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

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
BearingPoint, Inc., et al.,	Case No. 09-10691 (REG)
Debtors.	(Jointly Administered)

JOINT OPPOSITION TO THE MOTION OF JOHN DEGROOTE FOR AN ORDER ENFORCING THE CONFIRMATION ORDER, HOLDING F. EDWIN HARBACH, RODERICK C. MCGEARY AND EDDIE MUNSON IN CONTEMPT, AND FOR SANCTIONS

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F. Edwin Harbach, Roderick C. McGeary, and Eddie Munson (the "Plaintiffs") submit this opposition to John DeGroote's Motion for an Order (A) Enforcing Confirmation Order, (B) Holding the Plaintiffs in Contempt, and (C) Imposing Sanctions [Docket No. 2271] ("Motion") filed on December 13, 2012.[1] Plaintiffs' lawsuit does not violate the Plan,[2] the Confirmation Order, or any other order entered by this Court. Plaintiffs' Fraud and Malpractice Action seeks legitimate redress for recently discovered, *intentional* misconduct perpetrated by Mr. DeGroote to advance his own financial interests while Plaintiffs were relying on him for legal advice regarding their potential personal liability.[3] Mr. DeGroote enjoys no release from intentional misconduct. Plaintiffs properly filed this suit in Virginia state court, the forum in which Mr. DeGroote has been litigating related facts for more than a year after successfully petitioning this court to be in that venue.

PRELIMINARY STATEMENT

Plaintiffs discovered only recently during the deposition of Mr. DeGroote that Mr. DeGroote was operating under a disabling conflict of interest while he was advising Plaintiffs about the BearingPoint bankruptcy and that — in the same time frame that he was providing personal advice to Plaintiffs that he was not aware of any basis for claims against them in their

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[1] On December 21, 2012, "John DeGroote Services, LLC as Liquidating Trustee to the BearingPoint, Inc. Liquidating Trust" filed a separate Motion and Joinder to Motion to Enforce the Plan Injunction [Docket No. 2273] ("Joinder Motion"). It is unclear what basis or authority John DeGroote Services, LLC has for submitting any filing in this matter. John DeGroote Services, LLC is not a defendant in, or otherwise impacted by, the Fraud/Malpractice Action. Moreover, John DeGroote Services, LLC was not appointed Liquidating Trustee by this Court. In any event, to the extent the Court decides to consider the separate motion of John DeGroote Services, LLC, this opposition responds to it as well.

[2] Capitalized terms and phrases undefined herein shall have the meanings given to them in the Plan and Confirmation Order.

[3] A copy of the Complaint filed in the Fraud/Malpractice Action (hereafter "Complaint" or "Compl.") is attached hereto as Exhibit A.

personal capacities arising out of the efforts to sell or reorganize the Company in the roughly 13-month period leading up the Chapter 11 filing and that they should accordingly accept only limited releases in BearingPoint's Plan, *see* Ex. A ¶¶ 28-34[4] — he was intentionally taking steps to preserve his own ability to subsequently pursue precisely this type of claim against Plaintiffs on behalf of the Liquidating Trust. *See id.* ¶¶ 35-36. While continuing to provide counsel to the Plaintiffs about their personal exposure to claims, as well as other substantial issues related to the bankruptcy, Mr. DeGroote also was negotiating a fee arrangement with the Creditors Committee that would incentivize him to bring suit against the Plaintiffs upon his appointment as Liquidating Trustee. *See id.* ¶ 35. Mr. DeGroote counseled Plaintiffs to, among other things, forgo an investigation that would have permitted them to obtain broad releases and told them that an investigation would be prohibitively expensive and time consuming. *See id.* ¶¶ 32, 34-35. Mr. DeGroote had no relevant basis for this statement. As an attorney licensed in Virginia, Mr. DeGroote knew or should have known that this self-interested and conflicted conduct was blatantly improper and actionable under Virginia law. *See id.* ¶ 36.

Throughout 2009, Mr. DeGroote was a primary legal advisor to the Plaintiffs and served as the Chief Legal Officer ("CLO") of BearingPoint — a position to which the BearingPoint Board promoted him because of their trust in his ability to guide them and the Company through the bankruptcy process. *See* Compl. ¶¶ 17, 44. Following the Company's filing for relief under Chapter 11 in February 2009, Mr. DeGroote advised the Plaintiffs personally regarding their risks in the Chapter 11 process without ever telling them that he might have a different interest or

[4] References to "Ex. __" refer to the Declaration of William T. Russell, Jr., dated January 14 2013, submitted herewith.

suggesting that they secure independent legal counsel. *See id*. ¶¶ 17, 46.[5] Plaintiffs considered Mr. DeGroote to be their trusted legal advisor. *See id*. ¶ 19.

Mr. DeGroote himself clearly understood he had a disabling conflict. He recently testified that, unbeknownst to the Plaintiffs, he secretly recused himself from reviewing a key company filing in this Court regarding the directors' releases. *See id*. ¶ 41. Mr. DeGroote admitted under oath that he decided to secretly recuse himself because he was worried that if he approved the Company's Factual Brief in Support of Limited Releases [Docket No. 1501] ("Factual Brief"), the statements in the brief might be imputed to him if and when he subsequently asserted claims against the Plaintiffs as Liquidating Trustee. *See* Compl. ¶ 41. Plaintiffs did not learn this information until Mr. DeGroote's recent deposition.

The Board held its final in-person meeting in Dallas, Texas on November 16, 2009. DeGroote was in attendance. *See id*. ¶ 34. At the meeting, the Board was informed by outside counsel that the current draft of the proposed bankruptcy plan included a limited release, which preserved the breach of fiduciary duty claims brought in the Trustee Action. *See id*. Outside counsel further advised that, in order to get a full release, the Board would have to pay consideration, settle the creditors' potential claims, or conduct an investigation for the full time period at issue. *See id*. Outside counsel further stated that while the Creditors' Committee had objected to the releases, it had articulated no basis for any claim. *See id*. DeGroote, who has since testified to his detailed knowledge of the sales process at the time, confirmed that he was

[5] In addition to his personal, trusted relationship with the Plaintiffs, *see* Compl. ¶ 46, a key function of the CLO was to provide legal counsel directly to individual company directors, including the Plaintiffs. *See id*. One such occasion occurred in March 2009, when Mr. DeGroote helped Mr. Harbach prepare to testify about the pre-bankruptcy sales process and provided legal counsel to him. *See id*. ¶ 21. And the Plaintiffs sought Mr. DeGroote's advice throughout fall 2009 on issues regarding the Plan, including on matters related to the Plaintiffs' personal liability. *See id*. ¶¶ 27-38. Mr. DeGroote has testified, moreover, that he considered the BearingPoint Board — including the Plaintiffs — to be his client during this timeframe. *See id*. ¶ 18.

unaware of any breach of fiduciary duty claims against the Board. *See id.* When the Plaintiffs turned to Mr. DeGroote and asked for his view on the limited releases, Mr. DeGroote advised the Board that an investigation was not necessary because he was not aware of any claims against the directors and that the Board should accept the limited releases. *See id.*

Relying on Mr. DeGroote's advice, the Plaintiffs and their fellow directors agreed to forego authorizing an independent investigation to determine the merit (or lack thereof) of potential claims against the directors. *See id.* ¶ 37. The Creditors' Committee objected solely to the Plan's inclusion of releases from claims that could be brought against BearingPoint's directors arising out of the efforts to sell or reorganize the company in the roughly 13-month period leading up the chapter 11 filing (the "Prepetition Releases"). At the confirmation hearing held on December 17, 2009, this Court denied the Prepetition Releases, citing the absence of an independent investigation as an important factor in its decision. *See* Confirmation Hr'g. Tr. [Docket No. 1586] at 75. On December 30, 2009, the Effective Date of the Plan, Mr. DeGroote was appointed Liquidating Trustee. *See* Compl. ¶ 44.

To the surprise of Plaintiffs and the other former directors, Mr. DeGroote subsequently moved this Court for relief from the Confirmation Order [Docket Nos. 1977 & 1979] to allow him to file an action against the Plaintiffs and other former directors in the Circuit Court for the County of Fairfax (Virginia) (the "Trustee Action"). The Trustee Action asserts claims for breach of fiduciary duty in connection with BearingPoint's pre-bankruptcy sales process and seeks damages in excess of $1.88 billion.

Over the past eighteen months, the Plaintiffs have been engaged in expensive litigation in Virginia state court. That litigation has recently revealed the serious misconduct committed by Mr. DeGroote described above as well as other misconduct, including, for example, that Mr.

DeGroote signed a filing in this Court regarding the robust nature of the BearingPoint sales process that in his deposition he suddenly contended was "misleading," but that he took no direct action to correct. Specifically, at his October/November 2012 deposition, Mr. DeGroote characterized a February 2009 declaration, for the first time, as "misleading." Compl. ¶ 43. Mr. DeGroote's February 18, 2009 declaration, which he now seeks to disavow, stated to the Court, in relevant part:

> To enhance stockholder value, BearingPoint has continually discussed and reviewed its business, strategic direction, performance, and prospects in the context of developments in the markets in which BearingPoint operates. Specifically, commencing in 2004, BearingPoint has worked with financial advisors in connection with its review and consideration of various strategic alternatives and financing options. . . . In 2008, BearingPoint again embarked on a comprehensive restructuring effort. To address the foregoing financial difficulties, in January 2008, BearingPoint engaged Greenhill & Co., Inc. ("Greenhill") to advise the Board with respect to strategic alternatives, including a strategic transaction involving a sale of all or a portion of BearingPoint's assets, or an equity investment in BearingPoint. ***Greenhill initiated an extensive sale process during which approximately 25 strategic and financial buyers expressed an interest in buying all or parts of BearingPoint.***

Decl. of John DeGroote, dated Feb. 18, 2009 [Docket No. 3] ¶ 45 (emphasis added). But DeGroote testified that he never withdrew the declaration or informed the Court that it was misleading — insisting that filing a lawsuit against the directors was sufficient to absolve him of responsibility to correct what he now claims was a misleading declaration he filed with this Court. *See id.*; Dep. of John DeGroote, Oct. 18, 2012 at 251-53 ("Q. You – you can't tell me, as you sit here today, whether or not this paragraph is or is not accurate? A. I can tell you that this sentence here that we just talked about, the – the '25 strategic or financial buyers,' is certainly misleading." . . . Q. Did you ever tell the Court that you filed a misleading declaration? A. I have never told the Court that I filed a misleading declaration.") (entire relevant transcript portion is attached as Ex. B.)

Discovery in the Trustee Action also has shown that the claims now asserted by Mr. DeGroote (as Liquidating Trustee) against the Plaintiffs are without merit.

Mr. DeGroote argues that an independent investigation would not have aided the Plaintiffs because two courts have "concluded" that the facts asserted in his complaint "raise non-frivolous claims." Mot. at 10.

But neither this Court, nor the state court in Virginia, has had occasion to consider the *facts* underlying Mr. DeGroote's claims against the Plaintiffs. To the contrary, both courts have considered only Mr. DeGroote's *allegations* in deciding whether the complaint was colorable. Discovery has shown the complaint is baseless.

For example, Mr. DeGroote's complaint relies very heavily on snippets of emails from the former General Counsel of BearingPoint, Laurent Lutz. Mr. Lutz is referred to more than 46 times in the complaint. Yet, at his August 2012 deposition, Mr. Lutz stated that Mr. DeGroote had taken his emails out of context. Mr. Lutz testified as follows:

> Q. Were you surprised to see the way your e-mails were used in that complaint?
>
> A. In a number of cases, yes. I don't – I certainly recognize the e-mails, but I don't think the entire context is clearly reflected.
>
> . . .
>
> Q. I take it that you are telling us that it is your view that the complaint does not fairly capture the meaning of your e-mails and other communications that are featured in that complaint, correct?
>
> A. Correct.

Ex. C at 72-73 (objection omitted). Amazingly, Mr. DeGroote never even consulted the former GC, his boss, about the complaint before it was filed. *See id.* Mr. Lutz also testified that he did not believe any of the defendants breached any fiduciary duties:

> Q. . . . Are you aware of any of – any conduct by any of the directors that violated the duty of good faith and loyalty?
>
> A. No.
>
> . . .
>
> Q. . . . Mr. Lutz, on Page 2 under the heading, "Discussion of the Board's Fiduciary Duties," third or so sentence states, "Mr. Bick expressed his opinion that the directors have demonstrated both their duties of care and good faith and that creation of the special committee to review and monitor the transaction process is designed to address any real or perceived conflicts of interest arising in any transaction." . . . Did you disagree with Mr. Bick?
>
> Q. No.

Id. at 38-39, 202-03. Mr. Lutz further testified that he was not aware of any additional steps that the directors of BearingPoint could have taken to prevent a bankruptcy:

> Q. And as you sit here today, can you say there was any concrete step available to the defendants in 2007, 2008, that they could have taken that would have eliminated the prospect of bankruptcy?
>
> A. In the context of that time and that economic environment, no.

Id. at 236.

Discovery also established that the Board's advisors during the sales process, including Davis Polk & Wardwell LLP and Greenhill, did not believe that the Board ever breached its fiduciary duties. John Bick of Davis Polk, for example, testified:

> Q. It goes on to say "Mr. Bick expressed his opinion that directors demonstrated both their duties of care and good faith and that the creation of a special committee to review and monitor the transaction process is designed to address any real or perceived conflicts of interest arising in any transaction." Did you express that opinion at the meeting?
>
> A. Yes.
>
> Q. And did you feel that you had a good basis to express that opinion at the meeting?
>
> A. Yes.

> …
> Q. . . . And in the continuing to represent the company and the board in that time period did you observe any breaches of fiduciary duty by any of the defendants?
> A. Nothing came to my attention for the period after July 17th through the filing of the bankruptcy indicating that any member of the board breached their fiduciary duties.

Ex. D at 55-56, 62 ("Q. In your view did the board ever exhibit conscious indifference to its fiduciary duties? A. I was not aware of any conscious indifference to its fiduciary duties by – by the board."). Another central allegation in the Trustee Action is that a potential buyer (Cerberus) of BearingPoint ultimately backed out of the deal based on certain management equity proposals made by Mr. Harbach and designed for his benefit. Yet Mr. DeGroote did not even bother speaking with Cerberus to confirm the validity of this core assertion before filing the Trustee Action. And discovery in the Trustee Action has flatly contradicted Mr. DeGroote's allegation.

The Plaintiffs commenced the Fraud/Malpractice Action against Mr. DeGroote in November 2012 after Mr. DeGroote's deposition in the Trustee Action revealed the scope of his actions and conduct. The Fraud/Malpractice Action alleges, among other things, that "DeGroote betrayed his responsibility to provide competent and loyal legal representation and counsel to the [BearingPoint] Board to gain personal monetary advantage."[6] The action was brought in the same Virginia state court in which the parties had been litigating related and overlapping issues since July 2011 (a forum this Court deemed appropriate for litigation between the parties). Despite the fact that Mr. DeGroote litigated in this Court to be able to bring his related claims in Virginia state court, Mr. DeGroote removed the Fraud/Malpractice Action to the United States District Court for the Eastern District of Virginia immediately after the Plaintiffs filed a motion

[6] While Mr. DeGroote's motions label the claims as "terrorism," "frivolous," and "outlandish," his motions do not deny the essential factual allegations that form the basis for the claims.

to consolidate the Fraud/Malpractice Action with the Trustee Action. Mr. DeGroote now returns to this Court asking for relief despite the fact that Virginia is his chosen forum. His request that this Court enjoin the Fraud/Malpractice Action, and hold the Plaintiffs in contempt, is without merit.

The Fraud/Malpractice Action is not precluded by the release Mr. DeGroote received under the Plan and Confirmation Order. The applicable language of the Plan makes clear that Mr. DeGroote did not receive a waiver or release from "any causes of action arising out of [Mr. DeGroote's] ***willful misconduct, gross negligence, intentional fraud, or criminal conduct***." Confirmation Order ¶ 34 (emphasis added). Notwithstanding Mr. DeGroote's protestations to the contrary, there simply is no avoiding that the Plaintiffs' claims arise out of and allege "willful misconduct . . . [and] intentional fraud" by Mr. DeGroote. Mr. DeGroote's own testimony at his October/November 2012 deposition unequivocally revealed an intentional effort to mislead Plaintiffs and to use his position of trust as their lawyer and to subsequently enrich himself at the expense of the clients he was supposed to be advising in good faith. The Fraud/Malpractice Action thus does not violate the Plan or Confirmation Order, and, for the same reason, is not a "collateral attack" on this Court's orders.

Further, the Plaintiffs' claims against Mr. DeGroote should not be construed as falling within the exclusive jurisdiction provision of the Confirmation Order. *See id.* ¶ 34(c). Their claims are not based on, or related to, any equity interest they may have held at one time in BearingPoint. *See id.* (retaining jurisdiction of "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), above").[7] The Plaintiffs are not, for example, aggrieved former

[7] Under the Plan, "*Equity Interest* means the interest of any holders of equity securities of any of the Debtors represented by issued and outstanding shares of common or preferred stock or other

shareholders suing as a result of dissatisfaction with their recovery from the bankruptcy process. They are suing Mr. DeGroote based on his professional misconduct and willful breach of duties to the Plaintiffs while serving as their attorney.

Moreover, at the Liquidating Trustee's insistence, this Court ultimately elected not to retain exclusive jurisdiction over all claims identified in paragraph 34(c) of the Confirmation Order. The Court's rationale for not retaining jurisdiction of the Trustee Action, as expressed in its Bench Decision, applies with even greater force to the Fraud/Malpractice Action, which was properly commenced in the Fairfax County Circuit Court where the Trustee Action is pending. To the extent, however, the Plaintiffs should have sought limited relief from the Confirmation Order in this Court, the Plaintiffs consent to jurisdiction in the Southern District of New York.

To address a final point, the Fraud/Malpractice Action is not a mere "litigation tactic," and the timing of its commencement provides no support to the contrary. *See* Joinder Mot. at 1, 10. The timing of the lawsuit was a function of Mr. DeGroote's deposition schedule. The Plaintiffs filed their action promptly after discovering the facts, through Mr. DeGroote's sworn testimony, that give rise to their claims against him. The Plaintiffs clearly did not bring suit in order to waste the time or resources of any party. Indeed, the Fraud/Malpractice Action was filed in the court that now is most familiar with the underlying facts and issues in part to avoid inefficiencies and needless costs.

Lastly, Mr. DeGroote violated this Court's Case Management Order by failing to confer with the Plaintiffs or seek any relief from them directly, before filing his Motion in this Court.[8]

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instrument evidencing a present ownership interest in any of the Debtors, whether or not transferrable, or any option, warrant, contractual or other right to acquire such interest, including, but not limited to, the warranties issued in connection with the FFL SPA." Plan ¶ 1.44.

[8] Mr. DeGroote's failure to confer before filing violated the Court's Case Management Order, which provides that "[o]n Motions that reasonably may be expected to engender opposition and as to

After Mr. DeGroote's Motion was filed, the Plaintiffs promptly agreed to a stay of all proceedings in the Fraud/Malpractice Action pending this Court's consideration of the Motion. And, as discussed below, now that Mr. DeGroote has removed the Fraud/Malpractice Action from state court and thereby eliminated any efficiencies of litigating the two actions together, the Plaintiffs would consent to jurisdiction in the Southern District of New York.

Plaintiffs possess legitimate claims under Virginia common law arising from Mr. DeGroote's deliberate and willful misconduct. Mr. DeGroote's return to this Court now, requesting that it free him from having to answer for his serious, intentional misdeeds and that Plaintiffs be sanctioned simply for seeking redress for those misdeeds, is without basis. His motion should be denied in all respects.

BACKGROUND

Mr. DeGroote is an attorney licensed in the state of Virginia. *See* Compl. ¶ 9. Mr. DeGroote joined the in-house legal team of BearingPoint as Chief Litigation Counsel in 2000. *See id.* ¶ 15. On December 31, 2008, Mr. DeGroote was promoted by the former directors, including the Plaintiffs, to Chief Legal Officer of BearingPoint. *See id*. ¶ 17.

At all relevant times, BearingPoint's headquarters were located in Fairfax, Virginia. *See* Mot. of Liquidating Trustee for Limited Relief at 11 [Docket No. 1979]; *see also* Bench Decision at 8 n.13.

On February 18, 2009 (the "Petition Date"), BearingPoint and certain of its affiliates (collectively, "BearingPoint" or "Debtors") filed petitions for relief under Chapter 11 in this Court. *See* Compl. ¶ 20.

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which the movant will wish the opportunity to reply, the movant should confer with any expected adversaries to agree on a briefing schedule." Case Management Order ¶ 26.

On October 5, 2009, the Debtors filed the Second Amended Joint Plan Under Chapter 11 of the Bankruptcy Code [Docket No. 1326] (the "October Plan").

The October Plan contained the Prepetition Releases sought by the Debtors. The Prepetition Releases would have released all claims and causes of action held by the Debtors against the Debtors' officers and directors arising from the efforts to sell or reorganize the Company between January 18, 2008 and February 18, 2009.

The Creditors Committee communicated to BearingPoint's outside bankruptcy counsel their objection to the Prepetition Releases for the Debtors' officers and directors. The Creditors Committee argued that, in the absence of an independent investigation, claims against the Debtors' officers and directors for pre-Petition conduct should be preserved and left to the Liquidating Trustee to investigate and pursue (or not pursue) as he saw fit. *See* Compl. ¶¶ 30-31.

On November 2, 2009, the Debtors filed a revised Second Amended Joint Plan Under Chapter 11 of the Bankruptcy Code [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 November Disclosure Statement").

The November Plan retained the Prepetition Releases that were included in the October Plan.

The November Disclosure Statement contained a section ("Justification for Limited Releases") in which the Debtors explained the grounds for granting the Prepetition Releases. The section also noted the objection of the Creditors Committee to the Prepetition Releases and explained the grounds for their objection. The section also disclosed that both the Debtors and the Creditors Committee believed that the Prepetition Releases were severable from the Plan, and that both intended to support the Plan regardless of this Court's ruling on the issue.

On December 10, 2009, the Creditors Committee filed their Limited Objection. The Creditors' sole objection was to the November Plan's inclusion of the Prepetition Releases.

On December 11, 2009, the Debtors filed the 25-page Factual Brief, in which the Debtors described at length the factual basis for granting the Prepetition Releases.

On December 17, 2009, this Court held a confirmation hearing. After hearing the respective arguments of Debtors and the Creditors Committee, the Court denied the Debtors' request for Prepetition Releases. The Court highlighted, among other things, the absence of an independent investigation into the merits of such claims as an important factor in its decision:

> Also, and importantly here, if the claims had been investigated by a disinterested party, like a judge, examiner or creditors' committee and if it were determined that there weren't any viable claims or any whose prosecution would be cost-effective, I think it would be at least, quite reasonable to find that the giveup of such rights is in the best interests of the estate.

Confirmation Hr'g Tr. at 75.

In denying the Prepetition Releases, the Court nevertheless expressed the desire to give the Debtors' directors "the comfort that the validity of these claims [that would have been extinguished by the Prepetition Releases] will be thoughtfully analyzed with the benefit of as much knowledge of the surrounding facts as possible." *Id*. at 77. The Court thus decided to retain exclusive jurisdiction over all claims by the Liquidating Trustee against the Debtors' directors.

On December 22, 2009, the Court entered the Confirmation Order, confirming the Plan [Docket No. 1550].

As the Court had indicated during the confirmation hearing, the Confirmation Order contained a provision under which the Court (and the United States District Court for the Southern District of New York) retained exclusive jurisdiction to adjudicate any and all claims

brought by the Liquidating Trustee. The provision also retained exclusive jurisdiction of all claims 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 ¶ 34(c).

Among the parties that received a limited release within subparagraph 34(a) of the Confirmation Order was John DeGroote. The release provision expressly excludes, however, "any causes of action arising out of [Mr. DeGroote's] willful misconduct, gross negligence, intentional fraud, or criminal conduct." *Id.* ¶ 34(a).

On December 30, 2009, Mr. DeGroote was terminated as CLO of BearingPoint and appointed Liquidating Trustee. *See* Compl. ¶ 44.

On November 29, 2010, the Liquidating Trustee moved this Court for limited relief from the exclusive jurisdiction provision of the Confirmation Order so that it could file suit in Virginia state court against the Plaintiffs and other former Board members. The Plaintiffs objected to the motion and filed an opposition [Docket No. 2020]. After hearing argument of the parties, the Court issued its Bench Decision on the motion on July 11, 2011. Over the objection of Plaintiffs and the Former Directors, the Court decided not to enforce the exclusive jurisdiction provision of the Confirmation Order with respect to the Trustee Action.

On July 21, 2011, the Liquidating Trustee filed the Trustee Action in Fairfax County Circuit Court.

Since the filing of the Trustee Action, the parties have been engaged in extensive discovery in Virginia. The discovery has included the deposition of John DeGroote, which took place over a four-day period between October 18, 2012 and November 2, 2012.

On November 15, 2012, following the conclusion of Mr. DeGroote's deposition, the Plaintiffs commenced the Fraud/Malpractice Action against Mr. DeGroote in Fairfax County Circuit Court. The Fraud/Malpractice Action, which is essentially a counterclaim arising out of the same nucleus of facts as are being litigated in the Virginia Trustee Action, asserts Virginia common law claims for attorney malpractice, fraud, and punitive damages based upon Mr. DeGroote's admitted misdeeds while operating as counsel to the Plaintiffs.

Like the Trustee Action, the Fraud/Malpractice Action is a "non-core" matter under 28 U.S.C. § 157.

Mr. DeGroote removed the Fraud/Malpractice Action to the United States District Court for the Eastern District of Virginia, and then filed the instant Motion in this Court.

At Mr. DeGroote's request, the Plaintiffs have since agreed to stay all proceedings in the Fraud/Malpractice Action pending this Court's resolution of Mr. DeGroote's Motion.

ARGUMENT

Mr. DeGroote asserts four purported grounds for the relief he seeks from this Court:

[i] the claims in the Fraud/Malpractice Action were released by the Plan and Confirmation Order;

[ii] the Fraud/Malpractice Action is a collateral attack on this Court's prior orders;

[iii] the Fraud/Malpractice Action is barred by the *Barton* doctrine; and

[iv] the Fraud/Malpractice Action violates the exclusive jurisdiction or gatekeeper provision in the Confirmation Order.

Mot. at 12-23. Each of these contentions, discussed in turn below, is without merit. None of them warrant an order "enforcing" the Confirmation Order, holding the Plaintiffs in contempt, or awarding sanctions. His Motion should be denied.

I. The Fraud/Malpractice Action Does Not Violate the Plan, the Confirmation Order, or Any Other Order of this Court.

A. The claims asserted against Mr. DeGroote in the Fraud/Malpractice Action fall outside of the limited release he received under the Plan.

The Confirmation Order granted Mr. DeGroote and certain other individuals "Limited Releases" from certain claims and causes of action accruing prior to the Effective Date. *See* Confirmation Order ¶ 34(a). The provision states explicitly, 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." *Id*.[9]

The claims asserted in the Fraud/Malpractice Action are not based on an error in judgment, mere negligence, or other similar conduct by Mr. DeGroote that could have been released by the Plan. To the contrary, the Plaintiffs have alleged that Mr. DeGroote engaged in deliberate and willful misconduct, including through misrepresentations and omissions to the Plaintiffs, which conduct gives rise to common law claims for fraud and legal malpractice. On their face, those claims fall outside the scope of the Plan release.

In his Motion, Mr. DeGroote argues that the Plaintiffs' claims "sound[] in negligence or contract, rather than one of the explicitly excluded types of actions," and thus were released by the Plan. Mot. at 14. Even assuming this Court could ignore the Plaintiffs' claim against Mr. DeGroote for fraud (which it cannot), Mr. DeGroote's argument is baseless as to the malpractice

[9] Mr. DeGroote appears to rely as well on the "Exculpation" provision in the Confirmation Order. *See* Confirmation Order ¶ 33. That provision, however, releases "the Liquidating Trustee" for certain actions "taken in connection with, or arising out of, the Chapter 11 Cases, the formulation, dissemination, confirmation, consummation or administration, of the Plan." *Id*. As discussed *infra*, the Fraud/Malpractice Action does not assert claims based upon any actions taken by Mr. DeGroote within the scope of his duties as Liquidating Trustee. *See infra* § I.C. In any event, the exculpation provision likewise does not release acts or omissions that constitute "willful misconduct, gross negligence, intentional fraud, or criminal conduct." *See* Confirmation Order ¶ 33.

claim and is contradicted by the plain language of the release. The release provision states in relevant part that "*any causes of action arising out of willful misconduct*" are not waived or released. Accordingly, regardless of the manner in which a cause of action is denominated, the Court must look to the substantive allegations of the claim to determine whether it "aris[es] out of willful misconduct," and thus whether or not it is released.[10] Here, because the Plaintiffs' malpractice claim (like their fraud claim) against Mr. DeGroote indisputably is based on his willful misconduct, it was not released.[11]

In essence, Mr. DeGroote asks the Court to interpret the limited release provision as providing that claims for willful misconduct are excluded, *unless* such willful misconduct is alleged in the context of a cause of action "sounding in negligence or contract," in which case the claims are released. But that is not what the limited release provision says, and Mr. DeGroote offers no basis for construing the provision in such fashion.

Mr. DeGroote's argument that the malpractice claim is released because it is not "one of the explicitly excluded types of actions," Mot. at 14, also ignores that the limited release does not exclude only specifically denominated "types of actions." Rather, the limited release provision excludes all causes of action, regardless of how they are styled, to the extent that they are based

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[10] The correct analysis is similar to that performed by bankruptcy courts in determining whether a debt can be discharged under 11 U.S.C. § 523(a)(6), which prohibits discharge if the debt is "for willful and malicious injury by the debtor." *Id.* In such cases, courts look past the elements of the cause of action to the underlying facts. *See In re Miera*, 926 F.2d 741, 744 (8th Cir. 1991) (finding that a debt could not be discharged, noting that "evidence adduced in the state court proceeding supports a finding of malice"); *In re Page*, 197 B.R. 61, 64 (Bankr. N.D. Ohio 1996) (finding that a debt arising out of a state court action was not dischargeable on the grounds that "[t]he complaint in the state court action allege[d] 'intentional and unjustified' conduct").

[11] Mr. DeGroote's argument likewise is contradicted by the preservation of all claims or causes of action arising out of "gross negligence." Confirmation Order ¶ 34. Even in states in which an attorney malpractice claim "sounds in negligence," the claim would not be released to the extent "gross negligence" was asserted. In that case as well, the substantive allegations of the complaint, rather than the mere denomination of the claim, would determine whether or not the claim is released.

on specific types of *conduct* (willful misconduct, gross negligence, intentional fraud, criminal conduct). Indeed, "willful misconduct" is not an independent cause of action arising under state law. Rather, as the limited release language clearly and correctly contemplates, "willful misconduct" includes actions and inactions that can give rise to a number of different causes of action, including a cause of action for attorney malpractice in this case. *See Bangert v. Harris*, 553 F. Supp. 235, 237 (M.D. Pa. 1982) ("[I]f a client alleges intentional actions by an attorney, which actions are not in the client's best interest and which the attorney knows or should know are not, the client may sue the wrongdoer [for attorney malpractice]. To argue that negligent conduct has a remedy but that intentional conduct does not is illogical and incorrect."). *Cf. Brevon Developers, Inc. v. Phillips*, No. 117155, 1993 WL 946386, at *3-4 (Va. Cir. Ct. Dec. 22, 1993) (legal malpractice can arise from "intentional, extreme, wanton or outrageous" conduct).

Mr. DeGroote has no persuasive argument that the Plaintiffs' claims against him were released under the Plan. Accordingly, his Motion digresses into an attack on the merits of the Fraud/Malpractice Action itself. But if Mr. DeGroote wishes to challenge the merits of the Fraud/Malpractice Action, he should file a motion to dismiss (or demurrer, as appropriate).

The laws of Virginia apply to the Plaintiffs' claim of attorney malpractice, which was commenced in Virginia state court against a Virginia attorney for misconduct while advising the Plaintiffs regarding their personal liability and while serving as CLO of a Virginia-based company. In Virginia, it does not matter that "Mr. DeGroote was never engaged as counsel by any of the directors and officers individually." Mot. at 4. Virginia recognizes both express and implied relationships between an attorney and client. *See Arriba Corp. v. Bostic*, No. CH01-1413, 2002 WL 33957194, at *4 (Va. Cir. Ct. Jan. 17, 2002) ("An attorney-client relationship need not be formally established."). To establish an attorney-client relationship, "it is sufficient

that the advice and assistance of the attorney is sought and received, in matters pertinent to his profession." *Id*. (quoting *Nicholson v. Shockley*, 64 S.E. 2d 813, 817 (Va. 1951)). The Fraud/Malpractice Action alleges just that, as Mr. DeGroote was providing advice directly to the Plaintiffs throughout 2009, and as late as November 16, 2009. *See* Compl. ¶¶ 17-19, 21, 32, 34, 46. The Fraud/Malpractice Action also alleges Mr. DeGroote's breach of his duties to the Plaintiffs, and resulting damages. *See id*. ¶¶ 35-37, 44, 52-54. The Plaintiffs' Complaint thus adequately states a claim for attorney malpractice against Mr. DeGroote.

Mr. DeGroote argues that it is *the Company* with whom an in-house counsel shares an attorney-client relationship. *See* Mot. at 15. That is undisputed. But Mr. DeGroote cites no authority that forecloses an in-house counsel from sharing an attorney-client relationship with a company's directors as well — especially where that attorney provides personal advice regarding a client's personal liability, as occurred, among other times, at the November 16, 2009 final Board meeting in Dallas. To the contrary, in Virginia (and elsewhere), "[a] lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents" subject to general conflict of interest principles. *See* Va. Sup. Ct. R. pt. 6, § II, 1.13(e).

Whether an independent attorney-client relationship arises between an in-house counsel and a company's directors obviously turns on the facts of the given case. *See In re Teleglobe Commc'ns Corp.*, 392 B.R. 561, 588 (Bankr. D. Del. 2008) (holding when a lawyer's client is an entity, whether the representation is limited to the organization or also extends to individuals related to the entity "is a question of fact to be determined based on reasonable expectations in the circumstances"). And, in appropriate circumstances, courts have found an attorney-client relationship between a company's lawyer and individuals within the company. *See United States*

v. Barer, No. 06-MC-9021-BR, 2006 WL 3693370, at *3 (D. Or. Oct. 30, 2006) (owners of professional corporation had objectively reasonable basis to believe corporation's attorney also represented them individually); *see also Margulies v. Upchurch*, 696 P.2d 1195, 1200 (Utah 1985) (law firm defending a limited partnership also had attorney-client relationship with limited partners).

Under the circumstances here, Mr. DeGroote had an independent attorney-client relationship with the Plaintiffs and Plaintiffs held an objectively reasonable belief that Mr. DeGroote represented them individually. Mr. DeGroote frequently provided legal counsel directly to the Plaintiffs including in helping Mr. Harbach prepare to testify in bankruptcy court proceedings about the pre-bankruptcy sales process and in advising the Plaintiffs about whether an independent investigation should be conducted when they sought his advice and counsel during November 2009. *See* Compl. ¶¶ 17-19, 21, 31-36. This advice was inherently personal — it involved personal liability of the directors. As detailed in the Complaint, the Plaintiffs reasonably considered Mr. DeGroote to be their trusted legal advisor in light of their substantial relationship and interactions with him. *See id*. ¶ 19.

The Plaintiffs also have adequately stated a claim for fraud against Mr. DeGroote. Mr. DeGroote's suggestion that the allegations somehow are vague, non-specific, or implausible is without merit. The Fraud/Malpractice Action states with specificity the source, timing, and substance of the misrepresentations and omissions that give rise to their cause of action against Mr. DeGroote, including:

- Mr. DeGroote's failure to disclose in fall 2009 the disabling conflict of interest that arose as a result of his negotiation of a compensation package that incentivized him to sue the Plaintiffs, *see id*. ¶ 35-37;

- Mr. DeGroote's representation, with little or no basis, in October 2009 that an independent investigation of the Plaintiffs' conduct would cost $5-10

million and would be prohibitively expensive and time consuming, *see id*. ¶ 32;

- Mr. DeGroote's representation, in November 2009, that an independent investigation of the Plaintiffs' conduct was not necessary because he was aware of no claims against them (even though he already was planning to bring such claims), *see id*. ¶¶ 34-37; and

- Mr. DeGroote's failure to disclose in December 2009 that he would not review and approve the Factual Brief that the company submitted to this Court in support of the Prepetition Releases (clear evidence that Mr. DeGroote understood and believed that he had a conflict of interest) and failure to suggest that other internal Company counsel review the document, *see id*. ¶ 41.

The Plaintiffs likewise have alleged Mr. DeGroote's incentive and intent to mislead, the Plaintiffs' reliance on his misrepresentations and omissions, and resulting damages. *See* Compl. ¶¶ 32, 34-38, 44, 53-54, 58-60. Mr. DeGroote's attack on the merits of the fraud claim against him is thus likewise without basis.[12]

Mr. DeGroote also argues that the fraud claim is "entirely duplicative" of the attorney malpractice claim and should be subject to dismissal on this basis. *See* Mot. at 19. Again, Mr. DeGroote is mistaken, and there is no prohibition on plaintiffs in Virginia from simultaneously asserting attorney malpractice and fraud claims against counsel. *See Hewlette v. Hovis*, 318 F. Supp. 2d 332, 336-37 (E.D. Va. 2004) ("[A]n individual does not relinquish his or her right to seek remuneration for tortious breach of common law duties simply because he or she retained the tortfeasor as counsel."). Independent of the duties Mr. DeGroote owed the Plaintiffs as their

[12] Mr. DeGroote also argues that the fraud claim is barred by Virginia's two-year statute of limitations. The argument is relegated to a footnote, Mot. at 19 n.3, which is all the argument deserves. Under Virginia law, a cause of action for fraud accrues "when such fraud . . . is discovered or by the exercise of due diligence reasonably should have been discovered." Va. Code § 8.01-249(1) (2012). The Plaintiffs' lawsuit was brought within a few months of when they discovered the actions of Mr. DeGroote (through his sworn deposition testimony) that give rise to their fraud claim against him. The Malpractice Action also was brought within two years of when Mr. DeGroote first moved for limited relief from this Court to file suit against the Plaintiffs in Virginia.

attorney, he owed a duty not to defraud them, which gives rise to a separate cause of action. *See id*. In any event, it is Mr. DeGroote's position that he had no attorney-client relationship with the Plaintiffs. Even if a court ultimately agrees with Mr. DeGroote on this point, the Plaintiffs' fraud claim against Mr. DeGroote would be allowed to proceed nonetheless.

In sum, the Plaintiffs have valid claims against Mr. DeGroote for attorney malpractice and fraud, neither of which was released by the Confirmation Order.

B. The Fraud/Malpractice Action is not a collateral attack on this Court's prior orders.

Mr. DeGroote argues that the Fraud/Malpractice Action is an improper collateral attack on the Plan and Confirmation Order. It is not. Mr. DeGroote's assertion is based on the faulty premise that the claims asserted in the Fraud/Malpractice Action were released and enjoined by the Plan and Confirmation Order. As discussed above, they were not. To be clear, the Plaintiffs' lawsuit against Mr. DeGroote does not challenge in any respect the Plan, the Confirmation Order, or the jurisdiction and authority of this Court in entering such orders. The Plaintiffs' ability to recover against Mr. DeGroote in the Fraud/Malpractice Action does not require that any order of this Court be amended or overturned. *Compare Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 154 n.7 (2009) ("[T]o the extent respondents argue that the 1986 [Confirmation] Orders should not be enforced according to their terms because of a jurisdictional flaw in 1986, this argument is an impermissible collateral attack."), *with In re Spiegel, Inc.*, No. 03-11540, 2006 WL 2577825, at *13 (Bankr. S.D.N.Y. Aug. 16, 2006) (party seeking to advance claims released by confirmation order could not collaterally attack the order by arguing that the "Plan Release and Injunction were improperly approved"). All that is challenged in the Fraud/Malpractice Action is the intentional, un-released conduct of John DeGroote in advising

the Plaintiffs while serving as their attorney. The orders of this Court are not implicated by such claims.

Mr. DeGroote complains about the time and expense associated with defending against the Fraud/Malpractice Action. *See* Mot. at 20. Yet the Plaintiffs brought the Fraud/Malpractice Action in Fairfax County Circuit Court and sought consolidation with the ongoing Trustee Action, in part to avoid unnecessary costs and expenses. At least some of the costs Mr. DeGroote has incurred to date relate to his removal of the Fraud/Malpractice Action out of the forum he selected for litigation against the Plaintiffs. In any event, given that the underlying issues already have been the subject of extensive discovery in the Trustee Action, the Plaintiffs believe that the Fraud/Malpractice Action can be resolved quickly and efficiently with minimal additional time and expense.[13] Moreover, it is the time and expense of the baseless Trustee Action that should concern the Court.

Mr. DeGroote also suggests that the Court should enjoin the Fraud/Malpractice Action because it threatens to "disrupt" the Trustee Action. *See* Mot. at 20. He does not specify what disruption has occurred and the assertion is baseless. The Trustee Action is proceeding along just as it was prior to the commencement of the Fraud/Malpractice Action, and it remains set for trial on April 1, 2013. By contrast, nothing currently is happening in the Fraud/Malpractice Action, as the parties have agreed to stay all proceedings pending the resolution of Mr.

[13] Mr. DeGroote also argues that the Trust is required to indemnify him for his defense costs, such that the Fraud/Malpractice Action could reduce amounts available to creditors. *See* Mot. at 20. That should not be the case. Under the Liquidating Trust Agreement, Mr. DeGroote only is entitled to indemnification for acts or omissions taken while acting in his capacity as Liquidating Trustee. *See* LTA § 7.6. Further, liability arising out of Mr. DeGroote's "willful misconduct" is excluded from coverage. *See id*. The Fraud/Malpractice Action asserts claims arising out of Mr. DeGroote's willful misconduct while acting as attorney to the Plaintiffs (not in his duties as Liquidating Trustee).

DeGroote's Motion presently before this Court. If and when the stay is lifted, the Fraud/Malpractice Action presumably will proceed on its own separate track.

Further, even if the Fraud/Malpractice Action resulted in some incidental (and unspecified) disruption of the Trustee Action, that would not provide Mr. DeGroote with a basis for seeking relief from this Court. To suggest otherwise would imply that this Court likewise could prevent the Plaintiffs from taking discovery, filing motions, or otherwise mounting a vigorous defense in the Trustee Action, or filing a counterclaim, all of which conceivably could be characterized as "disrupting" that lawsuit.

To be sure, this Court denied the Prepetition Releases in approving the Plan, and it allowed the Liquidating Trustee to bring the Trustee Action in Virginia state court (rather than in New York). But through these orders, this Court cannot be said to have endorsed the ultimate merits of the Trustee Action, and the Court has had no occasion to consider the factual record that has developed in that lawsuit since it was filed. Likewise, the Court has not entered any order that would prevent the Plaintiffs from using all appropriate means to defend themselves and seek vindication of their own rights and interests in connection with the Trustee Action.

The principals of *res judicata* are inapplicable as the Fraud/Malpractice Action does not conflict with, much less "attack," any order of this Court.

C. The Fraud/Malpractice Action is not barred under the *Barton* doctrine.

Mr. DeGroote also suggests that the Fraud/Malpractice Action should be barred under the *Barton*[14] doctrine. *See* Mot. at 22 (citing *Satterfield v. Malloy,* 700 F.3d 1231 (10th Cir. 2012)).[15] The *Barton* doctrine, however, acts as a potential bar only to claims against a court-

[14] *Barton v. Barbour*, 104 U.S. 126 (1881).

[15] The Liquidating Trustee likewise argues (incorrectly) that the *Barton* doctrine acts as a bar to the Fraud/Malpractice Action. *See* Joinder Mot. at 15-16.

appointed trustee for acts taken in connection with his official duties as trustee. *See Satterfield*, 700 F.3d at 1236 ("[C]laims based on acts that are related to the official duties of the trustee are barred by the *Barton* doctrine . . . ."); *id*. at 1237 ("We conclude that [the trustee's] actions fell within the scope of his court-appointed authority as trustee because each of his alleged actions was related to his trusteeship duties."); *see also In re Lehal Realty Assocs*., 101 F.3d 272, 276 (2d. Cir. 1996) ("[T]he 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.").

Here, the Plaintiffs' claims against Mr. DeGroote are not based on actions taken in connection with his duties (official or otherwise) as Liquidating Trustee. Mr. DeGroote had not even been appointed Liquidating Trustee when the misconduct at issue occurred. Rather, the actions giving rise to the claims against Mr. DeGroote occurred in connection with his duties (or dereliction thereof) as counsel to the Plaintiffs. Mr. DeGroote concedes this point, correctly stating in his Motion that "[t]he claims by the Former [Clients] . . . are for conduct that took place prior to the Plan's effective date" (*i.e.*, the date that DeGroote was appointed Liquidating Trustee). Mot. at 15 (emphasis in original). The *Barton* doctrine has no application here.

Although it is true that the damages claimed by the Plaintiffs are based in part on the costs and expenses arising out of the Trustee Action, that does not mean, as the Joinder Motion suggests, that "Mr. DeGroote is being sued personally because of action he has taken as Liquidating Trustee." Joinder Mot. at 16. As discussed above, and as conceded by Mr. DeGroote in his Motion, the Plaintiffs' claims are based on actions predating the appointment of a Liquidating Trustee (and long before the Trustee Action was filed). Indeed, assuming, hypothetically, that Mr. DeGroote had been replaced as Liquidating Trustee before 2011, and someone else commenced the Trustee Action, the Plaintiffs claims against Mr. DeGroote would

be precisely the same as they are now. That Mr. DeGroote personally was involved in commencing the Trustee Action is irrelevant to the Plaintiffs' claims against him.

D. The Fraud/Malpractice Action does not violate the exclusive jurisdiction provision of the Confirmation Order, but to the extent the Court finds otherwise, Plaintiffs will consent to jurisdiction in the Southern District of New York.

Mr. DeGroote next contends that under Paragraph 34(c) of the Confirmation Order, the Plaintiffs were required to bring the Fraud/Malpractice Action before this Court in the first instance, "either to litigate them here or to seek leave to file them elsewhere." Mot. at 21. For a number of reasons, the Plaintiffs' claims against Mr. DeGroote should not be construed as falling within the exclusive jurisdiction provision of the Confirmation Order. In the alternative, however, the Plaintiffs would consent to jurisdiction in the Southern District of New York since the Trustee's removal of the Fraud/Malpractice Action to federal court eliminated the efficiencies they sought to obtain by litigating before the same Virginia state court.

Whereas the Trustee Action is precisely the lawsuit that the Court had in mind when it added the exclusive jurisdiction provision, and the provision applies *explicitly* to any claims brought by the "Liquidating Trustee," *see* Confirmation Order ¶ 34(c), the same cannot be said for claims brought by the Plaintiffs. Messrs. Harbach, McGeary, and Munson are not personally identified within the exclusive jurisdiction provision.[16] Instead, the provision provides generally for retention by the Court of claims brought by each holder of an "Equity Interest" against any party granted a limited release in subparagraphs 34(a) and 34(b) of the Confirmation Order. This language reasonably was intended to cover the typical Chapter 11 shareholder litigation:

[16] At the December 2009 confirmation hearing, there was no discussion about, or contemplation of, litigation in which the company's directors would be *plaintiffs*.

shareholders, unhappy with their recoveries, asserting claims for additional monies based on harms to their interests in the debtor. The Fraud/Malpractice Action is not such a suit.

The Plaintiffs are not suing as shareholders of BearingPoint, or seeking to advance any interests as such. Whatever equity interest the Plaintiffs held in BearingPoint is irrelevant to their claims against Mr. DeGroote. They are suing Mr. DeGroote, instead, based on his professional misconduct and breach of duties to the Plaintiffs while serving as their attorney and while providing them personal legal advice. However, because the Plaintiffs purportedly were shareholders in BearingPoint, Mr. DeGroote asserts that any and all claims they may have against him must be asserted here, regardless of the nature of those claims, or whether, for that matter, they have anything to do with BearingPoint. Under his view, a personal injury action stemming from a car accident between Mr. DeGroote and Mr. Harbach presumably would fall within the exclusive jurisdiction of the Confirmation Order. The exclusive jurisdiction provision should not be construed in this fashion, or be interpreted as covering claims (like the Plaintiffs' claims against Mr. DeGroote) that are unrelated to a claimant's equity interest in BearingPoint.

Further, it is more than a little ironic that Mr. DeGroote now asserts the exclusive jurisdiction provision of the Confirmation Order in trying to deprive the Plaintiffs of their preferred forum for litigation. This Court added the exclusive jurisdiction provision to the Confirmation Order with the intention of providing some measure of relief to *the Plaintiffs and their fellow directors* after the Court denied the Prepetition Releases they sought.[17] Seeking to spare the directors from the difficulties involved in cases in distant state courts, *see* Confirmation Hr'g Tr. at 67, the Court included the exclusive jurisdiction provision with the apparent goal of

[17] *See* Bench Decision at 4 ("As noted, those [exclusive jurisdiction] provisions arose from the pre-confirmation dispute over the original releases that had been proposed by the Debtors which would have released the former officers and directors from claims based on any alleged prepetition misconduct.").

ensuring that potential claims against them by the Liquidating Trustee would be analyzed and adjudicated "with the benefit of as much knowledge of the surrounding facts as possible." *Id*. at 77. Nevertheless, Mr. DeGroote ultimately convinced the Court (over the Plaintiffs' objection) *not to enforce* the exclusive jurisdiction provision when he sought to file the Trustee Action against the Plaintiffs in Virginia state court. After motions practice and a hearing, this Court concluded that the Trustee Action could be brought in Virginia. *See* Bench Decision at 9-10.

After successfully asserting that his claims related to the Plaintiffs (and their fellow former directors) should be litigated in Virginia, Mr. DeGroote now asserts that, unlike his claims against the Plaintiffs, their claims against him arising out of the same facts should be litigated in the Southern District of New York. Mr. DeGroote provides no plausible reason for that — especially given that the allegations of intentional and willful conduct are not covered by the Plan's releases. Mr. DeGroote's new position exposes his forum-shopping for what it is: nothing more than an attempt to gain what he perceives as a tactical advantage, rather than a good-faith attempt to litigate claims arising out of the pre-bankruptcy sales in the most efficient forum.

The Plaintiffs filed the Fraud/Malpractice Action in Virginia and then immediately moved to consolidate it with the Trustee Action claims. *See* Ex. E. They did so because the Fraud/Malpractice Claims are essentially counterclaims against DeGroote in his personal capacity,[18] and litigating all of these claims in the same case represented the most efficient way to proceed. Both cases rely on the same nucleus of facts and will involve the same documents and witnesses. The judge in Virginia, who was specially assigned by the Fairfax County Court,

[18] Mr. DeGroote sued the Plaintiffs in his capacity as Liquidating Trustee, and therefore the malpractice and fraud claims could not be asserted back against him in the same litigation, but rather had to filed separately and then consolidated. *See In re Bernard L. Madoff Inv. Sec. LLC*, 440 B.R. 282, 290 (Bankr. S.D.N.Y. 2010) ("[I]t is fundamental that in an action brought by a party in a representative capacity, a counterclaim cannot be asserted against the plaintiff in his individual capacity.") (citations omitted).

is already familiar with the facts of the case and the parties. It therefore makes sense as a matter of efficiency to litigate the claims together to avoid the need to re-take depositions, re-produce documents, and to educate another judge on these same matters. The Fraud/Malpractice Claims would not delay the Trustee Action's April 1, 2013 trial date because the facts underlying both claims are the same. Indeed, as soon as the Fraud/Malpractice Plaintiffs learned of the facts giving rise to this action in November 2012, they filed this action immediately in Virginia to achieve the efficiencies of combining the two suits and to make sure that the matters could be tried together in April 2013.[19]

Since Mr. DeGroote has taken the position that he no longer wants to litigate in Virginia state court, however, and has removed the Fraud/Malpractice Action to federal court, the efficiencies that the Plaintiffs sought to achieve no longer exist. Mr. DeGroote did not confer with the Plaintiffs before filing this motion. If he had done so, the Plaintiffs would have told Mr. DeGroote that they have no desire to waste judicial resources, time, and money on another forum fight, and would consent to jurisdiction in the Southern District of New York because this Court has familiarity with many of the pertinent facts and with the parties.

In sum, given the nature of the claims asserted against Mr. DeGroote, and given the prior experience of the parties and the Court regarding the Confirmation Order's exclusive jurisdiction provision, the Plaintiffs believe that the Fraud/Malpractice Action appropriately was filed in Fairfax County Circuit Court. In the event this Court decides otherwise, however, the Plaintiffs would consent to jurisdiction in the Southern District of New York.[20]

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[19] The Plaintiffs have never asked the Virginia Court to delay the April 1, 2013 trial date, and have no intention of doing so — DeGroote's assertions that the Fraud/Malpractice Claims are a delaying tactic are simply false.

[20] The Plaintiffs intend to assert their rights to a jury.

II. Mr. DeGroote's Request That The Plaintiffs Be Held in Contempt and for Sanctions Should Be Denied.

"Civil contempt is a failure to obey a court order issued for another party's benefit and such sanctions are coercive or remedial in nature." *In re Chief Exec. Officers Clubs, Inc.*, 359 B.R. 527, 534 (Bankr. S.D.N.Y. 2007) (citing Black's Law Dictionary 313 (7th ed. 1999)). "A court's inherent power to hold a party in civil contempt may be exercised only when (1) the order the party allegedly failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the party has not diligently attempted in a reasonable manner to comply." *Id*. at 535.

The "clear and unambiguous" requirement means that "the clarity of the order must be such that it enables the enjoined party 'to ascertain from the four corners of the order precisely what acts are forbidden.'" *Id.* The second prong's "clear and convincing" standard, moreover, "requires a quantum of proof adequate to demonstrate 'reasonable certainty' that a violation occurred." *Id*. (citation omitted). And where contempt is found, the defendant must not have diligently attempted to comply with the order. *Id*. (citing *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1352 (2d Cir. 1989) (finding that defendants did not diligently attempt to comply with the court order in a reasonable manner; instead, the defendants proceeded with demonstrations even though there was ample opportunity to comply with the court order either by curtailing their scope or by stopping them altogether)).

Any doubts about whether the requirements for finding civil contempt in a particular case have been met must be resolved in favor of the party accused of the civil contempt. *See Chief Exec. Officers Clubs*, 359 B.R. at 535. Indeed, even when courts find that an action is barred, they often decline to impose contempt sanctions. *See In re Monarch Capital Corp.*, 173 B.R. 31, 46 (D. Mass. 1994), *aff'd sub nom. Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973 (1st Cir.

1995); *In re R.H. Macy & Co., Inc.*, 236 B.R. 583, 593 (Bankr. S.D.N.Y. 1999), *aff'd*, 283 B.R. 140 (S.D.N.Y. 2002).

Here, Mr. DeGroote's request that the Plaintiffs, all lay people, be held in contempt must be denied, because they did not violate the Confirmation Order (or any other order of this Court). As discussed above, the commencement of the Fraud/Malpractice Action did not violate the Confirmation Order's limited release provision, as the Plaintiffs' claims against Mr. DeGroote arise out of his serious and willful misconduct and fraud. At a minimum, the Confirmation Order does not unambiguously release the claims asserted in the Fraud/Malpractice Action, and Mr. DeGroote does not appear to suggest otherwise.

Instead, Mr. DeGroote argues that the Plaintiffs should be held in contempt for violating the Confirmation Order's exclusive jurisdiction provision. He argues that, because the Plaintiffs previously relied on the same provision in objecting to the Liquidating Trustee's motion to file the Trustee Action in Virginia, the alleged violation is clear. Mr. DeGroote is mistaken, and he again ignores that the Trustee Action (unlike the Fraud/Malpractice Action) was the specific cause of action that the Court had in mind when it decided to include an exclusive jurisdiction provision in the first place. *See* Confirmation Hr'g Tr. at 64-77; *see also* Bench Decision at 13 ("[T[he provisions were included **solely** to implement *my* sense of what was appropriate, when I sustained objections by the BearingPoint Creditors' Committee to the releases the Debtors sought."). By contrast, for the reasons discussed above in section I.D, the exclusive jurisdiction provision should not be construed as being applicable to the Plaintiffs' claims against Mr. DeGroote. At the very least, the Confirmation Order's exclusive jurisdiction provision does not "clearly and unambiguously" apply to the Fraud/Malpractice Action. Contempt thus is not warranted.

Further, there is no basis to find that the Plaintiffs have not diligently attempted to comply with the Court's Order. Notwithstanding the exclusive jurisdiction provision of the Confirmation Order, neither the parties nor the Court can ignore that the Court subsequently permitted the Liquidating Trustee to file his action against the Plaintiffs in Fairfax County Circuit Court. It was through discovery in that action that the Plaintiffs learned of the facts giving rise to their claims against Mr. DeGroote. So, the Plaintiffs filed their lawsuit — which is analogous to a counterclaim in the court in which substantially related litigation already was pending — in a forum that this Court already had decided was appropriate for litigation of issues of this nature between the parties. Nevertheless, after Mr. DeGroote filed the present Motion in this Court — his first indication that he believed the Fraud/Malpractice Action violated the Confirmation Order — the Plaintiffs agreed to a stay of all proceedings in the Fraud/Malpractice Action pending this Court's consideration of the Motion. The Plaintiffs' diligent attempts to comply with this Court's orders are evident.

Finally, it is worth reiterating that the Confirmation Order's exclusive jurisdiction provision was issued solely for the benefit of Mr. Harbach and his fellow Board members, not for "another party's benefit." *See Chief Exec. Officers Clubs*, 359 B.R. at 534. Accordingly, by definition, the Plaintiffs' alleged violation of the exclusion jurisdiction provision should not qualify as civil contempt. *See id*. And it is unclear what purpose would be advanced by holding the Plaintiffs in contempt for violating a provision that originally was intended for their benefit, but which, with the benefit of hindsight, the Court has previously decided not to enforce in any event. *See* Bench Decision.

Mr. DeGroote's request that the Plaintiffs be held in contempt should be denied.

CONCLUSION

For all the foregoing reasons, the Motion and Joinder Motion should be denied in all respects.

Dated: January 14, 2013

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UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

Michael J. Castiglione, being duly sworn, deposes and says:

(I) That he is not a party to the within action, is over the age of 21 years and resides in New York, New York.

(II) That on January 14, 2013, he caused the following document to be served: *Joint Opposition to the Motion of John DeGroote for an Order Enforcing the Confirmation Order, Holding F. Edwin Harbach, Roderick C. McGeary and Edward Munson in Contempt, and for Sanctions* via first class mail to the parties on **Exhibit A** and via electronic mail to the parties listed on **Exhibit B**.

Michael J. Castiglione

Sworn to before me this
14th day of January, 2013.

Notary Public

CYRENA M. TERRICONE
Notary Public, State of New York
No. 01TE6068392
Qualified in New York County
Commission Expires Dec. 31, 2013

EXHIBIT A

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