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

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

BEARINGPOINT, INC. LIQUIDATING TRUSTEE'S MOTION AND JOINDER TO MOTION TO ENFORCE THE PLAN INJUNCTION

With trial in Virginia only months away, a group of defendants who are being sued by a liquidating trustee have filed, in violation of a chapter 11 plan, retaliatory litigation to disrupt that trial. Their suit (the "**Plan Release Lawsuit**") is premised on actions allegedly taken and advice allegedly given during Chapter 11 confirmation proceedings here. It alleges that one estate fiduciary (Mr. DeGroote, now the principal of the BearingPoint Liquidating Trustee, and then president and chief legal officer of the Debtors) somehow committed malpractice and fraud by failing to advise other estate fiduciaries (the "**Former Directors**") how they could avoid personal liability ***to the estate***. These Former Directors were not Mr. DeGroote's clients, and the suit is a frivolous litigation tactic, plainly barred by the release and exculpation provisions in the

Plan and even a rudimentary understanding of the Former Directors' fiduciary responsibilities in a chapter 11 case. The claim itself speaks loudly about the insensitivity of the protagonists to their roles as fiduciaries.

Mr. DeGroote has moved for relief personally. The Liquidating Trust joins Mr. DeGroote's motion [Docket No. 2271]. But because the Plan Release Lawsuit affects the most important asset of the BearingPoint, Inc. Liquidating Trust (the "**Liquidating Trust**"), it moves on its own behalf to enforce the terms of the Plan and Confirmation Order, enjoining prosecution of the vexatious lawsuit, or, in the alternative, to compel the Former Directors to bring their meritless claims here.[1] The relief requested is necessary to preserve valuable Liquidating Trust Assets and to avoid undue prejudice to the Liquidating Trust and the creditors it serves.[2]

I. PROCEDURAL HISTORY

A. The Plan and the Release Dispute

1. Public filings in the chapter 11 case show that the core matters complained of in the Plan Release Lawsuit were all publicly known and actively debated during chapter 11 confirmation proceedings in 2009. The complaining parties in that lawsuit, who then were directors of a chapter 11 debtor, knew that the Plan contemplated a liquidating trust, that the Unsecured Creditors' Committee (the "**Committee**") vigorously opposed granting releases to them, that the Liquidating Trust would ultimately investigate claims against them if the releases were denied, that the Debtors had agreed this Court would decide the release question and could allow the plan to proceed to confirmation without releases, and that Mr. DeGroote was tapped to serve as trustee.

2. On February 18, 2009 (the "**Petition Date**"), BearingPoint, Inc. and certain of its subsidiaries (collectively, the "**Debtors**") filed for bankruptcy relief in this Court.

[1] The Liquidating Trustee has requested, by letter dated concurrently with this motion and accompanying discovery, that the Former Directors confirm (or deny) their use of proceeds from the Debtors' director and officer liability insurance policy (the "**D&O Insurance**") to fund the Plan Release Lawsuit.

[2] Capitalized terms undefined herein shall have the meaning attributed to them in either Mr. DeGroote's motion or the Plan and Confirmation Order.

3. On October 5, 2009, the Debtors filed (a) the Second Amended Joint Plan Under Chapter 11 of the Bankruptcy Code, dated October 5, 2009 [Docket No. 1326] (the "**October Plan**"); and (b) the Proposed Disclosure Statement for Debtors' Second Amended Joint Plan Under Chapter 11 of the Bankruptcy Code [Docket No. 1327].

4. The October Plan contained third party releases (the "**Prepetition Releases**") that would have relinquished claims and causes of action of both the Debtors and third parties against certain non-debtor third parties, including all of the Debtors' officers and directors, from January 18, 2008 to the Petition Date.

5. On November 2, 2009, the Debtors filed a revised Second Amended Joint Plan Under Chapter 11 of the Bankruptcy Code, dated November 2, 2009 [Docket No. 1394] (the "**November Plan**") and a revised Disclosure Statement for Debtors' Second Amended Joint Plan Under Chapter 11 of the Bankruptcy Code [Docket No. 1394] (the "**Disclosure Statement**"). With slight revisions, the November Plan contained the same Prepetition Releases. On November 4, 2009 the Court granted an Order Approving the Disclosure Statement [Docket No. 1400].

6. The Disclosure Statement included a "toggle" feature, whereby the Committee and the Debtors agreed that if the Committee Objection (as defined below) to the Prepetition Releases in the November Plan was upheld, the scope of the releases provided to officers and directors would be limited only to conduct occurring after the Petition Date, thereby permitting the estate to bring claims against the Former Directors for their acts and omissions during earlier periods. *See* Disclosure Statement § C.1.

7. In a section of the Disclosure Statement entitled "Justification for Limited Releases," the Debtors argued for the Prepetition Releases and discussed the Committee's objections. *See* Disclosure Statement §§ C.1 & C.2. Another section of the Disclosure Statement described potential claims against the Former Directors based on pre-bankruptcy acts,

including claims like those currently being pursued by the Liquidating Trustee in the D&O Action (as defined below). *See* Disclosure Statement § C.1.

8. On December 1, 2009, the Debtors filed a Plan Supplement in Support of the November Plan [Docket No. 1466] (the "**Plan Supplement**"), which attached a Form of Liquidating Trust Agreement (the "**LTA**") that names John DeGroote as the Liquidating Trustee of the BearingPoint, Inc. Liquidating Trust. *See* Plan Supplement Exhibit D.

9. On December 10, 2009, the Committee filed a Limited Objection to Confirmation of the November Plan [Docket No. 1496] (the "**Committee Objection**"). It opposed the inclusion of the Prepetition Releases in the November Plan, arguing, among other things, that the Prepetition Releases were drafted by and would protect insiders and that the estate would receive no benefit by the Prepetition Releases. *See* Committee Objection §§ III.A.10, III.B.i.15-III.B.ii.18.

10. The Committee Objection argued that the Liquidating Trustee should evaluate possible claims against third parties and "…decide whether there are claims against the directors and officers for the period from January 18, 2008 to the Petition Date…" Committee Objection § III.b.iv.23.

11. On December 17, 2009, the Court held a confirmation hearing, and heard arguments regarding the Prepetition Releases dispute. The Court denied the Debtors' request for the Prepetition Releases, finding that granting such releases would not be in the best interest of the estate because, among other reasons, "it would be foolhardy for the estate to release away claims it might assert" and "there was no attention by me or by anyone else that I'm aware of as to whether there were any breaches of the duty of care in the year before these cases were filed." Confirmation Hrg. Tr. at 74-76 [Docket No.1586].

12. Because it was concerned with the threat of frivolous litigation, as part of its ruling on the release issue, the Court also ruled that the courts in this district would retain

exclusive jurisdiction to hear any case brought against those parties given limited releases in the Plan . *See* Confirmation Order ¶ 34(c).

13. On December 22, 2009, the Court entered the Confirmation Order [Docket No. 1550], confirming the Debtors' Modified Second Amended Joint Plan Under Chapter 11 of the Bankruptcy Code, dated December 17, 2009 (the "**Plan**"), which went effective on December 30, 2009 (the "**Effective Date**") [Docket No. 1577].

14. The Plan and Confirmation Order authorized the creation of the Liquidating Trust through the LTA. The Plan also provides that the Liquidating Trustee is entitled to "reasonable compensation approved by the Trust Advisory Board in an amount consistent with that of similar functionaries in similar roles." Plan § 5.7(c).

15. The Confirmation Order specifically appoints Mr. DeGroote as Liquidating Trustee (Confirmation Order ¶ 14), and finds as follows: "To the extent appointment of the Liquidating Trustee implicates section 1129(a)(5), such appointment was made in conjunction with and with the support of the Creditors' Committee and is in the best interest of all creditors." Confirmation Order ¶ EE.

16. While the Prepetition Releases for most directors and officers were limited pursuant to the Court's ruling on the Committee's confirmation objection, Mr. DeGroote was broadly released from all prepetition claims except those resulting from fraud, gross negligence, willful or criminal misconduct. *See* Plan § 10.8(a); Confirmation Order ¶ 34(a). The Plan also contains a standard exculpation provision protecting Mr. DeGroote, and other officers, directors and professionals of the Debtors, from future claims based upon their actions taken in connection with the bankruptcy cases (including the plan confirmation process) - with the same exception[s] for fraud, gross negligence, willful or criminal misconduct. *See* Plan § 10.7.

B. The D&O Action

17. Following the Effective Date, the Liquidating Trustee investigated claims that it, as successor to the Debtors, might have against the Former Directors based upon prepetition conduct.

18. On November 29, 2010, the Liquidating Trustee moved this Court for relief from the retention of exclusive jurisdiction provisions of the Confirmation Order [Docket No. 1977] (the "**Motion for Relief**"), so that it might file a complaint in Virginia against each of the Former Directors as well six other members of the Board, based upon the facts uncovered by its investigation.

19. On July 11, 2011, the Court granted the motion. It noted first that prosecution of the proposed complaint in Virginia "would be violative of the Confirmation Order" absent relief. But the Court also found that the Liquidating Trustee's claims, as evidenced in the complaint attached to the Motion for Relief, were "colorable" and "not brought for the purposes of harassment" and that relief was warranted. *See* Bench Decision on Liquidating Trustee's Motion for Relief from Plan and Confirmation Order ("Bench Decision"), July 11, 2011 at 1, 19 [Docket No. 2171].

20. On July 21, 2011, the Liquidating Trustee commenced litigation in state court in Virginia against the Former Directors and others based upon the complaint initially filed with the Motion for Relief in this Court (the "**D&O Action**"). The D&O Action seeks damages in excess of $1.8 billion, and the Debtors have $300 million in D&O Insurance (less defense costs) that covers the claims.

21. The Former Directors removed the D&O Action to the United States District Court for the Eastern District of Virginia and sought to dismiss the D&O Action on *forum non conveniens* grounds or, in the alternative, to transfer the D&O Action to Delaware. The case was remanded to the Virginia court. The Defendants then brought a motion for demurrer, which the Virginia court denied on May 26, 2012.

22. Fact discovery in the D&O Action concluded on November 30, 2012, and expert reports were served on December 14, 2012.

23. The D&O Action is set for jury trial on April 1, 2013.

C. The Plan Release Lawsuit

24. On November 15, 2012, the Former Directors commenced the Plan Release Lawsuit. A copy of the complaint in the Plan Release Lawsuit (the "**Complaint**") is attached to Mr. DeGroote's Motion as Exhibit A. The Former Directors assert claims for malpractice and fraud based on Mr. DeGroote's purported comments made at the Debtors' board meetings regarding the Plan and confirmation proceedings. *See* Complaint ¶¶ 31-34. The suit specifically targets Mr. DeGroote's purported comments with respect to the release dispute, and his alleged suggestion that the debtors and their creditors would not be well served by seeking a full claims investigation prior to confirmation. *See Id.* ¶ 32. The Complaint alleges a conflict as the result of Mr. DeGroote "secretly" conspiring with the Debtors' creditors regarding his appointment and compensation as Liquidating Trustee. *See Id.* ¶ 4.

25. On November 28, 2012 the Former Directors filed a motion to consolidate the Plan Release Lawsuit with the D&O Action (a copy of the motion to consolidate is attached to Mr. DeGroote's Motion as Exhibit B).

26. Believing that the Plan Release Lawsuit belongs here, if anywhere, and mindful of the deadline for filing, Mr. DeGroote removed it to the United States District Court for the Eastern District of Virginia. At Mr. DeGroote's request, the parties have since agreed to stay all proceedings in the Plan Release Lawsuit pending resolution of Mr. DeGroote's motion before this Court.

II. ARGUMENT

A. Jurisdiction and Request for Relief By Motion.

27. This is a motion to enforce the terms of the Plan and Confirmation Order entered by this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and

157, and this is a core proceeding pursuant to 28 U.S.C. § 157(b). *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 154 (2009) (Bankruptcy Court for the Southern District of New York entitled to enforce release-granting provisions in confirmation order); *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 . . . .").

28. Pursuant to Paragraph 39 of the Confirmation Order and Article XI of the Plan, this Court retained jurisdiction to "hear and determine disputes or issues arising in connection with the interpretation, implementation or enforcement of the Plan [and] the Confirmation Order . . . ." Plan § XI(k).

29. Relief by motion is appropriate where a party is seeking to enforce the terms of a Plan and Confirmation Order - specifically a plan injunction. *See, e.g., In re Petrie Retail, Inc*., 304 F.3d 223, 230 (2d Cir. 2002) (hearing a plan consummation motion seeking to enforce an injunction in bankruptcy court's confirmation order and finding a bankruptcy court retained core jurisdiction post-confirmation "to interpret and enforce its own orders, particularly when disputes arise over a bankruptcy plan of reorganization.") (citing *Back v. LTV Corp. (In re Chateaugay Corp.)*, 213 B.R. 633, 640 (S.D.N.Y. 1997)); *In re Johns-Manville Corp*., 97 B.R. 174, 179-80 (Bankr. S.D.N.Y. 1989)); *In re Charter Communications*, 2010 WL 502764, at *1 (Bankr. S.D.N.Y. Feb. 8, 2010), *aff'd*, 2011 WL 3278624 (S.D.N.Y. July 26, 2011) (hearing and granting emergency motion to enforce the injunction and release provisions of confirmed plan of reorganization to end litigation brought in district court against individuals released under plan).

B. The Plan Release Lawsuit, on Its Face, Is Barred by the Plan Injunction.

30. Mr. DeGroote was released from the claims set forth in the Plan Release Lawsuit by the release and exculpation provisions of the Plan. When it granted the releases that mention Mr. DeGroote specifically by name (while at the same time denying similar broad releases for the Former Directors) this Court explained that Mr. DeGroote provided "material benefits to the

liquidation process" and his release was "entirely understandable, appropriate, justifiable . . . ." Confirmation Hrg. Tr. at 72-73 [Docket No. 1586].

31. Because Mr. DeGroote was released, the Former Directors' prosecution of the Plan Release Lawsuit violates the injunction set forth in the Plan and the Confirmation Order, which prohibits parties from pursuing claims released or barred by the Plan. *See* Plan § 10.4; Confirmation Order ¶ 30.

32. Apparently, the Former Directors' theory for avoiding the injunction provisions in the Plan is that Mr. DeGroote committed fraud prior to confirmation. Those claims are so outlandish that this Court can confidently ground a permanent injunction in the allegations of the Complaint and the undisputed record facts from confirmation. The potential for claims of the Debtors against directors and officers was centrally and publicly raised. Mr. DeGroote was an officer of the company (its president and chief legal officer). The Former Directors are sophisticated. They knew that his duties were to the Debtors, that he was a fiduciary of the estate, and that they had not engaged him personally. The circumstances, and his position, made it impossible for them to place any reasonable reliance in the notion that his job was to protect them from the claims of the Debtor.

33. The Former Directors' complaint alleges that Mr. DeGroote should have pressed for a pre-confirmation investigation. *See* Complaint ¶ 34. But unless the Former Directors' position is that Mr. DeGroote's job was to sabotage such an investigation, any such investigation would not have advanced their cause. It would have turned up the same facts that were later uncovered by the Liquidating Trustee's post-confirmation investigation. The net result was the complaint in the D&O Action -- itself massively grounded in statements and actions of the Former Directors -- that this Court and the Virginia court have each reviewed and found to state a colorable claim. *See* Bench Decision [Docket No. 2171]; Order Following Hearing on May 11, 2012 on Defendants' Demurrers, Civil Action No. 2011-10612 (Circuit Court of Fairfax County, Virginia, May 26, 2012).

34. In short, the allegations in the Plan Release Lawsuit would not permit a fact finder to find duty, reliance, or harm, and so any fraud claim is certain to fail. The Plan Release Lawsuit is barred by the Plan injunction.

C. The Plan Release Lawsuit Should Be Permanently Enjoined as It Is Nothing More than a Litigation Tactic, Prosecuted at Prejudice to the Liquidating Trust.

35. Plan injunctions exist to prevent parties from interfering with a former debtor's post-confirmation activities through the assertion of claims that have been released or discharged by a plan. *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973 (1st Cir. 1995) (plan injunctions appropriate to prevent proceedings where pursuit of such actions would adversely impact the bankruptcy estate); *In re WorldCom, Inc*., 2006 WL 2270379, at *9 (S.D.N.Y. August 4, 2006) (stating that the purpose of the post-confirmation plan injunction "is to allow the Bankruptcy Court to administer promptly the claims before it, a purpose which would be undermined by constant disruption if separate claims before other courts were permitted to continue until final resolution in the courts, particularly when the claims involve issues of law easily disposed of by the Bankruptcy Court.").

36. Similarly, exculpation for professionals that participated in the bankruptcy proceeding is a routine protection, necessary to encourage professionals to do the work of reorganization cases without fear of irresponsible and collateral attack. Absent such provisions, Chapter 11 participants would be hamstrung by the threat of reprisals from parties aggrieved by the bankruptcy process. Reprisal is precisely what the Former Directors pursue by way of the Plan Release Lawsuit.

37. The Court may begin with timing. The key facts alleged in the Plan Release Lawsuit have been known to the Former Directors since the Plan was confirmed in late 2009, if not earlier. The Former Directors were aware of the dispute with the Creditors Committee as to the scope of the Plan's releases - the dispute was public and central to confirmation - and that the Plan could toggle to confirmation without the releases. They knew what Mr. DeGroote had said

in board meetings (and what legal advice the Debtors' outside counsel - Weil, Gotschal & Manges, LLP - had provided at those meetings). They knew that he was proposed as the Liquidating Trustee; and that the Liquidating Trustee would investigate potential claims against the Former Directors post-confirmation.

38. Aware of these facts for years, the Former Directors waited until two weeks prior to the conclusion of the discovery period in the D&O Action to file the Plan Release Lawsuit. Even in 2010, when they urged this Court to deny the motion for leave to proceed in Virginia, they said little about Mr. DeGroote having violated their rights.

39. This filing has already distracted and consumed the time and resources of the Liquidating Trustee. It was filed during a critical juncture in the D&O Action, as discovery was concluding and expert reports (which were served on December 14) were being prepared. In a way, it has already served its purpose, as it divided the Liquidating Trustee's attention in the most critical pre-trial month of the litigation.[3] Prejudice to the Liquidating Trust and the creditors it serves will continue if the Plan injunction is not enforced.

40. The Plan Release Lawsuit, and specifically the Motion to Consolidate, has also needlessly distracted the Trustee's trial counsel in the D&O Action, and threatens to derail that litigation. When the parties were last here on the motion to allow the Liquidating Trustee to bring the D&O Action in Virginia, the Former Directors argued that there was no "statistical evidence" showing that a trial in Virginia would lead to efficiencies and cost savings for the Trust. Motion for Relief Hrg. Tr. at 30-31 [Docket No. 2120]. But the trial judge has proceeded with dispatch. The D&O Action was filed on July 11, 2011 and a jury trial is set to commence less than two years later - on April 1, 2013.

[3]The Former Directors consumed much of the last week of the discovery period in the D&O Litigation with the depositions of Alfredo Perez (the Debtors' lead bankruptcy counsel in late 2009) and Jeffrey Sabin (lead counsel to the Committee). While noticed in connection with the D&O Litigation, these depositions almost exclusively concerned topics relevant only to the Plan Release Litigation.

41. This speed and efficiency has been achieved despite the best efforts of the Former Directors to avoid a jury trial in Virginia. Their attempts to remove the D&O Action and transfer it to Delaware failed. Their demurrer was denied by the Virginia court after extensive briefing and argument. The Motion to Consolidate is yet another litigation tactic - this one an effort to needlessly detract from the issues of the underlying D&O Action with highly prejudicial claims that have no merit.

42. The Plan Release Lawsuit imposes other, more direct costs on the Trust. The Liquidating Trust Agreement obligates the Liquidating Trust to indemnify Mr. DeGroote out of the Liquidating Trust Assets for any costs he incurs in defending against the Plan Release Lawsuit. *See* LTA § 7.6. The Liquidating Trust incurs the cost of both counsel for Mr. DeGroote in Virginia and counsel who has appeared for Mr. DeGroote in this Court. Of course, the Liquidating Trust must also pay the fees of its own counsel.

43. In addition, if pursuit of the Plan Release Lawsuit is being, or is intended to be, funded by the D&O Insurance - the same insurance policy that the Trust can look to for recovery in part on the claims in the D&O Action - a significant asset is being depleted in an effort to frustrate the Liquidating Trustee's collection efforts and in the pursuit of claims barred by the Plan. At this juncture, the Trustee does not know if the Plan Release Lawsuit is being funded by insurance,[4] but the lawsuit is being prosecuted by the three same law firms that are being paid through the insurance policy to defend the Former Directors in the D&O Action.

44. The Plan Release Lawsuit is a litigation tactic, employed by the Former Directors to hinder and impede the Liquidating Trust's pursuit of its largest and most important asset - breach of duty claims against those very same Former Directors that are set for trial in the Virginia court next year. It represents precisely the type of "litigation terrorism" that this Court sought to prevent with the Plan releases, injunction and gatekeeper function that it retained in the Confirmation Order. *See* January 21, 2011 Hearing Transcript at 47.

[4]The Liquidating Trustee is seeking clarity from the Former Directors on this issue.

D. If Not Permanently Enjoined, the Former Directors Should Be Required to Bring the Plan Release Lawsuit in This Court.

45. If the Court believes that any issue requires further development, it should enjoin the directors from proceeding outside of this Court. The D&O Action should go forward unimpeded in Virginia, while this Court addresses any question of misconduct by the Liquidating Trustee.

46. The Confirmation Order 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 . . . (b) each holder of a Claim or Equity Interest against any party granted a limited release in subparagraphs 34(a) and 34(b), above.
>
> Confirmation Order ¶ 34(c).

47. As set forth in Mr. DeGroote's Motion, each of the Former Directors was the holder of Equity Interests (as that term is defined in the Confirmation Order) and Mr. DeGroote was one of the parties specifically released in paragraph 34(a) of the Confirmation Order. By operation of the Confirmation Order, therefore, the courts in this district have exclusive jurisdiction to hear the Plan Release Lawsuit.

48. Just as the Liquidating Trustee did with the D&O Action, the Former Directors were obliged first come to this Court to seek relief from the provisions of the Confirmation Order, if they wished to proceed elsewhere.

49. Unlike the D&O Action, however, the Plan Release Lawsuit would be inappropriate elsewhere, for it asserts only state-law claims that arise out of facts occurring prior to the bankruptcy filing. Contrast that with the Plan Release Lawsuit, which is premised upon alleged actions taken by an estate fiduciary (Mr. DeGroote) *during* the bankruptcy - specifically in connection with Plan confirmation. A claim that this Court is better suited to review would be difficult to draft.

50. At its core, the Plan Release Lawsuit alleges that one estate fiduciary (Mr. DeGroote) committed malpractice by failing to advise other estate fiduciaries (the Former Directors) how they could manipulate the confirmation process to avoid personal liability to the estate. Also asserted is that Mr. DeGroote was conflicted from taking the role of Liquidating Trustee to pursue estate claims as the result of his previous role as an estate fiduciary. The degree to which the theory of this case contradicts core duties of chapter 11 may not be as obvious to a non-bankruptcy court as it will be here, which is why this Court should retain exclusive jurisdiction over the lawsuit.

51. One need only look at the allegations in the Complaint to see the danger inherent in this case proceeding elsewhere. The Former Directors allege that Mr. DeGroote somehow "secretly" worked out a deal with Debtors' creditors regarding his service as Liquidating Trustee (Complaint ¶ 4), when, as the record here shows, Mr. DeGroote was proposed by **the Debtors** to serve as Liquidating Trustee (with Committee consent) and his appointment was publicly approved by the Court. The Former Directors also accuse Mr. DeGroote of failing to inform them that he intended to bring legal claims against them as Liquidating Trustee. *Id.* ¶ 38. But the prospect of claims against the Former Directors was not only described in the Disclosure Statement, it was the focus of the very public release dispute at confirmation. The Complaint itself describes how the Former Directors were advised by Debtors' outside counsel that the Committee was interested in pursuing claims. Complaint ¶ 31 (" . . . outside counsel noted that the existence of a $300 million D&O tower made this situation 'unique,' meaning that it was an attractive asset that creditors of the estate might want to access by brining claims against former Board members - including Plaintiffs.")

52. Adjudication of the Plan Release Lawsuit here is also necessary because the claims implicate many of this Court's orders. One of the basic allegations of the lawsuit is that Mr. DeGroote could have done something that would have changed this Court's decision to strike the Prepetition Releases from the Plan. The lawsuit also inherently challenges whether

this Court's orders appointing Mr. DeGroote as Liquidating Trustee were appropriate given Mr. DeGroote's alleged conflicts of interest.[5] As set forth above and in Mr. DeGroote's Motion, these claims implicate the scope and extent of the releases and exculpation approved by the Court in the Plan.

53. A final distinction between the D&O Action and the Plan Release Lawsuit warrants mention. This Court's decision to allow the D&O Action to proceed in Virginia was based, in part, upon the finding that the Liquidating Trustee's claims were "colorable" and "not brought for the purpose of harassment." Bench Decision at 1,10 [Docket No. 2171]. The opposite can be said for the Plan Release Lawsuit. If allowed to proceed anywhere, it should be here.

E. The *Barton* Doctrine also Requires that the Former Directors first Seek Permission from this Court Before Suing Mr. DeGroote.

54. The *Barton* Doctrine is a long-standing common-law rule first articulated by the Supreme Court in *Barton v. Barbour*, 104 U.S. 126, 129 (1881), barring a suit against a court-appointed receiver for acts done in his official capacity, unless the petitioning party obtains leave of the court that appointed the receiver. The Supreme Court's holding was based in part on the reasoning that the appointing court has *in rem* jurisdiction over the receivership property. Without leave of the appointing court, the forum in which the receiver is sued lacks subject-matter jurisdiction over the action.

55. Over the years, the *Barton* Doctrine has been expanded to include trustees of liquidating trusts appointed by bankruptcy courts to oversee the liquidation of estate assets. *See In re Crown Vantage, Inc.*, 421 F.3d 963, 970 (9th Cir. 2005) (applying *Barton* Doctrine to suit commenced against a liquidating trustee post-confirmation); *In re Lehal Realty Associates*, 101 F.3d 272, 276 (2d Cir. 1996) (applying *Barton* Doctrine to protect trustee post confirmation of chapter 11 plan).

[5] Effectively, the lawsuit's fraud allegation is barred by Section 1144 of the Bankruptcy Code as it challenges a final confirmation order entered by this Court.

56. Strong policy favors application of the *Barton* Doctrine. It not only provides bankruptcy courts with the exclusive ability to supervise their appointed officers but also affords trustees a modicum of protection from the commencement of frivolous lawsuits in foreign jurisdictions based upon actions taken in their official capacity. As the Second Circuit has written, "[T]the court that appointed the trustee has a strong interest in protecting him from unjustified personal liability for acts taken within the scope of his official duties." *In re Lehal Realty*, 101 F.3d at 276. *See also In re Eerie World Entertainment, L.L.C.*, 2006 WL 1288578, at *10 (Bankr. S.D.N.Y. 2006) (retaining jurisdiction over suit against attorneys for trustee where suit was based upon actions taken while administering estate).

57. The damages claimed by the Former Directors in the Plan Release Lawsuit are the costs and expense arising out of the Liquidating Trustee's pursuit of the D&O Action. Accordingly, Mr. DeGroote is being sued personally because of actions he has taken as Liquidating Trustee to pursue claims and maximize return to creditors. This is the quintessential fact pattern for the application of the *Barton* Doctrine.

58. The Court has a strong interest in protecting the Liquidating Trustee's actions from a frivolous lawsuit, and the Liquidating Trustee should be able to seek the protection of this Court if they are.

F. Joinder to Request for Sanctions

59. The Liquidating Trustee joins in Mr. DeGroote's request for sanctions. The Former Directors should be required to reimburse the Liquidating Trust for its costs and expenses in pursuing this motion and for any amounts the Liquidating Trust pays to indemnify Mr. DeGroote for his costs in defending against the Plan Release Lawsuit both here and in the Virginia court.

III. CONCLUSION

For the reasons set forth herein and in Mr. DeGroote's motion, the Liquidating Trustee respectfully requests that the Court: (i) enjoin the Former Directors from prosecuting the Plan

Release Lawsuit; (ii) direct the Former Directors to either (a) take all necessary steps to procure dismissal of the Plan Release Lawsuit with prejudice or (b) take all necessary steps to procure dismissal of the Plan Release Lawsuit without prejudice and require that any such claims be brought before this Court in the first instance; (iii) order the Former Directors to pay sanctions to the Liquidating Trust in an amount equal to the costs and expenses incurred by the Liquidating Trust as the result of the Plan Release Lawsuit; and (iv) grant to the Liquidating Trustee such other and further relief as is just and proper.

Dated: December 21, 2012
New York, NY

BINGHAM McCUTCHEN LLP

By: /s/ Jeffrey S. Sabin_____

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