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.	)	Civil Action No. 2011-10612
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.	)	

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

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Plaintiffs' Opposition fails to show (1) that the Complaint[1] could possibly state a claim for breach of the duty of care and (2) that even if it did, any such breach would not be exculpated. Instead, Plaintiffs attempt to re-cast their duty of care allegations as a claim for breach of the duty of loyalty – *i.e.*, that the Former Outside Directors acted in bad faith and in *intentional* dereliction of their responsibilities – despite the fact that the Complaint contains no support for any duty of loyalty allegations and the standard for pleading such breaches is even higher than alleging a violation of the duty of care.

A breach of the duty of loyalty premised on bad faith is "the conscious doing of a wrong because of dishonest purpose or moral obliquity." *McGowan v. Ferro*, 859 A.2d 1012, 1036 (Del. Ch. 2004). As the Delaware Supreme Court recently explained:

> Directors' decisions must be reasonable, not perfect. In the transactional context, an extreme set of facts is required to sustain a disloyalty claim premised on the notion that disinterested directors were intentionally disregarding their duties . . . . Only if [directors] knowingly and completely failed to undertake their responsibilities would they breach their duty of loyalty.

Lyondell Chemical Co. v. Ryan, 970 A.2d 235, 243 (Del. 2009) (quotations and alterations omitted). Plaintiffs' invitation to extend this doctrine to allegations that suggest in hindsight that the directors *should have* heeded supposed warnings or *should have* been more proactive – in other words, allegations of unintentional conduct – must be declined. Also, merely arguing, without any supporting facts, that the Former Outside Directors consciously disregarded their duties is not enough to avoid dismissal. Delaware courts routinely dismiss unsupported duty of loyalty claims like those here even when the plaintiffs append conclusory terms such as "consciously" and "intentionally" to their allegations.

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[1] Capitalized terms not otherwise defined shall have the same meanings as those set forth in the Former Outside Directors' opening brief, dated November 21, 2011.

ARGUMENT

I. Plaintiffs Concede That The Directors Did Not Breach The Duty of Care And Mis-Read The Law Regarding Exculpation

The Former Outside Directors' opening brief demonstrated that their Demurrer is meritorious because the Complaint fails to state claim against them for a breach of the duty of care and that, even if it did, their Plea in Bar should be sustained because Former Outside Directors are exculpated by the Section 102(b)(7) provision in BearingPoint's charter. *See* Def. Br. at 9-13. Indeed the Complaint itself alleges that the Former Outside Directors retained sophisticated advisors and relied on legal advice throughout the sales process. These undisputed facts establish that they did not breach their duty of care. *See* Def. Br. at 12. Plaintiffs' opposition does not dispute this, and therefore concedes it. Instead, Plaintiffs try to argue that their pleadings "sufficiently allege violations of directors' duty of loyalty or good faith" such that the Court "should not address the potential application of a Section 102(b)(7) provision" at this stage of the proceedings. *See* Opp. at 12-13. Plaintiffs are incorrect. Accordingly, the only conclusion is that the unrebutted application of the Section 102(b)(7) charter provision requires the dismissal of the claims for breach of the duty of care.

A. *The Entire Fairness Standard Does Not Apply*

Plaintiffs misstate Delaware law in arguing that the Court must determine whether the conduct in question meets the "entire fairness" standard before addressing the application of Section 102(b)(7).[2] *See* Opp. at 12-13 (citing *Emerald Partners v. Berlin*, 787 A.2d 85, 92 (Del. 2001)). In order to make this argument, Plaintiffs conflate two separate and distinct scenarios in

[2] Plaintiffs' argument that the exculpatory clause authorized by Section 102(b)(7) does not dispose of their purported duty of loyalty claims misses the point. *See* Opp. at 17. The Former Outside Directors do not argue they should "obtain a dismissal of the plaintiffs' loyalty claims as a result of the exculpatory charter provision; they obtain a dismissal *because* the complaint fails to properly plead a loyalty claim or another claim premised on behavior not immunized by the exculpatory charter provision." *McMillan v. Intercargo Corp.*, 768 A.2d 492, 501 (Del. Ch. 2000) (emphasis in original).

which Delaware law requires the "entire fairness" standard of review. Neither scenario is remotely applicable here.

First, as the Delaware Supreme Court explained in *Emerald Partners*, for certain types of transactions not at issue here (involving buyouts of companies by controlling shareholders or other insiders who have an inherent conflict of interest), entire fairness is the standard of review *ab initio*. That is because "by definition, the inherently interested nature of those transactions are inextricably intertwined with issues of loyalty." 787 A.2d at 93. In such cases, "injury or damages becomes a proper focus only *after* a transaction is determined *not* to be entirely fair. *A fortiori*, the exculpatory effect of a Section 102(b)(7) provision only becomes a proper focus of judicial scrutiny after the directors' potential personal liability for the payment of monetary damages has been established." *Id.* This case does not involve a buyout by a controlling shareholder nor do Plaintiffs allege that the Former Outside Directors stood on both sides of any transaction. Accordingly, no "entire fairness" analysis needs to be undertaken. *See Malpiede v. Townson*, 780 A.2d 1075, 1094-96 (Del. 2001) (dismissing complaint without "entire fairness" analysis); *McPadden v. Sidhu*, 964 A.2d 1262, 1275 (Del. Ch. 2008) (same); *see also Lyondell Chemical Co. v. Ryan*, 970 A.2d 235, 244 (Del. 2009) (granting summary judgment without "entire fairness" analysis).

Second, "entire fairness" comes into play when a plaintiff succeeds in rebutting the business judgment presumption of good faith and loyalty *at trial* and thereby shifts the burden to the directors to prove the entire fairness of their actions. *See Malpiede*, 780 A.2d at 1094 n.65 ("If the plaintiff were to establish by proof at trial a *prima facie* case of a loyalty violation, defendants would then have the burden to establish entire fairness."); *see also Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (noting that it is plaintiff's "evidentiary

burden" to rebut the business judgment rule). The Court need not conduct an "entire fairness" review merely because Plaintiffs have included purported duty of loyalty claims in the Complaint. It is true Plaintiffs must first plead sufficient facts to support a claim that withstands a demurrer. But that is only the first hurdle. And here Plaintiffs have failed to even do that. *See Malpiede*, 780 A.2d at 1094-96 (dismissing complaint pursuant to charter provision where plaintiffs did not sufficiently allege breach of duty of loyalty/bad faith by directors in connection with merger); *McPadden*, 964 A.2d at 1275 (same).[3]

II. Plaintiffs Have Failed To Meet Their Heavy Burden To Allege A Cognizable Breach Of The Duty Of Loyalty

A. *A Claim Of Bad Faith Requires Particularized Pleading That The Defendants Engaged In Intentional Wrongdoing*

Plaintiffs' contention that the Former Outside Directors violated their duty of loyalty by acting in bad faith simply has no basis in fact or law. "Bad faith is 'not simply bad judgment or negligence,' but rather 'implies the conscious doing of a wrong because of dishonest purpose or moral obliquity . . . it contemplates a state of mind affirmatively operating with furtive design or ill will.'" *McGowan v. Ferro*, 859 A.2d 1012, 1036 (Del. Ch. 2004) (quoting *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1208 n.16 (Del. 1993)). It can be shown by a fiduciary (i) *intentionally* acting in violation of the law or the corporation's best interests or (ii) *knowingly and completely* failing to act in a *conscious disregard* of his duties. *See In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006). It is among the highest standards in the law.

Recognizing a "vast difference between an inadequate or flawed effort to carry out

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[3] The cases cited by Plaintiffs are consistent. In *Alidina v. Internet.com Corp.*, No. 17235-NC, 2002 WL 31584292, at *5 (Del. Ch. Nov. 6, 2002), for example, the court held that the alleged facts, payment of bribes by the buyer to the CEO to obtain his approval for the merger at issue coupled with a "grossly inadequate" merger price stated a claim for breach of the duty of loyalty. Plaintiffs here plead no such facts.

fiduciary duties and a conscious disregard of those duties," courts have imposed a "high standard" on plaintiffs alleging that directors were intentionally disregarding their duties. *Robotti & Co., LLC v. Liddell*, No. 3128-VCN, 2010 WL 157474, at *11 (Del. Ch. Jan. 14, 2010) (quoting *Lyondell*, 970 A.2d at 243) (alterations omitted); *see also 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."). As the Delaware Supreme Court in *Lyondell* explained:

> In the transactional context, an extreme set of facts is required to sustain a disloyalty claim premised on the notion that disinterested directors were intentionally disregarding their duties . . . . Only if they knowingly and completely failed to undertake their responsibilities would they breach their duty of loyalty . . . . Instead of questioning whether disinterested, independent directors did everything that they (arguably) should have done to obtain the best sale price, the inquiry should have been whether those directors utterly failed to attempt to obtain the best sale price.

Lyondell, 970 A.2d at 243-44 (reversing denial of summary judgment and directing trial court to enter judgment for defendants).

As set forth in the Former Outside Directors' opening brief, under the business judgment rule, the Court begins with a baseline presumption that the Former Outside Directors acted in good faith, (loyally and with due care). Plaintiffs must overcome this presumption. That burden cannot be met by conclusory assertions. "[B]ad faith cannot be averred generally" to defeat this presumption, but rather "must be supported by particularized factual pleading." *In re IAC/InterActiveCorp Sec. Litig.*, 478 F. Supp. 2d 574, 605 (S.D.N.Y. 2007) (applying Delaware law); *see also Blackmore Partners L.P. v. Link Energy LLC*, 864 A.2d 80, 85 (Del. Ch. 2004) ("[T]o survive the motion to dismiss, the complaint must allege particularized facts that support an inference of disloyalty or a lack of good faith."); *McMillan v. Intercargo Corp.*, 768 A.2d

492, 500 (Del. Ch. 2000) (courts evaluating sufficiency of pleadings "will not rely upon conclusory allegations of wrongdoing or bad motive unsupported by pled facts").[4] In the Complaint's 343 paragraphs, Plaintiffs have failed to plead *any* facts, much less particularized facts, that would support a conclusion that the Former Outside Directors acted with "dishonest purpose or moral obliquity." *McGowan*, 859 A.2d at 1036. Indeed, the Former Outside Directors, who were advised by legal and financial experts throughout, had nothing to gain – and a great deal to lose – by the demise of BearingPoint. Plaintiffs do not refute this.

B. *The Delaware Chancery Court Routinely Rejects Similar Allegations*

Delaware courts have repeatedly dismissed complaints advancing the conclusory type of allegations Plaintiffs have highlighted in pages 15-16 of their brief. These allegations can be generally categorized as relating to (i) the board's alleged delegation of certain negotiations to Harbach (Opp. at 15-16); (ii) the board's alleged knowledge of Harbach's self-interest (Opp. at 16); (iii) the scope of the sales process (Opp. at 15); and (iv) financial reporting (Opp. at 15).

1. Delegation of Negotiations Is Not A Breach Of Fiduciary Duty

Plaintiffs contend that Defendants acted by bad faith because they "sat on their hands" and did not "wrest ... negotiations from Harbach's control." Opp. at 15. But Plaintiffs'

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[4] Solely by way of example, a plaintiff might seek to allege improper motive by pointing to a financial conflict shared by a majority of the board of directors. *See, e.g., Orman v. Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002) ("To rebut successfully business judgment presumptions in this manner, . . . a plaintiff must normally plead facts demonstrating that a *majority* of the director defendants have a financial interest in the transaction or were dominated or controlled by a materially interested director.") (emphasis in original) (punctuation omitted); *see also Pfeffer v. Redstone*, 965 A.2d 676, 690 (Del. 2009) (plaintiff failed to allege a valid claim for breach of the duty of loyalty because she did not allege that the directors "stood on both sides" of the transaction or "received a unique financial benefit to the exclusion of the shareholders"). In those cases, "it is well settled that plaintiffs' allegations of pecuniary self-interest must allow the Court to infer that the interest was of a sufficiently material importance, in the context of the director's economic circumstances, as to have made it improbable that the director could perform her fiduciary duties without being influenced by her overriding personal interest." *In re Gen. Motors (Hughes) S'holder Litig.*, No. 20269, 2005 WL 1089021, at *8 (Del. Ch. May 4, 2005) (quotations omitted). Plaintiffs have not made – because they cannot make – such allegations about *any* of the Former Outside Directors.

Complaint concedes (as it must) that the board empowered an Independent Committee composed of Messrs. Lord, Strange, and McGeary – not Harbach – to oversee negotiations with prospective bidders. *See* Compl. ¶ 229. Moreover, to the extent certain functions, including attendance at meetings and the back-and-forth negotiation of matters such as management equity, *see id.* ¶ 254, were delegated to Harbach by the Independent Committee,"[i]t is well within the business judgment of the Board to determine how merger negotiations will be conducted, and to delegate the task of negotiating to the Chairman and the Chief Executive Officer." *In re NYMEX S'holder Litig.*, Nos. 3621, 3835 (VCN), 2009 WL 3206051, at *7 (Del. Ch. Sept. 30, 2009); *see also State of Wisc. Inv. Bd. v. Bartlett*, No. 17727, 2000 WL 238026, at *7 (Del. Ch. Feb. 24, 2000) (board did not breach duty of loyalty or care by delegating handling of negotiations to its chairman, who had financial incentive to close the challenged transaction). Even the delegation of negotiating power to an officer with an obvious conflict of interest, which was not present here, does not rise to the level of bad faith – it goes at most to the duty of care (which is exculpated). *See McPadden*, 964 A.2d at 1274-75. Plaintiffs' suggestion that the Former Outside Directors acted in bad faith by allegedly not handling negotiations themselves is simply not the law.

2. Harbach's Incentive Compensation Did Not Create A Conflict, Much Less A *Known* Conflict

Five of the eight allegations listed by Plaintiffs as showing that the Former Outside Directors breached their duties of loyalty and good faith are simply different ways of saying that the Former Outside Directors had "knowledge" of Harbach's alleged self-interest. *See* Opp. at 15-16; *see also id.* at 14 ("The Director Defendants were well aware of Harbach's conflict of interest when they incentivized him with BearingPoint shares and restricted stock units…"). Delaware courts have repeatedly emphasized, however, that incentive-based compensation like

Harbach's does *not* create a conflict of interest – it aligns the interests of the recipient with shareholders. *See, e.g.*, *In re Pennaco Energy, Inc.*, 787 A.2d 691, 709 (Del. Ch. 2001) (grant of options was "consistent with a policy of aligning the board's interests with those of the stockholders").

Nor was Harbach's alleged interest in retaining his position post-merger an impermissible conflict. *See In re Alloy, Inc.*, No. 5626-VCP, 2011 WL 4863716, at *12 (Del. Ch. Oct. 13, 2011) (board did not act in bad faith by acquiescing to CEO and COO retaining their positions with company post-merger); *Morgan v. Cash*, No. 5053-VCS, 2010 WL 2803746, at *5 (Del. Ch. July 16, 2010) ("To view the retention of management on reasonable terms with suspicion would only undermine business practices that often facilitate the difficult transitions required when two businesses merge."); *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1002 (Del. Ch. 2005) (rejecting allegations that company CEO had "general incentive to cause the sale of the Company as a whole, so as to trigger change of control provisions that were personally lucrative, and had a particular incentive to sell to [a private equity buyer], because [it] offered the best, though not certain, potential for his continued employment"). Plaintiffs' conclusory assertion that the Former Outside Directors *actually knew* that Harbach had a conflict of interest based on his position and compensation package is belied by the clear Delaware jurisprudence on that issue.

3. Plaintiffs' Quibbles With The Sales Process Do Not Show Bad Faith

Plaintiffs' attacks on the sales process – *i.e.*, allegedly "suppressing or ignoring specific expressions of interest," *see* Opp. at 15 – fare no better, as such decisions are considered to implicate *at most* the duty of care and not the duty of loyalty. *See Alloy*, 2011 WL 4863716, at *8 (board's alleged failure to fully evaluate alternative transactions does not constitute bad faith but rather states "at best a claim for breach of duty of care," which was exculpated by corporate

charter); *McMillan*, 768 A.2d at 504-05 (the plaintiff's challenge to the type and scope of sales process employed "is the sort of quibble that, at best, raises a due care claim under Delaware law"); *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 731-32 (Del. Ch. 1999) ("If a complaint merely alleges that the directors were grossly negligent in performing their duties in selling the corporation, *without some factual basis to suspect their motivations*, any subsequent finding of liability will, necessarily, depend on finding breaches of the duty of care, not loyalty or good faith.") (emphasis added).

4. Financial Reporting

Plaintiffs' argument that the Former Outside Directors acted in bad faith by "[a]ffirmatively and knowingly generating, or causing the generation of, inaccurate and misleading financial information…", Opp. at 15, is contradicted by the allegations in the Complaint. The Complaint alleges, not that the Former Outside Directors played any direct role in the preparation of allegedly misleading financial forecasts, but that they reviewed and approved optimistic forecasts prepared by management without inquiring sufficiently into the feasibility of those forecasts. *See* Compl. ¶¶ 131, 137 (despite having "reason to suspect the feasibility of the 2008 Management Plan," the Former Outside Directors approved it "without adequate or good faith diligence into its feasibility"). Even if this were true, "board approval of a transaction, even one that later proves to be improper, without more, is an insufficient basis to infer culpable knowledge or bad faith on the part of individual directors." *Wood v. Baum*, 953 A.2d 136, 142 (Del. 2008). Putting aside Plaintiffs' legal conclusions as to the adequacy of the board's inquiry (which the Court need not accept as true on this demurrer), the question of whether the board conducted sufficient diligence into management's projected financials can only go to whether the directors breached their duty of *care*, not their duty of loyalty.

The Complaint also does not allege that the Former Outside Directors actually knew that

any projections were "inaccurate and misleading." Opp. at 15. First, they were, after all, *projections* of future results, not statements of fact. *Cf. Consol. Fisheries Co. v. Consol. Solubles Co.*, 112 A.2d 30, 37 (Del. 1955) ("It is the general rule that mere expressions of opinion as to probable future events, when clearly made as such, cannot be deemed fraud or misrepresentations."). Second, Plaintiffs concede, as they must, that Harbach "scoured" BearingPoint's business units to find opportunities to improve profitability and meet the objectives in the 2008 Management Plan. Compl. ¶¶ 126-27.[5]

C. *The Delaware Chancery Court Has Held That Allegations Far More Extreme Than These Do Not State A Claim*

The allegations in the Complaint do not come close to rising to the level of bad faith. The Delaware Chancery Court recently considered allegations strikingly similar to (but of a more extreme nature than) those at issue here in *McPadden v. Sidhu*, 964 A.2d 1262 (Del. Ch. 2008). There the plaintiff alleged that the company's board of directors acted in bad faith by entrusting the process of selling a business unit to its vice president – whom the board knew was conflicted by his desire to allow one particular buyout group to purchase the subject asset *because he himself led that buyout group*. *Id.* at 1266-68. Despite knowing of this obvious conflict, the

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[5] Plaintiffs' related suggestion that BearingPoint's reporting was in violation of Sarbanes Oxley, *see* Opp. at 15, is incorrect and irrelevant. Plaintiffs appear to imply in their brief that the Former Outside Directors breached their duty of oversight. The duty of oversight requires directors to take some measures to ensure that company officers do not create substantial liabilities for the company by, *e.g.*, engaging in accounting fraud. It is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996). In *Caremark*, the claim was that the "directors allowed a situation to develop and continue which exposed the corporation to enormous legal liability and that in so doing they violated a duty to be active monitors of corporate performance." *Id.* There are no such allegations here, nor does the Complaint allege that BearingPoint sustained any liability by violating Sarbanes Oxley or other reporting requirements. To withstand a motion to dismiss under this theory, "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." *Stone v. Ritter*, 911 A.2d 362, 372 (Del. 2006) (quoting *Caremark*, 698 A.2d at 971). To the extent Plaintiffs now seek to invoke the duty of oversight, their attempt should be rejected out of hand.

McPadden board allegedly failed to create a special committee or even engage in meaningful negotiations with the vice president's buyout group prior to signing a binding letter of intent. *Id.* at 1267. Yet the Delaware Chancery Court *still* found that the board's conduct was not in bad faith because there was no indication from the allegations that they acted in *conscious* disregard of their duties and, consequently, dismissed the complaint. *Id.* at 1274-75.

Even if this Court were to find that there are sufficient allegations that Harbach had a conflict (which the Former Outside Directors believe is not the case), the same result should obtain here where, based on the Complaint itself, the Former Outside Directors engaged in a substantially more robust process than the board in *McPadden*.

CONCLUSION

For the foregoing reasons, the Former Outside Directors' Demurrer should be sustained and the Complaint dismissed with prejudice. In the alternative, the Former Outside Directors' Plea in Bar should be sustained because they are exculpated for any alleged breach of their duty of care by BearingPoint's corporate charter.

Dated: February 10, 2012

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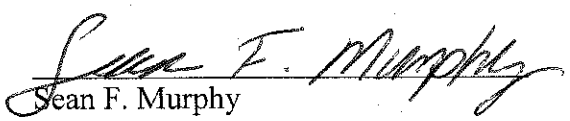

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