

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

In re:

BLITZ U.S.A., Inc., *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 11-13603 (PJW)

Jointly Administered

Related Docket No. 574

Objection Deadline: July 10, 2012 at 4:00 p.m. (EDT)

Hearing Date: July 17, 2012 at 9:30 a.m. (EDT)

**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS 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 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 CERTAIN  
RELATED RELIEF; AND (II) ENTRY OF AN ORDER (A) APPROVING THE SALE  
OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS FREE AND CLEAR OF  
LIENS, CLAIMS AND ENCUMBRANCES AND INTERESTS; AND (B) AUTHORIZING  
THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS  
AND UNEXPIRED LEASES**

The Official Committee of Unsecured Creditors (the "Committee") of Blitz U.S.A., Inc., et al., the above-captioned debtors and debtors-in-possession (collectively, the "Debtors"), hereby submits this objection and reservation of rights (this "Objection") 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*

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: LAM 2011 Holdings, LLC (8742); Blitz Acquisition Holdings, Inc. 98825); 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 26<sup>th</sup> Ave. NW, Miami, OK 74354.





*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 Certain 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; And (B) Authorizing The Assumption And Assignment Of Certain Executory Contracts and Leases* filed by the Debtor on June 29, 2012 (the "Sale Motion")<sup>2</sup> [Docket No. 574]. As and for this Response, the Committee respectfully states as follows:

### **BACKGROUND**

1. On November 9, 2011 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").
2. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these cases.
3. On November 21, 2011, the Office of the United States Trustee appointed the Committee.

---

<sup>2</sup> Capitalized terms used but not defined herein shall have the same meanings ascribed to them in the Sale Motion.



4. On June 29, 2012, the Debtor filed the Sale Motion, seeking, among other related relief, approval of its proposed procedures (the “Bidding Procedures”) for the auction (the “Auction”) and sale (the “Sale”) of substantially all of the assets of the Debtors, which also contemplates the Sale to a potential Stalking Horse Purchaser, pursuant to section 363 of the Bankruptcy Code; approval of a form of asset purchase agreement ( the “Form APA”) which is not appended to the Sale Motion, and approval of a sale order (“Proposed Sale Order”). The Sale Motion also seeks to establish procedures for approval of bid protections, if any (the “Bid Protections”) that may be requested by a potential Stalking Horse Bidder that has not yet been selected by the Debtors or disclosed to the Committee.

### **OBJECTION**

5. Section 363(b) of the Bankruptcy Code provides, in pertinent part, that “[t]he trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b). In determining whether to authorize the use, sale or lease of property of the estate under this section, courts require the debtor to show that a sound business purpose justifies such actions. *See In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999); *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991); *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983).

6. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *See, e.g., In re Food Barn Stores, Inc.*, 107 F.3d 558, 564-65 (8th Cir. 1997). *See also In re Cybergene Corp.*, 330 F.3d 548, 573 (3d Cir. 2003) (*en banc*) (debtor has a fiduciary duty to maximize the value of the bankruptcy estate). The purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate. *See In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998). As stated in *In re*



*President Casinos, Inc.*, 314 B.R. 784, 786 (Bankr. E.D. Mo. 2004), “[s]tructured bid procedures should provide a vehicle to enhance the bid process and should not be a mechanism to chill prospective bidders’ interests.” To accomplish these goals, bankruptcy courts are necessarily given discretion and latitude in conducting a sale of a debtor’s assets. *In re Wintz Co.*, 219 F.3d 807, 812 (8th Cir. 2000) (stating that in structuring the sale of assets, “[bankruptcy courts] have ample latitude to strike a satisfactory balance between the relevant factors of fairness, finality, integrity, and maximization of assets”). The purpose of the bidding procedures is to facilitate a sale of the debtor’s assets through a process that will maximize the value for all of the debtor’s stakeholders. The Bidding Procedures, in their current form, neither demonstrate an exercise of the Debtors’ business judgment nor provide a process to maximize the value of the Debtors’ estates for their creditors. *See In re E-Z Serve Convenience Stores, Inc.*, 289 B.R. 45, 54 (Bankr. M.D.N.C. 2003) (the Bankruptcy Court denied the approval of sale on grounds that the auction procedures were “unfair and inequitable.”).

7. As an initial matter, the deadlines contained in the Sale Motion are unrealistic and instead of encouraging bidding, will chill bidding. It is axiomatic that the paramount goal of any proposed auction process is to maximize the proceeds received by the estate. *See e.g., In re Food Barn Stores, Inc.*, 107 F.3d 558, 564-65 (8th Cir. 1997). Approval of reasonable sale procedures is appropriate only in circumstances where the procedures and fees are necessary to preserve and benefit the estate, *In re O’Brien*, 181 F.3d 527 (3d Cir. 1999), are reasonable, in the best interests of these estates, and designed in a fashion to promote, enhance and encourage bidding. *In re S.N.A. Nut Co.*, 186 B.R. 98, 104 (Bankr. N.D. Ill. 1995); *In re America West Airlines, Inc.*, 166 B.R. 908, 913 (Bankr. D. Ariz. 1994); *In re Integrated Resources, Inc.*, 147 B.R. 650, 663 (S.D.N.Y. 1992).



8. The purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate. *See In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998). To accomplish that goal, bankruptcy courts are necessarily given discretion and latitude in conducting a sale. *See id.*; *see also In re Wintz Co.*, 219 F.3d 807, 812 (8th Cir. 2000) (stating that in structuring the sale of assets, bankruptcy courts “have ample latitude to strike a satisfactory balance between the relevant factors of fairness, finality, integrity, and maximization of assets”).

9. In this case, the Sale Motion includes an aggressive timeline which will preclude interested parties from meaningfully participating in the sale process. The abbreviated timeline denies interested parties adequate time to perform due diligence (including valuation of assets and liabilities), locate committed financing, prepare a bid and/or file and obtain necessary financing and regulatory approvals (if needed).

10. The Sale Motion provides the following unreasonably constricted timeline:

- **July 17, 2011** – Bidding Procedures Hearing;
- **August 20, 2011** – Proposed Bid Deadline;
- **August 23, 2011** – Auction; and
- **August 29, 2011** – Sale Hearing.

11. The Committee is aware of the Debtors’ stated desire for a timely sale of the Debtors’ assets to the highest and best bidder. However, the timeline in proposed Bid Procedures does not provide sufficient time for interested parties to conduct due diligence, much less formulate a bid and meet all of the other proposed Bid Requirements that will lead to the highest and best bid for the Debtors’ assets. The proposed deadlines should be extended by two weeks so that the Auction and proposed sale hearing take place on or about September 15, 2012,



in order to provide interested parties with a reasonable timeframe to conduct due diligence and submit a bid.

12. The Committee also has the following objections to the proposed Bidding Procedures, exhibits to the Bidding Procedures and proposed orders in their current form. The following are the Committee's specific objection points, with references to the applicable section of the Sale Motion, Bidding Procedures or Bidding Procedures exhibits and proposed orders in which such provision is set forth.

### **General Objections**

13. The Debtors' Sale Motion does not comply with the Local Rules of the Bankruptcy Court for the District of Delaware. Specifically, the Sale Motion does not comply with Local Rule 6004-1 because no executed asset purchase agreement or form asset purchase agreement ("APA") is annexed to the Sale Motion. *See* Local Rule 6004-1(b)(i) ("All sale motions shall attach...[a] copy of the proposed purchase agreement, or a form of such agreement substantially similar to the one the debtor reasonably believes it will execute in connection with the proposed sale.") (emphasis added). In addition, certain key provisions are not identified in the Sale Motion such as: (i) whether the Debtors would entertain a Sale to insiders; (ii) whether agreements with existing management are contemplated in the Form APA; (iii) whether any proposed sale contemplates the sale of avoidance actions; and (iv) whether the Form APA grants third party releases. A form APA or executed APA is required to prevent prejudice to the Debtors' stakeholders and to prevent open questions of fact and interpretation. *See e.g., In re Arlington Hospitality, Inc.*, 368 B.R. 702, 713 (Bankr. N.D. Ill. 2007) (rev'd on other grounds)



(stating that “...a debtor must have a loan agreement on hand before filing a motion under section 364...”)<sup>3</sup>

14. The proposed Bidding Procedures for conducting the Auction should make clear that the Debtor shall consult with the Committee throughout the sale process and Auction. The Committee should have the right to participate in any discussions, negotiations, consultations or other decisions regarding the Bidding Procedures and/or the Auction.

15. The Debtors request pre-approval of a Break-Up Fee of, at most 3%, of the cash purchase price offered for the Assets. *See Sale Motion*, ¶¶ 55, 59. No showing has been made that the award of the proposed Break-Up Fee and expense reimbursement are an actual or necessary cost to preserve the estate as required under *Calpine Corp. v. O'Brien Environmental Energy, Inc. (In re O'Brien Environmental Energy, Inc.)*, 181 F.3d 527 (3rd Cir. 1999). *See also Reliant Energy Channelview, L.P.*, 594 F.3d 200 (3rd Cir. 2010); 3-363 *Collier on Bankruptcy* P 3-363.02 (15 ed. rev. 2012) (Buyer protections, such as break-up fees, are often justified because “by conducting due diligence and negotiating a form of purchase agreement, the prospective buyer has set the stage for the auction and facilitated the trustee’s sale of the assets”). In addition, the Debtors cannot meet the *O’Brien* factors because, without a proposed Stalking Horse Bidder in hand, the “reasonableness” of the Break-Up cannot be assessed by the Committee or the Court in the context of the proposed Sale. There would be an “adverse impact” to the unsecured creditors because the estate could be burdened with a large administrative claim should any proposed Stalking Horse Bidder “walk away” from any APA. Moreover, the Debtors should be required to file a new motion to seek approval of any proposed bid protections, not simply file a notice on the bankruptcy court docket and obtain a hearing on

---

<sup>3</sup> The Committee specifically reserves all rights to supplement this Objection at the time such Form APA is produced.



shortened notice and place the burden on creditors to object. *See Sale Motion*, ¶¶39-40. A full evidentiary hearing must be conducted in order to establish whether a Break-Up Fee is warranted in these cases. *See e.g., In re Beth Israel Hosp. Ass'n*, Case No. 06-16186 (NLW), 2007 Bankr. LEXIS 2386, \*34 (Bankr. D. N.J. July 12, 2007) (denying break-up fee to stalking horse bidder because the stalking horse's due diligence efforts did not produce data on which others relied, and the facts did not reveal that the stalking horse's bid acted as a "catalyst" for the second, successful bidder).

16. Because no form APA is attached to the Sale Motion, it remains unclear whether any proposed purchaser will assume any liabilities of the Debtors' estates including, but not limited to, any administrative expenses.

17. The Bidding Procedures should be modified to include the same language contained in the proposed Bidding Procedures Order which expressly reserves the Committee's right to object to any attempt by the secured lenders to credit bid pursuant to section § 363(k) of the Bankruptcy Code. As the Court in *In re Radnor Holdings Corp.*, 353 B.R. 820 (Bankr. D. Del. 2006), held, unless the court expressly reserves a committee's rights, the entry of an order permitting a credit bid (which the proposed Bid Procedures allow) is tantamount to an order approving of the nature, extent and validity of the lien claim and also prevents any litigation against the lender for avoidance, reduction, recharacterization, disallowance, disgorgement, counterclaim, surcharge, subordination, marshalling or other litigation claims. *Id.* at 846. Thus, such a reservation must be included in the Bidding Procedures as well as the proposed BiddingProcedures Order.



### **Objections to the Proposed Bidding Procedures Order, Exhibits and Sale Order**

18. Although the Committee is granted certain consultation rights in the Sale Motion and certain of the Bidding Procedures, it is not consistent., The Committee's consultation rights should be clearly stated with regard to all aspects of the sale process, including but not limited to consultation on the selection of a Stalking Horse Bidder, if any; consultation on any determination to allow a party to conduct due diligence; consultation on any modifications to the Bidding Procedures, or auction procedures.

19. The Committee also objects to the following in the Sale Motion, Bidding Procedures Order, related exhibits and Proposed Sale Order:

### **Objections to the Proposed Bidding Procedures**

#### **Participation and Qualified Bid Requirements and Bid Deadline**

- (a) The Bidding Procedures provide that each Potential Bidder must provide certain financial disclosure to the Debtors. A Potential Bidder must also be required to provide information on its ability to obtain insurance and regulatory approvals because these will be key closing issues in conjunction with the financing and sale of the Assets. *Sale Motion*, ¶38 (iii); *Proposed Bidding Procedures*, Exhibit 1 (iii).

#### **Consultation Rights of Committee and Secured Lender**

- (b) The Debtors must consult with the Committee and the Secured Lender before determining that a bid made by a Potential Bidder is or is not a Qualified Bid.

#### **Due Diligence from Bidders**

- (c) The Debtors must consult with the Committee before determining that a party may conduct due diligence in connection with a potential bid. The Committee and the Secured Lender should also receive due diligence on potential bidders that is provided to the Debtors.

#### **Free of Any and All Interests**

- (d) The Committee reserves its rights to object to any proposed sale to any bidder for the Assets to be sold free and clear of



any and all pledges, liens, security interests, encumbrances, claims, charges, options and interests as there is currently no form APA or Stalking Horse Bid. Neither the Committee nor the Court can make a determination at this time whether a proposed sale free and clear of any and all interests is appropriate. *Proposed Bidding Procedures, Free of Any and all Interests*, Exhibit 1.

#### **Other Terms**

- (e) The Debtors must consult with the Committee prior to announcing any additional terms and conditions for bidding that are not consistent with the Bidding Procedures Order and Bidding Procedures.
- (f) The Debtors are permitted to adjourn the Sale hearing. *Proposed Bidding Procedures*, Exhibit 1. There should be certainty as to the closing of any sale and therefore, the Committee and the Secured Lender should be consulted before the Sale Hearing is adjourned, or a court hearing or status conference should be required in the event of a non-consensual adjournment of a Sale hearing.

#### **Return of Deposit**

- (g) The Bidding Procedures provide that Minimum Deposits of Qualified Bidders shall be returned within two (2) business days of the Auction. This should be changed to two (2) calendar days.

#### **Reservation of Rights**

- (h) The Debtors request that the Bidding Procedures Order be effective immediately by providing that the 14-day stay under Bankruptcy Rules 6004(h) and (d) is waived. *Bidding Procedures Order*, ¶25. This provision should be stricken from the Bidding Procedures Order. *See e.g., In re PSINet, Inc.*, 268 B.R. 358, 379 (Bankr. S.D.N.Y. 2001) (court refused to grant waiver of 10-day stay requirement under prior version of Federal Rule of Bankruptcy Procedure 6004).

#### **Objections to the Proposed Bidding Procedures Order**

- (i) The Committee suggests that Notice of the Sale Hearing should be published in *The New York Times* or *USA Today*. The notice of the Sale Hearing should be given to all parties involved in PCGC Lawsuits in addition to all the parties the Debtors list in the Sale Motion as a particular bidder may



seek a sale order that may contain injunctions and release provisions. Furthermore, any releases or injunctions should also be clearly stated in the proposed Sale Hearing Notice. The Committee reserves all rights to object to any such provisions.

- (j) Any Cure Amount/Assignment Objections must be served on the Committee and the Committee should be added to the definition of “Cure Objection Notice Parties”. *Bidding Procedures Order*, ¶ 13.
- (k) The Claimed Cure Amount must be held in a separate bank account and held in escrow even if such objection is not resolved by the closing of the Sale.
- (l) Should the Debtors or Successful Bidder(s) determine to exclude any Executory Contract or Unexpired Lease from the list of Assigned Contracts, the Debtors must file notice of such exclusion on the docket in the Debtors’ bankruptcy cases in addition to sending the notices to the affected non-debtor parties. *Bidding Procedures Order*, ¶¶ 11-15.
- (m) As soon possible after the Closing Date, the Bidding Procedures Order directs the Debtors to file on the Court’s docket a notice identifying the Executory Contracts and Real Property Leases which were assumed and assigned to the Successful Bidder as of the Closing Date. Such notice must also be served via overnight mail, courier service, email or facsimile. *Bidding Procedures Order*, ¶ 18.

### **Objections to the Proposed Sale Order**

- (n) The Proposed Sale Order provides for the sale of the assets free and clear of liens, interests, claims, etc., except for “Excluded Liabilities” (*Proposed Sale Order*, Exhibit C, ¶¶ R, S, 5, 6, 9, 20). Because no APA is attached, these provisions should be subject to any challenges by the Committee.
- (o) The Proposed Sale Order provides for the separation of Assumed Liabilities and Excluded Liabilities, and No Successor Liability (*Proposed Sale Order*, Exhibit C, ¶¶ V, W, 11, 12). Because no form APA is attached, these provisions should be subject to any challenges by the Committee.



- (p) The Proposed Sale Order provides for the Determination of Cure Amounts (*Proposed Sale Order*, Exhibit C, ¶¶ 16, 17). This provision should be amended to require that the Debtors establish a reserve account for any disputes with contract counter parties that are not resolved by the Closing Date of the Sale.
- (q) The Proposed Sale Order provides for a “no material modifications” provision (*Proposed Sale Order*, Exhibit C, ¶ 22). This should be stricken so that any modifications require court approval. Any modifications could impact the Sale and potential distributions to creditors and lead to endless litigation over various agreements that the Court approved and did not approve. *See generally In re Lehman Brothers, Inc.*, --B.R.--, Case Nos. 11-6052, 11-6053, 2012 WL 1995089 (S.D.N.Y. Jun. 5, 2012).
- (r) The Proposed Sale Order provides for a waiver of the 14-day stay period (*Proposed Sale Order*, Exhibit C, ¶25). This should be stricken from any sale order. *See e.g., In re PSINet, Inc.*, 268 B.R. 358, 379 (Bankr. S.D.N.Y. 2001) (court refused to grant waiver of 10-day stay requirement under prior version of Federal Rule of Bankruptcy Procedure 6004).

### **RESERVATION OF RIGHTS**

20. The Sale Motion and the proposed Bidding Procedures contemplate that the Debtors may select a stalking horse bidder and a form of stalking horse asset purchase agreement **after** the hearing to approve Bid Procedures. The proposed Bidding Procedures also provide that Bidding Procedures and rules for the Bidding Process may be modified provided that such procedures or rules are not inconsistent with any proposed stalking horse asset purchase agreement.

21. As of the filing of this Objection, the Committee is not aware of the Debtors having identified a stalking horse bidder and, more importantly, the terms of any potential stalking horse bid. At this juncture, the Committee does not know the aggregate value of a potential stalking horse bidder’s bid or the parties’ framework of negotiations. As such, the



approval of a stalking horse bid should be made only after the Committee has been fully consulted concerning the offers received and the terms of the proposed stalking horse bid.

22. The Committee reserves the right to supplement this Objection at any time prior to the hearing to approve Bidding Procedures. The Committee expressly reserves its right to raise additional or further objections to the proposed Bidding Procedures, the selection of a Stalking Horse Bidder and/or a Stalking Horse APA, any proposed Bid Protections that may be sought by a Stalking Horse Bidder, any additional or revised proposed Bidding Procedures, any other issues raised in the Sale Motion, and any proposed sale orders, at or prior to the Bid Procedures hearing or any subsequent hearing, including the Sale Hearing.

**WHEREFORE**, the Committee respectfully requests that the Court (i) deny the Sale Motion or, in the alternative, (ii) modify the Bidding Procedures and the Bidding Procedures Order as necessary, and incorporate the additional concerns and objections of the Committee set forth in the Objection; (iii) require the Debtors to file and submit the proposed Form APA to the Court and the Committee prior to entry of any order approving Bidding Procedures; and (iv) grant the Committee such other and further relief as the Court deems just and appropriate.

Dated: July 10, 2012

Respectfully submitted,

**LOWENSTEIN SANDLER PC**

Mary E. Seymour, Esq.

Jeffrey D. Prol, Esq.

65 Livingston Avenue

Roseland, New Jersey 07068

(973) 597-2500 (Telephone)

(973) 597-2400 (Facsimile)

-- and --



**WOMBLE CARLYLE SANDRIDGE  
& RICE, PLLC**

By: /s/ Kevin J. Mangan  
Francis A. Monaco, Jr. (No. 2078)  
Kevin J. Mangan (No. 3810)  
222 Delaware Avenue, Suite 1501  
Wilmington, DE 19801  
Telephone: 302-252-4320  
Facsimile: 302-252-4330

*Co-Counsel for the Official Committee of  
Unsecured Creditors*



**CERTIFICATE OF SERVICE**

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

Daniel J. DeFranceschi  
Paul Heath  
Richards, Layton & Finger  
One Rodney Square, P.O. Box 551  
Wilmington, DE 19899

Richard Schepacarter  
Office of the United States Trustee  
844 King Street, Suite 2207  
Wilmington, DE 19801

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

\_\_\_\_7/10/2012\_\_\_\_\_  
Date

\_\_\_\_/s/ Heidi Sasso\_\_\_\_\_  
Heidi Sasso