

In re:)	Chapter 11
BLITZ U.S.A., Inc., <i>et al.</i> , ¹)	Case No. 11-13603 (PJW)
Debtors.)	(Jointly Administered)
<hr/>		
BLITZ U.S.A., INC., <i>et al.</i> ,)	
Plaintiffs,)	
v.)	Adv. Proc No. 11-53578 (PJW)
TABITHA ALEXSON AS NATURAL)	
GUARDIAN AND NEXT FRIEND FOR)	Obj. Deadline: 3/26/12 at 4:00 p.m. (EDT)
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)	



RLF1 5833105v. 3

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)
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.)

**DEBTORS' MOTION FOR ENTRY OF AN ORDER
EXTENDING TIME TO SERVE SUMMONS**

The above-captioned debtors and debtors in possession (collectively, the "Debtors"), hereby submit this motion (the "Motion") pursuant to Rule 4(m) of the Federal Rules of Civil Procedure (the "Federal Rules") and Rules 7004 and 9006(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") for entry of an order, substantially in the form attached hereto as Exhibit A, extending the Debtors' time to effect service upon the above-captioned defendants (the "Defendants"). In support of this Motion, the Debtors respectfully represent as follows:

JURISDICTION

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory bases for the relief sought is Fed. R. Bankr. P. 9006(b), and Fed. R. Civ. P. 4(m), made applicable here by Fed. R. Bankr. P. 7004.

BACKGROUND

A. General Background

2. On November 9, 2011 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"), thereby commencing the above-captioned chapter 11 cases (the "Chapter 11 Cases"). 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. Additional information regarding the Debtors' business and the background relating to events leading up to the Chapter 11 Cases can be found in the *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, which was filed on the Petition Date. As of the date hereof, no trustee or examiner has been appointed in the Chapter 11 Cases.

B. Specific Background

3. The Debtors are the industry leader in portable consumer gas containers (“PCGCs”). Blitz USA, Inc. (“Blitz”) sells its PCGCs through various retailers. Blitz and certain of its resellers, including (among others) Wal-Mart Stores, Inc. and certain of its affiliates (collectively, “Wal-Mart”) have been named as defendants (along with other parties) (collectively, the “Third Parties”) in one or more of approximately forty pending lawsuits relating to PCGCs in various state and federal courts across the country (the “PCGC Litigation”). In general, these lawsuits allege design and manufacturing defects and failure to warn on account of personal injuries and/or death that allegedly occurred as a result of fires or explosions that arose when Blitz PCGCs were used or stored in the vicinity of flames or other combustion sources, alter ego or similar grounds for liability and claims for alleged fraudulent transfers.

4. Prior to the Petition Date, the Debtors actively defended against any liability in the PCGC Litigation. The Debtors also were providing defense in these actions to Wal-Mart subject to and pursuant to certain indemnification agreements between the parties. Additional lawsuits involving PCGCs have been filed from and after the Petition Date.

5. Although the PCGC Litigation is stayed as to the Debtors, as of the Petition Date, the Debtors were concerned that the continual prosecution of the PCGC Litigation against the Third Parties would require the Debtors to continue to litigate in the PCGC Litigation, including to provide certain Third Parties with defense in order to protect the Debtors from the risk of increased indemnification obligation, claims for set-off, or other ligation or claim risks including collateral estoppel, evidentiary prejudice and/or *stare decisis*. Therefore, on the Petition Date,

the Debtors filed the above-captioned adversary proceeding (the “Action”) and moved the Court for the entry of (1) judgment enjoining the Defendants from prosecuting the pending PCGC Litigation and commencing new actions or proceedings asserting any PCGC claims against the Third Parties and (2) declaratory judgment that the transfer and consolidation of the PCGC Litigation does not violate the automatic stay. The Debtors also moved for entry of a temporary restraining order (“TRO”) extending the automatic stay for PCGC-related claims to the Third Parties.

6. The Court declined to grant the TRO at the Debtors’ first day hearing. Instead, during that hearing, the Court suggested that the relevant Third Parties seek stay-related relief from the courts in which the PCGC Litigation is pending. The Court also scheduled a further hearing (the “TRO Hearing”) on the Debtors’ request for entry of a TRO with respect to Kinderhook Capital Fund II and Kinderhook Industries, LLC (collectively, “Kinderhook”), a Third Party in certain of the PCGC Litigation.

7. After the First Day Hearing, Wal-Mart and Kinderhook have moved to stay or dismiss one or more of the actions in the courts where the PCGC Litigation is pending against them (the “PCGC Motions”). Certain of the PCGC Motions remain pending and undecided by those courts and the Debtors have continued the TRO Hearing on several occasions in order to permit the relevant courts to consider and decide the pending PCGC Motions. Indeed, if the PCGC Motions are granted or the parties otherwise agree to a stay, then the relief the Debtors seek under the complaint in this proceeding (the “Complaint”) may be mooted. As of the date of this Motion, the TRO Hearing currently is scheduled for March 19, 2012 at 1:30 p.m. (EDT). This date may be continued further depending on the resolution (or not) of the PCGC Motions.

Accordingly, as of the date of this Motion, the Debtors do not know whether any further relief is needed in the Action.

8. The Debtors' initial 120-day time period for service in this Action under Bankruptcy Rule 7004 and Federal Rule 4(m) expires on March 8, 2012 (the "Initial Time Period"). As noted above, the Debtors are continuing to assess the need to move forward (or not) with the Action. Therefore, in order to maintain the status quo, the Debtors seek to extend the Initial Time Period through July 6, 2012.

RELIEF REQUESTED

I. Extension of Time

9. By this Motion, the Debtors seek to extend the time period contained in Federal Rule 4(m) an additional 120 days from the expiration of the Initial Time Period to July 6, 2012.

10. Pursuant to Bankruptcy Rule 9006(b)(1), the Court "for cause shown may at any time in its discretion (1) with or without motion or notice order a time period enlarged if the request is made before the expiration of the period originally prescribed...." Fed. R. Bankr. P. 9006(b)(1).² The Court's discretion under Bankruptcy Rule 9006(b) allows enlargement of time periods except where the Bankruptcy Rules specifically do not permit enlargement. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 389 n. 4 (1993) ("The time-computation and time-extension provisions of Rule 9006 ... are generally applicable to any time requirement found elsewhere in the rules unless expressly excepted."). In addition, Federal Rule 4(m), incorporated into this proceeding by Bankruptcy Rule 7004(a)(1), permits a court to extend

² The Initial Time Period is extended pending this Court's resolution of the Motion. *See* Del. Bankr. L.R. 9006-2. As the Motion was filed before the expiration of the Initial Time Period, a bridge order is not needed. *See* Del. Bankr. L.R. 9006-2 ("if a motion to extend the time to take any action is filed before the expiration of the period prescribed by the Code, the Fed. R. Bankr. P., these Local Rules or Court order, the time shall automatically be extended until the Court acts on the motion, without the necessity for the entry of a bridge order.").

the time period to effect service of process upon a showing of “good cause.” *See* Fed. R. Civ. P. 4(m).

11. For the reasons set forth herein, the Debtors submit that good cause exists for enlargement of their deadline to serve the Complaint.

(i) **The Debtors have demonstrated cause warranting an extension under Bankruptcy Rule 9006.**

12. While there are no cases within the Third Circuit that address the quantum of proof necessary to show “cause” under Bankruptcy Rule 9006(b)(1) where the deadline has not yet expired, cases examining the “good cause” standard are instructive. In defining “good cause” in the context of enlarging time periods, courts in this district have equated “good cause” with “excusable neglect.” *See, e.g., Sun Healthcare Group, Inc. v. Mead Johnson Nutritional (In re Sun Healthcare Group, Inc., et al.)*, 2004 WL 941190, *3 (Bankr. D. Del. Apr. 30, 2004) (*citing* *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298, 1312 (3d Cir. 1995)); *see also Chama, Inc. v. Arcadian Management Servs., Inc.*, 403 B.R. 313, 315 (Bankr. D. Del. 2009) (“The Court of Appeals for the Third Circuit has equated ‘good cause’ with the concept of ‘excusable neglect’ with respect to requests for enlargement of time.”) (internal quotations omitted) (quoting *MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1097 (3d Cir.1995)). “Excusable neglect requires ‘a demonstration of good faith on the part of the party seeking an enlargement [of time for service] and some reasonable basis for non-compliance with the time specified in the rules.’” *Sun Healthcare Group*, 2004 WL 941190, at *3 (citations omitted).

13. The Debtors have moved for relief in the Action in good faith and have a reasonable basis for seeking an extension of the Initial Time Period. As discussed above, certain of the Third Parties have moved to dismiss or stay pre-petition actions as against them. If this relief is granted, then the Debtors no longer may require any relief from this Court in the Action.

Moreover, extension of the Initial Time Period as requested hereunder will conserve estate resources – protecting the Debtors from incurring the burden and expense of serving the Complaint – while protecting the Defendants from the potentially unnecessary burden of receiving the Complaint at a time when the Debtors are not yet certain that further relief may be necessary from the Court. An extension of the Initial Time Period therefore not only conserves estate resources but also minimizes potentially unnecessary disruption to the Defendants. Accordingly, ample “cause” exists justifying the requested extension under Bankruptcy Rule 9006(b).

14. Pursuant to section 105(a) of the Bankruptcy Code, a court “may 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). This authority, coupled with the discretion granted under Bankruptcy Rule 9006(b)(1), further provides a basis for granting the extension.

(ii) **The Debtors have demonstrated good cause warranting an extension under Federal Rule 4(m).**

15. Federal Rule 4(m) provides that the 120-day time period should be extended upon due motion filed before the time period has expired. *See* Fed. R. Civ. P. 4(m). Here, the Initial Time Period to serve the Complaint has not yet expired and the Debtors timely have filed this Motion to extend the Initial Time Period for the reasons discussed.

16. The Third Circuit has held that deciding whether or not to extend the prescribed time period for service of a complaint pursuant to Federal Rule 4(m) requires a two-step analysis. *Petrucelli*, 46 F.3d at 1305. First, a court must determine whether “good cause” exists for an extension of time. *Id.* As the *Petrucelli* court explained, “[i]f good cause is present, the district court must extend time for service and the inquiry is ended.” *Id.*; *see also Boley v. Kaymark*, 123 F.3d 756, 758 (3d. Cir. 1997). Courts generally consider three factors in determining whether

good cause exists to extend time under Federal Rule 4(m): (1) whether the plaintiff has reasonably attempted to effect service; (2) whether the defendant is prejudiced by the absence of timely service; and (3) whether the plaintiff moved for an extension of time for effecting service. *See United States v. Nuttall*, 122 F.R.D. 163, 166-67 (D. Del. 1988); *see also In re Submicron Systems Corp.*, 2004 WL 883391, *4 (D. Del. Apr. 5, 2004) (describing factors); *Ritter v. Cooper*, 2003 WL 23112306, *4 (D. Del. Dec. 30, 2003) (same).

17. The second step only comes into play if good cause does not exist. *Petrucelli*, 46 F.3d at 1305. If good cause has not been demonstrated, the Court in its discretion still may extend time for service. *Id.*; *see also Sun Healthcare Group*, 2004 WL 941190, at *4. “Courts prefer to avoid default judgments and dispose of cases on the merits.” *Sun Healthcare Group*, 2004 WL 941190, at *5 (citing *Tozer v. Krause Milling Co.*, 189 F.2d 242, 245 (3d Cir.1951) and *In re USN Communications, Inc.*, 288 B.R. 391, 398 (Bankr. D. Del. 2003)). As discussed by the Third Circuit in *Petrucelli*, the Advisory Committee notes on Federal Rule 4(m) provide factors for courts to consider when deciding to exercise their discretion. 46 F.3d at 1305-06. These factors include (1) whether the applicable statute of limitations would bar re-filing of the action, (2) the frivolousness of the complaint, (3) the objective unreasonableness of the plaintiff’s case (factual and legal), and (4) the plaintiff’s motivation in pursuing the claims.³ *Id.*; *see also Sun Healthcare Group*, 2004 WL 941190, at *4 (describing factors courts consider when deciding to exercise their discretion to extend time for service of summons); *Ritter*, 2003 WL 23112306, at *3 (same). “The greater the number of these factors that appear true, the weaker the rationale for the court to exercise its discretion in favor of extending the time for service.” *Sun Healthcare Group*, 2004 WL 941190, at *4.

³ Other factors courts have considered are “if the defendant is evading service or conceals a defect in attempted service.” *Id.*

18. Here, good cause exists to extend the Initial Time Period. While the Debtors have not served the Complaint on the Defendants, the Defendants' counsel was served and thus the Defendants have received preliminary notice through their attorneys. As discussed above, the Debtors move for an extension of the Initial Time Period because the PCGC Motions are still pending and their resolution may obviate the need to continue the Action. Therefore, extension of the Initial Time Period not only preserves estate funds but also prevents a potentially unnecessary service of the Complaint on the Defendants. Moreover, no prejudice will result to the Defendants. Under these circumstances, the Debtors submit that good cause exists to enlarge the Initial Time Period.

19. Alternatively, if the Court concludes that the Debtors have failed to establish good cause to enlarge the Initial Time Period, it should nonetheless exercise its discretion to extend the Initial Time Period. The Action is not frivolous or unreasonable. The Debtors are requesting a TRO in order to prevent them from having to expend their limited resources defending certain Third Parties in the PCGC Litigation while in the midst of the Chapter 11 Cases. The Debtors' requested relief is motivated by their desire to preserve estate assets. *See Sun Healthcare Group*, 2004 WL 941190, at *4 (granting extension of Federal Rule 4(m) time period where complaint was not frivolous, unreasonable or based on improper motive).

20. Based on the reasons discussed above, the Debtors believe that good cause exists to grant an extension of the Initial Time Period. Furthermore, even if the Court decides that the Debtors have not demonstrated good cause, the Court should extend the period in its discretion.

II. Service of Motion

21. Bankruptcy Rule 2002(m), which gives the Court discretion to enter orders regulating notice, provides that the Court may designate the scope, form, and manner of notices except as otherwise provided under the Bankruptcy Rules. Fed. R. Bankr. P. 2002(m) ("The

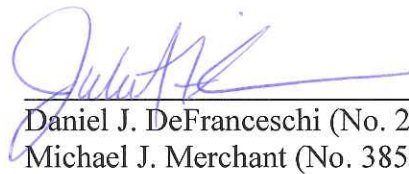
court may from time to time enter orders designating the matters in respect to which, the entity to whom, and the form and manner in which notices shall be sent except as otherwise provided by these rules.”); *see also* Fed. R. Bankr. P. 9007 (“the court shall designate, if not otherwise specified herein, the time within which, the entities to whom, and the form and manner in which the notice shall be given.”). Furthermore, section 105(a) of the Bankruptcy Code grants the Court authority to issue any order “necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a).

22. The Defendants in this Action are plaintiffs in the PCGC Litigation and are represented by counsel in those actions; certain of those Defendants also are members of the Debtors’ Official Committee of Unsecured Creditors. In order to preserve estate funds as well as prevent unnecessary disruption to the Defendants, the Debtors request that service of this Motion upon the Defendants’ respective counsel in the PCGC Litigation rather than the Defendants personally be deemed sufficient under the circumstances.

CONCLUSION

For the foregoing reasons, the Debtors respectfully request entry of an order substantially in the form attached hereto as Exhibit A, (i) granting the relief requested herein and (ii) granting such other or further relief as is just and proper.

Dated: March 8, 2012
Wilmington, Delaware



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Counsel to the Debtors and Debtors in Possession

EXHIBIT A

Proposed Order

In re:)	Chapter 11
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FOR TIMOTHY BURCH; CHRISTOPHER)	
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WARD AND CURTIS WARD; RICHARD)
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Defendants.)

ORDER EXTENDING TIME TO SERVE SUMMONS

Upon the motion dated March 8, 2012 (the “Motion”),² of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for an order pursuant to Federal Rule 4(m) and Bankruptcy Rules 7004 and 9006 extending the Debtors’ time to effect service upon the above-captioned defendants, as more fully set forth in the Motion; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been given; and the relief requested in the Motion being in the best interests of the Debtors and their estates and creditors; and the Court having reviewed the Motion; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted hereon; and after due deliberation and sufficient cause therefor;

IT IS HEREBY ORDERED THAT:

1. The Motion is granted.
2. The Debtors have given due and proper notice of the Motion and no other or further service of the Motion was necessary or required.
3. The time period provided by Federal Rule 4(m), made applicable by Bankruptcy Rule 7004, within which the Debtors may serve the summons in the Action, is extended 120 days to July 6, 2012.
4. Such extension is without prejudice to the Debtors’ right to file one or more motions seeking a further extension of their time to serve the summons in the Action.

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

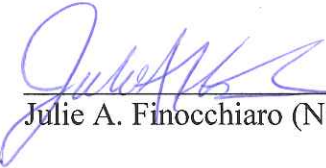
5. This Court shall retain jurisdiction with respect to all matters relating to the interpretation or implementation of this Order.

Dated: _____, 2012
Wilmington, Delaware

THE HONORABLE PETER J. WALSH
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

I, Julie A. Finocchiaro, do hereby certify that on March 8, 2012, I caused copies of the foregoing **Debtors' Motion for Entry of an Order Extending Time to Serve Summons** to be served by first class mail as indicated on the attached service list.



Julie A. Finocchiaro (No. 5303)

SERVICE LIST

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