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,

- 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.

Index No. 70431/2012

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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Plaintiffs Briarcliff Solutions Holdings, LLC ("BSH") and Briarcliff Solutions Group, LLC ("BSG"), by their undersigned counsel, respectfully submit this Memorandum of Law, along with the Affidavit of Paul Lightfoot dated February 7, 2013 and the exhibits attached thereto, and the Affirmation of Emergency of Thomas A. Kissane, made on February 7, 2013, in support of their motion, pursuant to CPLR 6301 and made by Order to Show Cause, for a temporary restraining order and preliminary injunction.

PRELIMINARY STATEMENT

BSG will suffer immediate and irreparable harm if Defendants are permitted to carry out their stated to plan to seize control of the Company. Defendants' purpose in doing so could not be more transparent: they resigned, nearly two years ago, after having stripped the Company of all its assets, and return now, although the Company has no operations, for the express purpose of stopping it from pursuing this litigation against them.

The Defendants subject to this application are GCP, a sketchy " institutional" lender, its chosen board designees, and James Iversen. GCP lent money to the Company over a period of years. They took over the management of the Company in December 2010, exploiting a term in the Company's Operating Agreement, added at the time of their loan, allowing them to do so in the event of non-payment. In doing so, they relied on a non-payment that, as described in the Amended Verified Complaint, resulted solely from co-Defendant Fifth Third Bank (Chicago)'s ("FTB") refusal to allow the Company to make payments, when it was ready and able to do so.

Once they obtained control, Defendants assumed fiduciary duties to the Company and its shareholders. Defendants breached those duties by looting the Company, forcing it to (i) pay $875,000 in cash to FTB (beyond its regular debt service), (ii) take out at least $500,000 in additional loans from GCP on unreasonable terms (including hundreds of thousands of dollars in

fees to GCP), (iii) refrain from even considering the option of a bankruptcy filing while these oppressive actions were taken over the objections of the Company's then CEO, Mr. Lightfoot, and (iv) by attempting to convert the equity of BSG to the benefit of GCP. *See, e.g.,* Amended Complaint at para. 3. Iversen resigned as CEO the day before a foreclosure upon all the Company's assets that he participated in.

After leaving the Company an empty husk in the wake of the foreclosure, the GCP designees and James Iversen resigned their board memberships and abandoned the Company to Plaintiff BSH and Mr. Lightfoot, who own approximately 89% of the equity and who thereafter commenced this law suit for breach of fiduciary duty, breach of contract, and breach of the duty of good faith and fair dealing, alleging that Defendants had wrongfully contrived to take control of the Company and then misused that control for the benefit of themselves and their co-defendants.

Yet, even more brazen than their looting of the Company, is that GCP and James Iversen now have the gall to seek to take back their abandoned board seats. GCP and its designees admit that the only reason they are doing this is to have the Company withdraw this lawsuit and/or file a bankruptcy to prevent this action from going forward. In other words, having killed the victim, they want to prevent any recourse to justice. This is a subversion of the judicial process.

By their conduct, Defendants have essentially admitted that they do not have the authority to re-assume their resigned seats. The only purpose for the contractual provision allowing them to appoint themselves to the board in the first instance was to further loan repayment (consistent with the fiduciary duties once they became board members). Defendants resigned because there was no more money or assets to pay. By resigning they admitted that the

purpose of the appointment power was moot, and they let those resignations stand for nearly two years until learning that they had been sued by the Company.

The irreparable harm to the Company is clear—Defendants are seeking re-appointment to prevent the Company form obtaining redress. This is the starkest bad faith.

Therefore, Plaintiffs are seeking a preliminary injunction and a temporary restraining order prohibiting Defendants GCP, Radzik, Missner, Wellek, James Iversen, and Roger Rose, from taking control of the BSG Board and prohibiting them from taking any action, while purporting to act in the name of or on behalf of the Company, to interfere with the prosecution of this lawsuit against them or the other Defendants.

STATEMENT OF FACTS[1]

The Amended Complaint describes an elaborate scheme whereby Defendants: (1) colluded to force BSG into a payment default, though) FTB's assertion of its contractual right to prevent BSG from making payments to GCP for 120 days; (2) seized upon the default they had orchestrated to seize control of the BSG Board; (3) used control of the Company's Board to loot BSG for the benefit of FTB, GCP, and James Iversen; and (4) then abandoned the Company by collectively resigning from the Board, without appointing replacement directors, once all of the Company's assets had been taken through a UCC foreclosure sale, in which Mr. Iversen, still a BSG Board member and, until the day before the UCC foreclosure sale its CEO, headed up one of the two groups of foreclosing parties.

Without its holding companies, BSG was left without any material assets.

From that time, until their recent effort to seize control of the Company to prevent it from suing them, Defendants have failed and refused to take any responsibility for winding up or

[1] This factual statement is drawn from the accompanying Affidavit of Paul Lightfoot, dated February 7, 2013.

otherwise attending to the operations of BSG, and GCP and James Iversen have failed to exercise their asserted right to appoint directors to the Company's Board of Directors:

- On or about March 16 2011, Defendant Radzik resigned from the BSG Board seat he held as one of Defendant GCP's designees. Defendant GCP declined to appoint a successor.

- On or about April 6, 2011, Defendants Missner, Wellek, and James Iversen all resigned from the BSG Board. GCP declined to appoint a successor to either Missner or Wellek, who were its designees, and James Iversen declined to appoint a successor to the seat he controlled.

This left Mr. Lightfoot as the sole remaining member of the BSG Board. Indeed, on or about May 16, 2011, Defendant James Iversen sent an e-mail to the Company's insurer, stating that I was "the sole remaining member of the Board of Directors of BSG." Despite repeated notices sent by Mr. Lightfoot and his counsel, including Mr. Lightfoot's e-mail requests for notification as to whether GCP and James Iversen would be appointing successor Board designees, neither the resigned directors nor GCP took any action in connection with the business of the Company from April 6, 2011, until January 31, 2013.

On January 31, 2013, Defendant James Iversen sent an e-mail to Mr. Lightfoot and others purporting to reclaim the seat on the BSG Board that he had abandoned. On January 31, 2013, Defendant GCP, through Defendant Radzik, sent a letter to Mr. Lightfoot and others (copy at Exhibit 3) purporting to appoint Defendants Radzik, Missner, and Rose to the BSG Board. On January 31, 2013, Defendant Radzik sent an e-mail to Mr. Lightfoot and others purporting to call a "Special Meeting" of the Board of Directors of BSG for February 11, 2013, and attaching a "notice" of such "meeting."

Among the purposes stated by Mr. Radzik for the February 11 meeting are: (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) "Acknowledgement [by BSG] of additional Liabilities" purportedly 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 Chapter 11 bankruptcy petition.

In other words, after having abandoned their positions on the Board of the Company after it had been denuded of assets through the foreclosure sale—and having done so in violation of § 5.2(c) of the BSG Operating Agreement, which requires 60 days' notice of resignation, and § 5.2(d), which calls for the party who appointed a resigned director to appoint his replacement—and having left the Company for 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.

Mr. Radzik's January 31, 2013 letter states that because BSG "has failed to timely pay the Liabilities and such nonpayment continued for a period of 120 consecutive days," GCP "has a continuing right to maintain a majority of the Directors." Thus, GCP relies upon the same payment "default" pursuant to which it first seized control of the Board, on December 7, 2010.

As described at Paragraphs 24-25 & 38 of the Amended Complaint, that "default" occurred solely as a result of co-defendant FTB's insistence that BSG cease making payments to GCP for a period of 120 days, based upon certain technical covenant defaults, not any default of payment. The collusion of FTB and GCP in enabling GCP to seize control of the Company in this manner is a significant element of the claims alleged in the Amended Complaint. Moreover, as also alleged there (at ¶ 44(B)), while Mr. Lightfoot was still its CEO, BSG repaid the amounts that it had been prohibited from paying to GCP once FTB's right to forbid such payment lapsed.

Since the March 2012 UCC foreclosure sale denuded the Company of its assets, GCP has not sought any payment from BSG.

The evident reason GCP was given the right to take control of the BSG Board in the event of a payment default was to enable it to protect its status as lender (within the limits of the fiduciary duties of the directors it appointed.) As BSG has neither assets nor business apart from this action, it is apparent that GCP does not seek to take control of the Board for that reason, but rather solely to protect Defendants, including itself, from being forced to answer Plaintiffs' allegations of contractual and fiduciary breach. Indeed, GCP is seeking to cause BSG to incur additional debt from GCP for the sole purpose of paying another law firm to represent the Company in obtaining a discontinuance of this action and seeking a Chapter 11 bankruptcy protection for the Company, which has no material assets other than this action.

ARGUMENT

PLAINTIFFS ARE ENTITLED TO A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION TO PREVENT DEFENDANTS FROM TAKING CONTROL OF THE COMPANY'S BOARD IN ORDER TO PROTECT THEMSELVES AND THEIR CO-DEFENDANTS FROM THIS LAWSUIT

I. Standard of Review

The standards for granting a preliminary injunction and a temporary restraining order pending adjudication of a preliminary injunction motion are the same. *See Dua v. New York City Dep't of Parks & Recreation*, 84 A.D.3d 596, 924 N.Y.S.2d 47 (1st Dep't 2011); *Bailey v. Ossi Sport Club, Inc.*, 71 A.D.3d 1069, 898 N.Y.S.2d 223 (2d Dep't 2010). Those standards require the movant to demonstrate "a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 N.Y.3d 839, 840, 800 N.Y.S.2d 48, 49 (2005) (mem.) (citing CPLR 6301). "The existence of an issue of fact 'shall not in itself be grounds for denial of the

motion.'" *Winzelberg v. 1319 50th Realty Corp.*, 52 A.D.3d 700, 701, 860 N.Y.S.2d 185, 186 (2d Dep't 2008) (quoting CPLR 6312(c)). For the reasons set forth below, Plaintiffs have satisfied each of these criteria, and its motion for a preliminary injunction and temporary restraining order should be granted.

II. Plaintiffs Have Demonstrated a Probability of Success on the Merits of Their Fifth Claim

In addition to the claims for fiduciary breach, aiding and abetting fiduciary breach, and for breaches of contract or the contractual duty of good faith and fair dealing mentioned earlier, the Amended Complaint contains a fifth claim: for breach of fiduciary duty, based on the recent efforts of GCP and its designees to seize control of the Company in order to prevent it from asserting its claims against them and the other Defendants. Plaintiffs are likely to succeed on this claim.

First, GCP and its appointees clearly owe fiduciary duties to BSG to the extent they serve on the Company's Board (which, pursuant to Section 5.1 of the Company's Operating Agreement, functions as the Manager of the Company.) *See Coventry Real Estate Advisors, L.L.C. v. Developers Diversified Realty Corp.*, 84 A.D.3d 583, 584, 923 N.Y.S.2d 476, 477 (1st Dep't 2011) (observing that "absent a provision to the contrary in the governing LLC agreement, an LLC's managers and controlling members owe the traditional fiduciary duties that directors and controlling shareholders in a corporation would (including the traditional duties of loyalty and care")).

Second, Defendants' announced intention to terminate this action against them, or impede its progress by causing the Company to file for bankruptcy, describes a self-interested transaction under Section 411(b) of the New York Limited Liability Company Law. As Defendants cannot show such self-interested action to the Company's detriment, to be "fair and

reasonable as to the limited liability company at the time it was approved," it is improper under Section 411(b). Such a transaction is therefore voidable. *Blue Chip Emerald LLC v. Allied Partners, Inc.*, 299 A.D.2d 278, 279, 750 N.Y.S.2d 291,294 (1st Dep't 2002) ("absent full disclosure of self interest", violation of duty of loyalty meant that "transaction was voidable"); *Kutik v. Taylor*, 80 Misc.2d 839, 364 N.Y.S.2d 387, 389-90 (Sup. Ct. Kings Co. 1975) (recognizing principle that transactions violating the duty of loyalty are voidable under New York corporate law); *Valeant Pharmaceuticals Inter. v. Jerney*, 921 A.2d 732, 752 (Del. Ch. 2007) ("The court begins with the observation that there are two distinct sources for an award of damages in the case of an unfair self-dealing transaction. First, such a transaction is voidable[.]"); *Schock v. Nash*, 732 A.2d 217, 225-26 (Del. 1999) ("At common law, transactions which violated the fiduciary duty of loyalty were void").

Defendants' efforts in this regard also constitute actions "in violation of plaintiff's rights respecting the subject of the action," and such acts, "if committed or continued during the pendency of the action, would produce injury to" Plaintiffs, within the meaning of § 6301 of the New York Civil Practice Law and Rules. As set forth in the ensuing section, such injury to BSG would be irreparable. Therefore, a preliminary injunction against such actions should issue under CPLR § 6301.

III. BSG Will Suffer Irreparable Injury in the Absence of a TRO and a Preliminary Injunction

If Plaintiffs' request for preliminary injunctive relief and a TRO is not granted, the control over the management of BSG will be wrested away from BSH by Defendants, which is per se irreparable harm. *Vanderminden v. Vanderminden,* 226 A.D.2d 1037, 1041, 641 N.Y.S.2d 732, 737 (3d Dep't 1996) ("[plaintiffs'] alleged harm, 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"); *see also See Walker & Zanger v. Zanger*, 245 A.D.2d 144, 145, 666 N.Y.S.2d 152, 153 (1st Dep't 1997) (same); *Louis Foodservice Corp. v. Konstantinos Vouyiouklis*, 2002 N.Y. Slip Op. 50448(U), 2002 WL 31663230, at *3 (Sup. Ct. Kings Co. Aug. 26, 2002) ("It is well-settled that plaintiffs' alleged harm, an opportunity for defendants to shift the balance of power and assume management and control of the corporation, may properly be viewed as irreparable injury."). Accordingly, Plaintiffs have demonstrated that BSG is in danger of suffering immediate and irreparable harm if a TRO and a preliminary injunction are not granted.

IV. The Balance of the Equities Favors Plaintiffs

The balance of the equities plainly favors Plaintiffs. If Defendants are permitted to seize control of the BSG for the purpose of preventing the Company from asserting claims against them, Plaintiffs might never have their day in court, or might be forced to contend with a bankruptcy filing made solely to obstruct this lawsuit. As announced in their notice, Defendants expressly intend to use control of the Company to determine, on the Company's behalf, that they, themselves, should not be sued, and/or to cause the Company to make a bankruptcy filing in order to obstruct this lawsuit.

On the other hand, Defendants will suffer no injury if the status quo—which they created with their resignations nearly two years ago and which Plaintiffs have relied on to their detriment for two years—is maintained. Accordingly, "a balancing of the equities favors [Plaintiffs] since the irreparable injury to be sustained by the plaintiff is more burdensome to it than the harm caused to defendant[s] through imposition of the injunction." *Burmax Co., Inc. v. B&S Indus.,*

Inc., 135 A.D.2d 599, 601, 522 N.Y.S.2d 177, 179 (2d Dep't 1987) (internal quotation marks omitted); *Vanderminden,* 226 A.D.2d at 1042, 641 N.Y.S.2d at 737 (same).

Weighing the lack of injury to Defendants against the imminent threat that BSG will lose any chance to realize value from its only remaining asset—this lawsuit—the temporary restraining order and preliminary injunction requested by Plaintiffs should issue under CPLR § 6301.

CONCLUSION

For the reasons set forth above, Plaintiffs' motion for a TRO and a preliminary injunction prohibiting Defendants GCP, Radzik, Missner, Wellek, James Iversen and Roger Rose, from taking control of the BSG Board and prohibiting them from taking any action, while purporting to act in the name of or on behalf of the Company, to interfere with the prosecution of this lawsuit against them or their co-Defendants should be granted.

Dated: New York, New York
February 7, 2013

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