

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

BLITZ U.S.A., INC., *et al.*,¹

Debtors.

) Chapter 11

) Case No. 11-13603 (PJW)

) (Joint Administration Requested)

BLITZ, U.S.A., INC, *et al.*,

Plaintiffs,

vs.

) Adv. Proc No. _____ ()

TABITHA ALEXSON AS NATURAL
GUARDIAN AND NEXT FRIEND FOR ETHAN
GROOMS; JASMINE ALEXIS BALLEW, A
MINOR, BY AND THROUGH HER GUARDIAN
AD LITEM, KAREN BRITT PEELER AND
JASMINE BALLEW; JERRY C. BARNETT AND
DANIEL R. FULTON; MIGUEL BARRERA,
INDIVIDUALLY AND AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF
SIXIALFREDO BARRERA; LANDON
BEADORE, BY AND THROUGH HIS PARENTS,
PAUL BEADORE AND MELISSA WEEKS, AND
MELISSA WEEKS, AND PAUL BEADORS,
INDIVIDUALLY; CHRISTOPHER BOSSE;
AMANDA BURCH, INDIVIDUALLY AND AS
NEXT FRIEND AND NATURAL GUARDIAN
FOR TIMOTHY BURCH; CHRISTOPHER
DRONEY; JESSICA FENN AND JEREMIAH
FENN, SR., INDIVIDUALLY AND ON BEHALF
OF THEIR DECEASED SON AND DAUGHTER,
JEREMIAH FENN, JR. AND JA'EL FENN;
KAYLEE FREELAND, A MINOR; CHAD
FUNCHESS; KAREN GUENIOT-KORNEGAY,
INDIVIDUALLY, AND ON BEHALF OF ALL OF
THE WRONGFUL DEATH BENEFICIARIES OF
MATTHEW DYLAN KORNEGAY; WADE

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Blitz U.S.A., Inc. (8104); LAM 2011 Holdings, LLC (8742); Blitz Acquisition Holdings, Inc. (8825); Blitz Acquisition, LLC (8979); Blitz RE Holdings, LLC (9071); and F3 Brands, LLC (2604). The location of the Debtors' corporate headquarters and the Debtors' service address is: 404 26th Ave. NW, Miami, OK 74354.



GUILFORD; ROBERT JACOBY; RANDALL JOHNSON; CARMEN LOPEZ AND SANTIAGO ROSA, GUARDIANS AD LITEM FOR JESUS SANTIAGO ROSA, CARMEN LOPEZ AND SANTIAGO ROSA IN THEIR OWN RIGHT, AND JESUS SANTIAGO ROSA, IN HIS OWN RIGHT; MARY JO PIERCE FOR B.P., A MINOR, BY HIS MOTHER AND NATURAL GUARDIAN; SHERRI PURVIS INDIVIDUALLY AND AS NEXT FRIEND AND NATURAL GUARDIAN FOR JAMES C. PURVIS; LORI SHICKEL, BOTH INDIVIDUALLY AND AS MOTHER AND NEXT FRIEND OF JORDAN SHICKEL, A MINOR; ROBYN SMITH, FOR DEVAN VANBRUNT, A MINOR, BY HIS MOTHER AND NATURAL GUARDIAN; STATE FARM LLOYDS, AS SUBROGEE OF ERIC AND TAMMY BALCH; DENNIES THORNTON, A MINOR, BY AND THROUGH HIS NEXT FRIEND AND FATHER, DAVID THORNTON; DYLAN J. TREVINO, A MINOR, SUING BY HIS NEXT FRIEND AND GUARDIAN, DIANA TREVINO, AND DIANA TREVINO, INDIVIDUALLY; KENNETH WARD AND CURTIS WARD; RICHARD L YIM, JR.; and JOHN DOES 1-1000.

Defendants.

**VERIFIED COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Blitz U.S.A., Inc., *et al.* (“**Blitz**” and/or the “**Debtors**”), as plaintiffs in the above-captioned adversary proceeding, allege for their Verified Complaint, upon knowledge of their own acts and upon information and belief as to other matters, as follows:

NATURE OF THE ACTION

1. This is an adversary proceeding brought pursuant to Fed. R. Bankr. P. 7001(7) and (9) and Fed. R. Bankr. 7065, for a judgment enjoining the Defendants from prosecuting pending portable consumer gas container (“PCGC”) actions (the “**PCGC**

Litigation”), and commencing new actions or proceedings asserting any PCGC claims (the “**Future PCGC Actions**”) against third-parties Wal-Mart Stores, Inc. and/or any of its affiliates or related entities (referred to herein collectively or individually, as appropriate, as “**Wal-Mart**”), Kinderhook Capital Fund II (“**Kinderhook**”), Kinderhook Industries, LLC (“**Kinderhook Industries**”) and the other defendants in the PCGC Litigation, including but not limited to Palmetto Distributors of Orangeburg, LLC, Express Lane, LLC, Joseph E. Carroll, and Foley’s, Inc. and/or any of Blitz’s other PCGC resellers (collectively with Wal-Mart, Kinderhook and Kinderhook Industries, the “**Other Defendants**”).

2. Blitz seeks a temporary restraining order and preliminary injunction extending the automatic stay for PCGC-related claims to Blitz’s largest reseller, Wal-Mart, Kinderhook, Kinderhook Industries and any other Blitz resellers of PCGCs that otherwise would be named as defendants in Future PCGC Actions as well as the Other Defendants. The PCGC-related claims are potentially among the largest unsecured claims pending against the estate.

3. Absent an immediate extension of the stay, Blitz will be forced to continue providing Wal-Mart with defense in pending PCGC Actions, and also to participate in the defense of Wal-Mart at trials beginning April 3, 2012 to protect itself from the risk of indemnification obligations, set-off, collateral estoppel, evidentiary prejudice, and/or *stare decisis*. Key Blitz employees—including Blitz’s General Counsel James R. King, who is integral to both the PCGC Litigation and reorganization—will be diverted from the reorganization effort in these critical early months of its bankruptcy. As a result,

Blitz will be forced to focus its efforts on defending the PCGC Litigation, rather than its chapter 11 reorganization.

4. Blitz also seeks a declaratory judgment that the transfer and consolidation of the PCGC Litigation does not violate the automatic stay.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (G) and (O).

6. Venue in this district is proper pursuant to 28 U.S.C. § 1409.

7. The statutory predicates for the relief requested herein are sections 105, 362(a)(1) and (a)(3) of the Bankruptcy Code and Fed. R. Bankr. P. 7001(7) and (9), and 7065.

THE PARTIES

8. The Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in this Court on November 9, 2011 (the “**Petition Date**”). 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.

9. The Debtors are the industry leader in portable fuel containment. Since its inception as the supplier of the traditional, olive-drab “jerry can” to the U.S. military throughout World War II, Blitz and its predecessor companies have evolved into the producer of the best fuel containment products in the world. Today, the red plastic jerry can is an American icon. Blitz sells its PCGCs through various retailers, including Wal-Mart, which is Blitz’s largest customer. With its global headquarters in Miami,

Oklahoma, the Debtors employ over 250 employees and achieve annual sales of approximately \$80 million.

10. The Other Defendants include: (i) Wal-Mart Stores, Inc.; (ii) Wal-Mart Stores East LP; (iii) Wal-Mart Stores East, Inc.; (iv) MNSP Services Corporation d/b/a Olden Avenue Exxon and Tiger Mart ("**Tiger Mart**"); (v) Stewart's Shops Corporation; (vi) Palmetto Distributors of Orangeburg, LLC; (vii) Express Lane, LLC; (viii) Foley's Inc.; (ix) Discovery Plastics; (x) PSE&G Services Corp.; (xi) Rheem Manufacturing Co.; (xii) Chase Manhattan Bank; (xiii) John Doe Mortgage Lender Home Inspector; (xiv) John Doe Installation Co.; (xv) John Doe Retailer; (xvi) John Does #1-10; (xvii) ABC Corporations #1-10; (xviii) A.O. Smith Corp.; (xix) Central Hudson Gas & Electric Corp.; (xx) Central Hudson Energy Services, Inc.; (xxi) C.H. Energy Group, Inc.; (xxii) Texas Land and Lakes, Inc.; (xxiii) Bob Martin, d/b/a E-Tex Underwater Services; (xxiv) Maria Alvarado; (xxv) Joseph E. Carroll; (xxvi) Richard Jardine; (xxvii) Robert Jardine; (xxviii) John P. Sullivan; (xxix) Rio Steere, LLC; (xxx) Hurricane Bar & Grill; (xxxi) Ford Motor Company; (xxxii) Deborah Jean Ballew; (xxxiii) Kinderhook Industries, LLC; (xxxiv) Ronney Orso; (xxxv) American Water Heater Co.; (xxxvi) Lawson Investments, LLC (xxxvii) Lawson Industries, Inc.; (xxxviii) Jason Lawson; (xxxix) Atmos Energy Corporation; (xl) Glenn Hurst (xli) Marsha Hurst; (xlii) Kinderhook Capital Fund II, L.P.; (xliii) Western Industries, Inc.; and (xliv) State Industries, Inc.

11. Wal-Mart owns and operates a variety of retail stores that operate under names such as "Wal-Mart" and "Sam's Club."

12. Wal-Mart purchases PCGCs from Blitz for resale to its retail customers pursuant to a Supplier Agreement, dated March 11, 2010 (the "Supplier Agreement"). Wal-Mart is Blitz's largest customer.

13. Defendants Carmen Lopez and Santiago Rosa Guardians ad Litem for Jesus Santiago Rosa, and Carmen Lopez and Santiago Rosa in their own right, and Jesus Santiago Rosa, in his own right, are plaintiffs in the action *Lopez v. MSNP Services Corp.*, No. MER-L-2500-08 currently pending in the Superior Court of Mercer County, New Jersey. Tiger Mart, a third-party defendant in such action, has asserted rights to equitable indemnification against Blitz.

14. Defendants Landon Beadore, by and through his parents, Paul Beadore and Melissa Weeks, and Melissa Weeks and Paul Beadors, individually are plaintiffs in the action *Beadore v. Stewart's Shops Corp.*, No. 20062122 currently pending in the Supreme Court of Saratoga County, New York. Stewart's Shops Corp., A.O. Smith Corp., Central Hudson Gas & Electric Corp., Central Hudson Energy Services, Inc., and C.H. Energy Group, Inc. are defendants in such action.

15. Defendant Christopher Bosse is a plaintiff in an action currently pending in Greg County, TX State Court, Cause No. 2009-372-A.

16. Defendant Miguel Barrera, individually, and as Personal Representative of the Estate of Sixialfredo Barrera, is a plaintiff in the action *Barrera v. Wal-Mart Stores, Inc.*, No. Cv-2009-04375 currently pending in the District Court of Lea County, New Mexico. Wal-Mart, a third-party defendant in such action, has asserted rights to indemnification or contribution against Blitz and has tendered its defense to Blitz.

17. Defendant Chad Funchess is the plaintiff in the action *Funchess v. Blitz, U.S.A., Inc.*, No. 2009CP3801257 currently pending in the Court of Common Pleas of Orangeburg County, SC. Palmetto, Express, Carroll, and Foley's, all third-party defendants in such action, have asserted rights to equitable indemnification against Blitz.

18. Defendant Randall Johnson is the plaintiff in the action currently pending in San Diego State Court, CA, Case No. 37-2009-00061581-CU-PO-NC.

19. Defendants Jerry C. Barnett and Daniel R. Fulton are the plaintiffs in the action *Barnett v. Blitz U.S.A., Inc.*, No. 3:09-cv-00366, currently pending in the United States District Court for the Southern District of Mississippi. Wal-Mart, a third-party defendant in such action, has asserted rights to indemnification or contribution against Blitz and has tendered its defense to Blitz.

20. Defendant Jasmine Alexis Ballew, a minor, by and through her Guardian ad Litem, Karen Britt Peeler and Jasmine Ballew, are plaintiffs in the action *Ballew v. Blitz U.S.A., Inc.*, No. 10-CVS-691, currently pending in the Superior Court of Gaston County, North Carolina. Wal-Mart, a third-party defendant in such action, has asserted rights to indemnification or contribution against Blitz and has tendered its defense to Blitz.

21. Defendant Dennies Thornton, a minor, by and through his next friend and father, David Thornton, is a plaintiff in the action pending in Circuit Court of Mobile County, AL, CV# 09-902481.

22. Defendants Jessica Fenn and Jeremiah Fenn, Sr., individually and on behalf of their deceased son and daughter, Jeremiah Fenn, Jr. and Ja'El Fenn, are

plaintiffs in the action currently pending in Superior Court Dougherty County, GA, Civil Action No. 11.

23. Defendant Kaylee Freeland, a minor, is the plaintiff in the action pending in Mercer Circuit State Court, Kentucky, Civil Action No. 10-CI-00437.

24. Defendant Tabitha Alexson as Natural Guardian and Next Friend for Ethan Grooms is a plaintiff in the action pending in U.S. District Court for South Carolina, No. 4:11-cv-01327.

25. Defendants Dylan J. Trevino, a minor, suing by his Next Friend and Guardian, Diana Trevino, and Diana Trevino, individually, are plaintiffs in the action pending in U.S. District Court for the Middle District of Tennessee, No. 1:10-cv-00115. Kinderhook Capital Fund II, L.P. is included in such action.

26. Defendant Robert Jacoby is the plaintiff in the action *Robert Jacoby v. Blitz U.S.A., Inc.*, No. 1:10-cv-03075, currently pending in the United States District Court for the District of Oregon. Wal-Mart, a third-party defendant in such action, has asserted rights to indemnification or contribution against Blitz and has tendered its defense to Blitz.

27. Defendant Karen Gueniot-Kornegay, Individually, and on Behalf of All of the Wrongful Death Beneficiaries of Matthew Dylan Kornegay is the plaintiff in the action *Gueniot-Kornegay v. Blitz U.S.A., Inc.*, No. 3:10-cv-429, which is currently pending in the United States District Court for the Southern District of Mississippi. Wal-Mart, a third-party defendant in such action, has asserted rights to indemnification or contribution against Blitz and has tendered its defense to Blitz. Pending before the court

is a motion to amend the complaint, adding, *inter alia*, third-party defendants Kinderhook Industries, LLC and Kinderhook Capital Fund II, L.P.

28. Defendant Robyn Smith, for Devan VanBrunt, a Minor, by his mother and natural guardian is the plaintiff in the action *Smith v. Blitz U.S.A., Inc.*, No. 0:11-cv-01771, currently pending in the District Court of Clay County, Minnesota. Wal-Mart, a third-party defendant in such action, has asserted rights to indemnification or contribution against Blitz and has tendered its defense to Blitz.

29. Defendant Mary Jo Pierce for B.P., a minor, by his Mother and Natural Guardian, is a plaintiff in the action currently pending in U.S. District Court for the Southern District of Indiana, No. 1:11-cv-01022.

30. Defendant State Farm Lloyds, as subrogee of Eric and Tammy Balch, is a plaintiff in the action currently pending in U.S. District Court for the Western District of Texas, No. 6:10-cv-00284.

31. Defendant Richard L. Yim, Jr. is the plaintiff in the action *Yim v. Wal-Mart Stores, Inc.*, No. 4:11-cv-01578, currently pending in the United States District Court for the Eastern District of Missouri. Wal-Mart, a third-party defendant in such action, has asserted rights to indemnification or contribution against Blitz and has tendered its defense to Blitz.

32. Defendant Christopher Droney is the plaintiff in the action *Droney v. Blitz U.S.A., Inc.*, No. 6:11-cv-01320-TMC, currently pending in the United States District Court of South Carolina. Wal-Mart, a third-party defendant in such action, has asserted rights to indemnification or contribution against Blitz and has tendered its defense to Blitz.

33. Defendants Curtis Ward and Kenneth Ward are the plaintiffs in the action *Ward v. Blitz U.S.A., Inc.*, No. 1:11-cv-00039, currently pending in the United States District Court for the Middle District of Georgia. Wal-Mart, a third-party defendant in such action, has asserted rights to indemnification or contribution against Blitz and has tendered its defense to Blitz.

34. Defendants Sherri Purvis Individually and as Next Friend and Natural Guardian for James C. Purvis, are the plaintiffs in the action *Purvis v. Blitz U.S.A., Inc.*, No. 7:11-cv-00111, currently pending in the United States District Court for the Middle District of Georgia. Wal-Mart, a third-party defendant in such action, has asserted rights to indemnification or contribution against Blitz and has tendered its defense to Blitz.

35. Defendants Amanda Burch, individually and as Next Friend and Natural Guardian for Timothy Burch, is the plaintiff in the action *Burch v. Blitz U.S.A., Inc.*, No. 5:11-cv-00084, currently pending in the United States District Court for the Southern District of Georgia. Wal-Mart, a third-party defendant in such action, has asserted rights to indemnification or contribution against Blitz and has tendered its defense to Blitz.

36. Defendant Wade Guilford is the plaintiff in the action *Guilford v. Blitz U.S.A., Inc.*, No. 5:11-cv-00336, currently pending in the United States District Court for the Northern District of Florida. Wal-Mart, a third-party defendant in such action, has asserted rights to indemnification or contribution against Blitz and has tendered its defense to Blitz.

37. Defendant Lori Shickel, both individually and as Mother and Next Friend of Jordan Shickel, a minor, is the plaintiff in the action *Shickel v. Blitz U.S.A., Inc.*, No. 3:11-cv-03380, currently pending in the United States District Court for the Central

District of Illinois. Wal-Mart, a third-party defendant in such action, has asserted rights to indemnification or contribution against Blitz and has tendered its defense to Blitz. Kinderhook Capital Fund II, L.P. is also a third-party defendant in this action.

38. Defendants identified in paragraphs 13 through 37, and any claimant with regard to a future PCGC Action, will be collectively referred to as the “**PCGC Claimants.**”

FACTUAL BACKGROUND

Nature of Claims

39. The PCGC Claimants have brought product liability actions relating to Blitz PCGCs. The PCGC Claimants allege personal injury and/or death as a result of fires or explosions that allegedly arose when Blitz PCGCs were used or stored in the vicinity of fire or other combustion sources.

40. Blitz and/or Wal-Mart have been named in thirty-five pending PCGC actions. Thirty-three (33) of these actions name Blitz as a defendant; eleven (11) name both Blitz and Wal-Mart; and two (2) name Wal-Mart but not Blitz. Aside from Wal-Mart, the Other Defendants are named in eleven (11) actions in which Blitz has been named as a defendant.

41. Plaintiffs in the PCGC Litigation typically have alleged that their respective PCGCs exploded when they were using it to pour or “splash” gasoline onto an existing fire or burning embers to facilitate combustion. Plaintiffs have alleged that when the gasoline from their open Blitz PCGCs comes in contact with the existing flame or other ignition source, gasoline vapors outside of their PCGCs ignite and the flame follows the vapor trail back inside the container causing it to explode. These plaintiffs have alleged that these explosions would be eliminated through the use of a metal flame

arrestor. In certain cases the plaintiffs also allege that Blitz's cans were manufactured defectively, thereby making an explosion more likely.

42. So-called "flame arrestors" consist of wire mesh that is inserted at the opening of the PCGC or its spout. According to the PCGC Claimants, flame arrestors absorb and dissipate the heat of fire travelling into the can, thereby preventing fire from entering the can and cause an explosion.

43. Blitz disputes that any of the PCGC Claimants' alleged injuries were caused by explosions *within* the PCGCs at issue, but rather represent ignition at the point of contact between the fire and gasoline being poured onto the fire or vapors in the air near the fire. Therefore, even if a flame arrestor otherwise functioned in the manner alleged by the PCGC Claimants, it would do nothing to stop the PCGC Claimants' alleged injuries. Blitz also disputes the PCGC Claimants' allegations concerning the commercial practicality of adding a flame arrestor, including their representations concerning cost. Blitz further contends that adding a flame arrestor may increase the risk of injury to persons using the product as directed. Upon information and belief, explosions may occur from static electricity that builds up from the introduction of metal into an ungrounded can, causing static "sparks" outside the PCGC.

44. Not a single manufacturer of plastic PCGCs for gasoline storage includes a metal flame arrestor in its PCGCs.

45. The PCGC Claimants have alleged that Blitz failed to adequately warn them of the risks of using or storing a PCGC near a flame or combustion source and/or the risks of allowing children access to Blitz PCGCs.

46. Blitz PCGCs contain a warning, which is embossed in elevated plastic on one side of the can, and states as follows:

DANGER - EXTREMELY FLAMMABLE
VAPORS CAN EXPLODE
HARMFUL OR FATAL IF
SWALLOWED

IF SWALLOWED, DO NOT INDUCE VOMITING.
CALL PHYSICIAN IMMEDIATELY - KEEP OUT
OF REACH OF CHILDREN - AVOID PRO-
LONGED BREATHING OF VAPORS - DO NOT
SIPHON BY MOUTH - DO NOT STORE IN
VEHICLE OR LIVING SPACE - STORE AND
USE IN WELL VENTILATED AREA - VAPORS
CAN BE IGNITED BY A SPARK OR FLAME
SOURCE MANY FEET AWAY - KEEP AWAY
FROM FLAME, PILOT LIGHT, STOVES,
HEATERS, ELECTRIC MOTORS, AND OTHER
SOURCES OR IGNITION - KEEP CONTAINER
CLOSED - PLACE CONTAINER ON GROUND
WHEN FILLING

47. The warning embossed on Blitz PCGCs is virtually identical to the exemplar warning provided in ASTM F839 (Standard Specification for Cautionary Labeling of Portable Gasoline Containers for Consumer Use), which the ASTM describes as follows: "This specification establishes nationally recognized requirements for the cautionary information to be placed on the label of portable gasoline containers for consumer use. It is not the intent of this specification to include any other labeling requirements, such as those set forth in Federal Hazardous Substances Act (FHSA) or other applicable regulations and standards."

48. In addition to the warning embossed on the side of its PCGCs, Blitz PCGCs also contain an affixed sticker, which includes step-by-step written and pictorial instructions for the can's use, and also additional warnings, including: (i) "KEEP OUT

OF REACH OF CHILDREN”, (ii) “CAUTION: Never use gas to start fire. May cause severe injury or death.”

49. Recently, the National Gasoline Safety Project, an outreach of the Portable Fuel Can Manufacturers Association (of which Blitz is a member) has also placed hangtags on new portable gasoline fuel containers sold in the United States to “remind parents that gas and fire never mix.” The tags prominently feature firefighters and invite the purchaser to visit www.stopgasfires.org, which contains fire-safety information. Blitz’s PCGCs contain these warning tags.

50. The PCGC Actions against Blitz and/or Wal-Mart and the Other Defendants turn on identical legal theories, factual allegations, and defenses, including:

- **Causation.** In every pending PCGC Action, a person allegedly was injured while using or storing a PCGC near an open flame or combustion source. A preliminary issue, therefore, is whether the PCGC Claimants’ alleged injuries were caused by fuel from Blitz’s PCGC or the independent fire source;

- **Defective Design.** Whether the PCGCs at issue were “defectively designed” by Blitz. This issue involves questions of law (i.e. can a warning, which exceeds the pronouncements of the ASTM, be inadequate as a matter of law) and issues of fact (i.e. comparing the risks and costs from adding a “flame arrester” with the benefits claimed by PCGC Claimants determining what circumstances, if any, can give rise to an explosion inside of Blitz PCGC, etc.);

- **Adequacy of Warning.** Whether warnings provided by Blitz and Wal-Mart were adequate. This issue involves consideration of (a) whether the warnings imprinted on, and attached to, Blitz’s PCGCs adequately described the risks of misuse; (b) whether the label imprinted on the side of Blitz’s PCGCs was printed in a manner that allowed users to see and read the warning; and (c) whether Wal-Mart reasonably relied upon Blitz’s warning to downstream purchasers;

- **Manufacturing Defect.** Whether Blitz’s manufacturing and quality control processes were adequate to ensure that its products were designed according to specifications and with the commercially reasonable quality for their intended use as fuel containers;

- **Daubert Challenges.** Whether the PCGC Claimants' experts on product defect, causation, and damages are qualified and/or basing their opinions on relevant and reliable methods and data; and

- **Apportionment of Liability.** If Blitz and/or Wal-Mart or the Other Defendants are otherwise liable to any of the plaintiffs, then the Court must address the appropriate allocation of responsibility between Blitz and Wal-Mart or the Other Defendants.

- **Veil Piercing.** Allegations against Kinderhook are limited to piercing the corporate veil. The complaints in these cases do not allege that Kinderhook designed, manufactured or sold PCGC and, therefore, seek only to hold Kinderhook liable to the extent that the Debtors are liable.

51. Blitz's sales to Wal-Mart are made pursuant to the Supplier Agreement.

The Supplier Agreement requires Blitz to defend and indemnify Wal-Mart for certain claims brought against Wal-Mart on account of Blitz PCGCs:

14. INDEMNIFICATION. Supplier shall protect, defend, hold harmless and indemnify Company, including its officers, directors, employees and agents, from and against any and all lawsuits, claims, demands, actions, liabilities, losses, damages, costs and expenses (including attorneys' fees and court costs), regardless of the cause or alleged cause thereof, and regardless of whether such matters are groundless, fraudulent or false, arising out of any actual or alleged: (b) Death of or injury to any person, damage to any property, or any other damage or loss, by whomsoever suffered, resulting or claimed to result in whole or in part from any actual or alleged use or latent or patent defect in such Merchandise, including but not limited to (i) any actual or alleged failure to provide adequate warnings, labeling or instructions, (ii) any actual or alleged improper construction or design of said Merchandise, or (iii) any actual or alleged failure of said merchandise to comply with specifications or with any express or implied warranties of Supplier...

52. In every pending PCGC Action where Wal-Mart has been named as a defendant, it has tendered the defense of the litigation to Blitz, and Blitz has accepted tender of claims relating to its product.

53. The Supplier Agreement further contains provisions concerning Wal-Mart's cooperation in the defense of any such claims:

Supplier ... shall immediately take such action as may be necessary or appropriate to protect the interests of Company, its officers, directors, employees and agents. Any and all counsel selected or provided by Supplier to represent or defend Company or any of its officers, directors, employees or agents shall accept and acknowledge receipt of Company's Indemnity Counsel Guidelines, and shall conduct such representation or defense strictly in accordance with such Guidelines. If the Company in its sole discretion shall determine that such counsel has not done so, or appears unwilling or unable to do so, Company may replace such counsel with other counsel of Company's own choosing. In such event, any and all fees and expenses of Company's new counsel together with any and all expenses or costs incurred on account of the change in counsel, shall be paid or reimbursed by Supplier as part of its indemnity obligation hereunder

54. The Supplier Agreement also provides that Wal-Mart may setoff certain amounts that it is owed under the Supplier Agreement against its payables to Blitz:

5. SET-OFF; RESERVATION OF ACCOUNT; CREDIT BALANCE. Company may set off against amounts payable under any Order² all present and future indebtedness of Supplier to Company arising from this or any other transaction whether or not related hereto....

55. Aside from Wal-Mart, other of the Other Defendants have asserted or may assert a contractual or non-contractual basis for demand of indemnity and/or defense from Blitz.

56. To the extent that the PCGC Litigation is allowed to proceed, or Future PCGC Actions are allowed to be commenced against Wal-Mart or Other Defendants, the Debtors not only may be required to pay for Wal-Mart's defense and provide employees to aid in Wal-Mart's defense, but may also be liable (through setoff or otherwise) for any amounts that Wal-Mart or others are required to pay to PCGC claimants on account of such claims.

² "Order" is defined in the Purchase Agreement as "any written or electronic purchase order issued by the Company [Wal-Mart]."

57. To date, Blitz has tried two PCGC-related cases to verdict. The first case *Green v. Blitz U.S.A., No. 2:07-cv-372 (N.D. Texas, Marshall Division)* was tried to a complete defense verdict in Marshall Texas in 2008. The second case, *Calder v. Blitz, USA, No. 2:07-cv-00387 (Dist. Utah)*, was tried before a jury in November 2010. In the *Calder* action—where the plaintiff, an adult man, admitted that he “splashed” gasoline from an open Blitz PCGC onto burning embers in a trailer stove in the presence of his two infant children—the jury concluded that the can at issue was a Blitz product; that Blitz was 70% liable; and the plaintiff, Mr. Calder, was 30% liable. The jury awarded \$6.17 million in total damages, including \$3 million for the death of one of Mr. Calder’s children. After apportionment of fault, Blitz’s share of the award was approximately \$4.32 million.³ In recent years, Blitz’s insurance carriers also settled several lawsuits.

58. The *Calder* judgment and Blitz’s experience with regard to the settlement of PCGC claims suggest that the claims of the PCGC Claimants and Wal-Mart could be among the largest unsecured claims asserted against Blitz’s estate, and thus could have a substantial impact on Blitz’s estate and reorganization, including determinations relating to feasibility of any plan of reorganization. Further, Wal-Mart and other retailers are insureds under Blitz’s commercial liability insurance policies. If the PCGC Litigation is allowed to proceed against Wal-Mart or other retailers, coverage otherwise available to Blitz could be depleted in defending or settling matters for Wal-Mart or other retailers. This would reduce the amount of insurance coverage available to jointly settle litigation as part of the reorganization plan. To the extent that the PCGC Litigation were allowed

³ Blitz has appealed the *Calder* judgment to the United States Circuit Court of Appeals for the Tenth Circuit and is confident that it will prevail.

to proceed against other of the Other Defendants, Blitz could be exposed to the risk of collateral estoppel or other adverse determination of underlying liability.

Current Status of PCGC Litigation

59. There are thirty-six (36) PCGC cases pending in twenty-seven (27) jurisdictions around the country. Of the thirty-five (35) suits pending against Blitz and/or Wal-Mart, fourteen have trial dates. Discovery is in the intermediate stages and ongoing in all but three (3) of the fourteen cases where trial dates have been set. Most of the remaining twenty-one actions where a trial date has not been set are in the early stages of discovery. (*Id.*)

60. Of the thirteen (13) suits pending against Wal-Mart, five (5) have trial dates. *Jacoby* (United States District Court for the District of Oregon) is set for trial on April 3, 2012; *Dronney* (United States District Court for the District of South Carolina) is set for trial on April 4, 2012; *Ward* (United States District Court for the Middle District of Georgia) is set for trial on October 1, 2012; *Barnett* (United States District Court for the District of Mississippi) is set for trial on October 1, 2012; and *Gueniot-Korneguy* (United States District Court for the Southern District of Mississippi) is set for trial on November 5, 2012. The remaining eight (8) actions are all in various stages of discovery, and most of these are in the early stages of discovery.

61. Blitz's participation in discovery in the thirty (30) actions where discovery is ongoing will likewise result in irreparable harm to Blitz, by, *e.g.*, depleting its estate and distracting key personnel from the Debtors' reorganization process.

Future Suits

62. Blitz continues to manufacture PCGCs for sale through Wal-Mart and other resellers. The number of such claims is likely to increase as soon as notice of any bar date in these chapter 11 cases issues.

Potential Impact of Litigation On Estate

63. The continued pursuit of the actions brought by the PCGC Claimants will irreparably harm Blitz and its bankruptcy estate.

64. *First*, the defense of the PCGC Litigation will divert employees who are key to Blitz's reorganization efforts.

65. For example, Blitz's General Counsel, James R. King, has been overseeing the PCGC Litigation for Blitz since its inception and is responsible for maintaining Blitz's defenses and the coordinated defense efforts of Blitz and Wal-Mart in PCGC cases. Mr. King is integral to developing the factual and legal defenses to the litigation; the preparation of Blitz's responses to interrogatories relating to the PCGC Litigation; the coordination of document collections; and the identification and preparation of fact witnesses and designees to testify as witnesses under Federal Rule of Civil Procedure 30(b)(6) or state equivalents.

66. Mr. King's time and attention are essential to Blitz's reorganization efforts. As General Counsel, Mr. King is overseeing the reorganization of Blitz and the other Debtors. Among other things Mr. King is responsible for directing the resolution of Blitz's liabilities through the reorganization process.

67. Blitz is subject to discovery in various of the actions. Moreover, PCGC Claimants have noticed the depositions of approximately 12-15 employees of Blitz in cases where Wal-Mart is named as a defendant. In order to prepare, they will be required

to read numerous documents and interview a variety of people (including both counsel and other Blitz employees).

68. In sum, the prosecution of the PCGC Litigation will divide the attention of these and other witnesses and Blitz's managers with responsibility for litigation, thus compromising their availability to the Debtors and impeding the Debtors' reorganization efforts.

69. **Second**, as explained above, the continued prosecution of the PCGC Litigation including as against Wal-Mart threatens to deplete assets of the estate—through, *e.g.*, the costs of defending Wal-Mart pursuant to its tendered defense in the thirteen (13) PCGC-related actions where it is named as a defendant; indemnification of Wal-Mart for damages or other amounts paid on account of PCGC-related claims, which Wal-Mart may seek to set-off against the approximately \$4 million that it owes the Debtors' estate; and cooperating and participating in the PCGC litigation—that would otherwise be available to Blitz.

70. **Third**, upon information and belief, the PCGC Claimants allege identical claims against Blitz and Wal-Mart and intend to use the same expert witnesses against each entity. Rulings with respect to key issues in one jurisdiction therefore may be shopped to other jurisdictions. Resolution of these claims against Wal-Mart poses the threat of collateral estoppel, and/or evidentiary prejudice against Blitz.⁴

71. **Fourth**, even if Blitz was not collaterally estopped or otherwise bound by legal or factual determinations made in any PCGC Litigation that otherwise would proceed during the pendency of the chapter 11 cases, a finding that other defendants were

⁴ While Blitz Corporation and Wal-Mart intend to vigorously contest such claims, plaintiffs and other parties are likely to raise them.

liable on identical claims and facts could severely prejudice the (currently stayed) litigation against Blitz on those identical claims based on identical evidence. For example, in subsequent litigation, Wal-Mart, as a co-defendant whose liability is premised upon Blitz's actions, may be estopped from denying any liability finding against it, thereby effectively binding Blitz. As a practical matter, the Debtors risk material prejudice in their defense of cases against them if causes of action against Wal-Mart, Kinderhook or any other defendant were to proceed now and without the Debtors' active participation.

72. ***Finally***, Blitz expects to request that the United States District Court for the District of Delaware transfer the PCGC Litigation for consolidation before it. Blitz anticipates seeking common issues adjudication and/or estimation of PCGC-related claims for purposes of the Debtors' chapter 11 plan. To the extent that the PCGC Litigation is not stayed, there is a risk of inconsistent findings in the disparate actions, thereby interfering with the Debtors' plan of seeking the efficiencies of consolidated adjudication.

COUNT ONE
(Automatic Stay Declaratory Judgment)

73. Plaintiff repeats and re-alleges the allegations contained in the preceding paragraphs of this Complaint as if fully set forth herein.

74. Blitz seeks an order under sections 362(a)(1) and (a)(3) of the Bankruptcy Code extending the automatic stay to Wal-Mart, Kinderhook, Kinderhook Industries and the Other Defendants until the effective date of a plan of reorganization in the underlying chapter 11 case or final order of this Court.

75. Section 362(a)(1) of the Bankruptcy Code operates as a stay, “applicable to all entities,” of “the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.” 11 U.S.C. § 362(a)(1).

76. Section 362(a)(3) of the Bankruptcy Code prohibits “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” 11 U.S.C. § 362(a).

77. Under section 362 of the Bankruptcy Code and by virtue of the Debtors having filed their chapter 11 petitions commencing their reorganization cases, there is in place an automatic stay of any act to collect, assess, or recover a claim against Blitz that arose before the commencement of the case under chapter 11.

78. As explained above, continued prosecution of the PCGC Litigation against the Other Defendants or the initiating of Future PCGC Actions against the Other Defendants will have an immediate, adverse impact on the Debtors’ estates, and the Debtors have an identity of interest with the Other Defendants for purposes of the relief sought in this Complaint. Accordingly, the automatic stay should be extended to the Other Defendants.

COUNT TWO
(Injunction Under Section 105)

79. Plaintiff repeats and re-alleges the allegations contained in the preceding paragraphs of this Complaint as if fully set forth herein.

80. Blitz seeks an injunction staying the continued prosecution of the PCGC Litigation and enjoining the initiation of Future PCGC Actions under section 105(a) of the Bankruptcy Code until the effective date of a plan of reorganization in Blitz's chapter 11 case or further order of this Court.

81. Section 105(a) of the Bankruptcy Code authorizes the court to issue "any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Relief under section 105 of the Bankruptcy Code is particularly appropriate in a chapter 11 case when necessary to protect a debtor's ability to effectively confirm a plan of reorganization and to preserve the property of the Debtor's estates. A bankruptcy court may, therefore, in its discretion stay actions under section 105.

82. There is a substantial likelihood that Blitz will be able to confirm a plan of reorganization if its key officers, directors, and employees are permitted to focus on restructuring, unimpeded by the diversion and drain on their time and resources occasioned by the defense of the PCGC Litigation.

83. If the PCGC Litigation is allowed to proceed, Blitz will experience irreparable harm, as any continued litigation will expose Blitz to risk of collateral estoppel, indemnification claims and/or evidentiary prejudice. Blitz will also suffer irreparable harm by being forced to develop the factual and legal defenses to the

litigation, participate in discovery and expend resources and management time on discovery rather than reorganization.

84. Continuing the PCGC Litigation will also diminish Blitz's prospects for successfully confirming a plan, will deplete property of the Blitz's chapter 11 estate, and will distract key Blitz personnel from the process of reorganization.

85. Defendants will not be harmed, because this order would simply stay the litigation until the Debtors emerge from bankruptcy. In addition, the Debtors intend to use the stay to pursue a consolidation strategy of resolving all PCGC Litigation against Blitz and other entities in the United States District Court for the District of Delaware. This may well advance, rather than delay, the ultimate resolution of the PCGC Litigation against Blitz and the related entities.

86. The injunctive relief requested herein will serve the public interest by promoting compliance with the Congressional purpose of the automatic stay, furthering Blitz's reorganization efforts, and facilitating a resolution of the PCGC Litigation claims in a more efficient, effective and fair manner.

87. Based on the foregoing, Blitz seeks an injunction under section 105(a) of the Bankruptcy Code enjoining and prohibiting the continued prosecution of the PCGC Litigation and Future PCGC Actions.

88. No prior application for the relief requested herein has been made to this or any other court.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays the Court to enter an order:

A. declaring that section 362(a)'s automatic stay extends to the commencement or continuation of PCGC Litigation or Future PCGC Actions against the

Other Defendants until the effective date of a plan of reorganization in the underlying chapter 11 cases or final order of this Court;

B. enjoining the commencement or continuation of PCGC Litigation or Future PCGC Actions against the Other Defendants pursuant to section 105(a) until the effective date of a plan of reorganization in the underlying chapter 11 case or final order of this Court;

C. declaring that Blitz's efforts to remove and transfer the PCGC Litigation to the United States District Court for the District of Delaware are not subject to the automatic stay, including removal and transfer of claims against Wal-Mart, Kinderhook and the Other Defendants;⁵

D. enjoining any party from seeking discovery from the Debtors in the PCGC Litigation until the effective date of a plan of reorganization in the underlying chapter 11 case or final order of this Court; and

E. authorizing such further relief as deemed necessary by the Court.

⁵ Blitz believes that removal and transfer under 28 U.S.C. § 157(b)(2)(5) is a ministerial act not subject to the stay. Blitz requests this declaration only out of an abundance of caution, and not because such a declaration is required prior to removal and transfer.

Dated: November 9, 2011
Wilmington, Delaware



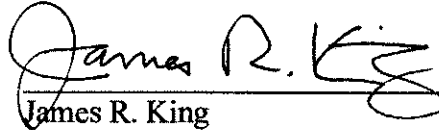
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VERIFICATION

The undersigned, James R. King, herein states that he is authorized to make this verification on behalf of Blitz U.S.A., Inc., he has read the complaint and is familiar with its contents, and the matters stated therein are true to the best of his knowledge, information and/or belief.

Executed on November 8, 2011


James R. King