

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
DG LIQUIDATION CORP., <i>et al.</i> , <sup>1</sup>	)	Case No. 08-10601 (CSS)
	)	
Debtors.	)	Jointly Administered
	)	
	)	Hearing Date: October 24, 2008 at 11:00 a.m. (ET)
	)	Objection Deadline: October 17, 2008 at 4:00 p.m. (ET)

**DEBTORS' MOTION, PURSUANT TO BANKRUPTCY RULE 9019, FOR APPROVAL OF SETTLEMENT BETWEEN DEBTORS AND KENNETH LEVINE**

DG Liquidation Corp. f/k/a Diamond Glass, Inc. f/k/a Diamond Glass Companies, Inc. f/k/a Diamond Triumph Auto Glass, Inc. ("Diamond Glass") and DT Subsidiary Corp. ("DT Subsidiary", and with Diamond Glass, the "Debtors"), by and through their undersigned counsel, hereby file this motion (the "Motion") for entry of an order approving the Settlement Agreement and Release (the "Settlement Agreement") by and among the Debtors and Kenneth Levine ("Levine"), a copy of which is attached hereto Exhibit A. In support of this Motion, the Debtors represent as follows:

**JURISDICTION**

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of this Motion is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of this proceeding is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The Court has

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<sup>1</sup> The Debtors in these proceedings are: DG Liquidation Corp., f/ka/ Diamond Glass, Inc. (Tax ID No. XX-XXX8853); and DT Subsidiary Corp., a wholly owned subsidiary of DG Corp. (Tax ID No. XX-XXX3494), each with a mailing address of 220 Division Street, Kingston, PA 18704.

authority to grant the relief requested herein pursuant to Rule 9019(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

**A. GENERAL BACKGROUND FACTS**

2. On April 1, 2008 (the "Petition Date"), each of the Debtors filed its voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").

3. The Debtors continue to operate their business and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these cases.

4. On April 10, 2008, the United States Trustee (the "U.S. Trustee") appointed an official committee of unsecured creditors (the "Committee").

5. On September 24, 2008, the Court entered an Order (Docket No. 517) approving the Debtors' Second Amended Disclosure Statement (the "Disclosure Statement") with respect to the Second Amended Plan of Liquidation (the "Plan").

**B. THE LEVINE CLAIMS**

6. On June 17, 2008, Levine, the Debtors' former president and chief executive officer, filed proofs of claim nos. 138 and 139, asserting a secured claim of \$10,127,993.14 (plus interest, fees and costs) against each of the Debtors by virtue of being subrogated to the secured rights of the Debtors' prepetition and post-petition lender, Guggenheim Corporate Funding, LLC (the "Original Subrogation Claim").

7. On September 3, 2008, Levine filed proofs of claim nos. 631 and 635, amending proofs of claim nos. 138 and 139 from the amount of \$10,127,993.14 to \$10,555,310.00 (plus interest and any additional fees and costs) (the "Amended Subrogation Claim" and with the

Original Subrogation Claim, the "Levine Subrogation Claim"). Concurrently therewith, Levine also filed proofs of claim nos. 632, 633, 634 and 636, asserting unsecured claims against the Debtors (the "Other Claims") related to purported obligations of the Debtors unrelated to those claims asserted in the Levine Subrogation Claim.

8. By virtue of the Levine Subrogation Claim, Levine is the largest secured creditor of the estates and Levine's lien encumbers approximately 97% of the cash currently held by the estates.

### **C. THE PLAINFIELD ADVERSARY PROCEEDING**

9. On September 5, 2008, Plainfield Special Situations Master Fund, Ltd. ("Plainfield"), a member of the Committee, instituted an adversary proceeding against Levine (Adv. Proc. No. 08-51406 (the "Adversary Proceeding")). In the Adversary Proceeding, Plainfield asserts three (3) claims: (a) that the Original Subrogation Claim should be recharacterized as equity and disallowed in full; (b) that because the Original Subrogation Claim should be recharacterized as equity, Levine's claims should be disallowed because Levine failed to file a proof of interest; and (c) that to the extent that the Original Subrogation Claim is allowed, it should nonetheless be equitably subordinated to the claims of other creditors.<sup>2</sup>

10. From the time of the Debtors' auction in June 2008 until the commencement of the Adversary Proceeding, the Committee had been investigating these same claims, and Committee counsel had negotiated a settlement agreement in principle with Levine. However,

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<sup>2</sup> Presumably, Plainfield instituted its Adversary Proceeding without knowledge that Levine filed, two days before, the Amended Subrogation Claim. Plainfield would presumably assert the same causes of action with regards to the Amended Subrogation Claim as are asserted against the Original Subrogation Claim.

due to a voting deadlock on the Committee, the Committee was unable to approve or disapprove the proposed settlement.

11. The Debtors cooperated with the Committee's investigation, and when it became clear that the Committee was deadlocked, and that the Plainfield Adversary would cover the same ground at the cost of higher administrative expenses and delay in the completion of the cases, the Debtors actively engaged in settlement discussions with Levine. Indeed, at all times when the Committee was in negotiations, and in all ways in the Plainfield Adversary, and as discussed more fully below, all the claims being negotiated were claims belonging to the estates that the Debtors have the right to settle.

12. The Debtors were able to negotiate improvements to the settlement agreement above and beyond the agreement in principle previously reached with the Committee's counsel. Among other things, and as discussed more fully below, Levine has agreed (a) to reduce his claims from approximately \$10.6 million to approximately \$8.1 million, and (b) to a mechanism (in the concept of the "Approval Fees" set forth below) to pay all the administrative expenses associated with the prosecution and approval of this Motion so that the estates receive a benefit, net of the costs associated with this Motion, of over \$2 million.

#### **D. THE SETTLEMENT AGREEMENT**

13. As set forth in the liquidation analysis (the "Liquidation Analysis") attached as Exhibit B to the Disclosure Statement (a copy of which is annexed hereto as Exhibit B), given Levine's status as the Debtors' largest secured creditor, the distribution to unsecured creditors under the Plan will depend entirely upon the resolution of the Levine Subrogation Claim. Specifically, if the Levine Subrogation Claim is allowed in full, the Debtors estimate that there would be approximately \$331,000 available for distribution to unsecured creditors. *See Ex. B.*

If, however, the Levine Subrogation Claim is disallowed in its entirety, the Debtors estimate that there would be approximately \$10,880,000 available for distribution to unsecured creditors. *See id.*

14. In order to ameliorate the risk that there would be virtually no recovery to the general unsecured creditors under the Plan if the Levine Subrogation Claim is allowed, the Debtors have reached an agreement with Levine which would resolve the Levine Subrogation Claim and provide for a meaningful distribution to unsecured creditors. The terms of the agreement are set forth in the Settlement Agreement attached hereto as Exhibit A and are incorporated herein by reference. Under the Settlement Agreement:<sup>3</sup>

A. The Amended Subrogation Claim will be deemed withdrawn and the Original Subrogation Claim will be deemed to be the operative proofs of claim concerning subrogation.

B. The Original Subrogation Claim will be reduced and allowed as a single secured claim against the Debtors in full and final satisfaction of the Levine Subrogation Claim in the amount of \$8,127,993.14 minus the "Approval Fees" (the "Allowed Secured Amount").

C. "Approval Fees" shall be defined as the reasonable legal fees and expenses of Debtors' bankruptcy counsel commencing on September 22, 2008 and lasting until the entry of a final, non-appealable Court order approving the Settlement Agreement incurred in seeking or obtaining Court approval of the Settlement Agreement, including any appeals related thereto.

D. To the extent that the filed amount of the Levine Subrogation Claim exceeds the Allowed Secured Amount, the difference is disallowed with prejudice.

E. Upon the Bankruptcy Court's approval of the Settlement Agreement, any security interest Levine asserts in any assets of the estates

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<sup>3</sup> The following is a summary of the terms and conditions of the Settlement Agreement. To the extent that any discrepancy exists between the above and the Settlement Agreement, the terms and conditions of the Settlement Agreement shall control.

in excess of the Allowed Secured Amount, including but not limited to any claim that the cash being held by the Debtors or their estates constitutes cash collateral for the benefit of Levine, will be irrevocably released.

F. Levine, on behalf of himself and anyone claiming by, through or on behalf of Levine, releases, acquits and forever discharges the Debtors from any and all claims that he or anyone claiming by, through or on behalf of Levine may hold against the Debtors or their estates, whether known or unknown, asserted or unasserted, contingent or unliquidated, provided, however, that the forgoing shall not release any liability of the Debtors or their estates with respect to the claims asserted in the Other Claims (a carevout of two unrelated claims filed by Levine and more fully defined in the Settlement Agreement).

G. The Debtors, on behalf of themselves and any and all representatives of their estates, and on behalf of anyone acting or asserting a claim derivatively on behalf of the estates (whether or not such person purports to be acting derivatively on behalf of the estates), release, acquit and forever discharge Levine from any and all claims that the Debtors or their estates may hold against Levine, whether known or unknown, asserted or unasserted, contingent or unliquidated, including but not limited to allegations of recharacterization, equitable subordination, breach of fiduciary duty, deepening insolvency, fraudulent transfer, preference, aiding and abetting or other Damages Claims (as defined in the Settlement Agreement), provided, however, that the foregoing shall not release any claim of the Debtors or their estates related, in any way, to the Other Claims, including but not limited to counterclaims, cross claims, affirmative defenses or equitable or legal defenses.

15. Based upon the assumptions set forth in the Liquidation Analysis, if the Settlement Agreement is approved, there will be approximately \$2,700,000 available for distribution to unsecured creditors or, roughly, a 4.5% dividend on general unsecured claims.

#### **RELIEF REQUESTED**

16. The Debtors request the entry of an Order approving the Settlement Agreement pursuant to Bankruptcy Rule 9019.

#### **BASIS FOR RELIEF REQUESTED**

17. Bankruptcy Rule 9019(a) provides that, on motion from the trustee, the Court may approve a compromise and settlement. The decision to approve a settlement or compromise lies

within the discretion of the Court and is warranted when the settlement is found to be reasonable and fair in light of the particular circumstances of the case. *See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry v. Anderson (TMT Trailer)*, 390 U.S. 414, 424-25 (1968). The Delaware District Court has held that a Court should approve a compromise under Rule 9019 when it “is fair, reasonable, and in the interest of the estate.” *In re Marvel Entertainment Group, Inc.*, 222 B.R. 243, 249 (D. Del. 1998) (quoting *In re Louise’s, Inc.*, 211 B.R. 798, 801 (D. Del. 1997)); *Myers v. Martin (In re Martin)*, 91 F.3d 389, 394 (3d Cir. 1996). This inquiry does not require the Court to consider whether the proposed settlement is the best possible compromise. *In re Key3Media Group, Inc.*, 336 B.R. 87, 92-93 (Bankr. D. Del. 2005). The Court is not required to, nor should it conduct a “mini-trial;” rather the Court should only inquire whether the proposed settlement falls below the “lowest point in the range of reasonableness.” *Id.* at 93. In determining whether a compromise is in the best interests of the estate, the Court must “assess and balance the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal.” *Myers*, 91 F.3d at 393.

18. In analyzing proposed settlements under Rule 9019, Bankruptcy Courts in this district focus on four factors: (1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors. *In re Key3Media Group, Inc.*, 336 B.R. at 93. Additionally, and of particular relevance to the proposed settlement here, courts focus on the fact that compromises are favored in bankruptcy, as they minimize litigation (and the associated costs) and expedite the administration of the bankruptcy estate. *Id.*

19. The Settlement Agreement with Levine is in the best interests of the estates and falls well above the lowest point in the range of reasonableness. Therefore, this Motion should be approved.

20. As a threshold matter, it is without dispute that the claims asserted by Plainfield, which claims will be resolved by the Settlement Agreement, constitute property of the estate and therefore may be settled by the Debtors. “[P]roperty of an estate includes all legal and equitable interests in property” except as provided in 11 U.S.C. §§ 541(b) and (c)(2). *See Matter of Energy Coop., Inc.*, 886 F.2d 921, 929 (7th Cir. 1989). This includes claims available to the debtor. *See In re Scott Acq. Corp.*, 364 B.R. 562, 569 (Bankr. D. Del. 2007); *see also OHC Liq. Trust v. Discover Re (In re Oakwood Homes Corp.)*, 342 B.R. 59, 71 (Bankr. D. Del. 2006) (“the estate has a recognized interest in the contractual and equitable claims of the [d]ebtor”).

21. A claim is a “legal or equitable interest in property” belonging to the debtor if the claim seeks to bring property into the estate. If the claim will benefit all unsecured creditors, in that the proceeds will be used to pay unsecured claims, then it is a general claim belonging to the estate. On the other hand, if the claim only affects the interest of a single creditor or specific group of creditors, the claim does not belong to the estate, but rather to the interested creditor or creditors. *See Bd. of Trs. of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 170 (3d Cir. 2002). A debtor has primary authority to bring, litigate, and resolve general claims. *See id.* (“[i]f a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee’s action”) (citation omitted).

22. Plainfield’s recharacterization claim – and, by extension, its disallowance claim – is clearly property of the estate. The purpose of recharacterizing debt as equity is to reduce debt

claims, thereby enhancing the distribution percentages for all creditors. By definition, recharacterization is a general claim belonging to the estate, and the Debtors may therefore resolve the recharacterization and disallowance claims without Plainfield's authorization. *See Investment Exchange Group, LLC v. Colorado Cap. Bank (In re 1031 Tax Group, LLC)*, Bankr. No. 07-11448, Adv. No. 07-1710, 2007 WL 2455176 (Bankr. S.D.N.Y. Aug. 23, 2007) (approving settlement between debtors and defendants in adversary action, over adversary plaintiffs' objections, where plaintiffs sought to recoup funds allegedly belonging to the estate).

23. Plainfield's equitable subordination claim is likewise property of the Debtors' estates. Where an equitable subordination claim seeks to strip a secured creditor of its secured status, all unsecured creditors stand to benefit if the claim is successful, and therefore the claim is general and belongs to the estate. *See In re Elrod Holdings Corp.*, 392 B.R. 110, 115 (Bankr. D. Del. 2008). Here, Plainfield's claim, if successful, would transform Levine's secured claim into an unsecured claim "subordinated to the claims of all unsecured creditors." (Plainfield Adversary Complaint at ¶ 57.) Because the estates and all unsecured creditors stand to benefit in the unlikely event that Plainfield's equitable subordination claim were to succeed, the claim is property of the estates, and the Debtors therefore have authority to settle that claim as well.

24. The Debtors believe that the resolution of the Levine Subrogation Claim in accordance with the terms of the Settlement Agreement meets the criteria for settlement cited *supra*.

A. Probability of Success<sup>4</sup>

25. The Settlement Agreement will bring significant assets into the estates for the benefit of unsecured creditors. While litigation success could conceivably do the same, for the reasons set forth below the probability of success in the Plainfield Adversary Proceeding, even were Plainfield's claims to be brought by the Debtors, is at best highly dubious.

26. With regards to Plainfield's recharacterization claim, the Third Circuit has stated that "the characterization as debt or equity is a court's attempt to discern whether the parties called an instrument one thing when in fact they intended it as something else." *In re Submicron Sys. Corp.*, 432 F.3d 448, 456 (3d Cir. 2006). Generally, where a party infuses funds into the debtor's estate expecting to be repaid with interest "no matter the borrower's fortunes," the infused funds are considered debt. Where the party infuses funds expecting to be repaid an amount determined by the borrower's fortunes, the infused funds are considered equity. *See id.*

27. The District of Delaware applies a seven factor test in determining whether a debt should be recharacterized as equity. *See In re Submicron Sys. Corp.*, 291 B.R. 314, 323 (D. Del. 2003). These seven factors are: (1) the name given to the instrument; (2) the intent of the parties; (3) the presence or absence of a fixed maturity date; (4) the right to enforce payment of principal and interest; (5) the presence or absence of voting rights; (6) the status of the contribution in relation to regular corporate contributors; and (7) certainty of payment in the event of the corporation's insolvency or liquidation. *Id.*

28. It is doubtful that Plainfield will be able to satisfy its burden of proof on these issues. In this case, the Levine pledge appears to have been properly documented as such, to

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<sup>4</sup> The Debtors reserve the right to supplement this Motion by filing exhibits and other documentary evidence in support of the arguments asserted herein.

have been intended by both Levine and Guggenheim as a form of collateral to secure the Guggenheim senior loan and to induce Guggenheim to make that loan. Unlike equity, it had a maturity date co-extensive with the Guggenheim loan (*i.e.*, would remain in full force and effect until the Guggenheim debt was satisfied in full), and it does not appear to have any economic or voting attributes of equity. Accordingly, it is highly doubtful that Plainfield will be able to prevail upon its recharacterization claim or its disallowance claim which is, by its nature, entirely dependent upon the success of the recharacterization claim.

29. With regards to Plainfield's remaining subordination claim, for a claim to be equitably subordinated to the claims of the general unsecured creditors, the claimant must have committed misconduct resulting in injury to the unsecured creditors or conferring an unfair benefit on the claimant. *See Cohen v. KB Mezzanine Fund II, LP (In re Submicron Sys. Corp.)*, 432 F.3d 448, 461-62 (3d Cir. 2006). Here, the Debtors believe that the chances of Plainfield being able to prove that Levine committed misconduct by abusing his position on Debtors' board of directors is highly remote at best.

30. The gravamen of the Plainfield Complaint in this regard is that Levine in some way 'controlled' the Debtors' decisionmaking on the timing of a chapter 11 filing in order to improve his position as a subrogated creditor. As previously disclosed at the outset of the case, and as discussed in the Plainfield Complaint, the Debtors discovered in the Fall of 2007 that Guggenheim had neglected to file UCC-1s reflecting the Debtors' February 2007 change of name, and that as a consequence, Guggenheim's position as senior secured creditor might be unperfected as to the portion of the debt incurred from and after the four-month grace period permitted by the UCC for the filing of amended statements.

31. Guggenheim filed a corrected UCC-1 reflecting the name change on October 29, 2007. By this act, Guggenheim arguably perfected an antecedent debt, which in a bankruptcy context could have been attacked as a preference, provided that a chapter 11 case were then commenced within the 90-day preference period. Any defect in the Guggenheim position would necessarily affect Levine's position as well, as Levine might then be subrogated at least in part to an unsecured claim. Thus, Levine would certainly have had a motive, as had Guggenheim, for at least 90 days to pass from October 29, 2007 before the Debtors' chapter 11 cases were commenced.

32. The Plainfield allegations stem from a belief that Levine actually acted on that motive to the detriment of the creditors. Based on the Debtors' investigation and strong belief as to what it could and would prove in litigation, the facts and evidence show otherwise. Based upon the Debtors' investigation and research, the following points demonstrate that the likelihood of Plainfield proving any such claims is highly remote:

- There is no legal duty, of which the Debtors are aware after diligent research, to commence a chapter 11 case for the sole purpose of setting aside a transaction as preferential, and thereby benefiting one class of creditors (unsecured) over another (secured).
- To the contrary, the responsibilities of the Debtors' board and management was to assure the survival of the enterprise as a whole (and concomitantly to avoid preferring any one constituency over another). Management believed, particularly with additional financial support received from Guggenheim, that it had the time and opportunity to achieve an out-of-court restructuring that would benefit all its constituents. While remaining out-of-court undoubtedly benefited Guggenheim (and Levine), it was based upon management's business judgment that an out-of-court solution would be significantly better than any results achieved through a bankruptcy filing, including a filing that incidentally resulted in a partial set-aside of the Guggenheim secured position.
- Most importantly, Levine resigned from management in October 2007 and had absolutely nothing to do with management's decisionmaking in respect of the Debtors' financial condition and potential bankruptcy

strategies. He remained on the board, and as a board member agreed with and supported management's recommendation for resolutions authorizing a chapter 11 filing on two occasions: December 2007 and March 2008. The decision to act on the authorizing resolutions was left to management.

- The December 2007 resolution permitted the Debtors to file chapter 11 cases before the 90-day period from the Guggenheim corrected UCC-1 filing expired. The decision whether to commence a chapter 11 case at that time was in the hands of management, not Levine, and Levine played no role in the management deliberations. Management weighed the costs and benefits of a filing (including the results of a set-aside of part of the Guggenheim claim, and the consequent detriment of not having Guggenheim's financial support as a debtor-in-possession lender) against continued out-of-court negotiations with significant creditors, and determined not to file a chapter 11 case at that time because they secured the promise of further financial support from Guggenheim, and believed based upon discussions with some creditors that there was still a viable possibility of achieving an out-of-court workout.
- Management's belief in the viability of an out-of-court workout began to diminish as the calendar moved closer to the April 1, 2008 maturity date for the bonds. By March 2008 therefore the Debtors retained an investment banker and eventually commenced these chapter 11 cases on April 1, 2008.

33. In sum, while Levine may have had a personal motive (co-extensive with Guggenheim's interests) to see a filing delayed past the time in January 2008 that the corrected UCC-1 could be set aside as preferential, the facts show that he had no opportunity to act upon that motive from a management perspective, *and as a board member he acted contrary to the motive*; else he would have voted against the December 2007 authorizing resolution. Given these facts and circumstances, the Debtors simply do not see and do not believe that Plainfield could prove that there was any misconduct by Levine that could be actionable by subordination or disallowance of his subrogated claim.

**B. Likely Difficulties in Collection**

34. This prong is not a factor in these cases and therefore does not adversely impact the Debtors' request for the relief set forth herein.

**C. Complexity of Litigation**

35. As is clear from the above analysis, the basic facts are simple and relatively indisputable, but litigation of these matters would involve great expense, extensive hard and electronic document production, depositions and delay. Given the facts as the Debtors understand them, there does not appear to be any benefit to such litigation. Indeed, the administrative expenses attendant to the litigation (which while against Levine, would undoubtedly draw into its scope the estates and Debtors' management) could well exceed any likely recovery.

**D. Interest of Creditors**

36. The interests of the creditors will be best served by the certainty attendant with the Settlement Agreement, as opposed to the highly speculative Plainfield Adversary Proceeding. In fact, as noted *supra*, the distribution to unsecured creditors depends almost entirely upon the resolution of the Levine Subrogation Claim in a manner favorable to the estates. Moreover, since Levine has asserted a security interest in over \$10.5m of the \$10.8m in cash held by the estates and the Debtors do not otherwise have Levine's permission to use this cash collateral, progress on administering these cases will surely grind to a halt without approval of the Settlement Agreement.

**CONCLUSION**

37. The Debtors have negotiated a resolution of Levine's Subrogation Claim that will provide a significant benefit to the unsecured creditors. In contrast, Plainfield's claims are speculative and the outcome of the litigation uncertain and, if unsuccessful, will result in no distribution to unsecured creditors and possibly administrative insolvency for the estate. When the attendant costs and risks of litigation are balanced against the probability of success, the Debtors believe, in the good faith exercise of their sound business judgment, that the Settlement

Agreement is in the best interests of Debtors, their bankruptcy estates, their creditors, and other interested parties and should therefore be approved.

**NOTICE**

38. Notice of this Motion has been provided to: (i) the Office of the United States Trustee; (ii) counsel to Guggenheim, the Debtors' prepetition secured lender and postpetition secured lender, (iii) counsel to the Committee; (iv) counsel to Plainfield; and (v) any parties requesting notice pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure in accordance with Del. Bankr. L.R. 2002-1(b). In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

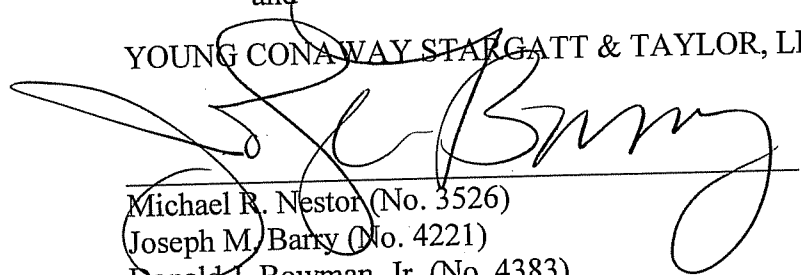
WHEREFORE, the Debtors respectfully request entry of an order substantially in the form annexed hereto (i) approving the Settlement Agreement, and (ii) granting such other and further relief as the Court may deem just and proper.

Dated: Wilmington, Delaware  
October 3, 2008.

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