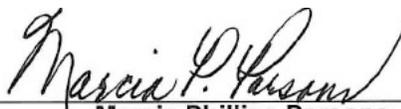




SO ORDERED.

SIGNED this 2nd day of December, 2014

**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

TRI-CITIES MEMORY GARDENS, INC.

Debtor.

No. 14-50577

Chapter 11

ORDER

This case came before the court for hearing on December 2, 2014, upon the Debtor's motion filed on November 6, 2014, requesting that the order dismissing this case entered October 28, 2014, be stayed pending appeal pursuant to Fed. R. Bankr. P. 8005, now found at Fed. R. Bankr. P. 8007 per amendment effective December 1, 2014. Both East Tennessee Funeral Home & Crematory LLC ("East Tennessee Funeral Home") and the Tennessee Department of Commerce and Insurance, Division of Regulatory Boards, Burial Services Section (the "State of Tennessee"), filed responses in opposition to the Debtor's motion on November 25, 2014. After considering the parties' written briefs and oral argument of counsel at the hearing, the Debtor's motion for stay is denied for the following reasons.

The Debtor's filing of this second chapter 11 case on April 4, 2014, came on the heels of a plan confirmed in its first case on July 22, 2013, and in face of a foreclosure sale by East Tennessee Funeral Home of the Debtor's Blountville, Tennessee facility. That plan, among other things, sought to bring the Debtor into compliance with pertinent state regulations and extended the maturity date until January 31, 2014, on a note then held by First Tennessee Bank and secured by the Blountville facility, at which time it was to be paid in full. After an evidentiary hearing and a consideration of the totality of the circumstances, the court dismissed this case for lack of good faith by the Debtor in this second filing pursuant to 11 U.S.C. § 1112(b)(1), as requested by both the State of Tennessee and East Tennessee Funeral Home, the assignee of First Tennessee Bank and present holder of the note. The Debtor has appealed the October 28, 2014 dismissal order, filing its notice on November 6, 2014, and seeks a stay pending its appeal in order to prevent a foreclosure sale scheduled by East Tennessee Funeral Home for December 10, 2014, on its collateral consisting of the Blountville facility, one of the Debtor's two funeral homes and cemeteries that it operates.

While a motion for a stay pending appeal under former Fed. R. Bankr. P. 8005 is discretionary with the court, it is also an exceptional form of relief that requires a considerable showing from the movant. *See First Nat'l Bank of Boston v. Overmyer (In re Overmyer)*, 53 B.R. 952, 955 (Bankr. S.D.N.Y. 1985); *In re Quade*, 496 B.R. 520, 526 (Bankr. N.D. Ill. 2013). 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, whether there are serious questions going to the merits of its appeal, the Debtor makes two arguments: first, that the court erred as a matter of law when it

“elected not to follow *Laguna* or apply its eight factor test” in finding “bad faith due to the serial filing of the Debtor’s Chapter 11 filing”; and, second, that the court erred in finding that the Debtor failed to demonstrate an unforeseen or extraordinary change in circumstances that occurred after substantial consummation of its plan that substantially impaired its performance under the plan.

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. However, as noted by East Tennessee Funeral Home, “focusing on the eight specific factors set forth in *Laguna Associates Limited Partnership* as the Debtor had urged, would not be helpful in the Court’s evaluation of whether the Debtor acted in good faith because *Laguna* did not deal with a repeat bankruptcy filing and the impact of Sections 1127 and 1141 of the Bankruptcy Code.” The court said as much in its opinion. Because a confirmed plan binds a debtor and § 1127 does not permit a debtor to avoid the binding effect of § 1141 by filing a second chapter 11 petition to achieve a modification that would otherwise be prohibited by § 1127, 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 an unforeseen or unanticipated change in circumstances. The court did not choose to ignore *Laguna*, but cited to the list of factors in *In re Bouy, Hall & Howard and Associates*, 208 B.R. 737, 743-33 (Bankr. S.D. Ga. 1995), because unlike *Laguna*, *Bouy* involved a repeat bankruptcy filing.

As the court of appeals stated in *Laguna*, “[w]hether the debtor filed for relief in good faith is a discretionary determination that turns on the bankruptcy court’s evaluation of a multitude of factors.” *In re Laguna Assocs. Ltd. P’ship*, 30 F.3d at 738. Consistent with *Laguna*, at the October 14, 2014 hearing, this court considered a multitude of factors in evaluating whether the Debtor’s second filing was in good faith. These factors were listed in the brief filed by East Tennessee Funeral Home and include the following:

- The Debtor’s actions in its prior bankruptcy case and failure to comply with the Plan.
- The length of time between the two cases, specifically that at the time of the second filing the Debtor had operated under its confirmed plan less than nine months with a final decree being entered only four months prior.

- The Debtor's failure to merge with Tri-Cities Funeral Home, LLC as required under the Plan.
- That the majority of the Debtor's obligations as to the State under the Plan have not been met.
- The Debtor's continued failure to create and make any initial deposits into the required new pre-need funeral trust fund.
- The fact that the Debtor's requests for [the State of Tennessee's] consent to withdrawals did not occur until nearly five months after the Debtor filed the current Chapter 11 petition, and when the requests were eventually made they lacked the requisite certifications.
- The Debtor's deficiency in trust funding transactions that have occurred after Plan confirmation.
- The fact that Debtor's unregistered agents have sold burial containers in violation of state law.
- The fact that the Debtor does not carry fidelity bond insurance as required by state law.
- Debtor's delinquent deposits into the improvement care trust fund.
- Debtor's delinquent annual reports.
- Debtor's repeated and continued failure to comply with state law.
- The fact that nothing in the loan documents, Plan or in the Agreed Order contemplated an exception, an extension, or a modification to the maturity deadline contained in the Plan.
- The foreseeability of events which ultimately led to the subsequent filing, including the undeniable foreseeability of the fact that the Debtor would not be able to pay the note when it matured.
- The economic reality that lenders sell notes regularly and often refuse to grant further extensions even with the most cooperative debtors.
- The fact that nothing in the Plan or loan documents prohibited Original Lender from selling the Note.
- The fact that just as [East Tennessee Funeral Home] was bound by the terms of the Plan as it related to Original Lender, the Debtor continued to be bound by the terms of the Plan regardless of who held the Note.
- The fact that the sale of the Note did not cause the Debtor's default under the Plan.
- The fact that Debtor is not liquidating, but is, instead, seeking to reorganize for a second time and has filed two adversary proceedings, both designed to substantially modify debts or obligations that were provided for in the confirmed Plan.

- The extent to which the objecting parties' rights were modified in the initial reorganization and their proposed treatment in the present case.
- The lack of existence of unusual circumstances.
- [And lastly,] [t]he fact that no plan has been filed, even though the second bankruptcy case has been pending for more than six months.

Laguna's non-exhaustive list of factors includes whether:

- (1) the debtor has one asset;
- (2) the pre-petition conduct of the debtor has been improper;
- (3) there are only a few unsecured creditors;
- (4) the debtor's property has been posted for foreclosure, and the debtor has been unsuccessful in defending against the foreclosure in state court;
- (5) the debtor and one creditor have proceeded to a standstill in state court litigation, and the debtor has lost or has been required to post a bond which it cannot afford;
- (6) the filing of the petition effectively allows the debtor to evade court orders;
- (7) the debtor has no ongoing business or employees; and
- (8) the lack of possibility of reorganization.

In re Laguna Assocs. Ltd. P'ship, 30 F.3d at 738. *Bouy's* list includes:

- (1) the length of time between the two cases;
- (2) the foreseeability and substantiality of events which ultimately caused the subsequent filing;
- (3) whether the new plan contemplates liquidation or reorganization;
- (4) the degree to which creditors consent to the subsequent reorganization; and
- (5) the extent to which an objecting creditor's rights were modified in the initial reorganization and its treatment in the subsequent case.

In re Bouy, Hall & Howard and Assocs., 208 B.R. at 743-33. Whether considering *Laguna's* eight factors, the *Bouy* list of four factors, or both, the court concluded in a final analysis based on the totality of the circumstances that the Debtor did not file this second bankruptcy case in good faith. Accordingly, this court must disagree that an issue of law exists or that the court applied the wrong legal standard in reaching its conclusion regarding the absence of good faith.

Lastly in this regard, the Debtor raises the question of whether dismissal for lack of good faith is still a basis for dismissal under § 1112(b) because it is not listed in subparagraphs (A)

through (P) of § 1112(b)(4). However, as recognized by the Bankruptcy Appellate Panel for the Sixth Circuit in *In re Lee*, “[a] bankruptcy court has broad discretion to determine if dismissal of a chapter 11 case for cause is warranted.” *In re Lee*, 467 B.R. 906, 917 (B.A.P. 6th Cir. 2012). Even though “a debtor’s bad faith is not included in the non-exhaustive list in § 1112(b)(4), it is well-settled in the Sixth Circuit that a debtor’s bad faith in filing a chapter 11 may serve as cause for dismissal under § 1112(b)(1).” *Id.* Accordingly, concerning the first factor as to whether a stay should be imposed, the court concludes that the Debtor has failed to demonstrate that there are serious questions regarding the legal basis of the court’s opinion such that the Debtor is likely to prevail on the merits of the appeal. Thus, the first factor weighs heavily against the Debtor.

As to the second factor, the likelihood that the movant will suffer irreparable injury unless the stay is granted, the Debtor contends that foreclosure by East Tennessee Funeral Home on the Debtor’s Blountville facility will cause the Debtor to “lose its primary business asset at the foreclosure sale” and “then the Debtor’s attempt to further reorganize would be moot, denying the Debtor any opportunity for appellate review.” “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 473 W. End Realty Corp.*, 507 B.R. 496, 502 (Bankr. S.D.N.Y. 2014) (acknowledging split of authority); *In re MAC Panel Co.*, No. 98-10952C-11G, 2000 WL 33673784, *4 (Bankr. M.D.N.C. March 8, 2000) (collecting cases). Without deciding whether mootness of the appeal is enough, the court agrees that a foreclosure sale of the Blountville facility will cause injury to the Debtor that is both real and substantial. “As the Sixth Circuit has explained, ‘The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay. Simply stated, more of one excuses less of the other.’” *In re 473 W. End Realty Corp.*, 507 B.R. at 502 (citing *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir.1991)). Applying this proportional test, the court finds that this factor weighs in favor of the Debtor.

The third factor is whether other parties will suffer substantial harm if the stay is granted. East Tennessee Funeral Home argues that it will be seriously harmed by a stay because such a stay would “further unduly delay [East Tennessee Funeral Home’s] ability to pursue its contractual remedies against the Debtor and its collateral, and would result in lost opportunities, further costs, and injury to [it].” While the court recognizes the possibility of monetary losses to East Tennessee Funeral Home by imposing a stay, the Debtor’s proposal of monthly payments of \$7,500 to East Tennessee Funeral Home during the stay might compensate East Tennessee Funeral Home for some of its losses. On the other hand, the potential harm to the State of Tennessee and its citizens is far more considerable because it involves the Debtor’s continued failure to meet and satisfy numerous state regulatory requirements. As to the State of Tennessee during the pendency of the Debtor’s requested stay, the Debtor proposes to “seek to resolve such remaining plan compliance or regulatory issues through informal negotiations or through the pending State of Tennessee administrative proceedings involving the Debtor.” Considering the Debtor’s prior commitments undertaken in its confirmed plan to bring its facilities into regulatory compliance and the Debtor’s wholesale and defenseless failure to do so other than make \$100 monthly payments towards deficiencies in two perpetual trust funds, the Debtor’s present proposal rings false. In whole, this third factor weighs against the Debtor.

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 Debtor states that “[t]he public will be better served by allowing the Debtor to continue to deal with its customers and to preserve that customer base, if the Debtor is permitted to reorganize.” The Debtor acknowledges that it “has disputes” with the State of Tennessee, but asserts that there “was no proof at the October 14, 2014 hearing that there has been any harm to the public by the Debtor’s continued operation” While actual harm to the public may not have occurred yet despite the Debtor’s continuing noncompliance with state law, this absence does not mean that there is no risk of harm to the public if a stay is imposed. As long as the Debtor remains in violation of state burial and cemetery law, there is an actual risk of harm to the public. As such, this factor weighs against the Debtor.

In conclusion, only one of the four factors considered favors the Debtor, that it 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 672–673). “The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.” *Id.* The Debtor has not met that burden here.

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