

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

STEPHEN P. LAMB
VICE CHANCELLOR

New Castle County Court House
500 N. King Street, Suite 11400
Wilmington, Delaware 19801

Submitted: September 23, 2005

Decided: September 28, 2005

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***RE: Gila Dweck v. Albert Nasser and Kids International Corp.
C.A. No. 1353-N***

Dear Counsel:

The plaintiff has moved, pursuant to Court of Chancery Rule 65(b), for a temporary restraining order against defendants Albert Nasser and Kids International Corporation (“Kids”). For the reasons set forth herein, the motion is denied.

I.

On May 18, 2005, Gila Dweck, a 30% shareholder of Kids, filed this action against Kids and Nasser claiming that Nasser, a director and majority controlling shareholder of Kids, breached his fiduciary and contractual duties. In this action, Dweck seeks the appointment of a custodian, specific performance of an alleged shareholders agreement, and a declaratory judgment concerning her alleged right to compete with Kids.

On June 14, 2005, the defendants counterclaimed that Dweck was wrongfully operating competing businesses out of Kids’s premises, and had

breached her fiduciary duties by tortuously interfering with Kids's business relationships, misappropriating its trade secrets, engaging in deceptive trade practices, and converting its assets.

Following the commencement of this and related litigation, the parties engaged in protracted settlement discussions, in the course of which Dweck and her attorneys were given access to Kids's financial records. According to her affidavit of September 22, 2005, such access allowed Dweck to confirm that "there had not yet been any extraordinary corporate expenditures." Evidently, those settlement discussions broke down in mid-September, fueling fears that monies would be diverted and leading to the filing of the motion for a temporary restraining order.

Dweck now seeks, four months after the commencement of this action, an order temporarily restraining the defendants from taking, directly or indirectly, any action out of Kids's ordinary course of business without her prior written consent. The actions she seeks to restrain include: (1) incurring any debt on behalf of Kids International, (2) transferring or in any manner dissipating the assets of Kids International with a value in excess of \$10,000, (3) engaging, entering into or agreeing to any transaction, contract or agreement which exceeds \$10,000, or (4) increasing any officer's, director's or employee's compensation or benefits. The premise of the motion is that, in the absence of such an order, there is a substantial likelihood that the defendants will misappropriate Kids's assets, which are alleged to include as much as \$20 million in cash or cash equivalents. In addition, Dweck's counsel suggested at oral argument that Nasser is a Swiss national against whom it would be difficult to enforce a judgment.

In response, the defendants filed an affidavit denying any plan to divert Kids's assets and, instead, relating that they are employing Kids's assets in the pursuit of its children's clothing business. They also point out that, according to Dweck's allegations, the assets of the corporation have grown substantially in recent months. The defendants' response also addresses the underlying merits of Dweck's complaint, pointing out a number of substantial difficulties she is likely to encounter in enforcing any rights claimed under an alleged verbal voting agreement.

II.

The standards governing the issuance of a temporary restraining order are well settled. The essential predicate for the issuance of a temporary restraining order is a threat of imminent, irreparable injury.¹ If that is shown, the remedy typically will be issued unless it appears “(1) that the claim asserted on the merits is frivolous or not truly litigable, (2) that the risk of harm in granting the remedy is greater than the risk to plaintiff of denying it, or (3) that plaintiff has not proceeded as promptly as it might, has therefore contributed to the emergency nature of the application and is guilty of laches.”²

Having considered the submissions and arguments presented by the parties, the court is persuaded that the plaintiff has not shown an imminent threat of irreparable harm. The plaintiff has alleged no facts to suggest that the defendants are likely to dissipate the disputed assets. Thus, there is no showing of imminent harm. Moreover, the court is not persuaded that the feared transfer of funds from Kids to Nasser or other foreign entities controlled by Nasser would constitute irreparable harm.

The court is also concerned with the timing of this TRO application, coming as it does four months after the filing of this action. Nothing in the record suggests that there is any greater threat of injury now than there was in May when the action was first filed. While the delay is partly explained by the parties’ settlement efforts, it nevertheless undermines the plaintiff’s argument that there is, in fact, an imminent threat of injury of any sort.

III.

For the reasons set forth above, the motion for a temporary restraining order is DENIED. IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor

¹ *Cottle v. Carr*, 1988 Del. Ch. LEXIS 21, at *8 (Del. Ch. Feb. 9, 1988); *See generally* Donald J. Wolfe, Jr. and Michael A. Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY, § 10-3[a] at 10-52 (2005).

² *Id.*