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

In re

FIVE RIVERS ELECTRONIC INNOVATIONS, LLC; CREATIVE MOLDINGS, LLC; and DISTRIBUTION SERVICES, LLC, Debtors.	No. 04-23616 No. 04-23617 No. 04-23618 Jointly Administered
FIVER RIVERS INNOVATIONS, LLC, Plaintiff, vs. GREAT AMERICAN INSURANCE COMPANY, Defendant.	Adv. Pro. No. 04-2060

M E M O R A N D U M

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

In this adversary proceeding, the chapter 11 debtor-in-possession, Five Rivers Electronic Innovations, LLC, seeks injunctive relief, monetary damages for violation of the automatic stay, turnover of property of the estate, and the avoidance and recovery of a post-petition transfer. Presently pending before the court is the debtor's request that the temporary restraining order entered by this court on December 13, 2004, be converted to a preliminary injunction. A hearing on the request was held January 14, 2005. For the reasons discussed below, the debtor's request will be denied. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(E), (G) and (O).

I.

The debtor filed for bankruptcy relief under chapter 11 on October 25, 2004, and is currently operating as a debtor-in-possession. In its complaint filed December 13, 2004, initiating this adversary proceeding, the debtor alleges that on or about October 1, 2003, the defendant, Great American Insurance Company, issued the debtor a workers' compensation insurance policy to cover the workers' compensation claims of its employees along with the claims of the employees of the debtor's affiliated companies. The debtor states that this policy has a deductible in the amount of $1.2 million and that the defendant required it to obtain a standby letter of credit to ensure payment of the deductible. On January 21, 2004, Greene County Bank issued a "Clean Irrevocable Standby Letter of Credit" in the amount of $600,000 for the benefit of the defendant. To protect itself in the event it was called upon to pay on the letter of credit, Greene County Bank required the debtor to execute a promissory note in the Bank's favor, secured by the debtor's certificate of deposit in the amount of $600,000.

According to the debtor's complaint, on December 9, 2004, after the debtor's bankruptcy filing,

the defendant issued a draw request to Greene County Bank on the letter of credit, which the bank honored on December 10, 2004, by issuing a check payable to the defendant, although to the debtor's knowledge the defendant has not yet presented the check for payment. The debtor alleges that at the time of the defendant's draw request, it was not in default of its obligations under the policy and while it was indebted to the defendant in the approximate amount of $89,000, such sums were prepetition obligations for which no demand had been made. In Count I of the complaint and in the debtor's application for a temporary restraining order filed December 13, 2004, the debtor requests that a temporary restraining order be issued, restraining and enjoining the defendant, its officers, directors, employees, and agents from presenting for payment the check given it by Greene County Bank pending a trial on the merits of the adversary proceeding. In Count II of the complaint, the debtor asserts that the defendant's conduct in drawing on the letter of credit is a violation of the automatic stay under 11 U.S.C. § 362(a)(3), entitling the debtor to actual damages because "the Letter of Credit Proceeds in effect represent the proceeds of the [debtor's] Certificate of Deposit and, therefore, constitute 'property of the estate' under 11 U.S.C. § 541." Alternatively, the debtor asserts that its claim under the policy to recoup from the defendant any unused deductible is property of the estate.

In Count III of the complaint, the debtor seeks under 11 U.S.C. § 542 turnover of the letter of credit proceeds as property of the estate. In Count IV, the debtor avers that the defendant's draw under the letter of credit is in effect a post-petition transfer of property of the estate "because the Certificate of Deposit is property of [the debtor] which will be used by the Bank to fund the Note which, in turn, will be used by the Bank to fund the Defendant's draw under the Letter of Credit." The debtor asserts that this unauthorized transfer is avoidable under 11 U.S.C. § 549(a) and that the proceeds or their value may be

recovered pursuant to 11 U.S.C. § 550(a)(1). In its prayer for relief, the debtor requests that a temporary restraining order be issued; that following notice and hearing the TRO be converted to a preliminary injunction; that the debtor be awarded its actual damages, including costs and attorney fees caused by the defendant's automatic stay violation; that the debtor be awarded punitive damages in the amount of $100,000 to the extent that the defendant's conduct is deemed to be a willful stay violation; that the court direct the defendant to turnover the letter of credit proceeds as property of the estate; and alternatively, that the court award the debtor a judgment in the amount of the letter of credit proceeds plus prejudgment interest.

On December 13, 2004, after a brief *ex parte* hearing, this court entered a temporary restraining order which prevents the defendant from presenting for payment check no. 076412 issued by Greene County Bank in the amount of $600,000 (the "TRO"). The order also scheduled a December 21, 2004 hearing on the debtor's request that the TRO be converted to a preliminary injunction, but pursuant to an agreed order entered December 27, 2004, this hearing was continued to January 14, 2005. The defendant filed on January 7, 2005, a brief in opposition to the debtor's application for preliminary injunction, supported by the declaration of Larry Les Chander, a divisional senior vice-president of the defendant. The debtor filed a responsive brief on January 12, 2005.

In Mr. Chander's declaration, he recites that the defendant is "an admitted insurance company in all 50 states with policyholders surplus (the functional equivalent of equity) of approximately $1.5 Billion." According to Mr. Chander, Great American Assurance Company, a wholly owned subsidiary of the defendant, first issued a large deductible workers' compensation policy to the debtor on or about October 2, 2001. This policy was extended in 2002 and 2003 and expired on October 1, 2004. The original

policy had a per claim deductible of $250,000 with an aggregate annual deductible of $500,000, but during the final policy term (10/01/2003-0/01/2004) the per claim deductible was $300,000 with an aggregate annual deductible not to exceed $950,000. Mr. Chander states that in conjunction with the policy, the debtor and defendant entered into a Loss Fund and Security Agreement, dated October 1, 2001, a copy of which was attached to Mr. Chander's declaration. Mr. Chander recites that this Loss Fund and Security Agreement initially required a letter of credit in the amount of $250,000, but this amount was increased upon the renewal of the policy in 2002 and 2003, until "on January 21, 2004, Greene County Bank issued the Letter of Credit in the amount of $600,000 for the benefit of [the defendant] as required by the Security Agreement." Contrary to the debtor's averments in the complaint, Mr. Chander states that at the time of the debtor's bankruptcy filing, the debtor "was in default under the Security Agreement by virtue of its failure to pay $196,273.07 in losses paid by [the defendant] in March, August, September and October of 2004." Attached to Mr. Chander's declaration as Exhibit D is a Statement of Account dated December 13, 2004, which reflects these past-due amounts, plus an additional amount of $14,978.55 for the month of November 2004.

Testifying at the January 14, 2005 hearing were Charles White, Secretary/Treasurer and chief financial officer of the debtor, and Thomas Jack Lister, the debtor's director of human resources. Mr. White stated that he was familiar with the debtor's workers' compensation insurance policies and the workers' compensation claims made by the debtor's employees. Introduced through Mr. White were the three workers' compensation insurance policies issued by the defendant to the debtor for October 1, 2001 through October 1, 2001; October 1, 2002 through October 1, 2003; and October 1, 2003 through October 1, 2004. Mr. White stated that these were three separate policies rather than extensions or

renewals of the first policy and that since the last policy with the defendant expired October 1, 2004, the debtor has workers' compensation insurance through another insurer. According to Mr. White, the Loss Fund and Security Agreement dated October 1, 2001, by its terms, only applied to the first year's policy. Mr. White testified that the way the debtor's large deductible policy operated was that the defendant through its claims agent Strategic Comp LLC would evaluate and if appropriate pay an employee's workers' compensation claim and then bill the debtor for the amounts paid by it, up to the amount of the deductible. The debtor would then review the bill and reimburse the defendant for the amounts paid by it plus its expenses.

Mr. White testified that Dan Silverman of Strategic Comp telephoned him on November 30, 2004, and advised him that the defendant would be drawing down on its letter of credit at Greene County Bank. Mr. White stated that Mr. Silverman did not give him a reason for the draw-down and noted that the defendant had never before requested a draw on the letter of credit. With respect to the defendant's assertion that the debtor was in default in the amount of $196,273.07 based on claims paid by the defendant for which it had not been reimbursed by the debtor, Mr. White noted that the statement of account evidencing this arrearage is dated December 13, 2004, and that because it receives the defendant's statement of account a month after payment (*i.e.*, the debtor would have received a bill in late September for the amounts paid by the defendant in August), the debtor would have only received the August 2004 bill at the time of its bankruptcy filing.

It was Mr. White's understanding that the defendant was seeking to retain the proceeds from the letter of credit to compensate it for the amount presently owed to it by the debtor, $211,251.62, and to protect itself from workers' compensation claims which have already been asserted against it by the

debtor's employees, but not finalized. These potential losses, or reserves, have been set by the defendant in the amount of $614,601.32. Mr. White testified that these reserve amounts were computed by the defendant and Strategic Comp without input from the debtor and represented reserves in 14 cases, three claims from the most recent policy year, eight claims from the policy year 2002-2003, and three claims remaining from the debtor's first policy year with the defendant. Mr. White believed that these reserves were excessive and opined that if the defendant were allowed to retain the proceeds from the letter of credit, it would have no incentive to settle the workers' compensation claims since it already had its reimbursement money in hand. Mr. White stated that the $600,000 pledged by the debtor to Greene County Bank to secure its promissory note would be useful in the debtor's reorganization if it were allowed to recover this money from the Bank.

On cross-examination, Mr. White admitted that because the debtor's insurance policies are incurrence policies, valid claims can be made even after the insurance policy has expired if the claims were incurred during the policy period and that several of the claims listed on the customer experience report, Exhibit 6, were made after the expiration of the policy. Mr. White also admitted that Section 4 of the Loss Fund and Security Agreement entitled "Default" includes as "events of default" a "failure to timely pay or perform any obligation" and insolvency. Mr. White did not dispute that the August billing had not been paid as of the debtor's bankruptcy filing. While Mr. White denied that the debtor was insolvent as of its bankruptcy filing if insolvency were defined as liabilities in excess of assets, Mr. White conceded that the debtor was not paying all of its debts as they became due. Mr. White also agreed that the Loss Fund and Security Agreement provides that upon default, the defendant may "[d]raw on the SECURITY in the full amount." Regarding his testimony on direct examination that the Loss Fund and Security Agreement

pertained only to the first year's insurance policy, Mr. White continued to maintain this assertion on cross-examination although admitted that the first "Whereas" provision on page 1 of the agreement provides that the defendant in the future may issue additional policies, "which policies singularly and collectively ("POLICIES") are subject to this AGREEMENT." Mr. White also recognized that Section 1, paragraph C of the agreement provides, "all amendments and/or endorsements to the POLICIES as well as any additional POLICIES that may be issued by INSURER to POLICYHOLDER … during the policy period 10/01/01 to 10/01/02, or any renewal policy periods, are subject to this AGREEMENT." Finally, as to Mr. White's assertion that the defendant had no incentive to reasonably settle the outstanding workers' compensation claims if it were allowed to retain the proceeds from the letter of credit, Mr. White admitted that the sum of the monies already paid by the defendant, $211,251.62, and the reserves of $614,601.32, exceed the letter of credit proceeds of $600,000 such that if all of the reserves were paid out, the defendant would have an unsecured claim against the debtor in excess of $200,000.

Mr. Lister testified that as director of human resources for the debtor, he and his staff handled the employees' workers' compensation claims and he was custodian of the employees' personnel files. During his direct examination, Mr. Lister went through the personnel files of each of the 14 employees whose workers' compensation claims remained outstanding and for which the defendant had established a reserve. Of the 14, several had returned to work without restrictions, yet the defendant continued to retain reserve in their cases for future potential losses. For example, the defendant had set reserves totaling $75,000 on the claims of employee Jenny Fox even though she had been cleared to work without restriction.

Also introduced into evidence through the stipulations of the parties was a letter from counsel for Greene County Bank to counsel for the debtor advising that in light of the defendant's draw on the letter

of credit, the Bank intended to file a motion for relief from the automatic stay in order to apply the debtor's $600,000 certificate of deposit in payment of the promissory note.

II.

The Sixth Circuit Court of Appeals has stated that in determining whether to issue a preliminary injunction under Fed. R. Civ. P. 65, applicable to adversary proceedings in bankruptcy by Fed. R. Bankr. P. 7065, a court must examine four factors: "(1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction." *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). "These factors are not prerequisites, but are factors that are to be balanced against each other. [Citation omitted.] A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Id.*

With respect to the first factor, whether the movant has shown a strong likelihood of success on the merits, this court must examine the debtor's causes of action set forth in the complaint. As previously noted, the debtor seeks damages for violation of the automatic stay, turnover of property of the estate, and the avoidance and recovery of an unauthorized post-petition transfer. All of these claims are based on the debtor's contention that the letter of credit proceeds are property of the debtor's estate because Greene County Bank's obligation to pay the letter of credit is secured by the debtor's property. However, the overwhelming majority of courts which have considered this issue have rejected this contention, concluding

that "[a] bank honors a letter of credit and pays the beneficiary with its own funds, and not with assets belonging to the debtor who caused the letter of credit to be issued." *See In re M.J. Sales & Distrib. Co.*, 25 B.R. 608, 614 (Bankr. S.D.N.Y. 1982). *See also Page v. First Nat'l Bank of Maryland (In re Page Assocs.)*, 18 B.R. 713 (D.D.C. 1982); *Sabratek Corp. v. LaSalle Bank, N.A. (In re Sabratek Corp.)*, 257 B.R. 732, 735 (Bankr. D. Del. 2000); *Duplitronics, Inc. v. Concept Design Elecs. and Mfgs., Inc. (In re Duplitronics, Inc.)*, 183 B.R. 1010, 1015 (Bankr. N.D. Ill. 1995); *A.J. Lane & Co., Inc. v. BSC Group (In re A. J. Lane & Co., Inc.)*, 115 B.R. 738, 740-41 (Bankr. D. Mass. 1990); *In re W.L. Mead, Inc.*, 42 B.R. 57, 60 (Bankr. N.D. Ohio 1984); 3 *Collier on Bankruptcy* ¶ 362.03[3][d] (15th ed. rev. 2004).

To support its contention that the letter of credit proceeds are property of the estate, the debtor cites *Twist Cap, Inc. v. Southeast Bank of Tampa (In re Twist Cap, Inc.)*, 1 B.R. 284 (Bankr. M.D. Fla. 1979), wherein the court, utilizing its equitable powers, preserved the status quo by enjoining a draw on the letter of credit secured by the debtor's property. *See also In re Metrobility Optical Sys., Inc.*, 268 B.R. 326 (Bankr. D.N.H. 2001)(granting preliminary injunction against draw on letter of credit where debtor exhibited a likelihood of success on the merits). *Twist Cap* was decided under the old Bankruptcy Act, and with limited exception, has been uniformly rejected and criticized. *See Lower Brule Const. Co. v. Sheesley's Plumbing & Heating Co.*, 84 B.R. 638 (D.S.D. 1988)(noting that recent decisions have not followed *Twist Cap*); *Armstrong v. FNB Fin. Co. (In re Clothes, Inc.)*, 35 B.R. 487, 489 (Bankr. D.N.D. 1983)("This Court rejects whatever rationale has evolved from the *Twist Cap* case, feeling that to follow that case would be wholly contrary to long established commercial law principles."); *North Shore & Central Ill. Freight Co. v. Am. Nat'l Bank & Trust Co. of Chicago (In re North Shore & Central*

Ill. Freight Co.), 30 B.R. 377 (Bankr. N.D. Ill. 1983)(rejecting *Twist Cap* to the extent it stands for proposition that bankruptcy court can enjoin beneficiary from drawing upon letter of credit arranged by debtor); *Planes, Inc. v. Fairchild Aircraft Corp. (Matter of Planes, Inc.),* 29 B.R. 370(Bankr. N.D. Ga. 1983)("This Court declines to follow the rationale of *Twist Cap*."). *See also* Juliet M. Moringiello, *Silencing the Loose Cannon: The Need For the Bankruptcy Code to Recognize Letters of Credit*, 27 Loy. L.A. L. Rev.619 (Jan.1994); Douglas G. Baird, *Standby Letters of Credit in Bankruptcy*, 49 U. Chi. L. Rev. 130 (1982).

The debtor also asserts that decisions from the Eleventh and Fifth Circuit Courts of Appeals support the contention that letter of credit proceeds are property of the estate, citing *Am. Bank of Martin County v. Leasing Serv. Corp. (In re Air Conditioning, Inc.),* 845 F.2d 293 (11th Cir. 1988), and *Kellogg v. Blue Quail Energy, Inc. (Matter of Compton Corp.),* 831 F.2d 586 (5th Cir. 1987). However, neither case supports this proposition and to the contrary, bolster the defendant's assertion that enjoining payment of the letter of credit would be inappropriate. Each of these cases involved transfers by the debtor during the 90-day preference period to secure existing unsecured debts with secured letters of credit. The courts allowed the bankruptcy trustees to recover the property transferred by the debtor during the preference period, the collateral transferred to secure the letters of credit, but expressly noted that payment of the letter of credit itself could not be disturbed. As stated by the Fifth Circuit in *Compton*:

> It is well established that a letter of credit and the proceeds therefrom are not property of the debtor's estate under 11 U.S.C. § 541. [Citations omitted.] When the issuer honors a proper draft under a letter of credit, it does so from its own assets and not from the assets of its customer who caused the letter of credit to be issued. [Citations omitted.] As a result, a bankruptcy trustee is not entitled to enjoin a post petition payment of funds under a letter of credit from the issuer to the beneficiary, because such a payment is not a transfer of debtor's property (a threshold requirement under 11 U.S.C. § 547(b)). A case

> apparently holding otherwise, *In re Twist Cap., Inc*., 1 B.R. 284 (Bankr.[M.D.] Fla.1979), has been roundly criticized and otherwise ignored by courts and commentators alike.

Matter of Compton Corp., 831 F.2d at 589-590.

Lastly in this regard, the debtor cites the Sixth Circuit Court of Appeals decision in *Demczyk v. Mutual Life Ins. Co. of New York (In re Graham Square, Inc*.), 126 F.3d 823 (6th Cir. 1997), wherein, according to the debtor, the court recognized the doctrine of independence regarding letters of credit advanced by the defendant herein, but held that it did not apply under the facts of that case. In *Graham Square*, the chapter 7 trustee sued to recover a loan commitment fee paid on the debtor's behalf in the form of a letter of credit. The payee argued that the trustee could not recover the fee because it was paid via a standby letter of credit and recovery was precluded by the doctrine of independence. *Id.* at 827. The Sixth Circuit rejected this argument because the trustee's challenge was to the underlying contract rather than to the distribution of the letter of credit proceeds. *Id*. at 828. The discussion by the court is particularly instructive to the case at hand:

> A letter of credit transaction comprises three separate contracts. The first arises from the underlying contract, ordinarily between a buyer and seller, and creates the basis for the letter of credit.... The second contract arises between the account party, here the debtor, and the bank issuing the letter of credit (UNB). The third contract arises between the issuing bank (UNB) and the beneficiary of the letter of credit, MONY.
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> It is well established that once a beneficiary complies with the terms of the letter of credit, an account party may not prevent the issuing bank from distributing the proceeds of the letter of credit, absent fraud in the underlying contract. [Citation omitted.] The doctrine of independence recognizes this principle, and requires that a letter of credit be kept separate from the underlying contract that generates it. This "insulates the letter of credit from disputes over performance of collateral agreements and allows the letter of credit to function as a swift and certain payment mechanism." [Citations omitted.] Critically, and of great importance here, the doctrine of independence protects only the *distribution* of the proceeds of the letter of credit. It prohibits an attack on the issuing bank's distribution to

> the beneficiary and does not address claims respecting the underlying contract. In these cases the trustee has not challenged the distribution of the proceeds by UNB, but instead, has challenged MONY's right to retain the commitment fee and has brought an action on the underlying contract between the debtor and MONY.
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> While the fee was paid through the vehicle of a standby letter of credit, and may thus be considered "proceeds" of the letter of credit, it is significant that MONY has already received those funds. It is one thing to attempt to prevent the distribution of the proceeds of a letter of credit, an attempt the doctrine of independence is designed to prevent; but it is quite another to bring an action on the underlying contract that created the letter of credit.
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> If the debtor had paid MONY the commitment fee in cash, the debtor could seek a refund by challenging the fee provision in the underlying contract as an illegal penalty. All of MONY's arguments aside, there is no principled reason for allowing a challenge *to the underlying contract* when the fee is paid in cash, and not allowing such a challenge after the fee is paid via a standby letter of credit. In other words, challenging the distribution of the proceeds of a letter of credit is different than challenging the underlying contract. The ultimate result may be the same (refund of the fee), but in one case the method of recovery is permissible and in the other it is barred.

Id. at 827-828.

In the instant case, the debtor is challenging by way of this application for injunctive relief the Bank's distribution of the proceeds of the letter of credit. Inherent in the *Graham Square* decision is that while the debtor may challenge the defendant's underlying right to these funds in this adversary proceeding, it may not "prevent the issuing bank from distributing the proceeds of the letter of credit." *Id*. at 827. ("The doctrine of independence protects … the *distribution* of the proceeds of the letter of credit. It prohibits an attack on the issuing bank's distribution to the beneficiary....")(Emphasis in original.) Based on the previous cases discussed, this court does not believe that the debtor has shown a strong likelihood of prevailing on the merits as to the issue of whether the letter of credit proceeds constitute property of the estate and consequently, whether the defendant has violated the automatic stay in drawing on the letter of

credit, whether an unauthorized post-petition transfer has occurred, and whether turnover of property of the estate is appropriate. And, while the more difficult issues in this case concern the underlying contractual dispute between the debtor and the defendant, how much of the letter of credit proceeds the defendant may rightfully retain, *Graham Square* instructs that any claims which the debtor may have arising out of its contractual relationship with the defendant, regardless of the merits of these claims, are independent of, and do not provide a basis for, any interference by the debtor with the separate contractual arrangement between the defendant and Greene County Bank and the Bank's distribution of the letter of credit proceeds to the defendant.

While this court believes that the foregoing discussion is dispositive of the debtor's application for a preliminary injunction, the court will briefly address the other factors relevant to the debtor's application, whether the movant will suffer irreparable harm if the injunction is not issued, whether the issuance of the injunction would cause substantial harm to others, and the public interest which would be served. The debtor herein claims that absent the injunction, it will lose a substantial asset of its estate, the $600,000 certificate of deposit held by Greene County Bank, and that this loss to a chapter 11 debtor by definition constitutes irreparable harm. According to the debtor, the fact that it will retain its remedy at law against the defendant is of little comfort: the cost and delay inherent in recovering any damages from the defendant will materially impair the debtor's ability to reorganize, and because the defendant seeks to hold the letter of credit proceeds for reserves against future claims, "there will be an indefinite period of time before [the debtor's] damage claim against [the defendant] becomes liquidated."

The Sixth Circuit Court of Appeals has held generally that an injunction should not issue if there is an adequate remedy at law, see *EBSCO Indus., Inc. v. Lilly*, 840 F.2d 333, 336 (6th Cir. 1988); and

clearly, the debtor in this case has a remedy at law against the debtor, the ability to sue and recover damages. Although the Sixth Circuit has not addressed this issue in the context of a chapter 11 debtor's reorganization efforts, it has indicated in the context of international letters of credit that an injury is not "irreparable" unless "it cannot be undone through monetary remedies" and the fact that monetary relief is "speculative" is not enough to constitute a showing of irreparable harm. *Hendricks v. Comerica Bank*, 2004 WL 2940879, *5 (6th Cir. Dec. 20, 2004)(citing *Enter. Int'l, Inc. v. Corp. Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985)). In *Wysko Inv. Co. v. Great Am. Bank*, 131 B.R. 146, 148 (D. Ariz. 1991), the court found that irreparable harm had been established based on the testimony of the president of the debtor that the letter of credit was essential for reorganization and the reorganization hinged upon the injunction. In the present case, Mr. White testified that the $600,000 certificate of deposit would be useful to the debtor's reorganization and the debtor asserted in its brief that absent the injunction, its reorganization efforts would be materially impaired. While the court assumes this testimony and the argument of the debtor to be accurate, it does not satisfy the strict standard of irreparable harm demanded by the Sixth Circuit.

As to whether issuance of the injunction would cause substantial harm to others, no evidence was introduced on this subject. Nonetheless, it does not appear that the defendant would sustain a "severe financial hardship" if it were unable to present the $600,000 letter of credit check for payment. *Cf. Golden v. Kelsey-Hayes Co.*, 845 F. Supp. 410, 416 (E.D. Mich. 1994)("[D]efendant has made no showing that requiring it to reinstate the old retiree benefit plan would cause it severe financial hardship."). The declaration of Larry Les Chander filed by the defendant indicates that the defendant has approximately $1.5 Billion in "policyholder surplus (the functional equivalent of equity)."

Lastly, as to whether the public interest would be served by issuing the injunction, the debtor asserts that no public interest is at stake because the defendant remains liable to the underlying workers' compensation claimants and by its own admission, is financially able to meet these obligations. The defendant, on the other hand, asserts that commerce will be adversely affected "[i]f the bankruptcy of the payor would allow the payor to enjoin the otherwise rightful draw against that letter of credit." In this regard, the Sixth Circuit has stated in the context of international letters of credit that:

> [T]his reluctance to grant preliminary injunctive relief in international letter of credit cases is well founded in policy and business practice as well as in equity. The obligations created by a letter of credit are completely separate from the underlying transaction, with absolutely no consequence given the underlying transaction unless the credit expressly incorporates its terms. This principle of independence provides the letter of credit with one of its peculiar values, assurance of payment, and makes it a unique device developed to meet the specific demands of the market place.

Hendricks v. Comerica Bank, 2004 WL 2940879 at *5. This court sees no basis for concluding that this public interest applies only to international letters of credit. *See In re Page Assocs.*, 18 B.R. at 717 ("[E]njoining the payment of the letter of credit, even temporarily, would frustrate the commercial purposes of letters of credit to the detriment of financial institutions as well as their customers.... If payment on a letter of credit could be routinely delayed by the filing of a Chapter 11 petition the intended substitution of a bank for its less credit-worthy customer would be defeated.").

Based on all of the foregoing, an order will be entered denying the debtor's application for a preliminary injunction.

FILED: January 18, 2005

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE