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ON BEHALF OF CERTAIN SETTLING CLAIMANTS**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re	)	In a case under Chapter 11
	)	Case No. 04-15739 (SMB)
QUIGLEY COMPANY, INC.,	)	
	)	Civil Action No. 1:09-CV-00117 (CM)
Debtor.	)	

OBJECTION OF CERTAIN SETTLING CLAIMANTS REPRESENTED BY BARON & BUDD, P.C. TO MOTION OF THE AD HOC COMMITTEE OF TORT VICTIMS FOR AN ORDER PARTIALLY WITHDRAWING THE REFERENCE FOR PURPOSES OF THE CONFIRMATION HEARING ON QUIGLEY COMPANY INC.'S FOURTH AMENDED AND RESTATED PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE (AS MODIFIED AS OF MARCH 28, 2008) AND MEMORANDUM OF LAW IN SUPPORT

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TO THE HONORABLE COLLEEN MCMAHON,
UNITED STATES DISTRICT JUDGE:

Stutzman, Bromberg, Esserman & Plifka, a Professional Corporation and Douglas T. Tabachnik of the Law Offices of Douglas T. Tabachnik, counsel for Baron & Budd, P.C. ("Counsel for the Settling Claimants"), file this Objection on behalf of certain Settling Claimants[1] to the Motion of the Ad Hoc Committee of Tort Victims for an Order Partially Withdrawing the Reference for Purposes of the Confirmation Hearing on Quigley Company, Inc.'s Fourth Amended and Restated Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (As Modified as of March 28, 2008) (the "Motion") and Memorandum of Law in support and state the following:

I.
INTRODUCTION

The Bankruptcy Court has already on more than one occasion carefully considered how best to conduct what promises to be a lengthy confirmation hearing and how to acquire the District Court's review and affirmance of any eventual confirmation order. A recurring theme in the Bankruptcy Court's remarks on the subject made on the record is the Bankruptcy Court's concern that having the District Court preside jointly with the Bankruptcy Court over a confirmation hearing that could extend for days (or even weeks) would be

[1] Counsel for the Settling Claimants represent thousands of asbestos personal injury claimants who settled their claims against Pfizer Inc. ("Pfizer"), Quigley Company, Inc.'s ("Quigley" or the "Debtor") non-debtor parent, prior to the commencement of the Debtor's Chapter 11 case. These personal injury claimants are referred to herein as the "Settling Claimants."

an inefficient use of judicial resources. These concerns are valid and should be the foremost consideration when considering the Ad Hoc Committee's ill-conceived Motion.

Although having the two courts preside jointly over a confirmation hearing may be expedient in a case where confirmation is not contested (and the confirmation hearing thus short in duration), there is nothing to recommend such a joint hearing where—as here—a contested confirmation could be lengthy due to issues falling squarely within the Bankruptcy Court's expertise (and which consequently do not require or even warrant the District Court's consideration). As the Bankruptcy Court suggested in earlier colloquy, "in a multi-day trial it's just—it's really not a very efficient way." Sch. Conf. Trans. 8:6-7, May 23, 2008, attached as Exhibit A. It would be sound practice for the two courts involved to follow the more typical procedure that has been used in other section 524(g) confirmations, where the Bankruptcy Court presides alone over the core matter of plan confirmation, subsequently transmitting its confirmation order, the confirmation record, and its recommendation for affirmance of any specialized asbestos injunction to the District Court for the discreet and targeted review contemplated by Bankruptcy Code, section 524(g). Indeed, this Bankruptcy Court has indicated that this alternative would be the more reasonable and pragmatic option:

> It just sounds like the easiest thing may be for me to try everything and then you can argue about what's subject clearly erroneous and what's de novo and up in the district court.

Sch. Conf. Trans. 14:13-16, May 23, 2008.

Despite the Bankruptcy Court's inclination to preside alone over the confirmation hearing in this case—and the sound reasons that it has articulated for this inclination—the Ad Hoc Committee nonetheless requests that the District Court withdraw the reference so that it may concurrently conduct a protracted confirmation hearing with the Bankruptcy Court, at the expense of the many other matters pending on the District Court's docket. As shown below, the Ad Hoc Committee's request would have the wasteful result that the District Court would be compelled to sit through potentially days of testimony and argument on core bankruptcy issues that may be only tangential to the District Court's special role in affirming a channeling injunction. Only a small portion of the proof at confirmation would be relevant to the District Court's affirmance of the Bankruptcy Court's recommendation that a channeling injunction be issued and none of it will be relevant to the District Court if the plan is not confirmed.

II.
BACKGROUND

1. On September 3, 2004, Quigley Company, Inc. ("Quigley") filed a voluntary petition for bankruptcy relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") in order to resolve its asbestos-related liabilities under a court-supervised reorganization process (See Quigley's Fifth Amended and Restated Disclosure Statement With Respect to Quigley Company, Inc. Fourth Amended and Restated Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (As Modified as of March 28, 2008), Bankr. Docket No. 1379, p. 41) (hereinafter, the "Disclosure Statement").

2. The case was originally administered by the Honorable Prudence Carter Beatty, United States Bankruptcy Court Judge for the Southern District of New York. As of January 24, 2006, the case was reassigned to the Honorable Stuart M. Bernstein, Chief United States Bankruptcy Court Judge for the Southern District of New York. Quigley continues to operate its business and manage its property as a debtor in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

3. On September 22, 2004, the United States Trustee for the Southern District of New York pursuant to its authority under section 1102

of the Bankruptcy Code, appointed a creditors' committee in the bankruptcy case. No trustee or examiner[2] has been appointed.

4. On September 27, 2004, the Bankruptcy Court entered an order, pursuant to sections 105 and 524(g)(4)(B)(i) of the Bankruptcy Code, appointing Albert Togut as the legal representative for the purpose of protecting and representing the rights of persons who might assert future asbestos-related claims pursuant to section 524(g)(5) of the Bankruptcy Code.

5. On March 28, 2008, Quigley filed its Fourth Amended and Restated Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (As Modified as of March 28, 2008) (the "Plan"). The hearing on confirmation of the Plan has not yet been set. Pursuant to the Amended Stipulated Scheduling Order entered by the Bankruptcy Court on January 7, 2009, subject to the Bankruptcy Court's availability, the hearing on confirmation of the Plan will be held on a date after March 16, 2009.

6. The Plan seeks to implement a permanent channeling injunction under section 524(g) of the Bankruptcy Code, pursuant to which all current and future asbestos-related claims against Quigley and its affiliates, including Pfizer, will be channeled for processing and payment to a trust established pursuant to section 524(g) of the Bankruptcy Code. The Settling Plaintiffs hold claims against Quigley which under the Plan will be paid by the section 524(g) trust in accordance with the trust distribution procedures,

[2] The Bankruptcy Court denied the United States Trustee's motion for the appointment of an examiner on October 21, 2008.

as established under Quigley's Plan. Pursuant to Bankruptcy Code section 524(g)(3)(A), any injunction under section 524(g) must be issued or affirmed by a district court.

III.
ARGUMENT

7. The Second Circuit has made it clear that withdrawal of the reference should not be used as an "escape hatch" from the Bankruptcy Court. Under the factors enumerated by the Second Circuit in Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095 (2d Cir. 1993), withdrawing the reference is especially inappropriate where the matter involves core bankruptcy issues. Any analysis must begin with the statute itself.

8. Under 28 U.S.C. § 157(d), a district court "may withdraw, in whole or in part, any case or proceeding referred [to the bankruptcy court] . . . for cause shown." 28 U.S.C. § 157(d). By using the permissive "may," Congress has made it clear that such withdrawal is discretionary. Furthermore, the requirement to show cause "creates a 'presumption that Congress intended to have bankruptcy proceedings adjudicated in bankruptcy court unless rebutted by a contravening policy.'" Hatzel & Buehler, Inc. v. Cent. Hudson Gas & Elec. Corp., 106 B.R. 367, 371 (D. Del. 1989) (quoting Allard v. Benjamin (In re DeLorean Motor Co.), 49 B.R. 900, 912 (Bankr. E.D. Mich. 1985)).

9. Section 157 does not define the phrase "for cause shown." However, the Second Circuit, in Orion Pictures Corp., interpreted the phrase and set forth numerous factors that district courts should weigh in assessing whether cause exists to withdraw a case. Orion Pictures Corp., 4 F.3d at 1101. The district courts in the Second Circuit have consistently held that the Orion Pictures factors should be construed narrowly ***against*** withdrawal of the reference so that section 157(d) "does not provide an 'escape hatch' out of bankruptcy court." See Hassett v. Citicorp N. Am., Inc. (In re CIS Corp.), 188 B.R. 873, 877 (S.D.N.Y. 1995) (citing C-TC 9th Ave. P'ship v. Norton Co. (In re C-TC 9th Ave. P'ship), 177 B.R. 760, 763 (N.D.N.Y. 1995), reconsid. denied, 182 B.R. 1 (N.D.N.Y. 1995), quoting In re White Motor Corp., 42 B.R. 693, 704 (N.D. Ohio 1984)); Int'l Ass'n of Machinists & Aerospace Workers v. Eastern Air Lines, Inc. (In re Ionosphere Clubs, Inc.), 103 B.R. 416, 419 (S.D.N.Y. 1989); United States v. Johns-Manville Corp. (In re Johns-Manville Corp.), 63 B.R. 600, 603 (S.D.N.Y. 1986).

10. The Second Circuit instructs that the district court should first evaluate whether the proceeding is a core proceeding or a non-core proceeding, "since it is upon this issue that questions of efficiency and uniformity will turn." Orion Pictures Corp., 4 F.3d at 1101; see also, Statutory Comm. of Unsecured Creditors v. Motorola, Inc. (In re Iridium Operating LLC), 285 B.R. 822, 828 (S.D.N.Y. 2002) (quoting Orion Pictures Corp., 4 F.3d at 1101). Once the district court makes the core/non-core

determination, it should next consider additional factors such as "the efficient use of judicial resources, delay and costs to the parties, uniformity of bankruptcy administration, the prevention of forum shopping, and other related factors." Orion Pictures Corp., 4 F.3d at 1101.

11. As shown below, the Ad Hoc Committee's Motion should be denied because an analysis of the Orion Pictures factors demonstrates that the requisite "cause" does not exist in this case to warrant a partial withdrawal of the reference for purposes of having the District Court hear core confirmation issues, a myriad of which will not be relevant to the District Court's affirmance of a confirmation order entered by the Bankruptcy Court.

A. The Ad Hoc Committee's Motion should be denied because Congress itself has determined that confirmation of a plan of reorganization is a core proceeding committed to the expertise of the Bankruptcy Court.

12. The District Court must first determine whether confirmation of Quigley's plan is a core proceeding or a non-core proceeding. See Orion Pictures Corp., 4 F.3d at 1101. "The core/non-core factor is the most important factor to consider when determining if cause for withdrawing bankruptcy references exists, because that factor drives the efficiency and uniformity determinations." Abondolo v. GGR Holbrook Medford, Inc., 285 B.R. 101, 112 (E.D.N.Y. 2002) (citing South St. Seaport Ltd. P'ship v. Burger Boys, Inc. (In re Burger Boys, Inc.), 94 F.3d 755, 762 (2d Cir. 1996) and Orion Pictures Corp., 4 F.3d at 1101). In other words, where the matter to be

withdrawn is a core matter, withdrawal of the reference should be disfavored, because the bankruptcy court is in a better position to rule on the issues therein. See Orion Pictures Corp., 4 F.3d at 1101 ("hearing core matters in a district court could be an inefficient allocation of judicial resources given that the bankruptcy court generally will be more familiar with the facts and issues").

13. Bankruptcy courts have the authority to "hear and determine … all core proceedings arising under title 11 … and may enter appropriate orders and judgments, subject to review under section 158 of [title 28]." 28 U.S.C. § 157(b)(1). "Confirmations of plans" is expressly designated as a "core proceeding." 28 U.S.C. § 157(b)(2)(L).

14. Here the matter to be withdrawn is confirmation of a debtor's plan—a matter expressly designated as "core" by Congress—and accordingly retention of the matter by the bankruptcy court is presumptively appropriate, absent any overriding considerations. This conclusion comports with the usual practice in section 524(g) cases. In the vast majority of such cases, the bankruptcy court presides over confirmation alone and enters a confirmation order and a recommendation as to confirmation.[3] The bankruptcy court then sends the order, recommendation, and the record to the district court to

[3] Tellingly, of the numerous plans confirmed under section 524(g) in the fourteen years since the section was enacted, the Ad Hoc Committee provides four examples in which a joint confirmation hearing was held. The reason for this dearth of examples is that most confirmation hearings are not typically heard by the bankruptcy court and district court sitting jointly.

review. After allowing objecting parties an opportunity to be heard, the district court can then determine whether the bankruptcy court's confirmation order should be affirmed or entered based on the record before it.

15. This procedure allows the district court to conduct the discreet and targeted analysis of those issues peculiar to section 524(g) bankruptcies contemplated by Congress, without being bogged down in the minutia of a full-blown confirmation hearing. See e.g., In re ACandS, Inc., Misc. Case No. 08-119 (D. Del filed June 27, 2008); In re North Am. Refractories Co. and Global Indus. Techs., Inc., Misc. Nos. 07-318 and 07-319 (W.D. Pa. filed Dec. 20, 2007); In re Federal-Mogul Global, Inc., Bankr. Case No. 01-10578 (D. Del. filed Nov. 14, 2007); In re Owens Corning, Bankr. Case No. 00-3837 (Bankr. D. Del. filed Sept. 28, 2006); In re ABB Lummus Global, Inc., Misc. Case No. 06-138-SLF (D. Del. filed July 19, 2006); In re Kaiser Aluminum Corp., Misc. Case No. 06-41-JJF (D. Del. filed May 11, 2006); In re Combustion Engineering, Inc., Misc. Case No. 06-21 (JEI) (D. Del. filed March 2, 2006); In re Mid-Valley, Inc., Misc. No. 04-295 (W.D. Pa. filed July 27, 2004). The orders entered in these section 524(g) bankruptcies, in which the bankruptcy court conducted the confirmation hearing and issued the confirmation order before transmitting its order to the district court, are appended as Exhibit B.

16. Notably, in In re Western Asbestos Co., No. C 03-0989, 2003 WL 23741861, at * 1 (N.D. Cal. Sept. 25, 2003), the district court refused to withdraw the reference for purposes of hearing confirmation issues, stating that:

> Although such a procedure is permitted in the context of non-core proceedings (28 U.S.C. § 157(c)(1)), plan confirmation is explicitly identified in the statute as a core proceeding. *See* § 157(b)(2)(L). Thus, the procedure recommended by Judge Tchaikovsky is not permitted under bankruptcy statute, and, for this reason, the Court declines to adopt her report and recommendation. The reference shall stay in effect.

17. The mere fact that confirmation of Quigley's Plan is a core proceeding—what the Second Circuit called the "most important" of its Orion Pictures factors—strongly suggests that there is no cause to partially withdraw the reference. However, as demonstrated below, the other factors identified by the Second Circuit in Orion Pictures also support denial of the Ad Hoc Committee's Motion to partially withdraw the reference.

B. The Ad Hoc Committee's Motion should be denied because it would be an inefficient use of judicial resources to have both this Court and the Bankruptcy Court jointly preside at what could be a protracted confirmation hearing on Quigley's Plan.

18. Withdrawal of the reference should be denied, because it would result in a waste of judicial resources. Quigley is now in its fifth year in bankruptcy. As the duration of the case might suggest, the bankruptcy has been extremely complex. Furthermore, the Ad Hoc Committee has filed numerous objections to confirmation, which increases the number and complexity of issues to be heard during confirmation. It is, therefore, no

surprise that the parties anticipate the confirmation hearing will be protracted and contentious.

19. The Bankruptcy Court has a complete understanding of the complex factual and procedural background of the case and is intimately familiar with parties and issues involved. For this reason, judicial efficiency counsels against withdrawal of the reference. See e.g., Oneida Ltd. v. Pension Benefit Guar. Corp., 372 B.R. 107, 112 (S.D.N.Y. 2007) (judicial efficiency counseled against withdrawing the reference when bankruptcy judge had presided over the case for more than a year, was thoroughly familiar with the dispute between the parties, and bankruptcy judge's view would assist the district court in reviewing the issue in case of an appeal). Furthermore, most of the issues raised at confirmation fall within the expertise of the Bankruptcy Court and will be extraneous to any determinations the District Court must make under section 524(g). The Bankruptcy Court is fully capable of determining these confirmation matters without burdening the District Court with jointly presiding over the confirmation hearing. It should be allowed to do so.

20. Additionally, in the event that Quigley's plan is unconfirmable for reasons *unrelated* to its section 524(g) supplemental injunction, the District Court would have wasted valuable time and resources presiding over confirmation of a plan that was not ripe for its consideration. Judicial economy dictates that the Bankruptcy Court be permitted to make its initial

determinations as to whether Quigley's plan meets the requirements for confirmation under sections 1129(a) and 524(g) before submitting the affirmance of a recommended channeling injunction to the District Court. Once the Bankruptcy Court determines that the plan may be properly confirmed, it can then issue its detailed findings of fact and conclusions of law and enter its order confirming the plan and recommending affirmance of that order. With this record before it, making full benefit of the Bankruptcy Court's familiarity with the facts and its decisions on the core issues that necessarily inform a confirmation order, the District Court is in a position to determine whether the issuance of the 524(g) supplemental injunction is proper. This is the procedure that has been used in other districts in a number of important section 524(g) cases. See e.g., orders from those districts which are appended as Exhibit B. This proceeding in tandem, with the District Court taking its actions only after the completion of the core confirmation proceedings by the Bankruptcy Court, avoids the risk of wasting the District Court's time and resources.

C. The reference should be maintained because the Ad Hoc Committee fails to show why having this Court and the Bankruptcy Court jointly preside over Quigley's confirmation hearing will avoid delay and costs to the parties.

21. Remarkably, the Ad Hoc Committee asserts the contrafactual proposition that it would be "unnecessarily time-consuming, duplicative, and expensive to hold a confirmation hearing in front of the Bankruptcy Court only to then repeat the process to allow the District Court to draw its own

conclusions as required by Section 524(g)(3)(A)." Motion at 18. The Ad Hoc Committee's view of the procedural process is misplaced. If the Bankruptcy Court determines that Quigley's Plan should be confirmed, the District Court need not "repeat the process" of hearing "extensive testimony, cross-examination, and documentary evidence." Motion at 18, ¶ 2. Rather, the Bankruptcy Court will conduct its core confirmation proceeding, make its findings of fact and conclusions of law and issue its order confirming the Plan, along with its very straightforward order recommending affirmance of the confirmation order and the supplemental injunction by the District Court. The District Court then considers whether it should affirm or issue the injunction under section 524(g). To the extent the Ad Hoc Committee has further objections it wishes the District Court to consider, it will be provided notice and a hearing to assert those objections, which will be considered by the District Court based on the record before it.

22. Confirmation of a plan is a core proceeding. Thus, in determining whether the Bankruptcy Court's recommendation of affirmance of its supplemental injunction should be followed, the District Court will not review confirmation *de novo*.[4] Thus, there is no gain in judicial efficiency by requiring the District Court to sit with the Bankruptcy Court during the confirmation hearing. To the contrary, withdrawing the reference will not avoid delay and costs to the parties, but could instead contribute to the waste

[4] In contrast to a core proceeding, bankruptcy courts do not have the authority to issue final orders in non-core proceedings. 28 U.S.C. § 157(c)(1).

of judicial resources. See Abondolo, 285 B.R. at 113 (withdrawal of the reference would cause undue delay and increase the cost to parties to litigate certain matters before the district court, when the bankruptcy court is already familiar with the law and facts).

D. Uniformity of bankruptcy administration weighs in favor of a hearing before the bankruptcy judge alone, who is most familiar with the facts and issues in the case.

23. The uniform administration of the Bankruptcy Code's reorganizational provisions requires that the reference to the Bankruptcy Court be maintained. Quigley's reorganization is now going on its fifth year. The facts and issues that the Ad Hoc Committee says it intends to litigate at confirmation are not new. It has raised the same or similar issues in connection with other matters in the case. The Bankruptcy Court is most familiar with the facts and issues in the case and has published various opinions demonstrating familiarity with facts and issues of this complex and protracted bankruptcy case. In order to assure continuity in the administration of the case, the Bankruptcy Court should preside at the confirmation hearing. Cohen v. Nat'l Union Fire Ins. Co. (In re County Seat Stores, Inc.), No. 01 Civ. 2966 (JGK), 2002 WL 141875, at * 6 (S.D.N.Y. Jan. 31, 2002) (denying withdrawal of reference where matter involved "questions that involve expertise of the Bankruptcy Court" and concluding that judicial economy would be better served by allowing the Bankruptcy Court to decide the dispute). To the extent the Ad Hoc Committee desires the District Court

to consider specific objections to the channeling injunction—the only portion of the confirmation order triggering the requirement of District Court involvement under the Code, it can make those arguments to the Bankruptcy Court, which will address them in its findings of facts and conclusions of law, bringing to bear its considerable familiarity with the case and expertise in resolving bankruptcy disputes. The Ad Hoc Committee will subsequently be in a position to reurge those issues at the time the District Court decides whether it should "issue" or "affirm" the confirmation order under section 524(g). The District Court will rule on those issues based on the record before it, a record that will make the best use of the Bankruptcy Court's cumulative experience in the administration of Quigley's reorganization.

E. Maintaining the reference prevents the misuse of withdrawal of the reference as a means of forum shopping.

24. The Ad Hoc Committee is one of the most active litigants in Quigley's bankruptcy case and, despite its best efforts, has failed thus far to derail Quigley's plan. Over its numerous objections, the Bankruptcy Court has determined that Quigley may proceed with a hearing to demonstrate whether its plan is confirmable under the Bankruptcy Code.

25. Unable to persuade the Bankruptcy Court to thwart Quigley's efforts to confirm a plan, the Ad Hoc Committee shifts its focus to the District Court. It asks the District Court to preside jointly with the Bankruptcy Court at a confirmation hearing that could take weeks to hear and determine. The Ad Hoc Committee's Motion appears to be an attempt to shop for a more

favorable forum, hoping that the District Court, which is unfamiliar with the extensive background of the case, might somehow be more sympathetic to arguments on core bankruptcy matters that the District Court will hear only once, but that the Bankruptcy Court may have heard repeatedly. District Courts are properly wary of being used in such a manner. As this very District Court recognized in In re CIS Corp., 188 B.R. at 877, the courts in this Circuit have construed motions to withdraw the reference narrowly in order to prevent parties such as the Ad Hoc Committee from using withdrawal of the reference as an "escape hatch" out of bankruptcy court. See Official Comm. of Unsecured Creditors of Verestar, Inc. v. Am. Tower Corp., No. 05 Civ. 6268 (RPP), 2005 WL 3455775, at *3 (S.D.N.Y. Dec. 15, 2005) (courts "must employ [withdrawal] judiciously in order to prevent it from becoming just another litigation tactic for parties eager to find a way out of bankruptcy court.") (quoting Kenai Corp. v. Nat'l Union Fire Ins. Co. (In re Kenai Corp.), 136 B.R. 59, 61 (S.D.N.Y. 1992)); Comco Assocs. v. Faraldi Food Indus. Ltd., 170 B.R. 765, 772 (E.D.N.Y. 1994) (motion to withdraw the reference denied because district court recognized that bankruptcy court had consistently ruled against movant and, because of this, movant may well have desired another forum, but "forum shopping is to be prevented").

26. In summary, the Ad Hoc Committee has failed to demonstrate "cause" to warrant the partial withdrawal of the reference and its apparent attempt to forum shop should not be permitted.

IV.
CONCLUSION

Wherefore, the Counsel for the Settling Claimants pray for an order (i) denying the Ad Hoc Committee of Tort Victims' Motion for an Order Partially Withdrawing the Reference for Purposes of the Confirmation Hearing on Quigley's Plan, and (ii) granting the Counsel for the Settling Claimants such other and further relief to which it may be entitled.

Respectfully submitted this 21st day of January, 2009.

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