Dated: January 11, 2017
The following is SO ORDERED:

David S. Kennedy
UNITED STATES CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re	
William H. Thomas, Jr.,	**Case No. 16-27850-DSK**
Debtor.	**Chapter 11**
SSN: xxx – xx – 8251	

MEMORANDUM AND ORDER RE "DEBTOR'S MOTION TO ALTER OR AMEND COURT'S ORDER LIFTING AUTOMATIC STAY AS TO CLEAR CHANNEL, INC. AND TENNISON BROTHERS, INC." COMBINED WITH RELATED ORDERS AND NOTICE OF THE ENTRY THEREOF

INTRODUCTION

This core proceeding under 28 U.S.C. § 157(b)(2)(A) and (G) arises out of the "Debtor's Motion to Alter or Amend Court's Order Lifting Automatic Stay as to Clear Channel, Inc. and Tennison Brothers, Inc." ("Motion") filed on December 13, 2016, by Michael P. Coury, Esquire ("Mr. Coury"), on behalf of the Chapter 11 debtor, Mr. William H. Thomas, Jr. ("Debtor" or "Mr.

Thomas"). Mr. Coury is the current Chapter 11 attorney of record for Mr. Thomas. The Motion resulted in two (2) written objections or responses thereto. Robert L. J. Spence, Jr., Esquire ("Mr. Spence") and Kristina A. Woo, Esquire ("Ms. Woo"), are attorneys for the creditor, Clear Channel Outdoor, Inc. ("Clear Channel"), and Kathy Baker Tennison, Esquire ("Ms. Tennison") and Stuart B. Breakstone, Esquire ("Mr. Breakstone"), are attorneys for the creditor, Tennison Brothers, Inc. ("Tennison Brothers"). All the immediate parties in interest participated at the hearing on the Motion that was held in open court on January 3, 2017. The parties' attorneys provided thoughtful oral statements on behalf of the position of each of their respective clients.

The ultimate question for judicial determination here arises out of a FED. R. BANKR. P. 9023 motion filed by Mr. Thomas. Query: Whether this Court clearly erred creating a manifest injustice by granting Clear Channel's prior motion for relief from the § 362(a) automatic stay under the Bankruptcy Code and Tennison Brother's motion for joinder thereto on November 28, 2016, such that the order should be altered or amended, under the particular facts and circumstances and applicable law of this specific case.

As noted earlier, this is a core proceeding under 28 U.S.C. § 157(b)(2)(A) & (G). The Court has the statutory and constitutional authority to hear and determine this matter subject to the statutory appellate provisions of 28 U.S.C. § 158. The following shall constitute this Court's findings of fact and conclusions of law in accordance with Rule 7052 of the Federal Rules of Bankruptcy Procedure. FED. R. BANKR. P. 7052 (2016).

BACKGROUND INFORMATION AND PROCEDURAL HISTORY

A discussion of the relevant pre- and postpetition background facts and procedural history of this case may be helpful here and can be summarized as follows. Debtor, Mr. Thomas, an attorney, apparently is a resident of the State of Tennessee and also a resident of the State of

Florida, who, among other things, conducts business in Memphis, Tennessee. Clear Channel is a Delaware corporation with its principal address located in San Antonio, Texas; however, at all relevant times here, Clear Channel owned and/or operated billboard advertising structures in Shelby County, Tennessee. Tennison Brothers is a corporation with its principal office located in Memphis. Clear Channel and Tennison Brothers are prepetition Tennessee judgment creditors of Mr. Thomas.

John E. Venn, Jr., Esquire ("Mr. Venn"), former Florida bankruptcy attorney of record for Mr. Thomas, filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on behalf of Mr. Thomas on June 6, 2016, in the Bankruptcy Court for the Northern District of Florida. After several months of litigation, Mr. Spence, acting on behalf of Clear Channel, filed a "Motion to Transfer Case to Another District," [Dkt. # 58]; and Mr. Thomas filed a "Response" thereto. [Dkt. # 77]. After notice and a hearing, the Bankruptcy Court for the Northern District of Florida entered an "Order Granting Motion to Transfer Bankruptcy Case to United States Bankruptcy Court, Western District of Tennessee, Western Division" on August 11, 2016, reasoning that the Western District of Tennessee was a more convenient forum and also that such transfer was in the interest of justice based on the location of the creditors. [Dkt. # 86]. *See* 28 U.S.C. § 1412; *see also* FED R. BANKR. P. 1014(a). The case was officially transferred to this Bankruptcy Court, on August 29, 2016. On August 30, 2016, Mr. Thomas filed an "Application to Employ Michael P. Coury and Glankler Brown, PLLC, as Attorneys for Debtor," [Dkt. # 91], which was granted by this Court after notice and a hearing on September 27, 2016. [Dkt. # 128]. *See* 11 U.S.C. § 327(a) (2016); *see also* FED. R. BANKR. P. 2014(a) (2016). Mr. Venn subsequently filed a "Motion to Withdraw as Attorney" on October 11, 2016, [Dkt. # 150], and this Court granted his motion on November 21, 2016. [Dkt. # 183].

On October 28, 2016, Clear Channel filed a "Motion and Memorandum of Clear Channel Outdoor, Inc. for Relief from Automatic Stay to Allow Pending Appeal to the Tennessee Court of Appeals to Proceed to Finality," [Dkt. # 164]; and on October 31, 2016, Tennison Brothers filed a "Notice of Joinder." [Dkt. # 165]. On November 17, 2016, Mr. Thomas filed "Debtor's Objection to Motion of Clear Channel Outdoor, Inc. for Relief from Automatic Stay and Joinder of Tennison Brothers, Inc. in Motion," [Dkt. # 174], and on November 18, 2016, Clear Channel filed a Reply. [Dkt. # 176]. This contested matter pursuant to FED. R. BANKR. P. 9014 came on to be heard before this Court on November 23, 2016; and a combined Order granting both Clear Channel's Motion for Relief from the Automatic Stay and Tennison Brothers' Notice of Joinder was entered on November 28, 2016, after notice and opportunity for a hearing. [Dkt. # 190].

On December 12, 2016, Mr. Thomas filed the "Debtor's Motion to Alter or Amend Court's Order Lifting Automatic Stay as to Clear Channel, Inc. and Tennison Brothers, Inc.," which is the matter now before this Court. [Dkt. # 197]. On December 27, 2016, Clear Channel filed a Response, [Dkt. # 201], and Tennison Brothers filed an Objection. [Dkt. # 202]. A Reply was filed by Mr. Thomas on December 30, 2016. [Dkt. #204].

Clear Channel and Tennison Brothers have both filed proofs of claim in this Chapter 11 case based upon a judgment rendered by the Tennessee Chancery Court on February 4, 2016. *See* Proof of Claim Nos. 4 and 7. However, Mr. Thomas disputed the claims of Clear Channel and Tennison Brothers in his Schedules. *See* [Dkt. # 39, Sch. E]. It is expressly noted that Clear Channel and Tennison Brothers also have filed adversary proceedings before this Court under 11 U.S.C. § 523(c) seeking to determine the dischargeability of their claims based on the prepetition Chancery Court judgment. *See* Adv. Proc., Nos. 16-00260 and 16-00261 herein.

Pending State Court Civil Actions

On July 16, 2008, Tennison Brothers filed its "Original Complaint for Damages in the Chancery Court of Shelby County, Tennessee," [Dkt. # 123, Ex. 1]; and on December 4, 2009, it also filed its "Second Amended Complaint" ("Tennison Chancery Court Complaint"). [Dkt. # 123, Ex. 2]. The Tennison Chancery Court Complaint alleged that Mr. Thomas constructed an unpermitted and illegal billboard without obtaining a permit under the Tennessee Billboard Act. TENN. CODE ANN. § 54-21-101, *et seq.* ("the Billboard Act"); *see also* TENN. CODE ANN. §§ 54-21-104, 54-21-105, and 54-21-112. The Tennison Chancery Court Complaint states that the "illegally constructed billboard interferes with the construction of the billboard on the Plaintiff's property," and more specifically that Mr. Thomas intentionally interfered with business relationships, induced breach of contract, and created a public nuisance by failing to remove an "illegal" and "unpermitted" billboard. [Dkt. # 123, Ex. 2 at ¶¶ 15, 19-22, 28-29, and 33-35].

On September 8, 2008, Clear Channel filed a Cross-Complaint against Mr. Thomas alleging that he intentionally interfered with Clear Channel's contract with Tennison Brothers by constructing a billboard not permitted under the Billboard Act. [Dkt. 122, Ex. 1 at ¶¶ 19-25, 27, 29-36, and 38-41]. In its Cross-Complaint, Clear Channel alleged that Mr. Thomas "failed to obtain a lawful permit for the erection of the billboard", that his billboard was "illegal" and that his "illegally constructing a billboard on … was tortious (sic) and designed to cause harm to the business relationship" between Clear Channel and Tennison Brothers. [Dkt. # 122, Ex. 1 at ¶¶ 11, 16, and 34].

On November 20, 2009, the Chancery Court entered a default judgment against Mr. Thomas for his contumacious conduct in refusing to respond or to participate in the discovery

process despite having been ordered to do so.[1] [Dkt. # 122, Ex. 2]. On June 4, 2010, the Chancery Court imposed an additional sanction on Mr. Thomas for his failure to appear at his scheduled deposition and his refusal to produce discovery documents. *See* [Dkt. # 122, Ex. 3]. As a result of Mr. Thomas' continued contumacious conduct, the Chancery Court prohibited Mr. Thomas from "present[ing] proof related to damages or in defense thereto." *See Id*.

On August 6, 2014, the Tennessee Court of Appeals for the Western Section at Jackson ("Court of Appeals") adjudicated that Clear Channel and Tennison Brothers were entitled to damages against Mr. Thomas for his intentional acts. *See Tennison Brothers, Inc. v. William H. Thomas, Jr.*, 2014 WL 3845122 (Aug. 6, 2014); *see also* [Dkt. # 122, Ex. 4]. The Court of Appeals remanded the case to the Chancery Court solely for a determination of appropriate amount of damages in favor of Clear Channel and Tennison Brothers. *See* Docket No. W2013-01835-COA-R3-CV ("First Appeal"). Mr. Thomas did not appeal the Tennessee Court of Appeals' decision.

After the case was remanded by the Court of Appeals, the Chancery Court entered an "Order of Reference to *Determine Amount of Damages and Financial Status* of William H. Thomas, Jr.," [Dkt. # 122, Ex. 5], and on June 2, 2015, the Special Master conducted a hearing with all parties present to determine Clear Channel's and Tennison Brother's damages and Mr. Thomas' financial status. On August 14, 2015, the Special Master issued his report, and determined that Mr. Thomas' willful and malicious acts had damaged Clear Channel in the amount of $3,906,000.00 and Tennison Brothers in the amount of $1,094,670.94. *See* [Dkt. # 122, Ex. 6]. On October 29, 2015, the Chancery Court conducted a hearing on the Special Master's Report.

[1] Default judgments may have dire consequences. *See, e.g., Bay Area Factors v. Calvert* (*In re Calvert*), 105 F.3d 315, 318 (6th Cir. 1997); *see also H.G. Hill Realty Co., L.L.C. v. Re/Max Carriage House, Inc.*, 428 S.W.3d 23, 30 (Tenn. Ct. App. 2013); *Clark v. Sputniks, LLC*, 368 S.W.3d 431 (Tenn. 2012); *Patterson v. Rockwell Int'l*, 665 S.W.2d 96, 101 (Tenn. 1984), among others.

After the hearing on the Special Master's Report, the Chancery Court conducted its own independent review of the damage proceedings before the Special Master and reviewed the proposed findings of fact and conclusions of law submitted by the parties. On January 29, 2016, the Chancery Court adopted the Report of the Special Master. *See* [Dkt. # 122, Ex. 7]. On February 4, 2016, while still on remand, the Chancery Court entered a judgment in favor of Clear Channel in the amount of $3,906,000.00, and in favor of Tennison Brothers in the amount of $1,094,670.94. *See* [Dkt. # 122, Ex. 8]; *see also* [Dkt. #123, Ex. 3]. On March 22, 2016, the Chancery Court entered an order denying Mr. Thomas' Rule 59 motion.

On April 15, 2016, Mr. Thomas appealed the *Final Chancery Court Judgment* to the Tennessee Court of Appeals. *See* Docket No. W2016-00795-COA-R3-CV ("Second Appeal"). The scope of the Second Appeal is limited to appellate review of three (3) issues: (1) whether the Chancery Court appropriately calculated the amount of damages due Clear Channel and Tennison Brothers against Mr. Thomas; (2) whether the Chancery Court's February 2016 Order is a final order; and (3) whether the factual allegations of the Complaint sufficiently state facts which would create liability to Mr. Thomas. However, after filing the notice of appeal, on June 3, 2016, Mr. Thomas submitted a *Suggestion of Bankruptcy* to the Court of Appeals; and on June 7, 2016, the Court of Appeals entered a stay, which remains in effect. Subsequently, this Court entered an Order granting relief from the § 362(a) automatic stay to allow the non-bankruptcy appeals to proceed to finality. It is this Order that resulted in Mr. Thomas filing the instant Rule 9023 motion to alter or amend.

Bankruptcy Adversary Proceedings

By way of further background information, it is mentioned that Clear Channel and Tennison Brothers entered into a lease agreement, which was effective on August 19, 2004,

wherein Clear Channel leased certain space from Tennison Brothers for an outdoor advertising structure. The rent was to commence on the date the construction was completed. The bankruptcy adversary proceedings, No. 16-00260 for Clear Channel and No. 16-00261 for Tennison Brothers, arise out of the Chancery Court's finding that Mr. Thomas acted "willfully and maliciously" by intentionally interfering with the parties' business relationship causing a breach of contract. Clear Channel and Tennison Brothers both assert that the Chancery Court judgment is a non-dischargeable debt under 11 U.S.C. §523(a)(6). *See Grogan v. Garner*, 111 S. Ct. 654 (1991). Mr. Thomas has filed an answer in both adversary proceedings arguing, *inter alia*, that the Chancery Court judgment by which the above-named parties rely is not final in this Court because it is currently on appeal in the Tennessee Court of Appeals. As noted above, the Court of Appeals has imposed a stay that remains in effect due to Mr. Thomas' filing of this Chapter 11 case. 11 U.S.C. § 362(a) (2016).

Pending Federal District Court Civil Action

On or about August 19, 2004, Clear Channel entered into a lease agreement ("Lease") with Tennison Brothers for the purpose of constructing an outdoor advertising structure ("Tennison Billboard") on Tennison Brothers' property at Log Mile 2.40 on I-40 East in Shelby County. On August 27, 2004, Clear Channel filed an application with the Tennessee Department of Transportation ("TDOT") seeking permits to construct the Tennison Billboard, and on September 8, 2004, Clear Channel's application to TDOT was approved. However, on August 31, 2004, Mr. Thomas applied to TDOT to erect a billboard on the same side of the highway and less than 1000 feet away from the billboard TDOT approved for Clear Channel on September 8, 2004. TDOT denied Mr. Thomas' application due to his request being in violation of TDOT Rule 1680-2-3-

.03(1)(a)4(i)(I)[2] and TDOT's prior approval granted to Clear Channel. On December 1, 2004, Mr. Thomas appealed the denial of his application to an Administrative Law Judge. As a result of the appeal filed by Mr. Thomas, TDOT voided the permit it previously issued to Clear Channel to erect the Tennison Billboard.

During the pendency of Mr. Thomas' TDOT Appeal, Mr. Thomas constructed the billboard ("Thomas Billboard") without first receiving permission from the State. On November 16, 2005, TDOT first discovered the Thomas Billboard, which had been constructed without State permits.

On March 5, 2007, Administrative Law Judge, the Honorable Thomas G. Stovall, issued a ruling that TDOT had properly issued to Clear Channel permits to construct the Tennison Billboard and that the Thomas Billboard was illegally constructed and should be immediately removed. After Judge Stovall issued his ruling on March 5, 2007, Mr. Thomas refused to remove the Thomas Billboard. Mr. Thomas then appealed the Order to the Honorable Gerald F. Nicely, the Commissioner of TDOT. [Case No. 22.01-063021J]. On July 31, 2007, the Commissioner of TDOT issued a Final Order upholding the Order issued by the Administrative Law Judge and held that the Thomas Billboard had been illegally constructed and should be immediately removed. After the Commissioner of TDOT issued his ruling, Mr. Thomas nonetheless refused to remove the Thomas Billboard.

On December 17, 2013, Mr. Thomas filed suit against the TDOT asserting several causes of action including the challenging the constitutionality of the Tennessee Billboard Act on First Amendment grounds (the "Federal Suit"). *See William H. Thomas, Jr. v. John Schroer, John Reinbold, Patti Bowlan, et al.*, 2:13-cv-02185-JPM-cgc, (W.D. Tenn.); *see also* [Dkt. # 197, Ex.

[2] TDOT Rule 1680-2-3-.03(1)(a)(4)(i)(I) provides that "no two structures shall be spaced less than 1000 feet apart on the same side of the highway."

A]. The Federal Suit is currently pending before the Honorable Jon P. McCalla, United States District Court Judge for the Western District of Tennessee.

While the Federal Suit was pending, TDOT attempted in 2015 to remove one of Mr. Thomas' billboards that was built without a TDOT billboard permit. *See Thomas v. Schroer*, 127 F. Supp. 3d 864 (W.D. Tenn. 2015). Mr. Thomas then sought and obtained a "Temporary Restraining Order" that later became an "Order Granting Preliminary Injunction," which was entered in the United States District Court on September 8, 2015. *Id* at 878. The Preliminary Injunction prohibited TDOT from removing Mr. Thomas' billboard. *Id.*

The Federal Suit was tried before Judge McCalla in September 2016; and post-trial briefing is substantially complete. The matter is presently under advisement.

DISCUSSION

Section 362 of the Bankruptcy Code provides for an automatic stay of most civil actions against the debtor upon the filing of a bankruptcy petition under any chapter of the Bankruptcy Code. *See* 11 U.S.C. § 362(a) (2016). With narrowly defined exceptions set forth in § 362(b), the automatic stay generally provides for a broad stay of litigation, lien enforcement, and other actions against the debtor that are attempts to enforce or collect prepetition claims. The automatic stay does not affect substantive rights; it merely delays the enforcement of such rights. In addition, it also stays a wide range of actions, whether formal or informal, that would affect or interfere with property of the estate, property of the debtor, or property in the custody of the estate under 11 U.S.C. § 541. *See*, for example and among others, *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 503 (1986).

The § 362(a) automatic stay applies to all "entities." The Bankruptcy Code defines "entity" broadly, and includes a "person, estate, trust, governmental unit, and United States trustee." 11

U.S.C. § 101(15) (2016). Although the stay protects the debtor against a variety of actions, it does not protect separate legal entities, such as corporate directors, officers or affiliates, partners of the debtor, or co-defendants in pending litigation. *See* 11 U.S.C. § 524(e) (2016); *Patton v. Bearden*, 8 F.3d 343, 348 (6th Cir. 1993) (finding that the automatic stay did not protect a general partner); *Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1197 (6th Cir. 1983). Once the § 362(a) automatic stay is triggered, it "continues until the bankruptcy case is closed, dismissed, or discharge is granted or denied, or until the bankruptcy court grants some relief from the stay." *Pope v. Manville Forest Products Corp.*, 778 F.2d 238, 239 (5th Cir. 1985) (citations omitted).

To obtain relief from the automatic stay, a creditor must file a motion under 11 U.S.C. § 362(d) and FED. R. BANKR. P. 9014 requesting that such relief be granted. *See* 11 U.S.C. § 362(d) (2016) and FED. R. BANKR. P. 9014 (2016). Section 362(d) provides that the court "shall" grant relief, for example, by terminating, annulling, modifying or conditioning the stay:

> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; (2) with respect to a stay of an act against property under subsection (a) of this section if—(A) the debtor does not have equity in such property; and (B) such property is not necessary to an effective reorganization; (3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief []…

11 U.S.C. § 362(d) (2016). If a party claiming to be a creditor is seeking relief from the automatic stay, there needs to be a showing that the party has a "claim" against the debtor or property of the estate. A "claim" is defined in section 101 of the Bankruptcy Code to be a "right to payment" or a "right to an equitable remedy for breach of performance" that would give rise to a right to payment from the debtor or the debtor's estate. 11 U.S.C. § 101(5) (2016). The party requesting relief from the automatic stay "has the burden of proof on the issue of the debtor's equity in

property; and the party opposing such relief has the burden of proof on all other issues." 11 U.S.C. § 362(g) (2016).

Underlying Purpose of Automatic Stay Under 11 U.S.C. § 362(a)

The automatic stay under 11 U.S.C. § 362(a) serves a two-fold purpose in bankruptcy: (1) to afford the debtor a "breathing spell" by halting the collection process, and (2) to protect creditors by preventing one creditor from obtaining payment of its claims to the detriment of other creditors so as to permit orderly resolution of all claims. *Webb Mtn, LLC v. Exec. Realty P'ship, L.P.* (*In re Webb Mtn, LLC*), 414 B.R. 308, 335 (Bankr. E.D. Tenn. 2009); *see also Mar. Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1204 (3d Cir. 1991*); Chao v. Hosp. Staffing Services, Inc.*, 270 F.3d 374, 382-83 (6th Cir. 2001) ("The stay helps . . . prevent[ ] a 'chaotic and uncontrollable scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts.'" (quoting *Holtkamp v. Littlefield* (*In re Holtkamp*), 669 F.2d 505, 508 (7th Cir. 1982))) (internal quotation marks omitted) (citations omitted).

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collections efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 3 COLLIER ON BANKRUPTCY ¶ 362.03, p. 362-23 n.6 (16th ed. 2016); S. REP. NO. 989, 95th Cong., 2d Sess. 54-55 (1978), *reprinted in* 3 COLLIER ON BANKRUPTCY ¶ 362.03, p. 362-23 n.6 (16th ed. 2016).

Many debtors are driven to bankruptcy because of insurmountable debts and the nuisance of constant communication attempts and lawsuits by creditors. "Consistent with [this] goal of insulating the debtor to provide financial stability, '[t]he automatic stay is designed to protect the debtor from judgments and the consequences thereof, such as the attachment of a judgment lien to

the debtor's property.'" *Evelyn NYE v. Bayer Cropscience, Inc.*, 347 S.W.3d 686, 695 (Tenn. 2011) (citing *Kliefoth v. Fields*, 828 S.W.2d 714, 716 (Mo. Ct. App. 1992)).

In this case, Mr. Thomas has had sufficient time since the filing of this voluntary Chapter 11 case to breathe and act freely without being harassed by creditors. The original 120-day exclusivity period to file a plan of reorganization expired on September 30, 2016, and the original 180-day period for solicitation of acceptances of the plan has likewise expired. *See* [Dkt. # 115]. However, after being transferred to this Court, from the Florida Bankruptcy Court, Mr. Thomas was allotted an extension of the 120-day period, which expires on January 28, 2017. *See* [Dkt. # 178]. In addition, Mr. Thomas requested that the 180-day period for obtaining acceptances of the plan be extended for an additional 120 days; yet this Court only extended the 180-day period for an additional 60 days making the deadline March 29, 2017. *See Id.* As of today, Mr. Thomas has not filed a disclosure statement, a plan of reorganization, or a summary of a plan. As a practical matter, the appeals of Clear Channel and Tennison Brothers likely must become final before any substantive and meaningful action may proceed in this Court. The reality is that until these pending appeals are deemed final, it will be very difficult, if not impossible, for Mr. Thomas to file a meaningful plan and/or move forward with his Chapter 11 case at all. The sooner these appeals are finalized, the sooner a realistic plan, if one exists, can be formalized and filed with this Court.

With regards to the second purpose, the automatic stay also provides protection for creditors. H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977). Without the automatic stay, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and the detriment of other creditors. *Mari. Elec. Co.*, 959 F.2d at 1204; *see also Martin-Trigona v. Champion Fed. Sav. & Loan Ass'n*, 892 F.2d 575, 577 (7h Cir. 1989) (citations omitted). Bankruptcy is designed to provide an orderly

liquidation procedure under which all creditors are treated equally, or in a reorganization, equal distribution based on which class within each creditor falls. *Lincoln Sav. Bank v. Suffolk Cty. Treasurer* (*In re Parr Meadows Racing Ass'n, Inc.*), 880 F.2d 1540, 1545 (2d Cir. 1989) (*cert. denied*). "A race of diligence by creditors for the debtor's assets prevents that." *Fed. Land Bank of Louisville v. Glenn* (*In re Glenn*), 760 F.2d 1428, 1437 (6th Cir. 1985) (citation omitted).

In this case, this Court previously and discretionarily found that sufficient "cause" existed to allow Clear Channel and Tennison Brothers relief from the automatic stay in order for these appeals to be finalized. These claims need to be liquidated for voting purposes on the plan and possible later distribution under a confirmed plan. Both parties are creditors of Mr. Thomas and have filed proofs of claims in this case as well as separate § 523(c) dischargeability adversary proceedings. There also is a question as to the finality of the amount asserted in the proofs of claims. Each proof of claim is based on a judgment rendered in a previous, ongoing State court action. The need to achieve finality of these State court claims is absolutely crucial to this bankruptcy case and process due to the fact that the State court judgments, once rendered final, may (or may not) provide collateral estoppel effect and eliminate duplicate litigation (e.g., the pending dischargeability litigation). The creditors' interests as well as the interests of this Court (as well as Mr. Thomas) are best served by allowing the above-named creditors relief from the automatic stay in order to pursue these appeals to finality.

Federal Rule of Bankruptcy Procedure 9023

A motion for reconsideration is the equivalent of a motion to alter or amend a judgment often treated as a motion under Federal Rule of Civil Procedure 59(e). *McDowell v. Dynamics Corp. of Am.*, 931 F.2d 380 (6th Cir. 1991). Federal Rule of Bankruptcy Procedure 9023 states:

> Except as provided in this rule and Rule 3008, Rule 59 F.R.Civ.P. applies in cases under the Code. A motion for a new trial or to alter

> or amend a judgment shall be filed, and a court may on its own order a new trial, no later than 14 days after entry of judgment. In some circumstances, Rule 8008 governs post-judgment motion practice after an appeal has been docketed and is pending.

FED. R. BANKR. P. 9023 (2016). Therefore, Federal Rule of Civil Procedure 59(e) is made applicable to cases under the Bankruptcy Code by virtue of Federal Rule of Bankruptcy Procedure 9023. Rule 59(e) provides that "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." FED. R. CIV. P. 59(e) (2016). Rule 9006 provides that if the time period expires on a Saturday or Sunday or a legal holiday, the period "runs until the end of the next day which is not one of the aforementioned days." FED. R. BANKR. P. 9006(a) (2016). Although given 28 days to file a motion to alter or amend after entry of a judgment in a civil proceeding, the bankruptcy courts still abide by the 14-day cutoff period. The purpose of a Rule 59(e) motion to alter or amend a judgment is to have the court reconsider matters "properly encompassed in a decision on the merits." *Osterneck v. Ernst and Whinney,* 489 U.S. 169, 174 (1989) (citations omitted). In fact, the Supreme Court stated that Congress' intent in adopting Rule 59(e) "had a clear and narrow aim." *White v. N.H. Dep't of Emp't Sec.*, 455 U.S. 445, 450 (1982). The aim was to empower district courts "to rectify [their] own mistakes in the period immediately following the entry of judgment." *Id*; *see also* 5 F.R.D. 433, 476 (1946).

Whether to grant or deny a motion to alter or amend under Rule 59(e) is a decision which falls soundly within the discretion of the court. *In re Henning*, 420 B.R. 773, 784 (Bankr. W.D. Tenn. 2009) (citing *Huff v. Metro. Life Ins. Co.*, 675 F.2d 119, 122 (6th Cir. 1982)). However, "[a] motion to alter or reconsider a judgment is an extraordinary remedy and should be granted sparingly because of the interests in finality and conservation of scarce judicial resources." *U.S. ex rel. Am. Textile Mfrs. Inst., Inc. v. The Ltd, Inc.*, 179 F.R.D. 541, 547 (S.D. Ohio 1997). There are three instances in which motions to alter or amend judgments may be granted: (1) if the court

has committed a clear error of law, (2) if there is newly discovered evidence (i.e. an intervening change in controlling law), or (3) "to prevent manifest injustice." *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999).

The party seeking reconsideration of a decision bears the burden of proving the existence of sufficient grounds entitling them to Rule 59(e) relief. *Hamerly v. Fifth Third Mortg. Co.* (*In re J & M Salupo Dev. Co.*), 388 B.R. 795, 805 (B.A.P. 6th Cir. 2008) (citing *In re Nosker*, 267 B.R. 555, 565 (Bankr. S.D. Ohio 2001)); *see also In re Redmon Oil Co., Inc.*, 100 B.R. 945, 948 (Bankr. S.D. Ohio 1989). In addition to demonstrating one of the grounds for relief under Rule 59(e), the movant must also be able to show that correcting the defect by altering or amending the judgment "will result in a different disposition of the case." *Shepard v. U.S.*, 2009 WL 3106554, *1 (E.D. Mich. 2009) (citation omitted).

Rule 59(e) relief is only to be granted in limited circumstances and should not be invoked in an attempt to "relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2617, n. 5 (2008) (citation omitted); *Aull v. Osborne*, 2009 WL 722605, *1 (W.D. Ky. 2009); *Vanguard Transp. Sys., Inc. v. Volvo Trucks N. Am., Inc.*, 2006 WL 3097189, *2 (S.D. Ohio 2006). Numerous courts in the Sixth Circuit have recognized that "parties should not use [Rule 59(e) motions] to raise arguments which could, and should, have been made before judgment issued." *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998); *see also 1704 Farmington, LLC v. City of Memphis*, 2009 WL 2065337, *2 (W.D. Tenn. 2009); *Simmons v. Lake Erie Corr. Inst.*, 2009 WL 3172866, *1 (N.D. Ohio 2009). As succinctly stated by the United States District Court for the Northern District of Ohio:

> It is not the function of a motion to reconsider either to renew arguments already considered and rejected by a court or "to proffer

> a new legal theory or new evidence to support a prior argument when the legal theory or argument could, with due diligence, have been discovered and offered during the initial consideration of the issue."

McConocha v. Blue Cross & Blue Shield Mut. of Ohio, 930 F. Supp. 1182, 1184 (N.D. Ohio 1996) (citation omitted). Additionally, Rule 59(e) is not intended to be used by an "unhappy litigant" as a means for rehashing matters a court has already decided. *Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC*, 477 F.3d 383, 395 (6th Cir. 2007). If the court has ruled and the movant is dissatisfied with the outcome, oftentimes an appeal is the more appropriate remedy. *Liberte Capital Grp. v. Capwill*, 630 F. Supp. 2d 835, 838 (N.D. Ohio 2009).

With regard to the "new evidence" prong of Rule 59(e), courts have routinely held that the party moving for Rule 59(e) relief must show that there is new evidence which was previously unavailable to that party prior to entry of the original judgment. *Montgomery v. Bagley*, 581 F.3d 440, 451-52 (6th Cir. 2009); *Gen. Truck Drivers, Chauffeurs, Warehousemen & Helpers, Local No. 957 v. Dayton Newspapers, Inc.*, 190 F.3d 434, 445 (6th Cir. 1999); *In re Grady*, 417 B.R. 4, 2-3 (Bankr. W.D. Mich. 2009); *Matter of No-Am Corp.*, 223 B.R. 512, 513 (Bankr. W.D. Mich. 1998); *In re Cont'l Holdings, Inc.*, 170 B.R. 919, 933 (Bankr. N.D. Ohio 1994). "It is well-established . . . that a district court does not abuse its discretion in denying a Rule 59 motion when it is premised on evidence that the party had in his control prior to the original entry of judgment." *Emmons v. McLaughlin*, 874 F.2d 351, 358 (6th Cir. 1989). Under the "newly discovered evidence" theory, a party may not seek relief from "what turned out to be an erroneous tactical decision prior to the entry of judgment." *Goggin Warehousing, LLC v. Morin*, 2009 WL 2996405, * 2 (E.D. Tenn. 2009).

The "manifest injustice" contemplated by Rule 59(e) is a vague concept with no hard line definition. *In re Henning*, 410 B.R. at 785 (citing *U.S. v. Jarnigan*, 2008 WL 2944902, *2 (E.D.

Tenn. 2008)). However, courts have established various guidelines to be used on a case-by case basis when addressing the issue. *Id*. A party seeking Rule 59(e) relief must be able to show "an error in the trial court that is direct, obvious, and observable . . . ." *Cummings, Inc. v. BP Products N. Am., Inc.*, 2009 WL 3169463, *2 (M.D. Tenn. 2009). In addition, the moving party must be able to demonstrate that the underlying judgment caused them some type of serious injustice which could be avoided if the judgment were to be reconsidered. In essence, the moving party must be able to show that altering or amending the underlying judgment will result in a change in the outcome in their favor. *Via The Web Designs, L.L.C. v. Beauticontrol Cosmetics, Inc.*, 148 Fed. App'x 483, 489 (6th Cir. 2005); *see also Campbell v. Credit Bureau Sys., Inc.*, 655 F. Supp. 2d 732 (E.D. Ky. 2009). A party may not seek Rule 59(e) relief on the premise of "manifest injustice" if the only error the movant seeks to correct is a "poor strategic decision." *GenCorp.*, 178 F.3d at 834. "Generally, relief under Rule 59(e) is an 'extraordinary remedy' restricted to those circumstances in which the moving party has set forth facts or law of a 'strongly convincing nature' that indicate that the court's prior ruling should be reversed." *In re Henning*, 410 B.R. at 785 (citing *Cummings*, 2009 WL 3169463 at *2). Essentially, "a showing of manifest injustice requires that there exists a fundamental flaw in the court's decision that without correction would lead to a result that is both inequitable and not in line with applicable policy." *McDaniel v. Am. Gen. Fin. Services., Inc.*, 2007 WL 2084277, *2 (W.D. Tenn. 2007).

In the instant action, Mr. Thomas has not sufficiently satisfied any of the three (3) required ways to alter or amend a prior order. First, this Court does not believe that it committed a clear error of law. The decision whether or not to modify the automatic stay resides within the sound discretion of the bankruptcy court, and will not be overturned absent abuse of discretion. *See*, for example and among others, *Laguna Assocs. Ltd. P'ship v. Aetna Cas. & Sur. Co.* (*In re Laguna*

Assocs., Ltd. P'ship), 30 F.3d 734, 737 (6th Cir. 1994). Immediately following the Rule 9023 hearing, this Court made brief oral findings of fact and conclusions of law on November 22, 2016, in open court in accordance with the entire case record as a whole as well as Federal Rule of Bankruptcy Procedure 7052, and thereafter entered its written ruling on November 23, 2016, finding that sufficient cause existed under 11 U.S.C. § 362(d)(1) to warrant relief of the automatic stay to allow these appeals to go forward to finality. Second, there has not been any newly discovered evidence to present to this Court. It seems that Mr. Thomas is attempting to seek relief here based upon an intervening change in controlling law; however, the controlling law has not changed at this time. The change in controlling law is arguably speculative at best. Mr. Thomas simply seeks to relitigate the same issues upon the same evidence. He merely disagreed with this Court's prior findings of fact and conclusions of law. Dissatisfaction is not a basis under FED. R. BANKR. P. 9023 and FED. R. CIV. P. 59(e) for setting aside a prior order. Lastly, in this Court's opinion, the prior Order does not rise to a level that would create "manifest injustice." Mr. Thomas does not lead this Court to any fundamental flaw or error that is direct, obvious, or observable in its prior order modifying the automatic stay. It is observed here that this Court expressly stated in the November 28, 2016, Order that "Mr. Thomas is free to seek an independent stay or injunctive relief in the non-bankruptcy appellate process if he feels going forward there will, for example, result in legal prejudice to him or for any other appropriate reason(s)." [Dkt. # 190, p. 3]. In addition, Mr. Thomas is absolutely afforded the right to appeal this Order. This Court sees no reason under a totality of the particular facts and circumstances and applicable law to reconsider its prior Order because Mr. Thomas offered no reasonable legal or factual basis to alter, amend, or vacate the prior § 362(d) Order.

CONCLUSION

Based on all the foregoing and the case record as a whole, Mr. Thomas' instant Rule 9023 Motion merely reiterates and expands upon previously rejected arguments, and fails to satisfy any one of the three prongs applied to motions to alter or reconsider a ruling. For all of the aforementioned reasons, this Court for cause denies the "Debtor's Motion to Alter or Amend Court's Order Lifting Automatic Stay as to Clear Channel, Inc. and Tennison Brothers, Inc."

Simply put, these appeals seemingly need to be finalized as soon as possible for this Court to accomplish the judicial goal set forth in FED. R. BANKR. P. 1001 "to secure the expeditious and economical administration of every case under the Code and the just, speedy, and inexpensive determination of every proceeding therein."

Accordingly, based on the foregoing and consideration of the entire Chapter 11 case and the record as a whole, IT IS ORDERED AND NOTICE IS HEREBY GIVEN that:

1. Mr. Thomas' Rule 9023 Motion to Alter or Amend the Order entered on November 28, 2016, is denied; and
2. The Bankruptcy Court Clerk shall cause a copy of this Memorandum, Orders, and Notice of the entry thereof to be sent to the following interested entities:

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