

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re

BEARINGPOINT, INC., *et al.*,

Debtors.

Chapter 11 Case No.

09-10691 (REG)

(Jointly Administered)

**DECLARATION OF JOHN DEGROOTE IN SUPPORT OF MOTION FOR ENTRY OF
ORDER APPROVING SETTLEMENT BETWEEN THE LIQUIDATING TRUST AND
F. EDWIN HARBACH, ALBERT L. LORD, RODERICK M. MCGEARY, J. TERRY
STRANGE, DOUGLAS C. ALLRED, BETSY J. BERNARD, SPENCER C. FLEISCHER,
JILL KANIN-LOVERS AND EDWARD MUNSON AND AUTHORIZING
SETTLEMENT PAYMENT**

I, John DeGroote, hereby declare that the following is true to the best of my knowledge, information and belief:

1. I am President of John DeGroote Services, LLC. I, together with John DeGroote Services LLC, serve as trustee (the “**Liquidating Trustee**”) of the BearingPoint, Inc. Liquidating Trust (the “**Liquidating Trust**”) and have done so since the creation of the Liquidating Trust on or around December 30, 2009. The Liquidating Trust was created pursuant to BearingPoint, Inc.’s (“**BearingPoint**”) and its affiliated Debtors’ (collectively, the “**Debtors**”) Modified Second Amended Joint Plan Under Chapter 11 of the Bankruptcy Code, December 17, 2009 (the “**Plan**”), which was confirmed by order of the United States Bankruptcy Court for the Southern District of New York on December 22, 2009 (the “**Confirmation Order**”) and became effective on December 30, 2009 (the “**Effective Date**”).

2. On behalf of the Liquidating Trust, I am responsible for, among other things: (i) prosecuting for the benefit of the Liquidating Trust Beneficiaries (as such term is defined in the BearingPoint, Inc. Liquidating Trust Agreement (the “**LTA**”)), through counsel and other professionals I select, any causes of action that may from time to time be held by the Liquidating

Trust; (ii) preserving, maintaining and liquidating the Liquidating Trust Assets (as defined in the LTA); (iii) distributing the Liquidating Trust proceeds to the Liquidating Trust Beneficiaries; and (iv) otherwise performing the functions and taking the actions provided for in the LTA or permitted in the Plan and/or Confirmation Order.

3. I submit this declaration (the “**Declaration**”) in support of the motion (the “**Motion**”) for entry of an order approving settlement between the Liquidating Trust and F. Edwin Harbach, Albert L. Lord, Roderick M. McGeary, J. Terry Strange, Douglas C. Allred, Betsy J. Bernard, Spencer C. Fleischer, Jill Kanin-Lovers and Edward Munson (collectively, the “Defendants”, and with the Liquidating Trustee, the “Parties”)¹ and authorizing settlement payment (the “**Settlement Agreement**”)² dated March 21, 2013 [Dkt. No. 2289].

4. On behalf of the Liquidating Trust, I participated in extensive litigation, negotiations and discussions with the Defendants and their counsel that resulted in the Settlement Agreement described in the Motion and attached thereto as Exhibit A. I am fully familiar and have knowledge of the facts and matters set forth in the Motion regarding the terms of the Settlement Agreement, the investigation of potential claims against the Defendants, the litigation arising from that investigation and the negotiations and mediation leading to the Settlement Agreement.

¹ The D&O Insurance Carriers, though not Parties to the lawsuit, participated in the mediation leading to the Settlement Agreement through their counsel or other representatives, and certain of the D&O Insurance Carriers agreed to fund the Settlement Amount. The D&O Insurance Carriers are Federal Insurance Company (Chubb Group of Insurance Companies), Houston Casualty Company, AIG (Chartis), ACE USA, AWAC Bermuda, Hartford, Arch Insurance, Ironshore, AXIS, CODA Bermuda, XL Bermuda, XL USA, Endurance Bermuda, AXIS Bermuda, Zurich, Beazley, Liberty Insurance, Admiral, and STAR Bermuda. On information and belief, I understand that counsel for the Defendants has information detailing which of the D&O Insurance Carriers will pay what amounts toward the Settlement Amount.

² Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion and the Settlement Agreement.

The Settlement Agreement

5. The proposed Settlement Agreement resolves on a global basis the issues and disputes between the Parties. Following the date on which all conditions to the Settlement Agreement are fulfilled or waived, as described further below (the “**Settlement Effective Date**”), the Settlement Agreement provides for a payment to the Liquidating Trust by the Defendants, through certain insurance carriers, of \$55,000,000 (the “**Settlement Amount**”) in exchange for mutual releases of claims. The settlement, as set forth below, is in the best interest of the Liquidating Trust and its beneficiaries, and should be approved.

6. The Settlement Amount is to be paid by the D&O Insurance Carriers from the D&O Policies to an account established by the Liquidating Trustee within fifteen (15) business days of the Bankruptcy Court Approval Order, which the Defendants represent the D&O Insurance Carriers have agreed to do, and Defendants have agreed to use best efforts to cause the Settlement Amount to be paid in full.

7. The Settlement Amount will remain in the account established by the Liquidating Trustee until all conditions to the Settlement Effective Date, as set forth herein and more fully described in the Settlement Agreement, are satisfied. Upon satisfaction of all conditions to the Settlement Effective Date, the Settlement Amount will be distributed to the Liquidating Trust.

8. The conditions to the Settlement Effective Date, as described more fully in the Settlement Agreement, are:

- a. Entry of the Order dismissing the D&O Action with prejudice without the award of any damages, costs, fees or the grant of any further relief except for the relief provided in the Settlement Agreement; and
- b. Filing of the DeGroot Notice of Dismissal with prejudice; and

- c. The passing of thirty (30) days following entry of the order dismissing the D&O Action without an appeal of such order having been filed, or if an appeal is filed such appeal affirming the order dismissing the D&O Action in all material respects and the time for any reconsideration of further appellate review has passed; and
 - d. Obtaining of the Bankruptcy Court Approval Order or an order or ruling of the Bankruptcy Court declining to decide the motion to approve the Settlement Agreement and authorizing payment or denying the motion to approve the Settlement Agreement and authorizing payment on the basis of lack of authority or jurisdiction; and
 - e. Payment in full of the Settlement Amount; and
 - f. Withdrawal of the Enforcement Motion by Plaintiffs; and
 - g. Effectiveness of the Releases contained in the Settlement Agreement.
9. With certain exceptions set forth in the Settlement Agreement, within five (5) business days of the full Settlement Amount being deposited into the account established by the Liquidating Trustee: (1) the Liquidating Trustee will file an order dismissing the D&O Action with prejudice with the State Court; (2) Defendants Harbach, McGeary and Munson will submit a Notice of Dismissal dismissing with prejudice the DeGroote Action in this Court; and (3) I will withdraw any pending motions with the Bankruptcy Court relating to the DeGroote Action, including the Enforcement Motion.
10. After each of the conditions to the Settlement Effective Date have occurred, the Settlement Amount funds in the account established by the Liquidating Trustee will be distributed to the Liquidating Trustee. Shortly thereafter, the Liquidating Trustee expects to then

allocate or distribute the proceeds received from the Settlement Amount as described further below.

11. The Parties will provide each other and certain related parties releases of claims against one another that exist as of the Settlement Effective Date (as more fully described in Section III of the Settlement Agreement).

12. The Settlement Agreement shall not be construed as an admission of liability or wrongdoing by any of the Parties.

Basis for Approving the Settlement Agreement

13. The Settlement Agreement is the product of a lengthy, multi-party, arms-length negotiation process, including a multi-day mediation, that took place over several weeks. It resolves a wide array of complex issues and disputes, the continued litigation of which would be both costly and time consuming with uncertain results, while providing the Liquidating Trust with substantial funds to distribute to its beneficiaries.

14. Pursuant to the LTA, the Liquidating Trust established a Trust Advisory Board (the “**Advisory Board**”), which has the duty to oversee the actions of the Liquidating Trustee pertaining to administration of the Liquidating Trust. The authority of the Advisory Board member was effective as of the Effective Date and will remain and continue in full force and effect until the Liquidating Trust is dissolved. LTA §§ 6.2-6.3.

15. The Advisory Board member has been fully informed of the extensive investigations, litigations, negotiations and discussions between the Parties that resulted in the Settlement Agreement as well as the terms and implications of the Settlement Agreement, and the Advisory Board member has analyzed and approved the settlement as discussed in the separate declaration submitted by the Advisory Board member, the *Declaration of Charles Hale*

in Support of Motion for Entry of Order Approving Settlement Between the Liquidating Trust and F. Edwin Harbach, Albert L. Lord, Roderick M. McGeary, J. Terry Strange, Douglas C. Allred, Betsy J. Bernard, Spencer C. Fleischer, Jill Kanin-Lovers and Edward Munson and Authorizing Settlement Payment.

16. In the instant case, weighing the reasonableness factors to consider for purposes of Bankruptcy Rule 9019, the Settlement Agreement should be approved.³

- a. *Benefits of Settlement v. Likely Rewards of Litigation.* As more fully discussed in the Motion, in balancing the likelihood of the Liquidating Trust's success in its litigation against the Defendants *vis a vis* the concrete present and future benefits of the Settlement Agreement, approval of the Settlement Agreement is in the best interests of the Liquidating Trust, taking into account the inherent uncertainties and risks associated with litigating the complex issues present in this situation, including, but not limited to, the various alleged fiduciary duties owed by the Defendants to BearingPoint, the application of the defenses asserted by the Defendants, the standards applicable to the relevant facts, the burdens of proof to be applied to the relevant facts, valuing damages before a jury (which is required to return a unanimous verdict under Virginia law), and the expense and delay of a trial and subsequent appellate procedures.
- b. *Prospect of Complex and Protracted Litigations if the Settlement is Not Approved.* There is a high probability of complex and protracted litigation if the settlement is not approved. Several of the legal issues litigated in this matter are unsettled in Delaware jurisprudence and, thus, there is disagreement among the Parties about

³ For a detailed analysis of the reasonableness factors, see *In re Adelpia Communications Corp.*, 327 B.R. 143 (Bankr. S.D.N.Y. 2005); *In re Texaco Inc.*, 84 B.R. 893 (Bankr. S.D.N.Y. 1988).

whether the business judgment, enhanced scrutiny, or entire fairness standards would be imposed by the State Court and/or jury, and thus who would have the burden of proof on various transactional and corporate governance issues. There are also factual disputes relating to, among other things, the Defendants' alleged bad faith, the interestedness of BearingPoint's management and certain Board members, the independence of certain Board members, the Defendants' reliance on advisors (and whether this reliance was reasonable), exculpation under Delaware law for breaches of the duty of care, causation as it relates to potential buyers of BearingPoint and its business units, and damages. The lack of clarity of these issues would likely protract litigation and result in an appeal to the Virginia Supreme Court if the Liquidating Trust was successful in obtaining a judgment against the Defendants, which appeal would add costs to the prosecution of the case and additional uncertainties relating to eventual outcomes. These risks are eliminated by the Settlement Agreement. Additionally, if the jury does not return a unanimous decision, the litigation would be protracted even longer through a retrial of the case as well as any subsequent appeal.

- c. *Competency and Experience of Counsel Who Support the Settlement.* The Parties are represented by sophisticated and experienced professionals. The Parties are represented by highly regarded law firms and financial advisors with significant experience in the relevant fields. The Parties and the D&O Insurance Carriers were assisted in the negotiating process over a multi-day mediation by a highly qualified and renowned independent mediator and an independent expert retained by the mediator to evaluate the damages asserted by the Parties. The Parties'

professionals also fully understand the difficulties of litigating claims of this size and complexity, and the potential consequences to general creditors and the Liquidating Trust if the Settlement Agreement is not consummated.

- d. *Proportion of "Class Members" Who Support or Do Not Object.* As of the filing of this Declaration, the response deadline to the Motion seeking approval of the Settlement Agreement has passed and no objections to the Motion or Settlement Agreement have been filed with the Court.
- e. *Relative Benefits Within the Class.* As more fully described below, under the Settlement Agreement the Liquidating Trust will receive \$55,000,000, which, net of litigation expenses and other costs, will be distributed to the creditors of the Liquidating Trust.
- f. *Nature and Breadth of Releases.* The nature and breadth of the releases to be obtained by the Parties, as described more fully in the Settlement Agreement, were negotiated over a several week period and are the product of nearly three years of investigation, litigation, and extensive discovery, including the production and inspection of nearly 2.5 million documents, more than six (6) million pages of materials, nearly thirty (30) depositions and expert reports from thirteen (13) expert witnesses. After analyzing the potential risks and benefits to the Liquidating Trust, I believe the exchange of the Settlement Amount as consideration for the full and final releases described in the Settlement Agreement is in the best interest of the Liquidating Trust and falls well within the range of reasonableness.

g. *Extent to Which the Settlement is a Product of Arms-Length Bargaining.* The Settlement Agreement is the product of arms-length bargaining after years of vigorous litigation and negotiation, and was negotiated in good faith by the Parties, the D&O Insurance Carriers and counsel for the Parties. Moreover, as mentioned above, the Advisory Board has analyzed and approved the Settlement Agreement.

Effect of Settlement Agreement - Distributions to Creditors

17. Following the Effective Date, on May 10, 2010, December 20, 2010 and August 25, 2011, respectively, the Liquidating Trust made additional distributions to the Debtors' creditors (the "**Distributions**"), bringing the distribution aggregate total to over \$449 million. This amount includes the payment in full to the Debtors' secured lenders, full satisfaction of BearingPoint's paid time off obligations to former employees, payment of over \$4 million to additional administrative and priority creditors, and approximately \$26 million to general unsecured creditors.

18. Once each of the conditions to the Settlement Effective Date is met, the funds from the Settlement Amount will be disbursed to the Liquidating Trust.

19. Pursuant to the powers granted to the Liquidating Trustee under the LTA, Plan and Confirmation Order and subject to appropriate oversight and input from the Advisory Board, as the Liquidating Trustee, I plan to allocate or distribute the proceeds received from the Settlement Amount toward certain fees, costs, expenses, disbursements and distributions relating to the litigation and resulting from any such distribution, including, but not limited to:

a. *KEIP Recovery Incentives.* Pursuant to the order granted by this Court on July 24, 2009 authorizing the Debtors to implement a key employee incentive plan (the

“**KEIP**”) [Docket No. 1128], the Debtors (or the Liquidating Trustee pursuant to the Plan, Confirmation Order and LTA) agreement to distribute up to five (5) percent of the actual recoveries to prepetition creditors over \$350 million to eligible employees previously deemed by the Debtors or the Liquidating Trust to make a special contribution to achieving recoveries. Pursuant to the KEIP, as a key employee I will collect a previously negotiated fair and reasonable fee as a Recovery Incentive (as that term is defined in the KEIP).

- b. *Trust Professionals Fees and Other Trust-Related Fees.* Pursuant to the LTA, Plan and Confirmation Order, the Liquidating Trust from time to time enters into contracts with and consults with Trust Professionals (as defined in the LTA). Pursuant to the compensation agreement of the Liquidating Trustee, as approved by the Advisory Board, I will collect a previously negotiated fair and reasonable fee for my services associated with the recovery of the Settlement Amount.
- c. *Distribution to Creditors.* Pursuant to the LTA, any of the Liquidating Trust Assets (as that term is defined in the LTA) available for distribution shall be applied, (i) first, to the fees, costs, expenses and liabilities of the Liquidating Trust and the Liquidating Trustee (including, without limitation, the fees and expenses of the Trust Professionals and the Trust Advisory Board relating to the litigation resolved by this Settlement Agreement); and (ii) second, to distributions to holders of Allowed Claims in accordance with the terms of the LTA, Plan and Confirmation Order. As such, after the Liquidating Trust has applied the proceeds of the Settlement Amount, or has retained sufficient funds as the Liquidating Trustee determines will be necessary, to satisfy the fees, costs,

expenses, disbursements and liabilities described above, the Liquidating Trustee expects to disburse all remaining funds from the Settlement Amount plus any other sums the Liquidating Trustee determines to be appropriate, subject to appropriate oversight and input from the Trust Advisory Board, to holders of Allowed Claims in accordance with the LTA, Plan and Confirmation Order; such distributions are presently estimated to result in additional distributions to general unsecured creditors of \$28,000,000 to \$30,000,000, thereby more than doubling their recovery to date.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: New York, New York

April 16, 2013

JOHN DEGROOTE SERVICES, LLC

/s/ *John DeGroote*

John DeGroote
President