

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

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In re : Chapter 11
  
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HRP Myrtle Beach Holdings, LLC, *et al.*,<sup>1</sup> : Case No. 08-\_\_\_\_\_ (\_\_\_\_)
  
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Debtors. : (Jointly Administered)
  
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**MOTION OF THE DEBTORS AND DEBTORS IN POSSESSION FOR AN ORDER AUTHORIZING THEM TO (A) MAINTAIN CERTAIN CUSTOMER PROGRAMS AND (B) HONOR OR PAY RELATED PREPETITION OBLIGATIONS TO THEIR CUSTOMERS**

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) hereby move the Court for the entry of an order pursuant to sections 105(a), 363 and 507(a)(7) of title 11 of the United States Code (the “Bankruptcy Code”): (i) authorizing the Debtors to (a) maintain certain Customer Programs (as defined below) and (b) honor or pay certain prepetition obligations related to the Customer Programs (collectively, the “Customer Obligations”) and (ii) granting certain related relief. In support of this Motion, the Debtors incorporate the statements contained in the Affidavit of Steven Goodwin in Support of First-Day Pleadings (the “Goodwin Affidavit”) filed contemporaneously herewith and further respectfully state as follows:

<sup>1</sup> The Debtors are the following seven entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): HRP Myrtle Beach Holdings, LLC (1546), HRP Myrtle Beach Holdings Capital Corp. (5553), HRP Myrtle Beach Operations, LLC (1625), HRP Myrtle Beach Capital Corp. (4272), HRP Myrtle Beach Management, LLC (0297), HRP Global Management LLC (2138) and We Got Your Back Security Co., LLC (3877). The address of each of the Debtors is 211 George Bishop Parkway, Myrtle Beach, South Carolina 29579.

### **Jurisdiction and Venue**

1. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue is proper in this district under 28 U.S.C. §§ 1408 and 1409.

### **Background**

2. On the date hereof (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (collectively, the "Bankruptcy Cases"). The Debtors are continuing to operate their businesses as debtors and debtors in possession under sections 1107 and 1108 of the Bankruptcy Code. No trustee or official committee of unsecured creditors has been appointed in these cases.

3. The Debtors own and operate Hard Rock Park (the "Park"), a 50-acre destination theme park (as part of a 140 acre development) located in Myrtle Beach, South Carolina. As the world's first rock-'n-roll theme park, the Park offers visitors an entertainment experience that features six unique, custom-designed zones celebrating the culture, lifestyle and legends of rock music entertainment. The Debtors are not affiliated with Hard Rock Café International, Inc., but have branded and operate the Park pursuant to a license agreement with Hard Rock Café International (USA), Inc.

4. The Park opened on time and under budget in April 2008, after nearly two years of construction. Although guest satisfaction levels were strong and guests spent considerable amounts on food, beverage and retail items, overall attendance at the Park was lower than expected, primarily as a result of macroeconomic conditions that significantly depressed overall demand in the travel and leisure industry, as well as the Debtors' inability to devote sufficient resources to local, regional and out-of-market marketing in their initial year of

operations. The Debtors accordingly faced significant liquidity constraints at the conclusion of their first season of operations and, in that context, a substantially overleveraged balance sheet.

5. The Debtors therefore commenced the Bankruptcy Cases to restructure their debt and refocus and further develop their marketing and other operational strategies for the Park. In particular, the Debtors seek to take full advantage of the regularly scheduled, seasonal cessation of Park operations after the conclusion of the summer travel season to negotiate and implement a comprehensive recapitalization and new business strategy in advance of the anticipated reopening of the Park for the 2009 season. Significantly, the Debtors also believe that they have the support of their senior creditors for that overall strategy, as evidenced best by the proposed provision of a critically-needed debtor in possession financing facility by a consortium of the Debtors' existing secured bondholders.

***The Debtors' Customer Programs Generally***

6. The Debtors, in the ordinary course of their businesses, engage in certain marketing and sales practices that are, among other things, (a) targeted to develop and sustain positive reputations for the Park and the merchandise sold there and (b) designed to attract new customers to the Park and to enhance sales within the Debtors' existing customer base. These customer-targeted practices (collectively, the "Customer Programs") include, but are not limited to, those practices described in the following paragraphs.

7. Annual Passes. As part of their efforts to build customer loyalty, encourage repeat visits to the Park and enhance sales of food, beverages, and merchandise at the Park, the Debtors have established an "Annual Pass Program," which allows customers to purchase passes to attend the Park at any time during regular Park hours for one year from the

date of purchase (the “Year Round Passes”). As of the Petition Date, the Debtors estimate that approximately eleven thousand customers purchased Annual Passes.

8. Season Passes. As part of their efforts to build enthusiasm for the Park with residents of the region surrounding Myrtle Beach, South Carolina, the Debtors have established a “Season Pass Program.” Critical hospitality and travel workers – and other influential individuals within the region surrounding the Park received passes to attend the Park at any time during regular Park hours during the Park’s 2008 operating season. As of the Petition Date, the Debtors estimate that approximately 7,500 individuals received Season Passes.

9. Ticket Resale Program. As part of their efforts to market the Park and increase ticket sales, the Debtors have established a “Ticket Resale Program,” which allows certain select local businesses to purchase (on either a prepayment or consignment basis) blocks of tickets for resale, packaging or distribution. As of the Petition Date, the Debtors had approximately \$39,500.00 in resale tickets that had not yet been validated at the Park.

10. Group Ticket Sales Program. As part of their efforts to increase ticket sales for the Park, the Debtors have established a “Group Ticket Sales Program,” which allows organizations and groups to purchase large quantities of tickets at a discount rate for their organization or group to visit the Park. As of the Petition Date, the Debtors had reservations for approximately \$1,600.00 of Group Ticket Sales.

11. Noting that the Park’s operating calendar remains subject to change, the Debtors have previously communicated to the public through the Park’s website, advertising materials and other forms of communication that the Park would remain open for operations through the fall season of 2008. Due to the Debtors’ current financial situation, the Park will not be open for operation for as long as the Debtors have indicated. In an effort to maintain goodwill

with individuals that purchased Year Round Passes or tickets to the Park, the Debtors intend to seek authorization to extend the termination date for 2008 Year Round Passes and sold but unused 2008 tickets. The Park believes that the support and loyalty of these individuals are critical to the Park's planned relaunch for the 2009 operating season.

12. Netting of Chargebacks Under Credit Card Processing Agreements. The Debtors are party to a processing agreement (the "Processing Agreement") with Elavon Inc., which enables the Debtors to accept credit cards as payment for passes, food and beverage sales and merchandise sales. This Processing Agreement is essential to the Debtors' business, as it allows the Debtors' customers the flexibility to purchase on credit. This flexibility is essentially taken for granted by modern retail customers and its loss would significantly impair the Debtors' ability to serve, attract and retain those customers.

13. Under the Processing Agreement, upon the return to the Debtors of merchandise purchased using a credit card, the Debtors are obligated to refund the purchase price of the returned merchandise plus certain adjustments (collectively, the "Chargebacks"). Generally, the Debtors' Chargeback obligations are satisfied by a reduction of payments currently owing to the Debtors under the Processing Agreement (collectively, the "Processor Payments") in the amount of the outstanding Chargebacks.

14. It is possible that certain Chargebacks incurred by the Debtors immediately prior to the Petition Date may not have been fully netted out against Processor Payments received by the Debtors prior to the Petition Date. Moreover, although the Debtors' believe that any Chargebacks arising after the Petition Date would be postpetition obligations of the Debtors, it may be argued that Chargebacks arising after the Petition Date nevertheless would be prepetition obligations where the merchandise returned was purchased from the Debtors prior

to the Petition Date. In such circumstances, to the extent that the netting of the parties' obligations would not constitute recoupment, the setoff of Chargebacks against Processor Payments arguably may be foreclosed by the automatic stay imposed by section 362(a) of the Bankruptcy Code.

**Relief Requested**

15. The Debtors hereby request the entry of an order, pursuant to sections 105(a), 363 and 507(a)(7) of the Bankruptcy Code, authorizing them to continue the Customer Programs as they determine to be appropriate, to honor and pay, in their discretion, the Customer Obligations arising prior to the Petition Date and to renew, modify, terminate or replace such Customer Programs in their discretion.

***The Priority Accorded to Claims for Prepayments Under the Bankruptcy Code Justifies the Honoring of Prepetition Prepayments***

16. As an initial matter, to the extent that Customer Obligations constitute claims arising from prepayments made prepetition, many, if not all, of such claims are entitled to priority under section 507(a)(7) of the Bankruptcy Code.<sup>2</sup> Accordingly, the value of the prepetition prepayments currently held by the Debtors is value that would not otherwise have been available for distribution to the Debtors' general unsecured creditors in the absence of the relief sought herein. Thus, the honoring of such prepetition prepayments does not serve to prejudice such creditors.

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<sup>2</sup> Section 507(a)(7) of the Bankruptcy Code entitles to priority the "allowed unsecured claims of individuals, to the extent of \$2,425 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property . . . for the personal, family, or household use of such individuals, that were not delivered or provided." 11 U.S.C. § 507(a)(7).

***The “Doctrine of Necessity” Provides a Basis for the Relief Requested with Respect to the Honoring of Customer Obligations Generally***

17. Section 363(b)(1) of the Bankruptcy Code provides: “The trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). Section 105(a) of the Bankruptcy Code provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent the abuse of process.

11 U.S.C. § 105(a). Section 105(a) of the Bankruptcy Code grants bankruptcy courts broad authority and discretion to enforce the provisions of the Bankruptcy Code either under specific statutory fiat or under equitable common law principles.

18. Courts have repeatedly recognized “the existence of the judicial power to authorize a debtor in a reorganization case to pay prepetition claims where such payment is essential to the continued operations of the debtor.” In re Ionosphere Clubs, Inc., 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989); see also In re Columbia Gas Sys., Inc., 171 B.R. 189, 191-92 (Bankr. D. Del. 1994) (finding that a debtor is entitled to pay certain prepetition creditors upon a showing that the payment is “essential to the continued operation of the business”) (citations omitted). The United States Supreme Court first articulated the equitable common law principle commonly referred to as the “doctrine of necessity” over 125 years ago in Miltenberger v. Logansport, C. & S.W.R. Co., 106 U.S. 286, 1 S.Ct. 140, 27 L.Ed. 117 (1882). “The Supreme Court, the Third Circuit and the District of Delaware all recognize the court’s power to authorize payment of pre-petition claims when such payment is necessary for the debtor’s survival during chapter 11.” In re Just for Feet, Inc., 242 B.R. 821, 825 (D. Del. 1999). “The necessity of

payment doctrine recognizes that paying certain pre-petition claims may be necessary to realize the goal of chapter 11 – a successful reorganization.” Id. at 825-26.

19. Under the doctrine of necessity, a bankruptcy court may exercise its equitable power to authorize a debtor to pay critical prepetition claims, even though such payment is not explicitly authorized under the Bankruptcy Code. See In re Columbia Gas Sys., Inc., 136 B.R. 930, 939 (Bankr. D. Del. 1992) (citing In re Lehigh & New England Rwy. Co., 657 F.2d 570, 581 (3d Cir. 1981) (recognizing that “if payment of a prepetition claim ‘is essential to the continued operation of [the debtor], payment may be authorized.’”).

20. The bankruptcy courts exercise of its authority under the “doctrine of necessity” is appropriate to carry out specific statutory provisions of chapter 11, specifically sections 1107(a), 1108 and 363(b)(1) of the Bankruptcy Code, which collectively authorize a debtor in possession to maintain and operate the debtor’s business and use estate property outside of the ordinary course of business. Indeed, a debtor in possession operating a business under section 1108 of the Bankruptcy Code has a duty to protect and preserve the value of its business, and prepetition claims may be paid if necessary to perform the debtor’s duty. See In re CoServ, L.L.C., 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002) (“There are occasions when this duty can only be fulfilled by the preplan satisfaction of a prepetition claim.”).

21. This Motion satisfies the foregoing criteria, as the relief sought herein plainly is essential to the Debtors’ reorganization. The Debtors operate in a highly competitive sector of the domestic economy (i.e., travel and leisure) and consumers are acutely aware of consistency in terms of customer service options. Quite simply, the Debtors cannot afford any material disruptions of their business operations or present anything less than a “business as usual” appearance to the public.

22. Thus, the continuation of the Customer Programs and the honoring of the Customer Obligations is clearly warranted. Much of the success and viability of the Debtors' business is dependent upon the loyalty and confidence of their customers. The continued support of this constituency is absolutely essential to the success of the Debtors' businesses and the preservation of the value of their estates. Were the Debtors to fail to honor the Customer Obligations in the ordinary course and without interruption, they would almost certainly suffer an irreparable lapse in customer support and confidence. To use an obvious example, the failure of the Debtors to honor the Year Round Passes would result in a substantial loss of goodwill and jeopardize customer loyalty – if not destroy it altogether. As another example, any interruption in the Debtors' customers' ability to use credit cards would result in a similar loss of goodwill and confidence and impose a costly disruption of the Debtors' cash flow and operations.

23. Clearly, the expenditure of estate funds required to fulfill the Debtors' Customer Obligations is minimal when compared to the benefits accruing to the Debtors from the preservation of their customer relationships. Accordingly, to preserve the value of their estates, the Debtors request that they be permitted to continue honoring and/or paying all Customer Obligations without interruption or modification. In addition, to provide necessary assurances to the Debtors' customers on a prospective basis, the Debtors request authority to continue honoring or paying all obligations to customers that arise from and after the Petition Date as appropriate under the circumstances.<sup>3</sup>

24. Courts in this District regularly have authorized debtors to honor and pay obligations to customers arising prior to and after the filing of their chapter 11 cases in the

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<sup>3</sup> The Debtors believe that, pursuant to section 363(b) of the Bankruptcy Code and other governing statutory and case law, they possess the authority to continue such Customer Programs without an express grant of authority from the Court, but seek such approval out of an abundance of caution and to provide further assurances to their customers that these programs will continue to be available if offered by the Debtors.

ordinary course of business. See, e.g., In re Linens Holding Co., No. 08-10832 (CSS) (Bankr. D. Del. May 2, 2008) (order entered authorizing the debtors to honor prepetition obligations to customers and continue customer programs); In re Lillian Vernon Corp., No. 08-10323 (BLS) (Bankr. D. Del. Feb. 21, 2008) (same); In re Sharper Image Corp., No. 08-10322 (KG) (Bankr. D. Del. Feb. 20, 2008) (same); In re Buffets Holding, Inc., No. 08-10141 (MFW) (Bankr. D. Del. Jan. 23, 2008) (same); In re Joan Fabrics Corp., No. 07-10479 (CSS) (Bankr. D. Del. Apr. 11, 2007) (same).

***Request for Authority for Banks to Honor and Pay Checks Issued and Funds Transfers with Respect to the Customer Obligations***

25. In addition, by this Motion, the Debtors request that all applicable banks and other financial institutions (collectively, the “Banks”) be authorized and directed, when requested by the Debtors, to receive, process, honor and pay any and all checks presented for payment of, and to honor all fund transfer requests made by the Debtors related to, Customer Obligations, whether such checks were presented or fund transfer requests were submitted prior to or after the Petition Date, provided that sufficient funds are available in the applicable accounts to make the payments. The Debtors represent that these checks are drawn on identifiable disbursement accounts and can be readily identified as relating directly to the authorized payment of Customer Obligations. Accordingly, the Debtors believe that checks other than those relating to authorized payments will not be honored inadvertently.

26. Nothing contained herein is intended or shall be construed as: (a) an admission as to the validity of any claim against the Debtors, (b) a waiver of the Debtors’ rights to dispute any claim on any grounds, (c) a promise to pay any claim or (d) an implication or admission that any particular claim against the Debtors would constitute a claim for a Customer Obligation.

**Requests for Immediate Relief & Waiver of Stay**

27. Pursuant to Rules 6003(b) and 6004(h) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), the Debtors seek (a) immediate entry of an order granting the relief sought herein and (b) a waiver of any stay of the effectiveness of such an order. Bankruptcy Rule 6003(b) provides, in relevant part, that “[e]xcept to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 20 days after the filing of the petition, grant relief regarding . . . a motion to pay all or part of a claim that arose before the filing of the petition.” Accordingly, where the failure to grant any such requested relief would result in immediate and irreparable harm to the Debtors’ estates, the Court may allow the Debtors to pay all or part of a claim that arose before the Petition Date prior to the twenty-first day following the Petition Date. Bankruptcy Rule 6004(h) provides that “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise.”

28. As set forth above, the honoring and payment of the Customer Obligations is necessary to prevent the immediate and irreparable damage to the Debtors’ retail operations, going-concern value and ability to reorganize that would result from a collapse of customer confidence in the Debtors. Accordingly, the Debtors submit that ample cause exists to justify: (a) the immediate entry of an order granting the relief sought herein and (b) a waiver of the ten-day stay imposed by Bankruptcy Rule 6004(h), to the extent that it applies.

**Notice**

29. Notice of this Motion has been provided to: (a) the Office of the United States Trustee for the District of Delaware, (b) the Debtors’ largest unsecured creditors on a consolidated basis, as identified in their chapter 11 petitions, (c) counsel to the Debtors’ senior

secured lenders, (d) counsel to the Debtors' postpetition secured lenders and (e) counsel to the Debtors' bondholders. As this Motion is seeking first-day relief, notice of this Motion and any order entered hereon will be served on all parties required by Rule 9013-1(m) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware. Due to the urgency of the circumstances surrounding this Motion and the nature of the relief herein, the Debtors respectfully submit that no further notice of this Motion is required.

WHEREFORE, the Debtors respectfully request that the Court enter an order substantially in the form attached hereto as Exhibit A: (i) granting the relief sought herein and (ii) granting to the Debtors such other and further relief as the Court may deem proper.

Dated: September 24, 2008  
Wilmington, Delaware

Respectfully submitted,

/s/ Daniel J. DeFranceschi

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PROPOSED ATTORNEYS FOR DEBTORS AND  
DEBTORS IN POSSESSION

**EXHIBIT A**

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

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In re : Chapter 11
  
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HRP Myrtle Beach Holdings, LLC, *et al.*,<sup>1</sup> : Case No. 08-\_\_\_\_\_ (\_\_\_\_)
  
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Debtors. : (Jointly Administered)
  
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: Re: Docket No. \_\_\_\_
  
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**ORDER AUTHORIZING THE DEBTORS AND DEBTORS IN POSSESSION TO (A) MAINTAIN CERTAIN CUSTOMER PROGRAMS AND (B) HONOR OR PAY RELATED PREPETITION OBLIGATIONS TO THEIR CUSTOMERS**

This matter coming before the Court on the Motion of the Debtors for an Order Authorizing Them to (A) Maintain Certain Customer Programs and (B) Honor or Pay Related Prepetition Obligations to Their Customers (the “Motion”),<sup>2</sup> filed by the above-captioned debtors and debtors in possession (collectively, the “Debtors”); the Court having reviewed the Motion and the Goodwin Affidavit and having considered the statements of counsel and the evidence adduced with respect to the Motion at a hearing before the Court (the “Hearing”); the Court having found that (i) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (ii) venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409, (iii) this is a core proceeding pursuant to 28 U.S.C. § 157(b), (iv) notice of the Motion and the Hearing was sufficient under the circumstances and (v) there is good cause to waive the ten-day stay imposed

<sup>1</sup> The Debtors are the following seven entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): HRP Myrtle Beach Holdings, LLC (1546), HRP Myrtle Beach Holdings Capital Corp. (5553), HRP Myrtle Beach Operations, LLC (1625), HRP Myrtle Beach Capital Corp. (4272), HRP Myrtle Beach Management, LLC (0297), HRP Global Management LLC (2138) and We Got Your Back Security Co., LLC (3877). The address of each of the Debtors is 211 George Bishop Parkway, Myrtle Beach, South Carolina 29579.

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meanings given to them in the Motion.

by Bankruptcy Rule 6004(h) to the extent it is applicable, after due deliberation the Court having determined that the relief requested in the Motion is (i) necessary and essential for the Debtors' reorganization, (ii) in the best interests of the Debtors, their estates and their creditors and (iii) necessary to prevent immediate and irreparable harm to the Debtors and their estates, and good and sufficient cause having been shown;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.
2. The Debtors are authorized, in their sole discretion, to continue, renew, modify, terminate or replace the Customer Programs. The Debtors shall provide notice of any material modification, termination or replacement of the Customer Programs to (a) the United States Trustee for the District of Delaware, (b) any official committees appointed in these cases, (c) counsel for the postpetition lenders and counsel for the agent for the postpetition lenders, Klee, Tuchin, Bogdanoff & Stern, LLP (Attn: David Stern) and (d) counsel for the postpetition lenders, Pachulski, Stang, Ziehl & Jones, LLP (Attn: Laura Davis Jones).
3. The Debtors are authorized, in their sole discretion, to honor the Customer Obligations.
4. The Banks are authorized and directed, when requested by the Debtors, to receive, process, honor and pay all checks presented for payment of, and to honor all funds transfer requests made by the Debtors related to, Customer Obligations, whether such checks were presented or funds transfer requests were submitted prior to or after the Petition Date, provided that funds are available in the Debtors' accounts to cover such checks and funds transfers. The Banks are authorized to rely on the Debtors' designation of any particular check or funds transfer as approved by this Order.

5. Nothing in the Motion or this Order, nor the Debtors' payment of claims pursuant to this Order, shall be deemed or construed as: (a) an admission as to the validity of any claim against the Debtors, (b) a waiver of the Debtors' rights to dispute any claim on any grounds, (c) a promise to pay any claim, (d) an implication or admission that any particular claim would constitute a Customer Obligation or (e) an express or implied assumption of any contract.

6. The requirements of Bankruptcy Rule 6003(b) have been satisfied with respect to the payments authorized by this Order.

7. This Order shall be immediately effective and enforceable upon its entry. To the extent that it may be applicable, the ten-day stay imposed by Bankruptcy Rule 6004(h) is hereby waived.

Dated: \_\_\_\_\_, 2008  
Wilmington, Delaware

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UNITED STATES BANKRUPTCY JUDGE