VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

JOHN DeGROOTE SERVICES, LLC and JOHN DeGROOTE, as liquidating trustee for and on behalf of the BEARINGPOINT, INC. LIQUIDATING TRUST, Plaintiffs, v. 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, Defendants.	Civil Action No. 2011-10612

BRIEF IN SUPPORT OF FORMER OUTSIDE DIRECTOR DEFENDANTS' PLEA IN BAR AND DEMURRER

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Defendants Albert L. Lord, Roderick C. McGeary, J. Terry Strange, Douglas C. Allred, Betsy J. Bernard, Spencer C. Fleischer, Jill Kanin-Lovers, and Edward Munson (the "Former Outside Directors") respectfully file this memorandum of law in support of their Plea in Bar and Demurrer to the Complaint dated July 21, 2011 (the "Complaint" or "Compl.").[1]

PRELIMINARY STATEMENT

Plaintiffs allege that the Former Outside Directors breached their fiduciary duty of care by failing to properly oversee the management of BearingPoint, Inc. before it entered into bankruptcy in February 2009. Specifically, the Complaint alleges that the Former Outside Directors failed "to develop, manage and oversee the Company's sales process," which purportedly resulted in an "inability to obtain the best price available for its assets[.]" Compl. ¶ 1. But, Plaintiffs cannot prevail on such a claim for at least two reasons. *First*, BearingPoint's Certificate of Incorporation has a standard exculpatory clause that protects the Board from personal liability for breach of the fiduciary duty of care. *Second*, the Complaint admits on its face that the law firm hired by the Board to advise it on fulfilling its fiduciary duties and responsibilities during the sales process, Davis Polk & Wardwell LLP, advised the Former Outside Directors that they "have demonstrated both their duties of care and good faith" during the sales process. Compl. ¶ 265. This admission is fatal to a claim for a breach of the duty of care. Moreover, any reading of the allegations supports the conclusion that the Former Outside Directors were not grossly negligent, which is the controlling legal standard, but rather were informed and actively engaged in monitoring the sales process through regular board meetings,

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[1] Former BearingPoint director and Chief Executive Officer F. Edwin Harbach has demurred separately. The Former Outside Directors incorporate by reference arguments made in that demurrer to the extent applicable including, without limitation, Harbach's arguments regarding the Trustee's lack of standing. *See* Brief in Support of Defendant F. Edwin Harbach's Demurrer and Plea in Bar at Part III (No. 2011-10612) (Nov. 21, 2011).

committee meetings, and meetings with financial and legal advisors. No Delaware court has ever found directors liable for a breach of the duty of care based on circumstances even remotely similar to those alleged by Plaintiffs in the Complaint.

BACKGROUND [2]

The suit is brought on behalf of the BearingPoint, Inc. Liquidating Trust (the "Trust"), an entity that is organized under the laws of Delaware and was created to liquidate and distribute the assets of BearingPoint. The key asset Plaintiffs have said they hope to acquire is the proceeds of the Defendants' Directors and Officers insurance policy. The Former Outside Directors were independent, non-management directors of BearingPoint, Inc. ("BearingPoint"), a management consulting firm. *See* Compl. ¶¶ 9-16. BearingPoint, formerly known as KPMG Consulting, Inc., was spun off from the KPMG accounting firm in 2002. *Id.* ¶¶ 20-21. After several years in which its financial condition steadily deteriorated, BearingPoint filed for Chapter 11 bankruptcy protection on February 18, 2009. *Id.* ¶ 291. Plaintiffs are BearingPoint's liquidating trustee and his company, which were appointed by a bankruptcy court to pursue claims on behalf of a liquidating trust. *Id.* ¶ 6.

A. *The Board Explores Strategies To Address A Liquidity Shortfall*

According to the Complaint, "[a]s 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." *Id.* ¶ 45. The Complaint further alleges that "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." *Id.* ¶ 46. In order to address these issues, and among other steps, the Board hired an experienced management consulting executive, F. Edwin

[2] The following is a recitation of the factual allegations in the Complaint. While such factual allegations are to be accepted as true for the purposes of this demurrer, the Former Outside Directors do not agree that the allegations in the Complaint are accurate and/or complete.

Harbach, as Chief Operating Officer in early 2007. *Id.* ¶¶ 48-49 ("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. . . . Before joining BearingPoint, Harbach had been in retirement for two years, following service with BearingPoint's competitor, Accenture, managing its operations in Tokyo, Japan.").

At that time, BearingPoint faced a liquidity shortfall due, in large part, to its substantial indebtedness and macroeconomic issues, *id.* ¶¶ 46-47, 51, and it became evident by late 2007 that BearingPoint would not have sufficient liquidity to meet its obligations in the likely event that holders of certain outstanding debentures elected to "put" them back to the Company on April 15, 2009. *Id.* ¶¶ 43, 54. The Former Outside Directors acted to address this liquidity crisis by authorizing the Company to enter into an additional credit facility. *Id.* ¶ 52. In addition, the Board, in consultation with financial advisors, began exploring various alternatives for generating liquidity including the potential sale of some or all of the company. *Id.* ¶¶ 66-100.

B. *BearingPoint Engages Advisors And Begins Merger Negotiations*

According to the Complaint, "[i]n or before 2007, BearingPoint engaged Morgan Stanley & Co., Inc. . . . and UBS Securities LLC . . . as financial advisors to assist in addressing its mounting liquidity problems." *Id.* ¶ 66. The Complaint admits that "each firm had broad experience in merger and acquisition transactions involving consulting services firms." *Id.*

In addition to Morgan Stanley and UBS, according to the Complaint, BearingPoint also engaged Greenhill & Co., another well-respected financial advisor, to perform the role of "rendering a fairness opinion" in connection with the sale of one of BearingPoint's businesses. *Id.* ¶ 80. Later, Greenhill's role expanded and it became "BearingPoint's primary financial advisor" in January 2008. *Id.* ¶ 98.

In addition to hiring numerous professional advisors by November of 2007, the Board had formed a Transaction Committee to report and make recommendations to the full Board with respect to matters involving BearingPoint's outlook and strategic alternatives. *Id.* ¶¶ 84, 118. The Committee was composed of Former Outside Directors Fleischer, Strange, and Lord. *Id.* The Committee was later re-named the Finance Committee and its membership was changed to include Former Outside Directors Strange, Fleischer, and McGeary as well as Mr. Harbach. *Id.* ¶ 316.

According to the Complaint, a "plethora" of parties expressed interest in discussing an acquisition of BearingPoint. Specifically, Cerberus, CGI Group, Inc., Indachin Limited, Nikko Principles Investment Japan, Ltd., SERCO, Ernst & Young, Electronic Data Systems, CACI International, Credit Suisse / CPM, the Chinese Government, MHW Capital, Infosys Technologies Ltd., SystemsNet/GTCR, Goldman Sachs, JPMorgan Chase, Bear Stearns Merchant Banking, Ripplewood and Silver Lake all expressed interest in potentially acquiring some or all of the Company. *Id.* ¶¶ 146-66.

In response to these inquiries, the Board of Directors' Finance Committee approved non-disclosure agreements with all of these interested parties in a February 2, 2008 meeting so that discussions with all interested parties could proceed. *Id.* ¶ 167. Following this approval, BearingPoint management gave a "road-show" presentation to potential purchasers in March 2008. *Id.* ¶ 173. BearingPoint management then met both with purchasers interested in the whole company and one potential purchaser of certain business units. *Id.* ¶¶ 181-82.

C. *BearingPoint Engages In Merger Negotiations*

Three potential buyers showed interest in negotiating with the Company. BearingPoint engaged in substantive negotiations with CGI, an information technology management and business process services company. CGI first expressed interest in purchasing the whole

company in December 2007. *Id.* ¶ 146. In late June 2008, CGI expressed interest in one of BearingPoint's businesses as well. *Id.* ¶ 282.

In or around April 2008, Cerberus and Silver Lake, two private equity firms, also expressed interest in acquiring BearingPoint. *Id.* In April 2008, the Board granted Cerberus and Silver Lake the right to conduct due diligence in order to facilitate negotiations. *Id.* ¶ 184. Negotiations proceeded with Cerberus, CGI, and Silver Lake. After six weeks of due diligence, however, negotiations with Silver Lake ended unsuccessfully in May 2008. *Id.* ¶ 228. Discussions with CGI were also unsuccessful. *Id.* ¶ 283. Negotiations with Cerberus, however, continued through the summer of 2008, but also ended unsuccessfully in September 2008. *Id.* ¶ ¶ 227, 280.

To oversee these negotiations and manage the sales process, the Board appointed a "Special Committee" composed of Former Outside Directors Lord, McGeary, and Strange in May 2008. *Id.* ¶ 229. The Special Committee was advised by Davis Polk, an experienced and respected corporate law firm in New York City with substantial expertise in mergers and acquisitions. *Id.* ¶ 260. Part of Davis Polk's engagement was to advise the Board and the Special Committee on the fiduciary requirements of Delaware law in connection with the sales process. *See id.* ¶ 284. At a July 2008 Board meeting, John Bick of Davis Polk advised the Board:

> (i) "that the directors have demonstrated both their duties of care and good faith, and that the creation of the Special Committee to review and monitor the transaction process is designed to address any real or perceived conflicts of interest arising in any transaction" and
>
> (ii) that "the steps taken by the Board to evaluate the offer letter and alternative structures, as well as continuing discussions with Greenhill, reflect that the Board members are taking the appropriate steps to be fully informed and to fulfill their duty to obtain the highest value for the Company."

Id. ¶ 265.

On February 18, 2009, BearingPoint filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Southern District of New York. *Id.* ¶ 6.

D. *Plaintiffs' Allegations*

In Counts I-III of the Complaint, Plaintiffs assert claims against the Former Outside Directors for breaches of their fiduciary duty of care.[3] According to Plaintiffs, the Former Outside Directors breached their fiduciary duties by: (i) "ignoring buyers in 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"; and (ii) "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." *Id.* ¶¶ 3-4. The Complaint does not allege that the Former Outside Directors received any benefit, direct or indirect, from these alleged breaches.

ARGUMENT

A special plea or plea in bar is a discrete form of defensive pleading, which does not "address the merits of the issues raised by the bill of complaint or the motion for judgment." *Nelms v. Nelms*, 236 Va. 281, 289, 374 S.E.2d 4, 9 (1988). Rather, it is a pleading, "which alleges a single state of facts or circumstances (usually not disclosed or disclosed only in part by the record) which, if proven, constitutes an absolute defense to the claim." *Id.* If the single issue

[3] Specifically, Count I is against the Board of Directors as a whole, Count II is against the Finance Committee, and Count III is against the Special Committee.

of fact is proven, the plaintiff is then barred from recovery. *See Sullivan v. Jones*, 42 Va. App. 794, 803, 595 S.E.2d 36, 40 (2004).

"A demurrer tests the legal sufficiency of a pleading and can be sustained if the pleading, considered in the light more favorable to the plaintiff, fails to state a valid cause of action." *Kitchen v. City of Newport News*, 275 Va. 378, 385-86, 657 S.E.2d 132, 136 (2008) (citing *Welding, Inc. v. Bland County Serv. Auth.*, 261 Va. 218, 226, 541 S.E.2d 909, 914 (2001)); *Thompson v. Skate Am. Inc.*, 261 Va. 121, 128, 540 S.E.2d 123, 127-28 (2001) ("The sole question to be decided by the trial court is whether the facts thus pleaded, implied, and fairly and justly inferred are legally sufficient to state a cause of action against the Defendant."). "A demurrer admits the truth of the facts contained in the pleading to which it is addressed, as well as any facts that may be reasonably and fairly implied and inferred from those allegations." *Taboada v. Daly Seven, Inc.*, 271 Va. 313, 317, 626 S.E.2d 428, 429 (2006) (quoting *Yuzefovsky v. St. John's Wood Apts.*, 261 Va. 97, 102, 540 S.E.2d 134, 137 (2001)). In order to survive a demurrer, however, "a pleading must be made with 'sufficient definiteness to enable the court to find the existence of a legal basis for its judgment.'" *Eagle Harbor, L.L.C. v. Isle of Wight Cty.*, 271 Va. 603, 611, 628 S.E.2d 298, 302 (2006) (quoting *Moore v. Jefferson Hosp., Inc.*, 208 Va. 438, 440, 158 S.E.2d 124, 126 (1967)).

I. Plaintiffs Face A Heavy Burden In Alleging Breaches Of the Fiduciary Duty of Care By Directors Under Delaware Law

Plaintiffs allege breaches of the fiduciary duty of care owed by the Former Outside Directors under Delaware law.

A. *Duty Of Care*

The duty of care generally describes the level of attention required of a director in all matters related to the corporation. This duty requires that directors act in a reasonably informed

and deliberate manner when making decisions on behalf of the company. *See Brehm v. Eisner*, 746 A.2d 244, 259 (Del. 2000) ("[I]n making business decisions, directors must consider all material information reasonably available . . . ."); *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 66 (Del. 1989) (Delaware courts consider "whether a board has acted in a deliberate and knowledgeable way in identifying and exploring alternatives. Within the context of this analysis, we are, of course, ever mindful of the realities of corporate directorship. We recognize that management is often the catalyst in the decision-making process.").

It is not a breach of the duty of care if directors' actions and decisions, in hindsight, turn out to be wrong or unwise. To establish a breach of the duty of care, a plaintiff must prove a director took an action that was grossly negligent. *See Brehm*, 746 A.2d at 259 ("[T]he directors' process is actionable only if grossly negligent."). Gross negligence is defined as deliberate disregard or reckless indifference to the whole body of stockholders, or actions that are outside the bounds of reason. *See In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 749-50 (Del. Ch. 2005); *see also McPadden v. Sidhu*, 964 A.2d 1262, 1274 (Del. Ch. 2008) (gross negligence is "conduct that constitutes reckless indifference or actions that are without the bounds of reason."); *Guttman v. Huang*, 823 A.2d 492, 507 n.39 (Del. Ch. 2003) (to successfully plead that the directors acted with the requisite gross negligence, plaintiff must articulate "facts that suggest a *wide* disparity between the process the directors used . . . and that which would have been rational.") (emphasis in original).

B. *The Business Judgment Rule*

Delaware courts apply the "business judgment" rule to lawsuits challenging decisions by a company's board of directors. The business judgment rule "is a presumption that in making a business decision the directors of a corporation acted 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); *see also Watchmark Corp. v. ArgoGlobal Capital, LLC*, No. 711-N, 2004 WL 2694894, at *4 (Del. Ch. Nov. 4, 2004) (recognizing that the business judgment rule is a "strong presumption" that counsels judicial deference to the decisions of corporate boards). In other words, Delaware law presumes that directors adhere to their fiduciary duty of care. That presumption is heightened where, as here, the majority of the board of directors is composed of independent, outside directors. *See Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334, 1343 (Del. 1987) ("Thus with the independent directors in the majority [the presumption of] good faith . . . is materially enhanced.").

The business judgment presumption exists even at the pleading stage. To withstand a demurrer, Plaintiffs, as the party challenging the Board's conduct, have the burden to plead *facts* that defeat the presumption. *See Gantler v. Stephens*, 965 A.2d 695, 706 (Del. 2009) ("Procedurally, the plaintiffs have the burden to plead facts sufficient to rebut [the business judgment] presumption."); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (explaining that "a shareholder plaintiff challenging a board decision has the burden at the outset to rebut the rule's presumption"); *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 964, 984 (Del. Ch. 2000) ("In order for plaintiffs' duty of care claims to survive a motion to dismiss, they must sufficiently plead facts which if true would take defendants' actions outside the protection afforded by the business judgment rule."). This burden is high. *See In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 125 (Del. Ch. 2009) ("[T]he burden required for a plaintiff to rebut the presumption of the business judgment rule by showing gross negligence is a difficult one, and the burden to show bad faith is even higher.").

II. The Complaint Does Not Allege A Breach Of The Duty Of Care

The Complaint fails to state a claim for breach of the duty of care because (1) BearingPoint's Certificate of Incorporation completely immunizes the Former Outside Directors

from liability for such claims even if the Complaint had properly pled such claims such that the Plea in Bar should be sustained. Separately, (2) Plaintiffs have failed to allege facts sufficient to sustain such a claim such that the Demurrer should be sustained.

A. *The Court Should Sustain The Former Outside Directors' Plea In Bar Because BearingPoint's Corporate Charter Forecloses The Duty Of Care Claims*

Plaintiffs are legally barred from recovery of money damages, whether based in law or equity, for breach of the fiduciary duty of care. *See Arnold v. Soc'y for Savs. Bancorp.*, 678 A.2d 533, 541-42 (Del. 1996). The Delaware General Corporation Law ("DGCL") governs the internal affairs of corporations that (like BearingPoint) were incorporated in Delaware. Section 102(b)(7) of the DGCL authorizes a corporation to immunize its directors for breaching their fiduciary duty of care by so providing in the corporate charter.[4] It provides:

> [T]he certificate of incorporation may also contain . . . [a] provision 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, provided that such provision 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; (iii) under § 174 of this title;[5] or (iv) for any transaction from which the director derived an improper personal benefit.

8 Del. C. § 102(b)(7).[6]

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[4] Delaware courts routinely take judicial notice of the company's certificate of incorporation in deciding a pre-answer motion to dismiss. *See, e.g., McPadden v. Sidhu*, 964 A.2d 1262, 1274 (Del. Ch. 2008). As noted above, Virginia procedure on a plea in bar is in accord, as the moving party for a plea in bar "may introduce evidence in support of the plea." *See Patel v. Anjali, LLC*, No. CL09–3353, 2010 WL 7765591, at *6 (Va. Cir. Ct. Oct. 8, 2010).

[5] Section 174 concerns the unlawful payment of dividends and repurchase of stock; it has no relevance to this case.

[6] The Delaware Legislature's purpose in enacting Section 102(b)(7) was to "encourag[e] capable persons to serve as directors of corporations by providing them with the freedom to make risky, good faith business decisions without fear of personal liability." *Prod. Res. Grp., L.L.C. v. NCT Grp.*, 863 A.2d 772, 793 (Del. Ch. 2004). This policy is most important after a corporation has become insolvent, "because there is the real danger that a fact-finder, in view of hindsight bias and its knowledge of the fact that the directors' business strategy did not pan out, will conclude that the directors have acted with less than due care, even if they did not." *Id.* at 794.

BearingPoint's charter has a Section 102(b)(7) provision immunizing its directors for breaching their duty of care. It provides:

> A director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (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, (iii) under Section 174 of the DGCL, or (iv) for any transaction from which the director derived an improper personal benefit.

Former Outside Directors' Plea in Bar and Demurrer, Ex. A (Amended and Restated Certificate of Incorporation), Article VIII. For the purposes of this action, Plaintiffs stand in the shoes of the "Corporation" – *i.e.*, BearingPoint. *See, e.g.*, *Prod. Res. Grp.*, 863 A.2d at 794 (holding that Section 102(b)(7) provision applies to claims brought by a trustee). Consequently, the Former Outside Directors "shall not be personally liable" for breaching the duty of care.

When a corporation has immunized its directors in this fashion, a claim asserting breach of the duty of care is not legally cognizable and must be dismissed. *See McPadden*, 964 A.2d at 1275 ("Because [the Director Defendants'] conduct breaches the Director Defendants' duty of care, this violation is exculpated by the Section 102(b)(7) provision in the Company's charter and therefore the Director Defendants' motion to dismiss for failure to state a claim must be granted."); *see also Malpiede v. Townson*, 780 A.2d 1075, 1093 (Del. 2001) (affirming dismissal of duty of care claim on the pleadings based on Section 102(b)(7) provision in company's charter); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 501 (Del. Ch. 2000) (dismissing claims "to the extent that those claims are premised upon allegations that the defendant directors failed to meet the requisite standard of care[.]"); *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 734 (1999) ("The function of the § 102(b)(7) Provision is to render duty of care claims not cognizable and to preclude plaintiffs from pressing claims of breach of fiduciary duty, absent the most basic factual showing (or reasonable basis to infer) that the directors' conduct was the

product of bad faith, disloyalty or one of the other exceptions listed in the statute."); *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 619 (Del. Ch. 1999) (summarily dismissing duty of care claim); *cf. Arnold v. Soc'y for Savs. Bancorp.*, 678 A.2d 533, 541-42 (Del. 1996) (affirming summary judgment based on exculpatory clause).

B. *Even Absent The Exculpatory Clause In BearingPoint's Charter, Plaintiffs' Allegations Still Would Not Constitute Breaches Of The Duty Of Care Sufficient To Survive Demurrer*

Even if Plaintiffs' duty of care claims were not barred by Section 102(b)(7), Plaintiffs have failed to state a cause of action for breach of the fiduciary duty of care. Plaintiffs' conclusory assertion that the Former Outside Directors failed to properly engage themselves in BearingPoint's sales process are plainly contradicted by the factual allegations in the Complaint.

First, the Board retained a battery of the world's most sophisticated legal and financial advisors to assist in the process. *See* Compl. ¶¶ 66, 98, 242, 260. The retention of sophisticated and independent legal and financial advisors supports a finding that the Former Outside Directors fulfilled their fiduciary duty of care. *See Citron v. Fairchild Camera & Instrument, Corp.*, 569 A.2d 53, 67 (Del. 1989) (affirming lower court's finding that board fulfilled its fiduciary duties where board received advice from investment advisors).

Second, Davis Polk – one of the country's leading firms in the mergers and acquisitions arena – advised the Board that it had satisfied its fiduciary duties. *See* Compl. ¶ 265. Under the DGCL, the Board is entitled to rely on the opinion of experts it retains for advice and is "fully protected" from liability when it relies on that advice in good faith. *See* 8 Del. C. § 141(e); *see also Brehm*, 746 A.2d at 262 (holding that board's good faith reliance on opinion of retained expert defeats duty of care claim).[7]

[7] Significantly, Plaintiffs do not dispute that this advice was within Davis Polk's professional competence or claim that Davis Polk's retention was attributable to a faulty selection process. Nor do

Third and finally, the Complaint also admits several facts establishing that the Board was informed and engaged in the sales process. For example, in the fall of 2007, the Board actively pursued a strategy of divesting one of its business units until it became evident that the divestiture would not close as planned because of insufficient interest by the potential acquirers. Compl. ¶¶ 71-86. In the spring of 2008 the Board oversaw a sales process that included a "plethora" of potential buyers, *id.* ¶ 166, at least three of which conducted due diligence. *See id.* ¶¶ 199, 287. The Board formed a Special Committee of independent directors to oversee negotiations with Cerberus in May 2008. *Id.* ¶ 229. And the Complaint repeatedly asserts that the Former Outside Directors were informed about the Company's deteriorating finances, expressions of interest by potential acquirers, negotiations with Cerberus, and Harbach's handling of the process. *Id.* ¶¶ 148, 168-69, 231, 234, 275.

The fact that Plaintiffs now speculate in hindsight that a hypothetical sales process might have resulted in a higher sales price for BearingPoint does not establish a breach of the duty of care under Delaware law.[8]

Plaintiffs state any reason why the Former Outside Directors should not have reasonably relied on the advice in good faith. *Cf. Brehm*, 746 A.2d at 262.

[8] The Complaint vaguely alleges that defendants breached their "duty of loyalty." To succeed on such a claim, a plaintiff must show that directors consciously diverted corporate assets, opportunities, or information for personal gain. While it is unclear if Plaintiffs are asserting such a claim against the Former Outside Directors, the Complaint does not contain a single allegation that any of the Former Outside Directors diverted such assets, opportunities, or information. Nor does the Complaint allege that the Former Outside Directors in any way acted in bad faith. Therefore, to the extent Plaintiffs seek to bring a duty of loyalty claim against any of the Former Outside Directors, it should be dismissed for failure to provide basic notice pleading to the Former Outside Directors.

CONCLUSION

At the end of the day, it is not enough that Plaintiffs speculate, in hindsight, that a different sales process could have resulted in a different outcome for BearingPoint. Their failure to plead facts establishing that the Former Outside Directors' conduct rose to the level of a breach of the fiduciary duty of care under Delaware law and, indeed, the Complaint's explicit admission of contrary facts requires that the Court sustain this Plea in Bar and/or Demurrer and dismiss the Complaint with prejudice.

Dated: November 21, 2011

Respectfully,

By: _____

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