

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

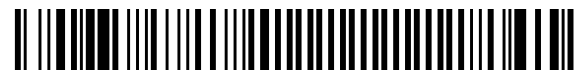
In re:	§	Chapter 11
	§	
	§	Case No. 11-13603 (PJW)
BLITZ U.S.A., Inc., et al.,	§	
	§	(Joint Administration Requested)
Debtors.	§	
	§	Hearing Date: December 9, 2011
		Objection Deadline: December 2, 2011
		Re: Docket No. 14

**LIMITED OBJECTION OF WAL-MART STORES, INC.
TO DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (A)
AUTHORIZING THE DEBTORS TO OBTAIN POSTPETITION FINANCING ON A
SENIOR SECURED AND SUPERPRIORITY BASIS, (B) AUTHORIZING THE USE OF
CASH COLLATERAL, (C) GRANTING ADEQUATE PROTECTION TO CERTAIN
PREPETITION PARTIES, (D) GRANTING RELATED RELIEF, AND (E)
SCHEDULING FINAL HEARING THEREON**

WAL-MART STORES, INC. ("Walmart"), a secured creditor and party-in-interest herein, hereby files this *Objection of Wal-Mart Stores, Inc. to Debtors' Motion for Entry of Interim and Final Orders (A) Authorizing the Debtors to Obtain Postpetition Financing on a Senior Secured and Superpriority Basis, (B) Authorizing the Use of Cash Collateral, (C) Granting Adequate Protection to Certain Prepetition Parties, (D) Granting Related Relief, and (E) Scheduling Final Hearing Thereon* (the "Objection") by and through its undersigned counsel and in support thereof respectfully represents as follows:

PERTINENT PROCEDURAL HISTORY

1. On November 9, 2011, the Debtor filed the *Debtors' Motion for Entry of Interim and Final Orders (A) Debtors to Obtain Postpetition Financing on a Senior Secured and Superpriority Basis, (B) Authorizing the Use of Cash Collateral, (C) Granting Adequate Protection to Certain Prepetition Secured Parties, (d) Granting Related Relief, and (E) Scheduling Final Hearing Thereon* (the "Motion") [Docket no. 14].



2. On November 10, 2011, the Bankruptcy Court entered an order (i) approving the Motion on an interim basis and (ii) scheduling a hearing to approve the Motion on a final basis (the “Interim Order”) [Docket no. 40].

3. Pursuant to the Interim Order, as extended, the deadline to object to the relief requested in the Motion is December 2, 2011.

FACTUAL BACKGROUND

4. Walmart purchases portable consumer gas containers or PCGCs from Debtor for resale under the terms of Supplier Agreements between Walmart and Blitz. A true and correct copy of the current Supplier Agreements are attached as Exhibit 1 to the *Declaration Of Ryan Underwood In Support Of The Motion Of Wal-Mart Stores, Inc. For Relief From The Automatic Stay To Permit Set Off Of Obligations And For Adequate Protection* [Docket no. 66].

5. According to the Verified Complaint for Declaratory and Injunctive Relief filed by Debtor on November 9, 2011 (the “Complaint”) [see Adversary Proceeding no. 11-53578 (“PJW”), Docket no. 1], Blitz and/or Walmart have been named in thirty-five personal injury actions arising from the use of PCGCs. Complaint ¶¶40, 41.

6. A number of different Supplier Agreements span the time during which the dates on which the alleged personal injuries took place. In each case, the following indemnity provision is contained in the Supplier Agreement

14. INDEMNIFICATION. Supplier shall protect, defend, hold harmless and indemnify Company, including its officers, directors, employees and agents, from and against any and all lawsuits, claims, demands, actions, liabilities, losses, damages, costs and expenses (including attorneys' fees and court costs), regardless of the cause or alleged cause thereof, and regardless of whether such matters are groundless, fraudulent or false, arising out of any actual or alleged:
(b) Death of or injury to any person, damage to any property, or any other damage or loss, by whomsoever suffered, resulting or claimed to result in whole or in part from any actual or alleged use or latent or

patent defect in such Merchandise, including but not limited to (i) any actual or alleged failure to provide adequate warnings, labeling or instructions, (ii) any actual or alleged improper construction or design of said Merchandise, or (iii) any actual or alleged failure of said merchandise to comply with specifications or with any express or implied warranties of Supplier... [See Complaint ¶51. See also, Declaration, Exhibit 1, pages 4, 15, and 27].

7. The Supplier Agreements also contain the following terms allowing Walmart to offset amounts owed to Blitz by amounts Blitz owes to Walmart.

5. SET-OFF; RESERVATION OF ACCOUNT; CREDIT BALANCE. Company may set off against amounts payable under any Order all present and future indebtedness of Supplier to Company arising from this or any other transaction whether or not related hereto. If Company determines that Supplier's performance under an Order and/or this Agreement is likely to be impaired, Company may establish a reserve on Supplier's Account to satisfy Supplier's actual or anticipated obligations to Company arising from any such Order or this Agreement, by withholding payment of Supplier's invoices. Supplier agrees that any credit balance will be paid in cash to Company upon written request.

8. The Supplier Agreements between Walmart and Blitz do not contain any agreement or provision that Walmart will not assert any of its defenses or claims.

WALMART'S OBJECTION

9. Walmart objects to the Motion to the extent that the relief requested in the Motion seeks to subordinate, impair, encumber, or hinder Walmart's contractual rights set forth in the Supplier Agreements, its common law right to setoff, and its equitable right to recoup the sum of \$1,545,010.57 owed as of the petition date by Walmart to Blitz U.S.A (or to any of its related bankruptcy debtors or non-debtor affiliates referred to herein as "Blitz") against monies owed as of the Petition date by Blitz to Walmart.

10. Walmart further objects to the Motion to the extent that the relief requested in the Motion seeks to subordinate, impair, encumber, or hinder Walmart's contractual rights set forth in

the Supplier Agreements, its common law right to setoff, and its related equitable right to recoup from any monies that may become owed postpetition by Walmart to Blitz against monies owed postpetition by Blitz to Walmart.

ARGUMENTS AND AUTHORITIES

11. The rights of Walmart set forth in the two preceding paragraphs are statutorily embodied in Section 9-404 of the Uniform Commercial Code as adopted by the State of Arkansas in Ark. Code Section 4-9-404¹ which reads in pertinent part as follows:

(a) Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (b)-(e), the rights of an assignee are subject to:

(1) all terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract.

12. An assignor can only assign to an assignee only those rights possessed by the assignor. In this case, the assignor, Blitz, does not have the right to subordinate, impair, encumber, or hinder Walmart's contractual right to offset and its related equitable rights to recoup from amounts owed Blitz by granting a superpriority lien on Walmart's accounts payable [Blitz's accounts receivable] without first allowing Walmart by virtue of such rights to net out the amount owed by Walmart to Blitz against the amounts owed by Blitz to Walmart.

¹ 4-9-404. Rights acquired by assignee -- Claims and defenses against assignee.

(a) Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (b)-(e), the rights of an assignee are subject to:

(1) all terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and

(2) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.

(b) Subject to subsection (c) and except as otherwise provided in subsection (d), the claim of an account debtor against an assignor may be asserted against an assignee under subsection (a) only to reduce the amount the account debtor owes.

(c) This section is subject to law other than this chapter which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(d) In a consumer transaction, if a record evidences the account debtor's obligation, law other than this chapter requires that the record include a statement to the effect that the account debtor's recovery against an assignee with respect to claims and defenses against the assignor may not exceed amounts paid by the account debtor under the record, and the record does not include such a statement, the extent to which a claim of an account debtor against the assignor may be asserted against an assignee is determined as if the record included such a statement.

(e) This section does not apply to an assignment of a health-care-insurance receivable.

The assignee of an account debt "stands in the shoes of the assignor and is subject to contract defenses or claims of the account debtor arising by virtue of the terms of the contract out of which the receivable was created." *Delacy Invs., Inc. v. Thurman*, 693 N.W.2d 479, 485 (Minn. Ct. App. 2005) (quotation marks omitted). Specifically, Minn. Stat. § 336.9-404(a) provides that an assignee's rights are subject to (1) all terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and (2) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee. See also UCC § 9-404(a)(1)-(2). Accordingly, USRAC may assert against USB its defenses against Walden regarding the amount of the account debt. *United States Bank Nat'l Ass'n v. United States Rent a Car, Inc.*, 2011 U.S. Dist. LEXIS 92436 (D. Minn. Aug. 17, 2011).

13. 11 U.S.C. § 553(a) preserves rights of creditors to offset mutual debts arising before a bankruptcy petition is filed. See *United States v. Gerth*, 991 F.2d 1428, 1431 (8th Cir. 1993). However, § 553(a) only preserves setoff rights that are otherwise valid under applicable nonbankruptcy law. See *In re Sauer*, 223 B.R. 715, 724 (Bankr. D.N.D. 1998).

14. For a creditor to establish this right of setoff, it must demonstrate: (i) that a debt exists from the creditor to the debtor; (ii) the debt arose prior to the commencement of the bankruptcy case; (iii) that the creditor has a claim against the debtor which arose prior to the commencement of the bankruptcy case; and, that the debt and the claim are mutual obligations. See *United States v. Gerth*, 991 F.2d 1428, 1431 (8th Cir. S.D. 1993).

15. Based upon the judicial admissions of Blitz, Walmart has established its rights of recoupment and offset under §553(a). Specifically, Blitz has acknowledged its pre-petition obligation to pay the Indemnification Debt. See Complaint ¶¶ 69-71. The net Indemnification Debt amount is currently undetermined and unmatured but, pursuant to 11 USC §506, constitutes a secured claim by Walmart against Blitz to the extent of the amount of monies owed as of the Petition Date by Walmart to Blitz. Thus, Walmart is entitled to recoup and offset these mutual, pre-petition obligations.

16. Walmart is not aware of any postpetition authorization granted to Blitz to honor its continuing indemnification obligations.

PRAYER

WHEREFORE, Walmart prays that the Court sustain this Objection; and, grant Walmart such other and further relief as the Court deems just and proper.

Dated: December 1, 2011
Wilmington, Delaware

POTTER, ANDERSON & CORROON, LLP

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Counsel to Walmart Stores, Inc.

CERTIFICATE OF SERVICE

I, Jeremy W. Ryan, hereby certify that on this 1st day of December 2011, I caused a true and correct copy of the **Limited Objection of Wal-Mart Stores, Inc. to Debtors' Motion for Entry of Interim and Final Orders (A) Authorizing the Debtors to Obtain Postpetition Financing On a Senior Secured and Superpriority Basis, (B) Authorizing the Use of Cash Collateral, (C) Granting Adequate Protection to Certain Prepetition Parties, (D) Granting Related Relief, and (E) Scheduling Final Hearing Thereon** to be served in the manner indicated upon the parties on the attached service list.

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

Dated: December 1, 2011

/s/Jeremy W. Ryan
Jeremy W. Ryan (DE No. 4057)

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