SAM GLASSCOCK III
VICE CHANCELLOR

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: August 12, 2011
Decided: August 15, 2011

Adam Hiller
Brian Arban
Hiller & Arban, LLC
1500 N. French Street, 2nd Floor
Wilmington, DE 19801

Re: *Smart Home, Inc. v. Bryan Selway et al.*
Civil Action No. 6778-VCG

Dear Counsel:

This is my decision on the application of plaintiff Smart Home, Inc. ("Smart Home") for a Temporary Restraining Order.[1] Smart Home has specifically requested that its presentation be *ex parte*, because, according to the Plaintiff, it appears that the Defendant, Bryan Selway ("Mr. Selway"), might, upon notice of this matter, take the very acts that the TRO request is designed to prevent.

The following facts are truncated and taken from the application and complaint in this matter. Smart Home is a Delaware corporation controlled by Brian Darby. The corporation's business is the sale of energy efficient products. It was capitalized by an investment by Mr. Darby and Mr. Selway of only $54,000, of which $6,000 was invested by Mr. Selway and the other $48,000 was supplied by Mr. Darby. Mr. Selway was employed by Smart Home and received periodic payments from the corporation. By July 31, 2011, however, Smart Home was no longer in a financial position to make payments to Mr. Selway, and he was discharged as an employee at that time.

[1] A telephonic hearing was held this morning during which I informed the Plaintiff of my decision and that this letter decision would follow.

The corporation was run informally and never executed a shareholder agreement or promulgated bylaws. Mr. Darby and Mr. Selway reached no agreement as to whether the payments made to them were for salary, commissions, dividends, or otherwise. As part of Mr. Selway's duties, he had checkbook authority over Smart Home's bank account, which was located at the Wilmington Savings Fund Society ("WSFS"). On August 11, 2011, Mr. Selway withdrew funds from Smart Home's WSFS account. According to Smart Home, the Defendant was not entitled to these funds.

Smart Home alleges that Mr. Selway has a personal bank account at defendant Fulton Financial Corporation ("Fulton"), of which defendant Stacey Selway ("Mrs. Selway"), Mr. Selway's wife, may be a joint holder. Smart Home seeks a temporary restraining order enjoining Mr. or Mrs. Selway from using the funds or removing them from Fulton, pending a final disposition of its claim that the funds were wrongfully removed by Mr. Selway from Smart Home's account.

Chancery Court Rule 65(b) provides that:

> A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the Court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

A temporary restraining order, of course, will be entered only upon a showing (1) that the plaintiff has a colorable claim, (2) that absent the entry of the order, plaintiff will suffer irreparable harm, and (3) that the hardship to the plaintiff absent entry of the restraining order outweighs the harm which the order may cause to the defendant.[2] In particular, "[t]he granting of an *ex parte* restraining order is an extreme remedy granted only to prevent imminent irreparable injury."[3]

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[2] *See, e.g.*, *Roseton OL, LLC v. Dynegy Holdings*, 2011 WL 3275965, at *8 (Del. Ch. July 29, 2011).

[3] *Royal Improvements Co. v. Rosauri*, 1987 WL 19318, at *1 (Del. Ch. Oct. 30, 1987).

Here, while the complaint states a colorable claim, I am unpersuaded that irreparable harm will result absent the entry of a restraining order, *ex parte*. Plaintiff's claim is simply that a corporate employee has abused his position to steal $6,000. Smart Home's claim in support of satisfaction of the irreparable harm prong of the TRO analysis is that "Plaintiff is very concerned that upon learning of this action, Defendant will attempt to transfer the Funds away from his own possession or conceal them. Defendant has admitted to Plaintiff that Defendant's financial situation is precarious, and Plaintiff believes that Defendant will quickly seek to spend or transfer the funds."[4] Moreover, Smart Home avers that "Plaintiff is a small business, and the Funds represent approximately 75% of its total cash. Plaintiff's industry is very competitive . . . If the Funds are not returned, this will have an impact upon Mr. Darby, Plaintiff's existing customers, and Plaintiff's ability to generate future business. In fact, Plaintiff believes that it may be forced to stop operating."[5]

To me, this falls noticeably short of the required demonstration of imminent irreparable harm sufficient to justify an *ex parte* TRO. Smart Home has stated that, if a restraining order is not entered, recovery of the funds may be more difficult. As this Court has found in a similar context, however:

> It is insufficient for a plaintiff seeking to attach property of a defendant simply to allege in conclusory terms that there is a risk that if defendant has notice of a proposed seizure, he may abscond. I see no reason to conclude that a plaintiff should be granted the analogous remedy here sought on less of a showing. Allegations of the kind here made, do not, in my opinion, establish the kind of actual threat of irreparable injury that would be necessary to justify the extraordinary remedy of a restraining prior to notice and an opportunity to be heard.[6]

Particularly where, as here, the plaintiff seeks to freeze the funds of an account legally held, not only by the alleged wrongdoer but jointly by an innocent third party, a request for *ex parte* action raises concerns of due process.[7] I find

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[4] Pl.'s Motion for TRO ¶ 8.
[5] Pl.'s Motion for TRO ¶ 9.
[6] *Delaware Trust Co. v. Partial*, 517 A2d 259, 263 (Del. Ch. 1986).
[7] *See, e.g.*, *Rosauri*, 1987 WL 19318, at *1.

Smart Home's bald allegation that the funds allegedly embezzled will be placed beyond the reach of a remedy from this Court to be insufficient to meet the high burden required for the issuance of a restraining order *ex parte* under Rule 65.

Similarly, the allegations by Smart Home that irreparable harm will result absent a quick return of the funds are insufficient to justify the issuance of a TRO without at least allowing the defendants the chance to be served and to respond. Smart Home simply states that if the funds are not returned, this "will have an impact upon Mr. Darby, Plaintiff's existing customers, and Plaintiff's ability to generate future business," and that "Plaintiff believes that it may be forced to stop operating." Nothing in this conclusory statement convinces me that irreparable harm will occur during the time it will take to serve Mr. and Mrs. Selway and Fulton, and to allow them an opportunity to be heard.

Since the Plaintiff has failed to show that irreparable harm will occur absent entry of a temporary restraining order *ex parte*, I defer decision on the restraining order request pending service and an opportunity for the Defendants to be heard.[8]

The Plaintiff shall arrange a telephonic hearing on the application for a Temporary Restraining Order as soon as is practicable.

Sincerely,

/s/ Sam Glasscock III

Vice Chancellor

[8] Rule 65(b)(2) requires that the applicant's attorney certify to the court, in writing, "the efforts, if any, which have been made to give [notice to the Defendant] and the reasons supporting the claim that notice should not be required." While Plaintiff's attorney has clearly made an attempt to give the required certification, a typographical error appears to have made this certification unintelligible. Specifically, Plaintiff's Certification of Attorney reads as follows: "I, counsel for Plaintiff, hereby certify in accordance with Rule 65 that I have recommended to Plaintiff that notice of the Complaint or the foregoing motion, for the reasons set forth in ¶ 8 hereof." [sic]. I assume, for purposes of this decision, that Plaintiff's attorney's certification intended to adopt the rationale of the application itself. Whether or not those reasons would be sufficient, I have not denied the Plaintiff's request based on lack of a certification; I point this out only so that it may be corrected in future proceedings in this matter.