IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TRILOGY PORTFOLIO COMPANY, LLC, CANYON VALUE REALIZATION FUND, L.P., THE CANYON VALUE REALIZATION MASTER FUND, L.P., and CANYON BALANCED MASTER FUND, LTD.,	:	
Plaintiffs,	:	
v.	:	C.A. No. 7161-VCP
BROOKFIELD REAL ESTATE FINANCIAL PARTNERS, LLC, BREF ONE, LLC, WELLS FARGO BANK, NATIONAL ASSOCIATION, solely in its capacity as Master Servicer and Special Servicer under the Servicing and Intercreditor Agreement, dated October 24, 2006, and PCCP, LLC,	:	
Defendants.	:	

MEMORANDUM OPINION

Submitted: January 11, 2012
Decided: January 13, 2012

Joel Friedlander, Esq., Jamie L. Brown, Esq., BOUCHARD MARGULES & FRIEDLANDER, P.A., Wilmington, Delaware; Robert Stark, Esq., Sigmund S. Wissner-Gross, Esq., BROWN RUDNICK LLP, New York, New York; *Attorneys for Plaintiffs.*

Donald J. Wolfe, Jr., Esq., Brian C. Ralston, Esq., POTTER ANDERSON & CORROON LLP, Wilmington, Delaware; Philip M. Abelson, Esq., DEWEY & LEBOEUF LLP, New York, New York; *Attorneys for Defendants BREF ONE, LLC and Brookfield Real Estate Financial Partners*.

P. Clarkson Collins, Jr., Esq., Corinne Elise Amato, Esq., Bryan J. Townsend, Esq., MORRIS JAMES LLP, Wilmington, Delaware; Mitchell S. Kaplan, Esq., James S. Yu, Esq., Alexander M. Jeffrey, Jr., Esq., SEYFARTH SHAW LLP, New York, New York; *Attorneys for Defendants Wells Fargo Bank, National Association*.

Danielle Gibbs, Esq., C. Barr Flinn, Esq., Tammy L. Mercer, Esq., YOUNG CONAWAY STARGATT & TAYLOR LLP, Wilmington, Delaware; *Attorneys for PCCP LLC*.

PARSONS, Vice Chancellor.

This action is before the Court on a motion for a temporary restraining order ("TRO") to enjoin the consummation of a proposed restructuring of a mortgage loan secured by certain resort properties in Mexico and the Bahamas. Under the terms of the proposed restructuring, the holder of the junior-most securitized debt participation of an issuer will forgive its share of the principal in exchange for a 100% equity interest in the issuer. Holders of more senior participations claim that the proposed transaction unfairly benefits the junior holder at the expense of more senior holders in direct contravention of the terms of the agreements controlling the debt. The senior holders further claim that if the proposed transaction is allowed to close, they will suffer irreparable harm through the loss of certain rights and guaranties under the new terms of the loan.

In determining whether a TRO should issue to enjoin the proposed transaction, I must determine whether the senior holders have asserted colorable claims that the proposed transaction will violate their contractual and fiduciary rights under the terms of the relevant agreements. If so, I must consider whether the threatened harms to the senior holders if I deny the TRO would be irreparable. Finally, I must consider the consequences of awarding injunctive relief and determine whether the balance of the equities lies in favor of the senior or the junior holders.

For the reasons stated in this Memorandum Opinion, I conclude that the senior holders have stated colorable claims and made a sufficient showing that they would suffer imminent irreparable harm if the proposed transaction were allowed to close. Furthermore, I find that this potential irreparable harm outweighs the harm that would

result to the junior holders by delaying the closing for a few weeks until a preliminary injunction motion can be heard. Therefore, I grant the motion for a TRO.

I. BACKGROUND

A. The Parties

Plaintiffs, Trilogy Portfolio Company, LLC, Canyon Value Realization Fund, L.P., the Canyon Value Realization Master Fund, L.P., and Canyon Balanced Master Fund, Ltd. (collectively, "Trilogy") are holders of the third-most junior participation in a $2.78 billion loan securitization backed by certain properties in the Caribbean and Mexico, including the Atlantis Resort and Casino in the Bahamas (the "Loan").

Defendant Brookfield Real Estate Financial Partners, LLC ("BREF Partners") is a wholly-owned subsidiary of Brookfield Asset Management. BREF Partners is the direct parent of Defendant BREF One, LLC ("BREF One" and, together with BREF Partners, the "Brookfield Defendants"), which holds the junior-most participation under the Loan.

Defendant Wells Fargo Bank ("Wells Fargo") is a national banking association. Wells Fargo was the Master Servicer of the Loan at all times relevant to this litigation and has been the Special Servicer since December 8, 2011.[1]

Defendant Pacific Coast Capital Partners, LLC ("PCCP") holds the second-most junior participation under the Loan.

---

[1] Capitalized terms not otherwise defined are given the meanings ascribed to them under the Participation and Servicing Agreement and the Servicing and Intercreditor Agreement (together, the "Agreements").

B. Facts

This case concerns the restructuring of a $2.78 billion mortgage loan[2] secured by the Atlantis Resort and Casino in the Bahamas (the "Atlantis"). The Atlantis is owned and operated by various subsidiaries of Kerzner International Limited ("Kerzner" or the "Borrower"),[3] a luxury hotel development and management company run by Solomon Kerzner.

In 2006, Kerzner decided to expand the Atlantis through a $3.8 billion LBO. As part of that transaction, the Loan was originated. At or around the time of origination, a portion of the Loan was securitized by its lenders and sold into a real estate mortgage investment conduit, or "REMIC," which is an investment vehicle that holds mortgages and other securities backed by residential and commercial mortgages in trust and issues securities to investors in the secondary market in the form of certificates representing beneficial interests in these trusts.

As part of the securitization, the loan was broken up into two promissory notes (the "A-Notes"), as well as several B-Note participation interests (the "B-Note Participations"). The A-Notes are senior in priority to the B-Note Participations and equal in priority to each other. The B-Note Participations, on the other hand, are broken up into seven junior participations (the "Participations") that have descending priority.

---

[2] Currently, the Loan has approximately $2.5 billion in principal outstanding.

[3] Kerzner controls Paradise Island Holdings Limited, Atlantis Holdings (Bahamas) Limited, and Ocean Club Holdings Limited, the entities which comprise the Borrower obligated under the Loan. For the purposes of this Opinion, I refer to the "Borrower" or "Kerzner" interchangeably.

The priority of the Participations is governed by the Participation and Servicing Agreement (the "Participation Agreement"). Under the Participation Agreement, the holder of the junior-most Participation is entitled to act as the Controlling Holder, which empowers it to appoint and remove the Special Servicer at its discretion.

The duty to service and manage the Loan is assigned to a "Master Servicer," which at all times relevant to this action has been Defendant Wells Fargo. If a "Special Servicing Period" arises, however, such as upon the occurrence of an Event of Default under the Loan, a Special Servicer may be appointed by the Controlling Holder to service the Loan and undertake such actions necessary to deal with the default. For example, during a Special Servicing Period, the Master and Special Servicers can, with the consent of the Controlling Holder, agree to waive a default or extend the maturity date of the Loan. BREF One appointed BREF Partners as the Special Servicer on or about May 2011, but Defendants deny that a Special Servicing Period existed at that time. BREF Partners held that position until it transferred it to Wells Fargo on December 8, 2011. BREF One has been the Controlling Holder at all times relevant to this litigation.[4]

---

[4] Plaintiffs dispute whether BREF One's Participation was "in the money" when it was acting as the Controlling Holder. If it was not, then BREF One would not have been entitled to act as Controlling Holder; instead, that position would have belonged to PCCP, which holds the second-most junior Participation. To the extent Plaintiffs are correct, that would strengthen their request for a TRO. The facts, however, have not yet been developed in any detail. Thus, for the purposes of Plaintiffs' motion for a TRO, I assume that BREF One's Participation was "in the money," but recognize that the Court would benefit from a more developed factual record.

Outside of a Special Servicing Period, the Master and Special Servicer are prohibited from unilaterally making material modifications to the Loan without Lender and Participant consent. Material modifications include, among other things, changes to (1) the amount and timing of loan payments, (2) the release of collateral or guarantees, and (3) the modification of management contracts. During a Special Servicing Period, however, the Special Servicer is empowered to make such modifications that it determines in good faith are "reasonably likely to produce a greater recovery" to all Participants "than would a foreclosure or other liquidation." To make such modifications, however, the Special Servicer must receive the consent of the Controlling Holder.

1. The Default

The severe economic downturn of 2007-08 undermined the success of the Atlantis expansion and Kerzner quickly found itself at risk of defaulting on its obligations under the Loan. The Loan was initially due on September 9, 2008, but Kerzner exercised its unilateral right to extend the maturity date for three consecutive one-year extensions, making its final maturity date September 9, 2011. Even with these extensions, however, Kerzner was unable to repay the Loan by the final maturity date. As a result, the final maturity of the Loan was pushed back to December 30, 2011.[5]

---

[5] While it is not entirely clear from the record before me, it appears that Wells Fargo, as Master Servicer, and BREF Partners, as Special Servicer, extended the maturity date of the Loan with the consent of BREF One, as Controlling Holder.

By late November, it became apparent that Kerzner would not be able to refinance the Loan or negotiate another extension of its maturity. To avoid an outright default, Kerzner agreed to enter into a deal in which it would transfer 100% of its equity interest in the Borrower to BREF One in exchange for the elimination of the principal amount held by BREF One, along with other modifications to the Loan (the "Proposed Transaction").

A term sheet for the Proposed Transaction was circulated to the Plaintiffs on November 29, 2011. On December 7, Plaintiffs sent Wells Fargo, BREF Partners, and BREF One a letter explaining why they believed the Proposed Transaction to be unfair and improper. Undeterred, Defendants continued to move toward closing the Proposed Transaction, perhaps, as early as January 6, 2012. As a result, Plaintiffs filed the Complaint in this action on January 4, 2012, and requested a TRO.

2. The Proposed Transaction

Under the terms of the Proposed Transaction, BREF One, the junior-most creditor on the Loan, will forgive the outstanding principal owed to it, approximately $175 million, in exchange for 100% of the equity in the Borrower, as well as interests in certain joint ventures in Mexico and the Bahamas. In addition, Kerzner will be released as guarantor from various obligations owed by the Borrower to the Participants under the Loan. Although most of these guaranties will remain in place, BREF One will be substituted for Kerzner as guarantor.

As guarantor, BREF One will be required to guarantee, among other things: (1) losses incurred by the Participants as a result of certain bad faith or fraudulent actions of

the Borrower; (2) losses arising from the voluntary commencement of any bankruptcy or insolvency proceeding; and (3) losses resulting from the potentially substantial transfer taxes due and payable to the Bahamian government in the event of a foreclosure or other disposition of the Atlantis. Unlike Kerzner, however, BREF One will not be required to maintain a minimum net worth of $500 million at all times and, in fact, there will be nothing to prevent BREF One from liquidating its assets at any time. Finally, as it relates to guarantees, the parent of Kerzner International, Kerzner Holdings Ltd., as well as some of its equity sponsors, also will be released from certain guarantees of damages to the Property resulting from certain windstorms.

Although it will no longer own the equity of the Borrower, Kerzner will be retained as manager of the Atlantis under new contracts, which Plaintiffs allege provide for substantial fee increases to Kerzner. The Borrower also will be liable to pay all the Bahamian transfer taxes on the Proposed Transaction in exchange for an agreement from Kerzner to reimburse the Borrower for those payments over a multi-year period. Finally, material modifications will be made to the Loan, including an extension of its maturity date until September 9, 2013, and a reduction in the protection offered by the interest rate cap provided for under the Loan.

C. Procedural History

On January 4, 2012, Plaintiffs filed the Verified Complaint in this action, along with their motions for a TRO and expedited proceedings. Defendants Wells Fargo, PCCP, and the Brookfield Defendants each responded separately on January 9. Only the

Brookfield Defendants opposed Plaintiffs' motion for a TRO. Plaintiffs submitted their Reply on January 10 and the Court heard argument on the motion on January 11, 2012.

D. Parties' Contentions

Plaintiffs argue that the terms of the Proposed Transaction are unfair to the rest of the Participants and that BREF One abused its position as Controlling Holder by negotiating a deal that will provide it with a potentially valuable equity interest in the Borrower while transferring substantial risk to the rest of the Participants. Plaintiffs further claim that the Proposed Transaction will violate their contractual rights under the Participation and Servicing Agreements and will also result in various breaches of fiduciary duties owed to it by the Special Servicer, which is currently Wells Fargo. Although Defendants Wells Fargo and PCCP generally support the Proposed Transaction, they have not opposed the motion for a TRO.[6]

II. ANALYSIS

A. TRO Standard

A TRO is a special remedy of short duration designed primarily to prevent imminent irreparable injury pending a preliminary injunction or final resolution of a matter.[7] "To obtain such an order, a party must demonstrate three things: '(i) the

---

[6] Wells Fargo has requested that, if a TRO is granted, it include provisions enabling Wells Fargo to continue ongoing work with respect to the Proposed Transaction short of consummation or closing, including, but not limited to, due diligence, supplemental consent requests, and analysis of the Proposed Transaction.

[7] *Arkema Inc. v. Dow Chem. Co.*, 2010 WL 2334386, at *3 (Del. Ch. May 25, 2010) (quoting *CBOT Hldgs., Inc. v. Chicago Bd. Options Exch., Inc.*, 2007 WL 2296356, at *3 (Del. Ch. Aug. 3, 2007)).

existence of a colorable claim, (ii) the [existence of] irreparable harm . . . if relief is not granted, and (iii) a balancing of hardships favoring the moving party.'"[8] When deciding whether to issue a TRO, the Court's focus is less upon the merits of the plaintiff's legal claim than on the relative harm to the various parties if the remedy is or is not granted.[9] Indeed, if imminent irreparable harm exists, "the remedy ought ordinarily to issue" unless the claim is frivolous, granting the remedy would cause greater harm than denying it, or the plaintiff has contributed in some way to the emergency nature of the need for relief.[10]

This "less exacting merits-based scrutiny"[11] derives from a realistic appreciation of the short-term duration of the remedy and the limited factual record generally available at such an early stage in the proceeding.[12] Where, however, the factual record is more fully developed, "the traditional temporary restraining order standard does [not fully] apply," and the Court considers whether there is a probability of success on the merits.[13]

---

8 *Id.* (quoting *CBOT Hldgs., Inc.*, 2007 WL 2296356, at *3); *see also Newman v. Warren*, 684 A.2d 1239, 1244 (Del. Ch. 1996).

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

10 *Id.* at *3 (footnote omitted).

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

12 *Cottle*, 1988 WL 10415, at *2.

13 *CBOT Hldgs., Inc.*, 2007 WL 2296356, at *3 (citing *Insituform Techs., Inc. v. Insitu, Inc.*, 1999 WL 240347, at *7 (Del. Ch. Apr. 19, 1999) and *Cochran v. Supinski*, 794 A.2d 1239, 1247 (Del. Ch. 2001)).

1. The Existence of a Colorable Claim

At this juncture, Defendants do not challenge the existence of a colorable claim for the purposes of this motion and instead have reserved their rights to challenge the relative merits of Plaintiffs' claims at the preliminary injunction stage of these proceedings. Therefore, I discuss only briefly why I find that Plaintiffs have alleged colorable claims.

In their Verified Complaint, Plaintiffs assert various claims for breach of contract under the Agreements against all Defendants, as well as breach of fiduciary duties against Wells Fargo, and a claim for aiding and abetting breach of fiduciary duties against PCCP and the Brookfield Defendants. Plaintiffs also seek declaratory judgments as to each of their breach of contract claims.

As to their breach of contract claims, Plaintiffs assert that the Proposed Transaction will violate their rights under the Agreements by, among other things: (1) granting the Brookfield Defendants equity interests in the Borrower ahead of more senior creditors;[14] (2) releasing collateral securing the loan prior to a determination by the Special Servicer of how that will affect the Borrower's ability to repay the Loan;[15] (3) authorizing a conversion of property that is not for the benefit of all Participants;[16] (4) subordinating the payment of the Loan to the payment of certain management fees to

---

[14] Participation Agreement §§ 3, 6.

[15] Servicing Agreement § 2.20(b)(iv).

[16] Servicing Agreement § 2.7.

Kerzner;[17] and (5) changing the amount or timing of payments due to a junior holder without such junior holder's consent by extending the Loan maturity date until September 9, 2013.[18]

As to Wells Fargo, Plaintiffs allege that, by consenting to the Proposed Transaction, Wells Fargo breached its contractual obligations to Plaintiffs because the terms of the Proposed Transaction violate the Accepted Servicing Practices that §§ 2.1 and 7.2(b) of the Servicing Agreement require Wells Fargo to follow.[19]

Plaintiffs also assert breaches of fiduciary duties against Wells Fargo in its capacity as Master and Special Servicer because § 2.1 of the Servicing Agreement allegedly establishes an agency relationship between the Master and Special Servicers and the Participants. Plaintiffs claim that Wells Fargo breached those duties by consenting to the Proposed Transaction because the Proposed Transaction benefits the other Defendants at the expense or to the exclusion of Plaintiffs and other senior

---

[17] Sections 2 and 5 of certain documents entitled Assignment of Management Agreement and Subordination of Management Fees.

[18] Participation Agreement § 4.6(a).

[19] Specifically, Plaintiffs claim that Wells Fargo will breach Accepted Servicing Practices by: (1) failing to administer the Loan in the interests of all Lenders and Participants; (2) disregarding the subordinate nature of BREF One's claims; (3) failing to use "good faith and reasonable judgment" in balancing the Participants' interests; and (4) causing Events of Default to occur under the Agreements. Plaintiffs also claim that Wells Fargo was not properly appointed as Special Servicer because when BREF One appointed Wells Fargo to that position on December 8, 2011, BREF One was an affiliate of the Borrower and therefore prohibited from acting as Directing Holder under § 19(a) of the Participation Agreement.

Participants. Plaintiffs also claim that, by participating in the Proposed Transaction, the Brookfield Defendants and PCCP are aiding and abetting Wells Fargo's breach of fiduciary duty.

Determining whether Plaintiffs have alleged a colorable claim requires this Court to examine closely and interpret a number of specific provisions of the Agreements governing the Loan. Having considered those provisions, I cannot say that Plaintiffs' interpretations of the disputed contractual provisions are frivolous or so lacking in merit as to make it impossible for Plaintiffs to prevail on their claims at a later stage.

For example, Plaintiffs contend that the Proposed Transaction would violate §§ 3 and 5 of the Participation Agreement by subordinating the senior Participants' right to payment to BREF One in that it would enable the transfer of equity interests in the Borrower to BREF One before those interests were applied to the payment of senior creditors. Under § 3 of the Participation Agreement, senior Participants are entitled to receive payments of "interest, principal, *and other amounts*" prior to more junior Participants.[20] The term "other amounts," however, is not defined. Therefore, I am unable to conclude, at this preliminary stage, that the transfer of equity interests to BREF One in exchange for the extinguishment of BREF One's Participation cannot conceivably constitute the payment of "other amounts" that would be due first to more senior Participants and, therefore, violate the priority scheme outlined under § 3.

---

[20] Participation Agreement § 3 (emphasis added).

The resolution of this claim and others like it asserted by Plaintiffs would benefit from further development of the factual and legal record. Therefore, I find that Plaintiffs have stated sufficiently colorable claims to support a TRO, assuming they meet the other requirements for such an order.

2. Irreparable Harm

Preliminary injunctive relief in the form of a TRO or otherwise is an extraordinary remedy that should not be issued in the absence of a clear showing of imminent irreparable harm to the moving party.[21] To make such a showing, a plaintiff must demonstrate harm for which she has no adequate remedy at law and that refusal to issue an injunction would be a denial of justice.[22] The alleged harm must be imminent and genuine, as opposed to speculative.[23] This Court has found a threat of irreparable harm, for example, "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."[24] Potential harm that may occur in the future, however, does not constitute imminent and irreparable injury for the purposes of a TRO or preliminary injunction.[25]

---

[21] *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).

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

[23] *Id*.

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

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

Plaintiffs allege that the Proposed Transaction will irreparably harm their interests by modifying key, contractually-negotiated protections and guarantees under the Agreements, thereby affording them less security and decreasing the probability that they will be paid back in full on their investment. Moreover, Plaintiffs aver that if the Proposed Transaction is allowed to close, they will be deprived forever of "their distinctive rights to receive distributions and payments according to a priority scheme, prior to junior Participants . . . and to have decisions made by the Special Servicer for the benefit of all Participants."[26] Because the Proposed Transaction allegedly violates these and other rights, Plaintiffs claim they would suffer immediate and irreparable harm if the Proposed Transaction were permitted to close before they had an opportunity to take any discovery and be heard on a preliminary injunction motion.

In opposition, Defendants characterize the alleged harm to Plaintiffs from the Proposed Transaction as solely an increased risk that the Borrower will be unable to meet its obligations to Plaintiffs under the Loan at some point in the future. According to Defendants, this alleged "harm" is speculative and, to the extent it ever materializes, could be remedied by an award of post-closing damages. "At bottom," Defendants assert, "Plaintiffs' argument is nothing more than speculation that, as a result of the Transaction, their investment will face greater risk, and that the risk itself constitutes irreparable injury."[27] Relying on this Court's decisions in *Angelo, Gordon & Co., L.P. v.*

---

[26] Pls.' Reply Br. 11-12.

[27] Defs.' Ans. Br. 11.

Allied Riser Communications Corp.,[28] and *Roseton OL, LLC v. Dynegy Holdings, Inc.*,[29] Defendants claim the mere increase in the enterprise risk of an entity following a legitimate business transaction that makes it more likely that the entity will be unprofitable and unable to pay damages in the future is, at best, a speculative harm. Hence, they deny that it constitutes a threat of imminent irreparable harm. Finally, Defendants make the conclusory assertion that the Proposed Transaction will benefit all Participants, including Plaintiffs, and avoid the undesirable result of foreclosure on the Property, which would leave all parties worse off.

Having considered the parties' respective arguments and the limited record before me, I find that Plaintiffs have made a sufficient showing of a threat of irreparable harm. Although I agree with Defendants that *Angelo, Gordon* and *Dynegy* support the proposition that increased business risk resulting from a legitimate business transaction, standing alone, will not suffice to show irreparable harm, the irreparable harm claimed here is distinguishable from those cases. Although Plaintiffs do allege that the Proposed Transaction may damage their ability to receive future payments, as was the case in *Angelo, Gordon*,[30] or seek monetary damages, as was the case in *Dynegy*, those harms are

---

[28] 805 A.2d 221 (Del. Ch. 2002).

[29] 2011 WL 3275965 (Del. Ch. July 29, 2011).

[30] In *Angelo, Gordon*, Vice Chancellor Lamb held that the mere possibility that a proposed merger would "not prove to be a profitable enterprise" and result in the inability of the defendants to pay money damages in the future did not constitute irreparable harm. 805 A.2d at 231. In denying a motion for a preliminary injunction, the Vice Chancellor stated that he could not "conclude that this possibility alone justifies the entry of an injunction against the Merger because the

secondary to the underlying threat that the Proposed Transaction will invert the bargained-for priority of the Loan Agreement and significantly advantage BREF One, the junior-most Participant, at the expense of more senior Participants.

Thus, if the Proposed Transaction is allowed to close, Plaintiffs stand to lose the benefit of contractually-negotiated rights related to their priority relative to other Participants, as well as contractual rights related to their relationship with the Borrower. These rights are valuable to Plaintiffs not only because they increase the likelihood that Plaintiffs will be repaid the principal and interest owed to them under the Loan, but also because they provide a certain degree of leverage relative to other Participants and the Borrower in situations where, as here, modifications to the Loan are being negotiated. As a result, the risk to Plaintiffs from the Proposed Transaction is not simply that their investment may be less secure, but also that Plaintiffs will be deprived of the opportunity to assert these rights as leverage against the other Participants and the Borrower in modifying the Loan and reshaping the commercial relationship between the Participants and the Borrower.

In that respect, I find the situation here to be analogous to *Telcom-SNI Investors, L.L.C. v. Sorrento Networks, Inc.*[31] In that case, this Court held that a defendant's disregard of its preferred shareholders contractually-bargained for protective rights in attempting to incur additional debt and issue additional shares in contravention of the

---

injury it contemplates is both speculative and will not result from the Merger itself but will only be felt, if at all, with the passage of time after the Merger." *Id.*

[31] 2011 WL 1117505 (Del. Ch. Sept. 7, 2001), *aff'd*, 790 A.2d 477 (Del. 2002).

company's certificate of incorporation threatened irreparable harm because such rights were "designed to provide, not only protection for [the plaintiffs'] investment, but also leverage in negotiations regarding the future of [the defendant-company]."[32] The Court went on to find that "[t]he denial of the leverage which [the plaintiffs] reasonably believed they had secured through their bargain restructures the commercial relationship between [the plaintiffs] and [the defendant-company] and constitutes a harm that cannot be measured by money damages."[33]

Similarly, in *Boesky v. CX Partners, L.P.*,[34] in granting an injunction against a partial liquidation of a partnership as to some partners, but not others, this Court held that a provision in the partnership agreement requiring that "[n]o limited partner shall have the right to . . . receive . . . priority over any other limited partner, in return of his capital or in respect of any other distribution" created a right "not to a return of capital but rather . . . a right in each partner to be treated *pari passu* with others as to distributions."[35] The Court further held that the right to *pari passu* treatment provided the partners with the "distinctive right" of leverage, the loss of which could not adequately be compensated by monetary damages.[36]

---

[32] *Id.* at *10.

[33] *Id.*

[34] 1988 WL 42250 (Del. Ch. Apr. 28, 1988).

[35] *Id.* at *13.

[36] *Id.*

Plaintiffs assert they are entitled to be treated with due regard to their priority under the Loan and that the Proposed Transaction would disregard that priority by providing unique benefits to BREF One, the junior-most Participant, at the expense of other, more senior Participants. Specifically, Plaintiffs claim that the Proposed Transaction negotiated between Kerzner and BREF One substantially alters the commercial relationship between the Participants and the Borrower in a way that benefits BREF One and gives it valuable leverage relative to the other Participants by providing it with exclusive control over the disposition of the Borrower.

For example, Plaintiffs assert that if the deal is allowed to close, Kerzner will be released from all of its major guaranty obligations to Plaintiffs and replaced by BREF One. Unlike Kerzner, however, BREF One will not be required to maintain a net worth of at least $500 million and apparently would be permitted to liquidate its assets at any time. In fact, Plaintiffs allege that BREF One currently is in the process of winding down and expects to complete the liquidation of its assets by 2014. Because Plaintiffs have not yet had any discovery, the Court is in no position to assess the accuracy of that allegation. Consequently, I cannot rely on Defendants' conclusory denial of Plaintiffs claim that, regardless of whether BREF One currently has a greater ability to guaranty the obligations of the Borrower, the Proposed Transaction provides no assurance that BREF One's ability to cover the Borrower's obligations will persist and that, indeed, all of BREF One's guarantees may soon be worthless. Similar uncertainties exist as to Plaintiffs' further claims, which Defendants apparently dispute, that the Proposed Transaction will eliminate certain guarantees owed to Plaintiffs under the current terms of

the Loan, including the guarantee of any losses or damages resulting from: (1) the payment of Bahamian transfer taxes on the Property in the event of a foreclosure, which could be substantial;[37] (2) a windstorm or hurricane; and (3) the initiation bankruptcy proceedings.[38]

The overall effect of the new terms of the Proposed Transaction, Plaintiffs argue, would be to make it easier for BREF One, as the 100% equity owner of the Borrower, to force the Borrower into a voluntary bankruptcy so that BREF One could use its position as the equity owner of the Borrower to "cram down or otherwise impair the interests of the Lenders and Participants in the Loan to the benefit of the Brookfield Defendants."[39] Thus, Plaintiffs assert that the Proposed Transaction threatens to "restructure[] the commercial relationship" between BREF One and the other Participants in a way that was neither contemplated nor bargained-for under the Agreements.[40]

Finally, although Defendants trumpet the merits of the Proposed Transaction over a foreclosure on the Property, their position is not very persuasive because the total range

---

37 The Brookfield Defendants assert in their briefs that a foreclosure on the Property valued at $2.5 billion could result in a stamp tax at the statutory rate of 12%. At that rate, the stamp tax for a foreclosure could be as high as $300 million.

38 Defendants allege that BREF One will be required to guarantee damages to Plaintiffs arising from bankruptcy proceedings up to a cap of 20% of the outstanding value of the Loan. Defendants failed to cite to anything in support of this assertion, however.

39 Pls.' Opening Br. 13.

40 For example, § 2.1 of the Servicing Agreement requires the Master and Special Servicers to administer the Loan on behalf of all Participants as a "collective whole, giving due regard to the subordinate nature of the related Junior Participation Interest and any related Subordinate Companion Loans . . . ."

of restructuring outcomes in this situation is not binary. Thus far, Defendants have failed to identify any contractual provision or legal principal that would explain why they alone should enjoy the opportunity to assume control of the Borrower as part of the proposed restructuring of the Loan. As Plaintiffs' fervent opposition to the Proposed Transaction illustrates, the opportunity to benefit from the upside potential of the Borrower may be a uniquely valuable asset in which the more senior Participants may have a legitimate claim to participate. Indeed, by entering into a Participation other than the most junior participation held by BREF One, each senior Participant presumably thought it was acquiring the opportunity described in the Agreements to receive the benefits of the Loan in order of their priority. If the Proposed Transaction is allowed to close, the Participants senior to BREF One permanently may be deprived of their opportunity to receive the Borrower's equity and participate in the management and upside potential of the Borrower, which may prove lucrative in the future.

For all of these reasons, I find that Plaintiffs have shown that they are likely to suffer imminent irreparable harm if a TRO along the lines they have requested is not granted.

3. Balance of the Equities

In considering the balance of the equities regarding this motion, I find that the balance weighs heavily in favor of Plaintiffs. As discussed *supra*, the closing of the Proposed Transaction threatens to irreparably harm Plaintiffs, whereas Defendants have advanced nothing but conclusory allegations that a TRO would undermine the Borrower's continuing ability to meet its obligations under the Loan. Defendants have

made no showing as to why delaying the closing for a few weeks would be detrimental to their interests. In fact, the Brookfield Defendants are alone in their opposition to the TRO. Defendant Wells Fargo does not oppose the motion and Defendant PCCP took no position on it, stating in a letter to the Court only that it will "move promptly to dismiss the complaint or for summary judgment on the ground that it is not properly a party to this litigation."[41] In addition, I note that the Loan maturity date repeatedly has been pushed back since September 9, 2011 and that Wells Fargo stated in its letter to the Court that analyses and review of the Proposed Transaction are still ongoing. Therefore, I find that the threat of irreparable harm to Plaintiffs if the Proposed Transaction is allowed to close outweighs any harm Defendants might suffer from a brief delay of a few weeks until a preliminary injunction hearing can be held.

In summary, I find that Plaintiffs have demonstrated that all these elements for a TRO exist in this case. Accordingly, I hereby grant their motion for a temporary restraining order.

4. Posting of a Bond

Finally, as Defendants correctly point out, Court of Chancery Rule 65(c) states that "no restraining order . . . shall issue except upon the giving of security by the applicant, in such sum as the Court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." "[F]or a substantial bond to be required" as

---

[41] Letter from Danielle Gibbs, Esq. to V.C. Parsons, Docket Item No. 19 (Jan. 9, 2012).

Defendants seek, however, "it should be supported either by facts of record or by some realistic as opposed to a yet-unproven legal theory from which damages could flow to the party enjoined."[42]

Here, Defendants have not submitted any factual evidence to support their contention that the bond should be set at an amount equivalent to the costs associated with a foreclosure on the Property. Moreover, because there is no evidence that the risk and cost of delaying the closing of the Proposed Transaction until sometime between January 17 and February 10, 2012, as the Court has proposed for a preliminary injunction hearing, would be substantial, I reject Defendant's bald contention that bond should be set at $230 million. Instead, I find that a relatively modest bond of $100,000 secured should be required in the circumstances of this case, which include Defendants' complaints that Plaintiffs seek plainly unreasonable and unduly burdensome discovery and otherwise will subject Defendants to potential losses, if the TRO is providently granted.

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, I grant Plaintiffs' motion for a temporary restraining order enjoining the closing of the Proposed Transaction until after a hearing for a preliminary injunction can be held. The hearing will be held at 10:00 a.m. on January 27, 2012 unless the parties agree to a later date convenient to the Court. Plaintiffs shall post a secured bond in the amount of $100,000 in connection with the

---

[42] *Petty v. Pennytech Papers, Inc.*, 1975 WL 7481 (Del. Ch. Sept. 24, 1975).

TRO. The TRO is effective immediately. Counsel for Plaintiffs shall submit on notice within two business days a proposed form of TRO in accordance with this Memorandum Opinion.[43]

IT IS SO ORDERED.

---

43 The proposed Order should incorporate the exceptions referred to in the Wells Fargo Answering Statement.