IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BARRY HENSON, individually and derivatively on behalf of TALSICO, LLC, and WALKABOUT II PTY LTD, as trustee for WALKABOUT DISCRETIONARY TRUST,	)	
Plaintiffs,	)	
v.	)	*Civil Action No. 8057-VCG*
FILOMENA SOUSA, DANIEL WILKINSON, TALSICO, LLC, TALSICO NORTH AMERICA, LLC, TALSICO PTY LTD, FUNDA DISCRETIONARY TRUST & SIMUNYE DISCRETIONARY TRUST, JABULANI PTY LTD & KWAFUNDA PTY LTD, JABULANI PTY LIMITED, , as trustee for SIMUNYE DISCRETIONARY TRUST, and KWAFUNDA PTY LIMITED, as Trustee for FUNDA DISCRETIONARY TRUST,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: December 10, 2012
Date Decided: December 19, 2012

Brian M. Rostocki, J. Cory Falgowski, and John C. Cordrey, of REED SMITH LLP, Wilmington, Delaware; OF COUNSEL: Constantine Karides, of REED SMITH LLP, New York, New York, Attorneys for Plaintiff.

Michael A. Weidinger, of PINCKNEY, HARRIS & WEIDINGER, LLC, Wilmington, Delaware, Attorney for Filomena Sousa, Daniel Wilkinson and Talsico, LLC.

GLASSCOCK, Vice Chancellor

Plaintiff Barry Henson and Defendants Filomena Sousa and Daniel Wilkinson (all citizens and residents of Australia) formed Talsico, LLC, in 1995. Talsico provides operational advice to prominent businesses in various industries including pharmaceuticals, medical devices, aviation, and consumer products.[1] Henson has alleged that Sousa and Wilkinson have terminated Talsico's employees and disrupted its customer relationships in order to transfer the entirety of Talsico's business to new entities in which Sousa and Wilkinson are the sole owners.[2] Henson further asserts that Sousa and Wilkinson have colluded to wrongfully dissolve Talsico, LLC and thereby deprive him of his one-third interest in the business without compensation.[3] Henson now requests a Temporary Restraining Order enjoining Sousa and Wilkinson from transferring assets away from Talsico LLC, from directing payment of licensing fees from Talsico-related businesses to any new entity owned by Sousa and Wilkinson, and from terminating employment or customer relationships of Talsico. For the reasons given below, I deny Henson's request for a TRO.

[1] Pls.' Br. Supp. Mot. Prelim. Inj/TRO 3.
[2] *Id.*
[3] *Id.* at 1-2.

I. BACKGROUND[4]

Talsico, LLC ("Talsico") was originally formed in 1995 as the brainchild of Barry Henson and Filomena Sousa.[5] At the time, Henson and Sousa were married, and when they formed the company, they recruited Daniel Wilkinson, Sousa's brother-in-law, to join them.[6] Henson and Sousa separated in 2009 and agreed to a divorce in late 2010.[7] At some point, Henson ceased participating in the actual operations of Talsico and became a passive investor in the Talsico business.[8]

Talsico "develops and sells a proprietary suite of products and services for improving corporate profitability by reducing human errors in the process of the corporate environment."[9] Talsico is a global business, with offices in the United States as well as Australia, serving clients from around the world.[10] Talsico's "products" consist primarily of intellectual property acquired under license from a related entity, Talsico International Partnership ("TIP I"), which Talsico in turn licenses to its clients.[11] Talsico's unique products, combined with "an extremely

[4] For all facts I rely on Henson's Brief in Support of the Motion for a Preliminary Injunction/TRO. Except as noted below, these facts were not disputed by Defendant's counsel at oral argument.
[5] *Id.* at 2.
[6] *Id.*
[7] *Id.* at 5.
[8] *Id.* at 6.
[9] *Id.* at 2.
[10] *Id.*
[11] *Id.*

loyal client base," have generated substantial profits for Talsico's ownership.[12] Talsico employs "slightly fewer than twenty employees."[13] Henson, Sousa, and Wilkinson each own an equal 1/3 share of Talsico.[14]

Complicating this matter is the tangled web of Australian partnerships, private companies and trusts—all controlled by either Henson, Sousa, or Wilkinson—with which Talsico does business.

A. Talsico International Partnership

TIP I is an Australian partnership that owns the intellectual property that generates virtually all of Talsico's revenue. This intellectual property includes "trademarks, copyrights, research and development, electronic and hard copy documents, software, manuals, and graphic designs and images."[15] TIP I licenses its intellectual property to Talsico in exchange for licensing fees.[16] TIP I also licenses the intellectual property to "other entities," presumably clients of Talsico.[17] However, Talsico is the largest source of TIP I's revenue.[18]

[12] *Id.*
[13] *Id.* at 3.
[14] *Id.* at 6.
[15] *Id.* at 3.
[16] *Id* at 3-4 ("[T]he majority of the Talsico International Partnership's revenues stem from IP fees paid by Talsico for its use of the Intellectual Property.").
[17] *Id.*
[18] *Id.* at 4.

Henson, Sousa, and Wilkinson each have, through their respective entities, an equal stake in TIP I.[19] TIP I is formally organized with three equal partners: Jabulani Pty Limited, Kwafunda Pty Limited, and Walkabout II Pty Limited.[20] These entities are organized as Australian private companies.[21] Jabulani, Kwafunda, and Walkabout serve as trustees, respectively, for the Simunye Trust, the Funda Trust, and the Walkabout Trust.[22] Jabulani, Kwafunda, and Walkabout are controlled, respectively, by Sousa, Wilkinson, and Henson.[23] The Simunye Trust, the Funda Trust, and the Walkabout Trust each have as their respective beneficiaries Sousa, Wilkinson, and Henson.[24] To sum up, Sousa, Wilkinson, and Henson share equal control of TIP I through companies and trusts that effectively make each of them his or her own trustee.

The ownership of TIP I was not always structured as detailed above. As previously mentioned, Henson and Sousa were married when they formed Talsico, but their marriage ended in 2010. Before the divorce, Henson and Sousa shared 2/3 control of Talsico as well as 2/3 control of TIP I by virtue of the Jabulani company and the Simunye Trust.[25] The Walkabout entities, which Henson

[19] *Id.* at 6.
[20] *Id.* at 5.
[21] *Id.* at 4 ("Jabulani is an Australian private company . . . . Kwafunda is an Australian private company"); Compl. ¶ 5 ("Walkabout is an Australian private company").
[22] Pls.' Br. Supp. Mot. Prelim. Inj/TRO 5-6.
[23] *Id.* at 4-5.
[24] *Id.* at 4.
[25] *Id.*

controls, were created and made partner in TIP I in 2011 as the result of the divorce.[26]

B. Talsico Innovations Partnership

Henson alleges that in July and August 2012 Sousa and Wilkinson began pushing him out of the business by creating the entities into which Talsico's consulting business would be moved.[27] In July, they formed two Australian partnerships, Talsico Innovations Partnership ("TIP II") and Jabulani/Kwafunda Partnership.[28] They also formed a new Delaware LLC, Talsico North America LLC (Talsico NA").[29]

The new entities are purportedly the means by which Sousa and Wilkinson are diverting the profits of Talsico's business away from Henson. Henson alleges that when the new entities were created, Sousa and Wilkinson arranged for Talsico to stop paying licensing fees to TIP I and instead pay the fees to either TIP II or Jabulani/Kwafunda Partnership.[30] Henson further alleges that Sousa and Wilkinson

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[26] *Id.* at 5.
[27] *Id.* at 7.
[28] *Id.*
[29] *Id.* I am cognizant of the degree to which the obvious similarities between the names of original Talsico entities (Talsico and TIP I) and the names of the new entities (Talsico NA and TIP II, created and controlled solely by Sousa and Wilkinson) obfuscate the underlying facts of this case and tend to bolster the Plaintiff's argument that wrongdoing is afoot. At oral argument, Defendant's counsel represented that Talsico (the first Talsico LLC, the one in which Henson, Sousa, and Wilkinson all shared control) was informally referred to in internal company records as "Talsico North America, or Talsico NA." This has created confusion concerning the question of whether the old Talsico or the new Talsico was the entity that was accruing licensing fees payable after the Australian court enjoined all use of Talsico intellectual property.
[30] *Id.*

have transferred rights in Talsico intellectual property away from TIP I, and have claimed the right to recoup licensing fees already paid to TIP I.[31] Henson also asserts that Sousa and Wilkinson opened new bank accounts using the Talsico name without Henson's knowledge or consent.[32]

C. Australian Litigation

In addition to this litigation, Henson has filed suit against Sousa and Wilkinson in Australia. In so doing, he obtained an injunction from the Supreme Court of New South Wales forbidding Sousa and Wilkinson (and entities controlled by them) from using or licensing the trademarks, copyrights, and other intellectual property of TIP I, except as was necessary for the winding up of TIP I.[33] The Australian court also ordered the parties to agree to a receiver to conduct the wind-up.[34]

[31] *Id.* at 8. Henson supports his allegation with a letter, dated September 12, in which Sousa and Wilkinson "demanded an immediate repayment from Walkabout and Henson of a $441,204 profit distribution for the financial year ending June 30, 2011, based upon the assertion that it had "erroneously" been paid. Sousa and Wilkinson's position that they are the sole beneficiaries of the IP is erroneous and inconsistent with documentation and all previous conduct." *Id.*

[32] *Id.* at 9.

[33] I characterize the New South Wales Supreme Court Order thus, based on a copy made available to me by counsel but not yet a part of the record. *See also*, Letter from Brian M. Rostocki, Ex. A, at 1, Dec. 10, 2012; Letter from Michael A. Weidinger in Response to Letter from Brian M. Rostocki, at 1, Dec. 10, 2012.

[34] Pls.' Reply Br. Supp. Mot. TRO, Ex. K, at 2.

D. Dissolution of Talsico, LLC

On the morning of October 26, 2012 Henson received notice from Sousa that a meeting of the members of Talsico would be held that afternoon.[35] Henson informed Sousa that he would be unable to attend and that he could be available at another time.[36] Sousa and Wilkinson, the only other two members of Talsico, held the meeting without Henson.[37] At that meeting, they voted to dissolve the company.[38] Though there is some disagreement concerning the validity of the Talsico LLC Operating Agreement,[39] Section 10.2 of the Operating Agreement provides that dissolution requires unanimous consent of the LLC members.[40]

Sousa then informed Henson on November 14 that "all Talsico [LLC] employees would be terminated effective November 15, 2012."[41] Henson also asserts that Sousa confirmed that "Talsico's customers and prospective customers had been or would be advised of the termination of all employees and dissolution of Talsico."[42] Henson believes that the employees and customer relationships of

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[35] Pls.' Br. Supp. Mot. Prelim. Inj/TRO 9.
[36] *Id.*
[37] *Id.*
[38] *Id.*; *See also* Pls.' Reply Br. Supp. Mot. TRO, Ex. G, at 1.
[39] Wilkinson denies signing the Operating Agreement submitted by Hensen. However, the Defendants have not argued that some other Operating Agreement controls the governance of Talsico, and Defendants' counsel at oral argument on the Motion for a Temporary Restraining Order conceded that even under the default provisions of the LLC Act, Henson's consent would have been required to dissolve the company. *See* 6 *Del. C.* § 18-801(a)(3) (requiring for dissolution a vote of the members holding *more than* two-thirds of the membership interests).
[40] Pls.' Br. Supp. Mot. Prelim. Inj/TRO 10; Pls.' Reply Br. Supp. Mot. TRO, Ex. H, at 2.
[41] Pls.' Br. Supp. Mot. Prelim. Inj/TRO 11.
[42] *Id.*

Talsico, LLC have been or will be transferred to Talsico NA—the new LLC owned solely by Sousa and Wilkinson.[43] For their part, Sousa and Wilkinson assert via affidavit that "Talsico North America, LLC is not an operating entity; Talsico North America, LLC has not obtained a license to do business and has not engaged in any business. Talsico North America, LLC has received no assets from Talsico, LLC, including but not limited to customer contracts or fees."[44]

II. ANALYSIS

This court will issue a TRO, a "special remedy of short duration,"[45] when the moving party can demonstrate "(i) the existence of a colorable claim, (ii) the irreparable harm that will be suffered if relief is not granted, and (iii) a balancing of hardships favoring the moving party."[46]

[43] *Id.*

[44] Affidavit of Filomena Sousa 1; Affidavit of Daniel Wilkinson 1. These affidavits might lead one to wonder for what purpose Talsico NA was created, if not to operate as a business. When asked this question at oral argument, Defendants' counsel was unclear on his client's rationale, but suggested that the sole purpose behind the creation of Talsico NA might be so that the Defendants could learn about how an LLC is organized. Though "learn by doing" is certainly at times a useful strategy, I find counsel's supposition wildly unlikely.

[45] *Sherwood v. Ngon*, 2011 WL 6355209, at *6 (Del. Ch. Dec. 20, 2011).

[46] *CBOT Hldgs., Inc. v. Chicago Bd. Options Exch., Inc.*, 2007 WL 2296356, at *3 (Del. Ch. Aug. 3, 2007).

A. Colorable Claim for Relief on the Merits

Henson has alleged sufficient facts to establish a claim for breach of Talsico's Operating Agreement and for breach of fiduciary duties by Sousa and Wilkinson. Accordingly, Henson has shown a colorable claim for relief.[47]

B. Imminent Threat of Irreparable Harm

I now consider "whether the absence of a TRO will permit imminent, irreparable injury to occur to the applicant."[48] Plaintiff's counsel conceded at oral argument that issues involving payment of royalties can be remedied by damages, and thus do not create a risk of irreparable harm. However, Henson contends that he satisfies the irreparable harm standard in two ways. First, he asserts that irreparable injury will result from Sousa and Wilkinson terminating relationships with customers and employees.[49] Second, Henson argues that the transfer of assets from Talsico to Talsico NA constitutes a "fraudulent transfer" warranting temporary injunctive relief under the Delaware Uniform Fraudulent Transfer Act.[50] For the reasons that follow, neither of Henson's arguments support a finding of irreparable harm.

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[47] *See Arkema Inc. v. Dow Chem. Co.*, 2010 WL 2334386, at *4 (Del. Ch. May 25, 2010) ("When seeking to show that the alleged claims are meritorious on an application for a temporary restraining order, plaintiffs must meet the low burden of showing 'that a colorable claim has been made out if the facts alleged are true.'") (citing *Topspin P'rs, L.P. v. RockSolid Sys., Inc.*, 2009 WL 154387, at *2 (Del.Ch. Jan.21, 2009)).
[48] *ACE Ltd. v. Capital Re Corp.*, 747 A.2d 95, 102 (Del. Ch. 1999).
[49] Pls.' Br. Supp. Mot. Prelim. Inj/TRO 13.
[50] *Id.* at 14.

1. Loss of Business Relationships with Customers and Employees

Henson accurately points out that this Court has held that "the danger of losing valuable revenue-generating relationships is a harm that may not be compensable in any manner other than injunctive relief."[51] Such an allegation, however, does not automatically justify injunctive relief. The issue before me is whether Henson has shown that the alleged acts of Sousa and Wilkinson will *irreparably* damage "the continuing income stream and goodwill gained from a sustained relationship between [a company] and its . . . customers."[52] I conclude that Henson has failed to make such a showing for two reasons.

First, Henson has conceded that TIP I, the owner of the intellectual property which is the principal source of Talsico's revenue, is in the process of being wound up in Australia via an action brought by Henson himself, and the Australian Court overseeing those proceedings has entered an injunction preventing the use of TIP I intellectual property. Because Talsico's core business relies on the use and licensing of TIP I intellectual property, Talsico's operations have been effectively suspended by the Australian Court. Therefore, the "harm" that Henson fears—the interruption of important business relationships—has occurred pursuant to a court order initiated by Henson, and cannot be prevented by entry of a TRO here.[53]

[51] *ZRii, LLC v. Wellness Acq. Gr., Inc.*, 2009 WL 2998169, at *13 (Del. Ch. Sept. 21, 2009).
[52] *Id.*
[53] Obviously, this analysis would be different were the Australian Court to lift its injunction.

Second, to the extent that any Talsico-related business is ongoing, Henson has not alleged that Sousa and Wilkinson are sabotaging that business or seeking to permanently prevent "Talsico"—writ large—from serving clients in the future. Rather, Henson has alleged that Sousa and Wilkinson have engaged in conduct that *perpetuates* the Talsico business as Talsico NA, thus depriving Henson of an interest in Talsico's future profits. Henson's factual assertions belie his claim of irreparable harm, because he alleges that any termination of customer or employee relationships is a temporary formality, and that customers and employees will simply be transferred to Talsico NA (also a defendant here).[54] Because Henson alleges that Sousa and Wilkinson are simply transferring Talsico's "substantial business relationships and goodwill"[55] from one entity before this Court to another (rather than destroying those assets), I conclude that such conduct does not create the risk of irreparable harm.

2. Fraudulent Transfer

Henson asserts that he has satisfied the irreparable harm standard because, absent injunctive relief, Sousa and Wilkinson will engage in the "fraudulent transfer of assets" away from Talsico and into Talsico NA.[56] Henson relies on the

[54] Pls.' Br. Supp. Mot. Prelim. Inj./TRO 11.
[55] *All Pro Maids, Inc. v. Layton*, 2004 WL 1878784, at *5 (Del. Ch. Aug. 10, 2004).
[56] Pls.' Br. Supp. Mot. Prelim. Inj./TRO 13.

Uniform Fraudulent Transfer Act[57] ("UFTA") for the proposition that injunctive relief is an appropriate remedy to prevent fraudulent transfers.[58] Henson argues that because he has alleged that Sousa and Wilkinson will fraudulently transfer assets away from Talsico, he is automatically entitled to injunctive relief in the form of a TRO, without a separate showing of irreparable harm. That argument is incorrect.

Section 1307(a)(3)(a) of the UFTA provides that injunctive relief to prevent fraudulent transfer is available, "subject to applicable principles of equity."[59] This express language indicates that even assuming Henson has shown a colorable claim under the UFTA, Henson still bears the burden of showing that "true immediate and irreparable harm will occur if a temporary restraining order is not granted."[60] Our cases recognize this principle. For example, in *Roseton OL, LLC v. Dynegy Holdings Inc.*, the plaintiffs failed to demonstrate irreparable harm notwithstanding the fact that they were seeking a TRO enjoining the defendants from reorganizing their business and thereby engaging in a fraudulent transfer.[61]

Henson points to one Delaware case, *Mitsubishi Power Systems Americas, Inc. v. Babcock & Brown Infrastructure Group US, LLC*, which states that "[t]he

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[57] 6 *Del. C.* § 1307(a)(2)-(3).
[58] Pls.' Br. Supp. Mot. Prelim. Inj./TRO 14.
[59] 6 *Del. C.* § 1307(a)(3).
[60] *Am. Hoechst v. Nuodex, Inc.*, 1985 WL 11531, at *1 (Del. Ch. Feb. 26, 1985).
[61] *Roseton OL, LLC v. Dynegy Hldgs. Inc.*, 2011 WL 3275965, at *17-*19 (Del. Ch. July 29, 2011).

threat of a fraudulent transfer will constitute irreparable harm warranting injunctive relief."[62] Henson asks this Court to apply *Mitsubishi Power* in a way that would obviate the clear language of Section 1307, which provides for injunctive relief to prevent fraudulent transfer "[s]ubject to applicable principles of equity."[63] It is unclear to what extent the Court in *Mitsubishi Power* conflated a showing of a colorable claim under the UFTA with a showing of actual, threatened, irreparable harm,[64] and I note that a threat of actual irreparable harm appears consistent with the facts of that case.[65] Henson's argument that demonstrating a colorable claim is sufficient to compel a finding of irreparable harm is inconsistent with the unambiguous statutory language of Section 1307 of the UFTA.[66] Regardless of whether Henson has articulated a colorable claim of fraudulent transfer, he still bears the burden of showing that he will be irreparably harmed without a TRO.[67]

Henson has failed to make the requisite "clear showing of imminent irreparable harm" to justify his request for a TRO. As I have found above, this

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[62] *Mitsubishi Power Sys. Ams., Inc. v. Babcock & Brown Infrastructure Grp. US, LLC*, 2009 WL 1199588, at *4 (Del. Ch. Apr. 24, 2009).
[63] 6 *Del. C.* § 1307(a)(3).
[64] *Id.* at *4-*5 (finding "that BBIG's debts exceed its assets, thereby making it insolvent," and the "Trans Bay sale [by the plaintiff] . . . was arguably fraudulent as to [the defendant].").
[65] *Id.* at *4 ("MPSA's showing of imminent, irreparable harm hangs on its ability to demonstrate a colorable claim that BBIG intends to engage in one or more fraudulent transfers in the near future.").
[66] *See* 6 *Del. C.* § 1307(a)(3).
[67] Because I find that he has not demonstrated irreparable harm, I need not reach the question of whether Henson is a creditor under the UFTA or has otherwise stated a colorable claim for fraudulent transfer.

Court can remedy any transfer of tangible or intangible assets between Defendant Talsico and Defendant Talsico NA after a trial on the merits. The harm that Henson is really concerned with is "the diversion of [Talsico] IP Fees to entities that should not receive these IP fees."[68] This harm, if it exists, can be adequately redressed via money damages. Therefore, I find that Henson has failed to meet his burden to show the immediate risk of irreparable harm.[69]

III. CONCLUSION

For the forgoing reasons, Henson's Motion for a Temporary Restraining Order is denied. IT IS SO ORDERED.

[68] Pls.' Br. Supp. Mot. Prelim. Inj./TRO 24.

[69] Furthermore, Henson has not made the requisite showing that "a balancing of hardships favor[s] the moving party." *See CBOT Hldgs.*, 2007 WL 2296356, at *3. The harm to Talsico of my entering a TRO could well outweigh any benefits. I have no information about the status of any transfer of business between Talsico and Talsico NA. Furthermore, TIP I—the Australian partnership which licenses intellectual property to Talsico—is currently in receivership, and I do not know how a TRO restricting Sousa and Wilkinson's conduct with regard to Talsico might affect the wind-up. Accordingly, I find that Henson has failed to show that the balance of hardships to the parties weighs in favor of granting a TRO.