,  
 however, ignores the impact of the language underscored above: the Debtor remains the owner  
 of the assets only in the event New Boca was prohibited from acquiring the Debtor’s assets.  
 FATCO has identified no such prohibition or impediment.

27 <sup>20</sup> Indeed, instead of estate property vesting in the Debtor upon confirmation, the Plan  
 28 provides for the Debtor’s assets to vest in New Boca. See Plan, Art. IX., A. and Plan  
 Confirmation Order at II., 6.

1 Plan or the Plan Confirmation Order, conversion to Chapter 7 will produce no distribution for  
2 creditors.

3 Conversion of this proceeding to Chapter 7 also will not vacate the Chapter 11 discharge  
4 previously obtained by the Debtor. Moreover, a separate proceeding to revoke the Debtor's  
5 discharge under FRCP 60(d)(3) is not before the court. Compare Levander v. Proper (In re  
6 Levander), 180 F. 3d 1114 (9th Cir. 1999)(bankruptcy court may amend prior order based on  
7 fraud on the court); Pryor v. ITEC Fin., Inc. (In re Pryor), 2015 WL 1530097, at \*5 (B.A.P. 9th  
8 Cir. Feb. 19, 2015)("The bankruptcy court only ruled that Pryor untimely filed his Motion to Set  
9 Aside Judgment. As a result, the court incorrectly applied a standard of law as to his claim for  
10 relief under Civil Rule 60(d)(3). Motions to set aside judgments for 'fraud on the court' have no  
11 time limit.") and Pryor v. ITEC Fin., Inc. (In re Pryor), 2016 WL 400119 at \*4-5 (B.A.P. 9th Cir.  
12 Jan. 29, 2016) (affirming bankruptcy court's denial of Rule 60(d)(3) motion on remand).

13 Because conversion to Chapter 7 will not produce assets for distribution by a Chapter 7  
14 trustee, nor will conversion vacate the Chapter 11 discharge previously received by the Debtor,  
15 FATCO has not demonstrated that conversion is warranted in this proceeding.

16 **IT IS THEREFORE ORDERED** that Motion to Enforce Plan by Requiring Payment of  
17 Plan Payments, or in the Alternative, Conversion of Case to Chapter 7, Docket Nos. 998 and  
18 1000, be, and the same hereby is, **DENIED without prejudice**.

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