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 2012 DEC 13 AM 8:20
 JOHN T. FREY
 CLERK, CIRCUIT COURT
 FAIRFAX, VA

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

F. EDWIN HARBACH,)
 et al.,)
)
 Plaintiffs,)
)
 v.)
)
 JOHN DeGROOTE,)
)
 Defendant.)

Civil Action No. 2012-17151

**SUGGESTION OF LACK OF JURISDICTION OR,
 IN THE ALTERNATIVE, AND IN THE EVENT OF A REMAND ONLY,
 MOTION CRAVING OYER OF DOCUMENTS RELIED UPON IN COMPLAINT,
 BUT NOT ATTACHED TO IT**

Concurrently with the filing of this pleading, the Defendant, John DeGroote, is filing a Notice of Removal of this case to the Alexandria Division of the United States District Court for the Eastern District of Virginia. Accordingly, after the Notice of Removal is filed in that Court and this, this Court will no longer have jurisdiction over this case. In the unlikely event, however, that the federal Court should ever remand the case to this Court, then DeGroote craves oyer of each of the documents discussed in, and central to, the Complaint that the Plaintiffs, F. Edwin Harbach, Roderick C. McGeary and Eddie R. Munson, have filed against him.

MOTION CRAVING OYER

1. In order to avoid the situation that occurred in *Levine v. Lacy*, 204 Va. 297, 130 S.E.2d 443 (1963), where a default was ordered in a case removed from state court to federal court, but later remanded to state court, DeGroote craves oyer of the documents mentioned in, but not attached to, the Complaint. He files this motion only in the event of a future remand of

this case from federal court, and solely in order to protect his legal rights and to avoid having a default judgment entered against him.

2. On December 31, 2008, DeGroot became the Chief Legal Officer of BearingPoint, Inc. The Plaintiffs were, at that time, members of BearingPoint's Board of Directors. In February 2009, BearingPoint filed a petition for relief under Chapter 11 of the United States Bankruptcy Code. In September of 2009, DeGroot was appointed President of BearingPoint. Throughout 2009, DeGroot attended various Board meetings at which the bankruptcy proceedings were discussed. The Bankruptcy Court approved BearingPoint's Second Amended Joint Plan Under Chapter 11 of the Bankruptcy Code on December 17, 2009, and BearingPoint's Board, as then constituted, resigned on or about December 30 2009, the date upon which confirmation of the Plan became effective.

3. Pursuant to the court-approved bankruptcy plan, DeGroot, who operates through John DeGroot Services, LLC, and of which he is the sole member, was appointed as the Liquidating Trustee of the BearingPoint, Inc. Liquidating Trust. On July 21, 2011, after notice and a hearing before the United States Bankruptcy Court for the Southern District of New York, John DeGroot Services, LLC, and DeGroot, as Trustee of the Liquidating Trust, filed a lawsuit against nine of BearingPoint's former Directors, including the three named Plaintiffs in this case.

4. On November 15, 2012, the Plaintiffs filed a Complaint against DeGroot in this Court, in which they accuse him of legal malpractice and fraud. They allege that they had some sort of a personal attorney-client relationship with DeGroot, and that he supposedly engaged in "disloyal, dishonest and self-interested conduct." (Compl. ¶¶ 1, 46.) The Plaintiffs also claim that DeGroot failed to advise them that he had "a disabling conflict and was unable

to render unbiased legal counsel." (*Id.* 49.) Finally, the Plaintiffs assert that DeGroote "made material misstatements and omissions to Plaintiffs." (*Id.* ¶ 56.)

5. In support of their nebulous claims of legal malpractice and fraud, the Plaintiffs rely upon, and make various representations about, the contents of numerous documents. The Plaintiffs failed, however, to attach copies of any of those documents to their Complaint.

6. First, the Plaintiffs' legal malpractice claim is based upon their allegation that they supposedly had an attorney-client relationship with DeGroote. (Compl. ¶ 46.) Such a relationship would be contractual in nature. The Plaintiffs have not attached to the Complaint a copy of any contract or contracts between them and DeGroote that established this alleged attorney-client relationship. Accordingly, DeGroote craves oyer of all such contracts.

7. Second, the Plaintiffs claim that they agreed to certain "releases" from liability based upon DeGroote's alleged advice. (*E.g.*, Compl. ¶¶ 28, 34.) They did not include copies of those releases with their Complaint. Therefore, DeGroote craves oyer of the releases discussed in Paragraphs 28 and 34 of the Complaint.

8. Finally, the Plaintiffs insist that their claims revolve around discussions that occurred during four meetings of BearingPoint's Board of Directors, which the Plaintiffs claim to be set out in the minutes of those meetings. (Compl. ¶¶ 28, 31, 33 & 34.) The plaintiffs did not, however, include copies of the minutes of these Board meetings as exhibits to their Complaint.¹

¹ It appears from the allegations in the Complaint that the Board discussions and the meeting minutes may have been protected by the attorney-client privilege. Nonetheless, the Plaintiffs have cited portions of these minutes in the publicly-filed Complaint. The privilege, however, does not belong to the Plaintiffs, and they have no authority to waive it. *E.g.*, *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 353 (1985).

DeGroot craves oyer of the minutes of these four Board meetings identified in Paragraphs 28, 31, 33 and 34 of the Complaint.

9. "A litigant has no right to put blinkers on the court and attempt to restrict its vision to only such parts of the record as the litigant thinks tend to support his view. When a court is asked to make a ruling upon any paper or record, it is its duty to require the pleader to produce all material parts." *Culpeper Nat'l Bank v. Morris*, 168 Va. 379, 382-83, 191 S.E. 764, 765 (1937). Thus, when a plaintiff relies upon a document for its assertions of liability on the part of a defendant, but omits to include that document in its pleadings, a Court should order the document to be produced, and to be filed as part of the pleadings. *Id.*, 191 S.E. at 765 (ordering entire record of prior suit to be included in pleadings); *see also Ward's Equipment, Inc. v. New Holland North America, Inc.*, 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997) ("When a demurrant's motion craving oyer has been granted, the court in ruling on the demurrer may properly consider the facts alleged as amplified by any written agreement added to the record on the motion."); *Welch v. McDonald*, 85 Va. 500, 504, 8 S.E. 711, 714 (1888) ("Had oyer of the contract been craved, and the true contract made known to the court, the demurrer to these counts ought to have been, and, doubtless, would have been sustained.").

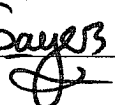
10. The failure to attach copies of documents relied upon in the pleadings can effectively deprive a defendant of its basic procedural entitlement to file a properly supported demurrer. *See Culpeper Nat'l Bank*, 168 Va. 379 at 382-83 ("No intelligent construction of any writing or record can be made unless all of the essential parts of such paper or record are produced."). Furthermore, if the documents relied upon in the pleadings contradict the Plaintiffs' characterizations of those documents, the Court is free to ignore the Plaintiffs' characterization of

the documents and can rely upon what the documents actually say. *Ward's Equipment*, 254 Va. at 382, 493 S.E.2d at 518.

11. Accordingly, DeGroote craves oyer of the following documents:
 - (a) All contracts that the Plaintiffs claim to establish an attorney-client relationship between any one of them and DeGroote, and/or between BearingPoint, Inc. and DeGroote.
 - (b) The releases to which the Plaintiffs supposedly agreed, as alleged in Paragraph 34 of the Complaint.
 - (c) The minutes of the September 29, 2009 Board of Directors' meeting, discussed in Paragraphs 27 through 30 of the Complaint, as well as all documents discussed during that meeting (as reflected in the meeting minutes), to be filed under seal because they are protected by the attorney-client privilege.
 - (d) The minutes of the October 2, 2009 Board of Directors' meeting, discussed in Paragraphs 31 through 32 of the Complaint, as well as all documents discussed during that meeting (as reflected in the meeting minutes), to be filed under seal because they are protected by the attorney-client privilege.
 - (e) The minutes of the October 5, 2009 Board of Directors' meeting, discussed in Paragraph 33 of the Complaint, as well as all documents discussed during that meeting (as reflected in the meeting minutes), to be filed under seal because they are protected by the attorney-client privilege.
 - (f) The minutes of the November 16, 2009 Board of Directors' meeting, discussed in Paragraphs 34 and 35 of the Complaint, as well as all documents discussed during that meeting (as reflected in the meeting minutes), to be filed under seal because they are protected by the attorney-client privilege.

THEREFORE, in the event that the United States District Court for the Eastern District of Virginia remands this action to this Court, and solely to avoid the possibility of a default judgment, DeGroote requests this Court to order the Plaintiffs to file the documents identified above, and to order that those documents should be deemed to be part of the Plaintiffs' pleadings for all purposes.

JOHN DeGROOTE

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CERTIFICATE OF SERVICE

I certify that, on December 13, 2012, a copy of this Suggestion of Lack of Jurisdiction or, in the Alternative and in the Event of a Remand Only, Motion Craving Oyer was e-mailed and hand-delivered to the offices of:

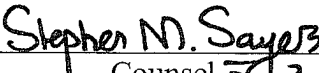
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In addition, on the same date, a copy of this Motion was e-mailed and mailed to the offices of:

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