

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In Re:

BLITZ U.S.A., Inc., et al.,

Debtors

Chapter 11

Case No. 11-13603 (PJW)

Jointly Administered

Re. Docket Entry 2007

Objection: January 21, 2014 4:00 p.m. ET

Hearing: January 27, 2014 9:30 a.m.

**Objection of Newby Claimant to Confirmation of the Debtors' and Official
Committee of Unsecured Creditors' First Amended Joint Plan of Liquidation**

Carrie Larkin, Individually and as next friend of Rayne Newby, a minor, and Billy Wayne Newby ("Claimant"), holder of personal injury claims against the above-captioned debtors, debtors-in-possession ("Debtors"), and non-debtor parties (collectively, "Non-Debtor Defendants"), by and through their undersigned counsel, hereby object to confirmation of the Debtors' and Official Committee of Unsecured Creditors' First Amended Joint Plan of Liquidation (the "Plan"). In support of the Objection, the Claimant respectfully states as follows:

I. INTRODUCTION

1. The Claimant is the plaintiff in a post-petition federal court action pending in the state of Texas against Wal-Mart Stores, Inc. ("Wal-Mart") and other Non-Debtor Defendants. (Complaint, Dkt. 1583, Attachment 1) The Complaint does not allege a cause of action against any Debtor. Claimant timely filed a Proof of Claim for Blitz Personal



Injury Claimants in the amount of \$49 million. The Newby Complaint arises from the November 2011 explosion of a defective fuel container that was manufactured by the Debtors and sold by Wal-Mart. Rayne Newby was severely burned in the explosion, who spent one year in the hospital, incurred several million dollars in medical bills, and is still undergoing surgeries. The Complaint alleges, among other allegations, that Wal-Mart had actual knowledge of dangers associated with the Debtors' defective containers but failed to correct the defects or warn the Claimant.

2. The Claimant asserts state law tort claims, including statutory products liability, common-law negligence, breach of warranty, and gross negligence claims—along with other claims—against Wal-Mart. The Claimant has a clear right to have his personal injury claims against the Non-Debtor Defendants determined by a jury in a federal district court. *See, e.g.*, U.S. Const. amend. VII; 28 U.S.C. §§ 157(b)(5), 1411(a). The Claimant hereby expressly reserves and preserves his rights in this regard and further objects to any relief under the Plan that would impair or prejudice his jury trial rights in any manner whatsoever. The Claimant is expressly not waiving his *Stern v. Marshall* rights and is not consenting to the jurisdiction of the bankruptcy court over his tort claims.

3. Over the course of many months, the Plan proponents engaged in extended, private settlement negotiations and point to the prestige of mediators as some indicia of fairness. The Claimant was not a party to these negotiations which produced a liquidation scheme that eliminated the Claimant's right to recover from Wal-Mart and the other Non-Debtor Defendants by channeling his claims into a liquidating trust. This scheme will cause the Claimant to forever forego his right to sue the exceedingly-solvent Non-Debtor Defendant, Wal-Mart, and offer him pennies on the dollar relative to the value of his claim

in a jury trial. As a summary, the scheme provides the following attributes which, in the aggregate, are aggressive, bordering on abusive:

- a) Releases all claims against Non-Debtor Wal-Mart;
- b) Releases all claims against the insurers, without specifying who paid, how much they paid, why they paid, what defenses were available, or what coverage period was involved;
- c) Provides for repurchase of the insurance policies, to foreclose any contractual claims for the remaining policy limits along with any extra-contractual claims,
- d) Provides unexplained, preferential, and disparate treatment between claimants, and
- e) Utilizes funds designed for injured parties to fund administrative costs.

II. SUMMARY OF OBJECTION

4. The Plan cannot be confirmed because it is the product of a tainted settlement process that rewards those creditors with a seat at the table at the expense of those creditors who were not. Moreover, the Plan fails to satisfy the requirements of section 1129(a) of the Bankruptcy Code, which provides that “the court shall confirm a plan only if all the following requirements are met “ 11 U.S. C. § 1129(a).

5. As Plan proponents, the Debtors and Committee bear the burden of establishing by a preponderance of the evidence that the Plan complies with each of the confirmation requirements of section 1129(a) of the Bankruptcy Code. *In re Exide Techs.*, 303 B.R. 48, 58 (Bankr. D. Del. 2003). Further, the Bankruptcy Court has an independent duty to determine whether a plan proponent has met its evidentiary burden under section

1129(a) of the Bankruptcy Code prior to entering a confirmation order. In re Lernout & Hauspie Speech Prods., NV, 301 B.R. 651, 656 (Bankr. D. Del. 2003).

6. Despite the Plan proponents' recent allegations to the contrary, the Plan is not the result of a Wal-Mart's largesse. Rather, it is the result of an improper settlement between the Plan proponents and the Non-Debtor Defendants, which cannot be confirmed because it (i) does not comply with the applicable provisions of the Bankruptcy Code, in violation of section 1129(a)(1), (ii) was not proposed in good faith, in violation of section 1129(a)(3) of the Bankruptcy Code, and (iii) contains nonconsensual releases of Non-Debtor third parties without satisfying the requirements for such releases under this Court's precedent. Moreover, the Plan cannot be confirmed because it discriminates unfairly among similarly situated creditors and is not fair and equitable in violation of section 1129(b)(1) of the Bankruptcy Code.

III. ARGUMENT

A. Improper Non-Debtor Release and Channeling Injunction

The Plan proponents have failed to fulfill the substantive requirements for the approval of a Non-Debtor release and a channeling injunction

7. The Plan provides the extraordinary remedy of a "channeling injunction" to force unwilling claimants to settle their claims not only against the Debtors, but against non-Debtors as well. But "[s]ection 524(e) of the Bankruptcy Code makes clear that the bankruptcy discharge of a debtor, by itself, does not operate to relieve non-debtors of their liabilities." *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 211 (3rd Cir. 2000). "The Bankruptcy Code does not explicitly authorize the release and

permanent injunction of claims against non-debtors, except in one instance not applicable here [asbestos litigation].” *Id.* While “[s]ection 105(a) of the Bankruptcy Code supplements courts’ specifically enumerated bankruptcy powers by authorizing orders necessary or appropriate to carry out provisions of the Bankruptcy Code, . . . section 105(a) has a limited scope . . . [i]t does not create substantive rights that would otherwise be unavailable under the Bankruptcy Code.” *Id.* In the Third Circuit, “the hallmarks of permissible, non-consensual third-party releases and permanent injunctions [are] fairness, necessity to the reorganization, . . . specific factual findings to support these conclusions” and exceptional or unusual circumstances. *Id.*, at 214; *see also In re United Artists Theatre Co.*, 315 F.3d 217, 227 (3d Cir. 2004) (Using *Continental* factors to evaluate nonconsensual third-party releases).

8. In *Continental*, the Third Circuit held that that fairness is partly determined by whether the releases and injunctions were supported by reasonable consideration. *Continental*, 203 F.3d at 215. Such requires a finding that the released Non-Debtor provided a financial contribution necessary to the feasibility of the plan of reorganization. *Id.* Here, though, there is no evidence that Wal-Mart has made a substantial contribution at all or that such a settlement is necessary to these proceedings and, of course, there is no reorganization but only a liquidation. Again, Wal-Mart’s contribution has been kept secret. But when and if disclosed, this Court must then undertake an evaluation of whether it constitutes a “substantial contribution,” itself a concept that is, at best, vague. Given that available insurance proceeds appear *not* to be exhausted by the proposed settlement terms, as a reasonable settlement would demand, Wal-Mart’s contribution cannot be deemed “substantial” for purposes of Non-Debtor releases until the Plan proponents provide

adequate proof that it closes the gap between what the insurers' tender and their true liability.

9. Here, uncapped third-party claims against a culpable, solvent, multi-billion dollar corporation are "exchanged" for the opportunity to participate in an arbitrarily-limited settlement pool that is inadequate to provide full and fair value to the non-settling Claimant. No information has been provided to determine whether the proposed settlement results in a bigger "pool" than would exist by looking just to the Debtor's available assets and liability insurance proceeds. Any incremental increase in the size of the limited pool is not adequate consideration for waiver of the right to seek compensation from a solvent tortfeasor with billions in assets.

10. Approval of channeling injunctions and third-party releases must be predicted on a plan that provides for payment of "all or substantially all" of the released claims. *See In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002) (Holding that the plan must provide a mechanism to pay all, or substantially all, parties affected by the channeling injunction). Here, there is no analysis, and certainly no representation or assurance, that "all or substantially all" of the Claimant's claims against Wal-Mart will be paid.

11. The Plan does not show that the Chapter 11 liquidation is in the best interest of the creditors. The Plan's proponents bear the burden to make this showing. *In re MCorp Financial, Inc.*, 137 B.R. 219, 228 (Bankr. S.D. Tex.1992). The application of the best-interests test involves a hypothetical application of chapter 7 to a chapter 11 plan. *See In re Stone & Webster, Inc.*, 286 B.R. 532, 544 (Bankr. D.Del. 2002); *In re Zaruba*, 384 B.R. 254, 262 (Bankr. D. Alaska 2008) ("The best interests of creditors test requires that

the debtor demonstrate that creditors will fare at least as well in Chapter 11 as they would in Chapter 7.”); *accord In re Resorts Int’l. Inc.*, 145 B.R. 412, 477–78 (Bankr. D.N.J. 1990).

12. Here, the analysis is complicated by the Non-Debtor releases as the Claimant’s potential recovery against the released Non-Debtors must be analyzed. *See Mercury Capital Corp. v. Milford Conn. Assocs.*, 354 B.R. 1, 9 (D. Conn. 2006) (Reversing confirmation of debtor’s Chapter 11 plan and remanding with instructions to the bankruptcy court to consider whether the plan satisfied the best interest test; the district court’s concern was that the plan released a creditor’s claim against non-debtor guarantors, and thus the creditor “may be significantly less secured under the debtor’s plan than under a Chapter 7 liquidation.”); *In re Conseco, Inc.*, 301 B.R. 525, 527-28 (Bankr. N.D. Ill. 2003) (Explaining that the debtor’s prior plan of reorganization was not confirmable because it violated the best interests test by providing that creditors who were entitled to a Chapter 7 liquidation distribution had to release non-debtors in order to receive any payment under the Chapter 11 plan). Both *Mercury Capital Corp.* and *In re Conseco, Inc.*, support the proposition that, when a plan contains a third-party release, the best interest analysis must take account of distributions the releasing creditors would receive in Chapter 7 from the debtor *and* from the protected third parties.

13. The Plan proponents do not provide the “specific factual findings” required before this exceptional and extraordinary relief may be approved. As a threshold matter, with regard to the Claimant’s non-derivative claims against Wal-Mart, there is simply not an identity of interest between the Debtors and Wal-Mart such that a suit against Wal-Mart is, in essence, a suit against the Debtors or will deplete the assets of the Debtor’s estate.

“[T]he fact that the reorganized [debtor] might face an indemnity claim sometime in the future, in some unspecified amount, does not make the release and permanent injunction of Plaintiffs’ claims ‘necessary’ to ensure the success of the [debtor’s] reorganization.”

Continental, 203 F.3d at 216. Moreover, the existence of an insurance policy covering both the debtor and the non-debtors, as additional insureds, does not render non-debtor releases “necessary” to the reorganization. *See id.* (“Similarly unsupported is the District Court’s conclusion that the non-debtor release and permanent injunction were warranted because Plaintiffs’ lawsuits ultimately might implicate the D&O liability insurance policy, which was property of the Continental Debtors’ bankruptcy estate under 11 U.S.C. § 541(a).”) As the court stated, “One cannot assume too quickly that the proceeds of this policy are property of the estate when the non-debtor D&Os, not the Continental Debtors, are the direct beneficiaries of the policy.” Indeed, the Third Circuit previously recognized in a different context “that the proceeds from a[n] insurance policy should be evaluated separately from the debtor’s interest in the policy itself.” *Id.* at 216-17. But “even assuming that the proceeds are property of the estate, this by itself does not justify a permanent injunction of Plaintiffs’ actions against the insured non-debtor D&O defendants as necessary for the reorganization of the Continental Debtors.” *Id.* at 217.

14. As in *Continental*, the liquidation here does not require the extraordinary and abusive relief sought by the Plan proponents. Distinct from *Continental*, however, the indemnification mechanism in this case provides somewhat of a closed system. In great part, and perhaps *in toto*, the claims on the estate are Blitz personal injury claims; conversely, the assets of the estate are liability policy insuring the Debtors and certain Non-Debtors against liability for those Blitz personal injury claims. While true that each

dollar paid by Wal-Mart to a Blitz personal injury claimant provides a theoretical increase in the estate's indemnification exposure, that dollar also satisfies a like amount of the Debtors' personal injury exposure. The net effect on the estate is zero.

15. The Plan proponents simply fail to provide details from which a determination of "necessity" can be made. The limited facts certainly do not support a finding that, but for Wal-Mart's contribution, the Plan would not be feasible. As the Plan Trust will be funded with \$161,320,000.00, the scant information provided on Wal-Mart's *de minimus* contribution is substantially insufficient to label its release a "necessity." See *In re Vencor, Inc.*, 284 B.R. 79, 86 (Bankr. D. Del. 2002).

16. The propriety of non-consensual third-party releases is even more questionable when, as here, the Plan contemplates liquidation instead of reorganization. *In re Berwick Black Cattle Co.*, 394 B.R. 448, 461 (Bankr. C.D. Ill. 2008) ("The rationale for granting third-party releases is far less compelling, if it exists at all, in a liquidation than in a reorganization."). This proposed plan takes a tool that should only be permissible in "extraordinary cases" and applies it for the benefit of one of the largest companies on earth. See *in Lower Bucks Hosp.*, 471 B.R. 419, 463 (Bankr. E.D. Pa. 2012) (citing *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000)).

17. The Third Circuit is clear that non-debtor releases "should not be considered absent a showing of exceptional circumstances." *Continental*, 203 F.3d at 213; see *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002) ("[S]uch an injunction is a dramatic measure to be used cautiously Enjoining a non-consenting creditor's claim is only appropriate in 'unusual circumstances.'") The proposed scheme simply does not provide an opportunity for those claimants who choose not to settle to recover in full.

Consequently, the request for a channeling injunction and non-debtor release is unwarranted and Plan confirmation should be denied.

B. The Settlement is Not Fair or Equitable and Cannot be Approved Under Section 1123(b)(3)(A) of the Bankruptcy Code

18. This Plan is a settlement among Wal-Mart, the Participating Insurers, the Committee and the Debtors. Wal-Mart's contribution to this Plan is a settlement payment. In exchange for its settlement payment, Wal-Mart is receiving consideration. Wal-Mart is purchasing releases from its liabilities to the Blitz Personal Injury Claimants, among other parties. See Plan § 7.2 (granting releases to the Protected Parties, defined to include Wal-Mart).

19. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S. C. § 1123(b)(3)(A). The standards for approving settlements set forth in a plan are the same as the standards for approving settlements pursuant to Bankruptcy Rule 9019. See *In re Nutritional Sourcing Corp.*, 398 B.R. 816, 832 (Bankr. D. Del. 2008); *In re New Century TRS Holdings, Inc.*, 390 B.R. 140, 167 (Bankr. D. Del. 2008). Accordingly, when evaluating the Plan, the Court must determine that the proposed compromise it contains is "fair and equitable." *In re Exide Techs.*, 303 B.R. 48, 67 (Bankr. D. Del. 2003).

To determine whether a settlement is fair and equitable, Third Circuit courts consider four factors: '(1) the probability of success in litigation, (2) the likely difficulties in collection, (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it, and (4) the paramount interest of the creditors.

Nutritional Sourcing, 398 B.R. at 832 (quoting *In re New Century TRS Holdings*, 390 B.R. at 167). While these four factors establish the baseline for the analysis, “Third Circuit courts have made clear that ‘all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise’ should be considered as well.” *Id* at 833 (quoting *In re Marvel Entm’t Group, Inc.*, 222 B.R. 243, 249 (Bankr. D. Del. 1998)). Importantly, when evaluating settlements under the fair and equitable standard, courts “look to the fairness of the settlement to other persons, *i.e.*, the parties who did not settle.” *In re Nutraquest*, 434 F.3d 639, 645 (3d Cir. 2006). Here, the non-settling party is the Newby Claimant. This test applies even if the class as a whole votes to accept the plan and it is clear that “if even one dissenting member of an impaired class would get less under the plan than in a hypothetical liquidation, the fact that the class as a whole approved the plan is immaterial.” *ACC Bondholder Group v. Adelphia Communs. Corp. (In re Adelphia Communs. Corp.)*, 361 B.R. 337, 364-365 (S.D.N.Y. 2007).

20. This Court’s prior decision in *In re Nutritional Sourcing Corporation* is particularly instructive in analyzing the Plan. In *Nutritional Sourcing*, this Court was presented with a dispute concerning the definition of “trade creditor” as used in the Debtors’ plan. Although the Court acknowledged that two of the three applicable factors favored the approval of the settlement and the plan, the Court ultimately denied approval of the settlement. One of the creditors objecting to the plan asserted that “the definition was *created* to unfairly redistribute value away from creditors who were rightfully entitled to it in an attempt to forge consensus for the plan among the major constituencies in this case.” *Nutritional Sourcing*. 398 B.R. at 834 (emphasis in original).

21. This Court examined the alignment of interests of the parties taking part in the negotiations and concluded that six of the nine members had interests in reaching the definition of “trade creditor” that favored their own recoveries. *Id.* at 835. The parties “obviously had a motive in arriving at a narrow definition of ‘trade creditor.’” *Id.* This Court determined that despite the official committee of unsecured creditors’ fiduciary duties, “the composition of the Committee was such that the vast majority of the creditors on that Committee held interests aligned against the ‘non-goods’ trade creditors.” *Id.* at 836. Ultimately, the Court denied approval of the settlement and confirmation because “those parties whose rights were severely adversely impacted were not afforded meaningful participation in the negotiations.” *Id.* at 837. Because the “preeminent interests of creditors” is the paramount consideration in evaluating the fairness and equity of a proposed settlement, a “proposed settlement will necessarily fail where one creditor benefits at the other creditors’ expense.” *Nutritional Sourcing*, 398 B.R. at 837 (quoting *In re Mavrode*, 205 B.R. 716, 721 (Bankr. D.N.J. 1997)).

22. This case present a similar situation. Here, the “Blitz Personal Injury Claimants” are present as a single, homogenous class (Class 4(a)) even though the Claimants are readily grouped into discrete classes according to a variety of criteria.¹ Of these, the most relevant stratification is based on the Claimants’ dates of injury and the corresponding insurance coverage. Although the insurance buyback transaction contemplated in the Plan provides for slightly over \$130 million in payment for the tendered policies, the coverage potentially available under the policies is more than twice

¹ Such criteria include pre-petition vs. post-petition claimants and claimants seeking relief from the Debtors vs. claimants seeking relief only from non-debtors.

as large: \$286 million. [Dkt. 1915, Attachment 1, Exhibit A]. The policies in question are spread among seven different policy years with widely differing policy terms, particularly as to whether coverage may be accessed prior to payment of any self-insured retention and as to Debtor-specific actions may have voided coverage. [Dkt. 1915, Attachment 1, Exhibit A, Deposition of McClain pp.77-78; 134].

23. The last two policy years (which encompass the claims of the Newby Claimant) have the most insurance available with the fewest impediments to coverage. [Dkt. 1915, Attachment 1, Exhibit A, Deposition of McClain pp.77-78; 134].² The converse is also true: older policy years have the least coverage with the greatest coverage defenses. While not fully disclosed, it appears that the Committee was heavily weighted with claimants whose counsel also represent the majority of the “older year” claimants. The appearance of conflict is clear as the claimants in the last two years of coverage are subsidizing the pre-2010 clients of counsel to the Committee members. As noted, a “proposed settlement will necessarily fail where one creditor benefits at the other creditors’ expense.” *Nutritional Sourcing*, 398 B.R. at 837. For this reason, the Newby Claimant objects to Plan confirmation and requests that confirmation be denied.

B. Unreasonable Settlement under *In re Martin*.

The movants have the burden of establishing the reasonableness of the settlement, and this burden has not been met.

24. The standards for approving settlements set forth in a plan are the same as the standards for approving settlements pursuant to Bankruptcy Rule 9019. *See Nutritional*

² Indeed, it appears that the unexpended policy limits for the last two years of coverage are equal to the entire purchase price being paid for buyback of all seven policy years.

Sourcing, 398 B.R. at 832; *In re New Century TRS Holdings, Inc.*, 390 B.R. 140, 167 (Bankr. D. Del. 2008). This requires a showing of reasonableness, and the Plan proponents make no such showing. The Court has a duty to determine whether a proposed settlement is reasonable; that is, whether it is fair and equitable. *See In re Sea Containers Ltd.*, 2008 Bankr. LEXIS 2363, at *15 (Bankr. D. Del., Sept. 19, 2008). This determination requires analysis by the Court to ascertain whether the settlement rests above “the lowest point in the range of reasonableness,” as determined by evaluation of four factors (the “*Martin* factors”). These factors include:

- (1) the probability of success in litigation;
- (2) the likely difficulties in collection;
- (3) the complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and
- (4) the paramount interest of creditors.

In re Capmark Fin. Group Inc., 438 B.R. 471, 476 (Bankr. D. Del. 2010)

25. Beyond the *Martin* factors, however, the determination of whether a settlement is fair and equitable must be measured by analysis of *all additional facts* relevant to a full and fair evaluation of the settlement. *See In re Nutritional Sourcing Corp.*, 398 B.R. 816, 833 (Bankr. D. Del. 2008). Such additional facts can include the scope of releases received by insiders and whether the settlement negotiations were truly arm’s-length. *See also In re Dow Corning Corp.*, 198 B.R. 214 (Bankr. E.D. Mich. 1996).

26. Courts also consider the fairness of the settlement to non-settling parties. *See In re Nutraquest*, 434 F.3d 639 (3d Cir. 2006)(Declining approval of a motion because non-settling parties were denied a fair role in the settlement negotiations.) Here, the Committee members disproportionately represent Claimants whose dates of injury place

them at odds with the Newby Claimant. The Plan proponents fail to provide enough details about the claims settled and the estate assets to allow a meaningful chance to analyze the logic, if any, of the transaction. Absent such details, it is impossible to determine if the Plan is fair and equitable and the Plan proponents have not carried their burden in this regard..

1. Martin Factor 1

Probability of Success in the Litigation

27. Throughout the course of this litigation, the Plan proponents consistently maintained that the insurance-buyback portion of the transaction was necessitated by issues surrounding choice of law and insurance coverage, the “intrinsic risks” of coverage litigation, and open questions about applicable coverage policy periods. But most all coverage litigation involves both risks and complex legal issues, and a settlement may not be deemed reasonable solely because such issues are side-stepped. All settlements mitigate risk. Reasonableness is measured only after full and informed disclosure of those risks, such that the Court and interested persons can weigh the risk of litigation against the settlement proposal. Here, no meaningful disclosure is provided. Of course, the Court need not adjudicate each granulated issue. *See In re Integrated Health Services, Inc.*, 2001 Bankr. LEXIS 100 (Bankr. D. Del., Jan. 3, 2001). That said, the Plan proponents’ burden to show reasonableness is high when the requested relief includes the aggressive release of claims brought against Non-Debtors.

28. The current level of disclosure is insufficient to allow proper coverage analysis. The Plan proponents have offered no information regarding the amount to be paid by each insurer, under which policy, and for which policy year. Coverage defenses

available in any one policy year are not necessarily available in others; as a result, improperly allocating equivalent risk would allow some claimants access to insurance proceeds that might not otherwise enjoy.

29. The failure of the Plan proponents to explain the allocation of payments from the participating insurers—and to explain the logic behind such allocation—suggest that Plan confirmation is not proper. In *Mission Iowa Wind Co. v. Enron Corp. (In re Enron Corp.)*, the bankruptcy court approved a section 363 sale which provided that assets of the chapter 11 debtors and certain European non-debtor affiliates were to be sold for \$325 million in cash and \$168 in assumed liabilities. 291 B.R. 39 (S.D.N.Y. 2003). The bankruptcy court approved the sale in deference to the debtors' proposed allocation of the sale proceeds among the U.S. and European sellers. *Id.* On appeal to the district court, that court concluded the bankruptcy court erred by only approving the total consideration but not making an independent determination of whether the allocation among sellers was fair and reasonable. *Id.* at 43-44. The situation is similar here where different insurance policies with different terms and with different coverage defenses are sold in a block such that it is impossible to analyze the allocation of the total consideration paid to each discrete and disparate asset sold.

30. Claimant asks that the Court remain mindful that the first *Martin* factor measures the viability of claims to be released *by or against the estate*. Wal-Mart, a Non-Debtor, is not the estate. Evidence and argument that might support settlement of claims *by or against the estate* would not justify release of the claims against Non-Debtor Wal-Mart. Wal-Mart's liability to the Claimant is based upon independent, non-derivative causes of action, in contrast to the derivative liability of the insurers. *See The Travelers*

Indem. Co. v. Bailey, 557 U.S. 137 (2009). The Plan proponents seek a release of claims against Wal-Mart based on the unsupported allegation that such is “necessary.” Both Wal-Mart and the Claimant are third-party Non-Debtors. Evaluation of litigation risks among the insurers, the Debtors, and the Committee is no way informs or supports release of the Claimant’s claims against Wal-Mart. Such extraordinary relief is an improper perversion of bankruptcy law.

2. Martin Factor 2

Likely Difficulties in Collection

31. The Plan proponents must support the insurance buy-back portion of the transaction with argument and evidence on the collectability of any judgment awarded against the Participating Insurers to establish the second *Martin* factor. Debtors allege that collectability is in doubt, but such status in no way concerns the claims of the Claimant against Non-Debtor Wal-Mart. Notably, Wal-Mart has not disclaimed the existence of its own, separate liability insurance, which would presumably be available as a source of recovery for Wal-Mart. The Plan proponents rely on anticipated collection difficulties to support their requested relief, yet fail to explain that difficulty with respect to Non-Debtor Wal-Mart.

32. Insurance issues aside, the Plan proponents simply do not discuss the status of Wal-Mart as one of the largest, most profitable, and most solvent companies on the planet. Insurance challenges facing the Blitz Personal Injury Claimants are not present and not relevant to the Claimant’s anticipated success in collecting on claims against Wal-Mart. Nothing addresses the second *Martin* factor with respect to Wal-Mart or the extraordinary relief it seeks.

3. Martin Factor 3

Complexity, Expense, Inconvenience, Delay of Litigation

33. The Plan proponents also fail to establish the third *Martin* Factor: the complexity of the litigation involved and any concomitant expense, inconvenience and delay. Litigation is more complex and more expensive than settlement: that's why parties often settle. But the Plan proponents simply make no showing whatsoever to allow meaningful analysis of the extent to which expense, inconvenience or delay is ameliorated by the proposed transaction. The Claimant respectfully suggests that when the Movants propose a \$162 million settlement for a release of enormous contractual and extra-contractual claims against the Non-Debtors, the Court and the Claimant deserve more than mere platitudes. But that is all the Plan proponents provide; accordingly, they fail to establish the third *Martin* factor with respect to insurance litigation. As noted in discussion of the second *Martin* factor, alleged burdens surrounding the Debtors' coverage litigation are irrelevant to the Claimant's claim against Wal-Mart. The Plan proponents make no showing that this factor supports or even relates to those claims.

4. Martin Factor 4

Paramount Interest of Creditors

34. Here, the Claimant has a substantial claim against Wal-Mart and the Plan seeks to block and channel his Wal-Mart claim into a liquidating trust. This stripping of the Claimant's claims against Non-Debtor Walmart is hardly in the paramount interest of the Claimant. Litigation can certainly be unpredictable and inefficient, but the Claimant is much better served by pursuing its claims against Wal-Mart and avoiding a claims process crafted by the fox in the henhouse.

C. No Showing of Sound Business Judgment

The movants have the burden of proving the exercise of sound business judgment in the sale of their insurance policies, and this burden has not been met.

35. Far from sound business judgment, the record shows that the Debtor in this case has exercised no business judgment whatsoever. Here, the assets being sold are insurance policies owned by Blitz U.S.A., and its CEO testified during his deposition that the Debtor did virtually no analysis and did not know a) the value of the policies, b) the amount being paid for the policies, c) the relationship of the purchase price to the insurers' remaining contractual obligations; the existence or validity of coverage defenses, d) the amount being paid by Wal-Mart, or e) the relationship between personal injury claims in any specific policy period to insurance available in that policy period. [Dkt. 1915, Attachment 1, Exhibit G, Deposition of Flick, pp.22, 23, 29-34, 110-12].

36. The Debtor cannot demonstrate business judgment by deferring to the judgment of the Committee. *In re Lionel Corp.*, 722 F.2d at 1071 ("In this case the only reason advanced for granting the request to sell [the assets] was the Creditors' Committee's insistence on it. Such is insufficient as a matter of fact because it is not a sound business reason and insufficient as a matter of law because it ignores the equity interests required to be weighed and considered under Chapter 11."). The Debtor must exercise its own sound business judgment. *Id.* Here, the Plan proponents make no showing that this was done.

D. Constitutional Concerns

The claimants' private, state-law claims cannot be released by an Article I Court and such would constitute an impermissible taking and fail to provide the Claimant due process. Further, the Plan proponents make no showing that the gender-based access to the Special Circumstances Fund is substantially related to the achievement of an important objective.

37. The Supreme Court has determined that it is unconstitutional for non-Article III judges to finally adjudicate state law private rights when those rights will not necessarily be adjudicated and resolved as part of the claims allowance process. *See Stern v. Marshall*, 131 S. Ct. 2594, 2604-20 (2011) (Holding unconstitutional a bankruptcy court's final adjudication of a debtor's state common law counterclaim because it was a private right and the Court had no "reason to believe that the process of ruling on [the] proof of claim would necessarily result in the resolution of [the] counterclaim."). Private rights are traditional claims, including contract and tort claims, involving "the liability of one individual to another" *Stern*, 131 S. Ct. at 2612; *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) ("The restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages").

38. Here, the claims asserted in the Newby Complaint against Wal-Mart are private rights, including statutory rights, created under state law and are outside this Court's jurisdiction to finally adjudicate. Specifically, the Claimants' claims against Wal-Mart do not implicate the debtor-creditor relationship between the Claimants and the Debtors' estates. These claims against Wal-Mart cannot be enjoined or released by a non-Article III judge.

39. Claimant doubts that this Court has “related to” subject matter jurisdiction over the Claimants’ claims against Wal-Mart, and the Plan proponents’ tacit assumption that such jurisdiction exists is impermissible. *Continental*, 203 F.3d at 214 n.12 (“[A] court cannot simply presume it has jurisdiction in a bankruptcy case to permanently enjoin third-party class actions against non-debtors.”); *accord In re Combustion Engineering, Inc.*, 391 F.3d 190 (3d Cir. 2004) (Suggesting that because 11 U.S.C. § 105 “does not provide an independent source of federal subject matter jurisdiction” that “[r]elated to jurisdiction must therefore exist independently of any plan provision purporting to involve or enjoin claims against non-debtors.”)

40. “Related to” jurisdiction is further questionable when the basis of non-debtor liability is not derivative of the debtor. Here, the Claimant’s state-law claims against Wal-Mart are premised upon the breach of independent duties of Wal-Mart, not Wal-Mart’s derivative liability for wrongful acts of the Debtors. *See* Tex. Civ. Prac. & Rem. Code. Ann. § 82.003(a)(6) (A seller that did not manufacture a product is not liable for harm caused . . . unless . . . (6) that (A) the seller actually knew of a defect to the product at the time the seller supplied the product; and (B) the claimant’s harm resulted from the defect”); *Combustion Engineering, Inc.*, 391 F.3d at 236-37 (Questioning whether “related to” jurisdiction extends to a non-debtor’s non-derivative claims against another non-debtor). But regardless of the presence of “related to” subject matter jurisdiction, under *Stern v. Marshall*, this Court does not have the constitutional power to adjudicate, enjoin, or release the Claimant’s independent causes of action against the Non-Debtor Wal-Mart.

41. The contemplated scheme also violates the Claimants' rights under the United States Constitution, specifically the 5th Amendment (as a violation of due process and as a taking) and the 7th Amendment (concerning the right to a jury trial against Wal-Mart).

42. Finally, the fourth, gender-based criteria for access to the Special Circumstances Fund requires that, under intermediate scrutiny, the Plan proponents show that such discrimination is substantially related to the achievement of an important objective. [Exhibit A to the Plan, p. 8] The Plan proponents make no showing in this regard and confirmation is not permissible.

E. Exceeding Authority under the Bankruptcy Code

The Plan gives an impermissible discharge to a Non-Debtor and impermissibly invokes the Court's equitable powers under section 105(a).

43. The Supreme Court held that exercise of the bankruptcy power to discharge debt cannot be constitutionally accomplished absent a contemporaneous, fair allocation of the debtor's assets to the debtor's creditors. *See Kuehner v. Irving Trust Co.*, 299 U.S. 445, 450, 452, 455 (1937). "[E]quitable powers authorized by § 105(a) are not without limitation, and courts have cautioned that this section 'does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law'" *Combustion*, 391 F.3d at 236. In *Combustion*, the Third Circuit found that the proposed channeling injunction and non-debtor release improper under Section 105(a) because "§ 524(g) provides no specific authority to extend a channeling injunction to include third-party actions against non-debtors where the liability alleged is not derivative of the debtor." *Id.* The Third Circuit further found that Section 524 prohibits the extension of a

channeling injunction to third-party actions against non-debtors where the liability, is, as here, non-derivative, because “Outside the context of § 524(g), § 524(e) provides statutory authority limiting the extension of bankruptcy relief to non-debtors.” *Combustion*, 391 F.3d at 237 n.48. Indeed, under the facts of this case, “the practical effect of the § 105(a) injunction here is to extend bankruptcy relief to two non-debtor companies outside of bankruptcy.” *Combustion*, 391 F.3d at 237. Here, of course, this is not asbestos litigation and Section 524 provides no authority for the Settlement and Non-Debtor Release. *See* § 524(g)(2)(B)(i)(I). No other sections of the Code authorize such relief. *See generally Combustion*, 391 F.3d 190.

44. Given that Section 524(g) is the Code’s sole offer of this remedy, there is no basis to conclude that broader relief is available to non-asbestos debtors and non-debtors under § 105(a). And Section 105(a)’s equitable powers cannot provide this Court with statutory authority for approving the Plan. Even with such authority, however, the seven required *Combustion* factors, as outlined and described in earlier sections of this Objection, are simply not met and Section 524(g) would bar relief even if this were an asbestos case.

45. This Court is without statutory grant the requested relief, which must be summarily denied.

WHEREFORE, the Claimant respectfully request that the Court enter an order denying confirmation of the Plan.

Dated: January 21, 2014
Wilmington, DE

Gellert Scali Busenkell & Brown, LLC

/s/ Brya M. Keilson

Brya M. Keilson (DE Bar No. 4643)

913 N. Market Street, 10th Floor

Wilmington, DE 19801

Phone: 302-425-8500

Fax: 302-425-8514

bkeilson@gsbblaw.com

and

Steven R. Samples (admitted pro hac vice)

Texas Bar No. 24086348

Noteboom

669 Airport Freeway, Suite 100

Hurst, Texas 76053

Phone: 817-282-9700

Fax: 817-282-8073

samples@noteboom.com

Counsel to the Newby Claimants

CERTIFICATE OF SERVICE

The undersigned certifies that on January 21, 2014, a copy of the foregoing *Objection of Newby Claimant to Confirmation of the Debtors' and Official Committee of Unsecured Creditors' First Amended Joint Plan of Liquidation* was electronically filed using the court's CM/ECF system and served as indicated on the parties on the attached service list.

This 21st day of January, 2014

/s/ Brya M. Keilson
Brya M. Keilson (DE Bar No. 4643)
Gellert Scali Busenkell & Brown, LLC
913 N. Market Street, 10th Floor
Wilmington, DE 19801
T: 302.425.8500
F. 302.425.8514
bkeilson@gsbblaw.com

Via Hand Delivery

Daniel J. DeFranceschi, Esq.
Richards, Layton & Finger, P.A.
One Rodney Square
Wilmington, DE 19801

Via Hand Delivery

Sean M. Beach, Esq.
Young Conaway Stargatt & Taylor, LLP
Rodney Square
1000 North King Street
Wilmington, DE 19801

Via Hand Delivery

Francis A. Monaco Jr., Esq.
Womble Carlyle Sandridge & Rice
222 Delaware Avenue, Suite 1501
Wilmington, DE 19801

Via Hand Delivery

Office of the United States Trustee
Attention: Richard Schepacarter, Esq.
844 King Street, Suite 2207
Lockbox 35
Wilmington, DE 19801

Via Hand Delivery

Jeremy W. Ryan, Esq.
Potter Anderson & Corroon, LLP
1313 North Market Street
Wilmington, DE 19801

Via Hand Delivery

John D. Demmy, Esq.
Stevens & Lee, P.C.
1105 N. Market Street, Suite 700
Wilmington, DE 19801

Via Hand Delivery

Richard W. Riley, Esq.
Duane Morris LLP
222 Delaware Avenue, Suite 1600
Wilmington, DE 19801

Via Hand Delivery

Brett D. Fallon, Esq.
Morris James LLP
500 Delaware Avenue, Suite 1500
Wilmington, DE 19801

Via Hand Delivery

James S. Yoder, Esq.
White & Williams LLP
824 North Market Street, Suite 902
Wilmington, DE 19801

Via First Class U.S. Mail

Jeffrey Prol, Esq.
Lowenstein Sandler P.C.
65 Livingston Avenue
Roseland, NJ 07068

Via First Class U.S. Mail

Leonard P. Goldberger, Esq.
Stevens & Lee, P.C.
620 Freedom Business Center, Suite 100
King of Prussia, PA 19406

Via First Class U.S. Mail

Tancred Schiavoni, Esq.
O'Melveny & Meyers LLP
7 Times Square
New York, NY 10036

Via First Class U.S. Mail

Margaret M. Anderson, Esq.
Fox, Swibel, Levin & Carroll LLP
200 W. Madison Street, Suite 3000
Chicago, IL 60606

Via First Class U.S. Mail

Abbey Walsh, Esq.
Freshfields Brockhaus Deringer US LLP
601 Lexington Ave., 31st Floor
New York, NY 10022