

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

In re:	:	
	:	
	:	Chapter 11
	:	
	:	Case No. 11-13603 (PJW)
BLITZ, U.S.A., INC., <u>et al.</u> ,	:	
	:	
Debtors.	:	(Jointly Administered)
	:	
	:	Hearing: March 28, 2012, 10:00 AM
	:	Objection Due: March 23, 2012, 12:00 PM

**OBJECTION OF THE UNITED STATES TO THE
SALE OF CERTAIN ASSETS FREE AND CLEAR
OF LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS**

The United States, on behalf of its Navy Exchange Service Command (“NEXCOM”), through undersigned counsel, objects to the Debtors' 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 Unexpired Leases (“Motion”). (DE 310). In support of its objection, the United States avers as follows:



1. On November 9, 2011, the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. (DE 1).

2. On February 7, 2012, the Debtors filed the Motion. On March 15, 2012, the Debtors supplemented the Motion and filed the Notice of Selection of "Stalking Horse" Bidder and Hearing to Approve (I) Proposed Bidding Protections with Respect to the Stalking Horse Bidder; and (II) A Proposed Amended Bidding Procedures Order and Related Bidding Procedures in Connection with the Sale of Certain of the Debtors' Assets Pursuant to Section 363 of the Bankruptcy Code ("Supplement"). (DE 309). Exhibit C to the Supplement is the proposed 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 Unexpired Leases ("Sale Order").

3. On February 10, 2012, the Debtors filed the Notice of Sale of Certain Assets Free and Clear of Liens, Claims, Encumbrances and Interests ("Notice"). (DE 317). The Notice lists NEXCOM as having a F3 Brands Vendor Agreement. The cure amount of the contract is listed at zero. NEXCOM has reviewed its records and does not believe it is currently doing business with the Debtors. NEXCOM records also indicate that no amounts are owed to NEXCOM by the Debtors.

4. On February 29, 2012, the United States filed an objection to the relief sought in the Notice. (DE 282).

5. The United States objects to the Supplement and the Motion because they contain provisions which are extremely prejudicial to the rights of the United States. This is evidenced in Paragraphs 9 and 18 of the Sale Order:

9. General Assignment. As of the Closing, this Sale Order shall be construed and shall constitute for any and all purposes a full and complete general assignment, conveyance and transfer of the Purchased Assets and/or a bill of sale or assignment transferring indefeasible title and interest in the Purchased Assets, including the Purchased Contracts and Leases, to the Purchaser. Each and every federal, state, and local governmental agency or department is hereby directed to accept any and all documents and instruments necessary and appropriate to consummate the Transactions and to reflect the effectiveness of the Transactions.

18. Ipsa Facto Clauses Ineffective. ... Any provision in a Purchased Contract or Lease that prohibits or conditions the assignment of such Purchased Contract or Lease (including without limitation, the granting of a Lien therein) or allows the counterparty thereto to terminate, recapture, impose a penalty, condition on renewal or extension, or modify any term or condition upon such assignment or sublease, constitutes an unenforceable anti-assignment provision that is void and of no force or effect...

Pursuant to 11 U.S.C. Section 365(c)(1), the United States does not consent to the assumption or assignment of its contract. Moreover, the United States objects to the assumption and assignment of any of its contracts, including but not limited to the NEXCOM agreement, to the extent the Debtors fail to comply with all applicable federal law.¹ The Debtors are not entitled to assume and assign any contract with the United States without its consent. In re West Electronic, Inc., 852 F.2d 79, 83 (3d Cir. 1988); Anti-Assignment Act 41 U.S.C. Section 15. It is imperative to preserve the Government's ability to determine with whom to contract. Federal regulations make it clear that the decision to assign federal interests to the successful bidder is not one that the Debtors may make. Section 363 of the Bankruptcy Code, 11 U.S.C. § 363, upon which the sale process primarily relies, does not preempt non-bankruptcy law in this regard.

¹ The only notice of a federal agreement with the Debtors received by the undersigned was of the NEXCOM agreement.

6. The United States objects to the Sale Order to the extent that it negatively affects its appeal rights. The Sale Order provides:

27. General Provisions. Notwithstanding the provisions of Bankruptcy Rule 6004 and Bankruptcy Rule 6006 or any applicable provisions of the Local Bankruptcy Rules, this Sale Order shall not be stayed for fourteen (14) days after the entry hereof, but shall be effective and enforceable immediately upon entry, and the fourteen (14) day stay provided in such rules is hereby expressly waived and shall not apply. Time is of the essence in approving the Transactions, and the Debtors and the Purchaser intend to close the Transactions as soon as practicable. Any party objecting to this Sale Order must exercise due diligence in filing an appeal and pursuing a stay within the time prescribed by law and prior to Closing, or risk its appeal will be foreclosed as moot.

By including these provisions in the Sale Order, the Debtors are attempting to circumvent the appeal rights of the United States. Pursuant to Rules 6004(h), 6006(d) and 7062 of the Federal Rules of Bankruptcy Procedure, unless otherwise ordered by the Court, there is an automatic fourteen day stay imposed from the date of entry of the order. Under the Debtors' proposed scheme, if the United States is unable to immediately obtain a hearing before the appropriate Court to seek a stay, its appeal may be contended to be moot. Particularly in light of the fact that the appellant in this case would be a government agency, with a chain of command to be consulted, this unilateral ability of the Debtors and the Purchaser to truncate the stay period would be unfair and prejudicial to the government.

WHEREFORE, the United States requests, with respect to the interests of NEXCOM,
that the Court deny the relief sought in the Motion for the reasons stated above.

CHARLES M. OBERLY, III
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By: /s/ Ellen W. Slights
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Dated: March 23, 2012

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AFFIDAVIT OF SERVICE

I, Marie Steel, an employee in the Office of the United States Attorney for the District of Delaware, hereby attest under penalty of perjury that on March 23, 2012, a copy of the **OBJECTION BY THE UNITED STATES TO THE SALE OF CERTAIN ASSETS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS** was served, as indicated, upon:

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