SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

BRIARCLIFF SOLUTIONS HOLDINGS, LLC, in its individual capacity, and derivatively on behalf of BRIARCLIFF SOLUTIONS GROUP, LLC, and BRIARCLIFF SOLUTIONS GROUP, LLC *Plaintiffs,*	**Index No. 70431/2012**
- 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.*	**MEMORANDUM IN OPPOSITION TO REQUEST FOR PRELIMINARY INJUNCTIVE RELIEF**

This Memorandum is submitted on behalf of Granite Creek Flexcap I, L.P. ("Granite Creek"), Jeffrey Wellek ("Wellek"), Roger Rose ("Rose"), Mark A. Radzik ("Radzik"), David Missner ("Missner", and together with Rose and Radzik, the "Board Members") in opposition to the motion filed by Plaintiff Briarcliff Solutions Holdings, LLC ("BSH") on its own behalf, and purporting to act on behalf of Briarcliff Solutions Group, LLC (the "Company"), for preliminary injunctive relief (the "Motion"). (The Board Members, together with Jeffrey Wellek and Granite Creek are hereinafter referred to as the "Defendants"). The Affidavit of Mark A. Radzik is submitted in support hereof.

At a hearing held on February 8, 2013, this Court entered a TRO, enjoining the Company's Board Members from holding a Board meeting pending hearing to be held on

February 22, 2013. On February 22, 2013, the Court approved a Stipulation adjourning the hearing and continuing the TRO until conclusion of the hearing now scheduled for March15, 2013. For the reasons set forth below, and in the accompanying Affidavit of Mark A. Radzik (hereinafter, "Radzik Aff."), the request for preliminary injunctive relief should be denied.

INTRODUCTION

Until he resigned more than three years ago, Paul Lightfoot was the Company's Chief Executive Officer ("CEO"). In his capacity as CEO, Paul Lightfoot arranged for significant loans to be made to the Company by four lenders. At that time, Plaintiff BSH owned (and continues to own) the majority of the Company's equity interests. Paul Lightfoot and Christian Feuer are the owners of BSH. To secure repayment of the loans, the Company granted to the lenders liens and security interests in substantially all of its assets. As additional security for repayment of the loans, Paul Lightfoot, acting in his capacity as CEO and as an owner of BSH, agreed that BSH would cede control of the Company's Board of Directors upon the occurrence of certain events of default.

While Mr. Lightfoot was at the helm, the Company failed to perform as he had projected, and failed to remain in compliance with certain of the covenants in the loan documents. As a result, the loans went into default, and certain of its lenders exercised their rights to foreclose on their collateral.

Now, two years after the failure of the Company under his stewardship, Paul Lightfoot is, understandably, not happy that the Company's lenders declared defaults and exercised their rights and remedies. In his view, the lenders should have agreed to forebear, and to wait for repayment of their loans until he could turn the Company around. But the loan documents that Mr. Lightfoot negotiated and agreed to, do not require the lenders to forbear from enforcing their

rights in the face of a default. That said, Fifth Third and Granite Creek did agree to an amendment to their loan documents in December, 2008. The amendment was predicated on projections and representations made by Paul Lightfoot that showed the Company's covenant compliance under the revised loan documents for the next year. Twelve days after the execution of the amendment, the Company was out of covenant compliance and was again in default even under the revised terms. Ultimately, knowing that he failed to produce the operating results he had promised, and anticipating that the lenders might foreclose on their collateral, Paul Lightfoot abandoned the Company by resigning as CEO, and walking away from his responsibilities as President of the Company's operating subsidiaries. Now, in a disingenuous attempt to recoup their losses, he and BSH are blaming the lenders and the Company's Board Members, everyone other than Paul Lightfoot, for the Company's failure to perform and meet its obligations.

This action seeks ***money damages*** for alleged (a) breaches of fiduciary duty by Granite Creek and the Company's Board members (First Cause of Action); (b) aiding and abetting breach of fiduciary duty by Fifth Third Bank, Philip Kain and James Iversen (Second Cause of Action); (c) breach of contract by Fifth Third Bank and Granite Creek (Third Cause of Action); and (d) breach of the covenant of good faith and fair dealing by Fifth Third Bank and Granite Creek (Fourth Cause of Action). Amended Verified Complaint (hereinafter, "Amended Complaint")(Dkt. No. 5), ¶¶ 1-2 and pp. 15-21. The initial complaint, dated December 13, 2012 (Dkt. No. 1) (hereinafter "Initial Complaint") contained these same four causes of action. Both the Initial Complaint and the Amended Complaint were brought by counsel selected by BSH, on its own behalf, and, ostensibly on behalf of the Company.

The actions complained of took place *more than three years ago*, beginning in late 2009, and continued until March 14, 2011, when the Company's junior lenders (hereinafter, the

"Sellers"), who were the former owners of the Company, foreclosed on their security interests in the stock of the Company's operating subsidiaries, AL Systems, Inc. ("AL Systems"), and Mincron SBC Corporation ("Mincron"). Amended Complaint, ¶ 24, *et. seq.*

As Plaintiffs acknowledge, the Company has been dormant since the Sellers' foreclosure; all of the business operations of its subsidiaries were taken over by the foreclosing Sellers, and there was no need for Board action. Complaint, ¶¶ 56-57. Although BSH, by and through Paul Lightfoot, had threatened to sue the Board Members at least twice, the first time in January, 2010, and then again, on March 10, 2011 (*See* Radzik Aff. At ¶¶25, 28), BSH and Paul Lightfoot have done nothing for almost two years prior to bringing the captioned action.

After the Initial Complaint was filed, the Company needed to take action in accordance with the Company's Operating Agreement to respond, including, to address the Company's position in this litigation and the availability of insurance proceeds to cover defense costs. Mr. Lightfoot was notified of the Board meeting and given the opportunity to attend in person or telephonically. Plaintiffs filed the Amended Complaint only after the notices of Board meeting were sent. The Amended Complaint has the identical four causes of action raised in the Initial Complaint, but now also includes a Fifth Cause of Action alleging ***prospective, speculative*** breaches of fiduciary duty by Granite Creek and the Board Members. *See* Amended Complaint, Fifth Cause of Action, pp. 19-20. The Fifth Cause of Action *does not seek injunctive relief*, but seeks instead to invalidate actions which Plaintiffs fear may be, but, have not been, taken by Granite Creek and the Board. *Id.* The Fifth Cause of Action alleges that *if* Granite Creek and the Board Members make any decisions "to prevent the Company from asserting claims against them", such actions "*would constitute* breaches of their fiduciary duties to BSG and BSH", and "*would constitute* self interested transactions . . . in breach of their fiduciary duties". Amended

Complaint, ¶¶ 98-99. No such actions have been alleged to have occurred; Plaintiffs request only that the Court "issue an order *rescinding or avoiding* those transactions" when and if they do take place. *Id.* at ¶ 100 (emphasis added). In any event, money damages are always available to remedy a breach of fiduciary duty of the type alleged in the Fifth Cause of Action.

Plaintiffs' request for injunctive relief appears for the first time in its Motion. The injunction sought is unusual, in that it is not sought to further the relief requested in the Amended Complaint, or to protect a *res* at issue. Instead, it has been brought solely to frustrate the Board's ability to assert the Company's position in this litigation, and interfere with the Company's ability to access insurance coverage. By its request for an injunction, Plaintiffs do not seek to maintain the *status quo ante* as it relates to the acts complained of-they simply seek to gain a litigation advantage, by precluding the Company from defending itself, pursuing insurance coverage or taking any position to refute BSH's alleged derivative standing.

By requesting this Court to enjoin the Board from meeting, BSH is asking this Court to interfere with the Company's internal affairs and the Board's business judgment before any action has been taken. Since nothing has happened, BSH has been forced to manufacture a case. Supposition, innuendo and conjecture are not a substitute for probative facts, and do not support injunctive relief. Moreover, the case law is clear-where a request for injunctive relief is simply incidental to, and in aid of, the monetary relief being sought, litigants have no prejudgment right to interfere with another party's affairs.

Finally, although those acting on behalf of BSH may have obtained the authority to bring claims under BSH's corporate governance documents, neither Paul Lightfoot nor BSH obtained authority under the Company's governance documents to file the Initial Complaint, Amended Complaint or Motion on the Company's behalf. There is simply no basis for any individual-

whether purporting to act as a Board member or otherwise-to take any action on behalf of the Company. To the contrary, the Company's Operating Agreement provides for a five-member Board to manage the Company's affairs, and precludes unilateral action on the Company's behalf. Radzik Aff., ¶¶ 18, 40-41. BSH and Paul Lightfoot admit that the Company's Board "functions as the Manager of the Company" (Plaintiffs' Memorandum (hereinafter "Plaintiffs' Mem.") at 7), and do not cite to any provisions of the loan documents or the Company's Operating Agreement that would allow an individual Board member or equity holder to bring legal action in the Company's name. Nor do they claim that the provisions of the Operating Agreement are invalid. Since BSH and Paul Lightfoot do not assert that the Operating Agreement is anything other than valid and binding, there is no mechanism for the Plaintiffs to override the governance provisions of that agreement other than by asking the Court to rewrite the agreement under the guise of seeking equitable relief.

STATEMENT OF FACTS[1]

A. Formation of the Company and its Capital Structure.

The Company was formed as a holding company in 2007. Its business was conducted by its two subsidiaries, AL Systems and Mincron. Paul Lightfoot was the Company's CEO and President of each of AL Systems and Mincron, until he resigned from those positions in January, 2010. As CEO of the Company and President of the operating subsidiaries, Mr. Lightfoot was responsible for all of their day-to-day business operations.

The Company and its subsidiaries initially borrowed a total of approximately $14.2 million, to finance the acquisitions and for working capital, as follows: (i) senior debt from Fifth Third Bank ("Fifth Third"), secured by a lien against all of the Company's and subsidiaries'

[1] This Memorandum contains only a summary of the facts, which are fully set forth in the Affidavit of Mark Radzik, filed in support hereof.

assets; (ii) subordinated mezzanine debt from Granite Creek, secured by a lien against all of the Company's and subsidiary's assets, as well as a pledge of the stock of the subsidiaries, a pledge of the membership interests in the Company, and a warrant to purchase 15% of the membership interests in the Company; and (iii) junior debt from the Sellers, secured by pledges of the stock in AL Systems and Mincron. The lenders entered into various intercreditor and subordination agreements governing the priority of their respective secured positions and rights. As CEO of the Company, and President of the operating subsidiaries, Paul Lightfoot negotiated and agreed to the terms of the loan documents with each of the Company's lenders.

B. Governance of the Company.

The Company has operated under an Amended and Restated Operating Agreement dated December 21, 2007 (the "Operating Agreement") (Exhibit "C" to Radzik Aff.). Pursuant thereto, the Company is to be managed by the Board of Directors comprised of five members. The Board of Directors was originally composed of two members appointed by BSH, one member appointed by the Sellers, and one member appointed by Granite Creek.

The Operating Agreement expressly provides for Granite Creek 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 [i.e. Granite Creek], and such non-payment of Liabilities continues for a period of 120 consecutive days". In that event, Granite Creek is authorized to name two Directors to replace two of the Directors appointed by BSH (i.e. Granite Creek is permitted to appoint three of the five Directors, BSH is permitted to appoint only one Director, and the Sellers are permitted to appoint one Director.) *Id.* at § 5.2(g).

C. Loan Defaults.

The Company suspended payments to the Sellers beginning in 2008, thereby creating payment defaults under the Sellers' loan documents. In September, 2008, the Company also defaulted on certain of its financial covenants under the Fifth Third and Granite Creek loan documents.

In May, 2009, Fifth Third notified Granite Creek that the Company was in default of certain of its financial covenants under the Fifth Third loan documents, and that Fifth Third was, therefore, exercising its remedies under its subordination agreement with Granite Creek, thereby prohibiting the Company from making further payments to Granite Creek. As a result, the Company did not make any payment to Granite Creek for a period in excess of 120 consecutive days, thereby triggering Granite Creek's right to take control of the Company's Board of Directors by appointing two directors to replace two of the directors appointed by BSH. Granite Creek appointed David Missner and Jeffrey Wellek to replace two of the directors appointed by BSH, while BSH initially chose to remove Christian Feuer and Paul Lightfoot from the Board. Although Plaintiffs characterize these actions as a nefarious "scheme", they concede that the actions of its lenders were fully in conformity with the provisions of the loan documents and the Company's Operating Agreement, all of which had been approved by Paul Lightfoot. Plaintiffs' Mem. at 1-3; Lightfoot Aff. at ¶¶20-21. Moreover, for three years, neither Paul Lightfoot nor BSH took any action to challenge the provisions of the Operating Agreement or to enjoin Granite Creek from taking control of the Board.

D. Paul Lightfoot's Resignation and the Sellers' Foreclosure.

Paul Lightfoot resigned as CEO of the Company and as President of AL Systems and Mincron on January 22, 2010, at a time when the Company was in default of its obligations to

each of its lenders. Just one day prior to his resignation, BSH threatened the Board with legal action for alleged breaches of fiduciary duty.

In February, 2011, the Sellers notified the Company of monetary defaults under each of the stock purchase agreements, and of the Sellers' intention to foreclose on their security interests. On March 10, 2011, following receipt of the Sellers' notices of intent to foreclose, BSH, by and through Paul Lightfoot, sent a letter demanding that the Board retain counsel chosen by Mr. Lightfoot to take various actions, including, to procure an injunction to preclude the foreclosure, consider actions against each of the Board Members, Fifth Third and Granite Creek, and terminate the employment of James Iversen as interim CEO. Additionally, in the March 10, 2011 letter, BSH, by and through Paul Lightfoot, again threatened, as he had one year before, to sue the Board Members for breach of fiduciary duty if the Board did not accede to Mr. Lightfoot's demands. At the same time, despite his resignation as CEO, BSH re-appointed Paul Lightfoot to the Board. Therefore, at the time of Paul Lightfoot's resignation, the Board was comprised of Paul Lightfoot, David Missner, Jeffrey Wellek, James Iversen, and Mark Radzik.

The foreclosure took place in March, 2011, leaving the Company without any operating assets. Following the foreclosure, the day-to-day business was taken over by the foreclosing Sellers. After the foreclosure, the Company's remaining assets were insurance policies purchased by the Company and causes of action that may have been available to the Company. At this time, there are no other known remaining assets of the Company.

BSH took no action on its threats against the Board of Directors prior to the foreclosure; nor did BSH appear at the Uniform Commercial Code foreclosure sale. Since the foreclosure left the Company without any operating assets, and neither BSH nor Paul Lightfoot had taken the threatened legal action, there was no need for the Board to take any action, and the Board

Members therefore resigned. After the foreclosure, BSH took no action on its threats against the Board for almost two years, until the Initial Complaint was filed. At the time the Initial Complaint was filed, Paul Lightfoot was the sole member of the Company's Board of Directors; he was not an officer of the Company, and had no authority to act unilaterally on the Company's behalf. The Operating Agreement prohibits Paul Lightfoot from acting as a single-member Board of Directors, as a member or as an officer, to bring the captioned action, or take any other action on behalf of the Company; nor did he have authority to replace Company counsel with new counsel of his choosing.

ARGUMENT

A. Standard for Injunctive Relief.

CPLR § 6301 provides in pertinent part:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual or, in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued . . . would produce injury to the plaintiff.

A preliminary injunction is a drastic remedy, since it prohibits one party from taking action before the rights and obligations of the parties have been determined. It should, therefore be "issued cautiously". *Uniformed Firefighters Assn. of Greater New York v. City of New York,* 79 N.Y .2d 236, 239, 581 N.Y.S .2d 734, 736 (1992). Even if a party seeking injunctive relief is able to establish that the predicates for relief in CPLR § 6301 have been met, the movant must also establish, by *clear and convincing evidence,* "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor." *Doe v. Axelrod*, 73 N.Y.2d 748,750, 536

N .Y.S. 244, 245 (1988); *see also Gluck v. Hoary*, 55 A.D.3d 668, 865 N.Y.S.2d 356 (2d Dep't. 2008)(movant's burden is to establish such elements by "clear and convincing evidence"). The burden rests with the movant to establish these elements "by competent proof, with evidentiary detail". *Faberge International, Inc. v. Di Pino,* 109 A.D. 2d 235, 240, 491 N.Y. S. 2d 345, 349 (1st Dep't 1985). Relief may be denied if key facts are in dispute, or if the proof rests on speculation or conjecture, particularly if money damages will compensate the plaintiff. *Id. at* 240; *Sur La Table Ltd. v. Rosenthal AG. et.al.,* 173 A.D.2d 325, 326, 575 N.Y.S.2d 281 (1st Dep't. 1991).

Apart from establishing that equitable relief is appropriate, "plaintiff is required to overcome the 'powerful presumption of the business judgment rule'", that bars judicial inquiry into corporate actions taken in furtherance of corporate purposes. *Kimeldorf v. First Union Real Estate Equity and Mortgage Investments, et. al.,* 309 A.D. 2d 151,155, 764 N.Y. S.2d 73, 76 (1st Dep't. 2003)(internal citations omitted).

Also, as more fully set forth below, Plaintiffs are guilty of laches, and, on that basis alone, the request for equitable relief should be denied.

B. Injunctive Relief is not Warranted Under CPLR § 6301.

CPLR § 6301 provides that injunctive relief may be granted to a plaintiff: (i) if a defendant threatens to harm plaintiff's rights in the *subject of the action* and such harm could render the judgment ineffectual; and (ii) when necessary to restrain a defendant from committing acts injurious to plaintiff during the course of the litigation. Plaintiffs have failed to establish either one of these bases for relief.

In order to warrant relief under the first prong of CPLR § 6301, a plaintiff must establish that a defendant threatens to harm the plaintiff's rights in the "subject of the action". "Subject of

the action" is typically a specific *res* in which the plaintiff has a pre-existing interest". McKinney CPLR § 6301, Vincent Alexander, Practice Commentaries , C6301:1(2013). For example, in an action for specific performance of a real estate contract, a court can issue an injunction to prohibit sale of the property while the action is pending. *See Bachman v. Harrington,* 184 N.Y. 458, 77 N.E. 657 (1906).

Here, there is no *res* in which Plaintiffs have a pre-existing interest to protect. Nor have Plaintiffs challenged the provisions of the Operating Agreement governing Board control and management decision-making authority. To the contrary, Plaintiffs acknowledge that Granite Creek's actions in reconstituting the Board were authorized by its loan agreements and the terms of the Operating Agreement. Plaintiffs' Mem. at 1, 5. It is important to separate the allegations in the Amended Complaint from those in the Motion; the Amended Complaint seeks *monetary relief* for alleged actions taken 2-3 years ago by the Company's Board Members and lenders, and seeks *rescission* of acts which Plaintiffs speculate may occur in the future. The Amended Complaint does not seek to restrain Defendants from taking any actions, and does not allege any property interest or *res* in which the Plaintiffs have rights. Further, the only "harm" Plaintiffs allege is that the Board members *may* address the Company's position in the litigation if they engage in a Board meeting, and *may* take certain actions that Plaintiffs may view as objectionable. Plaintiffs cite to no provision of 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 on the Company's behalf.

CPLR § 6301 also authorizes injunctive relief to restrain a defendant from committing acts injurious to plaintiff during the course of the litigation. "Acts injurious to the plaintiff" do not include a party's participation in the litigation, or that are merely incidental to enforcement of a potential judgment. Courts have refused to impose an injunction which simply seeks to grant to the plaintiff the ultimate relief it seeks, or to defeat satisfaction of a requested judgment. *See Credit Agricole Indosuez v. Rossiyskiy Kredit Bank,* 94 N.Y. 2d 541, 708 N.Y.S. 2d 26 (2000)(reversing trial court's grant of injunction which would have defeated satisfaction of judgment); *SportsChannel America Associates, v. National Hockey League,* 186 A.D.2d 417, 589 N.Y.S.2d 2 (1st Dep't. 1992)(affirming denial of injunctive relief which would have the effect of granting to plaintiff the ultimate relief it sought). Even when a defendant fraudulently seeks to frustrate a potential judgment by dissipating its assets, courts will not, by granting injunctive relief, interfere in the defendant's right to manage its affairs and property. *Credit Agricole,* 94 N.Y.2d at 547-48, 708 N.Y.S.2d at 29-30.

Here, the requested injunction is merely incidental to the monetary relief sought in the Amended Complaint. The only "injury" Plaintiffs allege is that the Board Members seek to "reassert their control of the Company's Board for the sole purpose of preventing it from asserting its claims against them". Plaintiffs' Mem. at 5. Plaintiffs acknowledge, however, that (i) the Operating Agreement allows Granite Creek to control the Board in the event of non-payment; (ii) Fifth Third had the "contractual right to prevent [the Company] from making payments to GCP [Granite Creek]"; (iii) after the Sellers' foreclosure, the Company "was left without any material assets"; and (iv) the Board now seeks to meet to address the pending litigation. Plaintiffs' Mem. at 1, 5.

More importantly, however, Plaintiffs have failed to adduce any evidence to support the allegation that the Board meeting would cause any injury whatsoever to BSH. That is because there is none. There is nothing the Board Members can do to prevent BSH from bringing the claims it has made in the Amended Complaint, other than to defend on the merits. Although Plaintiffs seem terrified of a bankruptcy filing, even if the Company were to file a bankruptcy petition, the automatic stay that takes effect upon a bankruptcy filing to keep creditors from pursuing the debtor 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. *See* U.S.C.§ 362.

Defendants challenge the right of Paul Lightfoot and BSH to act alone on the Company's behalf, and dispute the facts as presented by Paul Lightfoot, and in Plaintiffs' pleadings. Accusations of a "scheme", "looting" and "abandonment" grossly misrepresent the facts. "[H]ypothesizing and innuendo" do not raise triable factual issues as to the Board's disinterestedness. *See Kimeldorf,* 309 A.D.2d at 159, 764 N.Y.S. 2d at 79. Nor is there any support in either the Operating Agreement or state law to keep the Board from meeting in order to address the Company's position in this litigation.

Finally, allowing BSH and Paul Lightfoot to take unilateral control of the Company in order to assert the Company's claims for their own benefit, and enjoining the Company from raising defenses, runs directly contrary to 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. *See, e.g., Credit Agricole Indosuez,* 94 N.Y.2d 541, 708 N.Y.S.2d 26, and cases cited therein. "[W]here . . . the substantive validity of the final injunction does *not* establish the substantive

validity of the preliminary one . . . For the latter was issued not to enjoin *unlawful* conduct, but rather to *render unlawful conduct that would otherwise be permissible,* in order to protect the anticipated judgment of the court . . . ." *Credit Agricole Indosuez,* 94 N.Y. 2d at 549, 708 N.Y.S. 2d at 30-31, *quoting Grupo Mexicano de Desarrollo v. Alliance Bond Fund,* 527 U.S. 308, 313-15, 119 S.Ct. 1961, 1966 (1999)(emphasis in original).

C. Plaintiffs Cannot Establish a Likelihood of Success on the Merits.

In addition to the requirements of CPLR§ 6301, Plaintiffs must establish each of the following, by *clear and convincing evidence*, in order to obtain injunctive relief: (i) a probability of success on the merits of the action; (ii) irreparable injury in the absence of injunctive relief; *and* (iii) a balance of equities in favor of Plaintiffs. *Faberge International,* 109 A.D.2d at 240, 491 N.Y.S.2d at 349(1985).

Plaintiffs argue that they are likely to succeed on the merits on their Fifth Cause of Action which, by their admission simply is a claim for prospective breach of fiduciary duty. Plaintiffs' Mem. at 7. In support, Plaintiffs claim that (i) the Board members owe fiduciary duties to the Company, and (ii) Defendants "inten[d] to terminate this action against them, or impede its progress by causing the Company to file for bankruptcy [which would be] a self-interested transaction . . .". Plaintiffs also argue, without support, that such potential action by the Board is "voidable", and would cause irreparable injury if pursued. *Id.* at 8.

Although there is no dispute that members of a company's directors owe fiduciary duties to a company's equity holders *and* creditors when an entity is insolvent (which is clearly the case here)(*see, e.g. RSL Communications PLC v. Bildirici*, 649 F.Supp.2d 184 (S.D.N.Y., 2009) (citing *Cooper v. Parsky*, 1997 WL 242534 (S.D.N.Y. Mar. 27, 1997, rev'd. on other grounds), this Court

cannot void or rescind actions which have not yet taken place, and which may never occur. Plaintiffs offer no "clear and convincing" evidence that all actions the Board *might take* will be subject to rescission, which is the sole relief requested in the Fifth Cause of Action. "Speculation and conjecture" cannot form the basis for injunctive relief. *Faberge International,* 109 A.D.2d at 240, 491 N.Y.S.2d at 349. *Draft* board resolutions circulated in order to inform Board members of potential topics for discussion do not equate to action taken by the Board, and it is presumptuous of Plaintiffs to assume that all actions the Board may take in connection with the pending litigation are prohibited, voidable, or contrary to the Board's fiduciary duties to the Company's constituents.

Further, the draft resolutions do not state any intent to keep *BSH* from pursuing its claims. As stated in the Affidavit of Mark Radzik, the purpose of the Board meeting is to address *the Company's position and defense* with respect to the litigation, and to protect and access insurance coverage. Radzik Aff. at ¶45. Although it may suit Paul Lightfoot's and BSH's purposes to unilaterally take actions on behalf of the Company to prosecute this litigation without opposition, there are indeed actions that the Board can and should consider, e.g. challenging BSH's alleged 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.

D. Plaintiffs Cannot Establish the Prospect of Irreparable Injury Absent Injunctive Relief.

Plaintiffs base their claim of irreparable harm on the argument that "control over the management of [the Company] will be *wrested away from BSH* by Defendants, which is per se irreparable harm". Plaintiffs' Mem. at 8 (emphasis added). However, BSH has never been entitled to, nor did it ever have, any control over the Company. As noted in Mark Radzik's

Affidavit, and the Company's Operating Agreement, the Company has always been managed by a manager, with the Board of Directors acting as the manager. Radzik Aff. at ¶40. BSH was not a Board member, and as a member/equity holder did not control management of the Company. *See* Operating Agreement, Exhibit "C" to Radzik Aff., at §5.7(a). Even prior to the Company's default under the Fifth Third loans documents, when BSH designated two of the five Board members, BSH did not, thereby, have "control" via Board majority.

Nor did Paul Lightfoot have unfettered control over the management of the Company as CEO. Even as CEO (a position he resigned from on January 22, 2010), he was directed by the Board. *Id.* at §5.6(f). Moreover, Plaintiffs concede that the Operating Agreement and operative loan documents authorized Granite Creek to control the Board under certain default situations. Plaintiffs' Mem. at 1, Lightfoot Aff. at ¶21. *See also id.* at §5.1(g). The suggestion that Defendants could "wrest" control of the Board away from BSH is grossly misleading.

The Board Members have already been reappointed. Radzik Aff. at ¶44. The reconstituted Board has virtually the same members as it did just prior to the Sellers' foreclosure[2]. "Control" is determined by the provisions of the Operating Agreement. There is no basis for effectively re-writing or ignoring the provisions of the Operating Agreement under the guise of injunctive relief. *See ALF Naman Real Estate Advisors, LLC v. Capsag Harbor Management, LLC, 2012 WL 4892399, 2012 N.Y. Slip Op. 32559(U) (N.Y. Cty. Oct. 3, 2012)*(request for preliminary injunction denied where court found that company's operating agreement permitted actions sought to be enjoined); *Gluck v. Hoary,* 55 A.D.3d 668, 865 N.Y.S.2d 356 (2d Dep't 2008)(motion for preliminary injunctive relief denied where actions were taken in reliance on company's by-laws); *Giblin v. Sechzer,* 97 A.D. 2d 833, 468 N.Y.S.2d

[2] At the time of the foreclosure, Jeffrey Wellek was a Board member and Roger Rose was not. Currently, Roger Rose is a Board member, and Jeffrey Wellek is not.

719(2d Dep't 1983)(motion for preliminary injunction to preclude expelling partners from partnership denied when action would be taken in reliance on provisions of binding partnership agreement); *Roehner v. Brecher,* 9 Misc. 2d 637, 170 N.Y.S.2d 78(1957)(request for injunctive relief to enjoin stockholders and/or directors meeting denied as records of company indicated shareholders of record, and corporation could not be enjoined from carrying on its affairs).

The cases cited by Plaintiffs support maintaining the *status quo ante* by adhering to the provisions of the Operating Agreement, and allowing the Board Members to meet. In *Walker & Zanger v. Zanger*, 245 A.D. 2d 144, 666 N.Y.S.2d 152 (1st Dep't 1997), the court granted a request for preliminary injunction because the request was consistent with the terms of a shareholder agreement between the parties, and restrained the shareholders from amending the company's by-laws, thereby *preserving the allocation of directors* between the family factions seeking control. Similarly, in *Vanderminden v. Vanderminden,* 226 A.D. 2d 1037, 641 N.Y.S. 2d 732 (3d Dep't 1996), the court maintained the *status quo ante* and balance of power, by granting injunctive relief to enforce the parties' pre-existing voting trust agreement. Finally, in *Louis Foodservice Corp. v. Vouyiuklis,* 2002 N.Y. Slip Op. 50448(U), 2002 WL 31663230 (Kings Cty. Aug. 26. 2002), the focus again was on enforcing the company's by-laws, which provided that the affairs of the corporation were to be managed by a board of two directors. The court noted that since the by-laws had not been amended to increase the number of directors, plaintiffs had raised doubts about defendants' claims that they were, in fact, directors. *See* 2002 WL 31663230. The court enforced the company's by-laws, finding that defendants lacked authority thereunder to call a special meeting of the board of directors, and, therefore, enjoined defendants from meeting. *Id.* The court also enforced the provisions of the by-laws, which

required the presence of a quorum to conduct business, and enjoined the actions of certain individuals who claimed to be acting as officers of the company. *Id.*

Here, the Defendants are seeking to maintain the *status quo ante*, while Plaintiffs seek to disturb the *status quo ante* by asking this Court to re-write the provisions of the Operating Agreement. As in *Louis Foodservice*, the Operating Agreement governing the management of the Company should be enforced to allow the Board to meet. *See id.*

E. The Balance of Equities Favor Defendants.

Plaintiffs argue that the balance tips in their favor because they "*might* never have their day in court, or *might* be forced to contend with a bankruptcy filing made solely to obstruct this lawsuit". Plaintiffs' Mem. at 9 (emphasis added). This is far from "clear and convincing evidence". *See Gluck v. Hoary,* 55 A.D.3d 668, 865 N.Y.S.2d 356; *Faberge International,* 109 A.D. 2d 235, 240, 491 N.Y.S. 2d 345. As discussed above, Defendants have no ability to preclude BSH from continuing with this litigation; BSH will, therefore, have its "day in court". Moreover, whether the Board seeks dismissal of the Company as a direct plaintiff, or to challenge BSH's derivative authority, a motion will have to be made to this Court, on notice to plaintiffs, with an opportunity to object. There is simply no way that this litigation can be dismissed without notice, a hearing and entry of a court order. Therefore, denial of Plaintiffs' Motion cannot, and will not result in the injury of the sort alleged by Plaintiffs.

Further, as discussed above, while Plaintiffs may be concerned about a bankruptcy filing, the filing itself would not stay this litigation. But more importantly, it would run counter to public policy for this Court to restrain the Board from meeting in order to keep the Company from filing a bankruptcy petition. *See, e.g., Siragusa v. Prudential Milk,* 29 N.Y.S.2d 29 (NY Cty. 1941)(holding restraints on an entity's rights to a bankruptcy proceeding are contrary to

public policy and void). Whether the Company can file a voluntary bankruptcy petition, and what consents are needed, are governed by the Operating Agreement, which Plaintiffs concede is valid. *See Gluck v. Hoary,* 55 A.D.3d 668, 865 N.Y.S.2d 356; *Giblin v. Sechzer,* 97 A.D. 2d 833, 468 N.Y.S.2d 719.

Plaintiffs argue that Defendants will suffer no harm if the *status quo ante* is maintained, by defining the "*status quo ante*" as the Board composition two years prior to the filing of this case, when the Board members had resigned following the foreclosure. Plaintiffs claim that they relied to their detriment on the fact that the Board members had resigned, yet fail to specify what actions, if any, they took, in reliance on those resignations (other than bringing this action, and hoping to be unopposed). But Granite Creek and Jim Iversen were lured into maintaining that *status quo ante,* and relied to their detriment on BSH's failure to bring its claims for more than *three years* after Paul Lightfoot first threatened to do so.

Rather, it is the Defendants and the Company that 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 (Plaintiffs' Mem. at 5); 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.

F. Plaintiffs Have Failed to Make a Clear Showing that Interference in the Company's Internal Affairs is Warranted.

Since the Operating Agreement is valid and binding, and controls the business of the Company, there is no mechanism for the Plaintiffs to override its provisions under the guise of seeking equitable relief. *See Gluck v. Hoary,* 55 A.D.3d 668, 865 N.Y. S.2d 356; *Giblin v. Sechzer,* 97 A.D. 2d 833, 468 N.Y.S.2d 719. It is well established that courts "should not interfere in the internal affairs of a corporation unless a clear showing is made to warrant such action." *In the Matter of the Election of Directors of R. Hoe & Co., Inc.,* 14 Misc. 2d 500, 505, 137 N.Y.S.2d 142, 148 (Bronx Cty. 1954)(injunction denied where petitioner failed to present clear evidence that election of directors should be set aside). Corporate affairs should not be disrupted by the claims of a disgruntled shareholder unless his right to relief is "crystal clear". *Roehner v. Brecher,* 9 Misc. 2d 637, 170 N.Y.S. 2d 78.

Plaintiffs support their request with conclusory claims that the Board Members have conflicts of interest that *may* color their fiduciary duties. Plaintiffs claim that since all of the Board members other than Paul Lightfoot were appointed by the lenders, they must, therefore, not be disinterested. These allegations, made by a disgruntled shareholder, should be viewed skeptically, particularly since the underlying agreements were negotiated by that same shareholder, and are admittedly valid and binding. Plaintiffs have not come close to overcoming the "powerful presumption of the business judgment rule." *See Kimeldorf v. First Union Real Estate Equity and Mortgage Investments,* 309 A.D. 2d 151, 155, 764 N.Y.S. 2d 73, 76 (1st Dep't 2003).

G. Plaintiffs are Guilty of Laches, and, on That Basis Alone, the Request for Equitable Relief Should be Denied

Plaintiffs' request for injunctive relief should be denied on the grounds of laches, as the acts complained of occurred more than *two years ago.* Plaintiffs cannot now use their self-imposed delay to keep the Board from taking action in response to the Amended Complaint. To succeed on a defense of laches, Defendants must show (1) conduct by Defendants giving rise to the situation complained of, (2) delay by the Plaintiffs in asserting their claim for relief despite having had a prior opportunity to do so, (3) lack of knowledge or notice on the part of the Defendants that the Plaintiffs would assert their claim for relief, and (4) injury or prejudice to the Defendants in the event that Plaintiffs' request for relief is granted. *See Bailey v. Chernoff*, 45 A.D.3d 1113, 1115, 846 N.Y.S.2d 462, 464-65 (3d Dep't 2007) (holding that laches barred neighbors' request for a preliminary injunction seeking to prohibit owners of lakefront property from erecting and maintaining boathouse, because neighbors had notice of owner's intent to construct and did not seek injunction for several months until after construction was complete). Here, all of the elements of laches are met.

First, the acts complained of in the Amended Complaint occurred long before this law suit was commenced. Second, Defendants waited *two years* to bring this action—significantly longer than the mere months deemed to constitute laches in *Bailey*. *Id.* With respect to the third factor, Defendants had no prior knowledge that Plaintiffs would seek to restrain their ability to hold Board meetings. Moreover, despite Plaintiffs' threatening to bring a legal action years ago, Plaintiffs sat on their rights and did nothing until now, long after the Board Members had resigned in connection with the foreclosure. Defendants did not attempt to hold Board meetings during the last two years as the Company has been dormant, and no pending litigation required the Company's or the Board's action. Finally, as discussed herein, the restraints sought by

Plaintiffs would significantly prejudice Defendants because they will be unable to address insurance coverage issues and defending/advancing the Company's position in this action. Accordingly, as in *Bailey*, on the basis of Plaintiffs' laches, the preliminary injunction should be denied.

CONCLUSION

For all of the reasons set forth above, Defendants request that Plaintiffs' Motion be denied, and that this Court grant such further relief as is equitable.

Dated: March 7, 2013

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By: _____

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