IN THE CHANCERY COURT, STATE OF WYOMING

2022 WYCH 1

Michael Terpin, Plaintiff, vs. Jason Cooner, Defendant.	Docket No. CH-22-1

Order Denying Temporary Restraining Order

[¶ 1] This case comes before the Court on Plaintiff's *Application for Exparte Temporary Restraining Order or, in the Alternative, Expedited Hearing*. The Court has considered it along with the complaint and supporting materials, and finds the extraordinary relief of a temporary restraining order is not warranted and the application should be denied.

Background

[¶ 2] The record before the Court consists of Plaintiff's verified complaint and attachments along with the motion for a temporary restraining order. Taken from these submissions are the following pertinent facts.

[¶ 3] The parties are officers of ITMO US, Inc., a corporation that Defendant incorporated in Wyoming in April 2020, which has its principal office in Alabama. In October, 2020, Plaintiff and Defendant agreed that Plaintiff would become involved with ITMO US, and they signed contracts for Plaintiff to provide advising services for ITMO US in exchange for equity. Beginning in January 2021, Plaintiff also invested approximately $575,000 in ITMO US via a Simple Agreement for Future Equity or SAFE, a security regulated by the SEC. And in April 2021, Plaintiff entered a contract to provide chairman services for ITMO US in exchange for equity.

[¶ 4] Plaintiff participated in ITMO US's corporate governance, including several board of directors meetings, in 2021. In December 2021, Plaintiff requested a reconciliation of funds spent by ITMO US from Defendant. Defendant has refused to

provide it. In early 2022, an insider whistleblower gave Plaintiff and the third board member (other than Plaintiff and Defendant) bank statements for a bank account belonging to The ITMO, Inc. Plaintiff alleges The ITMO was a Florida corporation which was administratively dissolved in September 2020, before which Defendant rolled its assets, including the bank account, into ITMO US.

[¶ 5] According to Plaintiff, the bank records show Defendant spent approximately $165,000 of $740,000 in investment income (The ITMO and ITMO US have no revenue from sales yet) on business expenses, and spent the rest on what appear to be personal expenses, such as personal shopping, etc. Plaintiff also alleges Defendant has accepted about $500,000 in investor funds in the form of cryptocurrency, which was immediately transferred to Defendant's personal control. Plaintiff further alleges Defendant has failed to report or record funds raised and misrepresented his and others' equity shares in ITMO US.

[¶ 6] Plaintiff and the third board member, as a majority of the board of directors, approved consent board minutes terminating Defendant as the CEO of ITMO US, in order to allow the board to investigate. In retaliation, Defendant, through counsel, terminated Plaintiff's contracts and called a shareholder meeting for February 25, 2022, providing notice to the board on February 14, 2022. Noticed topics for the meeting include membership on the board and confirmation of Defendant's authority and Plaintiff's lack of authority.

[¶ 7] Plaintiff now requests a temporary restraining order enjoining the shareholder meeting from occurring on February 25, 2022, and requiring it be rescheduled; enjoining Defendant from holding himself out as an agent, employee, officer, or director or acting on behalf of ITMO US; and, enjoining Defendant from making any changes to ITMO US's management or board structure.

Standard of Review

[¶ 8] Rule 65 pertinently provides:

> (b) Temporary Restraining Order.
>
> > (1) Issuing Without Notice. The chancery court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:
> >
> > > (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss,

or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the chancery court clerk's office and entered in the record. The order expires at the time after entry--not to exceed 14 days-- that the chancery court sets, unless before that time the chancery court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) Expediting the Preliminary-Injunction Hearing. If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the chancery court must dissolve the order.

(4) Motion to Dissolve. On 2 days' notice to the party who obtained the order without notice- -or on shorter notice set by the chancery court--the adverse party may appear and move to dissolve or modify the order. The chancery court must then hear and decide the motion as promptly as justice requires.

(c) Security. The chancery court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the chancery court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.

(d) Contents and Scope of Every Injunction and Restraining Order.

(1) Contents. Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail--and not by referring to the complaint or other document--the act or acts restrained or required.

(2) Persons Bound. The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

W.R.C.P.Ch.C. 65.

[¶ 9] As the Wyoming Supreme Court has warned, injunctive relief is an extraordinary remedy which ought to be treated with caution:

> In evaluating a court's exercise of discretion in the grant or denial of injunctive relief, this Court has observed:
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> In *Kincheloe v. Milatzo,* Wyo., 678 P.2d 855, 861 (1984), we said:
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> "Preliminarily, it is to be remembered that, when courts are called upon to employ their injunctive authority, they must utilize this power with great caution. We have said:
>
> " 'The extraordinary remedy of an injunction is a far-reaching force and must not be indulged in under hastily contrived conditions. It is a delicate judicial power and a court must proceed with caution and deliberation before exercising the remedy.' *Simpson v. Petroleum, Inc.,* Wyo., 548 P.2d 1, 3 (1976).
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> "Injunctions are extraordinary remedies and are not granted as of right. In granting an injunction, the court exercises broad, equitable jurisdiction. *Brown v. J.C. Penney Co.,* D.C.Wyo., 54 F.Supp. 488 (1943). This discretion is, however, not unfettered, but 'must be exercised reasonably and in harmony with well established principles.' 43 C.J.S. Injunctions § 14 p. 772."
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> *In re Adoption of RHA,* 702 P.2d 1259, 1266 (Wyo. 1985).

Operation Save Am. v. City of Jackson, 2012 WY 51, ¶ 19, 275 P.3d 438, 447 (Wyo. 2012).

Discussion

[¶ 10] There are three primary reasons to deny the application. First, the absence of ITMO US as a party is problematic for procedural reasons. Second, Plaintiff has not

shown irreparable harm, a prerequisite for preliminary relief. Third, Rule 65 notice and bond requirements have not been adequately addressed.

Absence of ITMO US, Inc., as a Party

[¶ 11] In his complaint, Plaintiff asks this Court to enjoin "the Company and Defendants from holding the February 25, 2022 shareholder meeting." Consistent with this request, Plaintiff's proposed TRO provides that "[t]he February 25, 2022 shareholder meeting is enjoined from occurring and shall be rescheduled at a reasonable time to allow Plaintiff and [third board member] adequate time to conduct an investigation."

[¶ 12] Yet, under Rule 65(d)(2) an "order binds only the following who receive actual notice of it by personal service or otherwise: (A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)." A prominent learned treatise explains this is because under traditional equity practice and F.R.C.P. 65 (which W.R.C.P.Ch.C. 65 mirrors) a court must have jurisdiction to bind a person purported to be subject to its orders:

> A court ordinarily does not have power to issue an order against a person who is not a party and over whom it has not acquired in personam jurisdiction. Therefore, persons who are not actual parties to the action or in privity with any parties may not be brought within the effect of a decree merely by naming them in the order. The only significant exception to this rule involves nonparties who have actual notice of an injunction and are guilty of aiding or abetting or acting in concert with a named defendant or the defendant's privy in violating the injunction. They may be held in contempt.

11A Wright & Miller, *Fed. Prac. & Proc. Civ.* § 2956 (3d ed. April 2021 Update). Because ITMO US is not a party, and is not alleged to be aiding or abetting Defendant, this Court does not have the power to issue an order prohibiting the corporation from holding a meeting of its shareholders.

[¶ 13] It's possible this is an oversight. The complaint alleges "Plaintiff ITMO US, Inc. ("ITMO") is a Wyoming Corporation…" (Compl., ¶ 2.) But ITMO US is not named a party in Plaintiff's caption, prayer of relief, or electronic filing system submission.

Irreparable Harm

[¶ 14] A temporary restraining order may issue without notice to the opposing party or its attorney if specific facts in an affidavit or verified complaint clearly show an immediate and irreparable injury will result to the moving party before the opposing party can be heard. W.R.C.P.Ch.C. 65(b). The evidence to support a temporary restraining order "must be sufficient to convince a court that there is immediate and great danger of irreparable injury that necessitates the temporary dispensing of some of the trappings of due process." 11A Wright & Miller, § 2952. Irreparable injury has been described as:

> Injunctions are issued when the harm is irreparable and no adequate remedy at law exists. *Id.; Gregory v. Sanders,* 635 P.2d 795, 801 (Wyo. 1981). Injunctive relief is appropriate when an award of money damages cannot provide adequate compensation. *Rialto Theatre, Inc.,* 714 P.2d at 332. **An injury is irreparable " 'where it is of a "peculiar nature, so that compensation in money cannot atone for it."** *Gause v. Perkins,* 56 N.C. 177 (1857).' *Frink v. North Carolina Board of Transportation,* 27 N.C.App. 207, 218 S.E.2d 713, 714 (1975)." *Gregory,* 635 P.2d at 801.

Polo Ranch Co. v. City of Cheyenne, 2003 WY 15, ¶ 26, 61 P.3d 1255, 1264 (Wyo. 2003) (emphasis added); *see also In re Kite Ranch, LLC v. Powell Fam. of Yakima, LLC*, 2008 WY 39, ¶ 22, 181 P.3d 920, 926 (Wyo. 2008) (harm is irreparable when there is no adequate remedy at law to compensate for it).

[¶ 15] Plaintiff fails to establish he will suffer irreparable harm if the shareholder meeting is allowed to proceed. His principle argument is that Defendant is using his power to stop an investigation into his conduct. There's no reason to think any information Plaintiff could obtain as an officer or director is not just as, or more, readily available in discovery. Defendant can't use his majority control to quash discovery and need not be sidelined for discovery to occur. Thus, Plaintiff's principle argument does not weigh in favor of granting a temporary restraining order. *See Humble Oil & Ref. Co. v. Harang*, 262 F. Supp. 39, 44–45 (E.D. La. 1966) ("[I]njunctive relief is not normally available in aid of or in lieu of discovery . . . .").

[¶ 16] As a secondary argument, Plaintiff asserts the notice for the shareholder meeting is flawed because there are a number of shareholders that were left off the notice, and shareholders listed in the notice Plaintiff doesn't know of, citing Appendix S. This exhibit is 53 pages. Plaintiff doesn't offer a pinpoint citation to the portion of the record that supports this assertion, and the Court can find none.

[¶ 17] Plaintiff also briefly mentions that Defendant has accepted investor funds in violation of securities laws, and if he's not enjoined from continuing to do so, he could put Plaintiff, as a board member, at risk for prosecution or civil fines. (Motion at 12-13.) This argument is unclear. Assuming for argument's sake that Plaintiff is correct that Defendant, as majority shareholder, will vote the current members off the board of directors at the upcoming shareholder meeting, Plaintiff doesn't explain how Defendant's future conduct could be attributed to him. Speculative injury is not sufficient to show irreparable injury will result absent a temporary restraining order

[¶ 18] At its core, this is a dispute over money. Plaintiff alleges that Defendant has committed conversion and breach of fiduciary duty, and in the absence of an injunction could continue. And other than injunctive relief, the complaint seeks money damages (in various forms, such as compensatory damages, interest, attorney fees, and punitive damages). Plaintiff does not explain why an award of money damages is not an adequate remedy at law in this case. If Plaintiff prevails on his claims, he will receive the monetary relief he seeks. He doesn't cite any pertinent authority or make any cogent argument how the injury he may suffer as a result of the shareholder's meeting is irreparable, that is, of a "peculiar nature, so that compensation in money cannot atone for it" such that there is no adequate remedy at law. *Polo Ranch,* ¶ 26, 61 P.3d at 1264

Rule 65 Notice and Bond Requirements

[¶ 19] Plaintiff also fails to adequately address Rule 65's notice and bond requirements.

[¶ 20] First, on the notice issue, Rule 65(b)(1)(B) requires that "the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required." Counsel certified "that attempts will be made between filing and any hearing granted to properly serve and provide notice to Defendant" and "notice of the Verified Complaint and this Application will be provided as soon as practical" to Defendant's lawyer. (Motion at 13-14.) Counsel's certification does not contain attempts to notify Defendant or Defendant's lawyer or reasons why notice should not be required.

[¶ 21] There's no indication it was not possible for Plaintiff and Plaintiff"s lawyer to make contact with Defendant or Defendant's lawyer by telephonic or electronic means. *See Operation Save Am.,* ¶¶ 92-95, 275 P.3d at 465. Indeed, while counsel's certification says it is anticipated that Defendant will not be located and served before

the shareholder meeting, the Advisory Committee Note to the 1966 Amendments of F.R.C.P. 65 expressly says (emphasis added):

> Heretofore the first sentence of subdivision (b), in referring to a notice "served" on the "adverse party" on which a "hearing" could be held, perhaps invited the interpretation that the order might be granted without notice if the circumstances did not permit of a formal hearing on the basis of a formal notice. **The subdivision is amended to make it plain that informal notice, which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all.**

[¶ 22] Second, on the bond issue, Plaintiff's only mention of the issue is as follows: "Because these actions will actually stabilize the Company and will not further injure the Company, Plaintiff requests this Court waive any bond pursuant to W.R.C.P.Ch.C. 65(c)." The Wyoming Supreme Court recently reiterated the importance of the requisite bond in making a whole a defendant wrongly enjoined. See *Malave v. W. Wyoming Beverages, Inc.*, 2022 WY 14, ¶ 16, n.2, --- P.3d --- (Wyo. 2022) (calling it "especially troubling" that the security required by Rule 65 was neither demanded by the district court nor posted when the defendant was wrongly enjoined). Given its importance, the bond requirement may not be lightly dispensed with even where harm to the enjoined party may be unlikely. *Operation Save Am.*, ¶¶ 98-99, 275 P.3d at 466 (finding a district court erred by failing to make findings as to the likelihood of harm and whether a security must be posted even when it was unlikely the enjoined party suffered any damages as the result of a twelve-hour TRO).

[¶ 23] Finally, the Court notes that Plaintiff's proposed temporary restraining order does not set the time after entry, not to exceed 14 days, as required by W.R.C.P.Ch.C. 65(b)(2), and Plaintiff's motion does not address this omission.

[¶ 24] For the foregoing reasons, it is, therefore, **ORDERED** that the *Application for Exparte Temporary Restraining Order or, in the Alternative, Expedited Hearing* is **DENIED**.

DATED: 2/24/2022

/s/ Richard L. Lavery
Chancery Court Judge