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

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| In re: | Chapter 11 |
| BLITZ U.S.A. Inc., *et al.*,[1] | Case No. 11-13603 (PJW) |
| Debtors. | (Jointly Administered) |
| | **Related Docket No. 234** |
| | **Hearing Date: February 23, 2012 @ 9:30 a.m.**<br>**Obj. Deadline: February 20, 2012**<br>**For Committee** |

**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO AMENDED MOTION OF DEBTORS AND DEBTORS IN POSSESSION FOR AN ORDER APPROVING (A) SALE RELATED INCENTIVE AND RETENTION PLAN FOR CERTAIN NON-INSIDER EMPLOYEES OF F3 BRANDS LLC AND (B) SALE RELATED INCENTIVE PLAN FOR CERTAIN MANAGEMENT EMPLOYEES OF F3 BRANDS LLC PURSUANT TO SECTIONS 105(a), 363 AND 503 OF THE BANKRUPTCY CODE**

The Official Committee of Unsecured Creditors (the "Committee") of Blitz U.S.A. Inc., *et al.*, the above-captioned debtors and debtors-in-possession, (the "Debtors"), by and through its undersigned counsel, submits this objection (the "Objection") to the Amended Motion of Debtors and Debtors In Possession for An Order Approving (A) Sale Related Incentive and Retention Plan for Certain Non-Insider Employees of F3 Brands LLC and (B) Sale Related Incentive Plan for Certain Management Employees of F3 Brands LLC Pursuant to Sections 105(a), 363 and 503 of the Bankruptcy Code (the "EIP Motion") [Docket No. 234]. In support of this Objection, the Committee respectfully states as follows:

## PRELIMINARY STATEMENT

1. By the EIP Motion, the Debtors seek approval of (i) a sale related incentive program ("SRIP") for two senior management executives of debtor F3 Brands LLC ("F3"), F3's president and chief executive officer and its vice-president (the "SRIP

[1] The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's are as follows:



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Participants"), and (ii) a sale related incentive and retention program (the "Incentive and Retention Plan", and together with the SRIP Plan, the "F3 EIP Plans") for nineteen (19) F3 "non-insider" employees (the "Plan Participants" and, together with the SRIP Participants, the "EIP Participants"). According to the EIP Motion, the EIP Participants would receive the proposed retention bonuses from proceeds of the sale of F3's assets that would otherwise be distributed to the Lenders (after repayment of transaction costs).

2. Given the distressed economic environment and the tight employment market in both Miami, Oklahoma and throughout the United States, the Debtors' proposed "sale related incentive and retention plans" serve no purpose as the Debtors have not demonstrated that the F3 employees are at risk of leaving (the Committee understands that one F3 employee may have left since the bankruptcy filing and the announcement of a sale of F3's assets). Likewise, the Debtors have not explained how or why the F3 employees who will receive these retention bonuses are essential to the proposed F3 Brands sale process and why nearly 20% of the F3 workforce needs to participate in the F3 EIP Plans. If any of the F3 employees were truly essential to maintain the going concern value, a loyal customer base or a competitive position in the market for F3 Brands, then a stalking horse bidder can make retention of just those employees a condition precedent to a transaction.

3. Further, the tight deadlines for this sale process, even if this were a more robust job market, will reward certain employees and the F3 senior management with potentially at least $ 450,000 in the aggregate for the sale of substantially all of F3's assets (assuming Net Sale Proceeds of the Minimum Threshold of $14.5 Million) on an expedited schedule (approximately one month from the date of the hearing on the EIP Motion and less than 60 days from the filing of the Debtors' motion to approve the sale of F3's assets). Logic

dictates that the F3 employees would stay for this short time period to understand whether they had an employment opportunity here even if there were other employment options open to them.

4. Of equal, if not more importance, a review of bankruptcy sale transactions of comparable size shows that, in most cases, employee incentive programs were not pursued by the debtors and management correctly received no payments beyond its ordinary-course compensation. *See* Exhibit II annexed hereto.

5. Further, the F3 EIP Plans attached to the EIP Motion require no "stretch" or "reach" from the EIP Participants, as mandated by applicable law. The Committee understands that the F3 investment banker, Capstone Financial Group, Inc. ("Capstone") is running a robust sale process[2]. Thus, the facts and circumstances of these cases provide no basis for the F3 EIP Plans. The Debtors have not identified any specific tasks or roles that each of the EIP Participants have undertaken or will perform that will enhance the F3 Brands sale process. The F3 EIP Plans fail to tie specific, identifiable contributions of management and other employees to the success of the sale process. It also fails to tie any reward to EIP Participants for improving the sale proceeds to a level at which there would be a recovery to unsecured creditors. Unless unsecured creditors receive a full recovery during these cases, the Committee does not see a reason why the EIP Participants should receive any substantial out-of-the-ordinary-course payments. Unlike unsecured creditors, the EIP Participants are already being paid in full for their work efforts. Given the absence of a clear link between the F3 EIP

[2] Pursuant to the confidentiality agreement between the Debtors and the Committee, the Committee has received information regarding the F3 Brands Sale process that is relevant to the EIP Motion. The Committee can provide that information to the Court at the hearing or under seal.

Plans and any demonstrable contribution by the EIP Participants, the proposed F3 EIP Plans serve no legitimate purpose here.

6. Finally, assuming the Debtors are able to convince the Court that these retention bonuses are appropriate, the proposed payouts in the F3 EIP Plans are excessive. While proper bonuses of this type should be a percentage of the recipients' salaries, these bonuses could easily exceed the recipients' current salaries and are multiples of the EIP Participants' prior performance bonuses.

7. Accordingly, the Court should deny the EIP Motion because the Debtors fail to meet the requirements of either Bankruptcy Code section 503(c) or the business judgment test.

## GENERAL BACKGROUND

8. On November 9, 2011 (the "Petition Date"), the Debtors each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, the Debtors continue to operate their businesses and manage their properties as debtors in possession. By order dated November 10, 2011, the Court approved the joint administration of these cases for procedural purposes only [Docket No. 31].

9. On November 21, 2011, the Office of the United States Trustee appointed the Committee pursuant to section 1102(a)(1) of the Bankruptcy Code. The Committee retained Lowenstein Sandler PC to serve as its counsel, Womble Carlyle LLP to serve as its Delaware co-counsel, and FTI Consulting, Inc., to serve as its financial advisor.

10. No trustee or examiner has been appointed in the Debtors' bankruptcy cases.

11. On February 7, 2012, the Debtors filed their Motion Pursuant to 11 U.S.C. §§ 105(a), 363 and 365 and Bankruptcy Rules 2002, 6004 and 6006 for (I) Entry of an Order: (A) Establishing Bidding and Auction Procedures Related To The Sale Of Certain of the Debtors' Assets; (B) Establishing Procedures For Approval of Related Bid Protections; (C) Scheduling An Auction and Sale Hearing; (D) Establishing Notice Procedures For Determining Cure Amounts For Executory Contracts And Leases To Be Assigned; And (E) Granting Certain Related Relief; And (II) Entry Of An Order (A) Approving the Sale of Certain Of The Debtors' Assets Free And Clear Of All Liens, Claims, Encumbrances And Interests; And (B) Authorizing The Assumption And Assignment Of Certain Executory Contracts and Leases (the "Sale Motion") [Docket No. 230].

12. Pursuant to the Sale Motion, the Debtors seek entry of proposed bid procedures setting March 21, 2012 as the deadline for submission of qualified bids for the sale of F3's Assets; with an auction to take place on March 23, 2012 and a hearing to approve the sale on March 28, 2012.

## THE EIP MOTION

13. On February 9, 2012, even though the Committee's professionals had previously expressed their concerns to the Debtors regarding the flaws of the F3 EIP Plan, the Debtors filed the EIP Motion[3].

[3] The Debtors originally filed an EIP Motion on February 2, 2012, which was superseded by the Amended EIP Motion filed on February 9, 2012.

14. Under the Incentive and Retention Plan (for the 19 non-insider employees), the Debtors propose to make baseline bonus payments, in addition to their existing wages or salary, to the Plan Participants from proceeds of the sale of F3's Assets that would otherwise be payable to the Lenders (after the repayment of transaction costs), regardless of the amount of the proceeds received from the Sale. EIP Motion, ¶ 7. Additionally, the Debtors propose to increase the bonus payments to the Plan Participants as certain milestones are met based solely on the Net Sale Proceeds realized in the F3 Sale. *Id.* A chart attached as Exhibit A to the EIP Motion shows how the Plan Participants would share total payments under the Incentive and Retention Plan.

15. Under the SRIP, the Debtors propose to pay the two insider SRIP Participants an incentive bonus, in addition to their existing wages or salary, in the event that the Net Sale Proceeds from the F3 Sale are equal to or greater than the $14.5 Million Minimum Threshold. In the event that the Net Sale Proceeds exceed the Minimum Threshold, the SRIP Participants will be entitled to a greater SRIP payment. EIP Motion, ¶ 10.

16. The Debtors argue that the F3 EIP Plans were designed to "incentivize Plan Participants to maximize the Net Sale Proceeds realized in the F3 Brands Sale." EIP Motion, ¶ 21. They also contend that the F3 EIP Plans target a limited number of employees "who are essential to the ability of F3 Brands to operate as a going concern through the sale process and who may be inclined to search for other employment in light of an impending sale". EIP Motion, ¶ 22.

17. If Net Sale Proceeds realized from the Sale exceed the $14.5 Million Minimum Threshold in the EIP Motion, an aggregate payment under the F3 EIP Plans of at

least $450,000 will be triggered. This is a likely scenario given the attractiveness of these assets. Such a payment for the approximately 60 days of work between the filing of the EIP Motion and the anticipated sale hearing date is simply "too rich". For the SRIP Participants, an approximate $117,000 aggregate payment under the SRIP would mean individual approximate payments of at least $ 47,000 and $ 70,000. These "windfall" bonuses serve no legitimate purpose.

**OBJECTION**

18. The Debtors argue the proposed retention bonuses contemplated under the F3 EIP Plans are permissible under the business judgment standard under section 363(b)(1) or alternatively under section 503(c)(3) of the Bankruptcy Code. The Committee disagrees: the Court cannot approve the F3 EIP Plans on the basis of either of these provisions.

19. The Debtors assert that the F3 EIP Plans may be approved pursuant to section 363(b) or section 503(c)(3) of the Bankruptcy Code, and that the business judgment rule is the proper standard for the Court to apply when considering such approval under either section. However, the payments under the F3 EIP Plans may not be approved by reference to the deferential business judgment that generally applies under section 363(b) of the Bankruptcy Code. Section 503(c)(3) of the Bankruptcy Code expressly requires the Debtors to show that the F3 EIP Plans are justified by "the facts and circumstances of the case."

A. The F3 EIP Plans Do Not Comply with Bankruptcy Code Section 503(c)(3).

20. The Debtors' assertion that section 503(c)(3) of the Bankruptcy Code subjects the proposed payments under the F3 EIP Plans to review under a form of "the business judgment" rule fails to accord proper meaning to the new limitations imposed by section 503(c)(3) of the Bankruptcy Code.

21. Section 503(c)(3) of the Bankruptcy Code states that "notwithstanding subsection (b), there shall neither be allowed nor paid– … other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition."

22. In enacting section 503(c) of the Bankruptcy Code, Congress clarified and specifically limited what might otherwise be allowed as an administrative expense under section 503(b) of the Bankruptcy Code. Section 503(b) of the Bankruptcy Code provides that:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—
>
> (1)(A) the actual, necessary costs and expenses of preserving the estate including—
>
> (i) wages, salaries, and commissions for services rendered after the commencement of the case;

23. Administrative expenses may not be allowed unless they are actual and necessary to preserve the estate. *In re Unidigital, Inc.*, 262 B.R. 283, 288 (Bankr. D.Del. 2001). Thus, the Debtors must demonstrate that (i) the F3 EIP Plans are necessary to preserve the value of the Debtors' estates, and (ii) that payments under the F3 EIP Plans are "justified by the facts and circumstances of the case." The Court is therefore required to make an independent determination that the F3 EIP Plans are justified by the facts and circumstances of the case, rather than deferring to the Debtors' business judgment.

24. Prior to the 2005 Bankruptcy Code amendments, bankruptcy courts generally employed the "business judgment" rule on a case-by-case basis when considering employee compensation and bonus plans. In 2005, subsection 503(c) was added to the

Bankruptcy Code to curtail payments of retention incentives and severance to insiders, as well as any type of bonuses for officers and managers absent factual and circumstantial justification. Section 503(c) (1) and (3) provides as follows:

> (c) Notwithstanding subsection (b), there shall neither be allowed, nor paid--
> (1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that--
> (A) the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;
> (B) the services provided by the person are essential to the survival of the business; and
> (C) either--
> (i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or
> (ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred; or
>
> * * * * * * * *
>
> (3) other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition.

11 U.S.C. § 503.

25. Contrary to the Debtors' assertions, courts are increasingly distancing section 503(c)(3) from the more deferential "business judgment rule" of section 363(b)(1) and requiring judges to play a more critical role in reviewing bonus programs. The *Pilgrim's Pride* court stated "the test of section 503(c)(3) should not be equated to the business judgment rule as applied under section 363(b)(1)" because to do so would make section 503(c)(3) redundant.

*In re Pilgrim's Pride Corp.*, 401 B.R. 229, 236 (Bankr. N.D. Tex. 2009). The *Pilgrim's Pride* court further asserted that "the conditioning of approval of covered transfers and obligations upon their being 'justified by the facts and circumstances of the case'" suggested that "Congress intended the court to play a more critical role in assessing transactions" that fell within the ambit of section 503(c)(3). *Id.* (internal citations omitted). Moreover, when a court applies the "simple business judgment test" it is "adjured to defer to the debtor in possession or trustee" and, therefore, "if a valid business reason is shown for a transaction, the transaction is to be presumed appropriate." *Id.* However, under section 503(c)(3), "even if a good business reason can be articulated for a transaction, the court must still determine that the proposed transfer or obligation is justified in the case before it." *Id*. at 237.

26. Assuming that none of the proposed compensation is subject to the strict requirements (none of which the Debtors have attempted to satisfy) of section 503(c)(1) or (2), they nonetheless fail to satisfy the section 503(c)(3) test of being "justified by the facts and circumstances" of these cases.

27. FTI Consulting, the Committee's financial advisor, performed a survey of recent bankruptcy sale transactions in 14 cases of a similar size, in which the debtors attempted to sell their assets.[4] *See* Exhibit II annexed hereto. In more than 71% of those cases, the debtors did not propose an employee incentive plan. Here, the Debtors have not shown that these cases are somehow different and warrant approval of the F3 EIP Plans.

[4] To complete this work, FTI used The Deal Pipeline, a recognized database of bankruptcy transactions, to identify bankruptcy sale transactions totaling $10 million to $49 million that have been announced within one year of the Debtors' F3 EIP Plans. Exhibit I to this Objection contains a list of 26 transactions that met this criteria. FTI removed 12 of these transactions that were not comparable to the proposed F3 Brands Sale process. The transactions that were excluded were either non-profits, single asset real estate sales, certain financial companies, liquidations and intellectual property transactions.

28. The Debtors point in part to the need to retain the EIP Participants given their knowledge of the F3 Brands business. However, these qualities are why F3 Brands are employing the EIP Participants in the first place and are compensating them in the ordinary course of business. If the EIP Participants are really essential to the Debtors' business, a stalking horse bidder will insist that the asset purchase agreement make their employment a condition precedent.

29. The Debtors also contend that the proposed payments to the Plan Participants "… will motivate Plan Participants to not only perform their typical job duties through the sale process, but to put forth the additional effort that will be necessary to achieve a greater level of Net Sales Proceeds for the estate." EIP Motion, ¶ 21. Again, the Debtors have not shown that each of the Plan Participants, or the SRIP Participants, have or will play a "critical role" in the sale process that will lead to a higher sale price for the F3 Assets. The Debtors have failed to show what each of the EIP Participants have done since the Petition Date, or will do prior to the Sale Hearing, to contribute to a higher sale price. Although the Debtors, like most companies, may have some motivational or retention concerns, these concerns are far outweighed by the facts and circumstances described above that strongly militate against approving the F3 EIP Plans. As the F3 EIP Plans fail to satisfy the "facts and circumstances of the case" standard of section 503(c)(3) of the Bankruptcy Code, the Court should not approve them.

B. <u>The F3 EIP Plans Do Not Satisfy the "Sound Business Judgment Test".</u>

30. Even if the Court were to assume that the "sound business judgment" test applies, the F3 EIP Plans also fails to satisfy it as the F3 EIP Plans are primarily retention

plans and not incentivizing. The Court must examine the following factors to determine whether the F3 EIP Plans meet the "sound business judgment" test:

- Is there a reasonable relationship between the plan proposed and the results to be obtained, *i.e.*, will the key employee stay for as long as it takes for the debtor to reorganize or market its assets, or, in the case of a performance incentive, is the plan calculated to achieve the desired performance?

- Is the cost of the plan reasonable in the context of the debtor's assets, liabilities and earning potential?

- Is the scope of the plan fair and reasonable; does it apply to all employees; does it discriminate unfairly?

- Is the plan or proposal consistent with industry standards?

- What were the due diligence efforts of the debtor in investigating the need for a plan; analyzing which key employees need to be incentivized; what is available; what is generally applicable in a particular industry?

- Did the debtor receive independent counsel in performing due diligence and in creating and authorizing the incentive compensation?

*In re Global Home Prods., LLC*, 369 B.R. 778, 786 (Bankr. D. Del. 2007) (citing In *re Dana Corp.*, 358 B.R. 567, 576-77 (Bankr. S.D.N.Y. 2006)).

31. Reasonable Relationship between EIP and Results to Be Obtained. With respect to the first factor, the EIP is not calculated to achieve the desired performance. As discussed above, the so-called incentive plan does not provide any actual incentives for the EIP Participants to do anything extra in the future but guarantees payments for an event which is inevitable: the sale of the assets of F3 Brands.

32. The EIP Motion does not describe the marketing process during the months before the bankruptcy filing or the steps that Capstone, the investment banker for F3 Brands, has taken to date to identify and contact potential buyers of F3's assets. The EIP

Motion does not explain how F3's management or other employees who will receive the retention bonuses contributed to the marketing process or added any value to Capstone's work beyond performance of their jobs. The EIP Motion merely states that it "targets a limited number of employees who are essential to the ability of F3 to operate as a going concern through the sale process."

33. The Debtors also assert that the F3 EIP Plans will incentivize the EIP Participants to maximize the value received in connection with the F3 Sale. Again, the Debtors fail to explain how the EIP Participants are doing anything beyond their job duties or adding value to what Capstone, the F3 Brands investment banker, has already been doing.

34. The Debtors sought and obtained the Court's authorization to retain Capstone as the investment banker to market F3's assets during the bankruptcy process, and Capstone will be seeking substantial compensation in exchange for those marketing and sale-related services. See *Debtors' Application For An Order (I) Authorizing the Retention and Employment of Catstone Financial Group, Inc. to Serve as the Debtors' Investment Banker In Connection With the Sale of The Assets of F3 Brands LLC, Pursuant to Section 372(a) and 328(a) of the Bankruptcy Code, Nunc Pro Tunc to the Petition* [Docket No. 78].

35. Thus, the EIP Participants' involvement in the F3 Brands sale process is likely limited as the F3 investment banker has been hired to, and is in fact running the F3 sale process. The Committee sees no reason why the EIP Participants should receive any payments out of the ordinary course for the work that they are already paid to do in the ordinary course of operating F3 Brands.

36. In addition, although the F3 EIP Plans tie payments to Net Sale Proceeds, it does so very late in the game. The EIP Motion fails to demonstrate the EIP Participants' contribution to generating a sale price as high as possible. A mere four weeks before the anticipated sale hearing, it is difficult to see what the EIP Participants can do to bring the sale price higher. Therefore, it is difficult to justify the aggregate payments of approximately $450,000 to the EIP Participants for standing by for four weeks(assuming Net Sale Proceeds of $14.5 Million).

37. The Debtors have therefore failed to show a reasonable relationship not only between the F3 EIP Plans and procuring the highest and best bid for the F3 assets, but also between the F3 EIP Plans and the best interests of the Debtors' estates and creditors.

38. Whether the EIP Is Reasonable. As to the second factor, the Debtors do not address it. The Debtors have presented no evidence that the cost of the F3 EIP Plans is reasonable in the context of their assets, liabilities and earning potential.

39. Additionally, it remains unclear whether payment under the F3 EIP Plans will be waived or limited if an EIP Participant secures new employment with the purchaser of F3's assets. Without full disclosure, the Court cannot properly evaluate the F3 EIP Plans in order to make an informed decision as to the appropriateness of the proposed plans. While the EIP Motion does state that each Plan Participant and each SRIP Participant shall be required to execute a form of agreement acceptable to the Board releasing F3 Brands and the other Debtors and waiving any and all claims against the Debtors' estates, it is not clear whether the EIP Participants are still entitled to the proposed retention bonuses if they are hired by the

purchaser of F3's assets. Payments to an EIP Participants should be adjusted to the extent an EIP Participant secures new employment with the purchaser of the F3 Brands assets.

40. Scope of EIP. As to the third factor, the Debtors provide no explanation for the allocation of the payments under the Incentive and Retention Plan or the SRIP Plan.

41. The Debtors should also disclose whether the Debtors have any claims against the EIP Participants or whether the EIP Participants may have claims against the Debtors' estates. If the Debtors do in fact have claims against any of the EIP Participants, there is no reason to pay them substantial sums of money when the Debtors should seek to recoup any such funds due to them. Similarly, if the EIP Participants hold claims against the Debtors, they should waive those claims.

42. Additional Factors. The Debtors state that the F3 EIP Plans were "formulated after a significant amount of due diligence by the Debtors and with input from the Debtors' counsel and their financial advisor retained in these Chapter 11 Cases." EIP Motion, ¶ 22, 26. However, the Debtors have not demonstrated (i) whether the proposed F3 EIP Plans are consistent with industry standards, (ii) the extent of the Debtors' due diligence efforts in investigating the need for the F3 EIP Plans, or (iii) whether the Debtors received independent counsel in performing due diligence and in creating and authorizing the F3 EIP Plans.

43. Thus, the Court cannot approve the F3 EIP Plans on the basis of the "sound business judgment" test either.

C. The SRIP is a Retention Plan for the Debtors' Insiders, Which Does Not Comply with Bankruptcy Code Section 503(c)(1)

44. The Debtors have chosen to characterize what they are seeking here under the SRIP Plan as approval of an incentive program to avoid the strict requirements of section 503(c)(1) for the approval of retention payments to insiders. EIP Motion, ¶24. However, as discussed in detail above, the F3 EIP Plans, including the SRIP, do not create real incentives for the EIP Participants. As noted above, the Committee understands that Capstone is running a robust sale process for the F3 Brands assets. With the sale of F3 Brands likely to occur within the next three to four weeks, the F3 insiders[5] are almost guaranteed to receive at least $116,475 in aggregate bonus payments under the SRIP.

45. As a practical matter, the SRIP rewards the SRIP Participants simply for staying put until the F3 Sale closes, and is really nothing more than a retention plan that must satisfy the stringent requirements of section 503(c)(1) of the Bankruptcy Code. Given that the Debtors have not made any demonstration whatsoever that the elements of section 503(c)(1) have been satisfied, the SRIP Plan should be denied.

46. The Committee reserves the right to supplement, amend or modify this Objection at any time prior to the hearing and if necessary, to conduct formal discovery related to the EIP Motion.

[5] The Committee reserves the right to assert any argument related to the EIP Participants' status as insiders under the Bankruptcy Code.

**WHEREFORE**, the Committee respectfully requests that the Court deny the Debtors' EIP Motion and grant the Committee such other and further relief as the Court deems just and appropriate.

Dated: February 20, 2012

Respectfully submitted,

**WOMBLE CARLYLE SANDRIGE & RICE LLP**

/s/Kevin J. Mangan

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**Blitz U.S.A.**
Exhibit I - All Transactions

**Deal Value:** **$10 million to $49 million**
**Announcement Dates:** **2/1/11 to 2/15/12**
**Region:** **United States**

| Filing Date | Case No. | Court | Asset | Transaction Value ($ in mil) [1] | Announcement Date [2] | Include | If No, Reason to Exclude |
|---|---|---|---|---|---|---|---|
| 12/8/11 | 11-13853 | Delaware | ALC Holdings LLC | $ 49 | 11/11/11 | Yes | |
| 6/9/11 | 11-11764 | Delaware | Allen Family Foods Inc. | 48 | 6/9/11 | Yes | |
| 5/17/11 | 11-03216 | South Carolina | Merit Group Inc. | 47 | 5/17/11 | Yes | |
| 4/1/11 | 11-11002 | Delaware | Ambassadors International Inc. | 39 | 4/1/11 | Yes | |
| 7/1/11 | 11-16394 | Massachusetts | Quincy Medical Center Inc. | 38 | 7/1/11 | No | Non-Profit |
| 8/15/11 | 11-12590 | Delaware | Evergreen Solar Inc. | 35 | 8/15/11 | Yes | |
| 4/14/11 | 10-11963 | SDNY | Sisters of Charity Health Care System Nursing Home Inc. | 34 | 6/9/11 | No | Non-Profit |
| 10/30/11 | 11-13450 | Delaware | Beacon Power Corp. | 31 | 10/30/11 | Yes | |
| 10/4/10 | 10-13207 | Delaware | International Garden Products Inc. | 27 | 4/8/11 | Yes | |
| 2/1/12 | 12-10405 | SDNY | United Retail Group Inc. | 25 | 2/1/12 | Yes | |
| 12/1/11 | 11-14366 | California, Northern | MC2 Capital Partners LLC | 25 | 2/1/12 | No | Single Asset Real Estate |
| 1/9/12 | 12-10140 | Delaware | International Media Group Inc. | 25 | 1/9/12 | Yes | |
| 1/4/12 | 12-10069 | Delaware | Trident Microsystems Inc. | 25 | 11/3/11 | No | Multiple sales are contemplated in excess of the transaction value range |
| 10/18/10 | 10-24771 | California, Central | Crystal Cathedral Ministries | 25 | 5/27/11 | No | Non-Profit |
| 3/29/11 | 11-11385 | SDNY | Gramercy Park Land LLC | 25 | 3/29/11 | No | Foreclosure/Real Estate Portfolio |
| 3/7/11 | 11-10688 | Delaware | PJ Finance Co. LLC | 25 | 3/7/11 | No | Real Estate Portfolio |
| 7/6/11 | 11-20704 | Nevada | November 2005 Land Investors LLC | 21 | 7/6/11 | No | Real Estate Portfolio |
| 4/8/11 | 11-30895 | Alabama, Middle | MP-Tech America LLC | 18 | 4/8/11 | Yes | |
| 8/7/09 | 09-30679 | New Jersey | Plainfield Apartments LLC | 16 | 3/18/11 | No | Real Estate Portfolio |
| 2/16/11 | 11-10614 | SDNY | Borders Group Inc. (Intellectual Property Assets & Real Estate Leases) | 16 | 7/27/11 | No | Real Estate Portfolio (leases); intellectual property |
| 2/24/11 | 11-02896 | California, Southern | No Fear Retail Stores Inc. | 14 | 2/24/11 | Yes | |
| 10/26/10 | 10-43178 | New Jersey | 15-35 Hempstead Properties LLC | 14 | 7/25/11 | No | Single Asset Real Estate |
| 5/8/11 | 11-19605 | Illinois, Northern | Gourmet Kitchens Inc. | 13 | 10/14/11 | Yes | |
| 6/29/11 | 11-16217 | Massachusetts | Women's Apparel Group LLC | 11 | 3/1/11 | Yes | |
| 4/3/11 | 11-41938 | Texas, Northern | Jefferson Bank; Outsource Holdings Inc. | 11 | 4/3/11 | No | Financial Services |
| 1/25/11 | 11-10577 | Massachusetts | Rugged Bear Co. | 10 | 2/11/11 | Yes | |

| | | | |
|---|---|---|---|
| **Median** | **$ 25** | **Yes:** | **14** |
| **Average** | **$ 26** | **No:** | **12** |

*Source: The Deal Pipeline*
*(1) Includes value of cash and any credit bid as reported in The Deal Pipeline.*
*(2) Date which sale was announced as reported in The Deal Pipeline*

**Blitz U.S.A.**
Exhibit II - Select Comparable Transactions

**Deal Value:** **$10 million to $49 million**
**Announcement Dates:** **2/1/11 to 2/15/12**
**Region:** **United States**

| Filing Date | Case No. | Court | Asset | Transaction Value ($ in mil) [1] | Announcement Date [2] | KEIP [3] |
|---|---|---|---|---|---|---|
| 12/8/11 | 11-13853 | Delaware | ALC Holdings LLC | $ 49 | 11/11/11 | No |
| 6/9/11 | 11-11764 | Delaware | Allen Family Foods Inc. | 48 | 6/9/11 | Yes |
| 5/17/11 | 11-03216 | South Carolina | Merit Group Inc. | 47 | 5/17/11 | No |
| 4/1/11 | 11-11002 | Delaware | Ambassadors International Inc. | 39 | 4/1/11 | No |
| 8/15/11 | 11-12590 | Delaware | Evergreen Solar Inc. | 35 | 8/15/11 | Yes |
| 10/30/11 | 11-13450 | Delaware | Beacon Power Corp. | 31 | 10/30/11 | Yes |
| 10/4/10 | 10-13207 | Delaware | International Garden Products Inc. | 27 | 4/8/11 | Yes |
| 2/1/12 | 12-10405 | SDNY | United Retail Group Inc. | 25 | 2/1/12 | No |
| 1/9/12 | 12-10140 | Delaware | International Media Group Inc. | 25 | 1/9/12 | No |
| 4/8/11 | 11-30895 | Alabama, Middle | MP-Tech America LLC | 18 | 4/8/11 | No |
| 2/24/11 | 11-02896 | California, Southern | No Fear Retail Stores Inc. | 14 | 2/24/11 | No |
| 5/8/11 | 11-19605 | Illinois, Northern | Gourmet Kitchens Inc. | 13 | 10/14/11 | No |
| 6/29/11 | 11-16217 | Massachusetts | Women's Apparel Group LLC | 11 | 3/1/11 | No |
| 1/25/11 | 11-10577 | Massachusetts | Rugged Bear Co. | 10 | 2/11/11 | No |

| | | | |
|---|---|---|---|
| **Median** | **$ 26** | **Yes:** | **4** |
| **Average** | **$ 28** | **No:** | **10** |

*Source: The Deal Pipeline*
*Note: Excludes real estate transactions, non-profits, certain financial companies, liquidations and intellectual property transactions*
*(1) Includes value of cash and any credit bid as reported in The Deal Pipeline.*
*(2) Date which sale was announced as reported in The Deal Pipeline*
*(3) FTI searched on the Court Docket, using keywords: "management", "incentive", "key", "employee", "KEIP", "bonus" and "retention"*