UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

September 8, 2015 at 10:00 a.m.

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1. 15-23700-A-12 JOE/MARIA PIMENTEL — MOTION TO CONFIRM CHAPTER 12 PLAN 5-11-15 [5]
WW-1

Tentative Ruling: The motion will be denied without prejudice.

The debtors seek confirmation of their chapter 12 plan filed on May 11, 2015. Docket 7. The trustee, however, objects contending that he has not received the debtors' income tax return for the most recent year a return was filed and had not received evidence of income within the 60-day period prior to filing.

The motion also will be denied because the debtors did not appear at the continued meeting of creditors held on July 9, 2015. Thus, the trustee has not had sufficient opportunity to examine the debtors.

Further, the motion will be denied because although the 45-day deadline for plan confirmation under 11 U.S.C. § 1224 was extended to August 24, 2015 (Docket 37 at 2), the plan was not confirmed within that deadline and the court has not extended that deadline beyond August 24. Hence, confirmation of the plan at this time violates the 45-day section 1224 deadline.

In addition, the plan does not provide for the full amount of NAEDA's claim, $13,211.51. POC 10. The plan provides only $12,000. Docket 7 at 3. Also, as the debtor lists the value of NAEDA's collateral at $15,000 (Docket 1, Schedules B and D), NAEDA is an oversecured creditor entitled to post-petition interest and attorney's fees. Yet, the plan does not provide for interest and attorney's fees.

Finally, the proposed 3% interest to be paid on account of NAEDA's claim is inadequate, given that NAEDA is over-secured, given the 5% contractual rate, and given the fast depreciation of NAEDA's collateral, a 1994 Kirby Freightliner with 1020 Haunted Mixer.

2. 14-30833-A-11 SHASTA ENTERPRISES — MOTION FOR RELIEF FROM AUTOMATIC STAY 12-8-14 [67]
DL-1
REDDING BANK OF COMMERCE VS.

Tentative Ruling: The hearing on the motion will be continued for a final hearing.

The movant, Redding Bank of Commerce, seeks relief from stay as to 355 Hemsted Drive Redding, California. Given that the court appointed a chapter 11 trustee in this case on December 23, 2014, the court will continue the hearing on the motion to provide the trustee with time to evaluate and respond to the motion. Dockets 142 & 143.

3. 14-30833-A-11 SHASTA ENTERPRISES MOTION TO
FWP-14 SELL
8-11-15 [350]

Tentative Ruling: The motion will be conditionally granted in part.

The chapter 11 trustee requests authority to sell "as is", for $3,125,000, less a credit of $50,000 for repairs, the estate's interest in 310 Hemsted Drive Redding, California, to Richard Putnam. In connection with this sale, the trustee is also assigning four leases to the buyer. The assumption and assignment of the leases are the subject of another motion brought by the trustee (DCN FWP-15), also being heard on this calendar.

The trustee seeks permission to pay the following from escrow:

- property taxes,
- approximately $1,601,547.95 secured claim of the Curto Trust,
- typical closing costs,
- broker's commission,
- $10,000 to David Cretaro under a court-approved incentive agreement, and
- $52,237 to a tenant (Morgan Stanley) on the property, in connection with the trustee's assumption and assignment of all existing leases on the property.

The trustee seeks approval of the sale free and clear of an already satisfied $8,230,000 pre-petition obligation, held by Citibank. In the event the trustee will be unable to reach a consensus with the Curto Trust on the final payoff amount of its secured claim, the trustee requests approval of the sale free and clear of the Curto Trust lien.

The sale is subject to any non-monetary liens or encumbrances, such as dedications, redevelopment notices, and easements.

The trustee also asks for waiver of the 14-day period of Fed. R. Bankr. P. 6004(h), asks for a determination of good faith under section 363(m), and asks for approval of the payment of the real estate commission. The estate's two brokers, John Skaife of Properties by Merit, Inc. and Kennedy Wilson, will share the contemplated 5% commission.

The trustee seeks approval of a $30,000 break-up fee to the buyer, in the event the property is sold to an over-bidder, given the extensive due diligence performed by Mr. Putnam on the property.

The trustee anticipates that the estate will net approximately $1,084,815 from the sale. The trustee does not anticipate material tax consequences for the estate from the sale.

11 U.S.C. § 363(b) allows the trustee to sell property of the estate, other than in the ordinary course of business. Under 11 U.S.C. § 363(f), the trustee may sell property of the estate free and clear of liens only if: 1) applicable nonbankruptcy law permits sale of such property free and clear of such liens; 2) the entity holding the lien consents; 3) the proposed purchase price exceeds the aggregate value of the liens encumbering the property; 4) the lien is in bona fide dispute; or 5) the entity could be compelled to accept a money satisfaction of the lien.

The sale will generate substantial proceeds for distribution to creditors of the estate, while freeing the estate from substantial ongoing obligations in

owning the property.

Hence, the sale will be approved pursuant to 11 U.S.C. § 363(b), as it is in the best interests of the creditors and the estate.

The court will waive the 14-day period of Rule 6004(h) and will authorize payment of the real estate commission, in accordance with the employment terms approved by the court.

The court will approve the $30,000 break-up fee to Mr. Putnam, in the event he does not purchase the property due to an over-bidding, to compensate Mr. Putnam for his due diligence and investigation efforts with respect to the property.

The court will not approve the sale free and clear of the Citibank lien under 11 U.S.C. § 363(f), as the trustee has stated that he will be receiving a reconveyance of Citibank's deed prior to escrow closing.

As to approving the sale free and clear of the Curto Trust lien, the court will determine whether that is necessary at the hearing on the motion. If the trustee and the Curto Trust cannot agree on a final payoff amount prior to the September 8 hearing on this motion, the court will consider approving the sale free and clear of the Curto Trust lien.

Further, prior to making a good faith determination under section 363(m), the court needs a declaration from Mr. Putnam about his good faith in purchasing the property. No such declaration is part of the record on the motion.

4. 14-30833-A-11 SHASTA ENTERPRISES — MOTION TO ASSUME LEASE OR EXECUTORY CONTRACT
FWP-15 — 8-11-15 [355]

Tentative Ruling: The motion will be granted in part.

The chapter 11 trustee seeks to assume and assign four unexpired leases involving the estate's 310 Hemsted Drive real property. The estate is the lessor under each of the leases.

The property is being sold by the trustee and he is seeking to assign the leases in connection with the sale. The assignment of the leases is part of and conditioned on the sale of the property. The proposed assignment is to Richard Putnam, the existing buyer of the property, or any successful overbidder.

The parties to the leases include Morgan Stanley Smith Barney Financing, L.L.C.; InterWest Insurance Services, L.L.C.; KNAK & CO., Inc.; and the United States Army Corp of Engineers.

The trustee is also seeking:

- determination of the cure amounts under each of the four leases;

- authority to pay any cure amounts; authority to transfer the security deposits held by the estate as a lessor under the leases;

- declare that the estate has no liability as stated under section 365(k); and

- waive the 14-day stay for orders authorizing the assignment of unexpired

leases.

11 U.S.C. § 365(a) and (b)(1) provides that:

"*(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.*

"*(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee--*

"*(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;*

"*(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and*

"*(C) provides adequate assurance of future performance under such contract or lease.*"

11 U.S.C. § 365(d)(2) prescribes that "In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease."

11 U.S.C. § 365(f) further provides that:

"*(f)(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.*

"*(2) The trustee may assign an executory contract or unexpired lease of the debtor only if--*

"*(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and*

"*(B) adequate assurance of future performance by the assignee of such contract*

or lease is provided, whether or not there has been a default in such contract or lease.

"*(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.*"

The standard for determining whether to approve the assumption of unexpired leases and/or executory contracts is a business judgment test. Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 318 U.S. 523 (1943); Robertson v. Pierce (In re Chi-Feng Huang), 23 B.R. 798, 800-01 (B.A.P. 9th Cir. 1982) (holding that the primary issue is whether rejection or assumption would benefit the general unsecured creditors, which may also involve a balancing of interests).

The court "should approve the rejection [or assumption] . . . unless it finds that the debtor-in-possession's conclusion that rejection [or assumption] would be 'advantageous is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice.' [. . . .] Such determinations, clearly, involve questions of fact . . . which we review for clear error." Agarwal v. Pomona Valley Medical Group, Inc. (In re Pomona Valley Medical Group, Inc.), 476 F.3d 665, 670 (9th Cir. 2007).

"The Bankruptcy Court, in evaluating the debtor's decision, 'should presume that the debtor-in-possession acted prudently, on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the bankruptcy estate.' It should approve the decision to reject [or assume] . . . 'unless it finds that the debtor-in-possession's conclusion that rejection [or assumption] would be advantageous is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice.'" In re Yellowstone Mountain Club, L.L.C., Case Nos. 08-61570-11, 0861571-11, 08-61572-11, 08-61573-11, CV-09-48-BU-SEH, 2010 WL 5071354, at *2 (D. Mont. Dec. 7, 2010) (quoting and citing to Pomona Valley Medical Group at 670).

As there has been no plan confirmation yet in this case and the court has not set an independent deadline for the assumption of unexpired leases in this case, the deadline of section 365(d)(2) does not restrict the proposed assumption by the trustee.

The assumption will benefit the estate substantially as it will allow it to sell one of its real properties, generating over $1,084,000 in proceeds for the benefit of the unsecured creditors, while freeing the estate from substantial ongoing obligations in owning the property.

There are no cure amounts under three of the four leases. The cure amount under the fourth lease, with Morgan Stanley, is in the amount of $52,237, representing overpaid rent and reimbursable tenant improvements.

The court will permit the assignment of the leases. The buyer, Mr. Putnam, has submitted a declaration, indicating that he has the ability to close on the proposed purchase of the property, at the purchase price of $3,125,000, as made clear by the trustee's sale motion. Dockets 350 & 357. The court is satisfied

then that there is adequate assurance of future performance by the buyer.

The court will authorize the trustee to pay the cure amount under the Morgan Stanley lease, in connection with the sale of the property. The court will authorize the trustee also to transfer the security deposits to the buyer of the property (totaling $9,900), in connection with the sale. And, the court will waive the 14-day stay of Rule 6006(d), given the impending sale of the property.

But, the court will make no declarations about the estate's liability under 11 U.S.C. § 365(k), which states: "Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment."

There is no case or actual controversy for the court to make any declarations under section 365(k). The trustee has not identified any liability based on the breach of a lease, implicating section 365(k).

More, declaratory relief under section 365(k) seems to require an adversary proceeding. See Fed. R. Bankr. P. 7001(1) and (9). The court is unaware of any statutory provision permitting the court to make declarations under section 365(k) on a motion. The motion will be granted in part.

5.	13-34541-A-11 14-2322 6056 SYCAMORE TERRACE, L.L.C. V. HONARDOOST ET AL	6056 SYCAMORE TERRACE L.L.C. CAH-5	MOTION FOR ENTRY OF DEFAULT JUDGMENT 8-7-15 [54]

Tentative Ruling: The motion will be granted in part and denied in part.

The plaintiff, 6056 Sycamore Terrace L.L.C., also the debtor in the underlying bankruptcy case, seeks entry of a default judgment against the defendants, Faran Honardoost, Jahan Honardoost, Hossein Bozorgzad and Auburn Hospitality, L.L.C.:

- declaring that the Honardoost defendants have no interest in the plaintiff's real property in Pleasanton, California,

- determining the Honardoost defendants' deed of trust on the plaintiff's Pleasanton property as null and void, and that it does not encumber the property,

- determining that the Honardoost defendants do not hold a claim against the plaintiff's bankruptcy estate, and

- awarding "costs of suit" to the plaintiff.

Fed. R. Civ. P. 55(b)(2) provides that:

"A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals — preserving any federal statutory right to a jury trial — when, to enter or effectuate

judgment, it needs to:

(A) conduct an accounting;
(B) determine the amount of damages;
(C) establish the truth of any allegation by evidence; or
(D) investigate any other matter."

The factors courts consider in determining whether to enter a default judgment include: (i) the possibility of prejudice to the plaintiff, (ii) the merits of the plaintiff's substantive claim, (iii) the sufficiency of the complaint, (iv) the amount at stake, (v) the possibility of a dispute over material facts, (vi) whether the default was due to excusable neglect, and (vii) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. Valley Oak Credit Union v. Villegas (In re Villegas), 132 B.R. 742, 746 (B.A.P. 9th Cir. 1991).

The facts giving rise to the subject dispute, as described by the complaint, are as follows. In April 2008, Jahan Honardoost loaned $300,000 to Hossein Bozorgzad. Although there are allegations in the complaint that the transfer was classified as an "investment" in a hotel project being developed by Mr. Bozorgzad's Auburn Hospitality, L.L.C., the parties have been treating the transfer largely as a loan.

In any event, Faran Honardoost, the wife of Jahan Honardoost at the time, did not know of the loan. When the financing for the project fell through in September 2008 and Mr. Bozorgzad was unable to pay back the $300,000 to Jahan, Jahan told Faran of the loan. In December 2008, Mr. Bozorgzad executed three deeds of trust in favor of Faran Honardoost and Jahan Honardoost, one deed against a real property in Livermore, California, securing a claim for $100,000, another deed against a real property in Pleasanton, California, securing a debt for $200,000, and a third deed against a real property in Auburn, California, securing a debt of $300,000.

The grantor and trustor under the deeds encumbering the Livermore and Pleasanton real properties is Mr. Bozorgzad in his individual capacity, as he owned those properties at the time. The grantor and trustor under the deed encumbering the Auburn real property is Auburn Hospitality, L.L.C. Mr. Bozorgzad executed that deed in his capacity as a managing member of Auburn Hospitality, L.L.C. Dockets 33 & 57, Exs. A- C.

In addition to granting the Honardoost defendants a security interest, the deed on the Auburn property provided: "**This Deed of Trust is Recordable on January 31st 2009 at 12:00 pm (noon) if the note is not paid in full. Upon recording of this Deed of Trust, the Deed of Trusts [*sic*] recorded against parcel #098-0390-154 [(the Livermore property)] and parcel #948-0017-015 [(the Pleasanton property)] both located in Alameda County will be released and removed from the properties they are against.**" Dockets 33 & 57, Ex. C at 1.

The deed against the Auburn property was recorded with Placer County on January 30, 2009.

In May 2012, Mr. Bozorgzad transferred the Pleasanton property from himself to 6056 Sycamore Terrace, L.L.C., which filed the underlying bankruptcy case on November 14, 2013 and became a debtor in possession. The plaintiff debtor filed the instant adversary proceeding on November 19, 2014.

As the plaintiff has named Auburn Hospitality as a defendant in this

proceeding, along with Mr. Bozorgzad, the managing member of Auburn Hospitality, and given that the Honardoost defendants recorded the deed on the Auburn property, the deed the Honardoost defendants were holding on the plaintiff's Pleasanton property was released, per the terms of the agreement between the Honardoost defendants and Auburn Hospitality, as outlined in the deed on the Auburn property.

Although the recordation of the deed on the Auburn property took place on January 30, 2009, one day prior to the contemplated January 31, 2009 recordation date, Auburn Hospitality has waived any defects in the recorded deed. As such, by recording the deed on the Auburn property, the Honardoost defendants relinquished any rights to the Pleasanton property.

Thus, the Honardoost defendants have no interest in the Pleasanton property, arising from their deed on that property, and the Pleasanton deed is null and void. The Honardoost defendants also hold no claims against the plaintiff's bankruptcy estate, based on the debt secured by the Pleasanton property.

Finally, the court will deny the plaintiff's costs of suit request, as the motion does not establish the basis for such an award. The court cannot award costs of suit simply because the movant is the prevailing party. Even if there is an attorney's fees and costs provision in the Auburn property deed, such a provision cannot be enforced by the plaintiff against the Honardoost defendants because the plaintiff is not a party to that agreement. The only parties to that agreement are Auburn Hospitality and the Honardoost defendants.

6. 13-34541-A-11 6056 SYCAMORE TERRACE L.L.C.
14-2322
6056 SYCAMORE TERRACE, L.L.C. V. HONARDOOST ET AL

STATUS CONFERENCE
6-19-15 [46]

Tentative Ruling: None.

7. 15-21575-A-11 BR ENTERPRISES, A CALIFORNIA PARTNERSHIP

MOTION TO APPROVE DISCLOSURE STATEMENT
6-26-15 [111]

Tentative Ruling: The motion will be granted.

The debtor asks for approval of its first amended disclosure statement filed on August 24, 2015. Dockets 143 & 144.

The hearing on this motion was continued from August 10. The respondents who had originally objected to the approval of the disclosure statement (secured creditors Redding Bank of Commerce and Joe and Lavone Curto, as trustees of the Curto Family Trust), no longer have opposition to its approval. Dockets 148 & 149.

The motion will be granted and the first amended disclosure statement will be approved, as it contains adequate information and the detail necessary that will permit creditors to make an informed decision regarding the plan. See 11 U.S.C. § 1125(a). The debtor shall file the first amended disclosure statement as a stand-alone document.

8. 14-27083-A-11 DBH-10 — RCK CONSERVATION CO-OP, L.L.C. — MOTION TO APPROVE COMPENSATION OF DEBTOR'S ATTORNEY 8-21-15 [202]

Final Ruling: The motion will be dismissed without prejudice because it was set for hearing on 18 days notice in violation of Fed. R. Bankr. P. 2002(a)(6), which requires at least 21 days notice of the hearing on dismissal motions. The motion was served on August 21, 2015, 18 days prior to the September 8 hearing. While Local Bankruptcy Rule 9014-(f)(2) permits motions to be set on as little as 14 days of notice, and permits opposition to be made at the hearing, this local rule also provides this amount of notice is permitted "unless additional notice is required by the Federal Rules of Bankruptcy Procedure. . . ." Because Rule 2002(a)(6) requires a minimum of 21 days of notice of the hearing and because only 18 days' was given, notice is insufficient.

9. 14-31890-A-11 AP-1 — SHAINA LISNAWATI PENNYMAC HOLDINGS, L.L.C. VS. — MOTION FOR RELIEF FROM AUTOMATIC STAY 8-3-15 [187]

Tentative Ruling: The motion will be granted.

The movant, Pennymac Holdings, L.L.C., seeks relief from the automatic stay under 11 U.S.C. §§ 362(d)(1), (2), (4), asserting bad faith due to multiple prior bankruptcy filings, as to a real property in Auburn, California.

The debtor opposes the motion, denying bad faith and asserting that the movant has not demonstrated that the property is not necessary to an effective reorganization.

11 U.S.C. § 362(g) provides that:

"In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues."

In other words, the moving creditor has the burden of persuasion as to the value of and lack of equity in the property while the debtor has the burden of persuasion as to necessity to an effective reorganization. United Sav. Ass'n of Texas v. Timbers of Inwwod Forest Assocs., Ltd., 484 U.S. 365, 375 (1988). The standard in a chapter 11 proceeding is a showing that "the property is essential for an effective reorganization that is in prospect." This means, that there must be "a reasonable possibility of a successful reorganization within a reasonable time." Timbers at 376.

The movant has produced evidence that the property has a value of $325,000, based on this court's valuation of the debtor's 50% interest in the property at $162,500 (Docket 160) and that it is encumbered by claims totaling approximately at least $531,069. Docket 191. The movant's deed is the only encumbrance against the property. See also Docket 1, Schedules A & D.

On the other hand, the debtor has not come forward with admissible evidence to establish necessity to an effective reorganization of the property. The only admissible evidence in support of the motion is the debtor's declaration, Docket 203, which says nothing about the necessity of the property to an effective reorganization.

The debtor's contention that there is necessity to an effective reorganization due to the fact that she has filed a chapter 11 plan which provides for the reorganization of the debt secured by the property, is not sufficient to meet the necessity to an effective reorganization standard.

As mentioned above, the requirement is that "the property is essential for an effective reorganization that is in prospect." This means, that there must be "a reasonable possibility of a successful reorganization within a reasonable time." Timbers at 376.

"*Applying this rule to subsequent cases, the Ninth Circuit Bankruptcy Appellate Panel has adopted the four-part test first stated in In re Holly's, Inc., 140 B.R. 643, 700 (Bankr. W.D. Mich. 1992) in which the burden of proof is described as a 'moving target which is more difficult to attain as the Chapter 11 case progresses.' See, In re Sun Valley Newspapers, Inc., 171 B.R. 71, 75 (9th Cir. BAP 1994). The Holly's[], court separated the inquiry into four stages based on the timing of the creditor's motion for relief: 'The four broad categories can be stated as follows: (1) is it plausible that a successful reorganization will occur within a reasonable time?; (2) is it probable that a successful reorganization will occur within a reasonable time?; (3) is it assured that a successful reorganization will soon occur?; or (4) is it impossible that a successful reorganization will occur within a reasonable time?' Holly's, 140 B.R. at 700 (emphasis original); see also, Sun Valley Newspapers, Inc., 171 B.R. at 75.*

"*Holly's[] teaches us that the Timbers standard imposes an increasing burden of proof on the debtor regarding the viability of reorganization as a means of balancing a debtor's need to reorganize against the delay, and consequent harm, imposed on creditors by the automatic stay. Initially the balance favors the debtor. But the burden of proof rapidly shifts in favor of secured creditors, requiring a heightened showing by the debtor of its ability to reorganize. Immediately after the case is filed, a debtor opposing stay relief may offer a 'less strenuous' showing of 'a reasonable possibility of successful reorganization within a reasonable time.' During this stage, the debtor may sustain its burden of proof by offering evidence that a successful reorganization within a reasonable time is 'plausible.' The standard is initially low, requiring only evidence that is 'superficially worthy of belief' that the debtor is capable of producing a plan. The terms of the plan can be obscure and vague, as long as it is plausible that a successful reorganization may occur. The bankruptcy court must balance the reasonableness of the delay borne by the secured creditors against the debtor's ability to formulate a confirmable plan. During this early phase of the case, if the debtor presents any evidence that a confirmable plan is plausible, the balance favors the debtor and the creditors are expected to wait while the debtor attempts to craft its plan. Holly's, 140 B.R. at 701.*

"*As expiration of the exclusivity period draws near, a greater showing is required; the debtor must show that a successful plan of reorganization is 'probable.' 'Probable' requires an evidentiary showing that it is more likely than not that the debtor is capable of producing a plan that is confirmable.*

Though not required to produce a plan or satisfy confirmation standards, it must produce sufficient evidence 'that the tools necessary to formulate a plan are available.' During this phase of the case, 'the balance between the reasonableness of the delay borne by the secured creditors and the debtor's ability to formulate a plan is approximately equal.' If the court can't be persuaded that a successful reorganization is probable, no further delay is warranted and the court should grant stay relief. Holly's, *140 B.R. at 701-02.*

"*After exclusivity ends, the debtor faces the 'most stringent and convincing showing' as to the viability of reorganization. The debtor must offer evidence that a successful reorganization within a reasonable time is 'assured.' 'Assured' means that evidence offered in opposition to the motion for stay relief demonstrates that it is 'certain or unquestionable that a plan to be considered at confirmation will soon be produced.' (emphasis original). Even at this late stage the debtor is not required to produce a plan to defend a motion for stay relief. But the debtor must produce 'concrete evidence' that a plan capable of confirmation is forthcoming. After the expiration of the exclusivity period, the 'balance between the reasonableness of the delay borne by a secured creditor and the debtor's ability to formulate a plan favors the creditor.' If the debtor fails in its showing, the creditor should be put to no further delay and the stay should be lifted.* Holly's, *140 B.R. at 702.*

"*Finally, notwithstanding the amount of time that a case has been pending, whether long or short, the court must grant relief if successful reorganization is 'impossible.' 'Impossible' means there is a 'lack of any realistic prospect of effective reorganization.'* Holly's, *140 B.R. at 702-03.*"

In re R.K. Best, Inc., No. 13-13229, 2013 WL 4050998, at *4-5 (Bankr. E.D. Cal. Aug. 6, 2013).

This case falls within the standard applicable after the end of exclusivity. This case was filed on December 6, 2014 and under 11 U.S.C. § 1121(b) the debtor's exclusivity period for filing a plan was 120 days from that date, or no later than April 6, 2015. Accordingly, the debtor must produce "concrete evidence" that a plan capable of confirmation is forthcoming. "[T]he debtor must offer sufficient evidence to indicate that a successful reorganization within a reasonable time is "assured." Holly's at 702.

The court rejects the notion that the mere filing a plan is sufficient to prove "successful reorganization within a reasonable time" for the post-exclusivity period. This is especially true in this case, where the plan proposed by the debtor is unconfirmable on its face. The plan violates the absolute priority rule. The plan is paying less than 100% (20%) to general unsecured creditors, while the debtor is retaining her interest in property. Docket 182 at 8-9.

The plan also modifies several mortgage claims even though this court already denied the debtor's motions to have those claims modified. For instance, the plan includes a purported stripped down portion ($160,361.58) of PennyMac's mortgage on the property in Auburn, California, in the pool of the general unsecured claims. Docket 182 at 8.

However, while the court valued the debtor's 50% interest in that property, the court did not strip down PennyMac's claim or any of the other mortgage claims.

"*Accordingly, the court will only value the debtor's 50% interest in the property.* It will not alter in any way the respondent's claim *against the*

property. The court has unrefuted evidence of value of the debtor's 50% interest in the property, given PennyMac's valuation of the entire property at $325,000 and the debtor's agreement to such valuation. The value of the debtor's 50% interest in the property is $162,500. Dockets 150 & 156. No other relief will be awarded."

Docket 160 at 3.

The debtor's inability to modify, by stripping down or stripping off, a claim secured by a real property in which the debtor owns only partial interest has been already litigated in this case. See Dockets 130, 132, 160, 161, 162 (each ruling unequivocally stating that the court "will not alter in any way the respondent's claim against the property"). The court will not allow the debtor to relitigate this question in connection with the confirmation of the plan filed with the court.

Further, the plan is unconfirmable because it does not provide for the post-petition arrears and advances on account of the mortgagee creditors' claims. For instance, the plan does not provide for payment of any post-petition arrears on the mortgages held by the movant or Bayview, even though both creditors are owed post-petition arrears. Docket 182 at 6-8. For example, in the summary sheet for this motion, the movant has disclosed approximately $20,282 in post-petition arrears, the equivalent of seven outstanding payments. Docket 191.

Finally, the court does not have specific evidence on whether the subject property is necessary to an effective reorganization. There is no evidence from the debtor about whether she is generating any profit from the subject property, after taking into account the monthly expenses on the property, even under the terms of the debtor's currently proposed plan and disclosure statement. Neither the plan, nor the disclosure statement list how much in monthly rent the debtor is generating from the subject property. Neither the plan, nor the disclosure statement list how much are the monthly expenses for the subject property. Docket 182 at 10-11; Docket 183 at 19-21.

Just because the debtor is seeking to keep the property and has provided for some treatment of the claims secured by the property does not mean that the subject property is necessary to an effective reorganization. This is especially true if the debtor is not generating sufficient income from the property to cover its expenses.

Hence, the debtor has not met her burden of proof on the issue of necessity to an effective reorganization. Relief from stay then is warranted under section 362(d)(2).

The court will grant relief from stay also under section 362(d)(1), based on the debtor's seven prior bankruptcy filings in the last four years.

On February 17, 2010, the debtor filed a chapter 13 bankruptcy case in the **Northern District of California** (In re Lisnawati, **case no. 10-51499** (Bankr. N.D. Cal.)). The case was dismissed on April 20, 2010 due to the debtor's failure to make plan payments.

On May 13, 2010, the debtor filed a chapter 13 bankruptcy case in the **Northern District of California** (In re Lisnawati, **case no. 10-55002** (Bankr. N.D. Cal.)). The case was dismissed on June 30, 2010 due to the debtor's failure to file a chapter 13 plan, schedules and statements. The debtor also did not disclose

her prior bankruptcy filing when she filed this case.

On July 25, 2011, the debtor filed a chapter 13 bankruptcy case in the **Eastern District of California** (In re Lisnawati, **case no. 11-38120** (Bankr. E.D. Cal.)). The case was dismissed on October 12, 2011, pursuant to the debtor's request for dismissal filed on September 27, 2011. The debtor never filed a plan, schedules or statements in the case. The debtor also did not disclose any of her prior bankruptcy filings when she filed this case.

On October 26, 2011, the debtor filed a chapter 13 bankruptcy case in the **Eastern District of California** (In re Lisnawati, **case no. 11-45430** (Bankr. E.D. Cal.)). The case was dismissed on March 6, 2012, pursuant to the debtor's request for dismissal filed on February 6, 2012. The debtor failed to appear at the meeting of creditors, failed to make plan payments, failed to file and prosecute a motion for plan confirmation, failed to provide the chapter 13 trustee with payment advices or evidence of income received within the 60-day period prior to the filing, and failed to provide the trustee with her most recent tax year for which a return was filed. Case No. 11-45430, Docket 27 at 2-3. The debtor also did not disclose all of her prior bankruptcy filings when she filed this case.

On October 18, 2012, the debtor filed a chapter 13 bankruptcy case in the **Eastern District of California** (In re Lisnawati, **case no. 12-38520** (Bankr. E.D. Cal.)). The case was dismissed on January 10, 2013, pursuant to the debtor's request for dismissal filed on January 9, 2013, after the chapter 13 trustee had objected to plan confirmation and requested dismissal of the case because the debtor had failed to provide him with her business records. The debtor also did not disclose all of her prior bankruptcy filings when she filed this case.

On January 16, 2013, the debtor filed a chapter 13 bankruptcy case in the **Northern District of California** (In re Lisnawati, **case no. 13-50266** (Bankr. N.D. Cal.)). The case was dismissed on April 30, 2013, pursuant to the debtor's request for dismissal at the April 25, 2013 hearing on her motion to convert to chapter 11, after the trustee had already filed an objection to plan confirmation due to the debtor's ineligibility for chapter 13 relief, the debtor's failure to timely file a plan, her failure to provide the trustee with payment advices or evidence of income within the 60-day period prior to the filing, her failure to provide the trustee with her most recent tax year for which a return was filed, her failure to disclose all bankruptcy cases filed within the last eight years, and her failure to make plan payments. Case No. 13-50266, Dockets 30 & 36.

On July 24, 2013, the debtor filed a chapter 13 bankruptcy case in the **Northern District of California** (In re Lisnawati, **case no. 13-53941** (Bankr. N.D. Cal.)). The case was dismissed on September 19, 2013, pursuant to the trustee's motion for dismissal due to the debtor's failure to make the initial plan payment. Case No. 13-53941, Docket 21. The debtor also did not disclose all of her prior bankruptcy filings when she filed this case. She disclosed only two cases. Case No. 13-53941, Docket 1.

The debtor filed the instant bankruptcy case on December 6, 2014.

The court takes judicial notice of all cases, case dockets and pleadings referenced or cited above. Fed. R. Evid. 201(c)(1).

Bad faith is determined by examining the totality of the circumstances. In re

Rolland, 317 B.R. 402, 414-15 (Bankr. C.D. Cal. 2004). The misrepresentation of facts, the unfair manipulation of the Bankruptcy Code, the history of filings and dismissals, and the presence of egregious behavior are all factors to be considered in determining whether bad faith exists." Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999).

A finding of bad faith does not require fraudulent intent, malice, ill will or an affirmative attempt to violate the law. Leavitt at 1224-25 (quoting In re Powers, 135 B.R. 980, 994 (Bankr. C.D. Cal. 1991)); see also Cabral v. Shabman (In re Cabral), 285 B.R. 563, 573 (B.A.P. 1st Cir. 2002).

The debtor has not disputed or even addressed any of the facts pertaining to the filing of any of her prior cases. In fact, she makes no effort to explain her prior filings. In her only declaration in support of the opposition to this motion, the debtor states nothing about her prior filings, much less attempting to explain their propriety. Docket 203, Debtor Decl.

The debtor's sole focus in addressing the bad faith arguments is that this case has been prosecuted timely and diligently.

But, the court cannot examine this case in vacuum, without considering the debtor's long and egregious history of prior filings. This case must be viewed in light of her prior filing history.

The debtor's filing of seven reorganization bankruptcy cases in the last four years, since February 17, 2010, and her failure to prosecute each of those cases, amounts to egregious behavior and unfair manipulation of the Bankruptcy Code.

The debtor has manifested a clear pattern of abuse and manipulation of the Bankruptcy Code. Prior to filing this case, she has been filing only chapter 13 reorganization cases, which can be dismissed without a hearing. She filed the prior cases and then either defaulted in not filing bankruptcy documents or providing documents to the chapter 13 trustee, or simply requested dismissal before the court could dismiss due to her defaults or lack of prosecution.

Her persistent refiling of chapter 13 cases - even though she was ineligible for chapter 13 relief - is another strong indicator of egregious behavior. For instance, although this court is convinced that the debtor knew or should have known of her ineligibility for chapter 13 relief early in her history of prior filings, the debtor was clearly apprised of her ineligibility for chapter 13 relief in Case No. 13-50266, when the chapter 13 trustee filed an objection to confirmation over two months prior to the hearing on her motion to convert to chapter 11, at which the debtor requested dismissal.

Nevertheless, the debtor filed Case No. 13-53941, another chapter 13 bankruptcy case.

If the debtor really wanted to be in a chapter 11 proceeding, she should have stayed in Case No. 13-50266 and prosecuted her motion to convert to chapter 11.

However, her true intentions were to improperly delay and hinder her creditors and not reorganize within the bounds of the Bankruptcy Code. That is why the debtor - as if changing her mind at the last minute - asked for dismissal of the case rather than conversion to chapter 11. This last minute request for dismissal is consistent with all her dismissal requests in the other prior cases, where she sought dismissal only after it had become apparent that the

debtor had defaulted or was not cooperating with the chapter 13 trustee.

Further, her failures to list prior filings - starting with her second case, Case No. 10-55002, are misrepresentations of fact. The instant case is the first case that all her prior filings have been disclosed. When she disclosed prior filings before, she disclosed only one or two of her several prior filings.

The debtor's compliance with the requirements of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure in this case, to the extent that is so, does not undo or somehow excuse her improper conduct in filing the seven prior reorganization cases. The court is entitled to draw inferences from the debtor's prior conduct in bankruptcy, in determining her true intentions in this case.

From the foregoing, the court infers that the debtor has filed this case in bad faith, with no real intention to reorganize. She has had many chances to reorganize in the past but has over and over again manifested an intent to hinder and delay creditors. The court is not persuaded that this case is any different. This is corroborated by the facial unconfirmability of the debtor's chapter 11 plan, as the court has discussed above in this ruling.

And, bad faith exists even in the absence of improper intent, malice, ill will or affirmative attempt to violate the law. The debtor's filing of seven prior reorganization bankruptcy cases and her failure to prosecute those cases, even without the court's conclusions about her motives, amounts to bad faith.

Bad faith is cause for the granting of relief from stay under section 362(d)(1).

Accordingly, the motion will be granted pursuant to section 362(d)(1) and (2) to permit the movant to conduct a nonjudicial foreclosure sale and to obtain possession of the subject property following sale. No other relief is awarded.

The court determines that this bankruptcy proceeding has been finalized for purposes of Cal. Civil Code § 2923.5 and the enforcement of the note and deed of trust described in the motion against the subject real property. Further, upon entry of the order granting relief from the automatic stay, the movant and its successors, assigns, principals, and agents shall comply with Cal. Civil Code § 2923.52 et seq., the California Foreclosure Prevention Act, to the extent it is otherwise applicable.

Because the movant has not established that the value of its collateral exceeds the amount of its secured claim, the court awards no fees and costs in connection with the movant's secured claim as a result of the filing and prosecution of this motion. 11 U.S.C. § 506(b).

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be waived.

The court will grant relief also under section 362(d)(4), which prescribes that:

"*On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay . . .*

"*with respect to a stay of an act against real property under subsection (a),*

by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either-

"(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

"(B) multiple bankruptcy filings affecting such real property."

As outlined above, this is the debtor's eight bankruptcy case since February 17, 2010. And, as already concluded by the court in connection with the debtor's motion for valuation of the subject property:

"The debtor was the original and sole borrower on the loan from the respondent or its predecessor. The debtor obtained the loan secured by the entire property in August 2007. POC 1 at 25, 29. She is the sole grantor and trustor under the deed of trust securing the loan, also dated August 2007. POC 1 at 9, 22. This means that the debtor was the sole owner of the property when she obtained the loan and granted a deed of trust to secure it. This is corroborated by Schedule A filed in Case No. 11-45430 which shows that she owned the entire property. Case No. 11-45430, Docket 25."

Docket 160.

In other words, all of the debtor's prior filings have affected the subject property, because the debtor has always been the obligor on the note secured by the property. Given the egregiousness of the debtor's prior filings, as outlined above, this case was part of a scheme to delay, hinder, or defraud creditors, involving multiple bankruptcy filings, including the movant in the exercise of state law remedies as to the property.

This is further substantiated by the facial unconfirmability of the debtor's chapter 11 plan in this case, also as discussed above. Relief under section 362(d)(4) will be granted. The motion will be granted.

10. 14-31890-A-11 SHAINA LISNAWATI — MOTION TO APPROVE DISCLOSURE STATEMENT 7-28-15 [183]
JHH-7

Tentative Ruling: The motion will be denied.

The debtor is asking the court to approve the disclosure statement filed on July 28, 2015. Docket 183.

The motion will be denied for the following reasons:

(1) The disclosure statement does not state when the debtor purchased each of her real properties, when she transferred fractional interests in such properties, how much fractional interest she transferred and to whom she transferred such interests in the properties, what is the relationship between the debtor and the persons to whom she transferred the fractional interest in the properties, and why she transferred the fractional interests in the properties.

The disclosure statement also provides inadequate information about what has changed in the debtor's business operations post-petition, as opposed to her pre-petition operations, that will enable her to successfully fund the proposed

plan.

(2) The disclosure statement does not provide background for the debtor's prior bankruptcy cases and a discussion about how this plan is proposed in good faith. See 11 U.S.C. § 1129(a)(3). The good faith discussion should also address the proposed 10-year 20% dividend distribution to general unsecured creditors.

(3) The disclosure statement shall fully incorporate the plan, as the disclosure statement is a stand-alone document that exists separately and independently from the plan. In its summary of claim treatment, the disclosure statement merely refers to the plan. Docket 183 at 15.

(4) The disclosure statement does not disclose that Bayview Loan Servicing obtained stay relief on its collateral (Willow Glen Drive property) and does not address the eventuality that Bayview may foreclose on the property.

The disclosure statement shall explain what will be the repercussions for the debtor's operations and monthly projected budget and income anticipated to fund the plan, if Bayview forecloses on its collateral.

(5) It is unclear from the disclosure statement whether and to what extent the debtor has maintained post-petition payments on the mortgages on the various properties and, if there are post-petition arrears, how the plan will cure those (including post-petition advances). For instance, the disclosure statement does not say whether there are any post-petition arrears on the mortgage held by Bayview. Docket 183 at 10-11; Docket 182 at 7-8.

(6) The disclosure statement provides no discussion on how the debtor plans to comply with the absolute priority rule, given that the plan is paying less than 100% (20%) to general unsecured creditors, while the debtor is retaining her interest in property. Docket 182 at 8-9.

(7) The disclosure statement also does not explain how the plan can treat the secured claims of mortgagees as modified, when the court has not modified such claims. For instance, the plan includes a purported stripped down portion ($160,361.58) of PennyMac's mortgage on the property in Auburn, California, in the pool of the general unsecured claims. Docket 182 at 8.

However, while the court valued the debtor's 50% interest in that property, the court did not strip down PennyMac's claim or any of the other mortgage claims.

"*Accordingly, the court will only value the debtor's 50% interest in the property. It will not alter in any way the respondent's claim against the property. The court has unrefuted evidence of value of the debtor's 50% interest in the property, given PennyMac's valuation of the entire property at $325,000 and the debtor's agreement to such valuation. The value of the debtor's 50% interest in the property is $162,500. Dockets 150 & 156. No other relief will be awarded.*"

Docket 160 at 3.

The debtor's inability to strip down or strip off a claim secured by a real property in which the debtor owns only partial interest has been already litigated in this case. See Dockets 130, 132, 160, 161, 162 (each ruling unequivocally stating that the court "will not alter in any way the respondent's claim against the property"). The court will not allow the debtor

to relitigate this question in connection with the approval of a disclosure statement.

The disclosure statement then should be amended to provide for the mortgage claims in full and to apprise parties in interest about how the debtor plans to pay such mortgage claims.

The court will not address plan confirmation objections at this time.

Future amendments of the disclosure statement should be accompanied by a red/black-lined version.