UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: BEARINGPOINT, INC. *Debtor.*	Case No. 09-10691-reg New York, New York January 31, 2013 11:30 a.m. - 5:42 p.m.

TRANSCRIPT - CHAPTER 11 HEARING - 09-10691-REG

- BEARINGPOINT, INC. AND JOHN DEGROOTE SERVICES, LLC AS LIQUIDATING TRUSTEE -

CHAMBER CONFERENCE AND DOC# 2271 MOTION TO AUTHORIZE / MOTION FOR ORDER (A) ENFORCING CONFIRMATION ORDER, (B) HOLDING F. EDWIN HARBACH, RODERICK C. MCGEARY, AND EDDIE R. MUNSON IN CONTEMPT, AND (C) IMPOSING SANCTIONS FOR WILLFUL VIOLATION OF CONFIRMATION INJUNCTION

BEFORE THE HONORABLE ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE

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(Proceedings recorded by electronic sound recording)

THE COURT: I want to get appearances and then I want everybody to sit down.

MR. LONGMIRE: Again then, Your Honor, John Longmire of Willkie Farr & Gallagher on behalf of John DeGroote.

THE COURT: Okay, Mr. Longmire.

MS. HYKAL: Deirdre Hykal, Willkie Farr & Gallagher on behalf of Mr. DeGroote.

THE COURT: Okay.

MR. GALLO: Good morning, Your Honor. Andrew Gallo from Bingham McCutchen for the trustee.

THE COURT: Okay, Mr. Gallo.

MR. CURNIN: Good morning, Your Honor. Paul Curnin, Simpson Thacher for the Plaintiffs.

THE COURT: All right, Mr. Curnin.

MR. RUSSELL: Good morning, Your Honor. William Russell, also of Simpson Thacher for the Plaintiffs.

THE COURT: All right, Mr. Russell. Will I be hearing from you or Mr. Curnin?

MR. RUSSELL: Mr. Curnin, primarily, Your Honor.

THE COURT: Okay.

MR. RUDGE: Your Honor, Andrew Rudge from Williams & Connolly on behalf of Mr. Harbach. Thank you.

THE COURT: Did you say Rudd, R-u-d-d-?

MR. RUDGE: Rudge, R-u-d-g-e.

THE COURT: I'm sorry, Mr. Rudge.

MR. RUDGE: Thank you.

THE COURT: All right. Gentlemen, make your presentations as you sit fit but I want you to address the following questions and -- Mr. Curnin, Mr. Russell, Mr. Rudge, I am troubled, very troubled by your efforts to put your accuser on trial but I am even more troubled by your efforts to sidestep this court's jurisdiction in construing the scope and meaning of its earlier orders.

You make an argument on 34(c) and say that your guys aren't suing in their capacity as creditors or stockholders. But the language of the order is clear in cases like Ron Pair and many others, both in the bankruptcy area and in the statutory construction area tell us that when language is clear and doesn't lead to an absurd result, judicial inquiry ends. And it's hardly absurd for an order to say that -- putting on attacks on one accusing you, who is acting under the authority of orders that the Court has approved, is subject to the same kinds of potential abuses.

We bankruptcy judges see this stuff all the time. We see people throwing around accusations in the Court against people who were doing their jobs in the bankruptcy system and while they may be very wrong when they do their jobs in terms of making claims, which is the exact purpose of the Virginia action and where I express no view as to its outcome, the very purpose of the original language which was to protect your guys and the

exculpation language, was to protect people from this frivolous stuff that we bankruptcy judges see all the time and to allow claims to have a least a colorable basis before they go forward.

Now my tentative California style based upon my review of the briefs in the underlying cases, is to issue an injunction in the nature of a preliminary injunction against proceeding in Virginia or in any place other than this court with respect to the matters that are the subject of this lawsuit against Mr. DeGroote and continuing pending an evidentiary hearing, the aspect of the motion insofar as it seeks a finding of contempt and sanctions, to give a greater opportunity for the two law firms and their clients to help explain to me why this was proper or at least arguably proper.

I particularly want counsel for both sides to talk about Barton v. Barbour and its Second Circuit manifestation in Lehal Realty and the line at Lehal Realty at page 276 which talks about right after the right to surcharge or find a trustee or fiduciary responsible if he or she has damaged the estate or creditors. Where it goes onto say "At the same time, the Court that appointed the trustee has a strong interest in protecting him from unjustified personal liability for acts taken within the scope of its official duties."

And for the life of me, I have difficulty seeing how these claims would have been brought against DeGroote if he hadn't gone after the officers and directors here but Barton v.

Barbour make it very clear; you come to this court and then we decide whether the claims can and should proceed beyond that. And in that gatekeeper role, which the officers and directors seemed to welcome until they made references in the Borden (ph.) letter that was sent to me, was that I -- based upon my knowledge of what went on have a certain ability to decide what claims are deserving of further pursuit and what are not. And then we'll decide where it should go.

Mr. Curnin and Mr. Rudge, I particularly want you to address whether even though I think your opponents would agree, that the protection under the exculpation provisions is not absolute, and that fraud, gross negligence, knowingly wrongful conduct, although we can argue about the exact contours of all of that, would seemingly provide exceptions to the general exculpation. Whether you're telling me or arguing to me that it's the law that you can put any allegations you want in a complaint and then once you do that, the exculpation provisions no longer provide protection to an estate representative. That's counterintuitive to me but if you have any law that supports that notion, I would certainly want to hear it.

Now with that said, I will hear from Mr. Longmire and Mr. Gallo first, then give the D&O counsel a chance to respond, the litigation trust side, an opportunity to reply and then the D&O side a chance to sur-reply; in each case, limited to the new stuff that's brought up in the first round.

Mr. Longmire?

MR. LONGMIRE: Thank you, Your Honor. I think the points in question, as Your Honor has just addressed go absolutely to the heart of today's argument and to the issues that are before the Court today and I would like to address them directly, as well. I would first though like to take a couple of steps back, discuss the background, how we got here and then get to the questions Your Honor just raised.

For the record, and as the Court well knows, these BearingPoint cases were filed early in 2009. There were a series of asset sales conducted in these cases, following which the debtors proposed a liquidating plan under which the remaining assets of the estates would be transferred to a liquidating trust for the benefit of the remaining creditors of the debtors.

At the confirmation hearing, the debtors proposed broad releases in favor of their current and former directors and officers, which would include releases of claims for conduct or inaction that occurred during a period of about a year-and-a-half before the filing of the bankruptcy cases.

The unsecured creditors committee opposed the scope of those releases because it felt that there might be claims against those directors and officers for pre-petition activity but otherwise, the committee supported the plan and otherwise, the plan was consensual and the plan proceeded to confirmation

on what all parties including the Court at the time called a "toggle" basis, meaning that there were sufficient votes and sufficient evidence to support confirmation of the plan regardless of the outcome of the dispute regarding the scope of the releases. And the plan was presented to the Court at confirmation such that it could be confirmed on either basis, depending on how the Court ruled.

The confirmation hearing was fairly highly contested with respect almost solely to that issue, the scope of releases for these former directors and some colleagues of theirs. At confirmation also, the Court appointed John DeGroote Services, LLC as the trustee of the liquidating trust and Mr. DeGroote, as the name would suggest, of course the principal of that entity.

The Court ruled at confirmation that the former directors of the debtors were not entitled to the broad releases that they sought and that the company sought for them. And instead, provided that they would have releases that were limited only to the post-petition period.

Under the plan, however, Mr. DeGroote personally, as well as some other individuals, received broader releases for reasons that the Court identified and supported at confirmation, including the fact that Mr. DeGroote agreed to remain with the assets of the estates and supervised the wind down for the benefit of the creditors, and as well as -- including the fact that he and a number of other individuals agreed to remain as

directors of various non-U.S., non-debtor affiliates of BearingPoint, as those entities were wound down outside of insolvency proceedings; a very involved process that took place largely post-confirmation.

The committee did not object to the broader release from Mr. DeGroote. The other directors and officers did not object to that broader release. The Court made some statements at confirmation which are quoted in our motion in support of that broader release from Mr. DeGroote.

His release covers all claims that any creditor or shareholder of the BearingPoint debtors could have, did have, would have, against him arising at any time with an exception as Your Honor just noted for fraud, willful misconduct, et cetera.

There is, of course, also an injunction in the plan in the confirmation order against the prosecution of any of the released claims and as Your Honor also noted, an exculpation provision in the plan and confirmation order that exculpates all officers of the debtors, including Mr. DeGroote who was at the time the President and Chief Legal Officer of BearingPoint, from any claim or assertion of liability for any act or omission taken by any of those officers, including Mr. DeGroote in connection with the Chapter 11 cases or the plan; also with exceptions only for willful misconduct and fraud as Your Honor indicated.

And of course, the fourth key provision of the plan is

the gatekeeper provision, Your Honor, also referred to. In order to protect released parties from the risk of exactly the sort of lawsuit that the directors have filed here, the Court -- this court retained exclusive jurisdiction over all actions and all claims that any BearingPoint creditor or any BearingPoint shareholder might file against the beneficiary of the releases such as Mr. DeGroote.

And as Your Honor just pointed out, that exculpation provision and that gatekeeper provision rather, is not limited to claims related to the claims held by the creditor or shareholder, not related to the shares held by a shareholder, any claims by a BearingPoint creditor or shareholder against a released party such as Mr. DeGroote.

After confirmation, the liquidating trust determined that, in fact, it did have viable claims against several former directors of BearingPoint and because of that gatekeeper provision, the trust was not free to pursue those claims anywhere but in this court or in the district court for this district. So, the trustee moved this court in 2010 for relief from that provision in order to pursue those claims in Virginia.

At the hearing on that motion, the Court accurately, of course, described that gatekeeper provision as requiring that actions against any released party be brought "in this court and nowhere else."

The Court then granted the motion and specifically

found that the trusts claims against these directors and officers were both colorable and not brought for purposes of harassment. The trust then sued these and other directors in Virginia for breach of their fiduciary duties to BearingPoint. Discovery is complete in that case. Trial is upcoming and scheduled for April 1st of this year.

Now the reason we're here, of course, is that on the eve of that trial, three of the defendants in that case have sued Mr. DeGroote personally in Virginia, asserting damages in the neighborhood of 1.8 billion dollars. Not only are those claims clearly covered by the release injunction and exculpation, as well as the gatekeeper provisions of the plan and confirmation order, they are also on their face think it's very safe to say, outrageous to anyone accustomed to practicing bankruptcy law.

Essentially, the claims suggest that the directors believe they should have received the broader releases under the BearingPoint plan. Your Honor should have given them broader releases and therefore, they should have been protected against the very claims that they are facing in Virginia. And the reason why they didn't receive from Your Honor broader releases than Your Honor gave them, is because Mr. DeGroote, then the Chief Legal Officer of the debtors somehow conspired or plotted to insure that they would get narrow release so that he could somehow be appointed trustee and receive compensation in that

role for bringing the claims.

In order eve to make those claims with what I assume is a straight face, there are a lot of square pegs that they've got to fit into round holes. First, among those, is that they've got to suggest that Mr. DeGroote somehow had a duty to protect them individually from being sued by his employer and to say that, they've got to come up with the idea or they apparently have come up with the idea, that he was their personal attorney and therefore, had some attorney-client relationship with them and therefore, I assume, some duty to protect them from his employer. And because of this attorney-client relationship they say it was malpractice that he allowed them not to great broader releases or he caused them somehow not to get broader releases from Your Honor and that has caused them damages.

They're obviously many, many problems with these arguments but let's just start with the existence of this alleged attorney-client relationship. I think it's fairly straightforward proposition that everyone can agree to here that in an in-house corporate attorney has as his client, the corporation that employs him. Corporate directors, of course, wear multiple hats. They're fiduciaries for the company on whose board they serve. But, of course, there are circumstances under which they may become adverse to that company in their personal capacity. It may be negotiating a compensation

arrangement. They may have indemnity claims against the company or in extreme cases, like here, they may become targets of breach of fiduciary duty claims by the company.

Directors, of course, may become accustomed to in-house lawyers or outside attorneys advising the board as to the company's interest but that, of course, does not mean that those attorneys represent them in their personal capacities and certainly not when their personal interests become adverse to those of the company. It's, of course, a fundamental premise of legal representation of corporations that any attorney for the corporation represents the corporation and not the individuals who work for and within it individually.

By way of analogy, I'll read one sentence -- two sentences, rather from the Federal Regulations governing the practice of law before the Securities and Exchange Commission and this is 17 CFR 205.3(a). "An attorney appearing and practicing before the Commission in the representation of an issuer both his or her professional and ethical duties to the issuer as an organization, that the attorney may work with and advise the issue as officers, directors or employees in the course of representing the issuer, does not make such individuals the attorney's clients."

That regulation --

THE COURT: Pause please, Mr. Longmire. As your opponent said in their brief in substance, that although that

may be the general rule, there is Virginia authority and I seem to remember a Virginia case having been cited, providing that notwithstanding that general rule, they can retain the lawyer and in essence what they're saying is that the facts here would trump the general rules.

How do you think I should deal with that and their desire to try to plead something that would take it out of the general rule?

MR. LONGMIRE: Very directly, Your Honor. And I think this falls into a very similar category from something Your Honor raised in the opening discussion at this hearing, which is whether you can simply call something -- take a state of facts and simply label them to be something they're not and therefore, fall within exceptions to the case Your Honor raised and I'll address momentarily, the exculpation provision. Here, I think the same is true with how these directors are trying to address the question Your Honor is raising.

We don't contest the fact and it may, in fact, be true under Virginia law or otherwise, that an in-house corporate attorney can theoretically, hypothetically also represent individually directors of that same entity at the same time. Certainly, however, that could only be the case if the interests of those parties were aligned with one another and not in conflict with one another. It is simply not credible to suggest that an attorney could have those roles when the interests of

his employer and the entity that clearly is his client, are in direct conflict with the interests of the individuals he has purported also to represent as is the case where the issue is breach of fiduciary duty claims by his clear client, against directors of the company.

THE COURT: So you're drawing a distinction with let's say the situation where the CEO says hey, since you're a lawyer, would you represent me in my house closing?

MR. LONGMIRE: Absolutely. If, in fact, the CEO said hey, since you're a lawyer, would you represent me in my employment contract negotiation with the company, it would be impossible for that attorney to say yes, while he also represents the company on the other side of that negotiation.

I also think that there are no facts here that even support the suggestion that one could reasonably believe that Mr. DeGroote represented these gentlemen individually. They don't suggest that he signed -- they signed some sort of engagement letter with him. They don't suggest that he billed them. They don't suggest that they paid him. They don't suggest he had private conferences with them to strategize on how to deal with the company and the potential claims against them.

What they're suggesting really is that Mr. DeGroote at a time when he was an officer of this court, and a fiduciary for the BearingPoint bankruptcy estate had a duty somehow to them

personally against the bankruptcy estate, to prevent the bankruptcy estate from recovering assets of the estate in their possession, namely these breach of fiduciary duty claims and the proceeds that may be received if the trust is successful.

It's unfathomable to me as a bankruptcy practitioner, Your Honor, that it could be the job, the fiduciary role of an estate fiduciary to prevent the estate from recovering on claims belonging to the estate against non-debtors but that is the suggestion. There's zero evidence presented or alluded to that it is true in this case. And as I said, Your Honor, I think in principle, it's impossible for it to be true when there is a direct conflict of interest between the interests of the corporate client of an in-house lawyer, and the targets of claims held by that corporation.

Even, Your Honor, if there were an attorney-client relationship here, I don't think that the next step in any of their arguments get any further because if there were an attorney-client relationship here, what is it that they say Mr. DeGroote did to violate his obligations to them? Well, essentially they seem to me to be saying that he advised them that for the company to engage in a pre-confirmation investigation of whether the company had or did not have viable claims against them, would have been costly and time-consuming.

And their claim is that had such an investigation occurred, they would have received broader releases from Your

Honor at confirmation. This one, I find even more difficult to understand because the irony of this position is that post-confirmation, the claims were investigated and the result of that investigation is they got sued.

So, I find it very easy to infer from that, that had the investigation -- any investigation occurred pre-confirmation, the result would have been concrete identification of the very claims that have been asserted in this D&O lawsuit and the opposite result from that which they seek would have occurred. In other words, there's no way they would have received broader releases if they had been investigated and the investigation uncovered exactly what the actual investigation did uncover.

I also have no comment on the ultimate merits of that D&O case but I will say that this court find those claims to be both colorable and not fraud for purposes of harassment. Those claims have survived a motion for summary judgment in Virginia and they're going to trial this spring.

THE COURT: Was it a summary judgment or merely a demurrer?

MR. LONGMIRE: Demurrer, I saw -- I meant motion to dismiss if I said summary judgment.

THE COURT: Okay.

MR. LONGMIRE: Also, Your Honor may well recall that there was no time to delay confirmation for an investigation for

the benefit of directors or anything else, as there would have been massive negative tax consequences to the BearingPoint estate and therefore, to the creditors at BearingPoint had the transfer of assets to the trust occurred after December 31, 2009. In fact, confirmation occurred mid-December of 2009 and the effective date of the plan was December 30, 2009. So any delay and I'm happy to talk in detail about the tax issues, although I'm not sure it's necessary for today's purposes, I'm simply reminding Your Honor that there were -- there would have been very, very negative significant tax consequences to the estate had confirmation been delayed for any reason including to conduct an investigation to attempt to benefit some directors.

Furthermore, by the director's own papers, even if Mr. DeGroote gave this advice, he wasn't the only one giving it. By their own papers, the Weil Gotshal firm was giving the same advice and I'm unclear whether that means they are inferring that that firm committed the same malpractice or not.

In any event, it's not as though the debtors, Mr. DeGroote or anyone else at the debtors, determined that these directors should not receive broad releases. In fact, the debtors proposed broad releases for them and advocated for those releases vociferously at the confirmation hearing. It's the unsecured creditors committee that opposed the releases based on the perception that there might be viable claims to pursue and it was this court, of course, that ruled in favor of the

committee's objection and limited the releases.

So, what other duties do they say Mr. DeGroote breached to them? As far as I can tell from their papers, they also say that what he did wrong was to cause the trustee to sue them when, in fact, he had a conflict of interest because of this purported prior attorney-client relationship. Putting aside for the moment, as I've addressed it, the question of whether there was such a relationship, what's unclear from the presentation the directors have made is how is it that that conflict did not become known to them if it existed until now? Well before confirmation in this case, the committee made it very well known that they thought claims might exist against these directors. At their request, the debtors included in the disclosure statement, a discussion of those potential claims. In the complaint that led to this motion, the directors say that Mr. Harbach was personally deposed by the committee nine months before confirmation about allegations of breach of fiduciary duty in the pre-petition sales process.

According to their complaint, there were several board meetings before confirmation that involved discussions of those potential claims and the scope of releases of those potential claims that could be achieved at confirmation. Almost as I said, the entire confirmation hearing was a discussion of whether those claims would or would not be released in the confirmation order.

So, if they believed that Mr. DeGroote was their attorney, and they understood at confirmation that his firm was being appointed as liquidating trustee, and that they were not getting broad releases and therefore, these causes of action were being transferred to that trust, why didn't they object to his appointment as trustee on the basis of this conflict? Maybe they are suggesting they thought that he would somehow bury the claims? I don't know. That certainly would be inappropriate conduct on his part of the claims were valid and it certainly has not happened.

Even if they didn't expect him to sue them or expect the trust to sue them as a result of the appointment, they certainly would have figured that out in 2010 when the trust brought a gatekeeper motion to Your Honor and asked for permission to sue them on these very claims. They didn't raise at that point that the suit was impermissible because of some alleged conflict.

And in Virginia, when the suit was itself brought, they didn't raise this alleged conflict. If this conflict were to exist, it would have existed all along. So I think that question puts them logically in another square peg, round hole situation and they've got to -- they seem to be trying to find a way to say they just now discovered that this conflict existed. And I don't know quite what they means, they just now discovered that he used to be their attorney or they just now discovered

that he sued them? It doesn't quite add up.

But what they seem to say about it is that they just now discovered that he has a compensation arrangement through his firm's role as trustee or that they just now discovered that that -- the terms of that compensation arrangement incentivize the trustee to increase creditor recoveries and increase the compensation to the trustee to some extent as creditor recoveries increase. That point too strikes me as highly ironic, at least, self-contradictory maybe.

The point being that if Mr. DeGroote's firm receives incentive compensation as a result of this D&O lawsuit in Virginia, that's only if he wins the D&O lawsuit which by definition can only happen if, in fact, there was a breach of fiduciary duty.

So to suggest that assuming there's a breach of fiduciary duty and assuming the trust wins in the lawsuit, we should have been released, seems ludicrous to me. That outcome in the lawsuit in fact if it occurs, will justify exactly the opposite conclusion. It will justify the limitation on the releases that this court imposed at confirmation.

On the other hand, of course, if the directors prevail in the D&O case, then they'll have no liability in that case and there won't be any incentive compensation to the trustee. I can only surmise also that the reason why this -- we just discovered it argument is being made is because the claims they're bringing

happened to be time-barred under Virginia law to begin with.

What I would like to go to now is to the confirmation order itself. As I mentioned --

THE COURT: I didn't see the time-barred argument in your brief. Is that something where you're merely preserving your rights to argue if that comes up or did I just miss it in the papers?

MR. LONGMIRE: I believe it is in our brief. One moment while I identify the location, Your Honor.

THE COURT: You're talking an old-fashioned statute of limitations defense, Mr. Longmire?

MR. LONGMIRE: Yup. I am looking, Your Honor, at footnote 3 and maybe I should apologize for having this be only in a footnote. But over --

THE COURT: No, I see it now.

MR. LONGMIRE: Okay.

THE COURT: I just forgot it.

MR. LONGMIRE: So turning Your Honor to the confirmation order, as I mentioned, Mr. DeGroote received a very different type of release than the former directors did and his release covers all claims by all creditors and shareholders.

THE COURT: All right. Before you get that far --

MR. LONGMIRE: Yes.

THE COURT: -- now that I am focusing on footnote 3, a lot of statutes of limitations have tolling provisions either in

their own terms or in their related case law that makes it run from discovery. Do you know whether that -- that seems to be the point of your last sentence in footnote 3.

MR. LONGMIRE: That is the point, Your Honor, and that's why I say, I think it must be or I surmise that must be the reason the directors are now claiming that they only just now somehow discovered this conflict existed, so that they can try maybe to take advantage of some tolling argument on what would otherwise be a time-barred claim, if in fact, this court were to permit the assertion of the claim at all.

In any event, Your Honor, the release Mr. DeGroote relieved -- received rather, as well as the injunction exculpation provisions, are extraordinarily broad and fairly so, and they're -- to boil it down, the exception to them is as simple as fraud and willful misconduct.

If the claims are anything other than that, then they're barred by their release, they're enjoined by the injunction, they're barred by the exculpation provision and these directors have violated your court's order and should be held in contempt.

That brings me to the point, I think Your Honor raised at the very beginning of this hearing which is one can't describe a set of facts that constitutes, for example, breach of contract, realize that that claim is barred and so call it fraud, to say it's not barred. If it's not fraud, it's not

fraud no matter what you call it.

And as Your Honor has raised also at this hearing, the Barton doctrine plays a very important role in this discussion and analysis. The Barton doctrine as Your Honor says and I'll let Mr. Gallo address it in much more detail when he speaks, but as Your Honor well knows, the Barton doctrine bars a claim against a trustee in another court for actions taken in the conduct of his duties as trustee.

That has led these directors to say well, okay, we weren't talking about conduct in his capacity as trustee. We don't mean we're complaining about him suing us, which seems to conflict with a lot of things they said in their complaint. We only meant things he did before confirmation. So what is the fraud they allege he engaged in before confirmation?

Fraud is an intentional misstatement, reasonably relied on causing damages. What are the intentional misstatements they accuse him of? Do they claim he told them that he wouldn't be the liquidating trustee? No, in fact they say quite the opposite. They cite to minutes of board meetings pre-confirmation in which his appoint -- potential appointment was discussed at length. Do they claim he told them he wouldn't be compensated for being the trustee? No, quite the opposite. They cite to numerous sets of board minutes that occurred pre-confirmation in which negotiations of his compensation arrangement as trustee was discussed. Do they claim he promised

he wouldn't sue them? No.

The only statement of his that they seem to point to is they allege he told them that investigating D&O claims pre-confirmation would be time-consuming and expensive. Your Honor, I don't know whether he said that or not but it sounds like a true statement to me.

So what they seem to be doing is asserting some sort of negligence or malpractice claim or he should have somehow caused this court to give us broader releases than the Court gave us and then calling it fraud, so that they can claim that they're not in contempt of this court's order. Spelling out some other sort of claim and throwing that word on it doesn't change its character.

Now there are in some courts, in some circumstances, as I understand it, ways to assert fraud through omissions. I think you can assert maybe that the failure to say something if there was a duty to say it, may have -- may constitute fraud and that must be, it seems to me, why they've got to create this convoluted theory that there was an attorney-client relationship that didn't actually exist.

So, from where we sit, Your Honor, these claims couldn't fall more squarely within the release and injunction provisions and exculpation provisions of the plan. But the gatekeeper provision is not even one they seem to contest their violation of. This provision of the plan couldn't be clearer.

It says that no BearingPoint creditor or shareholder can sue or release party even if the claim's not released, except in this court or with leave of this court. So, even if their claims were outside the release and the exculpation and the injunction provisions, which they're not, they still acted in contempt of this court's gatekeeper order and that contempt in and of itself has caused significant damage to Mr. DeGroote. He's had to hire separate Virginia counsel, separate from the trust's counsel to address this complaint, seek removal of that complaint to federal court in Virginia, seek to deal with a motion by the directors to consolidate the two cases in Virginia, seek a stay of that case pending this court's determination of this motion and he's had to bring this motion.

The entire process amounts, in our view, to an attack on the integrity of the confirmation order and to this court's jurisdiction over these claims.

THE COURT: That was one of your arguments that I had more trouble with, Mr. Longmire. They're not really trying to attack my -- collaterally attack my confirmation order, are they? They're really trying to say well, there's a loophole in the confirmation order and we're going to go through that loophole, aren't they?

MR. LONGMIRE: Well, I think they're trying to attack it and then sort of say after the fact when they were called on it, that it fell -- that their actions fell within a loophole.

I think again, the gatekeeper provision applies whether there is or is not a loophole in the releases but for the reasons I've laid out, I don't think there is a loophole in the releases that applies to these claims.

This is a lawsuit -- this court as any other bankruptcy court I am sure appoints liquidating trustees and plan administrators and the like all the time. If those fiduciaries can be sued personally by the targets of estate claims for bringing those claims or for thinking about bringing those claims or for planning to bring those claims or for arranging to bring those claims, then we have an entirely different landscape than us bankruptcy practitioners and those prospective trustees think there is in that practice and it's in that sense that I think it's an attack on this court's order.

On that basis, Your Honor, on Mr. DeGroote's behalf, we would ask the Court to enforce the confirmation order, find this complaint to be void and impose sanctions on the plaintiffs to cover at the least, the cost of responding to the complaint in Virginia, bringing this motion and all related costs. Thank you.

THE COURT: Thank you. Mr. Gallo?

MR. GALLO: Thank you, Your Honor. Your Honor for the record, Andrew Gallo for the trustee, John DeGroote Services, LLC. I'll try not to retread any ground that Mr. Longmire's already covered and instead I'll focus specifically on your

tentative and on the specific questions you asked regarding the Barton doctrine and the other questions you asked at the beginning of the hearing.

Before I do that, I do feel it necessary to address a preliminary question which is raised in a footnote in the director's brief, which is whether the trustee even has standing to be here today to oppose or to join in the motion as we have and to also bring our own motion to enforce Your Honor's rulings at confirmation.

THE COURT: You said trustee, did you mean the trust or --

MR. GALLO: The trust, Your Honor, yes. The trust through its embodiment which is the liquidating trust.

THE COURT: The entity for whom the trustee is carrying the ball.

MR. GALLO: That's right. And the standing, I think couldn't be clearer based upon the harm to the trust that has resulted from the -- what we would term frivolous lawsuit that's been brought here. As Mr. Longmire laid out the time frame, the D&O litigation is set to go on trial in Virginia the beginning of April. The end date for discovery in the case was November 30th and as Your Honor is well aware, we litigators tend often times to push many of the discovery obligations right to the limit and there are depositions in this case on -- I was at a deposition on November 30th.

The litigation here was brought on November 15th. Not only was discovery concluding on November 30th but expert reports in the case in the D&O litigation were due in the middle of December and I understand from the attorneys handling the D&O litigation that there were no less than thirteen expert reports filed or served, excuse me, in that litigation.

So, November was quite possibly the busiest and most important month for the truth with respect to its largest asset and this -- so I assert to Your Honor there was no coincidence that this case happened to be filed on November 15th. And the harm that was done by that filing is already done; we can't undo that, the distraction and the time consumed and the expense that's been consumed with respect to that.

There's also a second more important point and this -- I know we're scheduled for a chamber's conference, Your Honor, with respect to discovery that we've served on this point, but this point relates to the --

THE COURT: Yes, before you go on, Mr. Gallo, I should give you my tentative on that, as well. I've dealt with D&O policies a lot over the years and I've written on some and I've dictated a lot on it. My view is that D&O policies, except in rare circumstances where there's entity coverage or something like that, have their purpose in life to protect the officers and directors and while I've had most recently in the Solstice litigation, arguments by people who are on the offense side

against the officers and directors, that inappropriate invocation of D&O policies by officers and directors hurts them because there's less of a pot of money to recover from if the litigation's successful.

I've held that that's not a legally cognizable interest and therefore, if the D&Os wanted to invoke the D&O policy proceeds or get the D&O carriers to pay for their going on offense against Mr. DeGroote, that that may bear on their motivation, although even that's debatable but I'm not sure if the litigation trust has a legally cognizable interest in how the carriers decide to pay their officers and directors.

The corollary of that would be that I would at least have to deny your request for that information without prejudice and then make a judgment later if the litigation is pressed before me, whether it's relevant for any other purpose but that it's not relevant now and therefore, I would not make them produce that information either by interrogatories -- you know, they make a procedural argument, a Rule 26 timing argument.

But apart from that, I think the reason that the trust cares about it or at least I would posit that the reason that the trust cares about it is either to preserve the size of the D&O pot if the trust ultimately turns out to be successful or to try to cut your opponents off at the purse strings so as not to bankroll a tactic that you regard as offensive and which I might conclude is offensive too. But all that says that my tentative

on this is that you lose on the production of the D&O payment stuff but I'll give you a chance to be heard to tell me that my tentative is wrong.

MR. GALLO: Your --

THE COURT: Like I'm giving your opponents the chance to be heard on the remainder of my tentative.

MR. GALLO: Thank you, Your Honor. And with respect to the discovery issue, Your Honor, I respect Your Honor's ruling and your -- or your tentative ruling and your finding that there's not a -- that at this point in the litigation, there is not a cognizable interest such that the trust is entitled to the information as to how they're conducting their defense.

My point, I think was going to be a slightly different one with respect to this issue and it relates back to what we colloquially refer to as the gatekeeper ruling in Your Honor's complaint -- excuse me, in Your Honor's confirmation order and the purpose behind that.

And one of the purposes as you stated in your well-reasoned decision on confirmation when you were addressing the issue of providing -- of not having releases in the plan that would bar actions by third-parties but also reserving to yourself the ability to pass upon whether that litigation was frivolous or harmful or used to intimidate or harass. You said that that would especially be true, and I'm quoting now from

page 62 of Your Honor's confirmation decision --

THE COURT: Did you say 5-2?

MR. GALLO: I'm sorry, Your Honor, 6-2.

THE COURT: Okay.

MR. GALLO: I quote, "That's especially true in the event that there are any meritorious claims," again you're talking about meritorious claims by third-parties against directors and officers, "since tapping the insurance coverage are assets of a defendant in a private action can siphon off assets that properly should go to the estate as a whole for the benefit of all creditors."

So at the -- I think Your Honor was very -- that Your Honor's confirmation order, and I'm going to go back to it a couple of more times here, would be very prescient on these issues in saying that one of the important purposes for the gatekeeper function, so that people can come back to Your Honor in the first instance, was to protect against this type of frivolous litigation, even particularly where it could affect the insurance proceeds.

So, you know that is why I think that, you know, the trust certainly has standing here to argue before you that the case at least should be as Your Honor has tentatively ruled, brought in this court.

So, and I think Your Honor actually correctly articulated at the beginning of the hearing, that there are two

succinct and sufficient bases for Your Honor's tentative. One -- and they're different and they both could support it. The first is the Barton doctrine and the second is what we refer to as the gatekeeper. So, let me address Barton in more specifics, Your Honor.

And I too had highlighted the sentence that you highlighted on page -- in Barton which says -- the Second Circuit's decision in Barton which says, "At the same time, 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."

Now I think what the former directors are going to argue is they're going to focus on the last portion of that sentence and they're going to say, Barton only applies where the challenges to acts taken in as part of the trustee's official duties and here, because the focus is on acts that occurred pre-confirmation, we fall outside of Barton.

Well, I would argue two bases, Your Honor, as to why that's incorrect. The first is, I think the basis that Your Honor articulated which is the question you have to ask yourself is would this lawsuit have been brought had Mr. DeGroote not brought the D&O litigation? The answer to that question is no. I think it's no. And therefore, I would say that Barton applies because the principles of Barton should apply in this particular instance where a trustee is being sued individually in an effort

to disrupt official duties of the trustee to collect assets for the estate. And that's what's happening here.

But separately, I would also point to Judge Gropper's decision and we cited it in our papers in The Erie World Entertainment decision. This is an unpublished decision but it was a -- this is a case where the parties there did the right thing. They came to Judge Gropper in the first instance and they said we want to bring litigation against, I believe in that case, it was a Chapter 7 trustee and his counsel, in state court and Judge Gropper denied the request. But Judge Gropper notes in that decision that the Barton doctrine has not only been extended to post-confirmation liquidation -- litigation or liquidation trustees as we have in this case, but also the debtors-in-possession and their professionals.

So, I ask the flipside question; let's assume that Mr. DeGroote was never appointed liquidating trustee and let's assume that there was never a D&O litigation and let's assume that these directors wanted to bring this malpractice case against Mr. DeGroote based upon his actions and advice that he provided as a professional for the estate in this court in connection with the confirmation process that occurred in front of this court.

Even in that scenario, I think Barton would require them first to come to this court to bring those claims and Judge Gropper notes that in his decision, that Gropper extend --

excuse me, that Barton extends to professionals of a debtor-in-possession. And it would make sense. I mean, the Barton -- the initial Barton case deals with a railroad receiver. Railroad receivers are receivers evolved into trustees under the Code and as we know, the Code teaches us in a Chapter 11 case where you have a debtor-in-possession, the debtor-in-possession is the trustee. And naturally, Barton should then extend to the debtor-in-possession and to his professionals.

So, I believe that Barton does apply here and specifically, as the Second Circuit quoted in the Lehal case, when -- affirming District Judge Brieant, this court has a vital -- "vital institutional interest in protecting trustees from being brought into another court on frivolous or trumped charges." And I will say that that's the case we have here.

Now, turning separately I think to the separate and distinct -- the other separate and sufficient basis for Your Honor's tentative ruling which is the gatekeeper portion as we call it of the confirmation order, their argument there is they say well, yes, it says what it says but that's really not what the gatekeeper provision was meant to do. It wasn't meant to cover a personal litigation like this. This is like if Mr. Harbach had been in a car crash with Mr. DeGroote and sued him on that basis. And, you know, that's not what the gatekeeper was meant to cover. It was really meant to cover the shareholder claims, these D&O claims.

Well again, I would point to Your Honor's decision, the confirmation decision and now I'm at page 61, 6-1, of your confirmation decision where you are discussing the applicable -- the basis for your ruling and for including the gatekeeper provisions in the confirmation order and you say that that ruling is in part -- I quote -- "in part, is based on my greater familiarity with the debtor's affairs than a state court judge or even a federal court judge somewhere else in the country might have." And here's the important part, "And that's especially true for professionals, since a bankruptcy judge has a greater understanding of what professionals do in a Chapter 11 case and before one and as to what is fair or unfair to expect a professional to do."

So, I think to say that the gatekeeper has nothing to do or wasn't intended for this type of -- this piece of -- a litigation of this -- this type of litigation, is just not a correct interpretation of Your Honor's ruling and Your Honor was specific that where it's most important is where professionals who participated in the Chapter 11 case are being sued because Your Honor knows and has a better understanding as to what professionals do in a Chapter 11 case.

And I think it specifically important as Your Honor has ruled, that the case remain here. Personally for me, reading the complaint, it was very troubling because there are allegations that were made in front of -- in that complaint in

the Court in Virginia that quite frankly, I don't think would have been made if that complaint was brought in front of Your Honor. Particularly I'm noting paragraph 4 of the complaint where the allegation is made that there was some sort of secret deal between the unsecured creditors committee and Mr. DeGroote regarding his compensation. I know I was here. There are no secrets in Your Honor's courtroom. That was a public proceeding where Your Honor approved as part of the confirmation order, Mr. DeGroote as trustee, gave him releases based upon not only his service to the estate but also his continued future service.

THE COURT: Pause please, Mr. Gallo.

MR. GALLO: Yes, Your Honor.

THE COURT: Are the rules applicable to how I can take judicial notice of things in this court, the same or different than those that a Virginia judge or a Virginia jury could take judicial notice of if these claims were heard in Virginia?

MR. GALLO: Is your question, Your Honor, the rules in Virginia as to whether the Virginia court could take judicial notice of Your Honor's rulings?

THE COURT: I guess. What I am trying to get my arms around is the extent to which a Virginia court could get to the same place in understanding things that I could take judicial notice of.

MR. GALLO: Your Honor, I am hesitant to speak off the cuff on that point. My general -- and I'm not a Virginia

litigator but my general experience in state court is that you are put through your motions of putting on evidence if you want to prove actions that occurred in a different court. So, there would have to be -- you would have to meet the evidentiary thresholds in the Virginia court with respect to Your Honor's confirmation decision and the other acts that happened in front of this court.

But I think -- you know, I think Your Honor's on the right track though and it's precisely why Your Honor made the unequivocal ruling -- the unequivocal gatekeeper ruling that you made in the confirmation order. I mean, if any case fit within a case that should be in front of Your Honor, it's this one because they're claiming the failure -- the acts or omissions -- the claims are based upon acts and/or omissions that were made in the course of a confirmation proceeding in front of Your Honor.

And that's what I will conclude with, Your Honor. You know, I -- in a separate career -- separate from my bankruptcy practice, I do a lot of -- I do a lot of malpractice defense. And one of the issues that is always an issue for me in those cases is causation, because causation, as you know, with any torts that they've asserted, be it malpractice or fraud, requires a showing of causation. Not only must you show that something bad was done but you must show that but for that whatever bad act is claimed, you would have not suffered some

sort of cognizable injury and with respect to the -- what the causation is in this case or the damages in this case are the costs associated with the D&O litigation. And let's assume a 12(b)(6) standard for purposes of this portion of the argument. Let's assume all the facts in their complaint are true. Mr. DeGroote was their personal lawyer under Virginia law. Mr. DeGroote defrauded them. Mr. DeGroote gave them advice that was -- you know, that rises to the level of malpractice. We don't believe any of those things are true but let's assume that all the well-pleaded allegations in their complaint are true. All right. What harm did that cause? What is the but for?

And if you get a look at paragraph 53 of their complaint, which sets forth the -- is in their prayer and they say -- that's where they have the but for -- but for Mr. DeGroote's conduct, they could have appointed another lawyer -- all right, well that doesn't really tell us what you would have avoided with another lawyer -- or authorized an investigation pre-confirmation. So, really there's only two things that could have happened that could have avoided this litigation and the harm that they're claiming. If they appointed another lawyer, that that lawyer could have done one of two things; one, that lawyer could have proposed a broader release in the plan and we know what would happen then, Your Honor, because Your Honor -- you know, based upon the motion by the creditors committee, Your Honor or the objection, excuse me, Your Honor denied smaller

releases. So there's no way that broad -- so they brought another lawyer into argue, let's put broader release in the plan. There's no way that those would have been approved. What else could they have done?

Well, they could have, you know, had an investigation and, you know, maybe this investigation would have resulted in a different ruling and broader releases. Well, first of all, let's be clear here what type of investigation would have had to happen and again I go back to Your Honor's confirmation order. And I'm at paragraphs -- page -- excuse me, page 75 of your confirmation decision on the record where you say, "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 the least quite reasonable to find that the give up of such rights is in the best interest of the state."

So, to say that another lawyer could have come in and could -- the directors then could have conducted an investigation, that wouldn't have been good enough. I know that wouldn't have been good enough for the creditors committee. We were looking for an independent investigation. But as Mr. Longmire pointed out, let's say someone did come in and do an investigation, Your Honor's ruling at confirmation says, well,

not only must there have been an investigation but that investigation would have not have to had turned up any colorable claims. Well, we know what happened as Mr. Longmire said. We know what happened post confirmation. There was an investigation. It did turn up colorable claims. Your Honor determined that those claims had enough merit that they should be pursued in Virginia state court and they survived a demurrer in Virginia.

So, there is no but for with respect to these tort claims against Mr. DeGroote. Even assuming all the facts as they have them, there was nothing that could have been done to avoid the assertion of these claims in Virginia and therefore, they have no cognizable claim for fraud. They have no cognizable claim for malpractice.

Unless Your Honor has anymore questions, I thank you for the time.

THE COURT: No, thank you. Okay, Mr. Curnin, are you up?

MR. CURNIN: Yes, Your Honor. Thank you, Your Honor. And let me start by saying we regret the -- creating the impression that we attempted to disregard Your Honor's orders or to sidestep this court. And as you'll remember, we fought very hard to stay here. We wanted to be here.

THE COURT: Well, maybe the Simpson Thacher guys did, Mr. Curnin but I got the Borden letter pointedly reminding me

that I couldn't enter a final order and back at the time that I issued the written decision at 453 BR and what Borden was telling me is that my decision was at the least, not all that important because it presaged to me and I didn't get any contrary impression from your colleagues at Williams & Connolly, that there was going to either be a motion to withdraw the reference or an effort to get the second bite at the apple if I issued a decision that wasn't to the Williams & Connolly client's liking and whatever knowledge of the case I had would go up in smoke on de novo review.

MR. CURNIN: Your Honor, that's not my position. I don't remember the Borden letter that way. There was intervening jurisprudence that suggested that this was appealable or non-final.

We opposed the trustee's motion to get out of this court. We fought to stay here. We wanted to be here because Your Honor knew the facts. That exactly why we wanted to be here. We're not resisting being here now. Nobody picked up the phone and said, you know, we had -- there was no meet and confer, which would be in New York. We agreed to a stay of our case while this motion was being heard by Your Honor.

So, we've only filed in Virginia because you sent us there and that -- if there's a misunderstanding about the gatekeeper function, it's mine and not my client's. We understood in the hearing on that gatekeeper function where I

asked to stay here, because I knew that Your Honor would appreciate the advice that our clients got from Davis Polk, et cetera, that the transcript of that hearing says that the purpose of the gatekeeper function was to protect my clients because my clients had gotten limited release.

And when we wound up in Virginia, in our mind, either that purpose hadn't been served or had already been served. It was not to protect Mr. DeGroote, as we understood it and I'll get to Barton in a second. We fought to stay here. We objected to going to Virginia. We don't want to be in Virginia. We've never tried to slow the trial down. We never asked to slow the trial down and Judge Rausch (ph.) never said we would.

And I do want to get to the timing of the complaint. The complaint was filed, counsel's supposed it had to have been filed, because we were busy in discovery -- the complaint was filed the day before the statute of limitations ran. There was a critical meeting November 16, 2009 where Mr. DeGroote turned to my clients. They said to him, "John, what would you do if you were us?" And he said, "I would take the limited release. I'm not aware of any claims."

And in terms of the diligence that we did before we filed this complaint, among other things, including talking to experts, about how an attorney-client relationship is created, we secured the week before we filed the complaint, the affidavit of an uninterested non-party who was at that meeting who

supports exactly what we said.

Now we're not here on a motion to dismiss today. There's a lot of arguments about the merits and I'm very happy to defend this complaint. I hadn't filed a complaint like this in twenty-six years. I hope I never have to file one again but I stand behind it. My clients were shabbily treated and misled and never had a fighting chance and that's wrong.

I stand behind the complaint one hundred percent today. We've done our diligence. We have our experts. We have our independent information in affidavit form and we can prove our case. But we're not here to prove our case today. I'll talk about my case.

The question today is was this claim within the release? Did we allege willful misconduct? Yes, we did. Did we just simply toss out the label conclusorily (sic), it's willful misconduct? Absolutely not. But we did a lot more work to file our complaint than Mr. DeGroote did to file his and we learned only in October of last year when we finally got a chance to talk to Mr. DeGroote under oath, take his deposition, we learned a lot of things we didn't know before.

And until we had that information, and the third-party affidavit, we weren't ready to file our complaint because we don't do this kind of thing without a lot of forethought and we barely got it done the day before the statute of limitations ran. That's the time pressure that we were under.

We ended up in Virginia. We didn't want to be there. We had -- we developed this evidence carefully. And by the way, we'd have to develop it anyway to explain our defense in the case that Mr. DeGroote brought. So, there's very little incremental cost and there would be almost no incremental cost if counsel had picked up the phone and said look, we have an issue on the venue. Let's bring it to Gerber. I'm fine with that. We always wanted to be in front of Judge Gerber. We have a difference of opinion on the release. Well, that one, we'll have to fight out because we see it differently.

But if people are interested in minimizing costs -- first of all, Mr. DeGroote said let's go to Virginia because it will minimize costs. So, we're already in Virginia. So that's why we filed there. We thought the gatekeeper function had passed. Our complaint is essentially a counterclaim. We couldn't file it as a counterclaim because we were so time pressed. We would have had to file leave for motion to file a counterclaim and that motion may not have been a complaint per se and therefore, we could have blown the statute of limitations. So, we did the absolute best we could under the time that we had. We researched the claim. We've talked with four experts who were willing to testify and who would say (1) under Virginia law whether or not attorney-client relationship is formed is a question of fact, can't certainly be decided here today but it's what did the client think. And there's questions

about whether -- there's some technical argument about well there's a conflict and the client should have known and therefore -- that's not the way it works. These are lay people. They turned to a trusted advisor who had misled them for months and said I'm facing an issue about personal releases. This goes to my personal liability. John, what would you do if you were in my shoes. There's no way that that's not personal advice. And we stand behind that. We may win. We may lose. But it's a very good complaint. It's got a lot of merit and everything that's in it is accurate.

But having been sent to Virginia, we thought and if it was in error, it's mine, not my client's, that the gatekeeper function had been served. The transcript says, and my recollection was, that Your Honor said the sole purpose of that was to protect my clients because they got a limited release when they wanted a broad one.

That being the case, and the time constraints we were under and our view that it was essentially a counterclaim, we filed it in Virginia. We also didn't understand we have a difference of opinion with the other side, that these claims are in the nature of equity holder claims. I understand what the words say. I can read, as well as anybody but that's not how we understood it. I don't practice in bankruptcy court. So, I spoke with bankruptcy lawyers and I said what's the meaning of this, how should I interpret it. And they said look, that's a

-- it means to us in the practice, equity holder claim is somebody who is complaining about the values that they got in the bankruptcy proceeding. That's not what I understood this to be.

This is a counterclaim in Virginia, same facts. The judge that we didn't ask for, their chosen judge, we filed it there because it made sense to us. It was efficient. No disrespect to Your Honor, we wanted to be here. We're happy to be here now. We're not fighting be here now.

As to the Barton doctrine, we believe it didn't apply because we are not attacking Mr. DeGroote for his actions as liquidating trustee. It's his misrepresentations and omissions to our client before he became liquidating trustee. And if someone else was a liquidating trustee, and we were sued by that person, we would still have a claim against Mr. DeGroote because it was Mr. DeGroote who said any investigation would be prohibitively costly and would cost at least five to ten million dollars and my clients took that to mean it was infeasible and didn't pursue an investigation.

Now, in October, when I got to examine Mr. DeGroote in his deposition, I said "What was your basis for telling -- giving that advice to the Board?" He said, "Well, there once was an investigation that I knew about and it cost about five million dollars." I said, "Well, is that it?" "Yeah, that's it." "Well, that's not a basis for deciding or advising my

clients on this issue of critical personal importance to them, that the investigation would be prohibitively costly."

And it turns out that not only was that horrible, baseless advice, but at the time he gave it, he was negotiating his comp with the creditors committee. My clients didn't know that. My clients didn't know that he didn't have a basis for the advice. They didn't know he was negotiating his comp at the same time. And we didn't learn it until his deposition which was in late October and early November.

Two weeks later, we filed this complaint. One week after the deposition, we got the affidavit of somebody who was at that critical meeting in Dallas on November 15, 2009. One week after that, we filed the complaint. We worked as fast as we can and we did it on a good faith basis and we still stand behind it. It is hardly the case that we just slapped a label of intentional misconduct on this; furthest thing from the truth.

As I already mentioned, we consulted with multiple experts. It's a question of fact as to whether attorney-client privilege was consulted. We have the affidavits that I had mentioned. We've never sought to delay Virginia. We never asked for a delay. We never suggested we'd ask for a delay. There's no suggestion in the world that Judge Rausch would entertain a delay, much less grant a delay. So there's been no attempt to interfere with that case whatsoever.

The demurrer in Virginia, with all due respect to Virginia, was hardly a search and inquiry. The judge in Virginia said two things; wow, I wish I had federal law. I wish I had Twombly. I wish I had Iqbal but I don't. My Supreme Court has told me that disputes of this manner should be tried and decided by the people of Virginia and my hands are tied. But I do want to say, that I am very skeptical about this complaint because why would the directors do this? Why would the directors knowingly violate their fiduciary duty for no gain? It doesn't make sense. But, as I said, my hands are tied. So, the fact that it's survived a demurrer in Virginia with all due respect to that commonwealth, is not meaningful at all.

What kind of investigation might have been done? My client should have had a fighting chance. My client should have been told that there was -- that Mr. DeGroote had a very serious conflict and couldn't advise them. They got the opposite advice. They got the advice of Mr. DeGroote said an investigation was too costly but don't worry because I don't know of any claims. They took comfort in the fact that Mr. DeGroote was going to be the trustee. The investigation that could have been done is quite simple and, in fact, it's the investigation that Mr. DeGroote should have done but didn't do.

As you know, the directors are exculpated for violations of the duty of the care. So, all of the issues and

all of the drama about whether or not it was the best possible sales process in the world, whether some buyers weren't followed up with quickly or thoroughly, is irrelevant to duty of care. My clients are directors who oversaw a process that was run by Davis Polk, Green Hill and later, Weil Gotshal. They're overseers.

Let's assume that some -- there was some buyer out there for this company which we know that there really wasn't because as Mr. DeGroote's witnesses have testified, or witnesses in the case that Mr. DeGroote's -- whose testimony Mr. DeGroote sought, it was public knowledge that this company was for sale. Anybody and anybody could have come forward and did. But nobody wanted to buy it. Nobody wanted to buy it because the company was in bad condition and the economic world was falling apart.

One of the key allegations in the case, you might remember, Judge, is that the defendants thwarted Cerberus by asking for too much equity. Well, when Your Honor performed the gate keeping function and Your Honor saw that there were specific allegations with specific dates attached to them, Your Honor could take comfort in that and say this is not -- does not on its face appear to be a frivolous complaint. However, although Mr. DeGroote could have, he never spoke to Cerberus before he filed the complaint. And by the way, there's dozens of e-mails that make it perfectly clear that Cerberus did not withdraw because of management equity concerns and beyond that,

quite to the contrary because Green Hill sent e-mails to the company saying don't worry, Cerberus knows if they want to do the deal, they don't have to worry about equity demands. That will get worked out. That's part of the record that whatever massive investigation Mr. DeGroote did, that was part of the record. It wasn't in the complaint.

More to the point, Cerberus gets deposed this fall and says we didn't stop bidding -- we didn't stop pursuing a bid because of Ed Harbach's ask in a negotiation for management equity. By the way, that negotiation got to about sixteen percent, fourteen percent. There was no wide gulf there.

THE COURT: I couldn't hear the last point.

MR. CURNIN: There was no --

THE COURT: After the fourteen to sixteen percent.

MR. CURNIN: There was no wide gulf between -- I'm sorry. There was no wide gulf between Cerberus and management with respect to the equity portion, if there was going to be a buyout. It was -- they were two percent apart.

More to the point though, Cerberus said we stopped bidding for two reasons; one, we couldn't get comfortable with the value of the company and two, Lehman failed and we could never get financing. It had nothing to do with management equity.

But performing the gatekeeper function, Your Honor gets a detailed complaint. That allegation's in there. It

seems specific and detailed but there was nothing behind it.

More disturbing to us was that -- and Your Honor might remember this, in the complaint, the backbone of the complaint are the e-mails of the former General Counsel, Laurent Lutz (ph.). We counted it up and I don't remember the exact number but Mr. Lutz is cited in the complaint, I believe, forty-one times. I could be a little bit wrong.

Well, I read the complaint like Your Honor did. I came to this pretty cold. I read the complaint and I saw it. Well, there's a lot of detail here. There's a lot of specific quotes from specific dates naming specific people and appearing to raise non-frivolous concerns.

Well, it wasn't until the fall that we got to sit down with Mr. Lutz and take his testimony and to our amazement, Mr. DeGroote had never consulted Mr. Lutz about the complaint; had never told Mr. Lutz he was going to use his e-mails. Mr. Lutz testified under oath last fall that his e-mails had been taken out of context and distorted and didn't present his views. That, in fact, his views were none of the directors ever breached their fiduciary duty or did anything that caused the company not to be sold.

So what kind of investigation could have been done? Either if my clients got unconflicted advice and said listen, I'm negotiating my comp. I had a breakfast meeting five months ago in Dallas with members of the creditors committee, I don't

-- I really want very badly to be liquidating trustee. It's not that I might be, I am definitely going to do it. I'm negotiating my comp. It's an incentive comp package. I can't tell you anything. You need to get independent advice. Very easy. Somebody could have come in and said okay, here's what we need to do.

Duty of care is exculpated. So we don't need to look at every single allegation of whether one CFO liked the controller or whether the controller was interfering with the financing function. If the Board had failed to oversee that and if it had anything to do with the failure to sell the company, which it didn't, that's negligence. That's duty of care.

So, duty of care is exculpated. All you need to know is, is there evidence that these directors intentionally breached known duties, okay? We would have to be duty of loyalty or bad faith. There's nothing like that. How could you find out quickly and efficiently? Good question. But it's easily answered and we know it now because we've taken those depositions now.

You could have called in very short order Mr. Lutz. Mr. Lutz, you were present for all of the Board meetings. You were on site all the time. You knew exactly what was going on. We're troubled that this process failed. We're troubled that this company, which once had a lot of money doesn't have it anymore. Did the directors have anything to do with that? Did

you ever see a breach of fiduciary duty? Okay. There's one data point. No, I was the general counsel. These directors worked very hard. They met constantly; sometimes twice a day. They hired the best lawyers they could. They listened to outside advice and inside advice all the time.

Yes, I occasionally wrote e-mails and said I'm concerned that what we're doing could be revisited in litigation and when I raised that concern, they addressed it. When I raised the concern about the composition of the independent financing committee, they changed it.

My concerns were all addressed. The directors were qualified, paid attention, experienced, no independent -- no disinterest -- they were all disinterested and they had great advice. I saw nothing. I've been advising boards for fifteen years. I saw nothing that was a breach of fiduciary duty. Data point one.

Data point two; I suppose you might call their lawyers. I suppose you might call the lawyers from Davis Polk that went to every single board meeting, finance committee meeting and other meeting and said, gee, Mr. Bick (ph.), you've been watching this board for sixteen months, you've seen them over and over and over again in action. You've seen their decisions. You've seen their level of preparedness. Do you see anything that amounted to breach of fiduciary duty? By the way, does Davis Polk know anything about fiduciary duty? Yes. Okay,

thanks. Do you have a basis for an opinion? Yes, I do. I never saw anything that approached a breach of fiduciary duty. Well, I know you gave that opinion in the minutes. It's documented. Two single-spaced pages. What about after that time? Nope, not after the time either.

THE COURT: Pause, please, Mr. Curnin. These remarks you've made for the last five minutes or ten or whatever sound a lot like the kinds of things that might be in an opening or a summation at the trial in Virginia when the trustee's going after your guys and might lead me to conclude that the battle in Virginia is going to be a real horse race.

But can you help me better understand why it's relevant to the matters which Mr. Gallo described as being the two principle issues here; one being the gatekeeper function and one being Barton v. Barbour?

MR. CURNIN: Yes, Your Honor. I think that the point I was trying to make that's directly related to the question you asked was the release obviously says on its face, willful misconduct is excluded; is it enough just to slap that label on the complaint? The answer is maybe not but that's not what we did.

We've been accused of bad faith. We've been accused of timing this to frustrate the discovery process. So we want to respond to that. But in respect of Barton, and the gatekeeper function, my points are simply that we believed

rightly or wrongly, we understood the comments from the hearing where we fought hard to stay here to be that Your Honor's concern was for our clients to have you review the complaint before it was filed elsewhere and having that function performed at the gatekeeper function was served. That was our interpretation.

And in respect of the Barton doctrine, we don't attack Mr. DeGroote for what he did as liquidating trustee. We attack him for the advice -- the misleading advice and omissions that he made while he was Chief Legal Officer and gave advice to my clients. And the answer is quite simply, if -- is it but for him filing the complaint that we would bring this claim? No. If anybody filed this complaint, we would bring it because they were badly served.

They had an opportunity that was taken away from them to do an investigation that would have given or could have given this court and the creditors committee comfort, that it would have been a silly waste of assets to pursue breach of loyalty and bad faith claims against directors who listened to David Polk, worked very hard. Their GC said they'd performed their duties. Weil Gotshal and Manges said they performed their duties. Green Hill said the process was excellent and well-supervised. And Cerberus said they went away for reasons having nothing to do with anything that any of the directors or defendants did.

That could have been determined rapidly. It was rapidly determined when we took the depositions of those individuals. It could have been even faster if you were doing an investigation, say okay, look, here are the facts. You can have Judge Martin or someone else come in and say I need to talk to these five people; Davis Polk, Weil Gotshal and Manges, Green Hill, Cerberus, Laurent Lutz. I want their opinion because I'm not looking at high standards, not duty of care; bad faith.

If all of those people say that the directors performed their duties and they told the directors they were performing their duties, which they did, it's really insurmountable almost or certainly very difficult to go to prove that the directors knew they weren't performing their duties. So, perfectly reasonable to say not in the best interest of the estate to have this many lawyers read hundreds of thousands of e-mails to come up with quibbles about -- that are duty of care type allegations when I know they're exculpated and Davis Polk, Weil Gotshal and Manges, Green Hill and Laurent Lutz, the man on the scene, all say that they had never saw anything like breach of duty of loyalty or bad faith. That would be the rational result.

And we're here today because there's complaints about expense that we created by filing in Virginia. Well, ironically, we fought to stay here and we're willing to be here now. We've rapidly agreed to a stay of our case so that Your

Honor could hear it. We -- if anybody called us, we would have come here. We don't have a problem being here.

The great expense that was wasted here was the investigation that preceded the filing of Mr. DeGroote's complaint, not ours. The work that we had to do, we would have had to do anyway to prepare our defense in Virginia and I'm sorry if I sound like I'm giving an opening in that case but we've been accused of doing a lot of bad things, none of which is true.

We stand by the complaint. We have a basis for every single thing in it we said. The timing of the filing of the complaint was driven by outside events, primarily the running of the statute of limitation and the delay of getting Mr. DeGroote to sit down for his deposition and our obtaining an affidavit of an independent third-party that supported our case.

We got all of those things right under the wire and filed the complaint the day before the statute of limitations ran. So to hear from people that aren't involved in the case that we're trying to frustrate Your Honor or subvert the process of this court or delay our day of reckoning in Virginia, it's frustrating because it's just not true. So, I do want to make sure Your Honor has all this information and I do think it's relevant to the questions that Your Honor asked at the outset.

Your Honor, I think I -- I hope I've addressed the questions you asked at the outset and I'm perfectly willing to

answer any other questions that you have.

THE COURT: No, thank you very much.

MR. CURNIN: Okay.

THE COURT: Mr. Rudge?

MR. RUDGE: Thank you, Your Honor. Andrew Rudge of Williams & Connolly on behalf of Mr. Harbach. I agree with what Mr. Curnin said and I'm not going to be repetitive. I will be brief. But I do want to address a few discrete points.

With respect to Mr. Gallo and the issue of the standing of the trustee, I think he misses our point. Our point is we don't understand the genesis of John DeGroote Services, LLC. My understanding is that this court appointed John DeGroote as the trustee, the liquidating trustee in this case, not John DeGroote Services, LLC.

And when Mr. DeGroote was asked about this at his deposition, whether he was the liquidating trustee or whether there was a new LLC entity that was the liquidating trustee and why there was now two entities, he didn't answer and he claimed privilege. That is why we had the footnote saying we don't know what the standing is of this entity John DeGroote Services, LLC, just to be clear on that.

THE COURT: Is your contention that John DeGroote, LLC doesn't have the standing vis-à-vis claims against John DeGroote or the converse of that or that the trust doesn't have standing to be joining into a motion by one or both of John DeGroote and

John DeGroote, LLC?

MR. RUDGE: I think my only contention is we don't understanding the standing of John DeGroote Services, LLC because Mr. DeGroote refused to answer questions about the genesis of that entity and I believe that the interrogatories in at least one of the briefs in connection with this hearing was filed on behalf of the entity John DeGroote Services, LLC. That was the point of the comment in our brief, Your Honor.

THE COURT: Go on.

MR. RUDGE: Okay. With respect to the Barton doctrine, which you have raised, I would point briefly to page 15 of Mr. DeGroote's motion and on page 15, Mr. DeGroote argued against the applicability of Rule 1.8(h) of the New York Professional Rules of Conduct and that rule prohibits attorneys from making an agreement prospectively limiting the lawyer's liability to a client for malpractice. And Mr. DeGroote said well, that's not a way in which you can argue that these claims fall outside of the release and exculpation provisions of the confirmation order.

And he said that rule is inapplicable here because it precludes only the release of prospective claims of professional misconduct. The claims brought by the former directors are not prospective. Rather, they are for conduct that took place prior to the plan's effective date and therefore are released.

In that respect, we agree. I don't think Rule 1.8

applies but by the same token, neither does the Barton doctrine. We are not suing Mr. DeGroote for actions that he took in his official capacity as a liquidating trustee. We are suing him for actions taken while he was an attorney for the individual directors that we represent.

Mr. Gallo said that the Barton doctrine has been expanded to apply to professionals of debtors but again, we're not suing Mr. DeGroote as a professional of a debtor. We are suing him as attorney of specific individuals.

With respect to the Borden letter, Your Honor, that is a little bit before my time on this case but let me tell you what I understand about that letter. I did read the transcript of the hearing in connection with Mr. DeGroote's request for limited relief from the confirmation order, so he could file a lawsuit in Virginia. And my colleagues from Williams & Connolly were at that hearing and we argued strenuously against that request for relief and we argued that those claims should be brought here and they should be heard in front of Your Honor.

I don't believe that the Borden letter was intended to suggest anything to the contrary. I believe that the Borden letter was in response to a letter that had been sent to Your Honor by the trustee after Stern v. Marshall was decided and I believe in that letter, the trustee suggested that Stern v. Marshall decision somehow suggested that the claims against the former directors could no longer be heard in this court and that

they were more appropriately brought elsewhere. And I believe that the purpose of the Borden letter was to suggest that that was not true and that these claims still should and could be heard in this court by Your Honor.

THE COURT: Well, I have the Borden letter in front of me. I think it may not be as relevant as some of the other things we have addressed today but the Borden letter twice reminded me that I couldn't enter a final order and that the implications of that, which could have very easily been avoided if Borden had said we're very happy to be before you, statement that is -- was conspicuously absent as I stated in the written opinion, and the Court would not be authorized to enter final judgment. What was your partner trying to tell me then?

MR. RUDGE: Respectfully, Your Honor, perhaps he was just stating the fact as he saw it but I think that the focus of the letter was the issue of whether Stern v. Marshall impacted the ability of the claims against the former directors to go forward in this court and I think the position in that letter was that the case did not --

THE COURT: Of course but that isn't the point. You know, I've had the luxury in this case of having very capable lawyers on both sides and it's been my experience that capable lawyers rarely say things for no reason. If Borden's point were to say of course it's a non-core matter but we're very happy to be before you and we think it's important that you use your

expertise, that would have been the more appropriate way to convey the message that you're trying to convey to me now, if that in fact had been the intent.

MR. RUDGE: I understand your point, Your Honor.

THE COURT: All right. Move on, please.

MR. RUDGE: I don't have anything further. I think that Mr. Curnin covered the points that I would have liked to have cover. Unless you have anything further for me --

THE COURT: Okay. We've been going on for a long time but I want to finish this before the lunch hour without a break.

Mr. Longmire, I'll hear from you, limit it to new stuff you heard from Mr. Curnin, from Mr. Rudge.

MR. LONGMIRE: Thank you, Your Honor and I will attempt to be quite brief about this and address only those matters raised by the respondents to our motion today in their response.

This contention that the gatekeeper provision doesn't mean what it says or takes a bankruptcy expert to understand what it says is quite hard for me to wrap my mind around. I looked back at the gatekeeper provision while I was listening to that, and it's one sentence. It's very straightforward; notwithstanding anything contained in the plan, this court and the United States District Court for the Southern District of New York, shall retain exclusive jurisdiction to adjudicate any and all claims or causes of action brought by the debtors, the

liquidating trustee, the secured lenders, or any holder of a claim or interest which are defined terms in the plan and defined to mean creditors of BearingPoint or equity holders of BearingPoint against any party granted a limited release in subparagraphs 34(a) and 34(b) above. If you look in 34(a) and 34(b), you see Mr. DeGroote named and an extensive release provided for him.

It doesn't say unless you can make an argument that your claim isn't exactly related to the bankruptcy or unless that released party asks for relief from this provision in a different proceeding. I mean, it doesn't take an expert to read this. It's extraordinarily clear and straightforward.

In addition, the concept behind their argument on this is very hard for me to take seriously, as well. The idea that well, Mr. DeGroote asked for relief or rather the liquidating trust asked for relief in a different context for a different case for different claims, so therefore he's sort of lost or waived his benefit -- the benefit of that in a different context in the future or it simply doesn't exist anymore once he got relief from it with respect to the D&O claims, runs contrary to the clear language of the gatekeeper provision. It also doesn't really make any logical sense.

As Your Honor said, these D&O claims were admittedly by both parties at the last gatekeeper hearing, non-core matters. Those claims arise out of facts that occurred or

didn't occur prior to the commencement of the bankruptcy cases and again were non-core.

The claims that they're asserting against Mr. DeGroote are quite the opposite and they go to the heart of this Court's jurisdiction. They are saying that the principal of a trustee appointed by this court committed misdeeds before this court in this bankruptcy case that impacted the content of this court's confirmation order and that suing a fiduciary appointed by this court personally for his conduct in this case, doesn't violate the gatekeeper provision. This is very much a core issue and very much directed to the what happened during this bankruptcy case and very much directed to the jurisdiction of this court; quite different from the D&O claims.

But turning to the connection between these claims and the D&O claims, one thing that troubled me a lot was Mr. Curnin's statement that this case against Mr. DeGroote and when they overlooked the gatekeeper provision or determined somehow, someone told them that it shouldn't have applied, was filed when it was filed because of a statute of limitations. I think in saying so, Mr. Curnin's sort of making our argument.

As we point out in the -- that footnote 3 in our motion, the statute of limitations under Virginia law for fraud is two years. So, he's talking about a three year statute of limitations. He just said that they had to file in November of 2012 to meet the statute of limitations with respect to a

statement was made in November of 2009; three years earlier. The three year statute of limitations in Virginia is for malpractice negligence.

So, I think he's making my point about the fact that they've asserted what amounts to a negligent malpractice claim and they're slapping the word fraud on it. If in fact it were a fraud claim, it would be time-barred under Virginia law, assuming Virginia law does apply.

They also say well, we didn't really think the gatekeeper applied because this is sort of in the nature of a counterclaim but it's not in the nature of a counterclaim. They're talking about a claim against a different party, not the trust or the trustee but Mr. DeGroote personally over a completely different set of facts; things that occurred during the bankruptcy case around the time of confirmation as opposed to things that occurred in the sales process a year or two before confirmation.

THE COURT: Pause, Mr. Longmire. I'm wondering if it has a hybrid character in some respects. Does a lot of the documents that form litigation trusts in my experience obligate the trust to indemnify the trustee if he or she has been nailed for anything in the course of serving the trust's interest? Do your documents have such provisions?

MR. LONGMIRE: I believe they do.

THE COURT: All right. Continue.

MR. LONGMIRE: The point was made in response that the directors did not know that Mr. DeGroote was negotiating a compensation arrangement for a role for him or his firm as trustee post-confirmation during the time pre-confirmation.

I'm not quite sure the relevance of whether he was or wasn't or they did or didn't know it, that sort of escapes me but in any event, I am not quite sure how they can say that. I'm not sure. Are they suggesting they thought until just now that he was working for free as the liquidating trustee?

But even if not, it sort of seems to me to conflict with the statements in their complaint which cite to board minutes, minutes of board meetings that occurred pre-confirmation in which they say in their complaint that negotiations for his compensation as liquidating trustee were discussed with the board pre-confirmation.

In any event, the bottom line I think on all of this is that these directors either did or did not breach their fiduciary duties and as a result, they either will or will not be liable to the liquidating trust in the D&O action. Mr. Curnin as you said, seemed to give what seemed to me like an opening argument in that case and I don't make any comment on the substance of that case or what the outcome will be. But it seems to me to be the height of nerve to suggest that if they did breach those fiduciary duties, and they are in fact found liable in Virginia, that they should have been released from the

very claims they've just been found liable on because if -- and that's the heart of their argument, it seems to me; if we're liable, we should have been released. If we actually caused 1.8 billion dollars of damages to this bankruptcy estate, we should have been released. Because if they prevail at trial, they don't' have any damages in the case they brought against Mr. DeGroote. If they prevail at trial while it's certainly not a pleasant thing to be sued, there are no damages here.

Now the other point I want to raise with respect to the response, the statute -- going back to the statute of limitations point. Mr. Curnin said well, we had to file in three years, notwithstanding that fraud's a two year statute of limitations in Virginia because one day more than three years before we filed the complaint, there was a meeting and one or more of the directors said to Mr. DeGroote hey, John, what would you do if you were me and Mr. DeGroote, according to them, said I don't know of any claims against you at this time. I'd take the limited release. I don't know if he said that or he didn't say that but if he did, that sure doesn't sound like fraud to me. That sounds like they're suggesting he made an error of judgment when he advised them.

So, they're putting themselves inside the release that Mr. DeGroote received. Even if what they are saying is true, I don't see how it's possible based on the presentations we've heard and the complaint and the opposition, that this Virginia

complaint can survive this hearing or that it should be -- the claims should be countenanced any further than they've gone already. That's it.

THE COURT: All right. Thank you.

Mr. Gallo?

MR. GALLO: Thank you, Your Honor. Again, Andrew Gallo for the trust.

Three very brief points; first of all, I was very happy to hear at the beginning of his argument, Mr. Curnin's statements that they want to be in front of Your Honor and they are going to try -- they want this case to be here in front of Your Honor. They did use very careful language in their brief when they said "In the event this court" -- I'm reading from the bottom of page 29 -- "In the event this court decides otherwise," in other words that the case can't proceed in Virginia, "However, the plaintiffs would consent to jurisdiction in the Southern District of New York. Footnote: the plaintiffs intend to assert their right to a jury."

So that sounds like they're happy to be in New York, whether it's in front of Your Honor or not, that -- questionable in their brief but I was happy to hear Mr. Curnin say that they do want to be here, at least until this case -- I'm not saying people don't have a right to assert a jury -- a right to a jury, certainly they do but for pretrial purposes, I think the appropriate forum is here and I was glad that Mr. Curnin agrees

with that. That's point number one.

Point number two, I wanted to also address this argument that you know, it was a mistake, that we didn't understand the gatekeeper and as a litigator I've used this one before. You know, I blame the bankruptcy guys. I consulted the bankruptcy lawyers. They told me I was doing the right thing.

But there was lots of reference back to the hearing and I have the transcript on the motion to permit the D&O claims to proceed in Virginia and that was a January 21, 2011 hearing in front of Your Honor. And I've read through that transcript and in reading that transcript, it's hard for me to understand how someone could understand that the gatekeeper wouldn't apply to these type of claims. Your Honor was very clear -- and this in addressing Mr. Curnin and I'm on page 47 now, you likened the gatekeeper function to what you did in Adelphia and you said, you know -- in talking about Adelphia, you said there was so much -- and I'm quoting again from page 47 of that transcript, "There was so much inter-creditor, unsecured creditor, and your firm," addressing Mr. Curnin, "had the secured creditors or some of them, hostility that I thought I needed to impose a measure of discipline in the case to prevent litigation terrorism, not Osama bin Laden type of terrorism but different kinds of terrorism. That's why it was in Adelphia and I thought there was no indication of that here but I thought I would put in some of the same safeguards."

So hearing that, that the purpose of this gatekeeper was to safeguard against frivolous litigation, litigation used as a tactic to oppose legitimate claims of others, I don't see how they could understand that the gatekeeper wouldn't apply to this.

And then finally, I want to address -- my third point I want to address this notion that well we never sought to delay the litigation in Virginia, so really this wasn't a litigation tactic. Well, there's two ways to disrupt that litigation. You could seek to delay it which would increase costs and expense and further delay or you could say we don't want delay, Your Honor, we want to proceed expeditiously but please consolidate these claims with the other claims.

Please -- and then force Mr. DeGroote to try these claims against him personally that make these horrible allegations against him personally, specifically horrible allegations for someone who makes his business as a lawyer to try those claims in three months or four months or however long it was from November to April. That's equally as disruptive, I would argue, to the trust claims in Virginia as delaying the case. Thank you, Your Honor.

THE COURT: All right. Any sur-reply, Mr. Curnin?

MR. CURNIN: Yes, Your Honor. We moved in Virginia for the reasons I said. We didn't understand these to be the claims of an equity holder. In fact, I think our equity

interests were extinguished. We weren't complaining as in the cite that counsel just read about Adelphia. The bomb-throwing in Adelphia was about people attacking plan provisions. We weren't doing that.

We understood Your Honor to say the provision was included solely to implement my sense of what was appropriate when I sustained the BearingPoint creditors committee's objection to the releases the debtors sought, that it was for our benefit. And that function happened and then we were in Virginia, so we filed in Virginia.

At no point in time were we trying to avoid this court. I regret any impression of that and we're here to say now that we would be in this court.

I think that the idea that it's only if we lose that we have damages is simply not realistic because cases settle and people lose litigations all the time for all kinds of reasons and to be exposed to that is itself an unfair risk.

Counsel says he doesn't see how the --

THE COURT: Pause please, Mr. Curnin.

MR. CURNIN: Yes.

THE COURT: Having, you know, been a litigator before I came over to bankruptcy, I understand I think some of the things you're talking about but doesn't the points you made apply equally well in the other direction, just as having that claim out there or not affects the dynamics from your client's

perspective? Isn't it kind of a sort of a Damocles hanging over your opponent's head as well that affects him in pretty much the same way you described as affecting yourselves?

MR. CURNIN: Your Honor, there was no way that learning what we learned, we couldn't take some action. At the time of the November 16 meeting when the directors asked for personal advice, got it and relied on it and acted on it, Mr. DeGroote had secretly recused himself from reading the key Weil Gotshal brief that supported the directors releases. Under oath in his deposition -- we only learned this in late October -- he said I did that because I didn't want to be linked to all those statements that said the directors did a good job. He claimed that he told Weil Gotshal he recused himself. We made five requests to Weil Gotshal and deposed a Weil Gotshal partner. They have no record of that ever happening.

Under those circumstances, and given what happened here, we don't do this lightly; never filed something like this before and I hope to never come across these circumstances again. We had no choice, other than to close our eyes and let our clients be disserved and be bullied into a trial and take their chances.

We believe in the merits of our case in Virginia. We believe in the merits of the complaint that we filed against Mr. DeGroote. We filed it in good faith and I apologize once again if I made a mistake about judging what Your Honor intended with

respect to the gatekeeper function. We gave it some thought. We acted under time pressure. We understood it was for our protection based on what you told us and we acted accordingly. It was never any disrespect to Your Honor intended. We're happy to be here now.

THE COURT: Okay. Thank you. Mr. Rudge?

MR. RUDGE: Thanks, Your Honor, just very briefly on the argument that this lawsuit falls squarely within the gatekeeper provision. My understanding, as Mr. Curnin said, was that this provision was not part of the plan but it was enacted by this court for the benefit of the directors to give them some measure of comfort. My understanding is Mr. DeGroote did not agree with the provision, argued against it in 2009 and then ultimately convinced this judge not to enforce that provision when he sought to sue the directors in Virginia.

And I do believe that it's appropriate to consider subsequent events when construing that provision. I don't think that the Court or the parties can overlook the fact that after that gatekeeper provision was added to the confirmation order, significant activities shifted out of this court and to Fairfax County Court. And they did so because that is the specific forum that Mr. DeGroote chose to litigate against the directors. And those parties had been engaged in extensive litigation over the past eighteen months.

So against that backdrop, I don't think it was

unreasonable for the former directors to bring their claims against Mr. DeGroote in the forum that he had selected and that this court had approved of for related litigation.

In any event, as Mr. Curnin said, when he first raised a concern about that, there was an agreement to a stay and subsequently as we said in our papers, we would be fine with the action being transferred here.

So I don't think that this is a case for contempt. I don't think there was respectfully, particularly when viewed against the backdrop of what happened after this order was entered, that there's been a violation of the order. I don't believe that the directors acted unreasonably and I don't think it's a case for contempt. Thank you.

THE COURT: All right. Thank you.

Folks, it's now about 1:30. I intend to give you a ruling today. It's going to take me at least an hour-and-a-half to do it, perhaps more. You have a choice. You can take a long lunch, be back here at about 3:00 and be present for the dictation of a decision recognizing that I have less than a fifty percent success rate in showing up when I tell people to show up. Or if you prefer, that should give you enough time to arrange for Court Call to hear a dictated decision which will be announced in open court but where nobody's under an obligation to be here when I dictate it. Your call.

I would ask that parties be back by 3:00 or be

prepared to go on the phone by 3:00 but again, I can give you no guarantee that there will actually be something going on at that time. We're in recess now.

(Court recessed.)

THE COURT: Have seats, please. I apologize for keeping you all waiting.

In this contested matter in the Chapter 11 case of reorganized debtor BearingPoint, Inc. and its affiliates, John DeGroote, the sole member of John DeGroote Services, LLC, who serves as the liquidating trustee for BearingPoint, joined by the liquidating trust, moved for entry of an order enforcing certain provisions of the confirmation order entered by this court on December 22, 2009.

Mr. DeGroote asked me to order three of BearingPoint's former directors and Edwin Harbach, Roderick McGeary and Eddie Munson, whom I'll refer to here as the former directors, to dismiss pending litigation which I'll call the new lawsuit, that they commenced in the Virginia state court seeking 1.8 billion dollars in damages from Mr. DeGroote.

Mr. DeGroote and the liquidating trust contend that the suit against Mr. DeGroote, the person who is suing the former directors, is a blatant violation of the confirmation order. The former directors opposed the motion, arguing that their claims are not prohibited by the confirmation order and that they're probably brought in the Virginia state courts

because they're essentially counterclaims to the liquidating trustee's pending lawsuits against them for alleged breaches of fiduciary duty.

Mr. DeGroote's motion is granted to the extent of issuing what in substance will be a preliminary injunction enjoining the prosecution of these claims in Virginia and requiring the new lawsuit to be either dismissed or transferred here, so that if these claims are to be asserted anywhere, they must be brought before me and by me, I mean, me; not the district court.

I will continue the requested motion insofar as it seeks contempt and sanctions for an evidentiary hearing on these matters and to await the outcome of matters that could make at least part of those requests moot.

Putting aside the two side's positions on the merits, on both the underlying litigation brought by Mr. DeGroote in Virginia and in the one, the former director's wish to bring against Mr. DeGroote, the issues before me ultimately turn on the gatekeeper and exculpatory provisions that appeared in the confirmation order early in this case or earlier in this case and the doctrine of Barton v. Barbour, under which courts appointing fiduciaries, like Mr. DeGroote here, protect them from unjustified personal liability for acts taken within the scope of their official duties.

Putting one's accuser on trial raises red flags to any

judge. The action brought by the former directors in Virginia violates the letter and especially the spirit of the gatekeeping and exclusive jurisdiction provisions of the confirmation order I entered earlier in this case, particularly paragraph 34(c). It requires any such claims, if they're to be heard at all, to be heard in this court.

Additionally, and as importantly, this effort to impose personal liability upon Mr. DeGroote in connection with his efforts to sue the former directors without first having secured my approval to do so, is a paradigmatic violation of the Barton doctrine. Though the claims brought by the former directors may be colorable, I have substantial skepticism as to their strength and Barton doctrine exists to protect the trustee from measures which have the effect if not also the purpose, of intimidating the trustee or pressuring the trustee in connection with the claims that he's bringing on behalf of the trust he represents. They are almost as objectionable when they are used to achieve leverage in connection with any settlement.

My findings of fact, conclusions of law, and bases for the exercise of my discretion in connection with these determinations follow. Turning first to the facts, the facts underlying this controversy are not in dispute, to the limited extent they're relevant here and neither side requested an evidentiary hearing though I don't think I'll be able to make a finding of contempt or to award sanctions which would be the

main consequence of the contempt finding without an evidentiary hearing and without ascertaining the full extent to which the claims which will now be heard before me are colorable or may ultimately succeed. They'll also turn, as I'll talk about later, as to the extent of the due diligence that accompanied the assertion of these very aggressive claims.

Since 2000, Mr. DeGroote was employed as an Executive Vice President and Chief Legal Officer for BearingPoint, a Delaware corporation. The former directors, Edwin Harbach, Roderick McGeary and Eddie or Edward Munson served as directors of BearingPoint.

On February 18, 2009, BearingPoint and certain of its affiliates filed voluntary bankruptcy petitions in the Southern District of New York. The Chapter 11 cases were assigned to me. During the course of the bankruptcy proceedings, Mr. DeGroote continued to serve as Chief Legal Officer to BearingPoint and continued to provide its board of directors with legal advice including advice with respect to the formulation of the reorganization plan.

The capacity in which members of the Board of Directors were provided with that legal advice is a matter of dispute, although there is no dispute that BearingPoint was Mr. DeGroote's client, whether individual boards of -- members of the board of directors were also his clients and the extent to which he owed them a duty, and in particular owed them any

duties that might be in conflict with his principal client, is disputed between the parties and a matter as to which I make no ultimate conclusions today.

The debtors also retained outside counsel who represented them in the course of their Chapter 11 case; that being the Weil Gotshal firm, whose principal partner on the engagement was Alfredo Perez. On October 5, 2009, the debtors filed an amended joint plan which proposed, among other things, broad releases of BearingPoint's former directors for certain *pre-petition* conduct, including "any and all claims or causes of action whatsoever in connection with, related to, or arising out of the debtor's restructuring or reorganization efforts on or after January 18, 2008."

But the unsecured creditors committee objected to the proposed plan in part on the grounds that the scope of the releases for former directors was too broad.

In November 2009, there was a board meeting in Dallas, Texas or at least as alleged by the former directors, at which Mr. DeGroote is alleged to have made certain statements which form at least part of the former director's claims. That was at a time when the creditors committee had already telegraphed its concerns about the scope of the releases, though I can make and do not make any findings as to the extent to which parties at that board meeting were already on notice as to the strength of the creditors committee's concerns or the reasons why the

creditors committee might object to the releases, which at least impliedly might be because of their recognition of the possibility that they might want to sue the former directors.

About a month later, on December 17, 2009, a confirmation hearing was held in this court before me during which I was asked to rule on the objection of the unsecured creditors committee to the scope of the releases and in particular, the extent to which releases of liability could be provided in the confirmation order.

During that hearing, I noted that "if the claims [to be released] 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" -- and I'm changing the word think to thought -- "it would be at least, quite reasonable to find that the give-up of such rights," and I've changed the word is to was -- "in the best interest of the estate."

In part for that reason, i.e., because there was no investigation of potential claims, and because I didn't know whether there were any claims there or not, but also for other reasons including the lack of any consideration by the former directors for those releases, I could not find it to be in the best interest of the estate to release away claims against the directors for their conduct prior to the bankruptcy petition.

I did, however, find that it was in the best interest

of the estate that to the extent that claims were not released, prospective targets of the claims would "have the comfort that the validity of these claims," -- and I'm changing the word will to would -- "be thoughtfully analyzed with the benefit of as much knowledge of the surrounding facts as possible."

The reason for this, as stated in the transcript of that hearing, a matter as to which I can take judicial notice, was that I've had some bad experiences in cases on my watch with stakeholders in cases throwing around accusations at each other, most significantly in the Adelphia Communications Corporation case, another case on my watch where as I described in another published decision the conduct by some of the parties in the case especially in terms of their throwing around accusations to each other had been truly outrageous.

For those reasons, I then retained exclusive jurisdiction over those claims. As I noted then, and continue to believe now, this court is in the best position to "tell the difference between legitimate claims on the one hand and harassment, retaliation, or frivolous litigation on the other." Those concerns remain today, though the shoe is now on the other foot.

I also noted, finally, at the confirmation hearing, that "to the extent that releases aren't objected to, as for example, Mr. DeGroote's...and as the releases relate to actions by releases taking place after the filing date, those releases"

-- and I'm changing will to would -- "be approved."

On December 22, 2009, I entered the confirmation order which provided for the more limited releases of the directors, not including pre-petition conduct and providing for a more extensive release of Mr. DeGroote. Those releases did not apply to any causes of action arising out of the willful misconduct, gross negligence, intentional fraud, or criminal conduct of any of the beneficiaries of the releases.

The order also contained exculpation and injunction clauses limiting Mr. DeGroote's liability for actions taken in connection with the bankruptcy case. The way we commonly use the different terms in bankruptcy, we normally refer to releases as applying to the pre-petition period and we normally talk in terms of exculpation for those involving the post-petition period or to protect estate fiduciaries acting in the course of a Chapter 11 case. Technically, of course, exculpation provisions are a species of release but as used then and now, I use exculpation to focus on matter that happened after the filing of the Chapter 11 case and talk about pre-petition releases as relating to the pre-petition period.

To put those observations in context, the former directors are being sued at least principally with respect to pre-petition conduct while the accusations running back at Mr. DeGroote are principally, if not wholly relating to post-petition conduct.

The confirmation order further provided for the creation of a liquidating trust into which the debtor's assets would be transferred and for the appointment of Mr. DeGroote as the liquidating trustee. He was empowered in that capacity to investigate and if warranted, prosecute litigation on behalf of the liquidating trust.

On December 30, 2009, the effective date of the plan, Mr. DeGroote ceased his role as Chief Legal Officer to BearingPoint and was retained as the liquidating trustee for the liquidating trust.

On November 29, 2010, Mr. DeGroote as liquidating trustee, sought leave from this court to file a complaint against the former directors and six other members of the board in the Circuit Court of Fairfax County, Virginia. As I've noted earlier, under the confirmation order, I had retained exclusive jurisdiction over all claims against former directors that were not released under the plan. By reason of that, Mr. DeGroote could not file a complaint in the state courts without first receiving permission from me.

Ultimately, after extensive argument on the matter, I granted that leave after satisfying myself that the trustee's claims weren't frivolous and with regard to the procedural hurdles that the trustee would have to endure in this court after the Supreme Court's decision in Stern v. Marshall and the pointed reminder by one of the counsel for the former directors

in the Borden letter of June 24, 2011, that I couldn't enter a final judgment.

These factors, particularly in the aggregate, caused me to believe that there would be no benefits to hearing the action here and that indeed, even my substantial knowledge of the case might not do much good. See *In re BearingPoint, Inc.*, 453 BR 486, (Bankr. SDNY 2011).

Thereafter on July 21, 2011, the liquidating trustee filed an action against the former directors in Virginia State Court alleging breaches of fiduciary duty. A jury trial on those matters is scheduled to begin in roughly eight weeks, on April 1, 2013.

On November 15, 2012, the former directors filed a separate lawsuit, a lawsuit I called the new lawsuit, against Mr. DeGroote, also in the Virginia State Court, asserting claims of malpractice and fraud. The former directors' legal malpractice claims are based on an alleged attorney-client relationship that they allege was created between Mr. DeGroote and the former directors while formulating the reorganization plan in this case.

The former directors allege that they "understood DeGroote to be giving them personal legal advice in connection with the scope of the releases available under the bankruptcy plan," and that Mr. "DeGroote did not advise them that he was acting solely as counsel for BearingPoint or was otherwise

unable to give them personal legal advice."

Because of this alleged attorney-client relationship, the former directors alleged that Mr. DeGroote owed them certain duties attorneys generally owe to clients under the state's rules of professional conduct and that Mr. DeGroote violated these rules due to the alleged conflict of interest that arose as a result of his purported concurrent representation of BearingPoint and the individual directors.

In particular, the former directors allege that Mr. DeGroote inappropriately advised the board not to undertake an independent investigation of the potential claims against them during the course of the bankruptcy and that this failure resulted in a limitation of the releases they were able to retain under the confirmation order.

The former directors further alleged that Mr. DeGroote committed fraud when he "made material misstatements and omissions" to the former directors, though if the specifics of what these fraudulent misstatements or omissions were, were stated in the complaint, I missed them.

Turning now to my conclusions of law and bases for the exercise of my discretion. As a preliminary matter, I note a fundamental background consideration. This court has the power to enforce its own orders, including the confirmation order entered in this case. See for example, *Travelers Indemnity Company v. Bailey*, 557 U.S. 137, 151 (2009).

I further hold that each of DeGroote, his LLC, and the liquidating trust has standing to voice his or its concerns in this case by reason of the pecuniary interests that each of them has. And even if this were not true, any deficiencies could be cured by the other bringing the same issues back here a second time.

The controversy at its core is going after Mr. DeGroote personally when he is bringing claims against the former directors. The fact that he may be doing so through DeGroote, LLC doesn't undercut this basic fact. Likewise, the trust itself has standing in part because of its duty to indemnify and in part because as was acknowledged or stated in a context other than an acknowledgement, the claims against Mr. DeGroote have many of the aspects of counterclaims, if in fact they aren't intended to be exactly that.

Now let's talk about context. This contested matter implicates several causes of the confirmation order. The first relating to exculpation is like so many other provisions in confirmation orders, unbelievably dense and verbose, but its substance is that none of the debtors, the liquidating trust, the liquidating trustee, members of the creditors committee and their respective officers, directors, employees, attorneys, and which I can loosely call agents, shall have or incur any liability for any claim, cause of action or other assertion of liability for any act taken or omitted to be taken in connection

with or arising out of the Chapter 11 cases, the formulation, dissemination, confirmation, consummation or administration of the plan, or any other act or omission, provided, however, that the foregoing doesn't affect the liability of such a person that otherwise that might result, to the extent such act or omission was determined by a final order to have constituted willful misconduct, gross negligence, intentional fraud or criminal conduct of any such person or entity. That was a paraphrase.

The substance is, putting it in plainer English, that those who are acting to come up with the plan or to implement it would be protected unless one of those specific exceptions would apply. And I was paraphrasing sections 10.7 of the plan and paragraph 33 of the confirmation order.

What I just read was then implemented by the injunction provisions of the confirmation order which was paragraph 30 of the confirmation order. As Mr. DeGroote correctly notes, all of the allegations made by the former directors which form the basis of their Virginia lawsuits, that is the new lawsuit, arise from actions Mr. DeGroote took in connection with the formulation of the debtor's reorganization on plan, actions which are expressly exculpated under the confirmation order, so long as its narrow exceptions don't apply.

They also involve his acting in furtherance of the mechanism that was put into place under the plan that would

enable him to prosecute claims on behalf of BearingPoint's creditor community as the trustee of the liquidating trust.

Indeed, in their complaint, the former directors state that the alleged attorney-client relationship giving rise to the malpractice claim arose because they "understood DeGroote to be giving them personal legal advice in connection with the scope of the releases available under the bankruptcy plan."

And though their fraud claim was pleaded without anything in the way of specificity, it vaguely alluded to Mr. DeGroote's actions taken in connection with the bankruptcy and reorganization plan. So, under the exculpation clause, Mr. DeGroote could not incur liability for those actions unless its narrow exceptions were shown to imply.

Now the underlying contentions that I have here rest on the fact that the former directors believe that they threaded the needle and made allegations that were not covered under the exculpation provisions and that the liquidating trust side, the liquidating trust and Mr. DeGroote, violently disagree and say in addition, that it's not for the targets of litigation to make that determination, it's for a guy like me, like the judge. And that ultimately is the narrow ground upon which I can make the determinations today, though I have instincts as to the strength of the allegations made by the former directors or the lack thereof, I don't need to rule upon that today and for the avoidance of doubt, I don't decide that today.

Bottom line, certain claims but only a very narrow class of claims can be brought without running afoul of the confirmation order but as I said, there are separate issues with respect to whether the targets of litigation can attack their accuser by simply invoking the exceptions and making allegations that purport to bring themselves within the exceptions and whether my gatekeeper function can be sidestepped by simply making the accusations in a complaint in another jurisdiction without compliance with the gatekeeper provisions or the Barton v. Barbour doctrine.

Turning next to the gatekeeper function, paragraph 34(c) of the confirmation order states and I am quoting, "Notwithstanding anything contained in the plan, this court (and the United States District Court for the Southern District of New York) shall retain exclusive jurisdiction to adjudicate any and all claims or causes of action brought by (a) the debtors, (or the liquidating trustee as applicable) and the secured lenders or (b) each holder of a claim or equity interest against any party, granted a limited release in subparagraphs 34(a) and 34(b) above.

By its terms, 34(c) applies to the new action here because it is undisputed that the former directors were stockholders. Of course it's true that the principle concern that I had which caused this language to be included in the confirmation order was the misbehavior that I saw in the

Adelphia case. The underlying concern, however, which I then anticipated to be most relevant with respect to creditors and equity security holders, who as I reasoned at the time, had a long track record of blaming others for their failures to get greater recoveries, could apply to a wide variety of cases where people bring frivolous and aggressive claims against each other.

While what I just said was the legislative history, if you will, of that language, its meaning was clear. Its coverage was clear. It was not in any way ambiguous. And many, many cases of the Supreme Court and after having heard them, lower courts, have told us, see for example, *Ron Pair*, 489 U.S. 235 (1989), that when language is clear, and if its application does not lead to an absurd result, judicial inquiry ends and we construe language -- and this is true in statutes, it's also true for contracts, it's also true for confirmation orders -- in accordance with its plain language and to cut off the loose end, its application in this fashion is not at all absurd because the purpose of the gatekeeper provisions was to ensure that only colorable claims would be prosecuted and that use of the litigation process for harassment would not be tolerated in cases on my watch. And this is simply another example of application of that language to avoid such a result.

Now to be sure, counsel for the former directors have stated that they did a lot of due diligence and that they did not intend to harass and that they thought about these claims

and thought that they would pass muster. I don't make a finding as to that today. But what I am saying is that that's the exact purpose of the gatekeeper function and ultimately, I need to be the person who makes that decision and not a party in the case acting by what effectively is self-help.

The plain language of 34(c) says that people wishing to assert claims have to come before me. There is no basis under Ron Pair or its progeny or its sibling cases to disregard the plain language of the confirmation order.

So then we turn to the second of the principle bases upon which I rule today, that being the doctrine of Barton v. Barbour. Under the Barton doctrine established over a century ago in *Barton v. Barbour*, 104 U.S. 126 19 -- (1881), forgive me, to protect court appointed receivers and now expanded over time to encompass officers appointed by the bankruptcy court, a plaintiff wishing to sue a receiver or a bankruptcy court appointed officer must obtain leave from the Court appointing him or her in this context, must first obtain leave from the bankruptcy court before initiating actions against the liquidating trustee in another forum. When a leave is not obtained, the appropriate remedy is cessation of the improper action.

As the Second Circuit observed in *In re Beck Industries, Inc.*, 725 F.2d 880, 888, (2d Cir. 1984), a trustee in bankruptcy is an officer of the Court that appoints him.

Likewise, a liquidating trustee who has been appointed under a court order acts in the same capacity.

There's no question, of course, that a trustee in bankruptcy may be held personally liable for breach of his or her fiduciary duties which are to the estate whom the trustee serves but courts recognized the importance of trustees acting in accordance with the duties for which they've been appointed and as relevant here, in protecting them from efforts to impose liability of them personally as retribution against them when they're doing their job.

As the Second Circuit held in *In re Lehal Realty Associate*, 101 F.3d 272, 276 (2d Cir. 1996) and I am quoting, having said this after recognizing that a trustee that violates his fiduciary duties to the estate is potentially subject to liability for doing that, "At the same time 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. A well-recognized line of cases starting with *Barton v. Barbour*, 104 U.S. 126, 26 L.Ed. 2d 672 (1881), extends such protection by requiring leave of the appointing court before a suit may go forward in another court against the trustee." The Circuit cited three cases for that proposition, one of which was issued by learned hand, *Vass v. Conron Bros.*, *In re DeLorean Motor Co.*, In re Baptist Medical Center of New York and for good measures, cited Collier.

There are strong reasons for a doctrine like that articulated in Barton v. Barbour, even putting aside the fact that decisions of the United States Supreme Court are binding on the lower courts in the cases on their watch. Putting one's accuser on trial is one of the oldest tricks in the book. There may be times when the trustee has acted improperly and in such cases a court like mine can recognize that.

Here, by way of example, if it turns out that Mr. DeGroote acted improperly, upon a proper showing, I can recognize that. But a situation in which the defendants in litigation brought by trustees can go after the trustees personally, just by filing a piece of paper and asserting by ipse dixit that the claims are well taken, and fall within narrow exceptions permitting those claims to be asserted is intolerable.

And to his credit, counsel for the former defendants did not contend that there were no circumstances under which a scenario like that could be reviewed. He simply said that under the facts here, his guys had acted okay. Well, maybe they did but that's a decision for me to decide and it requires compliance with the Barton v. Barbour doctrine before we can be satisfied that that's the case.

Here, counsel for the former directors says that he engaged in a lot of due diligence before going after Mr. DeGroote personally. I take him at his word. But if he did so,

he can then make that showing to me in compliance with Barton v. Barber. He can't just sue the trustee when the affect, if not also the purpose, is to pressure the trustee with respect to claims that the trustee brought on behalf of the trust or even if its purpose is merely to change the negotiating dynamics of any settlement or to gain leverage in any settlement negotiations.

The former directors also argue that the Barton doctrine isn't applicable because their accusations against Mr. DeGroote personally are said to rest on actions Mr. DeGroote took before he was formally appointed by me as trustee. I cannot agree.

First, courts like mine are allowed to be realists. I have no doubt whatever that the accusations against Mr. DeGroote wouldn't have been brought against him if he hadn't sued the former directors on behalf of the trust. Secondly, the former directors efforts to characterize their claims describe only a portion of the totality of the circumstances that give rise to them. Any damages in the new lawsuit will result from liability exposure on their part in the litigation the trustee has been bringing and/or their cost of defense of that litigation.

And it's recognized by all concerned, or at least the former directors whose counsel twice referred to the suit against Mr. DeGroote as what was in substance a counterclaim, that the new lawsuit was filed with the intent of having it

heard in connection with the existing Virginia lawsuit, which is now expected to begin on April 1st, just sixty days from now. It also will affect the dynamics of settlement negotiations in that suit and the parties leverage in those negotiations.

Now in oral argument, I referred to the claim against Mr. DeGroote as having a hybrid character; in part counterclaim, as argued by counsel and in part going after him personally. It can be viewed in either of those respects because it has trappings of each. When an individual trustee is sued for acting in a professional capacity or when he's acting in a professional capacity and he's faced with personal accusations against him after he's acted that way, the fact that it's been brought against him personally results in attributes that are distinct from those in the typical counterclaim.

At the same time, as a procedural matter and because of its potential to affect settlement dynamics and because of its procedural posture at the time at which it would be heard until curative measures were taken, along with the underlying lawsuit brought by the trustee against the former defendants, it did indeed have characteristics as a counterclaim and maybe the use of the counterclaim also corresponds to the mindset of the former defendants in bringing it.

Any analysis of the nature of the claim against Mr. DeGroote, however, whichever of those factors is taken into account or better yet, when all of those are taken into account,

necessarily must avoid looking at what happened with blinders and if these claims continue to be asserted and if I need to decide whether I am going to permit them to proceed, both sides would be well-advised to bring whatever thoughts they have to me relevant to that because it's something I am going to want them to address.

Now one of the reasons I made you all wait so long before coming out after the recess was because I gave a lot of thought to the probabilities of success as I so often do when I consider preliminary injunction applications. Ultimately, I came to the view that it would be premature for me to make any findings on each of the particular contentions. Having heard so much, I must confess, that I formed preliminary views on those things but I think that any consideration of that now is unnecessary to issuing this ruling based on the two grounds that I articulated, neither of which requires the Court to today make a finding as to likelihood of success.

It may be, and neither side was very extensive in talking about Barton v. Barbour beyond talking about whether it applied in the first instance, that you folks could provide me with more on Barton v. Barbour and the standards to the extent they've been judicially articulated, for deciding when bankruptcy courts faced with a Barton v. Barbour application, should grant leave for continued prosecution and when they shouldn't.

That would at least seemingly and I'm speaking more intuitively than because I saw any case on point, require the Court to make some kind of decision as to the likelihood of success and how strong the claims to be asserted are, and the basis for them and the due diligence that went into them and other similar factors that parties might want to bring to the table in helping the judge decide but at this point, I don't have enough case law to work with to see whether there are any judicially articulated standards under which we judges should make that decision. I hope you guys can give me some help in that going forward. In any event, you have reservations of rights on those issues.

Lastly, with respect to the request for contempt and sanctions, I believe that that aspect of the motion needs to be continued pending an evidentiary hearing. While I won't prejudge the issues, if such request is brought up again, before holding any attorney in contempt or imposing sanctions on any such attorney, either of which could be more damaging to the attorney and its reputational effect than in its monetary significance, I would need to hear more about the circumstances giving rise to the conduct complained of and in particular, the due diligence that accompanied the action taken.

I know most but not all of the facts relevant to that now but this is much more -- much too important a matter to express views on without providing the due process that any

attorney or party faced with an accusation of a contempt would understandably desire.

So for those reasons, folks, the former directors are preliminarily enjoined from proceeding with the new lawsuit in Virginia and are ordered to take such steps as are appropriate to either dismiss or cause it to be transferred to be heard before me.

The request for contempt and sanctions are to be continued sine die, pending an evidentiary hearing on those matters if they are not by then moot.

Mr. Longmire, you and/or Mr. Gallo are to settle an order in accordance with this ruling at your earliest reasonable convenience.

MR. LONGMIRE: Very well, Your Honor.

THE COURT: All right. Not by way of re-argument, do we have any open issues?

MR. LONGMIRE: No, Your Honor.

THE COURT: Hearing none, we're adjourned. Have a good evening.

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CERTIFICATION

I, Linda Ferrara, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: February 4, 2013

Signature of Approved Transcriber