To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
COMMERCIAL DIVISION

Present: HON. ALAN D. SCHEINKMAN,
Justice.

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BRIARCLIFF SOLUTIONS HOLDINGS, LLC, in its individual capacity, and derivatively on behalf of BRIARCLIFF SOLUTIONS GROUP, LLC, and BRIARCLIFF SOLUTIONS GROUP, LLC,

Plaintiff,

-against-

FIFTH THIRD BANK (CHICAGO), GRANITE CREEK FLEXCAP I, L.P., PHILIP KAIN, MARK RADZIK, DAVID MISSNER, JEFFREY WELLEK, JAMES IVERSEN, and ROGER ROSE,

Defendants.

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Index No. 70431/2012

Motion Seq. # 001
Motion Date: 3/15/13

DECISION & ORDER

Scheinkman, J:

Plaintiffs Briarcliff Solutions Holdings, LLC ("BSH"), in its individual capacity, and derivatively on behalf of Briarcliff Solutions Group, LLC ("BSG") and BSG (hereinafter "Plaintiffs") move by Order to Show Cause ("OTSC") pursuant to CPLR 6301 for order (1) enjoining Defendants Granite Creek Flexcap I, L.P., ("GCP"), Mark Radzik ("Radzik"), David Missner ("Missner"), Jeffrey Wellek ("Wellek"), James Iversen ("Iversen") and Roger Rose ("Rose") (together "Defendants"), while this action is pending from taking control of the BSG Board of Directors and/or prohibiting them from taking any action, while purporting to act in the name of or on behalf of BSG, to interfere with the prosecution of this lawsuit against them or the other Defendants. Defendants GCP, Wellek, Rose, Radzik and Missner (the "GCP Defendants") submit opposition papers. Defendant Iversen submits a "Joinder of Opposition to Request for

Injunctive Relief" in which he "adopts and joins in the arguments set forth in" GCP Defendants' opposition.

FACTUAL AND PROCEDURAL HISTORY

A. Introduction

This Court had a prior action involving BSG wherein BSH's principal, Paul Lightfoot sued BSG in July 2010 for a severance he claimed was due pursuant to an Employment and Noncompetition Agreement dated December 21, 2007 (the "Employment Agreement") *Paul Lightfoot v Briarcliff Solutions Group, LLC*, Index # 500003/2010 (the "prior action"). The parties settled that action in July 2012, following this Court's grant of a default judgment against BSG based on its failure to appear through counsel at a conference held on August 17, 2011 and its subsequent denial of a motion made by BSG's insurer, Zurich American Insurance Co. to vacate the default pursuant to a Decision and Order dated February 23, 2012 (the "February Decision"). The facts and procedural history set forth in the February Decision are incorporated herein by reference.

In the prior action, BSG's default was occasioned by the deliberate decision on the part of, among others, Defendant James Iversen, to foreclose on the assets of BSG, which foreclosure was followed by the resignations of all of the members of the Board of Directors, other than Lightfoot. The Court concluded that BSG's default was intentional. The Court commented in the February Decision as follows:

> From the beginning of this action, given the ownership issues and the ongoing viability of BSG, this action always seemed as either a sideshow or a preclude to the real issues – whether Lightfoot was wronged by the lender and its representatives on the BSG Board. It is apparent that the lender and its representatives sought to avoid any determination on the merits by simply leaving BSG as an empty shell, recognizing that BSG is the only named Defendant in this action (February Decision at 18).

The present application appears to this Court to have been necessitated by yet another effort by the lender and its representatives to avoid a determination on the merits. Now that they have been sued by BSH (individually and on behalf of BSG), they decide, nearly two years after the fact, to try to reclaim their abandoned Board seats, not for the purpose of running a defunct BSG, but for the purpose of having this present action dismissed, denying Lightfoot his opportunity to have his day in court, so that the merits of this action are not reached.

B. The Complaint

This action was initiated by Plaintiffs' filing of the Summons and Verified Complaint in December 2012. Thereafter, Plaintiffs filed an Amended Verified Complaint (Amended Complaint) on February 7, 2013, together with the OTSC. This action is being asserted both derivatively by BSH on behalf of BSG, and, purportedly, directly by BSG based on the authorization provided by the current sole surviving director of BSG's Board of Directors, Paul Lightfoot. Lightfoot and Christian Feurer own BSH, which owned 88.89% of BSG (Amended Complaint at ¶ 6). The remaining owners of BSG were James Iversen and Alfred Iversen. James and Alfred were also the owners of AL Systems, Inc ("AL") and Mincron SBC Corporation ("Mincron"). It is alleged that BSG is a holding company that until March 2011, owned and operated AL and Mincron (described as entities providing enterprise software solutions to leading retailers and wholesale distributors) (Amended Complaint at ¶ 16).

As previously stated and based on the Amended Complaint's allegations, it was the Defendants' involvement in the foreclosure of BSG's assets in March 2011 which is at the heart of Plaintiffs' current claims of breach of fiduciary duty against Defendants. And the crux of the instant dispute is a power struggle between Lightfoot and BSG's prior board members who resigned as board members without obtaining replacements in March and April 2011 and are now trying to reinstate themselves after having voluntarily resigned from the BSG Board – a reinstatement that was prompted by a desire by Defendants to rid themselves of this lawsuit. Since it is undisputed that BSG has no material assets and does not operate any businesses, the purpose of the reinstatement, as reflected in the notices of meeting, was to set the stage for a dismissal of this lawsuit or avoid it through a voluntary bankruptcy filing.

The parties to this action are described in the Amended Complaint as follows: (1) Defendant Fifth Third Bank ("FTB") is a Michigan banking corporation with offices in Chicago, Illinois; (2) Defendant GCP is a Delaware Limited Partnership with offices in Chicago, Illinois; (3) Kain is believed to be an Illinois resident and at all relevant times, was the Senior Vice President and/or Managing Director of FTB; (4) Radzik is believed to be an Illinois resident and at all relevant times, a GCP-appointed member of the BSG's Board; (5) Missner is believed to be an Illinois resident and at all relevant times, a GCP-appointed member of BSG's Board; (6) Defendant Wellek is believed to be an Illinois resident and at all relevant times, a GCP-appointed member of the BSG Board; (7) Iversen is a New York resident and at all relevant times, a member of BSG's Board until his resignation in August 2009, and again from January 2010 through April 2011; and (8) Rose is believed to be a Florida resident and "served as Mr. Iversen's appointee on the BSG board of directors from August 2009 until January 2010 and, upon appointment by the GCP-controlled board, served as CEO of BSG from January to June 2010" (Amended Complaint at ¶ 14).

Plaintiffs allege that in 2007 Lightfoot co-founded BSG and then, in order

to finance BSG's purchase of AL and Mincron, in December 2007, BSG, AL and Mincron received a senior term loan from FTB and a subordinated mezzanine loan from GCP (Amended Complaint at ¶ 18). Plaintiffs allege that in 2009, BSG was having difficulty due to the financial crisis and in the Spring of 2009, GCP through Radzik proposed a foreclosure of BSG whereby the existing equity holders of BSG would lose their equity with a majority placed with GCP and a minority with BSG's management (Lightfoot and Feurer). It is alleged that when BSH (Lightfoot and Feurer) rejected the proposal, Radzik became angry and threatened he would foreclose on BSG by getting the cooperation of FTB. According to Plaintiffs, FTB (through Kain) initially stated that it would side with GCP, then agreed to side with BSH, and then switched sides again in May 2009 when it "invoked its contractual right under the loan documents to prohibit BSG from making payments to GCP as junior lender for a period of 120 days, beginning with the payment due June 30, 2009" based on what Plaintiffs characterize as "previously-existing technical defaults in BSG's financial ratios" (Amended Complaint at ¶ 24). Plaintiffs note that by precluding BSG from making its required payments to GCP, pursuant to the terms of the loan documents, GCP had the right to take over BSG's board and both Lightfoot and Feurer became concerned that FTB and GCP would exercise this power to their own benefit as lenders and contrary to BSG's interests.

Based on his concern over the bad intentions of FTB and GCP, it is alleged that Lightfoot began to craft a restructuring plan during the Spring 2009 through the Fall 2009 in order to revise the loan terms to everyone's satisfaction. Thus, the purpose of the restructuring was to enable BSG to "remain current on its obligations to FTB, to catch up on the GCP payments missed due to the FTB-imposed standstill, to remain current on future obligations to GCP, and to continue the operating performance momentum achieved during 2009" (Amended Complaint at ¶ 27).

Plaintiffs contend that in August 2009, when Iversen resigned from the Board, he replaced himself with what was contended to be a neutral board member, Rose, who, in actuality, was a colleague of Radzik and "worked previously with GCP, Mr. Radzik, Mr. Missner and/or Mr. Wellek on one or more deals where GCP had taken control of te board of its borrowers" (*id.* at ¶ 30).

It is alleged that in October 2009, despite the fact that Lightfoot obtained the oral consent to his restructuring plan by all of BSG's equity holders, FTB and all the major creditors of BSG including the sellers of Mincron and ALS, he could not obtain GCP's consent. Plaintiffs allege that it was out of his concern that GCP was up to no good that Lightfoot secured, at the October 27, 2009 Board meeting, the authorization from 3 out of the 5 Board members (only Radzik, GCP's sole board member and Rose opposed), to file a voluntary bankruptcy petition if "in the judgment of the Board, it is desirable and in the best interests of the Company" (*id.* at ¶ 33). According to Plaintiffs, despite BSG's strong showing of cash balance and profitability in 2009 (*i.e.*, a 50%

increase over 2008), Lightfoot remained concerned and "regarded the availability of the bankruptcy option as a key element in the Company's negotiating position" based on the size of BSG's debt to FTB and GCP (*id.* at ¶ 34).

Despite the fact that BSG resumed its payments to GCP in late 2009, Plaintiffs contend that FTB and GCP conspired to lure Lightfoot and Feurer to a Board meeting in Illinois in December 2009 under the pretext that GCP and FTB were willing to enter into Lightfoot's restructuring plan. However, as it turned out, GCP used that meeting as its vehicle for serving legal notices on Lightfoot and Feurer "announcing, inter alia, that GCP had seized control of the Board of BSG (as well as the boards of ALS and Mincron), and had arranged for a meeting of the new BSG board to withdraw the authority to pursue filing for bankruptcy protection that Mr. Lightfoot had previously secured from the board" (*id.* at ¶ 37). According to Plaintiffs, this coup was well thought out and was the result of a prior agreement among FTB, GCP, Kain, Radzik, and Rose to force BSG into a payment default and then use that default to seize control of BSG. Further, the failure to provide Lightfoot and Feurer with advance notice of the purpose of the meeting was to thwart Lightfoot's ability to use his prior board authorization to throw BSG into bankruptcy. Prior to the December 2009 meeting, the Board consisted of Lightfoot, Feurer, Michael Lynch (BSH's designees), Radzik (GCP's designee) and Rose (Iversen's designee). After the seizure, the Board consisted of Lynch, Radzik, the two new GCP designees (Missner and Wellek), and Rose – with control of the Board in GCP with 3 of the 5 board members.

Plaintiffs contend that the GCP-controlled Board advanced the interests of GCP and FTB to the detriment of BSG, its members and its other creditors in the following ways: (1) by rescinding the authority to file the bankruptcy; (2) by attempting to entrench the BSG default by preventing BSG from making up the payments owed to GCP even though the FTB 120 day turn off period had expired as of June 2009 (it is alleged that Lightfoot [BSG] nevertheless made payments to GCP prior to the end of 2009); (3) by making payments above and beyond the regular debt service to FTB in the amount of $375,000 in December 2009 and $300,000 in January 2010, which created a cash crisis for BSG in June 2010, requiring BSG to borrow more than $500,000 from GCP "on commercially unreasonable terms, including fees of at least $350,000 and an 18% interest rate" which loan only benefitted FTB and GCP – not BSG.

According to Plaintiffs, during the period December 2009 to January 2010, Lightfoot had been in negotiations with FTB to obtain a forbearance agreement from it with regard to the interest payments due from BSG in exchange for substantial cash payments but at the same time, GCP (through Missner) was also negotiating with FTB to allow the seizure of BSG's cash thereby undermining Lightfoot's negotiating posture and BSG's best interests. Lightfoot resigned from the Board, effective January 2010 and Rose was appointed CEO. Rose was then replaced by Iversen in June 2010. Plaintiffs contend that "[i]n February 2011, BSH received notice that the stock of ALS

and Mincron – BSG's only assets – were being foreclosed upon by the two groups that had sold those assets to BSG in the 2007 transaction: including James Iversen. The foreclosure was subject to the debt of FTB and, upon information and belief, was carried out with their consent" (*id.* at ¶ 54). Plaintiffs further allege that despite BSH's efforts to have BSG retain new counsel to investigate BSG's options and whether the foreclosure was another collusion among FTB, GCP and the foreclosing parties, BSG's lawyers responded by stating that Lightfoot's assertions of collusion were considered but "the board 'believed they were in compliance with their fiduciary duties' ... [and] took no action in response to the foreclosure" (*id.* at ¶ 55). It is alleged that the foreclosure occurred on March 24, 2011 and "[t]here were no other bidders apart from the Mincron and ALS sellers (including James Iversen), who tendered their notes in exchange for all the assets of the respective companies" (*id.* at ¶ 56). It is alleged that the effect of the foreclosure "was to eliminate BSH as an obstacle to Defendants' continuing misconduct at BSG by transferring ownership of all of BSG's assets from the BSG (owned nearly 90% by BSH, which had consistently objected to Defendants' misconduct) to the Mincron and ALS sellers (including James Iversen, who had cooperated with Defendants' misconduct, over the objections of BSH)" (*id.* at ¶ 58). It is alleged that Radzik resigned from the BSG board on March 16, 2011 and GCP "declined to appoint a successor" (*id.* at ¶ 59). Thereafter on April 6, 2011, Missner, Wellek and Iversen resigned from the board and GCP declined to appoint a successor to either Missner or Wellek and Iversen declined to appoint a successor to his seat, leaving Lightfoot the sole remaining Board member. This was confirmed in an email dated May 16, 2011 from Iversen to BSG's insurer during the prior action in which Iversen admitted that Lightfoot was BSG's sole board member (*id.* at ¶ 62).

This abandonment of BSG by GCP and Iversen continued from April 6, 2011 through the course of the prior action despite repeated requests from the Court that GCP and Iversen appear and defend the action on behalf of BSG. It was not until January 31, 2013 that Iversen sent an email to Lightfoot and others purporting to reclaim his seat. GCP followed suit on January 31, 2013 and Radzik sent a letter to Lightfoot and others purporting to appoint Radzik, Missner and Rose to the Board. In addition, on January 31, 2013, Missner sent an email to Lightfoot and others "purporting to call a 'Special Meeting' of the Board of Directors of BSG for February 11, 2013" (*id.* at ¶ 66), the purposes of which were described as:

> (I) to cause the Company "to consider retention of Quarles & Brady LLP to represent the Company in seeking dismissal of the Complaint [in this matter] and/or an amendment to the Complaint to remove the Company as a plaintiff"; (ii) "Acknowlegement [by BSG] of additional Liabilities" assertedly payable to defendant GCP "as a result of certain advances to be made by [GCP] on behalf of the Company in order to finance the retention by the Company of Quarles & Brady LLP"; and (iii) "to consider the filing of a voluntary bankruptcy petition" (*id.* at ¶ 67).

Plaintiffs assert that based on the foregoing, it is clear that despite Defendants having (1) abandoned their positions on the board without providing the requisite 60 days advance notice as required by the BSG Operating Agreement, (2) stripped BSG of its assets, and (3) "left the Company dead for nearly two years, Defendants now seek to reassert their control of the Company's board for the sole purpose of preventing it from asserting its claims against them" (*id.* at ¶ 68).

Plaintiffs' First Cause of Action for breach of fiduciary duty is asserted directly by BSG and derivatively on behalf of BSG by BSH, as against Defendants GCP, Radzik, Missner, Wellek, Iversen and Rose. In it Plaintiffs claim that since BSG was a manager-managed LLC in which the Board was the sole manager of BSG, the directors owed a fiduciary duty to the members including BSH and they breached these duties by stripping BSG of its cash, refusing to allow it to proceed with bankruptcy, and burdening it with unnecessary and unreasonable debt for the benefit of FTB and GCP. Plaintiffs seek damages that exceed $10 million, together with an award of punitive damages.

The Second Cause of Action is for aiding and abetting a breach of fiduciary duty (again brought directly by BSG and derivatively on behalf of BSG by BSH) as against FTB and Kain and, alternatively, GCP and Iversen (and particularly Iversen while Rose occupied his position on the Board), based on these defendants' knowing and substantial assistance to the aforementioned breaches of fiduciary duty. Plaintiffs again seek damages that exceed $10 million, together with an award of punitive damages.

Plaintiffs' Third Cause of Action is against GCP and FTB and asserts that these Defendants breached the covenant of good faith and fair dealing under Illinois law (which governs based on the choice of law clause found in the loan documents) when they agreed that FTB would require BSG to cease making payments to GCP thereby triggering a default as to GCP and allowing GCP to seize control of BSG and loot BSG. Plaintiffs again seek damages that exceed $10, million together with an award of punitive damages.

The Fourth Cause of Action is identical to the Third Cause of Action but alleges that in the event New York law controls rather than Illinois law, GCP and FTB breached the covenant of good faith and fair dealing under New York law.

The Fifth Cause of Action is for breach of fiduciary duty as against GCP, Radzik, Missner, Iversen and Rose and is asserted directly by BSG and derivatively by BSH on behalf of BSG. It is asserted prospectively in the event Defendants are successful in wresting control of BSG from BSH and in the event these Defendants then prevent BSG from asserting claims against them. Plaintiffs claim that if these events were to happen, then the actions would constitute breaches of fiduciary duty and

self-interested transactions under Section 411(b) of the New York Limited Liability Company Law, which must be rescinded.

C. The Temporary Restraining Order

The Court heard argument on the TRO requested in Plaintiffs' proposed Order to Show Cause on February 8, 2013. At the conclusion of oral argument, the Court granted the TRO staying the meeting until the return date that was set for February 22, 2013. Counsel thereafter stipulated to adjourn the return date to March 15, 2013 and consented to the continuation of the retraining order until that time.

On the return date, Defendants' counsel requested that the Court vacate the TRO that had been issued. The Court stated that, based on its reading of the opposition, it would be willing to entertain an application from both sides for the appointment of a neutral receiver to run BSG and would also be willing to consider any application the Defendants might seek to make to prevent Plaintiffs from doing anything detrimental to the parties' interest, but that it would not vacate the TRO and it would stay in place until the Court's determination of this motion. The Court also signed a Preliminary Conference Order setting forth a discovery end date of September 30, 2013 and stated that discovery would not be stayed pending the outcome of the motion. A review of this Court's efiling system (NYSCEF) reveals that no answers have been filed by any of the Defendants to date.

PLAINTIFFS' CONTENTIONS IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

In support of their motion, Plaintiffs submit an affirmation of emergency from their counsel, Thomas A. Kissane, Esq., an affidavit of Paul Lightfoot together with supporting exhibits including the Amended Complaint, and a Memorandum of Law.

In his affidavit, Lightfoot recounts the history of Defendants' abandonment of BSG as set forth in the Amended Complaint, and argues that they only resurfaced to reinstate themselves as the majority in control of BSG after they learned of the filing of this action. Lightfoot asserts that because BSG is managed by its Board of Directors (Operating Agreement § 5.1), Defendants' wholesale resignations without providing replacements can only be characterized as an abandonment (Affidavit of Paul Lightfoot, sworn to February 7, 2013 ["Lightfoot Aff."] at ¶ 5). Lightfoot contends that after looting BSG and stripping it of its assets, Defendants have returned for the sole purpose of protecting themselves from this suit by either causing BSG to discontinue the action or obstructing the action by causing BSG to file for bankruptcy (Lightfoot Aff. at ¶ 6).

Lightfoot further repeats the allegations of the Amended Complaint

concerning Defendants' attempts at reinstating themselves and he attaches the correspondence referenced in the Amended Complaint in further support of his position.

Lightfoot points out that Defendants' actions violated the Operating Agreement since (1) pursuant to section 5.2 (c), Defendants were required to provide 60 days' advance notice before resigning, and (2) pursuant to section 5.2(d), a party who appointed a resigned director is required to appoint a replacement.

According to Lightfoot, GCP professes that it has the right to appoint a majority of the Board because BSG failed to pay its liabilities and such nonpayment has continued for a period of 120 days. But, according to Lightfoot, that default occurred as a result of FTB's and GCP's collusion in manufacturing a default so that GCP could seize control of BSG back in 2009. Lightfoot argues that as soon as FTB's right to prevent BSG from paying GCP terminated, BSG paid GCP the amounts it had been prevented from paying. Lightfoot further contends that since the March 2012 foreclosure that stripped BSG of its assets, GCP has not sought any payment from BSG. Lightfoot argues that since the sole purpose for GCP to take control of BSG's board was to protect its right to repayment of the monies due as BSG's lender, and since that ship (*i.e.*, repayment) has sailed since BSG has no ability to repay its debts, the only reason for GCP's attempt to regain control is to protect Defendants from this suit. And in so doing, GCP is attempting to saddle BSG with further debt by requiring that it pay another law firm to represent BSG and to obtain a discontinuance of this action and seek Chapter 11 bankruptcy protection even though BSG has no material assets other than this action.

In their memorandum of law, Plaintiffs characterize Defendants' actions as a "subversion of the judicial process" (Pltf's Mem. at 2). They further assert that by their own actions, Defendants have admitted that they don't have right to reassume their seats – *i.e.*, their right to have control over the board was based on the need to protect the assets of BSG so GCP could be repaid. However, their resigning from the Board following the foreclosure evidences that they conceded that the purpose for their appointment is now moot.

In support of their having shown a likelihood of success on the merits, Plaintiffs rely on their Fifth Cause of Action that Defendants' attempts at terminating this action constitute a breach of fiduciary duty since (1) GCP and its appointees owe fiduciary duties to BSG to the extent they serve on BSG's board; and (2) their intention to terminate this action would constitute a breach as a self interested transaction under section 411(b) of New York's Limited Liability Law and because Defendants cannot show that the action is fair and reasonable, it is voidable. Plaintiffs further argue that Defendants' efforts would violate Plaintiffs' rights with respect to the subject of this action and if committed during the pendency of this action, would produce injury to

Plaintiffs within the meaning of CPLR 6301.

In support of the irreparable injury prong, Plaintiffs argue that if the injunction were not granted, "the control over the management of BSG will be wrested away from BSH by Defendants, which is per se irreparable harm" (*id.* at 8).

Finally, Plaintiffs argue that the balance of equities weigh in their favor because if Defendants are permitted to seize control of BSG and put BSG into bankruptcy, Plaintiffs may never have their day in court and BSG will "lose any chance to realize value from its only remaining asset– this lawsuit" (*id.* at 10).. By contrast, it is Plaintiffs' position that Defendants won't suffer any injury in the event an injunction issues since it would merely be a continuation of the status quo they themselves created two years ago and upon which Plaintiffs have detrimentally relied.

DEFENDANTS' CONTENTIONS IN OPPOSITION

In opposition, Defendants submit an affidavit from Mark A. Radzik who purports to be a member of BSG's Board of Directors and a Manager of Granite Creek GP Flexcap I, L.L.C., the General Partner of GCP (Affidavit of Mark A. Radzik, sworn to March 5, 2013 ["Radzik Opp. Aff."] at ¶ 2). Radzik describes BSG's purchases of the stock of AL on June 25, 2007 and of Mincron on December 31, 2007 and how those purchases were financed through three levels of financing: (1) FTB provided a $3.5 million term loan and $1.25 million revolving line of credit in exchange for a blanket lien on all the assets of BSG, AL and Mincron (hereinafter the "senior debt"); (2) GCP provided a term note in the principal amount of $4.5 million secured by a blanket lien against all of the assets of BSG, AL and Mincron, as well as a pledge of the Company's stock interests in AL and Mincron, a pledge of BSG's membership interests, and a warrant to purchase 15% of BSG's membership interests ("the subordinated[1] mezzanine debt"); and (3) seller acquisition financing in the amounts of $2,400,000 for the AL purchase and $2,402,000 for the Mincron purchase in exchange for BSG's stock pledges of its interests in AL to the owners of AL (James and Alfred Iversen) and its interests in Mincron to the owners of Mincron (unnamed sellers) (the stock pledges were also subject to subordination agreements with GCP and FTB) (the "junior debt") (Radzik Opp. Aff. at ¶¶ 9-17).

Radzik avers that in connection with these transactions, Lightfoot represented that following BSG's acquisitions of AL and Mincron, BSG would generate net income in the amount of $756,309 in 2008 (Radzik Opp. Aff. at ¶ 8). However, for

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[1]FTB and GCP entered into a Subordination Agreement which governed the rights of FTB and GCP following a default under the FTB loan documents.

the six month period immediately following the closing (June 20, 3008), BSG incurred a Net Loss of $434,975 rather than its Projected Net Income of $414,474. According to Radzik, beginning in September 2008, BSG went into default on certain of its financial covenants under the senior debt loan documents and the subordinated mezzanine debt loan documents (*id.* at ¶ 21) and completely stopped making payments on the junior debt, eventually causing the Sellers' foreclosure of their security interests (*id.* at ¶ 22). As evidence, Radzik attaches a certification from Lightfoot dated November 18, 2008 evidencing BSG's violation of the following covenants (Fixed Charge Ration, Total Leverage Ratio, and Capital Expenditures) (Radzik Opp. Aff., Ex. D). Radzik avers and the financial statements (Ex. D) show that BSG incurred a Net Loss of $434,975 for 2008 rather than the projected Net Profit of $414,475 (Radzik Opp. Aff. at ¶ 21 and Ex. D thereto). Radzik also contends that "[e]xcept for a 12-day period in 2008, following certain amendments to the loan documents, the Company remained in default until April 30, 2010, when a debt restructure was approved. At that time, [GCP] was required to make an additional investment of $500,000, primarily in order to reduce the debt to [FTB], as required by [FTB] as a condition of the restructure" (*id.* at ¶ 21). Radzik states that in 2009, BSG continued sustaining losses (*i.e.*, a Net Loss of $884,177 for the five months ending May 31, 2009). Radzik further avers that in May 2009, FTB sent a notice to GCP that BSG was in default and that FTB was exercising its remedy under its Subordination Agreement with GCP to prohibit BSG from making payments to GCP and Radzik attaches a copy of this letter to his affidavit (*id.* at ¶ 23 and Ex. E thereto). FTB's exercise of this right caused BSG not to make a payment to GCP for a period in excess of 120 days (*id.*).

Based on BSG's continued poor financial performance (*i.e.*, $10,656,208 in Net Losses in 2009 as evidenced by BSG's 2009 Audited Financials - Radzik Opp. Aff., Ex. F), Radzik asserts that in December 2009, GCP exercised its right under the loan documents[2] to take majority control of the BSG Board. Prior to GCP's exercise, the BSG Board consisted of 3 members appointed by BSH (Lightfoot, Feurer and Lynch), 1 member appointed by the Iversen brothers (Iversen) and 1 member appointed by GCP (Radzik) (*id.* at ¶ 19). In December 2009, the Board composition changed in that GCP appointed David Missner and Jeffrey Wellek to replace 2 of the 3 BSH appointees. BSH initially chose to leave Lynch on the Board but two months later in March 2010, Lightfoot replaced Lynch and therefore, as of March 2010, the Board was comprised of Lightfoot, Missner, Wellek, Iversen and Radzik (*id.* at ¶ 24).

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[2]It is contended that "[t]he Operating Agreement provides for [GCP] to take majority control of the Board '[i]n the event the Company fails to timely pay all or any material portion of the Liabilities ... due and owing to the Mezzanine Lender .... and such non-payment of Liabilities continues for a period of 120 consecutive days'" by appointing 2 of the 3 Board members appointed by BSG (Radzik Opp. Aff. at ¶ 20, *quoting* Operating Agreement at § 5.2[g]).

Radzik states that during Lightfoot's tenure as the CEO of BSG and the President of AL and Mincron until his resignation on January 21, 2010,[3] BSG had net losses of $163,163 in 2007, $1,495,495 in 2008 and $10,656,208 in 2009. Yet, on January 21, 2010, a day before Lightfoot resigned, BSH's counsel sent a letter to each of the Board members threatening legal action against them for their alleged breaches of fiduciary duties (a copy of which is attached as Ex. I to his affidavit). The Board members (through BSG's counsel Quarles & Brady LLP) responded by denying BSH's claims and Radzik further attaches a copy of their response (*id.* at ¶ 26 and Ex. J thereto). BSH next threatened suit on March 10, 2011 in a letter to the Board of Directors after receiving notice from counsel to the Iversens (Jackson Walker LLP) dated February 25, 2011 notifying BSH and BSG (and BSG's counsel Quarles & Brady LLP) of the foreclosure sale scheduled for March 24, 2011 (*id.* at ¶¶ 28-29 and Exs. K and L thereto). In that letter, BSH again asserted breaches of fiduciary duties by the Board members and demanded that they retain independent counsel (*i.e.,* not Quarles & Brady) to, *inter alia*, (1) obtain an injunction against the foreclosure, (2) "[t]o investigate, and consider[ ] bringing suit against, directors appointed by GCP that have acted in the interests of GCP rather than in the interests of BSG"; (3) "[t]o investigate and consider[ ] bringing suit against, FTB & GCP, for fraud, breaches of contract and for self-dealing", and (4) to terminate Iversen as CEO (*id.,* Ex. L). BSH threatened that their failure to take these actions would result in BSH bringing suit against them for breaches of fiduciary obligations (*id.*). The Board again responded through their counsel Quarles & Brady, LLP by letter dated March 16, 2011 in which the Board members denied BSH's assertions of self-dealing or breaches of fiduciary duties (*id.,* Ex. M).

Radzik points out that, despite these threats, BSH did not appear at the foreclosure sale nor did it take any action for almost two years until the present action was filed. He avers that at the time BSG received the foreclosure notice, BSG was indebted to FTB in the amount of $1.4 million, $5.9 million to GCP and $6.0 million to the Sellers (*id.* at ¶ 32). He confirms Plaintiffs' position that following the foreclosure, BSG had no operating assets and its only assets consisted of its insurance policies and any claims BSG may have (*id.* at ¶ 32). Radzik resigned from the Board on March 16, 2011 and Missner, Wellek and Iversen resigned in April 2011.

With regard to Plaintiffs' claims that the Board members disregarded the prior action, Radzik disputes Plaintiffs' position and claims that the Board initially hired Jackson Lewis to evaluate the prior action and then tendered the defense of the action to its insurance carrier, Zurich American Insurance Co. Zurich then retained the Littler firm to represent BSG in the prior action (*id.* at ¶ 36). According to Radzik, the default in

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[3]According to Radzik, Rose replaced Lightfoot as CEO until June 2010 when Rose was replaced by Iversen (Radzik Opp. Aff. at ¶ 27).

the prior action by BSG was the result of a maternity leave by the Zurich representative (Julie Kringle) charged with overseeing the prior action. Thus, it was Littler's inability to get authorization from Zurich as to whether it should appear in court which is what led to the default being entered. Radzik claims that it is for this reason that he "and the other Board members do not want to leave the Company without an active Board of Directors, and a designated contact person, who is not the Plaintiff, to deal with Zurich in connection with" this action (*id.* at ¶ 39).[4]

Relying on various provisions of the Operating Agreement, Radzik contends that although BSH has brought this action purportedly on behalf of BSG, there is no provision in the Operating Agreement that would authorize such an action and indeed, the Operating Agreement makes clear that BSG was to be managed by a Board comprised of five Directors and that the Board must act as a Board and "'***no individual Director*** .. ***shall have any authority to bind or act for*** ... ***the Company*** unless expressly authorized to do so by action taken by the Board of Directors in accordance with this Agreement'" (*id.* at ¶ 40, *quoting* Operating Agreement § 5.2[a] [emphasis added]). Thus, while Lightfoot was the only member on BSG's Board at the time the Complaint was filed, he was not an officer and was not authorized to bring the action on behalf of the company or to replace BSG's counsel with counsel of his choosing (*id.* at ¶ 42). Upon learning of this suit, Radzik avers that he (1) tendered a copy of the Complaint to Zurich (*id.* at ¶ 43); and (2) re-appointed Missner, Wellek and himself to the Board (*id.*, Ex. O), and (3) James and Alfred Iversen appointed Iversen to the Board (*id.*, Ex. P) "in accordance with the provisions of the ... Operating Agreement" (*id.* at ¶ 44, *citing* Operating Agreement, Ex. C at § 5.2[g]). He claims the Board members were reappointed "to ensure that the Company's interests are represented in the captioned litigation, to raise any claims or defenses the Company may have in the litigation, and in order to appoint a Company representative to protect and access the Company's D&O insurance, and communicate with Zurich on the

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[4]These contentions are belied by the Court's February Decision in the prior action which concluded that BSG's default was intentional. As the Court pointed out in the February Decision, all of the relevant parties were put on notice of the issues created when BSG's original counsel reported that BSG "had neither the funds to continue the litigation nor anyone in control with the intention to do so." The claim about the maternity leave of the Zurich claims lawyer is an entirely new (and somewhat suspect) argument. As recounted in the February Decision, a lawyer from the Littler firm was present in the courtroom in June 2011 when the Court set an appearance date and gave notice that nonappearance may result in a default. The Littler lawyer did not appear on August 17, 2011 appearance date – not even for the purpose of requesting an adjournment. The issue of the maternity leave was not even raised on the motion to vacate the default (it being asserted, as an after thought, for the first time on a motion to renew the motion to vacate the default - a motion that was not decided in view of the parties' settlement of the case).

Company's behalf" (*id.* at ¶ 45). Finally, Radzik acknowledges the board meeting noticed by Missner which is the subject of this motion and he attaches a copy of the notice as Exhibit Q to his affidavit.

In their memorandum of law, Defendants repeat many of the same arguments made by Radzik in his affidavit in opposition which will not be repeated herein.

As their first point of contention, Defendants argue that injunctive relief is not available since Plaintiffs have not established a right under either of the two available avenues under CPLR 6301. First, Plaintiffs have not established a right to relief under CPLR 6301(1) since there is no *res* under which Plaintiffs have a pre-existing right to protect and there is no request for injunctive relief. Instead, the Amended Complaint seeks monetary damages for acts taken by the Board 2-3 years ago and seeks rescission of acts that might occur in the future in connection with the Fifth Cause of Action (Defs' Opp. Mem. at 12). Defendants argue Plaintiffs have failed to cite any "provision in the Operating Agreement or state law that would preclude the Board from meeting, nor do Plaintiffs have any support for their position that Paul Lightfoot, who himself abandoned the Company more than two years ago, and has not conducted any business as a Board member for at least two years, can suddenly act alone in the Company's behalf" (*id.*).

As to the second basis for injunctive relief, Defendants argue Plaintiffs have not established that they are seeking to restrain Defendants from committing an act injurious to Plaintiffs during the course of this litigation since injurious acts "do not include a party's participation in the litigation, or that are merely incidental to enforcement of a potential judgment" (*id.* at 13). According to Defendants, the injunction sought is merely incidental to the monetary relief sought (*i.e.,* the only injury articulated is that Defendants are seeking to reassert their control to prevent BSG from asserting claims against them). Defendants also point out that Plaintiffs have failed to provide any evidence of any injury that would befall them if Defendants were able to follow through with the actions set forth in the Notice for the meeting. Thus, even the Board members acted in accordance with their stated intentions as set forth in the Notice, such actions would not prevent BSH from asserting the claims and even if BSG were to file for bankruptcy, it "would not stay the Company from pursuing this litigation or stay BSH, a non-debtor, from bringing litigation against the lenders and Board Members, also non-debtors" (*id.* at 14). Defendants argue that the issuance of an injunction here would contradict the well "established precedent that injunctive relief cannot be invoked to preclude the Defendants from taking actions in furtherance of their rights unless and until a judgment to that effect has been entered in Plaintiffs' favor in the underlying litigation" (*id.* at 14).

Turning to the first prong for the grant of injunctive relief, Defendants

argue that Plaintiffs have not shown by clear and convincing evidence that they are likely to succeed on their Fifth Cause of Action involving a prospective breach of fiduciary duty. Thus, Plaintiffs have not shown that all of the actions the reconstituted board might take would be subject to rescission and, indeed, there are actions that the Board should take that would not be subject to a claim for breach of fiduciary duty such as "challenging BSH's derivative standing to act on behalf of the Company, and to procure insurance coverage that is an asset of the Company, earmarked to satisfy the Company's indemnity obligations to its Board Members" (*id.* at 16).

With regard to Plaintiffs' showing that they will be irreparably injured absent a grant of injunctive relief (*i.e.,* Defendants are attempting to wrest the control of BSG away from Plaintiffs), Defendants point out that BSH never had control over BSG (*i.e.,* BSH was not a Board member and as an equity holder, it did not control the management of the Company) (*id.* at 17). Likewise, Lightfoot as CEO did not have unfettered control of the Company. Defendants argue that they have already reappointed the Board members, who, for the most part, are identical to the Board members existing at the time of the foreclosure and since "'[c]ontrol is determined by the provisions of the Operating Agreement ... [t]here is no basis for effectively re-writing or ignoring the provisions of the Operating Agreement under the guise of injunctive relief" (*id.*). Thus, rather than seeking to preserve the *status quo ante*, Plaintiffs are disturbing it by trying to re-write the provisions of the Operating Agreement under the guise of an application for injunctive relief (*id.* at 19).

Defendants argue that Plaintiffs have not established that the balance of equities tips in their favor based on their speculation that they might not have a day in court or might be forced to contend with a bankruptcy filing. To begin with, Defendants have no ability to prohibit BSH from pursuing this action. Further, if the Board seeks to dismiss this action on behalf of BSG as a direct Plaintiff or to challenge BSH's derivative authority, Defendants would need to make a motion before this Court on notice to BSH with an opportunity to oppose so BSH will have its day in court.

With regard to the desire for an injunction to keep BSG from starting a bankruptcy proceeding, Defendants argue that it is against public policy to restrain the Board from meeting in order to keep the Company from filing.

Defendants assert that while Plaintiffs contend that the *status quo ante* to be maintained is the board composition two years ago when the members had resigned, Plaintiffs have failed to show how they have relied to their detriment (*i.e.,* what actions they took in reliance to their detriment). By contrast, Defendants assert that GCP and Iversen have relied to their detriment on BSH's failure to bring claims for more than three years since it first threatened to do so and

> Defendants and the Company will suffer significant injury if the Board cannot meet to address insurance coverage issues and defending/advancing the Company's position in this litigation. Although Paul Lightfoot and BSH claim to be in control and to speak for the Company, they have seized such "control" without any authority; Plaintiffs have no support for their theory that resignations by Board members should be deemed "abandonment", nor is there any legal concept of abandonment which would preclude those members from being reappointed. To the contrary, Plaintiffs argue that the resignations were effected in violation of the Operating Agreement ... if so, then the resignations arguably never became effective, and the "status quo" to be maintained is that of a Board entitled to continue to act on behalf of the Company (*id.* at 20).

As an alternative reason for why an injunction should not issue, Defendants argue that Plaintiffs are asking that the Court interfere with the internal affairs of BSG and the business judgment rule before any action has been taken. Thus, the corporate affairs of BSG should not be interfered with by a disgruntled shareholder unless his right to relief is crystal clear and here, Plaintiffs' conclusory allegations that the Board members have conflicts of interest that may color their fiduciary duties thereby rendering them not disinterested, are insufficient. This is particularly true in light of the fact that the underlying agreements were negotiated by BSH and are valid and binding. As such, Defendants assert that "Plaintiffs have not come close to overcoming the 'powerful presumption of the business judgment rule'" (*id.* at ¶ 21, *quoting Kimeldorf v First Union Real Estate Equity and Mtg. Inv.*, 309 AD2d 151 [1st Dept 2003]).

Defendants argue that the Court should reject Plaintiffs' request for injunctive relief since Plaintiffs are guilty of laches. Defendants argue all the elements for laches are present since: (1) the acts complained of in the Amended Complaint occurred a long time ago; (2) Plaintiffs waited two years before bringing this action; (3) Defendants had no prior knowledge that Plaintiffs would seek to restrain their ability to hold board meetings; and (4) the restraints sought "would significantly prejudice Defendants because they will be unable to address insurance coverage issues and defending/advancing the Company's position in this action" (*id.* at 22-23).[5]

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[5]The Court finds this last point, regarding insurance coverage, to be entirely without factual support. Further, to the extent the action is brought derivatively for the benefit of BSG, it is not clear that BSG has a position to defend. Its role would appear to be passive.

THE STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF

"Preliminary injunctive relief is a drastic remedy that will not be granted unless a clear right to it is established under the law ... and the burden of showing an undisputed right rests upon the movant" (*Zanghi v State of New York*, 204 AD2d 313, 314 [2d Dept 1994]). The movant must show: (a) probability of success on the merits; (b) danger of irreparable harm in the absence of an injunction; and (c) that the balance of the equities weighs in its favor (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]; *Apa Sec., Inc. v Apa*, 37 AD3d 502 [2d Dept 2007]). While the existence of an issue of fact will not defeat a motion for injunctive relief which demonstrates the required elements, (CPLR 6312[c]), the movant must show a clear right to relief which is plain from the undisputed facts (*Matter of Related Prop., Inc. v Town Bd. of Town/Village of Harrison*, 22 AD3d 587 [2d Dept 2005]; *Stockley v Gorelik*, 24 AD3d 535 [2d Dept 2005]). This is especially true when the preliminary injunction, in effect, awards the movant the identical relief that is sought by the final judgment (*Sportschannel Am. Assoc. v National Hockey League,* 186 AD2d 417 [1st Dept 1992]; *Allied-Crossroads Nuclear Corp. v Atcor, Inc.*, 25 AD2d 643 [1st Dept 1966]).

THE PROVISIONS OF THE OPERATING AGREEMENT RELEVANT TO THIS MOTION

The crux of the dispute relevant to the present motion is the right to control the management of BSG (and thus potentially the pursuit of this action) as between the BSH faction and the GCP faction. The provisions of the Operating Agreement concerning BSG's management, and role the Board of Directors plays in such management, are as follows:

5.1 Manager Management. The business and affairs of the Company shall be managed by its manager in accordance with the provisions of this Agreement and the Act.

5.2 Board of Directors

(a) General. There shall be only one (1) manager of the Company within the meaning of the Act and the Board of Directors shall at all times be the manager of the Company within the meaning of the Act. Except as provided herein, the business and affairs of the Company shall be managed by the Board of Directors in accordance with the provisions of this Agreement and the Act. Except as provided herein, the Board of Directors shall, to the fullest extent permitted by the Act, have full and complete authority, power and discretion to direct, manage, and control the business, affairs and properties of the Company, to make all decisions

necessary, customary or incident to the management of the Company's business, affairs and properties, whether or not in the ordinary course of business of the Company. The Board of Directors must act as a board and no individual Director, as such, shall have any authority to bind or act for, or assume any obligation or responsibility on behalf of, the Company unless expressly authorized to do so by action taken by the Board of Directors in accordance with this Agreement. Only the officers of the Company shall have the right and authority to act on behalf of or bind the Company as set forth herein, subject to the direction and control of the Board of Directors.

(b) Number; Tenure; Qualification. The Board fo Directors shall at all times be comprised of five (5) Directors. A Director shall hold office until such Director's successor is duly elected and qualified or until such Director's resignation or removal. Except as set forth herein, BSH shall be permitted to appoint all of the Directors. BSH initially appoints CF [Christian Feurer] and PL [Paul Lightfoot] as Directors and will appoint an additional Director to be chosen as its sole discretion. So long as JI [James Iversen] and AI [Alfred Iversen] hold any Membership Interest, JI and AI shall be permitted to appoint one (1) Director, in the aggregate, provided that such Director shall be prohibited from competing in any material way with the Company. JI and AI initially appoint JI as a Director. BSH, JI and AI also agree that, so long as the Mezzanine Lender holds any (I) Membership Interests, (ii) warrants or options with respect to the Membership Interests or (iii) there is any amount outstanding under the Mezzanine Lender Loan Documents, the Mezzanine Lender shall have the right to appoint one (1) Director. The Mezzanine Lender initially appoints Mark Radzik as a Director. BSH shall at all times be permitted to appoint one (1) of the Directors appointed by it to the Board of Directors as chairman of the Board of Directors. The Mezzanine Lender shall be permitted to appoint one (1) Director to the board of directors of each of the Company's current subsidiaries upon all of the same terms and conditions applicable to the Mezzanine Lender's rights herein to appoint one (1) director to the Board of Directors of the Company. Until such time as the Additional Payments are satisfied under the AL Systems Purchase Agreement, in the event JI and AI do not have an appointee serving on the Board of Directors, JI and AI shall have observer rights with respect to meetings of the Board of Directors.

(c) Resignation and Removal. A Director may resign at any time by giving written notice to the Board of Directors and Members. The resignation of a Director shall take effect at such time as may be stated in such notice but in no event earlier than sixty (60) days from the date of the notice. Except

as otherwise provided in a written agreement between the Company and a Director, a Director may be removed at any time, with or without cause, only by the Member or other party that appointed such Director. No resignation or removal of a Director shall affect any party's rights as a Member.

(d) Vacancies. Any vacancy occurring by any reason in the office of Director shall be filled by a Person selected by the Member or other party that appointed such Director. A Director selected to fill a vacancy shall serve until such Director's successor is duly elected and qualified or until such Director's resignation or removal.

* * *

(g) Board Control by Mezzanine Lender. In the event the Company fails to timely pay all or any material portion of the Liabilities (as defined in the Loan Documents) due and owing to the Mezzanine Lender, and such nonpayment of Liabilities continues for a period of 120 consecutive days, the Mezzanine lender shall be permitted to take majority control of the Board of Directors by naming two Directors to replace two of the Directors appointed by BSH (i.e., the Mezzanine Lender will be permitted to appoint three of the five Directors, BSH will be permitted to appoint one Director and JI and AI (in the aggregate) shall be permitted to appoint one Director if at such time otherwise permitted to do so). During any period in which the Mezzanine Lender is permitted to appoint three of the five Directors, notwithstanding any provision herein including Section 5.4(b), all matters required to be decided by the Board of Directors hereunder shall be decided by a Majority Vote of the Directors. Notwithstanding any provision herein, during any period in which the Mezzanine Lender controls the Board of Directors pursuant to the terms herein, any Member of the Company may arrange or procure financing for the Company that pays all Liabilities of the Company (and its Affiliates) to the Mezzanine Lender and, to the extent necessary, the votes of the Directors appointed by the Mezzanine Lender shall all be cast in favor of such financing. In the event all Liabilities of the Company (and its Affiliates) under the Mezzanine Lender Loan Documents are paid to the Mezzanine Lender, the Mezzanine Lender shall no longer be permitted to maintain majority control as provided for in this Section 5.2(g). Notwithstanding the foregoing, if the Mezzanine Lender still holds (a) Membership Interests or (b) any warrants or options with respect to the Membership Interests, the Mezzanine Lender shall have the right to appoint one (1) Director in accordance with Section 5.2(b).

It is Plaintiffs' position that Defendants violated section 5(c) of the Operating Agreement when Radzik resigned on March 16, 2011, effective immediately, and when Missner, Wellek and Iversen resigned on April 6, 2011, effective immediately, without providing the required 60 days' advance notice. Plaintiffs also contend that Defendants violated section 5.2(d) by failing to appoint replacements to the positions of the resigned directors. In addition, Plaintiffs argue that either (1) Defendants have waived their rights to appoint successor directors given their abandonment of BSG for the past two years, or (2) the need for GCP to appoint directors to protect its right to the repayment of its loans (the entire purpose underlying the appointment provisions in the Operating Agreement) has been rendered moot given that BSG has been stripped bare of its assets by Defendants. Defendants dispute Plaintiffs' position and argue: (1) there can be no waiver of their rights to appoint replacement Board members as there is no such time limit provided in the Operating Agreement; (2) they did not abandon BSG; rather, BSG has been dormant and there has been no need for Board action since the foreclosure of BSG's assets in March 2011 with its operations being handled by the foreclosing Sellers; and (3) the Operating Agreement is clear in its directive that the management of BSG is vested in the five Board members and, as such, Lightfoot's (BSH's) attempts to act on behalf of BSG are *ultra vires* and of no force and effect since the Operating Agreement specifically precludes such unilateral action.

The Court now turns to whether Plaintiffs have made the requisite showing to be granted injunctive relief.

A. Irreparable Injury

It is well settled that an injunction should be denied in cases in which a party would be made whole through an award of money damages (*Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d 738 [2d Dept 2010]; *Mar v Liquid Mgt. Partners, LLC*, 62 AD3d 762 [2d Dept 2009]; *Sutton, DeLeeuw, Clark & Darcy v Beck*, 155 AD2d 962 [4th Dept 1989]). Thus, irreparable injury is construed as meaning that the party seeking the injunctive relief could not be made whole with money damages (*White Bay Enter., Ltd. v Newsday, Inc.* 258 AD2d 520 [2d Dept 1999]).

Plaintiffs have satisfied the required showing of irreparable injury since Defendants' attempt to "shift the balance of power and wrest complete control over the company" in an effort to thwart this lawsuit can constitute irreparable injury (*Cooperstown Capital, LLC v Patton,* 60 AD3d 1251, 1253 [3d Dept 2009]; *Casita, LP v Mapelwood Equity Partners (Offshore) Ltd.*, 60 AD3d 488 [1st Dept 2009]; *Dong-Pyo Yang v 75 Rockefeller Café Corp.*, 50 AD3d 320 [1st Dept 2008]; *see also Vanderminden v Vanderminden*, 226 AD2d 1037, 1041 [3d Dept 1987] ["an opportunity for defendants to shift the balance of power and assume management and control of the company, may properly be viewed as irreparable injury"]; *Matter of Brenner v Hart*

Sys., Inc., 114 AD2d 363, 366 [2d Dept 1985] [irreparable injury found for a director because without injunction, director would be voted out of office and then would lose right to inspect the corporation's books and records]; *Walker & Zanger v Zanger*, 245 AD2d 144 [2d Dept 1997]; *Feinberg v Silverberg*, 2011 WL 3875571 [Sup Ct NY County 2011]; *Matter of Madelone v Whitten*, 2008 NY Slip Op 50258[U], 18 Misc 3d 1131[A] at *8 [Sup Ct Albany County 2008]). In such situations, courts find that when the issue at stake involves the control and management of a company, money damages are insufficient (*Yemini v Goldberg*, 60 AD3d 935 [2d Dept 2009]).

While Defendants argue the fact that Plaintiffs are seeking money damages negates that Plaintiffs will suffer irreparable injury, the Court disagrees. Thus, in their Fifth Cause of Action, Plaintiffs have articulated the irreparable injury they may suffer if Defendants are permitted to reappoint themselves as Board members and then proceed with the noticed meeting the purpose of which is to thwart Plaintiffs' ability to seek redress against Defendants in this action for their alleged breaches of fiduciary duty.[6] Accordingly, Plaintiffs have satisfied the irreparable injury prong for the grant of injunctive relief.

B. Likelihood of Success on the Merits

Defendants argue, and have cited supporting authority, to the effect that the Court should not interfere with the internal affairs of BSG absent a clear showing of a right to relief[7] (*see, e.g., Kimeldorf v First Union Real Estate Equity and Mortgage*

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[6]The Court is not apprised as to Defendants' position concerning BSH's (Lightfoot's) current status as a member or director. The right for BSH to sue derivatively is tied to its status and Defendants have already suggested that, in seeking to proceed with the noticed meeting, that they preparing to seek to dismiss this action based on BSH's lack of standing (*see, e.g., Tzolis v Wolff*, 10 NY3d 100 [2008]; *Tenney v Rosenthal*, 6 NY2d 204 [1959]; *Billings v Bridgepoint Partners, LLC*, 21 Misc 3d 535 [Sup Ct Erie County 2008]; *Levine v Chavkin*, 82 Misc 2d 441 [Sup Ct NY County 1974]; *Gresov v Shattuck Denn Min. Corp.*, 40 Misc 2d 569 [Sup Ct NY County 1963]).

[7]As explained by the New York Court of Appeals

> [The Business Judgment] doctrine bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. "Questions of policy of management, expediency of contracts or actions, adequacy of consideration, lawful appropriation of corporate funds to advance corporate interests, are left solely to their honest and unselfish decision, for their powers therein are without limitation and free from restraint,

Investment, 309 AD2d 151 [1st Dept 2003]; *Roehner v Brecher*, 9 Misc 2d 637 [Sup Ct Queens County 1957]). But is entirely unclear whether the principles of business judgment have any application to an effort by former board members to reinstate themselves to the Board of a defunct entity for the purpose of thwarting a suit claiming that they breached their fiduciary duties to the defunct entity. Likewise, it is unclear whether any presumption of regularity arising from the use of business judgment is rebutted by Defendants' personal interests which appear to override any issue of business judgment. Specifically, a recovery in favor of BSG would only create assets for it; BSG is not a defendant and is not exposed to any liability; the only parties exposed to liability are the Defendants. As the cases point out, the application of the business judgment rule may be overcome by evidence of bad faith or fraud; there are sufficient questions presented to whether the present case involves bad faith or fraud.

> and the exercise of them for the common and general interests of the corporations may not be questioned, although the results show that what they did was unwise or inexpedient ...."
>
> * * *
>
> the business judgment doctrine, at least in part, is grounded in the prudent recognition that courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments. The authority and responsibilities vested in corporate directors both by statute and decisional law proceed on the assumption that inescapably there can be no available objective standard by which the correctness of every corporate decision may be measured by the courts or otherwise. Even if that were not the case, by definition the responsibility for business judgments must rest with corporate directors; their individual capabilities and experience peculiarly qualify them for the discharge of that responsibility. Thus, absent evidence of bad faith or fraud ... the courts must and properly should respect their determinations (*Auerbach v Bennett*, 47 NY2d 619, 629 [1979], *quoting Pollitz v Wabash R.R. Co.*, 207 NY 113, 124 [1913]).

Defendants argue that the Court should reject Plaintiffs' request that it inject itself into this power struggle based on the well established rule that courts "'should not interfere in the internal affairs a corporation .... unless a clear showing is made to warrant such action'" (*Nyitray v New York Athletic Club of City of New York, Inc.*, 195 AD2d 291 [1st Dept 1993], *quoting Matter of Scipioni v Young Women's Christian Assn.*, 105 AD2d 1113 [4th Dept 1984]; *Matter of Election of Officers and Directors of F.I.G.H.T., Inc*, 79 Misc 2d 655, 659 [Sup Ct NY County 1974]). This follows the view that "[t]he conduct of private corporate affairs should be interfered with as little as possible" (*Matter of Ohrbach v Kirkeby*, 3 AD2d 269, 273 [1st Dept 1957]).

Further, there is authority for a court's issuance of a preliminary injunction enjoining the holding of a meeting at which it is proposed for plaintiff to be ousted from managerial authority (*see, e.g., Louis Foodservice Corp. v Vouyiouklis*, 2002 NY Slip Op 50448[U], 2002 WL 31663230 [Sup Ct Kings County 2002]). Here, Plaintiffs have provided evidence (which Defendants do not dispute) that Defendants resigned as Directors of BSG in March and April 2011 without providing the requisite 60 days advance notice required by section 5 (c) of the Operating Agreement and without providing for replacements. Plaintiffs have further provided evidence that this abandonment of BSG continued for the better part of two years after it is alleged that Defendants stripped BSG bare of its assets (except for its D&O insurance and any claims it may have including this lawsuit). Whether Defendants may now, after a long period of absence, reassert their rights to act as the Directors of BSG, is a disputed issue of fact. Thus, there is a valid argument for a conclusion that such absence constituted a waiver of the Defendants' rights to reappoint their directors/successors and that Defendants should be estopped from interfering with the BSG's management (*cf. Matter of Abramson v Studer,* 11 NY2d 773 [1962], *affirming* 15 AD2d 497 [2d Dept 1961]). Plaintiffs have also presented evidence that if Defendants were permitted to follow through with their meeting and take the actions set forth in the notice, that those actions may very well constitute interested transactions rendering them null and void.

At one time, the existence of issues of fact was the near absolute death-knell for an application for a preliminary injunction. CPLR 6312 was amended in 1996 to add subdivision c which specifies that, provided that the plaintiff's papers demonstrate the elements required for a preliminary injunction, the presentation by defendant of "evidence sufficient to raise an issue of fact as to any of such elements shall not itself be grounds for denial of the motion." Where factual issues are presented, the court is required to make a determination of the issues after a hearing (*see Winzelberg v 1319 50th Realty Corp.*, 52 AD3d 700 [2d Dept 2008]; *see also Stockley v Gorelik*, 24 AD3d 535 [2d Dept 2005]).

The Court concludes that, because Plaintiffs present a *prima facie* case for a preliminary injunction and there are a number of factual issues that are not resolvable on the basis of the moving and opposition papers alone, a hearing is necessary to determine whether a preliminary injunction is appropriate (*see Morgenthau v Eliopoulos*, 269 AD2d 204 [1st Dept 2000]; *see also Peconic Surgical Group, P.C. v Cervone*, 2011 NY Slip Op 51059[U], 31 Misc 3d 1240 [A] [Sup Ct Suffolk County 2011]; *Zomba Recording LLC v Williams*, 2007 NY Slip Op 50752[U], 15 Misc 3d 1118[A] [Sup Ct NY County 2007]).

The factual issues the Court presently sees as necessary for the resolution of this motion include, but are not limited to (1) whether Defendants waived their right to reappoint members to the Board to replace the members who resigned back in March/April 2011 and the effect, if any, on BSH's ability to control the

management of BSG unilaterally, and (2) whether Plaintiffs should be barred by laches from bringing the present action based on Lightfoot's threats from three years ago that he intended to bring such a suit without any follow through.

Accordingly, the Court will continue the existing TRO pending the hearing to be held herein. The Court will herewith schedule a prompt conference for the purpose of establishing a hearing date. The Court invites counsel to consider consolidation of the hearing with the trial on the merits in order to avoid undue expense to the parties.

C. Balance of the Equities

The Court must determine whether a balancing of the equities favors Plaintiffs because the irreparable injury to be sustained by the Plaintiffs is more burdensome to them than the harm caused to defendants through the imposition of an injunction (*Burmax Co. v B&S Indus., Inc.*, 135 AD2d 599, 601 [2d Dept 1987]). The Court agrees that while Plaintiffs are attempting to preserve the *status quo* pending the ultimate resolution of this action through this injunction, Defendants are "seek[ing] to upset the status quo by setting in motion a process that would [potentially] deny [BSH or Lightfoot]" the right to seek redress in this action (*Matter of Madelone, supra*, 2008 NY Slip Op 50258[U] at *7).

The Court is not persuaded by Defendants' claim that continuation of the existing TRO would prejudice them by preventing them from "dealing with insurance coverage issues" (Def. Mem. at 23). To the extent that Defendants have existing D&O insurance, they have not shown that they have been unable to notify the carrier of this suit acting as individuals[8] and they have not shown that the carrier has disclaimed coverage. On the other hand, Defendants also suggest that the Board needs to meet so as to "procure insurance coverage that is an asset of the Company" (Def. Mem. at 16). It seems doubtful that Defendants could now obtain insurance coverage for this pre-existing lawsuit. More important, the notice of meeting issued by David Missner did not mention, as an agenda item, any discussion or action on insurance issues. However, the Court is willing to consider modification of the existing TRO upon an appropriate showing by Defendants.

The Court finds that the balance of equities tips in Plaintiffs' favor.

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[8]Indeed Radzik avers in his affidavit that "[w]hen [he] learned the Complaint had been filed, [he] tendered a copy to Zurich" (Radzik Opp. Aff. at ¶43).

CONCLUSION

The Court has considered the following papers in with this motion:

1) Order to Show Cause dated February 8, 2013; Affirmation of Emergency of Thomas A. Kissane, Esq. dated February 7, 2013; Affidavit of Paul Lightfoot, sworn to February 7, 2013 together with the exhibits annexed thereto;

2) Plaintiffs' Memorandum of Law in Support of their Motion for a Temporary Restraining Order and Preliminary Injunction dated February 7, 2013;

3) Affidavit of Mark A. Radzik, sworn to March 5, 2013, together with the exhibits annexed thereto;

4) Affidavit of Paul Lightfoot in Opposition to Motion to Vacate Default, sworn to December 22, 2011;

5) Memorandum in Opposition to Request for Preliminary Injunctive Relief dated March 7, 2013; and

6) Joinder of Opposition to Request for Injunctive Relief by James Iversen filed 3-13-13.

Based on the foregoing, it is hereby

ORDERED that Plaintiffs' motion for a preliminary injunction is held in abeyance pending a hearing; and it is further

ORDERED that the TRO granted in the OTSC dated February 8, 2013 is continued pending the hearing to be scheduled in this action, without prejudice and with leave to both parties to seek appropriate modifications not inconsistent with this Decision and Order; and it is further

ORDERED that counsel are directed to attend a conference to be held by this Court on May 2, 2013 at 9:30 a.m. the purpose of which is to schedule the hearing to be held in this action.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
April 2, 2013

ENTER:

Alan D. Scheinkman
Justice of the Supreme Court