

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 BRENT GEPHART, an individual,)
4)
5 Plaintiff,)
6 vs.)
7)
8 DOUG MERRYMAN, as an individual and as the)
managing member of OPMNY, LLC,)
9 Defendant.)

Case No.: 2:18-cv-01670-GMN-CWH

ORDER

10
11 Pending before the Court is Plaintiff Brent Gephart’s (Plaintiff’s) Emergency Motion for
12 Temporary Restraining Order or Preliminary Injunction (“Motion”), (ECF No. 12). Defendant
13 filed a Response, (ECF No. 14), on October 18, 2018, and the Court held a hearing for the
14 Motion on October 19, 2018. For the reasons discussed below, the Court **grants** Plaintiff’s
15 Motion.

16 **I. BACKGROUND**

17 This case concerns a business dispute regarding companies owned by Plaintiff and
18 Defendant. The company at the center of this dispute is OPMNY, LLC (“OPMNY”). Plaintiff
19 and Defendant are the sole “equitable and legal owners” of OPMNY. (Am. Compl. ¶ 5, ECF
20 No. 11). Specifically, Plaintiff owns a 49% interest, and he controls the development of
21 technology; whereas Defendant owns a 51% interest, and he controls the financial aspects of
22 the company. (*Id.*); (Emergency Mot. TRO 5:3–5, ECF No. 12). OPMNY is in the business of
23 providing merchant services and marketing to businesses that accept credit cards as payments
24 for goods or services. (Decl. Brent Gephart ¶ 5, ECF No. 12-1).

1 To provide those merchant services, OPMNY operates alongside two other companies
2 also run by Defendant and Plaintiff: Ploutos Holdings, LLC and Instant Accept, LLC. (Am.
3 Compl. ¶ 7). According to Plaintiff, Ploutos Holdings, LLC operates a “payment gateway”
4 known as “Prismpay,” and OPMNY merely receives the revenue from Ploutos Holdings, LLC
5 to “pay the bills” for the above-named companies. (Decl. Brent Gephart ¶¶ 5(a), 13). In
6 contrast, Defendant argues that Prismpay is an “asset of OPMNY,” and OPMNY provides
7 merchants with the ability to use that technology for “secure credit card and direct payments
8 processing.” (Decl. Dough Merryman ¶¶ 4, 22, ECF No. 14-2). Undisputed, however, is that
9 the payment gateway technology of Prismpay enables merchants to securely transmit credit
10 card and transaction data to payment processing platforms that subsequently “clear the credit
11 card transactions and fund the merchants.” (Decl. Brent Gephart ¶ 5(a)); (Resp. 8:6–10, ECF
12 No. 14).

13 In 2018, Plaintiff alleges that he discovered evidence of Defendant misusing the
14 technology of OPMNY and mismanaging the company. (Am. Compl. ¶ 10, ECF No. 11). After
15 attempting to investigate those wrongful actions, Plaintiff filed suit against Defendant on
16 September 1, 2018, in this Court naming Defendant and OPMNY as parties. (ECF No. 1).
17 Defendant then filed a Motion to Dismiss Plaintiff’s Complaint, (ECF No. 6), after which
18 Plaintiff filed an Amended Complaint, (ECF No. 11). The Amended Complaint removed
19 OPMNY from the action and named only Defendant as a party. (*See id.*). The Amended
20 Complaint alleges four claims against Defendant: (1) breach of fiduciary duty; (2) constructive
21 fraud; (3) embezzlement/conversion; (4) accounting. (*Id.* ¶¶ 14–40).

22 However, four days after filing the initial Complaint in this Court, Plaintiff filed two
23 additional suits against Defendant in the Delaware Chancery Court—first seeking dissolution of
24 Ploutos Holdings, LLC, and second seeking an order allowing Plaintiff to “inspect the books
25 and records of Ploutos and Instant Accept.” (Decl. Brent Gephart ¶ 20). The Delaware

1 Chancery Court issued a Status Quo Order prohibiting Defendant from taking specific actions
2 to harm Ploutos property during the pendency of those actions. (*Id.* ¶ 27).

3 Defendant also filed his own suit against Plaintiff on October 4, 2018. (*See* Resp. 10:6–
4 12); (see Ex. A-10 to Resp., ECF No. 14-12). Defendant’s case is before the Eighth Judicial
5 District Court of Nevada, and he sues on behalf of himself individually as well as on behalf of
6 OPMNY. (*See* Resp. 10:6–12).

7 In the instant Motion, Plaintiff essentially seeks to extend the Status Quo Order from the
8 Delaware Chancery Court by requesting an emergency temporary restraining order or
9 preliminary injunction to prevent Defendant from taking certain actions with respect to
10 OPMNY. (*See* Emergency Mot. TRO at 2–4).

11 **II. LEGAL STANDARD**

12 Temporary restraining orders are governed by the same standard applicable to
13 preliminary injunctions. *See Cal. Indep. Sys. Operator Corp. v. Reliant Energy Servs., Inc.*, 181
14 F. Supp. 2d 1111, 1126 (E.D. Cal. 2001). Furthermore, a temporary restraining order “should
15 be restricted to serving [its] underlying purpose of preserving the status quo and preventing
16 irreparable harm just so long as is necessary to hold a hearing, and no longer.” *Granny Goose*
17 *Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 439 (1974).

18 A preliminary injunction may be issued if a plaintiff establishes: (1) likelihood of
19 success on the merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3)
20 that the balance of equities tips in his favor; and (4) that an injunction is in the public interest.
21 *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). “Injunctive relief [is] an
22 extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is
23 entitled to such relief.” *Id.* at 22.

24 The Ninth Circuit has held that “‘serious questions going to the merits’ and a hardship
25 balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming

1 the other two elements of the *Winter* test are also met.” *Alliance for the Wild Rockies v.*
2 *Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011).

3 “In deciding a motion for a preliminary injunction, the district court ‘is not bound to
4 decide doubtful and difficult questions of law or disputed questions of fact.’” *Int’l. Molders’ &*
5 *Allied Workers’ Local Union No. 164 v. Nelson*, 799 F.2d 547, 551 (9th Cir. 1986) (quoting
6 *Dymo Indus., Inc. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964)). “The urgency of
7 obtaining a preliminary injunction necessitates a prompt determination and makes it difficult to
8 obtain affidavits from persons who would be competent to testify at trial. The trial court may
9 give even inadmissible evidence some weight, when to do so serves the purpose of preventing
10 irreparable harm before trial.” *Flynt Distrib. Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir.
11 1984) (citing 11 C. Wright and A. Miller, *Federal Practice and Procedure, Civil*, § 2949 at 471
12 (1973)).

13 **III. DISCUSSION**

14 In the instant Motion, Plaintiff moves for a temporary restraining order to prevent
15 Defendant from engaging in conduct that would damage OPMNY. (Emergency Mot. TRO
16 15:17–23, ECF No. 12). In response, Defendant argues that the Court should deny Plaintiff’s
17 request because the Court does not have subject-matter jurisdiction over this case; because
18 Plaintiff failed to follow the Court’s Local Rules in filing the instant Motion; and because the
19 evidence in this case does not warrant a temporary restraining order or preliminary injunction.
20 (Resp. 2:4–4:21, ECF No. 14). The below discussion addresses each of Defendant’s arguments
21 in turn, beginning first with the Court’s jurisdiction over this case.

22 **A. Subject-Matter Jurisdiction**

23 Plaintiff’s Amended Complaint asserts that the Court has subject-matter jurisdiction
24 under 28 U.S.C. § 1332(a)(1) because Plaintiff and Defendant are completely diverse and the
25 amount in controversy exceeds \$75,000. (Am. Compl. ¶ 1, ECF No. 11). However, Defendant

1 argues that Plaintiff’s failure to include OPMNY as a party in the Amended Complaint is in a
2 violation of Federal Rule of Civil Procedure 19. (Resp. 3:1–11). According to Defendant,
3 OPMNY must be included as a party, which would destroy complete diversity under 28 U.S.C.
4 § 1332 because OPMNY is a limited liability company with a citizenship in the same states as
5 both its members, the Plaintiff and the Defendant. (*Id.* 3:1–11).

6 To determine whether a party must be added to the case under Rule 19 of the Federal
7 Rule of Civil Procedure, courts take a two-step approach. First, a court must determine
8 whether the absent party is “necessary” to the case. *Makah Indian Tribe v. Verity*, 910 F.2d
9 555, 558 (9th Cir. 1990). If the party is “necessary,” the court must then determine whether
10 that party is “indispensable” so that “in equity and good conscience” the suit should be
11 dismissed. *Id.*

12 A party is “necessary” under the first step if: (1) “complete relief” is not possible among
13 those already parties to the suit; and (2) the absent party has a “legally protected” interest in the
14 suit. *Id.* If the court finds that a party is not “necessary,” then the court does not need to
15 consider the second step under Rule 19 and the case may continue without the absent party. *Id.*
16 at 559.

17 In this case, Defendant argues that OPMNY is “necessary” and “indispensable” under
18 Rule 19 because Plaintiff brings his claims to seek relief on behalf of OPMNY—and thus this
19 is a “derivative claim” rather than as a “direct claim.” (Resp. 13:15–14:8). Moreover,
20 Defendant cites *Ross v. Bernhard*, 396 U.S. 531, 539 (1970), for the position that if the claims
21 resemble a derivative claim, OPMNY would then be a “necessary party” because such action
22 arises from the company itself. (*See id.*). However, this argument fails to recognize numerous
23 cases decided by this District which recognizes a narrow exception relieving a court from
24 making the hardline designation of a claim as direct versus derivative. *See, e.g., Carstarphen v.*
25 *Milsner*, 693 F. Supp. 2d 1247, 1249 (D. Nev. 2010). For example, in the context of a closely

1 held corporation, this District has adopted an exception which allows minority shareholders to
2 file a direct action for wrongs that normally must be derivative. *Id.*; see *Simon v. Mann*, 373
3 F.2d 1196, 1198 (D. Nev. 2005) (recognizing the exception for the first time).

4 Though it is a question of state law whether a claim is derivative or direct, see *Sax v.*
5 *World Wide Press, Inc.*, 809 F.2d 610, 613 (9th Cir. 1987), the Nevada Supreme Court has not
6 foreclosed or limited this District’s interpretation of state law to permit the above-mentioned
7 exceptions. The Nevada Supreme Court’s recent decision in *Parametric Sound Corp. v. Eighth*
8 *Judicial Dist. Court in & for Cty. of Clark*, 401 P.3d 1100 (Nev. 2017) specifically discussed
9 when a claim is direct or derivative under Nevada law. *Parametric Sound Corp.* did not,
10 however, render an opinion about the exceptions created in *Simon v. Mann*; nor do the facts or
11 analysis in *Parametric Sound Corp.* suggest that the *Simon v. Mann* exceptions are no longer
12 viable. Defendant fails to provide case law demonstrating that the decision in *Simon v. Mann*,
13 or any later cases relying upon that decision, have been rejected.

14 the Court finds that the facts in this case resemble that of a closely held corporation, and
15 thus warrant the application of the exception created in *Simon v. Mann* to categorize a claim as
16 direct rather than derivative. See 373 F.2d at 1198. Plaintiff and Defendant are the only owners
17 of OPMNY, with Plaintiff serving as a minority shareholder owning a 49% interest while
18 Defendant owns a 51% interest. (Am. Compl. ¶ 5); (Emergency Mot. TRO 5:3–5, ECF No. 12).
19 Accordingly, because of the exception allowing minority shareholders to file a direct action for
20 wrongs that normally must be derivative, the Court considers the Plaintiff’s claims as “direct”
21 claims. In effect, then, OPMNY need not be added as a party to this case. See *Carstarphen v.*
22 *Milsner*, 693 F. Supp. 2d 1247, 1253 (D. Nev. 2010) (“Because we do not characterize
23 [Plaintiff’s] suit as derivative, American Medflight is not a necessary party to the suit, and its
24 absence as a party is not a basis for dismissal . . .”). Therefore, the Court has subject-matter
25 jurisdiction through diversity under 28 U.S.C. § 1332 because the only named parties are

1 citizens of different states. (Am. Compl. ¶ 3) (stating that Plaintiff is a citizen of Georgia and
2 Defendant is a citizen of California).

3 **B. Violation of the Court’s Local Rules**

4 Defendant also argues that the Court should not consider Plaintiff’s instant Motion
5 because Plaintiff’s failed to file a mandatory certification for emergency motion practice.
6 (Resp. 20:19–27). Local Rule 7-4 requires “[a] statement of movant certifying that, after
7 participation in the meet-and confer process to resolve the dispute, the movant has been unable
8 to resolve the matter without court action.” D. Nev. Local R.7-4. However, in light of the
9 parties’ recent prior communication about the central issues in this dispute during the
10 Delaware Chancery Court litigation, the Court finds that Plaintiff’s failure to include a
11 certification statement does not render the instant Motion premature.

12 **C. Temporary Restraining Order**

13 Finding no impediment, this Court now addresses the merits of Plaintiff’s request for a
14 temporary restraining order. A preliminary injunction may be issued if a plaintiff establishes: (1)
15 likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of
16 preliminary relief; (3) that the balance of equities tips in the plaintiff’s favor; and (4) that an
17 injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).
18 The Ninth Circuit has held that “‘serious questions going to the merits’ and a hardship balance
19 that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other
20 two elements of the *Winter* test are also met.” *Alliance for the Wild Rockies v. Cottrell*, 632
21 F.3d 1127, 1132 (9th Cir. 2011).

22 Here, the Court finds that each factor favors the granting of a temporary restraining
23 order. Looking first to whether there is a likelihood of success on the merits, the Court
24 examines the claims and evidence supporting those claims. Plaintiff’s Amended Complaint
25 asserts claims for breach of fiduciary duties owed to Plaintiff by Defendant during his operation

1 of OPMNY and embezzlement of OPMNY funds. (See Am. Compl. at 9–14). To support
2 these claims, Plaintiff provides evidence that Defendant has been misusing OPMNY’s business
3 operations in violation of federal banking laws and failing to report funds earned by OPMNY.
4 (Decl. Brent Gephart ¶ 15, ECF No. 12-1); (Balance Sheet, ECF No. 12-8). At this early stage
5 of the case, the Court finds that this evidence weighs in favor of Plaintiff’s likelihood of
6 success on the merits.

7 Looking next to the likelihood of irreparable harm, Plaintiff argues that an injunction is
8 necessary to “preserve the status quo” because “OPMNY stands to lose customers, goodwill,
9 and revenue.” (Emergency Mot. TRO 19:27–28). Plaintiff also provides evidence that one of
10 OPMNY’s customers (Worldpay), notified Defendant on September 11, 2018, that it was
11 declining to renew its underwriting approval of OPMNY because of the “nature of the
12 allegations” raised in this dispute. (Email to Doug Merryman (Defendant), ECF No. 12-25)).
13 During the hearing, Plaintiff also clarified that this suit was primarily brought because
14 Defendant was claiming OPMNY possessed rights over the Prismpay intellectual property so
15 the Delaware Status Quo Order did not prevent him from exercising his authority as the
16 manager of OPMNY. In response to the Court’s inquiry, Defendant declined to agree that
17 OPMNY did not possess any authority over the intellectual property sought to be preserved by
18 the Delaware Status Quo Order. Thus, at this stage, the Court finds that this factor weighs in
19 favor of granting the temporary restraining order to prevent the irreparable harm of threatened
20 loss of prospective customers or goodwill of OPMNY. See *Stuhlberg Int’l Sales Co. v. John D.*
21 *Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001).

22 Last, the Court finds that both the balance of equities and public interest favor a
23 temporary restraining order. As stated in the hearing on the instant Motion, the Court’s
24 granting of a temporary restraining order should only preserve the current status of OPMNY
25 and protect the Prismpay technology; it does not grant any additional rights to Plaintiff that

1 did not exist before. Further, the Court required Plaintiff to tailor its proposed terms for the
2 temporary restraining order to preserve OPMNY and its technology in its current state, thereby
3 preventing any change to the business relationships and connections between OPMNY, its
4 customers, and those associated with OPMNY.

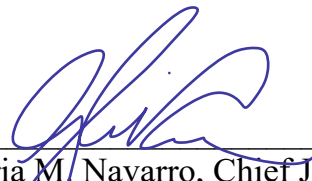
5 **IV. CONCLUSION**

6 **IT IS HEREBY ORDERED** that Plaintiff's Emergency Motion for Temporary
7 Restraining Order ("Motion"), (ECF No. 12), is **GRANTED**.

8 **IT IS FURTHER ORDERED** that the parties may file supplemental briefs before 5:00
9 pm Tuesday, October 30, 2018 addressing the extension of the Temporary Restraining Order
10 beyond 14 days.

11 **DATED** this 19 day of October, 2018.

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Gloria M. Navarro, Chief Judge
United States District Judge