

NOT FOR PUBLICATION

JUL 19 2010

SUSAN M SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	CC-10-1144-HPaD
	)		
FABTECH INDUSTRIES, INC.,	)	Bk. No.	10-18411-BB
	)		
Debtor.	)	Adv. No.	10-01294-BB
	)		
<hr/>			
BANK OF THE WEST,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>AMENDED</b>	
	)	<b>M E M O R A N D U M<sup>1</sup></b>	
FABTECH INDUSTRIES, INC.,	)		
	)		
Appellee.	)		
	)		

Argued and Submitted on June 16, 2010  
at Reno, Nevada

Filed - July 19, 2010

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Sheri Bluebond, Bankruptcy Judge, Presiding

Before: HOLLOWELL, PAPPAS and DUNN, Bankruptcy Judges.

Fabtech Industries, Inc. (the Debtor) was granted a temporary restraining order and preliminary injunction enjoining its primary secured creditor, Bank of the West (the Bank), from continuing an action in state court to enforce a guaranty against

<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 the Debtor's CEO. The injunction was extended twice by the  
2 bankruptcy court over the Bank's objection.

3 When the bankruptcy court granted the Debtor's third motion  
4 to continue the extension until the date scheduled for the  
5 Debtor's chapter 11 plan confirmation hearing, the Bank appealed.  
6 The Bank contends that because the Debtor's chapter 11 plan  
7 contains a post-confirmation provision limiting the Bank's  
8 ability to pursue its guaranty against the Debtor's CEO, the  
9 Debtor's plan cannot be confirmed, and therefore, the Debtor  
10 necessarily failed to establish that it had a reasonable  
11 likelihood of successful reorganization, one of the requirements  
12 necessary for a preliminary injunction. We **AFFIRM**.

### 13 I. FACTS

14 The Debtor is in the business of designing, developing and  
15 manufacturing suspension systems and accessories for off-road car  
16 and truck enthusiasts and race teams. The company was  
17 established in 1989, and employs between 45 and 50 workers. The  
18 Debtor had a profitable history until 2006-2007, when it lost  
19 money after it incurred significant expenses associated with a  
20 large advertising and sales campaign for one of its customers  
21 that ultimately failed. Additionally, in conjunction with the  
22 recession, its primary customers cut back on purchases and  
23 payments for the Debtor's specialty products.

24 The Debtor is owned and run by Brent Riley (Riley) and David  
25 Winner (Winner). Riley is a 10% shareholder and the president of  
26 the Debtor. He oversees the Debtor's administrative business  
27 operations. Winner is a 90% shareholder through The David James  
28 Winner Trust. Winner is the Debtor's CEO and oversees its

1 manufacturing and warehouse operations. Together, Riley and  
2 Winner run the Debtor's day-to-day business; however, Winner is  
3 in charge of the design, manufacture and marketing of the  
4 Debtor's products and according to the Debtor is considered to be  
5 "the face of Fabtech."

6 On March 7, 2005, the Debtor and the Bank entered into a  
7 credit agreement (the Agreement). The extension of credit was  
8 secured by almost all of the Debtor's personal property and  
9 assets. Winner personally guaranteed the Debtor's obligations  
10 under the Agreement. Over time, the Debtor's borrowing limit  
11 reached \$8 million. In March 2008, the Bank requested the credit  
12 line be paid down. Winner paid down over \$2.5 million, from \$7.6  
13 million to \$5 million.<sup>2</sup> On August 31, 2008, the Agreement  
14 matured and the Bank declined to renew the credit line and  
15 demanded payment. The Debtor filed a chapter 11<sup>3</sup> bankruptcy  
16 petition on March 9, 2009, and continued to operate as the  
17 debtor-in-possession.

18 On April 28, 2009, the Bank filed a complaint in state court  
19 against Winner individually and as trustee for The David James  
20 Winner Trust alleging Winner breached his guaranty obligations to  
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22 <sup>2</sup> Winner used \$652,000 of his personal assets to pay down  
23 the credit line in June 2008; and caused Eucalyptus Properties,  
24 LP, an entity in which Winner is a member, and White Star  
25 Properties, another entity in which Winner has an interest, to  
26 pay \$1,090,000 and \$636,764, respectively, to the Bank.

The Bank filed a proof of claim on April 16, 2009, asserting  
a secured claim in the amount of \$5,117,198.14.

27 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 the Bank under the Agreement (the State Court Action). Bank of  
2 the West v. David J. Winner, et. al., Superior Court of  
3 California, County of Orange, Case No. 0012219.

4 On May 19, 2009, the Debtor filed a complaint for a  
5 temporary restraining order and a motion for preliminary  
6 injunction seeking to restrain the Bank from proceeding with the  
7 State Court Action. The Debtor alleged that the diversion of  
8 Winner's time to the State Court Action would adversely affect  
9 the Debtor's ability to effectively reorganize. The Bank argued,  
10 in opposition, that the Debtor had no financial ability to make  
11 any payments to creditors, and therefore any plan of  
12 reorganization contemplated by the Debtor would not be feasible.  
13 Additionally, the bank argued it would be harmed by an injunction  
14 of indefinite duration if other creditors sued Winner and  
15 obtained judgments that would dissipate Winner's assets.

16 On July 6, 2009, the bankruptcy court approved the Debtor's  
17 motion for a preliminary injunction to restrain the Bank from  
18 prosecuting its State Court Action through September 30, 2009  
19 (the Injunction Order). The Injunction Order allowed the Debtor  
20 to seek further extensions of the injunction. It also required  
21 Winner to notify the Bank if he was served with any other  
22 complaint and enjoined Winner from transferring or disposing of  
23 any of his assets outside the ordinary course unless he obtained  
24 the consent of the Bank or the bankruptcy court.

25 On September 8, 2009, the Debtor filed a motion to continue  
26 the preliminary injunction. The Bank again opposed the motion  
27 arguing that no confirmable plan could be proposed by the Debtor.  
28 The bankruptcy court granted the extension of the preliminary

1 injunction on the same terms and conditions as the Injunction  
2 Order until December 11, 2009.

3 On November 3, 2009, the Debtor filed its initial plan of  
4 reorganization. On November 12, 2009, the Debtor again sought to  
5 continue the injunction. In opposition, the Bank argued that the  
6 Debtor's plan was not feasible because it proposed to pay  
7 \$600,000 compensation to Winner and Riley, and lacked any  
8 infusion of new money into the Debtor's business. Overruling the  
9 Bank's objection, the bankruptcy court extended the preliminary  
10 injunction to March 31, 2010.

11 On March 1, 2010, the Debtor filed a third motion to extend  
12 the preliminary injunction (the Third Extension Motion). By that  
13 time, it had filed a Second Amended Disclosure Statement and  
14 Second Amended Plan (the Plan). The Second Amended Plan proposed  
15 to pay the Bank in full over seven years. It also contained a  
16 provision that restricted the Bank's right to pursue Winner on  
17 his guaranty by prohibiting the Bank from taking any action until  
18 the Debtor had been in default on its Plan obligations for over  
19 90 days and the Bank had provided notice of the default to the  
20 Debtor.<sup>4</sup> The Bank argued that the Plan was not confirmable

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21  
22 <sup>4</sup> The Plan provides, in relevant part:

23 The order confirming the plan (or the plan as amended) shall  
24 act as a temporary injunction restraining any creditor,  
25 party-in-interest or any third party from pursuing any of  
the equity holders for so long as the Debtor is making  
payments pursuant to the Plan. . . .

26 This temporary injunction is to remain in effect only for so  
27 long as the Debtor complies with the terms of the Plan  
concerning payment of claims. Should the Debtor be in  
28 violation of payment terms in the Plan and that violation  
remains uncured for a period of 90 days after receipt by the  
(continued...)

1 because it included an impermissible post-confirmation  
2 injunction. At the hearing on the Third Extension Motion,<sup>5</sup> the  
3 bankruptcy court set out findings supporting each requirement  
4 necessary to obtain a preliminary injunction. It extended the  
5 injunction until July 8, 2010, which was the date set for plan  
6 confirmation. On April 22, 2010, the bankruptcy court entered  
7 its Order on Motion to Continue Preliminary Injunction  
8 Restraining Bank of the West from Prosecuting State Court Action  
9 and Continuing Status Conference in Adversary Proceeding to  
10 July 8, 2010 (the Fourth Injunction Order). The Bank timely  
11 appealed.

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12  
13 <sup>4</sup>(...continued)

14 Debtor of written notice from any party affected by such  
15 violation, the affected party may apply to the Bankruptcy  
16 Court for an order to dissolve the temporary injunction as  
17 to the affected party.

18 To the extent they may have any liability, neither the  
19 officers, guarantors, and directors of the Debtor . . .  
20 shall be discharged and released from any liability for such  
21 claims and debts under the Plan, however, absent further  
22 order of the court, upon notice and hearing, the exclusive  
23 remedy for payment of any claim or debt so long as the plan  
24 is not in default as described above shall be payment  
25 through the Plan. . . . This temporary injunction is not  
26 intended to discharge a debt of a non-debtor. § 524(e).

27 <sup>5</sup> A Third Amended Disclosure Statement and Third Amended  
28 Plan were filed on March 26, 2010 (a deadline set by the  
29 bankruptcy court). However, at the time of the hearing on the  
30 Debtor's Third Extension Motion, only the Debtor's Second Amended  
31 Disclosure Statement and Second Amended Plan were before the  
32 bankruptcy court. See Hr'g Tr. at 1:22 - 2:9. Both the Second  
33 and the Third Amended Plans proposed full payment to the Bank and  
34 contained the limited post-confirmation injunction provision.

35 The Debtor's Third Amended Disclosure Statement was approved  
36 by the bankruptcy court on April 22, 2010. The Third Amended  
37 Plan was sent out for votes and is scheduled for plan  
38 confirmation on July 8, 2010.

1 **II. JURISDICTION**

2 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
3 § 157(b)(1). Because an injunction granted by the bankruptcy  
4 court is a final decision, we have jurisdiction under 28 U.S.C.  
5 § 158. Solidus Networks, Inc. v. Excel Innovations, Inc.  
6 (In re Excel Innovations, Inc.), 502 F.3d 1086, 1092 (9th Cir.  
7 2007), cert. denied, 553 U.S. 1017 (2008) (equating the granting  
8 or denying of a preliminary injunction to relief from a § 362(a)  
9 automatic stay), citing Shugrue v. Air Line Pilots Ass'n, Int'l  
10 (In re Ionosphere Clubs, Inc.), 139 B.R. 772, 778 (S.D.N.Y. 1992)  
11 (“[W]here the bankruptcy court issues a ‘preliminary’ injunction,  
12 but contemplates no further hearings on the merits of the  
13 injunction, apart from the outcome of the reorganization, the  
14 injunction is a final, appealable order.”).

15 **III. ISSUE**

16 Did the bankruptcy court abuse its discretion in granting  
17 the Debtor’s Third Extension Motion to continue the preliminary  
18 injunction?

19 **IV. STANDARDS OF REVIEW**

20 An order granting a preliminary injunction is reviewed for  
21 an abuse of discretion. Am. Trucking Ass’ns, Inc. v. City of Los  
22 Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009). The “review is  
23 limited and deferential.” Sw. Voter Registration Educ. Project  
24 v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003); Canter v. Canter  
25 (In re Canter), 299 F.3d 1150, 1155 (9th Cir. 2002).

26 In determining whether the bankruptcy court abused its  
27 discretion, we first review de novo whether the bankruptcy court  
28 “identified the correct legal rule to apply to the requested

1 relief" and, if it did, we determine whether the bankruptcy  
2 court's application of the legal standard to the facts was  
3 "(1) illogical, (2) implausible, or (3) without support in  
4 inferences that may be drawn from the facts in the record."  
5 United States v. Hinkson, 585 F.3d 1247, 1261-63 (9th Cir. 2009).

## 6 V. DISCUSSION

7 Bankruptcy courts have the authority to grant injunctive  
8 relief under § 105(a), which allows the bankruptcy court to  
9 "issue any order, process, or judgment that is necessary or  
10 appropriate to carry out the provisions of [the Bankruptcy  
11 Code]." 11 U.S.C. § 105(a). Under § 105(a) the bankruptcy court  
12 may enjoin an action against a non-debtor, effectively extending  
13 the automatic stay to actions (beyond those subject to § 362(a))  
14 that "threaten the integrity of a bankrupt's estate."  
15 In re Canter, 299 F.3d at 1155 (citation omitted); Lazarus Burman  
16 Assocs. v. Nat'l Westminster Bank USA (In re Lazarus Burman  
17 Assocs.), 161 B.R. 891, 898 (Bankr. E.D.N.Y. 1993) (injunction  
18 justified when an action would "interfere with, deplete or  
19 adversely affect property of the [bankruptcy estate]" or  
20 "diminish [the debtor's] ability to formulate a plan of  
21 reorganization."); Otero Mills, Inc. v. Sec. Bank & Trust  
22 (In re Otero Mills, Inc.), 21 B.R. 777, 778 (Bankr. D.N.M. 1982)  
23 (collecting cases).

24 In order to obtain a preliminary injunction, the moving  
25 party must establish: (1) a strong likelihood of success on the  
26 merits, (2) the likelihood of irreparable injury to plaintiff if  
27 preliminary relief is not granted, (3) a balance of the hardships  
28 favoring the plaintiff, and (4) that an injunction advances the



1 public interest. Am. Trucking Ass'ns v. City of Los Angeles, 559  
2 F.3d at 1052; Winter v. Nat. Res. Def. Council, Inc., -U.S.-, 129  
3 S.Ct. 365, 374 (2008).

4 Here, there is no question that the bankruptcy court applied  
5 the correct legal standard because it identified each criterion  
6 to be satisfied in its oral ruling. However, the Bank argues  
7 that the bankruptcy court's factual findings supporting the grant  
8 of the injunction were erroneous. A factual finding is clearly  
9 erroneous only if, based on the entire evidence, we are left with  
10 the definite and firm conviction that a mistake has been  
11 committed. Anderson v. City of Bessemer City, 470 U.S. 564, 573  
12 (1985).

13 **A. Likelihood Of Success On The Merits**

14 In this context, "a strong likelihood of success on the  
15 merits" requires a showing that "the debtor has a reasonable  
16 likelihood of a successful reorganization." In re Excel  
17 Innovations, Inc., 502 F.3d at 1096; In re Otero Mills, Inc.,  
18 21 B.R. at 779; Homestead Holdings, Inc. v. Broome & Wellington  
19 (In re PTI Holding Corp.), 346 B.R. 820, 826 (Bankr. D. Nev.  
20 2006). Although it is "not a high burden" to show a reasonable  
21 likelihood of successful reorganization, the debtor must  
22 demonstrate a "meaningful contribut[ion] toward reorganization."  
23 In re Excel Innovations, Inc., 502 F.3d at 1097.

24 The Bank contends that the Debtor did not satisfy this  
25 requirement. The Bank asserts that the Debtor's Plan violates  
26  
27  
28

1 § 524(e)<sup>6</sup> by improperly affecting the liability of a non-debtor  
2 third party, and therefore, cannot be confirmed. The Bank argues  
3 that the Plan impermissibly proposes to enjoin the Bank from  
4 pursuing its State Court Action against Winner for the term of  
5 the Plan.

6 However, the applicable standard for enjoining an action  
7 against a non-debtor is the ability to demonstrate a reasonable  
8 likelihood of reorganization, not, as the Bank contends, "a  
9 reasonable likelihood of being able to confirm its Plan."  
10 Appellant's Opening Brief at 2, 13-23.

11 Whether the Plan, including its provision for a limited  
12 post-confirmation injunction, meets the requirements for  
13 confirmation under § 1129 was not before the bankruptcy court and  
14 is not before us now. Chapter 11 plans can be amended and  
15 certain provisions and terms may be altered or deleted during the  
16 confirmation process. As the bankruptcy court noted: "I'd put a  
17 bullet through the brain of a plan that I think is not likely to  
18 be confirmed. So I haven't ruled on the confirmation yet, but  
19 I'm cautiously optimistic that that's going to occur." Hr'g Tr.  
20 at 6:1-4.

21 The bankruptcy court based its finding that the Debtor had a  
22 reasonable likelihood of successful reorganization on the history  
23 of the case and the Debtor's Second Amended Disclosure Statement.  
24 The disclosure statement, along with the declarations submitted  
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26 <sup>6</sup> Section 524(e):

27 Except as provided in subsection (a)(3) of this  
28 section, 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.

1 by Riley and Winner, stated that the Debtor had obtained the  
2 authority to use cash collateral and was current on all  
3 postpetition obligations, including its obligations to the Bank;  
4 had settled litigation and obtained turnover of personal  
5 property; and had, postpetition, increased its sales and  
6 revenues, along with its receivables and inventory. Furthermore,  
7 according to the Second Amended Disclosure Statement, Winner and  
8 Riley had expanded the Debtor's business by forming contracts  
9 with the U.S. military and private label sales, and Winner was  
10 working to expand the business through new marketing strategies  
11 and through the design and introduction of new products.

12 As to whether the post-confirmation injunction provision  
13 contained in the Plan rendered the Debtor's ability to reorganize  
14 futile, the bankruptcy court stated,

15 It's not before me and I haven't seen the briefing on  
16 it, but I certainly am familiar with contexts in which  
17 such a post-confirmation injunction under the plan was  
18 permitted. . . . I don't know whether the Ninth Circuit  
19 has a different view on that or not. I haven't looked  
20 at those cases yet. . . . I'm not - - that to me didn't  
21 strike me as [meaning the Plan] was necessarily  
22 unconfirmable.

23 Hr'g Tr. at 7:13 - 8:7.

24 Based upon the information provided by the Second Amended  
25 Disclosure Statement, the Debtor had become more profitable  
26 postpetition and was making a meaningful contribution toward  
27 reorganization. Therefore, notwithstanding the provision in the  
28 Plan limiting the Bank from pursuing Winner, we are not convinced  
the bankruptcy court made a mistake in finding that the Debtor  
established a reasonable likelihood of successful reorganization.

1 **B. Likelihood Of Irreparable Injury To Plaintiff**

2 The bankruptcy court found that it would be detrimental to  
3 the reorganization effort if the attention of the Debtor's  
4 principals was not devoted to reorganization and running the  
5 company. The Bank argues that Winner's distraction is not enough  
6 to establish that the Debtor would be irreparably harmed.  
7 However, "courts have easily found that the loss of such key  
8 participants at a crucial period in the operational life and  
9 reorganization of the debtor may constitute irreparable harm to  
10 the estate and to the reorganization effort." In re PTI Holding  
11 Corp., 346 B.R. at 827 (collecting cases). Irreparable harm may  
12 be found if an action would "so consume the time, energy and  
13 resources of the debtor that it would substantially hinder the  
14 debtor's reorganization effort." Gilman v. Continental Airlines,  
15 Inc. (In re Continental Airlines, Inc.), 177 B.R. 475, 481 n.6  
16 (D. Del. 1993) (citation omitted).

17 The declarations of Riley and Winner indicate that Winner is  
18 focused on and committed to running the company and formulating  
19 new strategies to expand and refine the business. The bankruptcy  
20 court found that Winner, as one of the Debtor's principals,  
21 should be able to "continu[e] minding the store" and "respond to  
22 what I'm sure will be [the Bank's] very well written and well  
23 argued attempts to try to not confirm the plan" without being  
24 distracted by other litigation. Hr'g Tr. at 6:11-20.

25 We conclude that the bankruptcy court did not err in its  
26 finding. See In re Lazarus Burman Assocs., 161 B.R. at 899-900  
27 (principals are in best position to effectively formulate,  
28 negotiate, and carry out the Debtor's plan of reorganization);

1 Northlake Bldg. Partners v. Nw. Nat'l Life Ins. Co.

2 (In re Northlake Bldg. Partners), 41 B.R. 231, 233-34 (Bankr.  
3 N.D. Ill. 1984) (guarantor's critical management function  
4 integral to debtor's ability to reorganize).

5 **C. Balance Of Hardships**

6 The Bank's enforcement of its bargained-for rights is an  
7 interest that would be adversely affected by an injunction. The  
8 bankruptcy court was required to balance this harm against the  
9 harm to the Debtor if the injunction was not granted. The  
10 bankruptcy court found that the

11 hardship of continuing to wait to proceed on vis-a-vis  
12 the guarantors while we try to see if the plan is  
13 confirmable and will be confirmed, doesn't impose an  
14 unreasonable hardship and the risks of having the plan  
derailed instead is more significant and would outweigh  
whatever hardship is on the other equation.

15 Hr'g Tr. at 6:22-7:3.

16 As noted above, the declarations, together with the Debtor's  
17 Second Amended Disclosure Statement, demonstrated that Winner was  
18 integral to running the day-to-day business of the Debtor and in  
19 reorganizing the business in order to be profitable. The  
20 bankruptcy court found that the focus of the parties on  
21 reorganization and the confirmation of a plan was paramount.

22 The Bank has not identified any particularized harm it  
23 suffers by the delay from enforcing its remedies against the  
24 Debtor. Additionally, the terms of the Fourth Injunction Order  
25 (as all of its predecessors) protect the Bank from risk of loss  
26 or dissipation of Winner's assets. Therefore, we do not  
27 determine that the bankruptcy court's findings were clearly  
28 erroneous.

1 **D. Advancement Of The Public Interest**

2 The Bank argues that the public interest in ensuring the  
3 enforceability of contracts is a stronger public interest than  
4 "grant[ing] Winner the benefit of the automatic stay without  
5 requiring him to accept any of the burdens of bankruptcy."  
6 Appellant's Opening Brief at 28. While upholding contract rights  
7 is an important public interest, the grant of a preliminary  
8 injunction that is limited in time (as it is here) does not  
9 destroy the Bank's enforcement rights; it merely postpones them.  
10 In re PTI Holding Corp., 346 B.R. at 832.

11 On the other hand, "[t]he public interest in successful  
12 reorganization is significant." In re PTI Holding Corp.,  
13 346 B.R. at 832 (internal citations omitted); In re Lazarus  
14 Burman Assocs., 161 BR at 901. Indeed, the bankruptcy court  
15 found that the Debtor's successful reorganization was the  
16 paramount goal, which required that Winner focus his attention on  
17 managing the business and confirming a plan rather than being  
18 distracted by dealing with litigation against him.

19 Winner's declaration stated that he is in charge of moving  
20 the design and manufacturing business along. He is actively  
21 involved in new strategies for innovation and attends trade shows  
22 and engages in other marketing efforts. He stated that he would  
23 be distracted and unable to perform his job at the same level if  
24 he were diverted to defend litigation. He stated that any  
25 defenses he may raise in the State Court Action could impact the  
26 Debtor's arguments regarding the Bank's claims.

27 As a result, the bankruptcy court found the primary interest  
28 advanced was the goal of a successful reorganization of the

1 Debtor, which it was optimistic would occur if Winner could  
2 continue to "mind the store" without distraction, and which it  
3 found outweighed any hardship the Bank would suffer by waiting to  
4 enforce its rights under the Agreement. Given this record, we  
5 are not left with the definite and firm conviction that the  
6 bankruptcy court committed a mistake in granting the Third  
7 Extension Motion.

8 **VI. CONCLUSION**

9 For the foregoing reasons, we AFFIRM the bankruptcy court's  
10 Fourth Injunction Order.