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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)

JOINT OPPOSITION TO THE 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 F. EDWIN HARBACH AND CERTAIN FORMER DIRECTORS

F. Edwin Harbach ("Former CEO") and Albert L. Lord, Roderick C. McGeary, J. Terry Strange, Douglas C. Allred, Betsy J. Bernard, Spencer C. Fleischer, Jill Kanin-Lovers, and Edward Munson ("Certain Former Directors") submit this opposition to John DeGroote Services, LLC as Liquidating Trustee to the BearingPoint, Inc. Liquidating Trust's *Motion for Limited Relief from Article XI of Debtor's Modified Second Amended Joint Plan and Sections 34(C) and 39 of Confirmation Order as to F. Edwin Harbach* [Docket No. 1977] ("CEO Motion") and *Motion for Limited Relief from Article XI of Debtor's Modified Second Amended Joint Plan and Sections 34(C) and 39 of Confirmation Order as to Certain Former Directors* [Docket No. 1979] ("Directors Motion") filed on November 29, 2010 (collectively, the "Motions").

PRELIMINARY STATEMENT

The Trustee seeks leave to file an action in Virginia state court against the Former CEO and Certain Former Directors of BearingPoint, Inc. alleging breaches of fiduciary duties (the "Contemplated Action"). The Trustee does this even though (1) this Court explicitly reserved for itself exclusive jurisdiction over precisely such an action; (2) the clear provisions of the Debtor's Amended Joint Plan, dated December 17, 2009, Docket No. 1550, Ex. A (the "Plan"), reflect the Court's desire to retain exclusive jurisdiction; and (3) this Court expressed concern that such a suit not be subject to the "vagaries of state court jury trials in remote jurisdictions."

The Trustee summarily asserts that court dockets in Virginia move faster than those in New York. (Presumably, the Trustee also believes filing in a "more efficient" court gives him a tactical advantage since he acknowledges having already conducted an extensive, if incomplete, investigation.) In addition to being devoid of any factual support, the Trustee's argument unaccountably ignores this Court's intimate familiarity with many of the facts and participants involved in the Contemplated Action.

The reasons underlying the Court's decision to retain exclusive jurisdiction are unchallenged and remain compelling. Among other things, New York courts routinely handle fiduciary duty claims brought under Delaware law, as these claims would be. Obviously, this Court has already expended significant effort and resources in determining the rights of the parties involved in this matter – effort that would be lost if the Contemplated Action proceeded in Virginia. Retaining this case also is plainly a proper and prudent exercise of "related to" jurisdiction, as this Court has already noted. Finally, transfer to Virginia state court could work unwarranted prejudice on the Defendants in the Contemplated Action, as the procedures applicable in a Virginia court differ substantially from those in this Court and may impinge on the ability to obtain a fair and efficient resolution of this case.

BACKGROUND

1. The Court approved the Plan on December 22, 2009. *See* Confirmation Order, dated December 22, 2009, Docket No. 1550 ("Confirmation Order"). Pursuant to Article XI of the Plan and Sections 34(c) and 39 of the Confirmation Order, this Court and the United States District Court for the Southern District of New York have *exclusive* jurisdiction over actions such as the Contemplated Action.

2. The Confirmation Order states, in relevant part:

> Notwithstanding anything contained in the Plan, this Court (and the United States District Court for the Southern District of New York) shall retain exclusive jurisdiction to adjudicate any and all claims or causes or action brought by (a) the Debtors (or the Liquidating Trustee, as applicable) . . . .

Confirmation Order ¶ 34(c). The Confirmation Order continues:

> 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.

Confirmation Order ¶ 39.

3. Reflecting the Court's Confirmation Order, Article XI of the Plan states that this Court:

> shall have 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).

4. As the Court is aware, these provisions arose from a pre-confirmation dispute over releases that the Debtors sought (the "Director Releases"), which would have released the former directors from claims based on any alleged prepetition misconduct. *See* Limited Objection of Official Committee of Unsecured Creditors, dated December 10, 2009, Docket No. 1496. After the Official Committee of Unsecured Creditors objected, the Court ordered the Director Releases removed from the Plan, but expressly ruled that this Court and the Southern District of New York would have exclusive jurisdiction over any such claims. *See* Confirmation Hearing Transcript, dated December 17, 2009, attached to Sabin Decl. as Ex. 1 ("Confirmation Hearing Transcript"), at 77; Confirmation Order ¶ 34(c).

5. During the Confirmation Hearing, current counsel for the Trustee sought to have the Plan amended to address his purported concern that this Court might not have jurisdiction over certain future actions:

> MR. SABIN: Thank you very much, Your Honor. I listened very carefully, especially to the modification to the plan. I have just one issue. To the extent that the liquidating trustee determines as a jurisdictional matter, that he wants to sue somebody and can only get jurisdiction in a state court, can you consider supplementing your direction to modify the plan, such that a scenario such as that would come to you first for the determination of the propriety of the claim?

In denying the request to reconsider its ruling, the Court explained:

> THE COURT: I have some reservations as to that, Mr. Sabin, in no small part because of my view that it's a classic case of related to … jurisdiction, if not also "arising under" jurisdiction and that therefore, that there'd be jurisdiction under 1334. I'll give you and the trustee a reservation of rights on that issue and anybody who might feel differently as well. But I don't, at this point, see the need for that. *As my ruling hopefully reflects, I gave this a lot of thought. I think that people can get justice in this court. I have a number of concerns with them being litigated elsewhere.*

Confirmation Hearing Transcript at 78 (emphasis added).

6. On November 29, 2010, the Trustee filed two companion motions seeking leave to file a breach of fiduciary duty suit in Virginia against former directors of BearingPoint. *See* CEO Motion, Ex. A; Directors Motion, Ex. A.

7. In seeking leave to contravene the Confirmation Order and the Plan, the Trustee makes three arguments. *First*, the Trustee argues that if the Contemplated Action were filed in this Court or the Southern District of New York, there are "considerable procedural delays" that "could attend the prosecution of the claims." CEO Motion ¶ 21. While not citing any specific "delays," the Trustee generally observes that this Court has an "extremely busy docket" and then asserts that the Contemplated Action "will involve time-consuming factual and expert disputes" that "would greatly burden this Court's calendar." *Id.* ¶ 23. *Second*, the Trustee argues that this Court might not have jurisdiction to consider these types of claims. *Third,* and finally, the Trustee argues that placing the draft complaint before the Court on this motion obviates the Court's rationale for retaining jurisdiction "to protect against frivolous litigation." CEO Motion ¶¶ 10–11, 29; Directors Motion, ¶¶ 10–11, 22. None of these arguments justifies the requested relief.

ARGUMENT

A. *This Court Can Efficiently Manage The Contemplated Action*

8. The Trustee speculates that if the Contemplated Action were filed in this Court or the Southern District of New York, there would be "considerable procedural delays." *See* CEO Motion ¶ 21. The Trustee further contends that this Court has an "extremely busy docket" and then predicts that the Contemplated Action "will involve time-consuming factual and expert disputes" that "would greatly burden this Court's calendar." *See id.* ¶ 23. Weaving these bits of conjecture together, the Trustee divines that courts outside of this jurisdiction would hear his claims "more efficiently" and at "considerably lower expense." *Id.* ¶¶ 22–23. This contention is incorrect for at least three reasons.

9. *First*, the Trustee's assertions are based entirely on speculation. His assertions about the speed with which the Virginia courts may address the claim are premised solely "[o]n information and belief," *id*. at ¶23 n.9, and fail to specify whether the conjectural time frames provided apply to the docket generally or to complex factual cases such as the Contemplated Action. Further, the suggestion that this case will involve time-consuming fact and expert disputes is speculative. Indeed, even if these predicted contentious disputes materialize, they presumably will have the same effect on the time to disposition whether they are litigated in Virginia state court or in this Court. Moreover, despite a busy docket, this Court and the Southern District of New York routinely handle large and complex cases in an efficient manner. Notably, the Trustee does not cite any unique delays specific to the Contemplated Action.[1]

[1] The Trustee suggests that the exercise of jury trial rights will likely result in the case ultimately being tried in the United States District Court for the Southern District of New York, rather than in this Court. *See* CEO Motion ¶ 23. At this stage, however, the Former CEO and Certain Former Directors have not decided whether they will exercise jury trial rights and reserve all rights to do so. In any event, this Court may conduct a jury trial with the parties' consent. 28 U.S.C. § 157(e).

10. *Second*, this Court's familiarity with the surrounding issues undermines the Trustee's argument that a Virginia state court will be a more efficient forum. Granting leave to file the Contemplated Action in Virginia in this instance would do so at the expense of the thoughtful analysis and knowledge of the surrounding facts that this Court or the Southern District of New York would bring to the case – elements that the Court sought to preserve in establishing the exclusive jurisdiction provisions of the Plan.[2] *See, e.g.*, *In re Enron Corp.*, 317 B.R. 629, 641, 643–44 (Bankr. S.D.N.Y. 2004) (finding that the court's familiarity with issues in the case weighed against granting a motion for change of venue, and noting that "the higher per judge caseload in the Southern District of New York is not indicative of whether this Court will be able to address the . . . [a]ctions in a timely manner"). And, it also does so at the expense of efficiency.

11. Indeed, in examining the exclusive jurisdiction issue, the Court specifically expressed its desire to have future claims heard by this Court or the Southern District of New York because these courts have more extensive knowledge of the surrounding facts and procedural history of the case. *See* Confirmation Hearing Transcript at 77. The Court expressed this concern throughout the Confirmation Hearing. *See, e.g.*, Confirmation Hearing Transcript at 61 (stating that certain creditor claims must be brought in this Court or the Southern District of New York because this Court has a "greater familiarity with the debtors[']affairs than a state court judge or even a federal court judge somewhere else in the country might have"); *id.* at 67 (stating desire to ensure litigation avoids the "vagaries of state court jury trials in remote

[2] The fact that the Trustee has provided this Court with a draft of its complaint—and expects this Court to review the claims prior to reaching a decision on this motion to ensure that they are not frivolous—underscores the fact that this Court is the appropriate forum to determine the merits of this case. A court unfamiliar with the case would, of course, be slowed by the inevitable "learning curve."

jurisdictions").[3] The Court's familiarity with the procedural history of the case will be particularly important in managing discovery given that the Trustee already has spent the better part of a year engaged in document and deposition discovery pursuant to Rule 2004 prior to the lodging of the draft complaint, while defendants will be starting from scratch.

12. *Third*, Delaware law will almost certainly govern here and this Court and the Southern District of New York are uniquely well positioned to apply that law to these facts. *See, e.g.*, *In re Hydrogen, L.L.C.*, 431 B.R. 337, 346 (Bankr. S.D.N.Y. 2010) ("A claim for breach of fiduciary duty brought against a corporate officer or director raises issues relating to the internal affairs of a corporation and therefore should be governed by the law of the state of incorporation of the relevant corporation."); *St. Clair Shores Gen. Emps. Ret. Sys. v. Eibeler*, 2010 WL 3958803 (S.D.N.Y. Sept. 8, 2010) (applying Delaware law to breach of fiduciary duty claims against former officers and directors); *In re BH S & B Holdings LLC*, 420 B.R. 112, 133 (Bankr. S.D.N.Y. 2009) (applying Delaware law to veil-piercing and fiduciary-breach claims against Delaware entities); *In re Magnesium Corp. of Am.*, 399 B.R. 722, 758–59 (Bankr. S.D.N.Y. 2009) (applying Delaware law to claims for breaches of fiduciary duty against two Delaware corporations); *Sonnenblick-Goldman Co. v. ITT Corp.*, 912 F. Supp. 85 (S.D.N.Y. 1996) (applying Delaware law to a veil-piercing claim against a Delaware corporation).

[3] In fact, the Contemplated Action would very likely face these vagaries in Virginia, where state law limits the availability of summary judgment. *See* Va. Code § 8.01-420. In Virginia courts, "[s]ummary judgment practice is almost nonexistent" and is "too weak to act as a catalyst for sufficient evidence production, which is necessary in order to predict reliably the existence of triable issues, or to define their scope." Kent Sinclair & Patrick Hanes, *Summary Judgment: A Proposal for Procedural Reform in the Core Motion Context*, 36 Wm. & Mary. L. Rev. 1633, 1678, 1713 (1995). In addition, Fairfax County Circuit Court procedures generally do not provide for a single judge to hear a case but instead require motions, including dispositive motions, to be heard by whichever judge is overseeing motion practice on the calendar day assigned. *See* "Fairfax County Circuit Court Motions Procedures Flow Chart," http://www.fairfaxcounty.gov/courts/circuit/pdf/CCR-E-06.pdf. Thus, the judge hearing dispositive motions may be unfamiliar with the case. The potential unavailability of an important procedural mechanism for resolving cases short of trial and the potential unfamiliarity of the judge presiding over dispositive motions are two more reasons it would be both more fair and more efficient for this Court to preside over the Contemplated Action.

13. Granting leave to file the Contemplated Action in Virginia state court could also risk allowing the suit to proceed in a forum less familiar with principles of Delaware corporate law. Indeed, we have been unable to identify any cases from Fairfax County in which the court applied Delaware law to a breach of fiduciary duty claim. In such a situation, the Trustee could attempt to avoid the high legal burden that Delaware law imposes on such claims – a result that this Court expressly sought to avoid when crafting the Plan.

B. *This Court Has Jurisdiction Over The Contemplated Action*

14. The Trustee argues that purported jurisdictional problems with hearing the Contemplated Action in this Court counsel in favor of granting the motions for relief. *See* CEO Motion ¶ 21 n.8.

15. However, at the Confirmation Hearing, when counsel for the Trustee explicitly sought to have the Plan amended to address his concerns that some future actions in this Court or the Southern District of New York may have jurisdictional defects, the Court noted that actions such as the Contemplated Action are "classic cases" of "related to" jurisdiction. Confirmation Hearing Transcript at 78.

16. Case law confirms that actions such as the Contemplated Action fall comfortably within the Court's "related to" jurisdiction pursuant to 28 U.S.C. §§ 1334(b) and 157(a). After confirmation of a plan, the Court has jurisdiction over potential claims: (a) that have a "close nexus to the bankruptcy plan or proceeding," and (b) where the confirmation "provide[s] for the retention of jurisdiction over the dispute." *In re Refco, Inc. Sec. Litig.*, 628 F. Supp. 2d 432, 442–43 (S.D.N.Y. 2008). The Contemplated Action easily satisfies these requirements.

17. *First*, the Contemplated Action has a "close nexus" to the Plan. As the Trustee himself notes, the Trustee is "the assignee of estate causes of action" under the Plan. CEO Motion ¶ 4. Because the right to bring this suit is granted to the Trustee by the Plan, the

Contemplated Action is the type of action that "arise[s] under the Plan." *Refco*, 628 F. Supp. 2d. at 443.

18. Assuming *arguendo* that alleged damages are recovered in the Contemplated Action, these funds would increase the amount distributed through the Liquidating Trust, further evincing the "close nexus" of the Contemplated Action to the Plan. *See Refco*, 628 F. Supp. 2d at 443; *see also In re DPH Holdings Corp.*, 437 B.R. 88, 98 (S.D.N.Y. 2010) (finding jurisdiction because the claim would "have an effect on the determination of claims and expenses, and ultimately the distribution of the estate"); *In re PT-1 Commc'ns, Inc.*, 403 B.R. 250, 268 (Bankr. E.D.N.Y. 2009) (finding, *inter alia*, that post-confirmation jurisdiction is appropriate "when adjudication has an impact on the estate or the recovery of the creditors, such as where resolution of a dispute may substantially increase the asset pool available for distribution to creditors under a liquidating plan"); *In re Boston Reg'l Med. Ctr., Inc.*, 410 F.3d 100, 107 (1st Cir. 2005) ("[W]hen a debtor (or a trustee acting to the debtor's behoof) commences litigation designed to marshal the debtor's assets for the benefit of its creditors pursuant to a liquidating plan of reorganization, the compass of related to jurisdiction persists undiminished after plan confirmation."). The Trustee himself noted that "[t]he damages [derived from the Contemplated Action] would become, by far, the estate's largest asset." CEO Motion ¶ 20.

19. *Second*, as explained above, the Court specifically retained jurisdiction over such claims in its Confirmation Order and the Plan. Therefore, the second post-confirmation jurisdiction requirement is easily satisfied. *See Refco*, 628 F. Supp. 2d at 443 (finding retention of jurisdiction satisfied when the Plan expressly preserved jurisdiction over "causes of action by or on behalf of . . . the Litigation Trustee"); *see also In re Perry H. Koplik & Sons, Inc.*, 357

B.R. 231, 246–47 & n.44 (Bankr. S.D.N.Y. 2006) (finding retention of jurisdiction when Plan stated that the "Court shall retain and have exclusive jurisdiction over all matters . . . .").

20. Furthermore, the sole case cited by the Trustee as purportedly creating a jurisdictional issue is inapposite. The Trustee claims that *In re Marshall*, 600 F.3d 1037 (9th Cir. 2010), and the subsequent grant of *certiorari* by the United States Supreme Court, put the scope of "related to" jurisdiction "in play." CEO Motion ¶ 21 n.8. However, in *Marshall*, the Ninth Circuit did not alter the scope of "related to" jurisdiction, but instead examined whether a compulsory counterclaim always constitutes a "core" proceeding under 28 U.S.C. § 157(b)(2)(C). *See Marshall*, 600 F.3d at 1058.[4] Indeed, neither party in *Marshall* contests a bankruptcy court's jurisdiction to hear state law claims "related to" bankruptcy or the scope of "related to" jurisdiction; rather, the primary issue under dispute in *Marshall* is whether bankruptcy courts have the authority to render a final determination on compulsory, state law counterclaims.[5] In short, *Marshall* does not put "related to" jurisdiction "in play."

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[4] The issues as to which certiorari has been granted are: (1) whether the Ninth Circuit opinion, which renders §157(b)(2)(C) surplusage in light of §157(b)(2)(B), contravenes Congress' intent; (2) whether Congress may constitutionally authorize core jurisdiction over debtors' compulsory counterclaims to proofs of claim; and (3) whether the Ninth Circuit contravened this Court's post-*Marathon* precedent, creating a circuit split in the process, by holding that Congress cannot constitutionally authorize non-Article III bankruptcy judges to enter final judgment on all compulsory counterclaims to proofs of claim. *Stern v. Marshall*, No. 10-179, 2010 WL 3068082 (Aug. 3, 2010) (petition for writ of certiorari); *see also Stern v. Marshall*, No. 10-179, 2010 WL 3053869 (Sept. 28, 2010) (order granting certiorari).

[5] In *Marshall*, the debtor filed a compulsory counterclaim to a proof of claim in bankruptcy court. *Marshall*, 600 F.3d at 1044-45. The district court found that the bankruptcy court's entry of final judgment in favor of the debtor was inappropriate because the counterclaim was not a "core proceeding." *Id.* at 1048. On appeal, the Ninth Circuit examined whether a compulsory counterclaim always constitutes a "core proceeding" pursuant to 28 U.S.C. § 157(b)(2)(C) (listing counterclaims as "core"). *Id.* at 1058. The Court held that although the counterclaim in *Marshall* was compulsory, it was not a "core proceeding" because it was "not so closely related" to the claim against the bankruptcy estate that "it must be resolved in order to determine the allowance or disallowance" of that claim against the estate. *Id.* at 1059. In finding that the counterclaim was not "core," the Court also focused on the difference in the scope of evidence required to address the counterclaim versus the claim against the estate, the

C. *The Court's Concern With Protecting Litigants Remains Valid and Compelling*

21. In seeking leave to file suit in Virginia, the Trustee also argues that the purpose of this Court retaining jurisdiction "stemmed from a desire to protect against frivolous litigation." CEO Motion ¶ 10. The Trustee asserts that because the Trustee has submitted a "detailed draft of a complaint, this Court is fully able to address the concerns it articulated at the confirmation hearing and assess whether the Trustee would be proceeding in a measured fashion . . . ." *Id.* ¶ 29.

22. The Trustee takes too narrow a view of the Court's ruling. The Court's concern at the Confirmation Hearing was with providing "safeguards to insure that any permitted litigation really is in the best interest of the estate." Confirmation Hearing Transcript at 67. Part of this concern clearly involved weeding out frivolous claims. *See id.* at 77 ("I'll be able to tell the difference between legitimate claims on the one hand and harassment, retaliation or frivolous litigation on the other."). But, the Court also wanted to ensure that any "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." *Id.; see also id.* at 61("[A]ny claims brought by creditors in this category must be brought before me or at least a district judge in this district. That, in part, is based on my greater familiarity with the debtors[']s affairs than a state court judge or even a federal court judge somewhere else in the country might have."). Indeed, this Court already has heard testimony about the extensive efforts undertaken by the board to market the company both prior to and after the bankruptcy and can bring that knowledge to bear on the analysis of the issues presented in this case. In that sense, this Court is uniquely situated to manage this litigation and to assess whether the Contemplated Action presents legitimate

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"attenuated" nexus between the transactions out of which the claims arose, and the lack of overlap in the legal elements of the two claims. *See id.* at 1059–60.

claims or, rather, represents an effort on the part of the Trustee to leverage a payment out of the "nearly $300 million in insurance coverage" that is implicated by these claims. CEO Motion ¶ 20 n.7.

23. This legitimate concern requires this Court to retain jurisdiction of the Contemplated Action to, among other things, decide a motion to dismiss and if necessary, preside over discovery, summary judgment, and trial.

CONCLUSION

24. The filing of the Contemplated Action in Virginia, where "prospective targets" would be brought to a forum unfamiliar with the facts and circumstances of this case, without many of the procedural protections available in this Court, is precisely the situation that the Court sought to prevent when retaining exclusive jurisdiction over such claims. In other words, allowing the Contemplated Action to be filed in Virginia would mean that it would not "be thoughtfully analyzed with the benefit of as much knowledge of the surrounding facts as possible" and would subject the putative defendants to the "vagaries of state court jury trials in remote jurisdictions." *See* Confirmation Hearing Transcript at 77, 67. The Trustee has failed to offer any compelling reason why this Court should abandon its previous rulings and reject the safeguards it previously instituted to protect the interests of parties for whom the Debtors had sought a release under the Plan.

25. For all the reasons set out above, the Trustee's companion CEO Motion [Docket No. 1977] and Directors Motion [Docket No. 1979] should be denied.

Dated: January 4, 2011

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