

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

In re:

BLITZ U.S.A., Inc., et al.,¹

Debtors.

Chapter 11

Case No. Case No. 11-13603 (PJW)

(Jointly Administered)

Re: Docket No. 2007 and all subsequent amendments

**OBJECTION TO CONFIRMATION OF DEBTORS' AND OFFICIAL COMMITTEE OF
UNSECURED CREDITORS' FIRST AMENDED JOINT PLAN OF LIQUIDATION**

One century ago, the first Justice Harlan admonished this Court that the Constitution ‘neither knows nor tolerates classes among citizens.’ Unheeded then, those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stakes. The Equal Protection Clause enforces this principle ...

Romer v. Evans, 517 U.S. 620, 623 (1996) (citing dissenting opinion in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896)).

Today we reaffirm what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.

J.E.B. v. Ala. ex rel. T.B., 511 U.S. 127, 130-31 (1994) (invalidating peremptory strikes against males based upon their gender in a paternity trial).

Pursuant to 11 U.S.C. 1128-29, and the Court’s January 15, 2014 Order, Creditors, Michael Bauman, Jr., Michael Bauman, Sr., and Donna (Bauman) Greer (collectively, the “Bauman Claimants”)² hereby tender the following as their objection to the confirmation of the

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtors’ 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 F3 Brands LLC (2604). The location of the Debtors’ corporate headquarters and the Debtors’ service address is 394 North Main Street, Miami, OK 74354.

² Pursuant to the Court’s Order, the objecting parties are Michael Bauman, Jr., Michael Bauman, Sr. and Donna (Bauman) Greer (the “Bauman Claimants”), who reside at 3319 Dean Drive, Louisville, Kentucky 40213. The Bauman Claimants’ claims are personal injury (and derivative) in nature, listed at a value of \$50,000,000.00.



Debtors' and Official Committee of Unsecured Creditors' (the "Committee") First Amended Joint Plan of Liquidation (the "Plan") because it violates Michael Bauman, Jr.'s constitutional right to due process and equal protection under the laws.³ More specifically, the Bauman Claimants' objection centers upon the Blitz Personal Injury Trust Distribution Procedures (the "TDP") (*see* DN 2007-4) and, particularly, the TDP Scoring System's creation of a \$30 million Special Circumstances Fund that contains an unconstitutional gender-based exclusion. (*See* DN 2007-4 at p. 17).

INTRODUCTION

Quite simply, this Court is being asked to confirm a proposed Chapter 11 Plan that contains a facially unconstitutional Trust Distribution Plan ("TDP"). The TDP, as proposed, treats females who were under the age of 18 at the time of their injuries in a much different fashion than similarly situated male claimants. This is not an insignificant provision. In fact, this unconstitutional gender-based discrimination has the effect of varying claim payouts by ***millions*** of dollars per claimant – based upon ***nothing more than gender alone***.

Such gender-based distinctions have long been held to be unconstitutional. *See, e.g., Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982) ("Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause ...") (citing the seminal case of *Reed v. Reed*, 404 U.S. 71, 75 (1971)). Accordingly, the Court should modify the proposed Plan to provide for a gender-neutral access to a full and fair recovery under the \$30 million Special Circumstances Fund.

³ This Objection pertains to the Plan filed as DN. 2007 on December 9, 2013 and all subsequent amendments and/supplementations thereto.

ARGUMENT

The unconstitutional provision provides that “[f]emale claimants who suffered severe burn injuries when less than 18 years of age and survived such injuries” qualify for the Special Circumstances Fund. (*See* DN 2007-4 at p. 17). Similarly situated male claimants do not. That a government action “discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review.” *Miss. Univ. for Women*, 458 U.S. at 723-24 (citing *Caban v. Mohammed*, 441 U.S. 380 (1979); *Orr v. Orr*, 440 U.S. 268 (1979)). Such gender-based discrimination is facially unconstitutional.

a. Claimant Michael Bauman, Jr. (“Michael”)

Michael suffered 3rd degree burns on over 54% and 2nd degree burns on 10% of his body because of a defectively designed fuel container sold by the Debtors. Michael’s burns were to his face, head, torso, arms, hands, legs and fingers. In fact, multiple of his fingers required amputation. He is currently unable to use his hands to do such ordinary things as go to the bathroom, bathe and dress without assistance.

At the time of the incident, Michael was twelve years old. Today, over two years later, Michael continues to receive treatment for his permanently disfiguring and painful burn injuries. He still has several open wounds that have never healed. And Michael will continue to require additional surgeries as his body grows with his age.

b. The Unconstitutional Provision

Besides being drafted specifically with particular cases in mind,⁴ the Special Circumstances Fund eligibility criteria is unconstitutional on its face. As indicated below,

⁴ Each of these criteria was developed after a full analysis of the claimants’ medical records by those involved in revising the TDP in exchange for Plan support from a group of objectors. For instance, it was determined that there would be too many claimants who would qualify if “amputation” included the loss of less than five fingers; therefore, a provision was added to allow only those who lost all five fingers on a hand. Those involved with

“[f]emale claimants who suffered severe burn injuries when less than 18 years of age and survived such injuries” qualify for the \$30 million Special Circumstances Fund. Similarly situated male claimants do not.

If the Blitz Personal Injury Trust submits an Offer Amount to a Covered Claimant that the Covered Claimant does not believe is appropriate and the Covered Claimant meets one of the enumerated criteria set forth below, the Covered Claimant can reject the Offer Amount and opt to apply for payment out of the Special Circumstances Fund by serving within 15 days of receipt of their Offer Amount a notice of rejection of Offer Amount and of application to the Special Circumstances Fund. The criteria to be eligible to apply to the Special Circumstances Fund is as follows:

1. Wrongful death³;
2. Amputation of a limb (this does not include amputation of individual digits, but shall include amputation or loss of all fingers on the hand);
3. Severe and permanent internal organ damage other than damage to the respiratory tract (including, without limitation, the mouth, lungs, or esophagus); and
4. Female who suffered severe burn injuries when less than 18 years of age and survived such injuries.

(See DN 2007-4 at p. 17). The undersigned counsel attempted to convince the Committee on numerous occasions to remove the gender-based discriminatory provision. But counsel was informed that “the deal would fall apart” if that happened because “too many” claimants would qualify for the Special Circumstances Fund. Moreover, the Committee (through one of its members) provided counsel with anecdotes that it was the Committee’s belief that “girls suffer more emotional problems than boys,” “have more trouble getting dates,” and generally are “worse off than boys” based upon the Committee members’ personal experiences representing female burn victims.

drafting this provision can undoubtedly testify *exactly* how many claimants will qualify as a result of the newly defined qualification criteria. Likewise, those lawyers involved in drafting the TDP are well aware of exactly how many claims will qualify –and which claimants will benefit—as “severe and permanent organ damage” cases, wrongful death cases, and females under the age of 18. There is simply no reason to treat these claims in the non-transparent manner as proposed. The fairest, and **more transparent** way to address such cases, would have been to quantify such losses within the body of the TDP for all interested parties –and this Court—to evaluate.

But, importantly, the the TDP's Special Circumstances Fund was not always this way. In fact, as initially proposed, the Special Circumstances Fund was designed as a fair and equitable way to account for all those who were severely injured –without any sort of exclusive criteria, much less an unconstitutional exclusion. *See* Exhibits A & B, Oct. 30, 2013 Correspondence from D. Brenemen with attached Proposed TDP Scoring Sytem. Notably, there was no hard and fast eligibility criteria **and** all unused funds *reverted back* to the other claimants for distribution:

J. Application to the Special Circumstances Fund

The Special Circumstances Fund serves multiple purposes. One purpose is to adequately compensate those Claimants that incurred burns on less than 15% of their total body surface area or were injured by a Blitz U.S.A. product in a manner other than burns. The purpose of the Special Circumstances Fund is to also provide compensation above the amount of the Claimant's original Offer Amount based upon conditions that are not be adequately addressed by a mathematical calculation applied to the Claimants as an entire group. It is not the intent of the Special Circumstances fund to be available to increase the Offer Amount for all Claimants but instead to account for exigent circumstances not fairly or fully addressed pursuant to the formula used in this TDP to score Claimants.

Upon application to the Special Circumstances Fund, the Offer Amount of all applicants to the Special Circumstances Fund will be added into the Special Circumstances Fund. Once all applications to the Special Circumstances Fund have been reviewed by the Trustee, the Trustee will submit a Final Offer Amount to all the Claimants that have applied to the Special Circumstances Fund along with a Release form approved by the Blitz Personal Injury Trust. If the Claimant accepts the Final Offer Amount and returns the Release form properly executed, such Blitz Personal Injury Trust Claim will be placed in the First In First Out Payment Queue. Payment of a Blitz Personal Injury Trust Claim placed in the First In First Out Payment Queue having accepted the Final Offer Amount will be paid within five (5) business days of being placed in the Queue, or at the request of the Payee, such amounts shall be earmarked and set aside for sufficient time to allow the establishment of an appropriate trust or structured annuity.

Application to the Special Circumstances Fund does not guarantee that the Claimant will receive a Final Offer Amount in excess of the Claimant's Offer Amount. Claimants that apply to the Special Circumstances Fund are not guaranteed to receive a Final Offer in an amount even equal to or greater than the Claimant's original Offer Amount. A Claimant may receive a lower Final Offer Amount than the Claimant's Offer Amount. Claimants who apply to the Special Circumstances Fund and do not receive an offer higher than the initial Offer Amount will be responsible for all costs associated with the application. Such costs would include, but not be limited to, the fees and expenses of the Blitz Personal Injury Trustee and TAC incurred to review the Claimant's application along with the costs of any medical or other professionals retained to assist with the review. These costs shall be deducted from the amount awarded by the Trustee to the Claimant.

If the Claimant accepts the Final Offer Amount and returns the Release form properly executed, such Blitz Personal Injury Trust Claims will be placed in the First In First Out Payment Queue. Payment of a Blitz Personal Injury Trust Claim placed in the First In First Out Payment Queue having accepted the Final Offer Amount will be paid within five (5) business days of being placed in the Queue or at the request of the payee, the payment shall be earmarked and set-aside for sufficient time to allow the establishment of an appropriate trust or structured annuity. If the Blitz Personal Injury Trust submits a Final Offer Amount to a Claimant that the Claimant does not believe is appropriate, the Claimant may litigate the value of their Blitz Personal Injury Claim.

But the current version before the Court has been perverted through efforts to gain Plan support. Now, rather than being a fair way to allocate nearly 20% of the available settlement funds, the Special Circumstances Fund has become an exclusive fund designed to benefit just a handful of claimants. But in an attempt to restrict the \$30 million Special Circumstances Fund to a select few claimants, the drafters were forced to insert an unconstitutional gender-based exclusion –designed to foreclose minor boys with severe burns from participating. Because there are “too many boys” who are severely injured, allowing them to participate would mean less money for the select few claimants who agreed to support the Plan if they were included in the Special Circumstances Fund.

Moreover, and indeed very importantly, the \$30 million fund is now set to be ***distributed in full –regardless of the number of eligible Special Circumstances Fund claimants.*** This is, again, a monumental change. Thus, if there are just 10 claimants who qualify, they will ***each receive*** an average of ***\$3 million more in addition*** to their payout under the \$130 million fund. Because these “Special Circumstances” will have to be quantified and paid out at some point, it offends all notions of transparency to have this fund divied up in private by those who drafted the exclusions. Accordingly, because the Special Circumstances Fund is the only issue standing in the way of Plan Confirmation, this Court should scrap the entire TDP Scoring Process (including the TDP Committee) and appoint an independent Special Master to allocate the settlement funds. Indeed, it is time to remove all hints of self-interest from the process and fairly and equitably allocate these limited settlement funds to those who need them the most –the tragically burned individuals.

I. Court Approval of a Settlement Agreement Constitutes Government Action Subject to the Limitations of the United States Constitution.

Clearly, confirmation of the Plan, which includes the approval of the TDP, constitutes a governmental action. Ordinarily, a settlement agreement between private parties would not give rise to a constitutionality challenge. However, in this case, the TDP (and, indeed, all of the settlement documents) is subject to the strictures of the United States Constitution because it requires approval by this Court as part of the Plan.

The Fifth Amendment to the United States Constitution guarantees all claimants in this proceeding, including Michael, the coveted rights of Due Process and Equal Protection of the Laws. “Equal protection analysis in the Fifth Amendment area, is the same as that under the Fourteenth Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *see also Frontiero v. Richardson*, 411 U.S. 677 (1973); *Califano v. Goldfarb*, 430 U.S. 199 (1977). “It is now the settled doctrine ... that the Due Process Clause embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history ... Due Process is that which comports with the deepest notions of what is fair and right and just.” *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922). Therefore, this Court is required to carefully evaluate the proposed TDP to ensure that it is constitutionally sound.

II. The TDP’s Gender-Based Discrimination Violates Michael’s Rights to Due Process and Equal Protection Under the Laws.

The proposed TDP violates Michael’s Fifth Amendment rights to due process and equal protection under the laws, by excluding him on the *basis of his gender* from applying to the \$30 million Special Circumstances Fund. The Fifth Amendment provides that: “No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be

taken for public use, without just compensation.” *See* U.S. Const. Amend. V. “Equal protection analysis in the Fifth Amendment area, is the same as that under the Fourteenth Amendment.” *Buckley*, 424 U.S. at 93; *Weinberger*, 420 U.S. at 638 n.2. Importantly, the Equal Protection Clause of the Fourteenth Amendment provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” *See* U.S. Const. Amend. XIV, Section 1.

The gender-based distinction contained in the TDP Scoring Process is a clear case of discrimination on the basis of sex, in direct contravention of the Equal Protection Clause. Intentional discrimination can take several forms. “‘When a distinction between groups of persons appears on the face of a state law or action, an intent to discriminate is presumed and no further examination of legislative purpose is required.’” *Bishop v. United States ex rel. Holder*, 2014 U.S. Dist. LEXIS 4374 at *75 (N.D. Okla. Jan. 14, 2014) (citing *SECSYS, LLC v. Vigil*, 666 F.3d 678, 684-85 (10th Cir. 2012) (citations omitted)).

Importantly, the burden rests with the Debtor and the Committee to demonstrate that their proposal does not violate Michael’s constitutional rights. And a lofty burden it is. One who seeks to uphold a classification based upon gender that is challenged under the Equal Protection Clause must show an **“exceedingly persuasive justification for the classification.”** *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (emphasis added) (internal citation and quotation omitted). To survive this intermediate scrutiny, the “classification must be substantially related to an important governmental objective.” *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *see also Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980). Requiring that close relationship between the classification and the government objective is important “to assure that the validity of a classification is determined through a reasoned analysis rather than through

the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.” *Miss. Univ. for Women*, 458 U.S. at 725-26.

Gender classifications subject to an Equal Protection Clause challenge “must not rely on overbroad generalizations about the different talents, capacities or preferences of males and females.” *United States v. Virginia*, 518 U.S. 515, 533 (1996). A justification for the classification must “be genuine, not hypothesized or invented post hoc in response to litigation.” *Id.* Moreover, “[e]ven a true generalization about the class is insufficient reason for disqualifying an individual to whom the generalization does not apply.” *City of Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978). “[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.” *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

The United States Supreme Court has traditionally invalidated government-sponsored action that discriminates on the basis of gender on equal protection grounds. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982) (“Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause ...”) (invalidating all-female nursing college’s exclusion of men) (citing the seminal case of *Reed v. Reed*, 404 U.S. 71, 75 (1971)). Indeed, the Court has considered numerous gender-based discrimination throughout its history, allowing only a few to survive – and then only if the **actual** justification for the distinction survived intermediate constitutional scrutiny.

In *Reed v. Reed*, the seminal case that has provided the underpinning for decisions invalidating gender-based discriminatory action, the Court considered the constitutionality of an

Idaho probate code provision that, in establishing who would administer a decedent's estate, gave a “mandatory” preference to men over women when they were in the same degree of relationship to the decedent. *Reed*, 404 U.S. at 73. The Idaho law permitted no consideration of the individual qualifications of particular men or women as potential administrators, but simply preferred males in order to reduce probate expenses by eliminating contests over the relative qualifications of men and women otherwise similarly situated. *Id.* at 76-77. The Court held that “[b]y providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause.” *Id.* at 77 (citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

Just two years later, the United States Supreme Court held that benefits provided by the United States Military to the families of service members could not be provided differently because of gender. *Frontiero v. Richardson*, 411 U.S. 677 (1973). In *Frontiero*, Lieutenant Sharron Frontiero applied for housing and medical benefits for her husband, who she claimed as a dependent. *Id.* at 680. While servicemen were allowed to claim their wives as dependents, and automatically receive benefits, servicewomen were required to prove that their husbands were dependent on them for more than half of the man’s support. *Id.* Ms. Frontiero claimed that the statute unreasonably discriminated on the basis of sex in violation of her Fifth Amendment Due Process rights. *Id.* The Court (with four Justices arguing for strict scrutiny of such discrimination) declared the military’s benefits policy unconstitutional because there was no reason why military wives needed benefits any more than similarly situated military husbands. *Id.* at 690-92.

By 1976, the Supreme Court adopted what has become known as “intermediate scrutiny” for evaluating gender-based discrimination claims. *Craig v. Boren*, 429 U.S. 190 (1976). In

Craig, a reverse gender discrimination case, the state of Oklahoma passed a statute prohibiting the sale of “nonintoxicating” 3.2% beer to males under the age of 21 but allowed females over the age of 18 to purchase it. *Id.* at 191-92. The statute was challenged as a Fourteenth Amendment Equal Protection violation by Curtis Craig, a male who was over 18 but under 21, and by an Oklahoma alcohol vendor. *Id.* at 192.

“To withstand constitutional challenge, previous cases establish that classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” *Id.* at 197. The Court held that the gender classifications made by the Oklahoma statute were unconstitutional because the substantial statistics relied upon by the state were insufficient to show a substantial relationship between the statute and the benefits intended to stem from it. *Id.* at 200-04. The Court struck down the law because it “invidiously discriminates against males 18-20 years of age” and “constitutes a denial of equal protection of the laws to males aged 18-20.” *Id.* at 204, 210.

Just a year later, the Court held that the different treatment of men and women mandated by a federal statute providing Social Security survivor benefits constituted invidious discrimination against female wage earners by affording them less protection for their surviving spouses than is provided to male employees, and therefore violated the Due Process Clause. *Califano v. Goldfarb*, 430 U.S. 199 (1977). In *Goldfarb*, Leon Goldfarb, a widower, applied for survivor's benefits under the Social Security Act. *Id.* at 202-03. Goldfarb's late wife, Hannah, had paid Social Security taxes for 25 years. *Id.* Nevertheless, Mr. Goldfarb's application was denied. *Id.* at 203. In order to be eligible for benefits pursuant to the federal statute, he must have been receiving half his support from his wife at her time of death. *Id.* However, the federal

statute did not impose this requirement on widows. *Id.* at 201. Mr. Goldfarb challenged the statute under the Fifth Amendment's Due Process Clause. *Id.*

The Court held that gender specific requirements for Social Security benefits were unconstitutional. *Id.* at 204. Citing an "indistinguishable" situation in *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975), the Court noted that *Weinberger* involved a similar statute that was deemed unconstitutional. *Id.* The Court rejected the "archaic and overbroad" generalizations that a wife is more likely to be dependent on her husband than a husband on his wife. *Id.* at 207. Indeed, such "role-typing society has long imposed" do not comport with "contemporary reality" and do not provide ample support for withstanding an equal protection challenge. *Id.* As the Court held:

But '[t]o withstand constitutional challenge, classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.' *Craig v. Boren*, 429 U.S. 190, 197 (1976). Such classifications, however, have frequently been revealed on analysis to rest only upon 'old notions' and 'archaic and overbroad' generalizations, *Stanton v. Stanton*, 421 U.S. at 14; *Schlesinger v. Ballard*, 419 U.S. at 508; cf. *Matthews v. Lucas*, 427 U.S. 495, 512-513 (1976), and so have been found to offend the prohibitions against denial of equal protection of the law. *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Stanton v. Stanton*, *supra*; *Craig v. Boren*, *supra*. See also *Stanley v. Illinois*, 405 U.S. 465 (1972); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

Id. at 210-11.

More recently, the Court has continued its longstanding legacy of invalidating such gender-based discrimination based upon "overbroad generalizations about the different talents, capacities or preferences of males and females." *United States v. Virginia*, 518 U.S. 515, 533 (1996).⁵ And when the Supreme Court has been willing to uphold gender-based distinctions, those decisions "rested upon the Court's perception of the laudatory purposes of those laws as

⁵ A long line of lower courts agree. See, e.g. *Beattie v. Line Mt. Sch. Dist.*, 2014 U.S. Dist. LEXIS 4051 (M.D. Pa., Jan. 13, 2014).

remedying disadvantageous conditions suffered by women in economic and military life.” *Craig v. Boren*, 429 U.S. at 198 n.6 (citing *Kahn v. Shevin*, 416 U.S. 351, 353-54 (1974) and *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)).

In this case, the pretext proffered by the Committee for the gender-based preference for females is based upon the same archaic and overbroad generalizations about how much better males are at dealing with self-esteem issues than females. But such a generalization, besides being offensive to females (who it is implied are not as capable as males at handling such an adversity), certainly is subject to dispute. It ignores that individuals are different (regardless of gender) and some may handle the emotional distress differently. These kids (regardless of gender) come from different socioeconomic backgrounds, have different levels of family support, and have different levels of access to psychological care to help them cope with their devastating injuries. Indeed, some of these victims will handle their plight well, while others will not fare so well. But one thing is clear, gender is not the determining factor. Therefore, the proffered reason for this gender-based exclusion is unconstitutional because it does the very thing that the Constitution prohibits –it treats the two genders differently for no reason other than gender. Accordingly, the Plan should not be approved without removal of the gender-based exclusion.⁶

CONCLUSION

As proposed, the proposed Plan is defective in several respects. The Trust Distribution Plan (“TDP”) contains an unconstitutional gender-based exclusion from the \$30 million Special Circumstances Fund (“Special Fund”), which violates the Equal Protection guarantees of all male claimants who would otherwise qualify for the fund. Additionally, the Special Fund is not

⁶ Additionally, the other articulated “special circumstances” criteria should be quantified and disclosed in the body of the TDP, with any unused funds to revert to the remaining claimants as originally proposed.

only handicapped by its unconstitutionality, but also its lack of transparency. Indeed, between the time the TDP was initially proposed on October 30, 2013 and the currently proposed version, the Special Fund has evolved to provide a \$30 million fund available only to a small group of claimants –all in exchange for support of the Plan. Because the entire TDP process is irreparably tainted, an independent Special Master should be appointed to devise a distribution process that fairly and equitably compensates the horribly burned victims for whom the Trust was created.

Respectfully submitted,

JONES WARD PLC
Lawrence L. Jones II (*Pro Hac Vice In Process*)

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all interested parties of record (as identified in the Court's January 15, 2014 Order) have been served via electronic mail, first-class United States Mail, postage prepaid, and the Court's ECF/CM system upon the filing of this pleading.

/s/ Lawrence L. Jones II
Counsel for the Bauman Claimants

From: Diane Breneman Diane@litigationkc.com 
Subject: TDP Draft
Date: October 30, 2013 at 1:13 PM
To: Richard Denney rdenney@dennbarr.com, rbraugh@swhhb.com, larry@jonesward.com, mm@glendacochran.com,
Julian Gomez jcgomez@glflaw.com, dharris@swhhb.com
Cc: Kenneth McClain kbm@hfmlegal.com, Dan Haltiwanger Dhaltiwanger@rpwb.com, Hank Anderson lawfirm@wf.net

Those of you on this email represent the attorneys who have requested to be involved in reviewing trust distribution procedures. Attached please find an initial draft of the TDP for your review. As most of you know, we had solicited input from objectors with regards to a draft TDP. We had hoped to have a meeting of all interested parties before we had to actually draft a TDP for review. Unfortunately, it appears that the TDP needs to be filed on Monday so the committee has prepared a draft as a point to begin discussions. If you have questions with regards to any of the provisions, please feel free to call me at 913-568-4518. We would like to arrange for a call at 8:00 central on Friday morning to discuss any issues that arise about the terms in hopes that we can resolve as many as possible before our end of the day Monday deadline. Please let me know your availability and feel free to call me at any time.

Best regards,

Diane Breneman



The TDP Scoring System

In order to achieve consistent and fair valuations for Blitz Personal Injury Trust Claims, and to arrive at a value for Blitz Personal Injury Trust Claims, pursuant to Section VII of the TDP, the Blitz Personal Injury Trust shall employ the TDP Scoring System, which consists of the following components:

- (1) Blitz Product Identification
- (2) Causation
- (3) Statute of Limitations/Repose
- (4) Offer Amount
- (5) Special Circumstances
- (6) Final Offer Amount

A bankruptcy claim form filed prior to the bar date deadline, all materials required by the claim form, and a positive finding by the Trustee on Blitz Product Identification, Causation, and Statute of Limitations/Repose (collectively, the “Threshold Components”) are threshold inquiries that must be met in order to participate in the Gross Scoring and Special Circumstances distributions set forth in this TDP. In order to qualify for compensation under the Blitz Personal Injury Trust, a Blitz Personal Injury Trust Claim must receive a positive assessment for each of the Threshold Components from the Trustee. The Trustee is entitled to consult the Trust Advisory Committee (“TAC”) and retain qualified experts to assist in all aspects of the assessment. If a positive assessment is provided for each of the Threshold Components, the Blitz Personal Injury Trust Claim will proceed to an assessment of a Gross Score for the Blitz Personal Injury Trust Claim. The Gross Score will then be adjusted into an Offer Amount as set forth below in paragraph I. In the event that a Blitz Personal Injury Trust Claim does not receive a positive assessment for each Threshold Component, such Blitz Personal Injury Trust Claim will not receive a Gross Score or an Offer Amount and will be disallowed.

A. Blitz Product Identification

A positive Blitz Fuel Container Product Identification may be established by:

1. Credible Claimant testimony by deposition or sworn affidavit positively identifying the Blitz Product;
2. If the Claimant was not the owner of the gasoline container, credible testimony of the owner of the container by deposition or sworn affidavit identifying the Blitz Product;
3. Actual production of the Blitz Product;
4. Photographs of the Blitz Product with appropriate materials authenticating the Blitz Product as being the container involved in the underlying injury; or

5. Other credible documentary proof as determined and/or required by the Blitz Personal Injury Trustee with input from the TAC in situations, where the identification is deemed to be questionable.

In situations, where the Blitz Personal Injury Trustee in consultation with the TAC determines that there are potential questions regarding product identification, the Blitz Personal Injury Trustee may employ professionals with experience in gas can identification to assist in assessing the product identification determination. The Trustee in his or her discretion then determines whether the evidence on product identification is sufficient.

B. Causation Threshold

The Causation Threshold requires the Claimant to establish that the Claimant was in fact injured in a manner that would be compensable in a lawsuit against Blitz, as a product manufacturer in the venue in which the incident occurred. Causation requires a report written pursuant to *NFPA 921's Guide for Fire and Explosion Investigations* by a trained fire investigator concluding that the Claimant was injured in a manner that would be compensable against a product manufacturer but additional information can be required by the Trustee in consultation with the TAC and/or experts in fire investigation if the Trustee determines there are legitimate questions about causation. The Blitz Personal Injury Trustee has discretion, with review and advice of the TAC, to employ professionals with experience in gas can fire and explosion evaluation to assist in assessing the evidence of causation. In consultation with the TAC and/or experts, the Trustee in his or her discretion then determines whether the evidence on causation is sufficient.

C. Statute of Limitations/Repose Threshold

If a Blitz Personal Injury Trust Claim is barred by the applicable statute of limitations or repose, the claim will not be eligible for further consideration by the Trust and will not be entitled to any payments under the Plan. The Blitz Personal Injury Trustee with input from the TAC will make this threshold determination.

D. Materials to be Provided by Claimants

In order to receive a distribution based upon Gross Score or special circumstances each Claimant must provide all information required as a matter of the claim filing procedure in this Bankruptcy and all information deemed necessary to analyze the claim by the Trustee in consultation with the TAC and/or experts, must be provided. If the Claimant decides to go to the Special Circumstances fund, the Claimant can provide such supplemental information as the Claimant deems necessary to support his or her special circumstances claim and must provide all information requested by the Trustee in consultation with the TAC and/or experts.

E. Gross Score Determination for Blitz Personal Injury Trust Claims

The objective of the Blitz Personal Injury Trust is to compensate holders of Blitz Personal Injury Trust Claims in a manner that ensures that such holders are treated accurately and reasonably in light of the limited assets available to satisfy such Blitz Personal Injury Trust Claims and the uncertainty regarding the total amount of Blitz Personal Injury Claims that will finally receive payment from the Blitz Personal Injury Trust. The TDP was created to employ a methodology to compensate Claimants in accordance with the severity and extent of their injuries, and to ensure that similarly situated Claimants are compensated equitably. Furthermore, the TDP was created to compensate the Blitz Personal Injury Claimants for the economic and non-economic damages they could legally claim if the Debtors had not filed for Chapter 11 bankruptcy. The following procedure will be used to compensate those who suffer from burn injuries equal to or greater than 15% TBSA and/or wrongful death from burn injuries. All of those claiming compensation as the result of someone burned over 15% or more of their bodies, including but not limited to claims for loss of consortium, medical bills incurred by a parent on behalf of a burned minor and/or negligent infliction of emotional distress shall be consolidated into one claim and the total amount of damages will be calculated for that injury and all such related claims. All claims for burn injuries less than 15% TBSA and all property damage claims shall do straight into special circumstances fund without any gross score calculation and any distribution comes solely from the special circumstances fund.

For Claimants who survived their burns, compensable damages consist of:

1. pain & suffering;
2. loss of enjoyment of life;
3. lost earning capacity and household services; and,
4. past and future medical costs.

For survivors of deceased burn victims, compensable damages consist of:

1. pain and suffering incurred by their decedent while alive;
2. past medical expenses; and
3. loss of financial support and services they potentially would have received from their decedent.

Compensable damages shall be computed as follows:

1. Pain and suffering is calculated based on a claimant or decedent's days hospitalized in relation to total body surface area ("TBSA") burnt.
 - a. The annual average value of life is \$356,000.00,¹ making the daily value of life approximately \$1,000.00.
 - b. Pain and suffering damages are calculated using the following formula:
 - i. Days hospitalized x daily value of life
 - ii. E.g., 50 days hospitalized x \$1,000.00 = \$50,000.00

¹ The annual average value of life is calculated using a population average age of 38.6 (<https://www.census.gov/population/age/data/2011comp.html>) and an annual real discount rate of 3% after the 2008 value was adjusted to a 2012 level using the Consumer Price Index.

2. Loss of enjoyment of life is diminished in relationship to age and TBSA%.
 - a. The accepted measure for loss of enjoyment of life is quality adjusted life years.
 - b. For persons under 18 years old, 0.15% annual quality of life is lost for every % of TBSA.
 - c. For persons over 18 years old, 0.05% annual quality of life is lost for every % of TBSA.
 - i. E.g., Claimant under 18 years old with 50% TBSA, annual quality of life is calculated by $15\% \times 50 = 7.5\%$.
 - ii. E.g., Claimant over 18 years old with 50% TBSA, annual quality of life is calculated by $.05\% \times 50 = 2.5\%$.
 - iii. Annual loss of enjoyment of life is calculated using the following formula:
 - a. Annual predicted quality of life lost x annual average value of life.
 - b. E.g., $10\% \text{ lost quality of life} \times \$356,000.00$ (see fn 1) = $\$35,600.00$
 - iv. Lifetime loss of enjoyment of life is calculated using the following formula:
 - a. Annual loss of enjoyment of life x remaining life expectancy
 - b. E.g., $\$35,600 \times 40 \text{ years remaining life expectancy} = \$1,424,000.00$
3. Lost earning capacity and household services are calculated based on age and the national averages for life earnings.
 - a. Lost earning capacity is based on TBSA%.
 - i. E.g., $10\% \text{ TBSA \%} = \text{approximately } 20\% \text{ loss of earning capacity.}$
 - ii. E.g., $60\% \text{ TBSA\% and over} = \text{approximately } 100\% \text{ loss of earning capacity.}$
 - b. Lost earning capacity and household services is calculated based on the following formula:
 - i. Percent of loss of earning capacity x life earning capacity
 - ii. E.g., 25 year old on average makes \$2 million for entire life
 - iii. E.g., 25 year old w/ $60\% \text{ TBSA} = 100\% \text{ loss of earning capacity}$
 - iv. E.g., $100\% \times 2 \text{ million} = \$2,000,000.00$
4. Past medical expenses are to be provided by each Claimant. The Claimant's past medical expenses will be added to the other elements of recovery in determining the Claimant's Gross Score.
5. Future medical expenses will be estimated by creating a sliding scale of available total life care plan numbers based on TBSA%.
 - a. The life care plan number is then divided by life expectancy for an annual future medical figure.

- b. The annual future medical figure is then multiplied by the remaining life expectancy.
6. Loss of financial support and services is delineated by gender and age.
- a. For deceased victims under age 25, lost earnings and service are reduced by 80% to account for personal consumption.
 - b. For deceased victims 25 years and older, lost earnings and service are reduced by 25% to account for personal consumption
 - c. Loss of financial support and services is calculated using the following formula:
 - i. Earning capacity at age of death x remaining lost earnings and service after consumption deduction.
 - ii. E.g., 3 million x 20% = \$600,000.00
 - iii. E.g., 3 million x 75% = \$2,250,000.00

Any Claimant who suffered burn injuries that cannot provide medical documentation acceptable to the Trustee establishing a TBSA equal to or greater than 15% will not be included in the Gross Scoring process. Rather than receiving a Gross Score and initial offer, any Claimant seeking compensation for burns comprising less than 15% TBSA will be accepted into the Special Circumstances fund set forth in paragraph J. All Claimants must have satisfied the Threshold Requirements as defined above before being accepted into the Special Circumstances fund. If the Trustee, in consultation with the TAC, has any reason to question the amount and/or extent of injuries suffered by a Claimant, the Trustee is empowered to retain an outside consultant regarding the extent of Claimant's injuries and the Trustee is entitled to make adjustments to the Claimants distribution as necessary based upon that consultation. Claimant shall provide all information requested by the Trustee regarding any Threshold issue and any aspect of his or her damage claim.

F. Adjustments to the Gross Score for Past Medical Treatment at the Shriners Hospital for Children

With respect to the calculation of a Claimant's past medical expenses as a component of a Claimant's Gross Score, the TDP recognizes that a number of Claimants received substantial medical care from the Shriners Hospital for Children. The Shriners Hospital for Children is a network of non-profit hospitals that provide medical care for minor children with severe burns and customarily does not charge for its medical services. In order to compensate those Claimants treated at Shriners Hospital for Children equitably in comparison with other Claimants with substantially similar injuries who underwent substantially similar medical treatments, the value of past medical expenses for Claimants treated at Shriners Hospital for Children will be adjusted. The value of the past medical bills component for any Claimant treated at Shriners Hospital for Children will be the number of days the claimant was a patient at Shriners Hospital For Children multiplied by the medical costs of an average day charged to all other claimants submitting claims for medical expenses incurred at non-charitable, full rate burn facilities, and who was of a similar age and suffered a similar TBSA as the Claimant suffered. The Trustee shall determine this rate in consultation with experts based upon the medical billing information submitted with the Claimants' claim forms prior to the bar date.

If a Claimant received past medical treatment from a facility that operates in the same or substantially similar charitable manner as the Shriners Hospital for Children, the Claimant can petition the Blitz Personal Injury Trustee to calculate past medical expenses in the same manner as set forth in the previous paragraph and the Blitz Personal Injury Trustee can do so in his or her sole discretion.

G. Determination of a Claimant's Settlement Percentage

Once all Claimants have received a Gross Score as set forth in paragraphs E and F, the sum of the amounts of the Gross Scores for all Claimants will be calculated by the Blitz Personal Injury Trustee. Each Claimant's Gross Score will then be divided by the sum of all the Gross Scores to determine the Settlement Percentage of each Claimant's Gross Score in comparison with all the Claimants participating in the Trust. A Claimant's Offer Amount will be calculated by multiplying the Claimant's Settlement Percentage by the amount of money held in the Non-Appealing Fund described in paragraph H.

H. Settlement Fund Division

On the Payment Date when the Blitz Personal Injury Plan Trust is funded, the Settlement Amount will be separated into two funds: (1) the Non-Appealing Fund; and (2) the Special Circumstances Fund. The Settlement Amount will be divided with \$30,000,000.00 going into the Special Circumstances Fund and the remainder will be placed into the Non-Appealing Fund. The trust shall be funded by \$159,751,000 in monies owed to the Trust by the insurance carriers and Wal-Mart and these monies will fund distributions to Claimants whose injuries occurred between July 31, 2007 and July 31, 2012. Claimants whose injuries occurred outside of this claim period are not entitled to distributions from Trust monies other than as set forth in this paragraph. An additional \$3,075,000 shall be inserted into the trust for sole payment to Michael Montgomery who is outside of the period intended for compensation by this trust. The monies for settlement of this Montgomery case shall come from Kinderhook pursuant to the Kinderhook term sheet and these monies shall be available only to the Montgomery claimant. Additionally, the Green payment, which is outside of the period intended for compensation by this trust shall be allowed to retain penalty payments of \$250,000 which has been in the Green Claimant's attorney's trust account since before the debtor took bankruptcy. The Calder Claimant, whose claim was also outside of the period intended for compensation by this trust and whose trial resulted in a judgment that has been on appeal shall now be entitled to collect \$2,942,014 from Westchester and \$1,057,986 from RLI. Nothing in this TDP shall entitle Montgomery, Green or Calder to any additional monies from the trust other than those specific sums set forth to compensate them in this paragraph and these sums are from sources outside of the \$159,751,000 monies from the insurance carriers and the 3,075,000 from Kinderhook and shall not dilute these monies to the other Claimants. None of these three claimants are eligible to receive a distribution based on a gross score or the special circumstances fund and the monies set forth above are the only distributions, these Claimants shall receive.

I. Calculation of a Claimant's Offer Amount

The Trustee will provide the Offer Amount to the Claimants along with a Release form approved by the Blitz Personal Injury Trust. If the Claimant accepts the Offer Amount and returns the Release form properly executed, such Blitz Personal Injury Trust Claim will be placed in the First In First Out Payment Queue in order of receipt of the Release.

If the Blitz Personal Injury Trust submits an Offer Amount to a Claimant that the Claimant does not believe is appropriate, the Claimant can opt to apply for payment out of the Special Circumstances Fund. Claimants will have ten (10) business days to either return the properly executed release or make an application to the Special Circumstances Fund. Payment of a Blitz Personal Injury Trust Claim placed in the First In First Out Payment Queue having accepted the Offer Amount will be paid within five (5) business days of being placed in the Queue or at the request of the payee, the payment shall be earmarked and set-aside for sufficient time to allow the establishment of an appropriate trust or structured annuity.

J. Application to the Special Circumstances Fund

The Special Circumstances Fund serves multiple purposes. One purpose is to adequately compensate those Claimants that incurred burns on less than 15% of their total body surface area or were injured by a Blitz U.S.A. product in a manner other than burns. The purpose of the Special Circumstances Fund is to also provide compensation above the amount of the Claimant's original Offer Amount based upon conditions that are not be adequately addressed by a mathematical calculation applied to the Claimants as an entire group. It is not the intent of the Special Circumstances fund to be available to increase the Offer Amount for all Claimants but instead to account for exigent circumstances not fairly or fully addressed pursuant to the formula used in this TDP to score Claimants.

Upon application to the Special Circumstances Fund, the Offer Amount of all applicants to the Special Circumstances Fund will be added into the Special Circumstances Fund. Once all applications to the Special Circumstances Fund have been reviewed by the Trustee, the Trustee will submit a Final Offer Amount to all the Claimants that have applied to the Special Circumstances Fund along with a Release form approved by the Blitz Personal Injury Trust. If the Claimant accepts the Final Offer Amount and returns the Release form properly executed, such Blitz Personal Injury Trust Claim will be placed in the First In First Out Payment Queue. Payment of a Blitz Personal Injury Trust Claim placed in the First In First Out Payment Queue having accepted the Final Offer Amount will be paid within five (5) business days of being placed in the Queue, or at the request of the Payee, such amounts shall be earmarked and set aside for sufficient time to allow the establishment of an appropriate trust or structured annuity.

Application to the Special Circumstances Fund does not guarantee that the Claimant will receive a Final Offer Amount in excess of the Claimant's Offer Amount. Claimants that apply to the Special Circumstances Fund are not guaranteed to receive a Final Offer in an amount even equal to or greater than the Claimant's original Offer Amount. A Claimant may receive a lower Final Offer Amount than the Claimant's Offer Amount. Claimants who apply to the Special Circumstances Fund and do not receive an offer higher than the initial Offer Amount will be responsible for all costs associated with the application. Such costs would include, but not be limited to, the fees and expenses of the Blitz Personal Injury Trustee and TAC incurred to review the Claimant's application along with the costs of any medical or other professionals retained to assist with the review. These costs shall be deducted from the amount awarded by the Trustee to the Claimant.

If the Claimant accepts the Final Offer Amount and returns the Release form properly executed, such Blitz Personal Injury Trust Claims will be placed in the First In First Out Payment Queue. Payment of a Blitz Personal Injury Trust Claim placed in the First In First Out Payment Queue having accepted the Final Offer Amount will be paid within five (5) business days of being placed in the Queue or at the request of the payee, the payment shall be earmarked and set-aside for sufficient time to allow the establishment of an appropriate trust or structured annuity. If the Blitz Personal Injury Trust submits a Final Offer Amount to a Claimant that the Claimant does not believe is appropriate, the Claimant may litigate the value of their Blitz Personal Injury Claim.

K. Litigation of Blitz Personal Injury Trust Claims

Claimants may litigate the value of their Blitz Personal Injury Trust claim in the tort system as provided below. If a Blitz Personal Injury Trust Claim is not resolved following the Offer or Final Offer then the Claimant may file a lawsuit against the Blitz Personal Injury Trust in the Claimant's jurisdiction. Any such lawsuit must be filed by the Claimant in his or her own right and name and not as a member or representative of a class, and no such lawsuit may be consolidated with any other lawsuit. All defenses that could have been asserted by the Debtors or any Released Party with respect to a Blitz Personal Injury Trust Claim shall be available on a non-exclusive basis to the Blitz Personal Injury Trust in such Litigation. Following the final resolution of any litigation, including any associated appeals, a Claimant shall be eligible for payment of a judgment for monetary damages obtained in such litigation from the Blitz Personal Injury Trust Assets until those assets are exhausted.

L. Disbursement of Remaining Funds

Should any funds remain in either the Non-Appealing Fund or the Special Circumstances Fund following payment of all Blitz Personal Injury Claims as set forth in preceding paragraphs, the remaining funds shall be disbursed on a *pro rata* basis among all Blitz Personal Injury Claimants who previously received payment from the Trust and did not participate in the Special Circumstances Fund.

M. Claim of Michael Montgomery

The claim of Michael Montgomery shall be allowed and paid in the sum of \$3,075,000, and shall not be scored in accordance with the above procedures. Mr. Montgomery's claim arose out of an incident that occurred in a year when insurance coverage was provided by Non-Participating Insurers who are presently in liquidation. After the terms of a global settlement were agreed upon with the Participating Insurers and Wal-Mart with respect to claims incurred between July 31, 2005 and July 31, 2012, an additional \$3,075,000 was contributed in order to settle Mr. Montgomery's claim and to finalize the global settlement. This amount was estimated by all involved to be less than what Mr. Montgomery would have received if he was scored under the Blitz Personal Injury Trust. As a result, it was agreed that Mr. Montgomery would retain his claims against the Non-Participating Insurers and other non-Walmart parties currently involved in his litigation in order to provide Mr. Montgomery with the opportunity to recover damages closer to what he would have received had he been allowed to be scored under the Blitz Personal

Injury Trust. In return for being able to pursue other causes of action, Mr. Montgomery shall not be entitled to participate in the special circumstances fund.

N. Lien Satisfaction

Each Claimant is responsible for satisfaction of all liens associated with their claim and must participate in the procedure set forth in the term sheet for lien satisfaction. All costs incurred by the Trust for services to resolve liens on behalf of a Claimant shall be deducted from that individual Claimant's distribution amount. Monies shall not be distributed to claimants until Medicare and Medicaid liens are satisfied.