UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
BLITZ U.S.A. Inc., *et al.*,[1]	Case No. 11-13603 (PJW)
Debtors.	(Jointly Administered)
	Related Docket No.s. 574, 618 & 695
	Hearing Date: September 11, 2012 @ 9:30 a.m.

RESPONSE AND LIMITED OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' SALE MOTION PURSUANT TO 11 U.S.C. §§ 105(a), 363, AND 365 AND BANKRUPTCY RULES 2002, 6004, AND 6006

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 response and limited objection (the "Response") to the Debtors' *Motion Pursuant To 11 U.S.C. Sections 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 Substantially All 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 Related Relief; And (II) Entry Of An Order (A) Approving The Sale Of Substantially All of The Debtors' Assets Free And Clear Of All Liens, Claims, Encumbrances And Interests; (B) Authorizing The Assumption And*

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtors' federal tax identification number, are: LAM 2011 Holdings (8742); Blitz Acquisition Holdings, Inc. (8825); Blitz Acquisition, LLC (8979); Blitz RE Holdings, LLC (9071); Blitz U.S.A., Inc. (8104); and MiamiOK LLC (2604). The location of the Debtors' corporate headquarters and the Debtors' service address is: 404 26th Ave. NW, Miami, OK 74354.

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Assignment Of Certain Executory Contracts And Unexpired Leases (the "Sale Motion") [Docket No. 574]. In support of this Response, the Committee respectfully states as follows:

PRELIMINARY STATEMENT

1. Pursuant to a Notice of Selection of "Stalking Horse" Bidder and Hearing to Approve Proposed Bidding Protections with Respect to the Stalking Horse Bidder dated August 23, 2012, the Debtors selected the bid submitted by Scepter Holdings Inc. ("Scepter") as the "stalking horse" bid for the sale of substantially all of the assets of Debtors Blitz U.S.A., Inc. ("Blitz USA") and Blitz RE Holdings, LLC ("Blitz RE") related to the Blitz USA business.

2. While the bid submitted by Scepter provides for the assumption by Scepter of certain administrative expenses and that certain administrative expenses will be paid by the Blitz USA bankruptcy estate, there are other administrative expenses, including section 503(b)(9) claims and estate wind-down costs that are not accounted or allocated for. Although the Sale Motion is silent on the issue, the Debtors have confirmed that it is their intention to distribute the net proceeds of closing of the sale to Scepter to the Lenders to pay off the obligations due to them under the pre-petition loan facility[2], without making any provision to reserve for unaccounted for administrative claims. The Committee hereby objects to the approval of the Scepter bid and the proposed sale to the extent that the sale will leave the Blitz USA and Blitz RE estates administratively insolvent, and requests that the Court only approve the sale provided that all net proceeds of the sale are held in escrow pending payment in full of all allowed administrative claims of the Debtors' bankruptcy estates.

3. In addition to the Committee's issue with the distribution of the Net Sale Proceeds, the Committee has concerns and issues with certain of the terms and conditions set forth in the Asset Purchase Agreement. The Committee, through its professionals, have engaged

[2] Although the pre-petition lenders also provided debtor-in-possession financing to the Debtors, the Debtors have not drawn down any funds under the DIP facility.

in discussions with both the Debtors' professionals and counsel to Scepter regarding the Committee's concerns with the Asset Purchase Agreement and anticipates working with Scepter on language to be included in the sale order that will resolve several of the Committee's issues with the Asset Purchase Agreement. However, as of the filing of this Response, the Committee has not received any such proposed language and reserves all of its rights to object at the Sale Hearing to those unresolved terms and conditions of the Asset Purchase Agreement and the form of proposed sale order.

GENERAL BACKGROUND

4. 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].

5. 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.

6. No trustee or examiner has been appointed in the Debtors' bankruptcy cases (the "Debtors' Chapter 11 Cases").

7. On December 12, 2011, the Court entered the *Final Order (I) Authorizing Debtors to Incur Post-Petition Secured Indebtedness, (II) Granting Security Interests and Superpriority Claims, (III) Approving Use of Cash Collateral* (the "DIP Order") [Docket No. 132]. The DIP Order authorized the Debtors to obtain up to $5,000,000 in post-petition financing under a revolving credit facility pursuant to the terms of a Senior Secured, Super-

priority Debtor-in Possession Credit Agreement, dated as of November 28, 2011 (the "DIP Financing Agreement"), among the Debtors, BOKF, NA, d/b/a Bank of Oklahoma, as agent, and the lenders identified therein (the "DIP Lenders"). The DIP Order grants to the DIP Lenders, among other things, post-petition liens on substantially all of the Debtors' assets, superpriority administrative expense claims, and expedited remedies in the case of a default. To date, no funds have been advanced to the Debtors under the DIP Financing Agreement.

8. The DIP Order also provides, without prejudice to the rights of the Committee, that as of the Petition Date, certain of the Debtors had outstanding debt obligations pursuant to the First Amended and Restated Credit Agreement (the "Prepetition Credit Agreement"), dated February 4, 2011, among Blitz Acquisition, LLC, Blitz U.S.A., LLC, Inc., and Blitz RE Holdings, as borrowers (the "Prepetition Borrowers"), Blitz Acquisition Holdings, Inc. as guarantor, F3 Brands LLC as guarantor (the "Prepetition Guarantors"), LAM 2011 Holdings, LLC as parent, the lenders thereto (the "Prepetition Lenders") and BOKF, NA, d/b/a Bank of Oklahoma as agent (the "Prepetition Agent") (as amended, the "Prepetition Credit Facility"). [DIP Order at ¶11(d)].

9. The Prepetition Credit Facility consisted of a $15 million revolver note facility (the "Prepetition Revolver Facility"), and a $20 million term note facility (the "Prepetition Term Note Facility"). [DIP Order at ¶11(e)]. The Debtors claim that as of the Petition Date, the principal amount outstanding under Prepetition Revolver Facility was $18,968,464.29, and the principal amount outstanding under the Prepetition Term Note Facility was $21,845,180.46 (together, the "Prepetition Indebtedness"). [DIP Order at ¶11(g)].

10. The Prepetition Lenders were provided with a continuing lien and security interest to secure the Prepetition Indebtedness in substantially all in of the Prepetition Borrowers' and Prepetition Guarantors' assets, subject only to "Permitted Liens" as defined in the

Prepetition Credit Facility. Nothing in the DIP Order provides for the allocation of any sale proceeds to pay down the Prepetition Indebtedness.

11. The Committee retained the right to file an adversary proceeding or contested matter challenging or objecting to the validity, perfection, enforceability, or priority of the Prepetition Agent's and the Prepetition Lenders' security interests in and liens on prepetition collateral or amount and allowance of the Prepetition Indebtedness. [DIP Order at ¶19(e) and Docket No. 349]. The Committee's challenge rights have been extended pursuant to various stipulations with the Prepetition Lenders extending the lien challenge period.

12. In early June 2012, the Debtors announced that they would cease operations at Blitz USA on July 31, 2012 and would pursue a sale of substantially all of their assets.

13. On June 29, 2012, the Debtors filed the Sale Motion, seeking, among other relief, approval of bidding and auction procedures related to the sale of certain assets of Debtors Blitz and Blitz RE (the "Sale Assets") free and clear of all liens, claims, encumbrances, and other interests.

14. By order dated July 17, 2012 (the "Bid Procedures Order") [Docket No. 618], the Court granted the first phase of the Sale Motion, approving bidding and auction procedures for the proposed sale of the Sale Assets. Pursuant to the Bid Procedures Order, bids for the Sale Assets were due on September 4, 2012 (the "Bidding Deadline"), an auction for the sale of the Sale Assets (the "Auction") was scheduled for September 6, 2012 and the hearing to approve the sale of assets (the "Sale Hearing") is currently scheduled for September 11, 2012. Objections to the proposed sale of the Sale Assets, including objections to the Auction and the selection of the Successful Bidder (as defined in the Bid Procedures Order), are due by September 10, 2012 at 12:00 p.m. (Prevailing Eastern Time) (the "Sale Objection Deadline"). See Bid Procedures Order at ¶¶ 3, 20, 21.

15. Pursuant to a Notice of Selection of "Stalking Horse" Bidder and Hearing to Approve Proposed Bidding Protections with Respect to the Stalking Horse Bidder dated August 23, 2012, the Debtors selected the bid submitted by Scepter Holdings Inc. ("Scepter") to serve as the stalking horse bid for the sale of substantially all of the assets of Debtors Blitz U.S.A. and Blitz RE related to the Blitz USA business, subject to higher and better offers (the "Asset Purchase Agreement").

16. The Debtors did not receive any competing bids for the Blitz Assets by the Bidding Deadline. Accordingly, the Debtors canceled the Auction and declared Scepter the Successful Bidder, with a bid in the gross amount of $9,500,000.00.

17. Neither the Sale Motion, nor the accompanying proposed sale order [Docket No.] indicate the manner in which the net proceeds from the sale of the Sale Assets (the "Net Sale Proceeds") will be distributed. Based on discussions between and among counsel for the Debtors, Committee, and Prepetition Lenders, however, the Committee understands that the Debtors intend to disburse substantially all of the Net Sale Proceeds to the Prepetition Lenders to pay off the Prepetition Indebtedness.

18. While certain administrative claims are being assumed by Scepter and certain other administrative expenses, such as accrued taxes will be paid by the Blitz estate from Net Sale Proceeds, certain other administrative expenses have been completely ignored. For example, the Committee understands that section 503(b)(9) claims in the estimated amount of $115,000 are not being assumed by Scepter and are not being reserved for by the Blitz USA estate. In addition, the Committee does not believe that the Debtors intend to set up a reserve to address any gain on the sale of Sale Assets, any potential environmental liabilities, or costs associated with the wind-down of the Blitz USA and Blitz RE estates.

Response and Limited Objection

I. The Sale Motion Should Not Be Approved Unless Adequate

Provision is Made For Payment of Administrative Claims

19. Further, a chapter 11 case should not be administered for the sole benefit of secured lenders. *See, e.g., In re Aqua Assocs.*, 123 B.R. 192, 195-96 (Bankr. E.D. Pa. 1991); *In re Ames Dep't. Stores, Inc.*, 115 B.R. 34, 37 (Bankr. S.D.N.Y. 1990) ("[A] proposed financing will not be approved where it is apparent that the purpose of the financing is to benefit a creditor rather than the estate."); *In re Tenney Village Co., Inc.*, 104 B.R 562, 568 (Bankr. D.N.H. 1989).

20. For example, it is inappropriate for a case to remain in chapter 11 where there is no realistic possibility that a plan will be confirmed and where lenders are simply utilizing the chapter 11 process to arrange a section 363 sale to be followed by a conversion to chapter 7, all while not providing for payment of all chapter 11 administrative expense claims. *See, e.g., In re Encore Healthcare Assocs.*, 312 B.R. 52, 54-55 (Bankr. E.D. Pa. 2004) (court denied bid procedures motion finding that section 363 sale served no legitimate business purpose). *Accord In re Duro Industries, Inc.*, 2002 WL 34159091 (Bankr. D. Mass. 2002) ("Where all equity in a debtor's assets belongs to the secured creditor, with no appreciable expectation of a remainder for unsecured creditors, the liquidation of the assets serves no bankruptcy purpose and should not be permitted to occur in bankruptcy."); *In re Fremont Battery Company*, 73 B.R. 277, 279-80 (Bankr. N.D. Ohio 1987); *In re Au Natural Restaurant, Inc.*, 63 B.R. 575, 581 (Bankr. S.D.N.Y. 1986) (need for expedited sale is not a sufficient business justification to sell substantially all of the debtor's assets when the debtor's prospect of proceeding to confirmation and making distributions to unsecured creditors is unlikely).

21. Indeed, this Court, *In re NEC Holdings Corp., et al.*, Case No. 10-11890, recently concluded that "I can't let a case . . . [run] that's administratively insolvent." *In re NEC Holdings Corp., et al.*, Case No. 10-11890, July 13, 2010 Hearing Transcript (the "NEC

Transcript"),[3] p. 78:18-20. Further, with respect to section 503(b)(9) claims, the Court observed during the same hearing that:

> [While] I generally have held in the past that you can run a case for the benefit of a secured creditor . . . [t]hey've got to pay the freight, and the freight is . . . certainly an administratively solvent estate. And while there's not a guarantee, there has to be something other than a wing and prayer on the payment of admin claims. And counsel very honestly and appropriately answered the question here that at least it's unclear, as we stand here, and it's quite unclear whether 503(b)(9) claims would be paid.

NEC Transcript, p. 100:14-20. *See also, In re Townsends, Inc., et al.*, Case No., No. 10-14092, January 21, 2011 Hearing Transcript (the "Townsends Transcript"), pp. 23:25–24:9; 24:9-22 (recognizing that it is inappropriate to run a case that is administratively insolvent).[4]

22. Here, the Debtors intend to disburse the entirety of the Net Sale Proceeds of the sale of substantially all of Blitz USA and Blitz RE Assets to the Prepetition Lenders without leaving any funds for the payment of any of the unpaid administrative expense claims or wind-down costs, and will leave these estates administratively insolvent. In order to prevent this unjust result, the Court should condition approval of the Scepter bid on the escrowing of a portion of the Net Sale Proceeds for the purpose of satisfying unpaid administrative expense claims and wind-down costs, and in the event the funds placed into escrow are inadequate to satisfy these amounts, the DIP Lenders and/or the Prepetition Lenders should be compelled to disgorge portions of the Net Sale Proceeds to satisfy these amounts. *In re Timbers of Inwood Forest Associates, Ltd.*, 808 F.2d 363, 373 (5th Cir. 1987), *aff'd*, 484 U.S. 365 (1988) (emphasis added)("[a] principal goal of the reorganization provisions of the Bankruptcy Code is to benefit the creditors of the Chapter 11 debtor by preserving going-concern values and thereby enhancing the amounts recovered by ***all*** creditors."). *In re R.H. Macy & Co.*, 170 B.R. 69, 74 (Bankr. S.D.N.Y. 1994) (*citing NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984) (it is a

[3] Copies of the relevant pages of the *NEC* Transcript are attached hereto as Exhibit A.
[4] Copies of the relevant pages of the *Townsends* Transcript are attached hereto as Exhibit B.

fundamental policy of bankruptcy law that a debtor in possession has "an affirmative, overarching duty to reorganize and maximize estate assets for the benefit of all creditors," not just a select few.).

23. In December 12, 2011, this Court entered the Final Order Under 11 U.S.C. §§ 105(A), 361, 363, and 364 and Fed. R. Bankr. P. 2002, 4001 and 9014 (I) Authorizing Debtors to Incur Post-Petition Secured Indebtedness, (II) Granting Security Interests and Superpriority Claims, (III) Approving Use of Cash Collateral (the "DIP Order") [D.I. 132, as amended at D.I. 570 and 619]. The term of the financing provided under the DIP Order, as subsequently amended, expires the earlier of the closing of the Sale or September 30, 2012. Therefore, it is anticipated that by no later than September 30, 2012, the Debtors will lacks funds to continue the administration of these cases in chapter 11, which could result in the cases being converted to chapter 7 sometime about October 1, 2012.

24. During the course of these cases, the Lender's prepetition secured claim has been paid down from approximately $41 million to $9 million. In connection with the proposed sale, the Debtors are proposing to pay the net proceeds of closing plus other cash-on-hand to the Lender in full payment of its Prepetition secured claim without reserving sufficient funds to pay accrued administrative claims or to pay costs of winding down the estates. The Court should not permit the Prepetition Secured Lenders to use this Court to liquidate its collateral and then walk away with its secured claim paid in full without making adequate provision to pay the costs of liquidating its collateral.

25. The DIP Order provides for Bankruptcy Code section 506(c) and 552(b) waivers in favor of each of the DIP Lenders and Prepetition Lenders. DIP Order ¶¶ 18 and 34. Specifically, paragraph 18 of the DIP Order provides as follows:

> Limitation On Additional Surcharges. Except to the extent of the Carve-Out Expenses, no costs or expenses of administration or other surcharge, lien, assessment or claim incurred on or after the Petition Date of any person or entity

> shall be imposed against any of the Collateral, the Prepetition Collateral, any Prepetition Lenders, the Prepetition Agent, any DIP Lenders, or DIP Agent, nor shall the Collateral, the Prepetition Collateral, any Prepetition Lenders, the Prepetition Agent, any DIP Lenders or DIP Agent be subject to surcharge by any party-in-interest for any amounts arising or accruing after the Petition Date pursuant to sections 506(c), 552(b) or 105(a) of the Bankruptcy Code or similar principle of law. No action, inaction, or acquiescence by the Prepetition Lenders, the Prepetition Agent, the DIP Lenders or DIP Agent in these cases, including the Prepetition Lenders' or the DIP Lenders' funding of the Debtors' ongoing operations under this Final Order or the DIP Financing Agreement, shall be deemed to be or shall be considered as evidence of any alleged consent by the Prepetition Lenders, the Prepetition Agent, the DIP Lenders or DIP Agent to a charge against the Prepetition Collateral, the Collateral, any Prepetition Lender, the Prepetition Agent, any DIP Lender, or DIP Agent pursuant to sections 506(c), 552(b) or 105(a) of the Bankruptcy Code. Neither the Prepetition Lenders, the Prepetition Agent, the DIP Agent nor the DIP Lenders shall be subject in any way whatsoever to the equitable doctrine of "marshaling" or any similar doctrine with respect to the Collateral or the Prepetition Collateral.

DIP Order, ¶ 18.

26. Paragraph 34 of the DIP Order provides as follows:

> Section 552(b). In light of their agreement to subordinate their liens and superpriority claims (i) to the Carve Out in the case of the DIP Lenders, and (ii) to the Carve Out and the DIP Liens in the case of the Prepetition Lenders, each of the DIP Lenders and Prepetition Lenders is entitled to all of the rights and benefits of section 552(b) of the Bankruptcy Code and the "equities of the case" exception shall not apply with respect to proceeds, product, offspring or profits of any of the Collateral or Prepetition Collateral.

Id., ¶ 34.

27. Although the Prepetition Lenders received the above protections typically associated with providing new money into an estate, no funds were ever extended by the Prepetition Lenders under the DIP Financing Agreement. Instead, the Debtors have financed their businesses and run these cases strictly through the use of cash collateral.

28. Since the entry of the DIP Order, the Debtors announced that they would cease their gas can manufacturing operations on or about July 31, 2012. As a result of that announcement, certain of the Debtors' largest customers placed significant orders for gas cans

that exceeded their prior orders with the Debtors. The Debtors devoted significant additional resources to fulfilling these orders, increasing their manufacturing staffing hours to operate around the clock through July 31, 2012. The Debtors generated significant amounts of cash and accounts receivable that arguably are the collateral of the Prepetition Lenders. In late July and early August, the Debtors made payments totaling $10 million to the Prepetition Lenders in reduction of the obligations due under the prepetition loan facility. On cessation of operations on July 31, 2012, the Debtors had cash on hand of $9.6 million and accounts receivable of $6.4 million. Therefore, a perverse result of the Debtors' announcement that they would cease to manufacture gas cans has been that gas can sales have dramatically increased, creating strong financial performance that has kept the DIP Lenders from having to actually advance any funding under the DIP Order, while at the same time having the prepetition debt being completely paid down.

29. Although the funds generated by these dramatically increased sales of gas cans are proceeds of property of the estate, the central beneficiaries of these payments have been the Prepetition Lenders, to the detriment of the unsecured creditors of the Debtors' estates. Without injecting a penny of new money into the Debtors' estates, the Prepetition Lenders have nonetheless drained assets of the Debtors' estates to retire their own prepetition debt.[5] Equity dictates that this value should be recovered for unsecured creditors by vacating those portions of the DIP Order providing for section 506(c) and 552(b) waivers. Accordingly, it is appropriate to escrow proceeds of the sale that otherwise would go to the Prepetition Lenders while the Committee pursues remedies against the Prepetition Lenders.

[5] This includes the bonus program approved by the Court that incented employees to work extra shifts to generate more sales of cans. See Order and Opinion Granting Amended Motion of Debtors and Debtors in Possession for an Order Approving Ordinary Course EBITDA Based Bonus Plan for Employees of Blitz U.S.A., Inc. Pursuant to Sections 105(a), 363 and 503 of the Bankruptcy Code [D.I. 595 and 596].

30. In addition, as of the Petition Date, the Debtors' operations were segregated as follows:

a) Debtor Blitz USA manufactured PCGCs;

b) Debtor F3 Brands, LLC ("F3 Brands"), which was "spun off" from Blitz on October 1, 2011, manufactured injection molded products for the automotive industry; and

c) non-Debtor Reliance Products, Inc. ("Reliance Products"), which was purchased in February 2011 with $13.4 million upstreamed by Blitz USA to its corporate parents for no consideration, manufactured consumer camping and hydration products and specialized bottles used for storage of agricultural chemicals.

31. Under the DIP Order, the Debtors agreed to sell the assets of F3 Brands and Reliance Products in order to pay down the obligations due to the Prepetition Lenders. Debtors anticipated that after the sale of those businesses, they would be able to reorganize Blitz and address their tort liability through a plan of reorganization. However, the sale of Reliance Products never took place. Indeed, although the sale of this non-debtor was intended to pay down debt allegedly owed to the Prepetition Lenders, the Prepetition Lenders did not assert the existence of an event of default arising out of the Debtors' failure to sell Reliance Products. Indeed, given the financial performance of the Debtors, the Prepetition Lenders had the benefit of the paydown of debt out of estate assets without insisting on the liquidation of collateral that they required be completed under the DIP Order.

32. Under Bankruptcy Code section 506(c), a trustee or debtor-in-possession is empowered to recover administrative expenses from a secured creditor's collateral if the expenses (i) are "necessary" to preserve or dispose of the collateral, (ii) are "reasonable," and (iii) provided a "benefit" to the secured creditor. 11 U.S.C. § 506(c). The very purpose of this section is to prevent a windfall to the secured creditor who benefits from the claimant's expenses in preserving or disposing of the secured party's collateral. See IRS v. Boatmen's First Nat'l

Bank, 5 F.3d 1157, 1159 (8th Cir. 1993). This case presents a paradigmatic example of the utility of section 506(c) to the estate of a debtor. The Prepetition Lenders have realized the best conceivable windfall – payment in full of their prepetition claims out of assets of the Debtors' estates.

33. Bankruptcy Code section 552(a) states the general rule that the filing of a bankruptcy petition cuts off the effectiveness of an after-acquired property clause in a security agreement.[6] Bankruptcy Code section 552(b) provides the only exception to this general rule. Under section 552(b)(1), a secured creditor can claim an interest in property the debtor acquires postpetition if the property is "proceeds, products, offspring, or profits" of the secured creditor's prepetition collateral. 11 U.S.C. § 552(b)(1). However, this exception is not absolute. Section 552(b)(1) gives courts discretion to cut off a secured creditor's interest in the proceeds of its prepetition collateral "based on the equities of the case." Id.

34. The purpose of section 552(b) is "to prevent a secured creditor from reaping benefits from collateral that has appreciated in value as a result of the trustee's/debtor-in-possession's use of other assets of the estate." Stanziale v. Finova Capital Corp. (In re Tower Air, Inc.), 397 F.3d 191, 205 (3d Cir. 2005) (citing Marine Midland Bank v. Breeden (In re Bennett Funding Group, Inc.), 255 B.R. 616, 634 (N.D.N.Y. 2000) (quoting Great-West Life & Annuity Assurance Co. v. Parke Imperial Canton, Ltd., 177 B.R. 843, 855 (N.D. Ohio 1994))). That very concern creates the extraordinary circumstances that warrant relief from the DIP Order.

35. Based on the unforeseen circumstances surrounding the dramatic increase in the Debtors' sale of gas cans attributable to the announcement of the cessation of that business, the significant devotion of estate assets to fulfilling these order, and the resulting

[6] Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case. 11 U.S.C. § 552(a).

inequitable windfall to the DIP Lenders and Prepetition Lenders at the expense of unsecured creditors, equity dictates that those portions of the DIP Order relating to the section 506(c) and 552(b) waivers be vacated particularly when the DIP Lenders provided no funding through the pendency of the cases.

36. Accordingly, while the Committee seeks to pursue its remedies with respect to the section 506(c) and 552(b) issues, the Committee respectfully urges the Court to order that any proceeds of the Sale that would otherwise be paid to the Prepetition Lenders and DIP Lenders be escrowed until such time as the Court decides these issues.

II. The Asset Purchase Agreement Should Not Be Approved Unless Modified To Address the Committee's Concerns

37. As noted above, the Committee has identified several provisions and terms of the Asset Purchase Agreement that are objectionable and has discussed proposed modifications with counsel for the Debtors and Scepter. Among the provisions that the Committee has identified and requested modifications to are the following:

38. Section 1.1 of the Asset Purchase Agreement sets forth definitions used elsewhere in the Asset Purchase Agreement. The Committee has raised concerns with the following definitions:

> "Excluded Contracts" – Deadline to add contracts, leases or licenses to Schedule 1.1(a) must be a date prior to the hearing to approve the Sale. The Committee and Debtors need to know the universe of assets being sold and/or retained, contracts that will be assumed and/or excluded and any potential "cure" amounts or other obligations that the Debtors' estates may be liable for prior to approval of the Asset Purchase Agreement and the Sale.
>
> "Purchased Contracts" – Deadline to add contracts, leases, licenses to Schedule 1.1(d) must be a date prior to hearing to approve the Sale. The Committee and Debtors need to know the universe of assets being sold and/or retained. Contracts that will be assumed and/or excluded and any potential "cure" amounts or other obligations that Debtors' estates may be liable for prior to approval of Asset Purchase Agreement and the Sale.

"Purchased Intellectual Property" – Deadline to add intellectual property to Schedule 1.1(f) must be a date prior to hearing to approve the Sale. Prior to approval of Asset Purchase Agreement and the Sale, the Committee and Debtors need to know the universe of intellectual property that is being sold and/or retained and any potential "cure" amounts or other Retained Liabilities for which the Debtors' estates may be liable.

39. Section 2.1 of the Asset Purchase Agreement sets forth a comprehensive list of all assets (defined therein as the "Purchased Assets") that will be sold and conveyed to Scepter. The Committee has identified several categories of Purchased Assets that it believes should be limited and has discussed same with counsel for the Debtors and Scepter. For example, the Committee is concerned about preservation of documents and records post-closing given the proposed sale of various documents, servers and other computer equipment listed as Purchased Servers on Schedule 2.1(c). Similarly, Section 2.1(g) of the Asset Purchase Agreement sets forth an extensive list of Purchased Documents. The Committee requests that the sale order be modified to provide that all documents, records and other information, including information contained on any computer hard drives or Purchased Servers, is copied, downloaded (including a forensic mirror of all servers and laptops to be transferred in the Sale), saved to a hard copy prior to closing of the Sale and provided to the Committee prior to closing. so that all records, documents and/or electronically stored information are preserved for use by a liquidating trustee or other successors to the Debtors and the Committee.

40. Section 2.1(d) addresses the sale of Purchased Intellectual Property. As noted above in its comments to the Definition of Purchased Intellectual Property, the Committee and the Debtors must know the specific universe of Debtors' intellectual property that is being sold prior to the Sale Hearing, as well as any "cure" amounts or other payments or other obligations that may be associated with the sale and transfer of such Purchased Intellectual Property.

41. Section 2.1(k) addressed the sale of Causes of Action, which include Avoidance Actions and/or other Causes of Action that belong to the Debtors' estates. The

Committee believes that the Definition of Causes of Action to be sold is extremely broad and can be read to include Avoidance Actions and other causes of action against insiders, directors and officers, etc. The Committee has sought clarification of this provision and has requested a specific list of Causes of Action that Scepter seeks to purchase in connection with the machinery and equipment it is purchasing.

42. Section 2.1(l) of the Asset Purchase Agreement provides that all rights to insurance proceeds related to the Purchased Assets are to be sold to Scepter. The Committee believes that this provision could be interpreted or read that Scepter is buying Debtors' rights, interests and/or proceeds in the Debtors' general liability, D&O and other insurance policies that should be transferred to a liquidating trust for the benefit of unsecured creditors. The Committee understands that Scepter is reviewing this provision to identify the specific insurance policies that would be impacted by this provision. The Committee reserves all of its rights to review, and if necessary, to object, to any such list or clarification to this provision of the Asset Purchase Agreement.

43. Similarly, Section 2.2(m) of the Asset Purchase Agreement should be clarified to make clear that all rights, interests in and/or proceeds of insurance policies in which the Debtors have an interest are Retained Assets.

44. Section 2.2(n) of the Asset Purchase Agreement should be clarified to make clear that all Avoidance Actions and other causes of action that the Debtors' estates may have, such as claims against insiders, directors and officers, etc. are Retained Assets.

45. Section 2.2 should also be modified to make clear that any security amounts, deposits, letters of credit or other amounts posted in connection with the Debtors' pending appeal of the Calder Judgment are Retained Assets.

46. Section 13.10 of the Asset Purchase Agreement provides in part that "No past, present or future director, officer, employee, incorporator, member, partner, agent or equityholder of any Seller shall have any liability for any obligations or liabilities of Seller under this Agreement…" The Committee seeks clarification in the Sale Order that this provision is solely a release by and between the Purchaser, Scepter or its assigns and Blitz USA and Blitz RE and is not a release of any claims that the Debtors' estates or any successor to the Debtors may have against the parties listed therein.

III. Preservation of Business Records

47. Pursuant to Section 8.10 of the Asset Purchase Agreement, either party thereto may destroy the business records of Blitz USA and Blitz RE on a mere 90 days notice. The Committee is concerned that this may result in the destruction of critical documents needed for the formulation of a liquidating plan in these Cases and/or destruction of evidence relevant to the pending products liability claims asserted against Blitz, the other Debtors and other related entities, including Kinderhook and Crestwood.[7] In order to prevent further prejudice to the Debtors' creditors, the Committee respectfully requests that the Debtors be required to provide a hard copy of all of Blitz USA's business records, including mirror copies of all servers and laptops transferred in the sale, to the Committee prior to closing.

[7] The Committee's concern in this regard in heightened due to the fact that the Debtors have previously been sanctioned for the willful destruction of documents in products liability litigation that preceded these chapter 11 cases. *See Memorandum Opinion And Order*, dated March 1, 2011 and entered in the matter entitled *Rene Green, Individually, and as Heir of Jonathan Edward Brody Green v. Blitz U.S.A., Inc.*, and commenced in the United States District Court for the Eastern District of Texas (Marshall Division). A copy of the Green Order was previously provided to the Court in connection with the sale of assets of Debtor F3 Brands, LLC.

RESERVATION OF RIGHTS

48. The Committee reserves the right to raise further and other objections to the Sale Motion prior to or at the hearing thereon in the event the Committee's concerns and issues raised herein are not resolved prior to the Sale Hearing.

WHEREFORE, the Committee respectfully requests the entry of an Order directing that (i) a portion of the Net Sale Proceeds be placed into escrow for the purpose of satisfying unpaid administrative expense claims and to fund the wind-down of the Debtors' estates, (ii) in the event the funds placed into escrow are inadequate to satisfy all administrative expenses claims and fund the wind-down of the estates, requiring the DIP Lenders and/or the Prepetition Lenders to disgorge portions of the Net Sale Proceeds in an amount sufficient to satisfy those amounts, (iii) requiring the Debtors to provide a copy of all of Blitz U.S.A., Inc.'s business records, including mirror copies of all servers and laptops transferred in the sale, to the Committee prior to closing and (iv) granting the Committee such other and further relief as the Court deems just and appropriate.

Dated: September 10, 2012

Respectfully submitted,

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Counsel to the Official Committee of Unsecured Creditors

EXHIBIT A

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 10-11890-PJW

- -x

In the Matter of:

NEC HOLDINGS CORP, ET AL.,

Debtors.

- -x

U.S. Bankruptcy Court

824 North Market Street

Wilmington, Delaware

July 13, 2010

9:32 AM

B E F O R E:

HON. PETER J. WALSH

HON. CHRISTOPHER S. SONTCHI

U.S. BANKRUPTCY JUDGES

ECR OPERATOR: MICHAEL MILLER/LESLIE MURIN

THE COURT: Mr. Austin, if you want to put people on the stand and make a record, make a record. Okay? Otherwise, it's not in the record.

MR. AUSTIN: With respect to the Gores APA, it too has an August 29th date in it. So this budget and the DIP financing is tied into that APA. From that standpoint, we think the Court should overrule that objection.

The 503(b)(9) and the 506(c), I'm going to take in conjunction, together. We are not a guarantor of claims incurred post -- pre-petition. On the 503(b)(9), yes, while they are administrative claims, I think it's important to note, they were claims incurred within twenty days of a bankruptcy filing.

THE COURT: Well, admin claims are admin claims.

MR. AUSTIN: Admin claims are admin claims, Your Honor. But that's not what we believe should be an issue for the DIP financing in this particular instance. And at --

THE COURT: But I can't -- I can't let a case -- Judge Walsh -- I can't let Judge Walsh run a case that's administratively insolvent.

MR. AUSTIN: We can appreciate that, Your Honor.

THE COURT: All right.

MR. AUSTIN: But at the same time, if it's -- these claims, if we are in a liquidation, our secured claims, wherever they are, fall out in front of them. And you look at

that needs to be tempered with 503(b)(9) claimants being left out in the lurch.

THE COURT: All right.

MR. PALACIO: Thank you, Your Honor.

THE COURT: Anyone else? I assume the Term B issues have been resolved?

MR. ATHANAS: They have, Your Honor.

THE COURT: Okay. Just wanted to make sure.

Let me give you some thoughts, maybe, before you reply.

MR. ATHANAS: Certainly, Your Honor.

THE COURT: 503(b)(9), the lender is not a guarantor of the 503(b)(9) or any other admin claims, and neither is the debtor. Mr. Palacio's right in that I generally have held in the past that you can run a case for the benefit of a secured creditor. It's the crime of having collateral that some people seem to say that they can't. They've got to pay the freight, and the freight is, at least -- the freight is not necessarily a tip to the unsecureds, but the freight is certainly an administratively solvent estate. And while there's not a guarantee, there has to be something other than a wing and a prayer on the payment of the admin claims. And counsel very honestly and appropriately answered the question that at least it's unclear, as we stand here, and it's quite unclear whether 503(b)(9) claims would be paid. It doesn't need to be in the

EXHIBIT B

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 10-14092(CSS)

- -x

In the Matter of:

TOWNSENDS, INC., et al.,

Debtors.

- -x

United States Bankruptcy Court

824 North Market Street

Wilmington, Delaware

January 21, 2011

1:09 PM

B E F O R E:

HON. CHRISTOPHER S. SONTCHI

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: DANA MOORE

collateral, the same million-eight will be available for the 503(b)(9) claimants, given their administrative priority status is protected by the Code.

Unless Your Honor has any questions of the committee position, that's why we have come to difficult conclusions, and it's been a lot of conversation by the committee including direct conversation between the committee members and the bankers, yesterday, with no professionals on the phone call to discuss these issues.

THE COURT: Okay.

MR. BUECHLER: Thank you.

THE COURT: Thank you, Mr. Buechler. Anybody else wish to be heard?

Let me see if I understand, Mr. Abbott. Under no scenario will the 503(b)(9) creditors be paid in full?

MR. ABBOTT: Your Honor, technically, it's possible; practically, impossible. The range of values, given the amount of debt, here, we just don't see a buyer clearing the secured debt.

THE COURT: But other administrative claims will be paid in full?

MR. ABBOTT: Post-petition administrative claims, we expect to be paid in full under this revised budget, Your Honor.

THE COURT: Well, we've got a problem. Not going to

run an administratively insolvent estate. There are benefits to the current administrative claims that are accruing. There are benefits to the unsecured creditors. But it can't be done on the back of the 503(b)(9) admin claims, which are admin claims. Congress has made that determination. So certainly I would have a problem running any case that was administratively insolvent. But one that is both administratively insolvent and prefers one set of administrative creditors over another is doubly troubling. So that's -- well, I'm not going to do it.

MR. ABBOTT: To clarify --

THE COURT: I'm not making -- I'm not making the -- this came up on Goody's, for example, Goody's I, and it turned out we were all wrong. But the point there was there had to be a set aside to pay these claims in the plan that the evidence indicated was a reasonable estimate that they would get paid. Turns out, it was wrong. But the point being, I'm not making anyone guarantors or insurers of the fact that the case is administratively solvent. But to go in with a path forward that indicates -- and I certainly appreciate your candor to the Court -- that a certain type of administrative expense claim won't get paid in full but yet others will, I just -- I can't run that kind of case.

MR. ABBOTT: I understand that, Your Honor. Could I ask the -- well, is it --

THE COURT: Need help? Go ahead.

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2012, the foregoing document was served via electronic mail and Hand Delivery or overnight mail on the following parties:

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

____9/10/2012_____ __/s/ Heidi Sasso_____
Date Heidi Sasso