

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re

BLITZ U.S.A., Inc., *et al.*,¹

Debtors.

Chapter 11

Case No. 11-13603 (PJW)

Jointly Administered

Hearing Date: December 18, 2013 at 11:00 a.m. (ET)

Re: D.I. 1922, 1971, 1976, 1979

REPLY OF THE DEBTORS AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE UNITED STATES TRUSTEE'S OBJECTION TO THE DISCLOSURE STATEMENT FOR DEBTORS' AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS JOINT PLAN OF LIQUIDATION

The debtors and debtors-in-possession in the above-captioned cases (collectively, the “Debtors”), together with the Official Committee of Unsecured Creditors (the “Committee,” and collectively, “Movants”) by and through their undersigned counsel, for their reply (the “Reply”) to the *United States Trustee's (the “U.S. Trustee”) Objection to the Disclosure Statement for Debtors' and Official Committee of Unsecured Creditors Joint Plan of Liquidation* [D.I. 1979] (the “Objection”), respectfully state as follows:

GENERAL BACKGROUND

1. On November 12, 2013, the Movants filed the *Debtors' and Official Committee of Unsecured Creditors' Joint Plan of Liquidation* [D.I. 1921] (the “Plan”) and the *Disclosure Statement for the Debtors' and Official Committee of Unsecured Creditors' Joint Plan of Liquidation* [D.I. 1922] (the “Disclosure Statement”).

¹ The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's 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 309 North Main Street, Miami, OK 74354.



2. On November 27, 2013, the Movants filed the *Joint Motion of the Debtors and the Official Committee of Unsecured Creditors for Order (A) Approving the Disclosure Statement; (B) Approving Form and Manner of Notice of Confirmation Hearing; (C) Approving Procedures for the Solicitation and Tabulation of Votes to Accept or Reject the Plan; (D) Estimating Each Blitz Personal Injury Claim at \$1.00 for Voting Purposes; (E) Approving Notice and Objection Procedures in Respect Thereof and (F) Granting Related Relief* [D.I. 1971] (the “Solicitation Motion”)².

3. The Solicitation Motion established an objection deadline of December 11, 2013. The Objection was the only objection filed to date addressing the Disclosure Statement or the Solicitation Motion.³

REPLY

4. The issues raised in the Objection pertaining to the confirmability of the Plan are not properly before the Court. See, e.g., In re United States Brass Corp., 194 B.R. 420, 427-28 (Bankr. E.D. Tex. 1996); Kirk v. Texas, 82 B.R. 678, 683 (S.D.N.Y. 1988). Thus, courts routinely overrule confirmation-related objections disguised as disclosure statement issues. See, e.g., In re Adell, 325 B.R. 883, 886 (Bankr. M.D. Fla. 2005). The Movants will be prepared at the confirmation hearing to respond to any and all confirmation objections; until then, however, such objections are entirely premature. See, e.g., In re Cardinal Congregate I, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990) (“The objections raised as to the confirmability of the [plan] may not ultimately be found meritorious; however, the Court will not determine such objections and the

² Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Disclosure Statement or the Solicitation Motion, as relevant.

³ While styled on the docket as a response to the Disclosure Statement, docket item 1976 appears to be a request for payment of an invoice, and should be overruled in its entirety to the extent it constitutes an objection to the Disclosure Statement.

related issues at this juncture.”). Accordingly, the confirmation-related issues raised in the Objection—most notably the propriety of the releases—should be overruled in their entirety.

5. With respect to adequacy of disclosure issues raised in the Objection, the U.S. Trustee raises three primary challenges: (i) the Disclosure Statement does not provide sufficient disclosure regarding the rationale for the releases of the Protected Parties provided by the Plan, (ii) the Plan, the Disclosure Statement and the proposed ballots attached to the Solicitation Motion do not provide for an “opt-out” from the proposed releases and (iii) the Plan and Disclosure Statement are unclear regarding the treatment of “future” personal injury claims.⁴ Each of these objections is addressed in turn below.

Rationale for Releases

6. The Movants believe that the rationale for the releases is evident from the Disclosure Statement: (i) the Participating Insurers are collectively contributing \$137,540,639.36 to the bankruptcy estates on behalf of themselves and all entities covered under the Insurance Policies; (ii) Wal-Mart is contributing \$23,779,360.64 (plus an additional \$1,540,000) to the bankruptcy estates, and (iii) Blitz Acquisition Holdings, Inc., on behalf of the BAH Settling Parties, is contributing \$6,250,000 (plus the allowed amount of the Flick Claim up to \$250,000) to the bankruptcy estates. Further, certain of the Protected Parties are giving up a right to distribution on their claims. Nevertheless, Movants are willing to add additional language to satisfy the concerns of the U.S. Trustee. Specifically, the Movants will add new paragraphs IV.G.5. of the Disclosure Statement, as follows:

The Releases set forth in sections 7.2.1 through 7.2.3 of the Plan are given in exchange for the substantial contributions being made by, or on behalf of, each of the Protected Parties. As described elsewhere in the Plan and Disclosure Statement, Wal-Mart and the

⁴ Although the U.S. Trustee has raised some additional issues, such issues are properly objections to confirmation, and as such are premature

Participating Insurers are providing \$161,320,000 to the estate so that there may be a distribution to holders of Blitz Personal Injury Claims through the Insurance Settlement Payment. Moreover, because the release of the Participating Insurers is only effective if their obligations under the Participating Insurer Policies are satisfied in full, all claims against the Debtors, their present and former directors and officers, their Vendors, holders of Co-Defendant Claims and any other Additional Insureds that have or may arise under or relate to the Participating Insurer Policies must also be released. Further, the claims of Vendors, Co-Defendants and Additional Insureds are also being channeled to the Blitz Personal Injury Trust, but those creditors are not receiving a distribution on their claims. Accordingly, the Proponents believe that the release of all the foregoing Entities is necessary and appropriate.

Similarly, the BAH Released Parties are providing, among other things, the release of claims, payment of an employee claim up to \$250,000, and \$6,250,000 to distribute to Creditors of the Debtors' Estates through the BAH Settlement Payment. Because proceeds of the Insurance Settlement Payment are being used solely to make distributions to the holders of Blitz Personal Injury Claims, the BAH Settlement Payment, along with Wal-Mart's payment of an additional \$1.54 million is the predominate source of funds to make distributions to and payments required under the Plan. Given this critical contribution, the Proponents believe that the release of the BAH Released Parties is necessary and appropriate.

Without the contributions of the Participating Insurers, Wal-Mart and Blitz Acquisition Holdings, Inc. on behalf of the BAH Settling Parties, it would not be possible for the Debtors to confirm the Plan. Thus, the Releases are essential to the Plan.

The Absence of an Opt-Out from the Releases

7. The U.S. Trustee argues that creditors must be provided an ability to "opt-out" of the releases provided pursuant to the Plan. This proposal is at odds with the fundamental nature of this Plan. Significantly, both the Insurance Settlement and the BAH Settlement are contingent on full releases of the Protected Parties by all holders of Blitz Personal Injury Claims. See BAH Settlement, at ¶2, 8; Insurance Settlement, at ¶¶5-7. Absent the finality provided by the releases and the channeling injunction, the Participating Insurers, Wal-Mart and the BAH Settling Parties

cannot make the Insurance Settlement Payment or the BAH Settlement Payment. Without these funds, the Debtors cannot confirm any chapter 11 plan—and certainly not one that provides the robust distributions offered in the Plan.

8. The Plan reflects a heavily negotiated compromise among the primary constituencies in these cases. The Court should not insist on the inclusion of an “opt-out” provision that could effectively defeat confirmation of the Plan before the Debtors’ Creditors are provided an opportunity to consider, and vote on, the Plan.

9. Ultimately, whether the Court will approve the settlement, the releases and the channeling injunction is a matter for confirmation. Accordingly, to the extent the U.S. Trustee wishes to challenge the propriety of the releases themselves, the appropriate time is at the confirmation hearing. Until that time, the Court should not permit the U.S. Trustee, or any other party, to foist plan terms on parties who have spent the better part of the past year to arrive at the current structure of the Plan. Rather, those parties are entitled to have the Debtors’ creditors, who have a financial stake in the outcome of these cases, vote on the Plan as presently constituted. The Court should afford creditors that opportunity.

Treatment of “Future Tort Claims”

10. Finally, the U.S. Trustee argues that the Disclosure Statement is both ambiguous and confusing with respect to the Plan’s treatment of personal injury claims occurring after July 30, 2012. The Movants believe that the Plan and Disclosure Statement are clear, that such claims are not being channeled to the Blitz Personal Injury Trust, are not being released, and that the holders of such claims retain whatever rights they have with respect to their claims. The Movants propose to add a new section 7.2.3.8 to the Plan that excepts from the general release provisions “Any claim for damages on account of bodily injury and/or property damage that

occurred on or after 12:01 A.M. on July 31, 2012.” This provision is identical to the reservation to the channeling injunction found in section 4.3.3.2(a) of the Plan, and is consistent with the Insurance Settlement Agreement and the BAH Settlement Agreement. Because section 7.2.3 of the Plan is expressly incorporated into sections IV.G.2 and IV.G.3 of the Disclosure Statement, this correction satisfies the concerns raised in the Objection.

11. The Movants will also add the following language as new section IV.C.12 to the Disclosure Statement under the heading “Effect on Personal Injury Claims Arising After July 30, 2012”:

Notwithstanding anything to the contrary in the Plan, the Disclosure Statement, or any of the other Plan Documents, no holder of a claim for damages on account of bodily injury and/or property damage relating to the Debtors or a Blitz Product that occurred on or after 12:01 A.M. on July 31, 2012 shall be subject to the provisions of the Plan, including without limitation the Channeling Injunction and the Releases. Any holder of a claim described in this section shall retain all rights, if any, against the Protected Parties and any other Entity, including the right to liquidate such claim(s) in the tort system. To the extent applicable, as of the Effective Date of the Plan, the automatic stay provided by section 362(a) of the Bankruptcy Code shall be lifted with respect to such claim(s).

WHEREFORE, for the reasons set forth herein, the Movants respectfully request the Court (a) enter the Proposed Form of Order attached as Exhibit A to the Solicitation Motion, (b) approve the Disclosure Statement, as modified, (c) overrule the Objection, and (d) grant the Movants such other and further relief as the Court deems just and proper.

Dated: December 16, 2013

/s/ Amanda R. Steele

RICHARDS, LAYTON & FINGER, P.A.

Daniel J. DeFranceschi (Bar No. 2732)

Michael J. Merchant (Bar No. 3854)

Amanda R. Steele (Bar No. 5530)

One Rodney Square

920 North King Street

Wilmington, Delaware 19801

Telephone: (302) 651-7700

Counsel to Blitz Acquisition, LLC, Blitz RE Holdings, LLC, Blitz U.S.A., Inc. and MiamiOK LLC (f/k/a F3 Brands LLC)

-and-

/s/ Sean M. Beach

YOUNG CONAWAY STARGATT & TAYLOR, LLP

Sean M. Beach (Bar No. 4070)

John Dorsey (Bar No. 2988)

Rodney Square

1000 North King Street

Wilmington, Delaware 19801

Telephone: (302) 571-6600

Counsel for LAM 2011 Holdings, LLC and Blitz Acquisition Holdings, Inc.

/s/ Kevin J. Mangan

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

Francis A. Monaco, Jr. (Bar No. 2078)

Kevin J. Mangan (Bar No. 3810)

222 Delaware Avenue, Suite 1501

Wilmington, Delaware 19801

Telephone: (302) 252-4320

-and-

Jeffrey D. Prol, Esq.

Mary E. Seymour, Esq.

LOWENSTEIN SANDLER LLP

65 Livingston Avenue

Roseland, New Jersey 07068

Telephone: (973) 597-2500

Counsel to the Official Committee of Unsecured Creditors