IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv-00911-WYD-CBS

MERCURY COMPANIES, INC.; AMERICAN HERITAGE TITLE AGENCY, INC. D/B/A FIRST AMERICAN HERITAGE TITLE COMPANY OF DENVER; SECURITY TITLE GUARANTY CO.; TITLE AMERICA, INC.; and UNITED TITLE COMPANY, INC.

Plaintiffs,

v.

THE FIRST AMERICAN CORPORATION and FIRST AMERICAN TITLE INSURANCE COMPANY

Defendants.

THE FIRST AMERICAN CORPORATION and FIRST AMERICAN TITLE INSURANCE COMPANY,

Counterclaimants,

v.

MERCURY COMPANIES, INC.

Counterdefendant

RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs, Mercury Companies, Inc.; American Heritage Title Agency, Inc. d/b/a First American Heritage Title Company of Denver, Security Title Guaranty Co.; Title America, Inc.; and United Title Company, Inc. (collectively, "Mercury"), through counsel, submit the following response to the motion for a temporary restraining order filed by Defendants, The First American Corporation and First American Title Insurance Company (together, "First American").

INTRODUCTION

On or about July 24 or 25, 2008, Mercury's lender, Comerica, unexpectedly (a) declared Mercury's $40 million line of credit immediately due and payable, and (b) swept approximately $40 million that Mercury had held in various accounts, including $27 million held in the operating account Mercury used for itself and all of its subsidiaries. Because of this financial crisis, the only way Mercury can continue to operate is to sell off its Colorado subsidiaries (the "Subsidiaries"). On August 3, 2008, Mercury entered into an agreement to sell the Subsidiaries to FNF Security Acquisition, Inc., Inc. ("Fidelity"). Fidelity has paid Mercury part of the price, has funded the Subsidiaries' payroll obligations, and has provided closing protection letters (when First American failed to do so in violation of the underwriting agreements).

First American has now filed a motion for a temporary restraining order ("TRO") in which it asks this Court to order Mercury and Fidelity to undo their transaction, and instead to force Mercury to sell the Subsidiaries to First American for millions less than the price paid by Fidelity. As shown below, First American cannot satisfy the high burden that must be met for obtaining a TRO. Accordingly, Mercury requests the Court to deny First American's motion.

BACKGROUND

1. Mercury and First American are parties to an agreement pursuant to which First American agreed, among other things, to purchase shares of preferred stock when they were "put" to First American. Although the number of shares, and the amount of the purchase price, were determined pursuant to a specified formula, it is undisputed that the number of shares was 15,000, and the price for the shares were $15,000,000.

2. On May 13, 2008, Mercury notified First American that Mercury was exercising its put rights. First American refused to purchase the shares of stock, however, claiming that the notification was defective. Although First American's position was meritless, Mercury delivered to First American a second notice that Mercury was exercising its put rights. First American still refused to purchase the stock.

3. Because of the dispute over Mercury's put rights, Mercury was unable to provide its lender with audited financial statements. The lender responded by calling Mercury's loans and sweeping its operating capital. (Declaration of Jerrold Hauptman ¶ 2-3, attached as Ex. 1.)

4. The only way Mercury could continue to operate was to sell its Subsidiaries. Mercury initially entered into negotiations to sell the subsidiaries to First American. (Hauptman Aff. ¶ 11.)

5. After initial discussions, however, First American – viewing itself in the catbird's seat – took unwarranted and untenable positions. (Hauptman Aff. ¶ 13-16.) When Mercury protested that it was being placed in an impossible position, First American's lawyer replied, "You have no choices." (Hauptman Aff. ¶ 16.)

6. Because of the lack of success in negotiating an agreement with First American, Mercury decided to respond to an inquiry from another title insurer, Fidelity, about purchasing the Subsidiaries. ((Hauptman Aff. ¶ 17.) Mercury expressly told First American that Mercury intended to discuss a possible purchase of the Subsidiaries by Fidelity. (Hauptman Aff. ¶ 20.) First American vehemently opposed any such purchase, making it clear that if Mercury were to attempt to sell to Fidelity, First American would do everything in its power to block the transaction. (Affidavit of Virginia G. Johnson ¶ 4, attached as Ex. 2; Hauptman Aff. ¶22.)

7. Despite this, Mercury met with, and negotiated a sale of its stock to, Fidelity. On August 5, 2008, Mercury and Fidelity entered into a Stock Purchase Agreement pursuant to which Fidelity agreed to pay $5,000,000 to Mercury, and assume all of the liabilities of the Subsidiaries. (See Stock Purchase Agreement at ¶ 1, attached as Ex. 3.) The sale price is millions of dollars more than the best offer made by First American. (Hauptman Aff. ¶ 23.) When First American learned of the Stock Purchase Agreement, it informed Mercury that First American intended to seek a TRO the following day. (Johnson Aff. ¶ 4; Hauptman Aff. ¶ 22.)

ARGUMENT

I. FIRST AMERICAN CANNOT ESTABLISH THAT IT IS ENTITLED TO A TRO.

To obtain a TRO, First American must show: (1) a substantial likelihood that it will prevail on the merits; (2) that it will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to First American outweighs whatever damage the proposed injunction may cause Mercury; and (4) that the injunction, if issued, will not be adverse to the public interest. Camp Coast to Coast, Inc. v. Woodbine Investments, LLC, No. 08-cv-00981-REB-BNB, 2008 WL 2095540, at *2 (D.Colo. May 15, 2008). A TRO is an extraordinary remedy. It should issue only when necessary to "preserve the status quo and prevent irreparable injury," and it should last "just so long as is necessary to hold a hearing, and no longer." Bryant v. Nat'l Football League, Inc., No. 07-cv-02186-MSK-MJW, 2007 WL3054985, at *2 (D. Colo. Oct. 18, 2007) (quoting Granny Goose Foods, Inc. v. Int'l. Bhd. of Teamsters, 415 U.S. 423, 438-39 (1974) (internal quotations omitted)). Moreover, the TRO First American is seeking (a) disturbs the status quo, and (b) is mandatory as opposed to prohibitory. As a result, First American bears "an even heavier burden," and must show that the four factors for obtaining a temporary restraining

order "weigh heavily and compellingly in [First American's] favor before such an injunction may be issued." SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991) ("Visa USA");[1] see also Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001).

Here, First American cannot meet its burden. As shown below, none of the factors support the issuance of any kind of TRO, let alone one that is mandatory and upsets the status quo. Accordingly, Mercury requests the Court to deny First American's motion.

A. First American Cannot Show That It Will Suffer Irreparable Harm.

"Irreparable injury is established 'when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain.'" NxGen, LLC v. Dejonge, No. 07-cv-00396-WYD-KLM, 2007 WL 2788607, at *3 (D.Colo. Sept. 20, 2007) (quoting Dominion Video Satellite, Inc. v. Echostar Satellite Corp., 269 F.3d 1149, 1156 (10th Cir.2001)). See also Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1250 (10th Cir. 2001). A party seeking a TRO must show that "the injury complained of is of such imminence that there is a clear and present need for equitable relief." Heidman v. S. Salt Lake City, 348 F.3d 1182, 1189 (10th Cir.2003).

First American cannot establish that it will suffer irreparable harm. To begin with, this case is a classic monetary dispute. First American claims that Mercury breached its agreement with First American by selling the Subsidiaries to Fidelity rather than to First American. Courts and juries are routinely asked to determine, and do determine, the damages incurred as a result of

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1Although Visa USA concerned issuance of a preliminary injunction, the standards for issuance of a temporary restraining order mirror the standards for issuance of a preliminary injunction where the opposing party has notice. Abu-Nantambu-El v. Lovingier, No. 06-cv-00945-WDM-CBS, 2007 WL 684132, at *3 (D.Colo. Jan. 17, 2007).

such alleged breaches. Thus, any claims arising out of the sale of the Subsidiaries to Fidelity will be garden-variety legal claims, and the alleged damages can readily be quantified. First American has an adequate remedy at law and cannot establish irreparable harm.

Additionally, any damages First American may have suffered were due to its own unrepentant greed, and not to any wrongful action by Mercury. Mercury attempted to sell the Subsidiaries to First American, but First American repeatedly refused to pay even a small percentage of the Subsidiaries' fair value. And it was only because of First American's bad faith that Mercury began negotiating with Fidelity. Because the Subsidiaries were not sold to First American due solely to its refusal to pay a competitive price, and because courts in this circuit "will not consider a self-inflicted harm to be irreparable," Salt Lake Tribune Publishing Co., LLC v. AT&T Corp., 320 F.3d 1081, 1106 (10th Cir. 2003), for this reason as well First American cannot establish irreparable harm.

B. First American Cannot Show a Likelihood of Success on the Merits.

Next, for two reasons First American cannot show that it is likely to succeed on its claim that the sale to Fidelity was a breach of Mercury's agreement with First American. The provision on which First American's breach of contract claim is based states:

> [Mercury] will not acquire any business entities, wind up, liquidate or dissolve its affairs or enter into any transaction of merger or consolidation, or convey, sell, lease or otherwise dispose of (or agree to do any of the foregoing at any future time) all or any significant part of its property or assets without the written consent of [First American].

(Preferred Stock Agreement § 8.3.) Here, Mercury disclosed its intent to discuss a sale of the Subsidiaries to Fidelity. In response, First American made it absolutely clear that it would not consent to any sale of the Subsidiaries to Fidelity. (See Affidavit of Virginia G. Johnson ¶4,

attached as Ex. 2.) This disclosure and response was sufficient to comply with the substance of § 8.3 of the Preferred Stock Agreement.

Moreover, even if that were not the case, First American suffered no damage from any supposed breach. Implied within a "consent" provision such as § 8.3 is the requirement that the party from whom consent is sought must act in good faith in giving or withholding consent. Because Fidelity was willing to pay millions of dollars more for the Subsidiaries than First American had offered, First American could not have withheld consent in good faith. Thus, any alleged breach of the consent requirement was not substantive because it caused no harm to First American.

C. First American Cannot Show That Any Alleged Injury to It Outweighs the Damage That a TRO Will Cause to Mercury.

Third, the damage that a TRO will cause to Mercury and Fidelity greatly outweighs any alleged harm to First American. To begin with, the Stock Purchase Agreement has been partially performed by Fidelity, and the money provided by it was used to meet Mercury's payroll obligations. This part of the Agreement, therefore, cannot be undone. In addition, First American has denied Mercury access to closing protection letters, which are an essential component of any closing. Because of the Agreement, Fidelity has stepped in and provided closing protection letters and Mercury has continued to conduct business. Third, if a TRO is granted, Mercury will have no cash with which to pay its creditors. In short, a TRO will cause Mercury's employees to lose their jobs, it will prevent Mercury from paying its creditors, and it will shut down the Subsidiaries.

Denial of the TRO, by contrast, will not harm First American. It will continue as it has until the claims are finally resolved. If First American prevails, it can recover any damages it may have incurred. If it does not prevail, First American will continue as it has.

D. First American Cannot Show That a TRO Will Not Be Adverse to the Public Interest.

Finally, a TRO will harm the public interest for several reasons. First, Fidelity's purchase of the Subsidiaries has allowed Mercury to complete its pending transactions without interruption and harm to the economy. The temporary restraining order will paralyze Mercury's ability to continue to complete transactions. Second, the sale of the Subsidiaries has enabled Mercury to pay its employees. If a TRO issues, Mercury's employees will either be without pay or without jobs. The funds received by the sale to Fidelity – at more than five times the proposed sale price to First American – obviate this problem. Finally, the sale of the Subsidiaries to Fidelity enhances competition in the marketplace. Fidelity continues to operate as before.

Respectfully submitted this 6th day of August, 2008.

BROWNSTEIN HYATT FARBER SCHRECK, LLP
By: */s/ Jeanine M. Anderson on file*
Jeanine M. Anderson, #28206

ATTORNEYS FOR PLAINTIFFS AND COUNTER-DEFENDANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of August, 2008, a true and correct copy of the foregoing **RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER** was served electronically upon the following e-mail addresses and via U. S. Mail:

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