IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
BLITZ U.S.A., Inc., et al.,	Case No. Case No. 11-13603 (PJW)
Debtors.	(Jointly Administered)
	Re: Docket Nos. 1921, 2007, 2041, 2090, 2091, 2092. 2116

WAL-MART STORES, INC.'S MEMORANDUM OF LAW IN SUPPORT OF THE DEBTORS' AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS' FIRST AMENDED JOINT PLAN OF LIQUIDATION

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PRELIMINARY STATEMENT

1. This memorandum of law (the "Memorandum") is submitted by Wal-Mart Stores, Inc. ("Wal-Mart") in support of confirmation of the *Debtors' and Official Committee of Unsecured Creditors' First Amended Joint Plan of Liquidation* [D.I. 2007] (including all exhibits thereto and as amended, modified or supplemented from time to time, the "Plan").[1]

2. The Plan should be confirmed for all the reasons set forth in the *Memorandum of Law and Omnibus Reply in Support of the Debtors' and Official Committee Of Unsecured Creditors' First Amended Joint Plan Of Liquidation* (the "Estate Brief"). Wal-Mart submits this Memorandum to provide further support for the Releases and Channeling Injunction contemplated by the Plan, as applicable to Wal-Mart, as well as to correct certain factual allegations in the Confirmation Objections (defined below) and respond to certain arguments therein.

3. The Releases and Channeling Injunction, as applied to Wal-Mart, are appropriate in the extraordinary circumstances of these Chapter 11 Cases. In exchange for the Releases and the Channeling Injunction, Wal-Mart is contributing $24.1 million to the Blitz Personal Injury Trust for the benefit of holders of Blitz Personal Injury Claims along with additional substantial contributions to the Debtors' estates to permit the Plan process to proceed. The Releases and Channeling Injunction are mandatory pre-conditions to Wal-Mart's contributions to assure that all affected claims subject to coverage by the Participating Insurer Policies are resolved with finality. Wal-Mart cannot make such contributions without receiving the benefits of the Releases and the Channeling Injunction. Absent Wal-Mart's participation and consent, neither of the settlements incorporated into the Plan would be viable and no funds would be available to distribute to the Debtors' creditors. Instead, the evidence to be provided at the Confirmation

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan.

Hearing will demonstrate that the holders of Blitz Personal Injury Claims—the persons subject to the Releases and the Channeling Injunction—are receiving fair and substantial distributions on account of their claims. Accordingly, the Releases and the Channeling Injunction, as applied to Wal-Mart are appropriate and warranted.

CONFIRMATION OBJECTIONS

4. On January 21, 2014, Carrie Larkin and Billy Wayne Newby (the "Newby Claimants") filed their *Objection of Newby Claimants to Confirmation of Debtors' and Official Committee of Unsecured Creditors' First Amended Joint Plan of Liquidation* [D.I. 2090] (the "Newby Objection"). The Newby Objection asserts that the Releases of Wal-Mart are impermissible because, among other things, Wal-Mart is not making a substantial contribution to the estates, this is not an extraordinary case warranting non-consensual third party releases, and non-consensual releases are impermissible in a plan of liquidation.[2] Each of these arguments is refuted herein.

5. Newby repeatedly states that the Wal-Mart contribution has not been disclosed. Newby is incorrect. Wal-Mart's contribution has not been a secret; rather, it was disclosed on December 16, 2013 in advance of the hearing on the Disclosure Statement.[3] Specifically, Wal-Mart (i) is contributing $24,129,360.64 to the Blitz Personal Injury Trust; (ii) is waiving its secured setoff claim of $1,540,000 to provide supplemental funds the Debtors' estates; (iii) is

[2] The Newby Objection also asserts that the Insurance Settlement is not fair and equitable under section 1123(b)(3)(A) of the Bankruptcy Code and that the Insurance Settlement does not satisfy the standards of Bankruptcy Rule 9019. This objection and any other objections raised by the Newby Claimants that are not addressed herein are being addressed in the Estate Brief, so Wal-Mart will not belabor them here. Wal-Mart's decision not to address these arguments in this Memorandum is not a waiver of its rights to present evidence and argument on these issues at the Confirmation Hearing.

[3] *Reply of the Debtors and the Official Committee of Unsecured Creditors to the United States Trustee's Objection to the Disclosure Statement for Debtors' and Official Committee of Unsecured Creditors' Joint Plan of Liquidation* [D.I. 1988], at ¶3.

waiving over $7.5 million in indemnity claims; and (iv) has advanced approximately $100,000 toward the cost of publication in connection with the claims bar date process.

6. Due to Wal-Mart's extensive contribution, as well as the other settlements embodied in the Plan, holders of Blitz Personal Injury Claims voted overwhelmingly in favor of the Plan, with 94.25% of those with claims against the USA Debtors and 100% of those with claims against the BAH Debtors voting in favor of the Plan.[4] Indeed, 56 of the 115 holders of Blitz Personal Injury Trust Claims against the USA Debtors were parties to the Insurance Settlement Term Sheet and were represented through counsel in the discussions leading to the Insurance Settlement.

7. Also on January 21, 2014,[5] Lori Cataldi filed her *Objection of the Estate of Joseph M. Cataldi and Lori Cataldi (as Guardian, Parent and Natural Guardian for Minors Michael Cataldi and Brianna Cataldi) to Debtors' and Official Committee of Unsecured Creditors' First Amended Joint Plan of Liquidation* [D.I. 2091] (the "Cataldi Objection, and together with the Newby Objection, the "Confirmation Objections"). The Cataldi Objection is a protective objection that challenges the Releases and the Channeling Injunction in the event the Court sustains the Committee's objection to these claimants' motion to allow a late filed claim. Wal-Mart does not understand the Cataldi Objection to oppose the entry of the Releases and the Channeling Injunction if their motion is granted and the late-filed claim is allowed. Nevertheless, the evidence to be presented at the Confirmation Hearing together with the legal

[4] See *Certification of P. Joseph Morrow IV with Respect to the Tabulation of Votes on the Debtors' and Official Committee of Unsecured Creditors' First Amended Joint Plan of Liquidation,* sworn to on January 23, 2014 (the "Voting Declaration").

[5] Michael Bauman's *Objection to Confirmation of the Debtors' and Official Committee of Unsecured Creditors' First Amended Joint Plan of Liquidation* [D.I. 2092] (the "Bauman Objection") raises a constitutional challenge relating to the Equal Protection Clause that is not addressed to Wal-Mart. Accordingly, this Memorandum does not address the Bauman Objection.

memoranda in support of confirmation provide overwhelming support for the approval of the Releases and the Channeling Injunction.

8. To the extent any of the Confirmation Objections remain unresolved at the time of the Confirmation Hearing, Wal-Mart submits that they should be overruled.

ARGUMENT

9. The keystones of the USA Debtors' Plan are (a) the creation of the Blitz Personal Injury Trust to administer $161,970,000, which is being contributed by the Participating Insurers and Wal-Mart and to administer the Assigned Blitz Insurance Policies and (b) the creation of the Blitz Liquidating Trust, which is being funded by the USA Debtors' remaining assets, $6.25 million (plus up to another $250,000) from BAH on behalf of the BAH Settling Parties and $1.54 million from Wal-Mart in exchange for (1) releases of the Protected Parties by the Debtors ("Debtor Releases") and third parties ("Third Party Releases"); and (2) the Channeling Injunction which funnels all Blitz Personal Injury Trust Claims to the Blitz Personal Injury Trust. Wal-Mart is a Protected Party entitled to the benefit of the Debtor Releases, the Third Party Releases and the Channeling Injunction contained in the Plan. The Releases and the Channeling Injunction are supported by valuable consideration from Wal-Mart, are indispensable components of the Plan, and are appropriate equitable relief under Third Circuit law.

I. Non-Consensual Third Party Releases and Channeling Injunctions Are Permissible under Third Circuit Law[6]

10. As recognized in the Newby Objection, the seminal case for analyzing the propriety of non-consensual releases within this district is the Third Circuit's decision in In re Continental Airlines. Gillman v. Continental Airlines (In re Continental Airlines), 203 F.3d 203, 212-15 (3d Cir. 2000) (examining the propriety of "non-debtor release and permanent injunction provisions"). In Continental, the Third Circuit pronounced that the "hallmarks" of a permissible non-consensual release are "fairness, necessity to the reorganization, and specific factual findings to support these conclusions." Continental, 203 F.3d at 214.

11. Lower courts within the Third Circuit have approved non-consensual releases in extraordinary cases where Continental's hallmarks were met.[7] See, e.g., In re Global Indus. Techs., Inc., Case No. 02-21626, 2013 WL 587366, at *39 (Bankr. W.D. Pa. Feb. 13, 2013) (approving channeling injunction for tort claims relating to silica products under section 105(a) of the Bankruptcy Code); In re Kaiser Aluminum Corp., Case No. 02-10429, 2006 WL 616243,

[6] While a release and a channeling injunction are distinct legal concepts, the practical effect of each renders these concepts largely interchangeable. See generally Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.), 416 F.3d 136, 142 (2d Cir. 2005) (noting the distinction between claims subject to a release that are extinguished and those that are channeled to a settlement fund); In re Adelphia Commc'ns Corp., 364 B.R. 518, 528 (Bankr. S.D.N.Y. 2007) (explaining that proposed channeling injunction shared many important characteristics with third party release as it would proscribe litigation between non-debtor entities and would in substance release the protected party from any further obligations to creditors). Moreover, case law addressing requests for non-consensual releases and channeling injunctions apply an equivalent legal framework. Thus, the factors relevant to the Court in approving the requested Third Party Releases and the Channeling Injunction are indistinguishable in scope and will be analyzed together for purposes of this Memorandum.

[7] Other decisions within the Third Circuit have acknowledged that Continental permits non-consensual releases in certain circumstances even though the facts of those cases did not warrant such releases. See, e.g., In re Lower Bucks Hosp., 471 B.R. 419, 464, n.43 (Bankr. E.D. Pa. 2010) ("[C]onfirmation of a plan that includes a third-party release requires that the court makes specific factual findings regarding the release's fairness and necessity.") (citing Continental, 203 F.3d at 214); In re Saxby's Coffee Worldwide, LLC, 436 B.R. 331, 338 (Bankr. E.D. Pa. 2010) (recognizing that non-consensual releases may be approved when the "plan is widely supported by the creditor constituency that includes the parties being restrained, accords significant benefits to that constituency and the court is satisfied that the creditors being restrained are also being treated fairly"); In re Congoleum Corp., 362 B.R. 167, 192 (Bankr. D.N.J. 2007) (denying request for third party release because "under the general jurisprudence for nonconsensual third party releases . . . [m]any of [the Continental] hallmarks are lacking in the proposed releases."); In re Genesis Health Ventures, Inc., 266 B.R. 591, 608-09 (Bankr. D. Del. 2001) (citing to the "threshold Continental criteria of fairness and necessity for approval of non-consensual third-party releases," but finding releases inappropriate under the circumstances).

at *17-20 (Bankr. D. Del. Feb. 6, 2006) (approving three separate channeling injunctions under section 105(a)); In re Am. Family Enters., 256 B.R. 377, 406-08 (D.N.J. 2000) (authorizing issuance of third party release and channeling injunction for consumer fraud claims under 11 U.S.C. § 105(a)). Indeed, the Third Circuit itself has read Continental to permit non-consensual[8] third party releases in exceptional circumstances when an adequate record in support is developed. See In re Global Indus. Techs., Inc., 645 F.3d 201, 207 (3d Cir. 2011) (considering a plan containing a channeling injunction for Silica tort claims and explaining that "for the Plan to be approved as designed (i.e., with the inclusion of the Silica Injunction), the debtors needed to show that the Plan's resolution of silica-related claims is necessary or appropriate under 11 U.S.C. § 105(a), which, under our precedent, requires showing with specificity that the Silica Injunction is both necessary to the reorganization and fair.") (citing Continental, 203 F.3d at 214).

12. Moreover, Continental was not the first circuit level opinion to analyze the permissibility of non-consensual third party releases in connection with a Chapter 11 plan. Indeed, prior to Continental, the Second, Fourth and Seventh Circuits had authorized non-

[8] Decisions indicating that consent is a prerequisite for such relief are inapposite. First, those cases are rooted in a contract theory of binding releasing parties, rather than through bankruptcy courts' general equitable powers under section 105(a) of the Bankruptcy Code. See In re Coram Healthcare Corp., 315 B.R. 321, 336 (Bankr. D. Del. 2004) ("[A] Plan is a contract that may bind those who vote in favor of it.") (citation omitted); In re Arrowmill Dev. Corp., 211 B.R. 497, 506 (Bankr. D.N.J. 1997) ("When a release of liability of a nondebtor is a consensual provision, however, agreed to by the effected [sic] creditor, it is no different from any other settlement or contract . . . ."); see generally In re Indianapolis Downs, LLC, 486 B.R. 286, 305-06 (Bankr. D. Del. 2013). Second, even those cases that have ruled that consent is a prerequisite for granting a third party release did not involve rare or unique circumstances. See, e.g., In re Zenith Elecs. Corp., 241 B.R. 92, 111 (Bankr. D. Del. 1999); In re Washington Mutual, Inc., 442 B.R. 314, 346 (Bankr. D. Del. 2011) (holding that releases must be consensual, but acknowledging that while the "Third Circuit has not barred third party releases, it has recognized that they are the exception, not the rule."). Indeed, the Third Circuit in Continental expressly considered the Zenith decision regarding the propriety of third party releases and distinguished it on the ground that it did not involve any extraordinary circumstances, such as mass litigation. Continental, 203 F.3d at 214 n. 11; see also Genesis Health Ventures, 266 B.R. at 608 (citing reference to Zenith decision in Continental and concluding that "the message of Continental appears to be that the type of financial restructuring plan under consideration here would not present the extraordinary circumstances required to meet even the most flexible test for third party releases.").

consensual releases under section 105(a) of the Bankruptcy Code in appropriate circumstances.[9] See In re Specialty Equip. Co., Inc., 3 F.3d 1043, 1047 (7th Cir. 1993); In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 293 (2d Cir. 1992); In re A.H. Robins Co., Inc., 880 F.2d 694, 700-02 (4th Cir. 1989); MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 93-94 (2d Cir. 1988). Since the Third Circuit's articulation of the hallmarks of non-consensual releases in Continental, other circuits have articulated similar tests to analyze those hallmarks. See Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.), 416 F.3d 136 (2d Cir. 2005) ("A nondebtor release in a plan of reorganization should not be approved absent the finding that truly unusual circumstances render the release terms important to success of the plan, focusing on the considerations discussed above."); Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 280 F.3d 648, 657-59 (6th Cir. 2002) (applying a seven-factor test in considering a channeling injunction for silicone breast implant claims).

II. Framework for Analyzing Third Party Releases and Channeling Injunction

13. Based on the foregoing, and as acknowledged in the Newby Objection, a plan that includes compelled releases of non-debtors and a channeling injunction is permissible in the Third Circuit under section 105(a) provided that an adequate record demonstrates that such extraordinary relief is warranted. This relief is appropriate when the Continental hallmarks of

[9] The Courts of Appeal for the Fifth, Ninth and Tenth Circuits have held that non-consensual third party releases are prohibited under the Bankruptcy Code. See In re Zale Corp., 62 F.3d 746, 760 (5th Cir. 1995); In re Lowenschuss, 67 F.3d 1394, 1401-02 n.6 (9th Cir. 1995); In re W. Real Estate Fund, Inc., 922 F.2d 592, 601 (10th Cir. 1990). The First, Eleventh, and D.C. Circuits have yet to address directly whether the Bankruptcy Code authorizes a third party release or permanent injunction, however, authority from these Circuits is aligned with those approving such releases. See In re Munford, Inc., 97 F.3d 449 (11th Cir.1996) (approving third party non-debtor releases in a settlement agreement in a related adversary proceeding); Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973, 980 (1st Cir.1995) (agreeing with pro-release courts that in "extraordinary circumstances, a bankruptcy court can grant permanent injunctive relief essential to enable the formulation and confirmation of a reorganization plan"); In re AOV Indus., Inc., 792 F.2d 1140 (C.A.D.C.1986).

fairness and necessity to the reorganization are satisfied. In determining whether the proposed releases and channeling injunction are fair and necessary to the reorganization, courts have formulated various multi-factor tests to expound upon the Continental hallmarks. [10] See generally Continental, 203 F.3d at 217 n.17 (listing items for courts in evaluating the propriety of a permanent injunction). The most recent articulation of this test was set forth by the Sixth Circuit in Dow Corning. 280 F.3d at 658.

14. In Dow Corning, the Sixth Circuit articulated the following factors for analyzing non-consensual releases and a section 105(a) channeling injunction:

> (1) an identity of interest between the debtor and non-debtor such that a suit against the non-debtor will deplete the estate's resources;
>
> (2) a substantial contribution to the plan by the non-debtor;
>
> (3) the necessity of the release to the plan;
>
> (4) the overwhelming acceptance of the plan and release by creditors and interest holders;
>
> (5) the plan provides a mechanism to pay all or substantially all of the claims of the creditors and interest holders under the plan;
>
> (6) the plan provides an opportunity for those claimants who choose not to settle to recover in full; and
>
> (7) the bankruptcy court made a record of specific factual findings that support its conclusions

See id.; see also Global Indus. Techs., 2013 WL 587366, at *39 (analyzing channeling injunction for tort claims relating to silica products under section 105(a) and 1123 and relying on Dow Corning factors); Washington Mutual, 442 B.R. at 346 (citing Master Mortgage Inv. Fund, Inc.,

[10] As discussed further herein, the factors considered by certain courts in approving releases of a third party by a debtor's estate mirror certain of the considerations regarding third party releases and permanent injunctions. These factors, which were originally set forth in Master Mortgage Inv. Fund, Inc., 168 B.R. 930, 937 (Bankr. W.D. Mo. 1994) are: (1) an identity of interest between the debtor and non-debtor such that a suit against the non-debtor will deplete the estate's resources; (2) a substantial contribution to the plan by the released party; (3) the necessity of the release to the plan; (4) the overwhelming acceptance of the plan and release by creditors; and (5) the plan provides a mechanism to pay all or substantially all of the claims of the creditors and interest holders affected by the release. See Washington Mutual, 442 B.R. at 347. Accordingly, if the standards for approving the Third Party Releases are satisfied, the standards for permissible Debtor Releases will be satisfied as well.

168 B.R. 930, 937 (Bankr. W.D. Mo. 1994)) (applying factors (1)-(5) in analyzing an estate release of third parties).

15. Although the factors set forth in Dow Corning are instructive as guideposts in analyzing third party releases in a Chapter 11 plan, these should not be viewed as a set of conjunctive requirements. See Metromedia Fiber Network, 416 F. 3d at 142 (citing to Dow Corning and Continental and explaining that the analysis of whether sufficiently unique circumstances exist to justify third party releases is "not a matter of factors and prongs"); Dow Corning, 280 F.3d at 658 (explaining that the factors set forth in the opinion represented a summary of the considerations employed by other courts, including the Third Circuit's Continental decision); see generally Washington Mutual, 442 B.R. at 346 (analyzing debtor releases and applying the first five factors summarized in Dow Corning while stating that "[t]hese factors are neither exclusive nor conjunctive requirements, but simply provide guidance in the Court's determination of fairness"); Indianapolis Downs, 486 B.R. at 304 (approving debtor releases although not essential to the plan and plan did not provide for payment of substantially all of the claims affected where the record reflected overwhelming creditor support). Rather, the Court should look to the Continental "hallmarks" to determine whether non-consensual releases are appropriate given the facts of the case before it.

III. Releases and Channeling Injunction are Warranted Under the Circumstances

16. As discussed herein, regardless of the precise methodology applied, an adequate record exists to support the approval of the Releases and Channeling Injunction. For purposes of completeness and concision, factors used by other courts will be discussed seriatim.

A. Identity of Interest Between the Debtors and Wal-Mart

17. An identity of interest exists between the debtor and a released third-party when "a suit against any such non-Debtor either is, in essence, a suit against one or more of the

Debtors, or will otherwise deplete the assets of the Debtors' estates." Am. Family Enters., 256 B.R. at 392. This identity of interest typically exists where the debtor maintains an indemnification obligation to the released party. See Indianapolis Downs, 486 B.R. at 303; Washington Mutual, 442 B.R. at 347. Blitz U.S.A., Inc. and Wal-Mart were party to certain Wal-Mart vendor agreements (the "Vendor Agreements") which contractually required the Debtors to indemnify Wal-Mart for all personal injury suits, including those arising from Blitz Personal Injury Trust Claims. Further, Wal-Mart has presented demands to the Debtors with respect to all Blitz Personal Injury Trust Claims for which litigation has commenced against Wal-Mart both before and after the Petition Date. These indemnification obligations alone are sufficient to establish an identity of interest between Wal-Mart and the Debtors.

18. Moreover, in addition to these specific indemnification obligations, Wal-Mart is a critical stakeholder in these Chapter 11 Cases. Specifically, Wal-Mart, along with the Participating Insurers and the BAH Settling Parties, share the common goal of resolving their interrelated and competing claims and achieving a fair and equitable distribution of the Debtors' remaining assets accomplished through the Plan. This unified interest in formulating and confirming the Plan establishes an appropriate identity of interest. See Coram Healthcare, 315 B.R. at 335 ("Although the Noteholders do not share an identity of interest with the estate on the matter of the litigation (unlike a debtor's insurance carrier or directors and officers who may have indemnification agreements with the debtor), as the largest creditors and preferred shareholders they do share a common goal of achieving a reorganization of the Debtors."); Zenith, 241 B.R. at 111 (parties being released "who were instrumental in formulating the Plan, similarly share an identity of interest [with the Debtor] in seeing the Plan succeed . . . ."); In re Tribune Co., 464 BR 126, 187 (Bankr. D. Del. 2011) (holding that debtors and their secured

lenders "share the common goal of confirming the [] Plan" and implementing the consummation thereof, thus creating an identity of interest between the parties).

19. Even if the Court were to find that Wal-Mart's indemnification rights against the Debtors and its unified interest in confirming the Plan were insufficient to establish an identity of interest, the Vendor Agreements also required the Debtors to maintain insurance which provided coverage for Wal-Mart in addition to the Debtors' indemnification obligations. Wal-Mart is an additional insured under all of the Blitz Insurance Policies, including the Participating Insurer Policies. Wal-Mart vigorously defended its rights as an additional insured under the Blitz Insurance Policies and has independently tendered Blitz Personal Injury Claims asserted against Wal-Mart to the Participating Insurers. Because the primary remaining assets in the Debtors' Estates are the Blitz Insurance Policies and suits against Wal-Mart are covered by and satisfied from those policies, any liability against Wal-Mart on account of Blitz Personal Injury Trust Claims undoubtedly would deplete the assets of the Debtors' Estates. Thus, an identity of interest exists between the Debtors and Wal-Mart.

20. When discussing Wal-Mart's indemnification and contribution rights, the Newby Claimants assert that "[t]he net effect on the estate is zero."[11] That assessment misses two critical points. First, in addition to its indemnification rights, Wal-Mart is entitled to reimbursement of its defense costs under several of the Blitz Insurance Policies. The payment of such costs further erodes the value of these policies and decreases the proceeds available for other holders of Blitz Personal Injury Claims. Indeed, at the Confirmation Hearing, Wal-Mart will put on expert testimony that historically defense costs have equaled 80% of indemnity costs. Thus, for every $100 paid on behalf of personal injury claims, an additional $80 in defense costs are incurred.

[11] Newby Objection, at ¶14.

21. Second, the Newby Claimants completely ignore the reality that not every holder of a Blitz Personal Injury Claim has a claim against Wal-Mart. Those claimants, who may not have any source of recovery other than from the Debtors (who, absent the settlement, are otherwise administratively insolvent), are the creditors most affected when proceeds from the Blitz Insurance Policies are paid to Wal-Mart for defense costs or for indemnification. Indeed, in cases where Wal-Mart is entitled to reimbursement of its defense costs as well, the pace of the exhaustion of the Blitz Insurance Policy at issue will be greatly accelerated.

B. Substantial Contribution by Wal-Mart

22. Wal-Mart believes that its substantial contribution is evident. Wal-Mart is contributing $24,129,3600.64 to the Blitz Personal Injury Trust in connection with the Insurance Settlement. As the evidence to be offered at the confirmation hearing will demonstrate, the $24,129,3600.64 that Wal-Mart is contributing through the Insurance Settlement is well beyond any reasonable interpretation of the self-insured retention ("SIR") obligations arising from the Blitz Personal Injury Trust Claims. The excess portion of Wal-Mart's contribution is to pay for and justify the extraordinary relief provided to Wal-Mart under the Plan.

23. Wal-Mart's substantial contribution does not end there, however. Wal-Mart was acutely aware of the lack of funds in the Debtors' Estates and has provided, or will provide, additional contributions to fund a significant portion of the costs of carrying these cases through the Effective Date. In particular, Wal-Mart agreed to waive its $1.54 million secured setoff claim to provide additional funds as a source for payment of administrative and general unsecured claims against the USA Debtors. In addition, Wal-Mart advanced over $100,000 toward the costs of notification of the bar date for Blitz Personal Injury Claims. Without these

additional significant contributions from Wal-Mart, the Debtors could not achieve confirmation of the Plan.

24. Finally, Wal-Mart is also making a substantial contribution to the Debtors' Estates by agreeing to waive its contribution and indemnification claims against the Debtors. As noted above, Wal-Mart, as an additional insured and in the absence of a settlement, would be entitled to indemnity from the Blitz Insurers and a right of contribution from the Debtors for Blitz Personal Injury Trust Claims and defense costs. Wal-Mart will provide evidence at the Confirmation Hearing to assign a value to the waiver of these claims.

25. Wal-Mart made a substantial contribution for the benefit of the Debtors' Estates to fund the distributions in the Plan. Accordingly, this factor weighs in favor of approving the Releases and the Channeling Injunction.

C. Releases and Channeling Injunction are Indispensable to Plan

26. The Releases and Channeling Injunction are integral to the Plan and are given in exchange for contributions that will ultimately result in meaningful distributions to the Debtors' creditors. The Plan could not be more unambiguous that the Insurance Settlement and the BAH Settlement will not be effective absent the Releases and the Channeling Injunction. See Plan, §§ 14.2.5-14.2.6; see also BAH Settlement Term Sheet, at ¶¶2, 8; Insurance Settlement Term Sheet, at ¶¶5–7. Absent the funds provided by the Insurance Settlement and the BAH Settlement, the Debtors' cases cannot remain in Chapter 11.

27. Without the finality provided by the Releases and the Channeling Injunction, Wal-Mart is unwilling to make any of the contributions described above. Moreover, Wal-Mart, as an additional insured under the Participating Insurer Policies, would not consent and allow its insurance rights to be compromised without being fully released and protected from Blitz

Personal Injury Claims.[12] Moreover, Wal-Mart's contribution satisfied the SIR requirements under all the Participating Insurer Policies, which was necessary to activate coverage under those policies for all beneficiaries of the policies, including the Debtors and holders of Blitz Personal Injury Claims that do not have claims against Wal-Mart. Thus, the Insurance Policy Buy-Back, which generates nearly $138 million of the Insurance Settlement Payment, would not be possible without Wal-Mart's involvement and consent.[13]

28. Without the funds from the Insurance Settlement Payment and the other contributions by Wal-Mart discussed above, the Debtors cannot confirm any Chapter 11 plan—and certainly not one that provides the robust distributions offered in the Plan. Absent those funds, the Debtors are left with little to no assets to distribute to creditors, and their remaining insurance coverage would rapidly be depleted by substantial litigation and administrative costs. Even if any insurance proceeds remained available in such a scenario, they would only be available—at some unknown point in the future as opposed to now—to the holders of Blitz Personal Injury Claims on a first-come, first-served basis, leaving most creditors with no recovery. The Newby Objection argues that this is precisely the result that should happen. This Court should not jeopardize the substantial recoveries available to holders of Blitz Personal

[12] At the Confirmation Hearing, Wal-Mart will offer testimony demonstrating that (i) it relies heavily on the insurance policies of its suppliers, including the Debtors, as part of its risk management policy and (ii) it aggressively protects and defends its insurance rights under such policies.

[13] Indeed, because Wal-Mart is an additional insured, the Participating Insurers' portion of the Insurance Settlement Payment is being contributed **on behalf of Wal-Mart** as well as the Debtors.

Injury Claims at the insistence of one hold-out that wants to "roll the dice" on a larger recovery in the tort system.[14]

29. The Releases and the Channeling Injunction for Wal-Mart were negotiated at arm's-length and represent fair value in exchange for the substantial monetary contributions by Wal-Mart. There is no chance of a confirmable Plan without the Releases and Channeling Injunction, and if the Plan is not confirmed, these Chapter 11 Cases will immediately be converted to Chapter 7 or dismissed to the detriment of all creditors. Accordingly, the Releases and the Channeling Injunction are essential to the success of the Plan. See In re Union Fin. Servs. Group, Inc., 303 B.R. 390, 428 (Bankr. E.D. Mo. 2003) ("Where the success of the reorganization is premised in substantial part on such releases, and the failure to obtain releases means the loss of a critical financial contribution to the debtor's plan that is necessary to the plan's feasibility, such releases should be granted.").

30. The Newby Claimants also argue that the Releases and Channeling Injunction are impermissible in a liquidating plan because they cannot be essential to a "reorganization." That objection is flawed. While the majority of cases have examined third party releases and injunctions in the context of reorganization cases, as opposed to liquidating plans in Chapter 11,

[14] Besides the fact that the Blitz Personal Injury TDP provides Newby with the ability to resort to the tort system to liquidate her claims, as set forth below, the Newby Objection also assumes that liability is a foregone conclusion. Wal-Mart has asserted significant defenses to liability in the underlying litigation, to which the Newby Objection declines to assign any risk. Moreover, Newby is projected to receive $5,040,918.00. In light of Wal-Mart's defenses to liability and the insurance coverage issues acknowledged in the Newby Objection, this amount hardly constitutes "pennies on the dollar."

no cases from the Third Circuit have held that they are impermissible in liquidating plans.[15] See In re Medford Crossings North, LLC, Case No. 07-25115, 2011 WL 182815, at *18 (Bankr. D.N.J. Jan. 20, 2011) (denying third party releases for inadequacy of consideration, but rejecting argument that a liquidating plan is per se ineligible for such relief and citing Continental); Official Comm. of Unsecured Creditors v. Bechtle (In re Labrum & Doak), 237 B.R. 275, 283, 305 (Bankr. E.D. Pa. 1999) (approving of a postconfirmation permanent injunction even though the debtor-partnership filed a chapter 11 liquidating plan); see also In re U.S. Fidelis, Inc., 481 B.R. 503, 520 (Bankr. E.D. Mo. 2012) ("[E]ven though this Case is a liquidation, the same principal applies as in a reorganization. A release of a non-debtor is appropriate only if, without it, there would be little likelihood of the accomplishing of the goal of the chapter 11: the confirmation of a successful plan of liquidation that benefits the creditors, including the unsecured creditors. Here, there is no chance of a plan of liquidation without the releases, and if there is no confirmed plan, the Case either will be converted to a chapter 7 case or dismissed."). Instead, the proper focus of this factor is how essential the injunction is to the chapter 11 plan, rather than whether it is essential to a successful reorganization. It is undoubtedly essential here.

[15] In fact, a significant number of cases have approved of non-debtor releases contained in chapter 11 liquidating plans. See, e.g., Greer v. Gaston & Snow (In re Gaston & Snow), Case No. 93 Civ. 8517 1996 WL 694421, at *2-*5 (S.D.N.Y. Dec. 4, 1996) (holding that the non-debtor releases in the debtor-partnership's liquidating chapter 11 plan were valid); Abel v. Shugrue (In re Ionosphere Clubs, Inc.), 184 B.R. 648, 654-55 (S.D.N.Y. 1995) (upholding a non-debtor release contained in the corporate debtors' chapter 11 liquidating plan); In re Heron, Burchette, Ruckert & Rothwell, 148 B.R. 660, 666-68, 685-87 (Bankr. D.D.C. 1992) (same); Polygram Distribution, Inc. v. B-A Sys., Inc. (In re Burstein-Applebee Co.), 63 B.R. 1011, 1012, 1018-20 (Bankr. W.D. Mo. 1986) (approving permanent non-debtor injunction in liquidating Chapter 11). Moreover, recent cases have authorized third party releases in a liquidation scenario even outside of the context of a chapter 11 plan. See, e.g., Apps v. Morrison (In re Superior Homes & Invs., LLC, Case No. 12-15451, __ Fed. App'x ___ (11th Cir. June 10, 2013) (available at 2013 WL 2477057) (issuing a "bar order" enjoining claims against settling defendants in a chapter 7 case); O'Toole v. McTaggart (In re Trinsum Group, Inc.), Case No. 08-12547, 2013 WL 1821592 (Bankr. S.D.N.Y. Apr. 30, 2013) (issuing a "bar order" enjoining non-consenting third party claims against settling defendants in a post-confirmation liquidating chapter 11 case).

D. Voting Classes Have Overwhelmingly Accepted the Plan

31. As evident from the Voting Declaration, all classes eligible to vote have voted to accept the Plan. Most importantly, approximately 94.25% of the holders of Blitz Personal Injury Trust Claims against the USA Debtors and 100% of the holders of Blitz Personal Injury Trust Claims against the BAH Debtors who voted have voted in favor of the Plan.[16] Although the case law does not specify the percentage of claims required to constitute overwhelming acceptance of a plan, courts have found that the "overwhelming acceptance" factor was satisfied by voting results similar to those indicated in the Voting Declaration. See A.H. Robins Co., 880 F.2d at 702 (finding overwhelming acceptance when 94.38% of personal injury claimants subject to channeling injunction voted in favor of the plan); Coram Healthcare, 315 B.R. at 335 (finding overwhelming acceptance by general unsecured creditors voting 96.6% in amount and 87.2% in number in favor of the plan); Master Mortgage, 168 B.R. at 938 (finding that the two classes most affected by the injunction overwhelming supported it when analyzing voting results indicating that between 93.4% and 96.2% supported the plan).[17] Indeed, the approval percentages here far surpass the statutory requirement for approval in asbestos cases found in section 524(g). 11 U.S.C. § 524(g)(2)(B)(IV)(bb) (requiring that "at least 75 percent of those voting [vote] in favor of the plan"). Accordingly, the holders of Blitz Personal Injury Trust Claims that are subject to the Releases and the Channeling Injunction have overwhelming

[16] Moreover, of the five (5) members of those classes that voted against the Plan, only two (2) filed an objection to the Plan. Because the other three (3) holders that voted no did not file an objection to the Releases or the Channeling Injunction, they have consented to the Releases and the Channeling Injunction. See Fidelis, 481 B.R. at 517 (finding that a creditor that rejects the plan can be found to have consented to a release unless the creditor objects); In re Spansion, Inc., 426 B.R. 114, 144 (Bankr. D. Del. 2010) (finding the fact that no member of a class deemed to accept the third party releases objected to the releases persuasive in overruling objection by US Trustee).

[17] Importantly, the Master Mortgage court indicated that it "considers [the overwhelming support factor] the single most important factor." Master Mortgage, 168 B.R. at 938.

accepted the Plan, which weighs heavily in favor of approving the Releases and the Channeling Injunction.

E. The Plan Provides a Mechanism to Pay Fair Consideration to Affected Claims

32. The Third Circuit has instructed that fair consideration must be provided in exchange for a compelled release. See In re United Artists Theatre Co., 315 F.3d 217, 227 (3d Cir. 2003) (citing Continental Airlines, 203 F.3d at 214-15). Courts have interpreted this as necessitating a substantial satisfaction of the claims affected by the third party releases and channeling injunction. See Fidelis, 481 B.R. at 520 (non-consensual third party release permissible where creditors were set to receive a meaningful distribution under the plan); In re Exide Techs., 303 B.R. 48, 74 n. 37 (Bankr. D. Del. 2003) (noting that this factor may be satisfied "upon presentation of a consensual plan, in the absence of objection to the release/injunction provisions, or upon a [] meaningful distribution to unsecured creditors"). Courts have recognized that fair consideration exists where the affected claims receive a significant distribution that otherwise would be unavailable absent confirmation of the plan. See Metromedia Fiber Network, 416 F. 3d at 142 (explaining that a finding of "good and sufficient consideration" being paid to an enjoined creditor has weight in equity, but is not an absolute requirement to justify a third party release); Drexel Burnham, 960 F.2d at 288-93 (approving multi-billion dollar settlement of 850 securities claims against debtor, but where creditors did not receive payment in full from contributing debtor personnel); Am. Family Enters., 256 B.R. at 377, 386-87, 390-92, 405-08 (approving third party release and injunction even though the plan did not provide for payment in full on the extinguished claims, where claimants received approximately 90% projected recovery on their claims). To the extent that a plan, such as the proposed Plan, provides for payment in full of claims affected by the releases, it undoubtedly demonstrates "fair consideration" under Continental and United Artists. See Dow Corning, 280

F.3d at 658 (approving channeling injunction providing for full payment of covered claims); A.H. Robins Co., 880 F.2d at 701 (approving plan providing for payment in full of enjoined claims).

33. The expert testimony to be provided at the Confirmation Hearing will demonstrate that the proceeds available from the Insurance Settlement Payment will provide fair consideration for the Releases and the Channeling Injunction. Indeed, the distributions under the Plan to holders of Blitz Personal Injury Claims may meet or exceed the anticipated value of such claims if they were liquidated in the tort system. The significant defenses to the underlying personal injury litigation along with the complex and threshold coverage disputes surrounding the Participating Insurer Policies casts further doubt on the ultimate net recoveries for holders of Blitz Personal Injury Claims if liquidated on a one-off basis in the tort system.

34. In contrast, the Plan provides for an orderly distribution to holders of Blitz Personal Injury Trust Claims based on a comprehensive analysis under the Blitz Personal Injury TDP which takes into account numerous individual factors in deriving the value ultimately assigned to a particular Blitz Personal Injury Claim. Thus, the Plan ensures that no particular claimant will be advantaged or disadvantaged by the pace at which its claims are liquidated in the tort system and that no one particular claimant will have access to the Debtors' insurance coverage to the prejudice of others. Neither of these benefits is available outside of the Plan, where holders of Blitz Personal Injury Claims must "race to the courthouse" to have any hope of recovery from the Blitz Insurance Policies. Accordingly, Blitz Personal Injury Claims as a whole will fare better based on distributions from the Blitz Personal Injury Trust under the Plan than they would through the tort system outside of Chapter 11. This factor weighs in favor of approving the Releases and Channeling Injunction.

F. TDP Provides an Opportunity for Liquidation of Claims in the Tort System

35. Because the settlements embodied in the Plan likely provide a significantly greater distribution to holders of Blitz Personal Injury Claims, Wal-Mart submits that holders of Blitz Personal Injury Claims would achieve better results by not resorting to the tort system. Nevertheless, the Blitz Personal Injury TDP provides a mechanism for holders of Blitz Personal Injury Claims to reject the offers they receive from the Blitz Personal Injury Trustee and proceed to mediation/arbitration and ultimately litigation through the tort system with respect to their respective Blitz Personal Injury Claim. See Blitz Personal Injury TDP at § 6.5(a)-(c). Therefore, since claimants will have an opportunity to liquidate their respective claims in the tort system, this factor weighs in favor of approving of the Releases and Channeling Injunction.

G. Adequate Record Exists to Support Specific Factual and Legal Findings

36. At the Confirmation Hearing, Wal-Mart will provide more than adequate evidence to demonstrate the specific factual and legal findings required to justify its receipt of the benefits of the Releases and Channeling Injunction. Moreover, the proposed Confirmation Order will set out each of these necessary findings in detail to establish that the record justifies the requested relief. Accordingly, if the Court elects to approve the Releases and the Channeling Injunction, it will have sufficient evidence before it to make the detailed findings of fact and conclusions of law to support the approval of the Releases and Channeling Injunction with respect to Wal-Mart.

IV. The Court Has Jurisdiction to Enter the Releases and Channeling Injunction

37. Although Wal-Mart believes that the foregoing discussion clearly establishes a basis for jurisdiction to enter the Releases and the Channeling Injunction, a significant portion of the Newby Objection asserts "doubts" about this Court's subject matter jurisdiction to enter the Channeling Injunction. See Newby Objection at ¶¶39-40. The Newby Objection, however, does

not definitively argue that the Court is without jurisdiction. Nevertheless, the Newby Claimants' doubts are misplaced based on the rationale set forth in the very case the Newby Objection relies upon, In re Combustion Engineering, Inc., 391 F.3d 190 (3d Cir. 2004). Contrary to the assertions in the Newby Objection, Combustion Engineering acknowledged that with appropriate factual findings, the Bankruptcy Court's "related to" jurisdiction can extend to non-derivative claims against non-debtor third parties when (1) there is a corporate affiliation between the debtor and the third party, (2) the independent claims at issue may have a direct effect on the plan, (3) there is a unity of interest between the Debtors and the third party, including express indemnification obligations, and (4) the Debtors and the third party share insurance policies. Id. at 227-233 (discussing other cases where jurisdiction existed in each of these circumstances). As set forth above, several of these jurisdictional bases are present with respect to claims against Wal-Mart.

38. The seminal test for determining "related to" jurisdiction was set forth in Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir.1984). In Pacor, the Third Circuit stated that "[t]he usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy* . . . ." Id. at 994 (emphasis in original). "A key word in [this] test is 'conceivable.' Certainty, or even likelihood, is not a requirement." In re Marcus Hook Dev. Park Inc., 943 F.2d 261, 264 (3d Cir. 1991) (citation omitted). Further, determining whether a lawsuit could conceivably affect the bankruptcy requires an analysis of "whether the allegedly related lawsuit would affect the bankruptcy without the intervention of yet another lawsuit." In re Federal–Mogul Global, Inc., 300 F.3d 368, 382 (3d Cir.2002).

39. Applying the Pacor test, as interpreted by the Third Circuit in Combustion Engineering, the most obvious ground for this Court's jurisdiction over personal injury claims against Wal-Mart is the unity of interest with the Debtors based on Wal-Mart's potential claims for contribution and indemnification. See In re Dow Corning Corp., 86 F.3d 482, 493-94 (6th Cir. 1996) (finding related to jurisdiction where claims for contribution and indemnity "would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as [debtor's] ability to resolve its liabilities and proceed with reorganization"). Wal-Mart has contractual indemnification rights under its Vendor Agreements with Blitz U.SA. Inc. Because the Blitz Personal Injury Claims themselves are covered by the Blitz Insurance Policies, "a judgment against [Wal-Mart] will in effect be a judgment or finding against the debtor." Id. (citing A.H. Robins Co. v. Piccinin, 788 F.2d 994, 999 (4th Cir. 1986)); see also Combustion Eng'g, 391 F.3d at 230-31 (identifying the rationale expressed in Dow Corning as a basis to exercise related to jurisdiction). Separately, jurisdiction exists because Wal-Mart and the Debtors share the same pool of insurance. See id. at 495 (collecting cases).

40. The Third Circuit's decision in CoreStates Bank, N.A. v. Huls Am., Inc., 176 F.3d 187 (3d Cir. 1999) serves as an additional ground for related to jurisdiction based on the facts of these Chapter 11 Cases. As in CoreStates, the resolution of Newby's claim against Wal-Mart "would have impacted upon the debtor's options in crafting a plan that met with [Wal-Mart]'s approval and thereby affected the handling of the bankruptcy estate." Id. at 204. Specifically, Wal-Mart would not have agreed to waive its contribution and indemnity rights against the Debtors if Newby's (or anyone else's) claim against Wal-Mart was not released. Moreover, the Insurance Settlement represents a global resolution of all claims surrounding the Participating Insurer Policies, including Wal-Mart's claims against the policies. Because the Participating

Insurer Policies represent a significant portion of the Debtors' remaining assets, the Insurance Settlement "involved a dispute regarding assets of the debtor's bankruptcy estate." Combustion Eng'g, 391 F.3d at 230 (distinguishing CoreStates on this "most important" ground). Thus, because Newby's claim against Wal-Mart directly affects the viability of the Plan, related to jurisdiction exists on this basis as well.

41. In addition to its unfounded "doubts" about the Court's jurisdiction, the Newby Objection also asserts that the Court is without authority to "finally adjudicate" its claim against Wal-Mart under the Supreme Court's recent decision in Stern v. Marshall, 131 S. Ct. 2594 (2011). Much like its concerns about the Court's jurisdiction, the Newby Objection's Stern argument is also misplaced. In particular, neither Wal-Mart, nor the Plan itself, asks this Court to "finally adjudicate" any Blitz Personal Injury Claim. Indeed, the Plan makes no attempt to liquidate, estimate, or otherwise resolve the Blitz Personal Injury Claims, and the Blitz Personal Injury TDP provides an express mechanism to permit any holder of a Blitz Personal Injury Claim to refuse the settlement and liquidate his or her claim in the tort system. See Blitz Personal Injury TDP, at ¶ 6.5(c). Instead, the Releases and the Channeling Injunction simply substitute the Blitz Personal Injury Trust as the defendant in the underlying litigation; all rights and defenses are expressly preserved.

CONCLUSION

The Court's task is to ensure that the Releases and the Channeling Injunction satisfy the hallmarks set forth in Continental. For all the foregoing reasons, and based on the authorities and evidence presented above, and as will be further demonstrated at the Confirmation Hearing, Wal-Mart submits that the Plan, and in particular the Releases and the Channeling Injunction, satisfies all of the applicable requirements of the Bankruptcy Code and the Bankruptcy Rules and should be confirmed. Accordingly, Wal-Mart respectfully request that the Court enter the proposed Confirmation Order confirming the Plan and all provisions thereof and grant such other relief as is just and proper.

Dated: January 24, 2014

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
BLITZ U.S.A. Inc., *et al,*	:	Case No. 11-13603(PJW)
	:	
Debtors.	:	
	:	
	:	

CERTIFICATE OF SERVICE

I, Jeremy W. Ryan hereby certify that I am not less than 18 years of age and that on this 24th day of January 2014, I caused a true and correct copy of ***Wal-Mart Stores, Inc.'s Memorandum of Law in Support of the Debtors' and Official Committee of Unsecured Creditors' First Amended Joint Plan of Liquidation*** to be served upon the parties on the attached service list via first class mail, postage pre-paid.

Under penalty of perjury, I declare the foregoing is true and correct.

Dated: January 24, 2014
Wilmington, Delaware

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