

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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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: July 19, 2013 at 4:00 p.m. (ET)
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,)
<hr/>)

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



JEREMIAH FENN, JR. AND JA'EL FENN;)
 KAYLEE FREELAND, A MINOR; CHAD)
 FUNCHES; KAREN GUENIOT-)
 KORNEGAY, INDIVIDUALLY, AND ON)
 BEHALF OF ALL OF THE WRONGFUL)
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 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)
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 BOTH INDIVIDUALLY AND AS)
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 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' FIFTH 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, further 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 wind-down their business 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. As of the Petition Date, Blitz U.S.A., Inc. (“Blitz”) was the leading producer of portable consumer gasoline containers (“PCGCs”) in the United States with as many as 150 million Blitz PCGCs in circulation. Approximately three years prior to the Petition Date, Blitz began to experience an increase in litigation relating to PCGCs with approximately four to seven new personal injury cases filed against Blitz each year. Although Blitz previously had been able to manage its litigation exposure and associated defense costs, the marked increase in PCGC related lawsuits compelled Blitz to divert virtually all net operating cash flows after debt service to fund its self-insured retention payments of \$1 million per occurrence. Indeed, between March 2011 and the Petition Date, as many as 22 new cases (occurrences) were filed against Blitz, for a total of 36 pending lawsuits (the “PCGC Litigation”). Thus, Blitz was forced to commence the Chapter 11 Cases to obtain a much needed breathing spell from its pending litigation.

4. As noted above, prior to the Petition Date, the Debtors actively defended against any liability in the PCGC Litigation. The Debtors also were providing a defense to Wal-Mart Stores, Inc. and certain of its affiliates (collectively, “Wal-Mart”) who (along with other parties (with Wal-Mart, collectively, the “Third Parties”)) were named in one or more of the PCGC Litigation lawsuits, including subject to and pursuant to certain indemnification agreements between the parties.

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 in order to protect the Debtors from the risk of increased indemnification obligation, claims for set-off, or other litigation 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 “Hearing”) on the Debtors’ request for entry of injunctive relief 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 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”). Upon information and belief, certain of the PCGC Motions have been decided by those courts — some have been granted, some denied. Moreover, since filing the Action, several additional lawsuits have been filed naming Wal-Mart and/or Kinderhook as defendants. The Debtors have continued the Hearing on several occasions including in order to permit the relevant courts to consider and decide pending PCGC Motions. As of the date of this Motion, the Hearing has been continued to a date to be determined.

8. On July 31, 2012, the Debtors announced that they would liquidate rather than continuing to operate their business as a going concern. Following Court approval of bidding

procedures, the Debtors initiated a process to sell substantially all of their assets. On September 11, 2012, the Court entered the *Order (A) Approving the Sale of Substantially All of the Debtors Assets Free and Clear of All Liens, Claims, Encumbrances And Interests; and (B) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases* [D.I. 758] approving the sale of substantially all of the Debtors' assets. The sale closed on September 28, 2012. Accordingly, the Debtors are no longer operating as an on-going business.

9. The sale proceeds allowed the Debtors to pay down much of their secured debt obligation. Moreover, following the closing of the sale, the Debtors obtained the use of a limited amount of cash collateral from their lenders in order to, among other things, work toward achieving a consensual resolution in the Chapter 11 Cases. *See Order Approving Second Stipulation (I) Authorizing the Debtors' Continued Use of Cash Collateral and Granting Adequate Protection and (II) Granting Related Relief* [D.I. 817].

10. On August 13, 2012 the Court entered its *Order Appointing Mediator* [D.I. 666] (the "Mediation Order") in the Chapter 11 Cases. The Mediation Order states that the mediator was appointed to "assist the parties in resolving certain issues and impediments relating to the formulation and confirmation of a chapter 11 plan." *See Mediation Order*. The Debtors and other parties in interest participated in several mediation sessions, however, on December 10, 2012 the mediator entered his *Mediator's Status Report* [D.I. 957] indicating that mediation ended without settlement. While the mediation did not achieve an immediate resolution of claims and interests, the parties' discussions regarding a potential consensual plan are ongoing. As has been reported to the Court on several occasions, certain of Blitz's insurers, Wal-Mart, the Committee and others are engaged in continuing discussions regarding plan and/or settlement related issues. While there is no certainty regarding whether the parties' discussions will be

fruitful, the Debtors remain optimistic that the parties may come together for the purposes of supporting a plan.

11. The Debtors' previously sought and received four extensions of the initial 120-day time period for service in this Action provided in Bankruptcy Rule 7004 and Federal Rule 4(m), which extensions expire on June 28, 2013 (the "Current Time Period"). In light of the current posture of the Debtors' cases, 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 Current Time Period through October 25, 2013.

RELIEF REQUESTED

I. Extension of Time

12. By this Motion, the Debtors seek to further extend the time period contained in Federal Rule 4(m) an additional 119 days from the expiration of the Current Time Period to October 25, 2013.

13. 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 or as extended by a previous order." 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

² The Current 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 Current 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.").

excepted.”). In addition, Federal Rule 4(m), incorporated into this proceeding by Bankruptcy Rule 7004(a)(1), permits a court to extend the time period to effect service of process upon a showing of “good cause.” *See* Fed. R. Civ. P. 4(m).

14. 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.

15. 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).

16. The Debtors have moved for relief in the Action in good faith and have a reasonable basis for seeking an extension of the Current Time Period. As discussed above, certain of the Third Parties have moved to dismiss or stay pre-petition actions as against them.

While many of the PCGC Motions have been decided, additional lawsuits naming Third Parties continue to be filed. In addition, the Debtors remain optimistic that the parties may come together for the purposes of supporting a plan. An extension of the Current Time Period as requested hereunder will conserve estate resources at a critical time in the Chapter 11 Cases – 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 Current 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).

17. 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).

18. 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 Current Time Period to serve the Complaint has not yet expired and the Debtors timely have filed this Motion to extend the Current Time Period for the reasons discussed.

19. In the Third Circuit, 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).

20. 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

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

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.

21. Here, good cause exists to extend the Current 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 Current Time Period because the Debtors are at a critical stage in the Chapter 11 Cases. The Debtors remain optimistic that the parties may come together for the purposes of supporting a plan. Therefore, extension of the Current 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 Current Time Period.

22. Alternatively, if the Court concludes that the Debtors have failed to establish good cause to enlarge the Current Time Period, it should nonetheless exercise its discretion to extend the Current Time Period. The Action is not frivolous or unreasonable. The Debtors seek relief 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).

23. Based on the reasons discussed above, the Debtors believe that good cause exists to grant an extension of the Current 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

24. 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).

25. 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 (the “Committee”) and, through counsel, are actively involved in the Committee and the Debtors’ Chapter 11 Cases. 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 (just as was done with the previous extension motions) 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: June 28, 2013
Wilmington, Delaware

/s/ Robert C. Maddox

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Michael J. Merchant (No. 3854)
Marcos A. Ramos (No. 4450)
Robert C. Maddox (No. 5356)
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-and-

/s/ Sean M. Beach

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Counsel for LAM 2011 Holdings, LLC and Blitz Acquisition Holdings, Inc.

EXHIBIT A

Proposed Order

**IN THE UNITED STATES BANKRUPTCY COURT
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 Defendants.)
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ORDER EXTENDING TIME TO SERVE SUMMONS

Upon the motion dated June 28, 2013 (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 further 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 further extended to October 25, 2013.
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: _____, 2013
Wilmington, Delaware

THE HONORABLE PETER J. WALSH
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

I, Robert C. Maddox, do hereby certify that on June 28, 2013, I caused copies of the foregoing **Debtors' Fifth Motion for Entry of an Order Extending Time to Serve Summons** to be served by first class mail on the attached service list.

/s/ Robert C. Maddox
Robert C. Maddox (No. 5356)

SERVICE LIST**Counsel for the Defendants**

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