SO ORDERED.
SIGNED this 29th day of January, 2020

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

Marcia Phillips Parsons
CHIEF UNITED STATES BANKRUPTCY JUDGE

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

In re

GREGORY MITCHELL LAYMAN
and DONNA KAY LAYMAN,

Debtors.

No. 19-50405 MPP
Chapter 11

O R D E R

This case is before the court on the debtors' motion requesting a stay pursuant to Fed. R. Bankr. P. 8007(a) pending their appeal of the court's order dismissing the case. Tennessee State Bank ("TSB"), the debtors' largest creditor that moved for the dismissal, opposes the motion. After considering the parties' memoranda in support of their positions, the motion for stay is denied for the following reasons.

The debtors filed this second chapter 11 case after having defaulted in making payments to TSB required under their confirmed plan in their first chapter 11 case. The filing was made to stay TSB's foreclosure sale of the debtors' real property that was scheduled for the following day. TSB moved to dismiss this case for lack of good faith because it was filed to prevent TSB from enforcing its liens as specially permitted under the default provision of the confirmed plan. After a two-day evidentiary hearing, the court took the matter under advisement and issued a written opinion on December 11, 2019, concluding that the debtors could not maintain two simultaneous reorganization cases and, even if they could, this second case had to be dismissed because it was filed in bad faith. The debtors filed their notice of appeal on December 26, 2019, and their present motion for a stay on January 14, 2020.

While a motion for a stay pending appeal under Fed. R. Bankr. P. 8007 is discretionary with the court, it is also an exceptional form of relief that requires a considerable showing from the movant. *See In re Quade*, 496 B.R. 520, 526 (Bankr. N.D. Ill. 2013); *First Nat'l Bank of Boston v. Overmyer (In re Overmyer)*, 53 B.R. 952, 955 (Bankr. S.D.N.Y. 1985) (both discussing predecessor Fed. R. Bankr. P. 8005). The Sixth Circuit Court of Appeals has stated that in considering whether to grant such a request, the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction should be considered: (1) the likelihood that the party seeking stay will prevail on the merits of the appeal; (2) the likelihood that the movant will suffer irreparable injury unless the stay is granted; (3) whether other parties will suffer substantial harm if the stay is granted; and (4) whether the public interest will be served by granting the stay. *See Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Although the four factors are "integrated considerations that must be balanced together," the "movant is always required to demonstrate more than the mere 'possibility' of success on the merits" and "is still required to show, at a minimum, 'serious questions going to the merits.'" *Id.* at 153-54.

As to the first consideration, the likelihood of prevailing on the merits of their appeal, the debtors make two primary arguments. First, concerning the pendency of their two simultaneous chapter 11 reorganization cases, the debtors argue that "whether a second bankruptcy case may proceed when [they] have not received a discharge in their first bankruptcy case is an issue that is unsettled in the Sixth Circuit" such that the "lack of binding authority on this issue indicates that there are serious questions going to the merits of their appeal." The confirmed plan in the debtors' first chapter 11 case, which remains pending, provides for payment in full of allowed claims over time with a discharge to be granted to the debtors after completion of plan payments. The debtors defaulted in making the payments on TSB's allowed claims required by the plan. The court concluded that where an individual (as opposed to a corporate) debtor in a pending chapter 11 reorganization case has not received a discharge, the debtor may not file a second chapter 11 case seeking to discharge the same debts. Unlike for corporate debtors in chapter 11, individual debtors are provided a means for modifying confirmed plans after a default pursuant to 11 U.S.C. § 1127(e) and (f).

In ruling on this issue, the court followed the thoughtful reasoning of *In re McMahan*, 481 B.R. 901 (Bankr. S.D. Tex. 2012), that is supported by the United States Supreme Court's holding in *Freshman v. Atkins*, 269 U.S. 121 (1925). Although McMahan involved a chapter 11 case followed by a chapter 13 case in contrast to the two chapter 11 cases here, the difference is irrelevant. In *McMahan* the court concluded:

> [U]ntil the debtor receives a discharge in his Chapter 11 case, he is barred from filing a second bankruptcy petition and proposing a new plan even if his Chapter 11 Case has been closed following confirmation of the plan. Two simultaneous reorganization cases in which no discharge has been granted constitutes an abuse and manipulation of the Code. Thus, the fact that the Debtor has not yet received his discharge in the Chapter 11 Case requires dismissal of the Pending Chapter 13 Case. This result is necessary, as an alternative rule would leave creditors vulnerable to adjudication of the same debt under two concurrent cases and plans.

In re McMahan, 481 B.R. at 905.

The debtors attempt to distinguish their situation from that of *McMahan* by arguing that their assets and liabilities in their two cases are not the same. In its memorandum, the court addressed this factual contention, concluding:

> The only difference in [the debtors'] significant assets, their real properties, is that they have three fewer parcels than in the first case because they liquidated National Bank of Tennessee's collateral to pay off the creditor postconfirmation [contrary to the terms of their plan]. Otherwise their asset picture in this regard is substantially the same, since the eleven real properties listed by the debtors in their current schedules were also listed in their prior schedules. As for liabilities, yes, the debtors do have some new unsecured debts, namely for seed, fertilizer, and approximately $6,300 in medical bills. But with the primary exception of National Bank of Tennessee, the majority of the approximately $4.5 million in debt that the debtors had at the time of confirmation in their first case remains unpaid, as their current summary of schedules list total liabilities of $3.3 million, which include

> new debts totaling less than $300,000. The debtors' two largest secured creditors, TSB and Farm Service Agency, are still owed in excess of $2 million and $600,000, respectively, and the majority of the property taxes that existed in the first case still remain unpaid, including Jefferson County property taxes from 2011-2014. And most importantly, it is undisputed that the debtors' new case is designed not only to address the new debts, but also the "old" debts, and to further modify the treatment of those old debts, including preventing TSB's collection efforts that were expressly authorized under the confirmed plan. Consequently, it is simply not true, as amply demonstrated by TSB's very objection to the second case, that the debtors' current case addresses different assets and liabilities.

Notwithstanding any difference between the assets and liabilities in the debtors' first and second cases, the reason for the debtors' filing of the second chapter 11 was to stop TSB from enforcing its liens per the terms of their confirmed plan in the first case and to re-reorganize its debts to TSB in the second. In their proposed plan filed in the second case, the debtors seek to surrender certain property to reduce the amount of their indebtedness to TSB, something they are barred from doing in a modification of their confirmed plan in the first case. Specifically, 11 U.S.C. § 1127(e) does not permit the modification of a confirmed plan to reduce the amount of a creditor's claim, but only to change the amount and timing of payments to the creditor. *See In re Hanson*, 2018 WL 4674592, at *7 (Bankr. E.D. Tenn. Sept. 26, 2018). Thus, the court found that the debtors' purpose in filing the second chapter 11 was nothing less than an attempt to "manipulate and bypass the explicit procedures of § 1127(e) and (f)" as the *McMahan* court likewise concluded. *In re McMahan*, 481 B.R. at 920.

In any event, the issue of whether an individual debtor may maintain two simultaneous reorganization cases involving the same debts is not "unsettled" in the Sixth Circuit Court of Appeals. This court found no case in the circuit holding contrary to this court's decision and the debtors have cited none. The debtors argue that this court's holding is suspect because the Supreme Court's *Atkins'* decision was "premised on the doctrine of prior suit pending" while Sixth Circuit precedent precludes application of the doctrine in federal courts. However, neither assertion is entirely correct. As the *Atkins'* court explained, its holding was based on a general rule of law *analogous* to the doctrine of prior suit pending:

> A proceeding in bankruptcy has the characteristics of a suit, and since the denial of a discharge, or failure to apply for it, in a former proceeding, is available as a bar, *by analogy* the pendency of a prior application for discharge is available in

> abatement *as in the nature of a prior suit pending, in accordance with the general rule that the law will not tolerate two suits at the same time for the same cause*.

Freshman v. Atkins, 269 U.S. 121, 123 (1925) (emphasis added). As for whether the doctrine of prior suit pending applies in federal court, the case cited by the debtors for this proposition, *Laney Brentwood Homes, LLC v. Town of Collierville,* 144 Fed. App'x. 506, 511-12 (6th Cir. 2005), pertained to the question of whether a pending case in state court would preclude a subsequent case between the same parties in federal court. That question has no applicability here, as the debtors' pending case and subsequent case are both federal chapter 11 bankruptcy cases. Notably, the Sixth Circuit Court of Appeals had no problem relying upon *Atkins* when it dismissed as moot the appeal of a dismissed chapter 11 case because the debtor had filed a chapter 7 case while the appeal was pending. *See In re Gateway N. Estates, Inc.*, No. 94-1332, 1994 WL 610167, at *2-3 (6th Cir. Nov. 3, 1994) (observing that the Supreme Court had held in *Atkins* that "the pendency of a petition in bankruptcy precluded the discharge of the same debts in a second petition," the court concluded that "there is no effective relief which this court may grant, because a reversal will result in two simultaneous petitions with respect to the same debtor and the same assets"). In sum, the debtors fail to show a likelihood of success on their appeal regarding the court's conclusion that they may not simultaneously maintain two chapter 11 cases.

Even if the first and second cases are not simultaneous and only serial as the debtors argue such that maintaining a second filing is possible, the debtors must still show "serious questions going to the merits" of the court's finding that the debtors did not file the second case in good faith. Section 1141(a) of the Bankruptcy Code provides that a confirmed plan binds a debtor. "Courts do not permit a debtor to avoid the binding effect of § 1141 by filing a second Chapter 11 petition to achieve a modification that would be prohibited by § 1127." *In re Tillotson*, 266 B.R. 565, 568 (Bankr. W.D.N.Y. 2001). A second filing is only permissible if the debtor filed in good faith with a genuine need for a new chapter 11 filing, with the genuine need established by unanticipated and unforeseeable changes in circumstances that have substantially impaired the debtor's performance under the confirmed plan. *Id.* at 569-70.

In this regard, the debtors make their second primary argument: that "substantial questions exist as to whether this Court's findings of bad faith in this case constituted clear error." The

Sixth Circuit Court of Appeals in *In re Laguna Associates Limited Partnership*, 30 F.3d 734, 737 (6th Cir. 1994), set forth a non-exhaustive list of eight factors for courts to consider when analyzing a particular debtor's good faith in a bankruptcy filing. Because *Laguna* did not deal with a repeat bankruptcy filing and none of its factors specifically address simultaneous or serial bankruptcy filings, the court also considered the factors set forth in *In re Bouy, Hall & Howard and Associates*, 208 B.R. 737, 743-44 (Bankr. S.D. Ga. 1995), which did involve a repeat bankruptcy filing. The totality of the circumstances, considered in light of those applicable factors, led the court to conclude that the debtors did not file their second case in good faith.

The debtors assert that the court erred in not finding that the case was filed in good faith because the court: (1) should have permitted the debtors' proposed plan to be considered by all creditors; (2) should have considered the overall circumstances of the debtors' second case and their efforts to pay creditors; (3) should not have considered Mr. Layman's threat of physical harm to a TSB officer as improper conduct because he never carried it out; and (4) and should not have considered the debtors' second case filing as an attempt by them to evade the confirmation order. First, as evident from the docket report, all creditors were served with the motion to dismiss, the notice of hearing on the motion, and the plan. The only other creditor that chose to take a position on the dismissal motion was Farm Service Agency ("FSA"), the second largest creditor after TSB, and it joined in the request for dismissal, even though the debtors maintained that FSA was unlikely to be paid in full if TSB were allowed to foreclose. Second, as evident in the memorandum opinion, the court did discuss and consider the overall circumstances of the debtors' second case, including what had transpired after the plan was confirmed in their first case. As to the barn fire, which the debtors said presented the genuine need for the second chapter 11, the court concluded the evidence failed to establish that the fire loss was either unforeseeable or that it substantially impaired the debtors' plan performance. Third, the court cited several instances of Mr. Layman's improper conduct in connection with his dealings with TSB other than just his threat to the bank officer. And as for his threat of physical harm to that person, it is preposterous to say the conduct was marginalized because Mr. Layman did not follow through on his threat. Lastly, TSB's representative testified that the bank agreed to the debtors' plan in their first case if, among other things, it contained a plan provision lifting the automatic stay postconfirmation to pursue defaults.

The debtors' filing of the second bankruptcy case was for the admitted purpose of staying TSB's foreclosure sale remedy. The debtors intended to and did effectively nullify TSB's bargained-for agreement confirmed by court order. Collectively, these contentions by the debtors fail to demonstrate a likelihood of success on their appeal regarding the court's conclusion of their bad faith filing.

As to the second factor, the likelihood that the movant will suffer irreparable injury unless the stay is granted, the debtors contend that TSB's foreclosure on their properties, some of which are income producing, will preclude their efforts to reorganize and render their appeal moot. TSB responds that any harm is a consequence of the debtors' defaults under their confirmed plan and that the debtors may not be able to effectively reorganize even if they retain the properties, since the debtors' income projections in the first case grossly exceeded their actual income. While the majority of the debtors' income is from farming, only about ten percent of the land the debtors farm is collateral for TSB's claims and TSB does not have a lien on the debtors' crops or any of their farming equipment.

"The Sixth Circuit generally considers three factors to evaluate the degree of harm a moving party will suffer absent a stay pending appeal: (1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided." *In re Village Green I, GP*, No. 14-2351-STA, 2014 WL 2589444, at *4 (W.D. Tenn. June 10, 2014). There is a division among the courts as to whether mootness of an appeal is enough to show irreparable injury. *See, e.g., In re Simpson*, No. 17-10442, 2018 WL 1940378, at *10 (Bankr. D. Vt. Apr. 23, 2018) ("The bankruptcy courts in the Second Circuit are divided as to whether mootness of an appeal is enough to show irreparable injury."); *CWCapital Asset Mgmt., LLC v. Burcam Capital II, LLC*, No. 5:13-CV-278-F, 2013 WL 3288092, at *6 (Bankr. E.D.N.C. June 28, 2013) ("The cases reveal a significant divide on the question of whether the loss of appellate rights is per se irreparable harm."). Similarly, the courts disagree whether foreclosure on a debtor's real property pending appeal constitutes irreparable harm because the debtor can be compensated by damages for wrongful foreclosure. *See In re Pertuset*, No. 11-15607, 2014 WL 7991693, at *4 (Bankr. S.D. Ohio May 15, 2012) (citing disagreement among the courts). On this point, the court notes that the debtors here complain that they will lose their home if the foreclosure is allowed to proceed, yet they propose in their plan to surrender the home. Notwithstanding this inconsistency, the debtors' concern is real about the potential loss by foreclosure of income producing properties that in turn could cause their farming operations to be curtailed for the lack of income from the properties. Accordingly, the court concludes without deciding either mootness or the sufficiency of damages issues that the foreclosure sale will cause injury to the debtors that is both real and substantial.

The third factor is whether other parties will suffer substantial harm if the stay is granted. "This factor is the other side of the coin to irreparable harm. The court must measure the harm to the non-movant, here the creditors, and balance the harm inuring to all parties." *In re Pertuset,* 2012 WL 7991693, at *4 (Bankr. S.D. Ohio May 15, 2012) (quoting *Henkel v. Lickman (In re Lickman),* 301 B.R. 739, 748 (Bankr. M.D. Fla. 2003)). The debtors argue that TSB will not be harmed if the court grants the stay because there is substantial equity in TSB's collateral and they will continue to insure and maintain their properties. TSB disagrees, noting that nearly six years have passed since the debtors filed their first petition to stay TSB from enforcing its deeds of trust, that no payments were made for two years in the first case, and that the last significant payment it received was the January 2018 plan installment of $85,918.69 that was not made until March 2018. TSB questions whether any equity would be sufficient to protect it, as the most recent publication and mailing costs totaled $10,462.39 and attorney fees as well as per diem interest of $1,108.23 are accruing without payment.

The court concludes that the third factor weighs against the debtors notwithstanding any equity that may exist in the properties. Despite the debtors' assurances that they will keep their properties insured and maintained, the record is replete with numerous instances of the debtors' failure to do so. Moreover, as pointed out by TSB, the debt owed to it continues to grow as it has only received payment from the debtors in two of the last six years, despite having agreed to the debtors' plan of reorganization in the first case. And now, even though this court has found that the debtors have acted in bad faith in filing a second case to stop TSB's foreclosure, they seek a stay without offering to post a bond or make any payments to TSB while the appeal, which could take months if not years to resolve, is pending. Given these inequities, the court must balance the potential harm in favor of TSB.

Finally, the fourth factor, whether the public interest will be served by granting the stay, is not usually a focal consideration in most bankruptcy appeals. This case is an exception. The debtors seek to stay TSB from foreclosing its deeds of trust while they appeal an order dismissing the case that the debtors filed to avoid a negotiated and settled-upon plan provision approved by court order. Bankruptcy courts are well-served when debtors and creditors mutually agree to settle significant differences to permit a reorganization plan to be consensually confirmed as was done in the debtors' first chapter 11 case that remains pending. Permitting debtors to file a new case to avoid their agreements made with creditors to obtain confirmation of a plan in a current case would give any creditor pause to reconsider working with debtors to give them a chance at reorganization as the debtors received in their first case. Setting such a precedent does not serve the public interest. This factor weighs against the debtors.

In conclusion, only one of the four factors considered favors the debtors, that they may suffer irreparable harm if a stay is not imposed. As the United States Supreme Court has held, however, "[a] stay is not a matter of right, even if irreparable injury might otherwise result." *Niken v. Holder*, 556 U.S. 418, 433, 129 S. Ct. 1749 (2009) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). "It is instead 'an exercise of judicial discretion,' and 'the propriety of its issue is dependent upon the circumstances of the particular case.'" *Id*. (quoting *Virginian Ry Co.*, 272 U.S. at 672–73). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* The debtors have not met that burden here.

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