Docket #1979 Date Filed: 12/11/2013

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
	:	
Blitz USA, Inc. *et al,* [1]	:	Case No. 11-13603(PJW)
	:	
	:	Jointly Administered
	:	
Debtors	:	**Hearing Date: December 18, 2013 at 11:00 a.m.**
	:	**Objections Due: December 11, 2013 at 4:00 p.m.**

THE UNITED STATES TRUSTEE'S OBJECTION TO THE DISCLOSURE STATEMENT FOR DEBTORS' AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS JOINT PLAN OF LIQUIDATION (D. I. 1922, 1971)

In support of her Objection to the Disclosure Statement for Debtors' and Official Committee of Unsecured Creditors' Joint Plan of Liquidation (D. I. 1922, 1971) (the "Disclosure Statement"[2]), Roberta A. DeAngelis, the United States Trustee for Region 3 ("U. S. Trustee"), by undersigned counsel, states as follows:

1. This Court has jurisdiction to hear and determine this Objection.

2. Pursuant to 28 U.S.C. § 586(a)(3), the U. S. Trustee is charged with administrative oversight of the bankruptcy system in this District. Such oversight is part of the U. S. Trustee's overarching responsibility to enforce the laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that U. S. Trustee has "public interest standing" under 11 U.S.C. § 307 which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U. S. Trustee as a "watchdog").

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtors' federal tax identification number, include: LAM 20 II Holdings, LLC (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).

[2] Capitalized terms herein are ascribed the same meaning as set forth in the Disclosure Statement and Plan.

3. Under 11 U.S.C. § 307, the U. S. Trustee has standing to be heard on the issues raised by this Objection.

4. On November 9, 2011, the Debtors commenced the above-captioned jointly administered cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code (the "Cases").

5. On November 21, 2011, the U. S. Trustee appointed an official committee of unsecured creditors (the "Committee") in these cases (D. I. 63, 169).

6. On November 12, 2013, the Debtors and the Committee filed the Disclosure Statement and a Joint Plan of Liquidation (the "Plan") (D. I. 1921).

7. Section 1125 of the Bankruptcy Code prohibits solicitation of votes on a reorganization plan prior to court approval of a written disclosure statement, upon at least twenty-five days prior notice, which contains "adequate information." *See* 11 U.S.C. § 1125(b).

8. "Adequate information" is defined in section 1125 as being information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of debtor's books and records, that would enable a reasonable hypothetical investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan. 11 U.S.C. § 1125(a)(1).

9. The disclosure statement requirement of section 1125 is "crucial to the effective functioning of the federal bankruptcy system[;] . . . the importance of full and honest disclosure cannot be overstated." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996) (citing *Oneida Motor Freight, Inc. v. United Jersey Bank* (*In re Oneida Motor Freight, Inc.*), 848 F.2d 414 (3d Cir. 1988)).

10. "Adequate information" under section 1125 is "determined by the facts and circumstances of each case." *See Oneida*, 848 F.2d at 417 (citing H.R. Rep. No. 595, 97th Cong., 2d Sess. 266 (1977)). The "adequate information" requirement is designed to help creditors in their negotiations with Debtors over the plan. *See Century Glove, Inc. v. First American Bank*, 860 F.2d 94 (3d Cir. 1988).

11. Section 1129(a)(2) conditions confirmation of a plan upon compliance with applicable Code provisions. The disclosure requirement of section 1125 is one of those provisions. *See* 11 U.S.C. § 1129(a)(2); *In re PWS Holding Corp.*, 228 F.3d 224, 248 (3d. Cir. 2000).

12. Pages 53 through 55 of the Disclosure Statement identify and describe the injunction, release and discharge provisions of the Plan.

13. The Disclosure Statement and Plan confer both Debtor and third-party releases upon a number of parties defined as the "Protected Parties" which parties include, among others, present and former directors of each of the Debtors, shareholders of the Debtors, holders of co-defendant claims and other identified (and unidentified) parties. The Debtors and the Committee should set forth, identify and disclose in the Disclosure Statement the reasons and rationale for the third-party releases granted to each of the Protected Parties and how these third-party releases are appropriate under applicable law.

14. Additionally, and without additional information, the releases sought to be bestowed upon many of the Protected Parties may not comply with *In re Washington Mutual, Inc., et al.*, 442 B. R. 314, 349-350 (Bankr. D. Del. 2011) (where the Bankruptcy Court held, *inter alia*, that under applicable law, there was no basis whatsoever for the debtors to grant releases to the debtors' directors and officers or any professionals, current or former, because no

evidence was presented with respect to, among other things, a substantial contribution" having been made to the case by the parties seeking such releases).

15. These provisions also appear to run afoul of the five-factor test cited in *In re Zenith Electronics Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999) (where Judge Walrath adopted and cited to the five factors set forth in *In re Master Mortgage Inv. Fund, Inc*., 168 B.R. 930, 935, 937 (Bankr.W.D.Mo.1994); *See also, In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 606-609 (Bankr. D. Del. 2001) (discussing *Zenith*).

16. The Disclosure Statement does not impart any rational for granting such requested relief and fails to give to creditors sufficient information concerning these releases, exculpations and injunction so that they may make informed choice regarding approval or rejection of plan. *In re Rook Broadcasting of Idaho, Inc.*, 154 B. R. 970, 976 (Bankr. D. Idaho 1993); *See also, In re Ferretti*, 128 B. R. 16, 18 (Bankr. D.N.H. 1991)(where the Bankruptcy Court held that the purpose of a Chapter 11 disclosure statement is to provide adequate information to creditors to enable them to decide whether to accept or reject proposed plan.).

17. Additionally, the proposed ballots for Classes 3(a), 3(b), 4(a) and 4(b) do not allow for any "opt-out" from the third-party releases and do not contain sufficient information regarding the application and effect of the releases. To the extent such release are deemed appropriate under applicable law, the ballots, Plan and the Disclosure Statement should be revised to provide for an "opt-out" option from the third-party releases and the ballots should also provide creditors with, *inter alia*, instructions on how to opt-out of the third party releases.

18. Finally, the Disclosure Statement is both ambiguous and confusing with respect to the Plan's treatment of personal injury claims that occurred or may occur after July 31, 2012.

19. There may be substantial future tort claims[3] that will arise concerning Blitz Products since these products are and will remain in the stream of commerce. These tort claims would otherwise confer liability upon the Debtors and the other Protected Parties. However, it is unclear what relief may be available, if any, to redress these claims.

20. For example, there are various provisions in the Disclosure Statement that discuss the treatment of these personal injury claims. These provisions are as follows:

> Blitz USA maintains such insurance coverage for all policy years in which Blitz Personal Injury Claims have been asserted, through July 31, 2012. Blitz USA does not have similar insurance coverage for the period after July 31, 2012, when it ceased active business operations. Disclosure Statement at p. 11.
>
> The Bankruptcy Court established October 14, 2013, as the last date by which Blitz Personal Injury Claims must be filed in these Chapter 11 Cases. Disclosure Statement at p. 15.
>
> The Channeling Injunction does not enjoin any claim for damages on account of bodily injury and/or property damage that occurred on or after 12:01 A.M. CST on July 31, 2012. Disclosure Statement at pp. 37-38.
>
> The third-party release provisions release the Protected Parties from personal injury claims that result from due to a Blitz Products through the Effective Date but apparently does not release claims that accrue after the Effective Date. Disclosure Statement at pp. 54-55.
>
> Blitz Personal Injury Claims, as defined in the Disclosure Statement, are those claims that occurred prior to July 31, 2012. Disclosure Statement at p. 8, Exhibit #1.

[3] The ultimate "determination of whether a claim arises in bankruptcy requires an analysis of interests created by non-bankruptcy substantive law." *In re National Gypsum Co.*, 139 B.R. 397, 405 (N. D. Tex. 1992) (citations omitted), the Third Circuit has adopted the view that a personal injury claim based on pre-petition exposure to a debtor's products is a claim, even if injury does not manifest until after the bankruptcy case. *Jeld-Wen, Inc. v. Van Brunt (In re Grossman's Inc.)*, 607 F.3d 114, 125 (3d Cir. 2010) (en banc).

21. It is not clear what treatment is accorded personal injury claims that arise from a Blitz Product, where those claims arose after July 31, 2012 but before the Effective Date. Although the Plan's channeling injunction may not apply to these claims, the third-party releases seem to bar those claims. Moreover, it is not clear what rights, relief and treatment may be available to personal injury claimants whose claims arise after the Effective Date.

22. In any event, without more information provided, the due process rights of future claimants[4] may be affected by the Plan and Disclosure Statement and there does not appear to be any proposed protections or avenues for recovery for future claimants once the Debtor is liquidated and the other Protected Parties are eventually shielded from liability as a result of the creation of the Blitz Personal Injury Trust and the approval of this Plan.

23. Accordingly, the Disclosure Statement should be revised to describe the effect of the Plan as to the claims outlined above and as to the treatment and options for future claims that may lie against the Debtors and the Protected Parties.

24. The U. S. Trustee reserves any and all rights, remedies and obligations found at law, equity or otherwise to, *inter alia*, complement, supplement, augment, alter and/or modify this Objection, file an appropriate motion or objection, and/or conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent upon further factual discovery.

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[4] In asbestos bankruptcy cases, for a channeling injunction to be valid and enforceable against future claimants, section 524(g) requires, among other things that the court appoint during the bankruptcy proceedings "a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind." 11 U.S.C. § 524(g)(4)(B)(I); *See, e.g.*, S. *Elizabeth Gibson, Fed. Judicial Ctr., Judicial Management of Mass Tort Bankruptcy Cases* 67 (2005) ("In deciding whom to appoint, judges should look for persons with the training and experience needed to deal competently with the tort, bankruptcy, corporate, financial, and constitutional issues that will be involved in representing the interests of future claimants."). *See generally*, 140 Cong. Rec. H10, 765 (Oct. 4, 1994) ("[T]he interests of future claimants are ill-served if Johns Manville and other asbestos companies are forced into liquidation and lose their ability to generate stock value and profits that can be used to satisfy claims").

WHEREFORE the U. S. Trustee respectfully requests that this Court deny the approval of the Disclosure Statement consistent with this Objection and/or grant such other relief as this Court deems appropriate, fair and just.

Respectfully submitted,

ROBERTA A. DEANGELIS
UNITED STATES TRUSTEE

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Dated: December 11, 2013

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CERTIFICATE OF SERVICE

I certify that on December 11, 2013, I caused to be served a copy of the United States Trustee's Objection to the Disclosure Statement for Debtors' and Official Committee of Unsecured Creditors' Joint Plan of Liquidation (D. I. 1922, 1971) *via* email and/or regular mail upon the parties listed below.

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