So Ordered.

Dated: July 19, 2022

G. Michael Halfenger
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re:

Antonio Terrell and Angel Marie Terrell,	Case No. 18-28674-gmh Chapter 13
Debtors.	

ORDER ON MOTION TO VACATE
MODIFICATION AND DISCHARGE ORDERS

On July 12, 2022, the court of appeals reversed this court's September 21, 2021 order sustaining the debtors' claim objection, which contested the State of Wisconsin's allegation that its benefits-overpayment claim is entitled to priority under §507(a)(1)(B) of the Bankruptcy Code. Based on that reversal, the state filed a motion under Civil Rule 60(b)(1) and (5) (made applicable by Bankruptcy Rule 9024) to vacate (a) a November 3, 2021 order granting the debtors' motion to modify their confirmed plan to reduce the plan term from five years to three and (b) a December 8, 2021 order granting the debtors a discharge under Code §1328 following their completion of all payments under the modified plan. The state filed and served notice that any objection to the motion must be filed on or before July 27.

I

A

The state did not properly serve the motion. The state's counsel filed proof of service of the motion and notice of the time to object to it but only on the debtors' counsel and the chapter 13 trustee. Bankruptcy Rule 9014(a) & (b) requires the state to serve its motion on "the party against whom relief is sought" (i.e., the debtors) "in the manner provided for service of a summons and complaint by Rule 7004". In other words, the state must mail a copy of its motion directly to the debtors. Fed. R. Bankr. P. 7004(b)(9) (requiring service "[u]pon the debtor . . . by mailing a copy . . . to the debtor at the address shown in the petition or to such other address as the debtor may designate in a filed writing") & (g) (requiring service on "the debtor's attorney" *in addition to* service on the debtor "[i]f the debtor is represented by an attorney"). It does not appear to have done that.

B

The motion is also premature. It contends that the court of appeals' judgment reversing the September 21 decision means that this court's subsequent orders modifying the plan and granting the debtors discharges must be vacated. But the court of appeals' judgment becomes effective only once the mandate issues. See *Bell v. Thompson*, 545 U.S. 794, 800–01 (2005); *Calderon v. Thompson*, 523 U.S. 538, 558 (1998); *Kusay v. United States*, 62 F.3d 192, 193–94 (7th Cir. 1995).

The mandate will issue no earlier than August 2, 2022—21 days after the entry of the judgment. Appellate Rule 41(b) provides, "The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later." And Appellate Rule 40(a)(1) generally affords parties "14 days after entry of judgment" to file a petition for rehearing.

To request rehearing, a party must timely file a petition that brings to the court's

attention any "point of law or fact that the petitioner believes the court has overlooked or misapprehended". Fed. R. App. P. 40(a)(2). As discussed below, there may be plausible grounds for such a petition here. So, even if this court has jurisdiction to act on the state's motion to vacate, doing so before the mandate issues would be unwise.

II

A

The state appealed only this court's September 21 decision and order. That order sustained the debtors' challenge to the state's assertion that its claim is entitled to priority under §507(a)(1)(B)—a challenge made "in a claim objection", as expressly authorized by Bankruptcy Rule 3012(b). The September 21 order also required further submissions on the debtors' then-pending motion to modify their confirmed plan, thus plainly leaving that motion unadjudicated.

The court of appeals decision, however, characterizes the September 21 ruling as *adjudicating* the debtors' motion to modify their plan, stating:

> The Terrells' plan was confirmed in February 2019. In June 2019 this court held that excess public-assistance payments are not entitled to priority status under § 507(a)(1)(B). *In re Dennis*, 927 F.3d 1015 (7th Cir. 2019). The ruling in *Dennis* raised the possibility that the Terrells' plan could be cut from 60 to 36 months, which would reduce their total payments. They did not seek the benefit of *Dennis*, however, until December 2020, **when they filed a motion objecting to Wisconsin's claim. The bankruptcy judge sensibly treated the Terrells' motion not as an objection to the state's claim (the Terrells do not deny owing the money) but as a proposal to amend the confirmed plan to eliminate the debt's priority and cut the length of payments to 36 months.** This motion, so understood, was granted over the state's objection.

In re Terrell, 21-3059, 2022 WL 2688232, at *1 (7th Cir. July 12, 2022) (emphasis added).

The bankruptcy court record is clear that the September 21 order **did not** treat the Terrells' claim objection "as a proposal to amend the confirmed plan" **or** adjudicate the Terrells' separate, then-pending request to modify the plan **or** suggest that it was

doing anything of the sort.[1] The September 21 order is expressly limited to adjudicating the debtors' Rule 3012(b) objection to the assertion of priority in the state's proof of claim and left the then-pending motion to modify the confirmed plan (to which the state had *not* then objected) for a later day, stating:

> For the foregoing reasons, IT IS ORDERED that:
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> 1. The debtors' claim objection is sustained, and the Department's claim is determined to *not* be entitled to priority under §507 in any amount.
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> 2. Unless following this determination the trustee withdraws her objection to the debtors' pending request to modify the plan, the trustee must file, by no later than **October 12, 2021**, a brief that explains, in detail, all remaining bases for her objection to the modification; the debtors must file a response brief by no later than **October 28, 2021**.

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[1] The September 21 decision and order stated:

> Again, the debtors' request that the court decide whether the Department's claim is entitled to priority is not foreclosed by any rule or Code provision, and the Department does not suggest otherwise. The Department argues that the confirmed plan provides that its claim is entitled to priority under § 507(a)(1)(B), a confirmed chapter 13 plan can only be modified as permitted by § 1329, and § 1329 "does not authorize a debtor to reclassify a claim" as not entitled to priority. ECF No. 77, at 5–6. **This claim-objection dispute, though, is not about whether the debtors can modify the confirmed plan; it is about whether the court can determine that the Department's claim is not entitled to priority. That request is properly made in a claim objection under Rule 3012(a)(2) asking the court to "determine . . . the amount of a claim entitled to priority under § 507". See also Fed. R. Bankr. P. 3012(b) ("A request to determine the amount of a claim entitled to priority may be made only by motion after a claim is filed *or in a claim objection*." (Emphasis added.)).** Thus, contrary to the Department's contentions, §1329 has no particular bearing on the **debtors' request to determine the non-priority status of its claim**. Again, absent an applicable statute or rule, law of the case and judicial-estoppel principles govern the preclusive effect of any determination that the Department's claim is entitled to priority that results from plan confirmation.

In re Terrell (Terrell I), 633 B.R. 872, 880 (Bankr. E.D. Wis. 2021) (emphasis added).

Terrell I, 633 B.R. at 882–83.[2]

What is more, the suggestion in the court of appeals' decision that claim objections can only contest the amount or validity of a claim—the linchpin in recasting the appealed order adjudicating claim priority into an order adjudicating plan modification—is contrary to Bankruptcy Rule 3012(b), which expressly allows, "A **request to determine the amount of a claim entitled to priority** may be made **only** by motion after a claim is filed **or in a claim objection**."[3] (Emphasis added.)

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[2] The September 21 decision and order also stated the following about the sequential relationship between the debtors' claim objection and their separate motion to modify the plan:

> Seeing in *Dennis* a basis to contest the Department's assertion of priority as a precursor to modifying the plan to reduce the time over which they must make monthly plan payments, the debtors objected to the Department's claim.
>
> . . . .
>
> The plan thus provides for the Department's claim as one entitled to priority under § 507(a)(1)(B). This provision governs the debtors' and the Department's rights and obligations under the confirmed plan—that's the effect of § 1327(a)—and any alteration of those rights and obligations requires a request to modify the confirmed plan under 11 U.S.C. § 1329. Section 1329 authorizes the debtor, as well as the trustee and any holder of an allowed unsecured claim, to modify a plan after it is confirmed but before the completion of plan payments to "reduce the amount of payments on claims of a particular class provided for by the plan" or "reduce the time for such payments", among other things. § 1329(a)(1) & (2). **The debtors have moved under § 1329 to modify the plan to shorten the plan term. The trustee (but not the Department) objected that the modification** is impermissible because the plan as modified would not pay the Department's § 507(a)(1)(B) claim in full or require the debtors to pay their disposable income for a full 5 years. See § 1329(b)(1) (applying the plan-composition requirements of § 1322(a) & (b) and the plan-confirmation requirements of 11 U.S.C. § 1325(a) to requests to modify a confirmed plan). **In response, the debtors objected to the Department's claim seeking a determination that the Department's claim is not entitled to priority under § 507(a)(1)(B).**

Terrell I, 633 B.R. at 876 & 877.

[3] As this court's November 3 decision and order explains, "[a]llowance of claims", governed by Code §502, and "[p]riority", governed by §507, are distinct, and Rule 3012(b) authorizes the use of a claim objection to challenge the assertion of priority in a proof of claim:

> Rule 3012 also governs a debtor's "request to determine the amount of a secured claim"

The state's response to the claim objection was that confirmation of the plan precluded any subsequent determination that its claim is not entitled to priority, even though such a determination is expressly authorized by Rule 3012(b) and affects more than just the treatment of the claim under the plan, including whether any unpaid amount of the claim is dischargeable at the end of the case. See §1328(a)(2); see also 11 U.S.C. §523(a)(5); *Dennis*, 927 F.3d at 1017 ("In 2018, Dennis filed a Chapter 13 bankruptcy petition. DHS filed a proof of claim, arguing that the $7,962.25 overpayment debt was a priority domestic support obligation under § 507(a)(1)(B). Dennis objected, arguing the overpayment was a general unsecured **dischargeable** debt." (Emphasis added.)). In rejecting the state's argument that confirmation of the plan precluded the later adjudication of the debtors' priority-contesting claim objection, the September 21 order followed the court of appeals' instruction, in *In re Hovis*, that "issue preclusion has no role within a unitary, ongoing proceeding." 356 F.3d 820, 822 (7th Cir. 2004) (explaining that decisions suggesting otherwise, such as *Adair v. Sherman*, 230 F.3d 890 (7th Cir. 2000), "that arise from **sequential suits** are **irrelevant** within one suit" (emphasis added)). Instead, "'[w]hat matter within a single suit', apart from any

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> and such request may also be made in a claim objection. Fed. R. Bankr. P. 3012(b). The rules thus contemplate two types of claim objections, those requesting that the court disallow a claim (in whole or in part) and those requesting that the court determine the extent to which an allowed claim is entitled to priority or the extent to which it is secured (in whole or in part). The debtors elected to make their request for a determination of the amount of the claim entitled to priority in a claim objection, as permitted by Rule 3012(b), but that claim objection did not implicate allowance of the claim.

In re Terrell (Terrell II), 637 B.R. 129, 135 (Bankr. E.D. Wis. 2021). Rule 3012(b)'s requirement that challenges to assertions of priority must be made by motion or claim objection stands in contrast to its preceding statement that "a request to **determine the amount of a secured claim** [held by a non-governmental entity] may be made by motion, in a claim objection, **or in a plan filed in a chapter 12 or chapter 13 case.**" (Emphasis added.) Consistent with this distinction in Rule 3012(b), paragraph (1) of Rule 3015(g), which concerns the effect of "the confirmation of a . . . chapter 13 plan", provides that confirmation of a chapter 13 plan makes "any determination in the plan made under Rule 3012 about the amount of a **secured claim** . . . binding on the holder of the claim", but Rule 3015(g) gives no such effect to such a determination, in a plan, about the amount of a **priority claim**, as Rule 3012(b) does not permit such a determination to be requested in a chapter 13 plan. (Emphasis added.)

'deadlines set by statute and rule', are 'the law of the case and judicial estoppel.'" *Terrell I*, 633 B.R. at 880 (quoting *Hovis*, 356 F.3d at 822). The September 21 decision reasoned that no statute or rule barred the debtors' claim objection and neither the law of the case nor judicial estoppel prevented adjudication of its merits. See *id.* at 876 ("no applicable statute or rule sets a deadline on requests to determine the amount of a claim entitled to priority under § 507. The Department . . . does not contest this.") & 879–82. (discussing the application of the law-of-the-case doctrine and judicial estoppel).

The court of appeals' decision considers none of this, since it construes the appealed order as considering plan modification, not the distinct contested matter raised by the debtors' request to determine priority. The appellate decision states that §1329(a) of the Bankruptcy Code—the section authorizing the modification of confirmed chapter 13 plans—does not allow the debtors to reduce the plan term to 36 months, because that would require "reclassifying" the state's claim, stating:

> Neither [11 U.S.C.] § 1327(a) nor [11 U.S.C.] § 1330(a) forbids modification. But what *authorizes* modification? . . . .
>
> The bankruptcy court considered the possibility that 11 U.S.C. § 1329 supplies the necessary power. But it did not rely on § 1329, and for good reason. That section includes a lengthy list of authorized changes, but eliminating the priority of a claim that the debtor has itself earlier acknowledged is not among the sorts of changes covered by § 1329. Authority must come from elsewhere.

2022 WL 2688232, at *2.

The appealed September 21 order did not rely on §1329, but the November 3 order adjudicating the debtors' motion to modify the plan did. That order reasons that if the state's claim is not entitled to priority—the actual relief afforded by the September 21 order—then the debtors' request to reduce the plan term fits within §1329(a)(1) & (2)'s authority to modify a confirmed plan to "increase or reduce the amount of payments on claims to a particular class provided for by the plan" and to "extend or

reduce the time for such payments". See *Terrell II*, 637 B.R. at 141–42. As that order explains, the modification "reduce[d] the time during which the debtors [were required to] make payments under the plan from 60 months to 36 months", "reduce[d] payments on unsecured claims by decreasing the amount of the debtors' periodic payments to the trustee", and "increase[d] payments on administrative expenses (attorney's fees) by $300 to compensate counsel for filing the modification request," all of which "fit within the categories of plan modifications authorized by § 1329(a)." *Id.* at 141. And the only hurdle to reducing the plan term—a claim entitled to priority under §507(a)(1)(B)—was removed by the September 21 order. See 11 U.S.C. §§1322(a)(4), 1329(b)(1).

B

The appellate decision also observes that "a confirmed plan is binding under § 1327(a)", meaning "[i]t cannot be collaterally attacked and must be obeyed, but like other kinds of judicial orders it may be revisited and changed through authorized means." 2022 WL 2688232, at *2 (citation omitted) (citing *Adair*, 230 F.3d at 894). The court of appeals' reliance on *Adair* for the proposition that confirmed plans cannot be *collaterally* attacked does not address the extent to which plan confirmation precludes a later post-confirmation motion or claim objection under Rule 3012(b) **in the same case**. The decision instead suggests the debtors' use of a claim objection to contest priority was illegitimate—a suggestion that is at odds with Rule 3012(b)'s text. See *id.* at *1 (describing "the Terrells' motion" as "sensibly treated . . . not as an objection to the state's claim"—because "the Terrells do not deny owing the money"—"but as a proposal to amend the confirmed plan to eliminate the debt's priority").[4]

[4] *Hovis*, which the court of appeals also cited, explains that *Adair* (and, more broadly, "issue preclusion (collateral estoppel)") does not apply to subsequent contested matters in the same bankruptcy case:

> Like Bankruptcy Judge Barbosa, the district judge held that *Adair v. Sherman*, 230 F.3d 890 (7th Cir. 2000), gives rise to issue preclusion (collateral estoppel). . . . *Adair*, like its predecessor *D & K Properties Crystal Lake v. Mutual Life Insurance Co.*, 112 F.3d 257 (7th Cir.

This court's November 3 decision and order explains, moreover, that §4.5 of the plan, the model plan form section in which a debtor must list creditors who hold claims that may be entitled to priority under §507(a)(1)(B), is properly construed to provide that the relevant claims will not be paid in full, but will instead be treated under §4.5, *to the extent that* the creditor has a claim that is both, generally, an "allowed claim" under §502 and, specifically, a claim entitled to priority under §507(a)(1)(B). See *Terrell II*, 637 B.R. at 138–41.[5] Although the state did not appeal the November 3 order, the appellate

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> 1997), treats the amount of a debt (or collateral) established within bankruptcy as conclusive between the same parties in subsequent litigation. This is a normal application of preclusion. **But issue preclusion has no role within a unitary, ongoing proceeding. *Adair* and similar decisions that arise from sequential suits are irrelevant within one suit.**
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> **What matter within a single suit are the deadlines set by statute and rule, plus the law of the case and judicial estoppel.** Law of the case has no bearing here, for the amount of the Bank's claim has yet to be assessed by any tribunal. **Nor does any statute or rule require objection to precede confirmation.** Setting dates for filing of claims, and objecting to them, is within the discretion of the bankruptcy judge. Leeway is sensible, because sometimes the best means to administer an estate is to sell the assets quickly in order to maximize their value and only then turn to determining which creditors are entitled to how much. . . . [But] in . . . other cases it may not be possible to present or evaluate the claims before confirmation. . . . **It would greatly and needlessly disrupt ordinary, efficient means of reorganization to adopt a rule that all claims must be filed and litigated to conclusion before a plan of reorganization is confirmed**.

356 F.3d at 822 (emphasis added). Given that the appealed order at issue here adjudicated a properly raised contested matter (a dispute as to the priority of a claim) in the same bankruptcy case, the court of appeals' decision in this case can be read to say that confirmation of a plan gives rise to collateral estoppel in the same bankruptcy case, which is contrary to *Hovis*. In creating this apparent conflict with *Hovis*, the decision further complicates the administration of similar pending cases in which confirmed plans provide for overpayment claims of the state based on assertions of priority status in proofs of claim. See, e.g., *In re Garrett*, No. 16-29784 (Bankr. E.D. Wis.).

[5] On this issue, the November 3 decision and order concludes:

> [T]he confirmed plan as written—accorded its plain meaning, consistent with how a reasonable person in the community of bankruptcy practitioners would best understand its terms under the circumstances, including the circumstances under which its operative language was drafted and employed—does **not** provide that the Department *has* an allowed claim entitled to priority under § 507(a)(1)(B), but instead provides that the Department's claim will be paid as a priority claim in the manner permitted by § 1322(a)(4)

decision states, "[T]he Terrells proposed a plan that classified about $30,000 owed to Wisconsin as a priority debt under 11 U.S.C. § 507(a)(1)(B), which gives that status to 'claims for domestic support obligations ... owed directly to or recoverable by a governmental unit'." 2022 WL 2688232, at *1. The plan form required the debtors to list the state's claim in §4.5—the boilerplate location for listing creditors who have filed proofs of claim alleging priority under §507(a)(1)(B)—the plan does not *state an amount* of the debt entitled to priority. If the plan form is read as requesting a determination of the amount of a claim that is entitled to priority (and the result is that the determination is made when the plan is confirmed), with or without specifying an actual amount, then it conflicts with Rule 3012(b), which, as noted above, does not authorize a request for such a determination to be made in a chapter 13 plan.[6]

III

If the mandate issues, giving effect to the court of appeals' judgment, the state will likely be entitled to the relief it requests in its motion. Indeed, this court's November 3, 2021 opinion on certification of the state's appeal for direct review made a

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to the extent that the claim is entitled to priority under § 507(a)(1)(B).

Terrell II, 637 B.R. at 141.

[6] As the November 3 decision and order explains, the ruling that the state's claim is not entitled to priority is a necessary but not sufficient condition for granting the motion to modify the confirmed plan. The November 3 decision also interprets the plan to allow post-confirmation litigation over the extent to which the state's claim is entitled to priority—that is, to allow for the possibility of "reclassification" using the procedures authorized by Rule 3012(b). *Terrell II*, 637 B.R. at 141 ("[T]he claim amounts entitled to priority remain open to determination through motion or claim objection, as Rule 3012(b) requires."). The consequence of the September 21 decision's conclusion that no amount of the state's claim is entitled to priority under §507(a)(1)(B) because no amount of that claim is for a "domestic support obligation" is that any amount of that claim that is left unpaid after the completion of all payments under the plan—and some amount will be left unpaid even if payments continue for five years—is dischargeable under §1328(a), paragraph (2) of which excepts from the discharge certain debts, including those "of the kind specified . . . in paragraph . . . (5) . . . of section 523(a)", i.e., those that are "for a domestic support obligation". §523(a)(5). If, on the other hand, the formulaic model plan must be construed to bar post-confirmation challenges to assertions of priority in proofs of claim, then debtors, trustees, and holders of allowed unsecured claims must raise such challenges before confirmation, long before any distributions to the holders such claims, or to the holders of allowed nonpriority unsecured claims, become likely.

similar observation. ECF No. 114, at 7 ("If the . . . September 21 decision and order is reversed on appeal, the order granting the debtors' request for plan modification and any later order granting them a discharge would seemingly be set aside.").

Perhaps the debtors will argue that the state forfeited any challenge to the order granting plan modification by not appealing it. See *United States v. Funds in the Amount of One Hundred Thousand and One Hundred Twenty Dollars*, 901 F.3d 758, 767 n.5 (7th Cir. 2018) ("Regardless of nomenclature . . . if an issue was decided by the district court but was not appealed, the issue is forfeited, and the district court may not reconsider the issue on remand." (quoting *Med. Ctr. Pharmacy v. Holder*, 634 F.3d 830, 835 n.3 (5th Cir. 2011); see also *McCleskey v. CWG Plastering, LLC*, No. 15-CV-01284, 2020 WL 8482769, at *3 (S.D. Ind. June 5, 2020) ("CWG did not appeal Judge McKinney's ruling. CWG therefore waived the argument."). But any outcome other than the one requested by the state's motion to vacate seems irreconcilable with the court of appeals' decision reversing the September 21 order, construed as granting the debtors' motion to modify the plan. And, once the mandate issues, this court must resolve the state's motion to vacate in accordance with that decision. See *Gacy v. Welborn*, 994 F.2d 305, 310 (7th Cir. 1993) (citing *Hutto v. Davis*, 454 U.S. 370, 375 (1982)) ("Ours is a hierarchical judiciary, and judges of inferior courts must carry out decisions they believe mistaken."). As the Seventh Circuit recently reiterated:

> "[W]hen a court of appeals has reversed a final judgment and remanded the case, the district court is required to comply with the express or implied rulings of the appellate court." Said another way, the court must follow "the spirit as well as the letter of the mandate." The court may believe and even express its belief that our reasoning was flawed, yet it must execute our mandate nevertheless.

In re A.F. Moore & Assocs., Inc., 974 F.3d 836, 840 (7th Cir. 2020) (citations omitted) (first quoting *Moore v. Anderson*, 222 F.3d 280, 283 (7th Cir. 2000); then quoting *In re Cont'l Illinois Sec. Litig.*, 985 F.2d 867, 869 (7th Cir. 1993); and then citing *Donohoe v. Consol.*

Operating & Prod. Corp., 30 F.3d 907, 910–11 (7th Cir. 1994)).

The sole avenues for correction of perceived errors in the appellate decision, narrow as they are, lie in the court of appeals (by way of a petition for rehearing) or in the Supreme Court (by way of a petition for certiorari)—not in this court. See *Trinidad v. McCaughtry*, 17 F. App'x 394, 396 (7th Cir. 2001) (unpublished order) ("Appellate judges are not immune from error. We make plenty of mistakes. There is even an institution in the judicial hierarchy charged with the duty of correcting error by a United States Court of Appeals . . . ."). But the state has jumped the gun in requesting relief from the November 3 plan-modification order and the December 8 discharge order based on the court of appeals' July 12 judgment. This court will not consider that request for relief until after the mandate issues from the court of appeals.

IV

For these reasons, IT IS ORDERED that:

1. Consideration of the state's motion to vacate is stayed until the court of appeals' mandate issues.

2. After issuance of the mandate, the state must file and serve a notice of its motion to vacate that affords parties in interest at least 14 days to object or withdraw that motion.

3. The state must serve the motion and notice on the debtors, as well as on their counsel, in the manner provided by Rule 7004, as required by Rule 9014.

4. If the debtors oppose the motion to vacate, they must file and serve an objection that states all bases for the objection, with supporting citations to the record and legal authorities, by the objection deadline; alternatively, they must file correspondence indicating their lack of objection by that deadline.

5. If the debtors file a timely objection to the motion to vacate, the state must file a supporting memorandum that is supported by citations to the record and to legal authorities no later than 7 days after the date on which the debtors filed their objection.

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