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Re: *BMEF San Diego, L.L.C. v. Gray East Village San Diego L.L.C.*
C.A. No. 9963-VCN
Date Submitted: September 25, 2014

Dear Counsel:

Plaintiffs BMEF San Diego, L.L.C. (“BMEF”) and East Village San Diego, L.L.C. (the “L.L.C.”) have moved for an expedited trial on the merits in December 2014 because of a dispute with Defendants Gray East Village San Diego L.L.C. (“Gray East”) and Gray California Architects, Inc., which has made the lender for the L.L.C.’s \$146 million project in San Diego, California unwilling to lend essential funds. A judgment is needed by mid-January 2015 in order to avoid the loss of a valuable municipal project approval as a result of the inability to pay an

\$8 million fee for an essential permit that will otherwise lapse.¹ Not only would seeking a new approval cause delay, but also the project costs would escalate because of modifications in the interim to the applicable building code.²

The dispute between the Plaintiffs and Gray East has been well-known since at least the beginning of 2014.³ Indeed, Gray East, which had served as the managing member of the L.L.C. for the project, has essentially been eliminated from that position. The dispute between Plaintiffs and Defendants is largely about cash: whether the Plaintiffs owe Defendants and whether the Defendants owe the Plaintiffs. Although the Plaintiffs filed this action in July, they did not move to expedite until the latter half of September. There is a non-monetary aspect to the relief which the Plaintiffs seek: BMEF, as anticipated in its agreement with Gray

¹ The project is ready for construction. Apparently, the only remaining obstacle is funding the construction loan of almost \$100 million.

² In addition, the housing and lending markets might change, and carrying costs would continue to accumulate.

³ BMEF implicitly concedes the long-running dispute. “BMEF’s complaint seeks . . . a declaration that Gray does not possess any of the rights underlying the claims *it had long been threatening to assert.*” Pls.’ Mot. for Expedited Proceedings ¶ 5 (emphasis added).

East, has recalculated capital percentages.⁴ The adjustment of capital percentages is necessary, according to BMEF, because of various defaults by Gray East.⁵

If this were simply a dispute between Plaintiffs and Defendants, expediting this proceeding would not be appropriate. Money is the principal topic of their dispute, and it is unclear why the timing of when the percentages are effectively reallocated matters. Moreover, because of the delay between knowing of the dispute and seeking expedition of the litigation, the Plaintiffs have simply waited too long. Whether characterized as laches or simply undue delay, imposition of the burdens of expedited proceedings upon the Defendants and the Court cannot be reconciled with Plaintiffs' failure to proceed with alacrity.

The question presented by the Plaintiffs, however, is different.⁶ The exigency that is the motivating force is the conduct of a private third party, *i.e.*, the

⁴ Based on the Complaint, the bulk of the litigation would be directed to BMEF's damages claims. The purpose behind that approach is less than clear because the Plaintiffs concede that Gray East, a single-purpose entity, is not likely to pay any judgment.

⁵ Gray East's membership interest would be reduced from 10 percent to less than one percent.

⁶ Motions to expedite require a showing of a colorable claim and irreparable harm. *See, e.g., Giammargo v. Snapple Bev. Corp.*, 1994 WL 672698, at *2 (Del. Ch.

project lender. The project lender has known of problems between Plaintiffs and Defendants for some significant time; the lender did not appear to be that troubled by the differing positions; indeed, the lender's recent refusal to fund the project appears to have come as something of a surprise to the Plaintiffs.

The lender, which is not a party to this litigation, has not had the opportunity to explain why it has taken the steps that it has taken. The Plaintiffs have done little to justify to the Court why these time-sensitive problems occurred at the behest of the lender. The timing of the lender's change of heart with respect to its funding commitment is not clear. The Plaintiffs refer to the timing of that decision

Nov. 15, 1994). BMEF's contentions regarding Gray East's defaults, that Defendants owe significant sums, that Defendants' claims are not likely of success, and that revising capital percentages is appropriate are colorable. The harm caused directly by Defendants' conduct is not irreparable, and the lack of funding is not a placeholder for irreparable harm. Irreparable harm is at stake, however, and it arises from the conduct of the private lender in refusing to fund the project. That refusal to fund is based on the dispute between Plaintiffs and Defendants. Thus, Defendants' conduct seems to have motivated the potential harm and, in that sense, and only in that sense, the Defendants are indirectly responsible for the attendant risk of irreparable harm.

under the label of “recently.”⁷ Thus, it is not clear how long the Plaintiffs have known of the lender’s refusal to fund or, possibly, its growing reluctance to fund.⁸ In short, the Plaintiffs have not fully described why they are in the position with their lender that they now find themselves.⁹

⁷ *Id.* ¶ 27; Aff. of Shereen P. Jones in Supp. of Pls.’ Mot. for Expedited Proceedings ¶ 10 (“[The lender] has now informed BMEF that it will not fund the loan until the resolution of claims threatened by Gray.”). BMEF concedes that threats of litigation by Gray East date back until April 2014. *Id.* ¶ 9.

⁸ Plaintiffs also have not set forth in any detail the potential for alternative financing.

⁹ In *Brookstone Partners Acquisition XVI, LLC v. Tanus*, the Court denied the plaintiff’s motion to expedite because of its unreasonable delay in seeking expedition after filing the action. 2012 WL 3711410, at *1 (Del. Ch. Aug. 22, 2012). Plaintiff argued that it did not consider expedition necessary when it initiated its action because it was relying on certain assurances it believed defendant to have made that defendant would renew an agreement. However, the Court found that by the time the plaintiff had filed its complaint, it was aware of facts indicating that defendant might act out of self-interest to fail to renew the agreement. Because plaintiff was aware of the facts suggesting that defendant might take certain action, the plaintiff was also aware of the facts that should have caused it to have moved to expedite.

Here, BMEF had been negotiating with the lender for many months under the specter of Gray East’s threatened lawsuit. Although BMEF claims that it was not until “recently” that the lender conditioned financing on the resolution of the problems between Plaintiffs and Defendants, BMEF had known that its issues with Defendants might affect its agreement with its lender. While the lender may have recently drawn a hard line, the present predicament does not seem to have been unforeseeable.

Perhaps the private party's recent change in position with respect to funding the loan is not a sufficient basis for granting the motion to expedite, but there is another problem for which the Plaintiffs shoulder a substantial responsibility. It does not appear that it is practicable to have this case ready for trial in less than three months and have it decided in less than four months.¹⁰ Launching an expedited proceeding with trial and final judgment as the objectives on such a limited timeframe is cause for concern. In addition, the Plaintiffs have not made clear exactly what it is that the lender demands. Whether a decision by the Court would suffice or whether an unappealable, final decision is necessary is not clear. Coming to judgment and allowing the appeal period to expire would be impossible as a practical matter in the time that the Plaintiffs have allowed the Defendants and the Court.

In conclusion, there is too much uncertainty as to why the demand for expedition on such a compressed schedule has become necessary, and the Plaintiffs have failed to meet their burden of demonstrating why the commitment of

¹⁰ In contrast, addressing a traditional preliminary injunction application in that time period would be reasonable.

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substantial resources to reach final judgment on an unreasonably tight schedule is warranted.¹¹

Accordingly, Plaintiffs' Motion to Expedite is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc: Register in Chancery-K

¹¹ Perhaps the burdens of a trial in late January 2015 or February 2015 would be warranted, but that is not what the Plaintiffs have sought.