

1 SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

2 -----X
3 BRIARCLIFF SOLUTIONS HOLDINGS, LLC.,
4 in its individual capacity and
5 derivatively on behalf of BRIARCLIFF
6 SOLUTIONS GROUP, LLC and BRIARCLIFF
7 SOLUTIONS GROUP, LLC
8 Plaintiff

9
10 -against-

Index No.
704312012

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

16 -----X

17 Courthouse
18 White Plains, New York
19 February 8, 2013

20 BEFORE:

21 HON. ALAN D. SCHEINKMAN,
22 Justice of the Supreme Court

23 APPEARANCES:

24 SCHLAM STONE & DOLAN, LLP
25 Attorneys for the Plaintiffs Briarcliff
Solutions Holdings, LLC and Briarcliff
Solutions Group, LLC
26 26 Broadway
27 New York, New York 10004

28 BY: DAVID J. KATZ, ESQ.,
29 THOMAS A. KISSANE, ESQ.,
30 of Counsel

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THOMPSON & KNIGHT, LLP
Attorneys for the Defendant Briarcliff
Solutions Group, LLC
900 Third Avenue
New York, New York 10022

BY: IRA L. HERMAN, ESQ.,
GEORGE F. HRITZ, ESQ.,
of Counsel

Susan M. Guadagno, RPR
Senior Court Reporter

1 THE CLERK: In the matter of
2 Briarcliff Solutions versus Fifth Third Bank.
3 Counsel, state your appearances
4 for the record, please.

5 MR. KATZ: David Katz and Thomas
6 Kissane from Schlam Stone for the
7 plaintiffs.

8 MR. HERMAN: Ira Herman and
9 Goerge F. Hritz and I'm going to refer to
10 us as BSG.

11 MR. KATZ: I guess I would have
12 to say at this point --

13 THE COURT: Now I'm confused.

14 MR. KATZ: There is a dispute
15 about who is here on behalf of Briarcliff.

16 THE COURT: BSG is not a named
17 defendant.

18 MR. KATZ: BSG is a named
19 plaintiff and in the alternative, a nominal
20 defendant.

21 THE COURT: I'm just looking at
22 the Order to Show Cause and I don't see BSG
23 in the caption.

24 MR. HERMAN: They are listed as
25 plaintiff, Judge and as the derivative

1 plaintiff.

2 MR. KATZ: If you look at the
3 caption --

4 THE COURT: I got it. Who
5 represents the named defendants; anybody?

6 MR. HERMAN: Your Honor, Fifth
7 Third I know is represented by a different
8 law firm.

9 MR. KATZ: Baker Hostetler.

10 THE COURT: They are not here?

11 MR. HERMAN: They are not here.

12 MR. KATZ: But we are not seeking
13 any relief on this motion against them.

14 THE COURT: What about these
15 other folks?

16 MR. HERMAN: I don't know who
17 represents Granite Creek, Judge and to be
18 fair to the Court, there is a likelihood
19 that if things go the right way we will end
20 up representing the Board members who are
21 listed as defendants in addition to the
22 company, unless that creates conflict
23 issues.

24 THE COURT: This is the most
25 peculiar thing. We have been down this

1 road once before with the Lightfoot matter.
2 I assume that's who your real principle is,
3 Mr. Lightfoot?

4 MR. KATZ: Correct, Judge.

5 THE COURT: And I have no idea
6 who your real principals are and why are
7 they having a meeting to get rid of a
8 lawsuit after two years?

9 MR. HERMAN: Your Honor, may I
10 respond?

11 Your Honor, they are not trying to get
12 rid of the lawsuit, that's a red herring.
13 They are just trying to get the LLC, BSG
14 off the caption as a plaintiff.

15 All that defendants are trying to do
16 here by this Order to Show Cause is prevent
17 corporate governance from proceeding in the
18 ordinary course and placing the defendants
19 in position and the LLC in position, BSG to
20 invoke some insurance coverage and proceeds
21 to defend the case.

22 The insurance coverage was purchased.
23 They are looking for an unfair advantage,
24 Judge.

25 THE COURT: Can you enlighten me,

1 why we didn't have that fight two years
2 ago?

3 MR. HERMAN: I have no clue. I'm
4 recently retained.

5 THE COURT: You are familiar with
6 the previous decisions in this case?

7 MR. HERMAN: I am not, your
8 Honor, I must apologize to the Court.

9 THE COURT: Well, I don't know
10 that these are annexed to any of the papers
11 but --

12 MR. KATZ: There was a different
13 index number.

14 THE COURT: But I was looking to
15 see if anybody might have annexed it.

16 MR. KATZ: We were speaking with
17 your part clerk -- I was -- the other day.

18 THE COURT: There was a previous
19 lawsuit about, if I remember, about Mr.
20 Lightfoot claimed what he wasn't getting
21 under an employment agreement.

22 MR. KATZ: Severance, correct.

23 THE COURT: And he sued Mr.
24 Lightfoot. BSG, I think.

25 MR. KATZ: Correct.

1 THE COURT: And no one appeared
2 on behalf of BSG.

3 MR. KATZ: Initially, someone
4 did.

5 THE COURT: No one appeared and I
6 granted, actually, originally somebody
7 appeared, a lawyer appeared and then the
8 lawyer said that, the lawyer really wasn't
9 properly retained, it had nobody to take
10 instruction from so I granted the lawyer's
11 application to be relieved. We noticed,
12 gave notice to anybody we thought at the
13 time might have an interest in the company.

14 MR. KATZ: Correct.

15 THE COURT: It turned out that
16 somebody from a law firm was sitting in the
17 courtroom at the time all of this was going
18 on Littler Mendelson, somebody from the
19 Littler Mendelson firm was sitting in the
20 audience the whole time and nobody
21 appeared, I granted a default judgment and
22 then the lawyers from Littler Mendelson
23 asked me to vacate the default judgment,
24 which I declined to do.

25 MR. KATZ: Right. You wrote a

1 very lengthy and heartfelt opinion about
2 that.

3 THE COURT: So why, after all of
4 this time, did somebody finally decide to
5 wake up and what's this dispute really all
6 about?

7 MR. HERMAN: Your Honor, they
8 woke up because they are now, the
9 defendants named and BSG are now being
10 sued, essentially, on claims for corporate
11 misconduct or alleged corporate misconduct
12 or fiduciary duty breaches, et cetera and
13 there is an insurance policy that's owned
14 by BSG and the way to access that insurance
15 policy is the plaintiff properly to name
16 BSG derivatively, so that you don't have an
17 insured versus insured problem.

18 All defendant is trying to do -- I'm
19 not talking about the merits of the action
20 and that's your bailiwick to decide, I'm
21 just talking about what's before your Honor
22 here today. There is an attempt to deprive
23 the defendants from being able to properly
24 prosecute their defense and access an
25 asset, they are trying to deprive the

1 company of accessing an asset, that is it's
2 insurance policy and that's all that's
3 going on here, Judge, today and that's why
4 the Order to Show Cause must fail. They
5 are not entitled to the TRO.

6 The balance of the harm false on BSG
7 and the other parties.

8 THE COURT: Why would there be
9 any harm if I were to stay this meeting for
10 a period of time sufficient so that I could
11 evaluate your papers and their papers and
12 render a decision?

13 MR. HERMAN: Because, Judge, the
14 clock is running on accessing the
15 insurance.

16 THE COURT: How much time runs on
17 that?

18 MR. HERMAN: They are out there
19 trying to serve the papers, apparently.

20 THE COURT: On who?

21 MR. HERMAN: I don't know who,
22 Judge, but apparently they are out there
23 trying to serve them. Nothing has been
24 served since December.

25 THE COURT: So if the individual

1 defendants have not yet been served with
2 any papers their time to request insurance
3 hasn't run yet, has it?

4 MR. HERMAN: The problem is
5 Judge, plaintiff is well aware that the way
6 they have captioned the action rather than
7 bringing it derivatively will cause the
8 insurance company to decline coverage which
9 will put the defendants behind the eight
10 ball.

11 THE COURT: This is Briarcliff
12 Solutions in its individual capacity,
13 that's what you are saying throws it off?

14 MR. HERMAN: No. The Briarcliff
15 Solutions Group, LLC added at the end of
16 the caption as a plaintiff so you have the
17 insured versus insured. You have the LLC
18 BSG suing its officers and directors or
19 members.

20 MR. KATZ: It's not quite that
21 way. When you are ready I'll explain why I
22 don't think it's like that.

23 MR. HERMAN: Your Honor, there is
24 no authority under the operating agreement
25 to do this.

1 THE COURT: Stop. Who has the
2 shares in Briarcliff Solutions LLC, who are
3 the members?

4 MR. KATZ: Briarcliff Solutions
5 Holdings owns roughly about 80 percent of
6 the shares and the two Iversons, I believe,
7 own the other 20 percent.

8 THE COURT: Who owns Briarcliff
9 Solutions Holdings?

10 MR. KATZ: Mr. Lightfoot and I
11 believe one other individual, Christian
12 Foyer.

13 THE COURT: How much does Mr.
14 Lightfoot own?

15 MR. KATZ: I think they own it
16 50/50 but they are acting in unity here.

17 THE COURT: So what I'm getting
18 at is, if Briarcliff Solutions Holdings
19 owns, if the interests have elected to
20 bring that lawsuit and they speak for
21 Briarcliff Solutions Group, what am I doing
22 here?

23 MR. HERMAN: But they don't,
24 Judge.

25 THE COURT: Wait, stop. Why

1 don't they?

2 MR. HERMAN: If you take a look
3 at the operating agreement that's attached
4 to the moving papers, the governance of
5 this entity is clearly set out on how this
6 is supposed to work because of where the
7 moneys came in and other things.

8 If your Honor looks at 5.2G, work
9 controlled by mezzanine lender after
10 default it precludes this lawsuit.

11 If your Honor looks at Paragraph 9.2,
12 it expressly precludes this lawsuit. They
13 are espousing novel theory to get around
14 the four corners of the document, Judge.

15 THE COURT: But who has been
16 managing this company for the past two
17 years?

18 MR. KATZ: Mr. Lightfoot.

19 THE COURT: So you folks just
20 come springing in?

21 MR. HERMAN: My understanding,
22 the company has been dormant because it's
23 been foreclosed and there is no reason for
24 anything to happen.

25 THE COURT: Why do we care?

1 MR. HERMAN: Now we care because

2 --

3 THE COURT: You want the
4 insurance.

5 MR. HERMAN: Of course. That's
6 an asset of the company and the company is
7 entitled and it has a liability because of
8 the indemnities it owes to the management.
9 They are just trying to use the process
10 that they have invoked to come to your
11 Honor to say these folks can't defend
12 themselves because they can't invoke their
13 insurance.

14 MR. KATZ: That never occurred to
15 us. When we originally had the severance
16 lawsuit the company was represented,
17 everybody was on board all the way through
18 the end of discovery and we had a motion
19 for advances pending, as you mentioned in
20 one of the other cases we are here about
21 today, advances and indemnification. That
22 was sub judice.

23 We were getting ready to go to trial
24 and when it looked like we were going to go
25 to trial and you might grant the advances

1 motion what happened? Everyone resigned
2 from the Board, they collusively with the
3 Iversons did this UCC foreclosure.

4 The only thing Briarcliff Group had at
5 that time it was a holding company for two
6 operating subsidiaries. The stock was
7 foreclosed on and the company lost all of
8 its assets.

9 At that point, counsel for the company
10 withdrew because he said he wasn't getting
11 paid. That is what led to the default and
12 then Mr. -- when one of the things that
13 came up in your Opinion which you commented
14 on which we also thought was a farce was
15 that the insurance company wanted to come
16 in to reactivate a lawsuit because
17 everybody had resigned.

18 So, for two years we have been getting
19 ready to bring this complaint. We have
20 relied, to our detriment, on the fact that
21 they resigned and abdicated all of their
22 management to the company for two years
23 even though they were on notice, as you
24 said and we initially brought this action
25 in December; not a derivative lawsuit but

1 for Briarcliff Solutions against the former
2 directors. The LLC was never on the other
3 side of the caption.

4 We were getting ready to serve them
5 last week and then they came in and told us
6 oh, we are going to have a Board meeting on
7 Monday, we are going to rejoin the Board,
8 we are going to get this lawsuit dismissed,
9 we are going to discontinue the lawsuit, we
10 are going to have the mezzanine lender
11 advance more money to the company and
12 burden it with more debt so we can pay a
13 big law firm called Quarles to come in here
14 and represent the company and get this
15 lawsuit dismissed and then we are going to
16 take the company which has no assets
17 whatsoever and file Chapter 11.

18 We then brought this amended complaint
19 as part of our OSC just as a protection in
20 case they eventually succeed on what they
21 are trying to do to bring the derivative
22 claims in the alternative.

23 THE COURT: Stop, stop. This is
24 all as clear as mud.

25 MR. KATZ: You got it all right

1 in the Opinion, though. I just have to
2 refresh your memory.

3 THE COURT: What I'm looking at
4 is the letter of January 31st from Granite
5 Creek Flexcap.

6 MR. KATZ: That's the mezzanine
7 lender.

8 THE COURT: They are not here.
9 Did you give them notice?

10 MR. KATZ: Yes. We gave them
11 notice on Wednesday. We gave everyone
12 notice on Wednesday.

13 THE COURT: Have you heard from
14 them?

15 MR. KATZ: If I may, your Honor,
16 I have knowledge on that. I spoke with
17 Faye Feinstein, partner at Quarles & Brady
18 who hired the gentleman on my left as local
19 counsel purportedly on behalf of the
20 company. She told me that she was acting
21 at the request of the three appointed board
22 members who are appointed by Granite Creek.

23 So, we haven't heard directly from
24 Granite Creek, although they were given
25 notice but we've heard that.

1 THE COURT: What I'm wondering
2 about is why wouldn't Granite Creek appoint
3 the members whether you look at it or not.

4 MR. KATZ: Because we have --
5 well, because two things. One, they have,
6 we have an estoppel argument that we relied
7 on to our detriment for two years that they
8 had the ability to control this company and
9 done nothing and number two, they certainly
10 wouldn't have the right to have their
11 directors come back on the board and
12 basically cause the company to do a self
13 interested transaction which would be to
14 withdraw an absolute against themselves.

15 THE COURT: How do they get to do
16 that if you are bringing a derivative
17 action?

18 MR. KATZ: We are only bringing
19 the derivative action on the assumption
20 that they are going to do that. We pled it
21 in the alternative, Judge.

22 THE COURT: So if you planned for
23 that eventually how are you prejudiced?

24 MR. KATZ: We are prejudiced if
25 they put the case into bankruptcy we are

1 prejudiced.

2 THE COURT: You put holdings in
3 the bankruptcy?

4 MR. KATZ: No, they want to put
5 Briarcliff Solutions Group into bankruptcy.
6 That's on the agenda for the Board meeting.

7 THE COURT: How are you
8 prejudiced by that?

9 MR. KATZ: At that point I assume
10 -- because we don't have control of the
11 company anymore.

12 THE COURT: Well, if there is no
13 company to control what difference does it
14 make?

15 MR. KATZ: We don't have control
16 of this lawsuit.

17 THE COURT: What do you care?
18 If you are telling me Mr. Lightfoot and
19 this other fellow control a holding
20 company, that's who is ostensibly bringing
21 this lawsuit.

22 MR. KATZ: No. The original
23 company was Briarcliff Solutions LLC
24 because Mr. Lightfoot has been allowed to
25 remain as the only director and officer of

1 that company by the inaction of the
2 defendants for two years. And these claims
3 are clearly claims of the entity.

4 If we had brought this as a derivative
5 claim back in December the response would
6 have been why did you bring this as the
7 derivative claim, you are the majority
8 shareholder? There is nobody that would
9 stop you from bringing this lawsuit as a
10 direct lawsuit on behalf of Briarcliff
11 Solutions Group, LLC.

12 MR. HERMAN: Your Honor,
13 basically they are asking you to prejudge
14 the entire dispute. There is no emergency
15 here, Judge.

16 THE COURT: It doesn't seem to me
17 to be so much urgency that this meeting on
18 Monday has to go forward --

19 MR. KATZ: We did ask them --

20 THE COURT: Wait. Stop.

21 MR. HERMAN: Assuming the meeting
22 goes forward and the Board votes to do
23 whatever the Boards wants to do, what harm
24 is there to the plaintiff?

25 THE COURT: Because they may take

1 irreparable action such as putting the
2 company into bankruptcy then you are going
3 to go fight about it across the street.

4 MR. HERMAN: What's wrong with
5 that? It's against public policy to take
6 that right away.

7 THE COURT: I am not taking that
8 right away. What I find peculiar is you've
9 got individuals who abandoned this company
10 two years ago and now they want to come
11 back in and start taking some fairly
12 significant actions before I've had an
13 opportunity to consider what the merits of
14 the arguments are. I don't see how you are
15 prejudiced if I hold this off for a couple
16 of weeks until I make a decision.

17 MR. HERMAN: Your Honor, they are
18 prejudiced because the clock is running on
19 the insurance.

20 THE COURT: So tell me -- that's
21 why I asked you when does the clock run on
22 the insurance.

23 MR. HERMAN: As soon as the
24 caption reads Briarcliff Solutions Group,
25 LLC they are precluding, the company is

1 precluded --

2 THE COURT: So it's already too
3 late.

4 MR. HERMAN: They haven't served
5 anything yet and to the extent your Honor
6 denies --

7 THE COURT: I can't prevent them
8 from suing whoever they want.

9 MR. HERMAN: No.

10 THE COURT: Excuse me. If you
11 think that at some point that somebody has
12 been improperly named, you are entitled to
13 make a motion.

14 MR. HERMAN: But it's the
15 plaintiff.

16 THE COURT: If you think that the
17 plaintiff, the named plaintiff shouldn't be
18 part of this case and you have standing to
19 say something about it, you're welcome to
20 make an application to dismiss.

21 MR. HERMAN: But, your Honor,
22 they are assuming the conclusion of that
23 argument.

24 THE COURT: I am not assuming
25 anything. I'm inclined, even if it's Mr.

1 Lightfoot who is the real party in interest
2 here, I am inclined to stay a meeting until
3 I hear from everybody as to what's going on
4 here.

5 You know, this is a horrible
6 situation. I don't mean to direct my
7 attention at you but it seems to me that
8 whoever was opposed to Mr. Lightfoot has
9 done everything that he or she can do over
10 the last two or three years to run away
11 from this problem.

12 As evidenced, as counsel reminded me,
13 there was a previous litigation that was
14 supposed to go to trial and as soon as that
15 happened they all ran away and the lawyer
16 came in and said well, I don't have anybody
17 to talk to anymore.

18 And then as soon as the default
19 judgment had been entered, then all of a
20 sudden the lawyers who had been sitting in
21 the back of the courtroom come forward and
22 say well, wait a minute, Judge, we want to
23 be heard now.

24 The default judgment stands and then
25 two years later there is an effort by the

1 people who quit two and-a-half years ago to
2 come back.

3 I'm looking at this letter. Yes, I
4 noticed the right of the creditor to come
5 back because I also looked at this letter
6 which says from Mr. Iverson, e-mail on
7 January 31st, given the attached, I take
8 back the BSG Board seat and rights
9 associated that were given to Al Iverson
10 and replies as part of the AL Systems sale
11 to BSG.

12 All of a sudden, two years later he's
13 purporting to re-claim a Board seat.
14 Really? I think there is more here than
15 meets the eye and I'm not going to let
16 anybody rush into anything.

17 If you want me to consider enjoining
18 Mr. Lightfoot from doing anything until
19 your side gets to get heard, you can be
20 back here next week and I'll entertain that
21 application.

22 MR. KATZ: We would also be willing to
23 work something out with them on consent,
24 Judge. We asked them to put the Board
25 meeting off so we wouldn't have to be here

1 on the TRO and we would have just presented
2 you with the OTSC to sign.

3 I'm not blaming these two individuals,
4 we have worked with them before; we are
5 talking about their clients, not them. We
6 have nothing but great things to say about
7 the two of them but we did reach out to the
8 principals and we did ask to try to avoid
9 being here on Friday in the middle of a
10 snowstorm.

11 MR. HERMAN: Your Honor, assuming
12 everything that is said here is true,
13 assuming everything said here is true,
14 there is a plaintiff, a derivative
15 plaintiff who can pursue this action.
16 There is Briarcliff Solutions who can
17 pursue this action. My clients, they can
18 still pursue the action whether Briarcliff
19 Solutions, LLC should be named as a
20 plaintiff. They should be named as a
21 defendant.

22 THE COURT: Look, are you willing
23 to take them out of the caption and then I
24 assume they are willing to agree to a
25 complete standstill.

1 MR. KATZ: No, Judge. As far as
2 I'm concerned right now until this Board
3 meeting happens we are contesting their
4 ability to come back under the Board.

5 Right now it's our position that
6 Mr. Lightfoot is the only officer and
7 director of Briarcliff Solutions Group, LLC
8 and we are the counsel. We have made an
9 appearance on behalf of them, we have the
10 authority to act for them and to take them
11 out of the caption would prejudice our
12 client.

13 THE COURT: Look, I'm going to
14 put this on for February 22nd at 9:30. In
15 the meantime, I'm enjoining the holding of
16 a Board meeting. I don't think I need to
17 say taking control of the Board, conducting
18 or attending a meeting of the Board or
19 taking any action while purporting to act
20 on behalf of BSG. We'll take out the
21 business about interfering with the
22 lawsuit. It's not going to be pending the
23 determination of this motion, it's going to
24 be pending the return date. And I'm not
25 going to, you can get me your opposing

1 papers the day before.

2 MR. KATZ: Is there any way we
3 might be able to get a reply?

4 THE COURT: No.

5 MR. KATZ: Sorry. If you don't
6 ask you don't get so --

7 THE COURT: And counsel, can you
8 accept service on behalf of the defendants?

9 MR. HERMAN: Your Honor, I can't
10 accept anything at this point, Judge. What
11 I was going to ask for your Honor is the
12 standstill that your Honor mentioned so
13 that my clients aren't prejudiced while
14 this is all going on.

15 THE COURT: If you want to come
16 back with that application, you can. But
17 we are going to have to provide, we are
18 going to have to add a service provision.

19 MR. HERMAN: Then we are going to
20 have to ask for a bond.

21 THE COURT: I am not going to
22 impose a bonds at this point on a temporary
23 strange orders. You can put that in your
24 papers. I'll be happy to consider it in
25 your papers. It seems to me that you have

1 a problem here, counsel. You are going to
2 come back and tell me two years after the
3 fact that Mr. Lightfoot was apparently,
4 everybody else apparently abandoned the
5 ship, too, is now all of a sudden doing
6 dangerous things.

7 MR. HERMAN: Your Honor, Mr.
8 Lightfoot didn't start the lawsuit two
9 years ago. It's sauce for the goose in
10 that regard, Judge.

11 THE COURT: So it's okay for you
12 folks to disregard and abandon whatever
13 corporate responsibilities they had or
14 membership responsibilities to have and
15 only come back when they get sued?

16 MR. HERMAN: That's up to you,
17 that's for to you decide on the merits.

18 THE COURT: That's why I'm not
19 letting them start come back in and take
20 control again. I'll give you an
21 opportunity to get some papers, I'll
22 revisit this on the return date after I've
23 seen what you've had to say. We'll go
24 through it all over again but for the
25 moment, I'm not prepared to let your

1 clients just walk back in here and act like
2 they can just march back in after all of
3 this time and after all of this effort.
4 And I strongly suggest that, and again, I
5 don't hold you responsible individually, I
6 know you are the new person on the block.

7 MR. HERMAN: Thank you, Judge.

8 THE COURT: I understand that but
9 you might want to take a look, if you can,
10 before you leave, if not counsel can get it
11 for you, copies of the previous decisions
12 in the Lightfoot case which recounts a
13 history here and a history, frankly, that's
14 not good, from the other side.

15 MR. HERMAN: Your Honor, I always
16 take advice from the Court when it's given
17 the way it's being given today.
18 Notwithstanding that, Judge, the parties
19 are being prejudiced, the clock is running.

20 THE COURT: I haven't heard that.
21 I haven't heard that. You tell me that the
22 insurance clock is ticking. I was willing
23 to set a return date in light of that. But
24 then you tell me that the clock is already,
25 the bell's already rung?

1 MR. HERMAN: Your Honor, that's
2 why I asked for you to stay service of the
3 complaint.

4 THE COURT: I can't -- how would
5 do I do that? Why would I do that?

6 MR. HERMAN: If you don't ask,
7 Judge, you don't get and just to keep the
8 playing field level. Because to the extent
9 that my colleagues are correct, my client
10 won't be able to properly access their
11 insurance and defend themselves.

12 THE COURT: Look, I don't know
13 whether that's so or not so. It doesn't
14 make a lot of sense to me particularly
15 because the lender who is on notice to this
16 proceeding, they haven't shown up. Of
17 anybody here they might be the more
18 involved party, a person like the people
19 who put up the money for this, that makes
20 some more sense to me but they are not
21 here.

22 MR. HERMAN: I'll advise our
23 clients of that, Judge.

24 THE COURT: This is really, as I
25 said, clear as mud as to who really is

1 doing what to whom here.

2 MR. KATZ: We also know from the
3 stuff we gave you is the one thing the
4 lender was willing to do was to advance
5 more money and burden this company with
6 more debt in order to hire a law firm and
7 come in here --

8 THE COURT: That's mitigated by
9 the fact that they are thinking they are
10 going to get insurance coverage to pay for
11 it.

12 MR. HERMAN: Thank you, Judge.

13 THE COURT: That's not that
14 persuasive either. But look, the last time
15 with the severance case it was all about
16 the insurance policy. This seems to be
17 it's all about the insurance policy and
18 frankly, I don't know enough to say that
19 anybody can go on here and do anything
20 that's irreparable.

21 What I would ask potentially and I
22 don't know if this makes any difference but
23 if you think that it would avert prejudice
24 I'm willing to consider it. How about you
25 accept the service of the moving papers in

1 this matter and if we put off service of
2 the process, you agree that you are not
3 going to make an issue out of it. The
4 reason being is that if you are asking me
5 to delay service, okay, if you think there
6 might be some prejudice, maybe you have a
7 point that if all that needs to be served
8 is the moving papers. But it doesn't seem
9 very fair to me to say to the plaintiff,
10 look, you go out and you have to
11 individually serve all these people but, by
12 the way, just serve them with the moving
13 papers.

14 MR. HERMAN: Judge, I'll raise
15 you one. I will go call the client now. I
16 will find out what I can do and can't do if
17 you give me about ten minutes to call them.
18 I'm not sure if I could get ahold of
19 everyone but to the extent, accepting
20 service reduces the angst of the Court and
21 the angst of the plaintiff.

22 THE COURT: It doesn't reduce my
23 angst, I'm trying to respond to something
24 you raised. I have no angst about signing
25 this Order to Show Cause with the Temporary

1 Restraining Order and providing for service
2 of process, none.

3 MR. KATZ: Judge, just so that --

4 THE COURT: If you don't want me
5 to -- stop. It's now almost 12:00 o'clock
6 and I have some things I have to do related
7 to the storm and the administration of
8 what's going on in this building. Tell me
9 what you want me to do. If you have
10 authority and you want me to provide that
11 the service of the Order to Show Cause and
12 the papers can be effectuated at least as
13 to your clients by service upon you, that's
14 fine.

15 As to the bank, I guess there is
16 nothing they can do because they are not
17 here and the same thing as to Granite
18 Creek. I can only ask you to take the
19 papers on behalf of the people you
20 represent.

21 MR. KATZ: I could tell you --

22 THE COURT: Excuse me. If that
23 moots the benefit, then I guess there is a
24 moot point.

25 MR. KATZ: One thing that I don't

1 think --

2 THE COURT: Stop.

3 MR. HERMAN: Your Honor, I wasn't
4 arguing, I was just offering to make the
5 phone calls to find out what I can or can't
6 do in terms of accepting service.

7 THE COURT: I'm asking you, this
8 is not my application to you, it's not my
9 request to you, I'm asking you if this is
10 what you want me to do.

11 MR. HERMAN: Yes, your Honor.

12 THE COURT: What do you want me
13 to do?

14 MR. HERMAN: We'll accept
15 service, Judge.

16 THE COURT: Thank you. As to
17 everybody or as to --

18 MR. HERMAN: I could only accept
19 as to the client and as to the motion.

20 THE COURT: Please tell me, for
21 the record, who you are willing to accept
22 papers for.

23 MR. HERMAN: Briarcliff Solutions
24 Group, LLC.

25 THE COURT: We are going to

1 provide for personal delivery upon,
2 personal service upon all defendants.

3 MR. KATZ: Some of them are in
4 the midwest, Judge.

5 THE COURT: Personal service
6 pursuant to the CPLR, 301 and 302.

7 MR. KATZ: I'm just saying if we
8 could have a couple of days to do that
9 because they are out of state.

10 THE COURT: Yes. I'm going to
11 give you until February 15th.

12 MR. KATZ: And, Judge, what I
13 was trying to say before is the stuff, the
14 complaint and summons were out for service
15 at the time the Board meeting was noticed.
16 It's possible that at least with respect to
17 some of the corporate defendants here that
18 they may have already been served through
19 the Secretary of State or something like
20 that. We just don't know and I didn't want
21 to withhold that information.

22 THE COURT: Presumably, you
23 didn't serve them with the Order to Show
24 Cause. Thank you very much. Get home
25 safely everybody.

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within proceedings.

SUSAN M. GUADAGNO, RPR
Senior Court Reporter