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Hearing Date: January 28, 2013, at 9:45 a.m.
Objection Deadline: January 14, 2013, at 4:00 p.m.

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re BEARINGPOINT, INC., *et al*., Debtors.	Chapter 11 Case No. 09-10691 (REG) (Jointly Administered)

NOTICE OF HEARING ON JOHN DeGROOTE'S MOTION FOR AN ORDER (A) ENFORCING CONFIRMATION ORDER, (B) HOLDING F. EDWIN HARBACH, RODERICK C. McGEARY, AND EDDIE R. MUNSON IN CONTEMPT, AND (C) IMPOSING SANCTIONS FOR WILLFUL VIOLATION OF CONFIRMATION INJUNCTION

PLEASE TAKE NOTICE that a hearing (the "**Hearing**") to consider John DeGroote's Motion for an Order (a) Enforcing the Confirmation Order, (b) Holding F. Edwin Harbach, Roderick C. McGeary, and Eddie R. Munson in Contempt, and (c) Imposing Sanctions For Willful Violation Of Confirmation Injunction, dated December 13, 2013 (the "**Motion**"), has been scheduled before 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, on **January 28, 2013, at 9:45 a.m.**, or as soon thereafter as counsel may be heard.

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 January 14, 2013** (the "**Response Deadline**"):

Counsel to Movant John DeGroote

Willkie Farr & Gallagher LLP
787 Seventh Avenue, New York, NY 10019
Attn: John C. Longmire, Esq. and Deirdre N. Hykal, Esq.

Counsel to the Liquidating Trustee

Bingham McCutchen LLP
399 Park Avenue
New York, New York 10022
Attn: Jeffrey S. Sabin, Esq.

-and-

Bingham McCutchen LLP
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Boston, MA 02110
Attn: Sabin Willett, Esq. and Andrew Gallo, 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.

Counsel for Roderick C. McGeary and Eddie R. Munson

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1750 Tysons Boulevard, Suite 1800
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Attn: Warren E. Zirkle, Sean F. Murphy, and Dion W. Hayes

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Counsel for F. Edwin Harbach

Blankingship & Keith, P.C.
4020 University Drive, Suite 300
Fairfax, Virginia 22030
Attn: William B. Porter

PLEASE TAKE FURTHER NOTICE that if no objection to the Application is received by the Objection Deadline, the relief requested shall be deemed unopposed, and the Bankruptcy Court may enter an order granting the relief sought without a hearing.

PLEASE TAKE FURTHER NOTICE that the moving and objecting parties are required to attend the Hearing, and failure to attend in person may result in relief being granted or denied upon default.

Dated: New York, New York
December 13, 2012

WILLKIE FARR & GALLAGHER LLP
Counsel for Movant John DeGroote

By: /s/ John C. Longmire
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UNITED STATES BANKRUPTCY COURT
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In re BEARINGPOINT, INC., *et al*., Debtors.	Chapter 11 Case No. 09-10691 (REG) (Jointly Administered)

MOTION FOR ORDER (A) ENFORCING CONFIRMATION ORDER, (B) HOLDING F. EDWIN HARBACH, RODERICK C. McGEARY, AND EDDIE R. MUNSON IN CONTEMPT, AND (C) IMPOSING SANCTIONS FOR WILLFUL VIOLATION OF CONFIRMATION INJUNCTION

John DeGroote, the sole member of John DeGroote Services, LLC, which serves as the Liquidating Trustee for the BearingPoint, Inc. Liquidating Trust (the "Trust"), by and through his attorneys Willkie Farr & Gallagher LLP, respectfully submits this Motion for an order (A) enforcing this Court's December 22, 2009 Order Confirming Debtors' Modified Second Amended Joint Plan Under Chapter 11 of the Bankruptcy Code (the "Plan") [Docket No. 1550] (the "Confirmation Order") in the above-captioned cases; (B) holding F. Edwin Harbach, Roderick C. McGeary, and Eddie R. Munson (collectively, the "Former Directors") in contempt of the Confirmation Order, and (C) imposing sanctions and fees on the Former Directors for willful violation of the Confirmation Order and injunctions contained therein. Mr. DeGroote

seeks this order pursuant to 11 U.S.C. §§ 1141(a), 1142(b), and 105(a), the retention of jurisdiction provisions in the Plan and Confirmation Order, and the Court's inherent judicial power to interpret and enforce its own orders.

PRELIMINARY STATEMENT

1. Almost three years after this Court limited the releases given to BearingPoint, Inc.'s former directors and almost two years after many of those same directors received notice that the Liquidating Trustee intended to sue them for conduct that fell outside the limited releases they were given, the Former Directors have filed a new lawsuit in Virginia against John DeGroote individually, claiming now that he supposedly represented them *personally* in their quest to be released by the company for which he served as general counsel, and should somehow have procured broader releases that would have shielded them from the very claims they soon will face at trial. The Former Directors' new lawsuit, filed in an apparent effort to seek some sort of litigation advantage as the Liquidating Trustee's action against them enters its final phase, has already required the diversion of time, attention, and funds otherwise dedicated to the Trust and that action and, if left unchecked, will continue to require such expenditures.

2. The Former Directors' actions are in direct violation of the clear release, injunction, exculpation, and jurisdictional provisions of the Plan and the Confirmation Order and, by this motion, Mr. DeGroote seeks to enforce those provisions. Specifically, Mr. DeGroote seeks an order of this Court that enforces the Confirmation Order, requires the Former Directors to voluntarily dismiss with prejudice the purported malpractice and fraud action filed against Mr. DeGroote (the "New Virginia Lawsuit," initiated by way of the "New Virginia Complaint" or "Complaint"), holds the Former Directors in contempt, and imposes sanctions on

the Former Directors for commencing and continuing this harassing lawsuit against Mr. DeGroote in willful violation of the Confirmation Order.

3. As the Court is well aware, John DeGroote Services, LLC (the "Liquidating Trustee"), of which Mr. DeGroote is the sole member, was appointed by order of this Court to serve as trustee of the Trust, and the purpose of the Trust is to maximize recoveries for the Debtors' general unsecured creditors. Mr. DeGroote, the Debtors' former President and Chief Legal Officer, is also the beneficiary of various release, injunction and exculpation provisions in the Plan and the Confirmation Order, which provisions were litigated before this Court with the active involvement and full knowledge of the Former Directors. As the Court also is well aware, the Liquidating Trustee, with this Court's explicit permission and after extensive briefing and argument by the Former Directors and others [Docket No. 2171], commenced an action against the Former Directors and six other former members of the BearingPoint, Inc. board of directors (collectively, the "Board") in the Circuit Court of Fairfax County, Virginia to recover damages resulting from the defendants' breaches of fiduciary duties to the Company (the "D&O Action").

4. The essence of the New Virginia Complaint is that Mr. DeGroote, as Chief Legal Officer for the Debtors, somehow (i) had individual, personal attorney-client relationships with each of the Former Directors; (ii) owed attorney-client duties to each of those directors in connection with the Debtors' fiduciary duty claims against them; (iii) conspired – despite the involvement of Debtors' bankruptcy counsel, Weil Gotshal & Manges LLP – to ensure that this Court would not grant the Former Directors releases broad enough to cover the claims asserted in the D&O Action; (iv) schemed to have this Court appoint his firm as Liquidating Trustee; and

(v) conspired to ensure that the Liquidating Trustee's compensation arrangement included incentives to maximize creditor returns based on, among other things, the D&O Action.

5. The irony of the Former Directors' position, of course, is that it is premised on the assumption that they did, in fact, breach their fiduciary duties to the Debtors. If they did not breach those duties, then they will face no liability in the D&O Action. If they do face liability, they argue that Mr. DeGroote failed to assist them adequately to foreclose these fiduciary duty claims by procuring full releases (of claims that by definition will have proved meritorious) for them in the Confirmation Order.

6. Mr. DeGroote was never engaged as counsel by any of the directors and officers individually, nor does the New Virginia Complaint allege that he was. He served as counsel to a corporation in chapter 11. No in-house attorney owes – or could owe – attorney-client duties to directors and officers to whom his client might at some point become adverse. And it was this Court, not Mr. DeGroote, that determined the scope of the Plan releases that apply to Mr. DeGroote and the Former Directors. (In fact, the Debtors sought broad releases for the Former Directors and, following an objection by the Official Committee of Unsecured Creditors (the "Creditors' Committee") that was litigated at the confirmation hearing, the Court determined to limit the scope of those releases.) Moreover, it was the Creditors' Committee, rather than Mr. DeGroote, that was empowered to recommend its choice of Liquidating Trustee to this Court.

7. The claims asserted in the New Virginia Lawsuit are released and enjoined under the Plan and the Confirmation Order. Because they are premised on facts related to the formulation, confirmation, and implementation of the Plan and related documents, they also are covered by the exculpation provisions of the Plan and Confirmation Order. And, as the Former

Directors must well recall from the motion practice and hearing that preceded the D&O Action, this Court retained exclusive jurisdiction to hear any and all claims such as these. The Former Directors thus are in contempt of the Plan and the Confirmation Order for filing the New Virginia Complaint, the New Virginia Lawsuit should be voluntarily dismissed with prejudice, and sanctions should be imposed.

BACKGROUND

A. The BearingPoint Chapter 11 Proceedings

8. On February 18, 2009, BearingPoint, Inc. ("BearingPoint" or the "Company") and certain of its affiliates (collectively, the "Debtors") filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). At that time, John DeGroote was the Chief Legal Officer, F. Edwin Harbach was a director and Chief Executive Officer, and Roderick McGeary and Eddie R. Munson were non-employee directors of BearingPoint, Inc. (Schedules 5 and 10 of Decl. of John DeGroote Pursuant to Local Bankruptcy Rule 1007-2 ("First Day Affidavit"), Feb. 18, 2009 [Docket No. 3].) During their chapter 11 proceedings, the Debtors engaged in a number of significant asset sales, and ultimately proposed a liquidating plan under which the Debtors' remaining assets, including causes of action, would be transferred to a liquidating trust, which would be administered for the benefit of general unsecured creditors.

9. The Debtors filed a plan seeking broad releases for directors and officers. The Creditors' Committee filed an objection to the scope of the releases. [Docket No. 1387] At the confirmation hearing, the Court denied the Debtors' request for broader releases for the Former Directors. The Court contrasted the Former Directors' entitlement to releases with that of Mr. DeGroote, noting that Mr. DeGroote was providing "material benefits to the liquidation

process," his release was "not a matter of debate," and "such a release could be entirely understandable, appropriate, justifiable and by itself, justify the grant of the release." (Confirmation Hrg. Tr. At 72-73 [Docket No. 1586].)

10. On December 22, 2009, this Court entered the Confirmation Order. The Plan and the Confirmation Order provide, in part: " **. . . each holder of a Claim or Equity Interest . . . shall be deemed to release unconditionally and forever (a) John DeGroote . . . from any and all Claims or causes of action whatsoever through the Effective Date**," except for willful misconduct, gross negligence, intentional fraud or criminal conduct. (Plan at § 10.8(a), Confirmation Order at ¶ 34(a) (emphasis added).) The Plan and Confirmation Order also provide that: "**all Persons or entities who have held, hold or may hold Claims against or Equity Interests in the Debtors are permanently enjoined, from and after the Effective Date, from . . . (e) acting or proceeding in any manner in any place whatsoever, that does not conform to or comply with the provisions of the Plan, (f) commencing, continuing or asserting in any manner any action or other proceeding of any kind with respect to any claims which are extinguished or released pursuant to the Plan.**" (Plan at § 10.4, Confirmation Order at ¶ 30 (emphasis added).) The Plan also provides that: "**none of the Debtors, the Liquidating Trust, the Liquidating Trustee . . . and their respective officers . . . [or] employees . . . shall have or incur any liability for any Claim, cause of action or other assertion of liability for any act taken or omitted to be taken in connection with, or arising out of, the Chapter 11 Cases, the formulation, dissemination, confirmation, consummation or administration of the Plan, property to be distributed under the Plan or any other act or omission in connection with the Chapter 11 Cases, the Plan (or any prior proposed version of the Plan) . . . and all such claims shall be deemed expressly waived and forever**

relinquished as of the Effective Date," except for willful misconduct, gross negligence, intentional fraud or criminal conduct. (Plan at § 10.7; Confirmation Order at ¶ 33 (emphasis added).) The Plan also provides that 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 of action brought by . . . each holder of a Claim or Equity Interest against any party granted a limited release in subparagraphs 34(a) and 34(b)" of the Confirmation Order. (Confirmation Order at ¶ 34(c).) Because each of the Former Directors held shares of BearingPoint's common stock (see Schedule 5 to the First Day Aff., [Docket No. 3]), and at least one was, among other things, a beneficiary of the Key Employee Incentive Plan approved by this Court [Docket No. 1128], they each fell within the Plan's definitions of holders of Claims and Equity Interests and, therefore, were releasors of Mr. DeGroote.

11. The Plan and Confirmation Order also contain limited releases of the Former Directors, among others, and a specific carve-out for claims such as those asserted in the D&O Action. (Confirmation Order at ¶¶ 34(a), 35.) Upon the effective date of the Plan, December 30, 2009, Mr. DeGroote ceased his tenure as President and Chief Legal Officer of the Debtors. On that date, the Debtors' remaining assets were transferred to the Trust, and John DeGroote Services, LLC became Liquidating Trustee.

B. The D&O Action

12. On November 29, 2010, the Liquidating Trustee moved this Court for entry of an order granting limited relief from the retention of exclusive jurisdiction provisions of the Confirmation Order to file a complaint in the Circuit Court of Fairfax County, Virginia, against each of the Former Directors as well six other members of the Board. [Docket No. 1977] As this Court explained, "The Trustee wishes to be relieved from requirements in [the Plan and

Confirmation Order] that provide, in substance, that any claims against BearingPoint's former officers an directors must be brought in this court and nowhere else." (Bench Decision on Liquidating Trustee's Motion for Relief from Plan and Confirmation Order ("Bench Decision"), July 11, 2011, [Docket No. 2171] at 3 (emphasis added).)

13. The Former Directors opposed the Liquidating Trustee's motion and agreed that this Court and the United States District Court for the Southern District of New York would have subject matter jurisdiction over the claims that would be brought by the Trustee against the Former Directors pursuant to 28 U.S.C. § 1334. *See id.* at 10.

14. Finding that the Trustee's prosecution of the proposed complaint in Virginia "would be violative of the Confirmation Order" absent relief from this Court, and also finding that the Trustee's claims were "colorable" and "not brought for the purposes of harassment," this Court granted the Trustee's motion for relief from the Confirmation Order for the limited purpose of permitting the Trustee to file the proposed complaint against the Former Directors in Virginia. (Bench Decision at 1, 19 [Docket No. 2171].)

15. On July 21, 2011, the Liquidating Trustee filed the D&O Action in the Circuit Court of Fairfax County, Virginia. In the D&O Action, the Liquidating Trust asserts various breach of fiduciary duty claims against each of the officer and director defendants. After an abortive attempt to remove the action to the United States District Court for the Eastern District of Virginia, it was remanded to state court, and the Former Directors filed a demurrer to have the action dismissed. The matter was extensively briefed and argued, and the demurrer was overruled on May 26, 2012. Fact discovery ended on November 30, 2012, and expert reports are due on December 14, 2012. A jury trial in the D&O Action is scheduled to begin on April 1, 2013.

C. The New Virginia Lawsuit

16. On November 15, 2012, two weeks before the close of fact discovery in the D&O Action, and a month before the expert reports are due, the Former Directors[1] commenced the New Virginia Lawsuit. A copy of the New Virginia Complaint is annexed hereto as Exhibit A. The Former Directors assert claims for malpractice and fraud against Mr. DeGroote for actions he allegedly took in his capacity as Chief Legal Officer of BearingPoint, during these chapter 11 cases, in connection with the formulation and filing of the Debtors' October 5, 2009 and December 17, 2009 proposed plans, and his appointment as Liquidating Trustee.

17. The Former Directors allege, inter alia, that "DeGroote attended meetings with the Board of Directors at least monthly and spent considerable time with the directors. In light of his substantial relationship with members of the Board, and as further detailed below, [the Former Directors] considered DeGroote to be their trusted advisor." (Compl. at ¶ 19.) Based on this alleged "substantial relationship," and citing no specific oral or written agreement under which Mr. DeGroote agreed to serve as their personal counsel at any time, the Former Directors now assert that Mr. DeGroote supposedly owed them "a duty of the utmost good faith, integrity, fairness and fidelity as well as to exercise a degree of care, skill, competence and diligence consistent with their professional relationship." (Id. at ¶¶ 1, 47.)

18. The Complaint focuses on advice Mr. DeGroote ostensibly provided at BearingPoint board meetings leading up to the October 5 filing of the proposed plan in the company's chapter 11 proceedings and the December 17 hearing on confirmation of the plan, all

[1] The New Virginia Complaint was filed by, among others, "Edward Munson"; however, in all relevant SEC filings, BearingPoint's then director's formal name was listed as "Eddie R. Munson." *See, e.g.*, BearingPoint, Inc. 2008 10-K dated June 5, 2009 (Noting reductions in the size of BearingPoint's Board and stating that, "[a]fter such resignations, the Board is currently composed of F. Edwin Harbach, Roderick C. McGeary, Frederic F. Brace and Eddie R. Munson.").

of which meetings were attended by the Company's outside counsel, Weil Gotshal & Manges LLP.

19. In particular, the Former Directors allege that outside counsel to BearingPoint advised the Board that the Creditors' Committee "was reluctant to agree to a full release to the directors," and that, in order to get a full release, the directors would have to pay consideration, settle potential claims against them, or conduct a full investigation into potential claims. (Id. at ¶¶ 29-34.)

20. The Former Directors allege that Mr. DeGroote counseled against such an independent investigation because it likely would cost millions of dollars and delay the filing of the proposed Plan. (Id. at ¶ 32.) (As the Court may recall, it was critical for tax reasons that the Plan be consummated by December 31, 2009.) The Former Directors claim that, but for this advice from Mr. DeGroote, the Board would have appointed a "non-conflicted" Chief Legal Officer, authorized an independent investigation, and obtained full releases from BearingPoint, thereby avoiding the D&O Action. (Compl. at ¶ 53.) There is no reason to assume, however, that a factual investigation conducted under this theory would have uncovered different facts than the factual investigation that was later conducted, and which has led two courts to conclude that the facts raise non-frivolous claims.

21. The Former Directors also claim that, while Mr. DeGroote was considering a potential role as Liquidating Trustee, "he did not disclose any potential conflict of interest arising from his intent to serve as Liquidating Trustee." (Id. at ¶ 27.) But, they admit that they were aware that Mr. DeGroote had been approached about the possibility of serving as the Liquidating Trustee. For example, at the November 16, 2009 Board Meeting, "the Board was informed that DeGroote was close to reaching an agreement with the Committee on

compensation" for his proposed role as Liquidating Trustee. (Id. at ¶ 35.) In any event, the entire "conflict" allegation is a red herring: it is common for a qualified in-house attorney to take on a post-confirmation role as a plan administrator or liquidating trustee and, moreover, there was no "conflict" because the Liquidating Trustee's claims in the D&O Action were previously owned by Mr. DeGroote's employer and client, BearingPoint. In other words, the Trust is the successor to the Debtors' estates for these claims, not in "conflict" with them. Before confirmation of the Plan, the Debtors (Mr. DeGroote's then employer and client) could have brought the claims asserted in the D&O Action.

22. The Former Directors also claim that Mr. DeGroote's compensation as Liquidating Trustee, which includes an incentive component and was approved and authorized by this Court, created some sort of conflict because it incentivized the Liquidating Trustee to bring the D&O Action.

23. Notwithstanding all these allegations, the Debtors, in fact, filed a plan that proposed broad releases for the Former Directors. [Docket No. 1326] The Creditors' Committee opposed those releases [Docket No. 1387] and this Court heard extensive argument on the subject at the Plan Confirmation Hearing. At the conclusion of that hearing, the Court itself limited the releases provided to the Former Directors and retained for the Trust the ability to bring a breach of fiduciary claim against them. The Liquidating Trustee is now pursuing such claims against the Former Directors for the benefit of the creditors.

ARGUMENT

I. THE COURT SHOULD ORDER PLAINTIFFS TO VOLUNTARILY DISMISS THE NEW VIRGINIA LITIGATION PURSUANT TO THE TERMS OF THE CONFIRMATION ORDER.

24. This Court has the inherent power to enforce its own orders, and should do so against the Former Directors. In Travelers Indem. Co. v. Bailey, the Supreme Court confirmed that a "Bankruptcy Court plainly ha[s] jurisdiction to enforce its own prior orders," 557 U.S. 137, 154 (2009) (holding that the Bankruptcy Court for the Southern District of New York was entitled to enforce the release-granting provisions included in an order confirming the debtors' bankruptcy plan); see also In re Spiegel, No. 03-11540, 2006 WL 257785, at *7 (S.D.N.Y. Aug. 16, 2006) ("A Bankruptcy Court also has inherent or ancillary jurisdiction to interpret and enforce its own orders, including the Confirmation Order . . . ."). Accordingly this Court should order the Former Directors to voluntarily dismiss the New Virginia Lawsuit with prejudice because, as set forth below, it violates the release, injunction, and exculpation provisions of the Confirmation Order, no carve-out to those provisions applies, it is an improper collateral attack on this Court's various orders, and it violates the gatekeeper provision of the Confirmation Order.

A. The New Virginia Lawsuit Violates The Release, Injunction And Exculpation Provisions Of The Confirmation Order.

25. The Confirmation Order contains an explicit release of Mr. DeGroote *by name* from exactly the types of claims that the Former Directors assert in the New Virginia Lawsuit. (Confirmation Order at ¶ 34(a).) Specifically, paragraph 34(a) of the Confirmation Order states, in relevant part:

> Effective as of the date hereof . . . each holder of a Claim or Equity Interest regardless of whether such holder abstained from voting or voted to accept or voted to reject the Plan, shall be deemed to

> release unconditionally and forever (a) John DeGroote . . . from any and all Claims or causes of action whatsoever through the Effective Date; provided however, that the foregoing shall not operate as a waiver of or release from any causes of action arising out of the willful misconduct, gross negligence, intentional fraud, or criminal conduct of any such person or entity . . . . Provided, further, that nothing herein shall limit the liability of the Debtors' professionals to their clients contrary to the requirement of Rule 1.8(h)(1) of the New York Rules of Professional Conduct.

Paragraph 30 of the Confirmation Order, which is labeled "Injunction," states, in relevant part:

> Pursuant to Section 10.4 of the Plan, except as otherwise expressly provided herein or in the Confirmation Order, all Persons or entities who have held, hold or may hold Claims against or Equity Interests in the Debtors are **permanently enjoined**, from and after the Effective Date, from . . . (e) acting or proceeding in any manner in any place whatsoever, that does not conform to or comply with the provisions of the Plan, (f) commencing, continuing, or asserting in any manner any action or other proceeding of any kind with respect to any claims which are extinguished or released pursuant to the Plan . . . .

26. As discussed above, as shareholders of BearingPoint, each of the Former Directors was the holder of an Equity Interest in the Debtor. It is without question, therefore, that the Former Directors released Mr. DeGroote for "any and all . . . causes of action whatsoever," except for those causes of action that are explicitly carved out of the release. In the New Virginia Lawsuit, the Former Directors assert a claim for malpractice, which, in all potentially relevant jurisdictions,[2] sounds in either negligence or contract. See, e.g., Tommy Gio, Inc. v. Dunlop, 348 S.W.3d 503, 507 (Tex. App. Dallas 2011) ("An attorney malpractice action in Texas is based on negligence."). Accord Russo v. Feder, Kaszovitz, Isaacson, Weber,

[2] The Former Directors have filed their case in Virginia. Federal courts in New York have exclusive jurisdiction. Mr. DeGroote is a Texas resident, BearingPoint was headquartered in Dallas, Texas during the time period of the allegations (*see, e.g.*, BearingPoint, Inc. 2008 10-K dated June 5, 2009 ("Our corporate headquarters are currently located at 100 Crescent Court, Suite 700, Dallas, Texas 75201.")), and the board meetings referenced in the Complaint occurred either telephonically or in person in Dallas, Texas (*see* Complaint ¶ 34 ("On November 16, 2009, the Board held its final in-person meeting in Dallas, Texas.")).

Skala & Bass, LLP, 301 A.D.2d 63, 67 (N.Y. App. Div. 1st Dep't 2002) ("As we have often stated, an action for legal malpractice requires proof of the attorney's negligence . . . ."); Gregory v. Hawkins, 468 S.E.2d 891, 893 (Va. 1996) (requiring plaintiff to plead that defendant "neglected or breached" his duty to his client). The Former Directors' malpractice claim, as a cause of action sounding in negligence or contract, rather than one of the explicitly excluded types of actions, was thus released by the Confirmation Order.

27. In addition, the Plan and Confirmation Order contain a section titled "Exculpation," which states, in relevant part:

> None of the Debtors, the Liquidating Trust, the Liquidating Trustee . . . and their respective officers, . . . [or] employees . . . shall have or incur any liability for any Claim, cause of action or other assertion of liability for any act taken or omitted to be taken in connection with, or arising out of, the Chapter 11 Cases, the formulation, dissemination, confirmation, consummation or administration of the Plan, property to be distributed under the Plan or any other act or omission in connection with the Chapter 11 Cases, the Plan (or any prior proposed version of the Plain) . . . and all such claims shall be deemed expressly waived and forever relinquished as of the Effective Date, *provided however*, that the foregoing shall not affect the liability of any Person that otherwise would result from any such act or omission to the extent such act or omission is determined by a Final Order to have constituted willful misconduct, gross negligence, intentional fraud, or criminal conduct of any such person or entity. Provided, further . . . that nothing herein shall limit the liability of the Debtors' professionals to their clients contrary to the requirement of Rule 1.8(h)(1) of the New York Rules of Professional Conduct.

Plan at § 10.7; Confirmation Order at ¶ 33 (emphasis in original).

28. The purportedly conflicted advice that the Former Directors allege Mr. DeGroote gave to the Board regarding director releases was all given in connection with the formulation of the plans proposed by the Debtors in October and December 2009. Any claims

related to such advice are expressly precluded by the Exculpation provision of the Confirmed Order and Plan.

B. No Carve-Out To The Release Or Exculpation Provisions Applies Here.

29. Although the Former Directors may point to either Rule 1.8(h)(1) of the New York Rules of Professional Conduct or the fraud carve-outs embodied in the release and exculpation clauses to justify their actions, no carve-out applies here.

30. First, the Former Directors can find no relief from the terms of the release or the exculpation provisions under the carve-out for Rule 1.8(h)(1). That rule, which prohibits attorneys from "mak[ing] an agreement prospectively limiting the lawyer's liability to a client for malpractice," N.Y. Comp. Code R. & Regs., Tit. 22, § 1200.8 (emphasis added), is inapplicable here. Rule 1.8(h)(1) precludes only the release of "prospective" claims of professional misconduct. Id. The claims brought by the Former Directors are not prospective; rather, they are for conduct that took place prior to the Plan's effective date and, therefore, are released.

31. Second, it is well-settled that a company's in-house counsel shares an attorney-client relationship with the company and not any individuals within that company absent an explicit agreement to the contrary. Talvy v American Red Cross in Greater N.Y., 205 A.D.2d 143, 149 (N.Y. App. Div. 1st Dep't 1994) ("Unless the parties have expressly agreed otherwise in the circumstances of a particular matter, a lawyer for a corporation represents the corporation, not its employees."); accord Tex. R. Prof Conduct 1.12(a) ("A lawyer employed or retained by an organization represents the entity.") and Va. Sup. Ct. R. pt. 6, sec. II, 1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."). None of the Former Directors has alleged – because none can –

any agreement between himself and Mr. DeGroote in which Mr. DeGroote agreed to act as the Former Director's personal attorney.

32. Simply saying in the Complaint that the Former Directors had an "attorney-client relationship" with Mr. DeGroote does not make it so. Mr. DeGroote was counsel to the Company (Compl. ¶¶ 1, 9), and the underlying issue of the releases concerned potential claims that Mr. DeGroote's client held against the Former Directors. It is neither credible nor plausible to assert that the President and Chief Legal Officer of the Company had a legal obligation to put the Former Directors' personal interests above those of the Company, particularly in connection with claims that those directors had caused harm to the Company. To suggest that the duty of a lawyer for a debtor-in-possession is to ensure that the estate does not pursue potentially valid claims against directors who have breached duties to the company is a ludicrous inversion of corporate responsibilities. To put a finer point on it, because Mr. DeGroote's client was BearingPoint, not the Former Directors, the Former Directors cannot avail themselves of the Rule 1.8(h)(1) exception to the release and exculpation based on certain attorney-client claims.

33. In addition, the carve-out for Rule 1.8(h)(1) relates to liability of "the Debtors' professionals to their clients," i.e., to the Debtors. Confirmation Order at ¶ 31. So, even if Mr. DeGroote did have some sort of attorney-client relationship with the Former Directors (which he did not), the carve-out would not apply to that relationship because, by its terms, the Rule 1.8(h)(1) carve out is restricted to liability owed by a Debtors' professional to the *Debtors*, and not to individuals such as the Former Directors.

34. Third, the Former Directors' assertion of a spurious "fraud" claim does not shoehorn the Complaint into any carve-out. Their transparent attempt to controvert the plain

language and intent of the Confirmation Order, and sledgehammer their claims into the narrow fraud exception to the release and exculpation provisions, must be rejected because the Complaint fails to state a claim for fraud and impermissibly duplicates the malpractice claim.

35. As a threshold matter, the purported fraud claim is deficient on its face. The Complaint contains not even a modicum of the precision and specificity required to state a fraud claim. See Bankr. R. Civ. P. 7009 (applying Fed. R. Civ. P. 9 to bankruptcy proceedings); Rombach v. Chang, 355 F.3d 164, 170 (2d Cir. 2004) (affirming dismissal of fraud claim on the pleadings because the plaintiffs failed to allege with specificity "the statements that the plaintiff contends were fraudulent," "the speaker," "where and when the statements were made," and "why the statements were fraudulent."); accord Ward's Equip., Inc. v. New Holland North Am., Inc., 493 S.E.2d 516, 521 (Va. 1997) (Affirming trial court's dismissal of fraud claim, and stating that "[g]eneralized, nonspecific allegations . . . are insufficient to state a valid claim of fraud" in Virginia).

36. To state a claim for fraud, the Former Directors must plausibly allege with particularity that Mr. DeGroote knowingly made a false or misleading statement or omission, that he had a duty to disclose any supposedly omitted information, that he intended the Former Directors to rely on the misstatement or omission, that they did rely on it, and suffered harm as a result. See, e.g., Hall v. Douglas, 2012 Tex. App. LEXIS 7281, 2012 WL 3756267 at *8 (Tex. App. Dallas Aug. 29, 2012); State Farm Mut. Auto. Ins. Co. v. Remley, 618 S.E.2d 316, 321 (Va. 2005); Mortarino v. Consultant Eng'g Servs., 467 S.E.2d 778, 782 (Va. 1996); Eurycleia Partners, LP v. Seward & Kissel, LLP, 849 N.Y.S.2d 510, 512 (N.Y. App.Div. 1st Dep't 2007), aff'd, 910 N.E.2d 976 (N.Y. 2009). In the New Virginia Lawsuit, the Former Directors fail to state a fraud claim because the conclusory allegations of a false statement or omission, duty,

motive, reliance and harm are not supported by well-pleaded facts. In many instances, the conclusory allegations defy common sense and are in stark contrast to factual allegations in the Complaint or the judicial proceedings whereby this Court confirmed the Plan and appointed the Liquidating Trustee. These inconsistencies and far-fetched theories are so implausible as to make the fraud allegations insufficient as a matter of law. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face."). Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

37. For example, the Former Directors' claim that the Company's Chief Legal Officer owed them a duty as their counsel in connection with the releases cannot be reconciled with the undisputed fact that Mr. DeGroote was counsel for the Company. The Former Directors' claim that Mr. DeGroote failed to disclose a supposed personal financial interest in pursuing claims against the Former Directors is belied by their admission that they knew at the time when they supposedly relied on Mr. DeGroote's "conflicted" advice that he may become the Trustee and would be compensated in that capacity (Compl. ¶ 35). Their bald assertion that Mr. DeGroote was motivated to commit fraud by the possibility of compensation in his potential role as Trustee is precisely the type of scienter allegation that courts routinely hold is insufficient as a matter of law. See, e.g., Rombach, 355 F.3d at 177. Moreover, the Former Directors' conclusory allegation of harm -- that Mr. DeGroote's purported advice not to seek a delay in confirmation to conduct an investigation was the determinative factor in Company's failure to obtain broad releases for the Former Directors – is flatly contradicted by a number of intervening factors, including that the Debtors actually proposed broad releases that the Court decided to limit in the best interest of the Estate, and that a later independent investigation resulted in the

assertion of claims against the Former Directors, rather than exonerating them as the Former Directors suggest it would have. Taken as a whole, the Former Directors' conclusory fraud allegations simply are not plausible and must be rejected. Iqbal, 566 U.S. at 686.

38. The fraud claim also is subject to dismissal as a matter of law for the independent reason that a fraud claim cannot lie where, as here, it is entirely duplicative of a malpractice claim. See, e.g., Sledge v. Alsup, 759 S.W.2d 1, 2 (Tex. App. El Paso 1988) (affirming trial court's dismissal of duplicative fraud claim because "[n]othing is to be gained by fracturing a cause of action arising out of bad legal advice or improper representation into claims for . . . fraud"); Waggoner v. Caruso, 873 N.Y.S.2d 238, 21-22 (Sup. Ct. N.Y. Cty. 2008) (stating that fraud claim "may not be founded upon the same underlying allegations as the malpractice claim, and must seek different relief"). Accordingly, the Court should reject the Former Directors' transparent attempt to conjure up a "fraud" claim to circumvent their releases and the exculpation of Mr. DeGroote.[3]

C. The New Virginia Lawsuit Is An Improper Collateral Attack On The Court's Prior Orders And Is Barred Under Principles Of *Res Judicata*.

39. In addition to violating the terms of the Confirmation Order, the New Virginia Lawsuit is barred by principles of *res judicata*, because it constitutes an improper collateral attack on this Court's orders granting releases and exculpation to Mr. DeGroote and appointing the Liquidating Trustee. In an analogous case, in which claims were released under a plan yet later pursued, the Supreme Court found the lawsuit to be an improper attack on the Bankruptcy Court's prior order and barred by the principles of *res judicata*. Travelers, 557 U.S.

[3] In addition, the fraud claim, involving 2009 conduct but not asserted until last month, is barred by the two-year statute of limitations in Virginia. Va. Code Ann. Sections 8.01-243 (a) & 249(1) (2007 Repl. Vol. & 2012 Cum. Supp.). Here, the Former Directors were aware of any potential fraud no later than December 22, 2009, the date the Plan was confirmed (and in all likelihood, much earlier). As the Court itself noted in the Hearing on the Trustee's Motion for Limited Relief from the Plan and Confirmation Order, "everybody in the world knew that there was the potential for these [D&O] claims at the time." [Doc. No. 2020]

at 154 (2009) (finding the plaintiffs' lawsuit to be an impermissible collateral attack on the bankruptcy court's order); In re Spiegel, 2006 WL 257785, at *13 ("Once, as here, a confirmation order has become final and nonappealable, a collateral attack on the order is precluded by *res judicata* principles . . . .").

40. The New Virginia Lawsuit is also a none-too-subtle attack on the integrity of this Court's orders and jurisdiction, and its very appointment of Mr. DeGroote as the Trustee and his court-approved compensation. By alleging that Mr. DeGroote committed legal malpractice and fraud, supposedly in his role as Chief Legal Officer to the Debtor advising on the Plan, and in connection with his appointment as Liquidating Trustee, the Former Directors seek to upset this Court's appointment of the Trustee and to disrupt the D&O Action, which this Court explicitly gave the Trustee leave to file. Such a collateral attack challenges the integrity and finality of this Court's orders, and would, if countenanced, make any party in a bankruptcy case think twice (or more) before agreeing to take on a fiduciary, post-confirmation role. Moreover, if the Former Directors are not ordered to pay Mr. DeGroote's costs in connection with this spurious action, the Trust's indemnity obligations to Mr. DeGroote may reduce the amounts available to Creditors in these cases, which should be of particular concern to this Court.

41. The very purpose of the exculpation provision is to prevent these sorts of collateral attacks. The Debtors' professionals and the Liquidating Trustee, in particular, are exculpated from any liability in connection with any act taken or omitted to be taken in connection with, or arising out of, the chapter 11 proceedings, including the formulation of the Plan or prior plans; in other words, just the sort of activities the New Virginia Lawsuit attacks. Exculpation is designed to ensure that those acting in furtherance of the chapter 11 proceedings

are not hamstrung from acting in the best interest of the estate or trust because they fear reprisals from parties who begrudge their legitimate actions – reprisals such as the New Virginia Lawsuit. To allow defendants in estate actions to attack the legitimacy of Debtors' counsel's advice regarding the Plan or a court-appointed trustee's compensation, particularly in an attempt to gain some sort of leverage to reduce their liability to the estate, is precisely what the exculpation provision is designed to prevent. The New Virginia Lawsuit is thus prohibited for this additional reason.

D. The New Virginia Lawsuit Violates The Gatekeeper Provision In The Confirmation Order.

42. The Court retained exclusive jurisdiction over any claims against any releasee – including Mr. DeGroote. Subparagraph (c) of the release provision in the Confirmation Order (the "Gatekeeper" provision) states:

> 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 [sic] action brought by . . . (b) each holder of a Claim or Equity Interest against any party granted a limited release in subparagraphs 34(a) and 34(b), above.

Irrespective of the merits—or lack thereof—of the Former Directors' claims, to the extent they were not prohibited by the release and exculpation provisions, see supra sections I.A-C, the Former Directors were required to bring them before this Court in the first instance, either to litigate them here or to seek leave to file them elsewhere.

43. The Former Directors are well aware of this requirement, having previously participated in proceedings before this Court pursuant to the Gatekeeper provision. Indeed, in those proceedings, the Former Directors agreed that the Court had retained exclusive jurisdiction over claims, like theirs against Mr. DeGroote, that are alleged against the Plan releasees.

E. The Court Should Enforce The Confirmation Order And Order The Former Directors to Voluntarily Dismiss the New Virginia Lawsuit And Enjoin Them From Re-Filing It.

44. Pursuant to the Court's inherent power to enforce its own orders, see Travelers, 557 U.S. at 151, this Court should order the Former Directors to voluntarily dismiss the New Virginia Lawsuit with prejudice. Allowing the Former Directors to proceed with the New Virginia Lawsuit, in contravention of the injunction, release, and exculpation provisions of the Plan and Confirmation Order, would set a dangerous precedent. If every plan administrator or liquidating trustee pursuing assets for the benefit of creditors had to fear a personal lawsuit relating to his or her participation in the formulation of the court-approved plan that conveys the authority to assert those litigation claims, then the integrity of the entire bankruptcy process would be undermined. See, e.g., Satterfield v. Malloy, No. 11-5144, 2012 WL 5935951, at *2 (10th Cir. Nov. 28, 2012) (finding that the plaintiffs must obtain leave of the court before filing suits against bankruptcy trustees because "if [the trustee] is burdened with having to defend against suits by litigants disappointed by his actions on the court's behalf, his work for the court will be impeded" (quoting In re Linton, 136 F.3d 544, 545 (7th Cir 1998))).

45. This Court already has enjoined the Former Directors from bringing the claims they now assert in the New Virginia Lawsuit. (Confirmation Order ¶¶ 30, 33, 34.) The Court should enforce its prior order and require the Former Directors to voluntarily dismiss the New Virginia Lawsuit with prejudice.

46. Even if the Court were not to preclude the Former Directors' specious fraud claim, the Court should, at a minimum, order the Former Directors to abide by the Gatekeeper provision and require the Former Directors to voluntarily dismiss the New Virginia Lawsuit and bring any purported fraud action against Mr. DeGroote in this Court.

47. By filing the New Virginia Lawsuit in an inappropriate forum, the Former Directors have attempted to create a situation in which Mr. DeGroote would be forced to (a) spend extra time and resources explaining the BearingPoint chapter 11 proceedings to a court unfamiliar with its history, and (b) engage in extensive litigation and motion practice simply to get the case before the proper court, *i.e.*, this Court. Already, in addition to filing the present Motion, which seeks to enforce an order that was intended to avoid this needless litigation in the first place, Mr. DeGroote has had to prepare papers to remove the New Virginia Lawsuit to the U.S. District Court for the Eastern District of Virginia and, immediately following removal, Mr. DeGroote may also need to file an emergency motion to stay the time to respond to the frivolous New Virginia Complaint or prepare both a motion to transfer venue to the Southern District of New York and refer the action to this Court and a full motion to dismiss the Complaint by December 20, 2012.

48. For these reasons, we respectfully urge the Court to enforce its Confirmation Order and order the Former Directors to voluntarily dismiss the New Virginia Lawsuit with prejudice and enjoin the Former Directors from re-filing the matter in any court or, in the alternative, require dismissal without prejudice and permit any re-filing of only the fraud claim to be made in this Court.

II. PLAINTIFFS HAVE WILLFULLY VIOLATED THE CONFIRMATION ORDER AND SHOULD BE HELD IN CONTEMPT.

49. It is well-settled that bankruptcy courts have the power to issue civil contempt orders where parties have violated an order of the court. See, e.g., Nisselson v. Empyrean Inv. Fund, L.P., (In re Marketxt Holdings Corp.), No. 05-01268, 2006 Bankr. LEXIS 3951, at *5 (Bankr. S.D.N.Y. Jan. 27, 2006) ("It is well accepted, in light of the 2001 amendments to Rule 9020, that bankruptcy courts have power to enter civil contempt orders.");

Fernos-Lopez v. United States District Court, 599 F.2d 1087, 1090-91 (1st Cir.), cert. denied, 444 U.S. 931 (1979); In re Andrus, 184 B.R. 311, 312 (Bankr. N.D. Ill.), aff'd, 189 B.R. 413 (N.D. Ill. 1995); In re Snider Farms, Inc., 125 B.R. 993, 996 (Bankr. N.D. Ind. 1991) (citing cases); In re Haddad, 68 B.R. 944 (Bankr. D. Mass. 1987); In re McLean Indus., 68 B.R. 690, 695 (Bankr. S.D.N.Y. 1986); In re Johns-Manville Corp., 26 B.R. 919, 924 (Bankr. S.D.N.Y. 1983). This power is derived from the inherent authority of courts, including Article I courts, to enforce compliance with their lawful orders to the extent such power is not restricted by statute, from the reference of the inherent power of the district court contained in 28 U.S.C. § 157(c), and from the broad statutory grant contained in section 105 of the Bankruptcy Code. In re McLean Indus., 68 B.R. at 695-97.

50. Imposition of a civil contempt order by a bankruptcy court requires a showing of two elements: (1) the existence of a clear, specific, enforceable order or statute unambiguously commanding a party to perform or refrain from performing certain acts; and (2) such party's noncompliance with the order or statute. In re Keane, 110 B.R. 477, 482-83 (S.D. Cal. 1990) (citing authorities); see also In re Andrus, 184 B.R. at 315. The alleged contemnor must have had either official or actual knowledge of the order or statute. In re Snider Farms, 125 B.R. at 996. No showing of willfulness is required. Id. at 997-98; In re McLean Indus., 68 B.R. at 701; In re Crabtree, 39 B.R. 702, 710 (Bankr. E.D. Tenn. 1984).

51. While the ultimate burden of proof lies with the movant, once a prima facie showing has been made, the burden of production shifts to the alleged contemnor to demonstrate an "inability" to comply with the order. In re Affairs With A Flair, Inc., 123 B.R. 724, 727 (E.D. Pa. 1991) (burden on contemnor "strictly construed"; a showing of "substantial" or "good faith" efforts will not suffice); In re Snider Farms, 125 B.R. at 997; In re Keane, 110

B.R. at 483 (quoting Combs v. Ryan's Coal Co., Inc., 785 F.2d 970, 984 (11th Cir.), cert. denied, 479 U.S. 853 (1986)). The movant's burden must be established by clear and convincing evidence. In re Snider Farms, 125 B.R. at 997; In re Keane, 110 B.R. at 477, 483.

52. The purpose of a civil contempt order is not punishment, but coercion and remediation. In re McLean Indus., 68 B.R. at 701. Courts have discretion to fashion appropriate remedies for contempt, In re Johns-Manville Corp., 26 B.R. at 923; In re 2218 Bluebird Ltd. Partnership, 41 B.R. 540, 544 (Bankr. S.D. Cal. 1984), and may impose a wide array of sanctions to coerce compliance with their orders and compensate the movant for actual losses suffered. Common sanctions include attorneys' fees, In re Thomas, 184 B.R. 237, 242 (Bankr. N.D.N.C. 1995); In re Snider Farms, 125 B.R. at 996 (citing cases), coercive fines, see id. ($5,000 for each day defendant fails to comply); In re Affairs With A Flair, 123 B.R. at 727 (actual damages); In re Thomas, 184 B.R. at 241-42; In re Clark, 91 B.R. 324, 337 (Bankr. E.D. Pa. 1988), opinion supplemented, 96 B.R. 569 (Bankr. E.D. Pa. 1989); In re Haddad, 68 B.R. at 954, and imprisonment until the contempt is purged, In re Spanish River Plaza Realty Co., 155 B.R. 249, 254-56 (Bankr. S.D. Fla. 1993); In re Crabtree, 39 B.R. at 712-13. In fact, the Second Circuit has held that, once a movant proves damages stemming from the contumacious behavior, a court has no discretion but to issue the appropriate remedial order. Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 130 (2d Cir. 1979).

53. Here, both elements necessary for the Court to enter a civil contempt order exist because: (a) the Confirmation Order clearly prohibits the action taken by the Former Directors, as demonstrated herein in Section I, supra, and (b) the Former Directors have violated the Confirmation Order by commencing and pursuing the New Virginia Lawsuit. Furthermore, the Former Directors have acted knowingly and willfully in their refusal to comply with the

injunction, release, exculpation, and Gatekeeper provisions in the Confirmation Order, because they clearly are aware of the existence of those provisions and have, in fact, argued to uphold them on another occasion in this Court. In an opposition brief filed in this Court on January 4, 2011, all three Former Directors in the New Virginia Lawsuit, through their respective counsel, quoted from subparagraph 34(c) of the Confirmation Order and argued for its application to the D&O Action. [Docket No. 2020] That the Former Directors lost on that motion is inapposite. What matters is that they clearly understand the relevant terms of the Confirmation Order and knowingly and willingly violated them.[4] The Former Directors thus should be found in contempt and should be sanctioned in an amount not less than the Mr. DeGroote's costs (including attorneys' fees) incurred in preparing, filing and prosecuting this Motion and otherwise responding to the New Virginia Lawsuit.

[4] For example, the Former Directors have moved to consolidate the New Virginia Action into the D&O Action, citing overlapping parties and a common nucleus of operative fact. Yet, despite these arguments, they argued for the enforcement of the Gatekeeper in the first action, and completely ignored its existence in the second.

CONCLUSION

For the reasons set forth herein, Mr. DeGroote respectfully requests that the Court enter an Order, substantially in the form annexed hereto as Exhibit B, granting this Motion and grant such other and further relief as this Court deems just and proper.

Dated: New York, New York
December 13, 2012

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