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. 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	Adv. Proc No. 11-53578 (PJW)

[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.

MEMORANDUM OF LAW
IN SUPPORT OF BLITZ, U.S.A., INC.'S, *ET AL.'S* MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION STAYING THE PCGC LITIGATION AND FUTURE PCGC ACTIONS AGAINST CERTAIN THIRD-PARTIES

Daniel J. DeFranceschi (No. 2732)
Michael J. Merchant (No. 3854)
Marcos A. Ramos (No. 4450)
Julie A. Finocchiaro (No. 5303)
Amanda R. Steele (No. 5530)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801
Telephone: (302) 651-7700
Facsimile: (302) 651-7701

Dated: November 9, 2011
Wilmington, Delaware

Proposed Attorneys for Plaintiffs

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES & RULES

PRELIMINARY STATEMENT

Blitz U.S.A., Inc., *et al.* (collectively "Blitz" or the "Debtors") submit this memorandum of law in support of their motion for a temporary restraining order and injunction and extension of the automatic stay to enjoin the commencement and continuation of the Portable Consumer Gasoline Container ("PCGC") Litigation[1] and Future PCGC Actions against Wal-Mart Stores, Inc. and its affiliates ("Wal-Mart"), and other third party defendants, including Kinderhook Capital Fund II, L.P. ("Kinderhook") which is a majority shareholder in Debtor LAM Holdings, LLC ("LAM"), Kinderhook Industries, LLC ("Kinderhook Industries"), which provides management services to Kinderhook and Debtors and/or any other resellers of Blitz's allegedly defective PCGCs (the "Motion").

The Motion arises out of a series of product liability lawsuits that allege personal injuries and/or death from explosions that allegedly occurred when Blitz PCGCs containing gasoline were used improperly in the vicinity of fires or other combustion sources. Wal-Mart is Blitz's largest customer. Wal-Mart has been named as a defendant with Blitz in eleven (11) of the thirty-three (33) pending PCGC cases against Blitz; it also is the sole defendant in two other PCGC cases. *See Declaration of James R. King in Support of Blitz U.S.A., Inc.'s Motion for a Temporary Restraining Order and Preliminary Injunction Staying the PCGC Litigation and Future PCGC Actions Against Wal-Mart, Inc. and Blitz's Other Retailers* ("King Declaration"), Exhibit A. Recently,

[1] The terms "PCGC Litigation" and "Future PCGC Actions" have the meaning given to them in Blitz's Motion for a Temporary Restraining Order and Preliminary Injunction Staying the PCGC Litigation and Future PCGC Actions Against Third-Party Defendants (the "**Motion**"), filed contemporaneously herewith.

the plaintiffs in the PCGC Litigation started naming Kinderhook as a defendant.[2] Certain of Blitz's other alleged resellers have also been named in other of the PCGC Litigation.[3] The PCGC Litigation claims are potentially among the largest unsecured claims pending against the estate.

Blitz and its affiliated debtors filed for bankruptcy on November 9, 2011, and accordingly are protected by the automatic stay from the prosecution of pending PCGC Litigation or Future PCGC Actions. However, the PCGC Claimants may continue to litigate against the Other Defendants, including Wal-Mart and Kinderhook. This continued litigation against the Other Defendants adversely impacts the Debtors' estate and threatens the Debtors with irreparable harm. As explained in more detail below, litigation against Wal-Mart or Kinderhook risks subjecting Blitz to contractual indemnification obligations that, in the case of Wal-Mart, may be set off against amounts owed to the Debtors' estate and will deplete the Debtors' estate through requirements that Blitz defend Wal-Mart and participate in its defense. The Other Alleged Resellers have similarly asserted common law and statutory indemnification rights against Blitz. Additionally, litigation generally against the Other Defendants will divert key personnel from the Debtors' reorganization efforts and threaten the Debtors with potential collateral

---

[2] One PCGC Litigation plaintiff recently sought leave to amend her complaint to add Kinderhook Industries as a defendant.

[3] The Other Alleged Retailers are named as defendants in the following cases: *Funchess v. Blitz, U.S.A., Inc., Palmetto Distributors of Orangeburg, LLC, Express Lane, LLC, Joseph E. Carroll, and Foley's, Inc.*, No. 5:10-cv-01634 (USDC S.C.) ("*Funchess*") and *Lopez v. MNSP Services Corp. d/b/a Olden Avenue Exxon & Tigermart; PSE&G Services Corp., Rheem Manufacturing Co., Chase Manhattan Bank, John Doe Mortgage Lender Home*, No. MER-L-2500-C18 (Mercer County, TX) ("*Lopez*"). The PCGC cases brought by Plaintiffs Funchess and Lopez name the following alleged resellers as defendants: Palmetto Distributors of Orangeburg, LLC, Express Lane, LLC, Joseph E. Carroll, Foley's, Inc., and MNSP Services Corporation d/b/a Olden Avenue Exxon & Tigermart (collectively, the "Other Alleged Resellers"). Collectively with Wal-Mart, the defendants or proposed defendants other than Blitz in the PCGC Litigation are referred to as the "Other Defendants".

estoppel and evidentiary prejudice. These risks are imminent; absent an immediate extension of the stay, Blitz will be forced to participate in the defense of a trial against: (1) certain of the Other Alleged Resellers on December 5, 2011, and (2) Wal-Mart beginning April 3, 2012. *See* King Declaration, Exhibit A.

The requested stay will give the Debtors much needed respite from the PCGC Litigation. This respite will allow them to focus on reorganization—thereby fulfilling the fundamental purpose of the automatic stay and chapter 11 of the Bankruptcy Code. The stay will also afford Blitz's counsel the opportunity to implement a consolidated strategy for resolving the PCGC Litigation. Using section 157(b)(5) of title 28, as well as the "related to" jurisdiction of 28 U.S.C. § 1334(b), Blitz intends to remove and transfer the PCGC Litigation to the District Court for the District of Delaware.[4] This would permit all PCGC Litigation claims against Blitz and the Other Defendants to be managed and resolved on a consolidated basis, thereby lessening the Debtors' litigation burdens, minimizing costs to the estates, and preserving judicial resources, with the ultimate goal of addressing the PCGC Litigation as effectively and expeditiously as possible for purposes of plan confirmation.

Blitz respectfully requests that the Court: (1) immediately enter a temporary restraining order staying any pending PCGC Litigation or Future PCGC Actions against any of the Other Defendants and/or Blitz's other resellers; (2) extending the automatic stay of section 362(a) of the Bankruptcy Code to prohibit the commencement or continuation of the PCGC Litigation and Future PCGC Actions against the Other Defendants, or, alternatively, enjoining the PCGC claimants pursuant to section 105(a) of

[4] A motion seeking this relief will be filed in the District Court for the District of Delaware.

the Bankruptcy Code from the commencement or continuation of PCGC Litigation and Future PCGC Actions against the Other Defendants during the pendency of the Debtors' bankruptcy cases; and (3) declaring that the stay does not apply to Blitz's efforts to remove and transfer the PCGC Litigation, including PCGC Litigation against the Other Defendants.[5]

STATEMENT OF FACTS

As described in the First Day Declaration, 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. With its global headquarters in Miami, Oklahoma, the Debtors employ over 250 employees and achieve annual sales of approximately $80 million. *Declaration of Rocky Flick, President and Chief Executive Officer of Blitz U.S.A., Inc. In Support of Debtors' Chapter 11 Petitions and First Day Motions* ("Flick Declaration") at ¶ 9.

A. Nature of Claims

Notwithstanding its industry-leading position and time-tested product-line, the Debtors, their owners, certain of their retailers, and others recently have become the subject of thirty-six (36) pending lawsuits, alleging design and manufacturing defects and failure to warn. The allegations in these cases generally go as follows: Plaintiffs allege that their PCGC exploded when they were pouring gas on an existing fire or on embers to

[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.

start a fire and "[g]asoline vapors outside the subject gas can ignited and the flame flashed back into the container, causing the subject gas can to explode and [plaintiff's] entire body the catch on fire." *See, e.g., Kornegay* Complaint at ¶ 10, attached as King Declaration, Exhibit C.

Plaintiffs claim that these explosions would be eliminated through the use of a metal flame arrestor. *See, id.* at ¶14 ("The subject gas can was defective and unsafe for its intended purpose at the time it left Blitz's control in that the design failed to include a flame arrestor device, which is a necessary safety device that would have prevented Dylan's injuries and subsequent death.").[6] Plaintiffs in some actions also allege manufacturing defects relating to the plastic used in Blitz's PCGCs. *See id.* at ¶33 ("Additionally, the Blitz can suffered from a defect in manufacturing that caused their caps not to fi[t] securely to the can and therefore, to be lost and gasoline stored in the cans to age."); *see, also*, Crouch Complaint at ¶29, attached as King Declaration, Exhibit D ("Additionally, Blitz's can was manufactured in a manner that violated basic quality and testing standards, making the can more likely to rupture.").

[6] A "flame arrestor" consists of wire mesh that is inserted at the opening of the spout of the PCGC. According to plaintiffs, it absorbs and dissipates the heat of fire travelling into the can, thereby preventing fire from entering the can. Blitz disputes plaintiffs' allegations concerning the commercial practicality, including the cost, of adding a flame arrestor. Not a single manufacturer of plastic PCGCs includes a flame arrestor in any of their containers. Blitz also disputes that there is sufficient evidence to show that flame arrestors adequately prevent flames from entering PCGCs and contends, instead, that the introduction of flame arrestor may result in greater risk that explosions may occur from static electricity that builds up from the introduction of metal into an ungrounded can. Blitz also contends that the "explosions" at issue in the PCGC cases do not occur within the can, but rather represent ignition at the point of contact between the fire and gasoline being poured onto the fire. Therefore, even if a flame arrestor otherwise functioned in the manner alleged by plaintiffs, it would do nothing to prevent claimants' injuries.

B. Blitz's Efforts to Warn and Stop the Conduct Giving Rise to PCGC Litigation

Almost without exception, the activities that allegedly gave rise to the alleged injuries in the pending PCGC Litigation were expressly warned against on the side of the Blitz PCGC allegedly at issue and elsewhere. However, despite Blitz's explicit warnings concerning such conduct, plaintiffs in the PCGC Litigation claim that Blitz failed to adequately warn them of the risks of using or storing a PCGC near a flame or combustion source. This is simply not true. 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 OF IGNITION - KEEP CONTAINER
> CLOSED - PLACE CONTAINER ON GROUND
> WHEN FILLING

King Declaration at ¶ 4.[7]

[7] Blitz's warning is virtually identical to the 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."

In early 2008, the Portable Fuel Can Manufacturers Association (of which Blitz is a member) started The National Gasoline Safety Project (the "NGSP") to educate users of PCGCs concerning their proper usage and storage. Flick Declaration at ¶ 16. Since June 2010, the NGSP has placed hangtags on PCGCs sold in the United States to "remind parents that gas and fire never mix." *Id.* 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. *Id.*

Blitz's website also features a separate section, titled "Safety Awareness," which warns that "Gasoline is dangerous and extremely flammable. Carefully read all cautions on all sides of gasoline containers. Review and adhere to the following safety precautions when using your portable fuel container: - KEEP OUT OF REACH OR USE BY CHILDREN! ... - NEVER USE GAS TO START A FIRE. May cause severe injury or death .... - KEEP AWAY FROM HEAT SOURCES ... - Vapors can be ignited by a spark or flame source many feet away..." King Declaration at ¶ 5. Blitz's "Safety Awareness" section also directs individuals to www.burnawarenessweek.org for more information on gasoline safety awareness. *Id.*

C. Common Issues in the PCGC Litigation

Since the PCGCs at issue in the PCGC Litigation were sold by Blitz to its resellers, without any alleged changes or modification by the resellers before sale, common factual and legal issues arise in each case against Blitz and the Other Defendants. These issues include:

- ***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 plaintiff's alleged injuries were caused by fuel from Blitz's PCGC or the independent combustion 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 plaintiffs; determining what circumstances, if any, can give rise to an explosion inside of Blitz PCGC, *etc.*);

- ***Adequacy of Warning.*** Whether warnings provided by Blitz were adequate. This issue involves consideration of whether: (1) the warnings imprinted on, and attached to, Blitz's PCGCs adequately described the risks of misuse; (2) 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 (3) whether the reseller 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 the reseller are otherwise liable to any of the plaintiffs, then the court must address the appropriate allocation of responsibility between Blitz and the respective reseller(s).

D. Current Status of PCGC Litigation and Burden on Blitz

There are thirty-six (36) PCGC cases pending in twenty-seven (27) jurisdictions around the country. King Declaration, Exhibit A. In thirteen of those cases, the plaintiffs have named Wal-Mart, Blitz's largest customer and the retailer where the plaintiffs claim the PCGC at issue was purchased, as a defendant. *Id.* In two of the thirty-six (36) pending PCGC Litigation cases the plaintiffs have named Other Alleged Resellers, which the plaintiffs claim sold the Blitz PCGCs at issue in the respective litigation. *Id.* In two of the thirty-six (36) pending PCGC Litigation cases, plaintiffs have named Kinderhook,

which owns a majority stake in Debtor LAM,[8] (*Id.*), and Kinderhook remains as a defendant in two actions and has been named as an additional defendant in a proposed amended complaint in one other action.

Of the thirty-six (36) suits pending against Blitz and/or Other Defendants, fourteen (14) have trial dates. King Declaration at ¶ 11. For example, *Funchess* (Court of Common Pleas for Orangeburg County, South Carolina) is set for trial on December 5, 2012, *Thornton* (Circuit Court of Mobil County, Alabama) is set for trial on March 26, 2012; *Jacoby* (United States District Court for the District of Oregon) is set for trial on April 3, 2012; *Droney* (United States District Court for the District of South Carolina) is set for trial on April 4, 2012; *Alexson* (United States District Court for the District of South Carolina) is set for trial on June 1, 2012; *Trevino* (United States District Court for the Middle District of Tennessee) is set for trial July 24, 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-Kornegay* (United States District Court for the Southern District of Mississippi) is set for trial on November 5, 2012. King Declaration, Exhibit A. The remaining nine actions are all in various stages of discovery, and most of these are in the early stages of discovery. *Id.*

---

[8] Kinderhook was named as a defendant in the following cases: *Trevino v. Blitz U.S.A., Inc., LAM 2011 Holdings, LLC, f/k/a Blitz Holdings, LLC; Kinderhook Capital Fund II, L.P.; Blitz Acquisition Holdings, Inc.; Blitz Acquisition LLC; and Blitz RE*, No. 1:10-cv-00115 (USDC M.D. Tenn.); and *Shickel v. Blitz U.S.A., Inc., LAM 2011 Holdings, LLC, f/k/a Blitz Holdings, LLC; Kinderhook Capital Fund II, L.P.; Blitz Acquisition Holdings, Inc.; Blitz Acquisition LLC; Blitz RE Holdings, LLC; F3 Brands, LLC; Wal-Mart Stores, Inc.; Wal-Mart Stores East, Inc.; and Wal-Mart Stores East, L.P.*, No. 3:11-cv-03380 (USDC C.D. Ill.). In addition, Kinderhook Industries and Kinderhook are proposed defendants in a pending motion to amend the complaint in *Gueniot-Kornegay v. Blitz U.S.A., Inc.*, No. 3:10-cv-429 (USDC S.D. Miss.).

The impending trials in PCGC Litigation cases threaten Blitz with imminent, irreparable harm. King Declaration at ¶ 11. Because these cases are aimed at determining whether Blitz's PCGC was defectively designed and/or manufactured, it is expected that Blitz's involvement will be necessary to prepare and litigate these actions. As to the remaining actions, counsel for Blitz anticipates that discovery will be extensive and will necessarily implicate the time and resources of Blitz.

E. Potential For Future Suits

In addition to the pending actions, there is a strong likelihood of new filings. Blitz has sold approximately 150 million PCGCs, and Blitz continues to manufacture PCGCs without flame arrestors. Therefore, in addition to claims that have not yet been filed by individuals who already have been injured, there may be individuals who become injured as a result of misuse of Blitz PCGCs after the Petition Date.

F. Potential Impact of Litigation on the Debtors' Estates

The Other Defendants' interests in indemnification, defense, setoff, and/or participation in defense present a substantial threat to the Debtors' estates. In addition, the PCGC Litigation would interfere with the consolidated adjudication of Blitz's PCGC liabilities for purposes of plan confirmation and may result in adverse legal and factual findings that plaintiffs may seek to use against Blitz in this bankruptcy or in subsequent litigation.

1. Blitz's Indemnification of Third-Party Defendants

Blitz's sales to Wal-Mart are made pursuant to a Supplier Agreement, dated

March 11, 2010 (the "Supplier Agreement").[9] King Declaration, Exhibit E. 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...

King Declaration, Exhibit E at ¶ 14. 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. King Declaration at ¶ 13.

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

[9] For the period of time at issue in the PCGC Litigation (i.e. 2002-2010), the relevant portions of Blitz's Supplier Agreement with Wal-Mart were identical to the provisions from the Supplier Agreement quoted herein. King Declaration at ¶ 12. Blitz's sales to other resellers may have been made pursuant to similar agreements. *Id.*

> 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 ....

Id. The Supplier Agreement also provides that Wal-Mart may set off 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 Order[10] all present and future indebtedness of Supplier to Company arising from this or any other transaction whether or not related hereto....

Therefore, to the extent that the thirteen (13) cases against Wal-Mart are allowed to proceed, the Debtors not only may be required to pay for Wal-Mart's defense and provide employees for participation in the cases against Wal-Mart, but may also be liable for any amounts that Wal-Mart is required to pay to PCGC claimants on account of such claims. Wal-Mart may attempt to setoff any such amounts against the approximately $4 million in payables that Wal-Mart currently owes the Debtors.

Blitz also has an obligation to indemnify Kinderhook Industries, LLC ("Kinderhook Industries") pursuant to a Management Agreement dated September 21, 2007, by and among Blitz, Blitz Holdings, LLC (now LAM 2011 Holdings, LLC) and Kinderhook Industries (the "Management Agreement"). Upon information and belief, Kinderhook Industries is the manager of Kinderhook Capital Fund II and provides management services to Blitz and other related entities. Although Kinderhook Industries is not itself a defendant in any case, at least one plaintiff has sought leave to amend her complaint to add Kinderhook Industries as a party.

---

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

The defendants in *Funchess*–where Other Alleged Resellers Palmetto, Express, Mr. Carroll, and Foley's Inc. are named as defendants–each filed answers that assert the following affirmative defenses: (1) the injuries suffered by Mr. Funchess were the sole result of Blitz's negligence; and (2) that Blitz is required to indemnify them under the doctrine of equitable indemnity. King Declaration at ¶ 14. Similarly, in *Lopez*–where plaintiffs have named MNSP Services Corp. d/b/a Olden Avenue Exxon & Tigermart ("Tigermart"), the alleged reseller of the PCGC at issue in that action, as a defendant–Tigermart has filed a third-party complaint seeking full indemnification of any judgment, costs and/or fees from Blitz under the New Jersey Tortfeasors Contribution Law, N.J. Stat. Ann. § 2A:53A-1 (West 2011), *et seq.* and the Comparative Negligence Act, N.J. Stat. Ann. § 2A:15-5.1 (West 2011), *et seq.* King Declaration at ¶ 15.

2. Common Insurance

Wal-Mart and other retailers are insured, in connection with the PCGC Litigation, under Blitz's commercial liability insurance policies. If the PCGC Litigation is allowed to proceed only against Wal-Mart or other resellers, coverage otherwise available to the Debtors' and their estate would be depleted to defend and/or settle claims against the reseller-defendants.

3. Potential Dollar Value of PCGC Judgments and Settlements

To date, Blitz has tried two PCGC cases to verdict. King Declaration at ¶ 7. 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 2008. *Id.* The second case, *Calder v. Blitz*, USA, No. 2:07-cv-00387 (Dist. Utah), was tried before a jury in November 2010. *Id.* In the *Calder* case–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 that the plaintiff, Mr. Calder, was 30% liable for the injuries that he and his family suffered. The jury awarded $6.17 million in total damages, including $3 million for the death of one of Mr. Calder's children and the remainder for Mr. Calder's own injuries. *Id.* After apportionment of fault, Blitz's share of the *Calder* judgment was approximately $4.32 million. *Id.* Blitz has appealed this decision to the United States Circuit Court of Appeals for the Tenth Circuit and is confident that it will prevail. However, this judgment and Blitz's experience with the settlement range for these cases 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.

4. Blitz's Key Employees

Blitz's General Counsel, James R. King, has been overseeing the PCGC Litigation for Blitz since September, 2010, and is responsible for maintaining the coordinated defense efforts of Blitz and Wal-Mart in PCGC cases. King Declaration at ¶ 16. Mr. King also is integral to developing the factual and legal defenses to the PCGC 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. *Id.* at ¶ 17.

Mr. King's time and attention are also essential to Blitz's reorganization efforts. As General Counsel for Blitz, Mr. King assists in the management of the legal issues involved in the reorganization of Blitz and the other Debtors. *Id.* at ¶ 14. Among other things, he will also be responsible for coordinating the resolution of Blitz's liabilities through the reorganization process, including valuation issues associated with the PCGC Litigation. *Id.*

The PCGC Litigation concerns factual issues that can only be addressed by Blitz's representatives and documents, such as the cost and feasibility of adding a flame arrestor to Blitz's PCGCs, the development of Blitz's warnings over time, and the process for manufacturing and ensuring quality in Blitz's products. Therefore, given that Blitz's employees are the individuals who possess most of the knowledge concerning the design and manufacture of its PCGCs, Blitz may be required to prepare and produce witnesses for deposition and trial in cases that are allowed to proceed against the Other Defendants.[11]

ARGUMENT

I. THIS COURT HAS JURISDICTION TO STAY THE PCGC LITIGATION AS TO NON-DEBTORS.

This Court has subject-matter jurisdiction to stay the PCGC Litigation as to non-debtors. The relevant subject matter jurisdiction statute—Section 1334 of Title 28—"is very broad." *Betty Owen Schs., Inc. v. U.S. Dep't of Educ. (In re Betty Owen Schs., Inc.)*, 195 B.R. 23, 28 (Bankr. S.D.N.Y. 1996) (*citing Celotex Corp. v. Edwards*, 514

[11] Blitz's plan to transfer the claims pursuant to § 157(b)(5) will allow the District Court to manage the litigation on a consolidated basis and thereby avoid the harm to Blitz's reorganization that will occur if the PCGC Litigation goes forward in an uncontrolled manner in numerous courts around the country.

U.S. 300 (1995)). It provides in part: "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in ***or related to cases under title 11***." *Lyondell Chem. Co. v. CenterPoint Energy Gas Servs. Inc. (In re Lyondell Chem. Co.)*, 402 B.R. 571, 586 (Bankr. S.D.N.Y. 2009) (quoting 28 U.S.C. § 1334(b)) (emphasis added). In this case, Blitz's request for injunctive relief is "related to" the Debtors' cases under title 11.

The Court of Appeals for the Third Circuit has held that the test for determining whether "related to" jurisdiction exists for claims against non-debtors is whether the action "could have an effect on the estate being administrated in the bankruptcy." *Ezekoye v. Ocean Loan Servicing, LLC (In re Ezekoye)*, 185 Fed. App'x. 181, 185 (3d Cir. 2006). Courts in the Third Circuit have applied this standard to find "related to" jurisdiction where, as here, the claims against a third-party non-debtor:

1) are "factually interwoven" with those of the debtor;[12]

2) would require the debtors participation in defense of the third-party claims;[13] or

3) are brought against a non-debtor that has a contractual right to indemnification from the debtors on account of such claims.

Id.; *see also Belcufine v. Aloe,* 112 F.3d 633, 637 (3d Cir. 1997) (contractual indemnity claims provide a basis for "related to" jurisdiction); *Gerard v. W.R. Grace & Co. (In re W.R. Grace & Co.)*, 115 Fed. App'x. 565 (3d Cir. 2004) (same); *Lane v. Phila. Newspapers, LLC (In re Phila. Newspapers, LLC)*, 423 B.R. 98 (E.D. Pa. 2010) ("related

[12] *See, e.g., Hopkins v. Plant Insulation Co.*, 342 B.R. 703, 710 (D. Del. 2006) (claims against a non-debtor that concerned an alleged defective product that was sold by the debtor were "related to" the bankruptcy, because they were "factually interwoven" with claims against the debtors).

[13] *See, e.g., Lane v. Phila. Newspapers, LLC (In re Phila. Newspapers, LLC)*, 423 B.R. 98, 101-02 (E.D. Pa. 2010) (finding "related to" jurisdiction over claims against the debtors' employees, where the debtor was required to defend and indemnify the employees, because "each piece of litigation costs the company, time money and effort.").

to jurisdiction existed for claims against non-debtor employees of debtors, because 1) "the impact of the litigation on the Debtors' reorganization efforts"; 2) the Debtor's indemnification agreements with non-debtor defendants would affect the Debtors' estate; and 3) "monitoring discovery in the [non-debtor action] will divert the attention of the Debtors' personnel.").

As explained in Section II(B), *infra*, the requested relief "relates to" the Debtors' bankruptcy, because Blitz seeks to stay litigation that would directly deplete the Debtors' estate through its obligations to defend and indemnify one or more of the Other Defendants, and because litigation against the Other Defendants would require the attention of Debtors' key personnel, thereby interfering with their bankruptcy cases. Like the claims against Blitz that have been automatically stayed, the PCGC claims against the Other Defendants also allege that Blitz's product was defective, and therefore are "factually interwoven" with the claims against the Debtors that gave rise to their chapter 11 filing. Courts in this jurisdiction have found "related to" jurisdiction under identical circumstances.

A. Courts Extend the Automatic Stay to Third-Parties Where, as Here, There is An Identify of Interests Between the Debtor and The Third-Party in the Subject Litigation.

The automatic stay is one of the fundamental debtor and creditor protections provided by the Bankruptcy Code. *Krystal Cadillac Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.* (*In re Krystal Cadillac Oldsmobile GMC Truck, Inc.*), 142 F.3d 631, 637 (3d Cir. 1998) (*citing* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296). It gives the debtor a breathing spell from its creditors by stopping all collection efforts, harassment, and foreclosure actions, thus relieving the debtor of the financial pressures that drove it into bankruptcy and facilitating the debtor's

attempts to reorganize. *Id.* For creditors, the automatic stay prevents the state-law "race of the diligent," whereby creditors who act first to pursue their remedies against the debtor's property obtain payment of their claims in preference to and to the detriment of other creditors. As the court remarked in *Gillman v. Cont'l Airlines, Inc.* (*In re Cont'l Airlines*), 177 B.R. 475, 479 (D. Del. 1993):

> The automatic stay is designed 'to protect the debtor from an uncontrollable scramble for its assets in a number of uncoordinated proceedings in different courts, to preclude one creditor from pursuing a remedy to the disadvantage of other creditors, and to provide the debtor and its executives with a reasonable respite from protracted litigation, during which they may have an opportunity to formulate a plan of reorganization for the debtor.'

Id. To that end, the automatic stay operates automatically to stay all judicial actions against a debtor that were, or could have been, brought prior to the commencement of a bankruptcy case. *See Maritime Elec. Inc. v. United Jersey Bank*, 959 F.2d 1194, 1203-04 (3d Cir. 1991).

Consistent with the broad reach Congress intended for the automatic stay, courts have utilized sections 362 and/or 105 of the Bankruptcy Code to extend the automatic stay to non-debtors to enjoin litigation, where, as here, the debtor is the real party in interest and the outcome of the litigation would directly affect the debtor's estate and its efforts to reorganize.[14] *See, e.g., McCartney v. Integra Nat'l Bank N.*, 106 F.3d 506, 510

---

[14] Certain courts in this circuit have concluded that section 362 authorized them to extend the stay to litigation against third-party non-debtors. *See, e.g., McCartney v. Integra Nat'l Bank N.*, 106 F.3d 506 (3d Cir. 1997); *see also In re Aldan Indus., Inc.*, 2000 WL 357719 (Bankr. E.D. Pa. Apr. 3, 2000). Other courts in this circuit have suggested that the two sections of the Code must work in tandem. *See, e.g., Phila. Newspapers, LLC v. Lane (In re Phila. Newspapers, LLC)*, 410 B.R. 404, 412 (Bankr. E.D. Pa. 2009) ("While this may be true if one were to analyze the limits of section 362 on its own—as [plaintiff] does in her Response Brief—it is not the case when one considers - as discussed above, the power that the bankruptcy court has under section 105 to expand the automatic stay to non-debtor parties."); *Am. Film Techs., Inc. v. Taritero (In re Am. Film Techns., Inc.)*, 175 B.R. 847, 855 (Bankr. D. Del. 1994) (holding that the court should exercise its power under §105 to ensure the effectiveness of the command of §362). Another court has suggested that the question is academic because either section provides an independent basis for achieving the same result. *See, e.g., Stanford v. Foamex L.P.*, 2009 WL 1033607 (E.D. Pa. Apr. (Continued...)

(3d Cir. 1997) ("[c]ourts have also extended the stay to non debtor third parties where stay protection is essential to the debtor's efforts of reorganization"); *A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994, 999 (4th Cir. 1986), *cert. denied*, 479 U.S. 876 (1986); (same); *In re Aldan Indus.*, 2000 WL 357719, at *4 (Bankr. E.D. Pa. April 3, 2000) (noting that courts have extended the automatic stay to non-debtor third parties in "unusual circumstances").

Bankruptcy courts extend the automatic stay to proceedings against non-bankrupt defendants when a judgment against the non-debtor would, in effect, be a judgment against the debtor:

> This "unusual situation," it would seem, arises when there is such identity between the Debtor and the Third-Party Defendant that the Debtor may be said to be the real party defendant and that a judgment against the Third-Party Defendant will in effect be a judgment or finding against the Debtor. An illustration of such a situation would be a suit against a third-party who is entitled to absolute indemnity by the Debtor on account of any judgment that might result against them in the case. To refuse application of this statutory stay in that case would defeat the very purpose and intent of this statute.

In re A.H. Robins Co., 788 F.2d at 998-99; *see also Am. Film Techs., Inc. v. Taritero (In re Am. Techns. Inc.)*, 175 B.R. 847, 850 (Bankr. D. Del. 1994) (to refuse application of the automatic stay defeats the very purpose and intent of the Code when there is such identity between the debtor and the third-party defendant that a judgment against the third-party defendant will in effect be a judgment against the debtor).

15, 2009) ("[I]t is unclear whether the Third Circuit views staying an action to aid a debtor's reorganization the result of extending the § 362(a) stay or the result of issuing a separate injunction pursuant to, for example, a district court's inherent power to stay a pending action or a bankruptcy court's power under § 105(a). This issue is academic, however, as the practical effect (i.e., the staying of an action) is the same regardless of the means employed."). For purposes of this Motion, Blitz requests that the Court expand 362 to Wal-Mart's automatic stay and/or use its equitable authority under section 105 to expand section 362's automatic stay to third parties, as it deems appropriate.

Courts in this Circuit have recognized three circumstances where "unusual circumstances" are present and give rise to an identity of interests between the debtor and third-party:

> 1. when the non-debtor owns assets which will either be a source of funds for the debtor or when the preservation of the non-debtor's credit standing will play a significant role in the debtor's attempt to reorganize;
>
> 2. upon a showing that the non-debtor's time, energy and commitment to the debtor are necessary for the formulation of a reorganization plan;
>
> 3. where the relationship between the non-debtor and debtor is such that a finding of liability against the non-debtor would effectively be imputed to the debtor, to the detriment of the estate.

Saxby's Coffee Worldwide, LLC v. Larson (In re Saxby's Coffee Worldwide, LLC), 440 B.R. 369, 379 (Bankr. E.D. Pa. 2009).

For example, in *In re Philadelphia Newspapers, LLC*, 407 B.R. 606, 616 (E.D. Pa. 2009), the court extended the automatic stay to litigation that had been brought against certain of the debtors' employees, based upon its finding that: (1) the debtors owed potential indemnification obligations, such that the interests of the debtors and their employees were identical; and (2) the resources involved in defending the pending actions would divert the debtors' resources and adversely affect the Debtors' attempted reorganization. The court noted as follows:

> Here, the 'unusual circumstances' to warrant the extension of the section 362(a) stay are present. As detailed above, (1) because the Debtors owe potential contractual and common law duties to indemnify the Non–Debtors, the interests of the Debtors and Non–Debtors in the state action are identical, and (2) the diversion of resources caused by the state action against the Non–Debtors will impact the Debtors' ability to engage in timely and effective reorganization. Under the *McCartney* analysis and given that 'unusual circumstances' are present, the extension of section 362(a) stay to the Non–Debtors is warranted.

Id. at 616. Similarly, in *In re American Film Technologies,* 175 B.R. 847 (Bankr. D. Del. 1994), the court extended the § 362 automatic stay to non-debtor directors, basing its decision upon the debtors' agreement to indemnify the non-debtor directors, and also because of potential collateral estoppel effects from such litigation. The court noted as follows:

> I conclude that because of the identity of subject matter, issues and parties involved, the California case squarely implicates [the debtor's] indemnification obligations and exposes it to collateral estoppel prejudice if it does not participate in that case. This conclusion justifies the invocation of Code § 105 to issue a preliminary injunction order staying [] prosecution of the California case in order to make effective the automatic stay of Code § 362(a).

Id. at 855; s*ee also Gerard v. W.R. Grace & Co. (In re W.R. Grace & Co.),* 115 Fed. App'x. 565 (3d Cir. 2004) (affirming the bankruptcy court's extension of the automatic stay to litigation pending against the debtors' insurer, where the debtors had entered into a pre-petition agreement to indemnify the insurer on account of such claims).

B. The Identity of Interests Between Blitz and the Third-Party Defendants in the PCGC Litigation Warrants an Extension of the Stay Pursuant to Sections 362.

Based on the facts at issue, it is clear there is an identity of interest between Blitz and the Other Defendants in the PCGC Litigation, and also that the continued litigation against the Other Defendants will have an immediate, adverse impact on the Debtors' estates. If left to proceed, the continuation of the PCGC Litigation against the Other Defendants will: (1) deplete estate assets through Blitz's indemnification, defense and set off obligations; (2) divert key personnel from assisting reorganization efforts; (3) result in *collateral estoppel* and evidentiary prejudice; and (4) result in concurrent, and potentially inconsistent, adjudication of the same issues that are likely to be addressed with regards to the PCGC claims in this Chapter 11 case. Thus, any judgment against the Other

Defendants would, in effect, be a judgment against the Debtors, and the PCGC Litigation should be stayed as to them.

1. Depletion of Estate Assets

Continuation of litigation against the Other Defendants risks the depletion of the estates' assets through judgments or settlements. The Management Agreement with Kinderhook Industries includes indemnity obligations and the Supplier Agreement with Wal-Mart provides that Blitz is required to indemnify Wal-Mart for certain amounts it is required to pay on account of judgment or settlement. The Other Alleged Resellers in *Funchess* and *Lopez* likewise have asserted a right to indemnification on account of the claims against them relating to Blitz's PCGCs. Moreover, the Supplier Agreement provides Wal-Mart with the right to set off certain amounts it is owed under the agreement against amounts it owes Blitz on account of the PCGCs that Wal-Mart purchases pursuant to the agreement. Therefore, it is likely that Wal-Mart will take the position that any such amounts may be automatically offset against its payables to the estate, rather than recovered through a claim against the estate. This amount is not insignificant; Wal-Mart currently owes Blitz approximately $4 million for Blitz products. King Declaration at ¶ 19.

Besides the risk of set off, the continuation of PCGC Litigation against Wal-Mart or the Other Alleged Resellers will deplete the Debtors' estate, because the claims against those parties may be covered by the Debtors' commercial insurance policies. King Declaration at ¶ 8. If the PCGC Litigation is allowed to proceed only against Wal-Mart or Other Alleged Resellers, coverage that would otherwise be available to the Debtors' and their estate will be expended to defend and/or settle claims against the reseller-defendants. *Id.*

In addition to indemnification obligations to Wal-Mart and Kinderhook Industries under the Management Agreement and Supplier Agreement, respectively, Blitz is responsible for providing Wal-Mart with a defense in the PCGC Litigation, and Blitz has accepted tender of defense in the pending PCGC cases where it has been named. Therefore, the continued litigation against Wal-Mart and/or Kinderhook will deplete the estate assets through the cost of indemnity, defense and/or litigation.

Moreover, because of the risk of indemnification under applicable common law, and the Other Alleged Retailers' asserted rights to indemnification, even if Blitz was not otherwise required to defend any of the Other Defendants, Blitz will still as a practical matter be compelled to spend resources defending its interests in the PCGC claims against any of the Other Defendants. *Sudbury, Inc. v. Escott (In re Sudbury, Inc.)*, 140 B.R. 461, 464 (Bankr. N.D. Ohio 1992) (granting stay under section 105 based on debtor's obligation to indemnify certain co-defendants even though "indemnities may be unenforceable" because the risk of indemnification would force the debtor to litigate regardless of whether the debtor would later prevail on the indemnification issue); *Am. Film Techs., Inc. v. Taritero (In re Am. Film Techs., Inc.)*, 175 B.R. 847, 855 (Bankr. D. Del. 1994) (same).

2. Diversion of Key Personnel

Continuation of the PCGC Litigation against the Other Defendants should also be stayed in order to prevent the continued diversion of key Debtor personnel from the reorganization process.

The Suppler Agreement provides that Blitz "shall immediately take such actions as may be necessary or appropriate to protect the interests of [Wal-Mart]." Blitz necessarily will be involved at some level in making documents, witnesses and other

information available to Wal-Mart for its defense. Therefore, should litigation proceed, Wal-Mart, Kinderhook or Other Defendants are likely to request discovery from Blitz and participation of witnesses in order to allow them to defend the claims against them pertaining to Blitz's product.

Even if the Debtors were not required to provide discovery or otherwise participate in the defense of PCGC Litigation against the Other Defendants, as a "prudent debtor," Blitz would almost certainly participate in such litigation, given that it is an assault on Blitz's best-selling products and, as explained below, could result in collateral estoppel and evidentiary prejudice as to Blitz. This diversion of key personnel to oversee and participate in the PCGC Litigation against the Other Defendants is, by itself, grounds for granting the stay. *See In re Am. Film Techs., Inc.*, 175 B.R. 847, 851 (Bankr. D. Del. 1994) ("To avoid the collateral estoppel effect, [the debtor] must participate in the defense of the state court case. That requires [the debtor] to do precisely what the automatic stay is intended to excuse it from doing ... the continued prosecution of Plaintiffs' actions would violate the spirit ... of section 362 of the Bankruptcy Code.") (internal quotation omitted); *see also Gillman v. Cont'l Airlines, Inc. (In re Cont'l Airlines)*, 177 B.R. 475, 481 (D. Del. 1993) (entering a stay where the debtor's participation in the litigation against the debtor's officers and directors would substantially detract from the debtor's reorganization efforts); *Zenith Labs. Inc. v. Sinay (In re Zenith Labs., Inc.)*, 104 B.R. 659, 665-66 (D.N.J. 1989) (same); *Haw. Structural Ironworkers Pension Trust Fund v. Calpine Corp., Inc.*, 2006 WL 3755175, at *5 (S.D.N.Y. Dec. 20, 2006) (same).

3. Risk of Collateral Estoppel and Evidentiary Prejudice

Continued prosecution of the PCGC Litigation against the Other Defendants will threaten Blitz with the risk of collateral estoppel and evidentiary prejudice. The PCGC claimants allege identical claims against Blitz and the Other Defendants and intend to use the same experts against each entity as well. Rulings with respect to key issues in one jurisdiction therefore may be shopped to other jurisdictions.[15] Moreover, the liability of Blitz and the Other Defendants turn on identical legal theories, factual allegations, and defenses, including:

- ***Causation.*** Whether the PCGC was the proximate cause of the alleged injuries to the PCGC claimants;
- ***Design Defect.*** Whether the PCGC at issue was defective as designed;
- ***Manufacturing Defect.*** Whether the PCGC at issue was defective as manufactured;
- ***Failure to Warn.*** Whether the warnings provided by Blitz on the side of the PCGC and otherwise adequately warned the claimant of the harm they allegedly experienced;
- ***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.*** The apportionment of responsibility between Blitz and Wal-Mart.
- ***Veil Piercing***. Allegations against Kinderhook are limited to piercing the corporate veil; Kinderhook is not alleged to have designed, manufactured or sold PCGC and, therefore, only could be liable to the extent that the Debtors are liable.

Courts have determined that the collateral estoppel effect of related litigation against third parties is sufficient to extend the stay to such parties. *See, e.g., In re Am. Film Techs.,*

---

[15] While Blitz intends to vigorously contest any such claims, plaintiffs and other parties are likely to raise them.

Inc., 175 B.R. 847, 851 (Bankr. D. Del. 1994) ("To avoid the collateral estoppel effect, [the debtor] must participate in the defense of the state court case. That requires [the debtor] to do precisely what the automatic stay is intended to excuse it from doing ... the continued prosecution of Plaintiffs' actions would violate the spirit ... of section 362 of the Bankruptcy Code." (internal quotation omitted)

4. Interference with the Estimation or Other Adjudication of PCGC Claims for Plan Feasibility

The Debtors expect to move the Delaware District Court to transfer all pending PCGC Litigation to the District Court to be addressed concurrently with this bankruptcy. The Debtors anticipate that such claims could be the subject of common issues adjudication pursuant to Fed. R. Civ. P. 42 and/or estimation under 28 U.S.C. § 502 for purposes of plan feasibility, capping liability and/or otherwise. To the extent that the PCGC Litigation against the Other Defendants is allowed to proceed, there is a risk that the factual and legal findings in those actions may be inconsistent with the progress in this bankruptcy, thereby resulting in inconsistent law and further delaying and interfering with the Debtors' efforts to reorganize. Therefore, to the extent that global issues will be resolved for the PCGC claims against Blitz (for purposes of estimation or otherwise), those same issues should be resolved concurrently as they relate to the identical claims that have been asserted against the Other Defendants.

II. The Court Should Also Enjoin The Continuation Or Commencement Of PCGC Litigation Against the Third-Party Defendants Under Section 105(a) Of The Bankruptcy Code.

Apart from the automatic stay, the Court should enjoin the PCGC Litigation against the Other Defendants pursuant to section 105(a) of the Bankruptcy Code. Under Section 105, the Bankruptcy Court has the power to issue any order that is necessary to

enforce the provisions of the Bankruptcy Code, including "ample power to enjoin actions excepted from the automatic stay which might interfere in the rehabilitative process, whether in a liquidation or in a reorganization case." *Maxicare Health Plans, Inc. v. Centinela Mammoth Hosp. (In re Family Health Servs. Inc.)*, 105 B.R. 937, 942 (Bankr. C.D. Cal. 1989), *quoting In re Johns-Manville Corp.*, 26 B.R. 420, 425 (Bankr. S.D.N.Y. 1983). The court may exercise its powers under Section 105 to stay litigation against non-debtors. *See, e.g., In re Phila. Newspapers, LLC*, 407 B.R. 606, 616 (E.D. Pa. 2009) ("The power of the Court to stay actions against Non–Debtors, pursuant to section 105(a), is clear.").

Courts have applied section 105 to stay actions against non-debtors if the continuation of the cases at issue would have an adverse impact on the debtor's ability to formulate a Chapter 11 plan or would otherwise impede the reorganization process. *See generally A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994, 1003 (4th Cir. 1986); *In re Johns-Manville Corp.*, 40 B.R. 219, 226 (S.D.N.Y. 1984) (holding that a bankruptcy court has power under section 105 of the Code to issue third-party injunctions, and in "the exercise of that authority the Court may issue or extend stays to enjoin a variety of proceedings [including discovery against the debtor or its officers and employees] which will have an adverse impact on the Debtors ability to formulate a Chapter 11 plan."); *In re Monroe Well Serv., Inc.*, 67 B.R. 746, 752 (Bankr. E.D. Pa. 1986) ("[T]he bankruptcy court ... has the power to issue injunctions under section 105 to prevent significant harm to the estate in appropriate circumstances.").

The issuance of an injunction under section 105(a) is governed by the standards generally applicable to the issuance of injunctive relief in non-bankruptcy contexts. *See*

Brennan v. Poritz (In re Brennan), 198 B.R. 445, 452 (D.N.J. 1996) ("In determining whether to issue a § 105 stay, bankruptcy courts also use [the] traditional four-pronged analysis.") (*citing In re Zenith Labs., Inc.*, 104 B.R. 659, 665 (D.N.J. 1989)); *W.R. Grace & Co. v. Chakarian (In re W.R. Grace & Co.),* 386 B.R. 17, 33 (Bankr. D. Del. 2008) (applying the traditional standards for injunctive relief with respect to a request to extend a preliminary injunction under section 105(a)) (*citing In re Excel Innovations, Inc.,* 502 F.3d 1086, 1096 (9th Cir. 2007)).[16] The Court considers the following factors in determining whether to issue an injunction extending the automatic stay under section 105(a):

> (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

Lane v. Phila. Newspapers, LLC (In re Phila. Newspapers, LLC), 423 B.R. 98, 106 (E.D. Pa. 2010), *citing McTernan v. City of York, Pa.*, 577 F.3d 521, 527 (3d Cir. 2009), *quoting United States v. Bell,* 414 F.3d 474, 478 n. 4 (3d Cir. 2005). The "likelihood of success under the first prong is interpreted by bankruptcy courts as the equivalent of the debtor's ability to successfully reorganize." *Id.*

---

[16] Alternatively, the Court may issue a preliminary injunction staying the PCGC Litigation against non-Debtors if it determines that the advancement of those cases would jeopardize its jurisdiction over the PCGC Litigation claims pending against the Debtors. *See, e.g., Chateaugay Corp. v. Bd of Educ. of the Cleveland City Sch. Dist. (In re Chateaugay Corp.)*, 93 B.R. 26, 29 (S.D.N.Y. 1988) ("The usual grounds for injunctive relief such as irreparable injury need not be shown in a proceeding for an injunction under section 105(a). Rather, a bankruptcy court may enjoin proceedings in other courts when it is satisfied that such a proceeding would defeat or impair its jurisdiction with respect to a case before it. In particular, it has been held that the Bankruptcy Court has the authority to issue an injunction on the grounds that it rather than another court should be the forum to decide whether a property is the property of the estate.") (internal citations and quotations omitted); *AP Indus., Inc. v. SN Philps & Co. (In re AP Indus., Inc).*, 117 B.R. 789, 802 (Bankr. S.D.N.Y. 1990) (same).

A. The Debtors Are Likely to Reorganize.

It is not disputed that the Debtors are likely to reorganize. Blitz is the market-leader in PCGCs and, but for the costs associated with defending itself and others from the recent wave of PCGC Litigation, it would be profitable. Therefore, the Debtors anticipate that once the claims that gave rise to its bankruptcy filing are addressed–whether through common-issue litigation, global adjudication and/or estimation–that it will successfully reorganize.

B. The Debtors Would Be Irreparably Harmed if the PCGC Litigation is Allowed to Proceed Against Wal-Mart, Kinderhook or Other Alleged Resellers.

The continuation of the PCGC Litigation against the Other Defendants would irreparably harm the reorganization process in several ways.

First, the Debtors have an obligation to participate in litigation against Wal-Mart and/or Kinderhook, thereby distracting the Debtors' employees and representatives from their reorganization efforts. And, even if no such contractual obligation existed, because the cases against the Other Defendants concern the Debtors' product and the findings in those cases are likely to be used against Blitz in subsequent litigation and their reorganization cases, Blitz would nonetheless be compelled to participate. Therefore, Blitz will be forced to divert senior management time and resources, and to participate in discovery, if litigation continues against the Other Defendants, thereby sapping the Debtors' resources and impeding the reorganization process.

Second, as explained above in Section I(B), the Debtors have contractual obligations to defend and/or indemnify Wal-Mart and Kinderhook Industries, thereby causing an immediate expenditure of estate funds and other resources for their defense.

In addition, the Other Alleged Retailers have asserted common law and statutory rights to indemnification and contributions from Blitz. Therefore, absent a stay of the litigation, a judgment against the Other Defendants may result in liability against the Debtors and their assets. The Suppler Agreement provides that Wal-Mart may set off amounts it is owed against amounts it owes Blitz pursuant to the Suppler Agreement. In addition, the Debtors' commercial insurance will be depleted (and perhaps exhausted) if the PCGC claims are allowed to proceed against the Other Defendants or other resellers of Blitz PCGs.

Third, Blitz risks collateral estoppel and evidentiary prejudice if litigation continues against Wal-Mart or the Other Defendants. This risk is particularly acute in this Chapter 11, where the Debtors will seek to transfer all PCGC Litigation to the Delaware District Court for resolution through, *e.g.*, common issue trials and/or estimation for purposes of plan feasibility. Concurrent litigation concerning Blitz's PCGCs would not only interfere with this process, but it has the potential to create inconsistent findings of fact and law.

The risks from these matters are imminent. The *Funchess* action against certain of the Other Alleged Retailers is set for trial on December 5, 2011, and the first cases where Wal-Mart is named as a defendant are set for trial beginning on April 3, 2011. To the extent the Court does not issue an immediate stay of those and the other actions, the Debtors will be required to spend estate resources preparing for and participating in the defense of these actions.

C. Enjoining the PCGC Litigation Will Not Result in Any Harm to PCGC Claimants.

The injunction of PCGC Litigation against the Other Defendants would not harm the respective claimants, who are not seeking injunctive relief, but rather money damages. Therefore, any delay in the PCGC Litigation against the Other Defendants would (at most) result in a delay in payment on account of claims. *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (delay of payment during course of litigation precludes finding of irreparable harm if there is adequate compensatory relief.); *see also Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp.*, 847 F.2d 100, 102-103 (3d Cir. 1988) ("financial distress," if it can later be compensated by a claim for money damages, does not support a claim of irreparable harm). Moreover, any delay in recovery by the claimants is outweighed by the benefits that would be bestowed upon the Debtors and their attempts to reorganize. As explained above, the PCGC Litigation drove the debtors to their chapter 11 filing, and the feasibility of any plan of reorganization likely will be driven by the treatment of such claims. Therefore, the Debtors and claimants are best-served by staying this litigation pending the estimation of the PCGC Litigation claims and/or other resolution of global issues in these cases, rather than risking the progression of multi-pronged litigation, and the confounding effects that it may cause.

D. Granting the Requested Injunction will be in the Public Interest.

Courts have held that the public interest is served through the successful reorganization of a chapter 11 debtor, and that this interest trumps a claimant's right to immediate adjudication of its claims. *In re Phila. Newspapers, LLC,* 407 B.R. at 617. Therefore, the benefits to the Debtors' reorganization process provide an immediate

public benefit, and the public interest would be served through an order enjoining PCGC Litigation against the Other Defendants.

CONCLUSION

For the reasons set forth above, the Debtors respectfully request that this Court immediately enter a temporary restraining order enjoining the PCGC Litigation or any Future PCGC Actions against any of the Other Defendants or the Debtors' other resellers of PCGCs pending this Court's ruling on this Motion. The Debtors further request that the Court enter an order extending the automatic stay to the Other Defendants and other resellers that may be named in Future PCGC Litigation or, in the alternative, staying such litigation pursuant to section 105 during the pendency of the Debtors bankruptcy cases. Finally, the Debtors request that the Court declare the stay inapplicable and/or lifted as to Blitz's efforts to remove and/or transfer the PCGC Litigation against Blitz and the Other Defendants to the District Court for the District of Delaware.

Dated: November 9, 2011
Wilmington, Delaware

Daniel J. DeFranceschi (No. 2732)
Michael J. Merchant (No. 3854)
Marcos A. Ramos (No. 4450)
Julie A. Finocchiaro (No. 5303)
Amanda R. Steele (No. 5530)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
Telephone: (302) 651-7700
Facsimile: (302) 651-7701

Proposed Attorneys for Plaintiffs