

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re: S-Tek 1, LLC,
Debtor.

No. 20-12241-j11

S-Tek 1, LLC

Plaintiff and Counter-Defendant,

v.

Adv. Proc. No. 20-01074-j

SURV-TEK, INC. *et al.*,

Defendants and Counterclaimants,

-and-

SURV-TEK, INC. *et al.*,

Third Party Plaintiffs,

v.

CHRISTOPHER CASTILLO *et al.*,

Third Party Defendants.

**MEMORANDUM OPINION AND ORDER DENYING MOTION
TO ENJOIN COLLECTION EFFORTS AGAINST DEBTOR'S PRINCIPALS**

THIS MATTER is before the Court on the Motion for Temporary Restraining Order as to Collection Actions Taken Against Debtor's Principals ("Injunction Motion" – [Doc. 149](#)) filed by S-Tek 1, LLC ("S-Tek"), Randy Asselin, Christopher Castillo, and Kymberlee Castillo (the individuals, together, "Movants"). The Court held a final, evidentiary hearing on the Injunction Motion on August 31, 2022 and took the matter under advisement. Having considered the Injunction Motion, evidence, applicable caselaw, and counsel's arguments, the Court finds and concludes that it is not appropriate to enjoin Surv-Tek, Inc. ("Surv-Tek") from taking any

collection actions against Movants. S-Tek has failed to demonstrate that it is likely to confirm a plan that contains a temporary injunction enjoining collection efforts against S-Tek's principals and their marital assets post-confirmation. Accordingly, the Court will deny the Injunction Motion.

FACTS AND PROCEDURAL HISTORY

S-Tek filed a voluntary petition under chapter 11 of the Bankruptcy Code on December 2, 2020 and elected treatment under subchapter V. *See* Case No. 20-12241-j11 – [Doc. 1](#). S-Tek initiated this Adversary Proceeding by removing an existing state court action it filed against Surv-Tek, Robbie Hugg, and Russ Hugg (together the “Surv-Tek Parties”). The Surv-Tek Parties asserted counterclaims against S-Tek, Randy Asselin, Christopher Castillo, and Kymberlee Castillo.¹ After a nine-day trial, the Court entered a one-hundred twenty-seven page Memorandum Opinion Regarding Adversary Proceeding and Debtor's Motion to Subordinate Pursuant to § 510(c) (“Memorandum Opinion” – [Doc. 132](#)) and related orders.² The Court incorporates herein by reference all of its findings of fact set forth in the Memorandum Opinion. The Order on Claims fixed Surv-Tek's allowed claim against S-Tek in the amount of \$1,567,454.77 (exclusive of attorney's fees) and fixed STIF's allowed claim against S-Tek in the amount of \$82,998.30 (exclusive of attorney's fees), subject to a \$5,800 security deposit set off, but reserved its ruling on Surv-Tek's claims against Randy Asselin, Christopher Castillo, and Kymberlee Castillo (collectively, the “Guarantors”) under a Commercial Guaranty (the “Commercial Guaranty”) and on STIF's claims against Mr. Asselin and Mr. Castillo under a

¹ The claims asserted in this Adversary Proceeding also include claims asserted by STIF, LLC (“STIF”) against S-Tek under its lease with S-Tek and claims by STIF against Randy Asselin and Christopher Castillo for breach of the related Personal Guaranty.

² *See* Order Regarding Claims, Counterclaims, and Third-Party Claims ([Doc. 133](#)) and Order Correcting Order Regarding Claims, Counterclaims, and Third-Party Claims ([Doc. 135](#)) (together, “Order on Claims”).

Personal Guaranty related to STIF's lease with S-Tek (the "Personal Guaranty").³ The Court has not entered a final judgment in this Adversary Proceeding.

In S-Tek's bankruptcy case, the Court entered a Memorandum Opinion ("Valuation Opinion") determining that the total replacement value of Surv-Tek's collateral is \$499,709.54. *See* Case No. 20-12241-j11 - [Doc. 370](#). Surv-Tek made an election under [11 U.S.C. § 1111\(b\)](#)⁴ on June 21, 2022, electing to have its claim treated as a secured claim to the extent its claim is allowed. *See* Case No. 20-12241-j11 - [Doc. 379](#).

S-Tek filed Debtor's Third Plan of Reorganization ("Third Amended Plan") on August 19, 2022. *See* Case No. 20-12241-j11 - [Doc. 420](#). A final hearing on confirmation of the Third Amended Plan is set for October 12, 13, and 14, 2022. S-Tek's Third Amended Plan proposes to pay allowed unsecured non-priority claims, a pro rata, a total of \$45,000 payable at the rate of \$750 per month for five years.⁵

The Third Amended Plan proposes two options for the treatment of Surv-Tek's allowed claim. Under Option A, S-Tek proposes to surrender all of Surv-Tek's collateral to Surv-Tek except for the tradename, web domain, and telephone number, and pay Surv-Tek a total of \$30,000⁶ plus interest at 5% in monthly installments through March of 2029.⁷ Option A anticipates a 2.9% dividend to non-priority unsecured creditors, including Surv-Tek.⁸ Under Option B, S-Tek proposes to surrender *all* of Surv-Tek's collateral to Surv-Tek in total

³ *Id.*

⁴ All future references to "Code," "Section," and "§" are to Title 11 of the United States Code unless otherwise indicated.

⁵ Third Amended Plan, ¶ 7.01(A) and ¶ 7.01(B). OK

⁶ This figure is the Court's valuation of the "Customer Database" from the Valuation Opinion. *See* Case No. 20-12241-j11 - [Doc. 370](#).

⁷ Third Amended Plan, ¶ 7.09(A).

⁸ Third Amended Plan, p.2.

satisfaction of Surv-Tek's allowed claim.⁹ Under Option B, if S-Tek's surrender of collateral to Surv-Tek is deemed total satisfaction of Surv-Tek's claim, S-Tek estimates a dividend of 27.6% to the remaining unsecured non-priority creditors, but if surrender of the collateral is merely applied to Surv-Tek's claim, the anticipated dividend to non-priority unsecured creditors, including Surv-Tek, is 3%.¹⁰

The plan proposes to pay an administrative claim of the Internal Revenue Service, which S-Tek estimates to be about \$37,000, the Debtor's unpaid post-petition attorneys' fees to S-Tek's bankruptcy counsel estimated to be about \$210,000, Subchapter V trustee fees estimated to be about \$5,000, priority tax claims estimated to be about \$80,000, and a total of \$45,000, pro rata, to holders of non-priority unsecured claims of about \$110,000 (excluding the Surv-Tek's and SITF's claims). *See* Third Amended Plan. Most of the debt to holders of non-priority unsecured claims (excluding the Surv-Tek's and STIF's claims) is secured by property pledged by Mr. Castillo.

Surv-Tek holds a high percentage of the prepetition debt in the bankruptcy case. No creditor other than Surv-Tek has actively participated in the bankruptcy case. By contrast, Surv-Tek has incurred professional fees of approximately \$480,000, consisting of \$320,000 incurred in connection with this bankruptcy case, and approximately \$160,000 incurred pre-petition in connection with the sale of assets by Surv-Tek to S-Tek and pre-petition litigation between S-Tek and Surv-Tek regarding that transaction.¹¹

⁹ Third Amended Plan, ¶ 7.09(B).

¹⁰ Third Amended Plan, p. 2.

¹¹ *See* Surv-Tek, Inc.'s and STIF, LLC's Claims for an Apportionment of Attorney's Fees, filed July 8, 2022. [Doc. 139](#). Although S-Tek and the Guarantors dispute whether some or all of these attorneys' fees should be included in a judgment against S-Tek or the Guarantors, Surv-Tek did incur the fees. Surv-Tek waived its claim for attorneys' fees against the Guarantors, which has not been liquidated, so the Court would be in a position to issue an immediate final judgment in favor of S-Tek against the Guarantors.

The Third Amended Plan contains the following provision:

Confirmation of the Plan will temporarily enjoin collection actions by Surv-Tek against Randy Asselin and Christopher Castillo. Such collection actions include actions taken to collect the marital property of either Randy Asselin or Christopher Castillo.

Except in the case of default, this third-party injunction shall last until the later of S-Tek's final Plan payment to Serv-Tek, or S-Tek's final Class 1 payment to Surv-Tek. In the event of default under the Plan, this injunction shall likewise cease, but if the default is de-accelerated through cure as allowed by § 12.02, above, then the injunction shall be reinstated.¹²

The Third Amended Plan is potentially feasible only if S-Tek is able to borrow funds from the New Mexico Community Development Loan Fund, Inc. ("The Loan Fund") to purchase equipment, vehicles and other assets to replace the collateral that will be surrendered to Surv-Tek if the plan is confirmed. As stated in the Third Amended Plan, the anticipated loan from The Loan Fund will be a line of credit with "a maximum principal balance of \$350,000" to be used "to recapitalize [S-Tek's] operations and enable it to surrender most or all of the collateral to Surv-Tek."¹³

The Third Amended Plan provides further that "Mr. Asselin or Mr. Castillo may be required to pledge personal property" to obtain a loan from The Loan Fund.¹⁴ The Loan Fund currently has a lien on certain real property owned by Christopher Castillo located at 11120 Vistazo Pl SE, Albuquerque, New Mexico ("Vistazo Property") in connection with a prior loan by The Loan Fund to S-Tek. A letter from The Loan Fund dated January 10, 2022 (the "Loan Fund Letter")¹⁵ states that the newly loaned funds will be used in part to refinance that debt. The Loan Fund Letter contemplates a second priority mortgage on the Vistazo Property, a first priority UCC 1 lien on business assets, and personal guarantees from Mr. Castillo, Kymberlee

¹² Third Amended Plan, ¶ 12.04.

¹³ Third Amended Plan, ¶ 10.03.

¹⁴ *Id.*

¹⁵ Exhibit 2.

Castillo, and Randy Asselin.¹⁶ The Loan Fund Letter is unsigned. Randy Asselin and Christopher Castillo testified that The Loan Fund is very willing to work with them and S-Tek to secure the financing contemplated by the Loan Fund Letter and the Third Amended Plan, but that S-Tek has not yet obtained a revised, signed loan commitment letter from The Loan Fund because of the “fluidity” of the situation and S-Tek’s efforts to obtain a confirmed plan.¹⁷

The Third Amended Plan provides for “a substantial contribution of managerial capital from both Mr. Asselin and Mr. Castillo[,]” defined as “the skill and effort, including the creative, entrepreneurial, managerial, and problem-solving acumen, required to maintain, manage, and grow” S-Tek.¹⁸ The Third Amended Plan does not contemplate that Mr. Asselin and Mr. Castillo will contribute any assets to S-Tek Mr. Asselin and Mr. Castillo apart from Mr. Castillo granting The Loan Fund a lien against the Vistazo Property and Mr. Asselin and Mr. Castillo possibly granting personal guarantees to enable S-Tek to obtain a new loan from The Loan Fund.

Mr. Castillo owns three parcels of real property, one of which is his principal residence (“Residence”). Mr. Castillo recently listed the Residence for sale.¹⁹ The other two parcels of real property, including the Vistazo Property, are rental properties. Both rental properties are encumbered by mortgages. Mr. Castillo estimated that all three properties, collectively, have between \$500,000 and \$600,000 in equity, before realtor fees. Most of the equity in the three properties is in the Residence. The Residence has not been pledged as collateral to secure financing from The Loan Fund. Apart from a possible pledge of the Vistazo Property to The

¹⁶ *Id.*

¹⁷ Counsel for S-Tek and the Movants offered to supplement the evidence with a signed commitment letter from The Loan Fund.

¹⁸ *Id.*

¹⁹ Mr. Castillo indicated that he listed his Residence for sale because of changed financial circumstances, including loss of his job in June of 2022. Mr. Castillo recently secured new employment with an annual salary of \$150,000, which is the same salary as his previous job, but continues to market his Residence for sale.

Loan Fund, the Third Amended Plan does not propose that Mr. Castillo or Randy Asselin to contribute any personal money or assets to pay S-Tek's creditors.

On August 29, 2022, Surv-Tek filed an Emergency Motion for Entry of Judgment Against Guarantors ("Emergency Motion for Judgment" – [Doc. 147](#)). Surv-Tek's only source of recovery on the indebtedness S-Tek owes it is from Surv-Tek and from the Guarantors. Surv-Tek filed the Emergency Motion for Judgment because it learned that Mr. Castillo had listed his primary residence for sale; Surv-Tek believes there is substantial non-exempt equity in that property to which a judgment lien could attach. *Id.* The Court scheduled a status conference on the Emergency Motion for Judgment on August 30, 2022. S-Tek and Movants filed the Motion just before the Court commenced the status conference on August 30, 2022.

At the status conference on the Emergency Motion for Judgment, Surv-Tek waived its unliquidated claim for attorney's fees and costs against Randy Asselin, Christopher Castillo and Kymberlee Castillo under the Commercial Guaranty.²⁰ Based on that waiver, the Court determined it would rule on the Emergency Motion for Judgment and enter final judgment, if and when appropriate, against Mr. Asselin, Mr. Castillo, and Ms. Castillo based on the breach of the Commercial Guaranty.²¹ Thereafter, the Court entered a Memorandum Opinion Regarding Claims Against Guarantors and Emergency Motion for Judgment Against Guarantors ([Doc. 158](#)) determining that Randy Asselin, Christopher Castillo, and Kymberlee Castillo are liable to Surv-Tek under the Commercial Guaranty in the amount awarded against S-Tek, \$1,553,454.77, plus post-petition interest at the per diem rate of \$203.48. The Court ruled further that it would enter a separate final judgment in favor of Surv-Tek and against the Guarantors in that amount, after it

²⁰ See [Doc. 153](#).

²¹ *Id.*

decides the Injunction Motion. The Court held a final, evidentiary hearing on the Injunction Motion on August 31, 2022, and took the matter under advisement.

THE COURT WILL TREAT THE MOTION FOR A TEMPORARY
RETRAINING ORDER AS A MOTION FOR PRELIMINARY INJUNCTION

The Injunction Motion is styled as a request for temporary restraining order, which may be issued without notice or an evidentiary hearing under [Fed. R. Civ. P. 65](#), made applicable to adversary proceedings by [Fed. R. Bankr. P. 7065](#). However, if the opposing party is given an opportunity to be heard and evidence is presented, the Court may treat a request for a temporary restraining order as a request for a preliminary injunction.²² The Court will treat the Injunction Motion as a motion for preliminary injunction. Although the evidentiary hearing on the Injunction Motion was held on short notice, given the three assumptions set forth below, the Movants have had a full and fair opportunity to present evidence relevant to the Court's consideration of the Motion under the preliminary injunction standard. For purposes of considering the Injunction Motion under the preliminary injunction standard, and only for that purpose, the Court is assuming that (1) the Third Amended Plan is feasible and confirmable apart from the plan injunction set forth in ¶ 12.04 of the plan (and apart from any effect on plan feasibility that may result from denial of the Injunction Motion), (2) The Loan Fund will sign a revised form of the Loan Fund Letter committing to loan S-Tek funds as contemplated by the Third Amended Plan, and (3) The Loan Fund will not make the loan to S-Tek if Surv-Tek files a

²² See *Valdez v. Grisham*, [559 F.Supp.3d 1161, 1170](#) n.1 (D.N.M. 2021), *aff'd*, No. 21-2105, 2022 WL 2129071 (10th Cir. June 14, 2022) (“Where . . . there has been notice to the adverse party, a motion for temporary restraining order ‘may be treated by the court as a motion for preliminary injunction.’” (quoting 13 Moore’s Federal Practice § 65.31 (2020))); *Kansas Hosp. Ass’n v. Whiteman*, [835 F.Supp. 1548, 1551](#) (D. Kan. 1993) (“When the opposing party has been notified and a hearing held prior to issuance of a temporary restraining order, the specific requirements of [Fed.R.Civ.P. 65\(b\)](#) . . . do not apply. In such a case the court . . . follows the same procedure as for a preliminary injunction motion.” (citing 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2951, at 500 (1973))).

judgment lien against the Vistazo Property, which would have an adverse impact on the S-Tek's ability to accomplish reorganization.²³

TO DECIDE WHETHER TO GRANT THE REQUESTED
PRE-CONFIRMATION INJUNCTION, THE COURT WILL CONSIDER WHETHER
IT WOULD APPROVE THE PROPOSED TEMPORARY PLAN INJUNCTION

S-Tek and Movants seek to enjoin Surv-Tek from taking any collection actions against Randy Asselin, Christopher Castillo, and Kymberlee Castillo, guarantors of S-Tek's indebtedness to Surv-Tek, until the Court rules on confirmation of S-Tek's Third Amended Plan, which contains a temporary plan injunction that would enjoin creditors from collection actions against Randy Asselin and Christopher Castillo (including actions to collect form marital property of either of them) post-confirmation.²⁴ In other words, S-Tek and Movants request pre-confirmation injunctive relief that would serve as a bridge to the post-confirmation temporary injunction contained S-Tek's proposed Third Amended Plan. A hearing on the confirmation of the Third Amended Plan is scheduled to take place in less than a month. If the Court will not approve the proposed temporary plan injunction, there is no reason to grant a pre-confirmation injunction as bridge to the plan injunction. Under these circumstances, to evaluate whether to

²³ The Court is making these assumptions because the Court held a hearing on the Motion for Temporary Injunction on short notice, the Court is converting that motion to a motion for preliminary injunction, and the assumptions have no effect on the Court's ruling on the Injunction Motion.

²⁴ It is unclear how long the post-confirmation temporary injunction will last. The Third Amended Plan provides that "this third-party injunction shall last until the later of S-Tek's final Plan Payment to Surv-Tek or S-Tek's final Class 1 payment to Surv-Tek." Third Amended Plan, ¶ 12.04. Under Option A Surv-Tek's Class 1 treatment includes a \$30,000 payment to Surv-Tek "in equal monthly payments beginning on the Initial Distribution Date and continuing each month through and including March of 2029" Third Amended Plan, ¶ 7.01(A). The Third Amended Plan also contemplates pro-rata payments to Surv-Tek from S-Tek's proposed \$750 monthly payments over five years. *See* Third Amended Plan, ¶ 7.01(A) (Class 2). Finally, the Third Amended Plan also contains a provision for S-Tek to surrender to Surv-Tek all of its collateral in total satisfaction of Surv-Tek's claim within 90 days after the Confirmation Date. Third Amended Plan, ¶ 7.01(B) (Class 1). These possible variances in the duration of the proposed temporary plan injunction do not change the Court's decision.

grant the requested pre-confirmation injunction, the Court will consider whether it would approve the proposed temporary plan injunction.

THE BANKRUPTCY COURT HAS THE AUTHORITY TO
APPROVE A TEMPORARY PLAN INJUNCTION

As a threshold matter, the Court will consider whether it has the authority to grant a temporary plan injunction. The Tenth Circuit has determined that a bankruptcy court does not have the power in a chapter 11 case to grant a post-confirmation permanent injunction preventing a creditor from exercising remedies against a non-debtor because its equitable powers can only be excised within the confines of the Bankruptcy Code. *In re W. Real Est. Fund, Inc.*, [922 F.2d 592, 601-02](#) (10th Cir. 1990), *modified sub nom. Abel v. West*, [932 F.2d 898](#) (10th Cir. 1991). The Tenth Circuit explained that a permanent injunction prohibiting collection against non-debtor guarantors in essence would discharge the liability of the non-debtor guarantors, a result not permitted by § 524(e). *Id.* at 601-02. Section 524(e) provides, with an exception not applicable here, that a “discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.”

S-Tek’s Third Amended Plan contains only a “temporary injunction” that would enjoin Surv-Tek and STIF from pursuing remedies under guarantees while S-Tek is making payments to creditors under its plan. A temporary plan injunction does not in essence discharge the liability of the non-debtor guarantors because it only delays collection efforts. When the temporary injunction expires, the creditor is free to pursue collection remedies against the non-debtor guarantors to the extent the creditor’s claim against them was not satisfied during the period the temporary injunction was in effect. Under § 105(a) the Court has the authority to grant a temporary plan injunction. The impropriety of a permanent injunction does not necessarily extend to a temporary injunction of third-party actions. Such an injunction may be proper under

unusual circumstances. *In re Zale Corp.*, [62 F.3d 746, 761](#) (5th Cir. 1995) (“The impropriety of a permanent injunction does not necessarily extend to a temporary injunction of third-party actions. Such an injunction may be proper under unusual circumstances”).

STANDARD FOR GRANTING A TEMPORARY PLAN INJUNCTION

It is not clear from the caselaw what standard the Court should apply in deciding whether to grant a temporary plan injunction preventing a creditor from exercising remedies against a non-debtor. In other jurisdictions where it is possible to obtain a permanent plan injunction or third-party release, some courts apply an “unusual circumstances” test that may include consideration of various factors. *E.g. In re Seaside Eng'g & Surveying, Inc.*, [780 F.3d 1070, 1078](#) (11th Cir. 2015); *Behrmann v. Nat'l Heritage Found.*, [663 F.3d 704, 712](#) (4th Cir. 2011); *In re Dow Corning Corp.*, [280 F.3d 648, 658](#) (6th Cir. 2002). In *Dow Corning*, the Sixth Circuit adopted factors, that have become known as the *Dow Corning* factors, to determine whether the proposed permanent plan injunction is necessary and fair. Those factors are:

1. Whether there is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtors, in essence a suit against the debtor or will deplete the assets of the estate;
2. Whether the non-debtor has contributed substantial assets to the reorganization;
3. Whether the injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor;
4. Whether the impacted class, or classes, has overwhelmingly voted to accept the plan;
5. Whether the plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction;
6. Whether the plan provides for an opportunity for those claimants who choose not to settle to recover in full; and
7. Whether the bankruptcy court made a record of specific factual findings that support its conclusions.

Dow Corning, [280 F.3d at 658](#). The Fourth and Eleventh Circuits find that the *Dow Corning* factors are instructive and commend them to a bankruptcy court as non-exclusive factors when

considering whether to approve non-debtor releases as part of a final plan of reorganization. *Seaside Eng'g*, [780 F.3d at 1079](#); *Behrmann*, [663 F.3d at 712](#).

For temporary plan injunctions to prevent a creditor from exercising remedies against a non-debtor third party, some courts apply a traditional preliminary injunction standard. *See, e.g., In re CE Elec. Contractors, LLC*, No. 21-20211 (JJT), 2022 WL 952776, at *2 (Bankr. D. Conn. Mar. 29, 2022); *In re Linda Vista Cinemas, L.L.C.*, [442 B.R. 724, 746](#) (Bankr. D. Ariz. 2010). Other courts consider the unusual circumstances identified in *Zale Corp.*²⁵ *See, e.g., In re Bernhard Steiner Pianos USA, Inc.*, [292 B.R. 109, 116](#) (Bankr. N.D. Tex. 2002) (applying unusual circumstances factors to determine whether to allow a temporary plan injunction). Yet another approach is to first consider whether unusual circumstances justifying a temporary plan injunction exist, and, if such circumstances are found to exist, then apply the traditional preliminary injunction standard. *See In re K3D Prop. Servs., LLC*, [635 B.R. 297, 316](#) (Bankr. E.D. Tenn. 2021).

In the Tenth Circuit, under the traditional preliminary injunction standard the moving party must demonstrate:

- (1) a likelihood of success on the merits;
- (2) a likely threat of irreparable harm to the movant;
- (3) the harm alleged by the movant outweighs any harm to the non-moving party; and
- (4) an injunction is in the public interest.

Hobby Lobby Stores, Inc. v. Sebelius, [723 F.3d 1114, 1128](#) (10th Cir. 2013), *aff'd sub nom., Burwell v. Hobby Lobby Stores, Inc.*, [573 U.S. 682, 134 S. Ct. 2751, 189 L. Ed. 2d 675](#) (2014).²⁶

²⁵ Unusual circumstances may exist “when the nondebtor and debtor enjoy such an identity of interests that the suit against the nondebtor is essentially a suit against the debtor, and . . . when the third-party action will have an adverse impact on the debtor’s ability to accomplish reorganization.” *Zale Corp.*, [62 F.3d at 761](#).

²⁶ *See also Zale Corp.*, [62 F.3d at 765](#) (the bankruptcy court must consider the traditional factors governing preliminary injunction when issuing a preliminary injunction under § 105); *In re Med. Mgmt.*

Here, the Court will apply the traditional injunction standard to determine whether to grant equitable relief by approving a temporary plan injunction preventing a creditor from exercising remedies against a non-debtor third party. However, to evaluate a temporary plan injunction, the Court will expand the balancing of harms requirement for preliminary injunctions to include a weighing of the equities. Unlike in a traditional two-party dispute, the balancing of harms in the context of a temporary plan injunction requires consideration not only of harm to the movant but also of harm to creditors, employees, and other parties in interest in the bankruptcy case. But regardless of what test or factors the Court applies, Movants are not entitled to injunctive relief.

DISCUSSION

Movants rely primarily on *In re Otero Mills*, [21 B.R. 777](#) (Bankr. D.N.M. 1982) where the bankruptcy court employed its equitable powers under § 105 to enjoin a creditor's collection efforts against a third-party, non-debtor guarantor. The *Otero Mills* court applied the following injunction factors: irreparable harm; likelihood of success, and harm to the creditor. *Id.* at 779. In granting the injunction, the bankruptcy court found that debtor would be irreparably harmed if the creditor were allowed to foreclose the property because the debtor's principal intended to sell that property to fund the plan; that while likelihood of success should be measured by the probability of a successful plan of reorganization, debtor's plan was not yet due, and foreclosure of the property would impede the debtor's ability to formulate a plan; and that the creditor did

Grp., Inc., [302 B.R. 112](#), *7 (10th Cir. BAP 2003) (unpublished) ("The relief available under section 105 [including the power to enjoin collection actions against third-party non-debtors] is in the nature of an injunction and is governed by the principals that govern injunctions in general." (citing *W. Real Est. Fund, Inc.*, [922 F.2d 592, 599](#) (10th Cir. 1990))); *Linda Vista*, [442 B.R. at 746](#) ("To gain injunctive relief, post-confirmation, a debtor would be required to prove traditional injunction standards.").

not present evidence of harm if the injunction were issued and was adequately protected by equity in the property. *Id.* at 779-80.

Although some of the facts in *Otero Mills* are similar to the facts present here, many are not. Markedly, S-Tek has filed a plan that itself contains a temporary injunction, and the non-debtor guarantors do not propose to fund the plan with the sale of their real property. The Court must evaluate the request for preliminary injunction in light of S-Tek's plan provision that seeks to temporarily enjoin creditors from collecting against S-Tek's principals and the principals' marital assets post-confirmation.

Application of the Traditional Preliminary Injunction Standards.

Movants cannot satisfy either the balancing of harms and equities or the public interest requirements for issuance of injunctive relief. Therefore, the Court need not consider the other requirements. *See Valdez v. Grisham*, [559 F.Supp.3d at 1181](#) (failure to satisfy one of the factors is alone fatal to a request for preliminary injunction).

Balancing of Harms and Equities

In this case, the most important consideration is whether Surv-Tek is protected in ultimately recovering what it can feasibly recover against the Guarantors to collect the amount of the guaranteed debt if the Court grants injunctive relief. *See K3D Property*, [635 B.R. at 317](#) (Whether the plan provides substantial payment to the enjoined creditor and whether the creditor has alternate sources for recovery for any amount owed to the creditor that will not be paid under the plan "is a critical piece of the analysis."). The Guarantors are liable to Surv-Tek in the amount of \$1,553,454.77 plus post-petition interest at the per diem rate of \$203.48. *S-Tek 1, LLC v. Surv-Tek, Inc. (In re S-Tek 1, LLC)*, Adv. No. 20-1074, 2022 WL 3965534, at *5 (Bankr. D.N.M. Aug. 31, 2022). Surv-Tek will recover at most about \$500,000 under S-Tek's plan, about

one-third of the Guarantors' indebtedness to it. Almost all of that recovery will be from S-Tek's surrender of collateral to Surv-Tek.

There is a reasonable likelihood that Surv-Tek will be irreparably harmed if the Court approves the proposed plan injunction. Mr. Castillo has approximately \$500,000 to \$600,000 in equity in his real property. That very well may be the primary source by which Surv-Tek can receive payment from the Guarantors. The proposed temporary plan injunction, if approved, would prevent Surv-Tek for a considerable time from filing judgment liens against that real property, and foreclosing the liens, which would allow Surv-Tek to realize a substantial pay down of the amount Mr. Castillo owes on his Commercial Guaranty, an amount that Sur-Tek will not be able to collect from S-Tek and may not be able to collect from any other source. The bulk of Mr. Castillo's equity in real estate is equity in his Residence. He recently listed his Residence for sale and has asked for issuance of a pre-confirmation injunction, in part, to permit him to consummate a sale of his Residence. If Surv-Tek is enjoined from filing judgment liens, Mr. Castillo will be able to sell his Residence before Surv-Tek can file a judgment lien and thereby convert his equity in the Residence to cash free of any liens Surv-Tek may subsequently be able to file. If the proposed temporary plan injunction issues, the Guarantors, including Mr. Castillo, will have ample opportunity to arrange their affairs to make it less likely that Surv-Tek ultimately will collect nearly as much on the Commercial Guaranty.²⁷

The irreparable harm to Surv-Tek by issuance of the plan injunction, and by a preconfirmation injunction as a bridge to the plan injunction, by itself is sufficient reason to deny

²⁷ The Movants argue that Surv-Tek would be protected because if any of the sale proceeds were fraudulently transferred to third parties then Surv-Tek could bring fraudulent transfer actions against the third parties. But the ability to engage in expensive and potentially risky litigation is not adequate protection. Further, sale proceeds could be spent, invested and lost, or over a period of time converted in part to forms of property exempt from claims of creditors.

the issuance of the requested pre-confirmation injunction. In the Tenth Circuit, bankruptcy courts do not have the power to issue permanent plan injunctions that prevent a creditor from exercising remedies against non-debtor guarantors because such an injunction in essence would impermissibly discharge the debt of a non-debtor in violation of § 524(e). *W. Real Est.*, [922 F.2d at 601-02](#). A temporary plan injunction preventing the exercise of collection remedies against a non-debtor guarantor, where it creates irreparable harm to a creditor's ultimate collection of the guaranteed debt, would essentially create the very harm that the prohibition against a permanent injunction is designed to prevent.

The Court also notes that Surv-Tek holds a high percentage of the prepetition debt in the bankruptcy case, and no creditor other than Surv-Tek has actively participated in the bankruptcy case. Surv-Tek has incurred professional fees to protect its claim against S-Tek and the Guarantors that exceeds the aggregate amount that S-Tek owes to all of its creditors other than Surv-Tek and STIF. These circumstances further support the Court's determination that the Movants have not satisfied the balance of harms and equities requirement for injunctive relief.

Public Interest

Often confirmation of a chapter 11 plan to preserve a small business as a going concern serves the public interest by maximizing payments to creditors, preserving jobs, by enabling the business to make its contribution to the local and national economy and tax base, and in some cases by promoting innovation and fostering the entrepreneurial spirit.²⁸ These are important

²⁸ See *Rehabworks, Inc. v. Lee (In re Integrated Health Servs., Inc.)*, [281 B.R. 231, 239](#) (Bankr. D. Del. 2002) ("In the context of a bankruptcy case, promoting a successful reorganization is one of the most important public interests.") (citations omitted); *Gathering Restaurant, Inc. v. First Nat'l Bank of Valparaiso (In re Gathering Rest.)*, [79 B.R. 992, 999](#) (Bankr. N.D. Ind. 1986) (in determining whether to grant an injunction under § 105, "the public interest, means the promoting of a successful reorganization . . .").

public policies underlying a chapter 11 small business reorganization and the tools afforded a debtor under the Bankruptcy Code to effectuate a reorganization.

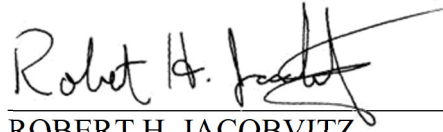
However, the Bankruptcy Code places limits on what interests may be sacrificed to accomplish a reorganization. Section 524(e) of the Code provides, with an exception not applicable here, that “discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.” As noted above, the Tenth Circuit has held that a permanent plan injunction against a creditor’s collection against a non-debtor guarantor violates this provision. *W. Real Est.* [922 F.2d at 601-02](#). A guarantee gives a creditor another source of payment if the debtor commences a bankruptcy case or does not pay, thereby limiting credit risk.²⁹ In the context of claims against non-debtor guarantors, § 524(e) reinforces the overriding freedom of contract public purpose served by commercial guaranties to facilitate commercial lending and commerce.

On balance, under the circumstances of this case, confirmation of the Third Amended Plan that includes a temporary plan injunction against Surv-Tek’s collection against the Guarantors does not serve the public interest. As stated above, Surv-Tek will be irreparably harmed if the Court issues the requested pre-confirmation and post-confirmation injunctive relief and will lose the opportunity to protect itself by filing judgment liens. That is not in the public interest.

Because S-Tek cannot satisfy the balance of harms and equities and the public interest elements of the traditional preliminary injunction standard, the Court will deny the requested injunctive relief.

²⁹ See *Credit All. Corp. v. Williams*, [851 F.2d 119, 122](#) (4th Cir. 1988) (the purpose of a guaranty is to protect a creditor if the debtor defaults); *Lyondell Chem. Co. v. CenterPoint Energy Gas Servs Inc. (In re Lyondell Chem. Co.)*, [402 B.R. 571, 593](#) (Bankr. S.D.N.Y. 2009) (same).

WHEREFORE, IT IS HEREBY ORDERED that the Motion for Injunction is DENIED.



ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: September 19, 2022

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