IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CNL-AB LLC, Plaintiff, v. EASTERN PROPERTY FUND I SPE (MS REF) LLC, Defendant,	)	C.A. No. 6137-VCP
EASTERN PROPERTY FUND I SPE (MS REF) LLC, Counterclaim/Third-Party Plaintiff v. CNL-AB LLC, Counterclaim Defendants, and MS RESORT SENIOR HOLDINGS LLC, MS RESORT MANAGEMENT MEMBER L.L.C., And MORGAN STANLEY REAL ESTATE FUND V U.S., L.P., Third-Party Defendants	)	

MEMORANDUM OPINION

Submitted: January 27, 2011
Decided: January 28, 2011

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PARSONS, Vice Chancellor.

This matter involves a distressed real estate restructuring and, in particular, an investor's application for the Court to temporarily restrain a mezzanine creditor's foreclosure proceeding on collateral securing its loan. The investor asserts that the entity in which it has its investment has an indirect ownership interest in the collateral, which will be lost forever if the foreclosure is permitted to proceed. In this Memorandum Opinion, I deny the investor's application, finding that its claim is barred by laches and, in any event, the investor has not made a showing sufficient to obtain the relief it requests.

I. BACKGROUND

A. Parties

Defendant, Counterclaimant, and Third-Party Plaintiff, Eastern Property Fund I SPE (MS REF), LLC ("Eastern"), is a Delaware limited liability company and the sole Class A unitholder of Third-Party Defendant MS Resort Senior Holdings LLC ("MS Resort") (together with the other Third-Party Defendants, "TPDs"). MS Resort is a Delaware limited liability company and, like the other TPDs, is an affiliate of Morgan Stanley. It is controlled by its managing member, Third-Party Defendant Managing Member, LLC ("Managing Member"), and the latter's sponsor, Third-Party Defendant MS Real Estate Fund V US ("MSREF"). Both Managing Member and MSREF are also Delaware limited liability companies. Finally, Plaintiff and Counterclaim Defendant, CNL-AB LLC ("CNL-AB"), is a Delaware limited liability company.

B. Facts

Eastern's application for a temporary restraining order ("TRO") requires me to unpack a rather complicated ownership structure among the parties involved in this matter. I briefly sketch this structure here.[1]

1. The basic structure of the Morgan Stanley affiliates and the Mezzanine Loans

MSREF owns MSREF Resort Holdings LLC, which owns a majority stake in MS Resort.[2] MS Resort owns 100% of MS Resort Holdings, LLC, which owns, in succeeding fashion, MS Resorts V, LLC, MS Resorts IV, LLC (the "Borrower"), MS Resorts III, LLC (the "Collateral"), MS Resorts II, LLC, and MS Resorts I, LLC. MS Resorts I, LLC owns interests in two pools of luxury resort hotels. Pool A contains five properties and Pool B contains three properties.[3] MS Resort's only asset is its indirect ownership of the Borrower, which owns 100% of the membership interests in the Collateral, which, in turn, indirectly owns interests in the pools of resort hotels.[4]

MS Resort and the hotel properties are burdened with more than $3.1 billion of secured and unsecured debt from numerous lenders. In particular, Pool A is subject to

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1 For additional information, see Exhibit B to CNL-AB's Verified Complaint (the "Complaint").

2 Approximately 51.7% of the common interests of MS Resort are held by MSREF with the remaining interests held by other equity investors. Aff. of Daniel Kamensky ("Kamensky Aff.") ¶ 3.

3 *Id*. ¶ 4.

4 *Id*. ¶ 5. CNL-AB contends that the Borrower is out of the money because it sits behind approximately $3.1 billion of debt at a variety of subsidiary levels above the Pool A and B properties. *Id.*

approximately $1.525 billion of property level debt, which matures on February 1, 2011.[5] Pool B is subject to approximately $995 million of property level debt, which matures on May 9, 2012.[6] Junior to this approximately $2.5 billion in debt (the "Senior Loans") is $600 million in additional corporate mezzanine debt held by CNL-AB. Specifically, between MS Resort and the Pool A properties are a series of entities that are borrowers on outstanding loans from CNL-AB and two joint ventures comprised of different indirect members of CNL-AB that are secured by the equity interests of the borrower in the next entity down the chain.[7] These loans include CNL-AB's extension of: (1) a $200 million loan to the Borrower (the "Corporate Mezzanine C Loan" or "C Loan") (together with the other Corporate Mezzanine loans, the "Corporate Mezzanine Loans"), which is secured by the Borrower's sole ownership interest in the Collateral;[8] (2) a $200 million loan to the Collateral (the "Corporate Mezzanine B Loan" or "B Loan"), which is secured

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5 Aff. of Marc D. Puntus ("Puntus Aff.") ¶ 3.

6 *Id*.

7 Kamensky Aff. ¶ 7.

8 *Id*. ¶ 6. Pursuant to the Mezzanine Loan and Security Agreement (Third Mezzanine) dated April 12, 2007, CNL-AB's predecessor in interest extended the $200 million Corporate Mezzanine C Loan to the Borrower. *See* Compl. ¶ 8; *id*. Ex. A. The original lender, Morgan Stanley Mortgage Capital Inc. (the "Original Lender") assigned its interests under the Mezzanine Loan to CNL-AB. Verified Countercl. and Third-Party Compl. of Eastern Property Fund I SPE (MS REF) LLC (the "Counterclaim Complaint") ¶ 23. For the purposes of this Memorandum Opinion, all references to CNL-AB include the Original Lender, unless specified otherwise.

by the Collateral's sole interest in MS Resorts II;[9] and (3) a $200 million loan to MS Resorts II (the "Corporate Mezzanine A Loan" or "A Loan"), which is secured by MS Resorts II's sole ownership interest in MS Resorts I, which in turn owns, among other things, the Pool A properties.[10] Loans A and B are senior to Loan C.[11] In addition, these three loans benefit from limited "bad boy" guarantees from MSREF up to an aggregate of $75 million, which may be triggered by certain specified violations of the Corporate Mezzanine Loan documents, including a bankruptcy filing by the relevant borrower.[12]

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9 Kamensky Aff. ¶ 6.

10 *Id*.

11 Aff. of Michael Quinn ("Quinn Aff.") ¶ 7.

12 Kamensky Aff. ¶ 8. Typically, real estate finance loans are made on a nonrecourse basis, meaning that lenders are generally only able to look to their collateral to offset losses, while borrowers and their equity-holders are expressly exculpated from liability. *See* Anthony J. Colletta & Daniel M. Kasell, *Nuances of Non-Recourse Carve-Out Guaranties*, *in* REIT AND REAL ESTATE M&A RESTRUCTURINGS AND RECAPITALIZATIONS 2010, at 125, 127 (PLI Real Estate Law & Practice, Course Handbook Series No. 574, 2010). So-called "bad boy" clauses are exceptions to a loan's nonrecourse status in that losses resulting from certain bad conduct of the borrower and its affiliates are may be recovered against the borrower. *Id*. "These 'bad-boy act' or 'non-recourse carve-out' guaranties cover certain defaults or other actions that lenders have identified as posing special risks to their interests and collateral, effectively carving out these actions from the non-recourse veil that otherwise shields the borrower and its equity-holders from liability." *Id*. "Standard non-recourse carve-outs covered by bad-boy act guaranties include fraud, intentional misrepresentation, misappropriation, waste, unpermitted transfers or encumbrances, unpermitted indebtedness (even if the debt is subordinate to the mortgage loan), failure to comply with special-purpose entity (or 'SPE') covenants and voluntary or collusive involuntary bankruptcy filings." *Id*.

Based on the $600 million in Corporate Mezzanine Loans and approximately $2.5 billion in Senior Loans, a total of $3.1 billion of debt sits ahead of MS Resort, in which Eastern claims its interest.[13] Moreover, CNL-AB avers that substantially the entire capital structure outlined above has been in place since April 2007, when MSREF first acquired its indirect interest in the resort properties.[14] In addition, the TPDs assert that Eastern has known of the problems with the above loans for a significant period of time because MS Resort and Managing Member have been attempting for well over a year to craft a plan to recapitalize MS Resort, and its indebtedness, in an equitable manner.[15] Despite Eastern's knowledge of the dire financial circumstances of the entities to which the rights of MS Resort are subordinate, the TPDs contend that Eastern showed little interest in a restructuring plan and refused to forebear its distribution payments under MS Resort's LLC agreement.[16] Eastern also declined various restructuring proposals by the TPDs in which Eastern was offered a nominal cash recovery, premised on new capital being funded into MS Resort and the opportunity to invest new money as part of the restructuring, stating that the cash recovery was too low and that it had no plans to invest

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13 Ans. Br. of Pl./Countercl. Def. CNL-AB in Opp. to Def/Countercl. Pl.'s Mot. for a Temp. Res. Or. or Prelim. Inj. ("CNL-AB Opp.") 5; Puntus Aff. ¶ 3.

14 Kamensky Aff. ¶ 10.

15 Quinn Aff. ¶ 15. The resort hotels are high-end luxury resorts, which plummeted in value during the recent recession. As such, their current value is nowhere near sufficient to service or repay the debt owed on or related to them. *Id*. To facilitate a restructuring plan, MS Resort and Managing Member engaged the services of financial advisors Miller Buckfire & Co. ("Miller Buckfire"). *Id*. ¶¶ 15-18.

16 *See* Quinn Aff. ¶ 19.

new capital.[17] As a result, MS Resort still was obligated to make payment distributions to Eastern, on which it subsequently defaulted, as discussed *infra*.

2. The Corporate Mezzanine Loan defaults

In October 2010, MSREF defaulted on all of the Corporate Mezzanine Loans.[18] MSREF temporarily cured the defaults on Loans A and B through a voluntary capital infusion and secured a forbearance with respect to Loan C. In November 2010, however, the Loan C forbearance ended and Loan B went back into default the next month.[19] Notwithstanding these events, CNL-AB has not yet foreclosed on any of its borrowers. But, on February 1, 2011, some $1.5 billion outstanding on the Senior Loans for the Pool A properties will become due and payable.[20] Thus, in an effort to foreclose on the Collateral before senior lenders can do the same or take any other action to inhibit its rights to the Collateral, CNL-AB has asserted its contractual rights to enforce its security interest in the Collateral and commenced two separate foreclosure actions under UCC Article 9 on January 6, 2011.[21]

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17 *Id*. ¶¶ 24-26.

18 *Id*. ¶ 28; Kamensky Aff. ¶ 12.

19 Quinn Aff. ¶¶ 29-30. The lenders of Loan B (*i.e.*, CNL-AB) agreed to forbear from foreclosing on Loan B for a limited time in December 2010. *Id*.

20 *Id*. ¶ 14. CNL-AB currently is in discussions with the lenders of the Senior Loans concerning a potential restructuring of those loans, but evidently no agreement has been reached to date. CNL-AB Opp. 8.

21 *See* Compl. ¶ 9; *id*. Exs. C and D.

3. The January 6 Agreements

Complicating this situation further, CNL-AB and certain other entities, including MSREF, entered into a "series of agreements" on January 6, 2011 (the "January 6 Agreements"), under which MSREF obtained "certain limited rights if and when [CNL-AB] obtained title to the Collateral."[22] According to CNL-AB and the TPDs, MSREF sought an agreement with CNL-AB to release MSREF from the "bad boy" guarantees to which it was a party with respect to Loans A-C.[23] Moreover, the parties to the agreements sought to "allocate among each other any new investment that might be made if necessary in a restructuring."[24]

The January 6 Agreements include: two Indemnification Agreements ("Indemnification Agreements I and II"); a Co-Investment Agreement; an Agreement Regarding Corporate Mezzanine Loans; and the Limited Liability Company Operating Agreement of CNL-AB LLC.[25] As part of these agreements, MSREF paid approximately $6 million to fund CNL-AB's purchase of Loan C in exchange for a release from its

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22 Compl. ¶ 17; Countercl. Compl. ¶ 28. Because MSREF remains liable under certain "bad boy" guarantees with respect to the Senior Loans connected to the Pool B properties, CNL-AB asserts that the two indemnification agreements offer MSREF some protection in connection with liability arising from actions taken by CNL-AB after obtaining title to the Collateral. Kamensky Aff. ¶ 17.

23 Quinn Aff. ¶ 32.

24 *Id*. ¶ 17.

25 Aff. of Joel Friedlander ("Friedlander Aff.") Exs. A-E.

guaranty of Loan C and contingent releases from its guarantees on Loans A and B.[26] MSREF also obtained certain contingent co-investment rights in CNL-AB that are transferable to other investors in MS Resort, including Eastern.[27]

4. Eastern's interests in the Collateral

In accordance with an Amended and Restated Limited Liability Company Agreement dated July 8, 2008 (the "Operating Agreement"), Eastern became the sole Class A preferred unitholder of MS Resort.[28] Pursuant to the Operating Agreement, MS Resort was obligated to pay to Eastern the Class A Distribution Amount on the tenth day of each month.[29] A "Default," as defined in the Operating Agreement, by MS Resort occurs when "[Eastern] is not paid the Class A Unit Distribution Amount within five days following the applicable Distribution Date more than two times in any twelve month period[.]"[30] Eastern contends that on September 10, 2010, MS Resort defaulted under the Operating Agreement because it failed to pay the Distribution Amount for the second

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26 Kamensky Aff. ¶ 16. CNL-AB explains that MSREF contributed Loan C to CNL-AB, which is a joint venture between the lenders of Loans A and B. *Id.* In addition, the TPDs aver that the release from Loan C was immediate, while the other releases are contingent upon certain events. *Id.* ¶ 33.

27 Quinn Aff. ¶ 34.

28 *See* Countercl. Compl. Ex. A, the Operating Agreement.

29 *Id.* § 4.1(a).

30 *Id.* § 1.8.

consecutive month.[31] As a result, and in accordance with §§ 6.1 and 6.2 of the Operating Agreement, which call for the immediate redemption of Eastern's Class A units and certain other payments upon MS Resort's Default, Eastern claims that MS Resort now owes it more than $200 million.[32] In a January 7, 2011 notice of default to MS Resort, Eastern made clear that it would oppose efforts by MS Resort, in conjunction with other entities, to liquidate all or substantially all of its assets, including MS Resort's indirect ownership of the Collateral, in frustration of Eastern's ability to collect its debt.[33]

5. The imminent foreclosure on the Collateral

On January 6, 2011, CNL-AB issued a notice of "Retention of Pledged Collateral in full satisfaction pursuant to Section 9-620 of the New York Uniform Commercial Code [(the 'UCC')]," which announced its intention to strictly foreclose on the Collateral, absent any applicable objections, on January 26, 2011.[34] Under New York UCC § 9-620, a secured lender may accept collateral in full satisfaction of the obligation it secures, in lieu of a sale or auction of the collateral, if, among other things, the debtor consents and

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31 Countercl. Compl. ¶ 16. Eastern also contends that a Default occurred when CNL-AB accelerated the Mezzanine Loan in accordance with Operating Agreement § 1.8. That provision states that a Default will occur upon the acceleration of an "Existing Secured Loan," which refers to a group of corporate mezzanine loans that includes Loan C. Operating Agreement § 1.8.

32 Countercl. Compl. ¶¶ 17-18.

33 *See* Compl. Ex. E.

34 *See* Compl. Ex. C. As discussed further *infra*, CNL-AB later agreed not to move forward with a strict foreclosure until Friday, January 28, 2011. Docket Items ("D.I.") 28, 42.

certain other interested parties to the loan, including individuals holding interests in the collateral subordinate to the security interest at issue, do not timely object.[35] In the absence of proper objections, the secured lender may commence the strict foreclosure on the collateral twenty days after sending the appropriate notice under §§ 9-620 and 9-621.[36] Eastern contends that unlike CNL-AB's notice under § 9-610 described below, the § 9-620 notice was not made public.[37]

Alternatively, in the event that a proper party objects to a strict foreclosure, a secured lender may dispose of the collateral under § 9-610 by a commercially reasonable "public disposition" with advance notice to parties in interest.[38] Pursuant to this alternative option, on January 6, 2011, CNL-AB issued notice of its intention to place the

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35 *See* N.Y. U.C.C. Law § 9-620(a) (McKinney). In particular, this provision states, in relevant part: "(a) Except as otherwise provided in subsections (g) and (h) [which are not applicable here], a secured party may accept collateral in full or partial satisfaction of the obligation it secures only if: (1) the debtor consents to the acceptance under subsection (c); (2) the secured party does not receive, within the time set forth in subsection (d), a notification of objection to the proposal authenticated by: (A) a person to which the secured party was required to send a proposal under Section 9-621; or (B) any other person, other than the debtor, holding an interest in the collateral subordinate to the security interest that is the subject of the proposal; . . . (4) subsection (e) does not require the secured party to dispose of the collateral or the debtor waives the requirement pursuant to Section 9-624." *Id*.

36 *See id*. §§ 9-620(c) and (d).

37 Countercl. Compl. ¶ 27.

38 *See* N.Y. U.C.C. Law §§ 9-610(a)-(c) (McKinney).

Collateral for auction to the highest qualified bidder at a public sale to take place on January 28, 2011 (if it is not able to complete a strict foreclosure earlier).[39]

Under either scenario, CNL-AB made clear its intent to foreclose on the Collateral before February 1, 2011. Eastern asserts on information and belief that Managing Member has agreed, as part of the January 6 Agreements and in violation of its fiduciary duties to MS Resort stakeholders, not to take any action to oppose CNL-AB's noticed foreclosure, such as objecting to the strict foreclosure under § 9-620 or opposing the public disposition under § 9-610.[40] According to Eastern, MSREF has assured itself of a continuing interest in the Collateral through the January 6 Agreements and the joint venture with CNL-AB and Managing Member agreed in a self-dealing fashion not to resist and to participate in the foreclosure in exchange for value. As a result, Eastern alleges they failed to take action to halt the imminent foreclosure, which will deprive MS Resort of its sole asset, the Collateral, and, thus, the ability to repay its obligations to Eastern.[41]

C. Procedural History

On January 19, 2011, CNL-AB filed the Complaint against Eastern, seeking declaratory and injunctive relief as well as damages for Eastern's alleged interference with CNL-AB's plans to foreclose on the Collateral securing Loan C. CNL-AB

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39 *See* Compl. Ex. D.

40 Countercl. Compl. ¶ 28.

41 *Id*.

concurrently moved for an expedited trial. Two days later, on January 21, Eastern filed its Counterclaim Complaint, asserting counterclaims against CNL-AB and third-party claims against MS Resort, Managing Member, and MSREF based on the following four counts: (I) breach of fiduciary duty against Managing Member; (II) aiding and abetting breach of fiduciary duty against CNL-AB and MSREF; (III) breach of contract against MS Resort; and (IV) appointment of a receiver for MS Resort. Eastern also filed motions for expedited proceedings, a TRO, and the appointment of a receiver pendente lite for MS Resort.

Later on January 21, I held a telephonic hearing (the "January 21 Hearing") on the parties' various motions. At the January 21 Hearing, CNL-AB effectively withdrew its motion to expedite and opposed Eastern's parallel motion to expedite as well as its applications for interim relief. Eastern's motions reflected concerns about a strict foreclosure by CNL-AB under UCC § 9-620 on January 26 and a foreclosure sale on January 28. The result of the January 21 Hearing was that I granted Eastern's motion to expedite to the extent that I scheduled a hearing for a preliminary injunction ("PI") on Thursday, January 27 (the "PI Hearing").[42] I reserved judgment on Eastern's motions for a TRO as to CNL-AB's plan to accomplish a strict foreclosure on January 26 until such time as I could consider the relevant submissions more closely.[43]

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42 *See* Transcript of January 21, 2011 Hearing ("Tr.") at 17-19.

43 At the time of the January 21 Hearing, CNL-AB had not responded to Eastern's motion for a TRO in writing.

On January 24, Eastern submitted a Renewed Motion for a Temporary Restraining Order, requesting that the Court temporarily restrain CNL-AB from strictly foreclosing on the Collateral until after the PI Hearing.[44] The following day, however, CNL-AB voluntarily agreed to postpone the strict foreclosure until Friday, January 28, to permit the Court to address the parties' claims on a more full record. CNL-AB and the TPDs filed their respective opposition briefs shortly thereafter, and Eastern replied on January 26. The TPDs filed a letter addressing certain limited issues on January 27. Later that day, I held the PI Hearing. This Memorandum Opinion reflects my ruling on Eastern's motion.

D. Parties' Contentions

Eastern asserts that a TRO is necessary because Managing Member, aided and abetted by CNL-AB and MSREF, has breached its fiduciary duties to MS Resort and Eastern by engaging in self-dealing in an effort to prevent Eastern from collecting any portion of the debt owed to it by MS Resort.[45] In particular, Eastern contends that CNL-AB and MSREF seek to frustrate the collection of its debt through a collusive foreclosure

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[44] In particular, it sought to bring to the Court's attention certain "newly discovered evidence" it received after the Hearing. In that regard, it submitted a supplemental brief (Eastern's "Supplemental Brief" or "DSB") on its motion on January 25, 2011. Similarly, I refer to Eastern's Brief in Support of its Motions for a Temporary Restraining Order, Appointment of Receiver and Expedited Proceedings as Eastern's "Original Brief" or "DOB." Eastern did not include an application for a receiver in its renewed motion or in its Supplemental Brief so I have not considered any application for a receiver in this Memorandum Opinion.

[45] Countercl. Compl. ¶¶ 1-3.

that would shift the only assets available to satisfy that debt away from MS Resort and direct them, instead, to entities as to which Managing Member and its affiliates retain "certain limited rights."[46] As a result, according to Eastern, Managing Member "is not a fiduciary able to evaluate whether the foreclosure is in the best interests of MS Resort and its stakeholders or able to fairly evaluate alternatives to permitting the foreclosure to proceed."[47]

For its part, CNL-AB contends that Eastern has no direct interest in the Collateral and its interest in MS Resort is too far underwater and removed from the underlying value in the resort properties to warrant the relief it seeks.[48] Essentially, CNL-AB argues that Eastern improperly is attempting to disrupt the restructuring negotiations between MSREF, CNL-AB, and related entities in the hopes of receiving a hold-up payment.

II. ANALYSIS

A. Laches

Preliminarily, CNL-AB and the TPDs urge the denial of Eastern's motion on the ground of laches.[49] They contend that Eastern knew about the prospect of a foreclosure

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46 *Id*. ¶ 9.

47 DSB 2.

48 CNL-AB Opp. 9.

49 *See id*. 11-13; Third-Party Defs.' Ans. Br. in Opp. to Third-Party Pl.'s Mots. for a TRO and App. of a Receiver ("TPD Opp.") 8-10. The TPDs also argue that I should deny Eastern's motion because Eastern comes to this Court with unclean hands in that it seeks only to "maximize its own hold-up value and deprive other investors, who have carefully followed the rules and openly disclosed their

on the Collateral by January 7, 2011, the day after CNL-AB publicly noticed its intention to enforce its right under UCC § 9-610 to sell the Collateral on January 28, or, perhaps, as early as October 14, 2010, when the Borrower first defaulted on the Corporate Mezzanine C Loan.[50] Despite this knowledge, however, Eastern waited until January 21 to assert its claims seeking to block the foreclosure.

The defense of laches bars an action in equity if the movant waited an unreasonable length of time before asserting its claims and the delay unfairly prejudices the nonmovant.[51] Generally, laches requires proof of three elements: (1) knowledge of a claim by the claimant; (2) unreasonable delay in bringing the claim; and (3) resulting prejudice to the nonmovant.[52] An unreasonable delay can range from as long as several years to as little as one month, but the temporal aspect of the delay is less critical than the reasons for it.[53] As such, the doctrine of laches permits this Court "to hold a [movant] to a shorter period if, in terms of equity, [it] should have acted with greater alacrity . . . ."[54]

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intentions, a long-planned foreclosure opportunity." TPD Opp. 10. Because I hold that Eastern's motion lacks merit, I do not reach the issue of unclean hands.

50 CNL-AB Opp. 11.

51 *See, e.g.*, *Whittington v. Dragon Gp., L.L.C.*, 991 A.2d 1, 7-8 (Del. 2009); *Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 930 A.2d 104, 135 (Del. Ch. 2007) (noting that laches may apply if a claimant has knowledge of its claim and prejudices the opposition by unreasonably delaying in bringing the claim).

52 *Whittington*, 991 A.2d at 8 ("This doctrine 'is rooted in the maxim that equity aids the vigilant, not those who slumber on their rights.'") (internal citations omitted).

53 *Id*. at 7-8.

54 *Id*. at 8.

Indeed, under Delaware law, a motion for expedited proceedings, like a TRO or a hearing, may be denied where the movant has not proceeded as promptly as it might and, by virtue of its torpor, has contributed to the emergency nature of its application for preliminary relief.[55]

Under these facts, I find that Eastern is guilty of laches. Regarding its knowledge, I note that Eastern reasonably might not have known about the imminence of CNL-AB's foreclosure as of October 14, 2010, the date the Borrower defaulted on the Corporate Mezzanine C Loan. For example, in a November 1, 2010 Forbearance Agreement, the Original Lender agreed to forbear from foreclosing on the Borrower's interest in the Collateral until November 14, 2010.[56] Eastern might have interpreted this agreement as evidencing a general intent by CNL-AB to avoid an imminent foreclosure and work to restructure the Borrower's debt, even if for a short duration. But, all notions of this sort should have been dispelled when, on January 6, 2011, CNL-AB publicly announced its "Notification of Disposition of Collateral," which stated its intention to foreclose on the Collateral, absent any applicable objections, on January 28, 2011.[57] Therefore, after January 6, Eastern had, at least, constructive knowledge that CNL-AB was going to foreclose on the Collateral, at the latest, on January 28, 2011. Any objections to this

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55 *See Moor Disposal Serv., Inc. v. Kent Cty. Levy Ct.*, 2007 WL 2351070, at *1 (Del. Ch. Aug. 10, 2007).

56 Aff. of Richard J. Thomas ("Thomas Aff.") Ex B.

57 *See* Compl. Ex. D.

foreclosure also should have been clear to Eastern by January 7.[58] The record confirms this because Eastern sent a letter to MS Resort on January 7 (the "January 7 Letter") outlining substantially the same claim against MS Resort and its representatives that it now asserts against CNL-AB and the TPDs, including MS Resort.[59]

Despite being on notice of the foreclosure by January 7,[60] Eastern unreasonably sat on its hands for two weeks. Indeed, with the notion that an eleventh-hour suit by Eastern could tie up CNL-AB's foreclosure efforts beyond the all-important February 1 deadline, CNL-AB filed a preemptive suit against Eastern for declaratory judgment on January 19 to prevent such an occurrence from happening.[61] It was not until January 21, however, that Eastern showed its hand by bringing a multitude of claims against CNL and the TPDs, alleging much of the substance contained in its January 7 Letter. A delay of this

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58 Despite Eastern's contention otherwise, there is no showing that Eastern needed actual copies of the January 6 Agreements to bring its charges against CNL-AB and the TPDs. Indeed, it eventually filed the Counterclaim Complaint without having received those agreements. It also was able to send its January 7 Letter to MS Resort alleging certain improprieties regarding those agreements without having seen them. Thus, it is no excuse for Eastern's delay that they did not receive the January 6 Agreements until after CNL-AB filed suit on January 19.

59 *See* Compl. Ex. E. In this letter, Eastern makes clear that it "intend[ed] to pursue all available avenues to challenge" the foreclosure. *Id*.

60 Eastern denies knowing of CNL-AB's plans to strictly foreclose on the Collateral until it received the Complaint on January 19. Countercl. Compl. ¶ 27. But, the strict foreclosure originally was to occur on January 26, a mere two days before the publicly noticed public disposition on January 28. Thus, for purposes of my laches analysis, I do not find that Eastern's lack of notice about the strict foreclosure excuses its dilatory response to the planned January 28 disposition.

61 *See* CNL-AB Opp. 12.

length, especially when Eastern wasted nearly fourteen of the twenty-one days before the foreclosure was set to occur, is typically found unreasonable for laches purposes.[62]

Eastern argues, however, that its delay is mitigated by the fact that it believed CNL-AB was interested in resolving the parties' disputes consensually.[63] In some situations, a movant reasonably might delay in filing suit because it believes in good faith that the parties might resolve their differences out of court, even in a time-sensitive matter.[64] Nevertheless, I am not persuaded that Eastern reasonably believed it could find

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62 *See Oliver Press P'rs, LLC v. Decker*, 2005 WL 3441364, at *1 (Del. Ch. Dec. 6, 2005) (finding that a delay wasting nearly half the time available for the parties to prepare was unreasonable).

63 Eastern asserts that it cannot be faulted for filing its claims as late as January 21 because it was duped by CNL-AB into believing that the latter sought to resolve Eastern's objections out of court. *See* Def. and Countercl. and Third-Party Pl.'s Supp. Br. in Further Support of its Mot. for a TRO and App. of a Receiver ("DRB"). 6; DSB Ex. 2, Dep. of Daniel Kamensky, 131; Tr. 15 ("They noticed out the sale. We immediately asked, repeatedly, as they would admit, for copies of the underlying documents, under which the collusion happened. They refused and they refused. Their papers, at paragraph 22 of the complaint, references a fairly extraordinary call, where the CEO of one of their clients called me, to ask that we hold off, and that he would need to talk to the Morgan Stanley entities to address the situation and get us the documents. That was only on January 14th. And we thought, given that, that we were to be getting the information and, more importantly, the -- I don't want to get into the substance of what was offered, but the -- there was relief to be given, and we got not that, but the complaint. So we were -- we were suckered in. Guilty as charged. And -- but we brought our action as soon as it became clear that what was happening was not actually our fiduciary minding any duties, but simply an effort by them to have us hold our papers and expect exercise of duties by a fiduciary when, in fact, they were preparing to eliminate our position by the back door."). Eastern claims that it was not until January 18 that it was informed by CNL-AB that negotiations had failed. DRB 6.

64 *See Doskocil Cos. v. Griggy*, 1988 WL 81267, at *667 (Del. Ch. Aug. 4, 1988) ("I am not satisfied that this delay constitutes laches under the facts presented.

common ground with CNL-AB regarding its objections to the foreclosure. On January 14, for example, Eastern's counsel made clear to an authorized representative of CNL-AB that Eastern's objective was to stop CNL-AB's foreclosure actions.[65] Moreover, by this time, there were less than two weeks before the foreclosure sale was to occur and Eastern had at least constructive knowledge, as well, of the looming defaults on the Senior Loans on February 1. With the knowledge that so much was riding on the timing of that sale, Eastern could continue to pursue single-mindedly a consensual resolution for only so long before it was required to bring its dispute before this Court, or risk exacerbating an already urgent situation and prejudicing the opposition. This Court generally looks favorably upon parties' efforts to settle disputes consensually, but by January 14, at the latest, Eastern should have proceeded on a parallel litigation path so as to avoid sleeping on its rights.

Regarding the element of prejudice, I find that Eastern's delay caused prejudice to CNL-AB and the TPDs by leaving them with an extremely short window within which to conduct discovery and present their defenses to the Court, when Eastern had the benefit of several weeks to prepare. In fact, the delay left the Court and the opposition parties with just seven days until the foreclosure sale was set to occur and a mere six days to

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> Although Doskocil was aware of the Preferred Stock offering at least by July 25, 1988, Doskocil apparently believed that an accommodation could be reached with Wilson Foods whereby the Preferred Stock would not be issued without sufficient prior notice to allow an emergency application to be brought to the Court.").

[65] Compl. ¶ 22.

prepare for the PI Hearing. Moreover, the delay consumed nearly fourteen days from the date Eastern had notice, which is about 2/3 of the time potentially available to prepare, hear, and decide its motion for a PI before the January 28 deadline. This Court previously has denied a PI on the ground of laches in the face of a shorter delay.[66]

Based on the record before me, I find that Eastern's claim is barred by laches because it contributed to the emergency nature of its application for injunctive relief and prejudiced the opposing parties in doing so. This case involves a highly complicated capital structure with numerous interested parties and somewhat unusual claims. Eastern's delay in asserting its counterclaims and third party claims under these circumstances, therefore, prejudiced the opposing parties and the Court in that this case now needs to be defended and decided, respectively, on a limited record and in a highly accelerated fashion with virtually no time for an appeal. Therefore, I deny Eastern's motion on the ground of laches. Because I also find Eastern's motion substantively deficient, as discussed *infra*, this laches denial is in the alternative to my denial of its motion on the merits.

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[66] In *Oliver Press Partners, LLC v. Decker*, for example, Vice Chancellor Lamb found that, under the circumstances of that case, the plaintiffs' delay of approximately eleven days was sufficiently prejudicial to the defendants' ability to present their case and burdensome to the Court's ability to adjudicate the matter fairly so as to warrant denying the plaintiffs' motion. *See Oliver Press P'rs, LLC v. Decker*, 2005 WL 3441364, at *1 (Del. Ch. Dec. 6, 2005).

B. Eastern's Motion for a TRO or Preliminary Injunction

1. The applicable standard

Through its renewed motion, Eastern seeks a TRO here. A TRO is a special remedy of short duration that primarily is designed to prevent imminent irreparable injury.[67] To prevail on a motion for a TRO, the movant has the burden to demonstrate: (i) the existence of a colorable claim, (ii) the irreparable harm that will be suffered if relief is not granted, and (iii) a balancing of hardships favoring the moving party.[68] In accordance with these factors, this Court has recognized that motions for TROs may be subject to less exacting merits-based scrutiny than motions for preliminary injunctions, in part, because of their duration and incompletely developed factual records.[69] Thus, greater flexibility accompanies judicial consideration of a motion for a TRO, which permits the Court to assess the imminent and irreparable injury sought to be avoided by the movant.[70]

Yet, "[w]here . . . the applicant [for a TRO] has had the opportunity to develop evidence and present a record from which the court may 'responsibly make a more informed judgment concerning the merits,' . . . 'the elements of the equitable test is

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67 *Cottle v. Carr*, 1988 WL 10415, at *2 (Del. Ch. Feb. 9, 1988).

68 *See, e.g.*, *CBOT Hldgs., Inc. v. Chicago Bd. Options Exch., Inc.*, 2007 WL 2296356, at *3 (Del. Ch. Aug. 3, 2007); *Stirling Inv. Hldgs., Inc. v. Glenoit Universal, Ltd.*, 1997 WL 74659, at *2 (Del. Ch. Feb. 12, 1997).

69 *CBOT Hldgs., Inc.*, 2007 WL 2296356, at *3.

70 *Id*.

something akin to the traditional preliminary injunction formulation.'"[71] In this event, the Court looks "more in the direction of whether there is a probability of success on the merits."[72]

Here, I consider it more appropriate to apply the latter standard and focus on the probability of success on the merits. While Eastern alleges that it was not apprised of the fact that CNL-AB sought to strictly foreclose on the Collateral until January 19, 2011, it admits that CNL-AB publicly noticed its alternative plan for a potential public disposition of the Collateral to occur on January 28.[73] At a minimum, and as discussed further *infra*, Eastern has had two to three weeks to prepare its allegations because it was on notice of its claim by approximately January 7, 2011, after CNL-AB issued its public notice of a plan to foreclose on the Collateral. Moreover, Eastern now has obtained copies of the purported January 6 Agreements, upon which its claims so heavily rely. In these circumstances, the parties have had sufficient time to create a record on which I may make a responsible judgment concerning the merits of Eastern's claims. Thus, to succeed on its motion, Eastern must demonstrate: (1) a reasonable probability of success on the merits; (2) that it will suffer irreparable injury if an injunction does not issue; and (3) that

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71 *E.g.*, *Mitsubishi Power Sys. Ams., Inc. v. Babcock & Brown Infrastructure Gp. US, LLC*, 2009 WL 1199588, at *3 (Del. Ch. Apr. 24, 2009) (citing *Instituform Techs., Inc. v. Insitu, Inc.*, 1999 WL 240347, at *7 (Del. Ch. Apr. 19, 1999)); *CBOT Hldgs., Inc.*, 2007 WL 2296356, at *3.

72 *CBOT Hldgs., Inc*, 2007 WL 2296356, at *3.

73 Countercl. Compl. ¶ 28.

the balance of the equities favors the issuance of an injunction.[74] These elements are not necessarily weighted equally; a strong showing on one element may overcome a weak showing on another element, but a failure of proof on one of the elements will defeat the application.[75]

2. Probability of Success on the Merits

In examining the merits of Eastern's motion, I am mindful that the central entity at issue here, MS Resort, is an LLC, not a corporation. Eastern is a member of MS Resort through its ownership of MS Resort preferred units.[76] Eastern asserts breach of fiduciary

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74 *In re Inergy L.P.*, 2010 WL 4273197, at *9 (Del. Ch. Oct. 29, 2010).

75 *See Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998).

76 In this regard, Eastern also asserts monetary claims against MS Resort arising out of its redemption call on MS Resort, discussed *supra*. To some extent, therefore, Eastern frames its allegations against Managing Member as those made in its capacity as MS Resort's creditor. *See, e.g.*, DOB 5 (noting that MSREF and its affiliates seek impermissibly to facilitate CNL-AB's foreclosure on the only asset of MS Resort, "rather than protect that asset for Eastern [], its *creditor* . . . .") (emphasis added); DRB 1 (citing cases for the proposition that a corporation's directors owe fiduciary duties to creditors when the corporation reaches the point of insolvency). Eastern has not argued, and I find no support for the proposition, that it is no longer bound as a member by the Operating Agreement and the standards announced therein. Moreover, to the extent Eastern argues it is owed other fiduciary duties by Managing Member because it is a creditor of MS, it has failed to show it is likely to succeed in even establishing it has standing to assert such creditor claims against Managing Member.

In the corporate context, absent certain limited circumstances, like fraud, violation of a statute, or insolvency, directors of Delaware corporations generally do not owe fiduciary duties to creditors. *See, e.g.*, *Blackmore P'rs, L.P. v. Link Energy LLC*, 2005 WL 2709639, at *6 (Del. Ch. Oct. 14, 2005); *Odyssey P'rs, L.P. v. Fleming Cos., Inc.*, 735 A.2d 386, 417 (Del. Ch. 1999); *Geyer v. Ingersoll Publications Co.*, 621 A.2d 784, 787 (Del. Ch. 1992). Indeed, "directors [generally] do not owe creditors duties beyond the relevant contractual terms

claims against Managing Member, arguing that Managing Member and MSREF are Morgan Stanley affiliates whose interests are not aligned with MS Resort's. Specifically, according to Eastern, Managing Member and MSREF, as Managing Member's sponsor and MS Resort's controlling stakeholder, by virtue of the January 6 Agreements, face a conflict of interests because they have pecuniary incentives to see CNL-AB foreclose on the only indirect asset of MS Resort, rather than protect that asset for its member and creditor, Eastern. Eastern also alleges that by entering into the January 6 Agreements, CNL-AB knowingly participated in the Managing Member's breach of fiduciary duty.

In its supplemental submission, Eastern argues that certain documents it obtained in discovery thus far reveal that Managing Member's conflicts are far more pervasive and troubling than it previously thought.[77] It contends that the January 6 Agreements show that MSREF obtained a release from not just a $75 million MSREF loan guarantee, but

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absent special circumstances." *See Blackmore P'rs, L.P.*, 2005 WL 2709639, at *6 (internal quotation marks omitted). Eastern has not articulated any reason for applying more expansive rules in the alternative entity context of LLCs. In fact, such rules likely are stricter in that context. Vice Chancellor Laster recently held in *CML V, LLC v. Bax* that under the plain language of 6 *Del. C.* § 18-1002 of the Delaware Limited Liability Company Act ("LLC Act") "standing to bring a derivative action is limited to 'a member or an assignee' of an LLC. *CML V, LLC v. Bax*, 6 A.3d 238, 242 (Del. Ch. 2010). Considering, among other things, the plain language and purpose of the LLC Act and comparable provisions of the Delaware Limited Partnership Act, the Court held that, in the LLC context, creditors lack the ability to bring even a derivative suit against managing members for breaches of fiduciary duties. *Id*. at 250. Thus, Eastern's standing to bring its claims in its capacity as MS Resort's creditor is highly problematic.

[77] DSB 1.

also a separate $49.765 million guarantee.[78] Further, MSREF, through its domination of CNL-A, has an opportunity to obtain a 50% ownership interest in CNL-AB.[79] In addition, MSREF is obligated to supply a certain percentage of new equity that CNL-AB may require in connection with the Co-Investment Agreement.[80] Hence, Eastern asserts that MSREF's ownership interests and investment requirements give it, and thus Managing Member, a direct financial interest in the foreclosure. What's more, Eastern alleges that the release of the guarantees is specifically conditioned on CNL-AB taking title to the Collateral.[81]

The TPDs deny Eastern's allegations and argue that Eastern cannot demonstrate a probability of success on the merits on its claim that Managing Member breached its fiduciary duties by facilitating the January 6 Agreements on two grounds: (1) Eastern's claim is barred under MS Resort's Operating Agreement; and (2) even if it is not, the claim lacks substantive merit.[82] CNL-AB contends that because there is no reasonable probability of Eastern prevailing on its breach of fiduciary duty claims with respect to

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78 *Id*. at 3; Friedlander Aff. Exs. A-B.

79 DSB 3; Friedlander Aff. Ex. E.

80 DSB 3; Friedlander Aff. Ex. C.

81 Friedlander Aff. Ex. D § 4(c)(ii).

82 TPD Opp. 12, 14.

Managing Member, it cannot succeed on its claim that CNL-AB aided and abetted that breach.[83]

Turning to TPD's first ground, I find that Eastern is unlikely to prevail on its breach of fiduciary duty claims under the Operating Agreement. That agreement invests the power to manage MS Resort's business and affairs exclusively in Managing Member,[84] but explicitly narrows the fiduciary duties Managing Member owes to MS Resort's stakeholders. In particular, § 3.1(b) states that:

> The execution, delivery or performance by the Managing Member . . . of any agreement authorized or permitted under this Agreement shall be in the sole and absolute discretion of the Managing Member without consideration of any other obligation or duty, fiduciary or otherwise, of the Company or the Members and shall not constitute a breach by the Managing Member of any duty that the Managing Member may owe the Company or any Non-Managing Member or any other Persons under this Agreement or of any duty stated or implied by law or equity.[85]

Specifically, § 3.3(a) exempts Managing Member from liability for monetary and other damages to MS Resort for "losses sustained, liabilities incurred or benefits not derived as a result of errors of judgment or mistakes of fact or law or of any act or omission, unless the Managing Member acted in bad faith and the act or omission was material to the matter giving rise to the loss, liability or benefit not derived."[86] These provisions

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83 CNL-AB Opp. 13.

84 Operating Agreement § 3.1(a).

85 *Id*. § 3.1(b).

86 *Id*. § 3.3(a). Section 3.3(e) makes clear that § 3.1(b) constitutes an express limitation of Managing Member's fiduciary duties. *Id*. § 3.3(e).

comport with § 18-1101 of the LLC Act, which expressly permits LLC agreements to limit an LLC's managing entity's fiduciary duties.[87] Delaware law permits such flexibility because of its policy to give maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.[88]

Eastern bases its breach of fiduciary duty claim on Managing Member's bad faith actions in failing to oppose the allegedly collusive January 6 Agreements and CNL-AB's upcoming foreclosure. Under Operating Agreement § 3.3(a), Eastern, therefore, has the burden to show that Managing Member acted in bad faith in facilitating and not opposing the January 6 Agreements and that that action was "material to the matter giving rise to

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[87] *See* 6 *Del. C.* § 1101(c) ("To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing."), 1101(e) ("A limited liability company agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a member, manager or other person to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement; provided, that a limited liability company agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.").

[88] *Id*. § 1101(b).

[Eastern's] loss."[89] Determining whether a party acts in bad faith generally is fact-specific and requires a contextual inquiry into what the parties knew and understood.[90] Bad faith generally requires a culpable mind or a conscious objective to do harm.[91] In particular, "'bad faith' is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will."[92]

With these principles in mind, I find that Eastern has not demonstrated that it is likely to succeed in proving that Managing Member entered[93] or facilitated the January 6 Agreements in bad faith, as is required to sustain its claim under Operating Agreement § 3.3(a). For example, MSREF, essentially a controlling stakeholder in MS Resort,

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89 Operating Agreement § 3.3(a). Because the Operating Agreement does not define the term bad faith, I look to our body of corporate and alternative entity law for guidance.

90 *See In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 127-28 n.63 (Del. Ch. 2009).

91 *See, e.g., In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 66-67 (Del. 2006); *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1208 (Del. 1993); *cf. Amirsaleh v. Bd. of Trade of City of New York, Inc.*, 2009 WL 3756700, at *5 (Del. Ch. Nov. 9, 2009) (noting that in the context of the implied covenant of good faith and fair dealing, "a plaintiff must demonstrate that the defendant's conduct was motivated by a culpable mental state [to prove bad faith]").

92 *Desert Equities, Inc.*, 624 A.2d at 1209 n.16 (citing Black's Law Dictionary 337 (5th ed. 1983).

93 Managing Member was not a party to any of the January 6 Agreements. Thomas Aff. Exs. C-F.

obtained certain contingent co-investment rights under the January 6 Agreements, which included a right to transfer them to other MS Resort stakeholders, including Eastern.[94] Though Eastern declined the opportunity to co-invest, its opportunity to do so supports an inference that Managing Member and MSREF did not try to use the January 6 Agreements as a vehicle to impermissibly strip Eastern of an ability to get future returns on its investment. Moreover, aside from these co-investment rights, in which Eastern could have shared, the January 6 Agreements did not alter the rights or obligations of MS Resort or its stakeholders.[95] Finally, the January 6 Agreements reflect the continuing existence of MSREF's fiduciary duties. Section 3(d)(ii) of the Agreement Regarding Corporate Mezzanine Loans, for example, expressly preserves MSREF's authority to interfere directly or indirectly with the foreclosure if such interference is "required in connection with MSREF's . . . exercise of its respective fiduciary duties (which fiduciary duties shall be determined as of the time such actions are taken and shall otherwise take into consideration all applicable constituents (including without limitation, any applicable creditors) and all other relevant factors with respect to such fiduciary duties)."[96] In addition, MSREF explicitly reserved its right to challenge both a potential strict foreclosure and a foreclosure sale under UCC Article 9.[97] These agreements, therefore,

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94 Quinn Aff. ¶¶ 33-34.

95 *Id*. ¶ 35.

96 Thomas Aff. Ex. C, § 3(d)(ii).

97 *Id*. § 2(c).

do not support an inference, as Eastern intimates, that MSREF and Managing Member, by virtue of the latter's affiliation with the former, were indisputably locked in by the January 6 Agreements to permitting the foreclosure to proceed, in violation of any duty.

Considering that MS Resort stakeholders had equal footing to receive co-investment rights and that the January 6 Agreements did not prevent MSREF, as Managing Member's controlling stakeholder, from exercising its fiduciary duties or taking action to prevent the foreclosure, I am not persuaded that it was Managing Member's conscious objective to do harm to MS Resort or Eastern by facilitating the January 6th Agreement and not opposing such foreclosure. Under these circumstances, it is improbable that Eastern will succeed in demonstrating that Managing Member breached the standard of conduct applicable under § 3.3(a) of the Operating Agreement.[98]

Even if Eastern did demonstrate bad faith, it would likely not succeed in demonstrating that Managing Member's actions were "material" to its lost investment under § 3.3(a) of the Operating Agreement. Even without the January 6 Agreements, CNL-AB would be entitled to foreclose on the Collateral. Indeed, under a public disposition pursuant to UCC § 9-610, no consent from MS Resort or MSREF is necessary to effectuate such a foreclosure. Thus, it is improbable that Eastern would prevail on its

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[98] To the extent Eastern contends that Managing Member's conduct, or that of the other nonmovants, violates the implied covenant of good faith and fair dealing, those claims are waived because Eastern failed meaningfully to brief or argue them in connection with the PI Hearing. *See Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived."); *see also* 6 Del. C. § 1101(e); DRB 8 n.6.

claim that Managing Member's actions breached the Operating Agreement, which is the operative source for the scope of the duties owed by Managing Member to MS Resort stakeholders.

I also find some merit in the TPDs' second ground of opposition: that no breach of fiduciary duty can be found because Managing Member could not cause Eastern to lose any asset of value.[99] Eastern asserts that in exchange for the "bad boy" releases and other benefits for its affiliate, MSREF, in the January 6 Agreements, Managing Member is standing aside so MSREF could cut a deal with CNL-AB, profit from CNL-AB's foreclosure, and leave MS Resort and Eastern with nothing. As discussed further in the next section, Eastern contends that a PI here might permit the Borrower to have an opportunity to reorganize and realize "greater value from the Resort Portfolio" it holds.[100] But, the TPDs credibly assert that Eastern's investment in MS Resort is "hopelessly underwater."[101] Even if CNL-AB does not foreclose on the Collateral, there is no dispute that several billions of dollars of additional debt owed by the Borrower, the Collateral, and MS Resorts II, will mature on or about February 1. The TPDs contend that the equity interests in MS Resort, including Eastern's preferred interests, are junior to and rank behind the $3.1 billion in aggregate Senior Loan and Mezzanine Corporate Loan

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99 TPD Opp. 14.

100 DOB 6.

101 TPD Opp. 14; Puntus Aff. ¶¶ 7-9.

debt.[102] Because the resort properties cannot generate enough income to repay these debts, Eastern could lose the value of its investment in MS Resort when, as is likely, a creditor more senior than CNL-AB forecloses on those properties. Eastern argues in conclusory fashion that it, as a preferred unitholder and sole creditor of MS Resort, is entitled to receive all value in MS Resort before MSREF, a common unitholder, gets anything.[103] This priority ordering, however, ignores the fact that regardless of the January 6 Agreements, neither entity's equity stake in MS Resort was likely to be worth anything due to the presence of creditors, like CNL-AB, with superior rights to the Collateral. Moreover, Eastern has not shown that any meaningful restructuring or other alternative is likely to surface in the next two to three days before such senior creditors would need to be paid off to avoid a foreclosure or the transfer of other rights in the Collateral to such creditors.

I also find that Eastern likely would not prevail on a claim that CNL-AB aided and abetted a breach of fiduciary duty by Managing Member. The reason is simple: because I find it improbable that Managing Member breached its fiduciary duties, Eastern cannot satisfy a necessary element of the test for liability for aiding and abetting a breach of

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102 Puntus Aff. ¶ 3.

103 DRB 2.

fiduciary duty. That is, absent an underlying breach, there can be no liability for aiding and abetting.[104]

Thus, it is questionable whether Eastern has satisfied its burden of demonstrating a probability of succeeding on the merits of its breach of fiduciary duty claims. To the extent it has, it is a very weak showing.

3. Irreparable Harm

A preliminary injunction is an extraordinary remedy that should not be issued in the absence of a clear showing of imminent irreparable harm to the plaintiff.[105] To make such a showing, a plaintiff must demonstrate harm for which he has no adequate remedy at law and that a refusal to issue an injunction would be a denial of justice.[106] The alleged harm must be imminent and genuine, as opposed to speculative.[107] For example, this Court has found a threat of irreparable harm "in cases where an after-the-fact attempt to quantify damages would 'involve [a] costly exercise[ ] in imprecision' and would not provide full, fair, and complete relief for the alleged wrong."[108] A potential harm that

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104 *See Globis P'rs, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *15 (Del. Ch. Nov. 30, 2007).

105 *See Baxter Pharm. Prods., Inc. v. ESI Lederle Inc.*, 1999 WL 160148, at *4 (Del. Ch. Mar. 11, 1999) (noting that a preliminary injunction should be issued only with the full conviction on the part of the court of its urgent necessity).

106 *See Aquila, Inc. v. Quanta Servs., Inc.*, 805 A.2d 196, 208 (Del. Ch. 2002).

107 *Id*.

108 *N.K.S. Distribs., Inc. v. Tigani*, 2010 WL 2367669, at *5 (Del. Ch. June 7, 2010).

may occur in the future, however, does not constitute imminent and irreparable injury for the purposes of a TRO.[109]

Eastern argues that the imminent foreclosure by CNL-AB threatens to irreparably harm it because MS Resort will be left without any direct or indirect assets of value. The result of CNL-AB's foreclosure, according to Eastern, is that MS Resort would be an entity whose sole asset is a chain of empty shell entities that no longer own the resort properties down the ownership chain from the Borrower, thereby making it impossible for MS Resort to satisfy the obligations it owes to Eastern.[110] Eastern contends that if this Court were to delay CNL-AB's foreclosure efforts, the Borrower might have an opportunity to reorganize, either consensually or through federal bankruptcy, and realize "greater value from the Resort Portfolio" it holds.[111] At the PI Hearing, counsel for Eastern asserted that Managing Member could pursue options other than permitting the foreclosure to proceed, including trying to sell its interests in the Borrower or a reorganization in Chapter 11 bankruptcy.[112] An immediate foreclosure, it argues, would preclude those possibilities and render it impossible for this Court to value MS Resort's lost opportunities to recover some value from its interests in the Borrower and Collateral.

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109 *Am. Gen. Corp. v. Unitrin, Inc.*, 1994 WL 512537, at *4 (Del. Ch. Aug. 26, 1994).

110 *See id.*; Countercl. Compl. ¶ 28.

111 DOB 6. Eastern further argues that an appropriate damages award would not be based on MS Resort's liquidation value as of the foreclosure, but rather would need to take into account the prospect for appreciation during and through bankruptcy reorganization. DRB 3.

112 *See* Transcript of January 27, 2011 PI Hearing ("PI Tr."), at 8-11.

This is especially so, according to Eastern, because a fair assessment of MS Resort's value necessarily would need to include the right to control the Borrower and the Collateral, including the right to control whether to seek relief under Chapter 11, which might create "tremendous value" for MS stakeholders.[113]

On the record before me, I am not persuaded that Eastern faces irreparable harm if the foreclosure is permitted to proceed, notwithstanding Eastern's contention that it will lose forever the opportunity to benefit from a potential reorganization of the Borrower. Eastern relies heavily on the importance of control over the Collateral (i.e., through control over the Borrower), which, up until CNL-AB forecloses on the Collateral, is vested in MS Resort.[114] The factual record is not sufficient to support a reasonable, nonspeculative inference that Eastern or any of the TPDs or related entities could forge realistic alternative options for the Borrower to generate enough income from the resort properties to repay the Corporate Mezzanine Loans and the Senior Loans, which all sit before Eastern's equity interest in MS Resort, before a portion of the Senior Loans comes due on February 1. Moreover, to engage in a meaningful restructuring plan of the Borrower, the parties likely would need to invest significant amounts of new capital. So far, Eastern has declined to endorse a path of this sort or to invest additional capital.[115]

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113 DRB 3-5.

114 The argument runs that MS Resort has control over the Borrower and the Collateral so it could pursue alternative options, including bankruptcy, beyond merely accepting CNL-AB's foreclosure on the Collateral.

115 *See* Quinn Aff. ¶¶ 25-27, 34.

MSREF has put up approximately $6 million of its own funds to facilitate CNL-AB's purchase of Loan C from the Original Lender (at a mere 3 cents on the dollar of the $200 million loan),[116] but the Court is unaware of any alternative plan to infuse the Borrower with the large sums it likely would need for a real chance at a turnaround before the Senior Loans come due. I also note that without new capital, the control over the Borrower that Eastern emphasizes is not likely to be worth much.

In addition, as Eastern admits, a possible future turnaround of the Borrower is entirely speculative at this point.[117] Eastern relies on other real estate finance successes resulting from bankruptcy restructurings, but it has not shown through expert testimony or otherwise that there is a sufficient nexus between those situations and this case to render that evidence material.[118] As such, a "lost opportunity" to realize speculative

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116 Through the Co-Investment Agreement, MSREF preserved an opportunity for it, and other MS Resort stakeholders, including Eastern, to invest new capital into CNL-AB after CNL-AB takes title to the Collateral. MSREF offered such an opportunity to Eastern, but Eastern declined. Quinn Aff. ¶ 34. Nevertheless, MSREF has represented that any such opportunity that results from the January 6 Agreements in the future also will be made available to Eastern. PI Tr. 43-44, 51.

117 PI Tr. 13-14 (noting that a restructuring of the Borrower "won't be 10,000 percent, in all likelihood, Your Honor, but we are not asking for 10,000 percent. It may not even be $200 million. But we do know one thing today. There is not a single person here who can tell you what it will be. None of us know. We will find out over the next year or so.").

118 *See* DRB 5 & Ex. A (discussing General Growth Properties).

gains sometime in the future is too ephemeral to serve as the basis for irreparable injury under Delaware law.[119]

Ultimately, what Eastern alleges is essentially a loss in value of its investment in MS Resort. The present value of that investment appears to be relatively small, if anything, especially given the pending foreclosure.[120] In fact, as of approximately September 30, 2010, Eastern itself believed that its investment was worth about $9 millions dollars, despite now claiming a potential value in excess of $200 million.[121] Regardless, this Court regularly values companies and the assets that companies own, especially in the appraisal context under 8 *Del. C.* § 262.[122] Thus, it is possible that this Court could provide an adequate remedy by awarding damages to Eastern based on its

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119 *Aquila, Inc. v. Quanta Servs., Inc.*, 805 A.2d 196, 208 (Del. Ch. 2002) ("The alleged [irreparable] injury must be imminent and genuine, as opposed to speculative.").

120 I am skeptical as to whether Eastern's investment in MS Resort would have any value even if I enjoined the imminent foreclosure. Because Loan B went into default again in December 2010, CNL-AB is ostensibly entitled to enforce its creditor rights against the borrower of that loan (i.e., the Collateral) and foreclose on the collateral securing that loan (i.e., MS Resorts II). This foreclosure would have the same impact on MS Resort, and thus Eastern, as the foreclosure on the Collateral that Eastern seeks to enjoin in this motion. That is, MS Resort still would be deprived of its indirect ownership of the resort hotels; it would just lose such ownership interests by virtue of a foreclosure on a different subsidiary entity in between it and the properties.

121 Dep. of Daniel J. Doherty ("Doherty Dep.") 37-40.

122 *See Matter of Shell Oil Co.*, 607 A.2d 1213, 1218-19 (Del. 1992) ("Once a shareholder perfects his right to appraisal under 8 *Del.C.* § 262(d), the Court of Chancery is required to determine the "fair value" of his shares . . . .").

determination of the value of Eastern's equity with regard to the loss of the resort assets in the foreclosure.

The other form of irreparable harm Eastern alleges is that if the foreclosure is permitted to proceed, MS Resort will be deprived of its only asset of value, an indirect ownership interest in the Collateral, and, accordingly, will be unable to satisfy the obligations it owes to Eastern. I am not persuaded, however, that Eastern will be left without recourse against any entity if the foreclosure is permitted to proceed. Eastern brought suit against not just Managing Member, but also against CNL-AB and MSREF. If the foreclosure occurs, CNL-AB will have title to the Collateral. If I later find that CNL-AB acted improperly in facilitating the foreclosure, either through aiding and abetting a breach of fiduciary duties by Managing Member or otherwise, Eastern potentially could recover damages from CNL-AB. In addition, if the facts alleged by Eastern are true, MSREF still would hold certain limited rights in the Collateral after the foreclosure by virtue of the January 6 Agreements. Thus, even if MSREF had no other asset, which the evidence indicates is not true,[123] it still would hold some indirect interest in the Collateral on which Eastern may levy to satisfy at least a portion of a damages judgment. Thus, I am not convinced that Eastern will be left with no recourse against the

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[123] It appears that MSREF has net assets of "less than" $[redacted]. Dep. of Michael Quinn ("Quinn Dep.") 27-28. That does not necessarily mean, however, that MSREF's assets are insufficient to cover the value of Eastern's investment in MS Resort.

TPDs if it obtains a judgment for damages.[124] In these circumstances, Eastern has not carried its burden of showing it would be irreparably harmed because this Court can issue an adequate remedy following a final determination on the merits.[125]

4. Balance of the Equities

The final factor in adjudicating Eastern's application for a PI is which party a balancing of the equities would favor, if any. Thus, I also must engage in a pragmatic balancing of the equities, for which I have considerable discretion, based on the facts of this case.[126]

Based on the limited record before me, I find the equities favor the denial of a PI. Eastern failed to show a probability of success on the merits of its claim and, more importantly, failed to show that it would suffer irreparable harm if I do not enjoin the upcoming foreclosure. Specifically, Eastern has not persuaded me that any losses from its investment in MS Resort, if that investment has any remaining value, cannot be remedied by an award of money damages. On the other hand, CNL-AB has made a persuasive showing that it would suffer severe detriment if I delay the foreclosure beyond

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[124] In addition, if CNL-AB pursues a public disposition of the Collateral, as opposed to a strict foreclosure, Eastern itself potentially could bid on the Collateral. The Collateral still would be subject to the senior debt that will become due and payable on February 1, but Eastern might have access to more control in the restructuring process than it otherwise would have.

[125] *See Unitrin, Inc.*, 1994 WL 512537, at *4; *see also Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 930 A.2d 104, 131 (Del. Ch. 2007) ("There is no irreparable harm if money damages are adequate to compensate Plaintiffs.").

[126] *In re Holly Farms Corp. S'holders Litig.*, 564 A.2d 342, 348 (Del. Ch. 1989).

February 1, when other, more senior creditors might take actions to inhibit its ability to obtain the Collateral. In that event, CNL-AB might lose forever its chance to foreclose on the Collateral and enjoy a measure of control in this very complicated and fluid situation. The record before me is far from complete and leaves many questions unanswered. That is largely because of Eastern's delay in bringing its claims against CNL-AB and the TPDs until the last minute. In these circumstances, I find that the harm to the latter parties would exceed the harm to CNL-AB and the TPDs that would be caused by the issuance of a PI would exceed the harm sought to be avoided by Eastern.

* * * *

In summary, having considered the parties' filings and arguments at the PI Hearing, I hold that Eastern's claim is barred by laches arising from its unreasonable and prejudicial delay in bringing forth its Counterclaim Complaint. In addition, I hold that Eastern has not carried its burden of proof with respect to the elements required for a preliminary injunction. Eastern has made a very weak showing as to the probability of succeeding on the merits and has failed to persuade me that it faces irreparable harm if I permit the foreclosure to proceed. Finally, the equities in this case favor the nonissuance of injunctive relief because of the importance of CNL-AB's ability to foreclose on the Collateral before February 1. Therefore, I hold that Eastern is not entitled to a preliminary injunction.

III. CONCLUSION

For the reasons stated above, I deny Eastern's renewed motion for a TRO or preliminary injunction.

IT IS SO ORDERED.