Hearing Date: December 16, 2010 at 9:45 a.m. (Eastern Time)
Objection Deadline: December 9, 2010 at 4:00 p.m. (Eastern Time)

MCKOOL SMITH P.C.
Peter S. Goodman
One Bryant Park, 47th Floor
New York, NY 10036
Telephone: (212) 402-9400

Lew LeClair (*pro hac pending*)
Robert Manley (*pro hac pending*)
300 Crescent Court, Suite 1500
Dallas, TX 75201
Telephone: (214) 978-4000

Basil A. Umari (*pro hac vice*)
600 Travis, Suite 7000
Houston, TX 77002
Telephone: (713) 485-7300

Counsel for John DeGroote Services, LLC,
as Liquidating Trustee to the
BearingPoint, Inc. Liquidating Trust

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
BearingPoint, Inc., et al.,	)	Case No. 09-10691 (REG)
Debtors.	)	(Jointly Administered)

MOTION OF LIQUIDATING TRUSTEE FOR LIMITED RELIEF FROM ARTICLE XI OF DEBTORS' MODIFIED SECOND AMENDED JOINT PLAN AND SECTIONS 34(C) AND 39 OF CONFIRMATION ORDER AS TO CERTAIN FORMER DIRECTORS

TABLE OF CONTENTS

I. RELIEF REQUESTED 1

II. JURISDICTION AND VENUE 2

III. BACKGROUND 2

IV. BASIS FOR RELIEF REQUESTED.. 11

TABLE OF AUTHORITIES

Cases

Brown v. Brewer, slip. op., No. CV 06-3731-GHK, 2010 WL 2472182 (C.D. Cal. June 17, 2010) 9, 11
Gantler v. Stephens, 965 A.2d 695, 708-709 (Del. 2009) 9
In re CBI Holding Co., 311 B.R. 350 (S.D.N.Y. 2004)¸ *aff'd in part, rev'd in part on other grounds*, 529 F.3d 432 (2d Cir. 2008) 10
In re Marshall, 600 F.3d 1037, 1059 (9th Cir. 2010) 10
In re Pacor, Inc., 743 F.2d 984 (3d Cir. 1984) 10
Lyondell Chemical Co. v. Ryan, 970 A.2d 235, 243-44 (Del. Supr. 2009) 9
Revlon v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del.1986) 9
Stern v. Marshall, No. 10-179, 2010 WL 3053869 (U.S. Sept. 28, 2010) 10

Statutes and Rules

11 U.S.C. § 105(a) 1, 2, 4
11 U.S.C. § 1142 4
28 U.S.C. § 157(b)(2) 2
28 U.S.C. § 157(c) 10
28 U.S.C. §§ 1408 and 1409 2
28 U.S.C. §§ 157 and 1334 2
Fed. R. Civ. P. 60(b)(6) 1
Federal Rule 9024 of Bankruptcy Procedure 1, 2

Pursuant to section 105(a) of the Bankruptcy Code, or alternatively through Federal Rule 9024 of Bankruptcy Procedure (incorporating Fed. R. Civ. P. 60(b)(6)), John DeGroote Services, LLC, as liquidating trustee (the "**Trustee**") of the BearingPoint, Inc. Liquidating Trust (the "**Liquidating Trust**"), submits this motion (the "**Motion**") for entry of an order granting it limited relief from Article XI, ¶ p of Debtors' Modified Second Amended Joint Plan Under Chapter 11 of the Bankruptcy Code (the "**Plan**") and paragraphs 34(c) and 39 of this Court's Confirmation Order, entered December 22, 2009 (the "**Confirmation Order**"), and granting the Trustee leave to file suit against certain former directors of BearingPoint, Inc. in another available jurisdiction. This Motion is filed in tandem with a motion (the "**CEO Motion**") filed by the Trustee seeking such relief as to BearingPoint's former Chief Executive Officer.[1] In support of this Motion, the Trustee relies on the declaration of Mr. Jeffrey S. Sabin ("**Sabin Decl.**"), and respectfully states as follows:

I. RELIEF REQUESTED

1. The Trustee has retained the firms of McKool Smith P.C. and Whiteford, Taylor & Preston L.L.P. to pursue claims against a number of intended defendants. A draft of the complaint is attached hereto as **Exhibit A**. By this Motion, the Trustee seeks limited relief from Article XI, ¶ p of the Plan and paragraphs 34(c) and 39 of the Confirmation Order, insofar as the provision would preclude the Trustee from prosecuting suit against BearingPoint's former directors in a different court. By this motion, the Trustee seeks leave to file the contemplated action against the former directors in any jurisdiction in which the Trustee concludes it prudent to do so, including, without limitation, before the circuit courts of the Commonwealth of

[1] As disclosed in its initial retention application, Bingham McCutchen LLP is conflicted with respect to Mr. Spencer C. Fleischer, a former director and putative defendant in the suit proposed by the Trustee. Accordingly, the McKool Smith P.C. firm is filing this Motion with respect to Mr. Fleischer and the other directors separately from the CEO Motion.

Virginia, the jurisdiction in which BearingPoint's former world headquarters was located and where it appears that jurisdiction could be obtained over all putative defendants.[2]

II. JURISDICTION AND VENUE

2. This Court has jurisdiction to consider this Motion pursuant to 11 U.S.C. § 105(a), 28 U.S.C. §§ 157 and 1334, and Article XI of the Plan. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicate for this Motion are Rule 105(a) of the Bankruptcy Code and Federal Rule 9024 of Bankruptcy Procedure.

III. BACKGROUND

3. On December 22, 2009, the Court confirmed the Plan (the "**Confirmation Order**") [Docket No. 1550].

4. Pursuant to the Plan and the BearingPoint, Inc. Liquidating Trust Agreement, dated as of December 30, 2009 (the "**Trust Agreement**"), the Trustee is the assignee of estate causes of action, holds the debtors' attorney-client privilege, and has the power to investigate and prosecute for the benefit of the Liquidating Trust Beneficiaries causes of action that may from time to time be held by the Liquidating Trust.

5. Prior to confirmation of the Plan, the Debtors in Possession had been operated and managed by their Board of Directors and management, including Mr. F. Edwin Harbach as director and Chief Executive Officer, and directors Albert L. Lord, Roderick C. McGeary, J. Terry Strange, Douglas C. Allred, Betsy J. Bernard, Spencer C. Fleischer, Jill Kanin-Lovers, and Edward Munson (collectively with Mr. Harbach, the "**Directors**"). The Debtors, at the direction

---

[2] Except as expressly requested, the Trustee does not by this Motion seek relief from this Court's retention of exclusive jurisdiction over any other matters set forth in the Plan and Confirmation Order.

of their Directors and Officers, originally sought in the Plan a release that would have released the Directors from claims, actions, or causes of action based on prepetition misconduct.

6. The Official Committee of Unsecured Creditors ("**Creditors' Committee**") objected to the proposed release provision.

7. The Court sustained the Creditors' Committee's objection, but ruled in its Confirmation Order that "this Court (and the United States District Court from the Southern District of New York) shall retain exclusive jurisdiction to adjudicate any and all claims or causes of action brought by (a) the Debtors (or the Liquidating Trustee, as applicable). . . ." Confirmation Order ¶ 34(c). In paragraph 39 of the Confirmation Order, this Court ordered: "Pursuant to Article XI of the Plan, the Bankruptcy Court shall retain and have exclusive jurisdiction over any matter arising under the Bankruptcy Code and arising in or related to these Chapter 11 Cases or the Plan, to the fullest extent as is legally permissible."

8. Articles X and XI of the Plan reflect the Court's resolution of the Creditors' Committee's objection to confirmation of Plan. Under Article X, section 10.8(c) of the Plan, the Directors were not released from, among other things:

> [A]ny claims, demands, debts, rights, causes of action or liabilities held by the estates or the Liquidating Trust . . . against any current or former directors or officers of the Debtors for fraud, negligence, corporate waste, abuse, mismanagement, or for breach of fiduciary or other duties under Delaware, New York, or other applicable state or federal law, including, but not limited to, any act or failure to act in connection with: (i) from January 2007 through and including the Commencement Date, a potential transaction for the merger, sale or acquisition of the BearingPoint or any component part thereof; (ii) the merger and/or acquisition of additional foreign and/or domestic subsidiaries from December 1999 through and including the Commencement Date [or] (iii) the operations of BearingPoint, including, without limitation, accounting, internal controls, and financial reporting from January 2000 through and including the Commencement Date[.]

9. Under Article XI of the Plan, this Court retained "exclusive jurisdiction of all matters arising out of, or related to, the Chapter 11 Cases and the Plan pursuant to, and for the purposes of, sections 105(a) and 1142 of the Bankruptcy Code, including ". . . (p) to hear and determine any rights, Claims or causes of action held by or accruing to the Debtors pursuant to the Bankruptcy Code or pursuant to any federal or state statute or legal theory." Plan, Article XI, ¶ (p).

10. The Trustee believes that the Court's purpose in retaining such jurisdiction (as embodied in paragraphs 34(c) and 39 of the Confirmation Order and Article XI of the Plan) stemmed from a desire to protect against frivolous litigation. The Court stated as follows during the hearing on confirmation of the Plan:

> On balance, I don't think I can find it to be in the best interests of the estate for the estate to release away these claims now based on the amalgam of the consideration or perhaps more properly, lack of consideration provided to date and the investigation that took place before giving up these claims.
>
> But once more, I can and will find it to be in the best interests of the estate to modify the plan, which in light of the way the plan was structured, I don't believe requites [*sic*] re-solicitation . . . to provide that any such claims if they are to be brought, be brought before me or a District judge in this [district] for at least several reasons that I articulated before. I think it's in the best interests that if claims aren't going to be released, *prospective targets have the comfort that the validity of these claims will be thoughtfully analyzed with the benefit of as much knowledge of the surrounding facts as possible*.
>
> So I won't approve a full release of these claims now but I will approve provisions of the type I approved in *Adelphia*, that give this court exclusive jurisdiction over any such claims. As I said in *Adelphia*, see 368 B.R. at 269, in a case that to be sure, had a materially higher level of creditor aggressiveness and discord and which involved claims that might have been asserted vis-a-vis a different stage in the Chapter 11 process, I'll be able to tell the difference between legitimate claims on the one hand and harassment, retaliation or frivolous litigation on the other.

Transcript of Hearing on Confirmation at 76-77, *In Re BearingPoint, Inc. et al.*, No. 09-10691 (Bankr. S.D.N.Y. Dec. 17, 2009) (emphasis added) (attached as **Exhibit 1** to Sabin Decl.).

11. The Trustee acknowledges that the Court's concerns were prudent and appropriate. Relief can be fashioned, however, in a manner that fairly balances both those appropriate concerns and the appropriate desire of the Trustee to reduce the cost of litigation and greatly expedite its resolution.

12. After its appointment, the Trustee commissioned an investigation of potential director and officer claims related to conduct in 2007 through 2008, and has retained special trial counsel in connection therewith. That investigation, while not fully complete, has disclosed that the Trustee, as successor to the corporation, holds in trust for the creditors valuable fiduciary-duty claims against the Directors and Chief Executive Officer, Mr. Harbach, based upon breaches of their duties as established under Delaware law. The Trustee has prepared a draft complaint, setting out, *inter alia*, those claims, which is attached hereto as **Exhibit A**,[3] and is prepared to commence an action with respect thereto.

13. The allegations in the draft complaint are detailed and drawn from actual and contemporaneous statements made by witnesses with actual and personal knowledge. The Trustee has had substantial access to BearingPoint's documents and emails of BearingPoint employees and officers who were centrally involved. The factual allegations are comprised from those documents, as well as other documentary support for the claims, including numerous email correspondence, internal reports and presentations, formal warnings and correspondence from then-counsel, investment bankers, and other advisors, documents obtained from third parties through Bankruptcy Rule 2004 examinations, including potential purchasers and professional advisors, corporate minutes and related records, as well as contemporaneous industry and analyst materials. Many factual allegations have also been corroborated by witness interviews and

[3] The draft complaint attached as **Exhibit A** represents the Trustee's investigation to date and it is subject to change as the investigation continues and new facts are brought to light.

testimony from either hearings or through testimony obtained through Bankruptcy Rule 2004 examinations. In addition, the Trustee has commissioned a damages analysis from an expert, which demonstrates that the harm caused to the Debtors and creditors—and thus the resulting value of the claims—ranges to as high as $1.884 billion.

14. In brief, the draft complaint alleges, *inter alia*, that the Chief Executive Officer, Mr. Harbach hijacked the Company's sales process, causing BearingPoint to ignore large segments of the sales market—including strategic buyers and buyers of business units—and to deflect and/or avoid numerous opportunities in 2007 and 2008 to sell the business to a strategic buyer or to a buyer of business units, and that this resulted in diminished recovery of proceeds for the units when they were later sold in chapter 11, in 2009 (**Exhibit A**, ¶¶ 56-65; 77-98; 102-112; 114-128; 130; 134-136; 140-144; 146-164; 168-172; 180-211; 214-218; 224; 226-228; 236-238; 240-241; 247-248; 251; 255-259; 262-263; 266- 270; 272-275; 278-283; 285-305; 333-342).[4] The draft complaint alleges that Mr. Harbach had a personal interest in ignoring significant areas of the marketplace in order to maintain his management position, vest his equity interests, and obtain new equity holdings in the purchasing entity. Indeed, scores of interested purchasers were ignored and overlooked because they did not fit the model that would benefit Mr. Harbach. These failures directly resulted in the decline of the company's value and inability to obtain the best price available for its assets, which could have been achieved by either selling the company as a whole or selling the company's business units.

15. The Trustee has engaged Mr. Robert Sherwin of The Analysis Group to investigate and confirm whether such sales of BearingPoint, or its business units, could have been achieved in 2007-2008. Mr. Sherwin's preliminary analysis, based on currently available

[4] Descriptions of, and references to, the allegations in the draft complaint are provided for the Court's convenience only. They do not limit or define any of the Trustee's factual or legal theories with respect to **Exhibit A**, or any action filed on the basis thereof (with respect to which the Trustee reserves all rights).

information, shows that the company could have been sold as a whole for a price in the approximate range of $1.0 to $1.4 billion and that the company's business units could have been sold for an aggregate price of $1.56 to $2.3 billion. Instead, the company was liquidated in bankruptcy and yielded approximately $424 million in proceeds, resulting in losses of $624 million to $1.88 billion (**Exhibit A**, ¶¶ 288-304).

16. The draft complaint alleges that, throughout 2007 and 2008, Mr. Harbach and the Directors were well aware of an April 2009 debt obligation, as well as numerous other corporate operational and financial obligations, and knew that the debt obligation would force a chapter 11 filing unless a sale or sales were arranged (**Exhibit A**, ¶¶ 33-65).

17. The draft complaint alleges that as of November 2007, in recognition of BearingPoint's impending liquidity crisis, the directors contemplated and embarked on a process in pursuit of a transaction or sale that would result in a change in control of BearingPoint, but thereafter breached their fiduciary duties in the conduct of that sale process. Their breach included their knowing failures: to sufficiently apprise themselves of the company's true value and financial position or of the available forms of transactions available to the company (**Exhibit A**, ¶¶ 119-129, 135-137, 141-147, 167-174); to arm themselves with specific and contemporary knowledge about the available market for the sale of the company or its business units (**Exhibit A**, ¶¶ 139-153, 167-174); to heed advice of company advisors with regard to the sales process (**Exhibit A**,¶¶ 99-102, 146, 183, 202-218), and/or to actively participate in the information-gathering, decision-making and negotiation process (**Exhibit A**, ¶¶ 119-129, 172-174, 179, 183). The directors further breached their fiduciary duties by permitting Defendant Harbach, knowing he was self-interested with regard thereto, to funnel the sales process towards his own self-interested ends, including by designating and empowering Defendant Harbach to

engage in self-interested negotiations with potential buyers without sufficient oversight (**Exhibit A**, ¶¶ 62-64, 77-79, 103-111, 140-147, 183, 229-271, 272-279, 280-287).

18. Detailing more than a score of offers and overtures actually received from outside bidders in 2007 and 2008, and detailing at least a dozen further instances where the record shows that bidders, investment bankers and others who approached the Company with interest in purchasing all or parts of the company were deflected (**Exhibit A**, ¶¶ 146-164), the draft complaint further alleges that Mr. Harbach—unconstrained by sufficient Board oversight—actively deflected and avoided bidders because the proposed transactions would all have resulted in the loss and/or erosion of his employment and equity interests, and that instead, he worked to position himself to capture additional, valuable equity from a financial buyer (**Exhibit A**, ¶¶ 48-50; 56-65; 77-98; 102-112; 114-128; 130; 134-136; 140-144; 146-164).

19. The draft complaint further alleges that Mr. Harbach seized control of BearingPoint's forecasting process, causing the issuance of fanciful projections that falsely suggested that BearingPoint's liquidity was sufficient to meet the April, 2009 debt obligation (when in fact it was not) while continuing operations, in order to avoid the urgent need for a sale (**Exhibit A**, ¶¶ 119-128; 130; 134-136; 181; 185-212; 214-228; 233; 252; 264). This conduct alarmed the company's general counsel, who in the summer of 2008 warned certain directors by formal letter of serious management dysfunction within the Company with respect to the sales process, and pleaded with certain of the directors to exercise some measure of control over Mr. Harbach (**Exhibit A**, ¶ 244). Serial resignations of two chief financial officers took place within three weeks of each other in May and June of 2008 (**Exhibit A**, ¶¶ 200-201; 243). Meanwhile, as the summer of 2008 progressed, Harbach continued to squander valuable sale opportunities, including by holding sale negotiations with BearingPoint's only remaining suitor hostage to

personal demands for equity compensation, a fact shown, in part, by the general counsel's near desperate pleas to certain of the directors to intervene in the negotiations (**Exhibit A**, ¶¶ 236-241; 244; 247-248; 255-259; 261-263; 266-275; 278-282; 285-286).

20. These pleas and warnings were ignored. Putative Defendants Lord, McGeary, and Strange, as directors, comprised a subcommittee tasked with overseeing the sale process on behalf of the Board. The available evidence indicates that they received the information, warnings, and pleas alleged above, and recklessly and in bad faith permitted Mr. Harbach to manipulate the process to BearingPoint's ultimate detriment (Exhibit A, ¶¶ 229-271, 280-287).

21. Recent case authority in Delaware and construing Delaware law[5] confirms the well-established principles and obligations of corporate fiduciaries in the context of the conduct alleged in the Complaint, including breaches of duties of care, loyalty and good faith when directors knowingly and completely fail to undertake their responsibilities to obtain the best sale price. *See Lyondell Chemical Co. v. Ryan*, 970 A.2d 235, 243-44 (Del. Supr. 2009) (citing *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del.1986)). *See*, *e.g.*, *Gantler v. Stephens*, 965 A.2d 695, 708-709 (Del. 2009); *Brown v. Brewer*, slip. op., No. CV 06-3731-GHK, 2010 WL 2472182 (C.D. Cal. June 17, 2010) (applying Delaware law) (attached hereto as **Exhibit B**).

22. The Trustee does not expect, on this motion, that this Court will in any way pass on the merits of the claims alleged against the Directors in **Exhibit A**, which have not been formally filed, and as to which the Directors have not had an opportunity to respond.[6] These

---

[5] BearingPoint was a Delaware corporation. The scope of the duties to the corporation of its fiduciaries will be governed by Delaware law. *See*, *e.g.*, *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009).

[6] The Trustee is mindful that if this motion were to be denied, the claims would initially be commenced in this Court under non-core jurisdiction (given that the Directors have filed no proofs of claim, and could be transferred to the Southern District in the event of a request for a jury trial. The Trustee is well aware that this

claims are detailed for the Court at this time simply to give it appropriate assurances that the Trustee is not proceeding in a hasty or frivolous manner. The Trustee has alleged only those factual claims that, after intensive and close research, appear in the factual record, and has alleged only those damages that are supported by documents and the opinion of a recognized economic expert. Further, the Trustee has, through its advisors, closely researched relevant law, and is pursuing only those claims that it believes are well grounded in Delaware law. If the claims succeed, the damages will be of substantial value to the trust and its beneficiaries. The damages would become, by far, the estate's largest asset.[7]

23. The Trustee can pursue the claims in this Court, as Article XI of the Plan provides, and as the Directors implicitly requested (by not objecting to jurisdiction of this Court (and the United States District Court for the Southern District of New York) in the Plan and Confirmation Order). But as the Court knows, the Directors, as well as the Trustee, will have jury trial rights, and the exercise of those rights by any party would likely cause the case to ultimately be tried in the Southern District of New York. The Trustee is aware, as a practical matter, of considerable procedural delays that could attend the prosecution of the claims in this Court, or in the Southern District.[8]

Court certainly would not address the merits of any claim in any way without affording notice and a full opportunity to defend to the Directors.

[7] The Trustee believes that the Directors, in addition to having personal wealth, are insured under multiple policies aggregating nearly $300 million in insurance coverage that would be liable on the claims in the event the Trustee's claims were to prevail.

[8] Further underscoring the propriety, as a practical matter, of granting the relief requested herein is the recent grant of certiorari by the Supreme Court of the United States of a decision from the Ninth Circuit concerning the scope of "related to" jurisdiction under 28 U.S.C. § 157(c). *See Stern v. Marshall*, No. 10-179, 2010 WL 3053869 (U.S. Sept. 28, 2010) (order granting certiorari). The decision under review held that a compulsory counterclaim to proof of claims is not a core proceeding where the counterclaims are based on state law and not "so closely related to [the issues in the adversary proceeding] that it must be resolved in order to determine the allowance or disallowance of" the claim. *See In re Marshall*, 600 F.3d 1037, 1059 (9th Cir. 2010). This decision conflicts with precedent from this circuit (*see In re CBI Holding Co.*, 311 B.R. 350 (S.D.N.Y. 2004)¸ *aff'd in part, rev'd in part on other grounds*, 529 F.3d 432 (2d Cir. 2008), and the Third Circuit (*see In re Pacor, Inc.*, 743 F.2d 984 (3d Cir. 1984). But the grant of certiorari indicates that the scope of "related to"

24. The Trustee is aware of other courts that would have jurisdiction of the claims, in which the claims might more efficiently be pursued. Among such courts is the Circuit Court for Fairfax County, Virginia, in which county, at all relevant times, BearingPoint's corporate headquarters were located.

25. The Trustee's research indicates that a claim prosecuted in the Circuit Court for Fairfax County, Virginia would be likely to reach resolution years earlier,[9] and at considerably lower expense, than a claim prosecuted initially in this Court, and it is not unusual for courts outside Delaware to apply Delaware corporate law. *See e.g. Brown v. Brewer*, slip. op., No. CV 06-3731-GHK, 2010 WL 2472182 (C.D. Cal. June 17, 2010) (applying Delaware law to deny motion for summary judgment on complaint against directors alleging breaches of duty of loyalty and care in the context of evaluating competing bids for a company "in play"). The Trustee is aware that this Court has an extremely busy docket, and believes that this case, although not difficult to comprehend in concept, will involve time-consuming factual and expert disputes, which would greatly burden this Court's calendar in the event of jury waiver.

26. In the exercise of its business judgment, the Trustee believes it would be prudent to save the estate that time and cost.

IV. BASIS FOR RELIEF REQUESTED

27. The Trustee adopts by reference the arguments contained in the CEO Motion.

WHEREFORE, the Trustee respectfully requests that the Court issue an order:

---

jurisdiction is now in play. Time and money spent litigating the claims outlined in **Exhibit A** in this Court would be wasted should the parties discover during the next term of the Court that the case suffers a jurisdictional defect. The Court's discretion here would be well exercised by granting this motion and avoiding any question on this point.

[9] On information and belief, trials in the Circuit Court for Fairfax Country, Virginia are typically held within twelve to eighteen months of the filing of the complaint.

(i) relieving it of so much of Article XI, ¶ p of the Debtors' Modified Second Amended Joint Plan Under Chapter 11 of the Bankruptcy Code and paragraphs 34(c) and 39 of the Confirmation Order, as operate to retain exclusive jurisdiction in this Court over the claims set out in the attached **Exhibit A**, as pursued against the Directors;

(ii) permitting the Trustee to pursue the claims and causes of action as set forth in **Exhibit A** in the Circuit Court for Fairfax County, Virginia, or such other court or tribunal as the Trustee, in its business judgment, determines is appropriate; and

(ii) granting the Trustee such other and further relief as may be just and proper.

Dated: November 29, 2010
New York, New York

/s/ Peter S. Goodman
MCKOOL SMITH P.C.
Peter Goodman
pgoodman@mckoolsmith.com
One Bryant Park, 47th Floor
New York, New York 10036
Telephone: (212) 402-9200
Facsimile: (212) 402-9444

- and -

Lew LeClair (*pro hac pending*)
lleclair@mckoolsmith.com
Robert Manley (*pro hac pending*)
rmanley@mckoolsmith.com
300 Crescent Court, Suite 1500
Dallas, TX 75201
Telephone: (214) 978-4000
Facsimile: (214) 978-4044

-and-

Basil A. Umari (*pro hac vice*)
bumari@mckoolsmith.com
600 Travis Street, Suite 7000
Houston, Texas 77002
Telephone: (713) 485-7300
Facsimile: (713) 485-7344

Counsel for John DeGroote Services, LLC as Liquidating Trustee to the BearingPoint, Inc. Liquidating Trust

V I R G I N I A :

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

BEARINGPOINT, INC. LIQUIDATING TRUST, by its trustee, JOHN DeGROOTE SERVICES, LLC and JOHN DeGROOTE Plaintiff, v.	)
F. EDWIN HARBACH 400 Alton Road, Apt. 1001 Miami Beach, Florida 33139,	) Civil Action No. _________
ALBERT L. LORD 1805 River Watch Lane Annapolis, Maryland 21401,	) JURY TRIAL DEMANDED
RODERICK C. MCGEARY 1911 Waverley Street, #202 Palo Alto, California 94301,	)
J. TERRY STRANGE 2226 Mimosa Drive Houston, Texas 77019,	)
DOUGLAS C. ALLRED 47 Valley Road Atherton, California 94027,	)
BETSY J. BERNARD 40 Shalebrook Drive Morristown, New Jersey 07960,	)
SPENCER C. FLEISCHER 2120 Washington Street San Francisco, California 94109-2845,	)
JILL KANIN-LOVERS 117 Valley Forge Road Weston, Connecticut 06883,	)
and	)

EDWARD MUNSON)
5879 Murfield Drive)
Rochester, Michigan 48306,)
)
Defendants.)

COMPLAINT

COMES NOW Plaintiff the BearingPoint, Inc. Liquidating Trust (the "Liquidating Trust" or "Plaintiff"), by its trustee, John DeGroote Services LLC and John DeGroote ("the Trustee"), for the Liquidating Trust's complaint against Defendants F. Edwin Harbach, Albert L. Lord, Roderick C. McGeary, J. Terry Strange, Douglas C. Allred, Betsy J. Bernard, Spencer C. Fleischer, Jill Kanin-Lovers, and Edward Munson, and alleges as follows:

INTRODUCTION

1. In July 2007, BearingPoint, Inc. was one of the largest professional and IT consulting firms in the world, with an aggregate value of as much as $2.3 billion. Nineteen months later, in February 2009, BearingPoint was bankrupt, and was later liquidated, yielding approximately $424 million in net proceeds. This Complaint seeks redress for the egregious breaches of fiduciary duty that caused this massive loss, and identifies the abject failure of BearingPoint's directors to develop, manage and oversee the company's sales process, instead allowing it to be hijacked by a self-interested Chief Executive Officer who had a personal interest in ignoring significant segments of the marketplace in order to maintain his management position, vest certain equity interests, and obtain new equity holdings in the purchasing entity. The tragic failures of the directors were avoidable, and directly resulted in the decline of the company's value and inability to obtain the best price available for its assets, which the directors could have achieved by either selling the company as a whole for a price in the approximate range of $1.0 to $1.4 billion or by selling the company's businesses for an aggregate price of $1.56 to $2.3 billion. Instead, the directors' failures led to the company's bankruptcy and

liquidation of its business units and other assets yielding approximately $424 million, resulting in losses of $624 million to $1.88 billion.

2. As members of the Board of Directors (the "Board") of BearingPoint, Inc. (with its affiliates, "BearingPoint" or the "Company"), each of the Defendants had a fiduciary duty to actively prepare, determine, develop, and manage a strategy to pursue and maximize the highest value for the Company. This responsibility included the obligation to participate, actively and directly, in the management and oversight of the sales process, and to examine, explore, understand, and become fully informed of the sale options. As they were advised by management and by independent professional financial advisors, these options included: (i) finding and selling the Company as a whole to a strategic buyer, *i.e*. a buyer already engaged in a similar business; (ii) finding and selling the Company as a whole to a financial buyer, *i.e*. a private equity buyer; or (iii) selling the Company's various discrete business units to separate purchasers.

3. As detailed further below, the Defendants consciously disregarded and abdicated their fiduciary duties by, among other things, ignoring two of the three large segments of the sales market—strategic buyers of the whole and buyers of business units—effectively allowing the sales process to hinge upon the willingness of a financial (private equity) buyer to purchase the whole Company. This wrongful limitation occurred even though the Company's financial advisors told both the Board and the CEO that the critical strategic buyer market "should not be ignored," that the sale of parts could yield a higher value, and presented them with the specific identities of numerous potential strategic buyers of the whole Company as well as buyers interested in the purchase of individual business units. One of the Company's financial advisors advised the defendants that it was ready to bring strategic buyers to the table, including two that

already had their own boards' approval to proceed, while the Company's General Counsel, whose advice was repeatedly ignored by the Defendants, was forced to warn them that proceeding with fewer than all interested parties was "the kind of decision that could be revisited in litigation," and thus the Company had to have "at least one active, strategic alternative to private equity bids . . . ."

4. The defendants further abdicated their fiduciary responsibilities by delegating the flawed sales process to a conflicted director, Defendant F. Edwin Harbach, who as the Company's Chief Executive Officer, deflected marketplace interest by commandeering and manipulating the sales process in a self-interested effort to preserve and enhance his personal interests, including a continued management role and monetizing current and newly obtained equity in a prospective sale. Harbach effectively limited the sales process to pursuit of a sale of BearingPoint as a whole to a financial/private equity buyer that would provide for these benefits. The Defendants, including those who were later appointed to a "Special Committee," knowingly permitted this conduct to occur, in conscious disregard of repeated, direct warnings, advice, evidence, and pleas, as well as direct, personal knowledge that it *was* occurring, in direct contravention of their obligation to ensure that the process was yielding maximum value.

5. Not surprisingly, the ultimate negotiations with Defendant Harbach's chosen financial buyer, Cerberus Capital Management L.P. ("Cerberus"), failed. In pursuit of his personal interests, including an unreasonable demand for additional equity holdings, Harbach had funneled the opportunity for him to obtain such benefits to a potential sale with Cerberus. The negotiations, however, were so beset by conflicts and a flawed process that the Company's then-financial advisor was forced to tell the other Defendants, after months of negotiations, that Cerberus was "choking" on Harbach's equity demands and to request the other Defendants'

intervention into the process—intervention that never occurred. Less than three weeks later, Cerberus ceased negotiations, and thereafter, in February 2009, the Company filed for bankruptcy as a result of its foreseeable cash liquidity crisis. The Company, as was inevitable for a company such as BearingPoint, was liquidated soon thereafter. The bankruptcy of a professional services firm with operations around the globe, as all Defendants knew far in advance, meant devastating loss to the value of its business units and the overall enterprise, as well as loss of numerous jobs for employees. All of these losses could have been avoided had the Defendants complied with their fiduciary duties, but, tragically, they did not. This case demands redress for these losses for the benefit of the Company and its creditors.

PARTIES

6. On February 18, 2009, BearingPoint commenced chapter 11 cases in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). Pursuant to an order (the "Confirmation Order") of the Bankruptcy Court confirming the Debtors' Modified Second Amended Joint Plan Under Chapter 11 of the Bankruptcy Code dated December 17, 2009 (the "Plan"), the Bankruptcy Court established the BearingPoint, Inc. Liquidating Trust to liquidate the assets of BearingPoint, pursue causes of action of BearingPoint, and distribute proceeds of asset sales and litigation to creditors of BearingPoint. Specifically, the Plan and the Confirmation Order assigned causes of action of BearingPoint to the Liquidating Trust (*see* Confirmation Order at ¶¶ GGG, 37), and conferred on the Trustee the authority to prosecute on behalf of the Liquidating Trust "any and all Causes of Action, including, but not limited to, any and all avoidance . . . actions, recovery causes of action and objections to Claims . . . ." Confirmation Order at ¶ 37; Plan at §§ 5.7(g), 10.9.

7. The Trustee is the Court-appointed Trustee who succeeded to the rights of BearingPoint to pursue causes of action and is a limited liability company organized under the

laws of Delaware, with its principal place of business at 100 Crescent Court, Suite 700, Dallas, Texas 75201. John DeGroote, a resident of Texas, is the sole member of John DeGroote Services, LLC.

8. Defendant F. Edwin Harbach is an individual and citizen of the United States, who, on information and belief, resides in the State of Florida. On November 30, 2007, the Board appointed Harbach, pursuant to 8 Del. C. §§ 142 & 223(a)(1), as Chief Executive Officer of BearingPoint (effective as of December 3, 2007), and elected Harbach a director of BearingPoint. At all relevant times, Harbach served as BearingPoint's chief executive officer and a director.

9. Defendant Albert L. Lord is an individual and citizen of the United States who, on information and belief, resides in Annapolis, Maryland. As of February 6, 2003, and at all relevant times, Lord served on the Board. As of May 15, 2008, Lord was appointed to and served on an independent committee of the Board charged with the responsibility of reviewing, evaluating, and negotiating the terms and condition of a sale transaction with purchasers (the "Special Committee").

10. Defendant Roderick C. McGeary is an individual and citizen of the United States who, on information and belief, resides in Palo Alto, California. As of November 1999, and at all relevant times, McGeary served on the Board. As of May 15, 2008, McGeary was appointed to and served on the Special Committee.

11. Defendant J. Terry Strange is an individual and citizen of the United States who, on information and belief, resides in Houston, Texas. As of April 29, 2003, and at all relevant times, Strange served on the Board. As of May 15, 2008, Strange served as the Chairman of the Special Committee.

12. Defendant Douglas C. Allred is an individual and citizen of the United States who, on information and belief, resides in California. At all relevant times to the allegations in this Complaint, Allred served on the Board.

13. Defendant Betsy J. Bernard is an individual and citizen of the United States who, on information and belief, resides in New Jersey. At all relevant times to the allegations in this Complaint, Bernard served on the Board.

14. Defendant Spencer C. Fleischer is an individual and citizen of the United States who, on information and belief, resides in California. At all relevant times to the allegations in this Complaint, Fleischer served on the Board.

15. Defendant Jill Kanin-Lovers is an individual and citizen of the United States who, on information and belief, resides in Connecticut. At all relevant times to the allegations in this Complaint, Kanin-Lovers served on the Board.

16. Defendant Edward Munson is an individual and citizen of the United States who, on information and belief, resides in Michigan. At all relevant times to the allegations in this Complaint, Munson served on the Board. Lord, McGeary, Strange, Harbach, Allred, Bernard, Fleischer, Kanin-Lovers, and Munson are all referred to collectively herein as the "Director Defendants" or the "Board."

JURISDICTION AND VENUE

17. This Court has jurisdiction pursuant to Va. Code Ann. § 17.1-513 and § 8.01-328.1(A). All of the Defendants regularly conducted and transacted business in the Commonwealth of Virginia, and specifically, Fairfax County, the location of BearingPoint's headquarters.

18. Venue is proper in the Court pursuant to Va. Code Ann. § 8.01-262(4).

FACTS

BearingPoint Grew to Become a Leading Global Consulting Firm

19. Prior to 2009, BearingPoint was a management and technology consulting company that provided consulting services for private and government clients around the world. At all relevant times, its world headquarters was located in McLean, Virginia.

20. BearingPoint's corporate and business roots lay in the consulting arm of the accounting firm KPMG LLP. On January 31, 2000, KPMG LLP transferred its consulting business to a newly-formed corporate entity, and on February 8, 2001, that entity began to trade on the NASDAQ National Market under the name KPMG Consulting, Inc.

21. On October 2, 2002, KPMG Consulting, Inc. changed its name to BearingPoint, Inc. and its common stock began to trade on the New York Stock Exchange under the symbol "BE."

22. BearingPoint generated revenues through fee-based consulting contracts with customers, many of which were governments or government agencies. Its core business was providing business consulting services, often concerning the installation, use, and management of information technology.

23. In the early years of the last decade, BearingPoint grew rapidly and internationally through debt-financed acquisitions, quickly becoming, on a revenue-generating basis, one of the world's leading providers of management and technology consulting services.

24. In 2006, BearingPoint reported annual net revenues of approximately $2.55 billion and gross profits of approximately $550.53 million.

25. In 2007, BearingPoint reported annual net revenues in the range of approximately $2.64 billion, and gross profits of approximately $468.53 million.

26. In neither 2006 nor 2007 did BearingPoint's gross profits exceed its selling, general, and administrative expenses, interest and other debt-related costs, with the result that in both years BearingPoint reported a net loss.

27. At all times relevant to this Complaint, BearingPoint's operations were divided into domestic and international business units. Domestically, BearingPoint's operations included the Public Services business unit, which contracted with governments and government agencies, the Commercial Services business unit, which did business with a range of commercial and industrial customers, and the Financial Services business unit, which focused on the financial services industry. BearingPoint's international business units were divided into the Europe, Middle East and Africa ("EMEA"), Asia Pacific ("APAC"), and Latin America business units.

28. BearingPoint enjoyed strong performance from certain of its business units, most notably the Public Services business unit. The Public Services business unit consulted to large federal and state agencies, such as the United States Departments of Defense; Homeland Security; and Interior; provincial, state and local governments; defense contractors; and institutions of higher learning. In 2007, the Public Services business unit's net revenues were approximately $1 billion, according to BearingPoint's 2008 Form 10-K. Evidence indicates that in 2007, the Public Services business unit generated earnings before income taxes, depreciation, and appreciation ("EBITDA") of approximately $283 million.

29. BearingPoint also received significant revenue from its Commercial Services business unit, which consulted to corporate clients across a broad range of industries, including life sciences, energy, consumer industries, manufacturing, and utilities. Key customers included Pfizer, Microsoft, and Chevron. In 2007, according to BearingPoint's 2008 Form 10-K, the

Commercial Service business unit's net revenues were $400.3 million, and evidence indicates that it generated EBITDA of approximately $65 million.

30. The EMEA business unit served clients such as Siemens, Phillips, and Onninen in sixteen countries. In 2007, the EMEA business unit generated net revenues of $671.9 million and EBITDA of $141.7 million.

31. The APAC business unit served clients in Asia and the South Pacific region, such as Telstra, Orix, and JP Holdings. In 2007, the APAC business unit generated net revenues of $271.4 million, with EBITDA of $74 million. In 2007 and 2008, the APAC business unit was generally regarded as a unit that had good prospects of generating rapid growth in Chinese and other Asian markets.

32. The Financial Services and Latin American business units were less successful at the business unit level, but they provided BearingPoint with an expanded business and marketing reach, and larger global footprint to service BearingPoint's clients.

BearingPoint had Ongoing Financial Reporting Problems

33. BearingPoint's rapid growth in the early 2000's contributed to significant problems in its financial and accounting functions. Also, BearingPoint's foreign business units were not part of BearingPoint's central financial and accounting systems, but maintained separate legacy systems, further aggravating the financial and accounting problems. Those accounting problems, in conjunction with mounting debt obligations, forced BearingPoint's Board and management to focus on stabilizing the Company's financial reporting systems year after year.

34. In September 2003, BearingPoint acknowledged in its Form 10-K filed with the Securities and Exchange Commission ("SEC") that material weaknesses existed in its internal controls.

35. In 2004, BearingPoint introduced a new financial accounting system known as "OneGlobe." The system later proved unreliable, and aggravated problems with internal controls and required reporting.

36. In November 2004, BearingPoint acknowledged in a Form 10-QA filed with the SEC that it had materially overstated its accounts receivable. Its chief executive and financial officers resigned.

37. In April 2005, BearingPoint warned in a Form 8-K filed with the SEC that its recent financial statements were not reliable, and that the Company was the target of an informal SEC investigation.

38. Several securities fraud lawsuits were filed against BearingPoint and certain of its former officers in April 2005. The suits contended that classes of shareholders had suffered damages as a result of materially misleading financial reporting.

39. In response to these adverse developments, BearingPoint hired Harry You as its new chief executive officer in March 2005. You had received a degree in economics from Harvard College and a master's degree from Yale University, and had served as a managing director in the investment banking division of Morgan Stanley, leading its computer and business services group. When BearingPoint went public in 2001, You was part of the Morgan Stanley team that led the offering. From 2001 through 2004, You was the chief financial officer of Accenture Ltd. Prior to his appointment at BearingPoint in 2005, You served as executive vice president and chief financial officer of Oracle Corporation.

40. BearingPoint's appointment of You signaled recognition by the Board that the Company's top priorities included stabilizing its accounting function, and developing a sale or other disposition strategy to meet mounting debt obligations.

BearingPoint's Borrowings Caused a Mounting Liquidity Crisis

41. In 2001, BearingPoint's predecessor, KPMG Consulting, raised approximately $2.3 billion in equity capital through an initial public offering.

42. To finance its rapid global growth through the early 2000's, BearingPoint obtained increasing levels of debt from capital markets.

43. In late 2004 and early 2005, BearingPoint raised $450 million by issuing convertible subordinated debentures (denominated Series "A" and "B" notes). In April 2005, it issued an additional $200 million in senior convertible subordinated debentures—the so-called Series "C" Notes—which carried the right to compel the Company to repurchase the notes at par value at specific dates, including April 15, 2009.

44. In July 2005, BearingPoint issued another $40 million in face amount of unsecured notes.

45. As BearingPoint expanded, it became clear that its global operations were unable to support the debt load that had been undertaken to acquire and develop them. As a result, the need for a divestiture was approaching the inevitable.

46. In addition, BearingPoint was facing a litany of operational, legal, and macroeconomic obstacles that lessened the likelihood of BearingPoint's chances of surviving as a going concern. BearingPoint also continued to devote massive resources to implementation of yet another financial accounting and reporting infrastructure in an effort to timely produce reliable information necessary to operate the Company consistent with its duties as a substantial government contractor and as a public company.

47. BearingPoint also suffered cash flow shortages from its inability to repatriate cash from some of its international business units, and due to its defense of several lawsuits and government actions, including several significant actions brought or threatened by clients and

SEC investigations relating to the Company's inability to timely file periodic reports with the SEC, and the restatement of prior financial statements to correct accounting errors and departures from generally accepted accounting principles.

BearingPoint Hired Harbach as Chief Operating Officer

48. In this environment of growing debt obligations and increasingly burdensome operational and legal hurdles, BearingPoint's Board appointed Defendant Harbach as its President and Chief Operating Officer in early 2007, reporting to You.

49. Before joining BearingPoint, Harbach had been in retirement for two years, following service with BearingPoint's competitor, Accenture, managing its operations in Tokyo, Japan. He had grown wealthy in that position. He had never worked as a consultant at BearingPoint—and never would—but was interested in joining BearingPoint to achieve the upside potential of BearingPoint's equity as his compensation.

50. In that regard, BearingPoint awarded Harbach an equity-heavy compensation package that included, among other things, a base salary of $700,000, a sign-on bonus of $1 million, a targeted annual bonus of up to $700,000, and an equity grant, consisting of 888,325 restricted stock units. Each of the restricted stock units ("RSUs") represented a right to receive one share of BearingPoint, Inc. common stock, or the cash equivalent. Harbach's RSUs were scheduled to vest ratably on the anniversary of the grant in 2008, 2009, 2010, and 2011, so long as Harbach remained employed through a respective vesting date. At the time of the grant, the RSUs represented $7,000,000 worth of BearingPoint stock.

BearingPoint Exhausted its Borrowing Abilities in 2007

51. At the beginning of 2007, BearingPoint faced an acute liquidity shortfall. Prior to 2007, nearly all of BearingPoint's major debt obligations (apart from various credit facilities entered into from time to time) were unsecured. By the first quarter of 2007, however, BearingPoint was unable to raise further debt capital without giving collateral as security.

52. To address BearingPoint's immediate crisis, the Board authorized an additional $300 million of fully secured debt (the "2007 Secured Facility"). The 2007 Secured Facility closed and funded in June 2007, and was secured by substantially all of BearingPoint's assets. The 2007 Secured Facility was fully drawn upon issuance, and all of the funds drawn were immediately consumed in operations. The 2007 Secured Facility also contained cross-default provisions that jeopardized the capital structure upon a default of certain debt obligations.

53. While the 2007 Secured Facility afforded BearingPoint temporary breathing space, it was obvious to the officers and directors of BearingPoint that the additional borrowed funds were merely a short-term "band-aid" measure that did not address the Company's long-term financial problems.

By Mid-2007, It was Clear BearingPoint Would Need to Pay the $200 Million "Series C" Put in April of 2009

54. BearingPoint reported a net loss in 2006, and, at the beginning of 2007, the outlook was not much better. Further, by mid 2007 it was becoming clear that BearingPoint would have to pay the $200 million Series C "Put" in April of 2009. Under the terms of the debenture agreement, the holders of the notes could opt to: 1) hold the notes until they matured in April 2025, continuing to receive 5% annual interest; 2) force BearingPoint to repurchase the notes at face value (the "Put" option) as early as April 2009; or 3) convert the shares into equity at a ratio of 151.5151 shares per $1000 of debt, which equals $6.60 per share. As part of its

continued, downward trajectory, BearingPoint's stock price slid below $6.60 in July 2007, never to recover.

55. By mid-2007, Harbach and the Director Defendants knew or should have known that, even with the 2007 Secured Facility in place, the company's operations would not generate sufficient revenues to enable it to meet its obligations, including the debt owed to the holders of the convertible Series "C" notes in the form of the $200 million "Put" obligation coming due in April 2009. They knew, or should have known, that some corporate disposition would be necessary to address the ongoing financial needs to support operations and the "Put" requirement likely to be exercised in April 2009.

Harbach Realized that He Could Personally Benefit From a Sale of the Whole Company to a Financial Buyer

56. BearingPoint reviewed its financial options and identified four potential strategies suggested by BearingPoint's advisors. First, BearingPoint could sell one or more of its business units to one or more purchasers to generate cash for partial satisfaction of maturing debt obligations, while preparing the remaining assets for a sale or restructuring. Second, BearingPoint could be sold, in whole, to a "strategic" buyer—a company providing similar professional services (such as a competitor to BearingPoint). Third, the entire Company could be sold to a "financial" buyer—a buyer able to finance an acquisition but without expertise in BearingPoint's businesses. Fourth, as the Company's liquidity crisis deepened, BearingPoint could attempt to arrange, through negotiations with its bondholders, for a debt-for-equity swap.

57. Harbach knew that each of these approaches carried benefits and risks to his current and potential future equity stake in BearingPoint. As further alleged below, he was to receive an additional compensation package when he became CEO that was even more heavily

weighted with unvested equity, which under his employment and equity agreements with BearingPoint would be lost or devalued by most forms of corporate disposition.

58. Harbach knew that, through a sale to a financial buyer—one who did not compete with BearingPoint and thus did not possess a management team at the ready—he might negotiate an even greater amount of equity as part of his employment arrangements with the buyer. Thus, a sale to a financial buyer offered him the best chance to maximize his current equity and to receive more equity in BearingPoint.

59. Harbach similarly understood that a sale to a strategic buyer would be less advantageous to his individual interests. A strategic buyer—one who competed with BearingPoint—already would have management in the consulting industry and would not need Harbach to fill that role. It was not lost on Harbach that a sale to a strategic buyer would likely result in his termination prior to consummation, and the consequential loss of his current and possible future equity in BearingPoint.

60. Further, Harbach recognized that a sale of an undivided BearingPoint to a financial buyer was in his best pecuniary interests. Conversely, sales of any discrete line of BearingPoint's business, which would reduce BearingPoint's debt load, would eliminate that line's future earnings from BearingPoint's business operations, and would diminish the size of BearingPoint.

61. Harbach knew, as experienced restructuring counsel would later advise, that a debt-for-equity swap would also likely result in loss of Harbach's board and management positions, as well as his current and potential equity interests.

62. Thus, all Defendants understood the dynamics associated with the different options open to BearingPoint in 2007: that sales of individual business units, a sale of the whole

Company to a strategic buyer, and/or debt-for-equity swaps all conflicted directly with the individual pecuniary interests of Harbach and other senior management members.

63. Similarly, all Defendants knew the third option—a sale of BearingPoint in its entirety to a financial purchaser—gave Harbach and BearingPoint's senior management the best option for individual financial gain: retaining employment; retaining the value of their present BearingPoint equity, if any; and the potential to negotiate even more equity in a BearingPoint that would likely be relieved of its substantial debt burden.

64. The Director Defendants also knew that Defendant Harbach had no history or role as a client-serving consultant in BearingPoint's business, had no personal history in BearingPoint, and, as a manager recently brought in from the outside, was highly incentivized to maximize the value of his and other management's equity-weighted personal compensation packages over the long term, even to the detriment of the Company's enterprise value.

65. All Defendants knew the worst possible option for BearingPoint was bankruptcy. Professional services businesses are poor candidates for chapter 11, primarily because personnel form the most valuable asset of these businesses and are not likely to remain with the business long enough to permit a restructuring. Further, customers are often unwilling to enter into the kind of long-term contracts with chapter 11 debtors that are essential to enterprise value, and customers in some countries abroad refuse to work with entities in chapter 11. As the former leader of Accenture's Japan business unit, Defendant Harbach was well aware of the disastrous consequences to BearingPoint's business operations there that a bankruptcy would bring. All of the Defendants knew and were advised that chapter 11 was a highly unfavorable approach, and unless accompanied by a fully consensual prepackaged plan of reorganization, was highly likely to result in massive erosion of the value of the enterprise.

BearingPoint's Advisors Recommended Selling Business Units

66. In or before 2007, BearingPoint engaged Morgan Stanley & Co., Inc. ("Morgan Stanley") and UBS Securities LLC ("UBS") as financial advisors to assist in addressing its mounting liquidity problems. On information and belief, each firm had broad experience in merger and acquisition transactions involving consulting firms.

67. Beginning in early 2007, Morgan Stanley advised BearingPoint, in light of its financial condition and the four options described above, that pursuing sales of lines of business was the best option to maximize value.

68. Throughout the first three quarters of 2007, on the advice of its advisors and under then-CEO Harry You, BearingPoint actively explored and engaged in a strategy to sell individual business units so as to address the mounting liquidity crisis.

69. On January 22, 2007, Morgan Stanley presented to the Board a scenario involving the potential sale of EMEA and APAC, units considered to be the best candidates for divesture because of their value and the relative ease with which they might be severed from the domestic business units.

70. Each unit had high enterprise value. As Cerberus would later calculate, APAC's net revenues in 2007 were $271.4 million, while its EBITDA was $74 million. EMEA's net revenues for 2007 were $671.9 million and its EBITDA was $141.7 million.

The Board Decided to Pursue a Sale of the EMEA Business Unit

71. Based on Morgan Stanley's advice, the Board authorized BearingPoint's management to undertake a sales process to explore the feasibility of a sale of EMEA to its managing directors in a "management buy-out" structure, whereby EMEA managing directors would purchase a majority share in EMEA to become its direct owners.

72. In July 2007, UBS joined Morgan Stanley in actively advising the Company to pursue a strategy of business unit divestures followed by an auction of the remaining business. On July 27, 2007, UBS told the Director Defendants that sales of individual business units were optimal, in part, because "[t]here does not appear to be a clear-cut buyer for [BearingPoint] as a whole," and because "[u]nfavorable debt markets make a financial sponsor sale challenging in the near term." On that same day, UBS recommended that the Company "execute a series of divestitures of the Company's business units, followed by a possible auction of the remaining business."

73. UBS presented the Director Defendants and others an "Illustrative Break-Up 'Road Map'" listing various options involving the structure and value of sales of individual business units, and listing potential purchasers that BearingPoint might pursue.

74. In August 2007, the Board determined, on the basis of sound advice from its advisors, to undertake a sales process and proceed with a strategy predicated on the sale of individual business units. It directed management to proceed with a sale of the EMEA business unit and to explore the potential sale of APAC.

75. On August 2, 2007, the Board authorized the expenditure of $10 million "to further explore the potential sale of EMEA," directed senior managers of BearingPoint, including then-chief operating officer Harbach, to "take the critical next steps it determines necessary to move forward with the EMEA transaction" and to "proceed with active due diligence and staging activities related to a possible transaction involving the Company's [EMEA] operations." Furthermore, the Board directed UBS to evaluate avenues for third-party equity financing to fund the EMEA transaction.

76. On November 4, 2007, UBS stated to Defendants Lord and Strange that an APAC "valuation of $500 million to $1 billion-plus is achievable."

Harbach Began Efforts to Resist the EMEA Sales Process

77. Harbach did not support the sale of EMEA or any transaction involving the sale of individual business units. Appearing without then-CEO Harry You, Harbach informed the Board on May 10, 2007 that he would not consider a business unit sale "unless there was no long term intention to run the remainder of the company intact." Such transactions would erode, and potentially destroy, the personal value of Harbach's management and equity positions in the long-term residual business at BearingPoint. Despite Harbach's position, the Board subsequently authorized the sales process.

78. Notwithstanding this directive, Harbach actively resisted EMEA's sale and ultimately prevented its successful consummation in 2007. BearingPoint's general counsel, who observed the process personally, stated that "the … main reason" that the EMEA deal could not be consummated "was [that] Ed Harbach was not supportive. He was given every opportunity to allow this to proceed and refused."

79. By the autumn of 2007, tensions had developed between You and BearingPoint's Board.

Harbach Used Greenhill to Scuttle the EMEA Sale

80. BearingPoint discontinued its engagement of Morgan Stanley in September 2007. This left UBS as BearingPoint's only financial advisor—an advisor that Harbach knew supported the strategy of selling parts of BearingPoint to reduce debt and supported the pending EMEA sale. In October, however, Harbach found support for his self-serving strategy of avoiding any sales and keeping BearingPoint together from the investment bank Greenhill and Company, Inc.

("Greenhill"). Greenhill was originally engaged by the Board in October 2007 to perform the discrete role of rendering a fairness opinion on the proposed EMEA sale.

81. Greenhill recognized the rift that had developed between the Board and You, the alternative strategy proposed by Harbach, and the opportunity to develop additional work at BearingPoint by supporting Harbach's strategy and supplanting UBS as BearingPoint's lead investment bank.

82. Harbach met with Greenhill on October 29, 2007 to discuss a larger role for Greenhill as primary advisor to BearingPoint. Harbach perceived that a change of investment bank would be a means to change UBS's advice and divert the Board from the sale process. In these initial Greenhill discussions, Harbach—who lacked in-depth financial and accounting expertise and whose primary role had been operationally focused—advocated jettisoning the EMEA sale in favor of an attempt at an operational turnaround. He claimed that the Company's liquidity was "in good shape," cast doubt on perceived benefits of the EMEA transaction, actively questioned UBS's conclusions that a sale of EMEA and other business units of BearingPoint would "unlock" more equity value than if BearingPoint remained consolidated, and refused to vouch for various assumptions underlying UBS's advice regarding the benefits of the EMEA transaction.

83. At this point, Greenhill had not been engaged to investigate BearingPoint's operational capabilities and had no independent basis on which to critique Harbach's observations. However, just six days after its October 29, 2007 meeting with Harbach, and with extremely limited information, Greenhill initially endorsed Harbach's vision of pursuing an operational turnaround, and merely "responding" to offers for the whole company. As alleged

below, that endorsement would change as Greenhill learned more about the true state of BearingPoint's financial condition.

84. On November 4, 2007, UBS prepared a presentation for a Transaction Committee established by the Board consisting of Defendants Fleischer, Strange, and Lord, and stated that "the sale of EMEA would enable the Company to repay the entire senior term loan and significantly reduce leverage from 4x to approximately 3x" and that an APAC "valuation of $500 million to $1 billion-plus is achievable." That same day, a Greenhill representative, who had limited information and involvement with the Company at that time, inserted himself into the process by criticizing UBS's "sale of the parts" strategy in an email to Defendants Fleischer and Strange, noting that "quietly pursuing a sale of the whole company is the right route."

85. Although Greenhill was in favor of a sales process and communicated this position to the Board, Greenhill was eager to position itself as a lead advisor and went along with Harbach's effort to scuttle the EMEA sale and, contrary to the advice of UBS, told Harbach that breaking up BearingPoint's U.S. business lines "always sounded problematic to us . . . ."

86. By November 13, 2007, it was apparent that BearingPoint managing directors with EMEA who were based in Scandinavian countries had decided not to participate in the management buy-out, and that the net cash proceeds that the Company would receive as a result of the sale of EMEA would likely be less than the minimum that the Director Defendants had hoped to achieve. As a result, questions arose concerning whether the EMEA transaction would close as predicted.

Harbach and Greenhill Advocated an "About Face" on the EMEA Sale

87. Having obtained Greenhill's initial and partial backing of his strategy—that is, not immediately selling EMEA—Harbach used an upcoming Board meeting on November 30, 2007

to present his alternative strategy that, while unrealistic and infeasible, aligned with his individual pecuniary interests.

88. Two weeks before that November 30, 2007 meeting, on or about November 14, 2007, UBS provided the Board with discussion materials for its consideration in advance of the upcoming meeting of the Board, specifically recommending that the Board continue to pursue the EMEA transaction and also consider pursuit of a sale of the Company's other business units. In making these recommendations, UBS, the Company's retained financial advisor, also told the Board that there was a "[l]imited likelihood of buyer for whole."

89. That same day, on November 14, 2007, Greenhill circulated to the Board a presentation suggesting that the Board should reverse its strategy, terminate the EMEA sales process, and instead (as it had recommended by email dated November 4, 2007 that "pursuing a sale of the whole company is the right route") consider a sale of the entire Company for several alternative reasons, including because such a sale would provide "[m]ore equity ownership for management . . . ." Greenhill also advised the Board that any public announcement that the Company was for sale should be deferred for a few months, which would allow for the release of the Company's 2007 year-end financial results.

90. Notably, in attempting to sell the entire Company, Greenhill explicitly advised the Director Defendants that while "[f]inancial buyers [were the] most likely" option, "strategics should not be ignored."

91. Up to this point, the formal scope of Greenhill's engagement had been brief and narrow. It had been engaged only a month before, in October, 2007, and its role had been limited to providing a fairness opinion in connection with the then-proposed sale of EMEA.

92. Further, as of this time, the Defendants knew that Greenhill had not been tasked by the Board to investigate, prepare or critique any financial model to demonstrate how BearingPoint's liquidity problems could be addressed without a sale, nor to give advice to the Board as to how to manage its liquidity crisis, nor to advise the Company as to overall sale or disposition strategies.

93. Thus, simultaneous with its November 14, 2008 presentation, Greenhill pressed various directors and Harbach to expand its engagement with BearingPoint. On November 13, 2007 (the day before it circulated its November 14, 2007 presentation), Greenhill sent an email to Defendants McGeary, Strange, and Fleischer providing specific examples of situations where Greenhill was the sole or lead advisor in the sale or acquisition of a public company in order to provide "points about Greenhill's capabilities to help [BearingPoint] in the next chapter."

94. In touting its capability to act as the "sole or lead advisor in the sale or acquisition of" the entire Company, Greenhill's November 13, 2007 email did not identify any transactions involving companies similar to BearingPoint. Indeed, while UBS had broad experience with professional services companies, Greenhill was not recognized as having particular expertise in sale transactions involving professional services companies.

95. Also on November 13, 2007, Greenhill noted in an email to Fleischer its view "that a sale of the whole company is optimal . . . ." and that it "[h]ad a very good call with [Defendant McGeary], who shares our views entirely."

96. On November 29, 2007, Greenhill pressed Defendant Fleischer to engage Greenhill as its lead advisor, writing that "we obviously want to help the Company . . . as well as generally continue our role as advisor through whatever the next chapter may be. I feel like we went a bit out on a limb in the early weeks of this assignment . . . ."

97. Soon thereafter, Greenhill reached out to Harbach with a final pitch in its campaign to be retained as the Company's advisor with the assurance that "[w]e see completely eye to eye on how Bearingpoint [*sic*] should proceed . . . ."

98. Greenhill's efforts were successful; it was appointed as BearingPoint's primary financial advisor on January 18, 2008.

The Board Terminated You, the EMEA Sale, and UBS's Role as its Sole Financial Advisor

99. Harry You recognized the risk of bankruptcy as early as November, 2007, and advised that the sale of EMEA would help reduce that risk. On or about November 29, 2007, You provided a written presentation for circulation to the Board for its November 30, 2007 meeting. He recommended, among other things, that BearingPoint proceed with the EMEA transaction, as it allowed BearingPoint to "[s]trengthen BearingPoint's balance sheet," "reduce bankruptcy risk," and "increase attractiveness of balance of BearingPoint business to broadest range of interested [acquirers]." You also recommended proceeding with an investment by the Chinese government in APAC.

100. An analysis prepared by UBS supported You's presentation. In that presentation, UBS reiterated its earlier warning of the "[l]imited likelihood of buyer for whole," and that "[f]inancial buyers will be hampered by … [p]oor credit markets which are not expected to strengthen in the near term." UBS advised that the "Public Services business remains attractive," and that "[s]ubstantial value upside can be created through crystallizing the value in APAC and Public Services, even before infrastructure savings are considered," by divesting them from BearingPoint. UBS again noted various possible "strategic buyers" for Public Services, and outlined a strategy for divesting APAC from BearingPoint by pursuing an investment by the Chinese government in APAC and an initial public offering on Asian markets.

101. The Director Defendants rejected the advice of You and UBS, the Company's only financial advisor at the time, and, at the November 30, 2007 meeting, abruptly terminated You as CEO, removed him from the Board, appointed Harbach to replace him, and elected Harbach as a director on the Board. At the same time, the Board decided that it would be appropriate for Defendants Fleischer and McGeary to speak with Greenhill on behalf of the Board about executing a new expanded engagement letter with Greenhill.

102. On December 11, 2007, Defendant McGeary told Greenhill that Harbach "understands the relationship the Board wants to establish with Greenhill." By letter dated, January 18, 2008, a new engagement letter was executed with Greenhill confirming Greenhill's engagement to develop and advise the Company with respect to alternatives involving:

- the sale of the Company as a whole,
- an acquisition of a majority of the Company's stock,
- a sale of all or substantially all of the Company's assets, or
- a sale of its principal business units.

Prior to confirming Greenhill's engagement via this engagement letter, Greenhill reported to at least Defendant McGeary about the inbound calls of interest from potential buyers and how to deal with them before the release in February 2008 of the Company's Form 10-K for year-end 2007.

<u>The Board Amplified Harbach's Equity Incentives Upon his Appointment as CEO</u>

103. Harbach's appointments as CEO and as a director were accompanied by a substantial increase in his equity interests in BearingPoint. In addition to a base salary of $900,214 (and a target annual bonus of the same amount), Harbach received an additional 199,275 Restricted Stock Units on January 2, 2008, as well as the option to purchase up to an additional 1,232,600 shares of BearingPoint common stock at $2.76 per share. The RSUs and stock option grants were scheduled to vest ratably in four equal installments on the anniversary

date of the grant in 2009, 2010, 2011 and 2012. If Harbach's employment was terminated without cause prior to a sale of BearingPoint or substantially all of its assets, Harbach's unvested equity, including that granted in connection with his prior appointment as COO, would be forfeited. This was the likely scenario if the Company was sold to a strategic purchaser. If, however, Harbach's employment was terminated without cause after a sale of BearingPoint or substantially all of its assets, all of Harbach's equity and options (including those awarded in connection with his appointment as COO) would vest immediately and become non-forfeitable. Because a financial buyer would likely want Harbach to stay in management for at least a transition period following the transaction, Harbach's equity and options would vest and he would be in a position to negotiate for higher equity in the new BearingPoint.

104. These new equity grants to Harbach, on top of the 888,325 RSUs granted to Harbach upon his appointment as COO in January of 2007, represented the potential for 2,320,200 shares of BearingPoint common stock. However, Harbach's options became almost immediately underwater when BearingPoint's stock price slid below the $2.76 strike price in January of 2008—the same month of their award. Therefore, a financial buyer, and the ability to negotiate new and additional equity in a sale, represented a potential vehicle for personal gain for Harbach.

<u>Harbach Quickly Dismantled BearingPoint's Plan to Sell its Parts</u>

105. From the moment of his appointment as CEO, Harbach worked swiftly to dismantle the Company's previous disposition strategy and to obtain control over the Company's divestiture process to ensure its alignment with his own personal interests, without regard to BearingPoint's interests.

106. On the day of his appointment on November 30, 2007, Harbach, as CEO, advised the Board to terminate negotiations for the sale of EMEA. Harbach informed the Board that

"unless he is otherwise directed by the Board, he will not approach or seek out potential investors or purchasers for BearingPoint . . . instead, he will focus on enhancing BearingPoint's operations and business performance." He also made clear that his "preference [wa]s to wait until a bona fide offer is presented" before engaging resources towards a strategic transaction.

107. As of November 30, 2007, no financial model supported either Harbach's recommendation to address liquidity concerns through operations or his observation that BearingPoint did not need to consummate the EMEA transaction or sell other units because it "could continue to remain independent."

108. As previously noted, as of this point in late 2007, Greenhill had no formal engagement with BearingPoint. Its narrow engagement to provide an EMEA fairness opinion was now moot. Greenhill had not yet developed a long relationship with BearingPoint, or the accompanying insight that would permit it to critique management's operational assertions. It would not be until January 18, 2008 that Greenhill would be engaged as the Company's general purpose investment bank and not until February 2008 that it would see any financial model supporting Harbach's turnaround plans.

109. While Greenhill's understanding of the Company would deepen in the coming months, as of late 2007, Greenhill was forced to rely entirely on Harbach and other management for information regarding the Company's results, performance, and forecast.

110. Thus, Harbach's strategic reversal and the Board's agreement to reverse course was not supported by a good faith financial model or any investment bank then engaged by BearingPoint.

111. Nevertheless, the Board terminated the EMEA transaction on November 30, 2007.

The Board Embarked on a New Sales Process

112. Pursuant to Harbach's request, the Board on November 30, 2007 revisited the topic of whether a sales process should be pursued. The Board instructed management "to continue its due diligence gathering exercise and to engage a small corporate development team under the leadership of General Counsel [Laurent] Lutz" but that "no proactive communications should be made, either within BearingPoint or externally, regarding a proposed strategic transaction involving BearingPoint.

113. The Board's instructions to reverse course from the approved "sale of the parts" plan and passively wait for an interested buyer with which to negotiate would prove disastrous for BearingPoint.

114. On December 3, 2007, BearingPoint publicly announced Harbach's appointment as CEO and its public reversal in strategy. The market was skeptical. Prior to its announcements, BearingPoint's stock price closed at $3.65. On Monday December 3, 2007 after the announcements, the stock price closed at $2.94—down nearly 20%. And on that Wednesday, December 5, 2007, it closed at $2.75, a drop of nearly 25% in less than one week.

115. The execution of Greenhill's January 18, 2008 engagement letter cemented Greenhill's lead advisory role.

116. Consistent with the sales process for the sale of the whole Company that was underway but delayed, Greenhill was hired to develop and advise "the Company with respect to various strategic and business alternatives for the Company involving a merger or sale of the Company as a whole, an acquisition of a majority of the stock of the Company, a sale of all or substantially all of the assets of the Company or the sale by the Company of any of its five principal business units (EMEA, Asia Pacific, Public Services, Commercial Services, and

Financial Services)." Harbach now knew that, thereafter, UBS's role was nominal, and that UBS would not be privy to any of the real strategic direction and negotiation being undertaken.

117. In addition to engaging Greenhill to develop and give advice on the sale process, in January 2008, the Company also hired a managing director specifically to coordinate the sales process. This managing director had previously served as a contracted consultant to the Company and was officially on-board as a managing director by the end of January 2008.

118. Also on January 18, 2008, Harbach obtained control over BearingPoint's consideration of future sales alternatives by joining BearingPoint's Finance Committee, a subcommittee of the Board charged with the duty of "report[ing] and mak[ing] recommendations to the full Board for their deliberation and action with respect to all matters involving BearingPoint's outlook or strategic alternatives." The Finance Committee consisted of Defendants Strange, McGeary, Harbach, and Fleischer.

The Board Permitted Harbach to Improperly Seize Control of the Financial Modeling and Budgeting Processes

119. As previously noted, and indicative of the need to sell the Company, no reasonable financial plan or model supported the feasibility of delaying a sale or limiting the scope of potential buyers, and solving the Company's liquidity crisis through operations alone. Having announced to investors and the public his vision of turning around BearingPoint and operating it as a profitable global enterprise, however, Harbach was pushed by the Board to support his strategy with a financial model projecting a positive spin on BearingPoint's future performance and cash position.

120. Soon after his appointment as CEO, but after he recommended to the Board to terminate the EMEA sale process (and any similar sale process), Harbach directed the Company's chief financial officer, Judy Ethell, to generate a 2008 business forecast that would

support Harbach's turnaround strategy and show that the "Put" obligation could be met through operations, without the need for any corporate sale.

121. Under Harbach's close control, Ethell developed the first draft of the plan (the "2008 Management Plan") early in 2008.

122. Harbach caused the 2008 Management Plan to be presented to the Board on January 18, 2008, and on the basis thereof, represented to the Board that BearingPoint would have sufficient liquidity at year-end 2008 to meet the April 2009 "Put" requirement without the need for a corporate disposition or sale. This initial version of a "Management Plan," however, showed that the Company would suffer a $100 million net loss in 2008.

123. The Director Defendants, however, knowing that the Company was for sale, were troubled by the projected $100 million net loss in 2008 and asked Harbach to revisit the projected loss.

124. The Board's challenge proved difficult. Harbach quickly realized that he would be unable to meet the Board's challenge so long as Ethell—and the objectivity and insight inherent in the CFO function—was centrally involved in the process.

125. Harbach thus looked outside of Ethell's office and turned instead to Mike Pope, a managing director who worked neither for Ethell nor the office of the CFO, but rather was a direct report to Harbach. Pope, in Harbach's words, "function[ed] as a CFO" and was "closest to [Harbach regarding the] budget changes" and forecasts purportedly supporting Harbach's turnaround strategy. By using Pope, Harbach was free to control the message the forecast would send to the Board, outside investors and potential purchasers regarding BearingPoint's financial condition.

126. Harbach and Pope scoured the North American business units to create purported improvement opportunities, imposing aggressive profitability targets over business unit leaders' concerns that the targets were unrealistic. In at least one instance, a business unit leader pushed back on Harbach's imposed budget due to the negative impact an unachievable budget would have on that business unit leader's bonus. Knowing that the budget was unachievable, Harbach agreed to base that business unit leader's bonus on a target far less than Harbach's imposed budget number.

127. Unable to "find another $100M" in North America, Harbach turned to the EMEA business unit—which had underperformed in 2007, and which until just weeks earlier, had been preparing to depart BearingPoint's ownership by way of a management buyout—and ordered it to make unspecified increases to their forecasted net revenues.

128. Within a few days, Harbach advised the Board that he had reviewed and revised the plan, which now magically projected positive net income in 2008 (the "2008 Management Plan") instead of a $100 million loss. At the same time, Harbach advised the Board that this "'make a buck' budget is clearly more aggressive [than his original 2008 Plan] and will be a challenge for us."

129. On information and belief, the Director Defendants engaged in no in-depth questioning, examination, or exploration of this sudden and implausible change in projections or of the viability of the 2008 Management Plan, its underlying assumptions, the process used to generate it, or Harbach's plan to solve the liquidity crisis through operational improvements alone.

Harbach Unveiled His Unrealistic Management Plan

130. The 2008 Management Plan gave an overly optimistic impression of the health of BearingPoint's financial condition and its equity value, and was based on unrealistic assumptions regarding BearingPoint's operational capacities, its ability to cut costs, and market conditions. In essence, the 2008 Management Plan created an inaccurate impression that BearingPoint had more time to run a sales process than it did in reality. From Harbach's perspective, this bought him time to pursue his strategy of finding a financial buyer for the whole of BearingPoint, to avoid dispositions that would not benefit him personally, and to negotiate enhancements to his own compensation and equity.

131. Having rejected the initial Management Plan's $100 Million loss and directed Harbach to revise it, the Director Defendants had reason to suspect the feasibility of the 2008 Management Plan, its underlying assumptions, and the viability of Harbach's strategy.

132. All Director Defendants were aware of BearingPoint's historic financial reporting problems—including acknowledged weaknesses in its internal controls and finance and accounting functions. Each was aware of the extensive analysis that had been done by Morgan Stanley and UBS, and their advice that in light of BearingPoint's structure, financial condition, and market conditions, sales of discrete business units of BearingPoint would be necessary to meet liquidity problems and maximize value to the Company.

133. Defendant McGeary in particular was aware of the lack of adequate controls in the process of creating the 2008 Management Plan. BearingPoint's General Counsel, Laurent Lutz warned Defendant McGeary on January 21, 2008 of his

> continuing concern . . . that I have little, if any, visibility on the evolution of the budget. And, I had none prior to the December 3 investor call. So it is impossible for me to give advice on the accuracy, even before or after the fact, of impromptu statements like obtaining $1 of Gaap [*sic*] net income nor can I correct them when

> the underlying premise on which they are based is not known. I have this morning again reiterated to [Harbach and Pope] the importance of having a detailed discussion of the content and assumptions under the budget as part of the preparation for Investor Day. That is all I can do. Anything you can do to reinforce would be appreciated.

134. In early February 2008, Harbach publicly unveiled the 2008 Management Plan to company investors in the form of a carefully crafted "Guidance" intended to deflect any speculation that BearingPoint was in distress, facing a liquidity crisis and in a sales process. Harbach's Guidance projected, among other things, $1 million in net income for the year and year-end cash in the range of $500 million to $570 million on a global basis. Harbach stated that BearingPoint's focus for 2008 was to "make profitability [its] first priority" and to push forward with operational improvements geared towards turning the Company around.

135. Harbach did not disclose to investors the sales process or the Board's directive to run a sales process. To the contrary, he deflected the issue by announcing that BearingPoint "can handle the $200 million put in April, 2009 with current cash from operations but we need to continue to strengthen [the balance sheet]. And what I mean by that is generate positive free cash flow from operations." In reality, neither Harbach nor any of the Director Defendants knew at this time (and did not know even as of early May 2008) how much cash was needed—and where—to continue running the business while satisfying the April 2009 Put obligation. Harbach's assertion amounted to little more than a guess rendered in pursuit of his objective—to funnel BearingPoint's sales process towards self-interested ends.

136. Harbach was similarly careful to avoid disclosing the sale process in his internal messaging to BearingPoint managing directors regarding the 2008 Management Plan. Despite telling the Board that the 2008 Management Plan was "aggressive," Harbach directed the managing directors to inform inquiring employees and clients that BearingPoint would have

enough cash to survive through the next twelve months without needing to access capital markets, and that "[g]enerating and conserving cash are both crucial to our success in 2008. We think our [2008 Management Plan] is conservative." There was absolutely no basis for the last of these statements, and it directly contradicted Harbach's written message to the Board.

137. The Director Defendants formally approved the 2008 Management Plan on February 25, 2008, without adequate or good faith diligence into its feasibility.

138. Despite Harbach's careful messaging, investors who saw the 2008 Management Plan remained doubtful and immediately questioned BearingPoint's "ability to sustain its targeted net revenue, and its cash position." Harbach's stated intent to continue operating was not credited in the marketplace, and from the moment of his appointment, BearingPoint received numerous offers and overtures for dispositions.

Despite Embarking on a Sales Process, the Board Sat Idle while Harbach Deflected Numerous Purchase Offers

139. Even as Harbach launched his 2008 Management Plan, market and other forces continued to aggravate BearingPoint's troubles. Doubts about the 2008 Management Plan grew quickly among the Company's advisors at Greenhill, its investors, the market, the Company's general counsel and its financial officers, especially as BearingPoint's actual financial performance and operational metrics failed to keep pace with the projections of the 2008 Management Plan.

140. As the first quarter of 2008 progressed, the inevitability of a sale was clear to all Defendants. Harbach thus worked to maintain tight control over the scope and direction of the consideration of strategic sales alternatives to ensure they aligned with his personal interests.

141. Harbach was well-positioned to do so. As alleged below, having terminated the EMEA transaction, having effectively excluded UBS from the sales process by expanding the

scope of Greenhill's engagement, and having secured an appointment to the Finance Committee, Harbach—unconstrained by any meaningful Board oversight—was free to deflect sales that might dilute or eliminate his long-term equity upside. At the same time, the Board, keenly aware of the sales process, failed to comply with its duties to prepare and develop a focused strategy to determine and pursue the best type of transaction reasonably available in order to maximize the value of the Company, which duty included the Board's obligation to engage, manage, and be fully involved in the sales process. It also required the Board to explore, know, and understand the market by arming themselves with specific and contemporary knowledge of the value of the Company and marketplace, to examine all reasonable types of transactions, and to have a reasonable, factual basis not to undertake exploration of a potential segment of the marketplace. As alleged below, sadly, the passive and detached Director Defendants did nothing to check Harbach's ambitions.

142. Interest in BearingPoint by potential purchasers had intensified after Harbach had been appointed CEO, but especially as of December 3, 2007, when BearingPoint finally became current in its SEC filing obligations by filing its Form 10-Q for the third quarter of 2007, removing any impediment to a sale relating to its filing status. Despite Harbach's efforts to deflect sales interest, the potential sale of BearingPoint was widely discussed among BearingPoint's consultants and in the industry.

143. As of January 18, 2008, and continuing through April 2008, BearingPoint received "significant incoming call volume from parties interested in discussion [of] an acquisition of BearingPoint." Nevertheless, Harbach and the Board continued to adopt a passive strategy of merely "responding" to any overture of interest in individual business units (as opposed to the whole Company). Acknowledging that it did not intend to plan or provide for a

proactive solicitation of interest, the Board directed Greenhill on January 18, 2008 simply "to log all calls and consider at the appropriate time with proper advice which callers might be worthy of re-engaging."

144. From late 2007 through April 2008, with the Director Defendants' knowledge, Harbach deflected, either personally or indirectly through Greenhill, numerous expressions of interest by potential purchasers, including several buyers interested in purchasing separate business units of BearingPoint, and several strategic buyers interested in purchasing the whole Company. With the Director Defendants' knowledge, Harbach deflected or caused the deflection of these overtures at their inception, without any deliberation or individualized determination as to their merits, or any consideration by the Board as to their merits, because they did not fit his personal plans or suit his personal interest in preserving and enhancing his equity interests in BearingPoint.

145. As a result, the Director Defendants knowingly permitted BearingPoint to lose many opportunities for sales of all of BearingPoint or individual business units of BearingPoint.

146. In December 2007, a strategic purchaser, CGI Group, Inc., expressed interest in purchasing the whole Company. Harbach was informed by Greenhill that CGI was "one of the better inquiries" and a "good one to respond to when we are ready." Harbach was also later warned by BearingPoint's General Counsel Lutz, who would repeatedly express concerns and provide advice and guidance to the Board regarding the process, that discussions with CGI were important because "as legal protection for the board, having at least one, active strategic alternative to [financial] bids will be pretty important to demonstrating sufficient due diligence and business judgment on any final transaction decision." As a result, when Harbach later

selected his group of financial buyers to focus upon to further a transaction, he included CGI in the process as the lone strategic buyer without giving them due consideration.

147. On December 8, 2007, and again on January 8, 2008, Indachin Limited ("Indachin") expressed interest in purchasing BearingPoint's Commercial Services business unit. On January 8, 2008, Indachin offered to put together a proposal for the Board. On January 10, 2008, Greenhill told Defendant McGeary to "sit on" these kinds of inquiries until [BearingPoint] was ready to engage in dialogue with interested parties. On February 14th, Greenhill invited Indachin to participate in the sales process, but on the condition that Indachin consider a transaction for the whole Company. On February 29th, Indachin informed Greenhill that it had determined not to pursue a potential transaction with BearingPoint, citing concerns about "the outlook for a Bearing Point turnaround." Greenhill informed Harbach of Indachin's decision, dismissing it as not "a significant detriment to our process since from the beginning we considered them as more interested in the commercial parts only."

148. On December 20, 2007, Greenhill informed Defendants Strange, McGeary and Harbach that Nikko Principles Investment Japan, Ltd ("Nikko") had expressed interest in purchasing APAC, which it valued at between $500-600 million. Greenhill (still trying to secure Greenhill's appointment as BearingPoint's financial advisor and knowing the Board's predisposition to restrict its consideration of potential sales transactions to a potential sale of the entire Company) deflected this interest, stating, "I believe we are all on the same page in terms of avoiding a series of breakup discussions."

149. Around this same time, SERCO, a potential strategic buyer, approached UBS with interest in purchasing BearingPoint. The opportunity with SERCO was not further pursued,

notwithstanding Greenhill's and Lutz's prior advice that strategic buyers "should not be ignored."

150. In or about January 2008, Ernst & Young approached Harbach regarding the possibility of purchasing EMEA's Finland practice. Harbach declined to consider the overture.

151. On or about January 7, 2008, Electronic Data Systems ("EDS"), a strategic purchaser, called Greenhill to express interest in a possible transaction. On January 8, 2008, Greenhill forwarded this information to Harbach. There was no further follow-up on the inquiry.

152. On January 17, 2008, Harbach was contacted by PriceWaterhouseCoopers on behalf of an undisclosed party interested in purchasing BearingPoint's Spain practice. Harbach directed that the invitation be declined, and that the potential buyer be informed that BearingPoint would "pass on any widespread effort to try and sale [*sic*] the business and continue to run the same." The very next day, Harbach accepted and agreed to Greenhill's then-proposed engagement to develop and advise the Company with respect to various alternatives for the sale of the Company as a whole or the sale of any of the Company's principal business units.

153. On January 22, 2008, CACI International Inc. ("CACI"), a strategic buyer with a significant public sector practice and a headquarters only miles from BearingPoint's, informed BearingPoint's Ethell that they "have made several acquisitions in the past few years" and that "if [BearingPoint] were to consider other strategic alternatives for our 'federal' business, CACI would be interested." At Harbach's direction, Ethell deflected CACI. There was no further follow-up with CACI or discussion of the inquiry.

154. Prior to January 30, 2008, a Citibank representative told Harbach that Citibank knew "several firms interested in our commercial business." When Citibank asked if Harbach wanted to meet with any of these firms, Harbach replied in the negative without seeking any

additional information on the proposed buyers or their intentions, and informed Citibank that BearingPoint was focused on improving the business.

155. Through January, February and March, 2008, Credit Suisse/CPM Braxis expressed an interest in acquiring BearingPoint's Latin American business for approximately $37-44 million. Despite being warned by General Counsel Lutz that "offers for Latin America are virtually non-existent and if this one is credible it may be one of a kind," Harbach also let the opportunity pass.

156. On February 4, 2008, Harbach was told that the Chinese Government was still interested in investing in the APAC business unit. Harbach skillfully deflected the opportunity, claiming to be "OK trying to find something pragmatic" while simultaneously ordering that the opportunity be declined because BearingPoint had "gone through a change in leadership and [was] focused on running the business."

157. On February 14, 2008, MHW Capital expressed an interest in purchasing the "Government Services" (*i.e*. Public Services) business unit. Greenhill instructed Lutz to respond to the inquiry (and all such similar inquiries) by informing the purchaser that BearingPoint was not interested in pursuing inquiries for purchases of individual business units.

158. On February 26, 2008, UBS emailed BearingPoint's General Counsel Lutz, informing him that UBS could "bring to the table . . . strategic buyer alternatives for the whole company" and that it had at least two strategic buyers ready to proceed. Lutz forwarded UBS's invitation to Harbach, Strange, and McGeary. The invitation, on information and belief, was ignored by Defendants Harbach, Strange, and McGeary, notwithstanding Greenhill's prior advice that strategic buyers should not be ignored.

159. In March 2008, Infosys Technologies Ltd., a strategic buyer, expressed interest in acquiring BearingPoint's APAC business unit. Harbach deflected Infosys, informing its representatives that BearingPoint had "no interest in selling our APAC business or any other pieces of our business at this time."

160. On March 13, 2008, Nikko again called Harbach to express interest in "equity participation in Japan/China." Harbach again deflected the overture.

161. On March 19, 2008, CGI's chief executive officer, Serge Godin, once again attempted to pursue CGI's interest in a transaction involving BearingPoint. He was once again deflected by Harbach.

162. In early January 2008, and again in March 2008, SystemsNet/GTCR, a financial buyer, expressed interest in purchasing the whole Company, but requested to pursue due diligence only with respect to the Public Services unit. On March 12, 2008, Greenhill informed Lutz: "I think we're all on the same page here (only looking for a deal for the whole)." SystemsNet/GTCR's interest in the Public Services business unit was not further pursued.

163. In early April 2008, the investment bank Goldman Sachs approached Harbach offering to explore "a strategic transaction," as well as an opportunity with Goldman's "own private equity group." While Harbach agreed to meet with Goldman Sachs, he did not meaningfully engage with either of the offered opportunities and deflected both.

164. In April 2008, Nomura, a potential strategic purchaser, expressed interest in buying BearingPoint's Japan operations. Harbach deflected that interest as well.

165. Defendant McGeary knew in January 2008 through a Greenhill report that a significant number of potential buyers had expressed interest in the purchase of BearingPoint, including, CGI, EDS through JP Morgan Chase, Bear Stearns Merchant Banking, GTCR Golder

Rauner, Indachin Limited, Nikko Principal Investments Japan, Ltd., Ripplewood, and Silver Lake.

166. The Director Defendants who were members of the Finance Committee—Harbach, Fleischer, McGeary and Strange—knew as of February 4, 2008 that a plethora of buyers had shown interest in BearingPoint, including CGI, EDS through JP Morgan Chase, Bear Stearns Merchant Banking, GTCR Golder Rauner, Indachin Limited, Nikko Principal Investments Japan, Ltd., Ripplewood, Silver Lake, Cerberus, CACI, CitiBank (representing an unnamed strategic buyer), and Credit Suisse, and that Greenhill was recommending that the Director Defendants consider an additional five specifically-named financial buyers and nine specifically-named strategic buyers.

Harbach Rigged the Sales Process to Favor of His Personal Interests and the Director Defendants' Inaction Allowed Lucrative Offers to be Lost

167. On or about February 4, 2008, the Board's Finance Committee met to review Greenhill's discussions to date with potential purchasers who had made inbound calls and was advised by Greenhill that there was strong interest among parties with experience in the Company's sector. The Board's Finance Committee was comprised of Defendants Strange, Fleischer, McGeary, and Harbach, and was charged with the duty to report and make recommendations to the full Board for their deliberation and action with respect to all matters involving BearingPoint's outlook or strategic alternatives. During the February 4, 2008 meeting, Greenhill sought the Finance Committee's approval to sign non-disclosure agreements with all parties who had contacted Greenhill expressing interest in speaking with the Company about a possible transaction. The Finance Committee agreed to take this step. Notwithstanding Greenhill's request, the Finance Committee's concurrence therewith, and the explicit terms of

Greenhill's engagement letter, there was no follow up with all the parties who had contacted the Company.

168. While Greenhill informed the Finance Committee on February 8, 2008 of many of the companies that had expressed interest in purchasing parts of BearingPoint (including two financial buyers and three strategic buyers) and companies that had expressed interest in purchasing the whole company (consisting of five financial buyers and two strategic buyers), neither Greenhill nor Harbach informed the Finance Committee of all of the expressions of interests received by Harbach or other members of management, including several from various other strategic buyers or buyers interested only in parts of BearingPoint.

169. Greenhill did, however, tell the Finance Committee that there were other potential buyers to consider that had not contacted the Company via inbound calls and specifically identified fourteen other potential buyers to be considered in a whole Company purchase, including nine potential strategic buyers.

170. By this point, Greenhill understood BearingPoint's financial distress and that Harbach's strategy was fanciful.

171. Rather than proceed with all interested parties who had initiated contact with the Company, as directed by the Finance Committee, or contact other potential buyers as suggested by Greenhill, Harbach and Greenhill limited their focus to the "sell to private equity" option.

172. Harbach caused Greenhill on February 13, 2008 to proceed with "Project Bullrun" (the code name for the sales process) and to engage with *only* those potential purchasers "that were identified [as having] 'expressed interest for whole'" of BearingPoint. Harbach further limited the scope of interested parties and concentrated on financial buyers, as opposed to strategic buyers. By this time, the managing director running the sales process and Greenhill

were already working to put together a presentation to be presented to certain potential buyers in early March 2008 after the release of the Company's Form 10-K for 2007.

173. In March 2008, Defendant Harbach, along with Greenhill, the Managing Director in charge of the sales process and CFO Ethell, gave a road-show presentation to potential purchasers. Thereafter, all of the Director Defendants were aware of serious, continuing interest by both strategic and financial buyers in a merger or acquisition with BearingPoint. The interested parties included the strategic buyers CGI, CPM Braxis, InfoSys, EDS, Serco, and CACI; as well as the financial buyers Cerberus, Bear Stearns Merchant Banking, GTCR Golder Rauner, KKR, Indachin Limited, Nikko Principal Investments Japan, Ltd., Ripplewood, and Silver Lake. Despite this active level of interest, the Director Defendants continued to disregard their duties and failed to explore these alternatives to maximize the value of the corporate enterprise.

174. Without the Board's active involvement in the management and oversight of the process, Harbach effectively proceeded with fewer than all interested bidders, and shopped BearingPoint to only certain preselected purchasers who indicated an interest in purchasing BearingPoint as a whole, all but one of which was a financial buyer. Most entities that had expressed interest in purchasing individual business units, including those communications alleged above, were not further pursued. Nor were the fourteen strategic purchasers identified by Greenhill pursued. Later that month, the Company's General Counsel advised Harbach that he should keep in mind that Cerberus—a financial purchaser to whom Harbach worked to funnel the sales process and which would turn out to be BearingPoint's primary private equity option—"is the ultimate bottom feeder."

General Counsel Lutz was Yet Again Ignored When he Provided Prophetic Advice

175. BearingPoint's general counsel was deeply concerned about Harbach's structural control of the sale process and the conflict between BearingPoint's needs on the one hand, and Harbach's personal interests and the interests of certain other directors who had significant debt and equity holdings on the other hand—so much so that in early 2008 he raised concerns to outside counsel for BearingPoint about the "configuration and operation of the Finance Committee," highlighting Harbach's "possible future package with a buyer," Fleischer's debt holdings, and McGeary's very recent departure as an executive chairman. Alluding to the active sales process, Lutz observed that "if we deliberate and go down to a set of, say, two finalists [in the sales process] is that not in part making a decision if there are more than two still interested in moving forward?" Prior to raising these specific concerns, Lutz had already told Defendants Strange, Fleischer, McGeary, and Harbach, on February 26, 2008, that UBS had advised it was aware that the Company was being shopped and to "make particular note" of the fact that UBS was "ready to bring to the table . . . strategic buyer alternatives, for the whole company" and that "there are at least two who already have Board approval to proceed."

176. On March 9, 2008, Lutz directly warned Defendants Harbach and McGeary about proceeding with fewer than all interested bidders, advising "it is the kind of decision that could be revisited in litigation to block a . . . transaction if someone wants to challenge the independence of the committee." Lutz "suggest[ed] [that the committee] consider whether or not it is appropriate to have a full board call . . . after [the members of the committee] have had time . . . to deliberate and recommend any final decision." Lutz's warning was further passed along to Defendant Strange.

177. The next day, Lutz issued another warning, advising Defendants Harbach, Fleischer, Strange, and McGeary that "[i]t is debatable whether the Finance Committee is an 'independent' body" and that all of the Director Defendants should be involved.

178. Despite Lutz's warnings, the Director Defendants failed to become actively involved, permitted Harbach to improperly narrow the bidding field to those purchasers he determined were most favorable to his own personal interest, and allowed Harbach to limit or cease discussions with those companies that Harbach determined to be inimical to his personal interests. Once again, the Director Defendants failed to insert themselves into the process to comply with their fiduciary duties.

179. During this crucial period, in early spring 2008, Harbach was the only Director Defendant to meet with any of the bidders. Despite Harbach's direct conflict by virtue of his desire to obtain substantial equity in the new company and a future management role with any financial buyer, none of the other Director Defendants directly participated in the process. The Director Defendants again ignored their fiduciary duty to insert themselves and take action to exercise oversight and control over the sale process led by Harbach.

180. Lutz's warnings would prove prophetic. Without independent control, check, or oversight on the process by which he would conduct the sales and due diligence process, Harbach freely limited BearingPoint's sales process to the one mode of transaction that would personally benefit him—a sale of the whole company to a financial buyer—and block other obvious and attractive disposition strategies—sales of discrete lines of business or a sale of the company to a strategic buyer—either of which raised the risk of eroding or eliminating the value of his expected equity interest and his management interest.

181. As alleged above, in March 2008, Harbach and other members of management met with the purchasers who indicated interest in the whole company (and one purchaser who had expressed interest for both the whole Company or certain business units) and presented them with a "Management Presentation," which outlined the strengths of BearingPoint, set forth overly-optimistic business forecasts that projected BearingPoint's performance through 2012, and which (as alleged below) were prepared under Harbach's direction in an attempt to create a favorable impression as to BearingPoint's equity having value.

182. Harbach was careful, however, to create the pretense of "sufficient due diligence and business judgment" by including at least one strategic purchaser in these management presentations, as well as one purchaser who had expressed interest for the Commercial Services business unit.

183. Contrary to Lutz's advice, and due to the failure of the Director Defendants to properly oversee and manage the process, Harbach ignored the potential strategic buyers and ensured that BearingPoint proceeded with only two bidders, both of which were financial buyers that made initial offers on March 31, 2008 to purchase the whole Company. Harbach caused BearingPoint shortly thereafter to eliminate further negotiations with more than a dozen potential counterparties, and limit further negotiations to the two financial buyers making offers for the whole: Silver Lake and Cerberus.

184. The Board granted Cerberus and Silver Lake due diligence rights in early April 2008. No other parties received due diligence rights during this crucial period, when a successful sale or sales would have advanced toward closure far in advance of the April 2009 "Put" obligation.

The Boarded Permitted Harbach to Completely Usurp Control of Financial Forecasting

185. As alleged above, after Harbach's accession to the CEO position in late 2007, and after directing Ethell to prepare the 2008 Management Plan in January 2008, Harbach asserted close control over Ethell in order to gain and retain control over BearingPoint's financial forecasting—the key to deflecting the urgency of sale efforts and persuading others of the viability of the 2008 Management Plan and Harbach's strategy.

186. Ethell had been hired by Harry You in 2006 as the Company's chief financial officer. Immediately upon Harbach's accession to the CEO position in late 2007, Harbach commenced an effort to push Ethell out of the CFO position in order, as he put it to her, to "establish his own . . . CFO" who would report directly to him.

187. At the same time, Harbach began to push Ethell to the periphery of critical financial forecasting and strategic efforts, impeding her ability to properly function as a CFO.

188. Starting in mid-February 2008, Harbach excluded Ethell from the development of BearingPoint's "Long Term Forecast," a forecast built with time afforded by, and on the assumptions underlying, the "aggressive" 2008 Management Plan and which was designed for the purposes of suggesting to potential purchasers of BearingPoint that BearingPoint's equity value would steadily increase from 2008 through 2012.

189. Like he did with the development of the 2008 Management Plan, Harbach closely controlled the development of the Long Term Forecast, relying primarily on Mike Pope and other direct reports rather than Ethell or her office. Harbach mandated that the Long Term Forecast be a "top down forecast" that incorporated the "aggressive" revenue and earnings targets that Harbach established. When business unit leaders identified operating limitations and recessionary effects that undermined the feasibility of meeting Harbach's imposed targets,

Harbach ordered that the business unit leaders be "ke[pt] . . . out of this for now" and directed his staff to "stick to plan."

190. Ethell soon began to chafe under Harbach's inappropriate control over the finance function. To accelerate her departure, Harbach substantially reduced Ethell's bonus in February 2008. Soon thereafter, Harbach asked Ethell to leave her position.

191. In March 2008, Harbach hired David Hunter, an old friend and colleague from his previous employment at Accenture, then, and at all relevant times, resident in Australia, as chief operating officer of BearingPoint and unit leader of APAC. Hunter's real task, however, was to help Harbach seize control of BearingPoint's financial forecasting so Harbach could control disclosures to parties then bidding for BearingPoint.

192. Within days of hiring Hunter, Harbach instructed the search consultant engaged to recruit a new CFO to amend the position specification so that the new CFO would report to both the CEO and COO Hunter.

193. Hunter had absolutely no history with, or loyalty to BearingPoint, or knowledge of its operations. He had never worked for BearingPoint as a consultant, would never do so, and had nothing to lose by its demise. His sole objective was to convert this opportunity into a personal benefit. As he put it shortly after being hired, he accepted the position because he had gotten "bored (in retirement)," adding that he was "financially independent and [did not] need the cash comp" and thus accepted a "comp package . . . largely equity/option based" in order to "participate in the equity upside" of the position with BearingPoint.

194. Hunter made his personal motivations clear from the outset. During his hiring process, Hunter's attempts to extract all possible advantage out of his compensation package prompted one board member to question whether "David is the right person and has the

appropriate motivation to accomplish what [Harbach] is hiring him for … I would expect the right person, at this point, to be so anxious to start driving a turnaround that he would be working; not spending all his time, energy and passion working on his compensation package and creating a family trust that did not already exist, to take advantage of this new contract."

195. In April 2008, noting to a potential acquirer that his motivation was to "participate in the equity upside," Hunter emphasized the importance of "meaningful management equity participation for all" managing directors in a transaction. Not surprisingly, Hunter's compensation package was heavily weighted with equity.

196. Harbach's installation of Hunter as chief operating officer was, on its face, highly irregular. Half a world away from the center of the Company's operations and from all of its business leaders other than those in APAC, he was an occasional visitor to the United States, then living in Sydney, Australia. Calls and interactions with dozens of key management and staff had to be scheduled for the late evening to accommodate his location. With no experience in the company's operations or financial difficulties, he invented projected cost savings that were unachievable at Harbach's direction. It should have been obvious to the Director Defendants that he had been installed for the sole purpose of exercising control over forecasting and financial disclosure in order to serve Harbach's personal agenda to protect his and Harbach's personal interests in the sales process.

197. With Hunter installed as the new COO, and Ethell pushed to the sidelines of the finance and forecasting function, Harbach could continue largely unabated to obfuscate the true state of BearingPoint's financial condition to potential buyers.

198. Immediately upon his appointment in March of 2008, Hunter joined Harbach in exerting control over the forecasting function carried out by the company's business units.

199. From April 2008 through June 2008, the due diligence process with Silver Lake and Cerberus commenced in earnest. Throughout that process, Harbach exerted tight control over the dissemination of financial information to Cerberus and Silver Lake with the goal of masking aggressive and overly optimistic financial disclosure, creating a false impression of equity value, and enhancing an impression of his own importance to the process and the future of the business.

200. By April 2008, with Hunter installed as COO, Ethell complained that she was "being impeded in her ability to accomplish her duties as CFO," and was "no longer being permitted to properly function as CFO."

201. In May 2008, Ethell resigned from her position as CFO.

The Board Ignored the General Counsel's and New CFO's Warnings about BearingPoint's Financial Forecasting Dysfunction

202. In the spring of 2008, Eileen Kamerick flew to Florida to meet with Harbach and interview for the CFO position as Ethell's replacement. Kamerick was a licensed attorney, had practiced corporate law at the firm of Skadden Arps, and gone on to earn her MBA and become a seasoned financial officer, with experience in both public and personal services companies. Kamerick's experience and education gave her a good understanding of both the financial and fiduciary responsibilities of a chief financial officer.

203. Remarkably, Harbach never advised Kamerick during the job interview process that BearingPoint was at that very moment in discussions with potential purchasers for a sale of the Company. This omission occurred despite Lutz's advice to Harbach that it was "urgent[]" for Kamerick to be informed of the status of the sales process.

204. Kamerick joined BearingPoint as CFO in mid-May 2008. When she reported for work, she was astonished to learn that an active due diligence process for a whole company sale was underway.

205. Kamerick joined BearingPoint just as it was releasing its first quarter, 2008 results, which demonstrated that the Company had, predictably, already missed its projections for the 2008 Management Plan.

206. Lutz and Greenhill by this time were already suggesting that the 2008 Management Plan be revised in light of BearingPoint's first quarter performance.

207. Kamerick immediately recognized a risk that BearingPoint's financial disclosures might be unreliable, and that as a consequence, she would "be directly at odds with the CEO and COO" with "really limited and . . . inadequate protection . . . ." Immediately upon her arrival to BearingPoint, she became "worried about the position I am in." Kamerick was so concerned that, against Harbach's wishes, she engaged an independent consultant—Huron Consulting Group ("Huron")—to examine the 2008 Management Plan on the Company's behalf.

208. From May 18, 2008 to June 2, 2008, Huron analyzed marketplace and company information, and tested the assumptions behind the 2008 Management Plan.

209. It was also immediately obvious to Kamerick that there were serious questions regarding the credibility and reliability of BearingPoint's forecasting process, and that it was effectively under the control of COO Hunter, who had commandeered the CFO's staff so as to seize the message and dictate optimistic projections of net income for May 2008.

210. BearingPoint's corporate controller complained to Kamerick of the controls being asserted over him by Hunter. On May 20, 2008, Kamerick advised him that "[t]he CFO controls

the presentation and communication of all financials, full stop. If you are ever pressured to do anything else, come to me, I will protect you."

211. At the same time, Kamerick became aware that Hunter was working outside of her purview to create forecasts for use in the sales process. She admonished Hunter: "As CFO, I must approve all forecasts and understand their assumptions prior to any distribution. Once my team and I have completed that, we will forward to you and [Harbach] for your approval. Such a process is a requirement of sound corporate governance and is the underpinning of the basics of the necessary controls to comply with Sarbanes Oxley. The CFO must have control of this process with the input of operations and senior management."

212. General Counsel Lutz directly advised the Board of his concerns about Hunter's overreaching. On May 19, 2008, Lutz reported to the Director Defendants that "David Hunter, leading the FP&A team (which last I looked reported to the CFO, not the COO) has now produced some sort of preliminary, updated 2008 forecast that indicates a $20 million net income for the year. David is, apparently, the sole architect of this item, working with the [Business Unit Managing Directors]." Lutz also wondered how BearingPoint could "endorse this kind of budget improvement - which is above and beyond even the original forecast and guidance." As Lutz would later sum up the situation: "David Hunter [wa]s in the middle of running [the forecasting process] all to the exclusion of the [newly-appointed] CFO who, after the fact, may but probably won't agree with Hunter's aggressive, self-held view of the world."

213. Kamerick warned Defendant Strange directly of Hunter's improper demands that her staff generate forecasts without her oversight.

214. Advised that Hunter was preparing a financial forecast outside of her oversight that would show $20 million net income for the year, Kamerick replied, "No f-ing way." She

immediately raised the issue with Harbach, warning that the "forecast David Hunter is presenting tomorrow bears no resemblance to what finance has been given by operations and [Hunter] has not shared it with me."

215. The severity of the dysfunction within BearingPoint's management was patent. Just a day after commencing her position as CFO, Kamerick found BearingPoint to be "a nuthouse." On May 19, 2008, Kamerick described BearingPoint as the "weirdest [f-ing] company on earth." As of May 23, 2008, there was no question to Kamerick that BearingPoint was "in crisis." Other managing directors shared this view.

216. Throughout this period, Harbach continued to deflect a meaningful sales process by representing to investors that BearingPoint was still able to generate and maintain sufficient liquidity by year-end 2008 to address the April 2009 Put and continue in operations. In a May 12, 2008 call to BearingPoint investors, Harbach claimed that while BearingPoint's first quarter financial results had fallen short of the 2008 Management Plan, "the most likely outcome for the year is that we will deliver performance near the bottom end of the range as we have previously named. Flat revenue growth, SG&A of $580 million to $585 million, net loss of approximately $70 million, year [end] cash and cash equivalents in the vicinity of $500 million and free cash flow of approximately $30 million."

217. Harbach's claim of projected year-end "cash and cash equivalents in the vicinity of $500 million" was intended to address a market perception that, in order to stay in operation, BearingPoint would need $200 million for the "Put" obligation, and $300 million for operations, in addition to a negotiated consent from its senior lenders.

218. Harbach understood the dampening effect those perceptions would have on expressions of interest by other potential purchasers. He had been warned by General Counsel

Lutz just days before that "[s]ince you, effectively, became CEO in late Q4 on a 'run the business' platform and you have a $200m put due in early 2009 . . . people are going to hold you accountable to this in ways they never held [Harry You]."

Management's Dysfunction was Known to Advisors, Analysts, Potential Purchasers, and the Board

219. Although the Board knew that Harbach and Hunter had hijacked the budget and forecasting process, and that unrealistic projections would hamstring the sales process, the Board failed to intervene, causing doubt, confusion and delay amongst BearingPoint's potential suitors. At this point, Greenhill, now fully versed in BearingPoint's finances and operations, felt compelled to address the Board to contradict Harbach's public misstatements and representations as to BearingPoint's ability to meet the April 2009 Put through operations alone. Harbach had publicly stated that BearingPoint's financial advisors had "analyzed alternative strategies intended to further improve that structure, our global cash balances and their accessibility," and that as a result, Harbach "continue[d] to believe that improving the cash generated by our business and servicing our debt payments as and when they become due from the cash remains are [*sic*] highest priority."

220. On May 15, 2008, Greenhill advised the Board that potential purchasers and industry analysts "believe[d] that management projections for 2008/9 are not achievable." As Greenhill advised the Board, criticism by industry analysts of Harbach's May 12, 2008 projections was immediate and unanimous.

221. Greenhill also highlighted for the Board on May 15, 2008, the "noteworthy" finding "that the most recent management plan is more than 60% above current research analyst estimates" and advised that the "Consensus Case could leave the Company with insufficient

operating cash during the first half of 2009 and beyond … the market consensus for the Company's EBIDTA would lead to uncomfortably low operating cash in early 2009."

222. In an analyst report on May 23, 2008, headlined "BE Results not Good Beneath Surface," Morningstar noted that "the firm's equity value is significantly less than zero," and that Morningstar was "increasingly concerned about BearingPoint's ability to turn around its fortunes." Morningstar warned of the "increasing likelihood that the firm will either put itself (or some of its business units) up for sale or face severe financial distress (which could include bankruptcy) over the next 12 months."

223. Greenhill opined to the Board on May 15, 2008 that it was unlikely that the Company could survive in 2009 absent a near-term transaction, and recommended that discussions with potential purchasers continue, but that the Board should consider "alternatives."

224. On information and belief, Greenhill had directly and unsuccessfully questioned Harbach about the forecast, and attempted throughout the second quarter of 2008 to advise him to change course. Greenhill's advice was ignored.

225. On May 22, 2008, Greenhill complained to BearingPoint's Lutz that Greenhill "ha[d] given tons of advice that has been ignored to the company's clear and possibly fatal detriment."

226. After gaining access to the Company's financial data, both Cerberus and Silver Lake also questioned and criticized the 2008 Management Plan.

227. On May 12, 2008, Cerberus issued its "Preliminary Due Diligence Findings," concluding that the projections were unreliable. Cerberus reduced the terms of its offer, citing "emerging concerns about the reliability of [BearingPoint's] financial data," and noting that it felt the May 2008 Guidance would be "difficult to achieve."

228. In May 2008, after approximately six weeks of due diligence, Silver Lake pulled out of the sale process, questioning BearingPoint's ability to achieve the 2008 Management Plan and citing "significant" financial challenges which "discouraged" Silver Lake from proceeding any further.

Instead of Taking Direct Action, the Board Created an Oversight Committee, Which Also Failed to Act

229. Despite the numerous, obvious, and unavoidable indications that the Company's future was in dire straits, the Director Defendants on May 15, 2008, rather than becoming fully involved in the sales process and exploring the marketplace and options available to maximize value to the shareholders, belatedly appointed a "Special Committee" consisting of Defendants Lord, Strange, and McGeary, and tasked it and them directly to oversee and take control of the struggling sales process. Specifically, the Board authorized the Special Committee to "review, evaluate and negotiate the terms and conditions of a Potential Transaction (or any offer or indication of interest therefore) . . . ."

230. That same day, on May 15, 2008, Harbach assured the Special Committee members "that even if BearingPoint does not meet management's plan for 2008, there will be enough cash on hand to focus on its operations, to continue to improve BearingPoint's business and to pay the $200,000,000 convertible bond 'Put' coming due in April 2009." General Counsel Lutz soon thereafter warned Defendants McGeary and Strange that Harbach had "disingenuous[ly] … contorted" and "misrepresent[ed]" legal advice provided to the Director Defendants by outside legal counsel to support his contention that the Company would be able to satisfy the Put, much to Lutz's "frustrat[ion]."

231. On May 19, 2008, Lutz informed each of the Director Defendants of "unanimous skepticism expressed by all financial advisors, analysis, and Bullrun parties against our existing management plan."

232. Given the near-uniform skepticism regarding the achievability of the 2008 Management Plan expressed by investors, analysts, potential purchasers, and BearingPoint's own advisors, General Counsel, and CFO, it was apparent to the Director Defendants that Harbach's assurances were unreliable, and that while BearingPoint had no equity value, its substantial enterprise value was in grave danger of erosion through Harbach's stewardship.

233. Concrete evidence contradicting Harbach's assurances came just two weeks later, when Huron rendered its final report on or about June 2, 2008 showing that the 2008 Management Plan was unachievable, that it overstated year-end available cash by at least $100 million, and that BearingPoint would not have enough to meet the April 2009 "Put" obligation. Huron informed Kamerick that it doubted that the operating improvements proposed by Harbach and Hunter were achievable.

234. Kamerick directly informed at least Defendants Harbach, Strange, Lord, and McGeary of Huron's conclusions.

235. Defendants Harbach, Lord, Strange, and McGeary steadfastly resisted any effort to permit Huron to meet with the full Board. Instead, Harbach secured the termination of Huron, without objection from Defendants Strange, Lord, or McGeary, who had been directly advised by Kamerick of its conclusions.

236. By this point, in furtherance of its due diligence efforts, Cerberus had requested nearly three dozen meetings with BearingPoint personnel, including employees below the senior-management level. In an effort to preserve control over the negotiations (and his last remaining,

realistic option to preserve his long-term equity value in BearingPoint), Harbach monopolized the negotiations with Cerberus by closely restricting the circle of people who could be involved in the negotiations or sales process, ordering Lutz and other BearingPoint senior management to "share Bullrun with no one" without his "express consent," and dictating that "[n]o one gets added without [Harbach's] prior approval. We must keep this as quiet for as long as possible."

237. Harbach's restrictions on the involvement of other personnel could not be justified by the theory that disclosure of negotiations would lead to employee attrition. From and after March 2008, if not long before, it was well known to BearingPoint's managing directors and employees that BearingPoint was for sale, and the sales process was widely known and discussed within the Company's management.

238. Harbach's unreasonable restrictions, which were intended to preserve his control over the negotiations in order to further his own self interest, eroded and delayed negotiations with Cerberus and contributed to their eventual breakdown.

<u>The Special Committee and other Director Defendants Continued to Disregard their Fiduciary Duties</u>

239. The Special Committee was aware of Harbach's obstructionist tactics. On May 19, 2008, Lutz pleaded with BearingPoint's outside counsel to "provide some guidelines to Harbach so that he understands that the Special Committee has authority to guide the sales process, not Harbach or management." Lutz requested outside counsel to schedule a meeting with Harbach so that Harbach "can hear directly what his role is and is not," and pleaded with Defendants Strange and McGeary for "clearer direction from the [Special] committee. . . . It is now unclear to me who is running what and I would ask for clarity before getting pitted [between] my CEO, advisors, and committee."

240. On May 22, 2010, Greenhill complained to Lutz that Cerberus had requested access to managing directors in individual business units, a request that was "consistent with every sale process I have been involved in for 24 years" but that Harbach was obstructing this access.

241. Greenhill now recognized that the situation was dire, and warned of the need to wrest the Cerberus negotiations from Harbach's control "before the last potential hope for avoiding bankruptcy and meltdown is gone."

242. Management, including Harbach, and the Director Defendants finally addressed the obvious and known danger of bankruptcy in May 2008, when General Counsel Lutz convened a meeting with one of the world's leading bankruptcy firms, Weil Gotshal & Manges, LLP, to discuss insolvency options. Lutz received and communicated to the Director Defendants information regarding a possible debt-for-equity swap approach to stave off bankruptcy.

243. As a further indication of the Company's increasing distress, having learned that she would not in fact gain control of the financial function, and that the other Director Defendants would not stand up to the actions of Harbach and Hunter, CFO Kamerick resigned on June 2, 2008—a mere three weeks after being hired.

244. Having been ignored and disregarded numerous times, on June 1, 2008, General Counsel Lutz took the unusual step of writing a formal letter to Defendants Lord, Munson, Strange, and Kemna warning of the serious management dysfunction within the Company. Among other things, Lutz warned that, "as general counsel," he was "increasingly concerned with the increasingly informal manner which I perceive governance surrounding financial matters to be moving," especially in light of "all the various conflicts between management and the Board and within the senior management team itself." Lutz pleaded with them to "inform

themselves," and to "take whatever steps you feel necessary in a timely fashion to satisfy yourselves we are moving forward properly and deliberately."

245. Against the backdrop of BearingPoint's historic problems with reliable financial reporting and accounting, Kamerick's abrupt resignation and Lutz's warnings and pleas plainly underscored the long-standing critical necessity for direct and immediate Board involvement in, and management of, the sales process—yet the Board still failed to engage.

246. Instead, the Defendants remained indifferent to Kamerick's warnings, Lutz's warnings, Greenhill's warnings, Huron's conclusions, analysts' conclusions, Silver Lake's withdrawal, Kamerick's resignation, and the Company's failure to keep pace with the 2008 Management Plan. Despite the explicit charge of the Special Committee, the Director Defendants appointed to this Committee took no action to wrest control of the sales process from Harbach. They did not further question the reliability of the 2008 Management Plan, require that it be revised, implement controls over the forecasts being provided to potential purchasers, or act to remedy any of Huron's findings. Nor did they reevaluate Harbach's strategy of focusing on operational improvements and limiting a sale of the Company to a financial buyer. Instead, Harbach continued to lead BearingPoint down a path of destruction—unimpeded and unchecked.

The Board and Special Committee Permitted Harbach to Monopolize Sale Negotiations for Self-Interested Ends

247. Through the summer of 2008, Harbach continued to control the sale process in an effort to negotiate a transaction that would preserve and enhance his equity and management interests in BearingPoint, preventing BearingPoint from completing transactions that would have addressed its liquidity crisis and avoided bankruptcy. The other Director Defendants allowed this to occur despite repeated warnings of self-interest and BearingPoint's deteriorating cash position.

248. The obstacles to BearingPoint's objectives presented by the personal agenda of Harbach had long been obvious, but crystallized in June 2008, when Harbach began directly negotiating with Cerberus regarding compensation and equity arrangements for BearingPoint management in the proposed new entity—including his own.

249. The Director Defendants on the Special Committee themselves recognized Harbach's conflict of interest at least by May 23, 2008, when they pondered whether something was needed to "incentivize" Harbach to "speed up negotiations with Cerberus."

250. Those Director Defendants received explicit advice on numerous occasions, but at least as of June 6, 2008, that Harbach was self-interested in the negotiations over his own equity compensation, and all Defendants knew as of June 12, 2008 that Cerberus expected to make an offer to purchase the Company for a range of $0.75 - $1.00 per share but that the offer was contingent on resolution of the "key remaining issue[]" of management equity and compensation arrangements.

251. On June 15, 2008, the Special Committee was advised by Greenhill that the "status quo (do no transaction and pay the debt as it comes due) [wa]s the worst outcome . . . . Bottom line is . . . the Company is very likely to be headed for default in early 2009 if no transaction is completed."

252. By June 22, 2008, when BearingPoint had again missed its monthly forecast, even Harbach could no longer pretend that BearingPoint's cash situation was anything but "troubling." The next day, on June 23, 2008, Greenhill advised BearingPoint's Board of what should have been obvious to the Board long before June: that "cash and employee attrition trends suggest [the status quo] is <u>not feasible</u>." (Emphasis in original).

253. Based on advice from Greenhill and outside counsel, and BearingPoint's year-to-date financial performance, it was apparent to the Director Defendants that BearingPoint could not resolve its liquidity crisis through continued operations, that it was urgently necessary to plan, prepare for, and develop promising sales approaches for disposition of business units or of the whole company to a strategic buyer.

254. Despite this, the Defendants still recklessly failed and consciously refused to evaluate and pursue alternative strategies for addressing the liquidity crisis or to monitor and oversee the negotiations with Cerberus. Instead, the Director Defendants on the Special Committee on June 6, 2008, permitted Harbach, without oversight, to "begin to discuss the broad parameters of a compensation system were the Company to be acquired by Cerberus," and on June 12, 2008, authorized him to engage in self-interested negotiations over even his own compensation and management position without direct or meaningful oversight to ensure those negotiations were carried out consistently with BearingPoint's interests.

255. As of early June 2008, Cerberus had proposed that eight percent of the total enterprise value be set aside and reserved for purposes of incenting management to stay with the post-transaction entity.

256. Eight percent of the total enterprise value fell far short of the 20% that Harbach had in mind for himself and others. Harbach had already determined, as a result of "confidential" research conducted by Mike Pope at Harbach's request in late April 2008, that of all potential bidders in the Bullrun process, Cerberus was among the least likely to make "[m]anagement [t]eam [c]hanges" after a transaction. He also determined that a reservation of 20% would ensure him a sufficient "cut," while leaving enough to fund sufficient equity

incentives for the approximately 650 managing directors and core senior management designated by Harbach as crucial to sustaining BearingPoint's operations after a transaction.

257. Specifically, as of June 16, 2008, Harbach envisioned that he should receive 3% of the total enterprise value as equity—approximately a $22.7 million equity value out of $758 million. Harbach further contemplated that 1.5%—approximately $11.4 million—would secure Hunter's continued support of the Cerberus transaction.

258. The 4.5% of the total enterprise value that Harbach planned to set aside for himself and Hunter—neither of whom contributed to client revenue—would cost a potential purchaser of BearingPoint an additional $34 million, or approximately 8% of the total sales proceeds of the $424 million that BearingPoint was ultimately able to realize in value through the 2009 bankruptcy sales.

259. By June 17, 2008, Harbach had met with Cerberus and proposed that 20% of the total enterprise value be carved out and distributed to MD's as equity grants, with 3% of the total enterprise value set aside for him and 1.5% set aside for Hunter. Defendant McGeary was aware that Harbach was asking for 20% of the total enterprise value for management new equity.

260. Soon thereafter, BearingPoint's outside counsel, Davis, Polk & Wardell LLP, also explicitly advised the Special Committee members of Harbach's self-interest on June 23, 2008, and that the Special Committee at the very least bore fiduciary responsibility to supervise and manage the negotiations. Nonetheless, instead of seizing control, managing, and overseeing the negotiations, the Special Committee further facilitated Harbach's control at this time by authorizing the appointment of special counsel at Cravath, Swaine and Moore, paid by BearingPoint not to represent the Company, but rather management in the negotiations.

261. Once Harbach had his personal advisors in place at the Company's expense, there was little communication between the Cravath firm and the Special Committee or BearingPoint advisors. Remarkably, neither the Board nor the Special Committee interposed a representative in the negotiations between Cerberus on the one hand, and Harbach and the Cravath firm on the other, or informed Cravath of any limits or restrictions on Harbach's authority or the terms of the deal.

262. Not surprisingly, throughout the summer of 2008, Harbach insulated the Board and BearingPoint representatives from his negotiations with Cerberus over the equity arrangements for himself and his management team.

263. In mid-July 2008, Cerberus flatly rejected Harbach's 20% proposal, with 3% set aside for Harbach himself, and instead proposed that 12% of the total enterprise value be set aside for management, with 5% shared among the Executive Committee which consisted of approximately seventeen persons. Cerberus also proposed mandatory co-investments totaling approximately $20 million from members of the Executive Committee.

264. On July 17, 2008, while Harbach negotiated his equity interest with Cerberus, Greenhill reminded the Board that "continued operation of the Company without any asset sales" was not viable, and that if the Company was not sold, the only remaining option apart from bankruptcy or a prepackaged sale of assets in a bankruptcy setting, was a sale of the Company to Cerberus at a discount. The Director Defendants were further warned by Harbach himself that "the Company would not survive in bankruptcy, regardless of how quickly the transaction could be executed," due to the high likelihood of wide-scale employee attrition.

265. Despite these explicit warnings, and knowing of the lack of agreement on the issues of management equity and compensation arrangements, the Director Defendants,

including those on the Special Committee, maintained their hands-off posture on the management equity negotiations and continued to disregard their duties as Board members and as members of the Special Committee. Instead of asserting control over BearingPoint's sales process, the Board elicited self-serving statements from counsel during its meetings. The July 17, 2008 Board minutes contain at least two such statements:

(i) "Mr. Bick expressed his opinion that the directors have demonstrated both their duties of care an good faith and that the Creation of the Special Committee to review and monitor the transaction process is designed to address any real of perceived conflicts of interest arising in any transaction."

(ii) "Upon an inquiry by the directors, Mr. Bick stated his belief that the steps taken by the Board to evaluate the offer letter and alternative structures, as well as the continuing discussions with Greenhill, reflect that the Board members are taking appropriate steps to be fully informed and to fulfill their duty to obtain the highest value for the Company."

266. Further, tempted by the prospect of enhancing his equity and management interests in BearingPoint, Harbach ignored his own warnings to the Board of the risk that the Company would not survive bankruptcy, and continued to hold the Cerberus negotiations hostage over the summer of 2008 to his own self-interested equity demands. Many options were available to the Board at this critical time that could have limited Harbach's power in the negotiations, ensured speed in the negotiation process, provided protection and alternatives, protected the interests of BearingPoint, and avoided disaster. Sadly, the Board pursued none of them.

267. On August 16, 2008, Cerberus revised its offer to purchase the Company to $1.00 per share, corresponding to an implied enterprise value of $1.162 billion. No progress was made on this offer, however, because of continued demands by Harbach for a high percentage of the equity in the new entity.

268. On August 25, 2008, Cerberus revised its proposal for management equity and proposed that 16% of the total enterprise value be set aside for management, including 7% shared amongst members of the Executive Committee.

269. This offer was still insufficient for Harbach, who on August 26, 2008, insisted that 18% of the total enterprise value be set aside for management, with 8% shared among the Executive Committee, that personal loans be made available to the Executive Committee to fund their co-investment obligations, and that employment agreements for himself and six other "top . . . executives" be entered into prior to closing.

270. Harbach's overreaching demands immediately chilled negotiations. That same day, Cerberus informed Harbach: "We do not want to engage in a discussion regarding your economic changes to the term sheet at tomorrow's meeting as we are still in the process of quantifying the impact that your economic changes have on the transaction. Given the extensive changes that you've made to the term sheet, we would like the agenda for tomorrow's meeting to consist of you walking us through your changes to the qualitative terms of our recent proposal."

271. On August 27, 2008, Greenhill sought the intervention of the Director Defendants, advising that Cerberus was "still choking on Ed's ask for a higher percentage . . . I believe that will require . . . potentially even some more guidance for Ed with respect to what is common and practical." No such guidance was offered by any of the other Director Defendants, nor did they involve themselves in the process to protect the Company's interests.

<u>The Board's Failure to Oversee and Actively Participate in the Cerberus Negotiations Caused the Deal to Fail, and Propelled BearingPoint Towards Bankruptcy</u>

272. As a direct result of the other Director Defendants' failure to oversee the management equity negotiations, Harbach's self-interested demands drove negotiations with Cerberus into the ground in mid-September 2008. As the Board knew or should have known,

BearingPoint was in a critical position in the summer of 2008, yet the Board acted as if time and deal certainty were neither urgent nor imperative, a mistake that would prove disastrous to BearingPoint.

273. On September 2, 2008, Cerberus rejected Harbach's demand that 18% of the overall equity be reserved for management, and maintained its prior proposal of 16% of the total enterprise value, with 7% shared amongst members of the Executive Committee.

274. The next day, Harbach informed McGeary that Cerberus had not moved from its position from the prior week, that there was "only a week to go," and that "we need to get in a room and see if we can reach a solution acceptable to both. No time left for taking a week to essentially say the same thing."

275. Also that same day, Greenhill pleaded that Defendant McGeary take control of the management equity negotiations, noting that "[g]iven the cash balance situation, it is difficult to imagine [Cerberus] will be more generous on management equity."

276. Defendant McGeary maintained his diffidence, responding that he would "stand by," and that he thought Harbach would move "without prompting." None of the other Director Defendants inserted themselves into the process either.

277. Defendant McGeary was as good as his word. He stood by. He simply "[t]alked to Ed and impressed importance of shortening his list and resolving" the issue.

278. A week later, Harbach had still not concluded negotiations with Cerberus. On September 9, 2008, Cerberus dropped its offer to $0.90 per share, corresponding to an implied enterprise value of $814 million, and told BearingPoint's Board that they were "[r]eady to sign pending agreement on management compensation." On September 11, 2008, Cerberus reduced

its management equity offer to 14% of the total enterprise value, with 6% shared among the Executive Committee.

279. On September 18, 2008, with still no agreement over the size of the equity package for management, negotiations with Cerberus ceased. And, as a result of the Defendants' disregard for their duties from November 2007 through this time period, there were no other viable options available to the Company.

BearingPoint Continued to Lose Valuable Opportunities During the Cerberus Negotiations

280. From June to September 2008, while a transaction with Cerberus was stalled by Harbach's self-interested negotiations over equity compensation, the credit markets and economic conditions worsened, and the need to consummate a disposition became even more pressing. These events were apparent to all Defendants.

281. In late June 2008, CGI reemerged as a strategic purchaser expressing primary interest in the Public Services unit but offering to purchase the whole Company and to retire all outstanding debt at par. Greenhill advised the Special Committee that at this point, given the turmoil in the credit market, this was the "best option" for BearingPoint.

282. The Director Defendants, including the Special Committee members, continued to exercise no meaningful control of the process. Instead, with the exception of limited involvement by McGeary, they allowed Harbach to engage personally with CGI, who overstated the health of BearingPoint's financial condition. As a direct and foreseeable consequence, CGI pulled out of the process.

283. On July 17, 2008, BearingPoint's outside counsel again advised the Board members of their fiduciary obligations, including the need to "participate actively in the decision-making process and carefully and thoroughly consider the issues presented to them."

284. Nonetheless, the Directors Defendants, including the Special Committee, passively remained on the outskirts of negotiations with potential purchasers and continued to allow Harbach to conduct the sales process without meaningful control.

285. In July 2008, CapGemini, a strategic purchaser, expressed interest in purchasing certain business lines of BearingPoint. On July 28, 2008, Harbach informed Greenhill that, in discussions with CapGemini, he "wanted to be the only representative" from BearingPoint involved. Astonishingly, the Special Committee acceded to this demand.

286. On August 17, 2008, and in the midst of his efforts to negotiate with Cerberus a favorable equity arrangement for himself in the post-disposition entity, Harbach directed that access to the "data room" (a website through which company information was stored and made accessible to potential purchasers for due diligence purposes) be cut off to CapGemini, thereby terminating CapGemini's ability to conduct due diligence and effectively cutting off any chance of a deal.

287. On September 24, 2008, Lutz lamented that Greenhill did not seem inclined to consider or move on inquiries by outside parties in discrete business lines. Lutz further lamented to Defendant McGeary and Strange that, "at the outset and recently in the past months, UBS approached me with propositions for sales of parts of BearingPoint. In all cases I have done nothing but refer them to Greenhill. I have no knowledge of what else may have transpired there . . . I will raise the question of whether or not they should be approached purely as a matter of due diligence and process."

<u>BearingPoint Suffered Massive Damages Resulting from the Defendants' Utter Failure to Manage the Sales Process to Maximize Value of the Company</u>

288. As a direct result of the Defendants' misconduct, more than $1.8 billion was squandered through their reckless mismanagement of the sale process.

289. A reasonable sales process, including negotiation of a purchase offer unencumbered by Harbach's self-interest and excessive equity demands, would have generated substantial interest in the purchase of the enterprise at a fair value, which, in 2008, would have been in the range of $1 to $2.3 billion, net of transaction costs.

290. As a result of the Defendants' misconduct and omissions, BearingPoint was forced to file for chapter 11 protection on February 18, 2009.

291. BearingPoint finished 2008 with $349.6 million in cash and cash equivalents, approximately $150 million lower than the 2008 Management Plan's projection, and dramatically short of what it would need to both meet the "Put" and continue operations.

292. After the forced bankruptcy filing resulting from the Defendants' misconduct and omissions, the Company quickly turned in March 2009 to the approach it could have pursued aggressively more than a year before—a sales process that included sale of specific business units.

293. Had the Defendants not deflected the numerous expressions of interest in various business lines of BearingPoint, or had Defendants properly canvassed the market, BearingPoint in late 2007 and throughout 2008 would have been able to sell those business lines, or the whole Company to a strategic buyer, for substantially more than the amounts it obtained through the bankruptcy liquidation sales process in 2009. At the very least, the Company should have kept these options on the table for leverage in the negotiations, leverage that was sorely lacking, and put Harbach in a position to stall and ultimately kill a successful sale.

294. There was, at all relevant times in 2007 and 2008, a vibrant market for the sale of individual business units of BearingPoint, or the whole Company.

295. In 2008, at least eighty-eight corporate transactions of large and small consulting firms like BearingPoint were completed, including, for example, Navigant Consulting's purchase of Chicago Partners, LLC in May 2008 for $100 million, Hewlett-Packard's purchase of Electronic Data Systems Corporation for $16.9 billion in August 2008, Convergys Corporation's purchase of Intervoice, Inc. for $322 million in August 2008, and Huron Consulting's purchase of Chelmax, Inc. for $218 million in July 2008.

296. In 2009, even with the difficulties of a chapter 11 case, in which BearingPoint had lost all liquidity and was placed under week-by-week financial controls exerted by its senior lenders, sales of the vast majority of the Public Services, Commercial Services, Financial Services, EMEA and APAC units were negotiated and closed.

297. Defendants knowingly and recklessly deprived BearingPoint of valuable opportunities in late 2007 and throughout 2008. Such opportunities were critical to avoiding liquidation of BearingPoint's assets in bankruptcy, and the Defendants knowingly squandered such opportunities by failing to plan for, manage, or execute sales or similar dispositions of BearingPoint's business units or the whole Company.

298. As shown in Figures One and Two below, the Public Services business unit's market value as of March 31, 2008 (based on expected revenues and EBITDA over the next twelve months and comparable-company trading multiples) was in the range of $895 million to $1,383 million. Because of the Defendants' misconduct, BearingPoint lost opportunities to sell the Public Services business unit at or near market value, and BearingPoint was instead forced to sell the Public Services Unit to Deloitte (a strategic buyer) and certain other assets of the Public Services business unit to another purchaser through a chapter 11 bankruptcy sale in March 2009

for total proceeds of $333 million, for a loss in business unit enterprise value of $562 million to $1,050 million

299. As shown in Figures One and Two below, the Commercial Services business unit's market value as of March 31, 2008 (based on expected revenues and EBITDA over the next twelve months and comparable-company trading multiples) was in the range of $198 million to $286 million. Also as shown on Figures One and Two below, the Financial Services business unit's market value as of March 31, 2008 (as based on expected revenues and EBITDA over the next twelve months and comparable-company trading multiples) was in the range of $75 million to $101 million. Because of the Defendants' misconduct, BearingPoint lost opportunities to sell the Commercial Services and Financial Services business units at or near market value, and BearingPoint was forced to sell the Commercial Services and Financial Services business units and related assets through a chapter 11 bankruptcy sale in March 2009, obtaining $44 million, for a loss in business unit enterprise value of $229 million to $343 million.

300. As shown in Figures One and Two below, the EMEA business unit's market value as of March 31, 2008 (based on expected revenues and EBITDA over the next twelve months and comparable-company trading multiples) was in the range of $303 million to $346 million. Because of Defendants' actions and/or inactions, BearingPoint lost opportunities to sell the EMEA business unit at or near market value, and was forced to sell the EMEA business unit through a chapter 11 bankruptcy sale for $69 million, for a loss in business unit enterprise value of $234 million to $277 million.

301. As shown in Figures One and Two below, the APAC business unit's market value as of March 31, 2008 (based on expected revenues and EBITDA over the next twelve months and comparable-company trading multiples) was in the range of $271 million to $362 million.

On December 3, 2007, a potential purchaser, Nikko Principal Investments Japan, Ltd., valued the business unit at between $500 - $600 million, a market value consistent with UBS's forecast from the same period. Because of Defendants' misconduct, BearingPoint was forced to split the APAC business unit in pieces through chapter 11 bankruptcy sale in March 2009, obtaining a total of approximately $49 million. The Defendants squandered valuable opportunities to dispose of the APAC business unit, and caused BearingPoint a loss in business unit enterprise value of $222 million to $313 million.

302. In early February 2008, Credit Suisse/CPM Braxis expressed an interest in acquiring the Latin American business unit for approximately $37 to $44 million. This expression of interest is the best indication of value for the Latin American business unit, as values computed using negative earnings forecasts and comparable-company trading multiples are not meaningful. Because of the Defendants' misconduct, BearingPoint lost this opportunity to sell the unit, and was forced to sell its assets through a chapter 11 bankruptcy sale in March 2009, obtaining $8 million, for a loss in business unit enterprise value in the range of $29 to $36 million.

303. BearingPoint's overall enterprise value was different from the sum of the individual business unit values because the amount of off-balance sheet liabilities and the likely costs necessary to effectuate the sales would need to be deducted, the cash balance of BearingPoint would need to be added, in whole or in part, and other factors would need to be considered. A reasonable estimate of this adjustment, offsetting for BearingPoint's cash, is $218 million, making the range of the realizable value of BearingPoint $1.5 billion to $2.3 billion.

Figure 1 (consensus forecasts):

($s in millions)	**Public Services**	**EMEA**	**APAC**	**Financial Services**	**Commercial Services**	**Latin America**	**Consolidated**
Enterprise Value	$895	$303	$271	$75	$198	$37	$1,778
Deduction (Working Liabilities, Sales Related Costs, and Cash Offset)	-	-	-	-	-	-	$(218)
Net Market Value (sale proceeds)	-	-	-	-	-	-	**$1,559**

Figure 2 (management forecasts):

($s in millions)	**Public Services**	**EMEA**	**APAC**	**Financial Services**	**Commercial Services**	**Latin America**	**Consolidated**
Enterprise Value	$1,383	$346	$362	$101	$286	$44	$2,522
Deduction (Working Liabilities, Sales Related Costs, and Cash Offset)	-	-	-	-	-	-	$(218)
Net Market Value (sale proceeds)	-	-	-	-	-	-	**$2,304**

304. As a direct and proximate result of Defendants' conduct, BearingPoint was forced to liquidate its business units and related assets in the bankruptcy sales process. This yielded net

distributable proceeds of $424 million, for a loss in net market value of $1.135 billion to $1.88 billion.

305. Even after the Defendants had squandered months of opportunities to pursue dozens of transactions, had the Director Defendants attended to their fiduciary duties following the appointment of the Special Committee in May 2008, the Cerberus transaction could have been salvaged, resulting in a sale with an approximate enterprise value of $814 million.

COUNT I
(AGAINST DIRECTOR DEFENDANTS)
BREACH OF FIDUCIARY DUTIES

306. Plaintiff repeats and realleges the allegations in paragraphs 1 though 305 above as if fully set forth herein.

307. As members of the Board, the Director Defendants owed BearingPoint fiduciary duties of care, loyalty, and good faith. The Director Defendants breached those duties.

308. Specifically, in November of 2007 or shortly thereafter, the Board contemplated and embarked on a process in pursuit of a transaction or sale that would result in a change of control of BearingPoint. Consequently, the Director Defendants had the duty to seek the best available price and to maximize the Company's value.

309. The Director Defendants breached their fiduciary duties by:

a. failing timely to adequately apprise themselves of the true value and financial position and affirmatively generating or causing the generation of inaccurate and misleading financial information regarding BearingPoint before and during their efforts to sell BearingPoint;

b. failing timely to adequately apprise themselves of the available forms of transactions and affirmatively disregarding advice provided by advisors before and during their efforts to sell BearingPoint;

c. failing timely to adequately explore, know, understand and/or canvass the market for the sale of BearingPoint by, among other things, failing to arm themselves with specific and contemporary knowledge of potential buyers and affirmatively suppressing or ignoring specific expressions of interest made by parties interested in purchasing all or part of BearingPoint before and during their efforts to sell BearingPoint;

d. failing timely to actively participate in the information gathering process, the decision making process, and the negotiation process, by among other things, ignoring advice given by BearingPoint's financial and legal advisors, and failure to cure clear infirmities and conflicts of interest that resulted from Board inaction;

e. affirmatively designating and empowering Defendant Harbach to influence negotiations with suitors, among others, Cerberus, when Harbach was clearly self-interested, and failing to actively participate in and oversee the negotiations to ensure BearingPoint's interests were adequately represented during the efforts to sell BearingPoint;

f. failing timely to adequately explore and affirmatively suppressing expressions of interests made by strategic buyers before and during their efforts to sell BearingPoint in November 2007 and through September 2009.

310. There is no reasonable basis for the Director Defendants to have failed in their duties to the extent that occurred in connection with the sale and marketing of BearingPoint or for the Board to have acted as it did.

311. Through these acts and omissions the Director Defendants failed to act in good faith, engaged in a dereliction of their duties, and either knew or recklessly ignored that they were not discharging their fiduciary duties.

312. As a result of these acts and omissions, the Defendants Lord, McGeary, Strange, Harbach, Allred, Bernard, Fleischer, Kanin-Lovers, and Munson caused BearingPoint direct injury and damages because BearingPoint lost opportunities to consummate a valuable corporate disposition much more valuable to BearingPoint than the liquidation dispositions later achieved in chapter 11 bankruptcy sales.

COUNT II
(AGAINST FINANCE COMMITTEE DEFENDANTS)
BREACH OF FIDUCIARY DUTIES

313. Plaintiff repeats and realleges the allegations in paragraphs 1 though 312 above as if fully set forth herein.

314. On or about January 18, 2008, given various developments and events then occurring, including that the Board and management had embarked on a sales process to market the Company as a whole, and given BearingPoint's outlook and expectations, the Board considered whether to amend the scope of its then named "Transaction Committee," and whether the activities of the such Committee should be broadened from reviewing specific transactions to reviewing all matters regarding BearingPoint's capital structure and the retention and oversight of financial advisors to BearingPoint.

315. Also on or about January 18, 2008, the Board changed the Transaction Committee's title to the "Finance Committee," changed the committee's membership to comprise Defendants Strange, Fleischer, McGeary, and Harbach (collectively, the "Finance Committee Defendants"), and charged the Finance Committee Defendants with the duty to report and make recommendations to the full Board for their deliberation and action with respect to all matters involving BearingPoint's outlook or strategic alternatives. As members of the Board and

the Finance Committee, Defendants Strange, Fleischer, McGeary and Harbach owed BearingPoint fiduciary duties of care, loyalty, and good faith. They breached those duties.

316. Because the Board had contemplated and embarked on a process in pursuit of a transaction or sale that would result in a change of control of BearingPoint by November 30, 2007, when formed, the Finance Committee Defendants had the duty to fulfill the Finance Committee's duties to seek the best available price and to maximize the Company's value for the stockholders' benefit.

317. The Finance Committee Defendants breached their fiduciary duties by:

a. failing timely to adequately apprise themselves of the true value and financial position and affirmatively generating or causing the generation of inaccurate and misleading financial information regarding BearingPoint before and during their efforts to sell BearingPoint;

b. failing timely to adequately apprise themselves of the available forms of transactions available and affirmatively disregarding advice provided by advisors before and during their efforts to sell BearingPoint;

c. failing timely to adequately explore, know, understand and/or canvass the market for the sale of BearingPoint by, among other things, failing to arm themselves with specific and contemporary knowledge of potential buyers and affirmatively suppressing or ignoring specific expressions of interest made by parties interested in purchasing all or part of BearingPoint before and during their efforts to sell BearingPoint;

d. failing timely to actively participate in the information gathering process, the decision making process, and the negotiation process, by among other things, ignoring advice

given by BearingPoint's financial and legal advisors, and failure to cure clear infirmities and conflicts of interest that resulted from Board inaction;

e. affirmatively designating and empowering Defendant Harbach to influence negotiations with suitors, among others, Cerberus, when Harbach was clearly self-interested, and failing to actively participate in and oversee the negotiations to ensure BearingPoint's interests were adequately represented during their efforts to sell BearingPoint;

f. failing timely to adequately explore and affirmatively suppressing expressions of interests made by strategic buyers before and during their efforts to sell BearingPoint.

318. There is no reasonable basis for the Finance Committee Defendants to have failed in their duties to the extent that occurred in connection with the sale and marketing of BearingPoint or for the Finance Committee to have acted as it did.

319. Through these acts and omissions the Finance Committee Defendants failed to act in good faith, engaged in a dereliction of their duties, and either knew or recklessly ignored that they were not discharging their fiduciary duties.

320. As a result of these acts and omissions, the Finance Committee Defendants, Defendants Strange, Fleischer, McGeary, and Harbach, caused BearingPoint direct injury and damages because BearingPoint lost opportunities to consummate a valuable corporate disposition much more valuable to BearingPoint than the liquidation dispositions later achieved in chapter 11 bankruptcy sales.

COUNT III
(AGAINST SPECIAL COMMITTEE DEFENDANTS)
BREACH OF FIDUCIARY DUTIES

321. Plaintiff repeats and realleges the allegations in paragraphs 1 though 320 above as if fully set forth herein.

322. On or about May 15, 2008, the Board formed the "Special Committee" and appointed Board member Defendants Strange, McGeary, and Lord (collectively, the "Special Committee Defendants") as its members.

323. On or about May 15, 2008, the Board authorized the Special Committee Defendants to:

a. when deemed appropriate, review, evaluate, and negotiate the terms and conditions of a potential transaction (or any offer or indication of interest therefore), as well as make recommendations to the Board as to whether a potential transaction is in the best interest of BearingPoint;

b. determine whether a potential transaction is advisable and fair to and in the best interest of BearingPoint and to recommend to the Board whether the final terms of a potential transaction are in the best interests of BearingPoint and should be approved by the Board.

324. On or about May 15, 2008, the Board also authorized, directed and empowered the Special Committee Defendants to engage, and enter into contracts on behalf of BearingPoint providing for the retention, compensation, reimbursement of expenses, and indemnification of experts, advisors, consultants, representatives, agents, legal counsel, or accountants as deemed necessary desirable or appropriate, in order to assist in the discharge of its responsibilities in

connection with the investigation, review and negotiation of a potential transaction, and the making of a recommendation to the Board with respect thereto.

325. On or about May 15, 2008, the Board also authorized BearingPoint to compensate Defendant Strange $50,000 for his work as Chairman of the Special Committee, and Defendants McGeary and Lord $40,000 for their efforts as Special Committee members.

326. On July 17, 2008, the Board expressly recognized that the Special Committee was created to address real or perceived conflicts of interests arising in any transaction. As members of the Board and the Special Committee, Defendants Strange, McGeary, and Lord owed BearingPoint fiduciary duties of care, loyalty, and good faith. They breached those duties.

327. By May 15, 2008, the Board had already decided to embark on a process in pursuit of a transaction or sale that would result in a change of control of BearingPoint. Consequently, the Special Committee Defendants had the duty to fulfill the Special Committee's duties to seek the best available price and to maximize the Company's value.

328. The Special Committee Defendants breached their fiduciary duties by:

a. failing timely to adequately explore, know, understand and/or canvass the market for the sale of BearingPoint by, among other things, failing to arm themselves with specific and contemporary knowledge of potential buyers and affirmatively suppressing or ignoring specific expressions of interest made by parties interested in purchasing all or part of BearingPoint before and during their efforts to sell BearingPoint;

b. failing timely to actively participate in the information gathering process, the decision making process, and the negotiation process, by among other things, ignoring advice given by BearingPoint's financial and legal advisors, and failing to cure clear infirmities and conflicts of interest that resulted from Committee inaction;

c. affirmatively designating and empowering Defendant Harbach to influence negotiations with suitors, among others, Cerberus, when Harbach was clearly self-interested, and failing to actively participate in and oversee the negotiations to ensure BearingPoint's interests were adequately represented during the efforts to sell BearingPoint;

d. failing to address the real conflict of interest posed by Defendant Harbach's self interest and its effect upon the sale process and the negotiations with potential suitors, including among other, Cerberus.

329. There is no reasonable basis for Special Committee Defendants to have failed in their duties to the extent that occurred in connection with the sale and marketing of BearingPoint, or for the Special Committee Defendants to have engaged in these acts and omissions.

330. Through these acts and omissions the Special Committee Defendants failed to act in good faith, engaged in a dereliction of their duties, and either knew or were reckless in not knowing that they were not discharging their fiduciary duties.

331. As a result of these acts and omissions, the Special Committee Defendants caused BearingPoint direct injury and damages because BearingPoint lost opportunities to consummate a more valuable corporate disposition than the liquidation dispositions later achieved in chapter 11 bankruptcy sales.

COUNT IV
(AGAINST DEFENDANT HARBACH)
BREACH OF FIDUCIARY DUTIES

332. Plaintiff repeats and realleges the allegations in paragraphs 1 though 331 above as if fully set forth herein.

333. Defendant Harbach, as chief executive officer of BearingPoint, owed BearingPoint fiduciary duties of care, loyalty, and good faith. Defendant Harbach breached those duties.

334. Specifically, Defendant Harbach knew as of late 2007 and early 2008, that BearingPoint faced a severe and important liquidity crisis as early as the spring of 2009 and that a corporate disposition or sale was necessary in the near future to maximize and protect the value of the enterprise.

335. Defendant Harbach further knew, or should have known, or was reckless in not knowing, that an efficient and successful corporate disposition or sale strategy demanded accurate and realistic financial projections for 2008, and that inflated projections would lead only to delay and mistrust by potential buyers.

336. Despite this, Defendant Harbach breached his fiduciary duties during the periods that he was an officer in 2007 and 2008 by consciously disregarding material information reasonably available to him, including available options and proposals for sales of business units and a sale of the Company to strategic and other types of buyers. Instead, Defendant Harbach acted in contravention to the interests of the Company, actively deflecting and failing throughout 2008 to pursue meaningfully attractive and viable offers and opportunities available to BearingPoint for addressing the liquidity crisis through sales of discrete business lines of BearingPoint and/or a sale of the whole Company to a strategic purchaser.

337. From January to August 2008, Defendant Harbach breached his fiduciary duties by overtly supplanting the Chief Financial Officer's function and by knowingly causing overstated and unrealistic financial projections to be created and presented to buyers and to the Board, in knowing and conscious disregard of the risks to BearingPoint and to the consummation

of a valuable disposition opportunity, and/or the risk and harm to the Company of loss of substantial asset value.

338. Harbach provided the overstated and unrealistic financial projections to the Board in an effort to create the impression to BearingPoint's Board that BearingPoint's financial crisis was not dire and that the liquidity crisis could be solved through operational improvements alone. By doing so, Harbach sought to avoid the implementation of strategies for addressing the liquidity crisis more attractive to the Company and less attractive to him.

339. Despite being aware of the need to consummate a transaction in order to avert liquidity problems, Harbach further provided the overstated and unrealistic financial projections to a prospective financial buyer, Cerberus. By doing so, Harbach frustrated and prolonged negotiations with Cerberus.

340. Harbach further breached his fiduciary duties by insisting on unwarranted and inappropriate personal equity and other compensation arrangements during negotiations with Cerberus in the summer of 2008 that were harmful to the ability of BearingPoint to close a transaction.

341. These acts and omissions of Harbach were not the result of his undivided loyalty to BearingPoint but rather of his personal efforts to further his own personal self-interest—including his desire to obtain excessive compensation, new and expanded ownership rights, and/or continued control of management—and to avoid the impairment of his personal equity interests and expectations. The outcome was unfair to and harmed the Company.

342. These acts and omissions of Defendant Harbach caused BearingPoint direct and grave injury and damages because BearingPoint lost opportunities to consummate more valuable corporate dispositions than the dispositions later achieved in chapter 11 bankruptcy sales.

WHEREFORE, the Liquidating Trust respectfully requests that this Court enter judgment against the Defendants, as follows:

(1) On the First Cause of Action, awarding the Liquidating Trust a money judgment against Defendants, jointly and severally, in an amount to be proved at trial in excess of $1.88 billion, plus interest and costs to the full extent allowable by law; and

(2) On the Second Cause of Action, awarding the Liquidating Trust a money judgment against Defendants Strange, Fleischer, McGeary, and Harbach, jointly and severally, in an amount to be proved at trial in excess of $1.88 billion, plus interest and costs to the full extent allowable by law; and

(3) On the Third Cause of Action, awarding the Liquidating Trust a money judgment against Defendants Lord, McGeary, and Strange, jointly and severally, in an amount to be proved at trial in excess of $1.88 billion, plus interest and costs to the full extent allowable by law; and

(4) On the Fourth Cause of Action, awarding the Liquidating Trust a money judgment against Defendant Harbach in an amount to be proved at trial in excess of $1.88 billion, plus interest and costs to the full extent allowable by law; and

(5) An award of prejudgment interest at the maximum legal rate as of the date hereof and an award of post-judgment interest at the maximum legal rate; and

(6) An award of the costs of the suit herein; and

(7) An award of such other and further relief the Court deems just and proper.

JURY TRIAL REQUESTED

By its attorneys,

____________________________ Andrew J. Terrell (#30093) Whiteford, Taylor & Preston L.L.P. 3190 Fairview Park Drive Suite 300 Falls Church, Virginia 22042 (703) 280-9260 (703) 280-9139 (fax)	Lewis T. LeClair Robert M. Manley McKool Smith P.C. 300 Crescent Court Suite 1500 Dallas, Texas 75201 (214) 978-4000 (214) 978-4044 *Pro hac admission to be requested*	Kevin G. Hroblak William F. Ryan, Jr. Whiteford, Taylor & Preston L.L.P. Seven Saint Paul Street Suite 1800 Baltimore, Maryland 21202 (410) 347-9405 (410) 223-4305 *Pro hac admission to be requested*

Counsel for the BearingPoint,
Inc. Liquidating Trust and its Trustee

Not Reported in F.Supp.2d, 2010 WL 2472182 (C.D.Cal.)
(Cite as: 2010 WL 2472182 (C.D.Cal.))

Only the Westlaw citation is currently available.

United States District Court,
C.D. California.
Jim BROWN
v.
Brett BREWER, et al.
No. CV 06-3731-GHK (SHx).

June 17, 2010.

Christy W. Goodman, Law Offices of Christy Goodman, Darren J. Robbins, David T. Wissbroecker, Randall J. Baron, Robbins Geller Rudman & Dowd LLP, Stephen J. Oddo, Lerach CoughlinStoia Geller Rudman and Robbins, San Diego, CA, Ramzi Abadou, Barroway Topaz Kessler Meltzer & Check, LLP, Radnor, PA, Laurence M. Rosen, Rosen Law Firm, New York, NY, for Jim Brown.

Bety Javidzad, Elizabeth A. Moriarty, Julie A. Shepard, Richard Lee Stone, Asheley G. Dean, Hogan Lovells US LLP, Rebecca M. Couto, Latham and Watkins LLP, Los Angeles, CA, James N. Kramer, Stephen M. Knaster, Erin Bansal, Teodora Manolova, Orrick Herrington and Sutcliffe, San Francisco, CA, Pamela S. Palmer, Latham & Watkins LLP, Costa Mesa, CA, for Brett Brewer, et al.

Proceedings: (In Chambers) Order re: Cross-Motions for Summary Judgment; [213, 218, 244, 251, and 261]

GEORGE H. KING, District Judge.

***1** Beatrice Herrera, Court Reporter.

This shareholder class action arises out of News Corporation's ("News Corp.") 2005 acquisition of Intermix Media, Inc. ("Intermix"), formerly known as eUniverse Inc. (Brewer Decl. ¶ 3), a company which owned, among other internet businesses, the social networking website MySpace. Plaintiff Jim Brown ("Plaintiff"), individually and on behalf of all members of the certified class of former Intermix shareholders,[FN1] claims that Defendants Brett Brewer ("Brewer"), Daniel Mosher ("Mosher"), Lawrence Moreau ("Moreau"), David Carlick ("Carlick"), Andrew Sheehan ("Sheehan"), Richard Rosenblatt ("Rosenblatt"), James Quandt ("Quandt"), and William Woodward ("Woodward") (collectively, "Defendants"), the eight Intermix directors at the time of the company's sale, breached their fiduciary duties under state law and violated Section 14(a) of the Securities and Exchange Act of 1934 and SEC Rule 14a-9 (Counts IV and II, respectively).[FN2] (Consolidated Second Amended Complaint ["CSAC"] ¶¶ 168-74, 179-87; Brewer Decl. ¶ 5). The only other remaining claim is Count III for "control person" liability under Section 20(a) of the 1934 Act against Defendants involved in the 2005 acquisition of Intermix. (CSAC ¶¶ 175-78). This matter is before us on the Parties' Cross-Motions for Summary Judgment. We have considered the papers filed and all of the admissible evidence, and deem this matter appropriate for resolution without oral argument. L.R. 7-15. As the Parties are familiar with the facts in this case, we will repeat them only as necessary. Accordingly, we rule as follows.

FN1. In our June 22, 2009 Order, we certified the following class: "All holders of Intermix Media, Inc. ('Intermix' or the 'Company') common stock, from July 18, 2005 through the consummation of the sale of Intermix to News Corporation ('News Corp') at the price of $12.00 per share on September 30, 2005 (the 'Acquisition'), who were harmed by defendants' improper conduct at issue in the litigation. Excluded from the Class are defendants and any person, firm, trust, corporation or other entity related to or affiliated with any defendant." (Dkt. No. 197).

FN2. In our July 14, 2008 Order on the Motion to Dismiss, we dismissed with prejudice Defendants Montgomery & Co. LLC ("Montgomery"), and Thomas Weisel Partners Group, Inc. and Thomas Weisel Partners LLC ("TWP"), the investment banks which advised the Intermix board during the 2005 transaction and completed fairness analyses on the $12 per share price offered by News Corp. in the consummated merger transaction. (Dkt. No. 110, at 4-5). In that same Order, we also dismissed with prejudice Count I for violation of Section 14(a) of the 1934 Act and SEC Rule 14a-9, which was stated against the 2003 Individual De-

fendants, which included Brewer, Mosher, Moreau, Jeffrey Scott Edell, Bradley Ward, Carlick, Sheehan, and Lipp, and VantagePoint. (*Id.* at 1-3). Accordingly, Count III for "control person" liability was dismissed as to Edell and Ward, as it was premised on the only other claim against them, the dismissed Count I. (*Id.* at 7-8). The Parties stipulated to dismiss certain Defendants. (Dkt.Nos.190, 204). On June 10, 2009, pursuant to the Parties' stipulation, we dismissed without prejudice Defendants VantagePoint Venture Partners, VP Alpha Holdings IV L.L.C., VantagePoint Venture Partners IV(Q) L.P., VantagePoint Venture Partners IV L.P., and VantagePoint Venture Partners IV Principals Fund L.P. (Dkt. No. 194). On August 28, 2009, pursuant to the Parties' stipulation, we dismissed without prejudice Defendant Christopher Lipp, Intermix's General Counsel. (Dkt. No. 205).

I. Motion for Summary Judgment Standard

Summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c)(2); *see also* *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). On a motion for summary judgment, our "function is not ... to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249.

The moving party bears the initial responsibility to point to the absence of evidence of any genuine issue of material fact. *Celotex Corp.,* 477 U.S. at 323. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *Miller v. Glenn Miller Prods., Inc.,* 454 F.3d 975, 987 (9th Cir.2006) (citation and quotation marks omitted). By contrast, where the non-moving party "bears the burden of proof at trial, summary judgment is warranted if the nonmovant fails to 'make a showing sufficient to establish the existence of an element essential to [its] case.' " *Nebraska v. Wyoming,* 507 U.S. 584, 590, 113 S.Ct. 1689, 123 L.Ed.2d 317 (1993) (quoting *Celotex Corp.,* 477 U.S. at 322) (alteration in original). "[T]he moving party can meet its burden by pointing out the absence of evidence from the non-moving party," and it "need not disprove the other party's case." *Miller,* 454 F.3d at 987 (citation omitted). Accordingly, "[t]he nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (internal quotation marks and citations omitted). However, "[i]f the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party." FED. R. CIV. P. 56(e)(2); *see also* *Celotex Corp.,* 477 U.S. at 322 ("[T]he plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). The "opposing party may not rely merely on allegations or denials in its own pleading[.]" FED. R. CIV. P. 56(e)(2). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson,* 477 U.S. at 255; *see also* *In re Barboza,* 545 F.3d 702, 707 (9th Cir.2008) ("The court must view all the evidence in the light most favorable to the nonmoving party.") (citations omitted).

***2** "Only admissible evidence may be considered in deciding a motion for summary judgment." *Miller,* 454 F.3d at 988. Under Federal Rule of Civil Procedure 56(e)(1), "[a] supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." *See also* *Block v. City of Los Angeles,* 253 F.3d 410, 418-19 (9th Cir.2001). Conclusory and speculative affidavits that fail to set forth specific facts are insufficient to raise a genuine issue of material fact. *Thornhill Publ'g Co., Inc. v. Gen. Tel. & Elecs. Corp.,* 594 F.2d 730, 738 (9th Cir.1979). Absent a proper exception, hearsay statements are inad-

missible. *See* *Japan Telecom, Inc. v. Japan Telecom Am., Inc.,* 287 F.3d 866, 875 n. 1 (9th Cir.2002). Furthermore, neither an unverified complaint nor unsworn statements made in the parties' briefs can be considered as evidence at this stage. *See* *Moran v. Selig,* 447 F.3d 748, 759 & n. 16 (9th Cir.2006) (noting that unverified complaint cannot be considered as evidence on motion for summary judgment); *British Airways Bd. v. Boeing Co.,* 585 F.2d 946, 952 (9th Cir.1978) ("[L]egal memoranda ... are not evidence[.]").

II. Count IV: Breach of Fiduciary Duty Claim

A. Delaware Law on Corporate Fiduciary Duties Generally

Delaware law governs Plaintiff's state law claim of breach of fiduciary duty. Under Delaware law, all directors and officers of a corporation owe their shareholders fiduciary duties of loyalty and care. *Gantler v. Stephens,* 965 A.2d 695, 708-09 (Del.2009).[FN3]

FN3. Under Delaware law, the business judgment rule creates "a presumption that in making a business decision, the directors of a corporation act on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis,* 473 A.2d 805, 812 (Del.1984). "A plaintiff challenging a board decision bears the burden to rebut the rule's presumption by providing evidence that the directors breached their fiduciary duties." *Goodwin v. Live Entm't, Inc.,* No. Civ. A. 15765, 1999 WL 64265, at *24 (Del.Ch. Jan.25, 1999) (citing *Cede & Co. v. Technicolor, Inc.,* 634 A.2d 345, 361 (Del.1993), *modified by,* 636 A.2d 956 (Del.1994) (*"Cede II"*); *Citron v. Fairchild Camera and Instrument Corp.,* 569 A.2d 53, 64 (Del.1989)). "In order to overcome that presumption, a plaintiff must prove an act of bad faith by a preponderance of the evidence." *In re Walt Disney Co. Derivative Litig.,* 907 A.2d 693 (Del.Ch.2005). "If the plaintiff fails to rebut the presumption, the business judgment rule protects the decision made." *Goodwin,* 1999 WL 64265, at *4 (citation omitted). "If the rule is rebutted, the burden shifts to the defendants ... to prove that the transaction was entirely fair to the plaintiff shareholder." *Id.* (citation omitted).

1. Duty of Care

"Director liability for breaching the duty of care 'is predicated upon concepts of gross negligence.' " *Binks v. DSL.net, Inc.,* C.A. No. 2823-VCN, 2010 WL 1713629, at *8 (Del. Ch. Apr. 29, 2010) (quoting *McMullin v. Beran,* 705 A.2d 910, 921 (Del.2000)). The Delaware General Corporation Law permits a corporation to include a provision in its charter "eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director." DEL.CODE ANN. tit. 8, § 102(b)(7). While such an exculpatory provision may eliminate any liability for breaches of the duty of care, it "shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; ... or (iv) for any transaction from which the director derived an improper personal benefit." *Id.* Intermix's charter exculpates Defendants from any duty of care claims. (J.A., Ex. 38, Certificate of Incorporation). Accordingly, Defendants assert this provision as their fifth affirmative defense: "The breach of fiduciary duty claim is barred, in whole or in part, by the exculpatory provision contained in Intermix's Certificate of Incorporation." (Dkt. No. 111, Aug. 4, 2008). In light of this provision, we conclude that the director Defendants cannot be liable for any purported breach of fiduciary duty based solely on their duty of care. Plaintiff does not argue otherwise.

***3** Defendants also move for summary judgment on the question of whether Brewer and Rosenblatt, who doubled as officers for Intermix, may be held liable for any breaches of the duty of care, since Section 102(b)(7) only permits exculpation of duty of care claims for directors. It is undisputed that both Brewer and Rosenblatt served as directors and officers of Intermix, Brewer as President and Rosenblatt as CEO. (Brewer Decl. ¶ 1; Rosenblatt Decl. ¶ 1). The law is clear that where it is impossible to separate actions taken in fulfillment of a defendant's directorial duties from actions taken in fulfillment of that defendant's duties as a corporate officer, then any

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

duty of care claim stated against that individual is exculpated. In *Arnold v. Society for Savings Bancorp, Inc.,* 650 A.2d 1270 (Del.1994), the Delaware Supreme Court held that since the plaintiff "failed to highlight any specific actions [the defendant] undertook as an officer (as distinct from actions as a director) that fall within the two pertinent exceptions to Section 102(b)(7) [,]" any duty of care claim was precluded under the exculpatory clause. *Id.* at 1288 (citing R. Franklin Balotti & Jesse A. Finkelstein, Delaware Law of Corp. & Business Org. § 4.19, at 4-335 (Supp.1992) (where a defendant is a director and officer, only those actions taken solely in the defendant's capacity as an officer are outside the purview of Section 102(b)(7))). Plaintiffs have not identified any actions taken by Rosenblatt or Brewer solely in their capacity as officers. Accordingly, to the extent any claim for breach of the duty of care is embodied in Count IV, we **GRANT** summary judgment on that specific basis as to all director defendants, including Brewer and Rosenblatt who also served as officers.

2. Duty of Loyalty

To hold a director liable for breach of the duty of loyalty, the plaintiff must establish that "a majority of the Director Defendants either [1] stood on both sides of the merger or were dominated and controlled by someone who did; or [2] failed to act in good faith, i.e., where a fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties." *In re NYMEX S'holder Litig.,* C.A. Nos. 3621-VCN, 3835-VCN, 2009 WL 3206051, at *6 (Del.Ch. Sept.30, 2009) (internal citations and quotation marks omitted); *Lyondell Chem. Co. v. Ryan,* 970 A.2d 235, 239-40 (Del.2009) (*"Lyondell"*) ("Because the trial court determined that the board was independent and was not motivated by self-interest or ill will, the sole issue is whether the directors are entitled to summary judgment on the claim that they breached their duty of loyalty by failing to act in good faith.").

With respect to the first basis for demonstrating breach of the duty of loyalty, Delaware law provides that "[w]hen directors ... are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain." *Weinberger v. UOP, Inc.,* 457 A.2d 701, 710 (Del.1983). "Classic examples [of this type of breach] are when a director appears on both sides of a transaction or receives a personal benefit not received by the shareholders, generally." *Oliver v. Boston Univ.,* No. Civ. A. 16570-NC, 2006 WL 1064169, at * 18 (Del.Ch. Apr.14, 2006) (citing *Cede II,* 634 A.2d at 362 (citing *Nixon v. Blackwell,* 626 A.2d 1366, 1375 (Del.1993))) (internal quotation marks and alterations omitted). "If corporate fiduciaries stand on both sides of a challenged transaction, an instance where the directors' loyalty has been called into question, the burden shifts to the fiduciaries to demonstrate the 'entire fairness' of the transaction." *Id.* (citations omitted). A showing of "entire fairness" requires proof that the transaction is "the product of both fair dealing *and* fair price." *Cede II,* 634 A.2d at 361 (emphasis in original and citations omitted).

***4** With respect to the second basis for demonstrating breach of the duty of loyalty, Delaware courts have noted that "the requirement to act in good faith is a subsidiary element, i.e., a condition, of the fundamental duty of loyalty." *Stone v. Ritter,* 911 A.2d 362, 369-70 (Del.2006) (citation, alteration, and internal quotation marks omitted) ("[T]he fiduciary duty of loyalty is not limited to cases involving a financial or other cognizable fiduciary conflict of interest. It also encompasses cases where the fiduciary fails to act in good faith."). In *Stone,* the Delaware Supreme Court explained that "although good faith may be described colloquially as part of a 'triad' of fiduciary duties that includes the duties of care and loyalty, the obligation to act in good faith does not establish an independent fiduciary duty that stands on the same footing as the duties of care and loyalty." *Id.* at 370.

The Delaware Supreme Court has explained what constitutes bad faith by way of a spectrum of directorial conduct. "At one end of the spectrum, [there is] a category of acts involving non-exculpable, so-called 'subjective bad faith,' that is, fiduciary conduct motivated by an actual intent to do harm." *Ryan v. Lyondell Chem. Co.,* C.A. No. 3176-VCN, 2008 WL 4174038, at *3 (Del.Ch. Aug.29, 2008) (*"Ryan"*) (quoting *In re Walt Disney Co. Derivative Litig.,* 906 A.2d 27, 64 (Del.2006) (*"Disney"*)) (internal quotation marks omitted). "The second category of conduct, which is at the opposite end of the spectrum, involves lack of due care-that is, fiduciary action taken solely by reason of gross negligence and without any malevolent intent." *Disney,* 906 A.2d at 64. The court observed that "grossly negligent conduct,

without more, does not and cannot constitute a breach of the fiduciary duty to act in good faith." *Id.* at 65. The third category identified by the Delaware Supreme Court is the one at issue in this case: "intentional dereliction of duty or a conscious disregard for one's responsibilities." *Id.* at 66. "Such misconduct, according to the Court, is 'properly treated as a non-exculpable, non-indemnifiable violation of the fiduciary duty to act in good faith.' " *Ryan,* 2008 WL 4174038, at *3 (quoting *Disney,* 906 A.2d at 66).

Accordingly, "the distinction between gross negligence and non-exculpable 'bad faith' (i.e., that elusive something 'more') has important consequences in Delaware's jurisprudence and corporate statutory scheme because, for example, director conduct amounting *only* to a violation of the duty of care, but otherwise taken in good faith, is exculpable under 8 Del. C. § 102(b)(7) or indemnifiable under 8 Del. C. § 145." *Id.* (citing *Disney,* 906 A.2d at 64-65).

B. Scope of Plaintiff's Claim of Breach of the Duty of Loyalty

Inasmuch as the director defendants are exculpated from potential breaches of their duty of care, the success of Count IV necessarily depends on "whether any arguable shortcomings on the part of the ... directors also implicate their duty of loyalty, a breach of which is not exculpated." *Lyondell,* 970 A.2d at 239. To that end, in order to rule on Defendants' motion for summary judgment, we must ascertain whether there are any genuine issues of material fact with respect to whether the directors breached their duty of loyalty, not merely their duty of care. In keeping with the Parties' Joint Brief, we address the two bases for breach of the duty of loyalty in the reverse order: first, Plaintiff's assertion of bad faith conduct by Defendants, and second, Plaintiff's allegation of a self-interested transaction not shown to be entirely fair.

1. Bad Faith in *Revlon* Auction Context

***5** The obligation to act in good faith, which is a necessary component of satisfying the duty of loyalty, requires directors to act for the purpose of advancing corporate well-being. Therefore, any "intentional dereliction of duty, a conscious disregard for one's responsibilities[,]" constitutes bad faith, or the failure to act in good faith. *Disney,* 906 A.2d at 66; *Stone,* 911 A.2d at 370 ("Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith."). In this case, Plaintiff and the shareholder class which he represents argue Defendants consciously disregarded their responsibilities in selling Intermix to News Corp. for $12 per share, when, so they contend, a likely topping bid from Viacom was imminent.

The seminal case of *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,* 506 A.2d 173 (Del.1986), regulates directorial conduct during a sale or change of control of a publicly held corporation. *Revlon* holds that directors satisfy their fiduciary duties when their conduct is geared towards "the maximization of the company's value at a sale for the stockholders' benefit." *Id.* at 182. *Revlon* is triggered in the following three scenarios: "(1) when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company; (2) where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the break-up of the company; or (3) when approval of a transaction results in a sale or change of control." *Arnold v. Soc'y for Sav. Bancorp., Inc.,* 650 A.2d 1270, 1289-90 (Del.1994) (internal citations and quotation marks omitted). More recently, the Delaware Supreme Court has stated that *Revlon* duties attach "when a company embarks on a transaction-on its own initiative or in response to an unsolicited offer-that will result in a change of control." *Lyondell,* 970 A.2d at 242. When the company's "break-up" became "inevitable," in *Revlon,* "[t]he directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company." 506 A.2d at 182. In addition to its principal holding that shareholder wealth maximization must be the directors' foremost objective, the court also noted that "favoritism for a white knight to the total exclusion of a hostile bidder" was impermissible if divorced from the objective of shareholder value maximization. *Id.* at 184. "[W]hen bidders make relatively similar offers, or dissolution of the company becomes inevitable, the directors cannot fulfill their [fiduciary] duties by playing favorites with the contending factions. Market forces must be allowed to operate freely to bring the target's shareholders the best price available for their equity." *Id.*

***6** The Delaware Supreme Court has clarified that "*Revlon* did not create any new fiduciary duties[,]" but rather "simply held that the 'board must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise.' " *Lyondell,* 970 A.2d at 239 (quoting *Malpiede v. Townson,* 780 A.2d 1075, 1083 (Del.2001)). Additionally, Delaware case law has time and again reaffirmed the anti-favoritism principle, *i.e.* that directors may not tilt the playing field in favor of one bidder or otherwise skew the auction unless this conduct is designed to maximize shareholder wealth. In *Barkan v. Amsted Industries,* 567 A.2d 1279 (Del.1989), the court warned that "the board must act in a neutral manner to encourage the highest possible price for shareholders." *Id.* at 1286. To be sure, "there is no single blueprint that a board must follow to fulfill its duties," and "there are no legally prescribed steps that directors must follow to satisfy their *Revlon* duties." *Id.; Lyondell,* 970 A.2d at 243. Nevertheless, "[w]hen multiple bidders are competing for control, this concern for fairness forbids directors from using defensive mechanisms to thwart an auction or to favor one bidder over another." *Id.* at 1286-87 (citation omitted). More recently, in *In re Toys "R" Us, Inc., Shareholder Litigation,* 877 A.2d 975 (Del.Ch.2005), the Delaware Chancery Court stated that "a selfish or idiosyncratic desire by the board to tilt the playing field towards a particular bidder for reasons unrelated to the stockholders' ability to get top dollar" is a violation of a director's fiduciary obligations. *Id.* at 1000-01.

To support his claim that Defendants acted in bad faith, Plaintiff cites *Mills Acquisition Co. v. Macmillan, Inc.,* 559 A.2d 1261 (Del.1988). In that case, Macmillan, Inc.'s Chairman and Chief Executive Officer ("CEO") and its President and Chief Operating Officer ("COO") orchestrated a leveraged buyout of their own company, resulting in a lock-up agreement "between Macmillan and Kohlberg Kravis Roberts & Co. ('KKR'), an investment firm specializing in leveraged buyouts." *Id.* at 1264-65. These directors, "as participants in the leveraged buyout, had a significant self-interest in ensuring the success of a KKR bid." *Id.* at 1279. Indeed, "Macmillan senior management would receive up to 20% ownership in the newly formed company." *Id.* at 1273. So strong was the pull of that promised 20 percent ownership stake that even before KKR had communicated a bid price, these self-interested actors indicated that they would "endorse" the acquisition to the full board of directors. *Id.* To steer the process in the desired direction, they "clandestinely and impermissibly skewed" the auction in KKR's favor by, among other things, tipping KKR off as to the amount of a competing bid and then concealing this tip from the board of directors. *Id.* at 1279-81. On appeal, the Delaware Supreme Court held that "discriminatory treatment of a bidder, *without any rational benefit to the shareholders,* was unwarranted." *Id.* at 1282 (emphasis added).[FN4] The court found that "KKR repeatedly received significant material advantages to the exclusion and detriment of [the competing bidder] to stymie, rather than enhance, the bidding process." *Id.* at 1281. Moreover, the court concluded that "[t]he board was torpid, if not supine, in its efforts to establish a truly independent auction ...." *Id.* at 1280. The court added: "By placing the entire process in the hands of [the chairman], through his own chosen financial advisors, with little or no board oversight, the board materially contributed to the unprincipled conduct of those upon whom it looked with a blind eye." *Id.*

FN4. Favoritism and deal protection devices, such as a termination fee, are permissible so long as they are strategically designed to maximize the price paid to shareholders. *Macmillan,* 559 A.2d at 1287 ("[T]he board's primary objective, and essential purpose, must remain the enhancement of the bidding process for the benefit of the stockholders."). *Macmillan* set forth a test which tolerates only *value-enhancing* preferential treatment:

> In the face of disparate treatment, the trial court must first examine whether the directors properly perceived that shareholder interests were enhanced. In any event, the board's action must be reasonable in relation to the advantage sought to be achieved, or conversely, to the threat which a particular bid allegedly poses to stockholder interests.

559 A.2d at 1288; *In re J.P. Stevens & Co., Inc. S'holders Litig.,* 542 A.2d 770, 782 (Del.Ch.1988) ("The board may tilt the playing field if, but only if, it is in the

shareholders' interest to do so.").

***7** Defendants contend that *Macmillan* is distinguishable because the directors in that case were on both sides of the transaction and therefore engaged in self-dealing. However, Defendants have pointed us to no authority for the proposition that *Macmillan* is only applicable when a court reviews self-interested transactions for fairness and may not support a finding of bad faith conduct in the *Revlon* auction context.

We recognize that *Wayne County Employees' Retirement System v. Corti,* Civil Action No. 3534-CC, 2009 WL 2219260 (Del.Ch. July 24, 2009), distinguishes *Macmillan* from the single-bidder merger reviewed in that case on the absence of any conflicted insiders seeking to transfer control of a company to themselves. *Id.* at *12-13 ("There is much less cause for concern where managers will continue their employment with the combined post-transaction entity, than when the conflicted managers are bidders in an auction for control of the company, and are thereby seeking to transfer control of the company to themselves personally."). But that discussion has no bearing on the prohibition on favoring a particular bidder in a *multiple*-bidder context, which this case arguably presents.[FN5] Defendants suggest that the directors may tilt the playing field in favor of a particular bidder, without regard to shareholder wealth maximization, so long as they are not on both sides of a transaction. We reject this argument. Simply because *Macmillan* examined "disparate treatment" through the lens of disloyalty premised on a self-interested transaction does not mean field-tilting is permissible in other contexts. *See Emerson Radio Corp. v. Int'l Jensen Inc.,* Civ. A. Nos. 15130, 14992, 1996 WL 483086, at * 11-12 (Del.Ch. Aug.20, 1996) (describing *Macmillan* as requiring fiduciaries to "treat all bidders equally and fairly in carrying out their *Revlon* duties" and identifying self-interested nature of merger transaction as an "addition[al]" or "alternative" theory for breach of duty of loyalty); *Roberts v. Gen. Instrument Corp.,* CIV. A. No. 11639, 1990 WL 118356, at *8 (Del.Ch. Aug.13, 1990) (citing *Macmillan,* 559 A.2d at 1287-88) ("In each instance where the board is not predominantly self-interested or under the control or dominating influence of a person with a conflicting interest, the principal judicial inquiries relate to whether the board was adequately informed and acting in good faith. This court has been pointedly instructed, however, that 'where issues of corporate control are at stake' action of even a disinterested board must meet an enhanced test before they will qualify for the deference that courts ordinarily accord to good faith business judgments.").

> FN5. Although Viacom did not actually submit a bid, we conclude that there are triable issues of fact as to whether Viacom was at least a serious potential bidder which was discouraged from actually submitting a bid by Defendants' alleged bad faith conduct.

Whatever a director's particular motivation, evidence that he skewed an auction in favor of a particular bidder can support a finding of an "intentional dereliction of duty," *Disney,* 906 A.2d at 66, *i.e.* a violation of the obligation to act in good faith. *See Nagy v. Bistricer,* 770 A.2d 43, 48, n. 2 (Del.Ch.2000) (observing that the duty of good faith may serve as a "constant reminder ... that, regardless of his motive, a director who consciously disregards his duties to the corporation and its stockholders may suffer a personal judgment for monetary damages for any harm he causes," even if for a reason "other than personal pecuniary interest").[FN6]

> FN6. The Delaware courts have explained that favoritism, untethered to any strategy to drive up bid prices, is a breach of the fiduciary duties which *Revlon* focused through the lens of shareholder wealth maximization:
>
> > Critically, in the wake of *Revlon,* Delaware courts have made clear that the enhanced judicial review *Revlon* requires is not a license for law-trained courts to second-guess reasonable, but debatable, tactical choices that directors have made *in good faith.* For example, the Supreme Court has held that the duty to take reasonable steps to secure the highest immediately available price does not invariably require a board to conduct an auction process or even a targeted market canvass in the first instance, emphasizing that there is "no single blue-print" for fulfilling the duty to maximize value. Nor does a board's decision to sell a company prevent it from offering bidders deal protections, so long as its decision to do so was reasonably directed to the objective of

> getting the highest price, *and not by a selfish or idiosyncratic desire by the board to tilt the playing field towards a particular bidder for reasons unrelated to the stockholders' ability to get top dollar.*
>
> *Toys "R" Us,* 877 A.2d at 1000-01 (emphasis added; citations omitted).

***8** Defendants' principal argument is that recent Delaware Supreme Court case law creates a much more stringent standard for claims of breaches of the obligation to act in good faith. To this end, they cite language in the Delaware Supreme Court's decision in *Lyondell.* In that case, Lyondell's board of directors approved the sale of their company to Basell AF, a privately held Luxembourg company, after negotiating several increases in the per share bid price up from $40 to $48, and a set of less stringent deal protection devices, including a "fiduciary out" clause in the standard no-shop provision and a reduced termination fee. 970 A.2d at 237-39. The court found no bad faith and therefore no breach of the duty of loyalty. *Id.* at 242-44. The Supreme Court rested its decision on the following facts:

> The Lyondell directors met several times to consider Basell's premium offer. They were generally aware of the value of their company and they knew the chemical company market. The directors solicited and followed the advice of their financial and legal advisors. They attempted to negotiate a higher offer even though all the evidence indicates that Basell had offered a "blowout" price. Finally, they approved the merger agreement, because "it was simply too good not to pass along [to the stockholders] for their consideration." We assume, as we must on summary judgment, that the Lyondell directors did absolutely nothing to prepare for Basell's offer, and that they did not even consider conducting a market check before agreeing to the merger. Even so, this record clearly establishes that the Lyondell directors did not breach their duty of loyalty by failing to act in good faith.

Id. at 244.

Contrary to Defendants' argument, *Lyondell* did not work any transformation in Delaware law on the duty of loyalty. Nothing in this case altered the standard definition of bad faith; indeed, the court reaffirmed that "bad faith will be found if a 'fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.' " *Id.* at 243 (quoting *Disney,* 906 A.2d at 67). The court continued: "there is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties." *Id.* Despite all the references to the "conscious disregard" standard, Defendants nevertheless cherry-pick certain language to argue that a more stringent standard applies, including the following lines: (1) "Only if they knowingly and completely failed to undertake their responsibilities would they breach their duty of loyalty"; and (2) "[T]he inquiry should have been whether those directors *utterly failed* to obtain the best sale price." *Id.* at 243-44 (emphasis added); (Joint Br. 5-7, 16). Defendants' citation of this language is out of context and misleading. A comprehensive review of the *Lyondell* opinion reveals that the court intended that language to be synonymous and coterminous with the "conscious disregard" standard. The court did not suggest that the "utter failure" standard would supplant the definition of bad faith set forth in *Disney.* Nor did it suggest any unprecedented diminishment of *Revlon* duties, as suggested by the minimalist standard Defendants advance. If such a radical departure were intended, we think the court would have taken the pains to say as much. Divorced from the surrounding text, the "utter failure" language could be said to require that directors simply do anything in the auction process, no matter how feckless, ineffectual, or at odds with the goal of maximizing shareholder wealth.

***9** The "utter failure" language derives from the *Stone* and *In re Caremark* decisions, which the court cited. 911 A.2d 362 (Del.2006); 698 A.2d 959, 971 (Del.Ch.1996). Both of those decisions concerned claims that directors failed to engage in the necessary oversight to ensure compliance with laws such as the federal Bank Secrecy Act in *Stone.* That vital factual context helps explain why *In re Caremark* defined bad faith as follows: "Generally where a claim of directorial liability for corporate loss is predicated upon ignorance of liability creating activities within the corporation, ... only a sustained or systematic failure of the board to exercise oversight-such as an utter failure to attempt to assure a reasonable information and reporting system exists-will establish the lack of good faith that is a necessary condition to liability." 698 A.2d at 971 ("Such a test of liability-lack of good faith as evidenced by sustained or sys-

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

tematic failure of a director to exercise reasonable oversight-is quite high.”). Nevertheless, the Delaware Supreme Court explained in *Stone* and reaffirmed in *Lyondell* that: “the *Caremark* standard is fully consistent with the *Disney* definition of bad faith.” *Lyondell,* 970 A.2d at 240 (citing *Stone,* 911 A.2d at 370). We cannot second-guess that determination as Defendants wish.

Instead of placing “utter failure” between “subjective bad faith” (*i.e.* “actual intent to do harm”) and “conscious disregard” on the *Disney* “bad faith” spectrum, *Lyondell equated* the “utter failure” and “conscious disregard” standards. 970 A.2d at 240. This reasoning was fully in keeping with the Supreme Court's prior decision in *Stone,* where it noted that the duty of loyalty could be breached by two specific kinds of conduct rising to the level of bad faith: “(a) the directors *utterly failed* to implement any reporting or information system or controls; or (b) having implemented such a system or controls, *consciously failed to monitor or oversee* its operations thus disabling themselves from being informed of risks or problems requiring their attention.” 911 A.2d at 370. Crucially, though bad faith could be demonstrated with either of these alternatives, the court emphasized, citing *Disney,* 906 A.2d at 67, that these were coterminous legal standards:

> In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations. *Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities,* they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.

911 A.2d at 370 (emphasis added). Delaware courts generally seem to read *Lyondell* in this way. *See, e.g., Robotti & Co., LLC v. Liddell,* C.A. No. 3128-VCN, 2010 WL 157474, at *11 (Del.Ch. Jan.14, 2010) (characterizing *Lyondell* as holding that “[b]ad faith, and thus a breach of the duty of loyalty, can arise only when a fiduciary consciously disregards his or her responsibilities”).[FN7]

> FN7. “A failure to act in good faith may be shown ... where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.” *In re Walt Disney Co. Derivative Litig.,* 907 A.2d at 755.

***10** In addition, we do not read *Lyondell* as diminishing the prohibition on tilting the playing field in favor of a particular bidder for any reason other than maximizing shareholder wealth. The lack of an actual or even potential second bidder was a key undisputed fact on which that court relied, noting: “[The directors] had reason to believe that no other bidders would emerge, given the price Basell had offered and the limited universe of companies that might be interested in acquiring Lyondell's unique assets.... Finally, no other acquiror [*sic*] expressed interest during the four months between the merger announcement and the stockholder vote.” 970 A.2d at 241. Other cases have distinguished between single-bidder and multiple-bidder contexts as well. *See, e.g., Barkan,* 567 A.2d at 1286-87; *Continuing Creditors' Comm. of Star Telecomms., Inc. v. Edgecomb,* 385 F.Supp.2d 449, 466 n. 14 (D.Del.2004) (“In [*Macmillan*], the claim was that the directors approved the use of a lock-up that stopped rival bidders from winning the auction for the company so that fellow directors could purchase the company through a leveraged buy-out. Here, however, *there were no other bidders for Star,* the Company was on the verge of bankruptcy, and the Gotel financing was, by the Plaintiff's own admission, the only financing option presented to the Board.”) (emphasis added and citations omitted). Since *Lyondell* only reviewed a merger with a lone bidder, even if we were to read its “utter failure” language as more lenient on Defendants, it is of severely diminished relevance in the multiple-bidder scenario we arguably confront here.

In short, *Revlon* and *Macmillan* are not displaced in any way by *Stone* or *Lyondell.* Accordingly, we must ask whether there is a genuine issue of material fact as to whether Defendants consciously disregarded their duties, *i.e.* “fail[ed] to act in the face of a known duty to act.” *Stone,* 911 A.2d at 370. There is nothing in the case law to warrant granting judgment as a matter of law for Defendants, simply because they engaged in some bargaining.

Having considered all of the admissible evidence before us and viewing it in the light most favorable to Plaintiff as we must under Rule 56, we conclude that there are genuine, triable issues of material fact sufficient to defeat Defendants' Motion for Summary Judgment on this *Revlon* claim. These issues fall into three categories: (1) whether Intermix CEO Rosenblatt impermissibly tilted the playing field in favor of News Corp.; (2) whether the remaining board members consciously disregarded their duties; and (3) whether the purported risk of a direct bid for MySpace, which would have frozen the MySpace Option, precludes a finding that Defendants consciously disregard their duties.

a. **Rosenblatt**

Plaintiff proffers evidence tending to show that during the crucial week leading up to the July 18, 2005 merger, Rosenblatt evaded Viacom's advances, even though Viacom's representatives were communicating that a competing bid was imminent. Plaintiff raises at least two interrelated triable issues: (1) whether Rosenblatt was self-interested in the merger transaction; [FN8] and (2) whether he impermissibly steered the auction in News Corp.'s favor.

> FN8. Although analytically we are reviewing the evidence on the bad faith prong of the duty of loyalty component of the breach of fiduciary duty claim at this juncture, we consider Rosenblatt's alleged self-interest to the extent that it bears on whether Plaintiff has raised a triable issue of material fact as to whether Rosenblatt acted in conscious disregard of his duties by impermissibly tilting the field in favor of News Corp.

***11** As to Rosenblatt's purported self-interest, there is evidence of Rosenblatt's motivation for the alleged bidder favoritism, namely his anticipation of future employment with News Corp. In one particularly revealing email sent on July 15, Rosenblatt excitedly endorses News Corp.'s Ross Levinsohn's vision: “So, we create the Fox Internet group, all our units (myspace, alena, grab) fall under it, plus all new acquisitions, and you are CEO Fox Internet and I am Fox Internet grand Puba!!!!” (J.A., Ex. 184). Rosenblatt continues: “I would like to discuss my specific role and structure whenever you are ready. It is no rush unless Peter and Rupert want me to sign an employment agreement by Sunday [July 17, 2005] ....” (*Id.*). In an earlier email in that same chain, Rosenblatt wrote: “[I] am burning some real equity with every major media company by getting [the deal] done .... u [*sic*] have no idea the pain I will suffer on Monday. U [*sic*] better have a good job for me cause I ain't [*sic*] gonna work in this town again....” (*Id.*). On July 13, Rosenblatt wrote: “tell Thom Murdoch and I cut the deal in 30 mins [*sic*] and I got 100% of what we wanted. Deal closing by Monday.” (*Id.,* Ex. 154). This evidence at least raises the inference that Rosenblatt had a strong interest in seeing a merger transaction with News Corp. completed and had made up his mind that Intermix would be sold to News Corp. as of July 13.

Moreover, Plaintiff points to several key pieces of documentary evidence and witness testimony which tend to support his contention that (1) Rosenblatt, in representing the Intermix board through the Transaction Committee (“TC”), (2) Sheehan, who also sat on the TC, and (3) their agents, deliberately dodged, if not frustrated, an arguably imminent bid from Viacom:

> *First,* on July 6, Montgomery responded to an email announcing “Viacom coming in hard” by telling Rosenblatt: “You need to dance with [Viacom] ... slow them down. I know you can do it.” (*Id.,* Ex. 117).
>
> *Second,* TWP, specifically Robert Kitts (“Kitts”), was aware that Epstein was trying to reach them to talk about a potential Viacom bid. (Kitts Tr. at 125:4-7, 126:4-13). Epstein noted on July 16 that Kitts never called him back as promised. (J.A., Ex. 191 (“We exchanged subsequent emails and he indicated he would call me, but he never did.”)).
>
> *Third,* on July 15, Mosher wrote Rosenblatt following one of Rosenblatt's updates to the full board, saying “Viacom sounds like a pipedream.” (*Id.,* Ex. 182).
>
> *Fourth,* on July 15, Judy McGrath of MTV [FN9] wrote Rosenblatt to inform him that Viacom was “coming with a bid early next week.” (*Id.,* Ex. 183). She added: “We really want to be with you on this, and hope to get in the ring for it ....” (*Id.*). Rosenblatt replied evasively, failing to correct her mistaken impression that the auction would still be

ongoing after Monday: "I am on a call but thanks so much for the email .... I will call you back soon ...." (*Id.*). Rosenblatt could not recall precisely whether he had returned her call: "I may have tried. I think, actually, I do think I tried and I couldn't get a hold of her." (Rosenblatt Tr. at 108:21-24).

FN9. Viacom owns MTV Networks.

***12** *Fifth,* Viacom's CEO Thomas Freston ("Freston"), who reiterated Viacom's interest in purchasing Intermix to Rosenblatt, has testified that he was only told that the process with the competing bidder was "moving quickly." (Freston Tr. at 17:12-20, 19:8-11, 22:4-14).[FN10] He testified that he could not "recall if [Rosenblatt] said that they were going to do a deal by Sunday." (*Id.* at 22:21-24). When asked whether Rosenblatt had communicated that a deal would be completed by Sunday, he stated that he did not believe so. (Freston Tr. at 19:8-11).

FN10. The Parties initially sought to file Freston's deposition transcript under seal because it contained information subject to the governing protective order. On November 13, 2009, the Parties filed a joint stipulation to withdraw their application to file under seal unredacted versions of the Joint Brief, the Joint Statement of Uncontroverted Facts, and Volumes 2-3 and 5-9 of the Joint Evidentiary Appendix, as well as several full deposition transcripts, including Freston's testimony. (Dkt. No. 234). In that document, the Parties stated that: "WHEREAS the Parties have contacted all non-parties that produced documents and/or gave deposition testimony which was the subject of the application to file under seal, and obtained their permission for the documents to be publicly filed, and therefore withdraw the Application to File Under Seal[.]" (*Id.* at 3). Our November 17, 2009 Order regarding the joint stipulation was not clear as to whether the deposition transcripts were also being filed in the public record. (Dkt. No. 236). We now clarify that all of the deposition transcripts labeled "Confidential Pursuant to Protective Order" and submitted to the Court along with the Cross-Motions for Summary Judgment **SHALL** also be filed in the public record pursuant to the Parties' joint stipulation.

Kitts of TWP also confirmed that he failed to give Viacom any hard deadline by which to submit a bid. (Kitts Tr. at 88:21-89:16, 90:11-22, 136:11-14).[FN11]

FN11. Rosenblatt, on the other hand, has testified that he actually told Freston that a deal would "likely be over by Sunday," or (stated with more certainty) that the deal was "going to be done by Sunday." (Rosenblatt Tr. at 64:5-22, 65:22-25, 92:5-8). For purposes of summary judgment, this conflicting evidence further supports the existence of a triable issue of fact as to Viacom's relative awareness of the impending consummation of the merger with News Corp. Moreover, Jason Hirschhorn ("Hirschhorn"), Viacom's top manager for Internet business, wrote in an internal email on Saturday July 16 that News Corp. "will deliver [its bid] anywhere from today-monday." (J.A., Ex. 192). Freston also states that Rosenblatt told him "a specific deal was imminent." (Freston Tr. at 29:11-16). Though the actual meaning of that statement is obscure as to whether a deal or a bid would have been imminent (particularly given Freston's other testimony), this ambiguity likewise buttresses our conclusion that there are genuine issues for trial.

Sixth, on July 17, Jason Hirschhorn emailed Chris DeWolfe, MySpace's CEO, to document his difficulties in staying in the auction process: "chris, quick concerns ... Intermix management did not show up on Friday as promised during our time there ... Intermix legal cancels their time with our legal today at the last minute ... Heard you guys got called off the ad sales call abruptly ... In short, I have had a team of 20+ people here working for 72 hours straight on a significant bid, is there anything I need to know?" (J.A., Ex. 200).

Seventh, on July 17, Van Toffler of MTV also emailed Rosenblatt directly to complain politely about the perceived run-around: "They are in the office working round [*sic*] the clock so we can put forth a number to you this week. They mentioned a

couple of calls were cancelled at the end of the day Friday, and seemed a bit concerned. Is there anything I can do to help the process for both of us as this is clearly on the fast track?" (*Id.,* Ex. 202). Again, Rosenblatt replied in such a way that a reasonable jury could infer an intent to evade an arguably imminent competing bid: "We like you and your guys a ton also. Chris called back or will your GC today. Have a great weekend [.]" (*Id.*).[FN12]

> FN12. A reasonable jury could infer from this email that Rosenblatt intended to evade an arguably imminent competing bid, and that the "[h]ave a great weekend" line at the end of the email was dismissive, given the fact that the email was sent at nearly 6 p.m. on a Sunday night.

Eighth, on July 17, Kitts of TWP, pursuant to the Intermix board's instructions, informed Viacom that it would be "in their best interest" to make a bid that evening.[FN13] (Kitts Tr. at 69:13-70:14, 88:21-89:16). Kitts admitted that he did not give Viacom a hard and fast deadline (*see id.* at 88:21-89:16, 90:11-22; Epstein Tr. at 53:21-55:5), but that he "relied upon the message [he] delivered as code that [Epstein] should get a bid in this evening." (Kitts Tr. at 90:20-22). Furthermore, Kitts admitted in the deposition that he had been instructed to ask for a bid on a timetable that he knew was infeasible. (*Id.* at 144:1-145:7). Kitts testified that he was aware of an upcoming Viacom board meeting, "at which [a potential bid] was going to be discussed." (*Id.* at 69:13-70:14). The Viacom board was not scheduled to meet until the evening of Tuesday July 19, 2005. (Rosenblatt Decl. ¶ 42; Brewer Decl. ¶ 29).

> FN13. We do not read the deposition to suggest that these were his actual words; Kitts was merely paraphrasing what he recalls saying to Viacom.

On the other hand, Defendants present the following evidence of events leading up to the July 18th merger, which they argue demonstrates the board members' good faith. News Corp. initially signaled that it would be willing to purchase Intermix in the $8-10 per share price range. (Rosenblatt Decl. ¶ 18). During the Tuesday July 12, 2005 meeting between Rosenblatt, Rupert Murdoch, and Peter Chernin,[FN14] News Corp. indicated that it would pay $12 per share, as long as the MySpace Option was exercised and a merger agreement was executed by no later than Sunday, July 17, 2005. (*Id.* ¶ 24 (describing the "handshake deal")). At the 2 p.m. meeting on July 15, the Intermix board of directors rejected News Corp.'s proposal to enter exclusive negotiations as premature. (*Id.* ¶¶ 29-30). At the 8 p.m. meeting on July 15, the Intermix board rejected the non-binding term sheet including a variety of deal protection provisions as "too strong a deterrent to other potential bidders." (*Id.* ¶ 33; J.A., Ex. 14). At the 8 p.m. meeting on July 16, TWP advised the board that it would be reasonable to approve a merger with News Corp. rather than waiting for Viacom to present an offer. (Brewer Decl. ¶ 27; Rosenblatt Decl. ¶ 37). At the 7:30 p.m. TC meeting on July 17, the committee directed TWP to contact Viacom and/or its representative, Morgan Stanley, to ascertain whether Viacom would be making an offer before the opening of the market the next morning. (Rosenblatt Decl. ¶ 41; Sheehan Decl. ¶ 36; J.A., Ex. 18). At the 10 p.m. Intermix board meeting on July 17, TWP advised that Viacom was not prepared to make any offer until its board met on Tuesday July 19 and approved a bid. (Rosenblatt Decl. ¶ 42; J.A., Ex. 19). At the 3:45 a.m. board meeting on July 18, both Montgomery and TWP presented their valuation analyses, explaining that $12 per share was a fair price for Intermix, and the Board voted to approve the merger. (Rosenblatt Decl. ¶ 44). On July 18, Intermix entered into a merger agreement with News Corp.'s Fox Interactive Media. (Rosenblatt Decl. ¶ 45; J.A., Ex. 4, at 319). Defendants contend, and the record reflects, that throughout this process the board met repeatedly, authorized ongoing discussions with both competing bidders, and consulted legal and financial advisers. (J.A., Exs.8-12, 14-19).

> FN14. Rupert Murdoch is the Chairman and CEO of News Corp. Peter Chernin was the then-President and COO of News Corp.

***13** Viewing the evidence as a whole and in the light most favorable to Plaintiff, we conclude that there are at least triable issues of fact as to whether Rosenblatt acted in good faith, whether he impermissibly skewed the auction in favor of News Corp. for a purpose other than maximizing shareholder value, knowing that a Viacom bid was likely and imminent, and whether this arguably disparate treatment of Viacom and News Corp. had any effect on Viacom's apprecia-

tion of the arguable need to make an offer by the evening of July 17, 2005.

b. The Other Directors

i. Sheehan

In addition to Rosenblatt, there are also triable issues of fact as to whether Sheehan consciously disregarded his fiduciary duties. On Friday July 15, Stuart Epstein ("Epstein"), the Morgan Stanley investment banker representing Viacom, tried to reach Sheehan but was unsuccessful. (Sheehan Tr. at 83:12-18; J.A. Ex. 175). Sheehan instructed his secretary as follows: "Do not tell [Epstein] anything about what I am doing or where I am[.]" (J.A., Ex. 175). In reply to his email, Sheehan's secretary informed him that she told Epstein that he was "unavailable." (*Id.*). A reasonable jury could conclude that this email chain evinces Sheehan's intent to avoid Viacom's representatives.

ii. The Other Six Directors

In *Gesoff v. IIC Industries, Inc.,* 902 A.2d 1130 (Del.Ch.2006), the court stated that bad faith may be found where directors have "acted with conscious disregard *or made decisions with knowledge that they lacked material information." Id.* at 1165 (emphasis added). Few Delaware cases attempt to define precisely what conduct reaches the level of actionable bad faith, but there is at least agreement that "adopting a 'we don't care about the risks' attitude concerning a material corporate decision" constitutes bad faith. *In re Walt Disney Co. Derivative Litig.,* 825 A.2d 275, 289 (Del.Ch.2003) (finding bad faith claim properly alleged where factual allegations, if true, implied that "the defendant directors *knew* that they were making material decisions without adequate information and without adequate deliberation, and that they simply did not care if the decisions caused the corporation and its stockholders to suffer injury or loss") (emphasis in original).

Having reviewed the record in full, we conclude that there is sufficient admissible evidence to create a triable question of fact as to whether the rest of the board, as in *Macmillan,* "plac[ed] the entire process in the hands of" Rosenblatt and to a lesser extent Sheehan and thereby "materially contributed to the [allegedly] unprincipled conduct of those upon whom it looked with a blind eye." 559 A.2d at 1281.

On February 9, 2005, the Intermix board of directors formed a Transaction Committee comprised of Rosenblatt, Sheehan, and Quandt. (Rosenblatt Decl. ¶ 6). From that point until July 18, 2005 when the merger was announced, it is undisputed that the Board received most of its information about the negotiations from its self-interested CEO, Rosenblatt. Indeed, it is undisputed that Rosenblatt was the only board member who had some first-hand information as to the circumstances of Viacom's efforts to put in a bid. (*See, e.g.,* Joint Statement of Uncontroverted Facts P347 ("Rosenblatt was the only person from the Intermix Board who negotiated with Viacom.")). Crucially, one of the board members testified that Rosenblatt had led him to believe "[t]hat Viacom was less urgent about the deal and hadn't taken the time or done the same level of work as Fox Network" and that Viacom was a "pipedream." (J.A., Ex. 182; Mosher Tr. at 25:24-26:1). This phrase is admittedly not indicative of *conscious* wrongdoing. However, there is a triable question as to whether the other board members consciously abdicated their responsibilities as corporate fiduciaries in allegedly swallowing Rosenblatt's version of events and utterly failing to assess the situation for themselves.

***14** More generally, a reasonable fact-finder could conclude that the other board members acted in bad faith by making "decisions with knowledge that they lacked material information." *Gesoff,* 902 A.2d at 1165. With respect to their knowledge of the relative likelihood of a Viacom bid, Mosher stated that he could not recall if he or any other board member had "asked any questions regarding Viacom or its status." (Mosher Tr. at 26:14-21). Additionally, he could not recall whether he had "any knowledge of whether anyone from management was providing equal information to Viacom and Fox News Corp about the time line" for submitting a bid for Intermix. (*Id.* at 43:17-21).

With respect to their knowledge of bidder favoritism, though Mosher testified that he could not recall the board ever instructing Rosenblatt to favor one bidder over another, he also could not definitively represent that the board had *not* so instructed Rosenblatt. (*Id.* at 41:10-21). Other board members besides Rosenblatt have also testified that they were unaware that any due diligence meetings with Viacom had been cancelled. (Brewer Tr. at 119:11-15; Sheehan Tr. at

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

98:1-20). Furthermore, Brewer testified that he was simply unaware that Viacom was conducting due diligence over the July 16-17, 2005 weekend. (Brewer Tr. at 26:5-24).

With respect to their knowledge of the fairness of the merger price, Rosenblatt did not inform Brewer that he was requesting $12 per share from News Corp. until the day of the "handshake deal" with Rupert Murdoch; it is unclear when the rest of the board learned this information. (*Id.* at 122:2-9). He also did not explain how that requested price was derived. (*Id.* at 122:10-14). Brewer testified that the board did not ask, and Mosher could not recall whether any board member sought an explanation. (*Id.;* Mosher Tr. at 53:6-9). Moreover, Brewer testified that the board as a whole never conducted any independent analysis to determine what "an appropriate price per share" would be. (Brewer Tr. at 122:15-18; *see also* Mosher Tr. at 49:24-50:4 (testifying that he himself did not perform any independent analysis)). Additionally, Mosher confirmed that the board had not "directed the management team to go get the specific valuation work done prior to the acquisition." (Mosher Tr. at 52:4-18). Finally, Brewer has testified that he could not even recall whether any of the directors had asked "any questions about [Montgomery and TWP's] fairness presentations." (Brewer Tr. at 104:2-10). Though Brewer's failure to recall what everyone had specifically asked back in 2005 would be understandable, a reasonable jury might draw a negative inference from his representation that he could not recall any discussion as to the investment banks' analyses.

Construing all of the above testimony in the light most favorable to Plaintiff as we must on Defendants' motion for summary judgment, we conclude that it is at least triable as to whether the remaining six board members consciously disregarded their duties and acted in bad faith. There is evidence in the record suggesting that no one on the board asked any questions about the requested per share price, the treatment of the competing bidders, the fairness valuations, or the relative likelihood of a Viacom bid. A reasonable jury could infer that this evidence demonstrates the other six directors consciously abdicated their roles as corporate fiduciaries required by law to do their utmost to maximize shareholder wealth. Of course, we remain mindful that even gross negligence, premised on "simple inattention or failure to be informed of all facts material to the decision[,]" violates only the duty of care and is not actionable as bad faith. *Disney,* 906 A.2d at 66. Nevertheless, we think a reasonable jury could find that the other six directors exceeded the bounds of negligent conduct, willfully proceeded to their decisions knowing they lacked material information, *Gesoff,* 902 A.2d at 1165, and thereby consciously disregarded their fiduciary duties. *Disney,* 906 A.2d at 66 ("Cases have arisen where corporate directors have no conflicting self-interest in a decision, yet engage in misconduct that is more culpable than simple inattention or failure to be informed of all facts material to the decision. To protect the interests of the corporation and its shareholders, fiduciary conduct of this kind, which does not involve disloyalty (as traditionally defined) but is qualitatively more culpable than gross negligence, should be proscribed.").

c. The MySpace Option

***15** The MySpace, Inc. Stockholders Agreement ("MSA") (J.A., Ex. 2), executed on February 11, 2005, was the culmination of negotiations between MySpace, Inc., MySpace Ventures, LLC, Redpoint Ventures I, L.P., Redpoint Associates I, LLC, Redpoint Ventures II, L.P., Redpoint Associates II, LLC, Redpoint Technology Partners Q-1, L.P., and/or Redpoint Technology Partners A-1, L.P. (collectively, "the Redpoint Entities"). (Brewer Decl. ¶ 6; Rosenblatt Decl. ¶ 7). Under the agreement, the Redpoint Entities purchased a 47 percent minority interest in Intermix, and at the same time, the 53 percent majority stockholders acquired an option ("the MySpace Option") to buy back that minority interest if a third party made a "bona fide ... offer" for 50 percent or more of Intermix's shares:

> So long as Intermix (together with its Affiliates) directly or indirectly holds at least 1,000,000 shares of Common Stock ..., in the event Intermix receives a bona fide third-party offer with respect to a Change of Control of Intermix ... within the twelve (12) month-period commencing on the date hereof ..., then, following receipt of such offer (and provided discussions relating to such offer are then-ongoing), Intermix shall have the right to purchase ... up to 100% of Common Stock and Common Stock Equivalents of the Corporation held by the other Stockholders, whether now owned or hereafter acquired ....

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

(J.A., Ex. 2 § 7.1.1; Brewer Decl. ¶¶ 6-7; Rosenblatt ¶¶ 7-8). Section 7.1.5 of the MSA precluded the majority from exercising the MySpace Option if a third party made a direct bid for MySpace of over $125 million: "Intermix may not exercise the Purchase Option if (a) the Corporation [MySpace, Inc.] has previously received a bona fide third party offer to purchase the Corporation's capital stock or assets for a purchase price greater than $125.0 million and discussions regarding such acquisition between the Corporation and such third party are ongoing ...." (J.A., Ex. 2 § 7.1.5). The two provisions are mutually exclusive: (1) a bid for 50 percent or more of Intermix's shares precludes any subsequent direct bid for MySpace (while discussions for the Intermix control share are ongoing); and (2) any direct bid for MySpace precludes any subsequent bid for 50 percent or more of Intermix's shares (while discussions for the acquisition of MySpace are ongoing).

Defendants contend their conduct was not in bad faith in light of the risk of a direct third-party bid for MySpace, which would have precluded the 53 percent Intermix majority interest from exercising the MySpace Option under the MSA to purchase the minority 47 percent interest. Accordingly, we must consider whether the purported risk of a direct bid for MySpace, which would have frozen the MySpace Option, dictates a conclusion that Defendants did not consciously disregard their duties as a matter of law.

Defendants claim that the risk of such a freezing bid was real and that any delay in consummating the merger with News Corp. threatened the loss of an opportunity to capture the value of Intermix's crown jewel, MySpace, for their shareholders. (Joint Br. 11-15). At the July 15th board meeting at 2 p.m., the directors discussed the status of conversations with News Corp. and Viacom and considered the possibility that if either company "viewed itself as unlikely to prevail in acquiring [Intermix], it might submit an offer to acquire only MySpace in order to potentially suspend, at least temporarily, [Intermix's] ability to exercise the MySpace option, thereby potentially jeopardizing economically attractive transactions involving the Company including the potential News Corp. transaction then under consideration." (Rosenblatt Decl. ¶ 31; J.A., Ex. 12). Rosenblatt and the other directors have declared that they "believed that the deadline provided by News Corp. by which to execute the Merger Agreement was firm and that News Corp. was prepared to walk away if the deal was not consummated by the opening of the stock market on July 18, 2005." (Rosenblatt Decl. ¶ 46).

***16** To substantiate their purported concern over a potential freeze-out bid, Defendants suggest that a "bona fide third-party offer" can only mean a fully executed agreement, as in the written merger agreement executed on July 18, 2005. (Joint Br. 93-97). We reject Defendants' assertion that this proposed construction of "bona fide third-party offer" is compelled as a matter of law. Under Sections 7. 1.1 and 7.1.5 of the MSA, a subsequent bid for MySpace or the Intermix control share, respectively, will only be precluded if discussions regarding the "bona fide third-party offer" are "ongoing." This language in the agreement suggests that the term "bona fide offer" does not contemplate the final execution of an agreement, at which point discussions would no longer be "ongoing."

Even though we reject Defendants' construction of the phrase "bona fide third-party offer" in the MSA, we also reject Plaintiff's request that we rule as a matter of law on the purely legal question of what constitutes a "bona fide third-party offer" under Sections 7. 1.1 and 7.1.5 of the MSA. In our view, Plaintiff's request misses the point. We are not here to construe the terms of the MSA, as such. Rather, the question is whether there is a triable issue that Defendants, reasonably fearing being frozen out of the MySpace Option, tilted the field in News Corp.'s favor for the permissible purpose of maximizing shareholder wealth, or whether Defendants had no such reasonable fear, but merely used the MySpace Option as a rationalization for a selfish or idiosyncratic desire to favor News Corp. unrelated to securing top dollar for the shareholders. We think the evidence fairly presents such triable issues as to Defendants' purported conscious disregard of their duties. In any event, our *post hoc* legal determination cannot dictate the result of the question of the propriety of Defendants' conduct that indisputably occurred without the benefit of our construction of the MSA.

Accordingly, we hereby **DENY** Plaintiff's Motion for Summary Judgment on this question of contractual interpretation.

In light of all the reasons set forth above, we hereby **DENY** Defendants' Motion for Summary Judgment

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

on the fiduciary duty claim with respect to Plaintiff's bad faith theory in the *Revlon* auction context.

2. Self-Interested Transaction

In the alternative, Defendants move for summary judgment on the second theory supporting the breach of fiduciary duty claim, arguing that five of the eight Defendants (a majority) were not self-interested or controlled by someone who was. The Delaware Supreme Court summarized the governing law in *Cinerama, Inc. v. Technicolor, Inc.*:

> A board of which a majority of directors is interested is not a "neutral decision-making body." *See, e.g., Paramount Communications, Inc. v. QVC Network, Inc.,* Del.Supr., 637 A.2d 34, 42 n. 9 (1994) ("[w]here actual self-interest is present and affects a majority of the directors approving a transaction, a court will apply [the entire fairness test]"); *Aronson v. Lewis,* Del.Supr., 473 A.2d 805, 812 (1984). A majority of disinterested directors is not "independent" if that majority was dominated by an interested director. *See Heineman v. Datapoint Corp.,* Del.Supr., 611 A.2d 950, 955 (1992). Similarly, the manipulation of the disinterested majority by an interested director vitiates the majority's ability to act as a neutral decision-making body. *See Mills Acquisition Co. v. Macmillan, Inc.,* Del.Supr., 559 A.2d 1261, 1279 (1989).

***17** 663 A.2d 1156, 1170 n. 25 (Del.1995). Accordingly, Plaintiff must make two showings. "First, the plaintiff must proffer evidence showing that those members of the board had a material self-interest in the challenged transaction[,]" and this must be "evidence of a substantial self-interest suggesting disloyalty, such as evidence of entrenchment motives, vote selling, or fraud." *Goodwin,* 1999 WL 64265, at *25 (citing *Cede II,* 634 A.2d at 362-63; *Cinerama,* 663 A.2d at 1169). "Second, the plaintiff must show that those materially self-interested members either: a) constituted a majority of the board; b) controlled and dominated the board as a whole; or c) i) failed to disclose their interests in the transaction to the board; ii) and a reasonable board member would have regarded the existence of their material interests as a significant fact in the evaluation of the proposed transaction." *Id.* (citing *Cinerama,* 663 A.2d at 1168).

There were eight directors on the Intermix board at the time of the merger: Rosenblatt, Sheehan, Mosher, Quandt, Brewer, Carlick, Moreau, and Woodward. Rosenblatt was conflicted due to his interest in becoming the head of Fox Interactive Media. He aimed to "receiv[e] a personal benefit from a transaction not received by the shareholders generally." *Cede II,* 634 A.2d at 362; *McGowan,* 2002 WL 77712, at *2 (deeming contracts for post-merger employment in acquiring entity a "disabling conflict of interest"); *Goodwin,* 1999 WL 64265, at *25 (finding "a triable issue of fact regarding whether [directors'] expectations constituted a material interest in the merger not shared by the stockholders" but granting summary judgment on lack of evidence that any material interest infected deliberative process); *Oliver,* 2006 WL 1064169, at * 19 ("[A]s a consequence of their personal interest in the negotiation of the Accord Agreement, in light of its potential impact on their rights under their employment agreements, they also were self-interested."). Rosenblatt did not simply seek to retain his current position, but sought to secure a coveted position at the top of a division at News Corp. Accordingly, read in conjunction with other admissible evidence we have cited previously, this self-interested motivation is suggestive of disloyalty.

Defendants argue that Rosenblatt's interests were coterminous with the shareholders' interests because every additional dollar increase in the price paid per share would yield roughly an additional $2 million for Rosenblatt, a significant shareholder in Intermix. (Rosenblatt ¶ 51; Joint Statement of Uncontroverted Facts D89). This argument, however, misses the point that Rosenblatt arguably stood to gain more money and prestige by becoming the "grand Puba" of Fox Interactive Media. If Chris DeWolfe, the former CEO of MySpace, stood to make a $30 million salary over two years if retained by the merged entity (the Parties appear to agree on this point) (*see* Joint Br. 37 n. 42, 41-42), a reasonable jury could infer that Rosenblatt, as head of Fox Interactive Media, would have been offered an even higher salary. As such, a per share price of well above $20 would be needed to offset Rosenblatt's conflicting interest in a $30 million (or higher) salary. (*Id.* at 41-42). Defendants only reiterate that Rosenblatt stood to gain a greater benefit from each incremental increase in the per share price.

***18** It is undisputed that no director instructed any

other director on how to vote or was influenced by how other board members voted. (Joint Statement of Uncontroverted Facts D95-96; Brewer Decl. ¶ 36; Carlick Decl. ¶ 38; Mosher Decl. ¶ 34; Moreau Decl. ¶ 36; Quandt Decl. ¶ 42; Rosenblatt Decl. ¶ 49; Sheehan Decl. ¶ 44; Woodward Decl. ¶ 34). The real question is whether each board member acted independently and free of any manipulation by the interested members, principally Rosenblatt, *i.e.* whether "[e]ach Board Member exercised his independent judgment and consideration in deciding how to vote." (Joint Statement of Uncontroverted Facts D97). In virtually identical declarations, the directors claim they were not so manipulated. (Brewer Decl. ¶ 36; Carlick Decl. ¶ 38; Mosher Decl. ¶ 34; Moreau Decl. ¶ 36; Quandt Decl. ¶ 42; Rosenblatt Decl. ¶ 49; Sheehan Decl. ¶ 44; Woodward Decl. ¶ 34). On the other hand, Plaintiff argues that Rosenblatt deliberately misled the other board members regarding the viability of the Viacom bid, steering them into approving the merger without waiting even a couple more days to see if Viacom would top News Corp.'s offer. (Joint Br. 26-27). Plaintiff cites an email Mosher sent to Rosenblatt after one of the July 15th meetings, stating: "We need to honor our commitment to Fox and get this done. Viacom sounds like a pipedream. Fox sounds dead serious and not screwing around." (J.A., Ex. 182). When asked about this email during his deposition, Mosher testified that Rosenblatt's periodic updates to the board had led him to believe "[t]hat Viacom was less urgent about the deal and hadn't taken the time or done the same level of work as Fox Network." (Mosher Tr. at 25:24-26:1, 26:5-13). He also noted that: "The discussion around Viacom that the management team had led indicated that Viacom did not seem as willing to come to the table with an offer for the company." (*Id.* at 25:1-4). This evidence is sufficient to raise an inference that Rosenblatt's presentation to the board may have been misleading as to Viacom's seriousness. According to Mosher's description of the board meetings, "from the management team estimation standpoint [*sic*], they were not inclined to make an offer for the company on the time line that we were looking at." (*Id.* at 25:18-21). Viewing the evidence as a whole in the light most favorable to Plaintiff, including the contrary evidence that Viacom was indeed very seriously interested in bidding on Intermix,[FN15] there are at least triable issues of fact as to whether Mosher was manipulated by a self-interested director, Rosenblatt.

FN15. Van Toffler of MTV emailed Rosenblatt on July 17 to note that his people were "in the office working around the clock so [Viacom could] put forth a number to [him that] week." (J.A., Ex. 202). On the same day, Jason Hirschhorn of Viacom informed Chris DeWolfe that he has "had a team of 20+ people ... working for 72 hours straight on a significant bid [.]" (*Id.,* Ex. 200).

Moreover, based on Mosher's description of the content of Rosenblatt's presentations to the board, the issue of manipulation is triable with respect to all of the other board members. Accordingly, as a reasonable jury could potentially conclude that a majority of the directors was interested or manipulated by someone who was, we hereby **DENY** Defendants' Motion for Summary Judgment on this second basis for Plaintiff's claim of breach of the duty of loyalty.

III. Count II: Violation of Section 14(a) of the Securities and Exchange Act of 1934 and SEC Rule 14a-9

***19** On August 25, 2005, Intermix issued a proxy statement ("Proxy") concerning the News Corp. merger. (Rosenblatt Decl. ¶ 53). On September 30, 2005, a majority of Intermix shareholders voted to adopt the Merger Agreement. (*Id.* ¶ 55). Plaintiff alleges that there were five material omissions in the Proxy. (J.A., Ex. 4). To succeed on "a claim under § 14(a) and Rule 14a-9, a plaintiff must establish that (1) a proxy statement contained a material misrepresentation or omission which (2) caused the plaintiff injury and (3) that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction." *New York City Employees' Ret. Sys. v. Jobs,* 593 F.3d 1018, 1022 (9th Cir.2010) (citation and internal quotation marks omitted); 15 U.S.C. § 78j(b); 17 C.F.R. § 240.14a-9(a) ("No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

of a proxy for the same meeting or subject matter which has become false or misleading.”).

A. Alleged Material Omissions

1. MySpace's Then-Current Revenue and Profits

Defendants first argue that Plaintiff failed to identify the alleged material omission of MySpace's then-current revenue and profits as a basis for this Section 14(a) claim in its responses to their interrogatories, thereby waiving this ground for his Section 14(a) claim. (Joint Br. 45 n. 49). We disagree. First, the CSAC clearly alleges that Defendants omitted “the current revenues and profits being generated by MySpace.” (CSAC ¶¶ 130-33). Second, our July 14, 2008 Order clearly identified this purported material omission as one of the five surviving bases for the Section 14(a) claim. (Dkt. No. 110, at 5). Third, whether Plaintiff actually identified this alleged material omission in his Revised Objections and Responses to Defendant VP Alpha Holdings IV, L.L.C.'s First Set of Interrogatories is unclear. (J.A., Ex. 28). Most of the response to Interrogatory No. 1 focused on the conspicuous absence of internal projections for MySpace's prospective growth, not the company's then-current revenue and profits. (*Id.* at 513-15). Plaintiff did not use the phrase “current revenue and profits,” but rather, stated the following:

> [S]hareholders ... *were never made aware of MySpace's true value* or its true growth potential, and had no way of comparing the information that was publicly available to management's projections and growth assumptions. *Thus, even though certain metrics that were used to track MySpace's growth were available from some hard to find public sources (and were not made available by the Company directly to its shareholders), shareholders and other members of the investing public could not compare this data to the Company's internal data* to determine if the Investment Banks' fairness opinions accurately reflected the explosive growth of MySpace.

***20** (*Id.* at 515 (emphasis added)). Although somewhat opaque, we think the highlighted text above can fairly be read to embrace internal data on MySpace's then-current financial position. Fourth, during the Parties' Local Rule 7-3 meet and confer, according to Defendants, Plaintiff did not identify this alleged omission. (Joint Br. 45 n. 49). Sheehan and Carlick's counsel has also declared that Plaintiff was asked at the meeting whether they were pursuing “any other misstatements or omissions,” but he does not declare that Plaintiff's counsel answered the question in the negative, thereby waiving this basis. (J.A., Ex. 30, Knaster Decl. ¶¶ 8-9). Fifth, Plaintiff's counsel also circulated a letter outlining the issues discussed at the meet and confer, which did not list this purported material omission. (J.A., Ex. 35). However, since this document purports to be an outline of the summary judgment arguments Defendants identified, we decline to conclude that this document contemplated a waiver of the “current revenue and profits” omission, which was so clearly identified in the CSAC (if not so clearly in the interrogatory responses). Accordingly, as this argument was not waived, and Defendants have not made any threshold showing entitling them to summary judgment on this basis, we **DENY** the Motion for Summary Judgment as to this alleged material omission under Count II.

2. Intermix Management's 2005-2009 Financial Projections

Plaintiff also alleges that Defendants failed to disclose Intermix management's internal financial projections, and that this information was material. The Supreme Court set forth the materiality standard for Section 14(a) claims in *TSC Industries, Inc. v. Northway, Inc.,* 426 U.S. 438, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976): “An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.” *Id.* at 449. The Court added that “there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.” *Id.*

While federal courts generally agree that financial projections, “forward-looking statements,” “puffing,” or other soft financial information need not be disclosed, this case is distinguishable. *See, e.g., Walker v. Action Indus., Inc.,* 802 F.2d 703, 707-08 (4th Cir.1986); *Flynn v. Bass Bros. Enters., Inc.,* 744 F.2d 978, 985 (3d Cir.1984) (noting SEC policy favoring nondisclosure of financial projections due to their unreliability and potential to mislead voting stockholders). In this case, the Proxy disclosed Montgomery and TWP's fairness analyses but did not disclose

the underlying 2005-2009 Intermix management projections used in formulating those opinions. In *Zemel Family Trust v. Philips International Realty Corp.,* No. 00 CIV. 7438 MGC, 2000 WL 1772608 (S.D.N.Y. Nov.30, 2000), the court honed in on this distinction:

> ***21** A company has no duty to include "speculative financial predictions" in a proxy. However, if a Proxy discloses valuation information, it must be complete and accurate. Both the proxy and the [financial valuation] opinion address the value of the Third Avenue property and so [the defendant] has a duty to fully and accurately disclose information related to the valuation.

Id. at *6.

Here, the "total mix" of information before the shareholders did not include any of the projected growth rates. *See SEC v. Mozilo,* No. CV 09-3994-JFW, 2009 WL 3807124, at *10 (C.D.Cal. Nov. 3, 2009) ("[T]he 'total mix' of information only includes information that is 'readily' or 'reasonably' available to an investor."); *Koppel v. 4987 Corp.,* 167 F.3d 125, 132 (2d Cir.1999) (same). A reasonable shareholder would have wanted to independently evaluate management's internal financial projections to see if the company was being fairly valued. "[T]here is a substantial likelihood that a reasonable shareholder would consider it important" in making his decision. *TSC Indus., Inc.,* 426 U.S. at 449. As we previously noted in our July 14, 2008 Order, the Ninth Circuit has observed that: "investors are concerned, perhaps above all else, with the future cash flows of the companies in which they invest. Surely, the average investor's interest would be piqued by a company's internal projections ...." *United States v. Smith,* 155 F.3d 1051, 1064 n. 20 (9th Cir.1998). Delaware courts concur. In a case that also considered a discounted cash flow ("DCF") analysis in a proxy statement, the same technique utilized by Montgomery and TWP, the court held that the underlying projections informing a DCF analysis completed for a fairness opinion were clearly material. *See In re Netsmart Techs. S'holders Litig.,* 924 A.2d 171, 203 (Del.Ch.2007) ("[P]rojections of this sort are probably among the most highly-prized disclosures by investors. Investors can come up with their own estimates of discount rates or ... market multiples. What they cannot hope to do is replicate management's inside view of the company's prospects.").[FN16] Here, we conclude that there is at least a triable issue as to the materiality of the omission of Intermix's internal financial projections.

> FN16. Even though this decision concerned a state law duty of disclosure claim, the materiality standard is the same as set forth in *TSC Industries. In re Netsmart Techs.,* 924 A.2d at 199-200.

Accordingly, Defendants' Motion for Summary Judgment is **DENIED** as to this alleged material omission.

3. Outstanding Derivative Lawsuits

Plaintiff also argues that Defendants failed to disclose one pending derivative lawsuit, *LeBoyer v. Greenspan, et al.,* No. CV 03-5603-GHK (JTLx), and the fact that shareholder derivative standing would be extinguished as to both *LeBoyer* and *Greenspan v. Salzman,* the two derivative lawsuits pending at the time the Proxy was issued. The Proxy merely stated: "Following the effective time of the merger, Fox Interactive Media will use commercially reasonable efforts to take such actions as are within its control so as to obtain the dismissal of *Greenspan v. Salzman, et al.,* LASC No. BC328558; provided that it will not be required to make any payments to any of the plaintiffs (or their counsel) in such litigation to do so." (J.A., Ex. 4, at 332).

***22** Defendants concede that they did not disclose the existence of the pending *LeBoyer* action. (Joint Br. 56 n. 67). However, Defendants maintain that this lawsuit had been disclosed in Intermix's prior public filings (*see* J.A., Exs. 47 (Form 10-Q), 3 (Form 10-K)), which they argue were incorporated by reference in the Proxy. A document "may be incorporated into proxy materials by reference, at the least, in circumstances where 'no reasonable shareholder can be misled.' " *Federated Bond Fund v. Shopko Stores, Inc.,* No. 05 CV 9923(RO), 2006 WL 3378696, at *2 (S.D.N.Y. Nov.17, 2006) (quoting *Kramer v. Time Warner Inc.,* 937 F.2d 767, 777 (2d Cir.1991)). We do not think this is a case where "no reasonable shareholder can be misled." *Id.* Moreover, "[c]orporate documents that have not been distributed to the shareholders entitled to vote on the proposal should rarely be considered part of the total mix of

information reasonably available to those shareholders." *United Paperworkers Int'l Union v. Int'l Paper Co.,* 985 F.2d 1190, 1199-1200 (2d Cir.1993) (rejecting notion that public reports and 10-K Report submitted to SEC were part of "total mix"). Accordingly, whether the undisclosed derivative lawsuit constituted material information which was not part of the "total mix" of information is at the very least a triable question.

With respect to the disclosed *Greenspan v. Salzman* action, Defendants argue they had no obligation to further announce the extinguishment of derivative standing. In Delaware, with only two exceptions not applicable here, a cash-out merger extinguishes the standing of shareholder plaintiffs to maintain a derivative suit. *Feldman v. Cutaia,* 951 A.2d 727, 731 (Del.2008) (citing *Lewis v. Anderson,* 477 A.2d 1040, 1049 (Del.1984)). This is so because a plaintiff must be a stockholder at the time of the alleged wrongdoing and throughout the litigation. *Lewis,* 477 A.2d at 1046. The failure to disclose the potential extinguishment of a derivative lawsuit is material. *See Lichtenberg v. Besicorp Group Inc.,* 43 F.Supp.2d 376, 387 (S.D.N.Y.1999). In *Lichtenberg,* the court noted that the proxy stated that the shareholder plaintiffs "may" not be able to maintain their derivative suits following the merger. *Id.* The court found the word "may" to be "affirmatively misleading," because it "implie[d] a possibility that the plaintiffs will be able to continue the actions as shareholder derivative suits," when that was in fact foreclosed as a matter of New York law. *Id.* Here too, the disclosure above is arguably misleading as well, as it did not affirmatively disclose that the *Greenspan v. Salzman* plaintiffs' derivative standing would be extinguished under Delaware law. (J.A., Ex. 4, at 332). Instead, it only stated that Fox Interactive Media would seek the dismissal of the action and would do so only if it was not required to pay the plaintiffs or their counsel. (*Id.*). Accordingly, it is at least triable whether the above language was misleading as to the extinguishment of derivative standing, which was material information.

***23** Accordingly, we also hereby **DENY** Defendants' Motion for Summary Judgment as to this alleged material omission.

4. Alleged Material Omissions Concerning Viacom and the MySpace Option

Plaintiff has also argued that the directors made two other material omissions concerning: (1) Viacom's ability to make an offer for Intermix or its ability to conduct due diligence; and (2) the likelihood of a direct bid for MySpace, which would freeze the MySpace Option. This subpart of the Section 14(a) claim essentially seeks to penalize Defendants for their failure to disclose that Viacom was allegedly stonewalled or otherwise prevented from making a bid during the auction. It also seeks to hold Defendants liable for purportedly exaggerating the threat of a direct bid for Intermix's crown jewel, MySpace.

However, these purported material omissions are nothing more than the building blocks of Plaintiff's fiduciary duty claim. Mandating the disclosure of the above allegations would compel Defendants to essentially accuse themselves of breaching their fiduciary duties. In *Koppel v. 4987 Corp.,* the court dismissed Rule 14a-9 claims based on its conclusion that "these allegations constitute no more than state law breach of fiduciary duty claims under a thin coat of federal paint." 167 F.3d at 133. The court explained:

> We have long recognized that no general cause of action lies under § 14(a) to remedy a simple breach of fiduciary duty. *See Field v. Trump,* 850 F.2d 938, 947 (2d Cir.1988) (quoting *Maldonado v. Flynn,* 597 F.2d 789, 796 (2d Cir.1979)), *cert. denied,* 489 U.S. 1012, 109 S.Ct. 1122, 103 L.Ed.2d 185 (1989); *cf. Santa Fe Indus., Inc. v. Green,* 430 U.S. 462, 477, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977) (refusing to construe § 10(b) to prohibit "instances of corporate mismanagement ... in which the essence of the complaint is that shareholders were treated unfairly by a fiduciary"). Although the Supreme Court has explained that explicit, conclusory statements concerning the wisdom of a proposed action are actionable, *see generally Virginia Bankshares,* 501 U.S. 1083, 111 S.Ct. 2749, 115 L.Ed.2d 929, there is no § 14(a) violation for merely failing to inform shareholders that a proposed action is not subjectively the most beneficial to an entity's shareholders: "Subjection to liability for misleading others does not raise a duty of self-accusation; [rather] it enforces a duty to refrain from misleading." *Id.* at 1098 n. 7, 501 U.S. 1083, 111 S.Ct. 2749, 115 L.Ed.2d 929. The securities laws do not "effectively require [an issuer] to accuse [it]sel[f] of breach of fiduciary duty." *Id.*

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

Id. at 133-34. The D.C. Circuit has arrived at the same conclusion: "Though *Santa Fe* does not bar a claim related to a breach of fiduciary duty if there has been a material misrepresentation or omission, a plaintiff may not 'bootstrap' a claim of breach of fiduciary duty into a federal securities claim by alleging that directors failed to disclose that breach of fiduciary duty." *Kas v. Fin. Gen. Bankshares, Inc.,* 796 F.2d 508, 513 (D.C.Cir.1986) (citations omitted).

***24** In this case, the Proxy unambiguously disclosed Rosenblatt's self-interested motivations, anticipated future employment with News Corp., and the immediate vesting of all his unvested options. (J.A., Ex. 4, at 272, 310, 312). The Proxy also disclosed that Viacom ("Company D") conducted due diligence and remained interested in making a bid for Intermix, but was "not then in a position to make a proposal [prior to] a [Viacom] board meeting later that week ...." (*Id.* at 287, 289). Plaintiff claims this disclosure was misleadingly incomplete, because it did not mention Rosenblatt's alleged evasion of Viacom executives and the alleged deliberate hampering of Viacom's due diligence efforts. (CSAC ¶¶ 147-48). Plaintiff claims that these omissions "left shareholders with the false impression that Viacom was given a full and fair opportunity to bid for the Company." (*Id.* ¶ 148). Plaintiff also claims that Defendants misrepresented Viacom and News Corp.'s ability to block a competing bid by freezing the MySpace Option. (CSAC ¶¶ 149-51 (citing J.A., Ex. 4, at 284, 288)). As there is no duty of self-accusation, these proffered material omissions cannot support a Section 14(a) claim. Indeed, the allegedly omitted details are not necessarily *facts,* but rather factual *allegations,* and unless and until judgment is granted in Plaintiff's favor, their omission from the Proxy simply could not have been material. In *Brown v. Perrette,* No. CIV.A 13531, 1999 WL 342340 (Del.Ch. May 14, 1999), the court explained this distinction:

> Although a flawed bidding process would be a material fact, [the plaintiff] must prevail on the substantive claim, that the process was flawed, before the alleged flaw becomes material. Once [the plaintiff] prevails on her *Revlon* claim, the alleged disclosure claim becomes superfluous because the defendants' breach of duty becomes the wrong for which an appropriate remedy must be crafted.

Id. at *10-11 [FN17]; *see also* *Stroud v. Grace,* 606 A.2d 75, 84 n. 1 (Del.1992) ("We recognize the long-standing principle that to comport with its fiduciary duty to disclose all relevant material facts, a board is not required to engage in 'self-flagellation' and draw legal conclusions implicating itself in a breach of fiduciary duty from surrounding facts and circumstances prior to a formal adjudication of the matter.") (citation omitted).

> FN17. Even though *Brown* analyzes the relationship between a state law fiduciary duty claim and a state law duty of disclosure claim, brought on the same grounds, the principles articulated are equally applicable to a Section 14(a) claim premised on the same allegations supporting a breach of fiduciary duty claim.

Accordingly, since "self-flagellation" omissions are not material, we hereby **GRANT** Defendants' Motion for Summary Judgment as to the purported material omissions concerning Viacom and the MySpace Option.[FN18]

> FN18. Notwithstanding our ruling, nothing in the above discussion precludes Plaintiff from introducing evidence of these omissions in the course of his breach of fiduciary duty claim.

B. Negligence

In *Desaigoudar v. Meyercord,* 223 F.3d 1020 (9th Cir.2000), the Ninth Circuit stated that a "Rule 14a-9 plaintiff must demonstrate that the misstatement or omission was made with the requisite level of culpability ...." *Id.* at 1022 (citation omitted). To succeed on a Section 14(a)/Rule 14a-9 claim, a plaintiff need only establish that the defendant was negligent in drafting and reviewing the proxy statement. *Gerstle v. Gamble-Skogmo, Inc.,* 478 F.2d 1281, 1300-01 (2d Cir.1973) (holding that negligence suffices for claim based on misleading proxy statement and that plaintiffs "are not required to establish any evil motive or even reckless disregard of the facts"). This holding was reaffirmed in the oft-cited case of *Wilson v. Great American Industries, Inc.,* 855 F.2d 987 (2d Cir.1988): "Liability can be imposed for negligently drafting a proxy statement." *Id.* at 995 (citing *Gerstle,* 478 F.2d at 1301 n.20). "As a matter of law, the

preparation of a proxy statement by corporate insiders containing materially false or misleading statements or omitting a material fact is sufficient to satisfy the *Gerstle* negligence standard." *Id.* Accordingly, a director may be found negligent under Section 14(a) for a failure to notice material omissions upon reading a proxy statement. *See, e.g., Parsons v. Jefferson-Pilot Corp.,* 789 F.Supp. 697, 703 (M.D.N.C.1992) ("Mr. Eagle [a senior in-house lawyer] is not the only negligent party in this action. Each of the directors who reviewed the proxy statement is equally as negligent for failing to notice the use of the word 'restricted' ten times in the document.").

***25** Here, each of the Defendants has declared that he was "involved in the process of preparing, reviewing, and disseminating the Proxy Statement to Intermix shareholders." (Sheehan Decl. ¶ 53 (internal citation omitted); Carlick Decl. ¶ 46; Brewer Decl. ¶ 39; Mosher Decl. ¶ 37; Moreau Decl. ¶ 39; Quandt Decl. ¶ 45; Rosenblatt Decl. ¶ 53; Woodward Decl. ¶ 37). Construing this sworn statement in the light most favorable to Plaintiff, we read it to mean each director personally reviewed the Proxy before it was disseminated to the Intermix shareholders. Since we have denied summary judgment with respect to three of the proffered material omissions in the Proxy, and Defendants have admitted to participating in "the process of preparing, reviewing, and disseminating" that Proxy, we must also **DENY** summary judgment with respect to the element of negligence. If Plaintiff can persuade a jury as to both materiality and Defendants' participation in the preparation and/or review of the Proxy at trial, then a finding of negligence will flow from those findings.

C. Damages

1. Benefit-of-the-Bargain Damages

This theory of damages is wholly inapposite to this case. A request for "benefit-of-the-bargain damages" seeks the "value that was represented as coming to" the shareholder under a particular transaction, such as a merger. *In re Real Estate Assocs. Ltd. P'ship Litig.,* 223 F.Supp.2d 1142, 1152 (C.D.Cal.2002). "[B]enefit-of-the-bargain damages are available in the limited instance where a misrepresentation is made in the proxy solicitations as to the consideration to be forthcoming upon an intended merger." *Id.* (citation omitted). As the Ninth Circuit has stated, "[t]he benefit-of-the-bargain measure of damages allows a plaintiff to recover 'the difference between what the plaintiff *expected* he would receive ... and the amount [the plaintiff] *actually received* ....' " *DCD Programs, Ltd. v. Leighton,* 90 F.3d 1442, 1449 (9th Cir.1996) (quoting *Cunha v. Ward Foods, Inc.,* 804 F.2d 1418, 1426 (9th Cir.1986) (emphasis in original)). Here, the Proxy made no misrepresentation as to the per share price offered to and ultimately received by the class members. The Proxy stated the class members would receive $12 cash for each common share, and it is undisputed that they received $12 cash for each common share. (J.A., Ex. 4, at 319; Joint Statement of Uncontroverted Facts D128). Accordingly, this damages theory is not viable. We **GRANT** summary judgment with respect to this damages theory.

2. Out-of-Pocket Losses

a. Legal Framework

" 'Out-of-pocket' losses are the standard measure of damages for Rule 10b-5 and Section 14(a) claims." *In re DaimlerChrysler AG Secs. Litig.,* 294 F.Supp.2d 616, 626 (D.Del.2003) (citing *Tse v. Ventana Med. Sys., Inc.,* 123 F.Supp.2d 213, 222 (D.Del.2000) (*"Tse II"*)). Out-of-pocket losses constitute "the difference between the fair value of all that the seller received and the fair value of what he would have received had there been no fraudulent conduct." *Tse II,* 123 F.Supp.2d at 222 (quoting *Affiliated Ute Citizens of Utah v. U.S.,* 406 U.S. 128, 155, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972)) (quotation marks omitted). The Ninth Circuit concurs: "The out-of-pocket rule fixes recoverable damages as 'the difference between the purchase price and the value of the stock at the date of purchase.' " *Wool v. Tandem Computers Inc.,* 818 F.2d 1433, 1437 (9th Cir.1987), *impliedly overruled in part on other grounds by Hollinger v. Titan Capital Corp.,* 914 F.2d 1564, 1577-78 (9th Cir.1990) (*en banc*) (citation omitted). "The guiding philosophy of the out-of-pocket theory of damages ... is to award not what the plaintiff might have gained, but what he has lost by being deceived into the purchase." *Id.* at 1437 n. 2 (citation and internal quotation marks omitted). Since this theory of damages is premised on an intrinsic valuation of the company as it existed at the time of the merger, Plaintiff has produced expert witness testimony consisting of two different financial valuations of Inter-

mix/MySpace. Defendants have moved to exclude that testimony as inadmissible.

b. Defendants' Motion to Exclude; Plaintif's Motions to Strike

***26** Defendants move to exclude Plaintiff's proffered expert testimony by Dr. G. William Kennedy as inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Plaintiff has moved to strike both this Motion to Exclude and Defendants' Motion for Summary Judgment, arguing that this *Daubert* challenge was not included in the joint brief on the Cross-Motions for Summary Judgment and therefore violates our Order Re: Summary Judgment Motions. (Dkt. No. 123, Oct. 30, 2008). We reject this argument. First, Defendants included virtually the same arguments attacking Dr. Kennedy's testimony in the Joint Brief. (Mot.77-80). Second, the Motion to Exclude is a challenge to the admissibility of evidence crucial to one of Plaintiffs' damages theories. As we may only consider *admissible* evidence in ruling on the Parties' Cross-Motions, nothing in the Order Re: Summary Judgment Motions precludes a party from filing a separate motion to exclude certain evidence from the Court's consideration. Third, it is common for litigants to move for the exclusion of certain evidence at the summary judgment stage. *See, e.g., In re Hanford Nuclear Reservation Litig.,* 292 F.3d 1124, 1131 (9th Cir.2002) ("Defendants linked their summary judgment motion to dozens of in limine motions challenging the admissibility of plaintiffs' expert witnesses, commonly known as *'Daubert* motions.' ") (citation omitted); *O'Hanlon v. Matrixx Initiatives,* No. CV 04-10391-AHM (JTLx), 2007 WL 2446496, at *1, 4 (C.D.Cal. Jan.3, 2007) (considering motions *in limine* concurrently with motion for summary judgment). Accordingly, we hereby **DENY** Plaintiff's Motions to Strike the Motion to Exclude and the Motion for Summary Judgment.

We now consider the merits of the Motion to Exclude. Defendants attack the reliability of Dr. Kennedy's application of his chosen methodologies for estimating the value of MySpace: (1) discounted cash flow ("DCF") analysis; and (2) comparable public company analysis. Federal Rule of Evidence 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In *Daubert,* the Supreme Court construed Rule 702 to require district courts to "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." 509 U.S. at 597. The Court noted that "[p]ertinent evidence based on scientifically valid principles will satisfy those demands" but cautioned that "[t]he focus ... must be solely on principles and methodology, not on the conclusions that they generate." *Id.; id.* at 595. To assist courts in assessing whether the proffered testimony is scientifically valid, the Supreme Court set forth a non-exhaustive list of factors, including: "whether the theory or technique employed by the expert is generally accepted in the scientific community; whether it's been subjected to peer review and publication; whether it can be and has been tested; and whether the known or potential rate of error is acceptable." *Daubert v. Merrell Dow Pharms., Inc.,* 43 F.3d 1311, 1316 (9th Cir.1995) (*"Daubert II"*) (citing *Daubert,* 509 U.S. at 593-94).

***27** The "gatekeeping obligation" *Daubert* requires us to fulfill "applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 141, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (quoting Fed.R.Evid. 702). "Because there are areas of expertise, such as the social sciences in which the research, theories and opinions cannot have the exactness of hard science methodologies, trial judges are given broad discretion to determine whether *Daubert'* s specific factors are, or are not, reasonable measures of reliability in a particular case." *United States v. Simmons,* 470 F.3d 1115, 1123 (5th Cir.2006) (citing *Kumho,* 526 U.S. at 153) (internal citations and quotation marks omitted). Courts have stated that "[i]n such instances, other indicia of reliability are considered under *Daubert,* including professional experience, education, training, and obser-

vations." *Id.* Though perhaps not to the same degree as psychology or social psychology, financial valuation is not an exact scientific methodology. Estimations, predictions, and inferences based on professional judgment and experience are key ingredients in any valuation. In a variety of contexts, the circuit courts have noted that economic valuation is less than an "exact science." *See, e.g., In re Arnold & Baker Farms,* 85 F.3d 1415, 1421 (9th Cir.1996) ("Experience has taught us that determining the value of real property at any given time is not an exact science. Because each parcel of real property is unique, the precise value of land is difficult, if not impossible, to determine until it is actually sold."); *Metlyn Realty Corp. v. Esmark, Inc.,* 763 F.2d 826, 830, 835 (7th Cir.1985) (noting that "[t]he process of valuation is inexact" and that DCF analyses "are highly sensitive to assumptions about the firm's costs and rate of growth, and about the discount rate").

With respect to the DCF analysis, the principal difference from Montgomery and TWP's DCF fairness analyses is Dr. Kennedy's MySpace growth rate projections for 2007-2008 and 2008-2009. (Baron Decl., Ex. 3, Expert Report of Dr. G. William Kennedy ["Kennedy Report"], May 20, 2009). Intermix management projected the following revenue growth rates for the company: 107 percent for 2005-2006; 67 percent for 2006-2007; 20 percent for 2007-2008; and 15 percent for 2008-2009. (J.A., Ex. 242). Montgomery used these projections for its analysis without any modification. (Baron Decl., Ex. 3, at 39). TWP's projections differed slightly from management's projections: 107 percent for 2005-2006; 67 percent for 2006-2007; 21 percent for 2007-2008; and 10 percent for 2008-2009. (*Id.*). Kennedy adopted management's growth rate projections for 2005-2006 and 2006-2007, derived a deceleration rate of 62.06 percent from those figures, and then used that same deceleration rate to calculate different revenue growth rates for 2007-2008 and 2008-2009, 41.36 percent and 25.67 percent, respectively. (*Id.* at 39-40). Based on these new figures, Kennedy calculated new Earnings Before Interest, Taxes, Depreciation and Amortization ("EBITDA") figures for 2008 and 2009 for MySpace. (*Id.* at 40). Finally, "[u]sing a discount rate of 19% and a terminal EBITDA multiple of 18[,]" Dr. Kennedy calculated "a value of $962.4 million after subtracting the $69 million option exercise price from the present value of MySpace's Cash Flows." (*Id.*). The 19 percent discount rate was chosen based on the discount rates used in the Montgomery and TWP fairness opinions, which ranged from 17 percent up to 25 percent. (*Id.* at 41).

***28** Defendants make several arguments against the reliability of this procedure. They argue first that Dr. Kennedy has insufficiently justified his use of a uniform deceleration rate from 2005 to 2009 and the 18x terminal multiple. (Mot.9-13). Defendants claim that Dr. Kennedy has offered no coherent reason for his rejection of management's projections for 2007-2008 and 2008-2009. (*Id.* at 11). They note that he has merely declared that Montgomery and TWP's projections "were unreasonably low and not consistent with the very rapid rates of growth currently observed at the time of the Proxy and expected in the social networking sector at the time." (*Id.* at 11 (quoting Moriarty Decl., Ex. 7, Kennedy Supplemental Decl. ¶ 6) (emphasis omitted)). Yet, Defendants neglect to mention that Dr. Kennedy explained his use of higher growth rates for 2007-2008 and 2008-2009 by noting that "MySpace revenues consistently outperformed Intermix management's own projections in each of the first four months of 2005." (Baron Decl., Ex. 3, Kennedy Report, at 35). This is at least one reasoned basis for his adjustments to what he viewed as demonstrably "conservative" forecasts. (*Id.*). After all, the entire endeavor is forecasting, not hard science. Projections themselves cannot be tested for accuracy; they "represent hopes rather than the results of scientific analysis." *Zenith Elecs. Corp. v. WH-TV Broad. Corp.,* 395 F.3d 416, 420 (7th Cir.2005); *see also In re Orchards Village Invs., LLC,* No. 09-30893-rldll, 2010 WL 143706, at * 11 (Bankr.D.Or. Jan.8, 2010) ("[P]rojecting future financial results from the operations of a business is not an exact science.").

Additionally, Defendants argue that: "Kennedy provides no theoretical or empirical justification for applying this incredibly aggressive 18x terminal multiple, except his statement that it is based on forward EBITDA multiples observed in comparable publicly traded guideline companies" referenced in the comparable public company analysis below. (Mot. 12-13 (quoting Moriarty Decl., Ex. 1, Kennedy Report, at 15) (quotation marks omitted)). They assert that Dr. Kennedy only relied on "the most profitable of the 14 comparable companies relied upon by" Montgomery and TWP, including Google and Yahoo!, and could not summon a single company that had grown at the rate projected with his revenue growth rates and terminal value. (*Id.* at 13 (citing Moriarty Decl., Ex. 1,

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

Kennedy Report, at 25; *id.,* Ex. 6, Kennedy Tr. at 123:4-24)).

While these two challenges may be objections to Kennedy's *conclusions* on his DCF analysis, they do not render his methodology unreliable. Rather, the deviation from management's projections, the use of an arguably aggressive terminal multiple, and the alleged selection of the most profitable guideline companies are proper subjects for cross-examination. Defendants do not take issue with the widely accepted DCF methodology; [FN19] nor do they attack any input that is identical to those used in the Montgomery and TWP projections (for instance, the 2005-2006 and 2006-2007 projections or the discount rate which fell within the same range in the investment banks' fairness analyses). Even in light of Dr. Kennedy's less than fully reasoned explanations for his choices, given the inherent element of judgment in these financial valuation analyses, we cannot say that he failed to identify any "reliable principles and methods" or to apply those "principles and methods reliably to the facts of [this] case." FED.R.EVID. 702. "A court may admit somewhat questionable testimony if it falls within 'the range where experts might reasonably differ, and where the jury must decide among the conflicting views.' " *S.M. v. J.K.,* 262 F.3d 914, 921 (9th Cir.2001) (quoting *Kumho,* 526 U.S. at 153).

> FN19. *Lippe v. Bairnco Corp.,* 288 B.R. 678, 689 (S.D.N.Y.2003) ("Many authorities recognize that the most reliable method for determining the value of a business is the discounted cash flow ('DCF') method.") (citations omitted); *see also Children's Broad. Corp. v. The Walt Disney Co.,* 245 F.3d 1008, 1018 (8th Cir.2001) (describing DCF analysis as "an uncontroversial accounting method").

***29** Defendants also argue that there is a fundamental flaw in Dr. Kennedy's DCF analysis, since it allegedly yields an average growth rate into perpetuity above that of the U.S. economy as a whole (12.74 percent versus a historical average of 6.5 percent). (Mot. 13-16; Cornell Decl. in Supp. of Mot. to Exclude ¶ 5). Arguing that this outcome violates a key tenet of financial valuation, Defendants cite to Professor Aswath Damodaran's treatise, which states: "The fact that a stable growth rate is sustained forever, however, puts strong constraints on how high it can be. Since no firm can grow forever at a rate higher than the growth rate of the economy in which it operates, the constant growth rate cannot be greater than the overall growth rate of the economy." (Defs.' Request for Judicial Notice ["RJN"], Ex. B, ASWATH DAMODARAN, DAMODARAN ON VALUATION: SECURITY ANALYSIS FOR INVESTMENT AND CORPORATE FINANCE 145 (John Wiley & Sons, Inc.2d ed.2006)). We have reviewed Defendants' expert Dr. Bradford Cornell's declaration in support of this Motion to Exclude, in which he argues that "Dr. Kennedy's use of an 18x EBITDA forward multiple is unreasonable ...." (Cornell Decl. in Supp. of Mot. to Exclude ¶ 5). To cross-check the outcome of Dr. Kennedy's DCF analysis, Dr. Cornell used three hypothetical scenarios, in which MySpace's revenue growth rate declines by 2 percent, 1 percent, and 0.5 percent, respectively, each year until it reaches 6.5 percent, the average annual growth rate in nominal Gross Domestic Product between 1928 and 2008. (*Id.* ¶¶ 8-10 (citing Defs.' RJN, Ex. F, Bureau of Economic Analysis News Release, July 31, 2009)). Using Dr. Kennedy's assumptions and the Gordon Growth Model (*id.* ¶¶ 11-13), Dr. Cornell calculated the following total present values as of January 1, 2010 and implied EBITDA multiples for each scenario: (1) for the 2 percent annual reduction, $549.13 million and a 4.7x multiple; (2) for the 1 percent annual reduction, $606.18 million and a 5.2x multiple; and (3) for the 0.5 percent annual reduction (what he calls the "most aggressive scenario"), $695.34 million and a 6.0x multiple. (*Id.* ¶¶ 14-19; *see also id.,* Exs. 5, 6). Applying the 19 percent discount rate used by Dr. Kennedy, Dr. Cornell calculates discounted values as of mid-2005 for each scenario, including: (1) $251.02 million; (2) $277.10 million; and (3) $317.8 million. (Cornell Decl. in Supp. of Mot. to Exclude ¶ 20). Finally, Dr. Cornell concludes that "even assuming an instance where MySpace's revenues grow at a rate exceeding that of the economy as a whole for fifteen years after 2010, *i.e.,* until 2025, Dr. Kennedy's implied EBITDA multiple of 18x is *three times too high* when compared with even [Dr. Cornell's] most aggressive implied EBITDA multiple of 6.0x to give a reasonable estimate of MySpace's value as of mid-2005." (*Id.* ¶ 21 (emphasis original)).

Though a jury might conclude at trial that Dr. Kennedy's selection of an 18x EBITDA multiple was overzealous, Dr. Cornell's calculations do not demon-

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

strate that Dr. Kennedy's *methodology* is fundamentally unreliable. At base, Dr. Cornell's challenge to this DCF analysis constitutes an attack on Dr. Kennedy's projections as to MySpace's annual growth rates and as to how long those growth rates can be sustained. Since Dr. Cornell is in essence attacking the reasonableness of Dr. Kennedy's projections, the generation of which we have already noted is not an exact science, we conclude that his arguments do not render Dr. Kennedy's methodology fundamentally unreliable and therefore inadmissible. Dr. Cornell himself has testified that an adjustment in the terminal multiple based on the expert's assessment of the company's growth potential is appropriate. (Baron Decl., Ex. 2 (Cornell Tr. I at 167:19-168:3)). Additionally, Dr. Cornell rejected the proposition that "any time that the implied perpetual growth rate exceeds the growth of the economy, that the terminal value multiple used would be unreliable[.]" (*Id.,* Ex. 1 (Cornell Tr. II at 21:21-22:1)). He further explained that "it's just a question of how much [the implied perpetual growth rate] exceeds [the economy rate,]" and there is no standardized method to determine whether the difference between the two rates is "unreasonable." (*Id.* at 22:3-24:6; *id.* at 23:12-25 ("Q[:] And then do they use judgment to see whether it's reasonable to them or not reasonable to them? .... Is there some written scale as to how much variation there can be before, in your view, it becomes reasonable or unreasonable; or is that a judgment of the analyst? A[:] Well, there's not a written scale .... And these calculations Dr. Kennedy used struck me as [unreasonable].")). These statements suggest that Defendants' Motion turns on a difference of professional opinion, not some fatal methodological flaw.

***30** Based on our review of the papers and evidence submitted, if anything is clear, it is that DCF analysis is, in not insubstantial measure, an inherently subjective and predictive methodology, which relies in part on the expert's judgment and experience. Indeed, neither Party has presented the Court with any accepted, standardized methodology for deriving the required inputs for DCF analysis. Accordingly, we are forced to conclude that DCF analysis is sufficiently pliable so that it may reasonably lead to a wide breadth of plausible conclusions. Dr. Kennedy's conclusions and the bases therefor may ultimately be subject to legitimate attacks on cross-examination, but we perceive no fundamental unreliability in his analysis that would counsel in favor of outright exclusion. We agree that our "gatekeeper role under *Daubert* is not intended to supplant the adversary system or the role of the jury." *DSU Med. Corp. v. JMS Co., Ltd.,* 296 F.Supp.2d 1140, 1147 (N.D.Cal.2003) (citation, quotation marks, and alteration omitted). It is readily apparent that Defendants have thoroughly researched the case law on DCF methodology, and in all but one of the several cases they cite, the expert witness's DCF analysis was considered *at trial* and *then* rejected by the court. *Compare* *In re Iridium Operating, LLC,* 373 B.R. 283, 350-52 (Bankr.S.D.N.Y.2007) (rejecting DCF analyses following trial); *In re Emerging Commc'ns, Inc. S'holders Litig.,* No. Civ.A. 16415, 2004 WL 1305745, at *14-15 (Del.Ch. June 4, 2004) (same); *Gray v. Cytokine Pharmasciences, Inc.,* No. Civ.A. 17451, 2002 WL 853549, at *8 (Del.Ch. Apr.25, 2002) (same), *with* *Kipperman v. Onex Corp.,* 411 B.R. 805, 844-49 (Bankr.N.D.Ga.2009) (simultaneously deciding summary judgment and granting motion to exclude an expert's testimony as unreliable under Rule 702, where the expert rejected management's projections and generated his own DCF analysis).

With respect to Dr. Kennedy's comparable public company analysis, Defendants argue that he only used the projected MySpace revenue and EBITDA figures for 2006, ignoring the 2005 numbers without explanation. (Mot. 17-18 (citing Moriarty Decl., Ex. 1, Kennedy Report, at 24)). They argue Dr. Kennedy's explanation for choosing to disregard the 2005 figures was inadequate *ipse dixit.* When asked if 2005 was "an aberrant year for MySpace," he replied: "No, but it wasn't who the company was expected to be." (Kennedy Tr. at 129:19-22). Furthermore, Defendants argue that Kennedy cherry-picked only the most profitable guideline companies referenced in Montgomery and TWP's fairness analyses, instead of applying an average of the multiples applicable to several companies. (Mot.18). In support of this latter contention, they cite another treatise, which states: "In employing the guideline publicly traded company method, every effort should be made to select as broad a base of comparative companies as is reasonably possible, as well as to give full consideration to every possible factor in order to make the comparison more meaningful." (Defs.' RJN, Ex. E, PRATT, REILLY AND SCHWIEHS, THE ANALYSIS AND APPRAISAL OF CLOSELY HELD COMPANIES 233 (2000) ("PRATT, et al.") (citation and internal quotation marks omitted)). Defendants contend that Dr. Kennedy erred in whittling down the broader

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

base of comparable public companies identified by Montgomery and TWP to only Google and Yahoo!, "seasoned" companies with "proven revenue model [s]" that experienced explosive growth. (Mot.19-20). Though this appears to strike Defendants as litigation-driven, we are instructed to evaluate the *methodology,* not the ultimate determination reached by the expert. Our "sole purpose is to determine the reliability of a particular expert opinion through a preliminary assessment of the methodologies underlying the opinion." *DSU Med. Corp.,* 296 F.Supp.2d at 1147 (citing *Daubert,* 509 U.S. at 592-93). Of course, we must consider "whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert II,* 43 F.3d at 1317. However, there is no evidence in the record that Dr. Kennedy deviated from his standard methodology for the purposes of testifying in this case.

***31** Dr. Kennedy explained his method as follows. First, he analyzed the companies selected by Montgomery and TWP and restricted his selection to those comparable companies. (Moriarty Decl., Ex. 1, Kennedy Report, at 18-20). Montgomery had chosen twelve companies (Google, Yahoo!, CNET Networks, iVillage, Monster Worldwide, Aptimus, ValueClick, Vertrue, Church & Dwight Co., Herbalife Ltd., Jarden Corp., and Nature's Sunshine Products) based on the following sectors: online advertising, online content and networking, online direct marketing, and offline direct marketing. (*Id.* at 19). TWP had chosen fourteen guideline companies (Bankrate, CNET, iVillage, 1-800-FLOWERS.COM, Blue Nile, Celebrate Express, Netflix, NutriSystem, Overstock.com, Provide Commerce, Aptimus, Marchex, ValueClick, and Vertrue) based on three sector categories: content, eCommerce, and direct marketing. (*Id.*). In identifying a narrower set of comparable companies, Dr. Kennedy explained that he considered these to be "the most similar operational, financial, and growth guideline publicly traded companies." (*Id.* at 20). He justified his deviation from the investment banks, beginning with TWP, as follows:

> In implementing the public guideline company method, TWP selected guideline Companies based on all of the businesses of Intermix on a combined basis.... Montgomery selected guideline companies based on each business within Intermix because "the three businesses have different economics and peer groups." As a result, Montgomery selected only "Online Advertising" and "Online Content and Networking" to apply to MySpace. We agree with Montgomery's approach that each Intermix business segment, and specifically MySpace has different growth and profit potential and therefore, different multiples would be appropriate to apply to MySpace and the other Intermix business segments. Within TWP's comparables, only the "Content" group is applicable.

(*Id.* at 20-21). Accordingly, Dr. Kennedy selected the following six comparable companies: Bankrate, CNET, iVillage, Google, Yahoo!, and Monster. (*Id.* at 21). Then, based on "separate MySpace financial performance information," Dr. Kennedy narrowed the field down to Google and Yahoo!, contending those were the only two companies with comparable revenue and EBITDA growth metrics. (*Id.* at 21-25). Dr. Kennedy concluded that MySpace "[fell] into the higher profitability tier" of the six guideline companies, and therefore, he could discount the 2005 figures for MySpace and utilize an "average of the multiples indicated by Google and Yahoo." (*Id.* at 24-25).

There is nothing in the record to support the proposition that selecting comparable companies based on (1) services provided, (2) revenue metrics, and (3) EBITDA metrics renders a comparable public company analysis fundamentally unreliable. We will not exclude this evidence simply because Defendants dislike Dr. Kennedy's conclusion that the only guideline companies left standing in the final analysis were Google and Yahoo!. Even Defendants' cited treatise urges the selection of "as broad a base of comparative companies *as is reasonably possible."* (Defs.' RJN, Ex. E, PRATT, et al., *supra,* at 233 (emphasis added)). Dr. Kennedy concludes, in effect, that the remaining comparable companies are as broad a base of comparable companies as is reasonably possible. Defendants' disagreement with this conclusion is properly explored on cross-examination.

***32** Accordingly, we hereby **DENY** Defendants' Motion to Exclude Dr. Kennedy's testimony. As Dr. Kennedy's testimony is sufficient to at least raise triable issues on damages from out-of-pocket losses, we also **DENY** Defendants' Motion for Summary Judg-

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

ment on this issue.

3. "Lost Opportunity" Damages

As a final alternative, Plaintiff seeks "lost opportunity" damages based on the allegedly impending Viacom bid. "When actual losses cannot be demonstrated," some circuit courts have recognized "an alternate theory of establishing damages," the "lost opportunity" theory. *DaimlerChrysler,* 294 F.Supp.2d at 627 (internal quotation marks omitted). Lost opportunity damages represent "loss of a possible profit or benefit, [defined as] an addition to the value of one's investment, unless the loss is wholly speculative." *Tse II,* 123 F.Supp.2d at 223 (internal citations omitted; alteration in original). "Lost opportunity damages are not 'wholly speculative' if they are based on 'certain, fixed and demonstrable profits thwarted by a defendant's alleged fraud.' " *DaimlerChrysler,* 294 F.Supp.2d at 627 (quoting *Rudinger v. Ins. Data Processing, Inc.,* 778 F.Supp. 1334, 1341 (E.D.Pa.1991)). "Further, lost opportunities damages 'are not available where the fact of the loss, i.e. whether there was any lost opportunity at all, is wholly speculative.' " *Id.* (quoting *Tse v. Ventana Med. Sys., Inc.,* 297 F.3d 210, 220 (3d Cir.2002) (*"Tse III"*)). Finally, " '[t]he risk of uncertainty as to [the] amount of damages is cast on the wrongdoer and it is the duty of the fact finder to determine the amount of the damages as best he can from all the evidence in the case.' " *Tse III,* 297 F.3d at 220 (quoting *Gould v. American-Hawaiian S.S. Co. .,* 535 F.2d 761, 781-82 (3d Cir.1976)).

In support of this theory of damages, Plaintiff argues that Viacom was contemplating a bid above $750 million, citing a single internal Viacom email, in which Jason Hirschhorn states: "My guess is that News [Corp.] is going to take the $12/share ask from Richard Rosenblatt and add a premium of 10-20%. $700-$750 million .... Don't know if offer will be binding from NEWS [Corp.]. But I belieove *[sic]* they will deliver it anywhere from today-monday." (J.A., Ex. 192). Viacom never in fact put in a bid for Intermix. Therefore, the relevant question on this motion for summary judgment is whether there is a triable issue of material fact as to whether Viacom would have submitted a bid. This question must be answered in the negative, since it is undisputed that Viacom's board simply refused to engage in a public bidding war with its competitor News Corp. Freston, Viacom's CEO, testified that the Viacom board members were adamant on this point: "There already had been an offer and it wasn't ours and it didn't look like there was an opportunity to counter bid or if there was, we would have to do so in a public way and the board had said on the spot, no, let's not get involved in that." (Freston Tr. at 35:11-15; *see also* West Tr. at 123:22-24 ("We had some discussion and we ended up saying that it wasn't worth pursuing a counterbid strategy.")). Therefore, given this unwavering refusal to engage in a public bidding war following the July 18th merger announcement, the Proxy, including whatever alleged material omissions, issued in late August had no effect whatsoever on Viacom's willingness to place a bid for Intermix. Accordingly, the allegedly defective Proxy cannot support the notion that Intermix shareholders missed out on an opportunity with Viacom.

***33** While it may be theoretically possible that Viacom would have entered a subsequent bid had the Intermix shareholders not been allegedly deceived by the defective Proxy and had they rejected the merger with News Corp., we conclude that under the totality of the evidence, Plaintiff's showing is no more than speculative. Moreover, mere rejection of the News Corp. bid by the shareholders would not necessarily have eliminated the specter of a public bidding war that Viacom abhorred. Nothing prevented News Corp. from countering any Viacom bid with a counterbid. This is precisely the type of speculation and indeterminacy that is insufficient to create a triable issue on the existence of any lost opportunity.

Accordingly, we **GRANT** Defendants' Motion for Summary Judgment as to this theory of damages.[FN20] On his Section 14(a) claim, Plaintiff may **ONLY** proceed at trial on his theory of out-of-pocket losses based on an intrinsic valuation of Intermix at the time of the merger.

FN20. We have no occasion to consider and therefore express no opinion on whether the "lost opportunity" theory of damages premised on a potential Viacom bid would be viable with respect to the breach of fiduciary duty claim which is based on evidence beyond the alleged material omissions from the Proxy. The Parties have not addressed this issue in their Cross-Motions.

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

IV. Count III: Violation of Section 20(a) of the Securities and Exchange Act of 1934

Section 20(a) of the 1934 Act provides that: "Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action." 15 U.S.C. § 78t(a). The Parties agree that if there is no primary liability under Section 14(a), there can be no control person liability. (Joint Br. 87). However, since we have denied summary judgment with respect to three of the bases for Count II, we likewise **DENY** the Motion for Summary Judgment with respect to Count III.

V. Conclusion

Plaintiff's Motion for Summary Judgment is **DENIED.** Defendants' Motion for Summary Judgment is hereby **GRANTED in part** and **DENIED in part** as set forth in this Order. **Within thirty (30) days hereof,** counsel **SHALL** file a joint status report setting forth their views regarding further mediation in light of these rulings.

IT IS SO ORDERED.

C.D.Cal.,2010.
Brown v. Brewer
Not Reported in F.Supp.2d, 2010 WL 2472182 (C.D.Cal.)

END OF DOCUMENT

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
BearingPoint, Inc., et al.,	)	Case No. 09-10691 (REG)
Debtors.	)	(Jointly Administered)

ORDER GRANTING THE LIQUIDATING TRUSTEE LIMITED RELIEF FROM ARTICLE XI OF DEBTORS' MODIFIED SECOND AMENDED JOINT PLAN AND SECTIONS 34(C) AND 39 OF CONFIRMATION ORDER AS TO CERTAIN FORMER DIRECTORS

On consideration of the Motion filed by John DeGroote Services, LLC, as liquidating trustee (the "**Trustee**") of the BearingPoint Liquidating Trust, by counsel, for limited relief from Article XI, ¶ p of the Debtors' Modified Second Amended Joint Plan Under Chapter 11 of the Bankruptcy Code (the "**Plan**") and paragraphs 34(c) and 39 of this Court's Confirmation Order, entered December 22, 2009 (the "**Confirmation Order**"), insofar as the provisions would preclude the Trustee from prosecuting suit against F. Edwin Harbach, Albert L. Lord, Roderick C. McGeary, J. Terry Strange, Douglas C. Allred, Betsy J. Bernard, Spencer C. Fleischer, Jill Kanin-Lovers, and Edward Munson (collectively, the "**Directors**"), former directors of BearingPoint, Inc., in another available jurisdiction, and for an order granting the Trustee leave to file suit in another available jurisdiction; and the Court having held a hearing to consider the relief requested therein (the "**Hearing**"), with the appearances of all interested parties noted in the record of the Hearing; the Court finds and determines the following:

a. Consideration of the Motion and the relief requested therein is a core proceeding pursuant to 28 U.S.C. § 157(b).

b. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

c. The Court has jurisdiction to consider the Motion and the relief requested therein in accordance with 11 U.S.C. § 105(a), 28 U.S.C. §§ 157 and 1334, and Article XI of the Plan.

d. The Trustee has provided due and proper notice of the Motion to parties in interest and no further notice is necessary.

e. Good cause has been shown for a grant of the relief sought.

Therefore, it is hereby **ORDERED** that:

1. The Motion is GRANTED, and

2. The Trustee is relieved of Article XI, ¶ p of the Debtors' Modified Second Amended Joint Plan Under Chapter 11 of the Bankruptcy Code and paragraphs 34(c) and 39 of the Confirmation Order, insofar as they operate to retain exclusive jurisdiction in this Court over the claims set out in the attached **Exhibit A**, as pursued against the Directors; and

3. The Trustee is permitted to pursue the claims and causes of action as set forth in **Exhibit A**, as pursued against the Directors in the Circuit Court for Fairfax County, Virginia, or such other court or tribunal as the Trustee, in its business judgment, determines is appropriate.

Dated: New York, New York
December __, 2010

____
ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE

Hearing Date: December 16, 2010 at 9:45 a.m. (Eastern Time)
Objection Deadline: December 9, 2010 at 4:00 p.m. (Eastern Time)

MCKOOL SMITH P.C.
Peter S. Goodman
One Bryant Park, 47th Floor
New York, NY 10036
Telephone: (212) 402-9400

Lew LeClair (*pro hac pending*)
Robert Manley (*pro hac pending*)
300 Crescent Court, Suite 1500
Dallas, TX 75201
Telephone: (214) 978-4000

Basil A. Umari (*pro hac vice*)
600 Travis, Suite 7000
Houston, TX 77002
Telephone: (713) 485-7300

Counsel for John DeGroote Services, LLC,
as Liquidating Trustee to the
BearingPoint, Inc. Liquidating Trust

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
BearingPoint, Inc., et al.,	)	Case No. 09-10691 (REG)
Debtors.	)	(Jointly Administered)

NOTICE OF HEARING ON MOTION OF LIQUIDATING TRUSTEE FOR LIMITED RELIEF FROM ARTICLE XI OF DEBTORS' MODIFIED SECOND AMENDED JOINT PLAN AND SECTIONS 34(C) AND 39 OF CONFIRMATION ORDER AS TO CERTAIN FORMER DIRECTORS

PLEASE TAKE NOTICE that John DeGroote Services, LLC, Liquidating Trustee of the BearingPoint, Inc. Liquidating Trust, has filed a Motion for entry of an order granting it limited relief from Article XI, ¶ p of the Debtors' Modified Second Amended Joint Plan Under Chapter 11 of the Bankruptcy Code (the "**Plan**") and paragraphs 34(c) and 39 of this Court's Confirmation Order, entered December 22, 2009 (the "**Confirmation Order**"), and granting the Trustee leave to file suit against F. Edwin Harbach, Albert L. Lord, Roderick C. McGeary, J.

Terry Strange, Douglas C. Allred, Betsy J. Bernard, Spencer C. Fleischer, Jill Kanin-Lovers, and Edward Munson (collectively, the "**Directors**"), former directors of BearingPoint, Inc., in another available jurisdiction.

PLEASE TAKE FURTHER NOTICE that a hearing (the "**Hearing**") to consider the relief requested in the Motion has been scheduled for 9:45 a.m. (Eastern) on December 16, 2010, before the Honorable Robert E. Gerber, United States Bankruptcy Judge, in the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, Courtroom 621, New York, New York 10004-1408 (the "**Bankruptcy Court**").

PLEASE TAKE FURTHER NOTICE that responses, if any, to the Motion must: (a) be made in writing; (b) comply with the Bankruptcy Code, the Bankruptcy Rules and the Local Rules for the United States Bankruptcy Court for the Southern District of New York; (c) be filed with the Bankruptcy Court in accordance with General Order M-242 (as amended) and any case management order entered by the Bankruptcy Court (i) electronically by registered users of the Bankruptcy Court's case filing system, or (ii) on a 3.5 inch disk (preferably in Portable Document Format (PDF), WordPerfect, or any other Windows-based word processing format) by all other parties in interest; (d) be submitted in hard copy form to the chambers of the Honorable Robert E. Gerber, United States Bankruptcy Judge, United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, New York 10004; and (e) be served upon the following parties, in each case so as to be **received no later than 4:00 p.m. (Eastern) on December 9, 2010** (the "**Response Deadline**"):

Liquidating Trustee to the BearingPoint, Inc. Liquidating Trust	***Counsel to the Liquidating Trustee***
John DeGroote Services, LLC 100 Crescent Court, Suite 700 Dallas, TX 75201 Attn: John DeGroote, Esq.	MCKOOL SMITH P.C. One Bryant Park, 47th Floor New York, New York 10036 Attn: Peter Goodman

	-and- MCKOOL SMITH P.C. 300 Crescent Court, Suite 1500 Dallas, TX 75201 Attn: Lew LeClair Robert Manley -and- MCKOOL SMITH P.C. 600 Travis Street, Suite 7000 Houston, Texas 77002 Attn: Basil A. Umari
Counsel to the Debtors Weil, Gotshal & Manges LLP 767 Fifth Avenue New York, New York 10153 Attn: Marcia L. Goldstein, Esq. Ronit Berkovich, Esq. Joseph Smolinsky, Esq. -and- Weil, Gotshal & Manges LLP 700 Louisiana Street, Suite 1600 Houston, Texas 77002 Attn: Alfredo R. Perez, Esq.	***Office of the U.S. Trustee*** Office of the U.S. Trustee 33 Whitehall Street, 21st Floor New York, New York 10004 Attn: Serene Nakano, Esq.
Mr. F. Edwin Harbach 400 Alton Road, Apt. 1001 Miami Beach, FL, 33139-6737 -and- Mr. F. Edwin Harbach 820 Saddle Butte Drive, Jackson, WY 83001	Robert A. Van Kirk, Esq. Williams & Connolly LLP, 725 Twelfth Street, N.W. Washington, DC 20005
Albert L. Lord 1805 River Watch Lane Annapolis, MD 21401-1054 -and- Albert L. Lord 29 E. Seaview Ave. Strathmere, NJ, 08248 -and-	Roderick C. McGeary 1911 Waverley Street, #202 Palo Alto, CA 94301-3848

Albert L. Lord 670 Springfield Ave. Summit, NJ 07901-2321 -and- Albert L. Lord 670 Polling House Road Harwood, MD 20776-9657	
J. Terry Strange 226 Mimosa Drive Houston, TX 77019 -and- J. Terry Strange 1433 Moraine Circle, Unit 25 Steamboat Spring, CO, 80487-8918 -and- J. Terry Strange 700 Louisiana Street, Suite 3000 Houston, TX 77002 -and- J. Terry Strange c/o Virginia Spikes HCI Box 147A Hunt, TX 78024	Douglas C. Allred 47 Valley Road Atherton, CA 94027-6434 -and- Douglas C. Allred 119 Waverly Street Palo Alto, CA 94301-3848 -and- Douglas C. Allred 4000 W. Lake Blvd., Unit 8 Homewood, CA 96141 -and- Douglas C. Allred 4000 Wailea Alanui Dr., Apt. 1702G Kihei, HI 96753-8465 -and- Douglas C. Allred c/o Betsy J. Bernard 40 Shalebrook Drive Morristown, NJ, 07960-6638
Spencer C. Fleischer 2120 Washington St. San Francisco, CA 94109-2845 -and- Spencer C. Fleischer 18881 Gehricke Rd. Sonoma, CA 95476	Jill Kanin-Lovers 117 Valley Forge Road Weston, CT 06883-1914 -and- Jill Kanin-Lovers 31 Wallacks Lane Stamford, CT 06902-7126
Eddie Ray Munson 5879 Murfield Drive Rochester, MI 48306-2362	

-and- Eddie Ray Munson 4751 Bonita Bay Blvd Bonita Springs, FL 34134-0763	

PLEASE TAKE FURTHER NOTICE that only responses made in writing and timely filed and received by the Response Deadline will be considered by the Bankruptcy Court at the Hearing and that if no responses to the Motion are timely filed and served in accordance with the procedures set forth herein, the Bankruptcy Court may enter an order granting the Motion without further notice.

Dated: November 29, 2010
New York, New York

/s/ Peter S. Goodman
MCKOOL SMITH P.C.
Peter Goodman
pgoodman@mckoolsmith.com
One Bryant Park, 47th Floor
New York, New York 10036
Telephone: (212) 402-9200
Facsimile: (212) 402-9444
- and -

Lew LeClair (*pro hac pending*)
lleclair@mckoolsmith.com
Robert Manley (*pro hac pending*)
rmanley@mckoolsmith.com
300 Crescent Court, Suite 1500
Dallas, Texas 75201
Telephone: (214) 978-4000
Facsimile: (214) 978-4044
-and-

Basil A. Umari (*pro hac vice*)
bumari@mckoolsmith.com
600 Travis Street, Suite 7000
Houston, Texas 77002
Telephone: (713) 485-7300
Facsimile: (713) 485-7344

Counsel for John DeGroote Services, LLC as Liquidating Trustee to the BearingPoint, Inc. Liquidating Trust